



Summary of Amicus Briefs Supporting Ivanka Talevski in *Health & Hospital Corporation of Marion County v. Talevski* (No. 21-806)

Prepared by Jane Perkins, Amanda Avery, and Erica Turret¹

Background: The Seventh Circuit Court of Appeals allowed Ms. Talevski to maintain her suit challenging the nursing facility's use of chemical/physical restraints on, and involuntary transfers of, her father (now deceased) as violating the federal Nursing Home Reform Act (NHRA). 6 F.4th 714 (7th Cir. 2021).

The Medicaid Act does not contain a provision authorizing beneficiaries to enforce it; however, § 1983 authorizes individuals to go to court when state action deprives them of rights under the Constitution and laws. Medicaid and other safety net laws have been enforced through § 1983 for decades.

On May 2, 2022, the Supreme Court granted the nursing facility's petition for certiorari. As phrased by the Petitioner, the questions presented are:

1. Whether, in light of compelling historical evidence to the contrary, the Court should reexamine its holding that Spending Clause legislation gives rise to privately enforceable rights under Section 1983.
2. Whether, assuming Spending Clause statutes ever give rise to private rights enforceable via Section 1983, NHRA's transfer and medication rules do so.

Briefing is underway. Most recently, *amicus curiae* ("friends of the court") filed briefs supporting Ms. Talevski. Twenty-five briefs were filed. They are summarized below.

¹ Erica Turret is a Jenner & Block Pro Bono Fellow at the National Health Law Program.

National Health Law Program and 42 Other Non-Profit Organizations: National Disability Rights Network, Alabama Disability Advocacy Program, Alaska Legal Services, William E. Morris Institute for Justice (Arizona), Legal Aid of Arkansas, Western Center on Law and Poverty (California), Disability Rights California, Colorado Center on Law and Policy, Disability Rights Connecticut, Community Legal Aid Society, Inc. (Delaware), Florida Health Justice Project, Atlanta Legal Aid Society, Idaho Legal Aid Services, Legal Council for Health Justice (Illinois), Indiana Justice Project, Kentucky Equal Justice Center, Massachusetts Law Reform Institute, Public Justice Center (Maryland), Disability Rights Maine, Center for Civil Justice (Michigan), Mid-Minnesota Legal Aid, Mississippi Center for Justice, Legal Services of Eastern Missouri, Nebraska Appleseed, New Hampshire Legal Assistance, Disability Rights New Jersey, New York Legal Assistance Group, Charlotte Center for Legal Advocacy (North Carolina), Legal Aid Society of Columbus (Ohio), Legal Aid Services of Oklahoma, Oregon Law Center, Community Legal Services of Philadelphia (Pennsylvania), Disability Rights Rhode Island, South Carolina Appleseed, Tennessee Justice Center, Disability Rights Texas, Disability Law Center (Utah), Disability Law Project at Vermont Legal Aid, Virginia Poverty Law Center, Legal Aid Justice Center (Virginia), Northwest Health Law Advocates (Washington), Mountain State Justice (West Virginia).

Counsel: Donald Verrilli, Counsel of Record (COR), Evelyn R. Danforth, Munger, Tolles & Olson, LLP; Jane Perkins, Sarah Somers, National Health Law Program

Subject Matter: Over 40 years ago, the Supreme Court held the text of § 1983 is a straightforward authorization of individual enforcement to secure “any rights” under the “Constitution and laws.” The plain language of the statute “leaves no room for judges to cherry-pick which laws or which rights fall within its reach.” Br. at 8. Moreover, in 1994, Congress enacted legislation expressly to state its intent that Social Security Act provisions are enforceable under § 1983. Br. at 23. As acknowledged by Justices Kavanaugh, Gorsuch, and Scalia, principles of statutory *stare decisis* apply with the greatest force in cases such as this one: Because Congress can revisit or discard the judicial interpretation, “the Court rarely if ever revisits its definitive interpretations of federal statutes.” Br. at 8. The Petitioner is asking the Court to depart from the text and apply common law contract principles that it says applied in the 1870s when § 1983 was enacted. However, the historical record does not support this argument to read § 1983 to mean something other than what it says.

Notable Quote: “Petitioners have not shouldered the heavy burden required to justify this kind of sharp break from settled statutory meaning.” Br. at 18. The Court “should not discard decades of precedent to stray from what Congress has written—particularly not on the back of

a highly uncertain historical record and in a context where statutory *stare decisis* has particular force.” Br. at 3.

3 briefs were filed by professors and scholars.

Contract Law and Legal History Professors (8 law school professors)

Counsel: Thomas G. Spranking (COR), Charles C. Bridge, Wilmer Cutler Pickering Hale and Dorr LLP

Subject Matter: Petitioner argues that spending clause enactments, such as Medicaid, should be excluded from private enforcement under § 1983 because these enactments are essentially contracts between the federal government and the states and that third parties could not enforce contracts at the time § 1983 was enacted in the 1870s. This brief uses historical sources to establish that, in the 1870s, American common law did recognize a third party beneficiary’s right to bring suit on a contract. It also points out that many of the secondary sources that Petitioners rely upon are from the 1880s or later—and thus are irrelevant to the state of the law when § 1983 was enacted, while the remaining secondary sources are quoted out of context or, unfortunately, simply misrepresented.

Health Policy Scholars (23 health policy scholars)

Counsel: Carolyn F. Corwin (COR), Virginia A. Williamson, Quyen T. Tru’o’ng, Emily A. Hooker, Covington & Burling LLP

Subject Matter: The brief traces the history of the Medicaid Act, enacted as an entitlement program and maintained as such by Congress against the backdrop of federal court enforcement supplementing federal agency compliance actions. States are well aware that program beneficiaries have a right of enforcement under § 1983, as that statute had been in place for nearly a century when the Medicaid program came into existence in 1965. Provisions of the Medicaid statute plainly establish individual rights. In 1994, Congress amended the Social Security Act, of which Medicaid is a part, expressly to recognize private enforcement.

Statutory Interpretation Scholars (4 legal scholars)

Counsel: Karla Gilbride (COR), Shelby Leighton, Public Justice

Subject Matter: The Court has recognized the right of individuals to enforce spending clause statutes through § 1983 for over 50 years. Statutory *stare decisis* compels the Court to adhere to that interpretation.

5 briefs were filed on behalf of affected population groups:

AARP, AARP Foundation, California Advocates for Nursing Home Reform, Center for Medicare Advocacy, Justice in Aging, Long Term Care Community Coalition, National Consumer Voice for Quality Long-Term Care.

Counsel: Maame Gyamfi (COR), William Alvadado, Kelly Bagby, AARP Foundation

Subject Matter: Nursing facility residents face high levels of abuse and poor care. Section 1983 enforcement is essential because the regulatory enforcement scheme contained in the NHRA is inadequate to protect them.

Notable Quote: "A recent systemic review of nursing facilities found that 33.4% of residents reported being psychologically abused, 14.1% physically abused, and 11.6% neglected." Br. at 16 (citation omitted).

American Cancer Society, American Cancer Society Cancer Action Network, American Diabetes Association, The AIDS Institute, Cystic Fibrosis Foundation, Epilepsy Foundation, Hemophilia Federation of America, Leukemia & Lymphoma Society, National Multiple Sclerosis Society, National Organization for Rare Disorders, National Patient Advocate Foundation, WomenHeart

Counsel: Thomas W. Curvin (COR), John H. Fleming, Thomas M. Byrne, Eversheds Sutherland (US) LLP; Mary Rouvelas, American Cancer Society Cancer Action Network.

Subject Matter: Research shows that “[h]aving access to Medicaid dramatically improves health incomes, particularly for persons with serious, life-threatening diseases, in many cases by providing specific rights to certain types of care.” Br. at 5. Section 1983 provides a well-established and appropriately limited means for enforcing rights to care under Medicaid. Medicaid beneficiaries are not merely third-party beneficiaries to a contract; restricting their access to courts under § 1983 would gut Medicaid enforcement and drastically reduce access to care.

Judge David L. Bazelon Center for Mental Health Law, American Association of People with Disabilities, The Arc of the U.S., Center for Public Representation, Compassion & Choices, Disability Rights Education & Defense Fund.

Counsel: Aaron M. Panner (COR), D. Chanslor Gallenstein, Ashle J. Holman, Caroline A. Schechinger, Kellogg, Hansen, Todd, Figel & Frederick PLLC; Ira A. Burnim, Brittany Vanneman, Judge David L. Bazelon Center for Mental Health Law

Subject Matter: This brief describes how Medicaid provides alternatives to institutionalization and effectuates the antidiscrimination protections guaranteed by the Rehabilitation Act (RA) and the Americans with Disabilities Act (ADA), which are indisputably enforceable through private causes of action. The interdependence between the Medicaid Act and antidiscrimination protections evidences congressional intent for both aspects of its disability-rights scheme to be privately enforceable.

Notable Quote: “When people with disabilities bring private suits to enforce Medicaid requirements, they effectively enforce the antidiscrimination provisions of the RA and the ADA.” Br. at 24.

Toby S. Edelman, Senior Policy Attorney, Center for Medicare Advocacy.

Counsel: Theodore A. Howard, Lukman Azees Wiley Rein LLP

Subject Matter: The legislative history of the NHRA evidences congressional intent that the Act be privately enforceable through § 1983.

National Center for Youth Law, Youth Law Center, National Center for Law & Economic Justice, A Better Childhood, Advokids, Alliance for Children’s Rights, Children’s Advocacy Institute, Education Law Center (PA), Equal Rights Advocates, Family Violence Appellate Project, Florida Legal Services, Greater Hartford Legal Aid, Juvenile Law Center, National Center on Adoption and Permanency, New Haven Legal Assistance Association, Shriver Center on Poverty Law, Southern Poverty Law Center.

Counsel: Constance Van Kley (COR), Rylee Sommers-Flanagan, Upper Seven Law; Gregory Bass, Saima Akhtar, National Center for Law & Economic Justice; Poonam Juneja, Brenda Star Adams, Brenda Shum, National Center for Youth Law; Erin Palacios, Rachel Murphy, Jennifer Pokempner, Youth Law Center

Subject Matter: Children depend upon programs funded through Spending Clause legislation to ensure access to necessary health care, food, and shelter. When it comes to children, agency intervention will likely come too late to redress injuries or to ensure future compliance before they age out of the system. Section 1983 enforcement is necessary to respond to deprivations of children’s rights, providing them a route to secure statutory rights designed to give them a chance to escape poverty and lead healthy, fulfilling lives.

4 briefs were filed by health care providers.

American Public Health Association, American College of Preventive Medicine, and 40 Deans, Chairs, and Public Health and Health Policy Scholars.

Counsel: Stephanie A. Webster (COR), Philip P. Ehrlich, Joshua Balk, John A. LeBlanc, Joanne J. Hyun, Ropes & Gray LLP

Subject Matter: Judicial oversight offers Medicaid beneficiaries a chance to present their cases and hold states accountable. Section 1983 provides a means for beneficiaries to obtain targeted relief while preventing interruptions in Medicaid eligibility and coverage. And even when Medicaid beneficiaries do not prevail on the merits of their claims, §1983 deters states from eliminating coverage.

California Medical Association

Counsel: Stacey M. Leyton (COR), Bronwen B. O'Herin, Altshuler Berzon LLP; Long X. Do, Kyle R. Brierly, Athene Law LLP

Subject Matter: In addition to beneficiaries, physicians and provider associations play an important enforcement role. Though the Supreme Court has refined the analysis for determining whether a federal law is privately enforceable, it has consistently recognized § 1983 as the proper vehicle for enforcement of such rights. Based on the Court's current enforcement test, lower courts are adept at identifying whether a provision of Medicaid secures an enforceable right. There is no reason to override that test.

Children's Health Care Providers and Advocates, Children's Hospital Association, American Academy of Pediatrics, Family Voices, First Focus on Children, Georgetown University Center for Children and Families, National Association of Pediatric Nurse Practitioners.

Counsel: Benjamin G. Shatz (COR), Julian Polaris, Manatt, Phelps & Phillips, LLP

Subject Matter: This brief outlines the history of Medicaid's Early and Periodic Screening, Diagnostic and Treatment (EPSDT) benefit for children and explains EPSDT's vital role in ensuring timely access to necessary care. The brief details how children and their families have utilized § 1983 in dozens of lawsuits to secure access to a wide range of necessary services. Weakening § 1983 would be inconsistent with legislative intent as to the enforceability of the EPSDT benefit and contravene Congress's goal of comprehensive health care coverage for children.

Notable Quote: "As a result of ever-expanding eligibility thresholds, Medicaid now covers more than four out of ten births and almost half of all children in America." Br. at 6 (citation omitted).

National Association of Community Health Centers, and 31 Primary Care Associations.

Counsel: Edward T. Waters (COR), Matthew Sidney Freedus, Phillip A. Escoriza, Rosie Dawn Griffin, Feldesman Tucker Leifer Fidell LLP

Subject Matter: Congress’s health center program legislation has been informed by § 1983 case law. Health centers’ experience enforcing their Medicaid payment rights provides ample evidence that “[l]ower courts have had little trouble applying this Court’s § 1983 precedents to health centers’ Medicaid rights consistently and predictably.” Br. 21 (citations omitted). The Court should affirm longstanding § 1983 jurisprudence to support reliance interests and avoid negating Congressional intent.

Notable Quote: “Five Circuit Courts of Appeal have determined that health centers may enforce Medicaid payment provisions through § 1983 actions. A sixth Circuit Court of Appeals permitted such a suit without discussing the issue. No Court of Appeal has held to the contrary.” Br. 21–22 (citations omitted).

3 briefs were filed by current and former federal officials.

Former HHS Officials (16 signatories with experience administering the Medicaid Act)
Counsel: Ishan K. Bhabha (COR), Samuel S. Ungar, Deanna E. Krokos, Aime J. Joo, Jenner & Block LLP; Stephen I. Vladeck

Subject Matter: HHS lacks the statutory authority and practical ability to enforce Medicaid beneficiaries’ rights without thwarting Medicaid’s other policy goals. HHS’s primary means for enforcement—the withholding of funds from noncompliant states—ultimately does not punish the state, but the very people the Medicaid Act is meant to benefit. This brief also discusses how eliminating private enforcement would lead to dire consequences in the context of the NHRA, where states like Indiana have weakened accountability because they own and lease the very nursing homes that they are supposed to regulate.

Notable Quote: “Indiana is essentially an adverse party with little incentive to stop siphoning funds away from nursing homes, let alone report or correct its own violations inuring to its own benefit.” Br. at 23–24.

Former Members of Congress (34 Bipartisan Signatories)

Counsel: Matthew J. Dowd (COR), Robert J. Scheffel, Dowd Scheffel PLLC

Subject Matter: The text of § 1983 allows enforcement of Spending Clause enactments. Congress has relied on this understanding when passing key legislation, including housing

and school-to-work laws, and has explicitly stated its intent that the Social Security Act is enforceable. Statutory *stare decisis* applies.

Members of Congress (Democratic Leadership and Committee Chairs)

Counsel: Erin E. Meyer, Anjali Srinivasan (COR), Max Alderman, Julia L. Greenberg, Keker, Van Nest & Peters LLP

Subject Matter: When drafting legislation, Congress has long relied on the Court's tradition of allowing private suits to enforce Spending Clause enactments. Congress drafted the NHRA with the expectation that private litigants could use § 1983 to bring suits to enforce the Act. A reversal of the Court's longstanding precedent would encroach on Congress's role to draft legislation and impede Congress's ability to oversee programs enacted through the Spending Clause.

3 briefs focus on Indiana, the originating state for the *Talevski* case:

Daniel L. Hatcher, Professor, University of Baltimore School of Law

Counsel: Robert J. Ward (COR), Douglas I. Koff, Frank W. Olander, Schulte Roth & Zabel LLP

Subject Matter: This brief explains how Indiana transformed virtually all of the State's nursing homes into government-owned facilities and then used those nursing homes "in an illusory scheme to maximize federal aid intended for Medicaid services and then divert some or all of the resulting funds to other uses [*e.g.*, construction of hospitals, clinics, and ambulance stations] thereby depriving Medicaid recipients like Respondent of the care to which they are entitled." Br. at 1, 9.

Notable Quote: "Indiana receives more supplemental Medicaid payments for their nursing homes—in total, *not* per capita—than any other state," Br. at 2 (emphasis in original), while "ranked ... 44th in the nation for overall quality of nursing home care," *id.* at 12.

Indiana Disability Rights

Counsel: Melissa L. Keyes, Thomas E. Crishon, Emily A. Munson (COR), Indiana Disability Rights

Subject Matter: The brief provides examples of lawsuits that Indiana residents have brought under § 1983 to enforce their rights under Spending Clause legislation including Medicaid and SNAP. The brief also discusses the unique harms Indiana nursing home residents face due to local government nursing facility owners' manipulation of Medicaid funds. Neither administrative enforcement mechanisms nor medical malpractice actions can remedy the rights violations Hoosiers experience.

Notable Quote: "ALJs presiding over FNHRA hearings generally lack the authority to address systemic rights violations. Each case is limited to a single petitioner's circumstances; there is no opportunity to recognize a class of nursing facility residents through administrative hearing procedures." Br. at 14.

Indiana Trial Lawyers Association

Counsel: Ashley N. Hadler, Garau Germano, P.C.

Subject Matter: Most of Indiana's nursing homes are publicly owned, and they are manipulating the federal Medicaid payment system to obtain windfalls. Determining that nursing home residents do not have access to § 1983 to enforce the NHRA would leave them without a remedy when facilities violate the Act. Other avenues for relief (*e.g.*, malpractice suits) have procedural obstacles, and residents should be able to rely on the general rule that plaintiffs may choose their cause of action and pursue claims concurrently.

6 briefs were filed by advocates and advocacy organizations.

Constitutional Accountability Center, American Civil Liberties Union Foundation, ACLU of Indiana

Counsel: Elizabeth B. Wydra, Brianne J. Gorod (COR), Miriam Becker-Cohen, Constitutional Accountability Center; David D. Cole, ACLU Foundation; Kenneth J. Falk, ACLU of Indiana

Subject Matter: The brief focuses on § 1983's expansive language and the Court's decisions that have given that expansive language its intended effect. Congress enacted § 1983 with the backdrop of the continued oppression of African Americans in the South in mind, reflecting its intent to give the provision a broad scope and effect. The brief discusses the limits of the contract analogy.

Notable Quote: “Given Section 1983’s drafters’ focus on protecting deeply personal liberties like the right to be free from unwarranted intrusions on one’s person and body, it would be especially problematic to exempt from that statute’s enforcement a broad class of laws that in many cases—as here—explicitly create analogous rights.” Br. at 13.

Georgia Advocacy Office, Emory Law School Disabled Law Students Association

Counsel: Paul Koster, Emory Law School Supreme Court Advocacy Program

Subject Matter: Congress intended for nursing facility residents to have the ability to sue for NHRA violations as part of an overall mechanism to prevent abuse of this population. The brief describes how common abuse is among nursing facility residents and the way in which administrative enforcement alone is insufficient to prevent this abuse from occurring.

Institute for Justice

Counsel: Brian A. Morris, Institute for Justice

Subject Matter: This brief focuses on the original clause in § 1983 providing that the statute would hold state officials liable “any such law, statute, ordinance, regulation, custom, or usage of the State to the contrary notwithstanding.” This text demonstrates that Congress chose to abrogate common-law principles when it enacted § 1983, and the clause’s later omission in the Revised Statutes of 1874 does not alter this decision.

Pennsylvania Association for Justice, American Association for Justice

Counsel: Robert F. Daley (COR), Jacob M. Landau, Robert Peirce & Associates, P.C.; Margaret M. Cooney, Lupetin & Unatin, LLC; Jeffrey R. White, American Association for Justice; Greg Heller, Pennsylvania Association for Justice

Subject Matter: This brief points out that a 2009 Third Circuit decision, *Grammer*, held that nursing homes owned by Pennsylvania counties are subject to § 1983 liability for violation of the NHRA, and none of the Petitioners’ parade of horrors have come to pass. Pennsylvania’s statutory immunity scheme gives residents of county-run nursing homes no state law recourse for poor nursing facility care, making private enforcement of the NHRA the only way in which these residents can secure their rights. The brief also provides data demonstrating the inadequacies of administrative enforcement in Pennsylvania and nationally.

Public Citizen

Counsel: Wendy Liu (COR), Scott L. Nelson, Public Citizen Litigation Group

Subject Matter: The contract law analogy is inapt because § 1983 provides an express right of action.

Notable Quote: “[A]lthough a funding recipient’s acceptance of federal funds may *trigger* the recipient’s obligation to comply with conditions attached to those funds, it is the statute itself that creates those conditions and, in some cases, confers corresponding rights against the funding recipient on individuals.” Br. at 9.

Retired Lawyers

Counsel: William J. Rold (COR); John W. Cleveland; Arthur S. Leonard

Subject Matter: This brief suggests that the Court dismiss the writ of certiorari as improvidently granted because of the lower courts’ failure to address Medicare. The brief explains that Congress intended to provide a Nursing Home Bill of Rights for all nursing home residents, not solely those enrolled in Medicaid. Thus, the Court should not use this case to issue a broad ruling on Spending Clause enactments. The brief also describes discrimination and poor treatment LGBT residents experience in nursing facilities, particularly those with dementia.