No. 14-20-00682-CV

IN THE FOURTEENTH COURT OF APPEALS
HOUSTON, TEXAS

MARIO TORRES, ANA PATRICIA TORRES, *individually and* A/N/F *of* N.T, *a minor*,

Appellants-Plaintiffs,
v.

TEXAS CHILDREN'S HOSPITAL, DR. JOHN DOE, AND DR. JANE DOE

Appellee-Defendants.

On Interlocutory Appeal from the 234th Judicial District Court, Harris County
Honorable Donna Roth, Presiding (substituting)

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ORAL ARGUMENT REQUESTED

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STATEMENT OF THE CASE

TO THE HONORABLE FOURTEENTH COURT OF APPEALS:

Pursuant to Rule 29.3[1], the Appellants respectfully requests an emergency order preserving the status quo established by the trial court when it issued a Temporary Restraining Order ("TRO") on September 30, 2020, so as to protect this Court's appellate jurisdiction to resolve the vital and constitutional issues this Interlocutory Appeal raises. On Friday, October 2, 2020, the trial court issued a second Order denying the Appellants' request for Temporary Injunction, basically allowing the Appellee, the Texas Children Hospital ("TCH"), to dispose of a child's life in any way it deems proper, with the unthinkable outcome for the minor in this case; namely, the TCH will "pull the plug" on Baby Nick's lung ventilator which keep his heart beating, blood flowing through his body and his other organs functioning, save his brain.

The interlocutory Order of October 2, 2020, denying temporary injunction to avoid this outcome is the one being appealed herein (hereinafter, the "Order"). The trial court however did not allow its Order to become immediately effective. Instead, the trial court wisely issued a temporary *stay* of its Order until Monday, October 5,

[1] TEX. R. APP. P. 29.3

2020, at 12:00 P.M. At that time, the TCH would have no longer been enjoined or prohibited from taking any action it deemed lawful or medically necessary concerning Baby Nick.

At the same time, the Appellants have filed an urgent motion with the trial court requesting an additional 24 hours, until Tuesday, October 6, 2020, at noon, extending the temporary *stay* of the Order, so that this Honorable Court of Appeals can assume jurisdiction and provide any relief that would be proper to protect its appellate jurisdiction going forward. The trial court eventually extended the temporary stay of the Order until Monday, October 5 2020, at 6:00 P.M.

This Honorable Court's emergency intervention is therefore necessary to avoid the certain demise of Baby Nick.

In its TRO issued last Wednesday, September 30, 2020, the Court ordered the following:

- "Withhold from making any *final decision* to discontinue medically appropriate life-sustaining treatment to the minor"
- "Continue to provide the minor, N.T., any medically appropriate pain management medication, medical procedures necessary to provide comfort, or any other health care provided to alleviate a patient's pain, unless such care would be medically contraindicated or contrary to the patient's or surrogate's clearly documented desire not to receive artificially administered nutrition or hydration."
- And encouraged Plaintiffs to "consider looking into the possibility of transferring the minor, N.T., to another facility willing to accept him …."

By its own terms, the TRO stated that it was binding on the TCH, and its "agents, servants, and employees, ***and on those persons in active concert or participation with them*** who receive actual notice of this order by personal service or otherwise."

The medical director of the Pediatric Intensive Care Unit at TCH, Dr. Matt Musick, MD, testified during the TRO hearing and explained that Baby Nick had suffered irreversible cessation of all brain function, but acknowledged Baby Nick had not yet been declared "deceased"—legally dead. The TRO was issued at approximately 12:15pm, and at approximately 1:31pm Dr. Musick walked into the hospital room where Baby Nick is located and made the final decision to declare him officially "deceased." This decision was basically a "check-mate" decision that gave little or no room for decision to the Honorable Judge Donna Roth during the temporary injunction hearing on Friday, October 2, 2020.

The terms of the TRO were undoubtedly binding on Dr. Musick because, even though he is not an employee of TCH, he has privileges to practice medicine there, and clearly, he is a person "in active concert or participation with" the TCH. His decision may have been, in his view, necessary, but it was unilateral, done without due notice to Baby Nick's parents, and made over their religious beliefs. More importantly, he did not "Withhold from making any *final decision* to discontinue medically appropriate life-sustaining treatment to the minor" because him declaring

Baby Nick "deceased" was *THE* final decision that paved the way for TCH to disconnect him and cease giving Baby Nick any and all life-sustaining treatment to the minor. This move by Dr. Musick was done without clean hands because he knew that his declaring Baby Nick "deceased" would legally make Baby Nick *a corpse* and no longer a living "patient" of the hospital. Hospitals have a duty to treat *patients*; they have no legal duty to treat *corpses*. Therefore, when the temporary injunction hearing came on Friday, October 2, 2020, Baby Nick was no longer just "brain dead," he now was completely dead, even though his heart still beats, his blood is flowing through his veins, and he has a pulse.

The undersigned asked Judge Roth to nullify and set aside Dr. Musick's declaration that Baby Nick is "deceased" so as to allow Baby Nick to be transferred home to be placed under hospice care with his parents by his bedside, and allow them what many terminally ill children obtain, a final chance to recover by either divine intervention (according to their Christian faith) or pass away naturally in peace at home without the cruel and sudden "disconnecting" of the machines. The TCH and Dr. Musick's decision effectively refused them the final decision and their faith that God should take him, not a man in a white coat. The Appellants believe the hospital and doctor violated the TRO, and in the process violated their constitutional right to due process and free exercise of their religion. Baby Nick's parents truly believe he is alive, and not dead. Why should one man or one hospital

get to decide, over the parent's stated position, if Baby Nick gets to live another day? That's what is at the heart of this case.

Emergency relief should be urgently granted under Rule 29.3 of the Texas Rules of Appellate Procedure to stay the trial court's Order and to stay Dr. Musick's official announcement that Baby Nick is "deceased" and keep in place all the other provisions of the TRO, until the merits of this accelerated interlocutory appeal are considered and adjudicated by this Honorable Court of Appeals. Time is of the essence.

STATEMENTS REGARDING ORAL ARGUMENTS

Oral Argument may help the Court better understand the various issues pertaining to this appeal and the genuine risk that appellants' rights will be prejudiced unless immediate temporary relief is granted.

ISSUES PRESENTED

1. Did the Appellees violate the Appellants' constitutional rights, as pled herein?
2. Who gets to decide whether to maintain a child on life-support systems when an impasse arises between treating physicians and the parents of a sick or injured child that is hospitalized?
3. Does the TCH have uncheck discretion to decide when and if to use the provisions of the Texas Advanced Directives Act, which would provide them reasonable time, notice and opportunity to be heard?

4. Should the Court issue Orders necessary to preserve the life of Baby Nick, ordering the Appellees to provide him with nutrition pending the outcome of this accelerated interlocutory appeal?

STATEMENTS OF THE FACTS

1. Background

On or about September 24, 2020, Baby Nick was found unconscious in a bathroom tub, laying in water and unresponsive. He is 10-months old. He was rushed to the Texas Children's Hospital The Woodlands, where he was placed in the Intensive Care Unit.

On or about September 27, 2020, the minor was then transferred to the Texas Children's Hospital in the Texas Medical Center, in Houston, Texas.

The hospital and medical staff informed Baby Nick's parents that there is nothing else that can be medially done, and that they must disconnect the baby from any and all life-support system, even though only 6 days had elapsed. The parents were then being asked to consider donating the child's organ. The parents felt the hospital had given up. They began requesting their child be transferred to another hospital facility.

The minor's heart is beating on its own and stable. The lungs are clear from any fluid, but he is still on a lung ventilator. Save for his brain, his other organs are fully

functional. His diaper is being changed regularly. He has blood flowing through his veins.

The problem is Baby Nick is not showing any brain waive activity. So, the attending doctors believe the law in Texas entitled them to make the final decision to declare him "deceased" based on the definitions provided under Texas law, because there was irreversible cessation of all brain function. The parents believe in God and have heard of numerous other children who have bounced back. They want more time. They don't want the hospital or doctors to force upon them any other decision and foreclose two other options:

- ✓ transfer Baby Nick to another facility, with the assistance of the TCH; or

- ✓ transfer Baby Nick home with a ventilator so they can give him appropriate hospice care, pray over him, and if God so decides, see him pass away in peace next to his loved ones, like so many other parents get to do when children are terminally ill.

The parents believe that the TCH and medical staff are rushing to make a decision without giving them due process of law and a real opportunity to recover, and that TCH is infringing in their free exercise of religion.

The TCH has submitted medical evidence that there is absolutely zero chance of Baby Nick recovering and that there is absolutely nothing that can be done medically or scientifically to help him regain brain function.

The TCH has never answered the question of why these decisions must be taken so quickly, especially when parents do not want to consider organ donation and wish to keep their baby alive, even if he is declared "brain dead." And it also has never answered the question why the parents could not take their baby home to provide him hospice care and allow him more time, the possibility of divine intervention, or a peaceful death next to his loved ones.

2. Procedural History & Trial Court Rulings

The Original Petition, Application for Temporary Restraining Order, Temporary Injunction, and Permanent Injunction against the TCH was filed at approximately 3:00am of September 30, 2020.

The case was assigned to the 234th Judicial District Court, but being an ancillary proceeding, the application for Temporary Restraining Order was presided over the Honorable Judge Mike Englehart. Judge Englehart heard attorney arguments, read caselaw, and listened to the testimony of Dr. Matt Musick, who admitted Baby Nick had not yet been officially declared "deceased." At approximately 12:15pm Judge Englehart issued the TRO.

On Friday, October 2, 2020, another judge, the Honorable Donna Roth, presided over the Temporary Injunction hearing, in her courtroom, the 295th Judicial District Court. After hearing testimony from Baby Nick's parents via Zoom conference, and the testimony of Dr. Musick, Dr. Gary Clark, and Dr. Lawrence McCullough, a retired professor in bioethics with a Ph.D. in Philosophy. It was revealed for the first time during this hearing that Dr. Musick had officially declared Baby Nick "deceased" 48 hours earlier, on September 30, 2020.

At the end of the temporary injunction hearing, the Honorable Judge Roth announced her decision to deny the parent's request for injunctive relief. She issued the Order shortly thereafter.

SUMMARY OF ARGUMENTS

Plaintiffs' contend that parts of Section 166.046 violate Plaintiffs' right to due process of law guaranteed by the Fourteenth Amendment of the United States Constitution and Article I, § 19 of the Texas Constitution. Section 166.046 grants doctors and the Hospital vast authority and unchecked discretion to terminate life-sustaining treatment of any patient regardless if there is an advance directive or medical decision determined by a surrogate as outlined in Texas Health and Safety Code 166.039, or expressed patient decision to the contrary. Defendant intends to exercise its authority and eventually schedule the discontinuation of Baby Nick's life-sustaining treatment over the objection of his parents and without due process

of law, by utilizing Section 166.001(b) which deems a patient dead when "there is irreversible cessation of all spontaneous brain function."

Plaintiffs now seek temporary and emergency relief declaring that Section 166.046 is facially and as applied, unconstitutional and enjoining Defendant from asserting their medical authority and hospital equipment against Baby Nick, in violation of Plaintiffs' constitutional rights. Baby Nick and his parents face immediate irreparable harm if life-sustaining treatment (i.e. ventilator) is discontinued prematurely. Section 166.046 violates Baby Nick's due process rights under both the United States and Texas Constitution. Furthermore, Mario Torres and Ana Torres due process rights to make vital medical decisions, as parents, regarding Baby Nick's life is also at risk of being violated. Mario Torres and Ana Torres also asserts that Defendants are infringing with their parent-child relationship; thus, robbing them of their fundamental rights as parents to the "care, custody, and control of their children." *Troxel v. Granville,* 530 U.S. 57, 65- 66 (2000)*; In re A.B.,* 47 S.W.3d. 498, 502 (Tex. 2014);[2] and doing so without review in front of a neutral judicial body.

Plaintiffs also assert that their freedom of religious expression and religious liberties guaranteed by First and Fourteenth Amendment and Texas Constitution Article 1, § 6 and 42 U.S.C. Section 1983 are being violated by the actions of

[2] *Troxel v. Granville,* 530 U.S. 57, 65- 66 (2000)*; In re A.B.,* 47 S.W.3d. 498, 502 (Tex. 2014)

Defendants acting through their authority in Section 166.046. Plaintiffs' right to be free from "state action" that interferes with their religious beliefs. The parents have a Christian religious belief that Baby Nick is still a human "person" that is alive with full body, soul and spirit given by God, notwithstanding the human medical exams that suggest that one of his organs or systems are not currently exhibiting spontaneous activity.

ARGUMENTS

I. Courts Need to Be Vigilant to Ensure that No Violations of Constitutional Rights Occur When an Impasse Arises Between Treating Physicians and the Parents of a Sick or Injured Child that is Hospitalized

Courts should play a limited, but critical role, in cases where there is an impasse between the attending physicians of a child and the parents of that child. "[T]he decision to withdraw life-sustaining medical care from a desperately ill child is one that should rarely involve the courts.... '[T]he decision-making process should generally occur in the clinical setting without resort to the courts, but ... courts should be available to assist in decision making *when an impasse is reached*.'" *T.L. v. Cook Children's Med. Ctr.*, No. 02-20-00002-CV, 2020 WL 4260417, at *61 (Tex. App. July 24, 2020)(*quoting In re A.M.B.*, 248 Mich.App. 144, 640 N.W.2d 262, 311 (2001)(determining that parents of child in state custody were denied procedural due

process when, without adequate notice of and no opportunity to participate in hearing, court ordered their child to be taken off life support).[3]

1) Private Hospitals and Doctors Can be Considered "State Actors" for Purposes of 42 U.S.C. § 1983 In the Context of Treating Children and When Acting Contrary to Parents' Consent for Treatment

Private hospitals and doctors have been given so much legal authority that, at times, their decisions can constitute "state action" under 42 U.S.C. § 1983. This is especially true when their decision supervenes a parent's treatment decision, a decision traditionally and exclusively a public function of the state as *parens patriae*. Because the Texas Legislature has, in enacting laws concerning the treatment of citizens, granted hospitals and doctors virtually unchecked legal authority, this constitutes "a delegation of state authority to the attending physician, who will become a state actor in conjunction with [a hospital] for purposes of Section 1983 liability" especially in the context of when a child's "life-sustaining treatment is discontinued." *T.L. v. Cook Children's Med. Ctr.*, No. 02-20-00002-CV, 2020 WL 4260417, at *28 (Tex. App. July 24, 2020).[4]

Section 1983 imposes liability for violations of rights protected by the United States Constitution. To state a cause of action under § 1983 for violation of the due

[3] *T.L. v. Cook Children's Med. Ctr.*, No. 02-20-00002-CV, 2020 WL 4260417, at *61 (Tex. App. July 24, 2020)(*quoting In re A.M.B.*, 248 Mich. App. 144, 640 N.W.2d 262, 311 (2001)(determining that parents of child in state custody were denied procedural due process when, without adequate notice of and no opportunity to participate in hearing, court ordered their child to be taken off life support).

[4] Id. at 28.

process clause, plaintiffs must show that they have asserted a recognized liberty or property interest within the purview of the Fourteenth Amendment, and that they were intentionally or recklessly deprived of that interest, even temporarily, under color of state law. The federal statute at issue, section 1983, is "not a source of substantive rights" but creates a cause of action against state actors to enforce those rights. *Escobar v. Harris County*, 442 S.W.3d 621, 629 (Tex. App.—Houston [1st Dist.] 2014, no pet.) (*citing Graham v. Connor*, 490 U.S. 386, 393-94, 109 S.Ct. 1865 (1989); *City of Lancaster v. Chambers*, 883 S.W.2d .650, 658 (Tex. 1994)).[5] A section 1983 claimant must show that a person acting under color of state law deprived the claimant of rights, privileges, or immunities secured by the Constitution or laws of the United States. *See Parratt v. Taylor*, 451 U.S. 527, 535, 101 S.Ct. 1908 (1981), *overruled in part on other grounds*, *Daniels v. Williams*, 474 U.S. 327, 331-32, 106 S.Ct. 662 (1986).[6] Individual government actors and, in certain circumstances, local governments can be "persons" subject to section 1983 liability. *See Howlett v. Rose*, 496 U.S. 356, 375, 110 S.Ct. 2430 (1990).[7]

Alternatively, even if 42 U.S.C. § 1983 does not apply, the Court could still decide the issue of constitutional violations under related civil rights statutes, 42

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[5] *Escobar v. Harris County*, 442 S.W.3d 621, 629 (Tex. App.—Houston [1st Dist.] 2014, no pet.) (*citing Graham v. Connor*, 490 U.S. 386, 393-94, 109 S.Ct. 1865 (1989); *City of Lancaster v. Chambers*, 883 S.W.2d .650, 658 (Tex. 1994)).
[6] *See Parratt v. Taylor*, 451 U.S. 527, 535, 101 S.Ct. 1908 (1981), *overruled in part on other grounds*, *Daniels v. Williams*, 474 U.S. 327, 331-32, 106 S.Ct. 662 (1986).
[7] *See Howlett v. Rose*, 496 U.S. 356, 375, 110 S.Ct. 2430 (1990).

U.S.C. §1985(c)(conspiracy to interfere with civil rights) and 1986 (action for neglect to prevent).

A. Substantive Due Process Violations

The Appellants believe that the Appellee violated their substantive due process rights. A violation of substantive due process occurs when the government deprives individuals of constitutionally protected rights by an arbitrary use of power. Procedural due process rules are meant to protect persons not from the deprivation, but from the mistaken or unjustified deprivation of life, liberty, or property. *Carey v. Piphus*, 435 U.S. 247, 260, 98 S.Ct. 1042 (1978).[8] Due process requires notice and an opportunity to be heard at a meaningful time and in a meaningful manner. *Univ. of Tex. Med. Sch. at Houston v. Than*, 901 S.W.2d 926, 930 (Tex. 1995).[9]

In a due process analysis, the Supreme Court of Texas looks to the balancing test laid out in *Mathews v. Eldridge*, 424 U.S. 319, 96 S.Ct. 893 (1976); *see also In re K.S.L.*, 538 S.W.3d 107, 114 (Tex. 2017).[10] That test requires the court to balance three elements: (1) the private interests at stake, (2) the government's interest supporting the challenged procedure, and (3) the risk that the procedure will lead to erroneous decisions. Id. (citing Mathews, 424 U.S. at 335, 96 S.Ct. 893).

[8] *Carey v. Piphus*, 435 U.S. 247, 260, 98 S.Ct. 1042 (1978).
[9] *Univ. of Tex. Med. Sch. at Houston v. Than*, 901 S.W.2d 926, 930 (Tex. 1995).
[10] *Mathews v. Eldridge*, 424 U.S. 319, 96 S.Ct. 893 (1976); *see also In re K.S.L.*, 538 S.W.3d 107, 114 (Tex. 2017).

When reviewing the application of due process to laws, statutes and regulations, the standard of review is elevated to "strict scrutiny" only if the statute (1) limits a fundamental, constitutionally secured right, or (2) implicates a suspect class. *City of Cleburne v. Cleburne Living Ctr*., 473 U.S. 432, 440–41, 105 S.Ct. 3249, 3254–55 (1985); *Spring Branch Indep. Sch. Dist. v. Stamos*, 695 S.W.2d 556, 559 (Tex.1985).[11]

B. Procedural Due Process

"The basic elements of due process are notice, hearing, and an impartial trier of facts." *Thompson v. Texas State Bd. of Med. Examiners*, 570 S.W.2d 123, 130 (Tex. Civ. App. 1978)(*citing City of Houston v. Fore*, 412 S.W.2d 35 (Tex.1967)).[12]

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, 242, 100 S.Ct. 1610, 1613 (1980).[13] Both the right to be heard from and the right to be told why are distinct from the right to a different outcome. Procedural due process expresses the fundamental idea that people, as opposed to things, at least are entitled to be

[11] *City of Cleburne v. Cleburne Living Ctr*., 473 U.S. 432, 440–41, 105 S.Ct. 3249, 3254–55 (1985); *Spring Branch Indep. Sch. Dist. v. Stamos*, 695 S.W.2d 556, 559 (Tex.1985).
[12] *Thompson v. Texas State Bd. of Med. Examiners*, 570 S.W.2d 123, 130 (Tex. Civ. App. 1978)(*citing City of Houston v. Fore*, 412 S.W.2d 35 (Tex.1967)).
[13] *Marshall v. Jerrico, Inc*., 446 U.S. 238, 242, 100 S.Ct. 1610, 1613 (1980).

consulted about what is done to them. See Laurence H. Tribe, *American Constitutional Law* § 10–7, at 666 (2d ed. 1988).[14]

Modern procedural due-process analysis begins with determining whether the government's deprivation of a personal 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, 577, 92 S.Ct. 2701, 2709 (1972); *Perry v. Sindermann*, 408 U.S. 593, 601, 92 S.Ct. 2694, 2699 (1972).[15] The courts must accord full deference to the statutory law that creates property interests beyond the "core" interests. *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 541, 105 S.Ct. 1487, 1492 (1985).[16] Rightly or wrongly, current procedural due-process analysis protects only what actually belongs to the individual, rather than recognizing that unfairness exists in the very act of disposing of an individual's situation without allowing the individual to participate in some meaningful way. *See* Tribe, *supra*, § 10–12, at 713.[17] Procedural due-process analysis next determines what process is due, with courts looking almost exclusively to the Constitution for guidance. *Loudermill*, 470 U.S. 532, 105 S.Ct. 1487 (1985).

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[14] See Laurence H. Tribe, *American Constitutional Law* § 10–7, at 666 (2d ed. 1988).
[15] *See Board of Regents v. Roth*, 408 U.S. 564, 577, 92 S.Ct. 2701, 2709 (1972); *Perry v. Sindermann*, 408 U.S. 593, 601, 92 S.Ct. 2694, 2699 (1972).
[16] *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 541, 105 S.Ct. 1487, 1492 (1985).
[17] *See* Tribe, *supra*, § 10–12, at 713.

C. Free Exercise of Religion

"The principle that government may not enact laws that suppress religious belief or practice is so well understood that few violations are recorded in our opinions." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 523, 113 S. Ct. 2217, 2222 (1993).[18] The Free Exercise Clause of the First Amendment, which has been applied to the States through the Fourteenth Amendment, provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof...."

A law that is facially neutral, and does not appear to target a particular religious practice or belief, does not necessarily avoid judicial scrutiny. "Facial neutrality is not determinative. The Free Exercise Clause, like the Establishment Clause, extends beyond facial discrimination. The Clause 'forbids subtle departures from neutrality,' … and 'covert suppression of particular religious beliefs,' …. Official action that targets religious conduct for distinctive treatment cannot be shielded by mere compliance with the requirement of facial neutrality. The Free Exercise Clause protects against governmental ***hostility which is masked, as well as overt***." *Church of the Lukumi*, 508 U.S. at 534 (internal citations omitted).[19]

[18] *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 523, 113 S. Ct. 2217, 2222 (1993).
[19] *Church of the Lukumi*, 508 U.S. at 534 (internal citations omitted).

The legitimate governmental interests in protecting the public health is indeed important, but courts often examine if regulation that is intended to protect the public health can be addressed by less restrictive means. *Id*. at 538.[20]

The Free Exercise Clause commits state actors to religious tolerance, and upon even slight suspicion that proposals for state actor's "intervention stem from animosity to religion or distrust of its practices, all officials must pause to remember their own high duty to the Constitution and to the rights it secures." *Id*. at 547 (voiding laws because they were found to be "contrary to these constitutional principles"). *Id*.[21]

II. The Texas Definition and Determination of "Brain Death" is Vague and Ambiguous, as It Arbitrarily Violates Due Process Rights and Free Exercise of Religion Rights Protected Under the U.S. Constitution

The determination and the meaning of "death," and the term "deceased," have long been historically controversial, because of their unavoidable deep cultural, religious, ethical and medical intersections. "Brain death" is relatively new concept to medicine. For the most part of modern medical history, cessation of cardiovascular function (heart death) was the standard parameter of "death" for

[20] *Id*. at 538.
[21] *Id*. at 547 (voiding laws because they were found to be "contrary to these constitutional principles").

practitioners of medicine. But that began to shift and changes in medicine sought to expand the concept of "death" in the 1970's and 1980's.

> *"Brain death, defined as the irreversible cessation of all brain activity, has been included in the medical and legal definition of death for nearly 40 years. Prior to the 1940s, the determination of death was defined by the cessation of blood circulation. In the 1950s, with the development of ventilators and cardiopulmonary resuscitation, death from circulatory stasis became 'reversible' and physicians started treating patients in permanent comatose states, unable to be liberated from life support machines. In response, an ad hoc multidisciplinary committee of the Harvard Medical School was assembled to 'define irreversible coma as a new criterion for death,' and established medical criteria for the permanently nonfunctioning brain. Use of the Harvard Criteria spread to hospitals across the country.*
>
> *"As it was not legally binding, by the late 1970s, individual states had different criteria of death, and a patient could be legally dead in one state but alive in another. To minimize conflict in these domains, in 1978, the US President's Commission for the Study of Ethical Problems in Medicine and Biomedical and Behavioral Research sought input from medical and legal associations, as well several religious organizations, and established the Uniform Determination of Death Act (UDDA) of 1981, which included the determination of death by neurological criteria (DNC) as a legal equivalent to death by cessation of circulatory and respiratory functions. All 50 states have since adopted the act, although specific language varies.*
>
> *"The advancement of medical technology and the ability to maintain metabolic and cellular homeostasis after neurological death have brought this scientific concept to the forefront of academic discussion. Public awareness and interest in brain death have also increased in the wake of legal cases that received widespread media coverage."*

Sarang Biel, MD; and Julia Durrant, MD, "Controversies in Brain Death Declaration: Legal and Ethical Implications in the ICU," p. 2, *Critical Care*

Neurology (H Hinson, Section Editor) (published online, 18 March 2020)(internal footnotes omitted).[22]

The concept of "brain death" was not formally adopted into law in Texas until the late 1980's. Indeed, Chapter 671 of the Texas Health & Safety Code adopts the two definitions of death, and attempts to regulate the determination of death in three simple sentences. The current definitions were originally enacted into law in 1989 by the Texas Legislature, and provide, in relevant part, as follows:

> Sec. 671.001. STANDARD USED IN DETERMINING DEATH.
>
> (a) A person is dead when, according to ordinary standards of medical practice, there is irreversible cessation of the person's spontaneous respiratory and circulatory functions.
>
> (b) If artificial means of support preclude a determination that a person's spontaneous respiratory and circulatory functions have ceased, ***the person is dead when, in the announced opinion of a physician***, according to ordinary standards of medical practice, there is ***irreversible cessation of all spontaneous brain function***. Death occurs ***when the relevant functions*** cease.
>
> (c) Death ***must be*** pronounced before artificial means of supporting a person's respiratory and circulatory functions are terminated.

Tex. Health & Safety Code Ann. § 671.001 (emphasis added).[23]

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[22] Sarang Biel, MD; and Julia Durrant, MD, "Controversies in Brain Death Declaration: Legal and Ethical Implications in the ICU," p. 2, *Critical Care Neurology* (H Hinson, Section Editor) (published online, 18 March 2020)(internal footnotes omitted). The Court may take judicial notice on appeal for the first time of this article, touching upon the history of "brain death" legislation, as its accuracy cannot reasonably be questioned. See Office of the Pub. Util. Counsel v. Public Util. Comm'n, 878 S.W.2d 598, 600 (Tex. 1994)("The court of appeals also erred by refusing to take judicial notice").

[23] Tex. Health & Safety Code Ann. § 671.001 (emphasis added).

Subsection (a) addresses death by "heart failure" or cardio vascular and respiratory functions of the human body. The Appellees are not basing their actions on subsection (a).

Subsection (b) defines the more modern form of recognized death, "brain death." The Appellees are basing their actions exclusively on subsections (b) and (c), which Appellants contend is a vague, ambiguous, arbitrary and unconstitutional definition. The definition of "irreversible cessation of all spontaneous brain function" and the term "relevant functions cease" are arbitrary and lacking clarity. These statutory terms may be well-intended, but they are dangerously vague and ambiguous, and as such cannot be held to be constitutionally valid. Moreover, the Appellees have been arguing that subsection (c) *forces* a decision on the physician, declaring that the physician "must" pronounce the "death" and has no other alternative. They believe the statute is mandatory, and therefore that Dr. Matthew Musick had to declare Baby Nick was "deceased." We don't agree with the conclusion that the statute mandates a declaration of death under either subsection (a) or (b), but either way we argue that the statute as drafted is unconstitutional because it is ambiguous, vague, and it violates due process and the free exercise of religion, as discussed below.

1) Ambiguous and Vague Law

A statute which forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law. *Connally v. General Const. Co*., 269 U.S. 385, 46 S.Ct. 126 (1926); *Passmore v. State*, 544 S.W.2d 399 (Tex.Cr.App.1976); *Baker v. State*, 478 S.W.2d 445 (Tex.Cr.App.1972); *Ex parte Chernosky*, 153 Tex.Crim. 52, 217 S.W.2d 673 (1949).[24]

Doctors can differ as to how to apply this statute, depending on the hospital in the State of Texas where the "brain death" occurs and resources available for testing. And citizens can differ as to the meaning and application, especially when no due process is given to the citizens to voice their concerns and their religious views are not respected as well.

> *"While death by neurological criteria has been a legal definition of death in all fifty states since the implementation of the UDDA, the legitimacy of brain death determination has been questioned since initial implementation, especially following popular media reports of "brain dead" patients making recoveries.*
>
> *"When updating the 2010 AAN guidelines, Wijdicks et al. found no peer-reviewed journal reports of patients who had regained neurological recovery after proper application of the AAN parameters. In the decade since, case reports have been described of patients declared brain dead, who on further examination were noted to have some type of neurological function of uncertain origin. Careful*

[24] *Connally v. General Const. Co*., 269 U.S. 385, 46 S.Ct. 126 (1926); *Passmore v. State*, 544 S.W.2d 399 (Tex.Cr.App.1976); *Baker v. State*, 478 S.W.2d 445 (Tex.Cr.App.1972); *Ex parte Chernosky*, 153 Tex.Crim. 52, 217 S.W.2d 673 (1949).

> *review of these case reports reveals incomplete and variable documentation of the confirmatory tests performed. Uncertainty of the proper application of AAN brain death guidelines makes retrospective interpretation of these cases impossible."*

See Biel & Durrant, p. 4, supra (internal footnotes omitted).[25]

1) Unconstitutional For Vagueness, Lack of Due Process and Unreasonable Suppression of Free-Expression of Family's Religion

A. First: Unconstitutionality of § 671.001(b) based on Vagueness

The first reason the statute defining "brain death" in Texas, § 671.001(b), is unconstitutional is that it is ambiguous and vague, on its face and in its application as to children, as discussed below. For abundance of caution, we adopt our discussion concerning vagueness and ambiguity elsewhere in this brief, but we address the most important aspects of this argument here. The statute at issue states that the decision about "death" for legal purposes is exclusively allowed to be taken by "a physician" and it does not clarify whether that decision should be shared by a group of physicians, or other physicians in general. In most cases, it would seem obvious for a physician to declare a person is dead or "deceased." Especially when the person has a severed head, or a bullet would to the heart, or has no cardiovascular function whatsoever and a heart transplant (real or artificial) is out of the question. But in situations like this where the heart is beating, and all major organs except the

[25] *See* Biel & Durrant, p. 4, supra (internal footnotes omitted).

brain are still functioning, having "a physician" (such as Dr. Musick) make the sole call is too dangerous. And can any physician make the call, even when that physician is not a doctor experienced with brain function or brain treatment. The term is not defined in this context. It is vague and ambiguous in this context.

Also, the statute at issue, subsection (b) specifically, speaks of when "there is irreversible cessation of all spontaneous brain function" and death because "the relevant functions cease." In the case of Baby Nick his other organs were functioning prior being declared "deceased" and it was therefore not clear how a physician can apply these definitions without any kind of checks and balances or statutory definitions, leaving the decision open to too much subjectivity. If the organs can be transplanted into other children's bodies, as the Appellees were offering the Appellants, then the Baby Nick, could conceivably be considered to have "relevant functioning" of his body still. Plus, many of the organs in his body, such as his heart and digestive system, depend on some nerve function attached to the stem of the brain. He still has bowel movement and has a heart beat. The fact that the brain is dead or in the process of dying is important, and cannot obviously be ignored, but the statute as drafted is so broad that it allows choices about "relevancy" and "functionality" that naturally entail too much subjectivity and speculation about the precise moment when such terms would be reasonably or objectively employed, especially in the particular circumstances of this case.

Furthermore, hospitals and physicians are reading the text of the statute as *mandatory*, insofar subsection (c) has the phrase "must be pronounced" deceased or dead, after announcing an opinion under subsections (a) or (b). This vagueness and ambiguity allows for doctors to rush to a determination that may or may not be agreeable to other physicians under similar circumstances, but either way it effectively gives a physician *the exclusive* power of decision that a child is better off dead, than alive. That the child is better off donating his organs, than dying a peaceful death at home with his family. The statute is unconstitutionally vague and ambiguous

B. Second: Unconstitutionality of § 671.001(b) based on Lack of Due Process

The second reason why it is unconstitutional and should be declared as such is because the doctors and hospital treating children under possible "brain death" situations have all the power over the life and liberty of a child, and those rights are constitutionally protected and cannot be taken away or significantly affected without due process of law. Especially in the case like this where parents wish to take the baby to another facility seeking a second opinion, when they have lost all trust in the attending physicians, and are being rushed to make decisions in an unreasonable short period of time and are directly or indirectly being pressured to consider organ donation, which is a critical huge segment of the modern medical industry.

This Court of Appeals recently said that constitutional due process violations can be substantive or procedural in nature:

> A violation of *substantive* due process occurs when the government deprives individuals of constitutionally protected rights by an arbitrary use of power. *Procedural* due process rules are meant to protect persons not from the deprivation, but from the mistaken or unjustified deprivation of life, liberty, or property. Due process requires notice and an opportunity to be heard at a meaningful time and in a meaningful manner.
>
> In a due process analysis, the Supreme Court of Texas looks to the balancing test laid out in *Mathews v. Eldridge*, … . That test requires the court to balance three elements: (1) the private interests at stake, (2) the government's interest supporting the challenged procedure, and (3) the risk that the procedure will lead to erroneous decisions.

Interest of G.X.H., 584 S.W.3d 543, 553–54 (Tex. App. 2019)(generally acknowledging due process concerns arise in the context of parent-child relationships *vis-à-vis* the state's *parens patriae* authority)(Wise, K., Justice)(emphasis added; internal citations omitted).

In this case, the standard of review of the statute at issue, 671.001(b) and (c) is elevated to "strict scrutiny" because the statute clearly can limit fundamental, constitutionally secured rights, namely *life* and *liberty*. Therefore, following strict scrutiny, the Appellees cannot prevail unless they can demonstrate that there is a compelling reason to uphold the law as written and applied, and that there are no other alternatives but to uphold the statute as written and applied.

Under so-called procedural due process, the courts are called to engage in a balance of interests analysis, considering three elements: (1) the private interests at stake, (2) the state actor's interest supporting the challenged procedure, and (3) the risk that the procedure will lead to erroneous decisions. Under this analysis, clearly the balance shifts in the favor of Appellants. The interests at stake are of the highest order, life itself, and freedom to chose how to fight to stay alive or keep a child alive or care for a child that is on an accelerated process of death due to injury. Secondly, the hospital and physician's interest in supporting the challenged procedure cannot be justified. The reality is the statute does not really establish a structured procedure, so it is left in the hands of each hospital to establish each it own. That allows for a "wild west" situation where each hospital institution can leverage their own opinions and interests over the physicians that practice medicine under "privilege" and over the interest of suffering parents.

In fact, the evidence in this case shows that Dr. Musick, not only used the law to base his decision to opine that Baby Nick was "dead" since September 24, 2020 (and as he declared during the TRO hearing, should have been declared so), and then saying something seemingly different at the T.I. hearing two days later to the effect that that the child became "dead" under the legal definition discussed above on September 27, 2020, *simply because the hospital has a procedure that either commanded or guided his discretion*. This Court can verify his testimony during

both the TRO and the T.I. hearing. A financially-profitable medical institution such as the TCH, that profits greatly by the organ transplantation industry, should not have such a pivotal role, establishing "procedures" that either delay or accelerate the process of death of a child. Either way, it is telling that Dr. Musick had not declared Baby Nick "deceased" until after this lawsuit was begun against the hospital, the Appellant, and he did so after basically *one hour* after the TRO hearing took place in the trial court against the hospital. And he did so *one week* from date of injury, after testifying about how the child's organs were still viable for donation. We realize there may be no cookie-cutter procedure for every case, but that does not mean that *no procedure* is constitutionally acceptable.

And finally, clearly this "wild west" situation can clearly lead to erroneous situations. This needs to be primarily remedied by the Texas Legislature, if it so wishes, but the courts in this state have a duty to stop the risk of violations of constitutional rights of citizens by upholding the rights of child and parents in this particular case.

What is sad and maybe insulting is that, even the procedures that arguably could have been applied, such as taking these decisions before an ethics committee, where parents could be heard, was not even followed. Not even attempted. Counsel for the TCH indicated during the TRO that there was no real need to give the parents ten additional days for any reason because, in the hospital's opinion, there was no

ethical decision to be made. The hospitals have unchecked power to even decide *when* to use the few procedures that give parents a voice in these cases, or whether to give them any voice at all. This clearly is a violation of due process.

Furthermore, as the Original Petition stated, and was argued before the TRO judge, per Texas Health and Safety Code 166.046(b)(4)(c), the hospital had a duty to provide the family or authorized representative with the medical records of Baby Nick, that compiles with said section. That would enable parents such as the Appellants to seek remedies or alternatives for their children. The Appellants were in the hospital caring and watching over their baby, and making decisions while sleep-deprived, and had nothing to go by because the TCH did not give them records in timely fashion. It had to be ordered by the trial court during the TRO, and only then were the documents provided. To this day, the hospital has not provided any complete records, and this is part of the due process violations that affect the Appellants' constitutional rights. How can parents make life or death decisions, or even ask intelligent questions about these decisions, when they don't have a voice in the process, and they lack vital information. All the while hospital rush to declare a baby "deceased." According to section 166.046(e), if they were not provided with any medical records in compliance with 166.046(b)(4)(c), they cannot effectuate or execute any procedures in reasonable or constitutional. Plus, the white board in the

baby's room has been blank since the beginning. Process is lacking. It is constitutionally due and this court should declare so.

Per Section 166.039(c) of the Texas Health and Safety Code, the decision "must be based on knowledge of what the patient would desire, if known." *Curzan v. Missouri*, 497 U.S. 261 (1990), stands for the proposition that it is acceptable to require "clear and convincing evidence" of a patient's wishes for removal of life support. In the case of a child, that desire is expressed to the parents, and that expressed desire should prevail if the outcome propends to life, even if only for limited time, as opposed to a quicker death. In this gray area of the law, the U.S. Constitution commands respect for *life* and liberty, not quicker death.[26] Especially in a case where there is zero evidence that the child is suffering in any way. Obviously, if he is unconscious, there can be no suffering.

C. Unconstitutionality of § 671.001(b) based on Restriction on Religion

The third reason why the definition of "brain death" found in the Texas Health and Safety Code, § 671.001(b), is unconstitutionally restricts the practice of a child patients or child's parent's religion. The statute at issue is therefore, on its face or in its application, is because it can allow the unreasonable intrusion of hospitals and

[26] Since Baby Nick is a minor, the treatment decisions are based on the decisions of his parents. That's standard substantive due process and equal protection right to family privacy and parental rights. Furthermore, Sections 166.039(b)(3), 166.035(2), and 166.004(d)(5) of the Texas Health and Safety Codes, lists the parents as authorized decision makers and able to receive the notice of advanced directive. And under Texas Family Code 151.001(a)(6), the parents of Baby Nick have the right to consent to treatment on Baby Nick's behalf.

treating physicians in the faith and personal religious beliefs of parents, thereby infringing their constitutional rights to freely exercise their religion as it pertains to child care. This is especially true in this case where the parents ultimately wish to take the baby home and give him hospice care, until God takes the baby beyond the world of the living or a miraculous recovery can take place, according to their faith.

Perhaps recognizing the difficulty in implementing the definition of death in the brain, and the effect this issue has on personal faith and religious views, at least one state, New Jersey, still allows for religious objection to the physician's opinion and declaration. New Jersey is apparently the only state that "allows declaration of death solely on cardiorespiratory criteria if for personal religious beliefs of the person or the person's family does not recognize brain death. There, a patient may not be declared dead legally even while meeting brain death criteria medically." *Id.* (*citing* New Jersey Declaration of Death Act, 26:6A (1991)).[27] The statute expressly incorporates a formal procedure to avoid mistakes, and adopts a religious exception, which is as follows:

> N.J.S.A. 26:6A-5. Exemption to accommodate personal religious beliefs
>
> The death of an individual shall not be declared upon the basis of neurological criteria pursuant to sections 3 and 4 of this act 1 when the licensed physician authorized to declare death, has reason to believe, on the basis of information in the individual's available medical records, or information provided by a member of the individual's family or any

[27] *Id.* (*citing* New Jersey Declaration of Death Act, 26:6A (1991)).

> other person knowledgeable about the individual's personal religious beliefs that such a declaration would violate the personal religious beliefs of the individual. In these cases, death shall be declared, and the time of death fixed, solely upon the basis of cardio-respiratory criteria pursuant to section 2 of this act.[28]

Unlike the New Jersey statute, the statute in Texas provides a definition that is vague and ambiguous, because it is narrow in scope, and fails to take into account a process that respects differing views about death in the brain. It unreasonably restricts the practice of religion as it pertains to a child that has cardiovascular and respiratory function (even if that respiratory function is aided by a ventilator), and the only organ of the body that is injured and not properly functioning is the brain.

The New Jersey statute carves out an exception based on religion under these circumstances. The undersigned attorneys are not asking this Court to "legislate" a new, revised statute for Texas. That is unquestionably up to the Texas Legislature to do. But the New Jersey statute demonstrates is that, in our American society, this issue concerning "brain death" –which is relatively new to modern medicine too— implicates religious views perhaps in ways that other areas of medicine don't, and that state's law acknowledging this confirms it. Therefore, what the Appellants are asking is that the courts give them injunctive or declaratory relief that would preclude the Appellees from intruding and violating the basic constitutional rights that every U.S. Citizen should enjoy under similar circumstances where the trust in

[28] Id. at 26.6A (1991).

a hospital has faded, specifically the rights of parents to decide that their child should be allowed to continue to live *even when important organs are clearly failing*, instead of a doctor's choice which is the child is "better off" to die faster, in order to allow other children to be treated in the facility, if the child and parents' view "brain death" differently than the physicians from a religious stand-point.

Moreover, the utilitarian views of hospitals and physicians cannot encroach on the religious views and choices of parents, because life *–even if seriously restricted—* is guaranteed by the Constitution. The hospital and physician do not have a constitutional right or duty to override a parent's conscious choice that pursues life, liberty and justice for their child who is facing dire odds and circumstances. Life, even if rationed or limited by the physical realities, is more valuable than death. Parents should have the freedom to seek, if they so chose, a second or third opinion, before a physician rushes to make the "check-mate" decision for them, as happened here. Parents should have the freedom to demand from a hospital who has physical control over their child's living body, to make more than one call to other hospital institutions before an official declaration of "death" is made. How many calls are reasonable is for the Legislature to decide, not the courts, but the courts can declare that in these particular circumstances three (3) calls is not reasonable. How many days should parents and medical professionals wait is not for the courts to decide, but the Legislature, but courts have authority to grant injunctive

and declaratory relief under their constitutional power, to declare that one (1) week may be unreasonable, which is what happened here. Should parents be allowed to take their child home in every situation where the child is facing a terminal situation, for religious or other reasons, is for the Legislature to decide. But the court can declare that in these circumstances, where the parents have expressed a desire to do so for religious reasons, to care for their child at home in hospice, that they be allowed to do so, as many other parents are allowed to when facing terminal situations.

The New Jersey statute seems to expressly acknowledge that there is a religious constitutional issue and basic human right issue underlying situations of "brain dead" patients. We cite that statute only to highlight that there is a problem with the Texas statute that needs to be corrected here, especially in the State of Texas where the sanctity of life of children has been traditionally respected and upheld. The best interest of children should be decided by parents in situations such as this one, and not a hospital or "a physician," when the cardiovascular and respiratory systems of the child can still function completely or with aid of modern medical instruments, such as ventilators. Parents don't want a hospital or physician to play God and decide that their child is better off dead if his brain cannot properly function, and the U.S. Constitution's Bill of Rights should allow the Appellants in this case to override the medical determination of "brain death" or "deceased" by cessation of

brain function, even if irreversible function, so long as the child has a heartbeat, pulse, and has otherwise functioning systems in his organism that can sustain the child's life, even if for a limited amount of time. The balance of interests, in specific situations like this, clearly favor the parent's religious views about "death" over than that of "a physician" who may disagree with those views (or who may secretly be atheist or agnostic), and that of a hospital who supports that physician's viewpoint directly or indirectly by, among other ways, promoting organ transplantation and refusing to discharge the child to go home and live the few days left on this Earth peacefully with his family, in prayer and in comfort.

Declaring Section 671.001(b) is unconstitutional on its face or as applied here would possibly force the Texas Legislature to re-examine this issue. But to validate this statute would be wrong because it is literally adding insult to injury to American citizens that are already facing the difficult prospect of caring for a child that is gravely injured in his brain, and we must add that the Appellants' predicament is not an uncommon situation in this State. Millions of parents care for children at home, providing hospice care, even though they are gravely or terminally ill, not fully conscious, and quickly deteriorating. Millions of parents are allowed to go home and have their clergy, pastors, ministers, rabbi, or other spiritual leaders visit the child and assist them in the difficult process. When hospitals and a physician are making the decision for parents that their child is "deceased"—even though the parents see

the child has a heartbeat, and other respiratory function— these entities are *in fact* making a choice that the child is "better off dead" (or *completely* dead, including also cardiovascular function), by turning off equipment belonging to the hospital that would otherwise allow a child to continue being "alive" in body, spirit and soul, even if the human brain is not properly functioning according to the doctor's informed opinion. That choice belongs to the parents under the U.S. Constitution, if it entails a fundamental religious belief about their faith and personal views on death.

It is important to note that the parents are not seeking a remedy against the death of their child in this Court. They are aware that mortality cannot be wished away or that mortality is inevitable, even in the case of their children. The parents in this case, the Appellants, simply want the Court to remedy the violation of their constitutional rights, which is a remedy that can be provided, especially when dealing with the broad and equitable powers given to courts considering injunctive relief against irreparable harm such as the violation of constitutional rights such as life, liberty and free-exercise of religious views.

Moreover, the Texas statute defining "brain death" employs terms that are too vague and ambiguous such as: "irreversible cessation" of "all spontaneous brain function," or "relevant functions" of the brain. And it is vague and ambiguous in that it is too narrow of a definition that does not take into account or respects the free exercise of religious beliefs about death of the person affected, or its family

members, such as parents. It only references the need for *ONE* person to opine, and not more, since it states that brain death can be declared "in the announced opinion of *a physician*," and that physician may be mistaken, and no chance for independent oversight or review of his single opinion is provided in the statute. That is, one person can decide over many other's wishes. In the context of "brain dead" children, the parents are afforded zero authority to question the determination of that one person. And in a representative and constitutional republic, that is too much unchecked power given to one person. The statute is also unconstitutional in that it is narrow in its scope, since it only affords one basis, the practice of medicine: "according to ordinary standards of *medical practice*." There is no process in place that requires or affords reasonable notice to affected persons, including the patient, reasonable opportunity to be heard, or any impartial oversight in the decision making. Especially when the matter entails a child, and parents who have a different religious view of death and the physicians acting over the life of a child view religion differently and say that they are legally compelled to declare the child "deceased" without consideration of other more fair alternatives, like hospice care, with or without the aid of a ventilator.

The practice of medicine is far from perfect. Lawmakers who trust the medical profession have given the practitioners of medicine too much power to decide death in the "brain" even though it is a relatively new concept to the practice of medicine

and it is riddled with ethical, moral and religious connotations. And the statute in Texas assumes the application of the term "irreversible" to be statistically certain and true, as long as *one physician* opines so. In its application, the statute does not seem to properly account for human error, or protect religious beliefs that may run counter to the persons affected by the human making the determination.

For all of these reasons, this Court should find that the Texas definition and determination of "brain death," as contained in Tex. Health & Safety Code Ann. § 671.001, is vague and ambiguous, as it arbitrarily violates substantive and procedural Due Process Rights and Free Exercise of Religion rights of citizens protected under the U.S. Constitution. The "declaration" or "announcement" of death done by Dr. Musick on September 30, 2020, was neither informed to the parents, nor were their religious views taken into account, to this date. They were not allowed to take their child home because the statute, as the hospital and physician apparently read it, understand they have *no other choice but to* declare the child "deceased" if the child's brain function is impaired in what they view is medically "irreversible." This mandatory view of the statute and the broad discretion given to the Appellees is what has caused harm to the Appellants, and should be remedied by the Justices of this Court who swore an oath to uphold the U.S. Constitution.

Therefore, because the statute is unconstitutional, then the "declaration" or "announcement" made based on said statute is also null and void.

In his address to the 18th International Congress of the Transplantation Society, Pope John Paul II stated that: "the death of the person … is an event no scientific technique or empirical method can identify directly." (John Paul II 2000, no. 4). Edgar Allan Poe also wrote, "The boundaries which divide Life from Death, are at best shadowy and vague. Who shall say where the one ends, and where the other begins?" (Poe 1966, p. 261). And it causes concern to educated scholars in the subject, that: "The inherent link between organ transplantation and 'brain death' is self-evident, despite repeated efforts to deny it …." Doyen Nguyen, "Brain death and true patient care," *The Linacre Quaterly*; 83(3), p. 258–282 (Aug 2016).[29]

In the context of this case, the TCH is a world-renowned medical facility that earns millions of dollars treating children and performing life-saving organ transplantation. The vague definitions and parameters provided in the statute allow a physician with privileges to practice medicine in a very successful enterprise such as TCH to make judgment calls that can gravely affect the sacred constitutional rights of due process and free exercise of religion of patients and families.

III. The TCH Refused to Use the Provisions of the Texas Advanced Directives Act, Which At Least Would Have Provided a Minimum of Due Process and Procedure to Appellants, Because They Have Unchecked Discretion to Invoke Said Act

[29] Doyen Nguyen, "Brain death and true patient care," *The Linacre Quaterly*; 83(3), p. 258–282 (Aug 2016). This article is readily available online and can be easily verified in terms of content and accuracy, see https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5102188/. Courts of appeals may take judicial notice for the first time on appeal. See Ramey v. Bank of N.Y., Case No. 14-06-00824-CV, 2010 WL 2853887.

The provisions of the Texas Advanced Directives Act (TADA) are found in Section 166.046 of the Texas Health & Safety Code.[30] These provisions afford due process to parents of ill children by giving them rights to question attending physician's life-sustaining treatment decisions and a procedure for when there is an impasse between doctors and parents. But the TCH refused to invoke these procedures because, in their own opinion, there was no ethical decision to be made, only a medical one. And therefore, in its view there was no need for an ethical committee hearing or review of the attending physician's decision concerning Baby Nick.

The problem with this position is two-fold: 1) the TCH could avoid the issue by simply deciding that there was no "ethical" issue afoot; and 2) the line between "ethical," legal and religious is blurry, so the application or not of the procedures in said statute was arbitrary and capricious. The trial court erred in not finding so in this case.

The relevant TADA provisions are contained in Section 166.046, and are stated in the law as follows:

> Procedure If Not Effectuating a Directive or Treatment Decision
>
> (a) If an attending physician refuses to honor a patient's advance directive or a health care or treatment decision made by or on behalf of a patient, the physician's refusal shall be reviewed by an ethics or medical committee. The attending physician may not be a member of

[30] Tex. Health & Safety Code Ann., § 166.046.

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

(b) The patient or the person responsible for the health care decisions of the individual who has made the decision regarding the directive or treatment decision:
(1) may be given a written description of the ethics or medical committee review process and any other policies and procedures related to this section adopted by the health care facility;
(2) shall be informed of the committee review process not less than 48 hours before the meeting called to discuss the patient's directive, unless the time period is waived by mutual agreement;
(3) at the time of being so informed, shall be provided:
(A) a copy of the appropriate statement set forth in Section 166.052; and
(B) a copy of the registry list of health care providers and referral groups that have volunteered their readiness to consider accepting transfer or to assist in locating a provider willing to accept transfer that is posted on the website maintained by the department under Section 166.053; and
(4) is entitled to:
(A) attend the meeting;
(B) receive a written explanation of the decision reached during the review process;
(C) receive a copy of the portion of the patient's medical record related to the treatment received by the patient in the facility for the lesser of:
(i) the period of the patient's current admission to the facility; or
(ii) the preceding 30 calendar days; and
(D) receive a copy of all of the patient's reasonably available diagnostic results and reports related to the medical record provided under Paragraph (C).

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

(d) If the attending physician, the patient, or the person responsible for the health care decisions of the individual does not agree with the decision reached during the review process under Subsection (b), the physician shall make a reasonable effort to transfer the patient to a physician who is willing to comply with the directive. If the patient is

> a patient in a health care facility, the facility's personnel shall assist the physician in arranging the patient's transfer to:
> (1) another physician;
> (2) an alternative care setting within that facility; or
> (3) another facility.
>
> (e) If the patient or the person responsible for the health care decisions of the patient is requesting life-sustaining treatment that the attending physician has decided and the ethics or medical committee has affirmed is medically inappropriate treatment, the patient shall be given available life-sustaining treatment pending transfer under Subsection (d). This subsection does not authorize withholding or withdrawing pain management medication, medical procedures necessary to provide comfort, or any other health care provided to alleviate a patient's pain. The patient is responsible for any costs incurred in transferring the patient to another facility. The attending physician, any other physician responsible for the care of the patient, and the health care facility are not obligated to provide life-sustaining treatment after the 10th day after both the written decision and the patient's medical record required under Subsection (b) are provided to the patient or the person responsible for the health care decisions of the patient unless ordered to do so under Subsection (g), except that artificially administered nutrition and hydration must be provided ….

Tex. Health & Safety Code Ann. § 166.046.

The term "Life-sustaining treatment" means "treatment that, based on reasonable medical judgment, sustains the life of a patient and without which the patient will die. The term includes both life-sustaining medications and artificial life support, such as mechanical breathing machines, kidney dialysis treatment, and

artificially administered nutrition and hydration." Tex. Health & Safety Code, § 166.052(a)(Statements Explaining Patient's Right to Transfer).[31]

"The centerpiece of these procedures is a review of the attending physicians decision by a health care facility's ethics or medical committee in a meeting that the patient or patient's representative is entitled to attend upon notice given no less than forty-eight hours before hand …" *T.L. v. Cook Children's Med. Ctr.*, No. 02-20-00002-CV, 2020 WL 4260417 (Tex. App. July 24, 2020).[32]

The Appellants were not even afforded the rights granted under TADA, and at the very least they should be allowed this process so that they can be heard and the ethical and religious impasse between attending physicians and the parents of Baby Nick is addressed by an separate group of individuals. The lack of transparency and failure to invoke these rules was a violation of the Appellant's due process rights that should be corrected.

IV. The TCH and Dr. Musick did not Follow the TRO and Made a Final Determination that Basically Cased a "Check-Mate" on Baby Nick and Against His Parents When they Declared him "Deceased"

On September 30, 2020, at approximately 1:31pm, Dr. Mike Musick of the Texas Children Hospital made an official pronunciation that the minor in this case, Baby Nick, was not only brain dead, but now was totally "deceased." This even

[31] Tex. Health & Safety Code, § 166.052(a)(Statements Explaining Patient's Right to Transfer).
[32] *T.L. v. Cook Children's Med. Ctr.*, No. 02-20-00002-CV, 2020 WL 4260417 (Tex. App. July 24, 2020).

though Nick continues to breath with the assistance of a ventilator, and has a beating heart and his other organs are still basically functioning.

Prior to Friday, October 2, 2020, during the Temporary Injunction, we were not aware that Baby Nick had officially declared him "deceased" following Wednesday's hearing. As far as I am concerned, the parents were not notified or made aware of this prior to the T.I. hearing.

The child's parents are suspicious that the hospital staff is rushing to make a decision, when the child was injured just days ago, and there has been no chance to get a second opinion on the matter from another hospital. The parents have indicated that a hospital in Dallas, Texas was willing to transfer the baby to their facility, but that the TCH would have to make the calls to coordinate. According to the parents, the hospital has not done so. I am not certain that there is a hospital in Dallas that would, in fact, receive Baby Nick, but regardless the medical staff at TCH has declared him officially "deceased" so it would seem futile to try to transfer him after this has been done.

As stated before, by doing this, the TCH and Dr. Musick basically issued a final determination or death sentence on Baby Nick. It was a "check-mate" move that changed everything. A doctor with a prominent position in the TCH, and who has played a pivotal role providing testimony to the courts, was also at the same playing a pivotal role in affecting the outcome of this case. That's not acting with

"clean hands" and when the T.I. hearing took place, this issue was raised. Perhaps that is why the lower court allowed the Appellants more time to seek remedies on appeal, and that was fair, but it should have played a more role in GRANTING the injunctive and declaratory relief that the Appellants were seeking. That's simply unreasonable and should not be allowed under the law and U.S. Constitution.

In the parents religious view, Baby Nick is still alive and they want to either transfer him to another facility, or take him home to be cared for in hospice if no other hospital will accept him (especially now that he was unilaterally declared "deceased" by Dr. Musick). If their constitutional rights are not vindicated in this court, they will have suffered more than the loss of a child. They will have suffered the loss of rights that are so vital to our free society.

That is why the Court's urgent intervention is so necessary. We therefore need emergency assistance.

V. The Court Should Issue Orders Necessary to Preserve the Parties' Rights and Should Order the Appellants to Give Proper Nutrition to Baby Neck Pending the Outcome of the Interlocutory Appeal

When an appeal from an interlocutory order is perfected, the appellate court may make any temporary orders necessary to preserve the parties' rights until disposition of the appeal." Tex. R. App. P. 29.3. To establish entitlement to that relief, movants must state the relief sought, the legal basis for the relief, and the facts necessary to establish a right to that relief. *See, e.g., Lamar Builders, Inc. v.*

Guardian Sav. & Loan Ass'n, 786 S.W.2d 789, 791 (Tex.App.Houston [1st Dist.] 1990, no writ) (considering application of Rule 43(c), the progenitor of Rule 29.3); *see also, e.g., McNeeley v. Watertight Endeavors, Inc*., No. 03-18-00166-CV, 2018 WL 157866, at *1 (Tex. App.—Austin Mar. 23, 2018, no pet.) (per curiam).[33] Such relief is appropriate here.

The Appellants need this Court's urgent assistance to command the TCH and physicians to give nutrients to Baby Nick because otherwise, his remaining organs will die from malnutrition, not injury. If he is given nutrition, he may go to be cared in hospice. If he is not, his heart will soon stop beating.

The hospital and physicians are of the opinion that they simply cannot feed a "corpse"—a gross statement they can make only because of Dr. Musick's precipitated declaration that *he had* to declare Baby Nick was "deceased." If this is not corrected through emergency intervention, this matter could run the risk of becoming moot, an outcome that this Court has already expressed it does not desire.

We now request additional relief under Rule 29.3 to save the life of a baby and to preserve the constitutional rights of his parents.

[33] *See, e.g., Lamar Builders, Inc. v. Guardian Sav. & Loan Ass'n*, 786 S.W.2d 789, 791 (Tex.App.Houston [1st Dist.] 1990, no writ) (considering application of Rule 43(c), the progenitor of Rule 29.3); *see also, e.g., McNeeley v. Watertight Endeavors, Inc*., No. 03-18-00166-CV, 2018 WL 157866, at *1 (Tex. App.—Austin Mar. 23, 2018, no pet.) (per curiam).

PRAYER

Therefore, the Appellants hereby request from this Honorable Court that it grant this accelerated interlocutory appeal, and also issue an order in the meantime to order the Appellees to provide nutrition to Baby Nick so that his heart can beat as long as God decides, notwithstanding his grave brain injuries.

Respectfully Submitted,

THE GONZALEZ LAW GROUP, PLLC

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ATTORNEYS FOR APPELLANTS

VERIFICATION BY UNSWORN DECLARATION UNDER PENALTY OF PERJURY

(Tex. Civ. Prac. & Rem. Code § 132.001 & 28 U.S.C. §1746)

My name is Kevin Acevedo. I am an attorney licensed in the State of Texas, Bar No. 24086848. My date of birth is August 16, 1974, and my office address is 7151 Office City Dr., Suite 200, Houston, Texas 77087. I, Kevin Acevedo, do verify under penalty of perjury, that:

1. I am over 18 years of age, of sound mind, and capable of making this affidavit. The facts stated in this affidavit are within my personal knowledge and are true and correct to the best of my ability and knowledge.

2. I have reviewed the attached Appellee's Motion for Emergency Relief and the facts stated therein are either (a) part of the record or (b) within my personal knowledge and are true and correct.

3. On September 30, 2020, at approximately 1:31pm, Dr. Mike Musick of the Texas Children Hospital made an official pronunciation that the minor in this case, Baby Nick, was not only brain dead, but now was totally "deceased." This even though Nick continues to breath with the assistance of a ventilator, and has a beating heart and his other organs are still basically functioning.

4. Prior to Friday, October 2, 2020, during the Temporary Injunction, we were not aware that Baby Nick had officially declared him "deceased" following Wednesday's hearing. As far as I am concerned, the parents were not notified or made aware of this prior to the T.I. hearing.

5. The child's parents are suspicious that the hospital staff is rushing to make a decision, when the child was injured just days ago, and there has been no chance to get a second opinion on the matter from another hospital. The parents have indicated that a hospital in Dallas, Texas was willing to transfer the baby to their facility, but that the TCH would have to make the calls to coordinate. According to the parents, the hospital has not done so. I am not certain that there is a hospital in Dallas that would, in fact, receive Baby Nick, but regardless the medical staff at TCH has declared him officially "deceased" so it would seem futile to try to transfer him after this has been done.

6. In the parents religious view, Baby Nick is still alive and they want to either transfer him to another facility, since they no longer trust TCH or take him home for hospice care.

7. Lastly, the undersigned knows that the hospital and staff have informed the parents that they will not provide Baby Nick nutrition because he is now "deceased," and not alive. That is why the Court's urgent intervention is so necessary. We therefore need emergency assistance.

8. I assure this Honorable Court that the Appendix attached is, to the best of my ability, and limited time, an accurate copy of the proceedings in the trial court. Time is of the essence.

Pursuant to Tex. Civ. Prac. & Rem. Code § 132.001 & 28 U.S.C. §1746, I hereby submit this Unsworn Declaration Under Penalty of Perjury, in Harris County, Texas, and confirm it by my signature below on October 5, 2020:

By: _____
Kevin Acevedo
Bar No. 24086848

CERTIFICATE OF SERVICE

On October 6, 2020, a true and correct copy of this document was served electronically on Kevin Yankowsky, lead counsel for the Appellee, Texas Children's Hospital, via email:

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TEXAS CHILDREN'S HOSPITAL

/s/ Kevin Acevedo
Kevin Acevedo

CERTIFICATE OF CONFERENCE

On October 4, 2020, counsel for the Appellants conferred with counsel for the Appellee regarding this motion. Counsel for Appellee indicated is opposed to the relief sought here.

/s/ Kyle D. Hawkins

/s/ Kevin Acevedo
Kevin Acevedo

CERTIFICATE OF COMPLIANCE

I certify that the body text is in 14 point font and Microsoft Word reports that this brief contains 11881 words, excluding the portions of the brief exempted by Rule 9.4(i)(1).

/s/ Kevin Acevedo
Kevin Acevedo

No. 14-20-00682-CV

IN THE COURT OF APPEALS
FOR THE FOURTEENTH JUDICIAL DISTRICT
HOUSTON, TEXAS

MARIO TORRES, ANA PATRICIA TORRES, *individually and* A/N/F *of* N.T, *a minor*,

Appellants-Plaintiffs,

V.

TEXAS CHILDREN'S HOSPITAL,

Appellee-Defendants.

On Interlocutory Appeal from the
234th Judicial District Court, Harris County
Honorable Donna Roth, Presiding (substituting)

APPENDIX

1. Exhibit A – Unofficial Transcript of T.I. Hearing on October 2, 2020
2. Exhibit B – Plaintiffs' Original Petition and Application for TRO and T.I.
3. Exhibit C – Response by Defendant to Original Petition and Application for TRO and T.I.
4. Exhibit D – Plaintiffs' Memorandum of Law in Support of T.I.
5. Exhibit E – Temporary Restraining Order, September 30, 2020
6. Exhibit F – Order Denying T.I. dated October 2, 2020