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

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

BRIEF FOR RESPONDENT

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QUESTIONS PRESENTED

Respondent Gorgi Talevski was a resident of Valparaiso Care and Rehabilitation (VCR), a government nursing home in Valparaiso, Indiana. He had dementia. VCR found caring for him difficult, so it administered psychotropic drugs to restrain him, then involuntarily transferred him to another facility. The Federal Nursing Home Reform Act (FNHRA) specifies that nursing homes in the Medicaid program "must protect" "the right" of "each resident" to be "free from … chemical restraints imposed for purposes of discipline or convenience," 42 U.S.C. § 1396r(c)(1)(A)(ii), and "must not transfer or discharge the resident" without notice and consent except in narrow circumstances not present here, § 1396r(c)(2)(A). The Civil Rights Act of 1871 provides a cause of action against any person who, under color of state law, deprives another of "any rights, privileges, or immunities secured by the Constitution and laws." § 1983. Respondent's wife, his guardian, sued VCR and its affiliates under § 1983 on his behalf for violating his FNHRA rights.

The questions presented are:

1. Whether this Court should overrule a half-century of precedent that has consistently interpreted § 1983 as capable of securing "rights" under "laws" enacted pursuant to the Spending Clause.

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

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INTRODUCTION

This case begins and ends with the statutory text. When Congress in 42 U.S.C. § 1983 created an express cause of action against those acting under color of state law who deprive individuals of "any rights, privileges, or immunities secured by the Constitution and laws" it meant exactly what it said: suits are authorized for the violation any "rights" "secured by" the "laws." Those "laws" include *all* the laws, including those enacted pursuant to the spending power. If you asked "were Gorgi Talevski's rights against chemical restraint and wrongful discharge and transfer secured by federal law?" The only answer consistent with ordinary English usage would be: "Yes." Consistent with its plain text, for decades all three branches of the government have understood that rights in Spending Clause statutes are enforceable under § 1983. Given that history, and the reliance interests at stake, if ever there was a case for holding to a statute's ordinary meaning, this is that case.

The ordinary meaning of the text is so clear no one thought to argue that Spending Clause statutes are excluded from § 1983 until more than 120 years after its enactment. Instead, in an unbroken consensus going back more than 50 years, this Court, Congress, and the Executive Branch have affirmed and reaffirmed the opposite: that "suits in federal court under § 1983 are proper to secure compliance with the provisions of the Social Security Act" (of which Medicaid is Title XIX), *Edelman v. Jordan*, 415 U.S. 651, 675 (1974) (Rehnquist, J.). When parties specifically argued to this Court that the text applied to fewer than all the laws in *Maine v. Thiboutot*, 448 U.S. 1 (1980), *Blessing v. Freestone*, 520 U.S. 329 (1997), and *Gonzaga University v. Doe*, 536 U.S. 273 (2002), this Court rejected those arguments. When the Executive Branch weighed in on the enforceability of provisions in Spending Clause statutes in *Gonzaga*,

Blessing, *Suter v. Artist M.*, 503 U.S. 347 (1992), and *Wilder v. Virginia Hosp. Ass'n*, 496 U.S. 498 (1990), it maintained that Spending Clause statutes can create enforceable rights. And when Congress placed rights-securing text in Spending Clause statutes—including the rights at issue in this very case—it did so believing that § 1983 could be used to enforce those rights.

The reason is obvious: the text permits no other reasonable interpretation. Petitioners do not argue otherwise. Petitioners do not purport to interpret the text of § 1983. Instead, they argue the Court should treat § 1983 not as a real statute, with real text, but as an anything-goes "common law" statute subject to "ongoing" judicial "interpretation." Br. 9, 36. The Court should reject that invitation. Not only because it transgresses basic separation of powers principles but also because Congress has four times amended or enacted statutes, including amending § 1983 itself, based on its understanding that the text of § 1983 dictates its meaning.

If the Court follows ordinary meaning or statutory *stare decisis* in this case, petitioners lose. But even if the Court accepts petitioners' invitation to ignore text and precedent and look instead to the common law of contracts in 1874 to determine whether § 1983 applies to Spending Clause statutes, petitioners' argument still fails. Under the common law in 1874, intended third-party beneficiaries ordinarily could sue to enforce a promise for their benefit.

Plain text also decides the second question presented. Using traditional tools of statutory interpretation, reflected in the factors set forth in *Blessing* and *Gonzaga*, Congress clearly intended enforcement in federal court of FNHRA's rights against chemical restraint and wrongful discharge and transfer. Congress used unambiguous rights-securing language similar to language it used when it enacted rights-securing statutes alongside § 1983.

FNHRA requires that nursing homes inform residents of their rights. FNHRA describes its rights as "*legal* rights." And FNHRA rights "devolve upon" the legal guardians of incompetent residents. These are individual entitlements that § 1983 protects. Nothing in FNHRA rebuts the presumption that these are individually enforceable rights. In fact, FNHRA's savings clause carefully and specifically preserves access to § 1983.

Petitioners are wrong that determining which federal rights are enforceable is beyond judicial ken. Br. 31-36. Courts of appeals have capably applied this Court's framework, holding when appropriate that unambiguous provisions secure federal rights enforceable under § 1983. *See DuBerry v. District of Columbia*, 824 F.3d 1046, 1052-54 (D.C. Cir. 2016) (holding 18 U.S.C. § 926C (JA8-12) creates federal rights under § 1983). Every court of appeals that has considered the question has held that FNHRA's rights against restraint and wrongful discharge and transfer are enforceable rights. As the United States notes, "occasional disagreements are unavoidable" in this area, but petitioners have not shown those disagreements are "more widespread with respect to Spending Clause legislation than they are with respect to other laws." U.S. Br. 22.

Finally, petitioners' repeated use of "implied" in relation to the rights at issue in this case evinces a basic misunderstanding. The rights against chemical restraint and wrongful discharge are not "implied" rights, Br. 8, and suits under § 1983 are not "implied causes of action," Br. 23. This is not a case like *Cort v. Ash*, 422 U.S. 66 (1975), where no statute authorized suit. *See Gonzaga*, 536 U.S. at 283-84. Section 1983 creates an express cause of action against state actors who violate federal rights, and FNHRA's text expressly and unambiguously creates federal rights. The court below correctly held that FNHRA clearly provides rights enforceable against

government nursing homes under § 1983, and its decision should be affirmed.

STATEMENT

A. Statutory Background

1. Section 1983. Since 1874, § 1983 has provided a cause of action against any person who, under color of state law, deprives another of "any rights, privileges, or immunities secured by the Constitution and laws." 42 U.S.C. § 1983; *see* Rev. Stat. § 1979.

a. Congress enacted § 1983 in 1871 as part of the Reconstruction Enforcement Acts. *Mitchum v. Foster*, 407 U.S. 225, 238 (1972). "Section 1983 opened the federal courts to private citizens, offering a uniquely federal remedy against incursions under the claimed authority of state law upon rights secured by the Constitution and laws of the Nation." *Id.* at 238-39. Thus, since 1871 "part of 'judicial federalism' has been the availability of a federal cause of action" for the violation of federal rights. *Knick v. Twp. of Scott*, 139 S. Ct. 2162, 2177 n.8 (2019) (Roberts, C.J.).

b. Congress amended § 1983 in 1874 as part of the Revised Statutes—"a massive revision, reorganization, and reenactment of all statutes in effect at the time." *U.S. Nat'l Bank of Or. v. Indep. Ins. Agents of Am., Inc.*, 508 U.S. 439, 449 (1993). While the 1871 predecessor reached only deprivations of "rights, privileges, and immunities secured by the Constitution of the United States," 17 Stat. 13, the Revised Statutes expanded § 1983 to reach deprivations of rights "secured by the Constitution and laws," Rev. Stat. § 1979. *See* 2 CONG. REC. 827-28 (1874).

At the same time that Congress expanded § 1983 to cover violations of rights secured by federal laws, Congress enacted four rights-securing statutes: Rev. Stat. §§ 1977, 1978, 2004, and 2005 (JA140-43). Sections 1977 and 1978 were the original rights-securing "laws" to

which Congress expected § 1983 would apply. *See Civil Rights Cases*, 109 U.S. 3, 16-18 (1883); *see also Jett v. Dallas Indep. Sch. Dist.*, 491 U.S. 701, 734 (1989).

Congress in the Revised Statutes also expanded the jurisdiction of the federal courts to facilitate the enforcement of the new § 1983 cause of action. *Mitchum*, 407 U.S. at 240-41, 241 n.31. Congress granted federal district courts jurisdiction over "all suits" for the violation of "any right secured by any law of the United States." Rev. Stat. § 563(12) (JA139).

In 1947, Judge Learned Hand held that § 1983 applies to privileges secured by the "laws." Unable to find an earlier case "in which the right or privilege at stake was secured by a 'law' of the United States," he nevertheless found "the language is so plain that the only question is whether this particular 'law'" permitting service on federal juries "secured to the plaintiff a 'privilege.'" *Bomar v. Keyes*, 162 F.2d 136, 138-39 (2d Cir. 1947). He held that it did. *Id.* at 139 ("We do not see how it can be questioned that to prevent a person, who wishes to do so, to serve on a federal jury, is to deny an interest which the statute means to protect.").

c. In 1968, this Court decided a § 1983 case alleging a deprivation of the rights secured by the Social Security Act. *King v. Smith,* 392 U.S. 309, 311-13 (1968). It did so again in *Rosado v. Wyman,* 397 U.S. 397, 399-400 (1970). And again, and again: sixteen more times over the next decade, this Court resolved § 1983 cases asserting rights secured by Spending Clause legislation—and in many cases held, on the merits, that a state entity violated a right secured by that legislation.[1] As of 1974, the Court

[1] *See Dandridge v. Williams*, 397 U.S. 471, 472-73 (1970) (using § 1983 to enforce rights secured by the Social Security Act); *Lewis v. Martin*, 397 U.S. 552, 553-55 (1970) (same); *Cal. Dep't of Hum. Res. Dev. v. Java*, 402 U.S. 121, 122-24 (1971) (same); *Townsend v.*

considered *Rosado* to have decided the issue: As Justice Rehnquist explained in *Edelman*, the *Rosado* Court had "of course" "held that suits in federal court under § 1983 are proper to secure compliance with the provisions of the Social Security Act on the part of participating States." 415 U.S. at 675.

d. In December 1979, Congress enacted the first of the two post-1874 amendments to the text of § 1983, each to overrule a decision by this Court. In *District of Columbia v. Carter*, the Court held that the original text of § 1983 did not permit suits against District of Columbia officials. 409 U.S. 418, 432 (1973). In response, Congress amended § 1983 to cover the District. *See* Pub. L. No. 96-170, 93 Stat. 1284 (1979). The House Report, the House sponsor, and the Senate sponsor all described § 1983 as providing a cause of action to enforce "statutory rights." H.R. REP. NO. 96-548 (1979); 125 CONG. REC. 33651-53 (1979); *id.* at 36755-56 (1979).

e. In 1980, Congress enacted the Civil Rights of Institutionalized Persons Act (CRIPA) "to ensure that the United States Attorney General has 'legal standing to enforce existing constitutional rights and Federal statutory rights of institutionalized persons.'" *Patsy v. Bd. of Regents*, 457 U.S. 496, 508 (1982) (quoting H.R. REP. NO. 96-897, at 9 (1980) (Conf. Rep.)). The statute

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Swank, 404 U.S. 282, 283-85 (1971) (same); *Jefferson v. Hackney*, 406 U.S. 535, 536-37 (1972) (same); *Carleson v. Remillard*, 406 U.S. 598, 599-600 (1972) (same); *N.Y. Dep't of Soc. Servs. v. Dublino*, 413 U.S. 405, 406-08 (1973) (same); *Hagans v. Lavine*, 415 U.S. 528, 530-33, 530 n.3 (1974) (same); *Edelman*, 415 U.S. at 653-54 (same); *Shea v. Vialpando*, 416 U.S. 251, 252-53 (1974) (same); *Van Lare v. Hurley*, 421 U.S. 338, 339-40 (1975) (same); *Burns v. Alcala*, 420 U.S. 575, 577-78 (1975) (same); *Philbrook v. Glodgett*, 421 U.S. 707, 708-09 (1975) (same); *Ohio Bureau of Emp. Servs. v. Hodory*, 431 U.S. 471, 472-73 (1977) (same); *Quern v. Mandley*, 436 U.S. 725, 726-28 (1978) (same); *Miller v. Youakim*, 440 U.S. 125, 126-29 (1979) (same).

arose from the Attorney General's unsuccessful efforts in two lawsuits brought to enforce federal rights on behalf of institutionalized persons. H.R. REP. NO. 95-1058, at 7-11 (1978); S. REP. NO. 96-416, at 16-18 (1979) (describing *Solomon* and *Mattson* decisions). Each case was dismissed because the Attorney General lacked a cause of action. *Id.*

In response, Congress enacted CRIPA, its text mirroring that of § 1983, giving the Attorney General a cause of action, to enforce the rights of institutionalized persons against state institutions, 42 U.S.C. § 1997a(a), including government nursing facilities, § 1997(1)(B)(v); *see also* S. REP. NO. 96-416 at 29 (1979) (describing § 1997a's limitations as "parallel" to those "applied to actions brought under 42 U.S.C. 1983 and similar rights enforcement statutes"); 126 CONG. REC. 3955 (1980) (Indiana Attorney General objecting to CRIPA as "not needed since [it] purport[s] to provide relief where numerous remedies already exist," including suits under § 1983). Under CRIPA, the Attorney General may initiate a civil action where a state or political subdivision is systematically subjecting persons in an institution "to egregious or flagrant conditions which deprive such persons of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States causing such persons to suffer grievous harm." 42 U.S.C. § 1997a(a) (JA132).

Congress understood that CRIPA's text, like § 1983's text, would permit the enforcement of federal rights against government nursing homes. *See* § 1997(1)(A); *see also* § 1997(2) (JA130-31). Congress also understood that CRIPA's text would authorize suits for violations of rights in Spending Clause statutes. *See* H.R. REP. NO. 95-1058, at 12 (1978) (explaining that authority for CRIPA rests in part on the "spending power"). Indeed, there was extensive debate over whether to strike the phrase "or

laws" from § 1997a, which would have limited CRIPA to constitutional rights. Representative Wiggins, the proponent of that limiting amendment, found it "unmistakably clear that the Attorney General intends to utilize various statutes, some of which are financial aid programs enacted by Congress, as the basis for claiming that individual inmates or patients are given enforceable rights under those statutes." 124 CONG. REC. 23184 (1978). But opponents of the amendment viewed that sort of statutory enforcement as crucial, citing the Justice Department's opinion that "if the phrase 'or laws' were removed from the bill," actions involving "nursing homes" and facilities for the disabled—which otherwise could be brought to enforce rights conferred by the Rehabilitation Act, the Developmentally Disabled Assistance and Bill of Rights Act, the Special Health Revenue Sharing Act, and the Social Security Act—"would be drastically affected." *Id.* at 23185-86. Congress rejected the amendment, *id.* at 23186, leaving CRIPA capable of enforcing "Federal statutory rights of institutionalized persons," S. REP. NO. 96-416, at 3 (1979).

f. In 1980, in *Maine v. Thiboutot*, 448 U.S. 1 (1980), a case arising under the Social Security Act, the Court specifically considered "whether § 1983 encompasses claims based on purely statutory violations of federal law" and held that it does. *Id.* at 3-4. The Court held that the "plain language of § 1983," coupled with the Court's "consistent treatment of that provision" (applying it to Social Security Act claims) foreclosed the argument that § 1983 applied only to *some* of the laws. *Id.* at 6-8. Wrote the Court: "[w]here the plain language, supported by consistent judicial interpretation, is as strong as it is here, ordinarily 'it is not *necessary* to look beyond the words of the statute.'" *Id.* at 6 n.4 (quoting *TVA v. Hill*, 437 U.S. 153, 184 n.29 (1978)). The Court also found it "important"

that Congress had "remained quiet in the face of our many pronouncements on the scope of § 1983." *Id.* at 8.

g. In 1981, in *Pennhurst State School and Hospital v. Halderman*, the Court held that § 111 of the Developmentally Disabled Assistance and Bill of Rights Act of 1975, 42 U.S.C. § 6010 (1976 ed. & Supp. III), did not create rights enforceable under § 1983. 451 U.S. 1, 19 (1981) (Rehnquist, J.). Section 6010, the "bill of rights" provision (JA135-37), declared that Congress had made certain "findings respecting the rights of persons with developmental disabilities," namely, that such persons have a right to "appropriate treatment" in the least restrictive environment and that federal and state governments have an obligation to ensure that institutions failing to provide "appropriate treatment" do not receive federal funds. *Id.* at 13; *see also id.* at 19, 22-23.

The Court did not doubt that Spending Clause statutes *could* create federal rights enforceable under § 1983. *See Suter v. Artist M.*, 503 U.S. 347, 356 (1992) (Rehnquist, C.J.) (describing *Pennhurst*). Rather, the Court concluded that to determine whether a Spending Clause statute creates rights under § 1983, "[w]e must carefully inquire … whether Congress … imposed an obligation … to spend state money to fund certain rights as a condition of receiving federal moneys under the Act or whether it spoke merely in precatory terms." *Pennhurst*, 451 U.S. at 18. Applying those principles, the Court concluded that the context of the statute and its legislative history revealed that Congress intended neither to create new substantive rights nor to require states to recognize such rights. *Id.* at 22-24. The Court examined the language of the provision and determined that a general statement of "findings" was "too thin a reed to support" a creation of rights and obligations. *Id.* at 19. Moreover, because compliance with the provision was not

a condition of receiving federal funding, the Court reasoned that "the provisions of § 6010 were intended to be hortatory, not mandatory." *Id.* at 24.

In 1987, in *Wright v. City of Roanoke Redevelopment & Housing Authority*, the Court found that the Brooke Amendment to the Housing Act of 1937, 42 U.S.C. § 1437a (1982 ed. & Supp. III), and its implementing regulations created rights enforceable under § 1983. 479 U.S. 418, 419-20 (1987). The Brooke Amendment imposed a rent ceiling for low-income tenants in public housing projects. *Id.* HUD regulations defined rent to include "'a reasonable amount for [use of] utilities,'" and further defined how that term would be measured. *Id.* at 420-21, 420 n.3. The Court reasoned that the statute and the regulations created enforceable rights because they were "mandatory limitation[s] focusing on the individual family and its income." *Id.* at 430-32.

In 1990, in *Wilder v. Virginia Hospital Association,* the Court allowed a § 1983 suit brought by health care providers to enforce a reimbursement provision of the Medicaid Act, on the ground that the provision, much like the rent-ceiling provision in *Wright,* explicitly conferred specific entitlements upon the plaintiffs. 496 U.S. 498, 522-24 (1990). Congress left no doubt of its intent for private enforcement, the Court said, because the provision required states to pay an "objective" monetary entitlement to individual health care providers, with no sufficient administrative means of enforcing the requirement against states that failed to comply. *Id.*

In 1992, in *Suter v. Artist M.,* the Court held that Title IV-E of the Social Security Act did not provide the plaintiffs with an enforceable right under § 1983. 503 U.S. 347, 350 (1992). Section 671(a)(15) of the Act required that to obtain federal reimbursement, a state must have a plan that "provide[d] that, in each case, reasonable efforts will be made (A) prior to the placement of a child in foster

care, to prevent or eliminate the need for removal of the child from his home, and (B) to make it possible for the child to return to his home." *Id.* at 351; *see also id.* at 358. But the Court held that the condition of federal funding was that the state have a plan approved by the HHS Secretary; carrying out the plan was a step removed from that obligation. *Id.* at 358 (quoting § 671(a)). Thus, the Court held that "[c]areful examination of the language ... does not unambiguously confer an enforceable right upon the Act's beneficiaries" because "[t]he term 'reasonable efforts' in this context is at least as plausibly read to impose only a rather generalized duty on the State, to be enforced not by private individuals, but by the Secretary in the manner [of reducing or eliminating payments]." *Id.* at 363.

h. Congress responded to *Suter* in 1994 by enacting 42 U.S.C. §§ 1320a-2, 1320a-10 to overrule some of the reasoning in *Suter* (JA37-38). Congress provided that "[i]n an action brought to enforce a provision of this chapter, such provision is not to be deemed unenforceable because of its inclusion in a section of this chapter requiring a State plan or specifying the required contents of a State plan." 42 U.S.C. § 1320a-2 (referencing *Suter* by name); § 1320a-10 (same); *see* H.R. REP. NO. 103-761 (1994) (Conf. Rep.); 140 CONG. REC. 29533 (1994).

i. In 1996, Congress enacted the second of the two post-1874 amendments to the text of § 1983, again to overrule a decision by the Court. In *Pulliam v. Allen*, the Court had weakened immunity protections for state judges, holding that judicial immunity is not a bar to prospective injunctive relief against a judicial officer. 466 U.S. 522, 541-43 (1984). Congress responded with the Federal Courts Improvement Act (FCIA), Pub. L. No. 104-317, § 309(c), 110 Stat. 3847, 3853 (1996), amending the text of § 1983 to "restore[] the doctrine of judicial immunity to the status it occupied prior to *Pulliam*." S.

REP. NO. 104-366, at 36-37 (1996); 141 CONG. REC. 21836 (1995).

j. In 1997, in *Blessing v. Freestone*, the Court held that a provision of Title IV-D of the Social Security Act did not create rights enforceable under § 1983. Five Arizona mothers invoked § 1983 against state officials on grounds that state child-welfare agencies consistently failed to meet the Act's requirement to "substantially comply" with Title IV-D's requirements designed to ensure timely payment of child support. 520 U.S. 329, 337 (1997). The Court held that the requirement to "substantially comply" with Title IV-D's requirements did not create individual rights. *Id.* at 343. "Far from creating an *individual* entitlement to services, the standard is simply a yardstick for the Secretary to measure the *systemwide* performance of a State's Title IV-D program." *Id.* Because the provision focused on "the aggregate services provided by the State," rather than "the needs of any particular person," it conferred no individual rights and thus could not be enforced by § 1983. *Id*. The Court emphasized: "[T]o seek redress through § 1983, ... a plaintiff must assert the violation of a federal *right,* not merely a violation of federal *law.*" *Id.* at 340.

k. The last time the Court addressed statutory rights under § 1983 was in 2002 in *Gonzaga University v. Doe*, 536 U.S. 273 (2002).[2] In *Gonzaga*, the Court held that the Family Educational Rights and Privacy Act of 1974 (FERPA), 20 U.S.C. § 1232g (JA13-30), a Spending Clause statute that prohibits the federal funding of educational institutions that have a policy or practice of releasing education records to unauthorized persons, did

[2] The Court mentioned the issue in passing in *Armstrong v. Exceptional Child Center, Inc.* but only to note the plaintiffs "[did] not assert a § 1983 action." 575 U.S. 320, 330 n.* (2015). Part IV of *Armstrong* is not about § 1983. *Id.* at 331-32.

not create enforceable rights under § 1983. 536 U.S. at 276; *see id.* at 278-79. The Court held that only "an unambiguously conferred right" will "support a cause of action brought under § 1983." *Id.* at 283. Accordingly, "where the text and structure of a statute provide no indication that Congress intends to create new individual rights, there is no basis for a private suit … under § 1983." *Id.* at 286. Applying those principles, there was "no question that FERPA's nondisclosure provisions fail to confer enforceable rights." *Id.* at 287. FERPA's requirements are "two steps removed from the interests of individual students and parents" because they (1) speak to the Secretary of Education, directing the Secretary to withhold funds from non-compliant institutions, and (2) prohibit non-compliant policies and practices not individual instances of disclosure. *Id.* at 287-90. The Court found its conclusion "buttressed" by the fact that Congress created robust administrative enforcement mechanisms, including a charge to the Secretary of Education to "*deal with violations*" of the Act. *Id.* at 289 (quoting with emphasis § 1232g(f)). That "squarely distinguish[ed]" the case from *Wright* and *Wilder* "where an aggrieved individual lacked any federal review mechanism." *Id.* at 290.

2. FNHRA. Congress enacted FNHRA as part of the Omnibus Budget Reconciliation Act of 1987, Pub. L. No. 100-203, 101 Stat. 1330. Congress made protecting the rights set forth in a comprehensive Residents' Bill of Rights a condition of participation in the Medicaid and Medicare programs. 42 U.S.C. §§ 1395i-3(c), 1396r(c).[3] The Bill of Rights requires that nursing homes that accept federal funds "must protect and promote the rights of each resident." § 1396r(c)(1)(A). Those rights include

[3] Sections 1395i-3 and 1396r are materially identical. Section 1396r is reproduced at JA39-128.

"[t]he right to be free from … any physical or chemical restraints imposed for purposes of discipline or convenience and not required to treat the resident's medical symptoms." § 1396r(c)(1)(A)(ii). They also cover certain "[t]ransfer and discharge rights," which require that nursing homes "must permit each resident to remain in the facility and must not transfer or discharge the resident from the facility" except for specified reasons, such as to protect the resident's welfare or others' safety. § 1396r(c)(2)(A). FNHRA describes these rights as "legal rights" and provides that a nursing home "must" "inform each resident, orally and in writing at the time of admission to the facility" of these rights. § 1396r(c)(1)(B). FNHRA also provides that "[i]n the case of a resident adjudged incompetent under the laws of a State, the rights of the resident under this subchapter shall devolve upon, and … be exercised by, the person appointed under State law to act on the resident's behalf." § 1396r(c)(1)(C).

The effort to enact a federal bill of rights protecting nursing-home patients traces back to December 1973 and Representative (later Senator) William S. Cohen's introduction of H.R. 11759, "providing for a Federal Nursing Home Patients bill of rights." 119 CONG. REC. 39382 (1973); *see also id.* at 40159. Congressman Cohen reintroduced legislation that would codify the Patient's Bill of Rights in the House in 1975, 1978, and in the Senate in 1979, and 1985. *See Federal Implementation of OBRA 1987 Nursing Home Reform Provisions: Hearing Before the S. Special Comm. on Aging*, 101st Cong. 11-12 (1989); H.R. 9315, 94th Cong. (1975), H.R. 9720, 95th Cong. (1978), S. 1546, 96th Cong. (1979), S. 2119, 99th Cong. (1986).

The legislative process that led to enactment of the nursing-home bill of rights showed acute focus on the need for judicial enforcement. Earlier bills provided a cause of action in federal court for damages and attorney's

fees against nursing homes for violations of the Patient's Bill of Rights. *See* H.R. 9720, 95th Cong. §§ 1127(d)(2)-(3) (1977); S. 1546, 96th Cong. §§ 7(a)-(b) (1979); S. 2119, 99th Cong. §§ 7(a)-(c) (1986). As nursing-home-reform advocates explained in a 1978 hearing, and as the legislative sponsor, Congressmen Cohen, explained in numerous statements in Congress, a damages remedy was necessary to ensure that nursing homes adequately protected patients' rights. *Amendments to the Medicare Program: Hearing Before the H. Comm. on Ways & Means*, 95th Cong. 154-56, 161-64 (1978); 125 CONG. REC. 19870 (1979); 132 CONG. REC. 3180 (1986).

Meanwhile, regulatory implementation of a Patients' Bill of Rights proceeded on a parallel track. In 1974, in response to Congressman Cohen's initial bills, HHS's predecessor agency, the Department of Health, Education, and Welfare, promulgated a "Bill of Rights" for nursing-home patients in the Medicaid program, the text of which basically mirrored the rights set forth in the initial bill. 39 Fed. Reg. 15230 (1974); *id.* at 35774; 120 CONG. REC. 5347-48 (1974). In January 1981, on the eve of this Court's decision in *Pennhurst*, the outgoing HHS Secretary elevated the rights from a standard to a condition of participation in the Medicaid program, but the new Secretary promptly rescinded the regulation. Institute of Medicine, Committee on Nursing Home Regulations, *Improving the Quality of Care in Nursing Homes* 15 (1986) (IOM Report); *see* 46 Fed. Reg. 7408 (1981). For the next three years, the administration and Congress remained at an impasse over whether and how to revise the bill of rights. IOM Report 247-48.

In 1983, the administration and Congress agreed to postpone virtually all changes to the regulations until a committee appointed by the Institute of Medicine (IOM) studied the issues and reported its recommendations. *Id.* at 248. In 1986, the IOM committee issued its report.

Among the report's central recommendations was that "Residents' rights should be raised from a standard to a condition of participation." *Id.* at 27, 81.

Following the IOM Report, Congress and the President enacted FNHRA. FNHRA codified resident's rights into federal law and elevated residents' rights to a condition of participation in the Medicare and Medicaid programs, as the IOM committee recommended. H.R. REP. NO. 100-391, at 452-53, 457-58 (1987). FNHRA did not include a freestanding private right of action but did include a savings clause providing that FNHRA's remedies "are in addition to those otherwise available under State or Federal law and shall not be construed as limiting such other remedies, including any remedy available to an individual at common law." 42 U.S.C. § 1396r(h)(8).

B. Factual Background

In the final years of his life, Gorgi Talevski began to suffer from dementia. His family members devoted themselves to his care until January 2016, when it became clear he would need professional care for his safety. Pet. App. 77a. At that point, he began living at VCR, a government nursing facility near his family home in Indiana. *Id.* When he entered VCR, he was able to walk, communicate in English, feed himself, and recognize his family. *Id.*

Shortly after he moved to VCR, however, Gorgi's daughter observed "sudden[] and dramatic[]" deterioration in his cognitive and physical abilities. *Id.* at 78a. He lost the ability to feed himself or communicate in English, instead speaking only in his native Macedonian. *Id.* During this time, his daughters frequently arrived to find that their father had soiled himself, leading to a "severe rash on his buttocks." *Id.* On one visit, Gorgi's family found that he could not get out of bed. *Id.*

VCR was abusing Gorgi. They were using drugs to restrain him, including six powerful psychotropics. *Id.* His family hired a private neurologist, who facilitated the removal of the drugs from his treatment. *Id.* at 78a-79a. Once he was off the drugs, Gorgi's condition improved, and he was able to feed himself again. *Id.* at 79a.

Gorgi's family filed a formal complaint against VCR. *Id.* Following that complaint and the tapering of the drugs, VCR started repeatedly transferring Gorgi to a distant neuropsychiatric hospital an hour and a half away, three counties over, and in a different time zone. *Id.* at 18a, 79a. Each time he returned from the hospital, VCR would transfer him right back in a matter of days. *Id.* at 79a. During his final transfer—over the holidays in December 2016—VCR transferred him without his teeth, causing his gums to degrade to the point where he could not be fitted for new dentures. *Id.* at 80a.

After the repeated transfers in late 2016, VCR refused Gorgi's readmittance to the facility. Instead, it attempted to transfer him—through an involuntarily discharge—to a dementia facility in Indianapolis, nearly three hours away from his family. *Id.* at 18a, 79a. His family filed an appeal of the unlawful transfer with the Indiana State Department of Health. *Id.*at 80a. A state administrative law judge held that VCR had violated Gorgi's discharge rights. *Id.* But the only relief available was readmittance to VCR. *Id.*at 81a. His family, fearful that VCR would retaliate against him, or continue to abuse him, moved Gorgi to another nursing home. *Id.*

Through his wife, Ivanka Talevski, Gorgi Talevski sued VCR under 42 U.S.C. § 1983 for violations of FNHRA. *Id.* at 2a-3a. The district court dismissed the action for failure to state a claim, finding that FNHRA does not provide rights redressable under § 1983. *Id.* at 3a. The Seventh Circuit reversed. This Court granted certiorari.

SUMMARY OF ARGUMENT

I. Section 1983 expressly grants a cause of action to protect "*rights . . . secured* by the Constitution and *laws*." Spending Clause statutes, like other laws, can "secure" "rights" for purposes of § 1983. Section 1983's text, context, and purpose all dictate that conclusion, as does congressional ratification and statutory *stare decisis*. The text and ratified interpretation of § 1983 should determine its meaning, not the common law of contract in the 1870s. Petitioners do not dispute that they cannot succeed if the Court follows the statute's ordinary meaning. But even if contract law overcomes the text and this Court's precedent, the prevailing rule in this country in the early 1870s was that third parties could sue to enforce contracts for their benefit.

II. Congress clearly intended FNHRA's rights against chemical restraint and involuntary discharge and transfer would be individually enforceable rights that § 1983 would protect. FNHRA's text, structure, history, and purpose place that conclusion beyond doubt.

It is hard to imagine a more unambiguous rights-creating statute than FNHRA. Residents must be notified repeatedly of these rights, the rights are part of a "bill of rights," provided orally and in writing to each resident (often posted on the wall of the facility, as they were at VCR), the statute repeatedly refers to them as "rights," the rights are specifically described as "legal rights," and the statute provides that these rights pass to a resident's guardian if he becomes incompetent. Protecting these rights is a condition of participation in the Medicaid program and the rights are conferred in mandatory language, requiring that nursing homes "must" protect them.

And these rights are fundamental basic rights, like rights to bodily autonomy and against surprise eviction. Nursing-home residents are among the most vulnerable

individuals in our society, and Congress recognized they require significant legal protections to protect them against abuse and neglect.

The statute's enforcement scheme dispels any doubt that FNHRA's rights are enforceable under § 1983. FNHRA offers no path to federal judicial review for rights violations and no federal accountability mechanism for individual rights violations at all; instead, in its savings clause, it explicitly preserves access to *other* federal remedies outside FNHRA. Section 1983 is among the federal remedies to which FNHRA preserves access.

At bottom, FNHRA was enacted to secure certain rights by law and make their protection binding conditions of participation in the Medicaid program. Before that, those rights had for nearly a decade been secured only by regulation. There would have been no reason to enact FNHRA if regulatory enforcement was adequate, because there already were regulations. Congress wanted more. It wanted to confer enforceable rights on nursing-home residents to protect them against neglect and abuse.

ARGUMENT

I. FNHRA'S RIGHTS AGAINST CHEMICAL RESTRAINT AND INVOLUNTARY DISCHARGE AND TRANSFER ARE ENFORCEABLE UNDER § 1983

A. Rights protected by Spending Clause statutes are "rights" "secured by" the "laws"

Section 1983 provides an express cause of action for the deprivation of rights secured by Spending Clause statutes.

1.a. *Text.* The starting point is the text. Section 1983 permits suit against any person who, under color of state law, deprives another of "any rights, privileges, or immunities secured by the Constitution and laws." 42 U.S.C. § 1983. The phrase "secured by the laws," had a

well-recognized ordinary meaning at the time of § 1983's enactment—it meant protected by law. *See Hague v. Comm. Indus. Org.*, 307 U.S. 496, 526-27 (1939) (opinion of Stone, J.) (explaining that the Court recognized a decade after its enactment that § 1983 uses "secured" by the Constitution to mean "protected" by the Constitution).

Indeed, at the time of § 1983's enactment, leading dictionaries defined "secure" as "[t]o make certain; to put beyond hazard," Webster's Dictionary (1828), and "to secure" as "to protect, insure, or save a right," Bouvier's Law Dictionary (1856). For nearly a century preceding § 1983's enactment, this Court used the word in the same way. *See Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 197-98 (1824) ("This principle … is secured by the tenth amendment"); *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 390 (1798) ("The prohibitions … were inserted [in the Constitution] to secure private rights"); *see also, e.g.*, *Harrison v. Sterry*, 9 U.S. (5 Cranch) 289, 299 (1809) (similar usage). The same consistent usage appeared across the nineteenth century in treatises, court cases, speeches, legislative debates, and periodicals. "To secure" a right by law was to protect it by law, and that formulation was used repeatedly. *See, e.g.*, 3 Joseph Story, *Commentaries on the Constitution of the United States* § 1641, at 508 (1833).

That more than 120 years elapsed before anyone conceived of the possibility that § 1983 excludes rights in Spending Clause legislation is powerful evidence that the phrase "secured by the … laws" carries its ordinary meaning in § 1983. Eighteen times between 1968 and 1980, this Court decided cases involving the enforcement of § 1983 in the Social Security Act without anyone mentioning the novel Spending Clause exclusion petitioners now advance. Did the Court in all of those cases just miss that obvious answer—and overlook the

fact that § 1983 does not apply to Spending Clause legislation? That seems implausible. *See Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1833 (2020) (Kavanaugh, J., dissenting); *cf. Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 576 U.S. 787, 824-25 (2015) (Roberts, C.J., dissenting). The reason is obvious: If you asked an ordinary English speaker whether the rights in this case were "secured by the laws" the answer would quite clearly be yes. Petitioners have offered no other way to read that text because none is available.

By its terms, § 1983 applies to any right protected by a federal law. And there is no textual or constitutional basis for treating Spending Clause legislation differently from legislation enacted under any other power. Indeed, petitioners concede that the Spending Clause authorizes Congress to create causes of action, notwithstanding the "contract[ual]" nature of Spending Clause legislation. Br.25. Thus, rights in Spending Clause statutes are enforceable under § 1983 for the same reason rights in other statutes are enforceable: because they are protected by federal law.

b. *Consistent Understanding.* The meaning of the statute is so clear that all three branches of the federal government have treated it as settled for decades. In addition to this Court, which has three times rebuffed the argument that § 1983 applies to fewer than all the laws (in *Thiboutot*, *Blessing*, and *Gonzaga*), the Executive Branch has for more than thirty years consistently maintained that Spending Clause statutes can create federal rights as long as Congress showed a clear intention that the rights are enforceable.[4] And Congress has relied on the

[4] *See, e.g.*, U.S. Br. 10-24; U.S. Br. at 18, *Gonzaga Univ. v. Doe*, 536 U.S. 273 (2002) (No. 01-679); U.S. Br. at 16-17, *Blessing v. Freestone*, 520 U.S. 329 (1997) (No. 95-1441); U.S. Br. at 8, *Suter v. Artist M.*, 503 U.S. 347 (1992) (No. 90-1488); U.S. Br. at 14-15, *Wilder v. Virginia Hosp. Ass'n*, 496 U.S. 498 (1990) (No. 88-2043).

enforceability of Spending Clause statutes when placing federal rights in spending statutes since *Rosado*.[5]

2.a *Ratification.* Congress has also ratified this Court's interpretation of § 1983 as applying to rights in Spending Clause legislation. Across four separate acts, Congress not only amended § 1983 in the face of decisions holding Spending Clause rights enforceable; it enacted new legislation to overrule decisions that impeded the enforcement of Spending Clause rights.

Congress ratified this Court's interpretation in 1994, when it enacted a pair of laws to overrule part of this Court's decision in *Suter* dealing with the enforceability of a category of Spending Clause statutes. *See* pp. 10-11, *supra*. By overriding part of *Suter*, Congress expressed that there are enforceable Spending Clause statutes that courts following *Suter* would have incorrectly found unenforceable. *See* 42 U.S.C. §§ 1320a-2, 1320a-10. Congress's *Suter* override is more than ratification—it is *super* ratification. *See Texas Dep't of Hous. & Cmty. Affs. v. Inclusive Communities Project, Inc.*, 576 U.S. 519, 537-38 (2015). If rights in Spending Clause legislation were unenforceable all along, Congress's *Suter* override was meaningless. That would contravene this Court's consistent recognition that, in matters of statutory interpretation, the Court must give effect, if possible, to every part of every statute. *See Biden v. Texas*, 142 S. Ct. 2528, 2539 (2022). In fact, the point is stronger: The principle that "Congress" does not enact "self-defeating

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[5] *See, e.g.*, H.R. REP. NO. 101-922, at 420 (1990) (Conf. Rep.) (explaining committee's intent "that the rights created by" the Cranston-Gonzalez National Affordable Housing Act of 1990 "be enforceable under 42 U.S.C. Section 1983"); 136 CONG. REC. 35640 (1990) (same); H.R. REP. NO. 103-480, at 64 (1994) (Conf. Rep.) (discussing intended application of § 1983 to the rights in the School-to-Work Opportunities Act of 1994); 140 CONG. REC. 8331 (1994) (same).

statute[s]" is stronger than the preference for giving effect to every word and clause. *Quarles v. United States*, 139 S. Ct. 1872, 1879 (2019). Yet, on petitioners' view, the whole legislative override was a nullity.

Congress also ratified this Court's view of § 1983 in the more conventional way by twice amending the statute to overrule decisions by this Court: first in 1979 and then again 1996. *Inclusive Communities*, 576 U.S. at 535-37. By the time Congress amended the statute in 1979, this Court had already decided eighteen cases involving the enforceability of rights secured by the Social Security Act under § 1983. *See* p. 5-6 & n.1, *supra*. Some of those cases held that state entities had violated rights secured by the Social Security Act.[6] By 1974, Justice Rehnquist, writing for the Court in *Edelman*, found the question beyond dispute: the Court "of course" had "held that suits in federal court under § 1983 are proper to secure compliance with the provisions of the Social Security Act on the part of participating States." 415 U.S. at 675 (citing *Rosado*, 397 U.S. at 399-400). And by the time Congress amended the statute again in 1996, this Court had decided *Thiboutot*, *Wright*, *Wilder*, and *Blessing*. Yet, both times it amended § 1983 to overrule other decisions interpreting § 1983, Congress left unchanged the text of § 1983 permitting the enforcement of rights in Spending Clause statutes.

This history is especially significant because Congress was aware of this Court's holdings that § 1983 applies to Spending Clause legislation and expressly considered whether to overrule it, but did not. Beginning just months after this Court's decision in *Thiboutot*, Senator Orrin

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[6] *See Java*, 402 U.S. at 122-24; *Townsend*, 404 U.S. at 283-85; *Carleson*, 406 U.S. at 599-600, 604; *Shea*, 416 U.S. at 252-53; *Van Lare*, 421 U.S. at 339-40; *Philbrook*, 421 U.S. at 708-09; *Youakim*, 440 U.S. at 126-29.

Hatch repeatedly introduced legislation that would have amended § 1983 to limit the enforceable "laws." S.3114, 96th Cong. (1980); *see also* S.584, 97th Cong. (1981). This limitation was necessary because, under *Thiboutot*, "a cause of action under section 1983 may now rest on the violation or deprivation of any rights secured by *any* statute." 126 CONG. REC. 25293 (1980) (emphasis added). Of particular concern were rights secured by "federal grant statutes" like those providing "unemployment, Medicaid, school lunch subsidies," or "food stamps and other welfare benefits." *Municipal Liability under 42 U.S.C. 1983: Hearings on S.584, S.585, and S.990*, 97th Cong. 336 (1981); *see* 126 CONG. REC. 25293-94 (1980). Courts would be open to "senior citizen torts." *Municipal Liability*, at 336. Opponents of the bill countered that these sorts of suits were in § 1983's heartland. *Id.* at 62-63. The bill never passed, despite reintroduction in 1983 and 1987. *See* S.141, 98th Cong. (1983); 129 CONG. REC. 811 (1983); S.325, 100th Cong. (1987); 133 CONG. REC. 1471 (1987).

Congress also ratified this Court's interpretation of § 1983 still another way: by enacting CRIPA. CRIPA was modeled on § 1983, using nearly identical language. The critical words "rights … secured by the … laws" appear in both statutes. *See* JA129, JA132. If petitioners are correct that those words do not include Spending Clause statutes in § 1983, then they would not include Spending Clause statutes in CRIPA either because CRIPA took them from § 1983. *See Sekhar v. United States*, 570 U.S. 729, 733 (2013) ("[I]f a word is obviously transplanted from another legal source, … it brings the old soil with it."). But Congress enacted CRIPA with the express understanding that CRIPA would apply against government nursing homes and that it would apply to rights in Spending Clause statutes. *See* pp. 6-8, *supra*; *see also Bragdon v. Abbott,* 524 U.S. 624, 645 (1998). It would

be bizarre to give § 1983 and CRIPA different meanings solely because one was enacted in 1874 and the other in 1980. *See Inclusive Communities*, 576 U.S. at 534-35.

b. *Stare Decisis.* Finally, in this case, *stare decisis* is "supercharged" because it involves statutory precedent. *Kimble v. Marvel Ent., LLC*, 576 U.S. 446, 456 (2015). Adherence to precedent is always extremely important. *See Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 798 (2014); *Payne v. Tennessee*, 501 U.S. 808, 827 (1991). Even when *stare decisis* is at its lowest ebb, overruling takes "special justification"—more than the "argument that the precedent was wrongly decided." *Halliburton Co. v. Erica P. John Fund, Inc.*, 573 U.S. 258, 266 (2014).

Here *stare decisis* is at its pinnacle. *Kimble*, 576 U.S. at 456; *Ramos v. Louisiana*, 140 S. Ct. 1390, 1413 (2020) (Kavanaugh, J., concurring) ("strict"). Precedent's special force in this context derives from the separation of powers and principles of institutional competence. *See, e.g.*, *Neal v. United States*, 516 U.S. 284, 295-96 (1996). Congress can always amend a statute to override this Court's interpretation. *Id.* at 295. Conversely, when this Court overrules a statutory precedent, it gives Congress "less reason to exercise its responsibility to correct statutes that are thought to be unwise or unfair." *Id.* at 295-96. Section 1983 is a statute that "Congress remains free to alter," *Patterson v. McLean Credit Union*, 491 U.S. 164, 172-73 (1989), and the same supercharged *stare decisis* applies to § 1983 that applies in other statutory cases. *See Oklahoma City v. Tuttle*, 471 U.S. 808, 818 n.5 (1985) (Rehnquist, J., plurality op.); *see also Patsy*, 457 U.S. at 517 (White, J., concurring in part); *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 714-19 (1978) (Rehnquist, J., dissenting).

Stare decisis carries even more force here than in a run-of-the-mine statutory case, for three reasons. *First*, ruling for petitioners would require the Court to overrule

not a single case, but a "long line of precedents"—each one reaffirming the rest and going back 50 years or more. *See Bay Mills*, 572 U.S. at 798. This Court has decided dozens of cases involving Spending Clause statutes, and lower courts have done so hundreds (if not thousands) of times. Section 1983 is integrated into the enforcement scheme of nearly every cooperative federalism program in the United States. *Second*, because that is so, this would be the rare overruling that introduces so much instability into so many areas, all in one blow, that it warrants heightened caution. *Third*, this precedent has stood intact for a very long time—over half a century—and Congress has not overruled it. Instead Congress has permitted suits under Spending Clause statutes, even after Members of this Court began to raise questions about whether § 1983 should extend to Spending Clause legislation. *See Blessing*, 520 U.S. at 349-50 (Scalia, J., concurring). Given all of that history—on top of statutory *stare decisis*—"[o]nly the most compelling circumstances can justify" now reversing course. *Monell*, 436 U.S. 714-19 (Rehnquist, J., dissenting). There are no such compelling circumstances in this case.[7] *See* U.S. Br. 21-24.

3. To overcome the text, context, purpose, and history of § 1983, petitioners offer several counterarguments. None is persuasive.

a. Petitioners contend that, regardless of the statutory text, Congress implicitly intended to exclude rights protected by Spending Clause statutes from § 1983. The fundamental problem with petitioners' implicit intent argument is that the text of § 1983 says no such thing. "Congress expresses its intentions through statutory text

[7] Petitioners argue that § 1983 is a "common law" statute entitled to reduced *stare decisis* protection. Br. 28, 36-38. Petitioners identify only one statute the Court has ever treated that way: the Sherman Act. Br. 36. That law is textually and historically unique. There is no basis to treat § 1983 similarly here.

passed by both Houses and signed by the President (or passed over a Presidential veto)." *Oklahoma v. Castro-Huerta*, 142 S. Ct. 2486, 2496 (2022). "As this Court has repeatedly stated, the text of a law controls over purported legislative intentions unmoored from any statutory text." *Id.* "The Court may not replace the actual text with speculation as to Congress' intent." *Id.* "Rather, the Court will presume more modestly" that "the legislature says what it means and means what it says." *Id.*; *see also id.* at 2497 (collecting cases); *Yellen v. Confederated Tribes of Chehalis Rsrv.*, 141 S. Ct. 2434, 2443-44 (2021).

To buttress their implicit intent argument, petitioners seize on this Court's cases holding that the Congress that enacted § 1983 would have expected it to be "construed in the light of common-law principles that were well-settled at the time of its enactment." Br. 12 (quoting *Kalina v. Fletcher*, 522 U.S. 118, 123 (1997)). They further claim that "[i]n the context of Spending Clause legislation in particular, it is common-law *contract* principles that control." Br. 12.

But filling gaps in a statute is fundamentally different from interpreting text. None of the cases petitioners cite, which deal with background tort principles like immunities not expressly addressed in § 1983, used the common law to determine which rights Congress was referring to when it wrote the words "any rights, privileges, or immunities secured by the Constitution and laws" in § 1983. *See* Br. 11-13. There is no reason to think that the Congress that wrote the phrase "rights … secured by the … laws" in § 1983 believed that phrase would mean something other than what it ordinarily means. And there is no evidence that the Congress that enacted that text believed it would be construed according to the common law of contract. Given the absence of modern Spending Clause programs in 1874, Congress

likely had no specific view of how § 1983 would interact with Spending Clause legislation. "And this Court does not rewrite a constitutionally valid statutory text under the banner of speculation about what Congress might have done had it faced a question that ... it never faced." *Castro-Huerta*, 142 S. Ct. at 2497.

b. Petitioners are also wrong about the history of third-party beneficiary enforcement.[8] Petitioners must show that it was "well-settled at the time of [§ 1983's] enactment" that intended third-party beneficiaries could not sue to enforce a contract. Br. 12 (quoting *Kalina*, 522 U.S. at 123). But in 1874, when Congress enacted § 1983, the prevailing rule was that intended third-party beneficiaries could sue to enforce a contract.

"The best known and most influential" contracts treatises in 1870 "were by William Story and Theophilus Parsons." E. Allan Farnsworth, *Contracts Scholarship in the Age of the Anthology*, 85 Mich. L. Rev. 1406, 1408-09 (1987); CONG. GLOBE, 42nd Cong., 2d Sess. 383 (1872) (Sen. Sumner citing Parsons). Six versions of Parsons were published between 1853 and 1874, using materially identical relevant language. Parsons said the "prevailing rule" was that intended third-party beneficiaries could sue. 1 Theophilus Parsons, *Law of Contracts* 467 (6th ed. 1873). This Court cited this exact passage of Parsons for this exact proposition in a contracts case in 1876. *Hendrick v. Lindsay*, 93 U.S. 143, 149 (1876). And across multiple editions Story also recognized this as the general American rule. William W. Story, *A Treatise on the Law of Contracts Not Under Seal* 82 (1st ed. 1844) (hereinafter W. Story, 1844 *Treatise*); 1 William W. Story, *A Treatise*

[8] To be sure, members of this Court have questioned whether third-party beneficiaries could enforce contracts in the 1870s. Br.3. Full briefing and further examination in this case shows that the "better considered position" is that they could. *McGrath v. Kristensen*, 340 U.S. 162, 176-78 (1950) (Jackson, J., concurring).

on the Law of Contracts Not Under Seal 549 (4th ed. 1856) (hereinafter W. Story, 1856 *Treatise*).

Petitioners' quotes from Story, Holmes, and Langdell are inapposite. The Langdell and Holmes quotes are from passages that were never meant to explain the prevailing rule. The quoted section of Holmes's lectures has nothing to do with contract rules for third-party beneficiaries. *See* Oliver W. Holmes, Jr., *The Common Law* 340-41 (1881). Langdell's *Summary* was a teaching aid, not a treatise, *see* Farnsworth, *supra* at 1410, and "decidedly not a canonic textual treatment of contract law," Stephen A. Siegel, *John Chipman Gray and the Moral Basis of Classical Legal Thought*, 86 Iowa L. Rev. 1513, 1516 (2001); *see also* Farnsworth, *supra*, at 1409. Moreover, Langdell was examining "the established doctrine in England and in Massachusetts"; he noted a "contrary doctrine" was "already established" elsewhere. Christopher C. Langdell, *A Summary of the Law of Contracts* 80 (2d ed. 1880). In Story's case, petitioners (at 14) omit text from the passage, which states: "in cases of simple contract if one person make a promise to another for the benefit of a third … the party for whose benefit it is made may maintain an action upon it." W. Story, 1844 *Treatise* 82. Story's 1856 edition made the point even more forcefully. W. Story, 1856 *Treatise* 554-55 (explaining "the broad doctrine is here held that where one person makes a promise to another upon a valid consideration for the benefit of a third, the third person may maintain an action thereon, although he be not privy to the original promise. Nor does it seem to matter whether the promise be founded upon an agreement relating to property or specific articles belonging to the third person or in respect to which he has a special interest" and collecting cases).

Also contrary to petitioners' arguments (at 15), third-party beneficiaries routinely successfully sued to enforce

promises for their benefit. Courts in New York, Ohio, Illinois, Missouri, Indiana, and thirteen other states, representing five of the six largest states and almost two thirds of the nation's population at the time of § 1983's enactment (and at least 19 states total) seemingly would have allowed such suits in 1874 in accordance with what they described as the prevailing rule in this country. *See* Resp. App. 1a-6a. The smattering of cases petitioners found from a handful of states (at 15) do not show a "settled" contrary rule.

Petitioners (at 18-23) are incorrect that rules governing government contracts "bolster" their argument. Instead, it reveals the inherent manipulability and error of petitioners' project to analogize Spending Clause legislation to contracts.[9] The best analogy when the federal government exchanges promises with a state under the Spending Clause is to a contract between sovereigns (a treaty), as this Court recognized in *Steward Machine Co. v. Davis*, 301 U.S. 548, 597 (1937). And treaties—like the treaties securing hunting, fishing, and travel rights to members of Indian tribes—create individually enforceable rights for third-party beneficiaries. *See, e.g.*, *Cree v. Waterbury*, 78 F.3d 1400, 1401-02 (9th Cir. 1996) (discussing plaintiff Indians' § 1983 claims to enforce their rights under the Treaty with the Yakima, June 9, 1855, 12 Stat. 951); *Cree v. Washington*, 990 F.2d 1256 (9th Cir. 1993) (Mem.) (same); *Romero v. Kitsap Cnty.*, 931 F.2d 624, 626-27 (9th Cir. 1991) (similar); 2 Joseph Story, *Commentaries on the Constitution of the United States* § 1838, at 571 (2d ed. 1851); *see also Edye v. Robertson*, 112 U.S. 580, 598 (1884) (treaties providing for the "rights of citizens and subjects

[9] Petitioners' government contracts analogy also fails because those contracts generally did not create intended individual third-party rights. *See* U.S. Br. 19-20.

of the contracting nations" "are capable of enforcement as between private parties in the courts of the country").

c. Petitioners argue that the Court should hold that separation of powers and federalism principles preclude the creation of statutory rights under § 1983. Br. 23-26. They argue that permitting § 1983 enforcement of federal statutory rights thrusts courts into a fundamentally legislative role, *id.* at 24-25, and that it betrays federalism by exposing states to unanticipated and unpredictable liability, *id.* at 25-26. Yet there is no dispute that Congress has the power to create a cause of action to enforce Spending Clause rights; the only question is whether it has done so. And it is *petitioners* who would thrust the courts into a legislative role, by overriding the statutory text that Congress enacted in favor of an *unwritten* limitation based on what petitioners *think* Congress *intended*.

Moreover, the requirement that rights must be unambiguously conferred (and recognized by courts as such) safeguards federalism and separation-of-powers principles. That requirement allows Congress to create rights knowing they will be enforced while allowing states to "anticipate—[and] budget for—possible litigation costs or jury awards" when state actors violate them. *Id.* Numerous statutes create federal rights with sufficient clarity to overcome separation of powers and federalism concerns. Rev. Stat. §§ 1977 and 1978 secure rights, as does the Law Enforcement Officers Safety Act, which unambiguously secures to law enforcement officers a right to carry concealed firearms. 18 U.S.C. § 926C (JA8-12); *see DuBerry*, 824 F.3d at 1052-55. "Of course, there will be some hard cases." *Wooden v. United States*, 142 S. Ct. 1063, 1071 (2022). But hard cases are not a reason to ignore the text of the laws Congress wrote.

B. FNHRA's chemical restraint and wrongful discharge and transfer rights are individually enforceable rights that § 1983 protects

FNHRA's text, context, and purpose show that its rights against chemical restraint and wrongful discharge and transfer are federal rights that § 1983 protects.

1. Not every violation of a federal statute is redressable under § 1983: "[A] plaintiff must assert the violation of a federal *right*, not merely a violation of federal *law*." *Blessing*, 520 U.S. at 340. Determining whether a federal statute creates rights enforceable under § 1983 requires taking "pains to analyze the statutory provisions in detail, in light of the entire legislative enactment." *Suter*, 503 U.S. at 357.

Whether a statute is enforceable under § 1983 turns on whether Congress "unambiguously confer[red] upon the … beneficiaries of the Act a right to enforce the requirement" at issue. *Id.* This painstaking analysis "in detail," this "close" examination for "unambiguous" intent, is directed not to whether the statute at issue "created unspecified 'rights,'" but rather to the more exacting inquiry into whether the statute confers a "protected individual interest," "an *individual* entitlement." *Blessing*, 520 U.S. at 343. To aid that inquiry, the Court has "traditionally looked at three factors" in considering whether a federal statute confers individual rights enforceable under § 1983: (1) whether the provision in question was intended to benefit the putative plaintiff; (2) whether the interest the plaintiff asserts is not so "vague and amorphous" that "its enforcement would strain judicial competence"; and (3) whether the statute "unambiguously impose[s] a binding obligation."[10] *Id.* at 340-41. At bottom, the "inquiry focuses

[10] Petitioners argued below that *Blessing* "set forth the standard courts must apply in evaluating whether a statute implies a private

on congressional intent," *id.* at 341, and "[t]he most important inquiry ... is whether Congress intended to create the private remedy sought by the plaintiffs." *Suter*, 503 U.S. at 364. That intent must be expressed "unambiguously" before spending power legislation will be held to give rise to individual rights enforceable under § 1983. *Id.* at 357, 363.

2.a. FNHRA meets § 1983's exacting standards. The United States agrees. *See* U.S. Br. 25-27. FNHRA uses unambiguous rights-creating language that shows a clear intent to create enforceable rights for individuals in the benefited class. The statute confers "rights"—using the word "right" repeatedly to describe the entitlement it confers—on individual nursing-home residents. 42 U.S.C. § 1396r(c). FNHRA says that nursing homes "must protect" these rights and "must not" violate them. §§ 1396r(c)(1)(A), 1396r(c)(2)(A). The statute describes them as "legal rights" and states that they devolve on guardians if residents are adjudged incompetent. §§ 1396r(c)(1)(B)(i), 1396r(c)(1)(C). The statute mandates that nursing-home residents be informed of these rights, orally and in writing, upon admission to a nursing home and on request. § 1396r(c)(1)(B)(i), (ii). The statute groups these rights under a section entitled "Requirements relating to residents' rights." § 1396r(c). The "Resident Rights" were literally posted on the walls of the nursing home in this case. That poster reads near the top: "This page summarizes specific rights you have as a nursing home resident as provided by both federal and Indiana state statutes and regulations."

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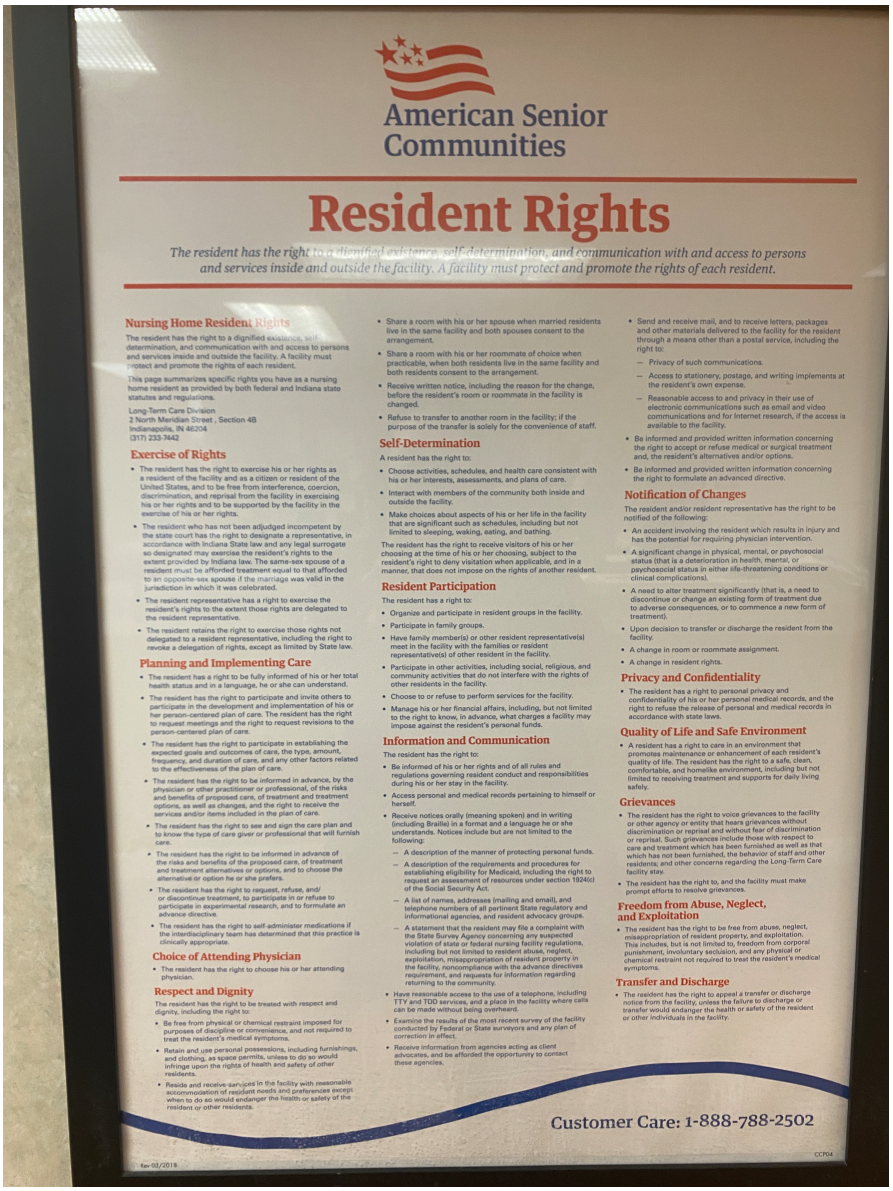
right of action, including for purposes of Section 1983." Pet. C.A. Br.19 ("This Court Should Apply the *Blessing* Test.").

Fig. 1. The Bill of Rights posted at Valparaiso Care and Rehabilitation



American Senior Communities

Resident Rights

The resident has the right to a dignified existence, self-determination, and communication with and access to persons and services inside and outside the facility. A facility must protect and promote the rights of each resident.

Nursing Home Resident Rights

The resident has the right to a dignified existence, self-determination, and communication with and access to persons and services inside and outside the facility. A facility must protect and promote the rights of each resident.

This page summarizes specific rights you have as a nursing home resident as provided by both federal and Indiana state statutes and regulations.

Long-Term Care Division
2 North Meridian Street , Section 4B
Indianapolis, IN 46204
(317) 233-7442

Exercise of Rights

- The resident has the right to exercise his or her rights as a resident of the facility and as a citizen or resident of the United States, and to be free from interference, coercion, discrimination, and reprisal from the facility in exercising his or her rights and to be supported by the facility in the exercise of his or her rights.
- The resident who has not been adjudged incompetent by the state court has the right to designate a representative, in accordance with Indiana State law and any legal surrogate so designated may exercise the resident's rights to the extent provided by Indiana law. The same-sex spouse of a resident must be afforded treatment equal to that afforded to an opposite-sex spouse if the marriage was valid in the jurisdiction in which it was celebrated.
- The resident representative has a right to exercise the resident's rights to the extent those rights are delegated to the resident representative.
- The resident retains the right to exercise those rights not delegated to a resident representative, including the right to revoke a delegation of rights, except as limited by State law.

Planning and Implementing Care

- The resident has a right to be fully informed of his or her total health status and in a language, he or she can understand.
- The resident has the right to participate and invite others to participate in the development and implementation of his or her person-centered plan of care. The resident has the right to request meetings and the right to request revisions to the person-centered plan of care.
- The resident has the right to participate in establishing the expected goals and outcomes of care, the type, amount, frequency, and duration of care, and any other factors related to the effectiveness of the plan of care.
- The resident has the right to be informed in advance, by the physician or other practitioner or professional, of the risks and benefits of proposed care, of treatment and treatment options, as well as changes, and the right to receive the services and/or items included in the plan of care.
- The resident has the right to see and sign the care plan and to know the type of care giver or professional that will furnish care.
- The resident has the right to be informed in advance of the risks and benefits of the proposed care, of treatment and treatment alternatives or options, and to choose the alternative or option he or she prefers.
- The resident has the right to request, refuse, and/or discontinue treatment, to participate in or refuse to participate in experimental research, and to formulate an advance directive.
- The resident has the right to self-administer medications if the interdisciplinary team has determined that this practice is clinically appropriate.

Choice of Attending Physician

- The resident has the right to choose his or her attending physician.

Respect and Dignity

The resident has the right to be treated with respect and dignity, including the right to:

- Be free from physical or chemical restraint imposed for purposes of discipline or convenience, and not required to treat the resident's medical symptoms.
- Retain and use personal possessions, including furnishings, and clothing, as space permits, unless to do so would infringe upon the rights of health and safety of other residents.
- Reside and receive services in the facility with reasonable accommodation of resident needs and preferences except when to do so would endanger the health or safety of the resident or other residents.
- Share a room with his or her spouse when married residents live in the same facility and both spouses consent to the arrangement.
- Share a room with his or her roommate of choice when practicable, when both residents live in the same facility and both residents consent to the arrangement.
- Receive written notice, including the reason for the change, before the resident's room or roommate in the facility is changed.
- Refuse to transfer to another room in the facility; if the purpose of the transfer is solely for the convenience of staff.

Self-Determination

A resident has the right to:

- Choose activities, schedules, and health care consistent with his or her interests, assessments, and plans of care.
- Interact with members of the community both inside and outside the facility.
- Make choices about aspects of his or her life in the facility that are significant such as schedules, including but not limited to sleeping, waking, eating, and bathing.

The resident has the right to receive visitors of his or her choosing at the time of his or her choosing, subject to the resident's right to deny visitation when applicable, and in a manner, that does not impose on the rights of another resident.

Resident Participation

The resident has a right to:

- Organize and participate in resident groups in the facility.
- Participate in family groups.
- Have family member(s) or other resident representative(s) meet in the facility with the families or resident representative(s) of other resident in the facility.
- Participate in other activities, including social, religious, and community activities that do not interfere with the rights of other residents in the facility.
- Choose to or refuse to perform services for the facility.
- Manage his or her financial affairs, including, but not limited to the right to know, in advance, what charges a facility may impose against the resident's personal funds.

Information and Communication

The resident has the right to:

- Be informed of his or her rights and of all rules and regulations governing resident conduct and responsibilities during his or her stay in the facility.
- Access personal and medical records pertaining to himself or herself.
- Receive notices orally (meaning spoken) and in writing (including Braille) in a format and a language he or she understands. Notices include but are not limited to the following:
  - A description of the manner of protecting personal funds.
  - A description of the requirements and procedures for establishing eligibility for Medicaid, including the right to request an assessment of resources under section 1924(c) of the Social Security Act.
  - A list of names, addresses (mailing and email), and telephone numbers of all pertinent State regulatory and informational agencies, and resident advocacy groups.
  - A statement that the resident may file a complaint with the State Survey Agency concerning any suspected violation of state or federal nursing facility regulations, including but not limited to resident abuse, neglect, exploitation, misappropriation of resident property in the facility, noncompliance with the advance directives requirement, and requests for information regarding returning to the community.
- Have reasonable access to the use of a telephone, including TTY and TDD services, and a place in the facility where calls can be made without being overheard.
- Examine the results of the most recent survey of the facility conducted by Federal or State surveyors and any plan of correction in effect.
- Receive information from agencies acting as client advocates, and be afforded the opportunity to contact these agencies.
- Send and receive mail, and to receive letters, packages and other materials delivered to the facility for the resident through a means other than a postal service, including the right to:
  - Privacy of such communications.
  - Access to stationery, postage, and writing implements at the resident's own expense.
  - Reasonable access to and privacy in their use of electronic communications such as email and video communications and for Internet research, if the access is available to the facility.
- Be informed and provided written information concerning the right to accept or refuse medical or surgical treatment and, the resident's alternatives and/or options.
- Be informed and provided written information concerning the right to formulate an advanced directive.

Notification of Changes

The resident and/or resident representative has the right to be notified of the following:

- An accident involving the resident which results in injury and has the potential for requiring physician intervention.
- A significant change in physical, mental, or psychosocial status (that is a deterioration in health, mental, or psychosocial status in either life-threatening conditions or clinical complications).
- A need to alter treatment significantly (that is, a need to discontinue or change an existing form of treatment due to adverse consequences, or to commence a new form of treatment).
- Upon decision to transfer or discharge the resident from the facility.
- A change in room or roommate assignment.
- A change in resident rights.

Privacy and Confidentiality

- The resident has a right to personal privacy and confidentiality of his or her personal medical records, and the right to refuse the release of personal and medical records in accordance with state laws.

Quality of Life and Safe Environment

- A resident has a right to care in an environment that promotes maintenance or enhancement of each resident's quality of life. The resident has the right to a safe, clean, comfortable, and homelike environment, including but not limited to receiving treatment and supports for daily living safely.

Grievances

- The resident has the right to voice grievances to the facility or other agency or entity that hears grievances without discrimination or reprisal and without fear of discrimination or reprisal. Such grievances include those with respect to care and treatment which has been furnished as well as that which has not been furnished, the behavior of staff and other residents; and other concerns regarding the Long-Term Care facility stay.
- The resident has the right to, and the facility must make prompt efforts to resolve grievances.

Freedom from Abuse, Neglect, and Exploitation

- The resident has the right to be free from abuse, neglect, misappropriation of resident property, and exploitation. This includes, but is not limited to, freedom from corporal punishment, involuntary seclusion, and any physical or chemical restraint not required to treat the resident's medical symptoms.

Transfer and Discharge

- The resident has the right to appeal a transfer or discharge notice from the facility, unless the failure to discharge or transfer would endanger the health or safety of the resident or other individuals in the facility.

Customer Care: 1-888-788-2502

Rev 03/2018

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Fig. 2. Close up of the Bill of Rights on the wall of Valparaiso Care and Rehabilitation

That Congress expressly elevated these rights to a condition of participation in the Medicaid program when it enacted FNHRA is powerful evidence that Congress understood it was creating enforceable rights. *See Pennhurst*, 451 U.S. at 18 (enforceability turns on whether Congress imposed an obligation "to fund certain rights as a condition of receiving federal moneys"). Congress and the executive branch understood—in light of this Court's holding in *Pennhurst*—that making compliance with statutory rights an express condition of participation in a federal spending program would make the rights enforceable. Congress and the executive branch sparred over whether to elevate these rights to the status of conditions of participation for over half a decade before Congress decided to accept the recommendations of the IOM Report and make them conditions of participation. *See* pp. 15-16, *supra*.

The legislative history of FNHRA further shows that Congress intended to confer individual enforceable rights on nursing-home residents. The regulatory precursor to FNHRA was entitled the "Patients' bill of rights," the legislative precursors to FNHRA were also entitled "Patients' bill of rights," and several of these statutes included a specific private cause of action against all nursing homes, public and private. *See* pp. 14-15, *supra*. Suits to enforce these rights were clearly contemplated in the legislative process.

The nature of the rights FNHRA protects is also strong evidence of Congress's intent. The rights FNHRA protects are basic rights to bodily autonomy and integrity similar to the basic protections enshrined in the Constitution's Bill of Rights. These are exactly the kind of "fundamental human, highly personalized rights" "from which § 1983 claims are to be made." *First Nat. Bank of Omaha v. Marquette Nat. Bank of Minneapolis*, 636 F.2d 195, 198 (8th Cir. 1980).

FNHRA's savings clause further shows Congress's intent that these rights would be enforceable. That savings clause provides that "[t]he remedies provided under this subsection are in addition to those otherwise available under State or Federal law and shall not be construed as limiting such other remedies, including any remedy available to an individual at common law." 42 U.S.C. § 1396r(h)(8). Congress would not have preserved access to other state and federal remedies outside FNHRA (a category that clearly includes § 1983) had it not intended for these rights to be enforced using state common law and the federal § 1983 remedy. That no one disputes that FNHRA's rights are enforceable under CRIPA (the language of which mirrors § 1983) further cements this conclusion. *See* U.S. Br. 34.

In short, petitioners had clear and unambiguous notice that violating FNHRA's chemical restraint and transfer and discharge rights would give rise to liability under § 1983.

b. Petitioners (at 43-46) claim that the phrasing of the residents' bill of rights—as an instruction to nursing homes to protect residents' rights—means FNHRA does not secure any rights. That is incorrect. Laws requiring officials to protect individual rights secure those rights. Rev. Stat. § 2005, a rights-creating statute passed in 1874 alongside § 1983 (JA143) secured the right to vote. *See* David P. Currie, *The Reconstruction Congress*, 75 U. Chi. L. Rev. 383, 458-59 (2008). The First Amendment, written as an instruction to Congress, similarly creates individual rights. U.S. Br. 26.

Petitioners (at 45) are also incorrect that FNHRA's chemical restraint and discharge and transfer rights are so "vague and amorphous" that they would "strain judicial competence" to enforce. The statute contemplates that innumerable officials can understand and protect these rights, including state administrative judges, state

surveyors and certifiers, HHS officials, and the nursing homes themselves. Federal courts are at least as capable of redressing rights violations as all of these other actors. These are rights courts are equipped to enforce.

3.a. Once a plaintiff demonstrates that a statute confers an individual right, that is typically the end of the matter. *Gonzaga*, 536 U.S. at 284-85. Section 1983 provides a remedy for the deprivation of any right secured by the Constitution and laws, and once a plaintiff establishes that a right is secured by the laws, "the right is presumptively enforceable by § 1983." *Id.* at 284.

But in this case, petitioners (Br. 39-42), and the United States (U.S. Br. 29-33), argue (for different reasons) that FNHRA "impliedly precluded Section 1983 suits" "by creating a comprehensive enforcement scheme that is incompatible with individual enforcement under § 1983," *Blessing*, 520 U.S. at 341.

At the outset, petitioners and the United States understate the burden they must meet. "Implied preclusion" is another way of saying implied repeal. Notwithstanding that FNHRA creates enforceable rights under § 1983, petitioners and the United States argue the Court should write into the statute an imaginary clause stating "Section 1983 does not apply to FNHRA." But such "repeals by implication are not favored." *Morton v. Mancari*, 417 U.S. 535, 549 (1974). They are a "rarity." *J.E.M. Ag Supply, Inc. v. Pioneer Hi-Bred Int'l, Inc.*, 534 U.S. 124, 142 (2001). "Inserting any clause, whether small or great, important or trivial" into a law is "not an exercise of judicial functions." *The Amiable Isabella*, 19 U.S. (6 Wheat.) 1, 71-73 (1821). As a consequence, presented with two statutes the Court will "regard each as effective"—unless Congress's intention to repeal is "clear and manifest," or the two laws are "irreconcilable." *Morton*, 417 U.S. at 550-51; *see also FCC v. NextWave Pers. Commc'ns Inc.*, 537 U.S. 293, 304 (2003).

Thus, implied preclusion arises only when an enforcement scheme is "incompatible" with individual enforcement under § 1983. *Fitzgerald v. Barnstable Sch. Comm.*, 555 U.S. 246, 252 (2009). As the Court explained in *Fitzgerald*, in the three cases where the Court has found implied preclusion, the statutes included federal judicial remedies, and all "the statutes at issue required plaintiffs to comply with particular procedures and/or to exhaust particular administrative remedies prior to filing suit." *Id.* at 253-54. "Allowing a plaintiff to circumvent the statutes' provisions … would have been inconsistent with Congress' carefully tailored scheme" in each case. *Id.* at 254-55. Thus the "dividing line" for purposes of implied preclusion is whether the statute provides a "more restrictive" federal judicial remedy. *Id.* at 255-56.

Implied preclusion is inappropriate here because FNHRA's remedial scheme is entirely compatible with § 1983 and includes no federal judicial remedy. The remedial scheme, as all concede, primarily consists of enforcement by the state and federal government in the form of penalties or expulsion from the Medicaid program. *See* U.S. Br. 3-5; Br. 5-6, 41 n.13. But the existence of a government enforcement scheme has never been enough to impliedly preclude access to § 1983. *See* U.S. Br. 28-29; *Fitzgerald*, 555 U.S. at 252-55; *Blessing*, 520 U.S. at 347-48.

FNHRA also provides nursing home residents a right to voice grievances, 42 U.S.C. § 1396r(c)(1)(A)(iv), and a right to appeal wrongful discharges and transfers, § 1396r(e)(3). But neither of those provisions are *federal* remedies. As petitioners and the United States concede, there is no pathway to a federal judicial remedy in FNHRA at all. The grievance and appeal rights are rights states are supposed to implement as a condition of the state's participation in Medicaid. But states often fail to protect or provide them. *See Anderson v. Ghaly*, 930 F.3d

1066, 1073 (9th Cir. 2019). And "the existence of a state administrative remedy does not ordinarily foreclose resort to § 1983," U.S. Br. 28-29 (quoting *Wright*, 479 U.S. at 427-28), because it does not show a clear congressional intent to displace § 1983, *Fitzgerald*, 555 U.S. at 252-55.

Moreover, the two state administrative remedies provide relief of a fundamentally different sort from the relief available under § 1983 and thus do not show an intent to displace § 1983. *See Wilder*, 496 U.S. at 523; *Wright*, 479 U.S. at 427-29. The administrative remedy for chemical restraint is that the nursing home must report the conduct to the state regulator and take "appropriate corrective action" to stop it. 42 C.F.R. § 483.12(c). The administrative remedy for an unlawful discharge is return to the nursing home that just made the discharge. § 431.231. Each of these remedies is about restoring the status quo and nothing more. In contrast, § 1983 provides redress for past wrongdoing or restraint against future misconduct.

At base, "the crucial consideration is what Congress intended." *Fitzgerald*, 555 U.S. at 252. And here, Congress made its intent absolutely clear. It included a savings clause that provides that "[t]he remedies provided" "are in addition to those otherwise available under" federal law. 42 U.S.C. § 1396r(h)(8). This Court has described § 1983 as a "remedy" numerous times, both before and after FNHRA's enactment.[11] The best reading

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[11] *See, e.g.*, *Fitzgerald*, 555 U.S. at 256 (describing § 1983 as a "remedy"); *Hudson v. Michigan*, 547 U.S. 586, 597 (2006) (same); *City of Rancho Palos Verdes, Cal. v. Abrams*, 544 U.S. 113, 121 (2005) (same); *Gonzaga*, 536 U.S. at 284 (same); *Crawford-El v. Britton*, 523 U.S. 574, 595 (1998) (same); *Golden State Transit Corp. v. City of Los Angeles*, 493 U.S. 103, 105 (1989) (same); *Wright*, 479 U.S. at 427 (same); *Middlesex Cnty. Sewerage Auth. v. Nat'l Sea Clammers Ass'n*, 453 U.S. 1, 20 (1981) (same); *Mitchum*, 407 U.S. at 239 (same).

of the savings clause is that it expresses Congress's clear intent that the remedies in FNHRA should be *in addition to* remedies "otherwise available under … Federal law." Those remedies include § 1983.

b. To overcome these points, petitioners and the United States advance a variety of arguments. None is persuasive.

Petitioners argue that this Court's precedents support a finding of implied preclusion because the administrative scheme offers "individualized enforcement methods." *See* Br. 40-42. But as *Fitzgerald* explains, and the basic principle underlying implied preclusion doctrine dictates, an "individualized enforcement method" is not enough. *See* 555 U.S. at 256; *Blessing*, 520 U.S. at 346-48; *Wilder*, 496 U.S. at 523; *Wright*, 479 U.S. at 427-29. For one remedy to displace the other, the two must be "incompatible," and FNHRA's remedies are not incompatible with § 1983. The United States agrees that petitioners are incorrect. *See* U.S. Br. 28-29.

The United States argues that because most nursing homes were private when Congress enacted FNHRA, Congress must have thought § 1983 suits to enforce FNHRA were unnecessary. U.S. Br. 29-33.[12]

That argument fails because it relies on a faulty premise for which there is no evidence: that Congress wanted a federal judicial remedy against all nursing homes or none. That assumption is baseless. Congress enacts and the President signs laws all of the time that reflect legislative compromises. And here Congress had many reasons to provide access to § 1983 to residents of government nursing homes. FNHRA's remedial scheme is less effective for government nursing homes, which

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[12] Contrary to the United States' (at 29) claim, nothing turns on whether the government is operating in a "distinctly governmental capacity." *See, e.g.*, *Wright*, 479 U.S. at 426-29.

FNHRA recognizes by vesting the HHS Secretary with additional oversight duties over "State nursing facilities." 42 U.S.C. § 1396r(h)(3)(A). Congress likely thought § 1983 was needed because states collecting billions of dollars in Medicaid funds for their government nursing homes—like Indiana is—have a strong incentive to look away when government nursing homes engage in misconduct.[13] Congress may also have recognized that states frequently immunize arms of the government from tort claims (while private nursing homes are amenable to suit),[14] and determined § 1983 would put government and private nursing homes on similar footing. Congress likely also determined that governments owe citizens a special duty to protect their rights and thus state actors should abide by a higher standard, a conclusion reflected in a range of statutes including RFRA, RLUIPA, and CRIPA. The point is that Congress had as many reasons to preserve access to § 1983 as it did to foreclose access to it. There is no way to decide which implicit intention the statute reflects, which is why the text of the law should guide the Court, not speculation about intent.[15]

Petitioners and the United States argue that the savings clause does not actually preserve access to the

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[13] *See* Tim Evans et al., *Careless*, Indianapolis Star, Mar. 11, 2020, https://bit.ly/3vsl1ZD.

[14] For example, in Pennsylvania government nursing homes have tort immunities that private nursing homes do not have. *See* 42 PA. CONS. STAT. § 8522(b)(2); *see also Davis v. County of Westmoreland*, 844 A.2d 54, 56 (Pa. Commw. Ct. 2004).

[15] That no party or judge in any case ever—not even petitioner here, *see* Br. 39-42; Pet. 26-29—has ever claimed that FNHRA precludes access to § 1983 for the reason the United States has given is another reason to reject its argument. When the United States claims to discover in a long-extant statute a heretofore unknown interpretation, the Court typically hesitates to embrace it. *See West Virginia v. EPA*, 142 S. Ct. 2587, 2610 (2022); *UARG v. EPA*, 573 U.S. 302, 324 (2014).

§ 1983 remedy. Br. 42; U.S. Br. 34. Both claim that this Court's cases construing savings clauses with different wording in different statutes dictate that result. They cite *Sea Clammers*, 453 U.S. at 15-16, 20 n.31, and *Rancho Palos Verdes*, 544 U.S. at 127.

But whether FNHRA's savings clause applies to the § 1983 remedy "is resolved by the most fundamental principle of statutory interpretation: Read the statute." *Becerra v. Empire Health Found.*, 142 S. Ct. 2354, 2368-69 (2022) (Kavanaugh, J., dissenting). In *Sea Clammers*, the relevant savings clause preserved access to "any right which any person ... may have under any statute or common law to seek ... any other relief." 453 U.S. at 15-16, 20 n.31. *Sea Clammers* held that a "right" to seek "other relief" is not a right to pursue a different "*remedy*" for a violation of the very statute the savings clause is in. *Id.* at 20 n.31. In *Rancho Palos Verdes*, the relevant savings clause provided that "[t]his Act and the amendments made by this Act shall not be construed to … impair … Federal … law." 544 U.S. at 126. The Court in *Rancho Palos Verdes* held that precluding access to § 1983 does not "impair" federal law. *Id.*

Neither of those savings clauses look remotely like the savings clause in FNHRA, which expressly preserves access to all other "*remedies*" "otherwise available under … Federal law." 42 U.S.C. § 1396r(h)(8) (emphasis added). Were there any doubt these other remedies were meant to be other remedies for FNHRA violations, the explanation of the savings clause in FNHRA's legislative history eliminates it. *See* H.R. REP. NO. 100-495, at 575 (1987) (Conf. Rep.); H.R. REP. NO. 100-391, at 472, 475 (1987). At minimum, FNHRA's savings clause dispels any implicit inference that Congress intended to "restrict"

access to § 1983 by providing "comprehensive" remedies in FNHRA.[16]

3. Petitioners and their *amici* make several policy arguments against § 1983 enforcement of FNHRA rights. They claim it disrupts state medical malpractice schemes and creates unjustified liability for government nursing homes. Those concerns are either misplaced or exaggerated.

Section 1983 does not displace medical malpractice. Section 1983 applies only to *government* nursing homes. And the intentional torts at issue here are not similar to typical malpractice claims alleging negligence. FNHRA's bill of rights merely sets a floor to protect the basic rights of nursing home residents. Section 1983 also does not create an unjustified disparity between government and private nursing homes. Indiana is an outlier that has made more than 90% of its nursing homes government-owned. It has apparently done this to vastly increase its Medicaid reimbursements and channel the additional Medicaid funds to county hospitals. *See* Evans, *supra* at note 13. That decision to make virtually all its nursing homes public forces people like Gorgi Talevski to live in government nursing homes—nursing homes that states may not adequately police. In the rare outlier like Indiana, § 1983 enforcement plays a crucial gap-filling role.

To be sure, petitioners and the United States have advanced important policy arguments. But this is a court, not Congress. Its role is not to make or amend the law. Under the Constitution's separation of powers, its role is to interpret and follow the law regardless of whether it

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[16] The United States concedes the savings clause preserves access to CRIPA to enforce FNHRA. U.S. Br. 34. That concession is fatal. Congress would not have preserved access to CRIPA, a cause of action with materially identical enforcement language to § 1983 for the Attorney General (JA132-33), and not § 1983 itself.

likes the result. *Cf. Texas v. Johnson*, 491 U.S. 397, 420-21 (1989) (Kennedy, J., concurring). Congress gave nursing-home patients rights that it requires federal courts to enforce under § 1983, and the Court must honor that decision.

II. AN ADVERSE RULING WOULD BE DISASTROUS FOR FEDERAL SAFETY-NET PROGRAMS

Enforcement of federal statutory rights through § 1983 has been an essential component of cooperative federalism programs for half a century. Eliminating the availability of § 1983 would leave tens of millions of people that Congress provided with rights under these Spending Clause programs without any effective means of enforcement. With more than a quarter of the United States population (more than 87 million people) dependent on Medicaid for their basic healthcare needs, the consequences of eliminating access to § 1983 to enforce rights in the Medicaid statute are staggering. Medicaid, and programs like it, will transform from programs where states must comply with strict conditions on participation into programs in which many of the rights guaranteed to program beneficiaries become illusory.

This is far from a hypothetical concern. The federal government almost never withdraws federal funds from states as a penalty for failing to safeguard required rights under the programs because withdrawing these funds harms the very people these programs are meant to benefit.

Federal government enforcement also means underenforcement. The federal government lacks the resources to police every individual violation of a nursing home resident's FNHRA rights, let alone the rights in every spending statute. And if the Executive Branch disagrees that certain rights are worthy of protection, it may exercise discretion and decline to penalize states for failing to protect disfavored rights. That is inconsistent

with the very concept of conferring a right on individuals. But it is the inevitable consequence of eliminating access to § 1983.

Section 1983 offers an essential component of the remedies available to individuals for violations of their rights under cooperative spending programs. These rights are embedded in the law and in the fabric of society. An adverse decision from this Court would upend the careful enforcement balance Congress has constructed over the course of decades while leaving millions of citizens without remedy for the deprivation of federal rights. The Court should decline to take that drastic step, especially where, as here, the text of the statutes involved so clearly dictates the opposite result.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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SEPTEMBER 2022

APPENDIX

STATES THAT ALLOWED INTENDED BENEFICIARIES TO ENFORCE CONTRACTS AS OF 1874

Alabama (996,992[1]**)** - *Mason v. Hall*, 30 Ala. 599, 601 (1857) ("[T]he weight of authority, both in England and America, is decidedly in favor of the proposition, that where a parol promise is made to one, for the benefit of another, an action may be maintained upon it by him for whose benefit it was made.").

California (560,247) - *Morgan v. Overman Silver Mining Co.*, 37 Cal. 534, 537 (1869) ("[T]he authorities show, that, in such cases, the party for whose benefit the promise is made, may maintain an action against the promisor.").

Illinois (2,539,891) - *Bristow v. Lane*, 21 Ill. 194, 197 (1859) ("In this country the right of a third party to bring an action on a promise made to another for his benefit, is generally asserted, and is the prevailing rule with us.").

Indiana (1,680,637) - *Day v. Patterson*, 18 Ind. 114, 117 (1862) ("[I]t is settled in *Indiana* that a party may sue upon a promise made to a third person for his benefit."); *Davis v. Calloway*, 30 Ind. 112, 113 (1868) (same).

Iowa (1,194,020) - *Scott's Adm'rs v. Gill*, 19 Iowa 187, 188 (1865) (reaffirming "the broad principle[] that if one person make a promise to another for the benefit of a third person, that the third person may maintain an action on the promise").

Kentucky (1,321,011) - *Allen v. Thomas*, 60 Ky. 198, 199 (1860) ("The doctrine is now well settled, that the party for whose sole benefit a contract is evidently made

[1] State population in 1870 according to United States Census data. *See* Table I., Population of the United States, Population by States and Territories—1790-1870 (available at https://www2.census.gov/library/publications/decennial/1870/population/1870a-04.pdf).

may sue thereon in his own name, although the engagement be not directly to or with him.").

Louisiana (726,915) - *Union Bank of Louisiana v. Bowman*, 9 La. Ann. 195, 196 (1854) ("It is true that one in whose favor a stipulation is made by another, may bring an action to enforce it, though not a party to the contract.").

Maine (626,915) - *Bohanan v. Pope*, 42 Me. 93, 96 (1856) ("[W]here a party for a valuable consideration stipulates with another, by simple contract, to pay money or do some other act for the benefit of a third person, the latter, for whose benefit the promise is made, if there be no other objection to his recovery than a want of privity between the parties, may maintain an action for a breach of such engagement."); *see also Motley v. Manufacturers' Ins. Co.*, 29 Me. 337, 340 (1849) (similar).

Maryland (780,894) - *Small v. Schaefer*, 24 Md. 143, 158 (1866) (allowing a third-party suit and citing "Professor Parsons in his Law of Contracts" for the proposition that a third-party beneficiary may hold the promisor liable even if the third-party was unaware of the contract when it was created).

Minnesota (439,706) - *Sanders v. Clason*, 13 Minn. 379, 382 (1868) (allowing a third-party suit and quoting Parsons: "In this country the right of a third party to bring an action on a promise made to another for his benefit, seems to be somewhat more positively asserted, and we think it would be safe to consider this a prevailing rule with us").

Mississippi (827,922) - *Sweatman v. Parker*, 49 Miss. 19, 31 (1873) (citing Parsons and concluding that "[t]he promise was made by Brantly to Cunningham for the benefit of Parker, who had an undoubted right to maintain an action upon it, and especially if adopted by him, or

where he had, as in this case, a beneficial concern and interest in the transaction").

Missouri (1,721,295) - *Flanagan v. Hutchinson*, 47 Mo. 237, 239 (1871) ("[T]he party for whose benefit the promise, in such a case, is made, may sue upon it in his own name."); *see also Meyer v. Lowell*, 44 Mo. 328, 330 (1869) (quoting Parsons: "In this country the right of a third party to bring an action on a promise made to another for his benefit, seems to be more positively asserted, and we think it would be safe to consider this a prevailing rule with us").

Nevada (42,491) - *Alcalda v. Morales*, 3 Nev. 132, 137 (1867) (citing Parsons for the proposition that "[t]here seems to be a decided inclination in this country to allow the party for whose benefit a contract is made to sue on it, although he may not have been a party assenting when the contract was made").

New Jersey (906,096) - *Joslin v. New Jersey Car-Spring Co.*, 36 N.J.L. 141, 146 (1873) ("[I]t is now well settled, as a general rule, that in cases of simple contracts, if one person makes a promise to another for the benefit of a third, the third may maintain an action on it though the consideration does not move from him.").

New York (4,382,759) - *Coster v. Mayor of Albany*, 43 N.Y. 399, 410-11 (1871) (holding that a city's contract with the state to pay for property damages stemming from public construction was enforceable by third-party property owners even though "[t]he ultimate beneficiary [was] uncertain" at the time of the contract and was not "privy to the consideration"); *see also Lawrence v. Fox*, 20 N.Y. 268, 274 (1859).

Ohio (2,665,260) - *Thompson v. Thompson*, 4 Ohio St. 333, 353 (1854) (describing as "well settled" the rule "that if one person makes a promise to another, for the benefit

of a third person, that third person may maintain an action at law on that promise").

South Carolina (705,606) - *Brown v. O'Brien*, 30 S.C.L. 268, 270 (1845) ("Where one person makes a promise, for the benefit of a third person, that third person may maintain an action on such promise.").

Texas (818,579) - *McCown v. Schrimpf*, 21 Tex. 22, 27 (1858) ("[T]he suit may be brought either by the legal holder or the party beneficially interested in the contract.").

Wisconsin (1,054,670) - *Putney v. Farnham*, 27 Wis. 187, 190 (1870) ("[T]he principle seems well settled now in cases of simple contracts, where one makes a promise to another for the benefit of a third person, that such third person can maintain an action in his own name upon the promise, though the consideration does not move from him.").

STATES THAT ALLOWED INTENDED BENEFICIARIES TO ENFORCE CONTRACTS SHORTLY AFTER 1874

Colorado (39,864) - *Lehow v. Simonton*, 3 Colo. 346, 348 (1877) ("[T]he decided preponderance of American authority sustains the action of the beneficiary.").

Florida (187,748) - *Wright v. Terry*, 23 Fla. 160, 172 (1887) (collecting authority saying that third-parties could enforce promises intended for their benefit).

Kansas (364,399) - *Anthony v. Herman*, 14 Kan. 494, 497 (1875) ("[N]otwithstanding some conflict in the authorities, we think the rule is settled that an action will lie on a promise made by a defendant, upon valid consideration to a third party, for the benefit of the plaintiff, although the plaintiff was not privy to the consideration."); *Burton v. Larkin*, 13 P. 398, 399 (1887) (noting that the rule is limited to intended, not merely incidental beneficiaries).

Nebraska (122,993) - *Shamp v. Meyer*, 20 Neb. 223 (1886) ("[I]n case of simple contract, where one makes a promise to another for the benefit of a third person, such third person may maintain an action upon the promise, though the consideration does not move from him.").

Oregon (90,923) - *Baker v. Eglin*, 11 Or. 333, 334 (1884) ("[T]he authorities with us are quite decisive that when A., for a valuable consideration, agrees with B. to pay his debt to C., the latter can enforce the contract against A.").

Rhode Island (217,353) - *Urquhart v. Brayton*, 12 R.I. 169, 171 (1878) (allowing a third-party suit under a theory of novation, and observing that "[t]he decisions on this question are conflicting, but many of the more recent cases support the right of the [third-party] mortgagee to maintain the action").

STATES THAT BARRED INTENDED BENEFICIARIES FROM ENFORCING CONTRACTS AS OF 1874

Arkansas (484,471) - *Hicks v. Wyatt*, 23 Ark. 55, 58 (1861) (rejecting a third-party suit where there "was no privity of contract").

Connecticut (537,454) - *Treat v. Stanton*, 14 Conn. 445, 451 (1841) ("[T]he parties to a contract are the persons in whom the legal interest in the subject of it is deemed to be vested, and who therefore must be the parties to the action which is instituted for the purpose of enforcing it, or recovering damages for its violation.").

Massachusetts (1,457,351) - *Mellen v. Whipple*, 67 Mass. 317, 321 (1854) (concluding that "[t]here must be a privity of contract between the plaintiff and defendant, in order to render the defendant liable to an action, by the plaintiff, on the contract," and describing contrary cases as "exceptions").

Michigan (1,184,059) - *Pipp v. Reynolds*, 20 Mich. 88, 93 (1870) (rejecting a third-party claim).

New Hampshire (318,300) - *Butterfield v. Hartshorn*, 7 N.H. 345, 347 (1834) ("It is apparent, that in cases of this kind, a contract, in order to be binding, must be mutual to all concerned . . . .").

North Carolina (1,071,361) - *Styron v. Bell*, 53 N.C. 222, 224 (1860) (requiring mutual agreement to a substitution or third-party action).

Pennsylvania (3,521,951) - *Blymire v. Boistle*, 6 Watts 182, 184 (1837) (rejecting a third-party suit because the beneficiary was not "the only party in interest").

Tennessee (1,258,520) - *McAlister v. Marberry*, 23 Tenn. 426, 427 (1844) (rejecting a third-party suit for lack of privity).

Vermont (330,551) - *Crampton v. Ballard's Adm'r*, 10 Vt. 251, 253 (1838) (denying third-parties' right to enforce a contract because "[i]t was made without their privity").

Virginia (1,225,163) - *Ross v. Milne*, 39 Va. 204, 218 (1841) (prohibiting a third-party suit at law, although declining to decide whether third-party beneficiaries may sue in equity).