No. 21-806

In the

Supreme Court of the United States

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

Petitioners,

v.

GORGI TALEVSKI, BY HIS NEXT FRIEND IVANKA TALEVSKI,

Respondent.

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

BRIEF OF THE NATIONAL CONFERENCE OF STATE LEGISLATURES, *ET AL.*, AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

Lisa Soronen
State and Local
Legal Center
123 N. Capitol St. N.W.
Washington, DC 20001
(202) 434-4845
lsoronen@sso.org

Christopher J. Wright
Counsel of Record
John R. Grimm
HARRIS, WILTSHIRE & GRANNIS LLP
1919 M Street N.W.,
Eighth Floor
Washington, DC 20036
(202) 730-1300
cwright@hwglaw.com

Counsel for Amici Curiae

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BRIEF OF THE NATIONAL CONFERENCE OF STATE LEGISLATURES, THE COUNCIL OF STATE GOVERNMENTS, THE NATIONAL ASSOCIATION OF COUNTIES, THE NATIONAL LEAGUE OF CITIES, THE UNITED STATES CONFERENCE OF MAYORS, THE INTERNATIONAL CITY/COUNTY MANAGEMENT ASSOCIATION, THE INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION, AND THE GOVERNMENT FINANCE OFFICERS ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

INTEREST OF AMICI CURIAE[1]

The National Conference of State Legislatures (NCSL) is a bipartisan organization that serves the legislators and staffs of the Nation's 50 States, its Commonwealths, and Territories. NCSL provides research, technical assistance, and opportunities for policymakers to exchange ideas on pressing issues. NCSL advocates for the interests of State governments before Congress and federal agencies, and regularly submits amicus briefs in cases, like this one, that raise issues of vital State concern.

The Council of State Governments ("CSG") is the Nation's only organization serving all three branches of State government. CSG is a region-based forum that fosters the exchange of insights and ideas to help State officials shape public policy. This offers unparalleled regional, national, and international opportunities to network, develop leaders, collaborate, and create problem-solving partnerships.

The National Association of Counties ("NACo") is the only national association that represents county governments in the United States. Founded in 1935, NACo serves as an advocate for county governments and works to ensure that counties have the resources,

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[1] Pursuant to Sup. Ct. R. 37.3(a), *amici* certify that all parties have consented to the filing of this brief. Pursuant to Sup. Ct. R. 37.6, amici certify that no counsel for any party authored this brief in whole or in part, no party or party's counsel made a monetary contribution to fund its preparation or submission, and no person other than amici or their counsel made such a monetary contribution.

skills, and support they need to serve and lead their communities.

The National League of Cities ("NLC") is the oldest and largest organization representing municipal governments throughout the United States. Its mission is to strengthen and promote cities as centers of opportunity, leadership, and governance. Working in partnership with forty-nine State municipal leagues, NLC serves as a national advocate for more than 19,000 cities and towns, representing more than 218 million Americans.

The U.S. Conference of Mayors ("USCM"), founded in 1932, is the official nonpartisan organization of all United States cities with a population of more than 30,000 people, which includes over 1,400 cities at present. Each city is represented in the USCM by its chief elected official, the mayor.

The International City/County Management Association ("ICMA") is a nonprofit professional and educational organization of over 9,000 appointed chief executives and assistants serving cities, counties, towns, and regional entities. ICMA's mission is to create excellence in local governance by advocating and developing the professional management of local governments throughout the world.

The International Municipal Lawyers Association ("IMLA") is a non-profit professional organization of over 2,500 local government attorneys. Since 1935, IMLA has served as a national, and now international, resource for legal information and cooperation on municipal legal matters. Its mission is

to advance the development of just and effective municipal law and to advocate for the legal interests of local governments. It does so in part through extensive amicus briefing before the U.S. Supreme Court, the U.S. Courts of Appeals, and State supreme and appellate courts.

The Government Finance Officers Association ("GFOA") is the professional association of State, provincial, and local finance officers in the United States and Canada. The GFOA has served the public finance profession since 1906 and continues to provide leadership to government finance professionals through research, education, and the identification and promotion of best practices. Its more than 19,000 members are dedicated to the sound management of government financial resources.

SUMMARY OF THE ARGUMENT

I. The Court should hold that the Spending Clause does not permit implied private rights of action, and that only clear congressional intent can create a private right of action under Spending-Clause statutes. This Court has held that federal grants to States may only be accompanied by *unambiguous* conditions. But judicially created implied rights of action expose States to conditions unknown at the time they agreed to accept federal dollars.

This is a serious problem, because a substantial portion of States' revenue comes from federal grants, so the possibility of future private actions turns every federal dollar States accept into a litigation risk down the road. Faced with this prospect, some States may choose simply to opt out of receiving federal funds. That would harm States—which use federal money for important purposes—as well as the federal government, which gives States money to promote important policy goals.

II. State and local governments are acutely affected by judicial creation of private actions under FNHRA, because it affects their ability to operate high-quality nursing homes. Counties and States operate hundreds of nursing homes around the country, and the decision below subjects them to potential liability—above what State malpractice law permits, and outside of any liability caps—when patients dispute the quality of care they receive.

The consequences of such a regime are serious for States and local governments, but even more

concerning for patients. Under the Seventh Circuit's holding, many local governments may simply decide it is not worth the increased risk of liability, and choose to get out of the nursing-home business. That would not be good for patients: As numerous studies confirm, county-owned nursing homes are widely regarded as providing better patient outcomes than private alternatives, including private-equity-owned facilities. The Court should carefully examine the significant down-stream consequences the Seventh Circuit's decision could have on patients.

Even if the lower court's ruling did not force local governments out of the market, the unbounded new liability they could face would seriously hobble their ability to care for patients. That consequence would be all the more severe because nursing homes around the country have suffered enormous losses of resources as a result of the COVID-19 pandemic. This is not the right moment to impose further costs on nursing homes.

III. The decision below also interferes with States' ability to craft their own legal remedies for medical malpractice, by superimposing an unnecessary, uniform federal cause of action. Every State in the country has medical malpractice laws that keep the doors to the courthouse open for litigants, and federalism concerns counsel against allowing private FNRHRA actions as a means of circumventing State-law malpractice claims.

The choice of 42 U.S.C. § 1983 as the vehicle for bringing private FNHRA actions is particularly ironic here. Section 1983 was enacted as a means of

safeguarding federal rights that States refused to enforce. But in the medical-malpractice context, patient rights are well protected by State law. Indeed, under this Court's precedent, the comprehensive, yet limited, statutory scheme Congress created in FNHRA supports the conclusion that Congress did not intend to create a private right of action enforceable through Section 1983.

ARGUMENT

I. THE COURT SHOULD HOLD THAT RIGHTS OF ACTION SHOULD NOT BE IMPLIED UNDER SPENDING-CLAUSE STATUTES.

The Court should hold that Spending-Clause statutes do not confer a private right of action except where Congress expressly provides that they do. The costs and uncertainty implied rights of action cause States and local governments are significant. Moreover, Spending-Clause statutes represent a partnership between the federal and State governments to promote important objectives. If States find it untenable to continue that partnership—because it carries too many uncertainties—not only States but the federal government will be harmed. Yet given the latent risk of unexpected litigation associated with every federal dollar States accept, there is a real potential that implied private actions under Spending-Clause statutes will undermine the policies those statutes were designed to promote.

States rely heavily on federal grants to carry out both State and federal objectives. In fiscal year 2019 alone, States received about one-third of their revenue—some $750 billion—in the form of federal grants. Congressional Research Service, CRS R40638 *Federal Grants to State and Local Governments: A Historical Perspective on Contemporary Issues* (May 22, 2019). When it comes to health care and public assistance, more than half of State funding comes from federal grants. *Id.* This Court has long recognized that, when States agree to accept federal dollars, the federal government must make any conditions attached to those dollars *unambiguous*: Since a State accepting federal funds is "much in the nature of a contract," and since "[t]here can * * * be no knowing acceptance if a State is unaware of the conditions" of accepting that money, "if Congress intends to impose a condition on the grant of federal moneys, it must do so unambiguously." *See Pennhurst State School and Hosp.* v. *Halderman*, 451 U.S. 1, 17 (1981). The possibility of judge-made private rights of action subverts this clear directive, threatening States with the risk of new forms of civil liability they did not know about when they accepted federal monies.

This case involves a private action under the Medicaid statute—a frequent source of Spending-Clause litigation against the States. *See* Br. of Amici Curiae Indiana and Sixteen Other States in Supp. of the Pet'n at 11–13. But, as Indiana and other State *amici* point out, courts have found implied private rights of action in a panoply of other statutes including the Social Security Act, the National Labor

Relations Act, the Housing Act, and the Low-Income Home Energy Assistance Act. *Id.* at 5–7, 13–14.

With a third of their revenue a potential source of civil liability, and an inability to predict where that liability may come from next, States essentially operate under a sword of Damocles. Of course, all of this is diametrically at odds with the clarity required by this Court's decision in *Pennhurst*. And the consequences of this lack of clarity are significant: Faced with an amorphous threat of litigation, some States may simply choose not to accept federal funds in the future. *See, e.g.*, Suzy Khimm, *Will States Really Turn Down Federal Money? They've Done it Before*, Washington Post (Jun. 29, 2012), *available at* https://www.washingtonpost.com/news/wonk/wp/2012/06/29/will-states-really-turn-down-federal-money-theyve-done-it-before/.

This case is a perfect example of that risk: If local governments find it is no longer tenable to maintain nursing home facilities like the one involved here, patients will ultimately bear that cost in the form of inferior care.

II. THE SEVENTH CIRCUIT'S DECISION RISKS HARMING PATIENTS AND STATE AND LOCAL GOVERNMENTS ALIKE.

State and local governments are among the most important providers of nursing home facilities in the country. Counties alone own and operate 449 nursing homes, and directly support 758 nationwide. *See,* National Association of Counties, *Nursing Homes &*

COVID-19, NaCO.org, (Aug. 3, 2021), https://www.naco.org/resources/featured/nursing-homes-covid-19. The data roundly confirms that county-owned facilities often offer the best patient outcomes. But creating a private FNHRA action under Section 1983 would create a disincentive for States and local governments to continue operating nursing homes, and the resulting privatization of facilities would lead to poorer patient care.

If States and local governments are driven from the nursing home market, it is widely recognized that the alternative—private nursing homes, and, increasingly, nursing homes owned by private equity firms—do not offer patients the same level of care. Earlier this year, a White House briefing laid the situation out starkly: nursing homes owned by private equity are 11.1% more likely to have a preventable emergency room visit and 8.7% more likely to experience a preventable hospitalization. White House Statements and Releases, *Fact Sheet: Protecting Seniors by Improving Safety and Quality of Care in the Nation's Nursing Homes* (February 28, 2022). Worse, one study showed that "private equity ownership increased excess mortality for residents by 10%, increased prescription of antipsychotic drugs for residents by 50%, decreased hours of frontline nursing staff by 3%, and increased taxpayer spending per resident by 11%." *Id.* And one study of a Pennsylvania nursing home showed that, after being privatized, patients received nearly 30 minutes less daily nurse care than the national average. Center for Medicare Advocacy, *Privatization of County-Owned Nursing Facilities is Not Good for Residents, Staff, and States*.

The lower-quality care offered by private equity nursing homes has particularly serious consequences in the COVID-19 epidemic. COVID infection and death rates in private-equity nursing homes were 30% and 40% higher than statewide averages. *Fact Sheet: Protecting Seniors by Improving Safety and Quality of Care in the Nation's Nursing Homes.* And while private-equity nursing homes account for about 15% of nursing home residents, in the early months of the pandemic they saw 20 percent of resident COVID cases and deaths. Americans for Financial Reform Education Fund, *The Deadly Combination of Private Equity and Nursing Homes During a Pandemic: New Jersey Case Study of Coronavirus at Private Equity Nursing Homes* (Aug. 2020).

Plainly, State and county governments play an indispensable role in offering high-quality nursing home care. But that role could be seriously compromised if State and county governments have to worry about un-capped liability whenever a patient experiences a negative outcome. Crucially, the point is not that patients should be unable to pursue relief when a nursing home fails to provide reasonable care. They can and should avail themselves of all of the appropriate State malpractice laws. But those State-law medical malpractice regimes are balanced to protect both patients and providers. And *States* determine how much of their own sovereign immunity to waive. Moreover, Congress added helpful remedies—a grievance process for decisions on medication and an appeals process on transfers—both of which provided relief to Mr. Talevski. Petition App. 79(a) (medication); 98a (transfers).

But, as Petitioners point out, the decision below overrides States' malpractice policy and wipes away State legislatures' careful weighing of competing interests. Petition 31. And in the case of State-owned nursing homes, States would essentially be forced to waive *all* sovereign immunity and subject themselves to un-capped damages simply by virtue of their ownership of nursing homes. *Id.* It is not hard to imagine States or local governments simply getting out of the nursing home business altogether, rather than risk exposure to this kind of lawsuit.

Even if the threat of these lawsuits does not drive States and local governments out of market, the financial toll of private FNHRA litigation pursuant to Section 1983 risks significant harm. The COVID pandemic has left nursing homes particularly financially vulnerable. From January 2020 to January 2021, nursing home occupancy nationwide dropped 16.5%. *See* American Health care Association, *Protect Access to Long Term Care for Vulnerable Residents*. Experts project that between the beginning of 2020 and the end of 2022 nursing homes will lose $34 billion in revenue—a decline of 24%, leaving "thousands of long term care facilities . . . on the verge of collapse[.]" *Id.* Now is not the time to open nursing homes to additional considerable financial risk that jeopardizes their ability to provide patient care. Yet the decision below will do exactly that.

III. IMPLYING PRIVATE RIGHTS OF ACTION UNDER FNHRA WOULD UNNECESSARILY INTERFERE WITH STATE MALPRACTICE LAW.

Petitioners rightly point out that the Seventh Circuit's decision "federalized medical malpractice law," "sweeping aside carefully chosen state policies in favor of a one-size-fits-all [regime]." Pet'n 9. The infringement on State and local governments' ability to enact policies that meet the needs of their communities, while balancing competing interests, is of critical importance to *amici*, and it warrants this Court's careful attention.

As this Court has recognized, "[i]mpermissible interference with state sovereignty is not within the enumerated powers of the National Government," and "action that exceeds the National Government's enumerated powers undermines the sovereign interests of States." *Bond* v. *United States*, 564 U.S. 211, 225 (2011). Multiple lower courts have recognized that "[m]edical malpractice is one traditional field of state regulation," which, in the analogous context of ERISA litigation, "Congress did not intend to preempt." *Bui* v. *Am. Telephone & Telegraph Co. Inc.*, 310 F.3d 1143, 1147 (9th Cir. 2002) (joining Third, Fifth, and Tenth Circuits in holding that ERISA preemption clause does not preempt State-law actions "involving allegations of negligence in the provision of medical care"). Yet, despite the broad recognition that medical malpractice law is a matter of State concern, the decision below effectively supersedes State law by superimposing a federal cause of action for any

malpractice committed in a facility receiving Medicaid funds.

By creating a *de facto* federalized medical malpractice regime, the Seventh Circuit essentially allows plaintiffs to circumvent State-law remedies, in effect rendering those remedies at best optional, at worst, a dead letter. Moreover, the decision below turns Section 1983 on its head, by creating a federal cause of action to vindicate an interest that is well-protected under State law. The purpose of Section 1983 was to provide relief where State actors refused to enforce federal civil rights. *See, e.g.*, Cong. Globe, 42d Cong., 1st Sess., App. at 78 (debate on H.R. 320, 42d Cong. (1871)); *see also Mitchum* v. *Foster*, 407 U.S. 225, 240 (1972) (citing legislative history of Section 1983 indicating congressional desire to secure rights States were unwilling to protect). But in the case of medical malpractice, States provide ample legal protections, and patients' right to adequate medical care is firmly ensconced in State law. *See generally* Nat'l Conference of State Legislatures, *Medical Liabilty/Medical Malpractice Laws* (Jun. 13, 2021), *available at https://www.ncsl.org/research/financial-services-and-commerce/medical-liability-medical-malpractice-laws.aspx* (cataloguing State-by-State civil remedies for medical malpractice). There is no need for remedial federal litigation to fill a gap left by State inaction here.

Indeed, the comprehensive but limited remedial scheme Congress enacted strongly counsels against creating a new remedy under Section 1983. Most importantly, Congress carefully preserved State law

remedies, including malpractice remedies, and did so without disturbing the various limitations States have adopted. 42 U.S.C. § 1396r(h)(8). Congress added a grievance right and an appeal right, limited to certain types of claims. *Id*. at § 1396r(c)(1)(A)(vi) (grievance procedure for over-medication claims); § 1396r(e)(3) (appeal right to challenge transfers). And Congress further protected patients by granting states extensive power to take action against nursing homes that fail to meet federal standards. *Id*. § 1396r(h)(2)(A)(i-iv). Creating a new Section 1983 cause of action would undermine that comprehensive but limited approach. As this Court explained in *Blessing* v. *Freestone*, 520 U.S. 329, 341 (1997), Congress may "forbid[] recourse to § 1983 . . . by creating a comprehensive enforcement scheme that is incompatible with individual enforcement under § 1983." This precisely applies to this case.

States and local governments have an undeniable interest in enacting the policies that best protect their communities, and there is no reason to doubt that State laws protect nursing-home patients from harmful or inadequate medical care. The Court should reverse the decision below, and ensure that receipt of federal aid does not require States to sacrifice their autonomy in an area of exclusively State concern.

CONCLUSION

The Court should reverse the decision of the Seventh Circuit.

Respectfully submitted,

Lisa Soronen
State and Local Legal Center
123 N. Capitol St. N.W.
Washington, DC 20001
(202) 434-4845
lsoronen@sso.org

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Christopher J. Wright
Counsel of Record
John R. Grimm
HARRIS, WILTSHIRE & GRANNIS LLP
1919 M Street N.W., Eighth Floor
Washington, DC 20036
(202) 730-1300
cwright@hwglaw.com
Counsel for Amici Curiae