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P R O C E E D I N G S

(10:00 a.m.)

CHIEF JUSTICE ROBERTS: Justice Sotomayor is participating remotely this morning.

We'll hear argument this morning in Case 20-1263, Gallardo versus Marstiller.

Mr. Gowdy.

ORAL ARGUMENT OF BRYAN S. GOWDY

ON BEHALF OF THE PETITIONER

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

Medicaid provides a benefit to persons needing medical care. It is not a loan to be repaid later. The anti-lien and anti-recovery provisions, part of the original 1965 Medicaid law, reflect this policy by prohibiting states from taking any property belonging to a beneficiary, including her third-party liabilities.

But, in 1968, Congress, in subparagraphs (A) and (B), established a limited pool of third-party liabilities from which a state could seek reimbursement for Medicaid expenses. States

1 were directed, and I quote, "to ascertain the
2 legal liability of third parties to pay for
3 care and services available under the plan" and
4 "to seek reimbursement to the extent of such
5 legal liability."

6 A liability for future medical
7 expenses does not pay for care available under
8 the Medicaid plan and, thus, is not part of the
9 pool of reimbursement funds.

10 The procedural tools enacted by
11 Congress after 1968 did not change the pool of
12 reimbursement funds. To the contrary,
13 subparagraph (H) confirms that a state acquires
14 only a beneficiary's rights to third-party
15 payments, and I quote, "for health care items
16 or services furnished" to the beneficiary.

17 Finally, Florida's isolated reading of
18 the assignment clause cannot be right because
19 it forces beneficiaries to make lifetime
20 assignments, leading to absurd results that
21 convert Medicaid from a benefit to a loan.

22 JUSTICE THOMAS: Counsel, the -- the
23 limitations that you would apply in this case
24 to the assignment, would you also apply it to
25 child support?

1 MR. GOWDY: They apply the -- they
2 apply the same, Your Honor. However, child
3 support works differently than a tort recovery.
4 Child support normally requires ongoing
5 payments to cover all of the child's medical
6 care. A tort payment is a one-time payment for
7 limited medical care that was caused by the
8 tort. So there -- it's -- so that's a --

9 JUSTICE THOMAS: Oh, I understand
10 that, but your -- you said that these
11 provisions limit -- the -- the provision you're
12 talking about, the assignment provision, is
13 very broad.

14 MR. GOWDY: Yes, Your Honor.

15 JUSTICE THOMAS: It doesn't have these
16 built-in limitations. And I will take -- I
17 will also agree that perhaps child support is
18 very broad in a different way. But you said
19 that the -- and they appear generally in the
20 same part of the statute.

21 But you say that the provisions that
22 you mentioned restrict the assignment, the
23 broad assignment language. Why doesn't that
24 also apply to the child support language?

25 MR. GOWDY: Well, Your -- Your Honor,

1 the -- the analysis would still be the same
2 whether it's child support or tort recovery.
3 The analysis would be -- the medical care --
4 and I said yes when you said it's very broad,
5 but the medical care mentioned in the
6 assignment clause, in -- in our view, when read
7 in the whole text, is shorthand for medical
8 care covered by Medicaid, furnished by
9 Medicaid, paid for by Medicaid, and, therefore,
10 the analysis will be whether the third-party
11 liability covers the same care, service, or
12 item covered by Medicaid.

13 And my point about distinguishing
14 between tort recoveries and childcare is tort
15 recovery does -- often pays for items, care,
16 and service not covered by Medicaid. For
17 example, if you're a disabled person, you will
18 need a special vehicle with medical equipment
19 to be transported to your appointments.
20 Medicaid does not cover for that, but a
21 tortfeasor may have to pay for that.

22 Childcare, I think, is different in
23 the other regard in that childcare requires the
24 parent to pay for all medic -- medical care,
25 whether it's covered by Medicaid or not, and,

1 therefore, I think it'll operate differently in
2 that context than in the tort recovery context.

3 JUSTICE THOMAS: Thank you.

4 MR. GOWDY: I'd like to turn back to
5 the -- the third-party liability provision if
6 the Court doesn't have any questions. The
7 Solicitor General has correctly stated this is
8 the anchor or main provision that sets a
9 state's general duty to reinvert --
10 reimbursement. And to quote a little bit more
11 than I did in my opening, in sub --
12 subparagraph (B), it says "where such a legal
13 liability is found to exist after medical
14 assistance has been made available, the State
15 will seek reimbursement for such assistance to
16 the extent of such legal liability."

17 This language in the 1968 provision
18 that establishes the pool of reimbursement
19 funds clearly indicates that it is for
20 third-party payments for medical assistance
21 already provided by Medicaid, already incurred.
22 And the -- the last phrase in subparagraph (B)
23 refers to "such legal liability," which must be
24 -- is cross-referencing the phrase in (A), "pay
25 for care and services available under the

1 Medicaid plan."

2 And as my hypothetical with Justice
3 Thomas mentioned, many of the items, services,
4 and care that a tortfeasor must pay for,
5 whether we're talking about past or future
6 medical expenses, are not covered by Medicaid.

7 So -- so, read sensibly, the
8 third-party liability in (A) and (B) must be
9 for the care, services, or items that have been
10 made available by Medicaid to the beneficiary
11 and can't be for future medical care, items, or
12 services that may never be made available by
13 Medicaid to the beneficiary.

14 JUSTICE KAGAN: Mr. Gowdy, I guess I'm
15 not quite sure why you read this language, to
16 pay for care and services available under the
17 plan, why you necessarily read that as
18 precluding payments for future expenses.

19 I mean, couldn't we just read that as
20 saying something like, you know, there's --
21 there are kinds of medical care that are
22 available under the plan, and, regardless,
23 whether they're past or future, those are the
24 kinds of things that are covered, and then
25 there are kinds of medical services that are

1 not available under Medicaid, and so that would
2 not be covered.

3 But why is it a future/past
4 distinction to have language like "available
5 under the plan"? I -- I would think it's just
6 a kind of service distinction.

7 MR. GOWDY: Right. And I understand
8 Your -- Your Honor's reading of that, but we --
9 we don't believe that's the most sensible
10 reading in the entire text of all these
11 provisions.

12 First, I would note that a dictionary
13 definition of "available" is "present or ready
14 for immediate use." And given the context
15 here, especially how "available" is used in the
16 -- in the immediately subsequent subparagraph,
17 "have been made available," we believe that it
18 -- it makes most sense to be talking about
19 services that have been incurred or provided.

20 That also lines up with subparagraph
21 (H). And then --

22 JUSTICE KAGAN: Right. I mean, you
23 definitely have -- I mean, sort of the way I
24 read these three provisions, like, (H) is for
25 you, and (K) is for Florida, and then there's a

1 little bit of a -- and then I think, you know,
2 (A) is -- is -- is harder, but I guess I'm
3 wondering why I shouldn't basically read it --
4 I'm not sure if it's really quite Florida's
5 way, the -- the -- the alternative that I'm
6 proposing. I'd like to ask General Whitaker
7 about that.

8 But -- but why is -- I would not think
9 that this language makes a distinction between
10 current -- between past and future payments, as
11 opposed to payments for things that Medicaid
12 covers and payments for things that Medicaid
13 doesn't cover.

14 There are some things that we know
15 that Medicaid is not going to cover, and -- and
16 those are kind of read out of this provision.

17 MR. GOWDY: Right. Well, first, we
18 would agree with the government's position.
19 The focal point should be on what Medicaid pays
20 for or covers. And so you can have this same
21 issue come up as it did in the Doe case out of
22 Vermont for past medical expenses.

23 Our context in this particular case
24 and many cases is future medical expenses,
25 which, in our view, are never available under

1 Medicaid, and I would give two reasons for
2 that, Your Honor.

3 First, you -- you have to know the
4 financial circumstances of the individual. And
5 many persons who receive a tort recovery become
6 immediately ineligible for Medicaid. So, until
7 we know the moment in time that the medical
8 care is administered and you look at that
9 person's financial situation, you don't know if
10 Medicaid is available.

11 Two, you have to know the person's
12 medical condition. Even if someone receives a
13 future medical expense award, because of the
14 confines of a -- of a tort lawsuit, a jury has
15 to make a -- a prediction about the -- the
16 medical care that a person will need in the
17 future.

18 But, as we know, sometimes people have
19 more rapid recoveries. Sometimes things get
20 worse. And then at that point in time when the
21 medical care is needed is when the availability
22 determination has to be made.

23 JUSTICE ALITO: What if -- what
24 happens if the person who receives a tort
25 recovery continues to be eligible for Medicaid

1 and continues to have medical bills paid by
2 Medicaid? That does happen in some instances,
3 doesn't it? Then would -- am I right on that?
4 And, if I am, would -- would you say that
5 Medicaid cannot recover for those expenses from
6 the portion of the tort recovery that was
7 allocated to future expenses?

8 MR. GOWDY: So, yes, you're right.
9 People do remain on Medicaid after -- after the
10 tort recovery. And especially it happens, as
11 it does in this case, with disabled children --

12 JUSTICE ALITO: Right.

13 MR. GOWDY: -- because they have
14 what's called a special needs trust, which is
15 discussed in the AAJ amicus brief.

16 To answer your question, the second
17 question, no, the state may not recover from
18 the future medical expense award, and I would
19 -- really two reasons for that.

20 The moment of the tort recovery, that
21 becomes the property of Ms. Gallardo and is --
22 is protected by the anti-lien provision. And
23 unless the state can point to an exception in
24 one of these third-party provisions, it is
25 protected.

1 And, secondarily, though, I would say
2 the state is -- and -- and what we say, really,
3 the assignment provision, 1396k, it -- it does
4 two primary things, Your Honor.

5 One, it granted the state the right to
6 control the beneficiary's cause of action for
7 medical damages paid by Medicaid and to -- and
8 to demand the beneficiary's cooperation in that
9 action.

10 Florida would have the right, if it
11 was concerned about life-long care for someone
12 like Ms. Gallardo, they could sue the
13 tortfeasor themselves and try to set something
14 up similar to a workers' compensation system
15 where you have ongoing payments.

16 JUSTICE ALITO: But why does that --
17 why does that regime make sense?

18 MR. GOWDY: Well, if an award --

19 JUSTICE ALITO: Why should --

20 MR. GOWDY: I'm sorry.

21 JUSTICE ALITO: -- why should Medicaid
22 not be able to recover for expenses that were
23 covered by the tort recovery, the portion of
24 the tort recovery for future medical expenses?
25 Why does that make sense?

1 MR. GOWDY: Well, it makes sense, Your
2 Honor, because the -- the -- because the few --
3 because, at the moment of the tort recovery, we
4 have to determine, is this person -- what is
5 this property here?

6 And -- and just like today you may be
7 on a certain health insurance policy, if you
8 lose your job tomorrow, you're not, and,
9 therefore, you will have to pay those expenses
10 out of pocket.

11 So it'll be -- there are many cases
12 where the person receives the tort recovery and
13 they're ineligible for Medicaid, but whether
14 they're ineligible or not, the -- the analysis
15 has to be at the point in time of the recovery.

16 And as far as what I suggested about a
17 workers' comp scheme, you know, if Florida were
18 to -- or the states were to set that up, those
19 often work where there's a determination that
20 there's an injury that was in the course and
21 scope of the employment, and then there could
22 be future determinations where the workers'
23 comp carrier has to make payments for future
24 care.

25 Unfortunately, the tort system is not

1 set up like that, and liability policies aren't
2 set up like that. There's a one-time payment.
3 And, therefore, we have to look at -- just like
4 with the -- the damages we discussed in -- that
5 were discussed in Ahlborn with respect to lost
6 wages, pain and suffering, we have to determine
7 who has the ownership of those damages at the
8 time of the tort recovery.

9 JUSTICE SOTOMAYOR: Counsel, this is
10 Justice Sotomayor.

11 MR. GOWDY: Yes, Your Honor.

12 JUSTICE SOTOMAYOR: I want to break
13 down what you're saying. You've been using,
14 and so have we, the Justices, past and future
15 medical expenses.

16 But the government makes it very clear
17 that this is not about past or future medical
18 expenses. This is about the statute, the
19 amount that the Medicaid has paid, correct?

20 MR. GOWDY: Correct.

21 JUSTICE SOTOMAYOR: And to the extent
22 that at the moment of a tort recovery the
23 government hasn't paid anything, it's not
24 entitled to recovery under the anti-lien
25 statute, correct?

1 MR. GOWDY: Correct.

2 JUSTICE SOTOMAYOR: And that's what
3 Ahlborn said, which is you're only entitled to
4 what -- the state is only entitled to what it's
5 paid, and at the moment of recovery, that's all
6 that it has a legal claim to, correct?

7 MR. GOWDY: Correct.

8 JUSTICE SOTOMAYOR: All right. So
9 your -- as I understand your position as you've
10 been discussing is, at the moment the lien is
11 placed on a tort recovery, even at the time of
12 an assignment, it -- you can only be assigned
13 what you have a right to.

14 And they are claiming they have a
15 right to all medical services. But the
16 problem, any services, is they haven't given
17 any services at that point, correct?

18 MR. GOWDY: Correct.

19 JUSTICE SOTOMAYOR: So they can't have
20 a lien for services at that moment they haven't
21 rendered?

22 MR. GOWDY: Correct.

23 JUSTICE SOTOMAYOR: All right. Now,
24 with respect to Justice Alito's question, if
25 I'm understanding it correctly, he's saying why

1 shouldn't we let Medicaid take. And your
2 answer, I think, is we don't know what it's
3 going to pay.

4 If the recovery is large enough, the
5 person can become ineligible for Medicaid,
6 correct?

7 MR. GOWDY: Correct.

8 JUSTICE SOTOMAYOR: Congress has given
9 a trust for -- the right to take money that is
10 given and place it in a trust for the medical
11 care of the children, correct?

12 MR. GOWDY: If they are disabled like
13 Ms. Gallardo, yes, correct.

14 JUSTICE SOTOMAYOR: Exactly. And so
15 that's what happened here.

16 MR. GOWDY: Correct.

17 JUSTICE SOTOMAYOR: So it's not like
18 that money is a windfall to her. It's being
19 used to pay medical expenses?

20 MR. GOWDY: Yes, or like things for a
21 van to get her to her appointment.

22 JUSTICE SOTOMAYOR: Right. But the
23 point is it's not a windfall?

24 MR. GOWDY: No. And -- and I would
25 add that when Ms. Gallardo dies, all the money

1 in the special needs trust goes back to
2 Medicaid.

3 JUSTICE SOTOMAYOR: Exactly. And so
4 it's not like med -- that the state is being
5 denied anything?

6 MR. GOWDY: Correct.

7 JUSTICE SOTOMAYOR: Now, with respect
8 to the future support payments that Justice
9 Thomas pointed to in this statute, as I read
10 that, that's not an assignment of any kind.
11 It's just an obligation for paternity to be
12 established and the parent to -- to be
13 obligated to pay for medical care. It's not
14 going to the state.

15 MR. GOWDY: Correct. That -- that's
16 right.

17 JUSTICE SOTOMAYOR: All right. Thank
18 you, counsel.

19 CHIEF JUSTICE ROBERTS: Thank you,
20 counsel.

21 Justice Thomas, anything further?

22 JUSTICE THOMAS: Nothing.

23 CHIEF JUSTICE ROBERTS: Justice
24 Breyer?

25 JUSTICE BREYER: Well, I thought I

1 understood it, but I'm a little less certain
2 now. Look, suppose that Medicare -- there's an
3 accident, okay, and Smith caused it, and, as a
4 result, Jones was in the hospital. His car was
5 destroyed. He had some -- television set which
6 was destroyed. He may have past -- he will
7 have past bills for -- and probably in the
8 future too for -- for his illness and health.

9 Now my understanding was that the
10 Medicaid, since he's on Medicaid, as of July 1,
11 when we're all taking place, has paid already
12 \$25,000. And the question was, I thought, but
13 you better correct me if I'm wrong -- the
14 question was they'd like to get this 25,000
15 back. And it's Smith, the causer, who has
16 settled with the victim, where they think they
17 can get some of the money. And they get some
18 of the money because \$10,000 was set aside in
19 this settlement for past expenses. Right?

20 MR. GOWDY: Right.

21 JUSTICE BREYER: And there is another
22 15,000 in past expenses that Medicare has paid,
23 and now they'd like to get that back too.

24 MR. GOWDY: Correct. That's what --

25 JUSTICE BREYER: And they can't get it

1 back from that part of the settlement that's to
2 pay for the television set?

3 MR. GOWDY: Correct.

4 JUSTICE BREYER: They can't get it
5 back from that part that is to pay for the
6 automobile repairs?

7 MR. GOWDY: Correct.

8 JUSTICE BREYER: But there is a little
9 bit here, which, let's say, says 20,000 or
10 30,000, which is to pay for medical expenses,
11 and it doesn't say whether it's past or future.
12 So what Florida would like is to get back some
13 of its past expenses from that portion of the
14 settlement which seems earmarked for future
15 expenses.

16 MR. GOWDY: Correct. That's what
17 Florida wants.

18 JUSTICE BREYER: That's what this
19 issue is, is it not?

20 MR. GOWDY: Yes.

21 JUSTICE BREYER: And one problem for
22 you is the statute says it can, that statute.

23 MR. GOWDY: Well --

24 JUSTICE BREYER: But the other four
25 statutes seem to say, look, you are supposed to

1 get back from the settlements that which is
2 earmarked for past. You're not supposed to get
3 back money earmarked for paintings or cars or
4 television sets but only that part for past.

5 And it doesn't say a damn thing about
6 your getting money -- in fact, it suggests the
7 contrary, those four -- money from that part
8 which is future.

9 Now I don't know why Congress wrote it
10 that way. They might have written it that way
11 because they thought a lot of people fall off
12 Medicare, and by the time they get future,
13 there won't even be Medicare people. Or they
14 might have written it because Medicare future
15 -- because future payments are -- are
16 uncertain. But that's how they wrote it.

17 MR. GOWDY: Right.

18 JUSTICE BREYER: And so you're saying,
19 hey, there's no more reason here -- I mean, now
20 I'm back to Justice Kagan's question. That
21 language in the last bit seems against you.

22 MR. GOWDY: It -- it -- I -- I
23 understand that's the weak point for us, but I
24 think -- now you kept saying Medicare, and --

25 JUSTICE BREYER: I meant Medicaid. I

1 mean Medicaid.

2 MR. GOWDY: Well, I wanted to point
3 Your Honor, though, to 2651 --

4 JUSTICE BREYER: Yeah.

5 MR. GOWDY: -- which does -- and which
6 is in the Medicare statutes, which does
7 precisely what Florida really wants. And that
8 statute allows Medicare to collect from the
9 entirety of the tort recovery.

10 JUSTICE BREYER: Mm-hmm.

11 MR. GOWDY: And that makes sense
12 sometimes, and Congress did that in 2013 with
13 Medicaid and then nullified it with -- in 2018,
14 because you would -- it makes sense to have the
15 third party responsible for the tort to pay for
16 all the medical care caused by the tort.

17 But, actually, Florida's reading and
18 why I said at the beginning it was absurd --
19 and I'm -- I'm trying -- I know I have to
20 answer your question and I hope I'm doing that
21 -- is that it's actually far broader, Florida's
22 reading, than what 2651(a) does.

23 It allows a -- a lifetime assignment
24 and would require third parties who are future
25 health insurers or future tortfeasors who did

1 not cause Ms. Gallardo's injury to pay for the
2 care that Medicaid paid for her injuries or --

3 JUSTICE BREYER: Okay. It's
4 complicated, but I -- I suppose --

5 MR. GOWDY: That -- well, that's not
6 --

7 JUSTICE BREYER: -- what Congress --
8 is Congress saying this to Medicaid agencies?

9 MR. GOWDY: Well --

10 JUSTICE BREYER: Medicaid agency, you
11 want to get back the future payments? Here's
12 what you do: Sue the tortfeasor yourself.

13 MR. GOWDY: Exactly. And I would just
14 say that Florida has pointed to these other
15 provisions, but none of them do this future
16 lifetime assignment. And so that's why, in --
17 in our view, that's just not a sensible
18 reading, Your Honor.

19 CHIEF JUSTICE ROBERTS: Justice Alito,
20 anything further?

21 Justice Sotomayor, anything further?

22 JUSTICE SOTOMAYOR: No. Thank you.

23 CHIEF JUSTICE ROBERTS: Justice Kagan?
24 Justice Gorsuch?

25 JUSTICE GORSUCH: I'm afraid I do,

1 Chief.

2 Medicaid is generally a statute about
3 funding from the federal government to states.
4 And if, in the normal course, we'd have a case
5 about this, you might think of it between the
6 federal government and the states, say, the
7 state violates the anti-lien provision and the
8 federal government stops paying.

9 That case would have a very different
10 light to me, and it would raise federalism
11 questions. Medicaid's a huge percentage of
12 state budgets. We'd normally require the
13 federal government, before it does something
14 that drastic to a -- in -- in -- in our federal
15 system to a state, to speak pretty clearly.

16 This case has a different light
17 because we have an individual suing under 1983
18 to protect tort compensation. But I wonder
19 whether that premise that an individual can sue
20 under 1983 is correct. I just don't know.

21 I know Florida has forfeited the issue
22 in this case, and you're going to tell me that.

23 MR. GOWDY: I won't now.

24 JUSTICE GORSUCH: You -- you can.

25 People do it all the time. You can tell me

1 again, all right?

2 And -- but a number of states have
3 written to us saying: Gosh, be careful about
4 deciding this case on that premise because it
5 may not be correct.

6 Do you have any thoughts for us about
7 that?

8 MR. GOWDY: Well, I -- first, I'd say,
9 if you want to avoid the question and the
10 opinions of those states that argue that, I
11 obviously don't object.

12 JUSTICE GORSUCH: I knew it was
13 coming. Okay.

14 MR. GOWDY: So -- but I do have a
15 thought, that 1396p(a)(1), which is the
16 anti-lien provision, and the anti-recovery
17 provision in (b) are clear. They're clear.
18 And they are -- they are rights for
19 individuals. They're not rights the federal
20 government is likely to assert because it's
21 Ms. Gallardo who will lose her property and be
22 unable to pay for care that Medicaid doesn't
23 pay for.

24 JUSTICE GORSUCH: I understand that.
25 It was a legal question, though. What in the

1 statute makes you think that it's a right that
2 belongs to individuals rather than to the
3 federal government?

4 MR. GOWDY: Because -- because the
5 statute by its plain text says no lien may be
6 imposed against the property of any individual.
7 So it is her individual right that she has a
8 right to assert here or in the lower federal
9 courts.

10 And, furthermore, I believe it's
11 clear, and the only condition here that is
12 happening is it's not like the state is -- I
13 know you have other cases where the state must
14 do A, B, and C to receive federal funding, but,
15 here, that condition that I just read is clear.
16 And what we're arguing about is whether the
17 state can go seek some other money, and the
18 federal government is telling them they can't.

19 But, anyway, to -- to directly answer
20 your question, if you don't allow individuals
21 to assert this right in federal court, it's
22 effectively lost because it's the individual's
23 -- it -- it's a statutory property right.

24 JUSTICE GORSUCH: Very helpful. Thank
25 you.

1 CHIEF JUSTICE ROBERTS: Justice
2 Kavanaugh.

3 JUSTICE KAVANAUGH: To the extent that
4 one provision, as Justice Kagan said, is
5 helpful to you and one provision is not helpful
6 to you, I want to ask you why we shouldn't look
7 to the Medicare analogy that you were
8 discussing with Justice Breyer as a sensible
9 landing point for us to arrive at in resolving
10 the discrepancy between the two provisions.

11 What's different --

12 MR. GOWDY: Okay.

13 JUSTICE KAVANAUGH: -- about the
14 Medicare?

15 MR. GOWDY: Well, so the Medicare
16 statutes --

17 JUSTICE KAVANAUGH: Not -- not the
18 language.

19 MR. GOWDY: Oh.

20 JUSTICE KAVANAUGH: But what would be
21 wrong with resolving this and treating it in
22 the same way as Medicare, given that you have
23 assumed for the second contradictory
24 provisions?

25 MR. GOWDY: Well, I -- I don't -- I

1 guess the premise of your question seems to be,
2 and correct me if I'm wrong, that the language
3 in the assignment clause is similar to the
4 language in the Medicare statute. And --

5 JUSTICE KAVANAUGH: I think the
6 premise is that that language just is not
7 helpful to you and other language in a
8 different provision is helpful to you. So we
9 have to sort out how are we going to figure out
10 which provision to follow.

11 And if Medicare is -- is done one way,
12 what sense would it make to have Medicaid done
13 a different way on this issue?

14 MR. GOWDY: This -- here's -- well, I
15 have two -- two responses.

16 One, you could follow the path of
17 Judge Wilson in the dissent in -- in the Utah
18 Supreme Court in Latham and you -- and you
19 apply the general specific canon and the most
20 recently enacted canon. And we've argued that
21 and we get the same point for Ms. Gallardo.

22 Number two, Medicare and Medicaid are
23 very different. Medicare, generally, you
24 become 65, you're eligible, and you're eligible
25 for the rest of the time you're here on the

1 earth.

2 Medicaid, you frequently see people
3 going in and out of Medicaid, and it actually
4 happens in tort cases a -- a lot.

5 You will have somebody who, when the
6 tort happens, is on private insurance, then
7 loses their job, can't make the COBRA payments,
8 and by the time you get to trial, they're on
9 Medicaid. And so you have -- that's -- that
10 happens where I was talking with these past
11 payments. You have some paid by private
12 insurance, some paid by Medicaid. And then
13 they get the tort recovery and they're off.

14 So there's a real distinction between
15 Medicare and Medicaid in that regard, and so I
16 don't think you can just apply Medicare -- and
17 -- and, again, Florida's reading is a lifetime
18 assignment. It's not the same as -- Medicare
19 -- the Medicare statute limits the recovery to
20 the -- to the tortfeasor.

21 And though Florida says its current
22 statute doesn't allow this, its reading of the
23 assignment clause necessarily means that future
24 third-party payers who didn't cause the tort
25 must pay for the past care caused by the tort.

1 JUSTICE KAVANAUGH: Thank -- thank
2 you. That's helpful.

3 CHIEF JUSTICE ROBERTS: Justice
4 Barrett?

5 JUSTICE BARRETT: Just one question.
6 So, you know, as several people, including
7 Justice Kagan, have said, 1396a --
8 1396k(a)(1)(A), you know, favors Florida and
9 the later enacted (25)(H) is better for you.

10 I think your case would be a lot
11 harder if you just had 1396k to go on. And I'm
12 just wondering whether there are any cases
13 interpreting 1396k before the later (25)(H) was
14 enacted?

15 MR. GOWDY: We did -- yes, if you look
16 at page 40 -- give me one second -- page 45 of
17 our brief, you'll see cases there from the --
18 from the 1980s from state courts --

19 JUSTICE BARRETT: Mm-hmm.

20 MR. GOWDY: -- that were enacting --
21 that before -- before the 1993 (H) provision.

22 So -- so the -- I -- I don't have any
23 Federal Circuit court opinion or -- but those
24 --

25 JUSTICE BARRETT: But did they

1 construe it your way?

2 MR. GOWDY: They -- they --

3 JUSTICE BARRETT: That -- that was --

4 MR. GOWDY: I'd have to go --

5 JUSTICE BARRETT: -- that was the
6 question. I'm just wondering whether, when
7 that was all there was, did the general
8 interpretation of that provision favor you?
9 Because that -- that makes a difference, right?
10 Otherwise, your argument really hinges on
11 (25)(H) having somehow narrowed the scope.

12 MR. GOWDY: I guess. So,
13 historically, this is what I would tell you:
14 Before the Ahlborn decision, which was in 2006,
15 many state courts, including those in Florida,
16 read these provisions as allowing the states to
17 take all those things Justice Breyer mentioned
18 a few minutes ago.

19 So this issue about -- between medical
20 expense -- medical care you don't see come up
21 in the litigation very much because what was
22 happening at that time was could we get the
23 whole tort recovery, including the part for
24 lost wages, pain and suffering, and the
25 television, okay?

1 JUSTICE BARRETT: Mm-hmm.

2 MR. GOWDY: So -- but what I would say
3 about these cases on page 45 is that they
4 basically apply background principles of
5 subrogation, assignment, and insurance law,
6 which the government and we have put in our
7 brief, including in our reply brief, and those
8 background principles line up with us.

9 JUSTICE BARRETT: Mm-hmm.

10 MR. GOWDY: So that's the best I can
11 do. And -- and you just -- I don't think
12 you're going to find -- I looked.

13 JUSTICE BARRETT: Mm-hmm.

14 MR. GOWDY: I looked really hard. And
15 I don't think you're going to --

16 JUSTICE BARRETT: I assumed that you
17 had.

18 MR. GOWDY: You're not -- you're not
19 going to find these cases from that time period
20 because of Ahlborn happening in 2006, which
21 kind of really changed the way a lot of the
22 lower courts were looking at this.

23 JUSTICE BARRETT: Thank you.

24 CHIEF JUSTICE ROBERTS: Thank you,
25 counsel.

1 Mr. Suri.

2 ORAL ARGUMENT OF VIVEK SURI

3 FOR THE UNITED STATES, AS AMICUS CURIAE,

4 SUPPORTING THE PETITIONER

5 MR. SURI: Mr. Chief Justice, and may
6 it please the Court:

7 Our position does not turn on any
8 distinction between past and future medical
9 expenses. It instead turns on who paid for
10 those expenses.

11 Medicaid is entitled to the portions
12 of the recovery that correspond to the things
13 Medicaid paid for, and the beneficiary gets the
14 portions of the recovery that correspond to the
15 things the beneficiary paid for.

16 Justice Thomas, you asked about how
17 this would work in the context of child support
18 or medical support provided by a parent. Our
19 answer is that it would work the same way. The
20 same kind of allocation would have to be made.

21 Justice Alito, you asked how this
22 would work in the context of payments that are
23 made after the settlement. I agree that's
24 something that can happen, although it's
25 unusual, and in that case, as I've said, we

1 draw no distinction between past and future
2 payments. The entitlement would turn entirely
3 on who made the payment.

4 Justice Kagan, you asked about the
5 word "available" in (A). And we agree that the
6 word "available" can be read to mean
7 theoretically available. But the key language
8 here is not in (A). It's in (B). (B) is the
9 provision that specifies the pool of funds from
10 which the recovery can be obtained. And that's
11 at the very end of (B) where it says "to the
12 extent of such legal liability."

13 But, if you look earlier in (B), it
14 says such a legal liability is found to exist
15 after medical assistance has been made
16 available on behalf of the individual. And
17 that makes clear that we're not talking about
18 theoretical availability. We're talking about
19 actually being made available.

20 In addition, if you look at page 7A of
21 our brief, there's a regulation, 42 C.F.R.
22 433.138, which interprets (A) itself to apply
23 to services that are furnished and not merely
24 available under the plan.

25 Justice Kavanaugh, you asked about the

1 Medicare analogy, and I don't think that
2 analogy really helps in this context. That's
3 because Medicare adopts the system that was
4 rejected in Ahlborn. In other words, it's not
5 the case that Medicare takes the pool of money
6 that is attributable to future medical
7 expenses. Rather, it takes from the entire
8 pool of the settlement.

9 And now -- we think it's rational for
10 Congress to have done one of two things. You
11 could say you limit the -- the government to
12 the pool of money that corresponds to the funds
13 that have actually been paid for by Medicaid,
14 and that would be fair to the beneficiary.

15 Alternatively, you could say that the
16 government could take the entire settlement.
17 That would be less fair to the beneficiary, but
18 it avoids the administrative costs and hassle
19 of having these allocation determinations.

20 But what's less understandable is why
21 Congress would have adopted the middle ground
22 that Florida wants, where you have the
23 administrative expense of these allocation
24 proceedings, but you also don't have the
25 fairness to the beneficiary because Medicaid is

1 going beyond the pool that corresponds to the
2 funds that Medicaid itself has paid for. In
3 many ways, it's the worst of all worlds.

4 Justice Gorsuch, you had asked about
5 Section 1983 and how that would apply here.
6 The federal government agrees that the Court
7 shouldn't reach that issue in this case. It's
8 a difficult issue about how Section 1983 should
9 be interpreted. There are also complications
10 about whether it should be under Section 1983
11 or *Ex parte Young*. We'd urge the Court to
12 reserve that case -- that issue for future
13 cases.

14 Justice Breyer, your hypothetical
15 involved Smith and Jones and Smith getting to
16 pay I think it was 15,000 out of the 25,000.
17 How does Medicaid recover the remaining 10,000?

18 I think the way to deal with that is,
19 first, the state could go after the tortfeasor
20 directly. It has multiple avenues for doing
21 that. It's received an assignment. It could
22 use that assignment to bring the suit in the
23 first place.

24 Second, after the suit has been
25 brought by the private individual, the state

1 could intervene in that case.

2 Third, after the settlement has been
3 reached, the state could say we're not a party
4 to that settlement and we still want to sue the
5 individual for the remaining money, and in that
6 suit, the state could ask for the full extent
7 of its expenses.

8 But what the state is doing here is
9 it's not going after the tortfeasor. It's
10 going after the victim of the accident, and
11 it's seeking funds that don't correspond to the
12 things it paid for.

13 We think that's exactly what the
14 anti-lien clause prevents the state from doing.

15 If there are any other questions, I
16 welcome them.

17 JUSTICE THOMAS: Mr. Suri, the -- I am
18 curious as to, in these cases -- this is a
19 funding case, right? Why wouldn't you just
20 sanction the State of Florida if you think
21 they're out of compliance?

22 MR. SURI: Justice Thomas, we would be
23 entitled to do that under a separate provision
24 of the Medicaid statute. I appreciate that you
25 have written in a separate opinion that is

1 cited in Florida's brief that that would be the
2 appropriate sanction, the appropriate sanction
3 wouldn't be preemption, but seven other
4 justices disagreed with that proposition in
5 that case, and we've gone with what the
6 majority of the Court has determined.

7 That's also consistent with what the
8 Court held in both Ahlborn and Wos, where it
9 rejected a state's efforts, even though the
10 alternative of the federal government
11 withholding funding was theoretically
12 available.

13 JUSTICE GORSUCH: I guess that's why I
14 -- I would appreciate the government's effort
15 to address my -- my question because, if this
16 is a Spending Clause case predominantly and a
17 relationship between the federal and a state
18 government, we might expect the federal
19 government to speak more clearly in prohibiting
20 or limiting the state's powers than it has here
21 before imposing a fine or maybe withholding
22 Medicaid funds altogether, which is a huge
23 percentage of state budgets these days.

24 But, if there is a personal right to
25 action here, that -- that -- that puts the case

1 in a different light. And I just want to make
2 sure we're not addressing a unicorn that
3 doesn't exist but something that actually does
4 exist in the world. And you tell us we don't
5 have to decide it. I understand that. You
6 don't need to tell me that again.

7 But how would the government have us
8 resolve that question? Does it have any views
9 it wishes to offer on that?

10 MR. SURI: At the very least, Justice
11 Gorsuch, even if the case couldn't proceed
12 under Section 1983, we expect it could proceed
13 under *Ex parte Young*. The state is taking an
14 action that would be contrary to federal law,
15 and the individual is entitled to bring an *Ex*
16 *parte Young* case to say that action cannot
17 proceed.

18 Now the argument on the other side,
19 according to the states' amicus brief that you
20 have cited, is that *Ex parte Young* wouldn't
21 apply where Congress has implicitly foreclosed
22 it, and they've relied on this Court's decision
23 in *Armstrong*.

24 But *Armstrong* was a case in which the
25 Court said that the provision being applied was

1 judicially inadministrable, and, therefore, you
2 could infer that Congress meant for the
3 Secretary, rather than individual lawsuits, to
4 be the mechanism through which that provision
5 was enforced. That concern isn't relevant
6 here.

7 JUSTICE SOTOMAYOR: Counsel, this is
8 Justice Sotomayor. The strength that was
9 conceded by Petitioner's counsel in k -- I'm
10 not sure I agree that k is a weakness for the
11 Petitioner. Are you in agreement with him?

12 MR. SURI: I will say only that k is
13 the least strong of our provisions. I wouldn't
14 say that it's weak. We have two arguments just
15 looking at k alone.

16 The first that we would say is there's
17 an absurdity argument that results from
18 Florida's position. If Florida reads
19 k(a)(1)(A) for all it's worth and the way that
20 Florida insists it should be read, which is
21 with no contextual limitations whatsoever, then
22 it leads to an absurd result of a lifetime
23 assignment.

24 For example, imagine that Ms. Gallardo
25 were to miraculously recover tomorrow, and 10

1 years from now she has a slip-and-fall
2 accident. If you take Florida's position to
3 its logical conclusion, that's medical care, so
4 Florida could look into the portion of the
5 judgment that represents medical care for the
6 slip-and-fall accident and use that to
7 reimburse the car accident care that it's
8 provided here. In fact, it would be required
9 to do that because this provision says a state
10 plan for medical assistance "shall."

11 The other things we would look to in k
12 are the language indicating that k does not
13 stand alone, that k has to be read in context.
14 This includes, for example, the opening words
15 of k(a)(A), "for the purpose of assisting in
16 the collection of medical support payments."
17 That word "assisting" suggests that k is not
18 some freestanding provision. It's meant to
19 implement the preexisting duty in (A) and (B).

20 And, Justice Barrett, if I could
21 quickly address your question about the
22 sequencing of the statute here, the order in
23 which Congress enacted those provisions was
24 first came (A) and (B), then came k, and then
25 finally came (H). So we don't have to rely on

1 (H) retroactively narrowing k, so to speak. We
2 can just look at k being enacted against the
3 backdrop of (A) and (B), and if you agree with
4 us on (A) and (B), then k incorporates the same
5 contextual limitation.

6 And even if you don't agree with that,
7 there are a number of opinions in which this
8 Court has said that a later-enacted provision
9 can clarify an ambiguity in an earlier
10 provision. An example of that would be Justice
11 Scalia's opinion for the Court in United States
12 against Fausto.

13 JUSTICE SOTOMAYOR: Now --

14 JUSTICE KAGAN: And, Mister --

15 JUSTICE SOTOMAYOR: Go ahead, Justice
16 Kagan.

17 JUSTICE KAGAN: Mr. Suri, is there any
18 argument here that k is more relevant than (H)
19 or that (H) is more relevant than k? Or do we
20 just have to deal with the whole ball of wax
21 together somehow?

22 MR. SURI: I'm afraid you have to deal
23 with all of them together, Justice Kagan. We
24 don't think -- we don't agree with the
25 arguments that suggest that k is applicable but

1 not (H) or that (H) is applicable but not k.

2 JUSTICE KAGAN: And -- and why is
3 that?

4 MR. SURI: The reason is, first, that
5 the Court said in Ahlborn that these provisions
6 echo and reiterate each other. And, second, k
7 has some features in it that would have to
8 apply regardless of whether the government is
9 proceeding under (H) or k, or else the
10 statutory scheme would not make sense.

11 For example, there's a duty to
12 cooperate in k that's not repeated in (H). And
13 if you treat these as two completely
14 freestanding, unrelated provisions, then that
15 would suggest that the beneficiary has no duty
16 to cooperate under (H).

17 Similarly, k says that the federal
18 government gets a share of the recovery.
19 That's not repeated in (H) either. And I think
20 we'd be quite worried if states could say we're
21 proceeding under (H) and we don't have to turn
22 over any money to the federal government.

23 JUSTICE BARRETT: Mr. Suri, I'd like
24 to ask you a question about the lifetime
25 assignment absurdity. In your example, you

1 talked about a tort settlement that came many
2 years later and the state still retaining a
3 right and an obligation, indeed, to get money
4 from that settlement to pay.

5 Does that only work if the recipient
6 is still on Medicaid?

7 MR. SURI: Not necessarily, Justice
8 Barrett, because the assignment in this
9 hypothetical would have been made at -- at the
10 outset when the Medicaid assistance were being
11 received for the first time, when Medicaid is
12 paying for Ms. Gallardo's injuries the first
13 time. And, presumably, the assistance would
14 last for the rest of Ms. Gallardo's life
15 because Florida says there's no limiting
16 language in k(a)(1)(A).

17 JUSTICE SOTOMAYOR: Counsel, in your
18 list of what states could do to protect
19 themselves, you didn't mention the fact that
20 the state at all times has a right to challenge
21 the allocation of a settlement. If it believes
22 the allocation with respect to past medical
23 payments was unfair, it can judicially or
24 administratively challenge that allocation,
25 correct?

1 MR. SURI: I agree, Justice Sotomayor.
2 That is an additional tool at the state's
3 disposal that prevents these harms that the
4 state is talking about here.

5 Indeed, in this very case, the
6 Eleventh Circuit took Petitioner to be arguing
7 that the state was bound by the settlement
8 allocation that the parties had privately
9 agreed to, and the Eleventh Circuit rejected
10 that argument.

11 We agree with the Eleventh Circuit
12 that to the extent Petitioner was making that
13 argument, that argument would have been
14 incorrect. The state is entitled to challenge
15 the allocation. And, again, the state doesn't
16 have to limit itself just to the allocation.
17 It can always sue the tortfeasor.

18 JUSTICE ALITO: To what extent does
19 this issue implicate important interests of the
20 federal government in the operation of the
21 Medicaid statute?

22 MR. SURI: It does to some extent,
23 Justice Alito, in the following ways.

24 First, the federal government has an
25 interest in recovering money. It gets a share

1 of the state's recovery.

2 But, on the other hand, it also has a
3 competing interest in protecting beneficiaries.
4 As Mr. Gowdy said, Medicaid is not a loan.
5 It's a benefit meant to be paid out. And the
6 federal government has an interest in ensuring
7 that states aren't, as it were, converting
8 Medicaid into a loan that the beneficiary is
9 then saddled with for the rest of her life.

10 JUSTICE ALITO: No, I -- I understand
11 that. I guess what I'm thinking about is why
12 the federal government hasn't itself taken
13 actions against Florida and any other states
14 that have laws like this?

15 MR. SURI: For two reasons, Justice
16 Alito, both textual.

17 The first is, if you look at (A) and
18 (B), they have the word "reasonable" in them.
19 They provide that the state or local agency
20 must take reasonable measures to ascertain the
21 legal liability of third parties and that the
22 state must pursue recovery when the
23 reimbursement that the state reasonably expects
24 to recover exceeds the cost of the recovery.
25 So we think that leaves states with some wiggle

1 room.

2 And then the provision about
3 withholding funds has, I think, the term
4 "substantial compliance." So it's not just
5 that any foot fault by a state would allow the
6 federal government to come in and cut off
7 funds. Rather, the state has to be not in
8 substantial compliance with the statute.

9 Finally, we -- we wouldn't want to
10 punish the innocent beneficiaries in Florida by
11 cutting off the state's Medicaid's fund --
12 Medicaid funds if that can be avoided.

13 JUSTICE GORSUCH: Why would an
14 individual have a right to then sue for any,
15 what you call foot fault, but the federal
16 government can only intervene when there is
17 substantial non-compliance?

18 MR. SURI: The statute uses the term
19 "substantial" in the provision authorizing the
20 -- the Secretary to deny approval. It doesn't
21 use the word "substantial" in this context.

22 JUSTICE GORSUCH: Isn't it awkward to
23 think that the individual right would be
24 broader than the federal government's?

25 MR. SURI: No, Justice Gorsuch. It

1 may be that the federal government could itself
2 have brought a lawsuit. It may not have been
3 able to --

4 JUSTICE GORSUCH: Well, I thought you
5 just told us it probably couldn't have.

6 MR. SURI: Couldn't have cut off
7 funds. That doesn't --

8 JUSTICE GORSUCH: Okay.

9 MR. SURI: -- necessarily mean that it
10 couldn't have brought its own lawsuit.

11 JUSTICE GORSUCH: Okay. Thank you.

12 CHIEF JUSTICE ROBERTS: Justice
13 Thomas?

14 JUSTICE THOMAS: Just one brief
15 question, Mr. Suri, addressing the preemption
16 issue. Normally, when we have a preemption
17 case, the federal government says do something
18 one way. A state says do it another way. And
19 there's a conflict.

20 In this context, the Spending Clause
21 context, this is -- we normally analogize that
22 to an agreement between the state and the
23 federal government.

24 Do you see that there's any
25 difference? I -- I -- I'm -- it -- I don't see

1 how you could say the laws are in conflict when
2 it is embodied in an agreement, as opposed to
3 two conflicting laws mandating certain conduct.

4 MR. SURI: Justice Thomas, the fact
5 that a law is an agreement doesn't prevent it
6 from also being a law with preemptive effect.
7 Treaties, for example, are agreements, but they
8 still have preemptive effect under the
9 Supremacy Clause. Interstate compacts are
10 agreements, but they have preemptive effect.

11 And, similarly, Spending Clause
12 legislation, although it has been termed in the
13 nature of a contract, they also have preemptive
14 effect, as this Court has recognized many
15 times. An example, if you'd like to look at a
16 case, is Dalton against Little Rock Family
17 Planning Services.

18 JUSTICE THOMAS: I don't think
19 treaties do you much good, but I -- I see your
20 point.

21 CHIEF JUSTICE ROBERTS: Justice
22 Breyer?

23 JUSTICE BREYER: For one minute I'd
24 like to go back to Justice Barrett's question.
25 Everybody agrees we're talking about Medicaid

1 has paid \$25,000 medical expenses. We're only
2 talking about what they paid.

3 And if we're only talking about when
4 the victim sues the tortfeasor, there's a
5 settlement, what can they collect that past
6 expense from, and I think that she suggested
7 that once upon a time it was possible to
8 collect it from the whole settlement. You
9 could collect it from the television part, from
10 the house destruction part, the car,
11 everything.

12 And then Congress narrowed it. And
13 now you say they narrowed it to you can only
14 collect from the part earmarked where that's
15 fair, from past expenses. But the language
16 says they've limited it down to anything in
17 that settlement that has to do with medical
18 expenses. And so what's wrong with that?

19 Now you made one point about future
20 accidents and so forth. Forget that one. I
21 understand it. I think you could get rid of
22 that by saying it has to be this accident, but
23 that's a -- that's a -- I've got that point.
24 Anything else?

25 MR. SURI: Yes, Justice Breyer.

1 First, your question assumes that
2 we're looking at k alone. But k shouldn't be
3 looked at alone. It should be looked at in the
4 context of (A) and (B), which it's
5 implementing, and in the context of (H), which
6 the Court in Ahlborn said it echoes.

7 In addition, if you look at
8 k(a)(1)(C), it refers to a third party who may
9 be liable to pay for care and services
10 available under the plan. So there's, again,
11 that same limiting language that's already in
12 (A), available under the plan. The same
13 language is in k.

14 I grant it's not in the assignment
15 provision specifically. It's in a different --
16 it's in a different part of k. But it really
17 wouldn't have made sense for Congress to say:
18 Beneficiary, you must assign the state your
19 rights with respect to all medical care, but
20 then you only have to cooperate with the state
21 with respect to the subset of that medical care
22 that relates to the services provided by
23 Medicaid.

24 It's more reasonable to infer that
25 Congress meant those provisions to be

1 harmonious and to have a similar scope.

2 CHIEF JUSTICE ROBERTS: Justice Alito?
3 Justice Sotomayor?

4 JUSTICE SOTOMAYOR: Counsel, is there
5 any way to accept Respondent, Florida's
6 reading, without overruling essentially
7 Ahlborn, the reasoning of Ahlborn?

8 MR. SURI: Justice Sotomayor, I don't
9 wish to overclaim the relevance of Ahlborn. We
10 think Ahlborn supports us in at least two
11 respects.

12 First, the bottom-line result in
13 Ahlborn. There was a settlement in that case
14 where there was a portion, \$35,000, that
15 represented past medical expenses that the
16 state had paid for. There was also an
17 additional portion that represented future
18 medical expenses that the state hadn't paid
19 for. And the Court's bottom-line judgment in
20 Ahlborn was the state gets the 35,000, not the
21 35,000 plus the additional portion
22 corresponding to the future medical expenses.

23 Second, there's a footnote in Ahlborn,
24 Footnote 19, where the Court reasons that it
25 would be unfair, unjust, to allow the state to

1 obtain a portion of the recovery that it didn't
2 compensate for. And we think that same
3 unfairness arises in this context.

4 But, again, I don't wish to claim more
5 of Ahlborn than -- than would be reasonable.
6 The issue that's presented in this case was not
7 squarely before the Court in Ahlborn, so we
8 wouldn't go so far as to say that it's a
9 binding holding on that point. We just think
10 its reasoning supports us.

11 JUSTICE SOTOMAYOR: Thank you.

12 CHIEF JUSTICE ROBERTS: Justice Kagan?

13 JUSTICE KAGAN: Mr. Suri, I -- I'd
14 like to ask you about an argument you didn't
15 make, and it seems to me a good argument, the
16 kind that I might ask General Whitaker about.
17 But you didn't make it, and that makes me think
18 it's a bad argument.

19 So here's the argument: It's from
20 1396a(25)(I), and that provision is sort of the
21 mirror image of k because it's where -- it's
22 the requirement that insurers accept an
23 assignment of rights. And -- and that
24 provision speaks very clearly about items or
25 services for which payment has been made under

1 the state plan. In other words, that provision
2 seems to support your understanding of made
3 payments.

4 And -- and -- and as I say, it seems
5 as though (I) should be the mirror image of k,
6 but then, again, you didn't make that argument.
7 So why not?

8 MR. SURI: Justice Kagan, we made the
9 argument at pages 18 and 19 of our brief. It's
10 true I didn't repeat the argument at the podium
11 today, but that's not because we don't think
12 it's a good argument.

13 It -- it -- it is just as strong for
14 us as (H), but I will note it was enacted after
15 k, and so you'd have the same questions about
16 whether (H) and (I) should be interpreted as
17 narrowing a previously enacted provision, but
18 we do agree it is very strong for us.

19 CHIEF JUSTICE ROBERTS: Justice
20 Gorsuch?

21 Justice Kavanaugh?

22 JUSTICE KAVANAUGH: I think you said a
23 minute ago that Florida's position would lead
24 to an unfair or unjust scheme. But, again, I
25 want to compare then the Medicare scheme is --

1 is even broader in terms of the state's ability
2 to recover than what Florida is proposing for
3 the Medicaid regime.

4 Is that regime similarly unfair and
5 unjust, or what -- what's the explanation
6 there?

7 MR. SURI: That regime sacrifices a
8 perfect fairness for administrative efficiency.
9 That scheme allows Congress to say: We don't
10 want to bother with these allocation hearings.
11 We'll just let the state -- we'll just let the
12 federal government take the full amount of the
13 settlement.

14 Now Florida's scheme here that it
15 proposes in this case wouldn't achieve that
16 offsetting administrative advantage because you
17 would still have to have the allocation
18 hearings to determine whether a portion of the
19 settlement is attributable to medical expenses
20 or to something like pain and suffering, which
21 even they concede they can't recover.

22 JUSTICE KAVANAUGH: I think earlier
23 you said that that would be the worst of all
24 worlds, but in some sense, it gives the
25 beneficiary a little more than the beneficiary

1 gets under the Medicaid regime but gives the
2 state a little more than it would get under
3 Petitioner and your proposal. So why is that
4 the worst of all worlds?

5 MR. SURI: It's the worst of all
6 worlds because it neither achieves the
7 administrative efficiency benefits of not
8 having these allocation hearings nor achieves
9 fairness.

10 Now I suppose you could defend that
11 system by saying it -- it's a compromise, it's
12 a little unfair to the beneficiary and a little
13 unfair to the state.

14 Yes, I accept that in theory Congress
15 could enact that system, but we just don't
16 think that's the system Congress enacted here.

17 JUSTICE KAVANAUGH: And -- and last
18 question. How is this operating in practice
19 right now throughout the 50 states, and what
20 implications would occur if we adopt Florida's
21 position and, by contrast, your position?

22 MR. SURI: In the 50-state survey we
23 conducted before this argument, we uncovered
24 nine states that --

25 JUSTICE KAVANAUGH: Glad I asked then.

1 MR. SURI: -- by judicial decision or
2 express legislation do things the way that
3 Petitioner would like. We identified six
4 states that -- in addition to Florida itself,
5 that do things the way Florida would like,
6 again, either by legislation or judicial
7 decision.

8 And most states were difficult to
9 classify either because they said we will go to
10 the maximum extent permitted by federal law or
11 they parrot the federal provisions and so you'd
12 have the same interpretive dispute under the
13 state law that you're currently having under
14 the federal law, or they're otherwise ambiguous
15 or they haven't updated their statutes since
16 Ahlborn, so it isn't clear from the face of the
17 statute what they would do now.

18 I would note, however, that the vast
19 majority of lower courts have come out in
20 Petitioner's direction, not in Respondent's
21 direction. So, to the extent that's any guide,
22 ruling for Petitioner would preserve the status
23 quo in this -- in this area.

24 JUSTICE KAVANAUGH: Thank you.

25 CHIEF JUSTICE ROBERTS: Justice

1 Barrett?

2 Thank you, counsel.

3 General Whitaker?

4 ORAL ARGUMENT OF HENRY C. WHITAKER

5 ON BEHALF OF THE RESPONDENT

6 MR. WHITAKER: Mr. Chief Justice, and
7 may it please the Court:

8 Medicaid is an important and expensive
9 part of the social safety net. To help keep
10 Medicaid solvent, Congress made Medicaid the
11 payer of last resort, meaning that other
12 available resources should pay medical expenses
13 before Medicaid pays. As part of that role,
14 Medicaid recovers money from tortfeasors who
15 injure Medicaid beneficiaries. When it does
16 so, Medicaid can never be reimbursed for more
17 than it paid out in benefits.

18 The question here is whether the
19 program may seek that reimbursement from a tort
20 settlement, not only out of medical damages or
21 medical expenses paid in the past but also for
22 medical expenses that will be paid in the
23 future.

24 Section 1396k of the statute answers
25 that question. It provides for Medicaid

1 beneficiaries to assign to the program rights
2 to payment for "medical care," not past medical
3 care, not some complicated subset of medical
4 care. Medical care, period, including payments
5 for medical care that may be necessary in the
6 future.

7 That reading is confirmed by
8 subsection (B) of Section 1396k, the remainder
9 provision. Medical expenses may include
10 expenses that Medicaid paid and expenses that
11 the beneficiary paid. The remainder provision
12 says that if Medicaid recovers all of those
13 medical expenses, Medicaid is reimbursed for
14 its expenses and the remaining amount goes to
15 the beneficiary.

16 But, if there isn't enough money to
17 reimburse both Medicaid and the beneficiary,
18 the remainder provision says that Medicaid gets
19 paid first. In other words, far from
20 prohibiting Medicaid from recovering out of all
21 medical damages, Section 1396k gives Medicaid's
22 reimbursement claim priority over other claims
23 to medical expenses.

24 The result is neither untoward nor
25 surprising. Medicaid can never be reimbursed

1 for more than it paid out in benefits.
2 Medicaid can also never receive any non-medical
3 damages, but because it is the payer of last
4 resort for medical expenses, it may recover
5 from all medical damages.

6 I welcome the Court's questions.

7 JUSTICE THOMAS: General Whitaker,
8 Petitioner says that if we accept your
9 interpretation of 1396, that you will be able
10 to get or benefit from a lifetime assignment
11 that covers third-party payments for future
12 medical needs.

13 What do you think of that?

14 MR. WHITAKER: Well, I think it's --
15 it's not correct. It's not an -- it's not an
16 implication of our position. It's not how
17 Florida has implemented the statute. And I
18 think that Florida's implementation of the
19 statute is correct.

20 Florida -- in Florida, the lien can
21 attach only to an injury for which Medicaid at
22 least provided some payment. And that, I
23 think, is a natural reading of the statute,
24 because the statute provides -- for a different
25 reading, I think -- for a different reason, I

1 think, than -- than -- than some of the -- of
2 the things we've been discussing today. I
3 think the reason is it's natural to think of an
4 assignment of a right that is being made in
5 exchange for a medical payment to be related in
6 some way to that medical payment. And so I
7 don't think that would be within the scope of
8 the assignment.

9 Here, however, what we have is what
10 everybody agrees is a valid assignment, and the
11 only question is, does the state's payment for
12 medical care extend to all medical care or only
13 some medical care?

14 JUSTICE THOMAS: But what about future
15 medical care? He's -- they -- he suggests that
16 your reading would result in all future medical
17 care --

18 MR. WHITAKER: No, Your Honor --

19 JUSTICE THOMAS: -- being covered.

20 MR. WHITAKER: -- it does not result
21 in all future medical care -- consistent with
22 Florida's -- result in the state being able to
23 recover from all future medical care.

24 What has to happen is, if -- if the
25 beneficiary -- if a Medicaid beneficiary is

1 injured and Medicaid pays for it, Medicaid
2 first seeks reimbursement out of the past
3 medical expenses portion of the recovery. But,
4 if that amount is not sufficient to satisfy
5 Medicaid's claim, then it may, if necessary,
6 get the remaining part of the future medical
7 expenses part of the recovery, what --

8 JUSTICE THOMAS: And, finally, the
9 distinction that the Petitioner made between
10 child support and medical care, what do you
11 make of that?

12 MR. WHITAKER: I don't think it makes
13 any sense. The statute says that the Medicaid
14 program is assigned rights to support that are
15 for the purpose of medical care. If that -- if
16 that -- if that payment happened in a lump-sum
17 amount that was for the purpose of medical
18 care, the program would absolutely have a right
19 to -- to use that money to reimburse its costs.

20 So I think -- I think that is actually
21 a quite strong textual indication that
22 Section 1396k is not limited in the way that
23 the other side suggests, because the only
24 example of a payment for medical care that we
25 have in the statute does not fit their

1 description of how payments for medical care
2 that come from tort recoveries should work.

3 JUSTICE THOMAS: Thank you.

4 MR. WHITAKER: So the -- the --

5 CHIEF JUSTICE ROBERTS: Counsel, does
6 the state par -- ever participate in the
7 underlying litigation that gives rise to the
8 judgment or the settlement?

9 MR. WHITAKER: Well, certainly,
10 Florida's statute allows us that authority. In
11 terms of our practice right now, my
12 understanding is that we don't do that just --
13 just because we -- it's not cost-effective for
14 it to do it that way, for us to --

15 CHIEF JUSTICE ROBERTS: Well, maybe
16 not in every one, but if you have sort of ones
17 where the amounts will be significant, that
18 would avoid the allocation hearings after the
19 fact, and you could address those things in the
20 structuring of the -- of the settlement or the
21 judgment, right?

22 MR. WHITAKER: Well, I'm not sure it
23 would necessarily -- well -- well, I guess we
24 would have an assignment for payment for -- for
25 medical expenses. That's presumably what we

1 would be pursuing in that -- in that instance.

2 Yes, Mr. Chief Justice, I think that's
3 right. I mean, certainly, we could bring these
4 claims ourselves. I do think that, in general,
5 it's more cost-effective for the beneficiary to
6 bring these claims because, of course, after
7 Ahlborn, the state -- the state's assigned
8 rights doesn't even extend to pain and
9 suffering. So, in most instances, the
10 beneficiary is going to be suing anyway.

11 CHIEF JUSTICE ROBERTS: Well, you
12 don't have to bring the actions yourself. You
13 could have a provision in the state regulations
14 or law that you need to get notice of
15 particular settlements or judgments that
16 implicate your rights to recovery, and then you
17 could at the -- at the outset, you know,
18 protect your interests in recovery of future
19 expenses.

20 MR. WHITAKER: Well, that's right,
21 Your Honor, and, indeed, our statute does
22 require the beneficiary to provide notice. If
23 we lose this case, though, there's a -- there's
24 a limited amount we can do to protect our
25 rights because no matter -- no matter how well

1 we protect our right to the medical expense
2 portion of the recovery, it's -- it's -- it's
3 in no event going to include the -- allow us to
4 recover from future medical expenses.

5 And, again, we're only ever talking
6 about recovering what Medicaid paid for in the
7 past. Medicaid's -- Medicaid's claim is always
8 limited to no more than what it paid for in the
9 past.

10 And with respect, my -- the -- the --
11 the theme that my other side -- the other side
12 paints about, well, Medicaid can only get what
13 it paid for, it just does not square with the
14 language of the remainder provision, which
15 express -- expressly contemplates that the
16 state can recover out of -- out -- for expenses
17 that it did not pay for.

18 And this Court made that quite clear
19 in Ahlborn itself, and this is what this Court
20 had to say in Ahlborn about the remainder
21 provision.

22 JUSTICE SOTOMAYOR: Counsel, if that's
23 true, and you've just conceded that k -- the
24 lien created by k is a lien on the -- on past
25 medical expenses that have been paid, correct?

1 MR. WHITAKER: That is absolutely
2 true, Justice Sotomayor, but that --

3 JUSTICE SOTOMAYOR: All right. So I
4 believe that the argument that the opposite
5 side is making is, if that's the amount of your
6 lien and you're saying that you are entitled to
7 payment for -- from any medical source,
8 correct, from -- for medical care from any
9 third party, they're saying, if you read that
10 as broadly as you're claiming, that means that
11 you're entitled to collect for that past
12 payment from any medical care from any third
13 party, payment for medical care from any third
14 party in the future, whether it's related to
15 this injury or not.

16 MR. WHITAKER: No, no, Justice
17 Sotomayor, that does not follow, as I was
18 explaining --

19 JUSTICE SOTOMAYOR: I know. But the
20 only way to not follow it is to break your lien
21 from the source of the payment, meaning here --

22 MR. WHITAKER: No, no --

23 JUSTICE SOTOMAYOR: -- the payment
24 that was assigned to you, you're saying,
25 included an assignment for future medical care.

1 MR. WHITAKER: No, Justice --

2 JUSTICE SOTOMAYOR: And what -- and
3 what the government is saying is the payment
4 that you're assigned is the payment for past
5 medical care, period.

6 MR. WHITAKER: Well, as I -- as I said
7 earlier, I think there is -- there would be a
8 question in other cases, not present --
9 presented here, about what kinds of rights are
10 within the scope of the assignment in the first
11 place. And Florida has implemented its statute
12 to say that an unrelated tort recovery would
13 not be within the scope of the state's assigned
14 rights in terms of whether the state has a
15 right to payment at all.

16 JUSTICE KAGAN: But put --

17 MR. WHITAKER: Here --

18 JUSTICE KAGAN: -- put Florida's
19 statute aside, because I -- I think that the
20 question that Justice Thomas and Justice
21 Sotomayor are asking is, what in your
22 understanding of the Medicaid provisions would
23 prevent a state from going that far?

24 MR. WHITAKER: I -- I guess I think
25 the way I read the statute, Justice Kagan, is

1 that let's say that a Medicaid beneficiary gets
2 injured and -- and has to -- and has to incur
3 medical expenses, and the beneficiary knows
4 there's a tort recovery.

5 I suppose, I think that in theory, and
6 I -- I admit that this seems kind of
7 unrealistic, the beneficiary could just say, I
8 don't want to accept these medical expense
9 payments, I want to take my chances and go
10 after the tortfeasor myself and use that to pay
11 the medical expenses.

12 And that actually happened in a case
13 not with regard to a beneficiary but with a
14 hospital that declined Medicaid -- Medicaid
15 reimbursement and actually decided to seek the
16 third-party recovery itself.

17 So I do think that in the statute
18 there is a notion that the assignment concerns,
19 when it's -- when you're talking about
20 assignment of a tort claim -- and this is a --
21 a common way of reasoning when you have
22 conditions on the receipt of government
23 funds -- I do think that there is a germaneness
24 requirement, that when you're assigning a right
25 to the state for -- specifically a right to a

1 tort recovery, that it's not anything. It's
2 something that is related to that payment. But
3 --

4 JUSTICE KAGAN: And -- and that's not
5 in any particular provision that you're seeing
6 that. You're just seeing that in the very idea
7 of what an assignment is?

8 MR. WHITAKER: Yes. I think that's
9 fair to say. And also just from the fact that
10 it's a -- it's a spending program.

11 But, look, all those -- all that --
12 all that, I think, is quite orthogonal to the
13 issue we have here because what we have here is
14 what everybody agrees is a right that the state
15 has to payment for medical care.

16 The other side agrees that we can
17 recover medical expenses, payments for medical
18 care. And the only question is, does medical
19 care also include future medical care? And it
20 does.

21 JUSTICE KAGAN: Right, but --

22 JUSTICE BREYER: Future -- well,
23 future -- here, it only involves recovery for
24 past medical care. The question is what money
25 can you collect it from. Am I right about

1 that?

2 MR. WHITAKER: Absolutely, Justice
3 Breyer.

4 JUSTICE BREYER: Okay. So forget
5 about collecting from the future. We're not
6 talking about that. We're talking about
7 collecting money earmarked for future payment
8 in order to reimburse the state for past
9 payment.

10 MR. WHITAKER: That's absolutely
11 correct.

12 JUSTICE BREYER: Okay. So, as I read
13 these together -- and please don't let me go
14 off on some incorrect reading because they're
15 complicated, all right?

16 One, first rule, in two provisions we
17 haven't much talked about, hey, the victim has
18 got some money. You can't touch it.

19 There's a no-lien provision. There is
20 a no -- whatever the other one's called. No,
21 you can't touch it, no recovery, no adjustment,
22 no recovery, that's -- you can't touch it,
23 State. I don't care how he got it. It's his.
24 I overstate a little.

25 But exception, exception. Now the

1 first thing that talks about exception is
2 there's an exception for our past money, you
3 know, Medicaid's paid already, and you can get
4 back what it says is where that victim has
5 right to payment for that thing you've spent by
6 any other party for such -- such health care
7 items or services. That "such" clearly refers
8 to you have a right from the tortfeasor to
9 payment for past.

10 That's no more about payment -- right
11 to payment for future than it is to a right
12 about for payment for balloons, for a right for
13 payment in that part.

14 Then you have the next part, which is
15 yours, and the next part says: Ah, but you
16 should take an assignment, you can take an
17 assignment, State, for payment for medical care
18 from any third party.

19 Here, it doesn't say such. And so,
20 literally, you've got your case right in that
21 language. And the only difficulty there is it
22 certainly seems to conflict with the language I
23 read just before it because we have a system
24 that says don't take any of their money. Then
25 it says take some of the money for the past

1 stuff you paid, but take it only from, they
2 have money coming from a future guy, a victim,
3 a tortfeasor for that, and then you have
4 something say take an assignment.

5 So it seems to me you're asking us to
6 read these two provisions, higgledy-piggledy,
7 slightly in conflict -- if not direct conflict,
8 at least hard to make consistent -- and they're
9 asking you, the government, to read them
10 consistently with the whole spirit of the
11 thing, which is leave the money with the
12 Medicaid victim.

13 That's a long question, and I'm really
14 interested if I got the analysis right, not the
15 conclusion necessarily.

16 MR. WHITAKER: There is no conflict,
17 Justice Breyer, between those two provisions.
18 Subparagraph (H), which is the provision that
19 you started out with about furnishing health
20 care items or services, plays a different but
21 complementary role in the scheme from 1396k.

22 Congress added subparagraph (H) to the
23 statute in 1993 to give Medicaid additional
24 payment rights, operating principally as
25 against insurers, who were evading the

1 assignment provision in various respects.

2 So 1396a, sub -- subsection (a),
3 paragraph (25), subparagraph (H), and that's --
4 that's the provision you're referring to, is --
5 is not in any way limiting the state's rights
6 under an assignment. It is broadening it to
7 make sure that Medicaid has an automatic right
8 of subrogation when Medicaid makes payments,
9 just like, Justice Kavanaugh, the -- the way
10 that the -- the -- the Medicare -- the
11 structure of the Medicare statute is exactly
12 the same thing because what you have in
13 Medicare is you have a broad provision, 26 --
14 42 U.S.C. 2651, that gives the state broad
15 authority to recover damages from tortfeasors.

16 But the most important point is that
17 the Medicare secondary payer statute in 1395y,
18 42 U.S.C. 1395y, similarly talks about
19 providing Medicare an automatic right of
20 subrogation when it comes to -- when -- when
21 Medicaid makes certain payments and a private
22 insurer may also be on the hook for those
23 particular items or services.

24 And, indeed, in the government report,
25 which -- which the United States cites as

1 reflecting the reason that Congress added
2 subparagraph (H) to the statute in 1993, they
3 explicitly modeled it on the Medicare secondary
4 payer provision. So there's no conflict.

5 And, Justice Breyer, you mentioned
6 four statutes. Well, I do think that we only
7 need one statute to have authority here. So
8 one is good enough.

9 And -- but the most important point is
10 that in all the other provisions, apart from
11 1396k, that my friends rely on, the language
12 they rely on is simply not present in 1396k.

13 JUSTICE KAVANAUGH: Can I --

14 MR. WHITAKER: Nor --

15 JUSTICE KAVANAUGH: -- can I follow up
16 on 1396k and follow up on Justice Kagan's
17 question, because it seems that you're
18 taking -- and I don't mean to load it by saying
19 this word -- but a literal reading of 1396k,
20 and the other side is saying, no, you have to
21 read it in context with the other provisions
22 and have it all make sense. And you say no.

23 But then you're presented with a
24 hypothetical, maybe the absurd hypothetical,
25 but it is a hypothetical that's been raised,

1 and you say, oh, well, there, don't read it
2 literally. Actually, there, there's a
3 germaneness requirement. And Justice Kagan
4 asked you where that came from.

5 So aren't you at least acknowledging
6 that you get to context rather than just within
7 the four corners of 1396k?

8 MR. WHITAKER: Justice Kavanaugh, I'm
9 happy to -- to -- to read it in context, and I
10 have no quarrel with that, but whether or not
11 that that contextual limitation that I was
12 discussing from Justice Kagan is or is not in
13 the statute, I think the important point is
14 that the particular limitations that the other
15 side would have you read into k cannot be right
16 because there are various other explicit
17 indications in the statute that that is not
18 what k means.

19 And, again, I spoke of this. You have
20 the statute's remainder provision. You have
21 the right to spousal support, which doesn't fit
22 their theory at all. Again, rights to spousal
23 support that are for the purpose of medical
24 care does -- does -- does -- does not fit --
25 fit their theory.

1 And -- and I think that the -- so --
2 so I think --

3 JUSTICE KAVANAUGH: Well, some of what
4 you're just saying there answers another
5 question I have and I want to get more, which
6 is suppose -- and I know you disagree with this
7 -- but suppose we think (H) points one way and
8 -- against you, and k points a little bit in
9 favor of you.

10 How would you suggest we go about
11 thinking about the resolution of that
12 discrepancy or conflict?

13 MR. WHITAKER: Well, I -- I guess I do
14 -- I do think that -- that --

15 JUSTICE KAVANAUGH: I think you're
16 saying you don't agree with the premise.

17 MR. WHITAKER: Well, I -- I don't
18 agree with the premise, but I do think that --
19 you know, the government talked about
20 subparagraph (A) in paragraph (25) as being the
21 anchor provision. I actually think that, in
22 this context, it is very much that 1396k is the
23 anchor provision.

24 And if you look at this Court's
25 decision in Ahlborn, this Court's analysis of

1 all of the third-party liability provisions was
2 keyed off this key language in 1396k.

3 So I think it's fair to say that this
4 Court in Ahlborn actually treated 1396k as the
5 anchor provision, which --

6 JUSTICE KAVANAUGH: So prioritize k is
7 what you would say?

8 MR. WHITAKER: I would say that. And
9 I think that's supported by the fact that for
10 16 years, before subparagraph (H) even existed
11 in the statute, the only provision in the
12 statute that spoke to the Medicaid program's
13 payment rights was k. And it would be quite
14 odd, I think, to say that Congress had just
15 sort of forgotten for all this time to -- to
16 put this explicit limit into k or, worse still,
17 to say that actually Congress sort of impliedly
18 repealed k when -- silently when it enacted
19 (H), not to restrict Medicaid's payment rights
20 but, rather, to take care of a specific problem
21 that was -- that it was having with private
22 insurers.

23 And that, I think, Justice Breyer, is
24 the explanation for why subparagraph (H) is
25 worded slightly differently than k, because it

1 is directed at -- primarily at insurers, who
2 pay medical expenses for particular items and
3 services, just like the Medicare secondary
4 payer statute.

5 JUSTICE KAVANAUGH: What -- what about
6 the idea that no one was even thinking about
7 this until Ahlborn? Do you want to contest
8 that? In other words, we're parsing language
9 from a '77 and an '83 and -- but -- but,
10 actually, until Ahlborn, the other side said no
11 one was really --

12 MR. WHITAKER: Well --

13 JUSTICE KAVANAUGH: -- contemplating
14 this precise issue.

15 MR. WHITAKER: -- well -- well, I
16 think that actually probably -- that -- that --
17 that supports my position, actually, I think,
18 quite strongly because, consistent with Justice
19 Barrett's question, I think counsel's answer
20 was: Well, before Ahlborn, many states just
21 assumed that they could get actually all med --
22 all damages -- they could recover from all
23 damages, even the TV, as Justice Breyer said.

24 And -- and Congress no doubt enacted
25 Section -- subparagraph (H) against that

1 backdrop, knowing that the states had been
2 administering the provision more broadly.

3 And I think that -- that's -- that
4 supports quite strongly that Congress did not
5 in subparagraph (H) silently overthrow --

6 JUSTICE KAVANAUGH: What's your best
7 support for the idea that that was the baseline
8 against which Congress was operating when it --
9 in 1993?

10 MR. WHITAKER: Well, I don't have a
11 specific case on me, Your Honor, but I do know
12 that -- that that was -- I do -- I do -- I do
13 think it's correct, counsel's statement. I
14 can't point to a specific case right now, but I
15 do think counsel's statement is correct.

16 JUSTICE KAVANAUGH: But you agree that
17 that's the -- that was the understanding at the
18 time?

19 MR. WHITAKER: Well, it may not have
20 --

21 JUSTICE KAVANAUGH: And, obviously,
22 that helps you, but I'll -- he can address it.

23 MR. WHITAKER: -- it may not have been
24 the uniform understanding. It certainly was
25 the understanding of the Department of Health

1 and Human Services, which, as this -- as this
2 Court noted in Ahlborn, had two administrative
3 adjudications that dated from the mid-'90s that
4 basically interpreted the statute more or less
5 to allow, indeed, require, states to recover
6 third-party liabilities out of all medical
7 damages.

8 And -- and, certainly, I -- I also
9 think that there are -- so, yeah. So I think
10 that there were -- there were a variety of
11 reasons why Congress enacted that. And if you
12 look at the enactment of subparagraph (H), it's
13 very clear on the face of the amendment that --
14 that created subparagraph (H) that Congress was
15 intensely concerned with the -- with insurers
16 because there are a variety of other amendments
17 that Congress enacted at the same time
18 specifically directed at insurers.

19 Now --

20 JUSTICE KAGAN: General, can we --
21 let's take a case which meets your germaneness
22 requirement, that the -- the future payments
23 are -- you know, arise from the same injury or
24 accident, all right? But let's say that the
25 future payments are ones that the Medicaid

1 program would not pay for. In other words,
2 let's say the Medicaid program does not pay for
3 certain kinds of home health aides or something
4 like that.

5 Are you saying that the state can also
6 recover money for those services, services
7 that, you know, to use the language of (a)(B),
8 are really not available under the plan?

9 MR. WHITAKER: Not only could we do
10 that, we could also do that clearly with
11 respect to any past medical expenses that
12 Medicaid had covered. Again, the remainder
13 provision, I think, reflects that -- clearly a
14 recognition, I think, that certainly as to past
15 medical expenses, even if the beneficiary has
16 incurred expenses out of pocket, Medicaid has
17 priority over the recovery from those damages
18 for all of its -- all -- all the medical
19 expenses, not just expenses --

20 JUSTICE KAGAN: So -- but where do you
21 get that? Because (a)(B) really does say
22 available under the plan. If these -- if -- if
23 this money is for care and services that are
24 not available under the plan, how is it that
25 the state can -- can get that?

1 I mean, then -- then k is not only
2 fighting (H); then k is very much fighting
3 (a)(B) and not only the provision of (a)(B)
4 that, you know -- not only (B) but also (A), I
5 guess is -- is the way I would say it.

6 MR. WHITAKER: Sure. And I -- I want
7 to get to the point about where I get it from,
8 which is the remainder provision, but to answer
9 your question about (A) and (B) first --

10 JUSTICE KAGAN: And the reason I say
11 it's important, right, because (a)(B) comes
12 first, right? (H) might be this weird
13 tag-along thing, but (a)(B) is first and --

14 MR. WHITAKER: I think, as the
15 Petitioner in the opening brief noted at page
16 48, subparagraph (A) does not speak to what the
17 state can recover in any -- when it imposes a
18 lien of this kind.

19 All (A) says, as I read it, is
20 Medicaid plans, go out and find people who may
21 owe money to the plan. It is not limiting in
22 any way the scope of the state's recovery
23 rights.

24 Ditto for (B), which -- which simply,
25 as this Court noted in Ahlborn,

1 cross-references the liability that
2 subparagraph (A) establishes. So this notion
3 that those provisions somehow limited the pool
4 of -- the state's pool of recovery all along
5 since 1968, even though state Medicaid programs
6 were merrily, apparently, administering their
7 programs all this time to allow recovery for
8 all damages --

9 JUSTICE KAGAN: Yeah. So I read you
10 then as saying basically this is only a k case,
11 you know? And this is very different from, I
12 think, the -- the government's reading. Well,
13 obviously, it is. But this is only a k case.
14 We -- we should put aside (H) and we should
15 also put aside (a)(B).

16 MR. WHITAKER: I don't think you
17 should put them aside. I should -- I think you
18 should read them to not derogate from the
19 state's recovery rights under k. And I do want
20 to address one thing because --

21 JUSTICE KAGAN: Well, I guess what I'm
22 saying when I say "put aside" is because the
23 way I read not -- (a)(B) and -- and not just
24 (B), which Mr. Suri says is stronger for his
25 position than (A), but really (A), to pay for

1 care and services available under the plan.
2 And you're saying you can recover money even
3 for care and services that are not available
4 under the plan. And -- and so you're saying k
5 just stands independent of (A), as well as of
6 (H), and we should just put everything else in
7 this statute out of our heads and just think
8 about k?

9 MR. WHITAKER: Not at all. The
10 language that you mentioned in subparagraph (A)
11 does not speak to this issue. And I think the
12 operative words in that provision are not so
13 much "care and services available under the
14 plan" but "liability to pay for."

15 And if you have, for example, a right
16 of spousal support, which I think everyone
17 would agree is a type of third-party liability
18 covered by the statute, that right of spousal
19 support for the purpose of medical care is
20 available to pay for care and services
21 available under the plan, even though the pool
22 of money may have nothing to do whatsoever with
23 any particular services Medicaid covered in the
24 past. It's just money that is available to pay
25 Medicaid's costs. That's what (B) -- that's

1 what (A) says. And that's what (B) says too.

2 And Mr. Suri cited the -- the language
3 in subparagraph (B) that talks about in any
4 case in which a legal liability is found to
5 exist after medical assistance has been made --
6 made available on behalf of the individual.
7 That's just saying that somebody who Medicaid
8 provided medical assistance for. It's not
9 limiting the state's pool of recovery in any
10 way. And -- and the -- the only --

11 JUSTICE KAVANAUGH: What about the
12 language at the end of (B), right?

13 MR. WHITAKER: Well, it says "to the
14 extent of such legal liability," which, as this
15 Court noted in Ahlborn, is a reference to
16 subparagraph (A), which I was -- as I was
17 discussing with Justice Kagan, does not itself
18 limit the pool of funds.

19 All -- all (A) and (B) are saying is
20 go out and identify third parties, state
21 Medicaid plans, and once you find them, recover
22 to the extent they are liable. If you have a
23 deadbeat spouse that owes child support, go out
24 and -- and get that money to recover for
25 Medicaid's costs. That's all that provision --

1 JUSTICE BARRETT: General Whitaker,
2 all of the money? And I guess this just
3 reflects that I'm not sure that I fully
4 understand how it works in the context of
5 spousal support or child support, because child
6 support obviously isn't just for medical
7 expenses. It's for clothing and -- and maybe
8 schooling and all kinds of expenses, feeding
9 the child.

10 So are you saying that the state can
11 just go after the pool in an undifferentiated
12 way?

13 MR. WHITAKER: Certainly not. And
14 that's because the assignment rights applies to
15 rights to support that are "specified as
16 support for the purpose of medical care by a
17 court or administrative order."

18 So there is this -- so -- so we could
19 definitely not get all of the support. We can
20 get the support to the extent it is for medical
21 expenses.

22 JUSTICE BARRETT: So would there be an
23 administrative hearing to allocate it in a
24 similar way that there would be in a tort
25 settlement?

1 MR. WHITAKER: I'm not aware of -- of
2 -- of that happening, Your -- Your Honor. I
3 think it would have to be sort of a separate
4 court order in order --

5 JUSTICE BARRETT: It just seems very
6 odd since that's not how -- you know, you don't
7 have child support, I -- I would think, in the
8 normal course, earmarked. This is solely for
9 medical expenses.

10 MR. WHITAKER: Right. But it does
11 happen sometimes, as I understand it. I mean,
12 most of the time what happens is that the
13 spouse is ordered to just buy health insurance,
14 but it can happen in other ways too, as I
15 understand it.

16 So -- but -- but it does happen.
17 Florida does treat rights of spousal support
18 somewhat differently from unallocated tort
19 recoveries, to which the administrative
20 proceeding applies.

21 But I did want to address --

22 JUSTICE SOTOMAYOR: Counsel, I -- I'm
23 afraid that I keep reading the child support
24 section of this and it doesn't work any kind of
25 assignment. All it says is that a state plan

1 for medical assistance shall provide that the
2 person you're covering be required to cooperate
3 with the state to establish paternity and -- to
4 establish paternity and get child support.
5 There's no assignment in it at all.

6 MR. WHITAKER: Well, the assign --
7 JUSTICE SOTOMAYOR: But putting that
8 aside, I'm a very simplistic person, okay?
9 Under A, you say that the person is required to
10 assign to you their entitlement to payment for
11 past services only. They're -- you're not
12 claiming that they have to assign to you
13 payments for future care. So you -- that's
14 correct, right?

15 MR. WHITAKER: Well -- well, no, Your
16 Honor, that's not quite correct because I think
17 that if Medicaid paid for an injury from --
18 that -- from which the -- a tort recovery
19 arose, then, yes, the assignment would
20 encompass the right to payment for all medical
21 expenses out of that.

22 JUSTICE SOTOMAYOR: That has -- that
23 have been paid by you?

24 MR. WHITAKER: Well, we could -- we
25 could -- we could only recover --

1 JUSTICE SOTOMAYOR: So are you saying
2 that -- are you saying that if you sued the --
3 the tortfeasor, that you would be obligated to
4 sue for past and future expenses, whether
5 you're paying for them or not?

6 MR. WHITAKER: Yes. But we obviously
7 would always in any -- in any case be limited
8 to recovering no more than we paid out in
9 benefits. And, again --

10 JUSTICE SOTOMAYOR: Exactly. So, at
11 the point of your suit, you could only recover
12 from the tortfeasor that which you paid,
13 correct?

14 MR. WHITAKER: No more than what we
15 paid, but that -- that wouldn't --

16 JUSTICE SOTOMAYOR: Now then let me
17 stop. But you're also arguing then that you
18 could sue also for future expenses that you
19 don't pay?

20 MR. WHITAKER: I think we could sue
21 for all medical damages, which could include
22 both medical expenses that Medicaid paid. It
23 could include past expenses that Medicaid did
24 not pay. And it could also include future
25 medical expenses, which, as was noted in the

1 opening --

2 JUSTICE SOTOMAYOR: That's quite --
3 that really then undoes (A), (B), (H), and all
4 of the provisions of the Act, correct?

5 MR. WHITAKER: Oh, I don't think it
6 undoes it -- undoes them at all. And just to
7 answer your initial question, though, about the
8 assignment, the assignment of support occurs in
9 1396, subsection (a), paragraph (1),
10 subparagraph (A), which does separately from
11 subparagraph (C) provide for an assignment of
12 the right to spousal support.

13 JUSTICE SOTOMAYOR: That seems
14 extraordinary, that what you're reading into
15 the statute, an anti-lien statute, that permits
16 you only to get an assignment of what you have
17 paid for.

18 Now you're saying the assignment under
19 k is incredibly broader than that, whether you
20 paid for it or not, whether you were required
21 to pay for it or not, and future, that you're
22 assigned the individual's entire rights.
23 That's what you're telling me?

24 MR. WHITAKER: Justice Sotomayor, the
25 assignment is always limited by the maximum

1 amount that Medicaid paid. If Medicaid pays
2 all -- if Medicaid successfully recovers all of
3 the medical expenses, then Medicaid will get
4 its claim for past medical expenses fully paid.

5 And if there are any -- also any
6 future medical expenses, the beneficiary will
7 get the remainder. Likewise, if the
8 beneficiary paid any past medical expenses, the
9 remainder provision says that the beneficiary
10 will get those as a remainder. But -- but if
11 --

12 JUSTICE SOTOMAYOR: Does a beneficiary
13 have to sue at all for past -- I don't see
14 anywhere in here -- there's an assignment to
15 the state, there's a subrogation by the state,
16 but why should Medi- -- why should any of the
17 recipients bother to sue for what you're going
18 to be paid --

19 MR. WHITAKER: Well --

20 JUSTICE SOTOMAYOR: -- if you're going
21 to take it all anyway?

22 MR. WHITAKER: -- we can't take it all
23 under Ahlborn, Your Honor.

24 JUSTICE SOTOMAYOR: Well, no, because
25 you're saying to me that if the pot is -- if

1 the pot exceeds what you paid, there's no pro
2 rata that's required at all, so why bother?

3 MR. WHITAKER: I think that
4 beneficiaries, even -- even if we were able to
5 recover from future medical expenses, would
6 also have substantial incentives to still bring
7 suit. And even as to --

8 JUSTICE SOTOMAYOR: Oh, yes, for pain
9 and suffering, for everything else. But why
10 bother suing for past medical expenses at all?
11 They should just sue for future.

12 MR. WHITAKER: Well, I think it's
13 because, under the remainder provision, they
14 would, in essence, have the upside. So -- so I
15 think that they -- they have -- but -- you
16 know, so they have an incentive both on the
17 non-medical damages side and on the non-medical
18 -- on the medical damages side certainly to
19 bring suit.

20 CHIEF JUSTICE ROBERTS: Thank you,
21 counsel.

22 Justice Thomas?

23 JUSTICE THOMAS: Just briefly, General
24 Whitaker. I think I have this on.

25 The -- I asked Mr. Suri about

1 preemption, and you heard his answer. Just a
2 brief comment from you on what you think about
3 preemption in the context of Spending Clause
4 cases like this.

5 MR. WHITAKER: Well, I think that
6 there is a strong presumption against
7 preemption and as well in Spending Clause cases
8 that -- to -- to -- to read -- read Spending
9 Clause statutes to impose obligations on the
10 states that are not clear.

11 But I -- I think it's quite
12 extraordinary for the federal government to
13 read all -- apparently all of the state Medi --
14 all 87 paragraphs of the state Medicaid plan
15 requirements in 1396 subsection a to sort of
16 permit any beneficiary to argue that state law
17 is ipso facto preempted, which -- which I would
18 have thought the United States would have
19 thought is inconsistent with the Secretary's
20 enforcement authority.

21 So -- so it's an extraordinary
22 position that they're -- that -- that they're
23 taking. And I can't imagine that those laws
24 are preempt -- are preemption, that all of
25 those provisions are preempted. And this Court

1 did not so hold in Ahlborn or Wos. This Court
2 only held that the anti-lien provision has
3 preemptive effect.

4 It certainly doesn't follow from that
5 that any state law that doesn't comply with any
6 state -- any of the many state Medicaid plan
7 requirements in -- in subsection (A) of 1396a
8 are preempted.

9 JUSTICE THOMAS: Thank you, Chief.

10 CHIEF JUSTICE ROBERTS: Justice
11 Breyer, anything further?

12 Justice Alito?

13 Justice Sotomayor?

14 JUSTICE SOTOMAYOR: No, thank you.

15 CHIEF JUSTICE ROBERTS: Justice Kagan?

16 JUSTICE KAGAN: I would -- I would
17 like to ask you, General Whitaker, about (I),
18 because (I) does seem as though it's the mirror
19 -- it should be the mirror image of k. k is
20 talking about an individual being required to
21 make an assignment, and then (I) is talking
22 about an insurer being required to accept the
23 assignment.

24 So you would think that the two would
25 -- would be phrased the same way, but they're

1 not. (I) is phrased in a way that's very
2 favorable to the other side because it talks
3 about an item or service for which payment has
4 been made under the plan.

5 So what are we to make of the fact
6 that what is -- what should be a mirror image
7 of k reads exactly the way you don't want it
8 to?

9 MR. WHITAKER: I don't agree that it
10 reads exactly the way I don't want it. I think
11 it actually supports our idea that the two
12 payment rights in 1396k and subparagraph (H)
13 are independent.

14 And if you look at Romanette ii in
15 subparagraph (I) -- and this is at page 3A of
16 the government's appendix -- before the mention
17 of the assignment provision, it says "except
18 the state's right of recovery and the
19 assignment to the state of any right of an
20 individual or other entity to payment from any
21 other party."

22 And I think that -- so I think that
23 recognizes that there are two different payment
24 rights that are at work here, one established
25 by k -- because, otherwise, Congress wouldn't

1 have talked about two different rights of
2 recoveries, one stemming from, I think,
3 subparagraph (H) and the other stemming from
4 1396k.

5 And it's not the mirror image at all,
6 Your Honor, because subparagraph (I), as I read
7 it, clearly only applies to insurers. There's
8 a question about whether (H) does, but,
9 clearly, (I) applies only to insurers because
10 Romanette i talks about -- imposes on insurance
11 companies obligations to identify -- to -- to
12 -- to bring to Medicaid's attention when
13 Medicaid beneficiaries have insurance coverage
14 and the like, which would be nonsense as
15 applied to anybody who is a potential
16 tortfeasor because -- unless we're all insurers
17 to everyone in the world.

18 So -- so I think that it is limited.
19 And Mr. Suri said: Oh, well, it doesn't make
20 -- (H) has no duty of cooperation. But I think
21 the reason for that is because insurers have
22 other applicable provisions that require them
23 to cooperate with state Medicaid programs to
24 help identify these liabilities, and Roman --
25 and (I) is a very good example of that.

1 And I think it reflects, just like the
2 story I was trying to tell with regard to (H),
3 that these provisions are directed at a
4 different problem. And -- and subparagraph (I)
5 was enacted in 2005 because, even after the
6 enactment of subparagraph (H), apparently,
7 insurers were still -- as it turns out, they
8 don't like paying money to Medicaid too much,
9 and so they were doing other things to evade
10 Medicaid's rights. And so Congress come along
11 -- came along and enacted subparagraph (I).
12 But it didn't do any more than it did when it
13 enacted subparagraph (H), limit or enact -- or
14 -- or -- or enact something that was
15 declarative of an existing limit in -- in 1396k
16 itself.

17 JUSTICE KAGAN: Thank you.

18 CHIEF JUSTICE ROBERTS: Justice
19 Gorsuch?

20 Justice Kavanaugh?

21 JUSTICE KAVANAUGH: In your brief,
22 General, you note that Florida spends about 28
23 billion per year on Medicaid services, which is
24 30 percent of the budget. How much would you
25 save, roughly, if you prevailed in this case?

1 MR. WHITAKER: I've tried to get good
2 numbers on that, Justice Kavanaugh.
3 Unfortunately, I haven't been -- been able to.
4 It's certainly something that's important to --
5 to my agency. And -- and -- and I know that it
6 can result in a substantial difference in
7 individual cases, as noted by the multi-state
8 amicus brief, which -- which touches on -- on
9 this issue.

10 But, unfortunately, I don't have great
11 numbers on that. But it is important to -- to
12 Florida's Medicaid program.

13 JUSTICE KAVANAUGH: And, second,
14 Mr. Suri helpfully said that nine states do it
15 Petitioner's way and six states, I think he
16 said, do it your way, and it was hard to tell
17 with other states. Do you want to give your
18 view on how the practices in the states --

19 MR. WHITAKER: Well, I'd be interested
20 to know how he came up with nine. That's --
21 that's different from the count we came up -- I
22 guess we couldn't compare notes before the
23 argument, but -- but we counted it as fewer. I
24 thought that there were only five that we could
25 find that explicitly allowed the recovery of

1 future. And most of those were the result of
2 the -- of states' high -- high -- judicial
3 decisions that said that that they had to.

4 I only thought that it was at most
5 California and Vermont that had actually
6 arguably done this on their own without some
7 kind of judicial prompting, on their own, but I
8 have no reason to -- it's a little bit unclear,
9 and, obviously, it's difficult to --

10 JUSTICE KAVANAUGH: Why -- and that's
11 my question -- why is it unclear --

12 MR. WHITAKER: Well -- well, I mean --

13 JUSTICE KAVANAUGH: -- in these 35
14 other states?

15 MR. WHITAKER: -- it's somewhat
16 unclear because many of these -- many of these
17 statutes kind of don't speak to the issue. And
18 a lot of the statutes are -- have the following
19 structure where they just say something like
20 the state has a lien up to the amount of
21 medical assistance paid, and it doesn't really
22 specify in -- in detail how exactly the state
23 can -- can recover on that lien and the like.

24 So -- so there are some states that
25 have explicitly said that you can recover

1 future medical expenses. Massachusetts is one.
2 Oklahoma is one. Obviously in Florida.
3 Florida is one. But -- but I could only -- we
4 -- so -- so I do think that, you know, this
5 Court's decision is very much going to set the
6 tone for the country on -- on this issue, and,
7 you know, state Medicaid programs are going to
8 have to, you know, have a policy now, I think.

9 JUSTICE KAVANAUGH: Yes.

10 MR. WHITAKER: So --

11 JUSTICE KAVANAUGH: Thank you.

12 CHIEF JUSTICE ROBERTS: Justice
13 Barrett? No?

14 Thank you, counsel.

15 JUSTICE SOTOMAYOR: Counsel, just --
16 I'm sorry, Chief, just one question?

17 CHIEF JUSTICE ROBERTS: Sure.

18 JUSTICE SOTOMAYOR: Counsel, you just
19 said that this decision will -- will force
20 states to change. Your reading will force
21 states to do what you're doing, correct?

22 MR. WHITAKER: I --

23 JUSTICE SOTOMAYOR: Because they're
24 obligated, you're saying, under the statute to
25 collect from whatever sources they can, so what

1 you're saying is those states who have contrary
2 laws to yours or explicit laws to the contrary,
3 they would be preempted?

4 MR. WHITAKER: Well, I don't think the
5 -- no, I don't think they would be preempted,
6 Justice Sotomayor, because I don't believe that
7 all of the state Medicaid plan requirements in
8 subsection (A) of 1396a are preemptive.

9 I do think you're -- it's certainly
10 true, Justice Sotomayor, that the states would
11 have an obligation likely to recover those
12 third-party liabilities, although I agree with
13 Mr. Suri that the statute does build in some
14 flexibility for state Medicaid programs in
15 seeking those recoveries and allows state
16 Medicaid programs to weigh costs and benefits
17 and only requires the identification of
18 liabilities to the extent that it is
19 reasonable.

20 CHIEF JUSTICE ROBERTS: Thank you,
21 counsel.

22 Rebuttal, Mr. Gowdy.

23 REBUTTAL ARGUMENT OF BRYAN S. GOWDY
24 ON BEHALF OF THE PETITIONER

25 MR. GOWDY: 1396k, Justice Kagan, you

1 asked if it was inapplicable. We would say it
2 is the least applicable, that this provision
3 authorized states to directly pursue third
4 parties for medical expenses paid by Medicaid,
5 and in doing so, it abrogated the common law
6 rules against claim splitting and against the
7 assignment of personal injury actions. And
8 Florida has not exercised those rights in this
9 case.

10 Justice -- or the Chief Justice asked
11 about is this ever used? It is occasionally in
12 mass torts. You all may recall the tobacco
13 settlements from the mid-1990s. Those were
14 cases brought by states against tobacco
15 companies for past medical expenses paid by
16 Medicaid. Generally, the states don't jump
17 into individual lawsuits, but this provision
18 gives them real force, but it's really the
19 least applicable here compared to the other
20 provisions we've been discussing today.

21 And, Justice Kagan, you brought up the
22 -- the home healthcare, and, Justice Barrett,
23 you brought up some questions about childcare,
24 and I would like to try to tie them together.

25 The state's position here is a

1 hyper-literal reading of the words "any rights
2 to payment for medical care." Reading that
3 hyper-literally, it's not just a future tort;
4 it's a future insurance policy, it's a future
5 parent who's ordered to pay for some type of
6 medical care.

7 And under the state's reading, even if
8 that future insurance policy is paying for
9 things or -- or the parent is ordered to pay
10 for things not covered by medical care -- I'm
11 sorry, by Medicaid, the state told you today
12 they could take it.

13 So, for example, if Ms. Gallardo's
14 father was ordered to pay for the special
15 medical equipment that she needs to get to her
16 appointments that is not covered by Medicaid,
17 the state's position is that they could take
18 that money.

19 And, finally, the state has talked --
20 has danced around the other provisions, in
21 particular, (H). You've been told repeatedly
22 it was primarily for insurers.

23 The plain language says "third party."
24 A third party includes a tortfeasor. And this
25 Court applied that language in Ahlborn. So

1 it's not primarily for insurers. It's for this
2 instance here and is directly applicable.

3 And (A) and (B), as we have indicated,
4 which the state has not addressed in their
5 brief, is for the legal liability of third
6 parties to pay for care and services available
7 under the plan.

8 And we did say -- we did point out at
9 page 48 of our brief that there was certainly
10 some confusion. We cite a case called White
11 from New Mexico in 1974. There was some
12 confusion about what that language meant by
13 some courts. I see I'm -- could I just
14 conclude? Just --

15 CHIEF JUSTICE ROBERTS: Certainly.

16 MR. GOWDY: Just -- and (H) clarifies
17 that without a doubt in our view.

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

20 (Whereupon, at 11:47 a.m., the case
21 was submitted.)

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Official

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