CAUSE NO. 2015-69681

EVELYN KELLY, INDIVIDUALLY, AND ON BEHALF OF THE ESTATE OF DAVID CHRISTOPHER DUNN,	§	IN THE DISTRICT COURT OF
Plaintiffs,	§	HARRIS COUNTY, TEXAS
v.	§	
HOUSTON METHODIST HOSPITAL,	§	
Defendant.	§	189th JUDICIAL DISTRICT

PLAINTIFF'S AMENDED MOTION FOR SUMMARY JUDGMENT

TO THE HONORABLE COURT:

Now comes Plaintiff Evelyn Kelly ("Mrs. Kelly"), individually and on behalf of the Estate of David Christopher Dunn ("Mr. Dunn"), and files this motion for summary judgment against Defendant Houston Methodist Hospital ("Methodist"), and as grounds thereof will show the Court the following:

SUMMARY OF THE ARGUMENT

Mrs. Kelly, individually and on behalf of her son's estate, asks this Court to (1) declare Tex. Health & Safety Code § 166.046 unconstitutional both facially and as applied to Mr. Dunn; and (2) find that Methodist deprived Mr. Dunn of his civil right to due process under color of state law, 42 U.S.C. § 1983, by utilizing Tex. Health & Safety Code § 166.046. This case is not moot because the Plaintiff's injuries are capable of repetition while escaping review.

FACTS AND PROCEDURAL BACKGROUND

Mr. Dunn was admitted as a patient of Methodist on October 12, 2015. On or about November 11, 2015, Methodist provided Mrs. Kelly with a letter (Exhibit A) informing Mrs. Kelly that Methodist intended to terminate the life-sustaining treatment of her son, Mr. Dunn, and that a meeting of the hospital's ethics committee would take place to discuss terminating Mr.

Dunn's life-sustaining treatment. The letter from Methodist was sent pursuant to Tex. Health & Safety Code § 166.046.

In response to receiving the letter, Mr. Dunn and Mrs. Kelly obtained a temporary restraining order on November 20, 2015. Methodist continued life-sustaining treatment pursuant to that order until Mr. Dunn's natural death on December 23, 2015.

In support of this Motion, Mrs. Dunn relies on her affidavit (Exhibit B), a video of her son praying to receive life-sustaining care (Exhibit C), and the affidavit of Mr. Nixon (Exhibit D).

ARGUMENT

I. The Court should grant summary judgment pursuant to Chapter 37 of the Civil Practice & Remedies Code (UDJA) because Tex. Health & Safety Code § 166.046 is facially unconstitutional.

A court has the power to issue a declaratory judgment on "issues of state law and issues of federal law."[1]

Tex. Health & Safety Code § 166.046 allows a hospital to make an arbitrary and unreviewable decision to terminate life-sustaining treatment without due process.[2] The statute states: "If an attending physician refuses to honor a patient's advance directive or a health care or treatment decision made by or on behalf of a patient, the physician's refusal shall be reviewed by an ethics or medical committee…"[3] If a conflict exists, the statute then gives a patient these rights:

[1] Tex. Civ. Prac. & Rem. Code Ann. § 37.003 (West 2017); see *Patel v. Tex. Dept. of Licensing and Regulation*, 469 S.W.3d 69, 88 (Tex. 2014). "A court having jurisdiction to render a declaratory judgment has power to determine issues of fact, issues of state law and issues of federal law if such questions be involved in the particular case." *United Services Life Ins. Co. v. Delaney*, 396 S.W.2d 855, 858 (Tex. 1965); *Chapman v. Marathon Mfg. Co.*, 590 S.W.2d 549, 552 (Tex. Civ. App.—Houston [1st Dist.] 1979, no writ).

[2] To comport with due process, a person facing deprivation of life, liberty, or property must be confronted with reasonable notice of the claims against him so as to be able to mount a proper defense. *In re R.M.T.*, 352 S.W.3d 12 (Tex. App.—Texarkana 2011, no pet.); *Pickett v. Texas Mut. Ins. Co.*, 239 S.W.3d 826 (Tex. App.—Austin 2007, no pet.).

[3] Tex. Health & Safety Code § 166.046(a).

(b) The patient or the person responsible for the health care decisions of the individual who has made the decision regarding the directive or treatment decision:

(1) may be given a written description of the ethics or medical committee review process and any other policies and procedures related to this section adopted by the health care facility;

(2) shall be informed of the committee review process not less than 48 hours before the meeting called to discuss the patient's directive, unless the time period is waived by mutual agreement;

(3) at the time of being so informed, shall be provided:

(A) a copy of the appropriate statement set forth in Section 166.052; and

(B) a copy of the registry list of health care providers and referral groups that have volunteered their readiness to consider accepting transfer or to assist in locating a provider willing to accept transfer that is posted on the website maintained by the department under Section 166.053; and

(4) is entitled to:

(A) attend the meeting;

(B) receive a written explanation of the decision reached during the review process;

(C) receive a copy of the portion of the patient's medical record related to the treatment received by the patient in the facility for the lesser of: (i) the period of the patient's current admission to the facility; or (ii) the preceding 30 calendar days; and

(D) receive a copy of all of the patient's reasonably available diagnostic results and reports related to the medical record provided under Paragraph (C).[4]

As written, Section 166.046 of the Health & Safety Code denies patients constitutional due process before a life-terminating decision is made. There is no right to be heard by the committee. There is no standard set in the statute by which the committee is required to make a decision. There is no standard as to who sits on the committee. There is no record made of the committee's meeting. There is no requirement the committee substantiate its decision in writing, and there is no right to review the committee's decision.

By statutorily protecting the hospital's committee and providing it the opportunity to deprive an individual of life by terminating life-sustaining treatment without any one of these

[4] Tex. Health & Safety Code Ann. § 166.046 (West 2017).

rights, the statute guarantees a constitutional violation. A substantive due process violation occurs when the government deprives individuals of constitutionally protected rights by an arbitrary use of its power.[5] Here, there are simply no standards and no specific procedures to protect against a deprivation of due process. Rather, the procedures outlined in Section 166.046(b)(1-4) expose patients to a risk of mistaken or unjustified deprivation of life without protection, and an unjustified deprivation of life cannot be corrected.

For example, the time period in which notice is guaranteed falls short of any due process standards. Pursuant to the statute, the patient or person responsible for the health care decisions of the individual "shall be informed of the committee review process not less than 48 hours before the meeting called to discuss the patient's directive, unless the time period is waived by mutual agreement."[6] This brief statutory notice period of two days does not afford a patient with adequate opportunity to prepare for a meeting where the subject at stake is the individual's life. The State sets an unreasonable time period in which individuals must: evaluate available options (if any); determine and confirm persons or entities willing to assist; gather needed medical records; seek and secure counsel to attend the meeting. Effectively, the patient can be served with 48-hour notice on a Friday near close of business (at which time administrative offices of hospitals and lawyers' offices are closed), making any meaningful preparation or search for helpful assistance within those two statutorily-afforded days impossible. Additionally, the statutes provides no right to participate or advocate in the meeting.

Similarly, the statute fails to require hospitals to provide notice as to why the institution has decided to unilaterally seek the withdrawal of life-sustaining treatment. The statute instead provides that the patient or surrogate: "**may** be given a written description of the ethics or

[5] *Byers v. Patterson*, 219 S.W.3d 514, 525 (Tex. App.—Tyler 2007, no pet.) (citing *Simi Inv. Co. v. Harris Cnty.*, 236 F.3d 240, 249 (5th Cir. 2000)).
[6] Tex. Health & Safety Code Ann. § 166.046(b)(2) (West 2017).

medical committee review process and any other policies and procedures related to this section adopted by the health care facility."[7] While the statute does not require hospitals to have policies or procedures, unpublished and unknown guidelines, criteria, or medical information undoubtedly leave patients and their families guessing at how to advocate on behalf of the patient. Without notice of the standards on which a hospital seeks to remove life-sustaining treatment or the process and procedure by which it makes its decision, the patient is not able to prepare for an ethics committee meeting. Ultimately, the statute allows for a life or death determination without any criteria or benchmarks for which patients are susceptible. Tex. Health & Safety Code § 166.046 fails to provide patients with a reasonable opportunity to prepare for the crucial hearing where deprivation of life is being determined.

Tex. Health & Safety Code § 166.046(b)(4) entitles the patient or their surrogate to "(A) attend the meeting." Attendance to a hearing in which the constitutional right to life is deliberated fails to meet a constitutional threshold of due process. "For when a person has an opportunity to speak up in his own defense, and when the State must listen to what he has to say, substantively unfair and simply mistaken deprivations [of property interests] can be prevented."[8]

Tex. Health & Safety Code § 166.046 fails to provide a patient a neutral or impartial decision-maker. Instead, the Code allows the hospital to appoint the committee members, without enforcing any standards of impartiality. A lack of neutrality is a deprivation of due process as a matter of law. As the United States Supreme Court said in *Marshall v. Jerrico, Inc.*,

[7] Tex. Health & Safety Code Ann. § 166.046(b)(1) (West 2017).

[8] *Fuentes v. Shevin*, 407 U.S. 67, 81 (1972). It has long been recognized that 'fairness can rarely be obtained by secret, one-sided determination of facts decisive of rights. . . . (And n)o [sic] better instrument has been devised for arriving at truth than to give a person in jeopardy of serious loss notice of the case against him and opportunity to meet it.' *Fuentes v. Shevin*, 407 U.S. 67, 81 (1972) (citing *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123, 170-72 (1951) (Frankfurter, J., concurring).

> "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."[9]

Finally, there is no right of appeal or review of the hospital's decision. Due process cannot be ensured without a review of a life-depriving decision.[10] Otherwise, all other due process safeguards are illusory.

Due to the statute's failure to provide substantive or procedural due process, the Court should grant summary judgment pursuant to Civ. Prac. & Rem. Code § 37, holding that the Health & Safety Code § 166.046 is facially unconstitutional and was unconstitutionally applied to Mr. Dunn.

II. The Court should grant summary judgment on Plaintiff's 42 U.S.C. § 1983 claim because the hospital deprived Mr. Dunn of Due Process.

A. This is a proper claim under 42 U.S.C. § 1983.

42 U.S.C. § 1983 allows an individual to bring a civil action to recover damages sustained as a result of the violation of their constitutional rights. The statute serves as the vehicle to redress the "deprivation of any rights, privileges, or immunities secured by the Constitution and laws by any person acting under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory."[11] To state a claim under the statute, a plaintiff must allege that (1) defendant deprived plaintiff of a federal right secured by the laws of the United States or by the Constitution and (2) acted under color of state law.[12] "Thus, a threshold inquiry

[9] 446 U.S. 238, 242 (1980).
[10] *Parham v. J.R.*, 442 U.S. 584, 591 (1979).
[11] *Gomez v. Toldeo*, 446 US 635, 638 (1980).
[12] See *Gomez v. Toledo*, 446 U.S. 635, 640 (1980); *Schreiber v. City of Garland*, Tex., CIV.A. 3:06-CV-1170-O, 2008 WL 1968310, at *4 (N.D. Tex. May 7, 2008) (citing *Flagg Bros., Inc. v. Brooks*, 436 U.S. 149, 155 (1978); *Bass v. Parkwood Hosp*., 180 F.3d 234, 241 (5th Cir.1999)).

in a 42 U.S.C. § 1983 cause of action is whether plaintiff has alleged a violation of a constitutional right or of federal law." [13]

B. The two elements to make a claim as required by 42 U.S.C. § 1983 are met in this case—deprivation of a federal right(s) under color of state law.

1. Dunn was deprived of his right to Due Process.

Due process requires a fair and impartial trial, accomplished by providing: (1) an opportunity to be heard (2) a reasonable opportunity to prepare for a hearing, (3) a reasonable notice of the claims against them, and (4) a decision to be reached through an impartial tribunal.[14] To constitute a competent trial, the trial (hearing) must be conducted before an unbiased judge.[15] Procedural due process rules are meant to protect persons not only from the deprivation, but from the mistaken or unjustified deprivation, of life, liberty, or property and

[13] *Schreiber v. City of Garland, Tex.*, CIV.A. 3:06-CV-1170-O, 2008 WL 1968310, at *4 (N.D. Tex. May 7, 2008) (citing *Neal v. Brim*, 506 F.2d 6, 9 (5th Cir. 1975)). The underlying nature of a claim determines whether or not it is a healthcare liability claim. *Tesoro v. Alvarez* (App. 13 Dist. 2009) 281 S.W.3d 654; *Covenant Health Sys. v. Barnett*, 342 S.W.3d 226, 231-32 (Tex. App.—Amarillo 2011, no pet.) (citing to *Yamada v. Friend*, 335 S.W.3d 192, 196 (Tex. 2010) (citing *Garland Cmty. Hosp. v. Rose*, 156 S.W.3d 541, 543 (Tex. 2004)). "A cause of action against a healthcare provider is a health care liability claim if it is based on a claimed departure from an accepted standard of healthcare. A claim alleges a departure from accepted standards of health care if the act or omission alleged in the complaint is an inseparable part of the rendition of healthcare services." *Covenant Health Sys. v. Barnett*, 342 S.W.3d 226, 231-32 (Tex. App.—Amarillo 2001, no pet.) (citing to *Diversicare General Partner, Inc. v. Rubio*, 185 S.W.3d 842, 848 (Tex. 2005); *Buck v. Blum*, 130 S.W.3d 285, 290 (Tex. App.—Houston [14th Dist.] 2004, no pet.)). Here, the committee formation and decision making processing is a separable claim.

Defendants cite to *Texas Cypress Creek* in their argument that this case is analogous and should be treated accordingly. Not so. A reading of this short opinion by the Texas appellate court addresses the issue of whether a mental healthcare claim is a Chapter 74 claim. In that case, the plaintiff claimed that the doctors did not provide adequate care for the patient and plaintiff had initially filed a healthcare liability claim but later amended her pleadings to artfully take out these claims. *Texas Cypress Creek Hosp., L.P. v. Hickman*, 329 S.W.3d 209, 216 (Tex. App.—Houston [14th Dist.] 2010, pet. denied).

Here, no such allegations are made. Plaintiff is not alleging the hospital did not provide care or failed to meet a professional standard; rather, Plaintiff's complaint is that the committee decision-making process violated due process and is unconstitutional as a matter of law. Plaintiff has not claimed a violation of a medical standard, nor that the medical professionals gave inadequate care. Previous briefing has also informed the Court that a claim pursuant to 42 U.S.C. § 1983 may not be pre-empted by state statute.

[14] *In re R.M.T.*, 352 S.W.3d 12 (Tex. App.—Texarkana 2011, no pet.); *Pickett v. Texas Mut. Ins. Co.*, 239 S.W.3d 826 Tex. App.—Austin 2007, no pet.); It is important to note, that while the Texas Constitution is textually different in that it refers to "due course" rather than "due process," the terms are regarded without meaningful distinction. *Mellinger v. City of Houston*, 68 Tex. 37, 3 S.W. 249, 252–53 (1887). Consequently, Texas has "traditionally followed contemporary federal due process interpretations of procedural due process issues." *Univ. of Texas Med. Sch. at Houston v. Than*, 901 S.W.2d 926, 929 (Tex. 1995); *Mellinger*, 3 S.W. at 252-53.

[15] *Johnson v. Mississippi*, 403 U.S. 212, 91 S. Ct. 1778, (1971); *Martinez v. Texas State Bd. of Medical Examiners*, 476 S.W.2d 400 (Tex. Civ. App.— San Antonio 1972), writ refused n.r.e., (May 17, 1972).

interests protected by the Fourteenth Amendment.[16] The right to due process is absolute. It does not turn on the merits of a claim, rather, "because of the importance to organized society", procedural due process must be observed.[17] Denial of the right to due process requires the award of nominal damages even without proof of actual injury.[18]

The statute at issue disregards this constitutionally required process. Here, Section 166.046 of the Texas Health and Safety Code violates multiple facets that make up the constitutional right to due process by: (1) failing to provide a patient (or their surrogate decision-maker) an opportunity to be heard, (2) failing to give a reasonable opportunity to prepare for a hearing, (3) failing to give adequate notice of the reasons why removal of life-sustaining treatment is to occur, and (4) failing to allow for a decision to be reached through an impartial tribunal, (5) failing to require objective standards, and (6) failing to provide a record or right of review.

2. Dunn was not given an opportunity to be heard.

The opportunity to be heard constitutes a fundamental requirement of due process and must be provided at a meaningful time and in a meaningful manner.[19] While due process allows

[16] *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 569 (1972); *County of Dallas v. Wiland*, 216 S.W.3d 344 (Tex. 2007) (citing *Carey v. Piphus*, 435 U.S. 247, 259 (1978)).
[17] *County of Dallas v. Wiland*, 216 S.W.3d 344, 356 (Tex. 2007) (citing *Carey v. Piphus*, 435 U.S. 247, 259 (1978)).
[18] *County of Dallas v. Wiland*, 216 S.W.3d 344, 356-57 (Tex. 2007) (citing *Carey v. Piphus*, 435 U.S. 247, 259 (1978)).
[19] *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965) (citing *Grannis v. Ordean*, 234 U.S. 385, 394 (1914)); *Univ. of Texas Med. Sch. at Houston v. Than*, 901 S.W.2d 926, 930 (Tex. 1995); *Mathews v. Eldridge*, 424 U.S. 319, 333, 96 S. Ct. 893, 902 (1976); At the core of affording sufficient due process lies the opportunity to be heard in front of an impartial tribunal. *Johnson v. Mississippi*, 403 U.S. 212 (1971); The constitutional right to be heard serves as a basic tenant of the duty of government to follow a fair process of decision-making when it acts to deprive a person of his [rights or] possessions. *See Fuentes v. Shevin*, 407 U.S. 67, 80 (1972) (noting the high value embedded in our constitutional and political history in permitting a person the right to enjoy what is his, free of governmental interference). In discussing the deprivation of property, the United States Supreme Court noted that the purpose of this requirement is not only to ensure abstract fair play to the individual, but more particularly, is to protect a person's use and possession of property from arbitrary encroachment – to minimize substantively unfair or mistaken deprivations of property, a danger that is especially great when the State seizes goods simply upon the application of and for the benefit of a private party. *Fuentes v. Shevin*, 407 U.S. 67, 80 (1972).

for variances in the form of hearing "appropriate to the nature of the case,"[20] depending on significance of the interests involved and nature of the subsequent proceedings, "the right to a meaningful opportunity to be heard within the limits of practicality, must be protected against denial by particular laws that operate to jeopardize it for particular individuals."[21] Part of the opportunity to be heard is the ability to be represented at the hearing.[22] Mr. Dunn's mother was left without an advocate to defend her son's life.

The Texas Supreme Court has held that the "opportunity [to be heard] may not be attenuated to mere formal observance."[23] Here, while Tex. Health & Safety Code § 166.046(b)(4) entitles a patient or surrogate decision-maker to attend the committee meeting and receive the patient's medical records, diagnostic results, and a written explanation of the committee's decision, that by no means equates to due process, and the constitutional right to be heard is glaringly absent in the statute.[24]

3. Dunn was not given proper notice of the proceeding.

The unnecessary exclusion of *the* critical party from meaningful participation in a determination of this right to direct the course of medical treatment contravenes the basic tenets

[20] *Mullane v. Central Hanover Tr. Co.*, 339 U.S. 306, 313 (1950).
[21] *Boddie v. Connecticut*, 401 U.S. 371, 378- 79 (1971).
[22] While U.S. Circuit Courts were split on whether a prohibition against representation of a plaintiff by and through counsel was a violation of plaintiff's right to due process when subject to permanent suspension, the Court in *Houston v. Sabeti* referred to and assessed five factors first laid out in *Wasson v. Trowbridge*, most notably were: the education level of the student, his/her ability to understand and develop the facts, whether the other side is represented, and fairness of the hearing. *Univ. of Houston v. Sabeti*, 676 S.W.2d 685, 687 (Tex. App. – Houston [1st Dist.] 1984, no writ). The *Sabeti* court held the student was met with due process upon determining that the *Wasson* factors were not present, for: 1) the proceeding was not criminal; 2) the government did not proceed through counsel; 3) the student was mature and educated; 4) the student's knowledge of the events enabled him to develop the facts adequately; and, 5) the other aspects of the hearing, taken as a whole, were fair. *Id*; *see Wasson v. Trowbridge*, 382 F.2d 807, 812 (2nd Cir. 1967).
[23] "Due process of law ordinarily includes: (1) hearing before condemnation; (2) accordance of reasonable opportunity to prepare for the hearing. Mandate of reasonableness of opportunity may not be attenuated to mere formal observance by judicial action." *Ex parte Davis*, 344 S.W.2d 153, 157 (Tex. 1961) (citing *Ex parte Hejda*, 13 S.W.2d 57, 58 (Tex. Comm'n App. 1929).
[24] The statute does not entitle the patient or surrogate decision-maker to offer evidence or utilize counsel. *Tex. Health & Safety Code Ann.* § 166.046(b)(4)(West 2017).

of our judicial system and affronts the principles of individual integrity that sustain it.[25] As such, notice of the claims is a critical component of due process.[26] Mr. Dunn, though lucid and communicative, was not provided direct notice of the hearing. The statute does not require a conscious patient be guaranteed notice of the hearing that will determine whether the patient will be removed from life-sustaining treatment. The statutory language provides certain entitlements to "the patient or the person responsible for the health care decisions of the individual who has made the decision regarding the directive or treatment decision."[27] In this instance, the hospital was aware of the patient's ability to communicate, yet his mother was handed the letter which stipulated the hearing date. In fact, Mr. Dunn had made clear his intention to continue life-sustaining treatment and the attached summary judgment evidence of a video recording reveals this to be certain even post-hearing. Further, it was not until counsel was hired and a temporary restraining order was put in place that the hospital took the stance that Mr. Dunn was incapacitated. And, not until after Mr. Dunn hired a lawyer and obtained a restraining order did the hospital seek the appointment of a permanent guardian. Where on its face and in practice, a statute neglects to safeguard the attendance or notification of the individual to be deprived of his constitutional right, the system is void of due process, especially so, when hospitals can legally and arbitrarily deem individuals incapacitated and go as far as to remove guardianship rights from family members.

[25] *Edward W. v. Lamkins*, (2002) 99 Cal. App. 4th 516, 529 (holding that public guardian's routine of seeking notice waivers violated conservatee's due process rights); *Thor v. Superior Court* (1993) 5 Cal. 4th 725, 723, fn. 2.
[26] "An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice 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." *Mullane v. Central Hanover Bank Tr. Co.* 339 U.S. 306, 314 (1950); *see Milliken v. Meyer*, 311 U.S. 457, 463 (1940) (noting that notice is required to satisfy the traditional notions of fair play and substantial justice implicit in due process).
[27] *See Tex. Health & Safety Code Ann.* § 166.046(b)(West 2017).

4. Dunn was not given ability to prepare for the hearing.

A disciplinary proceeding by which a medical student is dismissed for cheating demands a level of due process that consists of oral and written notice of the charges, written notice of evidence to be used against the student in the hearing, including a witness list and summaries of their respective testimonies, the right to counsel or other representation, a formal hearing with the opportunity to present evidence and cross-examine witnesses, and a right of appeal.[28] It is ironic that Tex. Health & Safety Code § 166.046 does not afford individuals on life-sustaining treatment any of these same procedural safeguards as are given to medical students.[29] Here, the interest at risk is higher, yet per the statute in question, ethics meetings are held without providing the patient or surrogate with notice of evidence to be used, a witness list accompanied by summaries, notice of panel members with accompanying qualifications, right to counsel or the opportunity to present evidence and cross-examine witnesses. With the absence of uniform statutory guidance, the ability of a patient or surrogate decision-maker to address an ethics committee depends upon the internal policies of individual hospitals, the individual in charge of that hospital's ethics committee, and the good graces (if any) of the committee members. Effectively, a patient's ability to advocate before the body determining whether to continue his life may well depend in which hospital he finds himself. This lack of uniformity creates different due process availability to similarly-situated patients, and therefore, renders the statute facially unconstitutional. As Methodist applied an unconstitutional statute, it deprived Mr. Dunn of his civil rights under color of state law.

[28] *Univ.of Tex. Med. Sch. at Houston v. Than*, 901 S.W.2d 926, 931 (Tex. 1995).

[29] Even with the heightened procedural due process observed in *Than*, the Court held that due course of law was infringed when a student with a liberty interest is denied an opportunity to respond to a new piece of evidence against him obtained in an ex parte visit and given that the countervailing burden on the state is slight. 901 S.W. 2d at 932.

5. The hospital committee is not an impartial tribunal as required by due process as a hearing must be conducted before an unbiased judge.[30]

The U.S. Supreme Court has stressed the importance of a "neutral factfinder" in the context of medical treatment decisions and the right to a review process.[31] Under Tex. Health & Safety Code § 166.046, a fair and impartial tribunal did not and could not hear Dunn's case. The "ethics committee" members who are employed by the treating hospital cannot be fair and impartial. Their decision may have an adverse financial impact on the hospital or put a colleague's judgment in public question. Additionally, there is no safeguard against ex parte communications or the ex parte presentation of evidence to which the patient or his surrogate could rebut.

Aside from hospital employees, the hospital itself has an inherent conflict of interest when acting as arbiter – treating any patient requires a financial burden upon the entity. Members of a fair and impartial tribunal should not only avoid a conflict of interest, they should avoid even the appearance of a conflict of interest, especially when a patient's life is at stake.[32] When a hospital "ethics committee" meets under Tex. Health & Safety Code § 166.046 for a patient within its own walls, objectivity and impartiality essential to due process are nonexistent. Section 166.046 provides no mechanism in which a patient's desire to live is considered by an impartial tribunal. Accordingly, a lack of an impartial committee by Methodist was another violation of Mr. Dunn's right to due process.

[30] *Johnson v. Mississippi*, 403 U.S. 212 (1971); *Martinez v. Texas State Bd. of Medical Examiners*, 476 S.W.2d 400 (Tex. Civ. App.—San Antonio 1972), writ refused n.r.e., (May 17, 1972).
[31] *Parham v. J.R.*, 442 U.S. 584, 591 (1979) (citing examples of hospital procedures where several hospitals' review boards are made up of non-staff community medical professionals and review processes afforded to patients).
[32] "There is a great potential for serious conflict of interest for the State when it is paying the medical bill for the treatment of its ward." *Woods v. Com.*, 142 S.W.3d 24, 64 (Ky. 2004).

6. Dunn was sentenced to a premature death.

The preservation of life in Texas is a long-valued right.[33]

Courts recognize "no right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law."[34]

The State of Texas does not own the decision, and thus lacks the authority, to end a patient's life by taking away life-sustaining treatment. As such, the State of Texas does not have any authority to delegate such a decision to any actor, private or public. The situation facing patients in hospitals is distinctly different than the institution of the death penalty for convicted felons. By the enactment of Tex. Health & Safety Code § 166.046**,** the State of Texas has created a scheme whereby patients in Texas hospitals may have their life extinguished without any standard, being found guilty of nothing except that of being ill. The State of Texas simply does not have the authority to sentence ill people to premature death.

In *Cruzan*, the Court noted that the Constitution requires that the State not allow anyone "but the patient" to make decisions regarding the cessation of life-sustaining treatment.[35] The Court went on to note that the state could properly require a "clear and convincing evidence" standard to prove the patient's wishes.[36] In this case, there is no evidentiary standard imposed by Tex. Health & Safety Code § 166.046. An attending physician and hospital ethics committee are given

[33] "(a) A person commits an offense if, with intent to promote or assist the commission of suicide by another, he aids or attempts to aid the other to commit or attempt to commit suicide." Tex. Pen. Code Ann. §22.08 (West 2017); Additionally, courts across the nation have upheld similar statutes. *See Donorovich-Odonnell v. Harris*, 241 Cal. App. 4th 1118 (2015) (upholding a statute criminalizing the mere act of prescribing drugs as it "is active and intentional participation in the events leading to the suicide).

[34] *Cruzan v. Director, Missouri Dep't of Health*, 497 U.S. 261, 269 (1990) (quoting *Union Pacific R. Co. v. Botsford*, 141 U.S. 250, 251 (1891)); "It cannot be disputed that the Due Process Clause protects an interest in life." *Cruzan*, 497 U.S. at 281.

[35] *Cruzan*, 497 U.S. at 286.

[36] *Id*. at 280.

complete autonomy in rendering a decision that further medical treatment is "inappropriate" for a person with an irreversible or terminal condition. This is an alarming delegation of power by the state law. A final decision rendered behind closed doors, without an opportunity to challenge the evidence, present contrary evidence, or appeal a committee decision, is legally insufficient from the due process intended to protect the first liberty mentioned in Article 1, Section 19 of the Texas Constitution and that of the Fourteenth Amendment. Accordingly, the act of using Tex. Health & Safety Code § 166.046 by Methodist deprived Mr. Dunn of his civil rights under color of state law.

7. The hospital acted under color of state law.

Conduct or action under color of state law requires that a defendant exercise power possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law.[37] A State cannot avoid constitutional responsibilities by delegating public function to private parties.[38] "In the typical case raising a state-action issue, a private party has taken the decisive step that caused the harm to the plaintiff, and the question is whether the State was sufficiently involved to treat that decisive conduct as state action… Thus, in the usual case we ask whether the State provided a mantle of authority that enhanced the power of the harm-causing individual actor."[39] Courts have made clear that state action is concluded when "the State create[d] the legal framework governing the conduct."[40] Here, the State enacted Tex. Health & Safety Code § 166.046, the legal framework granting authority to the hospital which deprived Dunn of his constitutional rights. And, Methodist used it. See Exhibit A.

[37] *See Georgia v. McCollum*, 505 U.S. 42, 51 (1992) (quoting *Lugar v. Edmonson Oil Co.*, 457 U.S. 922, 939 (1982)); see also *Mitchell v. Amarillo Hosp. Dist.*, 855 S.W.2d 857, 864 (Tex. App.—Amarillo 1993, cert. denied).
[38] *Georgia v. McCollum*, 505 U.S. 42, 53 (1992).
[39] *National Collegiate Athletic Ass'n v. Tarkanian*, 488 U.S. 179, 192 (1988).
[40] *Tarkanian*, 488 U.S. at 192 (citing *North Ga. Finishing, Inc. v. Di-Chem, Inc.*, 419 U.S. 601 (1975).

Pursuant to the Texas Health & Safety Code, the Hospital exercised statutory authority evocative of a government function in the following ways:

- Provided approximately two days' formal notice[41], that Dunn's life-sustaining could be removed;
- Held a hearing regarding whether Dunn's life-sustaining treatment should be removed[42];
- Came to a determination that Dunn's request to continue life-sustaining treatment should not be honored[43];
- Came to a determination that Dunn's life-sustaining treatment should be removed[44];
- Gave written notice that Dunn's life-sustaining treatment could be removed on or about November 24, 2015, as it can do under the Act[45].

Tex. Health & Safety Code § 166.046 gives hospitals the power to decide a patient is no longer worthy of life-sustaining treatment. This grant of authority indicates even a private hospital, when taking action under the statute, is performing a State function. The ability to take formal action which will result in death is not available to the public.[46] In making the decision to withhold life-sustaining treatment, the statute allows a hospital's ethics committee to sit as both

[41] *See* Tex. Health & Safety Code § 166.046(a)(2)(West 2017).
[42] *See* Tex. Health & Safety Code § 166.046 (a)(West 2017).
[43] *See* Tex. Health & Safety Code § 166.046 (a)(West 2017).
[44] *See* Tex. Health & Safety Code § 166.046 (a)(West 2017).
[45] *See* Tex. Health & Safety Code § 166.046(e)(West 2017) ("The physician and health care facility are not obligated to provide life-sustaining treatment after the 10th day after the written decisions required under Subsection (b) s provided to the patient or the person responsible for the health care decisions of the patient [.]").
46 Compare *Lindsey v. Detroit Entertainment*, LLC, 484 F.3d 824, 828–31 (6th Cir. 2007) (casino security personnel were not engaged in state action when they detained a patron and thus owner could not be held liable for an unlawful seizure under § 1983, because security personnel are not licensed under state law to have misdemeanor arrest authority; although private security guards who are endowed by law with plenary police power may qualify as state actors, plaintiffs could not point to any powers beyond those possessed by ordinary citizens that the state delegated to unlicensed security personnel, and thus they could not show that defendant engaged in any action attributable to the state); see also *Johnson v.* , 372 F.3d 894, 896-898, (7th Cir. 2004) *Children's Hosp.LaRabida* (delegation of a public function to a private entity triggers state action and a privately employed "special officer" who possesses full police power pursuant to city ordinance will be treated the same as a regular Chicago police officer.

judge and jury of a physician's recommendation to take action which will result in premature death. This judicial function of the "ethics committee" is similarly evocative of action.

Private entities have been held to be acting under color of State law for performing traditionally government functions/heavily regulated government functions as follows:

- *Marsh v. State of Ala.*, 326 U.S. 501 (1946) (company owned town);
- *Smith v. Allwright*, 321 U.S. 649 (1944) (primary election);
- *Watchtower Bible and Tract Society of New York, Inc. v. Sagardia De Jesus*, 634 F.3d 3, 10 (1st Cir. 2011), cert. denied, 132 S. Ct. 549, 181 L. Ed. 2d 396 (2011) (public streets within "urbanizations," which are neighborhood homeowners' associations authorized by city to control vehicular and pedestrian access, remain public property despite their enclosure, and regulating access to and controlling the behavior on public property is a traditional, classic government function; thus, urbanizations were state actors for purposes of § 1983 action challenging closure of access to public streets);
- *Romanski v. Detroit Entertainment, L.L.C.*, 428 F.3d 629, 636-40 (6th Cir. 2005) (although private security guards who exercise some police-like powers may not always be viewed as state actors, where guards are endowed by state law with plenary police powers, they qualify as state actors under the public function test; casino's private security police officers were licensed by the state and had the authority to make arrests and thus were afforded power traditionally reserved to the state alone such that guard's conduct on duty on the casino's premises would be considered state action);
- *Belbachir v. County of McHenry*, 726 F.3d 975, 978 (7th Cir. 2013) (although employees of private firm hired to provide medical services at jail were not public employees, they were performing a public function and thus were acting under color of state law);
- *Lee v. Katz*, 276 F.3d 550, 554-557 (9th Cir. 2002) (under *Brentwood*, it suffices that a nominally private party satisfy a single state action test and here private lessee of public outdoor area owned by city performed a traditional sovereign function when it sought to regulate free speech activity on city-owned land; although not everyone who leases or obtains a permit to use a state-owned public forum will necessarily become a state actor, here the city retained little, if any, power over the private entity and thus its policing of free speech in the public forum was a traditional and exclusive function of government);

- *Duke v. Massey*, 87 F.3d 1226, 1231 (11th Cir. 1996) (decision of presidential candidate selection committee for state Republican Party to exclude candidate from primary ballot pursuant to authority granted under state law constitutes state action for purposes of candidate's federal civil rights action despite argument that committee members made decision in their capacity as representatives of Republican Party); and

- *Duke v. Smith*, 13 F.3d 388, 393 (11th Cir. 1994), writ denied, 513 U.S. 867 (1994) (because bipartisan state-created committees are inextricably intertwined with the process of placing candidates' names on the ballot and it is the state-created procedures and not the political parties that make the final determination as to who will appear on the ballot, the power exercised is directly attributable to the state).

The Tex. Health & Safety Code § 166.046 clearly permits Texas hospitals, via its "ethics committees," to take action (such as to hear and determine whether a recommendation to withhold life-sustaining treatment against a patient's wishes is appropriate, and then exercise removal of life-sustaining care 10 days after providing written notice) normally only held in the hands of State officials such as peace officers and executioners who can take a person's life against that person's wishes with immunity.[47] Thus, as Methodist admitted to using Tex. Health & Safety Code § 166.046, the elements to a 42 U.S.C. § 1983 claim are met.

III. The case is not moot because it is capable of repetition yet evading review.

Despite Defendant's arguments, the death of Chris Dunn does not render this case moot. The Supreme Court of Texas has recognized two exceptions to the mootness doctrine: (1) the capability of repetition yet evading review exception, and (2) the collateral consequences exception.[48] "The 'capable of repetition yet evading review' exception is applied where the challenged act is of such short duration that the appellant cannot obtain review before the issue becomes moot."[49] The Supreme Court of Texas has noted that the "capable of repetition yet

[47] *See, e.g. Cornish v. Correctional Services Corp.*, 402 F.3d 545, 550-51 (5th Cir. 2005) (private corporation delegated authority to operate juvenile correctional facility fell within public function test as far as its provision of juvenile correctional services to the county).
[48] *State v. Lodge*, 608 S.W.2d 910, 912 (Tex. 1980).
[49] *Spring Branch I.S.D. v. Reynolds*, 764 S.W.2d 16, 18 (Tex. App.—Houston [1st Dist.] 1988, no writ).

evading review" exception has only been observed in cases that similarly challenge unconstitutional acts performed by the government or its designated surrogates.[50]

A. Application of Section 166.046 designed for repetition.

Specifically, Tex. Health & Safety Code § 166.046, on its face, applies to all persons for whom life-sustaining treatment is being utilized to sustain their life in all Texas hospitals. Certainly, application of the Statute is capable of repetition. Defendant's own citation, *Lee v. Valdez* states:

> [T]here may be rare instances where a court holds that a case involving a ***deceased*** prisoner is not moot, either because it is a class action or because it is capable of repetition yet evading review[.][51]

In the *Conservatorship of Wendland*, the California Supreme Court made clear that rather than dismissing a case upon the passing of the conservatee, it has the discretion to retain "otherwise moot cases presenting important issues that are capable of repetition yet tend to evade review."[52] The *Wendland* Court applied the exception, noting that the case raised "important issues about the fundamental rights of incompetent conservatees to privacy and life, and the corresponding limitations on conservators' power to withhold life-sustaining treatment."[53] Repeatedly, in Texas, patients on life-sustaining treatment are dealing with similarly important issues of their fundamental rights. Being provided 48 hours' of notice that a nameless, faceless panel of persons of unknown qualifications will decide whether to terminate life-sustaining treatment, the patient is afforded only a meeting, at which they will have no right to speak, no

[50] *Gen. Land Office v. OXY U.S.A., Inc.*, 789 S.W.2d 569, 571 (Tex. 1990); *eg State v. Lodge*, 608 S.W.2d 910 (Tex. 1980) (holding that the mootness doctrine does not apply to appeals from involuntary commitments for temporary hospitalization of less than 90 days in mental hospitals pursuant to Texas Mental Health Code).

[51] *Lee v. Valdez*, 2009 WL 1406244, *14 (N.D. Tex. May 20, 2009) (C.J. Fitzwater) (emphasis added) (citing *Kremens v. Bartley*, 431 U.S. 119, 133 (1977) (indicating that courts do not require or always anticipate that the repetition will occur to the same plaintiff in all circumstances – certainly, in the case of a deceased prisoner, the same prisoner will not receive the repeated action).

[52] (2002) 26 Cal.4th 519, ft. 1; *e.g. Thompson v. Department of Corrections* (2001) 25 Cal.4th 117, 122; *Conservatorship of Susan T.* (1994) 8 Cal.4th 1005, 1011, fn. 5.

[53] 26 Cal.4th at ft. 1.

right to counsel, no advance knowledge of the rules or standards, and with no right of review, is a deprivation of fundamental rights. Given that patients subject to Tex. Health & Safety Code § 166.046 are almost all gravely ill, this denial of due process is unarguably subject to repetition.

B. Application of Tex. Health & Safety Code § 166.046 is designed to evade review.

The Court in *Wendland*, which heard a case involving a conservator who had sought to remove life-sustaining treatment from the conservatee, further affirmed that "as this case demonstrates, these issues tend to evade review because they typically concern persons whose health is seriously impaired."[54] Similarly, where a guardian ad litem appealed to the Circuit Court in *Woods v. Kentucky* concerning the constitutionality of a statute governing the withdrawal of artificial life support after the passing of Mr. Woods to natural causes, the circuit court dismissed the case as moot, but the Court of Appeals reversed and remanded, "citing an exception to the mootness doctrine, applicable when the underlying dispute is 'capable of repetition, yet evading review.'"[55]

Tex. Health & Safety Code § 166.046 allows 48 hours' notice of the ethics committee meeting, and in 10 days' time, life-sustaining treatment may be removed, presumably resulting in death.[56] As the statutory answer period for a lawsuit is at least 20 days following date of service, it is practically impossible for a patient bound to life-sustaining treatment, let alone any person, to retain counsel and complete a lawsuit, with resulting appeals, in just twelve days.[57] The application of Tex. Health & Safety Code § 166.046 is undoubtedly capable of evading review.

[54] 26 Cal.4th at ft. 1.
[55] *142* S.W.3d 24, 31(Ky. 2004) (distinguished case from the one at hand due to the clear and convincing evidence standard required by the Kentucky statute).
[56] *See* Tex. Health & Safety Code § 166.046 (West 2017).
[57] *See* Tex. R. Civ. P. 99(b) ("The citation shall direct the defendant to file a written answer to the plaintiff's petition on or before 10:00 a.m. on the Monday next after the expiration of twenty days after the date of service thereof.").

Defendant is mistaken in believing this matter moot; Tex. Health & Safety Code § 166.046 fits squarely within a mootness exception, and case law as well as the importance of the issues firmly support the matter being heard as the act as put forth by the statute is capable of repetition while evading review.

CONCLUSION

There are no facts in dispute. Tex. Health & Safety Code § 166.046 reads as it is written. Methodist used and relied on that statute to assemble its ethics committee and render its decision. Only the intervention of this Court stayed implementation of Methodist's decision. But, the denial of due process had been accomplished. Accordingly, the Court should find that Tex. Health & Safety Code § 166.046 is unconstitutional, both facially and as applied to Mr. Dunn, because it denies patients due process rights and, specifically, denied Mr. Dunn of his due process rights. The Court should also find that Methodist violated Mr. Dunn's constitutional rights under color of state law and award nominal damages of one dollar ($1.00).

PRAYER

WHEREFORE, PREMISES CONSIDERED, Plaintiff Evelyn Kelly prays that the Court grant this motion for summary judgment and provide Plaintiff such other and further relief, at law or in equity, to which she may be justly entitled.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been forwarded to all counsel of record listed below in accordance Texas Rules of Civil Procedure 21a on August 21, 2017, via E-Filing and Serve system via email to:

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