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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

JONEE FONSECA, AN INDIVIDUAL PARENT AND GUARDIAN OF ISRAEL STINSON, A MINOR, LIFE LEGAL DEFENSE FOUNDATION Plaintiffs', v. KAREN SMITH, M.D. IN HER OFFICIAL CAPACITY AS DIRECTOR OF THE CALIFORNIA DEPARTMENT OF PUBLIC HEALTH; AND DOES 2-10, INCLUSIVE, Defendants.	2:16-cv-00889-KJM-EFB **OPPOSITION TO DEFENDANT'S MOTION TO DISMISS THIRD AMENDED COMPLAINT** Date: August 11, 2017 Time: 10:00 a.m. Dept.: Courtroom 3 Judge: Hon. Kimberly J. Mueller Date Filed: May 9, 2016 Trial Date: None Set

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INTRODUCTION AND SUMMARY OF THE ARGUMENT

What began as an attempt to save one young, innocent life has now taken on a new purpose of saving many lives by reclaiming the fundamental right to life from a legal fiction that has been used to justify ending lives prematurely. The Court cannot call Israel back from the grave, but it can begin to correct the injustice of his death and prevent future harm to similarly-situated families.

In seeking dismissal of the Third Amended Complaint (TAC), the State's essential position is that it cannot be held responsible for life-and-death harms sanctioned by statutes that it deems merely definitional. The Plaintiffs could not more strongly disagree. On its face, the statutory scheme at issue reaches well beyond definitions. More fundamentally, though, State laws that expressly permit deprivation of constitutional freedoms cannot evade scrutiny of the highest order. It is no defense to argue that the State is merely a bystander to the taking of life.

Through its statutory scheme, the State has endangered the most vulnerable, and medical providers would not prematurely end lives without that power placed in their hands. A determination that the California Uniform Determination of Death Act (CUDDA) is inconsistent with constitutional safeguards of due process, parental rights and privacy would effect a fundamental change that would redress the harms experienced by these plaintiffs.

ARGUMENT

I. THE CONSTITUTIONALITY OF CUDDA IS SQUARELY WITHIN THE JURISDICTION OF THIS COURT.

The threshold issue of Article III standing has taken on new dimensions since the passing of Israel. The Plaintiffs are keenly aware of the need to satisfy the basic formulation of standing as presented in such authorities as *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992). Since there is some overlap among the requirements of injury in fact, causation, and redressability, Plaintiffs will here approach these

elements as follows: 1) demonstrate that statutory definitions can indeed cause harm; 2) explain why the statutory scheme goes far beyond mere definitions; 3) show the causal link between the statutory scheme and the alleged harm; and, 4) identify why invalidating the statutes would indeed alleviate the alleged harm.

a. Defining fundamental rights out of a statutory scheme is indeed a constitutional wrong that demands a remedy.

It is beyond question that Israel and his family suffered harm by his untimely, tragic death, and the first *Lujan* factor is not seriously disputed. The Article III dispute therefore centers around causation and redressability. State Motion to Dismiss ("State's Brief") 1:16-19. Plaintiffs allege that, through the statutory scheme of CUDDA, the State bears ultimate culpability for the taking of Israel's life. TAC ¶63.

CUDDA's foundational definitional provision reads: "An individual who has sustained either (1) irreversible cessation of circulatory and respiratory functions, or (2) irreversible cessation of all functions of the entire brain, including the brain stem, is dead." Health & Safety Code §7180(a).[1] The legislative adoption of the legal fiction in the second half of the provision has the significant effect of defining out of life persons who would have been considered alive at the adoption of the Fifth and Fourteenth Amendments, respectively, due to their continued biological functioning. The State's constricted view of its obligations would take us backwards to a time when states did not protect life or liberty to the degree that all today recognize they must.

Indeed, the State's view that a definitional statute cannot trigger liability ignores the origin of the Fourteenth Amendment. In one of its darkest moments, the Supreme Court accepted just such a theory. "We think ['negroes of African

[1] All statutory references are from the Health & Safety Code.

descent']… were not intended to be included[] under the word 'citizens' in the Constitution, and can therefore claim none of the rights and privileges which that instrument provides for and secures to citizens… ." *Scott v. Sandford*, 60 U.S. 393, 404-05 (1857). Today, the notion that authorities once acquiesced in the deprivation of human beings' most basic liberties by defining them as non-citizens and deferring to private-third-party slave owners shocks the conscience.

We stand 160 years removed from Chief Justice Taney's decision, but not so far removed from the chilling logic. The State drew a line declaring Israel to be no longer a legally-recognized person, regardless of continued biological functioning. The State can no more deflect responsibility for the taking of life onto medical providers than could a State claim that laws permitting slavery were morally neutral, because individual slave owners carried out the actual deprivation of rights. The Fourteenth Amendment was enacted precisely to hold States accountable for laws permitting constitutional deprivations by private-party slave owners.

Fast-forwarding to the present age, and on the other side of the sanctity of life issue, defining life has become a new frontier in the abortion debate. Under the State's logic, jurisdictions like South Dakota should be free to define life to begin at conception, because definitions cause no harm. Yet the federal courts have disagreed. *Planned Parenthood Minnesota, N. Dakota, S. Dakota v. Rounds*, 530 F.3d 724, 737 (8th Cir. 2008).

Of course, the definition of marriage has also taken on great significance in the last few years, apart from the specific rights attached to it. The State has argued forcefully – and effectively – that definitions do indeed matter. The Supreme Court agreed in *Obergefell v. Hodges*. The Court held that being defined out of the marriage statute inflicted its own injury, even as to a deceased partner who could no longer become a spouse. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2602 (2015). Note that state law describes qualified candidates for marriage and

provides marriage certificates. But typically a private-third-party (e.g., a minister) officiates the ceremony and executes the certificate. It would provide no defense for a state to assert that it was a priest who caused harm by not conducting the service. In fact, state definitions created the conditions for Article III standing. Defining both the beginning and end of life are essential State functions that carry enormous moral and legal implications. The State's theory that statutory definitions cannot trigger liability is oversimplified and unhelpful to the Article III equation.

Fonseca and LLDF have stated claims linking the CUDDA definitions and other aspects of the statutory scheme to their injuries. TAC ¶63. The Motion to Dismiss should therefore be denied and the validity of the statute put through the crucible of strict scrutiny.

b. CUDDA is much more than merely definitional.

Definitional statutes can be fraught with constitutional deficiencies that demand correction. Sec. 7180 is indeed definitional. But it goes well beyond that. Nor is CUDDA merely about record-keeping, State Mot. to Dismiss at 11; it sets the boundaries between life and death, as the State acknowledges elsewhere when asserting its own interests. *Id.* at 16.

CUDDA's progenitor, UDDA, has its origin in the 1968 Ad Hoc Commission of the Harvard Medical School. The Commission published an article with the goal of changing how death was determined legally and medically. There were two primary reasons put forward: (1) to prevent a waste of medical resources on keeping people alive through modern technologies; and (2) the need to have organs for transplants. Seema K. Shah, *Piercing the Veil: The Limits of Brain Death as a Legal Fiction*, 48 U. Mich. J. L. Reform 301, 320 (2015); The redefining of *death* was not the result of a medical breakthrough. *Id.* 321. The Commission "did not believe that brain death was the equivalent of biological death." *Id.* at 320.

To effectuate these goals, CUDDA prescribes the protocol for confirmation of *death*. Sec. 7181. Under CUDDA, a medical facility must record, communicate with government entities, and maintain records relative to the "irreversible cessation of all functions of the entire brain." Sec. 7183. This includes filling out portions of the Certificate of Death provided by the Department of Public Health within 15 hours after death under (Sec. 102800) and that the medical facility register the death with county officials (Sec. 102775). County officials then jointly issue a death certificate with the State's Department of Vital Records directed by the Defendant, Karen Smith. Ct. doc. 71-1.

At its core, CUDDA represents a profound philosophical shift – with major constitutional implications – by the State. It could not have been carried out by the medical community acting on its own.

The symbiotic relationship is darkly illustrated in the present case. The State-issued Certificate of Death proved to be crucial and self-fulfilling. TAC ¶39.

c. The State, through CUDDA, exposes its most vulnerable citizens to great harm and cannot avoid responsibility by blaming third parties.

The Plaintiffs have further pled causation in that Israel was the object of the challenged regulation, and because the State has created a danger by placing patients like him at the mercy of physicians with the authority to end life.

In *Lujan*, the Court stated that when the plaintiff is the object of the regulation, there is little doubt regarding causation. *Id.* at 562. Grammatically, the subject of CUDDA's definition is the individual whose life hangs in the balance. Sec. 7180(a). The individual is also the focus of Sec. 7181 requiring independent confirmation of brain death. Israel, and by extension his mother, are unequivocally the "objects of the action" under the holding in *Lujan*.

The delegation of essential State functions, and the inadequacy of the accompanying safeguards, is more fully explained below in reference to procedural and substantive due process. For purposes of causation, though, it must be noted that the State cannot create dangers and then blame third parties when those dangers come to fruition.

As Judge Posner memorably put it,

> We do not want to pretend that the line between action and inaction, between inflicting and failing to prevent the infliction of harm, is clearer than it is. If the State puts a man in a position of danger from private persons and then fails to protect him, it will not be heard to say that its role was merely passive. It is as much an active tortfeasor as if it had thrown him into a snakepit. *Bowers v. Devito*, 686 F.2d 616, 618 (7th Cir. 1982).

Placement of the patient in a private facility does not insulate the State, where its policies are ultimately at issue. *K.H. Through Murphy v. Morgan*, 914 F.2d 846, 853 (7th Cir. 1990). And it is no defense to argue that a crime was committed by a third party and not the State, when a state actor places the victim in greater danger than they otherwise would have experienced. *Wood v. Ostrander*, 879 F.2d 583, 594 (9th Cir. 1989) (stranding arrestee's female passenger in high-crime area in the middle of the night). Nor is custody a prerequisite to liability for creation of danger. *L.W. v. Grubbs*, 974 F.2d 119 (9th Cir. 1992) (allowing constitutional claims of correctional employee to proceed, where she had been raped by inmate). One of the primary goals of Sec. 1983 is to provide a remedy for killings unconstitutionally caused *or acquiesced in* by state governments. *Chaudhry v. City of Los Angeles*, 751 F.3d 1096, 1103 (9th Cir. 2014).

The State misses the point by relying on authorities such as *Collins v. Harker Hts.*, 503 U.S. 115 (1992), where the widow of a deceased city employee pursued a failure-to-warn and failure-to train theories of liability. Plaintiffs are not alleging

that the State must better train doctors in ending lives or warn comatose patients that their lives may soon be ended without their consent, but that fundamental rights must be restored to patients and their families from the government-medical complex that is taking away these vital decisions from them.

While the State seeks to deflect responsibility onto doctors, medical providers have done the same toward the State. In Placer County Superior Court, the attorney for Kaiser told the Court, that "under Health and Safety Code [§§] 7180 and 7181, Israel has been found to be dead." Ct-doc. 14-4:38 at lines 9-11.

The attempt to shift responsibility for the most vulnerable patients is nothing new, but it is becoming more acute. Quite recently, this has played out in Sacramento in the form of the County trying to release a comatose inmate, solely to avoid paying for his medical care, and utterly irrespective of what that might mean for his life or death.[2] This trend must be arrested. Neither the State nor local governments can be permitted to absolve themselves of life-and-death decisions as a cost-cutting measure.

d. Invalidating CUDDA will redress the constitutional harm.

Under *Lujan*'s redressability prong, Fonseca a favorable ruling will result in remedying the loss of medical insurance coverage and government benefits to the child and his family. TAC ¶63. Besides the economic consequences that a favorable ruling will address, there are three additional essential points relative to redressability. First, a favorable ruling will redress her own grievances by conferring a degree of dignity similar to that which other constitutional litigants have found meaningful. Second, relief can be granted which will be meaningful to co-plaintiff LLDF's clients. Third, the State's position that redressability is lacking

[2] Hudson Sangree, *Judge won't release inmate in vegetative state because he can't sign paperwork*, Sacramento Bee, July 12, 2017, archived at http://www.sacbee.com/news/local/crime/article161056154.html.

because doctors are unlikely to change their behavior to conform to a change in the law is fallacious. Plaintiffs address these points in that order.

i. Dignity can be restored by a favorable ruling.

The Supreme Court's emphasis on dignity in the constitutional equation carries important implications here. Most recently, in *Obergefell*, the Court felt it was important to extend marriage rights to the plaintiff even though this same-sex partner had died and no further union was possible. *Obergefell*, 135 S. Ct. at 2597 ("The fundamental liberties protected by [the Due Process] Clause include most of the rights enumerated in the Bill of Rights…these liberties extend to certain personal choices central to individual dignity and autonomy, including intimate choices that define personal identity and beliefs"). Under the State's theory, *Obergefell* would have been rejected before being decided, as non-redressable. Of course, the State took the opposite view in *Obergefell*, as well as its predecessors, *U.S. v. Windsor*, 133 S.Ct. 2675 (2013), and *Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013). The State cannot have it both ways – either restoration of dignity through invalidation of an onerous statute is redressable, notwithstanding the death of a victim of that statute, or it is not. Consistent with *Obergefell*, Fonseca submits that the wrong inflicted upon Israel continues to be redressable. TAC ¶¶63, 65. To this end, the Prayer for Relief concretely seeks expungement of his erroneous death record. TAC 20:14-17.

ii. LLDF's claims are independently redressable.

The State has set up its standing arguments for both Fonseca and LLDF to rise and fall together, making it superfluous to examine LLDF's standing if Fonseca possesses it, or vice versa. But LLDF has independent grounds for satisfying Article III. The clearest explanation of this principle comes from the D.C. Circuit's decision in *Abigail Alliance*, where the Court found redressability established despite the death of a patient who had been seeking potentially life-saving

treatment. The organization's continuing interest kept the case alive. *Abigail Alliance for Better Access to Deve. Drugs v. Von Essenbach*, 469 F.3d 129, 136-37 (D.C.Cir. 2006). Namely, "the Alliance seeks to enforce the right of terminally ill patients to make an informed decision that may prolong life." *Id*.

The "mission of LLDF focuses on preservation of the lives of the most vulnerable members of society, including the very young and those facing the end of life." TAC ¶4. LLDF closely assisted the family of Israel in the present matter. Sadly, the facts presented in this case are not an outlier for LLDF. The organization attempts to protect members of the public facing withdrawal of life-support from loved ones. Due to the CUDDA protocol, LLDF's work in this regard has been profoundly frustrated. CUDDA causes a significant drain on LLDF's time and resources to address the burdensome undertaking of resisting attempts by medical facilities to remove life-support for members of the public whose loved ones are declared brain dead, though they are not biologically dead." *Id.* This organizational mission ensures that a decision on the constitutionality of CUDDA would have direct impact and would not be advisory. The State seeks to draw the Court into needless conflict with the D.C. Circuit. This invitation, the Court should decline.

iii. The State's claim that the medical community is unlikely to change its behavior even if there is a change in the law lacks credulity.

The State extends its blame-shifting into the realm of redressability in a way that exposes the limits of its logic. Redressability is lacking, claims the State, because doctors as independent actors will not likely change their ways even if CUDDA were invalidated. State's Brief 11:3-12. Two examples from other high-profile policy and medical debates show quite the opposite.

First, as to medical marijuana, courts accept that criminalization produces a chilling effect on doctors that legalization would lift. Prior to California's official acceptance of medical, and now recreational, marijuana, physicians acknowledged

that legislation created a chilling effect that deterred them from even mentioning marijuana to patients that they felt would benefit from it. *Conant v. McCaffrey*, 172 F.R.D. 681, 690 (N.D. Cal. 1997). While the law in California at the time did not explicitly prohibit physicians from merely recommending marijuana, physicians did not want to take any chances. *Id.* Fear of action being taken against them drove physicians to censor themselves. *Id. See also, Conant v. Walters*, 309 F.3d 629, 639 (9th Cir. 2002), *cert denied* 540 U.S. 946 (2003). After the Supreme Court denied certiorari, one of the plaintiff-physicians in the case rejoiced that they could practice without fear once again. Vonn Christenson, *Courts Protect Ninth Circuit Doctors Who Recommend Medical Marijuana Use*, 32 J.L. Med. & Ethics 174, 176 (2004). The notion that physicians do not change their behavior to reflect changes in the law – such as the striking down of CUDDA – is flawed.

A similar fear of the legal consequences for violating state law deters medical practitioners in the context of physician-assisted suicide. In the landmark *Cruzan* case, Nancy Cruzan's family had requested that she be taken off of her artificial hydration and nutrition to end her life. The healthcare facility refused to act absent court authority. *Cruzan by Cruzan v. Harmon*, 760 S.W.2d 408, 410 (Mo. 1988). *See also, Cruzan v. Dir., Mo. Dept. of Health*, 497 U.S. 261, 280 (1990).

In this Circuit's leading assisted suicide case, *Compassion in Dying v. State of Wash.*, five physicians who regularly treat patients with terminal illnesses wanted to assist their patients in dying, however "they have all been deterred from doing so by the existence of the Washington statute challenged in this case." *Compassion in Dying v. Wash.*, 850 F. Supp. 1454, 1458 (W.D. Wash. 1994), *aff'd* 79 F.3d 790, *rev'd* 51 U.S. 702 (1997).

By design, Sec. 1983 serves as a deterrent to unconstitutional takings of life and liberty. *Chaudhry,* at 1106. In contrast to the State's awkward attempt to minimize the influence of its end-of-life statutes, it should be inferred that removing

the cloak of legitimacy that CUDDA places over certain deprivations of life would most certainly deter physicians from pulling the plug prematurely.

The foregoing analysis of causation and redressability should lead the Court to further assess whether claims have been stated for violations of fundamental constitutional freedoms, as will be discussed next.

II. FONSECA HAS STATED VIABLE CLAIMS FOR BOTH PROCEDURAL AND SUBSTANTIVE DUE PROCESS.

The Fourteenth Amendment declares in relevant part, "No State shall make or enforce any law which shall…deprive any person of life…without due process of law." The heart of Plaintiffs' procedural due process claim is that CUDDA lacks the safeguards necessary to ensure that the State's most vulnerable citizens are not deprived of life. TAC ¶65. The substantive claim is that innocent children like Baby Israel have a fundamental right to life that does not yield to lesser interests such as the need for organ donors or economic efficiency. TAC ¶74, 83.

a. The State-established procedures for brain death are insufficient to prevent deprivation of life without due process of law.

Due process demands that "a person in jeopardy of serious loss [have] notice of the case against him and opportunity to meet it." *Joint Anti-Fascist Comm. v. McGrath*, 341 U.S. 123, 171-172 (1951) (Frankfurter, J., concurring). The degree of deprivation dictates the level of procedures required. *Mathews v. Eldridge*, 424 U.S. 319, 341 (1976). In view of the deprivation of life here, the highest level of procedures must be followed. *Roper v. Simmons*, 543 U.S. 551, 577 (2005).

CUDDA provided no realistic opportunity for Israel's mother to be heard. "The opportunity to be heard must be tailored to the capacities and circumstances of those who are to be heard." *Goldberg v. Kelly*, 397 U.S. 254, 268-69 (1970).

Deprivation of life must surely be attended with greater process and safeguards than the denial of welfare benefits at issue in *Goldberg*.

CUDDA expedites the determination of *death* by purposefully ignoring whether the person remains biologically alive. This lessoned standard of *death* provides no meaningful process by which the patient's advocate can obtain a different, truly independent medical opinion by the physician of her choosing or even challenge the findings.

This case illustrates the degree to which medical providers are willing to take liberties with even the minimal procedural safeguards that do exist, such as the independence requirement. Section 7181 mandates that, upon a brain death determination "there shall be independent confirmation by another physician."

On its face, CUDDA's independence requirement might be comforting. In actuality, it has proven to be a farce. Noting the holding in *Dority v. Superior Court*, 145 Cal.App.3d 273 (Cal. Ct. App. 4th Dist. 1983), the Honorable Judge Michael Jones asked attorneys for Kaiser: "And, therefore, the parent should not have the opportunity to have an independent evaluation?" The response: "We are the independent [evaluation]." Ct-doc. 14-4 at lines 12-15. The State's fallback position that the statute need not provide additional safeguards, because they have been judicially created, (State's Brief 18:15-26), is remarkable. It is a dubious premise at best that otherwise-deficient statutes can be salvaged by judicial infill. *See Aptheker v. Sec. of State*, 378 U.S. 500, 515 (1964).

Meanwhile, other appellate courts have recognized the disconcerting lack of uniformity with different protocols for declaring brain death. *Gebreyes v. Prime Healthcare Servs., LLC* (*In re Estate of Hailu*), 361 P.3d 524, 529 (Nev. 2015).

The haphazard, uneven and utilitarian-driven rush to declare patients brain dead, ignoring the possibility they might be alive, or the wishes of their family to

keep them alive, is irreconcilable with the principle that the most stringent procedures must be afforded for the greatest deprivations of life and liberty.

b. A patient and his family have significant substantive due process rights, rooted in privacy and self-determination, to resist discontinuation of life support.

The right to life arising under substantive due process is context-specific and resists rigid definition or limitation. *County of Sacramento v. Lewis*, 523 U.S. 833, 834 (1998). "If the right of the patient to self-determination in his own medical treatment is to have any meaning at all, it must be paramount to the interests of the patient's hospital and doctors." *Bartling v. Superior Court*, 163 Cal.App.3d 185, 195 (Cal.Ct. App. 2nd Dist. 1984). "The choice between life and death is a deeply personal decision of obvious overwhelming finality." *Cruzan*, 497 U.S. at 281.

Under this right of self-determination, emanating from the right to privacy, the choice of the patient or his legal surrogate whether to continue life-sustaining measures is not subject to veto by the medical profession or the judiciary. *Bouvia v. Superior Court*, 179 Cal.App.3d 1127, 1135 (Cal. Ct. App. 2d Dist. 1986). Stated another way, the patient's vote is not to be overridden. *Id.* at 1137. The State would have the foregoing judicial pronouncements about self-determination turned into wasted breath. The notion that Fonseca cannot maintain a claim on behalf of her now-deceased child against the regime which cut short his life renders these constitutional provisions worse than useless.

Although greater deference is afforded to decisions that deprive the innocent of life, when those decisions are split-second in contexts such as a police chase, *see Lewis, supra at* 853, much less deference should be afforded where the decision is deliberative and made through the legislative process.

There is a popular misconception that the drafters of UDDA, and by extension CUDDA, redefined death based upon medical discoveries resulting in a

new understanding of when death actually occurs. Such a notion is fiction. Shah, Id.; Michael Nair-Collins, *Death, Brain Death, and the Limits of Science: Why the Whole-Brain Concept of Death Is A Flawed Public Policy*, 38 J.L. Med. & Ethics 667, 668 (2010). Persons declared brain dead have living cells. These patients generate new tissue. Shah at 322. They heal if cut and fight infection. *Id.* at 330. They eliminate waste. Nair-Collins, at 670. Children will go into puberty. Shah at 312. Men grow beards. *Id.* 330. Women can continue to gestate a fetus. *Id.*[3] These are consistent with life – not death.

In the present case, the State is striving to head off, through a Motion to Dismiss, consideration by the Court or a jury of the astounding evidence that Israel remained alive after the official Certificate of Death was issued, after he was moved to Guatemala, and after he was brought back to Los Angeles.

In short, the biological basis for brain death is hotly disputed and central to this case. Were this merely a disagreement over treatment options or diagnosis, the Court might be able to defer to erroneous beliefs held by legislators. Since it is a matter of the highest constitutional magnitude, strict scrutiny is required and this case must proceed beyond the 12(b) stage to test the State's interests.

III. FONSECA HAS STATED A COMPELLING CLAIM FOR VIOLATION OF FUNDAMENTAL PARENTAL RIGHTS.

As to her claims for violation of fundamental parental rights, Fonseca's position is that, if such rights are to have any meaning at all, they must give parents a say in the life and death of their child.

[3] In a chilling yet predictable part of the ethical trajectory is the proposal that brain dead women be used as gestational incubators. Jennifer S. Higgins, *Not of Woman Born: A Scientific Fantasy*, 62 Case W. Res. 399, 407 (Winter 2011).

Typically, a fit parent has plenary authority over medical decisions for a small child. *In re Baby K*, 832 F. Supp. at 1030. Fonseca felt a moral and spiritual duty to give her child every benefit of the medical doubt as to whether he could improve with additional treatment. TAC ¶36.

The Supreme Court has maintained that fundamental parental rights include educational decision-making such as whether to send their child to public or private school. *Pierce v. Socy. of Sisters*, 268 U.S. 510, 534 (1925); *Meyer v. Nebraska*, 262 U.S. 390, 403 (1923); *Wisconsin v. Yoder*, 406 U.S. 205, 234 (1972). Surely, this Fourteenth Amendment liberty interest cannot mean parents have educational decision-making rights while lacking life-and-death decision-making rights for their child. *See, Chaudhry*, at 1106. Thus, courts in this state have upheld withdrawal of life support where all of the family is in agreement. *Barber v. Super. Ct.*, 147 Cal.App.3d 1006, 1021 (Cal. Ct. App. 2d 1983).

By asserting that Fonseca cannot even state, much less prove, such a claim, the State goes too far. This leaves the Court with the unappealing choice whether to agree that parents have no constitutional option but to watch in horror (or more likely, be physically restrained) as their child's breathing is deliberately stopped.

Fortunately, there is another way. The State ignores as it must the path laid out by the Michigan Court of Appeals in a similar case, *Family Independence Agency v. A.M.B.* (*In re AMB*), 248 Mich. App. 144 (Mich Ct. App. 2001). There, the appellate court conducted an extensive post-mortem of the circumstances surrounding the withdrawal of life support from Baby Allison. The appellate court found serious due process violations in the manner that the decision to end Baby Allison's life was taken away from her parents, all of their shortcomings notwithstanding. The Family Court had authorized the termination of life support after a doctor testified by telephone that being on the ventilator was not in the child's best interests. *Id.* at 160. The appellate court focused in on the

presumption that to establish incompetency for the parent who would otherwise have a Fourteenth Amendment liberty interest in making medical decisions for their child, the evidence must be clear and convincing. *Id*. at 204-5. Thus, the court held that, even though circumstantial evidence pointed to the parents' inability to make life-and-death decisions for their child, much more formal adjudication of the parents' incompetence was required to take away the decision from them. *Id.*

Liberty demands no less in the present case. Fonseca's fitness was not in question and the State, through its statutory scheme, nevertheless took away her ability to make this monumental decision for her child. There was a medical dispute as to whether Israel was alive. TAC ¶62. As it turned out, Fonseca's decision to err on the side of continuing life support was justified. TAC ¶26. Physicians in Guatemala ran two EEG tests and found that Israel was not only not biologically dead, but was also not brain dead. Drs. Ruben Posadas and Francisco Montiel determined that Israel was in a "persistent vegetative state." TAC ¶47.

But because Kaiser already acted under the CUDDA protocol, the medical providers at Children's Hospital would not accept the results of the two EEG tests, would not perform their own brain death examination, and would not allow the parents to bring in an eminent professor from UCLA's medical school to conduct an examination. TAC ¶57. That Israel was alive under any definition of death was an inconvenient truth. Instead of accepting that scientific reality, attorneys for Children's Hospital filed ex parte the death certificate signed by Kaiser and the death certificate from the Defendant's Department of Vital Records with the Superior Court in Los Angeles. TAC ¶¶58-59. Children's Hospital's intent was to convert the death certificate into a death warrant. As a direct result of the death certificate issued through the CUDDA protocol, the Superior Court lifted a temporary restraining order that the mother had secured in pro per and did not give even a 24 hour reprieve to seek emergency relief from a higher court. TAC ¶60.

By the authority vested in them by the State, before the close of business that day, Children's Hospital medical staff entered Israel's room, and disconnecting his life support, they killed him. TAC ¶61.

The State's diminished view of fundamental parental rights moves dangerously close to the conscience-shocking drama that has recently been playing out across the Atlantic.[4] Taking the facts as true, the disturbing deprivation of parental rights effectuated here cannot be waved off under FRCP 12(b).

IV. THE STATE TOO HASTILY WRITES OFF ITS OWN CONSTITUTION.

The State offers little on the California constitutional causes of action, contenting itself to note that the analysis follows the federal claims. The State's minimization of its own charter belies both the greater specificity of the state provisions, and the fact that they have been invoked to bolster the corollary federal claims. Set forth prominently in Article I §1, the State's Constitution provides for a "Declaration of Rights." The relevant language provides, "[a]ll people are by nature free and independent and have inalienable rights. Among these are enjoying and defending life…and privacy[5]." CA Const. Art. I §1. Liberties afforded by the California Constitution exist with independent force, not depending upon any provision of the federal Constitution's Bill of Rights. *People v. Pettingill*, 21 Cal.3d 231, 248 (1978). The Declaration of Rights dates back to 1849, nineteen years before the Fourteenth Amendment attached the liberties enumerated in the Bill of Rights to the citizens of each state.

[4] Aria Bendix, *British Hospital Declines Vatican's Offer to Treat Charlie Gard*, The Atlantic, July 5, 2017, archived at https://www.theatlantic.com/news/archive/2017/07/british-hospital-declines-vaticans-offer-to-treat-charlie-gard/532719/.

[5] The right to privacy as an inalienable right was added to the Constitution by proposition in 1974.

Interpretation of CA Const. Art. I §1 begins with the face of the text. *Advocate Health Care Network v. Stapleton*, 137 S. Ct. 1652, 1658 (2017). The *life* provision provides for both its enjoyment and defense. Though perhaps not in contrast, but as seen as a difference, the Fifth and Fourteenth Amendments speak in terms of the deprivation of life without due process of law. The State's provisions of *enjoying* and *defending* life carry a more robust connotation than due process. Note that Art. I §7(a) has a due process clause that mirrors the federal provisions. "A person may not be deprived of life…without due process of law… ." The State's position that the Art. I §1 claim in the TAC should receive identical analysis with the Fifth and Fourteenth Amendment claims is in error for two reasons.

First, it conflates Art. I §§1 and 7(a). The use of different language for the respective sections means that the drafters intended different things for each. Otherwise, reading the two sections as the same renders section 1 as mere surplusage. A cardinal principle of statutory construction is that "a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant." *TRW v. Andrews*, 534 U.S. 19, 31 (2001).

In related error, the State fails to address the scope of the California Constitution on its own terms. Art. I §1 identifies the right to enjoying and defending life as *inalienable*. The difference between the liberties set forth in the federal Bill of Rights and an *inalienable right* provided in the Declaration of Rights is that the former cannot be abridged by a state actor while the latter cannot be abridged by anyone. *Hill v. NCAA*, 7 Cal.4th 1, 19 (1994).

Here CUDDA is inconsistent with the inalienable right to the enjoyment and defense of life (as that term was understood in 1849) because it gives to medical providers the authority to declare a biologically living child as brain dead against the wishes of a fit parent. The ordinary meaning of *life* – and by extension *death* –

in 1849 tracked the first definition found in CUDDA, i.e., "irreversible cessation of circulatory and respiratory functions." In contrast, those who drafted and ratified the inalienable right to the enjoyment and defense of *life* in the Declaration of Rights could not have contemplated a definition of *death* as the "irreversible cessation of all functions of the entire brain, including the brain stem." Attempts to square the original understanding of Art. I §1 with the second part of CUDDA is simply an anachronism.

Turning to the right to privacy, Art. I §1 has been interpreted more expansively than the federal Constitution in such privacy decisions as *Hill v. NCAA*. The *Bartling* court grounded its understanding of patient self-determination in the right to privacy found in both state and federal constitutions. *Bartling*, at 195. *See also, People v. Adams*, 216 Cal.App.3d 1431, 1448 (Cal. Ct. App. 3d Dist. 1990) (based on the right to privacy in Art. I, §1, adults have the fundamental right to control decisions relating to their own medical care). Of particular relevance, such decisions have blurred the lines between private and state action that the State seeks to assert via its Article III arguments.

While state interests in preserving life and self-determination in medical decisions rooted in privacy share much in common with federal interests, as not identical they require independent evaluation. The State has not offered nearly enough to demonstrate that Fonseca and LLDF cannot state state-based claims.

V. *ROOKER-FELDMAN* DOES NOT APPLY.

The State reasserts the *Rooker-Feldman* doctrine. The reality is that the doctrine has been limited to the facts of the two cases from which it is derived, *Rooker v. Fid. Trust Co.*, 263 U.S. 413 (1923) and *D.C. Ct. of App. v. Feldman*, 460 U.S. 462 (1983).

The Ninth Circuit has explained that *Rooker-Feldman* "applies only when the federal plaintiff both asserts as her injury legal error…by the state court *and* seeks

as her remedy relief from state court judgment." *Kougasian v. TMSL, Inc*., 359 F.3d 1136 (9th Cir. 2004) (emphasis in original).

The original two defendants in the respective Superior Court cases that were filed on an emergency basis to prevent termination of life support were Kaiser Permanent Roseville Medical Center and Children's Hospital Los Angeles. Those two entities are not named as defendants in the current action, making the requested relief materially different than that which had been sought against them.

CONCLUSION

The State would have us believe that CUDDA played no role in the death of Baby Israel, or for that matter other vulnerable patients declared to be brain dead and thereby cut off from all fundamental and constitutional rights. The TAC pleads causes of action demonstrating that the State's role is pervasive, and that it lacks constitutionally-required safeguards. With the addition of LLDF as co-plaintiffs, the TAC ensures that relief will inure not only to Fonseca, but to countless other Californians who are currently at risk for deprivation of their most basic right – the right to life – with only a perfunctory process. The Motion to Dismiss should therefore be denied.

Respectfully submitted this Twenty-Seventh day of July, 2017.

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