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TINSLEE BREAUN LEWIS, A MINOR AND MOTHER, TRINITY LEWIS, ON HER BEHALF, Plaintiffs, v. COOK CHILDREN'S MEDICAL CENTER, Defendant.	§ § § § § § § § § § § §	IN THE DISTRICT COURT TARRANT COUNTY, TEXAS 48TH JUDICIAL DISTRICT

COOK CHILDREN'S MEDICAL CENTER'S SUPPLEMENTAL BRIEF IN OPPOSITION TO PLAINTIFF'S REQUEST FOR INJUNCTIVE RELIEF

Submitted: December 20, 2019

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Pursuant to the Court's direction at the December 12, 2019 hearing, Defendant Cook Children's Medical Center respectfully submits this supplemental response to Plaintiff's Request for Injunctive Relief, as follows.[1]

INTRODUCTION

Plaintiffs' request for a temporary injunction should be denied. Despite the undisputed medical evidence,[2] Plaintiffs have asked the Court to force Tinslee to suffer at the hands of Cook Children's because they contend that a mother has the absolute right to force doctors and nurses to provide the treatment a parent chooses. Importantly, ***Plaintiffs do not – and cannot – assert that continuing such treatment is in the best interest of Tinslee***. The sole basis for Plaintiffs' application for injunctive relief is their contention that the Texas Advance Directives Act is unconstitutional as violative of their due process right. The Court should reject this position not only because the statute is constitutional, but also because the statute does not form the basis for Cook Children's actions here such that its constitutionality is irrelevant to the injunction that Plaintiffs seek. No court has ever held that doctors and nurses can be forced to provide unethical, futile, and painful medical treatments to patients as such treatment violates the Hippocratic Oath. The Court, therefore, should deny the application for a temporary injunction.

[1] This brief does not repeat the arguments and authorities presented in Cook Children's prior briefing and, instead, focuses on providing supplemental material that needed to be addressed in light of the Temporary Injunction Hearing and the evidence and arguments presented at the hearing.

[2] Plaintiffs presented no testimony or evidence that Tinslee's condition is anything other than terminal and irreversible or to show that ongoing treatment is not medically futile.

FACTS

The evidence presented at the hearing was mostly undisputed. And, where disputes existed, the record clearly demonstrated where the truth lies.[3] Thus, the testimony and exhibits presented at the temporary injunction left the following facts clear:

- Tinslee is in dire condition. Because she cannot properly oxygenate her blood, Tinslee is kept on a ventilator, has three tubes down her nose, has multiple intravenous lines for the administration of medication, and is permanently attached to four additional machines to monitor various biological functions. She is swollen and carries more than two liters of fluid. Tinslee requires more than a dozen medications daily. To keep her alive, doctors and nurses must keep her on a constant stream of painkillers, sedatives, and paralytics. As a result, Tinslee is pharmacologically paralyzed at all times. As CNN showed through the Plaintiff (see Attachment A), Tinslee's current appearance is very unlike the smiling days of her first months.

- Medical treatment is futile. Tinslee cannot be cured or her condition treated. She has months to live. Even with medication and support, Tinslee has "dying events" 2-3 times per day. When she is in distress, Tinslee crashes and medical intervention is immediately necessary. While the exact treatment varies, it includes at least repeated forceful manual inflation of her lungs combined with various IV

[3] It is also important to recognize what evidence was ***not*** submitted. Although counsel stated that Trinity Lewis would testify (a) that she missed the informal meeting with the ethics committee due to a doctor's appointment and (b) that Cook Children's had "harassed" her to "pull the plug" on Tinslee daily, no such testimony was ever presented. Instead, the only evidence before the Court shows that Cook Children's constantly worked with Ms. Lewis in a compassionate manner to attempt to find common ground.

medications. A nurse must stay in her room with her 24-hours a day to monitor her vital signs. As Dr. Duncan testified, providers can no longer do anything ***for*** Tinslee; all treatment now is simply done ***to*** her.

- Life-sustaining intervention causes Tinslee to suffer, with no hope of recovery. As Dr. Duncan and Ms. Lane testified, Tinslee is suffering and in constant pain. The fact that her brain and limbs are healthy makes her situation even more excruciating, as Tinslee is aware of her situation, can feel pain, and would like to be active. Forcing her to lay still, paralyzed and sedated, is – while necessary to keep her alive – simply cruel. The medical treatment itself is causing Tinslee to suffer. Every time that Tinslee receives treatment – whether medication, an examination, or simply a readjustment of her position to prevent bed sores – she reacts to the touching as pain. Many times, the stress that such treatment brings causes Tinslee to crash. The doctors have all stated that continuing to treat Tinslee violates their Hippocratic Oath as they are hurting her for no medical benefit; rather than violate their ethics, as is their legal right,[4] numerous nurses at Cook Children's have simply refused to care for Tinslee.

- No other hospital or doctor will agree to treat Tinslee. Although Cook Children's has spoken with dozens of hospitals and doctors about Tinslee, no one has disagreed with their diagnosis and no one has been willing to treat her. Even with the active phone tree of multiple volunteers provided by Texas Right to Life and Texas Fragile Kids, no healthcare provider has come forth. ***Indeed, just a few days after the hearing ended, Boston Children's hospital formally declined to accept Tinslee as a transfer***.

These facts are why a temporary injunction is inappropriate. Tinslee lies in constant pain that is inflicted upon her by the very doctors and nurses that are supposed to ease her suffering. Although Ms. Lewis has the right to direct her child's medical care, that right does not include the authority to force doctors and nurses to violate their sacred oaths. As her testimony made clear, Ms. Lewis simply cannot accept her daughter's situation and, instead, is seeking to make medical decisions based on a dream she had one night. The undisputable situation is that, due to her grave medical condition, Tinslee is not sassy, does not like to watch Trolls, does not watch TV, or enjoy having her nails painted. No one holds Tinslee or cuddles with her. These assertions, just like the photographs introduced as Plaintiffs' Exhibits 1-6, are memories of a past that can never come

[4] *See, e.g.*, American Nurses Association, *Code of Ethics for Nurses with Interpretive Statements* § 5.4 (2015) (noting the absolute right of nurses to refuse to participate in medical care that violates moral standards).

again. Today, Tinslee lies in the hospital paralyzed, swollen, sedated, and in constant pain with no one picking her up from her bed to comfort her.

No law forces medical personnel to continue to inflict futile pain and suffering in violation of their oaths and conscience. They can terminate the physician-patient relationship or abstain from providing a particular intervention. Their only legal and ethical obligations are to provide advance notice and facilitate transfer, when appropriate. *See* Defendant's Brief in Response to Plaintiff's Request for Injunctive Relief, at 12-14. Defendant has fulfilled these obligations, and cannot be forced to continue the course of treatment the mother is demanding.

ARGUMENT

The Court should deny Plaintiff's application for injunctive relief. All of the equities demand the rejection of Plaintiffs' position, as the granting of the injunction not only extends the suffering of a child, but also mandates that doctors and nurses engage in affirmative conduct that violates their ethical obligations and continue to needlessly harm a patient. Plaintiffs nonetheless argue that an injunction is appropriate solely on the grounds that the Texas Advance Directives Act is unconstitutional as it violates their due process rights. However, Plaintiffs' argument is foundationally flawed as no due process claim can be asserted because Cook Children's is not a state actor nor have they deprived Plaintiffs of a substantive right. Furthermore, because the statute does not provide the basis for Cook Children's right to withdraw treatment, its constitutionality is irrelevant in determining whether the injunction should be granted. Therefore, the application for temporary injunction should be summarily rejected.

I. The Balance of Equities Favors Denying the Injunction.

When ruling upon an application for temporary injunction, a Texas court must be guided by equity. TEX. CIV. PRAC. & REM. CODE § 65.001. Whether a trial court grants or denies injunctive relief, it abuses its discretion if it does not seek to balance the equitable considerations

before it. *Seaborg Jackson Partners v. Beverly Hills Savs*., 753 S.W.2d 242, 245 (Tex. App. – Dallas 1988, writ dism'd).

In this case, the equities are clear. The Court must balance the continual suffering of a child and the violation of medical ethics on one side against the desire of a mother to dictate her child's medical treatment on the other. This does not present a close call. The undisputed evidence before the Court shows that Tinslee is in constant pain, that her condition is terminal and irreversible, and that the interventions to keep her alive are causing her pain and suffering. Requiring Cook Children's doctors and nurses to continue these interventions violates their medical ethics as they are causing Tinslee pain for no medical benefit. When the Court weighs those indisputable facts against the harm to Ms. Lewis in not being able to direct Tinslee's care, there can be no doubt that the injunction must be denied. Because the balance of hardships lies against the request for temporary injunction, the Court must deny Plaintiff's application. *See Texoma Med. Ctr. v. Brannan*, No. 05-94-00465-CV, 1995 Tex. App. LEXIS 4089, at *5-*6 (Tex. App. – Dallas 1995, no writ) (holding that trial court abused its discretion in granting a temporary injunction where the greater hardships were against the relief); *see also Parks v. U.S. Home Corp*., 652 S.W.2d 479, 486 (Tex. App.--Houston [1st Dist.] 1983, writ dism'd w.o.j.) (affirming the denial of an injunction where the balance of equities supported the defendant).

II. The Constitutionality of the Texas Advance Directives Act is Irrelevant to Determination of the Temporary Injunction.

As discussed below (and throughout the December 12 hearing), the law is clear that the Texas Advance Directives Act (the "Statute"), TEX. HEALTH & SAFETY CODE ch. 166, is constitutional. However, the Court does not even need to reach this issue in denying the injunction.

Plaintiffs are suing to prevent Cook Children's from withdrawing life-sustaining treatment from Tinslee. However, ***Cook Children's ability to withdraw life-sustaining treatment is in no***

way linked to the Statute. The Statute specifically makes clear that it is not the basis of a physician's right to withdraw life-sustaining care:

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

TEX. HEALTH & SAFETY CODE § 166.051; *see also HCA. Inc. v. Miller*, 36 S.W.3d 187, 193-94 (Tex. App. Houston [14th Dist.] 2000), *aff'd*, 118 S.W.3d 758 (Tex. 2003) (noting that the Statute does not change rights to withhold treatment). Instead, rather than granting a right to withdraw care, the Statute clearly notes that it only impedes a doctor's right to remove care in that a doctor cannot withhold care "until a reasonable opportunity has been afforded for transfer of the patient to another physician . . ." *Id.* This fact is critically underscored by the fact that ***the procedures complained of by Plaintiffs – seeking the review of an ethics committee and providing a 10-day notice – are completely voluntary***. As the Statute directs:

> If an attending physician refuses to comply with a directive or treatment decision and does not wish to follow the procedure established under Section 166.046, life-sustaining treatment shall be provided to the patient, but only until a reasonable opportunity has been afforded for the transfer of the patient to another physician or health care facility willing to comply with the directive or treatment decision.

TEX. HEALTH & SAFETY CODE § 166.045(c). Thus, if a doctor chooses not to consult an ethics committee or send 10-day notices, the doctor still retains the right to withdraw life-sustaining care after an opportunity to transfer has passed.

The only "right" a doctor obtains from the Statute in regard to the withdrawal of life-sustaining treatment is that if the doctor voluntarily chooses to follow the procedures outlined in

the Statute before withdrawing care, the physician is "not civilly or criminally liable or subject to review or disciplinary action by the person's appropriate licensing board." *Id.* § 166.045(d). If the Court were to declare the Statute unconstitutional as Plaintiffs and the Attorney General[5] suggest, the only impact would be that healthcare providers would no longer have immunity from suit for decisions to withhold life-sustaining care that have been reviewed by the ethics committee. Thus, even if the Statute is unconstitutional, Cook Children's can still withdraw life-sustaining care from Tinslee.

Rather than having a basis in a statute, physicians have ***always*** had the ability to refuse to provide life-sustaining care that they deem unethical. "Physicians are not ethically obligated to deliver care that, in their best professional judgment, will not have a reasonable chance of benefiting their patients. Patients should not be given treatments simply because they demand them." Am. Med. Ass'n, Opinion E-2.035. Instead, "physicians have an affirmative obligation to transition a patient to palliative care when other treatments have no reasonable chance of providing benefit." Mary S. McCabe & Courtney Storm, *When Doctors and Patients Disagree About Medical Futility*, 4 J. ONCOLOGY PRAC. 207, 209 (2008). The reason that doctors have such a right is that "[p]roviding medically futile treatment is not consistent with [a doctor's] professional ethic." *Id.* As one organization counseled its doctors, "a life-sustaining intervention may be withheld or withdrawn from a patient without the consent of the patient or surrogate if the

[5] Plaintiffs note in their recent brief that the Court should strongly consider the fact that the current Texas Attorney General is refusing to defend the statute. See Plaintiffs' Post-Hearing Brief, at 31 ("It cannot be overstated how significant it is that the governmental agency charged with defending the laws of this State cannot do so in this case."). However, departing from his statutory obligations to defend the laws of Texas is not unusual for this Attorney General. *See, e.g.*, Alejandro Matos, *Attorney General Ken Paxton Won't Defend Texas Ethics Commission as His Allies Try to Gut It*, HOUSTON CHRONICLE (Aug. 16, 2018) (noting that the current Attorney General refused to defend various Texas laws and regulations); David Saleh Rauf, *Attorney General Ken Paxton's Office Declines to Defend State Law*, SAN ANTONIO-EXPRESS NEWS (April 28, 2016) (noting that the current Attorney General would not defend state law barring the use of House and Senate footage); Amicus Brief in McDonald v. Longley, No. 1:19-CV-00219 (W.D. Tex. April 26, 2019) (Attorney General arguing that a Texas state law requiring bar dues in unconstitutional).

intervention is judged to be futile." American Thoracic Society, *Withholding and Withdrawing Life-Sustaining Therapy*, 144 AM. REV. RESPIR. DISEASE 726, 728 (1991).

The ability of a physician to withdraw life-sustaining care when such treatment is unethical is accepted across the United States, without regard to any state's statutory language. In a 1995 scientific survey of ICU physicians, it was noted that "the practice of withholding and withdrawing life-sustaining treatment is extremely widespread." David A. Asch, *et al*., *Decisions to Limit or Continue Life-sustaining Treatment by Critical Care Physicians in the United States: Conflicts Between Physicians' Practices and Patients' Wishes*, 151 AM. J. RESPIR. CRIT. CARE MED. 288, 292 (1995). Indeed, more than 80% of the respondents had withdrawn care that they determined was futile. *Id.* at 291. Of those doctors, 42% did so without the consent of the patient or family. *Id.* Recognizing the importance of a doctor's right to refuse futile treatment, "no state, including New York, has enacted a law that prohibits the withdrawal of life-sustaining therapy." Gordon L. Snider, *Withholding and Withdrawing Life-sustaining Therapy: All Systems Are Not Yet "Go,"* 151 AM. J. RESPIR. CRIT. CARE MED. 279, 280 (1995).

The need for a doctor to make such a decision is heightened when the medical treatment itself causes suffering. Under all ethical standards, "a physician's assessment that life-sustaining technology would be cruel should supersede contrary decisions that might be reached by surrogate decision makers." Susan Braithwaite & David C. Thomas, *New Guidelines on Foregoing Life-Sustaining Treatment in Incompetent Patients: An Anti-Cruelty Policy*, 104 ANNALS INTERN. MED. 711, 713 (1986). Instead, while doctors must ordinarily respect the wishes of patients and their surrogates, the American Medical Association explains bluntly that "[r]especting patient autonomy does not mean that patients should receive specific interventions simply because they (or their surrogates) request them." American Med. Ass'n, Ethics Opinion 5.5.

Although there is a dearth of legal opinions discussing the issue, the few cases where a court has had to consider whether a doctor can withdraw life-sustaining treatment over the objections of a parent when such treatment is futile and causing suffering have affirmed that right. *See Gilgunn v. Massachusetts Gen. Hosp*., No 92-4820 (Mass. Super. Ct. Civ. Action Suffolk So. April 22, 1995) (upholding doctor's right to stop life sustaining care over a family's objection); *Hudson v. Texas Children's Hosp*., No. 352,526 (Probate Court No. 4, Harris County, Texas, Feb. 16, 2005) (refusing mother's application for injunction and allowing hospital to remove patient from life support); *see also Hunt v. Division of Family Servs.*, 146 A.2d 1051, 1066-67 (Del. 2015) (affirming ruling that child should be taken off life support over the objections of the parent);; *In re Christopher I.*, 106 Cal. App. 4th 533, 554 (Cal. App. 2003) (affirming decision to withdraw life sustaining treatment from a child over a father's objections where the treatment was of no benefit and he was suffering substantial pain); *In re K.I.*, 735 A.2d 448, 462-63 (D.C. Ct. App. 1999) (affirming decision to withdraw life sustaining care over the objections of his parents).

At the conclusion of the evidentiary hearing, Plaintiffs' counsel made the statement that neither doctors nor the Court should consider Tinslee's condition or suffering in making decisions about life-sustaining care as he noted that the Statute specifically did not condone "mercy killing." However, no matter what one's position is on "mercy killing," there is no dispute that such a concept is irrelevant here. "Mercy killing" defines a situation where one takes a deliberate act that causes the death of another to prevent suffering. It requires that a person end the life of another through non-natural means (such as providing an overdose of painkillers) that hasten death. That situation is dramatically different than the withdrawal of life sustaining treatment which simply allows a natural death. *See, e.g.*, *Washington v. Glucksberg*, 521 U.S. 702, 724-26 (1997) (discussing the difference between the lawful withdrawal of life-sustaining treatment and

Washington's ban on hastening death through mercy killing). Indeed, while the Statute says that it does not condone mercy killing, it simultaneously notes that the withdrawal of life-sustaining treatment "to permit the natural process of dying" is allowed. TEX. HEALTH & SAFETY CODE § 166.050. Here, Cook Children's is not in any way suggesting that it would cause Tinslee's death through a mercy killing. Instead, Cook Children's notes that – as the law has always allowed – it intends to withdraw life-sustaining care and treat Tinslee's pain while her disease runs its natural course.

Because Cook Children's ability to withdraw life-sustaining care from Tinslee is in no way tied to the Statute, the Court must deny the application for an injunction even if the statute is unconstitutional. No law obliges a doctor to provide futile and painful intervention, and the request of Plaintiffs to force doctors and nurses to provide such intervention must be denied. Thus, the Statute's constitutionality is irrelevant to Plaintiffs' application for a temporary injunction. The Statute may grant Cook Children's immunity for a malpractice action (which would be impacted by a constitutionality determination), but this is not a malpractice action and the Court is not being asked to rule on immunity. Instead, when looking at this application for a temporary injunction, the Court must look at whether a valid claim has been asserted that can support the requested injunction. There is none.

III. Plaintiffs' Constitutional Claim Fails.[6]

Plaintiffs' lengthy attack on the purported flaws of the procedure set out in Section 166.046 and followed by Defendant (*see* Plaintiffs' Pre-Hearing Bench Brief, at 6–9) does not support a

[6] At the December 12 hearing, Plaintiffs' counsel referred to the then-pending case of *Kelly v. Houston Methodist Hospital*, which involved a similar challenge to the constitutionality of Section 166.046. However, the day after the hearing, the Texas Supreme Court denied the motion for rehearing of the petition for review in *Kelly*. *See* Case No. 19-0390, Dec. 13, 2019 Order, http://www.search.txcourts.gov/Case.aspx?cn=19-0390&coa=cossup. In so doing, the Supreme Court let stand the determination by the Houston Court of Appeals that the constitutional challenge had been mooted by the patient's death. *See Kelly v. Houston Methodist Hosp*., No. 01-17-00866-CV, 2019 Tex. App.

claim for a constitutional violation under 42 U.S.C. § 1983, because Defendant is not a state actor and did not deprive Plaintiffs of a constitutionally protected interest. At the hearing, Plaintiffs sought to obscure this fatal flaw in their case by invoking *County of Dallas v. Wiland*, 216 S.W.3d 344 (Tex. 2007), for the proposition that the right to procedural due process is "absolute" and requires an award of nominal damages even without proof of actual injury *See id*. at 356–57 (quoting *Carey v. Piphus*, 435 U.S. 247, 266–67 (1978)). But any entitlement to procedural due process presupposes both a constitutionally protected interest and a state actor, neither of which is present here.[7] *See Patel v. Tex. Dep't of Licensing & Regulation*, 469 S.W.3d 69, 86–87 (Tex. 2015); *Republican Party of Tex. v. Dietz*, 940 S.W.2d 86, 90–91 (Tex. 1997).

A. <u>There has been no deprivation of a constitutionally protected interest</u>.

None of the cases cited by Plaintiffs support any due process right to receive or demand the continuation of medical treatment. Plaintiffs rely heavily on the Supreme Court's statement in *Cruzan* that "[i]t cannot be disputed that the Due Process Clause protects an interest in life." *Cruzan v. Director, Mo. Dep't of Health*, 497 U.S. 26, 281 (1990). But *Cruzan* concerned a patient's right to ***refuse*** treatment, and that distinction is critical. The right recognized in *Cruzan* was grounded in the due process rights to liberty, privacy, and bodily autonomy. *See id*. at 278–79. The Court referred to a due process "interest in life" only in the context of requiring a high evidentiary threshold for establishing that an incapacitated patient ***would have wanted*** to cease treatment:

> The choice between life and death is a deeply personal decision of obvious and overwhelming finality. We believe Missouri may legitimately seek to safeguard the personal element of this choice through the imposition of heightened evidentiary

LEXIS 2327; 2019 WL 1339505 (Tex. App.—Houston [1st Dist.] March 26, 2019). To Defendant's knowledge, *Kelly* was the only other case in which a court has been asked to consider a constitutional challenge to Section 166.046.

[7] Both *Wiland* and *Carey* involved state actors. *See* 216 S.W.2d at 346–47 (wrongful termination suit by Dallas County deputy constables); 435 U.S. at 266–67 (public school discipline case).

> requirements. It cannot be disputed that the Due Process Clause protects an interest in life as well as an interest in refusing life-sustaining medical treatment. Not all incompetent patients will have loved ones available to serve as surrogate decisionmakers. And even where family members are present, "there will, of course, be some unfortunate situations in which family members will not act to protect a patient." *In re Jobes*, 108 N.J. 394, 419, 529 A.2d 434, 447 (1987). A State is entitled to guard against potential abuses in such situations.

Id. at 281.

Nothing in *Cruzan* suggests that the hospital had an obligation to continue to provide treatment it determined was not medically appropriate. Plaintiffs cannot point to a single case in which a court has applied a due process "right to life" or a parent's right to make medical decisions to compel a particular hospital or physician to continue providing treatment they have determined is medically inappropriate. To the contrary, Defendant has provided ample authority making clear that no such obligation exists. Resp. at 14–15; *see, e.g.*, *In re Guardianship of Tschumy*, 853 N.W.2d 728, 747 (Minn. 2014) (court-appointed guardian's decision to withdraw life-sustaining treatment from brain-damaged patient did not implicate due process even though guardian was a state actor). In a tragic situation such as this one, the withdrawal of life-sustaining treatment after a medical determination of futility does not "deprive" a patient of life, because the patient's death is the result of the underlying disease. *See Vacco v. Quill*, 521 U.S. 793, 801 (1997) (holding that withdrawal of life support is not equivalent to euthanasia or assisting a suicide).

This exact question was put before the court in *Disability Rights Wis. v. Univ. of Wis. Hosp. & Clinics*, 859 N.W.2d 628 (Wis. Ct. App. 2014). In *Disability Rights*, the plaintiffs argued that they had a cause of action for violation of their due process rights because certain state doctors had refused to provide certain healthcare treatments. In dismissing the case, the court noted that there is no authority to support an allegation "that doctors have an obligation, deriving from patients' fundamental constitutional rights, to begin or continue medical treatment." *Id.* at 639. Instead,

the court noted that the Supreme Court had explained that "the liberty interest protected by the Due Process Clause includes a limited number of specifically identified rights: 'to marry; to have children; to direct the education and upbringing of one's children; to marital privacy; to use contraception; to bodily integrity[;] ... to abortion'; and perhaps, 'the traditional right to refuse unwanted lifesaving medical treatment.'" *Id.* (quoting *Washington v. Glucksberg*, 521 U.S. 702 (1997) and *Cruzan*, 497 U.S., at 278-79). Stressing that courts should not expand due process rights beyond those listed above, the court concluded that there was no "substantive due process right to medical care from the government" as such a right would "run contrary to the fundamental principle that the government is not under a constitutional duty to affirmatively protect persons or to rescue them from perils that the government did not create." *Disability Rights Wis*., 859 N.W.2d at 640 (citing *DeShaney v. Winnebago Cnty. DSS*, 489 U.S. 189, 195 (1989); *Sandage v. Board of Comm'rs of Vanderburgh Cnty*., 548 F.3d 595, 597 (7th Cir. 2008)).

Similarly, in *Johnson v. Thompson*, the Tenth Circuit expressly rejected the argument that *Cruzan* creates any affirmative right to medical treatment. 971 F.2d 1487, 1495–96 (10th Cir. 1992). Such a right can be found only in the specific context of persons held in state custody against their will, such as prison inmates or involuntarily committed mental patients, because those persons are not free to depart and seek treatment elsewhere. *Id.*[8] That is manifestly not the situation here. To the contrary, the Statute expressly guarantees a patient the right to transfer to another facility if one can be found; requires the hospital to provide medical records for that purpose; and allows for an extension of time where there is a reasonable probability of finding another facility or physician to take over the patient's care. TEX. HEALTH & SAFETY CODE §

[8] The *Johnson* court also stressed that even when a state provided some medical benefits to a patient, that did not entitle them to further treatment based on substantive due process rights. *Id.* at 1496. As long as the patient's receiving of medical treatment was voluntary (and not due to forced confinement), no due process right for medical treatment ever arises. *Id.* (citing *Monahan v. Dorchester Counseling Center, Inc*., 961 F.2d 987, 993 (1st Cir. 1992)).

166.046(b), (d), (g). Thus, Section 166.046 does not violate either a patient's due process interest in life or a parent's due process interest in making medical decisions for her child, because the patient or parent has the right to seek out another facility or physician willing to continue treatment. Because that right is built into the statute itself, it is facially constitutional. *Cf. Tenet Hosps. Ltd. v. Rivera*, 445 S.W.3d 698, 702 (Tex. 2014) (plaintiff asserting facial challenge must show that the "statute, by its terms, ***always*** operates unconstitutionally") (emphasis added); *Barshop v. Medina Cty. Underground Water Conservation Dist.*, 925 S.W.2d 618, 631 (Tex. 1996) (same).

Furthermore, it is undisputed that Cook Children's went far beyond its obligations under the statute and made herculean efforts to find another facility willing to take over Tinslee's care. Dozens of doctors and hospitals have been contacted and all of them have refused to help. Moreover, every time Plaintiffs – or an organization offering to help Plaintiffs – asked for additional information or more medical tests, Cook Children's provided such information in an effort to support a potential transfer. Thus, Plaintiffs' as-applied challenge fails as well. *See Tex. Mun. League v. Tex. Workers' Comp. Comm'n*, 74 S.W.3d 377, 381 (Tex. 2002) ("we must evaluate the statute as it operates in practice against the particular plaintiff").

Finally, the arguments of Plaintiffs' counsel at the conclusion of the temporary injunction hearing about legal obligations to provide some treatment further demonstrate the lack of a constitutional right here. In his final closing, counsel for Plaintiffs noted that hospitals had an obligation to treat patients that come to an emergency room. While this fact is true – and not at issue in this case – the reasons for such obligations that have been added by statute only underscore the fact that there is no constitutional right to health care. Hospitals have limited obligations to treat emergent patients pursuant to the Emergency Medical Treatment and Active Labor Act ("EMTALA"), 42 U.S.C. § 1395dd. However, ***the key fact is that a patient's right to such***

treatment comes from a statute and not from the Constitution. Moreover, EMTALA only requires a certain level of care and does not mandate that a patient can dictate what care is appropriate.[9] In sum, no court has ever held that there is a substantive due process right to medical care. This Court should not become the first.

B. Cook Children's is not a State Actor.[10]

Plaintiffs have also failed to identify any authority in support of treating Defendant or its physicians as state actors, which is an absolute requirement for any due process claim under 42 U.S.C. § 1983. The cases relied on by Plaintiffs are distinguishable because they involved state officials ***actively participating*** in the challenged conduct, rather than merely acquiescing in it. *See* Plaintiffs' Pre-Hearing Bench Brief, at 10–11. The use of racially discriminatory peremptory strikes constituted state action because state law created the jury selection process and the court summoned the jury pool, enforced the strikes, and seated the jurors. *See Georgia v. McCollum*, 505 U.S. 42, 51 (1992); *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 615 (1991). Likewise, the prejudgment attachment process in *Lugar v. Edmondson Oil* implicated state action because the county sheriff actively participated in seizing debtors' property. 457 U.S. 922, 941–42 (1982). That active participation distinguished *Lugar* from cases such as *Flagg*, in which a statutory scheme merely authorized a private warehouse to sell a debtor's goods. *See Flagg Bros., Inc. v. Brooks,* 436 U.S. 149, 158 (1978) ("This Court, however, has never held that a State's mere acquiescence in a private action converts that action into that of the State.").

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[9] Indeed, if Plaintiff's contention were accurate and a party had a wholesale constitutional right to direct specific medical treatments, then EMTALA and hundreds of statutes like it would be unconstitutional as these statutes only grant patients' very limited rights in certain specific circumstances.

[10] Plaintiffs' latest filing makes the inexplicable assertion that "Cook did not dispute it was a state actor." Plaintiffs' Dec. 20, 2019 Post-Hearing Bench Brief, at 24. This is simply not true. In its prior brief, Defendant explained at length why neither Cook Children's nor its physicians are state actors. Defendant's Dec. 11, 2019 Resp. at 15–21; *see, e.g.*, 15 ("Here, Defendant – a private hospital – is indisputably a private actor.").

At the hearing, Plaintiffs' counsel also mentioned *Marsh v. Alabama*, in which privately-owned streets in a "company town" were deemed to be a public forum for purposes of First Amendment rights. 326 U.S. 501 (1946). *Marsh* is rarely followed, and it has no application here. As the Supreme Court explained in *Flagg*, the key to finding state action in the unique circumstances of *Marsh* was ***exclusivity*** – the company performed all municipal functions such that there were no other streets or public spaces on which the defendant could exercise her right to distribute religious literature. *Flagg*, 436 U.S. at 159–60. There is no such exclusivity concern here. Cook Children's is hardly the only hospital capable of providing high-level pediatric cardiac intensive care services, and it has actively assisted Plaintiffs' efforts to find an alternative provider by reaching out to dozens of other hospitals and specialists.[11]

Plaintiffs also cite *Rendell-Baker v. Kohn* in support of their argument that Defendant's use of § 166.046 makes it a state actor. Plaintiffs' Pre-Hearing Bench Brief at 10; *see* 457 U.S. 830 (1982). But *Rendell-Baker* actually stands for the opposite proposition. In that case, the Supreme Court held that a private school was ***not*** a state actor for purposes of a wrongful termination suit, despite the fact that it was subject to heavy state regulation and received nearly all of its funding from the government. *See id*. at 840–42. Likewise, a private hospital like Cook Children's is not a state actor no matter how heavily it is regulated or how much public funding it receives.

[11] The lack of exclusivity distinguishes this case from two state-action cases cited in Plaintiffs' latest brief (Plaintiffs' Dec. 20 Post-Hearing Bench Brief, at 26 n.58, 28). In *Belbachir v. County of McHenry*, employees of a private contractor hired to provide medical services in a jail were sued for failing to prevent a detainee's suicide. 726 F.3d 975, 978 (7th Cir. 2013). State action existed in that case because the detainee was being held in state custody and not free to seek psychiatric treatment from any other source; thus, the state had assumed a duty to protect her from harm. *See id*. at 980–81. *Millspaugh v. Bulverde Spring Branch Emergency Services* was a § 1983 action for wrongful termination brought against BSB, a private organization that contracted to provide ambulance and fire services to three districts in Comal County. 559 S.W.3d 613 (Tex. App.—San Antonio 2018, no pet.). The Court of Appeals concluded that a fact issue existed as to whether BSB was a state actor, noting that there was "substantial interdependence" between BSB and the districts insofar as BSB used district buildings and equipment, the districts relied on BSB to perform administrative functions "integral to governing," and the districts had oversight over BSB's major financial decisions and budget. *Id*. at 621. Even more importantly, the district commissioners had been personally involved in the events leading to the plaintiff's termination. *Id*. at 622–23. No comparable circumstances exist here.

It is significant that Plaintiffs cannot point to ***any*** cases from a hospital context to support their argument for state action.

- Plaintiffs can point to no case in which a private hospital's provision or withholding of medical treatment made it a state actor. Defendant has presented authority establishing the contrary. Defendant's Resp. at 15–16; *see Klavan v. Crozer-Chester Medical Center,* 60 F. Supp. 2d 436 (E.D. Pa. 1999).

- Plaintiffs can point to no case in which a medical provider's action pursuant to a statutory or regulatory scheme made it a state actor. Defendant has presented multiple cases establishing the contrary. Defendant's Resp. at 17–18; *see, e.g.*, *Blum v. Yaretsky,* 457 U.S. 991 (1982) (transfer of patients pursuant to Medicaid utilization requirements was not state action); *Bass v. Parkwood Hosp.,* 180 F.3d 234, 241–43 (5th Cir. 1999) (psychiatric commitment pursuant to statutory procedure was not state action); *Lewis v. Law-Yone,* 813 F. Supp. 1247, 1254 (N.D. Tex. 1993) (same).

- Plaintiffs can point to no case in which a private hospital was deemed to be a state actor simply because it received public funding. To the contrary, most federal circuits have held that the receipt of Medicare, Medicaid, or other public funding is not sufficient to create state action. *See, e.g.*, *Hodge v. Paoli Mem. Hosp.*, 576 F.2d 563, 564 (3d Cir. 1978) (collecting cases); *cf. Rendell-Baker*, 457 U.S. at 840 (private school was not state actor despite receiving nearly all of its funding from the government).

- Finally, Plaintiffs can point to no case (whether in a medical context or otherwise) in which a private party's benefiting from a statutory immunity scheme made it a state actor. Defendant has presented multiple cases expressly rejecting such an argument. Defendant's Resp. at 19–20; *see, e.g.*, *Goss v. Memorial Hospital System,* 789 F.2d 353, 356 (5th Cir. 1986) (immunity for medical peer review committees did not make them state actors); *cf. Flagg*, 436 U.S. at 158 (warehouse sale was not state action despite statutory immunity); *White v. Scrivner Corp.,* 594 F.2d 140, 141 (5th Cir. 1979) (store security guards' detention of suspected shoplifter was not state action despite statutory immunity).

C. <u>This case is not ripe for an "open courts" challenge</u>.

The State's amicus brief does not mention the Texas Constitution's open-courts guarantee, and the Plaintiff brings no open-courts challenge. The State, nevertheless, mentioned open courts in passing at the conclusion of the temporary-injunction hearing, with no explanation. But even if an open courts claim were at issue, it would fail for lack of ripeness.

The Texas Constitution's open-courts guarantee provides that "[a]ll courts shall be open, and every person for an injury done him, in his lands, goods, person or reputation, shall have

remedy by due course of law." Tex. Const. art. I, § 13. This provision ensures that a person bringing a well-established common-law cause of action will not suffer unreasonable or arbitrary denial of access to the courts. *Yancy v. United Surgical Partners Int'l, Inc.*, 236 S.W.3d 778, 783 (Tex. 2007) (citing *Jennings v. Burgess*, 917 S.W.2d 790, 793 (Tex.1996)). A statute denies access to the courts if it unreasonably abridges a plaintiff's right to redress injuries caused by another's wrongful act. *Id*. An open courts violation requires two elements: "(1) a cognizable, common-law claim that is statutorily restricted, and (2) the restriction is unreasonable or arbitrary when balanced against the statute's purpose and basis." *Id*.

Even if the Plaintiffs had brought an open-courts challenge, it would fail at a threshold level as unripe. The challenged statute, § 166.046, shields doctors and hospitals from malpractice claims, professional discipline, and criminal liability. TEX. HEALTH & SAFETY CODE § 166.046. This suit brings no such claim. In fact, Plaintiffs specified in their opening statement that "This is not a malpractice suit." That disclaimer by Plaintiffs forecloses any comparison to *Montalvo v. Lopez*, in which this Court applied the open-courts guarantee to find that a two-year statutory limitations provision for medical malpractice claims was unconstitutional as applied to a plaintiff who was a minor at the time of her injury. *See Montalvo v. Lopez*, 466 S.W.3d 290 (Tex. App.—San Antonio 2015, pet. denied). Because Plaintiffs are not asserting a malpractice claim, any purported abridgement of their right to assert such a claim is entirely hypothetical.

CONCLUSION AND PRAYER

For the reasons set forth above and in Defendant's prior briefing, and based on the evidence and argument presented at the temporary injunction hearing, Defendant respectfully requests that this Court lift the temporary restraining order, deny the temporary injunction, render judgment that Plaintiffs take nothing by this suit, award reasonable and necessary attorney's fees to Defendant, assess costs against Plaintiffs, and award Defendant all other relief to which Defendant is entitled.

Dated: December 20, 2019

Respectfully submitted,

By: */s/ Geoffrey S. Harper*

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing document has been served on Plaintiff's counsel via their emails as noted below on December 20, 2019.

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ATTACHMENT A

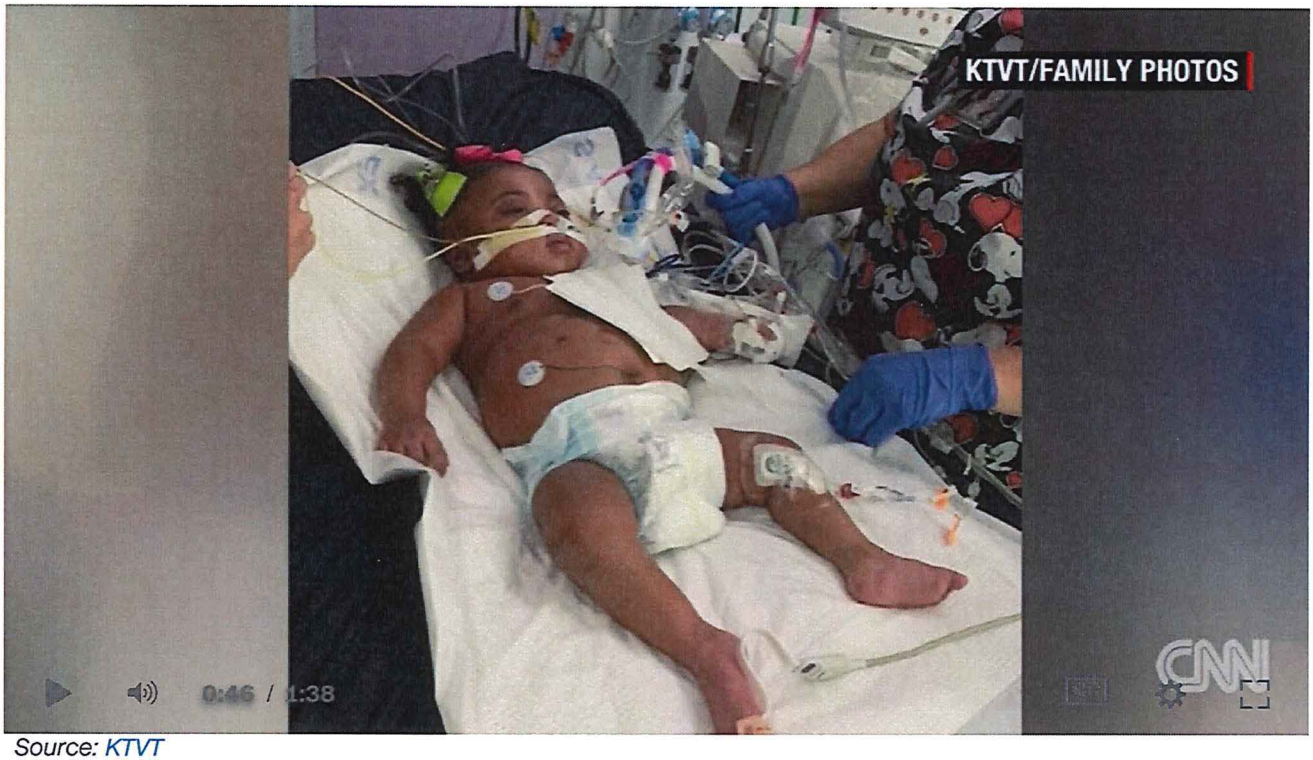
US

LIVE TV

Judge extends order that a hospital must keep 10-month-old on life-support, reports say

By **Madeline Holcombe**, CNN

Updated 5:31 AM ET, Fri December 13, 2019



Source: KTVT

Judge orders hospital to keep 9-month-old on life support 01:39

(CNN) — A Fort Worth judge has extended a temporary restraining order against a children's hospital that planned to take a 10-month-old girl off life-support, according to CNN affiliate KTVT.

Tinslee Lewis was born with a rare heart defect called Ebstein's anomaly and suffers from chronic lung disease and severe chronic pulmonary hypertension, Cook Children's Health Care System spokesperson Winifred King said in a statement last month. Her physicians believe she is suffering and her condition is irreversible, King said, so the hospital planned to remove her life-support.

A judge granted Tinslee's family a temporary restraining order against the hospital in November.

Judge Sandee Bryan Marion found that there was a reasonable expectation that the family could find a physician to take over her treatment and extended the temporary restraining order that would continue her care at the hospital, KTVT reported.

"This isn't Tinslee's first rodeo. She's made it this far; I know she is going to continue to fight for her life," Trinity Lewis, Tinslee's mother, told reporters outside the courtroom.

"[illegible] share the same sense of concern for Tinslee and her family as they face a very difficult situation. C[illegible]ctors and nurses have done everything humanely possible to save Tinslee's life. Currently, any care we provide, including feeding, bathing and providing treatments and medication, can cause her little body to experience a medical crisis, which causes even more intervention and pain for her," King said in a statement.

Last month, King said that Cook Children's had already reached out to nearly 20 facilities from Los Angeles to Philadelphia to see if another hospital would take over the infant's care. But they all agreed with Cook Children's assessment of her condition and said there was nothing more they could do, according to King.

King added that doctors have had to sedate and paralyze the infant to keep her from pulling at the lines connected to her ventilator. King said they believe she is reacting in pain when not sedated or paralyzed.

But Tinslee's family said that they wanted to take every opportunity to keep her alive.

"She deserves the chance to fight for her life and she's got a troop that will help her 100% and above," Lewis' great aunt, Beverly Winston, told reporters. "That's our baby, and we want to give her all the chances there are."

CNN's Chris Boyete contributed to this report.