

No. 18-1464

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**In The  
Supreme Court of the United States**

FILED  
MAY 14 2019  
OFFICE OF THE CLERK  
SUPREME COURT, U.S.

\_\_\_\_ Δ \_\_\_\_\_  
DR. MILOS JIRICKO,

Petitioner,

v.

FRANKENBURGJENSEN LAW FIRM  
CAROLYN STEVENS JENSEN, Lawyer  
JENIFER M BRENNAN, Lawyer  
KEITH KELLY, Judge in his official & personal  
Capacity, HEATHER BRERERTON, Judge in  
her official & personal capacity,  
Respondents,

\_\_\_\_ Δ \_\_\_\_\_  
On Petition For Writ Of Certiorari To The United  
States Court Of Appeals For The Tenth Circuit

\_\_\_\_ Δ \_\_\_\_\_  
PETITION FOR WRIT OF CERTIORARI

\_\_\_\_ Δ \_\_\_\_\_  
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**QUESTION PRESENTED:**

1. Whether the US Supreme Court can apply a blind eye to the alleged unconstitutionality of the Utah State Medical Malpractice statute, Code 78B-3-401, while the Chief Justice John Marshall declared that it is the Supreme Court's responsibility to overturn unconstitutional legislation as necessary consequence of the sworn to oath of office to uphold the Constitution mandated the US Const. Article VI.

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## PETITION FOR A WRIT OF CERTIORARI

Dr. Milos Jiricko pro se, respectfully petitions for a writ of certiorari to review the February 22, 2019 judgment of the United States Court of Appeals for the Tenth Circuit *infra* at App.1 and (b) respectfully prays that Supreme Court to take the judicial action to review and to rule upon the constitutionality of the Utah Medical Malpractice Statute Utah Code 78 B-3-401

## OPINIONS BELOW

Opinion of the Tenth Appeals Court in Denver, Co appears in Appendix A. This opinion was not published. On February 15, 2018, the United States District Court For The District Of Utah Case No. 2:16-cv-132-DB enter the Judgment In A Civil Case *infra* at App.12. On February 5, 2018, the United States District Court For The District Of Utah Case No. 2:16-cv-00132-DB-EJF filed a Report And Recommendation Regarding Defendants' Motion For Summary Judgment *infra* at App.13

## JURISDICTION

The judgment of the United State Court of Appeals for the Tenth Circuit was entered on February 22, 2019. See App., *infra*, at 1. The jurisdiction of this court is invoked pursuant to 28 U.S.C. § 1254(1).

Petitioner seeks review of the decision of the Court of Appeals for the 10th CIR entered on February 22, 2019 affirming the dismissal of the Utah district court AND (b) de-novo judicial review sought under the Supreme Court distinctive mandate to adjudicate the constitutionality of the State statute, namely the Utah Medical Malpractice statute, Utah Code 78 B-3-401, ignored below.

Allegations of unconstitutional state statute

establishes a controversy enough for Article III federal jurisdiction. (Cf. *INS v. Chadha*, 462 U S 919.

There was no motion for reconsideration filed to the Court Order dated February 22, 2019.

Petitioner respectfully submits that since the appeals court and the Utah district courts both overlooked to conduct the judicial review of Utah Code 78 B-3-401 in the presence of real controversy between Dr Jiricko and the Utah State manifested by the Utah State imposing unconstitutional statute upon the Petitioner's Utah State case No:: 30907101, the US Supreme Court should now hear it.

Pursuant to Utah code 78B-3-401 plaintiff law suit is medical malpractice action and the medical malpractice statute apply"; (June 19, 2014 Order *Utah State Court Judge Kelly*).

The apparent violation of US Constitution itself creates the US Supreme Court constitutional mandate to exercise its ultimate authority and to adjudicate the alleged Constitutional trespass, the Utah State perpetrated upon Dr. Jiricko and, to this date, continue to inflict upon all Utah medical malpractice patients. (*Marbury v. Madison*).

ART III, § 2 of the Constitution vests appellate jurisdiction in the Supreme Court:

... In all Cases affecting Ambassadors,  
other public Ministers and those cases in  
which a State shall be the Party....

Official-capacity suits filed against state officials are merely an alternative way of pleading an action against the entity of which the defendant is an officer. (*Hafer v. Mello*, 502 U.S. at 25).

## CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

### RCP Rule 5.1. Constitutional Challenge to a Statute

(c) INTERVENTION; FINAL DECISION ON THE MERITS. Unless the court sets a later time, the attorney general may intervene within 60 days after the notice is filed or after the court certifies the challenge, whichever is earlier. Before the time to intervene expires, the court may reject the constitutional challenge, but may not enter a final judgment holding the statute unconstitutional.

**Article III, Section 2, Clause 2 of the Constitution:**

In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be a Party, the Supreme Court shall have original Jurisdiction.

**Utah code 78B-3-401,**

Utah Health Care Malpractice Act, which was in effect in the year 2017.

**42 U.S. Code § 1983.**

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, for redress ...

**US Constitution Article I, Section 9.**

. ... "No Bill of Attainder or ex post facto Law will be passed"

**US Constitution Article I, section 10, Contract clause**  
...prohibits State from passing any law that "impairs the obligation of contracts"...



**US Constitution ART III, Supremacy Clause of the United States Constitution (Article VI, Clause 2)**

establishes that the Constitution, federal laws made pursuant to it, and treaties made under its authority, constitute the supreme law of the land. It provides that state courts are bound by the supreme law; in case of conflict between federal and state law, the federal law must be applied.

**US Constitution Amendment I**

Congress shall make no law respecting an establishment of religion or ...prohibiting the right of the people to petition the Government for a redress of grievances.

**US Constitution Amendment V**

No person shall be held to answer for a capital, or otherwise infamous crime ..... nor be deprived of life, liberty, or property without due process of law...

**US Constitution Amendment XIV**

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

**STATEMENT OF THE CASE****Preamble:**

Judicial review protects the fundamental rights of the citizens and thus it keeps the faith of democracy

alive; it helps in maintaining the fundamental system of “checks & balances” between judiciary and executive branch. (*Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803))

On February 16, 2016 Dr. Jiricko filed his federal case No: 2:16-cv-00132-DB at the district court in Salt Lake City, Utah; it included allegation of violation of Section 1983 and allegation of unconstitutional Utah medical malpractice code 78B-3-401. Federal Judge Benson was assigned to this law suit as the presiding judge. Judge Benson then appointed the magistrate judge Furse to assist him. Judge Benson was known by the local press as a ‘flip flop’ judge’, infra at App. 20. While the Judge Benson ostensibly acknowledged that Dr. Jiricko Complaint alleging unconstitutional Utah statute was filed at his federal Court for adjudication (by sending certified mail to the Utah State Attorneys ), the same judge Benson however then refused to engage and to enact upon any judicial review of Utah malpractice statute 78B-3-401, ‘sine qua non’ to any fair adjudication of Dr. Jiricko’s Section 1983 claim filed at his Salt Lake City, Utah federal court.

Petitioner respectfully submits that the Judge Benson failure to adjudicate Utah State Statute for its constitutionality, particularly in the presence of Dr. Jiricko Section 1983 action dismissed merely upon the pretext that Frankenburg lawyers are not state actors, made a mockery of the Petitioner’s 1983 action;( *Lugar v. Edmondson Oil Co.*, 457 U.S. 922)..

Dr. Jiricko’s section 1983 litigation at the Utah district court mandated the judicial review of Utah code 78B-3-401 for its constitutionality as it was applied by the Utah State upon Dr. Jiricko’s state case (See June 19, 2014 Order by *Utah State Court Judge Kelly*) – and on December 18, 2017 Dr. Jiricko case was then dismissed, in the violation of US

Constitution, Amendment 14, Section 1983 and thus illegally. (*Lugar*, supra).

US Supreme Court held that the conduct allegedly causing the deprivation of a constitutional right protected against infringement by a State must be attributable to the State. In determining the question of "fair attribution," the Supreme Court indicated:

(a) the deprivation must be caused by the exercise of some right or privilege created by the State or by a rule of conduct imposed by it or by a person for whom it is responsible;

(b) the party charged with the deprivation must be a person who may fairly be said to be a state actor, either because he is a state official, because he has acted together with or has obtained significant aid from state officials or because his conduct is otherwise chargeable to the State. (*Lugar* at 936-939 ).

However, insofar as petitioner's complaint challenged the state statute as being procedurally defective under the Due Process Clause, he did present a valid cause of action under § 1983. (*Lugar*). The Court continued ..."

[t]he statutory scheme obviously is the product of state action, and a private party's joint participation with state officials in enforcing invalid state statute allows to characterize that party as a "state actor" for purposes of the 14<sup>th</sup> Amendment". (*Lugar* at 939-942).

Frankenburg lawyers are state actors under *Lugar* decision.

Utah Code 78B-3-401 violates federal law and US Constitution and thus is preempted by the US Const. ART III and hence invalid.

Petitioner's district court Complaint includes 'Notice of Unconstitutional statute' (District Court Docket 26) and demanded the judicial review.

Under the applicable federal law Dr. Jiricko's right to a judicial review of acts of Utah legislature affecting constitutional issues as applied upon Dr. Jiricko Utah state case No: 30907101 is axiomatic.

Dr. Jiricko is in good standing in claiming such challenge as he was directly subjected to its application upon his Utah state case and suffered material loss, when his state claim was dismissed with prejudice, by a concerted action of the Respondents. (*Marbury; Lugar...*). While Dr. Jiricko invoked the proper mechanism by asserting his 1983 Section claim and alleging the unconstitutionality of Utah statute in the US District court, the Judge Benson inexplicably ignored his judicial mandate, refused to enact the judicial renew and trespassed upon his oath of office; (*Marbury v. Madison*)

... judicial branch officers, because of their oath of office, have a required constitutional duty to examine and determine if their actions are constitutional or unconstitutional. To not so discharge their duties "is worse than solemn mockery; to prescribe, or to take this oath, becomes equally a crime. (*Marbury v. Madison*).

A judgement is void if not consistent with Due Process. (*Orner v. Shalala*, 30 F3d 1307).  
US Constitution .Amendment V.

US Constitution Amendment I, guarantees to all US Citizens the fundamental and undeniable right to freely petition the government for redress of their grievances - since the Utah code 78B-3-401 mandates all Utah Citizens to obtain a certificate issued by the Utah state appointed panel first, before they are

allowed to file their grievance at the Utah state courts Utah code 78B-3-401 is therefore invalid as preempted by the US Constitution ART III.

ART I, Section 9, provides ...."No Bill of Attainder or ex post facto Law will be passed"...

Certainly, the US Constitution specifically prohibits passing retroactive law and since the Utah Code Section 78-12-36 mandates....."this statute shall apply retroactively" Utah statute 78-12-36 is in conflict with our Supreme law and invalid as being preempted by the us constitution ART III.

(*Sturges v. Crowninshield*, 17 U. S. (4 Wheat.) 122].

In Utah the doctor/patient relation is by law defined as contractual; Utah Health Care Act, Section 78-12-36 trespasses upon the Constitutional guaranty enumerated by the US Const.. ART I, section 10, Contract clause, which prohibits State from passing any law that... 'impairs the obligation of contracts'; Utah statute 78-12-36 therefore conflicts with our Supreme law, it is invalid as being preempted by the US Constitution ART III

When a party raises the issue of the actual "case and controversy", the judge has no judicial discretion to refuse to rule upon the controversy with the parties interests. (*Marbury v. Madison*).

The main three principles of judicial review are generally held as follows:

1. The Constitution is the supreme law of the country.
2. The Supreme Court has the ultimate authority in ruling on constitutional matters.
3. The judiciary must rule against any law that conflicts with the Constitution.

The reasons for the Supreme Court exercising its ultimate Constitutional powers and thus grants this Petition have been also summarized as follows:

- a/ For protecting the constitution b/ For interpreting the constitution c/ For maintaining

balance between Centre and state d/ For protecting the rights of citizens e/ For checking the misuse of powers, etc.

Legal experts weighted in this matter as follows:

(A) The most distinctive attribute of Supreme Court is its power of judicial Review. This is the power to determine whether a law passed by congress or any provision of state constitution or any law enacted by state legislature or any other public regulation having the force of law is in consonance with the constitution of the United States." (Prof. Munro).

Mr.. Springer, Utah renowned medical malpractice expert lawyer noted:

(B)Medical malpractice victims are treated as second-class citizens by Utah law. As a result, only a handful of law firms still handle these cases, and even fewer are successful. The odds favor the doctors and hospitals because the Utah State Legislature has enacted special laws to protect negligent doctors at the urging of powerful medical lobbyists. Frankenburg lawyers knew as well.

The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. One of the first duties of government is to afford that protection. (*Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803))

## REASONS FOR GRANTIONG THE PETITON

Dr. Jiricko's claim of unconstitutional Utah State statute is the cornerstone of this Petition, respectfully presented to the US Supreme Court.

Utah district court dismissal of the Petitioner's Section 1983 claim without the ruling upon the constitutionality of the Utah Code 78B-3-401 constituted structural, constitutional and ethical wrong that should not be now allowed to stand at this US Supreme Court.

After Dr. Jiricko, Plaintiff in his federal case No: 2:16-cv-00132-DB, raised the issue of actual case of controversy involving the constitutionality of the Utah State statute applied upon him by the Utah State on 12/18/2017, the federal judge Benson had no discretion to refuse to rule upon such constitutional controversy in which this Petitioner has a direct personal interests. (*Marbury v. Madison*). Judicial review of Utah Code 78B-3-401 is paramount for Dr. Jiricko and his patients due process adjudication of any Utah medical malpractice injuries; the Judge Benson abused his judicial discretion and in the violation of his oath of office refused to enact upon such Constitutional trespass he personally vowed to be on guard for and to protect US citizen from.

Judicial review, hereby respectfully prayed for allows the laws held inconsistent with the constitution in that they violate the citizens' rights and liberties protected by the US Constitution to be revised or expunged, so no further harm is made to a large number of the US Citizens and thus the public in general is also protected.

All executive and judicial Officers, both United States and of the individual States are bound by Oath or Affirmation to support and uphold the US Constitution. The Petitioner respectfully submits, that the federal judge Benson abandoned his judicial duties, debased his oath of office and therefore such conduct should not now be allowed to continue to cause harm to other Utah citizens.

Under the Supreme Court precedents, it is the judge Benson's constitutional duty to decide what the law is. (*Marbury v. Madison*).

While it is said, the US Supreme Court 'does not sit as a court of error', the matter presented in this Petition is not about an error but rather about the due enforcement of the Unites States Constitution, the US Supreme Court as the court of the highest and the last resort should now embrace and indorse by granting this Petition for Certiorari.

Judicial review by this US Supreme Court is vital to our constitutional democracy system. It is designed to initiate the process which then permits the laws, inconsistent with the constitution and/or that violate the Citizens' rights and liberties, protected by the constitution, to be revised or expunged.

Certainly, the judge Benson failure to conduct the judicial review of the state statute which directly adversely affects the interests of the Utah public generally, as are the rights declared in the US Constitution, constitute a fundamental judicial trespass and thus it should be now reversed by the US Supreme Court.

Surely it cannot be that preservation of the integrity of the judicial process must always wait upon the diligence of litigants [*Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238 .

#### CONCLUSION AND REQUEST FOR RELIEF

The Petitioner respectfully prays the Supreme Court to remand to the District Court for an evidentiary proceedings to effect the ruling of this US Supreme

Respectfully submitted.

DATE: MAY 14, 2019



By:

s/

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## APPENDIX INDEX

### APPENDIX A

February 22, 2019 Judgment in the United States Court of Appeal For The Tenth Circuit Case No. 18-4066 in which plaintiff appealed from District Court (Utah) dismissal of federal and state law claims and appealed from his motions to reopen the case Fed. R. Civ. P. 59 and 60(b) which was AFFIRMED.....App.1

### APPENDIX B

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### APPENDIX D

February 2, 2012, The Salt Lake Tribune Newspaper article about judge Deer Benson .....App.20