No.

IN THE

Supreme Court of the United States

VICTOR B. WILLIAMS, M.D., PETITIONER,

v.

BAPTIST HEALTH, DBA BAPTIST HEALTH MEDICAL CENTER, DOUGLAS WEEKS, EVERETT TUCKER, TIM BURSON, SCOTT MAROTTI, SUSAN KEATHLEY, CHRIS CATE, JOHN E. HEARNSBERGER, JOSEPH M. BECK, CHARLES MABRY AND JAMES COUNCE AND THE SURGICAL CLINIC OF CENTRAL ARKANSAS

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION(S) PRESENTED

1. Whether the April 3, 2014 revocation of Plaintiff's Arkansas medical license by the Arkansas State Board of Medical Examiners ("Medical Board") gave rise to a "new" separate and independent federal cause of action not barred by res judicata due to a civil action filed in Arkansas state court on February 25, 2014.

2. Whether the defendants are entitled to qualified immunity instead of absolute with respect to Plaintiff's federal claims arising from the improper revocation of his Arkansas medical license and the subsequent adverse negative reports related thereto.

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Related Proceeding (Arkansas State Court)[1]

Petitioner filed two separate actions in Pulaski Circuit Court, State of Arkansas. The first case, *Civil Action No. 60 CV-14-808* was filed on February 25, 2014, and the final judgment for defendants was entered on April 13, 2017. An appeal of the final judgment was filed on November 7, 2017, Arkansas Court of Appeals, CV-17-924, and currently remains pending.

On May 2, 2014 Petitioner filed *Civil Action No. 60 CV-14-1739* in Pulaski Circuit Court, State of Arkansas. A Consent Order was entered on November 3, 2015.

Federal Court Proceedings

On March 31, 2017 Petitioner filed this federal action Civil Action No., 4:17-CV-205-JM, in the United States District Court, Eastern District of Arkansas. The district court's September 19, 2017 opinion granting the Baptist Health defendants' motion to dismiss was not reported and is reproduced in the Appendix herein at 14a - 20a. The district court's March 8, 2018 opinion granting Counce and and Mabry's motion for summary judgment was not reported and is

[1]Arkansas State Court Proceedings are included because of the district court's reliance upon the doctrine of res judicata, which was unsuccessfully challenged by Plaintiff on appeal to the Eight Circuit Court of Appeals

reproduced in the Appendix herein at 12a-13a. The district court's May 31, 2018 opinion granting Hearnsberger and Beck's motion for summary judgment was not reported and is reproduced in the Appendix herein at 7a-11a.

On July 2, 2018 Petitioner filed appeal in the United States Court of Appeals for the Eighth Circuit, Case No., 18-2423 and Judgment entered on May 29, 2019. The Eighth Circuit Court of Appeals' opinion was not reported, *Williams v. Baptist Health*, 770 Fed. Appx. 781, 2019 U.S. App. LEXIS 15875, 2019 WL 2305570 (2019). Rehearing denied by, Rehearing, en banc, denied by *Williams v. Baptist Health*, 2019 U.S. App. LEXIS 20930 (8th Cir. Ark., July 15, 2019).

JURISDICTION

This Court has jurisdiction to consider this Writ of Certiorari to the Eighth Circuit Court of Appeals' judgment affirming the district court's orders granting the Baptist defendants' motion to dismiss and the remaining defendants' motions for summary judgment. The Eight Circuit Court of Appeals issued its opinion (Pet. App. 1a -3a) and entered judgment (Pet. App. 4a - 5a) on May 29, 2019. Williams filed a timely petition for rehearing (Pet. App. 162a - 168a) on June 12, 2019 which was denied on July 15, 2019. (Pet. App. 169a) This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

RELEVANT PROVISIONS INVOLVED

USCS Const. Amend. 1

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

USCS Const. Amend. 14, § 1

> 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.

42 U.S.C. § 1981

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishments, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

42 U.S.C. § 1982

> All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property.

42U.S.C. § 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, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT

Victor Williams, M.D., a black surgeon in Little Rock, Arkansas filed suit in Arkansas state court pursuant to the Arkansas Civil Rights Act and

Arkansas state law alleging that after it improperly terminated his medical staff privileges, Baptist Health Medical Center ("Baptist Health") inappropriately and prematurely[2] elicited assistance from the Arkansas State Medical Board ("Medical Board") in 2010 in order to help fend off his claims of racial discrimination.

On November 25, 2003, Plaintiff was first granted medical staff privileges at Baptist Health Medical Center, Little Rock for the two year time period November 2003 through November 2005. Complaint, ¶ 20. Pet App. 116a. At the time that he obtained medical staff privileges at Baptist Health Medical Center, Plaintiff was the only African-American surgeon in Little Rock, Arkansas, who provided both the range and the type of surgeries to patients in and around Pulaski County, Arkansas, in the areas of general, cardiac, thoracic and vascular surgery. *Id.*

In November, 2008, after having reappointed and credentialed for his third two year period at Baptist Health, Plaintiff purchased a parcel of real property located at 9712 W. Markham St., Little Rock, Arkansas for the purpose of constructing a medical office to provide treatment for his surgical patients, to include those patients that he treated at Baptist Health Medical Center. Complaint, ¶s 21-23. Pet App. 116a - 117a. In the fall of 2009, Plaintiff completed the build

[2]Contrary to both Baptist and the Board's customary policies and procedures, Williams had not yet exhausted his appeals at Baptist before he was required to appear before the Board in late 2010. The Baptist decision terminating his medical staff privileges became final in April, 2011. Complaint, ¶ 54. Pet App. 135a.

out process for his medical office located at 9712 W. Markham St., Little Rock, Arkansas, and began advertising the same to inform patients, both current and potential, that he would begin servicing and treating patients there. Complaint, ¶ 25. Pet App. 117a.

On November 3, 2009, Plaintiff submitted his third application for reappointment of his medical staff privileges at Baptist Health Medical Center, Little Rock. Complaint, ¶ 24. Pet App. 117a. At the time that Plaintiff applied to renew his medical staff privileges at Baptist Health Medical Center, Little Rock, in the fall of 2009, he had no reports of medical malpractice payments, no reports of state licensure actions, no reports of exclusions or debarment actions, no reports of clinical privileges actions, no reports of professional society actions, and no reports of DEA/Federal licensure actions[3] Complaint, ¶ 26. Pet App. 117a.

On January 18, 2010, Defendant Burson, acting in his capacity as Chief of the Department of Surgery at Baptist Health Medical Center, signed Plaintiff's application for re-credentialing and recommended that Plaintiff's application for reappointment to the medical staff be approved, but after Plaintiff's application for reappointment was approved by the Board of Trustees,

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[3]According to reports generated during Plaintiffs 2009 credentialing re-application process, it was documented that during the one year period September 1, 2008, through August 31, 2009, Plaintiff had performed over 550 surgical procedures at Baptist Health Medical Center, Little Rock. Complaint, ¶ 29. Pet App. 119a.

his medical staff privileges were revoked in April, 2010. Complaint, ¶s 39-42. Pet App. 126a - 128a.

After his medical staff privileges were revoked in April 2010, Plaintiff immediately pursued the appeal process authorized pursuant to the Baptist Health Medical Center's medical staff bylaws. Complaint, ¶ 44. Pet App. 129a. Attorney Gene McKissic notified defendant Weeks via letter dated May 14, 2010, that he would be representing Plaintiff during the appellate process at Baptist Health Medical Center. *Id.* McKissic formally filed a notice of appeal of the Credentials Committee's recommendation to terminate Plaintiff's medical staff privileges on May 25, 2010, and included in the notice of appeal to Baptist Health, a statement that Plaintiff believed that the actions taken against him were "racially biased and discriminatory," and that white physicians at Baptist Health Medical Center who had been subject to corrective action had not "received such severe punishment." Complaint, ¶ 46. Pet App. 130a.

Contrary to its established policy and prior to Plaintiff's first appearance before it,[4] the Medical Board submitted medical records related to the medical treatment at issue to Counce and Mabry in November 2010, nearly five months before Plaintiff had exhausted his appeal rights under the medical staff bylaws at Baptist Health. Complaint, ¶s 45 - 52. Pet App. 129a -

[4]The customary practice at the Arkansas State Medical Board is to promptly give the physician notice and the opportunity to respond in writing to any complaints immediately after they are received. Complaint, ¶s 45, 48. Pet App. 129a - 130a.

134a. In addition, Cryer sent a transmittal letter to them explaining the negligence standard to be utilized when giving their expert opinion of the records reviewed. *Id.* The transmittal correspondence sent by Cryer to Mabry and Counce also included a legal memorandum[5] explaining the terms, "gross negligence" and "ignorant malpractice." *Id.* Prior to the Medical Board's November, 2010 correspondence to Counce and Mabry, there had been no patient complaints submitted to the Medical Board about the medical treatment provided.[6] *Id.* The November 12, 2010, transmittal letter to Counce requested that the reviews be provided to the Medical Board before November 19, 2010, in time for the December 2010 Medical Board meeting, and informed him that, "we very much appreciate your willingness to work with us to settle this case promptly." *Id.*

After Plaintiff's first meeting before the Medical Board in December, 2010, the Medical Board required him to obtain a proctor and Dr. Carl Gilbert, a board certified general surgeon agreed to serve as his proctor. Complaint, ¶ 53. Pet App. 134a. On April 21, 2011, Plaintiff filed a state court racial discrimination cause of action (Civil Action No. 60CV-11-1990) against Baptist Health Medical Center and other individuals for the

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[5]Counce Depo., pp. 29, 39-40, 45, 49-51, Doc. 141, p. 9, 11, 13-14.

[6]There was no malpractice complaint filed with the Arkansas State Medical Board against Plaintiff by any patient and/or person related to the medical treatment at issue at the hospital. Complaint, ¶ 45. Pet App. 129a.

termination of his medical staff privileges at Baptist Health.[7] Complaint, ¶ 54. Pet App. 135a.

On October 3, 2011, Dr. Gilbert submitted a written report to the Medical Board which stated in relevant part as follows:

> I have served as a proctor for Dr. Victor Williams since December 2010. I have proctored him during performance of abdominal colon operations as well as other surgical procedures at his request. I have discussed the cases with him prior to surgical interventions and in the postoperative periods. His knowledge base is proficient in the areas of general surgery, and I have found his technical abilities to be proficient as well. I have no concerns regarding his judgment or surgical technique. He has handled patients with multiple complex medical issues well.
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> In summary, his preoperative and postoperative judgment is appropriate and his technical skills are proficient and within the standard of care. For any questions please do not hesitate to contact me.

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[7]Among other things, Plaintiff's state court cause of action alleged that he had been discriminated against because of his race, Black, in violation of the Arkansas Civil Rights Act of 1993. In addition, Plaintiff also alleged other state law claims including, conspiracy, defamation, tortious interference with contracts, and violations of rights secured by the Arkansas Constitution. Complaint, ¶ 54 Pet App. 135a.

Complaint, ¶ 59. Pet App. 137a - 138a.

On November 22, 2011, the Hospital Defendants filed a motion for partial summary judgment in *Civil Action No. 60CV-11-1990* regarding Plaintiff's Arkansas State Constitutional claims, asserting the absence of "state action."[8] Complaint, ¶ 61. Pet App. 138a.

On December 1, 2011, even though Plaintiff had complied with the condition to obtain a proctor and even though the proctor had indicated in writing that he had no concerns regarding Plaintiff's clinical judgment or surgical technique, the Medical Board voted to Notice Plaintiff for a disciplinary hearing, even though they had told him previously on June 16, 2011 to "Return in one (1) year for an update [in] (June 2012)," and even though there were no other acts and/or omissions committed by Plaintiff subsequent to June 2011 that constituted negligence, malpractice, or an alleged violation of the Arkansas Medical Practices Act, (i.e., "gross negligence or ignorant malpractice.") Complaint ¶ 62. Pet App. 138a - 139a.

When Plaintiff appeared for the properly noticed hearing on June 8, 2012, along with counsel and several witnesses who were to testify on his behalf, the Medical Board voted to postpone the hearing and requested that Plaintiff cease to perform any surgical procedures

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[8]The state trial court entered an Order in *Civil Action No. 60CV-11-1990* granting the Baptist Health defendants' motion for summary judgment regarding the absence of "state action" on July 9, 2012. Complaint, ¶ 68. Pet App. 141a.

at all until he completed a physician assessment program (PACE) and submit the results to the Board upon completion of the program. Complaint, ¶ 63. Pet App. 139a. Ten days later on June 18, 2012, a representative of the Baptist Health Defendants attempted to coerce Plaintiff into voluntarily dismissing his state court racial discrimination cause of action (*Civil Action No. 60CV-11-1990*) brought pursuant to the Arkansas Civil Rights Act, and stated to Plaintiff that "if he didn't dismiss his lawsuit, Plaintiff would have to either admit that he had done something wrong to the Arkansas State Medical Board, or lose his medical license." Complaint, ¶ 66. Pet App. 141a.

In December 2012 Plaintiff was recertified by the American Board of Surgery with his recertification set to expire in July 2023. Complaint, ¶ 70. Pet App. 142a. Plaintiff obtained a voluntary nonsuit pursuant to Arkansas statute and his Arkansas Civil Rights lawsuit was dismissed without prejudice on March 15, 2013. Complaint, ¶ 72. 142a. On August 2, 2013, Plaintiff applied to attend the KSTAR Physician Assessment Program at Texas A&M University Health Science Center. Complaint, 75. 143a. He paid a total amount of $ 13,000.00 in costs and fees for the assessment. *Id.* He successfully completed the testing dates on September 5-6, 2013, and the KSTAR Meeting and Determinations on September 30, 2013. *Id.* The Final Report was prepared on October 9, 2013, and the surgeon who interviewed Plaintiff during his assessment indicated that he would not place any restrictions on Plaintiff's ability to continue his surgical practice. *Id.*

On February 25, 2014, Plaintiff re-filed his action against Baptist Health Medical Center in Pulaski

County Circuit Court, *Civil Action No. 60CV-14-808*, and added the Arkansas State Medical Board as a named defendant because the Board failed to accept Plaintiff's completion of the KSTAR program, and in light of the other facts and circumstances surrounding Plaintiff's treatment by the State Medical Board since October 2010, even though there had been no hearing held and no finding made by the Board that Plaintiff had violated the Arkansas Medical Practices Act. Complaint, ¶ 78. Pet App. 144a.

Among the relief sought in Williams' February 25, 2014 state law Complaint was a request for injunctive relief seeking to preclude the Medical Board from requiring him to attend another physician assessment program and a request to enjoin the Medical Board from acting in a manner inconsistent with its customary policies by interfering with his ability to have the jury decide all disputed facts and opinions[9] related to the appropriateness of the medical

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[9]Williams had already provided medical expert opinions by Dr. Rhonda Tillman to the Baptist Health defendants opining that the medical treatment at issue did not fall below the applicable standard of care generally, which would therefore certainly be lower than and could not rise to the level of "gross negligence" and/or "ignorant malpractice" which would be required before the Medical Board would be authorized to revoke a physician's medical license. Tillman, a surgeon and professor at the University of Arkansas, had previously appeared before the Medical Board in June, 2012 along with Williams and other witnesses who appeared on his behalf for a properly noticed hearing that was to be held on that date. The hearing was postponed because one of the Medical Board's witnesses, defendant Counce, was not in attendance. Complaint, ¶ 64. Pet. App. 139a. Doc. 126, pp. 8-9. Tillman's written expert opinions that were submitted to Baptist had also been provided to the Medical Board, and even though they were read by

treatment at issue in his pending civil action.[10] See Complaint, ¶ 81. Pet App. 146a.

On April 3, 2014, after being served with the Complaint, but before filing its Answer, and without first notifying Williams of the date and time for the hearing as required by Arkansas law,[11] the Medical Board held a hearing in Williams' absence and revoked

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defendants Hearnsberger and Beck, they were not presented to the Medical Board members during the April, 2014 hearing and a genuine issue of fact exists as to whether they were ever presented to the rest of the Medical Board members as Dr. Betton, the only Black Medical Board member testified that the Medical Board members did not have Dr. Tillman's opinions to evaluate at the April, 2014 hearing. Doc. 126, p. 9, Betton Depo., pp. 62-63, 79-80; Hearnsberger Depo., pp. 81, 125, 130-135; Beck Depo., pp. 80-82.

[10] *See also Walker v. Mem'l Health Sys.*, 231 F. Supp. 3d 210, 217 (E.D. Tex. 2017),

> "The Court hereby ORDERs Defendant Memorial Health System of East Texas ... its respective officers, agents, employees, and anyone acting on its behalf to immediately submit to the National Practitioners Data Bank a Void Report regarding Dr. Walker, and all such entities and persons shall refrain from filing any other statements or reports with the National Practitioners Data Bank relating to the actions the Hospital has taken against Dr. Walker in connection with the peer review process that is the subject of this lawsuit..."

[11] See the Arkansas governing law in effect in April, 2014 regarding notice to physicians, *A.C.A. § 17-95-410(c)(2)*, which requires that the Medical Board send "by registered mail to the person's last known address of record a copy of the order and notice of hearing along with a written notice of the time and place of the hearing..." See also Compliant, ¶ 82. Pet. App. 146a.

his Arkansas medical license. See Complaint, ¶ 94.f[12] Pet App. 151a. After the Board revoked Plaintiff's Arkansas medical license on April 3, 2014, he immediately filed an appeal and a *Petition for Judicial Review* of the Board's Order in Pulaski Circuit Court on May 2, 2014, (*Civil Action No. 60CV-14-1739*). Complaint, ¶ 85. Pet. App. 147a - 148a. On that same date, Plaintiff filed a *Motion to Stay Order Revoking Medical License*, and attached thereto an Affidavit of Gene McKissic, which clearly evidenced that Plaintiff was not notified of the date and time for the hearing that had been held in his absence. *Id*. Despite having evidence that Williams had not received prior notice of the April, 2014 hearing, the Medical Board denied his motion stay the order revoking his medical license. Doc. 126, pp. 1-2, & Exhibits 8-10. In November, 2015, however, the Board reinstated Williams' Arkansas medical license and in accordance with its customary policies and procedures, and agreed to postpone disposition and/or any disciplinary action on the medical treatment at issue until the final disposition of Williams' state court cause of action, which is currently on appeal in the Arkansas state courts even though a decision as to whether or not an appeal would be filed had not been made at the time that Plaintiff filed his

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[12]See Complaint, ¶ 94, Pet App. 151a,

> "Because they knew that Plaintiff would not appear at the hearing held on April 3, 2014, due to a lack of proper notice of the same, as part of the conspiracy to retaliate against Plaintiff for complaining about racial discrimination, the agents, employees, and/or representatives of the Arkansas State Medical Board went forward with the hearing and revoked Plaintiff's medical license in retaliation for him filing *Civil Action No. 60CV-14-808*."

action in federal court. See Complaint, ¶s 2 & 88. Pet. App. 108a, 148a - 149a.

The reinstatement of Plaintiff's Arkansas medical license occurred as a result of action taken by all of the members of the Medical Board on June 15, 2015. See Doc. 37, Exhibit 8, p. 5, where it is provided that on June 4, 2015, the "Board further agreed *to rescind and void the 2014 revocation* of Dr. Williams' Arkansas medical license and return his licensure status to that prior to the hearing due to a lack of notice of hearing to Dr. Williams from his former attorney. Additionally, the Board agreed to retain control of the four cases involved in this matter and *that a re-hearing would not be held until Dr. Williams' lawsuit against Baptist Hospital is concluded*."

However, in addition to the Medical Board's continuing reporting of the April, 2014 revocation of Williams Arkansas medical license,[13] the Medical Board refused to void the National Practitioner Data Bank[14]

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[13] On April 30, 2014, the Board submitted a report to the National Practitioner Data Bank stating that the Board had revoked Plaintiffs medical license because Plaintiff had "violated the Medical Practices Act, in that he exhibited gross negligence and ignorant malpractice in the manner in which he performed diagnostic workup and surgical procedures." Complaint, ¶ 84. Pet. App. 147a.

[14]"Ostensibly, practitioners with one or more adverse reports in the Databank may find it difficult to build or maintain their practices, as healthcare entities, including hospitals and health insurance companies, are likely reluctant to associate with practitioners who have been deemed incompetent through peer review." *Walker v. Mem'l Health Sys.*, 231 F. Supp. 3d 210, 213-214 (E.D. Tex. 2017). See also Complaint, ¶s 97-102 (Pet. App. 152a -

("NPDB") report as requested by the Secretary of the United States Department of Health and Human Services ("HHS") causing HHS to void the report itself. Complaint, ¶s 90-91. Pet. App. 149a - 150a. Immediately after HHS unilaterally voided the unauthorized NPDB report resulting from the hearing that was held in Williams's absence, the Medical Board submitted another report to NPDB indicating that there was a "restriction"[15] on Williams's Arkansas medical license in addition to continuing to report the April, 2014 revocation to the public generally on the Medical Board's website. See Doc. 126, p. 20, and Julie Carlson Depo., pp. 30-35.

Information directly related to the Medical Board's 2014 revocation of Plaintiff's Arkansas medical license, to include Counce and Mabry's reports and the Order revoking Plaintiff's Arkansas medical license

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153a) for examples of the harm that Plaintiff has suffered as a result of the reports related to the improper revocation of his medical license. At fn 1 of its Order granting summary judgment to Beck and Hearnsberger, "[t]he district court declines to analyze Plaintiff's claims for injunctive relief because the Doctors are no longer members of ASMB and have no authority to correct reports sent to the NPDB or keep accurate minutes of ASMB investigations.") Pet. App. 10a.

[15] However, on February 2, 2017, just days before the trial in state court was to be begin, and where Board agents, employees, and/or representatives had been subpoenaed to testify, "the Board voted unanimously to amend Dr. Williams' Consent Order of October 19, 2015 to add a statement that the action *was not considered a restriction* of his Arkansas medical license." Doc. 126, Exhibit 8, p. 5. Yet, despite this express acknowledgment by the Medical Board that there is/was no restriction on Plaintiff's medical license, the reports have continued to indicate otherwise.

which was executed by defendant Beck on April 10, 2014, was provided by employees of the Arkansas State Medical Board to a local news reporter in May 2015 so that it could be published in the local news and seen by members of the general public. Doc. 126, Exhibits 29 & 32. Plaintiff was never given the opportunity to cross examined Counce and Mabry's reports before they were released to the public.

When Counce and Mabry moved for summary judgment in the trial court in this case, Plaintiff objected to their "narrative reports" that were provided to the Medical Board because that was the first opportunity for him to do so as Counce and Mabry were not parties to the state court action and their reports were not offered or placed into evidence in support of any of the summary judgment motions that were granted by the state trial court in Williams I. Plaintiff's objections to the Counce and Mabry reports were based on primarily two things. First, the reports failed to comply with the evidentiary requirements of Rule 702 of the Federal Rules of Evidence and *Daubert v. Merrell Dow Pharmaceuticals*, Inc., 509 U.S. 579 (1993) "to the extent [they purport] to establish as an evidentiary fact, that Plaintiff committed "gross negligence" and/or "ignorant malpractice." see Doc. Doc. 67, pp. 5-13, and Doc. 69, pp. 8-16.

Second, and more importantly, Counce and Mabry's conclusory narrative reports fail to meet the statutory requirements of Arkansas law regarding allegations of medical negligence (A.C.A. § 16-114-206(a)) generally, as interpreted by the Arkansas courts in *Dodd v. Sparks Regional Medical Center*, 204 S.W.3d 579 (2005), *Neal v. Sparks Reg'l Med. Ctr.*, 422 S.W.3d

116, *Fryar v. Touchstone Physical Therapy, Inc.*, 229 S.W.3d 13 (Ark. 2006), and *Ford v. St. Paul Fire & Marine Ins. Co.*, 339 Ark. 434, 437, 5 S.W.3d 460, 462 (1999). See Eighth Circuit Appellant's Brief, p. 33. Pet. App. 84a - 85a.

Disposition of Questions Presented Below

A. The April 3, 2014 revocation of Plaintiff's Arkansas medical license by the Arkansas State Board of Medical Examiners ("Medical Board") gave rise to a "new" separate and independent[16] federal cause of action

When he filed his Complaint Plaintiff cited *The Baker Group v. Burlington Northern and Santa Fe Railway Co.*, 228 F. 3d 883 (8th Cir. 2000) and *Lundquist v. Rice Memorial Hospital*, 238 F.3d 975 (8th Cir. 2000) and indicated that his claims were limited to those arising after he filed his state court action in February, 2014. Complaint, ¶ 2. Pet. App. 108. Therefore, before even deciding whether or not he would appeal the state court action, Plaintiff made it clear in his Complaint that because the April, 2014 revocation of Plaintiff's Arkansas medical license occurred after he filed his civil action in state court on February 25, 2014, Plaintiff had a right to pursue any

[16]See *Bd. of Regents v. Tomanio*, 446 U.S. 478, 491, 100 S. Ct. 1790, 1799, 64 L. Ed. 2d 440, 452 (1980), ("there is no question that respondent's § 1983 action was 'separate and independent' from the state judicial remedy pursued in state court. ... The federal remedy is supplementary to the state remedy, and the latter need not be first sought and refused before the federal one is invoked.")

federal constitutional and statutory claims arising therefrom in federal court in the first instance, along with any pendent state law claims pursuant to 28 U.S.C. § 1367.

In *Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2305, 195 L. Ed. 2d 665, 681 (2016), this Court pointed out that, "[f]actual developments may show that constitutional harm, which seemed too remote or speculative to afford relief at the time of an earlier suit, was in fact indisputable. In our view, such changed circumstances will give rise to a new constitutional claim. This approach is sensible, and it is consistent with our precedent." In reaching this conclusion, this Court used the following hypothetical:

"Imagine a group of prisoners who claim that they are being forced to drink contaminated water. These prisoners file suit against the facility where they are incarcerated. If at first their suit is dismissed because a court does not believe that the harm would be severe enough be unconstitutional, it would make no sense to prevent the same prisoners from bringing a later suit if time and experience eventually showed that prisoners were dying from contaminated water. Such circumstances would give rise to a new clam that the prisoners' treatment violates the Constitution." *Id.*

Similarly here, notwithstanding the fact that Plaintiff had unsuccessfully sought to enjoin the Medical Board from engaging in the conduct that ultimately caused his injuries, when responding to the Baptist Health defendants' motion to dismiss, Plaintiff argued that, "damages sought in his federal action accrued when his medical license was revoked without

him being present in April, 2014, and that the other *facts* contained in the Complaint are provided in support of the claims arising as a result of the *damages caused by the revocation of his medical license*." Doc. 37, p. 2.

For example, Plaintiff's due process claim alleges a deprivation of liberty due to the adverse reports following the April, 2014 revocation of his medical license. A similar claim was at issue in *Ulrich v. City & County of San Francisco*, 308 F.3d 968, 982-983 (9th Cir. 2002), where the Ninth Circuit Court of Appeals addressed the "stigma plus" test articulated by this Court in *Paul v. Davis*, 424 U.S. 693, 47 L. Ed. 2d 405, 96 S. Ct. 1155 (1976) as applied to a deprivation of liberty claim based on governmental defamation in the context of reports about a physician being submitted to the National Practitioner Data Bank in violation of the Fourteenth Amendment.

Plaintiff's Complaint alleged that the opinions of Counce and Mabry were first obtained in November, 2010,[17] prior to Paintiff being able to complete the appellate process at Baptist Health, as authorized by the Baptist Health medical staff bylaws, in order to be used, if necessary, to revoke Plaintiff's Arkansas medical license if he continued to pursue and/or did not abandon his claims of racial discrimination against

[17]During the hospital disciplinary proceedings, there had been no allegations made that Plaintiff had committed "gross negligence" and/or "ignorant malpractice," which would be a finding necessary before the Board would be lawfully authorized to take any disciplinary action against Plaintiff under the Arkansas Medical Practices Act. Complaint, ¶ 52. Pet. App. 133a - 134a.

Baptist Health Medical Center, its agents, employees and/or representatives. Complaint, ¶s 49-53. Pet. App. 131a - 134a.

It is undisputed that prior to the April, 2014 revocation of Plaintiff's Arkansas medical license, the Medical Board had not expressly restricted Plaintiff's ability to practice medicine and had not submitted any adverse and/or negative reports to the National Practitioner Data Bank or anyone else to Plaintiff's knowledge regarding the medical treatment at issue. On June 16, 2011, the Medical Board wrote Plaintiff and informed him that among other things, "you will refrain from performing colon procedures unless assisted by another surgeon pending resolution of your court case." Complaint, ¶ 56. Pet. App. 135a -136a. On the very next day, June 17, 2011, the Medical Board sent the narrative reports prepared by Counce and Mabry to Baptist Health for its use in *Civil Action No. 60CV-11-1990*, and in the transmittal letter, the Board's representative stated that, "Dr. Counts [Counce] and Dr. Mabry do not have to testify or follow-up for further testimony or work concerning these reviews unless they desire to." Complaint, at ¶57. Pet. App. 136a - 137a. These facts support an inference that by reporting Plaintiff to the Arkansas Medical Board prior to him exhausting his appellate remedies at Baptist, and by seeking these reports from the Medical Board after Plaintiff filed his civil action in state court, the Baptist Defendants' intent all along was to invoke the aid of the Medical Board to help it defend against Plaintiff's discrimination claims.[18] See Lugar v.

[18]As stated above, on May 25, 2010, McKissic notified Baptist in his notice of appeal that Plaintiff believed that the actions taken

Edmondson Oil Co., 457 U.S. 922, 942, 102 S. Ct. 2744, 2756, 73 L. Ed. 482, 498 (1982), ("The Court of Appeal s erred in holding that in this context 'joint participation' required something more than invoking the aid of state officials to take advantage of state-created attachment procedures.")

When filing their motion to dismiss in the federal action on July 26, 2017, the Baptist Defendants argued that they "had no involvement" in the decision to revoke Plaintiff's Arkansas medical license, and that, "because the factual matters raised by the instant Complaint have previously been litigated and the new legal claims could have been brought at that time, the Complaint should be dismissed as to the Baptist Health Defendants as precluded by the doctrine of res judicata." Doc. 31, p. 3.

On August 9, 2017, in his response to the Baptist defendants' motion to dismiss, Plaintiff argued that his federal cause of action did not accrue until his medical license was revoked in April, 2014,[19] and that the other facts alleged in the Complaint were merely provided in

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against him were "racially biased and discriminatory." Complaint, ¶ 46. Pet. App. 130a. The Medical Board's policy and customary practice had always been to await the outcome of any appeals and/or litigation related to medical treatment provided by a physician prior to any formal action being taken by the Board. Complaint, ¶s 48-49. Pet. App. 130a -132a.

[19]Responding to the Baptist defendants' statute of limitation argument, Plaintiff cited to the Eighth Circuit case of *Buford v. Tremayne*, 747 F.2d 445, 448 (8th Cir. 1984), ("In a conspiracy action, the statute of limitation begins to run from the occurrence of the last overt act resulting in damage to the plaintiff.")

support of those claims. Doc. 37, p. 2. Plaintiff further argued that pursuant to 28 U.S.C. § 1367, the federal court had supplemental jurisdiction over his state law claims arising out of the same facts, acts, omissions, and/or transactions at issue regarding the federal due process and retaliation claims[20] being asserted against the defendants in his federal claims arising from the revocation of his Arkansas medical license in April, 2014, to include those against the employees, agents and/or representatives of the Arkansas State Medical Board being sued in their personal capacities who were not parties to the civil action filed in state court. Doc. 37, pp. 2-3.

In granting the Baptist defendants motion to dismiss on September 19, 2017, the district court held that, "Plaintiff sought to have the April 2014 hearing regarding the revocation of his medical license enjoined. The state court denied Plaintiff's relief. Plaintiff cannot claim that the revocation of his license on April 2014 created a "new" claim that has not been litigated. The specific issue was before the court in *Williams I*." Doc. 47, p. 5. Pet. App. 19a. Plaintiff appealed the district court's holding granting the

[20]To support his federal retaliation claim, in addition to arguing that it arose subsequent to the filing of his original Complaint, citing *Johnson v. County of Nassau*, 480 F. Supp. 2d 581, 607-608 (E.D.N.Y. 2007), Plaintiff argued that he did not have a fair opportunity to litigate his federal claims in state court due to restrictions on discovery and that res judicata could not preclude a retaliation claim arising from the filing of a racial discrimination complaint itself. Doc. 37, p. 3. These arguments and Johnson's application to Plaintiff's case were rejected by the district court. Doc. 47, pp. 3-5. Pet. App. 16a -18a.

Baptist Health Defendants' motion to dismiss on the doctrine of res judicata. See Appellant's Eighth Circuit Brief, pp. 20-31. Pet. App. 73a - 83a.

In its March 8, 2018 Order Granting Counce and Mabry's Motions for Summary Judgment, the district court held that, "[r]es judicata bars Plaintiff's claims against Drs. Counce and Mabry because they could have been litigated in Williams I." Doc. 98, p. 2. Pet. App. Plaintiff appealed the district court's holding granting Counce and Mabry's motion for summary judgment on the doctrine of res judicata. See Appellant's Eighth Circuit Brief, pp. 31-33. Pet. App. 83a - 85a.

In its May 31, 2018 Order granting Beck and Hearnsberger's motion for summary judgment, the district court held that,

> As stated in the Court's previous orders, claims arising from the facts included in *Williams I* are barred by res judicata. Plaintiff's claims regarding the information sent to the NPDB by ASMB was considered in *Williams I* when Plaintiff filed his motion to enforce settlement on August 9, 2015. (Exh. 35 to Pl's Resp. to Mot. For Summ. J.). The court ruled that the Board's version of the Consent Order properly memorialized the settlement agreement[21]

[21]Plaintiff submits that the district court's ruling construing the parties' settlement "agreement" was not an adjudication on the merits that the Board was authorized to report that Plaintiff had committed "gross negligence" and/or "ignorant malpractice." Indeed, the Consent Order that was executed by the parties did not include any language regarding NPDB reports, and therefore,

> between the parties. The Board's version of the Consent Order, which was filed in the case on November 5, 2015, did not include the Plaintiff's proposed language regarding reports made to the NPDB by the ASMB. Dr. Hearnsberger, in his official capacity, and the AMSB, of which Dr. Beck was the chairman, were named defendants in *Williams I* and were dismissed with prejudice on November 5, 2015.

Doc. 146, p. 4. Pet. App. 10a - 11a.

Plaintiff appealed the district court's holding granting Beck and Hearnsberger's motion for summary judgment. See Appellant's Eighth Circuit Brief, pp. 45-39. Pet. App. 85a - 96a.

B. The defendants are entitled to qualified immunity instead of absolute immunity with respect to Plaintiff's federal claims arising from the revocation of his Arkansas medical license.

Regarding the defendants' motions for summary judgment arguing that they were entitled to immunity from Plaintiff's federal and state law pursuant to Arkansas statutory law, Plaintiff cited the Arkansas

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that issue was not decided and was not material to the action taken by the trial court. See Eighth Circuit Appellant's Brief, pp. 45-46. Pet. App. 94a - 95a. See also *Costello v. United States*, 365 U.S. 265, 286, 81 S. Ct. 534, ("the point of controversy must be the same in both cases, and must be determined on its merits.") (Citations Omitted.)

Supreme Court's decision in *Arkansas State Medical Board v. Cryer*, 521 S.W.3d 459, 465 (Ark. 2017), "[i]mmunity under state law is not dispositive of a federal civil-rights claim against state actors in their individual capacities, even if the claim is brought in state court." Doc. 126, p. 27.

Regarding Counce and Mabry, Plaintiff also cited *Holland v. Muscatine General Hospital*, 971 F. Supp. 385, 390 (S.D. Iowa 1997) for the proposition that "the statutory immunity of persons participating in professional review actions specifically does not include 'damages under any law of the United States or any State relating to the civil rights of an person or persons, including the Civil Rights Act of 1964, 42 U.S.C.§ 2000e et seq." Doc. 67, pp. 13-14. To further support his argument that Counce and Mabry would be entitlement to only qualified immunity, if any, Plaintiff also cited *Braswell v. Haywood Reg'l Med. Ctr.*, 352 F.Supp. 2d 639, 650 (W.D. N.C. 2005), "Congress, in passing the Health Care Quality Improvement Act of 1986 ["HCQIA"], 42 U.S.C. §§ 11101, et seq, has recognized the strong policy reasons for granting qualified immunity from money damages to hospitals, doctors, and others who participate in the professional peer review process. The act provides qualified immunity where the peer review activities have met the specific standards imposed by the Act. See 42 U.S.C. §11111 (a)(1) (granting immunity where specified standards of 42 U.S.C. §11112 (a) have been met). However, Congress specifically provided that qualified immunity did not extend to actions for damages for violations of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e, et. seq., and the Civil Rights Act, 42 U.S.C. §§ 1981, et seq." See Doc. 67, p. 14.

In his Eighth Circuit Brief, at p. 35, citing *Hafer v. Melo*, 502 U.S. 21, 31 (1991), Plaintiff argued that, "Beck and Hearnsberger are not "absolutely immune from personal liability under § 1983 solely by virtue of the 'official' nature of their acts," and that instead, "the focus should be on the state official's specific acts or omissions that caused and/or contributed to the injury suffered by Plaintiff." Pet. App. 85a -86a. Plaintiff also repeated the portion of this Court's holding that, "no more than a qualified immunity attaches to administrative [ ] decisions, even if the same official has absolute immunity when performing other functions." *Id.*

In responding to the defendants' motions for summary judgment in the trial court, among other things, Plaintiff argued that the Medical Board defendants' acts and/or omissions should have been evaluated under the doctrine of qualified immunity, not absolute immunity for their acts and/or omissions that were not adjudicatory in nature, including, but not limited to: (1) their investigative actions;[22] (2) the giving of instructions and legal advice[23] to Counce and

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[22] For example, see Appellant's Brief, Pet. App. 86a - 87a, where Plaintiff argued that, the investigatory actions undertaken by defendant Hearnsberger were unauthorized and in violation of A.C.A. § 17-95-301(h)(2), which provides that, "[n]o member of the Board may be involved in the conduct of the investigation except to cooperate with the investigation as required by the investigator."

[23]See Counce Depo., pp. 39-40, wherein he explains that at the time he received the memo from the Medical Board he did not know what "gross negligence" and "ignorant malpractice" meant. Doc. 141, p. 11. See *Burns v. Reed*, 500 U.S. 478, 495, 114 L. Ed. 2d 547, 111 S. Ct. 1934 (1991), "it is incongruous to allow prosecutors to be absolutely immune from liability for giving advice to the police, but

Mabry regarding the inclusion of the words, "gross negligence" and "ignorant malpractice" in their reports; and (3) the continued reporting of the 2014 license revocation, even after the Medical Board voted on June to void and rescind it. Doc. 37, Exhibit 8, p. 5

Plaintiff also cited *DiBlasio v. Novello*, 344 F.3d 292 (2nd Cir. 2003), and argued that the Medical Board defendants were not entitled to absolute immunity with respect to acts and/or omissions that were not adjudicative in nature. Doc. 67, pp. 14-15. Doc. 46-1, p. 8. In violation of the statutory Medical Board policy referenced in footnote 23 above, Hearnsberger, who was one of two[24] surgeons on the Medical Board, made exparte contact with Dr. Gilbert, the physician who served as Plaintiff's proctor and Dr. Eidt, one of Plaintiff's former professors and reported negative, false,[25] hearsay information to the other Medical Board members about his conversation with these physicians. Doc. 37, pp. 1-2, Exhibit 14, Doc. 89-2, pp. 22-23. In addition, Plaintiff also argued that the Medical Board defendants intentionally withheld favorable reports from the Medical Board members during the April, 2014 hearing that was held in his absence. Doc. 126, pp. 9-10.

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to allow police officers only qualified immunity for following the advice..."

[24] Defendant Counce's partner, Weiss was the other surgeon on the Medical Board. Doc. 37, p. 15.

[25] Hearnsberger reported that Gilbert did not want to proctor Plaintiff anymore and sent an email to the other physicians stated that Eidt had told him that Plaintiff was "hard headed" and a poor resident. Complaint ¶ 64 FN 15. Pet. App. 139a - 140a. Doc. 46-1, pp. 7 - 9.

Plaintiff raised the immunity issue with respect to Counce and Mabry in his appeal to the Eight Circuit in Appellant's Brief, p. 34. App. Plaintiff addressed the immunity defenses raised by Hearnsberger and Beck in his appeal to the Eighth Circuit in Appellant's Brief, pp. 35-49. App. In support of his Petition for Writ of Certiorari, Plaintiff also relies upon this Court's holding in *Buckley v. Fitzsimmons*, 509 U.S. 259, 113 S. Ct. 2602, 125 L. Ed. 2d 209 (1993) with respect to reports that have been made and continue to be made to the public regarding the revocation of Plaintiff's Arkansas medical license as a result of a hearing that was held in Plaintiff's absence and without the prior notice and opportunity to be heard as required by Arkansas law.

REASONS FOR GRANTING THE PETITION

The writ for certiorari should be granted because the Eighth Circuit Court of Appeals' opinion affirming the district court's holding that Plaintiff's federal claims are barred by the doctrine of res judicata conflicts with this Court's holding in *Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2305, 195 L. Ed. 2d 665, 680 (2016), and the cases cited therein from the Second, Third, Sixth, Seventh, and Eleventh Circuits, which hold that, "res judicata does not bar claims that are predicated on events that postdate the filing of the initial complaint." The April, 2014 hearing that was held without notice to Plaintiff and the subsequent revocation of his Arkansas medical license as a result of the hearing post dated the February, 2014 filing of Plaintiff's state court cause of action.

As stated above, on June 4, 2015 the Medical Board "*agreed to rescind and void the 2014 revocation*

of Dr. Williams' Arkansas medical license and return his *licensure status to that prior to the hearing* due to a lack of notice of hearing to Dr. Williams from his former attorney. Additionally, the Board agreed to retain control of the four cases involved in this matter and that *a re-hearing would not be held until Dr. Williams' lawsuit against Baptist Hospital is concluded.*" Doc. 37, Exhibit 8, p. 5.

To date, due to the pending appeal of Plaintiff's lawsuit in the Arkansas state courts, a re-hearing has not occurred. Yet, immediately after Plaintiff's Arkansas medical license was revoked the Medical Board has reported the 2014 revocation despite the November, 2015 reinstatement of Plaintiff's Arkansas medical license. Because he was denied the opportunity to refute these allegations in a meaningful way prior to the revocation of his medical license and prior to the publication of the negative adverse reports, related thereto, Plaintiff filed this action in federal court against alleging that the defendants' actions deprived him of his property interests in his his medical license and liberty interest in his professional reputation without due process. *Winegar v. Des Moines Indep. Community Sch. Dist.*, 20 F.3d 895 (8th Cir. 1994). His federal claims further assert that these actions were also taken in retaliation for his complaint of racial discrimination that was filed in Arkansas state court against the Baptist Health defendants. *Greenwood v. Ross*, 778 F.2d 448 (8th Cir. 1985). These claims are separate and independent from the cause of action that Plaintiff filed in Arkansas state court.

In *McDonough v. Smith*, 139 S. Ct. 2149, 204 L.ed. 2d 506 (June 20, 2019), this Court recently

clarified the accrual of federal causes of action related to ongoing conduct. This case was decided after Plaintiff's motion for rehearing was submitted on June 12, 2019 and was not cited or considered by the lower courts. In *McDonough*, this Court held that, "an accrual analysis begins with identifying 'the specific constitutional right' alleged to have been infringed." *Id.*, at 2155, 513. "Although courts look to state law for the length of the limitations period, the time at which a § 1983 claim accrues 'is a question of federal law,' conforming in general to common-law tort principles.' That time is presumptively 'when the plaintiff has 'a complete and present cause of action,' though the answer is not always so simple. Where, for example, a particular claim may not realistically be brought while a violation is ongoing, such a claim may accrue at a later date." *Id.* (Citations Omitted.)

The lower courts' orders holding that Plaintiff's cause of action is barred by the doctrine of res judicata not only prevent him from being able to assert federal constitutional rights that accrued when his medical license was revoked in April, 2014, but they also conflict with the relief that may be available to Plaintiff in the future in accordance with *McDonough v. Smith*, 139 S. Ct. 2149, 204 L.ed. 2d 506 (June 20, 2019) if and when he prevails at a re-hearing on the medical treatment at issue, should the Medical Board elect to subject him to such a hearing.

CONCLUSION

In light of the foregoing, Petitioner requests that his petition for certiorari be granted. In addition to being in conflict with the circuit court opinions cited in

Woman's Health v. Hellerstedt, 136 S. Ct. 2292, 2305, 195 L. Ed. 2d 665, 680 (2016), the Eighth Circuit Court of Appeals' opinion, if left standing, deprives Petitioner of his right to pursue his federal claims in federal court in the first instance even though he brought his federal claims in federal court within the applicable statute of limitations period, and even though Joseph M. Beck, Charles Mabry, James Counce, and The Surgical Clinic of Central Arkansas, all the parties to the federal action, were not parties in the state court action. Further, Petitioner expressly informed the state court that he reserved the right to bring federal claims related to the improper revocation in federal court, and the federal claims were never raised or addressed by the state court.

Respectfully Submitted,

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