IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 20-1664

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 INDIANA, ALABAMA, ALASKA, KENTUCKY, MISSISSIPPI, AND NEBRASKA AS *AMICI CURIAE* IN SUPPORT OF DEFENDANTS-APPELLEES

CURTIS T. HILL, Jr.
Attorney General of Indiana

THOMAS M. FISHER
Solicitor General

KIAN J. HUDSON
Deputy Solicitor General

JULIA C. PAYNE
LYDIA GOLTEN
Deputy Attorneys General

Counsel for Amici States

Office of the Attorney General
IGC South, Fifth Floor
302 W. Washington Street
Indianapolis, IN 46204
(317) 232-6255
Tom.Fisher@atg.in.gov

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

INTEREST OF *AMICI* STATES 1

SUMMARY OF ARGUMENT 2

ARGUMENT 3

I. The Supreme Court Has Long Held That Federal Spending Legislation Creates Rights Privately Enforceable via Section 1983 Only When the Statutory Text Unambiguously Manifests Congress's Intent to Do So 3

II. The Federal Nursing Home Reform Act Does Not Explicitly Establish Privately Enforceable Rights, and Its Requirements Are Therefore Not Enforceable via Section 1983 7

CONCLUSION 19

CERTIFICATE OF WORD COUNT 21

CERTIFICATE OF SERVICE 22

TABLE OF AUTHORITIES

CASES

Alexander v. Sandoval,
532 U.S. 275 (2001) 8, 9

Armstrong v. Exceptional Child Care Ctr., Inc.,
575 U.S. 320 (2015) 6, 9

Blessing v. Freestone,
520 U.S. 329 (1997) 4, 6, 9

Gonzaga University v. Doe,
536 U.S. 273 (2002) ..... *passim*

Pennhurst State Sch. & Hosp. v. Halderman,
451 U.S. 1 (1981) ..... *passim*

Planned Parenthood of Ind., Inc. v. Comm'r of Ind. State Dep't Health,
699 F.3d 962 (7th Cir. 2012) 7, 14

B.R. ex rel. Todd v. State,
1 N.E.3d 708 (Ind. Ct. App. 2013) 18

STATUTES

42 U.S.C. § 1395i–3 2

42 U.S.C. § 1396r ..... *passim*

Ind. Code § 34-18-3-2 17

Ind. Code § 34-18-3-4 18

Ind. Code § 34-18-6-1 17

Ind. Code § 34-18-7-1 17

Ind. Code § 34-18-8-1 *et seq.* 17

Ind. Code § 34-18-14-3 17

OTHER AUTHORITIES

Cyrus Moulton, *Nursing Homes Throughout Mass. Face 'Colossal Collapse' from Medicaid Shortfall* (Jan. 26, 2019), https://www.telegram.com/news/20190126/nursing-homes-throughout-mass-face-colossal-collapse-from-medicaid-shortfall 16

Juliette Cubanski & Tricia Neuman, *Medicare's Finances Have Gotten Much Worse in Recent Years, Foreshadowing Tough Choices for November's Winners* Kaiser Family Fund, (Sept. 3, 2020) https://www.kff.org/policy-watch/medicares-finances-have-gotten-much-worse-in-recent-years-foreshadowing-tough-choices-for-novembers-winners/ 16, 17

Kaiser Family Foundation, *Medicaid's Role in Nursing Home Care* (Jun. 20, 2017) https://www.kff.org/infographic/medicaids-role-in-nursing-home-care/ 16

Lisa Kaczke, *South Dakota Nursing Home Leaders Warn of 'Statewide Disaster' Without More Funding*, Argus Leader, (Jan. 29, 2019), https://www.argusleader.com/story/news/politics/2019/01/29/south-dakota-nursing-home-leaders-warn-statewide-disaster-without-more-funding/2705324002/ 15

MACPAC, *Nursing Facilities*, https://www.macpac.gov/subtopic/nursing-facilities/ 15

Maggie Flynn, *Skilled Nursing Providers Turn to Behavioral Health Amid Medicaid Headwinds*, Skilled Nursing News, (Sept. 24, 2018), https://skillednursingnews.com/2018/09/skilled-nursing-providers-turn-behavioral-health-amid-medicaid-headwinds/ 15, 16

INTEREST OF *AMICI* STATES

The states of Indiana, Alabama, Alaska, Kentucky, Mississippi, and Nebraska, respectfully submit this brief as *amici curiae* in support of the defendants-appellees.

The Federal Nursing Home Reform Act, 42 U.S.C. § 1396r, regulates nursing home services provided by state Medicaid programs. The statute imposes a variety of requirements on nursing homes, and authorizes state and federal officials to enforce these requirements. The plaintiff here, however, seeks to bypass this detailed enforcement regime and asks this Court to permit private individuals to enforce these statutory requirements via 42 U.S.C. section 1983.

As sovereign entities charged with administering Medicaid in general and the Federal Nursing Home Reform Act in particular, *Amici* States have a strong interest in seeing this Court reject this plaintiff's attempt to shift authority over the Act's enforcement from public officials to private litigants. Permitting individuals to use section 1983 to enforce the Federal Nursing Home Reform Act's requirements would disrupt *Amici* States' administration of their Medicaid programs, their regulation of nursing homes, and their policies governing medical malpractice claims. *Amici* States file this brief to explain why the Court should refuse to do so.

SUMMARY OF ARGUMENT

The Federal Nursing Home Reform Act (FNHRA) regulates nursing facilities that receive payments through the Medicare or Medicaid cooperative-federalism programs.[1] Through this action, Gorgi Talevski seeks to enforce FNHRA provisions via 42 U.S.C. section 1983, claiming that the requirements FNHRA imposes on nursing homes create rights that are individually enforceable under section 1983. The district court below properly dismissed his action. That dismissal should be affirmed.

Section 1983 is not an all-purpose federal cause of action. It is used most often to enforce federal constitutional rights, and may be used to enforce federal *statutory* rights only in those rare circumstances when federal law "*unambiguously*" confers a privately enforceable right. *Gonzaga University v. Doe*, 536 U.S. 273, 283 (2002) (emphasis added). And FNHRA's requirements—which are directed at nursing homes, not nursing home residents—fall far short of conclusively establishing privately enforceable rights. Indeed, FNHRA's extensive system of regulation and enforcement confirms that Congress did *not* intend to permit private enforcement. Permitting Talevski to use section 1983 to enforce FNHRA's provisions would not only be contrary to the Supreme Court's precedents in this area—and to this Court's interpretation of those precedents—but would also disrupt state Medicaid programs, state nursing-home regulation, and state medical-malpractice policies. The Court should thus reject Talevski's attempt to stretch section 1983 beyond its proper scope.

[1] This case concerns an attempt to enforce requirements imposed by 42 U.S.C. § 1396r, which applies to nursing homes that receive Medicaid funds. A similar FNHRA provision, found at 42 U.S.C. § 1395i–3, applies to nursing homes that receive Medicare funds. Because this case concerns only section 1396r, references to FNHRA in this brief refer only to section 1396r.

ARGUMENT

I. The Supreme Court Has Long Held That Federal Spending Legislation Creates Rights Privately Enforceable via Section 1983 Only When the Statutory Text Unambiguously Manifests Congress's Intent to Do So

1. For nearly four decades the Supreme Court has held that "legislation enacted pursuant to the spending power"—*i.e.*, statutes that provide federal funds to States with certain conditions attached—"is much in the nature of a contract," and "the legitimacy of Congress' power to legislate under the spending power thus rests on whether the state voluntarily and knowingly accepts the terms of the 'contract.'" *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981). For this reason, Congress is held to a high standard of clarity when establishing rules triggered by States' receipt of federal funds. If Congress "intends to impose a condition on the grant of federal moneys, it must do so unambiguously," for "[t]here can, of course, be no knowing acceptance [of the contract] if a State is unaware of the conditions or is unable to ascertain what is expected of it." *Id.* And "insisting that Congress speak with a clear voice" enables "the States to exercise their choice knowingly, cognizant of the consequences of their participation." *Id.*

Such clarity is especially important when considering whether a statute confers a right privately enforceable under section 1983, because "[i]n legislation enacted pursuant to the spending power, the typical remedy for state noncompliance with federally imposed conditions is not a private cause of action for noncompliance but rather action by the Federal Government to terminate funds to the State." *Id.* at 28. When Congress wishes to depart from this standard approach, it must be absolutely clear.

Accordingly, in *Pennhurst* the Court squarely rejected the plaintiffs' argument—much like the one Talevski presses here—that the statute at issue there was necessarily privately enforceable simply because it spoke "in terms of 'rights.'" *Id.* at 18. The Court explained that the plaintiffs' "reliance" on such language was "misplaced," because in determining whether a statute confers privately enforceable rights a court must "look to the provisions of the whole law," not just "a single sentence or member of a sentence." *Id.* (internal quotation marks and citations omitted).

The Court elaborated on this point in *Blessing v. Freestone*, 520 U.S. 329 (1997), again underscoring that a federal statute is enforceable via section 1983 only when Congress clearly specifies that the statute confers a privately enforceable right. In particular, *Blessing* requires a plaintiff to make three threshold showings before using section 1983 to enforce a purported statutory right: The plaintiff must show (1) that Congress "intended that the provision in question benefit the plaintiff," (2) "that the right assertedly protected by the statute is not so vague and amorphous that its enforcement would strain judicial competence," and (3) that the statute "unambiguously impose[s] a binding obligation on the States" and that the provision at issue is "couched in mandatory, rather than precatory, terms." *Id.* at 340–341 (internal quotation marks and citations omitted). These three requirements are designed to prevent section 1983 from allowing individual litigants to personally enforce every provision of every federal law; Congress, of course, often intentionally chooses to leave enforcement of federal-law requirements to democratically

accountable federal or state officials. The *Blessing* test is meant to ensure that federal statutes are privately enforceable only when Congress says so.

The Court again reiterated this point in *Gonzaga University v. Doe*, emphasizing that nothing "short of an unambiguously conferred right [can] support a cause of action brought under § 1983." 536 U.S. 273, 283 (2002). "[U]nless Congress 'speak[s] with a clear voice,' and manifests an 'unambiguous' intent to confer individual rights, federal funding provisions provide no basis for private enforcement by § 1983." *Id.* at 280 (quoting *Pennhurst*, 451 U.S. at 17, 28, and n. 21). This intent must be shown in the "text and structure of a statute," and if there is "no indication that Congress intends to create new individual rights" then "there is no basis for a private suit"—period. *Id*. at 286.

Taken together, these precedents set out a clear approach to determining whether spending statutes confer rights privately enforceable under section 1983—such a statute will do so only when, considered as a whole, it unquestionably creates privately enforceable rights. If there is any doubt on this score, the statute is simply not privately enforceable.

2. There are good reasons the Supreme Court has required Congress to be crystal-clear before allowing section 1983 to be used to enforce the provisions of federal spending legislation. Such provisions are necessarily *conditions*, and federal funding depends on States' compliance with these conditions. As such, it is of vital importance for all parties involved to understand what, exactly, States must do to comply with the requirements established by Congress. After all, these statutes are

fundamentally contractual, and it is essential that both parties to a contract know the terms of agreement. *See Pennhurst*, 451 U.S. at 17. Without clarity, there is no way for States to be sure what obligations they are undertaking in accepting federal funds, or to be sure that they are fulfilling the applicable conditions; and if States are in the dark about these matters, their acceptance of the terms of spending legislation cannot be full and knowing. *Id.*

Furthermore, *private* litigants by definition are not parties to the contracts constituted by spending legislation, and for that reason allowing them *ever* to enforce such legislation goes against the grain of modern and historical tradition—a fact that has been noted by several members of the Supreme Court. In *Blessing*, for example, Justices Scalia and Kennedy noted that contract law at the time of the passage of section 1983 did *not* allow a third-party beneficiary to enforce a contract's terms. *Blessing*, 520 U.S. at 349–50 (1997) (Scalia, J., and Kennedy, J., concurring). More recently, Justices Roberts, Thomas, Alito, and Scalia observed similarly that "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 v. Exceptional Child Care Ctr., Inc.*, 575 U.S. 320, 332 (2015) (plurality op. by Scalia J., joined by Roberts, C.J., and Thomas and Alito, JJ). There is thus a strong argument that spending legislation *never* confers privately enforceable rights. The Supreme Court has thus properly insisted that, at the very least, such legislation does not do so unless Congress has spoken clearly.

3. In light of the Supreme Court's decisions, this Court has recognized that the nature of "legislation adopted under the spending power" and the attendant "concerns about federalism" it inevitably raises require "set[ting] the bar high" and demand a "rigorous approach" to identifying privately enforceable rights. *Planned Parenthood of Ind., Inc. v. Comm'r of Ind. State Dep't Health*, 699 F.3d 962, 973 (7th Cir. 2012). Accordingly, a spending statute "cannot be construed to confer an individual right enforceable under § 1983" when "'by its terms [it] grants no private rights to any identifiable class.'" *Id.* (quoting *Gonzaga*, 536 U.S. at 284). "Instead, to create judicially enforceable private rights, the statute 'must be phrased in terms of the persons benefited,' with 'an *unmistakable focus* on the benefited class.'" *Id.* (emphasis in original; quoting *Gonzaga*, 536 U.S. at 284). That is, "the statute must contain 'rights-creating language' that unambiguously creates an '*individual* entitlement.'" *Id.* (emphasis in original; quoting *Gonzaga*, 536 U.S. at 287).

II. The Federal Nursing Home Reform Act Does Not Explicitly Establish Privately Enforceable Rights, and Its Requirements Are Therefore Not Enforceable via Section 1983

The text and structure of FNHRA make it clear that the statute does not create privately enforceable rights. FNHRA's text is directed at nursing homes themselves, not at nursing home *residents*. Additionally, the vagueness of FNHRA's provisions, including those upon which Talevski relies, strongly suggest that the statute was not meant to be privately enforceable. Finally, both States and the federal government are tasked with enforcing FNHRA, showing that Congress did have a clear plan for

enforcement of the statute—public enforcement by both participating governments, not private enforcement by individuals.

1. First, the language Congress adopted in FNHRA is expressly directed not at patients, but on the facilities that care for them. It is thus not "phrased in terms of the persons benefited" (*i.e.*, nursing home residents), but is instead phrased in terms of the obligated parties. *Gonzaga University v. Doe,* 536 U.S. 273, 274 (2002). Examples of this focus on nursing home facilities is found throughout the statute. There is no definition of patient or resident, but there is a definition (the only definition in the section) for "nursing facility." 42 U.S.C. § 1396r(a). The phrase "a nursing facility must" also appears 31 times throughout section 1396r. And the two specific provisions on which Talevski focuses in this appeal are themselves directed at nursing homes: The provision Talevski claims confers a "right" against chemical restraints states that "[a] *nursing facility must protect and promote* the rights of each resident, including. . . (ii) the right to be free from . . . any physical or chemical restraints imposed for purposes of discipline or convenience and not required to treat the resident's medical symptoms." *Id.* § 1396r(c)(1)(A)(ii) (emphasis added). Similarly, the provision Talevski argues confers a "right" against involuntary transfer states that "[a] *nursing facility must permit* each resident to remain in the facility and must not transfer or discharge the resident unless" one of the enumerated circumstances is met. *Id.* § 1396r(c)(2)(A) (emphasis added).

Because FNHRA "focus[es] on the person regulated rather than the individuals protected," it "create[s] 'no implication of an intent to confer rights on a particular

class of persons.'" *Alexander v. Sandoval*, 532 U.S. 275, 289 (2001); *see also Gonzaga*, 536 U.S. at 285 (noting that "the initial inquiry—determining whether a statute confers any right at all—is no different from the initial inquiry in an implied right of action case [such as *Alexander*], the express purpose of which is to determine whether or not a statute 'confer[s] rights on a particular class of persons'" (quoting *California v. Sierra Club*, 451 U.S. 287, 294 (1981)). That FNHRA's text focuses on the nursing homes it regulates, not on patients, is by itself sufficient to conclude that it does not confer on patients privately enforceable rights.

In response, Talevski argues that FNHRA was obviously intended to benefit nursing home residents. But the Supreme Court has made clear that such abstract purposes do not satisfy the requirement that a statute be "phrased in terms of the persons benefited." *Gonzaga*, 536 U.S. at 274. Merely falling into the "general zone of interest" of a statute is not enough—under section 1983, one must be deprived of a *right*, not merely a benefit or interest, to have a colorable claim. *Id.* at 283. *All* Medicaid programs are in some way intended to help those in need obtain healthcare; that does not mean that every provision of every statute regulating Medicaid is privately enforceable. *See, e.g., Armstrong v. Exceptional Child Care Ctr., Inc.*, 575 U.S. 320, 332 (2015); *Blessing v. Freestone*, 520 U.S. 329 (1997). While Talevski and his fellow nursing home residents may fall into FNHRA's general zone of interest, Congress did not adopt statutory text directed towards them; it instead adopted a statute phrased in terms of regulating the nursing homes that provide such residents care.

2. Second, some provisions of FNHRA are plainly "so 'vague and amorphous' that [their] enforcement would strain judicial competence." *Id.* at 340–41 (quoting *Wright v. City of Roanoke Redevelopment & Hous. Auth.*, 479 U.S. 418, 431–32 (1987)). For example, FNHRA provides that "a nursing facility must provide services and activities to attain or maintain the highest practicable physical, mental, and psychosocial well-being of each resident," § 1396r(b)(2), and that a nursing facility must "provide 24-hour licensed nursing services which are sufficient to meet the nursing needs of its residents." § 1396r(b)(4)(C)(i). These provisions would require courts to resolve disputes over an individual resident's highest practicable "physical, mental and psychosocial well-being," or over what level of care is sufficient to meet a resident's needs. Such issues are clearly outside judicial expertise and unsuitable for resolution through private litigation.

Talevski implicitly acknowledges as much by declining to rely on these patently unenforceable provisions on appeal; he instead relies on only two of the eleven provisions he raised below. The existence of so many unenforceable provisions alongside the two on which Talevksi now relies indicates that Congress did not expect any of FNHRA's provisions to be individually enforceable. Talevski cannot rescue his claim by identifying, amongst a field of admittedly unenforceable provisions, two that are perhaps slightly clearer. *See Pennhurst*, 451 U.S. at 18 (explaining that courts must "look to the whole law, and to its object and policy" when examining a statute (quoting *Philbrook v. Glodgett*, 421 U.S. 707, 713 (1975)).

And even the two provisions Talevski raises now are themselves vague and amorphous. The supposed "right" to be free from unjustified chemical restraint, as well as the "right" to be free from unwarranted transfer, are not as clear as Talevski presents them to be. Both provisions raise questions that any court would doubtless struggle to answer. How does a court determine when a nursing home has sufficiently "protect[ed] and promote[d]" these "rights?" 42 U.S.C. § 1396r(c)(1)(A). How should a court draw the line between a chemical restraint as a valid treatment of symptoms and one imposed "for the purposes of discipline or convenience?" *Id.* § 1396r(c)(1)(A)(ii). What if a legitimate treatment also has the effect of making managing that patient more convenient? How much restraint is too much? And has a resident's behavior sufficiently "endangered" other individuals in the facility to justify transfer? *Id.* § 1396r(c)(2)(A)(iii). Courts would be frequently confronted with such questions if FNHRA were to create privately enforceable rights. Perhaps that is why Congress chose not to do so.

3. Third, as in *Gonzaga*, the conclusion that FNHRA does not create enforceable rights is "buttressed by the mechanism[s] that Congress chose to provide for enforcing [its] provisions." *Gonzaga*, 536 U.S. at 280; *see also Pennhurst*, 451 U.S. at 18. The variety of enforcement mechanisms FNHRA provides make it clear that Congress did not intend for it to be enforced by private litigants.

FNHRA requires States to take on a great deal of responsibility when it comes to the monitoring, regulation, and enforcement of its provisions. These responsibilities include: creating a registry of those who have completed nurse aide

training, 42 U.S.C. § 1396r(e)(2)(A); administering an appeals process for involuntary transfers and discharges, *id.* § 1396r(e)(3); specifying the instrument to be used for resident assessment, *id.* § 1396r(e)(5); maintaining a notice of rights and obligations of residents, *id.* § 1396r(e)(6); creating a preadmission screening program, *id.* § 1396r(e)(7)(A)(i); certifying compliance of non-state facilities, *id.* § 1396r(g)(1)(A); investigating allegations of neglect and abuse, *id.* § 1396r(g)(1)(C); conducting unannounced surveys of nursing facilities, *id.* § 1396r(g)(2)(A)(i); and monitoring facilities that have been found noncompliant, *id.* § 1396r(g)(4).

Beyond these responsibilities, FNHRA also authorizes States to implement the monitoring and enforcement regime the statute erects. For example, if a State finds that a facility no longer meets FNHRA's nursing-home requirements, the State has discretion in how it will choose to address the issue and which of the available remedies it will pursue. *Id.* § 1396r(h)(1). Further, FNHRA authorizes a State to "establish alternative remedies (other than termination of participation) other than those described" where the State can show that the "alternative remedies are as effective in deterring noncompliance and correcting deficiencies." *Id.* § 1396r(h)(2)(B)(ii). FNHRA even authorizes States to go beyond punishment and reward good behavior through programs that incentivize high-quality care. *Id.* § 1396r(h)(2)(F).

In addition to the broad range of regulatory responsibilities FNHRA entrusts to States, the statute also empowers the federal government to supervise States' administration of its provisions. For example, it is the "duty and responsibility" of the

Secretary of Health and Human Services "to assure that requirements which govern the provision of care in nursing facilities under State plans approved under this subchapter, and the enforcement of such requirements, are adequate to protect the health, safety, welfare, and rights of residents and to promote the effective and efficient use of public moneys." *Id.* § 1396r(f)(1). And with respect to state nursing facilities, the statute gives the Secretary "the authority and duties of a State . . . , including the authority to impose remedies." *Id.* § 1396r(h)(3)(A).

The Secretary's involvement in FNHRA's enforcement further underscores that FNHRA was not meant to include private enforcement. The Secretary has the ability to take a global view of the Medicaid program, and can make regulatory, policy, and enforcement decisions that take into consideration the national view—including the number of Medicaid-participating nursing homes in each State, the funding available for Medicaid nursing-home care, and the fiscal health of the program overall. FNHRA includes the Secretary in both the regulation-creation and regulation-enforcement functions to ensure that the statute's requirements are administered with the big picture in mind—not created and shaped by private litigants in individual lawsuits.

Private enforcement also throws off the intended balance of power at the state level. Allowing private enforcement of FNHRA under section 1983 robs States of one of the benefits of the Medicaid bargain—the ability and flexibility to regulate nursing homes in the way that is best suited for each State. A program as complex and large as Medicaid involves many parties with different needs and interests. Balancing

those interests is a delicate thing, and the regime of enforcement designed by Congress allows States to make decisions about what rules and enforcement methods will work best for their populations and their unique needs.

Private enforcement of FNHRA, on the other hand, would disrupt state decision making in this area. The FNHRA-mandated appeals process—which Indiana has implemented and was used by Talevski to protest his transfer and initial refused readmittance, Appellant Br. 13–14—is especially significant here, for "[t]he provision of an express, private means of redress in the statute itself is ordinarily an indication that Congress did not intend to leave open a more expansive remedy under § 1983." *Planned Parenthood of Ind., Inc. v. Comm'r of Ind. State Dep't Health*, 699 F.3d 962, 975 (7th Cir. 2012) (quoting *Rancho Palos Verdes, Cal. v. Abrams*, 544 U.S. 113, 121 (2005)). By specifically enumerating and mandating an enforcement process for those residents who are dissatisfied by their treatment, FNHRA implicitly rejects the idea of private enforcement via section 1983. FNHRA has itself provided the method of recourse for individuals who feel wronged under this provision of the statute, and it is through state administrative procedures—not through federal 1983 lawsuits.

If Congress had wanted to regulate nursing homes by authorizing individual private lawsuits, it could have done so simply by creating an explicit cause of action. Yet it chose not to take this approach. Instead, Congress enacted a lengthy, detailed scheme of nursing home regulation—embedded into a broader scheme for partially funding for state medical assistance programs—in which the nursing homes are open to inspection, monitoring, and punishment from state authorities, whose regulation

and enforcement is in turn monitored by federal authorities. Surely, Congress would not have gone to the trouble of creating such a comprehensive regulatory scheme, with a wide variety of sanctions and a substantial role for the state and federal governments, if it meant for this system to be enforced by individuals.

4. There are compelling reasons for Congress to choose to vest the power to enforce FNHRA's provisions in States and the federal government rather than individuals. For one, allowing private actions would surely have a disruptive effect on the nursing home industry. Most American nursing homes receive Medicaid funds: "Medicaid is the primary payer of nursing facility services," with Medicaid usually covering "over 60 percent of nursing facility residents (CDC 2016)." MACPAC, *Nursing Facilities*, https://www.macpac.gov/subtopic/nursing-facilities/. The amount spent on nursing facilities by Medicaid reflects this large number of patients: In fiscal year 2017, $58 billion "or about 10 percent of total program benefit spending" was spent on long-term services and supports, which includes nursing facilities. *Id.* There would thus be serious consequences throughout the nationwide nursing-home industry if individual residents could use section 1983 to enforce FNHRA's provisions.

Moreover, nursing homes across the country already face challenges. Medicaid reimbursement rates have put pressure on nursing home providers in several States.[2]

[2] In 2019 in South Dakota, nursing home providers warned of "financial collapse" of the system because of a $42 million shortfall in Medicaid reimbursement. Lisa Kaczke, *South Dakota Nursing Home Leaders Warn of 'Statewide Disaster' Without More Funding*, Argus Leader, (Jan. 29, 2019), https://www.argusleader.com/story/news/politics/2019/01/29/south-dakota-nursing-home-leaders-warn-statewide-disaster-without-more-funding/2705324002/. In Washington, difficulties with Medicaid reimbursements pushed some nursing home providers to consider leaving the sector entirely. Maggie Flynn, *Skilled Nursing Providers*

And given that one in three people turning 65 will "require nursing home care at some point" during their life, the need for such services is high, and will continue to be so. Kaiser Family Foundation, *Medicaid's Role in Nursing Home Care* (Jun. 20, 2017) https://www.kff.org/infographic/medicaids-role-in-nursing-home-care/. Indeed, the total number of seniors in the United States is expected to double by 2060. *Id.* It would be a true blow to States if new legal liabilities, on top of already difficult conditions, were to drive providers away from the Medicaid market.

Notably, the state-federal enforcement regime FNHRA creates permits States and Medicaid administrators to consider these circumstances in the course of implementing FNHRA's requirements. These politically accountable officials can balance the needs of providers with the needs of patients, and take a global view. For example, the Congressional Budget Office has, partially as a result of the unanticipated devastation of COVID-19, projected that there will be a national Medicaid funding shortfall by 2024. Juliette Cubanski & Tricia Neuman, *Medicare's Finances Have Gotten Much Worse in Recent Years, Foreshadowing Tough Choices for November's Winners* Kaiser Family Fund, (Sept. 3, 2020) https://www.kff.org/policy-watch/medicares-finances-have-gotten-much-worse-in-

---

Turn to Behavioral Health Amid Medicaid Headwinds, Skilled Nursing News, (Sept. 24, 2018), https://skillednursingnews.com/2018/09/skilled-nursing-providers-turn-behavioral-health-amid-medicaid-headwinds/. In Massachusetts, in 2019, one news source reported that "20 nursing homes closed in the last year and more than half of the 401 nursing facility providers in the state [were] operating in the red," and providers predicted an oncoming "colossal collapse" of the industry due to Medicaid shortfall. Cyrus Moulton, *Nursing Homes Throughout Mass. Face 'Colossal Collapse' from Medicaid Shortfall*, Telegram.com (Jan. 26, 2019), https://www.telegram.com/news/20190126/nursing-homes-throughout-mass-face-colossal-collapse-from-medicaid-shortfall.

recent-years-foreshadowing-tough-choices-for-novembers-winners/. This shortfall "will require lawmakers to make politically difficult policy choices" in the coming years. *Id.* In such circumstances, regulatory and administrative decisions should be made by those who can see the big picture and who are incentivized to respond to it with the broad public interest in mind. Allowing private litigants and courts to make ad hoc changes to such a complex and important system would undermine interests of States, the federal government, and nursing homes—as well as the Medicaid beneficiaries who rely on the continuing operation of nursing homes in their area.

In addition to undermining the nursing home industry and the availability of nursing home care, allowing FNHRA to be enforced via private section 1983 lawsuits would also have the effect of circumventing States' medical malpractice schemes—an outcome that surely neither Congress nor States intended. Indiana's Medical Malpractice Act, for example, provides for mandatory insurance for healthcare providers, a patient's compensation fund, damage caps for qualifying providers, and an entire statutory process for bringing medical malpractice actions, including specific limitations periods and tolling rules. *See* Ind. Code §§ 34-18-3-2 (requiring providers to obtain insurance in order to obtain protections of medical-malpractice law), 34-18-6-1 (creating patient's compensation fund), 34-18-7-1 (setting limitations period "regardless of minority or other legal disability"), 34-18-8-1 *et seq.* (providing procedure for commencing medical malpractice action), 34-18-14-3 (imposing damages caps).

Government entities can qualify under Indiana's medical malpractice statute, meaning that state-owned and privately owned nursing homes are both governed by this scheme. *See id.* § 34-18-3-4. This means that if this action were brought in an Indiana state court, Talevski's claim against these nursing homes would fall under Indiana's medical malpractice statute: "The test to determine whether a claim sounds in medical malpractice is 'whether the claim is based on the provider's behavior or practices while "acting in his professional capacity as a provider of medical services,"'" and all of Talevski's alleged injuries occurred while his providers were acting in their professional capacities. *B.R. ex rel. Todd v. State*, 1 N.E.3d 708, 714 (Ind. Ct. App. 2013) (citations omitted).

Accordingly, Talevski is asking the Court to permit him to use section 1983 to evade the detailed requirements of the Indiana Medical Malpractice Act. By agreeing to participate in Medicaid, Indiana signed on to certain conditions on how it uses those funds; with respect to FNHRA, Indiana has agreed to significant federal monitoring, and has taken up the supervisory and regulatory duties this statute assigns to it. Indiana did not agree, however, to allow private litigants to evade the legislative decisions enshrined in its medical malpractice statute.

***

The weight of the text, structure, and purpose of FNHRA all fall against Talevski. He cannot show that any provision of the statute creates rights enforceable by individuals through section 1983. He cannot establish that Congress intended to create such rights, and indeed, the existence of enforcement mechanisms within the

statute illustrates Congress had the precisely opposite objective. Considerations of policy—including the balance of power between the States and the federal government, the ability of States to effectively regulate their own Medicaid programs, the ability of the Medicaid program as a whole to respond to a potential oncoming crisis, and protecting the proper control of areas such as medical malpractice by state authority—all weigh against Talveski. There is no reason, of law or policy, to find that FNHRA creates individually enforceable rights. This court should therefore affirm the district court's determination that FNHRA does not confer statutory rights that are privately enforceable under section 1983.

CONCLUSION

For the foregoing reasons, the district court's decision should be affirmed.

Respectfully submitted,

CURTIS T. HILL, Jr.
Attorney General of Indiana

s/Thomas M. Fisher
THOMAS M. FISHER
Solicitor General

KIAN J. HUDSON
Deputy Solicitor General

JULIA C. PAYNE
LYDIA GOLTEN
Deputy Attorneys General

Office of the Attorney General
IGC South, Fifth Floor
302 W. Washington Street
Indianapolis, IN 46204
(317) 232-6255
Tom.Fisher@atg.in.gov

ADDITIONAL COUNSEL

Counsel for Amici *States*

STEVE MARSHALL
Attorney General
State of Alabama

LYNN FITCH
Attorney General
State of Mississippi

CLYDE SNIFFEN, JR.
Acting Attorney General
State of Alaska

DOUG PETERSON
Attorney General
State of Nebraska

DANIEL CAMERON
Attorney General
Commonwealth of Kentucky

CERTIFICATE OF WORD COUNT

I verify that this brief, including footnotes and issues presented, but excluding certificates, contains 4,834 words according to the word-count function of Microsoft Word, the word-processing program used to prepare this brief.

By: *s/ Thomas M. Fisher*
Thomas M. Fisher
Solicitor General

CERTIFICATE OF SERVICE

I hereby certify that on October 6, 2020, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

s/ Thomas M. Fisher
Thomas M. Fisher
Solicitor General

Office of the Indiana Attorney General
Indiana Government Center South, Fifth Floor
302 W. Washington Street
Indianapolis, IN 46204-2770
Telephone: (317) 232-6255
Facsimile: (317) 232-7979
Tom.Fisher@atg.in.gov