Exhibit A

CAUSE NO. 2015-69681

DAVID CHRISTOPHER DUNN	§	IN THE DISTRICT COURT
	§	OF
	§	
V.	§	HARRIS COUNTY, TEXAS
	§	
THE METHODIST HOSPITAL	§	189TH JUDICIAL DISTRICT

AFFIDAVIT OF ADITYA UPPALAPATI, M.D.

THE STATE OF TEXAS	§
	§
COUNTY OF HARRIS	§

Before me, the undersigned authority, on this day personally appeared Aditya Uppalapati, M.D. who after first being duly sworn upon his oath, deposed and states as follows:

"My name is Aditya Uppalapati, M.D. I am over eighteen years of age and fully competent and authorized to make this affidavit. This affidavit is made of my own personal knowledge and the statements made herein are true and correct.

1. I am a medical doctor licensed to practice medicine in the state of Texas. I practice critical care medicine in the medical intensive care ("MICU") unit at Houston Methodist Hospital ("Methodist"). I am board certified in internal medicine and critical care medicine. In my medical specialty I am commonly referred to as an intensivist.

2. The MICU is unit at Methodist that cares for critically ill adult patients with complex and multi-system medical illnesses such as cardiopulmonary arrest, respiratory distress, sepsis, renal failure, gastrointestinal bleeding and multi-system organ failure. As a board certified intensivist I have the education, training and experience to provide on-going and continuous care to these types of adult critically ill patients. David Christopher Dunn ("Mr. Dunn") is

one such critically ill patient.

3. On October 12, 2015, I admitted Mr. Dunn to Methodist. I, along with the other members of the intensivist team, provide 24 hours care to patients in the MICU, including Mr. Dunn. I have provided on-going and continuous medical care and treatment to Mr. Dunn since his admission to Houston Methodist Hospital on October 12, 2015. In my capacity as Mr. Dunn's treating intensivist, I have made treatment decisions affecting his care. I am familiar with the progression of his chronic condition, his current condition, and prognosis.

4. Based on my education, training, experience as well as my care of Mr. Dunn, I, and members of my team, have advised his family members that Mr. Dunn suffers from end-stage liver disease, the presence of a pancreatic mass suspected to be malignant with metastasis to the liver and complications of gastric outlet obstruction secondary to his pancreatic mass. Further, he suffers from hepatic encephalopathy, acute renal failure, sepsis, acute respiratory failure, multi-organ failure, and gastrointestinal bleed. I have advised members of Mr. Dunn's family that it is my clinical opinion that Mr. Dunn's present condition is irreversible and progressively terminal.

5. On October 12, 2015, Mr. Dunn arrived unresponsive to Methodist. Since that time he has been on ventilator support as a life-sustaining treatment. This means that Mr. Dunn cannot verbally communicate. In addition to being unable to verbally communicate the severity of Mr. Dunn's critical illnesses as well as the use of narcotic pain medication have made him unable to participate in his care. On occasion he has been able to follow simple commands. However, the majority of the time he is completely unresponsive.

6. Since October 12, 2015, Mr. Dunn has been unable to participate in his health care decisions such as providing a review of systems or medical history due to his altered mental status, intubation and sedation.

7. Based on the foregoing, in my opinion, Mr. Dunn has a low probability that his mental status will return to his baseline. He is not oriented to person, time, place or situation. He cannot communicate. He cannot attend to any activities of daily living. He does not have the mental capacity to consent to any medical treatment. He does not have the mental capacity to consent to or make any business, managerial, financial, legal or other decisions. This

incapacity began October 12, 2015 and in reasonably medical probability will continue until his death.

FURTHER AFFIANT SAYETH NOT."

ADITYA UPPALAPATI, M.D.

Sworn to and subscribed before me by ADITYA UPPALAPATI, M.D. on December 02, 2015.

Notary Public In and For
The State of Texas

NAJMAH W. GRANT
Notary Public, State of Texas
My Commission Expires
October 17, 2016

Exhibit B

CAUSE NO. 2015-69681

EVELYN KELLY, INDIVIDUALLY, AND ON BEHALF OF THE ESTATE OF DAVID CHRISTOPHER DUNN	§	IN THE DISTRICT COURT OF
V.	§	HARRIS COUNTY, TEXAS
THE METHODIST HOSPITAL	§	189TH JUDICIAL DISTRICT

AFFIDAVIT OF J. RICHARD CHENEY

THE STATE OF TEXAS §
§
COUNTY OF HARRIS §

Before me, the undersigned authority, on this day personally appeared J. Richard Cheney, who after first being duly sworn upon his oath, deposed and states as follows:

1. "My name is J. Richard Cheney. I am over eighteen years of age and fully competent and authorized to make this affidavit. This affidavit is made of my own personal knowledge and the statements made herein are true and correct.

2. At the time of the care that was provided to David Christopher Dunn ("Chris"), I was the Project Director of Spiritual Care at Houston Methodist Hospital. Furthermore, I served as the Meeting Chair for the Houston Methodist Bioethics Committee (the "Committee"), which was consulted by Chris's treating physicians to review the ethical issues involved in his care at Houston Methodist Hospital. I am familiar with this matter, including the meetings and communications between Chris's health care providers and Chris's family, and the events that lead to the determination that the continuation of life-sustaining treatment was medically inappropriate. I was personally involved in communications between Chris's family and his health care providers. Further, I coordinated the ethical review process by which Chris's family was informed of the Biomedical Ethics consultations, the processes involved and the Committee's ultimate determination that the life-sustaining treatment being provided to Chris was medically inappropriate.

3. At the time of admission to Houston Methodist Hospital, Chris was not married and had no children. Multiple physicians declared him lacking the requisite mental capacity to understand his terminal medical condition, its predicted progression and

his capacity to make informed decisions about his care. Therefore, pursuant to Texas statute, his divorced parents, Evelyn Kelly and David Dunn, became Chris's legal surrogate decision makers regarding Chris's medical care. Houston Methodist Hospital looked to both parents for direction on issues relating to Chris's care and treatment.

4. On Wednesday, October 28, 2015, Chris's treatment team consulted the Biomedical Ethics Team regarding increased discordance between his divorced parents on whether to continue aggressive supportive care measures or de-escalate treatment to comfort care only. A Clinical Ethicist from the Biomedical Ethics Committee consulted with Chris's treatment team and his family. During the meeting, it was noted that the patient had recently left another facility against medical advice, refused to undergo a liver biopsy and refused treatment following the diagnosis of a pancreatic mass. The patient's father, David Dunn, expressed that his son "did not want to go to the hospital for treatment, because he believed he would die there." Accordingly, Mr. Dunn requested that the treatment team provide comfort care measures only to his son in accordance with what he thought Chris would want. The patient's mother, Evelyn Kelly, was unable to support any decision about transitioning the patient to comfort measures, opining that Chris would have wanted aggressive support, despite his prior conduct in leaving the prior hospital against medical advice, refusing liver biopsy and refusing treatment. At the conclusion of the meeting, Ms. Kelly requested additional time to discuss the matter with her family.

5. On Monday, November 2, 2015, members of the Biomedical Ethics Committee, along with several of Chris's treating physicians, multiple members of Chris's family, including his mother and siblings, again met to discuss Chris's terminal condition, prognosis and recommendations regarding his continued care and treatment. After hearing about the patient's terminal condition, prognosis and recommended transition to comfort care from Chris's treating physician, Ms. Kelly requested additional time to discuss the matter with her family. Chris's father, David Kelly, did not attend the meeting, but continued to request that Chris's care be transitioned to comfort care only out of respect for Chris's wishes.

6. On Friday, November 6, 2015, I was present at a meeting with Ms. Kelly, Aditya Uppalapati, M.D. (ICU intensivist and critical care specialist caring for Chris), Andrea Downey (a member of Houston Methodist's palliative care department), and Justine Moore (a hospital social worker assigned to the case). The meeting was convened at Chris's bedside to discuss Chris's terminal condition and the physicians' recommendation that the patient be switched to comfort care and the ventilator be

removed. Ms. Kelly continued to be unable to make the decision, and informed the group that she'd discuss the matter with her family on Monday. During the meeting, I personally described Houston Methodist Hospital Policy and Procedure PC/PS011 titled, "Medically Inappropriate Decisions About Life-Sustaining Treatment" in the event a consensus couldn't be reached. During this meeting, I answered Ms. Kelly's questions regarding the issues involved, including the process going forward, including the fact that another meeting of the Committee would be held where she would have the chance to address the Committee personally. I further assured her of the hospital's commitment to help her identify an alternative care facility should she continue to pursue aggressive treatment options. I told her that I would provide her with notice of the date and time for the formal Committee review, and that she would have the opportunity to participate in the meeting. I informed Ms. Kelly that hospital personnel would assist the physicians with efforts to transfer Chris should she change her mind and allow the hospital to seek transfer to another facility. Further, I assured Ms. Kelly that life-sustaining treatment would continue to be administered to Chris throughout this review process.

7. On Monday, November 9, 2015, I was present for a meeting with Evelyn Kelly, David Dunn, Daniela Moran, MD (ICU intensivist), Andrea Downey (palliative care), and Justine Moore (social work), and numerous members of the patient's family. During this meeting, the medical team again suggested to the family that due to Chris's terminal condition, it was recommended that Chris be shifted to comfort care and the ventilator removed. David Dunn asked that the meeting be adjourned so the family could discuss Chris's treatment and the treating physicians' recommendations. At this point, I explained that the Committee review process would go forward, and life-sustaining treatment will continue to be administered while the family seeks out opportunities to transfer Chris to another facility.

8. Later that evening, I was informed that the two divorced parents still could not reach a joint decision on Chris's care. Ms. Kelly requested that full aggressive treatment continue, while Mr. Dunn requested that Chris be transitioned to comfort care only and removal of the ventilator.

9. On Tuesday, November 10, 2015, I hand delivered letters addressed to Evelyn Kelly and David Dunn providing notification of the Committee review, which was scheduled to take place on November 13, 2015. These letters invited his family to attend to participate in the process and included the statements required by Tex. Health & Safety Code §166.052 and §166.053.

10. On Friday, November 13, 2015, the Committee review meeting took place. Evelyn Kelly was present, participated in discussions and addressed the Committee. Shortly after the Committee meeting, I hand delivered letters addressed to Evelyn Kelly and David Dunn providing a written explanation of the decision reached by the Committee during the review process. The letter described the Committee's determination that life-sustaining treatment was medically inappropriate for Chris and that all treatments other than those needed to keep him comfortable would be removed in eleven days from that date. I included the statements required by Tex. Health & Safety Code §166.052 and §166.053, and provided Ms. Kelly a copy of Chris's medical records for the past 30 days.

11. While the Committee did inform Chris's parents that all treatments other than those needed to keep him comfortable would be removed in eleven days, at no time did the Committee inform Chris's parents that Chris would be provided with a medication that would hasten his death.

12. The physicians, social workers, and case managers continued efforts to assist Ms. Kelly with her request to transfer Chris. These efforts continued though December 23, 2015. Life-sustaining treatment was constantly administered to Chris until his natural death on December 23, 2015.

FURTHER AFFIANT SAYETH NOT."

J. Richard Cheney

J. RICHARD CHENEY

Sworn to and subscribed before me by J. Richard Cheney on August 17, 2016.

Teresa Robinson

Notary Public In and For
The State of Texas

TERESA ROBINSON
Notary Public, State of Texas
Comm. Expires 12-20-2019
Notary ID 11589444

Exhibit C

CAUSE NO. 2015-69681

DAVID CHRISTOPHER DUNN	§	IN THE DISTRICT COURT OF
	§	
	§	
V.	§	HARRIS COUNTY, TEXAS
	§	
THE METHODIST HOSPITAL	§	189TH JUDICIAL DISTRICT

AFFIDAVIT OF JUSTINE MOORE, LMSW

THE STATE OF TEXAS	§
	§
COUNTY OF HARRIS	§

Before me, the undersigned authority, on this day personally appeared Justine Moore, LMSW, who after first being duly sworn upon her oath, deposed and states as follows:

"My name is Justine Moore, LMSW. I am over eighteen years of age and fully competent and authorized to make this affidavit. This affidavit is made of my own personal knowledge and the statements made herein are true and correct.

1. I am a Social Worker licensed to practice in the State of Texas since 2013. I have been employed as a Social Worker at Houston Methodist Hospital since June 24, 2013.

2. I served as one of the social workers for David Christopher Dunn ("Dunn") in the Medical Intensive Care Unit (MICU) at Houston Methodist Hospital from October 12, 2015 until his death on December 23, 2015. I am familiar with the progression of his condition throughout his hospitalization.

3. In my role as a social worker for Dunn, I have personal knowledge of the efforts Houston Methodist Hospital made to identify a potential facility willing to accept a transfer of Dunn. As a Social Worker at Houston Methodist Hospital, I am often involved in efforts to coordinate the transfer of patients like Dunn. I was personally involved in Houston Methodist Hospital's efforts to locate a transfer facility for him.

4. When contacting potential transfer facilities, we provide the facility with the patient's demographic information, and recent clinical information to be reviewed by the facility's transfer center.

5. With respect to our efforts to locate a potential transfer facility for Dunn, I contacted the following facilities for potential transfer of Dunn, all of which declined the requested transfer:

    1) Graham Oaks Care Center;
    2) Meridian Healthcare;
    3) Southern Specialty;
    4) Casa Rio Healthcare and Rehabilitation;
    5) Liberty Healthcare Center;
    6) Valley Grande Manor;
    7) Gilmer Care Center;
    8) Willowbrook Nursing and Rehabilitation;
    9) Christus Dubuis – Port Arthur;
    10) Creekside Terrace;
    11) Colonial Belle;
    12) River City Care Center;
    13) Casa Juan Diego;
    14) Crestview Manor Nursing and Rehabilitation;
    15) Christus St. Michael in Texarkana;
    16) West Houston Rehabilitation and Healthcare;
    17) Village of Richmond;
    18) Trinity Nursing and Rehabilitation;
    19) Season's Hospice;
    20) Christus Dubuis Hospital of Beaumont;
    21) Huntsville Health Care Center;
    22) Christus Dubuis Hospital of Houston;
    23) Christus Dubuis – Corpus Christi;
    24) The Village at Richardson;
    25) Park Manor of McKinney;
    26) Conroe Healthcare Center;
    27) Advanced Healthcare of Garland;
    28) Spanish Meadows;
    29) Clear Brook Crossing;
    30) Grace Care Center;
    31) Cornerstone – Clear Lake; and
    32) Paramount Senior Care.

6. Rosalyn Reed, RN, BSN, ACM, Case Manager contacted the following additional facilities, all of which declined transfer:

1) Houston Northwest Hospital;
2) North Cypress Medical Center;
3) Ben Taub General Hospital;
4) LBJ Hospital;
5) Memorial Hermann Hospital and 9 affiliated facilities;
6) Cornerstone Long Term Acute Care;
7) St. Joseph's Hospital;
8) Bayshore Hospital;
9) MD Anderson;
10) Kindred Long Term Acute Care;
11) CHI Baylor St. Luke's Medical Center;
12) East Houston Medical Center;
13) Cypress Fairbanks Medical Center;
14) Methodist Healthcare System Medical Center;
15) Northeast Methodist Hospital Medical Center;
16) Metropolitan Methodist Hospital Medical Center;
17) Methodist Texan Hospital Medical Center;
18) Methodist Stone Oak Hospital Medical Center;
19) Methodist Specialty and Transplant Hospital Medical Center;
20) Baptist Hospital System, San Antonio;
21) Baptist Hospital Medical Center;
22) Plaza Specialty Hospital;
23) North Central Baptist Medical Center;
24) Northeast Baptist Hospital;
25) Clear Lake Regional Hospital;
26) Conroe Regional Hospital;
27) Kingwood Medical Center;
28) Mainland Medical Center;
29) Pearland Medical Center;
30) Texas Health Resources to include all 24 affiliated facilities in the Dallas area;
31) Baylor Scott and White Health System to include all 14 affiliated facilities;
32) Select Specialty Hospital;
33) St Luke's Baptist Hospital; and
34) Mission Trail Baptist Hospital.

7. I continued to call, recall and call again facilities throughout Dunn's hospitalization in an attempt to locate a facility willing to accept his transfer. Despite the exhaustive measures described above, I was unable to locate a single facility that was willing to accept transfer.

8. I contacted Seasons Hospice, who was willing to clinically accept Dunn, and provide health care in Evelyn Kelly's home. Mrs. Kelly declined to accept this care in her home.

9. It is my understanding that in situations where an unmarried adult patient like Dunn is unable to assist his healthcare providers in making treatment decisions, then in absence of an advanced directive, healthcare providers are to look towards the patient's parents for treatment decisions. In Dunn's case, however, his parents were wholly unable to agree on a desired course of treatment. As a result, healthcare providers at Houston Methodist Hospital, including myself, were caught in the middle of a firestorm between Dunn's mother, his father and outside forces influencing them. Having no other place to turn for treatment decisions, it was determined that guardianship proceedings be filed to give Dunn's healthcare providers one clear voice in which to look for treatment decisions.

10. It has been alleged that I attempted to gain personal guardianship of Christopher Dunn through guardianship proceedings. I never sought personal guardianship of Dunn. I merely sought the Court's appointment of a person that could legally direct the care of Dunn during his hospitalization.

FURTHER AFFIANT SAYETH NOT."

JUSTINE MOORE, LMSW

Sworn to and subscribed before me by JUSTINE MOORE, LMSW on June 10, 2016.

KIMBERLY JOY LUCHT
Notary Public, State of Texas
Comm. Expires 04-23-2020
Notary ID 10411770

Notary Public In and For
The State of Texas

Exhibit D

DUNN, DAVID, CHRISTOPHER
0392136085284
AGE: 46 Y SEX: M DOB: 05/27/1969
DOCTOR: ADITYA UPPALAPATI

Pathology
Consultation
Report
CASE: AMP-15-203

10/12/2015

DATE OF ADMISSION:
12/23/2015
DATE OF DEATH:
DATE OF AUTOPSY: 12/23/2015

FINAL ANATOMIC DIAGNOSIS

PRIMARY:
GENERAL

Anasarca

Jaundice

Coagulopathy

Abdominal and chest adhesions, multiple

HEPATOBILIARY SYSTEM
Pancreas Moderately to poorly differentiated mucinous adenocarcinoma (7 x 6 x 5 cm)
Head of pancreas with involvement of common bile duct and duodenum
Secondary bile duct obstruction and severe duodenal lumen stenosis

Liver (1340 g) Multiple metastases ranging from 0.3 to 2.5 cm
Chronic passive congestion of liver parenchyma, diffuse
Marked cholestasis
Micro- and macrosteatosis (30%)
Common hepatic duct, dilated
Gallbladder Markedly distended, filled with approximately 75 ml of green bile
Peritoneal cavity Hemorrhagic and icteric ascites, 20 liters

CARDIOVASCULAR SYSTEM
Heart (330g) Concentric hypertrophy, mild
Coronaries Left main coronary Artery: 50% stenosis with calcification, no occlusion identified
RCA: 20-30% stenosis, calcified, no occlusion identified
LCA and circumflex: no calcifications, no occlusion identified
Aorta Aorta, atherosclerosis, distal

RESPIRATORY SYSTEM

DUNN, DAVID, CHRISTOPHER
039213608

6565 Fannin Street, MS205
Houston, TX, 77030

AUTOPS

NAME : DUNN, DAVID CHRISTOPHER ACCT NBR: 0392136085284

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DUNN, DAVID, CHRISTOPHER

0392136085284
AGE: 46 Y SEX: M DOB: 05/27/1969
DOCTOR: ADITYA UPPALAPATI

Pathology
Consultation
Report
CASE: AMP-15-203
Lungs (right 500 g; left 390 g) Microscopic metastatic adenocarcinoma in lung parenchyma
Acute pneumonia, right lower lobe
Edematous and congested parenchyma
Bilateral minimal pleural effusions, serosanguineous fluid
Pleural adhesions to chest wall
No pulmonary emboli identified

GASTROINTESTINAL TRACT
Stomach, distended, erythematous mucosa and hiatal hernia
Small bowel, bloody fecal contents
Large bowel, bloody fecal contents, extensive

RETICULOENDOTHELIAL SYSTEM
Spleen (300 g) Splenomegaly, mild, due to passive congestion
Lymph nodes Metastatic pancreatic adenocarcinoma to periaortic and mesenteric lymph nodes
Lymphadenopathy, diffuse

GENITOURINARY SYSTEM
Kidneys (right, 160 g; left 180 g) Cortical cysts (largest 0.5 cm), right
Cortical scars, bilateral
Acute pyelonephritis, right

MUSCULOSKELETAL SYSTEM
Diaphragm Hematoma, right
COMMENT:
History: 46 year old man with pancreatic mass and obstructive jaundice, hepatic encephalopathy, peritonitis, acute renal failure, acute respiratory failure and sepsis. The patient had worsening hemodynamic condition on the days before death, severe metabolic and lactic acidosis, and coagulopathy.

The main autopsy findings include a 7 x 6 x 5 cm pancreatic mass with involvement of the common bile duct and duodenum, with metastasis to the liver and lymph nodes and micrometastasis to the lungs. There was significant ascites clinically, which correlates with the obstructive pancreatic lesion.

DUNN, DAVID, CHRISTOPHER
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There was also sepsis and acute renal and respiratory failure clinically, which correlates with the autopsy findings of pyelonephritis and acute pneumonia in the lung.

NAME : DUNN, DAVID CHRISTOPHER ACCT NBR: 0392136085284

DUNN, DAVID, CHRISTOPHER

0392136085284
AGE: 46 Y SEX: M DOB: 05/27/1969
DOCTOR: ADITYA UPPALAPATI

Pathology
Consultation
Report
CASE: AMP-15-203
APZEZ / APMDG
APA2A 01/25/2016 01:26 PM
PATHOLOGIST: Alberto Ayala, M.D.
I have reviewed this material and confirm the report. 01/25/2016 13:26
Released by electronic signature on:
EXTERNAL EXAMINATION

The body is identified by wrist band, right toe tag, and two external ID tags as David Christopher Dunn.

The body is that of a slim, well-developed caucasian male appearing the stated age of 48 years. The body measures 180 cm in length. There is no rigor mortis present in the upper extremities. Decompositional changes are not present.

The abdomen is markedly distended and diffusely icteric. The chest, back, abdomen, and upper extremities have multiple petechiae. There are stretch marks on the abdomen and two scars on the lateral chest, each about approximately 3 cm. There is anasarca, diffusely. There is a 0.7 cm crusted scar on the left lateral abdomen.

IV lines are seen in the right upper extremity and in the right wrist. There is a Band-Aid placed on the dorsal left wrist and a Band-Aid on the right thumb and right index fingers. There are three sutured wounds, approximately 1-2 cm long, on the lateral left abdomen. There is a bandage covering a 0.2 cm puncture wound on the mid-abdomen.

INTERNAL EXAMINATION

The autopsy is limited to the chest and abdomen with the consent signed by Evelyn Kelly (mother; next of kin).
The body is opened using a standard U-shaped thoraco-abdominal incision. There is subcutaneous tissue edema. The peritoneal cavity contains approximately 20 liters of sero-sanguinous ascitic fluid. There are multiple adhesions between the rib cage and lungs. The abdominal organs are covered by a yellowish film of fibrinous tissue. Clots are present in the peritoneal cavity. The pleural cavity contains a minimal amount of fluid (approximately 10cc each). The pericardium is intact. The pericardial sac contains a minimal amount of clear fluid. There is a right subclavian catheter extending to the vena cava. The diaphragm is intact.

DUNN, DAVID, CHRISTOPHER
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DUNN, DAVID, CHRISTOPHER

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0392136085284
AGE: 46 Y SEX: M DOB: 05/27/1969
DOCTOR: ADITYA UPPALAPATI

Pathology
Consultation
Report
CASE: AMP-15-203
CARDIOVASCULAR SYSTEM

Heart : The heart weighs 330g and is of the usual shape, normally positioned and without congenital malformations. The pericardium is tan, smooth and glistening. The epicardium is smooth and glistening with marked adipose tissue. Serial sections are made across the ventricles and the heart is opened according to the flow of blood. The atrial and ventricular chambers are of normal size. The endocardium is tan-white, smooth and thin. The right ventricular wall is 0.3 cm thick, the left ventricular wall is 1.7 cm thick, and the interventricular septum is 2 cm. The myocardium is homogenous red-brown. Mural thrombi are not present. The valve leaflets and cusps are white, delicate and membranous. Valve circumferences are: Tricuspid 9.5 cm, Pulmonic 7.5 cm, Mitral 10 cm and Aortic 7.5 cm.

Vessels : The coronary arteries have a normal anatomic distribution. The coronary ostia are normally located and without stenosis. There is moderate atherosclerosis with 20-30% stenosis of the RCA and 50% stenosis of the left main coronary artery. The aorta contains atherosclerotic changes with complicated plaques in the distal abdominal aorta extending to the iliac arteries. There is not dissection or aneurysmal dilatation.

RESPIRATORY SYSTEM

Lung : The right and left lungs weighs 500g and 390g, respectively. The bronchial tree is patent without hemorrhage, mucous plugging, fluid or foreign material. The pulmonary tree does not contain thromboemboli. The hilar nodes are enlarged; with anthracosis. The pulmonary parenchyma is red-brown with marked edema and hemorrhage.

GASTROINTESTINAL TRACT

Esophagus : The esophageal mucosa is gray-tan, smooth and glistening without lesions.

Stomach and duodenum: The stomach is distended and is lined by an erythematous mucosa. A hiatal hernia is grossly identified. The mesentery and duodenum are involved by a mass originating from the pancreas.

Small Bowel : The small bowel has a 2 cm soft nodule and bloody fecal contents.

Large Bowel: The serosal surface and the mucosa are tan, smooth and glistening. There are bloody fecal contents throughout the entire length of the large bowel.

Appendix : The appendix is present.

DUNN, DAVID, CHRISTOPHER
039213608

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DUNN, DAVID, CHRISTOPHER

0392136085284
AGE: 46 Y SEX: M DOB: 05/27/1969
DOCTOR: ADITYA UPPALAPATI

Pathology
Consultation
Report
CASE: AMP-15-203
HEPATOBILIARY SYSTEM

Liver : The liver weighs 1340 g. There are multiple nodules ranging from 0.3 cm to 2.5 cm in diameter. The parenchyma is congested.

Biliary tract : The common hepatic duct is dilated. The gallbladder is markedly distended and filled with approximately 75 cc of green bile.

RETICULOENDOTHELIAL SYSTEM

Spleen : The spleen weighs 300 g. The capsule is gray-blue, translucent and smooth with a 4 x 3.5 cm surface scar. The parenchyma is soft and red-purple and unremarkable.

Lymph nodes : The lymph nodes of the mediastinum, mesentery and retroperitoneum are enlarged.

GENITOURINARY SYSTEM

Kidneys : The right and left kidneys weigh 160 g and 180 g respectively. The capsules strip with ease to reveal dark red smooth cortical surfaces. There are multiple cysts on the cortical surface of the right kidney, the largest measures 0.5 cm. The cut surfaces of the kidneys show well demarcated cortico-medullary junctions and the cortices are unremarkable, except for the cysts and bilateral cortical scars. The renal calyces and pelves are not dilated and the mucosa is tan-white and glistening, without lesions.

Ureters : The unobstructed ureters have a tan, smooth and glistening mucosa without lesions. The distal ureters are probe patent into the bladder.

ENDOCRINE SYSTEM

Pancreas : There is a 7 x 6 x 5 cm mass in the head of the pancreas. The mass grossly involves the duodenum, and mesentery. The pancreatic duct and common bile duct are obstructed secondary to the pancreatic mass. There is marked duodenal lumen stenosis secondary to the pancreatic mass. The ampulla is patent.

Adrenals : The right and left adrenal glands have a normal configuration and position.

MUSCULOSKELETAL SYSTEM

NAME : DUNN, DAVID CHRISTOPHER ACCT NBR: 0392136085284

There is a right diaphragmatic hematoma.

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AGE: 46 Y SEX: M DOB: 05/27/1969
DOCTOR: ADITYA UPPALAPATI

Pathology
Consultation
Report
CASE: AMP-15-203
MISCELLANEOUS

During the autopsy, photographs were obtained. Peritoneal swabs, lung tissue and peritoneal fluid samples were submitted for cultures.

CULTURE RESULTS (post mortem)
Left lung tissue Candida tropicalis

Ascites fluid Occasional Pseudomonas aeruginosa and occasional stenotrophomonas maltophilia

Abdominal cavity Lactobacillus paracasei

SECTIONS SUBMITTED

A1: Spleen
A2: Right adrenal and right kidney
A3: Left adrenal and left kidney
A4: Periaortic lymph nodes
A5: Right upper lobe, lung
A6: Right middle lobe, lung
A7: Right lower lobe, lung
A8: Left superior lobe, lung
A9: Left inferior lobe, lung
A10: Left main coronary artery, anterior left ventricle
A11: Circumflex artery, posterior left ventricle
A12: Left anterior descending artery, lateral left ventricle
A13: Right coronary artery, anterior right ventricle
A14: Hilar lymph nodes, posterior right ventricle
A15: Subcarinal lymph nodes, lateral right ventricle
A16: Mesenteric lymph nodes
A17: Small bowel, intraventricular septum
A18: Gallbladder, large bowel
A19: Liver mass
A20: Liver mass
A21: Uninvolved liver
A22: Pancreatic tumor
A23: Pancreatic tumor

DUNN, DAVID, CHRISTOPHER
039213608

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AUTOPS
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AGE: 46 Y SEX: M DOB: 05/27/1969
DOCTOR: ADITYA UPPALAPATI

Pathology
Consultation
Report
CASE: AMP-15-203
A24: Pancreatic tumor
A25: Pancreatic tumor
A26: Small bowel diverticulum

MICROSCOPIC EXAMINATION

CARDIOVASCULAR SYSTEM

Coronaries (slide # A10-A13): The left main coronary artery shows approximately 50% stenosis by atherosclerotic plaque with calcification. The right main coronary artery shows approximately 30% stenosis.

Heart (slide # A10-A15, A17): There is mild diffuse myocardiocyte hypertrophy.

RESPIRATORY SYSTEM

Lung (slide # A5-A9): There is congestion and edema of the lung parenchyma. There is evidence of aspiration. There is acute pneumonia in the right lower lobe. A microscopic focus of metastatic disease is present.

GASTROINTESTINAL TRACT

Small bowel (slide # A17, A26): There is marked autolysis limiting histologic examination. There is involvement of the pancreatic adenocarcinoma to the duodenum. The serosa shows fibrosis and marked fibrin deposits.

Large bowel (slide # A18): There is marked autolysis limiting histologic examination.

HEPATOBILIARY SYSTEM

Liver (slide # A19-A21): There is multifocal metastatic disease by pancreatic adenocarcinoma with marked autolysis. The uninvolved liver parenchyma shows autolytic changes. In the most preserved areas there is bridging fibrosis highlighted with trichrome stain (Stage 3-4), micro- and macrovesicular steatosis (30%), profound cholestasis (mixed type) and centrilobular necrosis. No alpha-1-antitrypsin globules are seen on PAS with diastase stain. Iron stain shows focal 2+ storage iron in hepatocytes

Gallbladder (slide # A18): There is marked autolysis limiting histologic examination.

NAME : DUNN, DAVID CHRISTOPHER ACCT NBR: 0392136085284

RETICULOENDOTHELIAL SYSTEM

DUNN, DAVID, CHRISTOPHER
039213608

6565 Fannin Street, MS205
Houston, TX, 77030

AUTOPS
Y

DUNN, DAVID, CHRISTOPHER

0392136085284
AGE: 46 Y SEX: M DOB: 05/27/1969
DOCTOR: ADITYA UPPALAPATI

Pathology
Consultation
Report
CASE: AMP-15-203
Spleen (slide # A1): Except for passive congestion there is no pathologic alteration.

Lymph nodes (slide # A4, A14, A15, A16): There is metastatic pancreatic adenocarcinoma to the periaortic and mesenteric lymph nodes. Examined hilar and subcarinal lymph nodes negative for carcinoma.

GENITOURINARY SYSTEM

Kidneys (slide # A2, A3): There are pigmented casts and calcifications within the kidney tubules in the left and right kidneys. The right kidney has an infiltration by acute inflammatory cells consistent with acute pyelonephritis

ENDOCRINE SYSTEM

Pancreas (slide # A22-A25): Sections of pancreas show presence of a moderately to poorly differentiated mucinous adenocarcinoma. Extensive perineural, neural and lympho-vascular invasion is identified.

Adrenals (slide # A2, A3): No pathologic alteration.

CENTRAL NERVOUS SYSTEM

Not examined. Autopsy limited to thorax and abdomen.

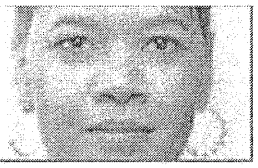
DUNN, DAVID, CHRISTOPHER
039213608

6565 Fannin Street, MS205
Houston, TX, 77030

AUTOPS
Y

This report was verified electronically.

Exhibit E



NEWS

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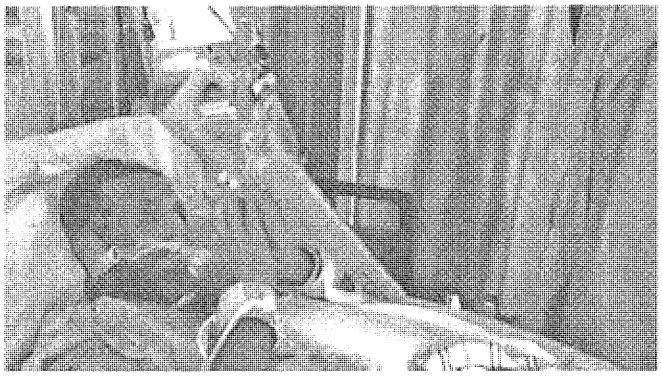

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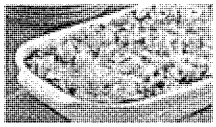

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Wednesday, December 23, 2015

HOUSTON (KTRK) -- The attorney for Chris Dunn says the 46-year-old man has died after his fight over life-sustaining treatment with Methodist Hospital.

The hospital told Dunn's family this week that it would soon stop his life-sustaining treatment. The family refused to accept the decision.

According to Texas Right to Life, Methodist continued life-sustaining care for Chris and he died this morning around 6:30am of natural causes. His attorneys feel they still have grounds to challenge the state law that allows hospitals to discontinue life sustaining treatment at their discretion.

Dunn's mother, Evelyn Kelly, shared this statement: "Chris's family and I are grateful for all of the prayers, kind notes of encouragement, and support we have received from around the world. We would like to express our deepest gratitude to the nurses who have cared for Chris and for Methodist Hospital for continuing life-sustaining treatment of Chris until his natural death. Chris's health battle has now ended, but I intend to continue the fight against this horrible law. No family should have to fight for the Right to Life of their loved one."

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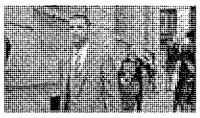

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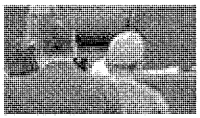

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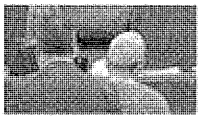
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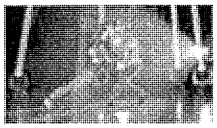
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CAUSE NO. 2015-69681

EVELYN KELLY, INDIVIDUALLY, AND ON BEHALF OF THE ESTATE OF DAVID CHRISTOPHER DUNN,	§	IN THE DISTRICT COURT OF
PLAINTIFF,	§	
V.	§	HARRIS COUNTY, TEXAS
THE METHODIST HOSPITAL,	§	
DEFENDANT.	§	189TH JUDICIAL DISTRICT

PLAINTIFFS' FIRST AMENDED PETITION

TO THE HONORABLE COURT:

Evelyn Kelly, Individually and on behalf of the Estate of David Christopher Dunn ("the Estate") ("Plaintiffs") file this First Amended Petition as follows:

I.
Discovery-Control Plan

1. Plaintiffs request that a "Level 3" discovery plan be adopted and affirmatively pleads that it seeks injunctive relief. Rule 190.4, Texas Rules of Civil Procedure.

II.
Background Facts and Relief Requested

2. Evelyn Kelly is the mother of David Christopher Dunn. David Christopher Dunn ("Dunn") was a Texas resident who was receiving life sustaining treatment[1] at The Methodist Hospital to treat an unidentified mass on his pancreas which caused damage to other organs. Dunn faced immediate irreparable harm of death if the life sustaining treatment discontinued.

[1] "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 artificial 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. Tex. Health & Safety Code § 166.052.

On November 10, 2015 The Methodist Hospital informed Ms. Evelyn Kelly and Dunn that it sought to discontinue Dunn's treatment, and that a committee meeting would be held on November 13, 2015 to make such a decision. At the committee meeting, Dunn had neither legal counsel nor the ability to provide rebuttal evidence pursuant to Texas Health and Safety Code §166.046, The Methodist Hospital found that it would discontinue life sustaining treatment on or about Monday, November 23, 2015. Plaintiffs assert the Texas Constitution and the U.S. Constitution guaranteed Dunn a representative to advocate for his life and opportunity to be heard when life sustaining treatment is being removed. Dunn sought and obtained a temporary restraining order preserving the status quo of his treatment. Thereafter, an order of abatement, to which the parties were agreed as to form, was entered, and required The Methodist Hospital to provide life sustaining treatment to Dunn until the time of his natural death on December 23, 2015.

3. Plaintiffs continue to seek a declaration that Texas Health and Safety Code Section 166.046 violated David Christopher Dunn's due process rights under the Texas Constitution and the U.S. Constitution. This case is brought to protect the constitutional right of Dunn, a man who faced certain death at the hands of Defendant acting under color of state law.

4. Section 166.046 of the Texas Health & Safety Code allows doctors and hospitals the absolute authority and unfettered discretion to terminate life-sustaining treatment of any patient, despite the existence of an advanced directive, valid medical power of attorney, medical decision determined by a surrogate as outlined in Texas Health & Safety Code § 166.039, or expressed patient decision to the contrary. The defendant hospital, given its lack of full statutory compliance, prematurely applied the procedures outlined in Section 166.046 to withdraw life sustaining treatment from Dunn. This implementation of Section 166.046 resulted in the

Defendant hospital scheduling: (1) Dunn's life sustaining treatment be discontinued on Monday, November 24, 2015, and (2) administration, via injection, of a combination of drugs which would end Dunn's life almost immediately.

5. Section 166.046 violates Dunn's right to due process of law guaranteed him by the Fourteenth Amended of the United States Constitution and Article I, Section 19, of the Texas Constitution.

III.
Parties

6. Plaintiff, Evelyn Kelly, Individually and on behalf of the Estate of David Christopher Dunn, is an individual who resides in Harris County, Texas.

7. Defendant, The Methodist Hospital, formerly known as Houston Methodist Hospital, is a domestic nonprofit corporation with its principle place of business in Harris County, Texas. Defendant has been served with process.

IV.
Jurisdiction and Venue

8. This Court has jurisdiction over this cause under § 24.007 of the Texas Government Code and Article 5, Section 8 of the Texas Constitution. Venue is proper in this County under Texas Civil Practices & Remedies Code § 15.002(a)(2) and Texas Civil Practices & Remedies Code § 15.005. The amount in controversy is within the jurisdictional limits of the court.

V.
Conditions Precedent

9. All conditions precedent to Plaintiffs' claim for relief have been performed or have occurred.

VI.
Causes of Action

10. As a direct result of the actions of the Defendant described above, Plaintiff individually and on behalf of the Estate has sustained injury, and brings the following claim for permanent relief:

1. Declaratory judgment regarding violation of due process.

11. Plaintiff, Individually and on behalf of the Estate petition this Court for a declaratory judgment pursuant to Chapter 37 of the Texas Civil Practice & Remedies Code declaring that, pursuant to Amendment 14 to the United States Constitution and Article I, Section 19, of the Texas Constitution, Defendant's actions in furtherance of coming to its decision to discontinue life sustaining treatment under the Texas Health & Safety Code infringed the due process right of Plaintiffs.

12. Texas Health & Safety Code § 166.046 indicates that if an attending physician refuses to honor a patient's treatment decision, such as continuing life sustaining treatment, the physician's refusal shall be reviewed by an "ethics committee". Tex. Health & Safety Code § 166.046(a).

13. There are no specific restrictions under the act regarding the qualifications of the persons serving on the committee, though the attending physician may not be a member of that committee. *Id.* The statute does not provide adequate safeguards to protect against the conflict of interest inherently present when the treating physician's decision is reviewed by the hospital "ethics committee" to whom the physician has direct financial ties.

a. Texas Health & Safety Code § 166.046 violates procedural due process

14. Texas Health & Safety Code § 166.046 violates Plaintiffs' right to procedural due process by failing to provide an adequate venue for Plaintiffs and those similarly situated to be

heard in this critical life-ending decision. The law also fails to impose adequate evidentiary safeguards against hospitals and doctors by allowing them to make the decision to terminate life-sustaining treatment in their own unfettered discretion. Finally, the law does not provide a reasonable time or process for a patient to be transferred.

15. Due process at a minimum requires notice and an opportunity to be heard at a meaningful time and in a meaningful manner. *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976); *Mullane v. Central Hanover Trust Co.*, 339 U.S. 306 (1950). Procedural due process involves the preservation of both the appearance and reality of fairness so that "no person will be deprived of his interests in the absence of a proceeding in which he may present his case with assurance that the arbiter is not predisposed against him." *Marshall v. Jerrico, Inc.*, 446 U.S. 238 91980). Under traditional notions of Due Process, the fourteenth amendment was "intended to secure the individual from the arbitrary exercise of the powers of government" which resulted in "grievous losses" for the individual. *Kentucky Dept. of Corrections v. Thompson*, 490 U.S. 454 (1989).

16. Procedural due process expresses the fundamental idea that people, as opposed to things, at least are entitled to be consulted about what is done to them. *See* Laurence H. Tribe, American Constitutional Law § 10-7, at 666 (2d ed. 1988). Modern procedural due-process analysis begins with determining whether the government's deprivation of a person interest warrants procedural due-process protection. This interest may be either a so-called "core" interest, i.e., a life, liberty, or vested property interest, or an interest that stems from independent sources, such as state law. *See Board of Regents v. Roth*, 408 U.S. 564 (1972); *Perry v. Sindermann*, 408 U.S. 593 (1972). Procedural due-process analysis next determines what process is due, with courts looking almost exclusively to the Constitution for guidance. *Cleveland Bd. of Education v. Lourdermill*, 470 U.S. 532 (1985). What process is due is

measured by a flexible standard that depends on the practical requirements of the circumstances. *Mathews*, 424 U.S. at 334. This flexible standard includes three factors: (1) the private interest that will be affected by the official action; (2) the risk of an erroneous deprivation of such interest through the procedures used, and probable value, if any, of additional or substitute procedural safeguards; and (3) the government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail. *Mathews*, 424 U.S. at 335.

17. In this case, Plaintiffs did not receive due process. Section 166.046 contemplates that those for whom life sustaining treatment is being provided may not be able to read letters, receive notice, attend the ethics committee meeting, etc. Therefore, the Statute specifically applies to not only the individual receiving treatment, but the person "responsible for the healthcare decisions of the individual." Dunn lived with his mother at the time of the occurrence, as he had for years, had no spouse or children. Therefore, Kelly assisted Dunn throughout the process. But, Kelly received both little and inadequate notice that the relevant committee of The Methodist Hospital would be hearing, on Friday, November 13, 2015, a recommendation to discontinue Dunn's life sustaining treatment. *See* Tex. Health & Safety Code 166.046(b) (the statute applies to not only the individual receiving treatment, but the person "responsible for healthcare decisions of the individual"). She did not have the right to speak at the meeting, present evidence, or otherwise seek adequate review. *See* Tex. Health & Safety Code 166.046(b). Thus, as a person to whom the statute applied, the statute only permits Kelly to sit and watch as an ethics committee determines it is appropriate to remove the life sustaining treatment of her son; as such, Kelly's right to due process was violated. *See, e.g., Planned Parenthood of Cent. Mo.*, 428 U.S. 52, 62 (1976) (physicians found to have standing

when seeking declaratory relief challenging the constitutionality of the Missouri abortion statute which placed an additional burden on a woman's right to abortion).

18. Under Tex. Health & Safety Code § 166.046, a fair and impartial tribunal did not and could not hear Dunn's case. "Ethics committee" members from the treating hospital cannot be fair and impartial, when the propriety of giving Dunn's expensive life-sustaining treatment must be weighed against a potential economic loss to the very entity which provides those members of the "ethics committee" with privileges and a source of income. Members of a fair and impartial tribunal should not only avoid a conflict of interest, they should avoid even the appearance of a conflict of interest, especially when a patient's life is at stake. That does not occur, when a hospital "ethics committee" hears a case under Texas Health & Safety Code § 166.046 for a patient within its own walls. The objectivity and impartiality essential to due process are nonexistent in such a hearing.

19. Finally, Texas Health & Safety Code § 166.046 is so lacking in specificity that no meaningful due process can be fashioned from it and, as a result, it is unconstitutional. For example, it does not contain or suggest any ascertainable standard for determining the propriety of continuing Dunn's life-sustaining treatment or the propriety of the attending physician's refusal to honor Dunn's health care decisions. Thus the statute is vague, ambiguous, and overbroad and should be declared unconstitutional.

b. Texas Health & Safety Code § 166.046 violates substantive due process.

20. It is unquestioned that a competent individual has a substantive privacy right to make his or her own medical decisions. "Before the turn of the century, this Court observed that 'no right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or

interference of others, unless by clear and unquestionable authority of law.'" *Cruzan v. Director, Missouri Dep't of Health*, 497 U.S. 261, 269 (U.S. 1990) (quoting *Union Pacific R. Co. v. Botsford*, 141 U.S. 250, 251 (1891)). "It cannot be disputed that the Due Process Clause protects an interest in life[.]" *Cruzan*, 497 U.S. at 281. This notion of bodily integrity has been embodied in the requirement that informed consent is generally required for medical treatment. In *Cruzan*, the Court noted that the Constitution requires that the State not allow anyone "but the patient" to make decisions regarding the cessation of life-sustaining treatment. *Id.* at 286. The Court went on to note that the state could properly require a "clear and convincing evidence" standard to prove the patient's wishes.

21. In this case, there is no evidentiary standard imposed by Section 166.046. The doctor and ethics committee are given complete autonomy in rendering a decision that further medical treatment is "inappropriate" for a person with an irreversible or terminal condition. This is an alarming delegation of power by the state law. When the final decision is rendered behind closed doors, and the Plaintiffs are not allowed to challenge the evidence or present his own testimony or medical evidence, this does not reassemble a hearing with due process protecting the first liberty mentioned in Article I, Section 19 of the Texas Constitution or the Fourteenth Amendment.

2. Defendant violated Plaintiffs' Civil Rights.

22. Section 1983 of Chapter 42 of the United States Code guarantees that every person who "under color of any statute...subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any right ... secured by the Constitution...shall be liable to the party in an action[.]" *See* 42 U.S.C. § 1983. Based on the foregoing facts and allegations, a Section 1983 matter clearly lies in this case.

23. Private actors are subject to regulation under the United States Bill of Rights, including the First, Fifth, and Fourteenth Amendments, which prohibit the federal and state governments from violating certain rights and freedoms when taking state action. Because the Defendants utilize Texas Health & Safety Code § 166.046 to protect their decision to remove life sustaining treatment, they are taking state action and are subject to Constitutional regulation. *See Rendell-Baker v. Kohn*, 457 U.S. 830 (1982).

24. The Supreme Court has set forth a two-pronged inquiry for determining when a private party will be held to be a state actor. First, the Court considers whether the claimed constitutional deprivation has resulted from the exercise of a right or privilege having its source in state authority. *Georgia v. McCollum*, 505 U.S. 42, 53 (1992) (quoting *Lugar v. Edmonson Oil Co.*, 457 U.S. 922, 939 (1982)). Second, the Court considers several factors relevant to determining whether the private party charged with the deprivation is a person who can, in fairness, be said to be a state actor. *Lugar*, 457 U.S. at 937.

25. Private conduct pursuant to statutory or judicial authority is sufficient to establish the first prong. Thus, the Court has held this prong satisfied by a creditor who sought the assistance of state authorities in attaching a debtor's property in a statutorily created pre-judgment attachment procedure, *Lugar*, 457 U.S. at 941-42, and by the racially discriminatory use of peremptory challenges to potential jurors in civil and criminal trials. *See Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 615 (1991); *Georgia v. McCollum*, 505 U.S. 42, 51-52 (1992). In each case the Court emphasized that the private party was using a state-created statutory procedure, and was reaping a privilege through the use of the statutorily prescribed procedure. Similarly, doctors and ethics committees empowered by the state to cloak their denial

of life sustaining medical treatment with absolute immunity by acting pursuant to the procedures of section 166.046 are exercising a right or privilege having its source in state authority.

26. The hospital committee's action also satisfies the second prong of the Supreme Court's state-actor test. The Court has laid out three factors that must be considered in answering the question of whether the person charged with a deprivation may be fairly considered to be a state act: (1) the extent to which the actor relies on governmental assistance and benefits, (2) whether the actor is performing a traditional governmental function and (3) whether the injury caused is aggravated in a unique way by the incidents of governmental authority. *See Lugar*, 457 U.S. at 942. Each of these factors weighs in support of the conclusion that the hospital committee should be held to be a state actor. The committees rely extensively on the state benefit of absolute immunity in determining whether a patient will receive life sustain medical treatment; the committee exercises the traditionally exclusive state function of a court when it issues final determinations of legal rights and duties with respect to life sustaining medical treatment, which cannot be reviewed under any circumstance; and the patient's injury is aggravated by incidents of state authority because the state allows the ethics review committee to bind the hands of state authorities with respect to societal protections that would otherwise be available to the patient.

27. Though The Methodist Hospital's decision permitted Plaintiffs to seek healthcare treatment for Dunn elsewhere, Dunn was unable to find treatment elsewhere, due in part to the stigma which attaches to a patient who a hospital has determined is no longer recommended for life sustaining treatment. Other hospitals sought after for transfer by Dunn's mother either failed to respond, or refused to receive him likely on the basis that The Methodist Hospital had deemed him a futile case unworthy of continued life sustaining treatment. As of November 13, 2015 (the

date of the "ethics committee meeting") neither Dunn's attending physician, Dr. Sanchez, nor Dunn's case worker, Roslyn Reed, had spoken with any potential receiving physician to review and determine whether or nor any other physicians would accept the transfer of Dunn as required by Texas Health & Safety Code § 166.046(d). Moreover, Dunn and Kelly never received definitive responses from the five local major healthcare facilities equipped and capable of treating Dunn and honoring his medical decision regarding basic life-sustaining treatment.

28. Further, transfer to another facility was likely to result in repeated application of Section 166.046 of the Texas Health and Safety Code, while evading the opportunity for adequate review. Plaintiffs further submit that the death of David Christopher Dunn should not absolve or otherwise excuse the violation of his constitutional rights. A finding otherwise would simply permit hospitals to 'wait out' lawsuits involving the terminally ill.

3. Defendant intentionally inflicted emotional distress on Plaintiff Kelly, Individually.

29. On November 10, 2015 The Methodist Hospital informed Ms. Kelly that it would hold a committee meeting on November 13, 2015 to determine whether the life-sustaining treatment of her son, who was alert and communicating, should be removed. Without the life-sustaining treatment, her son's death was imminent and certain. Directly after the committee meeting, on November 13, 2015, Ms. Kelly was informed by The Methodist Hospital that the committee had decided that The Methodist Hospital would withdraw her son's life-sustaining treatment, resulting in certain death, unless Ms. Kelly found a hospital willing to accept transfer of her son. Ms. Kelly suffered severe emotional distress, which was the expected risk of informing her that the hospital had decided to remove Mr. Dunn's treatment against Mr. Dunn's wishes. Ms. Dunn seeks a ruling by the court that use of Texas Health & Safety Code Section 166.046 is unconstitutional for reasons stated *supra*, and therefore the severe emotional distress

stemming from its intentional or reckless unlawful application is actionable. Ms. Dunn has other children, and fears that without a declaration of unconstitutionality, this situation may repeat itself, while evading review.

VII.
Attorney Fees and Costs

30. Plaintiffs are entitled to its reasonable attorney fees and costs incurred in pursuit of this action under the common law, and Texas Civil Practice and Remedies Code § 37.009.

VIII.
Conclusion and Prayer

31. In conclusion, Plaintiffs seek a declaration that application of Section 166.046 of the Texas Health and Safety Code violated the constitutional rights and liberties of David Christopher Dunn, and Plaintiffs seek such other and further relief, both general and special, at law or in equity, to which Plaintiffs may show itself to be justly entitled.

Respectfully submitted,

BEIRNE, MAYNARD & PARSONS, L.L.P.

/s/ James E. Trainor, III

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Attorneys for Plaintiff

CERTIFICATE OF SERVICE

On February 2, 2016 the foregoing document was served on counsel for The Methodist Hospital in accordance with Texas Rules of Civil Procedure via the Court's E-file and Serve system via email to:

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/s/ Joseph M. Nixon
Joseph M. Nixon

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CAUSE NO. 2015-69681

EVELYN KELLY, INDIVIDUALLY, AND ON BEHALF OF THE ESTATE OF DAVID CHRISTOPHER DUNN	§	IN THE DISTRICT COURT OF
V.	§	HARRIS COUNTY, TEXAS
THE METHODIST HOSPITAL	§	189TH JUDICIAL DISTRICT

DEFENDANT, HOUSTON METHODIST HOSPITAL 'S
TRADITIONAL AND NO-EVIDENCE MOTION FOR SUMMARY JUDGMENT

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW Houston Methodist Hospital f/k/a The Methodist Hospital ("Houston Methodist"), and files this its Traditional and No-Evidence Motion for Summary Judgment and respectfully shows the Court the following:

I.
SUMMARY OF THE ARGUMENT

Plaintiffs claim that §166.046 unconstitutionally deprives patients like Christopher Dunn of life and the right to make independent medical decisions. **Houston Methodist Hospital continues to take no formal position on the constitutionality of the statute itself, but is prepared to defend its conduct, and the conduct of its healthcare providers that provided professional, ethical and compassionate care and treatment to Christopher Dunn. Simply put, Houston Methodist did not violate Plaintiffs constitutional rights and rejects Plaintiffs' allegations in full.**

Houston Methodist Hospital is not the proper party to defend the constitutionality of a state statute. As demonstrated within the Brief of the Amici Curiae filed in this matter by proponents of the statute, the legislation in question offends no constitutional provision and,

importantly, implements public policy that the Legislature enacted after years of compromise and debate.[1] Challenges to that policy belong in the Capitol, not this Court.

Plaintiffs' due-process claim fails for two reasons. First, the Due Process Clause is properly invoked only where a constitutionally protected interest is at stake. Here, none is. Nothing in the Constitution or related caselaw compels physicians to provide any particular course of treatment when it violates their own beliefs. Neither does §166.046 deprive any patient of life. As the Supreme Court of the United States has acknowledged, when life-sustaining interventions are discontinued, death is caused by the underlying disease - not the withdrawal of treatment. Because there is no constitutional right to a particular form of medical treatment - including life-sustaining intervention - its withdrawal cannot violate the Constitution.

Second, because the Constitution protects an individual from a governmental deprivation, a plaintiff cannot prevail on a due process claim without first showing state action. Medical treatment decisions are quintessentially private. Section 166.046 has not altered that reality. Section 166.046 does not impose a duty on - let alone control the actions of - private actors, such as the healthcare providers involved in Chris Dunn's care and treatment. Rather, it provides immunity if a physician voluntarily complies. The private employment of a state-sanctioned remedy is not state action. In fact, both the Supreme Court and the Fifth Circuit have held that a legislative grant of immunity is not state action. Thus even if Plaintiff could show a constitutionally protected interest at stake in this case -

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[1] *See* Brief of Amici Curiae Texas Alliance for Life, Texas Catholic Conference of Bishops, Texas Baptist Chrisitian Life Commission, Texans for Life Coalition, Coalition of Texans with Disabilities, Texas Alliance for Patient Access, Texas Medical Association, Texas Osteopathic Medical Association, Texas Hospital Association, and LeadingAge Texas, filed with this Court on July 31, 2017. Houston Methodist Hospital incorporates the arguments expressed within the amici curiae brief verbatim as specifically delineated within this Motion for Summary Judgment.

which she cannot - the claim would fall on the state action prong.

Additionally, after an adequate time for discovery, Plaintiffs cannot offer any evidence to support her intentional infliction of emotional distress claim.

Accordingly, Houston Methodist is entitled to a judgment as a matter of law, as well as outright dismissal for reasons stated within its concurrently filed Motion to Dismiss.

II.
STANDARD OF REVIEW

The purpose of summary judgment is to eliminate patently unmeritorious claims or untenable defenses.[2] Houston Methodist Hospital urges this summary judgment, to eliminate Plaintiff's unmeritorious claims, pursuant to traditional and no evidence standards set forth in Texas Rules of Civil Procedure 166a(c) and 166a(i).[3]

A. Traditional Motion for Summary Judgment

Traditional summary judgment is proper when the movant has demonstrated that there is no genuine issue of material fact and that the movant is entitled to judgment as a matter of law.[4] A defendant may prevail in summary judgment by disproving as a matter of law at least one element of each of the plaintiff's causes of action.[5] Once a movant has established a right to summary judgment, the burden shifts to the non-movant.[6] The non-movant must then respond to the motion for summary judgment and present to the trial

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[2] *Gulbenkian v. Penn*, 151 Tex. 412, 416 (1952).

[3] TEX. R. CIV. P. 166a(c), 166a(i). A party may file a single summary judgment motion under both the no-evidence and traditional summary judgment standards. *Binur v. Jacobo*, 135 S.W.3d 646, 651 (Tex. 2004).

[4] *Nixon v. Mr. Prop. Mgmt. Co., Inc.*, 690 S.W.2d 546, 548 (Tex. 1985).

[5] *Int'l Union United Auto. Aerospace & Agr. Implement Workers of Am. Local 119 v. Johnson Controls, Inc.*, 813 S.W.2d 558, 563 (Tex. App.—Dallas 1991, writ denied).

[6] *HBO, A Div. of Time Warner Ent. Co., L.P. v. Harrison*, 983 S.W.2d 31, 35 (Tex. App.—Houston [14th Dist.] 1998, no pet.).

court any issues that would preclude summary judgment.[7] Methodist is entitled to summary judgment in this case because it has conclusively disproved at least one, if not all, element(s) of Plaintiffs' claims.

B. No Evidence Summary Judgment

A no-evidence motion for summary judgment is proper when, after adequate time for discovery, "the nonmovant fails to bring forth more than a scintilla of probative evidence to raise a genuine issue of material fact as to an essential element of the non-movant's claim on which the non-movant would have been the burden of proof at trial.[8] "If the evidence supporting a finding rises to a level that would enable reasonable, fair-minded persons to differ in their conclusions, then more than a scintilla of evidence exists."[9] On the other hand, "[l]ess than a scintilla of evidence exists when the evidence is so weak as to do no more than create a mere surmise or suspicion of a fact, and the legal effect is that there is no evidence."[10] This matter has been on file since November 2015. However, Plaintiff has no evidence to support any element of her intentional infliction of emotional distress claim against Houston Methodist.

III.
ARGUMENTS & AUTHORITIES

A. Traditional Motion for Summary Judgment on Plaintiffs' Constitutional Claims.

1. Section 166.046 gives medical professionals a safe harbor, but it does not mandate a specific course of action.

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[7] *Id.*

[8] *Jackson v. Fiesta Mart, Inc.*, 979 S.W.2d 68, 70–71 (Tex. App.—Austin 1998, no pet.).

[9] *Id.* at 71.

[10] *Id.* (internal quotation admitted).

Physicians have long been free to choose who they will treat and what treatments they will provide. "The physician-patient relationship is 'wholly voluntary.'"[11] Even once a physician-patient relationship has begun, either party may terminate it at will.[12]

While a physician cannot countermand a patient's wish, she can *abstain* from providing a particular treatment when her medical judgment, her conscience, or her ethics, demands it. The Code of Medical Ethics protects physicians' right "to act (*or refrain from acting*) in accordance with the dictates of conscience in their professional practice," allowing them "considerable latitude to practice in accord with well-considered, deeply held beliefs."[13] The key limitation is that the physician has an ethical duty not to terminate the relationship without "[n]otify[ing] the patient (or authorized decision maker) long enough in advance to permit the patient to secure another physician."[14] The physician must also "[f]acilitate transfer of care when appropriate."[15]

The Legislature passed the Texas Advance Directives Act ("TADA"),[16] to create a legal framework governing how physicians should handle and comply with advance directives, out-of-hospital do-not-resuscitate orders, and medical powers-of-attorney in the context of life-sustaining intervention.[17] The Act requires a physician or health-care facility that "is unwilling to honor a patient's advance directive or a treatment decision to provide life-

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[11] *Gross v. Burt*, 149 S.W.3d 213, 224 (Tex. App.—Fort Worth 2004, pet. denied) (quoting Fought v. Solce, 821 S.W.2d 218, 220 (Tex. App.—Houston [1st Dist.] 1991, writ denied)).

[12] AM. MED. ASS'N COUNCIL ON ETHICAL AND JUDICIAL AFFAIRS, CODE OF MED. ETHICS §1.1.5 (2016).

[13] *Id.* §1.1.7 (emphasis added).

[14] *Id.* §1.1.5.

[15] *Id.*; *accord King v. Fisher*, 918 S.W.2d 108, 112 (Tex. App.—Fort Worth 1996, writ denied) (describing elements of a common law abandonment claim); *see also Tate v. D.C.F. Facility*, Civil Action No. A407CV162-MPM-JAD, 2009 WL 483116, at *1 (N.D. Miss. Jan. 23, 2009) ("Doctors and hospitals of course have the right to refuse treatment . . . .").

[16] TEX. HEALTH & SAFETY CODE §§166.001–.166,

[17] See TADA §§166.002(1), (10) (defining "advance directive" and "life-sustaining treatment").

sustaining treatment" to nevertheless provide that treatment, but "only until a reasonable opportunity has been afforded for transfer of the patient to another physician or heath care facility."[18] This is wholly consistent with physicians' ethical rights and duties.

Generally, TADA requires a physician to follow an advance directive or treatment decision made by or on behalf of a patient. However, it acknowledges that a patient's wishes may conflict with a physician's conscience or understanding of medical necessity. It thus provides a procedure by which physicians can seek to harmonize their ethical duties with patients' wishes.[19] This is the procedure that is the subject of Plaintiff's constitutional challenge, but it applies regardless of whether the doctor wishes to withhold or provide life-sustaining intervention over the patient's wishes.[20] The procedure calls for a medical review committee to consider the case while a decision is made, with the patient's directive honored in the interim.[21]

The §166.046 procedure gives the patient or his representative a right to notice of and to attend the committee's meeting, but it leaves the decision regarding whether to disregard the advance directive to the committee.[22] If the committee makes the difficult decision to countermand the patient's or family's wish, the physician or hospital must "make a reasonable effort to transfer the patient to a physician who is willing to comply with the directive."[23] And if the committee's decision is to withdraw life-sustaining intervention, the hospital must

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[18] Id.

[19] Id. §166.046.

[20] Id. §166.052.

[21] Id. §166.046(a).

[22] Id. §166.046(b).

[23] Id. §166.046(d).

continue the intervention for at least 10 days while efforts are made to transfer the patient.[24]

TADA generally provides physicians who withdraw life-sustaining intervention in accordance with its provisions immunity from civil and criminal liability, as well as professional discipline, "unless the physician or health care facility fails to exercise reasonable care when applying the patient's advanced directive."[25] Section 166.046 goes further, providing an absolute safe-harbor to physicians who comply with it when abstaining from compliance with a patient's wishes.[26]

But §166.046 does not create a mandatory procedure, even for physicians wishing to abstain:

> 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.[27]

A physician who elects not to comply with the §166.046 procedure will lose the benefit of the safe-harbor provision. But he would still have the benefit of TADA's immunity to the extent that he withdrew life-sustaining intervention without "fail[ing] to exercise reasonable care when applying the patient's advance directive."[28]

2. Houston Methodist Did Not Violate Dunn's Civil Or Due Process Rights

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[24] Id. §166.046(e).

[25] Id. §§166.044(a), (c).

[26] Id. §166.045(d).

[27] Id. §166.045(c) (emphasis added).

[28] Id. §166.044(a).

The traditional procedural due-process inquiry has two parts: (1) whether the plaintiff had a protected liberty or property interest; and (2) what process is due.[29,30] The substantive due-process inquiry looks at whether the state has arbitrarily deprived the plaintiff of a constitutionally protected interest.[31] But because neither the Texas nor U.S. Constitution protects against purely private harms, Plaintiff must also demonstrate that the deprivation occurred due to state action.[32] Plaintiffs can show neither a constitutionally protected interest nor state action. Accordingly, her constitutional claims must fail.

i. Plaintiff fails to identify a protected interest.

To state a due-process claim, a plaintiff must identify an interest the constitution protects. Plaintiff identifies two purported interests: life, and the right to make individual medical decisions. In fact, neither of those interests are implicated in the case at hand.

Plaintiff's arguments are premised on their mistaken understanding of TADA, and they imply that a patient has a *constitutional right* to receive treatment from a physician that the physician does not wish to give. The constitution "generally confer[s] no affirmative right to governmental aid, even where such aid may be necessary to secure life, liberty, or property interests of which the government itself may not deprive the individual."[33]

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[29] *See Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 428 (1982); *Univ. of Tex. Med. School at Hous. v. Than*, 901 S.W.2d 926, 929 (Tex. 1995).

[30] The federal Due Process Clause, U.S. CONST. amend. XIV, §1, and Texas's Due Course of Law Clause, TEX. CONST. art. I, §19, are functionally similar, and the Texas Supreme Court routinely relies on federal precedent in interpreting the state clause. *Univ. of Tex. Med. School at Hous. v. Than*, 901 S.W.2d 926, 929 (Tex. 1995). This is especially true of "state action issues," with respect to which the Court has explained that "[f]ederal court decisions provide a wealth of guidance." *Republican Party of Tex. v. Dietz*, 940 S.W.2d 86, 91 (Tex. 1997).

[31] *See Patel v. Tex. Dep't of Licensing & Regulation*, 469 S.W.3d 69, 86–87 (Tex. 2015); *Simi Inv. Co. v. Harris Cty., Tex.*, 236 F.3d 240, 249 (5th Cir. 2000).

[32] *Shelley v. Kraemer*, 334 U.S. 1, 13 (1948) (holding that the Constitution "erects no shield against merely private conduct, however discriminatory or wrongful"); *Republican Party of Tex. v. Dietz*, 940 S.W.2d 86, 90–91 (Tex. 1997) (applying same doctrine to the Texas Constitution).

[33] *DeShaney v. Winnebago Cty. Dep't of Soc. Servs.*, 489 U.S. 189, 196 (1989).

Plaintiff has not confronted these fundamental precepts. Take, for example, her claim that TADA deprives patients of "life." In fact, it is the patient's illness that causes death; it is merely forestalled by life-sustaining intervention.[34] In *DeShaney*'s language, the life-sustaining treatment is "aid" that "secure[s]" the patient's life.[35] But patients have no constitutional right to this aid.[36] A physician is not *constitutionally obligated* to provide *any* treatment, including life-sustaining treatment.

A contrary holding would have severe consequences. Any illness or medical condition, if the responsibility of state actors, may cause constitutional injuries. If Plaintiff were right that the Constitution requires doctors to undertake treatment that *prevents or forestalls* illness, then patients would have a constitutional right to have *any and all* ailments treated. Yet the United States Supreme Court has expressly rejected this position.[37] Indeed, even in the unique prison context, courts have roundly rejected the notion that a patient has a right to receive "any particular type of treatment."[38]

The same analysis dooms Plaintiff's stated interest in the individual right to make medical decisions. That right is not diminished by TADA. Rather, TADA protects individuals' right to make their own medical decisions, confirming the longstanding rule that before terminating a patient-physician relationship, the physician must give the patient reasonable notice so that he can find someone who will comply with his wishes. But under

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[34] *Vacco v. Quill*, 521 U.S. 793, 801 (1997) ("[W]hen a patient refuses life-sustaining medical treatment, he dies from an underlying fatal disease or pathology . . . .").

[35] 489 U.S. at 196.

[36] *Id.*

[37] *Id.* at 198–99; *accord Abigail Alliance for Better Access to Developmental Drugs v. von Eschenbach*, 495 F.3d 695, 710 n.18 (D.C. Cir. 2007) (en banc) ("No circuit court has acceded to an affirmative access [to medical care] claim.");[37] *Johnson v. Thompson*, 971 F.2d 1487, 1495–96 (10th Cir. 1992) (rejecting argument that right to life includes right to receive medical care).

[38] *Long v. Nix*, 86 F.3d 761, 765 (8th Cir. 1996); *accord Jenkins v. Colo. Mental Health Inst. at Pueblo*, 215 F.3d 1337, at *1–2 (10th Cir. 2000) (unpublished).

DeShaney, an individual's right to make a decision does not compel a physician to implement it against the physician's own will. The patient's right is to make his choice, but this right does not overpower the physician's conscience.[39,40]

Plaintiff's claims of constitutional injury are predicated on the notion that a patient has a constitutional right not only to receive medical care, but to receive medical care of a specific type. But there is no constitutional right to medical care, let alone specific types of care, even if the care would save a person's life. Because physicians have no constitutional obligation to provide treatment they wish not to provide, Plaintiff's claims cannot succeed.

ii. Plaintiff's arguments are based on a misconception about §166.046.

Plaintiff argues that §166.046 "violated David Christopher Dunn's [substantive and procedural] due process rights under the Texas Constitution and the U.S. Constitution," and she seeks a declaration to this effect.[41] She complains that §166.046 "allows doctors and hospitals the absolute authority and unfettered discretion to terminate life-sustaining treatment of any patient," regardless of the patient's or his decision-maker's wishes.[42] In fact, however, TADA delegates no such authority. It explicitly did not alter "any legal right or

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[39] *See Harris v. McRae*, 448 U.S. 297, 318 (1980) ("Whether freedom of choice that is constitutionally protected warrants federal subsidization is a question for Congress to answer, not a matter of constitutional entitlement.").

[40] *Harris* illustrates the danger in Plaintiff's conception of constitutional rights. If a constitutional life interest conferred an affirmative right to medical care, so would the constitutional abortion right confer an affirmative right to have the state provide abortions. Yet *Harris* rejected precisely such an argument, explaining:

> It cannot be that because the government may not prohibit the use of contraceptives or prevent parents from sending their child to a private school, government, therefore, has an affirmative constitutional obligation to ensure that all persons have the financial resources to obtain contraceptives or send their children to private schools.

Harris v. McRae, 448 U.S. 297, 318 (1980) (citations omitted).

[41] Plaintiff's First Am. Pet. ¶3.

[42] *Id.* ¶4.

responsibility a person may have to effect the withholding or withdrawal of life-sustaining treatment in a lawful manner."[43] It did not grant physicians any new powers, and did not even require them to follow any procedure. It created a safe harbor for - that is, granted immunity to - physicians who withhold or withdraw life- sustaining intervention in a specific manner.

iii. A private physician's treatment decision does not constitute state action.

Proof of a constitutional claim requires state action. Houston Methodist cannot be considered a state actor. The Supreme Court has found state action in only a few unique circumstances, none of which are present here:

- The *public function test* asks "whether the private entity performs a function which is 'exclusively reserved to the State.'"[44]
- The *state compulsion test* attributes a private actor's conduct to the state when the state "exerts coercive power over the private entity or provides significant encouragement."[45]
- And the *nexus test* asks if "the State has inserted 'itself into a position of interdependence with the private actor, such that it was a joint participant in the enterprise.'"[46]

The Supreme Court has not resolved "[w]hether these different tests are actually different in operation or simply different ways of characterizing the necessarily fact-bound inquiry that confronts the Court in" state-action cases.[47]

a) Section 166.046 does not satisfy the state-compulsion test.

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[43] *See* TADA §166.051 (emphasis added).

[44] *Cornish v. Corr. Servs. Corp.*, 402 F.3d 545, 549 (5th Cir. 2005) (quoting *Flagg Bros., Inc. v. Brooks*, 436 U.S. 149, 158 (1978).

[45] *Id.* at 549–50 (citing *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 170–71 (1970).

[46] *Id.* at 550 (quoting *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 357–58 (1974)) (brackets omitted).

[47] *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 939 (1982).

Supreme Court precedent firmly refutes any notion that a hospital or physician invoking §166.046's safe harbor is a state actor. In the first place, §166.046 provides a discretionary, not mandatory, procedure; it requires no action from any private actor. The Supreme Court has repeatedly held that "[a]ction taken by private entities with *mere approval or acquiescence* of the State is not state action."[48]

Indeed, the "[p]rivate use of state-sanctioned private remedies or procedures does not rise to the level of state action."[49] A physician or hospital making use of §166.046 is doing no more than using a state-provided remedy; the physician or hospital does not receive the type of "overt, significant assistance of state officials" that creates state action.[50]

In the absence of overt assistance from or coercion by the State, even compliance with a *mandatory* procedure does not implicate state action. Consider *Blum v. Yaretsky*, in which "a class of Medicaid patients challeng[ed] decisions by the nursing homes in which they reside to discharge or transfer [them] without notice or an opportunity for a hearing."[51] Federal law *required* nursing homes to establish utilization review committees ("URC") to "periodically assess whether each patient is receiving the appropriate level of care, and thus whether the patient's continued stay in the facility is justified."[52] The *Blum* plaintiffs were found by their respective URCs to not require a higher level of care, and were

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[48] *Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 52 (1999) (emphasis added); *accord Blum v. Yaretsky*, 457 U.S. 991, 1004–05 (1982); *Flagg Bros.*, 436 U.S. at 154–65; *Jackson*, 419 U.S. at 357.

[49] *Tulsa Prof'l Collection Servs., Inc. v. Pope*, 485 U.S. 478, 485–86 (1988); *accord Flagg Bros.*, 436 U.S. at 161–62.

[50] *Pope*, 485 U.S. at 485–86; *cf. id.* at 487 (finding state action in private use of probate procedure, where probate judge was "intimately involved" in the procedure's operation); *Lugar*, 457 U.S. at 941 (holding that private use of prejudgment-attachment procedure constituted state action, where acts by sheriff and court clerk showed "joint participation with state officials in the seizure of the disputed property").

[51] 457 U.S. at 993.

[52] *Id.* at 994–95.

therefore transferred to other institutions in accordance with the statutory procedure.[53] Yet the Supreme Court held that there was no state action: the nursing homes, not the state, initiated the reviews and judged the patients' need for care on their own terms, not terms set by the state. The nursing homes' decisions "ultimately turn[ed] on medical judgments made by private parties according to professional standards that are not established by the State."[54]

Similarly, the decision to abstain from following a patient's wishes—and thus whether to initiate the §166.046 procedure—originates with the physician, who acts according to his own conscience, expertise, and ethics.[55] As in *Blum*, the State does not determine when or for what reasons a physician may invoke the §166.046 procedure. Moreover, unlike in *Blum*, use of §166.046 is permissive, even for physicians wishing to abstain. This case thus fits easily within *Blum*'s no-state-action holding.[56]

Another consideration cutting strongly against state action is that §166.046 does no more than immunize a physician who employs it. A similar issue arose in *Flagg Brothers*, in which the plaintiff sued to stop a warehouse from selling, pursuant to a warehouseman's lien, goods she had abandoned at the warehouse.[57] State law provided the warehouse a

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[53] *Id.* at 995.

[54] *Id.* at 1008; *see also id.* at 1010 ("[The] regulations themselves do not dictate the decision to discharge or transfer in a particular case.").

[55] *Cf. id.* at 1009 (noting that nursing homes' transfer decisions were based on judgments that "the care [the patients] are receiving is medically inappropriate").

[56] Even a private hospital's involvement in an involuntary commitment, pursuant to state law, is not state action. *See, e.g.*, *Estades-Negroni v. CPC Hosp. San Juan Capestrano*, 412 F.3d 1, 5–6 (1st Cir. 2005) (holding that the "scheme does not compel or encourage involuntary commitment," but "merely provides a mechanism through which private parties can, in their discretion, pursue such commitment"); *Bass v. Parkwood Hosp.*, 180 F.3d 234, 242 (5th Cir. 1999); *S.P. v. City of Takoma Park, Md.*, 134 F.3d 260, 269 (4th Cir. 1998); *Harvey v. Harvey*, 949 F.2d 1127, 1130– 31 (11th Cir. 1992); *see also Loce v. Time Warner Entm't Advance/Newhouse P'ship*, 191 F.3d 256, 266–67 (2d Cir. 1999) (holding that Time Warner's congressionally authorized, but non-mandatory, indecency policy was not state action).

[57] *See* 436 U.S. at 153–54.

procedure for making the sale and absolved it from liability if it complied.[58] The Court rejected the argument that the statute, or the state's decision to deny relief, constituted state action:

> If the mere denial of judicial relief is considered sufficient encouragement to make the State responsible for those private acts, all private deprivations of property would be converted into public acts whenever the State, for whatever reason, denies relief sought by the putative property owner.[59]

Likewise, the Legislature's decision to provide safe harbor for a physician's acts does not convert those acts into public acts.

The Fifth Circuit has applied these principles in even more analogous circumstances. In *Goss v. Memorial Hospital System*[60], the court considered a provision of the Texas Medical Practice Act that immunized hospitals' medical peer review committees from civil liability for reporting physician incompetency to the Board of Medical Examiners.[61] The plaintiff argued "that this immunity granted appellees by the State of Texas provided such encouragement to appellees that the peer review committee acted as an investigatory arm of the state."[62] Relying on *Flagg Brothers*, the Fifth Circuit rejected this argument, writing that the conferral of immunity "did not make the action of appellees a state action."[63]

Similarly, in *White v. Scrivner Corp.*, the Fifth Circuit considered whether a grocery store security guard's detention of a shoplifter constituted state action.[64] The plaintiff

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[58] *See id.* at 151 n.1.

[59] *Id.* at 165.

[60] 789 F.2d 353, 356 (5th Cir. 1986)

[61] An amended version of this statute is codified at TEX. OCC. CODE §160.010.

[62] *Id.*

[63] *Id.*

[64] See 594 F.2d 140, 141 (5th Cir. 1979)

relied on a Louisiana statute "insulating merchants from liability for detention of persons reasonably believed to be shoplifters."[65] The court held that *Flagg Brothers* "require[d] rejection of this argument."[66] Noting that the statute allowed, but did "not compel merchants to detain shoplifters," the court held that the immunity statute could not constitute state action.[67]

Because §166.046 is a permissive statute, initiated at a physician's sole option, and because it does no more than withhold a cause of action, there is no coercion or participation rising to the level of state action.

b) Section 166.046 does not satisfy the public-function test.

The Supreme Court holds that state action exists when a private entity performs a function that is "traditionally the *exclusive* prerogative of the State."[68] These are powers "traditionally associated with sovereignty."[69] The public-function test is "exceedingly difficult to satisfy."[70] The Court has "rejected reliance upon the doctrine in cases involving":

> coordination of amateur sports, the operation of a shopping mall, the furnishing of essential utility services, a warehouseman's enforcement of a statutory lien, the education of maladjusted children, the provision of nursing home care, and the administration of workers' compensation benefits.[71]

Plaintiffs argue that section 166.046 gives hospitals the power to decide a patient is no longer worthy of life-sustaining treatment. The statute does not give doctors or hospitals the

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[65] *Id.* at 143.

[66] *Id.*

[67] *Id.*

[68] *Jackson*, 419 U.S. at 353.

[69] *Id.*

[70] MARTIN A. SCHWARTZ, SECTION 1983 LITIG. CLAIMS & DEFENSES §5.14[A].

[71] *Id.* (footnotes omitted).

power to take life; it acknowledges their right not to provide treatment inconsistent with their own conscience. In this respect, Plaintiffs' premise is deeply flawed.

In the case at hand, Plaintiff cannot show a public function. It is true that in one exceptionally narrow circumstance - legally sanctioned executions - the state has an affirmative power to take life. But the power ends there; it has not "traditionally" or "exclusively" extended into the field of medicine. On the contrary, centuries of common law, and the state and federal constitutions, *bar* the State from taking the lives of private citizens. Thus, Plaintiff cannot cite, for example, a case in which a prison hospital has been held to have the power to deny a patient needed care.

Section 166.046 concerns a quintessentially *private* function: medical decision-making.[72] Even when overlaid with state regulations, a hospital's decisions are its own.[73] Decisions about when to enter into and leave doctor-patient relationships are governed by the desires of the doctor and patient. A doctor's decision to terminate that relationship is left to his medical judgment and conscience, provided that he conforms to a non-statutory code of medical ethics. These private, personal decisions are not - and never have been - regarded as public functions.

c) Section 166.046 does not satisfy the nexus test.

Likewise, the Plaintiffs cannot meet their burden to show that the nexus test applies to this case. The nexus test asks if the State has insinuated itself into a position of

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[72] *See Blum*, 457 U.S. at 1011 ("We are also unable to conclude that nursing homes perform a function that has been traditionally the exclusive prerogative of the State." (quotations omitted)).

[73] *See id.* 1011–12 (holding that even if the state were obligated to provide nursing home services, "it would not follow that decisions made in the day-to-day administration of a nursing home are the kind of decisions traditionally and exclusively made by the sovereign").

interdependence with the private actor, such that it was a joint participant of the enterprise.[74] In *Jackson*, the plaintiff sued a privately-owned utility company after the company disconnected her electricity.[75] The plaintiff argued that because the company had failed to provide adequate notice, her due process rights had been violated.[76] The plaintiff claimed that because the utility was state-regulated and was essentially a statewide monopoly, the utility was a state actor.[77] The U.S. Supreme Court disagreed, holding that there was not a "sufficiently close nexus" between the conduct of the utility company and the state in order to conclude that the utility was a state actor.[78]

Here, like the utility company in *Jackson*, Houston Methodist is a privately owned and operated corporation. Plaintiffs have not alleged that the State and Houston Methodist are joint participants of the same enterprise and there is absolutely no rational argument that there is a sufficiently close nexus between the conduct of Houston Methodist and the State. Accordingly, since Houston Methodist Hospital cannot be deemed a state actor, then it is entitled to judgment as a matter of law.

B. No-Evidence Motion for Summary Judgment as to IIED Claim

Plaintiff, Evelyn Kelly, Individually, has claimed that Houston Methodist Hospital intentionally inflicted emotional distress upon her through the hospital's actions in implementing §166.046 with regard to her son, Christopher Dunn's care and treatment. After an adequate time for discovery, Plaintiffs are unable to provide any evidence to

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[74] *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 366, 95 S. Ct. 449, 461, 42 L. Ed. 2d 477 (1974).

[75] *Id.* at 346–47.

[76] *Id.* at 348.

[77] *Id.* at 350–52.

[78] *Id.* at 354–59 (noting "[d]octors, … are all in regulated businesses, providing arguably essential goods and services, 'affected with a public interest.' We do not believe that such a status converts their every action, absent more, into that of the State").

support each of the required elements of Plaintiff's intentional infliction of emotional distress claim. Specifically, Plaintiff failed to present even a scintilla of evidence that: (1) Houston Methodist Hospital acted intentionally or recklessly; (2) its conduct was extreme and outrageous; (3) its actions caused Plaintiff emotional distress; (4) the emotional distress was severe; and (5) no alternative cause of action would provide a remedy for the severe emotional distress caused by Defendant's conduct.[79]

The Texas Supreme Court considers the tort of intentional infliction of emotional distress ("IIED") to be a "gap-filler."[80] Thus, an IIED claim is available only when a person intentionally inflicts severe emotional distress in a manner so unusual that the victim has no other recognized theory of redress; however, such cases are rare.[81]

Accordingly, this Court should grant Methodist's No-Evidence Motion for Summary Judgment as Plaintiff has not and cannot offer any evidence to support her claim for intentional infliction of emotional distress.

IV.
CONCLUSION AND PRAYER

For physicians, patients, and families, no aspect of health care is more fraught than end-of- life decision-making. In many instances, physicians face a difficult choice between their desire to carry out their patients' wishes and their ethical duty, as medical professionals, not to increase or prolong their patients' suffering.

Plaintiff's constitutional challenge misapprehends both the statute and its purpose. As a consequence, Plaintiff has failed to demonstrate two fundamental prerequisites to a

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[79] *Hoffmann–La Roche Inc.,* 144 S.W.3d at 445; *Wal–Mart Stores, Inc. v. Canchola,* 121 S.W.3d 735, 740 (Tex.2003).

[80] *Hoffman-La Roche Inc. v. Zeltwanger*, 144 S.W.3d 438, 447 (Tex.2004).

[81] Id. ("Meritorious claims for intentional infliction of emotional distress are relatively rare precisely because most human conduct, even that which causes injury to others, cannot be fairly characterized as extreme and outrageous.").

successful due process claim: a constitutionally protected interest and state action.

WHEREFORE PREMISES CONSIDERED, Defendant HOUSTON METHODIST HOSPITAL respectfully request that this Court GRANT its Traditional and No-Evidence Motion for Summary Judgment, and for any such other and further relief to which Defendant shows itself justly entitled.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document has been served on all counsel of record pursuant to Rule 21a, Texas Rules of Civil Procedure, on this the 21st day of August, 2017.

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CAUSE NO. 2015-69681

EVELYN KELLY, INDIVIDUALLY, AND ON BEHALF OF THE ESTATE OF DAVID CHRISTOPHER DUNN	§	IN THE DISTRICT COURT OF
V.	§	HARRIS COUNTY, TEXAS
THE METHODIST HOSPITAL	§	189TH JUDICIAL DISTRICT

ORDER ON DEFENDANT HOUSTON METHODIST HOSPITAL 'S TRADITIONAL AND NO-EVIDENCE MOTION FOR SUMMARY JUDGMENT

ON THIS DATE CAME TO BE HEARD Defendant **HOUSTON METHODIST HOSPITAL F/K/A THE METHODIST HOSPITAL's** Traditional and No-Evidence Motion for Summary Judgment. The Court, after considering Defendant's Motion, Plaintiffs' response, if any, and the arguments of counsel, is of the opinion that Defendant's Traditional and No-Evidence Motion for Summary Judgment is meritorious and should in all respects be GRANTED.

It is, therefore, ORDERED, ADJUDGED AND DECREED that Plaintiffs' suit against Defendant **HOUSTON METHODIST HOSPITAL F/K/A THE METHODIST HOSPITAL** is hereby dismissed with prejudice to the re-filing of same.

SIGNED this _____ day of _____, 2017.

_____
JUDGE PRESIDING

TAB H

CAUSE NO. 2015-69681

EVELYN KELLY, INDIVIDUALLY, AND ON BEHALF OF THE ESTATE OF DAVID CHRISTOPHER DUNN,	§	IN THE DISTRICT COURT OF
Plaintiff,	§	HARRIS COUNTY, TEXAS
v.	§	
HOUSTON METHODIST HOSPITAL,	§	
Defendant.	§	189th JUDICIAL DISTRICT

PLAINTIFF'S RESPONSE TO DEFENDANT'S MOTION TO DISMISS FOR MOOTNESS, CHAPTER 74 MOTION TO DISMISS, AND TRADITIONAL MOTION FOR SUMMARY JUDGMENT

TO THE HONORABLE COURT:

Now comes Plaintiff Evelyn Kelly ("Mrs. Kelly"), individually and on behalf of the Estate of David Christopher Dunn ("Mr. Dunn"), and files this final Response to Defendant Houston Methodist Hospital's ("Methodist") Motion to Dismiss for Mootness, Chapter 74 Motion to Dismiss, and its Traditional Motion for Summary Judgment.

SUMMARY OF THE ARGUMENT

The Court must deny Houston Methodist Hospital's Motions to Dismiss, because (i) the matter is not moot, but rather a prime example of the exception—being capable of repetition yet evading review and (ii) this is not a medical malpractice claim. The Court must also deny Methodist's Motion for Summary Judgment, because both elements of Mr. Dunn's §1983 claim are present: (a) the right to life and the right to determine one's own medical treatment are protected interests; and (b) by cloaking itself in the state's immunity and authority by following the statute's legal framework, Methodist made itself a state actor. Additionally, Methodist's motion cannot be granted as to Plaintiff's declaratory judgment claim, because Defendant's

Motion for Summary Judgment only addresses Plaintiff's civil rights action. Methodist expressly states that it takes "no formal position on the constitutionality of the statute."[1]

I. This case cannot be dismissed for Mootness.

This case falls squarely within the mootness exception for its capability of repetition yet evading review.[2] Plaintiff hereby incorporates her arguments as stipulated in Plaintiff's Amended Motion for Summary Judgment against the dismissal of its claims on grounds the matter is moot.

II. This case cannot be dismissed as though it were a Chapter 74 case.

Chapter 74 requires an expert report in a medical malpractice case; a civil rights case under 42 U.S.C. §1983 does not. Methodist incorrectly assumes that because this case deals with the medical care profession, it is mandatorily funneled into Ch. 74 and defined as a health care liability claim pursuant to the TEXAS CIVIL PRACTICE AND REMEDIES CODE. In so doing, Defendant pretends that individuals that happen to be patients in hospitals are no longer entitled to civil rights. This is a clear misunderstanding of the interplay between state and federal law. A constitutionally protected right, such as life, which is protected by way of 42 U.S.C. §1983 is not stripped of its federally-found claim due to a later-enacted Texas statute.

Moreover this case does not involve a question of tort liability as covered by Chapter 74 of the Civil Practice and Remedies Code. It is irrelevant that Methodist is a health care provider and Mr. Dunn was its patient; Mr. Dunn was an individual faced with a state-adopted, state-incentivized, and state-immunized statutory procedure that authorized his pre-mature death via a hospital- formed committee without his input, record, or review.

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[1] Defendant, Houston Methodist Hospital's Traditional and No-Evidence Motion for Summary Judgment, p. 1.

[2] *Spring Branch I.S.D. v. Reynolds*, 764 S.W.2d 16, 18 (Tex.App. – Houston [1st Dist.] 1988, no writ); *see Baby F. v. Oklahoma Cty. Dist. Crt.*, 348 P.3d 1080, 1084 (Okla. 2015)(determining that a case considering the constitutional adequacy of proceedings under a statute that grants DHS the authority to allow DNR status for a child in the state's care, though Baby F had already passed, was both a question of broad public interest and a prime example of a situation that is capable of repetition yet evades review).

A. **This is a civil rights case.**

Plaintiff's claim sounds in constitutional law. Specifically, Plaintiff claims that application of Section 166.046 to David Christopher Dunn (and his mother being a necessary party to that application) resulted in violation of due process rights protected by the Fourteenth Amendment. Plaintiff's claim Section 166.046, which was applied to Plaintiff:

(1) Unconstitutionally fails to provide adequate notice on critical life-ending decision,

(2) Unconstitutionally fails to provide adequate venue for hearing on critical life-ending decision,

(3) Unconstitutionally fails to provide a patient or their representative the opportunity to be heard on critical life-ending decision,

(4) Unconstitutionally fails to provide an advocate for the patient,

(5) Unconstitutionally fails to require elements for a decision, standard of evidence or a written record of proceedings regarding the life-ending decision, and

(6) The statute is unconstitutionally vague, ambiguous, and unconstitutionally overbroad.

These claims are clearly constitutional due process claims governed by the Constitution of the United States, and Section 1983 of Chapter 42 of the United States Code guarantees that every person who "under color of any statute ... subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any right ... secured by the Constitution ... shall be liable to the party in an action[.]" *See* 42 U.S.C. § 1983. This is a civil rights case, not a case arising out of "health care liability" governed by the Texas Civil Practice and Remedies Code. In fact – it cannot be qualified as such due to the Supremacy Clause – which holds that federal law preempts State law in this regard.

Under the Supremacy Clause of the United States Constitution, the laws of the United States are "the supreme Law of the Land; ... any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." *Mills v. Warner Lambert Co.*, 157 S.W.3d 424, 426-27 (Tex. 2005), (quoting U.S. Const. art. VI, cl. 2). "If a state law conflicts with federal law, it is

preempted and has no effect." *Mills*, 157 S.W.3d at 426, (citing *Maryland v. Louisiana,* 451 U.S. 725, 746 (1981); *Am. Cyanamid Co. v. Geye,* 79 S.W.3d 21, 23 (Tex.2002)). "There are three ways that a state law may conflict with federal law and thus be preempted." *Mills*, 157 S.W.3d at 426 (citing *See Great Dane Trailers, Inc. v. Estate of Wells,* 52 S.W.3d 737, 743 (Tex.2001)). First, "[a] federal law may expressly preempt state law." *Id.* (citing *Cipollone v. Liggett Group, Inc.,* 505 U.S. 504, 516, (1992)). Second, "federal law or regulations may impliedly preempt state law or regulations if the statute's scope indicates that Congress intended federal law or regulations to occupy the field exclusively." *Id.* (citing *Freightliner Corp. v. Myrick,* 514 U.S. 280, 287 (1995)). Finally, state law is also impliedly preempted if it "actually conflicts with federal law or regulations," because "(1) it is impossible for a private party to comply with both state and federal requirements; or (2) state law obstructs accomplishing and executing Congress' full purposes and objectives." *Id.* In this case, Plaintiff asserts that the Constitution of the United States fits into the first category of express preemption as it expressly provides that it is the "supreme law of the land". Second, Plaintiff asserts that liability is governed by Section 1983 of the United States Code, not Chapter 74 of the Texas Civil Practice & Remedies Code. And to the extent that there is a conflict, the Supremacy Clause states that the federal law will govern. And as there is no requirement for an expert report to support a Section 1983 claim, Defendant's arguments in support of dismissal at this time based thereon are futile. To hold otherwise would "obstruct accomplishing and executing Congress' full purpose and objectives" when instituting Section 1983 of the United States Code.

B. <u>This is not a claim for personal injury due to departure from medical care standards.</u>

This is not a Health Care Liability Claim pursuant to Texas Civil Practice & Remedies Code Chapter 74 and therefore no expert report is required. Defendant itself admits as much on Page 8 of its' motion, stating "Plaintiffs' ***constitutional claims for violation of due process and***

civil rights..." Plaintiff agrees that Plaintiff has alleged causes of action for violations of due process – both substantive and procedural, due to the Defendant's adherence to accepted standards of medical care – specifically Section 166.046 of the Texas Health and Safety Code. And because the constitutionality of Section 166.046 is a question of law for a court to determine, the production of a physician's report on its constitutionality should not be required and in fact makes little sense.

1. **Plaintiff's constitutional claim does not meet the HCLC definition of Chapter 74.**

As Defendant states, Section 74.001(a)(13) of the Texas Civil Practice and Remedies Code defines a HCLC as:

> a cause of action against a health care provider or physician for treatment, lack of treatment, or other claimed ***departure from accepted standards of medical care***, or health care, or safety or professional or administrative services directly related to health care, ***which proximately results in injury to or death of a claimant***, whether the claimant's claim or cause of action sounds in tort or contract.

Plaintiff admits that a physician or health care provider is the defendant. However, the suit does not relate to a ***departure*** from accepted standards of medical care, the suit is about the Hospital's actions ***pursuant*** to Section 166.046 of the Texas Health and Safety Code. Further, Plaintiff does not claim that Defendant caused Christopher Dunn's "injury to or death of a claimant," as the parties admit Dunn died of natural causes. *See* Tex. Civ. Prac. & Rem. Code § 74.001(a)(13). Further, Chapter 74 defines "claimant" to mean:

> a person, including a decedent's estate, seeking or who has sought recovery of damages in a healthcare liability claim. All persons claiming to have sustained damages as the result of the ***bodily injury or death*** of a single person are considered a single claimant.

Tex. Civ. Prac. & Rem. Code § 74.001(a)(2). Again, clearly, the Statute is intended to apply to personal injury claims alleging bodily injury or death. That is simply not the case here. Plaintiff does not claim Dunn's body was injured by the application of Section 166.046, nor does Plaintiff

claim that he died due to application of Section 166.046. The Health Care Liability Statute simply does not fit the constitutional claims at issue.

2. The report required by Chapter 74 for a HCLC would not provide support for or against Plaintiff's claims.

Additionally, Chapter 74 anticipates that an "expert report" would be produced by a physician regarding liability or causation. *See* Tex. Civ. Prac. & Rem. Code § 74.351 (requiring a physician to testify as to a departure from the applicable standard of medical care). The Statue specifically states:

> Nothing in this section shall be construed to require the serving of an expert report regarding any issue other than an issue relating to liability or causation.

Tex. Civ. Prac. & Rem. Code §74.351(j).

Because the constitutionality of a statute is a question of constitutional law for the court, a physician's report is not evidence of "liability" or "causation." It is imperative that such questions of Constitutional rights and liberties are taken up only by those duly elected to do so. Certainly, Defendant does not, and cannot, cite to a case where a court has found that the Health Care Liability Statute was meant to require physician reports with regard to constitutional due process claims.

III. This case concerns protected interests and state action.

Methodist's Motion for Summary Judgment cannot be granted, because both factors for a civil rights claim under 42 U.S.C. §1983 are present. First, the right to life and the liberty to make one's own medical decisions are both established and constitutionally protected interests. Second, while Methodis claims to take no position on the constitutionality of the statute, it does not deny that it utilized the statute and in fact, admits that it came under the statute for its immunizing power. By utilizing the statute, it became a state actor. Texas provided a mantle of authority to Methodist to deprive life of its patients without due process.

A.) **Mr. Dunn had a Protected Interest at Stake that went Unprotected by Section 166.046.**

As previously noted, "no right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of other, unless by clear and unquestionable authority of law." *Cruzan v. Director, Missouri Dep't of Health*, 497 U.S. 261, 269 (1990)(quoting *Union Pacific R. Co. v. Botsford*, 141 U.S. 250, 251 (1891)). Moreover, "[i]t cannot be disputed that the Due Process Clause protects an interest in life." *Cruzan,* 497 U.S. at 281.

Methodist twists the facts to question whether a patient has a constitutional right to receive treatment that a physician does not wish to give. Rather, the constitutional right in question is the individual's right to life and the right to choose one's own medical treatment[3]. A statute shall be found unconstitutional under the Due Process Clause if by that statute the government deprives an individual of a constitutionally protected interest without sufficient procedures to protect that interest. As the State of Texas put it: "This case clearly satisfies that requirement. When a patient has requested life-sustaining treatment, only to have it denied by a physician or health care facility, the physician and health care facility are denying the patient life for the period of time that he or she would have lived had the life-sustaining treatment been provided."[4]

In this instance, Chris Dunn requested to live. His intention was to stay on life-sustaining measures, and with the help of the Temporary Restraining Order and Methodist's subsequent decision to respect that last wish, Mr. Dunn was able to live out his last weeks with treatment,

[3] *Cruzan v. Director, Missouri Dept. of Health*, 497 U.S. 261 (1990)(noting that the Due Process Clause does not require the State to repose judgment on the withdrawal of life-sustaining treatment with anyone but the patient herself).

[4] Exhibit A, Amicus Brief of the State of Texas, p. 4.

free from the interference of Methodist's Ethics Committee.[5] But for those events, Mr. Dunn would have lost his most sacred right – life, in accordance to Methodist's Ethics Committee's determination without the safeguard of due process. Defendant would like the Court to believe that an individual on life-sustaining treatment does not have a protected interest directly at stake when faced with Section 166.046, but that is not the law.

Other states have considered the constitutionality of statutes enabling individuals or state entities to seek the removal of life-sustaining treatment, and the courts considering those cases have appreciated that the removal of such treatment is a question of life and death. In *Conservatorship of Wendland*, a 20-member ethics committee unanimously approved of a conservator's decision to withdraw life-sustaining nutrition and hydration of a conscious conservatee, who was neither terminally ill nor in a vegetative state. 26 Cal.4th 519, 526 (Cal. 2001). The California Supreme Court subsequently held that the conservator would be allowed to withhold artificial nutrition and hydration only if she could prove, by clear and convincing evidence, either that the conservatee wished to refuse life-sustaining treatment or that to withhold such treatment would have been in the conservatee's best interest. *Id.* at 527. The court "finding itself in unchartered territory" explained that "[w]hen a situation arises where it is proposed to terminate the life of a conscious but severely cognitively impaired person, it seems more rational … to ask 'why?' of the party proposing the act rather than 'why not?' of the party challenging it," and so placed the burden both of producing evidence and of persuasion on the conservator. *Id.*

Similarly, the Oklahoma Supreme Court asserted that the statute at the heart of a case, involving a baby with abnormalities, a deteriorating status and grim prognosis, "[did] not comport with the requirements of substantive due process because it permit[ted] a court to

[5] *See* Exhibit B, Cheney's Letter to Mrs. Evelyn Kelly and Mr. David Dunn. Mr. Christopher Dunn passed on December 23, 2015, approximately one month after the date, Nov. 24, 2015, provided by the committee pursuant to the letter.

authorize a DNR order for a child in state custody without addressing what burden of proof applies and what findings the court must make." *Baby F. v. Oklahoma Cty. Dist. Court*, 348 P.3d 1080, 1084 (Okla. 2015). Relying on *Cruzan*,[6] the court concluded that "the trial court, in all future matters, shall not authorize the withdrawal of life-sustaining treatment or the denial of the administration of cardiopulmonary resuscitation on behalf of a child in DHS custody without determining by clear and convincing evidence that doing so is in the best interest of the child." *Id.* at 1089. The court also noted that "the standard of proof is a matter of due process and serves to 'allocate the risk of error between the litigants and to indicate the relative importance attached to the ultimate decisions.'" *Id.* at 1086 (quoting *Addington v. Texas*, 441 U.S. 418, 423 (1979)).

In both cases, supreme courts of the respective states have understood that the withdrawal of life-sustaining treatment presents the risk of deprivation of a protected interest. The courts go further to demand that facts justifying such a decision be shown by clear and convincing evidence; the alternative is that the statutes are found to be unconstitutional for failure to comport with substantive due process. Furthermore, the courts in both instances emphatically and squarely placed the burden of proof on the seeker of the removal of life-sustaining treatment. Contrarily, Section 166.046 requires absolutely no standard of evidence or of persuasion. Pursuant to Section 166.046, Methodist's Ethics Committee was not required to adhere to any standard of proof for the evidence presented to measure against any required elements of decision-making in the closed-room committee meeting. Further, Mr. Dunn had no record to rely upon, no right of review, or other fundamental due process safeguards. As these cases point out, a very clear and sacred interest was at stake that should have prompted at least an evidentiary standard for the hearing.

[6] *Cruzan v. Director, Missouri Dept. of Health*, 497 U.S. 261 (1990).

B.) A Hospital Cloaked with State Authority Sentenced Mr. Dunn to Premature Death Pursuant to the State's Legal Framework.

As Methodist acknowledges, Section 166.046 clothes medical providers and health care facilities with "immunity from civil and criminal liability, as well as professional discipline"[7] when such providers follow the legal framework laid out by the state. Only then can a secretly-assigned ethics committee decide to remove life-sustaining treatment from patients regardless of their wishes and without procedural due process. Pursuant to the statute, Texas hospitals, public and private alike, are permitted to end life with the color of state law free of any review or consequence. It is the mantle of authority of this state law to which hospitals gladly avail themselves that converts a private hospital into a state actor. And, although the state does not own the right to life, the state has permitted hospital ethics committees to terminate life.

Congress enacted 42 U.S.C. §1983 as the statutory remedy for violations of the Constitution that occurred "under color of" state law; thus, liability attaches to wrongdoers 'who carry a badge of authority of a State and represent it in some capacity, whether they act in accordance with their authority or misuse it." *Monroe v. Pape,* 365 U.S. 167, 172 (1961). "In the typical case raising a state-action issue, a private party has taken the decisive step that caused the harm to the plaintiff, and the question is whether the State was sufficiently involved to treat that decisive conduct as state action." *Nat'l Collegiate Athletic Ass'n v. Tarkanian*, 488 U.S. 179, 192 (1988). "This may occur if the State creates the legal framework governing the conduct; *e.g., North Georgia Finishing, Inc. v. Di-Chem, Inc.,* 419 U.S. 601 (1975); [or] if it delegates its authority to the private actor." *Id.* "Thus, in the usual case we ask whether the State provided a mantle of authority that enhanced the power of the harm-causing individual actor." 488 U.S. at 192.

[7] Exhibit C, Defendant, Houston Methodist Hospital's Traditional and No-Evidence Motion for Summary Judgment, p. 7.

The legal framework of Section 166.046 was by state design, and therefore the conduct should be found to violate the Due Process Clause. In *North Georgia Finishing*, the Supreme Court found a Georgia statute to be in violation of the Due Process Clause of the Fourteenth Amendment for permitting a form of property (bank account) to be "impounded and, absent a bond, put totally beyond use during the pendency of the litigation on the alleged debt, by a writ of garnishment issued by a court clerk without notice or opportunity for an early hearing and without participation by a judicial officer." 419 U.S. at 606. As noted in *Tarkanian*, it was the fact that the State (Georgia, in that instance) had instituted the legal design of the statute that called for the writ of garnishment to transpire without 14th Amendment protections that permitted the Court to find state action. In the same way, the ending of lives is permitted and protected by the design the state laid out in Section 166.046. Because Methodist's conduct was in line with the statutory design and within its legal framework, this Court should not shy from a similar finding of state action.

Methodist believes that because the statute is not a mandatory procedure,[8] it would fail the state-compulsion test. However, the state compulsion test attributes a private actor's activity to the state when it results from the state's exercise of coercive power over the private entity or when the state provides "significant encouragement, either overt or covert." *Brentwood Academy v. Tennessee Secondary School Athletic Ass'n*, 531 U.S. 288, 296 (2001). Methodist is the first to admit that Section 166.046 "goes further, providing an absolute safe-harbor to physicians who comply with it when abstaining from compliance with a patient's wishes."[9] Section 166.045(d) in fact states: "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. When considering the amount of liability hospitals face, it is no small feat to

[8] Exhibit C, at p.12.
[9] Exhibit C, at p. 7 (referencing TEX. HEALTH & SAFETY CODE §166.045(d)).

find an "absolute safe-harbor" from all claims related to the withdrawal of life-sustaining treatment. In Section 166.046, the state, either overtly or covertly, delivered to Texas hospitals a "significant encouragement" to use the statutory procedures when it included Section 166.045(d).

Defendant is wrong to assert that the statute in question does no more than immunize physicians, for as discussed above, the state also laid out the framework for the process that would deprive an individual of life. Additionally, where there is substantial incentive or "significant encouragement" as a safe harbor would be, it cannot be said that the state offered no more than mere approval or acquiescence as the Defendant presents the situation. Contrary to Defendant's implication, there is no requirement that the activity be mandatory for a private entity to be found acting under the mantle of authority bestowed by the state. Defendant cannot have it both ways —state that the statute alters no legal right, that the hospital was not granted "any new powers," point out that the statute's procedures were not mandatory, yet admit the safe harbor and immunity[10] bestowed the private hospital when it follows the state's procedure pursuant to the statute. In actuality, Methodist was permitted to ignore Mr. Dunn's express wishes,[11] to seek a guardian ad litem despite Mr. Dunn's own consciousness and his parent's presence. This statute gave Methodist the legal right to notify family members that their loved one was no longer worthy of life-sustaining treatment without any mandated threshold for coming to that decision, to hold a hearing without the right to be heard, the right to review, the right to present evidence, the right to know the claims against Mr. Dunn, and the right to determine that Mr. Dunn's life would cease the date they provided.

IV. Procedural Due Process

As mentioned above, Defendant does not attempt to defend the constitutionality of the statute. Section 166.046 is doubtlessly void of any procedural protections as required by the Due

[10] Exhibit C, at pp. 9-10.
[11] See video, previously submitted to Court and Methodist.

Process Clause. The evidence of such disparity are apparent on the face of the statute itself and highlighted throughout the multiple pleadings throughout this lawsuit. Accordingly, Plaintiff hereby incorporates her prior arguments made in the Amended Motion for Summary Judgment.

CONCLUSION

Methodist's dispositive motions cannot be granted. The case at hand is capable of repetition yet evades review, and thereby falls into an exception to the mootness doctrine. Additionally, the claim sounds clearly in constitutional law, and the Pre-Emption Clause does not permit Ch.74 of TEXAS CIVIL PRACTICE AND REMEDIES CODE to rob Mr. Dunn of his federal constitutional claim. Furthermore, Methodist's Motion for Summary Judgment as to Plaintiff's §1983 claim cannot be granted, because both elements of a civil rights claim are present. First, the right to life and to choose one's own medical treatment are recognized protected interests. Second, Methodist became a state actor when it clothed itself with the state's mantle of authority, accepted the incentive of full immunity, and followed the legal framework laid out by the state in Section 166.046. Lastly, Methodist has not defended the constitutionality of the statute, therefore Plaintiff's declaratory action cannot be dismissed.

PRAYER

Plaintiff Evelyn Kelly prays that the Court deny Methodist's Motion to Dismiss for Mootness, its Chapter 74 Motion to Dismiss, as well as its Traditional Motion for Summary Judgment. Plaintiff further asks that the Court grant its Amended Motion for Summary Judgment and provide Plaintiff such other relief, at law or in equity, to which she may be justly entitled.

Respectfully submitted,

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I hereby certify that a true and correct copy of the foregoing has been forwarded to all counsel of record listed below in accordance with Texas Rules of Civil Procedure 21a on September 15, 2017, via E-Filing and Serve system:

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TAB I

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CAUSE NO. 2015-69681

EVELYN KELLY, INDIVIDUALLY, AND ON BEHALF OF THE ESTATE OF DAVID CHRISTOPHER DUNN	§	IN THE DISTRICT COURT OF
V.	§	HARRIS COUNTY, TEXAS
THE METHODIST HOSPITAL	§	189TH JUDICIAL DISTRICT

DEFENDANT HOUSTON METHODIST HOSPITAL f/k/a THE METHODIST HOSPITAL'S REPLY TO PLAINTIFF'S RESPONSE TO DEFENDANT'S MOTION TO DISMISS, AND TRADITIONAL MOTION FOR SUMMARY JUDGMENT

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW, **HOUSTON METHODIST HOSPITAL f/k/a THE METHODIST HOSPITAL** ("Houston Methodist" or the "Hospital"), and files this Reply to Plaintiff's Response to Defendant's Motion to Dismiss for Mootness, Chapter 74 Motion to Dismiss, and Traditional Motion for Summary Judgment, and respectfully shows the Court the following:

I.
SUMMARY OF THE ARGUMENT

This Court should grant Defendant's Motion to Dismiss for Mootness, Chapter 74 Motion to Dismiss, and Traditional and No-Evidence Motion for Summary Judgment in their entirety because:

- **This cause of action is moot and Plaintiff's argument that the Court should review it under an public interest exception to the mootness doctrine fails a matter of law;**
- **Plaintiff did not file a Chapter 74 report;**
- **No constitutionally protected interest is at stake here;**

- **Houston Methodist is not a state actor;**
- **Houston Methodist did not violate Dunn's civil or due process rights; and**
- **Plaintiff did not respond to Houston Methodist's No-Evidence Summary Judgment as to the Intentional Infliction of Emotional Distress Claim.**

II.
ARGUMENTS AND AUTHORITIES

1. REPLY TO PLAINTIFF'S RESPONSE TO DEFENDANT'S MOTION TO DISMISS

A. This cause of action is moot. Plaintiff's argument that this Court should recognize a public interest exception to the mootness doctrine is not a viable legal theory in our jurisdiction.

Plaintiff's argument that this Court should maintain jurisdiction over this moot case because "in Texas, patients on life-sustaining treatment are dealing with similarly important issues of their fundamental rights"[1] fails because a public interest exception to the mootness doctrine is not a viable legal theory in our jurisdiction. Houston Methodist provided Dunn with life-sustaining care until his natural death. This case became moot when Dunn died. Plaintiff argues that this case falls under the 'capable of repetition yet evading review' exception of the mootness doctrine.[2] In support of her argument Plaintiff cites the holdings of two cases from outside of our jurisdiction, one from California[3] and the other from Kentucky.[4] Both of the cases Plaintiff cites applied a public interest exception to the

[1] Plaintiff's Amended Motion for Summary Judgment at page 18, which Plaintiff incorporated into her Response to Defendant's Motion to Dismiss for Mootness, Chapter 74 Motion to Dismiss and Traditional Motion for Summary Judgment.

[2] *See* Plaintiff's Response to Defendant's Motion to Dismiss for Mootness, Chapter 74 Motion to Dismiss, and Traditional Motion for Summary Judgment at page 2 incorporating Plaintiff's arguments as stipulated in Plaintiff's Amended Motion for Summary Judgment.

[3] *Conservatorship of Wendland* (2001) 26 Cal. 4th 519, 110 Cal. Rptr. 2d 412.

[4] *Woods v. Commonwealth*, 142 S.W. 3d 24 (KY.2004); Plaintiff's also cite dicta from *Lee v. Valdez*, 2009 WL 1406244 (N.D. Tex. 2009). However, *Lee* held that a prisoner's claim for declaratory relief regarding inadequate medical care was rendered moot by that prisoner's death. *Lee*, 2009 WL 1406244 at *14.

mootness doctrine.[5] Plaintiff asks this Court to follow this California and Kentucky case law and asserts that "the importance of the issues firmly support the matter being heard."[6] However, the First Court of Appeals has explicitly held that "until and unless the Texas Supreme Court recognizes the public interest exception to the mootness doctrine, **it is not a viable legal theory in our jurisdiction.**"[7] Accordingly, this Court must reject Plaintiff's argument asking this Court to exercise jurisdiction over Plaintiff's civil rights and constitutional claims. This case is moot and no exception to the mootness doctrine applies here.

In addition, the rare capable of repetition yet evading review "exception to the mootness doctrine has only been used to challenge unconstitutional acts performed by the government."[8] As further explained below, Houston Methodist is a private hospital, not a government entity.

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[5] *Wendland*, 26 Cal. 4th at footnote 1 ("We have the discretion to decide otherwise moot cases presenting **important issues** that are capable of repetition yet tend to evade review. This is such a case. The case raises **important issues about fundamental rights of incompetent conservatees to privacy and life**, and the corresponding limitations on conservators' power to withhold life-sustaining treatment.") (emphasis added)(internal citations omitted); *Woods*, 142 S.W. 3d at 31; *see also Morgan v. Getter*, 441 S.W. 3d 94, 101 (Ky. 2014)(the Kentucky Supreme Court explained that "[c]learly, there was no chance that the ward himself would again be confronted by the challenged action (the removal of life support), and neither did the issue evade review, inasmuch as other patients on life support could be expected to survive until the matter was fully litigated" and therefore the Court reviewed *Woods* "not in any strict sense under the standard 'capable of repetition exception,' but rather **because it raised issues of substantial public importance** certain to be repeated with respect to other patients, their families, and their caregivers, and because guidance from the Court could properly be thought a matter of some urgency.")(emphasis added).

[6] Plaintiff's Amended Motion for Summary Judgment at page 20.

[7] *Houston Chronicle Pub. Co. v. Thomas*, 196 S.W.3d 396, 400 (Tex. App.—Houston [1st Dist.] 2006, no pet.) (noting that the Texas Supreme Court has not decided the viability of the public interest exception which is defined as permitting "judicial review of questions of **considerable public importance** if the nature of the action makes it capable of repetition yet prevents effective judicial review.")(emphasis added).

[8] *Blackard v. Schaffer*, 05-16-00408-CV, 2017 WL 343597, at *6 (Tex. App.—Dallas Jan. 18, 2017, pet. filed) (citing *Gen. Land.*, 789 S.W.2d at 571; *City of Dallas v. Woodfield*, 305 S.W.3d 412, 418 (Tex. App.–Dallas 2010, no pet.); *In re Sierra Club*, 420 S.W.3d 153, 157 (Tex. App.–El Paso 2012, orig. proceeding)).

B. This case is subject to the Chapter 74 Expert Report requirement.

a. Plaintiff's Intentional Infliction of Emotional Distress claim is unquestionably a medical malpractice claim.

Although Plaintiff fails to mention or respond to Defendant's arguments regarding her intentional infliction of emotional distress ("IIED") claim in her five pages of briefing regarding whether this case is subject to the Chapter 74 Expert Report requirement, Plaintiff's live petition in this case includes a claim for IIED.[9] An IIED claim that arises from health care decisions concerning a family member is a health care liability claim subject to the Chapter 74 expert reporting requirements.[10] The 120-day deadline long ago expired and Plaintiff has never filed an expert report. Consequently, her IIED claim must be dismissed.[11] Apparently, Plaintiff does not dispute this fact as she does not address Defendant's Motion to Dismiss her IIED claim in her Response to Defendant's Motion to Dismiss.[12]

b. Plaintiff's civil rights case is also a health care liability case subject to Chapter 74 requirements.

Plaintiff's civil rights and constitutional claims are moot and no exception to the mootness doctrine applies to Plaintiff's claims. Accordingly, there is no reason for this Court to consider whether these claims are subject to Chapter 74's expert report requirement. However, Defendant asserts that the underlying nature of Plaintiff's constitutional claims constitute a health care liability claim because the conduct complained

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[9] Plaintiffs' First Amended Petition; *see also* Plaintiff's Response to Defendant's Motion to Dismiss for Mootness, Chapter 74 Motion to Dismiss, and Traditional Motion for Summary Judgment at pages 2-6.

[10] *Groomes v. USH of Timberlawn, Inc.*, 170 S.W.3d 802, 803 (Tex. App.—Dallas 2005, no pet.).

[11] TEX. CIV. PRAC. & REM. CODE § 74.351(a).

[12] Plaintiff's Response to Defendant's Motion to Dismiss for Mootness, Chapter 74 Motion to Dismiss, and Traditional Motion for Summary Judgment at pages 2-6.

of "is an inseparable part of the rendition of health care services," therefore the claims are health care liability claims.[13]

Plaintiff argues that her case is not a health care liability claim because "[i]t is irrelevant that Methodist is a health care provider and Mr. Dunn was its patient; Mr. Dunn was an individual faced with state-adopted, state-incentivized and state-immunized statutory procedure that authorized his pre-mature death via a hospital-formed committee without his input, record, or review" and that federal preempts state law in this instance.[14] This argument fails for several reasons. First, far from being irrelevant, health care is at the heart of Plaintiff's claims. Plaintiff's claims are brought against a health care provider for acts of claimed departures from medical care, health care, or safety, or professional or administrative services directly related to health care that proximately caused alleged injuries for which Plaintiff's now seek relief. Second, Plaintiff wrongly attempts to characterize Houston Methodist, a private hospital, as a state actor. Third, while Defendant agrees that preemption may apply if a state law conflicts with federal law, there is no conflict between federal and state law in this case. Accordingly, Plaintiff's constitutional claims for violation of due process and civil rights are health care liability claims within the scope of Chapter 74.

2. REPLY TO PLAINTIFF'S RESPONSE TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

C. No constitutionally protected interest is at stake here.

Plaintiff claims that the "constitutional right in question is the individual's right to life and the right to choose one's own medical treatment" as articulated by the US Supreme

[13] *Boothe v. Dixon*, 180 S.W.3d 915, 919 (Tex. App.—Dallas 2005, no pet.).

[14] Plaintiff's Response to Defendant's Motion to Dismiss for Mootness, Chapter 74 Motion to Dismiss, and Traditional Motion for Summary Judgment at page 2, 4.

Court in the *Cruzan* case.[15] *Cruzan*, however, involved a patient's right to **refuse** life sustaining treatment.[16] In *Cruzan*, the U.S. Supreme Court held that a patient has a liberty interest under the Due Process clause to refuse unwanted medical treatment.[17] The inverse, however, has been rejected by the U.S. Supreme Court.[18] A hospital does not deprive a patient of life by removing life-sustaining treatment; rather, the patient's illness causes death. Moreover, a patient does not have a constitutional right to any and all medical treatment he requests and a physician is not constitutionally obligated to provide any treatment that a patient requests.[19] Frankly, to hold that a patient has a constitutional right not only to receive medical care, but to receive any medical care of the specific type requested by the patient, would have horrific results. Imagine an otherwise healthy schizophrenic who has decided that his left eye offends him and requests that a surgeon remove it. Based on Plaintiff's argument, such a patient has a constitutional right to have a healthy eye surgically removed because he requests that specific Hippocratic-oath violating medical procedure.

Plaintiff relies on two cases from jurisdictions outside Texas to support her assertion that "the withdrawal of life-sustaining treatment presents a risk of deprivation of a protected interest."[20] First, she cites *Wendland* again.[21] In *Wendland*, the California Supreme Court considered "whether a conservator of the person may withhold artificial nutrition and hydration from a conscious conservatee **who is not terminally ill**, comatose, or in a

[15] *Id.* at page 7 citing *Cruzan v. Director, Missouri Dept. of Health*, 497 U.S. 261 (1990).

[16] *Cruzan*, 497 U.S. at 278.

[17] *Id.* at 279.

[18] *DeShaney v. Winnebago County Dep't of Soc. Serv.*, 489 U.S. 189, 196-199, 109 S. Ct. 998, 103 L.Ed. 2d 249 (1989).

[19] *Id.* at 196-199; *see also* Brief of Amici Curiae attached as Exhibit A.

[20] Plaintiff's Response to Defendant's Motion to Dismiss for Mootness, Chapter 74 Motion to Dismiss, and Traditional Motion for Summary Judgment at page 9.

[21] *Wendland*, 26 Cal. 4th 519.

persistent vegetative state, and who has not left formal instructions for health care or appointed an agent or surrogate for health care decisions."[22] The California Supreme Court held that "in light of the relevant portions of the **California Constitution**, we conclude that a conservator may not withhold artificial nutrition and hydration from such a person absent clear and convincing evidence the conservator's decision is in accordance with either the conservatee's own wishes or best interest."[23] *Wendland* has no bearing on the case at bar. There is no dispute that Dunn was terminally ill. Further, the case was decided based on California law and the interpretation of the California Constitution.

Second, Plaintiff cites *Baby F. v. Oklahoma Cty. Dist. Court*, 348 P. 3d 1080, 1084 (Okla. 2015). *Baby F.* involved an infant that was in the custody of the State of Oklahoma.[24] The issues before the court in *Baby F.* was whether a trial court could authorize a change in resuscitation status from full code to allow-natural-death pursuant to an Oklahoma statute for a child in state custody.[25] The case did not involve any health care providers.[26] Because Oklahoma was in the role of *parens patriae*, the Oklahoma Supreme Court explained that the paramount consideration is the best interest of the child.[27] This is highly distinguishable from the facts here, where Dunn was an adult. Moreover, neither *Wendland* nor *Baby F.* hold that a physician is constitutionally obligated to provide any medical treatment requested by a patient. Accordingly, because physicians have no constitutional obligation to provide treatment they wish not to provide, Plaintiff's claims cannot succeed.

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[22] *Id.* at 523-524 (emphasis added).

[23] *Id.* (emphasis added).

[24] *Baby F. v. Oklahoma Cty. Dist. Court*, 348 P. 3d 1080, 1084 (Okla. 2015).

[25] *Id.*

[26] *Id.*

[27] *Id.* at 1088.

D. Houston Methodist Did Not Act Under Color of State Law.

Plaintiff claims that Houston Methodist "cloaked" itself in the "mantle of state authority" and "that converts a private hospital into a state actor."[28] This is absurd and incorrect. Houston Methodist is not a state actor and thus cannot be sued in the capacity in which Plaintiff seeks. As an initial matter, state action is a fact-intensive determination and no discovery has been conducted in this case.

Plaintiff claims that this case satisfies the state compulsion test because "the state provides 'significant encouragement, either overt or covert."[29] This is simply inaccurate. Plaintiff alleges that the safe-harbor aspect of Section 166.046 is a substantial incentive or significant encouragement by the state for a hospital to use the statutory procedure at issue.[30] Plaintiff cites no law in support of this allegation.[31] The existence of a safe-harbor provision falls far short of the State exercising "coercive power or [providing] significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the State."[32] Section 166.046 does not coerce a hospital in any way shape or form. Nor does a safe harbor provision provide significant encouragement to take any action. The Supreme Court has repeatedly held that "[a]ction taken by private entities with mere approval or acquiescence of the State is not a state action."[33]

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[28] Plaintiff's Response to Defendant's Motion to Dismiss for Mootness, Chapter 74 Motion to Dismiss, and Traditional Motion for Summary Judgment at page 11-12.

[29] *Id.*

[30] *Id.* at 12.

[31] *Id.* at 11-12.

[32] *Blum v. Yaretsky*, 457 U.S. 991, 1004 (1982).

[33] *Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 52 (1999); *accord Blum v. Yaretsky*, 457 U.S. 991, 1004-05 (1982).

E. Procedural Due Process.

Plaintiff asserts that Houston Methodist's motion cannot be granted as to Plaintiff's declaratory judgment claim because Houston Methodist "expressly states that it takes 'no formal position on the constitutionality of the statute.'"[34] This is an incomplete quotation of Houston Methodist's motion. The full rendition of Houston Methodist's position is as follows:

> Houston Methodist Hospital continues to take no formal position on the constitutionality of the statute itself, but is prepared to defend its conduct, and the conduct of its healthcare providers that provided professional, ethical and compassionate care and treatment to Christopher Dunn. Simply put, Houston Methodist did not violate Plaintiff's constitutional rights and rejects Plaintiff's allegations in full.[35]

This Court absolutely may grant Houston Methodist's Motion for Summary Judgement as to Plaintiff's declaratory judgment cause of action because 1) with Dunn's natural death there is no longer a justiciable controversy concerning the administration of life-sustaining treatment and declaratory judgment is not available when, like the case at bar, there is no justiciable controversy;[36] 2) there is no constitutionally protect interest here; and 3) Houston Methodist is not a state actor. There should be no doubt that Defendant opposes Plaintiff's Motion for Summary Judgment.

3. REPLY REGARDING DEFENDANT'S NO-EVIDENCE MOTION FOR SUMMARY JUDGMENT AS TO IIED CLAIM

Plaintiff did not respond to Defendant's No-Evidence Motion for Summary Judgment on the IIED claim. Plaintiff, Evelyn Kelly, Individually, has claimed that Houston

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[34] Plaintiff's Response to Defendant's Motion to Dismiss for Mootness, Chapter 74 Motion to Dismiss, and Traditional Motion for Summary Judgment at page 12-13.

[35] Defendant, Houston Methodist Hospital's Traditional and No-Evidence Motion for Summary Judgement at page 1.

[36] *Bonham State Bank v. Beadle*, 907 S.W. 2d 465, 467 (Tex. 1995).

Methodist Hospital intentionally inflicted emotional distress upon her through the hospital's actions in implementing §166.046 with regard to her son, Christopher Dunn's care and treatment. After an adequate time for discovery, Plaintiff is unable to provide any evidence to support each of the required elements of Plaintiff's intentional infliction of emotional distress claim. Specifically, Plaintiff failed to present even a scintilla of evidence that: (1) Houston Methodist Hospital acted intentionally or recklessly; (2) its conduct was extreme and outrageous; (3) its actions caused Plaintiff emotional distress; (4) the emotional distress was severe; and (5) no alternative cause of action would provide a remedy for the severe emotional distress caused by Defendant's conduct.[37] Accordingly, this Court should grant Houston Methodist's No-Evidence Motion for Summary Judgment as Plaintiff has not and cannot offer any evidence to support her claim for intentional infliction of emotional distress.

III.
CONCLUSION & PRAYER

WHEREFORE, PREMISES CONSIDERED, **DEFENDANT, HOUSTON METHODIST HOSPITAL,** respectfully requests that this Court GRANT its Motion to Dismiss for Mootness, Chapter 74 Motion to Dismiss, and Traditional and No-Evidence Motions for Summary Judgment in their entirety, and for any such other and further relief to which Houston Methodist shows itself justly entitled.

Respectfully submitted,

SCOTT PATTON PC

By: */s/Dwight W. Scott, Jr.*
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[37] *Hoffmann–La Roche Inc.,* 144 S.W.3d at 445; *Wal–Mart Stores, Inc. v. Canchola,* 121 S.W.3d 735, 740 (Tex.2003).

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document has been served on all counsel of record pursuant to Rule 21a, Texas Rules of Civil Procedure, on this the 21st day of September, 2017.

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Exhibit A

CAUSE NO. 2015-69681

EVELYN KELLY, INDIVIDUALLY AND ON BEHALF OF THE ESTATE OF DAVID CHRISTOPHER DUNN,	§	IN THE DISTRICT COURT OF
PLAINTIFF.	§	
v.	§	HARRIS COUNTY, TEXAS
THE METHODIST HOSPITAL,	§	
DEFENDANT.	§	189TH JUDICIAL DISTRICT

BRIEF OF *AMICI CURIAE*
TEXAS ALLIANCE FOR LIFE, TEXAS CATHOLIC CONFERENCE OF BISHOPS, TEXAS BAPTIST CHRISTIAN LIFE COMMISSION, TEXANS FOR LIFE COALITION, COALITION OF TEXANS WITH DISABILITIES, TEXAS ALLIANCE FOR PATIENT ACCESS, TEXAS MEDICAL ASSOCIATION, TEXAS OSTEOPATHIC MEDICAL ASSOCIATION, TEXAS HOSPITAL ASSOCIATION, AND LEADINGAGE TEXAS

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TABLE OF CONTENTS

INDEX OF AUTHORITIES

Cases

Constitution and Statutes

Other Authorities

INTEREST OF *AMICI CURIAE*

The amici are dedicated to a diverse set of goals, including preserving the integrity of the medical profession, ensuring high-quality medical care, promoting medical liability reform, protecting life, assuring dignity at the end of life, and protecting Texans with disabilities. All agree that the Texas Advance Directives Act, TEX. HEALTH & SAFETY CODE ch. 166, helps achieve these essential objectives. The amici believe the statute easily overcomes Plaintiff's constitutional challenge.

Texas Alliance for Life (TAL). TAL opposes "the advocacy and practice of abortion (except to preserve the mother's life), infanticide, euthanasia, and all forms of assisted suicide." https://www.texasallianceforlife.org/about-us/ (last visited June 23, 2017). In 1999, TAL, together with Texas Right to Life, helped negotiate §166.046 and urged its enactment. Texas Right to Life (which represents the Plaintiff here) now actively challenges the statute it also helped enact. This discordance is difficult to understand. Since 1999, TAL has supported various bills to increase patient protections in the Texas Advance Directives Act. However, TAL has been and continues to be unwavering in its support for §166.046 because it strikes a just and appropriate balance between the rights of patients to autonomy regarding decisions involving life-sustaining procedures and the conscience rights of health care providers to not have to provide medically and ethically inappropriate and harmful interventions to dying patients.

Texas Catholic Conference of Bishops (TCCB). TCCB has sought reforms in advance directives to highlight—as a matter of policy—the dignity inherent in a natural death. https://txcatholic.org/medical-advance-directives/ (last visited June 23, 2017). "Human intervention that would deliberately cause, hasten, or ***unnecessarily prolong*** the patient's death violates the dignity of the human person." *Id.* (emphasis added). "Reform efforts should prioritize the patient, while also recognizing the emotional and ethical concerns of families, health care

providers, and communities that want to provide the most compassionate care possible." *Id.* TCCB strongly supports §166.046 as indispensable for ensuring dignity at end of life.

Texas Baptist Christian Life Commission (CLC). The CLC is the ethics and public policy ministry of the Baptist General Convention of Texas (Texas Baptists), which includes 5,400 churches. The CLC does not speak for Texas Baptists, but it addresses policy issues that are of concern to Texas Baptists from a biblical perspective. Texas Baptists affirm the value of human life from conception to natural death and affirm the importance of honoring the rights of conscience of all Americans. While recognizing the inherent difficulties of these decisions for families, medical professionals, and patients, §166.046 strikes the appropriate balance between patients and medical professionals' rights of conscience. CLC supports §166.046 because it respects the inherent dignity of those created in the image of God, in death, in medical decisions, and in the provision of treatment.

Texans for Life Coalition (TLC). TLC has been educating and advocating for the sanctity of human life since 1974. After previously opposing the Texas Advance Directives Act, TLC changed its position after witnessing the Act's benefits. TLC now recognizes that, while imperfect, the Act provides a reasonable process for resolving differences between medical practitioners and patient surrogates regarding end-of-life treatment. Furthermore, TLC does not believe that patients have a *constitutional* right to medical care.

Coalition of Texans with Disabilities (CTD). Founded in 1978, CTD is a statewide, cross-disability non-profit organization. CTD has been involved in end-of-life policy discussions for several Texas legislative sessions. People with disabilities express considerable respect and appreciation for their health care providers, often crediting them with their lives. Yet, people with disabilities often report experiences where their lives are devalued, throughout society and

sometimes in health care situations. CTD staff has been told many times by the disability community that it wants to be sure its wishes are heard and respected in end-of-life decisions. CTD believes the Texas Advance Directives Act has advanced the rights of people with disabilities at this sensitive time.

The Texas Alliance for Patient Access (TAPA). TAPA is a statewide coalition of over 250 doctors, hospitals, clinics, nursing homes, and physician liability insurers. http://www.tapa.info/about-us.html (last visited June 23, 2017). TAPA promotes health care liability reform to help ensure that Texans receive high-quality, affordable medical care. TAPA supports §166.046 because it (1) preserves a doctor's existing right to refuse to provide medical intervention that violates his or her ethics or conscience, and (2) provides immunity from liability if doctors and hospitals adhere to predetermined procedures before declining to provide such intervention. Section 166.046's immunity protects doctors and nurses from exposing themselves to malpractice suits when adhering to professional and personal ethics.

TAPA is paying all fees associated with preparing this brief.

The Texas Hospital Association (THA). THA, a non-profit trade association, represents 459 Texas hospitals. THA advocates for legislative, regulatory, and judicial means to obtain accessible, cost-effective, high-quality health care. THA supports §166.046, which provides a safe harbor for physicians and hospitals that refuse to provide medically unnecessary interventions.

The Texas Medical Association (TMA) and Texas Osteopathic Medical Association (TOMA). TMA and TOMA are private, voluntary, non-profit associations. Founded in 1853, TMA is the nation's largest state medical society, representing over 50,000 Texas physicians and residents. https://www.texmed.org/Template.aspx?id=5 (last visited June 23, 2017). Founded in

1900, TOMA represents more than 5,000 licensed osteopathic physicians. Both organizations consider §166.046 vital to the ethical practice of medicine and the provision of high quality-care.

LeadingAge Texas (LAT). LAT provides leadership, advocacy, and education for Texas faith-based and not-for-profit retirement housing and nursing home communities. https://www.leadingagetexas.org/. The organization works extensively with the Texas Legislature on an array of issues affecting the elderly, including hospice and end-of-life matters.

SUMMARY OF THE ARGUMENT

End-of-life decisions are wrenching for patients, their families, and treating physicians. Interventions that prolong life may also prolong—or even intensify—suffering. Circumstances arise in which a family member wants to keep such procedures going after a doctor, compelled by her ethical obligation to do no harm, concludes that further intervention would only extend or enhance suffering. As even *conversations* about the end of life are difficult to begin, these conflicts between medical ethics and patient wishes have historically been intractable.

The Texas Advance Directives Act provides a resolution. When a life-sustaining intervention conflicts with medical ethics, the physician can initiate §166.046's procedure, allowing an ethics committee to review the patient's case and evaluate the appropriateness of further intervention. When this procedure is followed, the physician is not subject to liability. But the patient's wishes are respected too—the physician and hospital must work with the patient or his family to find a facility that will accommodate the patient's or his family's wishes if they are contrary to the committee's determination.

Section 166.046 exists to spur doctors and patients to have the difficult, but critical, dialogue that end-of-life care requires. Life-sustaining intervention has rarely been withdrawn under the Act. Much more often, the family and hospital come to an agreement, or the patient's disease runs its natural course. This is what happened in this very case: David Christopher Dunn died of natural causes while the §166.046 procedure was underway.

Plaintiff claims that §166.046 unconstitutionally deprives patients of life and the right to make independent medical decisions. As demonstrated below, however, the legislation offends no constitutional provision and, importantly, implements public policy that the Legislature enacted after years of compromise and debate. Challenges to that policy belong in the Capitol, not this Court.

Plaintiff's due-process claim fails for two reasons. First, the Due Process Clause is properly invoked only where a constitutionally protected interest is at stake. Here, none is. Nothing in the Constitution compels physicians to provide any particular course of treatment when it violates their own beliefs. Neither does §166.046 deprive any patient of life. As the Supreme Court of the United States has acknowledged, when life-sustaining interventions are discontinued, death is caused by the underlying disease—not the withdrawal of treatment. Because there is no constitutional right to a particular form of medical treatment—including life-sustaining intervention—its withdrawal cannot violate the Constitution.

Second, because the Constitution protects an individual from a *governmental* deprivation, a plaintiff cannot prevail on a due process claim without first showing state action. But medical treatment decisions are quintessentially private. Section 166.046 has not altered that reality. It does not require a physician to take any action. Rather, it provides immunity if a physician voluntarily complies. The private employment of a state-sanctioned remedy is not state action. In fact, both the Supreme Court and the Fifth Circuit have held that a legislative grant of immunity is not state action.

Section 166.046 is constitutional—an enactment designed to resolve otherwise-intractable end-of-life disputes. In almost every case—including this one—it does so *without* violating patient wishes. If reform is necessary, it should take place in a legislative venue.

STATUTORY BACKGROUND

The Legislature enacted the Texas Advance Directives Act, TEX. HEALTH & SAFETY CODE ch. 166, order to "set[] forth uniform provisions governing the execution of an advance directive" regarding health care. Senate Research Ctr., Bill Analysis, Tex. S.B. 1260, 76th Leg., R.S. (1999). The Act was the culmination of a six-year joint effort between a diverse array of stakeholders, including Texas and National Right to Life, the Texas Conference of Catholic Health Care Facilities, the Texas Medical Association, the Texas Hospital Association, and the Texas and New Mexico Hospice Organization. *See* Hearing on H.B. 3527, Comm. on Pub. Health, 76th Leg., R.S. (Apr. 29, 1999) (statement of Greg Hooser, Texas and New Mexico Hospice Organization); *see also id.* ("[W]e like it and the whole coalition seems to be in agreement with this. . . . [W]e are really united behind this language.") (statement of Joseph A. Kral, IV, Legislative Director, Texas Right to Life).[1] The bill passed the Senate unanimously and passed the House on a voice vote. Act of May 11, 1999, 76th Leg., R.S., ch. 450, §3.05, 1999 Tex. Gen. Laws 2835, 2865.

Among the Act's reforms was to provide immunity to hospitals and health-care providers that reasonably comply with patients' advance directives. TEX. HEALTH & SAFETY CODE §166.044. It also acknowledged the potential for conflicts between patients' wishes and physicians' ethical duties. It thus provided a procedure by which a physician or hospital that wished not to comply with a patient's wishes—including by withholding or withdrawing life-sustaining intervention—could act without risking malpractice liability. *Id.* §166.046. This is known as TADA's "medical futility" provision.

[1] No one registered as opposed to the bill. *See* Hearing on H.B. 3527, Comm. on Pub. Health, 76th Leg., R.S. (Apr. 29, 1999) (statement of Greg Hooser, Texas and New Mexico Hospice Organization) ("Mr. Hildebrand, no sir, there is no opposition."); *see also id.* (witness list).

I. Medical futility laws are necessary to maintain the integrity of the medical profession.

Although TADA does not define "medical futility," the term necessarily incorporates a complex array of medical and ethical judgments. Instead of substituting its judgment for physicians', the Legislature adopted "a process-based approach" similar to one recommended years earlier by the American Medical Association Council on Ethical and Judicial Affairs. Robert L. Fine, M.D., *Medical futility and the Texas Advance Directives Act of 1999*, 13 B.U.M.C. PROCEEDINGS 144, 145 (2000).[2] The AMA's approach had little practical effect because even when a physician concluded additional medical intervention was futile, the specter of potential malpractice liability kept the physician from contravening patient wishes. *Id.* The Texas statute solved that problem by providing a safe harbor procedure which, if followed, conferred immunity. *Id.* at 146.

Doctors believe that being forced to provide medically futile treatment threatens the proper and ethical practice of medicine. "It is inhumane to prolong a dying process that causes pain to a patient, and physicians believe they should not be forced to provide treatment that violates their ethics." CYNTHIA S. MARIETTA, THE DEBATE OVER THE FATE OF THE TEXAS "FUTILE CARE" LAW: IT IS TIME FOR COMPROMISE 3 (April 2007).[3]

So while patients' and families' wishes are entitled to substantial deference, they do not negate medical judgment or conscience. Doctors must consider whether a given treatment will help or harm the patient. Testifying against an amendment to TADA, one physician gave the example of a terminal cancer patient whose family wished to continue an intervention that required high-pressure intubation to force oxygen into the patient's lungs. *See* Hearing on C.S.S.B. 439

[2] https://www.ncbi.nlm.nih.gov/pmc/articles/PMC1312296/pdf/bumc0013-0144.pdf (last visited June 23, 2017).

[3] https://www.law.uh.edu/healthlaw/perspectives/2007/(CM)TXFutileCare.pdf (last visited June 23, 2017).

before the Senate Comm. on Health & Human Servs., 80th Leg., R.S. (April 12, 2007) (statement of Dr. Bob Fine, Texas Medical Association & Baylor Healthcare System). This intubation caused her lungs to rupture, inflicting severe pain. *See id.* Her pain, in turn, required substantial pain medication and paralytics. *See id.* Against her physicians' contrary medical advice, the patient's family persisted in keeping her on this painful course of intervention—and even tried to have her taken off the paralytics and painkillers. *See id.* It was TADA's dispute-resolution process that finally allowed the patient to pass peacefully, in a single minute, after enduring 20 days of agony. *See id.*

But it is not only extreme cases that present these dilemmas. As Dr. Ray Callas testified, even routine treatments like CPR can cause much more pain than benefit:

> Effectiveness: Whether CPR is likely to be effective depends on medical conditions and circumstances subject to medical decisionmaking. The physician must consider the patient's age, the circumstances in which the patient's cardiac arrest occurred, and the patient's other medical conditions. Some injuries or illnesses are simply not survivable. However, even in the best of circumstances, CPR is effective in only about 12 percent of cases when performed outside the hospital and in less than 25 percent of the time in a hospital setting.
>
> Possible Harm: Even when the medical circumstances are optimal and the results are good, CPR can cause pain, damage, and distress to patients. For example, chest compressions commonly result in broken ribs, and repeated attempts can cause those broken rib fragments to puncture lungs and damage other body tissues. These problems can become particularly acute when patients are elderly and frail. When there is no ultimate benefit to a patient, CPR can turn a tragic death into prolonged suffering or even torture.

Hearing on H.B. 2063 before the House Comm. on State Affairs, 85th Leg., R.S. (April 5, 2017) (statement of Dr. Ray Callas).[4] Dr. Callas concluded:

[4] https://www.texmed.org/Template.aspx?id=44569 (last visited June 23, 2017)

> When patients are dying due to the terminal stages of disease or the expected effects of advanced age, sometimes the best possible medical care is to take measures to relieve suffering but allow a natural death.

Id.

Dr. Ann Miller, a pediatric chaplain, made a similar point to the Legislature:

> In a hospital, you see we frequently must ask patients for permission to hurt them, to give them medicine, our children, that make them sick, to, it makes their hair fall out, burns their skin or makes huge bruises, treatment that is painful, frightening, embarrassing and undignified. . . . What makes the pain and indignity acceptable is our noble purpose. We have medical evidence that the benefits to the patient's health have a good chance of far outweighing the risk and the pain that we're going to inflict, and this noble purpose of affecting a patient's health is the only way we can justify our actions to patients and families, and the only way we can look ourselves in the mirror.

Hearing on C.S.S.B. 439 before the Senate Comm. on Health & Human Servs., 80th Leg., R.S. (April 12, 2007) (statement of Dr. Ann Miller, Director of Pastoral Care, Cook Children's Medical Center). But where the treatment brings only pain, and no benefit, Dr. Miller explained that for many doctors, prolonging life cannot be squared with their ethical duties: "[F]orcing physicians to continue to do painful treatments without a medical goal is something that shouldn't happen." *Id.*

The pressure to provide medically futile procedures takes a toll on medical personnel. A study of critical care nurses in Australia concluded that "moral issues faced by nurses in medically futile situations may be distressing enough to result in them leaving intensive care practice, or leaving nursing altogether." Melodie Heland, *Fruitful or futile: intensive care nurses' experiences and perceptions of medical futility*, AUSTRALIAN CRITICAL CARE 25, 27, Feb. 2006.

II. Texas's statutory medical-futility procedure only rarely causes a patient's wish for further intervention to be disregarded.

Texas is one of the few states in which medical-futility laws have been effective at fostering compromise and relieving suffering—most likely because of TADA's safe-harbor provision. But Texas doctors and hospitals rarely arrive at discontinuing life-sustaining intervention under the

Act. After surveying 409 Texas hospitals on their experience with the medical futility procedure between 1999 and 2004, one survey found:

> Most cases were resolved before the end of the mandated 10-day waiting period because patients died, patients or representatives agreed to forgo the treatment in question, or patients were transferred. Discontinuation of life-sustaining treatment against patient or patient representative wishes occurred in only a small number of cases.

M.L. Smith, et al., *Texas hospitals' experience with the Texas Advance Directives Act*, 35 CRIT CARE MED. 1271 (2007).[5]

This trend has continued in recent years. A Texas Hospital Association survey of 202 hospitals revealed that between 2007 and 2011 ***no*** patient was deprived of life-sustaining intervention against the patient's or family's wishes. In that time, almost four million patients were admitted to the responding hospitals. Section 166.046 was invoked just 30 times. In several of those cases, the patient was transferred. In others, the process caused the physician or the family to reassess their position. Much of the time, the patient passes naturally while the process is in motion.

Experience shows that §166.046 is rarely invoked. And when it is, its principal impact is not halting medical intervention. Rather, the procedure's mere existence fosters informal resolution among patients, families, and doctors.

[5] https://www.ncbi.nlm.nih.gov/pubmed/17414082 (last visited June 23, 2017).

ARGUMENT

I. Section 166.046 gives medical professionals a safe harbor, but it does not mandate a specific course of action.

Physicians have long been free to choose who they will treat and what treatments they will provide. "The physician-patient relationship is 'wholly voluntary.'" *Gross v. Burt*, 149 S.W.3d 213, 224 (Tex. App.—Fort Worth 2004, pet. denied) (quoting *Fought v. Solce*, 821 S.W.2d 218, 220 (Tex. App.—Houston [1st Dist.] 1991, writ denied)). Even once a physician-patient relationship has begun, either party may terminate it at will. AM. MED. ASS'N COUNCIL ON ETHICAL AND JUDICIAL AFFAIRS, CODE OF MED. ETHICS §1.1.5 (2016).

While a physician cannot countermand a patient's wish, she can *abstain* from providing a particular treatment when her medical judgment, her conscience, or her ethics, demands it. The Code of Medical Ethics protects physicians' right "to act (*or refrain from acting*) in accordance with the dictates of conscience in their professional practice," allowing them "considerable latitude to practice in accord with well-considered, deeply held beliefs." *Id.* §1.1.7 (emphasis added). The key limitation is that the physician has an ethical duty not to terminate the relationship without "[n]otify[ing] the patient (or authorized decision maker) long enough in advance to permit the patient to secure another physician." *Id.* §1.1.5. The physician must also "[f]acilitate transfer of care when appropriate." *Id.*; *accord King v. Fisher*, 918 S.W.2d 108, 112 (Tex. App.—Fort Worth 1996, writ denied) (describing elements of a common law abandonment claim); *see also Tate v. D.C.F. Facility*, Civil Action No. A407CV162-MPM-JAD, 2009 WL 483116, at *1 (N.D. Miss. Jan. 23, 2009) ("Doctors and hospitals of course have the right to refuse treatment . . . .").

The Legislature passed the Texas Advance Directives Act, TEX. HEALTH & SAFETY CODE §§166.001–.166, to create a legal framework governing how physicians should handle and comply with advance directives, out-of-hospital do-not-resuscitate orders, and medical powers-of-attorney

in the context of life-sustaining intervention. *See* TADA §§166.002(1), (10) (defining "advance directive" and "life-sustaining treatment").

But TADA operates within the historical framework governing physician-patient relationships. The Legislature preserved patients' and doctors' rights to make decisions about care. TADA disclaims any intent to "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." *Id.* §166.051. The Act requires a physician or health-care facility that "is unwilling to honor a patient's advance directive or a treatment decision to provide life-sustaining treatment" to nevertheless provide that treatment, but "only until a reasonable opportunity has been afforded for transfer of the patient to another physician or heath care facility." *Id.* This is wholly consistent with physicians' ethical rights and duties.

Generally, TADA requires a physician to follow an advance directive or treatment decision made by or on behalf of a patient. However, it acknowledges that a patient's wishes may conflict with a physician's conscience or understanding of medical necessity. It thus provides a procedure by which physicians can seek to harmonize their ethical duties with patients' wishes. *Id.* §166.046. This is the procedure that is the subject of Plaintiff's constitutional challenge, but it applies regardless of whether the doctor wishes to *withhold* or *provide* life-sustaining intervention over the patient's wishes. *Id.*; *id.* §166.052. The procedure calls for a medical review committee to consider the case while a decision is made, with the patient's directive honored in the interim. *Id.* §166.046(a).

The §166.046 procedure gives the patient or his representative a right to notice of and to attend the committee's meeting, but it leaves the decision regarding whether to disregard the advance directive to the committee. *Id.* §166.046(b). If the committee makes the difficult decision

to countermand the patient's or family's wish, the physician or hospital must "make a reasonable effort to transfer the patient to a physician who is willing to comply with the directive." *Id.* §166.046(d). And if the committee's decision is to withdraw life-sustaining intervention, the hospital must continue the intervention for at least 10 days while efforts are made to transfer the patient. *Id.* §166.046(e).

TADA generally provides physicians who withdraw life-sustaining intervention in accordance with its provisions immunity from civil and criminal liability, as well as professional discipline, "unless the physician or health care facility fails to exercise reasonable care when applying the patient's advanced directive." *Id.* §§166.044(a), (c). Section 166.046 goes further, providing an absolute safe-harbor to physicians who comply with it when abstaining from compliance with a patient's wishes. *Id.* §166.045(d).

But §166.046 does not create a *mandatory* procedure, even for physicians wishing to abstain:

> 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.

Id. §166.045(c) (emphasis added). A physician who elects not to comply with the §166.046 procedure will lose the benefit of the safe-harbor provision. But he would still have the benefit of TADA's immunity to the extent that he withdrew life-sustaining intervention without "fail[ing] to exercise reasonable care when applying the patient's advance directive." *Id.* §166.044(a).

II. Section 166.046 is constitutional.

A. Plaintiff's arguments are based on a misconception about §166.046.

Plaintiff argues that §166.046 "violated David Christopher Dunn's [substantive and procedural] due process rights under the Texas Constitution and the U.S. Constitution," and she seeks a declaration to this effect. Plaintiff's First Am. Pet. ¶3. She complains that §166.046 "allows doctors and hospitals the absolute authority and unfettered discretion to terminate life-sustaining treatment of any patient," regardless of the patient's or his decision-maker's wishes. *Id.* ¶4.

Plaintiff's arguments are predicated upon a misconception about §166.046. The core of her arguments is that by "delegati[ng] decision-making authority to hospital systems in Texas, the state has authorized the deprivation of life to Texas patients." MSJ at 2. This argument relies on an understanding that §166.046 granted physicians "statutory authority" to withdraw life-sustaining intervention. *Id.* at 8.

In fact, TADA purported to "delegate" no such authority. It explicitly *did not* alter "*any* legal right or responsibility a person may have to effect the withholding or withdrawal of life-sustaining treatment in a lawful manner." TADA §166.051 (emphasis added). It did not grant physicians any new powers, and did not even require them to follow any procedure. It created a safe harbor for—that is, granted immunity to—physicians who withhold or withdraw life-sustaining intervention in a specific manner.

B. Section 166.046 is consistent with due-process guarantees.

To establish a constitutional violation, a party must prove state action. But §166.046 does not even impose a duty on—let alone control the actions of—private actors. Thus even if Plaintiff could show a constitutionally protected interest at stake in this case—and she cannot—her claim would founder on the state action prong.

The traditional procedural due-process inquiry has two parts: (1) whether the plaintiff had a protected liberty or property interest; and (2) what process is due. *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 428 (1982); *Univ. of Tex. Med. School at Hous. v. Than*, 901 S.W.2d 926, 929 (Tex. 1995).[6] The substantive due-process inquiry looks at whether the state has arbitrarily deprived the plaintiff of a constitutionally protected interest. *Patel v. Tex. Dep't of Licensing & Regulation*, 469 S.W.3d 69, 86–87 (Tex. 2015); *Simi Inv. Co. v. Harris Cty., Tex.*, 236 F.3d 240, 249 (5th Cir. 2000).

But because neither the Texas nor U.S. Constitution protects against purely private harms, Plaintiff must also demonstrate that the deprivation occurred due to state action. *Shelley v. Kraemer*, 334 U.S. 1, 13 (1948) (holding that the Constitution "erects no shield against merely private conduct, however discriminatory or wrongful"); *Republican Party of Tex. v. Dietz*, 940 S.W.2d 86, 90–91 (Tex. 1997) (applying same doctrine to the Texas Constitution).

Plaintiff can show neither a constitutionally protected interest nor state action. Accordingly, her constitutional claims fail.

1. Plaintiff fails to identify a protected interest.

To state a due-process claim, a plaintiff must identify an interest the constitution protects. Plaintiff identifies two purported interests: life, and the right to make individual medical decisions. In fact, neither of those interests are implicated here.[7]

[6] The federal Due Process Clause, U.S. CONST. amend. XIV, §1, and Texas's Due Course of Law Clause, TEX. CONST. art. I, §19, are functionally similar, and the Texas Supreme Court routinely relies on federal precedent in interpreting the state clause. *Univ. of Tex. Med. School at Hous. v. Than*, 901 S.W.2d 926, 929 (Tex. 1995). This is especially true of "state action issues," with respect to which the Court has explained that "[f]ederal court decisions provide a wealth of guidance." *Republican Party of Tex. v. Dietz*, 940 S.W.2d 86, 91 (Tex. 1997).

[7] For the purposes of this section, it is assumed that physicians are state actors. Of course, reality is to the contrary. *See infra* § II.B.2.

Plaintiff argues that TADA "authorize[s] the deprivation of life to Texas patients" and "delegat[es]" to physicians "the right to make life-related medical decisions," in contravention of the constitutional requirement "that the State not allow anyone 'but the patient' to make decisions regarding the cessation of life-sustaining treatment." MSJ at 2, 7. Plaintiff's arguments are premised on their mistaken understanding of TADA, and they imply that a patient has a *constitutional right* to receive treatment from a physician that the physician does not wish to give.

The constitution "generally confer[s] no affirmative right to governmental aid, even where such aid may be necessary to secure life, liberty, or property interests of which the government itself may not deprive the individual." *DeShaney v. Winnebago Cty. Dep't of Soc. Servs.*, 489 U.S. 189, 196 (1989). Only those whom the state has deprived of their freedom—prisoners and the involuntarily committed, for example—have a constitutional right to be protected by the state. *Id.* at 198–99 (citing *Youngberry v. Romeo*, 457 U.S. 307, 314–15 (1982) (involuntary commitment); *Estelle v. Gamble*, 429 U.S. 97, 103–04 (1976) (prisoners)). Otherwise, the state has no obligation to affirmatively provide services to protect a person's constitutionally protected interests.

Plaintiff has not confronted these fundamental precepts. Take, for example, her claim that TADA deprives patients of "life." In fact, it is the patient's illness that causes death; it is merely forestalled by life-sustaining intervention. *Vacco v. Quill*, 521 U.S. 793, 801 (1997) ("[W]hen a patient refuses life-sustaining medical treatment, he dies from an underlying fatal disease or pathology . . . ."). In *DeShaney*'s language, the life-sustaining treatment is "aid" that "secure[s]" the patient's life. 489 U.S. at 196. But patients have no constitutional right to this aid. *Id.* A physician is not *constitutionally obligated* to provide *any* treatment, including life-sustaining treatment.

A contrary holding would have severe consequences. Any illness or medical condition, if the responsibility of state actors, may cause constitutional injuries. If Plaintiff were right that the Constitution requires doctors to undertake treatment that *prevents or forestalls* illness, then patients would have a constitutional right to have *any and all* ailments treated. Yet the United States Supreme Court has expressly rejected this position. *Id.* at 198–99; *accord Abigail Alliance for Better Access to Developmental Drugs v. von Eschenbach*, 495 F.3d 695, 710 n.18 (D.C. Cir. 2007) (en banc) ("No circuit court has acceded to an affirmative access [to medical care] claim.");[8] *Johnson v. Thompson*, 971 F.2d 1487, 1495–96 (10th Cir. 1992) (rejecting argument that right to life includes right to receive medical care). Indeed, even in the unique prison context, courts have roundly rejected the notion that a patient has a right to receive "any particular type of treatment." *Long v. Nix*, 86 F.3d 761, 765 (8th Cir. 1996); *accord Jenkins v. Colo. Mental Health Inst. at Pueblo*, 215 F.3d 1337, at *1–2 (10th Cir. 2000) (unpublished).

The same analysis dooms Plaintiff's stated interest in the individual right to make medical decisions. That right is not diminished by TADA. Rather, TADA protects individuals' right to make their own medical decisions, confirming the longstanding rule that before terminating a patient-physician relationship, the physician must give the patient reasonable notice so that he can find someone who will comply with his wishes. But under *DeShaney*, an individual's right to make a decision does not compel a physician to implement it against the physician's own will. The patient's right is to make his choice, but this right does not overpower the physician's conscience. *See Harris v. McRae*, 448 U.S. 297, 318 (1980) ("Whether freedom of choice that is

[8] In *Abigail Alliance*, the *en banc* D.C. Circuit held that the Due Process Clause does not give terminally ill patients a right of access to potentially life-saving experimental drugs that have not been approved by the FDA. *Abigail Alliance for Better Access to Developmental Drugs v. von Eschenbach*, 495 F.3d 695, 711 (D.C. Cir. 2007) (en banc).

constitutionally protected warrants federal subsidization is a question for Congress to answer, not a matter of constitutional entitlement.").[9]

Plaintiff's claims of constitutional injury are predicated on the notion that a patient has a constitutional right not only to receive medical care, but to receive medical care of a specific type. But there is no constitutional right to medical care, let alone specific types of care, even if the care would save a person's life.

Because physicians have no constitutional obligation to provide treatment they wish not to provide, Plaintiff's claims cannot succeed.

2. A private physician's treatment decision does not constitute state action.

Proof of a constitutional claim requires state action. Where, as here, the person effecting the alleged deprivation is a private party, the Supreme Court has nevertheless found state action in only a few unique circumstances:

- The *public function test* asks "whether the private entity performs a function which is 'exclusively reserved to the State.'" *Cornish v. Corr. Servs. Corp.*, 402 F.3d 545, 549 (5th Cir. 2005) (quoting *Flagg Bros., Inc. v. Brooks*, 436 U.S. 149, 158 (1978).
- The *state compulsion test* attributes a private actor's conduct to the state when the state "exerts coercive power over the private entity or provides significant encouragement." *Id.* at 549–50 (citing *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 170–71 (1970).

[9] *Harris* illustrates the danger in Plaintiff's conception of constitutional rights. If a constitutional life interest conferred an affirmative right to medical care, so would the constitutional abortion right confer an affirmative right to have the state provide abortions. Yet *Harris* rejected precisely such an argument, explaining:

> It cannot be that because the government may not prohibit the use of contraceptives or prevent parents from sending their child to a private school, government, therefore, has an affirmative constitutional obligation to ensure that all persons have the financial resources to obtain contraceptives or send their children to private schools.

Harris v. McRae, 448 U.S. 297, 318 (1980) (citations omitted).

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

The Supreme Court has not resolved "[w]hether these different tests are actually different in operation or simply different ways of characterizing the necessarily fact-bound inquiry that confronts the Court in" state-action cases. *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 939 (1982).

Construed generously, Plaintiff's motion for summary judgment relies on the public-function and state-compulsion tests. MSJ at 8 ("[T]he hospital exercised statutory authority evocative of a government function . . . ."); *id.* at 9 ("[A] private hospital, when taking action under the statute, is performing a State function."). Plaintiff does not appear to argue that the State and defendants are joint actors.[10]

a. Section 166.046 does not satisfy the state-compulsion test.

Supreme Court precedent firmly refutes any notion that a hospital or physician invoking §166.046's safe harbor is a state actor. In the first place, §166.046 provides a discretionary, not mandatory, procedure; it requires no action from any private actor. The Supreme Court has repeatedly held that "[a]ction taken by private entities with *mere approval or acquiescence* of the State is not state action." *Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 52 (1999) (emphasis added); *accord Blum v. Yaretsky*, 457 U.S. 991, 1004–05 (1982); *Flagg Bros.*, 436 U.S. at 154–65; *Jackson*, 419 U.S. at 357.

Indeed, the "[p]rivate use of state-sanctioned private remedies or procedures does not rise to the level of state action." *Tulsa Prof'l Collection Servs., Inc. v. Pope*, 485 U.S. 478, 485–86 (1988); *accord Flagg Bros.*, 436 U.S. at 161–62. A physician or hospital making use of §166.046

[10] Nor could she. Nothing in Plaintiff's pleadings or motion for summary judgment suggests that the State is involved in the §166.046 procedure, beyond having created it.

is doing no more than using a state-provided remedy; the physician or hospital does not receive the type of "overt, significant assistance of state officials" that creates state action. *Pope*, 485 U.S. at 485–86; *cf. id.* at 487 (finding state action in private use of probate procedure, where probate judge was "intimately involved" in the procedure's operation); *Lugar*, 457 U.S. at 941 (holding that private use of prejudgment-attachment procedure constituted state action, where acts by sheriff and court clerk showed "joint participation with state officials in the seizure of the disputed property").

In the absence of overt assistance from or coercion by the State, even compliance with a *mandatory* procedure does not implicate state action. Consider *Blum v. Yaretsky*, in which "a class of Medicaid patients challeng[ed] decisions by the nursing homes in which they reside to discharge or transfer [them] without notice or an opportunity for a hearing." 457 U.S. at 993. Federal law *required* nursing homes to establish utilization review committees to "periodically assess[] whether each patient is receiving the appropriate level of care, and thus whether the patient's continued stay in the facility is justified." *Id.* at 994–95. The *Blum* plaintiffs were found by their respective URCs to not require a higher level of care, and were therefore transferred to other institutions in accordance with the statutory procedure. *Id.* at 995. Yet the Supreme Court held that there was no state action: the nursing homes, not the state, initiated the reviews and judged the patients' need for care on their own terms, not terms set by the state. The nursing homes' decisions "ultimately turn[ed] on medical judgments made by private parties according to professional standards that are not established by the State." *Id.* at 1008; *see also id.* at 1010 ("[The] regulations themselves do not dictate the decision to discharge or transfer in a particular case.").

Similarly, the decision to abstain from following a patient's wishes—and thus whether to initiate the §166.046 procedure—originates with the physician, who acts according to his own

conscience, expertise, and ethics. *Cf. id.* at 1009 (noting that nursing homes' transfer decisions were based on judgments that "the care [the patients] are receiving is medically inappropriate"). As in *Blum*, the State does not determine when or for what reasons a physician may invoke the §166.046 procedure. Moreover, unlike in *Blum*, use of §166.046 is permissive, even for physicians wishing to abstain. This case thus fits easily within *Blum*'s no-state-action holding.[11]

Another consideration cutting strongly against state action is that §166.046 does no more than immunize a physician who employs it. A similar issue arose in *Flagg Brothers*, in which the plaintiff sued to stop a warehouse from selling, pursuant to a warehouseman's lien, goods she had abandoned at the warehouse. *See* 436 U.S. at 153–54. State law provided the warehouse a procedure for making the sale and absolved it from liability if it complied. *See id.* at 151 n.1. The Court rejected the argument that the statute, or the state's decision to deny relief, constituted state action:

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

Id. at 165. Likewise, the Legislature's decision to provide safe harbor for a physician's acts does not convert those acts into public acts.

The Fifth Circuit has applied these principles in even more analogous circumstances. In *Goss v. Memorial Hospital System*, 789 F.2d 353, 356 (5th Cir. 1986), the court considered a

[11] Even a private hospital's involvement in an involuntary commitment, pursuant to state law, is not state action. *See, e.g.*, *Estades-Negroni v. CPC Hosp. San Juan Capestrano*, 412 F.3d 1, 5–6 (1st Cir. 2005) (holding that the "scheme does not compel or encourage involuntary commitment," but "merely provides a mechanism through which private parties can, in their discretion, pursue such commitment"); *Bass v. Parkwood Hosp.*, 180 F.3d 234, 242 (5th Cir. 1999); *S.P. v. City of Takoma Park, Md.*, 134 F.3d 260, 269 (4th Cir. 1998); *Harvey v. Harvey*, 949 F.2d 1127, 1130–31 (11th Cir. 1992); *see also Loce v. Time Warner Entm't Advance/Newhouse P'ship*, 191 F.3d 256, 266–67 (2d Cir. 1999) (holding that Time Warner's congressionally authorized, but non-mandatory, indecency policy was not state action).

provision of the Texas Medical Practice Act that immunized hospitals' medical peer review committees from civil liability for reporting physician incompetency to the Board of Medical Examiners.[12] The plaintiff argued "that this immunity granted appellees by the State of Texas provided such encouragement to appellees that the peer review committee acted as an investigatory arm of the state." *Id.* Relying on *Flagg Brothers*, the Fifth Circuit rejected this argument, writing that the conferral of immunity "did not make the action of appellees state action." *Id.*

Similarly, in *White v. Scrivner Corp.*, 594 F.2d 140, 141 (5th Cir. 1979), the Fifth Circuit considered whether a grocery store security guard's detention of a shoplifter constituted state action. The plaintiff relied on a Louisiana statute "insulating merchants from liability for detention of persons reasonably believed to be shoplifters." *Id.* at 143. The court held that *Flagg Brothers* "require[d] rejection of this argument." *Id.* Noting that the statute allowed, but did "not compel merchants to detain shoplifters," the court held that the immunity statute could not constitute state action. *Id.*

Because §166.046 is a permissive statute, initiated at a physician's sole option, and because it does no more than withhold a cause of action, there is no coercion or participation rising to the level of state action.

b. Section 166.046 does not satisfy the public-function test.

The Supreme Court holds that state action exists when a private entity performs a function that is "traditionally the *exclusive* prerogative of the State." *Jackson*, 419 U.S. at 353. These are powers "traditionally associated with sovereignty." *Id.* The public-function test is "exceedingly difficult to satisfy." MARTIN A. SCHWARTZ, SECTION 1983 LITIG. CLAIMS & DEFENSES §5.14[A]. The Court has "rejected reliance upon the doctrine in cases involving":

[12] An amended version of this statute is codified at TEX. OCC. CODE §160.010.

> coordination of amateur sports, the operation of a shopping mall, the furnishing of essential utility services, a warehouseman's enforcement of a statutory lien, the education of maladjusted children, the provision of nursing home care, and the administration of workers' compensation benefits.

Id. (footnotes omitted).

Plaintiff argues that "section 166.046 gives hospitals the power to decide a patient is no longer worthy of life-sustaining treatment," which is "a State function" because "the ability to take action which will result in death is not available to the public." MSJ at 9; *see also id.* at 11 (arguing that this power is "normally only held in the hands of State officials such as police officers and executioners who can take a person's life against that person's wishes with immunity").

There are any number of problems with Plaintiff's arguments, first among which is her misunderstanding of §166.046. The statute does not give doctors or hospitals the power to take life; it acknowledges their right not to provide treatment inconsistent with their own conscience. In this respect, Plaintiff's premise is deeply flawed.

Second, even accepting Plaintiff's characterization, she still could not show a public function. It is true that in one exceptionally narrow circumstance—legally sanctioned executions—the state has an affirmative power to take life. But the power ends there; it has not "traditionally" or "exclusively" extended into the field of medicine. On the contrary, centuries of common law, and the state and federal constitutions, *bar* the State from taking the lives of private citizens. Thus Plaintiff cannot cite, for example, a case in which a prison hospital has been held to have the power to deny a patient needed care.

Indeed, Plaintiff explicitly argues that the State *lacks* the power she nevertheless calls a public function. *See* MSJ at 7 (arguing that "the Constitution requires that the State not allow anyone 'but the patient' to make decisions regarding the cessation of life-sustaining treatment" (quoting *Cruzan ex rel. Cruzan v. Director, Mo. Dep't of Health*, 497 U.S. 261, 286 (1990)). There

is an obvious illogic in holding that a power the Constitution *denies* the State is nevertheless "traditionally the exclusive prerogative" *of the State*. No court has ever embraced such a conclusion.

Section 166.046 concerns a quintessentially *private* function: medical decision-making. *See Blum*, 457 U.S. at 1011 ("We are also unable to conclude that nursing homes perform a function that has been traditionally the exclusive prerogative of the State." (quotations omitted)). Even when overlaid with state regulations,[13] a hospital's decisions are its own. *See id.* 1011–12 (holding that even if the state were obligated to provide nursing home services, "it would not follow that decisions made in the day-to-day administration of a nursing home are the kind of decisions traditionally and exclusively made by the sovereign").

Decisions about when to enter into and leave doctor-patient relationships are governed by the desires of the doctor and patient. A doctor's decision to terminate that relationship is left to his medical judgment and conscience, provided that he conforms to a non-statutory code of medical ethics. These private, personal decisions are not—and never have been—regarded as public functions.

c. Plaintiff's cases are inapposite.

Rather than confront these cases, Plaintiff relies on a variety of public-function cases arising under entirely different factual scenarios. *See Brentwood Academy v. Tenn. Secondary Sch. Athletic Ass'n*, 531 U.S. 288, 295–96 (2001) (highlighting the fact-bound nature of the state-action

[13] Plaintiffs emphasize the fact that hospitals are "heavily regulated." MSJ at 9. But even "[i]n cases involving extensive state regulation of private activity," the Supreme Court has "consistently held that '[t]he mere fact that a business is subject to state regulation does not by itself convert its action into that of the State." *Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 52 (1999) (quoting *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 350 (1974)) (alteration in original).

inquiry). Not one comes close to suggesting that decisions about the provision or non-provision of medical care in a private setting is an exclusive public function.

Plaintiff's most similar case is *Belbachir v. McHenry County*, 726 F.3d 975, 978 (7th Cir. 2013), which held that a private medical-services company employed to treat inmates at a county jail was a state actor when it provided that care. But *Belbachir* did not hold that the provision of medical care was a public function. Rather, the key to its holding was that the care was provided *in a jail, to incarcerated persons*. *Id.* This is consistent with longstanding Supreme Court precedent holding that when a physician "is authorized and obliged to treat prison inmates," she does so "clothed with the authority of state law." *West v. Atkins*, 487 U.S. 42, 55 (1988) (quotations omitted). The public-function requirement is satisfied in this context by the fact of incarceration:

> Under state law, the only medical care West could receive for his injury was that provided by the State. If Doctor Atkins misused his power by demonstrating deliberate indifference to West's serious medical needs, the resultant deprivation was caused, in the sense relevant for the state-action inquiry, by the State's exercise of its right to punish West by incarceration and to deny him a venue independent of the of the State to obtain needed medical care.

Id. But where the patient has access to an independent venue, decisions about medical care are not attributable to the state.

The remainder of Plaintiff's cases have no resemblance to the facts of this case:

- *Marsh v. Alabama*, 326 U.S. 501, 508–09 (1946), which long predates *Jackson*'s exclusivity test, concerned a company-run town in which the company exercised the gamut of traditional municipal powers. The Court held that the town's streets were therefore public fora. *Id.* at 509.
- *Watchtower Bible & Tract Society of New York, Inc. v. Sagardia de Jesus*, 634 F.3d 3 (1st Cir. 2011), is to similar effect. It holds that privately controlled *public* streets are public fora. *Id.* at 10. Likewise, *Lee v. Katz*, 276 F.3d 550, 555–56 (9th Cir. 2002), found state action when a private actor regulated speech in a public forum.

- *Smith v. Allwright*, 321 U.S. 649, 664 (1944), one of the *White Primary Cases*,[14] concerned the Texas Democratic Party's exclusion of African-Americans from its primary elections. The Court concluded that the holding of primaries, which often control the outcome of the general election, constitutes state action. *Id. Duke v. Massey*, 87 F.3d 1226 (11th Cir. 1996), and *Duke v. Smith*, 13 F.3d 388 (11th Cir. 1994), which Plaintiff also cites, are merely applications of the *White Primary Cases*.

- *Romanski v. Detroit Entertainment, LLC*, 428 F.3d 629, 637 (6th Cir. 2005), held that private security guards "endowed by law with plenary police powers such that they are *de facto* police officers" were state actors. But the court held that a more limited conferral of power would not constitute state action. *Id.*; *see also White*, 594 F.2d at 143.

Because neither logic nor precedent supports a finding of state action in this case, Plaintiff's constitutional claims are without merit.

CONCLUSION AND PRAYER

For physicians, patients, and families, no aspect of health care is more fraught than end-of-life decision-making. In many instances, physicians face a difficult choice between their desire to carry out their patients' wishes and their ethical duty, as medical professionals, not to increase or prolong their patients' suffering. TADA's §166.046 provides an important tool for balancing these competing concerns.

Plaintiff's constitutional challenge misapprehends both the statute and its purpose. As a consequence, Plaintiff has failed to demonstrate two fundamental prerequisites to a successful due process claim: a constitutionally protected interest and state action.

Amici request that this Court deny Plaintiff's motion for summary judgment.

[14] *See also Dietz*, 940 S.W.2d at 91–92 (discussing the *White Primary Cases*).

Respectfully submitted,

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CAUSE NO. 2015-69681

EVELYN KELLY, INDIVIDUALLY, AND ON BEHALF OF THE ESTATE OF DAVID CHRISTOPHER DUNN	§	IN THE DISTRICT COURT OF
V.	§	HARRIS COUNTY, TEXAS
THE METHODIST HOSPITAL	§	189TH JUDICIAL DISTRICT

DEFENDANT HOUSTON METHODIST HOSPITAL f/k/a THE METHODIST HOSPITAL'S RESPONSE TO PLAINTIFF'S AMENDED MOTION FOR SUMMARY JUDGMENT

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW, **HOUSTON METHODIST HOSPITAL f/k/a THE METHODIST HOSPITAL** ("Houston Methodist" or the "Hospital"), and files this Response to Plaintiff's Amended Motion for Summary Judgment, and respectfully shows the Court the following:

I.
SUMMARY OF THE ARGUMENT

This Court should deny Plaintiff's Amended Motion for Summary Judgment in its entirety because:

- **This cause of action is moot;**
- **Houston Methodist is not a state actor;**
- **The constitutionality of Texas Health and Safety Code § 166.046 is an issue more appropriately addressed by the Texas Legislature; and**
- **Houston Methodist did not violate Dunn's civil or due process rights.**

II.
ARGUMENTS AND AUTHORITIES

A. Applicable Legal Standard for Summary Judgment.

A nonmovant in a traditional summary judgment proceeding is not required to produce summary judgment evidence until after the movant establishes it is entitled to summary judgment as a matter of law.[1] In deciding whether there is a disputed issue of material fact that precludes summary judgment, the court takes as true all evidence favorable to the nonmovant.[2] The court must view the evidence in the light most favorable to the nonmovant and must indulge every reasonable inference and resolve all doubts in favor of the nonmovant.[3] In light of these standards, this Court should deny Plaintiff's traditional motion for summary judgment because Plaintiff has failed to prove all elements of her causes of action, resulting in genuine issues of material fact.

B. This Cause of Action is Moot.

a. As a result of Dunn's natural death, the due process and civil rights claims asserted against Houston Methodist no longer present a live case or controversy.

Due to Dunn's natural death and the undisputed fact that Houston Methodist never withdrew life-sustaining care, there is no longer a live case or controversy between the parties. As a result, Plaintiff's alleged injuries no longer exist and this Court cannot provide any effectual relief on Plaintiff's claims. Therefore, this Court lacks subject matter

[1] *Casso v. Brand*, 776 S.W.2d 551, 556 (Tex. 1989).

[2] *Limestone Prods. Distrib., Inc. v. McNamara*, 71 S.W.3d 308, 311 (Tex. 2002); *Rhône-Poulenc, Inc. v. Steel*, 997 S.W.2d 217, 223 (Tex. 1999); *Nixon v. Mr. Prop. Mgmt. Co.*, 690 S.W.2d 546, 548–49 (Tex. 1985).

[3] *Limestone Prods.*, 71 S.W.3d at 311; *Nixon*, 690 S.W.2d at 549.

jurisdiction over the aforementioned claims, as said claims are moot. Any decision rendered by this Court would constitute an advisory opinion.[4]

Article III of the Constitution confines this Court's jurisdiction to those claims involving actual "cases" or "controversies."[5] "To qualify as a case fit for adjudication, 'an actual controversy must be extant at all stages of review, not merely at the time the complaint is filed.'"[6] When a case is moot – that is, when the issues presented are no longer live or when the parties lack a generally cognizable interest in the outcome – a case or controversy ceases to exist, and dismissal of the suit is compulsory.[7]

b. No exception to the mootness doctrine applies to this case and Texas law does not recognize a public interest exception to the mootness doctrine.

Contrary to Plaintiff's assertion, this matter is moot as it is not capable of repetition. In their argument, Plaintiff fails to cite an important piece of jurisprudence regarding the "capable of repetition yet evading review" exception to the mootness doctrine: to invoke this exception, a plaintiff must prove that "a reasonable expectation exists that the *same complaining party* will be subjected to the *same action again*."[8] Not only must a plaintiff show that the challenged action is too short in duration as to evade review, but also must show a

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[4] "The distinctive feature of an advisory opinion is that it decides an abstract question of law without binding the parties." *Tex. Air Control Bd.*, 852 S.W.2d at 444 (citing *Ala. State Fed'n of Labor v. McAdory*, 325 U.S. 450, 461 (1945); *Firemen's Ins. Co. v. Burch*, 442 S.W.2d 331, 333 (Tex. 1968); *Cal. Products, Inc. v. Puretex Lemon Juice, Inc.*, 160 Tex. 586, 591 (Tex. 1960)). "An opinion issued in a case brought by a party without standing is advisory because rather than remedying an actual or imminent harm, the judgment addresses only a hypothetical injury." *Tex. Air Control Bd.*, 852 S.W.2d at 444.

[5] U.S. CONST. art. III, § 2, cl. 1; TEX. CONST. art. II, § 1.

[6] *Arizonans for Official English v. Arizona*, 520 U.S. 43, 67 (1997) (citing *Preiser v. Newkirk*, 422 U.S. 395, 401 (1975)); *see also Lewis v. Continental Bank Corp.*, 494 U.S. 472, 477 (1990).

[7] *City of Erie v. Pap's A.M.*, 529 U.S. 277, 287 (2000) (citing *Cnty. of Los Angeles v. Davis*, 440 U.S. 625, 631 (1979)).

[8] *Williams v. Lara*, 52 S.W.3d 171, 184 (Tex. 2001) (emphasis added); *see Murphy v. Hunt*, 455 U.S. 478, 482 (1982); *Weinstein v. Bradford*, 423 U.S. 147, 149 (1975); *Blum v. Lanier*, 997 S.W.2d 259, 264 (Tex. 1999); *Gen. Land Office v. OXY U.S.A., Inc.*, 789 S.W.2d 569, 571 (Tex. 1990).

"reasonable expectation" or "demonstrated probability" that the same controversy will recur *involving the same complaining party.*[9] The "mere physical or theoretical possibility that the same party may be subjected to the same action again is not sufficient to satisfy the test."[10] In addition, this rare "exception to the mootness doctrine has only been used to challenge unconstitutional acts performed by the government."[11] Without question, Houston Methodist is a private hospital, not a government entity.

In the present case, it is impossible for the same complaining party to be subjected to the same action in the future. Dunn is no longer living, and therefore, cannot be subject to the same action or controversy.[12] Additionally, because of the expiration of Dunn's natural life, he can never again, in any capacity, be a complaining party to a lawsuit. As such, there is no possible way, let alone reasonable expectation, that the same complaining party will be subjected to the same action or controversy.[13]

Plaintiff cites three cases in support of their novel request that this Court ignore Texas law stating that a plaintiff must prove that "a reasonable expectation exists that the *same complaining party* will be subjected to the *same action again.*"[14] None of these three cases are applicable or persuasive in the instant case.

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[9] *Murphy*, 455 U.S. at 482.

[10] *Trulock v. City of Duncanville*, 277 S.W.3d 920, 924-25 (Tex. App.—Dallas 2009, no pet.).

[11] *Blackard v. Schaffer*, 05-16-00408-CV, 2017 WL 343597, at *6 (Tex. App.—Dallas Jan. 18, 2017, pet. filed) (citing *Gen. Land.*, 789 S.W.2d at 571; *City of Dallas v. Woodfield*, 305 S.W.3d 412, 418 (Tex. App.–Dallas 2010, no pet.); *In re Sierra Club*, 420 S.W.3d 153, 157 (Tex. App.–El Paso 2012, orig. proceeding)).

[12] *See Williams*, 52 S.W.3d at 184–85.

[13] *Id.*

[14] *Williams*, 52 S.W.3d at 184 (Tex. 2001) (emphasis added); *see Murphy,* 455 U.S. at 482 (1982); *Weinstein,* 423 U.S. at 149 (1975); *Blum,* 997 S.W.2d at 264 (Tex. 1999); *OXY U.S.A., Inc.,* 789 S.W.2d at 571 (Tex. 1990).

First, Plaintiff cites incomplete and vague dicta from *Lee v. Valdez*.[15] In *Lee*, the court held that a prisoner's claim for declaratory relief regarding inadequate medical care while in prison was rendered moot by the prisoner's death. The court explained:

> To satisfy the "case or controversy" requirement of Article III, a "plaintiff must show that he has sustained or is immediately in danger of sustaining some direct injury as the result of the challenged official conduct and the injury or threat of injury must be both real and immediate, not conjectural or hypothetical." "Past exposure to illegal conduct does not in itself show a present case or controversy regarding injunctive relief ... if unaccompanied by any continuing, present adverse effects." Courts therefore hold, for example, that when a prisoner challenges prison conditions after he is released from confinement, his claim for injunctive and/or declaratory relief is moot, and the prisoner can no longer challenge the prison conditions unless he can point to a concrete and continuing injury. Similarly, the death of a prisoner renders a claim for prospective injunctive relief against the prison conditions moot. Although there may be rare instances where a court holds that a case involving a deceased prisoner is not moot, either because it is a class action or because it is "capable of repetition yet evading review," plaintiffs have presented no evidence that Sims's case fits into one of these categories. Even if plaintiffs can establish at trial that they are entitled to recover damages, their request for prospective declaratory and injunctive relief related to Sims is moot in light of her death. Accordingly, these claims for relief are dismissed without prejudice.[16]

The court in *Lee* does not suggest that courts should hear cases where there is no longer a live case or controversy between the parties because the party claiming they are in danger of sustaining an injury has died. Moreover, the court in *Lee* does not explain under what "rare circumstance" a case involving a deceased prisoner is not moot.[17] Instead, the holding in *Lee* is that the case is moot because of the prisoner's death.[18] Therefore, the holding in *Lee* supports the dismissal of the present case. Like in *Lee*, the natural death of Dunn has

[15] *Lee v. Valdez*, CIV.A.3:07-CV-1298-D, 2009 WL 1406244 (N.D. Tex. May 20, 2009).

[16] *Id.* at *14 (internal citations omitted).

[17] *Id.*

[18] *Id.*

eliminated the controversy between the parties. Accordingly, like in *Lee*, Plaintiff's claims should be dismissed.

Second, Plaintiff cites a California Supreme Court case captioned *Conservatorship of Wendland* in support of their claim that this Court should apply a mootness exception. However, California applies a different standard than Texas when evaluating the "capable of repetition yet evading review" exception to the mootness doctrine. In California, courts "have the discretion to decide otherwise moot cases presenting important issues that are capable of repetition yet tend to evade review."[19] This is not the law in Texas. In Texas, "[t]o invoke the exception, a plaintiff must prove that: (1) the challenged action was too short in duration to be litigated fully before the action ceased or expired; and (2) a reasonable expectation exists that the same complaining party will be subjected to the same action again."[20] Unlike California, whether or not a case concerns 'important issues' is not a factor in applying this mootness exception in Texas. In citing the *Wendland* case, Plaintiff asks this Court to ignore Texas law in favor of adopting law from California. This is improper and the Court should apply well-settled Texas law.[21]

Third, Plaintiff cites *Woods v. Kentucky*, a Supreme Court of Kentucky case.[22] Again, Kentucky law regarding "capable of repetition yet evading review" exception to the mootness doctrine is different than the law in Texas. Kentucky recognizes a public interest

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[19] *Conservatorship of Wendland*, 26 Cal. 4th 519, footnote 1 (2001).

[20] *In re Philadelphia Indem. Ins. Co.*, 12-17-00117-CV, 2017 WL 3224886, at *2 (Tex. App.—Tyler July 31, 2017, no pet. h.) (citing *Texas A & M Univ.-Kingsville v.Yarbrough*, 347 S.W.3d 289, 290 (Tex. 2011); *Williams*, 52 S.W.3d at 184–85; *Blum*, 997 S.W.2d at 264 (Tex. 1999); *OXY U.S.A.*, 789 S.W.2d at 571 (Tex. 1990); *In re Fort Worth Star Telegram*, 441 S.W.3d 847, 852 (Tex. App.–Fort Worth 2014, orig. proceeding).

[21] *See supra* footnote 49.

[22] *Morgan v. Getter*, 441 S.W.3d 94, 101 (Ky. 2014).

exception to the mootness doctrine.[23] In a later case, the Kentucky Supreme Court explained that it reviewed *Woods* "not in any strict sense under the standard 'capable of repetition' exception, but rather because it raised issues of substantial public importance."[24] In other words, the Kentucky Supreme Court heard *Woods* under a public interest exception to the mootness doctrine that is recognized in Kentucky jurisprudence. The Texas Supreme Court has not recognized a public interest exception to the mootness doctrine. The First Court of Appeals has explicitly stated that "until and unless the Texas Supreme Court recognizes the public interest exception to the mootness doctrine, **it is not a viable legal theory in our jurisdiction.**"[25] In relying on both *Woods* and *Wendland*, cases from jurisdictions outside Texas, Plaintiff asks this Court to apply a public interest exception to the mootness doctrine that simply does not exist in the State of Texas. The First Court of Appeals has explicitly rejected this legal theory.[26]

Here in Texas, the only exceptions to the mootness doctrine are (1) if the issue is capable of repetition, but evading review; and (2) the collateral consequences exception.[27] Neither exception applies to the instant case. As discussed above, the "capable of repetition" prong of the mootness exception requires plaintiff to prove that "a reasonable expectation exists that the *same complaining party* will be subjected to the *same action again.*"[28]

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[23] *Id.*

[24] *Id.*

[25] *Houston Chronicle Pub. Co. v. Thomas*, 196 S.W.3d 396, 400 (Tex. App.—Houston [1st Dist.] 2006, no pet.)(emphasis added).

[26] *Id.*

[27] *FDIC v. Nueces Cty.*, 886 S.W.2d 766, 767 (Tex. 1994) (citing *Camarena v. Tex. Employment Com'n*, 754 S.W.2d 149, 151 (Tex. 1988); *see also Gen. Land Office v. OXY U.S.A., Inc.*, 780 S.W.2d 569, 571 (Tex. 1990).

[28] *Williams*, 52 S.W.3d at 184 (Tex. 2001) (emphasis added); *see Murphy*, 455 U.S. at 482 (1982); *Weinstein*, 423 U.S. at 149 (1975); *Blum*, 997 S.W.2d at 264 (Tex. 1999); *OXY U.S.A., Inc.*, 789 S.W.2d at 571 (Tex. 1990).

Plaintiff has not argued the collateral consequences exception. The collateral consequences exception is inapplicable as collateral-consequences exception is "invoked only under narrow circumstances when vacating the underlying judgment will not cure the adverse consequences suffered by the party seeking to appeal that judgment."[29] There is no judgment at issue in this case. Accordingly, the narrow circumstances for which this exception might apply is not the circumstances present in the instant case.

Further, the undisputed facts here show that Methodist provided Dunn with life-sustaining care until his natural death – life-sustaining treatment was never withdrawn. Plaintiff seeks to have Texas Health and Safety Code §166.046 declared unconstitutional.[30] Plaintiff alleges that the law allows Texas hospitals "to end a patient's life by taking away life-sustaining treatment" and therefore violates procedural due process, substantive due process and civil rights.[31] Here, in addition to the fact that there is no possible way that Dunn will be subject to the same alleged deprivation of due process or civil rights under the Texas Health and Safety Code §166.046, the termination of life-sustaining treatment is also not capable of repetition because it never happened in the first place.

Based on Plaintiff's inability to meet the "capable of repetition" prong of the mootness exception, there is no need to consider whether the challenged action was in its duration too short to be fully litigated prior to its cessation or expiration, or whether Plaintiff

[29] *Marshall v. Hous. Auth. of City of San Antonio*, 198 S.W.3d 782, 789 (Tex. 2006); *see also RLZ Investments*, 411 S.W.3d at 33 ("Texas courts have recognized two exceptions to the mootness doctrine, *under which an appellate court should still consider the merits of an appeal even if the immediate issues between the parties have become moot*: (1) the capability of repetition yet evading review exception and (2) the collateral consequences exception.") (emphasis added).

[30] *See* Plaintiff's Amended Motion for Summary Judgment at13.

[31] *Id.*; *see also id.* at 13.

could obtain review before the issue became moot, as both elements are necessary for the exception to apply. Therefore, because this matter is not capable of repetition yet evading review and thus moot, any decision rendered by this Court would constitute an advisory opinion.[32] Accordingly, Plaintiff's due process and civil rights causes of action must be dismissed as moot.

C. Houston Methodist Did Not Act Under Color of State Law.

Undeniably, Houston Methodist is not a state actor and thus cannot be sued in the capacity in which Plaintiff seeks. As indicated in *Jones v. Memorial Hospital*, state-actor status can be an extremely fact-intensive issue that is difficult to get resolved by summary judgment evidence.[33] Further, as the movant, Plaintiff is responsible for conclusively establishing that Houston Methodist is a state actor.[34] There has been neither a single piece of discovery exchanged, nor a single deposition taken to date. As such, it would seem impossible for a court to determine that a full development of all relevant facts has been made, enough to conclude Houston Methodist is or functions as a state actor.

Contrary to Plaintiff's argument, Houston Methodist did not act under the color of state law. Plaintiff looks to *National Collegiate Athletic Ass'n v. Tarkanian*, 488 U.S. 179, 192 (1988), noting that "[i]n the typical case raising a state-action issue, a private party has taken

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[32] "The distinctive feature of an advisory opinion is that it decides an abstract question of law without binding the parties." *Tex. Ass'n of Business v. Tex. Air Control Bd.*, 852 S.W.2d 440, 444 (Tex. 1993) (citing *Ala. State Fed'n of Labor v. McAdory*, 325 U.S. 450, 461 (1945); *Firemen's Ins. Co. v. Burch*, 442 S.W.2d 331, 333 (Tex. 1968); *Cal. Prod., Inc. v. Puretex Lemon Juice, Inc.*, 160 Tex. 586, 591 (Tex. 1960)). "An opinion issued in a case brought by a party without standing is advisory because rather than remedying an actual or imminent harm, the judgment addresses only a hypothetical injury." *Tex. Air Control Bd.*, 852 S.W.2d at 444.

[33] *Jones v. Mem'l Hosp. Sys.*, 746 S.W.2d 891, 896 (Tex. App.—Houston [1st Dist.] 1988, no writ.) ("Whether a private hospital has actually functioned as a public entity involves a mixed question of fact and law. To make an accurate determination of that issue requires a full development of all relevant facts and a careful consideration of all pertinent laws.").

[34] *Id.* at 896.

the decisive step that caused the harm to the plaintiff, and the question is whether the State was sufficiently involved to treat that decisive conduct as state action…Thus, in the usual case we ask whether the State provided a mantle of authority that enhanced the power of the harm-causing individual actor"[35] Plaintiff incorrectly relies on this case, which held that the NCAA was *not* a state actor, in support of their theory that because the State enacted Tex. Health & Safety Code §166.046 and Houston Methodist used this statute, this use somehow equates to a state action.

Proof of a constitutional claim requires state action. Houston Methodist cannot be considered a state actor. The Supreme Court has found state action in only a few unique circumstances, none of which are present here:

- The *public function test* asks "whether the private entity performs a function which is 'exclusively reserved to the State.'"[36]
- The *state compulsion test* attributes a private actor's conduct to the state when the state "exerts coercive power over the private entity or provides significant encouragement."[37]
- And the *nexus test* asks if "the State has inserted 'itself into a position of interdependence with the private actor, such that it was a joint participant in the enterprise.'"[38]

[35] *National Collegiate Athletic Ass'n v. Tarkanian*, 488 U.S. 179, 192 (1988). (Holding that state university's imposition of disciplinary sanctions against basketball coach in compliance with NCAA rules did not turn NCAA's otherwise private conduct into state action was not performed "under color" of state law).

[36] *Cornish v. Corr. Servs. Corp.*, 402 F.3d 545, 549 (5th Cir. 2005) (quoting *Flagg Bros., Inc. v. Brooks*, 436 U.S. 149, 158 (1978).

[37] *Id.* at 549–50 (citing *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 170–71 (1970).

[38] *Id.* at 550 (quoting *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 357–58 (1974)) (brackets omitted).

The Supreme Court has not resolved "[w]hether these different tests are actually different in operation or simply different ways of characterizing the necessarily fact-bound inquiry that confronts the Court in" state-action cases.[39]

a. Section 166.046 does not satisfy the state-compulsion test.

Supreme Court precedent firmly refutes any notion that a hospital or physician invoking §166.046's safe harbor is a state actor. In the first place, §166.046 provides a discretionary, not mandatory, procedure; it requires no action from any private actor. The Supreme Court has repeatedly held that "[a]ction taken by private entities with *mere approval or acquiescence* of the State is not state action."[40]

Indeed, the "[p]rivate use of state-sanctioned private remedies or procedures does not rise to the level of state action."[41] A physician or hospital making use of §166.046 is doing no more than using a state-provided remedy; the physician or hospital does not receive the type of "overt, significant assistance of state officials" that creates state action.[42]

In the absence of overt assistance from or coercion by the State, even compliance with a *mandatory* procedure does not implicate state action. Consider *Blum v. Yaretsky*, in which "a class of Medicaid patients challeng[ed] decisions by the nursing homes in which they reside to discharge or transfer [them] without notice or an opportunity for a hearing."[43]

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[39] *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 939 (1982).

[40] *Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 52 (1999) (emphasis added); *accord Blum v. Yaretsky*, 457 U.S. 991, 1004–05 (1982); *Flagg Bros.*, 436 U.S. at 154–65; *Jackson*, 419 U.S. at 357.

[41] *Tulsa Prof'l Collection Servs., Inc. v. Pope*, 485 U.S. 478, 485–86 (1988); *accord Flagg Bros.*, 436 U.S. at 161–62.

[42] *Pope*, 485 U.S. at 485–86; *cf. id.* at 487 (finding state action in private use of probate procedure, where probate judge was "intimately involved" in the procedure's operation); *Lugar*, 457 U.S. at 941 (holding that private use of prejudgment-attachment procedure constituted state action, where acts by sheriff and court clerk showed "joint participation with state officials in the seizure of the disputed property").

[43] 457 U.S. at 993.

Federal law *required* nursing homes to establish utilization review committees ("URC") to "periodically assess whether each patient is receiving the appropriate level of care, and thus whether the patient's continued stay in the facility is justified."[44] The *Blum* plaintiffs were found by their respective URCs to not require a higher level of care, and were therefore transferred to other institutions in accordance with the statutory procedure.[45] Yet the Supreme Court held that there was no state action: the nursing homes, not the state, initiated the reviews and judged the patients' need for care on their own terms, not terms set by the state. The nursing homes' decisions "ultimately turn[ed] on medical judgments made by private parties according to professional standards that are not established by the State."[46]

Similarly, the decision to abstain from following a patient's wishes—and thus whether to initiate the §166.046 procedure—originates with the physician, who acts according to his own conscience, expertise, and ethics.[47] As in *Blum*, the State does not determine when or for what reasons a physician may invoke the §166.046 procedure. Moreover, unlike in *Blum*, use of §166.046 is permissive, even for physicians wishing to abstain. This case thus fits easily within *Blum*'s no state-action holding.[48]

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[44] *Id.* at 994–95.

[45] *Id.* at 995.

[46] *Id.* at 1008; *see also id.* at 1010 ("[The] regulations themselves do not dictate the decision to discharge or transfer in a particular case.").

[47] *Cf. id.* at 1009 (noting that nursing homes' transfer decisions were based on judgments that "the care [the patients] are receiving is medically inappropriate").

[48] Even a private hospital's involvement in an involuntary commitment, pursuant to state law, is not state action. *See, e.g., Estades-Negroni v. CPC Hosp. San Juan Capestrano*, 412 F.3d 1, 5–6 (1st Cir. 2005) (holding that the "scheme does not compel or encourage involuntary commitment," but "merely provides a mechanism through which private parties can, in their discretion, pursue such commitment"); *Bass v. Parkwood Hosp.*, 180 F.3d 234, 242 (5th Cir. 1999); *S.P. v. City of*

Another consideration cutting strongly against state action is that §166.046 does no more than immunize a physician who employs it. A similar issue arose in *Flagg Brothers*, in which the plaintiff sued to stop a warehouse from selling, pursuant to a warehouseman's lien, goods she had abandoned at the warehouse.[49] State law provided the warehouse a procedure for making the sale and absolved it from liability if it complied.[50] The Court rejected the argument that the statute, or the state's decision to deny relief, constituted state action:

> If the mere denial of judicial relief is considered sufficient encouragement to make the State responsible for those private acts, all private deprivations of property would be converted into public acts whenever the State, for whatever reason, denies relief sought by the putative property owner.[51]

Likewise, the Legislature's decision to provide safe harbor for a physician's acts does not convert those acts into public acts.

The Fifth Circuit has applied these principles in even more analogous circumstances. In *Goss v. Memorial Hospital System*[52], the court considered a provision of the Texas Medical Practice Act that immunized hospitals' medical peer review committees from civil liability for reporting physician incompetency to the Board of Medical Examiners.[53] The plaintiff argued "that this immunity granted appellees by the

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Takoma Park, Md., 134 F.3d 260, 269 (4th Cir. 1998); *Harvey v. Harvey*, 949 F.2d 1127, 1130– 31 (11th Cir. 1992); *see also Loce v. Time Warner Entm't Advance/Newhouse P'ship*, 191 F.3d 256, 266–67 (2d Cir. 1999) (holding that Time Warner's congressionally authorized, but non-mandatory, indecency policy was not state action).

[49] *See* 436 U.S. at 153–54.

[50] *See id.* at 151 n.1.

[51] *Id.* at 165.

[52] 789 F.2d 353, 356 (5th Cir. 1986)

[53] An amended version of this statute is codified at TEX. OCC. CODE §160.010.

State of Texas provided such encouragement to appellees that the peer review committee acted as an investigatory arm of the state."[54] Relying on *Flagg Brothers*, the Fifth Circuit rejected this argument, writing that the conferral of immunity "did not make the action of appellees a state action."[55]

Similarly, in *White v. Scrivner Corp.*, the Fifth Circuit considered whether a grocery store security guard's detention of a shoplifter constituted state action.[56] The plaintiff relied on a Louisiana statute "insulating merchants from liability for detention of persons reasonably believed to be shoplifters."[57] The court held that *Flagg Brothers* "require[d] rejection of this argument."[58] Noting that the statute allowed, but did "not compel merchants to detain shoplifters," the court held that the immunity statute could not constitute state action.[59]

Because §166.046 is a permissive statute, initiated at a physician's sole option, and because it does no more than withhold a cause of action, there is no coercion or participation rising to the level of state action.

b. Section 166.046 does not satisfy the public-function test.

The Supreme Court holds that state action exists when a private entity performs a

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[54] *Id.*

[55] *Id.*

[56] See 594 F.2d 140, 141 (5th Cir. 1979).

[57] *Id.* at 143.

[58] *Id.*

[59] *Id.*

function that is "traditionally the *exclusive* prerogative of the State."[60] These are powers "traditionally associated with sovereignty."[61] The public-function test is "exceedingly difficult to satisfy."[62] The Court has "rejected reliance upon the doctrine in cases involving":

> coordination of amateur sports, the operation of a shopping mall, the furnishing of essential utility services, a warehouseman's enforcement of a statutory lien, the education of maladjusted children, the provision of nursing home care, and the administration of workers' compensation benefits.[63]

Plaintiff argues that section 166.046 gives hospitals the power to decide a patient is no longer worthy of life-sustaining treatment. The statute does not give doctors or hospitals the power to take life; it acknowledges their right not to provide treatment inconsistent with their own conscience and long-standing medical ethics. In this respect, Plaintiff's premise is deeply flawed.

In the case at hand, Plaintiff cannot show a public function. It is true that in one exceptionally narrow circumstance - legally sanctioned executions - the state has an affirmative power to take life. But the power ends there; it has not "traditionally" or "exclusively" extended into the field of medicine. On the contrary, centuries of common law, and the state and federal constitutions, *bar* the State from taking the lives of private citizens. Thus, Plaintiff cannot cite, for example, a case in which a prison hospital has been held to have the power to deny a patient needed care.

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[60] *Jackson*, 419 U.S. at 353.

[61] *Id.*

[62] MARTIN A. SCHWARTZ, SECTION 1983 LITIG. CLAIMS & DEFENSES §5.14[A].

[63] *Id.* (footnotes omitted).

Section 166.046 concerns a quintessentially *private* function: medical decision-making.[64] Even when overlaid with state regulations, a hospital's decisions are its own.[65] Decisions about when to enter into and leave doctor-patient relationships are governed by the desires of the doctor and patient. A doctor's decision to terminate that relationship is left to his medical judgment and conscience, provided that he conforms to a non-statutory code of medical ethics. These private, personal decisions are not - and never have been - regarded as public functions.

c. Section 166.046 does not satisfy the nexus test.

Likewise, the Plaintiff cannot meet her burden to show that the nexus test applies to this case. The nexus test asks if the State has insinuated itself into a position of interdependence with the private actor, such that it was a joint participant of the enterprise.[66] In *Jackson*, the plaintiff sued a privately-owned utility company after the company disconnected her electricity.[67] The plaintiff argued that because the company had failed to provide adequate notice, her due process rights had been violated.[68] The plaintiff claimed that because the utility was state-regulated and was essentially a statewide monopoly, the utility was a state actor.[69] The U.S. Supreme Court disagreed, holding that there was not a

[64] *See Blum*, 457 U.S. at 1011 ("We are also unable to conclude that nursing homes perform a function that has been traditionally the exclusive prerogative of the State." (quotations omitted)).

[65] *See id.* 1011–12 (holding that even if the state were obligated to provide nursing home services, "it would not follow that decisions made in the day-to-day administration of a nursing home are the kind of decisions traditionally and exclusively made by the sovereign").

[66] *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 366, 95 S. Ct. 449, 461, 42 L. Ed. 2d 477 (1974).

[67] *Id.* at 346–47.

[68] *Id.* at 348.

[69] *Id.* at 350–52.

"sufficiently close nexus" between the conduct of the utility company and the state in order to conclude that the utility was a state actor.[70]

Here, like the utility company in *Jackson*, Houston Methodist Hospital is a privately owned and operated corporation. Plaintiff has not alleged that the State and Houston Methodist Hospital are joint participants of the same enterprise and there is absolutely no rational argument that there is a sufficiently close nexus between the conduct of Houston Methodist Hospital and the State. Accordingly, since Houston Methodist Hospital cannot be deemed a state actor, then Plaintiff's request for summary judgment fails as a matter of law.

Federal precedent leaves no room for conjecture. Houston Methodist Hospital is not a state actor, and does not function as a state actor. Therefore, Plaintiff's Amended Motion for Summary Judgment must be denied on this point.

D. The Constitutionality of Texas Health and Safety Code § 166.046 is an Issue More Appropriately Addressed By the Texas Legislature.

Plaintiff spends a majority of their motion attempting to discredit the constitutionality of TEXAS HEALTH AND SAFETY CODE § 166.046; however, this issue is better suited for assessment by the Texas Legislature. Houston Methodist Hospital continues to take no formal position on the constitutionality of the statute itself, but is prepared to defend its conduct, and the conduct of its healthcare providers that provided professional, ethical and compassionate care and treatment to Christopher Dunn. Simply put, Houston Methodist Hospital did not violate Plaintiff's constitutional rights and rejects Plaintiff's allegations in full. As such, Houston Methodist Hospital denies any assertion that

[70] *Id.* at 354–59 (noting "[d]octors, … are all in regulated businesses, providing arguably essential goods and services, 'affected with a public interest.' We do not believe that such a status converts their every action, absent more, into that of the State").

the Hospital committed any wrongdoing in its care and treatment of Dunn, or its implementation of TEXAS HEALTH AND SAFETY CODE § 166.046. Houston Methodist Hospital simply initiated the long-standing process set forth in TEXAS HEALTH AND SAFETY CODE § 166.046 during the course of Dunn's care, but never actually allowed the statutory process to come to fruition. The very act for which Plaintiff complains, namely the violation of Dunn's constitutional rights through the removal of life-sustaining treatment, never occurred because care and treatment was never removed, and he was allowed to die a natural death.

Houston Methodist Hospital specially excepts to Plaintiff's declaratory judgment cause of action regarding the constitutionality of TEXAS HEALTH AND SAFETY CODE § 166.046. With Dunn's natural death there is no longer a justiciable controversy concerning the administration of life-sustaining treatment. As further discussed above, declaratory judgment is not available when, like the case at bar, there is no justiciable controversy.[71] Therefore, all of Plaintiff's claims must be dismissed.

Texas courts may not render advisory opinions.[72] Nor do courts decide cases where no controversy exists between the parties.[73] In other words, a court must not render an advisory opinion in a case where there is no live controversy.[74] A declaratory judgment is only appropriate when a justiciable controversy exists concerning the rights and status of the

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[71] *Bonham State Bank v. Beadle*, 907 S.W. 2d 465, 467 (Tex. 1995).

[72] TEX. CONST. ART. V, § 8; *Firemen's Ins. Co. v. Burch*, 442 S.W.2d 331, 333 (Tex. 1968).

[73] *Lazarides v. Farris*, 367 S.W.3d 788, 803 (Tex. App.—Houston [14th Dist.] 2012, no pet.); *Chenault v. Jefferson*, No. 03-07-00176-CV, 2008 WL 2309178, at *1 (Tex. App.—Austin June 4, 2008, no pet.); *Camerana v. Texas Employment Comm'n*, 754 S.W.2d 149, 151 (Tex. 1988).

[74] *Id.*; *see also Scurlock Permian Corp. v. Brazos County*, 869 S.W.2d 478, 487 (Tex. App.—Houston [1st Dist.] 1993, writ denied) ("Courts may not give advisory opinions or decide cases upon speculative, hypothetical, or contingent situations.").

parties and the controversy will be resolved by the declaration sought.[75] That is, the Declaratory Judgment Act does not empower a court to render an advisory opinion or to rule on a hypothetical fact situation.[76] There are two prerequisites for a declaratory judgment action: (1) there must be a real controversy between the parties; and (2) the controversy must be one that will actually be determined by the judicial declaration sought.[77] "An advisory opinion is one which does not constitute specific relief to a litigant or affect legal relations."[78]

Clearly, there is no justiciable controversy between Plaintiff and Houston Methodist as Dunn's death has mooted any conceivable justiciable controversy between the parties.[79] Plaintiff seeks a declaratory judgment that Houston Methodist's "actions and planned discontinuance of life sustaining treatment" (emphasis added) violated Plaintiff's due process rights under both the Texas and United States Constitutions.[80] However, it is undisputed

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[75] *Brooks v. Northglen Ass'n*, 141 S.W.3d 158, 163–64 (Tex. 2004).

[76] *Id.* at 164.

[77] TEX. CIV. PRAC. & REM. CODE § 37.008; *see also Brooks*, 141 S.W.3d at 163–64.

[78] *Houston Chronicle Pub. Co. v. Thomas*, 196 S.W.3d 396, 401 (Tex. App.—Houston [1st Dist.] 2006, no pet.); *Lede v. Aycock*, 630 S.W.2d 669, 671 (Tex.App.—Houston [14th Dist.] 1981, no writ) (citation omitted).

[79] *See Plumley v. Landmark Chevrolet, Inc.*, 122 F.3d 308, 312 (5th Cir. 1997) (plaintiff's request for declaratory relief under Americans with Disabilities Act arising from his claim that auto dealer from whom plaintiff attempted to help his son purchase auto repudiated contract upon discovering that plaintiff was afflicted with the HIV virus, did not survive plaintiff's death; no actual controversy existed between plaintiff and dealership because plaintiff was deceased); *Ashcroft v. Mattis*, 431 U.S. 171, 172 (1977) (per curiam) (where suit was brought to determine both police officer's liability for death of plaintiff's son and for declaratory judgment as to constitutionality of Missouri statute authorizing officers to use deadly force in apprehending person who has committed felony following notice of intent to arrest, and there was no longer any basis for damage claim since no appeal was taken on the claim for damages, there was no basis for declaratory judgment as to constitutionality of statute as suit did not present a live case or controversy); *Lee v. Valdez*, No. CIV.A.3:07-CV-1298-D, 2009 WL 1406244, at *14 (N.D. Tex. May 20, 2009) (holding death of plaintiff prisoner rendered moot his declaratory judgment action that sheriff violated his civil rights by providing inadequate medical care because there was no continuing injury).

[80] Plaintiff's First Amended Petition, at 4. Plaintiff's Original Petition also sought a declaratory judgment that Texas Health & Safety Code §166.046 is unconstitutional. This Court has refused to entertain this cause of action. Such a declaratory judgment is also improper because the claims in this lawsuit are now moot and no controversy exists between the parties. *See Lazarides*, 367 S.W.3d at 803; *Chenault*, 2008 WL 2309178, at *1; *Camerana*, 754 S.W.2d at 151; *Scurlock Permian Corp.*, 869 S.W.2d at 487.

that Houston Methodist never discontinued life-sustaining treatment, and even more importantly, Dunn is now deceased. Thus, Houston Methodist did not discontinue life sustaining treatment to Dunn and obviously cannot discontinue such life sustaining treatment in the future given Dunn's death. Because there is no longer a justiciable controversy between Plaintiff and Houston Methodist, a declaratory judgment is improper under well-settled Texas law and all claims in this lawsuit should be dismissed.[81]

A case becomes moot if a controversy ceases to exist or the parties lack a legally cognizable interest in the outcome."[82] "The mootness doctrine implicates subject matter jurisdiction."[83] "[W]hen a case becomes moot the only proper judgment is one dismissing the cause."[84] Due to Dunn's death and the undisputed fact that Houston Methodist never withdrew life-sustaining care, there is no longer a controversy between the parties for the Court to decide.

At this juncture, it is clear the special interest group attached to Plaintiff simply wants to challenge the constitutionality of TEXAS HEALTH & SAFETY CODE § 166.046. Houston Methodist Hospital is not the proper entity to defend the constitutionality of a statute drafted and passed by the state legislature. Now that there are no proper claims asserted against it, Houston Methodist Hospital has no interest or incentive to zealously litigate on what now amounts to an advisory opinion on a Texas Health & Safety Code provision. That advocacy role belongs to the legislature.

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[81] *See Lazarides*, 367 S.W.3d at 803; *Chenault*, 2008 WL 2309178, at *1; *Camerana*, 754 S.W.2d at 151; *Scurlock Permian Corp.*, 869 S.W.2d at 487; *Brooks*, 141 S.W.3d at 163–64.

[82] *Allstate Ins. Co. v. Hallman,* 159 S.W.3d 640, 642 (Tex. 2005).

[83] *City of Dallas v. Woodfield*, 305 S.W.3d 412, 416 (Tex. App.—Dallas 2010, no pet.).

[84] *Polk v. Davidson*, 196 S.W.2d 632, 633 (Tex. 1946); *see also Woodfield*, 305 S.W.3d at 416 ("If a case is moot, the appellate court is required to vacate any judgment or order in the trial court and dismiss the case.").

E. Houston Methodist Did Not Violate Dunn's Civil Or Due Process Rights.

The traditional procedural due-process inquiry has two parts: (1) whether the plaintiff had a protected liberty or property interest; and (2) what process is due.[85,86] The substantive due-process inquiry looks at whether the state has arbitrarily deprived the plaintiff of a constitutionally protected interest.[87] But because neither the Texas nor U.S. Constitution protects against purely private harms, Plaintiff must also demonstrate that the deprivation occurred due to state action.[88] As discussed above, Houston Methodist Hospital is not a state actor. Plaintiff can show neither a constitutionally protected interest nor state action. Accordingly, her constitutional claims must fail.

a. Plaintiff fails to identify a protected interest.

To state a due-process claim, a plaintiff must identify an interest the constitution protects. Plaintiff identifies two purported interests: life, and the right to make individual medical decisions. In fact, neither of those interests are implicated in the case at hand.

Plaintiff's arguments are premised on their mistaken understanding of Texas Advance Directives Act ("TADA"),[89] and she implies that a patient has a *constitutional right* to receive treatment from a physician that the physician does not wish to give. The constitution

[85] *See Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 428 (1982); *Univ. of Tex. Med. School at Hous. v. Than*, 901 S.W.2d 926, 929 (Tex. 1995).

[86] The federal Due Process Clause, U.S. CONST. amend. XIV, §1, and Texas's Due Course of Law Clause, TEX. CONST. art. I, §19, are functionally similar, and the Texas Supreme Court routinely relies on federal precedent in interpreting the state clause. *Univ. of Tex. Med. School at Hous. v. Than*, 901 S.W.2d 926, 929 (Tex. 1995). This is especially true of "state action issues," with respect to which the Court has explained that "[f]ederal court decisions provide a wealth of guidance." *Republican Party of Tex. v. Dietz*, 940 S.W.2d 86, 91 (Tex. 1997).

[87] *See Patel v. Tex. Dep't of Licensing & Regulation*, 469 S.W.3d 69, 86–87 (Tex. 2015); *Simi Inv. Co. v. Harris Cty., Tex.*, 236 F.3d 240, 249 (5th Cir. 2000).

[88] *Shelley v. Kraemer*, 334 U.S. 1, 13 (1948) (holding that the Constitution "erects no shield against merely private conduct, however discriminatory or wrongful"); *Republican Party of Tex. v. Dietz*, 940 S.W.2d 86, 90–91 (Tex. 1997) (applying same doctrine to the Texas Constitution).

[89] TEX. HEALTH & SAFETY CODE §§166.001–.166.

"generally confer[s] no affirmative right to governmental aid, even where such aid may be necessary to secure life, liberty, or property interests of which the government itself may not deprive the individual."[90]

Plaintiff has not confronted these fundamental precepts. Take, for example, their claim that TADA deprives patients of "life." In fact, it is the patient's illness that causes death; it is merely forestalled by life-sustaining intervention.[91] In *DeShaney*'s language, the life-sustaining treatment is "aid" that "secure[s]" the patient's life.[92] But patients have no constitutional right to this aid.[93] A physician is not *constitutionally obligated* to provide *any* treatment, including life-sustaining treatment.

A contrary holding would have severe consequences. Any illness or medical condition, if the responsibility of state actors, may cause constitutional injuries. If Plaintiff is right that the Constitution requires doctors to undertake treatment that *prevents or forestalls* illness, then patients would have a constitutional right to have *any and all* ailments treated. Yet the United States Supreme Court has expressly rejected this position.[94] Indeed, even in the unique prison context, courts have roundly rejected the notion that a patient has a right to receive "any particular type of treatment."[95]

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[90] *DeShaney v. Winnebago Cty. Dep't of Soc. Servs.*, 489 U.S. 189, 196 (1989).

[91] *Vacco v. Quill*, 521 U.S. 793, 801 (1997) ("[W]hen a patient refuses life-sustaining medical treatment, he dies from an underlying fatal disease or pathology . . . .").

[92] 489 U.S. at 196.

[93] *Id.*

[94] *Id.* at 198–99; *accord Abigail Alliance for Better Access to Developmental Drugs v. von Eschenbach*, 495 F.3d 695, 710 n.18 (D.C. Cir. 2007) (en banc) ("No circuit court has acceded to an affirmative access [to medical care] claim.");[94] *Johnson v. Thompson*, 971 F.2d 1487, 1495–96 (10th Cir. 1992) (rejecting argument that right to life includes right to receive medical care).

[95] *Long v. Nix*, 86 F.3d 761, 765 (8th Cir. 1996); *accord Jenkins v. Colo. Mental Health Inst. at Pueblo*, 215 F.3d 1337, at *1–2 (10th Cir. 2000) (unpublished).

The same analysis dooms Plaintiff's stated interest in the individual right to make medical decisions. That right is not diminished by TADA. Rather, TADA protects individuals' right to make their own medical decisions, confirming the longstanding rule that before terminating a patient-physician relationship, the physician must give the patient reasonable notice so that he can find someone who will comply with his wishes. But under *DeShaney*, an individual's right to make a decision does not compel a physician to implement it against the physician's own will. The patient's right is to make his choice, but this right does not overpower the physician's conscience.[96][97]

Plaintiff's claims of constitutional injury are predicated on the notion that a patient has a constitutional right not only to receive medical care, but to receive medical care of a specific type. But there is no constitutional right to medical care, let alone specific types of care, even if the care would save a person's life. Because physicians have no constitutional obligation to provide treatment they wish not to provide, Plaintiff's claims cannot succeed.

b. Plaintiff's arguments are based on a misconception about §166.046.

Plaintiff argues that §166.046 "violated David Christopher Dunn's [substantive and procedural] due process rights under the Texas Constitution and the U.S. Constitution,"

[96] *See Harris v. McRae*, 448 U.S. 297, 318 (1980) ("Whether freedom of choice that is constitutionally protected warrants federal subsidization is a question for Congress to answer, not a matter of constitutional entitlement.").

[97] *Harris* illustrates the danger in Plaintiff's conception of constitutional rights. If a constitutional life interest conferred an affirmative right to medical care, so would the constitutional abortion right confer an affirmative right to have the state provide abortions. Yet *Harris* rejected precisely such an argument, explaining:

> It cannot be that because the government may not prohibit the use of contraceptives or prevent parents from sending their child to a private school, government, therefore, has an affirmative constitutional obligation to ensure that all persons have the financial resources to obtain contraceptives or send their children to private schools.

Harris v. McRae, 448 U.S. 297, 318 (1980) (citations omitted).

and she seeks a declaration to this effect.[98] Plaintiff complains that §166.046 "allows doctors and hospitals the absolute authority and unfettered discretion to terminate life-sustaining treatment of any patient," regardless of the patient's or his decision-maker's wishes.[99] In fact, however, TADA delegates no such authority. It explicitly did not alter "any legal right or responsibility a person may have to effect the withholding or withdrawal of life-sustaining treatment in a lawful manner."[100] It did not grant physicians any new powers, and did not even require them to follow any procedure. It created a safe harbor for - that is, granted immunity to - physicians who withhold or withdraw life- sustaining intervention in a specific manner.

The traditional procedural due-process inquiry has two parts: (1) whether the plaintiff had a protected liberty or property interest; and (2) what process is due.[101,102] The substantive due-process inquiry looks at whether the state has arbitrarily deprived the plaintiff of a constitutionally protected interest.[103] But because neither the Texas nor U.S. Constitution protects against purely private harms, Plaintiff must also demonstrate that

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[98] Plaintiff's First Am. P&I, ¶3.

[99] *Id.* ¶4.

[100] *See* TADA §166.051 (emphasis added).

[101] *See Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 428 (1982); *Univ. of Tex. Med. School at Hous. v. Than*, 901 S.W.2d 926, 929 (Tex. 1995).

[102] The federal Due Process Clause, U.S. CONST. amend. XIV, §1, and Texas's Due Course of Law Clause, TEX. CONST. art. I, §19, are functionally similar, and the Texas Supreme Court routinely relies on federal precedent in interpreting the state clause. *Univ. of Tex. Med. School at Hous. v. Than*, 901 S.W.2d 926, 929 (Tex. 1995). This is especially true of "state action issues," with respect to which the Court has explained that "[f]ederal court decisions provide a wealth of guidance." *Republican Party of Tex. v. Dietz*, 940 S.W.2d 86, 91 (Tex. 1997).

[103] *See Patel v. Tex. Dep't of Licensing & Regulation*, 469 S.W.3d 69, 86–87 (Tex. 2015); *Simi Inv. Co. v. Harris Cty., Tex.*, 236 F.3d 240, 249 (5th Cir. 2000).

the deprivation occurred due to state action.[104] Plaintiff can show neither a constitutionally protected interest nor state action. Accordingly, her constitutional claims must fail.

III.
CONCLUSION & PRAYER

Plaintiff's Amended Motion for Summary Judgment must be denied in its entirety because Plaintiff's case is moot, she has failed to show that no genuine issue of material fact exists, and has also failed to prove various elements of their claims.

WHEREFORE, PREMISES CONSIDERED, **DEFENDANT, HOUSTON METHODIST HOSPITAL,** respectfully requests that this Court deny Plaintiff's Amended Motion for Summary Judgment in its entirety, and for any such other and further relief to which Houston Methodist shows itself justly entitled.

Respectfully submitted,

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[104] *Shelley v. Kraemer*, 334 U.S. 1, 13 (1948) (holding that the Constitution "erects no shield against merely private conduct, however discriminatory or wrongful"); *Republican Party of Tex. v. Dietz*, 940 S.W.2d 86, 90–91 (Tex. 1997) (applying same doctrine to the Texas Constitution).

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document has been served on all counsel of record pursuant to Rule 21a, Texas Rules of Civil Procedure, on this the 15th day of September, 2017.

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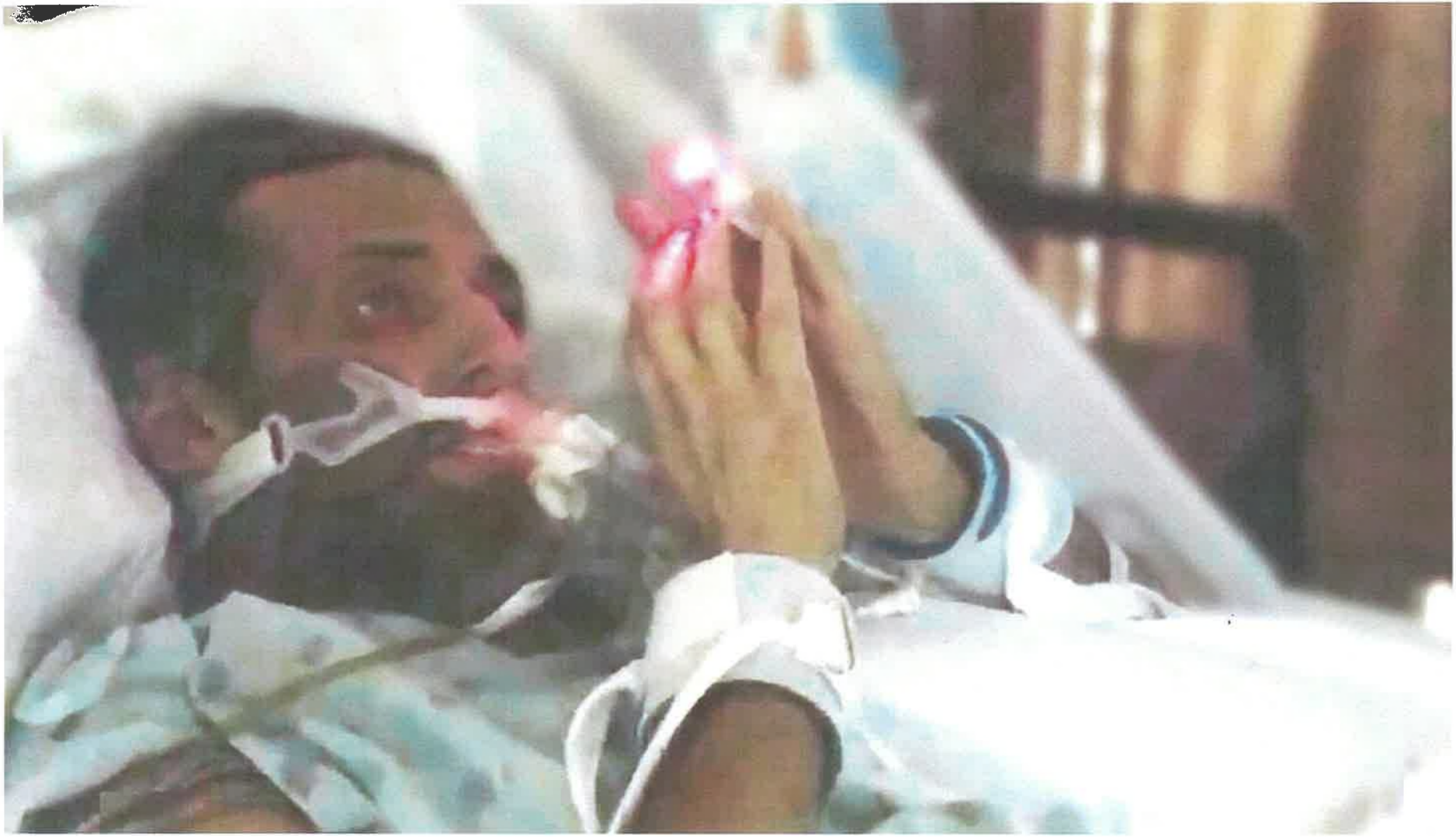
TAB K



TAB L

No. 2015-69681

EVELYN KELLY, INDIVIDUALLY, AND ON BEHALF OF THE ESTATE OF DAVID CHRISTOPHER DUNN, *Plaintiff,* **v.** **HOUSTON METHODIST HOSPITAL,** *Defendant.*	IN THE DISTRICT COURT OF HARRIS COUNTY, TEXAS 189TH JUDICIAL DISTRICT

AMICUS BRIEF OF THE STATE OF TEXAS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

INTRODUCTION

The right to due process of law is a fundamental bedrock of our Constitution and is one of the most important safeguards against the tyranny of the government. The right traces its origins to arguably the most important clause in the Magna Carta: "No free man shall be seized or imprisoned, or stripped of his rights or possessions, or outlawed or exiled, or deprived of his standing in any way, nor will we proceed with force against him, or send others to do so, except by the lawful judgment of his equals or by the law of the land." Magna Carta c. 39 (British Library trans.).

This revolutionary concept—that we are all entitled to appropriate legal process before the taking of our life, liberty, or property—found even firmer footing with the founding of this nation and the enactment of the Fifth Amendment to the U.S. Constitution, which provides that "No person shall be . . . deprived of life, liberty, or property, without due process of law." U.S. CONST. amend. V.

This case compels this Court to become part of this tradition and enforce the protections of due process once more. Section 166.046 of the Texas Health and Safety Code allows the government to deny an individual his or her life, and does so without sufficient process of law. That violates due process and cannot stand.

INTEREST OF AMICUS CURIAE

The State of Texas, acting through its Attorney General, has a solemn responsibility to defend the constitutional rights of Texas citizens, even from state statutes. Moreover, the State of Texas operates numerous public hospitals and health care facilities, and accordingly has a vested interest in determining the constitutionality of Section 166.046 of the Texas Health and Safety Code.

STATEMENT OF FACTS

This case presents a challenge to Section 166.046 of the Texas Health and Safety Code, which concerns the procedures that may be followed in the event that a physician "refuses to honor a patient's advance directive or a health care treatment decision made by or on behalf of the patient." TEX. HEALTH & SAFETY CODE § 166.046(a). In such circumstances, "the physician's refusal shall be reviewed by an ethics or medical committee." *Id.* That committee can approve the denial of medical treatment, and physicians and health care facilities that comply with the committee review procedures will not be held "civilly or criminally liable or subject to review or disciplinary action by the person's appropriate licensing board" for failing to effectuate a patient's directive. *Id.* § 166.045(d).

"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," the statute relieves the attending physician and health care facility of an obligation to provide life-sustaining treatment ten days after the written decision and relevant medical records are provided, unless a court orders otherwise. *Id.* § 166.046(e), (g).[1] During that ten-day window, "the physician shall make a reasonable effort to transfer the patient to a physician who is willing to comply with the directive." *Id.* § 166.046(d).

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[1] For purposes of Chapter 166, "life-sustaining treatment" is defined as:

> [T]reatment 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.

TEX. HEALTH & SAFETY CODE § 166.002(10).

During this process, Section 166.046 affords only limited rights to the patient or the person responsible for the health care decisions of the individual who has made the decision regarding the directive or treatment: 48 hours' notice of the committee review meeting, the right to attend the committee review meeting, the right to review certain portions of the patient's medical record, and the right to receive a written explanation of the decision reached during the review process. *Id.* § 166.046(b)(2), (4).

ARGUMENT

The Due Process Clause of the U.S. Constitution provides that "[n]o State shall . . . deprive any person of life, liberty, or property, without due process of law." U.S. CONST. amend. XIV, § 1. A statute is unconstitutional under the Due Process Clause if the government is depriving an individual of a constitutionally protected interest and is using insufficient procedures to effectuate that deprivation.

Section 166.046 badly fails the due process test. The statute leads to the denial of a constitutionally protected interest—the right to life and the right to determine one's medical treatment. And it does so through woefully insufficient procedures—Section 166.046 not only denies patients sufficient notice and opportunity to be heard, it does not even afford patients with a neutral arbiter to decide their fate.

I. The Denial of Life-Saving Medical Treatment Is the Denial of a Constitutionally Protected Interest.

The "Due Process Clause protects persons against deprivations of life, liberty, or property; and those who seek to invoke its procedural protection must establish that one of these interests is at stake." *Wilkinson v. Austin*, 545 U.S. 209, 221 (2005). This case clearly satisfies that requirement. When a patient has requested life-sustaining treatment, only to have it denied by a physician

or health care facility, the physician and health care facility are denying the patient life for the period of time that he or she would have lived had the life-sustaining treatment been provided. Additionally, individuals have a significant liberty interest with regard to decisions about their medical treatment. *See, e.g.*, *Cruzan by Cruzan v. Dir., Mo. Dep't of Health*, 497 U.S. 261, 278 (1990).

Thus, a physician or health care facility using the Section 166.046 process to refuse life-sustaining treatment is denying the patient his or her constitutionally protected rights—mainly, the right to life.

II. Section 166.046 Does Not Provide Adequate Notice.

Due process requires that "[t]he notice must be the best practicable, reasonably calculated under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 812 (1985) (citation and internal quotation marks omitted). Under section 166.046, the patient or person responsible for effectuating the patient's health care decisions only receives 48 hours' notice before a meeting is called to discuss whether to stop providing the treatment necessary to sustain life. TEX. HEALTH & SAFETY CODE § 166.046(b)(2).

Moreover, Section 166.046 provides no guarantee that the patient or person responsible will receive notice about why or how the physician made the decision to discontinue life-sustaining treatment, or what information the ethics or medical committee will consider in reviewing that decision. Without such information, the patient or person responsible will find it difficult, if not impossible, to formulate reasoned objections to the physician's decision.

Furthermore, Section 166.046 provides no standard by which to evaluate a physician's decision to refuse life-sustaining treatment. The statute simply states that a physician may decide, and

the committee may affirm, that life-sustaining treatment is medically inappropriate. *See id.* § 166.046(e). But Chapter 166 does not define or explain the meaning of the phrase "medically inappropriate"—making it again difficult, if not impossible, to formulate reasoned objections to the physician's decision.[2]

III. Section 166.046 Does Not Provide a Meaningful Opportunity to Be Heard.

In addition to requiring adequate notice, the Due Process Clause requires that the government provide "a meaningful opportunity to be heard" before depriving an individual of constitutionally protected rights. *LaChance v. Erickson*, 522 U.S. 262, 266 (1998). This includes not only the right to attend a hearing, but also an opportunity to participate and present arguments and evidence at that hearing. *See, e.g.*, *Tenn. v. Lane*, 541 U.S. 509, 523 (2004).

Section 166.046 fails this standard. Under its procedures, there is no guarantee that the patient or the person responsible for the health care decisions of the patient will be given any opportunity to be heard. While such individuals are "entitled to attend" the meeting held by the committee to discuss the patient's directive, the statutory procedures do not otherwise provide a right to speak at that meeting before the committee makes a final decision. *See* TEX. HEALTH & SAFETY CODE § 166.046(b)(4)(A). This lack of a meaningful opportunity for the patient or the patient's representative to be heard further demonstrates how Section 166.046 violates the Due Process Clause.

[2] Additionally, the failure to provide any meaningful limit on the physician's or committee's discretion in denying life-sustaining treatment suggests that the statute is void for vagueness. *See, e.g.*, Nora O'Callaghan, *Dying for Due Process: The Unconstitutional Medical Futility Provision of the Texas Advance Directives Act*, 60 BAYLOR L. REV. 528, 590–96 (2008).

IV. Section 166.046 Does Not Offer an Impartial Arbiter.

The "Due Process Clause entitles a person to an impartial and disinterested tribunal." *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 242 (1980). "This requirement of neutrality in adjudicative proceedings safeguards the two central concerns of procedural due process, the prevention of unjustified or mistaken deprivations and the promotion of participation and dialogue by affected individuals." *Id.*

Here, the ethics or medical committee, which is tasked by section 166.046 with reviewing the physician's decision to deny life sustaining treatment, is not a neutral and detached arbiter.

"Ethics or medical committee" is defined in Chapter 166 as "a committee established under Sections 161.031–161.033." TEX. HEALTH & SAFETY CODE § 166.002(6). Subsection 161.0315(a) authorizes the "governing body of a hospital," along with certain other health care facilities, to form "a medical committee . . . to evaluate medical and health care services." *Id.* § 161.0315(a). While the statutes do not expressly state who can be appointed to the committee, the clear implication is that they may be employees of the health care facility. Thus, although the attending physician that originally refused to honor the directive or health care decision may not serve on the committee, his or her coworkers will likely be members of the committee. *See id.* § 166.046(a). These coworkers may have any number of perceived or actual biases in favor of the original decision of their colleague, rendering the committee far from a neutral arbiter.

Moreover, while the procedures in Section 166.046 allow a patient or the person responsible for the health care decisions of the patient to petition the district or county court, such court involvement is limited to extending the time a patient shall be given available life-sustaining treatment pending transfer to a different physician or health care facility. *Id.* § 166.046(e), (g). Under

the terms of the statute, the ethics or medical committee is the final arbiter with regard to whether the patient will be given life-sustaining treatment.

Accordingly, the lack of a neutral and impartial arbiter in the Section 166.046 review process violates the Due Process Clause.

Conclusion

The Court should deny Defendant's motion to dismiss and grant Plaintiff's motion for summary judgment.

Respectfully submitted.

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing pleading has been served on all counsel of record or unrepresented parties on October 24, 2016, in accordance with Rule 21a of the Texas Rules of Civil Procedure, electronically through the electronic filing system, electronic mail, or certified and registered U.S. Mail.

/s/ Prerak Shah
PRERAK SHAH