No. 24-50956

United States Court of Appeals for the Fifth Circuit

MELISSA HICKSON, INDIVIDUALLY AND AS THE INDEPENDENT ADMINISTRATOR OF THE ESTATE OF MICHAEL HICKSON, DECEASED AND AS NEXT FRIEND OF M.H, M.H. AND M.H. (ALL MINORS); MARQUES HICKSON,
Plaintiffs-Appellants,

v.

ST. DAVID'S HEALTHCARE PARTNERSHIP, L.P., L.L.P.; DR. DEVRY ANDERSON; HOSPITAL INTERNISTS OF TEXAS; CARLYE MABRY CANTU; VIET VO,
Defendants-Appellees.

On Appeal from the United States District Court
for the Western District of Texas, Austin Division

BRIEF OF APPELLANTS

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CERTIFICATE OF INTERESTED PERSONS

Appellants certify that the following listed persons and entities as described in Fifth Circuit Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal:

1) **Plaintiffs-Appellants:**

Melissa Hickson; Marques Hickson

2) **Defendants-Appellees:**

St. David's Healthcare Partnership, L.P., L.L.P.; Hospital Internists of Texas; Carlye Mabry Cantu; Viet Vo

3) **Other Defendants in Underlying Case:**

Dr. Devry Anderson

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/s/ Ernest Galvan

Dated: March 31, 2025

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STATEMENT REGARDING ORAL ARGUMENT

Plaintiffs-Appellants Melissa Hickson and Marques Hickson ("the Hicksons") request oral argument as they believe it could significantly aid the decisional process in this case.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

CASES

STATUTES

OTHER AUTHORITIES

RULES

JURISDICTIONAL STATEMENT

This Court has jurisdiction over this appeal pursuant to 28 U.S.C. § 1291. The Hicksons timely appealed by filing their notice of appeal within 30 days of the district court's October 23, 2024 order dismissing the final claims in the Complaint. ROA.942-943.

ISSUES PRESENTED

This appeal raises questions regarding interpretation of federal and state statutes:

1. Are disability discrimination claims related to medical treatment decisions categorically prohibited under both the Rehabilitation Act and Affordable Care Act?

2. Can plaintiffs assert Section 1983 claims regarding the violation of the Fourteenth Amendment right to life against hospitals and doctors who, acting in *parens patriae*, determine to withdraw life-saving medical treatment from a disabled patient, in coordination with a court-appointed guardian but in contradiction of the patient's family's wishes?

3. Can plaintiffs assert an informed consent negligence claim for withdrawing medical treatment, based on incomplete disclosures of information to the patient's medical guardian, when the disclosure form stated that the result of withdrawing medical treatment was "likely death," but did not include the likelihood that the patient would survive with treatment?

4. Is the discriminatory refusal to provide medical treatment, resulting in death, or the publication of demeaning statements about a grieving widow sufficiently "outrageous" to form the basis of an intentional infliction of emotional distress claim?

INTRODUCTION

Michael Hickson went to the St. David's Healthcare Partnership hospital ("Hospital") in June 2020 to seek treatment for an acute respiratory illness. When he was admitted, Hospital staff determined that Mr. Hickson had a 70% chance of survival.

One week later, Mr. Hickson was dead, *not* because his doctors had tried their best to save him and failed, but because his doctors determined that they would not treat him. The doctors' stated reason for denying Mr. Hickson treatment was that he was not "walking" or "talking." In other words, it was because Mr. Hickson was disabled.

Mr. Hickson's widow—who had begged her husband's doctors to treat him, but whose pleas were disregarded by both Defendants and Mr. Hickson's court-appointed guardian—and his son filed this lawsuit for disability discrimination, violation of the Fourteenth Amendment right to life, negligence, and intentional inflection of emotional distress.

The district court dismissed those claims because, among other reasons, it determined as a matter of law that a medical treatment decision cannot form the basis of a disability discrimination lawsuit under either the Rehabilitation Act or the Affordable Care Act. As explained below, that conclusion was incorrect. This Court should reverse.

STATEMENT OF THE CASE

Michael Hickson was a father of five and had been married to his wife, Plaintiff Melissa Hickson, for eighteen years when he died at the Hospital on June 11, 2020. ROA.17, 30.[1]

I. MR. HICKSON'S DISABILITIES

For the last three years of his life, Mr. Hickson lived with disabilities. ROA.23. On May 24, 2017, Mr. Hickson suffered a sudden cardiac arrest, which temporarily deprived his brain of oxygen and resulted in anoxic brain injury. *Id.* Mr. Hickson also sustained a spinal cord injury that day, as a result of aggressive CPR provided by first responders. *Id.* That event left Mr. Hickson with *static*—*i.e.*, not progressive or changing—disabilities, including quadriplegia, motor weakness, vision loss, slow speech, short-term memory loss, and difficulty with swallowing and bowel and bladder management. *Id.* Mr. Hickson required assistance with eating, dressing, grooming, bathing, toileting, and transferring to and from his wheelchair. *Id.*

Mr. Hickson continued to lead a fulfilling life with his disabilities. *Id.* He laughed at jokes, responded to "yes" or "no" questions by nodding or shaking his

[1] The facts in this section are taken from the Complaint, which the Court accepts as true when reviewing a dismissal pursuant to Federal Rule of Civil Procedure 12(b)(6). *Scott v. U.S. Bank Nat'l Ass'n*, 16 F.4th 1204, 1208 (5th Cir. 2021) (per curiam).

head, and spoke with his wife and children—even though his speech was limited, slower, and muted, it was understandable. *Id.* He enjoyed doing math calculations with his children. *Id.* He sang and prayed with his family. *Id.*

While his life was gratifying and filled with love, Mr. Hickson fell ill on multiple occasions in the years following his injury. *Id.* In particular, he was hospitalized more than once for urinary tract infections, sepsis, and pneumonia. *Id.* People who have experienced high-level spinal cord injuries, like Mr. Hickson, are susceptible to a condition called autonomic dysreflexia, which can suppress their immune system and, in turn, leave them more vulnerable to infections. *Id.*

In early 2018, Mrs. Hickson filed for permanent guardianship of her husband. ROA.24. The guardianship application process was delayed when the Hickson family moved from Dallas to Austin, requiring Mrs. Hickson to re-file the petition in October 2019. *Id.* The process was further delayed when Mrs. Hickson's petition was unexpectedly contested by one of Mr. Hickson's three sisters—who had been, up to that point, uninvolved with Mr. Hickson's disability accommodations. *Id.* Pending a hearing over the guardianship petition, a probate court appointed Family Eldercare, Inc. ("Family Eldercare"), an Austin-based nonprofit guardianship program, as Mr. Hickson's temporary guardian. *Id.* Specifically, Family Eldercare employee Ashley Nicole Yates was assigned as Mr. Hickson's temporary guardian until April 1, 2020, when one of her trainee-

subordinates, Jessica Drake, assumed those duties. *Id.*[2]

II. MR. HICKSON'S HOSPITALIZATION AND HIS DOCTORS' DECISION NOT TO TREAT HIM

In March 2020, Mr. Hickson was treated for double pneumonia and sepsis at Defendant St. David's Healthcare Partnership Hospital, a private hospital receiving federal funding. ROA.24, 32. The treatment was successful, and Mr. Hickson was discharged from the Hospital to a local rehabilitation center. ROA.24.

Mr. Hickson remained at the rehabilitation center through May 2020, when he began to suffer from a respiratory illness. *Id.* On May 29, 2020, Mr. Hickson was tested for COVID-19, with negative results. *Id.*

On June 2, 2020, Mr. Hickson was returned to the Hospital for acute respiratory illness due to pneumonia, urinary tract infection, sepsis, and suspected COVID-19. *Id.* He was not taken to the Hospital to be cured of his disabilities. ROA.19.

Although Mr. Hickson was seriously ill with pneumonia, urinary tract infection, sepsis, and suspected COVID-19, each of those conditions was treatable. ROA.24-25. In fact, he had been successfully treated at the Hospital for very similar conditions just three months earlier. *Id.* When Mr. Hickson was admitted to the Hospital's Emergency Department on June 2, 2020, Hospital staff employed

[2] Family Eldercare, Ms. Yates, and Ms. Drake are not parties to the instant appeal, as they reached a settlement with Mrs. Hickson in separate litigation.

the Modified Early Warning Score tool, which is used to assess the risk of mortality and to identify patients who might need or benefit from higher levels of care. *Id.* According to the Modified Early Warning Score, Mr. Hickson had a 70% chance of surviving his conditions on June 2, just as he had only months earlier. *Id.*

Despite Mr. Hickson's assessed 70% chance of survival, a physician in the Emergency Department recommended to Defendant Dr. Cantu—a hospitalist who was soon to be Mr. Hickson's attending physician—that Mr. Hickson be placed in hospice and that his code be changed to Do Not Resuscitate ("DNR"). ROA.25. Dr. Cantu immediately began planning to place Mr. Hickson on a "comfort care" regimen, including reaching out to palliative care staff and indicating to that team that Mr. Hickson had a poor quality of life because of his disabilities. *Id.* Dr. Cantu wrote in Mr. Hickson's medical records: "Should family and, if able, patient choose, I do believe comfort measures would be a kind choice." *Id.* Those recommendations occurred within one hour of Mr. Hickson's arrival at the Hospital. *Id.*

Notably, on June 2, Dr. Cantu was aware that at least some of Mr. Hickson's family, including Mrs. Hickson, believed that her husband should not be on DNR status. ROA.46. However, at no point did Dr. Cantu consider or assess any alternative course of care to *treat* Mr. Hickson's illness before recommending that

Mr. Hickson be placed on hospice. ROA.25.

Such assumptions—that people with disabilities have poor quality of life—are all too common among medical professionals, and that implicit bias frequently leads to inadequate or inappropriate clinical decisions and a lack of preventive care for people with disabilities. ROA.17-18. In February 2021, *Health Affairs* published a study revealing that 82.4% of physicians nationwide believe that people with significant disabilities have worse quality of life than nondisabled people. *Id.* In 2020, The Council on Quality and Leadership published a study analyzing the results of disability implicit attitude tests from 25,006 health care providers, which revealed the overwhelming majority were implicitly biased against people with disabilities. *Id.* The 2020 study underscored that providers' attitudes about marginalized groups, like people with disabilities, directly influence providers' clinical decision-making and referral practices, resulting in disparities in both health care access and health care outcomes—just as happened here. *Id.*

After Dr. Cantu's initial request to the palliative care team, Mr. Hickson's health fluctuated. ROA.26. As of June 3, 2020, Mr. Hickson's urinary tract infection and sepsis were being treated with antibiotics, to which he was quickly responding. *Id.* However, he had a fever and experienced intermittent desaturations of oxygen, and he was therefore receiving oxygen via nasal cannula. *Id.* Though Mr. Hickson had used a gastrotomy tube since March 2018, feeding

through the tube was temporarily paused on June 3 due to lung aspiration. *Id.*

By the following day, Mr. Hickson's vital signs had improved, and he was reported to be stable. *Id.* Tests had identified the bacterial organism infecting Mr. Hickson, meaning that more targeted antibiotics could be prescribed. *Id.* Thanks to the antibiotics, his kidney function had normalized. *Id.* His gastrotomy tube feeds were restarted. *Id.*

On the afternoon of June 4, Mr. Hickson's Family Eldercare guardian, Ms. Drake, reported to Mrs. Hickson:

> I spoke with Michael's Dr. at the Hospital and she informed me that he now has a [urinary tract infection] and sepsis in addition to pneumonia and COVID. He does however appear to be responding to the antibiotics and at times requires minimum oxygen (both good signs) …. As of now he is FULL CODE but his status would need to be changed if we all decide against intubation.

Id.

On June 5, Mrs. Hickson visited Mr. Hickson at the Hospital. ROA.26-27. Though she was restricted from entering his room in the intensive care unit, Mrs. Hickson FaceTimed her husband from the hallway. *Id.* During the FaceTime, Mr. Hickson was very responsive, smiling and reacting to the conversation with his wife. *Id.* He became even more animated when his five children joined the FaceTime call. *Id.*

The same day, evidence showed that the antibiotic Mr. Hickson had been administered was effective. ROA.27. The Hospital still assessed Mr. Hickson's

survival rate as 70%. *Id.* Mr. Hickson did not have any terminal or irreversible conditions. *Id.*

Regardless of Mr. Hickson's improving health and assessed 70% survival rate, his doctors continued to push to place him on a "comfort care" regimen and withdraw life-saving treatment. *See* ROA.26-27. On June 3, Dr. Cantu reiterated her request to meet with the palliative care team. ROA.26. On June 5, Defendant Dr. Vo—one of Mr. Hickson's providers at the Hospital—completed a "treatment decision form," which he then sent to Family Eldercare, outlining in minimal detail Dr. Vo's decision that Mr. Hickson should be terminated from life-saving care. ROA.28. Specifically, Dr. Vo filled out the form as follows:

- Current medical conditions: "chronic – anoxic encephalopathy [3 letters unreadable] acute – respiratory failure, pneumonia, SARS2 corona virus"
- Relevant treatment options: "mechanical ventilator with intubation, BiPAP, vasopressors, fluids"
- Prognosis: "with treatment," "[p]oor as treatment is difficult and likely won't change outcome futile" / "Without treatment," "Poor. Likely death"
- Physician's advice for treatment: "Given baseline functions, recoverability, prognosis of those with COVID–19 likely poor outcome regardless of interventions. comfort/hospice is appropriate."

Id. Notably, the "prognosis" question on the treatment decision form, which Dr. Vo answered as indicated above, also asked the physician filling out the form to detail "evidence concerning success of treatment, pain/discomfort management,

futility of treatment, and anticipated return to baseline functioning." *See id.* In response to the form's question whether there were ethical issues or conflicts regarding treatment options or prognosis, Dr. Vo wrote: "No." *Id.*

To further bolster their biased decision to withhold life-sustaining treatment from Mr. Hickson, one physician falsely recorded in Mr. Hickson's medical records that he was in "multi-organ system failure." *Id.* But Mr. Hickson was not in multi-organ system failure prior to the withdrawal of life-sustaining treatment and antibiotics. *Id.* Rather, any worsening respiratory status was *caused by* the abrupt withdrawal of Mr. Hickson's antibiotics. *Id.*

Ultimately, on June 5, Drs. Vo and Cantu decided to—and did—halt Mr. Hickson's course of antibiotics; withdraw him from life-sustaining care, including oxygen and his feeding tube; change his code to DNR; and transfer him to hospice. ROA.27.

Mrs. Hickson learned that her husband's life-sustaining treatment was being stopped shortly after she finished her FaceTime visit with him on June 5. ROA.26-27. A nurse at the Hospital told Mrs. Hickson that Mr. Hickson was being transferred to hospice care and also told her—incorrectly—that Mr. Hickson had developed pressure sores on his back. *Id.* Mrs. Hickson then asked to speak to her husband's doctor. *Id.*

When Dr. Vo told Mrs. Hickson that her husband's code had been changed

to DNR, Mrs. Hickson pressed him to explain why the Hospital was letting her husband die instead of treating him. ROA.27. Dr. Vo replied, "as of right now, his quality of life, he doesn't have much of one." *Id.* Dr. Vo further explained that, when he said that Mr. Hickson had no quality of life, he was referring to Mr. Hickson's paralysis and brain injury—*not* the conditions he had been admitted to the Hospital to treat. *See id.* Dr. Vo also explained that Mr. Hickson's case was different from other, non-disabled patients who were being treated aggressively for COVID–19: Mr. Hickson's "quality of life is different than theirs. They were walking, talking." *Id.* In other words, Dr. Vo expressed that patients who could "walk[]" and "talk[]" were receiving treatment for COVID-19, but Mr. Hickson—because of his disabilities—was not. *See id.*

III. MR. HICKSON'S DEATH

Mrs. Hickson was distraught at the Hospital's decision to let her husband die. *Id.* On June 6, she called to check on Mr. Hickson's status. ROA.29. A nurse told her that Mr. Hickson was not receiving food, IV fluids, or antibiotics and that his code was DNR. *Id.* The only thing he was receiving was pain medications. *Id.*

After hearing that Mr. Hickson's life-sustaining care had been withdrawn, Mrs. Hickson went to the Hospital to see her husband. *Id.* When she arrived, she was told no visitors were allowed, but she was able to FaceTime her husband from

the lobby. *Id.* Hospital staff eventually allowed her to see Mr. Hickson in his room on the hospice floor, and she confirmed that he was not receiving fluids, oxygen, antibiotics, or any other treatments. *Id.*

On June 7, Mrs. Hickson tried to reach Family Eldercare by email, then called the Hospital for an update on her husband's condition. *Id.* She was able to speak briefly with Dr. Cantu, and she begged Dr. Cantu to change her husband's code status back, so that he would not be left to die. *Id.* Dr. Cantu replied that only Ms. Drake, of Family Eldercare, could make that request. *Id.* Ms. Drake, in turn, had instructed Hospital staff that information about Mr. Hickson should "be kept confidential and wife not involved." ROA.57.

On June 8, after being denied food or nutrition for two days, Mr. Hickson told a hospice nurse that he was hungry. ROA.29. His feeding tube was started at a low trickle rate "for comfort." *Id.* The nurse noted that Mr. Hickson was alert, that he nodded his head to respond to questions, and that he followed commands when asked to open his mouth. *Id.*

Later that day, Dr. Cantu noted that Mr. Hickson's health was improving. *Id.* She wrote that, even without oxygen, Mr. Hickson was "actually having somewhat better respiration." *Id.* Dr. Cantu then messaged the Hospital's ethics consultant and a palliative care nurse requesting further guidance on Mr. Hickson's case. *Id.* In particular, Dr. Cantu suggested that inpatient hospice care may no

longer be "appropriate" based on Mr. Hickson's improvement. *Id.* Despite this additional positive development, Defendants never restarted his life-sustaining treatments, nutrition, or hydration. *Id.*

The same day, Mrs. Hickson received an email from Ms. Yates, of Family Eldercare, stating that Mr. Hickson showed improvement and that the decision to put Mr. Hickson on hospice care may need to be re-evaluated. ROA.30.
Mrs. Hickson then called the Hospital, asking for an update on her husband and requesting to set up a FaceTime. *Id.* She was told only that Mr. Hickson was "comfortable" and that the Hospital would call her back regarding a FaceTime with her husband. *Id.* They never did. *Id.*

On June 9, Mrs. Hickson again called the Hospital, asking for an update and requesting to set up a FaceTime. *Id.* She was again told that Mr. Hickson was "comfortable" and that the Hospital would call her back regarding a FaceTime. *Id.* Again, they did not call her back. *Id.*

On June 10, Mrs. Hickson again called the Hospital, asking for an update and requesting to set up a FaceTime. *Id.* She was again told that Mr. Hickson was "comfortable" and that the Hospital would call her back regarding a FaceTime. *Id.* Again, they did not call her back. *Id.*

On June 11, Mrs. Hickson again called the Hospital. *Id.* The Hospital refused to provide any information about Mr. Hickson and instead instructed her to

contact Family Eldercare. ROA.30, 57. That morning, Mrs. Hickson emailed Family Eldercare asking to set up a visit with her husband. ROA.30. Family Eldercare responded at approximately 8:00 p.m., instructing Mrs. Hickson to instead contact the Hospital about visiting. *Id.*

Two hours later, at 10:10 p.m. on June 11, Hospital staff found Mr. Hickson dead. *Id.*

The morning of June 12, Mrs. Hickson called the Hospital to arrange a visit, consistent with Family Eldercare's instructions. ROA.30-31. The Hospital told her to call Family Eldercare to arrange a visit instead, despite Mrs. Hickson's protestations that Family Eldercare had told her to reach out to the Hospital. *Id.* The Hospital did not tell Mrs. Hickson during that call that her husband was already dead. ROA.57-58. Later that day, the Hospital called Mrs. Hickson to inform her that her husband had died the day before. ROA.30-31.

On July 2, in response to a video Mrs. Hickson had posted on Facebook about her husband's death, the Hospital issued a statement disclosing a significant amount of Mr. Hickson's medical information. ROA.31. The Hospital's statement further made derogatory and demeaning comments about Mrs. Hickson, though it did not include her name, referring to her only as Mr. Hickson's wife. *Id.* Specifically, the statement commented that it was uncommon for guardianship to be taken away from a family member and explained that Mrs. Hickson had been

allowed to visit Mr. Hickson only when "security was present." *Id.* Those comments caused emotional distress to Mrs. Hickson—now a grieving widow whose husband had been left to die in the Hospital.

IV. LITIGATION AT THE DISTRICT COURT

Mrs. Hickson, on behalf of herself and her four minor children, and the Hicksons' oldest child, Marques, filed this Complaint against the Hospital, Drs. Cantu and Vo, and Hospital Internists of Texas, the organization that directly employs Dr. Cantu, (collectively, "Defendants") on June 10, 2021. ROA.14-61.[3]

As relevant here, the Complaint alleged that the Hospital violated federal disability discrimination statutes—in particular, the Rehabilitation Act and the non-discrimination provision of the Affordable Care Act—by denying Mr. Hickson life-saving health care services on the basis of his disability. ROA.32-37. It further alleged that the Hospital and Drs. Cantu and Vo deprived Mr. Hickson of his right to life while acting under color of state law, in violation of the Fourteenth Amendment of the U.S. Constitution. ROA.50-52. It alleged that Drs. Cantu and Vo were negligent in failing to provide sufficient information to Mr. Hickson's court-appointed guardian, Family Eldercare, before transferring Mr. Hickson to hospice care. ROA.41-46. And finally, it charged the Hospital

[3] The Complaint also include a single claim against the Hospital's chief medical officer, Dr. Anderson. ROA.55-60. That claim was dismissed, ROA.489-490, and is not at issue in this appeal.

with intentionally inflicting emotional distress upon the Hicksons, both through its discriminatory denial of life-saving medical care to Mr. Hickson and through a series of actions directed at Mrs. Hickson, including: having her followed by security when she was in the Hospital, then posting a public statement about that practice on its website; refusing to timely provide medical information about her husband to Mrs. Hickson, including the fact that he was already dead when she was trying to arrange a visit with him; and disclosing Mr. Hickson's protected health information online. ROA.55-60.[4]

After briefing on Defendants' motions to dismiss, the magistrate judge recommended dismissing every one of those claims without leave to amend. ROA.427-445. *First*, he recommended dismissing the Hicksons' disability discrimination claims on the basis that the "core complaint" in this case "is improper treatment for Mr. Hickson's medical condition, including the decision to withdraw further life-sustaining treatment." ROA.433. The magistrate judge therefore reasoned, in only one paragraph and relying on unpublished district court decisions, that "Plaintiffs' claims are not 'classic discrimination claims,' but rather medical malpractice claims which are not subject to the [Rehabilitation Act] or

[4] The Complaint asserted additional state law claims against the Defendants, which the district court dismissed on a motion for summary judgment. ROA.937-941. Those claims are not at issue in this appeal.

[Affordable Care Act] and must therefore be dismissed." *Id.*

Second, the magistrate judge recommended dismissing Plaintiffs' Fourteenth Amendment right-to-life claim on the basis that Defendants were not acting under color of state law, even when they invoked *parens patriae* power in withdrawing life-sustaining treatment from Mr. Hickson over his wife's objection. ROA.436-437.

Third, the magistrate judge recommended dismissing the informed consent and failure to guide negligence claims against Drs. Cantu and Vo. ROA.439-444. The magistrate judge concluded that Plaintiffs had failed to plead sufficient facts to survive a Rule 12(b)(6) motion against Dr. Cantu, because the Complaint did not include specific details about conversations between Dr. Cantu and Family Eldercare. ROA.440. At the same time, it recognized that, without discovery, Plaintiffs could not know what had been said in those conversations. *See id.* The magistrate judge recommended dismissing the claim against Dr. Vo because it concluded that Dr. Vo's written statement that the outcome of withdrawing care was "his death" was sufficient to fulfill his duty to obtain informed consent. ROA.443.

Finally, the magistrate judge recommended dismissing the intentional infliction of emotional distress claim because it concluded that the allegations in the Complaint were not sufficiently "outrageous" to qualify for relief. ROA.434-

436. Notably, the magistrate judge's recommendation did not address the Hicksons' argument that the discriminatory denial of medical care, which ultimately led to Mr. Hickson's death, alone constitutes "outrageous conduct" for purposes of an intentional infliction of emotional distress claim. *See* ROA.237-238, 434-436.

The Hicksons timely objected to the magistrate judge's report and recommendations. ROA.446-461. Nonetheless, the district court approved and accepted the magistrate judge's recommendation and dismissed the above-referenced claims with prejudice. ROA.481-484.

The Hicksons timely appealed. ROA.942-943.

SUMMARY OF ARGUMENT

The district court erred in concluding that disability discrimination claims related to medical treatment decisions are categorically prohibited under both the Rehabilitation Act and Affordable Care Act. The Hicksons' Complaint, which alleges that Defendants refused to provide life-saving medical care to Mr. Hickson because he was disabled, states a claim under both statutes. The Second Circuit's decision in *United States v. University Hospital, State University of New York at Stony Brook* does not establish a blanket rule precluding such claims under the Rehabilitation Act. And the Affordable Care Act, by its plain text, prohibits disability discrimination in the provision of health care.

The district court erred in determining that Defendants did not act under color of state law for purposes of Section 1983 liability. Defendants acted in *parens patriae* when they decided to withdraw life-saving medical treatment from Mr. Hickson, in contradiction of his family's wishes, and therefore are liable for violation of the Fourteenth Amendment right to life.

The district court erred in dismissing the Hicksons' negligence claims arising from Drs. Vo and Cantu's failure to obtain informed consent. The court's reasoning for dismissing the Hicksons' claims against Dr. Vo—that the only information Dr. Vo was required to provide was that the decision to withdraw life-saving medical treatment would result in "likely death"—is illogical in the context of the decision to move a patient to hospice care. And its reasoning for dismissing the claims against Dr. Cantu—that Mrs. Hickson could not know what Dr. Cantu told Mr. Hickson's guardian because she was not present, and therefore that Mrs. Hickson had failed to plead sufficient facts—is an incorrect application of *Iqbal* and *Twombly*.

Finally, the district court erred in dismissing the Hicksons' claim for intentional infliction of emotional distress. In particular, it failed even to consider whether the discriminatory refusal to provide Mr. Hickson medical treatment, resulting in his death, could form the basis for that claim.

STANDARD OF REVIEW

The Court reviews *de novo* a district court's ruling on a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6). *Turner v. Pleasant*, 663 F.3d 770, 775 (5th Cir. 2011). In so doing, the Court "accept[s] all factual allegations in the pleadings as true," *Scott*, 16 F.4th at 1208, and "construe[s] facts in the light most favorable to the nonmoving party," *Turner*, 663 F.3d at 775. "The question at the motion to dismiss stage is whether, 'with every doubt resolved in the pleader's behalf, the complaint states any legally cognizable claim for relief.'" *Wilson v. Birnberg*, 667 F.3d 591, 595 (5th Cir. 2012) (quoting 5B Charles A. Wright & Arthur R. Miller, Fed. Prac. & Proc. Civ. § 1357, at 640 (3d ed. 2004)). "[A] motion to dismiss under 12(b)(6) is viewed with disfavor and rarely granted." *Turner*, 663 F.3d at 775 (citations and internal quotation marks omitted).

ARGUMENT

I. THE DISTRICT COURT ERRED IN DISMISSING PLAINTIFFS' FEDERAL STATUTORY DISCRIMINATION CLAIMS.

The Hospital denied life-saving treatment to Mr. Hickson—leaving him to die—*because* he was disabled. *See* ROA.27. As alleged in the Complaint, Mr. Hickson was seeking treatment for an illness separate from his disability; he was not seeking to be cured of the disability. ROA.19. A Hospital doctor told Mrs. Hickson that Mr. Hickson would not be treated for that illness, even though non-disabled patients were receiving treatment, because Mr. Hickson, unlike those

other patients, could not "walk[]" and "talk[]." ROA.27.

This is a classic case of disability discrimination. Yet the district court dismissed the Hicksons' disability discrimination claims under the Rehabilitation Act and Section 1557 of the Patient Protection and Affordable Care Act ("ACA"), distorting the case law in this area into a blanket rule that a medical treatment decision can never form the basis of a disability discrimination claim. ROA.482.

The district court was wrong. Medical care is not categorically immune from disability rights claims under the Rehabilitation Act. Any doubt on that point should have been put to rest when Congress included Section 1557 in the ACA expressly to apply federal antidiscrimination law to the provision of health care.

A. The Rehabilitation Act Prohibits the Kind of Discrimination the Hospital Inflicted Upon Mr. Hickson, Leading to His Death.

The Rehabilitation Act states that "[n]o otherwise qualified individual with a disability in the United States … shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under" a covered program or activity. 29 U.S.C. § 794(a). As this Court has explained, to state a claim for disability discrimination under the Rehabilitation Act, a plaintiff must allege that: "(1) he has a qualifying disability; (2) he is being excluded from participation in, denied the benefits of, or otherwise discriminated against by a covered entity; and (3) such discrimination is by reason of his disability." *Francois v. Our Lady of the Lake Hosp., Inc.*, 8 F.4th 370, 378

(5th Cir. 2021).

Applying that framework to the facts of this case, the Complaint unquestionably states a claim for disability discrimination under the Rehabilitation Act. Mr. Hickson was a person with a disability, ROA.23; as Dr. Vo put it, he had difficulty "walking" and "talking," ROA.27. He was denied the benefit of life-saving medical treatment for his acute respiratory illness at a hospital receiving federal funding. ROA.27, 32. And that denial was because of his disability: according to Dr. Vo, other people who were not disabled were receiving treatment. ROA.27.

Yet the district court dismissed the Hicksons' claim, citing a blanket rule immunizing medical care from disability law. That rule arises from a misapplication of the extensive body of case law on policing the line between medical malpractice and discrimination in the provision of medical care.

These cases originate in the Second Circuit's 1984 decision in *United States v. University Hospital, State University of New York at Stony Brook* ("*Stony Brook*"), 729 F.2d 144 (2d Cir. 1984). That case was about an infant, Baby Jane Doe, who was born with multiple severe disabilities. *Id.* at 146. Baby Jane Doe's parents were presented with two treatment options: a "conservative" treatment focused on antibiotics, or a series of two corrective surgical procedures. *Id.* The parents chose the conservative approach. *Id.* The federal government, following

an anonymous tip, began an investigation into Baby Jane Doe's care and attempted to obtain her medical records, arguing that they were entitled to investigate discriminatory denials of medical care under the Rehabilitation Act. *Id.* at 147.

The *Stony Brook* court held that the Rehabilitation Act did not apply, relying primarily on the lack of legislative intent that the Rehabilitation Act would "apply to treatment decisions involving defective newborn infants." *Id.* at 161. The court further noted that the Rehabilitation Act prohibits discrimination "only" when the disability "is unrelated to … the services" being denied, but that such analysis is difficult in the medical treatment context because "it is typically the handicap itself that gives rise to, or at least contributes to, the need for services." *Id.* at 156. Ultimately, the court concluded: "Until congress has spoken, it would be an unwarranted exercise of judicial power to approve the type of investigation that has precipitated this lawsuit." *Id.* at 161.

The Second Circuit's follow-on decisions to *Stony Brook* make clear that "the intention of the Rehabilitation Act" is to prohibit doctors from "inflict[ing] or withhold[ing] a type of medical treatment for reasons having no relevance to medical appropriateness—reasons dictated by bias rather than medical knowledge." *McGugan v. Aldana-Bernier*, 752 F.3d 224, 231 (2d Cir. 2014). Specifically, that court recognized that "persons who are severely physically disabled are often perceived as incompetent," leading medical and emergency

personnel to deny them access to services. *Green v. City of New York*, 465 F.3d 65, 78 (2d Cir. 2006). Finding disability discrimination under the Rehabilitation Act in such circumstances is "entirely consistent" with *Stony Brook*. *McGugan*, 752 F.3d at 232.

Other circuits are in accord. The First Circuit has recognized that "[p]hysicians … are just as capable as any other recipient of federal funds of discriminating against the disabled, and courts may not turn a blind eye to the possibility that a supposed exercise of medical judgment may mask discriminatory motives or stereotypes." *Lesley v. Hee Man Chie*, 250 F.3d 47, 54 (1st Cir. 2001). The Seventh, Tenth, and Eleventh Circuits have similarly adopted the Second Circuit's reasoning in *Stony Brook*, clarifying that those are cases in which the alleged disability was the cause of the requested medical treatment, *Fitzgerald v. Corr. Corp. of Am.*, 403 F.3d 1134, 1144 (10th Cir. 2005); *Schiavo ex rel. Schindler v. Schiavo*, 403 F.3d 1289, 1294 (11th Cir. 2005), or were otherwise cases in which "[n]o discrimination is alleged" because the plaintiff "was not treated worse because he was disabled," *Bryant v. Madigan*, 84 F.3d 246, 249 (7th Cir. 1996). And this Court has itself recognized that, just because a doctor is involved in alleged disability discrimination, courts are not required to dismiss discrimination claims as a matter of automatic deference to "reasoned medical judgment." *Cadena v. El Paso Cty.*, 946 F.3d 717, 726-27 (5th Cir. 2020)

(reversing summary judgment, holding that plaintiff raised a triable issue of fact regarding denial of wheelchair as reasonable accommodation, rejecting argument that ADA claim was barred by exercise of medical discretion).

This case presents exactly the scenario that the First and Second Circuits warned against. Mr. Hickson was seeking care for treatable illnesses, not for his underlying disability. ROA.19. By his physician's own account, Mr. Hickson was not treated for that illness because he, unlike the patients who were receiving treatment, could not "walk[]" and "talk[]." ROA.27. As explained in *McGugan*, the Rehabilitation Act prohibits doctors from withholding medical treatment for such "reasons dictated by bias," which have "no relevance to medical appropriateness." 752 F.3d at 231.

Holding otherwise would lead to absurd results. If any decision to withhold medical care to a disabled person were allowable under federal disability discrimination law, hospitals and physicians would be allowed to, for example, refuse to prescribe medication to a blind person with the flu, merely because they are blind, or refuse to set the broken arm of someone with diabetes, merely because they are diabetic. That cannot be the intent of the Rehabilitation Act.

The Hicksons' claims strictly respect the line between medical malpractice and federal disability law, as articulated in *Stony Brook* and its Second Circuit progeny. The Hicksons' federal disability law claims do not question whether the

doctors prescribed the right medications or respiratory therapy for Mr. Hickson. That would be a medical malpractice case. Instead, these claims are about the doctors' decisions to consign Mr. Hickson to death because he could not walk or talk. This is precisely the type of discrimination that is actionable under the Rehabilitation Act.

B. Section 1557 of the ACA Plainly States that Antidiscrimination Laws Apply to Health Care Treatment, Including in a Case Like This One.

Even if the district court were correct—which it is not—that the Rehabilitation Act categorically does not apply to medical treatment decisions, there is no basis to extend that blanket rule to the ACA.

Section 1557 of the ACA states that "an individual shall not … be excluded from participation in, be denied the benefits of, or be subjected to discrimination under, any health program or activity, any part of which is receiving Federal financial assistance," on the basis of any ground prohibited in various federal antidiscrimination statutes, including the Rehabilitation Act. 42 U.S.C. § 18116(a).

Nothing in the text of that provision supports the district court's conclusion that the statutes do not apply to medical treatment decisions. *See* ROA.482. To the contrary, the ACA expressly prohibits discriminatory exclusion from "any health program or activity." 42 U.S.C. § 18116(a). By its plain meaning, the term

"health program or activity" unambiguously includes medical treatment. *See Salazar v. Maimon*, 750 F.3d 514, 518 (5th Cir. 2014) ("The appropriate starting point when interpreting any statute is its plain meaning." (quoting *Sample v. Morrison*, 406 F.3d 310, 312 (5th Cir. 2005))). Because "'the statutory language is unambiguous and the statutory scheme is coherent and consistent,'" the inquiry ends there. *Id.* (quoting *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 450 (2002)). Moreover, the implementing regulations of ACA Section 1557 define "health program or activity" as "[a]ny project, enterprise, venture, or undertaking to … [p]rovide or administer health-related services" or "[p]rovide clinical, pharmaceutical, or medical care." 45 C.F.R. § 92.4 (2024).[5]

Therefore, to the extent that there was any question about the applicability of disability discrimination law to health care decisions after *Stony Brook*, Congress resolved that issue in the ACA. By its plain text, the ACA prohibits discrimination in medical care on the basis of disability.

Nor did the district court identify *any* case holding that disability discrimination claims related to medical treatment decisions are not actionable

[5] Though substantively similar, the definition of "health program or activity" has been revised slightly since the initial 2016 version of the regulations. In 2016, the term was defined as "the provision or administration of health-related services …." 45 C.F.R. § 92.4 (2016). In 2020, the term was defined to "encompass[] all of the operations of entities principally engaged in the business of providing healthcare …." 45 C.F.R. § 92.3(b) (2020).

under the ACA. The district court's order and magistrate judge's recommendation cite three Texas district court cases (*Kim v. HCA Healthcare, Inc.*, No. 3:20-CV-00154-S, 2021 WL 859131, at *2 (N.D. Tex. Mar. 7, 2021); *Guthrie v. Niak*, No. H-12-1761, 2017 WL 770988, at *14 (S.D. Tex. Feb. 28, 2017); *G.T. by Rolla v. Epic Health Servs.*, No. 17-CV-1127-LY, 2018 WL 8619803, at *4 (W.D. Tex. Dec. 27, 2018)), each of which adopts the—incorrect, as described above—blanket rule barring claims under the Rehabilitation Act or Americans with Disabilities Act related to medical treatment decisions. ROA.433-434, 482. But none of those cases includes ACA claims. *Kim*, 2021 WL 859131, at *1; *Guthrie*, 2017 WL 770988, at *1; *G.T.*, 2018 WL 8619803, at *2.

Instead, the magistrate judge appears to have relied on this Court's general statement in *Francois* that "the ACA incorporates the substantive analytical framework of the RA" to reach that conclusion. ROA.433 (quoting *Francois*, 8 F.4th at 378). However, *Francois* was about denial of sign language interpretation—not a medical treatment decision—and therefore does not address the blanket rule's relationship to the text of the ACA.

In sum, no case law requires or even suggests the result that the district court reached here, which ignored the statutory text of the ACA to dismiss the Hicksons' claim for disability discrimination.

II. THE DISTRICT COURT ERRED IN DISMISSING PLAINTIFFS' SECTION 1983 RIGHT-TO-LIFE CLAIM .

"To state a claim under § 1983, a plaintiff must allege the violation of a right secured by the Constitution and laws of the United States, and must show that the alleged deprivation was committed by a person acting under color of state law." *West v. Atkins*, 487 U.S. 42, 48 (1988). The right to one's life is secured by the U.S. Constitution. *Tennessee v. Garner*, 471 U.S. 1, 9 (1985) ("[The] fundamental interest in [one's] own life need not be elaborated on.").

Mr. Hickson was undoubtedly deprived of his right to life when Defendants refused to provide him with life-saving medical treatment, resulting in his death. ROA.27, 30. Yet the district court dismissed the Hicksons' claim based on its flawed conclusion that Defendants were not acting under color of state law.

To determine whether a private entity acted "under cover of state law"—and therefore can be subject to liability under Section 1983—the "critical inquiry" is "whether 'the alleged infringement of federal rights can be fairly attributable to the State.'" *Cornish v. Corr. Servs. Corp.*, 402 F.3d 545, 549 (5th Cir. 2005) (internal brackets omitted) (quoting *Rendell-Baker v. Kohn*, 457 U.S. 830, 838 (1982)). That inquiry is "fact-intensive." *Lindke v. Freed*, 601 U.S. 187 (2024); *see also Cornish*, 402. F.3d at 550 (describing the state action doctrine as a "necessarily fact-bound inquiry").

Specifically, a private entity acts under color of state law when it "performs

a function which is 'exclusively reserved to the State,'" *id.* at 549 (quoting *Flagg Bros., Inc. v. Brooks*, 436 U.S. 149, 158 (1978)); when the State "insert[s] 'itself into a position of interdependence'" with the private entity and makes itself "'a joint participant in the enterprise,'" *id.* at 550 (quoting *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 357-58 (1974)); or when private entities are "willful participant[s] in joint action with the State or its agents," *id.* (quoting *Dennis v. Sparks*, 449 U.S. 24, 27 (1980)).

In *T.L. v. Cook Children's Medical Center*, the Court of Appeals of Texas concluded that a private hospital can be deemed as having acted "under color of state law"—and therefore liable under Section 1983—when it withdrew life-sustaining treatment from an infant patient over the family's objections. 607 S.W.3d 9, 23 (Tex. App. 2020). The *T.L.* court explained, after analyzing U.S. Supreme Court precedent, that medical treatment decisions can be considered state action if "the state is exclusively responsible for the medical well-being of the individual patient. If so, treatment decisions for that patient constitute state action." *Id.* at 41. The court determined that "[o]nly the state, acting as *parens patriae*, has the authority to supervene a parent's refusal to consent to the withdrawal of life-sustaining support." *Id.* at 52. Similarly, the *T.L.* court explained that it is the "sovereign authority of the state, under its police power, to regulate what is and is not a lawful means or process of dying, naturally or

otherwise." *Id.* at 76. Therefore, any private actor making the same determination is performing an exclusive state function and therefore is acting under color of law. *See id.*

Other courts have also recognized that appointed guardians who are empowered by the state to make medical decisions on another's behalf are state actors for purposes of Section 1983. *E.g.*, *Thomas S. v. Morrow*, 781 F.2d 367, 377 (4th Cir. 1986).

Applying the reasoning of those cases, Defendants here acted under color of state law. Each one of the Defendants in this case—acting in concert with Mr. Hickson's court-appointed temporary guardian—made the decision to withdraw Mr. Hickson's medical care. ROA.24, 27. Defendants knew that Mr. Hickson's family would not agree to the withdrawal of care, ROA.29, but nonetheless made that decision, with discriminatory motivation and while attempting to keep Mr. Hickson's wife in the dark, ROA.57. By superseding Mr. Hickson's family members' requests, Defendants stepped into the State's traditional and exclusive role, acting as *parens patriae* and regulating the means of Mr. Hickson's death. For that reason, the district court's dismissal of the Hicksons' right-to-life claim should be reversed.

III. THE DISTRICT COURT ERRED IN DISMISSING WITH PREJUDICE PLAINTIFFS' STATE LAW INFORMED CONSENT AND FAILURE TO GUIDE NEGLIGENCE CLAIMS.

Health care providers in Texas can be held liable under both statute and common law for failing to inform patients about the risks and hazards involved in medical care before providing that care. Tex. Civ. Prac. & Rem. Code § 74.101; *Felton v. Lovett*, 388 S.W.3d 656, 660 (Tex. 2012).

By statute, the State created the Texas Medical Disclosure Panel ("the Panel") to determine which risks and hazards must be disclosed. *See* Tex. Civ. Prac. & Rem. Code § 74.102(a). The goal of establishing the Panel was to "eliminate the need for expert testimony regarding the materiality of" undisclosed risks "in most cases." *Peterson v. Shields*, 652 S.W.2d 929, 931 (Tex. 1983). To do that, the Panel is tasked with reviewing medical treatments and procedures to "determine which of those treatments and procedures do and do not require disclosure of the risks and hazards to the patient." Tex. Civ. Prac. & Rem. Code § 74.103(a). The Panel then maintains lists delineating which procedures do not require disclosure and which procedures do; for the latter, the Panel also establishes the degree of disclosure required. *Id.* § 74.103(b).

Yet the statutory scheme recognizes that the Panel may not be able to address every kind of medical care provided. It therefore states: "If medical care or surgical procedure is rendered with respect to which the disclosure panel has

made no determination either way regarding a duty of disclosure, the physician or health care provider is under the duty otherwise imposed by law." *Id.* § 74.106(b). As the Texas Supreme Court has explained, "when Section 74.101 does not apply, the common law does." *Felton*, 388 S.W.3d at 660.

The chapters listing the procedures analyzed by the Panel do not contain any references to the withdrawal of treatment, palliative care, or hospice. *See* 25 Tex. Admin. Code §§ 602.1-603.21. As a result, the common law duty to inform applies in this case.

The common law duty to provide information to a patient (or the patient's decision-maker) "is based upon the patient's right to information adequate for him to exercise an informed consent to or refusal of the procedure. The nature and extent of the disclosure depends upon the medical problem as well as the patient." *Felton*, 388 S.W.3d at 660 (quoting *Wilson v. Scott*, 413 S.W.2d 299, 301 (Tex. 1967)). "True consent to what happens to one's self is the informed exercise of a choice, and that entails an opportunity to evaluate knowledgably the options available and the risks attendant upon each." *Karp v. Cooley*, 493 F.2d 408, 419 (5th Cir. 1974).

The Complaint alleges that Drs. Vo and Cantu breached their duty to provide sufficient information to Family Eldercare to allow them to make an informed decision about withdrawing Mr. Hickson's life-saving care. Specifically, the

decision form completed by Dr. Vo makes no reference to that fact of Mr. Hickson's estimated 70% chance of survival. *See* ROA.28. The "prognosis" question on the treatment decision form required Dr. Vo to provide "evidence concerning success of treatment, pain/discomfort management, futility of treatment, and anticipated return to baseline functioning." *Id.* In response, Dr. Vo wrote: "with treatment," "[p]oor as treatment is difficult and likely won't change outcome futile" / "Without treatment," "Poor. Likely death." *Id.*

The district court incorrectly dismissed the claims against both doctors, though for different reasons.

A. The District Court Was Wrong to Dismiss the Informed Consent Claims as to Dr. Vo.

In recommending the dismissal of these claims against Dr. Vo, the magistrate judge concluded that Plaintiffs failed to state a claim for lack of informed consent, because "Dr. Vo clearly informed Mr. Hickson's legal guardian, Ms. Drake, of the 'most extreme degree of harm, his death.'" ROA.443. In other words, in the district court's view, Dr. Vo's statement that the potential outcome of withdrawing life-saving care was "[l]ikely death" is all the information he was required to provide. *See* ROA.28.

That reading of the duty to obtain patients' informed consent to medical procedures makes no sense in the context of the decision to withdrawal life-saving treatment. As this Court has recognized, "[t]rue consent … entails an opportunity

to evaluate knowledgably the options available and the risks attendant upon each." *Karp*, 493 F.2d at 419. What Mr. Hickson's guardian needed to know was not merely the fact that he would die without life-saving antibiotics, but also that he had a 70% chance of surviving if he had been given treatment. Dr. Vo, however, did not provide that information to Family Eldercare, even though the form asked for "evidence concerning success of treatment, pain/discomfort management, futility of treatment, and anticipated return to baseline functioning." ROA.28. As a result, the district court's conclusion should be reversed.

B. The District Court Was Wrong to Dismiss the Informed Consent Claims as to Dr. Cantu.

The district court dismissed those claims against Dr. Cantu for a different—but still incorrect—reason. In recommending dismissal of the informed consent claim, the magistrate judge stated that the Hicksons had not pled sufficient facts to support the claim and relied on Dr. Cantu's assertion that "Mrs. Hickson was not present for the[] conversations between physicians and Family Eldercare guardians," and therefore did not know "what was discussed between the parties who were making medical decisions." ROA.440.

That is not the standard courts apply at the motion to dismiss stage. District courts are required to treat allegations in a complaint "in the light most favorable to the plaintiffs," *Scott*, 16 F.4th at 1209 (internal citation and quotation marks omitted), and draw "all reasonable inferences" in plaintiffs' favor, *White v. U.S.*

Corrs., L.L.C., 996 F.3d 302, 306-07 (5th Cir. 2021). They should not dismiss a claim "unless the plaintiff cannot prove any set of facts … that would entitle him to relief." *Scott*, 16 F.4th at 1209 (internal citation and quotation marks omitted). This Court has explained that district courts err when they "discount[]" facts alleged in a complaint that, when interpreted in the light most favorable to the plaintiff, support the reasonable inference that they are entitled to relief. *Id.* at 1213; *see also Robertson v. Sea Pines Real Est. Cos.*, 679 F.3d 278, 291 (4th Cir. 2012) ("The requirement of nonconclusory factual detail at the pleading stage is tempered by the recognition that a plaintiff may only have so much information at his disposal at the outset.").

Mrs. Hickson alleged sufficient facts to support the plausible inference that Dr. Cantu did not provide the guardian with the necessary information to obtain informed consent to end life-saving treatment. These inferences are support by the following allegations: The Hospital assessed Mr. Hickson's survival rate as being 70%, and Dr. Cantu herself knew that Mrs. Hickson wanted her husband to receive life-saving care. ROA.27, 29. Yet there is no indication that the 70% survival rate was communicated to Mr. Hickson's guardian, and the guardian decided to consent to withdrawal of treatment—a decision that is inconsistent with an assessed 70% chance of survival. ROA.27-29. Moreover, three days after the decision was made to withdraw care from Mr. Hickson, Dr. Cantu noted that his health was

improving, including that he was "actually having somewhat better respiration," and Dr. Cantu specifically suggested that inpatient hospice care may no longer be "appropriate." ROA.29. Yet again, Mr. Hickson's guardian did not instruct Defendants to restart Mr. Hickson on life-saving treatment. *See id*.

Mrs. Hickson was not required to plead additional facts beyond these, particularly facts to which she does not have access without discovery, *e.g.*, details of the conversations between the providers and the guardians. *See Scott*, 16 F.4th at 1213 (reversing district court that imposed "a heavier burden than [plaintiff] was required to meet at the pleading stage"). The district court's decision as to Dr. Cantu should be reversed, at minimum, so that the Hicksons have an opportunity to amend.

IV. THE DISTRICT COURT ERRED IN DISMISSING PLAINTIFFS' INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS CLAIM.

To state a claim for intentional inflection of emotional distress under Texas law, a plaintiff must allege that: (1) "the defendant acted intentionally or recklessly"; (2) "the conduct was 'extreme and outrageous'"; (3) "the actions of the defendant caused the plaintiff emotional distress"; and (4) "the emotional distress suffered by the plaintiff was severe." *Wilson v. Monarch Paper Co.*, 939 F.2d 1138, 1142 (5th Cir. 1991).

This Court has described the "extreme and outrageous" conduct element as requiring conduct that is "atrocious," "utterly intolerable in a civilized

community," and "beyond all possible bounds of decency." *Id.* at 1143 (quoting *Dean v. Ford Motor Credit Co.*, 885 F.2d 300, 306 (5th Cir. 1989)). "Generally, the case [must be] one in which a recitation of the facts to an average member of the community would lead him to exclaim, 'Outrageous.'" *Id*. However, "[t]here is no litmus test for outrageousness; whether conduct was outrageous and extreme must be analyzed on a case-by-case basis." *Skidmore v. Precision Printing & Packaging, Inc.*, 188 F.3d 606, 613 (5th Cir. 1999).

The Hicksons' Complaint states a claim for intentional infliction of emotional distress under at least two theories. The district court was wrong in dismissing this claim under both.

First, the Hospital inflicted emotional distress when it refused to treat Mr. Hickson for a discriminatory reason, leading Mrs. Hickson to beg for her husband's life. ROA.27, 29. Other courts analyzing intentional inflection of emotional distress claims under the Restatement (Second) of Torts have concluded that discriminatory denials of medical care may be considered sufficiently "outrageous" conduct—reserving the decision for the jury and denying summary judgment. *See, e.g.*, *Miller v. Spicer*, 822 F. Supp. 158, 171 (D. Del. 1993) (denying doctors' motions for summary judgment where triable fact existed regarding whether comments and conduct during discriminatory denial of care were "outrageous"); *Woolfolk v. Duncan*, 872 F. Supp. 1381, 1391 (E.D. Pa. 1995).

Here, by contrast, the district court acted at the motion to dismiss stage, not allowing Mrs. Hickson to develop the factual record that was available to the courts in *Miller* and *Woolfolk.*

Neither the district court nor the magistrate judge even considered whether the discriminatory refusal to provide medical treatment to Mr. Hickson was actionable "outrageous conduct" within the scope of the tort. *See* ROA.434-436, 481-484. The district court's dismissal should be reversed on that basis alone.

Second, separate from the disability discrimination that led to Mr. Hickson's death, the Complaint alleges that the Hospital staff insulted and demeaned Mrs. Hickson, who was trying to save the life of her husband. Specifically, the Complaint alleges that the Hospital, a place that is supposed to provide care and healing to its community, published demeaning statements about a grieving widow and private medical information about her husband. ROA.31.

This Court has previously concluded that far lesser allegations satisfy the "outrageous conduct" requirement of the intentional infliction of emotional distress tort. In *Wilson*, for example, this Court concluded that being "demoted from an executive manager to an entry level warehouse supervisor with menial and demeaning duties" was sufficiently outrageous conduct. 939 F.2d at 1145. *Wilson* does not contain any facts regarding public disclosure of medical information or demeaning someone following the death of her husband. *See id.* This case is at

least as outrageous as the conduct at issue in *Wilson*, and the district court was therefore wrong to dismiss that claim.

CONCLUSION

For the foregoing reasons, the Court should reverse the district court's dismissal of Plaintiffs' claims and remand for further proceedings.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that the foregoing instrument has been served via the Court's ECF filing system in compliance with Rule 25(b) and (c) of the Federal Rules of Appellate Procedure, on March 31, 2025, on all registered counsel of record, and has been transmitted to the Clerk of the Court.

/s/ Ernest Galvan

Dated: March 31, 2025 **ERNEST GALVAN**

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1. This brief complies with the type-volume limitation of FED. R. APP. P. 32(a)(7)(B) because:

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