No. 21-806

IN THE

Supreme Court of the United States

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

v.

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

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

BRIEF OF FORMER MEMBERS OF CONGRESS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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QUESTIONS PRESENTED

1. Whether Spending Clause legislation can secure federal rights under § 1983.

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

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INTEREST OF *AMICI CURIAE*[1]

Amici curiae are a bipartisan group of Former Members of the U.S. Senate and House of Representatives, all of whom have devoted varying years of service to the United States as members of Congress. As part of their service in Congress, *amici* have developed an important and unique perspective on the role of 42 U.S.C. § 1983, arguably the most important civil rights statute in the history of the United States.

Whether through appropriations, oversight, or other activities, *Amici* as former members of Congress have a unique and important perspective. The Former Members have a substantial amount of experience with legislation relating to the Spending Clause and to individual rights pursuant to 42 U.S.C. § 1983. The present case identifies issues that are of extreme importance to how the intent of Congress, through duly enacted legislation, is carried out and how individual federal rights are duly enforced pursuant to § 1983 claims. Moreover, the present case addresses rights and remedies enacted through the Federal Nursing Home Reform Act ("FNHRA").

Of note, former Secretary of Defense William S. Cohen joins this brief to emphasize his particular experience with the issues presented, when he was a member of Congress, first as a Representative of Maine and later a Senator from Maine. Secretary Cohen was an original member of the House Select Committee on Aging

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[1] Pursuant to Supreme Court Rule 37.3, counsel of record for all parties consented to the filing of this brief through their respective letters of blanket consent filed with the Court. Pursuant to Supreme Court Rule 37.6, *Amici curiae* state that no counsel for any party authored this brief in whole or in part and that no entity or person, aside from amicus curiae, its members, and its counsel, made any monetary contribution toward the preparation or submission of this brief.

when it was established in 1973 (serving under the Chairman, Congressman Claude Pepper of Florida). Secretary Cohen was also a member and Chairman of the Senate Aging Committee. As a Congressman, he introduced legislation over multiple years that would codify a patient's bill of rights. Through those years, there was always a focus on ensuring that such rights for patients and nursing home residents could be protected through judicial action. In *Amici*'s view, and particularly in the view of Secretary Cohen, Congress ultimately enacted FNHRA to preserve access to § 1983 to enforce individual rights.

SUMMARY OF THE ARGUMENT

This case involves two important issues that raise concerns for *Amici*. First is the issue of whether Spending Clause legislation can secure federal rights under § 1983. *Amici* believe that this important issue must be answered in the affirmative. Congress has relied on this understanding of the law since at least the last forty years. A step backward on this issue would put at risk the ability of millions of Americans who rely on § 1983 to protect themselves when state officials violate their federal rights.

The second issue concerns whether the Federal Nursing Home Reform Act's rights against chemical restraint and improper discharge and transfer are federal rights that § 1983 protects. Again, as Former Members of Congress, *Amici* see no reason why this Court should hold that such rights, granted through federal legislation, cannot be protected. It seems plain to *Amici* that the text, context, and purpose of FNHRA demonstrate that the individual rights against chemical restraint and wrongful discharge and transfer are federal rights that should be protected by § 1983.

ARGUMENT

I. Congress Has Understood That Section 1983 Suits May Be Based On Rights Established By Spending Clause Legislation

Section 1983 provides a cause of action for the deprivation of a federal right that is "secured by the Constitution and laws." 42 U.S.C. § 1983. The express cause of action necessarily exists for any right that is "secured by" statutes enacted pursuant to the Spending Clause. Congress has relied on this consistent understanding, and the Court should re-affirm this correct understanding in this case.

A. The Text of 42 U.S.C. § 1983 Allows Suits Based on a Right Established Under Spending Clause

Starting with the text of §1983, it is clear that the statute authorizes a suit against any person who, under color of state law, deprives another of "any rights, privileges, or immunities secured by the Constitution and laws." 42 U.S.C. § 1983. Relevant here is the meaning of "secured by the laws." That phrase has long been understood to mean "protected by law." *See, e.g.*, *Hague v. Comm. Indus. Org.*, 307 U.S. 496, 526–27 (1939) (opinion of Stone, J.) ("The argument that the phrase in the statute 'secured by the Constitution' refers to rights 'created,' rather than 'protected' by it, is not persuasive.").

To *Amici*, this case is perhaps a rare instance in which there is little doubt about what can be reasonably understood by § 1983's phrase "secured by the laws." As Respondent identifies, *see* Resp. Br. 20, this Court decided eighteen cases, between 1968 and 1980, involving the enforcement of § 1983 in the context of the Social Security Act, without any advancement of the argument now pressed by the Petitioner, namely that § 1983 excludes rights secured by the Spending Clause.

Moreover, this Court itself has rejected the argument that § 1983 does not apply to all federal laws that secure a federal right. *See Maine v. Thiboutot*, 448 U.S. 1, 2 (1980) (holding that "§ 1983 encompasses claims based on purely statutory violations of federal law" in a case arising under the Social Security Act); *Blessing v. Freestone*, 520 U.S. 329, 340 (1997) ("[A] plaintiff must assert the violation of a federal right, not merely a violation of federal law."); *Gonzaga Univ. v. Doe*, 536 U.S. 273 (2002) (explaining that "an unambiguously conferred right" will "support a cause of action brought under § 1983"). The arguments presented and rulings in those cases are consistent with *Amici*'s accepted understanding that legislation passed pursuant to the Spending Clause may protect a right that enables an individual to sue pursuant to § 1983. As former lawmakers, *Amici* see no basis in the text of § 1983 to differentiate between federal rights created pursuant to Spending Clause legislation versus other federal rights created by other federal legislation.

B. Congress Has Proposed and Passed Key Legislation that Relies on the Correct Interpretation of the Spending Clause

Beyond the text of § 1983, *Amici* note that Congress itself has relied on its understanding of § 1983 when passing key legislation. This Congressional reliance is a further reason to uphold the consistent interpretation that Spending Clause legislation can create federal rights that are enforceable through actions brought under § 1983.

Specifically, Congress passed the Cranston-Gonzalez National Affordable Housing Act in 1990. The Conference Report for that legislation specifically noted the committee's intent "that the rights created by" legislation would "be enforceable under 42 U.S.C. Section 1983." H.R. Rep. No. 101-922, at 420 (1990); *see also* 136

Cong. Rec. 35640 (1990). The legislation was enacted pursuant to the Spending Clause.

Congress applied this same understanding when passing the School-to-Work Opportunities Act of 1994. There, the legislative history again documents Congress's clear understanding that rights created under that Spending Clause-based legislation would be enforceable through § 1983. H.R. Rep. No. 103-480, at 64 (1994); *see also* 140 Cong. Rec. 8331 (1994).

Beyond those select examples, there have been several notable instances of Congressional ratification of this consistent understanding that § 1983 applies to rights set forth in Spending Clause laws. For instance, in 1994, Congress legislatively overruled part of the holding in *Suter v. Artist M.*, 503 U.S. 347, 350 (1992), in which the Court held that Title IV-E of the Social Security Act did not establish an enforceable right under § 1983. In response, Congress enacted 42 U.S.C. §§ 1320a-2, 1320a-10 to overrule *Suter*'s reasoning.

Another instance of Congressional ratification of the Court's interpretation of § 1983 occurred in 1980 when Congress enacted the Civil Rights of Institutionalized Persons Act ("CRIPA"). Congress passed CRIPA "to ensure that the United States Attorney General has 'legal standing to enforce existing constitutional rights and Federal statutory rights of institutionalized persons.'" H.R. Rep. No. 96-897, at 9 (1980) (Conf. Rep.). CRIPA uses nearly identical language as § 1983: "rights . . . secured by the . . . laws." With that nearly identical language, Congress understood that this phrasing granted authority to sue for a violation of a right established under CRIPA—legislation resting in part on the Spending Clause. *See* H.R. Rep. No. 95-1058, at 12 (1978). Thus, it would be odd to conclude now that Congress understood the "rights . . . secured by the . . .

laws" statutory phrase to have one meaning in CRIPA and another meaning in FNHRA.

C. *Stare Decisis*: Congress Can Amend the Law If It Disagrees with This Court's Consistent Interpretation of the Statute

Finally, the concept of *stare decisis* is particularly important in the present case. The well-accepted and decades-long interpretation of § 1983 should stand to respect the fundamental principle of the separation of powers and principles of institutional competence.

"*Stare decisis* 'promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process.'" *Gamble v. United States*, 139 S. Ct. 1960, 1969 (2019) (quoting *Payne v. Tenn.*, 501 U.S. 808, 827 (1991)). Indeed, "[o]verruling precedent is never a small matter." *Kimble v. Marvel Entm't, LLC*, 576 U.S. 446, 455 (2015). As this Court has repeatedly explained, "[a]dherence to precedent is 'a foundation stone of the rule of law." *Kisor v. Wilkie*, 139 S. Ct. 2400, 2422 (2019) (quoting *Mich. v. Bay Mills Indian Cmty.*, 572 U.S. 782, 798 (2014)).

With the issue presented in this case, the respect for *stare decisis* should be preserved. *Amici* see no compelling circumstances to inject unnecessary uncertainty into the law by overruling decades' worth of precedent. Just as Congress has relied on this reliable statutory precedent, the Court should likewise respect it in this case. After all, as the Court has reminded us on numerous occasions, "Congress remains free to alter what" the Court has done. *Patterson v. McLean Credit Union*, 491 U.S. 164, 172–73 (1989). Thus, if the Court now believes that its prior interpretation of § 1983 is wrong—namely, that § 1983 should not extend to legislation enacted pursuant to the Spending Clause—

then Congress should be the institution to make that fix. In the interest of precedential stability and respect for the separation of powers, the change should come from the legislature and not by overruling long-standing precedent.

II. Congress Enacted FNHRA With The Understanding That § 1983 Would Offer A Means To Enable Nursing Home Residents To Vindicate Their Individual Rights

The second issue in this case is whether, under FNHRA, a nursing-home resident can enforce his or her rights against chemical restraint and involuntary discharge and transfer when those rights are violated by a government nursing home. Again, to *Amici*, the answer to the question seems plain and self-evident. FNRHA established clear rights to protect residents of nursing homes, and Congress expected that at least some nursing home residents would be able to use § 1983 to protect themselves when a government nursing home violated those rights.

A. FNHRA Unquestionably Grants Individual Rights to Residents of Government Nursing Homes

Here, the question is whether FNHRA "unambiguously confer[red] upon the . . . beneficiaries [of FNHRA] a right to enforce the requirement" at issue. *See Suter*, 503 U.S. at 357. The answer, in *Amici*'s view, is again a resounding, "Yes."

Under FNHRA, nursing home residents are unambiguously granted rights to protect themselves. The rights-granting nature of FNHRA flows through the law. *See, e.g.*, 42 U.S.C. § 1396r(c). Nursing homes "must protect" the rights and "must not" violate the rights. *Id.* §§ 1396r(c)(1)(A), 1396r(c)(2)(A). A nursing-home resident, not surprisingly, must be informed of his or her rights, orally and in writing, when the person is admitted

to the home and upon request. *Id.* § 1396r(c)(1)(B)(i), (ii); *see also id.* § 1396r ("Requirements relating to residents' rights.").

A straightforward consideration of the nature of the individual rights granted under FNHRA confirms that Congress must have intended that the rights could be protected and enforced under § 1983. The rights protect some of the most basic liberties than any individual should enjoy. One of the "specified rights" is "[t]he right to be free from physical or mental abuse, corporal punishment, involuntary seclusion, and any physical or chemical restraints imposed for purposes of discipline or convenience and not required to treat the resident's medical symptoms." 42 U.S.C. §§ 1395i-3(c)(1)(A)(ii), 1396r(c)(1)(A)(ii). Another right provides that a nursing home "must permit each resident to remain in the facility and must not transfer or discharge the resident from the facility," except for specified reasons, such as protecting the resident's welfare. *Id.* §§ 1395i-3(c)(2)(A), 1396r(c)(2)(A). As is self-evident, these rights go to the very core of an individual's autonomy and physical safety.

In short, as Former Members of Congress, *Amici* would be very surprised if any court could reasonably conclude that FNHRA did not grant enforceable individual rights to nursing home residents. Passing a law that protects nursing home residents is quite likely the least that the Nation's lawmakers can do for our elder citizens.

B. Congress Understood that § 1983 Would Be a Mechanism by Which a Nursing Home Resident Could Protect His or Her FNHRA Rights

The final question, then, is whether the individual rights under FNHRA are enforceable against government nursing homes in actions brought under § 1983. *Amici* see no strong argument why a nursing

home resident should not be permitted to enforce his or her rights in a § 1983 action when a government nursing home has violated such critical and important individual rights that protect the person's body autonomy.

With the context of § 1983 applying to Spending Clause legislation, the default understanding of Congress's intent is that FNHRA rights must have been enforceable through a private suit under § 1983. If Congress wanted to exclude FNHRA rights from § 1983 actions, it could have easily made that clear in the legislation.

In contrast, Congress included a savings clause that suggests an intent to ensure enforceable rights. The savings clause reads: "The remedies provided under this subsection are in addition to those otherwise available under State or Federal law and shall not be construed as limiting such other remedies, including any remedy available to an individual at common law." 42 U.S.C. § 1396r(h)(8). This savings clause is another of several indicia of Congress's intent that FNHRA's individual rights can be vindicated through § 1983 actions when a government nursing home violated those rights.

Finally, Petitioner and the Government argue that the remedies offered by FNHRA—such as a right to voice grievances, 42 U.S.C. § 1396r(c)(1)(A)(iv)—are textual evidence about Congress's intent to exclude FNHRA rights from § 1983 enforcement actions. But *Amici* believe that such an argument reads too much into these administrative remedies, which appear intended to act as a mechanism to restore a nursing home into compliance with its regulatory obligations. As this Court has explained, however, "the existence of a state administrative remedy does not ordinarily foreclose resort to § 1983." *Wright v. City of Roanoke Redevelopment & Hous. Auth.*, 479 U.S. 418, 427–28 (1987).

In that sense, these administrative remedial measures offer little recompense to the individual nursing home resident who was wrongly subjected to chemical restraint while living in a government nursing home. These administrative remedies, in *Amici*'s view, cannot adequately protect the individual FNHRA rights. In view of Congress's understanding that § 1983 actions can be premised on rights established in Spending Clause legislation, and given that FNHRA establishes such fundamental individual rights that protect bodily autonomy of vulnerable nursing home residents, *Amici* firmly believe that those FNHRA rights can and should be enforced through a § 1983 action.

CONCLUSION

For the foregoing reasons, *Amici* Former Members of Congress respectfully submit that the judgment of the court of appeals should be affirmed.

Respectfully submitted,

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SEPTEMBER 2022

APPENDIX

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Representative of Georgia

Berman, Howard
Representative of California

Braley, Bruce
Representative of Iowa

Capps, Lois
Representative of California

Carnahan, Russ
Representative of Missouri

Carr, Robert
Representative of Michigan

Cohen, William S.
Senator of Maine
Representative of Maine

Coleman, Tom
Representative of Missouri

Costello, Jerry
Representative of Illinois

Critz, Mark
Representative of Pennsylvania

Davis, Lincoln
Representative of Tennessee

Dorgan, Byron L.
Senator from North Dakota
Representative of North Dakota

Gephardt, Dick
Representative of Missouri

Gilchrest, Wayne
Representative of Maryland

Halvorson Bush, Debbie
Representative of Illinois

Hanabusa, Colleen
Representative of Hawaii

Hodes, Paul
Representative of New Hampshire

McHugh, Matthew
Representative of New York

Kagen, Steve
Representative of Wisconsin

Kilroy, Mary Jo
Representative of Ohio

Klein, Ron
Representative of Florida

Kopetski, Mike
Representative of Oregon

Lampson, Nick
Representative of Texas

Leboutillier, John
Representative of New York

Levine, Mel
Representative of California

McDermott, James
Representative of Washington

Schneider, Claudine
Representative of Rhode Island

Schroeder, Patricia
Representative of Colorado

Schwartz, Alyson
Representative of Pennsylvania

Smith, Peter
Representative of Vermont

Stupak, Bart
Representative of Michigan

Tierney, John
Representative of Massachusetts

Waxman, Henry
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Wu, David
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