No. 21-806

IN THE

Supreme Court of the United States

HEALTH AND HOSPITAL CORPORATION OF MARION COUNTY, *ET AL.*,

Petitioners,

v.

GORGI TALEVSKI, BY HIS NEXT FRIEND IVANKA TALEVSKI,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

At least five present or former Members of this Court have questioned whether, under 42 U.S.C. § 1983, third-party beneficiaries are entitled to enforce Spending Clause statutes. See, *e.g.*, *Blessing* v. *Freestone*, 520 U.S. 329, 349-50 (1997) (Scalia, J., concurring, joined by Kennedy, J.) (when Section 1983 was enacted, third-party beneficiaries could not sue to enforce performance); *Pharm. Research & Mfrs. of Am.* v. *Walsh*, 538 U.S. 644, 683 (2003) (Thomas, J., concurring) (same); *Armstrong* v. *Exceptional Child Ctr., Inc.*, 575 U.S. 320, 332 (2015) (plurality opinion of Scalia, J., joined by Roberts, C.J., Thomas, J., and Alito, J.) (third-party beneficiaries to this day cannot enforce government contracts). As the *Armstrong* plurality correctly recognized, "[M]odern jurisprudence permitting intended beneficiaries to sue does not generally apply to contracts between a private party and the government—much less to contracts between two governments." *Ibid.* (internal citations omitted).

Someone reading Respondent's brief, however, would never know any of that. Respondent never *addresses*, much less disputes, the doubtful provenance of *Wilder* v. *Virginia Hospital Association*, 496 U.S. 498 (1990), and this Court's post-*Wilder* jurisprudence. With respect to the first question presented, Respondent instead asserts that there is no conflict in the lower federal courts (scarcely surprising until some lower court goes rogue); that there are no reasons other than error-correction to revisit this body of law (tell that to the seventeen States and other *amici* that have pointed to the real

costs, financial and otherwise, arising from unexpected Spending Clause obligations); that the phrase "any rights" in Section 1983 supports the decision in *Wilder* (ignoring that Section 1983 covers only those rights "secured" by federal law); and that in any event the case is interlocutory (which is true *whenever* a court rejects a threshold legal defense).

Respondent fares no better when he turns to FNHRA itself. As we set out in the petition (at 22-35), the decision below is an ideal illustration of what can go wrong when Section 1983 is untethered from its historical underpinnings. And the fact that two other Circuits arguably have come out the same way is a feature, not a bug, of a legal standard so open-textured that nearly any Spending Clause statute, placed in the wrong hands, can satisfy it.

But perhaps the best reason to revisit this body of law is advanced by Respondent himself. Congress, he contends (BIO 9), has *relied* on *Wilder* and its progeny in enacting Spending Clause legislation. But if Respondent is right—if Congress is indeed *relying* on federal courts to recognize rights that Congress lacks the votes, the foresight, or the moxie to enact for itself—that is more reason, not less, to put an end to this practice. Federal (and state) courts should not be doing Congress's job.

I. QUESTION ONE SHOULD BE GRANTED

1. Respondent conspicuously fails to address the opinions of several Justices calling *Wilder* seriously into question. Instead, Respondent observes (BIO 7-8) that there is no circuit conflict on the question whether Section 1983 creates privately enforceable rights under Spending Clause statutes.

Quelle surprise. Unless and until this Court changes course on the first question presented, no lower court, state or federal, can be expected to do so.[1] "[I]t is this Court's prerogative alone to overrule one of its precedents." *State Oil Co.* v. *Khan*, 522 U.S. 3, 20 (1997).

2. *Contra* Respondent (BIO 8-11), this Court's traditional *stare decisis* considerations counsel in favor of revisiting *Wilder*.

a. For one thing, the multi-factor test this Court set forth in *Blessing*, and seemingly narrowed in *Gonzaga University* v. *Doe*, 536 U.S. 273 (2002), has in fact proven "unworkable." See BIO 8-9. As discussed extensively in our petition (at 15-18), the Courts of Appeals are divided—sometimes internally, sometimes splitting with other circuits—over whether to apply the *Blessing* test, the *Gonzaga* test, or some hybrid.

Indeed, just this month, Circuit Judge Richardson reiterated his concern that *Gonzaga* may have "laid down a different test than *Wilder* and *Blessing*"; that this Court has not squarely stated which of those tests (if either) should be applied; and that he was therefore "left hoping that clarity will soon be provided." *Planned Parenthood S. Atlantic* v. *Kerr*, --- F. 4th ---, 2022 WL 677811, at *10 (4th Cir.

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[1] Although Judge Easterbrook, writing for a different Seventh Circuit panel, has come close. *Nasello* v. *Eagleson*, 977 F.3d 599, 601 (7th Cir. 2020) (concluding that the courts of appeals are not permitted "to enlarge the list of implied [private] rights of action").

Mar. 8, 2022) (concurring in the judgment). The Court should answer his call.

Members of this Court have likewise recognized that the center cannot hold. In 2018, three Justices, dissenting from a denial of certiorari, observed that the "lower courts" are "divi[ded]" on "fundamental questions about the appropriate framework for determining when a cause of action is available under § 1983." That division, the dissenters noted, has arisen "at least in part[] from this Court's own lack of clarity on the issue." *Gee* v. *Planned Parenthood of Gulf Coast, Inc.*, 139 S. Ct. 408, 409 (2018) (Thomas, J., joined by Alito, J., and Gorsuch, J., dissenting from denial of cert.). "Courts," Justice Thomas correctly noted, "are not even able to identify which of our decisions are binding." *Id.* at 410 (internal quotation marks omitted). "We created this confusion. We should clear it up." *Ibid.*

This confusion has now prompted some seventeen states to file as *amici* in this case and urge the Court to reexamine this body of law. See generally Br. of Ind. and Sixteen Other States as *Amici Curiae* in Support of Petitioners ("States' Br."). As the States observe, "lower courts remain confused as to when federal Spending Clause statutes are enforceable via Section 1983," *id.* at 2, and the States contend—correctly, in our view—that the various tests this Court has set out in *Wilder*, *Blessing*, and *Gonzaga* have produced "only cost and confusion," *id.* at 4. The American Health Care Association and the Indiana Health Care Association—the trade groups that represent nursing facilities nationwide and in Indiana, respectively—echo the point. See generally Br. for the Am. Health Care Ass'n and Ind. Health

Care Ass'n as *Amici Curiae* Supporting Petitioners. The trade groups observe that "there exists substantial doctrinal confusion in the circuits," *id.* at 12, adding that "only this Court can provide the clarity needed by plaintiffs and defendants alike regarding the application of § 1983 in the context of Spending Clause statutes," *id.* at 4.

b. Respondent also claims that *Wilder* and its progeny have engendered heavy reliance interests. BIO 9. But the reliance interest Respondent invokes is not the traditional reliance interest of citizens and litigants on existing law. See, *e.g.*, *Kimble* v. *Marvel Ent., LLC*, 576 U.S. 446, 457 (2015) (identifying a "reliance" interest where parties arguably "rel[ied] on [a case this Court was asked to overrule] as a default rule" in structuring royalties in licensing agreements); see also BIO 10 (citing *Kimble*). Instead, Respondent asserts that "*Congress* has relied on *Thiboutot* and *Wilder* as the law when enacting legislation for over thirty years." BIO 9 (emphasis added).

What an astonishing claim. In Respondent's view, this Court should retain the implied-rights doctrine because *Congress now expects federal judges to do the job that Congress failed to do itself.* That's not how the separation of powers works. If Congress wants to include a private right of action in a statute, it should do what Article I anticipates: enact a law. Congress should not "rely" on judges to fill in the blanks.

Nor is it true that Congress "expressly ratified the Court's application of § 1983 to Spending Clause legislation" by adding an *explicit* "private action" to "certain provisions of the Medicaid Act" after this

Court's decision in *Suter* v. *Artist M*, 503 U.S. 347 (1992). BIO 9-10. Far from "ratifying" the implied-rights doctrine, this enactment simply confirms that Congress knows how to enact a private right of action when it wants to.

c. Finally, Respondent insists that *Wilder* should be retained because it was correct. BIO 11. Section 1983, says Respondent, uses the phrase "any rights," which is broad enough to encompass Spending Clause claims. *Ibid.* But what Section 1983 actually covers is "any right[] * * * *secured by the Constitution and laws*." 42 U.S.C. § 1983 (emphasis added). The relevant question, therefore, is whether Spending Clause legislation "secures" rights that are enforceable by private parties. And that question is best answered as Justice Scalia suggested in his *Blessing* concurrence—not "according to modern notions," but "rather * * * according to the understanding of § 1983 when it was enacted." 520 U.S. at 350.[2]

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[2] Respondent asserts (BIO 10) that *Wilder* is entitled to "'enhanced' protection" because Congress can simply overrule a judicial decision to recognize, or not recognize, an implied right of action. "Enhanced protection" may well be appropriate when a court construes a statute that Congress has actually enacted. That presumption is not warranted, however, when Congress has *failed* to act, and a court is therefore asked to fill in some statutory blank. In that event, Congress may not have focused on the issue at all, and accordingly there is no reason to attribute any meaning to its inaction. See Powell, The Still Small Voice of the Commerce Clause, 3 Selected Essays in Constitutional Law 931, 932 (Ass'n of American Law Schools 1938) ("Of course, when Congress keeps silent, it

II. QUESTION TWO SHOULD BE GRANTED

As we noted in our petition (at 22-35), the Seventh Circuit's application of *Blessing* and *Gonzaga* to the two amorphous FNHRA "rights" that Respondent invoked illustrates the frailties in the underlying doctrine. Respondent's efforts (BIO 11-18) to defend the court of appeals' decision are unavailing.

We acknowledge that at least one circuit has come out the same way as the court below.[3] All that tells us, however, is that *Blessing*'s multi-factor test is putty in the hands of motivated plaintiffs' lawyers and creative judges. Respondent does not even address the fact that both the Seventh Circuit in this case and the Third Circuit in *Grammer* v. *John J. Kane Regional Centers-Glen Hazel*, 570 F.3d 520 (2009), seized on the word "rights" in FNHRA above any other

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takes an expert to know what it means. But the judges are experts. They say that Congress by keeping silent sometimes means that it is keeping silent and sometimes means that it is speaking.").

[3] Respondent cites the Ninth Circuit's decision in *Anderson* v. *Ghaly*, 930 F.3d 1066 (2019), see BIO 12, but that case is sharply distinguishable. The plaintiffs in *Anderson* sued the *state health secretary*, not a facility, because the secretary refused to enforce *an administrative order* permitting plaintiffs to return to a nursing facility from which they had been transferred. 930 F.3d at 1072-73. The plaintiffs, the Ninth Circuit said, "are not suing under § 1983 to enforce a right to readmission *against the nursing homes*. Instead, the Residents seek to use § 1983 to enforce [their rights] *against the state*." *Id.* at 1080. *Anderson* was fundamentally a suit about whether states had to enforce their own administrative decisions, and thus is of little relevance here.

factor, see Pet. App. 9a; *Grammer*, 570 F.3d at 529-30, in clear defiance of this Court's guidance in *Pennhurst State Sch. and Hosp.* v. *Halderman*, 451 U.S. 1, 18 (1981), and *Gonzaga*, 536 U.S. at 289 n.7.

Nor does Respondent refute our contention that FNHRA's remedies foreclose recourse to Section 1983. As we noted in the petition, FNHRA contains exactly the kind of comprehensive, individualized remedies—a grievance process for decisions on medication and an appeals process on transfers—that this Court has found sufficient to preclude resort to Section 1983. Pet. 27-28 (citing *Fitzgerald* v. *Barnstable Sch. Comm.*, 555 U.S. 246, 254 (2009)). And indeed, Talevski used those exact remedies effectively: He put a stop to the medications he disliked, his transfer was canceled, and he was offered the chance to return to Petitioners' facility. Pet. 6-7; 27-28. Yes, he also wanted money damages; but that is scarcely a reason to displace federal and state procedures with the one-size-fits-all blunderbuss of Section 1983 relief.

The presence of a "savings clause" (BIO 17-18) does not alter the analysis. Twice this Court has explained that "[i]t is doubtful" that a phrase like "other remedies" in a savings clause "includes the very statute in which this statement was contained." *Middlesex Cnty. Sewerage Auth.* v. *Nat'l Sea Clammers Ass'n*, 453 U.S. 1, 15-16 & n.21 (1981); *see also City of Rancho Palos Verdes* v. *Abrams*, 544 U.S. 113, 126-27 (2005). Respondent's reliance on FNHRA's "savings clause" cannot be squared with this Court's cases.

III. THIS CASE IS AN IDEAL VEHICLE TO RESOLVE BOTH QUESTIONS PRESENTED

Respondent contends, finally, that the Court should deny review because the case is "interlocutory" and Petitioners could still prevail, either on statute-of-limitations grounds or on the merits. BIO 18. This "vehicle" objection is insubstantial.

1. It is the very nature of threshold legal defenses that a litigant, unsuccessful at the threshold, may later prevail on the merits. Government officials, for example, may assert qualified immunity defenses; the mere fact that such officials, if forced to defend on the merits, might ultimately prevail has not dissuaded this Court from granting review of the threshold legal issue. See, *e.g.*, *Ashcroft* v. *Al-Kidd*, 563 U.S. 731, 734-35, 744 (2011); *Wilkie* v. *Robbins*, 551 U.S. 537 (2007).

Indeed, it is typically one of the purposes of such threshold defenses to *spare* the defendant from having to absorb the costs and uncertainties of litigating merits defenses. See, *e.g.*, *Pearson* v. *Callahan*, 555 U.S. 223, 237 (2009); *Puerto Rico Aqueduct & Sewer Auth.* v. *Metcalf & Eddy, Inc.*, 506 U.S. 139, 143-44 (1993); *Harlow* v. *Fitzgerald*, 457 U.S. 800, 817-18 (1982). So, too, here: States should not be required to absorb the costs and uncertainties of merits litigation based on a "right" that is fictitious. Cf. *Bogan* v. *Scott-Harris*, 523 U.S. 44, 52 (1998) (citing "the time and energy required to defend against a lawsuit" as a reason to afford immunity to certain actors at "the local level"). The prospect that state actors might someday prevail at trial does not justify declining to review a legal defense that should shield the state

from running the discovery-and-trial gauntlet in the first place.

What is more, this Court has repeatedly noted the federalism concerns that are implicated when a federal-state bargain is modified by the courts. See, *e.g.*, *Pennhurst*, 451 U.S. at 17 ("The legitimacy of Congress' power to legislate under the spending power thus rests on whether the State voluntarily and knowingly accepts the terms of the 'contract.'"). Subjecting states to un-bargained-for obligations and their related costs upends that bargain—and implicates federalism concerns—even if the state ultimately prevails after trial. Respondent's position brushes that aside.

Lastly, this Court has regularly granted review in situations, like this one, where the petitioner seeks to reinstate a grant of a motion to dismiss. See, *e.g.*, *Blessing*, 520 U.S. at 337-38;[4] *F. Hoffman-La Roche Ltd.* v. *Empagran, S.A.*, 542 U.S. 155 (2004); *Santa Fe Indus., Inc.* v. *Green*, 430 U.S. 462 (1977); *Estelle* v. *Gamble*, 429 U.S. 97 (1976); see also Stephen M. Shapiro et al., *Supreme Court Practice* Ch. 4.18 (11th Ed. 2019) ("[T]he interlocutory status of the case may be no impediment to certiorari where the opinion of the court below has decided an important issue, otherwise worthy of review, and Supreme Court intervention may serve to hasten or finally resolve the litigation."). If the law were otherwise, this Court would never review a threshold legal defense until a final judgment had been entered.

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[4] In *Blessing*, the district court treated a motion to dismiss as a motion for summary judgment and granted the motion, and the Ninth Circuit reversed that grant. *Ibid.*

2. With respect to the present case in particular, Respondent has not come clean about the prospect that a statute of limitations defense will ultimately prevail. If and when this case returns to the district court for further litigation, Respondent will doubtless contend that the Seventh Circuit has already rejected the limitations defense by holding, in the decision below, that Respondent's lawsuit was *not* a medical malpractice action and therefore *was* governed by a tolling rule that saved his case from dismissal. Pet. App. 20a. Although we would strongly dispute such a characterization of the Seventh Circuit's decision, Respondent has greatly overstated this defense's chances of success.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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