NO. 21-_____

In the Supreme Court of the United States

DAVID SAXON BAGLEY,
INDIVIDUALLY AND AS REPRESENTATIVE OF
THE ESTATE OF JEREMIAH RAY BAGLEY,

Petitioner,

v.

RAMONA ROGERS, M.D.; MODESTO ZAMORANO;
STEPHANIE CUMPIAN; ROLANDO FLORES;
HECTOR ONTIVEROS; PRISCILLA NIETO;
SONIA HERNANDEZ-KEEBLE; BLAS ORTIZ, JR.;
DAVID MORON, M.D.; JAIME FLORES;
AND RIO GRANDE STATE CENTER,

Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Texas

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Texas Medical Liability Act's expert report and mandatory sanction of dismissal with prejudice for failure to serve an expert report provisions are preempted by 42 U.S.C. § 1983 in lawsuits filed in Texas courts involving Section 1983 claims, including excessive force claims that occur within State of Texas healthcare institutions, including state mental facilities?.

PARTIES TO THE PROCEEDINGS

All parties appear in the caption of the case on the cover page.

CORPORATE DISCLOSURE STATEMENT

There are no nongovernmental corporations involved in this proceeding.

LIST OF PROCEEDINGS

444th Judicial District Court of Cameron County, Texas

David Saxon Bagley, Individually and Representative of the Estate of Jeremiah Ray Bagley v. Ramona Rogers, M.D., Modesto Zamorano, Stephanie Cumpian, Rolando Flores, Hector Ontiveros, Priscilla Nieto, Sonia Hernandez-Keeble, Blas Ortiz, Jr., David Moron, M.D., Jaime Flores, and Rio Grande State Center, Cause No. 2017-DCL-00875 (Jan. 30, 2018) (order denying defendants' motion to dismiss for failure to serve Chapter 74 expert report)

Texas Thirteenth Court of Appeals,
Corpus Christi-Edinburg

Ramona Rogers, M.D., Modesto Zamorano, Stephanie Cumpian, Rolando Flores, Hector Ontiveros, Priscilla Nieto, Sonia Hernandez-Keeble, Blas Ortiz, Jr., David Moron, M.D., Jaime Flores, and Rio Grande State Center v. David Saxon Bagley, Individually and Representative of the Estate of Jeremiah Ray Bagley, Number 13-18-00092-CV (June 13, 2019) (defendants' appeal of trial court order)

Supreme Court of Texas

Ramona Rogers, M.D., Modesto Zamorano, Stephanie Cumpian, Rolando Flores, Hector Ontiveros, Priscilla Nieto, Sonia Hernandez-Keeble, Blas Ortiz, Jr., David Moron, M.D., Jaime Flores, and Rio Grande State Center v. David Saxon Bagley, Individually and Representative of the Estate of Jeremiah Ray Bagley, No. 19-0634 (Apr. 16, 2021) (defendants' appeal of court of appeals' judgment affirming trial court order)

TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

TABLE OF CONTENTS – Continued

Page

APPENDIX TABLE OF CONTENTS

OPINIONS AND ORDERS

REHEARING ORDER

STATUTORY PROVISIONS

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued

Page

TABLE OF AUTHORITIES – Continued

Page

TABLE OF AUTHORITIES – Continued

Page

CONSTITUTIONAL PROVISIONS

FEDERAL STATUTES

STATE STATUTES

JUDICIAL RULES

PETITION FOR A WRIT OF CERTIORARI

Petitioner David Saxon Bagley, Individually and Representative of the Estate of Jeremiah Ray Bagley prays that a writ of certiorari be granted to review the judgment of the Supreme Court of Texas issued on April 16, 2021.

OPINIONS BELOW

The opinion of the Supreme Court of Texas, the highest court to review the merits, appears in the Appendix at App.3a to the Petition and is reported at *Rogers v. Bagley*, 623 S.W.3d 343 (Tex. 2021).

The opinion of the Texas Thirteenth Court of Appeals, Corpus Christi-Edinburg appears at App.30a to the Petition and is reported at *Rogers v. Bagley*, 581 S.W.3d 362 (Tex. App.–Corpus Christi-Edinburg 2019, pet. granted).

JURISDICTION

On April 16, 2021, the Supreme Court of Texas entered its judgment and opinion. *Rogers v. Bagley*, 623 S.W.3d 343 (Tex. 2021) (App.1a, 3a).

On June 18, 2021, the Supreme Court of Texas denied Petitioner's timely filed motion for rehearing. (App.52a).

This Petition has been timely filed within 150 days of the June 18, 2021, order. *See* Order, Supreme Court of the United States (Monday, July 19, 2021).

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. art. VI., cl. 2.
Supremacy Clause

> This Constitution, and the Laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding.

42 U.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.

Tex. Civ. Prac. & Rem. Code § 74.001(a)(13)
Definition of Health Care Liability Claim

> "Health care liability claim" means a cause of action against a health care provider or physician for treatment, lack of treatment, or other claimed departure from accepted standards of medical care, or health care, or safety or professional or administrative services directly related to health care, which proximately results in injury to or death of a claimant, whether the claimant's claim or cause of action sounds in tort or contract. The term does not include a cause of action described by Section 406.033(a) or 408.001(b), Labor Code, against an employer by an employee or the employee's surviving spouse or heir.

These statutes are reproduced in the appendix:

Tex Civ. Prac. & Rem. Code § 74.001
(App.53a)

Tex. Civ. Prac. & Rem. Code § 74.351
Sec. 74.351. Expert Report (App.59a)

42 U.S.C. § 1983
§ 1983. Civil Action for Deprivation of Rights
(App.64a)

STATEMENT OF THE CASE

I. Factual Background

On November 6, 2014, 37-year old Jeremiah Bagley was arrested in Rockport, Texas for resisting arrest, and then transported to the Aransas County Detention Center in Rockport, Texas. CR183.

On December 31, 2014, Jeremiah was admitted under a mental health court order to Rio Grande State Center ("RGSC") in Harlingen, Texas. CR183.

On February 7, 2015, Jeremiah was in the room assigned to him at RGSC. On that same date, Hector Ontiveros, Modesto Zamorano, Stephanie Cumpian, Rolando Flores, and Priscilla Nieto were psychiatric nurse assistants at RGSC. The records from RGSC indicate Jeremiah allegedly struck one of the members of the staff. Ontiveros, Zamorano, Cumpian, Flores, and Nieto each used excessive force to restrain Jeremiah greatly exceeding any need, resulting in injuries.[1] Jeremiah was forcibly restrained and violently taken to the floor. He was deliberately restrained for approximately 10 minutes. He was not being aggressive while restrained on the floor.[2] The resulting injuries to Jeremiah included multiple broken ribs, fractures of the vertebrae of the spine, punctured lungs and a lacerated spleen, causing his body cavities to fill with blood and bodily fluids. While restrained, an employee of RGSC

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[1] The PMAB Master Trainer who reviewed the restraint said that three persons should never be involved in a restraint. CR145.

[2] CR145.

forcibly injected Jeremiah with 10 mg Olanzapine and 50 mg Diphenhdramine. CR183-84.

After being allowed up from the floor, Jeremiah returned to his room at about 12:15 p.m. He was disoriented and unsteady, eventually becoming pale, incoherent, and lapsing in and out of consciousness. Shortly thereafter, Jeremiah went into cardiac arrest and CPR was performed. The external debrillators did not have working batteries. CR184.

At about 12:31 p.m., a call was placed to dispatchers for EMS. Jeremiah was taken to a local hospital where he was pronounced dead. CR184.

The Final Report of the Office of the Inspector General (Texas Health & Human Services Commission) states: "The (PMAB) Master Trainer said the event was not a proper restraint in any way." CR145.

The Autopsy Examination Report identified multiple fractured vertebrae, cracked ribs, along with contusions on his head, shoulders, back and chest. RR129-37,186. The report stated Jeremiah had a ruptured spleen and multiple lacerations. *Id.* The extent of injuries was so severe that the Certificate of Death listed the immediate cause of death as "EXCITED DELIRIUM DUE TO PSYCHOSIS WITH RESTRAINT-ASSOCIATED BLUNT FORCE TRAUMA." CR186-87.

II. Procedural History

Jeremiah's father, David Saxon Bagley, filed suit in his individual capacity and in his capacity as representative of the estate of Jeremiah Ray Bagley in the 444th Judicial District Court of Cameron County, Texas. CR5.

RGSC was sued under the Texas Tort Claims Act. CR12. The contention made was that RGSC, by and through the negligence of its employees, dispensed and/or administered various drugs proximately causing the personal injury and death of Jeremiah. *Id.* This was the only state claim brought. RGSC was orally nonsuited with prejudice at the January 24, 2018, hearing on Defendants' Motion to Dismiss. RR32, lns.21-22.

Five psychiatric nurse assistants, Oniveros, Zamorano, Cumian, Flores, and Nieto, were sued, pursuant to 42 U.S.C. § 1983 and 1988, for using excessive force against Jeremiah that resulted in injury and death in violation of the protections afforded to him by the Fourth Amendment to the United States Constitution. CR14-16.

Sonia Hernandez-Keeble, Superintendent of RGSC, Blas Ortiz, Jr., Assistant Superintendent of RGSC, Dr. David Moron, Clinical Director of RGSC, and Jaime Flores, Mental Health Services Director of RGSC, were sued for failure to supervise or train in violation of protections afforded to Jeremiah under the United States Constitution. CR16-18.

Dr. Ramona Rogers was sued, pursuant to 42 U.S.C. § 1983 and 1988, for violating the Fourteenth Amendment to the United States Constitution in regard to the medical care of Jeremiah on February 7, 2015, and prior thereto that directly led to injury and death. The claim was that Dr. Rogers was deliberately indifferent to Jeremiah Bagley's serious medical needs, resulting in injury and death. CR19.

Defendants Rogers, Zamorano, Cumpian, Flores, Ontiveros, Nieto, Hernandez-Keeble, Ortiz, Moron,

and Flores filed their First Amended Answer and asserted in part that "Plaintiff's claims against Defendant Employees are health care liability claims subject to the substantive and procedural requirements of the Texas Medical Liability Act ("TMLA"), set forth in Chapter 74 Texas Civil Practice and Remedies Code." CR74. They also asserted that "Plaintiff's claims for a damage award are limited to the caps imposed by the TMLA." *Id.*

Defendants filed their Motion to Dismiss, claiming that David Bagley's claims are governed by the TMLA. CR77, 79. No exhibits were attached to the Motion.

David Bagley filed his Response in Opposition to the Motion to Dismiss for Failure to Serve Chapter 74 Expert Report, asserting that the TMLA did not apply to Bagley's claims and the expert report and dismissal requirements of the TMLA are preempted by 42 U.S.C. § 1983 and 1988 and the United States Constitution and its Amendments. CR91, 93.

Defendants filed a Reply to Plaintiff's Response to Defendants' Motion to Dismiss for Failure to Serve Chapter 74 Expert Report. They asserted that Section 1983 does not preempt Section 74.351 of the Texas Civil Practice & Remedies Code. No Exhibits were attached. CR114.

David Bagley filed his Supplemental Response to Defendants' Motion to Dismiss for Failure to Serve Chapter 74 Expert Report. CR.126. Bagley attached the autopsy report, final report from the Office of Inspector General and death certificate as evidence to support Bagley's civil rights claims. CR127.

On January 24, 2018, Bagley filed his Third Amended Petition. CR169. RGSC was dismissed as a party. *Id.*

On January 24, 2018, a hearing was held on the Motion to Dismiss for Failure to Serve Chapter 74 Expert Report. CR101.

On January 30, 2018, Bagley filed his Fourth Amended Petition. CR182. This is Bagley's live pleading. *Id.*

On January 30, 2018, the trial court denied Defendants' Motion to Dismiss for Failure to Serve Chapter 74 Expert Report. CR101.

Defendants took an interlocutory appeal of the Order denying their Motion to Dismiss to the court of appeals which affirmed the trial court's order, holding that Section 1983 preempts Section 74.351 of the Texas Civil Practice & Remedies Code, but sustained RGSC's first issue which was that Bagley's claim against RGSC was a health care liability claim ("HCLC"). *Rogers v. Bagley*, 581 S.W.3d 362, 364 (Tex. App.–Corpus Christi-Edinburg 2019, pet. granted).

Bagley raised the issue of preemption at page 10 of his June 27, 2018, brief on the merits in the court of appeals. He asserted that the TMLA's Expert Report and Dismissal requirements are preempted by 42 U.S.C. § 1983 and 1988 and the United States Constitution and its Amendments.

Defendants filed a petition for review with the Supreme Court of Texas, the Supreme Court of Texas granted the petition for review, and agreed with the court of appeals that all of the causes of action Bagley asserted in the trial court are health care liability

claims under the TMLA, but found that the court of appeals erred in concluding that 42 U.S.C. § 1983 preempts the TMLA's expert-report requirement. *Rogers v. Bagley*, 623 S.W.3d 343, 358 (Tex. 2021).

Bagley raised the issue of preemption at page 21 of his August 25, 2020, brief on the merits in the Supreme Court of Texas.

REASONS FOR GRANTING THE PETITION

The Supreme Court of Texas held that when Section 1983 claims, including excessive force claims occur within State of Texas healthcare institutions, including state mental facilities that Section 74.351 of the TMLA applies and Section 74.351 is not preempted by Section 1983. (App.59a). In their Briefing to the Supreme Court of Texas, Respondents asserted that the outcome of this case affects not "only a handful of hospitals," but "very large state healthcare facilities: the Health Science Center, Dell Seton Medical Center, and UT Southwestern Medical Center." (Sept. 27, 2019, Petition for Review, p.17). Therefore, the Supreme Court of Texas's holding will affect a class of Section 1983 claims in Texas occurring in the health care setting.

Section 74.351 of the TMLA provides that a plaintiff bringing a health care liability claim must serve defendants who are physicians or health care providers with an expert report within 120 days of their answers. Tex. Civ. Prac. & Rem. Code Ann. § 74.351(a). The report must provide the expert's opinions regarding the standard of care, the manner in which the

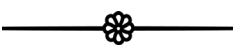
care rendered by the defendant failed to meet the standard, and the causal relationship between that failure and the injury, harm, or damages caused. Tex. Civ. Prac. & Rem. Code Ann. § 74.351(r)(6). A defendant may file objections to the report within 21 days after the report is served or the defendant files its answer. Tex. Civ. Prac. & Rem. Code Ann. § 74.351(a). If an expert report is not timely filed, the trial court must, on the defendant's motion, dismiss the health care liability claims with prejudice and award the defendant its reasonable attorney's fees and costs of court. Tex. Civ. Prac. & Rem. Code Ann. § 74.351(b). If the plaintiff serves an expert report that does not represent an objective good faith effort to comply with the definition of an expert report in Tex. Civ. Prac. & Rem. Code Ann. § 74.351(r)(6), then the court must grant a motion challenging the adequacy of the report. Tex. Civ. Prac. & Rem. Code Ann. § 74.351(1).

The Section 74.351 of the TMLA expert report and dismissal requirements conflict with the goals of Section 1983 which include compensation for those injured by a deprivation of federal rights and deterrence to prevent future abuses of power. *See Robertson v. Wegmann*, 436 U.S. 584, 591 (1978). The Section 74.351 requirements burden the exercise of the federal right by forcing civil rights victims who seek redress in state courts to comply with requirements that are entirely absent from civil rights litigation in federal courts. The Supreme Court of Texas has called the Section 74.351 expert report and dismissal requirements a substantive hurdle. *Spectrum Healthcare Res., Inc. v. McDaniel*, 306 S.W.3d 249, 253 (Tex. 2010). When a state law conflicts with federal law, it is

preempted under the Supremacy Clause and is void. *Maryland v. Louisiana*, 451 U.S. 725, 747 (1981).

The court of appeals in this case correctly held "that the expert report requirement of § 74.351 conflicts with the purpose of § 1983 and its application unfairly burdens a state § 1983 claimant in a manner that can be dispositive" and thus, "§ 1983 preempts § 74.351 when claims for excessive force occur within a health-care institution or against a healthcare provider or physician." (App.48a).

Granting this Petition is necessary to uphold the goals of Section 1983 and remove the substantive hurdle placed on Section 1983 claims in the health care setting by the Supreme Court of Texas.



ARGUMENT

I. STANDARD OF REVIEW AND APPLICABLE LAW.

Preemption is a question of law reviewed *de novo*. *Reece v. Houston Lighting & Power Company*, 79 F.3d 485, 487 (5th Cir. 1996), *cert. denied*, 519 U.S. 864 (1996); *Harris v. Alumax Mill Products, Inc.*, 897 F.2d 400, 402 (9th Cir.), *cert. denied*, 498 U.S. 835 (1990).

The United States Constitution provides that the laws of the United States are "the supreme Law of the Land; . . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const. art. VI, cl. 2. Thus, when a state law conflicts with federal law, it is preempted and has no effect. *Williamson v. Mazda Motor of Am., Inc.*, 562 U.S. 323,

330 (2011). However, this Court limits the preemption doctrine by presuming that Congress did not intend to displace state law. *Maryland*, 451 U.S. at 746.

In resolving questions of inconsistency between state and federal law, of particular importance is whether application of state law "would be inconsistent with the federal policy underlying the cause of action under consideration." *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454, 465 (1975). Section 1983 is "one of the 'Reconstruction civil rights statutes' that this Court has accorded a sweep as broad as [their] languge." *Griffin v. Breckenridge*, 403 U.S. 88, 97 (1971) (quoting *United States v. Price*, 383 U.S. 787, 801 (1966)). When the federal statute does not directly speak to preemption, the court "must be guided by the goals and policies of the Act" in determining preemption. *Int'l Paper Co. v. Oulette*, 479 U.S. 481, 493 (1987).

II. THE SUPREMACY CLAUSE PROHIBITS ENFORCEMENT OF THE TMLA EXPERT REPORT REQUIREMENTS ON CIVIL RIGHTS CASES OCCURRING IN THE HEALTHCARE SETTING.

The Supremacy Clause prohibits Texas courts from attempting to use the TMLA to dismiss this suit and other Section 1983 claims occurring in State of Texas healthcare institutions under Section 74.351 of the Texas Civil Practice & Remedies Code for failing to serve an expert report within 120 days after the date each defendant's original answer is filed. *See* Tex. Civ. Prac. & Rem. Code Ann. § 74.351.

Under the Supremacy Cause of the United States Constitution, state law is irrelevant if inconsistent with federal law. U.S. CONST. art. VI, cl. 2 ("This

Constitution, and the Laws of the United States . . . shall be the Supreme Law of the Land."). *See Free v. Bland*, 369 U.S. 663, 666 (1962) (According to the Supremacy Clause, "[t]he relative importance to the State of its own law is not material when there is a conflict with a valid federal law," for "any state law, however clearly within a State's acknowledged power, which interferes with or is contrary to federal law, must yield.").

The Texas Medical Liability and Insurance Improvement Act ("MLIIA") was passed in 1977 and is now known as the TMLA. *Diversicare Gen. Partner, Inc. v. Rubio*, 185 S.W.3d 842, 861-62 (Tex. 2005) (O'Neill, J., dissenting). In 2003, significant changes were made to the MLIIA and it was re-codified in the Texas Civil Practice and Remedies Code. *Tex. West Oaks Hosp., LP v. Williams*, 371 S.W.3d 171, 177 (Tex. 2012). The purposes of the TMLA relate to controlling medical-malpractice insurance rates, reducing the excessive frequency and severity of health care liability claims, decreasing the cost of those claims, and making health care in Texas more available and less expensive by reducing the cost of health care liability claims. *Tillman v. Memorial Hermann Hosp. System*, 440 S.W.3d 203, 210 (Tex. App.–Houston [14th Dist.] 2013, pet. denied); *see CHCA Woman's Hosp., L.P. v. Lidji*, 403 S.W.3d 228, 232 (Tex. 2013).

Section 74.351 of the TMLA provides that, within 120 days of suit, a plaintiff must serve expert reports for each physician or health care provider against whom a liability claim is asserted. Tex. Civ. Prac. & Rem. Code Ann. § 74.351(a). These reports must identify the "applicable standards of care, the manner in which the care rendered by the physician

or health care provider failed to meet the standards, and the causal relationship between that failure and the injury, harm, or damages claimed." Tex. Civ. Prac. & Rem. Code Ann. § 74.351(r)(6). If a plaintiff does not serve a timely report, a trial court "shall" grant the defendant's motion to dismiss the case with prejudice. Tex. Civ. Prac. & Rem. Code Ann. § 74.351(b)(2). An order that denies all or part of the relief sought in such a motion may be immediately appealed. Tex. Civ. Prac. & Rem. Code Ann. § 51.014(a)(9) (authorizing interlocutory appeal from order that "denies all or part of the relief sought by a motion under Section 74.351(b)"). If a report is served, "[e]ach defendant physician or health care provider whose conduct is implicated . . . must file and serve any objection to the sufficiency of the report not later than the 21st day after the date it was served, failing which all objections are waived." Tex. Civ. Prac. & Rem. Code Ann. § 74.351(a). Finally,"[i]f an expert report has not been served within [120 days] because elements of the report are found deficient, the court may grant one 30-day extension to the claimant in order to cure the deficiency." Tex. Civ. Prac. & Rem. Code Ann. § 74. 351(c). That decision may not be appealed. Tex. Civ. Prac. & Rem. Code Ann. § 51.014(a)(9) ("an appeal may not be taken from an order granting an extension under Section 74.351").

Section 1983 was enacted on April 20, 1871, as part of the Civil Rights Act of 1871. *Webster v. Houston*, 735 F.2d 838, 847 (5th Cir. 1984) (en banc). It "creates a species of liability in favor of persons deprived of their federal civil rights by those wielding state authority. As we have repeatedly emphasized, 'the central objective of the Reconstruction-Era civil

rights statutes . . . is to ensure that individuals whose federal constitutional or statutory rights are abridged may recover damages or secure injunctive relief.' Thus, § 1983 provides 'a uniquely federal remedy against incursions . . . upon rights secured by the Constitution and laws of the Nation' and is to be accorded 'a sweep as broad as its language.'" *Felder v. Casey*, 487 U.S. 131, 139 (1988).

Section 1983 and the TMLA have cross purposes in that Section 1983 is a broad remedial statute protecting federal constitutional or statutory rights and the TMLA's aim is to reduce healthcare liability claims. Because of the cross purposes, the TMLA's expert report and dismissal requirements should not be applied in Section 1983 cases. State policy of limitation of claims must give way to federal policy underlying the cause of action of broad remedial relief. Enforcement of Section 74.351 on Section 1983 claims in Texas state courts would discourage and interfere with state court Section 1983 lawsuits and thwart Section 1983's objective.

"A state law is not 'appropriate' if it fails to take into account practicalities that are involved in litigating federal civil rights claims and policies that are analogous to the goals of the Civil Rights Acts." *Burnett v. Grattan*, 468 U.S. 42, 50 (1984).

Whether an inconsistent state law is preempted when a plaintiff brings a federal cause of action in state court depends, generally, on whether the state law is procedural or substantive in nature. *Felder*, 487 U.S. at 138. This Court has said that, while "[s]tates may establish the rules of procedure governing litigation in their own courts[,] . . . where state courts entertain a federally created cause of

action, the 'federal right cannot be defeated by the forms of local practice.'" *Id.* (quoting *Brown v. W. Ry. of Ala.*, 338 U.S. 294, 296 (1949)).

Section 74.351 is not a mere procedural rule as the Supreme Court of Texas held (App.20a). It creates a significant and substantive hurdle for litigants to overcome in order to pursue their claims. In holding that Section 74.351 was a procedural rule (App.20a), the Supreme Court of Texas ignored its own precedent that Section 74.351 was a substantive hurdle. In *Spectrum Healthcare Resources, Inc.*, the Supreme Court of Texas referred to the Section 74.351 expert report requirement "as a substantive hurdle for frivolous medical liability suits before litigation gets underway." *Spectrum Healthcare Res., Inc. v. McDaniel*, 306 S.W.3d 249, 253 (Tex. 2010).

In *Scott* and *CHCA Woman's Hospital*, the Supreme Court of Texas also described the Section 74.351 expert report requirement as a substantive hurdle. *Scott v. Weems*, 575 S.W.3d 357, 363 (Tex. 2019) ("The expert-report mandate is a substantive hurdle that helps ensure frivolous claims are eliminated quickly."); CHCA *Woman's Hosp., L.P. v. Lidji,* 403 S.W.3d 228, 232 (Tex. 2013). The Supreme Court of Texas described Section 74.351 as requiring "threshold expert reports" and said these reports are treated differently than ordinary expert reports. *Spectrum Healthcare Res., Inc.*, 306 S.W.3d at 253. The Supreme Court of Texas said the early expert report requirement "has a unique purpose separate and apart from the procedural rules relating to discovery and typical expert reports." *Id.*

Several courts of appeals in Texas have followed *Spectrum Healthcare Resources, Inc.* in referring to

Section 74.351 as a substantive hurdle. *See Bryant v. Brazos Kidney Disease Ctr.*, No. 14-19-00024-CV, 2021 Tex. App. LEXIS 683, at *7 (Tex. App.–Houston [14th Dist.] Jan. 28, 2021, no pet. h.); *Ortiz v. St. Teresa Nursing & Rehab. Ctr., LLC*, 579 S.W.3d 696, 703 (Tex. App.–El Paso 2019, pet. denied); *Christus Spohn Health Sys. Corp. v. Goodhew*, No. 13-14-00322-CV, 2015 Tex. App. LEXIS 2556, at *10 (Tex. App.–Corpus Christi March 19, 2015, pet. denied).

III. THE EXPERT REPORT REQUIREMENT OF THE TMLA IS AN EXHAUSTION REQUIREMENT.

The TMLA's expert report requirement is effectively an exhaustion requirement prohibited by the Supremacy Clause. *Felder*, 487 U.S. at 147-49 (although States have the authority to prescribe rules and procedures for their courts, their authority does not extend so far as to place conditions on the vindication of a federal right). The TMLA requires Bagley and other claimants whose Section 1983 claims occur in State of Texas healthcare institutions to comply with the TMLA expert report requirements in order to be able to proceed with their lawsuits and move into the discovery stage of the litigation. Tex. Civ. Prac. & Rem. Code Ann. § 74.351(s).

This Court has said: "[T]he dominant characteristic of civil rights actions: *they belong in court*." *Burnett*, 468 U.S. at 50 (emphasis added). This Court further said: "These causes of action exist independent of any other legal or administrative relief that may be available as a matter of federal or state law. They are judicially enforceable *in the first instance*." *Id.* (emphasis added).

> "[T]o the extent the exhaustion requirement is designed to sift out 'specious claims' from the stream of complaints that can inundate local governments in the absence of immunity, we have rejected such a policy as inconsistent with the aims of the federal legislation." *Felder*, 487 U.S. 131, 149. One of the purposes of the TMLA expert requirement is to deter frivolous claims. *Am. Transitional Care Ctrs. of Tex., Inc.*, 46 S.W.3d at 879. This is inconsistent with the goals of Section 1983.

Felder, 487 U.S. at 149.

The Supreme Court of Texas stated that Section 74.351 is not an exhaustion requirement because it "applies only after suit has been filed." (App.21a). However, the Section 74.351 expert report requirement discourages suits from being filed until claimants have expert reports in hand since claimants are subject to liability for the physician or health care provider's reasonable attorney's fees and costs of court incurred by the physician or health care provider and dismissal the claim with respect to the physician or health care provider with prejudice to the refiling of the claim if the expert report requirements are not met. Tex. Civ. Prac. & Rem. Code Ann. § 74.351(b). Further, the TMLA expert report requirements effectively act as an exhaustion requirement as the suit is dismissed if the expert report requirements are not met. *Id.*

IV. THE EXPERT REPORT REQUIREMENT OF THE TMLA IS OUTCOME DETERMINATIVE.

In *Felder*, this Court held that Wisconsin's notice of claim statute was preempted by the Supremacy Clause because of its cross purposes with Section 1983's remedial scheme and the nonuniform outcomes produced based solely on whether the action was commenced in state or federal court. *Felder*, 487 U.S. at 138. The statute required the plaintiff to notify the governmental defendant of the circumstances giving rise to the claim, the amount of the claim and his or her intent to the hold the named defendant liable. *Id.* at 134. The claimant had to refrain from filing suit for 120 days after providing such notice. *Id.* Failure to comply with these requirements constituted grounds for dismissal of suit. *Id.*

The TMLA expert report and dismissal requirements are similarly as onerous as the notice-of-suit requirements in *Felder* and should be preempted. *Compare* Tex. Civ. Prac. & Rem. Code Ann. § 74.351, *with Felder*, 487 U.S. at 134.

In *Felder*, this Court stated that "the application of the notice requirement burdens the exercise of the federal right by forcing civil rights victims who seek redress in state courts to comply with a requirement that is entirely absent from civil rights litigation in federal courts." *Felder*, 487 U.S. at 141. The Court further stated: "[I]t reveals that the enforcement of such statutes in § 1983 actions brought in state court will frequently and predictably produce different outcomes in federal civil rights litigation based solely on whether that litigation takes place in state or federal court. States may not apply such an outcome-determinative law. . . . " *Id.*

If the TMLA expert report requirements are applied to Bagley's Section 1983 civil rights claims, a different outcome could occur than had this case been heard in federal court since Bagley is required to comply with the expert report requirements of the TMLA and his case is subject to automatic dismissal for failure to comply. If Bagley had filed his suit in federal court or Respondents had removed the case to federal court, Bagley's suit would not be subject to the substantive hurdle of providing expert reports and mandatory dismissal. As *Felder* mentioned, "States may not apply such an outcome-determinative law when entertaining substantive federal rights in their courts." *Felder*, 487 U.S. at 141.

The Supreme Court of Texas concluded that enforcement of Section 74.351 will not "frequently and predictably" produce a different outcome depending upon whether a section 1983 claim is brought in state or federal court because the elements required of a Section 74.351 expert report are the same elements that a "claimant asserting a health care liability claim, even one arising under section 1983, would need to present evidence of . . . to prevail at trial, regardless of whether he chooses to sue in federal or state court. (App.22a). The Supreme Court of Texas ignores the fact that Section 74.351 is a mandatory sanction for failing to comply with the expert report requirement with no discretion while there is discretion in federal court to not require a written report and to extend expert witness deadlines. The requirements are different for expert reports. *Compare* Tex. Civ. Prac. & Rem. Code Ann. § 74.351(r)(5) & (6), *with* Fed. R. Civ. P. 26(a)(2)(B). Civil rights claimants such as Bagley may not need experts to prove their cases.

Further, the Supreme Court of Texas ignores the fact that if civil rights claimants such as Bagley need experts to prove their cases that non-retained experts could be called as witnesses in federal court without the necessity of expert reports and the cases would not be subject to dismissal for failure to serve expert reports. *See* Fed. R. Civ. P. 26(a)(2). In this case, had it been in federal court, Bagley could have subpoenaed the PMAB Master Trainer identified in the Office of Inspector General (Texas Health & Human Services Commission) Final Report to testify as an expert witness. CR145. He had offered the following opinions: (1) "a Psychiatric Nurse Assistants [sic] approach of the patient from the front was improper"; (2) "the grasping of the patient by the shoulders was incorrect"; (3) "the pulling of the patient face first toward the floor was incorrect"; (4) the restraining of the patient on the floor with one arm over the shoulder and the other arm underneath the patients [sic] arm was improper"; and (5) "the event was not a proper restraint in any way." CR145. He could also subpoena the board certified pathologist who performed the autopsy to give opinions on cause of death. CR.131, 186, 187. Finally, if a retained or specially employed expert was needed by Bagley in federal court, there has been no showing that he would not have met his deadline which would have been a different deadline from that mandated by the TMLA expert report requirement.

The Federal Rules of Civil Procedure are flexible for experts compared to the rigid TMLA expert report requirement. Rule 26(a)(2)(B) of the Federal Rules of Civil Procedure gives a federal court discretion to not require a written expert report from a retained or

specially employed expert witness unlike Section 74.351 of the Texas Civil Practice & Remedies Code. Fed. R. Civ. P. 26(a)(2)(B) ("*Unless otherwise stipulated or ordered by the court*, this disclosure must be accompanied by a written report — prepared and signed by the witness-if the witness is one retained or specially employed to provide expert testimony in the case or one whose duties as the party's employee regularly involve giving expert testimony.") (emphasis added). Federal courts have discretion to extend expert witness deadlines under the relatively lenient good cause standard when the request is made before the deadline in question has expired. *See* Fed. R. Civ. P. 6(b)(1)(A). A party seeking an after-the-fact extension may also have the deadline extended if the party was not able to act within the deadline do to excusable neglect. *See* Fed. R. Civ. P. 6(b)(1)(B). Relevant factors to the excusable neglect inquiry include: the danger of prejudice to the non-movant, the length of the delay and its potential impact on the judicial proceedings, the reason for the delay, and whether the movant acted in good-faith. *Adams v. Travelers Indem. Co. of Connecticut*, 465 F.3d 156, 161 n.8 (5th Cir. 2006).

V. THE EXPERT REPORT REQUIREMENT OF THE TMLA ACTS AS A CONDITION PRECEDENT TO RECOVERY.

In *Felder*, this Court stated that the notice-of-claim statute operated as a condition precedent to recovery in all actions brought in state court against governmental officers. *Felder*, 487 U.S. at 144. The Court further said: "States, however, may no more condition the federal right to recover for violations of civil rights than bar that right altogether . . . and where the purpose and effect of those conditions, when applied

in § 1983 actions, is to control the expense associated with the very litigation Congress has authorized." *Id. The Supreme Court of Texas plainly considers notification of defendants of the specific conduct at issue in suits against them to be another significant function of the expert reports. Am. Transitional Care Ctrs*, 46 S.W.3d at 879. The TMLA expert report requirement therefore operates similarly to the notice-of-claim statute in *Felder*. The TMLA expert report requirements as applied to this case and other claimants whose Section 1983 claims occurred in State of Texas healthcare institutions would operate as a condition precedent to recovery in violation of the Supremacy Clause.

Just as the admitted purpose of the notice-of-claim statute in *Felder* is to control expense, the admitted purpose of TMLA is cost control too. *See Scoresby v. Santillan*, 346 S.W.3d 546, 552 (Tex. 2011) (The Texas Supreme Court has explained that the "fundamental goal" of the TMLA is "to make health care in Texas more available and less expensive by reducing the cost of [HCLCs]); *see also In re Woman's Hosp. of Tex., Inc.,* 141 S.W.3d 144, 147 (Tex. 2004) (Owen, J., concurring in part and dissenting in part) (stating that the legislature intended the expert-report requirement to "reduce waste of the parties', the courts', and the insurers' time and money, which would favorably impact the cost of insurance to health care providers and thus the cost and availability of health care to patients").

VI. THE EXPERT REPORT REQUIREMENT OF THE TMLA IS NOT A NEUTRAL AND UNIFORMLY APPLICABLE RULE OF CIVIL PROCEDURE.

States may apply their own neutral procedural rules to federal claims unless those rules discriminate against federal law. *Howlett v. Rose*, 496 U.S. 356, 372 (1990). The TMLA expert report requirement is not merely a neutral rule of civil procedure. *First*, the supposed neutral rule contains an automatic sanction that dismisses the claim with prejudice and allows for the recovery of attorney's fees and costs. Tex. Civ. Prac. & Rem. Code Ann. § 74.351(b)(1) & (2). It operates to reduce claims which collides with § 1983, a remedial statute. *Second*, the expert report requirement is not described as a rule of civil procedure. *Id.* It is not located in the Texas Rules of Civil Procedure. *Third*, the requirement is not uniformly applicable to all Texas suits. They are only applicable to health care liability claims. Tex. Civ. Prac. & Rem. Code Ann. § 74.351. *Fourth,* the expert report requirement does not necessarily have any relationship to how a case is prosecuted. With one exception, the expert report is not admissible in evidence by any party, shall not be used in a deposition, trial, or other proceeding, and shall not be referred to by any party during the course of the action for any purpose. Tex. Civ. Prac. & Rem. Code Ann. § 74.351(k). *Fifth*, Texas already has neutral rules of civil procedure that apply to designation of experts and expert reports. Tex. R. Civ. P. 166(i) (the court may direct the attorneys and parties to appear for a conference to consider "[t]he exchange of a list of expert witnesses who will be called to testify at trial, stating their address and telephone number, and the subject of the testimony

and opinions that will be proffered by each expert witness"); Tex. R. Civ. P. 190 (discovery control plans); Tex. R. Civ. P. 195 (discovery regarding testifying expert witnesses).

"[A]lthough States retain substantial leeway to establish the contours of their judicial systems, they lack authority to nullify a federal right or cause of action they believe is inconsistent with their local policies." *Haywood v. Drown*, 556 U.S. 729 736 (2009). The TMLA applied to § 1983 cases provides a special class of protection to health care providers, physicians, and institutions from perceived frivolous claims and pretrial discovery that other § 1983 defendants do not receive. *See* Tex. Civ. Prac. & Rem. Code Ann. ch. 74. It also provides damages caps. *Id.* This special status can have the effect of nullifying or restricting the federal right.

VII. BAGLEY AND OTHER CLAIMANTS WHOSE SECTION 1983 CLAIMS OCCURRED IN STATE OF TEXAS HEALTHCARE INSTITUTIONS WOULD NOT BE REQUIRED TO PRODUCE AN EXPERT REPORT IN FEDERAL COURT IF THE EXPERT WAS NOT RETAINED OR SPECIALLY EMPLOYED.

Bagley and other claimants whose Section 1983 claims occurred in State of Texas healthcare institutions would not necessarily be required to produce an expert report in federal court. In federal court, only written reports are required from witnesses who are retained or specially employed to provide expert testimony. Fed. R. Civ. P. 26(a)(2)(B). Bagley and other claimants whose Section 1983 claims occurred in State of Texas healthcare institutions would not be required to produce written reports from non-retained witnesses. Fed. R. Civ. P. 26(a)(2)(C). Even

assuming that expert witnesses were necessary, Bagley and other claimants whose Section 1983 claims occurred in State of Texas healthcare institutions could make their entire case in federal court with non-retained experts. Under that scenario, not a single written report would have to be provided "regarding applicable standards of care, the manner in which the care rendered by the physician or health care provider failed to meet the standards, and the causal relationship between that failure and the injury, harm, or damages claimed." *See* Tex. Civ. Prac. & Rem. Code Ann. § 74.351(r)(6).

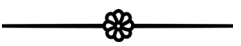
VIII. THE FIFTH CIRCUIT AND FEDERAL COURTS IN TEXAS HAVE HELD THAT THE EXPERT REPORT AND DISMISSAL REQUIREMENTS OF THE TMLA DO NOT APPLY IN FEDERAL COURT.

If Bagley had elected to bring his lawsuit in federal court or Respondents had removed the case to federal court, the issue of the applicability of the TMLA would have been a nonissue because a majority of federal district courts refuse to apply the report and dismissal requirements of Section 74.351 of the Texas Civil Practice & Remedies Code. *See Baker v. Bowles*, Civ. Action No. 3:05-CV-1118-L, 2005 U.S. Dist. LEXIS 32942, at *34-35 (N.D. Tex. Mar. 13, 2006) ("Dismissal of Plaintiff's § 1983 claims pursuant to § 74.351 would be inappropriate, as § 74.351 clearly does not foreclose federal civil rights claims."); *Garza v. Scott & White Mem'l Hosp.*, 234 F.R.D. 617, 623 (W.D. Tex. 2005) ("[T]he Court holds § 74.351 of the Texas Civil Practice and Remedies Code has no application in federal court."); *Jackson v. Ford*, No. A-10-CA-522-SS, 2011 WL 13127641, at *9 (W.D. Tex. Dec. 6, 2011), *aff'd*, 544 F. App'x 268 (5th Cir.

2013); *Nelson v. Myrick*, Civ. Action No. 3:04-CV-0828-G, 2005 LEXIS 5059, at *13 (N.D. Tex. March 29, 2005) (stating there is "no room for operation of section 74.351" in federal court.); *Roach v. Muncelle*, No. 2:02-CV-0166, 2004 U.S. Dist. LEXIS 3083, at *6 (N.D. Tex. Mar. 2, 2004) (denying motion to dismiss pursuant to § 13.01, observing that while the statute had been repealed after the filing of the motion, the statute would nevertheless not foreclose the plaintiff's § 1983 claims against defendant for alleged deliberate indifference to serious medical needs).

The Fifth Circuit Court of Appeals recently held that "a federal court entertaining state law claims may not apply section 74.351." *Passmore v. Baylor Health Care Sys.*, 823 F.3d 292, 299 (5th Cir. 2016). The rationale was that Section 74.351 collides with Rules 26 and 37 of the Federal Rules of Civil Procedure. *Id.*

The net effect of TMLA expert report requirements are that they place a substantive hurdle on incompetent individuals in Texas mental health institutions who attempt to bring Section 1983 claims who otherwise would not have the same burden in federal court. It is an unfair burden that can be dispositive.



CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that this Court grant certiorari and reverse the judgment of the Supreme Court of Texas. Petitioner requests such other and further relief which Petitioner may justly be entitled.

Respectfully submitted,

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NOVEMBER 15, 2021