SCOTT A. KELLER
SOLICITOR GENERAL

(512) 936-1700
SCOTT.KELLER@OAG.TEXAS.GOV

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Via E-Filing

Blake Hawthorne, Clerk
Supreme Court of Texas
P.O. Box 12248
Austin, Texas 78711

Re: No. 16-0549; *Nazari v. State*
No. 16-0671; *In re Xerox Corporation*

Dear Mr. Hawthorne,

This letter brief for the State of Texas responds to Xerox's recent letter brief concerning the two cases cited above.

In this brief the State makes two main points: First, Xerox fails to show that the subsection (a)(1) remedy of the TMFPA requires the State to prove the extent of its harm from an unlawful act, *i.e.*, its damages. The Legislature designed the subsection (a)(1) remedy to relieve the State of that requirement. Second, even were the subsection (a)(1) remedy labeled damages, that would not change the conclusions reached below on the application of chapter 33 fault apportionment (*Xerox* mandamus) or sovereign immunity (*Nazari* appeal).

1. Scope of the remedy. Xerox still fails to meaningfully grapple with the relevant statutory text. Instead, Xerox simply emphasizes that subsection (a)(1)'s remedy has a but-for causation requirement. Letter Br. 3 (citing *Burrage v. United States*, 134 S. Ct. 881 (2014), for the proposition that the phrase "as a results of" requires but-for causation). But that observation shows nothing of relevance here. The State acknowledges that the phrase "as a result of" is a causation requirement; however, this says nothing about the *object* of that causation

requirement. The statutory text here is clear that the State must show causation between the "unlawful act" and merely "any payment" made by the State—not financial harm or damages. Tex. Hum. Res. Code § 36.052(a)(1).

Put differently, the mere existence of some causation requirement—the point that Xerox trumpets—is not the same as a requirement that the claimant prove *the extent of its harm* caused by an act. The law routinely provides remedies defined by something other than the plaintiff's harm:

- **Restitution.** The defining characteristic of restitution is that it "measures recovery by defendant's gain rather than plaintiff's loss." Douglas Laycock, *The Scope and Significance of Restitution*, 67 Tex. L. Rev. 1277, 1279 (1989); *accord* 1 D. Dobbs, *Law of Remedies* § 4.1(1), at 557 (2d ed. 1993) ("As we have seen, *restitution* is not *damages*"). Because the extent of a plaintiff's harm in some contexts "is hard to prove," Laycock, *supra*, at 1288, this remedy turns on a different showing: restoring what the wrongful conduct caused the defendant to get.

- **CMPL assessments.** As a remedy for Medicaid-program violations, the federal government may recover an "assessment" on top of a civil penalty. 42 U.S.C. § 1320a-7a(a). For example, making a false statement when applying to be a Medicaid provider allows the United States to recover an assessment of up to three times "the total amount claimed for each item or service for which payment was made based upon the application." *Id.* This remedy has a causation requirement ("based upon the application"). But that requirement's object is not *damages* or *harm* from the prohibited application. "Proof of loss by the United States is not an element of the CMPL." *See Horras v. Leavitt*, 495 F.3d 894, 903 (8th Cir. 2007).

- **Criminal fines.** Proof of damages to the Medicaid program is also not required to set the Texas offense grade and criminal fine for Medicaid fraud. Rather, like the CMPL, the criminal fine is based on "the amount of any payment" or "claim for payment" "as a result of" the offense. Tex. Penal Code § 35A.02(b). Setting the fine thus requires a showing of causation. But the causal result upon which the fine turns is not damages or an overpayment. It is any payment or even a mere claim for payment. *Id.*

- **Statutory damages.** Statutory damages excuse proof of a plaintiff's harm. For example, the Copyright Act allows a plaintiff to elect between "actual

> damages and profits" or "statutory damages" within a fixed range. 17 U.S.C. § 504(c). Because measuring a plaintiff's harm from infringement may be "difficult or impossible," Congress provided this alternative remedy that does not require "proof of damages." *Douglas v. Cunningham*, 294 U.S. 207, 209 (1935) (discussing predecessor provision in Copyright Act of 1909).

In short, a host of remedies do not require the plaintiff to prove the extent of harm that it suffered from an unlawful act. These remedies award plaintiffs a recovery measured differently—including by other results caused by the act.

In resisting this point, Xerox cites (Letter Br. 3) the discussion of but-for causation in *Ryder Integrated Logistics, Inc. v. Fayette County*, 453 S.W.3d 922 (Tex. 2015). But *Ryder* simply analyzed whether the Tort Claims Act's waiver of sovereign immunity applied because "property damage, personal injury, or death arises from" the operation or use of a motor vehicle. *Id.* at 927. *Ryder* defined "arises from" to require factual causation, which in that context meant: "without [the act] the injury would not have occurred." *Id.* at 929.

That test accurately applies but-for causation *in the Tort Claims Act context*, where that statute lists three specific types of injury—in stark contrast to the "any payment" language in TMFPA § 36.052(a)(1). But *Ryder* did not hold that the only possible object of a but-for causation requirement, in all of remedies law, is a plaintiff's harm. *Ryder* was not a remedies case at all.

The question here is the *object* of subsection (a)(1)'s causation requirement. And Xerox's approach to that question is to silently rewrite the statute. Xerox repeatedly says that the subsection (a)(1) remedy measures the "harm" or "unauthorized payment" or "damages" caused by a Medicaid unlawful act. Letter Br. 1, 4, 5. But the statute nowhere uses that language. Rather, the Legislature carefully drafted subsection (a)(1) to award the State "any payment" resulting from an unlawful act. Tex. Hum. Res. Code § 36.052(a)(1). It follows then, that the object of subsection (a)(1)'s causation requirement is "any payment" made by the Medicaid program, not any overpayment.

If the Legislature had wished § 36.052(a)(1) to require the State to prove the extent of its harm or the overpayment caused by an unlawful act, it knew how to do so. The Legislature did expressly create a "damages" remedy in a different

TMFPA subchapter, for a retaliation cause of action that whistleblowers can bring. *Id.* § 36.115. But the Legislature chose different language in § 36.052(a)(1). That use of different language within the same statute confirms that the Legislature meant different things in each place. *See* Antonin Scalia & Bryan A. Garner, *Reading Law* § 25, at 170 (2012) ("[W]here the document has used one term in one place, and a materially different term in another, the presumption is that the different term denotes a different idea.").

Likewise, if the Legislature had meant what Xerox imagines, the Legislature could have simply copied the "damages" language found in the federal False Claims Act or the numerous state laws that defendants would like to rewrite the TMFPA to resemble. *See, e.g.*, Xerox Bench Ex. Tab 2; Nazari Reply Br. 9. Those laws all explicitly provide a "damages" remedy. It would have been easy for the Legislature to likewise write "damages" in subsection (a)(1) if that were the intended remedy. But it did not. That contrast speaks volumes.

What the Legislature did call the subsection (a)(1) remedy, originally, is "restitution." State's *Nazari* Bench Ex. 3. That is a different remedy than damages; it turns on the defendant's gain, not the plaintiff's harm. Then, in 2005, the Legislature added the final clause of subsection (a)(1), which expanded the remedy. The Legislature therefore dropped the label "restitution." *Id.* Given that amendment to make the remedy more potent, it would be strange to now treat the remedy as mere compensatory damages. In every iteration, this remedy has not required the State to prove the extent of its harm from an unlawful act.

That design comports with the federal CMPL and makes sound policy sense. Each unlawful act, by its commission, works a variety of harms that are often not easily capable of quantification. Those harms include: (1) the potential that a payment resulting from the violation exceeds what would be paid without a violation, if anything at all, and the burden of deciding that counterfactual inquiry; (2) impairment of integrity and confidence in the Medicaid program when, as the State intends to show happened here, one actor's unlawful conduct becomes known to others and leads others to commit additional unlawful acts; and (3) the need to spend resources detecting, investigating, and prosecuting program violations, which diverts resources from Medicaid recipients. *See* State's *Xerox* Br. 11. The need to quantify those serious but complex harms is obviated by the Legislature's choice to use the amount of *any payments* resulting from an unlawful act as a gauge of the unlawful act's severity.

Xerox also exploits loose terminology to confuse the subsection (a)(1) remedy with the extent of the State's harm. At oral argument, the State agreed with Justice Boyd that the subsection (a)(1) remedy requires proving the amount of "that loss, the payment" resulting from an unlawful act. Xerox Letter Br. 2. Justice Boyd stated that he was "using 'loss' in a non-partisan way." *Id.* The State understood that neutral usage to be simply the fact of a disbursement—*i.e.*, a payment—not Xerox's preferred usage equating "loss" with "overpayment."

But Xerox and the Nazari defendants are now using "loss" in the latter sense, to mean the State's *overpayment* or *harm* from an act. For example, Xerox's letter brief argues (at page 4) that the TMFPA requires proof of an "unauthorized payment"—a phrase notably absent in the text of the statute. *Cf.* Tex. Hum. Res. Code § 36.052(a)(1) (using "any payment," not "unauthorized payment").

To see the difference, take one of the unlawful acts charged in the *Nazari* case: "knowingly present[ing] . . . a claim for payment under the Medicaid program for a product provided or a service rendered by a person who . . . is not licensed in the manner claimed." *Id.* § 36.002(6); *see Nazari* CR.126. This unlawful act is complete upon presenting a claim falsifying the credentials of who performed a service. Regardless of any "actual" value of the service delivered, the State would be entitled under subsection (a)(1) to the "amount of any payment" made because of the presentation of such a claim.

Defendants' position would not allow this. In their view, the payment made because a party presented that claim does not define the subsection (a)(1) remedy. Rather, defendants argue that the State must prove its *over*payment—what portion of the payment made because of the claim exceeds the payment that might have issued, in a counterfactual world without an unlawful act, because of some actual value received by the State. On that view, the State must take discovery about and prove the quality of the service or product delivered to the Medicaid patient, if any, by the person whose licensure was misrepresented, and must then prove that service's or product's value or what payment might hypothetically have been authorized for it. That counterfactual analysis is what defendants mean by "loss," as opposed to the "non-partisan," neutral usage of Justice Boyd at oral argument.

The counterfactual analysis required by such an overpayment-only remedy would impose heavy burdens on the State, in some instances to the point of making the remedy impracticable to prove. The United States Congress already avoided

that result in the CMPL by authorizing a different remedy for Medicaid-program violations. So did the Texas Legislature here, by adopting a different remedy in the TMFPA. Moreover, the Legislature directed that the TMFPA "shall be liberally construed" in favor of the Medicaid program. Tex. Hum. Res. Code § 11.02. In short, the same policy concerns animating the CMPL are why subsection (a)(1) "does not limit the recovery to any type of overpayment; rather, the provision authorizes the full recovery of the payment." *Nazari v. State*, 497 S.W.3d 169, 179 (Tex. App.—Austin 2016, pet. granted).

The State has also illustrated the difference between a resulting *over*payment and *any* resulting payment by using the example of a prohibited kickback scheme. State's *Xerox* Br. 11-12. For example, it is a TMFPA "unlawful act" to pay a kickback to another provider for referring a patient for Medicaid services. Tex. Hum. Res. Code § 32.039(b)(1-d) (incorporated by reference in Tex. Hum. Res. Code § 36.002(13)). Xerox now argues that this example is not illustrative because the unlawful act "would not result in a payment" supporting a subsection (a)(1) civil remedy. Letter Br. 4.

That is incorrect. The very reason that a provider would pay a kickback for a referring a Medicaid patient is to then bill Medicaid for treating the patient. The resulting payment may itself be authorized by Medicaid policy, if the provider treated the patient and submitted a proper claim. So there is no unauthorized payment in this scenario. But the payment to the treating provider was still made "as a result of the unlawful act" because the kickback caused the referral, which caused the payment to the treating provider. Tex. Hum. Res. Code §36.052(a)(1). In seeking to obscure this point, Xerox is again silently conflating an "unauthorized payment" resulting from an act (Xerox Letter Br. 4) and "any payment" resulting from an act. Only the latter phrase is in the statute.

Lastly, Xerox offers unwarranted but perhaps misleading celebration in noting that "the State has conceded this point," namely, that subsection (a)(1) has a but-for causation requirement. Letter Br. 3 (emphasis in original). The State has never disputed that "as a result of" is a causation-in-fact standard. But that standard applies to *any payment* caused in fact by a prohibited act. Nowhere has the State conceded that standard only measures *overpayments* caused by a prohibited act.

2. Effects in this litigation. Once the substantive scope of the subsection (a)(1) remedy is clear, the Court may then confront the question of what to call that

remedy. Xerox suggests that the remedy is best called "damages." Letter Br. 4. The State maintains that the best label is a "civil remedy," which is the label used in section 36.052's title and whose generality reflects the various purposes and broad range of harms that animate this statutory remedy. Regardless, whatever label is chosen does not drive the remedy's substance. The substance is driven by the statutory text.

Moreover, even if the label "damages" is applied to the subsection (a)(1) remedy—perhaps on the view that the remedy is liquidated damages or statutory damages, rather than a civil remedy or assessment—the *Xerox* mandamus and *Nazari* appeal should still be decided for the State.

Chapter 33 fault apportionment still would not apply because, regardless of the label for the subsection (a)(1) remedy, it does not require proving an *overpayment* by the State. Chapter 33 focuses, not on fault for the extent of damages, but on fault for "the *harm* for which relief is sought." Tex. Civ. Prac. & Rem. Code § 33.002(a) (emphasis added). Unlike with a damages remedy, the subsection (a)(1) remedy does not correspond to a unitary harm, for which multiple people might be at fault. Rather, the only harms necessary to recover under subsection (a)(1) are the harms inherent to each unlawful act—burdening the State with the costs of investigation and prosecution of each unlawful act, and undermining the integrity of the Medicaid program. No further harm need be shown; the subsection (a)(1) remedy does not require proving the extent of any overpayment. And because Xerox has not alleged that anyone else is responsible for its own unlawful acts or their inherent harms, chapter 33 does not apply. *See* State's *Xerox* Br. 43-48.

Independently, excusing the subsection (a)(1) liability under chapter 33 when a defendant has not jumped through the hoops that the Legislature required to avoid that remedy—assisting an Attorney General investigation—would undermine and conflict with the TMFPA. *See id.* at 51; Tex. Hum. Res. Code § 36.052(c).

The *Reata* exception to sovereign immunity from counterclaims also would not apply. The Nazari defendants' "counterclaims" are not germane and connected to this action, as to fall within the recoupment exception. As counsel for the Nazari defendants repeatedly conceded at oral argument, the counterclaims are "independent" of the State's allegations under the TMFPA. They do not arise of the same facts that the State places in dispute, as with the defendants' claim in *City of Dallas v. Albert*, 354 S.W.3d 368, 375 (Tex. 2011), that a disputed payment was

not an underpayment but an overpayment. *See* State's *Nazari* Br. 49-51. The counterclaims are not "properly defensive" in this TMFPA action. Moreover, the Legislature spoke to sovereign immunity in the TMFPA, seeing fit to waive it only for one limited type of claim not brought here—underscoring that the rationale animating *Reata* does not apply here. *See* State's *Nazari* Br. 47.

Respectfully submitted.

/s/ Scott A. Keller
Scott A. Keller
Solicitor General
State Bar No. 24062822
scott.keller@oag.texas.gov

Counsel for the State of Texas

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On February 16, 2018, this document was served by electronic means on:

Counsel for Appellants in No. 16-0549 (Behzad Nazari et al.):

J. Woodfin Jones
Alexander Dubose Jefferson & Townsend, LLP
515 Congress Ave., Suite 2350
Austin, Texas 78701

Jason Ray
Riggs & Ray, P.C.
506 W. 14th St., Suite A
Austin, Texas 78701

Counsel for Petitioners in No. 16-0671 (Xerox Corporation et al.):

Constance H. Pfeiffer
Beck Redden LLP
1221 McKinney St., Suite 4500
Houston, Texas 77010

Robert C. Walters
Gibson, Dunn & Crutcher LLP
2100 McKinney Ave., Suite 1100
Dallas, Texas 75201

David M. Gunn
Eric J.R. Nichols
Christopher R. Cowan
Beck Redden LLP
515 Congress Ave., Suite 1750
Austin, Texas 78701

/s/ Scott A. Keller
Scott A. Keller