

No. 21-6639

**In the
Supreme Court of the United States**

JACQUELINE M. GIEBELL, PETITIONER

v.

HEARTLAND DUBLIN NURSING FACILITY, RESPONDENT

ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

**RESPONDENT HEARTLAND DUBLIN NURSING FACILITY'S
BRIEF IN OPPOSITION TO
PETITION FOR WRIT OF CERTIORARI**

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COUNTERSTATEMENT OF QUESTION PRESENTED

Petitioner, who lives in Virginia, was a “friend” of a nursing home resident in Ohio. Petitioner alleged the nursing home resident was being abused by his family in Ohio. Petitioner lodged complaints with the nursing home, Ohio Department of Health, and the local police department, none of whom substantiated any of Petitioner’s complaints. The nursing home resident, who was under hospice care, passed away in September 2018. Petitioner then brought suit in July 2020 in the District Court in Ohio against the nursing home only alleging violations of the federal Nursing Home Reform Act and federal criminal statutes. The District Court dismissed the Complaint for a lack of standing. The Sixth Circuit affirmed on other grounds holding that the statutes upon which Petitioner based her claims do not afford her a private right of action and that she cannot prosecute pro se claims on behalf of the decedent. Now, Petitioner seeks to improperly expand upon her claims and factual allegations with her Petition for a Writ of Certiorari under the guise of seeking review of the Sixth Circuit’s holding.

The questions presented at this juncture are (1) whether Petitioner has a private right of action under the federal Nursing Home Reform Act and various federal criminal statutes where she had no familial or legal relation to the nursing home resident and where none of the cited statutes provide for a private right of action; (2) whether Petitioner may proceed pro se on behalf of a deceased person; and (3) whether the Petition alleges facts and claims not pled in her Complaint filed in the District Court.

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The opinion of the Court of Appeals is not reported but is available at 2021 U.S. App. LEXIS 22413. The opinion of the District Court is not reported but is available at 2020 U.S. Dist. LEXIS 200035.

JURISDICTIONAL STATEMENT

The Sixth Circuit entered its judgment on July 28, 2021 and denied a petition for rehearing en banc on September 13, 2021. This Court's jurisdiction is invoked under 28 U.S.C. § 1254. Respondent denies that the case satisfies the standard set forth in this Court's Rule 10(a), (b) or (c).

COUNTERSTATEMENT OF THE CASE

Jacqueline Giebell, a resident of Virginia, claims to be the former caregiver and friend of Shiskin Wu, deceased. (Complaint, RE 1, Page ID # 5). Ms. Giebell does *not* allege she was Mr. Wu's power-of-attorney, nor that she is a representative of his Estate (which may or may not exist).

Ms. Giebell alleges that while she was taking care of Mr. Wu in the Commonwealth of Virginia, she reported to her boss Jen Wu, who was the son of Mr. Wu that there were "marks" on Mr. Wu's body. (Id.) Several weeks later, Mr. Wu was moved to Respondent Heartland Dublin Nursing Facility/HCR Manor Care ("Heartland" or "Respondent") in Dublin, Franklin County, Ohio. (Id.) According to Ms. Giebell, she then visited Mr. Wu at Heartland in January 2018, and observed

marks on him that were identical to marks she observed in Virginia. (Id.) She did not report the marks to anyone at that time but claims to have observed additional marks on Mr. Wu during visits in May, July, and August of 2018. (Id.)

Ms. Giebell alleges that on June 15, 2018, Mr. Wu's Power of Attorney, Keui Wu who was his wife, attempted to prevent Ms. Giebell from seeing Mr. Wu, but Heartland intervened. (Id.) At the same time, Ms. Giebell reported her "observation of [alleged] abuse" to Heartland's Administrator, Cody Brown. (Id.) Ms. Giebell believed Mr. Wu was being abused by a family member. (Id.)

Ms. Giebell continued to file complaints of abuse with Heartland, including with Mr. Brown's purported superior, Jason Hohlefeldt, and the Ohio Department of Health who has regulatory authority over the nursing home. (Id.) According to Ms. Giebell, Mr. Hohlefeldt evaluated Mr. Wu and determined the marks were "skin discolorations." (Id.) Ms. Giebell disagreed with this assessment. (Id.)

On August 2, 2018, Ms. Giebell called the Dublin, Ohio Police Department after being unable to reach Mr. Wu while his family was visiting. (Id.) During that call to the Dublin Police, Ms. Giebell purportedly discovered "there was another report involving [Mr. Wu]." (Id.) Ms. Giebell requested that "Sgt. Krayner" reopen the case, but the officer instead suggested Ms. Giebell document the abuse in Virginia and make a report there. (Id., Page ID # 6.) Ms. Giebell claims she attempted to do so but was denied. (Id.) Nevertheless, Sgt. Krayner received Ms. Giebell's allegation of abuse in Virginia. (Id.)

On August 6, 2018, “Officer Jones” was sent to Heartland to photograph the subject marks on Mr. Wu. (Id.) Ms. Giebell alleges that as a result of this action by the Dublin Police in response to her complaint of abuse, Keui Wu made a “telecommunications complaint” to the Dublin Police. (Id.) “Officer Traves” then allegedly warned Ms. Giebell not to contact Mr. Wu or she would be charged with harassment. (Id.) He also purportedly informed her that Mr. Wu’s family had taken his cellphone. (Id.) Ms. Giebell then proceeded to file an incident report with the Dublin Police about her conversation with Officer Traves. (Id.) She also talked to “Sgt. Rice” who was allegedly “very hateful and threatened” her. (Id.)

Mr. Hohlefeldt allowed Ms. Giebell to visit Mr. Wu at Heartland on August 18. (Id., Page ID # 7.) Ms. Giebell told Mr. Hohlefeldt the Dublin Police restricted her telephone access to Mr. Wu. (Id.) She alleges the Dublin Police eventually dismissed the warning of Officer Traves because “the legal dept. of the police had sided with [her and] because [Mr. Wu] was competent.” (Id.)

On August 22, Mr. Wu fell and was taken to the hospital. (Id.) Mr. Wu was then “mysteriously put back on hospice on sept. 2nd, even though he had handled being on hospice fine from 8/5 until he fell, he somehow started dying the next day on 9/3, and continued dying until close to midnight on 9/4.” (Id.) Even though, as she alleges, he was already under hospice care, Ms. Giebell believes Mr. Wu was placed in hospice as “retaliation and to ‘dispose’ of him. And to rid themselves of the abuse scandal.” (Id., Page ID # 8). She also alleges it was Heartland’s intention to declare Mr. Wu incompetent even though he was competent. (Id.)

On July 20, 2020, Ms. Giebell filed her Complaint pro se in the United States District Court for the Southern District of Ohio against Heartland (the “District Court”). (Complaint, RE 1, Page ID # 1). Ms. Giebell alleged negligence per se based on violation of the federal Nursing Home Reform Act, 42. U.S.C. 1395i-3, gross negligence, malice, obstruction of criminal investigations, and retaliation against a witness, and sought relief in the way of \$200,000 in punitive damages and that “a case be opened on Mr. Shiskin Wu.” (*Id.*, Page ID # 10).

On August 19, 2020, Heartland filed a Motion to Dismiss for failure to state a claim upon which relief could be granted. (Motion to Dismiss, RE 5, Page ID # 247). On August 31, 2020, Ms. Giebell filed her Response in Opposition to Defendant’s Motion to Dismiss. (Response in Opposition, RE 7, Page ID # 262).

On October 27, 2020, District Court Judge Sarah D. Morrison issued an Opinion and Order granting Defendant’s Motion to Dismiss (“Order”). (Order, RE 8, Page ID # 279). As to Ms. Giebell’s state law claims, the District Court noted Ms. Giebell was attempting to bring claims in her own name while asserting she represents the deceased, Mr. Wu’s, interests. (Complaint, RE 1, Page ID # 5; Response in Opposition, RE 7, Page ID # 275). The District Court determined Ms. Giebell lacks standing to bring claims on behalf of the deceased Mr. Wu and that Ohio Rev. Code § 3721.10(D) (defining the term “sponsor” as used in Ohio’s nursing home “Resident’s Rights” statute) does not confer standing to bring tort claims on another’s behalf. (Order, RE 8, Page ID # 283-285).

As to Ms. Giebell's federal criminal law claims, the District Court held Ms. Giebell possesses no private right of action against Heartland for alleged violation of federal criminal statutes, nor does she have authority to initiate a federal criminal prosecution of Heartland. (Id., Page ID # 285).

On October 27, 2020, the District Court entered its Judgment in a Civil Action, granting Defendant's Motion to Dismiss and dismissing the Complaint with prejudice ("Judgment"). (Judgment, RE 9, Page ID # 286).

Petitioner appealed to the Sixth Circuit, advancing three essential arguments. First, she argued the District Court erred by not referring her case to a magistrate judge, thereby depriving her of the procedures set forth in Fed. R. Civ. P. 72. (Doc # 16-2, page 4). Second, Petitioner challenged the district court's determination she lacked standing to bring her state-law claims on Mr. Wu's behalf. (Id.) Lastly, Petitioner challenged the District Court's determination she did not bring any tort claim on her own behalf. (Id.)

The Sixth Circuit was not persuaded. *First*, the Sixth Circuit found that although the District Court incorrectly determined Petitioner lacked standing, she was nonetheless subject to dismissal under Fed. R. Civ. P. 12(b)(6) because none of the federal authorities cited in her Complaint provide a private right of action. (Id., page 5). *Second*, the Sixth Circuit found that even if Petitioner could show she was serving Mr. Wu, or his Estate, in a representative capacity permissible under Fed. R. Civ. P. 17, she could not do so pro se. (Id., page 6). *Lastly*, the Sixth Circuit found

Petitioner's argument that the District Court must defer to the magistrate in the first instance lacked merit. (Id.) Thus, the Sixth Circuit affirmed the District Court.

In her Petition for Writ of Certiorari, Petitioner fails to address the propositions of law that caused the Sixth Circuit to affirm dismissal of her Complaint and, instead, introduces several new factual and legal contentions not raised in the subordinate courts.

First, Petitioner incorrectly asserts this action falls within a claimed circuit split as to a private right of action under the federal Nursing Home Reform Act ("FNHRA"). Any circuit split cited by Petitioner is inapposite to the instant action because (1) in the first instance, there is no private right of action under FNHRA, and Petitioner did not raise a substantive due process claim under 42 U.S.C. § 1983 for a per se violation of the same statute as was asserted in the cases cited in the Petition as giving rise to a circuit split; and (2) Petitioner did not meet the pleading standard under *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009) for her allegation that she is of the class protected by FNHRA, making any per se argument inappropriate.

Second, Petitioner fails to provide any support for the notion she is permitted to bring a pro se claim on behalf of another, in this instance the purported Estate of Mr. Wu. Thus, even if Petitioner could show she is serving Mr. Wu's Estate's interests in a representative capacity permissible under Fed. R. Civ. P. 17, she could not do so pro se.

Third, Petitioner's claims made under Ohio Rev. Code § 2307.60, 42 U.S.C. § 1983, the First Amendment of the United States Constitution, and 18 U.S.C. § 241,

were not raised to the District Court and she should not be permitted to use this appellate process as an avenue to amend her Complaint.

Lastly, Petitioner raises a flurry of facts and allegations not in the trial court record (mostly rooted in her own experiences and editorials on society at large) which should not be considered for purposes of whether the Petition compels this Court to exercise its discretion under this Court’s Rule 10(a), (b) or (c).

REASONS FOR DENYING THE PETITION

I. THE PETITION PLEADS CLAIMS NOT ALLEGED IN THE COMPLAINT.

In *Singleton v. Wulff*, this Court noted that “[i]t is the general rule, of course, that a federal appellate court does not consider an issue not passed upon below.” 428 U.S. 106, 120 (1976). Although “there are circumstances in which a federal appellate court is justified in resolving an issue not passed on below, as where the proper resolution is beyond any doubt” —that is not the case here. *Id.*, 428 U.S. at 121. As an initial matter, this Court should deny the instant Petition to the following issues of law that were not raised in the District Court proceedings for considerations of prudence: (1) substantive due process under 42 U.S.C. § 1983; (2) Ohio Rev. Code § 2307.60, contending Ohio law creates a cause of action to bring civil claims for alleged violations of federal criminal law; and (3) allegations of conspiracy under 18 U.S.C. § 241.

A. RESPONDENT IS NOT A ‘STATE ACTOR’ SUBJECT TO A 42 U.S.C. § 1983 CLAIM FOR DEPRAVATION OF CONSTITUTIONAL RIGHTS.

Aside from not being raised in the Complaint, Petitioner’s novel deprivation of Constitutional rights argument is without merit. “To state a claim under 42 U.S.C. § 1983, a plaintiff must set forth facts that, when construed favorably, establish (1) the deprivation of a right secured by the Constitution or laws of the United States (2) caused by a person acting under the color of state law.” *Feucht v. Triad Local Schs. Bd. of Educ.*, 425 F. Supp. 3d 914, 923 (S.D. Ohio 2019). Petitioner does not allege Respondent is a state-actor, and courts have dispelled the notion that a private business, such as a nursing home, is a state actor for the mere fact that it accepts Medicare and Medicaid payment for its services. *Peters v. Applewood Care & Rehab. Ctr.*, 2012 U.S. Dist. LEXIS 123390, *5-6 (N.H. Dist. 2012) (Dismissing 42 U.S.C. §1983 claims against a private nursing home, dismissing that accepting Medicaid and Medicare characterized the entity as a state actor); *see also, Blum v. Yaretsky*, 457 U.S. 991, 1011 (“We are also unable to conclude that the nursing homes perform a function that has been traditionally the exclusive prerogative of the State”). Thus, Petitioner’s 42 U.S.C. § 1983 claim is futile. The pleadings do not allege Respondent is a state-actor (which it in fact is not).

1. THERE IS NO RELEVANT CONFLICT AMONG THE CIRCUITS.

Petitioner’s reliance on *Talevski v. Health & Hosp. Corp.*, 6 F.4th 713 (7th Cir. 2021) giving rise to a conflict among the Circuits is likewise misguided, as the issue before the Seventh Circuit was whether a 42 U.S.C. § 1983 deprivation of

Constitutional rights action may be brought for violations of FNHRA. Because there is no allegation that Respondent was acting under color of state law, any perceived split between the Sixth and Seventh Circuits bears no relation to the instant case, a fact which is bolstered by the Sixth Circuit's recognition that no state actors were named as parties in Petitioner's Complaint. (Doc # 16-2, page 4) ("And while Giebell complains about the conduct of certain officers with the [Dublin Police Department], Heartland was the only party named as a defendant in this case").

Secondly, Petitioner's reliance on *Talevski* is ineffectual given the underlying statute of limitations expired. "Section 1983 claims do not have a built-in statute of limitations; instead, they borrow state statutes of limitations and tolling rules for general personal injury actions." *Id.*, 6 F.4th at 721. As the Sixth Circuit aptly noted, even if § 1983 applied here, "[t]o the extent that [Petitioner] intended to bring a cause of action for false imprisonment against Heartland, such a claim would be barred by the one-year statute of limitations set forth in Ohio Revised Code § 2305.11." (Doc # 16-2, page 5).

Third, Petitioner argues that Respondent violated her First Amendment rights. However, Respondent is not a state actor. And, this issue was not asserted in the Complaint, or raised in either of the Courts below.

B. OHIO REV. CODE § 2307.60 DOES NOT APPLY TO CLAIMS IN THE COMPLAINT REGARDING ALLEGED VIOLATIONS OF FEDERAL CRIMINAL STATUTES.

In her Complaint, Petitioner alleged Respondent violated various federal criminal statutes and that the conduct alleged gives rise to claims for civil damages.

On this point, the Sixth Circuit correctly noted that none of the federal criminal statutes cited in the Complaint confer a private right of action. (Doc # 16-2, page 4).

Now, for the first time, Petitioner seeks to invoke Ohio Rev. Code § 2307.60 to create a private right of action for alleged violation of federal criminal law. This claim, raised for the first time in the Petition, is not properly before this Court and should not be considered now.

Furthermore, in support of her position seeking to invoke Ohio Rev. Code § 2307.60, Petitioner relies upon *Buddenberg v. Weisdack*, 2018 U.S. Dist. LEXIS 139850, *1 (N.D. Ohio 2019). In *Buddenberg*, the district court certified a question to the Ohio Supreme Court as to whether Ohio Rev. Code § 2307.60 created a civil cause of action based on alleged criminal acts as defined by *state* statutes where there had been no conviction. *Id.* at *1-2. Of note, the plaintiff in *Buddenberg* claimed the defendants violated both federal and state law, but only the alleged state law violation (criminal offense of intimidation at Ohio Rev. Code § 2921.03(C)) was certified to the Ohio Supreme Court. *Id.* As such, *Buddenberg* is not instructive on Petitioner's alleged violations of different *federal* criminal statutes. Because Petitioner did not raise any violations of state criminal law in her Complaint, *Buddenberg* is inapposite to the question of whether Ohio Rev. Code § 2307.60 authorizes a civil action premised upon alleged violations of federal criminal statutes.

C. PETITIONER LACKS CAPACITY TO BRING CLAIMS ON BEHALF OF THE DECEDENT.

The next argument raised by Petitioner is that Respondent violated the deceased Mr. Wu's rights. However, Petitioner presents no law to rebut the Sixth

Circuit's finding that Fed. R. Civ. P. 17 prohibits Petitioner from proceeding pro se on behalf of a deceased person. (Doc # 16-2, at 5). As such, all claims for damages and equitable relief asserted on behalf of Mr. Wu were properly rejected.

D. 'OBSTRUCTION OF JUSTICE' IS NOT A COGNIZABLE CIVIL CLAIM.

Lastly, Question of Law Number 4 raised in the Petition, whether Heartland obstructed justice as defined by federal statute(s), is improperly before this Court because Petitioner is not a person protected by obstruction of justice statutes for consideration of negligence per se, and, as stated, there is no private right of action under the same statute. The District Court of the District of Columbia recognized there is no private right of action under 18 U.S.C. § 1510 or §§ 241 and 242, stating:

It is established that Sections 241 and 242 of Title 18 of the U.S. Code provide "no private right of action[.]" *Crosby v. Catret*, 308 Fed. App'x 453 (D.C. Cir. 2009) (per curiam). In addition, § 1113 (Attempt to commit murder or manslaughter); § 1503 (Influencing or injuring officer or juror generally); § 1510 (Obstruction of criminal investigations); § 1511 (Obstruction of State or local law enforcement); § 1512 (Tampering with a witness, victim, or an informant); and § 1513 (Retaliating against a witness, victim, or informant) are the type of "bare criminal statute[s]" from which no private right of action is implied.

Leonard v. George Wash. Univ. Hosp., 273 F. Supp. 3d 247, 256-257 (D.D.C. 2017); *see also Linda R.S. v. Richard D.*, 410 U.S. 614, 619 (1973) ("in American jurisprudence at least, a private citizen lacks a judicially cognizable interest in the prosecution or nonprosecution of another").

CONCLUSION

For all the above reasons, the Petition for a Writ of Certiorari should be denied. First, the Sixth Circuit's decision does not bear upon any important question

of federal law that this Court should decide, nor does it conflict with any relevant decision of this Court. Further, there is no conflict among the Circuits on the question of whether the federal Nursing Home Reform Act creates a private right of action like that pled by Petitioner in her Complaint in the District Court. Finally, Petitioner's newly added factual assertions and claims under federal and state law cannot be heard by this Court where she pled them for the first time in her Petition and they each otherwise fail on the merits.

Dated: February 15, 2022

Respectfully submitted,

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CERTIFICATE OF SERVICE

A copy of Respondent Heartland Dublin Nursing Facility's Brief in Opposition to Petition for Writ of Certiorari has been sent via U.S. Mail this 15th day of February, 2022 to the following:

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