IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

MELISSA HICKSON, Individually and MELISSA HICKSON as the DEPENDENT ADMINISTRATOR of the ESTATE OF MICHAEL HICKSON, DECEASED, and MELISSA HICKSON AS NEXT FRIEND OF M.H.; M.H. AND M.H., all minors, AND MARQUES HICKSON,	§	
Plaintiffs,	§	
v.	§	Cause No. 1:21-cv-514-LY
ST. DAVID'S HEALTHCARE, PARTNERSHIP, L.P., LLP, doing business as ST. DAVID'S SOUTH AUSTIN MEDICAL CENTER, DR. DEVRY ANDERSON, INDIVIDUALLY, HOSPITAL INTERNISTS OF TEXAS, DR. CARLYE MABRY CANTU, Individually, DR. VIET VO, Individually,	§	
Defendants.	§	

DEFENDANTS' JOINT RESPONSE TO PLAINTIFFS' OBJECTIONS TO MAGISTRATE JUDGE LANE'S REPORT AND RECOMMENDATION

TO THE HONORABLE U.S. DISTRICT JUDGE LEE YEAKEL:

COME NOW, Defendant ST. DAVID'S HEALTHCARE PARTNERSHIP, L.P., LLP, doing business as ST. DAVID'S SOUTH AUSTIN MEDICAL CENTER (individually **"SDHP"**) and Defendant DR. VIET VO (individually **"Dr. Vo"**), and pursuant to Local Rule CV-7, jointly file this response in opposition to Plaintiffs' Objections to Magistrate Judge Lane's Report and Recommendation.

I.
BRIEF INTRODUCTION

In SDHP's Rule 12(b)(6) motion, it requested dismissal of the following: **(1)** Plaintiffs' claims under the Rehabilitation Act and the Affordable Care Act; **(2)** Plaintiffs' claim for intentional infliction of emotional distress; **(3)** Plaintiffs' claim under 42 U.S.C. §1983; **and (4)** Plaintiffs' negligence theory regarding SDHP's alleged failure to properly train doctors. *See* Dkt. No. 11. In Dr. Vo's Rule 12(b)(6) motion, he requested dismissal of the following: **(1)** Plaintiffs' claim for lack of informed consent; **(2)** Plaintiffs' negligence theory for the alleged failure to "guide" the court-appointed guardians; **and (3)** Plaintiffs' claim under 42 U.S.C. §1983. *See* Dkt. No. 13.

After reviewing Plaintiffs' Responses and Defendants' Replies, Magistrate Judge Lane issued a thorough and thoughtful Report recommending for this Court to grant Defendants' motions in their entirety. *See* Dkt. No. 45. Plaintiffs filed objections to Magistrate Judge Lane's recommendation for this Court to dismiss the following claims: **(1)** Plaintiffs' claims against SDHP under the Rehabilitation Act and the Affordable Care Act; **and (2)** Plaintiffs' claims against all defendants under 42 U.S.C. §1983. As explained in detail below, Plaintiffs' objections merely confirm that Magistrate Judge Lane correctly concluded that binding precedent mandates the dismissal of those claims.

II.
PLAINTIFFS' OBJECTIONS CONFIRM THEIR CLAIMS UNDER 42 U.SC. §1983 FAIL AS A MATTER OF LAW

For the multiple independent reasons set forth below, Plaintiffs' objections to Magistrate Judge Lane's recommendation for this Court to dismiss their Section 1983 claims fail as a matter of law and must be overruled.

A. Magistrate Judge Lane Correctly Noted *T.L. v. Cook Med Ctr.* is *NOT* Binding on this Court.

As an initial matter, Plaintiffs object to Magistrate Judge Lane's recommendation for dismissal of Plaintiffs' Section 1983 claim "based on [his] conclusion that Defendants did not act under color of state law." *See* Dkt. No. 45 at p. 10 (brackets added). With respect to that recommendation, Plaintiffs take issue with Magistrate Judge Lane's threshold notation that the primary legal authority Plaintiffs cited as support for those claims – *T.L. v. Cook Med. Ctr.* – is from a Texas intermediate court of appeals and is therefore not binding on this federal court. *See* Dkt. No. 45 at pp. 10-11. Citing two cases in which federal courts exercised diversity jurisdiction over state-law claims, Plaintiffs rely upon the *Erie* doctrine to argue, "[t]he court of appeals' decision in *T.L.* . . . provides this Court with the best guidance as to the scope of Texas law so that this Court can determine whether Defendants acted under color of that law." *Id.* Contrary to Plaintiffs' objection, Magistrate Judge Lane's initial notation is correct.

Even if a Texas statute is implicated in the analysis under Section 1983, the *Erie* doctrine does not govern the dispositive issue presented in Defendants' motions.[1] Rather, it is well established that the issue of "[w]hether particular conduct is action 'under color of state law' for purposes of 42 U.S.C. §1983 is ***a question of federal***, ***not state, law***." *Midfelt v. Circuit Ct. of Jackson Cty., Mo.*, 827 F.2d 343, 345 (8th Cir. 1987) (emphasis added).[2] And, "[a]lthough state courts have the authority to decide issues of federal constitutional law, state court decisions are not binding upon the federal courts[.]" *Sys. Contractors Corp. v. Orleans Par. Sch. Bd.*, 148 F.3d 571, n. 23 (5th Cir. 1998) (explaining "we are not bound by *Haughton's* interpretation of the procedural due process clause.").

[1] *See, e.g., Levinson v. Deupree*, 345 U.S. 648, 651 (1953) ("The United States District Court for the Eastern District of Kentucky heard this suit sitting in admiralty. Its jurisdiction did not derive from diversity of citizenship; indeed there was no such diversity. *Erie R. Co. v. Tompkins*, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188, ***is irrelevant***."); *Grantham v. Avondale Indus., Inc.,* 964 F.2d 471, 473–74 (5th Cir.1992) ("The *Erie* doctrine ***does not apply*** ... in matters governed by the federal Constitution or by acts of Congress. It is beyond cavil that we are not bound by a state court's interpretation of federal law regardless of whether our jurisdiction is based on diversity of citizenship or a federal question...The district court erred in following the decisions of the Louisiana courts rather than that of this circuit on an issue of federal law."); *Ayers v. Thompson*, 358 F.3d 356, 376 (5th Cir. 2004) ("Appellants' contentions based on *Erie* and the First Amendment lack merit. First, this is not a diversity case; thus, *Erie* ***is inapplicable***."); *Barrosse v. Huntington Ingalls Inc.*, 563 F. Supp. 3d 541, 561 (E.D. La. 2021) ("According to the Fifth Circuit, 'The *Erie* doctrine ***does not apply*** . . . in matters governed by the federal Constitution or by acts of Congress.'"), *adopted by*, 2021 WL 5447447 (E.D. La. Nov. 22, 2021).

[2] *Accord, e.g., Gorenc v. Salt River Project Agr. Imp. and Power Dist.,* 869 F.2d 503 (9th Cir. 1989), *cert. denied,* 493 U.S. 899 (1989) (stating the same); *Powe v. Miles*, 407 F.2d 73, 82 (2d Cir. 1968) ("The question whether . . . acts of its delegates constitute action 'under color of any State law, statute, ordinance, regulation, custom or usage' is a different one, whose resolution depends upon federal law."); *Burton v. Wilmington Parking Auth.*, 365 U.S. 715, 725-726 (1961) (reversing the Delaware Supreme Court's determination of no state action).

B. Magistrate Judge Lane Correctly Concluded *T.L. v. Cook Med Ctr.* is Distinguishable and does *NOT* Apply in this Case.

With respect to the federal precedent governing the issue presented, the "Supreme Court has applied several different formulas to determine whether seemingly private conduct may be charged to the state": **(1)** the "public function test;" **(2)** the "state compulsion test;" **and (3)** the "nexus test" or "joint action test." *Bass v. Parkwood Hosp.*, 180 F.3d 234 (5th Cir. 1999) (citing *Lugar v. Edmondson Oil Co.,* 457 U.S. 922 (1982)).[3] In *T.L. v. Cook Med Ctr.*, the Texas court of appeals expressly acknowledged that, "**most authorities hold that treatment decisions made by private health care providers do not" constitute state action under Section 1983, "even if the provider is subject to considerable state regulation in providing such care,"** but the Texas court nevertheless concluded that under the "public function" test, a private hospital can be transformed into a state actor "when the private treatment decision is one traditionally and exclusively within the sovereign prerogative of the state[.]" *See* 607 S.W.3d 9, 38-39 & 40 (Tex. App.—Fort Worth July 24, 2020, pet. denied) (emphasis added and citations omitted)).

Despite the fact that it is not binding on this Court, Magistrate Judge Lane nonetheless fully considered the *T.L.* opinion and applied it to the undisputed facts in this case. *See* Dkt. No. 44 at p. 11. Based upon that thoughtful analysis, Magistrate Judge Lane

[3] "The Supreme Court has not resolved '[w]hether these different tests are actually different in operation or simply different ways of characterizing [this] necessarily fact-bound inquiry," and some district courts have further divided them into four different tests. *Griffin v. Pub. Access Cmty. Television*, No. A10CA602SS, 2010 WL 3815797, at *3 (W.D. Tex. Sept. 27, 2010); *Johnson v. Russ*, No. 6:16-CV-00284-RP-JCM, 2016 WL 10677902, at *4 (W.D. Tex. Dec. 7, 2016), *adopted by*, 2017 WL 6403058 (W.D. Tex. Jan. 10, 2017) (identifying four tests).

concluded that – even *assuming* the Texas court of appeals correctly decided that issue of federal law in that case – the *T.L.* holding is nonetheless inapplicable because at least five different factors that the *T.L.* court expressly relied upon are ***not*** present in this case:

> . . . **[1]** that the patient was a minor child, **[2]** that the minor child's parents refused to consent to the recommended treatment, **[3]** that the hospital performed a public function in supervening the fundamental right of the parent to make medical decisions for the treatment decisions of her child, **[4]** that the state has the sovereign authority to regulate what is and is not lawful means of dying, naturally or otherwise, **and [5]** that the hospital's decision to discontinue life sustaining treatment over the wishes of the legal guardian invokes the state's delegated authority under Section 166.046 of the Texas Advanced Directives Act (TADA).

Id. (brackets added). Indeed, considering the above factors, the State court's analysis in *T.L.* affirmatively establishes that Defendants ***cannot*** be transformed into State actors under the facts alleged in this case, and Plaintiffs' claims under Section 1983 fail as a matter of law. *See* Dkt. No. 11 at pp. 15-23 & Dkt. No. 36 at pp. 3-12 (explaining in exhaustive detail all of the reasons the *T.L.* opinion is inapplicable to the allegations in this case).

C. <u>Plaintiffs' Objection Regarding the Purported "Second Public Function" Lacks Merit.</u>

As support for their objections to the above conclusion, Plaintiffs maintain the *T.L.* court identified "two traditional and exclusive public functions" that can transform a private actor into a State actor: **(1)** "the power of the state to supervene the rights of parents or guardians to make medical decisions;" **and (2)** "the sovereign authority of the state, under its police power, to regulate what is and what is not a lawful means or process of dying, naturally or otherwise." *See* Dkt. No. 45 at p. 11. Assuming that is an accurate statement of federal law within the Fifth Circuit, Plaintiffs do ***not*** contend Magistrate Judge

Lane reached an incorrect conclusion regarding the first purported public function of intervening the rights of a guardian, and therefore Plaintiffs' right to a *de novo* review of that point is waived. *See generally* Dkt. No. 45 at pp. 10-12; *see also Douglas v. United Servs. Auto. Ass'n*, 79 F.3d 1415, 1417 (5th Cir. 1996),

Instead, Plaintiffs ***inaccurately*** represent to this Court that Defendants and Magistrate Judge Lane all "focused only on two features of *T.L.*—**(1)** the fact that the case involved a minor child, not present here; **and (2)** the fact that the minor child's mother refused to consent to the recommended treatment, whereas Mr. Hickson's temporary legal guardians consented to Defendants' recommended treatment." *See* Dkt. No. 45 at pp. 11-12. Relying upon that misrepresentation, Plaintiffs object that Magistrate Judge Lane altogether failed to address the second public function of regulating "what is and what is not a lawful means or process of dying, naturally or otherwise." *Id.* As noted, Plaintiffs' representation to this Court is wholly inaccurate.

In its prior briefing to Magistrate Judge Lane, SDHP included an entire section entitled, *"Defendants Did Not Exercise 'The Second' Public Function,"* and in that section, SDHP set forth in detail the multiple reasons why Plaintiffs' argument regarding the purported second public function fails as a matter of law. *See* Dkt. No. 35 at pp. 3-5; *see also* Dkt. No. 11 at pp. 22-23 (also addressing inapplicability of the "second public function"). In sum, SDHP explained to Magistrate Judge Lane that SDHP did not exercise the purported second public function of regulating a lawful means of dying because as the *T.L.* court explained, that is a function a "medical review committee" "uniquely" exercises under the "safe harbor" provision of the statute that was at issue in the *T.L.* case – **Section**

166.046 of the Texas Health and Safety Code – and it is undisputed that ***none*** of the defendants in this lawsuit invoked or relied upon the unique provisions of Section 166.046 at any point during their treatment of Mr. Hickson.[4]

Much more importantly, as the Court can see from the block quote of Magistrate Judge Lane's opinion above, *supra* p. 6, he did ***not*** "focus[] only on two features of *T.L.*," as Plaintiffs represent to this Court in their objections. Rather, Magistrate Judge Lane cited ***five*** different factors that distinguish *T.L.* from this case, and ***two*** of those factors relate solely to the purported second public function. As Magistrate Judge Lane explained, those two factors demonstrate that "the hospital's decision [in *T.L.*] to discontinue life sustaining treatment over the wishes of the legal guardian invokes the state's delegated authority **under Section 166.046** of the Texas Advanced Directives Act (TADA)," and as noted above and as Plaintiffs concede, Section 166.046 is ***not*** at issue in this lawsuit. *See* Dkt. No. 44 at p. 11 (brackets and emphasis added). Magistrate Judge Lane therefore fully considered – and correctly rejected – Plaintiffs' argument regarding the purported "second public function." Plaintiffs' objections should therefore be overruled.

[4] As the *T.L.* court explained, "Section 166.046 of the TADA provides a set of procedures by which an attending physician may obtain immunity from civil liability and criminal prosecution for a decision to **unilaterally** discontinue life-sustaining treatment against the wishes of a patient suffering from a terminal or irreversible condition or **against the wishes of the person responsible for the patient's health care decisions**," and according to the *T.L.* court, "[t]he **centerpiece** of those procedures **is a review of the attending physician's decision by a health care facility's ethics or medical committee**." *See T.L.*, 607 S.W.3d at 24 (emphasis added).

D. Plaintiffs' Objection Regarding the Purported "Third Public Function" also Lacks Merit.

Citing to an inapplicable opinion from the United States Supreme Court, Plaintiffs also object because Magistrate Judge Lane supposedly did not expressly address their unsupported argument "that Defendants exercised a third traditional and exclusive *parens patriae* power ordinarily reserved to the State – the 'power to protect the needs of individuals with disabilities if the family is prevented for whatever reason [from] performing that role." *See* Dkt. No. 45 at pp. 12-13 (brackets included) (citing *Alfred L. Snapp & Son v. P.R.*, 458 U.S. 592, 600 (1982)). The objection is unavailing because the argument misrepresents the cited opinion and is meritless.

First, Plaintiffs' objection is unavailing because it fails to establish State action under any of the express requirements of the Supreme Court's various tests. *See* Dkt. No. 36 at pp. 6-7 (discussing the Supreme Court's tests). Second, Plaintiffs' objection fails because the case Plaintiffs cite as support did not ***in any way*** involve a Section 1983 claim, and it did not ***in any way*** address whether a private actor can be transformed into a State actor under a theory that the private actor failed, "to protect the needs of individuals with disabilities if the family is prevented for whatever reason [from] performing that role." Dkt. No. 45 at pp. 12-13. Rather, in *Alfred L. Snapp & Son v. P.R.*, the Commonwealth of Puerto Rico filed "suit in its capacity as *parens patriae* against petitioners for their alleged violations of federal law," and the Supreme Court granted the petition for *writ of certiorari* in order to consider an issue entirely irrelevant to this case – whether Puerto Rico had standing to "maintain a *parens patriae* action, despite the small number of individuals

directly involved." *See* 458 U.S. 592 & 594 (1982). Plaintiffs' reliance on that case is therefore entirely misplaced, and to the extent the Report and Recommendation did not cover it, the misplaced argument did not merit any discussion in Magistrate Judge Lane's Report and Recommendation.

E. Plaintiffs cannot Satisfy the "Joint Action" Test.

Similarly, citing to two cases from outside the Fifth Circuit, Plaintiffs' final objection regarding their Section 1983 claim is that Magistrate Judge Lane did not address their argument that the private Defendants can be transformed into State actors under "the joint action" test because, "Defendants jointly engaged with these [court-appointed] guardians who wielded" powers "in a manner attributable to the state." *See* Dkt. No. 45 at p. 13-14 (brackets added) (citing *Reguli v. Guffee*, 371 Fed. Appx. 590, 601 (6th Cir. 2010); *Kirtley v. Rainey*, 326 F.3d 1088, 1095 (9th Cir. 2003); *Thomas v. Morrow*, 781 F.2d 367, 377 (4th Cir. 1986)). This argument also lacks merit because the cases Plaintiffs cite do ***not*** support Plaintiffs' argument, and Plaintiffs' allegations do ***not*** satisfy the Supreme Court's joint action test.

1. A Guardian is not a State Actor

First, a review of the only two cases Plaintiffs have cited on this issue reveals Plaintiffs are incorrect that a guardian qualifies as a State actor.[5]

In the first case Plaintiffs have cited – *Kirtley v. Rainey* – the Ninth Circuit exhaustively applied all of the "tests used to identify state action," and based upon its

[5] Notably, Plaintiffs sued Mr. Hickson's guardians in State court, ***but*** in that lawsuit, Plaintiffs are ***not*** asserting a section 1983 claim against the guardians. *See* Dkt. No. 11-1.

application of those tests, the Court flatly rejected the plaintiff's argument, "[t]hat a guardian essentially functions as an officer of the court and therefore acts under color of state law." *See* 326 F.3d 1088, 1092-95 (9th Cir. 2003). Directly relevant to Plaintiffs' objection to Magistrate Judge Lane's recommendation, the Court expressly held that "the joint action test is not satisfied with respect to the guardian's functions as an advocate." *Id.* at 1094. In reaching that holding, the Ninth Circuit acknowledged, "the guardian is appointed by a state actor, is paid by the state, and is subject to regulation by state law," but it concluded "there the nexus ends." *Id.*

In the second case Plaintiffs have cited – *Reguli v. Guffee* – the Sixth Circuit also expressly rejected the plaintiff's assertion that the "director of the Teen Peace program that [the minor] was required by court order to attend" was a State actor for purposes of section 1983, and in reaching that conclusion, the Court agreed with the Ninth Circuit's holding that a court-appointed guardian is ***not*** a State actor. *See* 371 F. App'x 590, 600 (6th Cir. 2010) (quoting *Kirtley,* 326 F.3d at 1095).

Plaintiffs' reliance on the above cases is therefore entirely misplaced and did not merit any discussion in Magistrate Judge Lane's Report and Recommendation. Significantly, Plaintiffs have not cited any authority from within the Fifth Circuit to establish a court-appointed guardian qualifies as a State actor, but a review of that precedent further confirms that Plaintiffs' argument lacks merit. As Judge Xavier Rodriguez previously observed, numerous federal courts across the country have held, "guardians and attorneys *ad litem* are not state actors merely by their positions or because a court appoints them," and therefore, "the Fifth Circuit has upheld a district

court's decision that found a guardian was not a state actor when she only participated in court proceedings, complied with court orders, and acted within her discretion as guardian to continue housing the plaintiff in an assisted living facility." *Cokley v. Barriga*, No. SA-14-CV-945-XR, 2014 WL 5469834, at *2 (W.D. Tex. Oct. 28, 2014) (collecting cases to hold that "alleging Defendants continue to have Cokley live at Morningside, hold her driver's license, house and car keys, and otherwise acting within their discretion as Cokley's guardian and guardian *ad litem,* Cokley fails to allege sufficient facts to show state action.").[6] Plaintiffs' objection is therefore directly contrary to the applicable precedent, and it fails to establish this Court should reject Magistrate Judge Lane's Recommendation.

[6] *Accord, e.g., Collins v. Texas Dep't of Fam. & Protective Servs.*, No. 5:19-CV-219-BQ, 2020 WL 3421497, at *5 (N.D. Tex. Apr. 22, 2020) ("Courts have held that, although guardians and attorneys ad litem are appointed by the state to represent the interests of an individual, they *do not* act under color of state law because their loyalties are to their client, not the state."), *adopted by*, 2020 WL 3421883 (N.D. Tex. June 22, 2020); *Stanton v. Heiberg*, No. 4:18-CV-405-ALM-CAN, 2019 WL 5390612, at *4 (E.D. Tex. July 25, 2019) ("Plaintiff alleges that Defendant Heiberg is an individual who served as executor of Decedent's estate, which for the same reasons enumerated above, is insufficient to establish that Heiberg is a state actor."), *aff'd*, 826 F. App'x 409 (5th Cir. 2020); *Johnston v. Dexel*, No. CV H-16-3215, 2017 WL 11612500, at *6 (S.D. Tex. Aug. 18, 2017) ("courts have held that guardians and attorneys ad litem are not state actors merely by virtue of their appointment by courts. . . This court reached the same conclusion"); *Wise v. Wilmoth*, No. 3:16-CV-1039-M-BH, 2017 WL 3267924, at *8 (N.D. Tex. July 3, 2017) ("To the extent that he relies on Mitchell's status as either a guardian for Marie Wise or executor of her estate, courts have rejected the position that guardians or executors were state actors because of their position or because a court appointed them."), *adopted by*, 2017 WL 3267727 (N.D. Tex. July 31, 2017).

2. There is no Conspiracy

Second, even assuming entirely for the sake of argument that Mr. Hickson's guardian could somehow qualify as a State actor, Plaintiffs still cannot satisfy the joint action test. The Fifth Circuit recently explained that, "[t]he joint action test asks whether private actors were 'willful participant[s] in joint action with the State or its agents." *Pikaluk v. Horseshoe Ent., L.P.*, 810 F. App'x 243, 247 (5th Cir. 2020). "To maintain a claim that a private citizen is liable under § 1983 based on joint action with state officials," the plaintiff must allege facts showing: **(1)** "an agreement or meeting of the minds between the state actor and the private actor to engage in a conspiracy to deprive the plaintiff of a constitutional right," **and (2)** "that the private actor was a willing participant in joint activity with the state or its agents." *Id.* Plaintiffs' allegations fail to satisfy both prongs of the joint action test.

Looking to the above requirements for the joint action test, Plaintiffs have not alleged "an agreement or meeting of the minds between the state actor and the private actor to engage in a conspiracy[.]" *Pikaluk*, 810 F. App'x at 247. That is, Plaintiffs have not even generally alleged any conspiracy existed, much less specifically alleged that all of the defendants in this case had an agreement or meeting of the minds with the Mr. Hickson's guardians to engage in a conspiracy to terminate Mr. Hickson's life. To the contrary, Plaintiffs' primary complaint in this case is that there was ***no*** meeting of the minds between Mr. Hickson's guardians and Defendants, because Defendants allegedly failed "to guide Ms. Drake through the substituted decision-making process," and Defendants allegedly failed "to provide Mr. Hickson's temporary guardians with sufficient information by which

to make an informed consent for the change of his status from full code to DNR and transfer to hospice[.]" *See* Dkt. No. 1 at 117 & 120; *see also, e.g.,* ¶¶103, 106, 109, 114, 117, 120. Thus, Plaintiffs' pleadings affirmatively negate the essential elements of the joint action test. For this additional reason, Plaintiffs' objections fail to identify any error in Magistrate Judge Lane's Recommendation. *See, e.g., Brinkmann v. Johnston*, 793 F.2d 111, 112 (5th Cir. 1986) ("Although private acts may support an action for liability under 42 U.S.C. § 1983 if the individual is 'a willing participant in a joint action with the state or its agents,' Mr. Brinkmann's complaint in the present case does not state any factual basis to support his conspiracy charges.").[7]

III.
PLAINTIFFS' CLAIMS UNDER THE RA AND ACA ALSO FAIL AS A MATTER OF LAW

With respect to their claims against SDHP under Section 504 of the Rehabilitation Act (**"the RA"**) and Section 1557 of the Affordable Care Act (**"the ACA"**), Plaintiffs do ***not*** dispute the legal foundation for Magistrate Judge Lane's recommended dismissal, which is that "every circuit court that has addressed the issue has held that a medical treatment decision cannot form the basis of a Rehabilitation Act claim." *See* Dkt. No. 44 at

[7] *Accord, e.g., Johnson v. Russ*, No. 6:16-CV-00284-RP-JCM, 2016 WL 10677902, at *4 (W.D. Tex. Dec. 7, 2016) ("Plaintiff does not allege a conspiracy existed between the City of Hearne and the Firm. . . Therefore, Plaintiff fails to establish that the City of Hearne and the Firm engaged in joint action to deprive the Plaintiff of his federally protected rights."), *adopted by*, 2017 WL 6403058 (W.D. Tex. Jan. 10, 2017); *Redhawk v. Hays Cty.*, No. A-09-CA-76-SS, 2009 WL 10701314, at *3 (W.D. Tex. Apr. 2, 2009) ("Without such joint action or conspiracy, Cabela's cannot be said to have acted under color of state law."); *Winters v. Greenwood*, No. A-11-CA-1109-LY, 2012 WL 13705, at *1 (W.D. Tex. Jan. 3, 2012) ("the plaintiff must allege and prove an agreement between the private party and persons acting under color of state law to commit an illegal act and an actual deprivation of the plaintiff's constitutional rights in furtherance of that agreement.").

p. 7 (citing *Kim v. HCA Healthcare, Inc*., 2021 WL 859131, at *2 (N.D. Tex. Mar. 7, 2021)); *see also* Dkt. No. at n. 2 (string citing cases on the same issue). Plaintiffs also do ***not*** dispute that this Court has previously agreed with those circuit holdings and expressly concluded that, "Section 504 claims . . . cannot be based on medical treatment decisions," because such a broad application of the statute "would turn every disabled person's medical malpractice claim into a suit under Section 504." *G.T. by Rolla v. Epic Health Servs*., No. 17-CV-1127-LY, 2018 WL 8619803, at *4 & *6 (W.D. Tex. Dec. 27, 2018) (Lane, M.J.), *adopted by*, 2019 WL 2565245 (W.D. Tex. Apr. 11, 2019) (Yeakel, J.).

Instead of disputing those foundational points of law, Plaintiffs attempt to distinguish the weight of authorities cited in SDHP's briefing and in Magistrate Judge Lane's Report and Recommendation. *See* Dkt. No. 45 at pp. 4-10. Plaintiffs' attempt to distinguish those numerous cases is unavailing because when deciding the question of law as to "whether a claim is a health care liability claim," federal courts "look to the nature and essence of the claim, rather than the way it was pleaded," and looking to the nature and essence of Plaintiffs' allegations in this case, Magistrate Judge Lane correctly concluded that Plaintiffs' RA claim and ACA claim are healthcare liability claims under Texas law. *See G.T. by Rolla*, 2018 WL 8619803, at *3 (Lane, M.J.).

More specifically, Plaintiffs rely upon the exact same factual allegations to support their medical-malpractice claims as they do to support their discrimination claims. In their Complaint, Plaintiffs acknowledge that after his admission to the hospital: Mr. Hickson "was being treated with antibiotics and was on oxygen for breathing support;" his "health fluctuated;" "he had intermittent desaturations of oxygen;" he "experienced lung

aspiration;" he "required assistance to clear secretions;" "a bacterial organism had been identified;" and he was "experiencing high fevers." *See* Dkt. No. 1 at ¶¶35 & 37. Plaintiffs also allege that after providing various forms of treatment, the physicians ultimately ***recommended*** to the court-appointed guardians for Defendants to: stop administering antibiotics; transfer Mr. Hickson to inpatient hospice; change his code status from full code to DNR; and withdraw all life-sustaining treatment, including artificial nutrition and hydration. *Id.* at ¶¶ 6-9, 32-52, 63. Plaintiffs maintain that in order to support their recommendations to the guardians, Mr. Hickson's physicians recorded that he was in "multi-organ system failure," which Plaintiffs allege was "false." *Id.* at ¶ 43.

The above allegations reveal that Plaintiffs' claims under the RA and ACA are based solely upon the physicians' ultimate medical recommendations to place "Mr. Hickson on hospice care and/or designating him as DNR," and those disability claims precisely mirror their medical-malpractice claims. *See* Dkt. No. 1 at ¶¶56-66.[8] With respect to both claims, Plaintiffs simply disagree with the physicians' ultimate post-treatment prognosis that due in part to his pre-existing comorbidities, Mr. Hickson's condition (*i.e.* the presence of pneumonia and sepsis, being COVID-positive, *et. al.*) was irreversible and/or terminal; and

[8] Notably, in their objections to Magistrate Judge Lane's Report and Recommendation, Plaintiffs repeatedly assert that Defendants "***refused*** to provide medical care and treatment to Mr. Hickson," but their Complaint reveals Plaintiffs simply disagree with the treatment that was indisputably provided. *See* Dkt. No. 45 at pp. 5-10. Perhaps more importantly, in the brief they submitted to Magistrate Judge Lane, Plaintiffs did not allege Defendants refused to provide treatment to Mr. Hickson; rather, they acknowledged that Defendants provided treatment but alleged differential treatment was provided in comparison to other patients: "Plaintiffs . . . allege that Michael Hickson received differential treatment (in the form of the withholding of nutrition and hydration until he perished) vis-à-vis members of a different group (others hospitalized with COVID-19 who had no underlying and unrelated disability) on the basis of his disability." *See* Dkt. No. 19 at pp. 9-10.

Plaintiffs also disagree with the physicians' accompanying recommendation to withdraw further life-sustaining treatment for those conditions. *Id.* at ¶¶41, 63, 64, 78-82, 89-90, & 126-127.

Regardless of whether those identical allegations are labeled as negligence or discrimination, they are indisputably healthcare liability claims under Texas law – ***not*** discrimination claims – because they are both causes of action "against a health care provider or physician for treatment, lack of treatment, or other claimed departure from accepted standards of medical care, or health care . . . which proximately results in . . . death of a claimant[.]" TEX. CIV. PRAC. & REM. CODE ANN. § 74.001. Considering that indisputable fact, this case cannot be distinguished from the great weight of authorities discussed and cited in Magistrate Lane's Report and Recommendation. Accordingly, this Court's prior precedent fully supports Magistrate Judge Lane's recommendation for this Court to dismiss Plaintiffs' claims against SDHP for alleged violations of the RA and ACA. *See G.T. by Rolla v. Epic Health Servs*., No. 17-CV-1127-LY, 2018 WL 8619803, at *4 (W.D. Tex. Dec. 27, 2018) (Lane, M.J.), *adopted by*, 2019 WL 2565245 (W.D. Tex. Apr. 11, 2019). Plaintiffs' objections therefore must be overruled.

IV.
CONCLUSION AND PRAYER FOR RELIEF

In conclusion, for all of the reasons set forth above and in Defendants' prior briefing to Magistrate Judge Lane, Defendants respectfully request this Court to overrule Plaintiffs' objections to Magistrate Judge Lane's Report and Recommendation, to enter an Order adopting in full Magistrate Judge Lane's Report and Recommendation, to dismiss ***with***

prejudice all of the claims at issue, and for any other relief to which Defendants are justly entitled.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify by my signature below that a true and correct copy of the foregoing document was served on all counsel of record on this 6th day of September, 2022.

By: */s/ Ryan C. Bueche*