No. 20-1664

In the United States Court of Appeals for the Seventh Circuit

GORGI TALEVSKI, by 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)

REPLY BRIEF OF APPELLANT

Jay Meisenhelder
JAY MEISENHELDER EMPLOYMENT & CIVIL RIGHTS LEGAL SERVICES, P.C.
650 North Girls School Road, Suite D40
Indianapolis, IN 46214
(317) 231-5193
jaym@ecrls.com

Susie Talevski
429 Hampshire Ct.
Valparaiso, IN 46385
TalevskiLaw@gmail.com

Andrew T. Tutt
R. Stanton Jones
Stephen K. Wirth
Nora G. Ellingsen*
ARNOLD & PORTER KAYE SCHOLER LLP
601 Massachusetts Ave., N.W.
Washington, DC 20001
(202) 942-5000
andrew.tutt@arnoldporter.com

**Admitted outside the District of Columbia; practicing law in D.C. under the supervision of Firm principals who are D.C. Bar members.*

Counsel for Gorgi Talevski

November 3, 2020

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Constitutional Provisions

Statutes

Legislative Materials

Other Authorities

INTRODUCTION

The text of the statute is unmistakable: The Federal Nursing Home Reform Act of 1987 ("FNHRA") confers federal "rights"—explicitly using the word "right" to describe the protection it confers—on nursing home residents. By its plain text, and under the three-part test from *Blessing v. Freestone*, 520 U.S. 329, 340–41 (1997), the FNHRA confers enforceable federal rights against state-run nursing homes under 42 U.S.C. § 1983. The Court should reverse.

ARGUMENT

I. Appellees Do Not Dispute Key Facts and Legal Arguments

Appellees do not dispute that every appellate court to have considered the question has ruled that the FNHRA creates federal rights against chemical restraint and involuntary discharge or transfer. *See* Br. 23–26. With respect to the cause of action, Appellees do not dispute that Appellees acted under color of state law for purposes of § 1983. *See id.* at 17 n.4. Appellees do not dispute that the Health and Hospital Corporation of Marion County's (HHC's) status as a publicly owned nursing home makes it subject to suit under § 1983. *See id.* Nor do Appellees dispute that American Senior Communities (ASC) is a proper defendant because it acted jointly with HHC. *See id.* With respect to FNHRA's purpose, Appellees do not dispute that Congress enacted the FNHRA to improve the federal statutory protections for nursing home residents. *See id.* at 20–22. Appellees do not dispute that systematic underenforcement of the FNHRA is a serious problem. *See id* at 8–10. And tellingly, Appellees do not dispute that Congress intended to create enforceable rights in the FNHRA; they argue only that Congress's purposes should be irrelevant. *See* Resp. 30–31, 43.

The last point is especially crucial. Congress's decision to provide nursing home residents with enforceable rights under § 1983 is reflected not only in the text of § 1983 and the FNHRA but in Congress's broader purposes in enacting them. As the law professors who filed an *amicus* brief in support of Mr. Talevski explain, Congress wrote § 1983 in sweeping terms to protect individuals' federal rights to the fullest extent of federal power. *See* Law Professors Amicus, Dkt. 26, at 5–8. And as the law professors, the AARP, and the National Health Law Program (NHLP), all explain, alongside the numerous interested groups that joined their briefs, Congress intended to create enforceable federal rights in the Medicaid Act and the FNHRA. *See id.* at 17–25; AARP Amicus, Dkt. 22, at 6–7, 13–14; NHLP Amicus, Dkt. 25, at 4–19. That fact is undisputed and undisputable.

II. The Argument That § 1983 Will Disrupt State Medical Malpractice Schemes Is Simultaneously Wrong and Irrelevant

The enforceable rights in the FNHRA *supplement* existing state and federal enforcement schemes; they do not disrupt them. Congress created rights in the FNHRA because nursing homes had an abysmal record of abuses. FNHRA enforcement by state and federal regulators has failed to curb those abuses, as the AARP well explains. *See, e.g.*, AARP Amicus, Dkt. 22, at 9–13, 22–23 ("[T]he prevalence of abuse and neglect in nursing facilities and the failure of regulatory authorities to hold them accountable create an urgent need for residents to use every tool of redress and deterrence available to protect themselves from harm."); *see also* Br. 10 (collecting sources).

Appellees and their *amici* object that honoring Congress's decision to permit residents to sue nursing homes that violate their rights would "disrupt state Medicaid

programs, state nursing-home regulation, and state medical-malpractice policies." States Amicus, Dkt. 41, at 1–2, 14–15; *see also* Resp. 42–43 & nn.24–25 (arguing that permitting § 1983 enforcement would "gut key provisions of Indiana law" governing medical malpractice liability); Health Care Associations Amicus, Dkt. 50, at 3 (arguing § 1983 is unnecessary). That argument is simultaneously wrong and beside the point.

The argument is wrong because violations of the FNHRA's rights against chemical restraint and involuntary discharge and transfer are *intentional* torts. They are not like medical malpractice claims which typically sound in negligence. Additionally, Congress deliberately enacted the FNHRA with rights it intended to be enforced, *see* NHLP Amicus, Dkt. 25, *passim*, and it should be obvious that Congress cannot "disrupt" a scheme *it designed*. Moreover, it is undisputed that Congress enacted the FNHRA because the ability to bring state–law tort suits was *not enough* to combat widespread nursing home abuse. *See* Br. 4–5. And the continuing epidemic of nursing home abuse and neglect shows that, without robust § 1983 enforcement, the scheme is still not working. *See* AARP Amicus, Dkt. 22, *passim*.

The argument that permitting § 1983 enforcement would disrupt the existing scheme is also beside the point because Congress chose to give nursing home residents enforceable federal rights in the FNHRA. That should be the end of the matter. Since Congress enacted § 1983 in 1871 the statute has "disrupt[ed]" state enforcement schemes. That is the whole idea. And it should go without saying that any scheme that leads to the kind of abuse Mr. Talevski suffered—and the widespread pattern of abuse that Mr. Talevski and the *amici* supporting him have documented—deserves to be disrupted.

III. Appellees' Statute of Limitations Argument Is Wrong Twice Over

This lawsuit cannot be dismissed as time–barred. This is not a close question. Dismissal on the basis of the statute of limitations here is precluded for two independent reasons: (1) The period of limitations is an affirmative defense on which a 12(b)(6) motion cannot be granted; and (2) the statute of limitations is tolled because Mr. Talevski is under legal disability by reason of his dementia.

A. A Complaint Cannot Be Dismissed for "Failure to State a Claim" Under Rule 12(b)(6) on the Basis of a Statute of Limitations Defense

Appellees' statute of limitations argument fails for a simple reason: A motion to dismiss under Rule 12(b)(6) cannot be used to mount a statute of limitations defense. *See Richards v. Mitcheff*, 696 F.3d 635, 637–38 (7th Cir. 2012) (Easterbrook, C.J.). "The period of limitations is an affirmative defense," and "[c]omplaints need not anticipate defenses and attempt to defeat them," *id.* at 637. Thus, this Court has "held many times that, because complaints need not anticipate defenses, Rule 12(b)(6) is not designed for motions under Rule 8(c)(1)," and a complaint that states a plausible claim "could not properly be dismissed under Rule 12(b)(6)." *Id.* Mr. Talevski's complaint stated a plausible claim; that was sufficient to survive a motion to dismiss for "failure to state" a claim. *See id.* at 637–38. The district court thus correctly declined to rule on Appellees' statute of limitations argument on a motion to dismiss. This Court should follow suit.

B. Defendants' Statute of Limitations Defense Fails Because § 1983 Borrows Indiana's Statute of Limitations for Personal Injury Actions, Including Its Tolling Provisions

Appellees' statute of limitations defense also fails because Mr. Talevski's claims were tolled by reason of his dementia. "For claims brought under § 1983, [this

Court] borrow[s] the limitations period and tolling rules applicable to personal-injury claims under state law." *Devbrow v. Kalu*, 705 F.3d 765, 767 (7th Cir. 2013); *see Richards*, 696 F.3d at 637 ("Suits under § 1983 use the statute of limitations and tolling rules that states employ for personal-injury claims."); *Granger v. Rauch*, 388 F. App'x 537, 541 (7th Cir. 2010) ("Section 1983 borrows not only the state statute of limitations for personal-injury claims but also all related state tolling rules."). "Indiana allows two years" under Indiana Code § 34-11-2-4. *Richards*, 696 F.3d at 637. Indiana tolls that statute of limitations when a person is under "legal disability." Ind. Code § 34-11-6-1. And dementia is an archetypical legal disability. *See id.* § 1-1-4-5(12) & (24); *see also Whitlock v. Steel Dynamics, Inc.*, 35 N.E.3d 265, 270 (Ind. Ct. App. 2015).[1] Mr. Talevski has had dementia at all times relevant to this lawsuit (indeed, this suit is being brought and maintained by his legal guardian). Therefore, because Indiana's personal injury statute would be tolled in these circumstances, and because § 1983 borrows "the tolling rules" applicable to the personal injury statute, the statute of limitations under § 1983 is tolled here as well. *See* Br.16 n.2.

Appellees' counterarguments all fail.

First, contrary to Appellees' argument, Resp.13, Mr. Talevski's tolling argument is not "waived." Appellees have it backwards. The district court (correctly) declined to pass on Appellees' procedurally improper statute of limitations argument in ruling on the motion to dismiss. *See Richards*, 696 F.3d at 637–38. This Court thus has no obligation to

[1] Indiana's constitution also "requires the judiciary to toll time limits for incapacitated persons." *Richards*, 696 F.3d at 637 (citing Ind. Const. art. I, § 12). Mr. Talevski may also be able to establish incapacity on remand.

reach this argument at all: "It is the general rule … that a federal appellate court does not consider an issue not passed upon below," *Singleton v. Wulff*, 428 U.S. 106, 120 (1976); *accord Exxon Shipping Co. v. Baker*, 554 U.S. 471, 487 (2008). Indeed, "affirming on legal grounds not considered by the trial court is disfavored." *Rimbert v. Eli Lilly & Co.*, 647 F.3d 1247, 1256 (10th Cir. 2011). Thus, "waiver" on the basis of arguments made to the district court has no place here because Appellees are asking this Court to rule on this issue in the first instance in this case; they are not asking the Court to affirm the correctness of a decision already reached by the court below. The arguments made to the court below are therefore irrelevant. All of the cases Appellees cite upholding a claim of waiver for failing to preserve an argument in district court, Resp. 13, are inapposite because in every one of those cases the district court ruled on the issue; none involved waiver in the context of an Appellee urging a court of appeals to affirm on alternative grounds not reached below. Mr. Talevski may raise any argument opposing affirmance on an alternative ground not ruled on below.

Second, contrary to Appellees' argument, Resp. 13–17, legal disability tolling under Indiana Code § 34-11-6-1 applies in this case. Legal disability tolling applies to personal injury claims in Indiana and thus applies to § 1983 claims that "borrow" that statute of limitations. Appellees concede that § 1983 "borrow[s] the limitations period *and tolling rules* applicable to personal-injury claims under state law." *Devbrow*, 705 F.3d at 767 (emphasis added); *see* Resp. 13. Appellees concede, as they must, that § 34-11-6-1 is a *tolling rule* applicable to personal-injury claims. Resp. 13–17. *See Tolling Statute*, Black's Law Dictionary (11th ed. 2019) (defining a "tolling statute" as "[a] law that

interrupts the running of a statute of limitations in certain situations"). And personal injury actions in Indiana have been subject to legal disability tolling for over 130 years. *See Whitlock*, 35 N.E.3d at 270 (addressing legal disability tolling in the context of a personal injury claim); *LaCava v. LaCava*, 907 N.E.2d 154, 162 (Ind. Ct. App. 2009) (same); *Collins v. Dunifon*, 323 N.E.2d 264, 266–68 (Ind. Ct. App. 1975) (same); *Lehman v. Scott*, 14 N.E. 914, 915-16 (Ind. 1888) (same).

Appellees argue "Indiana's Medical Malpractice statute expressly forecloses resort to the 'legal disability' tolling provision *for cases like this one*[.]" Resp. 14 (emphasis added). It is unclear what Appellees mean by "cases like this one" but whatever they mean, they are wrong. The Supreme Court has made clear that § 1983 actions borrow the statute of limitations and tolling rules applicable to personal injury actions regardless of the federal right at issue or the underlying facts giving rise to the claim. "If the choice of the statute of limitations were to depend upon the particular facts or the precise legal theory of each claim, counsel could almost always argue, with considerable force, that two or more periods of limitations should apply to each § 1983 claim." *Wilson v. Garcia*, 471 U.S. 261, 273–74 (1985).[2] "Moreover, under such an approach different statutes of limitations would be applied to the various § 1983 claims arising in the same State, and multiple periods of limitations would often apply to the same case." *Id.* The Indiana Court of Appeals has flatly rejected the application of the Medical Malpractice Act's

[2] Congress has since "enacted a catchall 4–year statute of limitations for actions arising under federal statutes enacted after December 1, 1990." *Jones v. R.R. Donnelley & Sons Co.*, 541 U.S. 369, 382-83 (2004) (citing 28 U.S.C. § 1658). This lawsuit would be timely under that statute of limitations.

"statute of limitations and tolling provisions" to § 1983 cases for this very reason. *Allen v. Hinchman*, 20 N.E.3d 863, 872–73 (Ind. Ct. App. 2014). In *Allen*, the allegation was that the prison doctors' medical care was so inept it amounted to cruel and unusual punishment in violation of the Eighth Amendment; nonetheless, the Medical Malpractice Act's statute of limitations and tolling rules had no relevance. *See id.* at 865, 868, 872–73.

Appellees' reliance on *Dixon v. Chrans*, 986 F.2d 201 (7th Cir. 1993), is misplaced. In *Dixon*, the Illinois tolling provision that applied to all personal injury suits differentiated among certain classes of defendants. *Id.* at 204. Personal injury suits by prisoners against most defendants were tolled; suits by prisoners against Illinois Department of Corrections officials or employees were not tolled. *Id.* Plaintiff was a prisoner suing Department of Corrections officials under § 1983, and so his suit was not tolled. *Id.* Key to the court's conclusion was that the tolling rule in *Dixon* applied to all personal injury actions. *Id.* If, instead, the "state had one tolling provision for general personal injury actions *and* one for suits against public officials, then [the plaintiff] is probably right that a court would have to characterize a § 1983 suit as a general personal injury claim rather than a claim against public officials[.]" *Id.* (citing *Hardin v. Straub*, 490 U.S. 536, 539 (1989)). This case is unlike *Dixon* because Indiana has one tolling rule for personal injury actions and a different tolling rule for medical malpractice actions. Appellees concede this. Resp. 15 ("Specifically, IC § 34-18-7-1 flatly states that the limitations period *for medical malpractice actions* applies without regard to 'legal disability.'" (emphasis added)). Because § 1983 actions *as a category* borrow the limitations and tolling provisions applicable to personal injury actions *as a category*, the

Court is bound to apply the tolling rule applicable to personal injury actions, not the tolling rule applicable to medical malpractice actions.

Appellees' argument fails in any event because violating the FNHRA's chemical restraint and involuntary discharge or transfer provisions is not "medical malpractice." The FNHRA, like the Eighth Amendment, "does not codify common law torts." *Duckworth v. Ahmad*, 532 F.3d 675, 679 (7th Cir. 2008); *see Wilson*, 471 U.S. at 272 (similarity between a federal right and a state tort is "purest coincidence"). Violations of the Eighth Amendment are "not medical malpractice" even when they involve the failure to provide adequate medical care. *Duckworth*, 532 F.3d at 679. Violations of the FNHRA's protections against chemical restraint and involuntary transfer or discharge are not medical malpractice for the same reason.

In this case the analogy to medical malpractice is not even close. In Indiana, a "plaintiff in [a] medical malpractice action must allege, in part, that defendant failed to conform to [the] requisite standard of care." *McGill v. Ling*, 801 N.E.2d 678, 686 (Ind. Ct. App. 2004) (summarizing the holding of *Oelling v. Rao*, 593 N.E.2d 189, 190 (Ind. 1992)). Appellees' own best case says the same thing. *See* Resp. 15 (citing *Metz ex rel. Metz v. Saint Joseph Reg'l Med. Ctr.-Plymouth Campus, Inc.*, 115 N.E.3d 489, 495 (Ind. Ct. App. 2018)). As *Metz* makes clear, actions for assault, false imprisonment, and kidnapping are not "medical malpractice" even if they are carried out by a doctor because they do not involve the standard of care. *See Metz*, 115 N.E.3d. at 495–96.

Like the intentional torts above, Mr. Talevski's claims can be resolved without reference to any "standard of care." *See id.* The claims in this lawsuit are *not* that

physicians acting in good faith made errors of medical judgment. Those may be Appellees' defenses, but they are not Mr. Talevski's claims. His claims are that Appellees intentionally administered unnecessary drugs to restrain him for discipline or convenience and transferred or discharged him from his home even though none of the criteria for a lawful transfer or discharge were met. And no party disputes that this *intentional* conduct, as alleged, is a violation of the FNHRA. Thus, even if the Medical Malpractice Act *could* apply here, it would not.[3]

The Ninth Circuit rejected an argument precisely analogous to Appellees' in *Ellis v. City of San Diego, Cal.*, 176 F.3d 1183 (9th Cir. 1999). The Defendants there argued that the Plaintiff's § 1983 claim should borrow the tolling rules applicable to "action[s] for injury or death against a health care provider based upon such person's alleged professional negligence" under California's Medical Injury Compensation Reform Act (MICRA). *See id.* at 1190–91. The argument had additional force in that case because there, unlike here, "the definition of 'professional negligence' include[d] acts of medical malpractice that amount to intentional torts." *Id.* The Ninth Circuit nonetheless rejected the argument because suits to enforce federal rights are not akin to state medical malpractice claims, and thus MICRA has "no application" to such suits. *Id.*

[3] Indeed, where, as in this case, Appellees committed *intentional* torts—not medical malpractice—concerns about oppressive medical malpractice liability are irrelevant. *Contra* Resp. 15; *see* States Amicus, Dkt.41, at 17; Health Care Associations Amicus, Dkt.50, at 17–20.

* * *

The Court need not reach Appellees' improper statute of limitations defense at all in this case. But if it does, it should hold that his claims are not time-barred.

IV. The FNHRA Creates Federal Rights Against Chemical Restraint and Involuntary Transfer or Discharge

Appellees' contrary arguments notwithstanding, Congress vested nursing home residents with enforceable federal rights in the FNHRA. Resp. 18–38. The FNHRA speaks of clearly defined "rights" that nursing homes "must protect." The plain meaning of the statute should be conclusive; the added complication of the test from *Blessing v. Freestone*, 520 U.S. 329 (1997), is unwarranted. But even applying *Blessing*'s three factors, the conclusion that the FNHRA creates rights enforceable under § 1983 is unavoidable. That is why every court of appeals to consider the question has concluded that the FNHRA creates enforceable federal rights. *See* Law Professors Amicus, Dkt. 26, at 13–14 (collecting cases).

A. The FNHRA's Text Creates Federal Rights for Nursing Home Patients

The FNHRA's text mandates the protection of nursing home patients' rights. It is hard to imagine how Congress could more clearly confer a right than by enacting a statute it calls a "bill of rights" and specifying in it that nursing homes "must protect and promote the rights of each resident, including" "[t]he right to be free from … any … chemical restraints imposed for purposes of discipline or convenience," 42 U.S.C. § 1396r(c)(1)(A)(ii); and under the heading "transfer and discharge rights" specify that nursing homes "must permit each resident to remain in the facility and must not transfer or discharge the resident from the facility unless" certain narrow, specified criteria are

met, *id.* § 1396r(c)(2). The FNHRA further requires both nursing homes and States to notify nursing home residents of these rights. *See* 42 U.S.C. § 1396r(c)(1)(B), (e)(6).

The plain meaning of the FNHRA's chemical restraint and involuntary transfer or discharge provisions decides this case. The Court does not need to reach the *Blessing* factors. *Contra* Resp. 19–21. "When the statutory language is plain, the sole function of the courts—at least where the disposition required by the text is not absurd—is to enforce it according to its terms." *Carr v. United States*, 560 U.S. 438, 458 (2010) (quoting *Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy*, 548 U.S. 291, 296 (2006)); *see Conn. Nat'l. Bank v. Germain*, 503 U.S. 249, 253–54 (1992) ("When the words of a statute are unambiguous … judicial inquiry is complete."); *see also* Br. 27–28. Indeed, even if "Congress may not have foreseen all of the consequences of a statutory enactment [that] is not a sufficient reason for refusing to give effect to its plain meaning." *Lockhart v. United States*, 546 U.S. 142, 146 (2005). The Supreme Court has repeated this maxim many times because it means it. The FNHRA creates "rights" using the word "rights" and mandates that nursing homes must protect them. No further "interpretation" is necessary in this case.

Contrary to Appellees' claim, Mr. Talevski is not asking the Court to "simply point to the word 'rights' and declare its work done." Resp. 20. Rather, he is asking the Court to apply the plain meaning of the statute. The statute creates clear-cut rights and mandates that nursing homes protect them. Unlike the statute at issue in *Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1 (1981), which was aspirational, not mandatory, every tool of interpretation points to the conclusion that the FNHRA creates

mandatory rights.[4] And applying *Blessing* to a statute like the FNHRA that vests individuals with federal rights misunderstands *Blessing*'s reason for existing, which is to determine when a federal statute *implies* a federal right. In the FNHRA Congress did not imply federal rights; it conferred them directly.

B. The FNHRA Satisfies Every *Blessing* Factor, As Two Courts of Appeals Have Already Held

The FNHRA also satisfies every *Blessing* factor. Appellees concede that the FNHRA meets the third *Blessing* factor. Resp. 19 n.10. The FNHRA also meets the first and second factors because (1) Congress's unambiguous rights-creating language shows that it intended that the FNHRA's provisions would benefit nursing home residents; and (2) the FNHRA's rights are capable of intelligent judicial appraisal.

1. Blessing Prong 1: The FNHRA's Chemical Restraint and Involuntary Discharge or Transfer Provisions Were Clearly Intended to Benefit Nursing Home Patients

The FNHRA readily clears *Blessing*'s first prong, as two federal courts of appeals have already held. *See Anderson v. Ghaly*, 930 F.3d 1066, 1075–78 (9th Cir. 2019); *Grammer v. John J. Kane Reg'l Ctrs.-Glen Hazel*, 570 F.3d 520, 527–31 (3d Cir. 2009). The FNHRA speaks in exactly the sort of unambiguous "rights-creating language" the Supreme Court has said shows Congress's intent to confer a federal right. *Gonzaga Univ. v. Doe*, 536 U.S. 273, 287 (2002); *see* Br. 30–34.

Appellees' attempts to avoid this conclusion fall short.

---

[4] Appellees' effort to distinguish *Pennhurst* only proves the point. Appellees explain that the right in *Pennhurst* was unenforceable because the statute was precatory and thus "failed *Blessing* factor three." Resp. 20. But Appellees "acknowledge[ ] that" unlike the statute in *Pennhurst*, the "FNHRA satisfies the third *Blessing* factor." Resp. 19 n.10.

First, contrary to Appellees' claim, Resp. 22–23, the phrasing Congress used to vest nursing home patients with federal rights against chemical restraint and involuntary discharge and transfer is highly significant. The FNHRA says that nursing homes "must" "protect" patients' "rights" against chemical restraint and "must not" involuntarily discharge or transfer them unless specified criteria are met. Appellees are simply wrong that this text—which says nursing homes must protect patient "rights"—"does not have an 'unmistakable focus' on the supposed rightsholder." Resp. 23. According to Appellees, had Congress intended to create federal rights in the FNHRA it would not have used the word "right" at all. Resp. 28 n.14. In Appellees' view, if the statute said "no person shall be subject to a physical or chemical restraint" in a nursing home, that would have created a federal right. Resp.28 n.14. But the FNHRA's "bill of rights," together with its express directives to protect residents' rights, and its requirement that nursing homes furnish their residents with *notice* of their "*rights*," 42 U.S.C. § 1396r(c)(1)(B), does not.

The Court should reject this argument both because it is ridiculous and because it is foreclosed by this court's precedents, as Appellees' own brief shows. *See* Resp. 26–27. In three different cases this court has found that the Medicaid statute confers federal rights using language more indirect than the language of the FNHRA. *See* Resp. 27; Br.33–34. All three of those cases found enforceable "rights" in statutes that used grammar identical to the grammar used in the FNHRA. The language of 42 U.S.C. § 1396a(a)(13)(A) is that the state "must" "provide . . . for a public process for determination of rates of payment under the plan for . . . nursing facility services" for use

by nursing facility operators. *BT Bourbonnais Care, LLC v. Norwood*, 866 F.3d 815, 817 (7th Cir. 2017). The language of 42 U.S.C. § 1396a(a)(23) is that state Medicaid plans "must ... provide that ... any individual eligible for medical assistance ... may obtain" certain assistance. *Planned Parenthood of Ind., Inc. v. Comm'r of Ind. State Dep't of Health*, 699 F.3d 962, 969 (7th Cir. 2012). The language of 42 U.S.C. § 1396a(a)(10) is that "[a] State plan for medical assistance must ... provide ... for making medical assistance available ... to all [eligible] individuals." *Bontrager v. Indiana Family & Soc. Servs. Admin.*, 697 F.3d 604, 606 (7th Cir. 2012). These statutes all share the exact same grammatical structure used in the FNHRA. All three were found to confer enforceable federal rights under *Blessing*. The statute at issue in *Wilder v. Virginia Hosp. Ass'n*, 496 U.S. 498, 502-03 (1990) had the same phrasing too ("a State plan for medical assistance must…." (quoting 42 U.S.C. § 1396a(a)(13)(A) (1982 ed., Supp. V)).

Second, contrary to Appellees' claim, Resp. 23–24, the fact that the FNHRA provides rights against nursing homes (and not individual doctors) shows only that Congress crafted the FNHRA exactly the same way it has crafted other important rights-conferring statutes. FNHRA's provision of rights against nursing homes is not a bug but a feature. *Contra* Resp. 23–25. Titles VI and IX, which confer important federal rights against race and sex discrimination, also run against institutions, not individuals. *See Smith v. Metro. Sch. Dist. Perry Twp.*, 128 F.3d 1014, 1019 (7th Cir. 1997) (no individual capacity liability under Title IX). By Appellees' logic, Title VI should not confer federal rights against educational institutions because there is a "layer of intermediaries" between the institutions and their students—the school officials who actually engage in

the race discrimination. *See* Resp. 23. Yet, as Appellees concede, Title VI is "one very famous example" of a statute that "grants rights directly." Resp. 28 n.14. Rights-conferring statutes, in other words, frequently confer rights against the institutions that actually receive the federal funds.

Third, *Gonzaga* does nothing to undercut the conclusion that Congress in the FNHRA intended to create federal rights. *Contra* Resp. 25–26. The statute at issue in *Gonzaga* read as follows:

> No funds shall be made available under any applicable program to any educational agency or institution which has a policy or practice of permitting the release of education records (or personally identifiable information contained therein ...) of students without the written consent of their parents to any individual, agency, or organization.

536 U.S. at 279 (quoting 20 U.S.C. § 1232g(b)(1)). The distinctions between that statute and the FNHRA are self-evident. The statute does not purport to create any "rights." The statute is not phrased as a mandate that *recipients* must protect the *rights* of beneficiaries. Instead, as Appellees concede, it is an instruction to the Secretary of Education to withhold funds from non-compliant recipients. Resp. 25. The policy was "two steps removed" in the words of the Court "from the interests of individual students and parents" because it was an instruction to the Secretary of Education (step one) and because it applied not to individual violations but rather to institutions with non-conforming policies or practices (step two). *Gonzaga*, 536 U.S. at 287. By *Gonzaga*'s logic, the FNHRA is *zero* steps removed from the interests of nursing home residents because (1) its focus is on how patients must be treated by recipients and (2) it is violated each time a resident's rights are transgressed. The statutory scheme in *Gonzaga* also granted the Secretary of Education sweeping authority to "*deal with violations*" of the

Act, which further "buttressed" the conclusion that Congress's meant to vest enforcement of the statute in the Secretary. 536 U.S. at 289. The Secretary of Health and Human Services has no similar authority, and the FNHRA's express preservation of state and federal remedies in 42 U.S.C. § 1396r(h)(8) shows no similar congressional intent. *Contra* Resp. 25–26.

Fourth, the FNHRA does not, as Appellees claim, "tell[ ] *states* how they must regulate nursing facilities in order to receive Medicaid funding." Resp. 24; *see also id.* at 27–28. The FNHRA's text imposes obligations directly on nursing homes that receive Medicaid.[5] *See* 42 U.S.C. §§ 1396r(c)(1), (2). Appellees' repeated incorrect assertion (without citation) that the FNHRA "tells *states* how they must regulate nursing facilities," Resp. 3, 24, has no basis in the statute's text or structure. The FNHRA plainly delineates between the requirements it imposes on nursing homes (e.g., 42 U.S.C. § 1396r(b), (c)) and the requirements it imposes on the states themselves (e.g., *id.* §§ 1396r(g), (h)). The *amici* supporting Appellees agree.[6] Moreover, the conclusion Appellees draw from the (false) premise that FNHRA regulates states and not nursing homes that receive Medicaid funds—that FNHRA therefore does not exhibit an "unmistakable focus on the benefitted class," Resp. 28—does not follow from the premise. At the end of the day, the FNHRA

[5] The FNHRA creates federal rights against chemical restraint and involuntary discharge or transfer against nursing homes that receive Medicaid. That only publicly owned nursing homes may be sued for violating FNHRA rights under 42 U.S.C. § 1983 arises because of the limited reach of § 1983.

[6] *See, e.g.*, States Amicus, Dkt. 41, at 1 (identifying that "[t]he statute imposes a variety of requirements *on nursing homes*…." (emphasis added)); *id.* at 2 (discussing "the requirements FNHRA imposes on nursing homes"); *id.* at 7 ("FNHRA's text is directed at nursing homes themselves…."); *id.* at 9 (explaining that "FNHRA's text focuses on the nursing homes it regulates….").

states that residents of nursing homes that receive Medicaid have a "right" to be free from chemical restraint and a "right" against involuntary transfer or discharge.

Fifth, Appellees' have no answer to *Grammer* and *Anderson*, Resp. 28–30, both of which held that the FNHRA easily surmounts *Blessing*'s first prong. Appellees say that both cases are wrong because, in Appellees' view, both were too quick to hold that Congress intended to create federal rights by writing a statute specifying that nursing home residents have "rights" the nursing homes "must" "protect." *See* Resp. 28–30. The Court can judge their thoroughness for itself. *See Anderson*, 930 F.3d at 1072–74; *Grammer*, 570 F.3d at 527–31.

2. Blessing Prong 2: The FNHRA's Chemical Restraint and Involuntary Discharge or Transfer Provisions Are Not So Vague or Amorphous That Their Enforcement Would Strain Judicial Competence

The FNHRA's chemical restraint and involuntary discharge or transfer rights are not "so vague and amorphous that its enforcement would strain judicial competence," 520 U.S. at 340–41, as two federal courts of appeals have found. *See Anderson*, 930 F.3d at 1078 (involuntary discharge or transfer); *Grammer*, 570 F.3d at 524–25, 528 (chemical restraint). The rights the FNHRA protects are tort-like rights that fall within the very core of judicial competency.

Contrary to Appellees' argument, Resp.32–36, the requirement that nursing homes "must" "protect" their residents' right to be free from "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), is not too vague or amorphous for courts to enforce. The elements are straightforward. A nursing home fails to "protect" a nursing

home resident's right to be free from chemical restraint where the nursing home resident: (1) is chemically restrained; (2) for purposes of discipline or convenience; and where (3) the restraint was not required to treat the resident's medical symptoms. This is not rocket science. *Contra* Resp.32–36. Appellees professed difficulty understanding the words "protect," "discipline," "convenience," "purpose," and "treat the resident's medical symptoms," Resp. 32–33 & n.17, strains credulity.

Similarly, and again contrary to Appellees' claim, Resp. 36–38, the requirement that nursing homes "must permit each resident to remain in the facility and must not transfer or discharge the resident from the facility unless" certain narrow, specified criteria are met, 42 U.S.C. § 1396r(c)(2), is not too vague or amorphous for courts to enforce. Appellees complain that some of the reasons a patient may be discharged implicate questions about the resident's well-being or health or the safety of individuals in the facility. *See* Resp. 36 (citing 42 U.S.C. § 1396r(c)(2)(A)(i)–(iii)). But nothing in the statutory provisions is too difficult for judges to administer—indeed, they are routinely resolved by state administrative law judges in state wrongful discharge actions under the FNHRA itself. *See* 42 U.S.C. § 1396r(e)(3); *see also* Br. 7–8 (describing the FNHRA's mechanism for appealing wrongful discharges or transfers). If these questions are capable of intelligent evaluation by state administrative judges, they are capable of intelligent evaluation by federal courts.

IV. The FNHRA Does Not Impliedly Foreclose § 1983 Liability

Contrary to Appellees' belated argument, Resp. 38–43—not made below—the FNHRA does not impliedly foreclose access to 42 U.S.C. § 1983 as a remedy; indeed, it expressly preserves it.

First, the Supreme Court has never found that a statutory scheme impliedly forecloses § 1983 liability unless the statutory scheme itself authorizes suit in federal court. "In three cases, [the Supreme] Court has found that statutory enactments precluded claims under [§ 1983]." *Fitzgerald v. Barnstable Sch. Comm.*, 555 U.S. 246, 252 (2009) (citing *Middlesex Cnty. Sewerage Auth. v. Nat'l Sea Clammers Assn.*, 453 U.S. 1 (1981); *Smith v. Robinson*, 468 U.S. 992 (1984); *Rancho Palos Verdes v. Abrams*, 544 U.S. 113 (2005)).[7] In *all three cases* the statutory scheme provided a private judicial remedy that contained restrictions on relief or administrative exhaustion requirements, or both, that § 1983 would render superfluous or insignificant (because access to § 1983 would provide additional remedies or eliminate the administrative exhaustion requirements). *See Rancho Palos Verdes*, 544 U.S. at 120–22 (noting this fact about the cases); *see also Fitzgerald*, 555 U.S. at 254 ("In all three cases, the statutes at issue required plaintiffs to comply with particular procedures and/or to exhaust particular administrative remedies *prior to filing suit*." (emphasis added)); *see also Levin v. Madigan*, 692 F.3d 607, 611–14 (7th Cir. 2012) (discussing the statutory schemes at issue in the cases).

Appellees are thus incorrect that nothing turns on the availability of a cause of action in federal court. Resp. 42. In fact, the Supreme Court has consistently called this factor the "key" consideration and even the "dividing line." *Fitzgerald*, 555 U.S. at 256. The *only* reason the Supreme Court impliedly foreclosed access to § 1983 in those three

[7] *Preiser v. Rodriguez*, 411 U.S. 475 (1973), which held that state prisoners cannot use § 1983 to attack the validity of their confinement because habeas corpus is the exclusive means for doing so, is a fourth example. *See Levin v. Madigan*, 692 F.3d 607, 613 (7th Cir. 2012).

cases—which as an implied repeal is disfavored, *see Wood v. United States,* 41 U.S. (16 Pet.) 342, 362–63 (1842)—is because the schemes were truly *incompatible* with access to § 1983. "Offering plaintiffs a direct route to court via § 1983 would have circumvented [required pre-suit] … procedures and given plaintiffs access to tangible benefits—such as damages, attorney's fees, and costs—that were unavailable under the statutes." *Fitzgerald*, 555 U.S. at 254. That is not the case here. Section 1983 *supplements* the FNHRA's scheme without rendering any aspect of it superfluous or insignificant. The fact that § 1983 is compatible with FNHRA's remedial scheme means there is no reason to think Congress meant to impliedly foreclose access to it.

Second, were there any doubt, the FNHRA's savings clause would remove it. *Contra* Resp. 42–43. The FNHRA says its remedies "are in addition to those otherwise available under State or Federal law and shall not be construed as limiting such other remedies." 42 U.S.C. § 1396r(h)(8). Appellees contend that this language is "best read" as preserving only *some* remedies available under federal law, but not all of them. Resp. 42–43. Actually, the provision is best read to mean what it says: that it preserves all "otherwise available" federal remedies, including those available under § 1983.[8]

[8] Appellees' contend that granting nursing home residents access to § 1983 under the FNHRA would "gut" Indiana's medical malpractice scheme. Resp.43 n.25. But that simply is not true. Proving up a violation of the FNHRA's chemical restraint and involuntary discharge or transfer rights requires proof of an intentional tort. Medical malpractice claims typically sound in negligence. Further, Congress enacted the FNHRA's Bill of Rights and its enhanced enforcement mechanisms because current systems—including state medical malpractice schemes—were failing to ensure that nursing home residents were receiving a minimum standard of care. *See* H.R. Rep. No. 100–391, pt. 1, at 458 (1987).

Finally, contrary to Appellees' claim, Resp. 43, the fact that access to § 1983 is compatible with the FNHRA's core purposes is an important consideration. At minimum it is a thumb on the scale in favor of preserving access to it.

CONCLUSION

The judgment below should be reversed.

Dated: November 3, 2020

Respectfully submitted,

Jay Meisenhelder
JAY MEISENHELDER EMPLOYMENT & CIVIL RIGHTS LEGAL SERVICES, P.C.
650 North Girls School Road, Suite D40
Indianapolis, IN 46214
(317) 231-5193
jaym@ecrls.com

Susie Talevski
429 Hampshire Ct.
Valparaiso, IN. 46385
TalevskiLaw@gmail.com

s/ Andrew Tutt
Andrew T. Tutt
R. Stanton Jones
Stephen K. Wirth
Nora G. Ellingsen*
ARNOLD & PORTER KAYE SCHOLER LLP
601 Massachusetts Ave., N.W.
Washington, DC 20001
(202) 942-5000
andrew.tutt@arnoldporter.com

**Admitted outside the District of Columbia; practicing law in D.C. under the supervision of Firm principals who are D.C. Bar members.*

CERTIFICATE OF COMPLIANCE

The foregoing brief complies with the type-volume limitation of Circuit Rule 32(c). The brief contains 6,191 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 proportionately spaced typeface using Microsoft Word 365 (2016) in Century Expanded BT 12-point font.

s/ Andrew Tutt
Andrew T. Tutt

CERTIFICATE OF FILING AND SERVICE

Pursuant to Federal Rule of Appellate Procedure 25, I hereby certify that on November 3, 2020, I electronically filed the foregoing Reply Brief of Appellant via ECF, and service was accomplished on counsel of record by that means.

s/ *Andrew Tutt*
Andrew Tutt