No. 20-1664

In the United States Court of Appeals for the Seventh Circuit

GORGI TALEVSKI, by his next friend IVANKA TALEVSKI,

Plaintiff-Appellant,

v.

HEALTH AND HOSPITAL CORPORATION OF MARION COUNTY, *et al.*,

Defendants-Appellees.

On Appeal From the United States District Court For The Northern District of Indiana, No. 2:19-CV-00013 (Hon. James T. Moody)

Brief of Appellees

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September 29, 2020

APPEARANCE & CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 20-1664

Short Caption: Talevski v. Health and Hospital Corp. of Marion County, et al.

To enable the judges to determine whether recusal is necessary or appropriate, an attorney for a non-governmental party, amicus curiae, intervenor or a private attorney representing a government party, must furnish a disclosure statement providing the following information in compliance with Circuit Rule 26.1 and Fed. R. App. P. 26.1.

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(2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:

Robbins, Russell, Englert, Orseck, Untereiner & Sauber LLP; Riley Bennett Egloff LLP

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N/A

Attorney's Signature: /s/ Courtney L. MIllian Date: 9/29/2020

Attorney's Printed Name: Courtney L. MIllian

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Jurisdictional Statement

Appellees agree with the complete and correct jurisdictional statement in Appellant's Brief.

Issues Presented

1. Whether the judgment of dismissal should be affirmed on statute-of-limitations grounds.

2. Whether, assuming the case is not time barred, 42 U.S.C. § 1396r creates an implied private right of action.

3. Whether, even if there is a private right of action, Congress foreclosed any private remedy enforceable under 42 U.S.C. § 1983 by including in 42 U.S.C. § 1396r a detailed and comprehensive federal and state enforcement scheme, including the provision of remedies for individual nursing-facility patients.

Introduction

This case involves an untimely effort to convert a garden-variety dispute concerning medical care in a state-owned nursing home—long the purview of state courts and administrative agencies—into a federal civil rights lawsuit. Appellant (and plaintiff below) Gorgi Talevski resided in a nursing home that was doing business as Valparaiso Care and Rehabilitation ("VCR"), which in turn was owned by Health and Hospital Corporation of Marion County ("HHC") and operated by American Senior Communities ("ASC").[1] Talevski suffered from dementia, and his stay in the facility was marked, through no fault of his own, by his repeated violent and sexually aggressive behavior toward female residents and staff. HHC attempted to address this behavior, first through medication and then by recommending his transfer to an all-male facility. Invoking available Indiana state-law administrative procedures, Talevski challenged both the medication decisions and the transfer.

Had he found those procedures insufficient, Talevski could have turned to Indiana state courts, but he did not. Instead, he filed a federal civil rights action, claiming that HHC had violated a laundry list of rights under the Federal Nursing Home Reform Act of 1987 ("FNHRA"), 42 U.S.C. § 1396r, and that FNHRA and 42 U.S.C. § 1983 provided him an implied private right of action and remedy. The district court held that the asserted rights were too vague to be judicially enforceable and dismissed the case. Now Talevski appeals.

[1] For convenience, where possible we refer to all three entities (defendants below and appellees here) collectively as "HHC."

This Court need not reach Appellant's Section 1983 issues to affirm the judgment of dismissal: The two claims Talevski presses on appeal, unlawful chemical restraint and wrongful transfer, are untimely. A Section 1983 plaintiff in Indiana has two years from the date his claims accrue to bring suit. Talevski's unlawful chemical restraint claim accrued when his daughter learned that he was allegedly restrained or, at the very latest, when the supposed restraint came to an end. And his unlawful transfer claim accrued when he was last transferred from HHC and was put on notice that the transfer was permanent. Both of those events accrued more than two years before Talevski filed his complaint. And the tolling provision Talevski invokes for the first time on appeal (and only in a footnote) does not apply.

If the Court elects not to affirm on limitations grounds, it should affirm because the district court, applying the test prescribed by *Blessing v. Freestone*, 520 U.S. 329 (1997), correctly held that FNHRA does not provide an implied private right of action. For one thing, FNHRA lacks the "unmistakable focus on the benefitted class" required to meet the first prong of the *Blessing* inquiry. *Gonzaga Univ. v. Doe*, 536 U.S. 273, 287 (2002). Instead, the statute is directed at states and nursing facilities. Indeed, it tells *states* how they must regulate *nursing facilities* in order to qualify to receive Medicaid funding, and then it tells *nursing facilities* how their *doctors* should use chemical restraints and transfers. The commands prescribed by the statute are thus multiple levels removed from the purported "benefitted class" of patients.

Nor does the statute satisfy the second *Blessing* factor, which requires the claimed rights not to be "so vague and amorphous" that their enforcement "would

strain judicial competence."[2] 520 U.S. at 340-41. Talevski claims to meet that standard, but only by recasting or distorting the statutory text. Thus, although he invokes a "right" to be free from all unnecessary chemical restraints, FNHRA by its terms instructs states merely to ensure that facilities "protect" and "promote" the right of patients to be free of such restraints. 42 U.S.C. § 1396r(c)(1)(A)(ii). How does a court decide whether a facility has sufficiently "promoted" or "protected" that right? And how is a judge to evaluate determinations made by medical professionals who must assess the treatment of a particular patient while also ensuring the safety of other residents and staff? As for Talevski's unlawful transfer claim, it too would require federal courts to second-guess a host of difficult and amorphous decisions made by medical professionals involving medical judgment, behavioral predictions, and security considerations. When can a patient's needs be met by a given facility? When has a patient recovered enough to be discharged? And when is a patient currently (or likely to become) a danger to others?

Finally, even if the Court finds that the *Blessing* test is satisfied, FNHRA's comprehensive remedial scheme for noncompliant nursing facilities shows that Congress did not intend that federal courts imply a supplemental private remedy enforceable under 42 U.S.C. § 1983. FNHRA's detailed scheme puts a variety of remedies at the disposal of both the states and the Secretary of Health and Human Services (the "Secretary"). It also provides individual nursing-facility patients with

[2] All internal quotation marks, citations, alterations, and footnotes are omitted unless otherwise noted.

remedies, and it preserves patients' access to traditional state-law claims (for example, medical malpractice) when the need arises. The provision of such a comprehensive set of remedies is strong evidence that Section 1983 has no place in the FNHRA enforcement scheme.

In short, this is an untimely case, based on a fictitious right of action, that Congress in any event intended to foreclose. The district court was right to dismiss it, and this Court should affirm.

Counterstatement of the Case

Appellant Gorgi Talevski is an adult residing at Signature of Bremen, a nursing home in Bremen, Indiana. A12. Talevski suffered—and continues to suffer—from dementia, and so in January 2016 his family placed him in VCR, a long-term care and skilled nursing facility located in Valparaiso and owned by HHC. A13-14. HHC contracts with ASC to manage VCR. A13. Except for two short-term stints at another more specialized facility, Talevski continued to reside at VCR until he was transferred on December 30, 2016. A15.

Talevski's condition was progressive, and his condition declined significantly while in HHC's care. A14. Unfortunately, this deterioration manifested itself in a series of violent and sexually aggressive incidents towards not only Talevski's fellow patients but also multiple members of VCR's staff. During the approximately 10 months in 2016 he lived at VCR, Talevski:

- Inappropriately touched female residents and tried to lure them into his room;
- Led female residents into his room and closed the door;
- Touched and rubbed the arms of female residents and became angry when told to stop;

- Pushed a certified nursing assistant and then pulled a knife on a nurse while making stabbing motions;
- Tried to stab a VCR worker with a fork;
- Touched a female resident's breast;
- Inappropriately touched female residents by kissing or grabbing them;
- Shoved a staff member onto a couch;
- Rubbed himself between the legs while putting his arm around a female resident; and
- Attempted to pull another female resident onto his lap, and made as if to hit her when his behavior was redirected.

A36-37.

VCR tried several measures to ameliorate Talevski's behavior and protect other patients and staff. Talevski's doctors prescribed, and requested that VCR administer, a variety of drugs intended to lessen the progression of his condition and control his behavior A14-15. Talevski's daughter resisted this treatment, apparently believing that—contrary to the doctors' decisions—her father should not be taking the prescribed medication. A15. She filed a complaint with the Indiana State Department of Health ("ISDH"), and a different doctor—evidently disagreeing with Talevski's prior prescriptions—ordered that his medication be tapered down in late September 2016. A15. But Talevski's dangerous and aggressive behavior continued; the last three incidents listed above—including violence against a female resident when he was stopped from pulling her onto his lap—occurred after the change in medication. A15; A37.

Because Talevski's sexually aggressive behavior was focused on female patients, in March 2016 HHC discussed with Talevski's family the possibility of transferring him to an all-male facility. A37. Later in 2016, VCR twice transferred Talevski to Doctors NeuroPsychiatric Hospital ("DNH") in Bremen, Indiana—once

from November 23 to December 15, and again from December 19 to December 29. A15. The November 23 transfer took place on the same day that Talevski shoved a staff member onto a couch, while the December 19 transfer coincided with Talevski's rubbing himself between the legs while putting his arm around a female resident. A37.

Talevski left HHC's care for the last time on December 30, 2016, when VCR once again transferred him to DNH. A15. This was the day that Talevski tried to pull a female resident onto his lap and then reared back to hit her when he was redirected. A37. While Talevski was still at DNH, a physician determined that Talevski could not return to VCR because of his physically and sexually aggressive behavior and recommended Talevski's transfer to an all-male facility. A37.

Significantly for purposes of the statute of limitations, on January 9, 2017, DNH attempted to return Talevski to VCR, but HHC declined to take him back. A15. HHC subsequently sought what we will term a Secondary Transfer—seeking to move Talevski from DNH to Harcourt Terrace Nursing and Rehabilitation in Indianapolis ("Harcourt"). A37. As was his right, Talevski challenged that Secondary Transfer before an Administrative Law Judge ("ALJ") of the Indiana State Department of Health ("ISDH"). A35. On February 28, 2017, the ALJ refused to affirm the Secondary Transfer (from DNH to Harcourt). A16; A41. HHC reiterated that it still did not think Talevski should be permitted to return to its own facility, and Talevski's family requested that the ISDH itself intervene. A16. In May 2017, ISDH completed a report on conditions at VCR. After the report issued, HHC contacted Talevski's

family to discuss his return, but his family decided to leave him in a facility in Bremen instead of accepting HHC's return offer. A16-17. To our knowledge, Talevski remains in the Bremen facility to this day.

On January 10, 2019—that is, two years and eleven days after he left HHC's care for the last time, and two years and one day after HHC informed Talevski that he could not return—Talevski filed this lawsuit under 42 U.S.C. § 1983, claiming that HHC's actions violated FNHRA. In his complaint, he alleged that HHC had violated a panoply of supposed federal rights, including rights to be free from "illegal chemical restraints," "to file grievance [sic] free of reprisal," "to remain at the nursing facility and not to be transferred or discharged without due process," to receive "proper and timely notification of any transfer or discharge from the nursing facility," and to be provided with care ensuring his "highest practicable physical, mental, and psychosocial well-being." A18-19. (That is just an excerpt of Talevski's claims; the full list of "rights" that HHC supposedly violated runs for more than a page and includes eleven separate entries. *See* A18-19.)

The United States District Court for the Northern District of Indiana (Moody, J.) dismissed the case. A1-8. The court concluded that the rights Talevski claimed—specifically, the "rights" to care that would "enhance[] . . . quality of life" and achieve Talevski's "highest practicable physical, mental, and psychosocial well-being"—were too amorphous and undefined to be federally enforceable. A6-7. This appeal followed.

Summary of Argument

For three independent reasons, this Court should affirm. First, although the district court did not reach this issue (though it was fully briefed), Talevski's claims

are clearly time-barred, and there is no tolling provision that absolves Appellant of his tardiness. Second, as the district court correctly concluded, Congress did not intend to create a private right of action in FNHRA. Congress did not evince in the statute an unambiguous focus on residents of nursing facilities, and the supposed "rights" Talevski claims are so vague and amorphous that their enforcement would unduly strain judicial competence. Third, and finally, FNHRA's express inclusion of comprehensive remedial provisions forecloses the *private* remedy that Talevski invokes.

Argument

I. The Court Should Affirm The Dismissal Of Talevski's Claims On Statute-Of-Limitations Grounds

Talevski's claims should be dismissed as untimely because it is clear from the face of his complaint that they accrued outside the two-year limitations period governing Section 1983 claims in Indiana. *See Collins v. Vill. of Palatine*, 875 F.3d 839, 842 (7th Cir. 2017) (upholding dismissal of time-barred claims under Rule 12(b)(6) because complaint and judicially noticeable documents "contain[] everything necessary to establish that the claim is untimely"). Appellees raised this argument below. *See* Defendants' Brief in Support of Motion to Dismiss 5-6; Defendants' Reply in Support of Motion to Dismiss 7-9. Although the district court did not reach it, this Court may still affirm on this basis. *See Effex Capital, LLC v. Nat'l Futures Ass'n*, 933 F.3d 882, 885 n.4 (7th Cir. 2019) ("We may affirm the district court's dismissal on any ground supported by the record, even if different from the grounds relied upon by the district court.").

A. The Governing Legal Standard

Section 1983 claims borrow the limitations period from the statute of limitations for general personal injury actions in the state where the alleged injury occurred. *See Logan v. Wilkins*, 644 F.3d 577, 581 (7th Cir. 2011). In Indiana, that limitations period is two years. *Behavioral Inst. of Indiana, LLC v. Hobart City of Common Council*, 406 F.3d 926, 929 (7th Cir. 2005); IC § 34-11-2-4. By contrast, federal law, not state law, determines when a Section 1983 claim accrues. *See Wallace v. Kato*, 549 U.S. 384, 387-88 (2007); *Lewis v. City of Chicago*, 914 F.3d 472, 478 (7th Cir. 2019). Under federal law, such a claim accrues when a plaintiff knows the fact and cause of an injury. *See Amin Ijbara Equity Corp. v. Vill. of Oak Lawn*, 860 F.3d 489, 493 (7th Cir. 2017). As with the statute of limitations, however, courts look to state law to determine whether a tolling rule applies, and if so, which one. *See Johnson v. Rivera*, 272 F.3d 519, 521 (7th Cir. 2001).

B. Talevski's Chemical Restraint Claim Is Untimely

According to the complaint, Talevski's daughter received a list of her father's medications and confirmed that he was being chemically restrained by HHC sometime in September 2016, about two years and four months before the complaint was filed. A14-15. Talevski's claim accrued either at that time or, at the latest, when the chemical restraint was removed by the orders of his doctor.[3] *See Devbrow v. Kalu*,

[3] The complaint does not specify the exact date on which Talevski's alleged chemical restraint by HHC ended. But it appears from the complaint that it ended prior to November 23, 2016, the first time Talevski was transferred from VCR, the facility owned by HHC. A15; *see* page 6, *supra*. And the alleged HHC restraint necessarily ended by the time Talevski was last transferred from VCR on December 30, 2016, because on that date his treatment by HHC ceased. *See* A15. That was two years and eleven days before the complaint was filed.

705 F.3d 765, 768-69 (7th Cir. 2013) (claim for medical injury accrues when plaintiff knows of fact and cause of injury); *Wallace*, 549 U.S. at 388-89 (claim of unlawful detention accrues when alleged detention ends). Because Talevski knew both the fact and cause of his alleged restraint more than two years before he filed his complaint, the unlawful restraint claim is untimely.

C. Talevski's Transfer Claim Is Also Untimely

As catalogued above, Talevski's complaint alleges several transfers from VCR to DNH in Bremen. It is not clear from the complaint exactly which of these transfers from VCR Talevski thinks are unlawful and why. What is clear, however, is that the *last* time HHC transferred Talevski was December 30, 2016, when Appellant was sent to DNH for the final time. A15. As Talevski conceded below, he knew by January 9, 2017—two years and a day before Appellant filed his complaint—that he was not allowed to return to the Valparaiso nursing home. *See* Plaintiff's Response In Opposition To Defendants' Motion To Dismiss 14 ("VCR's January 9, 2017, refusal to readmit Talevski" indicated to Talevski "that he would not be allowed to return to VCR."); *id.* (alleging that Talevski had "notice" on January 9, 2017 that HHC "intended to discharge or transfer Talevski.") (emphasis omitted). Because Talevski's transfer claim was filed more than two years after receiving notice that he'd been discharged, it too is untimely.

Below, Talevski argued that the statute of limitations did not accrue on the transfer claim until the ALJ had ruled against HHC on the Secondary Transfer and HHC *still* declined to readmit Talevski to VCR. *Id.* at 14; *see also* A36-40. But, from what can reasonably be gleaned from his complaint, the gravamen of Talevski's

transfer claim is that HHC unlawfully moved him from *its own* facility, not that it impermissibly recommended the Secondary Transfer (which never actually took place anyway).[4] The ALJ did not opine on the lawfulness of the transfer from VCR to DNH, which is the only one that matters. *See* A39 ("This does not mean that the facility erred in sending him to the hospital [in Bremen].").

Nor was Talevski's right to sue somehow resuscitated each time he asked to be readmitted to the HHC facility but was refused. An unlawful transfer is a discrete act. *See Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 114 (2002). It accrues, consistent with the general rule, when the injured party knows he has been injured and by whom. *See Moore v. Burge*, 771 F.3d 444, 446-47 (7th Cir. 2014). It is not revived each time the alleged wrongdoer refuses to *remedy* it. *See Stepney v. Naperville Sch. Dist. 203*, 392 F.3d 236, 239-40 (7th Cir. 2004); *Lever v. Northwestern Univ.*, 979 F.2d 552, 556 (7th Cir. 1992). In *Stepney*, for example, this Court concluded that the failure to remedy the allegedly unlawful transfer and demotion of an employee did not restart the limitations period or transform a discrete violation into a continuing one. 392 F.3d at 240. Similarly, in *Woods v. City of Rockford* this Court held that a claim that the state unlawfully deprived a business of a liquor license without notice accrued when license was revoked, and not when the city refused to hold a second hearing on whether to remedy that deprivation. 367 F. App'x

[4] And in any event, even a challenge to the non-existent Secondary Transfer would have been untimely. As Talevski admitted below, he was on notice of HHC's attempt to transfer him from Bremen to Indianapolis by January 9, 2017. *See* Plaintiff's Response In Opposition To Defendants' Motion To Dismiss 14; *see also* A15.

674, 678 (7th Cir. 2010). So, too, here: Talevski's claim accrued when he knew he had been transferred from VCR. It did not accrue, many months later, when HHC purportedly refused to remedy it by declining, once again, to readmit him.[5]

D. Talevski Is Not Entitled To Invoke Indiana's "Legal Disability" Tolling Rule

On appeal, Talevski argues for the first time, if only in a footnote, that the statute of limitations is tolled due to his "legal disability." Br. 16 n.2. This argument is waived because he failed to raise it below. *See Gallo v. Mayo Clinic Health Sys.-Franciscan Med. Ctr., Inc.*, 907 F.3d 961, 965 n.1 (7th Cir. 2018) ("[I]t is axiomatic that arguments not raised below are waived on appeal." (quoting *Oates v. Discovery Zone*, 116 F.3d 1161, 1168 (7th Cir. 1997)); *Rosas v. Advocate Christ Med. Ctr.*, 803 F. App'x 952, 954 (7th Cir. 2020) (declining to consider tolling argument based on mental disability because it was not raised below).

In any event, the "legal disability" tolling rule does not apply to Talevski's claims. As explained above (at page 10), when determining what tolling rules to borrow this Circuit looks to state law. Consistent with the decision to borrow the state's general personal injury limitations period, courts borrow any tolling rules provided by general personal injury law. *See Dixon v. Chrans*, 986 F.2d 201, 204 (7th Cir. 1993). But if the state's general personal injury law does not contain a tolling

[5] Talevski asserts (A16) that he sustained additional damages following HHC's refusal to readmit him, but that too cannot revive his untimely claim. Under federal law, a cause of action will accrue "even though the full extent of the injury is not then known or predicable." *See Amin Ijbara Equity Corp.*, 860 F.3d at 493. "Were it otherwise, the statute would begin to run only after a plaintiff became satisfied that he had been harmed enough," and the running of the limitations period would be at the plaintiff's sole discretion. *Wallace*, 549 U.S. at 391.

rule, then courts in this Circuit apply the state tolling rule that best fits the circumstances of the case and the cause of action. And here, Indiana's Medical Malpractice statute expressly forecloses resort to the "legal disability" tolling provision for cases like this one.

The *Dixon* case illustrates the basic principle at work. There, a former prisoner brought a claim against the Illinois Department of Corrections ("IDOC") outside of the limitations window. *Ibid.* At the time, Illinois had a tolling rule, specific to incarcerated persons, providing that claims brought by inmates were tolled during their incarceration but *not* when such claims were brought against the IDOC. *Ibid.* The former prisoner tried to invoke the incarceration tolling rule (which he claimed was general), without the exception for claims against the IDOC (which he said was too specific to be adopted for Section 1983 purposes). *Ibid.* This Court flatly rejected that argument. Because there was no tolling rule covering all general personal injury cases, the Court held that it would look to the incarceration tolling rule, *including* its exception for IDOC cases. *Ibid.*[6]

The "legal disability" tolling provision that Talevski invokes (IC § 34-11-6-1), like the incarceration tolling provision in *Dixon*, is not prescribed for general personal injury liability. *See* IC § 34-11-6-1 (making no reference to personal injury actions);

[6] The *Dixon* Court ultimately declined to apply the tolling exception on the ground that it was specifically designed to disadvantage claims against public officials and, as such, "made it more difficult for § 1983 plaintiffs to sue them." *Id.* at 205. That policy has no application to the exception we invoke to the "legal disability" tolling provision, because the exception applies to private parties and the government alike. *See* IC § 34-18-2-14 (defining "health care provider" to include numerous entities without regard to whether they are governmental or private).

see also, e.g., *In re Guardianship of French*, 927 N.E.2d 950, 960 (Ind. Ct. App. 2010) (applying IC § 34-11-6-1 to claim of unlawful conversion of estate property). Therefore, if Talevski is permitted to invoke it at all (despite having failed to raise it below), the disability provision, as *Dixon* mandates, comes with the exception contained in Indiana's Medical Malpractice Act ("MMA").

Specifically, IC § 34-18-7-1 flatly states that the limitations period for medical malpractice actions applies without regard to "legal disability." *See also Gooley v. Moss*, 398 N.E.2d 1314, 1317 (Ind. Ct. App. 1979). This exception to the "legal disability" tolling rule is a central pillar of Indiana public policy. The MMA, which includes this provision, was designed to stabilize the health care insurance market and limit the liability of qualified health care providers. *See Douglas ex rel. Douglas v. Hugh A. Stallings, M.D., Inc.*, 870 F.2d 1242, 1243 (7th Cir. 1989). Accordingly, it sweeps very broadly, covering claims against qualified health providers "based on the provider's behavior or practices while acting in [its] professional capacity as a provider of medical services." *Metz ex rel. Metz v. Saint Joseph Reg'l Med. Ctr.-Plymouth Campus, Inc.*, 115 N.E.3d 489, 495 (Ind. Ct. App. 2018).

All three appellees are qualified health care providers, and Talevski's claims pertain to HHC's decisions and practices in determining how best to treat him.[7] The

[7] Not surprisingly, the complaint omits any mention of the qualified healthcare status of the defendants. But that strategic choice does not entitle Talevski to avoid the consequences of filing too late. Attached as Exhibits A and B are notices under IC § 34-18-3-6 of the qualified health care status of the appellees: ASC and HHC d/b/a VCR (the real party in interest for both HHC and VCR). These records are publicly available on Indiana Patient's Compensation Fund website (https://www.indianapcf.com) and may be judicially noticed. *See Laborers' Pension Fund v. Blackmore Sewer Constr., Inc.*, 298 F.3d 600, 607 (7th Cir. 2002)

gravamen of Talevski's unlawful restraint claim is that he was improperly administered medication by HHC personnel, *see* A14-15—plainly acts performed within HHC's "professional capacity as a provider of medical services." *See Madison Ctr., Inc. v. R.R.K.*, 853 N.E.2d 1286, 1288-89 (Ind. Ct. App. 2006) ("The . . . failure to properly medicate, restrain, or confine the [patient] who struck and injured [a resident] may have constituted malpractice as to that [patient.]"); *Moyer v. Three Unnamed Physicians from Marion Cty. & Delaware Cty.*, 845 N.E.2d 252, 254 (Ind. Ct. App. 2006) (applying MMA to decision to prescribe medication that may have caused adverse health effects). Similarly, Talevski's unlawful transfer claim is grounded in an assessment by HHC about where his medical condition—namely his dementia and attendant lack of impulse control—could best be treated, as well as how to prevent that condition from causing harm to other patients. *See* A15; A36-37 (noting that Talevski "suffers from . . . unspecified dementia with behavioral disturbance" and Dr. Mirochna's recommendation that Talevski be treated at an all-male facility). Again, this is a professional medical judgment. *See AGM v. Mental Health Ctr.*, No. 2:16-CV-25-PRC, 2016 WL 5848693, *2, *6-7 (N.D. Ind. Oct. 6, 2016) (MMA covers claims related to involuntary commitment and transfer of patient to mental health center to prevent her from hurting herself); *Valencia v. St. Francis Hosp. & Health Ctr.*, No. 1:03-CV-0252-LJM-WTL, 2004 WL 963712, at *7 (S.D. Ind.

(taking judicial notice of ownership of a bank from FDIC website); *Massachusetts v. Westcott*, 431 U.S. 322, 323 n.2 (1977) (taking judicial notice of license "from the records of the Merchant Vessel Documentation Division of the Coast Guard"); s*ee also Terry v. Health & Hosp. Corp. of Marion Cty.*, No. 1:10-cv-00607-DML-JMS, slip op. at 3 (S.D. Ind. Mar. 29, 2012) (noting that ASC and HHC are qualified healthcare providers).

Mar. 1, 2004) (MMA covers claims related to improper transfer of patient under federal statute designed to prevent patient dumping because those claims "depend[ed] in substance on the health care that [the facility] provided or should have provided"). Both the unlawful restraint and the unlawful transfer claims fit comfortably within the ambit of the MMA. Accordingly, this Court should "borrow" the exception to legal disability tolling found in that statute, conclude that such tolling is not available to Talevski, and rule that, on the face of the complaint, his claims are untimely.

E. If This Court Concludes That It Cannot Resolve The Statute-Of-Limitations Issue On This Record, It Should Remand To The District Court For Limited Factual Development On This Issue

This Court has broad discretion to remand and to order "such further proceedings to be had as may be just under the circumstances." *Bell v. McAdory*, 820 F.3d 880, 884 (7th Cir. 2016) (quoting 28 U.S.C. § 2106). And a court of appeals may remand when a matter is best left to the district court to resolve in the first instance or when additional factual development could avoid the resolution of difficult legal questions. *See Int'l Fin. Servs. Corp. v. Chromas Techs. Canada, Inc.*, 356 F.3d 731, 740 (7th Cir. 2004); *Brown v. Plaut*, 131 F.3d 163, 172 (D.C. Cir. 1997). Where appropriate, such a remand may be limited to discrete factual issues. *See Dresser Indus., Inc. v. Pyrrhus AG*, 936 F.2d 921, 932-33 (7th Cir. 1991) (remanding for limited discovery into date on which contract was confirmed).

If the Court determines, contrary to our submission, that it is unable to resolve the statute-of-limitations issue on this record, then it should order a limited remand to resolve any lingering factual questions. There is no reason to decide the novel

private-right-of-action question now if, with a little discovery, this case can be resolved on timeliness grounds alone.[8]

II. The District Court Correctly Held That There Is No Private Right Of Action Under FNHRA

In ordering dismissal of the complaint, the district court reasoned that there was no private right of action under FNHRA, explaining among other things that Talevski's claimed "rights" to care that would "enhance[] . . . quality of life" and achieve his "highest practicable physical, mental, and psychosocial well-being" were simply too amorphous and undefined to be federally enforceable. A6-7. In seeking to overturn that result, Talevski makes no effort to salvage those particular claims (or indeed the vast majority of other claimed FNHRA violations included in his scattershot complaint). Instead, he has significantly narrowed the rights he claims Congress implied through FNHRA. Now, he says, the only "rights" that matter are (i) the "right" to be free of unnecessary chemical restraints found in 42 U.S.C. § 1396r(c)(1)(A)(ii), Br. 6, and (ii) the "right" "against involuntary transfer or discharge" found in 42 U.S.C. § 1396r(c)(2)(A), Br. 7-8. HHC therefore directs its argument to those two alleged rights.[9]

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[8] HHC respectfully requests that this Court otherwise retain jurisdiction over the case.

[9] The district court, of course, dismissed the *entirety* of Talevski's complaint, not just the particular "rights" Talevski selectively attempts to salvage in this appeal. A8. Talevski attempts to preserve the remainder of his claims—about enhancement of quality of life and so on—by claiming that they are subject to resolution at summary judgment because they may implicate factual disputes. Br. 35 n.8. But the district court dismissed those claims on legal, not factual, grounds, and Talevski does not raise any objection to that disposition other than the vague and undeveloped contention that the lower court somehow missed some lurking factual dispute. (Nor did he argue below that those claims implicated factual issues in opposing HHC's motion to dismiss.) Accordingly these arguments are waived. *See, e.g.*,

A. This Court Should Apply The *Blessing* Test

In *Blessing v. Freestone*, 520 U.S. 329 (1997), the Supreme Court set forth the standard courts must apply in evaluating whether a statute implies a private right of action, including for purposes of Section 1983. *Blessing* prescribed a three-factor test: "First, Congress must have intended that the provision in question benefit the plaintiff. Second, the plaintiff must demonstrate that the right assertedly protected by the statute is not so vague and amorphous that its enforcement would strain judicial competence. Third, the statute must unambiguously impose a binding obligation on the States." *Id.* at 340-41.[10] This Circuit has repeatedly applied the *Blessing* test. *See, e.g.*, *BT Bourbonnais Care, LLC v. Norwood*, 866 F.3d 815, 820 (7th Cir. 2017) ("When deciding whether a [statute implies a private right of action], the Court looks at [the *Blessing* factors]."); *Planned Parenthood of Ind., Inc. v. Comm'r of Ind. State Dep't Health*, 699 F.3d 962, 972-73 (7th Cir. 2012) (the *Blessing* factors are the "[t]hree factors [that] help determine whether a federal statute creates private rights enforceable under § 1983").

Talevski nevertheless invites this Court to bypass the *Blessing* inquiry altogether. Because FNHRA uses the word "rights" in certain places, he says, the statute effectively contains an *express* private right of action. Br. 26-29. But Talevski

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Gallo, 907 F.3d at 965 n.1 (arguments not made before the district court are waived); *CNH Indus. Am. LLC v. Jones Lang LaSalle Ams., Inc.*, 882 F.3d 692, 714 (7th Cir. 2018) (argument made in a "cursory" manner in opening brief was waived). Even if this Court rules for Talevski on the chemical restraint and transfer provisions, then, it should affirm the dismissal of his remaining claims.

[10] HHC acknowledges that FNHRA satisfies the third *Blessing* factor.

does not cite any cases, nor do we know of any, in which a court inferred a private right of action solely from a statutory reference to "rights." To the contrary, the principal case Talevski invokes (Br. 26 n.7) says just the opposite. In *Pennhurst State School & Hospital v. Halderman*, 451 U.S. 1 (1981), the Supreme Court considered a statute called the "Developmentally Disabled Assistance and Bill of Rights Act," which not only referred to "rights" but also included a "bill of rights" for the developmentally disabled. 451 U.S. at 8, 13. The Third Circuit had concluded that the statute created an implied private right of action, but the Supreme Court disagreed. In so doing, the Supreme Court rejected the very argument Talevski makes here: "Respondents nonetheless insist that the fact that § 6010 speaks in terms of 'rights' supports their view. Their reliance is misplaced. In expounding a statute, we must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy." *Id.* at 18. *Pennhurst* thus stands for the proposition that a court cannot simply point to the word "rights" and declare its work done.

Talevski attempts to distinguish *Pennhurst*, but his attempt only highlights the necessity of engaging in a careful evaluation of the *Blessing* factors. In Talevski's view, the Court should ignore *Pennhurst* because in that case "the text of the provision [was] unequivocally precatory." Br. 26 n.7. But that is just another way of saying that the text of the provision in *Pennhurst* "unequivocally" failed *Blessing* factor three. *See Blessing*, 520 U.S. at 341 (explaining that third factor is not met where asserted right is "couched in . . . precatory" rather than "mandatory. . . terms").

If the Supreme Court had done what Talevski advocates—identified the word "rights" and on that basis alone found a private right of action—it never would have noted the precatory nature of the statute.

B. FNHRA Does Not Focus Unambiguously On Patients, So It Fails *Blessing* Factor One

The first part of the *Blessing* test is deceptively simple: "Congress must have intended that the provision in question benefit the plaintiff." *Blessing*, 520 U.S. at 340. The Court clarified that standard in two later cases: *Alexander v. Sandoval*, 532 U.S. 275 (2001), and *Gonzaga University v. Doe*, 536 U.S. 273 (2002). In *Alexander*, the Court explained that "[s]tatutes that focus on *the person regulated* rather than *the individuals protected* create no implication of an intent to confer rights on a particular class of persons." 532 U.S. at 289 (emphasis added). The statute at issue in *Alexander*, the Court reasoned, fell short because it "focuse[d] neither on the individuals protected nor even on the funding recipients being regulated, but on the agencies that will do the regulating." *Ibid*

In *Gonzaga*, the Court further retrenched against implying private rights of action. It observed that "[s]ome language in our opinions might be read to suggest that something less than an unambiguously conferred right is enforceable by § 1983," but "now reject[ed] the notion that our cases permit anything short of an unambiguously conferred right to support a cause of action." 536 U.S. at 282-83; *see also Armstrong v. Exceptional Child Care Ctr., Inc.*, 575 U.S. 320, 330 n* (2015) (noting that later Supreme Court opinions "plainly repudiate the ready implication of a § 1983 action"). Such an "unambiguous" right could be found, the *Gonzaga* Court

explained, only through statutes "phrased in terms of the persons benefitted" that have an "*unmistakable focus* on the benefitted class" and use "rights-creating language." 536 U.S. at 284, 290.[11]

This Court has heard the Supreme Court loud and clear. The *Blessing* factors (and the Supreme Court's jurisprudence) "are meant to set the bar high." *Planned Parenthood*, 699 F.3d at 973. The question is fundamentally one of congressional intent, and therefore courts should "begin . . . [their] search for Congress's intent with the text and structure of [the statute at issue]." *Alexander*, 532 U.S. at 288; *see also U.S. Nat'l Bank of Or. v. Indep. Ins. Agents of Am., Inc.*, 508 U.S. 439, 455 (1993) ("Statutory construction . . . must account for a statute's full text, language as well as punctuation, structure, and subject matter.").

1. The Text And Structure Of FNHRA Demonstrate That Congress Did Not Have An "Unmistakable Focus on the Benefited Class"

The particular "rights" Talevski seeks are contained within subsection (c) of 42 U.S.C. § 1396r. The first thing one notices about the chemical restraint "right" Talevski invokes is that it derives from a directive to *nursing facilities*, not a grant of rights to individuals: "A nursing facility must protect and promote . . . [t]he right to be free from . . . physical or chemical restraints" except in certain circumstances. 42 U.S.C. § 1396r(c)(1)(A)(ii). The purported transfer "right" likewise comes from a directive to nursing facilities: "[a] nursing facility must permit each resident to

[11] The Court in *Gonzaga* also made clear that the question whether a private right of action exists is addressed identically in Section 1983 cases and cases outside Section 1983: "[O]ur implied right of action cases should guide the determination of whether a statute confers rights enforceable under § 1983." 536 U.S. at 283.

remain in the facility and must not transfer or discharge the resident from the facility" unless certain vague conditions are met. *Id.* § 1396r(c)(2)(A). Even at first blush, the statute does not have an "unmistakable focus" on the supposed rightsholder. Instead, it lays out conditions by which nursing facilities must abide.

But from there, it gets even worse for Talevski's restraint and transfer claims: There is another layer of intermediaries between the nursing facilities and their patients with respect to those purported rights—the *physicians* that approve the chemical restraints or transfers. FNHRA expressly contemplates their involvement in these kinds of decisions; it is physicians who determine whether restraints are necessary, *see* 42 U.S.C. § 1396r(c)(1)(A)(ii)(II), and physicians who determine whether a patient is a danger to other patients or staff and must be transferred, *see id.* § 1396r(c)(2)(A). FNHRA's text, then, includes as part of the conditions by which nursing homes must abide a further set of conditions on how their doctors must practice, and in so doing it regulates the acts of two intermediaries before reaching any patient. Again, that is not *Gonzaga*'s "unmistakable focus on the benefitted class." 536 U.S. at 287.

And even that is not the end of the attenuation. The structure and subject matter of FNHRA show that the first and most basic targets of regulation are the states that choose to accept the federal funds to participate in the program. "[T]he Medicaid Act (as amended by FNHRA) is a Spending Clause statute." *Anderson v. Ghaly*, 930 F.3d 1066, 1073 n.3 (9th Cir. 2019). Medicaid itself functions as a federal-state program intended to permit states to provide medical care to low-income

residents, *id.* at 1070; states that accept Medicaid funding must agree to comply with certain federal statutes and regulations, though they are free to reject the funding if they wish, *Grammer v. John J. Kane Reg'l Ctrs.-Glen Hazel*, 570 F.3d 520, 523 (3d Cir. 2009). "[L]egislation enacted pursuant to the spending power is much in the nature of a contract: in return for federal funds, the States agree to comply with federally imposed conditions." *Pennhurst*, 451 U.S. at 17.[12] Viewed against this Spending Clause backdrop, FNHRA is not a command to nursing facilities directly as to how their doctors should practice; rather, it tells *states* how they must regulate *nursing facilities* in order to receive Medicaid funding, and *then* it tells nursing facilities how their *doctors* should provide services to individual patients. What FNHRA provides are terms of the states' contract with the federal government. Understanding that structure makes clear that the focus of the statute is *three* levels removed—first states, then nursing facilities, and then doctors—from individuals like Talevski.[13]

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[12] Various members of the Supreme Court have questioned whether Spending Clause statutes can *ever* provide third-party beneficiaries like Talevski with a private right of action, either because contract law at the time Section 1983 was passed did not permit a third-party beneficiary to sue to enforce a contract, *Blessing*, 520 U.S. at 349-50 (Scalia, J., joined by Kennedy, J., concurring), or because "modern jurisprudence permitting intended beneficiaries to sue does not generally apply to contracts between a private party and the government, much less to contracts between two governments," *Armstrong*, 575 U.S. at 332 (plurality op. by Scalia J., joined by Roberts, C.J., and Thomas and Alito, JJ.). Although HHC recognizes that those arguments are foreclosed by Supreme Court and Seventh Circuit precedent, we believe a majority of the current Supreme Court might reach a different result if it were to revisit this issue. Accordingly, HHC raises these arguments in order to preserve them for appeal.

[13] That is true of the two provisions that Talevski has selectively chosen to invoke on appeal. Other provisions do not speak to patients *at all—see, e.g.*, 42 U.S.C. § 1396r(b)(5)(A)(i)(I) (requiring nursing facilities to use only nurse aides who have completed a training course)—

Gonzaga illustrates this point. There, the provisions of the statute at issue "sp[oke] only to the Secretary of Education, directing that [n]o funds shall be made available to any educational agency or institution which has a prohibited policy or practice." *Gonzaga*, 536 U.S. at 287. The focus of the statute was thus "two steps removed from the interests of individual students and parents," *id.*—the statute spoke to the Secretary of Education about how he was to regulate schools. The same is true here—the statute speaks to states about how they are to regulate nursing facilities. But FNHRA goes a step further, because it then tells nursing facilities how their doctors are to treat patients. FNHRA, then, acts on the putative rightsholders in an even more attenuated way than the statute at issue in *Gonzaga*.

And *Gonzaga* provides another textual and structural reason for concluding FNHRA was not intended to create a private right. There, the Supreme Court noted that its "conclusion that [the statute at issue]'s nondisclosure provisions fail to confer enforceable rights [was] buttressed by the mechanism that Congress chose to provide for enforcing those provisions"—namely, an individualized and comprehensive remedial scheme involving the Secretary of Education. *Id.* at 289. Here, and as described in more depth *infra* § III, the text of FNHRA provides for individualized remedies—namely, review of transfers and a grievance process—and also ensures that the Secretary of Health and Human Services is involved in remedying any problems in nursing facilities. Those remedies, as described *infra*, show an

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which strengthens the inference that *no* part of the FNHRA was "unmistakably focus[ed] on the benefitted class." *See U.S. Nat'l Bank of Or.*, 508 U.S. at 455 (statutory construction "must account for a statute's *full* text") (emphasis added).

unmistakable intent to foreclose access to Section 1983. But they also serve another purpose: to show a lack of Congressional intent to create a private right of action. They should "buttress" this Court's conclusion that FNHRA does not contain a private right, just as the analogous provisions in the statute at issue in *Gonzaga* "buttressed" the Supreme Court's decision there.

2. The Case Law Confirms That FNHRA Does Not Have An "Unmistakable Focus on the Benefitted Class"

Most courts that have considered whether FNHRA includes a private right of action have concluded that it does not. *See, e.g.*, *Liptak v. Ramsey Cty.*, 2016 WL 5349429, at *4-6 (D. Minn. Sept. 23, 2016); *Fiers v. La Crosse Cty.*, 132 F. Supp. 3d 1111, 1114-19 (W.D. Wis. 2015); *Schwerdtfeger v. Alden Long Grove Rehab. & Health Care Ctr., Inc.*, 2014 WL 1884471, at *2-6 (N.D. Ill. May 12, 2014); *Terry v. Health & Hosp. Corp. of Marion Cty.*, No. 1:10-cv-00607-DML-JMS, slip op. at 16 (S.D. Ind. Mar. 29, 2012); *Baum v. N. Dutchess Hosp.*, 764 F. Supp. 2d 410, 420-28 (N.D.N.Y. 2011); *Duncan v. Johnson-Mathers Health Care, Inc.*, 2010 WL 3000718, at *5-10 (E.D. Ky. July 28, 2010); *Brogdon ex rel. Cline v. Nat'l Healthcare Corp.*, 103 F. Supp. 2d 1322, 1330-32 (N.D. Ga. 2000). Although the supposed FNHRA "rights" at issue in these cases varied, the courts all correctly concluded that the statute's lack of a focus on patients doomed the argument for a private right of action.

Talevski contends that statutes enacted under the Spending Clause are *always* addressed to the states, and thus our argument, if credited, would foreclose a private right of action in *all* Spending Clause cases. Br. 32-33. That cannot be correct, says Talevski (*id.*), because this Court has found private rights of action in at least three

Spending Clause cases: *Planned Parenthood*, *BT Bourbonnais*, and *Bontrager v. Indiana Family & Social Services Administration*, 697 F.3d 604 (7th Cir. 2012).

But Talevski misses the crucial distinction: The statutes in each of those three cases instructed states what they must provide *directly to the rightsholder*. Congress did not interpose an intermediary between the states and the putative rightsholder. In *Planned Parenthood*, "all State Medicaid plans [must] provide that 'any individual eligible for medical assistance . . . may obtain such assistance from any institution, agency, community pharmacy, or person, qualified to perform the service or services required.'" 699 F.3d at 974 (quoting 42 U.S.C. § 1396a(a)(23)). In *BT Bourbonnais*, the state was required to "provide . . . for a public process for determination of rates of payment under the plan for . . . nursing facility services" for use by nursing facility operators. 866 F.3d at 817 (second alteration in original) (quoting 42 U.S.C. § 1396a(a)(13)(A)). And in *Bontrager*, the state was required "'to provide for making medical assistance available'" to all Medicaid-eligible individuals. 697 F.3d at 606 (quoting 42 U.S.C. § 1396a(a)(10)).

Here, by contrast, the state is not being told what it must provide directly to the putative rightsholder. Instead, it is being told how to regulate certain entities—in this case, nursing facilities—which in turn are required to regulate doctors in a certain manner in order to provide certain services to their patients. The focus upon patients, such as it is, is thus three layers removed from the entities upon which

FNHRA actually acts. Either of these intermediating layers alone would foreclose a finding under the first prong of *Blessing*. Taken together, they are fatal.[14]

This is an easy and straightforward distinction to make. Where Congress orders a state to provide rights directly—as in *Planned Parenthood*, *BT Bourbonnais*, and *Bontrager*—then the statute may satisfy *Blessing*'s first factor. But when Congress chooses to act through intermediaries, there is not the "unmistakable focus on the benefitted class" that *Gonzaga* requires.

Talevski cites two out-of-circuit court cases—*Anderson* and *Grammer*—but neither is persuasive. *Grammer* rests on the same fallacy that Talevski urges—because the statute uses the word "rights," it therefore must contain an implied private right of action. 570 F.3d at 529-30. Moreover, the *Grammer* court acknowledged but failed to accord any significance to the fact that FNHRA speaks to what states must require nursing homes to do, explaining casually that it was "not concerned that the provisions relied upon by the Appellant are phrased in terms of responsibilities imposed on the state or the nursing home." *Id.* at 530. And *Grammer* purported to distinguish *Gonzaga* because the statute in that case "concerned policies

[14] It is easy enough to imagine a statute that grants rights to nursing home residents directly, instead of working through multiple intermediaries. Title VI of the Civil Rights Act of 1964, to pick just one very famous example, grants rights directly; it provides that "[n]o person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." 42 U.S.C. § 2000d. Similarly, FNHRA could have simply said that "no person shall be subject to a physical or chemical restraint except under" certain specified conditions, instead of imposing upon states receiving federal Medicaid funding an obligation to insure that nursing homes "protect and promote . . . [t]he right to be free from . . . any physical or chemical restraints." 42 U.S.C. § 1396r(c)(1)(A)(ii).

and practices that must be in place to obtain federal funding." *Ibid.* But, of course, FNHRA likewise concerns "policies and practices that must be in place to obtain federal funding."[15]

Anderson has the identical flaws. There, the plaintiffs were transferred from facilities against their will and allegedly in violation of FNHRA; the state ruled through its appeal process that the residents should not have been transferred, but the nursing facilities refused to take the patients back, and the state refused to enforce its order. 930 F.3d at 1072. Like *Grammer* (and Talevski), the court focused myopically on the word "rights" within the statute, without reckoning with clear Supreme Court precedent stating that use of that word is not sufficient to establish an implied private right of action. In fact, *Pennhurst* received nary a mention in the court's opinion. And like *Grammer* (and Talevski), the court glossed over the multiple-step nature of FNHRA's command—it noted that FNHRA was enacted as part of the federal-state Medicaid program but overlooked that a directive to states

[15] The *Grammer* decision also drew a dissent. In concluding that no private right of action exists, the dissenting judge correctly emphasized that the provisions at issue in FNHRA "focus . . . on what the nursing facility must do in return for federal funds . . . *not* on the individuals to whom the benefit of each provision flows." *Id.* at 533 (Stafford, J., dissenting). Given its inconsistency with *Gonzaga*, it is no surprise that *Grammer* has been roundly criticized by other courts. In *Duncan*, for example, the district court criticized *Grammer* as "inconsistent" not only "with the Supreme Court's admonition in *Gonzaga* that statutes only display a Congressional intent to create federal rights when their text has an unmistakable focus on the benefitted class," 2010 WL 3000718, at *8, but also "with the Supreme Court's decision in *Pennhurst*, which indicated that there is no presumption of enforceability simply because a statute speaks in terms of rights," *ibid.* In *Baum*, the court cited *Duncan* extensively and "decline[d] to adopt the holding of *Grammer*" for much the same reasons. 764 F. Supp. 2d at 428. And in *Liptak*, the district court noted that "*Grammer* has been met with criticism" and endorsed the "reasoning" of the dissent in *Grammer* as "persuasive." 2016 WL 5349429, at *5-6.

as to how to regulate their nursing homes is not the equivalent of granting individual rights. *Id.* at 1072-74.[16]

3. Talevski's Extratextual Arguments Cannot Show That FNHRA Had An "Unmistakable Focus on the Benefitted Class"

Perhaps sensing the weakness of his textual argument, Talevski cycles through FNHRA's legislative history and supposed purpose. Br. 8-10, 21-23. Such resort to legislative history and purpose is hard to square with the Supreme Court's admonition that "anything short of an unambiguously conferred right" cannot "support a cause of action brought under § 1983." *Gonzaga*, 536 U.S. at 283. Legislative history and purpose, after all, are meant to be used only when a statute itself is *ambiguous*. *See, e.g.*, *Food Mktg. Inst. v. Argus Leader Media*, 139 S. Ct. 2356, 2364 (2019) (when a statute's plain text makes meaning clear, "judges must stop," and not consult legislative history); *Whitfield v. United States*, 543 U.S. 209, 215 (2005) ("Because the meaning of [the statute]'s text is plain and unambiguous, we need not accept petitioners' invitation to consider the legislative history."); *In re Burciaga*, 944 F.3d 681, 684 (7th Cir. 2019) ("Legislative history (and thus legislative intent) may be consulted when a statute is ambiguous."). Put another way, Talevski invokes tools that are available only when a statute is *ambiguous* to show that FNHRA is *unambiguous* in conferring a private right.

[16] *Anderson* was also procedurally quite different from the present case: It was an action against the state health secretary in her individual capacity, not against the nursing facility, and it was fundamentally a suit against the state for failing to provide the plaintiffs an effective remedy for their appeal. *Id.* at 1072-73.

In any event, the Supreme Court has long rejected those methods of interpretation when it comes to implying private rights of action. In *Alexander*, for example, the Court declined to "revert" to an earlier "understanding of private causes of action" based on an atextual belief that Congress must have intended a private right. 532 U.S. at 287. "Having sworn off the habit of venturing beyond Congress's intent [as expressed in the text], we will not accept respondents' invitation to have one last drink." *Ibid.* This Court should decline Talevski's similar invitation.

Talevski contends, however, that Congress *must* have intended a private right of action because otherwise FNHRA wouldn't work as well as some commentators think it should. Br. 9-10, 22 ("The fact that public enforcement mechanisms have failed to protect nursing home residents from widespread abuse is powerful evidence that Congress intended the FNHRA's rights to be privately enforceable."). Reduced to its essentials, Talevski posits that if Congress intended to achieve Goal A with Method 1, but Method 1 does not sufficiently achieve Goal A, then Congress must also have intended Method 2. "But no legislation pursues its purposes at all costs. Deciding what competing values will or will not be sacrificed to the achievement of a particular objective is the very essence of legislative choice—and it frustrates rather than effectuates legislative intent simplistically to assume that *whatever* furthers the statute's primary objective must be the law." *Rodriguez v. United States*, 480 U.S. 522, 525-26 (1987).

C. Talevski's Claimed "Rights" Fail The Second *Blessing* Factor

The second *Blessing* factor requires "the plaintiff [to] demonstrate that the right assertedly protected by the statute is not so 'vague and amorphous' that its

enforcement would strain judicial competence." *Blessing*, 520 U.S. at 340-41 (quoting *Wright v. City of Roanoke Redevelopment & Hous. Auth.*, 479 U.S. 418, 431 (1987)). Talevski fails to make such a showing.

1. The Chemical Restraint Provision Is Too Vague

According to Talevski, the "right" to be free from "unnecessary" chemical restraints is easily enforceable. "The term 'chemical restraints' is not vague," he says, "nor is the obligation amorphous." Br. 34. All a court need ask is whether "the nursing home resident [was] chemically restrained for discipline or convenience." *Id.* at 35.

If the obligations FNHRA imposes were truly that simple, Talevski might have a point. But they aren't. What the statute actually says with regard to chemical restraints is this: "A nursing facility must *protect and promote* the rights of each resident, including each of the following rights . . . [t]he right to be free from physical or mental abuse, corporal punishment, involuntary seclusion, and any physical or chemical restraints imposed for purposes of discipline or convenience and not required to treat the resident's medical symptoms." 42 U.S.C. § 1396r(c)(1)(A)(ii) (emphasis added). In other words, inasmuch as FNHRA conveys any "rights" at all with regard to chemical restraints, it conveys a "right" to have the facility "promote" and "protect" the "right" of patients to be free from restraints except under certain specified circumstances. Talevski ignores that prefatory language, and thereby misidentifies the supposed right.

That makes all the difference. Dictionaries contemporary with FNHRA's passage define "protect" to mean "to defend or guard from attack, invasion, loss,

annoyance, insult, etc.," Random House Dictionary of the English Language 1553 (2d ed. 1987), or "[t]o keep from being damaged, attacked, stolen, or injured; guard," The American Heritage Dictionary of the English Language 1456 (3d ed. 1992). And "promote" is defined as "to help or encourage to exist or flourish; further," Random House Dictionary of the English Language 1548 (2d ed. 1987), or "[t]o contribute to the progress or growth of; further," The American Heritage Dictionary of the English Language 1450 (3d ed. 1992). How is a court to determine whether a nursing facility has sufficiently "protect[ed] and promote[d]" the "right" to be free of unnecessary chemical restraints? Does a facility do enough "to defend or guard [the right] from attack" if it, for example, has a written policy prohibiting unnecessary chemical restraints, though its staff sometimes violates it? Does a facility "help or encourage [the right] to exist or flourish" if one of its doctors concludes that a patient needs a chemical restraint, but a second doctor disagrees? And, of course, the question whether a chemical restraint was necessary "to treat the resident's medical symptoms," 42 U.S.C. § 1396r(c)(1)(A)(ii), is a quintessential medical judgment. Talevski apparently expects federal courts to act as *post hoc* medical review boards, but without the expertise.[17]

[17] And the statute itself would give federal judges few, if any, guideposts in discharging their newfound duties as medical overseers. FNHRA does not suggest how to assess the "purpose" of a restraint; it does not define "discipline" or "convenience"; and it contains no clues for evaluating actions that have more than one purpose (e.g., what if a facility imposes a restraint both to protect other patients and because it is convenient?). The possibilities for complication are endless, and demonstrate that this supposed right is not judicially administrable.

Talevski's own complaint illustrates how difficult it is to enforce the right he asserts. All he says is that he was chemically restrained (A14-15), his family filed a complaint regarding supposed "over-prescribing" (A15), and a different doctor decided to taper the restraints down, A15. (There is no suggestion that the restraints were not actually ordered by a doctor, as the statute commands. *See* 42 U.S.C. § 1396r(c)(1)(A)(ii)(II).)[18] How is a federal court to decide whether the mere fact that two doctors disagreed constitutes a violation of the "right" purportedly conveyed by the statute?[19] And that is just the beginning of the enforceability complications. A court would then have to decide whether HHC "promote[d]" or "protect[ed]" the "right" to be free from unnecessary chemical restraints—if it did a *good enough job* of "help[ing] or encourag[ing] [that 'right'] to exist or flourish"—when one doctor thought a chemical restraint was necessary, but another doctor disagreed. A decision in either direction would require a federal court to second-guess a medical decision.

By contrast, in this Court's *Planned Parenthood* decision, the claimed right was "to obtain medical care from 'any institution, agency, . . . or person, qualified to perform the service.'" 699 F.3d at 968 (quoting 42 U.S.C. § 1396a(a)(23)). This Court had no trouble concluding that such a right was "administrable and f[ell] comfortably within the judiciary's core interpretive competence"; the only question to ask was whether a State "exclude[d] a provider from its Medicaid program for a reason other

[18] Indeed, the use of the word "prescribing," A15, strongly suggests that a doctor *did* order them.

[19] The palpable weakness in Talevski's claim regarding chemical restraint is reason enough, in its own right, for affirming the judgment of dismissal.

than the provider's fitness to render the medical services required." *Id.* at 974. That is a far cry from a standardless inquiry into whether a nursing facility had done *enough* to "promote" or "protect" a given "right"—a right that itself turns on whether the restraint was "required to treat the resident's medical symptoms."

BT Bourbonnais likewise illustrates the contrast. There, the statute laid out precisely "what the procedural requirements are for the process of rate-setting: publication of the proposed rates, methodologies used, and justifications; reasonable opportunity to comment; and publication of the final rates, methodologies, and justifications." 866 F.3d at 821-22. There is no similar explanation present with regard to what qualifies as the "promotion" and "protection" of the freedom from chemical restraint. Indeed, the *BT Bourbonnais* court specifically contrasted the version of the statute before it with a previous version, which simply asked courts to determine whether proposed rates were "reasonable and adequate." *Id.* at 821.[20]

In this crucial respect, FNHRA is much closer to the statute construed by this Court in *Bruggeman ex rel. Bruggeman v. Blagojevich*. The legislation in that case simply told states to "provide such safeguards as may be necessary [in their Medicaid plans] to assure that eligibility for care and services under the plan will be determined, and such care and services will be provided, in a manner consistent with . . . the best interests of the recipients," 42 U.S.C. § 1396a(a)(19). That provision, this Court concluded, was "insufficiently definite to be justiciable." 324 F.3d 906, 911 (7th

[20] Talevski also cites *Grammer* in support, Br. 34, but the *Grammer* court *did not even mention* the "promote and protect" language, 570 F.3d at 528—still more evidence that the Court should accord *Grammer* little if any weight.

Cir. 2003), *superseded by statute on other grounds as recognized by O.B. v. Norwood*, 838 F.3d 837, 843 (7th Cir. 2016). A requirement that a state "safeguard[] . . . the best interests of the recipients" is not meaningfully different from the "protect and promote" language at issue here. And it bears little resemblance to the language this Court found sufficiently concrete in *Planned Parenthood* and *BT Bourbonnais*.

2. The Transfer "Right" Would Strain Judicial Competence

Talevski asserts that the transfer provision conveys a readily enforceable "right" that "nursing home residents not be transferred or discharged except under narrow enumerated circumstances." Br. 34. But among those "narrow enumerated circumstances" are such broad and highly general exceptions as: "the transfer or discharge is necessary to meet the resident's welfare and the resident's welfare cannot be met in the facility," 42 U.S.C. § 1396r(c)(2)(A)(i); "the transfer or discharge is appropriate because the resident's health has improved sufficiently so the resident no longer needs the services provided by the facility," *id.* § 1396r(c)(2)(A)(ii); and "the safety of individuals in the facility is endangered," *id.* § 1396r(c)(2)(A)(iii).

The potential for mischief within those "narrow enumerated circumstances"[21] is enormous. How is a court to determine whether a given resident's medical needs can be met in a facility? Such a question goes to the very core of the doctor-patient

[21] This "narrow enumerated circumstances" language from Talevski's brief appears to be taken fairly directly from the Ninth Circuit's decision in *Anderson*, where the substance of the panel's reasoning on this factor was to describe the exceptions to the general transfer provision as "six narrow circumstances" and to conclude simply that "FNHRA provides six specific criteria for which a transfer or a discharge is permissible, thereby making the substance of an appeals decision quite amenable to judicial consideration." 930 F.3d at 1076, 1078. That reasoning fails to grapple with the difficult questions identified here.

relationship and to a doctor's medical judgment. Comparable questions would present themselves with regard to whether a transfer was warranted because of danger to other patients or staff (or, as here, whether a patient would do better in an all-male facility). How is a court to sit in judgment of such quintessential medical determinations? How much danger is too much? Such vague and standardless inquiries are open invitations to arbitrary decisionmaking.

Again, Talevski's complaint illustrates the enforceability complications. As the complaint acknowledges, VCR determined that Talevski was a danger to others in the facility and sought to transfer him somewhere more appropriate. A15. Following Talevski's successful appeal, HHC opened discussions with his family as to how to return him to its facility, but the family elected to leave him where he was. A16-17. From those bare bones, Talevski claims that a court should now find that HHC "maintain[ed] a policy, practice or custom that deprived Mr. Talevski and other VCR residents, [sic] to remain at the nursing facility and not to be transferred or discharged without due process." A18.[22]

But, as detailed above, FNHRA expressly permits transfers when a patient endangers others in the facility, 42 U.S.C. § 1396r(c)(2)(A)(iii), and the complaint itself says that HHC's reason for Talevski's transfer was "inappropriate behavior towards female residents and staff," A15. So to enforce the putative private right in

[22] Talevski also claims HHC "den[ied him] due process by failing to provide proper and timely notification of any transfer or discharge from the nursing facility." A18. But even assuming that HHC did fail to provide such notice, 42 U.S.C. § 1396r(c)(2)(B)(ii)(I) does not require such notice when the resident is transferred because he is a danger.

this case a court would have to decide whether a patient who repeatedly tried to lure female residents into his room, made inappropriate sexual advances on them, and, at one point, *threatened a staff member with a knife*, A36-37, was enough of a danger to residents and staff that he could be transferred involuntarily. The answer seems obvious enough in this case—*of course* Talevski was a danger when he pulled a knife on a staff member. But the larger point is that a court would have no standards to guide it in making such decisions in the wide swath of more complex claims that a private right of action would inevitably spawn.

In short: Because FNHRA fails two of the three *Blessing* factors, Congress did not intend to imply a private right of action. *See, e.g.*, *Blessing*, 520 U.S. at 342-45 (finding lack of private right where statutory provisions at issue failed to satisfy the first *Blessing* factor); *Bruggeman*, 324 F.3d at 911 (finding lack of private right where statutory provisions at issue failed to satisfy the second *Blessing* factor).

III. Even If There Is An Implied Right Of Action, Congress Foreclosed Any Private Remedy Enforceable Under Section 1983 By Including In FNHRA A Comprehensive Federal And State Remedial Scheme

"Even if a plaintiff demonstrates that a federal statute creates an individual right, there is only a rebuttable presumption that the right is enforceable under § 1983." *Blessing*, 520 U.S. at 341. Courts must still examine whether Congress intended to preempt a remedy under Section 1983. "Congress may do so expressly, by forbidding recourse to § 1983 in the statute itself, or impliedly, by creating a comprehensive enforcement scheme that is incompatible with individual enforcement under § 1983." *Id.* Here, the statute evidences just such an intent, because it both provides for a comprehensive federal and state enforcement scheme and gives

individuals recourse through mechanisms other than Section 1983. "Congress's choices about enforcement authority have consequences: 'The express provision of one method of enforcing a substantive rule suggests that Congress intended to preclude others.'" *Stewart v. Parkview Hosp.*, 940 F.3d 1013, 1015 (7th Cir. 2019) (quoting *Alexander*, 532 U.S. at 290).[23]

The federal and state enforcement scheme is detailed and extensive. 42 U.S.C. § 1396r(g)(2)(A) lays out a requirement for an "[a]nnual standard survey," which requires every nursing facility receiving Medicaid money to be subject to a yearly unannounced inspection to verify its compliance with FNHRA. If a state finds on the basis of one of those surveys that a facility is out of compliance with FNHRA, it has at its disposal a wide variety of remedies. For example, it can deny payment to the facility under Medicaid, assess a civil monetary penalty against the facility, appoint temporary management of the facility, or even close the facility and transfer its residents. *Id.* § 1396r(h)(2)(A)(i)-(iv). Those are exceptionally comprehensive remedies, providing for a variety of corrective actions that can be taken against any non-compliant facility. Indeed, the court in *Anderson* noted the existence of these remedies; it referred to them as "federal provisions for compelling nursing home compliance" and contrasted them with the lack of available remedies against states refusing to exercise their power. 930 F.3d at 1080.

[23] HHC did not argue this point before the district court. Nevertheless, this Court can "affirm the district court's dismissal on any ground supported by the record." *Effex Capital*, 933 F.3d at 885 n.4.

But the statute's available remedies do not stop there. 42 U.S.C. § 1396r(h)(3)(A) also provides the Secretary with *all the powers available to the states* when regulating state-owned facilities. And Section 1396r(h)(3)(B)-(C) gives the Secretary other powers with regard to non-state-owned facilities; she can deny payment under Medicaid, impose civil monetary penalties, or appoint temporary management. Indeed, the statute's remedial scheme is so comprehensive that it includes specific rules of decision for when a state and the Secretary disagree on a finding of noncompliance. *Id.* § 1396r(h)(6). It would make little sense for Congress to lay out such a comprehensive system of remedies available to both states and the Secretary—remedies that far outstrip a mere denial of federal funding, as in *Fitzgerald v. Barnstable Sch. Comm.*, 555 U.S. 246, 255-56 (2009), or the "limited powers to audit and cut federal funding" in *Blessing*, 520 U.S. at 348—and then permit facility residents to avoid them entirely through a Section 1983 damages action.

FNHRA's *individualized* remedies are also telling. With respect to transfers, states are required to "provide for a fair mechanism . . . for hearing appeals on transfers and discharges of residents of such facilities." 42 U.S.C. § 1396r(e)(3). That mechanism must also comply with guidelines the Secretary promulgates "establish[ing] . . . minimum standards which State appeals processes under subsection (e)(3) must meet to provide a fair mechanism for hearing appeals on transfers and discharges of residents from nursing facilities." *Id.* § 1396r(f)(3). "Offering [Talevski] a direct route to court via § 1983 would have circumvented these

procedures and given [him] access to tangible benefits—such as damages, attorney's fees, and costs—that [are] unavailable under the [FNHRA]." *Fitzgerald*, 555 U.S. at 254. Indeed, Talevski took advantage of the individual transfer remedy prescribed by FNHRA through his transfer appeal before the ISDH. A15-16. Talevski claims in a footnote that these procedures provide a "complement[]" to Section 1983's damages remedy, Br. 39-40 n.9, but *Fitzgerald* shows that courts should not readily infer access to remedies not provided by a statutory scheme.

Talevski has an individualized remedy for his chemical restraint claim as well. FNHRA requires that facilities provide the ability to "voice grievances with respect to treatment or care that is (or fails to be) furnished." 42 U.S.C. § 1396r(c)(1)(A)(vi). The Secretary has given that remedy further contour by issuing regulations mandating an individualized grievance process for facility residents, 42 C.F.R. § 483.10(j), with recourse first to the facility itself and then, if necessary, to an independent arbiter such as a state agency, *id.* § 483.10(j)(4)(i). The grievances that can be voiced include "those with respect to care and treatment which has been furnished as well as that which has not been furnished." *Id.* § 483.10(j)(1); *see also Liptak*, 2016 WL 5349429, at *4 (discussing Section 483.10 in connection with FNHRA). Those regulations, of course, "authoritatively construe the statute itself," *Alexander*, 532 U.S. at 284, and therefore are valid expressions of Congress's intent. And the direction to establish an individualized grievance process, with the implicit expectation that the Secretary would fill in the interstices, suggests strongly that Congress did not impliedly authorize patients to deploy a supplemental remedy in

federal court in the form of a Section 1983 action. Talevski made use of this grievance process, *see* A15 (alleging Talevski filed a "formal complaint" with ISDH), but fails to reckon with the implications of that express and comprehensive remedy for purposes of implying a separate Section 1983 remedy.[24]

Against this clear evidence that the express remedies are exclusive, Talevski offers three rejoinders. First, he appears to believe that the statute must contain a "private enforcement scheme" in order to preclude a Section 1983 remedy. Br. 43. But first, the statute *does* contain private enforcement mechanisms, as just explained. In any event, the argument is sheer question-begging; if the statute contained an *express* private right of action, then there would be no need for an *implied* private right of action in the first place.

Second, Appellant invokes (Br. 43) FNHRA's "savings clause," which provides that "[t]he remedies provided under this subsection are in addition to those otherwise available under State or Federal law and shall not be construed as limiting such other remedies, including any remedy available to an individual at common law." 42 U.S.C. § 1396r(h)(8). Talevski asserts that this language was designed to preserve access to Section 1983. But there is no good reason to think so. By preserving "otherwise available" remedies under state and federal law, the clause is best read to preserve

[24] And there is yet another remedy available to Talevski: a state-law medical malpractice claim. If VCR employees really were chemically restraining Talevski illegally, then he could bring a suit in state court advancing that claim. *See, e.g.*, *Chessie Logistics Co. v. Krinos Holdings, Inc.*, 867 F.3d 852, 858 (7th Cir. 2017) ("[A]s a general matter, rail carriers already have legal remedies against interference with their operations. They are the same remedies available to every property owner whose property is damaged: state-law tort claims."). Talevski has not even suggested that such a remedy is inadequate. *See id.* at 858.

existing state law causes of action (such as malpractice lawsuits),[25] along with federal procedural remedies the Secretary is authorized by the statute to promulgate. By contrast, it is hard to imagine that Congress was seeking to preserve a private remedy that it did not see fit to actually enact.

Finally, Talevski reiterates his contention that supplementing Congress's handiwork would "advance the statute's core purpose." Br. 44. But federal courts are not in the business of amending statutes, even when doing so might arguably promote a congressional goal. "[I]t frustrates rather than effectuates legislative intent simplistically to assume that whatever furthers the statute's primary objective must be the law." *Rodriguez*, 480 U.S. at 525-26.

Conclusion

For all of the foregoing reasons, the judgment should be affirmed.

[25] Notably, Talevski's preferred reading of the savings clause would gut key provisions of Indiana law that cap damages for medical malpractice, *see* IC § 34-18-14-3, along with attorney's fees, *id.* § 34-18-18-1. No rational plaintiff would sue under those laws instead of under Section 1983—which has no cap on damages and permits a full award of attorneys' fees for a successful plaintiff—if this Court were to find an implied private right of action.

Dated: September 29, 2020

Respectfully submitted,

By: s/ Lawrence S. Robbins

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Certificate of Compliance

The foregoing brief complies with the type-volume limitation of Circuit Rule 32(c). The brief contains 12420 words, excluding those parts of the brief exempted by Federal Rule of Appellate Procedure 32(f). This brief complies with the typeface and type-style requirements of Federal Rule of Appellate Procedure 32(a)(5)-(6) and Circuit Rule 32(b) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 365 (2016) in Century 12-point font.

Dated: September 29, 2020

/s/ Lawrence S. Robbins
Lawrence S. Robbins
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Certificate of Service

Pursuant to Federal Rule of Appellate Procedure 25, I hereby certify that on September 29, 2020, I electronically filed the foregoing Brief of Appellant via ECF, and service was accomplished on counsel of record by that means.

Dated: September 29, 2020

s/ Lawrence S. Robbins
Lawrence S. Robbins
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EXHIBIT A

STATE OF INDIANA

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STATE OF INDIANA
PATIENT'S COMPENSATION FUND
311 WEST WASHINGTON STREET, SUITE 300
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(317)232-2402

September 29, 2020

American Senior Communities, LLC
6900 S Gray Road

Indianapolis, IN 46237

Dear Health Care Provider:

Pursuant to I.C. 34-18-3-6, you are notified that the Indiana Patient's Compensation Fund has received proof of financial responsibility for your compliance as a qualified health care provider under the Indiana Medical Malpractice Act for the below policy period.

Surcharge Received On	**01/26/2016**
Policy Number	**HHC LTC PL-GL 16**
Policy Type	**Occurrence**
Insurance Company	**Lions Insurance Company**
Coverage Start Date	**01/01/2016**
Coverage End Date	**01/01/2017**
Limit Per Occurrence	**$250,000.00**
Limit Annual Aggregate	**$750,000.00**
Surcharge Amount Paid	**$100.00**
Retroactive Date	
Specialty Code	**80999**
Specialty Description	**CORPORATE & OTHER LEGAL ENTITIES**

If you have any questions regarding this matter, please contact your agent, or your insurance company, or our office.

STATE OF INDIANA

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Surcharge Received On	**01/23/2017**
Policy Number	**HHC LTC PL-GL 17**
Policy Type	**Occurrence**
Insurance Company	**Lions Insurance Company**
Coverage Start Date	**01/01/2017**
Coverage End Date	**01/01/2018**
Limit Per Occurrence	**$250,000.00**
Limit Annual Aggregate	**$750,000.00**
Surcharge Amount Paid	**$100.00**
Retroactive Date	
Specialty Code	**80999**
Specialty Description	**CORPORATE & OTHER LEGAL ENTITIES**

If you have any questions regarding this matter, please contact your agent, or your insurance company, or our office.

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Surcharge Received On	**6/30/2017 1:42:42 PM**
Policy Number	**HHC LTC PL-GL 17**
Policy Type	**Occurrence**
Insurance Company	**Lions Insurance Company**
Coverage Start Date	**1/1/2017 12:00:00 AM**
Coverage End Date	**1/1/2018 12:00:00 AM**
Limit Per Occurrence	**400000**
Limit Annual Aggregate	**1200000**
Surcharge Amount Paid	**0**
Retroactive Date	
Specialty Code	**80999**
Specialty Description	**CORPORATE & OTHER LEGAL ENTITIES**
Current Confirmation Number	**1150878**
Original Confirmation Number	**1117185**
Most Recent Confirmation Number ...	**1117185**

Amended effective 7/1/2017. Surcharge amount change of 0.

If you have any questions regarding this matter, please contact your agent, or your insurance company, or our office.

STATE OF INDIANA

ERIC J. HOLCOMB, GOVERNOR

Indiana Department of Insurance
Stephen W. Robertson, Commissioner
311 W. Washington Street, Suite 103
Indianapolis, Indiana 46204-2787
Telephone: (317) 232-2385
Fax: (317) 232-5251
Website: in.gov/idoi

STATE OF INDIANA
PATIENT'S COMPENSATION FUND
311 WEST WASHINGTON STREET, SUITE 300
INDIANAPOLIS, IN 46204-2787
(317)232-2402

September 29, 2020

American Senior Communities, LLC
6900 S Gray Road

Indianapolis, IN 46237

Dear Health Care Provider:

Pursuant to I.C. 34-18-3-6, you are notified that the Indiana Patient's Compensation Fund has received proof of financial responsibility for your compliance as a qualified health care provider under the Indiana Medical Malpractice Act for the below policy period.

Surcharge Received On	**01/30/2018**
Policy Number	**HHC LTC PL-GL 18**
Policy Type	**Occurrence**
Insurance Company	**Lions Insurance Company**
Coverage Start Date	**01/01/2018**
Coverage End Date	**01/01/2019**
Limit Per Occurrence	**$400,000.00**
Limit Annual Aggregate	**$1,200,000.00**
Surcharge Amount Paid	**$100.00**
Retroactive Date	
Specialty Code	**80999**
Specialty Description	**CORPORATE & OTHER LEGAL ENTITIES**

If you have any questions regarding this matter, please contact your agent, or your insurance company, or our office.

STATE OF INDIANA

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Surcharge Received On	**01/29/2019**
Policy Number	**HHC LTC PL-GL 19**
Policy Type	**Occurrence**
Insurance Company	**Lions Insurance Company**
Coverage Start Date	**01/01/2019**
Coverage End Date	**01/01/2020**
Limit Per Occurrence	**$400,000.00**
Limit Annual Aggregate	**$1,200,000.00**
Surcharge Amount Paid	**$100.00**
Retroactive Date	
Specialty Code	**80999**
Specialty Description	**CORPORATE & OTHER LEGAL ENTITIES**

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Surcharge Received On	**7/8/2019 3:36:41 PM**
Policy Number	**HHC LTC PL-GL 19**
Policy Type	**Occurrence**
Insurance Company	**Lions Insurance Company**
Coverage Start Date	**1/1/2019 12:00:00 AM**
Coverage End Date	**1/1/2020 12:00:00 AM**
Limit Per Occurrence	**500000**
Limit Annual Aggregate	**1500000**
Surcharge Amount Paid	**0**
Retroactive Date	
Specialty Code	**80999**
Specialty Description	**CORPORATE & OTHER LEGAL ENTITIES**
Current Confirmation Number	**1286451**
Original Confirmation Number	**1245705**
Most Recent Confirmation Number ...	**1245705**

Amended effective 7/1/2019. Surcharge amount change of 0.

If you have any questions regarding this matter, please contact your agent, or your insurance company, or our office.

STATE OF INDIANA

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Pursuant to I.C. 34-18-3-6, you are notified that the Indiana Patient's Compensation Fund has received proof of financial responsibility for your compliance as a qualified health care provider under the Indiana Medical Malpractice Act for the below policy period.

Surcharge Received On	**02/20/2020**
Policy Number	**HHC LTC PL-GL 20**
Policy Type	**Occurrence**
Insurance Company	**Lions Insurance Company**
Coverage Start Date	**01/01/2020**
Coverage End Date	**01/01/2021**
Limit Per Occurrence	**$500,000.00**
Limit Annual Aggregate	**$1,500,000.00**
Surcharge Amount Paid	**$100.00**
Retroactive Date	
Specialty Code	**80999**
Specialty Description	**CORPORATE & OTHER LEGAL ENTITIES**

If you have any questions regarding this matter, please contact your agent, or your insurance company, or our office.

EXHIBIT B

STATE OF INDIANA

ERIC J. HOLCOMB, GOVERNOR

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(317)232-2402

September 29, 2020

Health and Hospital Corporation of Marion County d/b/a Valparaiso Care and Rehabilitation
606 Wall Street

Valparaiso, IN 46383

Dear Health Care Provider:

Pursuant to I.C. 34-18-3-6, you are notified that the Indiana Patient's Compensation Fund has received proof of financial responsibility for your compliance as a qualified health care provider under the Indiana Medical Malpractice Act for the below policy period.

Surcharge Received On	**01/26/2016**
Policy Number	**HHC LTC PL-GL 16**
Policy Type	**Occurrence**
Insurance Company	**Lions Insurance Company**
Coverage Start Date	**01/01/2016**
Coverage End Date	**01/01/2017**
Limit Per Occurrence	**$250,000.00**
Limit Annual Aggregate	**$1,250,000.00**
Surcharge Amount Paid	**$12,713.00**
Retroactive Date	
Specialty Code	**80923**
Specialty Description	**NURSING HOME**

If you have any questions regarding this matter, please contact your agent, or your insurance company, or our office.

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606 Wall Street

Valparaiso, IN 46383

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Surcharge Received On	**01/23/2017**
Policy Number	**HHC LTC PL-GL 17**
Policy Type	**Occurrence**
Insurance Company	**Lions Insurance Company**
Coverage Start Date	**01/01/2017**
Coverage End Date	**01/01/2018**
Limit Per Occurrence	**$250,000.00**
Limit Annual Aggregate	**$1,250,000.00**
Surcharge Amount Paid	**$12,713.00**
Retroactive Date	
Specialty Code	**80923**
Specialty Description	**NURSING HOME**

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Surcharge Received On	**6/30/2017 1:42:40 PM**
Policy Number	**HHC LTC PL-GL 17**
Policy Type	**Occurrence**
Insurance Company	**Lions Insurance Company**
Coverage Start Date	**1/1/2017 12:00:00 AM**
Coverage End Date	**1/1/2018 12:00:00 AM**
Limit Per Occurrence	**400000**
Limit Annual Aggregate	**2000000**
Surcharge Amount Paid	**0**
Retroactive Date	
Specialty Code	**80923**
Specialty Description	**NURSING HOME**
Current Confirmation Number	**1150870**
Original Confirmation Number	**1117177**
Most Recent Confirmation Number ...	**1117177**

Amended effective 7/1/2017. Surcharge amount change of 0.

If you have any questions regarding this matter, please contact your agent, or your insurance company, or our office.

STATE OF INDIANA

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Surcharge Received On	**01/30/2018**
Policy Number	**HHC LTC PL-GL 18**
Policy Type	**Occurrence**
Insurance Company	**Lions Insurance Company**
Coverage Start Date	**01/01/2018**
Coverage End Date	**01/01/2019**
Limit Per Occurrence	**$400,000.00**
Limit Annual Aggregate	**$2,000,000.00**
Surcharge Amount Paid	**$12,713.00**
Retroactive Date	
Specialty Code	**80923**
Specialty Description	**NURSING HOME**

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Surcharge Received On	**01/29/2019**
Policy Number	**HHC LTC PL-GL 19**
Policy Type	**Occurrence**
Insurance Company	**Lions Insurance Company**
Coverage Start Date	**01/01/2019**
Coverage End Date	**01/01/2020**
Limit Per Occurrence	**$400,000.00**
Limit Annual Aggregate	**$2,000,000.00**
Surcharge Amount Paid	**$12,167.00**
Retroactive Date	
Specialty Code	**80923**
Specialty Description	**NURSING HOME**

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Surcharge Received On	**7/8/2019 3:36:40 PM**
Policy Number	**HHC LTC PL-GL 19**
Policy Type	**Occurrence**
Insurance Company	**Lions Insurance Company**
Coverage Start Date	**1/1/2019 12:00:00 AM**
Coverage End Date	**1/1/2020 12:00:00 AM**
Limit Per Occurrence	**500000**
Limit Annual Aggregate	**2500000**
Surcharge Amount Paid	**0**
Retroactive Date	
Specialty Code	**80923**
Specialty Description	**NURSING HOME**
Current Confirmation Number	**1286443**
Original Confirmation Number	**1245696**
Most Recent Confirmation Number ...	**1245696**

Amended effective 7/1/2019. Surcharge amount change of 0.

If you have any questions regarding this matter, please contact your agent, or your insurance company, or our office.

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Surcharge Received On	**02/20/2020**
Policy Number	**HHC LTC PL-GL 20**
Policy Type	**Occurrence**
Insurance Company	**Lions Insurance Company**
Coverage Start Date	**01/01/2020**
Coverage End Date	**01/01/2021**
Limit Per Occurrence	**$500,000.00**
Limit Annual Aggregate	**$2,500,000.00**
Surcharge Amount Paid	**$12,167.00**
Retroactive Date	
Specialty Code	**80923**
Specialty Description	**NURSING HOME**

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