IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
Marshall Division

EMMA WATSON, individually and as next friend of D.J.W.B.; ADRIANE SPRINGS, individually and as next friend of RON SPRINGS; DIANNE BASS; ANTHONY ROLLINS; SHARON, ASHKAR individually and as guardian of BASHAR ASHKAR; STEVE OKREI, D.D.S.; DAWN OKREI; YURITZI PENA and FELIPE FLORES JR., each individually and as next friends of A.F.; ANITA GARZA; LEO GARZA; LILIAN GUERRA, individually and as next friend of M.L.G; MARCELINO GUERRA; JUAN LIMON; ELIDA LIMON; and DWIGHT SMITH, individually and as guardian of CAROLYN SMITH, on behalf of themselves and others similarly situated,	)	No._____
Plaintiffs,	)	
v.	)	**COMPLAINT FOR DECLARATORY JUDGMENT UNDER 28 U.S.C. § 2201**
HARRISON COUNTY HOSPITAL ASSOCIATION, d/b/a MARSHALL REGIONAL MEDICAL CENTER; CHARLES DEMETRIS GASKIN, M.D.; GREGORY HORTMAN, M.D.; CARL TURNER, M.D.; JOYCE ABRAHAM, M.D.; TEXAS ANESTHESIA GROUP, P.A.; DAVID GODAT, M.D.; DAVID GODAT, M.D., P.A.; RANDOLPH WINSLER ROUNTREE, M.D.; WEST TEXAS MEDICAL ASSOCIATES; MARK D'ANDREA, M.D.; MARK D'ANDREA, M.D., P.A.; GULF COAST CANCER AND DIAGNOSTIC CENTER AT SOUTH EAST, INC.; GULF COAST ONCOLOGY ASSOCIATION; DAVID CARRIER, M.D.; HANI A. HAYKAL, M.D.; HOUSTON RADIOLOGY ASSOCATED, P.A.; THE METHODIST HOSPITAL; THE METHODIST HEALTH CARE SYSTEM; LUIS MORALES, M.D.; VALLEY BAPTIST MEDICAL CENTER-BROWNSVILLE;	)	

TENET HEALTHCARE, LTD., d/b/a BROWNSVILLE MEDICAL CENTER; TENET HEALTHCARE CORPORATION; TH HEALTHCARE, LTD.; SHE LING WONG, M.D.; HITESH R. PATEL, M.D.; MEMORIAL SOUTHEAST EMERGENCY PHYSICIANS, L.L.P.; VIVIAN HARTIG, M.D.; LAILA HASSAN, M.D.; CLEMENT UGORJI, M.D.; LEONARD M. RIGGS, JR., M.D.; DIGHTON PACKARD, M.D.; EMERGENCY HEALTH SERVICES ASSOCIATES; EMCARE, INC.; EMCARE HOLDINGS., INC; EMCARE O.P.L.P; EMERGENCY MEDICAL SERVICES, L.P.; S. MURTHY BADIGA, M.D.; RODOLFO GUERRERO, M.D.; MID VALLEY GASTROENTEROLOGY, P.A.; DOCTORS HOSPITAL AT RENAISSANCE, LTD.; LAWRENCE RICHARD GELMAN, M.D.; ROBERT EUGENE ALLEYN, M.D.; ROSALBA E. PUENTE, R.N.; MIGDALIA A. SOLIZ, R.N.; and HON. RANDY WILSON, Judge, 157th Judicial District Court, Harris County, Texas, and HON. RUSSELL AUSTIN, Judge, Probate Court No. 1, Harris County, Texas, on behalf of themselves and other Texas civil trial court judges similarly situated,

Defendants.

I. INTRODUCTION

1. This is a federal constitutional challenge by Texas medical malpractice victims to the Texas statutory cap on non-economic damages in health care liability actions, enacted as part of House Bill 4, Medical Malpractice and Tort Reform Act of 2003, *codified at* Texas Civil Practice & Remedies Code Ann. § 74.301 *et seq.* (Vernon Supp. 2004-2005) ("H.B. 4"). Defendants are (a) the health care providers who will seek to enforce the damage cap challenged herein as defendants in the health care liability actions filed by the named plaintiffs in this suit,

and (b) a class consisting of all Texas civil trial court judges who will be required to enforce the damage cap at issue unless this Court grants the relief sought here.

2. The plaintiffs, on behalf of themselves and the class they represent, seek a declaration that the non-economic damage cap of H.B. 4 violates the following federal constitutional provisions: the Seventh Amendment, by altering the jury's factual determination of appropriate compensatory damages, a part of the function of juries at common law since before and at the time our Constitution and Bill of Rights was ratified; the Due Process Clause of the Fourteenth Amendment, by legislating arbitrary abridgments of jury verdicts regardless of the evidence and without substituting a sufficient *quid pro quo*; the Equal Protection Clause of the Fourteenth Amendment, by treating similarly situated medical malpractice plaintiffs and defendants differently, and by treating plaintiffs and defendants in medical malpractice cases differently from plaintiffs and defendants in other negligence actions, without the compelling justification our Constitution requires for restrictions on fundamental rights, or the rational basis required for legislative action generally; the Takings Clause of the Fifth Amendment, by taking private property not for public use and without just compensation; and the right of access to the courts for redress guaranteed by the Privileges or Immunities, Equal Protection, and Due Process Clauses of the Fourteenth Amendment, as well as the Petition Clause of the First Amendment.

II. STATUTORY PROVISIONS AT ISSUE

3. In 2003, the 78th Legislature of Texas enacted H.B. 4, the Medical Malpractice and Tort Reform Act of 2003, a comprehensive overhaul of the Texas civil justice system. Tex. Civ. Prac. & Rem. Code Ann. § 1.001 *et seq*. (Vernon Supp. 2004-2005).

4. H.B. 4 limits the amount of non-economic damages in medical malpractice actions. Tex. Civ. Prac. & Rem. Code § 74.301 provides:

> (a) In an action on a health care liability claim where final judgment is rendered against a physician or health care provider other than a health care institution, the limit of civil liability for noneconomic damages of the physician or health care provider other than a health care institution, inclusive of all persons and entities for which vicarious liability theories may apply, shall be limited to an amount not to exceed $250,000 for each claimant, regardless of the number of defendant physicians or health care providers other than a health care institution against whom the claim is asserted or the number of separate causes of action on which the claim is based.
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> (b) In an action on a health care liability claim where final judgment is rendered against a single health care institution, the limit of civil liability for noneconomic damages inclusive of all persons and entities for which vicarious liability theories may apply, shall be limited to an amount not to exceed $250,000 for each claimant.
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> (c) In an action on a health care liability claim where final judgment is rendered against more than one health care institution, the limit of civil liability for noneconomic damages for each health care institution, inclusive of all persons and entities for which vicarious liability theories may apply, shall be limited to an amount not to exceed $250,000 for each claimant and the limit of civil liability for noneconomic damages for all health care institutions, inclusive of all persons and entities for which vicarious liability theories may apply, shall be limited to an amount not to exceed $500,000 for each claimant.

5. Tex. Civ. Prac. & Rem. Code § 74.001(a)(2), also enacted as part of H.B. 4, defines "claimant" for purposes of Section 74.301 and other H.B. 4 provisions as follows:

> "Claimant" means a person, including a decedent's estate, seeking or who has sought recovery of damages in a health care liability claim. All persons claiming to have sustained damages as the result of the bodily injury or death of a single person are considered a single claimant.

The effect of this provision is to limit recovery of non-economic damages in a health care liability action to a single $250,000 capped amount regardless of the number of plaintiffs or

the severity of the non-economic harms they prove at trial that they and each of them have suffered.

6. Tex. Civ. Prac. & Rem. Code § 74.302(a), also enacted as part of H.B. 4, contains a cap identical to that of Section 74.301 that would take effect "[i]n the event that Section 74.301 is stricken from this subchapter or is otherwise to any extent invalidated by a method other than through legislative means." The only difference between Sections 74.301 and 74.302 is that the "alternative" cap of Section 74.302 provides, whereas the "primary" cap of Section 74.301 does not provide, for a stepwise series of requirements, beginning in 2005 and escalating through 2007, for minimum professional liability insurance coverage of persons or entities wishing to avail themselves of the cap.

7. H.B. 4 became effective on September 1, 2003, for all health care liability actions filed on or after that date regardless of the date of injury or the date of accrual of the cause of action.

8. In 2003, after having enacted H.B. 4, the Texas Legislature passed a proposed amendment to the Texas Constitution that would authorize the state legislature to set limits on liability for all damages other than economic damages in health care liability suits and other tort actions. The proposed amendment was subjected to statewide referendum as Proposition 12 and was ratified, 51% to 49%, at a special election on September 13, 2003, at which no public office was on the ballot and approximately 12 percent of Texas' registered voters turned out to vote. Thereupon the proposed amendment became effective as Article III, Section 66, of the Texas Constitution, and purported to approve retroactively the cap enacted under H.B. 4.

9. The non-economic damage cap of H.B. 4, which applies only to health care liability actions, is the only cap thus far enacted by the Texas Legislature, retroactively, under the authority granted by Tex. Const. art. III, § 66.

III. JURISDICTION AND VENUE

10. This Court has jurisdiction over the federal questions raised in this Complaint under 28 U.S.C. §§ 1331 and 2201.

11. This Court has jurisdiction of the allegations of this Complaint under 28 U.S.C. § 1343(a)(3), which opens the federal courts to "any civil action authorized by law to be commenced by any person . . . [t]o redress the deprivation, under color of any State law . . . , of any right, privilege or immunity secured by the Constitution of the United States[.]"

12. This action is authorized by 42 U.S.C. § 1983, under which any person aggrieved by the violation of federal constitutional rights under color of state law may file a civil action in federal court for monetary, declaratory or injunctive relief. The plaintiffs have no adequate remedy at law for the continuing violations of the federal Constitution alleged herein.

13. Venue is proper in this District under 28 U.S.C. § 1391(a), and in this Division under 28 U.S.C. § 124(c)(1), because one or more named plaintiffs and one or more named defendants reside here.

IV. DECLARATORY JUDGMENT ACT ALLEGATIONS

14. Under 28 U.S.C. §§ 2201 and 2202, this Court has the power to order declaratory relief even if no other relief is requested or granted. The plaintiffs desire a judicial determination of their legal rights with respect to H.B. 4's damage cap under the Constitution of the United States.

15. The declaratory relief requested in this Complaint is necessary and appropriate at this time because the cap of H.B. 4 has a direct and immediate impact on the plaintiffs at the threshold of medical malpractice litigation and at every subsequent stage of such proceedings. Whether the cap will

apply to a jury trial award affects decisions a plaintiff must make as early as possible, *inter alia,* about the likely extent of recovery in a case, the likely cost of proof relative to that recovery, the extent of justifiable outlays for expert witnesses and other expenses of the presentation of evidence that is often highly technical and extremely costly to acquire, and the evaluation of any settlement offers against those factors and against the impact, if any, of the cap. In short, the cap of H.B. 4 has an enormous impact on every pretrial and trial decision in cases to which it applies, beginning with the decision whether to sue at all.

16. The impact of H.B. 4 as described above, and the valid allegations made in this Complaint that the cap infringes the constitutional rights of litigants in whose cases it applies, give rise to an actual controversy between the parties that is of sufficient immediacy and reality to warrant the issuance of a declaratory judgment.

V. PARTIES

A. Plaintiffs

17. Plaintiff Emma Watson of Harrison County, individually and as next friend of her daughter, D.J.W.B., a minor, alleges that D.J.W.B. suffered severe and permanent brain damage at birth in Harrison County in 2004 due to a failure to identify or timely treat her acute fetal distress. The petition, timely filed in the 71st Judicial District Court in Harrison County in 2006, alleges the negligence of the nurses and responsible employees at Marshall Regional Medical Center, Charles Gaskin, M.D., and Gregory Hortman, M.D., all of Harrison County, in fundamental failures of diagnosis, communication, intervention, and care in the perinatal and postpartum periods, including failure to diagnose and report fetal distress and placental abruption; delayed cesarean delivery; and failure to monitor and respond to the infant's postpartum distress, which included placental insufficiency, hypothermia, and abnormal blood

sugar levels. *See* Watson Original Petition, Exhibit 1 hereto. The Watsons' underlying health care liability action is now pending before the Honorable Bonnie Leggat. The Watsons have reserved their federal constitutional claims for presentation in federal court. The nature, severity, and extent of D.J.W.B.'s medical injuries and the harms to her family relationships and quality of life give rise to the reasonable expectation that a jury will award the Watsons substantially more than $250,000 in non-economic damages. *See* Declaration of Jim M. Perdue, Jr., Counsel for Plaintiff Emma Watson, individually and as next friend of D.J.W.B., Exhibit 2 hereto; Expert Witness Report of Dr. Cydney A. Menihan, Exhibit 3 hereto. The Watsons also reasonably expect that the defendants in their underlying tort action will seek to enforce the non-economic damage cap of section 74.301, and that absent the relief sought here the district court will apply that section to bar any non-economic damages awarded by a jury in excess of $250,000. Any settlement offers made by defendants will necessarily assume that liability for non-economic harm cannot exceed $250,000.

18. Plaintiff Adriane Springs of Collin County, individually and as next friend of her husband, former Dallas Cowboys football player Ron Springs, alleges that Mr. Springs suffered a severe anoxic brain injury as a result of the maladministration of surgical anesthesia in Dallas County in October 2007. Mr. Springs was given general anesthesia, including medical paralysis, for the routine removal of a cyst from his forearm, without pre-operative evaluation or consideration of less invasive anesthetic options, and in disregard of the airway difficulties he had at the time of his kidney transplant surgery at the same hospital in February 2007. Laryngeal mask airway insertion and intubation were mishandled and the patient suffered cardiopulmonary arrest. Mr. Springs was left permanently unconscious and non-responsive to verbal commands. Ms. Springs timely filed suit on her and her husband's behalf in the 14th Judicial District Court

of Dallas County in 2008, alleging medical negligence against Joyce Abraham, M.D., the anesthesiologist, and Texas Anesthesia Group, P.A., her employer, both of Tarrant County; and David Godat, M.D., the physician who arranged for Dr. Abraham's services and was responsible for Mr. Springs' pre-operative care, and David Godat, M.D., P.A., Dr. Godat's medical practice entity, both of Dallas County. *See* Springs Original Petition, Exhibit 4 hereto. That case is now pending before the Honorable Mary L. Murphy. The Springses have reserved their federal constitutional claims for presentation in federal court. The nature, severity, and extent of Mr. Springs' medical injuries and the harms to the Springs' relationship and quality of life give rise to the reasonable expectation that a jury will award Mr. and Ms. Springs substantially more than $250,000 in non-economic damages. *See* Declaration of Les Weisbrod, Counsel for Plaintiff Adriane Springs, Individually and as Next Friend of Ron Springs, Exhibit 5 hereto; Expert Witness Reports of Dr. Arnold S. Seid and Dr. Scott Groudine, Exhibit 6 hereto. Ms. Springs also reasonably expects that the defendants in her underlying tort action will seek to enforce the non-economic damage cap of Section 74.301, and that absent the relief sought here the state trial court will apply that section to bar any non-economic damages awarded by a jury in excess of $250,000. Any settlement offers made by defendants will necessarily assume that non-economic liability cannot exceed $250,000.

19. Plaintiff Dianne Bass of Tom Green County was sexually assaulted in 2005 by her obstetrician/gynecologist, defendant Randolph W. Rountree, M.D., during a medical examination in the professional offices of his employer, defendant West Texas Medical Associates, and suffered severe mental anguish as a result. The sexual assault in Ms. Bass's case was similar to previous attacks in which defendant Rountree sedated a female patient with narcotics, effectively paralyzed her, and then sexually assaulted her, after directing non-

physician staff, chaperones or others to leave the examination room. Since the sexual assault against Ms. Bass, defendant Rountree has lost his Texas medical license and has been convicted on felony sexual assault charges; he is presently incarcerated in a Texas state prison. Ms. Bass timely filed suit in the 51st Judicial District Court of Tom Green County in 2006, alleging medical malpractice against defendants Rountree and West Texas Medical Associates. *See* Bass Second Amended Petition, Exhibit 7 hereto. That case is now pending before the Honorable Barbara Walther. Ms. Bass has reserved her federal constitutional claims for presentation in federal court. The nature, severity, and extent of Ms. Bass's injuries and damage to her quality of life give rise to the reasonable expectation that a jury will award Ms. Bass substantially more than $250,000 in non-economic damages. *See* Declaration of Paula Sweeney, Counsel for Plaintiff Dianne Bass, Exhibit 8 hereto; Expert Witness Reports of Dr. Donald J. Coney & Paula L. Antognoli, RN, Exhibits 9 - 10 hereto. Ms. Bass also reasonably expects that the defendants in her underlying tort action will seek to enforce the non-economic damage cap of Section 74.301, and that absent the relief sought here the state trial court will apply that section to bar any non-economic damages awarded by a jury in excess of $250,000 as to each defendant. Any settlement offers made by defendants will necessarily assume that non-economic liability cannot exceed $250,000 as to each defendant.

20. Plaintiff Anthony Rollins of Harris County alleges that the negligent administration of external beam radiation by defendant Mark D'Andrea, M.D., of Harris County, during a medical procedure in Harris County in 2005, caused severe burns and permanent damage to his anal canal, rectum, bladder and perineum. As a result, he has suffered excruciating pain and mental anguish and has lost the ability to control his bowel and bladder, and the quality of his life has been irrevocably damaged. Mr. Rollins timely filed suit on these

allegations in 2007 in the 157th Judicial District Court of Harris County. *See* Rollins Original Petition, Exhibit 11 hereto. His case is now pending before the Honorable Randy Wilson. Mr. Rollins has reserved his federal constitutional claims for presentation in federal court. The nature, severity, and extent of Mr. Rollins' medical injuries give rise to the reasonable expectation that a jury will award Mr. Rollins substantially more than $250,000 in non-economic damages. See Declaration of Hartley Hampton, Counsel for Plaintiff Anthony Rollins, Exhibit 12 hereto; Expert Witness Report of Dr. L. A. Schlichtemeier, Exhibit 13 hereto. Mr. Rollins also reasonably expects that the defendants in his underlying tort action will seek to enforce the non-economic damage cap of Section 74.301, and that absent the relief sought here the state court will apply that section to bar any non-economic damages awarded by a jury in excess of $250,000. Any settlement offers made by defendants will necessarily assume that non-economic liability cannot exceed $250,000.

21. Plaintiff Sharon Ashkar of Harris County, individually and as guardian of her husband, Bashar Ashkar, alleges that Mr. Ashkar suffered a devastating brain injury as a result of a negligently performed epidural steroid injection in Harris County in 2005 that inserted the steroid into the patient's left vertebral artery. The result was a massive cerebellar hemorrhage that left Mr. Ashkar a permanently and completely paralyzed nursing home patient, unable to move or speak but conscious and aware of his surroundings and the horror of his condition. Ms. Ashkar timely filed suit on her and her husband's behalf in Probate Court No. 1, Harris County, in 2007, alleging medical negligence against David Carrier, M.D., of Harris County, the physician who performed the injection; Hani A. Haykal, M.D., the physician whom the plaintiff intended to perform the procedure but who was replaced immediately beforehand by Dr. Carrier without the patient's written consent; Houston Radiology Associated, P.A., the employer of both

physicians; and The Methodist Hospital, the hospital where the negligence occurred. *See* Ashkar Second Amended Petition, Exhibit 14 hereto. That case is now pending before the Honorable Russell Austin. The Ashkars have reserved their federal constitutional claims for presentation in federal court. The nature, severity, and extent of Mr. Ashkar's medical injuries and the harms to the Ashkars' relationship and quality of life give rise to the reasonable expectation that a jury will award the Ashkars substantially more than $250,000 in non-economic damages. *See* Declaration of Jim Perdue, Jr., Counsel for Plaintiff Sharon Ashkar, Individually and as Guardian for Bashar Ashkar, Exhibit 15 hereto; Expert Witness Report of Dr. Charles N. Aprill, Exhibits 16 hereto. The Ashkars also reasonably expect that the defendants in their underlying tort action will seek to enforce the non-economic damage cap of Section 74.301, and that absent the relief sought here the state trial court will apply that section to bar any non-economic damages awarded by a jury in excess of $250,000. Any settlement offers made by defendants will necessarily assume that non-economic liability cannot exceed $250,000.

22. Plaintiff Steve Okrei, D.D.S., a citizen and resident of Missouri, suffered severe and permanent neurological damage from a cervical spine imaging procedure performed in Harris County in 2005 by defendant Hani A. Haykal, M.D., of Harris County, in which he negligently injected an image contrast solution into Dr. Okrei's spinal cord instead of the subarachnoid space, and either failed to notice or ignored the immediate and obvious physical symptoms that resulted. An emergency physician discovered the problem days later, and treated Dr. Okrei with high-dose corticosteroids. Despite that emergency treatment, Dr. Okrei now suffers from severe and permanent disabilities, is permanently unable to practice dentistry, and suffers substantial and permanent impairments of physical, sexual, intellectual and creative function. Dr. Okrei and his wife, Dawn Okrei, timely filed suit in 2007 in the 215th Judicial

District Court of Harris County against Dr. Haykal; his employer, Houston Radiology Associated, P.A; The Methodist Hospital, the hospital where the negligence occurred; and The Methodist Health Care System, the hospital's parent entity. *See* Okrei Second Amended Petition, Exhibit 17 hereto. That case is now pending before the Honorable Levi Benton. The Okreis have reserved their federal constitutional claims for presentation in federal court. The nature, severity, and extent of Dr. Okrei's medical injuries and the harms to the Okreis' relationship and quality of life give rise to the reasonable expectation that a jury will award the Okreis substantially more than $250,000 in non-economic damages. *See* Declaration of Jim Perdue, Jr., Counsel for Plaintiffs Steve Okrei, D.D.S., and Dawn Okrei, Exhibit 18 hereto; Expert Witness Report of Michele A. Carson, Exhibit 19 hereto. The Okreis also reasonably expect that the defendant in their underlying tort action will seek to enforce the non-economic damage cap of Section 74.301, and that absent the relief sought here the state trial court will apply that section to bar any non-economic damages awarded by a jury in excess of $250,000. Any settlement offers made by defendants will necessarily assume that non-economic liability cannot exceed $250,000.

23. Plaintiffs Yuritzi Pena and Felipe Flores Jr., of Cameron County, individually and as guardian of their daughter, A.F., allege that A.F. suffered a perforated bowel and the catastrophic loss of intestinal function at age 10 months in 2001, and will suffer severe limitation of intestinal function for the rest of her life, because of the negligent failure of her treating physicians at Valley Baptist Medical Center-Brownsville to heed the parents' warnings about their daughter's known intestinal condition and to treat her abdominal obstruction accordingly. A.F.'s parents timely filed suit in the 138th Judicial District Court of Cameron County in 2007, alleging the medical negligence of Luis Morales, M.D., a pediatrician at Valley Baptist; She Ling

Wong, M.D., a general surgeon at that hospital; and the hospital and its parent entities. *See* Flores First Amended Petition, Exhibit 20 hereto. That case is now pending before the Honorable Arturo C. Nelson. Plaintiffs Pena and Flores have reserved their federal constitutional claims for presentation in federal court. The nature, severity, and extent of A.F.'s medical injuries and the harms to her and her parents' relationships and quality of life give rise to the reasonable expectation that a jury will award the victim and her parents substantially more than $250,000 in non-economic damages. *See* Declaration of Jim Perdue, Jr., Counsel for Plaintiffs Yuritzi Pena and Felipe Flores Jr., individually and as guardian of A.F., Exhibit 21 hereto; Expert Witness Report of Dr. Robert Katz, Exhibit 22 hereto. Ms. Pena and Mr. Flores also reasonably expect that the defendant in their underlying tort action will seek to enforce the non-economic damage cap of Section 74.301, and that absent the relief sought here the state trial court will apply that section to bar any non-economic damages awarded by a jury in excess of $250,000. Any settlement offers made by defendants will necessarily assume that non-economic liability cannot exceed $250,000.

24. Plaintiffs Anita Garza and Leo Garza of Harris County allege that the failure of Laila Hassan, M.D., Hitesh Patel, M.D., and Vivian Hartig, M.D., all of Harris County, to perform an MRI in March 2005 allowed Anita Garza's spinal abscess to progress to the point where it caused irreversible cord compression, resulting in permanent paralysis. As a result of this negligence Mrs. Garza is paraplegic, has weakness in and limited use of her arms, is incontinent, and is in constant pain. Anita and Leo Garza timely filed suit in 2007 alleging medical negligence on these facts in the 405th Judicial District Court of Galveston County. That lawsuit has now been transferred to the 333d Judicial District Court of Harris County, where it is now pending before the Honorable Tad Halbach. *See* Garza Sixth Amended Petition, Exhibit 23

hereto. The Garzas have reserved their federal constitutional claims for presentation in federal court. The nature, severity, and extent of Ms. Garza's medical injuries, and the harm to the Garzas' relationship and quality of life, give rise to the reasonable expectation that a jury will award the Garzas substantially more than $250,000 in non-economic damages. *See* Declaration of Hartley Hampton, Counsel for Plaintiffs Anita Garza and Leo Garza, Exhibit 24 hereto; Expert Witness Reports of Dr. James D. Leo, Dr. Richard S. Krause, & Dr. George Lopez, Exhibits 25 - 27 hereto. The Garzas also reasonably expect that the defendants in their underlying tort action will seek to enforce the non-economic damage cap of Section 74.301, and that absent the relief sought here the state court will apply that section to bar any non-economic damages awarded by a jury in excess of $250,000. Any settlement offers made by defendants will necessarily assume that non-economic liability cannot exceed $250,000.

25. Plaintiffs Lilian Guerra, individually and as guardian for her daughter, M.L.G., and Marcelino Guerra allege that M.L.G. suffered severe and permanent brain damage at birth at Polly Ryon Memorial Hospital in Fort Bend County in 1998 due to a failure to monitor her delivery and a botched intubation of her esophagus. The petition, timely filed in the 129th Judicial District Court of Harris County in 2005, alleges the gross negligence of Clement Ugorji, M.D., of Harris County; his corporate employer, Emergency Health Services Associates; its corporate alter egoes, EmCare, Inc.; EmCare Holdings, Inc.; EmCare O.P.L.P.; and Emergency Medical Services, L.P.; and their chief executive and medical officers, Leonard M. Riggs, Jr., M.D., and Dighton Packard, M.D., in allowing the hospital birth to remain unattended, in failing to intubate the newborn properly after she ingested mecomium, and in failing to monitor and respond to her dangerously low glucose levels. *See* Guerra Fourth Amended Petition, Exhibit 28 hereto. That case is now pending before the Honorable Grant Dorfman. The Guerras have

reserved their federal constitutional claims for presentation in federal court. The nature, severity, and extent of M.L.G.'s medical injuries and the harms to her family relationships and quality of life give rise to the reasonable expectation that a jury will award the Guerras substantially more than $250,000 in non-economic damages. *See* Declaration of Jack E. McGehee, Counsel for Plaintiff Lillian Guerra, Individually and as Guardian for M.L.G., Exhibit 29 hereto; Expert Witness Reports of Dr. Andrew P. Garlisi, Adrienne R. Bond, Dr. Albert C. Weihl, & Dr. Tim Cooper, Exhibits 30 - 33 hereto. The Guerras also reasonably expect that the defendants in their underlying tort action will seek to enforce the non-economic damage cap of section 74.301, and that absent the relief sought here the district court will apply that section to bar any non-economic damages awarded by a jury in excess of $250,000. Any settlement offers made by defendants will necessarily assume that non-economic liability cannot exceed $250,000.

26. Plaintiff Juan Limon of Hidalgo County suffered extreme pain and severe and permanent physical injuries as a result of three negligently performed procedures to clear a food obstruction from his esophagus in Hidalgo County in 2006 and repair the resulting perforation. Mr. Limon's esophagus was perforated during the first procedure; the second attempt at the procedure enlarged the perforation, and a third procedure failed to repair the perforation, allowing contamination of his chest cavity. Life-threatening impairments of his kidneys and lungs resulted, and his esophagus had to be disconnected and partly removed. Mr. Limon has required extensive hospitalization and nursing home confinement, and for the rest of his life will be on kidney dialysis and unable to eat. He and his spouse, Elida Limon, timely filed suit in 2007 in the 93rd Judicial District Court of Hidalgo County, alleging medical negligence against defendants S. Murthy Badiga, M.D., and Rodolfo Guerrero, M.D., and Dr. Badiga's practice entity, Mid Valley Gastroenterology, P.A., all of Hidalgo County. *See* Limon Second Amended

Petition, Exhibit 34 hereto. That case is now pending before the Honorable Rudy Delgado. The Limons have reserved their federal constitutional claims for presentation in federal court. The nature, severity, and extent of Mr. Limon's medical injuries and the harms to the Limons' relationship and quality of life give rise to the reasonable expectation that a jury will award the Limons substantially more than $250,000 in non-economic damages. *See* Declaration of Hartley Hampton, Counsel for Plaintiffs Juan and Elida Limon, Exhibit 35 hereto; Expert Witness Report of Dr. Daniel L. Miller, Exhibits 36 hereto. The Limons also reasonably expect that the defendants in their underlying tort action will seek to enforce the non-economic damage cap of Section 74.301, and that absent the relief sought here the state trial court will apply that section to bar any non-economic damages awarded by a jury in excess of $250,000. Any settlement offers made by defendants will necessarily assume that non-economic liability cannot exceed $250,000.

27. Plaintiff Dwight Smith of Hidalgo County, individually and as guardian of his wife, Carolyn Smith, alleges that Carolyn suffered profound and irreversible brain damage following a routine thyroidectomy in Hidalgo County 2004 because her health care providers failed to notice and correct an airway obstruction after surgery and allowed her brain to be deprived of oxygen for an extended period. Carolyn is now in a persistent vegetative state, breathes only with a mechanical ventilator and will require round-the-clock medical and custodial care for the rest of her life. Plaintiff Dwight Smith, individually and on Carolyn's behalf, timely filed suit in the 398th Judicial District Court of Hidalgo County in 2006, alleging the gross negligence of Carolyn's doctors and nurses, Lawrence R. Gelman, M.D.; Robert E. Alleyn, M.D.; Rosalba E. Puente, R.N.; and Migdalia A. Soliz, R.N.; and of Doctors Hospital at Renaissance, the hospital where the gross negligence occurred. *See* Smith Original Petition,

Exhibit 37 hereto. That case is now pending before the Honorable Aida Salinas Flores. The Smiths have reserved their federal constitutional claims for presentation in federal court. The nature, severity, and extent of Carolyn Smith's medical injuries and the harms to the Smiths' relationship and quality of life give rise to the reasonable expectation that a jury will award the Smiths substantially more than $250,000 in non-economic damages. *See* Declaration of Jim Perdue, Jr., Counsel for Plaintiff Dwight Smith, individually and as guardian for Carolyn Smith, Exhibit 38 hereto; Expert Witness Report of Rita K. Restrepo, Exhibit 39 hereto. The Smiths also reasonably expect that the defendants in their underlying tort action will seek to enforce the non-economic damage cap of Section 74.301, and that absent the relief sought here the state trial court will apply that section to bar any non-economic damages awarded by a jury in excess of $250,000. Any settlement offers made by defendants will necessarily assume that non-economic liability cannot exceed $250,000.

B. Health care provider defendants

28. Defendants Harrison County Hospital Association, d/b/a Marshall Regional Medical Center, Charles Gaskin, M.D., Gregory Hortman, M.D., and Carl Turner, M.D., all residents of Harrison County, are the named defendants in the underlying medical negligence action of plaintiff Emma Watson, individually and as next friend of D.J.W.B. They can be expected to rely upon the cap of H.B. 4 in any settlement negotiations, and to seek enforcement of the cap if the jury's non-economic damage verdict exceeds the cap amount. Defendant Harrison County Hospital Association, d/b/a Marshall Regional Medical Center may be served with process by serving its registered agent, Russel J. Collier, 811 S. Washington, PO Box 1599, Marshall, TX 75670. Defendant Charles Gaskin, M.D., may be served with process by serving his attorney, Victor Haley, Fairchild, Price, Thomas, & Haley, 1801 North Street, Nacogdoches, TX 75973-1668. Defendant Gregory Hortman, M.D., may be served with process by serving

him at 618 South Grove, Suite 300, Marshall, TX 75670. Defendant Carl Turner, M.D., may be served with process by serving him at 304 University Street, Marshall, TX 75670.

29. Defendants Joyce Abraham, M.D., Texas Anesthesia Group, P.A., David Godat, M.D., and David Godat, M.D., P.A., are named defendants in the underlying medical negligence action of plaintiff Adriane Springs, and reside and/or have resident agents in Tarrant and Dallas Counties, Texas. They can be expected to rely upon the cap of H.B. 4 in any settlement negotiations, and to seek enforcement of the cap if the jury's non-economic damage verdict exceeds the cap amount. Defendants Randolph W. Rountree, M.D., and West Texas Medical Associates are named defendants in the underlying medical negligence action of plaintiff Dianne Bass, and reside in Cuero, Texas, and San Angelo, Texas. They can be expected to rely upon the cap of H.B. 4 in any settlement negotiations, and to seek enforcement of the cap if the jury's non-economic damage verdict exceeds the cap amount. Defendant Joyce Abraham, M.D., may be served with process by serving her at 4916 Overton Plaza, Fort Worth, TX 76109. Defendant Texas Anesthesia Group, P.A., may be served with process by serving its registered agent, Thaddeus H. Ashmore, 4916 Overton Plaza, Fort Worth, TX 76109. Defendant David Godat, M.D., may be served with process by serving him at 7777 Forest Lane, C216, Dallas, TX 75230. Defendant David Godat, M.D., P.A., may be served with process by serving its registered agent, David Godat, 7777 Forest Lane, C216, Dallas, TX 75230.

30. Defendants Mark D'Andrea, M.D., Mark D'Andrea, M.D., P.A., Gulf Coast Cancer & Diagnostic Center at South East Inc., and Gulf Coast Oncology Association, all of Harris County, are named defendants in the underlying medical negligence action of plaintiff Anthony Rollins. They can be expected to rely upon the cap of H.B. 4 in any settlement negotiations, and to seek enforcement of the cap if the jury's non-economic damage verdict

exceeds the cap amount. Defendant Mark D'Andrea, M.D., may be served with process by serving him at 12811 Beamer Road, Houston, TX 77089. Defendant Mark D'Andrea, M.D., P.A., may be served with process at 4000 Spencer Highway, Pasadena, TX 77504. Defendant Gulf Coast Cancer & Diagnostic Center at South East Inc., may be served with process by serving its registered agent, Capitol Corporate Services Inc., 800 Brazos, Suite 1100, Austin, TX 75240. Defendant Gulf Coast Oncology Association may be served with process by serving its registered agent, Kim L. Lawrence, 5720 LBJ Freeway, Suite 410, Dallas, TX 75240.

31. Defendants David Carrier, M.D., Hani A. Haykal, M.D., Houston Radiology Associated, P.A., The Methodist Health Care System, and The Methodist Hospital are named defendants in the underlying medical negligence actions of plaintiff Sharon Ashkar, individually and as guardian of Bashar Ashkar, and/or of plaintiffs Steve Okrei, D.D.S., and Dawn Okrei. These defendants are all residents of Harris County. They can be expected to rely upon the cap of H.B. 4 in any settlement negotiations, and to seek enforcement of the cap if the jury's non-economic damage verdict exceeds the cap amount. Defendant David Carrier, M.D., may be served with process by serving his attorneys, Wayne Clawater, David J. McTaggard, Angela R. Allison, Cruse, Scott, Henderson, & Allen, L.L.P., 2777 Allen Parkway, 7th Floor, Houston, TX 77019. Defendant Hani A. Haykal, M.D., may be served with process by serving him at The Methodist Hospital, 6565 Fannin, MS D28l, Houston, Texas 77030. Defendant Houston Radiology Associated, P.A., may be served with process by serving its attorneys, Wayne Clawater, David J. McTaggard, Angela R. Allison, Cruse, Scott, Henderson, & Allen, L.L.P., 2777 Allen Parkway, 7th Floor, Houston, TX 77019. Defendants The Methodist Health Care System may be served with process by serving its registered agent, CT Corporation System, 1021 Main Street, Suite 1150, Houston, TX 77002. Defendant The Methodist Hospital may be

served with process by serving its registered agent, CT Corporation System, 1021 Main Street, Suite 1150, Houston, TX 77002.

32. Defendants Luis Morales, M.D., Valley Baptist Medical Center-Brownsville, Tenet Healthcare, Ltd., d/b/a Brownsville Medical Center, Tenet Healthcare Corp., TH Healthcare, Ltd., and She Ling Wong, M.D., all of Cameron County, are the named defendants in the underlying medical negligence action of plaintiffs Yuritzi Pena and Felipe Flores Jr., individually and as next friends of their daughter, A.F. These defendants can be expected to rely upon the cap of H.B. 4 in any settlement negotiations, and to seek enforcement of the cap if the jury's non-economic damage verdict exceeds the cap amount. Defendant Luis Morales, M.D., may be served with process by serving him at 5235 Southmost Road, #B, Brownsville, TX 78521. Defendant Valley Baptist Medical Center-Brownsville may be served with process by serving its registered agent, Manuel M. Vela, 21201 Pease Street, Harlingen, TX 78550. Defendant Tenet Healthcare, Ltd., d/b/a Brownsville Medical Center may be served with process by serving its registered agent, Trevor Fetter, 13737 Noel Road, Suite 100, Dallas, TX 75240. Defendant Tenet Healthcare Corp., may be served with process by serving its registered agent, CT Corporation System, 350 North St. Paul St., Dallas, TX 75201. Defendant TH Tenet Healthcare Ltd., may be served with process by serving its registered agent, Trevor Fetter, 13737 Noel Road, Suite 100, Dallas, TX 75240. Defendant She Ling Wong, M.D., may be served with process by serving her at 4770 North Expressway, Suite 100, Dallas, TX 78526.

33. Defendants Hitesh R. Patel, M.D., Memorial Southeast Emergency Physicians, L.L.P., Vivian Hartig, M.D., and Laila Hassan, M.D., are the named defendants in the underlying medical negligence action of plaintiffs Anita and Leo Garza. They can be expected to rely upon the cap of H.B. 4 in any settlement negotiations, and to seek enforcement of the cap if the jury's

non-economic damage verdict exceeds the cap amount. Defendant Hitesh R. Patel, M.D., may be served with process by serving him at 11800 Astoria Blvd, Houston, TX 77089. Defendant Memorial Southeast Emergency Physicians, L.L.P, may be served with process by serving its registered agent, CT Corporation, 350 North St. Paul St., Dallas, TX 75201. Defendant Vivian Hartig, M.D., may be served with process by serving her at 17030 Highway 3, Park Plaza One, Webster, TX 77598. Defendant Laila Hassan, M.D., may be served with process by serving her at 11914 Astoria Blvd., #330, Houston, TX 77089.

34. Defendant Clement Ugorji, M.D., is a named defendant in the underlying medical negligence action of plaintiffs Lilian Guerra, individually and as guardian of her daughter, M.L.G., and Marcelino Guerra Also named as defendants herein are the other defendants in the Guerras' action: Dr. Ugorji's employer at the time of the alleged medical negligence, Emergency Health Services Associates ("EHSA"); its parent corporation, EmCare, Inc.; that entity's corporate alter egoes EmCare Holdings, Inc., and EmCare O.P., L.P. ("EmCare entities"); Emergency Medical Services, L.P.; and the chief executive officer and chief medical officer of these entities, Leonard M. Riggs, Jr., M.D., and Dighton Packard, M.D. These defendants are all residents of Harris County. They can be expected to rely upon the cap of H.B. 4 in any settlement negotiations, and to seek enforcement of the cap if the jury's non-economic damage verdict exceeds the cap amount. Defendant Clement Ugorji, M.D., may be served with process by serving him at 14731 Bramblewood, Houston, TX 77079. Defendant Emergency Health Services Associates may be served with process by serving its registered agent, Corporation Services Company d/b/a CSC-Lawyers Incorporating Services Company, 701 Brazos, Suite 1050, Austin, TX 78701. Defendant EmCare, Inc., may be served with process by serving its registered agent, C/O Corporation Services Company d/b/a CSC-Lawyers Incorporating Services

Company, 701 Brazos, Suite 1050, Austin, TX 78701. Defendant EmCare Holdings, Inc., may be served with process by serving its registered agent, C/O Corporation Services Company d/b/a CSC-Lawyers Incorporating Services Company, 701 Brazos, Suite 1050, Austin, TX 78701. Defendant EmCare O.P.L.P., may be served with process by serving its registered agent, Leonard M. Riggs, Jr., 1717 Main, Suite 5200, Dallas, TX 75201. Defendant Emergency Medical Services may be served by serving its registered agent, Leonard M. Riggs, Jr., 1717 Main, Suite 5200, Dallas, TX 75201. Defendant Leonard M. Riggs, Jr., M.D., may be served with process by serving his attorney, James M. Stewart, Stewart & Stimmel, L.L.P., 1701 Market Street, Suite 318, LB 18, Dallas, TX 75202. Defendant Dighton Packard, M.D., may be served by serving his registered agent, Leonard M. Riggs, Jr., 1717 Main, Suite 5200, Dallas, TX 75201.

35. Defendants S. Murthy Badiga, M.D., Rodolfo Guerrero, M.D., and Mid Valley Gastroenterology, P.A., are the named defendants in the underlying medical negligence action of plaintiffs Elida and Juan Limon. All these defendants are residents of Hidalgo County. They can be expected to rely upon the cap of H.B. 4 in any settlement negotiations, and to seek enforcement of the cap if the jury's non-economic damage verdict exceeds the cap amount. Defendant S. Murthy Badiga, M.D., may be served with process by serving him at 902 S. Airport Drive, Suite 6, Weslaco, TX 78596. Defendant Rodolfo Guerrero, M.D., may be served with process by serving him at 1402 8th Street, Suite 1, Weslaco, TX 78596. Mid Valley Gastroenterology, P.A., may be served with process by serving it at 902 S. Airport Drive, Suite 6, Weslaco, TX 78596.

36. Defendants Doctors Hospital at Renaissance, Ltd., Lawrence R. Gelman, M.D., Robert E. Alleyn, M.D., Rosalba E. Puente, R.N., and Migdalia A. Soliz, R.N., are the named

defendants in the underlying medical negligence action of plaintiff Dwight Smith, individually and as guardian of his wife, Carolyn Smith. These defendants are all residents of Hidalgo County. They can be expected to rely upon the cap of H.B. 4 in any settlement negotiations, and to seek enforcement of the cap if the jury's non-economic damage verdict exceeds the cap amount. Defendant Doctors Hospital at Renaissance, Ltd., may be served with process by serving its registered agent, Lawrence Gelman, 5501 South McColl, Edinburg, TX 78539. Defendant Lawrence R. Gelman, M.D., may be served with process by serving him at 3601 West Alberta, Edinburg, TX 78539. Defendant Robert E. Alleyn, M.D., may be served with process by serving him at 620 South 12th Street, McAllen, TX 78501. Defendant Rosalba E. Puente, R.N., may be served with process by serving her at 2709 North Birch Street, Apt B, Pharr, TX 78577. Defendant Migdalia A. Soliz, R.N., may be served with process by serving her at 3309 Princess Street, Edinburg, TX 78539.

37. The liability of the foregoing individual and entity defendants in the plaintiffs' underlying medical negligence actions will be limited by the cap at issue absent the relief sought here. Any settlement negotiations that may take place will be conducted in the shadow of the cap, and its legal status will greatly influence any settlement negotiations. By seeking to enforce the cap in the courts of Texas, these defendants are cloaked with state authority, and their actions, whether in concert with the official defendants or otherwise, are fairly attributable to the state for purposes of this lawsuit.

C. <u>Judicial defendants</u>

38. Defendant Hon. Randy Wilson is a judge of the 157th Judicial District Court of Harris County, Texas. In that capacity, Judge Wilson presides over health care liability actions, including that of Anthony Rollins, a named plaintiff herein, and absent the relief sought here will have the absolute, non-discretionary duty in Mr. Rollins' case and any other such case to apply

the non-economic damage cap of H.B. 4 to any damage award that exceeds the cap amount. Defendant Hon. Randy Wilson may be served with process by serving him at 157th Judicial District Court, Harris County Civil Courthouse, 201 Caroline, 11th Floor, Houston, TX 77002.

39. Defendant Hon. Russell Austin is a judge of Probate Court No. 1, Harris County, Texas. In that capacity, Judge Austin presides over health care liability actions, including that of Sharon Ashkar, a named plaintiff herein, and absent the relief sought here will have the absolute, non-discretionary duty in Ms. Ashkar's case and any other such case to apply the non-economic damage cap of H.B. 4 to any damage award that exceeds the cap amount. Defendant Hon. Russell Austin may be served with process by serving him at Probate Court No. 1, Harris County Civil Courthouse, 201 Caroline, 6th Floor, Houston, TX 77002.

40. Defendant Judges Wilson and Austin are named as representatives of a proposed class of Texas civil trial court judges each of whom will be absolutely required by H.B. 4 to impose the cap at issue, and will have no discretion but to impose it, in any health care liability action in his or her court in which the jury's verdict exceeds the cap.

VI. CLASS ACTION ALLEGATIONS

A. Plaintiff class

41. This action is brought by plaintiffs, on behalf of themselves and others similarly situated, as a class action under Fed. R. Civ. P. 23(a) and 23(b)(2). The proposed plaintiff class also meets the criteria of Fed. R. Civ. P. 23(b)(1)(A).

42. The proposed plaintiff class in this suit consists of all individuals who have suffered personal injuries as a result of negligent medical treatment in Texas and who have filed following the enactment of H.B. 4, or who may file in the future, health care liability claims in Texas courts against health care providers and health care institutions for damages that, given the

nature, extent, and severity of the medical injuries involved, are reasonably likely to exceed the non-economic damage cap at issue in this case.

43. The named plaintiffs herein are members of the class they seek to represent, and as individuals have standing to bring this action. They have each filed civil suits alleging negligent medical treatment following the enactment of H.B. 4. Each named plaintiff alleges that the non-economic damages reasonably likely to be awarded in his or her underlying tort action will exceed the cap at issue, and each named plaintiff supports this allegation with a declaration of counsel under 28 U.S.C. § 1746 based on his or her attorney's professional experience.

44. Joinder of all members of the proposed plaintiff class is impracticable because of the numerosity, geographical dispersion, and limited financial resources of class members. It is infeasible to identify and issue individual notice to the plaintiffs in every health care liability action now pending in all the courts of Texas. Furthermore, the plaintiff class includes persons injured by medical negligence who may contemplate filing health care liability actions but have not yet done so and therefore cannot be identified. On information and belief, some of these cases will be filed, while others will not be pursued because of the adverse economic impact of H.B. 4 on the value of the cases in light of the costs of litigation, rather than because of any evaluation of the claims' merits. In other words, many class members will be impossible to identify precisely because of the harm that the cap at issue imposes on them.

45. The claims in this action raise questions of law and fact that are common to all members of the proposed plaintiff class, namely, questions regarding the federal constitutionality of the non-economic damage cap of H.B. 4. The relief sought in this action by each and every

member of the plaintiff class is the same: a declaration that the cap at issue violates the First, Fifth, Seventh, and Fourteenth Amendments to the Constitution of the United States.

46. The claims for relief asserted by the named plaintiffs in this action are typical and representative of the claims of each member of the plaintiff class under Fed. R. Civ. P. 23(a)(3), and indeed are identical to those of every other class member.

47. The named plaintiffs as class representatives will fairly and adequately represent the interests of the class as a whole under Fed. R. Civ. P. 23(a)(4), both because their underlying tort claims are strong and viable and because of the competence and experience of class counsel. The Center for Constitutional Litigation, P.C., and its attorneys have been involved in numerous constitutional challenges to statutory restrictions on tort remedies across the United States, and is recognized as one of the nation's leading litigation firms in this area of the law. The attorneys serving as local counsel for the plaintiffs in this action are all able and experienced lawyers in representing victims of medical malpractice in Texas courts.

48. The health care providers and health care institutions named as defendants herein will seek to enforce the cap, and the Texas civil trial court judges named as defendants herein will be required to enforce the cap, in any case to which it applies under H.B. 4, *i.e.*, in the underlying tort actions of the named plaintiffs and the members of the class they represent. The defendants therefore will act "on grounds generally applicable to the plaintiff class" under Fed. R. Civ. P. 23(b)(2), thereby making appropriate declaratory relief with respect to the plaintiff class as a whole.

49. The prosecution of separate actions by individual members of the plaintiff class would create a risk of inconsistent or varying adjudications as to the federal constitutionality of the cap at issue, which would necessarily establish different rules of recovery and different

standards of conduct for parties opposing the class within the meaning of Fed. R. Civ. P. 23(b)(1)(A).

B. Defendant class of Texas civil trial court judges

50. This action is brought as a class action under Fed. R. Civ. P. 23 against defendants Hon. Randy Wilson, Judge of the 157th Judicial District Court of Harris County, Texas, and Hon. Russell Austin, Judge of Probate Court No. 1, Harris County, Texas, on behalf of themselves and a class consisting of all Texas civil trial court judges who will be called upon to preside over health care liability claims that are subject to the non-economic damage cap of H.B. 4. In such capacity each and every member of the defendant class will have the absolute duty, absent the relief sought here, to enforce the cap in any case before him or her where it applies. The judges of Texas' trial courts of general jurisdiction are the public officers required to enforce the cap of H.B. 4 directly against the plaintiffs. They, and they alone, among Texas public officials, are required to enforce the cap and thus act under color of state law to violate plaintiffs' constitutional rights.

51. The proposed defendant class described in the preceding paragraph is composed of more than 600 judges of Texas civil trial courts with responsibilities for civil trials in which the amount in controversy is sufficient to implicate the cap of H.B. 4. Because the class of Texas civil trial court judges is so numerous, and because the composition of the class is subject to frequent change as a result of judicial elections, appointments, temporary assignments, retirements and other installations and departures, as well as case assignment rules and practices and other circumstances of judicial administration, joinder of all members of the class as individuals is impracticable under Fed. R. Civ. P. 23(a)(1).

52. The central claims in this action raise questions of law and fact that are common to all members of the defendant class within the meaning of Fed. R. Civ. P. 23(a)(2), *i.e.*,

questions regarding the federal constitutionality of the cap of H.B. 4. Each and every defendant class member will be absolutely required by H.B. 4 to enforce the cap in any case before him or her in which it applies. The plaintiff class requests the same relief with respect to each and every defendant class member, namely, a declaration that the non-economic damage cap of H.B. 4 violates the First, Fifth, Seventh, and Fourteenth Amendments to the Constitution of the United States.

53. The defenses of the named defendant Judges Wilson and Austin are typical of, indeed identical to, the defenses of the class, in that the substantive defenses of all members of the defendant class consist of contentions that the non-economic damage cap of H.B. 4 does not violate the First, Fifth, Seventh, or Fourteenth Amendments to the federal Constitution.

54. As a representative of the defendant class, named defendant Judges Wilson and Austin will fairly and adequately protect the interests of the class. Furthermore, the Attorney General of Texas, as the state's chief legal officer under Tex. Const. art. IV, § 22, has the duty under Tex. Gov't Code § 74.141 to defend state judges in litigation if they so request, and has the general duty under Tex. Const. Art. IV, § 22, and Tex. Gov't Code § 402.021 to defend the constitutionality of Texas statutes including the provisions challenged in this action. Pursuant to 28 U.S.C. § 2403(b) and Fed. R. Civ. P. 5.1, the Attorney General of Texas will be served with this Complaint and plaintiffs have served the Texas Attorney General with a courtesy copy of this Complaint.

55. Because the proposed defendant class consists exclusively of Texas state trial judges who may preside over health care liability actions in which the non-economic damages are alleged to exceed the cap, the defendant class acts or will act on grounds generally applicable

to the proposed plaintiff class for purposes of this suit within the meaning of Fed. R. Civ. P. 23(b)(2).

56. A disposition as to the entire defendant class will definitively adjudicate the interests of all defendant class members in this controversy. Furthermore, the prosecution of separate constitutional challenges to the cap at issue before or against individual members of the defendant class would create a risk of inconsistent or varying adjudications affecting the rights of the plaintiffs and those similarly situated, and would risk establishing inconsistent and mutually incompatible legal rules for health care liability actions in Texas. The plaintiffs' claims are therefore appropriately lodged against the defendant class under Fed. R. Civ. P. 23(b)(1)(A).

VII. COUNT I—DECLARATION THAT THE CAP OF H.B. 4 VIOLATES THE SEVENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES

57. The allegations of each and every preceding paragraph of this Complaint are incorporated herein by reference.

58. The Seventh Amendment to the federal Constitution guarantees the right to trial by jury in "suits at common law." That right is fundamental to principles of liberty and justice that are at the core of Anglo-American civil and political institutions, central to our system of jurisprudence, and essential to a fair trial.

59. The Seventh Amendment's guarantee of jury trials in "suits at common law" extends the jury trial right to all claims that were accorded trial by jury at common law at the time the Seventh Amendment was ratified.

60. Health care liability actions covered by H.B. 4 are "suits at common law" within the meaning of the Seventh Amendment.

61. The cap of H.B. 4 purports by legislation to redetermine compensable damages in the most serious individual health care liability actions, irrespective of the evidence adduced and

found credible and proper by the jury and judge. The cap thus plainly invades the jury's exclusive province in a manner foreign to and subversive of the Seventh Amendment's guarantees.

62. By substituting a legislative judgment for the jury's determination of the proper amount of damages in each individual health care liability action, the cap at issue violates, and absent the relief sought here will continue to violate, the Seventh Amendment to the Constitution of the United States.

VIII. COUNT II—DECLARATION THAT THE CAP OF H.B. 4 VIOLATES THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES

63. The allegations of each and every preceding paragraph of this Complaint are incorporated herein by reference.

64. The procedural guarantees of the Due Process Clause of the Fourteenth Amendment to the federal Constitution ("Due Process Clause") guarantee individualized consideration of evidence adduced in all matters brought before federal or state courts. That guarantee applies to the courts of Texas, to the merits of each and every health care liability claim brought under Texas law, and in particular to the merits of each plaintiff's individualized proof of damages.

65. The cap of H.B. 4 violates, and absent the relief sought here will continue to violate, the procedural guarantees of the Due Process Clause by replacing the individualized consideration of the evidence introduced to prove damages in individual medical negligence cases with a rigid and unvarying legislative determination of the maximum possible severity of non-economic damages in all such cases.

66. The cap of H.B. 4 further deprives litigants of due process of law, and absent the relief sought here will continue so to deprive, by divorcing judicial review of verdicts from the

evidence on which verdicts and review thereof must be based, and substituting an arbitrary fixed amount of damages above which all jury awards are deemed excessive without individualized consideration of any kind.

67. The substantive guarantees of the Due Process Clause include the requirement that no state may abrogate or abridge any remedy available under state common law without providing a reasonable substitute remedy with a fair and adequate *quid pro quo*, *i.e.,* a benefit that flows to the individual plaintiff in return for giving up the rights abridged by the change in law.

68. The cap of H.B. 4 abrogates or abridges a health care liability plaintiff's common law right to full compensation as determined through a jury trial without providing any sufficient *quid pro quo*, and therefore violates, and absent the relief sought here will continue to violate, the substantive guarantees of the Due Process Clause.

69. The "alternative" cap of H.B. 4, specified in Tex. Civ. Prac. & Rem. Code § 74.302, provides no more sufficient a *quid pro quo* to Texas medical negligence victims or to Texas health care consumers than does the identical "primary" cap of H.B. 4, specified in Tex. Civ. Prac. & Rem. Code § 74.301, and thus does not mitigate the violation of the Due Process Clause alleged in this Count.

70. The cap of H.B.4 violates both the substantive and the procedural guarantees of the Due Process Clause, and absent the relief sought here will continue so to violate, by imposing the abridgments and abrogations complained of upon those persons least able to bear them.

IX. COUNT III—DECLARATION THAT THE CAP OF H.B. 4 VIOLATES THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES

71. The allegations of each and every preceding paragraph of this Complaint are incorporated herein by reference.

72. The cap of H.B. 4 violates the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States ("Equal Protection Clause"), and absent the relief sought here will continue so to violate, by burdening the fundamental federal constitutional rights of prevailing tort plaintiffs to trial by jury and against uncompensated takings of their property, without tailoring such infringements narrowly in furtherance of any compelling governmental interest.

73. The cap of H.B. 4 violates the Equal Protection Clause, and absent the relief sought here will continue so to violate, even if subjected to less than heightened scrutiny, by dividing similarly situated tort plaintiffs into at least two classes, and dividing similarly situated tort defendants into at least two classes, based on the identity of the tortfeasor responsible for the injury, and by treating those classes of injured persons, and those classes of defendants, differently without a rational relationship to any legitimate governmental interest.

74. The cap of H.B. 4 also divides medical malpractice victims into two classes according to the severity of their injuries as found by juries of Texas citizens on the evidence: those victims with injuries so catastrophic that they result in jury awards above the cap, and those victims with less catastrophic injuries that result in awards below the cap. The cap provisions perversely deprive the most severely injured of the full amount of their non-economic damages, abridging those damages more harshly the greater the injury above the arbitrary and inflexible cap, while affording the full value of a jury's verdict to persons less severely injured

because the absolute amount of their non-economic damages falls below the cap. This pattern accomplishes precisely the opposite of the professed legislative aims of ensuring fair compensation to all tort victims and is irrational.

75. The cap of H.B. 4 limits non-economic damage awards to the cap amount for all plaintiffs combined, and precludes any separate redress to a medical malpractice victim's spouse or child or children for the harms inflicted upon them from the negligence at issue. The cap thus discriminates among medical malpractice victims by distinguishing between single, childless individuals, who are permitted the entire capped amount of a jury's damage award, and individuals who have a spouse and/or a child or children with separately cognizable injury claims, who must divide the capped award among them for want of any possibility of separate recognition of harms that have befallen them. It further discriminates against any plaintiff who has an independent claim for damages, such as a spouse or child, by subsuming his or her claim within the patient's.

76. The cap of H.B. 4 bestows special favor on medical professionals who are found liable for the severest medical malpractice by arbitrarily cutting the damages they would otherwise pay—a favor that increases with the severity of the harm inflicted—while requiring those whose malpractice is found less severe to pay the full amount of jury-awarded damages. The cap decreases the economic consequences of injuring persons through medical negligence, and decreases those consequences most for the severe harms. It flouts and subverts the state's interest in deterring medical negligence, and bears no rational relationship to that interest.

77. The cap of H.B. 4 by definition affects only claims that are found highly meritorious on the evidence, and by definition does nothing to further the avowed legislative aim of preventing the filing of meritless claims of professional negligence against health care

providers. The cap therefore lacks any rational relationship to the supposed legislative goal of deterring "frivolous" lawsuits.

78. The cap of H.B. 4 arbitrarily limits non-economic damages in all cases regardless of the facts. The cap irrationally treats all damages above the cap amount as illusory and nonexistent, and conclusively presumes every jury award of damages above that amount as excessive, even though those damages were found by the jury on the evidence and the trial court had no reason to suggest a remittitur or order a new trial.

79. H.B. 4 reduces the ability of the most severely injured medical malpractice victims to obtain redress in Texas courts. H.B. 4 was not when enacted, and is not today, supported by a rational basis, let alone the compelling state interest effectuated by least restrictive means that the Constitution requires for restrictions on fundamental rights.

X. COUNT IV—DECLARATION THAT THE CAP OF H.B. 4 VIOLATES THE TAKINGS CLAUSE OF THE FIFTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES

80. The allegations of each and every preceding paragraph of this Complaint are incorporated herein by reference.

81. The Takings Clause of the Fifth Amendment provides that private property shall not be taken for a public use without just compensation.

82. The members of the plaintiff class have a private property interest in their common-law causes of action for non-economic damages for medical negligence. By enacting the cap of H.B. 4, the legislature interferes with this property interest by arbitrarily devaluing the cause of action from the value a jury places upon it after due deliberation on the evidence, without a suggestion of remittitur or any other order of the court at variance with the verdict, and as such is a taking of private property without just compensation within the meaning of the Takings Clause.

83. H.B. 4 violates the Takings Clause because no public use is served by taking the portion of plaintiffs' private property interest that is in excess of the cap. In enforcing the cap, defendants take private property from successful medical malpractice plaintiffs under the pretext of a public use and with only incidental public benefits, when the actual purpose and effect of the taking is to confer a private benefit on negligent medical practitioners and/or their insurers.

84. Even if taking a portion of the jury-determined value of plaintiffs' private property for the benefit of defendants could be ascribed as some form of public use that conveys a benefit on the public, H.B. 4 operates without providing just compensation to the plaintiffs for that taking, in violation of the Fifth Amendment to the United States.

XI. COUNT V—DECLARATION THAT THE CAP OF H.B. 4 VIOLATES THE RIGHT OF ACCESS TO THE COURTS PROTECTED BY ARTICLE IV AND THE FIRST, FIFTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES

85. The allegations of each and every preceding paragraph of this Complaint are incorporated herein by reference.

86. The right of access to courts is grounded in the Petition Clause of the First Amendment, the Due Process Clause of the Fifth Amendment, and the Due Process, Equal Protection, and Privileges or Immunities Clauses of the Fourteenth Amendment.

87. The foregoing constitutional guarantees preserve the right of access to a complete judicial remedy for deprivations of life, liberty or property recognized in the common law, a right that has been firmly rooted in this nation's history and traditions, and to those it inherited from England, since Magna Carta.

88. The H.B. 4 cap imposes an undue burden on the right of members of the plaintiff class to receive their day in court.

89. The H.B. 4 cap disproportionately burdens those medical negligence victims whose claims are chiefly or exclusively for non-economic damages. Because medical negligence is among the most expensive civil claims to pursue, such claims cannot be brought to court, no matter how great their merit, where the cost of proof is prohibitive in view of the expected recovery. The cap of H.B. 4 places so low a ceiling on recovery as to preclude access to justice entirely for the poor, the young, the elderly, persons in low-wage or non-remunerative occupations such as mothers of young children, and persons whose present or future earning capacity is limited because of racial, gender or other discrimination, social disadvantage, or other reason unrelated to the tort they have suffered. The cap effectively closes the courthouse doors to the claims of these most vulnerable persons.

90. The cap of H.B. 4 operates as a form of systemic official action that frustrates a plaintiff in preparing and filing meritorious lawsuits alleging negligence in health care, as well as renders likely the loss or inadequate settlement of a meritorious case. Accordingly, the cap effects an undue and unconstitutional burden on the fundamental right of access to the courts.

91. The cap of H.B. 4 violates the constitutional right of access to courts by unduly burdening the plaintiffs' ability to obtain redress to which they are otherwise entitled at common law, and by cutting off access to the courts in meritorious cases that the recovery limit makes financially impossible to maintain.

XII. PRAYER FOR RELIEF

WHEREFORE, the above-named plaintiffs, individually and on behalf of the class of medical negligence victims they represent, pray for the following relief:

92. That the Court define and certify the plaintiff and defendant classes described herein;

93. That the Court take any and all other appropriate steps to protect the rights of the class members as alleged herein;

94. That the Court declare that the non-economic damage cap of H.B. 4, in both its primary and alternative forms as specified in Tex. Civ. Prac. & Rem. Code §§ 74.301 and 74.302, violates the federal Constitution as alleged herein;

95. That the Court award the plaintiffs their reasonable attorneys' fees and costs of suit pursuant to 42 U.S.C. § 1988 and 28 U.S.C. § 1920, notwithstanding any limitations on such awards against any of the defendants herein under 42 U.S.C. § 1983; and

96. That the Court award such other and further relief as it deems just and proper.

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