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In the Court of Appeals for the Second Judicial District
Fort Worth, Texas

T.L., a Minor and Mother, T.L., on her Behalf,
Appellants,

v.

Cook Children's Medical Center,
Appellee.

On Appeal from the 48th Judicial District Court, Tarrant County

BRIEF FOR THE STATE OF TEXAS, GOVERNOR GREG ABBOTT, AND ATTORNEY GENERAL KEN PAXTON AS AMICI CURIAE

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Statement of Interest of Amici Curiae

This case turns on the constitutionality of section 166.046 of the Texas Health and Safety Code. The constitutionality of its laws is one of the State's most pressing interests. And the Attorney General, as the State's chief legal officer, "is entitled to be heard" in any proceeding involving the constitutionality of a Texas statute. Tex. Civ. Prac. & Rem. Code § 37.006(b).

In addition, as state officials, the Governor and the Attorney General of Texas have a duty to support and defend the Constitution of the United States and of this State. U.S. Const. art. VI, cl. 3; Tex. Const. art. XVI, § 1. When a Texas statute infringes on constitutional rights—especially the foundational right to life—those officials have an interest in seeing that the statute is not enforced. In advancing that interest, they are necessarily advancing the State's interest. *See id*.

Finally, the State has a substantial interest in this case because it operates public state hospitals. *See* Tex. Health & Safety Code ch. 552. Section 166.046 applies to public state hospitals, so the State has an interest in the judicial resolution of that statute's constitutionality.

No fee has been or will be paid for the preparation of this brief.

Introduction

Life is the ultimate constitutionally protected interest. It comes before "liberty" and "property" in both the due-process clause of the Fourteenth Amendment and the due-course clause of the Texas Constitution. U.S. Const. amend. XIV, § 1; Tex. Const. art. I, § 19. It is listed first because it is first in importance.

This case presents a question of foundational importance: what process baby T.L. must be afforded before the hospital caring for her can end her life. Before the hospital may deprive her of her life, the federal and state constitutions guarantee her, at minimum, notice and an opportunity to be heard. Yet section 166.046 of the Texas Health and Safety Code does not adequately provide either. On its face, section 166.046 stands in conflict with the core right to life the federal and state constitutions promise baby T.L.

Section 166.046's defects make Texas a national outlier. Only one other State, Virginia, arbitrarily cuts off a provider's duty to continue life-sustaining treatment after a specified period. But Virginia provides a longer timeframe and, unlike Texas, ensures the patient's right to seek meaningful judicial review. Va. Stat. § 54.1-2990. Even criminals facing the death penalty for the most serious of crimes enjoy significantly more process than what section 166.046 provides the guiltless in Texas.

This case is of substantial importance to the State of Texas, Attorney General Ken Paxton, and Governor Greg Abbott. The Court should not delay its decision. It should promptly hold that section 166.046 is unconstitutional on its face. And it should reject the hospital's efforts to avoid a ruling on that question.

Record References

In this brief, "CR" refers to the clerk's record, "RR" to the reporter's record, and "Dx" to the defendant's exhibits admitted at the temporary-injunction hearing.

Statement of Facts

I. Overview

This case revolves around baby T.L., an infant with significant medical issues. CR.131–32, 150–51. She was born in February 2019. 2.RR.17. From birth, she has suffered from several life-threatening medical conditions. CR.132; 2.RR.17. Immediately after she was born, she was transferred to Cook Children's Medical Center here in Fort Worth, where she is currently under around-the-clock, life-sustaining care. 2.RR.18, 264–65; Dx 8–16. Her mother, whose initials are also T.L., wants her baby to live. 2.RR.24. The hospital wants either to terminate its care of baby T.L.—which would cause her death—or transfer her to another health care facility. CR.151, 281–84; Dx 1, 4.

To that end, the hospital followed the procedures established by Texas Health and Safety Code section 166.046 for resolving disagreements between doctors and patients (or their proxies) about whether medical care should continue. *See* 2.RR.33–57, 303; Dx 1, 2. If those procedures are constitutional, the hospital and the health care professionals who have treated baby T.L. could rely on section 166.045(d) of the code, which provides that "[a] physician, health professional acting under the direction of a physician, or health care facility is not civilly or criminally liable or subject to review or disciplinary action by the person's appropriate licensing board if the

person has complied with the procedures outlined in Section 166.046." The courts' resolution of this case will likely decide baby T.L.'s fate.

II. Procedural History

On October 31, 2019, mother T.L. received notice that the hospital intended to remove baby T.L.'s life-sustaining medical treatment pursuant to section 166.046. CR.132. In response, baby T.L. and mother T.L. initiated this action in the 48th Judicial District Court. *See* CR.6–24 (original petition and attachments). The T.L. family obtained a temporary restraining order preventing the hospital from ending its life-sustaining treatment of baby T.L. CR.28–30; *see* CR.113–14, 172–73 (orders extending the duration of the TRO by agreement of the parties). The hospital successfully moved for recusal of the judge who signed the TRO, and Chief Justice Hecht appointed Sandee B. Marion, Chief Justice of the Fourth Court of Appeals, to act as the trial-court judge. CR.128–130; *see* CR.34–100, 115–27 (additional recusal-related filings).

The family filed an amended verified petition. CR.131–46. After describing baby T.L.'s condition and the hospital's course of treatment, this live petition explained that the hospital had invoked the procedures of section 166.046 in connection with its effort to discontinue care. CR.131–32.

The family sought a declaration under the Uniform Declaratory Judgments Act that, "pursuant to the Fourteenth Amendment to the United States Constitution and Article I, Section 19 of the Texas Constitution, [the hospital's] actions and planned discontinuance of [baby T.L.'s] life-sustaining treatment under the Texas Health & Safety Code infringes upon [baby T.L.'s] right to due process." CR.135.

Through this claim, the family asserted that section 166.046 violates both procedural and substantive due process. CR.136–39. The family challenged the statute on its face and as the hospital applied it to baby T.L. *See* CR.138 (live petition asserting that section 166.046 "is so lacking in specificity that no meaningful due process can be fashioned from it and, as a result, it is unconstitutional in this case and every case"). The family also asserted a claim under 42 U.S.C. § 1983, alleging that the hospital functioned as a state actor in following the procedures established by section 166.046. CR.139–41.

The live petition sought "temporary and permanent injuncti[ve]" relief, asking the trial court to enjoin the hospital "from withdrawing life-sustaining treatment pursuant to [section] 166.046." CR.141; *see* CR.142 (assertions in support of injunctive relief). It requested actual and nominal damages. CR.142; *see* CR.143 (further requesting attorneys' fees and costs). And it made an alternative request that the hospital be ordered to extend its care of baby T.L. based on a reasonable expectation that a willing health care facility will be found. CR.142 (referencing Texas Health and Safety Code section 166.046(g)).

The hospital filed a general denial and requested attorneys' fees and costs. CR.147–48. It also filed a brief in response to the family's request for injunctive relief. CR.149–71.

Amici curiae weighed in on both sides. The State of Texas, the Texas Home School Coalition, and several individuals filed amicus briefs in support of the family. CR.105–12, 201–34. Other amici, including a coalition of hospitals, filed briefs in support of the hospital. CR.180–98, 269–79.

The trial court held a one-day temporary-injunction hearing. 1.RR.1. It heard testimony from several witnesses, including mother T.L., one of baby T.L.'s doctors, and the chair of the hospital's ethics committee, and it admitted several exhibits. 1.RR.4–7; 2.RR.16–17, 25–26, 84; 3.RR (exhibits).

After the parties filed post-hearing briefs, CR.235–68, 280–303, the trial court signed an order denying the family's request for a temporary injunction but requiring the hospital to continue providing care to baby T.L. for seven days, so that the family could seek emergency relief in this Court. CR.304. The family promptly noticed this interlocutory appeal and successfully sought emergency relief from this Court. CR.313–16; *see* Order, *T.L. v. Cook Children's Med. Ctr.*, No. 02-20-00002-CV (Jan. 3, 2020) (ordering the hospital not to discontinue life-sustaining treatment of baby T.L. while this appeal remains pending).

Summary of the Argument

I. Section 166.046 is a facially unconstitutional affront to procedural due process. The interests that section 166.046 implicates, including Texans' fundamental interest in life, fall within the protection of both the due-process clause of the United States Constitution and the due-course clause of the Texas Constitution. And for several reasons, the procedures that section 166.046 affords hospitals and other health care providers do not meet constitutional requirements. The statute provides insufficient notice to patients and their proxies. It deprives them of a meaningful opportunity to be heard. And it fails to ensure an impartial arbiter to resolve disagreements between patients and health care providers.

II. In light of the statute's significant constitutional flaws, the hospital will likely tell the Court that it should not—and indeed may not—reach the merits of the constitutional question. The Court should reject any such arguments.

A. A ruling on the constitutionality of section 166.046 is necessary to a decision in this case. That provision is central to the hospital's course of conduct and to the family's request for injunctive relief. It is part of a broader statutory framework under which the State mandates the provision of life-sustaining care to patients who want it. That framework allows a health care provider to terminate care in one of two scenarios: when a "reasonable opportunity" to transfer the patient to the care of another provider has passed without success, and when the procedures of section 166.046 are followed. Constitutionally deficient though they are, those procedures are the most process that the State affords in this setting, so a ruling on the provision's constitutionality is necessary to guide the hospital's permissible conduct.

B. Under the particular circumstances of this case, the hospital qualifies as a state actor subject to constitutional constraints. For the state-actor requirement to be satisfied, there must be a close nexus between the State and the challenged action, such that private conduct can fairly be attributed to the State.

Here, the hospital is properly viewed as engaged in state action. Use of section 166.046 constitutes an exercise of rights and privileges created by state law involving life-or-death decisions. And by following the requirements of that provision, a health care provider functions as a state actor.

Several factors support the latter conclusion. First, the section-166.046 procedure is predicated on the State's exercise of coercive power over health care providers. Second, the State uses its unique authority to encourage providers to follow that procedure. Third, the immunity that the hospital enjoys based on its decision to utilize section 166.046 amounts to a significant benefit from the State, such that the hospital can be fairly viewed as relying on governmental assistance and benefits to the detriment of a patient, who would otherwise have other avenues of legal recourse. Finally, section 166.046 delegates to the hospital the unique governmental function of adjudication.

Argument

I. Section 166.046 Unconstitutionally Authorizes Deprivations of Life and Liberty Without Due Course of Law.

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

This revolutionary concept—that we are all entitled to appropriate legal process before the taking of our life, liberty, or property—found even firmer footing with the founding of this nation and the enactment of the Fifth Amendment to the United States Constitution, which provides that "[n]o person shall be . . . deprived of life,

liberty, or property, without due process of law." U.S. Const. amend. V; *accord id.* amend. XIV, § 1.

This case compels the Court to become part of this tradition and enforce the protections of due course of law once more. Section 166.046 of the Texas Health and Safety Code allows the government to deny an individual his or her life, and it does so without constitutionally sufficient process.

A. Section 166.046 provides for inadequate approval of life-ending decisions.

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

"If the patient or the person responsible for the health care decisions of the patient is requesting life-sustaining treatment that the attending physician has decided and the ethics or medical committee has affirmed is medically inappropriate," the statute relieves the attending physician and health care facility of an obligation to provide life-sustaining treatment ten days after the written decision and relevant medical records are provided, unless a court orders otherwise. *Id.* § 166.046(e), (g);

see id. § 166.002(10) (defining "life-sustaining treatment"). During that ten-day window, "the physician shall make a reasonable effort to transfer the patient to a physician who is willing to comply with the directive." *Id.* § 166.046(d).

Section 166.046 affords only limited rights to the patient or proxy regarding the directive or treatment: 48 hours' notice of the committee review meeting, the right to attend the committee review meeting, the right to review certain portions of the patient's medical record, and the right to receive a written explanation of the decision reached during the review process. *Id.* § 166.046(b)(2), (4).

B. On its face, section 166.046 violates procedural due course.

The due-process clause of the United States Constitution provides that "[n]o State shall . . . deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV, § 1. Similarly, the due-course clause of the Texas Constitution provides that "[n]o citizen of this State shall be deprived of life, liberty, property, privileges or immunities . . . except by the due course of the law of the land." Tex. Const. art. I, § 19. A statute is unconstitutional under these provisions if it authorizes a state actor to deprive an individual of a constitutionally protected interest and uses insufficient procedures to effectuate that deprivation.

Section 166.046 fails the due-course test.[1] The statute leads to the denial of constitutionally protected interests—the right to life and the right to determine one's

[1] "[I]n matters of procedural due process" arising under the Texas Constitution's due-course provision, the Texas Supreme Court has "traditionally followed contemporary federal due process interpretations." *Univ. of Tex. Med. Sch. at Hous. v. Than*,

medical treatment. And it does so through woefully insufficient procedures. The statute not only denies patients sufficient notice and opportunity to be heard. It does not even afford patients a neutral arbiter to decide their fate.

1. The denial of life-saving medical treatment is the denial of a constitutionally protected interest.

The "Due Process Clause protects persons against deprivations of life, liberty, or property; and those who seek to invoke its procedural protection must establish that one of these interests is at stake." *Wilkinson v. Austin*, 545 U.S. 209, 221 (2005). That requirement is easily satisfied here. When a patient has requested life-sustaining treatment, only to have it denied by a physician or health care facility, the physician and health care facility are denying the patient life for the period of time that he or she would have lived had the life-sustaining treatment been provided. Additionally, individuals have a significant liberty interest with regard to decisions about their medical treatment, and parents have a fundamental liberty interest in making decisions about the care of their children. *See, e.g.*, *Troxel v. Granville*, 530 U.S. 57, 66 (2000) (plurality op.); *id.* at 77 (Souter, J., concurring in the judgment); *Cruzan by Cruzan v. Dir., Mo. Dep't of Health*, 497 U.S. 261, 278 (1990); *Parham v. J.R.*, 442 U.S. 584, 602-04 (1979). Thus, a physician or health care facility's use of section 166.046 to discontinue life-sustaining treatment implicates several constitutionally protected rights.

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901 S.W.2d 926, 929 (Tex. 1995). Because section 166.046 violates the Texas Constitution, the Court need not consider whether it would also violate the United States Constitution.

2. Section 166.046 fails to provide adequate notice, a meaningful opportunity to be heard, or an impartial arbiter.

a. Due process requires that "[t]he notice must be the best practicable, reasonably calculated under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Phillips Petrol. Co. v. Shutts*, 472 U.S. 797, 812 (1985) (citation and quotation marks omitted); *accord Highland Homes Ltd. v. State*, 448 S.W.3d 403, 410 (Tex. 2014). Yet under section 166.046, the patient or person responsible for effectuating the patient's health care decisions receives only 48 hours' notice before a meeting is called to decide whether to stop providing the treatment necessary to sustain life. Tex. Health & Safety Code § 166.046(b)(2).

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

Furthermore, section 166.046 provides no standard by which to evaluate a physician's decision to refuse life-sustaining treatment. The statute states only that a physician may decide, and the committee may affirm, that life-sustaining treatment is medically inappropriate. *See id.* § 166.046(e). Chapter 166 does not define or explain the meaning of the phrase "medically inappropriate"—which, again, makes it

difficult, if not impossible, to formulate reasoned objections to the physician's decision. *See also* Nora O'Callaghan, *Dying for Due Process: The Unconstitutional Medical Futility Provision of the Texas Advance Directives Act*, 60 Baylor L. Rev. 527, 590–96 (2008) (noting that the failure to provide any meaningful limit on the physician's or committee's discretion in denying life-sustaining treatment suggests that the statute is also void for vagueness).

b. In addition to requiring adequate notice, the due-process clause requires that the government provide "a meaningful opportunity to be heard" before depriving an individual of constitutionally protected rights. *LaChance v. Erickson*, 522 U.S. 262, 266 (1998); *accord Than*, 901 S.W.2d at 930. This includes not only the right to attend a hearing, but also an opportunity to participate and present arguments and evidence at the hearing. *See, e.g.*, *Tennessee v. Lane*, 541 U.S. 509, 523 (2004).

Section 166.046 fails this standard. Under its procedures, there is no guarantee that the patient or proxy will be given any opportunity to be heard. While such individuals are "entitled to . . . attend" the meeting held by the committee to discuss the patient's directive, the statutory procedures do not provide a right to speak at that meeting before the committee makes a final decision. Tex. Health & Safety Code § 166.046(b)(4)(A). This lack of a meaningful opportunity for the patient or the patient's representative to be heard further demonstrates the statute's unconstitutionality.

c. The "Due Process Clause entitles a person to an impartial and disinterested tribunal." *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 242 (1980); *accord Golden Eagle Ar-*

chery, Inc. v. Jackson, 24 S.W.3d 362, 366 (Tex. 2000). "This requirement of neutrality in adjudicative proceedings safeguards the two central concerns of procedural due process, the prevention of unjustified or mistaken deprivations and the promotion of participation and dialogue by affected individuals." *Marshall*, 446 U.S. at 242. Here, the ethics or medical committee, which is tasked by section 166.046 with reviewing the physician's decision to deny life-sustaining treatment, is not a neutral and detached arbiter.

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

Finally, while the procedures in section 166.046 allow a patient or proxy to petition the district or county court, such court involvement is limited to extending the time a patient shall be given available life-sustaining treatment pending transfer to a

different physician or health care facility. *Id.* § 166.046(e), (g). Under the terms of the statute, the ethics or medical committee is the final arbiter with regard to whether the patient will be given life-sustaining treatment. The lack of a neutral and impartial arbiter in the review process under section 166.046 is an independent reason that the statute is unconstitutional.

II. The Hospital Cannot Avoid the Question of Section 166.046's Constitutionality.

For the reasons just explained, section 166.046 violates baby T.L.'s procedural due course rights protected by the Texas Constitution. Because of that, the hospital will presumably renew its efforts to avoid the question of the statute's constitutionality altogether. *See* CR.285–90.

But the question cannot properly be avoided. The constitutionality of section 166.046, which the hospital invoked to protect itself from liability, is central to the family's claims. And the court should reject any argument that the hospital is not functioning as a state actor subject to constitutional constraints.

A. The constitutionality of section 166.046 is central to the family's request for injunctive relief.

The State has affirmatively inserted itself into Texans' health care decision-making by requiring health care facilities and physicians to provide life-sustaining treatment to patients who want it. Texas Health and Safety Code section 166.045(c) provides that, "[i]f 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 . . . ." (emphasis

added). Section 166.046(a) provides that "[t]he patient *shall be given* life-sustaining treatment during the [ethics or medical committee's] review" (emphasis added). And section 166.051 provides that the subchapter in which section 166.046 appears

> 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 . . . . (emphasis added).

But the statute then authorizes those same facilities and physicians to terminate that state requirement—and, it follows, patients' lives—through one of two constitutionally insufficient procedures. First, the facility or physician may wait until the expiration of a "reasonable opportunity" to transfer the patient to another facility or physician willing to comply with the patient's wish for life-sustaining treatment. *Id.* §§ 166.045(c), 166.051. "[R]easonable opportunity," however, is undefined, inherently vague, and apparently subject to the facility's or physician's sole discretion. Second, the facility or physician may invoke the committee-review procedure in section 166.046 and pursue it to its conclusion. *Id.* § 166.046(e). That procedure, however, is constitutionally insufficient for the reasons stated in Part I. And because the committee-review procedure is the *most* process provided by the State to patients when a facility or physician seeks to terminate the state-mandated obligation to provide life-sustaining treatment, that procedure's constitutionality is of central relevance here.

B. A private hospital subjects itself to due-course constraints and section-1983 liability when it employs section 166.046.

In the trial court, the hospital argued (and will presumably argue here) that it is free to ignore constitutional due-process protections, and cannot be sued under section 1983, because it is not a state actor. CR.163–69, 295–97. That is wrong in the scenario presented here. It is well-settled that private conduct qualifies as state action, and is therefore subject to due-process constraints and section-1983 liability, when there is a sufficiently "'close nexus between the State and the challenged action' that seemingly private behavior 'may be fairly treated as that of the State itself.'" *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n*, 531 U.S. 288, 295 (2001) (quoting *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 351 (1974)). As discussed below, the required "close nexus" is present in this scenario.

1. A private actor's conduct constitutes state action for due-process and section-1983 purposes when it is fairly attributable to the State.

The Fourteenth Amendment provides that a "State" shall not "deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV. Because that due-process requirement "is directed at the States, it can be violated only by conduct that may be fairly characterized as 'state action.'" *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 924 (1982). Similarly, the "due course of law" guarantee in article I, section 19 of the Texas Constitution applies only to "state action." *Republican Party of Tex. v. Dietz*, 940 S.W.2d 86, 91 (Tex. 1997).

This state-action requirement is related to one of the conditions of a civil-rights suit under section 1983. That statute creates a cause of action against a person who deprives another person of federal rights while acting "under color of any statute,

ordinance, regulation, custom, or usage, of any State." 42 U.S.C. § 1983. If there is "state action" for purposes of the Fourteenth Amendment, then the same conduct also satisfies section 1983's "under color of state law" condition. *Lugar*, 457 U.S. at 935.[2]

"State action" subject to the Fourteenth Amendment must involve conduct that is "fairly attributable to the State." *Id.* at 937. The same is true for the Texas Constitution's due-course-of-law provision. *Republican Party of Tex.*, 940 S.W.2d at 91.

The United States Supreme Court has outlined a "two-part approach" for determining whether a private party's alleged deprivation of constitutional rights is fairly attributable to the State. *Lugar*, 457 U.S. at 937. "The first inquiry is 'whether the claimed [constitutional] deprivation has resulted from the exercise of a right or privilege having its source in state authority.'" *Georgia v. McCollum*, 505 U.S. 42, 51 (1992) (quoting *Lugar*, 457 U.S. at 939). "The second inquiry is whether the private

[2] The converse is not always true—i.e., a person's conduct may be "under color of state law" under section 1983 without qualifying as "state action" under the Fourteenth Amendment. *Lugar*, 457 U.S. at 935 n.18. The difference between the two, however, is not relevant to this case. The broader scope of the "under color of state law" condition can be significant because section 1983 authorizes suits for deprivation of rights under *any* federal constitutional or statutory provision, including those that do not have a state-action requirement. *Id.* But where, as here, the deprivations alleged in a section-1983 claim all relate to constitutional rights that depend on state action, "the under-color-of-state-law requirement [in section 1983] does not add anything not already included within the state-action requirement of the Fourteenth Amendment." *Id.*

party charged with the deprivation can be described as a state actor." *Id.* As explained below, both conditions are met here.

2. A private health care provider's use of section 166.046 is an exercise of rights and privileges created by state law.

Under the first part of the state-action inquiry, the private party must have exercised some state-created right or privilege that caused the deprivation of a constitutionally protected interest. *Id.* The Supreme Court "has recognized that private conduct pursuant to statutory or judicial authority is sufficient to satisfy this requirement." Richard C. Reuben, *Public Justice: Toward a State Action Theory of Alternative Dispute Resolution*, 85 Cal. L. Rev. 577, 613 (1997). For example, when a plaintiff alleges that a private party deprived him of rights by proceeding under a "procedural scheme created by the [State's] statute," the first element of state action is "obviously" satisfied. *Lugar*, 457 U.S. at 941; *see also id.* at 937 (explaining that the first element was met when "a state statute provided the right to garnish or to obtain prejudgment attachment, as well as the procedure by which the rights could be exercised").

A private health care provider seeking to withhold or withdraw life-sustaining medical treatment through section 166.046's committee-review procedure satisfies this first inquiry. The State created the statute's procedural scheme. Under that scheme, the State mandates the provision of life-sustaining treatment to patients who want it. Tex. Health & Safety Code §§ 166.045(c), 166.046(a), 166.051. The State then authorizes health care providers to terminate that mandate by invoking the committee-review process and pursuing it to its conclusion. *Id.* § 166.046(e).

And when providers invoke their state-created rights to the committee-review procedure, they remove life-sustaining medical treatment under the protection of the state-created privilege of immunity from civil or criminal liability or a licensing authority's review or disciplinary action. *Id.* § 166.045(d). That state-conferred privilege is integral to the deprivation that occurs. Otherwise, providers would be unlikely to deny life-sustaining treatment in the face of potential legal action. *See* Nora O'Callaghan, *When Atlas Shrugs: May the State Wash Its Hands of Those in Need of Life-Sustaining Medical Treatment*, 18 Health Matrix: Journal of Law-Medicine 291, 313 (2008).

3. When it uses section 166.046's procedures, a private health care provider is effectively a state actor.

For the second part of the state-action inquiry, the private party "in all fairness" must be deemed a state actor under the circumstances of the case. *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 621 (1991).

The Supreme Court has applied various tests and factors to resolve this issue. For example, it has held that a private party may qualify as a state actor "because he has acted together with or has obtained significant aid from state officials, or because his conduct is otherwise chargeable to the State." *Lugar*, 457 U.S. at 937. It has also identified a trio of general principles that should be applied: (1) "the extent to which the actor relies on governmental assistance and benefits"; (2) "whether the actor is performing a traditional governmental function"; and (3) "whether the injury caused is aggravated in a unique way by the incidents of governmental authority." *Edmonson*, 500 U.S. at 621–22; *accord McCollum*, 505 U.S. at 51. Finally, it has listed

a "host of facts" that bear on the question: whether the State exercises "coercive power" over or "control[s]" the actor; whether the State provides "significant encouragement, either overt or covert" to the actor; whether the actor is "a willful participant in joint activity with the State"; whether the State has "delegated a public function" to the actor; and whether the actor is "entwined with governmental policies." *Brentwood Acad.*, 531 U.S. at 296 (cleaned up).

The Supreme Court has said that these myriad standards may merely reflect that the state-actor question is ultimately a "necessarily fact-bound inquiry." *Lugar*, 457 U.S. at 939; *see also Edmonson*, 500 U.S. at 621 (acknowledging that "this aspect of the analysis is often a factbound inquiry"); *Blum v. Yaretsky*, 457 U.S. 991, 1004 (1982) (explaining that "the factual setting of each case will be significant"). And the facts that warrant treating a private party as a state actor "might vary with the circumstances of the case." *Lugar*, 457 U.S. at 939. So, "no one fact can function as a necessary condition across the board for finding state action; nor is any set of circumstances absolutely sufficient." *Brentwood Acad.*, 531 U.S. at 295. Instead, "[o]nly by sifting facts and weighing circumstances can the nonobvious involvement of the State in private conduct be attributed its true significance." *Burton v. Wilmington Parking Auth.*, 365 U.S. 715, 722 (1961); *see also Republican Party of Tex.*, 940 S.W.2d at 91 ("Determining whether the government is sufficiently involved in the challenged conduct [to find state action] requires us to make a legal determination *based upon the circumstances of each case.*" (emphasis added)).

Several aspects of a private health care provider's use of section 166.046's procedure show that it should be deemed a state actor in those circumstances.

a. First, the entire procedure is predicated on the State's exercise of coercive power over the provider. *See Blum*, 457 U.S. at 1004 (explaining that the Court has held a State responsible for a private decision when the State "has exercised coercive power"); *accord Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 52 (1999). As already noted, when a physician refuses to honor a patient's wish for life-sustaining medical treatment, the State inserts itself into the dispute and compels the physician or facility to provide that treatment. *See supra* Part II.A. From the outset, then, this conflict is not merely a private disagreement. The State becomes a party and uses the coercive power of state law to control the provision of care.

And once the State has asserted its coercive power and required treatment, the provider may terminate that requirement only through procedures authorized by the State. Again, the provider may either (1) wait until the expiration of a "reasonable opportunity" to transfer the patient, Tex. Health & Safety Code §§ 166.045(c), 166.051; or (2) use the medical committee-review process, *id.* § 166.046(e). So it is the State's coercive power that channels a provider into either procedure and ensures that one of those procedures will be the vehicle for removing life-sustaining treatment from the patient.

b. Additionally, the State overtly uses its unique authority to strongly encourage providers to follow section 166.046's committee-review procedure. *See Blum*, 457 U.S. at 1004 (explaining that the Court has held a State responsible for a private decision when the State "has provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the State"); *accord Am. Mfrs. Mut. Ins.*, 526 U.S. at 52. Specifically, the State grants providers that choose to

follow section 166.046 absolute immunity from any civil or criminal liability or state administrative action. Tex. Health & Safety Code § 166.045(d).

That powerful shield would be incentive enough for a private actor to follow the State's dictates under any circumstances. But the State's offer of immunity is especially influential in this scenario. It comes into play once the physician and patient are at an impasse, *id.* § 166.046(a), a point when the prospect of future legal proceedings looms large. And because patients requiring life-sustaining treatment often present complex and difficult medical conditions, a provider may be particularly motivated to avoid judicial or administrative scrutiny of its treatment decisions. *See* O'Callaghan, 18 Health Matrix: Journal of Law-Medicine, at 316–17.

Between the State's initial commandeering of the treatment decision and its dangling of the immunity carrot to spur providers into using the 166.046 procedure to remove that treatment, this is in no sense a situation in which private actors are "not compelled or even influenced by any state regulation." *Rendell-Baker v. Kohn*, 457 U.S. 830, 841 (1982). It is exactly the opposite.

c. The absolute immunity afforded to a provider ticks even more boxes in the state-actor analysis. It means that the provider "obtain[s] significant aid from state officials," *Lugar*, 457 U.S. at 937, and extensively "relies on governmental assistance and benefits" in this context, *Edmonson*, 500 U.S. at 621.

That immunity also means that the injury suffered by the patient "is aggravated in a unique way by the incidents of governmental authority." *Id.* at 622. Specifically, once the provider's medical committee makes the final decision to withdraw life-sustaining treatment from the patient, the State aggravates that injury—as only the

State can—by blocking the patient from all legal recourse to state courts and administrative agencies for relief from that decision. Indeed, by affirmatively keeping its judiciary and regulators on the sidelines, the State "has elected to place its power, property, and prestige behind" providers' deprivations of patients' rights. *Burton*, 365 U.S. at 725 (finding that a State's "inaction" resulted in state action when a private restaurant leasing part of a state building discriminated against African-American customers and the State did not intercede); *see also Reitman v. Mulkey*, 387 U.S. 369, 377 (1967) (finding state action where California adopted a constitutional provision prohibiting state agencies from restricting a person's right to refuse to sell or rent property to a person for any reason, which made a private owner's racial discrimination "immune from legislative, executive, or judicial regulation at any level of the state government").

d. Finally, a private health care provider using section 166.046 should be deemed a state actor because the statute "delegate[s]" to the provider "a unique governmental function." *Edmonson*, 500 U.S. at 627; *see also West v. Atkins*, 487 U.S. 42, 54–57 (1988) (holding that a private doctor hired to provide medical care to state prison inmates was a state actor). The provider's medical committee functions as a court or administrative tribunal in finally adjudicating whether the patient's physician has a duty to follow the patient's request for life-sustaining medical treatment. *See* Tex. Health & Safety Code § 166.046(a).

The medical committee mimics a state adjudicatory body. To begin, the committee effectively has exclusive jurisdiction over the patient's dispute with the physician. Once the provider invokes section 166.046, the only thing the patient can do

to evade that procedure is leave the facility—an illusory option for most patients who need life-sustaining medical treatment and have not found another provider to accept a transfer. And by virtue of the immunity provision, the patient cannot appeal or collaterally attack the committee decision. *Id.* § 166.045(d).

And the committee is tasked with an adjudicatory function. It "review[s]" the physician's decision to refuse treatment. *Id.* § 166.046(a). It may "affirm[]" that decision. *Id.* § 166.046(e). And it is required to issue a written decision explaining the outcome of the review. *See id.* § 166.046(b)(4)(B).

Patients ordinarily have recourse to state licensing agencies and the judicial system to resolve their disputes with health care providers. When the dispute is about further provision of life-sustaining medical treatment, the State cannot completely outsource adjudication of that dispute to a provider's medical committee and then hide behind that provider's private status to avoid the Constitution. *See West*, 487 U.S. at 54–57. For this additional reason, a provider employing section 166.046's procedure should be deemed a state actor for due-process purposes.

Prayer

The Court should reverse the trial court's order denying the family's application for a temporary injunction, render judgment granting that application, and remand the case for further proceedings consistent with the Court's opinion.

Respectfully submitted.

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Certificate of Service

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Certificate of Compliance

Microsoft Word reports that this brief contains 6,437 words, excluding the portions of the brief exempted by Rule 9.4(i)(1).

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