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SUPREME COURT OF TEXAS
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No. 19-0390

IN THE SUPREME COURT OF TEXAS

EVELYN KELLY, INDIVIDUALLY AND ON BEHALF OF THE ESTATE OF DAVID CHRISTOPHER DUNN,
Petitioner,

V.

HOUSTON METHODIST HOSPITAL,
Respondent.

On Petition from the First Court of Appeals of Texas at Houston
No. 01-17-00866-CV

BRIEF OF AMICUS CURIAE DONALD JONES, CHRISTINE LONG, EBELE AGU, AND SANDRA HOLLIER IN SUPPORT OF PETITIONER EVELYN KELLY, INDIVIDUALLY AND ON BEHALF OF THE ESTATE OF DAVID CHRISTOPHER DUNN

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STATEMENT OF INTEREST OF AMICUS CURIAE

Donald Jones, Christine Long, Ebele Agu, and Sandra Hollier ("Amicus Curiae") all share a heart-wrenching experience. Each was responsible for the medical decisions of a family member who was receiving life-sustaining treatment at a Texas hospital when the hospital carried out the procedures prescribed by Texas Health and Safety Code section 166.046 to remove the life-sustaining treatment of their family member[1] over their objection.

Although section 166.046 did not provide them with a right to be heard during the ethics committee meeting at which the hospital determined to remove life-sustaining treatment, they would like to be heard now. Their request is simple.

They ask that the highest court in Texas determine whether the doors to the courthouse are open to those seeking a determination regarding whether the state statute that outlines the procedures the hospitals used as a liability shield comports with the requirements of procedural due process.

In *Dunn v. Houston Methodist Hospital*, No. 01-17-00866-CV, 2019 WL 1339505 (Tex. App.—Houston [1st Dist.] Mar. 26, 2019, pet. filed) ("*Dunn*"), the First Court of Appeals determined that Dunn's estate's claims, relating to whether section 166.046 comports with due process, are moot because Dunn succumbed to

[1] Donald Jones was responsible for the medical decisions of his wife, Carolyn Jones. Christine Long was responsible for the medical decisions of her daughter, Breanna Amerson. Ebele Agu was responsible for the medical decisions of her mother, Patricia Ikenma. Sandra Hollier was responsible for the medical decisions of her four-year-old son, Clifton F. Tarrant, II.

his terminal illness. Amicus curiae respectfully request that the Supreme Court of Texas grant Dunn's Petition for Review because the First Court of Appeals's holding in *Dunn* prevents judicial review of section 166.046.

The stories of amicus curiae show how the trial court's order dismissing Christopher Dunn's procedural-due process claims as moot, and the analysis in *Dunn* affirming the trial court's order, will prevent other Texans from bringing procedural-due process claims challenging the procedure outlined in section 166.046.

Amicus curiae therefore file this brief in support of Petitioner Evelyn Kelly, Individually and on Behalf of the Estate of David Christopher Dunn, and respectfully urge the Court to grant the Petition.[2]

ARGUMENT

A. This case is appropriate for review by the Supreme Court of Texas.

Christopher Dunn was a patient at Methodist Hospital. He wanted to live at the time the hospital began procedures outlined by Texas Health and Safety Code section 166.046 to remove his life-sustaining treatment. After he died, his estate brought claims under Chapter 37 of the Texas Civil Practices and Remedies Code and 42 United States Code section 1983, alleging that Methodist Hospital's use of the section-166.046 process violated his procedural-due-process rights because the

[2] Pursuant to Texas Rule of Appellate Procedure 11, Donald Jones, Christine Long, Ebele Agu and Sandra Hollier certify that this brief is tendered on their behalf and the fee paid for preparing for the brief was paid by Kathaleen Wall.

procedure does not provide meaningful notice and opportunity to be heard regarding whether life-sustaining treatment should be removed against a patient's wishes.

The factors that the Supreme Court considers in deciding whether to grant review are set forth in Texas Rule of Appellate Procedure 56.1. *See* Tex. R. App. P. 56.1. This case provides the Supreme Court with an opportunity to adopt the public-interest exception to the mootness doctrine. The intermediate courts of appeals are split regarding whether Texas law recognizes a public-interest exception to the mootness doctrine, which has been adopted by the vast majority of States. The validity of the public-interest exception to the mootness doctrine is a question of state law that should be, but has not yet been, resolved by the High Court. Further, the First Court of Appeals's erroneous holding that Dunn's estate's claims are moot creates law that would prevent other individuals from asserting constitutional claims relating to the validity of a state statute that allows deprivation of life without adequate process.

B. The Supreme Court should grant review and adopt the public-interest exception to the mootness doctrine.

The Supreme Court should grant review and adopt a substantial-public-interest exception to the mootness doctrine. The substantial-public-interest exception to the mootness doctrine allows review of a question of considerable public importance if that question is capable of repetition between either the same parties or other members of the public, but for some reason evades review. *See*

F.D.I.C. v. Nueces Cnty, 888 S.W.2d 766, 767 (Tex. 1994); *Univ. Interscholastic League v. Buchanan*, 848 S.W.2d 298, 304 (Tex. App.—Austin 1993, no pet.). In this case, a public-interest exception to the mootness doctrine would allow the trial court to assert jurisdiction over Dunn's estate's claims because although Dunn is deceased and Methodist Hospital cannot violate his procedural-due-process rights again, Methodist Hospital can use the same procedure to violate the procedural-due-process rights of other members of the public. *See Nueces Cnty*, 888 S.W.2d at 767; *Buchanan,* 848 S.W.2d at 304.

The Supreme Court has reserved the question of whether Texas will recognize a substantial-public-interest exception to the mootness doctrine for an appropriate case. *See Nueces Cnty*, 888 S.W.2d at 767. The issue has percolated in the intermediate courts of appeals where there is a significant circuit split regarding whether a public interest exception to the mootness doctrine should be adopted. The First, Fifth, Seventh, and Twelfth Courts of Appeals have refused to recognize the public interest exception to the mootness doctrine until the Supreme Court of Texas recognizes the exception. *See Houston Chronicle Pub. Co. v. Thomas*, 196 S.W.3d 396, 400 (Tex. App.—Houston [1st Dist.] no pet.); *State Farm. Mut. Automobile Ins. Co. v. Carmichael*, No. 05-0600990-CV, 1998 WL 122409, at *1 n.3 (Tex. App.—Dallas March, 20, 1998, no pet.) (not designated for publication); *Ex parte Huerta*, --S.W.3d--,--, No. 07-28-00066-CR, 2018 WL 344625, at *4 (Tex. App.—Amarillo

Jul. 17, 2018, pet. ref'd); *In re Smith Cty.*, 521 S.W.3d 447, 454 (Tex. App.—Tyler 2017, orig. proceeding). The Third, Sixth, and Thirteenth Courts of Appeals have recognized the public interest exception to the mootness doctrine. *See Buchanan*, 848 S.W.2d at 304; *Securtec, Inc. v. Cnty of Gregg*, 106 S.W.3d 803, 810–11 (Tex. App.—Texarkana 2003, pet. denied); *Ngo v. Ngo*, 133 S.W.3d 688, 692 (Tex. App.—Corpus Christi 2003, no pet.).

Texas is one of only a few states that has not adopted the substantial-public interest exception to the mootness doctrine.[3] Adopting the substantial-public-

[3] Most states have adopted the substantial-public-interest exception to the mootness doctrine. *See City of Birminghman v. Long*, 339 So. 2d 1021, 1023 (Ala. 1976); *Hayes v. Charney*, 693 P.2d 831, 834 (Alaska 1985); *Wise v. First Nat'l Bank*, 65 P.2d 1154, 1156 (Ariz. 1937); *Campbell v. State*, 846 S.W.2d 639, 640 (Ark. 1993); *Liberty Mut. Ins. Co. v. Fales*, 505 P.2d 213, 215 (Cal. 1973); *Humphrey v. Southwestern Dev. Co*., 734 P.2d 637, 639 (Colo. 1987); *McDermott Inc. v. Lewis*, 531 A.2d 206, 211 (Del. 1987); *Holly v. Auld*, 450 So.2d 217, 218 (Fla. 1984); *United Pub. Workers v. Yogi*, 62 P.3d 189 (Haw. 2002); *Idaho Sch. for Equal Educ. Opportunity v. State Bd. of Educ.*, 912 P.2d 644, 651 (Idaho 1996); *People ex rel. Wallace v. Labrenz*, 104 N.E.2d 769, 772 (Ill. 1952); *Ind. Educ. Employment Relations Bd. v. Mill Creek Classroom Teachers Ass'n*, 456 N.E.2d 709, 712 (Ind. 1983); *Rush v. Ray*, 332 N.W.2d 325, 326 (Iowa 1983); *Smith v. Martens*, 106 P.3d 28, 32 (Kan. 2005); *Brown v. Baumer*, 191 S.W.2d 235, 238 (Ky. 1946); *Campaign for Sensible Transp. v. Me. Tpk. Auth.*, 658 A.2d 213, 215 (Me. 1995); *Lloyd v. Bd. of Supervisors of Elections*, 111 A.2d 379, 382 (Md. 1954); *Lockhart v. Att'y Gen.*, 459 N.E.2d 813, 815 (Mass. 1984); *Mead v. Batchlor*, 460 N.W.2d 493, 496 (Mich. 1990); *Jasper v. Comm'r of Pub. Safety*, 642 N.W.2d 435, 439 (Minn. 2002); *Allred v. Webb*, 641 So.2d 1218, 1220 (Miss. 1994); *State ex rel. Reser v. Rush*, 562 S.W.2d 365, 367 (Mo. 1978); *State ex rel. Ronish v. Sch. Dist. No. 1 of Fergus Cnty*, 348 P.2d 797, 800 (Mont. 1960); *In re Koch*, 736 N.W.2d 716, 720 (Neb. 2007); *State v. Glusman*, 651 P.2d 639, 643 (Nev. 1982); *Town of Bedford v. Lynch*, 308 A.2d 522, 523 (N.H. 1973); *State v. Perricone*, 181 A.2d 751, 755 (N.J. 1962); *Mowrer v. Rusk*, 618 P.2d 886, 889 (N.M. 1980); *Nat'l Org. for Women v. State Div. of Human Rights*, 314 N.E.2d 867, 868 (N.Y. 1974); *N.C. State Bar v. Randolph*, 386 S.E.2d 185, 186 (N.C. 1989); *Walker v. Schneider*, 477 N.W.2d 167–70 (N.D. 1991); *Franchise Developers, Inc. v. City of Cincinnati*, 505 N.E.2d 966, 969 (Ohio 1987); *Lawrence v. Cleveland Cnty Home Loan Ass'n*, 626 P.2d 314, 315–16 (Okla. 1981); *Wortex Mills v. Textile Workers Union of Am.*, 85 A.2d 851, 857 (Pa. 1952); *In re New England Gas Co.*, 842 A.2d 545, 554 (R.I. 2004); *Sloan v. Friends of Hunley, Inc.*, 630 S.E.2d

interest exception to mootness would bring an already widely adopted and utilized exception into Texas jurisprudence. Embracing the substantial-public-interest exception to the mootness doctrine would protect Texans against wrongs capable of repetition against others who are not necessarily parties to the dispute at bar.

C. The appellate court's failure to find an applicable exception to mootness is an error of great importance to Texas jurisprudence because it makes Texas Health and Safety Code section 166.046 unreviewable.

Under the mootness analysis in *Dunn*, Texans who live in jurisdictions that have not adopted the public-interest exception to the mootness doctrine cannot challenge Texas Health and Safety Code section 166.046. Section 166.046 shields hospitals from liability for ignoring a patient's wishes to continue life-sustaining treatment as long as the hospitals follow the procedure contained in the statute. *See* Tex. Health & Safety Code §§ 166.044–.046. The procedure outlined in section 166.046 requires that the hospital inform the patient (or the person responsible for the health-care decisions of the patient) that the hospital's ethics or medical committee will review whether to continue life-sustaining treatment forty-eight hours before the meeting. *Id.* § 166.046(b)(2). The patient or surrogate is entitled to (a) attend the meeting, (b) receive a written explanation of the decision reached

474, 478 (S.C. 2006); *Anderson v. Kennedy*, 264 N.W.2d 714, 717 (S.D. 1978); *McCanless v. Klein*, 188 S.W.2d 745, 747 (Tenn. 1945); *McRae v. Jackson*, 526 P.2d 1190, 1191 (Utah 1974); *Israel ex rel. Israel v. W. Va. Secondary Sch. Activities Comm'n*, 388 S.E.2d 480, 482 (W. Va. 1989); *In re Recall of Certain Officials of Delafield*, 217 N.W.2d 277, 279 (Wis. 1974); *In re RM*, 102 P.3d 868, 871 (Wyo. 2004).

during the review process, (c) receive a copy of the portion of the patient's medical record related to the treatment received by the patient, and (d) receive a copy of all of the patient's reasonably available diagnostic results and reports related to the medical record provided in compliance with (c). *Id.* § 166.046(b)(4). No one is entitled to speak on behalf of the patient.

Nor is the patient, or the person responsible for the patient's care, entitled to present evidence to the committee to rebut the evidence provided by the physicians. Section 166.046 does not provide any standards regarding the makeup of the committee other than that the attending physician may not be a member of the committee. *Id.* § 166.046(a). If the committee decides to remove life-sustaining treatment, the life-sustaining treatment must be continued for ten days before being removed. *Id.* § 166.046(e).

The analysis in *Dunn* that the trial court lacked jurisdiction over the claims brought by Dunn's estate prevents those affected by this law from challenging the lack of process inherent in procedures that comply with section 166.046.

1. Under the appellate court's reasoning, other Texas patients victimized by removal of life-sustaining treatment against their wishes have no legal recourse.

When Texas hospitals decide to remove life-sustaining treatment over the objections of their patients, generally one of three outcomes will occur. The first potential outcome is that the patient manages to retain legal counsel and the hospital

abandons or defers its decision to override the patient's or surrogate's decision to continue life-sustaining treatment. This is the fact pattern in *Dunn*.

The second possibility is that the patient is unable to successfully retain counsel, the hospital removes life-sustaining treatment against the patient's wishes, and the patient dies. The third possibility is that the hospital removes life-sustaining treatment against the patient's wishes and the patient lives long enough without the life-sustaining treatment to be transported to another facility that honors the patient's decision to receive life-sustaining treatment.

Amicus curiae believe *Dunn* would prevent any patient who later sought to complain about the way the statute operated from having their day in court. The following are examples of how *Dunn* would affect individuals in situations like those of amicus curiae.

2. Carolyn Jones

The First Court of Appeals's holding in *Dunn* would silence the claims of Carolyn Jones.

Mrs. Jones, a conscious 61-year-old woman, was receiving life-sustaining treatment at Memorial Hermann Southwest Hospital in May 2019. Although Mrs. Jones was intubated and could not communicate, she was awake, responsive, reacting to pain and did not have a terminal condition. The hospital followed the

procedures outlined in section 166.046 and decided to remove her life-sustaining treatment over the objection of her husband.

After waiting the ten-day statutory period, the hospital removed Mrs. Jones's ventilator on Monday, May 13, 2019, at 2 p.m. Mrs. Jones's family was gathered by her bedside, begging the hospital staff not to remove her care. Miraculously, Mrs. Jones lived through the night. Tuesday was the day of the week Mrs. Jones normally received dialysis. Although Mrs. Jones had survived the removal of the ventilator, the hospital refused to administer dialysis. On Wednesday, Mrs. Jones was still alive and the hospital continued to refuse dialysis.

Finally, late on Wednesday night, a nonprofit organization arranged for a private ambulance to transport Mrs. Jones to the emergency room at Ben Taub Hospital. Eventually, Ben Taub Hospital secured a transfer to Lyndon B. Johnson Hospital where medical personnel provided dialysis to Mrs. Jones. Mrs. Jones then resided at a skilled nursing facility, until she passed away of natural causes on June 25, 2019.

In *Dunn*, the First Court of Appeals held that a patient's claim that a hospital violated her right to procedural due process is moot unless the patient proves a deprivation of the right the patient asserts was at risk of erroneous deprivation due to inadequate process. *See Dunn*, at *3. The First Court of Appeals's holding means any procedural-due-process claims Mrs. Jones's estate might assert are moot.

Because Mrs. Jones survived the hospital's removal of her life-sustaining treatment, under the holding in *Dunn*, courts would lack jurisdiction over any claims asserted by Mrs. Jones's estate because the hospital did not deprive her of life, nor the right to make her own medical decisions. *See id.*

3. Breanna Amerson

Breanna Amerson is a 29-year-old woman. In 2016, Ms. Amerson was diagnosed with multiple sclerosis. In June 2016, Ms. Amerson was in a rehabilitation facility, regaining strength after recovering from pneumonia, when she stopped breathing. A nurse administered a breathing treatment, and Ms. Amerson was transferred to Texas Health in Fort Worth where she began receiving life-sustaining treatment.

While Ms. Amerson was in the process of receiving life-sustaining treatment, the hospital informed Ms. Amerson's mother that the hospital was planning to have an ethics committee meeting to discuss withdrawing Ms. Amerson's breathing assistance. The ethics committed informed Ms. Amerson's mother of the meeting, scheduled for Monday morning, on Friday afternoon. Ms. Amerson's mother was able to have the meeting postponed after learning that the committee chairman would miss the meeting due to his vacation. Because the meeting was delayed, Ms. Amerson's mother was able to secure counsel before the meeting and start the process to have Ms. Amerson accepted by a different hospital.

During the meeting, the attending physician's remarks, included the query, "Who would want to live with MS (multiple sclerosis)?" The remarks showed the attending physician considered Ms. Amerson's life not worth living because of her underlying condition. Ms. Amerson's counsel was able to intervene in the process and fight for Ms. Amerson to be transferred to another facility and weaned from breathing assistance. The weaning was successful and Ms. Amerson is alive today. Ms. Amerson's mother suspects that if the ethics committee meeting had not been delayed, and Ms. Amerson were prematurely removed from life-sustaining treatment, Ms. Amerson would have died.

Under the holding in *Dunn*, a patient in Ms. Amerson's position is unable to challenge section 166.046. Under the First Court of Appeals's holding, Ms. Amerson has no legal recourse to challenge the constitutionality of the statutory scheme that placed her at risk for erroneous deprivation of her right to life because she was not actually deprived of her life or her decision to continue receive life-sustaining treatment.

Ms. Amerson is at risk of another hospital using the procedure outlined by section 166.046 to deprive her of her right to life and to self-determination to make her own medical decisions. Under the First Court of Appeals's analysis in *Dunn*, however, this fear is too speculative to fall under the doctrine that allows review of cases that are capable of repetition yet likely to evade review. *See Dunn*, at * 4.

4. Patricia Ikenma & Clifton F. Tarrant, II

Patricia Ikenma was a 69-year-old who became sick in August 2018. Mrs. Ikenma was receiving life-sustaining treatment at John Peter Smith Hospital when an ethics committee decided to remove life-sustaining treatment over her daughter's objection. The statutory ten-day countdown began on September 26, 2018 and the hospital removed Mrs. Ikenma's ventilator on October 5, 2018. Mrs. Ikenma died following the removal of life-sustaining treatment.

Clifton F. Tarrant, II was a four-year-old boy who suffered a traumatic brain injury. Doctors could not declare Clifton brain dead, and despite his improvement, Children's Memorial Hermann Hospital used the procedure outlined in section 166.046 to remove his life-sustaining treatment over his mother's objections. During the ethics committee meeting, a panelist told Clifton's mother, "This is not a courtroom where people can object. This isn't up for discussion." Claiming Clifton had poor quality of life due to his injury, the ethics committee ultimately decided to remove Clifton from life support. Clifton died when the hospital removed his life-sustaining treatment.

Although portions of *Dunn* suggest that a patient who dies after the removal of life-sustaining treatment might be able to bring a procedural-due-process claim, other parts of *Dunn* suggest that a patient cannot. *Dunn* holds that a party cannot assert a claim for nominal damages under section 1983 unless those damages would

compensate the party for injuries caused by the deprivation of a constitutional right. *See Dunn*, at *4.

But *Dunn* also suggests that the cause of a patient's death is the patient's underlying condition rather than the removal of life-sustaining treatment. *See id.* at *3. At the very least, to bring a procedural-due process claim relating to the risk of erroneous deprivation of a patient's right to life, *Dunn* would require a patient to prove that the hospital, rather than the underlying disease, caused the patient's death in order to challenge the process the hospital used to withdraw life-sustaining treatment over a patient's objection. *See id.* at *4.

As demonstrated by the situations of amicus curiae, the errors in *Dunn* set up a steep and potentially insurmountable hurdle for any patient in any situation to challenge the lack of process afforded by the procedures outlined in section 166.046.

D. The Court of Appeals's erroneous holding that the claims of Dunn's estate are moot conflicts with the standard for reviewing procedural-due-process claims and will prevent Texans from asserting due-process claims.

Even if the Supreme Court is not inclined to adopt the public-interest exception to the mootness doctrine, the Supreme Court should grant review because the First Court of Appeals erred in its mootness analysis in *Dunn*. In *Dunn*, the Court improperly (1) analyzed the merits of the claims of Dunn's estate to determine that they are moot and (2) applied the substantive law governing the merits of a procedural-due-process claim in reaching its conclusion that the claims are moot.

1. *Rather than determining whether Dunn's estate asserted claims in which the estate has a legally cognizable interest, the First Court of Appeals concluded that the claims asserted by Dunn's estate are moot because they fail on the merits.*

In *Dunn*, the First Court of Appeals affirmed the trial court's dismissal of the claims asserted by Dunn's estate for lack of subject-matter jurisdiction on the basis that the case did not present a justiciable controversy because the claims are moot. In its mootness analysis, the First Court of Appeals explained:

> The constitutionally-protected interests that she alleged she and Dunn were deprived of without due process are the "rights to life and self-determination to make one's own medical decisions." It is undisputed that Methodist continued the life-sustaining treatment allegedly desired by Dunn until he passed away naturally from his terminal condition. Accordingly, no action inconsistent with Dunn's alleged desires regarding his medical treatment was ever taken and he was not actually deprived of any constitutionally-protected right by Methodist's utilization of the procedure set forth in section 166.046. Because there was no deprivation of his rights, and there can be no deprivation of his future rights by these means due to his death, there is also no remaining controversy between the parties in regard to the alleged due process violations.

Dunn, at *3. The Court of Appeals reasoned that Dunn's estate's claims are moot because it concluded that the hospital did not take any actions that violated Dunn's due-process rights and could not do so in the future because he had died.

Subject-matter jurisdiction is essential to a court's power to decide a case. *Bland Indep. School Dist. v. Blue*, 34 S.W.3d 547, 554 (Tex. 2000). Inquiries into a court's subject-matter jurisdiction should be decided without delving into the merits of the case. *Id.* A case becomes moot when there is no longer a justiciable

controversy between the parties or when the parties cease to have a legally cognizable interest in the outcome. *State ex rel. Best v. Harper*, 562 S.W.3d 1, 6 (Tex. 2018). When a case becomes moot, the court loses jurisdiction because any opinion rendered by the court would be an advisory opinion, which is outside the jurisdiction conferred by Texas Constitution article II, section 1. *Matthews ex rel. M.M. v. Kountze Indep. Sch. Dist.*, 484 S.W.3d 416, 418 (Tex. 2016).

In *Dunn*, the First Court of Appeals conflated its view of the merits with its jurisdictional analysis. The claims of Dunn's estate do not lack merit, but even presuming for the sake of argument that the claims asserted by Dunn's estate lacked merit, that fact does not render them moot or deprive the trial court of jurisdiction over the claims. *See Blue*, 34 S.W.3d at 554. The First Court of Appeals's conclusion regarding the merits of the claims asserted by Dunn's estate is irrelevant to whether Dunn's estate has a legally cognizable interest in the due-process claims asserted.

2. Dunn conflicts with Supreme Court precedent regarding the requirements for asserting a procedural-due-process claim.

In *Dunn*, the First Court of Appeals held that because Dunn did not prove a substantive-due-process violation, Dunn had no procedural-due-process claim. *See Dunn*, at *3. But, to assert a claim for procedural-due process, a party must prove only a liberty or property *interest* that is entitled to protection. *See Mosley v. Tex. Health & Human Servs. Comm'n*, No. 17-0345, 2019 WL 1977062, at *9 (Tex. May

3, 2019). A party asserting a violation of due process must "(1) have a liberty or property interest that is entitled to procedural due process protection; and (2) if so, we must determine what process is due." *Mosley*, 2019 WL 1977062, at *9. A party asserting a procedural-due-process claim is entitled to damages even if no harm results from the procedural-due-process violation. *See Cnty of Dallas v. Wiland*, 216 S.W.3d 344, 356–57 (Tex. 2007).

The First Court of Appeals concluded that Dunn's estate's procedural-due-process claims are moot by rewriting this basic test to require that Dunn's estate prove a deprivation of a protected interest. *Dunn* cites to *Bexar County Sheriff's Civil Service Commission v. Davis* and *American Manufacturers Mutual Insurance Co. v. Sullivan* for the proposition that a party must show deprivation of a protected interest to assert a procedural-due-process claim. *See Dunn*, at *3. Although both cases contain language stating that a procedural-due-process claim requires showing "deprivation of a protected interest" a deeper analysis of those opinions shows that both courts were in fact referring to whether the party asserting a procedural-due-process claim was asserting an interest that qualified as a protected interest.

In *Davis*, the Supreme Court noted that the first prong of the test was met because "the parties agree that Davis has a constitutionally protected property *interest* in continued employment." *Bexar Cnty Sheriff's Civil Serv. Comm'n v. Davis*, 802 S.W.2d 659, 661 (Tex. 1992) (emphasis added). The Court in *Sullivan*

faced the question of whether a party's interest in workers' compensation medical benefits constituted a protected property interest. *See Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 60, 119 S.Ct. 977, 990, 143 L.Ed.2d 130 (1999). It concluded that the party asserting the procedural-due-process claim had not shown such a property interest. *See id.*

Dunn's estate asserted that Dunn's life was at stake. Dunn's interest in life is specifically protected by the Texas Constitution and Fourteenth Amendment to the United States Constitution. Tex. Const. art. I § 19; U.S. Const. amend. XIV, § 1. Accordingly, the First Court of Appeals improperly concluded that Dunn's estate has no procedural-due-process claim.

CONCLUSION

Amicus curiae file this brief out of a place of hope that they can help to prevent others from suffering in the way that they have. If the Court refuses to recognize a substantial-public interest exception to the mootness doctrine or to correct the First Court of Appeals's mootness analysis in *Dunn*, hospitals will continue to be able to take the lives of private citizens without judicial review of the questions surrounding whether the process comports with the procedural-due process protections guaranteed by the Texas and United States Constitutions.

Amicus curiae request that the High Court review this case involving basic questions that strike at the core of the Court's purpose. Will Texas courts hear the

due-process claims relating to a statute that allows hospitals to remove life-sustaining treatment without affording patients basic procedural rights? Amicus curiae respectfully request that the highest court in Texas answer.

For the foregoing reasons, the Petition for Review should be granted.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that this Brief of Donald Jones, Christine Long, Ebele Agu, and Sandra Hollier as Amicus Curiae was prepared using Word in Microsoft Office 365, which indicated that the total word count (exclusive of those items listed in rule 9.4(i)(1) of the Texas Rules of Appellate Procedure, as amended) is 4,465 words.

/s/ Jillian L. Schumacher
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CERTIFICATE OF SERVICE

I certify that on the 12th day of August, 2019, a true and correct copy of the foregoing document was delivered via electronic filing or email and certified mail, return receipt requested, to all known counsel of record and interested parties.

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