FILED
19-0390
8/21/2019 12:04 PM
tex-36166948
SUPREME COURT OF TEXAS
BLAKE A. HAWTHORNE, CLERK

NO. 19-0390

In the Supreme Court of Texas

EVELYN KELLY, INDIVIDUALLY AND ON BEHALF OF THE ESTATE OF CHRISTOPHER DUNN,
Petitioner,

v.

HOUSTON METHODIST HOSPITAL,
Respondent.

On a Petition for Review from the First Court of Appeals,
Houston, Texas.
(No. 01-17-00866-CV)

RESPONSE OF HOUSTON METHODIST HOSPITAL TO THE PETITION FOR REVIEW

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WHY THE COURT SHOULD DENY REVIEW

Petitioner's son continued to receive life-prolonging care from Houston Methodist Hospital until he died from cancer. *See* 4.CR.1225-32 (autopsy) The only injury that his mother, Evelyn Kelly, could possibly assert was emotional distress, but Petitioner Kelly dismissed her claim for infliction of emotional distress,[1] signaling that the purpose for this lawsuit is to invalidate section 166.046 of the Texas Health & Safety Code.

The Petition for Review provides no cogent basis for why review is important to Texas jurisprudence. If the Court ever does want to address the constitutionality of section 166.046, and even if it decides to do so in the absence of any deprivation of life-prolonging care, it should wait for a different case—a case involving a state actor rather than a private hospital and a case in which due process was strictly limited to what section 166.046 requires.

Much more due process than that was given to Petitioner and her son. Methodist carried on an extended dialogue with the family on the issue of whether only harm was being done by continuing to prolong Christopher Dunn's life. Christopher's father, David Dunn, favored only palliative care, informing Methodist that Christopher had once left a hospital against orders and later barricaded himself

[1] The Final Order that Judge Burke signed referred to "Plaintiff s oral motion in open court voluntarily dismissing all claims for Intentional Infliction of Emotional Distress." 5.CR.1544.

into a room to try to avoid being taken to a hospital so he could die at home. Petitioner Kelly, however, insisted on continuing efforts to prolong her son's life.

Beyond that, due process continued in the courts. After Methodist followed section 166.046's procedures and announced its decision to discontinue life-prolonging care, Petitioner filed an injunctive action—even though another facility had been found that would have given Christopher life-prolonging care—and Methodist agreed to a stay. Methodist then initiated a guardianship proceeding to resolve the issue, but Christopher died before a guardian was appointed.

Thus, before Methodist invoked section 166.046, it accorded due process to the patient and family, and after it followed the steps required by section 166.046, more due process was accorded in two judicial proceedings. Those facts make this case an improper vehicle for considering whether a hospital can suspend life-prolonging care by following the procedures in section 166.046. It is also an improper vehicle because Methodist is a private hospital. The protection against denials of due process is a protection against governmental action, and Methodist is not a state actor.

One more point. Methodist expresses no view on the constitutionality of section 166.046. It invoked the statute because of the atypical situation of not being able to obtain a family consensus on whether to artificially prolong the suffering of a terminally ill cancer victim. Yet Methodist has had to expend substantial amounts

in legal fees[2] to defend itself, when the only goal of this lawsuit is a political goal, as evidenced by Ms. Dunn's public expression of thanks in the media to Methodist for continuing to prolong her son's life:

> Chris's family and I are grateful for all of the prayers, kind notes of encouragement, and support we have received from around the world. *We would like to express our deepest gratitude to* the nurses who have cared for Chris and for *Methodist Hospital for continuing life-sustaining treatment of Chris until his natural death*.

2.CR.411 (emphasis added).

Methodist has never wanted to divert its resources from leading medicine to defending this suit. It respectfully asks the Court to deny review now.

STATEMENT OF FACTS

Christopher Dunn was admitted to Methodist Hospital on October 12, 2015, and he died on December 23, 2015, of natural causes. 4.CR.1225-32 (autopsy). His death resulted from cancer in his liver, pancreas, lymphatic system, and lungs. *See*

[2] The Petition for Review asserts at page 5, without record citation, that "Plaintiffs also spent money on lawyers to sue Methodist and obtain a TRO," and attempts, therefore, to classify incurred fees as injury that precludes mootness. The argument rings hollow for four reasons. The only claim for fees was under the Declaratory Judgment Act (*see, e.g.*, 1.CR.22), and the trial judge had the discretion not to award fees. There is nothing in the record to show that a request for fees was made on Petitioner's behalf when the case was dismissed, thus resulting in a waiver. The temporary injunctive action was not necessary because a facility was located that would have given Christopher life-prolonging care, but Petitioner rejected that option. 1.CR.362. Finally, there is no evidence in the record that Petitioner is herself obligated to pay any legal fees. She obtained legal representation by contacting Texas Right to Life. 3.CR.965. An attorney for Texas Right to Life has appeared as counsel in this case from the beginning. *See, e.g.*, 1.CR.22.

id. Until his death, Christopher received continuous, uninterrupted life-prolonging treatment at Houston Methodist Hospital. 4.CR.1212, 1217-18.

Approximately two weeks after Christopher's admission, Methodist's Bioethics Committee began considering whether continued life-prolonging treatment was appropriate. 4.CR.1216. The Committee could not discuss this issue with Christopher himself. He was unresponsive on admission, intubation prevented any oral communications with him, and he was diagnosed as suffering from delirium. *See* 4.CR.1212, 1215-17; 5.CR.1527-30.

As Christopher had no spouse or children, the Committee discussed the issue of continued treatment with, and gathered facts from, Christopher's divorced parents, David Dunn and Evelyn Kelly. 4.CR.1215-16. Representatives from the Committee met with both on several occasions. 4.CR.1215-18. During these meetings, Mr. Dunn relayed that Christopher had previously left another hospital against orders and did not want to be admitted again because he did not want to die in a hospital. 4.CR.1216. At one point, he had even barricaded himself in his room so he could remain at home. 5.CR.1527.

Christopher's father thought his son should receive only palliative care. *See* 4.CR.1216. His mother and the Petitioner before this Court, Evelyn Kelly, wanted him to continue to receive life-prolonging treatment. 4.CR.1217. While Christopher's parents were discussing whether they could make a joint decision,

Methodist continued life-prolonging treatment. *See* 4.CR.1216. When Petitioner remained opposed to palliative care, Methodist continued full care and began searching for other facilities that would accept Christopher. 4.CR.1217. Sixty-six facilities had declined to accept Christopher as a transfer patient. 4.CR.1220-23. One did accept, Seasons Hospice, but was rejected by Petitioner. 1.CR.362.

About a month after Christopher's admission, Methodist followed the procedure specified in section 166.046 of the Texas Health & Safety Code. 4.CR.1217-18. After a meeting of the Bioethics Committee, Methodist prepared a compassionate letter to Christopher's divorced parents stating its decision that continued life-prolonging treatment for Christopher was not ethical because it only prolonged his suffering with no hope of defeating or even curbing his fatal disease process. 4.CR.1218. Methodist's letter advised that, after 11 days, it would provide only palliative care. At the same time, Methodist was continuing its attempt to transfer Christopher to another facility. *See* 4.CR.1220-23.

Petitioner filed a lawsuit to compel the continuation of life-prolonging treatment. Very shortly after that suit was filed and an agreed temporary restraining order was issued (1.CR.33-35), Methodist voluntarily agreed to continue to comply with the TRO until the court ultimately decided the issue in Petitioner's lawsuit. A guardianship proceeding was also initiated. 1.CR.362. Before any ultimate decision was reached, however, Christopher died.

Almost two years later, in October of 2017, Judge William Burke granted Methodist's motion to dismiss on the ground of mootness. 5.CR.1544. Lacking subject matter jurisdiction because the lawsuit was moot, Judge Burke did not rule on Petitioner's amended motion for summary judgment and did not address Methodist's motion for summary judgment. Petitioner appealed the order of dismissal, and the First Court of Appeals affirmed, holding correctly that "there is no right to due process if there has not been a deprivation of a constitutionally-protected interest." *Kelly v. Houston Methodist Hosp.*, 2019 WL 1339505 (Tex. App.—Houston [1st Dist.] Mar. 26, 2019).[3]

SUMMARY OF THE ARGUMENT

Houston Methodist never discontinued life-prolonging care to Christopher. He died from his metastatic cancer. Although Petitioner asserted a claim for emotional distress, she dismissed that claim (5.CR.1544), making this a lawsuit about denial of procedural due process when there was no denial of any constitutionally protected right.

[3] Petitioner mischaracterizes the court's holding by stating in the Petition for Review at page 11 that the court of appeals held that a procedural due process claim cannot exist absent a denial of substantive due process. Substantive due process is not at issue in this case; it is "[t]he doctrine that governmental deprivations of life, liberty or property are subject to limitations regardless of the adequacy of the procedures employed." *Bowers v. City of Flint*, 325 F.3d 758, 763 (6th Cir. 2003); *see Cty. of Sacramento v. Lewis*, 523 U.S. 833, 845 (1998). What the court of appeals held, instead, is a violation of procedural due process cannot exist absent the deprivation of a constitutionally protected right.

No violation of due process can occur when there is no denial of rights. Every day, the State of Texas decides **not** to take the life, liberty, or property of its citizens with no hearings or proceedings whatsoever. Here, no deprivation occurred, and ample due process was accorded—by Houston Methodist in extended conferences with the family in hopes of reaching a consensus, in the procedures set forth in section 166.046 of the Health & Safety Code, and in two different judicial proceedings, both still pending after Christopher's death. In fact, the first judicial proceeding is still continuing now, before this Court.

If the Court ever does want to address the validity of section 166.046 in the absence of any deprivation, it should wait for a case in which the only due process accorded was what section 166.046 prescribes, and a case involving a state actor.

The body of this brief goes on to discuss such legal principles as mootness, standing, jurisdiction, and state action to the extent allowed by the word limit. But the issue of whether to grant review is simpler. Given the absence of any deprivation, and also given ample due process that was actually accorded to Petitioner by a private hospital and by four Texas courts,[4] the Court should deny review.

[4] The district court, the probate court, the court of appeals, and this Court.

ARGUMENT

I. PETITIONER'S CLAIMS ARE MOOT BECAUSE THERE WAS NO DEPRIVATION.

The "first inquiry in every due process challenge is whether the plaintiff has been deprived of a protected interest in 'property' or 'liberty.'" *Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 59 (1999) (quoting U.S. Const., amend. XIV).[5] "Only after finding the deprivation of a protected interest" does the Court "look to see if the State's procedures comport with due process." *Id.*[6] This threshold deprivation inquiry requires the plaintiff to demonstrate both a protected right and a deprivation of that protected right. *See, e.g.*, *Bd. of Regents of State Colls. v. Roth*, 408 U.S. 564, 569 (1972).

When Christopher died of natural causes while still receiving life-prolonging treatment, Petitioner's challenge to section 166.046's constitutionality and her §1983 claim immediately ceased to present a live controversy. No deprivation had ever occurred. District Judge Burke thus correctly dismissed the lawsuit as moot.

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[5] *See Logan v. Zimmerman Brush Co*., 455 U.S. 422, 428 (1982) (courts reviewing due process claims follow "a familiar two-part inquiry: we must determine whether [the plaintiff] was deprived of a protected interest, and, if so, what process was his due"); *Weiner v. Wasson*, 900 S.W.2d 316, 323 (Tex. 1995) (due process claim requires "that there ha[ve] been [a] deprivation of due process or liberty").

[6] The federal Due Process Clause, U.S. Const. amend. XIV, § 1, and Texas's Due Course of Law Clause, Tex. Const. art. I, § 19, are functionally similar, and the Texas Supreme Court routinely relies on federal precedent when interpreting the Texas Constitution's Due Course of Law Clause. *See Univ. of Tex. Med. Sch. at Hous. v. Than*, 901 S.W.2d 926, 929 (Tex. 1995)).

For a court to maintain jurisdiction over a case, a judicially cognizable controversy must exist. *See Williams v. Lara*, 52 S.W.3d 171, 184 (Tex. 2001).

When Methodist notified Petitioner that it intended to apply section 166.046 to withdraw Christopher's life-prolonging treatment, a controversy existed because Methodist was contemplating imminent action in compliance with the statute. That imminent action led to Petitioner's declaratory judgment action—although another facility was offering to provide the care that Petitioner was seeking. *See, e.g.*, *Transp. Ins. Co. v. WH Cleaners, Inc.*, 372 S.W.3d 223, 228 (Tex. App.—Dallas 2012, no pet.). When Christopher died of natural causes while still receiving life-prolonging treatment from Methodist, however, that possibility—and the parties' dispute—disappeared instantly.

II. PETITIONER'S CASE IS NOT SAVED BY A CLAIM FOR NOMINAL DAMAGES.

Petitioner's First Amended Petition never mentions nominal damages, and Petitioner cannot avoid mootness simply by referencing nominal damages in a motion for summary judgment. *See, e.g.*, *Arizonans for Official English v. Arizona*, 520 U.S. 43, 70-71 (1997); *Fox v. Bd. of Trustees of State Univ. of New York*, 42 F.3d 135, 141 (2d Cir. 1994); *Doe v. Marshall*, 622 F.2d 118, 119 (5th Cir. 1980).

More fundamentally, the purpose of nominal damages is to allow a claim when the past deprivation cannot easily be monetized. Thus, nominal-damages cases always deal with past deprivations. *See, e.g.*, *DA Mortgage, Inc. v. City of Miami*

Beach, 486 F.3d 1254 (11th Cir. 2007), *Utah Animal Rights Coalition v. Salt Lake City Corp.*, 371 F.3d 1248, 1257-58 (10th Cir. 2004); *Javits v. Stevens*, 382 F. Supp. 131, 136 (S.D.N.Y. 1974).

The point is well made in *Memphis Community School District v. Stachura*, 477 U.S. 299, 309-10 (1986). The Court reversed a damages award based on the "abstract value or importance of constitutional rights" emphasizing that "whatever the constitutional basis for §1983 liability, such damages must always be designed to *compensate injuries* caused by the [constitutional] deprivation." (quotations omitted; emphasis added).

Because there was no *deprivation* in this case, damages—nominal or otherwise—are unavailable here. Accordingly, even if an unpled claim for nominal damages could stave off mootness, the one that Petitioner attempts here could not.

III. THE RUBRIC OF "CAPABLE OF REPETITION BUT EVADING REVIEW" DOES NOT APPLY.

Under Texas law an otherwise moot claim can be adjudicated if the issue is capable of repetition but evading review, but the exception is narrow: The same issue must be capable of arising between or among the same parties:

> To invoke the exception, a plaintiff must prove that: (1) the challenged action was too short in duration to be litigated fully before the action ceased or expired; and (2) *a reasonable expectation exists that the same complaining party will be subjected to the same action again*.

Williams v. Lara, 52 S.W.3d 171, 184 (Tex. 2001) (emphasis added); *accord Texas A&M Univ.-Kingsville v. Yarbrough*, 347 S.W.3d 289, 290-91 (Tex. 2011).

The exception fails to apply here for two additional reasons. First, for a deprivation to be capable of repetition, it must have occurred in the first place. But Methodist never deprived Christopher of life-prolonging treatment. Second, section 166.046 does not evade review. It is an immunity statute. If a healthcare defendant that is a state actor invokes its protections in a future case, a court will then have an opportunity to address section 166.046's constitutionality.

IV. THE VOLUNTARY CESSATION DOCTRINE DOES NOT APPLY.

A defendant's voluntary cessation of a challenged practice does not deprive a court of its power to determine the legality of the practice. *Friends of the Earth, Inc. v. Laidlaw Envt'l Servs.*, 528 U.S. 167, 189 (2000). But this case did not become moot when Methodist agreed not to withdraw Christopher's life-prolonging treatment. *See* Aplt Br. 20. It became moot when Christopher died of natural causes.

Put another way, Methodist never began the challenged practice in the first place, so it was not possible for it to "return to [its] old ways." *City of Mesquite v. Aladdin Castle, Inc.*, 455 U.S. 283, 289 & n.10 (1982) (citation omitted).

V. THE DISTRICT COURT DID NOT REACH THE MERITS BECAUSE IT LACKED SUBJECT MATTER JURISDICTION.

Petitioner claims that District Judge Burke made a ruling on the merits because the parties had filed cross-motions for summary judgment. The denial of a

cross-motion for summary judgment is, of course, a proper subject for appellate review when the appellate court is also reviewing the grant of the opposing motion. But that procedural circumstance is missing here. By dismissing on mootness grounds, Judge Burke necessarily determined that he lacked subject matter jurisdiction.

When a court lacks subject matter jurisdiction, it cannot make any adjudication. A case in point is *Meeker v. Tarrant County College District*, 317 S.W.3d 754 (Tex. App.—Fort Worth 2010, pet. denied). The district court had ruled on cross-motions for summary judgment, and the losing party appealed. The court of appeals held that the claim was moot. As the court explained, mootness deprived all courts of subject matter jurisdiction. Therefore, the court of appeals vacated the adjudication by the district court and dismissed the appeal. *Id.* at 763. Likewise, here, once Judge Burke determined that the case was moot, he could make no adjudication of the cross-motions for summary judgment.

VI. ALTERNATIVE GROUNDS INDEPENDENTLY REQUIRE AFFIRMANCE.

A. Petitioner lacks standing.

Lack of standing was not a basis for Judge Burke's dismissal order, but standing can be raised at any time. *Austin Nursing Ctr., Inc. v. Lovato*, 171 S.W.3d 845, 849 (Tex. 2005); *Raytheon Co. v. Boccard USA Corp.*, 369 S.W.3d 626, 632 n.6 (Tex. App.—Houston [1st Dist.] 2012, pet. denied). Petitioner can challenge the constitutionality of a statute only to the extent that it is unconstitutional as to her.

See Kircus v. London, 660 S.W.2d 869, 872 (Tex. App.—Austin 1983, no writ). Petitioner would not have been deprived of life, liberty, or property even if the decision regarding Christopher's life-prolonging treatment had been carried out. Because the decision was never carried out, Christopher was also not affected by section 166.046 of the Health & Safety Code.

The bare communication of an intent to do or not do something in the future is not actionable in Texas. *See State v. Margolis*, 439 S.W.2d 695, 699 (Tex. Civ. App.—Austin 1969, writ ref'd n.r.e.) (no actionable controversy arises from statement of mere intention to impose a penalty). An exception to that rule could conceivably exist for a communication that qualifies as intentional infliction of emotional distress. *See, e.g.*, *Household Credit Servs. v. Driscol*, 989 S.W.2d 72, 82 (Tex. App.—El Paso 1998, pet. denied) (debt collector's death threats). Intentional infliction of emotional distress could not be factually maintained here and, in any event, has nothing whatsoever to do with denial of due process. But even putting that aside, Petitioner asserted but then voluntarily dismissed the claim for intentional infliction of emotional distress before Judge Burke dismissed her claims (5.CR.1544), thus eliminating the only possible (but not actual) basis for standing to sue.

B. Petitioner cannot identify a constitutionally protected interest.

To state a due-process claim, a plaintiff must identify an interest the Constitution protects. Petitioner claims to have identified two: life and the right to make individual medical decisions. In fact, though, neither interest is implicated. Methodist determined that continuing to provide more than palliative care would harm Christopher with no benefit to his chances for recovery. Petitioner has never disputed, as a factual matter, that Christopher's condition was fatal, and his death resulted from natural causes. Thus, even if Methodist had carried out its decision to withdraw Christopher's life-prolonging treatment, Methodist would not have deprived Christopher of his life but instead would have allowed the natural disease process to continue to its final and fatal conclusion. As the United States Supreme Court put it: "when a patient refuses life-sustaining medical treatment, he dies from an underlying fatal disease or pathology . . . ." *Vacco v. Quill*, 521 U.S. 793, 801 (1997).

Petitioner's claim to the contrary rests on the false assumption that patients have a constitutional right to receive treatment from a physician that the physician does not wish to provide. Not only does that assumption ignore the state-action requirement, it also ignores the fundamental principle that "the Due Process Clauses generally confer no affirmative right to governmental aid, even where such aid may be necessary to secure life, liberty, or property interests of which the government

itself may not deprive the individual." *DeShaney v. Winnebago Cnty. Dep't of Soc. Servs.*, 489 U.S. 189, 196 (1989). The government is therefore not obligated to provide "aid" even if doing so is necessary to "secure" a patient's life. *Id.*; *see also id.* at 196-97 ("[I]t follows that the State cannot be held liable under the Clause for injuries that could have been averted had it chosen to provide [protective services to the plaintiff]."). *A fortiori*, Methodist was not constitutionally obligated to provide life-prolonging treatment to delay Christopher's inevitable death from terminal cancer.

Faithful adherence to this fundamental principle is especially important in the context of the patient-doctor relationship. The United States Supreme Court has expressly disclaimed any constitutional right to receive particular medical treatments. *Id.*; *accord Abigail Alliance for Better Access to Developmental Drugs v. von Eschenbach*, 495 F.3d 695, 710 n.18 (D.C. Cir. 2007) (en banc) ("No circuit court has acceded to an affirmative access [to medical care] claim."); *Johnson v. Thompson*, 971 F.3d 1487, 1497 (10th Cir. 1992) (right to life does not include an affirmative right to receive medical care). Even in the prison context, where the State's "affirmative exercise of its power so restrains an individual's liberty that it renders him unable to care for himself" results in one of the "limited circumstances [in which] the Constitution imposes upon the State affirmative duties . . . . to provide for his . . . medical care," *DeShaney*, 489 U.S. at 198, 200, courts uniformly reject

any notion of a constitutional right to "particular type[s] of treatment." *See Long v. Nix*, 86 F.3d 761, 765 (8th Cir. 1996); *Jenkins v. Colo. Mental Health Inst. at Pueblo, Colo.*, 215 F.3d 1337, at *1-2 (10th Cir. 2000) (unpublished).

Petitioner's stated interest in the individual right to make medical decisions fares no better. In her view, protecting that right means forcing physicians to provide medical treatment even when doing so would be futile or contrary to their professional ethics. But the right to control one's medical decisions no more includes a right to force doctors to provide that preferred treatment than the right to use contraceptives includes the right to force the government to supply them. Petitioner's attempt to convert the shield provided by constitutional liberties into a sword to demand positive entitlements from private physicians violates the "long-recognized principle that . . . . [t]he Government has no constitutional duty to subsidize an activity merely because the activity is constitutionally protected." *See Rust v. Sullivan*, 500 U.S. 173, 201 (1991) (citations omitted).

In sum, while the Constitution unquestionably protects the right to determine one's own medical treatment, that right is not at issue in this case. *See Provenzale v. Dep't of Justice*, 2011 WL 693337, at *2 (N.D. Ohio Feb. 18, 2011); *Bonner v. Cagle*, 2016 WL 97648, at *5 (Tenn. Ct. App. Jan .7, 2016).

Adopting Petitioner's argument would also invite absurd results that the Framers could not possibly have intended. While they envisioned a Due Process

Clause that "protect[ed] the people from the State," *DeShaney*, 489 U.S. at 196, she sees an "affirmative right" so sweeping that private physicians who are *not* state actors may be forced to acquiesce to any and every patient demand for a la carte medical care even when the care requested would, in the doctor's professional judgment, be futile or even more harmful than helpful. That boundless vision of constitutional due process would nullify long-settled precedent and the Hippocratic Oath alike. This Court should reject it.

C. Methodist is not a state actor.

The United States Supreme Court has recognized that different inquiries can be relevant to the state-action tests:

- The "state compulsion" test attributes a private actor's conduct to the state when the state "exerts coercive power over the private entity or provides significant encouragement." *Cornish v. Corr. Servs. Corp.*, 402 F.3d 545, 549 (5th Cir. 2005) (citing *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 170-71 (1970).

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

- The "public function" test asks "whether the private entity performs a function which is 'exclusively reserved to the State.'" *Id.* at 549 (quoting *Flagg Bros., Inc. v. Brooks*, 436 U.S. 149, 158 (1978)).

Petitioner cannot satisfy this "state action" requirement in the abstract. Rather, the analysis "begins by identifying the specific conduct of which the plaintiff complains." *Am. Mfrs. Mut. Ins. Co*, 526 U.S. at 51 (quotations omitted); *see also*

Blum v. Yaretsky, 457 U.S. 991, 1003 (1982) (prescribing "careful attention to the gravamen of the plaintiff's complaint" to analyze state action).

Methodist's conduct cannot be attributed to the State because it satisfies none of the tests applicable to the state-action analysis. First, the State of Texas neither coerced nor encouraged Methodist's decision. Methodist is a private hospital, and the physicians and committee members who undertook the section 166.046 proceeding are not public figures. Nor are they beholden to the State with respect to their deliberations. Second, the nexus between the State of Texas and Methodist's decision regarding Christopher's life-prolonging treatment is virtually non-existent and certainly not close enough to warrant attributing Methodist's actions to the State. Finally, Methodist performed no public function here. Patient healthcare decisions have long rested in the hands of physicians and their treatment teams and have never been matters of State prerogative. Accordingly, and for the additional reasons discussed below, Methodist does not qualify as a state actor.

VII. POLICY CONSIDERATIONS SUPPORT A DENIAL OF REVIEW.

As commentators have noted, section 166.046 has resulted in a 67% increase in the number of futility consultations, suggesting that "physicians felt more comfortable confronting possible futile-treatment situations." Jon D. Feldhammer, *Medical Torture: End of Life Decision-Making in the United Kingdom and United States*, 14 Cardozo J. Int'l & Comp. L. 511, 529 (2006) (citing Robert L.

Fine & Thomas Mayo, *Resolution of Futility by Due Process: Early Experience with the Texas Advance Directives Act*, 138 Annals Internal Med. 743, 745 (2003)). These statistics demonstrate that section 166.046 not only promotes the independent exercise of professional medical judgment among physicians, it also promotes transparency and openness in patient-doctor relationships. Accordingly, public policy considerations support the decisions below and a denial of review by this Court.

PRAYER

The Court should deny review. Houston Methodist Hospital prays for all other relief to which it is entitled.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE UNDER APPELLATE RULE 9.4

I certify that this brief complies with the type-volume limitation of Texas Rule of Appellate Procedure 9.4(i)(2) because it contains 4,490 words, excluding the parts of the briefs exempted by Texas Rule of Appellate Procedure 9.4(i)(1).

/s/Reagan W. Simpson
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CERTIFICATE OF SERVICE

Under Texas Rule of Appellate Procedure 9.5(e), I hereby certify that a true and correct copy of this response has been served on lead counsel and additional counsel for appellants and counsel by electronic means on August 21, 2019, as follows:

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