NO. 09-696

IN THE

Supreme Court of the United States

JOHN J. KANE REGIONAL CENTERS-GLEN HAZEL,
Petitioner,

v.

SARAH GRAMMER, AS ADMINISTRATRIX OF THE ESTATE OF MELVINTEEN DANIELS, DECEASED,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether Spending Clause legislation can confer rights enforceable by third-party beneficiaries under 42 U.S.C. § 1983 only if Congress creates an "express private right of action."

2. Whether the Federal Nursing Home Reform Amendments (FNHRA) confer on qualified beneficiaries rights enforceable under 42 U.S.C. § 1983.

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RESPONDENT'S BRIEF IN OPPOSITION

Respondent Sarah Grammer, as administratrix of the estate of Melvinteen Daniels, respectfully requests that this Court deny the petition for writ of certiorari in this case.

Petitioner's first question asks no question raised below. It also asks no question not already answered by this Court in well-settled doctrine that does not warrant further review.

Petitioner's second question asks whether the Federal Nursing Home Reform Amendments (FNHRA) (Pet. for Writ of Cert. (i)), create rights that can be enforced under 42 U.S.C. § 1983. That question has been addressed by only three courts—the appellate court below and two district courts. All three answered affirmatively. Petitioner has identified no conflicts or confusion in the lower courts with regard to this question.

Neglecting the instruction of this Court to focus on specific pieces of Spending Clause legislation when ascertaining whether Spending Clause legislation creates enforceable rights, Petitioner attempts to demonstrate doctrinal confusion by alluding to the Medicaid Act as a whole (Pet. for Writ of Cert. 21) ("confusion is most pronounced in the Medicaid Act arena"), instead of to the enactment in question, FNHRA. Yet while courts have found that some pieces of the Medicaid Act are enforceable and some are not, they have exhibited remarkable consistency in deciding which pieces fall into each category.

The court below faithfully applied clear doctrine of this Court to find that FNHRA creates rights enforceable under 42 U.S.C. § 1983. No court has decided to the contrary. This case presents no question appropriate for review by this Court.

STATEMENT OF THE CASE

Melviteen Daniels, age 80, was a resident of Petitioner John J. Kane Regional Center in Pittsburgh, Pennsylvania. (Compl. ¶ 88.) As a result of Kane Center's failure to provide proper care, she developed decubitus ulcers, became malnourished, and eventually developed sepsis, from which she died. (Pet. for Writ of Cert. App. 3a.) The ulcers evidenced profound neglect, measuring 10.92 inches long, 7.02 inches wide, and 1 inch deep. (Grammer 3d Cir. Br. 3.)

Ms. Daniels's daughter, Sarah Grammer, as administratrix of Ms. Daniels's estate, sued under 42 U.S.C. § 1983, asserting that Kane Center had violated various rights of Ms. Daniels guaranteed by FNHRA. FNHRA required, *inter alia*, that Petitioner create and abide by a detailed individual plan for the care of Ms. Daniels. (Pet. for Writ of Cert. App. 18a-19a.)

The District Court dismissed the claim, finding that FNHRA did not create rights enforceable under 42 U.S.C. § 1983. (Pet. for Writ of Cert. App. 29a, *et seq.*) Plaintiff appealed and the Third Circuit reversed. (Pet. for Writ of Cert. App. 1a, *et seq.*) Petitioner timely sought review in this Court.

REASONS FOR DENYING THE PETITION

I. Petitioner's First Question Is Not Presented by This Case.

Petitioner alludes often to a "Spending Clause question" at issue in this case.[1] No issue of whether Congress has the power, when spending money, to create enforceable rights in third-party beneficiaries of its spending was raised below[2] and therefore

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[1] *See* Pet. for Writ of Cert. (i) (Question Presented number 1); 20 ("This case provides an opportunity to resolve an important question in which several members of this Court have expressed interest: namely, whether Spending Clause legislation establishing requirements for federal-state cooperative programs can confer "rights" enforceable by third-party beneficiaries under § 1983." This formulation suggests a constitutional question.); 21 (proposition I., "This Case Provides An Excellent Vehicle To Resolve The Spending Clause Question Identified By Several Members Of This Court"); 22-23; 24; 25 ("the Spending Clause question presented by this case.").

[2] See J.J. Kane Regional Center's brief filed in the Third Circuit. The only issue framed by Petitioner below was:

> Did the District Court correctly determine that Congress did not intend the Omnibus Budget Reconciliation Act of 1987, the Nursing Home Reform Act and its implementing regulations to create a federal court personal injury cause of action because of the fact that the statutes themselves do not expressly create any such personal injury claims, the fact that the federal courts have no implied right of action exists under these statutes, and the fact that the statutes speak in terms of

cannot be presented here. *Youakim v. Miller*, 425 U.S. 231, 234 (1976) ("[O]rdinarily, this Court does not decide questions not raised or resolved in the

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> what states must do to receive federal funding as opposed to creating personal rights?

(Kane Ctr. 3d Cir. Br. 1.)

See also the Third Circuit's statement of the issue it was resolving:

> We are asked in this appeal to determine whether an action will lie under 42 U.S.C. § 1983 to challenge the treatment Appellant's decedent received (or did not receive) at the Appellee nursing home—treatment Appellant argues violated the Federal Nursing Home Reform Amendments (FNRA), 42 U.S.C. § 1396r, *et seq.* We answer that question in the affirmative and will reverse and remand the cause to the District Court.

(Pet. for Writ of Cert. App. 2a.) In its Statement of the Case (Pet. for Writ of Cert. 11), Petitioner describes its contentions on its originally successful motion to dismiss, the issue it raised below:

> The Kane Center moved to dismiss Ms. Grammer's complaint, arguing that FNHRA does not unambiguously confer federal "rights" on individual Medicaid beneficiaries that can be enforced via § 1983. Alternatively, the Kane Center argued that FNHRA's enforcement scheme was sufficiently comprehensive so as to demonstrate congressional intent to preclude the remedy of § 1983 suits.

lower court.").[3] Similarly, no question of whether 42 U.S.C. § 1983 can be interpreted to provide a cause of action to enforce Spending Clause legislation was raised below.[4] *Id.* Only Petitioner's second question—whether a particular piece of Spending Clause legislation, FHNRA, can be construed to provide rights enforceable under 42 U.S.C. § 1983—was raised below.[5]

In any case the question of Congressional power has been asked and answered. Congress can assure that the intended beneficiaries of its spending have rights enforceable under the express right of action granted by 42 U.S.C. § 1983. *Gonzaga University v. Doe*, 536 U.S. 273, 284 (2002) ("Plaintiffs suing under § 1983 do not have the burden of showing an intent to create a private remedy because § 1983 generally supplies a remedy for the vindication of rights secured by federal statutes."), citing with approval, at 280, *Wilder v. Virginia Hospital Ass'n*, 496 U.S. 498 (1990) (requirement under Medicaid statute that reimbursement rates be "reasonable and adequate" created enforceable rights in parties reimbursed). This Court has found that when the People gave Congress the power to spend their money they gave Congress the power to assure that it was well spent. That power can be exercised absent the creation of any explicit private right of action. *Cannon v.*

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[3] This Court does not depart from that general rule absent a showing of "'unusual circumstances.'" *Taylor v. Freeland & Kronz*, 503 U.S. 638, 646 (1992) (citation omitted).

[4] *Supra* n.2.

[5] *Id.*

University of Chicago, 441 U.S. 677 (1979) (recognizing rights of action implied in Spending Clause enactments), cited with approval, *Gonzaga*, 536 U.S. at 284.

Petitioner asserts that a "Spending Clause question," (Pet. for Writ of Cert. 22-23), is raised in Justice Scalia's concurrence, joined by Justice Kennedy, in *Blessing v. Freestone*, 520 U.S. 329, 349-50 (1997). No question of the power of Congress was raised in Justice Scalia's concurrence. Justice Scalia raised only a question of statutory construction: whether 42 U.S.C. § 1983 could be construed as having created a cause of action in favor of third-party beneficiaries of Congressional spending. *Blessing*, 520 US at 350 (questioning whether meaning of "secure" in § 1983, which enforces rights "secured by the Constitution and laws," "is to be determined according to modern notions rather than according to the understanding of § 1983 when it was enacted.") Whatever validity that potential interpretation of the statute had then has waned in light of continued re-application by this Court of doctrine finding that § 1983 does create such a cause of action, *see, e.g., Gonzaga University v. Doe*, 536 U.S. at 279-80[6]; *Jackson v. Birmingham Board of*

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[6] The absence of ongoing dispute about this question is evident in *Gonzaga* from the question at issue, which was limited, in a fashion analogous to the second question presented here, to whether a particular statute created rights enforceable under § 1983. *See Gonzaga Univ. v. Doe*, 2001 WL 34092009 (2002) (petition for certiorari, setting out questions presented), and *Gonzaga Univ. v. Doe*, 534 U.S. 1103 (2002) (mem.) (granting certiorari limited to question of statutory construction).

Education, 544 U.S. 167, 181-82 (2005),[7] and, tellingly, *City of Rancho Palos Verdes, California v. Abrams*, 544 U.S. 113, 119-20 (2005), in which Justice Scalia, writing for the majority, applied the *Blessing/Gonzaga* analysis. Validity of that potential statutory interpretation also would be rendered suspect by long Congressional acquiescence in the *Blessing* court's interpretation of § 1983. *See Watson v. U.S.*, 552 U.S. 74 (2007) ("[I]n 14 years Congress has taken no step to modify [a prior] holding, and this long congressional acquiescence 'has enhanced even the usual precedential force' we accord to our interpretations of statutes . . . ").

Petitioner's first question presents no question raised below and, in any case, no question that requires this Court's review.

II. There Is No Conflict in the Lower Courts With Regard to Petitioner's Second Question Presented.

Petitioner does not contend that there is a conflict in the lower courts regarding the second question presented: whether FHNRA confers rights enforceable under section 1983. Only two published decisions address the question presented—the decision below and a decision from a district court in

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[7] Justice Scalia joined Justice Thomas in dissent on other grounds in *Jackson*, with the dissenting opinion acknowledging *Gonzaga* as precedent, alluding to repeated holdings of the court that spending power enactments can be enforced under 1983, and simply emphasizing doctrine acknowledged by the lower court here that "obligations Congress imposes on States in spending power legislation must be clear." *Jackson*, 544 U.S. at 190-91 (Thomas, J., dissenting).

New York and both conclude that FNHRA does confer rights enforceable under § 1983. *Joseph S. v. Hogan*, 561 F. Supp. 2d 280, 304 (E.D.N.Y. 2008). An unpublished decision from a Wyoming district court reaches the same result. *Estate of Corrine Kennedy v. Teton County Hosp. Dist.*, Case 1:06-cv-00291-ABJ, Doc. 19 (D. Wy. Apr. 18, 2007)

Petitioner's second question presented properly focuses on the particular statutory text at issue—FNHRA—as this Court has instructed. *See Blessing v. Freestone,* 520 U.S. 329, 342 (1997) (remanding for consideration of whether particular pieces of Title IV-D of the Social Security Act, regarding child support enforcement, are enforceable). *See also Westside Mothers v. Olszewski*, 454 F.3d 532, 544 (6th Cir. 2006) (requiring inquiry into "whether specific provisions of the Medicaid Act create enforceable rights under § 1983.") Petitioner's argument, however, attempts to portray conflict not with regard to FNHRA, but with regard to the Medicaid Act, Title XIX of the Social Security Act, as a whole:

> Nowhere is post-*Gonzaga* confusion more pronounced than with respect to the Medicaid Act, the provisions of which have spawned extensive § 1983 litigation throughout the United States. As described by a recent analysis prepared by the National Health Law Program, since the year in which *Gonzaga* was decided (2002), federal appellate courts have been asked to review the enforceability of at least 14 different Medicaid Act subsections in 25 different appellate rulings. *See* Jane

> Perkins, National Health Law Program, *Developments Affecting Medicaid Cases Filed Under 42 U.S.C. § 1983* at 6 (Dec. 31, 2008)[8]

(Pet. for Writ of Cert. 27.) Tellingly, the author of the article quoted by Petitioner finds no conflict among those 25 rulings and concludes, "The circuit courts are applying the *Gonzaga/Blessing/Wilder* enforcement test consistently." Jane Perkins, National Health Law Program, *Developments Affecting Medicaid Cases Filed Under 42 U.S.C. § 1983*, at 7 tbl.2 (Dec. 31, 2008) (categorizing decisions by statutory provision sought to be enforced).

Petitioner asserts specifically that circuit courts have split with regard to the enforceability of one piece of the Medicaid statute, 42 U.S.C. § 1396a. (Pet. for Writ of Cert 27-28) (asserting two circuits finding enforceability, five circuits finding no enforceability). But that one section is no small law. It is entitled "State plans for medical assistance," goes on for pages, contains over 22,000 words, sets out requirements that have nothing to do with the issues in this case, and is exactly the kind of statute that this Court in *Blessing* mandated be analyzed piece by piece. *See, e.g., Sanchez v. Johnson*, 416 F.3d 1051, 1062 (9th Cir. 2005) (noting that even a subsection of § 1396a, 1396a(a), needs to be divided for an enforceability analysis, because while it "sets

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[8] Petitioner cites this document as available at http://www.healthlaw.org/library/attachment.139385. (Pet. for Writ of Cert. 27 n.1.) That link appears not to work. Respondent found the document at http://www.probono.net/healthlaw/library/attachment.139385.

out a comprehensive list of requirements that a state plan must meet, it does not describe every requirement in the same language. Some requirements . . . . focus on individual recipients, while others are concerned with the procedural administration of the Medicaid Act by the States and only refer to recipients, if at all, in the aggregate.").

The two cases that Petitioner asserts conflict with the other five with regard to enforceability of 42 U.S.C. § 1396a, *Pediatric Specialty Care, Inc. v. Selig*, 443 F.3d 1005, 1015 (8th Cir. 2006), *vacated in part on other grounds*, 551 U.S. 1142 (2007) and *Westside Mothers v. Olszewski*, 454 F.3d 532, 542 (6th Cir. 2006), actually conflict with each other with regard to the one piece of 42 U.S.C. § 1396a, 42 U.S.C. § 1396a(a)(30), both cases adjudicate. *Pediatric Specialty Care* finds that the provision is enforceable, 443 F.3d at 1015, and *Westside Mothers* finds that it is not. 454 F.3d at 542. The *Westside Mothers* court, 454 F.3d at 542, acknowledged that this holding was inconsistent with *Pediatric Specialty Care*. The tally is 6-1, not 5-2.[9]

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[9] Similarly, the *Westside Mothers* decision noted its consistency with another case that Petitioner alleges it is in conflict with, the previously decided *Sanchez v. Johnson*, 416 F.3d 1051 (9th Cir. 2005). *Westside Mothers*, 454 F.3d at 542. And another case that Petitioner asserts to be in conflict with *Westside Mothers*, the subsequently decided *Equal Access for El Paso v. Hawkins*, 509 F.3d 697, 704 (5th Cir. 2007), *cert. denied*, 129 S. Ct. 34 (2008), acknowledged its harmony with *Westside Mothers*. Again, the discernable common element is the enforceability of 42 U.S.C. § 1396a(a)(30), which, like *Westside Mothers*, both *Sanchez* and *Equal Access* found not to be enforceable. *See Sanchez*, 416 F.3d at 1055, *Equal Access*,

Thus, even spanning widely and inappropriately through the Medicaid Act for conflicts that are not at issue in this case, Petitioner cites only one case that conflicts with decisions from other circuits, *Pediatric Specialty Care,* identifies that case as having been vacated as moot (Pet. for Writ of Cert. 27-28), and identifies that very limited conflict only on an issue not before the Court.

The circuit courts are having no problems administering existing doctrine with regard to the Medicaid Act in general and exhibit no conflict in limited experience administering existing doctrine with regard to FNHRA.

III. Petitioner Does Not Raise Any Important Question Requiring Resolution By the Court.

Petitioner asserts that the ruling below will "federalize the field of medical malpractice as it

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509 F.3d at 703. Two of the other three cases cited by Petitioner, *New York Association of Homes & Services for the Aging, Inc. v. DeBuono*, 444 F.3d 147,148 (2d Cir. 2006) (per curiam), and *Oklahoma Chapter of the American Academy of Pediatrics v. Fogarty*, 472 F.3d 1208, 1210 (10th Cir. 2007), *cert. denied*, 552 U.S. 813 (2007) (No. 06-1482) (mem.), also deny enforceability of 42 U.S.C. § 1396a(a)(30)(A). The other case Petitioner cites, *Hobbs ex rel. Hobbs v. Zenderman*, 579 F.3d 1171, 1179 (10th Cir. 2009), does not deal with 42 U.S.C. § 1396a(a)(30)(A) but denies enforceability of three other provisions of the Medicaid Act. ("We consider first whether the statutory provisions at issue provide Hobbs a right of action cognizable under 42 U.S.C. § 1983. Hobbs seeks enforcement of three provisions of the Social Security Act: §§ 1396p(d)(4)(A), 1396a(a)(10)(C)(i), and 1396a(a)(17).")

relates to government-operated medical facilities." (Pet. for Writ of Cert. 31.) That is not accurate. First, FNHRA applies only to nursing homes, not more broadly to "medical facilities," and a § 1983 claim enforcing FNHRA applies only to publicly funded nursing homes, of which there are few.[10] Nothing in FNHRA or 42 U.S.C. § 1983 pre-empts state medical malpractice law. FNHRA creates rights and 42 U.S.C. § 1983 creates a remedy; both are independent of state medical malpractice law. And FNHRA imposes duties regarding planning, administration, recordkeeping, psychological, physical therapy, and social work functions, breach of which is not necessarily within the bounds of the tort of medical malpractice.[11] Significantly, FNHRA

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[10] In 2007, the latest year for which data are available, of the 16,072 nursing homes in the United States, only 974, or 6%, were governmentally owned. U.S. Centers for Medicare & Medicaid Services, Nursing Home Data Compendium, 2008, at 4 fig.1.4, Number of Nursing Homes by Ownership Type and Year: United States, 2003-2007, http://www.cms.hhs.gov/Certification andComplianc/Downloads/2008NursingHomeDataCompendium_508.pdf.

[11] For example, FNHRA requires: attention to quality of life, in general, without limitation to medical care, 42 U.S.C. § 1396r(b)(1)(A); attention to physical, mental and psychosocial wellbeing pursuant to a written plan, 42 U.S.C. § 1396r(b)(2)(A), and provision of services by both qualified medical personnel and other qualified professionals to reach those goals, 42 U.S.C. § 1396r(b)(4)(A)(ii) & (v); documentation of each resident's capability of performing "daily life functions;" the additional requirement of identifying "medical problems" indicates that the statute covers more than purely medical issues, 42 U.S.C. § 1396r(b)(3)(A); provision of dietary services, 42 U.S.C. § 1396r(b)(4)(A)(iv); periodic

imposes a duty to keep residents free of "physical or mental abuse, corporal punishment, involuntary seclusion, and any physical or chemical restraints imposed for the purposes of discipline or convenience and not required to treat the resident's medical symptoms" and precludes administration of psycho-pharmacologic drugs except on orders of a physician. 42 U.S.C. § 1396r(c)(1)(A)(ii) & (c)(1)(D). These are duties that in the case of punishment readily could be violated wholly outside the context of medical malpractice and in the case of administration of psycho-pharmacologic drugs would by definition be breached by non-physician personnel.

The decision below is a faithful application of well-settled doctrine of this Court. The Third Circuit carefully set out the factors this Court described in *Blessing* and noted that *Gonzaga* had closely circumscribed when a statute could be said to create rights enforceable under 42 U.S.C. § 1983:

> As we held in *Sabree*, *supra*, meeting *Blessing's* "zone of interest" factor is not enough. In *Gonzaga University*, the Supreme Court cautioned us to be careful to ensure that the statute at issue contains "rights-creating language" and to make certain that the language is phrased in terms of the persons benefited [sic], not in terms of a general "policy or practice." 536 U.S. at 287, 122 S. Ct. 2268. While *Blessing* stands for the proposition that

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review of plans, according to a set schedule, 42 U.S.C. § 1396r(b)(2)(C), (b)(3)(C)(i)(I) & (ii), (b)(3)(D), (b)(4)(B). (*See* Pet. for Writ of Cert. App. 7a-8a.)

> violations of rights, not laws, give rise to § 1983 actions, nevertheless, the *Gonzaga University* court warned against interpreting *Blessing* "as allowing plaintiffs to enforce a statute under § 1983 so long as the plaintiff falls within the general zone of interest that the statute is intended to protect." *Gonzaga University*, 536 U.S. at 283, 122 S. Ct. 2268. Therefore, nothing short of an "unambiguously conferred [individual] right" as demonstrated through "rights-creating language" can support a § 1983 action. *Id.* at 283, 290, 122 S. Ct. 2268.
>
> The Supreme Court explained that rights-creating language must clearly impart an individual entitlement, and have an "unmistakable focus on the benefited [sic] class." *Id.* (quoting *Blessing*, 520 U.S. at 343, 117 S. Ct. 1353; *Cannon v. Univ. of Chicago*, 441 U.S. 677, 690-93, 99 S. Ct. 1946, 60 L.Ed.2d 560, (1979)). The Supreme Court next demonstrated the type of rights-creating terms that unambiguously confer enforceable rights by looking to its implied right of action cases. *Id.* at 283-84, 122 S. Ct. 2268.

(Pet. for Writ of Cert. App. 15a-16a.)

The decision below creates no split of authority and properly applies this Court's

jurisprudence. This Court's review is unwarranted here.

CONCLUSION

The petition for a writ of certiorari should be denied.

Date: January 14, 2010

Respectfully submitted,

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