No. 21-806

IN THE

Supreme Court of the United States

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

Petitioners,

v.

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

Respondent.

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

BRIEF FOR THE GEORGIA ADVOCACY OFFICE AND THE EMORY LAW SCHOOL DISABLED LAW STUDENTS ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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INTEREST OF AMICI CURIAE[1]

The Georgia Advocacy Office is a non-profit corporation that advocates with and for oppressed and vulnerable individuals in Georgia who have significant disabilities. The Georgia Advocacy Office has been designated by Georgia as the agency to implement Protection and Advocacy systems within the state. *See, e.g.,* 42 U.S.C. § 15041 et seq.; 29 U.S.C. § 794e. The Georgia Advocacy Office's work is guided by the understanding that people with disabilities have the right to self-determination, protections from harm, and the opportunity to fully exercise their citizenship rights and responsibilities, including through self-advocacy. The legal issues presented in this case are of interest to the Georgia Advocacy Office because of their vast implications on the availability of the courts to disabled individuals seeking to vindicate their rights.

The Emory Law School Disabled Law Student Association (EDLSA) is a student organization dedicated to empowering disabled legal professionals throughout and beyond their legal education. EDLSA's members are students within the Emory Law School community, which has over 800 students. EDLSA seeks to confront ableism in the legal system and promote disability justice locally and nationally. Protecting the availability of private causes of action

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[1] Pursuant to Sup. Ct. R. 37.6, *amici curiae* affirm that no counsel for a party has written this brief in whole or in part, and that no person or entity, other than amici curiae, its members, or its counsel, has made a monetary contribution to the preparation or submission of this brief. This brief is filed pursuant to Sup. Ct. R. 37.3(a) and the blanket consents of the parties.

via § 1983 to enforce rights provided under Spending Clause legislation fits squarely within EDLSA's purpose to promote disability justice.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

Millions of individuals rely on Spending Clause programs to access health care and weather economic hardship. Spending Clause safety net programs provide essential support to many disabled individuals; as of 2020, more than 8 million disabled individuals were eligible for full Medicaid benefits.[2] Many Spending Clause programs, including Medicaid, were designed as entitlements to guarantee rights and protections to those who meet eligibility requirements. Precluding private causes of action via § 1983 to enforce rights provided under social safety net programs jeopardizes the rights of individuals Congress sought to protect.

Congress designed the Federal Nursing Home Reform Act (FNHRA) to abate abuses in nursing facilities receiving Medicaid and Medicare dollars. Congress set forth rights to which facility residents are entitled and expressly reserved access to individual causes of action to enforce these rights. The availability of private causes of action via § 1983 is essential for nursing facility residents to protect themselves from abuse and ensure FNHRA compliance.

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[2] *Who Enrolls in Medicaid & CHIP?,* MEDICAID.GOV, https://www.medicaid.gov/state-overviews/scorecard/who-enrolls-medicaid-chip/index.html (last visited Sept. 22, 2022).

ARGUMENT

I. Precluding private causes of action via § 1983 to enforce rights provided under Spending Clause legislation jeopardizes the rights of millions of individuals who depend on safety net programs

Longstanding legal precedent permits beneficiaries to seek the aid of courts when the rights of social program beneficiaries are unlawfully threatened.[3]

Depriving individuals of the ability to sue under § 1983 will result in the disentitlement of millions of poor, elderly, and/or disabled individuals. Spending Clause programs—including Medicaid, Medicare, the Children's Health Insurance Program (CHIP), Temporary Assistance to Needy Families, the Supplemental Nutrition Assistance Program, and McKinney-Vento Homeless Assistance Programs—comprise core components of the United States' social safety net. If individuals cannot access courts to enforce their rights under Spending Clause legislation, they will be left at the "mercy of state legislatures and public officials, who often embrace federal funding but resist the concept of beneficiary rights."[4]

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[3] *See King v. Smith*, 392 U.S. 309 (1968); *Townsend v. Swank*, 404 U.S. 282 (1971); *Wilder v. Va. Hosp. Ass'n*, 496 U.S. 498 (1990); *Frew ex rel. Frew v. Hawkins*, 540 U.S. 431 (2004).

[4] Sara Rosenbaum & Timothy Jost, *Is The Supreme Court Poised To Wipe Out Legal Rights For Medicaid Beneficiaries?*, HEALTH

Indeed, such were the stakes in *Frew ex rel. Frew v. Hawkins*:[5] Parents of Medicaid-eligible children filed a § 1983 action seeking injunctive relief based on the assertion that the Texas Medicaid program failed to ensure that eligible children could receive preventative health services, in violation of Medicaid's Early and Periodic Screening, Diagnosis and Treatment requirement.[6] State officials ultimately entered into a consent decree that required a comprehensive plan for implementing Medicaid requirements, a result made possible only by the parents' rightful § 1983 claim.[7] Foreclosing access to the courts "would essentially end [safety net] programs as legal entitlements, bringing us back decades to the time when public benefits were considered a privilege rather than a right."[8]

Such a holding will have an outsize effect on Black, Indigenous, Latine, and multiracial individuals, who are disproportionately represented in these programs because they are more likely to have faced economic marginalization.[9] "The question of whether to

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AFF. FOREFRONT (May 20, 2022), https://www.healthaffairs.org/do/10.1377/forefront.20220518.925566/full/.

[5] 540 U.S. 431 (2004).

[6] *Id.* at 433.

[7] *Id.* at 434–35.

[8] Rosenbaum & Jost, *supra* note 4.

[9] *See, e.g.,* Tricia Brooks & Allexa Gardner, *Snapshot of Children with Medicaid by Race and Ethnicity, 2018*, GEO. UNIV. HEALTH POL'Y INST., CTR. FOR CHILD. AND FAM. (July 27, 2020), https://ccf.georgetown.edu/wp-

foreclose § 1983 actions in the case of Medicaid and similar programs is a matter of fundamental health equity and equal justice under law."

II. Congress intended private causes of action for FNHRA violations as part of an overall mechanism to prevent abuse of nursing facility residents

When nursing facility residents' rights are violated, Congress intended the availability of private enforcement of FNHRA pursuant to § 1983. Private causes of action under § 1983 are necessary for individuals in nursing facilities to protect themselves from abuse and ensure FNHRA compliance.

A. Congress intended the availability of private enforcement of FNHRA pursuant to § 1983

Congress passed FNHRA as part of amendments to the Social Security Act (SSA) in 1987 in order to "improve the quality of care" for Medicaid-eligible nursing facility residents.[10] In 1982, at the urging of Congress, the predecessor to the Centers for Medicare and Medicaid Services (CMS) commissioned a study from the Institute of Medicine to review the regulation

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content/uploads/2020/07/Snapshot-Medicaid-kids-race-ethnicity-v4.pdf; *Medicaid Coverage Rates for the Nonelderly by Race/Ethnicity*, KFF, https://www.kff.org/medicaid/state-indicator/nonelderly-medicaid-rate-by-raceethnicity/ (last visited Sept. 22, 2022); *Earnings Disparities by Race and Ethnicity*, DOL.GOV, https://www.dol.gov/agencies/ofccp/about/data/earnings/race-and-ethnicity (last visited Sept. 22, 2022).

[10] H.R. REP. NO. 100-391, pt. 1, at 452 (1987).

of nursing facilities.[11] The study found that in many government-certified nursing facilities, individuals "receive very inadequate—sometimes shockingly deficient—care that is likely to hasten the deterioration of their physical, mental, and emotional health. They also are likely to have their rights ignored or violated, and may even be subject to physical abuse."[12] The report suggested a "major overhaul of all three elements of the current regulatory system," including the sanctions "with which noncompliance is remedied and deterred."[13] In response to the Institute of Medicine's findings and recommendations, Congress enacted FNHRA to ensure that nursing facilities participating in Medicare or Medicaid programs respect the rights of residents and provide high-quality care.[14]

FNHRA sets out requirements relating to nursing facilities' provision of services and residents' rights, as well as mechanisms for state and federal oversight and enforcement.[15] In recognition of the "inability of the current regulatory system . . . to force substandard facilities to improve their performance,"[16] Congress made explicit that "remedies provided under [FNHRA] 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

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[11] *Id.*
[12] COMM. ON NURSING HOME REGUL., INST. OF MED., IMPROVING THE QUALITY OF CARE IN NURSING HOMES 1 (1986).
[13] H.R. REP. NO. 100-391 at 452.
[14] *Id.* at 458.
[15] *See* 42 U.S.C. § 1396r.
[16] COMM. ON NURSING HOME REGUL., *supra* note 12.

available to an individual at common law."[17] Individual rights of action under § 1983 are one of the enforcement mechanisms that Congress made available to ensure a high quality of care among Medicaid and Medicare-participating nursing facilities.

Lest there be any doubt about Congress's intent to include § 1983 rights of action in its overall FNHRA enforcement design, 42 U.S.C. § 1320a-2 should put such doubt to rest. In response to *Suter v. Artist M.*,[18] in which the Court found no § 1983 private right of action under a different section of the SSA, Congress enacted 42 U.S.C. § 1320a-2 to make clear private rights of action to enforce a provision of the SSA could not be barred simply because the provision is part of a state plan requirement. Foreclosing § 1983 actions contravenes the text and intent of FNHRA and 42 U.S.C. § 1320a-2.

B. Private causes of action under § 1983 are necessary for individuals in nursing facilities to protect themselves from abuse and ensure FNHRA compliance

The problem of abuse in nursing facilities remains significant and widespread. In a study including over 2,000 nursing facility residents, 44% reported they had been abused and 95% said they had either themselves been neglected or seen another resident

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[17] 42 U.S.C. § 1396r(h)(8) (emphasis added).
[18] 503 U.S. 347, 364 (1992).

being neglected.[19] In an analysis of CMS data, the Government Accountability Office (GAO) found that from 2013 through 2017, "abuse deficiencies"—a finding that a nursing facility failed to keep a resident free from mental, verbal, sexual, or physical abuse—became more frequent, with the largest increase in severe cases.[20] Still, these statistics belie the extent of the problem, as abuse in nursing facilities frequently goes unreported.[21]

Reports conducted by the GAO repeatedly show the mechanisms employed by CMS to monitor nursing facilities are alone inadequate to prevent abuse suffered by people in nursing facilities.[22] All of the state officials included in GAO's review indicated "facility-reported incidents can lack key information that can cause potential delays in abuse investigations."[23] Specifically, these state officials indicated "the facility-reported incidents they receive from nursing homes can lack key information that affects their ability to effectively triage incidents and

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[19] Karan Patel et al., *Elder Abuse: A Comprehensive Overview and Physician-Associated Challenges*, CUREUS (Apr. 8, 2021), https://www.cureus.com/articles/55913-elder-abuse-a-comprehensive-verview-and-physician-associated-challenges.

[20] U.S. GOV'T ACCOUNTABILITY OFF., GAO 19-433, NURSING HOMES: IMPROVED OVERSIGHT NEEDED TO BETTER PROTECT RESIDENTS FROM ABUSE 14 (2019).

[21] *See, e.g.*, UNDER THE RADAR: NEW YORK STATE ELDER ABUSE PREVALENCE STUDY (2011) (available at http://www.ocfs.state.ny.us/main/reports/Under%20the%20Radar%2005%2012%2011%20final%20report.pdf).

[22] *See, e.g.*, GAO 19-433, *supra* note 20, at 35 ("[CMS] lacks key information critical to understanding and appropriately addressing nursing home abuse with its oversight.").

[23] *Id.* at 36.

determine whether an investigation should occur and how soon."[24]

Even if CMS and states could effectively monitor nursing facilities, the remedies available to them are largely punitive rather than protective or restorative.[25] In practice, enforcement actions for abuse-related deficiencies identified through the oversight process most often result in civil monetary penalties and denial of payment for new Medicare or Medicaid admissions.[26] Unlike § 1983, FNHRA's state and federal oversight mechanisms afford residents no opportunity to argue their case, access prospective injunctive relief, or recover for violations of their rights.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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[24] *Id.*

[25] *See* 42 U.S.C. §§ 1396r(h)(1)(A)–(h)(2)(A).

[26] *See* GAO 19-433, *supra* note 20, at 20.