ORIGINAL

No. 18-1452

In the Supreme Court of the United States

JOSE A. PEREZ,

Petitioner,

v.

PHYSICIAN ASSISTANT BOARD and MARGARET K. BENTLEY, in her Official and Personal Capacities,

Respondents.

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

PETITION FOR WRIT OF CERTIORARI

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MAY 17, 2019

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QUESTIONS PRESENTED

This Court has ruled that in the case of a pro se litigant, the courts must, sua sponte, grant leave to amend the complaint to correct curable defects and/or correct defective jurisdictional allegations, *Scarborough v. Principi*, 124 S.Ct. 1856, 541 U.S. 401, 158 L.Ed.2d 674 (U.S. 05/03/2004) citing *Becker v. Montgomery*, 532 U.S. 757 (2001), 28 U.S.C. § 1653 and Rule 15(c) Federal Rule Civil Procedure.

Furthermore, Rule 54(c) of the Federal Rules of Civil Procedure directs trial courts to "grant the relief to which each party is entitled, even if the party has not demanded that relief in its pleadings, *Engel v. Teleprompter Corp.*, 732 F.2d 1238 (5th Cir. 05/25/1984); *In re Railworks Corporation*, 760 F.3d 398 (4th Cir. 2014);

QUESTIONS PRESENTED

1. Whether Mr. Perez can amend his complaint pursuant to 28 U.S.C. § 1653 and 15(c) F.R.C.P., to allege that a State cannot exclude a person from the practice of medicine in a manner or for reasons that contravene the Due Process or Equal Protection. Clause of the Fourteenth Amendment, *Schware v. Board Bar Examiners New Mexico*, 353 U.S. 232 (1957), *Dent v. West Virginia*, 129 U.S. 114 (1889).

2. Whether Mr. Perez can amend his complaint pursuant to 28 U.S.C. 1653 and 15(c) F.R.C.P., to allege that the continued enforcement of an unconstitutional statute cannot be insulated by the statute of limitations. *Va. Hosp. Ass'n v. Baliles*, 868 F.2d 653, 663 (4th Cir. 1989), *aff'd sub nom. Wilder v. Va. Hosp. Ass'n*, 496 U.S. 498 (1990).

3. Whether The Fifth Circuit erred when it ruled that a Federal Fifth Amendment Takings Claim must be filed within the two year statute of limitations imposed by Texas on 42 U.S.C. 1983 actions.

4. Whether the Fifth Circuit erred when it ruled that a good faith reliance on *Williamson County Regional Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 194 (1985) was not considered an exceptional circumstance justifying tolling the statute of limitations.

PARTIES TO THE PROCEEDINGS AND RULE 29.6 STATEMENT

- The Petitioner is Physician Assistant Jose A. Perez.
- The Respondents are a Texas State agency, the Physician Assistant Board and its Director Margaret K. Bentley.

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OPINIONS BELOW

The Fifth Circuit Court of Appeals opinion is included in Petitioner's Appendix at App.1a, The Opinion of the U.S. District Court granting the Motion to Dismiss is included at App.6a, 9a.

JURISDICTION

On October 15th, 2018, the U.S. District Court granted the Motion to Dismiss. Jose A. Perez filed a timely appeal to the U.S. Court of Appeals for the Fifth Circuit which affirmed dismissal on March 8th, 2019. (App.1a) Mr. Perez filed a timely petition for rehearing en banc. On April 18th, 2019 the court denied the petition. This court has jurisdiction pursuant to 28 U.S.C. § 1254(1)

CONSTITUTIONAL PROVISIONS INVOLVED

- **U.S. Const. Amend V**

The Fifth Amendment of the United States Constitution includes a provision known as the Takings Clause, which states that "private property [shall not] be taken for public use, without just compensation."

- **U.S. Const. Art. V**

The Power to amend the constitution was reserved by Article V, which reads:

> The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures

STATEMENT OF THE CASE

Mr. Perez became a physician assistant on September 22nd, 1994. He never committed medical malpractice or any act injurious to any patient or a member of the public. Nevertheless, his right to work as a physician Assistant was arbitrarily, capriciously and whimsically revoked on March 7th, 2014.

When his license was revoked (a) he was denied a jury trial; (b) he was denied access to a quasi-criminal proceeding, he license was revoked pursuant to an administrative default proceedings (c) he was denied his right to a neutral adjudicator; (d) he was denied his right to fair notice of the precise charges against him; (e) he was denied the right to access the courts to oppose the administrative actions without subjecting himself to have his license revoked in retaliation thereof; (f) he was denied his right to have his license revoked pursuant to the clear and convincing standard of proof.

Mr. Perez has been diligently asserting his rights: first at the State Office of Administrative Hearings from November 1st, 2011 until May 16th, 2013, case

Number 503-12-1940. Mr. Perez also sought relief in the state courts until the Texas Supreme Court recently dismissed his case on January 12th, 2018–Case # 17-0952. Mr. Perez appeared before the State Office of Administrative Hearings and the Physician Assistant Board via written submissions and presented factual and Constitutional objections.

REASONS FOR GRANTING THE WRIT

I. THE FIFTH CIRCUIT DECISION CONFLICTS WITH THIS COURT'S PRECEDENT

This court has ruled that in the furtherance of justice, upon such terms as may be just, permit any process, proceeding, pleading, or record to be amended, or material supplemental matter to be set forth in an amended or supplemental pleading. *Scarborough v. Principi*, 541 U.S. 401 fn. 15 citing Federal Rule of Civil Procedure 15(c) (2004), 28 U.S.C. § 1653 This court has further stated that at every stage of the proceeding, must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties. (*Id.*) Mr. Perez further incorporates and adopt herein the issues raised in the questions presented.

This Court has previously ruled that the Fifth Amendment Takings Clause can not be modified or controlled by statute, *Pumpelly v. Green Bay Company*, 80 U.S. 166, 177-178 (1871), Mr. Perez respectfully submits that if the Fifth Circuit's decision is correct, to wit, that 42 U.S.C. 1983 amends or modifies the Takings Clause, then Article V, of the U.S. Constitution

has been transgressed upon. The same reads: The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures.

Furthermore, this court has ruled that the just compensation requirement of the Takings Clause places takings in a class by themselves because, unlike other constitutional deprivations, the Takings Clause provides both the cause of action and the remedy, *United States v. Clarke*, 445 U.S. 253, 257 (1980), *City of Monterey v. Del Monte Dunes at Monterey*, 526 U.S. 687, 711-712 119 S.Ct. 1624, 143 L.Ed.2d 882 (U.S. 05/24/1999) citing *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304 (1987) and *Jacobs v. United States*, 290 U.S. 13, 16 (1933)).

This Court has also ruled that a District court must entertain suits, directly under the Constitution or laws of the United States, except: (a) where the alleged claim appears to be immaterial, and made solely for the purpose of obtaining jurisdiction, or (b) where it is wholly insubstantial and frivolous, *Bell v. Hood*, 327 U.S. 678 (1946). There was no finding that Mr. Perez' claim was: (a) immaterial, (b) made solely for the purpose of obtaining jurisdiction, (c) wholly insubstantial or (d) frivolous,

This court has also ruled that a plaintiff's allegation that local government action resulted in a taking is not " ripe" for review in federal court until the plaintiff seek[s] compensation through the procedures the State has provided for doing so, *Williamson County Regional Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 194 (1985) *Williamson County Regional Hospital v. Hamilton Bank of Johnson City*, 473 U.S.

172 (1985) is still binding precedent, *Arrigoni Enterprises, LLC v. Town of Durham, Connecticut, et al.*, 136 S.Ct. 1409 (2016)

II. THE FIFTH CIRCUIT DECISION CONFLICTS WITH IT'S OWN PRECEDENTS

The Fifth Circuit has previously ruled that: (a) 42 U.S.C. § 1983 is not a jurisdictional statute and, therefore, does not give federal courts the power to decide claims that arise under it. The Fifth Circuit has also stated, that the failure to present an adequate § 1983 claim does not strip the court of jurisdiction unless the claim is clearly immaterial, frivolous, and wholly insubstantial. The Fifth Circuit further ruled that Jurisdiction of civil rights actions is instead conferred by 28 U.S.C. § 1343, which gives district courts original jurisdiction "of any civil action authorized by law to be commenced by any person . . . to recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights . . . " *Daigle v. Opelousas Health Care Inc.*, 774 F.2d 1344 (5th Cir. 10/30/1985);

The Fifth Court has also previously ruled that (1) A Good Faith Reliance on a Supreme Court Ruling is a complete defense to any civil action brought under any law, *Alexander v. Verizon Wireless Services, LLC*, No. 16-31227 (5th Cir. 2017); (2) One Fifth Circuit panel's decision may only be overruled by the Fifth Circuit sitting en banc)) *Texas Employers' Insurance Association v. Jackson*, 862 F.2d 491 (5th Cir. 12/13/1988).

III. THE FIFTH CIRCUIT DECISION CONFLICTS WITH NINTH CIRCUIT PRECEDENT

The Ninth Circuit has ruled that the federal statute of limitations depends on the statute of limitations the state applies to its Takings Clause, *DW Aina LE'A Development, LLC, v. State of Hawai'i Land Use Commission, et al.*, No. 17-16280 (9th Cir. 2019)

If the Ninth Circuit interpretation is correct then Mr. Perez respectfully submits that Texas courts have ruled that causes of actions pursuant to Section 17 of Article 1 of the Texas Constitution have no Constitutionally or legislatively imposed statute of limitations, *Steele v. City of Houston*, 603 S.W.2d 786, 789 (Tex. 1980); *State v. Hale*, 146 S.W.2d 731 (Tex. 1941), Section 17 of Article 1 of Texas Constitution.

CONCLUSION

The Petition ought to be granted.

Respectfully submitted,

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