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

REPLY BRIEF FOR THE PETITIONERS

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REPLY BRIEF FOR THE PETITIONERS

INTRODUCTION

It's 1987. Congress has just enacted the Federal Nursing Home Reform Act ("FNHRA"). A State Governor, mulling whether to participate, asks her legal advisor whether she would be exposing state facilities to § 1983 lawsuits if she accepts the federal money. The advisor demurs, saying the Act uses the word "rights." The Governor asks again, "So, am I buying a lawsuit?" The advisor answers, "Well, there's a multi-factor test." The Governor, frustrated, asks, "For the third time, am I buying a lawsuit?" Helpless, the advisor replies, "It depends on whether the judge we draw finds the right 'unambiguous.'" The Governor decides to flip a coin.

States shouldn't be put in that position. Absent language giving funding recipients clear notice that they will be subject to liability in private damages actions, Spending Clause legislation does not "secure" individual rights under § 1983.

But even if *some* Spending Clause statutes give rise to § 1983 claims without such a clear statement, FNHRA does not. The statute and its implementing regulations provide a comprehensive remedial scheme, including individual non-monetary remedies, thereby precluding a § 1983 right of action. And the two rights Respondent invokes are not framed "in clear and unambiguous terms" (*Gonzaga Univ.* v. *Doe*, 536 U.S. 273, 290 (2002)), and for that additional reason do not give rise to § 1983 enforcement.

I. UNLESS A SPENDING CLAUSE STATUTE PROVIDES CLEAR NOTICE THAT ACCEPTING STATES WILL BE SUBJECT TO PRIVATE ENFORCEMENT LAWSUITS, SUCH STATUTES DO NOT "SECURE" RIGHTS UNDER § 1983

A. Federalism And Separation-Of-Powers Principles Require A "Clear Notice" Standard

1. Respondent does not dispute that "legislation enacted pursuant to the spending power is much in the nature of a contract," and that "the legitimacy of Congress' power to legislate under the spending power thus rests on whether the State voluntarily and knowingly accepts the terms of the 'contract.'" *Pennhurst State Sch. & Hosp.* v. *Halderman*, 451 U.S. 1, 17 (1981). See Brief for Respondent ("Resp. Br.") at 21. Nor does she dispute that Spending Clause legislation must furnish "clear notice [of] the liability at issue" to "a state official … deciding whether the State should accept funds and the obligations that go with those funds." *Arlington Cent. Sch. Dist. Bd. of Educ.* v. *Murphy*, 548 U.S. 291, 296 (2006).

Respondent is therefore mistaken in asserting that "there is no textual or constitutional basis for treating Spending Clause legislation differently from legislation enacted under any other power." Resp. Br. at 21. Spending Clause legislation is unique in our constitutional system. Whereas Congress's authority to legislate is ordinarily limited to specifically enumerated subjects (see U.S. Const. art. I, § 8; *id.* amend. X), "objectives not thought to be within Article I's enumerated legislative fields may nevertheless be attained through the use of the spending power and

the conditional grant of federal funds." *S. Dakota* v. *Dole*, 483 U.S. 203, 207 (1987).

But the spending power is "not unlimited." *Ibid.* Recognizing the federalism concerns at stake, this Court has "regularly applied th[e] contract-law analogy" to "defin[e] the scope of conduct for which funding recipients may be held liable for money damages … with an eye toward ensuring that the receiving entity of federal funds had notice that it will be liable." *Cummings* v. *Premier Rehab Keller, P.L.L.C.*, 142 S. Ct. 1562, 1570 (2022). "The same analogy similarly limits the scope of available remedies in actions brought to enforce Spending Clause statutes," since "a prospective recipient" must have notice of "what sort of penalties might be on the table." *Ibid*.

Spending Clause legislation must likewise put States on clear notice that their affiliated providers are subject to private enforcement litigation. It does not suffice that the asserted "right" be "unambiguous." *Gonzaga*, 536 U.S. at 280-83. Even if all judges would agree on what constitutes an "unambiguous right" (and they don't), the question remains: Who is charged with *enforcing* that unambiguous right? If the answer is "any private plaintiff with a grievance and a lawyer," the State should be given the clearest possible notice. After all, "[n]ot only are the lawsuits themselves a financial burden on the States, but the looming potential for complex litigation inevitably will dissuade state officials from making decisions that they believe to be in the public interest." *Gee* v. *Planned Parenthood of Gulf Coast, Inc.*, 139 S. Ct. 408, 409 (2018) (Thomas

J., joined by Alito, J. and Gorsuch J., dissenting from denial of certiorari).

2. Separation-of-powers principles reinforce that conclusion: Spending Clause legislation must give States clear notice that they are exposing their facilities to private lawsuits.

"[C]reating a cause of action is a legislative endeavor. Courts engaged in that unenviable task must evaluate a range of policy considerations at least as broad as the range a legislature would consider." *Egbert* v. *Boule*, 142 S. Ct. 1793, 1802 (2022). Only where Congress has clearly notified participating States that their facilities risk private lawsuits can a court be sure that such States have made an informed decision, thereby "securing" the asserted "right".[1] When a court instead divines an individually enforceable right based on something short of "clear notice," it risks legislating, in violation of separation of powers.

B. Common Law Contract Principles Confirm That A "Clear Notice" Standard Is Warranted

This Court has consistently held that "Congress intended [§ 1983] to be construed in the light of common-law principles that were well settled at the time of its enactment." *Kalina* v. *Fletcher,* 522 U.S. 118, 123 (1997). Accord *Will* v. *Mich. Dep't of State*

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[1] It is question-begging to assert, as Respondent does, that the term "laws" in § 1983 means "all laws," and not "some of the laws." Resp. Br. at 19-22. The correct question, instead, is which rights are "*secured* by the … laws." 42 U.S.C. § 1983 (emphasis added).

Police, 491 U.S. 58, 67 (1989) (collecting cases). At the time § 1983 was enacted, third parties generally did not have the right to enforce contracts merely because the benefits of those contracts inured to their benefit. And third parties were allowed to enforce *government-to-government* contracts only in those rare instances in which the contract expressly stated that the breaching party would be liable to third parties.

1. With respect to contracts in general, we agree with Justice Scalia's observation in his *Blessing* concurrence:

> Until relatively recent times, the third-party beneficiary was generally regarded as a stranger to the contract, and could not sue upon it; …. This appears to have been the law at the time § 1983 was enacted. If so, the ability of persons in respondents' situation to compel a State to make good on its promise to the Federal Government was not a "righ[t] ... secured by the ... laws" under § 1983. While … newly enacted laws are automatically embraced within § 1983, it does not follow that the question of what rights those new laws … *secure* is to be determined according to modern notions rather than according to the understanding of § 1983 when it was enacted. Allowing third-party beneficiaries of commitments to the Federal Government to sue is certainly a vast expansion.

Blessing v. *Freestone*, 520 U.S. 329, 349-50 (1997) (Scalia, J., concurring).

Respondent and *amici* dispute Justice Scalia's historical account, but their reports of privity's death

are greatly exaggerated. See Resp. Br. at 28-30; Brief for the United States as Amicus Curiae Supporting Neither Party ("Gov't Br.") at 18-19; Brief of Contract Law Professors as Amici Curiae Supp. Resp. ("Prof. Br.") at 4-5, 10-19. Most of their treatise citations are strategically truncated to elide competing points,[2] or, in the case of Parsons, materially overstated. Resp. Br. at 28.[3] And Respondent's compilation of case law

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[2] Respondent's *amici* quote Francis Hilliard as stating that "[t]here are many cases in the books … maintaining" that third-party beneficiaries may sue (see Prof. Br. at 16), but omit Hilliard's explanation that this exception applied only to intended or creditor beneficiaries. See 1 Francis Hilliard, *The Law of Contracts* 426-429 (1872). Similarly, Respondent's *amici* refer to a "modern-day survey of 304 nineteenth-American appellate cases," which "concluded that a clear majority of those cases permitted third-party beneficiaries to sue." Prof. Br. at 10-15. But *amici* neglect to include Karsten's caveat that his analysis "did not include appellate cases where … the contract only incidentally made a third party into a potential beneficiary." Peter Karsten, *The "Discovery" of Law by English and American Jurists of the Seventeenth, Eighteenth, and Nineteenth Centuries: Third-Party Beneficiary Contracts as a Test Case*, 9 Law & Hist. Rev. 327, 331 & n.22 (1991). Respondent's *amici* also elide Francis Wharton's statements that "no one can sue on a contract to which he was not a party" and "[m]any of the cases … cited to show that a stranger can maintain an action on a contract, are explicable on other grounds" (2 Francis Wharton, *A Commentary on the Law of Contracts* 155, 162 (1882)), and they bury in a footnote (Prof. Br. at 17 n.11) William Story's 1874 acknowledgment that the "tendency" of contemporary contracts cases is that "no stranger to the consideration can take advantage of a contract, though made for his benefit" (1 William W. Story, *A Treatise on the Law of Contracts* 509 (M. Bigelow ed. 1874)). Respondent's *amici* do, however, have the better reading of the quotation from Oliver Wendell Holmes, Jr.

[3] Parson's reference to the "prevailing rule" was directed to the narrow circumstance involving creditor beneficiaries, where the

from around 1874 fails to show that it was "well-settled" that incidental or donee beneficiaries could sue on private contracts. See Resp. Br. at 28-31 & 1a-6a.[4] The cited cases generally involved contracts in which the third party had some direct interest, either as a creditor seeking to enforce an agreement for one party to pay another's debts,[5] or as the sole intended beneficiary of a contract between two parties.[6]

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beneficiary has provided some consideration in connection with the arrangement between promisor and promisee, see Theophilus Parsons, The Law of Contract 467 & n.(*x*) (6th ed. 1873), as illustrated by the cases he cited for his conclusion, see, *e.g.*, *Brewer* v. *Dyer*, 61 Mass. 337 (1851) (plaintiff lessor (Brewer) was entitled to enforce sublease between his lessee (Parmalee) and defendant sublessee (Dryer), under which defendant agreed to pay rent due on lease directly to plaintiff); *Hind* v. *Holdship*, 2 Watts 104 (Pa. 1833) (plaintiff (Hind) was creditor of promisee (Patterson & Lambdin) who owed him wages, and defendant promisor (Holdship) agreed to pay promisee's wage obligations to Hind and others in exchange for assignment of property from promisee). That scenario, however, bears no resemblance to the position of beneficiaries of Spending Clause statutes, who give no consideration for the funding recipients' promises.

[4] Word limits preclude us from addressing the list of cases that Respondent saw fit to include in a lengthy Appendix. See Sup. Ct. R. 24.3.

[5] See, *e.g.*, *Morgan* v. *Overman Silver Mining Co.*, 37 Cal. 534, 536-37 (1869) (upholding right of creditor to "recover the debt" that defendant agreed to pay as consideration for property acquisition); *Bristow* v. *Lane*, 21 Ill. 194, 196-98 (1859) (same).

[6] See, *e.g.*, *Allen* v. *Thomas*, 60 Ky. 198, 199-201 (1860) (upholding right of intended beneficiary to enforce agreement by defendant to pass along funds to plaintiff); *Bohanan* v. *Pope*, 42 Me. 93, 96-97 (1856) (logger could sue defendant who promised to pay his wages in contract with logger's employer).

This Court's decision in *Hendrick* v. *Lindsay*, 93 U.S. 143, 149 (1876)—which the Law Professors chastise us for omitting (Prof. Br. 15 n.9)—illustrates Respondent's failure to distinguish between incidental and intended beneficiaries. In that case, Hendrick asked Lindsay to provide a supersedeas bond for a pending appeal; Lindsay and Mansfield provided the requested bond; and in return Lindsay asked Hendrick to indemnify them both. See *id*. at 143-45. After Lindsay and Mansfield paid on the supersedeas bond, they asked Hendrick to make good on his indemnity. See *id*. at 145. Hendrick refused as to Mansfield because he had negotiated only with Lindsay. Since it was uncontested that Mansfield had given consideration for the indemnity, the Court held Hendrick liable to Mansfield. See *id*. at 149.

Justice Scalia's historical account, in short, is correct: At the time § 1983 was enacted, third parties who were not expressly identified in contracts as intended beneficiaries generally did not have the right to sue, even if the object of the contract inured to their benefit.

2. In all events, neither Respondent nor her *amici* dispute that, at the time § 1983 was enacted (or, for that matter, in the years since), third parties were almost never permitted to enforce *government-to-government* contracts absent a clear statement authorizing them to do so.

As Justice Scalia noted in *Armstrong* v. *Exceptional Child Center, Inc*., "the modern jurisprudence permitting intended beneficiaries to sue does not generally apply to contracts between a private party and the government—much less to contracts between two governments." 575 U.S. 320,

332 (2015) (plurality opinion as to Part IV). Instead, "a promisor who contracts with a government or governmental agency … is not subject to contractual liability to a member of the public for consequential damages resulting from performance or failure to perform unless … the terms of the promise provide for such liability; …." Restatement (Second) of Contracts § 313(2) (1981).

Although no party before the Court has located a pre-1874 case on point, the closest contemporary evidence confirms the *Armstrong* plurality's observation. See, *e.g.*, Pet. Br. at 19 (collecting cases); *Nickerson* v. *Bridgeport Hydraulic Co.*, 46 Conn. 24, 29-30 (1878) (dismissing third party claim against water company because "it is clear that there was no contract relation between the defendants and the plaintiffs"); *Foster* v. *Lookout Water Co.*, 71 Tenn. 42, 45–46 (1879) (same where "there is no averment that this stipulation of the contract was to enure to the benefit of any citizen aggrieved").[7]

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[7] The Government cites (Br. 19-20) *City of Brooklyn* v. *Brooklyn City Railroad Co*., 47 N.Y. 475, 486 (1872) (discussing *Robinson* v. *Chamberlain*, 34 N.Y. 389 (1866)) as contrary authority, but that is not so. The defendant in *City of Brooklyn*, which had contracted with the State to maintain a section of the canals, was held liable to a boat owner, not because members of the public were intended beneficiaries of the state contract, but rather on the ground that, under the terms of the contract, the defendant had "assumed the duties and was invested with the powers of a public officer," "for a neglect of which the State … would be liable to the party injured." 47 N.Y. at 486; see *Robinson*, 34 N.Y. at 399-400 (noting that, under state act that authorized contract, defendant was vested "with the power to bring suits in behalf of the State" and with police power to "to seize and detain all boats"). Neither the Government nor Respondent asserts that

This long-standing limitation on third party suits applies even when the benefits under the government contract inure, not to the public generally, but to a specified class of persons identified in the contract. Thus, in *Astra USA, Inc.* v. *Santa Clara County*, 563 U.S. 110 (2011), this Court held that covered entities protected by a pricing program could not sue as intended beneficiaries of pharmaceutical pricing agreements (PPAs) between drug manufacturers and the Secretary of Health and Human Services, despite the fact that the PPAs "specifically name[d]" covered entities as recipients of discounted drugs. *Id*. at 117-18. Plaintiff had contended that "[w]hen the Government uses a contract to secure a benefit … the intended recipient acquires a right to the benefit enforceable under federal common law." *Id*. at 118. Disagreeing, the Court noted that "where the promisee is a governmental entity," it is important to honor "[t]he distinction between an intention to benefit a third party and an intention that the third party should have the right to enforce that intention." *Ibid*. (quoting 9 Corbin on Contracts § 45.6, p. 92 (rev. ed. 2007)).

Unable to find support in the common law treatment of government contracts, Respondent asserts that "[t]he best analogy when the federal government exchanges promises with a state under the Spending Clause is to a contract between sovereigns (a treaty)." Resp. Br. at 30. But the treaty analogy is cold comfort, as *Edye* v. *Robertson (Head Money Cases)*, 112 U.S. 580, 586 (1884) (cited in Resp.

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funding recipients under Spending Clause statutes have assumed the status of public officers.

Br. at 30-31), illustrates. Steamship owners sued the tariff collector of the port of New York, who was charging the carriers duties on each foreign passenger. *Id.* at 587. The carriers argued that the duties violated certain treaties between the United States and other countries. *Id.* at 597. Rejecting that contention, the Court held that treaty enforcement is a matter left to "the governments which are parties to it." *Id.* at 598. The sole exception to this rule is if the treaty "contain[s] provisions which confer certain rights" on individuals." *Ibid.* In other words, unless the treaty explicitly provides that a right is privately enforceable, "the judicial courts have nothing to do and can give no redress." *Ibid.*[8]

C. *Stare Decisis* Does Not Compel A Different Result

1. Respondent accuses Petitioners of seeking to undo an "unbroken consensus going back more than 50 years." Resp. Br. 1, 26. But there is no such "unbroken consensus." Rather, this Court's decisions are punctuated by case after case limiting the scope of Spending Clause "rights" cognizable under § 1983, the actors who can be held liable, and the relief that can be granted.[9]

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[8] Federal courts have generally followed the rule in the *Head Money Cases*. See, *e.g.*, *Haitian Refugee Ctr.* v. *Baker*, 949 F.2d 1109, 1110 (11th Cir. 1991) (treaty must "directly accord[] enforceable rights to persons"); *Comm. of U.S. Citizens Living in Nicar.* v. *Reagan*, 859 F.2d 929, 937 (D.C. Cir. 1988) (treaty must "confer rights on private individuals"); *Frolova* v. *U.S.S.R.*, 761 F.2d 370, 374 (7th Cir. 1985) (treaty must confer "rights enforceable by private litigants in American courts").

[9] See, *e.g.*, *Edelman* v. *Jordan*, 415 U.S. 651, 678 (1974); *Pennhurst*, 451 U.S. at 17-18 (1981); *Will*, 491 U.S. at 71 (1989);

In *Armstrong,* for example, the Court noted that it had years ago "repudiate[d] the ready implication of a § 1983 action that *Wilder* exemplified." 575 U.S. at 330 n.* (opinion of the Court as to Part III). *Gonzaga*, in particular, had "expressly 'reject[ed] the notion,' implicit in *Wilder*, 'that our cases permit anything short of an unambiguously conferred right to support a cause of action brought under § 1983.'" *Ibid.* Indeed, in the 42 years since *Thiboutot*, "only twice [has this Court] found spending legislation to give rise to enforceable rights." *Gonzaga*, 536 U.S. at 280. Those two times were *Wright* v. *City of Roanoke Redevelopment and Housing Authority*, 479 U.S. 418 (1987) and *Wilder* v. *Virginia Hospital Association*, 496 U.S. 498 (1990), whose expansive approach to Spending Clause claims *Gonzaga* "expressly rejected." *Armstrong*, 575 U.S. at 330 n.*

It is therefore difficult to credit Respondent's claim that patients and providers have "relied" on "the ready implication of a § 1983 action that *Wilder* exemplified." *Ibid.* Nor is it appropriate to defer to the "reliance" interest invoked by Certain Members of Congress as *amici*. Br. of Members of Congress as *Amici Curiae* Supp. Resp. at 3. If Congress cannot muster the votes required to include a clear statement providing for third-party enforcement, it is not the judiciary's job to "arrogat[e] legislative power." *Hernandez* v. *Mesa*, 140 S. Ct. 735, 741 (2020).

2. Respondent asserts that, in the wake of this Court's *Suter* decision, Congress "ratified" the

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Suter v. *Artist M.*, 503 U.S. 347, 350 (1992); *Blessing*, 520 U.S. at 343-345 (1997); *Barnes* v. *Gorman*, 536 U.S. 181, 189 (2002); *Gonzaga*, 536 U.S. at 290 (2002).

proposition that Spending Clause statutes give rise to enforceable rights under § 1983. Resp. Br. at 11-12, 22-25. That is not so.

Suter held that a federal statute requiring participating States to create plans for foster care providing that "reasonable efforts shall be made to preserve and reunify families" (42 U.S.C. § 671(a)(15)) did not create an individually "enforceable right." 503 U.S. at 355-60. In response, Congress amended the Social Security Act to state that no provision should be found unenforceable solely because of its "inclusion in a section of [the Act] requiring a State plan or specifying the required contents of a State plan." 42 U.S.C. §§ 1320a-2 & 1320a-10. Congress emphasized that it was overruling *only* the "plan" rationale articulated in *Suter*, but not the reasoning "applied in prior Supreme Court decisions respecting such enforceability." *Ibid*.

Put differently, the post-*Suter* amendments left untouched all the principles on which we now rely: the contractual nature of Spending Clause statutes;[10] the requirement that Congress must impose its grant conditions "unambiguously";[11] the duty to give States clear "notice" of their obligations under Spending Clause statutes; [12] and the distinction between "violations of federal law" and "enforceable rights" for purposes of § 1983.[13]

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[10] See *Suter*, 503 U.S. at 356 (quoting *Pennhurst*, 451 U.S. at 17).

[11] *Ibid*. (quoting *Pennhurst*, 451 U.S. at 17).

[12] *Ibid*. (quoting *Pennhurst*, 451 U.S. at 24); see also *id*. at 362.

[13] See *id*. at 357 (citing *Wilder*, 496 U.S. at 509); see also *Golden State Transit Corp.* v. *City of Los Angeles*, 493 U.S. 103, 106

Conversely, when Congress intends to ratify a judicially-created cause of action, it does so expressly. In *Cannon* v. *University of Chicago*, 441 U.S. 677, 717 (1979), the Court found an implied private cause of action to enforce Title IX against States. Subsequently, Congress enacted 42 U.S.C. § 2000d–7(a)(2), which provides that in Title IX lawsuits against a State, "remedies (including remedies both at law and in equity) are available for such a violation to the same extent as such remedies are available for such a violation in the suit against any public or private entity other than a State." That's what ratification looks like. See *Franklin* v. *Gwinnett Cnty. Pub. Schs.*, 503 U.S. 60, 72-73 (1992) ("This statute cannot be read except as a validation of *Cannon*'s holding.").[14]

(1989) ("Section 1983 speaks in terms of 'rights, privileges, or immunities,' not violations of federal law.").

[14] Respondent also contends that Congress "ratified" the application of § 1983 to rights under Spending Clause statutes by enacting the Civil Rights of Institutionalized Persons Act ("CRIPA"). See Resp. Br. at 6-8, 24-25 (discussing 42 U.S.C. § 1997a(a)). But it is hard to see how a statute like CRIPA, which includes an *express* grant of enforcement authority to the Attorney General, sheds any useful light on a statute like FHNRA, which says nothing about who besides the Secretary and the States can enforce the statute.

II. IN ALL EVENTS, FNHRA DOES NOT GIVE RISE TO § 1983 CLAIMS

Even if the Court declines to adopt a clear statement rule for private damages liability under Spending Clause statutes generally, Respondent has failed to show that Congress intended FNHRA to be enforceable through damages actions under § 1983.

A. FNHRA's Comprehensive Enforcement Scheme Is Incompatible With Individual Enforcement Under § 1983

As the Court explained in *Blessing*, Congress can preempt a § 1983 claim "impliedly, by creating a comprehensive enforcement scheme that is incompatible with individual enforcement under § 1983." 520 U.S. at 341. Congress has done exactly that in FNHRA. See Gov't Br. at 24, 27-34.

1. In *Fitzgerald* v. *Barnstable School Committee*, 555 U.S. 246 (2009), the Court elaborated on the features of a statutory enforcement scheme that preclude individual enforcement under § 1983. Relying on *Middlesex County Sewerage Authority* v. *National Sea Clammers Association*, 453 U.S. 1 (1981); *Smith* v. *Robinson*, 468 U.S. 992 (1984); and *City of Rancho Palos Verdes* v. *Abrams*, 544 U.S. 113 (2005), the Court explained that "unusually elaborate" and "carefully tailored" "enforcement provisions," such as "detailed and restrictive administrative and judicial remedies," beyond simply "the withdrawal of federal funding," indicate Congress's intent not to allow an individual remedy under § 1983. *Fitzgerald*, 555 U.S. at 253-255.

As the Government agrees, Congress provided just such a "comprehensive system of enforcement

mechanisms in FNHRA itself." Gov't Br. at 30. These include both procedures for policing a nursing facility's compliance with the requirements of 42 U.S.C. § 1396r(b)-(d) on a systemwide basis and administrative remedies through which individual residents can seek redress for violation of their "rights" under § 1396r(c).

The systemwide procedures include a hierarchy of compliance surveys based on unannounced inspections by State authorities and by the Secretary (complete with fines and penalties for persons who tip off facilities about an upcoming site visit), as well as review by the Secretary of the adequacy of the State inspections. These procedures have teeth: The State or the Secretary can impose a range of escalating penalties on non-compliant facilities, including withdrawal of funding, civil money penalties, appointment of temporary management, and closure. See 42 U.S.C. § 1396r(h).

Individual residents have access to administrative grievance procedures through which they can complain about violations of their § 1396r(c) "rights." Grievances are filed with independent State entities, orally or in writing, and may be filed anonymously. Decisions must be provided in writing and include "the date the grievance was received, a summary statement of the resident's grievance, the steps taken to investigate the grievance, a summary of the pertinent findings or conclusions regarding the resident's concern(s), a statement as to whether the grievance was confirmed or not confirmed, any corrective action taken or to be taken by the facility as a result of the grievance, and the date the written decision was issued." 42 C.F.R. § 483.10(j)(4)(v). The

facility must take appropriate corrective action if the alleged violation of the resident's rights is confirmed by the facility or an Administrative Law Judge. See *id*. § 483.10(j)(4)(vi).

2. Respondent does not dispute that Congress provided this highly reticulated enforcement scheme. Nor does Respondent deny that Mr. Talevski successfully availed himself of the individual administrative process—both for his chemical restraints grievance (his medication was reduced), and his transfer grievance (the ALJ ordered the original facility to take him back).

But Respondent also wants money. To that end, she asserts that "the 'dividing line'" in *Fitzgerald* "for purposes of implied preclusion is whether the statute provides a 'more restrictive' *federal judicial remedy*." Resp. Br. at 39 (emphasis added). False. As *Fitzgerald* explains, the "dividing line" between cases where a § 1983 claim is precluded, and those where it is not, has been the existence of a "more restrictive *private* remedy" for statutory violations. *Fitzgerald*, 555 U.S. at 256 (citing *Rancho Palos Verdes*, 544 U.S. at 121) (emphasis added). When Congress has provided a "more restrictive private remedy," allowing a § 1983 claim would "circumvent" Congress' chosen procedures and give "plaintiffs access to tangible benefits—such as damages, attorney's fees, and costs—that [a]re unavailable under the statutes" and "inconsistent with Congress' carefully tailored scheme." *Id*. at 254-55 (citing *Smith*, 468 U.S. at 1012).

In FNHRA, Congress did just that—it provided a "more restrictive private remedy" in the form of a state administrative hearing process that provides for

individual relief only in kind. Respondent's demand for the "tangible benefits [of] damages, attorney's fees, and costs" would therefore circumvent the "more restrictive private remedy" that Congress judged sufficient.

Undaunted, Respondent urges that FNHRA's enforcement remedies are "of a fundamentally different sort" from those available under § 1983, and therefore "do not show an intent to displace § 1983." Resp. Br. at 40. In particular, she says, the remedies in FNHRA focus on "restoring the status quo and nothing more," whereas "§ 1983 provides redress for past wrongdoing," *ibid.*, which is just an oblique way of saying "damages." But under *Fitzgerald*, implied preclusion applies when Congress provides a "more restrictive private remedy," which necessarily means a remedy "of a different sort" than § 1983 and therefore excludes some "tangible benefits—such as damages" available under § 1983.

Respondent leaves little doubt that the availability of damages and fees helps explain her decision to sue under § 1983, and why she found the relief Mr. Talevski obtained under FNHRA insufficient. To preclude a § 1983 remedy, however, Congress is not required to provide the same remedy as § 1983; it need only provide some "*express*, private means of redress in the statute itself." *Fitzgerald*, 555 U.S. at 256. Thus, in *Sea Clammers*, the "elaborate enforcement provisions" that sufficed to preclude a § 1983 suit limited individuals to injunctive relief, while monetary penalties were payable only to the government. 453 U.S. at 14 & n.25. The similar form of private relief expressly provided in FNHRA should likewise suffice.

B. The Absence Of An Express Damages Remedy In FNHRA For Residents Of Privately Owned Facilities Confirms That Congress Did Not Intend Residents Of Publicly Owned Facilities To Have A § 1983 Remedy

FNHRA's requirements for nursing facilities—including the "transfer" and "chemical restraint" "rights" at issue here—apply without distinction both to public- and privately-owned facilities. See 42 U.S.C. § 1396r(b)-(d). But for purposes of this dispute there is one critical legal difference between the two. Public facilities (such as those run by Petitioners) are potentially subject to § 1983 suits by their residents (such as Respondent), while private facilities are not.

More than 90% of nursing facilities in this country are privately owned. See Gov't Br. at 30 (collecting sources). This is true today, and it was true when Congress enacted FNHRA. *Ibid.* Yet the "carefully tailored" and "elaborate enforcement provisions" that Congress provided in FNHRA do not distinguish between public and private nursing facilities. Nor did Congress provide an express damages remedy for residents of private nursing facilities that mirrors § 1983. The absence of such an express damages remedy strongly indicates that Congress intended that the statutory enforcement mechanisms in § 1396r were sufficient to protect both the great majority of residents who live in private facilities and the few who live in public facilities.

To accept Respondent's contrary position would require the Court to infer that Congress intended that (i) the statutory enforcement scheme it expressly provided in § 1396r was sufficient to regulate the

90+% of nursing facilities that are privately owned, but (ii) the less-than-10% of nursing facilities that are government-owned should be subject to the statutory enforcement scheme (including civil money penalties of up to $10,000 per day) *and also* should be subject to potentially unlimited damages actions by their residents. There is no evidence, and Respondent provides none, that Congress intended to create such a bifurcated and illogical enforcement scheme.

C. FNHRA Does Not "Unambiguously Confer" The Two "Rights" Respondent Asserts

In addition to flunking the *Sea Clammers* test, FNHRA fails to meet the *Gonzaga* requirement that individually enforceable rights be "unambiguously conferred," 536 U.S. at 283. True, the word "right" is sprinkled in parts of the statute. Resp. Br. at 33-36. But a statute will not be read to create rights enforceable under § 1983 merely because it "speaks in terms of 'rights.'" *Pennhurst*, 451 U.S. at 18 (statute including "bill of rights" did not create rights cognizable under § 1983); see *Gonzaga*, 536 U.S. at 289 n.7 (rejecting contention that "any reference to 'rights'" made statute enforceable under § 1983).

Instead, "[i]n expounding a statute, we must not be guided by a single sentence or member of a sentence, but look to the provisions of *the whole law*, and to its object and policy," *Pennhurst*, 451 U.S. at 18 (emphasis added), as well as "the text and structure," to find an "indication that Congress intend[ed] to create new individual rights," *Gonzaga*, 536 U.S. at 286. Only an "unambiguously conferred right" and an "*unmistakable focus* on the benefitted class" will "support a cause of action under § 1983." *Id.* at 283-

84. Conversely, "[s]tatutes that focus on the person regulated rather than the individuals protected create 'no implication of an intent to confer rights on a particular class of persons.'" *Alexander* v. *Sandoval*, 532 U.S. 275, 289 (2001).

FNHRA, as relevant to this case, is codified at 42 U.S.C. § 1396r ("Requirements for nursing facilities"). In view of "the whole law," the statute's evident "object and policy" is to provide for the administration and regulation of nursing facilities, see *id*. § 1396r(b)-(d), (g)-(h), and for the respective supervisory roles of the State and the Secretary, see *id.* § 1396r(e), (f). Within the statute, three lengthy subsections impose scores of regulatory requirements on nursing facilities: "Requirements relating to provision of services," § 1396r(b); "Requirements relating to administration and other matters," § 1396r(d); and sandwiched between those two, "Requirements relating to residents' rights," § 1396r(c).

Within the structure of the statute, the requirements for nursing facilities relating to "residents' rights" are generally not treated separately from the requirements for nursing facilities related to "provision of services" and "administration." Instead, throughout the statute, the three sets of nursing facility requirements are repeatedly treated as a unitary whole, with the statute referring 21 times to the consequences of a nursing facility's compliance (or lack thereof) with "subsections (b), (c), and (d)."

In context, the purported "rights" provisions that Respondent invokes are simply two of a myriad of administrative protocols to be followed by regulated nursing facilities in various routine aspects of

resident care and handling. The first provides that a "nursing facility must protect and promote … [t]he right to be free from … physical or chemical restraints" except in certain enumerated circumstances. 42 U.S.C. § 1396r(c)(1)(A)(ii). But an obligation to "protect and promote" a right speaks to the systemwide duties of the facility, not to an "unambiguously impose[d]" individual right. See *Blessing*, 520 U.S. at 341; *Suter*, 503 U.S. at 363 (requirement that States take "reasonable efforts" to reunify families did not confer individual right to family reunification).

The second, *which does not even use the word "right,"* provides that a "nursing facility must permit each resident to remain in the facility and must not transfer or discharge the resident from the facility" unless one of six enumerated health or safety conditions has been met, and then specifies who must sign the transfer paperwork under the various conditions. 42 U.S.C. § 1396r(c)(2)(A). Both provisions invoked by Respondent "focus on the person regulated [the nursing facility] rather than the individuals protected" and thus "create no implication of an intent to confer rights on" the class of residents. *Sandoval*, 532 U.S. at 289.

D. The Savings Clause Does Not Preserve A § 1983 Remedy

Last, Respondent contends that the FNHRA "savings clause" makes "absolutely clear" Congress intended to create individual rights enforceable under § 1983. Resp. Br. at 40. The clause states: "The remedies provided under this subsection are in addition to those otherwise available under State or Federal law." 42 U.S.C. § 1396r(h)(8). Respondent

argues that § 1983 is a remedy under federal law, so the "remedies … otherwise available under … Federal law" must include § 1983. Resp. Br. at 40-41.

But that simply assumes the conclusion to be proven—that relief *is* available under § 1983 for the violation of purported rights under FNHRA—which Respondent has not shown. Moreover, this Court has squarely held that "[s]aving clauses attached to the statutes at issue" do not "'preserve' a § 1983 action" because they refer to *other* statutes or common law, not to a suit for redress of a violation of the same statute in which they appear. *Rancho Palos Verdes*, 544 U.S. at 126-27 (citing *Sea Clammers*, 453 U.S. at 20-21 & n.13). Nor does the savings clause affect the conclusion that Congress precluded a § 1983 remedy by providing a "more restrictive private remedy" in the statute, see *id.* at 121, as Congress did here.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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October 17, 2022