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

BRIEF OF APPELLANTS

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CERTIFICATE OF INTERESTED PERSONS

Pursuant to 5th CIR. R. 28.2.1, Appellants, Berman De Paz Gonzalez and Emerita Martinez-Torres, submit this Certificate of Interested Persons:

(1) Number and Style of the Case:

No. 20-10615, *Berman De Paz Gonzalez, et al. v. Therese Duane, M.D., et al.*

(2) The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

Appellants:	Berman De Paz Gonzalez, individually and as heir of Berman De Paz Martinez; Emerita Martinez-Torres, individually and as heir of Berman De Paz Martinez[1]
Counsel for Appellants:	William D. Taylor, of Taylor & Taylor Law P.C., appellate counsel; Jackson Davis, of Streck & Davis Law, trial counsel
Appellees:	Therese M. Duane, M.D.; Acclaim Physician Group, Inc.; Tarrant County Hospital District d/b/a JPS Health Network
Counsel for Appellees:	Jordan Matthew Parker, Katherine Hancock, and Philip Avery Vickers, of Cantey Hanger, LLP, counsel for Therese M. Duane, M.D. and Acclaim Physician Group, Inc.; Gregory P. Blaies, Grant David Blaies, and Brian Keith

[1] As noted below, the Complaint initially asserted claims on behalf of the estate of Berman De Paz Martinez, and those claims are reflected in this Court's caption. However, the claims on behalf of the estate were voluntarily dismissed and were the subject of a final judgment that is not the subject of this appeal.

Garret, of Blaies & Hightower, LLP, counsel
for Tarrant County Hospital District

/s/ William D. Taylor
William D. Taylor
Counsel for Appellants

STATEMENT REGARDING ORAL ARGUMENT

The appropriateness of oral argument will depend on what issues the Court considers. The trial court based dismissal on a single ground—lack of standing—which involves issues that are straightforward and have already been the subject of this Court's precedents. As such, the Court may decline to address the other grounds that were raised by the Defendant-Appellees, but that were not adopted by the trial court, since it may be more appropriate to decide such issues on a full record rather than a short and plain statement of facts. Therefore, if the Court addresses only the ground that was addressed by the trial court, oral argument would not be necessary.

If, however, the Court decides to address the other grounds that were raised by the Defendant-Appellees, then the Parent-Appellants would request oral argument. This case presents an unusual factual scenario, in which state actors unilaterally decided to end a patient's life, over the objections of his family and without any of the due-process protections required by federal or state law. While this Court and the Supreme Court have discussed end-of-life issues in the context of due process, those issues have generally involved so-called "right to die" cases, such as: (1) cases involving physician-assisted suicide; or (2) cases that balanced a family member's desire to withdraw life-sustaining measures with the state's well-recognized interests in preserving and protecting life, preventing abuses, *etc.* In contrast to those types of cases, this is a "right to life" case—in which the private and public interests are aligned—and the only question is whether the state actors are to be held liable for

arbitrarily usurping the processes that are required to protect those interests. While the Parent-Appellants believe the legal standards are clear and well-established, the nature of the case necessarily involves issues of considerable public interest. Accordingly, if the Court determines to address the grounds raised by the Defendant-Appellees, oral argument would be appropriate to address any questions the Court may have.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Federal Cases

State Cases

Federal Statutes

State Statutes

Federal Rules

Secondary Authorities

JURISDICTIONAL STATEMENT

The district court had federal question jurisdiction under 28 U.S.C. § 1331 and supplemental jurisdiction under § 1367. This Court has jurisdiction over the district court's final judgments, pursuant to 28 U.S.C. § 1291.[2] Appellants filed their notice of appeal in a timely manner, on June 15, 2020. ROA.278.

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[2] As noted elsewhere, there were actually three final judgments entered by the District Court. The first related only to the voluntary dismissal of claims brought on behalf of the deceased's estate, *see* ROA.52, and it is not at issue in this action. The second related to the dismissal of claims against Therese M. Duane and Acclaim Physician Group, Inc. on May 16, 2020. ROA.263. The third final judgment, issued three days later, related to the dismissal of claims against Tarrant County Hospital District d/b/a JPS Health Network. ROA.277. Because of the timing of the second and third final judgments, both were appealed by a single notice of appeal on June 15, 2020. *See* ROA.278.

STATEMENT OF ISSUES PRESENTED

1. Whether the trial court erred in dismissing the claims raised under 42 U.S.C. § 1983 for lack of standing.

   a. Does 42 U.S.C. § 1983 implicitly grant standing to parents to vindicate the constitutional rights of a deceased child?

   b. Did the Parent-Appellants have standing to assert claims for violations of their Deceased Son's civil rights, pursuant to 42 U.S.C. § 1988?

2. Whether the dismissal must be affirmed for any other reason?

   a. Should the Court consider the arguments that were raised by the Defendant Appellees but not adopted by the trial court?

   b. If the Court considers the additional arguments raised by the Defendant-Appellees:

      i. Did the individual Defendant-Appellee, Dr. Duane, establish that she was sued in an official capacity only, even though: (1) the Complaint asserts claims for damages against her and (2) the Complaint must be construed against dismissal?

      ii. Did the municipal and corporate Defendant-Appellees (JPS and Acclaim) establish that the Complaint did not allege any violation of a due process, even though the allegations indicate that the Deceased Son's life was terminated over the objections of his family, without: (1) any advance notice; (2) opportunity for a hearing; or (3) time to seek other remedies?

      iii. Did the municipal and corporate Defendant-Appellees establish that the Complaint did not allege that they could be liable for any violation of due process, even though the allegations: (1) plausibly indicate that these Defendant-Appellees had granted Dr. Duane authority to make unilateral decisions to terminate patient life support without consent; (2) that other employees recognized her authority to make such decisions; (3) that she had done so on multiple occasions; and (4) that Dr. Duane was a Department Chair whose decisions constituted decisions of JPS and Acclaim themselves?

3. Whether any portion of the trial court's decision on the state-law claims conflicts with any ruling of this Court in this Appeal?

STATEMENT OF THE CASE

This appeal arises from the dismissal of claims brought by Berman De Paz Gonzalez and Emerita Martinez-Torres (the "Parent-Appellants") to vindicate the rights of their 21-year-old son, Berman De Paz Martinez (the "Son" or "Deceased Son"), whose life was terminated by the unilateral decision of state actors, without due process of law. *See* ROA.8-18; ROA.251-62; ROA.264-76. More specifically, this appeal involves claims under § 1983[3] asserted by the Parent-Appellants (as their Deceased Son's parents and heirs) against:

(1) A municipal defendant, Tarrant County Hospital District d/b/a JPS Health Network ("JPS"), which operated John Peter Smith Hospital;

(2) A corporate defendant, Acclaim Physician Group, Inc. ("Acclaim"), through which JPS conducted its operations; and

(3) An individual defendant, Dr. Therese Duane, the physician and department head that unilaterally "decided" to end their Deceased Son's life-supporting services and that obtained the "order" that did so.

ROA.8-9, 13-14.

[3] The Complaint also involved state-law claims, which were dismissed based on immunity. Although the Parent-Appellants disagree with the trial court's decision, they have decided to focus this brief on the federal claims (which would include all the damages allowed by state law and which have greater personal and public import). As such the state-law claims are not at issue, except to the extent that the Court could construe the trial court's rulings as conflicting with any of this Court's rulings in this appeal. *See infra,* § IV.

Factual Background

As the Parent-Appellants alleged in the Complaint, their Son was hospitalized on March 29, 2018 with a serious head injury. ROA.9. In accordance with federal and state law, he was given emergency treatment that included the life-sustaining treatment of a ventilator. *See* ROA.9. As a member of a devout Catholic family, their Son would not have wanted the ventilator to be withdrawn until his family had assured themselves that there were no other options (and certainly not before his family had the opportunity to make peace with the circumstances and, if necessary, to say their goodbyes). *See generally* ROA.10 (discussing family's background and religious beliefs).

On the evening of March 31, 2018, the family discussed these issues at length, through the services of a chaplain, and made clear that they did not wish to discontinue treatment at that time. ROA.10. In response, they received assurances that their Son would be allowed to stay for seven days (which was actually shorter than the time required by law), and would then be allowed to go home with necessary medical equipment. ROA.10.

Those representations were false, however, as Dr. Duane unilaterally usurped the decision-making process before the next business day had even begun. More specifically, "[a]t 6 a.m. the next morning," Dr. Duane "appeared unexpectedly in the room with an interpreting nurse stating that they had an order to disconnect [the Son] from life support." ROA.10. "Shocked, unnerved, and panicked," the father—who

was the only family member that maintained an overnight vigil, in light of the assurance that treatment would be provided for at least seven days—"asked her what had happened" to the previous plan. ROA.10. "Dr. Duane stated that the doctors had gotten together and decided to take [the Deceased Son] off life support." ROA.10. "Without allowing him to even speak with his family or giving his family a chance to return to the hospital, without his consent and right in front of him, Dr. Duane disconnected his son from life support as he helplessly watched his son die." ROA.10-11.

Furthermore, this was the not the first time that Dr. Duane had circumvented the required process of law. To the contrary, the Complaint incorporates facts that allege Dr. Duane had made at least three unilateral termination decisions (and perhaps as many as ten) in a *single month*. ROA.12-13, 18. More specifically, an online article indicated that JPS had "pulled the plug" on ten patients in one month, and an anonymous email from a surgical resident indicated that: (1) Dr. Duane was the source of the unilateral decisions; (2) she was the Chair of the Department of Surgery; (3) the anonymous resident was aware of three unilateral terminations in a single month; and (4) there had been other questionable terminations in prior months. ROA.18. Furthermore, the Complaint alleges that Dr. Duane made the termination decisions with a "sickening motive," *i.e.* choosing "victims who didn't speak English, [who] weren't insured," and who she "thought [were] undocumented." ROA. 12, 18.

Procedural History

The Parent-Appellants filed suit in the Northern District of Texas on January 28, 2020, asserting claims under both state and federal law. As to the state-law claims, the Parent-Appellant relied largely on the Texas Advance Directives Act, which requires mandatory processes in end-of-life situations, to protect against the arbitrary termination of life by a medical provider. *See* ROA.11-12. For example, if a patient cannot communicate and has not made a written, advance directive regarding life-sustaining treatment, the Act requires that his wishes be considered through his closest relative as a surrogate decision maker. *See* ROA.11 (citing, *e.g.*, Tex. Health & Safety Code § 166.039). If the medical provider and family cannot reach an agreement on treatment, the Act provides a required process for resolving the dispute, which includes particularized notice and an opportunity to be heard (initially by a neutral "committee," but with an additional opportunity to seek relief from a district or county court). *See* ROA.11-12; Tex. Health & Safety Code §§ 166.040,. 166.044-.046, 166.051-.052. Perhaps most importantly, the Act provides an absolute right to treatment during the legal process and for a minimal period thereafter (*i.e.* at least ten days from notice of a committee decision) to allow the family to seek alternate treatment or other relief. *See* ROA.12; Tex. Health & Safety Code §§ 166.046(e), 166.052.

Due to the "complete and utter failure" to provide the legal process required by the Texas Advance Directives Act (or provide any other process to prevent arbitrary termination of their Son's life), the Parent Appellants also asserted federal claims under § 1983. ROA.12-14. More particularly, the Parent-Appellants alleged that the failure constituted a violation of due process under the Fourteenth Amendment, which protects against "deprivation of life, liberty, or property without due process of law." ROA.12-14; U.S. CONST. amend. XIV.

The claims were initially brought by the Parent-Appellants "individually and as heirs, and on behalf of the estate of" their Deceased Son. ROA.8 (capitalization omitted). However, after the Court questioned their capacity *sua sponte*,[4] the Parent-Appellants voluntary dropped the representative claims on behalf of the estate. ROA.48. The Court issued a partial final judgment as to the representative claims, which also confirmed that the claims brought individually and as heirs were not dismissed. ROA.52. The Parent-Appellants then confirmed their understanding that they were their Deceased Son's heirs, that he had no creditors, and that no probate proceeding was necessary. ROA.54.

All three Defendant-Appellees moved to dismiss, on equivalent grounds. As to state law, they argued the claims against JPS and Acclaim were barred by sovereign

[4] The trial court raised the issue *sua sponte*, citing cases that treated the issues as matters of standing, which goes to a court's subject matter jurisdiction. The Parent-Appellants disagree with those citations, as the Texas Supreme Court has since determined that the issues are matters of *capacity* that are not jurisdictional. *See, e.g., Austin Nursing Ctr., Inc. v. Lovato,* 171 S.W.3d 845, 850-51 & n.3 (Tex. 2005). However, the Parent-Appellants did not challenge the trial court's orders, and instead attempted to comply with what they believed were the trial court's wishes.

immunity and that the claims against Dr. Duane were barred by statutory immunity under section 101.106 of the Texas Civil Practice and Remedies Code. ROA.74-79; ROA.136-42. As to the § 1983 claims, the Defendant-Appellees sought dismissal under Federal Rule of Civil Procedure 12(b)(6). ROA.79-92; ROA.142-153. Dr. Duane argued that the claims were asserted against her in an official capacity and were therefore redundant, while JPS and Acclaim made a number of arguments that they could not be held liable for any constitutional violation on the facts alleged. ROA.79-92; ROA.142-53.[5]

The trial court agreed with the Defendant-Appellees' state-law arguments, and dismissed the state-law claims on immunity grounds. *See* ROA.256-60; ROA.269-74. Conversely, the court did not accept the Defendant-Appellees' arguments as to the § 1983 claims. *See* ROA.261-62; ROA.274-75. Nevertheless, the court dismissed the claims based on a different ground that had not been briefed by the parties, *i.e.* that the Parent-Appellants did not have standing to assert claims based on the violation of their Deceased Son's civil rights. *See* ROA.261-62; ROA.274-75.

On May 16, 2020, the trial court issued a partial final judgment as to Dr. Duane and Acclaim. ROA.263. On May 19, 2020, the court then issued a final judgment that dismissed the remaining claims against JPS. ROA.276. On June 15, 2020, the Parent-Appellants filed their notice of appeal as to both final judgments. ROA.278.

[5] Dr. Duane and Acclaim also referenced Rule 12(e) and requested a more definite statement. However, the trial court did not a grant a motion for more definite statement, and Rule 12(e) could not provide a basis for affirming the trial court's judgment of dismissal.

SUMMARY OF THE ARGUMENT

With a limited (probably inapplicable) exception discussed in section IV of the Arguments below, this appeal involves the dismissal of the procedural due process claims that were asserted under 42 U.S.C. § 1983. More specifically, the Defendant-Appellees raised a number of arguments that the trial court did not adopt, but the trial court instead dismissed on a ground that had not been briefed.

As to the actual basis for the trial court's decision, the analysis is straightforward. The trial court dismissed the claims for a single reason—lack of standing—based on a mistaken application of two, out-of-circuit opinions. Neither of the cited cases supports dismissal in this case, as discussed in section II(A) of the Argument section below. More importantly, the statutory law (particularly 42 U.S.C. § 1988) and this Court's precedents have recognized additional bases for standing in cases involving *deceased* children, as discussed in section II(B). Under those precedents, the Parent-Appellants have standing as both parents and heirs, and the trial court's decision should be reversed.

In the event that the Court considers the other arguments that were raised by the Defendant-Appellees (but that were not adopted by the trial court), none of the arguments would justify dismissal. The first argument applies solely to the individual Defendant-Appellee, Dr. Duane, who asserts that she was sued in her official capacity and that the claim is redundant of the claims against Acclaim or JPS. As discussed in Section III(A) of the Argument section, however, the Parent-Appellants have properly

asserted claims for damages against Dr. Duane in her individual capacity, as demonstrated by the "course of proceedings" below. As such, the dismissal of the claims against her must be reversed, regardless of whether claims can be maintained against JPS or Acclaim.

The remaining arguments were asserted by a municipal defendant (JPS) and a corporate defendant (Acclaim) and fall into two categories: (1) that the Parent-Appellants have not alleged any violation of their Deceased Son's constitutional rights; and (2) even if the Parent-Appellants have alleged a constitutional violation, the violation would not be attributable to Acclaim or JPS. However, neither set of arguments has merit. As discussed in Sections III(B), the Parent-Appellants have alleged that their son was deprived of life, liberty, *and* property interests, when a state actor made the unilateral decision to terminate his life without providing any procedural due process—*i.e.,* without advance notice, opportunity for hearing, or even time for his family to seek alternative treatment. Moreover, the allegations clearly indicate that the violations were based on intentional decisions, and the federal claims are not based on mere negligence.

Finally, as discussed in section III(C), the Parent-Appellants have alleged plausible bases for attributing the violations to both JPS and Acclaim. First, the Complaint alleges that Dr. Duane was a Department Chair, which creates a plausible inference that she was "policymaker" whose acts were the acts of JPS. Likewise, the Complaint creates a plausible inference that she was a "vice-principal" of Acclaim,

based on her status as both a Department Chair and a Director, whose acts are the very acts of Acclaim itself. However, such inferences are not necessary to state a claim for municipal or corporate liability. Regardless of whether Dr. Duane was the policymaker, the allegations indicate that JPS and Acclaim had a policy of authorizing their physicians to unilaterally "decide" to terminate their patients' lives and to obtain "orders" to carry out their decisions. But that grant of unilateral authority is itself a violation of due process, and JPS and Acclaim's actions were therefore a moving force behind the constitutional violations. Accordingly, none of the un-adopted arguments would require dismissal in this action, and the trial court's decisions must be reversed.

ARGUMENT

I. STANDARD OF REVIEW

Orders on motions to dismiss are subject to de novo review, under the same standards applicable to the district court. *See, e.g., Rogers v. Bromac Title Servs., L.L.C.*, 755 F.3d 347, 350 (5th Cir. 2014); *Gen. Elec. Capital Corp. v. Posey*, 415 F.3d 391, 395 (5th Cir. 2005).

In deciding motion under Rule 12(b)(1), a court may find the existence of subject matter jurisdiction from: (1) the complaint alone; (2) the complaint supplemented by undisputed facts evidenced in the record; or (3) the complaint supplemented by undisputed facts plus the court's resolution of disputed facts. *Barrera Montenegro v. United States*, 74 F.3d 657, 659 (5th Cir. 1996). In the absence of an evidentiary hearing, a court must accept all well-pleaded allegations as true and view the allegations and evidence in the light most favorable to the plaintiffs. *See, e.g., Ambraco Inc. v. Bossclip B V*, 570 F.3d 233, 237-38 (5th Cir. 2009); *Lane ex rel. Lane v. Halliburton*, 529 F.3d 548, 557 (5th Cir. 2008).

In deciding a motion to dismiss for failure to state a claim, the court's task is to determine "not whether a [claimant] will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims." *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974)). Under the standards of Rule 8, set forth in *Twombly* and *Iqbal*, a plaintiff or counterclaimant may not merely rest on "labels and conclusions," and a "formulaic recitation of the elements of a cause of action will not do." *See Bell Atl. Corp. v.*

Twombly, 550 U.S. 544, 561-63 (2007). However, *Twombly* and *Iqbal* do not impose a probability requirement or require detailed factual allegations; instead, they require only that the plaintiff state a plausible claim for relief that rises above mere speculation. *See, e.g.*, *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). Thus, dismissal is inappropriate if factual allegations are "enough to raise a right to relief above the speculative level, on the assumption that all the allegations in the complaint are true (even if doubtful in fact)." *Id.* at 696 (citations and footnote omitted).

In ruling on a motion to dismiss, the Court must "construe the complaint in the light most favorable to the [claimant] and draw all reasonable inferences in the [claimant's] favor." *Severance v. Patterson,* 566 F.3d 490, 501 (5th Cir. 2009). In doing so, the allegations must be read "as a whole." *E.g., Matrixx Initiatives, Inc. v. Siracusano,* 563 U.S. 27, 47 (2011); *Gulf Coast Hotel-Motel Ass'n v. Miss. Gulf Coast Golf Course Ass'n*, 658 F.3d 500, 506 (5th Cir. 2011). In other words, Rule 12(b)(6) does not permit a court to dismiss a claim unless the court determines ""it is beyond doubt' that [the claimant] 'cannot prove a plausible set of facts' to support his allegations." *Wilson v. Birnberg*, 667 F.3d 591, 600 (5th Cir. 2012) (quoting *Lane v. Halliburton*, 529 F.3d 548, 557 (5th Cir. 2008)).

Furthermore, a complaint is not required to include argument or explanation of the legal theories involved. *See, e.g., Johnson v. City of Shelby*, 574 U.S. 10, 11-12 (2014) (2014) (per curium); *Skinner v. Switzer*, 562 U.S. 521, 530 (2011); *see also St. Paul Mercury Ins. Co. v. Williamson*, 224 F.3d 425, 434 (5th Cir. 2000) (stating that a complaint is

sufficient if it alleges facts upon which relief can be granted, "even if it fails to categorize correctly the legal theory giving rise to the claim"); *Jacked Up, LLC v. Sara Lee Corp.*, 854 F.3d 797, 810 (5th Cir. 2017) (accord).

Finally, both the Rules and courts have recognized that pleading standards must be measured by the evidence that is available to a plaintiff, *i.e.*, where necessary information would be in the possession of the adverse party. *See, e.g.*, *Braden v. Wal-Mart Stores, Inc.*, 588 F.3d 585, 598 (8th Cir. 2009); *Michaels Bldg. Co. v. Ameritrust Co., N.A.,* 848 F.2d 674, 680 (6th Cir. 1988). This principle has been frequently recognized in municipal-liability cases, since it "is exceedingly rare that a plaintiff will have access to (or personal knowledge of) specific details regarding the existence or absence of internal policies or training procedures prior to discovery." *E.g., Brown v. City of Hous.*, 297 F. Supp. 3d 748, 767 (S.D. Tex. 2017); *Sanchez v. Gomez*, 283 F. Supp. 3d 524, 532 (W.D. Tex. 2017).

Indeed, where necessary facts are in the sole possession of the opposing party, a court need not rule on a motion to dismiss at all. Instead, the court has discretion "to postpone deciding a motion to dismiss until some later stage in the proceedings, such as summary judgment or even trial," or to deny it outright, where a "motion for summary judgment . . . is a more appropriate procedural device."[6] 5B Charles Alan

[6] The frequency with which courts apply these principles is no doubt understated in the case law, since district court decisions on these bases would not ordinarily be published or appear in Westlaw or Lexis. *See, e.g.*, *Schoenfeld v. U.S. Resort Management, Inc.*, 2007 WL 2908622, *2 (W.D. Mo.) (referring to earlier unpublished order denying a motion to dismiss based on an affirmative defense since "that issue [was] more appropriate for summary judgment").

Wright & Arthur Miller, *Federal Practice and Procedure* § 1357, pp. 714, 730 (3d ed. 2004) (citing, *e.g.*, *Fisher & Porter De Puerto Rico, Inc. v. ITT Hammel-Dahl/Conoflow*, 369 F. Supp. 638 (D.P.R. 1974); *APR Energy, LLC v. Pakistan Power Resources, LLC*, 653 F.Supp.2d 1227, (M.D. Fla. 2009); *Cassady v. Quaker Oats Co.*, 2002 WL 3155797, *2 (N.D. Ill.)). Or, even if a court determines that a pleading is insufficient, it may nevertheless allow both discovery and leave to amend after discovery is completed. *See, e.g., Bausch v. Stryker*, 630 F.3d 546, 554, 558-62 (7th Cir. 2010) (stating that if the plaintiff were required to plead specific facts, the plaintiff should be entitled to discovery before amending his complaint).

II. THE TRIAL COURT ERRED IN DISMISSING THE § 1983 CLAIMS FOR LACK OF STANDING, WHICH WAS THE ONLY GROUND ADOPTED BY THE TRIAL COURT.

A. The authorities cited by the trial court do not support dismissal.

In the proceedings below, the three Defendant-Appellees made a variety of arguments that the complaint failed to state a claim under Rule 12(b)(6). Although the trial court purported to dismiss the claims under this rule, it did not do so based on any of the arguments that had been briefed. Instead, it *sua sponte* raised a different argument that none of the parties had briefed on the motions to dismiss. More specifically, the court relied on two, out-of-circuit court cases—*Burrow* and *Morgan*—for the proposition that parents cannot pursue § 1983 cases claims based on the violation of their child's civil rights:

> [T]o state a § 1983 claim, plaintiffs must plead that their **own rights** were violated and may not claim their son's injury as their own.

ROA.275 (emphasis added) (citing *Morgan v. City of New York*, 166 F. Supp. 2d 817, 819 (S.D.N.Y. 2001); *Burrow by and through Burrow v. Postville Cmty. Sch. Dist.*, 929 F. Supp. 1193, 1208 (N.D. Iowa 1996)); ROA.261 (accord). Although the trial court acknowledged that the Parent-Appellants asserted claims for violations of "plaintiffs' son's" rights, the court nevertheless dismissed the claims (based on *Burrow* and *Morgan*) "[b]ecause plaintiffs failed to allege that **their** constitutional rights were violated." ROA.262 (emphasis added); ROA.75 (accord). Therefore, while the court referenced Rule 12(b)(6), the dismissal was actually for lack of "standing"—as is made clear from *Burrow* and *Morgan*—which is an issue of subject matter jurisdiction.

Unfortunately, the trial court's reliance on *Burrow* and *Morgan* was misplaced. Assuming for the sake of argument that these cases correctly state the law within the scope of their facts, they do not support dismissal in this case. To the contrary, the reasoning of both cases demonstrates that a parent has standing to assert claims for violations of a child's civil rights, when the child is unable to do so.

In *Burrow*, the parents asserted both individual claims and claims on behalf of their daughter, all of which were based on violations of their daughter's rights. *Burrow*, 929 F. Supp. at 1196. The court dismissed the individual claims because there was no basis for the parents' "standing" to assert such claims. *Id.* at 1208. But that was not the case as to the claims made on behalf of their daughter, and the court did not

dismiss them on that basis. Instead, it addressed those claims on the merits. *Id.* at 1208-10. Since the daughter had reached the age of majority, the court determined that they could be brought by the daughter herself, and that there was no further need for the parents to assert claims as guardians, next friends, or parents. *Id.* at 1208 n.11. But it did not even suggest that the claims were improperly asserted by the parent in the first instance, while the daughter was a minor. *See id.* at 1208-1210.

In *Morgan*, the facts were somewhat different, but the reasoning was the same. From the court's opinion, it appears that a mother brought *only* individual claims deriving from violation of her daughter's constitutional rights, *i.e.*, asserting violations of "**her** right for her female child to receive the benefits of a public high school education and **her** right to be treated equally and fairly as a parent." *Morgan*, 166 F. Supp. 2d at 819 (emphasis added). The court followed *Burrow* in holding that the mother lacked standing to bring these claims, but the court likewise followed *Burrow* in holding that claims for violation of the daughter's civil rights could be pursued. *Id.* at 819-820. Therefore, the court allowed the complaint to be amended to assert claims for violations of the daughter's rights. *Id.* at 820. Furthermore, a review of the docket sheet indicates that claims were subsequently asserted by the mother "as a parent and natural guardian of" her daughter.[7] *See docket sheet in Morgan v. City of New York,* No.

[7] The opinion might be read as indicating that the daughter should pursue claims on her own behalf, which would be the case if the daughter had reached the age of majority and was not otherwise incapacitated. However, the docket sheet appears to indicate that the daughter was still a minor, since the court apparently allowed an amendment asserting claims by the mother as a parent and guardian.

1:00-cv-09172-LMM-DFE*, available via PACER at https://ecf.nysd.uscourts.gov/cgi-bin/DktRpt.pl?111653425344338-L_1_0-1* (capitalization omitted). Accordingly, nothing in *Burrow* or *Morgan* even hints that a parent would lack standing to vindicate the rights of a child that could not bring claims on his or her own behalf.

B. The applicable statutes and this Court's precedents all make clear that the Parent-Appellants have standing as parents and heirs of their Deceased Son.

In any event, neither case is applicable to the analysis of standing in the context of **deceased** victims, where the applicable statutes and precedents unmistakably hold that parents have standing to pursue claims based on the violations of their child's rights. As a preliminary matter, the Parent-Appellants believe that § 1983 implicitly requires standing to be available to a deceased person's parents (or some other third party) for such claims. If not, then there would be no way to vindicate the constitutional right against deprivations of "life" without due process, which is the foremost interest protected by the Fourteenth Amendment. *See generally Bell v. Milwaukee*, 746 F.2d 1205, 1237-40 (7th Cir. 1984), *partially overruled on other grounds by Russ v. Watts,* 414 F.3d 783 (7th Cir. 2005).

Standing need not be based on any implication from § 1983, however, since standing clearly exists based on an additional statute and this Court's interpretation thereof. Specifically, Congress enacted § 1988 to address questions such as this, by incorporating state laws to fill gaps in the federal scheme (so long as state laws are not inconsistent with the purposes of the civil rights statutes). *See* 42 U.S.C. § 1988(a).

The application of § 1988 is no mystery in the context of deceased victims, as the Court has maintained a consistent position on the issue for more than fifty years. In *Brazier*, the Court (applying Georgia law) held that § 1988 incorporates *both* survival and wrongful death statutes:

> Since Georgia now provides both for survival of the claims which the decedent had for damages sustained during his lifetime as well as a right of recovery to his surviving widow and others for homicide, . . . we need not differentiate between the two types of actions. **To make the policy of the Civil Rights Statutes fully effectual, regard has to be taken of both classes of victims**. Section 1988 declares that this need may be fulfilled if state law is available. Georgia has supplied the law.

Brazier v. Cherry, 293 F.2d 401, 409 (5th Cir. 1961). This principle has been re-affirmed in cases arising in Texas, and the Court's decisions make clear that § 1988 provides standing to the full panoply of plaintiffs recognized by the Texas wrongful death and survival statutes. *See Rhyne v. Henderson Cty.,* 973 F.2d 386, 390-91 (5th Cir. 1992).

Under Texas's wrongful death statute, section 71.004(a), claims may be brought by "parents of the deceased," or by the "surviving spouse" or "children." Tex. Civ. Prac. & Rem. Code § 71.004(a). Under Texas's survival statute, section 71.021(a), claims may be brought by the "heirs, legal representatives, and estate" of the deceased person. Tex. Civ. Prac. & Rem. Code § 71.021(b). Therefore, in a § 1983 action, the parents of a deceased child may bring both individual *and* representative claims for damages incurred by the violations of the child's civil rights. *See, e.g., Rhyne,* 973 F.2d at 390-91.

Here, the Parent-Appellants brought claims individually and as heirs of their Deceased Son, based on their alleged status as "parents" under the wrongful death statute and as "heirs" under the survival statute. *See* ROA.8-9, 15; Tex. Civ. Prac. & Rem. Code §§ 71.004(a), 71.021(b). Accordingly, the Parent-Appellants properly asserted their standing for § 1983 claims, and the trial court's decision on this issue—which was the sole basis for dismissing the federal claims—must be reversed as a matter of a law.

III. NO OTHER ARGUMENTS REQUIRE DISMISSAL.

Since the trial court dismissed the § 1983 claims for lack of standing, it did not reach any of the arguments that were actually raised by the Defendant-Appellees—which amounted to nine overlapping and intertwined arguments for dismissal under Rule 12(b)(6). *See* ROA.79-92; ROA.142-153. As such, the Court need not address them either, as it may be more appropriate to leave the issue to the trial court in the first instance (particularly since the issues may be more appropriate for summary judgment).[8]

[8] As noted above, a federal court has discretion "to postpone deciding a motion to dismiss until some later stage in the proceedings, such as summary judgment or even trial," or to deny it outright, where a "motion for summary judgment . . . is a more appropriate procedural device." 5B Charles Alan Wright & Arthur Miller, *Federal Practice and Procedure* § 1357, pp. 714, 730 (3d ed. 2004). Likewise, even if a court determines that a complaint is insufficient, it may nevertheless grant both discovery and leave to amend after discovery is completed. *See, e.g., Bausch v. Stryker*, 630 F.3d 546, 554, 558-62 (7th Cir. 2010). The trial court was well-acquainted with these principles, and given that the trial court chose not to address any of the Defendant-Appellees' arguments, it might be inferred that the trial court would have deferred their resolution until after discovery (*i.e.,* if the trial court had not mistakenly believed the Parent-Appellants lacked standing).

In the event that the Court addresses the arguments, however, it would find no basis for affirming the trial court's judgments, as discussed in the following subsections. Since the Defendant-Appellees' arguments are intertwined and overlap, the arguments are grouped into three categories to avoid duplication of briefing, each of which is addressed in turn.

The first argument applies solely to the individual Defendant-Appellee, Dr. Duane, who asserts that she was sued in her official capacity and that the claim is redundant of the claims against Acclaim or JPS. ROA.87. As discussed in Section III(A), however, the Parent-Appellants have properly asserted claims for damages against Dr. Duane in her individual capacity, which is demonstrated by the course of proceedings below.

The remaining eight arguments were raised by the corporate and municipal Defendant-Appellees. More particularly, the corporate Defendant-Appellee (Acclaim) raises three arguments for the proposition that "Plaintiffs have failed to state a § 1983 claim against Acclaim," while the municipal Defendant-Appellee (JPS) raises five arguments for the equivalent proposition. ROA.88-92 (capitalization omitted); ROA.142-53. The eight arguments fall into two categories: (1) that the Parent-Appellants have not alleged any violation of their Deceased Son's constitutional rights; and (2) even if the Parent-Appellants have alleged a constitutional violation, the violation would not be attributable to Acclaim or JPS. As discussed in Sections III(B) and III(C), respectively, both categories of arguments are without merit.

A. Dr. Duane was sued in an individual capacity, and the claims against her are not redundant.

Unlike claims against municipal defendants, claims against individual defendants do not require the showing of (for instance) any municipal policy. Instead, "to establish *personal* liability in a § 1983 action, it is enough to show that the official, acting under color of state law, caused the deprivation of a federal right." *Kentucky v. Graham*, 473 U.S. 159, 166 (1985) (emphasis added).

Dr. Duane, the sole individual Defendant-Appellee, attempts to avoid this principle by arguing that that she was sued only in an "official capacity" and that the claims against her are "redundant" of the claims against the other Defendant-Appellees. ROA.87. But this argument is without merit. Even assuming that Dr. Duane has an official capacity in which she could be sued (which is not at all clear), the contention that she was sued only in that capacity—a capacity that would render the damages claims against her meaningless—is contrary to the applicable legal standards.

Dr. Duane acknowledges that the Complaint does not state whether claims are asserted against her in an individual or official capacity.[9] Instead, she asserts that it is

[9] Dr. Duane does not contend that the Parent-Appellants had any obligation to make such a statement, which is not required by any applicable law of which the Parent-Appellants are aware. Although courts may have indicated a preference for the inclusion of such statements, the Supreme Court has declined to modify Rule 9 or otherwise impose such a requirement. *See, e.g.,* Fed. R. Civ. P. 9(a)(1) (stating that a pleading need not allege "a party's capacity to sue or be sued").

"evident" she is sued in an official capacity, based on the capacity in which she **acted** when engaging in the unconstitutional conduct:

> Specifically, Plaintiffs identify that **Dr. Duane was a an [sic] employee of Acclaim, and the actions of Dr. Duane** described in Plaintiffs' Original Complaint, to the extent they actually occurred, **were performed by Dr. Duane during the scope of such employment**.

ROA.88 (emphasis added). But this argument, if accepted, would reach a nonsensical result, since unconstitutional violations will almost always be made in an official capacity at the time they occur (due to the requirement that constitutional violations be made under "color of law"). Thus, the Supreme Court has made a clear distinction between the capacity in which actions *were taken* and the capacity in which an actor *is sued*: "[Official capacity] is best understood as a reference to the capacity in which the state officer is sued, **not** the capacity in which the officer inflicts the alleged injury." *Hafer v. Melo*, 502 U.S. 21, 26 (1991) (emphasis added).

Instead, this Court follows the majority rule and determines a defendant's capacity from the "course of proceedings," based on factors such as the substance of the claims, the type of relief requested, and the plaintiffs' assertions and admissions during the course of briefing. *See Adrian v. Regents of Univ. of Calif.,* 363 F.3d 398, 403 (5th Cir. 2000) (citing *Kentucky v. Graham*, 473 U.S. 159, 167 n.14 (1985)). For instance, if a suit seeks damages from an individual (as opposed to injunctive relief), "a strong presumption is created in favor of a personal-capacity suit." *See, e.g., Mitchell v. Washington*, 818 F.3d 436, 442 (9th Cir. 2016). As such, this presumption would

only be overcome by (for instance) a plaintiff's admissions or acquiescence to the contrary. *See Adrian*, 363 F.3d at 403 (finding that a claim involved official capacity where the plaintiff essentially conceded the point during briefing).

Here, all of the relevant "course of proceeding" factors demonstrate that the § 1983 claims are asserted against Dr. Duane in her individual capacity. Although the Complaint indicates she was *formerly* an official at Acclaim and JPS, it does not indicate that she was sued "as" an official of Acclaim and JPS. Instead, the only indication of her status for suit is that she "is an individual" residing in Texas. ROA.8.

More importantly, the Complaint asserts claims for damages against all three Defendant-Appellees, including Dr. Duane, which creates a presumption that the § 1983 claims are asserted against her personally. *See, e.g., Mitchell*, 818 F.3d at 442. Furthermore, that presumption is mandatory in this particular context, *i.e.* on a motion to dismiss, since courts must "construe the complaint in the light most favorable to the [claimant] and draw all reasonable inferences in the [claimant's] favor." *See Severance v. Patterson,* 566 F.3d 490, 501 (5th Cir. 2009).

Finally, there are no subsequent statements of the Parent-Appellants that would overcome the favorable inference required by Rule 12(b)(6), or even call it into question. Instead, the Parent-Appellants' briefing affirmatively indicated that their allegations were made "against Dr. Duane **in her individual capacity**." ROA.189 (emphasis added).

Since the claims are asserted against Dr. Duane in her individual capacity, she is a "person" that may be held liable under U.S.C. 1983 for any constitutional deprivations that she caused, regardless of whether the deprivations were related to any policies of Acclaim or JPS. *See, e.g., Graham*, 473 U.S. at 166. Whether or not the Parent-Appellants have stated claims for municipal or corporate liability against JPS and Acclaim (issues that are discussed below), the claims against Dr. Duane must be allowed to proceed. Therefore, the trial court's judgment should be reversed as to Dr. Duane.

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

Turning to the arguments of Acclaim and JPS, three arguments can be grouped together as an assertion that the Parent-Appellants failed to allege any plausible violation of their Deceased Son's civil rights at all. *See* ROA.91-92 at § V(B)(3); ROA.144-45 at IV(B)(1); ROA.152-53 at IV(B)(5). Of course, the Defendant-Appellees do not make that assertion directly, as such an argument would be absurd. As alleged, the Deceased Son was a living human being at 6:00 a.m. on the morning of March 31, 2010. ROA.10. Shortly thereafter, his life was ended by the unilateral decision of state actors without due process of law—without ***any*** process of law—as the Defendant-Appellees terminated his life without advance notice, without opportunity to be heard, and without time to seek alternate relief. ROA.10-11. These

allegations plainly implicate deprivations of life, liberty, and property interests, and any assertion to the contrary would be as reprehensible as the underlying acts.

Instead, the Defendant-Appellees make their arguments obliquely, attempting to confuse the issues and distorting the allegations of the complaint. JPS first argues that § 1983 claims may not be predicated on a state statue. *See* ROA.144-45 at IV(B)(1). Then, JPS and Acclaim each raise arguments asserting that the § 1983 claims are merely "repackaged medical negligence claims." *See* ROA.91-92 at § V(B)(3); ROA.152-53 at IV(B)(5). But none of these arguments has merit.

1. Violations of state law will also constitute violations of the Constitution, if the violations deprive a person of life, liberty, or property interests without due process.

JPS's first argument misconstrues the nature of the Parent-Appellants' claims, as well as the nature of due process. As the Parent-Appellants explained in response to the JPS motion, the Complaint does not assert § 1983 claims for violations of the Texas Advance Directive Act. Rather, it alleges that the complete failure to abide by the ministerial requirements of the Act resulted in violations *of the United States Constitution* (specifically, violations their Deceased Son's "due process rights under the 14th [A]mendment of the United States Constitution"). ROA.14. In turn, the Due Process Clause protects against deprivations of "life, liberty, or property" interests, and state law is directly relevant to the existence and deprivation of those interests. *See* U.S. CONST. amend. XIV.

After the Parent-Appellants filed their response explaining that the Complaint was asserting a constitutional injury, JPS did not challenge that assertion in a reply brief. This should end the matter, but the Parent-Appellants will nevertheless elaborate on the nature of the life, liberty, and property interests at issue, so that there is no confusion on the issue.

First, the most obvious interest at issue is the interest in "life" itself. This interest is the most fundamental interest in American law, and it is expressly recognized in the text of the Fourteenth Amendment: "[N]or shall any State deprive any person of **life** . . . without due process of law." U.S. CONST. amend. XIV (emphasis added). No further elaboration could be needed.

Likewise, federal law recognizes a person's "liberty" interest in making his own medical decisions—or at least having his preferences considered through a surrogate—which is an interest that stems from the long-recognized protection of a person's own bodily integrity. *See generally Cruzan v. Dir., Mo. Dep't of Health,* 497 U.S. 261, 269-87 (1990); (discussing the concepts in the context of a so-called "right to die" case); *see also id.* at 287-92 (O'Connor, J. concurring). Furthermore, when the medical decisions involve life-sustaining treatments, the requirements for procedural safeguards are heightened, due to the risks involved in an erroneous decision:

> **An erroneous decision not to terminate results in a maintenance of the status quo**; the possibility of subsequent developments such as advancements in medical science, the discovery of new evidence regarding the patient's intent, changes in the law, or simply the unexpected death of the patient despite the administration of life-

> sustaining treatment at least create the potential that a wrong decision will eventually be corrected or its impact mitigated. **An erroneous decision to withdraw life-sustaining treatment, however, is not susceptible of correction.**

Id. at 283.

In both cases, the right to "life" and the right to participate in medical decisions arise from sources that are separate from, and that underlie, the Texas Advanced Directives Act and other state statutes. Such statutes nevertheless inform the due process analysis, and the Parent-Appellants have assumed that ministerial compliance with the Texas Advance Directives Act would have satisfied the requirements of due process in this case. To be sure, that assumption might not be accurate, since both conservative and liberal commentators (albeit perhaps more from the conservative side) have criticized aspects of the Act, and (upon information and belief) the constitutionality of the Act is currently being challenged in state court. However, the Parent-Appellants have assumed that ministerial compliance with the Act would have been sufficient to satisfy due process here. Conversely, they have properly alleged that the "complete and utter failure" to comply with the Act, or provide any alternative due process protections, constitutes a violation of the Fourteenth Amendment. *See, e.g.,* ROA.12, 14.

Furthermore, even without regard to the protections of life and liberty interests recognized by federal law, the Texas Advance Directives Act creates additional interests in both "liberty" and "property" that are protected by due process. Contrary

to the implications of JPS, the Supreme Court has "repeatedly held that state statutes may create liberty interests that are entitled to the procedural protections of the Due Process Clause of the Fourteenth Amendment." *Vitek v. Jones*, 445 U.S. 480, 488 (1980) (collecting cases). Such interests can even be created by procedural rules. *See, e.g., Hicks v. Oklahoma,* 447 U.S. 343, 346-47 (1980) (holding that state procedures requiring a jury trial created a liberty interest in a jury determination).

Moreover, "property interests" will almost always be created by state laws:

> Property interests, of course, are not created by the Constitution. Rather, **they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law** -- rules or understandings that secure certain benefits and that support claims of entitlement to those benefits.

Bd. of Regents v. Roth, 408 U.S. 564, 577 (1972) (emphasis added). These interests are not limited to tangible property, but include expectations of intangible benefits, such as the continuation of financial payments, continuation of employment, or continuation of educational benefits. *See, e.g., Goss v. Lopez,* 419 U.S. 565, 573-74 (1975)(collecting cases and holding that Ohio law created property interest in educational benefits). Of course, a property interest is not created by a person's "abstract need or desire for" the benefit, and "[h]e must have more than a unilateral expectation of it." *Roth*, 408 U.S. at 577. However, property interests do exist whenever state law creates a "legitimate claim of entitlement," based on "rules or understanding that secure certain benefits and that support claims of entitlement to those benefits." *Id.*

Here the Texas Advance Directives Act—once applied to the Deceased Son—created both liberty and property interests that were protected against arbitrary violations by the state actors. For instance, even if federal law had not already given the Deceased Son a liberty interest in his own medical treatments, a similar liberty interest would have been created by the Act—*e.g.,* requiring the state to allow surrogate family members to convey his wishes, requiring a hearing (and perhaps even a court case) before those wishes could be ignored, *etc.* *See* Tex. Health & Safety Code §§ 166.039-040,. 166.044-.046, 166.051-.052. Furthermore, the Act created a property interest in medical benefits for a minimum period of time—*e.g.* requiring the state to provide life-sustaining services for at least ten days after a decision to terminate those benefits had been made. *See, e.g.,* Tex. Health & Safety Code §§ 166. 046(a), 166.052. In each case, the liberty and property interests are protected by federal law (even though their sources stem from state law) and the arbitrary deprivation of those interests constitutes a violation of due process . . . exactly as the Complaint alleges.

Of course, the Court need not undertake a full analysis of the due process protections in order to decide this appeal. Indeed, the Court should not undertake such analysis based on a "short and plain" statement of fact, since such an analysis would be more appropriate for summary judgment or trial. For the present purposes, it is enough to determine that JPS's argument—that § 1983 claims cannot be based on

state law—is without merit, and that the Parent-Appellants have stated a *plausible* claim for violation of their Deceased Son's due process rights.[10]

2. The § 1983 claims are not claims for mere negligence.

Finally, both JPS and Acclaim assert that the § 1983 claims are merely "repackaged medical negligence" claims, but nothing could be further from the truth. *See* ROA.91-92 at § V(B)(3); ROA.152-53 at IV(B)(5). To be sure, the Complaint makes references to "negligence," and such references were entirely proper in the context of the state-law claims, since the various acts and omissions fell below the required standard of care under Texas law. But the complaint does not allege *mere* negligence, even as to the state-law claims. If buzzwords were needed to indicate the point, they certainly appear in the Complaint: "extreme," "unconscionable," "gross negligence," "complete and utter failure," "egregious," a "sickening" "motive and method," a "widespread" "practice of ignoring the laws," "actual subjective awareness," and "beyond reprehensible." ROA.10, 12-15.

[10] The allegations of the Complaint might also implicate substantive due process, which involves a balancing of both the private interests and state interest. Unlike the so-called "right to die" cases, none of the interests in this case—public or private—would be served by a state actor unilaterally deciding to terminate a life, without even considering the wishes of the patient or his surrogate decision-maker. To the contrary, the Supreme Court has recognized just the opposite, acknowledging that a state's legitimate interests lie in protecting and preserving life, protecting the "deeply personal" right to make medical decisions, protecting against abuses or erroneous decisions in the case of incompetent persons, *etc. See, e.g., Cruzan v. Dir., Mo. Dep't of Health,* 497 U.S. 261, 281 (1990). Likewise, the allegations might, after discovery, implicate the Equal Protection Clause (based on Dr. Duane's "motive" for termination decisions). However, the Court need not consider such issues, since the allegations create plausible claims for violations of procedural due process, as to all the liberty interests discussed above.

More importantly, however, the references to negligence do not provide the basis for the federal claims under § 1983 at all. As discussed above, the § 1983 claims are based on specific allegations of due process violations—*i.e.* the delegation of life-ending decision-making to state actors, without consent or other due process protections—and those violations were *intentional*. *See* ROA.10 (alleging that the termination of life support was based on a deliberate "deci[sion]," was made pursuant to hospital "order," *etc.*). Or, at the very least, the acts and omissions were the result of deliberate indifference or disregard for the risks involved.

The Supreme Court has made clear that claims do not depend on magic words or references to the correct legal theory; indeed, a complaint need not reference any legal theory, much less tie the legal theory to the factual allegations. *See, e.g., Johnson v. City of Shelby*, 574 U.S. 10, 11-12 (2014) (per curium); *Skinner v. Switzer*, 562 U.S. 521, 530 (2011). Instead, a Complaint is sufficient if its allegations create plausible inferences of a violation.

Here, the Complaint does not allege that the "plug pulling" was in any way accidental. Instead, it affirmatively alleges that the due process violations were the result of an intentional, deliberate "deci[sion]" of state actors to usurp the required legal process:

> Shocked, unnerved, and panicked, Mr. DePaz [sic] Sr. asked her what had happened to the plan to release him home after 7 days, and Dr. Duane stated that the doctors had gotten together and **decided** to take him off life support. Without allowing him to even speak with his family or giving his family a chance to return to the hospital, without his

> consent and right in front of him, Dr. Duane disconnected his son from life support as he helplessly watchd his son die.

ROA.10-11 (emphasis added). Thus, the allegations—the *factual* allegations—demonstrate that the § 1983 claims are not based on mere negligence.

Furthermore, while an improper motive is not necessary to allege a violation of due process, the Complaint in this case alleges that the due process violations (as to Dr. Duane, at least) were driven by a "sickening" "motive and method": "She chose victims who didn't speak English, weren't insured, and at least one patient . . . who she (mistakenly) thought was undocumented." ROA. 12; *see also* ROA.18.

In short, no reasonable reader could believe that the due process claims in this action are based on mere negligence. Furthermore, even if there were any question on the point, the Complaint would have to be construed in the light most favorable to the Parent-Appellants, with all reasonable inferences in their favor. *See, e.g., Severance v. Patterson,* 566 F.3d 490, 501 (5th Cir. 2009).

As such, the Complaint is more than sufficient to allege violations of their Deceased Son's constitutional rights. Therefore, whether or not the violations may be attributable to JPS and Acclaim (an issue discussed below), the claims against Dr. Duane must be allowed to proceed. Accordingly, the Court should reverse the dismissal of the claims against Dr. Duane, and remand those claims for a resolution on the merits.

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

Since the Complaint alleges plausible claims for violation of their Deceased Son's constitutional rights (*see supra,* § III(B)), and since the Parent-Appellants have standing to assert those claims (*see supra*, § II), the only remaining question is whether the claims may proceed against JPS and Acclaim.

1. The Parent- Appellants do not base any § 1983 claims on respondeat superior.

On that question, JPS first asserts that § 1983 claims should be dismissed "[t]o the extent Plaintiffs intend to allege *respondeat superior* liability as a basis." ROA.145. However, this argument can be quickly discarded. Unlike their state-law claims, the Parent Appellants did not intend to premise any § 1983 claims on *respondeat superior*, so there are no *respondeat superior* claims to dismiss.

2. The Parent-Appellants have satisfactorily alleged that JPS was a moving force in the violations.

Rather, JPS and Acclaim are subject to § 1983 liability because their own acts and omissions constituted moving forces behind the violations. On this issue, JPS and Acclaim assert that there are inadequate allegations of a policy, policymaker, *etc.*, that would subject JPS and Acclaim to municipal or corporate liable for the violations of the Deceased Son's constitutional rights. ROA.146-152; ROA.89-90. They are mistaken.

Turning first to JPS, a municipal entity (or something that is essentially equivalent), the Parent-Appellants have directly alleged facts indicating that the constitutional violations derived directly from a policy of JPS, *i.e.* granting its physicians (or at least its department heads) the authority to make unilateral end-of-life decisions without obtaining consent or providing any process of law. Alternatively, the only other reasonable inference would be that JPS failed to implement a policy that would provide due process, and thereby caused the due process violations.

Of course, the specific details of JPS's acts and omissions cannot be obtained without discovery, but there is no need for such details at the pleading state. Instead, the only requirement is the existence of facts that create a *plausible* inference that a policy (or lack thereof) led to a due process violation. Here, the alleged facts create plausible inferences of liability in multiple, alternative ways, all of which would indicate that JPS was a moving force behind the violations. Ultimately, it does not matter which inference is *most* reasonable, since *all* of the reasonable inferences would prevent dismissal.

First, the Complaint necessarily creates an inference that JPS had an official policy that allowed physicians such as Dr. Duane to make unilateral life-termination decisions. 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 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.

More specifically, the Complaint affirmatively alleges that Dr. Duane "decided" to take the Son off life support, and that she had obtained an "order" to do so. ROA.10. The Deceased Son's life was then ended pursuant to that "order," over the objections of his father and without providing any due process of law whatsoever. ROA.10-11. Furthermore, the complaint alleges that this was not an isolated incident, as Dr. Duane had made similar, unilateral decisions as to at least three (and perhaps ten) other patients ***in a single month***, with other questionable instances in prior months. ROA.12, 18. Moreover, the unilateral terminations were performed with the knowledge and participation of other JPS doctors (who apparently concurred in the "deci[sion]" in this case) and nurses, indicating that they all understood that Dr. Duane had been delegated the authority to make unilateral termination decisions. ROA.10-11, 18.

The Parent-Appellants believe that the most likely explanation for the alleged series of events is that Dr. Duane—as a Department Chair who would be expected to have authority to oversee, operate, and manage the entire department—was given authority to make policy decisions within her realm, and that she thereby granted

herself the authority to make unilateral termination decisions.[11] *See* ROA.242 (describing belief that Dr. Duane was policymaker); ROA.18 (alleging that Dr. Duane was chair of the department of surgery). If so, then JPS would be liable for her actions without regard to any other issues. ROA.242 (citing, *e.g., Pembaur v. City of Cincinnati* 475 U.S. 469, 481 (1986)). The nature of Dr. Duane's position, as well as surrounding facts, make such an inference reasonable at the pleading stage, and the Complaint is sufficient for this reason alone.

The sufficiency of the Complaint, however, does not depend on the inference that Dr. Duane was a "final policymaker," since other inferences are equally valid. For instance, it does not matter who the final policymaker was at the pleadings stage of this case, since some policymaker gave Dr. Duane unilateral discretion to "decide" life-termination decisions and to issue an "order" to have the decision carried out. ROA.10-11. It is this grant of unilateral authority—to any state actor—that offends due process. In other words, the procedural due process violation does not depend on the manner in which Dr. Duane chose to exercise her decision-making authority (such as choosing uninsured patients), but rather stems from the very fact that she had been given unilateral authority in the first place.

[11] As an aside, the evidence submitted by Dr. Duane and Acclaim confirms what is reasonably inferred from the title of "Department Chair" in the hospital context, *i.e.* that each "Department Chair" will "oversee and assume responsibility for operating and managing the Department." ROA.111. That evidence is not properly considered on the § 1983 claims (which were decided under Rule 12(b)(6)), but there is no need for it to be considered. Reasonable inferences of a department chair's authority can be made without any extraneous evidence.

Perhaps the grant of authority was made directly by the "Board of Managers," which JPS contends is the final policymaker as to the issues in this case. Or perhaps it was granted by the Administrator (under section 281.026) or by the executive committee (under section 281.0286), which each may have had relevant policymaking authority in this case. Tex. Health & Safety Code §§ 281.026; 281.0286. Or perhaps it was granted by some other person, since the Supreme Court has made clear that municipal policymaking may be spread among a wide array of officials who are delegated policymaking authority within their respective spheres:

> Authority to make municipal policy may be granted directly by a legislative enactment or may be delegated by an official who possesses such authority, and of course, whether an official had final policymaking authority is a question of state law. However, like other governmental entities, **municipalities often spread policymaking authority among various officers and official bodies. As a result, particular officers may have authority to establish binding county policy respecting particular matters and to adjust that policy for the county in changing circumstances.**

Pembaur v. City of Cincinnati, 475 U.S. 469, 483 (1986). But the answer makes no difference at this stage, as the Complaint makes sufficient allegations to plausibly infer that *some* final policymaker had adopted an official policy that granted physicians the unilateral authority to make life-termination "deci[sions]." *See* ROA.10.

Conversely, if JPS did not have a policy granting its physicians unilateral authority to make termination decisions, the only alternative explanation for the alleged facts would be that JPS was deliberately indifferent to the need to implement a policy that provided for due process in end-of-life situations. For instance, if JPS did

not have an official policy that prevented its physicians from making unilateral life-termination decisions, then the very absence of such a policy would constitute a due process violation. Or, assuming that JPS had a nominal policy requiring participation by family members, *etc.*, the allegations create a reasonable inference that JPS was deliberately indifferent to its enforcement, through either a failure to train or the acceptance of a custom of contrary behavior. *See* ROA.243-44 (discussing failure to train).

In short, the Complaint alleges that Dr. Duane "decided" to terminate the Son's treatment without due process, obtained an "order" to do so, and had done the same thing multiple times, all with the knowledge and participation of other doctors and nurses. *See* ROA.10-12, 18. Regardless of the specifics that will be determined in discovery, the allegations in this case create a plausible inference that the due process violations stem from some act or omission of JPS—whether by an official policy or deliberate indifference—whereby JPS's physicians and nurses all understood that Dr. Duane had the unilateral authority to terminate its patients' lives without their consent. As such, the Defendant-Appellees' argument does not justify dismissal, and the trial court's decision as to JPS should be reversed.

3. The Parent-Appellants have satisfactorily alleged that Acclaim was a moving force in the violations.

Finally, the same points will apply equally to Acclaim, albeit with one additional point, since Acclaim is a private corporation rather than a government entity. In

Rosborough, this Court determined that private corporations may be subject to § 1983 liability when they act under color of law. *Rosborough v. Management & Training Corp.*, 350 F.3d 459, 461 (5th Cir. 2003). Since then, however, it does not appear that this Court or the Supreme Court have clearly defined the standards for corporate liability in this context.

Lower courts have generally believed that the corporate liability is subject to the causation principles of *Monell* and its progeny (*i.e.* that liability turns on the existence of a "policy" or some other basis whereby the employee's act is considered the act of the defendant itself). *See Monell v. Dep't of Soc. Servs.,* 436 U.S. 658 (1978). To the extent that this belief means the corporation must have played a part in the violation and is not simply subject to *respondeat superior* liability, the Parent-Appellants assume the belief is correct. *See id.* at 691. Therefore, Acclaim will be liable for all the same reasons discussed above as to JPS.

That does not mean the analysis is entirely identical, however, as Acclaim may be subject to a broader basis for liability than JPS. 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. *Jett v. Dallas Indep. Sch. Dist.,* 7 F.3d 1241, 1245 (5th Cir. 1993). As to corporations, this logically means a court should also look to state *corporate* law to determine whether a corporation caused a violation. In other words, Acclaim is not only subject to the foregoing bases discussed above as to municipal liability—*e.g.* an official policy of an official

policymaker, deliberate indifference in failing to implement a policy, *etc.*—but is also subject to any theories of corporate law that would treat Dr. Duane's acts as the acts of Acclaim itself.

Most obviously, Texas corporate law has long recognized that corporations are subject to liability for the acts of their "vice-principals." *See, e.g., Gte Sw. v. Bruce*, 998 S.W.2d 605, 618 (Tex. 1999); *Fort Worth Elevators Co. v. Russell*, 70 S.W.2d 397, 402-08 (Tex. 1934), *disapproved in part on other grounds by Wright v. Gifford-Hill & Co.*, 725 S.W.2d 712, 714 (Tex. 1987). The concept of a vice-principal in the corporate context is similar to the concept of a policymaker in the municipal context, except that corporate policymaking functions may be more diversified than in the municipal context, and the range of corporate policymakers/vice-principals therefore may be broader.

The vice-principal doctrine was originally adopted in the context of punitive damages, where the Texas Supreme Court described the "correct rule" as: "A corporation is liable for exemplary damages for its own act, that is, for the act of **its directors or other agents** whose act is the act of the corporation." *Ft. Worth Elevators Co.*, 70 S.W. at 407 (emphasis added). As to identity of these "other agents" (in addition to directors), the Texas Supreme Court has identified four categories of "vice-principals":

> (a) Corporate officers; (b) those who have authority to employ, direct, and discharge servants of the master; (c) those engaged in the performance of nondelegable or absolute duties of the master; and (d)

> those to whom a master has confided the management of the whole or a department or division of his business.

Hammerly Oaks, Inc. v. Edwards, 958 S.W.2d 387, 391 (Tex. 1997) (citing *Ft. Worth Elevators Co.*, 70 S.W. at 406). Furthermore, the Texas Supreme Court made clear that "corporate officer" in this context is not limited to "corporate officers, *per se*, but that the term 'vice principal' includes one who represents the corporation in its corporate capacity." *Id.* These principles have since been applied to other issues, such as the existence of corporate knowledge, and at each point the Texas Supreme Court has confirmed their validity. *See, e.g., Chrysler Ins. Co. v. Greenspoint Dodge of Hous., Inc.,* 297 S.W.3d 248, 250, 253 & n.1 (Tex. 2009)(holding that knowledge of vice-principals was knowledge of the corporation for the purposes of an insurance exclusion).

The significance of the vice-principal doctrine is that it is distinct and separate from the doctrine of *respondeat superior*, and it places liability on "very different grounds." *See Hammerly Oaks, Inc.,* 958 S.W.2d at 391. Unlike *respondeat superior,* this theory does not simply hold a principal liable for the acts of a servant. Rather, the acts of a vice-principal are the "**very acts of the corporation itself**." *Fort Worth Elevators Co.,* 70 S.W.2d at 406 (emphasis added); *see also Gte Sw. v. Bruce,* 998 S.W.2d at 618 (stating that acts of a vice-principal are deemed to be the acts of the corporation itself); *Hammerly Oaks, Inc.,* 958 S.W.2d at 391 (accord).

Applying these principles to the present case, the Complaint sufficiently alleges facts that indicate Dr. Duane was a vice-principal of Acclaim. As discussed above

regarding the question of whether Dr. Duane was a "policymaker," the Complaint alleges that Dr. Duane was appointed as a Department Chair. *See supra* at 37-38 (citing, *e.g.,* ROA.18). This allegation affirmatively indicates that Dr. Duane falls into the fourth category of "other agents" recognized as vice-principals by the Texas Supreme Court: "(d) those to whom a master has confided the management of . . . a department." *Hammerly Oaks, Inc.*, 958 S.W.2d at 391 (citing *ef*, 70 S.W. at 406). Furthermore, the allegation at least raises an inference that Dr. Duane may also fit into the first and second categories: "(a) [c]orporate officers;" and "(b) those who have authority to employ, direct, and discharge servants of the master." *Id.* (citing *Ft. Worth Elevators Co.*, 70 S.W. at 406). Finally, Acclaim itself raised an additional basis for a vice-principal finding, by introducing public records that indicate that Dr. Duane is a "director" of Acclaim. ROA.100.[12] As such, she is also a vice-principal under the rule that a corporation is liable for an "act of its directors," which was recognized more than eighty years ago. *Fort Worth Elevators Co.,* 70 S.W.2d at 407. For all of these reasons, Acclaim is liable under § 1983 to the same extent as Dr. Duane, since her acts are the "very acts of [Acclaim] itself." *Fort Worth Elevators Co.,* 70 S.W.2d at 406.

[12] Although not all documents submitted to the trial court may be considered as to the § 1983 claims (which were based on Rule 12(b)(6) rather than Rule 12(b)(1)), the Court can consider this document as a public record subject to judicial notice. *See, e.g., U.S. ex rel. Willard v. Humana Health Plan of Tex., Inc.*, 336 F.3d 375, 379 (5th Cir. 2003).

Therefore, the Parent-Appellants have asserted a plausible claim that Acclaim may be held liable for violation of due process, based on both: (1) the reasons discussed above as to JPS; and (2) the vice-principal doctrine. Accordingly, the unaddressed arguments raised by Acclaim could not justify the affirmance of dismissal in this case, and the dismissal should be reversed.

IV. IF THE TRIAL COURT'S RULINGS ON THE STATE-LAW CLAIMS COULD BE CONSTRUED AS CONFLICTING WITH THE RULINGS OF THIS COURT IN THIS APPEAL, THE TRIAL COURT'S RULING SHOULD BE REVERSED TO THAT EXTENT.

The trial court also dismissed the claims that the Parent-Appellants raised under state law, as the Court found the Defendant-Appellees were immune from suit. The Parent-Appellants do not agree with the trial court's decisions on these issues. However, the Parent-Appellants have decided to focus this appeal on the constitutional issues for a variety of reasons (such as the public and private import of those issues and the fact that damages under § 1983 would encompass the damages available for the state-law claims).

Therefore, the state-law claims are not before the Court, except to the extent that any part of the trial court's opinions could be read to conflict with whatever ruling this Court reaches on the § 1983 claims. Frankly, the Parent-Appellants do not believe there could be any conflict. Indeed, there appears to be only one remotely-related issue decided by the trial court—*i.e.* whether Dr. Duane was an independent

contractor of JPS for the purposes of the Texas Tort Claims Act—and that issue would not appear to have any impact on the federal claims at issue here:

> (1) It was unnecessary to the trial court's decision (since the court believed there was no waiver of immunity, regardless);
>
> (2) It was not decided on the merits (*i.e.* dismissal was based on a lack of subject matter jurisdiction);
>
> (3) It involved an entirely different issue (*i.e.* whether Dr. Duane was an "employee" as opposed to a "policymaker");
>
> (4) It involved different substantive standards (*i.e.* the definition of "employee" under the Texas Tort Claims Act, as opposed to the standards governing municipal decision-making in the § 1983 context); and
>
> (5) It involved different procedural standards (*i.e.* under Rule 12(b)(1) as opposed to Rule 12(b)(6)).

Nevertheless, if the Court disagrees and believes that any portion of the trial court's state-law decisions conflict with any portion of the decision that is ultimately reached in this case, the Parent-Appellants request that the Court reverse the trial court's orders to the extent needed to conform to this Court's opinion (so that there is no possible confusion as to the effects of the trial court's orders under *res judicata*, law of the case, *etc.*).

V. CONCLUSION

The district court erred in dismissing the Parent-Appellants' §1983 claims. As

such, this Court should reverse the district court's judgments as to those claims and remand this action to have those claims decided on the merits.

Respectfully submitted,

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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 September 9, 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 11,773 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

APPENDIX OF STATUTES

I. UNITED STATES CONSTITUTION

Amendment XIV

Section 1.
All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

. . .

II. UNITED STATES CODE, TITLE 42

. . .

§ 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

. . .

§ 1988. Proceedings in vindication of civil rights

(a) Applicability of statutory and common law

The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of titles 13, 24, and 70 of the Revised Statutes for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty.

(b) Attorney's fees

In any action or proceeding to enforce a provision of sections 1981, 1981a, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92–318 [20 U.S.C. 1681 et seq.], the Religious Freedom Restoration Act of 1993 [42 U.S.C. 2000bb et seq.], the Religious Land Use and Institutionalized Persons Act of 2000 [42 U.S.C. 2000cc et seq.], title VI of the Civil Rights Act of 1964 [42 U.S.C. 2000d et seq.], or section 12361 of title 34, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity such officer shall not be held liable for any costs, including attorney's fees, unless such action was clearly in excess of such officer's jurisdiction.

(c) Expert fees

In awarding an attorney's fee under subsection (b) in any action or proceeding to enforce a provision of section 1981 or 1981a of this title, the court, in its discretion, may include expert fees as part of the attorney's fee.

. . .

III. TEXAS HEALTH AND SAFETY CODE, TITLE 2, CHAPTER 166

. . .

Sec. 166.039. PROCEDURE WHEN PERSON HAS NOT EXECUTED OR ISSUED A DIRECTIVE AND IS INCOMPETENT OR INCAPABLE OF COMMUNICATION. (a) If an adult qualified patient has not executed or issued a directive and is incompetent or otherwise mentally or physically incapable of communication, the attending physician and the patient's legal guardian or an agent under a medical power of attorney may make a treatment decision that may include a decision to withhold or withdraw life-sustaining treatment from the patient.

(b) If the patient does not have a legal guardian or an agent under a medical power of attorney, the attending physician and one person, if available, from one of the following categories, in the following priority, may make a treatment decision that may include a decision to withhold or withdraw life-sustaining treatment:

(1) the patient's spouse;
(2) the patient's reasonably available adult children;
(3) the patient's parents; or
(4) the patient's nearest living relative.

(c) A treatment decision made under Subsection (a) or (b) must be based on knowledge of what the patient would desire, if known.

(d) A treatment decision made under Subsection (b) must be documented in the patient's medical record and signed by the attending physician.

(e) If the patient does not have a legal guardian and a person listed in Subsection (b) is not available, a treatment decision made under Subsection (b) must be concurred in by another physician who is not involved in the treatment of the patient or who is a representative of an ethics or medical committee of the health care facility in which the person is a patient.

(f) The fact that an adult qualified patient has not executed or issued a directive does not create a presumption that the patient does not want a treatment decision to be made to withhold or withdraw life-sustaining treatment.

(g) A person listed in Subsection (b) who wishes to challenge a treatment decision made under this section must apply for temporary

guardianship under Chapter 1251, Estates Code. The court may waive applicable fees in that proceeding.

Sec. 166.040. PATIENT CERTIFICATION AND PREREQUISITES FOR COMPLYING WITH DIRECTIVE. (a) An attending physician who has been notified of the existence of a directive shall provide for the declarant's certification as a qualified patient on diagnosis of a terminal or irreversible condition.

(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.

Sec. 166.041. DURATION OF DIRECTIVE. A directive is effective until it is revoked as prescribed by Section 166.042.

Sec. 166.042. REVOCATION OF DIRECTIVE. (a) A declarant may revoke a directive at any time without regard to the declarant's mental state or competency. A directive may be revoked by:

(1) the declarant or someone in the declarant's presence and at the declarant's direction canceling, defacing, obliterating, burning, tearing, or otherwise destroying the directive;

(2) the declarant signing and dating a written revocation that expresses the declarant's intent to revoke the directive; or

(3) the declarant orally stating the declarant's intent to revoke the directive.

(b) A written revocation executed as prescribed by Subsection (a)(2) takes effect only when the declarant or a person acting on behalf of the declarant notifies the attending physician of its existence or mails the revocation to the attending physician. The attending physician or the physician's designee shall record in the patient's medical record the time and date when the physician received notice of the written revocation and shall enter the word "VOID" on each page of the copy of the directive in the patient's medical record.

(c) An oral revocation issued as prescribed by Subsection (a)(3) takes effect only when the declarant or a person acting on behalf of the declarant notifies the attending physician of the revocation. The attending physician or the physician's designee shall record in the patient's medical record the time, date, and place of the revocation, and, if different, the time, date, and place that the physician received notice of the revocation. The attending physician or the physician's designees shall also enter the word "VOID" on each page of the copy of the directive in the patient's medical record.

(d) Except as otherwise provided by this subchapter, a person is not civilly or criminally liable for failure to act on a revocation made under this section unless the person has actual knowledge of the revocation.

Sec. 166.043. REEXECUTION OF DIRECTIVE. A declarant may at any time reexecute a directive in accordance with the procedures prescribed by Section 166.032, including reexecution after the declarant is diagnosed as having a terminal or irreversible condition.

Sec. 166.044. LIMITATION OF LIABILITY FOR WITHHOLDING OR WITHDRAWING LIFE-SUSTAINING PROCEDURES. (a) A physician or health care facility that causes life-sustaining treatment to be withheld or withdrawn from a qualified patient in accordance with this subchapter is not civilly liable for that action unless the physician or health care facility fails to exercise reasonable care when applying the patient's advance directive.

(b) A health professional, acting under the direction of a physician, who participates in withholding or withdrawing life-sustaining treatment from a qualified patient in accordance with this subchapter is not civilly liable for that action unless the health professional fails to exercise reasonable care when applying the patient's advance directive.

(c) A physician, or a health professional acting under the direction of a physician, who participates in withholding or withdrawing life-sustaining treatment from a qualified patient in accordance with this subchapter is not criminally liable or guilty of unprofessional conduct as a result of that action

unless the physician or health professional fails to exercise reasonable care when applying the patient's advance directive.

(d) The standard of care that a physician, health care facility, or health care professional shall exercise under this section is that degree of care that a physician, health care facility, or health care professional, as applicable, of ordinary prudence and skill would have exercised under the same or similar circumstances in the same or a similar community.

Sec. 166.045. LIABILITY FOR FAILURE TO EFFECTUATE DIRECTIVE. (a) A physician, health care facility, or health care professional who has no knowledge of a directive is not civilly or criminally liable for failing to act in accordance with the directive.

(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.

(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.

(d) A physician, health professional acting under the direction of a physician, or health care facility is not civilly or criminally liable or subject to review or disciplinary action by the person's appropriate licensing board if the person has complied with the procedures outlined in Section 166.046.

Sec. 166.046. PROCEDURE IF NOT EFFECTUATING A DIRECTIVE OR TREATMENT DECISION. (a) If an attending physician refuses to honor a patient's advance directive or a health care or treatment decision made by or on behalf of a patient, the physician's refusal shall be reviewed by an ethics or medical committee. The attending physician may not

be a member of that committee. The patient shall be given life-sustaining treatment during the review.

(b) The patient or the person responsible for the health care decisions of the individual who has made the decision regarding the directive or treatment decision:

(1) may be given a written description of the ethics or medical committee review process and any other policies and procedures related to this section adopted by the health care facility;

(2) shall be informed of the committee review process not less than 48 hours before the meeting called to discuss the patient's directive, unless the time period is waived by mutual agreement;

(3) at the time of being so informed, shall be provided:

(A) a copy of the appropriate statement set forth in Section 166.052; and

(B) a copy of the registry list of health care providers and referral groups that have volunteered their readiness to consider accepting transfer or to assist in locating a provider willing to accept transfer that is posted on the website maintained by the department under Section 166.053; and

(4) is entitled to:

(A) attend the meeting;

(B) receive a written explanation of the decision reached during the review process;

(C) receive a copy of the portion of the patient's medical record related to the treatment received by the patient in the facility for the lesser of:

(i) the period of the patient's current admission to the facility; or

(ii) the preceding 30 calendar days; and

(D) receive a copy of all of the patient's reasonably available diagnostic results and reports related to the medical record provided under Paragraph (C).

(c) The written explanation required by Subsection (b)(4)(B) must be included in the patient's medical record.

(d) If the attending physician, the patient, or the person responsible for the health care decisions of the individual does not agree with the decision

reached during the review process under Subsection (b), the physician shall make a reasonable effort to transfer the patient to a physician who is willing to comply with the directive. If the patient is a patient in a health care facility, the facility's personnel shall assist the physician in arranging the patient's transfer to:

(1) another physician;

(2) an alternative care setting within that facility; or

(3) another facility.

(e) If the patient or the person responsible for the health care decisions of the patient is requesting life-sustaining treatment that the attending physician has decided and the ethics or medical committee has affirmed is medically inappropriate treatment, the patient shall be given available life-sustaining treatment pending transfer under Subsection (d). This subsection does not authorize withholding or withdrawing pain management medication, medical procedures necessary to provide comfort, or any other health care provided to alleviate a patient's pain. The patient is responsible for any costs incurred in transferring the patient to another facility. The attending physician, any other physician responsible for the care of the patient, and the health care facility are not obligated to provide life-sustaining treatment after the 10th day after both the written decision and the patient's medical record required under Subsection (b) are provided to the patient or the person responsible for the health care decisions of the patient unless ordered to do so under Subsection (g), except that artificially administered nutrition and hydration must be provided unless, based on reasonable medical judgment, providing artificially administered nutrition and hydration would:

(1) hasten the patient's death;

(2) be medically contraindicated such that the provision of the treatment seriously exacerbates life-threatening medical problems not outweighed by the benefit of the provision of the treatment;

(3) result in substantial irremediable physical pain not outweighed by the benefit of the provision of the treatment;

(4) be medically ineffective in prolonging life; or

(5) be contrary to the patient's or surrogate's clearly documented desire not to receive artificially administered nutrition or hydration.

(e-1) If during a previous admission to a facility a patient's attending physician and the review process under Subsection (b) have determined that

life-sustaining treatment is inappropriate, and the patient is readmitted to the same facility within six months from the date of the decision reached during the review process conducted upon the previous admission, Subsections (b) through (e) need not be followed if the patient's attending physician and a consulting physician who is a member of the ethics or medical committee of the facility document on the patient's readmission that the patient's condition either has not improved or has deteriorated since the review process was conducted.

(f) Life-sustaining treatment under this section may not be entered in the patient's medical record as medically unnecessary treatment until the time period provided under Subsection (e) has expired.

(g) At the request of the patient or the person responsible for the health care decisions of the patient, the appropriate district or county court shall extend the time period provided under Subsection (e) only if the court finds, by a preponderance of the evidence, that there is a reasonable expectation that a physician or health care facility that will honor the patient's directive will be found if the time extension is granted.

(h) This section may not be construed to impose an obligation on a facility or a home and community support services agency licensed under Chapter 142 or similar organization that is beyond the scope of the services or resources of the facility or agency. This section does not apply to hospice services provided by a home and community support services agency licensed under Chapter 142.

Sec. 166.047. HONORING DIRECTIVE DOES NOT CONSTITUTE OFFENSE OF AIDING SUICIDE. A person does not commit an offense under Section 22.08, Penal Code, by withholding or withdrawing life-sustaining treatment from a qualified patient in accordance with this subchapter.

Sec. 166.048. CRIMINAL PENALTY; PROSECUTION. (a) A person commits an offense if the person intentionally conceals, cancels, defaces, obliterates, or damages another person's directive without that person's consent. An offense under this subsection is a Class A misdemeanor.

(b) A person is subject to prosecution for criminal homicide under Chapter 19, Penal Code, if the person, with the intent to cause life-sustaining treatment to be withheld or withdrawn from another person contrary to the other person's desires, falsifies or forges a directive or intentionally conceals or withholds personal knowledge of a revocation and thereby directly causes life-sustaining treatment to be withheld or withdrawn from the other person with the result that the other person's death is hastened.

Sec. 166.049. PREGNANT PATIENTS. A person may not withdraw or withhold life-sustaining treatment under this subchapter from a pregnant patient.

Sec. 166.050. MERCY KILLING NOT CONDONED. 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.

Sec. 166.051. LEGAL RIGHT OR RESPONSIBILITY NOT AFFECTED. This subchapter does not impair or supersede any legal right or responsibility a person may have to effect the withholding or withdrawal of life-sustaining treatment in a lawful manner, provided that if an attending physician or health care facility is unwilling to honor a patient's advance directive or a treatment decision to provide life-sustaining treatment, life-sustaining treatment is required to be provided the patient, but only until a reasonable opportunity has been afforded for transfer of the patient to another physician or health care facility willing to comply with the advance directive or treatment decision.

Sec. 166.052. STATEMENTS EXPLAINING PATIENT'S RIGHT TO TRANSFER. (a) In cases in which the attending physician refuses to honor an advance directive or health care or treatment decision requesting the provision of life-sustaining treatment, the statement required by Section 166.046(b)(3)(A) shall be in substantially the following form:

When There Is A Disagreement About Medical Treatment: The Physician Recommends Against Certain Life-Sustaining Treatment That You Wish To Continue

You have been given this information because you have requested life-sustaining treatment* for yourself as the patient or on behalf of the patient, as applicable, which the attending physician believes is not medically appropriate. This information is being provided to help you understand state law, your rights, and the resources available to you in such circumstances. It outlines the process for resolving disagreements about treatment among patients, families, and physicians. It is based upon Section 166.046 of the Texas Advance Directives Act, codified in Chapter 166, Texas Health and Safety Code.

When an attending physician refuses to comply with an advance directive or other request for life-sustaining treatment because of the physician's judgment that the treatment would be medically inappropriate, the case will be reviewed by an ethics or medical committee. Life-sustaining treatment will be provided through the review.

You will receive notification of this review at least 48 hours before a meeting of the committee related to your case. You are entitled to attend the meeting. With your agreement, the meeting may be held sooner than 48 hours, if possible.

You are entitled to receive a written explanation of the decision reached during the review process.

If after this review process both the attending physician and the ethics or medical committee conclude that life-sustaining treatment is medically inappropriate and yet you continue to request such treatment, then the following procedure will occur:

1. The physician, with the help of the health care facility, will assist you in trying to find a physician and facility willing to provide the requested treatment.

2. You are being given a list of health care providers, licensed physicians, health care facilities, and referral groups that have volunteered their readiness to consider accepting transfer, or to assist in locating a provider willing to accept transfer, maintained by the Department of State Health Services. You may wish to contact providers, facilities, or referral groups on the list or others of your choice to get help in arranging a transfer.

3. The patient will continue to be given life-sustaining treatment until the patient can be transferred to a willing provider for up to 10 days from the time you were given both the committee's written decision that life-sustaining treatment is not appropriate and the patient's medical record. The patient will continue to be given after the 10-day period treatment to enhance pain management and reduce suffering, including artificially administered nutrition and hydration, unless, based on reasonable medical judgment, providing artificially administered nutrition and hydration would hasten the patient's death, be medically contraindicated such that the provision of the treatment seriously exacerbates life-threatening medical problems not outweighed by the benefit of the provision of the treatment, result in substantial irremediable physical pain not outweighed by the benefit of the provision of the treatment, be medically ineffective in prolonging life, or be contrary to the patient's or surrogate's clearly documented desires.

4. If a transfer can be arranged, the patient will be responsible for the costs of the transfer.

5. If a provider cannot be found willing to give the requested treatment within 10 days, life-sustaining treatment may be withdrawn unless a court of law has granted an extension.

6. You may ask the appropriate district or county court to extend the 10-day period if the court finds that there is a reasonable expectation that you may find a physician or health care facility willing to provide life-sustaining treatment if the extension is granted. Patient medical records will be provided to the patient or surrogate in accordance with Section 241.154, Texas Health and Safety Code.

*"Life-sustaining treatment" means treatment that, based on reasonable medical judgment, sustains the life of a patient and without which the patient will die. The term includes both life-sustaining medications and artificial life support, such as mechanical breathing machines, kidney dialysis treatment, and artificially administered nutrition and hydration. The term does not include the administration of pain management medication or the performance of a medical procedure considered to be necessary to provide comfort care, or any other medical care provided to alleviate a patient's pain.

(b) In cases in which the attending physician refuses to comply with an advance directive or treatment decision requesting the withholding or

withdrawal of life-sustaining treatment, the statement required by Section 166.046(b)(3)(A) shall be in substantially the following form:

When There Is A Disagreement About Medical Treatment: The Physician Recommends Life-Sustaining Treatment That You Wish To Stop

You have been given this information because you have requested the withdrawal or withholding of life-sustaining treatment* for yourself as the patient or on behalf of the patient, as applicable, and the attending physician disagrees with and refuses to comply with that request. The information is being provided to help you understand state law, your rights, and the resources available to you in such circumstances. It outlines the process for resolving disagreements about treatment among patients, families, and physicians. It is based upon Section 166.046 of the Texas Advance Directives Act, codified in Chapter 166, Texas Health and Safety Code.

When an attending physician refuses to comply with an advance directive or other request for withdrawal or withholding of life-sustaining treatment for any reason, the case will be reviewed by an ethics or medical committee. Life-sustaining treatment will be provided through the review.

You will receive notification of this review at least 48 hours before a meeting of the committee related to your case. You are entitled to attend the meeting. With your agreement, the meeting may be held sooner than 48 hours, if possible.

You are entitled to receive a written explanation of the decision reached during the review process.

If you or the attending physician do not agree with the decision reached during the review process, and the attending physician still refuses to comply with your request to withhold or withdraw life-sustaining treatment, then the following procedure will occur:

1. The physician, with the help of the health care facility, will assist you in trying to find a physician and facility willing to withdraw or withhold the life-sustaining treatment.

2. You are being given a list of health care providers, licensed physicians, health care facilities, and referral groups that have volunteered their readiness to consider accepting transfer, or to assist in locating a provider willing to accept transfer, maintained by the Department of State Health

Services. You may wish to contact providers, facilities, or referral groups on the list or others of your choice to get help in arranging a transfer.

*"Life-sustaining treatment" means treatment that, based on reasonable medical judgment, sustains the life of a patient and without which the patient will die. The term includes both life-sustaining medications and artificial life support, such as mechanical breathing machines, kidney dialysis treatment, and artificially administered nutrition and hydration. The term does not include the administration of pain management medication or the performance of a medical procedure considered to be necessary to provide comfort care, or any other medical care provided to alleviate a patient's pain.

(c) An attending physician or health care facility may, if it chooses, include any additional information concerning the physician's or facility's policy, perspective, experience, or review procedure.

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