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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 Plaintiff, **v.** **KAREN SMITH, M.D. IN HER OFFICIAL CAPACITY AS DIRECTOR OF THE CALIFORNIA DEPARTMENT OF PUBLIC HEALTH,** Defendant.	2:16-cv-00889-KJM-EFB **DEFENDANT'S REPLY IN SUPPORT OF MOTION TO DISMISS THIRD AMENDED COMPLAINT** **[Fed.R.Civ.Proc. 12(b)(1), (6)]** Date: August 11, 2017 Time: 10:00 a.m. Dept: 3 Judge: The Honorable Kimberly J. Mueller Trial Date: not set Action Filed: 5/9/2016

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INTRODUCTION

Plaintiffs Fonseca (Fonseca) and Life Legal Defense Foundation (LLDF) (collectively, Plaintiffs) have been given ample opportunity to establish Article III standing and to perfect this Third Amended Complaint (TAC) to state cognizable claims against Defendant Karen Smith, M.D., Director of Public Health (Director). Yet again, Plaintiffs have failed to do so.

It remains that this action should be dismissed for lack of standing. Fonseca makes no showing that the injuries alleged—the loss of Israel's life and the determination that Israel died on April 14—were caused by the Director or CUDDA, rather than the independent medical decisions of non-party doctors. Nor can Fonseca establish redressability, as there is no indication that the physicians who determined Israel's date of death would reach a different conclusion in the absence of CUDDA.

Similarly, LLDF, which works to resist attempts by medical facilities to remove life-support, fails to establish that CUDDA directs such facilities or their physicians to so act. Additionally, LLDF states no facts demonstrating that invalidating CUDDA will impact the medical opinions that individuals have suffered brain death and/or the recommendation that life-support should be withdrawn in those instances.

Nor have Plaintiffs shown that they can state cognizable claims against the Director for any asserted constitutional violation.

Finally, because Fonseca continues to assert "as applied" claims, which aim to reverse the Superior Court's ruling upholding the medical determination that Israel died on April 14, 2016, they are barred by the *Rooker-Feldman* doctrine.

For the reasons set forth below and those stated in the Director's Motion, the TAC should be dismissed without leave to amend.

I. FONSECA LACKS STANDING

A. CUDDA's Enactment Has Not Caused Fonseca's Harm

As stated in the Motion, the Article III standing test requires Fonseca to demonstrate that there is a causal connection between her alleged injuries and the conduct complained of; the injury has to be "fairly traceable to the challenged action of the defendant, and not the result of

the independent action of some third party not before the court." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992) (citations omitted). Accordingly, Fonseca must demonstrate that the injuries alleged—loss of Israel's life and determination that he died on April 14, 2016—stem from compliance with CUDDA. Despite being given repeated opportunities to so state, Fonseca has not sufficiently articulated how CUDDA's enactment ended Israel's life or *compelled* private physicians to act.

Fonseca summarily asserts that the "State bears ultimate culpability for the taking of Israel's life." Opposition to Motion to Dismiss TAC (Opp.), 2:6-11. Fonseca's conclusory opinion, however, does not satisfy her burden to allege facts showing causation. As a threshold matter, Fonseca cannot show causation because CUDDA, by its express terms, defers the actual determination of death to physicians based on medical standards. Cal. Health & Safety Code § 7180 ("A determination of death must be made in accordance with accepted medical standards."). Fonseca's opposition fails to address this shortcoming in her causal claims. Nor has Fonseca alleged any other facts that would show *CUDDA* caused Fonseca's alleged injuries. Indeed, Fonseca concedes that the determination that Israel suffered brain death and the decision to remove life support were made by physicians, and not the result of any mandate by CUDDA. See TAC ¶¶ 23-24, 54, 61. Thus, because Fonseca has not, and cannot, allege that CUDDA directed the decisions at issue, Fonseca cannot sustain her claim that CUDDA caused Israel's death. See *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citing *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 557 (2007) (A complaint does not "suffice if it tenders 'naked assertion[s]' devoid of 'further factual enhancement.'").

Next, Fonseca contends that CUDDA's definition of death, alone, is sufficient to meet her burden. Fonseca cites *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015), for the proposition that definitions can cause injury. Opp. at 2-3. Fonseca's reliance on *Obergefell* is misplaced. The statutes at issue in *Obergefell*—by definition—prohibited officials from issuing marriage licenses to same-sex couples or recognizing same-sex unions that were performed in other states. Quite unlike the statutes at issue in *Obergefell*, CUDDA defers the actual decision making to third parties. It provides that "[a] determination of death must be made in accordance with accepted

medical standards." Cal. Health & Safety Code § 7180(a). Thus, under CUDDA, physicians have discretion to make such determinations in accordance with their medical judgment, and nothing in CUDDA directs or prohibits them from taking the actions that they determine are medically appropriate.

Fonseca also mentions CUDDA's protocols regarding record-keeping, but does not address how these post-death determination protocols have caused her asserted injuries—loss of Israel's life and determination that he died on April 14. These administrative tasks have no bearing on Fonseca's injuries. Simply put, Fonseca has failed to proffer any facts or argument establishing that she has been injured by application of CUDDA.[1]

Finally, Fonseca, relying on *Lujan*, *supra*, argues that she has pled causation because Israel was the object of the challenged statute. Opp. at 5. *Lujan* does not support Fonseca's position. The Plaintiffs in *Lujan* called into question the scope of a federal regulation that required agencies to ensure that any authorized action or funding did not jeopardize endangered species. *Id.* at 558. The Court, in assessing whether the plaintiff environmental group had standing, reasoned that when the plaintiff is the object of the challenged action, "there is little question that the action or inaction has caused him injury." *Id.* at 561-562. Here, however, the action that caused Fonseca's alleged injury is not CUDDA (which is merely definitional), but rather the independent medical decisions of Israel's physicians. CUDDA has not caused Fonseca's injuries.

B. A Favorable Ruling Would Not Provide Fonseca the Relief She Seeks

Fonseca argues that a favorable ruling, i.e., "correcting" the date of death, will remedy the loss of medical insurance coverage and government benefits. Opp., at 7, *see also* TAC ¶ 63. Fonseca, once again, fails to address the fact that Kaiser physicians—who are not named in this action—declared that Israel died on April 14, not CUDDA or the Director. Fonseca speculates that if CUDDA is invalidated, these private physicians will reverse their medical opinions that

[1] Fonseca also cites *Planned Parenthood Minnesota, N. Dakota, S. Dakota v. Rounds*, 530 F.3d 724 (8th Cir. 2008) for the proposition that definitions alone cause harm. That case, however, offers no such support. *Planned Parenthood* involved a dispute over the *truthfulness and accuracy* of a statement that the State required be given to all women who sought an abortion. No such issues are involved here.

Israel suffered brain death on April 14. Opp. at 9-10. Fonseca, however, pleads no facts to support this speculative conclusion. As this Court previously recognized, "any pleading directed at the likely actions of third parties would almost necessarily be conclusory and speculative." ECF 79, 12 citing *Levine v. Vilsack*, 587 F.3d 986 (9th Cir. 2009). Such is the case here. Fonseca's injuries cannot be redressed by her claims against the Director.

For these same reasons, invalidating CUDDA will not restore Fonseca's stated loss of dignity caused by the declaration of death. Relying on *Obergefell*, Fonseca states that her and Israel's dignity can be restored by a favorable ruling. Opp. at 8. Once more, Fonseca's arguments fail because third party physicians, and not CUDDA or the Director, made the determination she now wishes to reverse. Fonseca has not met her burden to establish redressability.

II. LLDF ALSO LACKS ARTICLE III STANDING BECAUSE IT FAILS TO ALLEGE THAT CUDDA HAS CAUSED ITS INJURY OR THAT IT WOULD BE REDRESSED BY THIS ACTION

Like Fonseca, LLDF also lacks Article III standing. LLDF fails to establish that CUDDA caused its injury—frustration of its mission—and that the injury will be redressed by this action. LLDF leaves unaddressed the Director's argument that any frustration of LLDF's mission is the result of the independent decisions of medical professionals and hospitals, and not the result of CUDDA's mandate. Instead, LLDF simply reiterates, without facts, that "CUDDA's protocol" frustrates its work. Opp. at 9. Thus, just as in Fonseca's case, LLDF has pled no facts establishing that CUDDA has caused its injury.

LLDF's argument concerning redressability is also unpersuasive. LLDF suggests that invalidating CUDDA will deter physicians from rendering brain death declarations. It argues that this situation is akin to the time when physicians feared prescribing marijuana or assisting patients with end of life options because of the threat of criminal sanction. Opp. at 9-10. There, however, is no basis to conclude that physicians, in this context, fear censure or that they are likely to cease making such medical determinations if CUDDA is invalidated. LLDF has not alleged that—but for CUDDA—the medical community would abandon its recognition of brain death. Moreover, it has no basis to conclude that invalidating CUDDA will likely eliminate or

reduce its need to resist recommendations by physicians and attempts made by medical facilities to cease life-support measures. LLDF's suggestion that physicians will act differently is nothing more than speculation. Such conclusory and speculative statements, without factual allegations, are insufficient to satisfy LLDF's burden here. *Levine*, *supra*, 587 F.3d 997. A judgment against the Director here will not compel the medical community to reverse their medical opinions and protocols. See *Native Vill. of Kivalina v. ExxonMobil Corp.*, 696 F.3d 849, 867 (9th Cir. 2012) (Standing is lacking when the injury is "th[e] result [of] the independent action of some third party not before the court."). LLDF has not sufficiently alleged that invalidating CUDDA will redress its injury.

III. PLAINTIFFS STATE NO COGNIZABLE DUE PROCESS CLAIMS.

A. Plaintiffs Fail to Establish that CUDDA's Procedural Safeguards Are Unconstitutional.

"The fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner." *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976). Here, Plaintiffs' procedural due process challenges, both facial and as applied, fail to state a claim as a matter of law because California law provides—and Fonseca was in fact afforded—the right to challenge the determination of death. Plaintiffs, however, contend that notwithstanding these procedural protections, Fonseca and others similarly situated do not have a "realistic opportunity" to be heard. Opp. at 11. That is incorrect and Plaintiffs' arguments should be rejected.

Foremost, Plaintiffs here offer no response to the Director's argument that Fonseca was afforded the very process they now proclaim does not exist. *See* TAC ¶¶ 43-45. Plaintiffs do not dispute that Fonseca, not only challenged the Kaiser physicians' determination that Israel suffered brain death, but was also afforded the opportunity to secure her own independent assessment. ECF No. 14-2, 14-3, TAC ¶¶ 22-24. Only upon Fonseca's failure to proffer to the court competent medical evidence refuting the Kaiser physicians' determination, did the court dismiss her petition. ECF 14-8, 75:21-76:9, ECF 19-1, 2:5-6. Though Fonseca received several opportunities to be heard and to contest Kaiser's determination, Plaintiffs, citing *Aptheker v. Sec. of State*, 378 U.S. 500, 515 (1954), now dismiss this process solely because it is not expressly

included in CUDDA. Opp. at 12. *Aptheker*, however, does not support Plaintiffs' suggestion that due process requires that all protections have to be derived from the statute. Accordingly, Plaintiffs here fail to establish that judicial review of a brain death determination is not sufficient process.

Second, Plaintiffs' Opposition fails to address the additional safeguards that CUDDA provides as discussed by the Director's Motion. *See* § 7180(a) (requiring that all determinations of death be made in accordance with prevailing medical standards); *see also* § 7181 (requiring that in cases of brain death a single physician's opinion is insufficient; CUDDA requires *independent* confirmation by another physician).

Finally, Plaintiffs fail to identify—or even suggest— what different process they believe is constitutionally required under the circumstances. And, plaintiffs fail to discuss specifically what additional process (if any) Fonseca sought, but did not receive, in this case. Because Plaintiffs have not, and cannot, propose any additional facts that would bolster their First Cause of Action, it should be dismissed with prejudice.

B. Plaintiffs' Substantive Due Process Claims Are Also Without Merit.

Plaintiffs' substantive due process claims fail as a matter of law because CUDDA's enactment does not deprive anyone of life or liberty, and even if it did, the State's interests underlying CUDDA outweigh any individual interests in defining death differently. Motion at 14-16.

Plaintiffs maintain that *CUDDA* has deprived Israel and others of life. Opp. at 7, 10-11. However, CUDDA expressly provides that "[a] determination of death must be made *in accordance with accepted medical standards*." § 7180(a) (emphasis added). In cases of brain death, CUDDA also requires that before a patient is declared deceased "there shall be *independent* confirmation by another *physician*." *Id.*, § 7181 (emphasis added). Thus, CUDDA directs only that determinations of death be made according to accepted medical standards and be confirmed by an independent physician. Because Plaintiffs still fail to state encroachment—that *CUDDA* interfered with Fonseca's or Israel's rights—these claims should be dismissed on this ground alone.

Even if sufficient state involvement is established, Plaintiffs cannot demonstrate a constitutional violation. In her motion, the Director highlights the State's interests underlying CUDDA and argues that they should prevail when balanced against Fonseca's individual interests here. Motion at 15. Plaintiffs, in response, write off the State's interests and assert an unrestricted right to patient self-determination. Opp. at 13 (this "right of self-determination … is not subject to veto by the medical profession or the judiciary"). Plaintiffs argue that this includes the unquestioned right to determine whether to continue life-sustaining support. Opp. at 13. Plaintiffs, however, provide no support for such unfettered authority. Contrary to Plaintiffs' assertion, limits may be imposed by the State where competing legitimate interests are at stake, particularly where public health and safety are concerned. *See Carnohan v. United States*, 616 F.2d 1120, 1122 (9th Cir. 1980) (no fundamental right to access drugs the FDA has not deemed safe and effective).

The cases cited by Plaintiffs are unpersuasive. Plaintiffs cite *Bartling v. Superior Court*, 163 Cal. App.3d 186 (1984), for the proposition that a person has an unfettered right to direct medical decisions and decisions to prolong life. Opp. at 13. This decision, however, also acknowledges that the asserted fundamental rights are not absolute and must be balanced against the interests of the State. *Bartling*, *supra*, at 195 ("Balanced against [privacy interests] are the interests of the state in the preservation of life, the prevention of suicide, and maintaining the ethical integrity of the medical profession."); see also *Abigail All. for Better Access to Developmental Drugs v. Eschenbach*, 469 F.3d 129, 138 (D.C. Cir. 2006) ("the inherent right of every freeman to care for his own body and health in such way as to him seems 'best' is not 'absolute,' … [citation]").

Additionally, Plaintiffs overstate the scope of parental rights here. Plaintiffs suggest that unless the courts have determined the parents to be incompetent, parents have carte blanche authority to make any and all decisions regarding their children. Opp. at 15-16. Plaintiffs' cited case, *In re AMB*, 248 Mich. App. 144 (2001), is unpersuasive because in that case, the court sought to determine who was empowered to make the decision to withdraw life-support when the parent was incompetent to do so. *In re AMB* does not stand for the proposition that parents

possess limitless decision-making authority; no such authority exists. The "state has a wide range of power for limiting parental freedom and authority in things affecting the child's welfare . . . ." *Prince v. Massachusetts*, 321 U.S. 158, 167 (1944). Although parents undoubtedly have a right to the "custody, care and nurture of the child," *id.* at 166; *Troxel v. Granville*, 530 U.S. 57, 65 (2000), the "rights of parenthood are [not] beyond limitation." *Prince*, 321 U.S. at 167.

Plaintiffs have been given many opportunities to support their claims that CUDDA is unconstitutional, yet they still fail to allege any facts demonstrating that CUDDA is arbitrary or unreasoned. ECF No. 48, at 24:17-18 (This court has previously observed that plaintiff provides no facts that "suggest [] CUDDA is arbitrary, unreasoned, or unsupported by medical science."). It remains that Plaintiffs' disagreement with the prevailing definition of death cannot override the State's interests in enacting CUDDA. Plaintiffs' Second Cause of Action fails as a matter of law.

IV. LIKE PLAINTIFFS' FIRST AND SECOND CAUSES OF ACTION, PLAINTIFFS' THIRD CAUSE OF ACTION FOR DEPRIVATION OF LIFE IN VIOLATION OF THE CALIFORNIA CONSTITUTION FAILS.

Plaintiffs allege that CUDDA "deprived Israel of his right to life" in violation of the California Constitution. TAC ¶ 84. As argued herein, the claims based on the loss of Israel's life fail because CUDDA did not cause Israel's death, nor compel Kaiser physicians to run tests and determine that he suffered brain death. Plaintiffs have not addressed these arguments, and thus their claims under the California Constitution should also be dismissed on this ground alone.

Plaintiffs also assert that by defining death, the State encroaches upon one's inalienable right to enjoy and defend life and privacy. Opp. at 17-18. Without factual or legal support, Plaintiffs state that CUDDA is inconsistent with such rights because it gives to medical providers the authority to determine that an individual suffers from brain death. Opp. at 18. That is incorrect. CUDDA does not "authorize" physicians to make determinations against the wishes of parents. Though CUDDA defines death, it is silent as to all aspects of the actual assessment and determination of death. Here, Plaintiffs seem to suggest that CUDDA requires physicians to make brain death determinations. It does not. Nothing in CUDDA requires physicians to act. And, nothing in CUDDA *prevents* physicians from exercising their independent medical

judgment as to whether a patient is deceased, under any definition. As discussed above, CUDDA expressly affords physicians the discretion to so determine.

Plaintiffs also argue that the State has no right to define death in a manner that conflicts with their personal beliefs. Opp. at 18-19. They, however, offer no support for this proposition. It has long been recognized that the "constitutional guaranties of life, liberty, and property are not absolute in the individual, but are always circumscribed by the requirements of the public good." *In re Moffett*, 19 Cal. App. 2d 7, 14 (1937). Thus, an individual possesses no absolute right to be entirely free from state involvement. The court, in determining whether a constitutional violation occurred, must balance the individual liberty interest at stake against the State's interests. *Cruzan v. Director, Missouri Dept. of Health*, 497 U.S. 261, 279 (1990) (quoting *Youngberg v. Romeo*, 457 U.S. 307, 321 (1982)); *Donaldson v. Lungren*, 2 Cal.App.4th 1614, 1620 (1992). Here, the State's interests are vast, including, among others, the interests in drawing boundaries between life and death, ensuring that citizens receive quality health care, and ensuring that patients are treated with dignity, particularly at the end of their lives. Motion at 16. Plaintiffs have not addressed the State's interests or demonstrated that CUDDA is unreasonable or arbitrary. Accordingly, Plaintiffs have failed to state a claim under the California Constitution.

V. CUDDA DOES NOT VIOLATE THE RIGHT TO PRIVACY AND, THEREFORE, THE FOURTH AND FIFTH CAUSES OF ACTION SHOULD BE DISMISSED

Plaintiffs cannot establish that the State, by enacting CUDDA, has violated Fonseca's or Israel's right to privacy under the state and federal constitutions. It bears repeating that the medical decisions at issue were made by doctors according to prevailing medical standards and were not dictated by CUDDA. Motion at 17. Plaintiffs' argument in response is unavailing. Plaintiffs assert that individuals must have the unquestioned right to control decisions relating to their medical care. Opp. at 19. Yet, Plaintiffs allege no facts that *CUDDA* dictates whether life-sustaining support should continue.

Plaintiffs' claims fare no better even if the court proceeds to balance the interests of the parties. As stated in the Director's Motion, a parent's plenary authority over medical decisions for a child is not without its limits. Motion at 15-16. Plaintiffs offer no discussion or authority

that addresses the situation here: whether the right to dictate medical decisions should prevail once physicians determined that Israel suffered irreversible cessation of brain activity. Plaintiffs' Fourth and Fifth Causes of Action should be dismissed.

VI. THE *ROOKER-FELDMAN* DOCTRINE BARS THE "AS APPLIED" CLAIMS IN THE FIRST AND SECOND CAUSES OF ACTION.

Plaintiffs argue that *Rooker-Feldman* is limited to circumstances where a federal plaintiff alleges state court error and *expressly* seeks relief from the state court judgment. Opp. at 19-20. Plaintiffs also contend that the doctrine does not apply here because this action involves different defendants. *Id.* at 20. The doctrine, however, is not so narrowly limited. The focus is on the issues that were resolved by the state court and those now raised in the federal action, not on the parties. The doctrine precludes the exercise of jurisdiction not only over claims that are de facto appeals of a state court decision but also over suits that raise issues that are "inextricably intertwined" with an issue resolved by the state court. *See D.C. Court of Appeals v. Feldman*, 460 U.S. 462, 483, n. 16 (1983). As the Ninth Circuit has explained: "If claims raised in the federal court action are 'inextricably intertwined' with the state court's decision such that the adjudication of the federal claims would undercut the state ruling or require the district court to interpret the application of state laws or procedural rules, then the federal complaint must be dismissed for lack of subject matter jurisdiction." *Bianchi v. Rylaarsdam,* 334 F.3d 895, 898 (9th Cir. 2003). Such is the case here. In *Israel Stinson v. UC Davis Children's Hospital; Kaiser Permanente Roseville*, Case No. S-CV-0037673, the state court upheld the Kaiser physicians' determination that Israel died on April 14. ECF 14-8, 75:21-76:9, 19-1, 2:5-6. Fonseca here continues to dispute this determination and seeks an order from this Court reversing that determination. TAC ¶ 62, Prayer, ¶ 1. *Rooker-Feldman* bars Fonseca's "as applied" claims.

CONCLUSION

This court should dismiss the Third Amended Complaint without leave to amend.

Dated: August 4, 2017

Respectfully Submitted,

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CERTIFICATE OF SERVICE

Case Name: **Jonee Fonseca v. Kaiser Permanente Medical Center Roseville (CDPH)** No. **2:16-cv-00889-KJM-EFB**

I hereby certify that on August 4, 2017, I electronically filed the following documents with the Clerk of the Court by using the CM/ECF system:

DEFENDANT'S REPLY IN SUPPORT OF MOTION TO DISMISS THIRD AMENDED COMPLAINT

I certify that **all** participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on August 4, 2017, at Sacramento, California.

J. Hutcherson	/s/ J. Hutcherson
Declarant	Signature

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