SUPREME COURT
OF THE UNITED STATES

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            IN THE SUPREME COURT OF THE UNITED STATES

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GIANINNA GALLARDO, AN                   )

INCAPACITATED PERSON, BY AND            )

THROUGH HER PARENTS AND                 )

CO-GUARDIANS, PILAR VASSALLO AND        )

WALTER GALLARDO,                        )

            Petitioner,                 )

            v.                          ) No. 20-1263

SIMONE MARSTILLER, IN HER OFFICIAL )

CAPACITY AS SECRETARY OF THE            )

FLORIDA AGENCY FOR HEALTH CARE          )

ADMINISTRATION,                         )

            Respondent.                 )

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Pages:  1 through 105

Place:  Washington, D.C.

Date:   January 10, 2022
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 7   WALTER GALLARDO,   )

 8   Petitioner,   )

 9   v.   ) No. 20-1263

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11   CAPACITY AS SECRETARY OF THE   )

12   FLORIDA AGENCY FOR HEALTH CARE   )

13   ADMINISTRATION,   )

14   Respondent.   )

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16   Washington, D.C.

17   Monday, January 10, 2022

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19   The above-entitled matter came on for oral

20   argument before the Supreme Court of the United

21   States at 10:00 a.m.

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 1    APPEARANCES:

 2    BRYAN S. GOWDY, ESQUIRE, Jacksonville, Florida; on

 3        behalf of the Petitioner.

 4    VIVEK SURI, Assistant to the Solicitor General,

 5        Department of Justice, Washington, D.C.;

 6        for the United States, as amicus curiae,

 7        supporting the Petitioner.

 8    HENRY C. WHITAKER, Solicitor General, Tallahassee,

 9        Florida; on behalf of the Respondent.

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

         2   (10:00 a.m.)

         3   CHIEF JUSTICE ROBERTS: Justice

         4   Sotomayor is participating remotely this

         5   morning.

         6   We'll hear argument this morning in

         7   Case 20-1263, Gallardo versus Marstiller.

         8   Mr. Gowdy.

         9   ORAL ARGUMENT OF BRYAN S. GOWDY

        10   ON BEHALF OF THE PETITIONER

        11   MR. GOWDY: Mr. Chief Justice, and may

        12   it please the Court:

        13   Medicaid provides a benefit to persons

        14   needing medical care. It is not a loan to be

        15   repaid later. The anti-lien and anti-recovery

        16   provisions, part of the original 1965 Medicaid

        17   law, reflect this policy by prohibiting states

        18   from taking any property belonging to a

        19   beneficiary, including her third-party

        20   liabilities.

        21   But, in 1968, Congress, in

        22   subparagraphs (A) and (B), estab- --

        23   established a limited pool of third-party

        24   liabilities from which a state could seek

        25   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   the 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 settlement 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.

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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 enacted
21   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 do they construe
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1   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?

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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.
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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 the provisions was first

24   came (A) and (B), then came k, and then finally

25   came (H). So we don't have to rely on (H)

1   retroactively narrowing k, so to speak. We can

2   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

48

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

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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
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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 Medicare regime but gives the

2   state a little more than it would get under

3   Petitioner's 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

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 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
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 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

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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
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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
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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?

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 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.
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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 a

    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

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 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,

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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.

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 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
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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

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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
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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?

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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,
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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

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 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 --
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 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 right 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?
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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 a little --

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

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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 --
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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.

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 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?
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 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. This provision gives

18   them real force, but it's really the least

19   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.)

22

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