CAUSE NO. 2015-69681

EVELYN KELLY, INDIVIDUALLY, AND ON BEHALF OF THE ESTATE OF DAVID CHRISTOPHER DUNN	§	IN THE DISTRICT COURT OF
V.	§	HARRIS COUNTY, TEXAS
THE METHODIST HOSPITAL	§	189TH JUDICIAL DISTRICT

DEFENDANT, HOUSTON METHODIST HOSPITAL 'S
TRADITIONAL AND NO-EVIDENCE MOTION FOR SUMMARY JUDGMENT

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW Houston Methodist Hospital f/k/a The Methodist Hospital ("Houston Methodist"), and files this its Traditional and No-Evidence Motion for Summary Judgment and respectfully shows the Court the following:

I.
SUMMARY OF THE ARGUMENT

Plaintiffs claim that §166.046 unconstitutionally deprives patients like Christopher Dunn of life and the right to make independent medical decisions. **Houston Methodist Hospital continues to take no formal position on the constitutionality of the statute itself, but is prepared to defend its conduct, and the conduct of its healthcare providers that provided professional, ethical and compassionate care and treatment to Christopher Dunn. Simply put, Houston Methodist did not violate Plaintiffs constitutional rights and rejects Plaintiffs' allegations in full.**

Houston Methodist Hospital is not the proper party to defend the constitutionality of a state statute. As demonstrated within the Brief of the Amici Curiae filed in this matter by proponents of the statute, the legislation in question offends no constitutional provision and,

importantly, implements public policy that the Legislature enacted after years of compromise and debate.[1] Challenges to that policy belong in the Capitol, not this Court.

Plaintiffs' due-process claim fails for two reasons. First, the Due Process Clause is properly invoked only where a constitutionally protected interest is at stake. Here, none is. Nothing in the Constitution or related caselaw compels physicians to provide any particular course of treatment when it violates their own beliefs. Neither does §166.046 deprive any patient of life. As the Supreme Court of the United States has acknowledged, when life-sustaining interventions are discontinued, death is caused by the underlying disease - not the withdrawal of treatment. Because there is no constitutional right to a particular form of medical treatment - including life-sustaining intervention - its withdrawal cannot violate the Constitution.

Second, because the Constitution protects an individual from a governmental deprivation, a plaintiff cannot prevail on a due process claim without first showing state action. Medical treatment decisions are quintessentially private. Section 166.046 has not altered that reality. Section 166.046 does not impose a duty on - let alone control the actions of - private actors, such as the healthcare providers involved in Chris Dunn's care and treatment. Rather, it provides immunity if a physician voluntarily complies. The private employment of a state-sanctioned remedy is not state action. In fact, both the Supreme Court and the Fifth Circuit have held that a legislative grant of immunity is not state action. Thus even if Plaintiff could show a constitutionally protected interest at stake in this case -

[1] *See* Brief of Amici Curiae Texas Alliance for Life, Texas Catholic Conference of Bishops, Texas Baptist Chrisitian Life Commission, Texans for Life Coalition, Coalition of Texans with Disabilities, Texas Alliance for Patient Access, Texas Medical Association, Texas Osteopathic Medical Association, Texas Hospital Association, and LeadingAge Texas, filed with this Court on July 31, 2017. Houston Methodist Hospital incorporates the arguments expressed within the amici curiae brief verbatim as specifically delineated within this Motion for Summary Judgment.

which she cannot - the claim would fall on the state action prong.

Additionally, after an adequate time for discovery, Plaintiffs cannot offer any evidence to support her intentional infliction of emotional distress claim.

Accordingly, Houston Methodist is entitled to a judgment as a matter of law, as well as outright dismissal for reasons stated within its concurrently filed Motion to Dismiss.

II.
STANDARD OF REVIEW

The purpose of summary judgment is to eliminate patently unmeritorious claims or untenable defenses.[2] Houston Methodist Hospital urges this summary judgment, to eliminate Plaintiff's unmeritorious claims, pursuant to traditional and no evidence standards set forth in Texas Rules of Civil Procedure 166a(c) and 166a(i).[3]

A. Traditional Motion for Summary Judgment

Traditional summary judgment is proper when the movant has demonstrated that there is no genuine issue of material fact and that the movant is entitled to judgment as a matter of law.[4] A defendant may prevail in summary judgment by disproving as a matter of law at least one element of each of the plaintiff's causes of action.[5] Once a movant has established a right to summary judgment, the burden shifts to the non-movant.[6] The non-movant must then respond to the motion for summary judgment and present to the trial

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[2] *Gulbenkian v. Penn*, 151 Tex. 412, 416 (1952).

[3] TEX. R. CIV. P. 166a(c), 166a(i). A party may file a single summary judgment motion under both the no-evidence and traditional summary judgment standards. *Binur v. Jacobo*, 135 S.W.3d 646, 651 (Tex. 2004).

[4] *Nixon v. Mr. Prop. Mgmt. Co., Inc.*, 690 S.W.2d 546, 548 (Tex. 1985).

[5] *Int'l Union United Auto. Aerospace & Agr. Implement Workers of Am. Local 119 v. Johnson Controls, Inc.*, 813 S.W.2d 558, 563 (Tex. App.—Dallas 1991, writ denied).

[6] *HBO, A Div. of Time Warner Ent. Co., L.P. v. Harrison*, 983 S.W.2d 31, 35 (Tex. App.—Houston [14th Dist.] 1998, no pet.).

court any issues that would preclude summary judgment.[7] Methodist is entitled to summary judgment in this case because it has conclusively disproved at least one, if not all, element(s) of Plaintiffs' claims.

B. No Evidence Summary Judgment

A no-evidence motion for summary judgment is proper when, after adequate time for discovery, "the nonmovant fails to bring forth more than a scintilla of probative evidence to raise a genuine issue of material fact as to an essential element of the non-movant's claim on which the non-movant would have been the burden of proof at trial.[8] "If the evidence supporting a finding rises to a level that would enable reasonable, fair-minded persons to differ in their conclusions, then more than a scintilla of evidence exists."[9] On the other hand, "[l]ess than a scintilla of evidence exists when the evidence is so weak as to do no more than create a mere surmise or suspicion of a fact, and the legal effect is that there is no evidence."[10] This matter has been on file since November 2015. However, Plaintiff has no evidence to support any element of her intentional infliction of emotional distress claim against Houston Methodist.

III.
ARGUMENTS & AUTHORITIES

A. Traditional Motion for Summary Judgment on Plaintiffs' Constitutional Claims.

1. Section 166.046 gives medical professionals a safe harbor, but it does not mandate a specific course of action.

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[7] *Id.*

[8] *Jackson v. Fiesta Mart, Inc.*, 979 S.W.2d 68, 70–71 (Tex. App.—Austin 1998, no pet.).

[9] *Id.* at 71.

[10] *Id.* (internal quotation admitted).

Physicians have long been free to choose who they will treat and what treatments they will provide. "The physician-patient relationship is 'wholly voluntary.'"[11] Even once a physician-patient relationship has begun, either party may terminate it at will.[12]

While a physician cannot countermand a patient's wish, she can *abstain* from providing a particular treatment when her medical judgment, her conscience, or her ethics, demands it. The Code of Medical Ethics protects physicians' right "to act (*or refrain from acting*) in accordance with the dictates of conscience in their professional practice," allowing them "considerable latitude to practice in accord with well-considered, deeply held beliefs."[13] The key limitation is that the physician has an ethical duty not to terminate the relationship without "[n]otify[ing] the patient (or authorized decision maker) long enough in advance to permit the patient to secure another physician."[14] The physician must also "[f]acilitate transfer of care when appropriate."[15]

The Legislature passed the Texas Advance Directives Act ("TADA"),[16] to create a legal framework governing how physicians should handle and comply with advance directives, out-of-hospital do-not-resuscitate orders, and medical powers-of-attorney in the context of life-sustaining intervention.[17] The Act requires a physician or health-care facility that "is unwilling to honor a patient's advance directive or a treatment decision to provide life-

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[11] *Gross v. Burt*, 149 S.W.3d 213, 224 (Tex. App.—Fort Worth 2004, pet. denied) (quoting Fought v. Solce, 821 S.W.2d 218, 220 (Tex. App.—Houston [1st Dist.] 1991, writ denied)).

[12] AM. MED. ASS'N COUNCIL ON ETHICAL AND JUDICIAL AFFAIRS, CODE OF MED. ETHICS §1.1.5 (2016).

[13] *Id.* §1.1.7 (emphasis added).

[14] *Id.* §1.1.5.

[15] *Id.*; *accord King v. Fisher*, 918 S.W.2d 108, 112 (Tex. App.—Fort Worth 1996, writ denied) (describing elements of a common law abandonment claim); *see also Tate v. D.C.F. Facility*, Civil Action No. A407CV162-MPM-JAD, 2009 WL 483116, at *1 (N.D. Miss. Jan. 23, 2009) ("Doctors and hospitals of course have the right to refuse treatment . . . .").

[16] TEX. HEALTH & SAFETY CODE §§166.001–.166,

[17] See TADA §§166.002(1), (10) (defining "advance directive" and "life-sustaining treatment").

sustaining treatment" to nevertheless provide that treatment, but "only until a reasonable opportunity has been afforded for transfer of the patient to another physician or heath care facility."[18] This is wholly consistent with physicians' ethical rights and duties.

Generally, TADA requires a physician to follow an advance directive or treatment decision made by or on behalf of a patient. However, it acknowledges that a patient's wishes may conflict with a physician's conscience or understanding of medical necessity. It thus provides a procedure by which physicians can seek to harmonize their ethical duties with patients' wishes.[19] This is the procedure that is the subject of Plaintiff's constitutional challenge, but it applies regardless of whether the doctor wishes to withhold or provide life-sustaining intervention over the patient's wishes.[20] The procedure calls for a medical review committee to consider the case while a decision is made, with the patient's directive honored in the interim.[21]

The §166.046 procedure gives the patient or his representative a right to notice of and to attend the committee's meeting, but it leaves the decision regarding whether to disregard the advance directive to the committee.[22] If the committee makes the difficult decision to countermand the patient's or family's wish, the physician or hospital must "make a reasonable effort to transfer the patient to a physician who is willing to comply with the directive."[23] And if the committee's decision is to withdraw life-sustaining intervention, the hospital must

[18] Id.

[19] Id. §166.046.

[20] Id. §166.052.

[21] Id. §166.046(a).

[22] Id. §166.046(b).

[23] Id. §166.046(d).

continue the intervention for at least 10 days while efforts are made to transfer the patient.[24]

TADA generally provides physicians who withdraw life-sustaining intervention in accordance with its provisions immunity from civil and criminal liability, as well as professional discipline, "unless the physician or health care facility fails to exercise reasonable care when applying the patient's advanced directive."[25] Section 166.046 goes further, providing an absolute safe-harbor to physicians who comply with it when abstaining from compliance with a patient's wishes.[26]

But §166.046 does not create a mandatory procedure, even for physicians wishing to abstain:

> 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.[27]

A physician who elects not to comply with the §166.046 procedure will lose the benefit of the safe-harbor provision. But he would still have the benefit of TADA's immunity to the extent that he withdrew life-sustaining intervention without "fail[ing] to exercise reasonable care when applying the patient's advance directive."[28]

2. Houston Methodist Did Not Violate Dunn's Civil Or Due Process Rights

[24] Id. §166.046(e).

[25] Id. §§166.044(a), (c).

[26] Id. §166.045(d).

[27] Id. §166.045(c) (emphasis added).

[28] Id. §166.044(a).

The traditional procedural due-process inquiry has two parts: (1) whether the plaintiff had a protected liberty or property interest; and (2) what process is due.[29,30] The substantive due-process inquiry looks at whether the state has arbitrarily deprived the plaintiff of a constitutionally protected interest.[31] But because neither the Texas nor U.S. Constitution protects against purely private harms, Plaintiff must also demonstrate that the deprivation occurred due to state action.[32] Plaintiffs can show neither a constitutionally protected interest nor state action. Accordingly, her constitutional claims must fail.

i. Plaintiff fails to identify a protected interest.

To state a due-process claim, a plaintiff must identify an interest the constitution protects. Plaintiff identifies two purported interests: life, and the right to make individual medical decisions. In fact, neither of those interests are implicated in the case at hand.

Plaintiff's arguments are premised on their mistaken understanding of TADA, and they imply that a patient has a *constitutional right* to receive treatment from a physician that the physician does not wish to give. The constitution "generally confer[s] 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."[33]

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[29] *See Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 428 (1982); *Univ. of Tex. Med. School at Hous. v. Than*, 901 S.W.2d 926, 929 (Tex. 1995).

[30] 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 in interpreting the state clause. *Univ. of Tex. Med. School at Hous. v. Than*, 901 S.W.2d 926, 929 (Tex. 1995). This is especially true of "state action issues," with respect to which the Court has explained that "[f]ederal court decisions provide a wealth of guidance." *Republican Party of Tex. v. Dietz*, 940 S.W.2d 86, 91 (Tex. 1997).

[31] *See Patel v. Tex. Dep't of Licensing & Regulation*, 469 S.W.3d 69, 86–87 (Tex. 2015); *Simi Inv. Co. v. Harris Cty., Tex.*, 236 F.3d 240, 249 (5th Cir. 2000).

[32] *Shelley v. Kraemer*, 334 U.S. 1, 13 (1948) (holding that the Constitution "erects no shield against merely private conduct, however discriminatory or wrongful"); *Republican Party of Tex. v. Dietz*, 940 S.W.2d 86, 90–91 (Tex. 1997) (applying same doctrine to the Texas Constitution).

[33] *DeShaney v. Winnebago Cty. Dep't of Soc. Servs.*, 489 U.S. 189, 196 (1989).

Plaintiff has not confronted these fundamental precepts. Take, for example, her claim that TADA deprives patients of "life." In fact, it is the patient's illness that causes death; it is merely forestalled by life-sustaining intervention.[34] In *DeShaney*'s language, the life-sustaining treatment is "aid" that "secure[s]" the patient's life.[35] But patients have no constitutional right to this aid.[36] A physician is not *constitutionally obligated* to provide *any* treatment, including life-sustaining treatment.

A contrary holding would have severe consequences. Any illness or medical condition, if the responsibility of state actors, may cause constitutional injuries. If Plaintiff were right that the Constitution requires doctors to undertake treatment that *prevents or forestalls* illness, then patients would have a constitutional right to have *any and all* ailments treated. Yet the United States Supreme Court has expressly rejected this position.[37] Indeed, even in the unique prison context, courts have roundly rejected the notion that a patient has a right to receive "any particular type of treatment."[38]

The same analysis dooms Plaintiff's stated interest in the individual right to make medical decisions. That right is not diminished by TADA. Rather, TADA protects individuals' right to make their own medical decisions, confirming the longstanding rule that before terminating a patient-physician relationship, the physician must give the patient reasonable notice so that he can find someone who will comply with his wishes. But under

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[34] *Vacco v. Quill*, 521 U.S. 793, 801 (1997) ("[W]hen a patient refuses life-sustaining medical treatment, he dies from an underlying fatal disease or pathology . . . .").

[35] 489 U.S. at 196.

[36] *Id.*

[37] *Id.* at 198–99; *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.");[37] *Johnson v. Thompson*, 971 F.2d 1487, 1495–96 (10th Cir. 1992) (rejecting argument that right to life includes right to receive medical care).

[38] *Long v. Nix*, 86 F.3d 761, 765 (8th Cir. 1996); *accord Jenkins v. Colo. Mental Health Inst. at Pueblo*, 215 F.3d 1337, at *1–2 (10th Cir. 2000) (unpublished).

DeShaney, an individual's right to make a decision does not compel a physician to implement it against the physician's own will. The patient's right is to make his choice, but this right does not overpower the physician's conscience.[39,40]

Plaintiff's claims of constitutional injury are predicated on the notion that a patient has a constitutional right not only to receive medical care, but to receive medical care of a specific type. But there is no constitutional right to medical care, let alone specific types of care, even if the care would save a person's life. Because physicians have no constitutional obligation to provide treatment they wish not to provide, Plaintiff's claims cannot succeed.

ii. Plaintiff's arguments are based on a misconception about §166.046.

Plaintiff argues that §166.046 "violated David Christopher Dunn's [substantive and procedural] due process rights under the Texas Constitution and the U.S. Constitution," and she seeks a declaration to this effect.[41] She complains that §166.046 "allows doctors and hospitals the absolute authority and unfettered discretion to terminate life-sustaining treatment of any patient," regardless of the patient's or his decision-maker's wishes.[42] In fact, however, TADA delegates no such authority. It explicitly did not alter "any legal right or

[39] *See Harris v. McRae*, 448 U.S. 297, 318 (1980) ("Whether freedom of choice that is constitutionally protected warrants federal subsidization is a question for Congress to answer, not a matter of constitutional entitlement.").

[40] *Harris* illustrates the danger in Plaintiff's conception of constitutional rights. If a constitutional life interest conferred an affirmative right to medical care, so would the constitutional abortion right confer an affirmative right to have the state provide abortions. Yet *Harris* rejected precisely such an argument, explaining:

> It cannot be that because the government may not prohibit the use of contraceptives or prevent parents from sending their child to a private school, government, therefore, has an affirmative constitutional obligation to ensure that all persons have the financial resources to obtain contraceptives or send their children to private schools.

Harris v. McRae, 448 U.S. 297, 318 (1980) (citations omitted).

[41] Plaintiff's First Am. Pet. ¶3.

[42] *Id.* ¶4.

responsibility a person may have to effect the withholding or withdrawal of life-sustaining treatment in a lawful manner."[43] It did not grant physicians any new powers, and did not even require them to follow any procedure. It created a safe harbor for - that is, granted immunity to - physicians who withhold or withdraw life- sustaining intervention in a specific manner.

iii. A private physician's treatment decision does not constitute state action.

Proof of a constitutional claim requires state action. Houston Methodist cannot be considered a state actor. The Supreme Court has found state action in only a few unique circumstances, none of which are present here:

- The *public function test* asks "whether the private entity performs a function which is 'exclusively reserved to the State.'"[44]
- 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."[45]
- And the *nexus test* asks if "the State has inserted 'itself into a position of interdependence with the private actor, such that it was a joint participant in the enterprise.'"[46]

The Supreme Court has not resolved "[w]hether these different tests are actually different in operation or simply different ways of characterizing the necessarily fact-bound inquiry that confronts the Court in" state-action cases.[47]

a) Section 166.046 does not satisfy the state-compulsion test.

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[43] *See* TADA §166.051 (emphasis added).

[44] *Cornish v. Corr. Servs. Corp.*, 402 F.3d 545, 549 (5th Cir. 2005) (quoting *Flagg Bros., Inc. v. Brooks*, 436 U.S. 149, 158 (1978).

[45] *Id.* at 549–50 (citing *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 170–71 (1970).

[46] *Id.* at 550 (quoting *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 357–58 (1974)) (brackets omitted).

[47] *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 939 (1982).

Supreme Court precedent firmly refutes any notion that a hospital or physician invoking §166.046's safe harbor is a state actor. In the first place, §166.046 provides a discretionary, not mandatory, procedure; it requires no action from any private actor. The Supreme Court has repeatedly held that "[a]ction taken by private entities with *mere approval or acquiescence* of the State is not state action."[48]

Indeed, the "[p]rivate use of state-sanctioned private remedies or procedures does not rise to the level of state action."[49] A physician or hospital making use of §166.046 is doing no more than using a state-provided remedy; the physician or hospital does not receive the type of "overt, significant assistance of state officials" that creates state action.[50]

In the absence of overt assistance from or coercion by the State, even compliance with a *mandatory* procedure does not implicate state action. Consider *Blum v. Yaretsky*, in which "a class of Medicaid patients challeng[ed] decisions by the nursing homes in which they reside to discharge or transfer [them] without notice or an opportunity for a hearing."[51] Federal law *required* nursing homes to establish utilization review committees ("URC") to "periodically assess whether each patient is receiving the appropriate level of care, and thus whether the patient's continued stay in the facility is justified."[52] The *Blum* plaintiffs were found by their respective URCs to not require a higher level of care, and were

[48] *Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 52 (1999) (emphasis added); *accord Blum v. Yaretsky*, 457 U.S. 991, 1004–05 (1982); *Flagg Bros.*, 436 U.S. at 154–65; *Jackson*, 419 U.S. at 357.

[49] *Tulsa Prof'l Collection Servs., Inc. v. Pope*, 485 U.S. 478, 485–86 (1988); *accord Flagg Bros.*, 436 U.S. at 161–62.

[50] *Pope*, 485 U.S. at 485–86; *cf. id.* at 487 (finding state action in private use of probate procedure, where probate judge was "intimately involved" in the procedure's operation); *Lugar*, 457 U.S. at 941 (holding that private use of prejudgment-attachment procedure constituted state action, where acts by sheriff and court clerk showed "joint participation with state officials in the seizure of the disputed property").

[51] 457 U.S. at 993.

[52] *Id.* at 994–95.

therefore transferred to other institutions in accordance with the statutory procedure.[53] Yet the Supreme Court held that there was no state action: the nursing homes, not the state, initiated the reviews and judged the patients' need for care on their own terms, not terms set by the state. The nursing homes' decisions "ultimately turn[ed] on medical judgments made by private parties according to professional standards that are not established by the State."[54]

Similarly, the decision to abstain from following a patient's wishes—and thus whether to initiate the §166.046 procedure—originates with the physician, who acts according to his own conscience, expertise, and ethics.[55] As in *Blum*, the State does not determine when or for what reasons a physician may invoke the §166.046 procedure. Moreover, unlike in *Blum*, use of §166.046 is permissive, even for physicians wishing to abstain. This case thus fits easily within *Blum*'s no-state-action holding.[56]

Another consideration cutting strongly against state action is that §166.046 does no more than immunize a physician who employs it. A similar issue arose in *Flagg Brothers*, in which the plaintiff sued to stop a warehouse from selling, pursuant to a warehouseman's lien, goods she had abandoned at the warehouse.[57] State law provided the warehouse a

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[53] *Id.* at 995.

[54] *Id.* at 1008; *see also id.* at 1010 ("[The] regulations themselves do not dictate the decision to discharge or transfer in a particular case.").

[55] *Cf. id.* at 1009 (noting that nursing homes' transfer decisions were based on judgments that "the care [the patients] are receiving is medically inappropriate").

[56] Even a private hospital's involvement in an involuntary commitment, pursuant to state law, is not state action. *See, e.g.*, *Estades-Negroni v. CPC Hosp. San Juan Capestrano*, 412 F.3d 1, 5–6 (1st Cir. 2005) (holding that the "scheme does not compel or encourage involuntary commitment," but "merely provides a mechanism through which private parties can, in their discretion, pursue such commitment"); *Bass v. Parkwood Hosp.*, 180 F.3d 234, 242 (5th Cir. 1999); *S.P. v. City of Takoma Park, Md.*, 134 F.3d 260, 269 (4th Cir. 1998); *Harvey v. Harvey*, 949 F.2d 1127, 1130– 31 (11th Cir. 1992); *see also Loce v. Time Warner Entm't Advance/Newhouse P'ship*, 191 F.3d 256, 266–67 (2d Cir. 1999) (holding that Time Warner's congressionally authorized, but non-mandatory, indecency policy was not state action).

[57] *See* 436 U.S. at 153–54.

procedure for making the sale and absolved it from liability if it complied.[58] The Court rejected the argument that the statute, or the state's decision to deny relief, constituted state action:

> If the mere denial of judicial relief is considered sufficient encouragement to make the State responsible for those private acts, all private deprivations of property would be converted into public acts whenever the State, for whatever reason, denies relief sought by the putative property owner.[59]

Likewise, the Legislature's decision to provide safe harbor for a physician's acts does not convert those acts into public acts.

The Fifth Circuit has applied these principles in even more analogous circumstances. In *Goss v. Memorial Hospital System*[60], the court considered a provision of the Texas Medical Practice Act that immunized hospitals' medical peer review committees from civil liability for reporting physician incompetency to the Board of Medical Examiners.[61] The plaintiff argued "that this immunity granted appellees by the State of Texas provided such encouragement to appellees that the peer review committee acted as an investigatory arm of the state."[62] Relying on *Flagg Brothers*, the Fifth Circuit rejected this argument, writing that the conferral of immunity "did not make the action of appellees a state action."[63]

Similarly, in *White v. Scrivner Corp.*, the Fifth Circuit considered whether a grocery store security guard's detention of a shoplifter constituted state action.[64] The plaintiff

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[58] *See id.* at 151 n.1.

[59] *Id.* at 165.

[60] 789 F.2d 353, 356 (5th Cir. 1986)

[61] An amended version of this statute is codified at TEX. OCC. CODE §160.010.

[62] *Id.*

[63] *Id.*

[64] See 594 F.2d 140, 141 (5th Cir. 1979)

relied on a Louisiana statute "insulating merchants from liability for detention of persons reasonably believed to be shoplifters."[65] The court held that *Flagg Brothers* "require[d] rejection of this argument."[66] Noting that the statute allowed, but did "not compel merchants to detain shoplifters," the court held that the immunity statute could not constitute state action.[67]

Because §166.046 is a permissive statute, initiated at a physician's sole option, and because it does no more than withhold a cause of action, there is no coercion or participation rising to the level of state action.

b) Section 166.046 does not satisfy the public-function test.

The Supreme Court holds that state action exists when a private entity performs a function that is "traditionally the *exclusive* prerogative of the State."[68] These are powers "traditionally associated with sovereignty."[69] The public-function test is "exceedingly difficult to satisfy."[70] The Court has "rejected reliance upon the doctrine in cases involving":

> coordination of amateur sports, the operation of a shopping mall, the furnishing of essential utility services, a warehouseman's enforcement of a statutory lien, the education of maladjusted children, the provision of nursing home care, and the administration of workers' compensation benefits.[71]

Plaintiffs argue that section 166.046 gives hospitals the power to decide a patient is no longer worthy of life-sustaining treatment. The statute does not give doctors or hospitals the

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[65] *Id.* at 143.

[66] *Id.*

[67] *Id.*

[68] *Jackson*, 419 U.S. at 353.

[69] *Id.*

[70] MARTIN A. SCHWARTZ, SECTION 1983 LITIG. CLAIMS & DEFENSES §5.14[A].

[71] *Id.* (footnotes omitted).

power to take life; it acknowledges their right not to provide treatment inconsistent with their own conscience. In this respect, Plaintiffs' premise is deeply flawed.

In the case at hand, Plaintiff cannot show a public function. It is true that in one exceptionally narrow circumstance - legally sanctioned executions - the state has an affirmative power to take life. But the power ends there; it has not "traditionally" or "exclusively" extended into the field of medicine. On the contrary, centuries of common law, and the state and federal constitutions, *bar* the State from taking the lives of private citizens. Thus, Plaintiff cannot cite, for example, a case in which a prison hospital has been held to have the power to deny a patient needed care.

Section 166.046 concerns a quintessentially *private* function: medical decision-making.[72] Even when overlaid with state regulations, a hospital's decisions are its own.[73] Decisions about when to enter into and leave doctor-patient relationships are governed by the desires of the doctor and patient. A doctor's decision to terminate that relationship is left to his medical judgment and conscience, provided that he conforms to a non-statutory code of medical ethics. These private, personal decisions are not - and never have been - regarded as public functions.

c) Section 166.046 does not satisfy the nexus test.

Likewise, the Plaintiffs cannot meet their burden to show that the nexus test applies to this case. The nexus test asks if the State has insinuated itself into a position of

[72] *See Blum*, 457 U.S. at 1011 ("We are also unable to conclude that nursing homes perform a function that has been traditionally the exclusive prerogative of the State." (quotations omitted)).

[73] *See id.* 1011–12 (holding that even if the state were obligated to provide nursing home services, "it would not follow that decisions made in the day-to-day administration of a nursing home are the kind of decisions traditionally and exclusively made by the sovereign").

interdependence with the private actor, such that it was a joint participant of the enterprise.[74] In *Jackson*, the plaintiff sued a privately-owned utility company after the company disconnected her electricity.[75] The plaintiff argued that because the company had failed to provide adequate notice, her due process rights had been violated.[76] The plaintiff claimed that because the utility was state-regulated and was essentially a statewide monopoly, the utility was a state actor.[77] The U.S. Supreme Court disagreed, holding that there was not a "sufficiently close nexus" between the conduct of the utility company and the state in order to conclude that the utility was a state actor.[78]

Here, like the utility company in *Jackson*, Houston Methodist is a privately owned and operated corporation. Plaintiffs have not alleged that the State and Houston Methodist are joint participants of the same enterprise and there is absolutely no rational argument that there is a sufficiently close nexus between the conduct of Houston Methodist and the State. Accordingly, since Houston Methodist Hospital cannot be deemed a state actor, then it is entitled to judgment as a matter of law.

B. No-Evidence Motion for Summary Judgment as to IIED Claim

Plaintiff, Evelyn Kelly, Individually, has claimed that Houston Methodist Hospital intentionally inflicted emotional distress upon her through the hospital's actions in implementing §166.046 with regard to her son, Christopher Dunn's care and treatment. After an adequate time for discovery, Plaintiffs are unable to provide any evidence to

[74] *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 366, 95 S. Ct. 449, 461, 42 L. Ed. 2d 477 (1974).

[75] *Id.* at 346–47.

[76] *Id.* at 348.

[77] *Id.* at 350–52.

[78] *Id.* at 354–59 (noting "[d]octors, … are all in regulated businesses, providing arguably essential goods and services, 'affected with a public interest.' We do not believe that such a status converts their every action, absent more, into that of the State").

support each of the required elements of Plaintiff's intentional infliction of emotional distress claim. Specifically, Plaintiff failed to present even a scintilla of evidence that: (1) Houston Methodist Hospital acted intentionally or recklessly; (2) its conduct was extreme and outrageous; (3) its actions caused Plaintiff emotional distress; (4) the emotional distress was severe; and (5) no alternative cause of action would provide a remedy for the severe emotional distress caused by Defendant's conduct.[79]

The Texas Supreme Court considers the tort of intentional infliction of emotional distress ("IIED") to be a "gap-filler."[80] Thus, an IIED claim is available only when a person intentionally inflicts severe emotional distress in a manner so unusual that the victim has no other recognized theory of redress; however, such cases are rare.[81]

Accordingly, this Court should grant Methodist's No-Evidence Motion for Summary Judgment as Plaintiff has not and cannot offer any evidence to support her claim for intentional infliction of emotional distress.

IV.
CONCLUSION AND PRAYER

For physicians, patients, and families, no aspect of health care is more fraught than end-of- life decision-making. In many instances, physicians face a difficult choice between their desire to carry out their patients' wishes and their ethical duty, as medical professionals, not to increase or prolong their patients' suffering.

Plaintiff's constitutional challenge misapprehends both the statute and its purpose. As a consequence, Plaintiff has failed to demonstrate two fundamental prerequisites to a

[79] *Hoffmann–La Roche Inc.,* 144 S.W.3d at 445; *Wal–Mart Stores, Inc. v. Canchola,* 121 S.W.3d 735, 740 (Tex.2003).

[80] *Hoffman-La Roche Inc. v. Zeltwanger*, 144 S.W.3d 438, 447 (Tex.2004).

[81] Id. ("Meritorious claims for intentional infliction of emotional distress are relatively rare precisely because most human conduct, even that which causes injury to others, cannot be fairly characterized as extreme and outrageous.").

successful due process claim: a constitutionally protected interest and state action.

WHEREFORE PREMISES CONSIDERED, Defendant HOUSTON METHODIST HOSPITAL respectfully request that this Court GRANT its Traditional and No-Evidence Motion for Summary Judgment, and for any such other and further relief to which Defendant shows itself justly entitled.

Respectfully submitted,

SCOTT PATTON PC

By: */s/Dwight W. Scott, Jr.*

DWIGHT W. SCOTT, JR.
Texas Bar No. 24027968
dscott@scottpattonlaw.com
CAROLYN CAPOCCIA SMITH
Texas Bar No. 24037511
csmith@scottpattonlaw.com
3939 Washington Avenue, Suite 203
Houston, Texas 77007
Telephone: (281) 377-3311
Facsimile: (281) 377-3267

ATTORNEYS FOR DEFENDANT, HOUSTON METHODIST HOSPITAL f/k/a THE METHODIST HOSPITAL

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document has been served on all counsel of record pursuant to Rule 21a, Texas Rules of Civil Procedure, on this the 21st day of August, 2017.

Via E-file
James E. "Trey" Trainor, III
Trey.trainor@akerman.com
AKERMAN, LLP
700 Lavaca Street, Suite 1400
Austin, Texas 78701

Via E-file
Joseph M. Nixon
Joe.nixon@akerman.com
Brooke A. Jimenez
Brook.jimenez@akerman.com
1300 Post Oak Blvd., Suite 2500
Houston, Texas 77056

Via E-File
Emily Kebodeaux
ekebodeaux@texasrighttolife.com
TEXAS RIGHT TO LIFE
9800 Centre Parkway, Suite 20
Houston, Texas 77036

/s/ Dwight W. Scott, Jr.
DWIGHT W. SCOTT, JR.