No. 2015-69681

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

AMICUS BRIEF OF THE STATE OF TEXAS

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TABLE OF CONTENTS

Table of Authorities iii
Introduction 1
Interest of Amicus Curiae 1
Statement of Facts 2
Argument 3
I. The Denial of Life-Saving Medical Treatment is the Denial of a Constitutionally Protected Interest. 3
II. Section 166.046 Does Not Provide Adequate Notice. 4
III. Section 166.046 Does Not Provide a Meaningful Opportunity to Be Heard. 5
IV. Section 166.046 Does Not Offer an Impartial Arbiter. 6
Conclusion 7
Certificate of Service 8

TABLE OF AUTHORITIES

Cases

Cruzan by Cruzan v. Dir., Mo. Dep't of Health,
497 U.S. 261 (1990) 4

LaChance v. Erickson,
522 U.S. 262 (1998) 5

Marshall v. Jerrico, Inc.,
446 U.S. 238 (1980) 6

Phillips Petroleum Co. v. Shutts,
472 U.S. 797 (1985) 4

Tenn. v. Lane,
541 U.S. 509 (2004) 5

Wilkinson v. Austin,
545 U.S. 209 (2005) 3

Statutes

TEX. HEALTH & SAFETY CODE:

§ 166.002(6) 6

§ 166.002(10) 2

§ 161.0315(a) 6

§ 166.045(d) 2

§ 166.046 .... 1, 2, 3

§ 166.046(a) 2, 6

§ 166.046(b)(2) 3, 4

§ 166.046(b)(4) 3

§ 166.046(b)(4)(A) 5

§ 166.046(e) 2, 5, 6

§ 166.046(g) 2, 6

Other Authorities

Magna Carta c. 39 (British Library trans.) 1

Nora O'Callaghan, *Dying for Due Process: The Unconstitutional Medical Futility Provision of the Texas Advance Directives Act*, 60 BAYLOR L. REV. 528, 590–96 (2008) 5

Constitutional Provisions

U.S. CONST. amend. V 1

U.S. CONST. amend. XIV, § 1 3

Introduction

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

This revolutionary concept—that we are all entitled to appropriate legal process before the taking of our life, liberty, or property—found even firmer footing with the founding of this nation and the enactment of the Fifth Amendment to the U.S. Constitution, which provides that "No person shall be . . . deprived of life, liberty, or property, without due process of law." U.S. CONST. amend. V.

This case compels this Court to become part of this tradition and enforce the protections of due process once more. Section 166.046 of the Texas Health and Safety Code allows the government to deny an individual his or her life, and does so without sufficient process of law. That violates due process and cannot stand.

Interest of Amicus Curiae

The State of Texas, acting through its Attorney General, has a solemn responsibility to defend the constitutional rights of Texas citizens, even from state statutes. Moreover, the State of Texas operates numerous public hospitals and health care facilities, and accordingly has a vested interest in determining the constitutionality of Section 166.046 of the Texas Health and Safety Code.

Statement of Facts

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

"If the patient or the person responsible for the health care decisions of the patient is requesting life-sustaining treatment that the attending physician has decided and the ethics or medical committee has affirmed is medically inappropriate," the statute relieves the attending physician and health care facility of an obligation to provide life-sustaining treatment ten days after the written decision and relevant medical records are provided, unless a court orders otherwise. *Id.* § 166.046(e), (g).[1] During that ten-day window, "the physician shall make a reasonable effort to transfer the patient to a physician who is willing to comply with the directive." *Id.* § 166.046(d).

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[1] For purposes of Chapter 166, "life-sustaining treatment" is defined as:

> [T]reatment that, based on reasonable medical judgment, sustains the life of a patient and without which the patient will die. The term includes both life-sustaining medications and artificial life support, such as mechanical breathing machines, kidney dialysis treatment, and artificially administered nutrition and hydration. The term does not include the administration of pain management medication or the performance of a medical procedure considered to be necessary to provide comfort care, or any other medical care provided to alleviate a patient's pain.

TEX. HEALTH & SAFETY CODE § 166.002(10).

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

ARGUMENT

The Due Process Clause of the U.S. Constitution provides that "[n]o State shall . . . deprive any person of life, liberty, or property, without due process of law." U.S. CONST. amend. XIV, § 1. A statute is unconstitutional under the Due Process Clause if the government is depriving an individual of a constitutionally protected interest and is using insufficient procedures to effectuate that deprivation.

Section 166.046 badly fails the due process test. The statute leads to the denial of a constitutionally protected interest—the right to life and the right to determine one's medical treatment. And it does so through woefully insufficient procedures—Section 166.046 not only denies patients sufficient notice and opportunity to be heard, it does not even afford patients with a neutral arbiter to decide their fate.

I. The Denial of Life-Saving Medical Treatment Is the Denial of a Constitutionally Protected Interest.

The "Due Process Clause protects persons against deprivations of life, liberty, or property; and those who seek to invoke its procedural protection must establish that one of these interests is at stake." *Wilkinson v. Austin*, 545 U.S. 209, 221 (2005). This case clearly satisfies that requirement. When a patient has requested life-sustaining treatment, only to have it denied by a physician

or health care facility, the physician and health care facility are denying the patient life for the period of time that he or she would have lived had the life-sustaining treatment been provided. Additionally, individuals have a significant liberty interest with regard to decisions about their medical treatment. *See, e.g.*, *Cruzan by Cruzan v. Dir., Mo. Dep't of Health*, 497 U.S. 261, 278 (1990).

Thus, a physician or health care facility using the Section 166.046 process to refuse life-sustaining treatment is denying the patient his or her constitutionally protected rights—mainly, the right to life.

II. Section 166.046 Does Not Provide Adequate Notice.

Due process requires that "[t]he notice must be the best practicable, reasonably calculated under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 812 (1985) (citation and internal quotation marks omitted). Under section 166.046, the patient or person responsible for effectuating the patient's health care decisions only receives 48 hours' notice before a meeting is called to discuss whether to stop providing the treatment necessary to sustain life. TEX. HEALTH & SAFETY CODE § 166.046(b)(2).

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

Furthermore, Section 166.046 provides no standard by which to evaluate a physician's decision to refuse life-sustaining treatment. The statute simply states that a physician may decide, and

the committee may affirm, that life-sustaining treatment is medically inappropriate. *See id.* § 166.046(e). But Chapter 166 does not define or explain the meaning of the phrase "medically inappropriate"—making it again difficult, if not impossible, to formulate reasoned objections to the physician's decision.[2]

III. Section 166.046 Does Not Provide a Meaningful Opportunity to Be Heard.

In addition to requiring adequate notice, the Due Process Clause requires that the government provide "a meaningful opportunity to be heard" before depriving an individual of constitutionally protected rights. *LaChance v. Erickson*, 522 U.S. 262, 266 (1998). This includes not only the right to attend a hearing, but also an opportunity to participate and present arguments and evidence at that hearing. *See, e.g.*, *Tenn. v. Lane*, 541 U.S. 509, 523 (2004).

Section 166.046 fails this standard. Under its procedures, there is no guarantee that the patient or the person responsible for the health care decisions of the patient will be given any opportunity to be heard. While such individuals are "entitled to attend" the meeting held by the committee to discuss the patient's directive, the statutory procedures do not otherwise provide a right to speak at that meeting before the committee makes a final decision. *See* TEX. HEALTH & SAFETY CODE § 166.046(b)(4)(A). This lack of a meaningful opportunity for the patient or the patient's representative to be heard further demonstrates how Section 166.046 violates the Due Process Clause.

[2] Additionally, the failure to provide any meaningful limit on the physician's or committee's discretion in denying life-sustaining treatment suggests that the statute is void for vagueness. *See, e.g.*, Nora O'Callaghan, *Dying for Due Process: The Unconstitutional Medical Futility Provision of the Texas Advance Directives Act*, 60 BAYLOR L. REV. 528, 590–96 (2008).

IV. Section 166.046 Does Not Offer an Impartial Arbiter.

The "Due Process Clause entitles a person to an impartial and disinterested tribunal." *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 242 (1980). "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." *Id.*

Here, the ethics or medical committee, which is tasked by section 166.046 with reviewing the physician's decision to deny life sustaining treatment, is not a neutral and detached arbiter.

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

Moreover, while the procedures in Section 166.046 allow a patient or the person responsible for the health care decisions of the patient to petition the district or county court, such court involvement is limited to extending the time a patient shall be given available life-sustaining treatment pending transfer to a different physician or health care facility. *Id.* § 166.046(e), (g). Under

the terms of the statute, the ethics or medical committee is the final arbiter with regard to whether the patient will be given life-sustaining treatment.

Accordingly, the lack of a neutral and impartial arbiter in the Section 166.046 review process violates the Due Process Clause.

Conclusion

The Court should deny Defendant's motion to dismiss and grant Plaintiff's motion for summary judgment.

Respectfully submitted.

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Certificate of Service

I hereby certify that a true and correct copy of the foregoing pleading has been served on all counsel of record or unrepresented parties on October 24, 2016, in accordance with Rule 21a of the Texas Rules of Civil Procedure, electronically through the electronic filing system, electronic mail, or certified and registered U.S. Mail.

/s/ Prerak Shah
PRERAK SHAH