No. 20-651

In The Supreme Court of the United States

COOK CHILDREN'S MEDICAL CENTER,

Petitioner,

v.

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

Respondents.

On Petition For Writ Of Certiorari To The Second Court Of Appeals At Fort Worth, Texas

BRIEF FOR RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED RESTATED

Whether the court of appeals made a proper preliminary determination that when a hospital invokes Texas Health and Safety Code section 166.046 it performs the functions of (1) defining the lawful means of death and dying and (2) acting under the doctrine of *parens patriae*, which are functions that have traditionally and exclusively been exercised by the state.

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INTRODUCTION

> *I praise you because I am fearfully and wonderfully made; your works are wonderful, I know that full well. Psalm* 139:14.

A far cry from striking down any Texas statute or inventing federal constitutional rights, the court of appeals granted a temporary injunction to protect the life of a toddler, T.L. Pet.App.150a–51a. T.L. is loved deeply by her Creator and her mother.

The temporary injunction protects T.L.'s life while T.L. and T.L.'s Mother on her behalf ("Respondents"), challenge Cook Children's Medical Center's ("Petitioner") authority to remove T.L.'s life-sustaining treatment. Removal of life-sustaining treatment will kill T.L. Pet.App.5a. The temporary injunction binds the parties until final resolution after trial on the merits. It sets no precedent. It invalidates no law. It simply preserves T.L.'s life so that trial on the merits can occur.

The temporary injunction will give Texas courts the opportunity to address the constitutionality of Texas Health and Safety Code section 166.046 through trial on the merits. The state courts in Texas should have the opportunity to review the statute first. In this instance, the state law issues are determinative.

It is true that the issue of state action is nominally a federal issue. The federal question in the Petition is whether Petitioner is a state actor, subject to due process requirements, when it invokes Texas Health and Safety Code section 166.046. Texas Health and Safety

Code section 166.046 is a unique Texas statute with no parallel. While the invocation of Texas Health and Safety Code section 166.046 raises novel questions of state law, the guiding federal jurisprudence is well-established. There is no need to clarify the parameters of the state-action doctrine.

The federal issue in the Petition is whether the court of appeals misapplied the state-action doctrine. Proper application of the state-action doctrine hinges on questions of state law. To determine whether Petitioner performs a public function when it invokes Texas Health and Safety Code section 166.046, a reviewing court must first determine what function Petitioner performs pursuant to the statute. The state courts in Texas determined that under Texas law, when Petitioner invokes Texas Health and Safety Code section 166.046, the functions it performs are (1) defining the lawful means of death and dying and (2) acting under the doctrine of *parens patriae*. Petitioner disagrees with the court of appeals' preliminary determination that these are the functions it performs pursuant to Texas Health and Safety Code section 166.046. Petitioner argues that the state-action doctrine does not apply because the function it performs pursuant to Texas Health and Safety Code section 166.046 is providing medical care.

While the state-action question presents important issues of Texas law, the court of appeals' preliminary determination does not answer the primary question in the litigation—whether Petitioner violated Respondents' due process rights. The answer to the

question presented is necessary, but insufficient, for the ultimate determination of whether the statute is valid. Trial on the merits is necessary for a final determination of its validity.

The holding that T.L. has shown a probable right to relief to enable her to a temporary injunction pending trial on the merits is specific to T.L. The Supreme Court of Texas denied review of the interlocutory opinion, indicating that any error does not sufficiently affect Texas jurisprudence to warrant review.

I. T.L.'s life has value.

T.L. was born by God's grace nearly two years ago. She is fearfully and wonderfully made. She has faced—and overcome—medical challenges. Pet.App.11a–15a. Mother has stood firm in the face of heartbreak and pressure from the hospital to remove T.L.'s life-sustaining treatment. *See id.* As Mother fought for her daughter's life, Petitioner informed Mother that its ethics committee would meet to decide whether to withdraw T.L.'s life-sustaining treatment. Pet.App.17a–19a. Withdrawal of life-sustaining treatment would kill T.L., who has normal brain function, interacts with Mother, and experiences joy from living. 2 CA 19–25. Mother acknowledges that certain medical procedures, such as IV insertions, can cause T.L. pain, but T.L. is not in agony. 2 CA 292–93.

II. Texas Health and Safety Code section 166.046 allows hospitals to end patients' lives without allowing them notice and opportunity to be heard on the value of their life.

Under Texas Health and Safety Code section 166.046, a hospital has the right to withdraw life-sustaining treatment free from criminal or civil liability if it follows the procedure provided for by the statute. Tex. Health & Safety Code §§ 166.045(d)–.046. The procedure does not guarantee a patient or the patient's representative the opportunity to be heard on the subject of the value of his or her own life. The patient is entitled to almost no notice and there are few safeguards to ensure the procedure is fair, neutral, or free from conflicts of interest.

The words in the briefs before this Court do little to capture the gravity of the situation Mother faces. Nor do they capture the anger and powerlessness naturally associated with learning the hospital to which Mother entrusted her child intends to stop the effective medical treatment helping her live.

Petitioner states that it made a moral decision that treatment "inflicts pain and fear on a sedated child *for no benefit*." Pet.5. To be clear, treatment is providing medical benefit to T.L. in helping her continue to live. But Petitioner's position is that it is immoral to keep T.L. alive. The moral decision that there is no *benefit* in T.L.'s life is not Petitioner's to make. That decision belongs to her Mother and her Creator.

III. Because of T.L.'s current medical state, Petitioner's decision to withdraw life-sustaining treatment affects both Petitioner and T.L.

Petitioner contends that discontinuing the care facilitating T.L.'s life has nothing to do with Mother's rights as a parent. Pet.24. Petitioner characterizes the decision as a private decision for itself alone—not a decision that binds T.L. *See id.* This characterization grossly distorts reality. By making this decision at a time where T.L. is dependent on Petitioner, Petitioner will force death on T.L. Pet.App.150a–51a.

Mother has repeatedly asked Petitioner (and Petitioner has refused) to perform procedures that would make T.L. a candidate to be transferred to a lower level of care. *See* 2 CA 95–96, 198–99, 219–23. Mother fervently hopes that T.L. might be able to come home. *See id.* After this experience, Mother may never have peace. But bringing her daughter home would be a start.

Under Texas law, when Mother authorized Petitioner to treat T.L., Petitioner became obligated to work to save T.L.'s life and to continue the course of treatment. *See*, *e.g.*, *Granek v. Tex. State Bd. of Med. Exam'rs*, 172 S.W.3d 761, 766 n.2 (Tex. Civ. App. 2005) (op. on reh'g). Because of T.L.'s current medical status, her life depends on Petitioner not withdrawing life-sustaining treatment. Pet.App.150a–51a. Petitioner's involvement in "highly specialized" practice comes with difficult territory, but that does not absolve

Petitioner of its obligation to continue T.L.'s treatment. *See id.*

Once it begins treatment, a hospital should not be able to devastate parents by deciding to withdraw care over the patient's objection at a time when changing course will kill the patient. But, the court of appeals went nowhere near this far. The court of appeals did not consider who should make the decision that it is time for a child to die. *It held simply that Mother has shown a probable right to relief on her claim that before the hospital decides whether there is any benefit in her daughter being alive, she deserves notice and a meaningful opportunity to be heard on the matter, complete with the guarantees of due process*. Fairness (and human decency) require both.

Texas Health and Safety Code section 166.046 requires neither.

STATEMENT OF THE CASE

I. The Texas Advance Directives Act

The Texas Advance Directives Act defines life-sustaining treatment as treatment that "based on a reasonable medical judgment, sustains the life of a patient and without which the patient will die." Tex. Health & Safety Code § 166.002(10); Pet.App.6a–7a. Section 166.046 of the Texas Health and Safety Code provides a set of procedures that immunize an attending physician from civil liability and criminal

prosecution for a decision to unilaterally discontinue life-sustaining treatment against the wishes of a patient or the person responsible for the patient's health care decisions. Tex. Health & Safety Code §§ 166.045(d)-.046; Pet.App.7a, 164a.

Texas Health and Safety Code section 166.046 indicates that if an attending physician refuses to honor a patient's treatment decision, such as continuing life-sustaining treatment, the physician's refusal shall be reviewed by an ethics committee. Tex. Health & Safety Code § 166.046(a); Pet.App.165a. Before an ethics committee review, a patient *may* be given a written description of the process and shall be entitled to notice 48 hours before the meeting begins. Tex. Health & Safety Code §§ 166.046(b)(1) & (2); Pet.App.165a. A patient is entitled to attend the meeting, receive a written explanation of the decision reached during the review process, and receive a portion of the patient's medical record. Tex. Health & Safety Code §§ 166.046(b)(4); Pet.App.166a. If the committee determines to withdraw life-sustaining treatment against the patient's wishes, the hospital shall continue treatment for ten calendar days following the decision. Tex. Health & Safety Code § 166.046(e); Pet.App.167a.

There are no specific restrictions regarding the qualifications of the persons serving on the committee, though the physician may not be a member of that committee. *See generally* Tex. Health & Safety Code § 166.046. Accordingly, the statute does not provide adequate due process protections against the conflict of interest inherently present when the treating

physician's decision is reviewed by the hospital ethics committee to whom the physician has direct financial ties and which itself is made up of individuals with ties to the hospital. *See id.* The law does not provide any ascertainable standard for determining the propriety of continuing life-sustaining treatment or the propriety of the physician's refusal to honor a parent's health care decision on behalf of her child. *See id.* The statute does not provide patients the opportunity to speak to the ethics committee or the opportunity to consult counsel. *See id.* Indeed, the statute requires only 48 hours' notice of an ethics committee meeting and the 48 hours can be during the business day or over a weekend. *See id.*

II. Initial Supporters Grow to Oppose Texas Health and Safety Code section 166.046

Petitioners seek to mask the constitutional infirmities of Texas Health and Safety Code section 166.046 by trying to cast the law as one arrived at by a wide array of "stakeholders," including Texas Right to Life. Pet.5–6. The position of political stakeholders is irrelevant to whether Texas Health and Safety Code section 166.046 is constitutionally firm. But the fact that stakeholders that originally supported the statute now oppose it underscores how real and devastating it is to Texans affected by the statute. Texas Right to Life's opposition to Texas Health and Safety Code section 166.046 is borne out of experience.

In a lengthy legislative hearing in 2019, Director of Texas Right to Life, Elizabeth Graham, testified that her group's opposition to Texas Health and Safety Code section 166.046 grew due to their experience helping the families of patients who were subjected to the statute. *Senate Committee on Health and Human Services; Testimony on the Amendments to TADA*, SB 2089 & SB 2129, 2019 Leg., 86th Sess. (Tex. 2019) (testimony of Elizabeth Graham, Director, Texas Right to Life). Graham recalled that in 1999, the medical community stakeholders assured patient advocacy groups, like Texas Right to Life, that hospitals would invoke the statute rarely, only in extraordinary circumstances when patients were actually dying. *See id.* In 2005, when a registry of providers willing to assist patients was added, Texas Right to Life began receiving calls more frequently and in unexpected circumstances. *See id.* For example, in October 2019, Petitioner sought to invoke Texas Health and Safety Code section 166.046 to end the life-sustaining treatment of a baby, T.L., over her mother's objection. Pet.App.19a.

III. Factual and Procedural Background

Today, T.L. is a toddler who currently is receiving life-sustaining treatment from Petitioner. Pet.App.5a. Petitioner contends that T.L.'s condition is futile, she is in pain, and should be allowed to die.[1] Pet.App.10–13.

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[1] T.L.'s current medical condition is irrelevant to whether Petitioner is a state actor. The temporary-injunction hearing occurred in December 2019 and the testimony is dated. Time has shown that the medical testimony about her condition and

In addition to affirming that the hospital, rather than Mother, should make the decision that T.L. should be allowed to die, Petitioner's position is that Mother is not entitled to procedural due process protections, including notice and an opportunity to be heard, regarding the decision. *See* Pet.4.

On Friday, October 25, 2019, the ethics committee chair notified Mother, in a letter, that the ethics committee would meet on Wednesday, October 30, 2019, to determine whether to continue T.L.'s life-sustaining treatment. Pet.App.17a. Twenty-two members of the ethics committee attended the meeting. 2 CA 40:14. Of the 22 attending members, 19 were employed by Petitioner. 2 CA 40:21–25.

On Thursday, October 31, 2019, at 11:45 p.m., Petitioner gave Mother notice that on November 10, 2019, it intended to remove T.L.'s life-sustaining treatment pursuant to Texas Health and Safety Code section 166.046. Pet.App.19a. To save her daughter's life, on November 10, 2019, Mother filed suit on behalf of T.L. under 42 U.S.C. section 1983 and the Uniform Declaratory Judgments Act, alleging violations of procedural and substantive due process. Pet.App.5a&23a.

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prognosis was not entirely accurate. For example, Dr. Jay Duncan testified that T.L. would not survive for five more months. 2 CA 143:2-5. Respondents dispute a number of the "facts" as set out by Petitioner, but they are not relevant to the analysis of whether this Court has jurisdiction over the federal question at this juncture.

Mother obtained a temporary restraining order against Petitioner the same day. Pet.App.24a. The trial court denied Mother's request for a temporary injunction. Pet.App.26a.

Mother appealed, and Texas's Second Court of Appeals reversed the trial court's denial of Mother's request for a temporary injunction. Pet.App.150a–51a. Petitioner sought review in the Supreme Court of Texas, but the Supreme Court of Texas denied review of the petition. Pet.App.163a.

REASONS FOR DISMISSING OR DENYING THE PETITION

The Petition should be dismissed because Petitioner cannot establish that this Court has jurisdiction over the court of appeals' interlocutory order. But, even if Petitioner could establish jurisdiction, review of the interlocutory order would have little effect beyond the parties in the case. Respondents respectfully suggest that the Petition should be denied because (1) the temporary injunction does not invalidate any Texas statute and (2) the dispute between the parties regarding the propriety of the temporary injunction is primarily a dispute about state law.

I. There is no basis upon which the Court may exercise jurisdiction as there is no final judgment by Texas's highest court and there remain multiple federal questions to be resolved in further proceedings.

Respondents will celebrate the day that Texas patients no longer find themselves subject to Texas Health and Safety Code section 166.046. The statute imposes on patients an impossible powerlessness over their own fate that is antithetical to the Texas spirit. But no court has determined that hospitals cannot rely on Texas Health and Safety Code section 166.046. Nor has any court opined on whether section 166.046 comports with the requirements of procedural due process. No final determinations have been made in this case. Until the state courts issue a final determination, this Court lacks jurisdiction over the appeal.

The court of appeals' decision granted Respondents a temporary injunction to preserve the status quo between the parties to allow for full trial on the merits. The court of appeals' ruling in this context did not "wipe[] out" the statute or "flatly declare[] the provision unconstitutional." *See* Pet.29. The late Justice Kennedy observed that "[b]reath spent repeating dicta does not infuse it with life." *See Metro. Stevedore Co. v. Rambo*, 515 U.S. 291, 300 (1995). Similarly, the urgent repetition of dicta does not defuse this statute of life.

Because there is no final judgment, Petitioner has not met its obligation to establish this Court has jurisdiction. *See Johnson v. California*, 541 U.S. 428, 431

(2004). Petitioner asserts that this Court has jurisdiction pursuant to 28 U.S.C. section 1257(a).[2] This Court does not have jurisdiction under 28 U.S.C. section 1257(a) because (1) there is no final judgment on the issue of whether Petitioner is a state actor when it invokes Texas Health and Safety Code section 166.046 and (2) there has been no determination regarding whether Texas Health and Safety Code section 166.046 provides sufficient procedural due process protections to comply with the Fourteenth Amendment.

A. There is no final judgment regarding whether Petitioner is a state actor when it acts pursuant to Texas Health and Safety Code section 166.046.

Under 28 U.S.C. section 1257(a), this Court has jurisdiction over final judgments rendered by the highest court of a state in circumstances where a state statute is alleged to violate the United States Constitution. 28 U.S.C. § 1257(a). The Supreme Court of Texas declined review of an interlocutory order granting a temporary injunction. Pet.App.163a. Petitioner contends that the denial of review is "an unmistaken indication" of the opinion of the Supreme Court of Texas. Pet.29. This is unlikely.

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[2] Petitioner references in passing 29 U.S.C. section 2403, but provides no "direct and concise argument amplifying the reasons relied on for allowance of the writ." Supreme Court Rule 14.1(h). Petitioner's failure to make a direct argument that this Court has jurisdiction is sufficient reason for this Court to deny this petition. Rule 14.4.

The Supreme Court of Texas's denial of review of this interlocutory order is not a "[f]inal judgment . . . by the highest court of a State. . . ." 28 U.S.C. § 1257(a). Texas Rule of Appellate Procedure 56.1(b)(1) states a "[d]enied" petition means only that "the Supreme Court is not satisfied that the opinion of the court of appeals has correctly declared the law in all respects, but determines that the petition presents no error that requires reversal or is of such importance to the jurisprudence of the state as to require correction." Tex. R. App. P. 56(b)(1). The Supreme Court of Texas has noted that its denial of review "is no indication that this court approved the opinion of the court of appeals."[3] *Matthews Constr. Co., Inc. v. Rosen*, 796 S.W.2d 692, 694 n.2 (Tex. 1990).

Petitioner attempts to make the intermediate court's ruling appear final by noting that the state attorney general and governor filed amicus briefs supporting Respondents. These amicus briefs and opinions have no precedential authority in Texas. They do not invalidate the statute. Ultimately, there is no legal

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[3] This Court has looked to the procedural rules of a state to determine whether a judgment was final or not. For example, in *Cox*, the Court noted that the question of finality "will be resolved not only by an examination of the entire record . . . but, where necessary, by resort to the local law to determine what effect the judgment has under the state rules of practice." 420 U.S. at 479 n.8. *See also Atlantic Richfield Co. v. Christian*, 140 S.Ct. 1335, 1349 (2020) (noting that "the Montana Supreme Court exercised review . . . through a writ of supervisory control" which this Court had previously held " 'is a final judgment within our jurisdiction.' "). The Texas Supreme Court exercised no such review at all; it expressly refused to do so.

basis upon which to turn a denial of review by a state's highest court into a final judgment on a federal question in issue.

B. No Texas state court has ultimately determined the federal issue under 42 U.S.C. section 1983.

The courts have not determined the primary federal issue—whether Respondents are entitled to relief under 42 U.S.C. section 1983. The intermediate court of appeals did not hold any Texas statute is unconstitutional. The court of appeals held only that Respondents are entitled to a temporary injunction because they demonstrated a probable right of relief on one of the claims they asserted—that Texas Health and Safety Code section 166.046 violates their rights to procedural due process of law. Pet.App.150a–51a.

Under well-settled law, the lower court's order is not precedential. Texas Rule of Civil Procedure 683 provides that a temporary-injunction order is "binding only upon the parties to the action. . . ." Tex. R. Civ. P. 683. The purpose of a temporary injunction "is not to conclusively determine the rights of the parties." *Trump v. Internat'l Refugee Assistance Project*, 137 S.Ct. 2080, 2086, 198 L.Ed.2d 643 (2017). It merely preserves the last, peaceable, uncontested status between the parties that existed prior to the controversy. *In re Newton*, 146 S.W.3d 648, 651 (Tex. 2004). To obtain a temporary injunction, an applicant must demonstrate a probable right to recover. *Butnaru v. Ford Motor Co.*,

84 S.W.3d 198, 211 (Tex. 2002). To show a probable right of recovery, the applicant must plead a cause of action and present some evidence that tends to sustain it. *Id.* The evidence need be sufficient only to raise a bona fide issue as to the applicant's right to ultimate relief. *Intercontinental Terminals Co., LLC v. Vopak N. Am., Inc.*, 354 S.W.3d 887, 897 (Tex. Civ. App. 2011).

The temporary injunction in this case is not a final determination of the merits. *See Butnaru*, 84 S.W.3d at 211. Accordingly, the temporary injunction does not invalidate any Texas law. *See id.* Because T.L. will die without a temporary injunction, causing Respondents to suffer a permanent, irreparable harm that cannot be remedied, a temporary injunction is necessary to allow a meaningful trial on the merits. The state courts have yet to determine whether the statute provides adequate procedural due process protections. And, contrary to Petitioner's assertions, other hospitals in Texas continue to invoke Texas Health and Safety Code section 166.046. *See Texas hospitals continue to impose deadly 10-day Rule*, TEXASRIGHTTOLIFE.COM, https://www.texasrighttolife.com/texas-hospitals-continue-to-impose-deadly-10-day-rule/ (last visited December 14, 2020).

A temporary injunction is necessary to give state courts the opportunity to assess the constitutionality of Texas Health and Safety Code section 166.046 through a trial on the merits. The temporary injunction allows the trial to proceed on the merits and allows the Texas state courts to resolve an important issue regarding the validity of a Texas statute.

Respondents respectfully suggest that this Court's resources will not be best spent by reviewing the interim holding of the state intermediate court of appeals. The state courts should have an opportunity to do their work.

C. None of the authority Petitioner cites establishes jurisdiction.

In some instances, this Court has exercised jurisdiction over non-final judgments when further proceedings are contemplated in state court. This case does not fall into any of those categories. Petitioner cites *Organization for a Better Austin v. Keefe* and *Cox Broadcasting Corp. v. Cohn* in support of its argument that this Court has jurisdiction. Pet.2 n.1. These cases contemplate jurisdiction only when remaining proceedings on the federal issue are preordained. In this case, significant questions remain to be answered during trial on the merits.

First, although this Court allowed review in *Keefe*, it exercised jurisdiction because the record in that case was established such "that the issuance of a permanent injunction upon termination of these proceedings will be little more than a formality." 402 U.S. 415, 418 n.1 (1971). The Court emphasized that there was no "indication that the injunction rests on a disputed question of fact that might be resolved differently upon further hearing." *Id.* Unlike in *Keefe*, the remaining proceedings will be significant. Not only are there disputed issues of fact with regard to T.L.'s condition, but

there are also fact issues—and federal questions—regarding whether Petitioner violated Respondents' due process rights when it invoked Texas Health and Safety Code section 166.046.

Similarly, the lack of any determination regarding whether Petitioner violated Respondents' due process rights also makes *Cox* distinguishable. In *Cox Broadcasting Corp. v. Cohn*, this Court reviewed an opinion from the Georgia Supreme Court on the federal issue. 420 U.S. 469, 476 (1975). This Court indicated that it has jurisdiction over non-final judgments in four circumstances. But none apply here. Petitioner noted briefly that further proceedings are preordained, but that is untrue in this circumstance.

Petitioner has steadfastly denied that Petitioner violated Respondents' rights to due process of law in invoking Texas Health and Safety Code section 166.046. For example, in its brief, Petitioner asserts that Respondents had notice and a meaningful opportunity to be heard before a neutral committee. *See*, *e.g.*, Pet.12–13. Respondents strongly disagree.

While Respondents certainly expect to demonstrate that Petitioner has violated their due process rights, it is a stretch to say the outcome of the proceeding is preordained. Petitioner cannot say—nor did it—that it "has no other defense to interpose" or that "nothing remains to be done but the mechanical entry of judgment by the trial court" or that " 'there is nothing more to be decided.' " *Pope v. Atlantic Line R. Co.*, 345

U.S. 379, 383 (1953).[4] Because so many important decisions remain, exercising jurisdiction now would not meet the Court's goals of "immediate rather than delayed review" as "the best way to avoid 'the mischief of economic waste and of delayed justice.'" *Cox*, 420 U.S. at 478, citing *Radio Station WOW, Inc. v. Johnson*, 326 U.S. 120, 124 (1945).

II. The federal question hinges entirely on state law.

In addition to allowing the state courts an opportunity to interpret state law, the relief Petitioner requests would require this Court to reject the Texas court's interpretation of Texas law. Such a conflict would create needless friction with the state court's determinations regarding the public function an entity performs when it acts pursuant to Texas Health and Safety Code section 166.046. Accordingly, principles of comity and federalism support denying Petitioner's request for certiorari.

A. Comity and federalism support deference to a state court's determination of state law.

Typically, "this Court defers to a state court's interpretation of a state statute." *Bush v. Palm Beach*

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[4] *Ford Motor Co. v. Bandemer* involves a Minnesota Supreme Court decision regarding the exercise of specific personal jurisdiction in a products liability action against Ford and is not "in a similar posture" to this case.

Cnty. Canvassing Bd., 531 U.S. 70, 76 (2000). Historically, "comity and respect for federalism" have compelled this deference. *See Bush v. Gore*, 531 U.S. 98, 112 (2000) (Rehnquist, C.J., concurring). The reason for deference is because "the decisions of state courts are definitive pronouncements of the will of the States as sovereigns." *Id.* As sovereigns, "state courts are the ultimate expositors of state law." *Mullaney v. Wilbur*, 421 U.S. 684, 691 (1975). Federal courts have sought to avoid unnecessary friction with state courts by abstaining from answering questions where the federal constitutional question is "dependent upon" or "may be materially altered by, the determination of an uncertain issue of state law." *See*, *e.g.*, *Harman v. Forssenius*, 380 U.S. 528, 535 (1965).

In this case, the state court's determinations regarding the effect of a state statute undergird the state-action question. After resolving the issues of state law, the federal analysis is straightforward. Petitioner's arguments under the state-action doctrine depend on this Court reversing the state court's determination of state law.

B. The federal law is clear.

While there is a federal question of whether Petitioner is a state actor under 42 U.S.C. section 1983, the answer to the federal question turns on state law. Under federal law, Petitioner is a state actor if its actions under Texas Health and Safety Code section 166.046 are fairly attributable to the state. *Blum v. Yaretsky*,

457 U.S. 991, 1002 (1982). The tests to determine whether action taken by a private entity may fairly be attributed to the state are enshrined in the nation's jurisprudence. Pet.19. In this case, the state court held that Petitioner's actions under Texas Health and Safety Code section 166.046 are fairly attributable to the state because Petitioner is exercising a public function. Pet.App.5a.

The public-function test is clear. Petitioner's action is fairly attributable to the state if Petitioner is performing a function that has been traditionally and exclusively exercised by the state. *Manhattan Comm. Access Corp. v. Halleck*, 139 S.Ct. 1921, 1928 (2019). But, to apply the public-function test, courts have to determine what function an entity is performing. *See id.* The question of what function a hospital performs when it acts pursuant to Texas Health and Safety Code section 166.046 is a question of state law.

C. Petitioner's proposed application of the federal law requires reversing determinations of state law.

The parties strongly dispute what function Petitioner performs when it invokes Texas Health and Safety Code section 166.046. Petitioner claims that the hospital is simply exercising an optional review process in the course and scope of providing medical care. Pet.7,17,18,21,24,26. Based on that assumption, Petitioner argues that federal cases have held the provision of medical care cannot be attributed to the State.

See, *e.g.*, Pet.22 (arguing that Petitioner's exercise of private medical judgment is not attributable to the State).

But the state court did not agree that the function Petitioner performs when it invokes Texas Health and Safety Code section 166.046 is simply providing medical care. It determined the function is (1) defining the lawful means of death and dying and (2) acting under the doctrine of *parens patriae*. Pet.App.5a. The court made these determinations by analyzing the interplay between Texas Health and Safety Code section 166.046 and Texas tort law and criminal law. Pet.App.44a–124a. These are state law determinations. As such, they are entitled to deference. *See Bush*, 531 U.S. at 112.

D. Petitioner's true disagreement is with the state court's determination of state law—not the application of federal law.

Petitioner's primary disagreement with the court below is a disagreement with the court of appeals' determination of these state law issues. Petitioner does not contend that defining the lawful means of death or dying or acting under the doctrine of *parens patriae* are private functions. Petitioner's dispute is with the state law determination that these are the functions Petitioner performs pursuant to Texas Health and Safety Code section 166.046.

Petitioner claims that Texas Health and Safety Code section 166.046 is a mere "safe harbor." Pet.20–22. But, again, the state court held that Texas Health and Safety Code section 166.046 is not merely a safe harbor. The court held Texas Health and Safety Code section 166.046 provides private hospitals with new powers. Pet.App.5a. Based on this analysis, the court applied federal law and concluded these actions were traditionally and exclusively exercised by the State. *See id.*

While the application is technically a question of federal law, it hinges entirely on interpreting a state statute against the backdrop of state law. If this Court granted review, the Court's work would be unpacking a Texas statute and determining whether the state courts in Texas correctly ascertained how the statute operates against the background of state law. Only after completing this task would the Court then apply the public-function test to determine whether Petitioner's action is a public function. After the state law issues are resolved, applying the public-function test is straightforward.

III. Petitioner is performing a public function when it acts pursuant to Texas Health and Safety Code section 166.046.

Even if this Court chose not to defer to the state courts in Texas on issues of state law, review is unnecessary in this case because the court of appeals correctly determined that Petitioner exercises a public

function when it acts pursuant to Texas Health and Safety Code section 166.046.

A. An entity is a state actor when it performs a traditional and exclusive public function.

To state a claim under 42 U.S.C. section 1983, a plaintiff must allege a violation of a right secured by the Constitution and laws of the United States, and must show that the alleged deprivation was committed by a person acting under color of state law. *West v. Atkins*, 487 U.S. 42, 48 (1988). If an actor satisfies the state-action requirement of the Fourteenth Amendment, the actor acts under the color of state law. *Id.* at 49.

A private entity qualifies as a state actor when (1) the private entity performs a traditional, exclusive public function; (2) the government compels the private entity to take a particular action; or (3) when the government acts jointly with a private entity. *Manhattan Comm. Access Corp. v. Halleck*, 139 S.Ct. 1921, 1928, 204 L.Ed.2d 405 (2019). Under the first test, when the private entity performs a traditional, exclusive public function, the private entity must exercise power "traditionally exclusively reserved to the State." *Id.* The tests laid out in *Halleck* are laid out in the disjunctive. There are three different tests to determine when an action is fairly attributable to the State. *See id.*

Accordingly, a private entity is a state actor anytime it performs a public function. *See id.* It does not

matter whether the government approves, acquiesces, compels, coerces, regulates, or affects the judgment of the private party. The fact that the entity performs a public function is sufficient to constitute state action. *See id.*

B. The government has traditionally exclusively exercised the police power to define the lawful means of death and dying.

Petitioner contends that the hospital does not exercise a public function because the function of providing medical care is not exclusively within the government's province. Pet.24. But the federal law Petitioner cites applies only if the function Petitioner performs when it invokes Texas Health and Safety Code section 166.046 is providing medical care. *See*, *e.g.*, Pet.24–26. This argument puts the cart before the horse. In doing so, it fails to join issue with the analysis from the court of appeals.

1. Defining the lawful means of death and dying is state action.

The court of appeals did not say providing medical care is historically and exclusively a government function. In fact, its opinion includes a section entitled, "Most medical treatment decisions made by private health care providers are not traditionally or exclusively public functions." Pet.App.35a.

Texas Health and Safety Code section 166.046 does not simply deal with "medical care." It deals with what we hold most sacred. Texas Health and Safety Code section 166.046 grants physicians the right to take life over the objection of the living person whose life is at stake or the objection of their surrogate medical decisionmaker. Pet.App.165a.

The fact that the decision relates to medical care does not *ipso facto* exclude the decision from being attributable to the government. The court of appeals noted that "when a private treatment decision is one traditionally and exclusively within the sovereign prerogative of the state, the public-function exception applies." Pet.App.38a (citing *West v. Atkins*, 487 U.S. at 54–57). Defining the lawful means for death and dying in the context of providing medical care is no shield to being a state actor.

The court of appeals held that section 166.046 delegates to Petitioner the State's police power to define what is, and is not, a lawful means or process of dying. Pet.App.69a–115a. Historically, the government, and only the government, has set the boundaries on which actions constitute lawful killing. *See id.* (noting that the government, and exclusively the government, has made determinations about the lawfulness of homicide, suicide, wrongful death, mercy killing,[5] and euthanasia, among other decisions relating to the lawful process of dying). Petitioner does not attack any of the

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[5] Mercy killing is prohibited by Texas Health & Safety Code §166.050. Pet.App.103a.

court of appeals' analysis or suggest that this function has ever been performed by private actors. Nor does Petitioner cite any authority stating that regulating the lawful means of death and dying is not a public function.

2. Beyond immunizing conduct, Texas Health and Safety Code section 166.046 authorizes Petitioner to define the lawful means of death and dying.

Petitioner contends the court of appeals misapplied federal law because Texas Health and Safety Code section 166.046 merely denies judicial relief for a private action and the State is not responsible for conduct it simply immunizes from judicial relief. Pet.20. But section 166.046 is not a mere safe harbor.

Texas Health and Safety Code section 166.046 does not merely codify or clarify Texas tort law. Pet.App.70a–83a. In Texas, abandoning a patient after beginning treatment is a tort. *See St. John v. Pope*, 901 S.W.2d 420, 423 (Tex. 1995); *Childs v. Weis*, 440 S.W.2d 104, 106–07 (Tex. Civ. App. 1969). Texas tort law provides that a physician has a duty to continue to provide treatment to a patient because beginning treatment creates a consensual relationship. *See id.* In beginning the relationship, the physician makes certain representations, including that he has a reasonable degree of professional skill and that he will use that skill with reasonable care, diligence, and judgment in treating the patient. *Graham v. Gautier*, 21 Tex. 111, 120 (1858);

Helms v. Day, 215 S.W.2d 356, 358 (Tex. Civ. App. 1948). Once a physician enters the physician-patient relationship, obtains informed consent of the patient, and begins treatment, the physician is prohibited from withdrawing his professional services without affording the patient a reasonable opportunity to retain another physician to continue the form or course of treatment the physician initiated. *See Granek v. Tex. State Bd. of Med. Exam'rs*, 172 S.W.3d 761, 766 n.2 (Tex. Civ. App. 2005).

Under Texas law, the removal of life-sustaining treatment over a patient's objection can be criminal, medical malpractice, or patient abandonment. *See*, *e.g.*, *Gross v. Burt*, 149 S.W.3d 213, 222 (Tex. Civ. App. 2004). Once a physician assumes care of a patient, the physician has a duty to provide care during a period of transition to another physician. *See, e.g.*, Tex. Health & Safety Code § 166.045(c); *Lee v. Dewbre*, 362 S.W.2d 900, 902 (Tex. Civ. App. 1962). A reasonable amount of time to transition care for an established patient could vary widely depending on the complexity of the patient's medical condition and other factors.

Further, Petitioner is providing T.L. care under the Medicaid Star Kids Program. *See* 2 CA 224:8-12. The Medicaid Star Kids Program is a contract between the State of Texas and medical providers to provide indigent care to Texas's medically fragile children. *See* 2 CA 224:4-7. The program covers a special subset of Medicaid beneficiaries, who are limited in terms of options due to their care needs. *See id.* Providing care pursuant to a contract creates additional obligations.

Neither a physician nor a hospital has the right to take action that is criminal, a breach of contract, or a breach of the duty of care under state law. Petitioner seems to acknowledge this fact by observing that without section 166.046, physicians will be "coerced" to provide care they otherwise would not provide. Pet.29. If the physician had the right—and were not subject to liability—for removing life-sustaining treatment over a patient's objection, then there would be no true coercion. Further, if complying with Texas Health and Safety Code section 166.046 were voluntary, the statute's invalidity would not coerce any action. The reality is that Petitioner has these rights only because of this statute.

C. The government has traditionally and exclusively acted under the doctrine of *parens patriae*.

Texas Health and Safety Code section 166.046 also delegates to Petitioner, the sovereign power of the State, under the doctrine of *parens patriae*, to supervene the fundamental right of the parent to make medical decisions for her child.

1. Acting under the doctrine of *parens patriae* is a traditionally exclusively state function.

The State, traditionally and exclusively, has had the ability, under the doctrine of *parens patriae*, to supervene a parent's decision regarding the medical care

of a child. The only medical decisionmakers for children are their parents and the government. *See Schall v. Martin*, 467 U.S. 253, 265 (1984). The parents' decision is subject only to the *parens patriae* authority of the State to "supervene" their refusal to consent to treatment recommended for their child's welfare. *See Miller ex rel. Miller v. HCA, Inc.*, 118 S.W.3d 758, 766–67 (Tex. 2003).

The State has historically and exclusively been the only entity to supervene a parent's right to determine the medical care of her child. Pet.App.43a–68a. Consistent with its exclusive and traditional regulation of actors seeking to deny life-sustaining treatment to children, the Legislature subjected the Texas Advance Directives Act to the Child Abuse Prevention and Treatment Act. Pet.App.54a–65a. The Child Abuse Prevention and Treatment Act requires state intervention through Child Protective Services when parents withhold consent to life-sustaining treatment. Pet.App.54a–55a. Through laws authorizing intervention, the State has traditionally and exclusively been the only entity to supervene a parent's right to make decisions regarding the provision of life-sustaining treatment to a child. Petitioner does not argue that any private entity has exercised this right.

2. Petitioner is acting under the doctrine of *parens patriae*.

Instead, Petitioner contends the court of appeals wrongly decided that the doctrine of *parens patriae*

applies to this situation because, according to Petitioner, the doctrine applies only when the State dictates a patient's treatment. Pet.24–25. Petitioner contends it is not dictating T.L.'s treatment because it is not restricting T.L.'s ability to seek treatment, but instead is limiting its own services. *See id.* This argument is disingenuous.

Petitioner began treating T.L., and as a direct consequence of Petitioner's inability to treat T.L., and refusal to perform procedures (such as a tracheostomy) that other facilities have said are necessary to consider T.L. for transfer, T.L. has no other immediate treatment option. *See* 2 CA 198–99; 2 CA 220–21. Accordingly, though she is in a private facility, because of the condition she is in, Petitioner's refusal to provide care that would allow her transfer, and its request to withdraw life-sustaining treatment, all dictate T.L.'s treatment.[6]

Because of T.L.'s condition, the way T.L. has been treated (and left untreated) by Petitioner, and Petitioner's efforts to supervene Mother's decision to continue life-sustaining treatment, Petitioner is dictating T.L.'s treatment. Its action is therefore fairly attributable to the State because supervening a parent's right to make medical treatment decisions for a child has been traditionally and exclusively a public function.

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[6] Dr. Duncan testified that he would not sign discharge orders for T.L. to go to another facility that had a lower level of care, yet he also testified "Yes" when asked if he believed "the best thing for T[ ] is to die." 2 CA 98:5-23.

IV. The court of appeals' decision does not warrant review.

Even if the court of appeals had misapplied federal law, review of this case would have little effect beyond the parties before the Court.

A. The Rules of the Supreme Court of the United States suggest this case does not warrant review.

Supreme Court Rule 10, entitled, "Considerations Governing Review on Certiorari," provides that: "A petition for a writ of certiorari will be granted only for compelling reasons." Supreme Court Rule 10. In making its determination, the Court considers whether any of the following non-exclusive factors are present: (a) a decision from a federal court of appeals that conflicts with decisions of certain other courts; (b) a decision from a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals; and (c) a decision from a state court or a United States court of appeals that decides an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in ways that conflict with relevant decisions of this Court. *See id.* Rule 10 provides that a petition "is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." *Id.*

Petitioner asserts that the intermediate state court of appeals in Texas misapplied a properly stated rule of law. Rule 10 provides that reviewing a court of appeals' decision on this basis is atypical. The "Court normally does not sit simply to correct such errors. The Court has traditionally expended its limited time and resources on those cases that presents issues of national importance, for which there is some 'compelling' reason for invoking the Court's jurisdiction." Stephen M. Shapiro et al., *Supreme Court Practice* § 4.2, at 240 (10th Ed. 2013).

Even presuming this Court has jurisdiction, the Petition falls into a category of cases that rarely are worthy of review. Because the jurisprudence is clear, the Court's efforts will have little impact beyond the parties to this case.

B. This case is a poor vehicle for reviewing the federal questions presented in the Petition.

Petitioner contends that the question presented is exceptionally important and warrants review. As support, Petitioner states that (1) the court of appeals struck down a vital Texas statute on federal constitutional grounds, (2) the federal question has been finally decided, (3) the federal question is a necessary predicate to relief, (4) the record on the federal question is complete, and (5) declining review would delay benefits Congress intended to grant by allowing for appeal to this Court.

Petitioner selectively quotes from section 6.31(b) of Professor Stephen M. Shapiro's *Supreme Court Practice* to support for the proposition that it is "hornbook law (literally)" that decisions invalidating state statutes are important enough to warrant Supreme Court review. Pet.27. The full quote is:

> Absent a conflict among the courts of appeals or with Supreme Court precedent, extraordinary public importance is generally the only means of obtaining Supreme Court review. Decisions invalidating acts of Congress, or state statutes (particularly where the statutes are representative of those in other states), are ordinarily sufficiently important to warrant Supreme Court review without regard to the existence of a conflict. If a court invalidates a state law on constitutional grounds, a well-researched petition will canvass the laws of other states and attempt to show how the holding below threatens to disrupt their administration.

Supreme Court Practice § 6.31(b), at 482. Professor Shapiro goes on to advise practitioners that "[t]he petition should convince the Court that a nationally binding rule of law is imperative, not that the petitioner has suffered an individual injustice." *Id.*

An issue is important when it is important "to the public" as opposed to important to just the parties. *Supreme Court Practice* § 4.11, at 263. Even in the case of an important conflict between the courts, "[i]t is often most efficient for the Supreme Court to await a final judgment and a petition for certiorari that presents

all issues at a single time rather than reviewing issues on a piecemeal basis." *Id.* § 4.4, at 240.

The Petition should be dismissed or denied at this time. Even presuming this Court has jurisdiction, the posture of this case makes it a poor vehicle for review. First, contrary to Petitioner's assertion, the court of appeals did not strike down any Texas statute. Second, the court's decision is not final. Third, while the federal question is a necessary predicate to granting Respondents relief, it is insufficient to entitle Respondents to relief because the state courts have not determined whether Petitioner denied Respondents of their due process rights. While the court of appeals granted a temporary injunction based on federal law, Respondents asserted constitutional grounds under the Texas constitution that would provide adequate and independent avenues for relief. The state courts have not addressed those claims.

Fourth, although the court of appeals has decided one federal question in Respondents' favor, the determination is not sufficient to entitle Respondents to relief. The central question of whether Texas Health and Safety Code section 166.046 comports with procedural due process has not yet been decided. Accordingly, the possibility remains open that the state courts could hold that although Petitioner is a state actor, Petitioner has afforded Respondents sufficient procedural due process. Such a determination would validate Texas Health and Safety Code section 166.046. Although the issues are critically important to the parties, it is a stretch to argue that the ruling on the temporary

injunction is so important to the nation that it warrants this Court's immediate review at this point in time when so much is left to be decided.

Fifth, there is no conflict or confusion in the federal jurisprudence governing state action. Petitioner does not allege a conflict among the courts of appeals or with Supreme Court precedent. Petitioner's argument instead is that a state intermediate court of appeals has misapplied federal law while granting a temporary injunction.

Sixth, the decision below has no national effect. The court of appeals' decision is not precedential, even in the counties in Texas within the jurisdiction of Texas's Second Court of Appeals. No other state has a similar statute. Petitioner tries to expand the scope of its individual loss by suggesting that other physicians may be affected, but this argument is undercut by the fact that other hospitals continue to invoke the statute. *See Texas hospitals continue to impose deadly 10-day Rule*, TEXASRIGHTTOLIFE.COM, https://www.texasrighttolife.com/texas-hospitals-continue-to-impose-deadly-10-day-rule/ (last visited December 14, 2020).

Even presuming that this Court has jurisdiction, there are no compelling reasons to grant review. There are compelling reasons to deny review. First, the procedural posture of this case means that the issue may be subject to piecemeal review. If this Court affirmed the court of appeals' state action determination, the Court may find itself in the future faced with due

process questions arising from this case after trial on the merits. Second, review at this time would interfere with the state courts' ability to pass first on questions regarding the constitutionality of state statutes. Third, the Court's review primarily would be a review of state law issues. Review at this point, in the middle of state court proceedings, would create needless friction with state courts. Finally, all of these costs come with little potential national benefit. The parameters of the state-action doctrine are clear. There is no need to elucidate the federal jurisprudence surrounding the state action doctrine.

This case presents a disagreement regarding how the doctrine applies to a unique Texas statute. The Court's involvement at this stage has the potential to disrupt principles of comity and federalism and no corresponding potential to provide national guidance.

Respondents respectfully suggest that the Petition should be denied.

CONCLUSION

Respondents respectfully suggest that the court of appeals' interlocutory order does not warrant review. This Court lacks jurisdiction over the order and the Petition for Writ of Certiorari should be dismissed. In the alternative, the Writ of Certiorari should be denied

because it primarily presents issues of Texas law that the Texas state courts have correctly resolved.

Respectfully submitted,

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