

1 IN THE SUPREME COURT OF THE UNITED STATES

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3 RICHARD ARMSTRONG, ET AL., :

4 Petitioners : No. 14-15

5 v. :

6 EXCEPTIONAL CHILD CENTER, :

7 INC., ET AL. :

8 - - - - - x

9 Washington, D.C.

10 Tuesday, January 20, 2015

11

12 The above-entitled matter came on for oral
13 argument before the Supreme Court of the United States
14 at 10:13 a.m.

15 APPEARANCES:

16 CARL J. WITHROE, ESQ., Deputy Attorney General, Boise,
17 Idaho; on behalf of Petitioners.

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

21 JAMES M. PIOTROWSKI, ESQ., Boise, Idaho; on
22 behalf of Respondents.

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1 P R O C E E D I N G S

2 (10:13 a.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear argument
4 first this morning in Case 14-15, Armstrong v. The
5 Exceptional Child Center.

6 Mr. Withroe.

7 ORAL ARGUMENT OF CARL J. WITHROE

8 ON BEHALF OF THE PETITIONERS

9 MR. WITHROE: Thank you, Mr. Chief Justice,
10 and may it please the Court:

11 Respondents have no rights under
12 Section (30) (A), and so they have no privately
13 enforceable right of action to enforce that statute
14 under Section 1983 or under an implied right of action.
15 The Supremacy Clause does not provide an alternative
16 freestanding right of action to enforce Section (30) (A),
17 either. This case is distinguishable from the cases
18 where this Court has invalidated State or local law
19 under the Supremacy Clause. In fact, this is not a
20 preemption case at all; it is an action to enforce the
21 statute and it is foreclosed by Sandoval, Gonzaga
22 University, and Astra.

23 Preemption solves the problem of two
24 separate sovereigns regulating independently in the same
25 territory. The Supremacy Clause resolves the conflict

1 that arises when State law regulates a plaintiff in a
2 manner that Federal law protects against. But
3 Section (30)(A) is --

4 JUSTICE SOTOMAYOR: Could you tell me, if
5 this is unlike those other cases where we've invoked the
6 Supremacy Clause, what's the basis for those cases?

7 MR. WITHROE: The -- the basis for those
8 cases is that there, there would have been a Federal law
9 that allowed plaintiff's conduct, and then State law
10 that interfered with that conduct that it was allowed by
11 Federal law, and thus, the Supremacy Clause resolved
12 the -- the conflict and provided --

13 JUSTICE SOTOMAYOR: I'm not sure I
14 understand your answer.

15 MR. WITHROE: Okay.

16 JUSTICE SOTOMAYOR: That's the claim here,
17 that there's a Federal law that is contrary to the State
18 law, and I don't know why you can't look at this as an
19 enforcement action.

20 The State law won't permit these individuals
21 to charge an amount greater than they're willing to pay.
22 So if these doctors or providers wanted to charge more,
23 they would be in violation of State law and would have
24 an enforcement action against them. So, I mean, I
25 don't -- I don't actually see this enforcement -- this

1 enforcement argument that you're making.

2 MR. WITHROE: I have two responses to that,
3 Justice Sotomayor. The first is that under Idaho's
4 scheme, that there would not arise a situation where
5 providers are charging patients more than the State
6 allows. The way that it works in Idaho, particularly
7 with respect to this waiver program, is that the
8 providers provide the service to the beneficiary, the
9 providers then bill the State, and the State reimburses
10 them. And both under Federal regulations and State
11 regulations, the providers come into the program and
12 agree to take as payment in full the amount -- the
13 lesser of the amount of their customary charges or the
14 State's set rates. And so we would not have a situation
15 where we -- they would be charging -- resorting to
16 self-help and charging more than the -- than the rates
17 allow.

18 JUSTICE SOTOMAYOR: Well, they could, and
19 then you would come in and say, you violated Federal and
20 State regulation. But you --

21 JUSTICE GINSBURG: You wouldn't pay it.

22 MR. WITHROE: That -- that's correct, Your
23 Honor. We -- we wouldn't pay it. They -- they, in
24 fact, send us bills all the time with their customary
25 charge, and -- and we pay them the State rate. We say,

1 thank you.

2 JUSTICE KAGAN: Yes, but what if they just
3 asked the -- the patient herself to -- to pay a
4 supplemental rate? And then you would have come in and
5 you would say, you know, you can't do that.

6 MR. WITHROE: And that would be balance
7 billing, which is also not allowed under State or
8 Federal law.

9 JUSTICE KAGAN: Yes, it's not allowed.
10 That's right. But that's why you would bring an
11 enforcement action against such a supplemental bill.

12 MR. WITHROE: And their defense would not be
13 -- they wouldn't have a valid defense that our rates are
14 too low in violation of the Medicaid Act, because they
15 don't have a right to a specific rate or a process or
16 anything else under Section (30) (A), and so they
17 couldn't raise if we -- if, under that situation, we
18 were to go after them for violating the rule.

19 JUSTICE KAGAN: That would be a merits
20 question. I mean, they would make that exact claim.
21 They would say, the rates are too low; the rates violate
22 Federal law; we're entitled to a higher rate.

23 MR. WITHROE: And -- and that -- that might
24 go to the -- to the merits there. But what we would say
25 is that you look at the statute first, and the statute

1 doesn't entitle them to anything. And that, sort of
2 like in -- in determining whether a plaintiff has a
3 Section 1983 right or whether a plaintiff has standing,
4 for example, you kind of have to wade into the merits
5 just a little bit, but they wouldn't have that defense,
6 because the --

7 JUSTICE GINSBURG: We have an appendix to
8 the red brief that cites some 57 cases. And is it your
9 contention that those -- all of those cases fit into
10 this mold of an affirmative -- anticipatory affirmative
11 defense or regulation of primary conduct?

12 MR. WITHROE: Yes, Your Honor. Some of them
13 fall into -- actually, some of them fall into the
14 category of Section 1983 rights having been -- having
15 been raised, if -- if we look at the -- the lower court
16 opinions.

17 But the rest of them are largely explainable
18 in one of two ways. The first way is that they do
19 present that situation where you have one sovereign
20 regulating in territory that it is not supposed to be
21 regulating in, and -- and so that -- that law is deemed
22 invalid. The other scenario that those cases present is
23 that the issue of whether there was a pre-exemption
24 cause of action under the Supremacy Clause or some other
25 source wasn't raised.

1 JUSTICE BREYER: Could -- can you do this?
2 I'm a doctor, and I -- say I performed some services. I
3 send in the patient -- the bill to the patients would
4 have been \$82, all right? And the stat -- State statute
5 says you only get 60. So I bring a lawsuit, and I say,
6 I want 80. And you come back and say, no, the State
7 statute says 60. I say, okay, that State statute is
8 preempted by this Federal word that it has to be
9 sufficient so that enough providers come along. So
10 forget the State statute. Pay me.

11 Now, can't he say that? And now -- in
12 California, you could say, well, 80 is too high, you'd
13 have to have some way of figuring out what's the right
14 amount, but everybody would say that if it's true that
15 60 isn't enough to enlist, then the State statute which
16 says 60 is preempted by the Federal.

17 Now, that isn't trying to enforce it. What
18 you're trying to do is enforce your claim to get some
19 money for services rendered. Can they not do that?

20 MR. WITHROE: They can't do that.

21 JUSTICE BREYER: Why not?

22 MR. WITHROE: Because they don't have a
23 right under Section 30(A).

24 JUSTICE BREYER: No, I'm not saying we don't
25 to write under 30(A). There is a plan in California,

1 and that plan has a lot of words in it, and some of
2 those words say that a doctor who provides services
3 under this plan gets paid. Now, the next word happens
4 to be \$60. So he wants everything else, but when you
5 get to that 60, he's going to say those words are
6 preempted by the Federal plan and by the Federal
7 statute. And -- and that doesn't seem to me to have
8 anything about -- all these briefs are about Federal
9 causes of action under the Supremacy Clause.

10 This just seems like a normal case, like
11 where -- where there's a State statute, there is a claim
12 for services rendered, he's entitled to services
13 rendered, but few words of that State statute are
14 preempted by a Federal one.

15 Now, I -- I must be wrong so -- because this
16 has been the second time we heard this case, and I
17 didn't understand why it was different than that the
18 first time. So -- so -- so if you can't -- if I'm
19 off-base, don't bother to spend a lot of time.

20 MR. WITHROE: Well, let -- let me try to
21 respond to your question, Justice Breyer. The -- in
22 that situation, the claim would really be for an
23 enforcement. The -- the doctor there would be saying,
24 I'm entitled to this rate --

25 JUSTICE BREYER: Yes, yes.

1 MR. WITHROE: -- under this Federal statute.

2 JUSTICE BREYER: Yes.

3 MR. WITHROE: And that looks to me an awful
4 lot like the claims that you -- that the Court
5 entertained in Gonzaga and those kinds of things. And
6 there, the Court said there must be a right, and because
7 Section 30(A) confers no rights on this -- this doctor,
8 this doctor cannot make the preemption claim.

9 And then the second part of that is that in
10 that sense, the rates do not regulate the doctor's
11 conduct in a way that is protected by Federal law. And
12 that may sound confusing, and so let me try to restate
13 it.

14 In the preemption cases in the appendix in
15 the red brief, we have all of these cases where the
16 Federal government has a statute and the State
17 government has another statute and that Federal statute
18 displaces the State from being able to regulate, whereas
19 in this case, Medicaid, Section 30(A) is part of a
20 cooperative program where the State, rather than being
21 displaced from the arena of regulation, is invited in
22 and participates as a cooperative partner and so we
23 don't have that two separate sovereigns regulating
24 independently in overlapping territory.

25 JUSTICE KAGAN: Well, do you think , Mr.

1 Withroe -- and this is true of some significant parts of
2 your brief, you might have an argument on the merits
3 that there shouldn't be preemption here, that the nature
4 of 30(A) is that the Federal law doesn't preempt the
5 State law. But that's an argument on the merits; it's
6 not a question about whether somebody can come into
7 court and make that claim and tee it up for a court to
8 decide whether there's been preemption in the case.

9 MR. WITHROE: Sure. And I can understand
10 that, and I have a response to that. And that is, that
11 just like in the 1983 cases and just like in cases where
12 standing is at issue, the examination -- when the claim
13 is brought under the Supremacy Clause, the examination
14 first must be to the statute. What does the statute do?
15 Does the statute allow the plaintiff to engage in this
16 conduct that she says is being interfered with by the
17 State?

18 You make that threshold inquiry by looking
19 at the statute.

20 JUSTICE SOTOMAYOR: I'm sorry. Then what
21 you're arguing is that unless there's a 1983 claim,
22 there's no cause -- unless there's a private cause of
23 action, there could never be a Supremacy Clause claim.

24 MR. WITHROE: Not necessarily. There might
25 be a -- a preemption claim outside of the Section 1983

1 context if that State -- or if that Federal law
2 regulates the plaintiff in a way that the State law
3 interferes with.

4 So, for instance, the dissent in Golden
5 State hypothesized just this situation where you had
6 a -- a locality that was -- that was regulating
7 employment stuff, and then you had the NLRA, and the
8 employer sought a case under 1983. The dissent in
9 Golden State explained that there may, in certain
10 circumstances, be cases where the plaintiff doesn't have
11 a 1983 right; in other words, the statute at issue does
12 not confer upon her an actual enforceable right, but
13 that may be a case that may present a case of the wrong
14 sovereign regulating her. And that is -- that is the
15 second situation that we contemplate might give rise to
16 a --

17 JUSTICE GINSBURG: But why doesn't that -- I
18 mean, I thought that the rate that the providers can
19 bill is the rate that CMS approves. So, first, maybe
20 you should straighten out what is the rate. We did have
21 the 2006 rate and that was approved by CMS. Did CMS
22 approve the 2009 rate?

23 MR. WITHROE: Let me correct one aspect of
24 the reference to the 2006 rates. CMS does not approve
25 or disapprove rates in -- in Idaho's State plan or its

1 waiver. What CMS does is approve the methods and
2 procedures in our plan documents. And so the -- the
3 rates were -- the 2006 rates were the product of a
4 previous waiver where we had set forth the methods and
5 procedures. And so there was no approval or -- or
6 disapproval of any of the rates, and nor under the --
7 under the statute, the Federal statute or our
8 regulations is that called for.

9 JUSTICE GINSBURG: And there has been -- has
10 been no approval of the 2009 rate then?

11 MR. WITHROE: Of the 2000 which rate?

12 JUSTICE GINSBURG: The -- the recommended
13 rate for 2009, the -- the rate that Idaho itself said
14 was the appropriate rate, that CMS -- CMS did not pass
15 on that.

16 MR. WITHROE: That's correct, Your Honor.
17 And -- and what --

18 CHIEF JUSTICE ROBERTS: I'm -- I'm sorry,
19 what's correct? That there has been no approval of the
20 particular rates or the methodology?

21 MR. WITHROE: That there's been no approval
22 of the particular rates. And, in fact, in the 2009
23 waiver document that was -- that was referenced in the
24 Respondent's opposition to our cert petition, they
25 raised this -- this 2009 waiver document. And that

1 waiver document said we are moving to this new
2 methodology -- and, again, methodology is divorced from
3 actual rates -- but before we do that, we will submit
4 another waiver amendment to fully implement this.

5 JUSTICE KENNEDY: Well, I still don't
6 understand why, as Justice Kagan pointed, that isn't
7 just an argument on merit. If we go back to your very
8 first statement, I thought it was important. You -- I
9 thought you were saying -- please correct this if it's
10 -- if it's improper -- if it's a wrong
11 interpretation -- there -- there -- there's no supremacy
12 problem here because the Federal government and the
13 State government agreed. And then Justice Sotomayor
14 said but the position of -- of the Respondents is that
15 the Federal government was wrong. And that's just what
16 Justice Kagan pointed out. You -- if -- if -- if
17 there's no preemption, then you just win on the merits.

18 And did I miss something about your -- your
19 first statement? I -- I thought you were going to give
20 us a principled way to say why this case is different
21 from our other preemptions cases, and you began by saying
22 the Federal government and the State government agree.
23 But the point is the Federal government's wrong under --
24 under the assumption of the Respondent's case.

25 MR. WITHROE: If the Federal government is

1 wrong, then the time to raise that challenge would be in
2 an APA action to challenge the approval of the State
3 plan as arbitrary and capricious or in violation of law.

4 JUSTICE SOTOMAYOR: Do they have that right?

5 MR. WITHROE: Providers, yes, as long as
6 they meet the -- the zone of interest test, which I
7 understand is a very low barrier, and they might -- they
8 may as well do that. And as an example, these plan --
9 these plan -- these waivers are -- must be renewed every
10 5 years. And we can certainly see how every time a plan
11 is submitted for renewal and is decided upon that would
12 produce --

13 JUSTICE SOTOMAYOR: That's a somewhat
14 ineffective remedy. Let's assume, as inflation is going
15 up constantly, what happens 2 years into the plan when
16 providers can't work for what the State is giving or the
17 State is imposing a tremendous hardship on them, which
18 is happening to a lot of providers who are being
19 underpaid. Where do they go? They can't go to the
20 Federal agency because there's no action to challenge.
21 So what do they do?

22 MR. WITHROE: They -- they have a number of
23 opportunities available to them. The first is to call
24 their -- their State Medicaid agency and say, State
25 Medicaid agency, these -- we think that these rates are

1 insufficient; we can't meet the standards anymore.

2 If they get nowhere with the State, they can
3 go to the CMS regional office. And if enough of them
4 complain, the -- the CMS can -- can examine that. It
5 could conduct an audit, which is allowed. There is
6 ongoing program review of -- of these programs. It's an
7 ongoing dialogue once a plan is approved. And so they
8 can -- they can bug CMS and get CMS to take an action.

9 And so they have any number of ways --

10 JUSTICE SCALIA: I assume they could go to
11 the Federal agency as well and -- and petition for a new
12 rulemaking.

13 MR. WITHROE: Absolutely.

14 JUSTICE SCALIA: And if that rulemaking is
15 denied, they could appeal on the basis that that final
16 agency action is arbitrary or capricious in light of
17 inflation.

18 MR. WITHROE: And that's absolutely correct,
19 Your Honor.

20 If there are no further questions, at this
21 point I would like to reserve the balance of my time.

22 CHIEF JUSTICE ROBERTS: Thank you, counsel.

23 Mr. Kneedler.

24 ORAL ARGUMENT OF EDWIN S. KNEEDLER

25 FOR THE UNITED STATES, AS AMICUS CURIAE,

1 SUPPORTING PETITIONERS

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

4 If I may at the outset, I would like to
5 explain why a -- a cooperative Federalism program under
6 the Spending Clause, and particularly Medicaid, is
7 different from the cases in the brief and why this is
8 not just a question of the merits, but also the question
9 of right. And if I could just take a minute to explain
10 this.

11 JUSTICE SOTOMAYOR: Mr. Kneedler, you can
12 and I won't interrupt. But then get to why the various
13 cases that we've said there are private causes of action
14 under 1983 would survive because --

15 MR. KNEEDLER: Oh, yes, absolutely. We are
16 not -- we are not questioning the -- where the -- where
17 a Spending Clause statute confers a right, the 1983
18 cause of action is present. But I'd like to go back and
19 explain the origins of the cause of action.

20 The cases in the appendix are -- grew out of
21 an equity practice where someone's primary conduct, his
22 liberty, his property, his business, was being
23 interfered with by the State and Federal law ousted the
24 State from regulating it. What got the party into court
25 was not the Federal law, but the primary right that was

1 being regulated by the State.

2 So the -- the -- the cause of action came
3 from the interference with the property, liberty, or
4 business. Under the Spending Clause, under the Medicaid
5 program, no one has a right independent of the Medicaid
6 program to be reimbursed under Medicaid. There is no
7 freestanding liberty or property interest preexisting or
8 independent of the Medicaid program.

9 So it is necessary, both to have a right to
10 invoke some provision of the Medicaid program and then,
11 if you have a right to invoke it, to litigate the
12 merits. So under the Spending Clause program, it is
13 necessary to look to the Act both for the right and for
14 the merits question.

15 JUSTICE SOTOMAYOR: I don't understand why
16 that is. Why is the Spending Clause different than any
17 other provision?

18 MR. KNEEDLER: For -- for the reason that I
19 said. The -- absent the Medicaid program, there would
20 be no basis for the plaintiff to sue to get money from
21 the State or from the Federal government. It is the
22 Medicaid program that sets up the ability to be paid to
23 begin with. And there is a further point to be made --

24 JUSTICE KAGAN: We're not absent the
25 Medicaid program. The -- the Medicaid program is just

1 like any other statute which provides certain people
2 with certain entitlements or abilities or benefits or
3 something else. And the question here is whether a
4 benefit that the Medicaid program has provided and
5 whether a requirement that the Medicaid program has
6 imposed on the State is being flouted, and that's the
7 question, just like it is in any other question not
8 arising under the Spending Clause.

9 MR. KNEEDLER: No, I think it's quite
10 different. And -- and unlike the situation in the -- in
11 the appendix to the briefs, you have the sovereigns
12 acting independently of each other and the State law is
13 entering a field that Federal law does not allow.

14 In the Medicaid program, what you have is a
15 bilateral, essentially contractual, relationship between
16 the Federal government and the State, whereby the State
17 is invited in to operate under the superintendence of
18 the secretary. There's no conflict. There's a
19 cooperative relationship. It's contractual. And in the
20 contractual situation, a third-party does not have a
21 right to sue --

22 JUSTICE SOTOMAYOR: That still goes to the
23 merits.

24 MR. KNEEDLER: No, it does -- it does not.
25 It does not just go to the merits because under -- under

1 contract law, a third-party beneficiary has a right to
2 sue, in other words, to get into court, only if he is an
3 intended beneficiary. In other words, only if the two
4 parties --

5 JUSTICE SOTOMAYOR: But this is forgiving
6 the essence of the Supremacy Clause question. This is
7 about -- you're trying to make it one of is it preempted
8 or is it not. But instead, the Supremacy Clause
9 question is: Do you have a right to ensure that State
10 governments are complying with Federal law, whether it's
11 under the Appointments Clause, whether it's under any
12 provision of the Constitution.

13 Why is it that we should exempt out all
14 Spending Clause cases, because that's what your argument
15 is basically saying, from that kind of enforcement?
16 Who's going to go around when the Federal government
17 doesn't care to ensure that States are, in fact, doing
18 what they promised to do?

19 MR. KNEEDLER: What -- what Congress has set
20 up is a -- is a program that is essentially contractual.
21 And the point about this that's very important, and that
22 is, in a contractual relationship, a third party can sue
23 only if the two parties intend that party to be able to
24 sue to enforce rights. And that's what this Court's
25 1983 jurisprudence arising under Spending Clause cases

1 is driving at.

2 JUSTICE ALITO: What effect would private
3 suits like this have on HHS's ability to do its job?
4 Would they assist HHS or would they interfere?

5 MR. KNEEDLER: I think there's a substantial
6 potential to interfere or at least complicate, where
7 there is an individual right under the Act, like if an
8 individual beneficiary has a right to get particular
9 benefits under the statute, and courts have held there
10 are 1983 rights. If you're income-qualified or you get
11 hospital services, you can sue about that.

12 JUSTICE SOTOMAYOR: What do you do --

13 JUSTICE KAGAN: Judging from the -- the
14 names on the brief, I take it that HHS does not agree
15 with that statement.

16 MR. KNEEDLER: Those are -- those were
17 former officials. Yes --

18 JUSTICE KAGAN: Judging from the names on
19 your brief --

20 MR. KNEEDLER: Oh, I'm sorry.

21 JUSTICE KAGAN: -- or the absence of names
22 on your brief, I take it that HHS does not agree with
23 that statement.

24 MR. KNEEDLER: Well, in -- in some ways I
25 suppose private -- private suits could bring attention

1 to -- to what is going on. But if one reads the -- the
2 proposed regulation that HHS has developed, they -- they
3 have proposed that there be guidance for particular --

4 JUSTICE KAGAN: I mean --

5 CHIEF JUSTICE ROBERTS: I suppose -- I
6 suppose HHS may be interested in having these provider
7 rates raised so that they get a bigger chunk of the
8 Federal budget. And in fact, I mean the competition
9 here is not between the agencies and the providers.
10 It's between healthcare sector and roads, schools,
11 parks.

12 I mean, the effect here is that Federal
13 judges get to decide what the reimbursement rates are in
14 a particular area, and it depends -- I mean, what would
15 happen if you have five cases going, each one claiming
16 rights to higher rates for under the roads program,
17 under the parks program? Under what? Are you aware of
18 any situation where the Federal judges get together and
19 try to balance the State budget?

20 MR. KNEEDLER: No. It's -- it's very
21 different and I think if you look at the language in
22 (30)(A), it's very instructive. What it -- first of
23 all, it says that the States shall establish methods and
24 procedures for determining rates, and then it says that
25 the rates shall be consistent with efficiency, economy,

1 quality of fair -- of care, and be sufficient to enlist
2 enough providers to come in. Enlist. It doesn't speak
3 of providers having a right. It speaks of inducing the
4 providers to come in.

5 JUSTICE GINSBURG: If CSM thinks that that
6 standard in (30) (A) isn't satisfied that they're not
7 paying enough to enlist sufficient providers to provide
8 the service, could CMS -- we're told in the briefs they
9 can cut off funds. Could CMS sue this State and say, we
10 want to enjoin you from paying less than what it takes
11 to provide what (30) (A) calls for?

12 MR. KNEEDLER: It may be, although I think
13 such a suit would -- would be best brought after the --
14 the secretary has gone through the administrative
15 process, so that there -- so what would be enforced
16 would be the secretary's judgment about whether the
17 rates are sufficient, not asking a court to decide it in
18 the first instance.

19 JUSTICE GINSBURG: So you -- you agree
20 that -- that CMS has never blessed this 2009 rate, the
21 rate.

22 MR. KNEEDLER: I mean, it -- it approved the
23 procedures, but not the rate in particular.

24 I want to make one --

25 CHIEF JUSTICE ROBERTS: Just to follow up,

1 it never approves the rate in particular, right?

2 MR. KNEEDLER: No. It -- it could -- a
3 State could submit a rate, but States submit
4 methodologies.

5 JUSTICE SOTOMAYOR: Let's assume that I were
6 to accept the former HHS officials' position that these
7 private causes of action are highly important, given the
8 limited resources of the agency. Why couldn't we
9 suggest utilizing the doctrine of primary jurisdiction?

10 MR. KNEEDLER: Primary jurisdiction kicks
11 only in -- kicks in only when a court first has -- first
12 has jurisdiction.

13 And if -- if I could make one -- one further
14 point. If you -- this is a very odd lawsuit. It is a
15 provider who participates --

16 JUSTICE SOTOMAYOR: Well, I'm not sure
17 what -- "jurisdiction," what that means.

18 MR. KNEEDLER: Well, you have to be in court
19 in order for primary jurisdiction to be triggered.
20 That's all I meant.

21 JUSTICE SOTOMAYOR: Well, this is a Federal
22 law. They're coming in and saying if the State law
23 violates the Federal law. On the merits, they may or
24 may not win.

25 MR. KNEEDLER: Right, but --

1 JUSTICE SOTOMAYOR: But we keep going back
2 to how is jurisdiction missing.

3 MR. KNEEDLER: Because there is no right to
4 get into court. And -- and think of the oddity of this
5 suit. This is a provider who wants to be -- who is in a
6 contractual relationship, going to court and asking the
7 court to insist that the other party to the contract,
8 the State, make it a better offer.

9 That's -- that's a very bizarre sort of
10 lawsuit. There's -- nowhere else in the law does one
11 party to an existing or prospective contract have a
12 right to insist that the other party make a better offer
13 in order to tempt it or to induce it to come in.

14 JUSTICE KENNEDY: I'm thinking -- I'm
15 thinking about your -- your -- your distinction between
16 preemption suits we've had in the past and this, which
17 is based on the Spending Clause and there you said
18 there's a -- there's a right to proceed or right to life
19 or liberty or property.

20 What about the American Trucking
21 Association? There was an agreement with the State.
22 There was no preexisting right. There was an agreement
23 with the State, and then it was alleged that the Federal
24 government is tripping on this --

25 MR. KNEEDLER: No, but -- but the

1 business --

2 JUSTICE KENNEDY: So that would -- that
3 would -- that would fit your --

4 MR. KNEEDLER: Absolutely. The business --
5 the business of trucking was being engaged in. The
6 State was regulating it through the contract; and the
7 argument was, my business is being interfered with and
8 Federal law ousted that.

9 JUSTICE KENNEDY: Why isn't -- why isn't the
10 business of -- of medical -- providing medical services
11 involved here?

12 MR. KNEEDLER: Because the State is not
13 regulating the business of providing medical care. The
14 State is running a program to pay people, but it's not
15 regulating primary conduct independent of the Federal
16 program.

17 CHIEF JUSTICE ROBERTS: Thank you,
18 Mr. Kneedler.

19 Mr. Piotrowski.

20 ORAL ARGUMENT OF JAMES M. PIOTROWSKI

21 ON BEHALF OF THE RESPONDENTS

22 MR. PIOTROWSKI: Mr. Chief Justice, and may
23 it please the Court:

24 A question arose during my colleague's
25 argument about couldn't we simply have filed an APA

1 challenge to CMS's decision approving the amendment of
2 the State's waiver. And the fact is, no, we couldn't.
3 And that describes -- that fact describes what's
4 critical about this case.

5 The Department of Health and Human Services,
6 through its Center for Medicare and Medicaid Services
7 approved the rate-setting methodology that we asked to
8 have implemented. We could not sue CMS for doing
9 precisely what we would have wanted it to do, which is
10 approve this rate-setting methodology. And so lacking
11 any way to challenge either CMS or the State via any
12 administrative method whatsoever, we look to equity and
13 the longstanding cause of action that this Court has
14 recognized, that many of the courts of appeal have
15 recognized, to challenge unconstitutional conduct.

16 JUSTICE BREYER: I'm sorry. That just
17 confuses me. Suppose you were for their approving a
18 methodology that would end up with Dr. Smith getting
19 \$60. Okay? So what do -- why do you attack it? You
20 approved it. If you wanted it, if you like -- you're
21 saying they had a methodology, you approved it, you
22 liked it.

23 Now they apply it and he gets the \$60, you
24 think he should get 80. But I mean, how does this --
25 now I'm confused.

1 MR. PIOTROWSKI: They didn't apply it, Your
2 Honor.

3 JUSTICE KAGAN: That's -- that's your whole
4 claim, right, is that they didn't -- the State didn't
5 apply the methodology that the State developed and that
6 CMS approved. So CMS is completely consistent with your
7 position. The only --

8 MR. PIOTROWSKI: Right.

9 JUSTICE KAGAN: -- thing that is
10 inconsistent with your position -- and the Department,
11 for that matter, is consistent with your decision. The
12 only thing that's inconsistent with your decision is the
13 State's willingness to go ahead with the methodology
14 that its own department devised and that HHS, CMS
15 approved.

16 JUSTICE BREYER: Approved. Well, then, why
17 didn't you just sue -- see, that's why -- look. You
18 think -- the doctor says \$80, I want 80, you have some
19 statute in there that says 60. Okay. I'm suing you.
20 There must be a whole set of rules that say when doctors
21 get paid under this program. Probably half are State,
22 half are Federal.

23 So he brings a suit under those rules; and
24 when they come to the number that's there, they say, I'm
25 so sorry, but that number has been preempted by the

1 Federal determination under this statute.

2 Now, why is -- well, I can't get away from
3 that because I don't see why that -- I don't understand
4 what's wrong with what I'm saying.

5 MR. PIOTROWSKI: Because, Your Honor, there
6 is no set of rules that would have allowed my clients to
7 raise precisely that issue. There is a set of rules
8 that allows beneficiaries to challenge their eligibility
9 for services. There is a set of rules that allows the
10 States to challenge the denial of a waiver amendment.
11 There is a set of rules that allows providers to
12 challenge only if they -- only if the State deems them
13 to have been overpaid.

14 JUSTICE BREYER: There's no set of rules
15 that allows the doctor to say -- in other words, it's
16 not the State that pays the doctor? Who pays the
17 doctor?

18 MR. PIOTROWSKI: The State pays the doctor;
19 but there is no set of rules that provides a method for
20 a doctor to say, you've paid me the -- you've paid me
21 the rate that the regulations require, but that rate was
22 too low. There is no such clause --

23 CHIEF JUSTICE ROBERTS: If there were a set
24 of rules to that effect, would you still have an action
25 under the Supremacy Clause, or not?

1 MR. PIOTROWSKI: The equitable action we
2 pursued here requires as an element that there be no
3 remedy at law. Where there is an adequate remedy at
4 law, we can't prove our case.

5 CHIEF JUSTICE ROBERTS: So -- but what
6 you're saying is if the -- you cannot rely on the
7 Supremacy Clause to enforce the action in that case
8 because there are particular rules that give you an
9 avenue of relief, right?

10 MR. PIOTROWSKI: Yes, Your Honor.

11 CHIEF JUSTICE ROBERTS: Okay. How is that
12 different than -- I mean, from the private cause of
13 action? What you're saying in that case is you're not
14 going -- you know, you're going to follow these rules in
15 one situation, but you're not going to follow the rules
16 in the other situation.

17 MR. PIOTROWSKI: In this particular respect,
18 we are similar to those private cause of action cases in
19 that where there's a method to review, neither -- equity
20 no longer applies the right of action, and it answers
21 the question that the Chief Justice raised in Douglas,
22 which is: How can we conclude that something preempts
23 if Congress says it doesn't?

24 CHIEF JUSTICE ROBERTS: It's a good
25 question.

1 MR. PIOTROWSKI: In that case where --

2 (Laughter.)

3 MR. PIOTROWSKI: It is a good question, Your
4 Honor, of course.

5 And in that case, the -- the answer is the
6 preemption incorporates that method of review. Where no
7 method of review is applied, where Congress has been
8 silent on the subject, then the Court must exercise its
9 Article III power to implement --

10 CHIEF JUSTICE ROBERTS: When Congress has
11 been silent. What if Congress has been express? What
12 if they say in the statute, and to be clear, there is no
13 private right of action to enforce this provision, under
14 the statute, under the Supremacy Clause, under anything?

15 MR. PIOTROWSKI: In that case, we would have
16 to evaluate that language to see what -- what it
17 actually accomplished in context. What it might be
18 accomplishing is that might be Congress' way of saying
19 this statute does not have preemptive effect, which it
20 is, of course, free to do.

21 It might amount to Congress making a
22 procedural determination that injunctions won't be
23 available for a particular type of claim, as it's done
24 with many other types of claims.

25 CHIEF JUSTICE ROBERTS: What if it -- what

1 if it means that Congress doesn't want there to be a
2 private right of action? Because for the reasons that
3 have been set forth in our implied right-of-action
4 cases, there's an expert Federal agency that regulates
5 in this context, there's other avenues of relief for
6 people, they just say, look, we're entrusting this to
7 HHS. It would be too difficult if every provider can
8 bring a cause of action, if every provider under every
9 provision of the healthcare act can bring a private
10 right of action, we want the agency to be the one in
11 charge of implementing this.

12 MR. PIOTROWSKI: And Mr. Chief Justice,
13 Congress has done that in many circumstances where it
14 creates an express administrative process. And when --
15 and where Congress has done that, we agree there no
16 longer remains this equitable Supremacy Clause-based
17 cause of action, because the power to review has been
18 placed elsewhere.

19 JUSTICE ALITO: And if you say that Congress
20 can cut off -- that it can prevent a suit like yours, if
21 it says that expressly, I don't know why it doesn't
22 follow that Congress can also do that if it is
23 clearly -- if we can clearly infer from the statute that
24 Congress didn't want that, where do you get -- where
25 does this express statement rule come from?

1 MR. PIOTROWSKI: Express statement may be
2 overstating it, Your Honor; but the Court has decided in
3 other cases that where Congress wishes to, you know,
4 buck the existing law, so to speak, where it wishes
5 there not to be a 1983 cause of action, for instance,
6 you've required them to speak clearly. It could be a
7 clear inference or implication, yet it must be clear.

8 Here, where there is an existing right of
9 action in equity based on the Article III power as well
10 as on the Constitution itself, Congress should be
11 required to speak equally clearly.

12 JUSTICE GINSBURG: How about 1983? Do you
13 agree that there's no 1983 claim here?

14 MR. PIOTROWSKI: Yes, Your Honor.
15 Consistent with *Gonzaga v. Doe*, it's difficult to see a
16 1983 claim under this statute.

17 JUSTICE SCALIA: When you say it's clear --
18 it's clear to exclude a 1983 claim, but it's not clear
19 to exclude the claim that you're bringing --

20 MR. PIOTROWSKI: The decision --

21 JUSTICE SCALIA: -- why is that?

22 MR. PIOTROWSKI: The decision, Your Honor,
23 in *Gonzaga v. Doe* would require clearer rights-creating
24 language. And the Supremacy Clause action that we're
25 pursuing is not based on rights-creating language.

1 JUSTICE SOTOMAYOR: Isn't there a difference
2 in the remedies of the two actions?

3 MR. PIOTROWSKI: Absolutely, there is.

4 JUSTICE SOTOMAYOR: I mean, you know, when
5 we're talking about a private right of action, we're
6 talking about damages, we're talking about restitution,
7 we're talking about all sorts of things. Here, we're
8 talking just about younger stopping the State from doing
9 something that's wrong. Isn't that it?

10 MR. PIOTROWSKI: That -- that is it,
11 Justice. And it's -- it -- it's all of a part. The --
12 the issue here is the violation of a constitutional
13 provision. The remedy is the correction of that
14 violation, and no more.

15 JUSTICE BREYER: Let me try once more. I
16 did understand all these molecules. I ought to be able
17 to understand this. I don't know if I can. Maybe I'll
18 put it this way. This is how it always seemed to me it
19 should work, but apparently it can't. I'm a doctor, I
20 want \$80. Under the -- under the -- under the rules of
21 California, I can go ask for 60.

22 So I follow all those rules, I file my
23 claim, and when it comes to the number, I put 80 instead
24 of 60. All I did was change the 8 to the 6. And the
25 defense says, hey, you shouldn't have changed the 6 to

1 the 8. I say I did that because the 6, that number 6,
2 is preempted by this language in Section 30 of the
3 Federal thing, and I think, though it doesn't tell you,
4 it should be 8, okay?

5 Now I've got my preemption into the case.
6 If the district judge agrees with me, he's going to make
7 a point. He's going to say: We can't have 500
8 different judges deciding whether it should be an 8 or a
9 3 or a 5 or some other thing. Don't worry; there's a
10 doctrine called primary jurisdiction; go ask the agency
11 what to do. And the agency will either tell you, hey,
12 there's no problem with the 8, or it will have a hearing
13 or it will submit a brief. It will do something and
14 everything will work out. We'll get there.

15 But now, there's lots wrong with what I just
16 said. Maybe you can't even know where to begin. But
17 insofar as you can shed some light on it, I would be
18 helped.

19 MR. PIOTROWSKI: Your Honor, I believe that
20 you're correct, that at that point the district court
21 could, and perhaps should, say, wait a minute, you're
22 saying 80, the agency's saying 60, let's ask CMS.

23 And at that point, the court would have to
24 decide how exactly it goes about that. In *Pharma v.*
25 *Walsh*, in your opinion in that case, Your Honor, you

1 said they had the power and we certainly don't disagree.

2 If there is, however, ongoing harm,
3 irreparable harm pursuant to a constitutional violation,
4 it probably ought to at least consider and if -- if the
5 requirements are met, issue an injunction. But then it
6 could say, We're going to preliminarily enjoin but we
7 need CMS to come in and tell us --

8 JUSTICE BREYER: There used to be a fairly
9 well established doctrine at the Civil Aeronautics
10 Board, of blessed memory, and the -- the -- they'd
11 sometimes get briefs, sometimes they'd send the parties
12 over. There were ways of doing it.

13 Now, that doctrine I don't think is too
14 live, and if -- so maybe you shouldn't go on. Just
15 leave me to try to do my best.

16 JUSTICE SOTOMAYOR: All right. May I go
17 back to this -- what you started with earlier. You're
18 okay with the methods and procedures that have been
19 approved for the States setting of rates. You're saying
20 they misapplied --

21 MR. PIOTROWSKI: No --

22 JUSTICE SOTOMAYOR: What exactly are you
23 saying? Because you keep saying, I'm entitled to more
24 money. But what did they do wrong?

25 MR. PIOTROWSKI: The State went to the

1 Federal Government and it said: Looking forward, when
2 we spend Federal dollars we will do it by applying this
3 method.

4 JUSTICE SOTOMAYOR: Right.

5 MR. PIOTROWSKI: And CMS said: Great, we
6 like that method and it's approved. But then the Idaho
7 legislature decided: We're not going to do that method
8 at all. We're instead only going to let you pay the
9 rates that fit the budget.

10 So on the merits, this was a relatively easy
11 case because con -- the State of Idaho did not say, we
12 looked at the four Federal statute -- statutory factors
13 and we disagreed with you. Idaho said, we looked at the
14 Federal statutory factors, we reviewed them, we analyzed
15 them, and we came up with this rate, but we absolutely
16 are not going to pay that rate. Instead we're going to
17 pay a purely budgetary rate.

18 JUSTICE SOTOMAYOR: So that's the point,
19 you're saying --

20 JUSTICE ALITO: Can I ask you this question
21 to understand how far your argument goes? The federal
22 law still makes it a crime to sell marijuana. Some
23 States have legalized the sale of marijuana. So let's say
24 there is a party in one of these States who can satisfy
25 Article III standing, is injured in fact by the sale

1 of -- of marijuana, the person lives near the facility,
2 the person says it causes crime and so forth in the
3 area.

4 Could that person file a lawsuit like yours
5 based on the Supremacy Clause to challenge the State law
6 legalizing marijuana?

7 MR. PIOTROWSKI: In -- in that case, Your
8 Honor, I think their injury is not caused by the State
9 law. And so where it would fall down is if their injury
10 is a result of some nuisance or trespass or something of
11 that nature which would provide a right of action, in
12 which the preemptive effect of --

13 JUSTICE ALITO: But you're saying there
14 wouldn't be Article III standing. My hypothesis is that
15 the person could show injury in fact and the other
16 elements of Article III standing.

17 MR. PIOTROWSKI: Assuming those elements are
18 present, then, yes, there's a right of action to bring
19 the preemption claim. The remedy, however, is merely to
20 prevent enforcement of the particular State law at
21 issue.

22 And in this case, again, assuming -- Article
23 III standing assumes there's a way to remediate the
24 problem, there's a remedy available to the district
25 court, so I'd have to say, yes, that case could be

1 brought. It's difficult to imagine that particular
2 hypothetical occurring, and it would present a very
3 narrow case in fact that likely would be resolved on
4 other grounds. But with --

5 JUSTICE GINSBURG: What about if --

6 CHIEF JUSTICE ROBERTS: If you have --

7 JUSTICE GINSBURG: In this case -- in this
8 case there is a puzzle based on the district court's
9 determination. (30) (A) is what you're relying on and it
10 requires sufficient -- all that, sufficient to enlist
11 enough providers.

12 According to the district court, all
13 eligible recipients received the services that they
14 needed. So again, there was no waiting list; nobody's
15 being kept waiting. These providers, while they say
16 they're not getting enough, are still providing the
17 service. So where is the 30(A) violation?

18 MR. PIOTROWSKI: 30(A) has long been
19 understood to impose both procedural and substantive
20 requirements.

21 The substantive requirement is that there
22 must be actually enough providers to allow access, there
23 must be quality care. The procedural requirement is
24 that the -- the -- the rates actually be set based on
25 the factors that Congress considered important.

1 And the violation of 30(A) here was that the
2 State gave no consideration whatsoever to the Federal
3 factors. They relied only on their own factors, and it
4 is by mere accident that we ended up with a situation in
5 which there was adequate access. It was also --

6 JUSTICE GINSBURG: But if you look at this
7 and say, well, the service was efficient, it was
8 economical, quality care, and it enlisted enough
9 providers.

10 MR. PIOTROWSKI: Your Honor, we stipulated
11 that it enlisted enough providers and we stipulated that
12 the -- that the Respondents had been providing quality
13 care. Whether -- we did not stipulate as to whether it
14 was economic or efficient, and in fact we'd assert that
15 it was not.

16 JUSTICE SOTOMAYOR: Can I -- but that's
17 really irrelevant -- it's not relevant to -- to your
18 argument. You're saying CMS approved a certain method
19 and procedures for setting the rate. The State didn't
20 follow what CMS required, and -- well, what they agreed
21 to. And as a result of that, the rate was -- the rate
22 they set had nothing to do with the method and
23 procedures that had been set. Doesn't matter whether
24 it's efficient, it doesn't matter what it is. The
25 bottom line is that they were required to follow a

1 certain method and a certain procedure.

2 Am I correct about that?

3 MR. PIOTROWSKI: You are correct, Justice
4 Sotomayor. And in addition, it's that problem that
5 brought us to court rather than somewhere else.

6 JUSTICE SOTOMAYOR: Absolutely.

7 MR. PIOTROWSKI: Because when the State has
8 received approval but doesn't implement, there is no
9 other remedy.

10 CHIEF JUSTICE ROBERTS: What -- there are
11 dozens of different types of providers under the Act.
12 There's home care providers, you have dentists, you have
13 brain surgeons, orthopedic surgeons, everything. And in
14 most instances -- I don't know, maybe all -- they have a
15 similar provision: Rates have to be reasonable to
16 ensure the availability.

17 Now, what do you do if -- if each of those
18 providers bring a lawsuit similar to yours? The effect,
19 it seems to me, will be putting the setting of budget
20 priorities in the hands of dozens of different Federal
21 judges, and I just don't know what the practical
22 significance of that's going to be.

23 MR. PIOTROWSKI: The agency, in this case
24 CMS, is always entitled to deference and a fairly high
25 degree of deference on issue such as this. This case

1 presents the unusual situation in which the State simply
2 ignored CMS's direction and approval. In a typical
3 case, there is an approved rate-setting methodology and
4 that's the end of the matter.

5 CHIEF JUSTICE ROBERTS: That's in each -- in
6 each particular case, right? Let's just say down the
7 street in the next courthouse or across the river in
8 Montana or whatever that there is a suit going on for
9 orthopedic surgeons. Their rates are not reasonable and
10 they bring the same suit. What -- it seems to me that
11 this is a prescription for budget-busting across the
12 board.

13 MR. PIOTROWSKI: Since at least 1969 this
14 Court has allowed cases very similar to this, if not
15 identical to this, but very similar to this, to be
16 brought to the Court, and that was the date of Rosado v.
17 Wyman. And in that 45-year period, we haven't seen a
18 flood of litigation.

19 JUSTICE BREYER: That's not the problem, the
20 problem -- that's -- I mean, that underlying this is
21 what's bothering me, that you have a very strong case,
22 in your view, that there is a number, the number is
23 produced by CMS methodology, they just didn't follow it.
24 And, therefore, all the relief you need is tell them
25 follow the Federal rule, which is CMS period.

1 But if your suit is allowed, I do not see
2 how you distinguish -- let's say there are 5 million
3 medical procedures. Each has a cost. There are 500
4 judges. And 500 times 5 million is an awful lot of
5 numbers and they will conflict with each other. And how
6 do we get some coherence out of this?

7 Although you've solved the problem here, we
8 can't close the door to everybody else if we open it to
9 you. So how is that problem solved? That's why I was
10 harping on primary jurisdiction, et cetera. But what
11 I'm looking for is the solution to the problem the Chief
12 Justice brought up.

13 MR. PIOTROWSKI: I think the problem is
14 solved, Justice Breyer, by primary jurisdiction is one
15 method, but also by existing notions of deference.
16 Because the --

17 JUSTICE SCALIA: Excuse me. Are you asking
18 us to send this back to the agency?

19 MR. PIOTROWSKI: No, Your Honor. The agency
20 has spoken.

21 JUSTICE SCALIA: Well --

22 MR. PIOTROWSKI: The agency spoke and said
23 this was the method to, to calculate these rates and the
24 --

25 JUSTICE SCALIA: But you don't want us to

1 send it back to the Federal agency so they can tell us
2 whether you're right or wrong about the number?

3 MR. PIOTROWSKI: The agency has spoken on
4 this issue, Your Honor. They've approved the
5 methodology.

6 JUSTICE SCALIA: They approved the
7 methodology. They didn't approve the number. That's
8 what you're challenging here, not the methodology. You
9 agree with the methodology. You can't at one and same
10 -- at the same time agree that this is a primary
11 jurisdiction case and yet not ask to send it back to, to
12 the Federal agency.

13 MR. PIOTROWSKI: What --

14 JUSTICE SCALIA: Which is it?

15 MR. PIOTROWSKI: The decision whether to
16 seek the agency's input lies in the first instance with
17 the district court.

18 JUSTICE SCALIA: I see. It's too late for
19 that now.

20 MR. PIOTROWSKI: I believe the -- if there
21 was a need for that, the State should have asked for it.

22 JUSTICE SOTOMAYOR: Mr. Piotrowski --

23 JUSTICE KAGAN: It seems to me if I
24 understand your claim, it's that CMS has already spoken.
25 All you're asking is for the State to come into

1 compliance with what CMS said, that's it.

2 MR. PIOTROWSKI: That's correct, Your Honor.

3 So --

4 JUSTICE KAGAN: So they're not going to send
5 it back for you. They've already spoken. You're just
6 asking the State to come into compliance with what HHS
7 has said.

8 MR. PIOTROWSKI: That's correct, Your Honor.

9 JUSTICE SCALIA: HHS has not said \$80. It
10 has said the methodology. If you think \$80 is not in
11 accord with the methodology, according to Justice Breyer
12 you should send it back to the Federal agency --

13 JUSTICE KAGAN: No, you think --

14 JUSTICE SCALIA: -- under primary
15 jurisdiction but you didn't ask for that and you still
16 don't ask for it.

17 MR. PIOTROWSKI: Your Honor, we didn't
18 choose the number. The State of Idaho and its
19 Department of Health and Welfare, Petitioner Armstrong
20 chose the number. He ran the calculation he -- he prepared
21 the methodology. He utilized the methodology and he
22 published a number. That's why we ask for that number.

23 JUSTICE SOTOMAYOR: That's the problem. I
24 mean -- but now we're getting to the merits and it's not
25 before us.

1 Justice Breyer was absolutely right and this
2 answers just -- the Chief Justice's point. The
3 injunction here should have been a simple one: State,
4 come into compliance with the methods. The -- they may
5 have come out to the same number if they had figured it
6 out. Armstrong was the guy they -- who published, but
7 the State didn't accept that number. But they should
8 have done the method and presented the figure to the
9 judge. But that's not what happens here, correct?

10 MR. PIOTROWSKI: That is not what happened
11 here, that's right.

12 JUSTICE SOTOMAYOR: All right.

13 MR. PIOTROWSKI: That's correct.

14 JUSTICE SOTOMAYOR: So maybe there's
15 something wrong with the injunction, but all you were
16 seeking was compliance with Federal law, follow the
17 methods and procedures that CMS approved.

18 MR. PIOTROWSKI: That's correct, Your Honor.
19 That's what we were seeking was to follow the method
20 that CMS had approved.

21 CHIEF JUSTICE ROBERTS: Well, if that's
22 correct, then it's -- again, as Justice Breyer pointed
23 out, there's no way to allow you to seek that relief
24 under an implied right of action under the Supremacy
25 Clause without opening the courthouse door to everybody

1 who says the Federal law was not followed, whether it
2 was in going from 80 to 60 or improving the methodology
3 or whatever.

4 MR. PIOTROWSKI: That is -- yes, Your Honor,
5 that's right. We open the courthouse doors. I submit
6 they have been open, and we haven't seen this problem
7 arise --

8 CHIEF JUSTICE ROBERTS: Well, so it doesn't
9 matter. The discussion we'd be having over it's whether
10 it's 60 or 80, the rates, or if it's the methodology.
11 Under your theory of the case, it doesn't matter. You
12 still get into Federal court, right?

13 MR. PIOTROWSKI: The -- it depends on what
14 each State does. And that's the -- that's the design of
15 Medicaid, is that it provides room, it provides
16 flexibility for the States to act. The State of Idaho
17 chose to develop a methodology and have that methodology
18 approved. That's was how it chose to meet the State's
19 -- or Congress's command.

20 JUSTICE SCALIA: If I understand your
21 position, it is that the Federal Government could create
22 a system in which it's for the Federal agency to decide
23 whether the State has complied or not. It can do that.
24 It just has not done so expressly here, right?

25 MR. PIOTROWSKI: Yes and yes, Your Honor.

1 JUSTICE SCALIA: And you say it cannot do so
2 impliedly.

3 MR. PIOTROWSKI: The -- whether it could do
4 so impliedly is a -- truly a decision for a different
5 case. What we have here is that Congress has not told
6 us that it wishes to escape the 200-year history of
7 equitable actions for constitutional violations. It
8 hasn't told us that in any way whatsoever in the
9 Medicaid Act.

10 JUSTICE SCALIA: I think they're -- they're
11 asserting that under our standard there -- there is no
12 private right of action unless it is created by the
13 Congress and we do not have implied rights of action.

14 Now, you -- you want to create an implied
15 right of action here. I -- I don't know why that isn't
16 implicit in the scheme. Congress did not give a right
17 to the providers. It -- it provided a remedy through
18 the Federal agency.

19 MR. PIOTROWSKI: The implied right of action
20 cases address a different problem. They address the
21 assessment of loss and risk. They address the
22 apportionment of reward. And in that circumstance, this
23 Court has, for a very long time now, concluded that
24 certain particular standards must be met.

25 The equitable cause of action to stop

1 unlawful conduct is entirely different and predates the
2 implied rights.

3 JUSTICE SCALIA: That may well be, but it
4 seems to me it's -- I am able to say that -- that when
5 Congress wants the scheme that you desire, it creates a
6 private cause of action. It has not created a private
7 cause of action here and, therefore, it impliedly does
8 not want the scheme that you desire.

9 MR. PIOTROWSKI: That outcome we believe is
10 inconsistent with the history, the history of the
11 drafting of the Supremacy Clause. It is impractical as
12 -- or not impractical but rather it fails to respect the
13 expectations of Congress and the agencies that have
14 developed over certainly the last 45 years and arguably
15 nearly 200.

16 JUSTICE ALITO: If the plaintiffs in
17 Sandoval and Gonzaga, for example, had brought a suit
18 like yours, would they have stated a claim?

19 MR. PIOTROWSKI: Yes, they would have.

20 JUSTICE ALITO: So they just missed -- they
21 just missed the boat. They didn't -- all of this has
22 been clear for 200 years, but they missed it and the
23 court missed it, right?

24 MR. PIOTROWSKI: And --

25 JUSTICE ALITO: So the Court spent a lot of

1 time determining whether there's an action -- whether
2 there's a claim under 1983 or whether there's an implied
3 cause of action at all was clear and has been for a long
4 time under the Supremacy Clause itself?

5 MR. PIOTROWSKI: Nothing was missed at all,
6 Your Honor. The difference between an implied right of
7 action and a 1983 right of action and the right of
8 action I'm here to support is vast. I don't have an
9 entitlement to fees, I don't have an entitlement to
10 damages. All I can get, in this case, is prospective
11 injunctive relief.

12 JUSTICE KAGAN: Could I --

13 MR. PIOTROWSKI: In the 1983 claims, the
14 remedies were much more wide open, and even in the
15 implied right of action cases, we certainly have a
16 damages remedy at the least and retrospective relief.

17 JUSTICE KAGAN: Mr. Piotrowski, could I go
18 back to Justice Breyer's question and just if you will
19 tell me if you agree with this. In the -- in the mine
20 run of cases, CMS will have approved something. It will
21 have approved a methodology and/or a set of rates. And
22 -- and somebody's going to come in and challenge that
23 and -- and they're going to lose, right? Because the
24 Court is just going to say, we give deference to CMS and
25 CMS has approved what the State has done -- is doing,

1 end of case, correct?

2 MR. PIOTROWSKI: Yes, Your Honor.

3 JUSTICE KAGAN: So that leaves I think two
4 kinds of cases. And it's exactly the kinds of cases
5 that we've seen in Douglas and in this case. In Douglas
6 the State just flouts CMS. It says we're going to go
7 ahead and do what we want without seeking their
8 permission. States usually don't do that, but that's
9 what they did there and that gave rise to a claim which
10 was not so easy to dismiss. And then in the second kind
11 of case, the State goes to CMS, says: This is what we'd
12 like to do. CMS says: You're right, this is a great
13 thing to do. And then the State just doesn't do it.
14 All right.

15 So it's these two very cabined
16 circumstances: One where the State flouts CMS; and the
17 other where the State asks CMS, gets its approval and
18 then decides, we're not doing it. Those are not the
19 mine run of cases. The mine run of cases are going to
20 be extremely easy, I would think, under standard
21 principles of deference, to deal with.

22 MR. PIOTROWSKI: The vast majority of these
23 cases will founder on the shoals of preemption, because
24 there simply won't be a preemptive effect for the
25 conduct that is challenged, whether it be a deference or

1 some other tool.

2 CHIEF JUSTICE ROBERTS: Are those merits
3 determinations?

4 MR. PIOTROWSKI: They are primarily merits
5 determinations, Your Honor. And that's why there have
6 been so few of these cases despite the fact that we
7 believe they have been available and certainly many
8 lawyers have believed that they're available. We
9 haven't seen a lot of cases; we won't see a lot of
10 cases. Most of them will get resolved, one way or the
11 other, long before we see a genuine problem over whether
12 it's \$80 or \$60.

13 In this case, we had the unusual
14 circumstance that the State of Idaho had directly
15 flouted what it told the Federal agency it was going to
16 do. And that made this case relatively easy on the
17 merits, which ultimately brought it to this Court.

18 The limitations that exist on these cases
19 are serious already --

20 JUSTICE GINSBURG: Do you agree -- do you
21 agree that -- with your brother that -- that C -- CMS
22 could have gotten this injunctive -- could have gone
23 into court and said, they told us this is their method,
24 they didn't follow it, court enjoin them from not
25 following the method?

1 MR. PIOTROWSKI: Yes, I believe CMS could
2 also bring such a case. What's important --

3 JUSTICE BREYER: You're saying it's clearly
4 right under the law because of CMS that we should get
5 \$80. Clearly right. Now, for a variety of reasons, we
6 can't just go into court and say, give us the 80. But
7 what we want to do is reverse it. Ask that the Federal
8 law preempts the State's reason for not giving us the
9 80, namely, that statute. Is that right? That's the
10 form of this suit?

11 MR. PIOTROWSKI: I believe so, Your Honor.

12 JUSTICE SCALIA: Can CMS go into court as
13 you say? I thought -- I thought what CMS can do is to
14 -- is to simply refuse to fund the program.

15 MR. PIOTROWSKI: CMS certainly has the right
16 to bring any right of action that my clients have the
17 right to bring.

18 JUSTICE SCALIA: Is that right? Do you know
19 of any cases where that's what CMS does instead of --
20 instead of using the coercive power it has to simply cut
21 off the funding? I thought that was its only remedy.

22 MR. PIOTROWSKI: CMS has not done what I
23 suggest. We would suggest if you look at the brief --

24 JUSTICE SCALIA: It's had that power but
25 never used it.

1 MR. PIOTROWSKI: That's right, Your Honor.

2 JUSTICE GINSBURG: Does CMS routinely -- and
3 do Federal agencies that have this Draconian power -- do
4 they in fact -- are there in fact fund cutoffs? I mean,
5 the reality is that a fund cutoff hurts everybody; the
6 recipients don't get the benefits, the providers don't
7 get money for the services they rendered. So it's a
8 theoretically very powerful remedy, but practically it's
9 never used as far as I know.

10 MR. PIOTROWSKI: It is a nuclear option,
11 Your Honor, and one that the agency has never used so
12 far as we know. And that's precisely the problem that
13 this cause of action addresses.

14 Thank you.

15 CHIEF JUSTICE ROBERTS: Thank you, counsel.

16 Mr. Withroe, you have four minutes
17 remaining.

18 REBUTTAL ARGUMENT OF CARL J. WITHROE

19 ON BEHALF OF THE PETITIONERS

20 MR. WITHROE: Thank you, Mr. Chief Justice.

21 I want to go to a couple of points. If --
22 if the Court reads the district court opinion and the
23 court of appeal's opinion, nowhere in either of those
24 opinions is there a discussion about whether the State
25 complied with this 2009 waiver amendment methodology or

1 whether it didn't.

2 That -- this case has never been about that.
3 As pleaded, litigated and as it comes to this Court,
4 this case has been about whether our rates violated the
5 Ninth Circuit's requirements that rates be based on
6 provider costs and bear some reasonable relationship to
7 provider costs. That's how this case was pleaded and
8 litigated.

9 With that out of way, there's a couple other
10 points I'd like to get to. The -- the remedy of --

11 JUSTICE KAGAN: Sorry, Mr. Withroe, but I
12 just -- when you say that, I mean, my understanding of
13 the district court's opinion was that it was
14 specifically -- it wasn't sort of doing this on its own
15 in deciding what would be efficient by its lights. What
16 it was entirely based on was the State's own cost
17 studies and it was just saying that the State had
18 already decided this and because the State had already
19 decided that this was necessary in order to meet the
20 standard, that the State had to comply with its own
21 views.

22 MR. WITHROE: We did not ever say that these
23 rates were necessary to bring us to compliance with
24 Section (30) (A). We did some studies and the State
25 Medicaid people decided there might be some money to --

1 to -- to raise the rates and -- and give these providers
2 more rates. And the ultimate decision-makers, the State
3 legislature, decided, nope, not necessary. And --

4 JUSTICE SOTOMAYOR: So are you agreeing with
5 him that you didn't follow the procedures and methods
6 set out in (30) (A), that you went about it your own way?

7 MR. WITHROE: No, I don't agree with that.
8 We -- we followed the methods and procedures that had
9 been in place. And methods and procedures can be
10 different and still produce the same rates. Rates are
11 divorced from methods and procedures. And so, we never
12 violated any of the methods and procedures. And again,
13 we were -- we were acting under the -- the 2007 waiver
14 amendment at that time. The 2009 waiver amendment
15 wasn't even around until after this case had been filed.

16 And so the -- again, the important point
17 on -- on this is whether we complied with the 2009
18 waiver amendment, whether we did not, was never at issue
19 in this case. Ever.

20 And so there's a couple other points that I
21 want to get to in the limited time that I've got.

22 Going back to Justice Breyer's example
23 regarding why can't the doctor claim that the -- that
24 something is preempted. The doctor in that hypothetical
25 can't claim that the rate is preempted because he does

1 not have the right to insist to more. In other words,
2 the statute does not give that doctor any legally
3 cognizable interest. It would be different if the
4 Federal statute said, doctor, you are subject to
5 regulations X, Y, and Z and you are entitled to do
6 things A, B, and C. Section (30) (A) does not do that.

7 JUSTICE SOTOMAYOR: Let me -- let me go back
8 to -- forget your position, take my hypothetical.

9 You didn't follow the methods and
10 procedures. Who has -- do they have any right to come
11 in on ex -- on an ex parte Young theory --

12 MR. WITHROE: No --

13 JUSTICE SOTOMAYOR: -- and say, moving
14 forward, follow the procedures and set a rate consistent
15 with the methods and procedures that you obligated
16 yourself to do.

17 MR. WITHROE: No, they would not have a
18 right of action, we would have the same result. And the
19 reason for that is that Congress has set up a system
20 where the secretary gets to administer the statute and
21 monitor the plan for compliance, conduct periodic audits
22 and then make a determination about whether we are in
23 compliance with our methods and procedures. Our methods
24 and procedures are broad, they are general, and then we
25 get to work in the State to fill out the details. So

1 they would have no right of action.

2 CHIEF JUSTICE ROBERTS: Thank you, counsel.

3 The case is submitted.

4 (Whereupon, at 11:14 a.m., the case in the
5 above-entitled matter was submitted.)

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