UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

DAVID WINNETT, *et al.,* *Plaintiffs*, v. BRANNON R. FRANK, M.D., *et al.,* *Defendants*, and TEXAS HOSPITAL ASSOCIATION and KEN PAXTON, in his official capacity as Attorney General of Texas, *Defendant-Intervenors*.	§ § § § § § § § § § § § § § § § §	Case No. 1:20-cv-01155-LY

DEFENDANT-INTERVENOR KEN PAXTON'S MOTION TO DISMISS AND TRIAL BRIEF

INTRODUCTION

Plaintiffs filed a claim that does not exist based on alleged controversies that do not exist. They seek a novel decision from this Court with nationwide implications that defies United States Supreme Court precedent, the United States Supreme Court's admonition that only it should overrule its precedent, and decisions from most Circuit Courts of Appeals. Since Plaintiffs lack standing and have failed to state a claim upon which relief may be granted, their claims must be dismissed.

Plaintiffs are individuals who have pending Texas state court lawsuits alleging healthcare liability claims, along with two associations that advocate for abolishing statutory limitations on medical malpractice claim recovery. They have brought this suit solely to lodge a constitutional

challenge to Texas Civil Practice & Remedies Code §§ 74.301-02[1] ("Section 74.301"), which limits noneconomic damage awards in healthcare liability claims by reducing any jury award of such damages to the applicable threshold set forth in the statute. The jury is not limited or bound by the statutory thresholds; indeed, the jury is instructed to disregard any damage caps when rendering its decision. Tex. Civ. Prac. & Rem. Code §74.303(e). Section 74.301 was approved by both the Texas Legislature and Texas voters, yet Plaintiffs request that this Court declare the caps unconstitutional in the complete absence of any supporting federal precedent.

This Court lacks subject matter jurisdiction over this case because Plaintiffs lack standing to challenge the constitutionality of Section 74.301. Their alleged injury is entirely speculative: none of the Plaintiffs have even proceeded to trial, let alone secured a jury award of non-economic damages in excess of the statutory threshold. Relatedly, Plaintiffs' claim is not ripe for adjudication.

Even if this Court has jurisdiction, Plaintiffs' Amended Complaint should be dismissed in its entirety because there is no claim under 42 U.S.C. § 1983 against state actors for violation of the Seventh Amendment. It is well established by the United States Supreme Court and the Fifth Circuit Court of Appeals (among others) that the U.S. Constitution's Seventh Amendment is not applicable against the States. While Plaintiffs will likely claim that the Seventh Amendment should be incorporated against the States in the aftermath of the Supreme Court's decision in *McDonald v. City of Chicago*, 561 U.S. 742 (2010), the Supreme Court has declined to take up the issue despite opportunities since *McDonald* to do so. *See*, *e.g.*, *Schmidt v. Ramsey*, 860 F.3d 1038 (8th

[1] Texas Civil Practice & Remedies Code § 74.302 is an "alternative cap" which would take effect if Section 74.301 were to be found unconstitutional. Under the alternative provision, persons or entities wishing to avail themselves of the limitations would have to carry certain levels of professional liability insurance coverage.

Cir. 2017), *cert. denied*, 138 S. Ct. 506 (2017). Moreover, reducing a damages award after a jury verdict is rendered does not violate the Seventh Amendment. For these reasons, Defendant-Intervenor Ken Paxton, in his official capacity as the Attorney General of Texas, moves to dismiss Plaintiffs' Amended Complaint pursuant to Federal Rule of Civil Procedure 12(b)(1) and 12(b)(6). The Attorney General files this Motion in conjunction with and as part of his trial brief, the first responsive pleading filed by the Attorney General in this matter pursuant to the Court's briefing schedule. Plaintiffs' requested declaratory and injunctive relief lacks merit, and judgment should be entered in Defendants' favor.

FACTUAL BACKGROUND

I. SECTION 74.301 WAS ENACTED TO ADDRESS A STATEWIDE HEALTHCARE CRISIS.

Limitations on healthcare liability claims in Texas have been carefully researched and thoughtfully enacted since the 1970s to ensure affordable, accessible medical care to Texans. In 2003, the Texas Legislature passed House Bill 4 to replace prior statutes governing healthcare liability claims, known as the Texas Medical Liability Act. 78th Leg., R.S., ch. 204, § 10.11, 2003 Tex. Gen. Laws 847, 884-85. The Legislature made a number of findings about the state of the health care system in Texas, including that the number of health care liability claims, and the amounts paid out by insurers in judgments and settlements, had created a serious public problem in availability and affordability of adequate medical professional liability insurance. *Id.* § 10.11(a)(1), (3), and (4). This resulted in a medical malpractice insurance crisis in Texas that adversely affected the availability of medical and healthcare services to Texans. *Id.* § 10.11(a)(5) and (6). This crisis increased costs to physicians, hospitals, patients, and the public. *Id.* § 10.11(a)(7). As a result, the Legislature concluded that the "adoption of certain modifications in the medical, insurance, and legal systems . . . will have a positive effect on the rates charged by

insurers for medical professional liability insurance." *Id*. § 10.11(a)(12). Shortly thereafter, in September 2003, Texas voters approved an amendment to the Texas Constitution authorizing the Legislature to enact noneconomic damages limitations on healthcare liability claims and other types of claims. Tex. Const. Art. III, § 66.

II. PLAINTIFFS' COMPLAINT.

Plaintiffs are primarily individuals with healthcare liability claims pending in various Texas state district courts ("Individual Plaintiffs"). Dkt. 35 ¶¶ 13-24. Individual Plaintiffs each aver that they have a "reasonable expectation that a jury will award [him/her] substantially more than $250,000 in non-economic damages." *Id*. Some Individual Plaintiffs have attached affidavits from medical experts to support their anticipated recovery, while others have not. Each Individual Plaintiff similarly "reasonably expects that the defendants in the underlying tort actions will seek to enforce the non-economic damage cap" at trial, and that if any defendant makes a settlement offer, it will be based on the assumption that the noneconomic damages cap will apply. *Id.* at ¶ 27. But Individual Plaintiffs have not filed any evidence indicating that any Defendant has implicated the statutory damage cap during settlement discussions. Furthermore, numerous Defendants have been dismissed from this matter because the underlying state court action has been resolved. Dkts. 36, 60.[2]

Plaintiffs Texas Watch and National Medical Malpractice Advocacy Association ("Plaintiff Associations") are claiming organizational standing because "[their] members in Texas includes persons who have been injured by medical negligence, persons who have causes of action

[2] These stipulated dismissals reflect the state court lawsuits brought by Melissa Mikulec, David Winnett, Jessica Wilmore, individually and as next friend of J.W.; and some of the Defendants being sued by Candace and George Keen as next friend of E.K., and Lolita Scott, Jeremy Scott, and Ashley Combs as next friend of Leon Scott.

that are subject to the damage cap, and persons who make regular use of medical services and remain concerned that they would not receive full compensation for their injuries should they become victims of medical malpractice." *Id.* at ¶¶ 25-26. No Individual Plaintiff alleges that he or she is a member of either Plaintiff Association.

Plaintiffs assert a single 42 U.S.C. § 1983 claim alleging that Section 74.301 violates the Seventh Amendment. *Id.* at ¶ 8. They also seek a declaration pursuant to 28 U.S.C. §§ 2201 and 2202. *Id.* at ¶¶ 10-11. Plaintiffs request that this Court declare that the Seventh Amendment of the U.S. Constitution applies to the States and permanently enjoin enforcement of Section 74.301. *Id.* at ¶¶ 54-55.

ARGUMENT

I. THIS COURT LACKS SUBJECT MATTER JURISDICTION OVER THIS CASE.

A. Standard of Review.

Federal Rule of Civil Procedure 12(b)(1) governs motions to dismiss for lack of subject-matter jurisdiction. *Moore v. Bryant*, 853 F.3d 245, 248 (5th Cir 2017). When a court lacks the statutory or constitutional power to adjudicate a case, the case is properly dismissed for lack of subject-matter jurisdiction. *Hooks v. Landmark Indus., Inc.*, 797 F.3d 309, 312 (5th Cir. 2015). "The burden of proof for a Rule 12(b)(1) motion to dismiss is on the party asserting jurisdiction." *Ramming v. United States*, 281 F.3d 158, 161 (5th Cir. 2001). "Accordingly, the plaintiff constantly bears the burden of proof that jurisdiction does in fact exist." *Id.* Jurisdiction is "a threshold issue that must be resolved before any federal court reaches the merits of the case before it." *Perez v. United States*, 312 F.3d 191, 194 (5th Cir. 2002). Plaintiffs are required to submit facts through some evidentiary method to prove by a preponderance of the evidence that the trial court has subject matter jurisdiction. *Cell Science Sys. Corp. v. La. Health Serv.*, 804 F. App'x 260, 264

(5th Cir. 2020) (quoting *Paterson v. Weinberger*, 644 F.2d 521, 523 (5th Cir. 1981)) (cleaned up).

B. Plaintiffs Lack Standing Because Their Injury is Speculative.

To establish standing, a plaintiff must show: (1) an actual or imminent, concrete and particularized "injury-in-fact"; (2) that is fairly traceable to the challenged action of the defendant; and (3) that is likely to be redressed by a favorable decision. *Friends of the Earth, Inc. v. Laidlaw Envt'l. Servs. (TOC), Inc.*, 528 U.S. 167, 180–81 (2000). All three elements are "an indispensable part of the plaintiff's case," and the party seeking to invoke federal jurisdiction bears the burden to establish them. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561 (1992). "[E]ach element must be supported . . . with the manner and degree of evidence required at the successive stages of the litigation." *Id*.

To establish Article III standing, the injury must be "actual or imminent." *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 408 (2013). "Although imminence is concededly a somewhat elastic concept, it cannot be stretched beyond its purpose, which is to ensure that the alleged injury is not too speculative for Article III purposes—that the injury is *certainly* impending." *Id.* (emphasis in original) (quoting *Lujan*, 504 U.S. at 565 n.2). "Thus, [the Supreme Court] [has] repeatedly reiterated that 'threatened injury must be *certainly impending* to constitute injury in fact, and that allegations of *possible* future injury' are not sufficient.'" *Id*. (cleaned up). Even an "objectively reasonable likelihood" of future injury is insufficient to confer standing because it is inconsistent with the requirement that "threatened injury must be certainly impending to constitute injury in fact." *Id.* at 410 (internal quotation marks omitted). Rather, Plaintiffs must show a "substantial risk that they will suffer the potential future injury absent the requested relief." *Stringer v. Whitley*, 942 F.3d 715, 721 (5th Cir. 2019).

The Supreme Court and Fifth Circuit have consistently rejected claims of standing

contingent on future outcomes in pending litigation. "It is just not possible for a litigant to prove in advance that the judicial system will lead to any particular result in his case." *Whitmore v. Arkansas*, 495 U.S.149, 159–60 (1990). An anticipated injury in litigation is nothing more than uncertain potentiality, and standing cannot be based on a predicted harm that "depend[s] on the occurrence of numerous uncertain future events." *Prestage Farms, Inc. v. Bd. of Supervisors of Noxubee Cnty*., 205 F.3d 265, 268 (5th Cir. 2000); *see also Am. Fid. & Cas. Co. v. Penn. Threshermen & Farmers' Mut. Cas. Ins. Co*., 280 F.2d 453, 461 (5th Cir. 1960) ("It is not the function of a United States District Court to sit in judgment on these nice and intriguing questions which today may readily be imagined, but may never come to pass."). In a decision on this topic, the Supreme Court re-emphasized:

> Under Article III, federal courts do not adjudicate hypothetical or abstract disputes. Federal courts do not possess a roving commission to publicly opine on every legal question. Federal courts do not exercise general legal oversight of the Legislative and Executive Branches, or of private entities. And federal courts do not issue advisory opinions.

TransUnion LLC v. Ramirez, 141 S. Ct. 2190, 2203, 2210 (2021) (holding that class members who could be harmed in the future, but had not yet been harmed by defendant's violation of law, lacked standing).

Even when injunctive and declaratory relief is sought, a plaintiff must still establish a threatened future injury that "like all injuries supporting Article III standing, must be an injury in fact." *Stringer*, 942 F.3d at 720. "For a threatened future injury to satisfy the imminence requirement, there must be at least a 'substantial risk' that the injury will occur." *Id.* at 721. Yet, a "mere risk of future harm, standing alone, cannot qualify as a concrete harm" absent a showing that the plaintiff was "harmed by their exposure to the risk [of harm] itself." *TransUnion,* 141 S. Ct. at 2211. Additionally, when the alleged injury is dependent on certain contingencies, "[e]ach

link in the chain of contingencies must be 'certainly impending' to confer standing." *Glass v. Paxton*, 900 F.3d 233, 239 (5th Cir. 2018).

1. Individual Plaintiffs Lack Standing Because Each Has Suffered No Actual or Imminent, Concrete Harm.

Each remaining Individual Plaintiff claims to have a pending state court healthcare liability lawsuit, and they have brought this suit to challenge the constitutionality of Section 74.301 based solely on the "reasonable expectation that a jury will award [him/her] substantially more than $250,000 in non-economic damages." Dkt. 35, ¶¶ 13-24. Individual Plaintiffs further speculate that potential application of Section 74.301's cap will influence any settlement offers made by Defendants during the litigation. *Id.* at ¶ 27. To date, no Defendant has been found liable for any Individual Plaintiff's injury, and no Individual Plaintiff has received a jury award for any amount of noneconomic damages.

Individual Plaintiffs have alleged nothing more than a possible, hypothetical injury that wholly "depend[s] on numerous uncertain future events." *Prestage Farms,* 205 F.3d at 268. Their alleged "reasonable expectations," even if objectively reasonable, are insufficient to establish standing. *Clapper*, 568 U.S. at 410. For any Individual Plaintiff's anticipated injury to be realized, that Individual Plaintiff must, at a minimum: (1) survive summary judgment; (2) actually go to trial; (3) establish the respective healthcare defendant's liability at trial; and (4) receive a jury award of noneconomic damages in excess of Section 74.301's cap. It is just not possible at this juncture for Individual Plaintiffs to prove each and every one of these contingencies will occur, especially the "particular result" of receiving a non-economic damages award greater than $250,000. *Whitmore*, 495 U.S. at 159–60*; Glass,* 900 F.3d at 239. As a result, Individual Plaintiffs lack standing because their injury is not certainly impending.

Other cases challenging statutory damage limitations and raising identical standing

arguments as Individual Plaintiffs have been dismissed because the alleged injury, rather than being impending, was deemed speculative and contingent. *See, e.g.*, *J.S. v. Winchester Pediatric Clinic, P.C.*, No. 5:19-CV-0097, 2021 WL 833955, at *4 (W.D. Va. March 4, 2021) (dismissing a challenge to a statutory damage cap for lack of standing because plaintiff "cannot show that he has an actual injury because a finding has not been made that [defendant] is liable for his injuries such that he would be entitled to compensation were it not for the damages cap").

In addition to Individual Plaintiffs' alleged harm not being imminent, it is not concrete. Similar to the class members in *TransUnion*, Individual Plaintiffs have alleged a speculative risk of future harm and cannot establish that the risk of future harm itself constitutes a concrete harm. While Individual Plaintiffs assert that the statutory cap *could* impact settlement negotiations, not a single Individual Plaintiff has alleged that any settlement negotiations have occurred and were impacted by a named Defendant invoking the noneconomic damages statutory cap as a bartering chip. A risk of harm in prospective settlement negotiations is simply insufficiently concrete and particularized to establish Article III standing to sue. No Individual Plaintiff is required to settle, and each Individual Plaintiff is entitled to a jury determination of their non-economic damages unconstrained by the statutory damages cap that may be applied post-trial. Given these contingencies, some or all of which may never be realized, Individual Plaintiffs' claim should be dismissed for lack of standing.

2. The Plaintiff Associations Also Lack Standing.

"[A]n association has standing to bring suit on behalf of its members when: (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; *and* (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Ass'n of Am. Physicians &*

Surgeons v. Tex. Med. Bd., 627 F.3d 547, 550 (5th Cir. 2010) (emphasis added) (noting that the first two components of associational standing are constitutional requirements, while the third is solely prudential).

The Amended Complaint does not identify any Individual Plaintiff as a member of one (or both) of Plaintiff Associations, and there is no evidence that any member of either association would otherwise have standing to sue in their own right. Without evidence that any of its members have standing to bring this lawsuit, both Plaintiff Associations lack standing. Even with evidence that an Individual Plaintiff is a member of Plaintiff Associations, it would not help Plaintiff Associations establish standing because, as discussed above, Individual Plaintiffs also lack standing. Plaintiff Associations' assertion that their involvement should be permitted so that "the case is not mooted because no individual plaintiff with a live case remains" is itself a moot point. Dkt. 35, ¶¶ 25-26. "[I]f a plaintiff lacks standing at the time the action commences, the fact that the dispute is capable of repetition yet evading review will not entitle the complainant to a federal judicial forum." *Stringer*, 942 F. 3d at 724 (quotation omitted). Accordingly, Plaintiff Associations lack standing and this Court lacks subject matter jurisdiction over this case.

C. Plaintiffs' Claim Is Not Ripe for Adjudication.

Plaintiffs' preemptive challenge to a state statute not yet applicable—and likely never to be applied—to their underlying state court cases is not ripe for adjudication. Ripeness is "a constitutional prerequisite to the exercise of jurisdiction." *Shields v. Norton*, 289 F.3d 832, 835 (5th Cir. 2002). "A court should dismiss a case for lack of 'ripeness' when the case is abstract or hypothetical." *New Orleans Pub. Serv., Inc. v. Council of New Orleans*, 833 F.2d 583, 586 (5th Cir. 1987). "The key considerations are 'the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration.'" *Id.* (quoting *Abbott Labs. v. Gardner*,

387 U.S. 136, 148–49 (1967).

Similar to standing, the doctrine of ripeness "separates those matters that are premature because the injury is speculative and may never occur from those that are appropriate for judicial review." *United Transp. Union v. Forster*, 205 F.3d 851, 857 (5th Cir. 2000). "A claim is not ripe for adjudication if it rests upon 'contingent future events that may not occur as anticipated, or indeed may not occur at all.'" *Texas v. United States*, 523 U.S. 296, 300 (1998) (citation omitted). In determining whether an injury contingent upon future events "is sufficiently likely to happen to justify judicial intervention" in the form of declaratory or injunctive relief, the court must consider "the likelihood that these contingencies will occur." *Orix Credit Alliance v. Wolfe*, 212 F.3d 891, 897 (5th Cir. 2000). The ripeness inquiry "focuses on whether an injury that has not yet occurred is sufficiently likely to happen to justify judicial intervention." *Id.* (citing *Chevron U.S.A., Inc. v. Traillour Oil Co.,* 987 F.2d 1138, 1153 (5th Cir.1993)).

A claim is not ripe when no controversy exists due to a plaintiff attempting to obtain an advanced ruling on an affirmative defense. *Calderon v. Asthmus*, 523 U.S. 740, 747 (1998). Where, as here, a challenge to the constitutionality of a damages cap hinges upon a future factual determination of a defendant's liability, whether damages will be awarded in excess of the damages cap, and whether the defendant will invoke the damages cap, the claim is not ripe for adjudication. *J.S. v Winchester Pediatric Clinic, P.C.*, 2021 WL 833955, at *4; *Gomez v. Ford Motor Co.,* No. 5:15-CV-866-DAE, 2018 WL 3603119, at *4 (W.D. Tex. Feb. 5, 2018) (declining to address constitutionality of punitive damages cap because punitive damages would not become an issue unless the plaintiff obtained a verdict for compensatory damages and a verdict for punitive damages in excess of the statutory caps); *Gummo v. Ward*, No. 2:12–00060, 2013 WL 5446074, at *2 (M.D. Tenn. Sept. 30, 2013) (dismissing constitutional challenge to statutory cap as

premature because "if the Court were to undertake a determination of the constitutionality of the statutory caps at this time, it may be engaging in nothing more than an academic exercise that potentially has ramification beyond this case").

Ripeness is particularly important when constitutional questions are at stake because courts should avoid ruling on constitutional matters unless it is absolutely necessary to confront them. *Ashwander v. Tenn. Valley Auth*., 297 U.S. 288, 346–48 (1936) (Brandeis, J., concurring); *Poe v. Ullman*, 367 U.S. 497, 503 (1961); *Ruiz v. Estelle*, 679 F.2d 1115, 1158 (5th Cir. 1982). The issues of whether a case or controversy exists and whether it is necessary to determine a constitutional question "press with special urgency in cases challenging legislative action or state judicial action as repugnant to the Constitution." *Poe*, 367 U.S. at 503. "Such [state] law must be brought into actual or threatened operation upon rights properly falling under judicial cognizance, or a remedy is not to be had here." *Id*. at 504 (quoting *Georgia v. Stanton*, 73 U.S. 50, 75 (1867)). A party seeking to annul legislation on constitutional grounds must show not only that the statute is invalid, but that "he has sustained or is immediately in danger of sustaining some direct injury as the result of its enforcement." *Id*.

Plaintiffs' claims are not ripe for the same reasons Plaintiffs lack standing: their anticipated injury is too hypothetical and relies on too many contingencies that are not likely to occur. Few cases proceed to trial, and juries are unpredictable. This Court should not hear this case until it is clear that the constitutional question raised by Individual Plaintiffs is actually implicated by one of their state court cases that has gone to trial and resulted in a jury award of noneconomic damages in excess of Section 74.301's limitations. *Ashwander*, 297 U.S. at 346–48. Absent such factual development, this Court would be issuing an advisory opinion.

Plaintiffs also will not suffer any hardship by this Court withholding consideration at this

time. A case challenging a statute or regulation is not ripe if the impact "could not be said to be felt immediately by those subject to it in conducting their day-to-day affairs" since "no irremediably adverse consequences flowed from requiring a later challenge." *Reno v. Catholic Soc. Servs*., 509 U.S. 43, 57–58 (1993) (cleaned up).

An alleged impact on litigation strategy is not a hardship sufficient to satisfy the requirements for ripeness. This case is similar to *Ernst & Young v. Depositors Economic Protection Corporation*, 862 F. Supp. 709 (D. R.I. 1994), in which E&Y sought a federal court declaration that a state statute governing contribution rights in certain cases was unconstitutional while E&Y was still defending against the applicable claim in state court and had not yet been found liable for the claim. *Id.* at 712–13. E&Y argued that its claim was ripe because, without a determination in advance regarding the constitutionality of the statute, E&Y's ability to value its potential exposure significantly impaired its litigation strategy and "imposed improper and mounting pressure on E&Y to settle the state suit." *Id.* at 713. Despite this alleged hardship and E&Y's assertion that the statute, which only controlled contribution rights if the case proceeded to a jury verdict, impacted all phases of litigation, the court dismissed E&Y's claims as unripe because it was too speculative and contingent. *Id.* at 714–15. "The hardship, if any, experienced by E&Y is that of a litigant who claims the law to be invalid." *Id.* at 714. "The uncertainties faced by E&Y are no different in quality than those faced by every other litigant." *Id.* at 715.

The same is true here. Plaintiffs' claim hinges on the occurrence of several events, including that Individual Plaintiffs will (1) survive summary judgment, (2) proceed to a jury trial, (3) secure a finding of liability against the defendants, and (4) be awarded noneconomic damages by the jury in excess of Section 74.301's cap. "Whether these events will in fact occur is mere speculation at this point." *Id.* at 715. While Individual Plaintiffs allude to being harmed in

settlement negotiations, Individual Plaintiffs have failed to show that such harm has, in fact, been realized in any of their cases. Additionally, any impact on settlement negotiations is no different in quality or kind than that faced by every other litigant who must make difficult decisions regarding whether to proceed with trial or accept a settlement. Plaintiffs cannot offer any compelling reason for this Court to decide this constitutional issue now beyond the pressures inherent to litigation. Therefore, Plaintiffs' Amended Complaint should be dismissed pursuant to Rule 12(b)(1) because the case is not ripe for adjudication.

II. EVEN IF THIS COURT HAS SUBJECT MATTER JURISDICTION OVER THIS CASE, PLAINTIFFS' CLAIM FAILS AS A MATTER OF LAW.

A. Standard Of Review.

Federal Rule of Civil Procedure 12(b)(6) governs motions to dismiss for failure to state a claim upon which relief can be granted. To avoid dismissal, the plaintiff must plead "enough facts to state a claim to relief that is plausible on its face." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007). "Factual allegations must be enough to raise a right to relief above the speculative level." *Id*. at 555. "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* While courts must accept all factual allegations as true, they "do not accept as true conclusory allegations, unwarranted factual inferences, or legal conclusions." *Plotkin v. IP Axess Inc.,* 407 F.3d 690, 696 (5th Cir. 2005).

If this Court were to consider the merits of this case, "the burden is on the plaintiff to prove every element" of their claims. *Miraglia v. Bd. of Sup'rs of La. State Museum*, 901 F.3d 565, 573 (5th Cir. 2018) (quoting *Malvino v. Delluniversita*, 840 F.3d 223, 231 (5th Cir. 2016)) (cleaned up). At a bench trial, the Court should ignore any inadmissible evidence that it may hear when making its decisions. *Harris v. Rivera*, 454 U.S. 339, 346 (1981). Appellate courts will "review

findings of fact for clear error and conclusions of law and mixed questions of law and fact de novo" in an appeal from a bench trial. *Dickerson v. Lexington Ins. Co*., 556 F.3d 290, 294 (5th Cir. 2009).

B. <u>There is No § 1983 Claim Against State Actors for Violation of the Seventh Amendment.</u>

A § 1983 claim requires the plaintiff to identify a deprivation of a federal right, or the claim fails as a matter of law and is subject to dismissal under Rule 12(b)(6). *Phelan v Norville*, 460 F. Appx. 376, 381 (5th Cir. 2012). The Fifth Circuit has previously held that "a jury trial in a state civil case is not a right secured by the Constitution, so it cannot provide a basis for a § 1983 claim." *Id*.[3]

The Fifth Circuit's decision is substantiated by a long, consistent line of Supreme Court cases. For over 100 years, the Supreme Court has noted that the Seventh Amendment's right to a civil jury trial is not incorporated into the Fourteenth Amendment and does not apply to the states. *Walker v. Sauvinet*, 92 U.S. 90, 92 (1875) (The Seventh Amendment, "as has been many times decided, relates only to trials in the courts of the United States."); *Pearson v. Yewdall*, 95 U.S. 294, 296 (1877); *Minneapolis & St. Louis R.R. Co. v. Bombolis*, 241 U.S. 211, 217 (1916); *Wagner Electric Mfg. Co. v. Lyndon*, 262 U.S. 226, 232 (1923); *Dohany v. Rogers*, 281 U.S. 362, 369 (1930); *Gasperini v. Ctr. for Humanities*, 518 U.S. 415, 418 (1996) (the Seventh Amendment "governs proceedings in federal court, but not in state court"); *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 719 (1999); *McDonald v City of Chicago*, 561 U.S. 742, 765 n.13 (2010). "The States, so far as this amendment is concerned, are left to regulate trials in their own courts in their own way." *Walker*, 92 U.S. at 92.

[3] *See also Watson v. Hortman*, No. 2:08–CV–81, 2009 WL 10676569, at *6 (E.D. Tex. 2009) (challenging Section 74.301 by the same counsel representing Plaintiffs in this case and resulting in a decision that the Seventh Amendment does not apply to state court proceedings; no appeal was pursued from that decision).

The Supreme Court recently reiterated that a protection afforded by the Bill of Rights is only incorporated via the Fourteenth Amendment when "it is 'fundamental to our scheme of ordered liberty' or 'deeply rooted in this Nation's history and tradition.'" *Timbs v. Indiana*, 139 S. Ct. 682, 687 (2019) (internal citations omitted). State civil jury trials do not satisfy either of these requirements. "Admittedly, one could argue that only eighteen states in 1868 explicitly single out civil jury trial as a fundamental right," with other state constitutional provisions protecting a general right to a jury trial without specific reference to civil suits. Steven G. Calabresi & Sarah E. Agudo, *Individual Rights under State Constitutions When the Fourteenth Amendment Was Ratified in 1868: What Rights Are Deeply Rooted In American History and Tradition?*, 87 Tex. L. Rev. 7 (2008). At the time of this Nation's founding, there were "great differences between the limits of the jury trial in different states." THE FEDERALIST NO. 83 (Alexander Hamilton). Because of this historic and present variability (for example, small claims exceptions to jury trials), the Seventh Amendment's particular embodiment of the right to a jury trial does not encapsulate a deeply rooted history or tradition of the Nation, nor is the Seventh Amendment's specific civil jury trial strictures fundamental to "our scheme of ordered liberty." The right to a jury trial in civil cases is important. But each state, both historically and currently, has its own unique way of protecting and securing that right for its citizens that the Supreme Court has not seen fit to disturb.

Faced with the Supreme Court's precedent that the Seventh Amendment is not applicable to the states, this Court "should follow the case which directly controls, leaving to [the Supreme Court] the prerogative of overruling its own decisions." *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 484 (1989); *see also State Oil Co. v. Khan*, 522 U.S. 3, 20 (1997) ("[I]t is this Court's prerogative alone to overrule one of its precedents."). Courts of Appeals continue to follow the Supreme Court's precedent and hold that the Seventh

Amendment has not been incorporated against the states. *Gonzalez-Oyarzun v. Caribbean City Builders, Inc.*, 798 F.3d 26, 29 (1st Cir. 2015); *GTFM, LLC v. TKN Soles, Inc.*, 257 F.3d 235, 240, 245 (2d Cir. 2001); *Letendre v. Fugate*, 701 F.2d 1093, 1094 (4th Cir. 1983); *Coleman v. Sellars*, 614 Fed. App'x 687, 689 (5th Cir. 2015); *Olesen v. Trust Co. of Chicago*, 245 F.2d 522, 524 (7th Cir. 1957); *R.J. Reynolds Tobacco Co. v. Shewry*, 423 F.3d 906, 924 (9th Cir. 2005); *Elliott v. City of Wheat Ridge*, 49 F.3d 1458, 1459 (10th Cir. 1995); *Jones v United Parcel Service, Inc.,* 674 F.3d 1187, 1203 (10th Cir. 2012); *Woods v. Holy Cross Hosp.*, 591 F.2d 1164, 1171 (11th Cir. 1979). No Court of Appeals has held otherwise.

In fact, the Supreme Court has been presented with at least one opportunity to revisit incorporating the Seventh Amendment against the states since its decision in *McDonald*, but the Supreme Court declined to take up the issue. *Schmidt v Ramsey*, 860 F.3d 1038 (8th Cir. 2017), *cert. denied*, 138 S. Ct. 506 (2017). This Court is bound by the Supreme Court's precedent, and the issue of incorporation should be left to the United States Supreme Court. Therefore, Plaintiffs' claim should be dismissed for failure to state a claim.

C. Post-Verdict Limitations on Jury Awarded Damages Do Not Violate the Seventh Amendment.

The Seventh Amendment provides that:

> [i]n Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

U.S. Const. Amend. VII.

"The right to a jury trial includes the right to have a jury determine the amount of . . . damages." *Feltner v. Columbia Pictures Television, Inc.,* 523 U.S. 340, 353 (1998). However, as succinctly summarized in *Estate of Sisk v. Manzanares,* 270 F. Supp. 2d 1265, 1277–78 (D. Kan.

2003):

> Federal courts uniformly have held that statutory damage caps do not violate the Seventh Amendment, largely because a court does not 'reexamine' a jury's verdict or impose its own factual determination regarding what a proper award might be. Rather, the court simply implements a legislative policy decision to reduce the amount recoverable to that which the legislature deems reasonable.

(citations omitted).

For over 30 years, Courts of Appeals have consistently held that, even if the Seventh Amendment applied to the states, statutory damage caps do not violate the Seventh Amendment. *Boyd v. Bulala*, 877 F.2d 1191, 1196 (4th Cir. 1989) ("True, it is the role of the jury as factfinder to determine the extent of a plaintiff's injuries . . . however, it is not the role of the jury to determine the legal consequences of its factual findings."); *Davis v. Omitowoju*, 883 F.2d 1155, 1161–65 (3rd Cir. 1989) (finding no Seventh Amendment violation when jury verdict is reduced by the judge as required by enacted legislation rather than via the judge reexamining the jury's factual determinations); *Schmidt v Ramsey*, 860 F.3d 1038, 1045–46 (8th Cir. 2017) (holding that Nebraska state law damage cap on a jury's award did not violate the Seventh Amendment); *Smith v. Botsford Gen. Hosp.*, 419 F.3d 513 (6th Cir. 2005); *Hemmings v. Tidyman's Inc*., 285 F.3d 1174, 1202 (9th Cir. 2002) (holding that federal statutory limitations on damages do not violate the Seventh Amendment).[4]

Indeed, the Supreme Court has recognized that "[w]hile we have not specifically addressed the issue, courts of appeals have held that district court application of state statutory caps in diversity cases, post-verdict, does not violate the Seventh Amendment." *Gasperini*, 518 U.S. at

[4] As the Ninth Circuit highlighted in *Hemmings*, "[w]e further note the paradoxical implications of Plaintiffs' claim: If a judge cannot limit damages found by a jury in accordance with a statute, how can a judge impose statutorily mandated double or treble damages without also imposing on the jury's province as sole factfinder?" *Id.* at 1202.

429 n.9. This is because such caps do not limit the role of the jury. The jury still performs its fact-finding mission, but the cap imposed by the legislature acts as a limitation on the legal effect of the finding. *Boyd*, 877 F.2d at 1196. At least one federal district court in Texas has agreed, holding that statutory damage caps do not violate the Seventh Amendment, "largely because a court does not 'reexamine' a jury's verdict or impose its own factual determination regarding what a proper award might be." *Watson*, 2009 WL 10676569, at *6 (citations omitted). As in any case, the jury determines the amount of the damages, and then the judge applies the law (the statutory caps) to the facts found by the jury. Capping available damages in this manner is consistent with the protections afforded by the Seventh Amendment. Therefore, even if the Seventh Amendment was applicable to Individual Plaintiffs' state court cases, Section 74.301 does not violate it, and Individual Plaintiffs' claim fails as a matter of law.

III. BECAUSE PLAINTIFFS HAVE FAILED TO STATE A VIABLE § 1983 CLAIM, THEIR REQUEST FOR DECLARATORY RELIEF MUST ALSO BE DISMISSED.

The Declaratory Judgment Act is not an independent source of federal jurisdiction, as it "is merely a procedural device [and] does not create any substantive rights or causes of action." *Sid Richardson Carbon & Gasoline Co. v. Interenergy Res., Ltd.*, 99 F.3d 746, 752 n.3 (5th Cir. 1996); *Dallas v. Merscorp, Inc*, 2 F. Supp. 3d 938, 945–46 (N.D. Tex. 2014) (citing *Schilling v. Rogers*, 363 U.S. 666, 677 (1960)). A request for a declaratory judgment simply provides an additional remedy where jurisdiction already exists. *Skelly Oil Co. v. Phillips Petroleum Co*., 339 U.S. 667, 671–72 (1950). "Thus, a plaintiff cannot use the Declaratory Judgment Act to create a private right of action where none exists." *Reid v. Aransas Cnty.*, 805 F. Supp. 2d 322, 339 (S.D. Tex. 2011) (citation omitted). Dismissal of a plaintiff's substantive claims requires dismissal of the request for declaratory judgment as a matter of law. *Merscorp, Inc*, 2 F. Supp. 3d at 947.

Because Plaintiffs' sole § 1983 claim fails as a matter of law, Plaintiffs' request for

declaratory relief also fails since the Declaratory Judgment Act does not create a stand-alone, substantive cause of action. Therefore, this Court lacks jurisdiction to provide the injunctive and declaratory relief requested by Plaintiffs, and their Amended Complaint should be dismissed in its entirety.

CONCLUSION AND RELIEF REQUESTED

For the foregoing reasons, Ken Paxton, in his official capacity as the Attorney General of Texas, respectfully requests that this Court grant this motion, dismiss Plaintiffs' Amended Complaint in its entirety pursuant to Federal Rule of Civil Procedure 12(b)(1) and 12(b)(6), enter judgment against Plaintiffs in this matter, and grant him any further relief deemed just and proper.

October 20, 2021

Respectfully submitted.

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CERTIFICATE OF SERVICE

I hereby certify that on October 20, 2021, a true and correct copy of the foregoing document was transmitted using the CM/ECF system, which automatically sends notice and a copy of the filing to all counsel of record.

/s/ Christopher D. Hilton
CHRISTOPHER D. HILTON