No. 20-10615

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BERMAN DE PAZ GONZALEZ, INDIVIDUALLY AND AS HEIR AND ON BEHALF OF THE ESTATE OF BERMAN DE PAZ MARTINEZ; EMERITA MARTINEZ-TORRES, INDIVIDUALLY AND AS HEIR AND ON BEHALF OF THE ESTATE OF BERMAN DE PAZ MARTINEZ,
Plaintiffs-Appellants.

v.

THERESE M. DUANE; ACCLAIM PHYSICIAN GROUP, INCORPORATED; TARRANT COUNTY HOSPITAL DISTRICT DOING BUSINESS AS JPS HEALTH NETWORK,
Defendants-Appellees.

On appeal from the United States District Court
for the Northern District of Texas
Case No. 4:20-CV-0072-A, Judge John H. McBryde

REPLY BRIEF OF APPELLANTS

William D. Taylor (TX 24046954)
Taylor & Taylor Law, P.C.
4115 Highgrove Dr.
Arlington, TX 76001
817.483.8388
Fax: 817.483.8390
Email: wtaylor@taylorandtaylorlaw.com
Counsel for Appellants

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ARGUMENT

I. THE TRIAL COURT ERRED IN DISMISSING THE § 1983 CLAIMS FOR LACK OF STANDING.

In their opening brief, the Parent-Appellants demonstrated the trial court erred in dismissing the § 1983 claims for lack of standing, which was the trial court's only basis for dismissal. Appellants' Br. at 16-21. The Defendant-Appellees do not challenge that conclusion, and the trial court's dismissal should be reversed.

II. NO OTHER ARGUMENTS JUSTIFY DISMISSAL.

Nevertheless, the Defendant-Appellees argue the judgment should be affirmed on other grounds that were not addressed by the trial court.[1] Although this Court may consider any grounds that were briefed below, the Court may decline to consider them and remand this action for consideration by the trial court in the first instance, particularly since the issues are more appropriate for summary judgment. *See, e.g.,* Appellants' Br. at 21 & n.8.

[1] The Defendant-Appellees' issues are phrased somewhat differently in their respective briefs. In their second issue, the Acclaim and Dr. Duane ask whether the judgment should "be affirmed based on Appellants' failure to allege any constitutional injury," while JPS raises the same issue in two subparts: "(1) Appellants' Complaint does not allege a violation of a 14th Amendment due process right"; and "(2) Appellants' allegations invoke potential tort claims that are not actionable under Section 1983." *Compare* Acclaim/Duane Br. at 1 *with* JPS Br. at 1. Similarly, in their third issue, Acclaim and Dr. Duane ask whether the Parent-Appellants failed "to allege any injury suffered was the result of a policy or custom adopted by an Acclaim policymaker," while JPS again uses two sub-issues: "(3) Appellants' Complaint does not identify an official policy or custom"; and "(4) Appellants' Complaint does not identify a final policymaker, or allege that such policymaker knew of or approved the policy or custom." *Compare* Acclaim/Duane Br. at 1 *with* JPS Br. at 1.

In any event, the Parent-Appellants anticipated and addressed each of these other grounds, demonstrating that:

- Dr. Duane was sued in her individual capacity, *see* Appellants' Br. at 23-26;
- The Complaint alleged claims for constitutional injuries—deprivation of life, liberty, and property interests—which are not claims for medical negligence, *see* Appellants' Br. at 26-34.
- The Complaint alleged claims for liability by JPS and Acclaim, based on their own acts and not *respondeat superior, see* Appellants' Br. at 35-45.

Nevertheless, each of Defendant-Appellees' arguments will be addressed in turn.

A. Dr. Duane was sued in an individual capacity.

First, Dr. Duane argues that she was sued in her official capacity only and that the claims against her are redundant of the claims against JPS and Acclaim. This argument was anticipated in the opening brief, which explained that the "course of proceedings" demonstrates that Dr. Duane was sued in her individual capacity, based on the "substance of the claims, the type of relief requested, and the assertions during the course of briefing. *See* Appellants' Br. at 23-26 (citing, *e.g., Kentucky v. Graham*, 473 U.S. 159, 167 n.14 (1985)).

In response, Dr. Duane implies that the Parent-Appellants are somehow attempting to "change" the capacity assertions after the fact. Acclaim/Duane Br. at

13 (citing *Robinson v. Hunt Cnty., Texas*, 921 F.3d 440, 446 (5th Cir. 2019)).[2] That is plainly not the case, as the Parent-Appellants never made any allegation that would hint at an official capacity claim below.

The Complaint did not identify Dr. Duane as an official of a government entity, but instead identified her only as an "individual" residing in Texas. ROA.8. Indeed, the Complaint expressly incorporated allegations that Dr. Duane was a *former* employee of the other defendants, *i.e.* that she had been "dismissed" before suit. ROA.18. Therefore, if the claims *could* have been made against her in an official capacity at all, the Complaint would not have named Dr. Duane as the defendant, but would have named her *successor* as the defendant for such claims.

Furthermore, the assertion of individual capacity is demonstrated by additional factors, as the Complaint: (1) asserted claims against both Dr. Duane and her former employers; (2) did not merely allege an unconstitutional policy, but affirmatively alleged bad acts by Dr. Duane herself; and (3) sought relief (from all Defendant-Appellees) in the form of damages. ROA.8-15, 18. Each of these factors creates a presumption that the Complaint was intended to assert individual-capacity claims. *See* Appellants' Br. at 24-25 (citing, *e.g., Mitchell v. Washington*, 818 F.3d 436, 442 (9th Cir. 2016)); *see also Cummings v. Bexar Cty., Civil Action* No. 5:17-CV-783-XR, 2018 U.S.

[2] *Robinson* is irrelevant to this case, as the plaintiff in *Robinson* expressly asserted that the defendants were sued in their "official capacity as to injunctive and declaratory relief." *Robinson v. Hunt Cty.,* 921 F.3d 440, 446 (5th Cir. 2019).

Dist. LEXIS 185417, at *13 (W.D. Tex. 2018); *Hayward v. Lan Dry*, No. 02-927-D, 2005 U.S. Dist. LEXIS 59468, at *4-8 (M.D. La. 2005).

Therefore, the "substance of the claims" and the "type of relief" both demonstrate that the claims were asserted against Dr. Duane in her individual capacity, and Dr. Duane has never argued otherwise. Instead, the sole argument raised below—that the claims were "evidently" official-capacity claims because the a*lleged acts* occurred during the "scope of [her] employment," *see* ROA.88—was based on a mischaracterization of the applicable law. *See* Appellants' Br. at 24 (citing *Hafer v. Melo*, 502 U.S. 21, 26 (1991)). The contention that the Parent-Appellants have "changed" their capacity assertions is not only without merit, it is frivolous.

Nor is there merit to any assertion that the Parent-Appellants "did not dispute the Acclaim Appellees' characterization of the capacity in which Dr. Duane was sued."[3] *See* Acclaim/Duane Br. at 15. To the contrary, in response to the motion to dismiss below, the Parent-Appellants expressly stated that their allegations were made "against Dr. Duane **in her individual capacity.**" Appellants' Br. at 25 (quoting ROA.189).

Bizarrely, Dr. Duane attempts to twist this *express* statement of individual capacity into an *inference* of official capacity, simply because the statement was made in

[3] Dr. Duane purports to question whether the Parent-Appellants were "suing Dr. Duane under § 1983" at all. Acclaim/Duane Br. at 14. But Dr. Duane did not raise that argument below, as she construed the § 1983 claims as being asserted against both herself and Acclaim. ROA.87-88.

the first section of the response arguments (*i.e.* regarding state-law claims), rather than being repeated in each subsequent section of the response brief (*e.g.,* regarding federal claims). *See* Acclaim/Duane Br. at 15-16. Dr. Duane's argument is absurd. There is nothing that would indicate the Complaint altered the capacity of Dr. Duane from claim to claim, and the capacity statement in the first section of the response is logically applied to the following sections. *See* ROA.19. Furthermore, *if* there could be any contrary inference, it would not be availing to Dr. Duane, since all inferences must be construed against dismissal. *See, e.g., Severance v. Patterson,* 566 F.3d 490, 501 (5th Cir. 2009). Finally, there is nothing to indicate that Dr. Duane ever construed the response's individual-capacity statement as being limited to the state-law claims (as she now contends). Instead, Dr. Duane—unlike the defendants in *Adrian*—did not renew her capacity arguments in her reply brief to the trial court. *Compare* ROA.215-25 *with United States ex rel. Adrian v. Regents of Univ. of Cal.*, 363 F.3d 398, 403 (5th Cir. 2004).

Accordingly, the "substance of the claims," the "type of relief," and the "course of briefing" all indicate the claims were asserted against Dr. Duane in an individual capacity. As such, Dr. Duane is a "person" that may be held liable under 42 U.S.C. 1983 for any constitutional deprivations that she caused. *See, e.g., Graham*, 473 U.S. at 166.

B. The Complaint alleges plausible deprivations of life, liberty, and property interests without due process of law.

Next, the Defendant-Appellees assert (in slightly different terms, respectively) that the Complaint in this action merely alleges medical negligence claims and does not assert any constitutional injury. *See* Acclaim/Duane Br. at 1, 18-39; JPS Br. at 1, 8-31. This argument was also anticipated in the opening brief, which demonstrated the federal claims were not claims for medical negligence, but were claims for:

- violations of life and liberty interests created by the Constitution itself, Appellants' Br. at 28-29 (citing, *e.g., Cruzan v. Dir., Mo. Dep't of Health,* 497 U.S. 261, 269-87 (1990));
- violations of life and liberty interests created by state law, Appellants' Br. at 29-30 (citing *Vitek v. Jones*, 445 U.S. 480, 488 (1980)); and
- property interests created by state law, Appellants' Br. at 30 (citing, *e.g., Bd. of Regents v. Roth*, 408 U.S. 564, 577 (1972)).

Furthermore, the Parent-Appellants' factual allegations showed that the deprivations were not based on mere negligence, but were the result of intentional acts. Appellants' Br. at 32-34 (citing, *e.g.*, ROA.10-12, 18). In response, the Defendant-Appellees' arguments do not undermine any these points.

1. The Parent-Appellants have alleged deprivations of life and liberty interests created by the Constitution itself.

The Parent-Appellants first demonstrated that life and liberty interests in end-of-life decisions arise from the Constitution itself. Appellants' Br. at 28-29 (citing, *e.g., Cruzan,* 497 U.S. at 269-87). In their response, Dr. Duane and Acclaim do not address this issue and instead raise arguments that are simply are simply irrelevant. They attempt to reframe the issue as a general right to medical care and cite numerous cases for the proposition that medical negligence does create a constitutional claim. *See* Acclaim/Duane Br. at 8-26. These cases generally involve Eighth Amendment claims for cruel and unusual punishment (or the equivalent substantive due process claims) for failure to provide medical care. None of these cases address the claims at issue here, which involve the right to procedural due process in making end-of-life choices. *See* Acclaim/Duane Br. at 25-26 (collecting cases).

As an example, the *Baez* plaintiff argued that prison medical personnel violated the Eighth Amendment, by erroneously determining he did not need a hernia surgery, then delaying surgery, and failing to prescribe adequate pain medication. *Baez v. INS*, No. 06-30112, 2007 WL 2438311, 2007 U.S. App. LEXIS 20048, at *2-3 (5th Cir. Aug. 22, 2007) (per curiam). This Court, however, held that the actual evidence was only sufficient to establish negligence, which did not create a violation of the Eighth Amendment. *Id.* at 4-5. *Baez* simply has no relevance to this case, and neither do any of the other cases cited with it. *See* Acclaim/Duane Br. at 25-26.

Even further afield are the citations to what may be called "failure to guarantee" cases, which variously held that the government officials were not required to guaranty a safe workplace,[4] protect against the violence of third parties (such as a plaintiff's ex-boyfriend),[5] or guaranty access to contraceptives.[6] *See* Acclaim/Duane Br. at 22-24 (collecting cases). These cases are neither factually nor legally relevant to the issues at hand and merit no discussion.

JPS's arguments are closer to the issues at hand, but are no more persuasive. Like Dr. Duane and Acclaim, JPS attempts to frame the issue as a right to healthcare. It argues that there is no general right to healthcare and then extrapolates that argument to assert that there can be no right to continued healthcare, even in end-of-life situations. In other words, JPS argues that there is a bright-line distinction between taking active steps to kill a patient and merely "pulling the plug" (so to speak), and that the Constitution does not protect against the latter.

In short, the *official policy* of JPS—the government hospital for a county of two million people—is that the Constitution allows its physicians to **commit passive euthanasia without the patient's consent.**

JPS's policy on this issue is anathema to the Constitution. As noted in the opening brief, life and liberty interests in end-of-life choices are inherent in the

[4] *Collins v. City of Harker Heights*, 503 U.S. 115 (1992).

[5] *Pinder v. Johnson*, 54 F.3d 1169 (4th Cir. 1995) (en banc).

[6] *Harris v. McRae*, 448 U.S. 297, 317–18 (1980).

Fourteenth Amendment itself, and both were expressly acknowledged in this context by *Cruzan*. Appellants' Br. at 28-29 (citing, *e.g., Cruzan v. Dir., Mo. Dep't of Health,* 497 U.S. 261, 269-87 (1990)).

JPS nevertheless argues that *Cruzan* is inapplicable, because it was a so-called "right to death" case, *i.e.*, involving patients' right to withdraw life-sustaining treatment. JPS is mistaken. Although the issue in *Cruzan* was whether the right of an incapacitated person to withdraw treatment (exercised through a surrogate) overcame the state's interest in preserving life, the Court's reasoning was not so limited. *See id.* at 269-82; *see also id.* at 287-92 (O'Connor, J. concurring). Instead, the Court's rationale acknowledged both a life interest and a liberty interest (discussed below) in the end-of-life context. Indeed, the Court treated the right to life and the right to withdraw treatment (as least for competent persons) as two sides of the same coin: "It cannot be disputed that the Due Process Clause protects an interest in life as well as an interest in refusing life-sustaining medical treatment." *Id.* at 281.

This "interest in life" applies with even more force in cases such as this one, in which the patent's fundamental right to life is fully aligned with the state's interest in preserving life. The fact that the Supreme Court has not issued an express holding in that context is of no consequence, since the Supreme Court has never confronted a state actor with the audacity to contend that "withdrawal of life support, even if it was

done without consent, does not implicate a constitutional deprivation of life." *See* JPS Br. at 11.

Nevertheless, JPS attempts to avoid the implication of *Cruzan* by citing various state cases (and an artfully-truncated quote from the Supreme Court's *Vacco* case) for the proposition that withdrawal of life support does not "cause" the patient's death and that such death results from "natural causes." JPS Br. at 12 (citing, *e.g.*, *In re Welfare of Colyer*, 660 P.2d 738, 743 (Wash. 1983)). While this principle may be correct in certain contexts—*i.e.* distinguishing between the right of self-determination in medical decisions and the lack of a corresponding right to commit suicide—it has no bearing on the life interest that was acknowledged in *Cruzan*. To the contrary, each of the cases cited by JPS involve a patient's *voluntary* request (directly or through surrogate) to withdraw life support (or commit suicide). As such, these cases "are hardly supportive of a conclusion that the withdrawal of life-sustaining treatment *against* a patient's or patient representative's wishes does not implicate a terminally ill patient's right to life." *T.L. v. Cook Children's Med. Ctr.*, 607 S.W.3d 9, 77 (Tex. App.—Fort Worth 2020, pet. denied) (emphasis in original).

Next, JPS argues that passive euthanasia (even without consent) "does not implicate constitutional due process," since: (1) "to do so would require the court to recognize a constitutional right to continuing medical treatment;" and (2) that

right "has universally, and rightfully, been rejected by the courts." JPS Br. at 25. JPS, however, is wrong on both counts.

First, this case does not require the Court to recognize any "expansive" or "general" right to continued medical treatments. While the existence of such a right necessarily would require reversal, this case is limited to the narrower, end-of-life context. The right to medical care is only at issue to the extent necessary to preserve that life interest until the requirements of procedural due process have been met.

Furthermore, if the Court were address a general right to medical care, JPS's authorities would not show that such a right has been rejected. The three binding authorities—*DeShaney*, *Harris*, and *Walton*—do not address the withdrawal of medical care at all, and the remaining citations are similarly inapplicable or are incorrect. *See* JPS Br. at 19-23.

In contrast, the facts of this case might well implicate a general right to medical care under the cases JPS cites, if that right were at issue. The Deceased Son did not choose to be treated at JPS; he was sent there based on JPS's status as the county hospital. And he did not have the ability to voluntary leave and seek alternate treatment (even through a surrogate), since JPS chose to terminate his life without giving his parents time to seek an alternate treatment facility.

On the narrower issue at hand, however, the Supreme Court has already determined that a state holds a special relationship with incapacitated persons in the

end-of-life context. In *Cruzan,* the majority and dissent both determined that a state has a *parens patriae* relationship with an incompetent person. *Cruzan,* 497 U.S. at 281-82; *id.* at 315 (Brennan, J., dissenting). Therefore, if JPS's medical-care cases were relevant to the life interest at issue, they would confirm the Deceased Son *at least* had a right to basic treatment—respiration, hydration, painkillers—until a decision to withdraw life support could be made in accordance with the requirements of due process.

More importantly, the foregoing discussion has treated *Cruzan* as acknowledging a "life" interest, but the *Cruzan* decision was based in even greater part on a separate "liberty" interest. *See Cruzan,* 497 U.S. at 269-82. Specifically, the Court held that a liberty interest in treatment decisions stems from the "notion of bodily integrity"—"the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law." *Id.* at 269. Indeed, it is this fundamental interest to which the right to refuse medical care is merely a "corollary." *Id.* at 270.

The significance of this liberty interest is explained in Justice O'Connor's concurring opinion.[7] Using food and water as an example, Justice O'Connor noted the intrusion to bodily integrity that is inherent in decisions regarding life support:

> **Whether or not the techniques** used to pass food and water into the patient's alimentary tract **are termed "medical treatment," it is clear**

[7] Justice O'Connor both joined the majority opinion and issued a separate concurrence.

> **they all involve some degree of intrusion and restraint.** Feeding a patient by means of a nasogastric tube requires a physician to pass a long flexible tube through the patient's nose, throat, and esophagus and into the stomach. **The use of such procedures against a patient's will therefore "burdens the patient's liberty, dignity, and freedom to determine the course of her own treatment**.

Id. at 289-90.

Therefore, "the liberty guaranteed by the Due Process Clause must protect, if it protects anything, an individual's deeply personal decision to reject medical treatment, including the artificial delivery of food and water." *Id.* at 290. These same concerns of "liberty, dignity, and freedom to determine the course of [a patient's] own treatment" are involved in other types of life-support, such as insertion of electrodes to regulate heartbeat or (as in this case) intubation of a breathing tube.

More importantly, these concerns are necessarily applicable to the *involuntary* withdrawal of life support. If involuntary intubation of a feeding or breathing tube involves a "degree of intrusion and restraint" that burdens a patient's "liberty, dignity, and freedom to determine the course of treatment," then involuntary extubation is no less burdensome—particularly when the intended effect of that extubation is death by suffocation.

The Defendant-Appellees, however, do not discuss this liberty interest, so far as the Parent-Appellants can determine. Nor do any of their authorities appear to be applicable to either the life or liberty interest inherent in end-of-life decisions.

Indeed, the Defendant-Appellees cite only one case that is remotely analogous to the instant case—*Reynolds*—but that case involved plaintiffs acting *in forma pauperis* and *pro se,* and it was decided without the benefit of briefing and without complete consideration of the applicable standards. *See Reynolds v. Parkland Mem. Hosp.*, No. 3:12-cv-4571-N-BN, 2012 U.S. Dist. LEXIS 186244; 2012 WL 7153849 (N.D. Tex., December 28, 2012).

In contrast, where these issues have been properly briefed, the rights to life and liberty have both been affirmed. The most obvious example is the recent *T.L.* decision of the Fort Worth Court of Appeals—which happens be the state court having jurisdiction over the hospital in this case. *T.L. v. Cook Children's Med. Ctr.*, 607 S.W.3d 9, 21-94 (Tex. App.—Fort Worth 2020, pet. denied). In *T.L.*, a private hospital unilaterally decided to withdraw the life support for a minor child, and the decision was affirmed by an ethics committee. *Id.* at 22-26. Unlike the termination of life support in this case, the hospital apparently followed the requirements of the Texas Advance Directives Act (TADA). *Id.* Nevertheless, the mother brought claims under § 1983 and sought an injunction, alleging that the procedural requirements of the TADA were inadequate to satisfy the requirement of due process recognized by *Cruzan*, *et al. Id.* The mother's claims were supported by various *amici*—including the Attorney General of the State of Texas. *Id.* at 32.

The Fort Worth Court of Appeals agreed, holding that: (1) the decision to terminate life support of an incompetent person constitutes state action; (2) termination decisions constitute a deprivation of rights that are subject to due process; (3) the state therefore cannot unilaterally terminate life support without complying with due process requirements; and (4) the procedures afforded by TADA were inadequate to satisfy due process. *See id.* at 9-94. The Texas Supreme Court subsequently denied a petition for review, indicating the Texas Supreme Court found "no error that require[d] reversal or that [was] of such importance to the jurisprudence of the state as to require correction." *See* Tex. R. App. P. 56.1(b)(1).

Although the circumstances differ slightly from this case,[8] the court's decision and its reasoning are entirely persuasive, as the court considered and rejected the same arguments Defendant-Appellees raise here. Among other things, the court determined that:

- The state has a special relationship—*parens patriae*—with incompetent persons in connection with the withdrawal of medical care, which even extends to private hospitals, *id.* at 23, 46-54;

[8] In T.L., the defendant was a private hospital, requiring the court to determine whether it was nevertheless acting under color of law. The medical providers complied with the procedures of TADA, requiring the court to determine whether those procedures provided due process of law. And a minor child was involved, requiring the court to discuss the rights of both patient and parent.

- *Cruzan* and related cases acknowledge a right to life and liberty that is not limited to the "right to die" context, *id.* at 68, 75-77, 79-80, 90;
- Implications of *Cruzan* are not undermined by *DeShaney* or by cases involving a voluntary request (by patient or surrogate) to remove life support, *e.g., id.* at 77-79 & n.37;
- A physician cannot terminate life support without consent, unless she first complies with the requirements of due process, *id.* at 77-80; and
- The requirements of due process are even more stringent than the procedures provided by the TADA, *id.* at 83-93.

In short, the most analogous case of which the Parent-Appellants are aware (and certainly the most analogous that has been cited) squarely confirms that the Constitution creates a life and liberty interest in decisions regarding life-sustaining treatment:

> Not only do terminally ill patients have a vested, fundamental right to decide whether to discontinue life-sustaining treatment, either individually or through surrogate decision makers, this right is subject solely to the state's exercise of its *parens patriae* and police power functions to assure the circumstances prompting and ultimately effectuating the decision are lawful.

Id. at 77.

2. The Parent-Appellants have alleged deprivation of life and liberty interests created by state law.

The Parent-Appellants separately demonstrated that a liberty interest was created by the TADA, which prohibits a medical provider from withdrawing life-sustaining treatment except in compliance with the act. *See* Appellants' Br. at 29-30 (citing *Vitek v. Jones*, 445 U.S. 480, 488 (1980)).

In response, the Defendant-Appellees acknowledge that a state statute can create liberty interests, but they nevertheless argue that the TADA does not do so. In the first set of arguments, Acclaim and Dr. Duane assert that the TADA does not provide *any* prohibition of involuntary euthanasia (constitutional or otherwise) until a physician certifies that patient is suffering from a terminal or irreversible condition. *See* Acclaim/Duane Br. at 27, 30. In other words, they contend that: (1) physicians may involuntary withdraw life support by simply failing to make the required certification; and (2) physicians may euthanize patients even they are expected to "recover." Acclaim/Duane Br. at 30. The very notion is appalling.

In a similar vein, all of the Defendant-Appellees argue that the TADA does not provide any mandatory requirements at all, but is simply a permissive "safe harbor" statute that is "optional" for physicians. *See* Acclaim/Duane Br. at 36-38; JPS Br. at 26-27. Fortunately for the citizens of Tarrant County, the Defendant-Appellees' arguments are contrary to the plain language of the statute and Texas cases.

There can be no dispute that the TADA is a mandatory statute that prohibits termination of life support (by either "act or omission") unless the act's requirements are met. That point is explicit in the plain language of § 166.050:

> This subchapter does not condone, authorize, or approve mercy killing or permit an affirmative or deliberate act or omission to end life **except** to permit the natural process of dying **as provided by this subchapter**.

Tex. Health & Safety Code § 166.050 (emphasis added). The point is further confirmed by the mandatory language of § 166.040(b):

> (b) Before withholding or withdrawing life-sustaining treatment from a qualified patient under this subchapter, the attending physician **must** determine that the steps proposed to be taken are in accord with this subchapter and the patient's existing desires.

Tex. Health & Safety Code § 166.40(b) (emphasis added). Thus, the act provides no basis for withdrawing life support unless and until its requirements are met.

If there could be any doubt on this issue, it would have been put to rest more than twenty years ago, by authority construing the equivalent provision in a prior version of the statute. *See, e.g., Stolle v. Baylor Coll. of Med.*, 981 S.W.2d 709, 713-14 (Tex. App.—Houston [1st Dist.] 1998, pet. denied). Since that time, it has been clear that the statute is the "exclusive lawful means for effectuating removal of life support from terminally ill patients." *T.L. v. Cook Children's Med. Ctr.,* 607 S.W.3d 9, 71 (Tex. App.—Fort Worth 2020, pet. denied) (construing *id.*). Thus, *if* a physician wishes to withdraw life support for a patient without an advance directive, she *must* follow the predicates

required by §§ 166.039 and 166.046.[9] Tex. Health & Safety Code §§ 166.039, .046; *see also T.L.*, 607 S.W. 3d at 68, 72 (rejecting similar "safe harbor" arguments).

Nevertheless, the Defendant-Appellees include an alternative argument, that liberty interests are only created by "mandatory" provisions that establish "substantive predicates" and mandate a "particular result" if those predicates are not met. *See, e.g.,* JPS Br. at 25-26 (citing *Tony L. By and Through Simpson v. Childers*, 71 F.3d 1182, 1185 (6th Cir. 1995)).

Assuming those standards are applicable to the *liberty* interests in this case,[10] the Parent-Appellants have fully met them. As discussed above, the TADA contains mandatory substantive predicates for the withdrawal of life support, found in Section 166.039, 166.040(b), 166.046, and 166.050. Likewise, the statute makes clear that these procedures are the exclusive method for involuntarily withdrawing life support in a lawful manner, and Texas case law confirms the point. *See, e.g.,* Tex. Health & Safety Code § 166.050; *T.L,* 607 S.W.3d at 71. If the act's *substantive predicates* are not met, then the act mandates *a particular result*—**the medical provider cannot withdraw life-**

[9] The first two subsections of section 166.039 are phrased permissively as to what physicians, guardians, and family members "may" do in the absence of an advance directive. *See* Tex. Health & Safety Code § 166.039. This permissive language is obviously necessary for these provisions because the legislature did not intend to "require" any person to withdraw life support. However, *if* any party seeks to make a "decision to withhold or withdraw life-sustaining treatment," then that party must follow the mandatory requirements—"must" and "shall"—in the remainder of Section 166.039, in Section 166.046, and in Sections 166.040(b) and 166.050.

[10] Although these standards applied to liberty interests *in the prison context* (and appear to have been modified in that context), the Parent-Appellants will assume they are the applicable standards as to the *liberty interests* in this appeal. They are *not* the standards for evaluating *property* interests (discussed below), which are governed by *Bd. of Regents v. Roth*, 408 U.S. 564 (1972)).

sustaining treatment—and the statute therefore creates a liberty interest that is protected by due process. *See T.L,* 607 S.W.3d at 71. .

3. The Parent-Appellants have alleged deprivation of property interests created by state law.

Finally, the Parent-Appellants demonstrated that the TADA creates a separate property interest in life-sustaining treatment, at least for a period of time. Appellants' Br. at 30 (citing, *e.g., Bd. of Regents v. Roth*, 408 U.S. 564, 577 (1972)). Specifically, the plain language of TADA creates a "reasonable entitlement" to temporary life-sustaining treatment until the act's requirements for involuntary withdrawal have all been met, *plus* at least ten days of sustained treatment thereafter, to allow for transfer to another facility or a court proceeding extending that time. *See, e.g.,* Tex. Health & Safety Code § 166.046. Furthermore, Texas authority has confirmed that the TADA creates a property interest protected by due process (by virtue of its citation to *Goldberg*). *See T.L,* 607 S.W.3d at 71 (citing *Goldberg v. Kelley*, 397 U.S. at 264-71 (1970)).

The Defendants-Appellees have not attempted to controvert this argument, or even discuss the applicable standards of *Roth*, *et al.* Therefore, since the termination of life support was made intentionally without *any* process to protect the Deceased Son's interests, *see* ROA.10-12, the dismissal of this action must reversed for deprivation of all three interests—life, liberty, and property—without due process of law.

C. The Complaint alleges plausible bases for municipal and corporate liability by JPS and Acclaim, respectively.

Since the Parent-Appellants have alleged a deprivation of their Deceased Son's rights without due process, the Court must reverse the dismissal of the claims against Dr. Duane in her individual capacity. *See Kentucky v. Graham*, 473 U.S. 159, 166 (1985). As to JPS and Acclaim, however, the remaining issue is whether the deprivations of the Deceased Son's rights are attributable to JPS and Acclaim themselves.

In their responses, JPS and Acclaim both assert that the Complaint was required to allege "specific facts" to identify the specific policy and the specific policymaker that approved it. *See* JPS Br. at 34; Acclaim/Duane Br. at 43. However, the "specific facts" standard represented a "heightened pleading requirement,"[11] which was squarely rejected in *Leatherman*. *Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*, 507 U.S. 163, 168-69 (1993). Instead, a complaint need only present facts that nudge the claims beyond mere speculation and into the realm of plausibility.

Here, the Complaint adequately alleges that the deprivations were the result of an official policy, based on the very nature of the claims themselves:

> Notwithstanding the colloquial references to a "plug-pulling problem" at JPS, the Parent-Appellants do not allege that Dr. Duane surreptitiously crept into their Son's room and physically ripped an electrical cord from

[11] The Defendant-Appellees cited to *Pena,* which cited to *Spiller,* which cited to *Fraire*—a case that was expressly applying a "heightened pleading standard." *See Fraire v. Arlington,* 957 F.2d 1268, 1278 (5th Cir. 1992).

> its outlet. Nor do they allege that Dr. Duane violently forced her way past a phalanx of nurses and security guards to do so. No, **the allegations allege that Dr. Duane terminated their Son's life using a grant of authority that was accepted as valid (repeatedly) by all of the alleged JPS staff members**.

Appellants' Br. at 36-37. Furthermore, the Parent-Appellants pointed to specific factual allegations that supported this conclusion. Appellants' Br. at 37 (citing ROA. 10-12, 18).

Therefore, the opening brief demonstrated that these facts create multiple, alternative inferences (any one of which would impose liability on JPS and Acclaim), such as inferences that: (1) JPS and Acclaim had formal policies that allowed its physicians to involuntary terminate life support; (2) JPS and Acclaim chose not to adopt a policy prohibiting involuntary terminations, which would be equivalent to an official policy allowing them; or (3) Dr. Duane was herself a policy maker. *See* Appellants' Br. at 37-40. Nothing in the Defendant-Appellees' responses undermines this conclusion.

JPS argues that its official policies are limited, by statute, to written policies created by its "ultimate" legislative or executive officers. However, that is not the case. Official policies are "not always committed to writing," and they may also include "course[s] of action tailored to a particular situation and not intended to control decisions in later situations." *Pembaur v. City of Cincinnati*, 475 U.S. 469, 480-81 (1986). Furthermore, the creation of official policies is not limited to a government's

highest legislative body or its highest executive officers; it includes other officials who have been delegated authority to make policy within particular areas. *See id.* at 483. Thus, governments "often spread policymaking authority among various officers and official bodies." *Id.*

In any event, the factual allegations are sufficient to create an inference that JPS and Acclaim created "formal" policies that allowed their physicians to involuntarily withdraw life support. This is indicated by allegations that multiple nurses and doctors acquiesced to, and even participated in, the involuntary termination of the Deceased Son, as well as multiple other patients. *See* ROA.10-11, 18. Furthermore, this conclusion is not controverted by allegations of the nurses' subsequent complaints about Dr. Duane's actions or of her termination in lieu of a complaint to the Medical Board. *See* ROA.18. The complaints that led to Dr. Duane's dismissal were *not* complaints that Dr. Duane had violated a policy against making involuntary euthanasia decisions, but rather complaints that she had become "more reckless" in those decisions. ROA.18.

Therefore, the acts of these doctors and nurses create an inference that Dr. Duane was authorized to made involuntary-termination decisions, either because: (1) the Defendant-Appellees' formal policies expressly authorized involuntary-termination decisions; or (2) the formal policies were silent on the issue. In either case, the result is the same, since the failure to adopt a policy will create government

liability "when it is obvious that the likely consequences of not adopting a policy will be a deprivation of constitutional rights." *Rhyne v. Henderson County*, 973 F.2d 386, 392 (5th Cir. 1992).[12]

Furthermore, that conclusion is confirmed by the briefing in this case. As discussed above, the official policy of both JPS and Acclaim is that involuntary termination of life support is not prohibited by the Constitution or TADA and that compliance with the TADA is "optional." *See supra*, § II(B)(2). Therefore, the logical conclusion is the official policy of both JPS and Acclaim was to give their physicians the "option" of making involuntary life-termination decision, in accordance with their arguments here.

Finally, JPS and Acclaim may be liable for yet another reason, as the acts of Dr. Duane constitute the very acts of JPS and Acclaim. As to JPS, a government entity, the acts of a policy maker constitute the acts of a government entity itself. *See, e.g., Pembaur v. City of Cincinnati* 475 U.S. 469, 481 (1986). In turn, policy makers include persons who have been delegated the "authority to set goals and to structure and design the area of the delegated responsibility, subject only to the power of the

[12] Likewise, the result is the same as to both Acclaim and JPS. The Defendant-Appellees contend that Acclaim was operating the hospital on behalf of JPS, and that Dr. Duane and the other doctors and nurses were actually employees of Acclaim, even though Dr. Duane was a department head of JPS. The reasonable inference is that *multiple* doctors and nurses would not have participated in involuntary-termination decisions if such decisions were prohibited by either JPS or Acclaim policies.

governing body to control finances and to discharge or curtail the authority of the agent or board." *Bennett v. City of Slidell*, 728 F.2d 762, 769 (5th Cir. 1984) (en banc).

In this case, Dr. Duane's status as Department Chair indicates that she "oversaw, operated, and managed the entire department." *See* Appellants' Br. at 37-38 & n.11. As such, the allegations create a reasonable inference that she had the authority to "set goals and to structure and design" her department, meaning she was a policy maker under the standards of *Slidell*.

As a corporation, Acclaim is not subject to the same organizational rules and governance as a governmental body. Therefore, the Parent-Appellants argued that *Jett* mandates that "courts look to state law to determine whether a defendant is being subjected to *respondeat superior* liability or whether liability is based on the defendant's own acts." *See* Appellants' Br. at 41. (citing *Jett v. Dallas Indep. Sch. Dist.,* 7 F.3d 1241, 1245 (5th Cir. 1993)). That was the sole purpose for which *Jett* was cited, and *Jett* is binding on that point.[13]

Since Acclaim is a corporation, the applicable body of law is (logically) corporate law, not municipal law. Thus, the Parent-Appellants cited the Court to the corporate-law doctrine of vice-principal responsibility. *See* Appellants' Br. at 41-44. Contrary to Acclaim's assertions, this doctrine is not limited to punitive damages. It is

[13] Some cases have applied municipal standards to corporations, but it does not appear that any have made a reasoned analysis under the appropriate principles. In any event, this is an issue of first impression in this Court, and the Court should make an independent analysis of this issue for the benefit of future cases, regardless of whatever other decisions the Court renders in this case.

a general principle of corporate law, and the Texas Supreme Court has made clear that it extends beyond the context of punitive damages. *See, e.g., Chrysler Ins. Co. v. Greenspoint Dodge of Hous., Inc.,* 297 S.W.3d 248, 250, 253 & n.1 (Tex. 2009) (imputing vice-principals' knowledge to a corporation in the insurance context).

If the vice-principal doctrine applies, there is no dispute that Acclaim would be liable for Dr. Duane's actions. *See* Appellants' Br. at 41-44. Indeed, Acclaim does not even contest the point.

Furthermore, even if Acclaim were subject to the standards for municipal liability, as it contends, Acclaim would still be liable for same reasons already discussed as to JPS. The Defendant-Appellees agree that Acclaim was operating the hospital on behalf of JPS, and her authority to "set goals and structure and design" her department necessarily applies to both JPS and Acclaim. Or at least the Court can reasonably infer.

III. CONCLUSION

The Parent-Appellants have alleged plausible bases for holding JPS, Dr. Duane, and Acclaim liable for violations of their Deceased Son's due process rights. Therefore, the judgment of dismissal should be reversed and this action should be remanded for discovery and a trial on the merits.

Respectfully submitted,

/s/ William D. Taylor

William D. Taylor (TX 24046954)
Taylor & Taylor Law, P.C.
4115 Highgrove Dr.
Arlington, TX 76001
817.483.8388
Fax: 817.483.8390
Email: wtaylor@taylorandtaylorlaw.com
Counsel for Appellants

CERTIFICATE OF SERVICE

I hereby certify that the foregoing brief will be served on all counsel of record via the Court's electronic filing system on December 28, 2020.

/s/ William D. Taylor

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitations of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 6,492 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f).

2. This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type and style requirements of Federal Rule of Appellate Procedure 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in fourteen (14) point "Garamond" font.

/s/ William D. Taylor