No. 20-01664

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
HAMMOND DIVISION
CASE NO. 2:19-CV-00013-JTM-APR
HONORABLE JAMES T. MOODY, DISTRICT COURT JUDGE

BRIEF OF *AMICUS CURIAE* LAW PROFESSORS IN SUPPORT OF PLAINTIFF-APPELLANT

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, *amici curiae* state that no party to this brief is a publicly-held corporation, issues stock, or has a parent corporation.

Pursuant to Seventh Circuit Rule 26.1, *amici curiae* state that Schulte Roth & Zabel LLP is the only law firm that has appeared for *amici* in this Court.

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STATEMENT OF INTEREST

Amicus curiae law professors are scholars at American law schools whose research and teaching interests focus on health law and poverty law. Daniel L. Hatcher is Professor of Law at University of Baltimore School of Law; Nicole Huberfeld is Professor of Health Law, Ethics & Human Rights at Boston University School of Health and Professor of Law at Boston University School of Law; Jessica L. Roberts is the Director of the Health Law & Policy Institute and Leonard Childs Professor in Law at the University of Houston Law Center.[1]

Amici have no financial interest in this case, but we have an interest in ensuring a consistent and accurate interpretation of healthcare statutes in the United States, including the Federal Nursing Home Reform Act ("FNHRA"). This interest is particularly acute because, as set forth in greater detail herein, precedent regarding the Medicaid Act's enforceability under 42 U.S.C. § 1983 ("Section 1983") is varied and inconsistent. *Amici* file this *amicus* brief because the district court's decision rests on an erroneously restrictive interpretation of both

[1] *Amici* join this brief as individuals and not as representatives of any institutions with which they are affiliated.

Section 1983 and the FNHRA.

Both Plaintiff-Appellant and Defendants-Appellees have consented to the filing of this *amicus* brief.

PRELIMINARY STATEMENT

Amici submit this brief in support of Plaintiff-Appellant Gorgi Talevski, by and through his Next Friend Ivanka Talevski, and more specifically to assist the Court in determining whether the Federal Nursing Home Reform Act, 42 U.S.C. § 1396r, *et seq.* (the "FNHRA"), confers rights to nursing home residents that may be enforced under Section 1983. An examination of the plain language and legislative history of Section 1983 and the FNHRA indicates that this Court should answer that question in the affirmative.

Section 1983's legislative history shows that Congress intended it to have a broad reach and provide individuals with significant protection. Supreme Court jurisprudence has recognized Section 1983's broad scope while simultaneously attempting to delineate the outer reaches of that scope. Specifically, the Supreme Court has held that for a federal right to be enforceable under Section 1983, (1) "Congress must have intended that the provision in question benefit the plaintiff," (2) "the right

assertedly protected by the statute is not so vague and amorphous that its enforcement would strain judicial competence," and (3) "the provision giving rise to the asserted right must be couched in mandatory, rather than precatory, terms." *Blessing v. Freestone*, 520 U.S. 329, 340-41 (1997).

The test set forth in *Blessing*, as modified by *Gonzaga University v. Doe*, 536 U.S. 273 (2002), recognizes the broad reach of Section 1983 but has resulted in a patchwork of inconsistent holdings by lower courts in the healthcare context, with approximately half of the Medicaid Act provisions reviewed being held enforceable and the other half being held unenforceable. Even so, federal appellate courts have uniformly held that Section 1983 permits private enforcement of FNHRA rights. *See infra*. This Court should do the same.

Congress passed the FNHRA in response to the poor quality of care that was being provided in many of the nation's nursing homes and the failure of existing systems to enforce the law and protect nursing home residents. *See* S. Hrg. 101-698, at 1 (Chairman Pryor, May 18, 1989). To further protect nursing home residents, the FNHRA amended the Medicare Act and the Medicaid Act to set forth the rights of nursing home

residents and impose requirements for nursing homes seeking to participate in Medicare and Medicaid. Rights granted to individual nursing home residents include the right to choose their own physician, to be fully informed about their care and treatment, and to be free from chemical and physical restraints. 42 U.S.C. § 1396r(c)(1)(A)(i); 42 U.S.C. § 1396r(c)(1)(A)(i); 42 U.S.C. § 1396r(c)(1)(A)(ii). The FNHRA's language and legislative history show unambiguously that Congress intended to provide individual rights to nursing home residents that could be enforced through Section 1983.

Finally, Section 1983's plain language expressly permits "[e]very person" to enforce violations of their rights under the "Constitution and laws," without further limiting language, and the Supreme Court's recent decision in *Bostock v. Clayton County* confirms that this language should be applied as written.

For those reasons, and the reasons set forth below, *amici* respectfully submit that the Court should reverse the district court and

hold that the Federal Nursing Home Reform Act unambiguously confers individuals rights enforceable under Section 1983.

ARGUMENT

I. Section 1983 Broadly Permits Individuals To Enforce Violations of Their Rights Under Federal Statutes, Including the Medicaid Act.

The core issue in this case is whether the rights set forth under the FNHRA[2] may be enforced through Section 1983. Section 1983 is a civil rights statute that affords individuals a private right of action to enforce state violations of their rights under federal law. In relevant part, Section 1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress[.]

[2] The FNHRA is sometimes referred to as the Federal Nursing Home Reform Amendments, the Nursing Home Reform Act, or the Nursing Home Reform Amendments, and in some cases is abbreviated as the NHRA.

42 U.S.C. § 1983. While the statute itself confers no rights, privileges, or immunities, Section 1983 has been used as the procedural vehicle to enforce individuals' constitutional and statutory rights that have been violated "under color" of law.

The breadth of Section 1983's language is particularly important considering the context in which it became law. Congress originally enacted Section 1983 as part of the 1871 Ku Klux Klan Act (the "Act").[3] H.R. Rep. No. 96-548, at 1 (1979), *reprinted in* 1979 U.S.C.C.A.N. 2609, 2609. The purpose of the Act was

> to override the corrupting influence of the Ku Klux Klan and its sympathizers on the governments and law enforcement agencies of the Southern States, and . . . grave congressional concern that the State courts had been deficient in protecting federal rights.

Allen v. McCurry, 449 U.S. 90, 98-99 (1980) (citations omitted). To protect the federal rights of "newly freed slaves and union sympathizers," Congress provided individuals a "neutral federal forum" to enforce their federal rights. H.R. Rep. No. 96-548, at 1.

[3] It is also referred to as the Civil Rights Act of 1871.

Section 1983's legislative history demonstrates that Congress intended to broadly address racial violence and protect individuals' rights. Representative Aaron F. Perry of Ohio, demonstrating his concern with the need to hold actors accountable, stated:

> Sheriffs, having eyes to see, see not; judges, having ears to hear, hear not; witnesses conceal the truth or falsify it; grand and petit juries act as if they might be accomplices. In the presence of these gangs all the apparatus and machinery of civil government, all the processes of justice, skulk away as if government and justice were crimes and feared detection. Among the most dangerous things an injured party can do is to appeal to justice. Of the uncounted scores and hundreds of atrocious mutilations and murders it is credibly stated that not one has been punished.

Cong. Globe, 42d Cong., 1st Sess., pt. 2, app. at 78 (1871). Representative William Darrah Kelley of Pennsylvania referred to the past failures to hold actors accountable as a failure of government, saying that "[t]he power to protect its people inheres indestructibly in all Governments, and that frame of constitution or laws which does not provide for it fails to establish government." Cong. Globe, 42d Cong., 1st Sess. 339 (1871). Congress expressly sought to rectify these failures by passing the Act. Representative Job E. Stevenson of Ohio viewed it necessary to "extend the jurisdiction of the national courts" to "secure peace" and rectify the

past failures of the government to protect individuals rights. Cong. Globe, 42d Cong., 1st Sess. app. 299 (1871).

Many members of Congress viewed Section 1 of the Act (which was codified as Section 1983) as crucial to achieving the goals of the Act. *See* Susan H. Bitensky, *Section 1983: Agent of Peace or Vehicle of Violence Against Children*, 54 Okla. L. Rev. 344 & n.60 (2001) (reviewing the legislative history of Section 1). Representative Samuel Shellabarger of Ohio, in particular, described the provision as "wholly devoted to securing the equality and safety of all the people" and to the "protection of the citizens of the United States." Cong. Globe, 42d Cong., 1st Sess. app. 68 (1871).

While the focus of the Act was addressing the racial violence and legal abuses observed in the South, the Act's legislative history "suggests a firm congressional resolve that the problem feel the full effect of federal power, without regard to traditional limitations." Theodore Eisenberg, *Section 1983: Doctrinal Foundations and an Empirical Study*, 67 Cornell L. Rev. 482, 485 (1982). The application of Section 1983 was intentionally kept broad, limiting "[t]raditional immunities, respect for states, and other basic assumptions." *Id.* (citing *Monroe v. Pape*, 365 U.S. 167, 173-

74, 180 (1961)). The statute was intended to have a broad reach and provide individuals with significant protection. As such, Professor Eisenberg observed that "those who would limit [S]ection 1983's ability to protect the rights it was meant to protect must seek justification in something other than the intent of [S]ection 1983's drafters." *Id.* at 486.

A. Supreme Court Jurisprudence Confirms That Section 1983 May Be Used To Enforce Violations Of Rights Arising Under Spending Clause Legislation.

Courts have long recognized the expansive reach of Section 1983. For example, in *Maine v. Thiboutot*, the Supreme Court recognized that Section 1983 could be used to enforce violations of federal statutory rights in addition to constitutional rights. 448 U.S. 1, 4 (1980). Emphasizing the breadth of Section 1983, the Court went so far as to note that the phrase "Constitution and laws" in the statute "means what it says." *Id.* at 4.

In *Blessing v. Freestone*, a challenge to a child support services provision of the Social Security Act, the Supreme Court set forth a three-factor test to delineate the scope of Section 1983. 520 U.S. 329, 340-41 (1997). Under the *Blessing* test, for a federal right to be enforceable under Section 1983, (1) "Congress must have intended that the provision

in question benefit the plaintiff," (2) "the right assertedly protected by the statute is not so vague and amorphous that its enforcement would strain judicial competence," and (3) "the provision giving rise to the asserted right must be couched in mandatory, rather than precatory, terms." *Id.* Given the vagueness of the "substantial compliance" provision at issue in *Blessing*, the Court held that the provision of the Social Security Act at issue was not enforceable under Section 1983. *Id.*

The Court further sought to clarify the scope of Section 1983 when it refined *Blessing*'s first factor in *Gonzaga University v. Doe*, 536 U.S. 273 (2002). In *Gonzaga*, a student sought to enforce rights under the Family Educational Rights and Privacy Act through Section 1983. *Id.* at 276-77. Interpreting the first *Blessing* factor, which requires Congress to have intended that plaintiff benefit from the provision, the Court held that nothing short of an "unambiguously conferred right [may] support a cause of action" under Section 1983. *Id.* at 283.

The language in the *Blessing/Gonzaga* enforcement test informs the application of Section 1983 to rights arising under Spending Clause legislation. The Spending Clause, Article I, Section 8, Clause 1 of the United States Constitution, provides, in relevant part, that:

> The Congress shall have Power to lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States . . . .

The Spending Clause also gives Congress the power "to place conditions on the grant of federal funds." *Barnes* v. *Gorman*, 536 U.S. 181, 185-186 (2002). Such conditional spending makes Spending Clause legislation akin to a contract. *See Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981) ("[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.").

The Supreme Court has made clear that individuals can utilize Section 1983 to enforce rights conferred by Spending Clause legislation so long as the statutory provision at issue "unambiguously" confers rights. In *Pennhurst*, the Supreme Court held that the Developmentally Disabled Assistance and Bill of Rights Act of 1976 did not confer rights enforceable under Section 1983. 451 U.S. 1, 28 (1981). The Court focused on the statute's structure, which did not make clear that complying with the requirements of the statute was a condition of the federal funding. The Court said that the state did not "voluntarily and knowingly accept[] the terms of the 'contract'" and therefore finding such rights would

undermine "the legitimacy of Congress' power to legislate under the spending power." *Id.* at 17. In order for Spending Clause legislation to confer rights enforceable under Section 1983, the Court required that Congress "speak with a clear voice" and confer the rights "unambiguously." *Id.*

Since *Pennhurst*, the Supreme Court has twice found that Spending Clause legislation confers unambiguous rights enforceable under Section 1983.

First, in *Wright v. City of Roanoke Redevelopment and Housing Authority*, the Supreme Court found that a rent-ceiling provision of the Public Housing Act conferred a "a mandatory [benefit] focusing on the individual family and its income" was enforceable under Section 1983. 479 U.S. 418, 430 (1987). The Court held that Congress conferred the right with clarity and the right was "sufficiently specific and definite to qualify as enforceable" under *Pennhurst*. *Id.* at 432.

Second, in *Wilder v. Virginia Hospital Association*, the Supreme Court permitted a hospital association's Section 1983 claim to enforce a reimbursement provision of the Medicaid Act. 496 U.S. 498, 524 (1990). Because the provision created a "binding obligation . . . to adopt

reasonable and adequate rates" and was "cast in mandatory rather than precatory terms," the Court held the provision enforceable under Section 1983. *Id.* at 512. The Court further held that the Medicaid Act's administrative enforcement process "cannot be considered sufficiently comprehensive to demonstrate a congressional intent to withdraw the private remedy of" Section 1983. *Id.* at 521-22. As such, the plaintiff could not be precluded from bringing their Medicaid Act claim under Section 1983. *Id.*

B. Application Of The *Blessing/Gonzaga* Enforcement Test Has Led To A Patchwork Of Inconsistent Holdings In The Context of Medicaid And The FNHRA.

Since the Supreme Court's decision in *Gonzaga*, the First, Third, and Ninth Circuits have all held that the FNHRA creates rights enforceable by individual residents under Section 1983. *See Rolland v. Romney*, 318 F.3d 42 (1st Cir. 2003); *Grammer v. John J Kane Reg'l Ctrs.-Glen Hazel*, 570 F.3d 520 (3d Cir. 2009); *Anderson v. Ghaly*, 930 F.3d 1066 (9th Cir. 2019); *see also Steward v. Abbott*, 189 F. Supp. 3d 620, 638 (W.D. Tex. 2016) (noting the Fifth Circuit "'assume[d], without deciding'" that the FNHRA was enforceable via Section 1983) (quoting *Grant ex rel. Family Eldercare v. Gilbert*, 324 F.3d 383, 387 (5th Cir.

2003)). No federal appellate court opinion has been identified by *amici* denying enforcement of FNHRA provisions under Section 1983.

Outside the context of the FNHRA, however, *Gonzaga* has resulted in a confusing and conflicting body of jurisprudence in which courts find some provisions within a given statutory scheme to be enforceable under Section 1983 and other provisions within the same statutory scheme to be unenforceable.

Since *Gonzaga*, federal appellate courts have reviewed at least 60 Section 1983 cases involving at least 29 provisions of the Medicaid Act, with more than half being held enforceable. *See, e.g.*, Jane Perkins, *Pin the Tail on the Donkey: Beneficiary Enforcement of the Medicaid Act Over Time*, 9 St. Louis U. J. Health L. & Pol'y 207 (tbl. 2) (2016) (collecting cases); *Planned Parenthood S. Atl., v. Baker*, 941 F.3d 687, 698 (4th Cir. 2019) (Section 1396a(a)(23) enforceable); *Planned Parenthood of Greater Tex. Family Planning & Preventative Health Servs., Inc. v. Smith*, 913 F.3d 551 (5th Cir. 2019) (Section 1396a(a)(23) enforceable); *Legacy Cmty Health Servs., Inc. v. Smith*, 881 F.3d 358 (5th Cir. 2018) (Section 1396a(bb) enforceable); *Planned Parenthood of Kan. & Mid-Mo. v. Andersen*, 882 F.3d 1205 (10th Cir. 2018), *cert. denied*, No

17-1340, 2018 WL 1456394 (Dec. 10, 2018) (Section 1396a(a)(23)(A) enforceable); *BT Bourbonnais Care v. Norwood*, 866 F.3d 815 (7th Cir. 2017) (Section 1396a(13)(A) enforceable); *Planned Parenthood of Gulf Coast v. Gee*, 862 F.3d 445 (5th Cir. 2016), *rehearing denied*, 876 F.3d 699 (2017), *cert. denied*, 139 S. Ct. 408 (2018) (Section 1396a(a)(23)(A) enforceable); *Wilson v. Gordon*, 822 F.3d 934 (6th Cir. 2016) (Section 1396a(a)(3) enforceable).[4]

Despite this inconsistency at the appellate level, the Supreme Court has indicated that at least some provisions of the Medicaid Act may be enforced using Section 1983. *See Wilder v. Virginia Hospital Association*, 496 U.S. 498, 524 (1990) (Section 1396c enforceable).[5]

[4] This Court has reviewed at least 5 provisions of the Medicaid Act, finding at 3 provisions which focus on the rights of individual Medicaid beneficiaries enforceable. *See BT Bourbonnais Care v. Norwood*, 866 F.3d 815 (7th Cir. 2017) (Section 1396a(13)(A) enforceable); *Bontrager v. Ind. Fam. & Soc. Servs. Admin.*, 697 F.3d 604, 607 (7th Cir. 2012) (Section 1396a(a)(10)(A) enforceable); *Planned Parenthood of Ind., Inc. v. Comm'r of the Ind. State Dep't of Health*, 699 F.3d 962 (7th Cir. 2012) (Section 1396a(a)(23)(A) enforceable). *But see Bruggeman ex rel. Bruggeman v. Blagojevich*, 324 F.3d 906 (7th Cir. 2003) (Section 1396a(a)(19) unenforceable); *Turner v. Jackson Park Hosp.*, 264 Fed. App'x 527 (7th Cir. 2008) (assumed without deciding Section 1396a(w)(1) unenforceable).

[5] The Supreme Court has also held several other provisions of the Social Security Act, of which the Medicaid Act and Federal Nursing Home Reform Act are parts, to be enforceable under Section 1983. *See*

Further, the Supreme Court has denied certiorari in several cases permitting Section 1983 enforcement of the Medicaid Act and the FNHRA. *See Pl. P'hood of Kan. v. Andersen*, 882 F.3d 1205 (10th Cir. 2018), *cert. denied*, No 17-1340, 2018 WL 1456394 (Dec. 10, 2018); *Pl. P'hood of Gulf Coast v. Gee*, 862 F.3d 445 (5th Cir. 2017), *reh'g denied*, 876 F.3d 699 (2017), *cert. denied*, 139 S. Ct. 408 (2018); *Grammer v. John J Kane Reg'l Ctrs.-Glen Hazel*, 570 F.3d 520 (3d Cir. 2009) *cert. denied*, No. 09-696 (2010) (FNHRA case). And, as set forth above, every federal appellate court to have considered the question has held that the FNHRA creates rights enforceable by individual residents under Section 1983. *See supra.*

Maine v. Thiboutot, 448 U.S. 1, 4-8 (1980) (the Civil Rights Attorney's Fees Awards Act of 1976, 42 U. S. C. § 1988); *King v. Smith*, 392 U.S. 309, 333-34 (1968) (Section 602(a)(9) of the Social Security Act); *see also Edelman v. Jordan*, 415 U.S. 651, 675 (1974) ("[S]uits in federal court under § 1983 are proper to secure compliance with the provisions of the Social Security Act on the part of participating States.").

C. Congress Intended For Individual Enforcement of Medicaid Act Provisions.

While the courts have diverged on the issue of Section 1983 enforcement in Medicaid Act cases, Congress plainly intended for individuals to be able to enforce rights under the Medicaid Act. In fact, Congress has taken explicit steps to ensure that provisions of the Medicaid Act could be enforced under Section 1983.

Specifically, Congress amended the Social Security Act in response to the Supreme Court's decision in *Suter v. v. Artist M.*, 503 U.S. 347 (1992). In *Suter*, the Supreme Court held that plaintiffs could not enforce a provision of the Adoption Assistance and Child Welfare Act, a part of the Social Security Act, using Section 1983. *Id.* at 363-364. In reaching this holding, the Supreme Court found that provisions of the Social Security Act requiring states to include certain requirements in their plans to receive federal funds did not confer rights enforceable under Section 1983. *See id.* at 358 ("Therefore the Act does place a requirement on the States, but that requirement only goes so far as to ensure that the State have a plan approved by the Secretary which contains the 16 listed features."). This holding had potentially far-reaching consequences outside of the case's context, including in the Medicaid context, as many

Social Security Act provisions are phrased in terms of requirements for state plans to receive federal funds.

Recognizing the likely consequences of *Suter*, Congress amended the Social Security Act to make clear that certain provisions of the Act, including provisions of the Medicaid Act and Medicare Act, could be enforced under Section 1983. The amended statute, in relevant part, provides:

> In an action brought to enforce a provision of [the Social Security Act], such provision is not to be deemed unenforceable because of its inclusion in a section of [the Act] requiring a State plan or specifying the required contents of a State plan. This section is not intended to limit or expand the grounds for determining the availability of private actions to enforce State plan requirements other than by overturning any such grounds applied in *Suter v. Artist M.*, 112 S. Ct. 1360 (1992)...

42 U.S.C. § 1320a-2. Congress made clear that its intent was to protect an individual's ability to enforce their rights under Section 1983, saying "The intent of this provision is to assure that individuals who have been injured by a State's failure to comply with the Federal mandates of the State plan titles of the Social Security Act are able to seek redress in federal courts to the extent they were able to prior to the decision in *Suter v. Artist M.*" H.R. Conf. Rep. No. 761, 103d Cong., 2d Sess., at 926 (1994),

reprinted in 1994 U.S.C.C.A.N. 2901, 3257; *see also* Report Of The Comm. On Ways & Means, H. R. Doc., No. 102-631, at 364 (2d Sess. 1992) ("Prior to this decision, the Supreme Court has recognized, in a substantial number of decisions, that beneficiaries of Federal-State programs could seek to enjoin State violations of Federal statutes by suing under" Section 1983) (citing *Rosado v. Wyman*, 397 U.S. 397 (1970); *Maine v. Thiboutot*, 448 U.S. 1 (1980)).

II. The FNHRA Focuses On The Rights Of Residents And Unambiguously Confers Individual Rights To Nursing Home Residents Enforceable Under Section 1983.

The FNHRA was passed as part of the Omnibus Budget Reconciliation Act of 1987 ("OBRA"), and it made the first major change to federal nursing home regulation since the creation of Medicare and Medicaid.

Congress passed the FNHRA in response to the poor quality of care being provided in many of the nation's nursing homes and the failure of existing systems to enforce the law and protect nursing home residents. *See* S. Hrg. 101-698, at 1 (Chairman Pryor, May 18, 1989) ("There was continuing evidence of rampant poor quality in too many facilities in our nursing homes, inadequate systems for monitoring and enforcing the

law, which demanded that something be done."). Remedies were limited to decertification and denial of reimbursements, and they were very rarely invoked—resulting in "many substandard nursing homes [continuing] operations" without penalty. *Grammer v. John J Kane Reg'l Ctrs.-Glen Hazel*, 570 F.3d 520, 523 (3d Cir. 2009)

The FNHRA amends the Medicare Act and the Medicaid Act to set forth the rights of nursing home residents and the requirements for nursing homes participating in Medicare and Medicaid. The FNHRA's Resident Bill of Rights states that nursing homes must "protect and promote the rights of *each resident*." 42 U.S.C. § 1396r(c)(1)(A) (emphasis added). These rights, although guaranteed and fulfilled by the nursing home facilities, are individual in nature. The FNHRA consistently refers to the rights of "each resident," "the resident," or "any resident," making clear the individual, not aggregate, focus of the statute. For example, the FNHRA requires that nursing homes provide each resident with:

- "The right to choose a personal attending physician," 42 U.S.C. § 1396r(c)(1)(A)(i);
- The right "to be fully informed" about care and treatment and

any material changes that may affect the resident's well-being, 42 U.S.C. § 1396r(c)(1)(A)(i);

- The right to be free from restraints, including physical and chemical restraints, 42 U.S.C. § 1396r(c)(1)(A)(ii);
- The right to privacy, 42 U.S.C. § 1396r(c)(1)(A)(iii);
- The right to confidentiality, 42 U.S.C. § 1396r(c)(1)(A)(iv);
- "The right to voice grievances with respect to treatment or care," 42 U.S.C. § 1396r(c)(1)(A)(vi);
- The right to refuse certain transfers and discharges, 42 U.S.C. § 1396r(c)(1)(A)(x) & 42 U.S.C. § 1396r(c)(2);
- The right to appeal transfer or discharges, 42 U.S.C. § 1396r(c)(3); and
- The right to be notified of their rights, orally and in writing, at the time of admission to the facility, 42 U.S.C. § 1396r(c)(1)(B).

While some of the rights set forth are broader—for example, the right to "attain or maintain the highest practicable physical, mental, and psychosocial well-being," 42 U.S.C. § 1396r(b)(2)—the majority of the rights are specifically defined and individual in nature.

The implementing regulations further clarify the individual nature of the rights conferred by the FNHRA. In the section titled "Resident rights," the regulations state that each nursing home "resident has the right to exercise his or her rights as a resident of the facility and as a citizen or resident of the United States." 42 C.F.R. § 483.10(b)(1). The FNHRA and the implementing regulations permit nursing home residents to enforce their individual rights in both administrative tribunals and courts.

The legislative history also reinforces residents' enforcement rights. The House Committee on Energy and Commerce emphasized "that the remedies specified under the amendment are not exclusive, and should not be construed to limit . . . the remedies available to residents at common law, including a private right of action to enforce compliance with requirements for nursing facilities." H.R. Rep. No. 100-391 (1), at 457-58 (1987).

Providing individual rights was the express goal and the understanding of Congress at the time of passing the FNHRA. Then-Senator William Cohen of Maine, for example, in discussing the development of regulations to implement the FNHRA, reflected that he

"was glad to see a national standard of rights and basic guarantees to compassionate care for residents of nursing homes finally written into law." S. Hrg. 101-698, at 12 (Senator Cohen, May 18, 1989). Congress chose to "elevate" nursing home residents' rights "to a condition level" because the previous rights standard was "ambiguous," making enforcement of these rights "difficult because a resident's rights and a facility's obligations [were] unclear." Medicare and Medicaid: Conditions of participation for long-term care facilities, 52 Fed. Reg. 38584 (Oct. 16, 1987).

Both the language and legislative history of the FNHRA show unambiguously that Congress intended to provide individual rights to nursing home residents that could be enforced through Section 1983. The fact that Congress enacted these rights under the Spending Clause and set requirements for nursing homes to carry out these rights does not undermine the fact that the focus of the FNHRA is on "each resident."

III. Recent Supreme Court Jurisprudence Further Supports A Broad Reading of Section 1983.

Section 1983 is particularly well-suited for enforcement of individual rights flowing from spending legislation, including the FNHRA. The plain language of the statute permits "[e]very person" to

enforce violations of their rights under the "Constitution and laws," without further limiting language. The Supreme Court in *Maine v. Thiboutot* focused on this plain language, noting that the phrase "Constitution and laws" in the statute "means what it says." *Maine v. Thiboutot*, 448 U.S. 1, 4 (1980).

This broad reading of Section 1983 is supported by subsequent Supreme Court precedent, including the Supreme Court's recent case, *Bostock v. Clayton County*. In *Bostock*, the Supreme Court interpreted the language of Title VII of the Civil Rights Act of 1964, specifically the statute's prohibition of discrimination on the basis of sex. 590 U. S. ____ (2020) (slip op. at 1, 4-5). To interpret the statute, the Court explained that it must "determine the ordinary public meaning" of the provision in dispute with an "orient[ation]… to the time of the statute's adoption." *Id.* at 4. Emphasizing the importance of the plain language, Justice Gorsuch went as far as to say

> the limits of the drafters' imagination supply no reason to ignore the law's demands. When the express terms of a statute give us one answer and extratextual considerations suggest another, it's no contest. Only the written word is the law, and all persons are entitled to its benefit.

Id. at 1. The plain meaning of the terms of Title VII prohibited

discrimination on the basis of sex, which the Court held necessarily included discrimination on the basis of sexuality or gender identity. *Id.* at 33.

The plain meaning of Section 1983 permits a broader application than allowed by the district court. The statute does not contain limitations on the types of constitutional and statutory rights which may be enforced under Section 1983. The limitations imposed by lower courts on Section 1983 enforcement of rights conferred by Spending Clause legislation, *see supra*, are unsupported by the both the statutory language and the understanding of the statute at the time it was enacted.

Section 1983 was intended to provide individuals with the ability to enforce violations of their rights under the Constitution and federal laws. The FNHRA explicitly confers individual rights upon nursing home residents. Therefore, individuals must be allowed to enforce violations of their FNHRA rights under Section 1983. To hold otherwise would be to disregard both the plain meanings of the statutes and the clear intent of Congress in enacting the statutes.

CONCLUSION

For the foregoing reasons, the Court should reverse the district court and hold that the Federal Nursing Home Reform Act unambiguously confers upon individuals rights enforceable under Section 1983.

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume limitation of Federal Rules of Appellate Procedure 29(a)(5) and 32(a)(7)(B) and Circuit Rule 29 because it contains 4,994 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f). This brief also complies with the typeface and type-style requirements of Circuit Rule 32(b) because it was prepared using Microsoft Word 2010 in Century 12-point font, a proportionally spaced typeface.

Dated: August 7, 2020 By: /s/ Douglas I. Koff
Douglas I, Koff

CERTIFICATE OF SERVICE

I hereby certify that a copy of the attached Brief of Amici Curiae in Support of Plaintiff-Appellant was filed with the Clerk of the Court of Appeals for the Seventh Circuit and served on the parties through the Court's electronic filing system. I further certify that all parties required to be served have been served.

Dated: August 7, 2020 By: /s/ Frank W. Olander
Frank W. Olander