No. 20-1664

In the United States Court of Appeals for the Seventh Circuit

GORGI TALEVSKI, by his next friend IVANKA TALEVSKI,

Plaintiff-Appellant,

v.

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

Defendants-Appellees.

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

Petition For Panel Rehearing Or Rehearing *En Banc*

Lawrence S. Robbins
Alan E. Untereiner
John B. Goerlich
Courtney L. Millian
Robbins, Russell, Englert, Orseck,
& Untereiner LLP
2000 K St. N.W., 4th Floor
Washington, D.C. 20006
Telephone: (202) 775-4500
Facsimile: (202) 775-4510
lrobbins@robbinsrussell.com

August 10, 2021 *Counsel for Appellees*

APPEARANCE & CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 20-1664

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

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

The Court prefers that the disclosure statements be filed immediately following docketing; but, the disclosure statement must be filed within 21 days of docketing or upon the filing of a motion, response, petition, or answer in this court, whichever occurs first. Attorneys are required to file an amended statement to reflect any material changes in the required information. The text of the statement must also be included in the front of the table of contents of the party's main brief. **Counsel is required to complete the entire statement and to use N/A for any information that is not applicable if this form is used.**

☐ **PLEASE CHECK HERE IF ANY INFORMATION ON THIS FORM IS NEW OR REVISED AND INDICATE WHICH INFORMATION IS NEW OR REVISED.**

(1) The full name of every party that the attorney represents in the case (if the party is a corporation, you must provide the corporate disclosure information required by Fed. R. App. P. 26.1 by completing item #3):

The Health and Hospital Corporation of Marion County d/b/a Valparaiso Care and Rehabilitation and American Senior Communities, LLC

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

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

(3) If the party, amicus or intervenor is a corporation:

i) Identify all its parent corporations, if any; and

The Health and Hospital Corporation of Marion County is a municipal corporation/subdivision of Indiana.

ii) list any publicly held company that owns 10% or more of the party's, amicus' or intervenor's stock:

N/A

(4) Provide information required by FRAP 26.1(b) – Organizational Victims in Criminal Cases:

N/A

(5) Provide Debtor information required by FRAP 26.1 (c) 1 & 2:

N/A

Attorney's Signature: /s/ Lawrence S. Robbins Date: 08/10/2021

Attorney's Printed Name: Lawrence S. Robbins

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** ☑ **No** ☐

Address: 2000 K St. NW, 4th Floor
Washington, DC 20006

Phone Number: 202-775-4501 Fax Number: 202-775-4510

E-Mail Address: lrobbins@robbinsrussell.com

APPEARANCE & CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 20-1664

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

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

The Court prefers that the disclosure statements be filed immediately following docketing; but, the disclosure statement must be filed within 21 days of docketing or upon the filing of a motion, response, petition, or answer in this court, whichever occurs first. Attorneys are required to file an amended statement to reflect any material changes in the required information. The text of the statement must also be included in the front of the table of contents of the party's main brief. **Counsel is required to complete the entire statement and to use N/A for any information that is not applicable if this form is used.**

☐ **PLEASE CHECK HERE IF ANY INFORMATION ON THIS FORM IS NEW OR REVISED AND INDICATE WHICH INFORMATION IS NEW OR REVISED.**

(1) The full name of every party that the attorney represents in the case (if the party is a corporation, you must provide the corporate disclosure information required by Fed. R. App. P. 26.1 by completing item #3):

The Health and Hospital Corporation of Marion County d/b/a Valparaiso Care and Rehabilitation and American Senior Communities, LLC

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

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

(3) If the party, amicus or intervenor is a corporation:

i) Identify all its parent corporations, if any; and

The Health and Hospital Corporation of Marion County is a municipal corporation/subdivision of Indiana.

ii) list any publicly held company that owns 10% or more of the party's, amicus' or intervenor's stock:

N/A

(4) Provide information required by FRAP 26.1(b) – Organizational Victims in Criminal Cases:

N/A

(5) Provide Debtor information required by FRAP 26.1 (c) 1 & 2:

N/A

Attorney's Signature: /s/ Alan E. Untereiner Date: 08/10/2021

Attorney's Printed Name: Alan E. Untereiner

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** ☐ **No** ☑

Address: 2000 K St. NW, 4th Floor
Washington, DC 20006

Phone Number: 202-775-4505 Fax Number: 202-775-4510

E-Mail Address: auntereiner@robbinsrussell.com

APPEARANCE & CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 20-1664

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

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

The Court prefers that the disclosure statements be filed immediately following docketing; but, the disclosure statement must be filed within 21 days of docketing or upon the filing of a motion, response, petition, or answer in this court, whichever occurs first. Attorneys are required to file an amended statement to reflect any material changes in the required information. The text of the statement must also be included in the front of the table of contents of the party's main brief. **Counsel is required to complete the entire statement and to use N/A for any information that is not applicable if this form is used.**

☐ **PLEASE CHECK HERE IF ANY INFORMATION ON THIS FORM IS NEW OR REVISED AND INDICATE WHICH INFORMATION IS NEW OR REVISED.**

(1) The full name of every party that the attorney represents in the case (if the party is a corporation, you must provide the corporate disclosure information required by Fed. R. App. P. 26.1 by completing item #3):

The Health and Hospital Corporation of Marion County d/b/a Valparaiso Care and Rehabilitation and American Senior Communities, LLC

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

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

(3) If the party, amicus or intervenor is a corporation:

i) Identify all its parent corporations, if any; and

The Health and Hospital Corporation of Marion County is a municipal corporation/subdivision of Indiana.

ii) list any publicly held company that owns 10% or more of the party's, amicus' or intervenor's stock:

N/A

(4) Provide information required by FRAP 26.1(b) – Organizational Victims in Criminal Cases:

N/A

(5) Provide Debtor information required by FRAP 26.1 (c) 1 & 2:

N/A

Attorney's Signature: /s/ John B. Goerlich Date: 08/10/2021

Attorney's Printed Name: John B. Goerlich

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** ☐ **No** ☑

Address: 2000 K St. NW, 4th Floor
Washington, DC 20006

Phone Number: 202-471-3041 Fax Number: 202-775-4510

E-Mail Address: jgoerlich@robbinsrussell.com

APPEARANCE & CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 20-1664

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

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

The Court prefers that the disclosure statements be filed immediately following docketing; but, the disclosure statement must be filed within 21 days of docketing or upon the filing of a motion, response, petition, or answer in this court, whichever occurs first. Attorneys are required to file an amended statement to reflect any material changes in the required information. The text of the statement must also be included in the front of the table of contents of the party's main brief. **Counsel is required to complete the entire statement and to use N/A for any information that is not applicable if this form is used.**

☐ **PLEASE CHECK HERE IF ANY INFORMATION ON THIS FORM IS NEW OR REVISED AND INDICATE WHICH INFORMATION IS NEW OR REVISED.**

(1) The full name of every party that the attorney represents in the case (if the party is a corporation, you must provide the corporate disclosure information required by Fed. R. App. P. 26.1 by completing item #3):

The Health and Hospital Corporation of Marion County d/b/a Valparaiso Care and Rehabilitation and American Senior Communities, LLC

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

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

(3) If the party, amicus or intervenor is a corporation:

i) Identify all its parent corporations, if any; and

The Health and Hospital Corporation of Marion County is a municipal corporation/subdivision of Indiana.

ii) list any publicly held company that owns 10% or more of the party's, amicus' or intervenor's stock:

N/A

(4) Provide information required by FRAP 26.1(b) – Organizational Victims in Criminal Cases:

N/A

(5) Provide Debtor information required by FRAP 26.1 (c) 1 & 2:

N/A

Attorney's Signature: /s/ Courtney L. Millian Date: 08/10/2021

Attorney's Printed Name: Courtney L. Millian

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** ☐ **No** ☑

Address: 2000 K St. NW, 4th Floor
Washington, DC 20006

Phone Number: 202-471-3956 Fax Number: 202-775-4510

E-Mail Address: cmillian@robbinsrussell.com

Table of Contents

Table of Authorities

Page(s)

Cases

Statutes, Regulations, and Rules

FRAP 35(b) Statement and Introduction

The panel's decision in this case conflicts with a previous decision of this Court, *Nasello v. Eagleson*, 977 F.3d 599 (2020), and errs on a question of exceptional importance—whether certain provisions of the Federal Nursing Home Reform Act of 1987 (FNHRA), 42 U.S.C. § 1396r, confer a private right of action and thereby federalize a significant swath of state medical malpractice law. *See* Fed. R. App. P. 35(b)(1), (2). Rehearing or rehearing *en banc* is warranted for both reasons.

This should have been a simple state-court malpractice action, subject to Indiana's cap on malpractice damages. Plaintiff-appellant, a resident at a nursing facility owned and operated by the defendants-appellees, disagreed (through his wife and next friend) with the medication prescribed to treat his dementia and with the decision to transfer him to an all-male facility because of his sexually and physically aggressive behavior toward female patients. He challenged his transfer and filed a grievance over his medication, pursuant to the detailed remedies prescribed by FNHRA. And plaintiff-appellant was successful: he was switched to different medication and was permitted to return to defendants-appellees' facility (but ultimately elected not to do so).

But that wasn't enough. Talevski sued defendants-appellees in federal court under 42 U.S.C. § 1983, claiming that FNHRA, a Spending Clause statute, provided him an implied private right of action, and that Section 1983 granted him a remedy that exceeds the state damages limits. A panel of this Court agreed.

A different panel of this Court had previously instructed otherwise. Shortly before oral argument in this case, this Circuit decided *Nasello*, 977 F.3d 599. There,

too, the plaintiffs contended that a provision of the Medicaid statute afforded them an implied private right of action. The *Nasello* court said no. As that Court explained, the Medicaid Act, like other Spending Clause statutes, merely sets out the conditions of a contract between states and the federal government (states follow certain rules, and the federal government partially funds Medicaid), and in so doing it confers no private right to bring suit upon individuals.

Although the panel in this case purported to distinguish *Nasello*, it scarcely reckoned with that case at all. In truth, the panel's decision and *Nasello* cannot both be right; *en banc* review is therefore needed to "secure . . . uniformity of [this] court's decisions." Fed. R. App. P. 35(a)(1). What is more, by imposing on states in this Circuit contractual obligations that they never agreed to, the panel federalized a large swath of state medical malpractice law, rendered several state statutes a functional dead letter, and stripped states of the benefit of their Medicaid bargain with the federal government. *En banc* review is warranted to address these significant departures from basic federalism principles.

Statement

I. Factual Background

Plaintiff-appellant Gorgi Talevski suffers from dementia, and in January 2016 he began residing in defendant-appellee Valparaiso Care and Rehabilitation (VCR), a long-term care and skilled nursing facility owned by defendant-appellee Health and Hospital Corporation of Marion County (HHC) and managed by defendant-appellee

American Senior Communities (ASC).[1] A13-14. With brief exceptions, Talevski resided at VCR from early 2016 until he was transferred in late 2016. A15.

Talevski's dementia worsened while in HHC's care, A14, and (no doubt because of his condition) he behaved violently and sexually aggressively toward fellow patients and multiple members of VCR's staff. During the approximately ten months in 2016 that he lived at VCR, Talevski (among other things) inappropriately touched female residents; shoved a certified nursing assistant and then made stabbing motions with a knife towards a nurse; and attempted to stab a VCR employee with a fork. A36-37.

Talevski's doctors prescribed, and requested that VCR administer, a variety of drugs intended to address Talevski's dementia and manage his sexually aggressive behavior. A14-15. Talevski's daughter disagreed with this course of treatment, and she filed an official grievance with the Indiana State Department of Health (ISDH). A15. That grievance prompted a different doctor to order that Talevski's medication be tapered, as Talevski's daughter had requested. A15.

But Talevski's sexually aggressive behavior toward female patients persisted. HHC therefore proposed to transfer him to an all-male facility. A37. After two temporary transfers to another facility, VCR transferred him indefinitely from its care in December 2016. A15. A physician at Talevski's new facility determined that Talevski should not return to VCR because of his physically and sexually aggressive

[1] For convenience and brevity's sake, we refer to all three entities (defendants-appellees here) collectively as "HHC" wherever possible.

behavior toward women and recommended Talevski's transfer to an all-male facility. A37.

Talevski challenged that proposed transfer before an Administrative Law Judge (ALJ) of the ISDH, A35, and the ALJ ruled that Talevski should instead be allowed to return to HHC's care. A16; A41. Following Talevski's successful appeal to the ISDH, HHC agreed that he could return to its facility. A16. In the end, however, Talevski's family elected to keep him elsewhere, and he still resides in that separate facility today. A16-17. In short: Invoking the administrative procedures afforded by FNHRA, Talevski successfully challenged both his medication and transfer, but ultimately elected not to return to HHC.

Those administrative successes, however, did not deter his family from seeking damages in a federal lawsuit under Section 1983.

II. Procedural Background

More than two years after he left VCR for the last time, Talevski filed this lawsuit, claiming that HHC had violated his rights under FNHRA and Section 1983. The United States District Court for the Northern District of Indiana dismissed, holding that FNHRA does not create private rights enforceable under Section 1983. A1-8.

A panel of this Court reversed. In the panel's view, two provisions of FNHRA—the first, banning nursing homes from imposing chemical restraints for convenience; the second, banning nursing homes from transferring patients without a valid reason—met the standards for inferring private rights of action under *Blessing v. Freestone*, 520 U.S. 329 (1997), and *Gonzaga University v. Doe*, 536 U.S. 273 (2002).

The panel recognized that a different panel of this Court had only recently reached the opposite conclusion with respect to another provision of the Medicaid Act. *See Nasello*, 977 F.3d 599. But, ignoring the critical language from that case, the panel held that *Nasello* merely "reflects the caution with which we approach finding an enforceable private right of action" (rather than rejecting outright the proposition that Spending Clause statutes give rise to such enforceable rights). Slip Op. 23.

Argument

I. En Banc Review Or Panel Rehearing Is Warranted Because The Panel Departed From Circuit Precedent

In *Nasello*, plaintiffs claimed that the State of Illinois had reimbursed them too little for their medical expenses under 42 U.S.C. § 1396a(r)(1)(A), which, like FNHRA, is a provision of the Medicaid Act. *See Nasello*, 977 F.3d at 600-601. This Court held that plaintiffs lacked enforceable rights under Section 1983. Addressing the statute as a whole, the Court explained that the "threshold problem" is that "Medicaid is a cooperative program through which the federal government reimburses certain expenses of states that promise to abide by the program's rules." *Id.* at 601. As such, the Court flatly (and broadly) held, "Medicaid does not establish anyone's entitlement to receive medical care (or particular payments)," instead "requir[ing] only compliance with the terms of the bargain between the state and federal governments." *Ibid.* Congress could have made the various terms of that bargain enforceable through private suit, but "it has not done so," choosing instead to establish "a system of administrative remedies." *Ibid.*

The *Nasello* panel acknowledged that in some of its older cases the Supreme Court had found implied rights of action, but noted it had been "three decades" since *Wilder v. Virginia Hospital Association*, 496 U.S. 498 (1990), the last of those cases. *Nasello*, 977 F.3d at 601. In every case since *Wilder*, the *Nasello* Court noted, the Supreme Court had refused to find an implied private right of action, the most recent being *Armstrong v. Exceptional Child Care Center, Inc.*, 575 U.S. 320 (2015). *See Nasello*, 977 F.3d at 601. From that 30-year history, the *Nasello* Court derived a clear and emphatic lesson: "*Armstrong* and its immediate predecessors do not permit a court of appeals to enlarge the list of implied rights of action when the statute sets conditions on states' participation in a program, rather than creating direct private rights." *Ibid.* "Creating new [private] rights of action" was Congress's purview, not the Judiciary's. *Ibid.* Individual beneficiaries were therefore "remit[ted] . . . to the administrative"—not the judicial—"process," and could "ask the responsible federal officials to disapprove a state's plan or withhold reimbursement." *Id.* at 601-02.

Like the provision at issue in *Nasello*, FNHRA is part of the Medicaid Act. *See Anderson v. Ghaly*, 930 F.3d 1066, 1073 n.3 (9th Cir. 2019) (referring to FNHRA as "amend[ing] the Medicaid Act"); *see also* Slip Op. 2 (noting that FNHRA "establish[ed] the minimum standards of care to which nursing-home facilities must adhere in order to receive federal funds in the Medicaid program"). And like the provision at issue in *Nasello*, "FNHRA was enacted pursuant to Congress's Spending Clause powers." Slip Op. 3. That is, it sets out the "rules" by which states must abide in exchange for which the federal government agrees to "reimburse[] certain

expenses" of theirs. *Nasello*, 977 F.3d at 601; *see also Grammer v. John J. Kane Reg'l Ctrs.-Glen Hazel*, 570 F.3d 520, 523 (3d Cir. 2009) (noting, in assessing an implied private right of action under FNHRA, that "those [states] that do accept federal funding must" in turn "comply with the Medicaid Act and with regulations promulgated by the Secretary of Health and Human Services").

Faced with this stark conflict with *Nasello*, the *Talevski* panel gave *Nasello* the shortest of shrifts. In the panel's view, *Nasello* merely "reflects the caution with which we approach finding an enforceable private right of action." Slip Op. 23. That is simply not a fair account of the decision. *Nasello* broadly held that *Medicaid* (of which FNHRA is one portion) "does not establish anyone's entitlement to receive medical care." 977 F.3d at 601. Full stop. The panel below did not even advert to that language, much less reckon with it. Had the panel done so, it would not have gone on to flout *Nasello*'s further injunction that "a court of appeals" lacks the authority "to enlarge the list of implied rights of action when the statute sets conditions on states' participation in a program, rather than creating direct private rights." *Ibid.*

In the panel's view, it was "critical" in this case that FNHRA contained "mandatory" and "rights-creating" language. Slip Op. 8-9, 11. But so did the statute in *Nasello*. Section 1396a(r)(1)(A) provided that the expenses plaintiffs were seeking to cover "*shall* be taken into account" in "calculat[ing]" their benefits under the statute. *Nasello*, 977 F.3d at 601 (emphasis added) (internal quotation marks omitted). And while the panel below relied heavily on the use of the word "right" in

FNHRA, it neglected even to note, much less address, Supreme Court decisions that have flatly held that the use of the word "right" does not create enforceable private rights of action, under Section 1983 or otherwise. *See Gonzaga*, 536 U.S. at 289 n.7 (a "reference to 'rights'" does not "give rise to a statute's enforceability under § 1983"); *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 8, 18 (1981) (refusing to find an implied private right of action even where a statute spoke of a "bill of rights" for the developmentally disabled because "[i]n expounding a statute, we must not be guided by a single sentence or member of a sentence").

There is no reconciling these two views of the law. Either potential beneficiaries have the ability to enforce the terms of the Medicaid bargain between states and the federal government through lawsuit (*Talevski*) or they do not (*Nasello*). Either the terms of the Medicaid Act can imply a private right of action (*Talevski*) or they cannot (*Nasello*). Resolving that conflict through *en banc* review "is necessary to secure or maintain uniformity of th[is] court's decisions." Fed. R. App. P. 35(a)(1).

II. The Panel Erroneously Federalized Garden-Variety Medical Malpractice Claims, In Defiance Of The Statutory Scheme And In Derogation Of Basic Principles Of Federalism

The *Nasello* Court held that Spending Clause statutes, such as Medicaid, "remit[] beneficiaries to the administrative process." 977 F.3d at 601. And the administrative remedies prescribed by FNHRA are unusually robust. Both states and the federal Secretary of Health and Human Services (HHS) may choose to punish noncompliant facilities, or deny Medicaid payments, or assess civil monetary penalties, or appoint temporary management, or even close a facility and transfer its residents. 42 U.S.C. § 1396r(h)(2)(A)(i)-(iv); *id.* § 1396r(h)(3)(A). In addition, FNHRA

requires states to provide a process for hearing appeals of transfer decisions, *id.* § 1396r(e)(3), and requires facilities to provide a process whereby a patient may "voice grievances with respect to treatment or care that is (or fails to be) furnished," *id.* § 1396r(c)(1)(A)(vi).[2] Indeed, Talevski took full advantage of those administrative processes before filing this lawsuit, and he did so *successfully*—he no longer had to take the medicine his daughter disapproved, and he was offered the opportunity to return to VCR. *See supra* at 3-4.

The panel's discovery of a private right of action subverts that congressional design. Plaintiffs in this Circuit, disappointed with administrative remedies, may now charge off to federal court under Section 1983 and seek whatever remedies a judge or jury will permit. The invention of such novel federal claims is the opposite of what *Nasello* held when it said that "[c]reating new rights of action is a legislative rather than a judicial task." 977 F.3d at 601.

But that, unfortunately, is just the beginning of the mischief caused by "[c]reating new rights of action." *Ibid.* "[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," and "[t]he 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*, 451

[2] The Secretary of HHS has promulgated regulations mandating an individualized grievance process for residents, 42 C.F.R. § 483.10(j), with grievances being heard first by the facility and then by an independent arbiter such as a state agency, *id.* § 483.10(j)(4)(i).

U.S. at 17. There is no reason to suppose that Indiana, Illinois, and Wisconsin "knowingly accept[ed]" the prospect of nursing homes being held limitlessly liable in damages for a breach of the two FNHRA provisions at issue in this case. Indeed, numerous states were moved to suggest otherwise in their amicus filing in support of HHC. Finding an implied right of action, they noted, will "rob[] 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" and "would surely have a disruptive effect on the nursing home industry." Br. of Indiana, Alabama, Alaska, Kentucky, Mississippi, and Nebraska as *Amici Curiae* in Support of Defendants-Appellees, *Talevski v. HHC et al.*, No. 20-1664, at 13, 15 (Oct. 6, 2020), ECF No. 41 [hereinafter "States' Brief"].

And the consequences in this Circuit are severe: Indiana, for example, has enacted legislation capping damages and attorneys' fees in medical malpractice cases. *See* IC § 34-18-14-3; *id.* § 34-18-18-1. The panel has now gutted those laws; no rational Medicaid patient (and certainly no plaintiff's lawyer working on a contingent-fee basis) would sue under Indiana state law if he or she could instead seek a jackpot recovery under Section 1983. That was not the bargain to which Indiana, or the other states in this Circuit, thought they had agreed. The decision to upend state-federal relations and alter the terms of the states' bargain is an error of "exceptional importance," Fed. R. App. P. 35(a)(2), warranting *en banc* review. This Court should not allow a decision "rob[bing] States of one of the benefits of the Medicaid bargain" to stand. States' Br. 13.

Conclusion

Panel rehearing or rehearing *en banc* should be granted.

Dated: August 10, 2021

Respectfully submitted,

By: /s/ Lawrence S. Robbins

Lawrence S. Robbins
Alan E. Untereiner
John B. Goerlich
Courtney L. Millian
Robbins, Russell, Englert, Orseck,
& Untereiner LLP
2000 K St. NW, 4th Floor
Washington, DC 20006
Telephone: (202) 775-4500
Facsimile: (202) 775-4510
lrobbins@robbinsrussell.com
Counsel of Record for Appellees

Certificate of Compliance

The foregoing brief complies with the type-volume limitation of Fed. R. App. P. 35(b)(2)(A). The brief contains 2,692 words, excluding those parts of the brief exempted by Fed. R. App. P. 32(f). This brief complies with the typeface and type-style requirements of Fed. R. App. P. 32(a)(5)-(6) and Circuit Rule 32(b) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 365 (2016) in Century 12-point font.

Dated: August 10, 2021

/s/ Lawrence S. Robbins
Lawrence S. Robbins
Counsel of Record for Appellees

Certificate of Service

Pursuant to Federal Rule of Appellate Procedure 25, I hereby certify that on August 10, 2021, I electronically filed the foregoing Petition For Panel Rehearing Or Rehearing *En Banc* via ECF, and service was accomplished on counsel of record by that means.

Dated: August 10, 2021

/s/ Lawrence S. Robbins
Lawrence S. Robbins
Counsel of Record for Appellees