No. 21-806

IN THE

Supreme Court of the United States

HEALTH AND HOSPITAL CORPORATION OF MARION COUNTY, *et al.*,

Petitioners,

—v.—

IVANKA TALEVSKI, Personal Representative of the Estate of Gorgi Talevski, Deceased,

Respondent.

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

BRIEF FOR *AMICUS CURIAE* DANIEL L. HATCHER IN SUPPORT OF RESPONDENT IVANKA TALEVSKI, PERSONAL REPRESENTATIVE OF THE ESTATE OF GORGI TALEVSKI, DECEASED

ROBERT J. WARD
Counsel of Record
DOUGLAS I. KOFF
FRANK W. OLANDER
SCHULTE ROTH & ZABEL LLP
919 Third Avenue
New York, New York 10022
(212) 756-2000
robert.ward@srz.com

Attorneys for Amicus Curiae

TABLE OF CONTENTS

Page

Interest of Amicus Curiae 1

Summary of the Argument 1

Argument 3

I. Indiana Diverts Medicaid Money Generated By Nursing Homes to Unrelated Projects 3

A. Medicaid is a Partnership Between the Federal Government and the States 3

B. The Use of Nursing Homes to Maximize Medicaid Revenue is Widespread 5

C. Indiana Leverages Medicaid Loopholes for Nursing Homes to Maximize Revenue 7

D. Indiana's Nursing Homes Provide Substandard Care 12

II. Nursing Home Residents Must be Permitted To Bring Claims Under Section 1983 to Vindicate Their Rights 16

Conclusion 17

TABLE OF AUTHORITIES

Statutes and Regulation Page(s)

42 U.S.C. § 1396b(a) 4

42 U.S.C. § 1396b(a)(1) 5

42 U.S.C. § 1396b(i)(17) 5

42 U.S.C. § 1396d(b) 4

42 U.S.C. § 1396r(c)(1)(A) 6

42 U.S.C. § 1983 2

Ind. Code Ann. § 12-15-14-1(b)(1) (West) 7

42 C.F.R. § 433.51(c) 5

Other Authorities

85 Fed. Reg. 76586 (Nov. 30, 2020) 4

About Us, Marion County Public Health Department, Health & Hospital Corporation, https://hhcorp.org/about_mcphd.html (last visited Sept. 23, 2022) 3

Am. Health Care Ass'n, *State of the Nursing Home Industry*, Survey (2022), https://www.ahcancal.org/News-and-Communications/Fact-Sheets/FactSheets/SNF-Survey-June2022.pdf 12

Other Authorities—Continued Page(s)

Charlene Harrington & Helen Carrillo, Henry J. Kaiser Family Found., *Nursing Facilities, Staffing, Residents and Facility Deficiencies, 2009 Through 2015* 8–9 (2017), https://files.kff.org/attachment/REPORT-Nursing-Facilities-Staffing-Residents-and-Facility-Deficiencies-2009-2015 15

Ctr. for Medicare Advocacy, *Non-Profit vs. For-Profit Nursing Homes: Is There a Difference in Care?* (March 15, 2012), https://medicareadvocacy.org/non-profit-vs-for-profit-nursing-homes-is-there-a-difference-in-care/ 16

Ctr. for Medicaid & CHIP Servs., *Medicaid Fiscal Integrity: Protecting Taxpayers and Patients* (Feb. 12, 2020), https://www.medicaid.gov/about-us/messages/98981 9

Ctrs. for Medicare & Medicaid Servs., *Fact Sheet: 2019 Medicaid Fiscal Accountability Regulation (MFAR)*, (Nov. 12, 2019), https://www.cms.gov/newsroom/fact-sheets/fact-sheet-2019-medicaid-fiscal-accountability-regulation-mfar 10

Ctrs. for Medicare & Medicaid Servs., *Nursing Home Care Compare, Countryside Meadows*, https://www.medicare.gov/care-compare/details/nursing-home/155792?id=3bb5959a-9eb2-4a32-95d7-f408f700b2c9&state=IN (last visited Sept. 22, 2022) 14

Cong. Rsch. Serv., R43357, Medicaid: An Overview (2021) 4

Other Authorities—Continued Page(s)

Daniel L. Hatcher, *Medicaid Maximization and Diversion: Illusory State Practices that Convert Federal Aid into General State Revenue*, 39 Seattle U. L. Rev. 1225 (2016)...11

Families for Better Care, *Nursing Home Report Cards: Indiana* (2019) https://familiesforbettercare.com/index.php/report-cards/details/in...13

Federal Implementation of OBRA 1987 Nursing Home Reform Provisions: Hearing Before the U.S. Senate Special Comm. on Aging, 101st Cong. 12 (1989) (statement of Sen. William Cohen, Special Comm. on Aging)...7

Hearing Before S. Comm. on Fin., 109th Cong. (2005) (statement of George M. Reeb, Assistant Inspector Gen. for the Ctrs. for Medicare and Medicaid Audits, Off. of Inspector Gen., U.S. Dep't of Health and Human Servs.), https://oig.hhs.gov/testimony/docs/2005/50628-reeb-fin.pdf 6

Heather Gillers, Tim Evans, Mark Nichols & Mark Alesia, *Cash Flowed In, Care Lagged,* Ind. Star (May 9, 2010)... 7, 8, 11, 17

Ind. State Budget Agency, List of Appropriations Made By the Regular Session of the 2021 Ind. Gen. Assemb. for the Biennium July 1, 2021 to June 30, 2023 (2021), https://www.in.gov/sba/files/IntroductionHeading.pdf 11

Other Authorities—Continued Page(s)

Ind. State Legis. Servs. Agency, Off. of Fiscal & Mgmt. Analysis, Fiscal Impact Statement (2001), https://web.archive.org/web/20040831163225http://www.in.gov/legislative/bills/2001/PDF/FISCAL/SB0309.003.pdf 7

John E. Dicken, Dir., Health Care, U.S. Gov't Accountability Off., GAO-20-576, Infection Control Deficiencies Were Widespread And Persistent In Nursing Homes Prior To Covid-19 Pandemic (2020), https://www.gao.gov/assets/gao-20-576r.pdf 12

Joshua M. Wiener, Marc P. Freiman & David Brown, Henry J. Kaiser Found., *Nursing Home Care Quality: Twenty Years After the Omnibus Budget Reconciliation Act of 1987* (2007), https://www.kff.org/wp-content/uploads/2013/01/7717.pdf 6

Long-Term Services & Supports State Scorecard: Indiana, AARP, https://www.longtermscorecard.org/databystate/state?state=IN (last visited Sept. 22, 2022) 12

Medicaid & CHIP Payment & Access Comm'n, *MACStats: Medicaid and CHIP Data Book* (2021), https://www.macpac.gov/wp-content/uploads/2015/11/EXHIBIT-25.-Medicaid-Supplemental-Payments-to-Non-Hospital-Providers-by-State-FY-2020-millions.pdf 9

Robert Tyler Braun et al., *Association of Private Equity Investment in US Nursing Homes and the Quality and Cost of Care for Long-Stay Residents,* JAMA Health Forum (Nov. 19, 2021), https://jamanetwork.com/journals/jama-health-forum/fullarticle/2786442 16

Other Authorities—Continued Page(s)

S. Rep. No. 89-404 (1965), *as reprinted* in 1965 U.S.C.C.A.N. 1943 .... 1, 3

Tim Evans, Emily Hopkins & Tony Cook, *Nursing Home Residents Suffer as County Hospitals Rake in Millions*, Ind. Star. (Mar. 11, 2020, 9:11 PM), https://www.indystar.com/in-depth/news/investigations/2020/03/11/indiana-nursing-home-patients-suffer-medicaid-money-diverted-hospitals/2517834001/ ....*passim*

Tony Cook, *Even After Murder, Homestead Continues to Put Nursing Home Residents in Danger*, Ind. Star. (May 26, 2022, 5:36 AM), https://www.indystar.com/story/news/investigations/2022/05/26/homestead-healthcare-death-murder-nursing-home-indiana/9908012002/ 15

Tony Cook, *She Was Raped and Smothered at Indianapolis Nursing Home. Now Her Family is Speaking Out*, Ind. Star. (May 18, 2022, 5:32 AM), https://www.indystar.com/story/news/2022/05/18/family-homestead-nursing-home-resident-killed-indianapolis-speaks-out/9735980002/ 14, 15

Tony Cook, Tim Evans & Emily Hopkins, *16 Falls. An Amputated Leg. An Infected Tailbone. Dire Conditions In Indiana Nursing Homes*, Ind. Star. (Mar. 10, 2020, 9:06 PM), https://www.indystar.com/in-depth/news/investigations/2020/03/10/indiana-nursing-home-quality-stories-dire-conditions/4871118002/ 13, 14

Other Authorities—Continued Page(s)

White House, *Fact Sheet: Protecting Seniors by Improving Safety and Quality of Care in the Nation's Nursing Homes* (Feb. 28, 2022), https://www.whitehouse.gov/briefing-room/statements-releases/2022/02/28/fact-sheet-protecting-seniors-and-people-with-disabilities-by-improving-safety-and-quality-of-care-in-the-nations-nursing-homes/ 6

Victoria Chappell, Julia Kirkham & Dallas P. Seitz, *Association Between Long-Term Care Facility Staffing Levels and Antipsychotic Use in US Long-Term Care Facilities*, J. Post-Acute & Long-Term Care Med. (forthcoming 2022), https://doi.org/10.1016/j.jamda.2022.06.029. 17

INTEREST OF AMICUS CURIAE[1]

Daniel L. Hatcher is a Law Professor at the University of Baltimore School of Law whose research and teaching interests focus on health care and poverty law. *Amicus'* scholarship has addressed, *inter alia*, the conflicts between state agencies' revenue maximization strategies and the agencies' core missions to serve low-income children and families, including the widespread use of Medicaid maximization and diversion practices.

Amicus submits this brief to provide context and analysis regarding the manner in which Indiana's public hospital systems exploit the state's nursing homes in an illusory scheme to maximize federal aid intended for Medicaid services and then divert some or all of the resulting funds to other uses, thereby depriving Medicaid recipients like Respondent of the care to which they are entitled.

SUMMARY OF THE ARGUMENT

When it enacted the Medicaid program in 1965, Congress created a partnership between the federal government and the states "so as to make medical services for the needy more generally available." S. Rep. No. 89-404, at 66 (1965), *as reprinted in* 1965 U.S.C.C.A.N. 1943, 2014. At the center of that partnership is a system of shared financing—states spend their own funds to provide services to Medicaid beneficiaries and that spending entitles them to matching payments by the federal government. Thus, Medicaid combines federal spending with state spending to attain increased funding for medical services to the poor.

---

[1] No counsel for a party authored this brief in whole or in part, and no person other than the *amicus* and his counsel made any monetary contribution to fund the preparation or submission of this brief. Petitioners and Respondent have submitted blanket consents to the filing of *amicus* briefs in this case.

Indiana, however, has devised a way to exploit Medicaid's cooperative financing structure to subvert the very purpose of the Medicaid program. Over the past two decades, Indiana's county and municipal health care systems have engaged in a campaign to transform virtually all of the state's nursing homes into government-owned entities. They did so not as a way of providing better care to the residents, but rather as part of a scheme to maximize revenue from federal Medicaid matching payments. That scheme has been wildly successful, to the point that Indiana receives more supplemental Medicaid payments for their nursing homes—in total, *not* per capita—than *any* other state.

With that level of funding, it would be reasonable to expect that Indiana would have some of the best nursing homes in the country. Not so. Shockingly, Indiana's elderly residents continue to languish in nursing homes that are consistently rated as some of the *worst* in the country. That is because, rather than using the Medicaid funds for the purpose for which they were intended (*i.e.*, improving the quality of care in the state's nursing homes), Indiana's municipal health care systems routinely divert them to unrelated projects like the construction of glittering new hospitals.

Petitioner is one of the originators of Indiana's nursing home scheme. Over the last 20 years, it has purchased for-profit nursing homes across the state, leveraging those nursing homes to increase federal matching funds, and then diverted those federal funds to other uses, rather than to nursing home care. To Petitioner, nursing home residents are little more than cash cows.

This egregious exploitation of low-income nursing home residents underscores the conclusion that those residents must have an opportunity to vindicate their basic rights as Medicaid beneficiaries by bringing a claim under 42 U.S.C. § 1983.

ARGUMENT

I. INDIANA DIVERTS MEDICAID MONEY GENERATED BY NURSING HOMES TO UNRELATED PROJECTS

Petitioner is a municipal agency that operates the Marion County Public Health Department and hospital system, which covers Indianapolis. *About Us*, Marion County Public Health Department, Health & Hospital Corporation, https://hhcorp.org/about_mcphd.html (last visited Sept. 22, 2022). In the early 2000s, Petitioner was "on the verge of economic collapse" before it "zeroed in on a federal funding stream for government-owned nursing homes." Tim Evans, Emily Hopkins & Tony Cook, *Nursing Home Residents Suffer as County Hospitals Rake in Millions*, Ind. Star. (Mar. 11, 2020, 9:11 PM), https://www.indystar.com/in-depth/news/investigations/2020/03/11/indiana-nursing-home-patients-suffer-medicaid-money-diverted-hospitals/2517834001/. That "federal funding stream" was Medicaid, and the scheme was straightforward. First, Petitioner purchased the licenses of privately owned nursing homes all around Indiana, thereby making them government-owned, which led to an increase in federal Medicaid funding. *Id.* Then, Petitioner would route most of the funds to other uses, rather than nursing home care. *Id.*

Petitioner, and other agencies like it, have pushed that scheme to its limit, purchasing nearly every nursing home in the state to tap into extra Medicaid funding while leaving those nursing homes woefully underfunded. This arrangement is antithetical to the purpose of the Medicaid program.

A. Medicaid is a Partnership Between the Federal Government and the States

Congress enacted the Medicaid program in 1965 "to make medical services for the needy more generally available." S. Rep. No. 89-404, at 66. By design, Medicaid

is a cooperative program that is financed by both the federal government and any state that voluntarily participates. Cong. Rsch. Serv., R43357, Medicaid: An Overview 1 (2021).

Medicaid beneficiaries (such as Petitioner's nursing home residents) do not directly receive any Medicaid payments to pay for their health care. Rather, when a health care provider provides Medicaid-eligible services to an individual, the provider bills the state Medicaid agency for those services. Under Medicaid's cooperative funding scheme, those payments, in turn, entitle the state to receive matching payments from the federal government for the Medicaid services. 42 U.S.C. § 1396b(a); *see also* Cong. Rsch. Serv., Medicaid: An Overview, *supra*, at 1, 16.

The federal government's share of Medicaid funding—the federal medical assistance percentage ("FMAP")—is based upon the state's per capita income relative to U.S. per capita income. 42 U.S.C. § 1396d(b). That is, states with lower relative wealth receive more federal funding for Medicaid. *See* Cong. Rsch. Serv., Medicaid: An Overview, *supra*, at 16. For example, Mississippi, a relatively poor state, has 78.31% of its Medicaid costs covered by federal funding. 85 Fed. Reg. 76586, 76588 (Nov. 30, 2020). By contrast, New York, a relatively wealthy state, has 50.00%—the statutory minimum—of its Medicaid costs covered. *Id.* Indiana's Medicaid costs are covered up to 66.30% by the federal government, leaving the state responsible for 33.70%, not accounting for temporary increases related to COVID-19 legislation. *Id.* There is no cap on the total amount of funding a state can receive from the federal government to operate its Medicaid program. Cong. Rsch. Serv., Medicaid: An Overview, *supra*, at 16.

In this shared financing arrangement, states retain broad discretion to determine the manner in which they fund their share of Medicaid expenditures—they can use

general funds from income, sales, or corporate taxes, funds from taxes on healthcare providers, local government funds, or settlement funds. *Id.* at 17. Federal regulations, however, prohibit states from using federal funds to cover their own share of Medicaid expenditures. 42 C.F.R. § 433.51(c).

While states have some flexibility on how they fund and administer their own Medicaid programs, they are supposed to use the federal money they receive for Medicaid purposes. Federal Medicaid funds are meant to cover a percentage of "the total amount expended . . . as medical assistance under the [participating state's] plan." 42 U.S.C. § 1396b(a)(1). Furthermore, federal medical assistance payments may not be used for "roads, bridges, stadiums, or any other item or service not covered under a State plan under this subchapter." 42 U.S.C. § 1396b(i)(17). In other words, states are supposed to develop a plan for providing health care services to the poor and uninsured and to use federal matching funds for that purpose, *not* unrelated projects. Nonetheless, for decades, states and local government agencies, like Petitioner, have found ways to shuffle Medicaid funds around to the detriment of the intended beneficiaries.

B. The Use of Nursing Homes to Maximize Medicaid Revenue is Widespread

Of particular relevance here, numerous states and local governments, including Indiana, employ schemes to leverage nursing home residents as a source of federal Medicaid funds. As the U.S. Department of Health and Human Services' Office of Inspector General ("OIG") has explained, "audits have explored States' use of [intergovernmental transfers] in which some or all of the Medicaid funds that were directed to public nursing facilities as enhanced payments made under [upper payment limit] rules were returned to states instead of being retained at the facilities for the care of patients." *Hearing Before S. Comm. on Fin.*, 109th Cong. 3 (June

28, 2005) (statement of George M. Reeb, Assistant Inspector Gen. for the Ctrs. for Medicare and Medicaid Audits, Off. of Inspector Gen., U.S. Dep't of Health and Human Servs.), https://oig.hhs.gov/testimony/docs/2005/50628-reeb-fin.pdf.

The OIG has noted that because nursing home facilities were "required to return substantial portions of their enhanced payments to the States to be used for other purposes . . . the facilities were underfunded." *Id.* Such "under funding had a negative impact on quality of care." *Id.* The use of such strategies inflicts direct harm on vulnerable elderly patients, who are powerless—due to age, illness, and financial disadvantage—to advocate for the treatment they deserve.

The White House recently acknowledged that "[d]espite the tens of billions of federal taxpayer dollars flowing to nursing homes each year, too many continue to provide poor, sub-standard care that leads to avoidable resident harm." White House, *Fact Sheet: Protecting Seniors by Improving Safety and Quality of Care in the Nation's Nursing Homes* (Feb. 28, 2022), https://www.whitehouse.gov/briefing-room/statements-releases/2022/02/28/fact-sheet-protecting-seniors-and-people-with-disabilities-by-improving-safety-and-quality-of-care-in-the-nations-nursing-homes/.

Poor quality of care in nursing homes was an issue that the Federal Nursing Home Reform Act (FNHRA) was specifically intended to address—in part by guaranteeing the rights of nursing home residents. 42 U.S.C. § 1396r(c)(1)(A). In the years before it was enacted, "[s]candals and exposés about poor-quality care, abuse, and fraud in nursing homes were depressingly common." Joshua M. Wiener, Marc P. Freiman & David Brown, Henry J. Kaiser Found., *Nursing Home Care Quality: Twenty Years After the Omnibus Budget*

Reconciliation Act of 1987, at 3 (2007), https://www.kff.org/wp-content/uploads/2013/01/7717.pdf. Congress thought it important to improve nursing home conditions by implementing "a national standard of rights and basic guarantees" for nursing home residents. *Federal Implementation of OBRA 1987 Nursing Home Reform Provisions: Hearing Before the U.S. Senate Special Comm. on Aging*, 101st Cong. 12 (1989) (statement of Sen. William Cohen, Special Comm. on Aging).

C. Indiana Leverages Medicaid Loopholes for Nursing Homes to Maximize Revenue

Indiana, in particular, has been incredibly aggressive in leveraging its nursing home residents to maximize the federal Medicaid funding it receives. Unfortunately for Respondent and many others like him, that increased funding has not been used to improve care in Indiana's nursing homes.

As noted, states have discretion to administer their own Medicaid programs. In an exercise of that discretion, Indiana amended its laws in the early 2000s to provide for increased Medicaid payments to government-owned nursing homes. Ind. Code Ann. § 12-15-14-1(b)(1) (West). The intent, as explained in a legislative report, was to "maximize the amount of federal financial participation that the state can obtain." Ind. State Legis. Servs. Agency, Off. of Fiscal & Mgmt. Analysis, Fiscal Impact Statement 1 (2001), https://web.archive.org/web/20040831163225http://www.in.gov/legislative/bills/2001/PDF/FISCAL/SB0309.003.pdf. Petitioner, and other agencies like it, thus had a clear path toward maximizing federal participation: purchasing nursing homes and collecting supplemental Medicaid payments. Heather Gillers, Tim Evans, Mark Nichols & Mark Alesia, *Cash Flowed In, Care Lagged*, Ind. Star, (May 9, 2010), at A1.

Petitioner purchased twelve nursing homes from a for-profit operator in 2003, shortly after Indiana amended its Medicaid laws. Gillers et al., *supra*. And while Petitioner is a public health agency that serves *Indianapolis*, it soon acquired nursing homes all over the state, from Evansville at the southernmost point of Indiana all the way to South Bend in the north. *Id.* Other county agencies took up this approach as well, and over the last two decades, Petitioner and other county-run hospital systems have collectively purchased 499—or *93%*—of Indiana's 534 nursing homes. Petitioner owns 78 of those facilities. Tim Evans, Emily Hopkins & Tony Cook, *Nursing Home Residents Suffer as County Hospitals Rake in Millions*, Ind. Star. (Mar. 11, 2020, 9:11 PM), https://www.indystar.com/in-depth/news/investigations/2020/03/11/indiana-nursing-home-patients-suffer-medicaid-money-diverted-hospitals/2517834001/. As a result, government agencies have a virtual monopoly on nursing homes in Indiana, which means that the state's elderly population has limited options when it comes to receiving long-term care. *Id.*

In practice, counties and municipal agencies—including Petitioner—do not actually operate the nursing homes they own; instead, they buy licenses for existing nursing homes from for-profit companies, which retain ownership of the physical property. The county agencies—including Petitioner—then enter into contracts with the private-sector operators to manage the homes on a day-to-day basis. *Id.* The Indianapolis Star has described Petitioner as "an absentee landlord primarily concerned with using this collection of nursing homes to generate much-needed cash." Gillers et al., *supra*. The Center for Medicaid and CHIP Services, which is part of the Centers for Medicare & Medicaid Services ("CMS"), has also commented on these types of arrangements, noting that when the "local government

agrees to fund the state share of additional Medicaid payments on their behalf, and the additional payments are then split between the private operators of the nursing home and the local government . . . [e]veryone wins—except perhaps the patient and certainly the federal taxpayer." Ctr. for Medicaid & CHIP Servs., *Medicaid Fiscal Integrity: Protecting Taxpayers and Patients* (Feb. 12, 2020), https://www.medicaid.gov/about-us/messages/98981.

This strategy has been wildly successful in achieving its intended goal of maximizing federal Medicaid revenue. In fiscal year 2020, Indiana received $996.1 million in federal supplemental payments for nursing facilities—*more than any other state*, including more populous states like California and New York. Medicaid & CHIP Payment & Access Comm'n, *MACStats: Medicaid and CHIP Data Book*, Ex. 25 (2021), https://www.macpac.gov/wp-content/uploads/2015/11/EXHIBIT-25.-Medicaid-Supplemental-Payments-to-Non-Hospital-Providers-by-State-FY-2020-millions.pdf. In fact, Indiana accounted for over 30% of *all* supplemental nursing facility funding the federal government distributed that year. *Id.* Since 2003, Indiana county hospitals have accumulated approximately $4.3 billion in additional Medicaid funding for nursing homes. But the Indianapolis Star found that in that time, at least $1 billion (and possibly as much as $3 billion) of Indiana's supplemental nursing home funds have been diverted to other uses. Evans, Hopkins & Cook, *Nursing Home Residents Suffer*, *supra*.

Petitioner and the other Indiana counties following its lead used the funds generated from nursing home Medicaid supplemental payments to finance new construction of hospitals, clinics, and ambulance stations, and have lauded themselves for these improvements to the overall healthcare system. Evans, Hopkins & Cook, *Nursing Home Residents Suffer*, *supra.* But considering

the amount of Medicaid funding it receives, Indiana should *also* have the best nursing homes in the country. *Id.* Instead, Indiana's nursing homes are often rated among the lowest quality in the nation, and county health agencies, like Petitioner, are depriving the elderly and other vulnerable residents of much needed care.

The largest project Petitioner has funded with siphoned Medicaid money is the $754 million Sidney & Lois Eskenazi Hospital in Indianapolis—a project Petitioner took pride in completing without raising taxes. *Id.* In contrast to the often substandard quality of Indiana's nursing home care, the facility is noted for its beautiful architecture and rooftop garden. *Id.* Other counties have conceded that they, too, used nursing home funding for construction projects unrelated to nursing homes: Davies County Hospital built a physical therapy facility with pool, gym, and track, as well as EMS living quarters and an oncology service line; Schneck Medical Center built a new ambulance station and expanded its hospital; and Shelby County built an $89 million medical center. *Id.*

This diversion of funds has created an untenable system—a number of Indiana's counties now depend on this federal funding to maintain their primary hospitals, and would have to cut costs if they stopped employing the revenue scheme. Evans, Hopkins & Cook, *Nursing Home Residents Suffer*, *supra*, *citing* Ctrs. for Medicare & Medicaid Servs., *Fact Sheet: 2019 Medicaid Fiscal Accountability Regulation (MFAR)*, (Nov. 12, 2019), https://www.cms.gov/newsroom/fact-sheets/fact-sheet-2019-medicaid-fiscal-accountability-regulation-mfar. Indiana's county hospital systems even attempt to justify the diversion of Medicaid funds by claiming the money "has allowed [] rural hospital[s] to survive," and been used to open clinics in low-income neighborhoods. Evans, Hopkins & Cook, *Nursing Home Residents Suffer*, *supra*.

Further, it is not just Indiana's county health agencies that are using the state's nursing home residents to maximize and divert funds; Indiana's state government is using nursing home residents as well. Indiana actually *taxes* nursing homes—and other health providers—as a way to cover the state's share of other Medicaid costs without increasing state spending. Daniel L. Hatcher, *Medicaid Maximization and Diversion: Illusory State Practices that Convert Federal Aid into General State Revenue*, 39 Seattle U. L. Rev. 1225, 1249 (2016). Indiana calls its tax a "quality assessment fee" ("QAF") and has used the fees for illusory state spending on health care to trigger federal Medicaid matching. *Id.* Millions of dollars from this strategy have been diverted while nursing home residents languish in substandard facilities: for fiscal year 2020, Indiana reported a $47.7 million surplus from the QAF program, which was placed in its *general* fund. Zachary Q. Jackson, Ind. State Budget Agency, List of Appropriations Made By the Regular Session of the 2021 Ind. Gen. Assemb. for the Biennium July 1, 2021 to June 30, 2023, at 10 (2021), https://www.in.gov/sba/files/IntroductionHeading.pdf; *see also* Hatcher, *supra*, at 1249 (compiling estimates of total funds diverted for 2011–2013). In other words, millions in federal funding is not making its way toward improving care for the nursing home residents that most desperately need it.

Petitioner, other county hospital systems, and the State of Indiana itself have been purely profit-driven in their treatment of nursing homes. Petitioner's predatory acquisition of nursing homes for the purpose of generating revenue—in the form of federal dollars—instead of endeavoring to increase staffing or standards of care for elderly Medicaid beneficiaries is especially concerning. *See* Gillers et al., *supra*; Evans, Hopkins & Cook, *Nursing Home Residents Suffer*, *supra*. In spite of the billions of dollars in federal funding funneled into

Indiana, and public scrutiny of the effects that the diversion of those funds has had on Indiana's nursing homes, those elderly and vulnerable Medicaid beneficiaries often continue to receive substandard care.

D. Indiana's Nursing Homes Provide Substandard Care

When states like Indiana divert federal Medicaid funds away from care for nursing home residents, the intended beneficiaries are especially at risk of mistreatment. For example, a GAO report from 2020 found that 82% of nursing homes inspected between 2013 and 2017 had poor infection control procedures. John E. Dicken, Dir., Health Care, U.S. Gov't Accountability Off., GAO-20-576, Infection Control Deficiencies Were Widespread And Persistent In Nursing Homes Prior To Covid-19 Pandemic 4 (2020), https://www.gao.gov/assets/gao-20-576r.pdf. And another national survey found that 87% of nursing homes have moderate to severe levels of staffing shortages. Am. Health Care Ass'n, *State of the Nursing Home Industry*, Survey (2022), https://www.ahcancal.org/News-and-Communications/Fact-Sheets/FactSheets/SNF-Survey-June2022.pdf. These pervasive problems cannot be corrected without adequate investment in improved care. They are also the types of issues more typically found in *for-profit* nursing homes, not government-owned, non-profit facilities. Indiana seems to be an exception, because of Petitioner's unique revenue scheme.

Mr. Talevksi's experience at Petitioner's nursing home, Valparaiso Care and Rehabilitation, is unfortunately not an isolated occurrence. By nearly every measure, Indiana's nursing homes have rated among the worst in the country. One review ranked the state 44th in the nation for overall quality of nursing home care. *Long-Term Services & Supports State Scorecard: Indiana*, AARP,
https://www.longtermscorecard.org/databystate/state?st

ate=IN (last visited Sept. 22, 2022). Advocacy group Families for Better Care gave the state's nursing homes an "F" grade for the year 2019, citing chronic understaffing and a high number of homes with severe deficiencies. Families for Better Care, *Nursing Home Report Cards: Indiana (2019)* https://familiesforbettercare.com/index.php/report-cards/details/in. News reports and public records, as discussed below, also show that suffering among Indiana's nursing home residents is widespread.

Department of Health and Human Services ("DHHS") inspection reports obtained by journalists at the Indianapolis Star reveal that Indiana's nursing homes are "dangerously understaffed," fail to provide the assistance necessary to prevent falls or harms associated with being bed-ridden, neglect to provide adequate food, leave injuries untreated, and do not adequately supervise potentially violent residents. Evans, Hopkins & Cook, *Nursing Home Residents Suffer*, *supra*.

The Indianapolis Star uncovered and reported numerous instances of nursing residents who had died from conditions caused by neglect, including: Martha Hillman, 71, who died after her nursing home failed to provide a ventilator she needed; Jacqueline Vest, 79, who died from a severe fall after the nursing home neglected to develop a fall-prevention plan for her; and Sicely Daulton, a 75 year-old amputee who died after falling while attempting to shower without proper assistance. Tony Cook, Tim Evans & Emily Hopkins, *16 Falls. An Amputated Leg. An Infected Tailbone. Dire Conditions In Indiana Nursing Homes*, Ind. Star. (Mar. 10, 2020, 9:06 PM), https://www.indystar.com/in-depth/news/investigations/2020/03/10/indiana-nursing-home-quality-stories-dire-conditions/4871118002/.

The news investigations found that facilities in Shelby County have been cited for short-staffing that led to inadequate bathing and bed-sore prevention for

residents. Evans, Hopkins & Cook, *Nursing Home Residents Suffer*, *supra*. Medication errors and poor facility maintenance are also major problems. *Id.* DHHS inspectors found numerous violations during a 2019 inspection, observing that the facility had a "pungent urine odor," soiled furniture, sticky floors, improper sterilization of glucometers, and staff working with invalid nursing licenses (among other deficiencies). Cook, Evans & Hopkins, *16 Falls*, *supra*, *citing* Dep't of Health and Human Servs., Ctrs. for Medicare and Medicaid Servs., Statement of Deficiencies and Plan of Correction, Aperion Care Kokomo (Jun. 21, 2019).

Countryside Meadows, one of Petitioner's facilities, has received CMS's lowest rating for staffing levels. Ctrs. for Medicare & Medicaid Servs., Nursing Home Care Compare, *Countryside Meadows*, https://www.medicare.gov/care-compare/details/nursing-home/155792?id=3bb5959a-9eb2-4a32-95d7-f408f700b2c9&state=IN (last visited Sept. 22, 2022). Understaffing has led to an increase of insurance claims and malpractice suits because, quite obviously, adequate staffing is vital for providing preventative care such as preventing and treating bed sores. Evans, Hopkins & Cook, *Nursing Home Residents Suffer*, *supra*. Untreated bed sores can be fatal—such was the case of Gary Robinson, who was temporarily admitted to Countryside Meadows for rehabilitation of a broken hip and ultimately died from an infected bed sore. *Id.* Reporters also found indications that other residents received delayed treatment, were deprived of food and hydration, and suffered injuries and infections due to lack of care. Cook, Evans & Hopkins, *16 Falls*, *supra*.

DHHS citations appear to have little effect. A recent and notorious example is Homestead Healthcare Center, owned by Adams County Memorial Hospital. There, in February 2022, an 80 year-old woman was raped and murdered by a fellow resident. Tony Cook, *She Was*

Raped and Smothered at Indianapolis Nursing Home. Now Her Family is Speaking Out, Ind. Star (May 18, 2022),
https://www.indystar.com/story/news/2022/05/18/family-homestead-nursing-home-resident-killed-indianapolis-speaks-out/9735980002/. Even before the resident's murder, Homestead reportedly had a serious problem with crime—illegal use of narcotics, thefts, and assaults were common. *Id.* According to the Star's investigation, Homestead even knew that the rapist had threatened other female residents before the murder, but took no preventative measures. Tony Cook, *Even After Murder, Homestead Continues to Put Nursing Home Residents in Danger*, Ind. Star (May 26, 2022, 5:36 AM), https://www.indystar.com/story/news/investigations/2022/05/26/homestead-healthcare-death-murder-nursing-home-indiana/9908012002/.

Yet despite the increased scrutiny on the nursing home following the rape and murder, problems reportedly persisted. During its next DHHS inspection, Homestead was cited for leaving beds soaked in urine and "large brownish colored wet area[s]," failing to clean bandages, mishandling medications, and other issues, some of which led to patient hospitalizations. *Id.*, *citing* Dep't of Health and Human Servs., Ctrs. for Medicare and Medicaid Servs., Statement of Deficiencies and Plan of Correction, Homestead Healthcare Center (Mar. 21, 2022).

Given that Petitioner has unfortunately treated nursing home residents as a source of revenue, these results could have been easily predicted. Multiple studies have shown that for-profit nursing homes provide worse outcomes and have lower staffing levels than their non-profit and government-run counterparts. Charlene Harrington & Helen Carrillo, Henry J. Kaiser Family Found., *Nursing Facilities, Staffing, Residents and Facility Deficiencies, 2009 Through 2015* 8–9 (2017), https://files.kff.org/attachment/REPORT-Nursing-

Facilities-Staffing-Residents-and-Facility-Deficiencies-2009-2015. One study found that nursing homes acquired by private equity firms provide even lower-quality care than other privately owned facilities. Robert Tyler Braun et al., *Association of Private Equity Investment in US Nursing Homes and the Quality and Cost of Care for Long-Stay Residents*, JAMA Health Forum (Nov. 19, 2021), https://jamanetwork.com/journals/jama-health-forum/fullarticle/2786442. And for-profit nursing homes tend to resort to over-prescribing antipsychotic drugs as chemical restraints to compensate for low staffing levels. Ctr. for Medicare Advocacy, *Non-Profit vs. For-Profit Nursing Homes: Is There a Difference in Care?* (March 15, 2012), https://medicareadvocacy.org/non-profit-vs-for-profit-nursing-homes-is-there-a-difference-in-care/.

Profiteering from nursing homes has a deleterious effect, and, according to multiple news investigations, Petitioner's apparent motive from the start of its nursing home acquisition initiative was to access a new revenue stream. The results have been similar to what is typically seen in *for-profit* nursing home systems, which is unsurprising given that Petitioner has been using the revenue strategy to operate more like a for-profit enterprise than a government-run, non-profit system.

II. NURSING HOME RESIDENTS MUST BE PERMITTED TO BRING CLAIMS UNDER SECTION 1983 TO VINDICATE THEIR RIGHTS

For nearly twenty years, Petitioner has been taking in vast sums of federal Medicaid funds and diverting those funds away nursing homes that are responsible for the care of vulnerable individuals. Those actions both subvert the purpose of Medicaid and inflict very real harm on residents.

Petitioner's revenue strategy has perpetuated the lack of adequate care for nursing home residents in the facilities now owned by Petitioner and has, among other

things, left Indiana's nursing homes dangerously understaffed. When Petitioner began acquiring nursing homes, the strategy led to a vast increase in federal funds that could have (and should have) been used to improve care; instead, the quality of care in the nursing homes actually *declined*. Gillers et al., *supra*. In the decades since, residents have faced constant health risks, including the risk of losing their lives to infections caused by untreated bed sores, falls caused by inadequate supervision, and even violent crime.

Inadequate staffing leads to other predictable harms as well. For instance, where there are not enough staff members to monitor residents, nursing homes often resort to chemical restraint—the administration of powerful and unnecessary antipsychotic drugs in order to subdue or control residents. Victoria Chappell, Julia Kirkham & Dallas P. Seitz, *Association Between Long-Term Care Facility Staffing Levels and Antipsychotic Use in US Long-Term Care Facilities*, J. Post-Acute & Long-Term Care Med. (forthcoming 2022), https://doi.org/10.1016/j.jamda.2022.06.029. Indeed, that is precisely what Respondent alleges Petitioner did. Pet. App. 78a.

Residents who suffer such substandard care and abuse must have a means by which they can seek redress for the violations of their FNHRA-guaranteed rights. As a practical matter, Section 1983 is the only reasonable means available to them to do so.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

Robert J. Ward
Counsel of Record
Douglas I. Koff
Frank W. Olander
Schulte Roth & Zabel LLP
919 Third Avenue
New York, New York 10022
(212) 756-2000
robert.ward@srz.com

Dated: September 23, 2022