

No. 20-0644

---

In the Supreme Court of Texas

---

**COOK CHILDREN'S MEDICAL CENTER**

*Petitioner,*

v.

**T.L., A MINOR, AND MOTHER T.L., ON HER BEHALF,**

*Respondents.*

---

On Petition for Review from the Second Court of Appeals

Case No. 02-20-00002-CV

---

**BRIEF OF AMICI CURIAE PROTECT TX FRAGILE KIDS, HEALTHCARE  
ADVOCACY AND LEADERSHIP ORGANIZATION, NOT DEAD YET, ADAPT, ADAPT  
OF TEXAS, AUTISTIC SELF ADVOCACY NETWORK, HIS EXCELLENCY, MOST  
REVEREND RENÉ HENRY GRACIDA, BISHOP EMERITUS OF THE CATHOLIC  
DIOCESE OF CORPUS CHRISTI, TEXAS, HIS EXCELLENCY, MOST REVEREND  
JOSEPH E. STRICKLAND, J.C.L., BISHOP OF THE CATHOLIC DIOCESE OF TYLER,  
TEXAS, DEACON KEITH A. FOURNIER, J.D., M.T.S., M. PHIL. GENERAL LEGAL  
COUNSEL AND DIRECTOR OF DEACON FORMATION, CATHOLIC DIOCESE OF  
TYLER, TEXAS, RIGHT TO LIFE OF EAST TEXAS, THE COMMON GOOD  
FOUNDATION, TERRI SCHIAVO LIFE & HOPE NETWORK, TRUE TEXAS PROJECT,  
AND GRASSROOTS AMERICA WE THE PEOPLE  
IN SUPPORT OF RESPONDENTS**

---

Michelle C. Hayes

State Bar No. 24036358

LAW OFFICE OF MICHELLE C. HAYES

2505 Bering Dr., Ste. 11

Houston, Texas 77057

Facsimile (281) 501-1846

MHayes@hayeslawoffice.org

COUNSEL FOR AMICI CURIAE

## TABLE OF CONTENTS

Table of Contents .....	ii
Index of Authorities .....	iii
Brief Statement of Interest of Amici Curiae .....	vii
Argument.....	1
I.    Review at the temporary injunction stage is premature .....	4
A. The temporary injunction hearing was not a mini trial.....	5
B. The lower court’s opinion does not threaten Texas healthcare.....	6
II.   The right to life and parental rights are fundamental rights entitled to due-process protections .....	8
A. A critically ill person’s right to life is a fundamental right.....	1
B. Section 166.046 is unconstitutional as applied and on its face.....	9
Conclusion .....	11
Certificate of Compliance .....	12
Certificate of Service .....	13

## INDEX OF AUTHORITIES

### **Cases:**

<i>Anderson Oaks (Phase I) Ltd. P’ship v. Anderson Mill Oaks, Ltd.</i> , 734 S.W.2d 42 (Tex. App.—Austin 1987, no writ) .....	5
<i>Arnett v. Kennedy</i> , 416 U.S. 134 (1974).....	11
<i>Barclay v. Campbell</i> , 704 S.W.2d 8 (Tex. 1986) .....	9
<i>Butnaru v. Ford Motor Co.</i> , 84 S.W.3d 198 (Tex. 2002) .....	4
<i>Camp v. Shannon</i> , 162 Tex. 515, 348 S.W.2d 517 (1961).....	5
<i>Cruzan by Cruzan v. Dir., Missouri Dep’t of Health</i> , 497 U.S. 261 (1990).....	8-11
<i>Frequent Flyer Depot, Inc. v. American Airlines, Inc.</i> , 281 S.W.3d 215 (Tex. App.—Fort Worth 2009, pet. denied).....	5
<i>In re C.J.C.</i> , 603 S.W.3d 804 (Tex. 2020) .....	9

<i>In re Newton</i> , 146 S.W.3d 648 (Tex. 2004) .....	4
<i>Intercontinental Terminals Co., LLC v. Vopak N. Am., Inc.</i> , 354 S.W.3d 887 (Tex. App.—Houston 2011, no pet.).....	4-5
<i>Lee v. Dewbre</i> , 362 S.W.2d 900 (Tex. Civ. App.—Amarillo 1962, no writ).....	6
<i>Rogers v. Bagley</i> , 581 S.W.3d 362 (Tex. App.—Corpus Christi 2019, pet. filed).....	7
<i>Parham v. J.R.</i> , 442 U.S. 584 (1979).....	9-10
<i>Patel v. Tex. Dept. of Licensing and Regulation</i> , 469 S.W.3d 69 (Tex. 2015) .....	8
<i>Santosky v. Kramer</i> , 455 U.S. 745 (1982).....	11
<i>Spring Branch I.S.D. v. Stamos</i> , 695 S.W.2d 556 (Tex. 1985) .....	8

*Sun Oil Co. v. Whitaker*,  
424 S.W.2d 216  
(Tex.1968) .....4

*Tarr v. Timberwood Park Owners Ass’n Inc.*,  
510 S.W.3d 725 (Tex. App.—San Antonio 2016),  
*rev’d on other grounds*, 556 S.W.3d 274 (Tex. 2018) .....5

*Troxel v. Granville*,  
530 U.S. 57  
(2000) (plurality op.) (J. Thomas, concurring)..... 9-10, 13

**Rules and Statutes:**

TEX. CIV. PRAC. & REM. CODE § 37.003 ..... 7

TEX. HEALTH & SAFETY CODE §166.045(c).....6

TEX. HEALTH & SAFETY CODE § 166.046 .....2-3, 7

TEX. HEALTH & SAFETY CODE § 166.046(a)(2)..... 11

TEX. R. APP. P. 9.4(i) ..... 14

TEX. R. APP. P. 11 .....iv

TEX. R. CIV. P. 683 ..... 4

**Other:**

42 U.S.C. § 1983 ..... 7

Governor Abbott and Attorney General Paxton Release Joint Statement Regarding  
Case (Jan. 2, 2020)

[https://gov.texas.gov/news/post/governor-abbott-attorney-general-paxton-  
release-joint-statement-regarding-case-of-tinslee-lewis](https://gov.texas.gov/news/post/governor-abbott-attorney-general-paxton-release-joint-statement-regarding-case-of-tinslee-lewis)  
(last accessed Oct. 1, 2020) .....3

National Council on Disability, *Medical Futility and Disability Bias* (Nov. 20, 2019).  
[https://ncd.gov/sites/default/files/NCD\\_Medical\\_Futility\\_Report\\_508.pdf](https://ncd.gov/sites/default/files/NCD_Medical_Futility_Report_508.pdf)  
(last accessed Oct. 7, 2020) ..... 1

Notice Amicus Curiae Brief Received (Jan. 17, 2020)  
<http://www.search.txcourts.gov/Case.aspx?cn=02-20-00002-CV&coa=coa02>  
(last accessed Oct. 1, 2020) ..... 3

Tex. Const. art. 1, § 19 ..... 7

U.S. Const. amends. V, XIV, § 1 ..... 7

## BRIEF STATEMENT OF INTEREST OF AMICI CURIAE

The amici are a diverse group united in their belief in the dignity of each person, and the fundamental right of each person to avoid unilateral withdrawal of life-sustaining medical care that the sick person wishes to continue. That a patient is not legally or ethically obliged to receive extraordinary care against his or her wishes, does not mean that there is a legal or ethical right to unilaterally withdraw life-sustaining medical treatment from that patient if he or she wishes to continue it.

The amici believe the Ten Day Rule is unconstitutional, and that it is unlawful to unilaterally remove baby T.L.'s life-sustaining medical treatment over Mother's objection. Although she is a somewhat fragile child, T.L. is cognizant, interacts with her family and some caretakers, and enjoys life. (2RR 22–24). T.L.'s life has inestimable value despite her medical challenges, and the joy and love T.L. shares with her family are worth protecting. More detailed, individual statements of interest for the amici are contained in Appendix A to this brief.

Protect TX Fragile Kids and Healthcare Advocacy and Leadership Organization will each pay half of the fee for preparation of this brief. This brief will be served upon all parties to this appeal. *See* TEX. R. APP. P. 11.

TO THE HONORABLE SUPREME COURT OF TEXAS:

**ARGUMENT**

Without the temporary injunction, T.L. could lose her life pending trial, and Mother could lose her precious daughter with whom she regularly interacts. (2RR 19–24). Although T.L.’s treating physician at Cook testified in December 2019 that it was unlikely she would live six more months, T.L. is still alive today and nearing her second birthday. (2RR 17, 143).

In a recent study, the National Council on Disability found that healthcare providers often misperceive disabled individuals to have a low quality of life, and this can result in discriminatory determinations that life-sustaining medical care is futile and should be withdrawn.<sup>1</sup> The Council concluded that protections are needed to ensure (1) the patient’s wishes are followed; (2) life-sustaining medical care is not removed pending transfer; and (3) that in the absence of patient competency and an advanced directive, a neutral, unbiased, and independent decision maker is in place with a right to judicial appeal.<sup>2</sup> The Ten Day Rule at issue in this case does not provide these protections.

---

<sup>1</sup> See National Council on Disability, *Medical Futility and Disability Bias* (Nov. 20, 2019), at \*10. [https://ncd.gov/sites/default/files/NCD\\_Medical\\_Futility\\_Report\\_508.pdf](https://ncd.gov/sites/default/files/NCD_Medical_Futility_Report_508.pdf) (last accessed Oct. 7, 2020).

<sup>2</sup> See *id.* at \*42.



Petitioner urges this Court to grant review because it believes the lower court’s opinion is a bad precedent. *Petition*, at 2; *Petition Reply*, at 2–7, *Amici Brief for Petitioner*, at 11–12. But this Court’s review on the merits prior to trial is unnecessary and would further deprive T.L. and Mother of due process and their day in court.

Under well-settled law, the lower court’s order is only a temporary injunction to preserve the status quo *between the parties* pending trial. Neither the order nor the opinion is determinative of the outcome of the trial of this case. In future lawsuits, the lower court’s opinion is persuasive authority, at best.

Denying review (1) does not undermine the conscience rights of healthcare professionals or the Texas Medical Liability Act (“TMLA”) and (2) does not create a constitutional right to healthcare. Instead, denying review allows Mother and T.L. to develop the record at trial by presenting evidence in support of all of their claims when they shoulder the burden of proof in this lawsuit to demonstrate the unconstitutionality of Texas Health and Safety Code section 166.046. *See* TEX. HEALTH & SAFETY CODE § 166.046.

If review is granted, this Court should hold that section 166.046 is unconstitutional as applied and on its face.<sup>3</sup> *See id.* This would give clear guidance

---

<sup>3</sup> In the Court of Appeals, Texas Governor Greg Abbott and Texas Attorney General Ken Paxton filed an amici brief urging the court to hold Texas Health and Safety Code section 166.046

to the legislature, the parties, healthcare providers and their patients. For Cook to unilaterally withdraw T.L.'s life-sustaining treatment, is to deny T.L. and Mother's fundamental rights by an exercise of the State's exclusive police and *parens patriae* powers. To exercise these powers without adequate procedural protections, violates procedural and substantive due process under the United States and Texas Constitutions, and violates the Civil Rights Act.

Under the United States and Texas Constitutions, the right to life of a critically ill person and parental rights are fundamental. Every time section 166.046 is applied, pursuant to the statutory language, a deprivation of due process necessarily occurs. There is no standard of proof, no meaningful right for the patient to be heard,

---

unconstitutional on its face and as applied. *See* TEX. HEALTH & SAFETY CODE § 166.046. In their brief, they explained the Texas statute is a national outlier and no other state has a statute like it. *State's Amici Brief*, at \*1. Prior to filing their brief, they issued the following joint statement:

The case of [child] is complex and heartbreaking, and the state will continue to support [Mother's] exhaustion of all legal options to ensure that [child] is given every chance at life. The Attorney General's office is involved in the ongoing litigation, fighting to see that due process and the right to life are fully respected by Texas law. The Attorney General's office will be supporting an appeal of this case to the Second Court of Appeals. The State of Texas is fully prepared to continue its support of [Mother] in the Supreme Court if necessary. We are working diligently to do all we can to ensure that [child] and her family are provided the care and support that they seek.

*See* Governor Abbott and Attorney General Paxton Release Joint Statement Regarding Case (Jan. 2, 2020) <https://gov.texas.gov/news/post/governor-abbott-attorney-general-paxton-release-joint-statement-regarding-case-of-tinslee-lewis> (last accessed Oct. 1, 2020); *see also* Notice Amicus Curiae Brief Received (Jan. 17, 2020) <http://www.search.txcourts.gov/Case.aspx?cn=02-20-00002-CV&coa=coa02> (last accessed Oct. 1, 2020).

no right to call witnesses, no record, and no neutral arbiter to decide the patient's fate.

The fundamental right to life of a critically ill patient, who may not even be terminally ill, cannot be a privilege conferred upon the patient by a physician and a hospital's ethics committee. Likewise, a parent's fundamental right to make life-sustaining medical decisions cannot be relegated to a privilege conferred upon the parent by a physician and a hospital's ethics committee.

**I. Review at the temporary-injunction stage is premature.**

Under Texas Rule of Civil Procedure 683, a temporary-injunction order is “binding only upon the parties to the action . . . .” TEX. R. CIV. P. 683. It merely preserves the last, peaceable, uncontested status between the parties that existed prior to the controversy. *In re Newton*, 146 S.W.3d 648, 651 (Tex. 2004). To show a “probable right to recover” to obtain a temporary injunction, an applicant need not show that it will prevail at trial. *See Butnaru v. Ford Motor Co.*, 84 S.W.3d 198, 211 (Tex. 2002) (citing *Sun Oil Co. v. Whitaker*, 424 S.W.2d 216, 218 (Tex.1968)).

The “probable right of recovery” element in a temporary-injunction order is a term of art, and a finding of a probable right of recovery is not a holding that the applicant will prevail on the merits at trial. *Intercontinental Terminals Co., LLC v. Vopak N. Am., Inc.*, 354 S.W.3d 887, 897 (Tex. App.—Houston 2011, no pet.). Instead, to show a probable right of recovery, the applicant must plead a cause of

action and present *some evidence* that tends to sustain it. *Id.* (citing *Camp v. Shannon*, 162 Tex. 515, 348 S.W.2d 517, 519 (1961)); *see also Frequent Flyer Depot, Inc. v. American Airlines, Inc.*, 281 S.W.3d 215, 220 (Tex. App.—Fort Worth 2009, pet. denied). The evidence need only be sufficient to raise a bona fide issue as to the applicant’s right to ultimate relief. *Intercontinental Terminals Co., LLC*, 354 S.W.3d at 897.

**A. The temporary injunction hearing was not a mini trial.**

In other words, the temporary-injunction hearing is not a mini trial on the merits, in advance, at which the judge predicts the applicant’s likelihood of success based upon the judge’s estimate of where the truth probably lies concerning the adjudicative facts and the law applicable to the case under the applicant’s pleadings. *Id.* (citing *Anderson Oaks (Phase I) Ltd. P’ship v. Anderson Mill Oaks, Ltd.*, 734 S.W.2d 42, 44 n. 1 (Tex. App.—Austin 1987, no writ)). Consequently, it is well-settled that a finding of a probable right to relief has no precedential effect in the subsequent trial of the case. *Id.* Further, an intermediate appellate court’s opinion allowing a temporary injunction is not mandatory authority. *See Tarr v. Timberwood Park Owners Ass’n Inc.*, 510 S.W.3d 725, 730 (Tex. App.—San Antonio 2016), *rev’d on other grounds*, 556 S.W.3d 274 (Tex. 2018). It has persuasive value at best even in the appellate court that issued the opinion. *Id.*

Both the director of Cook’s ethics committee and T.L.’s treating physician testified that in their experience, it is rare for a patient’s family and treating physician to disagree over whether to withdraw life-sustaining medical treatment. (2RR 31, 86). The rarity of an “intractable difference” of opinion on a plan of care for Cook patients further vitiates the argument that the lower court’s temporary injunction is a threat to healthcare professionals in their daily work. (2RR 86).

**B. The lower court’s opinion does not threaten Texas healthcare.**

Granted the inherently limited nature of the lower court’s opinion, it is not a threat to healthcare professionals’ conscience rights or the TMLA. Nor does the opinion create a constitutional right to healthcare.

First, for a physician to continue providing medical care to a patient for a time after deciding to terminate the physician-patient relationship, is not an affront to conscience. Under Texas law, once a physician assumes care of a patient, the physician has a duty to provide care during a period of transition to another physician. *See e.g.*, TEX. HEALTH & SAFETY CODE §166.045(c); *Lee v. Dewbre*, 362 S.W.2d 900, 902 (Tex. Civ. App.—Amarillo 1962, no writ). A reasonable amount of time to transition care for an established patient could vary widely depending on the complexity of the patient’s medical condition and other factors. This does not create a universal, constitutional right to healthcare. Instead, the issue here is

the process due to T.L. and Mother in the attempted unilateral withdrawal of healthcare that has already commenced.

Second, this is not a medical malpractice lawsuit. (1CR 135–41). It is a declaratory-judgment suit to determine whether section 166.046 violates procedural and substantive due process, a suit for injunctive relief, and a civil-rights claim. (1CR 135–41); *see* U.S. Const. amends. V, XIV, § 1; Tex. Const. art. 1, § 19; 42 U.S.C. § 1983; TEX. CIV. PRAC. & REM. CODE § 37.003. The lower court’s holding that it is probable that a physician is a state actor when he rejects a parent’s medical directive to continue life-sustaining treatment for a minor child under section 166.046, (because the State has long exercised an exclusive right to (1) override a parent’s medical decision making when the best interests of the child require; and (2) determine the lawfulness of a death) has simply allowed the parties to pause any withdrawal of life-sustaining care pending a trial on the merits of whether section 166.046 is constitutional. *See Opinion*, at \*44–47 (analyzing TEX. HEALTH & SAFETY CODE § 166.046).

The lower court’s opinion does not mention the TMLA. This case is not like *Rogers* in which the Thirteenth Court of Appeals held a section 1983 lawsuit preempts the TMLA and its expert-report requirement. *See Rogers v. Bagley*, 581 S.W.3d 362, 369 (Tex. App.—Corpus Christi 2019, pet. filed) (applying 42 U.S.C. § 1983; TEX. CIV. PRAC. & REM. CODE § 74.351). Here, the parties’ briefing and the

clerk's record do not reflect that any party has invoked the TMLA's expert-report requirement. Accordingly, the TMLA is simply not implicated under the current record and review is not needed to preserve the TMLA.

**II. The right to life and parental rights are fundamental rights entitled to due-process protections.**

Because of the presumption that the legislature enacts constitutional statutes, T.L. and Mother bear the burden of proof in the trial court to demonstrate that section 166.046 is unconstitutional. *See Patel v. Tex. Dept. of Licensing and Regulation*, 469 S.W.3d 69, 87 (Tex. 2015); *Spring Branch I.S.D. v. Stamos*, 695 S.W.2d 556, 558 (Tex. 1985). Accordingly, this Court should deny review to give them the opportunity to develop the record more fully at trial in support of their constitutional challenge.

In the alternative that this Court grants review, it should hold section 166.046 is unconstitutional on its face and as applied because it violates procedural and substantive due process. The lower court has made a correct and compelling analysis that Cook is a state actor in its use of section 166.046 to withdraw life-sustaining medical care over Mother's objection. *See Opinion*, at \*17–27, 36–40. This Court should follow the lower court's well-reasoned state-actor analysis.

“An erroneous decision to withdraw life-sustaining treatment . . . is not susceptible of correction.” *Cruzan by Cruzan v. Dir., Missouri Dep't of Health*, 497 U.S. 261, 284 (1990). This Court should apply strict scrutiny to any review of

section 166.046 because of the fundamental rights at stake in this case. *See also Troxel v. Granville*, 530 U.S. 57, 80 (2000) (plurality op.) (J. Thomas, concurring) (stating strict scrutiny should apply to infringements of fundamental rights).

**A. A critically ill person’s right to life is a fundamental right.**

The right to life of a critically ill person is a fundamental right entitled to due-process protection to ensure the person is not deprived of life-sustaining care against his or her wishes. *See Cruzan*, 497 U.S. at 286. Similarly, the right to make medical decisions for oneself and the right to make medical decisions for one’s own child are fundamental rights entitled to due-process protection. *See Cruzan*, 497 U.S. at 284; *Parham v. J.R.*, 442 U.S. 584, 602 (1979) (discussing a parent’s right to make medical decisions for a child); *Barclay v. Campbell*, 704 S.W.2d 8, 11 (Tex. 1986) (discussing federal constitutional right to make medical decisions for one’s self); *see also Troxel*, 530 U.S. at 66 (2000) (discussing constitutional protection of parent-child relationship and the fundamental parental right to make decisions concerning the care, custody, and control of a child); *In re C.J.C.*, 603 S.W.3d 804, 807 (Tex. 2020) (same).

**B. Section 166.046 is unconstitutional as applied and on its face.**

Section 166.046 is unconstitutional on its face because any time section 166.046 is used to trump a patient’s decision to continue life-sustaining treatment, it violates that patient’s fundamental right to life because the statute does not provide



due-process protections. *See Cruzan*, 497 U.S. at 283, 286 (discussing constitutional interest in protecting a patient’s right to continue life-sustaining treatment with adequate due process). In this case, and in any case involving a minor, the parent’s fundamental right to make the medical decision to withdraw or continue life-sustaining care is also removed without due-process protections when section 166.046 is used. *See Troxel*, 530 U.S. at 68 (citing *Parham* and explaining there is a constitutional presumption that a parent’s decision is in the best interest of the child).

The amount of due process required is linked to the nature of the right at stake. *Parham*, 442 U.S. at 609. When the decision to remove a person’s life-sustaining medical treatment is made, appropriate due process protections would include:

- adequate notice of the hearing;
- a high burden of proof, such as clear and convincing evidence, placed on the party advocating withdrawal of life-sustaining treatment;
- the right to legal counsel;
- the right to call and cross-examine witnesses;
- a neutral decision maker;
- a record of the proceedings;
- and a right to appeal.

*See Cruzan*, 497 U.S. at 283–84 (discussing some of the due process protections that should apply to a decision to withdraw a patient’s life-sustaining medical treatment); *Arnett v. Kennedy*, 416 U.S. 134, 198 (1974) (explaining due process requires an impartial decision maker; substantial pecuniary interest makes decision maker partial).

The clear-and-convincing evidence standard is necessary when parental rights are terminated and appropriate when life-sustaining treatment is removed. *See Cruzan*, 497 U.S. at 283 (citing *Santosky v. Kramer*, 455 U.S. 745, 755 (1982)). This high standard of proof is commensurate with the rights at stake and serves as a societal judgment about how risks should be allocated between the litigants. *Id.*

Section 166.046 allows a patient forty-eight hours’ notice of the ethics-committee meeting. *See* TEX. HEALTH & SAFETY CODE § 166.046(a)(2). Cook’s ethics committee has twenty-five members, but can convene and make a binding decision under section 166.046 with *any* number of its members absent. (2RR 26). In this case, twenty-two of the ethics-committee members participated in the review of T.L.’s case, nineteen of whom were Cook employees. (2 RR 40).

Cook’s ethics committee considered the statements of T.L.’s treating physician that withdrawing life sustaining medical treatment would be in T.L.’s “best interests.” (2RR 81, 88). Mother addressed the ethics committee and asked that T.L.’s medical care be continued until T.L. could go home. (2 RR 72).

The treating physician did not have a certain medical standard (e.g., best practice) or burden of proof that he had to meet, and there is no suggestion in the record that a presumption was applied that Mother's decision to continue care was in T.L.'s best interest. (2RR 46–7). Mother did not have counsel or a right to counsel. (2RR 77–78). Mother was not given an opportunity to present witnesses or evidence. (2RR 78).

The twenty-two members of the ethics committee agreed unanimously with the physician's decision to withdraw life-sustaining treatment after discussing the matter in a closed meeting for about thirty to forty-five minutes. (2RR 45–6). There is no record or transcript of the ethics-committee meeting or the members' conversation. (*Id.*). Excluding weekends, after Cook's ethics committee decided to allow the withdrawal of T.L.'s life-sustaining care, Mother had six business days to have T.L. transferred to another facility. (2 RR 53–4, 81).

Under these facts, section 166.046 clearly resulted in a deprivation of T.L. and Mother's fundamental rights without any degree of due process. The presumption that Mother's decision to continue life-sustaining care is in T.L.'s best interest should have protected their rights, along with the other above-listed due process protections that should have been present. *See Troxel*, 530 U.S. at 69 (explaining that the presumption that a parent's decision is in the best interest of the child should

protect parental rights, and parent should not be required to *disprove* challenged action is in child's best interest). This case presents a grave miscarriage of justice.

### CONCLUSION

For the foregoing reasons, this Court should deny review of the Court of Appeals' order granting Mother and T.L. a temporary injunction and the lower court's supporting opinion. Under the record and the applicable law, the status quo between the parties should be preserved pending trial on the merits.

In the alternative that this Court grants review on the merits, it should hold that Health and Safety Code section 166.046 is unconstitutional on its face and as applied.

Respectfully submitted,

/s/ Michelle C. Hayes

Michelle C. Hayes

State Bar No. 24036358

LAW OFFICE OF MICHELLE C. HAYES

2505 Bering Dr., Ste. 11

Houston, Texas 77057

Facsimile (281) 501-1846

MHayes@hayeslawoffice.org

COUNSEL FOR AMICI CURIAE

## CERTIFICATE OF COMPLIANCE

In compliance with Texas Rule of Appellate Procedure 9.4(i), I certify that the number of words in this brief is 2,730. This text of this brief is in Times New Roman font in 14-point size, with footnote text in 12-point size. Appendix A to this brief contains 1,403 words in the same font.

/s/ Michelle C. Hayes  
Michelle C. Hayes

## CERTIFICATE OF SERVICE

I certify that on October 8, 2020, a true and correct copy of the foregoing document was served on the following counsel via e-filing:

Wallace B. Jefferson  
[wjefferson@adjtlaw.com](mailto:wjefferson@adjtlaw.com)

Amy Warr  
[awarr@adjtlaw.com](mailto:awarr@adjtlaw.com)

Nicholas Bacarisse  
[nbacarisse@adjtlaw.com](mailto:nbacarisse@adjtlaw.com)

ALEXANDER DUBOSE & JEFFERSON LLP  
515 Congress Avenue, Suite 2350  
Austin, Texas 78701-3562  
Telephone: (512) 482-9300

Steven H. Stodghill  
[sstodghill@winston.com](mailto:sstodghill@winston.com)

Thomas M. Melsheimer  
[tmelsheimer@winston.com](mailto:tmelsheimer@winston.com)

Geoffrey S. Harper  
[gharper@winston.com](mailto:gharper@winston.com)

John Michael Gaddis  
[mgaddis@winston.com](mailto:mgaddis@winston.com)

WINSTON & STRAWN, LLP  
2121 North Pearl Street, Suite 900  
Dallas, Texas 75201  
Telephone: (214) 453-6500

**COUNSEL FOR PETITIONER**

John F. Luman III  
[luman@dtlawyers.com](mailto:luman@dtlawyers.com)

Jillian L. Schumacher  
[jillian@dtlawyers.com](mailto:jillian@dtlawyers.com)

DANIELS & TREDENNICK, LLP  
6363 Woodway, Suite 700  
Houston, Texas 77057  
Telephone: (713) 917-0024

Emily Cook  
[emily@emilycook.org](mailto:emily@emilycook.org)  
THE LAW OFFICE OF EMILY KEBODEAUX COOK  
4500 Bissonnet  
Bellaire, Texas 77401  
Telephone: (281) 622-7268

Kassi Dee Patrick Marks  
[kassi.marks@gmail.com](mailto:kassi.marks@gmail.com)  
THE LAW OFFICE OF KASSI DEE PATRICK MARKS  
2101 Carnation Court  
Garland, Texas 75040  
Telephone: (214) 668-2443  
**COUNSEL FOR RESPONDENTS**

Don Cruse  
[don.cruse@texasappellate.com](mailto:don.cruse@texasappellate.com)  
LAW OFFICE OF DON CRUSE  
1108 Lavaca Street, Suite 110-436  
Austin, Texas 78701  
(512) 853-9100  
**COUNSEL FOR AMICI CURIAE IN SUPPORT OF PETITIONER**

/s/ Michelle C. Hayes  
Michelle C. Hayes  
COUNSEL FOR AMICI CURIAE IN  
SUPPORT OF RESPONDENTS

## **Tab A**

### **Individual Statements of Interest of Amici Curiae**



## APPENDIX A: INDIVIDUAL STATEMENTS OF INTEREST

**Protect TX Fragile Kids (PTFK)** is a grass roots, nonprofit organization founded and run by parents of medically fragile Texas children. PTFK's mission is: (a) to give a voice to Texas' most fragile citizens; (b) to inform, educate, and support families of children with disabilities; (c) to fight for what is right for children with special medical needs and disabilities; and (d) to champion public policy which supports and protects the well-being of children with disabilities and complex medical needs.

PTFK works to advocate and inform families and officials about what it is like to provide hospital-level care in the home for children who live with rare and complex medical needs and disabilities like baby T.L. PTFK has walked with Baby T.L. and her mother since the Ten Day Rule was invoked to end Baby T.L.'s life. PTFK categorically opposes Texas' Ten Day Rule as unconstitutional, discriminatory, bad public policy.

The **Healthcare Advocacy and Leadership Organization (HALO)**, is a Judeo-Christian, nonprofit group, that was founded by a group of individuals alarmed by the increasing incidences of neglect, abuse, and even intentionally caused deaths of vulnerable patients. Members of HALO recognize that every life comes from God, our Creator, and that we have a sacred duty to protect, care for, and support the well-being of our fellow humans as well as ourselves. HALO

members have numerous years of experience advocating for the right to life of every human being, regardless of age, disability, illness, or injury. HALO believes it is critical to ensure that medical professionals serve for the benefit of vulnerable patients and do no harm to their patients. HALO believes that Texas Health and Safety Code section 166.046 unconstitutionally allows physicians to deny patients the life-sustaining treatment they want to continue.

**Not Dead Yet** is a national grassroots disability rights organization that opposes legalization of assisted suicide and euthanasia as deadly forms of discrimination, and the non-voluntary withdrawal or withholding of life-sustaining medical treatment, including but not limited to, futility policies involving health care provider decisions to withhold or withdraw life-sustaining medical treatment.

Not Dead Yet provides information and referral services, including legal referrals, to individuals who face discrimination in the provision of life-sustaining medical care as well as to people who are being denied lifesaving medical treatment. Not Dead Yet's constituents are qualified individuals with disabilities within the meaning of Title II of the ADA, Section 504, and Section 1557 of the ACA. Not Dead Yet's constituents include chronic ventilator users.

Staff and board members of Not Dead Yet regularly give presentations to disability rights groups, people with disabilities, and their families, on a variety of topics related to disability discrimination and the provision of healthcare services,

including assisted suicide, the withholding of medical treatment, the effects of these policies on people with disabilities, and health care disparities based on race. Not Dead Yet has filed amicus briefs in numerous court cases on these issues, including a brief in the Texas Supreme Court case of *Miller v. HCA*.

**ADAPT** is a national grass-roots community that organizes disability rights activists to engage in advocacy of all types to assure the civil and human rights of people with disabilities to live in freedom. ADAPT members have severe disabilities, many of whom have been institutionalized solely because of their disabilities. ADAPT's work is committed to ending the institutional bias that segregates and dehumanizes aging and disabled people.

ADAPT has a long history and record of enforcing the civil rights of people with disabilities and was one of the key organizations that participated in the political and legislative process that resulted in the passage in 1990 of the Americans with Disabilities Act, 42 U.S.C. section 12101 et seq., ("ADA"). ADAPT has participated as amicus signatories in myriad cases challenging the discriminatory and deadly practices associated with withholding care and treatment for disabled and chronically ill people.

**ADAPT of Texas** a statewide, nonprofit, disability-rights organization representing people with disabilities and Community Attendants and allies. ADAPT of Texas advocates for enforcement of disability laws and rights. ADAPT

champions access to public accommodations as well as accessible, affordable, integrated housing, and opposes rationing of healthcare services. We champion community services so people are not forced into nursing facilities and other institutions, as well as recruitment and retention of Community Attendants, and support other issues that promote the integration of people with disabilities into their communities. Last but not least, ADAPT of Texas works to empower people with disabilities by providing trainings on organizing and various disability issues.

The **Autistic Self Advocacy Network (ASAN)** is a national, private, nonprofit organization, run by and for autistic individuals. ASAN provides public education and promotes public policies that benefit autistic individuals and others with developmental or other disabilities. ASAN's advocacy activities include combating stigma, discrimination, and violence against autistic people and others with disabilities; promoting access to health care and long-term supports in integrated community settings; and educating the public about the access needs of autistic people. ASAN takes a strong interest in cases that affect the rights of autistic individuals and others with disabilities to participate fully in community life and enjoy the same rights as others without disabilities.

**His Excellency, Most Reverend René Henry Gracida, Bishop Emeritus of the Catholic Diocese of Corpus Christi, Texas** is a World War II veteran and an advocate for the dignity of human life from conception to natural death. He opposes

use of the Ten Day Rule to unilaterally withdraw life-sustaining medical care from a patient who wishes to continue care.

**His Excellency, Most Reverend Joseph E. Strickland, J.C.L., Bishop of the Catholic Diocese of Tyler, Texas** is a native Texan and an ardent defender of the dignity of human life from conception to natural death. He opposes use of the Ten Day Rule to unilaterally withdraw life-sustaining medical care from a sick person who wishes to continue care.

**Deacon Keith A. Fournier, J.D., M.T.S., M. Phil. General Legal Counsel and Director of Deacon Formation, Catholic Diocese of Tyler, Texas** is an advocate for human rights, and the recognition of the dignity of human life from conception to natural death. He opposes use of the Ten Day Rule to unilaterally withdraw life-sustaining medical care from a sick person who wishes to continue care.

**The Common Good Foundation** is a nonprofit educational and ministry organization dedicated to the advancement of authentic social justice and culture through four pillars of participation: the dignity of human life, the primacy of marriage and family, religious freedom, and social solidarity through subsidiarity.

The **Terri Schiavo Life & Hope Network** serves as a voice for persons with disabilities and was established in response to the death of Terri Schiavo, a cognitively disabled woman who was intentionally dehydrated to death by court

order against her family's wishes. The Network has advocated for thousands of patients who are facing the prospect of the denial or the withdrawal of care.

The Network believes Texas needs to adopt comprehensive reform of the Texas Advance Directives Act ("TADA") to protect patient's rights, restore patient's autonomy and create an even playing field so that these critical medical decisions are not left in the hands of strangers. The Network believes that no other state's law so flagrantly violates the patient's right to life and constitutional right to due process.

**True Texas Project (TTP)** is a statewide nonprofit organization whose mission is to educate and motivate citizens to engage in government at all levels. One of TTP's strongly held beliefs is the value and sanctity of life from conception to natural death, along with the importance of the freedom to make medical decisions for one's self or dependent family members. For these reasons, TTP opposes the Ten Day Rule in TADA, section 166.046. TTP believes that end-of-life decisions should ultimately be made by the patient and/or the family in conjunction with sound medical consultation.

**Grassroots America We the People ("Grassroots America")** is dedicated to limited government and proper separation of powers as outlined in our United States Constitution. Grassroots America is confident that the usurpation of parental rights contained in section 166.046 is a gross violation of limited government and separation of powers, and an unconstitutional intrusion into parental rights and the

sanctity of the family. Grassroots America would like to aid the Texas Supreme Court in recognizing the grave constitutional deprivations that take place when any hospital utilizes this inhumane procedure.

### Automated Certificate of eService

This automated certificate of service was created by the eFiling system. The filer served this document via email generated by the eFiling system on the date and to the persons listed below:

Michelle Hayes on behalf of Michelle Hayes  
Bar No. 24036358  
MHayes@hayeslawoffice.org  
Envelope ID: 47014373  
Status as of 10/8/2020 1:51 PM CST

Associated Case Party: Cook Children's Medical Center

Name	BarNumber	Email	TimestampSubmitted	Status
Amy Warr		awarr@adjtlaw.com	10/8/2020 1:47:00 PM	SENT
Nicholas Bacarisse		nbacarisse@adjtlaw.com	10/8/2020 1:47:00 PM	SENT
Geoffrey Harper	795408	gharper@winston.com	10/8/2020 1:47:00 PM	SENT
Steven Hall Stodghill	19261100	sstodghill@winston.com	10/8/2020 1:47:00 PM	SENT
Thomas M. Melsheimer	13922550	tmelsheimer@winston.com	10/8/2020 1:47:00 PM	SENT
John Gaddis	24069747	mgaddis@winston.com	10/8/2020 1:47:00 PM	SENT
Wallace B. Jefferson		wjefferson@adjtlaw.com	10/8/2020 1:47:00 PM	SENT

#### Case Contacts

Name	BarNumber	Email	TimestampSubmitted	Status
Don Cruse		don.cruse@texasappellate.com	10/8/2020 1:47:00 PM	SENT
Cathi Trullender		ctrullender@adjtlaw.com	10/8/2020 1:47:00 PM	SENT
Sara Bean		sara@dtlawyers.com	10/8/2020 1:47:00 PM	SENT

Associated Case Party: T. L., Mother on Behalf of T.L., a Minor

Name	BarNumber	Email	TimestampSubmitted	Status
Kassi Dee Patrick Marks	24034550	kassi.marks@gmail.com	10/8/2020 1:47:00 PM	SENT
Jillian Schumacher	24090375	jill@dtlawyers.com	10/8/2020 1:47:00 PM	SENT
John Francis Luman	794199	luman@dtlawyers.com	10/8/2020 1:47:00 PM	SENT
Emily Cook		emily@emilycook.org	10/8/2020 1:47:00 PM	SENT

Associated Case Party: Protect TX Fragile Kids

Name
------



**Automated Certificate of eService**

This automated certificate of service was created by the eFiling system. The filer served this document via email generated by the eFiling system on the date and to the persons listed below:

Michelle Hayes on behalf of Michelle Hayes  
Bar No. 24036358  
MHayes@hayeslawoffice.org  
Envelope ID: 47014373  
Status as of 10/8/2020 1:51 PM CST

Associated Case Party: Protect TX Fragile Kids

Michelle Hayes		MHayes@hayeslawoffice.org	10/8/2020 1:47:00 PM	SENT
----------------	--	---------------------------	----------------------	------