No. 21-806

In the Supreme Court of the United States

HEALTH AND HOSPITAL CORPORATION OF MARION COUNTY, INDIANA, ET AL., PETITIONERS

v.

GORGI TALEVSKI, BY HIS NEXT FRIEND IVANKA TALEVSKI

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

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether Spending Clause legislation can give rise to federal rights under § 1983.

2. Whether the Federal Nursing Home Reform Act's rights against chemical restraint and unlawful discharge and transfer are federal rights § 1983 protects.

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The opinion of the court of appeals, Petition and Appendix ("Pet. App.") 2a-26a, is reported at 6 F.4th 713. The district court's order on defendants' motion to dismiss (Pet. App. 28a-36a) is unpublished but can be found at 2020 WL 1472132.

JURISDICTION

The judgment of the court of appeals was entered on July 27, 2021. Pet. App. 2a. The Seventh Circuit denied rehearing en banc on August 25, 2021. Pet. App. 38a-39a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATEMENT

1. The federal Medicaid program, 42 U.S.C. § 1396 *et seq.*, is a cooperative federal-state program under which the federal government provides funding to state programs that provide medical assistance to individuals "whose income and resources are insufficient to meet the costs of necessary medical services." 42 U.S.C. § 1396-1. Among those services is treatment at "nursing facilit[ies]," also known as nursing homes or long-term care facilities. *See id.* § 1396d(a)(4)(A). Congress enacted the Federal Nursing Home Reform Act (FNHRA) to amend the Medicaid statute—which included a "Residents Bill of Rights"—in response to widespread abuse of nursing home residents among government certified nursing homes. Included among these rights are "[t]he right to be free from … any … chemical restraints imposed for purposes of discipline or convenience" and the "right[]" not to be involuntarily "transfer[red] or discharge[d]" except for certain narrow specific reasons. 42 U.S.C. § 1396r(c). Congress passed both statutes through the Spending Clause.

Section 1983 creates a private cause of action against any person who, under color of state law, deprives another "of any rights … secured by the … laws" of the United States. 42 U.S.C. § 1983. This Court has determined that "the [section] 1983 remedy broadly encompasses violations of federal statutory as well as constitutional law," *Maine v. Thiboutot*, 448 U.S. 1, 4 (1980), including violations of a right unambiguously conferred by Spending Clause statutes, *see Blessing v. Freestone*, 520 U.S. 329, 340, 342 (1997); *Gonzaga Univ. v. Doe*, 536 U.S. 273, 274 (2002).

In addition to the court below, two federal courts of appeals have held that certain of the rights-conferring provisions in the FNHRA confer federal rights protected by § 1983. In *Anderson v. Ghaly*, the Ninth Circuit held that the appeal rights arising out of unlawful discharges and transfers are federal rights protected by § 1983. 930 F.3d 1066, 1081 (9th Cir. 2019). And in *Grammer v. John J. Kane Regional Centers-Glen Regional Centers.-Glen Hazel*, the Third Circuit held that the right against restraint and the right against unlawful discharge or transfer are federal rights § 1983 protects. 570 F.3d 520, 523-25, 532 (3d Cir. 2009). No court of appeals has reached a contrary conclusion.

2. Respondent Gorgi Talevski suffered from dementia.[1] Pet. App. 2a. His family cared for him until January 2016, when it became clear he would need fulltime care for his safety. *Id.* at 77a. He began living at Valparaiso Care and Rehabilitation (VCR), a state-run nursing facility near his family home in Indiana. *Id.* at 2a. When respondent entered into VCR, he was able to walk, communicate in English, feed himself, and recognize his family. *Id.* at 17a, 77a.

[1] Gorgi Talevski died on October 6, 2021.

Eight months into respondent's stay at VCR, his daughter observed rapid deterioration in his cognitive and physical abilities. *Id.* at 17a. Respondent could no longer feed himself or communicate in English; instead, he could only speak Macedonian, his native language. VCR attributed the change in respondent's condition to the natural progression of dementia. *Id.*

Respondent's daughter, concerned about her father's rapid deterioration, requested a list of her father's medications. *Id.* The list showed ten medications, of which six were powerful psychotropic drugs. *Id.* The Talevski family hired a private neurologist, who facilitated the removal of the drugs from respondent's treatment. *Id.*

The Talevski family filed a formal complaint against VCR during the week of September 27, 2016. *Id.* at 18a. On November 23, 2016, VCR transferred respondent, for twenty-two days, to a neuropsychiatric hospital over an hour away. *Id.* He returned to VCR on December 15, 2016, only to be sent back to the hospital on December 19, 2016. *Id.* at 79a. This time, he stayed for 10 days before returning to VCR on December 29, 2016. *Id.* Following his second return to VCR, he was sent back to the hospital a third time the next day, December 30, 2016, remaining until January 9, 2017. *Id.* During this final transfer, respondent was sent without his dentures, causing the degradation of his gums to the point where he could not be fitted for new dentures. *Id.* at 80a.

On January 9, 2017, after the repeated transfers to a hospital over an hour away from his Macedonian-speaking family members, VCR refused respondent's readmittance. *Id.* at 18a. VCR instead attempted to transfer him through an involuntarily discharge to a dementia facility in Indianapolis two-and-a-half hours away. *Id.* The Talevski family filed a petition for review of the transfer with the Indiana State Department of

Health (ISDH) while respondent was transferred to yet another facility, this one also over an hour away from his family. *Id.* An administrative law judge rejected VCR's transfer efforts, but respondent never returned to the facility. *Id.*

3. Through his wife, Ivanka Talevski, respondent sued VCR under 42 U.S.C. § 1983 for violations of the FNHRA. *Id.* at 3a. The district court dismissed the action for failure to state a claim on which relief can be granted. *Id.* The district court found that the FNHRA does not provide a private right of action that may be redressed under Section 1983. *Id.*

On appeal, the Seventh Circuit, applying *Blessing*'s three factors in light of *Gonzaga*, reversed. *Id.* at 2a. The court found that the first *Blessing* factor was satisfied, as the text explicitly "uses the language of rights." *Id.* at 9a. Indeed, said the court, following the heading, the statute states that "[a] skilled nursing facility *must protect and promote the rights of each resident, including each of the following rights*." 42 U.S.C. § 1396r(c)(1)(A) (emphasis added). Therefore, for the purposes of 42 U.S.C. § 1396r(c), nursing home residents are "expressly identified" as beneficiaries. Pet. App. 9a. The statute further requires that nursing home facilities "'must protect and promote the *right*[] of each resident' to be free from chemical restraints and 'must permit each resident to remain in the facility and must not transfer or discharge the resident.'" *Id.* at 10a. The court held that both statutory protections "contain exactly the type of 'rights-creating language'" described in *Gonzaga* as "critical" because they both "appear under the 'specified rights' heading of 42 U.S.C. § 1396r(c)" and set forth "'the rights of each resident.'" *Id.*

The court held that this express rights-conferring language reflected Congress's purpose in enacting the FNHRA. The court recognized that Congress enacted

the FNHRA "in response to widespread abuses among government-certified nursing facilities" and "[n]ursing facilities [had] an important role to play in ending that abuse." *Id.* at 11a. The court found "the fact that Congress spoke of resident rights, not merely steps that the facilities were required to take" shows Congressional intent to benefit nursing home residents directly. *Id.*

The court found the second *Blessing* factor, which requires the plaintiff to show the right assertedly protected by the statute is not "so vague and amorphous that its enforcement would strain judicial competence," also weighed in favor of protection under § 1983. *Id.* at 12a. The court found the rights fell "comfortably within the judiciary's core interpretive competence." *Id.* The statute requires that facilities "must not" "subject residents to chemical restraints for purposes of discipline" or " involuntarily transfer or discharge any resident absent one of several allowable justifications and notice." *Id.* Inquiry into whether a nursing home has engaged in forbidden restraint or unlawful discharge are precisely the types of "focused, straightforward inquires" that both agencies and courts are "well equipped to resolve." *Id.* As the court pointed out, there was no "hand-wringing" about the clarity of these rights in the administrative law judge's decision to hold the transfer violated the FNHRA. *Id.* at 12a-13a.

Finally, the court found "no dispute" that the FNHRA "meet[s] *Blessing*'s third factor" as the statute unambiguously mandates "[f]acilities *must* protect and promote the right against chemical restraints, *must* allow residents to remain in the facility, *must* not transfer, and *must* not discharge the resident." *Id.* at 13a (emphasis in original).

With all three factors weighing in favor of nursing home residents, the court held "sections 1396r(c)(1)(A)(ii)

and 1396r(c)(2)(A) unambiguously confer individually enforceable rights" upon such individuals. *Id.*

The Court further found no evidence that Congress expressly or impliedly foreclosed patients from enforcing FNHRA's rights under § 1983. Following this Court's guidance in *Fitzgerald v. Barnstable School Committee*, 555 U.S. 246, 255 (2009), the court found the FNHRA's enforcement scheme "is not the type of comprehensive enforcement scheme, incompatible with individual enforcement," for which the court looks when determining an implied repeal of § 1983 protection. *Id.* at 14a-15a. The court found that the savings clause in § 1396r(h)(8) "put to rest" any doubt that the rights created were enforceable under § 1983. *Id.* at 16a.

The court also held that Defendants' additional argument, that the statute of limitations bars this case, was not suitable for resolution at this stage of the case because the statute of limitations is an affirmative defense, and the case is still on a motion to dismiss. *Id.* at 16a-17a. The court specifically left open that petitioners could raise this argument at summary judgment and at trial should the evidence show that respondent's claim is in fact ineligible for tolling under Indiana law. *Id.* at 21a.

ARGUMENT

The petition for certiorari should be denied. There is no conflict among the courts of appeals on either of the questions presented. The questions presented arise infrequently as shown by the relative dearth of cases involving the enforcement of FNHRA rights in the lower courts.

Petitioners cannot make the difficult showing required to overrule the holding in *Wilder v. Virginia Hospital Association*, 496 U.S. 498 (1990), that federal rights in Spending Clause legislation are protected by § 1983—not least because *Wilder* is clearly right that

Spending Clause legislation, like all legislation, can confer federal rights, the very thing § 1983 protects. Petitioner also cannot show that the court below erred in its application of this Court's precedents, in particular *Blessing v. Freestone*, 520 U.S. 329, 340, 342; *Gonzaga Univ. v. Doe,* 536 U.S. 273, 274 (2002) and *Fitzgerald v. Barnstable School Committee*, 555 U.S. 246, 255 (2009), in holding that the FNHRA creates rights under § 1983.

This case is also a poor vehicle for the Court to review the questions presented. Petitioner seeks to involve the Court in litigation at an interlocutory stage with an outstanding statute of limitations question. Petitioner could win this case at summary judgment or at trial, on statute of limitations grounds, or on other grounds. Petitioners have already filed an answer in the district court that maintains petitioners' statute of limitations defense. And this case has not been stayed in the lower courts, raising the possibility it could become moot before the Court can decide it. Petitioner will suffer little or no prejudice by waiting to raise these claims in this Court on appeal after trial.

I. The Court Should Deny the First Question

The first question presented, whether the Court should overrule *Wilder*, does not warrant further review. There is no disagreement among the federal courts on the question and petitioners cannot establish that *Wilder* is the type of unworkable outlier precedent that the Court should overrule.

1. Petitioners have not shown any disagreement among the courts of appeals about the continued vitality of *Wilder*. The circuits are unanimous that *Wilder* remains good law and that Spending Clause statutes, like other statutes, can create federal rights. Petitioners claim there is "confusion" (Pet. 15-18) in the lower courts, but all petitioners mean is that courts have reached differing conclusions about whether particular statutes

create federal rights protected by § 1983 under the test set forth in *Blessing* and *Gonzaga*. There is no confusion or uncertainty in the lower courts on the question *whether* Spending Clause legislation can create federal rights protected by § 1983 generally. On that the circuits are unanimous.

2. Petitioners have not met their heavy burden to show that *Wilder* should be overruled. The Court typically "demand[s] a 'special justification,' over and above the belief 'that the precedent was wrongly decided,'" before reversing one of its decisions. *Allen v. Cooper*, 140 S. Ct. 994, 1003 (2020) (citation omitted). That demand for a special justification reflects the Court's recognition that *stare decisis* is a "foundation stone of the rule of law." *Id.* (citation omitted). Petitioners have identified no such special justification here. To the contrary, traditional *stare decisis* considerations strongly support adhering to *Wilder*.

Wilder is not an "outlier." *Janus v. American Fed'n of State, Cty. & Mun. Emps., Council 31*, 138 S. Ct. 2448, 2482 (2018). *Wilder* simply applied the principles that the Court had recognized a decade earlier in *Thiboutot*, 448 U.S. at 4. No decision of the Court has ever questioned the fundamental *premise* of *Wilder*—that Spending Clause legislation can create federal rights. Instead, in the years after *Wilder* the Court elaborated an entire framework for determining when Spending Clause legislation creates federal rights in *Blessing* and *Gonzaga*.

Wilder has not proven "unworkable." Petitioners offer no evidence that this Court or lower courts have struggled more to apply *Wilder*, *Blessing*, and *Gonzaga* than they have to apply other doctrinal tests. This Court has taken more cases about the interpretation of the pleading standard under Rule 8 in the last two decades than it has cases about which Spending Clause statutes

create federal rights protected by § 1983. *Wilder*, as elaborated by *Blessing* and *Gonzaga*, has created a remarkably clear standard. The FNHRA itself provides an excellent example. On the question whether the FNHRA creates enforceable rights under *Blessing* and *Gonzaga*, there is not any confusion in the lower courts: every court of appeals to rule on the question has held that the FNHRA creates federal rights under § 1983.

Wilder has also engendered significant reliance. Congress has relied on *Thiboutot* and *Wilder* as the law when enacting legislation for over thirty years and has ratified the creation of private enforceable rights in its Spending Clause litigation. The legal background against which Congress enacted the FNHRA evinces Congress' intention to grant private enforceable rights. In the same year that Congress enacted the FNHRA, this Court decided *Wright v. City of Roanoke Redevelopment and Housing Authority*, 479 U.S. 418 (1987), holding that a statute that did not use the word "right" could still create an enforceable federal right for low-income tenants overcharged for utilities. Against that backdrop, Congress expressly drafted FHNRA with a "Residents' Bill of Rights."

Congress also expressly ratified the Court's application of § 1983 to Spending Clause legislation by statutorily providing that certain provisions of the Medicaid Act and other subchapters of the Social Security Act pertaining to the content of a state plan may be enforceable by beneficiaries in appropriate circumstances in a private action under 42 U.S.C. § 1983. *See* 42 U.S.C. § 1320a-2; 42 U.S.C. § 1320a-10 (same). Congress enacted 42 U.S.C. § 1320a-2 in the wake of *Suter v. Artist M.*, 503 U.S. 347 (1992).[2] In *Suter*, the Court declined to allow an

[2] *See* 42 U.S.C. § 1320a-2 ("This section is not intended to limit or expand the grounds for determining the availability of private

action under 42 U.S.C. § 1983 to enforce a provision of the Adoption Assistance and Child Welfare Act of 1980 that required state plans to make "reasonable efforts" to avoid removing children from their homes and to help children return to their homes. *Id.* at 350-51 (quoting 42 U.S.C. § 671(a)(15)).

Wilder is also entitled to "enhanced" protection because it reflects a mere statutory interpretation, meaning petitioners "can take their objections across the street, and Congress can correct any mistake it sees." *Kimble v. Marvel Entm't, LLC*, 576 U.S. 446, 456 (2015). This is not a situation where the Court's "interpretation can be altered only by constitutional amendment or by overruling … prior decisions." *Agostini v. Felton*, 521 U.S. 203, 235 (1997). Congress created § 1983, and it has had the opportunity to change it for the past three decades. If Congress did not intend for Spending Clause legislation to create enforceable rights, it would have said so by now. *See Halliburton Co. v. Erica P. John Fund, Inc.*, 573 U.S. 258, 274 (2014) (reaffirming a "judicially created doctrine designed to implement a judicially created cause of action" under *stare decisis* because "Congress may overturn or modify" the doctrine). In fact, this is the rare case where the Court invited Congress to act if it disagreed with the Court's interpretation, and Congress chose not to. *Thiboutot*, 448 U.S. at 8.

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actions to enforce State plan requirements other than by overturning any such grounds applied in [*Suter*], but not applied in prior Supreme Court decisions respecting such enforceability."). The United States has filed at least five briefs in this Court recognizing that Congress ratified *Thiboutot* in the context of Spending Clause legislation. As the United States told this Court in *Blessing*, "in 1994, Congress twice ratified *Thiboutot* and its progeny—in 42 U.S.C. § 1320a-2, and then in 42 U.S.C. § 1320a-10." U.S. Amicus Br. at 13, *Blessing v. Freestone*, 520 U.S. 329 (1997) (No. 95-1441).

Wilder is also correct on the merits, which is an important consideration in the *stare decisis* analysis. *See Kimble*, 576 U.S. at 455 ("[*S*]*tare decisis* has consequence only to the extent it sustains incorrect decisions."). *Wilder*'s holding is sound: Spending Clause legislation can create federal rights because § 1983 permits an action in damages for the deprivation of "*any rights* … secured by the … laws." Petitioners ask (Pet. 11-15) the Court to put a gloss on § 1983 based on how petitioners' contend the Congress in 1871 expected it to apply. But the text of the statute is clear: "Every person who, under color of any statute … subjects … any citizen of the United States … to the deprivation of any rights … secured by the … laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress." 42 U.S.C. § 1983. The meaning of those words—"*any*" "*right*"—was as clear in 1871 as it is today. And it dictates that federal Spending Clause legislation creates rights enforceable under § 1983 because the meaning of those words in 1871 controls the statute's interpretation, not the expected application of those words. *See Bostock v. Clayton Cty., Georgia*, 140 S. Ct. 1731, 1749-53 (2020).

II. The Court Should Deny the Second Question

The second question presented, whether the FNHRA's rights against chemical restraint and unlawful discharge and transfer are protected by § 1983, does not warrant further review. There is no disagreement among the courts of appeals on the question whether those rights are protected by § 1983, the question is not important and does not recur frequently, and the decision below is correct on the merits.

1. Petitioners have not shown any disagreement among the courts of appeals about whether the FNHRA creates enforceable federal rights. All three courts of appeals that have addressed this issue have reached the same conclusion: the FNHRA establishes rights

enforceable through § 1983. Petitioners allege great confusion among the circuits in the application of the *Blessing* factors, but there is no confusion among the circuits about the application of the *Blessing* factors for FNHRA cases.

The Ninth Circuit in *Anderson v. Ghaly*, held that nursing home residents may use § 1983 to "challenge a state's violation" of the FNHRA's state-administrative appeals requirement. 930 F.3d 1066, 1069 (9th Cir. 2019). In that case, a nursing home transferred patients involuntarily and then refused to readmit them. *See id.* at 1072. Reversing the district court, the Ninth Circuit found that nursing home residents may sue under § 1983 to enforce their right to appeal under the FNHRA, which, the Ninth Circuit held, includes both the right to the appeal itself and the right to have the appeal enforced. *See id.* at 1081.

The Third Circuit in *Grammer v. John J. Kane Regional Centers-Glen Hazel* held that several of the rights enumerated in the FNHRA, including the right to be free of chemical restraint, are protected by § 1983. *See* 570 F.3d 520, 532 (3d Cir. 2009); *see also id.* at 524-25 (listing the FNHRA rights asserted in the case). In *Grammer*, the plaintiff (the decedent's daughter), sued her mother's nursing home, alleging that the care her mother received violated the FNHRA. The Third Circuit concluded that some of the provisions in the FNHRA, including the right to be free from chemical restraint, could be enforced through § 1983. And the court held that the Medicaid Act did not evidence congressional intent to preclude FNHRA-created private enforceable rights. *Id.* at 532.

The Seventh Circuit below applied a similar analysis to reach a similar result, holding that the rights against chemical restraint and unlawful discharge and transfer are protected by § 1983. 6 F.4th 713, 716 (7th Cir. 2021).

2. The question presented is not important and does not recur frequently. By respondents' count only a small number of FNHRA cases have ever been brought under § 1983 nationwide. That holds true even in the Third Circuit which has had a precedent, *Grammer*, squarely recognizing that the FNHRA rights are enforceable under § 1983 for more than a decade. Most nursing home residents are apparently able to obtain relief in other ways without the need to resort to the difficulty, time, and expense of federal court litigation.

3. The decision below is also correct. The FNHRA's rights against chemical restraint and involuntary transfer and discharge are compelled by the statutes' plain text and meet all three of the *Blessing* factors. Under *Blessing*: (1) "Congress must have intended that the provision in question benefit the plaintiff"; (2) the asserted right must not be "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*, 520 U.S. at 340-41. In *Gonzaga University v. Doe*, the Court clarified that the first *Blessing* factor requires that the federal provision contain an unambiguously conferred federal right using "rights-creating terms." 536 U.S. 273, 283-84 (2002). The relevant statute "must be phrased in terms of the persons benefitted," *id.* at 274, and its text and structure must unambiguously confer a right on individuals, *id.* at 283. "Once a plaintiff demonstrates that a statute confers an individual right, the right is presumptively enforceable by § 1983." *Id.* at 284.

a. *Blessing*'s first factor is met in this case. *Blessing*'s first factor requires that "Congress must have intended that the provision in question benefit the plaintiff." 520 U.S. at 340. This intention to benefit the plaintiff must go beyond placing the plaintiff within the

statute's "general zone of interest." *Gonzaga*, 536 U.S. at 283. To create judicially enforceable private rights, the statute "must be phrased in terms of the persons benefited," *id.* at 274, with "an *unmistakable focus* on the benefited class," *id.* at 284 (internal quotation marks omitted), and "confer[] entitlements sufficiently specific and definite to qualify as enforceable rights." *Id.* at 280 [internal quotation marks omitted). The most obvious way that Congress can show this intention is by employing "rights-creating language" that unambiguously creates an "*individual* entitlement." *Id.* at 287 (emphasis in original).

The FNHRA's chemical restraint and involuntary transfer and discharge provisions meet *Blessing*'s first factor in the most straightforward way: by employing unambiguous rights-creating language. The FNHRA's chemical restraint provision dictates that a nursing home "*must* protect … the right[] of *each resident*" to be free from "any physical or chemical restraints." 42 U.S.C. § 1396r(c)(1)(A)(ii) (emphasis added). Likewise, "[a] nursing facility *must* permit *each resident* to remain in the facility and must not transfer or discharge the resident from the facility[.]" *Id.* § 1396r(c)(2) (emphasis added). These substantive, individual rights, enumerated in a section entitled, "Requirements relating to residents' rights," *id.* § 1396r(c), could not make it clearer that Congress, in enacting the FNHRA's Residents' Bill of Rights, intended to benefit nursing home residents.

But Congress's intent is also evident from the statute's context. No one has a greater interest in ensuring that nursing homes acting under color of state law comply with the requirements of the restraint and transfer and discharge provisions of the FNHRA Residents' Bill of Rights than the nursing home residents whose autonomy and bodily integrity those provisions are meant to safeguard.

b. *Blessing*'s second factor—whether the asserted right is not "so vague and amorphous that its enforcement would strain judicial competence," 520 U.S. at 340-41—is also met in this case. The term "chemical restraints" is not vague, nor is the obligation amorphous. *See Grammer*, 570 F.3d at 528. The statute's requirement that nursing home residents not be transferred or discharged except under narrow enumerated circumstances similarly meets those requirements. *See Anderson*, 930 F.3d at 1078. These are tort-like legal questions that fall within the very core of judicial competency. Liability under the restraint and transfer and discharge provisions turns on answers to definite, factually determinable questions: Was the nursing home resident chemically restrained for discipline or convenience? Was the nursing home resident involuntarily discharged or transferred without observance of the statutory criteria? These are quintessentially judicially-manageable standards.

c. The third *Blessing* factor is also met in this case because the provisions are framed in "mandatory, rather than precatory, terms." *Blessing*, 520 U.S. at 341. The chemical restraint and involuntary discharge provisions do not leave any room for discretion on the part of nursing homes. Both provide that nursing homes "must" fulfill certain obligations. Specifically, the chemical restraint provision states that a nursing home "*must* protect and promote the rights of each resident, including … [t]he right to be free from … chemical restraints[.]" 42 § 1396r(c)(1)(A)(ii) (emphasis added). Likewise, the involuntary transfer provision dictates that "[a] nursing facility *must* permit each resident to remain in the facility and must not transfer or discharge the resident from the facility unless" one of several narrow circumstances applies. *Id.* § 1396r(c)(2) (emphasis added).

d. The statutory scheme does not impliedly foreclose enforcement of the FNHRA rights by § 1983. "If the existence of a federal right is established … there is a presumption that the right is enforceable under § 1983." *Blessing*, 520 U.S. at 341. The presumption, however, may be rebutted "if Congress specifically foreclosed a remedy under § 1983." *Id.* (internal quotations omitted). "Congress may do so expressly, by forbidding recourse to § 1983 in the statute itself, or impliedly, by creating a comprehensive enforcement scheme that is incompatible with individual enforcement under § 1983." *Id.*

No provision of the Medicaid Act expressly forbids enforcement through § 1983. Therefore, the only question is whether Congress established a comprehensive remedial scheme sufficient to impliedly preclude such enforcement. Courts "do not lightly conclude that Congress intended to preclude reliance on § 1983 as a remedy for the deprivation of a federally secured right." *Wilder*, 496 U.S. at 520. For such a conclusion to be warranted, "the remedial mechanisms provided" must be "sufficiently comprehensive and effective to raise a clear inference that Congress intended to foreclose a § 1983 cause of action for the enforcement of [the plaintiffs'] rights secured by federal law." *Wright*, 479 U.S. at 425.

The Medicaid Act shows no evidence of any such congressional intent. The FNHRA's central enforcement mechanisms all involve enforcement by the federal government or state governments, mechanisms that have proven ineffective at ensuring that the FNHRA's restraint and transfer and discharge rights are not routinely violated. The main mechanism by which the FNHRA is enforced—the threat to withhold federal funds—has been repeatedly held to be insufficient to foreclose access to § 1983. *See Fitzgerald v. Barnstable Sch. Comm.*, 555 U.S. 246, 255-56 (2009); *Blessing*, 520 U.S. at 347-48 (citing and discussing *Golden State Transit*

Corp. v. City of Los Angeles, 493 U.S. 103, 106 (1989), *Wright*, 479 U.S. at 426-27, and *Wilder*, 496 U.S. at 523, for the proposition that the mere "availability of administrative mechanisms to protect the plaintiff's interests" is insufficient to foreclose access to § 1983).

The Court has held that the key consideration is whether Congress has created a "comprehensive enforcement scheme that is *incompatible* with individual enforcement under § 1983." *Fitzgerald*, 555 U.S. at 252 (emphasis added). Thus, in the three cases where the Court has held that a statute impliedly foreclosed access to § 1983 "the statutes at issue required plaintiffs to comply with particular procedures and/or to exhaust particular administrative remedies prior to filing suit." *Id.* at 254. "Offering plaintiffs a direct route to court via § 1983 would have circumvented these procedures and given plaintiffs access to tangible benefits—such as damages, attorney's fees, and costs—that were unavailable under the statutes." *Id.* The FNHRA includes no similar private enforcement scheme that a § 1983 would "circumvent[]." Because all of the FNHRA's existing remedies are compatible with § 1983, the FNHRA nowhere evinces any Congressional intent to foreclose access to § 1983. *Id.* at 253.

Far from forbidding recourse to § 1983, the FNHRA expressly preserves it. The FNHRA includes a savings clause that provides that "[t]he remedies provided under this subsection are in addition to those otherwise available under State *or Federal law* and shall not be construed as limiting such other remedies, including any remedy available to an individual at common law." 42 U.S.C. § 1396r(h)(8) (emphasis added). The language of that section could not be clearer that the remedies specified in the FNHRA are intended to *supplement* any other remedy available under either State or Federal law (which includes actions under § 1983). If Congress had

meant to make the FNHRA's enforcement scheme exhaustive or exclusive, it would have written a provision in the statute foreclosing access to other remedies. Instead, it did the opposite, and wrote a provision specifically *preserving* access to other State and Federal remedies. Congress clearly did not intend the remedies in the FNHRA to be exhaustive or exclusive.

III. The Case Is a Poor Vehicle

This case is a poor vehicle for addressing the questions presented. This case comes to the Court in an interlocutory posture. The decision below reversed the granting of a motion to dismiss. Supreme Court review at an interlocutory stage is the exception rather than the rule. *See, e.g.*, *Va. Mil. Inst. v. United States*, 508 U.S. 946, 946 (1993) (Scalia, J.) ("We generally await final judgment in the lower courts before exercising our certiorari jurisdiction."); Shapiro, Geller et al., *Supreme Court Practice* § 4.18, at 282 (10th ed. 2013).

Here, petitioners could litigate this case to a judgment in the district court that obviates any need for this court to review the questions presented. Petitioners have several factual defenses, including a contention that respondent's suit is barred by the statute of limitations. Respondent may also prove unsuccessful in carrying respondent's burden of proof at summary judgment or trial. As to the statute of limitations defense specifically, the Seventh Circuit explained "[t]he proper course at this point is for the district court to develop the record and rule accordingly." Pet. App. 21a. Petitioners' victory at summary judgment or at trial would moot the issues raised by the petition. If the issues survive trial, petitioners will not be prejudiced by re-presentation in a post-judgment appeal.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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