No. 20-0644

In the Supreme Court of Texas

COOK CHILDREN'S MEDICAL CENTER,
Petitioner,

v.

T.L., A MINOR AND MOTHER T.L., ON HER BEHALF,
Respondents.

On Petition for Review to the
Second Court of Appeals at Fort Worth, Texas

BRIEF OF AMICI CURIAE TEXAS ALLIANCE FOR LIFE, TEXAS CATHOLIC CONFERENCE OF BISHOPS, TEXANS FOR LIFE COALITION, COALITION OF TEXANS WITH DISABILITIES, CHILDREN'S HOSPITAL ASSOCIATION OF TEXAS, CATHOLIC HEALTH ASSOCIATION OF TEXAS, TEXAS NURSES ASSOCIATION, TEXAS ALLIANCE FOR PATIENT ACCESS, AMERICAN ACADEMY OF PEDIATRICS, TEXAS PEDIATRIC SOCIETY, AMERICAN MEDICAL ASSOCIATION, TEXAS MEDICAL ASSOCIATION, TEXAS OSTEOPATHIC MEDICAL ASSOCIATION, TEXAS HOSPITAL ASSOCIATION, LEADINGAGE TEXAS, TARRANT COUNTY MEDICAL SOCIETY, DALLAS COUNTY MEDICAL SOCIETY, BAYLOR SCOTT AND WHITE HEALTH, TEXAS CHILDREN'S HOSPITAL, AND TEXAS ORGANIZATION OF RURAL AND COMMUNITY HOSPITALS

Don Cruse
Law Office of Don Cruse
1108 Lavaca Street, Suite 110-436
Austin, Texas 78701
(512) 853-9100
don.cruse@texasappellate.com
Counsel for Amici Curiae

Brief Interest of Amici Curiae[1]

The amici are stakeholders in the Texas Advance Directives Act. Some of the amici, including pro-life organizations, religiously affiliated hospitals, and medical associations, were involved in reaching a consensus that led to the Act's adoption in 1999 without a dissenting vote. Other amici join this brief because the court of appeals' sweeping opinion—which treats private physicians as 'state actors'—threatens the integrity of the medical profession in Texas. The unique viewpoints of the amici are reflected in their individual statements of interest, which are collected later in this brief.[2] What unites them is a shared belief in the vital importance of defending the Texas Advance Directives Act from this broadside constitutional attack.

The amici urge the Court to grant review and hold that physicians and hospitals who follow the Act are not thereby 'state actors.' They also urge the Court to take the added step of vacating or disapproving the opinion of the court of appeals regarding due process, an issue that—as the dissent below rightly noted, Diss. Op. 9—the court of appeals need never have reached if it had correctly held that these physicians and hospital are not 'state actors.'

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[1] All fees associated with this brief are being paid by two of the amici: Texas Alliance for Patient Access and Texas Alliance for Life. *See* Tex. R. App. P. 11.

[2] These individual statements of interest are assembled in Appendix A.

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Summary of the Argument

This case reaches the Court when many Texans are contemplating the unwelcome possibility that they may need to make directives about their own medical care or that of loved ones. The Texas Advance Directives Act is the legal framework promising certainty about how these directives will be treated in Texas. The Act authorizes medical powers of attorney, out-of-hospital DNR (do not resuscitate) orders, and in-hospital DNR orders, along with other directives to physicians by patients or surrogates.[3] For each type of directive, the Act is what explicitly authorizes physicians and other medical providers to follow a patient's directive and refrain from making certain life-sustaining medical interventions, with the effect that a natural death may occur.[4] And for each, the Act provides a protection from liability for physicians and other medical providers, even when refraining from a life-sustaining medical intervention might lead to a natural death.[5]

The Act also provides a path to certainty about how to proceed when there are intractable disagreements. Disagreements might arise between family members, such as if two parents have different views or if the adult chil-

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[3] Tex. Health & Safety Code §§ 166.032-037, 166.040, 166.082, 166.154, 166.203.

[4] *Id.* §§ 166.047, 166.096; *see also id.* §§ 166.048, 166.097.

[5] *Id.* §§ 166.044, 166.094, 166.160, 166.166, 166.207.

dren disagree about how to proceed in regard to a parent. There can also be intractable disagreements about how to proceed when an attending physician has determined that making further interventions on a patient near the end of life, in a medical situation with no meaningful prospect for cure or recovery, would inflict only harm on the patient—violating one of the oldest and most deeply held principles of medical ethics.

The Legislature's approach was to define a very specific set of steps that a physician and hospital could follow that would satisfy their own duties as a matter of law, shielding them from the risk of civil or criminal liability. These steps include a formal notice, a committee review process, assisting with the process of seeking a transfer to another physician, at least 10 more days to obtain such a transfer, and a streamlined procedure to have a court extend that 10-day period if needed to secure a transfer. TEX. HEALTH & SAFETY CODE §§ 166.046, 166.052, 166.053. By fulfilling those steps, the physician and hospital are deemed to have fulfilled their duty under the Act and are thus shielded from further liability. *Id.* §§ 166.045(c) & (d).

Yet the court of appeals held that even assiduously following the Act cannot provide the promised certainty. It reasoned that, because only the State might define homicide or wrongful death, private physicians become

'state actors' when death might be a consequence of their action or inaction. Op. 93. That logic is flawed. By drafting statutes that clarify the duties of private parties regarding advance directives, the Legislature was exercising its own power—not delegating it. Private citizens acting consistent with the rights and duties created by a statute do not, thereby, become 'state actors.'

Classifying private physicians as 'state actors' has huge consequences. Most immediately, it destabilizes the Texas Advance Directives Act at a time when physicians, hospitals, and patients need to rely on it. More broadly, treating physicians as 'state actors' casts doubt on their professional independence or whether they can be protected in the exercise of personal conscience. The court of appeals embraced that implication, brushing aside the argument that TADA was meant in part to protect the "individual rights of conscience" of physicians because it would "create a conflict of interest." Op. 76 n.29, with the expectation that 'state actors' are impartial. As 'state actors,' private physicians and private hospitals in Texas would be treated as interchangeable gears in the machinery of the state.

The court's interpretation of key parts of TADA makes things worse. Although it was undisputed that these defendants complied with the Act, the court nevertheless offered its view on a number of questions of statutory in-

terpretation—explicitly casting doubt on whether key parts of the Act are effective and even suggesting, almost in passing, that parts of the statute may be preempted by federal law. *See* Op. 62; Op. 80-81 n.31; Op. 103-04 n.35.

In terms of due process, the court fails to provide a clear answer to what process it believes was due. It calls the statutory notice drafted by the Legislature "anodyne to the point of subterfuge." Op. 116. When suggesting that a 48-hour formal notice before a committee review might not be enough, the court suggests there should be an indefinite longer time to seek an outside "expert" on the patient's behalf to testify to a committee comprising medical experts.[6] Op. 127-28. And it gives a conflicting maze of directions for what a 'state actor' committee might constitutionally do.

The majority opinion is a loud dissent to the Legislature's substantive policy choices in designing the Texas Advance Directives Act. What it should have held is that this hospital is not a 'state actor'—and stopped there. The Court should grant the petition and review this decision.

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[6] The court of appeals ignores the central role of transfers in the statute. Consulting with potential transfer destinations is a consultation with medical experts. If any one of those experts believes that the interventions are medically appropriate, they can simply accept a transfer and moot any further dispute. There would be no need to persuade the committee.

ARGUMENT

I. CLASSIFYING PRIVATE PHYSICIANS AND HOSPITALS AS 'STATE ACTORS' HAS ENORMOUS IMPLICATIONS.

A. A 'state actor' designation could short-circuit any future legislative improvements to the Act.

Constitutionalizing these questions not only threatens the Texas Advance Directives Act as it exists, it could "short-circuit the democratic process" that has led to amendments in the past and would otherwise be expected to lead to improvements in the future. *King St. Patriots v. Tex. Democratic Party*, 521 S.W.3d 729, 741-42 (Tex. 2017). "The wisdom or expediency of the law is the Legislature's prerogative." *Tex. Workers' Comp. Comm'n v. Garcia*, 893 S.W.2d 504, 520 (Tex. 1995). Courts "may not judicially revise statutes because [they] believe they are bad policy." *Univ. of Tex. at Austin v. Garner*, 595 S.W.3d 645, 651 (Tex 2019) (per curiam).

The amici believe that the Legislature remains the right forum for what are essentially policy disputes. The Legislature has been a responsive forum for those discussions. The Act reflected a consensus of a broad array of stakeholders, including Texas and national right-to-life groups, the Texas Conference of Catholic Health Care Facilities, and professional associations

including the Texas Medical Association and Texas Hospital Association.[7] It passed the Texas Legislature in 1999 without a dissenting vote.[8] The legislative process has continued to be responsive to calls to fine-tune these provisions. In 2003, the Legislature made substantial improvements to § 166.046 and added the detailed notice set out in § 166.052.[9] And in 2015, the Legislature made further refinements to § 166.046.[10]

By constitutionalizing these questions, the court of appeals would tie the hands of any future Legislature to amend or revise the statute. If private physicians and hospitals are 'state actors,' then the looming prospect of due-process claims could make it impossible to achieve any real certainty or predictability by fine-tuning the Act's provisions.

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[7] *E.g.*, Hearing on H.B. 3527, Comm. on Pub. Health, 76th Leg., R.S. (Apr. 29, 1999) ("[W]e like it and the whole coalition seems to be in agreement with this. . . . [W]e are really united behind this language.") (statement of Joseph A. Kral, IV, Legislative Director, Texas Right to Life).

[8] Act of May 11, 1999, 76th Leg., R.S., ch. 450, § 3.05, 1999 Tex. Gen. Laws 2835, 2865.

[9] Acts 2003, 78th Leg., ch. 1228 (S.B. 1320), §§ 3, 4, effective June 20, 2003. The 2003 amendments added what are now §§ 166.046(b)(1) and (b)(3), as well as the detailed notice given to patients at the beginning of the process that is specified in § 166.052.

[10] Acts 2015, 84th Leg., ch. 435 (H.B. 3074), § 5, effective Sept. 1, 2015. These 2015 amendments added what are now §§ 166.046(b)(4)(C) and (D), as well as refining the procedures in § 166.046(e) for what happens after the committee process.

B. Treating physicians as 'state actors' is in tension with giving weight to medical ethics or matters of conscience.

The American Medical Association code of ethics explains that a physician can abstain from providing a particular medical intervention when his or her medical judgment or ethics demands it. *See* AMA Code of Medical Ethics § 1.1.7 (noting that a physician can "refrain from acting" in accordance with "dictates of conscience" and "well-considered, deeply held beliefs"); *id.* § 5.5 (Medically Ineffective Interventions). Applied to end-of-life situations, the AMA ethics guidelines suggest an effort to transfer the patient to a provider willing to comply, but "[i]f transfer is not possible, the physician is under no ethical obligation to offer the intervention." *Id.* § 5.5.

The Texas Legislature implemented that same policy judgment in the Texas Advance Directives Act. Physicians and other care providers in Texas were facing what Ellen Martin, a registered nurse testifying on behalf of the Texas Nurses Association, described as a "moral distress when we perceive a violation of one's core values or duties."[11] She testified that research in this area shows "[t]he highest moral distress situations, for both registered nurses and physicians, … involve those situations on which caregivers feel pres-

[11] Hearing on S.B. 2089 and S.B. 2129 before the Senate Comm. Health & Human Servs., 86th Leg. R.S. (April 10, 2019) (testimony of Ellen Martin).

sured to continue aggressive treatment that prolongs suffering."[12] This distress can be so great that it causes nurses to leave the profession.[13] The Legislature struck the same balance as the AMA ethical guidance, allowing physicians to refrain from making a directed course of medical intervention that violate their conscience or sense of medical ethics, while providing the patient with a reasonable opportunity to transfer to another medical provider. TEX. HEALTH & SAFETY CODE § 166.045. And to provide certainty, the Legislature adopted a "process-based approach" similar to one recommended years earlier by the American Medical Association Council on Ethical and Judicial Affairs.[14] That approach built on "the same counseling and deliberation that major ethics committees had been using for years, with attempts to transfer the patient to alternative providers if the disagreement could not be resolved. At the end of the process, if no resolution was achieved and no transfer to a willing provider could be arranged, the council noted that by ethical standards it was acceptable to halt futile treatments."[15]

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[12] *Id.*

[13] *Id.*

[14] Robert L. Fine, M.D., *Medical futility and the Texas Advance Directives Act of 1999*, 13 B.U.M.C. Proceedings 144, 145 (2000), available at https://www.ncbi.nlm.nih.gov/pmc/articles/PMC1312296/pdf/bumc0013-0144.pdf (last visited December 10, 2019).

[15] *Id.*

What does the court of appeals say about these ethical concerns that are central to the balance struck by the Legislature? The court brushes them aside as irrelevant in a footnote, reasoning that if physicians and ethics committees are 'state actors,' then their own ethical concerns should not weigh in the decision. Op. 76 n.29. In the court of appeals' view, a statutory design that protects "individual rights of conscience" would "create a conflict of interest that impeaches the impartiality of [a physician's] professional medical judgment, as well as the committee review process itself." Op. 76 n.29. In other words, the court of appeals' view is that an ethics committee should be ignoring medical ethics. This troubling aspect of the court of appeals' 'state actor' analysis threatens the integrity of the medical profession and the robust ethical identity of many of Texas's large hospital systems.

C. A 'state actor' designation could also undermine the TMLA.

Another court of appeals has held that a § 1983 damages claim against a physician at a state hospital is not subject to the protections of the Texas Medical Liability Act. *Rogers v. Bagley*, 581 S.W.3d 362, 374 (Tex. App.—Corpus Christi 2019, pet. filed) ("we hold that the expert report requirement of § 74.351 conflicts with the purpose of § 1983"). The merits brief filed by

the Attorney General rightly noted that this "opens the door to artful pleading to circumvent the TMLA, something this Court has repeatedly rejected."[16] The *Rogers* case involved a state hospital. By holding that even private hospitals and private physicians can be sued under § 1983, the court of appeals has thrown the "door to artful pleading" wide open.

II. The Opinion's Discussion of TADA Injects Confusion Into an Area of Law That Needs Certainty.

The Texas Advance Directives Act only works if it remains a legal framework that physicians, hospitals, and families can rely on. Litigation about the Act has been exceedingly rare. Previous appeals were resolved by mootness[17] or by courts declining to overstep the limited role that the statute provides for courts.[18] This opinion is the first Texas authority to discuss some of these statutory provisions at all, and it is the first to weigh in on the

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[16] Petitioners' Brief on the Merits (Rogers), *Rogers v. Bagley*, No. 19-0634, at 27 (filed Aug. 5, 2020).

[17] *Kelly v. Hou. Methodist Hosp.*, 2019 WL 1339505, 2019 Tex. App. LEXIS 2327 (Tex. App.—Houston [1st Dist.] Mar. 26, 2019, pet. denied).

[18] TEX. HEALTH & SAFETY CODE § 166.046(g) ("the appropriate district or county court shall extend the time period … only if the court finds, by a preponderance of the evidence, that there is a reasonable expectation that a physician or health care facility that will honor the patient's directive will be found if the time extension is granted."); *see also Nikolouzos v. St. Luke's Episcopal Hosp.*, 162 S.W.3d 678 (Tex. App.—Houston [14th Dist.] 2005, no pet.); *Hudson v. Tex. Children's Hosp.*, 177 S.W.3d 232 (Tex. App.—Houston [1st Dist.] 2005, no pet.) (enforcing recusal rules for such an order).

merits of the constitutional issues it calls "a question of first impression." Op. 3. Given how rare reported cases in this area have been—and how few fact patterns in these end-of-life disputes could remain justiciable through a full appellate review—the court of appeals' 148-page, 52-footnote opinion could have outsized importance in Texas law.

The dissenting justice was correct that the majority offered views that went well beyond what was required for the procedural context. Diss. Op. 9. The dissent observed that much of the majority opinion was based on hypotheticals, reached issues not raised by the parties, and although "superficially couched in probable-right-to-relief terms" may in practice prove binding. Diss. Op. 9. This Court might clarify that much of the majority opinion is non-binding advisory dicta. But the majority opinion will cause confusion so long as it remains the last word—or for many of these statutory issues, the *only* word in Texas caselaw—about what key parts of the Texas Advance Directives Act mean and whether they are effective to serve their essential purpose. This Court should grant the petition to restore the certainty that the court of appeals has taken away.

A. The opinion creates undue uncertainty about key provisions of the Texas Advance Directives Act.

1. The opinion needlessly casts doubt on whether physicians are ever authorized to follow advance directives.

In a discussion that spans several pages, the court of appeals describes how it "has reason to know" that the process by which a patient is removed from life support "always implicates the police power of the state." Op. 101. The court describes a negligent-homicide criminal case against a physician, which relied in part on a statutory definition of death contained in § 671.001 of the Health and Safety Code. Op. 101-03.

What does that have to do with TADA? That chapter contains a general procedure for declaring that a patient has died, which sets in motion certain steps routinely taken after a patient has died. With regard to life support, that chapter provides: "Death must be pronounced before artificial means of supporting a person's respiratory and circulatory functions are terminated." TEX. HEALTH & SAFETY CODE § 671.001(c). That is, indeed, the general starting point against which the more specific provisions of TADA were enacted.

But the court of appeals would read this general provision to call into question one of the most fundamental parts of the Texas Advance Directive (and the Natural Death Act that preceded it): the statutory authorization for

physicians to carry out a patient's advance directive by withdrawing life-sustaining medical intervention from a qualified patient.

According to the court of appeals, it has spotted "a potential area of statutory conflict" with this aspect of TADA. Op. 103 n.35. "On the one hand, Section 671.001(c) expressly prohibits" the withdrawal of life support "absent a pronouncement of neurological death by the attending physician." Op. 103 n.35. "On the other hand," the Texas Advance Directives Act "authorizes an attending physician to withdraw life-sustaining treatment, including mechanical ventilation," before the natural death has occurred. *Id.*

This is no small question. Providing a legal framework of certainty in which physicians can carry out a patient's advance directive before a natural death has occurred is almost the definition of an advance directive. For the court of appeals to inject doubt into whether TADA achieves this essential goal, and actually does protect physicians and other medical providers who follow a patient's advance directives, ill-serves both physicians and the patients and families who want their advance directives to be followed.

Having injected this undue doubt into one of the most fundamental parts of TADA, the court of appeals stops there—describing its own question as "a question of reconciliation that we need not address other than to ob-

serve that the potential conflict clearly implicates the exercise of the state's police power…" Op. 104 n.35. But this was not an open question in Texas law before this opinion.[19] The protections of the Texas Advance Directives Act are specific and explicit. The court of appeals should not have called into question whether advance directives can be followed in Texas.

2. The court casts doubt on the statutorily required notice to patients and families, using the term "subterfuge."

The Act requires that patients or their surrogates be provided with a copy of a statement "explaining the patient's right to transfer." TEX. HEALTH & SAFETY CODE § 166.052; *see also id.* § 166.046(b)(3)(A). The "statement … shall be in substantially" the form set out in the statute. *Id.* § 166.052.

The court of appeals criticizes the wording set out in the statute, calling one of its headings "anodyne to the point of subterfuge." Op. 116. The criticism seems unwarranted; the actual text of the notice sets out in simple language what the court of appeals suggests is missing from the heading. TEX. HEALTH & SAFETY CODE § 166.052(a) ("5. If a provider cannot be found

[19] The court of appeals cited a 1998 federal district court order granting leave to amend a complaint for the proposition that "At least one court has held that these statutes should be read together to require both confirmation of neurological death and a surrogate decision maker's consent before life-sustaining treatment may be withdrawn…" Op. 103 n.35. That order predates TADA's enactment, does not explicitly state such a holding, and according to Shepard's had not previously been cited for such a proposition.

willing to give the requested treatment within 10 days, life-sustaining treatment may be withdrawn unless a court of law has granted an extension.").

In any event, because hospitals are required to use "substantially the … form" of the notice in the statute, the court of appeals' criticism creates uncertainty about whether or how they could comply.

3. The opinion needlessly casts doubt on the statutory effectiveness of the § 166.046 safe harbor, even for patients who would not have a constitutional claim.

The court of appeals posits another interpretation of TADA that would open physicians and hospitals to civil suits, regardless of the safe harbor. The court suggested that the more general provision setting out a background duty for physicians to provide a "reasonable opportunity" for a transfer, *see* TEX. HEALTH & SAFETY CODE § 166.051, trumped the more specific provision of § 166.045(d) providing that physicians who followed the safe harbor would be protected from civil or criminal liability. Op. 80-81 n.31 (calling this "a potential conflict in … TADA"). The court expressed its view that the general language of § 166.051 "suggest[s] that the ten-day deadline of the committee review process remains subject to reasonableness … standards." Op. 81 n.31. After having suggested this entirely novel reading of the Act

that would rob the § 166.046 procedures of their finality, the court of appeals then declined to "resolve this potential conflict" and moved on. Op. 81 n.31.

The "conflict" is illusory. The more specific statute is the one regarding the safe harbor, and its text is explicit that the physician "is not civilly or criminally liable." TEX. HEALTH & SAFETY CODE § 166.045(d). The general background provision that applies outside the safe harbor does not trump the more specific provision for those who qualify for the safe harbor.

Needlessly casting doubt on the safe harbor threatens to roll back the progress made by TADA. Before its enactment, the specter of liability put medical providers in a bind, in which the uncertainty about potential future legal outcomes warped how medical and ethical decisions were made. As Dr. Robert Fine explained the background of the law:

> During this time, this pre-1998 Advance Directives Act world, when these accusations were going back and forth, physicians, my colleagues, were routinely threatened by both sides, with both civil and criminal actions.
>
> "If you don't allow my mother to die, I'm going to sue you."
>
> "If you don't keep my mother alive, I'm going to sue you."
>
> We got slammed on both sides. We also saw family relationships frayed and often frankly destroyed.

Hearing on S.B. 2089 and S.B. 2129 before the Senate Comm. on Health & Human Servs., 86th Leg. R.S. (April 10, 2019) (testimony of Dr. Fine). Leading up to the 1999 enactment of TADA, the stakeholders who worked together to support the Act put the § 166.046 dispute-resolution procedure into place "because there were constant debates in which" doctors and medical providers "were being threatened." *Id.* Already, those threats are being made again with a printout of the court of appeals' opinion in hand.

4. The opinion also suggests a phantom conflict between TADA and a federal statute.

The court of appeals suggests that a federal statute (CAPTA) might give parents a kind of veto power over the Texas Advance Directives Act. Op. 53-63 & 141. It is not clear what led to the court of appeals down that wrong path. The plaintiffs did not raise this theory in their appellant's brief, and it was not part of their § 1983 theory. Regardless, the court of appeals' reading of the federal statute is incorrect. The cited provisions describe the "plan" a state must file to seek federal funding; they do not purport to preempt substantive state law. 42 U.S.C. § 5106a(b)(1) ("State plan…."). Nor do they suggest that parents would have a special federal veto to override state law. To the contrary, its definitions carve out this kind of situation, clarifying that

the type of "withholding of medically indicated treatment" protected against by CAPTA "does not include" medical interventions withheld by a physician for reasons covered by a statute like TADA. 42 U.S.C. § 5106g(5) ("the term does not include" medical interventions withheld because they have been determined to be inhumane or medically inappropriate). These statutes are not in conflict. The opinion introduces needless confusion by suggesting that there might be a federal bypass when minors are involved under TADA.

B. The opinion's far-ranging discussion of due process, based on hypotheticals and counterfactuals, does not adhere to the heavy standards for a facial challenge.

The court of appeals is not clear whether it is basing this injunction on a facial or as-applied constitutional challenge. The sweep of its analysis is enormously broad—and is not rooted in the specific facts of this record, as would be necessary to support a true as-applied challenge. Indeed, most of the factual scenarios are hypothetical—or, indeed, run counter to the testimony and evidence heard in the district court.

Hypotheticals do not satisfy the burden for a facial challenge. *Tex. Boll Weevil Eradication Found., Inc. v. Lewellen*, 952 S.W.2d 454, 463 (Tex. 1997); *Wash. State Grange v. Wash. State Repub. Party*, 552 U.S. 442, 449-50 (2008) ("we must be careful not to go beyond the statute's facial re-

quirements and speculate about 'hypothetical' or 'imaginary' cases"). To hold a law facially unconstitutional requires concluding that it, "by its terms, always operates unconstitutionally." *Tenet Hosps. Ltd. v. Rivera*, 445 S.W.3d 698, 702 (Tex. 2014); *Barshop v. Medina Cty. Underground Water Conservation Dist.*, 925 S.W.2d 618, 631 (Tex. 1996).

The forum for policy debates about hypotheticals is the Legislature, not reframing them as a "facial" challenge. "Facial challenges are … disfavored because they 'threaten to short circuit the democratic process by preventing laws embodying the will of the people from being implemented in a manner consistent with the Constitution." *King St. Patriots*, 521 S.W.3d at 741-42. The amici believe that the central balance struck by the Legislature and enacted in TADA is important and that it should be defended against such a constitutional attack. If refinements to the procedures set out in the Act are needed, those amendments are more appropriately and more effectively made through the legislative process.

III. The Public Interest Would Favor Vacating the Opinion.

This Court has recently used its power to vacate a court of appeals opinion after a petition became moot. *Morath v. Lewis*, 601 S.W.3d 785, 790 (Tex. 2020) (per curiam). If this petition became moot, the circumstances would equally support vacating this opinion. Doing so "clears the path" for future litigation. *Id.* (quoting *Arizonans for Official English v. Arizona*, 520 U.S. 43, 71 (1997)). Clearing the path is appropriate, for example, if "mootness occurs through happenstance—circumstances not attributable to the parties." *Arizonans*, 520 U.S. at 71-72.

The "legal issues involved" here are "potentially of consequence" to physicians, hospitals, and other stakeholders "across Texas."[20] The opinion challenges whether they can rely on the Texas Advance Directives Act. And the sheer breadth of its reasoning, treating physicians as 'state actors,' has spillover implications for related areas of law involving medical practice.[21] This uncertainty not only affects these third parties but could derail attempts to refine the Act through the legislative process. Vacating the opinion would formally "eliminate[] any binding precedential effect" and, in these circumstances, better serve the public interest. *Morath*, 601 S.W.3d at 791.

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[20] *Morath*, 601 S.W.3d at 792 ("potentially of consequence to schools across Texas").

[21] *Id.* ("the government's defense of *ultra vires* claims in other contexts").

Prayer

The Court should grant the petition and reverse. The Court should also vacate or disapprove the extraneous portions of the opinion calling into question the Texas Advance Directives Act. If the court of appeals had correctly decided 'state action,' it need never have reached those issues. This Court should clarify that the court of appeals' advisory views are not binding law.

Respectfully submitted,

/s/ Don Cruse

Don Cruse
Law Office of Don Cruse
1108 Lavaca Street, Suite 110-436
Austin, Texas 78701
(512) 853-9100
don.cruse@texasappellate.com

Counsel for Amici Curiae

Certificate of Compliance

Based on a word count provided by Apple Pages 10.1, this brief contains exactly 4,619 words, excluding the sections exempted by Texas Rule of Appellate Procedure 9.4(i)(1). The brief is set in Century Supra, with body text no smaller than 14 points and footnote text no smaller than 12 points. Appendix A to this brief contains exactly 2,433 words, set in the same font.

/s/ Don Cruse

Don Cruse

Certificate of Service

I certify that on August 31, 2020 this Brief of Amici Curiae was served on counsel of record by electronic mail:

Wallace B. Jefferson
Amy Warr
Nicholas Bacarisse
ALEXANDER DUBOSE & JEFFERSON LLP
515 Congress Avenue, Suite 2350
Austin, Texas 78701

Steven H. Stodghill
Thomas M. Melsheimer
WINSTON & STRAWN LLP
2121 North Pearl Street, Suite 900
Dallas, Texas 75201

Attorneys for Petitioner

John F. Luman III
Jillian L. Schumacher
DANIELS & TREDENNICK, LLP
6363 Woodway Street, Suite 700
Houston, Texas 77057

Emily Cook
THE LAW OFFICE OF EMILY KEBODEAUX COOK
4500 Bissonnet
Bellaire, Texas 77401

Attorneys for Respondents

s/ Don Cruse

Don Cruse

Tab A

Individual Statements of Interest of Amici Curiae

APPENDIX A: EXPANDED INTEREST OF THE AMICI CURIAE

The amici are dedicated to a variety of goals, including preserving the integrity of the medical profession, ensuring high-quality medical care, promoting medical liability reform, protecting life, assuring dignity at the end of life, and protecting Texans with disabilities. These diverse groups are united in the view that the Texas Advance Directives Act, TEX. HEALTH & SAFETY CODE ch. 166, helps achieve their essential objectives. The constitutionality of this statute is important to each of the amici.

Texas Alliance for Life (TAL). TAL is a statewide non-profit organization of people committed to protecting the fundamental right to life of all innocent human beings and to promoting respect for their value and dignity from the moment of conception until natural death. TAL opposes "the advocacy and practice of abortion (except to preserve the mother's life), infanticide, euthanasia, and all forms of assisted suicide."[1] In 1999, TAL, together with Texas Right to Life,[2] helped negotiate § 166.046 and urged its enactment. Since 1999, TAL has supported various bills to increase patient protections in the Texas Advance Directives Act. However, TAL has been and

[1] https://www.texasallianceforlife.org/about-us/ (last visited December 10, 2019).

[2] Texas Right to Life now represents the Plaintiff in challenging this statute.

continues to be unwavering in its support for § 166.046 because it strikes a just and appropriate balance between the rights of patients to autonomy regarding decisions involving life-sustaining procedures and the conscience rights of health care providers to not have to provide medically and ethically inappropriate and harmful interventions to dying patients.

Texas Catholic Conference of Bishops (TCCB). TCCB has sought reforms in advance directives to highlight—as a matter of policy—the dignity inherent in a natural death.[3] These reforms reflect the principles found in the United States Conference of Catholic Bishops' Ethical and Religious Directives, which constitute authoritative guidance on the provision of Catholic healthcare services.[4] Among other things, the Directives counsel Catholic healthcare providers to honor the sanctity of each human life by avoiding "two extremes"—"on the one hand, an insistence on useless or burdensome technology even when a patient may legitimately wish to forgo it and, on the other hand, the withdrawal of technology with the intention of

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[3] https://txcatholic.org/medical-advance-directives

[4] http://www.usccb.org/about/doctrine/ethical-and-religious-directives/upload/ethical-religious-directives-catholic-health-service-sixth-edition-2016-06.pdf; *see also* https://txcatholic.org/wp-content/uploads/2017/12/Conscience-Formation-2017.pdf (discussing application of Ethical and Religious Directives to end-of-life care).

causing death."[5] "Human intervention that would deliberately cause, hasten, or unnecessarily prolong the patient's death violates the dignity of the human person.[6]" "Reform efforts should prioritize the patient, while also recognizing the emotional and ethical concerns of families, health care providers, and communities that want to provide the most compassionate care possible."[7] The Catholic Church teaches that all human life is a gift from God, and therefore all human life is innately sacred. This respect for life is lifelong and applies to all human beings—from conception to natural death. The bishops reject medical decision–making based on flawed "quality-of-life" arguments which are often used to falsely justify euthanasia. The bishops have consistently supported the truth that decisions regarding treatment should be made through this lens of the inherent sanctity of all human life while recognizing that underlying medical conditions can have an impact on the effectiveness or appropriateness of certain medical interventions. They believe that treatment decisions should be based on whether or not the expected benefit of the treatment outweighs the burden to

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[5] http://www.usccb.org/about/doctrine/ethical-and-religious-directives/upload/ethical-religious-directives-catholic-health-service-sixth-edition-2016-06.pdf at 20.

[6] *Id.* (emphasis added).

[7] *Id.*

the patient.[8] Some may claim that this is a quality of life decision, or one that allows discrimination, but they are wrong—it is an assessment of the quality or effectiveness of the treatment or intervention, not the quality of life for the patient. While TCCB supports continued legislative improvements to the act, particularly those that safeguard against any discrimination in providing necessary and effective life-sustaining treatment, TCCB generally supports the framework of § 166.046 as a balanced dispute resolution process that respects both patient dignity and healthcare provider conscience.

Texans for Life Coalition (TLC). TLC has been educating and advocating for the sanctity of human life since 1974. After previously opposing the Texas Advance Directives Act, TLC changed its position after witnessing the Act's benefits. TLC now recognizes that, while imperfect, the Act provides a reasonable process for resolving differences between medical practitioners and patient surrogates regarding end-of-life treatment. Furthermore, TLC does not believe that patients have a *constitutional* right to medical care.

Coalition of Texans with Disabilities (CTD). Founded in 1978, CTD is a statewide, cross-disability non-profit organization. CTD has been involved

[8] https://txcatholic.org/sb-2355-support-reform-of-hospital-ethics-committees/

in end-of-life policy discussions for several Texas legislative sessions. People with disabilities express considerable respect and appreciation for their health care providers, often crediting them with their lives. Yet, people with disabilities often report experiences where their lives are devalued, throughout society and sometimes in health care situations. CTD staff has been told many times by the disability community that it wants to be sure its wishes are heard and respected in end-of-life decisions. CTD believes the Texas Advance Directives Act has advanced the rights of people with disabilities at this sensitive time.

Children's Hospital Association of Texas (CHAT). CHAT is a non-profit association whose mission is to advance children's health and well-being by advocating for policies and funding that promote children's access to high-quality, comprehensive health care. CHAT represents eight free-standing, not-for-profit children's hospitals located in the state of Texas. Children's hospitals are unique resources that benefit all children through clinical care, research, pediatric medical education and advocacy, and they provide specialized care for the most severe and complex medical problems.

The Catholic Health Association of Texas is a voluntary, professional association that represents and advocates on behalf of Catholic hospitals in

Texas and supports its mission through collaboration, advocacy, involvement, education and inspiration. The association generally supports the dispute resolution process in section 166.046 of the Texas Advance Directives Act as a tool to assist our member hospitals to provide care that is respectful of the life and dignity of patients as articulated in the Ethical and Religious Directives.

Texas Nurses Association (TNA). TNA is a non-profit, statewide association of more than 16,000 registered nurses. Founded in 1907, TNA is the oldest and largest nursing association in Texas. Our members care for patients in all clinical specialties and all practice settings. TNA members serve patients' medical needs in all seasons of life, from pre-natal to birth to the last breath and struggle. Nurses experience moral distress when faced with providing interventions that harms or prolongs the suffering of the very patients they took an oath to serve. The conflict resolution process in § 166.046 takes these concerns into account.

The Texas Alliance for Patient Access (TAPA). TAPA is a statewide coalition of over 250 hospitals, physician groups, charity clinics, nursing homes, and physician liability insurers.[9] TAPA promotes health care liability

[9] http://www.tapa.info/about-us.html (last visited December 10, 2019).

reform to help ensure that Texans receive high-quality, affordable medical care. TAPA supports § 166.046 because it (1) preserves a doctor's existing right to refuse to provide certain medical intervention that violates his or her ethics or conscience and (2) provides immunity from civil and criminal liability if doctors and hospitals adhere to the statutory procedures before declining to provide such intervention.

The American Academy of Pediatrics ("AAP") represents 67,000 primary care pediatricians, pediatric medical subspecialists, and surgical specialists who are committed to the attainment of optimal physical, mental, and social health and well-being for all infants, children, adolescents, and young adults. Pediatric health care is practiced with the goal of promoting the best interests of the child. AAP policy statement *Guidance on Forgoing Life-Sustaining Medical Treatment* states "it may be ethically supportable to forgo life-sustaining medical treatment without family agreement in rare circumstances of extreme burden of treatment with no benefit to the patient beyond postponement of death."

Texas Pediatric Society (TPS), The Texas Chapter of the American Academy of Pediatrics. TPS is the state-wide professional nonprofit organization of over 4,500 pediatric physician, resident and medical student

members whose mission is to ensure that the children in Texas are safe and healthy, that its members are well-informed and supported, and the practice of pediatrics in Texas is both fulfilling and economically viable. TPS supports § 166.046 which outlines an ethical and responsible protocol to resolving difficult end of life decisions in the best interest of patients and the medical judgment of physicians.

The American Medical Association (AMA). AMA is the largest professional association of physicians, residents, and medical students in the United States. Additionally, through state and specialty medical societies and other physician groups seated in its House of Delegates, substantially all physicians, residents, and medical students in the United States are represented in the AMA's policy-making process. The AMA was founded in 1847 to promote the art and science of medicine and the betterment of public health, and these remain its core purposes. AMA members practice in every medical specialty and in every state, including Texas. The AMA and TMA join this brief on their own behalves and as representatives of the Litigation Center of the American Medical Association and the State Medical Societies. The Litigation Center is a coalition among the AMA and the medical societies of each state and the District of Columbia. Its purpose is to

represent the viewpoint of organized medicine in the courts.

The Texas Hospital Association (THA). THA, a non-profit trade association, represents 459 Texas hospitals. THA advocates for legislative, regulatory, and judicial means to obtain accessible, cost-effective, high-quality health care. THA supports § 166.046, which provides a safe harbor for physicians and hospitals that refuse to provide medically unnecessary interventions.

The Texas Medical Association (TMA) and Texas Osteopathic Medical Association (TOMA). TMA and TOMA are private, voluntary, non-profit associations. Founded in 1853, TMA is the nation's largest state medical society, representing over 53,000 Texas physicians, residents, and medical students.[10] Founded in 1900, TOMA represents more than 5,000 licensed osteopathic physicians. Both consider § 166.046 vital to the ethical practice of medicine and the provision of high quality-care.

LeadingAge Texas (LAT). LAT provides leadership, advocacy, and education for Texas faith-based and not-for-profit retirement housing and nursing home communities.[11] The organization works extensively with the

[10] https://www.texmed.org/Template.aspx?id=5 (last visited December 11, 2019).

[11] https://www.leadingagetexas.org/page/AboutUs (last visited December 11, 2019).

Texas Legislature on an array of issues affecting the elderly, including hospice and end-of-life matters.

Tarrant County Medical Society. Tarrant County Medical Society is an organization of more than 3800 physicians, residents and medical students dedicated to providing health care of the highest quality. The mission of the Tarrant County Medical Society is to unite physicians in the region to advocate for physician and patient rights.

Dallas County Medical Society. The Dallas County Medical Society is a not-for-profit voluntary association representing over 8,600 physicians, residents, and medical student who live or practice in Dallas County, Texas. Founded in 1876, the Dallas County Medical Society is the second-largest medical society in the United States and is larger than 37 state medical associations. The mission of Dallas County Medical Society is to promote public health and to advocate for physicians and their relationship with patients while upholding professionalism in the practice of medicine. Dallas County Medical Society believes the Texas Advance Directives Act, § 166.046, is essential for ethically resolving conflicts regarding the treatment and care of terminally and/or irreversibly ill patients.

Baylor Scott & White Health including HealthTexas Provider Network and Scott & White Clinic (collectively, "BSWH"). BSWH is the largest not-for-profit healthcare system in Texas, providing a full range of inpatient, outpatient, rehabilitation, and emergency medical services through 52 hospitals and more than 800 patient access points with over 7.5 million patient encounters annually. HealthTexas Provider Network includes 1,120 plus physicians and 400 plus advance practice professionals across the Dallas-Fort Worth region. Scott & White Clinic includes 1,430 plus physicians and 510 plus advance practice professionals across the Central Texas region. BSWH often cares for the "sickest of the sick"—terminally and/or irreversibly ill patients, and this confronts all involved with hard choices near the end of life. BSWH believes the Texas Advance Directives Act, Section 166.046, provides an essential ethical process to resolve conflict about the treatment and care of terminally and/or irreversibly ill patients. Section 166.046 is critical to our ability to provide the best care possible for the patients we serve and honoring the moral foundations of the medical profession to serve for the benefit of the sick and to do no harm.

Texas Children's Hospital (TCH). TCH, a Texas non-profit corporation, was formed in 1954 and is now the largest freestanding children's hospital in

Texas, and in the United States. TCH provides comprehensive pediatric and women's healthcare services, specializing in caring for patients with the most complex medical conditions. TCH maintains a comprehensive clinical ethics program to assist with sensitive patient care matters, including end-of-life decision-making. TCH believes Section 166.046 of the Texas Advance Directives Act provides a thoughtful process that allows patients, families and providers to resolve these matters in a fair and ethical manner.

Texas Organization of Rural and Community Hospitals (TORCH). TORCH is the voice and principal advocate for Texas' 158 rural and community hospitals as well as the nurses, lab techs, therapists, and other staff that work there. These rural hospitals may only serve 12% of the Texas population but they cover emergency and local hospital care for 85% of the state's geography. Often, rural and community hospitals must immediately and expertly stabilize their most critically ill and injured patients so they can be quickly transferred to larger and better equipped urban hospitals. Rural hospitals fear that the dismantling of the Texas Advance Directive Act will not only impact the treatment they are able to give patients at their own facilities but also affect the willingness of urban hospitals to accept the transfer of their most critical patients.

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don.cruse@texasappellate.com
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Associated Case Party: Cook Children's Medical Center

Name	BarNumber	Email	TimestampSubmitted	Status
Amy Warr		awarr@adjtlaw.com	8/31/2020 4:53:16 PM	SENT
Nicholas Bacarisse		nbacarisse@adjtlaw.com	8/31/2020 4:53:16 PM	SENT
Geoffrey Harper	795408	gharper@winston.com	8/31/2020 4:53:16 PM	SENT
Wallace B.Jefferson		wjefferson@adjtlaw.com	8/31/2020 4:53:16 PM	SENT
Steven Hall Stodghill	19261100	sstodghill@winston.com	8/31/2020 4:53:16 PM	SENT
Thomas M. Melsheimer	13922550	tmelsheimer@winston.com	8/31/2020 4:53:16 PM	SENT
John Gaddis	24069747	mgaddis@winston.com	8/31/2020 4:53:16 PM	SENT

Associated Case Party: T. L., Mother on Behalf of T.L., a Minor

Name	BarNumber	Email	TimestampSubmitted	Status
John Francis Luman	794199	luman@dtlawyers.com	8/31/2020 4:53:16 PM	SENT
Kassi Dee Patrick Marks	24034550	kassi.marks@gmail.com	8/31/2020 4:53:16 PM	SENT
Jillian Schumacher	24090375	jill@dtlawyers.com	8/31/2020 4:53:16 PM	SENT
Emily Cook		emily@emilycook.org	8/31/2020 4:53:16 PM	SENT

Case Contacts

Name	BarNumber	Email	TimestampSubmitted	Status
Cathi Trullender		ctrullender@adjtlaw.com	8/31/2020 4:53:16 PM	SENT
Sara Bean		sara@dtlawyers.com	8/31/2020 4:53:16 PM	SENT
Don Cruse		don.cruse@texasappellate.com	8/31/2020 4:53:16 PM	SENT