No.

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

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In 1987, Congress enacted the Federal Nursing Home Reform Amendments (FNHRA) as part of an omnibus spending bill. Among other things, FNHRA amended the Medicaid Act to condition a State's receipt of federal funding on the State adopting a plan, approved by the Secretary of Health and Human Services, that requires nursing facilities to comply with certain requirements in order to participate in the State's Medicaid program. *See* 42 U.S.C. §§ 1396a(a)(28), 1396r. Generally speaking, Medicaid-participating nursing facilities must maintain substantial compliance with the requirements in order for a State to receive federal matching funds, and even instances of serious noncompliance by individual facilities may be dealt with using alternative remedies other than the denial of payment. A divided panel of the court of appeals below held that Medicaid beneficiaries can sue government-operated nursing facilities for damages under 42 U.S.C. § 1983 because FNHRA unambiguously confers individually enforceable "rights." The questions presented are as follows:

1. Whether, in the absence of an express private right of action, Spending Clause legislation establishing requirements for federal-state cooperative programs can unambiguously confer "rights" enforceable by third-party beneficiaries under 42 U.S.C. § 1983.

2. Whether, if the answer to Question 1 is "yes," FNHRA unambiguously confers "rights" enforceable by Medicaid beneficiaries under 42 U.S.C. § 1983.

RULE 29.6 CORPORATE DISCLOSURE STATEMENT

Petitioner John J. Kane Regional Centers - Glen Hazel is a nursing facility owned and operated by Allegheny County, Pennsylvania. No publicly held company owns a 10 percent or greater ownership interest in petitioner.

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Petitioner John J. Kane Regional Centers - Glen Hazel (the Kane Center) respectfully submits this petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-28a) is reported at 570 F.3d 520. The order of the district court adopting the magistrate judge's report and recommendation (App., *infra*, 29a-30a) and the magistrate judge's report and recommendation (App., *infra*, 31a-46a) are not published in the *Federal Supplement*, but are available at 2007 WL 1087751.

JURISDICTION

The judgment of the court of appeals was entered on June 30, 2009. The court of appeals denied the Kane Center's timely petition for panel rehearing and rehearing en banc on August 14, 2009 (App., *infra*, 47a-48a). On October 22, 2009, Justice Alito extended the time within which to file a petition for a writ of certiorari to and including December 14, 2009. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article I, Section 8, Clause 1 of the United States Constitution (Spending Clause) provides:

> The Congress shall have Power to lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States . . . .

Title 42 U.S.C. § 1983 provides, in relevant part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . .

Relevant provisions of the Medicaid Act, 42 U.S.C. §§ 1396-1396v, as well as § 1 of the Civil Rights Act of 1871, ch. 22, 17 Stat. 13, and Rev. Stat. § 1979, are

reprinted in an appendix to this petition (App., *infra*, 49a-134a).

STATEMENT

This case is a medical malpractice action disguised as a civil rights action. Relying on various provisions of the Medicaid Act, respondent Sarah Grammer filed suit against the Kane Center, which is a county-operated nursing facility located in Pittsburgh, Pennsylvania. Ms. Grammer alleged that the Kane Center deprived Ms. Grammer's mother of her civil rights by breaching a statutory duty to ensure quality care. The district court dismissed Ms. Grammer's complaint after finding that the Spending Clause legislation in question did not unambiguously confer individually enforceable "rights," the violation of which may be remedied by damages suits under 42 U.S.C. § 1983. A divided panel of the court of appeals reinstated Ms. Grammer's suit.

1. a. The Medicaid Act establishes a cooperative federal-state program that provides federal matching funds to States that choose to pay for medical services on behalf of certain low-income and disabled individuals. The purpose of the Medicaid program is to "enabl[e] each State, as far as practicable under the conditions in such State, to furnish . . . medical assistance on behalf of families with dependent children and of aged, blind, or disabled individuals, whose income and resources are insufficient to meet the costs of necessary medical services." 42 U.S.C. § 1396.

In order to participate in the Medicaid program, a State must submit a plan for medical assistance to the Centers for Medicare & Medicaid Services (CMS), which administers Medicaid on behalf of the

Secretary of Health and Human Services. §§ 1396, 1396a. Among other things, the state plan must list the categories of individuals who will receive medical assistance and the specific kinds of medical care and services that will be covered. § 1396a. "Within broad Federal rules, each State decides eligible groups, types and range of services, payment levels for services, and administrative and operating procedures. Payments for services are made directly by the State to the individuals or entities that furnish the services." 42 C.F.R. § 430.0.

If the state plan is approved by the Secretary, the State is thereafter eligible to be reimbursed by the Federal Government for a specified percentage of the amounts expended by the State as medical assistance under the state plan. 42 U.S.C. §§ 1396b(a)(1), 1396d(b). However, the Secretary may withhold federal matching funds in full or in part if a state plan "has been so changed that it no longer complies with the provisions of section 1396a of this title," or if, "in the administration of the plan there is a failure to comply substantially with any such provision." § 1396c.

b. In 1987, Congress enacted the Federal Nursing Home Reform Amendments (FNHRA) as part of a larger spending bill. *See* Omnibus Reconciliation Act of 1987 (OBRA), Pub. L. No. 100-203, tit. IV, subtit. C, 101 Stat. 1330, 1330-160 through 1330-221. In relevant part, FNHRA amended the Medicaid Act to require that state plans provide that "any nursing facility receiving payments under such plan must satisfy all the requirements of subsections (b) through (d) of section 1396r of this title as they apply to such facilities." 42 U.S.C. § 1396a(a)(28).

The provisions cross-referenced by § 1396a(a)(28) establish a wide variety of requirements for Medicaid-participating nursing facilities, the vast majority of which are also imposed on Medicare-participating nursing facilities. *See* 42 U.S.C. § 1395i-3. FNHRA organizes those requirements into 3 categories:

(1) "Requirements relating to provision of services," § 1396r(b);

(2) "Requirements related to resident's rights," § 1396r(c); and

(3) "Requirements relating to administration and other matters," § 1396r(d).

As is relevant here, the first category of FNHRA's requirements instructs that a Medicaid-participating nursing facility must "care for its residents in such a manner and in such an environment as will promote maintenance or enhancement of the quality of life of each resident." § 1396r(b)(1)(A). Such facilities must "provide services and activities to attain or maintain the highest practicable physical, mental, and psychosocial well-being of each resident in accordance with a written plan of care which . . . is periodically reviewed and revised." § 1396r(b)(2)(C). The written plan of care must "describe[] the medical, nursing, and psychosocial needs of the resident and how such needs will be met." § 1396r(b)(2)(A).

The first category of FNHRA's requirements also instructs that a Medicaid-participating nursing facility "must conduct a comprehensive, accurate, standardized, reproducible assessment of each resident's functional capacity" promptly and revise such assessments, as appropriate, following a reexamination of the resident "no less frequently than once every 3

months." § 1396r(b)(3)(C). The results from such assessments "shall be used in developing, reviewing, and revising the resident's plan of care." § 1396r(b)(3)(D).

Medicaid-participating nursing facilities must also provide "medically-related social services to attain or maintain the highest practicable physical, mental, and psychosocial well-being of each resident"; "dietary services that assure that the meals meet the daily nutritional and special dietary needs of each resident"; and "an on-going program, directed by a qualified professional, of activities designed to meet the interests and the physical, mental, and psychosocial well-being of each resident." § 1396r(b)(4)(A)(ii), (iv), (v). The foregoing services must be provided "by qualified persons in accordance with each resident's written plan of care," § 1396r(b)(4)(B), and participating facilities must "maintain clinical records on all residents," § 1396r(b)(6)(C).

Under the second category of requirements—"[r]equirements related to resident's rights"—FNHRA instructs that Medicaid-participating nursing facilities "must protect and promote the rights of each resident, including" the "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." § 1396r(c)(1)(A)(ii). "Psychopharmacologic drugs may be administered only on the orders of a physician and only as part of a plan . . . for which the drugs are prescribed and only if, at least annually an independent, external con-

sultant reviews the appropriateness of the drug plan of each resident receiving such drugs." § 1396r(c)(1)(D).

Under the third category of requirements—"[r]equirements relating to administration and other matters"—FNHRA instructs that a Medicaid-participating nursing facility "must be administered in a manner that enables it to use its resources effectively and efficiently to attain or maintain the highest practicable physical, mental, and psychosocial well-being of each resident." § 1396r(d)(1)(A). In addition, a Medicaid-participating nursing facility's administrator "must meet standards established by the Secretary," § 1396r(d)(1)(C), and the facility "must operate and provide services in compliance with all applicable Federal, State, and local laws and regulations . . . and with accepted professional standards and principles which apply to professionals providing services in such a facility," § 1396r(d)(4)(A).

FNHRA does not contain an express private right of action authorizing Medicaid beneficiaries to sue to enforce the statute's requirements. Instead, FNHRA established an elaborate administrative inspection and regulatory enforcement process to ensure that federal matching funds are well spent. "Under each State plan under this subchapter," FNHRA instructs that the "State shall be responsible for certifying, in accordance with surveys conducted under paragraph (2), the compliance of nursing facilities (other than facilities of the State) with the requirements of subsections (b), (c), and (d) of this section. The Secretary shall be responsible for certifying, in accordance with surveys conducted under paragraph (2), the compli-

ance of State nursing facilities with the requirements of such subsections." § 1396r(g)(1)(A).

Teams of specially trained and qualified inspectors, known as "surveyors," use unannounced inspections to determine whether nursing facilities are in "substantial compliance" with the requirements governing participation in the Medicaid program. *See* 42 U.S.C. § 1396r(g); 42 C.F.R. §§ 488.26, 488.301, 488.330(b)(1). "Substantial compliance" means a "level of compliance with the requirements of participation such that any identified deficiencies pose no greater risk to resident health or safety than the potential for causing minimal harm." 42 C.F.R. § 488.301.

By statute, the survey team must include a "multidisciplinary team of professionals," including at least one registered nurse. 42 U.S.C. § 1396r(g)(2)(E). Surveyors must use a "case-mix stratified sample of residents" to evaluate "the quality of care furnished, as measured by indicators of medical, nursing, and rehabilitative care, dietary and nutrition surveys, activities and social participation, and sanitation, infection control, and physical environment." § 1396r(g)(2)(A)(ii). Surveyors are to "directly observe the actual provision of care and services to residents, and the effects of that care, to assess whether the care provided meets the needs of individual residents." 42 C.F.R. § 488.26(c)(2). Failure to utilize the prescribed protocol renders the results of the inspection invalid. § 488.26(c)(4).

A finding that a nursing facility is not in substantial compliance with FNHRA's conditions of Medicaid participation does not necessarily preclude the facility from receiving payments from the State or the

State from receiving federal matching funds for its payments to the facility. Instead, FNHRA and its implementing regulations provide CMS and participating States with substantial discretion to impose a wide variety of remedies to promote compliance, including civil money penalties and placement of a temporary manager or state monitor in the facility. *See* 42 U.S.C. § 1396r(h)(3)(C); 42 C.F.R. §§ 488.406, 488.408. Even for a nursing facility that is not in substantial compliance, if the State finds it is more appropriate to impose alternative remedies than to terminate the facility's Medicaid participation, FNHRA expressly provides that federal matching funds can still be paid to the State. 42 U.S.C. § 1396r(h)(3)(D).

In order to select the appropriate remedy, surveyors are required to classify deficiency findings by seriousness. 42 C.F.R. § 488.404(b). Seriousness is assessed by evaluating the severity of the deficiency (i.e., the degree of actual and potential harm), in conjunction with the scope of the deficiency (i.e., the degree to which it is pervasive or isolated). §§ 488.404(b), 488.404(e)(i)-(iii), 488.410(a). Regardless of the remedy imposed, the facility must submit a plan of correction unless the deficiencies identified are isolated and present no more than a potential for minimal harm. §§ 488.402(d), 488.408(f)(2).

A Medicaid-participating nursing facility may appeal the imposition of a remedy to the Departmental Appeals Board (DAB) within the Department of Health and Human Services. 42 C.F.R. §§ 488.330(e)(3), 498.40. An administrative law judge adjudicates the dispute following an in-person hearing. § 498.60. Upon request, the DAB's Appel-

late Division will review the decision of the administrative law judge. § 498.80. In cases involving the imposition of civil money penalties, a facility may appeal the Appellate Division's decision to the circuit court of appeals in which the facility is located. *See* 42 U.S.C. § 1320a-7a(e); 42 C.F.R. § 498.95.

2. The Commonwealth of Pennsylvania has chosen to participate in the Medicaid program. The Kane Center, in turn, is a Medicaid-participating nursing facility operated by Allegheny County, Pennsylvania. Respondent Sarah Grammer's mother, Melvinteen Daniels, was a Medicaid beneficiary who resided at the Kane Center.

In 2006, Ms. Grammer sued the Kane Center in the United States District Court for the Western District of Pennsylvania. Ms. Grammer alleged that Ms. Daniels died as a result of the Kane Center's failure to provide proper medical treatment.

Asserting claims under 42 U.S.C. § 1983 for wrongful death and survival, Ms. Grammer alleged that the Kane Center deprived Ms. Daniels of her civil rights by breaching a duty to ensure quality care under FNHRA. Ms. Grammer's complaint was predicated on the laundry list of FNHRA subsections discussed above, which she alleged the Kane Center violated as a matter of custom and policy. Although her original complaint also alleged violations of federal "rights" predicated on CMS regulations, Ms. Grammer later abandoned those allegations in the course of proceedings before the district court.

Ms. Grammer's complaint did not allege that Pennsylvania's state plan failed to comply with 42 U.S.C. § 1396a(a)(28), nor was any Pennsylvania official named as a defendant. Instead, Ms. Gram-

mer sought damages in excess of $75,000 from the Kane Center, plus attorney's fees under 42 U.S.C. § 1988.

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.

3. Magistrate Judge Amy Reynolds Hay issued a report and recommendation (App., *infra*, 31a-46a) concluding that the Kane Center's motion to dismiss should be granted. The magistrate judge explained that a § 1983 plaintiff "must show that Congress intended to create an 'unambiguously conferred right' by pointing to clear and unambiguous 'rights-creating language.'" App., *infra*, 36a (quoting *Gonzaga Univ. v. Doe*, 536 U.S. 273, 283 (2002)). Citing numerous decisions that had previously held there is no implied right of action under FNHRA, the magistrate judge concluded that the statute did not contain unambiguous rights-creating language for purposes of § 1983. *Id.* at 37a-38a (citing *Solter v. Health Partners of Philadelphia, Inc.*, 215 F. Supp. 2d 533, 540 (E.D. Pa. 2002); *Brogdon ex rel. Cline v. Nat'l Healthcare Corp.*, 103 F. Supp. 2d 1322, 1330-32 (N.D. Ga. 2000); *Nichols v. St. Luke Ctr. of Hyde Park*, 800 F. Supp. 1564, 1567-68 (S.D. Ohio 1992); *Chalfin v. Beverly Enters., Inc.*, 741 F. Supp. 1162, 1166-67 (E.D. Pa. 1989); *Ratmansky ex rel. Ratmansky v. Plymouth House Nursing Home, Inc.*, No. Civ. A. 05-0610, 2005 WL 770628, at *3 (E.D. Pa.

Apr. 5, 2005); *Sparr v. Berks County*, No. Civ. A. 02-2576, 2002 WL 1608243, at *2-3 (E.D. Pa. July 18, 2002); and *Andrusichen v. Extendicare Health Servs., Inc.*, No. Civ. A. 02-674, 2002 WL 1743576, at *2-3 (E.D. Pa. July 23, 2002)).

The magistrate judge explained that FNHRA "merely sets forth the requirements that the Secretary of Health and Human Services must implement and the services that the state must require nursing facilities to provide if the state wants to qualify for federal funding. Thus, the statute imposes a duty only on states which choose to participate in the program and not on the nursing homes that provide medical services." *Id.* at 41a. "Because the Medicaid Act speaks to the states and their obligations thereunder," the magistrate judge reasoned, "it follows the states should be held accountable by those who are ultimately harmed when the state does not fulfill its obligations. It does not follow that an individual may bring a personal injury claim against a nursing home for providing insufficient care since the statute does not impose a duty on nursing care providers." *Id.* at 42a-43a.

In arguing against dismissal, Ms. Grammer principally relied on two circuit court decisions: *Sabree ex rel. Sabree v. Richman*, 367 F.3d 180 (3d Cir. 2004), and *Rolland v. Romney*, 318 F.3d 42 (1st Cir. 2003). In distinguishing both rulings, the magistrate judge explained that, "in both *Sabree* and *Rolland*, and in seemingly every other § 1983 case in which it was found that the Medicaid Act created an enforceable right, the case was brought against the state itself or the state agency responsible for implementing the provisions of the Medicaid Act rather than directly

against the care provider. Moreover, the relief sought by the plaintiffs was in the form of injunctive relief rather than the monetary damages sought by plaintiff here." *Id.* at 40a. This, the magistrate judge concluded, was a distinction with a difference. *Id.* at 41a.

Having found that FNHRA did not unambiguously confer federal "rights" upon individual Medicaid beneficiaries, the magistrate judge found it unnecessary to address the Kane Center's alternative argument that FNHRA's enforcement scheme was sufficiently comprehensive so as to demonstrate congressional intent to preclude the remedy of private suits under § 1983. *Id.* at 46a.

4. After receiving additional briefing from the parties, District Judge Gary Lancaster issued an order (App., *infra*, 29a-30a) adopting the magistrate judge's report and recommendation with one limited exception. The district court believed that one sentence in the magistrate judge's report and recommendation was "an overly broad interpretation of" *Gonzaga* and "superfluous to the analysis." App., *infra*, 30a. The sentence in the magistrate judge's report and recommendation read as follows: "Because *Gonzaga* instructs that where there is no implied right of action under a statute, there is no right enforceable under § 1983, it follows from these cases that plaintiff has no enforceable right under § 1983 and, thus, has failed to state a claim." App., *infra*, 38a. In all other respects, the district court adopted the magistrate judge's report and recommendation, and dismissed Ms. Grammer's complaint with prejudice.

5. a. A divided panel of the Third Circuit reversed the district court's judgment and remanded the case to the district court. App., *infra*, 1a-25a. In an opinion written by Senior Circuit Judge Richard Nygaard and joined by Circuit Judge D. Brooks Smith, the panel majority concluded that FNHRA is "sufficiently rights-creating and that the rights conferred by its various provisions are neither 'vague and amorphous' nor impose upon states a mere precatory obligation." *Id.* at 3a.

Although the analysis of *Blessing v. Freestone*, 520 U.S. 329 (1997), "may appear straightforward," the panel majority asserted that "subsequent Supreme Court decisions have suggested that there are fine distinctions in its application, requiring us to look not only at the statutory text, but also to congressional intent." *Id.* at 11a. In the opinion of the majority, *Gonzaga* "clarified the *Blessing* analysis by adding the requirement that any such right be unambiguously conferred by Congress." *Id.* The panel majority believed that under the Third Circuit's decision in *Sabree*, which had interpreted *Gonzaga*, a court first had to apply the "three components of the *Blessing* test and then, to inquire into whether the statutes in question unambiguously confer a substantive right." *Id.* at 13a-14a.

Applying the first *Blessing* factor, the panel majority found that Medicaid beneficiaries were intended beneficiaries of § 1396r, *id.* at 14a, and that § 1396r was directly concerned with whether the needs of any particular person had been satisfied, *id.* at 15a. As for the second *Blessing* factor, the majority believed that the "rights" asserted by Ms. Grammer were not "vague or amorphous"; instead,

§ 1396r's "repeated use of the phrases 'must provide,' 'must maintain' and 'must conduct' are not unduly vague or amorphous such that the judiciary cannot enforce the statutory provisions. These provisions make clear that nursing homes must provide a basic level of service and care for residents and Medicaid patients." *Id.* Turning to the last *Blessing* factor, the majority concluded that the language of § 1396r "unambiguously binds the states and the nursing homes as indicated by the repeated use of 'must.' This language is mandatory in nature and easily satisfies the third factor of the *Blessing* test." *Id.*

Satisfied that all three *Blessing* factors had been met, the panel majority then turned to the Third Circuit's interpretation of *Gonzaga*. *Sabree*, the majority explained, had applied *Gonzaga*'s heightened standard and nonetheless found that language within § 1396a was sufficiently rights-creating. *Id.* at 17a-18a. In particular, *Sabree* had examined § 1396a(a)(8), which provides that a state plan for medical assistance must "provide that all individuals wishing to make application for medical assistance under the plan shall have opportunity to do so, and that such assistance shall be furnished with reasonable promptness to all eligible individuals."

Judged against the statutory language found to be rights-creating in *Sabree*, the panel majority believed that FNHRA was "replete with rights-creating language." *Id.* at 18a. According to the panel majority:

> The amendments confer upon residents of such facilities the right to choose their personal attending physicians, to be fully informed about and to participate in care and treatment, to be free from

> physical or mental abuse, to voice grievances and to enjoy privacy and confidentiality. . . . Nursing homes are required to care for residents in a manner promoting quality of life, provide services and activities to maintain the highest practicable physical, mental and psychosocial well-being of residents, and conduct comprehensive assessments of their functional abilities. . . . Further, the statute specifically guarantees nursing home residents the right to be free from 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 their medical symptoms. . . .

Id. at 18a-19a (citations omitted). That § 1396r used the word "must" and "residents" throughout supported the panel majority's belief that § 1396r was mandatory and phrased in terms of the persons benefited, respectfully. *Id.* at 19a. In contrast, the panel majority was "not concerned that the provisions relied upon by [Ms. Grammer] are phrased in terms of responsibilities imposed on the state or the nursing home." *Id.* at 20a.

Next, the panel majority explained its belief that FNHRA's legislative history was "compelling" such that it supported the majority's conclusion that § 1396r created "rights" enforceable via § 1983. *Id.* at 20a. The apparent basis for the majority's belief was a lengthy quotation from the First Circuit's decision in *Rolland*, which, in turn, had relied upon legislative history unrelated to the provisions of § 1396r upon which Ms. Grammer relied. *Id.* at 21a-22a. Specifically, *Rolland* had cited a portion of a

House report regarding the improper placement of persons with mental retardation or mental illness in nursing facilities when those persons did not require nursing services. *See Rolland*, 318 F.3d at 46.

Only after focusing on the language of § 1396r and legislative history did the panel majority turn to what it deemed the "structural elements" of the Medicaid Act. *Id.* at 23a. In doing so, the majority explained that it

> recognize[d] that provisions within the Medicaid Act speak in terms of an "agreement between Congress and a particular state." *See Sabree*, 367 F.3d at 191. Other provisions, 42 U.S.C. § 1396[c] for example, empower the Secretary of Housing [*sic*] and Human Services to suspend payments to a state if it fails to "comply substantially" with the title's requirements. These provisions gave us pause in *Sabree*, and they continue to cause us some reticence today. . . . *Sabree* counsels, however, that we must consider the existence of rights-creating language in other relevant statutory provisions of [the Medicaid Act].

Id. According to the panel majority, *Sabree* "created a test whereby courts should balance the strength of the specific language of the statutory provisions at issue against the larger structural elements of the statute." *Id.* at 24a. In applying this test, the panel majority held that the "larger statutory structure" of the Medicaid Act did not "neutralize" the rights-creating language contained within § 1396r. *Id.*

The panel majority concluded its opinion with a terse rejection of the Kane Center's argument that FNHRA's enforcement scheme was sufficiently comprehensive so as to demonstrate congressional intent

to preclude the remedy of § 1983 suits. According to the panel majority, the Kane Center had "failed to demonstrate that Congress foreclosed [the § 1983] option by adopting another, more comprehensive enforcement scheme." *Id.* at 24a. In so holding, the panel majority made no mention of FNHRA's detailed survey-and-certification system whereby Medicaid-participating nursing facilities may continue to receive Medicaid reimbursement so long as they are in substantial compliance with the Medicaid Act's requirements, nor did the panel majority make any mention of the remedial discretion afforded CMS and participating States under FNHRA's administrative enforcement scheme.

b. Senior District Judge William Stafford, Jr., sitting by designation from the United States District Court for the Northern District of Florida, dissented. App., *infra*, 25a-28a. Judge Stafford found that "federal courts have consistently held that no implied private right of action exists under the Medicaid Act, OBRA, or FNHRA." *Id.* at 26a n.6 (citing *Prince v. Dicker*, 29 F. App'x 52 (2d Cir. 2002); *Brogdon*, 103 F. Supp. 2d at 1330-32; and *Sparr*, 2002 WL 1608243, at *2-3). The Medicaid Act is Spending Clause legislation, Judge Stafford explained, and Spending Clause legislation "rarely confers upon funding beneficiaries the right to bring private actions 'before thousands of federal- and state-court judges' against funding recipients." *Id.* at 25a (quoting *Gonzaga*, 536 U.S. at 290). According to Judge Stafford:

> The Supreme Court has been explicit: "[U]nless Congress 'speak[s] with a clear voice,' and manifests an 'unambiguous' intent to confer individual rights, federal funding provisions provide no basis

> for private enforcement by § 1983." *Gonzaga*, 536 U.S. at 280 (quoting *Pennhurst State Sch. and Hosp. v. Halderman*, 451 U.S. 1, 17). In section 1396r, Congress did not speak with a "clear voice" or manifest an "unambiguous intent" to provide a basis for private enforcement of funding requirements under section 1983.

Id. at 25a-26a.

Judge Stafford paid particular attention to the Medicaid Act's supposed "structural elements," which had been relegated to the end of the panel majority's opinion:

> Under the Medicaid Act, the federal government directs funding to states to assist them in providing medical assistance to certain eligible individuals. To receive federal funds under the Medicaid Act, states are required to administer low-income medical assistance programs pursuant to "State plans" approved by the Secretary of Health and Human Services. The Act sets forth detailed requirements for state plans. Among many other things, the Act provides that "[a] State plan for medical assistance must . . . provide . . . that any nursing facility receiving payments under such plan must satisfy all the requirements of subsections (b) through (d) of section 1396r." 42 U.S.C. 1396a(a)(28)(A). Section 1396r lists the requirements that nursing facilities—as recipients of federal funding—must meet relating to the provision of services to its Medicaid patients. Importantly, in each of the provisions in subsections (b) through (d), namely, subsections (b)(1)-(8), (c)(1)-(8) and (d)(1)-(4), Congress began by stating: "The nursing facility must . . . " In each case, the focus

> is on what the nursing facility must do in return for federal funds; the focus is not on the individuals to whom the benefit of each provision flows.

Id. at 27a-28a (ellipses supplied by Judge Stafford).

Judge Stafford concluded his dissenting opinion by explaining that, "[w]hatever *Sabree* may say as to section 1396a [the provision of the Medicaid Act listing the required contents of state plans], I do not agree that Congress intended to confer upon nursing home residents the right to invoke section 1983 to sue individual nursing homes for alleged violations of" the provisions of § 1396r cited by Ms. Grammer's complaint. *Id.* at 28a.

6. The Third Circuit denied the Kane Center's petition for panel rehearing, and a majority of the circuit judges in regular active service did not vote in favor of granting en banc rehearing. App., *infra*, 47a-48a. Judge Stafford would have granted panel rehearing. *Id.* at 48a.

REASONS FOR GRANTING THE PETITION

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. The Medicaid Act is prototypical Spending Clause legislation, and its provisions have spawned extensive litigation throughout the United States. However, if Spending Clause legislation cannot unambiguously confer "rights" enforceable via § 1983 in the absence of an express private right of action, such litigation unnecessarily burdens the treasuries of state and local governments, as well as

the judiciary. The time is ripe for the Court to decide this important question of federal law.

Plenary review by this Court is also warranted because, as reflected by the splintered decision below, *Gonzaga* has not had the intended effect of clarifying when one may bring a § 1983 suit based on a federal funding statute. Commentators have acknowledged that post-*Gonzaga* confusion is most pronounced in the Medicaid Act arena, where courts have been asked to parse the statute on a line-by-line basis in order to determine whether "rights" have been created. The substantial confusion that now exists breeds an enormous amount of unnecessary litigation. This Court's review is therefore warranted to bring uniformity to an important area of federal law that substantially impacts States, local governments and private litigants.

Finally, the question whether FNHRA creates individually enforceable "rights" is independently worthy of plenary review. The lower court's ruling effectively federalizes the traditionally state-law realm of medical malpractice as it relates to nursing facilities. Counsel for Ms. Grammer admitted as much during oral argument in the court of appeals, and the impact of the Third Circuit's ruling reaches far beyond § 1983 actions as plaintiffs continue to use FNHRA in arguing that the statute creates a national standard of care for governmental and nongovernmental facilities alike.

I. This Case Provides An Excellent Vehicle To Resolve The Spending Clause Question Identified By Several Members Of This Court

In *Maine v. Thiboutot*, 448 U.S. 1 (1980), a majority of the Court held that § 1983's use of the phrase

"and laws" includes claims based on violations of federal statutes other than statutes providing for equal rights. *See id.* at 4. *But see id.* at 15 (Powell, J., dissenting, joined by Burger, C.J., and Rehnquist, J.) (tracing § 1983's historical origins to § 1 of the Civil Rights Act of 1871 and concluding that the phrase "and laws," which was added to the statute during its 1874 codification in the Revised Statutes, is properly understood to only include equal rights legislation). Even after *Thiboutot*, however, a "plaintiff must assert the violation of a federal *right*, not merely a violation of federal *law*." *Blessing*, 520 U.S. at 340 (citing *Golden State Transit Corp. v. City of Los Angeles*, 493 U.S. 103, 106 (1989)).

Over the past 28 years, several members of this Court have expressed skepticism as to whether Spending Clause legislation establishing requirements for federal-state cooperative programs can create "rights" enforceable by third-party beneficiaries under § 1983. In *Pennhurst State School & Hospital v. Halderman*, 451 U.S. 1, 18-20 (1981), the Court first explained that a federal statute's use of the word "rights" created no presumption of enforceability via § 1983. In an opinion authored by then-Justice Rehnquist, the Court went on to explain that, "[i]n legislation enacted pursuant to the spending power, the typical remedy for state noncompliance with federally imposed conditions is not a private cause of action for noncompliance but rather action by the Federal Government to terminate funds to the State." *Id.* at 28.

Sixteen years later, Justice Scalia, joined by Justice Kennedy, issued a concurring opinion that expressed a willingness to decide the Spending Clause

question presented by this case. *See Blessing*, 520 U.S. at 349 (Scalia, J., concurring). State-federal cooperative programs, Justice Scalia explained, are in the nature of a contract, under which the State

> promises to provide certain services to private individuals, in exchange for which the Federal Government promises to give the State funds. In contract law, when such an arrangement is made (A promises to pay B money, in exchange for which B promises to provide services to C), the person who receives the benefit of the exchange of promises between the two others (C) is called a third-party beneficiary. Until relatively recent times, the third-party beneficiary was generally regarded as a stranger to the contract, and could not sue upon it; that is to say, if, in the example given above, B broke his promise and did not provide services to C, the only person who could enforce the promise in court was the other party to the contract, A. See 1 W. Story, A Treatise on the Law of Contracts 549-550 (4th ed. 1856). 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.

Id. at 349-50 (brackets supplied by Justice Scalia).

"While it is of course true that newly enacted laws are automatically embraced within § 1983," Justice Scalia explained that it "does not follow that the question of what rights those new laws (or, for that matter, old 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." *Id.* at 350. Although Justice Scalia acknowledged that previous decisions of the Court had "permitted beneficiaries of federal-state contracts to sue under § 1983," the contract-based argument had not been raised in proceedings before the Court. Therefore, Justice Scalia expressed a willingness to decide the Spending Clause issue were it presented in a future case. *Id.*; *see also Golden State Transit Corp.*, 493 U.S. at 117 (Kennedy, J., dissenting) ("Our cases in recent years have expanded the scope of § 1983 beyond that contemplated by the sponsor of the statute and have identified interests secured by various statutory provisions as well.").

Justice Thomas expressed similar skepticism several years later in *Pharmaceutical Research & Manufacturers of America v. Walsh*, 538 U.S. 644 (2003). Like this case, *Walsh* raised questions related to the provision of the Medicaid Act that specifies the contents of state plans, 42 U.S.C. § 1396a. In his opinion concurring in the Court's judgment, Justice Thomas explained that the contract analogy articulated in *Pennhurst* raised "serious questions as to whether third parties may sue to enforce Spending Clause legislation." *Walsh*, 538 U.S. at 683 (Thomas, J., concurring in judgment). According to Justice Thomas:

> In contract law, a third party to the contract (as petitioner is here) may only sue for breach if he is the "intended beneficiary" of the contract. See, *e.g.*, Restatement (Second) of Contracts § 304 (1979) ("A promise in a contract creates a duty in

> the promisor to any intended beneficiary to perform the promise, and the intended beneficiary may enforce the duty"). When Congress wishes to allow private parties to sue to enforce federal law, it must clearly express this intent. Under this Court's precedents, private parties may employ 42 U.S.C. § 1983 or an implied private right of action only if they demonstrate an "unambiguously conferred right." *Gonzaga Univ. v. Doe*, 536 U.S. 273, 283 (2002). Petitioner quite obviously cannot satisfy this requirement . . . .

Id. at 683.

The state respondents in *Walsh* had not advanced the contract-based argument in proceedings before the Court. "[W]ere the issue to be raised," however, Justice Thomas explained that he would "give careful consideration to whether Spending Clause legislation can be enforced by third parties in the absence of a private right of action." *Id.*

Justice Scalia also used *Walsh* as an opportunity to reiterate the views expressed in his *Blessing* concurrence, explaining that he would "reject petitioner's statutory claim on the ground that the remedy for the State's failure to comply with the obligations it has agreed to undertake under the Medicaid Act . . . is set forth in the Act itself: termination of funding by the Secretary of the Department of Health and Human Services, see 42 U.S.C. § 1396c." *Id.* at 675 (Scalia, J., concurring in judgment).

Finally, in the very decision on which the Third Circuit based much of its ruling below, then-Judge Alito used language suggesting a willingness to address the Spending Clause question presented by this case. In *Sabree*, the district court had looked to

the Medicaid Act's origin as Spending Clause legislation in finding that it did not unambiguously confer federal "rights" enforceable by Medicaid beneficiaries. *See Sabree ex rel. Sabree v. Houston*, 245 F. Supp. 2d 653, 659-70 (E.D. Pa. 2003). In concurring with the Third Circuit opinion reversing the district court, Judge Alito explained that, "[w]hile the analysis and decision of the District Court *may reflect the direction that future Supreme Court cases in this area will take*, currently binding precedent supports the decision of the Court." *Sabree*, 367 F.3d at 194 (Alito, J., concurring) (emphasis added); *see also Arlington Cent. Sch. Dist. v. Murphy*, 548 U.S. 291, 296 (2006) (Alito, J.) (discussing *Pennhurst*'s contract analogy for Spending Clause legislation in finding that the Individuals with Disabilities Education Act did not contain unambiguous language putting States on notice that, as a condition of accepting federal funds, States could be ordered to pay expert-witness fees).

If, in the final analysis, Spending Clause legislation cannot create "rights" enforceable via § 1983 in the absence of an express private right of action, a substantial portion of the § 1983 litigation in the United States unnecessarily burdens state and local treasuries, state and local officials, and the judiciary. This important question of federal law deserves a definitive answer. This case affords the Court with the opportunity to provide that answer.

II. Review Is Warranted To Fully Achieve *Gonzaga*'s Goal Of Clarifying This Court's § 1983 Jurisprudence

By granting review in *Gonzaga*, the Court hoped to "resolve any ambiguity" in the Court's § 1983

jurisprudence. 536 U.S. at 278. As reflected by the Third Circuit's splintered decision below and the numerous divergent opinions issued by other lower courts since *Gonzaga* was decided, that important goal has not been—but should be—fully realized.

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).[1]

The result has been a patchwork of rulings finding that certain subsections within the Medicaid Act create individually enforceable "rights" while others do not. *Compare, e.g.*, *Pediatric Specialty Care, Inc. v. Selig*, 443 F.3d 1005, 1015 (8th Cir. 2006) (holding that provisions of § 1396a create "rights" enforceable under § 1983), *vacated as moot*, 551 U.S. 1142 (2007) (No. 06-415); *Westside Mothers v. Olszewski,* 454 F.3d 532, 544 (6th Cir. 2006) (same), *with Hobbs ex rel. Hobbs v. Zenderman*, 579 F.3d 1171, 1175 (10th Cir. 2009) (holding that provisions of § 1396a do not create "rights" enforceable under § 1983); *Equal Access for El Paso, Inc. v. Hawkins*, 509 F.3d 697,

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[1] Http://www.healthlaw.org/library/attachment.139385.

704 (5th Cir. 2007) (same), *cert. denied*, 129 S. Ct. 34 (2008) (No. 07-1160); *Okla. Chapter of the Am. Acad. of Pediatrics v. Fogarty*, 472 F.3d 1208, 1210 (10th Cir. 2007) (same), *cert. denied*, 552 U.S. 813 (2007) (No. 06-1482); *N.Y. Ass'n of Homes & Servs. for the Aging, Inc. v. DeBuono*, 444 F.3d 147 (2d Cir. 2006) (per curiam) (same); *Sanchez v. Johnson*, 416 F.3d 1051, 1062 (9th Cir. 2005) (same).

As one commentator recently concluded in analyzing the current state of § 1983 jurisprudence in the Medicaid Act arena: "Federal circuit and district courts have inconsistently and confusingly applied the *Gonzaga* framework, which was supposed to clarify private causes of action under § 1983." Nicole Huberfeld, *Bizarre Love Triangle: The Spending Clause, Section 1983, and Medicaid Entitlements*, 42 U.C. Davis L. Rev. 413, 415 (2008) (footnote omitted). "*Gonzaga*'s legacy is a hodgepodge of lower court decisions. Some courts have substituted *Gonzaga* for the first element of the *Blessing* test, some courts primarily have substituted *Gonzaga* for, or conflate, *Gonzaga* and *Blessing*, and some courts effectively ignore *Gonzaga*." *Id.* at 442-43 (footnotes omitted). "Federal courts," Professor Huberfeld concludes, "have read some provisions [of the Medicaid Act] to be enforceable by enrollees, some provisions to be enforceable by providers, and some provisions to be enforceable by no one. Though the statutory framework is long and complex, inconsistent and variable enforcement possibilities can only confound the problem." *Id.* at 452; *see also* Comment, *Section 1983 Enforcement of the Medicaid Act After Gonzaga University v. Doe: The 'Dispassionate Lens' Examined*, 74 U. Chi. L. Rev. 991 (2007) (concluding that "circuit splits have developed regarding the proper scope of

the textual analysis commanded by *Gonzaga* and, derivatively, regarding the § 1983 enforceability of some of the Medicaid Act's most notable statutory provisions").

Accordingly, plenary review is warranted to fully achieve *Gonzaga*'s goal of clarifying this Court's § 1983 jurisprudence.

III. The Second Question Presented Is Independently Worthy Of Plenary Review Because The Lower Court's Ruling Effectively Federalizes The Traditionally State-Law Realm Of Medical Malpractice As It Relates To Nursing Facilities

In finding that the educational privacy legislation at issue in *Gonzaga* did not unambiguously confer "rights" upon individuals that were enforceable under § 1983, the Court highlighted the fact that education was an area in which Congress had traditionally deferred to state and local officials. *See* 536 U.S. at 286 n.5. As such, the Court believed it highly unlikely that Congress sought to intervene in a traditional state and local function by subjecting school officials to "private suits for money damages whenever they fail to comply with a federal funding condition." *Id.*

Similar considerations are present in this case, as the Third Circuit's ruling effectively federalizes medical malpractice as it relates to nursing facilities. This Court has long recognized that the field of medical malpractice is one traditionally governed by state law. *See, e.g.*, *Rush Prudential HMO, Inc. v. Moran*, 536 U.S. 355, 387 (2002) (describing "reasonable medical care" as involving "quintessentially state-law standards"); *Pegram v. Herdrich*, 530 U.S.

211, 237 (2000) (noting that the "field of health care" is "a subject of traditional state regulation"). However, during the following colloquy between Circuit Judge Smith and counsel for Ms. Grammer, counsel acknowledged that the theory of Ms. Grammer's case would have profound consequences if judicially accepted:

> Q. Let me begin by asking you what I suppose could be construed as a question of legal policy. But is not the position that you urge upon us one that would completely federalize malpractice cases that occur in nursing homes that are operated by state and local governments?
>
> A. To some extent, yes.
>
> Q. Well, to what extent would it not?
>
> A. To the extent that those nursing homes did not participate in the Medicaid program. But once they choose to participate in the federal Medicaid program, then they are bound to [abide] by the Medicaid regulations.

Oral Arg. Recording at 00:01:43-00:02:30, *Grammer v. John J. Kane Reg'l Ctrs. - Glen Hazel*, No. 07-2358 (3d Cir. May 20, 2008).[2]

It would be highly unusual if a government-operated nursing facility did *not* participate in Medicaid, which is by far the single largest funding source for nursing facility services. *See, e.g.*, U.S. Gen. Accounting Office, *Medicaid Nursing Home Pay-*

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[2] Http://www.ca3.uscourts.gov/oralargument/audio/07-2358GrammervKaneRegionalCenters.wma.

ments at 1, Rep. No. GAO-04-143 (2003) (explaining that Medicaid "pays at least in part for the care provided to approximately two in three nursing home residents"). Government-operated nursing facilities such as the Kane Center are typically tasked with serving individuals with low incomes or disabilities, which are the very populations targeted by Medicaid. As such, the practical effect of the ruling below is to federalize the field of medical malpractice as it relates to government-operated nursing facilities, many of which have been granted immunity from medical malpractice liability by their respective state legislatures. *See, e.g.*, *Davis v. County of Westmoreland*, 844 A.2d 54, 56 (Pa. Commw. Ct. 2004) (explaining that under Pennsylvania statutory law, county-owned nursing facilities such as the Kane Center are granted immunity to malpractice liability). This is especially true when one remembers that, by filing suit under § 1983 instead of using traditional common-law remedies, plaintiffs will be able to seek attorney's fees under 42 U.S.C. § 1988, as Ms. Grammer does in this case.

The ramifications of the Third Circuit's ruling go beyond just government-operated nursing facilities, however. As counsel for Ms. Grammer admitted during oral argument in the court below, even in cases involving nongovernmental nursing facilities, plaintiffs regularly use FNHRA in arguing that the statute creates a national standard of care or that it may serve as the basis for a negligence *per se* claim. *See* Oral Arg. Recording at 00:13:15-00:13:35 ("As we routinely do in a situation like this where the defendant-home is a Medicaid beneficiary, we rely upon the violations of these federal provisions in the Medicaid Act to serve as a basis for, not only the standard

of care, . . . but also negligence *per se* for their violation."). In finding that FNHRA unambiguously confers federal "rights" on individual Medicaid beneficiaries, the Third Circuit's ruling lends significant credence to this questionable, yet pervasive, practice.

That courts overwhelmingly have refused to find an implied right of action within FNHRA also counsels that the panel majority's decision is incorrect. *Gonzaga* held that a "court's role in discerning whether personal rights exist in the § 1983 context should . . . not differ from its role in discerning whether personal rights exist in the implied right of action context." 536 U.S. at 285. As clearly explained by both the district court and the Third Circuit dissent in this case, courts have regularly held that FNHRA does not create an implied right of action. App., *infra*, 26a n.6, 37a-38a (collecting cases); *see also Johnson v. Badger Acquisition of Tampa, LLC*, 983 So. 2d 1175, 1182 (Fla. Dist. Ct. App. 2008) ("Interpreting [FNHRA] to create a legal duty in this context would invite an unusual federal encroachment into Florida common law in an area typically a subject of state regulation."). Therefore, the panel majority's decision conflicts with the weight of existing authority—existing authority that the panel majority made no attempt to distinguish.

CONCLUSION

For the foregoing reasons, the Court should grant the petition for a writ of certiorari and reverse the judgment of the court of appeals. Alternatively, the

Court may wish to invite the Solicitor General to file a brief expressing the views of the United States.[3]

Respectfully submitted.

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[3] The Court invited the Solicitor General to file such a brief in *Selig v. Pediatric Specialty Care, Inc.*, 549 U.S. 1202 (2007) (No. 06-415), which asked whether certain provisions of the Medicaid Act create federal "rights" that are privately enforceable under § 1983. However, the plaintiff-respondents acted to moot the case prior to such a brief being filed. *See Selig v. Pediatric Specialty Care, Inc.*, 551 U.S. 1142 (2007) (granting the petition for a writ of certiorari, vacating the lower court's judgment, and remanding the case with instructions for the lower court to dismiss the appeal as moot) (citing *United States v. Munsingwear, Inc.*, 340 U.S. 36 (1950)); *see also* Nicole Huberfeld, *Bizarre Love Triangle: The Spending Clause, Section 1983, and Medicaid Entitlements*, 42 U.C. Davis L. Rev. 413, 450 (2008) (explaining that the plaintiff-respondents in *Selig* acted to moot the case after meeting with the Office of the Solicitor General).

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