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SUPREME COURT OF TEXAS
BLAKE A. HAWTHORNE, CLERK

No. _____

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 from the
Second Court of Appeals at Fort Worth, Texas
No. 02-20-00002-CV

EMERGENCY MOTION TO EXPEDITE

Petitioner Cook Children's Medical Center asks the Court to expedite briefing and consideration of this appeal for two reasons. First, the court of appeals struck down a statute that for over 20 years has been a vital tool for spurring difficult conversations between doctors, patients, and family members and resolving fraught end-of-life disputes. Disregarding binding U.S. Supreme Court precedent, the court held private medical decisions by private doctors at a private hospital to be State action subject to suit under 42 U.S.C. §1983 and recognized what amounts to an unprecedented constitutional right to the medical care of one's choice. Second, the patient here is a child in constant pain whose suffering is exacerbated by medical

intervention that her mother, and now the court of appeals, wish to compel physicians to provide against their ethics and conscience. Both of these factors, together, counsel for handling this case with the utmost dispatch.

I. T.L.'s medical condition.

T.L. has been a patient in the cardiac intensive care unit at Cook Children's for the past 18 months—since her premature birth in early 2019. A congenital heart defect and severe lung damage made her condition critical from the start. Cook Children's provided T.L. with aggressive, state-of-the-art treatment—including several surgeries—to provide some chance of recovery. But in the summer of 2019, T.L. suffered a major medical crisis from which she will never recover.

It is undisputed that T.L. is terminally ill, kept alive only through artificial life-support. She is on a ventilator, and any agitation can precipitate a crisis that necessitates painful, emergency intervention. To reduce the frequency of such episodes, doctors keep T.L. chemically paralyzed and sedated. As a result, T.L. cannot move, play, or interact, and she is rarely, if ever, held. Her doctors and nurses see her in daily agony and know that their medical intervention is causing much of her suffering.

II. The role of Section 166.046 of the Health and Safety Code.

T.L.'s doctors, as a matter of medical ethics and individual conscience, wished to discontinue providing artificial life-support.[1] After months of conversations with T.L.'s mother yielded no agreement, the physicians invoked Section 166.046 of the Texas Health and Safety Code. This statute provides an optional dispute-resolution procedure that the hospital may, but is not required to, follow before withdrawing artificial life-support. Cook Children's followed the statutory procedure, but not because it needed the statute's permission to withdraw artificial life-support. Following the procedure affords the physicians and hospital immunity from liability. Physicians already have, under the common law, the ability to refuse to provide an intervention that is at odds with their ethics and conscience. The statute does not alter that right.

Under the statutory procedure, the hospital's ethics committee met to discuss the case with the mother and the treating physician. The committee agreed that artificial life-support was causing T.L. to needlessly suffer and that Cook Children's medical staff should abstain from further intervention, as a matter of medical ethics.

[1] Cook Children's is more than willing to continue providing compassionate care for T.L., in accordance with the Hippocratic Oath. What Cook Children's and its physicians are unwilling to do is continue providing interventions that cause T.L. pain and suffering when there is no hope that she will ever recover. If these interventions cease, the likely result is that T.L.'s illness will overcome her, and she will die a natural death. Throughout this process, Cook Children's will ensure her comfort.

Herculean efforts were made to transfer T.L. to another hospital, but every hospital refused transfer.

III. The litigation.

T.L.'s mother sued Cook Children's under 42 U.S.C. §1983 to declare §166.046 unconstitutional for violating both procedural and substantive due process. The mother sought a temporary injunction to prevent Cook Children's from withdrawing T.L.'s artificial life support.

Cook Children's argued that the mother's suit failed for three independent threshold reasons:

- A §1983 claim requires State action, but neither Cook Children's nor its medical personnel are State actors. And even if Cook Children's *were* relying on the statute to withdraw medical care, which it is not, merely relying on a state-provided procedure is not State action.
- The mother's suit attacks §166.046, but Cook Children's does not rely on the statute to withdraw life-sustaining care. Cook's physicians have a preexisting, common law right to refuse treatment. The statute expressly disclaims modification of any existing right and is therefore irrelevant to the injunction that the mother sought. *See* TEX. HEALTH & SAFETY CODE §166.051.
- The true nature of the mother's suit is that T.L. is being deprived of the medical care of her choice, but there is no constitutional right to medical care and therefore no basis for a constitutional challenge.

The mother incorrectly framed this case as about a parent's authority to make medical decisions for a child. No one disputes that authority. Instead, this case is about whether a parent can force doctors and nurses to perform treatment that is

repugnant to their conscience and professional ethics because it causes a patient to suffer for no medical benefit.

After the initial trial judge was ordered recused, Chief Justice Hecht appointed Chief Justice Sandee Bryan Marion of the Fourth Court of Appeals to hear the case. After careful consideration, Chief Justice Marion denied the mother's request for temporary injunction.

On interlocutory appeal, the court of appeals reversed, holding that Cook Children's is a State actor and, essentially, that the statute is unconstitutional because it violates due process.

IV. Request for expedited briefing and consideration.

To expedite review of this important statute and to minimize the time T.L. must suffer, Cook Children's moves this Court to expedite briefing and decision. Expedited briefing will not unduly burden or prejudice the parties. They filed merits briefs in the court of appeals. Producing a brief on an expedited timetable is practicable and necessary given the urgent nature of this case. The record is small, and the issues are purely legal.

Petitioner respectfully requests that this Court also expedite its consideration and disposition of the petition for review. This Court has acted in expedited fashion when a child's well-being was at risk. *In re Texas Dep't of Family & Protective Servs.*, 255 S.W.3d 613, 613 (Tex. 2008) (per curiam) (issuing opinion in six days,

where children were suffering ongoing harm from unwarranted separation from their parents). This Court has acted with dispatch in a constitutional challenge to Texas's congressional districts, when immediate harm to the State's interest in drawing boundaries was threatened. *See Perry v. Del Rio*, 66 S.W.3d 239, 242 (Tex. 2001) (issuing opinion in seven days, where federal courts would soon assume authority for drawing districts).

T.L. deserves the same swift review because her individual pain combines with a court of appeals opinion that ignores binding precedent to expand the State action doctrine and recognize an unprecedented constitutional right to medical care, essentially striking down a Texas statute. Any undue delay will cause T.L. continued, needless suffering, and will deprive Texas doctors, patients, and families of a vital statutory tool for confronting end-of-life dilemmas.

PRAYER

For these reasons, Petitioner Cook Children's Medical Center respectfully requests that this Court expedite briefing and consideration of this appeal.

Respectfully submitted,

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CERTIFICATE OF CONFERENCE

On August 20, 2020, I conferred with Jillian L. Schumacher, counsel for Respondents, and she informed me that her clients were opposed to the relief requested in this motion.

/s/ *Amy Warr*
Amy Warr

CERTIFICATE OF SERVICE

I hereby certify that on August 20, 2020, a true and correct copy of this motion, including any and all attachments, is served via electronic service through eFile.TXCourts.gov on parties through counsel of record, listed below:

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