No. 20-651

In the Supreme Court of the United States

COOK CHILDREN'S MEDICAL CENTER, PETITIONER

v.

T.L., A MINOR, AND MOTHER, T.L., ON HER BEHALF

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF TEXAS, SECOND DISTRICT

REPLY BRIEF FOR THE PETITIONER

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A. The Decision Below Contravenes This Court's Jurisprudence

1. As previously established (Pet. 19-27), there was no state action under any existing doctrine, and the decision below defies this Court's authority. The conflict is direct and irrefutable. State action is limited to conduct that "'may fairly be said to be that of the States.'" *Blum* v. *Yaretsky*, 457 U.S. 991, 1002 (1982). Yet there is no plausible basis for finding the State "*responsible*" for petitioner's conduct here. *Blum*, 457 U.S. at 1004.

This case involves a private hospital providing private medical care to a private patient; there is no state input, participation, or control of any kind. Contra *Blum*, 457 U.S. at 1004 (requiring States to "exercise[] coercive power" or provide "significant encouragement"); *Flagg Bros., Inc.* v. *Brooks*, 436 U.S. 149, 164 (1978) (the State must have "compelled the act"). The hospital's ethics committee consists entirely of private actors, who exercise their own private judgment. When a decision "is made by concededly private parties" and turns on private judgment "'without 'standards'" "'established by the State,'" there is no state action. *American Mfrs. Mut. Ins. Co.* v. *Sullivan*, 526 U.S. 40, 52 (1999); *Rendell-Baker* v. *Kohn*, 457 U.S. 830, 841 (1982).

Nor, critically, does "the mere denial of judicial relief"—such as creating safe harbors or eliminating liability—constitute "sufficient encouragement to make the State responsible for those private acts." *Flagg Bros.*, 436 U.S. at 165. The Act dictates the liability scheme for private actors in a private industry; the legislature's choice not to punish certain private decisions does not transform that conduct into state action. *Tulsa Prof'l Collection Servs., Inc.* v. *Pope*, 485 U.S. 478, 485 (1988). On the contrary, "[t]he most that can be said of [the] statutory

scheme, therefore, is that whereas it previously prohibited [certain private acts], it no longer does so. Such permission of a private choice cannot support a finding of state action." *American Mfrs.*, 526 U.S. at 53.

2. a. Respondents do not genuinely contest these critical facts. They do not dispute that the process concerns exclusively private actors. Opp. 7, 10. They admit these actors are guided by their own private standards; they even concede the lack of state influence or control over the private medical decision at issue: "The law does not provide any ascertainable standard for determining the propriety of continuing life-sustaining treatment or the propriety of the physician's refusal to honor a parent's health care decision on behalf of her child." *Id.* at 8. Nor do they dispute that the Act does not compel or coerce any unwanted treatment: the committee's decision determines what the hospital itself is willing to do per its own moral, ethical, and medical judgment, but patients remain free to disagree and seek treatment at other facilities. Opp. 7, 31; see Tex. Health & Safety Code 166.046(d), (g).

Respondents admit, in short, that the dispute "ultimately turn[s] on medical judgments made by private parties according to professional standards that are not established by the State." *Blum*, 457 U.S. at 1008. While respondents disagree with the regulatory decision to provide a safe harbor, their true complaint "is not that the State *has* acted, but that it has *refused* to act." *Flagg Bros.*, 436 U.S. at 166. Their concessions foreclose any state-action finding: a private party's "exercise of the choice allowed by state law where the initiative comes from it and not from the State, does not make its action in doing so 'state action' for purpose of the Fourteenth Amendment." *Jackson* v. *Metro. Edison Co.*, 419 U.S. 345, 357 (1974).

b. Perhaps realizing their arguments cannot withstand scrutiny under this Court's decisions, respondents change the subject.

First, they sidestep this Court's state-action doctrine by insisting the entire dispute somehow "hinges on questions of state law." Opp. 2, 19-23 ("the Court's work would be unpacking a Texas statute"). But as even a passing glance confirms, there is no dispute over what the statute means, how it operates, or what it does. The entire question is how to *characterize*, under federal law, the actions of private actors under the statute—and whether those actions make private hospitals state actors. *E.g.*, *Manhattan Cmty. Access Corp.* v. *Halleck*, 139 S. Ct. 1921, 1928-1933 (2019) (engaging this analysis).

This is not a situation where parties disagree about a statute's scope or effects. No one thinks, for example, that the Act permits a private hospital to *force* patients to accept any given treatment—patients are always free to pursue care elsewhere. Nor does anyone think the State has any influence on the private hospital's decision-making—private professionals make private decisions that are reviewed by a private ethics committee. Nor does anyone think the Act dictates any substantive medical standard or has any other input, coercion, or control—it merely protects private actors from liability upon complying with the internal-review process. Pet. 6-7; Pet. App. 7a-11a; Opp. 7-8.

Accordingly, there is no need to "unpack[]" any disputed issues of Texas law (Opp. 23)—were it otherwise, respondents surely would have identified *some* statutory term, clause, phrase, or other Texas-law issue that remained in dispute. The only question is the *consequence* of the Act's (undisputed) operation: whether a private hospital is a state actor because state law creates a safe har-

bor for those who conduct a private internal review to determine private medical care in a private facility. Nothing about that question "hinges" on state law. *Id.* at 19. It simply asks whether the court below assigned the correct constitutional label ("state actor") to private conduct regulated under the Act's uncontested interpretation.

Second, respondents urge this Court to defer to Texas state courts and afford them "the opportunity to review the statute first." Opp. 2, 19-20. But those courts already seized that opportunity—and used it to declare, definitively, that petitioner was a state actor and the statute was unconstitutional. Pet. 14-17, 29-31. State action is a question of federal law, and the court below resolved it by "constitutionaliz[ing] issues of legislative policy" and impairing a vital Texas statute on federal constitutional grounds. Stephen M. Shapiro, et al., *Supreme Court Practice* § 6.31(b), at 482 (10th ed. 2013).

Federalism and comity have no role in preventing this Court from correcting a state court's egregious misreading of this Court's established state-action jurisprudence—thereby "enforc[ing] a critical boundary between the government and the individual." *Manhattan Cmty.*, 139 S. Ct. at 1934. There is no reason for this Court to cede the final word to the Texas judiciary on this significant federal question.

3. When respondents do finally defend the decision below, their arguments fail. Opp. 23-31. There is no colorable basis for characterizing private medical care (even in end-of-life settings) as a function "traditionally the exclusive prerogative of the state." *Jackson*, 419 U.S. at 352-353.

a. According to respondents, the Act delegates petitioner the power to "supervene" the parent's right to dictate her child's medical care, rendering petitioner a state actor under "*parens patriae*." Opp. 29-31.

Yet respondents cannot answer the obvious error in the lower court's logic: *Parens patriae* applies where the State assumes control and dictates the patient's treatment; the State's decision is binding and the patient is compelled to accept the State's chosen care. Here, by contrast, petitioner is *not* compelling respondents to accept *any* treatment; its decision affects only the care *that petitioner itself is willing to provide*. Pet. 24-25. Respondents are free to seek any care they wish at any other hospital (Tex. Health & Safety Code 166.046(d)-(e), (g))—and petitioner has repeatedly confirmed its commitment to do everything possible to facilitate a transfer.

That respondents cannot find any willing provider does not mean that petitioner is "supervening" their preferred care—any more than *any* hospital "dictates" a patient's care by refusing any improper procedure. It simply indicates the deep moral, ethical, and medical problems with respondents' proposed course of painful treatment for a terminally ill child.[1]

So respondents switch gears and accuse petitioner of somehow preventing any transfer. Opp. 5. According to respondents, it is petitioner's refusal to "perform procedures that would make T.L. a [transfer] candidate" that has eliminated her options elsewhere, effectively "dictat[ing] T.L.'s treatment." *Id.* at 31.

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[1] Although irrelevant to state action, respondents argue that T.L. "interacts" with her mother, "experiences joy," and suffers pain but "is not in agony." Opp. 3. Respondents rely entirely on the mother's opinion and cite no medical evidence. The uncontroverted medical testimony established the opposite: because T.L.'s daily care imposes pain and prompts crashes, the medical team uses medication to keep her sedated and paralyzed; she cannot move, she is rarely, if ever, held, and her primary physician since birth has never seen her smile. 2 C.A. Rec. 91, 150-151, 275, 283-284.

This is false. It notably was *not* the basis of the decision below, and for good reason: it is directly refuted by the record. At every turn, petitioner has offered to accommodate respondents' wishes however it can. It explained, for example, that it would not perform a tracheostomy without medical reason—but it *would* perform the surgery if requested by any facility willing to treat T.L. Pet. Tex. S. Ct. Reply Br. 7-8, Ex. 1 at 10 ("if you have a provider who is prepared to treat [T.L.] and the holdup is the type of ventilator used, Cook Children's will happily perform a tracheotomy to aid the transfer").

The problem is that no doctor or hospital, anywhere, is ultimately willing to accept a transfer or carry out respondents' preferred treatment. The parties have exhaustively searched to locate alternate facilities. But once T.L.'s full medical records are examined, every doctor has refused. That is not a product of petitioner failing to perform some procedure; it is a product of the clear defects in respondents' desired course of care. Petitioner does not become a state actor simply because it happens to treat a patient who wants a treatment that no hospital is willing to provide. *Blum*, 457 U.S. at 1011-1012.

b. According to respondents (Opp. 25-29), petitioner is a state actor because the Act authorizes hospitals to "define the lawful means of death and dying." Not so. Pet. 26-27.

The Act creates a safe harbor. It reflects the determination that medical professionals who submit decisions for review by an ethics committee should be protected from subsequent punishment. It thus provides certainty that private actors will not face penalties for the hardest decisions in the most difficult circumstances—so long as they make those decisions with deliberate care. And the Act, again, does not bind patients, who remain free to pursue

care elsewhere; it simply permits private actors to decide for themselves what treatment they are willing to provide.

That ends the inquiry: state action does not "inhere[] in the State's creation or modification of any legal remedy" (*American Mfrs.*, 526 U.S. at 53), and this Court has "never held that a State's mere acquiescence in a private action converts that action into that of the State." *Flagg Bros.*, 436 U.S. at 164. The Act does not "compel[]" any private act; it "merely announce[s] the circumstances in which [Texas] courts will not interfere" with private conduct. *Id.* at 166.

Respondents may dislike the legislature's decision to grant medical professionals the right not to perform procedures against their will—even if their refusal might lead to a patient's death. But that standard is set *by the legislature*, not petitioner, and the legislature elected against imposing punishment in those circumstances. To the extent this involves "defin[ing] the lawful means of death and dying" (which is dubious), that *regulatory* decision is the State's—petitioner is simply acting as a private entity within the confines of the regulated field. There is no state action. *Lugar* v. *Edmondson Oil Co.*, 457 U.S. 922, 937 (1982).[2]

B. This Court Has Jurisdiction

1. As previously established (Pet. 2, 30-31), jurisdiction exists under a straightforward application of this Court's settled doctrine. The court below squarely held that petitioner was a state actor, and it decided every element of petitioner's due-process claim. There is nothing left to do

[2] Respondents mention petitioner's participation in the Medicaid Star Kids Program. Opp. 28. *Blum* itself disproves that a private facility's Medicaid participation creates state action. 457 U.S. at 1012; see *Manhattan Cmty.*, 139 S. Ct. at 1932.

on remand; "the outcome of further proceedings [is] pre-ordained." *Cox Broad. Corp.* v. *Cohn*, 420 U.S. 469, 479 (1975).[3]

2. Respondents nevertheless resist jurisdiction because the decision below granted a temporary injunction and was preliminary, non-final, and subject to further fact-finding before final disposition. Opp. 12-19. This blinks reality and flouts established law.

This Court is "not bound to determine the presence or absence of finality from a mere examination of the 'face of the judgment'"; Section 1257 permits "review of federal questions which are in fact ripe for adjudication" under "the policy of [Section] 1257." *Pope* v. *Atlantic Coast Line R. Co.*, 345 U.S. 379, 382 (1953).

There was nothing remotely "preliminary" about the majority's *151-page opinion*. This was its "dispositive" holding: "the trial court erred by denying the temporary injunction *because [respondent] had shown the 'necessary elements' entitling her to that relief on her Section 1983 claim*." Pet. App. 26a-27a (emphasis added). That holding is "temporary" in name only. The court explicitly declared petitioner a state actor (*id.* at 114a), recognized respondents' "vested, fundamental right[s]" (*id.* at 116a, 124a), and found the Act lacked sufficient procedural protections (*id.* at 129a, 131a-132a, 142a-143a). While the court couched its holding as finding a "probable right to relief," it found relief "probable" because petitioner, definitively, "*did not provide [respondents] sufficient procedural due process*." *Id.* at 129a (emphasis added).

As the dissent recognized, the majority's opinion "gives the impression that the underlying merits of

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[3] Respondents are simply wrong (Opp. 13-15) that Section 1257(a) requires a merits ruling from the Texas Supreme Court. *Supreme Court Practice* § 3.13, at 178-180.

Mother's § 1983 claim have been finally decided such that little, if anything, is left for the trial court to determine." Pet. App. 152a, 159a-160a ("many of the majority's holdings, even though some are superficially couched in probable-right-to-relief terms, essentially constitute final and binding decisions on the merits of Mother's § 1983 claim"). While the dissent felt the majority "overreach[ed]," the dissent *was a dissent*—and the majority never countered the dissent's (correct) "impression" of "the breadth of [its] opinion." *Id.* at 159a. No rational defendant reading the opinion could think the outcome is unresolved—"there [i]s nothing more of substance to be decided in the trial court." *Local No. 438 Constr. & Gen. Laborers' Union, AFL-CIO* v. *Curry*, 371 U.S. 542, 551 (1963).[4]

Respondents claim finality must await some unspecified further "fact-finding." Opp. 3, 16-18. But *no remaining fact issues exist on the federal claim*. Everyone agrees that "the minimum procedure set forth in Section 166.046 was followed," and the court's analysis focused on "that procedure." Pet. App. 124a-125a. Nothing further could affect the majority's dispositive analysis. *Organization for a Better Austin* v. *Keefe*, 402 U.S. 415, 418 n.1 (1971).[5]

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[4] The court's (technical) reservation of judgment on Section 166.046's "facial[] and as applied" constitutionality (Pet. App. 150a n.52) is irrelevant. That caveat came *after definitively concluding each element of respondents' constitutional claim was satisfied*. The state court's characterization does not bind the finality calculus—especially after unambiguously resolving the federal claim. *Cox*, 420 U.S. at 479 n.8.

[5] Respondents cite (Opp. 12-13) *Johnson* v. *California*, 541 U.S. 428 (2004), which involved *Cox*'s *third and fourth* exceptions; this case involves *Cox*'s *first* exception.

In sum, the shoe has dropped. "[N]othing in the record" "indicate[s] that the [Texas] courts applied a less rigorous standard in issuing and sustaining this [temporary] injunction than they would with any permanent injunction"—"the issuance of a permanent injunction upon termination of these proceedings will be little more than a formality." *Keefe*, 402 U.S. at 418 n.1. Because "'there is nothing more to be decided'" and "there has been 'an effective determination'" of the federal claim, this Court has jurisdiction. *Cox*, 420 U.S. at 479 n.8.[6]

C. The Question Presented Is Important And Warrants Immediate Review

This case "presents a question of foundational importance." State C.A. Amicus Br. 1. The decision below effectively invalidates a Texas statute on federal constitutional grounds, eliminating a six-year legislative effort and limiting policy options for one of the most challenging issues of patient care and medical ethics. The prominent stakeholders' amicus brief confirms its obvious importance—and the urgent need for this Court's intervention. The decision below throws Texas law into disarray. No rational actor can now rely on the Act, especially with the State's highest executive officers promoting its unconstitutionality. A "failure to decide the question now" leaves the medical community "operating" with intolerable uncertainty. *Cox*, 420 U.S. at 486.[7]

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[6] Contrary to respondents' contention (Opp. 35), hypothetical, undecided state-law grounds are neither "adequate" nor "independent." Pet. 30 n.11.

[7] Respondents insist the decision has little relevance and Texas hospitals continue to invoke the Act. Opp. 16. Respondents' support is a blogpost by a group associated with one of respondents' lawyers. It cites two examples that predate the Texas Supreme Court's denial of review, and another where the hospital ultimately elected not to

Respondents argue the majority's opinion "'bind[s]'" the parties only (Opp. 15 (quoting Tex. R. Civ. P. 683)); respondents have apparently confused the narrow effect of a trial-court injunction (Rule 683's subject) with the precedential effect of an appellate opinion. Far from having "little effect" (Opp. 32), a reversal here would revive the statute and restore the proper scope of the state-action doctrine in this vitally important context. A denial, by contrast, would leave the statute impaired and distort the line between governmental and individual action in one of the nation's largest States. *Manhattan Cmty.*, 139 S. Ct. at 1934. There is no benefit to postponing review; the petition should be granted.

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pursue the process—a point supporting *petitioner*. Suffice it to say the amicus brief makes absolutely clear the importance of the issue and its exceptionally high stakes.

Respectfully submitted.

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