No. 21-806

In The Supreme Court of the United States

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

Petitioners,

v.

IVANKA TALEVSKI, PERSONAL REPRESENTATIVE OF THE ESTATE OF GORGI TALEVSKI, DECEASED,

Respondent.

On Writ of Certiorari To The United States Court of Appeals for the Seventh Circuit

BRIEF FOR THE PETITIONERS

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QUESTIONS PRESENTED

1. Whether, in light of compelling historical evidence to the contrary, the Court should reexamine its holding that Spending Clause legislation gives rise to privately enforceable rights under Section 1983.

2. Whether, assuming Spending Clause statutes ever give rise to private rights enforceable via Section 1983, the transfer and medication rules under the Federal Nursing Home Reform Act of 1987 do so.

PARTIES TO THE PROCEEDING

Petitioners, defendants-appellees below, are Health and Hospital Corporation of Marion County, Indiana ("HHC"), Valparaiso Care and Rehabilitation ("VCR"), and American Senior Communities LLC ("ASC").

Respondent is Ivanka Talevski, in her capacity as executor of the estate of Gorgi Talevski, plaintiff-appellant below. The Court granted Ms. Talevski's unopposed motion to substitute a party under Supreme Court Rule 35.1 on May 2, 2022.

CORPORATE DISCLOSURE STATEMENT

HHC is a municipal corporation/subdivision of the state of Indiana. VCR is one of the names under which HHC does business. ASC is a privately held nursing home management company. No publicly traded corporation owns 10% or more of ASC.

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BRIEF FOR THE PETITIONER

OPINIONS AND RULINGS BELOW

The opinion of the Seventh Circuit is reported at 6 F.4th 713. Pet. App. 2a-26a. The order of the Seventh Circuit denying rehearing is not reported. *Id.* at 38a-39a. The order of the district court granting defendants' motion to dismiss is not reported, but can be found at 2020 WL 1472132.

JURISDICTION

The Seventh Circuit entered judgment on July 27, 2021. Petitioners timely filed a petition for panel and *en banc* rehearing, which was denied on August 25, 2021. Pet. App. 39a. The petition for a writ of certiorari was filed on November 23, 2021, and granted by this Court on May 2, 2022. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

42 U.S.C. § 1983 provides in pertinent part:

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

The Federal Nursing Home Reform Act of 1987 ("FNHRA") can be found at 42 U.S.C. § 1396r and the relevant portions are available at Pet. App. 41a-73a.

INTRODUCTION

For most of this nation's history, individuals did not have a recognized private right to enforce obligations prescribed by federal statutes. It is only when the rights revolution of the 1960s and 1970s came into full force that this Court began to expand access to courts through judicially implied private rights of action. See, *e.g.*, *J.I. Case Co.* v. *Borak*, 377 U.S. 426, 433 (1964). In 1980, this Court held for the first time that 42 U.S.C. § 1983 provides a cause of action for deprivations of federal statutory rights. *Maine* v. *Thiboutot*, 448 U.S. 1, 4 (1980). And in *Wright* v. *City of Roanoke Redevelopment & Housing Authority*, 479 U.S. 418 (1987), and *Wilder* v. *Virginia Hospital Association*, 496 U.S. 498 (1990), the Court held that Section 1983 suits may be brought by private parties to enforce rights contained in federal Spending Clause legislation.

Since the high-water mark in *Wilder*, this Court has consistently rebuffed efforts to find privately enforceable rights in Spending Clause statutes. Nevertheless, purporting to rely on this Court's jurisprudence, plaintiffs continue to bring such Section 1983 lawsuits in the federal and state courts. As a consequence, state and local governments have been burdened by litigation costs and hefty damages—arising from unpredictable and shifting multi-factor balancing tests—that they never anticipated when they agreed to accept federal funding. Spending Clause legislation, as this Court has noted, derives its constitutional legitimacy from

an agreement between the states and the federal government. States' knowing and voluntary acceptance of such agreements "is critical to ensuring that Spending Clause legislation does not undermine the status of the States as independent sovereigns in our federal system." *Nat'l Fed'n of Indep. Bus.* v. *Sebelius*, 567 U.S. 519, 577 (2012) (plurality opinion). It is doubtful that third-party enforcement actions, with sky's-the-limit damages, are among the commitments that contracting states expected to shoulder.

And the historical evidence shows that states should not have to absorb those costs at all. At the time that Section 1983 was enacted, third-party beneficiaries generally had no right to sue to enforce contracts and could only rarely enforce *government* contracts. For those reasons, many Members of this Court have questioned whether Section 1983 permits third-party beneficiaries to enforce cooperative federal-state Spending Clause programs. See, *e.g.*, *Blessing* v. *Freestone*, 520 U.S. 329, 349 (1997) (Scalia, J., concurring, joined by Kennedy, J.); *Pharm. Research & Mfrs. of Am.* v. *Walsh*, 538 U.S. 644, 683 (2003) (Thomas, J., concurring in judgment); *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.).

Because this argument was not raised in early cases like *Wright* and *Wilder*, the Court has never squarely addressed it. It should now hold that Spending Clause statutes do not give rise to private rights of action under Section 1983.

Assuming that we are mistaken on that threshold question, the Court should hold that the Federal

Nursing Home Reform Act of 1987 ("FNHRA"), in particular, did not afford Mr. Talevski the enforceable rights he asserted under Section 1983. First and foremost, Congress has created "a comprehensive enforcement scheme that is incompatible with individual enforcement under § 1983." *Blessing*, 520 U.S. at 341. Indeed, Mr. Talevski *availed himself* of that comprehensive scheme and secured all the relief he wanted—except for money damages for himself, his family, and his lawyers. Second, FNHRA falls well short of the "clear and unambiguous terms" that this Court has required to infer a Section 1983 claim from Spending Clause legislation. *Gonzaga Univ.* v. *Doe*, 536 U.S. 273, 290 (2002).

The court of appeals held otherwise, but only by investing the statutory term "right" with the kind of talismanic significance this Court has twice rejected. See *Pennhurst State Sch. & Hosp.* v. *Halderman*, 451 U.S. 1, 8, 13, 18 (1981) (statute containing a "bill of rights" did not imply private right of action because this Court "must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law"); *Gonzaga*, 536 U.S. at 289 n.7 (rejecting contention that "any reference to 'rights'" gives rise to a statute's enforceability under Section 1983, the same "argument [that] was rejected in *Pennhurst*"). Under the court of appeals' free-wheeling approach, patients may use Section 1983 to second-guess garden-variety transfer and medication decisions—thereby federalizing much medical-malpractice litigation and nullifying important state medical-malpractice rules.

STATEMENT

A. Statutory Background

FNHRA, 42 U.S.C. § 1396r *et seq.*, establishes a cooperative federal-state program and was enacted under the Spending Clause. See *Talevski ex rel. Talevski* v. *Health & Hosp. Corp. of Marion Cnty.*, 6 F.4th 713, 716 (7th Cir. 2021). FNHRA imposes an obligation on participating states to regulate their nursing facilities in a certain manner. In exchange, the states receive Medicaid funding. Pet. App. 41a-73a.

This case implicates two FNHRA directives to nursing facilities. The first is that a "nursing facility must protect and promote . . . [t]he right to be free from . . . physical or chemical restraints" except in certain circumstances. 42 U.S.C. § 1396r(c)(1)(A)(ii). The second is 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 certain conditions have been met. *Id.* § 1396r(c)(2)(A). Both of those directives are contained in a portion of FNHRA entitled "Requirements relating to residents' rights." *Id.* § 1396r(c).

FNHRA also contains an extensive set of remedies intended to ensure that states and nursing facilities live up to their statutory obligations. For example, states must survey nursing facilities on a yearly basis, and facilities that fail those surveys are subject to a variety of sanctions, including denial of access to Medicaid funds and replacement of management. *Id.* § 1396r(h)(2)(A)(i)-(iv). The federal Secretary of Health and Human Services may levy

many of the same sanctions. *Id.* § 1396r(h)(3)(A)-(C). FNHRA also requires facilities to provide an individualized grievance system for patients who object to their treatment or medication, *id.* § 1396r(c)(1)(A)(vi), and mandates an independent administrative review system for patients who wish to appeal a transfer to another facility, *id.* § 1396r(e)(3).

B. Factual Background

For months preceding his death, Gorgi Talevski suffered from dementia. Pet. App. 2a. His wife and next friend Ivanka placed him in VCR, a long-term care facility in Valparaiso, Indiana that is owned by HHC and operated by ASC. *Ibid.*[1] Mr. Talevski's condition was progressive, and it worsened while he was in VCR's care; no doubt because of his condition, Mr. Talevski repeatedly acted in a violent and sexually aggressive manner toward members of VCR's staff and female residents. Pet. App. 91a-92a. These were not minor infractions; among other things, Mr. Talevski repeatedly (and inappropriately) touched female residents, led them into his room and closed the door, and tried to stab VCR staff members with knives and forks. *Ibid.*

In an effort to arrest his decline and ameliorate his behavior, Mr. Talevski's doctors prescribed, and requested that VCR administer, several drugs. Mr. Talevski's daughter disagreed with some of those prescriptions, so Mr. Talevski filed a grievance with the Indiana State Department of Health ("ISDH") and, in September 2016, a different doctor ordered that Mr. Talevski's medication be tapered down. Pet.

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[1] We refer to these three entities—petitioners here and appellees below—collectively as "VCR" whenever possible.

App. 79a. Unfortunately, Mr. Talevski's aggressive behavior persisted, and after an incident in December 2016 VCR chose to transfer him permanently to an all-male facility (after discussing that possibility with his family in March 2016 and transferring him temporarily to such a facility twice in the intervening months). Pet. App. 79a; 92a.

Mr. Talevski's family again objected. Pet. App. 80a. Nevertheless, a physician at the new facility—entirely independent of VCR—determined that, because of his behavior, Mr. Talevski should not return to VCR. Pet. App. 92a-93a. So VCR sought to transfer Mr. Talevski again—this time from the facility to which VCR had originally transferred him to a new and different facility. Pet. App. 93a. After Mr. Talevski's family challenged that transfer before an Administrative Law Judge ("ALJ") of the ISDH, the ALJ ruled in Mr. Talevski's favor. Pet. App. 95a. But, when VCR offered Mr. Talevski the opportunity to return to its facility, Mr. Talevski declined that invitation. Pet. App. 81a.

More than two years later, Mr. Talevski filed suit in the United States District Court for the Northern District of Indiana. Pet. App. 75a-86a. He claimed that VCR had violated a panoply of resident "rights" under FNHRA and that 42 U.S.C. § 1983 provided him a means of enforcing those rights. *Ibid.* The district court dismissed his complaint for failure to state a claim, Pet. App. 28a-36a, and Mr. Talevski appealed.

C. The Court of Appeals' Decision

The Seventh Circuit reversed. Pet. App. 3a. In its view, the two supposed FNHRA obligations that

Talevski specifically pressed on appeal—the rights (a) to be free from certain chemical restraints and (b) to remain in a facility without being transferred except in certain circumstances—were implied in the text of FNHRA, and that Talevski could therefore sue to enforce them under Section 1983. Pet. App. 8a-13a.

In so concluding, the Seventh Circuit purported to apply the tests this Court set out in *Blessing* v. *Freestone*, 520 U.S. 329 (1997), and *Gonzaga University* v. *Doe*, 536 U.S. 273 (2002). It held that FNHRA, despite being a Medicaid grant condition telling states how to regulate Medicaid-participating nursing facilities, unambiguously focused on the rights of nursing facility residents. Pet. App. 9a-10a. The court also concluded that enforcing the supposed rights Talevski claimed would not strain judicial competence. Pet. App. 12a-13a. And, even though FNHRA contains extensive administrative and individualized remedies for residents who are unhappy with medications or transfers—and no suggestion that Congress meant the underlying "rights" to be *further* enforceable though an action for damages—the Seventh Circuit concluded that those remedies did not foreclose resort to Section 1983. Pet. App. 13a-15a.

Petitioners' request for rehearing and rehearing *en banc* was denied without comment. Pet. App. 38a-39a.

SUMMARY OF THE ARGUMENT

I. Spending Clause legislation does not give rise to enforceable rights under Section 1983. Congress enacted Section 1983 with common-law principles in mind, and at the time Section 1983 was enacted and later amended, third parties were generally precluded from suing to enforce contracts, especially government contracts. Precluding third-party beneficiaries from seeking to enforce Spending Clause duties is also consistent with separation-of-powers and federalism principles. Finally, this Court's traditional reluctance to revisit statutory precedents is unwarranted in this setting. That is true both because of the improvidence of certain of the Court's early Spending Clause decisions, and in view of the Court's more recent case law, which has called into question whether Spending Clause statutes give rise to Section 1983 claims. Moreover, the Court's earlier precedents have not engendered any cognizable reliance interests, particularly because Section 1983 is a common law statute subject to ongoing judicial interpretation.

II. Even if Spending Clause legislation sometimes gives rise to Section 1983 claims, the Federal Nursing Home Reform Act of 1987, 42 U.S.C. § 1396r, does not. Congress has provided more than sufficient individualized remedies to foreclose resort to Section 1983. Moreover, the two "rights" that Respondent seeks to enforce come nowhere close to meeting the stringent criteria the Court identified in *Gonzaga University* v. *Doe*, 536 U.S. 273 (2002), and (to the extent it has survived *Gonzaga*) *Blessing* v. *Freestone*, 520 U.S. 329 (1997).

ARGUMENT

I. THIRD-PARTY BENEFICIARIES MAY NOT INVOKE SECTION 1983 TO ENFORCE SPENDING CLAUSE LEGISLATION

Over the last twenty years, Members of this Court have questioned whether Spending Clause statutes give rise to private rights of action under Section 1983. Justice Scalia, joined by Justice Kennedy, concurring in *Blessing* v. *Freestone*, 520 U.S. 329, 349 (1997), observed that when "[t]he State promises to provide certain services to private individuals, in exchange for which the Federal Government promises to give the State funds," the recipient of those services is merely a "third-party beneficiary." *Ibid.* And "[u]ntil relatively recent times, the third-party beneficiary was generally regarded as a stranger to the contract, and could not sue upon it." *Ibid.* Accordingly, Justice Scalia explained, the ability of a private citizen "to compel a State to make good on its promise to the Federal Government was not a 'right . . . secured by the . . . laws' under § 1983." *Id.* at 350.

Justice Thomas made the same point in his concurring opinion in *Pharmaceutical Research & Manufacturers of America* v. *Walsh*, 538 U.S. 644, 683 (2003). As Justice Thomas noted, "[t]his contract analogy raises serious questions as to whether third parties may sue to enforce Spending Clause legislation." *Ibid.* In an appropriate case, Justice Thomas added, he "would give careful consideration to whether Spending Clause legislation can be enforced by third parties in the absence of a private right of action." *Ibid.*

More recently, the four-Member plurality in *Armstrong* v. *Exceptional Child Center, Inc.* recognized that inferring private rights of action from Spending Clause legislation is difficult to square even with contemporary contract law. Although third-party-beneficiary claims are today given wider berth than they were when Section 1983 was enacted, private suits to enforce *government* contracts are almost always *verboten*. 575 U.S. 320, 332 (2015) (Op. of Scalia, J., joined by Roberts, C.J., Thomas, J., and Alito, J.). "[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). And there's the rub: Spending Clause legislation is not just contractual in nature—it represents a contract "*between two governments*." *Ibid.* (emphasis added).

As we show below, the concerns raised in these opinions are well-founded: Spending Clause statutes do not give rise to privately enforceable rights under Section 1983.

A. Common-Law Contract Principles Foreclose Implying Section 1983 Rights Under Spending Clause Statutes

1. Section 1983 generally provides that a person who has been subjected, under color of state law, "to the deprivation of any rights, privileges, or immunities *secured by the Constitution and laws*," may bring an "action at law" or otherwise seek redress. 42 U.S.C. § 1983 (emphasis added). As with any other statute, this Court interprets Section 1983 "consistent with [its] 'ordinary meaning . . . at the time Congress enacted the statute.'" *Wis. Cent. Ltd.* v.

United States, 138 S. Ct. 2067, 2070 (2018) (quoting *Perrin* v. *United States*, 444 U.S. 37, 42 (1979)). The Court presumes "that members of the 42d Congress were familiar with common-law principles, . . . and that they likely intended these common-law principles to obtain, absent specific provisions to the contrary." *Will* v. *Michigan Dep't of State Police*, 491 U.S. 58, 67 (1989); see also *Kalina* v. *Fletcher*, 522 U.S. 118, 123 (1997) (holding that "Congress intended [Section 1983] to be construed in the light of common-law principles that were well-settled at the time of its enactment"); *Nieves* v. *Bartlett*, 139 S. Ct. 1715, 1726 (2019) (same).

Consistent with this presumption, the Court has repeatedly construed the reach of Section 1983 in accordance with the common law as it existed in 1871, when Section 1983 was enacted, and 1874, when it was amended. See*, e.g.*, *Nieves*, 139 S. Ct. at 1726 (police officers not liable for arrests based on probable cause); *Buckley* v. *Fitzsimmons*, 509 U.S. 259 (1993) (state prosecutors entitled to absolute immunity when serving as advocates, but only qualified immunity when acting as investigators or speaking to press); *Carey* v. *Piphus*, 435 U.S. 247, 257 (1978) (damages awards under § 1983 governed by the "principle of compensation"); *Pierson* v. *Ray*, 386 U.S. 547 (1967) (absolute immunity for state judges and "good faith and probable cause" defense for police officers); *Tenney* v. *Brandhove*, 341 U.S. 367 (1951) (absolute immunity for state legislators).

In the context of Spending Clause legislation in particular, it is common-law *contract* principles that control. Spending Clause programs (like FNHRA) are

"much in the nature of a contract." *Cummings* v. *Premier Rehab Keller, P.L.L.C.*, 142 S. Ct. 1562, 1568 (2022) (quoting *Pennhurst State Sch. & Hosp.* v. *Halderman*, 451 U.S. 1, 17 (1981)). "The State promises to provide certain services to private individuals, in exchange for which the Federal Government promises to give the State funds." *Blessing*, 520 U.S. at 349 (Scalia, J., concurring). "[T]he States are given the choice of complying with the conditions set forth in the [legislation] or forgoing the benefits of federal funding." *Pennhurst*, 451 U.S. at 11. "[I]f Congress desires to condition the States' receipt of federal funds, it must do so unambiguously." *South Dakota* v. *Dole*, 483 U.S. 203, 207 (1987) (internal quotation marks omitted).

2. "In contract law, when . . . A promises to pay B money, in exchange for which B promises to provide services to C[], the person who receives the benefit of the exchange of promises between the two others (C) is called a third-party beneficiary." *Blessing*, 520 U.S. at 349 (Scalia, J., concurring). Thus, the operative question is whether the common law recognized a right of third-party beneficiaries to bring suit when Section 1983 was enacted. *Ibid.*

The answer is: generally not. Although some "early cases" were "contradictory on this point," William W. Story summarized the "general rule" in his seminal 1844 treatise:

> [I]f one person make a promise to another for the benefit of a third, although no consideration move from such third person, it is binding . . . . The principal difficulty seems to be in

> determining in which party the right of action resides. As between the plaintiff and defendant, there must be a privity of contract, and if the plaintiff be a mere stranger to the consideration, and no promise be made by the defendant to him, founded in privity upon it, the action is not maintainable by him, although a promise have been made by the defendant to pay the plaintiff.

William W. Story, *A Treatise on the Law of Contracts Not Under Seal* 82-83 (1844) (footnote omitted); see also 1 William W. Story, *A Treatise on the Law of Contracts* 509 (M. Bigelow ed. 1874) ("tendency of the courts" is "that no stranger to the consideration can take advantage of a contract, though made for his benefit").

In an 1881 lecture, then-practitioner, later-Justice Oliver Wendell Holmes echoed this sentiment:

> The fact that a consideration was given yesterday by A to B, and a promise received in return, cannot be laid hold of by X, and transferred from A to himself. The only thing which can be transferred is the benefit or burden of the promise, and how can they be separated from the facts which gave rise to them? How, in short, can a man sue or be sued on a promise in which he had no part?

Oliver W. Holmes, Jr., *The Common Law* 340-41 (1881).

In his 1880 treatise, Professor Christopher Langdell summarized the state of the law in exactly the same way:

> [A] person for whose benefit a promise was made, if not related to the promisee, could not sue upon the promise. This latter proposition is so plain upon its face that it is difficult to make it plainer by argument. A binding promise vests in the promisee, and in him alone, a right to compel performance of the promise, and it is by virtue of this right that an action is maintained upon the promise.

Christopher C. Langdell, *A Summary of the Law of Contracts* 79 (2d ed. 1880).[2]

Not surprisingly, the weight of contemporaneous case law strongly supports these scholars' conclusion. Courts almost uniformly held that third-party beneficiaries did not have standing to sue. See*, e.g.*, *Butterfield* v. *Hartshorn*, 7 N.H. 345 (1834); *Warren* v. *Batchelder*, 15 N.H. 129 (1844); *Chamberlain* v. *New Hampshire Fire Ins. Co.*, 55 N.H. 249 (1875); *Ross* v.

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[2] See also*, e.g.*, 1 Francis Hilliard, *The Law of Contracts* 422 (1872) ("In general, the party with whom a contract is made is the proper plaintiff in a suit upon such contract, although the beneficial interest is in other persons."); 2 Francis Wharton, *A Commentary on the Law of Contracts* 155 (1882) ("no one can sue on a contract to which he was not a party"); J.I. Clark Hare, *The Law of Contracts* 193 (1887) ("[i]t is equally well settled, on a principle common to every system of jurisprudence, that the obligation of a contract is under ordinary circumstances confined to the parties, and cannot be enforced by third persons").

Milne, 39 Va. 204 (1841); *Jones* v. *Thomas*, 62 Va. 96 (1871); *Stuart* v. *James River & Kanawha Co.*, 65 Va. 294 (1874); *Hall* v. *Huntoon*, 17 Vt. 244 (1845); *Fugure* v. *Mut. Soc'y of St. Joseph*, 46 Vt. 362 (1874); *Blymire* v. *Boistle*, 6 Watts 182 (Pa. 1837); *Pipp* v. *Reynolds*, 20 Mich. 88 (1870); *Turner* v. *McCarty*, 22 Mich. 265 (1871); *Styron* v. *Bell*, 53 N.C. 222 (1860*); Mellen* v. *Whipple*, 67 Mass. 317 (1854); *Dow* v. *Clark*, 73 Mass. 198 (1856); *Rogers* v. *Union Stone Co.*, 130 Mass. 581 (1881); *Conklin* v. *Smith*, 7 Ind. 107 (1855);; *McCarteney* v. *Wyoming Nat'l Bank*, 1 Wyo. 382 (1877); *Empire State Ins. Co.* v. *Collins*, 54 Ga. 376 (1875); *Gunter* v. *Mooney*, 72 Ga. 205 (1883); *Jefferson* v. *Asch*, 55 N.W. 604 (Minn. 1893).

There were, to be sure, a few narrow exceptions to the strict rule of privity.[3] And the common law was not entirely free from debate—it never is. But the "general rule" was that "privity of contract" was required. *Nat'l Bank* v. *Grand Lodge*, 98 U.S. 123, 124-25 (1878). The cases that did allow third parties to bring suit were "at odds with the received wisdom," heavily criticized, and often quickly narrowed. See*, e.g.*, Anthony Jon Waters, *The Property in the Promise: A Study of the Third Party Beneficiary Rule*, 98 Harv. L. Rev. 1109, 1116, 1150-66 (1985).

Lawrence v. *Fox*, 20 N.Y. 268 (1859), a case familiar to every first-year law student, illustrates the point. In *Lawrence*, the Court of Appeals "departed significantly from nineteenth-century contract

[3] For example, some courts authorized claims brought by the promisee's relatives or agents, and in some instances by third parties who had provided consideration in their own right. See 2 Wharton, at 162-63.

doctrine"[4] by importing concepts from trust law to permit a third-party creditor beneficiary (Lawrence), who was owed money by the promisor (Holly), to sue the promisee (Fox), to whom Holly had lent money in exchange for Fox's promise to pay Holly's debt to Lawrence. 20 N.Y. at 270-71. Just a few years later, however, the New York Court of Appeals reversed course, essentially limiting *Lawrence* to its facts. See *Vrooman* v. *Turner*, 69 N.Y. 280 (1877). "The courts are not inclined to extend the doctrine of *Lawrence v. Fox* to cases not clearly within the principle of that decision." *Id.* at 284-85; see also *Wheat* v. *Rice*, 97 N.Y. 296, 302 (1884) ("We prefer to restrict the doctrine of *Lawrence v. Fox* within the precise limits of its original application.").

Third-party beneficiary lawsuits did not truly come into their own until well after the turn of the twentieth century, following a doctrinal campaign waged by Yale Law School Professor Arthur Corbin. See Waters, at 1150-1166. Of particular note, "the rights of donee beneficiaries"— *i.e.*, a beneficiary not owed money by the promisee and thus more analogous to traditional Spending Clause plaintiffs like Talevski—"were not clearly established until *Seaver v. Ransom* (1918)," more than forty years after Section 1983 was enacted. Kevin M. Teeven, *A History of the Anglo-American Common Law of Contract* 230 (1990); see also *Westside Mothers* v. *Haveman*, 133 F. Supp. 2d 549, 581 (E.D. Mich. 2001) ("[T]he common law right of donee beneficiaries to sue was a 20th Century

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[4] M.H. Hoeflich and E. Perelmuter, *The Anatomy of a Leading Case:* Lawrence v. Fox *in the Courts, the Casebooks, and the Commentaries*, 21 U. Mich. J.L. Reform 721, 726 (1988).

development that altered the previous state of affairs."), *rev'd on other grounds*, 289 F.3d 852 (6th Cir. 2002).

It follows that third-party-beneficiary enforcement of Spending Clause statutes should not be read into Section 1983. See *Will*, 491 U.S. at 67 (Court presumes Congress's intent to incorporate common law principles governing at time of Section 1983's enactment). See also David E. Engdahl, *The Spending Power*, 44 Duke L.J. 1, 104 (1994) ("[T]hird-party rights . . . are 'secured' (if at all) not by any 'law,' but only by the contract between the recipient and the United States, and section 1983 does not even remotely contemplate causes of action for contract violations.").

3. That conclusion is further bolstered by the even stronger common law rule barring third parties from suing to enforce *government* contracts.

At the time Section 1983 was enacted, even jurisdictions that authorized *some* third-party-beneficiary lawsuits typically prohibited actions arising from a government contract. Even sixty years later, the First Restatement of Contracts stated: "A promisor bound to the United States . . . by contract to . . . render a service to . . . members of the public, is subject to no duty under the contract to such members to give compensation for the injurious consequences of performing . . . or of failing to do so." Restatement (First) of Contracts § 145 (1932).

The reason for this rule is plain: The government is *supposed* to act in the public interest, so almost everything it does may be said to "benefit" individual

members of the public. But such individual benefits are merely incidental to the government's mission to benefit designated *groups* of people and the public at large. See *Ferris* v. *Carson Water Co.*, 16 Nev. 44, 47-48 (1881); *Eaton* v. *Fairbury Waterworks Co.*, 56 N.W. 201, 204 (Neb. 1893); *House* v. *Houston Waterworks Co.*, 31 S.W. 179, 180 (Tex. 1895); *Allen & Currey Mfg. Co.* v. *Shreveport Waterworks Co.*, 37 So. 980, 986 (La. 1905).

So, for example, in the late nineteenth century, there was a spate of suits by property owners against water companies for fire damage arising from the companies' failure to supply water to hydrants as required by their contracts with local governments. Almost without exception, courts rejected those claims because the contracts were made for the safety and benefit of the property owners generally. See*, e.g.*, *Davis* v. *Clinton Water-Works Co.*, 6 N.W. 126, 127 (Iowa 1880); *Beck* v. *Kittanning Water Co.*, 11 A. 300, 301 (Pa. 1887); *Fowler* v. *Athens Water-Works Co.*, 9 S.E. 673, 674 (Ga. 1889); *Howsmon* v. *Trenton Water Co.*, 24 S.W. 784, 787 (Mo. 1893); *Wainwright* v. *Queens Cnty. Water Co.*, 28 N.Y.S. 987, 992 (Gen. Term 1894); *House*, 31 S.W. at 180; *Allen & Currey Mfg. Co.*, 37 So. at 986. "The city, in exercise of its lawful authority to protect the property of the people, may cause water to be supplied for extinguishing fires, and for other objects demanded by the wants of the people. . . . The people must trust to the municipal government to enforce the discharge of duties and

obligations by the officers and agents of that government." *Davis*, 6 N.W. at 127.[5]

Contemporaneous contract law recognized only two significant exceptions to this rule. First, some courts permitted third parties to seek enforcement when the promisee was legally obligated to provide benefits to the third party and had contracted with the promisor to furnish that benefit in lieu of the promisee. See*, e.g.*, *City of Brooklyn* v. *Brooklyn City R.R. Co.*, 47 N.Y. 475 (1872); *McMahon* v. *Second Ave. R.R. Co.*, 75 N.Y. 231 (1878); *Porter* v. *Richmond & D.R. Co.*, 2 S.E. 374 (N.C. 1887); *Kulwicki* v. *Munro*, 54 N.W. 703 (Mich. 1893). These cases typically involved municipal governments that, by dint of state law, had formal obligations to "keep their streets and highways safe and convenient for travelers." *St. Paul Water Co.* v. *Ware*, 83 U.S. 566, 573 (1872). The municipalities would often contract with private companies to discharge the city's duty; and if the contractor failed to keep the roads safe consistent with the municipality's legal obligation, it could be held liable, in some jurisdictions, to an injured member of the public. See Restatement (First) of Contracts, § 145 cmt. a, illus. 5. It is hard to see how this narrow exception sheds any meaningful light on the question of private rights of action under Spending Clause statutes pursuant to Section 1983, which generally do

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[5] The proposition that legislation is generally designed to benefit the public at large, and not individual members of the public, is similarly reflected in this Court's "taxpayer standing" cases. See generally *DaimlerChrysler* v. *Cuno*, 547 U.S. 332, 345 (2006); *Doremus* v. *Board of Educ.*, 342 U.S. 429, 433-34 (1952).

not concern the delegation of duties over which government itself may be sued.

The second exception, however, is more instructive, and cuts decisively against the recognition of third-party enforcement rights here. Courts often permitted third party suits where the government contract *expressly provided* that the contractor would be liable to members of the public. For example, in *Schnaier* v. *Bradley Contracting Co.*, 181 A.D. 538, 540 (N.Y. 1918), the New York Court of Appeals held that a contractor was liable to a third-party property owner whose apartment building was damaged by the contractor's construction. But that was because the contract expressly provided that the contractor "would, at his own expense, make good any damage that should be done to any foundations, walls or other parts of adjacent buildings or structures" and "would be solely responsible for all physical injuries to persons or property occurring on account of or during the performance of the work under the contract." *Ibid.* Likewise, in *La Mourea* v. *Rhude*, 295 N.W. 304, 305 (Minn. 1940), the Minnesota Supreme Court held that a plaintiff was entitled to recover for damages caused to his property by nearby construction where the operative government contract provided that the contractor would be "liable for any damages done to . . . public or private property" due to the construction. *Ibid.*

Where, however, a government contract did *not* expressly grant enforcement rights to individual members of the public, such third-party lawsuits were uniformly rejected. As late as 1928, then-Judge Cardozo, writing for the New York Court of Appeals

in *H.R. Mock v. Rensselaer Water Co.*, 247 N.Y. 160 (1928), held that a third-party plaintiff, whose warehouse was destroyed in a fire, could not sue on a government contract that required the defendant to supply sufficient water to the City of Rensselaer. "In a broad sense," Judge Cardozo explained, "it is true that every city contract, not improvident or wasteful, is to the benefit of the public." *Id.* at 164. But unless the contract expressly provides a benefit to individual members of the public, "[t]he field of obligation would be expanded beyond reasonable limits." *Id.*

The First Restatement of Contracts recognized this exception for *express* third party benefits. See Restatement (First) of Contracts § 145 (no third party can sue under a government contract unless "an intention is manifested in the contract . . . that the promisor shall compensate members of the public for such injurious consequences"). And its illustrations reinforce the point. For example: "A, a county, enters into a contract with B, a surety company, by which B promises indemnity to a stated amount for any damages caused by clerical errors of clerks in the Registry of Deeds. C is injured by an error of such a clerk. C can recover damages from B." *Id.* cmt. a, illus. 4.

So, too, for Section 1983 claims under Spending Clause statutes. If the statute expressly authorizes private parties to enforce obligations incurred for their benefit, then common-law contract principles permit third-party enforcement. In any other instance, however, it cannot be said—in light of the common law rules governing third-party rights under both private and public contracts when Section 1983

was adopted—that Spending Clause legislation "secures" the right of a private citizen to compel a state to make good on its statutory obligations.

B. Implying Section 1983 Rights In Spending Clause Statutes Violates The Separation Of Powers And Core Principles Of Federalism

In addition to lacking historical grounding, interpreting Spending Clause statutes to implicitly permit private suits under Section 1983 runs contrary to fundamental constitutional principles. The traditional "remedy for state noncompliance with federally imposed conditions is . . . action by the Federal Government to terminate funds to the State." *Pennhurst*, 451 U.S. at 28. Congress, not the Judiciary, is tasked with determining the existence of any alternative private right of action, as well as the scope of available remedies. See*, e.g.*, *Alexander* v. *Sandoval*, 532 U.S. 275, 286 (2001) ("private rights of action to enforce federal law must be created by Congress"); see also *Cummings*, 142 S. Ct. at 1576-77 (Kavanaugh, J., concurring) ("Congress, not this Court, creates new causes of action. And with respect to existing implied causes of action, Congress, not this Court, should extend those implied causes of action and expand available remedies." (internal citation omitted)).[6] When courts imply private rights of action or the availability of particular remedies, they "risk[]

[6] These separation of powers principles apply both in the Section 1983 context and in the implied right of action context. See *Gonzaga*, 536 U.S. at 286. As a result, the test for whether the law establishes a right is the same. See *ibid.*

arrogating legislative power," in contravention of the separation of powers. *Hernández* v. *Mesa*, 140 S. Ct. 735, 742 (2020); see also *Egbert* v. *Boule*, 142 S. Ct. 1793, 1803 (2022) ("absent utmost deference to Congress' preeminent authority in [determining whether to provide a damages remedy], the courts 'arrogat[e] legislative power'").

As the Court recently reiterated, "[a]t bottom, creating a cause of action is a legislative endeavor." *Egbert*, 142 S. Ct. at 1802. The process of legislating "involves balancing interests and often demands compromise." *Mesa*, 140 S. Ct. at 742. In contrast, judicial inference of a private right to sue for particular relief based on "a provision that makes no reference to that remedy" threatens to "upset the careful balance of interests struck by the lawmakers." *Ibid.* When federal courts do so, they "bypass[] "the legislative process with its public scrutiny and participation" and disrupt "the normal play of political forces." *Cannon* v. *Univ. of Chicago*, 441 U.S. 677, 743 (1979) (Powell, J., dissenting). Particularly in the Spending Clause context, judicial authorization of private damages lawsuits can undercut Congress's intended federal enforcement scheme and the ability of Congress and designated agencies to effectively manage enforcement. In fact, the risk of liability from third party lawsuits not expressly stated as part of the funding bargain may deter prospective recipients from even accepting federal funding in the first place.

Accordingly, as the Court explained in *Gonzaga*, "relations between the branches" are not "served by having courts apply a multifactor balancing test to pick and choose which federal requirements may be enforced by § 1983 and which may not." 536 U.S. at

286. Congress knows how to create private causes of action in Spending Clause statutes if it wants to. See, *e.g.*, Individuals with Disabilities Education Act, 20 U.S.C. § 1415(i)(3)(A); Rehabilitation Act, 29 U.S.C. § 794a(a). The Judiciary, for its part, should allow Congress to fulfill its constitutional mandate to legislate, and should recognize only those causes of action and remedies expressly provided for in Spending Clause legislation.

A more freewheeling approach to Spending Clause statutes also threatens to upend core federalism principles. As Spending Clause statutes are "much in the nature of a contract" between the federal government and the states, "[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 U.S. at 17. And because there can "be no knowing acceptance if a State is unaware of the conditions or is unable to ascertain what is expected of it," when "Congress intends to impose a condition on the grant of federal moneys, it must do so unambiguously." *Ibid.* This knowing and voluntary acceptance "is critical to ensuring that Spending Clause legislation does not undermine the status of the States as independent sovereigns in our federal system." *Nat'l Fed'n of Indep. Bus.* v. *Sebelius*, 567 U.S. 519, 577 (2012) (plurality opinion); see also *Pennhurst*, 451 U.S. at 25 (the "crucial inquiry" is whether "Congress spoke so clearly that we can fairly say that the State could make an informed choice").

Permitting private parties to sue under Section 1983 scrambles a state's expectations. In contrast to congressionally designated enforcement schemes,

states facing private lawsuits have no way to anticipate—or budget for—possible litigation costs or jury awards. Allowing damages remedies under Section 1983 may also circumvent state damages caps, thereby undermining states' ability to regulate areas of traditional state competence. See*, e.g.,* Ind. Code § 34-18-14-3 (Indiana provision imposing cap on damages for medical malpractice); *id.* § 34-18-18-1 (Indiana statute capping attorneys' fees in medical malpractice suits).

In short, implying private rights of action in Spending Clause statutes "entails a judicial assumption, with no basis in statutory text, that Congress intended to set itself resolutely against a tradition of deference to state and local [] officials, by subjecting them to private suits for money damages whenever they fail to comply with a federal funding condition." *Gonzaga*, 536 U.S. at 286 n.5. And when "Congress intends to alter the 'usual constitutional balance between the States and the Federal Government,' it must make its intention to do so 'unmistakably clear in the language of the statute.'" *Id.* at 286 (quoting *Will*, 491 U.S. at 65).

C. Stare Decisis Does Not Justify Retaining *Wilder* And Its Predecessors

In deciding whether to overrule one or more of its decisions, this Court considers (among other things) "the quality of the decision's reasoning; its consistency with related decisions; [and] legal developments since the decision." *Franchise Tax Bd. of Cal.* v. *Hyatt*, 139 S. Ct. 1485, 1499 (2019). All of those factors favor overruling *Wilder* and predecessor decisions allowing Section 1983 claims under Spending Clause statutes.

1. In "'the heady days in which this Court assumed common-law powers to create causes of action,'" *Egbert*, 142 S. Ct. at 1802 (quoting *Corr. Servs. Corp.* v. *Malesko*, 534 U.S. 61, 75 (2001) (Scalia, J., concurring)), it was said to be "the duty of the courts to be alert to provide such remedies as are necessary to make effective the congressional purpose," regardless of statutory text, *J.I. Case Co.* v. *Borak*, 377 U.S. 426, 433 (1964). *Wilder* was the high-water mark for this muscular view of judicial power. There, Justice Brennan—writing for a 5-4 majority—concluded that a provision of the Medicaid Act which "requires reimbursement according to rates that a 'State finds, and makes assurances satisfactory to the Secretary, are reasonable and adequate to meet the costs which must be incurred by efficiently and economically operated facilities'" could be enforced by private plaintiffs. 496 U.S. at 501 (quoting 42 U.S.C. 1396a(a)(13)(A) (Supp. V 1987)). The Court concluded that "Congress [did not] intend[] to deprive health care providers of their right to challenge rates under § 1983" because, "as the legislative history shows," states had an "obligation to adopt reasonable rates." *Id.* at 519.

In retrospect, *Wilder*'s approach to statutory text seems to have emerged from a time capsule. Justice Brennan judged it "useful first to consider the history of the reimbursement provision." *Wilder*, 496 U.S. at 505. Citing and quoting from various House and Senate reports, he divined the meaning of the provisions at issue, first and foremost, from those secondary sources. *Id.* at 505-08. Only then did he address the text of the statute, and then only briefly—indeed, Chief Justice Rehnquist (writing for himself and Justices O'Connor, Scalia, and Kennedy in

dissent) noted that "the Court virtually ignores the relevant text of the Medicaid statute in this case." *Id.* at 527 (Rehnquist, C.J., dissenting). Put another way—and again quoting from the dissent—"[t]he Court reason[ed] that the *policy underlying* the Boren Amendment would be thwarted if judicial review under § 1983 were unavailable to challenge the reasonableness and adequacy of rates established by States for reimbursing Medicaid services providers." *Id.* at 525 (emphasis added).

This Court has long since abandoned this mode of analysis. In case after case, the Court has instead treated the text and structure of the statute as the primary considerations in statutory interpretation, and has emphasized that if those tools reveal the plain meaning of the statute, "judges must stop." *Food Mktg. Inst.* v. *Argus Leader Media*, 139 S. Ct. 2356, 2364 (2019); see also*, e.g.*, *NLRB* v. *SW Gen., Inc.*, 137 S. Ct. 929, 941-42 (2017) (Court "need not consider [] extra-textual evidence" such as purpose if "[t]he text is clear"). Although this Court still seeks to determine congressional intent, it does so through examination of text and structure. "The difference between textualist interpretation and so-called purposive interpretation is not that the former never considers purpose. It almost always does. . . . [T]he purpose must be derived from the text, not from extrinsic sources such as legislative history or an assumption about the legal drafter's desires." Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 56 (2012).

This fundamental change in interpretive approach reflects a revised understanding about the separation of powers. Since the heyday of private

rights implication, this Court has "come 'to appreciate more fully the tension between' judicially created causes of action and 'the Constitution's separation of legislative and judicial power.'" *Egbert,* 142 S. Ct. at 1802 (quoting *Hernández*, 140 S. Ct. at 741)). The creation of private rights of action, whether derived directly from federal statutes or through the vehicle of Section 1983, is, at its core, a legislative function.

Not surprisingly, then, in the thirty years since *Wilder* was decided, the Court has consistently pared back implied private rights. In *Suter* v. *Artist M.*, 503 U.S. 347 (1992), for example, the Court reversed a decision of the Seventh Circuit implying a private right of action under the Adoption Act because the statutory language at issue did "not unambiguously confer an enforceable right upon the Act's beneficiaries." *Id.* at 363. This was a marked break from *Wilder*; indeed, the dissenting Justices (both of whom had been in the *Wilder* majority) protested that "the Court's reasoning [was] consistent with the *dissent* in *Wilder*" and "flatly contradict[ed] what the Court *held* in that case," *id.* at 373, "by resurrecting arguments" *Wilder* "decisively rejected," *id.* at 377.

Nine years later, in *Alexander* v. *Sandoval*, 532 U.S. 275 (2001), the Court expressed still greater skepticism of implied private rights. "Statutes that focus on the person regulated rather than the individuals protected," the Court explained, "create no implication of an intent to confer rights on a particular class of persons." *Id.* at 289 (internal quotation marks omitted). The Court acknowledged that its earlier precedent had taken a more forgiving view of private remedies; it observed, however, that those cases were part of an "understanding of private causes of action

that held sway 40 years ago." *Id.* at 287. "Having sworn off the habit of venturing beyond Congress's intent," the Court declared, "we will not accept respondents' invitation to have one last drink." *Ibid.*

The following year, in *Gonzaga*, 536 U.S. 273 (2002), the Court explained that, in contrast to *Wilder*, "more recent decisions . . . have rejected attempts to infer enforceable rights from Spending Clause statutes." *Id.* at 280-81. Even though "[s]ome language in our opinions might be read to suggest that something less than an unambiguously conferred right is enforceable by § 1983," this Court "now reject[s] the notion that our cases permit anything short of an unambiguously conferred right to support a cause of action." *Id.* at 282-83. Such an "unambiguous" right exists, this Court concluded, only in statutes "phrased in terms of the persons benefitted" that have an "unmistakable focus on the benefitted class" and use "rights-creating language." *Id.* at 284, 290.

Armstrong v. *Exceptional Child Center, Inc.*, 575 U.S. 320 (2015), casts even darker shade on *Wilder*. There, in rejecting another attempt to imply a private right of action in the Medicaid Act, the Court noted that this Court's "later opinions plainly repudiate the ready implication of a § 1983 action that *Wilder* exemplified." *Id.* at 330 n*. *Gonzaga*, the Court explained, "expressly 'reject[ed] the notion,' implicit in *Wilder,* 'that our cases permit anything short of an unambiguously conferred right to support a cause of action brought under § 1983.'" *Ibid.*[7]

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[7] Chief Justice Roberts and Justices Thomas and Alito joined Justice Scalia's opinion in full, while Justice Breyer joined the

In short, *Wilder*'s "doctrinal underpinnings have . . . eroded over time." *Kimble* v. *Mavel Ent., LLC*, 576 U.S. 446, 458 (2015). It is "the kind of doctrinal dinosaur or legal last-man-standing for which [this Court will] sometimes depart from *stare decisis*." *Ibid.* That is "the primary reason" for discarding precedent that interprets a statute. *Patterson* v. *McLean Credit Union*, 491 U.S. 164, 173 (1989).[8]

2. *Wilder* and its precursors have also spawned substantial confusion in the state and lower federal courts concerning which of this Court's precedents to apply. In *Blessing*, this Court laid out a three-factor test to determine whether a federal statute creates enforceable rights: (i) did Congress intend that the provision in question benefit the plaintiff?; (ii) is the asserted right so "vague and amorphous" that its enforcement would strain judicial competence?; and (iii) does the statute at issue impose a binding obligation on the states? *Blessing*, 520 U.S. at 340-41.

Just five years after *Blessing*, however, this Court granted review in *Gonzaga* "to resolve [a] conflict among the lower courts." 536 U.S. at 278. "Some language in our opinions might be read to suggest that something less than an unambiguously conferred right is enforceable by § 1983," the Court

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opinion except as to Part IV. The footnote quoted above comes in Part III of the Court's opinion, which means that five Justices subscribed to it.

[8] *Wilder*'s status as a doctrinal outlier is further underscored by the fact that the *Wilder* Court was not presented with, and did not consider, the argument that contemporaneous common law at the time Section 1983 was enacted generally did not permit third-party beneficiaries to sue to enforce government contracts. See section I.A, *supra*.

stated, but it "now reject[ed] the notion that our cases permit anything short of an unambiguously conferred right to support a cause of action." *Id.* at 282-83. Statutes, the Court held, must be "phrased in terms of the persons benefitted" and have an "unmistakable focus on the benefitted class" in order to create a private right. *Id.* at 284, 290. And, in an apparent swipe at *Blessing*, the Court noted that it "fail[ed] to see how relations between the branches are served by having courts apply a multifactor balancing test to pick and choose which federal requirements may be enforced by § 1983." *Id.* at 286.

Unfortunately, *Gonzaga* has not provided the clarity this Court sought. As an initial matter, the failure to overrule *Blessing* outright, or even to expressly clarify its status in the wake of *Gonzaga*, has prompted lower courts to apply highly divergent standards in deciding whether a given statute implies a private right. The Seventh Circuit in this case, for example, tried to "apply[] *Blessing*'s three factors in light of *Gonzaga*." Pet. App. 9a. But just a few short months earlier, a different panel of the Seventh Circuit declined even to *discuss* the *Blessing* factors in concluding that courts should not recognize new Spending Clause rights. *Nasello* v. *Eagleson*, 977 F.3d 599, 601 (7th Cir. 2020). Indeed, the *Nasello* court flatly declared, the courts of appeals are not permitted "to enlarge the list of implied rights of action." *Ibid.* See also *McCready* v. *White*, 417 F.3d 700, 703 (7th Cir. 2005) (applying *Gonzaga* without mention of *Blessing*).

That confusion would be bad enough if it were confined just to the Seventh Circuit. But it isn't. Compare, *e.g.*, *DeCambre* v. *Brookline Hous. Auth.*,

826 F.3d 1, 10 (1st Cir. 2016) (applying *Blessing* factors); *Cal. Ass'n of Rural Health Clinics* v. *Douglas*, 738 F.3d 1007, 1011-12 (9th Cir. 2013) (applying *Blessing* factors unaltered by *Gonzaga*), with *Rio Grande Cmty. Health Ctr., Inc.* v. *Rullan*, 397 F.3d 56, 73 & n.10 (1st Cir. 2005) (finding that *Gonzaga* imposed "somewhat different factors" and applying "*Gonzaga* rather than the *Blessing* test"). Sometimes courts have simply thrown up their hands and refused to decide which test applies. See*, e.g.*, *Mendez* v. *Brown*, 311 F. Supp. 2d 134, 140 (D. Mass 2004) (stating that court could not decide whether to apply *Blessing* or *Gonzaga*, but nevertheless concluding that there is a private right to enforce § 1396a(a)(17)).

This confusion has prompted comment from Members of this Court and from circuit judges. Dissenting from a denial of certiorari in *Gee* v. *Planned Parenthood of Gulf Coast, Inc.*, three Members of this Court noted that "this Court made a mess of the issue" of implied private rights and remedies. 139 S. Ct. 408, 409 (2018) (Thomas, J., joined by Alito, J., and Gorsuch, J., dissenting from denial of certiorari). Indeed, the mess was so severe that "[c]ourts are not even able to identify which of our decisions are 'binding.'" *Id.* at 410. Several judges on the Circuit Courts have agreed. Circuit Judge Richardson has twice requested that this Court clarify its private right of action jurisprudence. He has asked whether "*Wilder* specifically, and the *Blessing* factors, generally, [are] still good law?" *Planned Parenthood S. Atl.* v. *Baker*, 941 F.3d 687, 709 (4th Cir. 2019) (Richardson, J., concurring). More recently, Judge Richardson has pointed out that *Gonzaga* "laid down a different test than *Wilder* and *Blessing,*" without acknowledging doing so, and that he was therefore

"left hoping that clarity will soon be provided." *Planned Parenthood S. Atl.* v. *Kerr*, 24 F. 4th 945, 959 (4th Cir. 2022) (Richardson, J., concurring in judgment). Judge Livingston, too, has pointed to confusion in the Circuits regarding how to determine when a private right of action is implied. See *N.Y. State Citizens' Coal. for Children* v. *Poole*, 922 F.3d 69, 94 (2d Cir. 2019) (Livingston, J., dissenting) (observing that "the Supreme Court's more recent jurisprudence calls into question the vitality of" *Blessing*).

Sanding off some rough doctrinal edges is no longer appropriate. Instead, this Court should make a clean break, and hold that Spending Clause statutes do not give rise to private rights of action under Section 1983. Cf. *Kennedy* v. *Bremerton Sch. Dist.*, 142 S. Ct. 2407, 2427-28 (2022).

3. There are no cognizable reliance interests warranting the application of stare decisis to *Wilder* and its precursors. To use this case as an example, no one has ever chosen a nursing care facility because it was located in a Circuit permitting Section 1983 damages.

Perhaps that is why Respondent has advanced only the weakest reliance rationale for retaining *Wilder*. In its opposition to our certiorari petition, Respondent asserted that *Congress* has relied on this Court's implied-rights jurisprudence when enacting legislation. BIO 9. But if true, that is a reason to *abandon,* not *preserve*, the rule in *Wilder*. The Judicial Branch is not responsible for filling in crucial details that Congress lacked the votes, the foresight, or the moxie to enact for itself.

4. Nor is it true that the interests of individual third-party beneficiaries justify courts in inferring rights that Congress has not expressly enacted. That would be true even if individuals invariably benefit from such judicial legislation. "[I]t frustrates rather than effectuates legislative intent simplistically to assume that *whatever* furthers the statute's primary objective must be the law." *Rodriguez* v. *United States*, 480 U.S. 522, 525-26 (1987) (per curiam). As noted *supra* at 25, Congress is more than capable of enacting a private right of action when it deems that necessary to effectuate a statute's purpose.

In any event, judges are poorly positioned to determine whether a private right of action will actually advance the interests of the (purportedly) benefited class in ways that Congress intended. The present case illustrates the point. Mr. Talevski objected to his medicine, but, using a grievance procedure *provided by FNHRA itself*, see *infra* at 40, he was able to put a stop to it. Pet. App. 78a-79a. And, again using a process explicitly provided for by the statute, see *infra* at 39-40, Mr. Talevski was able to challenge his unwanted transfer and receive an offer to return to his preferred facility. Pet. App. 80a-81a. Mr. Talevski's family had complaints about his care, and those complaints were resolved in Mr. Talevski's favor. It is difficult to see how adding a damages remedy on top of the administrative procedures that Respondent successfully invoked would accomplish anything except pad the coffers of plaintiffs and their lawyers.

5. We recognize that "*stare decisis* carries enhanced force when a decision . . . interprets a statute" because "Congress can correct any mistake it

sees." *Kimble*, 576 U.S. at 456. But that principle applies with considerably less force when the Court is asked to overrule an interpretation of a *common-law statute*. See*, e.g.*, *Leegin Creative Leather Prods., Inc.* v. *PSKS, Inc.*, 551 U.S. 877, 899 (2007); *State Oil Co.* v. *Khan*, 522 U.S. 3, 20-21 (1997). True, this Court has not yet held that Section 1983 is a common-law statute. But as a range of prominent commentators have noted, the Court has taken a fundamentally common-law approach to Section 1983. See*, e.g.*, Richard H. Fallon, Jr., *Bidding Farewell to Constitutional Torts*, 107 Cal. L. Rev. 933, 993 (2019) (given Section 1983's "interpretative history, . . . the Supreme Court should recognize that it is for all practical purposes a 'common law statute'"); Caleb Nelson, *State and Federal Models of the Interaction Between Statutes and Unwritten Law*, 80 U. Chi. L. Rev. 657, 762 (2013) (Court has suggested that Section 1983 "incorporates evolving principles of common law"); Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 Harv. L. Rev. 405, 422 (1989) (because "section 1983 is silent on many important questions, . . . judges must fill the gaps," and so "[t]o this extent, the statute delegates power to make common law"); William N. Eskridge, Jr., *Dynamic Statutory Interpretation*, 135 U. Pa. L. Rev. 1479, 1536-37 (1987) (noting that this Court has approached the task of interpreting Section 1983 as making "statutory common law").

Section 1983 is so capacious a vessel that the Court cannot avoid making common law when it interprets it. That is especially so when a court is asked to infer a private right of action under Section 1983. In that setting, the court is asked to decide whether Section 1983 "secures" a right that Congress

did not see fit to actually enact. Even in less ambiguous circumstances, "[c]onstruing the sounds of congressional . . . silence" (Laurence H. Tribe, *Toward a Syntax of the Unsaid: Construing the Sounds of Congressional and Constitutional Silence,* 57 Ind. L.J. 515 (1982)) is constitutionally fraught; but it is especially risky in Spending Clause cases, where clear notice to the contracting states is essential. In these circumstances, the Court should be more willing to revisit its precedents and, if appropriate, correct them. Cf. Calvin Coolidge, 91 Cong. Rec. 2627 (1945) ("I have noticed that nothing I never said ever did me any harm.").[9]

Consistent with that understanding, this Court has felt free to change course on § 1983 when the need arose. Take the example of municipal liability. In 1961, this Court held squarely that "Congress did not undertake to bring municipal corporations within the ambit" of Section 1983. *Monroe* v. *Pape*, 365 U.S. 167, 187 (1961). But less than 20 years later, the Court concluded it was mistaken in *Monroe*: "[W]e now overrule *Monroe v. Pape* . . . insofar as it holds that local governments are wholly immune from suit under § 1983." *Monell* v. *Dep't of Soc. Servs.*, 436 U.S. 658, 663 (1978). So, too, for private rights of action under Section 1983; as discussed above, the Court began with an expansive vision that reached its zenith in *Wilder* before steadily paring back implied private

[9] See Thomas Reed Powell, *The Still Small Voice of the Commerce Clause*, in 3 Selected Essays on Constitutional Law 931, 932 (Ass'n of American Law Schools 1938) ("Of course, when congress keeps silent, it 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.").

rights. Stare decisis poses no barrier to completing that work.[10]

For all these reasons, the Court's general reluctance to overrule its statutory precedents simply does not apply.

II. EVEN IF A SPENDING CLAUSE STATUTE COULD GIVE RISE TO A SECTION 1983 CLAIM, FNHRA DOES NOT DO SO

If we are mistaken on the first question presented, the Court should still reverse the judgment below on the ground that FNHRA does not give rise to enforceable rights under Section 1983. First and most plainly, the remedies available under FNHRA are more than sufficiently comprehensive to foreclose resort to Section 1983. Second, the private "rights" that Respondent invokes do not meet the standards prescribed by this Court in *Gonzaga* and *Blessing*.[11]

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[10] Even with respect to non-common-law statutes, this Court has been willing to overrule a previous interpretation where appropriate. See, *e.g.*, *Rodriguez de Quijas* v. *Shearson/American Express, Inc.*, 490 U.S. 477, 485 (1989) (overruling previous case dealing with "law for arbitration agreements under the Securities Act").

[11] We address the "comprehensive remedy" issue first because, in light of the uncertainty concerning the vitality of *Blessing* in the wake of *Gonzaga*, it is the more straightforward of the two reasons to reject Respondent's Section 1983 claims under FNHRA.

A. Congress Intended To Preclude Section 1983 Remedies For The "Rights" That Respondent Purports To Find In The Statute

"Even if a plaintiff demonstrates that a federal statute creates an individual right, there is only a rebuttable presumption that the right is enforceable under § 1983." *Blessing*, 520 U.S. at 341. Congress can still preempt a remedy under § 1983 "impliedly, by creating a comprehensive enforcement scheme that is incompatible with individual enforcement under § 1983." *Ibid.* Moreover, "[t]he express provision of one method of enforcing a substantive rule suggests that Congress intended to preclude others." *Alexander*, 532 U.S. at 290.

Here, the remedial scheme for the two rights Respondent asserts is so extensive that Congress cannot have intended to permit supplementation under Section 1983. First and foremost, FNHRA provides an individualized enforcement scheme for both unwanted transfers and inappropriate chemical restraints. For transfers, states must "provide for a fair mechanism . . . for hearing appeals on transfers and discharges of residents of such facilities." 42 U.S.C. § 1396r(e)(3). Such transfer appeal processes must comply with guidelines promulgated by the Secretary of Health and Human Services ("the Secretary"), including rights to a decision by an impartial decisionmaker, to examine any adverse evidence before the hearing, to bring favorable witnesses to the hearing and confront adverse witnesses, and, if the hearing officer considers it necessary, "to have a medical assessment other than that of the individual involved in making the original

decision . . . obtained at agency expense." 42 C.F.R. §§ 431.240(a)(3), (b), 431.242(a)-(b), (e); see also *id.* §§ 431.220(a)(2), 431.241(b) (specifically noting that hearing rules apply to challenges to nursing facility transfer and discharge decisions).

As to the chemical restraint claim, 42 U.S.C. § 1396r(c)(1)(A)(vi) mandates that facilities allow residents to "voice grievances with respect to treatment or care that is (or fails to be) furnished." The Secretary has refined that right further by issuing regulations requiring an individualized grievance process for any resident "with respect to care and treatment which has been furnished" or not furnished, 42 C.F.R. § 483.10(j)(1), and recourse to an independent arbiter such as a state agency, *id.* § 483.10(j)(4)(i).[12]

Indeed, Mr. Talevski and his family successfully invoked these individualized procedures before filing this lawsuit. They commenced a grievance regarding Mr. Talevski's chemical restraints, see Pet. App. 79a (noting that Mr. Talevski filed a "formal complaint" with the Indiana State Department of Health ("ISDH")), and it worked—Mr. Talevski no longer had to take the medicine at issue, see *ibid.* Mr. Talevski likewise challenged his transfer, this time before an administrative law judge of the ISDH, and won again, entitling him (had he chosen to do so) to return to Petitioners' facility. Pet. App. 80a-81a.

This Court has repeatedly held that the availability of such individualized enforcement methods is the touchstone of a sufficiently

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[12] All of these regulations "authoritatively construe the statute itself." *Alexander*, 532 U.S. at 284.

comprehensive remedy. See*, e.g.*, *City of Rancho Palos Verdes* v. *Abrams*, 544 U.S. 113, 121 (2005) ("The provision of an express, private means of redress in the statute itself is ordinarily an indication that Congress did not intend to leave open a more expansive remedy under § 1983."); *Middlesex Cnty. Sewerage Auth.* v. *Nat'l Sea Clammers Ass'n*, 453 U.S. 1, 20 (1981) ("It is hard to believe that Congress intended to preserve the § 1983 right of action when it created so many specific statutory remedies, including the two citizen-suit provisions."). The individualized remedies available to the Talevski family, which they successfully invoked, should have been the end of the matter. [13]

Yes, the Talevskis also wanted cash. But "[o]ffering [Talevski] a direct route to court via § 1983 would have circumvented the[] [statutory] procedures and given [him] access to tangible benefits—such as damages, attorney's fees, and costs—that [are] unavailable under the [FNHRA]." *Fitzgerald* v. *Barnstable Sch. Comm.*, 555 U.S. 246, 254 (2009). This Court's case law offers no support for such circumvention of statutory remedies.

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[13] There are also extensive mechanisms for use by the Secretary or the states to enforce compliance with FNHRA. The statute mandates an annual survey of nursing facilities receiving Medicaid money, 42 U.S.C. § 1396r(g)(2)(A), and states are authorized to impose monetary penalties or even closure on offending facilities, *id.* § 1396r(h)(2)(A)(i)-(iv). To be doubly sure that state nursing facilities meet the conditions of their grant, FNHRA gives the Secretary the same powers as it gives the states. See *id.* § 1396r(h)(3)(A). As for non-state-owned facilities, the Secretary can go even further, including appointing replacement management on a temporary basis. *Id.* § 1396r(h)(3)(B)-(C).

The Seventh Circuit held otherwise because, in its view, FNHRA failed to contain "the type of comprehensive enforcement scheme, incompatible with individual enforcement, that we are looking for." Pet. App. 14a. But what, exactly, was the court of appeals "looking for"? The panel did not say. The Seventh Circuit acknowledged that FNHRA prescribes an "administrative appeals process," but added, without elaboration, that this individualized remedy "does not indicate a comprehensive enforcement scheme." Pet. App. 15a. Tellingly, the court made no effort to reconcile its hand-waving with this Court's statement in *Alexander* that the "express provision of one method of enforcing a substantive rule suggests that Congress intended to preclude others." 532 U.S. at 290.

The court of appeals also invoked FNHRA's "savings clause," 42 U.S.C. § 1396r(h)(8), which provides that the remedies listed in FNHRA "shall not be construed as limiting such other remedies, including any remedy available to an individual at common law." Pet. App. 16a. But this Court has made clear that "[i]t is doubtful" that the "other remedies" preserved by such savings clauses include ones allegedly created by "the very statute in which this statement was contained." *Middlesex Cnty. Sewerage Auth.*, 453 U.S. at 15-16; *Rancho Palos Verdes*, 544 U.S. at 127 (2005). The Seventh Circuit did not so much as acknowledge that proposition.

B. The Supposed Rights At Issue Fail The *Gonzaga* Test

In *Gonzaga*, this Court made clear that any supposed implied private right of action must be "unambiguously conferred." 536 U.S. at 282. And

such unambiguously conferred rights may be derived only from statutes "phrased in terms of the persons benefitted" that have an "unmistakable focus on the benefitted class" and use "rights-creating language." *Id*. at 284, 290.

The rights Respondent claims here do not fit the bill. Both the chemical restraint and transfer rights Talevski claims are directed at nursing facilities. See 42 U.S.C. § 1396 r(c)(1)(A)(ii) ("A nursing facility must protect and promote . . . [t]he right to be free from . . . physical or chemical restraints" except in certain circumstances); *id.* § 1396r(c)(2)(A) ("[a] nursing facility must permit each resident to remain in the facility and must not transfer or discharge the resident from the facility" except under certain circumstances). It is difficult to see how a directive to nursing facilities could have an "unmistakable focus" on residents, which is the benefited class that Talevski claims. And, setting that aside, FNHRA is in fact part of the Medicaid program, which is itself a Spending Clause statute. See*, e.g.*, *Anderson* v. *Ghaly*, 930 F.3d 1066, 1073 n.3 (9th Cir. 2019). Medicaid itself is functionally a federal-state contract; the federal government offers funding to the states on the condition that they comply with certain statutes and regulations, including FNHRA. See *Grammer* v. *John J. Kane Reg'l Ctrs.-Glen Hazel*, 570 F.3d 520, 523 (3d Cir. 2009). So in fact FHNRA—like other Spending Clause legislation—focuses on the states; it tells them what to do if they want to receive federal Medicaid dollars. A statute that lays out the terms of a contract between the federal government and the states cannot possibly have an "unmistakable focus," *Gonzaga*, 536 U.S. at 284, on persons like Talevski,

who is at best a third-party beneficiary of the contract.[14]

What, then, led the Seventh Circuit astray? The short answer is that it relied almost entirely on the fact that the word "right" is sprinkled throughout the statute. Pet. App. 9a-10a.[15] But this Court's precedents make clear that that isn't enough. In *Pennhurst*, for example, the statute at issue contained a "bill of rights" for the developmentally disabled, but that wasn't enough to imply a private right of action because this Court "must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law" "[i]n expounding a statute." 451 U.S. at 8, 13, 18. And in *Gonzaga*, this Court rejected an argument advanced by the dissent that "any reference to 'rights,' even as a shorthand means of describing standards and procedures imposed on funding recipients, should give rise to a statute's enforceability under § 1983." 536 U.S. at 289 n.7. That reasoning, this Court explained, ran afoul of *Pennhurst*. *Ibid.* So, too, does the Seventh Circuit's reasoning here.

C. The Supposed Rights At Issue Fail The *Blessing* Test

Insofar as *Blessing* has survived this Court's decision in *Gonzaga*, the two rights at issue must meet a three-part test: the pertinent statutory provisions must be "intended [to] benefit the plaintiff," protect a

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[14] FNHRA's comprehensive enforcement remedies, see *supra* at 5-6, 39-40, "buttress[]" the inference that the statute "fail[s] to confer enforceable rights." *Gonzaga*, 536 U.S. at 289.

[15] The Third Circuit made a similar error in *Grammer*, the only other case to squarely address this issue. 570 F.3d at 529-30.

right "not so 'vague and amorphous' that its enforcement would strain judicial competence," and "unambiguously impose a binding obligation on the States." 520 U.S. at 340-41.[16]

With regard to the first factor—at a high level, it is possible to claim that the provisions in question were intended to benefit Talevski and others similarly situated. After all, the statute does lay out conditions by which facilities must abide, and some of those conditions surely inure to the benefit of facility residents. But dealing with *Blessing*'s first factor at a high level misses the trees for the forest. As discussed above, FNHRA is best understood as a directive to states and nursing facilities, with residents benefitting from, but not being the focus of, the two provisions at issue. That should not be enough to satisfy *Blessing* factor one.

The rights in question are also so "vague and amorphous" that they would "strain judicial competence" to enforce, thus failing *Blessing* factor two. *Blessing* 520 U.S. at 340-41. With regard to the chemical restraint right, what FNHRA actually says is that "[a] nursing facility must *protect and promote* the rights of each resident, including . . . [t]he right to be free from physical or mental abuse, corporal punishment, involuntary seclusion, and any physical or chemical restraints imposed for purposes of discipline or convenience and not required to treat the resident's medical symptoms." 42 U.S.C. § 1396r(c)(1)(A)(ii) (emphasis added). Courts trying to enforce this right would therefore have to ask themselves, not whether a given resident was

[16] HHC concedes that the third *Blessing* factor is satisfied here.

subjected to a chemical restraint for a prohibited purpose, but rather whether a given facility had done enough to "protect and promote" the supposed chemical restraint right. FNHRA itself provides no help to a court trying to answer that question because it does not lay out any standard by which any such "protection" or "promotion" should be judged. What's more, assessing this particular "right" would require a court to decide whether a given chemical restraint was medically necessary and to determine its purpose. Such an open-ended invitation for federal courts to act as *post hoc* medical review boards will inevitably result in fragmented, poorly reasoned, and arbitrary decision-making. That is the exact opposite of a judicially administrable "right."

The transfer "right" fares no better. Although Respondent claimed a "right" against involuntary transfer, FNHRA in fact permits involuntary transfers in a wide variety of circumstances: when "the transfer or discharge is necessary to meet the resident's welfare and the resident's welfare cannot be met in the facility," 42 U.S.C. § 1396r(c)(2)(A)(i); "the transfer or discharge is appropriate because the resident's health has improved sufficiently so the resident no longer needs the services provided by the facility," *id.* § 1396r(c)(2)(A)(ii); or "the safety of individuals in the facility is endangered," *id.* § 1396r(c)(2)(A)(iii). Those are *quintessential* medical judgments. How is a federal court to determine whether a resident needs to be moved to a different facility to meet his or her medical needs, or poses enough of a danger to his or her fellow residents that a move is necessary? Again, the lack of administrable standards here is an invitation to arbitrary decision-making.

The Seventh Circuit dismissed these concerns because, in its view, the two rights Respondent invoked pose merely "straightforward inquiries that agencies and courts are well equipped to resolve." Pet. App. 12a. The court noted, in particular, that it discerned "no evidence" of "hand-wringing in the administrative law judge's decision rejecting [HHC]'s transfer decision." Pet. App. 12a-13a.

That is an utter non-sequitur. An ALJ whose very mission is to adjudicate transfer challenges is unlikely to engage in "hand-wringing" precisely because the ALJ—unlike federal judges (and juries)—*is an expert on the subject matter*. The Seventh Circuit's decision would, perversely enough, supplant subject-matter experts with generalist judges and lay jurors. For this reason as well, the *Blessing* test bars an implied right of action here under Section 1983.

CONCLUSION

For the foregoing reasons, this Court should reverse the judgment of the court of appeals.

Respectfully submitted,

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