NO. 01-17-00866-CV

First Court of Appeals
Houston, Texas

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

v.

HOUSTON METHODIST HOSPITAL,
Appellee.

On Appeal from the 189th Judicial District Court,
Harris County, Texas
Cause No. 2015-69681

BRIEF OF APPELLEE HOUSTON METHODIST HOSPITAL

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STATEMENT OF THE CASE

The challenged order, signed by Judge William Burke of the 189th District Court for Harris County Texas, dismissed this suit as moot. 5.CR.1544. The issue that the plaintiff, Evelyn Kelly, had raised was whether Houston Methodist Hospital could constitutionally employ the procedure in §166.046 of the Texas Health & Safety Code to discontinue life-sustaining treatment to Kelly's son, David Christopher Dunn, a terminally ill cancer patient. Methodist, however, never discontinued life-sustaining treatment. Consequently, Dunn died of natural causes from complications of his metastatic cancer. *See* 4.CR.1225-32 (autopsy). Nevertheless, Kelly continues to seek a ruling on the constitutionality of §166.046.

STATEMENT REGARDING ORAL ARGUMENT

Oral argument is not necessary in this case. Under settled legal principles, this suit clearly became moot when Dunn died. If the Court grants oral argument, however, Methodist requests the opportunity to participate.

ISSUES PRESENTED

The issue in this appeal is whether the district court correctly dismissed the claims in this case for mootness.

If this Court were to disagree on the mootness issue, it should still affirm on alternative grounds—namely, that Kelly lacks standing and that there was no deprivation of a constitutionally protected right by a state actor.

Alternatively, the Court should remand for the district court to consider the parties' cross-motions for summary judgment. The district court did not rule on those motions and could not have done so given its determination that it had no subject matter jurisdiction over a moot claim.

STATEMENT OF FACTS

Dunn was admitted to Methodist Hospital on October 12, 2015, and he died on December 23, 2015, of natural causes. 4.CR.1225-32 (autopsy). His death resulted from cancer in his liver, pancreas, lymphatic system, and lungs. *See id.* As is typical, his metastatic cancer was complicated by pneumonia and organ failure. *See id.* Until the moment of his death, Dunn received continuous, uninterrupted life-sustaining treatment at Houston Methodist Hospital. 4.CR.1212, 1217-18.

Approximately two weeks after Dunn's admission, Methodist's Bioethics Committee began considering whether continued life-sustaining treatment was appropriate. 4.CR.1216. The Committee could not discuss this issue with Dunn himself. Given the progress of his disease to near end stage, he was unresponsive on admission, and intubation prevented any oral communications with him. *See* 4.CR.1212, 1215-17. Further, as confirmed by a psychiatrist, Dunn was suffering from delirium and was not mentally capable to make any decisions about his healthcare. 5.CR.1527-30.

As Dunn had no spouse or children, the Committee discussed the issue of continued treatment with, and gathered facts from, Dunn's divorced parents, David Dunn and Evelyn Kelly. 4.CR.1215-16. Representatives from the Committee met with both on several occasions. 4.CR.1215-18. During these meetings, Mr. Dunn relayed that Christopher had previously left another hospital against orders and did not want to be admitted again because he did not want to die in a hospital. 4.CR.1216. At one point, he had even barricaded himself in his room so he could remain at home. 5.CR.1527.

Dunn's father held the view that Christopher should receive only palliative care. *See* 4.CR.1216. His mother, Evelyn Kelly, wanted him to continue to receive life-sustaining treatment. 4.CR.1217. While Dunn's parents were discussing whether they could make a joint decision, Methodist agreed to continue life-sustaining treatment. *See* 4.CR.1216. When Kelly remained opposed to palliative care, Methodist continued full care and began searching for other facilities that would accept Dunn. 4.CR.1217. It continued to do so until the time of his death. At that point, 66 facilities had declined to accept Dunn as a transfer patient. 4.CR.1220-23.

On November 13, 2015, about a month after Dunn's admission, Methodist followed the procedure specified in §166.046 of the Texas Health & Safety Code. 4.CR.1217-18. After convening a meeting of the Bioethics Committee, Methodist

prepared a compassionate letter to Dunn's divorced parents stating its decision that continued life-sustaining treatment for Dunn was not ethical because it only prolonged his suffering with no hope of defeating or even curbing his fatal disease process. 4.CR.1218. Methodist's letter advised that, after 11 days, it would provide only palliative care. At the same time, Methodist was continuing its attempt to transfer Dunn to another facility. *See* 4.CR.1220-23.

Opposed to the Bioethics Committee's decision, Kelly filed a lawsuit to compel the continuation of life-sustaining treatment. Very shortly after that suit was filed and an agreed temporary restraining order was issued (1.CR.33-35), Methodist voluntarily agreed to continue to comply with the TRO until the court ultimately decided the issue in Kelly's lawsuit. Before any ultimate decision was reached, however, Dunn died.

Almost two years later, in October of 2017, Judge William Burke granted Methodist's motion to dismiss on the ground of mootness. 5.CR.1544. Lacking subject matter jurisdiction because the lawsuit was moot, Judge Burke did not rule on Kelly's amended motion for summary judgment and did not address Methodist's motion for summary judgment. Kelly appeals the order of dismissal.

SUMMARY OF THE ARGUMENT

A declaratory judgment action about imminent future conduct may be proper to provide affected parties guidance. Accordingly, while Dunn was alive, a

justiciable controversy regarding the constitutionality of the statute that Methodist had invoked to reach a decision about the propriety of continuing his life-sustaining treatment was at least theoretically possible. Once Dunn died of natural causes, however, no deprivation of any constitutionally protected interest was even possible. Because no live controversy between the parties remained, Kelly's lawsuit was moot.

No exception to mootness applies. Texas courts will adjudicate an otherwise moot claim that is capable of repetition yet evading review only when the same complaint will be raised again involving the same parties—a circumstance that is obviously impossible here. Further, Judge Burke's dismissal for mootness necessarily meant that the district court lacked subject matter jurisdiction. Consequently, there is no ruling on the merits for this Court to review.

Even if the Court were to disagree with Judge Burke's ruling on mootness, the Court should still affirm on alternative grounds under an application of the harmless error rule that is particularly appropriate here, given the strong policy against deciding the constitutionality of statutes absent necessity. The alternative grounds are that:

1. Kelly lacks standing;

2. Kelly premises her claims on the mistaken assumption that the individual rights to life and to make decisions about one's healthcare somehow include the right to require physicians to provide medical treatment contrary to the physician's professional ethics;

3. Methodist provided Dunn with continuous uninterrupted life-sustaining treatment until the time of his natural death, making the threshold showing of deprivation impossible; and

4. Methodist is not a state actor subject to liability for Kelly's claimed constitutional and civil rights violations; and

Finally, if the Court does not affirm, it should at most remand for the district court to resolve the remaining factual and legal issues, which the district court could not have addressed after determining that Kelly's lawsuit was moot.

ARGUMENT

I. Kelly's Claims Are Moot Because Dunn Died of Natural Causes While Still Receiving Life-Sustaining Treatment, Thus Eliminating the Only Possible Basis for a Claimed Constitutional Deprivation.

When Dunn died of natural causes while still receiving life-sustaining treatment, Kelly's challenge to §166.046's constitutionality and her §1983 claim immediately ceased to present a live controversy. Judge Burke thus correctly dismissed the lawsuit as moot. For a court to maintain jurisdiction over a case, a judicially cognizable controversy must exist between the parties at every stage of the legal proceedings. *See Williams v. Lara*, 52 S.W.3d 171, 184 (Tex. 2001) (citing *United States v. Munsingwear, Inc.*, 340 U.S. 36, 39 (1950)).[1] If a controversy ceases to exist—"the issues presented are no longer 'live' or the parties lack a legally

[1] The Texas Supreme Court applies federal case law when assessing subject matter jurisdiction. *See, e.g.*, *Heckman v. Williamson Cty.*, 369 S.W.3d 137,163 n.135 (Tex. 2012).

cognizable interest in the outcome"—the case becomes moot. *Id.* (quoting *Murphy v. Hunt*, 455 U.S. 478, 481 (1982)); *see also O'Shea v. Littleton*, 414 U.S. 488, 495-96 (1974) ("Past exposure to illegal conduct does not in itself show a present case or controversy regarding injunctive relief . . . if unaccompanied by any continuing, present adverse effects."). Dunn's natural death instantly and permanently eliminated the possibility of deprivation of life-sustaining treatment about which Kelly complained, making judicial relief impossible.

Before addressing these mootness issues directly, Methodist pauses to address Kelly's accusations that Methodist has mischaracterized her claims.

A. Kelly's unfounded accusations that Methodist has mischaracterized her claims reveal Kelly's own fundamental confusion about due-process claims.

Kelly warns that Methodist has mischaracterized her claims by insisting that the only deprivation she alleges is the actual withdrawal of Dunn's life-sustaining treatment. According to Kelly, Methodist ignores her additional complaint that, by adhering to §166.046's protocols, Methodist also deprived her of sufficient process before deciding to withdraw Dunn's life-sustaining treatment. Br. 12. But because the concepts of "process" and "deprivation of right" are fundamentally different, Methodist was (and is) right to resist Kelly's attempts to treat them interchangeably.

In particular, the government's[2] duty to provide process arises only when the government deprives some particular person of a constitutionally protected interest. Kelly's attempt to treat alleged process deficiencies like deprivations of rights is therefore fundamentally confused.

Even if Kelly were right about deficiencies in the process outlined in §166.046, any such deficiencies would not in and of themselves deprive Kelly or Dunn of any protected right. The words of a statute cannot violate the Due Process Clause. For a judicially cognizable due-process claim to arise, a state actor must actually deprive some particular person of a constitutionally protected interest without affording that person due process of law. *See, e.g.*, *Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 59 (1999) ("The first inquiry in every due process challenge is whether the plaintiff has been deprived of a protected interest in 'property' or 'liberty.' Only after finding the deprivation of a protected interest do we look to see if the State's procedures comport with due process.") (citations omitted).

In sum, Methodist has not mischaracterized Kelly's claims. Instead, Kelly fundamentally misapprehends the essential role that an actual deprivation of a constitutionally protected interest plays in any due-process claim. Ironically, the same misapprehension explains Kelly's stubborn and equally misguided insistence

[2] As discussed at length below, Section II.C., *infra*, Methodist is *not* a state actor, and its discussion of the *government's* duties under the Due Process Clause should not be interpreted as a concession to the contrary.

that a live controversy still exists here despite the manifest impossibility of any constitutional deprivation now that Dunn has died of natural causes.

B. This lawsuit is moot.

Dismissal for mootness is not a ruling on the merits. Rather, the court's duty to dismiss moot cases arises from a proper respect for the judicial branch's unique role in our system of separated powers, namely deciding contested cases. Under our Constitution, courts simply have no jurisdiction to render advisory opinions. Tex. Const. art. II, §1; *e.g.*, *Texas Ass'n of Bus. v. Texas Air Control Bd.*, 852 S.W.2d 440, 443-44 (Tex. 1993).

The parties' underlying dispute—whether the state or federal constitutions empower patients or their guardians to force a private physician to administer medical care contrary to the physician's professional ethics—ended the very second that Dunn died of natural causes. Kelly's argument that the parties' dispute is capable of repetition yet evading review ignores binding precedent limiting that mootness exception to situations where the same dispute is reasonably likely to arise in the future *between the same parties*—a contingency that is not even theoretically possible here.

When Methodist notified Kelly that it intended to apply §166.046 to withdraw Dunn's life-sustaining treatment, a controversy existed because Methodist was contemplating imminent action in compliance with the statute. That imminent action

provided a basis for Kelly's declaratory judgment action. *See, e.g.*, *Transp. Ins. Co. v. WH Cleaners, Inc.*, 372 S.W.3d 223, 228 (Tex. App.—Dallas 2012, no pet.) (declaratory judgment action may concern immediate future event); *Harris Cnty. Mun. Util. Dist. v. United Somerset Corp.*, 274 S.W.3d 133, 139-40 (Tex. App.—Houston [1st Dist.] 2008, no pet.) (threatened litigation); *City of Atlanta v. Hotels.com, L.P.*, 674 S.E.2d 896, 898 (Ga. 2009) (future conduct depending on uncertain legal relations).

When Dunn died of natural causes while still receiving life-sustaining treatment from Methodist, however, that possibility—and the parties' dispute—disappeared instantly and for good. All that remains is Kelly's generalized, one-sided challenge to a statute. Because there was no longer any dispute between Kelly and Methodist for Judge Burke to remedy, he correctly dismissed this case on mootness grounds.

Although no Texas court has ever addressed mootness in the context of a challenge to a hospital's decision to end life-sustaining treatment, the decisions of other courts confirm the propriety of Judge Burke's mootness determination. *Betancourt v. Trinitas Hospital*, 415 N.J. Super. 301 (N.Y. Super. Ct. App. Div. 2010) is an example.

Rueben Betancourt underwent surgery at Trinitas Hospital to remove a malignant tumor from his thymus gland. The surgery went well, but while Rueben

was recovering in the intensive care unit, an accident occurred that left him in a persistent vegetative state. *Id.* at 304. After various attempts to resolve the issue of continued treatment with Rueben's family proved unsuccessful, the hospital concluded that continued treatment would be futile and placed a "Do Not Resuscitate" (DNR) order in Rueben's chart. Rueben's daughter filed suit in New Jersey trial court seeking a preliminary injunction to prevent that hospital from ending her father's life-sustaining treatment. *Id.* Unlike Methodist in this case, Trinitas did not agree to continue Rueben's life-sustaining treatment while Rueben's daughter's case was pending. Nevertheless, the New Jersey court appointed the daughter as Rueben's guardian and enjoined the hospital from withholding life-sustaining treatment. The hospital appealed, but within three months of the judge's order requiring reinstatement of treatment, Rueben died. *Id.* at 304-05.

The appellate court dismissed the case as moot, explaining that in light of Rueben's death "any decision on the merits would be 'legislation' to resolve the issues that it has raised." *Id.* at 318. Those issues, the court emphasized "warrant thoughtful study and debate not in the context of overheated rhetoric in the battlefield of active litigation . . . but in thoughtful consideration by the Legislature as well as Executive agencies and Commissions charged with developing the policies that impact on the lives of all." *Id.* at 318-19.

Unlike Methodist, the hospital in *Betancourt* ended Rueben's life-sustaining treatment before he died. Rueben's death thus mooted a controversy over an alleged deprivation that had actually occurred, whereas Dunn's death prevented any potential deprivation from happening in the first place. *A fortiori*, "any decision on the merits" in this case would be "whole-cloth legislation from the bench" of an even more inappropriate sort.

None of Kelly's arguments to the contrary has merit. In her view, a live controversy will continue to exist in this case unless and until "Methodist agree[s] to a permanent injunction prohibiting it from utilizing §166.046." Br. 22. But Dunn's natural death prevents Methodist from using §166.046 to end his life-sustaining treatment more effectively than any permanent injunction ever could. Because no remedy from this Court could possibly provide the parties any relief, Kelly's claims are moot. *See Chafin v. Chafin*, 568 U.S. 165, 172 (2013) (case moot where it is "impossible for a court to grant any effectual relief . . . to the prevailing party") (quotations omitted).

Nor does Kelly's request for nominal damages save her claims from mootness. Kelly's First Amended Petition never even mentions nominal damages. Plaintiffs cannot avoid mootness simply be referencing nominal damages in a motion for summary judgment, when the petition does not seek any damages. *See, e.g.*, *Fox v. Bd. of Trustees of State Univ. of New York*, 42 F.3d 135, 141 (2d Cir.

1994) ("Plaintiffs argue that because they are seeking to recover nominal damages, this case is not moot. This contention fails primarily because there is absolutely no specific mention in [the Complaint] of nominal damages.") (quotations omitted); *see also Doe v. Marshall*, 622 F.2d 118, 119 (5th Cir. 1980) (same). The United States Supreme Court confronted a similar argument in *Arizonans for Official English v. Arizona*, 520 U.S. 43, 70-71 (1997). In that case, a state government employee sued the state and several state officials, challenging an amendment to the state's Constitution declaring English the state's official language. The Supreme Court held that the lawsuit became moot when the employee resigned from her government post and accepted a job in the private sector.

The employee in *Arizona* insisted that a claim for nominal damages that she had raised for the first time on appeal saved her case from mootness. The Supreme Court rejected that argument. Citing *Fox*, the Supreme Court admonished that "[i]t should have been clear to the Court of Appeals that a claim for nominal damages, extracted late in the day from [the employee's] general prayer for relief and asserted solely to avoid otherwise certain mootness, bore close inspection." *Id.* at 71. Just so here.

The cases Kelly relies on for this point are all distinguishable. Four of them concerned nominal-damages claims based on actual past deprivations of constitutional rights. *See Javits v. Stevens*, 382 F. Supp. 131, 136 (S.D.N.Y. 1974)

(section 1983 claim based on a three-year suspension of plaintiff's law license not mooted by expiration of the suspension order or plaintiff's death because plaintiff actually was suspended in the past and "the collateral consequences of the [plaintiff's] suspension here would have supported an action by him under §1983 to set aside the order, even after it expired"); *Carey v. Piphus*, 435 U.S. 247, 266-67 (1978) ("Even if respondents' suspensions were justified, and even if they did not suffer any other actual injury, the fact remains that they were deprived of their right to procedural due process."); *see also id.* ("By making *the deprivation* of such rights actionable for nominal damages without proof of actual injury, the law recognizes the importance to organized society that those rights be scrupulously observed."); *Morgan v. Plano Indep. Sch. Dist.*, 589 F.3d 740, 743 (5th Cir. 2009) ("Four families with students in Plano Independent School District schools allege that over a three-year period students were not permitted to distribute various religious materials, including pencils inscribed with 'Jesus is the reason for the season,' candy canes with cards describing their Christian origin, tickets to a church's religious musical programs, and tickets to a dramatic Christian play, this by a policy then in effect and captured by a 2004 version of the District rules.");[3] *Utah Animal Rights Coalition v. Salt Lake City Corp.*, 371 F.3d 1248, 1257-58 (10th Cir. 2004) (nominal damages

[3] *Morgan* is also inapposite because it did not involve due-process claim under §1983 at all. *Id.* at 740.

claim saved lawsuit from mootness where the claim was based on alleged harm resulting from City's delay in issuing a permit—a delay that actually occurred in the past). Because no deprivation ever occurred in this case, *Carey* and *Javits* do not help Kelly.

The other two cases Kelly relies on undermine her argument even more directly. In *Memphis Community School District v. Stachura*, 477 U.S. 299, 309-10 (1986), the Court reversed a damages award based on the "abstract value or importance of constitutional rights" emphasizing that "whatever the constitutional basis for §1983 liability, such damages must always be designed to *compensate injuries* caused by the [constitutional] deprivation." (quotations omitted). Because there was no *deprivation* in this case, damages—nominal or otherwise—are unavailable here.

DA Mortgage, Inc. v. City of Miami Beach, 486 F.3d 1254 (11th Cir. 2007), is particularly instructive. Like Kelly, the plaintiff in *DA Mortgage* attempted to rely on a nominal-damages claim to stave off mootness even though he had not actually suffered any past deprivation. *See id.* at 1260. The *DA Mortgage* Court rejected that argument, explaining that claims for "money damages continue[] to present a controversy" only when they "d[o] not depend upon any threat of future harm." (citations omitted). *Id.* No past violation occurred in this case because the potential withdrawal of life-sustaining treatment never materialized.

A nominal-damages claim that has no basis in law is a poor substitute for the judicially cognizable live dispute necessary to maintain subject matter jurisdiction. Accordingly, even if an unpled claim for nominal damages could stave off mootness—and it cannot—the one that Kelly attempts here could not.

C. The rubric of "capable of repetition but evading review" does not apply.

Texas law recognizes that an otherwise moot claim can be adjudicated if the issue is capable of repetition but evading review, but the exception is very narrow. Specifically, the same issue must be capable of arising between or among the same parties:

> To invoke the exception, a plaintiff must prove that: (1) the challenged action was too short in duration to be litigated fully before the action ceased or expired; and (2) *a reasonable expectation exists that the same complaining party will be subjected to the same action again*.

Williams, 52 S.W.3d at 184; *Texas A&M Univ.-Kingsville v. Yarbrough*, 347 S.W.3d 289, 290-91 (Tex. 2011); *Nehls v. Hartman Newspapers, LP*, 522 S.W.3d 23, 28 (Tex. App.—Houston [1st Dist.] 2017, pet. filed); *Fowler v. Bryan Indep. Sch. Dist.*, No. 01-97-01001-cv, 1998 WL 350488, at *6 (Tex. App.—Houston [1st Dist.] July 2, 1998, no pet.) (not designated for publication). Thus, the doctrine applies in Texas only in "rare circumstances." *Blank v. Nuszen*, No. 01-13-01061-CV, 2015 WL 4747022, at *3 (Tex. App.—Houston [1st Dist.] Aug. 11, 2015, no pet.). The

exception obviously does not apply here. Because Dunn died, the issue of whether he will be denied life-sustaining treatment can never arise again.

The exception fails to apply here for two additional reasons. First, for a deprivation to be capable of repetition, it must have occurred in the first place. But Methodist never deprived Dunn of life-sustaining treatment in the first place. In other words, the only conduct of Methodist that could be classified as capable of repetition would be *not* depriving Dunn of life-sustaining treatment. Needless to say, the absence of any deprivation hardly creates a justiciable controversy. Second, §166.046 does not evade review. It is an immunity statute. If a healthcare defendant invokes its protections in a future case, a court will then have an opportunity to address its constitutionality.

To be sure, Methodist *could* invoke §166.046 with respect to the life-sustaining treatment of some future patient not currently before the Court, but Kelly does not have standing to pursue the potential claims of future third parties. *See, e.g.*, *Blum v. Yaretsky*, 457 U.S. 991, 1000 (1982) ("'[J]udicial power is to be exercised . . . only at the instance of one who is himself immediately harmed, or immediately threatened with harm, by the challenged action.'") (quoting *Poe v. Ullman*, 367 U.S. 497, 504 (1961)). Before the district court, Kelly made the similar argument that because Methodist could, in the future, apply §166.046 to withdraw the life-sustaining treatment of one of her other children, she "fears that without a

declaration of unconstitutionality, this situation may repeat itself, while evading review." 1.CR.166. Again, however, because Methodist never withdrew Dunn's life-sustaining treatment, a repeat of "this situation" with respect to Kelly's other children—even if it materialized—would not create a justiciable controversy.

Furthermore, Kelly's fears regarding a perceived threat to her other children do not reflect "sufficient immediacy and reality" to sustain a justiciable conflict. *See, e.g.*, *Golden v. Zwickler*, 394 U.S. 103, 109 (1969). In *Zwickler*, the plaintiff challenged the constitutionality of a specific statute under which he had previously been prosecuted and convicted. *Id.* at 104-05. On appeal, his conviction was reversed, but the appellate court did not address the constitutionality of the statute. *Id.* at 105. Zwickler argued that even though his conviction was overturned, the case was not moot because the court's failure to overturn the statute in question left the possibility that he could be prosecuted under the same allegedly unconstitutional statute again in the future. *Id.* at 109. The Court rejected that argument, explaining that "it was wholly conjectural that another occasion might arise when Zwickler might be prosecuted for distributing the handbills referred to in the complaint." *Id.*

It is equally conjectural that Methodist Hospital might, at some uncertain date in the future, attempt to invoke §166.046 to withdraw life-sustaining treatment from one of Kelly's other children. In short, "the threat of injury from the alleged course of conduct [Kelly] attack[s] is simply too remote to satisfy the case-or-controversy

requirement and permit adjudication." *O'Shea v. Littleton*, 414 U.S. at 498. As the United States Supreme Court has emphasized, "the normal course of state [judicial proceeding]s cannot be disrupted or blocked on the basis of charges which in the last analysis amount to nothing more than speculation about the future." *Boyle v. Landry*, 401 U.S. 77, 81 (1971).

Finally, Kelly's invocation of the "voluntary cessation" doctrine is misguided. It is, of course, "'well settled that a defendant's voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of a practice.'" Br. 20 (quoting *Friends of the Earth, Inc. v. Laidlaw Envt'l Servs.*, 528 U.S. 167, 189 (2000) (quotations omitted); *accord City of Mesquite v. Aladdin Castle, Inc.*, 455 U.S. 283, 289 (1982). Contrary to Kelly's depiction, however, this case did not become moot when Methodist agreed not to withdraw Dunn's life-sustaining treatment. *See* Br. 20. Instead, as Methodist has maintained all along, it became moot when Dunn died of natural causes.

Put another way, the voluntary cessation doctrine does not apply here because Methodist never began and thus could not voluntarily cease the "challenged practice," *i.e.* withdrawing Dunn's life-sustaining treatment. Because Methodist never began the challenged practice in the first place, it was not possible for it to "return to [its] old ways." *City of Mesquite*, 455 U.S. at 289 n.10 (citation omitted). Because Methodist provided Dunn with continuous and uninterrupted life-sustaining

treatment until his natural death, it has no "old ways" to return to. Kelly's attempt to invoke the voluntary cessation doctrine only underscores her basic misunderstanding of the mootness problem that is fatal to her case.

D. The district court did not reach the merits because it lacked subject matter jurisdiction.

Kelly strains to state some basis for requesting a ruling on the constitutionality of §166.046. She argues, essentially, that the dismissal on mootness was really a ruling on the merits denying her amended motion for summary judgment, which (somehow) permits this Court to reach the merits as well by reviewing that implicitly denied cross-motion for summary judgment. The denial of a cross-motion for summary judgment is, of course, a proper subject for appellate review when the appellate court is also reviewing the grant of the opposing motion. But that procedural circumstance is missing here.

By dismissing on mootness grounds, Judge Burke necessarily determined that he lacked subject matter jurisdiction. When a court lacks subject matter jurisdiction, it cannot make any adjudication. A case in point is *Meeker v. Tarrant Cnty. College Dist.*, 317 S.W.3d 754 (Tex. App.—Fort Worth 2010, pet. denied). The district court had ruled on cross-motions for summary judgment, and the losing party appealed. The court of appeals held that the claim was moot. As the court explained, mootness deprived all courts of subject matter jurisdiction. Therefore, the court of appeals vacated the adjudication by the district court and dismissed the appeal. *Id.* at 763.

Kelly cites cases in which appellate courts treated motions to dismiss as motions for summary judgments. *See* Br. 2-8 (discussing *Harris Cnty. Hosp. Dist. v. Textac Partners I*, 257 S.W.3d 303 (Tex. App.—Houston [14th Dist.] 2008, no pet.); *Nabelek v. City of Houston*, No. 01-06-01097-CV, 2008 WL 5003737 (Tex. App.—Houston [1st Dist.] 2008, no pet.)). The courts did so in those cases for purposes of determining the standard of review. *See Textac Partners I*, 257 S.W.3d at 312 ("[W]e must look to the substance of the issue rather than the procedural vehicle employed to determine the appropriate standard of review. After carefully reviewing the motions and responses filed below, we conclude that Textac's motion to dismiss is the functional equivalent of a motion for summary judgment directed to the merits . . . ."); *Nabelek*, 2008 WL 5003737, at *6 ("[T]he City's motion to dismiss cited to summary judgment case law, claimed that the City was entitled to dismissal as a matter of law, and prayed that a take-nothing judgment be entered. Accordingly, we will apply the standard of review for summary judgments."). Further, the cited cases did not deal with dismissals for lack of subject matter jurisdiction resulting from mootness. Instead, despite being labeled motions to dismiss, the motions addressed in those cases presented arguments on the merits—not challenges to the courts' subject matter jurisdiction. *See Textac Partners I*, 257 S.W.3d at 312 ("[T]he issues discussed in the motion are not the type of issues typically contained in a motion to dismiss. Generally, a 'motion to dismiss' does not

address claims on the merits. [Instead] [i]t is directed to procedural or avoidance issues . . . such as . . . lack of jurisdiction.") (citations omitted); *Nabelek*, 2008 WL 5003737, at *2 n.7 (motion to dismiss raising limitations defense, "which goes to the merits of a case," treated as motion for summary judgment) (citations omitted). Methodist's motion to dismiss, by contrast, focused on mootness, a classic jurisdictional ground for dismissal. *See, e.g.*, *Heckman v. Williamson Cty.*, 369 S.W.3d 137, 162 (Tex. 2012) ("If a case is or becomes moot, the court must vacate any order or judgment previously issued and dismiss the case for want of jurisdiction."). Simply put, when there is no subject matter jurisdiction, there can be no adjudication of any kind. The only proper ruling is to dismiss the case. *Id.*

II. Several Alternative Grounds Independently Require Affirmance.

If this Court concludes—contrary to settled law—that Kelly's lawsuit still presents a live controversy, affirmance of the dismissal order would still be appropriate under the harmless error rule, because there are alternative grounds for dismissal. The harmless error rule is always applicable on appeal, but it is particularly appropriate here because of the strong policy against deciding the constitutionality of statutes absent necessity. *See City of San Antonio v. Shautteet*, 706 S.W.2d 103, 105 (Tex. 1986) (per curiam); *San Antonio Gen. Drivers, Helpers Local No. 667 v. Thornton*, 299 S.W.2d 911, 915 (Tex. 1957).

No constitutional pronouncement is necessary here because Kelly's claims face three insuperable threshold problems, each of which would require dismissal even if the case were not moot. First, Kelly lacks standing to pursue her constitutional claims. Second, the absence of a judicially cognizable deprivation of any constitutionally protected liberty or property interest dooms Kelly's claims. And third, Kelly's claims are fatally flawed because Methodist did not act "'under color of [State] statute, ordinance, regulation, custom, or usage.'" *See Mentavlos v. Anderson*, 249 F.3d 301, 310 (4th Cir. 2001) (quoting *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 150 (1970) (brackets in *Mentavlos*). Each of these alternative bases for affirmance is explored further below.

A. Kelly lacks standing.

Lack of standing was not a basis for Judge Burke's dismissal order, but standing can be raised at any time, including for the first time on appeal. *Austin Nursing Ctr., Inc. v. Lovato*, 171 S.W.3d 845, 849 (Tex. 2005); *Raytheon Co. v. Boccard USA Corp.*, 369 S.W.3d 626, 632 n.6 (Tex. App.—Houston [1st Dist.] 2012, pet. denied). Kelly can challenge the constitutionality of a statute only to the extent that it is unconstitutional as to her. *See Kircus v. London*, 660 S.W.2d 869, 872 (Tex. App.—Austin 1983, no writ). Kelly would not have been deprived of life, liberty, or property even if the decision regarding Dunn's life-sustaining treatment

had been carried out. Because the decision was never carried out, Dunn was also not affected by §166.046 of the Health & Safety Code.

The bare communication of an intent to do or not do something in the future is not actionable in Texas. *See State v. Margolis*, 439 S.W.2d 695, 699 (Tex. Civ. App.—Austin 1969, writ ref'd n.r.e.) (no actionable controversy arises from statement of mere intention to impose a penalty). An exception to that rule could conceivably exist for a communication that qualifies as intentional infliction of emotional distress. *See, e.g.*, *Household Credit Servs. v. Driscol*, 989 S.W.2d 72, 82 (Tex. App.—El Paso 1998, pet. denied) (debt collector's death threats). Intentional infliction of emotional distress could not be factually maintained here and, in any event, has nothing whatsoever to do with denial of due process. But even putting that aside, Kelly asserted but then voluntarily dismissed the claim for intentional infliction of emotional distress before Judge Burke dismissed her claims. By dismissing that claim, Kelly eliminated the only possible (but not actual) basis for demonstrating standing to sue.

Finally, while Kelly's brief refers at pages 24-25 to a claim for nominal damages under §1983—for a denial of a constitutionally protected right that never occurred—there is no claim for damages pleaded in the live petition. *See* 1.CR182-194). Indeed, Kelly's first reference to nominal damages—made only in passing—appears in the Amended Motion for Summary Judgment. *See* 4.CR.1171.

In sum, if Kelly could assert any claim for damages—and she cannot—then it was either voluntarily dismissed or never pleaded or both. Kelly is not a private attorney general authorized to challenge the constitutionality of a statute that never could have applied to her and that was not, in the end, ever applied to her son. Her lack of standing to bring these claims provides an additional and independent basis for affirming Judge Burke's dismissal order.

B. Kelly's failure to identify a constitutionally protected interest and her failure to demonstrate that Methodist deprived Dunn of such an interest doom her claims.

The "first inquiry in every due process challenge is whether the plaintiff has been deprived of a protected interest in 'property' or 'liberty.'" *Am. Mfrs. Mut. Ins. Co.*, 526 U.S. at 59 (quoting U.S. Const., amend. XIV ("nor shall any State deprive any person of life, liberty, or property, without due process of law")).[4] "Only after finding the deprivation of a protected interest" does the Court "look to see if the State's procedures comport with due process." *Id.*[5] This threshold deprivation

[4] *See Logan v. Zimmerman Brush Co*., 455 U.S. 422, 428 (1982) (courts reviewing due process claims follow "a familiar two-part inquiry: we must determine whether [the plaintiff] was deprived of a protected interest, and, if so, what process was his due"); *see also id.* at 131 n.17 (proving a violation of Due Process Clause impossible where "there [was] no deprivation of [the plaintiff's] liberty at all"); *Weiner v. Wasson*, 900 S.W.2d 316, 323 (Tex. 1995) (due process claim requires "that there ha[ve] been [a] deprivation of due process or liberty") (citing *Middleton v. Tex. Power & Light Co.*, 249 U.S. 152, 162-63 (1919)); *Provenzale v. Dep't of Justice*, No. 4:10cv2373, 2011 WL 693337, at *2 (N.D. Ohio Feb. 18, 2011); S*mith v. St. Tammany Sheriff's Office*, 668 So.2d 1331, 1335 (La. Ct. App. 1996); *Bonner v. Cagle*, 2016 WL 97648, at *5.

[5] The federal Due Process Clause, U.S. Const. amend. XIV, §1, and Texas's Due Course of Law Clause, Tex. Const. art. I, §19, are functionally similar, and the Texas Supreme Court routinely

inquiry requires the plaintiff to demonstrate both a protected right and that a deprivation of that protected right actually occurred. *See, e.g.*, *Bd. of Regents of State Colls. v. Roth*, 408 U.S. 564, 569 (1972) ("The requirements of procedural due process apply only to the deprivation of interests encompassed by the Fourteenth Amendment's protection of liberty and property."). Kelly's inability to make either showing is doubly fatal to her claims.

1. Kelly's claims fail because she cannot identify a constitutionally protected interest.

To state a due-process claim, a plaintiff must identify an interest the Constitution protects. Kelly claims to have identified two: life and the right to make individual medical decisions. In fact, though, neither interest is implicated here. Methodist determined that continuing to provide more than palliative care would harm Dunn with no benefit to his chances for recovery. Kelly has never disputed, as a factual matter, that Dunn's condition was fatal and his death resulted from natural causes. Thus, even if Methodist had carried out its decision to withdraw Dunn's life-sustaining treatment, Methodist would not have deprived Dunn of his life but instead would have allowed the natural disease process to continue to its final and fatal conclusion. As the United States Supreme Court put it: "when a patient refuses life-

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relies on federal precedent when interpreting the Texas Constitution's Due Course of Law Clause. *See Univ. of Tex. Med. Sch. at Hous. v. Than*, 901 S.W.2d 926, 929 (Tex. 1995)).

sustaining medical treatment, he dies from an underlying fatal disease or pathology . . . .” *Vacco v. Quill*, 521 U.S. 793, 801 (1997).

Kelly’s claim to the contrary rests on the demonstrably false assumption that patients have a constitutional right to receive treatment from a physician that the physician does not wish to provide. Not only does that assumption ignore the state-action requirement, *see* Section II.C., *infra*, it also ignores the fundamental principle that “the Due Process Clauses generally confer no affirmative right to governmental aid, even where such aid may be necessary to secure life, liberty, or property interests of which the government itself may not deprive the individual.” *DeShaney v. Winnebago Cnty. Dep’t of Soc. Servs.*, 489 U.S. 189, 196 (1989). The government is therefore not obligated to provide “aid” even if doing so is necessary to “secure” a patient’s life. *Id.*; *see also id.* (“[I]t follows that the State cannot be held liable under the Clause for injuries that could have been averted had it chosen to provide [protective services to the plaintiff].”). *A fortiori*, Methodist was not constitutionally obligated to provide life-sustaining treatment to prevent Dunn from dying of natural causes.

Faithful adherence to this fundamental principle is especially important in the context of the patient-doctor relationship. The United States Supreme Court has expressly disclaimed any constitutional right to receive particular medical treatments. *Id.*; *accord Abigail Alliance for Better Access to Developmental Drugs*

v. von Eschenbach, 495 F.3d 695, 710 n.18 (D.C. Cir. 2007) (en banc) ("No circuit court has acceded to an affirmative access [to medical care] claim."); *Johnson v. Thompson*, 971 F.3d 1487, 1497 (10th Cir. 1992) (right to life does not include an affirmative right to receive medical care). Even in the prison context, where the State's "affirmative exercise of its power so restrains an individual's liberty that it renders him unable to care for himself" results in one of the "limited circumstances [in which] the Constitution imposes upon the State affirmative duties . . . . to provide for his . . . medical care," *DeShaney*, 489 U.S. at 200, courts uniformly reject any notion of a constitutional right to "particular type[s] of treatment." *See Long v. Nix*, 86 F.3d 761, 765 (8th Cir. 1996); *Jenkins v. Colo. Mental Health Inst. at Pueblo, Colo.*, 215 F.3d 1337, at *1-2 (10th Cir. 2000) (unpublished).

Kelly's stated interest in the individual right to make medical decisions fares no better. In her view, protecting that right means forcing physicians to provide medical treatment even when doing so would be futile or contrary to their professional ethics. But the right to control one's medical decisions no more includes a right to force doctors to provide that preferred treatment than the right to use contraceptives includes the right to force the government to supply them. Kelly's attempt to convert the shield provided by constitutional liberties into a sword to demand positive entitlements from the private physicians runs headlong into the "long-recognized principle that . . . . [t]he Government has no constitutional duty to

subsidize an activity merely because the activity is constitutionally protected." *See Rust v. Sullivan*, 500 U.S. 173, 201 (1991) (citations omitted). In sum, while the Constitution unquestionably protects the right to determine one's own medical treatment, that right is not at issue in this case. *See Provenzale v. Dep't of Justice*, No. 4:10cv2373, 2011 WL 693337, at *2 (N.D. Ohio Feb. 18, 2011); *Bonner v. Cagle*, No. W2015-01609-COA-R3-CV, 2016 WL 97648, at *5 (Tenn. Ct. App. Jan 7, 2016).

Adopting Kelly's argument would also invite absurd results that the Framers could not possibly have intended. Where they envisioned a Due Process Clause that "protect[ed] the people from the State," *DeShaney*, 489 U.S. at 196, she sees an "affirmative right" so sweeping that private physicians who are *not* state actors (*see* Section II.C., *infra*) may be forced to acquiesce to any and every patient demand for a la carte medical care even when the care requested would, in the doctor's professional judgment, be futile or even more harmful than helpful. That boundless vision of constitutional due process would nullify long-settled precedent and the Hippocratic Oath alike. This Court should reject it.

2. Kelly's claims fail because Methodist never deprived Dunn of life-sustaining treatment and Kelly has alleged no other judicially cognizable deprivation.

Even if Kelly did identify a constitutionally protected interest—and she does not—her claims would still fail because Methodist never deprived Dunn of any such

interest. Without a deprivation, no due-process claim can possibly succeed. *See* cases discussed *supra* n.4. Because Dunn died of natural causes without Methodist ever acting on its decision to discontinue his life-sustaining treatment, no deprivation occurred in this case. As a result, Kelly simply cannot state a cognizable due-process claim.

There is no dispute that Methodist provided Dunn continuous and uninterrupted life-sustaining treatment until his natural death. That treatment was in place while Dunn's parents attempted to resolve their own dispute regarding Dunn's continued treatment. It continued after Kelly filed suit. It continued unabated as Methodist canvassed 66 other care facilities about accepting Dunn as a transfer patient. And it continued all the way until Dunn drew his final breath and died of natural causes. There is simply no basis for claiming that Methodist deprived Dunn of any constitutionally protected interest.

C. Kelly's claims fail because Methodist is not a state actor and its authority to withdraw Dunn's life-sustaining treatment does not emanate from §166.046.

The constitutional prohibition on deprivations of rights without due process of law is limited to *state action* resulting in such deprivations.[6] This important

[6] The Due Process Clause's state-action requirement and §1983's under-color-of-state-law requirement are interchangeable, and courts often refer to "state action" in §1983 cases. *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n*, 531 U.S. 288, 295 n.2 (2001); *Mentavlos*, 249 F.3d at 310.

constraint on §1983 liability ensures that the Constitution remains, as designed, "a shield that protects private citizens from the excesses of government, rather than a sword that they may use to impose liability upon one another." *Philips v. Pitt Cty. Mem'l Hosp.*, 572 F.3d 176, 181 (4th Cir. 2009).

To allege state action, the plaintiff must clear two obstacles. *Am. Mfrs. Mut. Ins. Co.*, 526 U.S. at 50; *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 937 (1982); *Flagg Bros., Inc. v. Brooks*, 436 U.S. 149, 156 (1978). First, state action requires a showing that the alleged constitutional deprivation emanated from exercising some right "created by the State or by a rule of conduct imposed by the State or by a person for whom the State is responsible." *Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. at 50. Second, the party accused of causing the deprivation "must be a person who may fairly be said to be a state actor." *Id*. Neither required showing is possible in this case.

1. Methodist's authority to withdraw Dunn's life-sustaining treatment does not emanate from §166.046.

Kelly insists that because Methodist invoked §166.046's protocols when deciding whether Dunn's life-sustaining treatment should continue, the deprivation she alleges emanated from a right "created by the State." *Id.* But Methodist's authority to end Dunn's life-sustaining treatment did not derive from §166.046. Indeed, physicians possessed and exercised that very authority long before the

Legislature passed §166.046, and they continue to exercise it today without invoking §166.046's protocol.

Section 166.046 does, of course, provide immunity to physicians who follow its procedures to arrive at a decision about withdrawing (or not withdrawing) life-sustaining treatment. But because Methodist never invoked that statutory immunity that aspect of the statutory scheme is beside the point in this case. Having provided Dunn with continuous, uninterrupted life-sustaining treatment until his natural death, Methodist never had to make any decision even potentially subject to immunity under the statute. It is thus unsurprising that Kelly never mentions statutory immunity when discussing her alleged "deprivation." Instead, she focuses on Methodist's "decision" to "begin the process" of withdrawing Dunn's life-sustaining treatment. But Methodist's authority to make *that* decision and to begin *that* process "emanate[d]" from the ordinary authority that physicians and hospitals have always exercised—not from §166.046. Accordingly, Kelly cannot show that Methodist's authority to withdraw Dunn's life-sustaining treatment emanated from a law or rule created by the State.

2. Kelly's claims fail because Methodist is not a state actor.

The United States Supreme Court has recognized that different inquiries can be relevant to the state-action tests:

- The "state compulsion" test attributes a private actor's conduct to the state when the state "exerts coercive power over the private entity or

provides significant encouragement." *Cornish v. Corr. Servs. Corp.*, 402 F.3d 545, 549 (5th Cir. 2005) (citing *Adickes*, 398 U.S. at 170-71).

- The "nexus" test asks whether "the State has inserted itself into a position of interdependence with the private actor, such that it was a joint participant in the enterprise." *Id.* at 550 (quoting *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 357-58 (1974) (brackets omitted)).

- The "public function" test asks "whether the private entity performs a function which is 'exclusively reserved to the State.'" *Id.* at 549 (quoting *Flagg Bros.*, 436 U.S. at 158).

Plaintiffs cannot satisfy this "state action" requirement in the abstract. Rather, the analysis "begins by identifying the specific conduct of which the plaintiff complains." *Am. Mfrs. Mut. Ins. Co*, 526 U.S. at 51 (quotations omitted); *see also Blum*, 457 U.S. at 1003 (prescribing "careful attention to the gravamen of the plaintiff's complaint" to analyze state action).

Methodist's conduct cannot be attributed to the State because it satisfies none of the tests applicable to the state-action analysis. First, the State of Texas neither coerced nor encouraged Methodist's decision. Methodist is a private hospital, and the physicians and committee members who undertook the §166.046 proceeding are not public figures. Nor are they beholden to the State with respect to their deliberations. Second, the nexus between the State of Texas and Methodist's decision regarding Dunn's life-sustaining treatment is virtually non-existent and certainly not close enough to warrant attributing Methodist's actions to the State. Finally, Methodist performed no public function here. Patient healthcare decisions

have long rested in the hands of physicians and their treatment teams and have never been matters of State prerogative. Accordingly, and for the additional reasons discussed below, Methodist does not qualify as a state actor.

a. Methodist is not a state actor under the state-compulsion test.

According to Kelly, Methodist's decisions regarding Dunn's life-sustaining treatment qualify as state action simply because Methodist made them under §166.046's procedure. As the United States Supreme Court has recognized, however, "[a]ction taken by private entities with the mere approval or acquiescence of the State is not state action." *Am. Mfrs. Mut. Ins. Co.*, 526 U.S. at 52. Under that standard, Methodist cannot be a state actor. After all, §166.046 provides a discretionary, not mandatory, procedure for resolving life-sustaining disputes. Physicians exercise entirely independent discretion when deciding whether to invoke that procedure, and the process itself—from beginning to end—requires no input from the State. Given that Methodist's decision regarding Dunn's life-sustaining treatment under §166.046's dispute-resolution protocol did not even require the approval or acquiescence of the State at issue in *American Manufacturers Mutual Insurance Co. v. Sullivan*, Kelly simply cannot demonstrate state action in this case.

Along the same lines, courts have held that the "[p]rivate use of state sanctioned private remedies or procedures does not rise to the level of state action."

Tulsa Prof'l Collection Servs., Inc. v. Pope, 485 U.S. 478, 485-86 (1988). That is precisely what Methodist did by invoking §166.046 when deciding whether to end Dunn's life-sustaining treatment. Nor did Methodist receive the "overt, significant assistance of state officials" necessary to establish state-actor status. *Id.*

As already discussed, physicians exercise entirely independent discretion when deciding whether to invoke §166.046 with respect to any life-sustaining treatment dispute resolution process. Even if §166.046 were mandatory, though, Methodist's decisions related to life-sustaining treatment under the statute still would not qualify as state action. In *Blum*, for example, "a class of Medicaid patients challeng[ed] decisions by the nursing homes in which they reside[d] to discharge or transfer [them] without notice or an opportunity for a hearing." 457 U.S. at 993. Federal law *required* the nursing homes to establish utilization review committees ("URCs") when making such decisions. *Id.* at 994-95. Nevertheless, the Court held that the nursing homes' decisions under the mandatory URC procedure did not qualify as state action because the "State [was not] responsible for the *decision to discharge or transfer particular patients.*" *Id*. (emphasis added). In other words, to transform private conduct into state action, the State must go further and actually *control* the decision itself. *Id*. at 1008, 1009. That simply did not happen here, and Kelly does not argue to the contrary.

The availability of immunity under §166.046 does nothing to change the analysis. In *Flagg Bros.*, for example, the plaintiff sued to stop a warehouse from selling goods the plaintiff had abandoned in the warehouse. 436 U.S. at 153-54. Applicable state law provided the warehouse with immunity in making the sale if the warehouse complied with certain specified requirements. *Id.* at 151 n.1. The Court rejected the argument that the statute, or the state's decision to deny relief, constituted state action:

> If the mere denial of judicial relief is considered sufficient encouragement to make the State responsible for those private acts, all private deprivations of property would be converted into public acts whenever the State, for whatever reason, denies relief sought by the putative property owner.

Id. at 165. The availability of immunity under §166.046 is therefore insufficient to justify treating Methodist as a state actor.

Polk County v. Dodson, 454 U.S. 312 (1981) is also instructive. There, the Court held that a public defender's legal judgment made in the course of representing her client was not state action because professional canons of ethics—and not any state-imposed rule—governed the substantive decision at issue. *Id*. at 321. Likewise, Methodist's decisions regarding Dunn's life-sustaining treatment were governed by professional standards, not State rules. *See* Tex. Health & Safety Code §166.045(b) ("A physician, or a health professional acting under the direction of a physician, is subject to review and disciplinary action by the appropriate licensing board for

failing to effectuate a qualified patient's directive in violation of this subchapter or other laws of this state. This subsection does not limit remedies available under other laws of this state."); *see also* Lisa L. Dahm, *Medical Futility and the Texas Medical Futility Statute: A Model to Follow or One to Avoid?*, 20 No. 6 Health Law 25, 26 n.38 (August 2008) (highlighting the separation of the State from medical judgments by noting that courts typically do not question a physician's professional judgment). Since *Polk County*, the Court has expressly recognized that the legal professional standards discussed in *Polk County* are analogous to the professional standards applicable to healthcare decision. *See Blum*, 457 U.S. at 1009.

b. The nexus between the State and Methodist's decisions regarding Dunn's life-sustaining treatment is not sufficiently close to render Methodist a state actor.

The extent of the State's entwinement in the conduct at issue can also be relevant to the state-actor analysis. *Burton v. Wilmington Parking Auth.*, 365 U.S. 715, 723-25 (1961) (holding state action existed because of the "symbiotic" relationship between the actor and the State); *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 171-72, 175 (1972) (holding no state action because the nexus between a State-issued liquor license and discriminatory practices by a club owner was too remote). Again, however, the State's enactment of §166.046 hardly demonstrates State "entwinement" in Methodist's decisionmaking process with respect to Dunn's life-sustaining treatment. For example, in *Moose Lodge No. 107*, 407 U.S. at 171-

72, the United States Supreme Court held that even when the State requires private parties to obtain a State-issued license before engaging in certain conduct, that does not mean that the decisions private parties make once they obtain that license constitute state action. The plaintiff in *Moose Lodge* alleged that because the Pennsylvania Liquor Board issued an alcohol license to Moose Lodge, a private club, Moose Lodge's discriminatory conduct amounted to state action. *Id*. at 165. The Court rejected that argument, emphasizing that the interdependence between the State Liquor Board and private club was too tenuous to transform Moose Lodge's conduct into state action. *Id.* at 175-76 (emphasizing that the Pennsylvania Liquor Board "plays absolutely no part in establishing or enforcing the membership or guest policies of the club that it licenses to serve liquor").

The State of Texas is significantly further removed from Methodist's decisions regarding Dunn's life-sustaining treatment. Methodist operates independently of the State. No public officials were involved in the decision regarding Dunn's life-sustaining treatment, and Methodist receives no State funding to assist with its resolution of these healthcare disputes. *See Blum*, 457 U.S. at 1011 (holding that 90% financial subsidization was insufficient to demonstrate state action). Having failed to allege facts tending to show a close connection between the State and Methodist's life-sustaining treatment decisions, Kelly cannot satisfy the nexus test.

c. Methodist's decisions regarding Dunn's life-sustaining treatment do not satisfy the public function test.

Although private-party conduct may be deemed state action when the private party exercises "powers traditionally exclusively reserved to the State," the test is narrowly construed and "exceedingly difficult to satisfy." *See Jackson v. Metro. Edison Co.*, 419 U.S. 345, 352-53 (1974) (narrow construction); Martin A. Schwartz, *Section 1983 Litig. Claims & Defenses* §5.14(A) (4th ed. 2018) (exceedingly difficult). In *Jackson*, for example, the Court specifically rejected an invitation to expand the doctrine to include action by professionals that benefit the State. *Id*. Noting that a wide variety of professions, including doctors, optometrists, and lawyers, provide "arguably essential goods and services 'affected with a public interest,'" the Court admonished that such an expansion would dilute the state action doctrine by casting an overly broad net. *Id*. at 353-54.

Methodist's decisions regarding Dunn's life-sustaining treatment cannot possibly satisfy that test. For one thing, Methodist exercises no function traditionally subject to exclusive State control. Private healthcare decisions like those at issue here have traditionally rested with medical professionals, not public officials. Kelly's claim that §166.046 delegates prerogatives traditionally subject to exclusive State control is thus mistaken.

Furthermore, the existence of alternate means of solving the disagreement between the Methodist and Kelly also prevent Kelly from satisfying the public

function test. *Flagg*, 436 U.S. at 160. In *Flagg*, the Court underscored the importance of "exclusivity" in analyzing the public function doctrine. *Id.* at 159. It explained that the State's decision to provide private parties the option to conduct a private sale did not create an *exclusive* remedy because it did not replace traditional actions to resolve a property dispute such as waiver or replevin. *Id.* at 160 (because the proposed sale under the statute was "not the only means of resolving this purely private dispute," respondent did not satisfy the public function test).

Likewise here, §166.046 does not constitute the only method available to resolve disputes regarding the withdrawal of life-sustaining treatment. Indeed, the Legislature expressly framed §166.046 as an alternative process available to physicians for resolving such disputes. *See, e.g.*, Tex. Health & Safety Code §166.045(c) ("If an attending physician refuses to comply with a directive or treatment decision *and does not wish to follow the procedure established under Section 166.046*, life-sustaining treatment shall be provided to the patient, but only until a reasonable opportunity has been afforded for the transfer of the patient to another physician or health care facility willing to comply with the directive or treatment decision.") (emphasis added). Even this litigation demonstrates the availability of post-decision injunctive relief or constitutional challenges as further alternative means of resolving these disputes.

In short, §166.046 does not imbue Methodist with the power to exercise functions traditionally performed exclusively by the State. Furthermore, alternatives to the §166.046 process exist for resolving private healthcare disputes like the one at issue here. Accordingly, Kelly cannot satisfy the public function test.

III. Policy Considerations Support Affirmance.

Accepting Kelly's constitutional arguments would have severe consequences. For one thing, treating Methodist as a state actor with respect to its decisions regarding Dunn's life-sustaining treatment would mean recognizing the State's authority to control end-of-life healthcare decisions. Beyond being unprecedented, such a decision would also directly contravene the established policy of all fifty states. Lisa L. Dahm, Medical Futility and Texas Medical Futility Statute: A Model to Follow or One to Avoid?, 20 No. 6 Health Law. at 26 (noting that every state has at least one law addressing end-of-life decisionmaking, but "none of the states' laws regulate the substance of end-of-life decisionmaking") (quoting Catherine J. Jones, *Decisionmaking at the End of Life*, 63 Am. Jr. Trials 1, §31 (2008)). Such unanimous opposition to the outcome Kelly urges speaks for itself.

Moreover, as commentators have noted, §166.046 has resulted in a 67% increase in the number of futility consultations, suggesting that "physicians felt more comfortable confronting possible futile-treatment situations." Jon D. Feldhammer, *Medical Torture: End of Life Decision-Making in the United Kingdom*

and United States, 14 Cardozo J. Int'l & Comp. L. 511, 529 (2006) (citing Robert L. Fine & Thomas Mayo, *Resolution of Futility by Due Process: Early Experience with the Texas Advance Directives Act*, 138 Annals Internal Med. 743, 745 (2003)). These statistics demonstrate that §166.046 not only promotes the independent exercise of professional medical judgment among physicians, it also promotes transparency and openness in patient-doctor relationships. Accordingly, public policy considerations provide powerful support for Judge Burke's dismissal order.

IV. As a Final Alternative, the Court Should Remand.

If the Court were to find that a justiciable controversy still exists and declines to apply the harmless error rule to affirm, then the proper course of action would be to remand for a determination of all remaining factual and legal issues. Judge Burke did not address those issues, and could not have done so, given his ruling that the case was moot.

PRAYER

The Court should affirm the dismissal on mootness grounds. Alternatively, the Court should affirm under the harmless error rule, because dismissal was proper for other reasons. Further in the alternative, if the Court reverses the ruling on mootness grounds, it should remand the case for consideration by the district court of the other legal and factual issues in this case. Houston Methodist Hospital prays for all other relief to which it is entitled.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE
UNDER APPELLATE RULE 9.4

I certify that this brief complies with the type-volume limitation of Texas Rule of Appellate Procedure 9.4(i)(2) because it contains 9,634 words, excluding the parts of the briefs exempted by Texas Rule of Appellate Procedure 9.4(i)(1).

/s/Reagan W. Simpson
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CERTIFICATE OF SERVICE

Under Texas Rule of Appellate Procedure 9.5(e), I hereby certify that a true and correct copy of this brief has been served on lead counsel and additional counsel for appellants by electronic means on April 25, 2018, as follows:

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