17-17153

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JONEE FONSECA, AN INDIVIDUAL PARENT AND GUARDIAN OF I.S., A MINOR,

Plaintiff and Appellant,

v.

KAREN SMITH, M.D. IN HER OFFICIAL CAPACITY AS DIRECTOR OF THE CALIFORNIA DEPARTMENT OF PUBLIC HEALTH; AND DOES 2-10, INCLUSIVE,

Defendant and Appellee.

On Appeal from the United States District Court
for the Eastern District of California

No. 2:16-cv-00889-KJM-EFB
Honorable Kimberly J. Mueller, Judge

ANSWERING BRIEF

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INTRODUCTION

Plaintiffs-Appellants Jonee Fonseca (Fonseca) and Life Legal Defense Foundation (LLDF) (collectively, Plaintiffs) brought suit against Karen Smith, M.D., Director of the California Department of Public Health (Director), challenging (1) the constitutionality of the California Uniform Determination of Death Act (CUDDA), the statute that has defined death in California for over 35 years, and (2) the determination by non-party physicians that Fonseca's son, Israel, died on April 14, 2016, when he was declared brain dead, rather than on August 25, 2016, when he was removed from life-support and his heart stopped beating. Plaintiffs assert that CUDDA's definition of death to include brain death, and the non-party physicians' independent determination that Israel died on April 14, 2016, violate Plaintiffs' due process rights, as well as Plaintiffs' rights to privacy—specifically, the right to make medical decisions on behalf of Israel—under the United States and California Constitutions.

As the district court correctly determined, Plaintiffs lack Article III standing to bring their claims against the Director, who is the only defendant sued. First, there is no causal link between the Director and the non-party physicians' determination that Israel died on April 14, 2016, as the Director's duties are limited to recordkeeping, and the Director plays no part

in making, directing, or regulating physicians' determinations of death. Nor is there a causal link between CUDDA and the physicians' determination that Israel died on April 14, 2016, because under California law a determination of death is not mandated by CUDDA's definition, but instead must be (and in this case was) made based upon the independent determination of a medical doctor (and, in the case of brain death, at least two independent medical doctors) in accordance with accepted medical standards. Cal. Health & Saf. Code § 7180(a).[1] Simply put, Plaintiffs have sued the wrong party to address their claims, which fundamentally assert that *non-party physicians* incorrectly determined that Israel had died on April 14, 2016.

Nor are Plaintiffs' injuries redressable through Plaintiffs' claims against the Director, as an order invalidating CUDDA would not change the doctors' independent medical opinions that Israel died on April 14, 2016. Further, to the extent that Plaintiffs seek an order from the federal district court amending the date of death on Israel's death certificate, their claims are barred by the *Rooker-Feldman* doctrine because Plaintiffs have already challenged the doctors' determination of death in state court, and thus these

[1] All further statutory references are to the California Health and Safety Code unless otherwise noted.

claims constitute an improper de facto appeal of that state court judgment. Plaintiffs have failed to show that they have standing to bring this lawsuit against the Director, and accordingly the district court's order of dismissal should be affirmed.

The district court's order of dismissal may also be affirmed on two additional grounds not reached by the district court. First, Plaintiffs' claims against the Director are barred by the State's sovereign immunity under the Eleventh Amendment. The Eleventh Amendment bars claims in federal court against the State, including its officers acting in their official capacity. While *Ex parte Young*, 209 U.S. 123 (1908), provides an exception allowing certain suits for prospective injunctive or declaratory relief against state officers to prevent them from enforcing unconstitutional laws, that exception does not apply here because the Director does not enforce CUDDA, which is purely definitional and leaves the determination of death to the discretion of doctors in accordance with accepted medical standards.

Second, even if Plaintiffs' claims were justiciable, the dismissal should be affirmed because Plaintiffs have failed to state a claim upon which relief can be granted. Plaintiffs' procedural due process claims fail because as a matter of law California provides sufficient procedures to challenge a determination of death—indeed, prior to filing this case Fonseca utilized

those procedures to unsuccessfully challenge the doctors' determination of Israel's death in state court. Plaintiffs' substantive due process claims fail at the threshold because Plaintiffs provide no facts suggesting that CUDDA is arbitrary, unreasoned, or unsupported by medical science. And Plaintiffs' privacy claims concerning the right to make medical decisions also fail at the threshold because as a matter of law CUDDA does not direct or interfere with the decisions of doctors, exercising their medical judgment, concerning medical treatment.

For these reasons, the district court's dismissal of Plaintiffs' Third Amended Complaint should be affirmed.

JURISDICTIONAL STATEMENT

The district court did not have jurisdiction over Fonseca and LLDF's claims against the Director—even though the Third Amended Complaint raised federal questions under 28 U.S.C. § 1331—because, as the district court found, they lacked Article III standing to sue the Director. *See infra* Argument Part I. Additionally, Plaintiffs' claims, which are brought against the Director in her official capacity, are barred by the State's sovereign immunity under the Eleventh Amendment. *See infra* Argument Part II.

The district court's order granting the motion to dismiss is appealable under 28 U.S.C. § 1291, which is the statutory basis for the jurisdiction of this Court.

The district court's order granting the motion to dismiss was filed September 25, 2017, and Fonscea and LLDF filed their notice of appeal on October 19, 2017. The appeal is timely. Fed. R. App. P. 4.

ISSUES PRESENTED FOR REVIEW

1. Did the district court properly dismiss the Third Amended Complaint for failure to establish Article III standing?

   a. Did the district court properly determine that Plaintiffs failed to establish the causation element required for Article III standing?

   b. Did the district court properly determine that Plaintiffs failed to establish the redressability element required for Article III standing?

2. May the district court's order of dismissal also be affirmed because Plaintiffs' claims are barred by the State's sovereign immunity under the Eleventh Amendment?

3. May the district court's order of dismissal also be affirmed because the Third Amended Complaint fails to state a claim as a matter of law?

LEGAL BACKGROUND

I. THE CALIFORNIA UNIFORM DETERMINATION OF DEATH ACT (CUDDA)

Over 35 years ago, in 1982, California adopted the California Uniform Determination of Death Act (CUDDA), under which the State defines death as follows:

> 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. A determination of death must be made in accordance with accepted medical standards.

§ 7180(a).

CUDDA is modeled on the Uniform Determination of Death Act (Uniform Death Act), which was approved by the National Conference of Commissioners on Uniform Laws in 1980, and has been adopted by over 33 other States. Request for Judicial Notice (RJN), Ex. B; *see also,* 14 Witkin, Summary 11th Wills § 21 (2017). The definition of death codified by the Uniform Death Act is the result of the agreement between the American Bar Association (ABA) and the American Medical Association (AMA). RJN, Ex. B, at 3. The Uniform Death Act does not comment on "acceptable medical diagnosis or procedures"; it offers nothing more than "the general

legal standard for determining death," and not the medical criteria for doing so. *Id*. at 4.

Before CUDDA's adoption, California's statutory definition of death referred only to brain death. RJN, Ex. A, at 1 (death is "a person who has suffered a total and irreversible cessation of brain function…"). In 1982, the California Legislature adopted the Uniform Death Act when it enacted CUDDA. RJN, Ex. A, at 1. Thus, CUDDA added to California law the common law definition of death, which included cessation of cardiorespiratory functions, and conformed California's approach to that of the majority of States in the country. *Id.*

CUDDA contains a number of patient protections. It requires "independent confirmation by another physician" when an individual is pronounced dead based on the determination that the individual has sustained irreversible cessation of brain function. § 7181. In the event that organs are donated, the physician making the independent confirmation may not participate in the procedures for removing or transplanting the organs. § 7182. Additionally, complete medical records shall be "kept, maintained, and preserved" with respect to the determination of brain death. § 7183. And, following determinations of death under CUDDA, families must

receive a reasonable period of accommodation to gather at the patient's bedside and to observe any religious or cultural practices. § 1254.4.

If a disagreement exists concerning the determination of death, judicial review is available by filing a petition with the superior court. *See Dority v. Superior Court*, 145 Cal.App.3d 273, 280 (1983) ("The jurisdiction of the court can be invoked upon a sufficient showing that it is reasonably probable that a mistake has been made in the diagnosis of brain death or where the diagnosis was not made in accord with accepted medical standards."). Additionally, a person may seek to correct errors stated in a registered certificate of death by complying with the process contained in § 103225 *et seq.*

II. THE DIRECTOR HAS RECORDKEEPING DUTIES CONCERNING CERTIFICATES OF DEATH BUT PLAYS NO ROLE IN DETERMINING WHETHER, OR WHEN, A PERSON HAS DIED

The Director's duties in relation to CUDDA are limited to overseeing and enforcing certain recordkeeping requirements for Certificates of Death. Specifically, the Director, or her designee, is the "the State Registrar of Vital Statistics."[2] *See* § 102175 et seq. These requirements include ensuring that determinations of death are recorded on the proper forms, that those forms

[2] The Director has delegated her duties in this regard to Dr. James Greene.

are timely completed and submitted, and that records are properly maintained. *See, e.g.*, §§ 102145 (hospitals must keep records sufficient and adequate for completion of death certificates), 102200 (State Registrar shall provide the forms for Certificates of Death), 102775 (each death shall be registered with the local registrar within eight calendar days), 102800 (attending physician shall complete medical and health section of Certificate of Death within 15 hours after the death).

In overseeing these recordkeeping requirements, however, the Director has no role in determining whether, or when, a person has died. That determination is made solely by medical professionals. "The physician or surgeon last in attendance . . . shall . . . specify . . . the hour and day on which death occurred, except in deaths required to be investigated by the coroner." § 102825; *see also* § 7180(a) ("A determination of death must be made in accordance with accepted medical standards.").

FACTUAL AND PROCEDURAL BACKGROUND

I. PHYSICIANS DETERMINED THAT ISRAEL SUFFERED BRAIN DEATH ON APRIL 14, 2016

On April 1, 2016, Israel suffered a severe asthma attack and was taken to Mercy General Hospital in Sacramento where he was placed on a breathing machine. 2ER 119 ¶ 7. He was eventually transferred to

University of California, Davis Medical Center (UC Davis), and admitted to the pediatric intensive care unit. 2ER 119 ¶ 7. After a series of tests, including a magnetic resonance imaging (MRI) and computed tomography (CT) scan, physicians at UC Davis concluded on April 10, 2016, that Israel suffered brain death. 2ER 122 ¶ 20. Fonseca requested that Israel be transferred to another hospital. The following day, Israel was transferred to Kaiser Permanente Roseville Medical Center (Kaiser). 2ER 122 ¶ 21. Kaiser physicians, following all procedures recommended by the American Academy of Pediatrics and the Society of Critical Care Medicine, performed further tests and confirmed that Israel was brain dead. 2ER 122 ¶¶ 22-24. Israel's attending physician, Dr. Michael Steven Myette, completed the physician's certification portion of the death certificate attesting that as of April 14, 2016, Israel was deceased. 2ER 125-126 ¶ 39; 3ER 447.

II. FONSECA UNSUCCESSFULLY CHALLENGED THE DECLARATION OF DEATH IN STATE COURT

Following Dr. Myette's determination that Israel was deceased, Fonseca sued both hospitals that treated Israel in Placer County Superior Court in a case captioned *Stinson v. UC Davis Children's Hospital, et al.*, Case No. S-CV-0037673. 2ER 126 ¶43; 5ER 1007-1013. Fonseca sought to prevent Kaiser from removing life-sustaining support while she secured

an independent examination of Israel. The superior court granted a temporary restraining order (TRO) requiring Kaiser to maintain life support, 5ER 977, and allowing Fonseca time to find a physician to conduct an independent medical examination pursuant to § 7181, 5ER 909, 917-919, 997-998. The TRO was extended over two weeks to afford Fonseca additional time to secure an independent examination or relocate Israel to another hospital. *See* 5ER 909, 917-919, 999, 1001, 1004. Fonseca did not have Israel assessed by an independent physician. 5ER 917-919.

On April 27, 2016, the court concluded that "a determination of death [] has been made in accordance with accepted medical standards under [Section] 7181." 5ER 876-877. The matter reconvened on April 29, 2016 and the court confirmed compliance with CUDDA and dismissed the petition. 5ER 909, 929-930. Fonseca did not appeal.

III. FONSECA FILED THIS ACTION SEEKING RELIEF IN FEDERAL COURT

A. Initial Federal Proceedings

On April 28, 2016, Fonseca filed this action in federal court. 5ER 1040. The complaint named Kaiser and Dr. Myette as defendants, and alleged claims under the federal Constitution, the federal Rehabilitation Act, and the Americans with Disabilities Act. 5ER 1040. On May 2, 2016, the

district court granted a temporary restraining order that enjoined Kaiser from removing life support. 5ER 983.

On May 3, 2016, Fonseca amended the complaint to include the Director. 4ER 627-644. The First Amended Complaint sought, among other things, an order preventing Kaiser from removing life-sustaining support and a declaration that CUDDA is unconstitutional on its face. 4ER 644-645.

On May 6, 2016, Fonseca filed a motion for preliminary injunction seeking to restrain Kaiser from removing Israel from ventilation. 4ER 543. Kaiser opposed the motion and the matter was heard on May 11, 2016. 4ER 681-704. The court issued an order denying the motion on May 13, 2016. 3ER 317. The court determined, in part, "Fonseca has not borne her burden to show she is likely to succeed on the merits of the [constitutional] claims [against the Director that] she relies on at this stage, and she has not presented sufficiently serious questions to justify a preliminary injunction." 3ER 343-44. In particular, the court concluded: "Nothing before the court suggests CUDDA is arbitrary, unreasoned, or unsupported by medical science." 3ER 340. The court recognized that "[the uniform definition of death] and similar brain death definitions have been uniformly accepted throughout the country." 3ER 340. Moreover, the court determined that

Fonseca is unlikely to show that CUDDA's protections are inadequate. 3ER 344.

Fonseca filed a notice of interlocutory appeal on May 14, 2016, seeking relief from the Order denying the motion for a preliminary injunction. ECF 3ER 310. Days later, Fonseca dismissed the appeal as Israel was flown to a facility out of the country. 3ER 306, 2ER 126-127.

On June 8, 2016, Fonseca dismissed Kaiser and Dr. Myette from the First Amended Complaint, leaving the Director as the only defendant. 3ER 302.

On July 1, 2016, Fonseca amended her complaint for the second time. The Second Amended Complaint asserted five claims against the Director as the sole defendant: (1) Deprivation of Life in Violation of Due Process under the Fifth and Fourteenth Amendments; (2) Deprivation of Parental Rights in Violation of Due Process of Law under the Fifth and Fourteenth Amendments; (3) Deprivation of Life under the California Constitution; (4) Violation of Privacy Rights under the United States Constitution; and (5) Violation of Privacy Rights under the California Constitution. 3ER 284-300.

B. Interim State Court Proceedings

On August 6, 2016, before the Director responded to the Second Amended Complaint in this federal action, Israel returned to the United States and was admitted to Children's Hospital Los Angeles (CHLA). 2ER 128, ¶ 52. On August 16, 2016, Fonseca was informed that the hospital intended to remove Israel's ventilator. 2ER 128, ¶ 54. On August 18, 2016, Fonseca initiated *Stinson v. Children's Hospital Los Angeles*, Los Angeles County Superior Court Case No. BS164387, again contesting the determination of death and seeking an independent evaluation of Israel. 2ER 264-272. The court issued a TRO requiring CHLA to refrain from removing Israel from the ventilator and to cooperate with Fonseca to facilitate an independent evaluation of Israel. 2ER 280-281.

After reviewing the death certificate and information provided by CHLA, on August 25, 2016, the court dissolved its TRO. 2ER 283; 2ER 128 ¶¶ 58-59. Later that same day, CHLA removed Israel from the ventilator, eliminating any dispute that Israel is deceased. 2ER 129 ¶¶ 60-61.

C. Subsequent Federal Proceedings Leading to this Appeal

On August 31, 2016, the Director filed a motion to dismiss the Second Amended Complaint, which the district court granted on March 28, 2017.

2ER 207, 137. The court determined that Fonseca's allegations were insufficient to establish that CUDDA caused her injury—the Kaiser physicians' determination that Israel had died—or that invalidating CUDDA would redress that injury. 2ER 147-149. Because it found that Fonseca did not have standing, the district court declined to address the Director's other arguments for dismissal. 2ER 149. The court gave Fonseca leave to amend. 2ER 149.

On April 14, 2017, Fonseca—now joined by LLDF—filed the operative Third Amended Complaint which again challenged the validity of CUDDA as well as the non-party physicians' determination of death, stating the same constitutional claims as those alleged in the Second Amended Complaint: (1) Deprivation of Life in Violation of Due Process under the Fifth and Fourteenth Amendments; (2) Deprivation of Parental Rights in Violation of Due Process of Law under the Fifth and Fourteenth Amendments; (3) Deprivation of Life under the California Constitution; (4) Violation of Privacy Rights under the United States Constitution; and (5) Violation of Privacy Rights under the California Constitution. 2ER 116. Plaintiffs sought extraordinary relief: (1) an injunction directing the Director to expunge all records that state that Israel died on April 14, 2016; (2) an injunction directing that all records be amended to reflect that Israel

died on August 25, 2016; and (3) a judicial declaration that CUDDA is unconstitutional on its face and as applied. 2ER 116, 135.

The allegations of the Third Amended Complaint focus on the alleged mistakes made by third party physicians in determining that Israel died on April 14, and not on CUDDA itself. 2ER 121-123, 125-127 ¶¶ 18-28, 35-36, 42, 44-50. LLDF, without providing any specific facts, alleges that its efforts to resist attempts made by "medical facilities to remove life support" have been significantly impacted by CUDDA. 2ER 118 ¶ 4.

The Director moved to dismiss on the grounds that Plaintiffs lack standing, that Plaintiffs' challenges to the determination of death are barred by *Rooker-Feldman*, and that the Third Amended Complaint fails to state a claim upon which relief can be granted. 2ER 88-115. On September 25, 2017, the district court dismissed the Third Amended Complaint without leave to amend. The court determined that Fonseca lacks standing because her causal story "turn[s] on 'independent actions of third parties that break the causal link between' CUDDA and Fonseca's injury." 1ER 12. Moreover, "[d]ue to an attenuated chain of causation, Fonseca has not shown a 'substantial likelihood' that declaring CUDDA unconstitutional would redress her injury." 1ER 12. The court also acknowledged that two state courts have reviewed and upheld the determination of death. Therefore, the

court held that Plaintiffs' request for an order amending the date of death on the death certificate is not redressable because it is barred by the *Rooker-Feldman* doctrine, which "prohibits this court from disrupting or undoing a prior state-court judgment." 1ER 12-13.

As to LLDF's standing, the court reached the same conclusion, stating that its "injury is not plausibly caused by CUDDA and will not be redressed by the remedies plaintiffs seek." 1ER 15. Because the court dismissed on standing grounds, it did not address the Director's arguments that the Third Amended Complaint fails to state a claim on the merits. In conclusion, the district court determined:

> Plaintiffs have not shown they have standing to pursue their claims and the complaint must be dismissed. In the court's prior order concluding the same, the court granted leave to file a third amended complaint . . . . Plaintiffs now have not provided a basis to suggest granting leave to file a fourth amended complaint would not be futile.

1ER 15.

Plaintiffs filed a notice of appeal on October 19, 2017.

STANDARD OF REVIEW

This Court reviews de novo a dismissal for lack of subject matter jurisdiction under Federal Rule of Civil Procedure 12(b)(1). *Crist v. Leippe*, 138 F.3d 801, 803 (9th Cir. 1998). It applies the same de novo standard to a

dismissal for failure to state claim under Federal Rule of Civil Procedure 12(b)(6). *Steckman v. Hart Brewing, Inc*., 143 F.3d 1293, 1295 (9th Cir. 1998). Standing is a question of law, which is also reviewed de novo. *San Diego County Gun Rights Comm. v. Reno*, 98 F.3d 1121, 1124 (9th Cir. 1996).

SUMMARY OF ARGUMENT

This Court should affirm the district court's dismissal of the Third Amended Complaint for lack of Article III standing. First, as the district court correctly determined, Fonseca cannot establish the element of causation because there is no causal connection between the Director or CUDDA and Fonseca's alleged injury—the determination by non-party physicians, in accordance with accepted medical standards, that Israel died on April 14, 2016. Second, the district court correctly held that Fonseca cannot establish the element of redressability, as an order invalidating CUDDA would not change the non-party physicians' medical determination concerning Israel's death, and Fonseca's request for an order amending the death certificate is barred by the *Rooker-Feldman* doctrine because Fonseca already litigated this claim in state court. Finally, LLDF has waived any challenge to the district court's determination that it lacks organizational

standing, and in any event, LLDF lacks organizational standing for the same reasons as Fonseca.

Additionally, the district court's dismissal should also be affirmed on two additional, independent grounds not reached by the district court. First, Plaintiffs' claims against the Director are barred by the State's sovereign immunity under the Eleventh Amendment. While *Ex parte Young*, 209 U.S. 123, provides an exception that allows certain suits for prospective injunctive or declaratory relief against state officers to prevent them from enforcing unconstitutional laws, that exception does not apply here because the Director does not enforce CUDDA, as CUDDA is purely definitional and does not impose any enforceable requirements concerning whether brain death constitutes death.

Second, on the merits Plaintiffs' allegations fail to state a claim upon which relief can be granted. Plaintiffs' procedural due process claims fail because California provides more than sufficient procedures to challenge a determination of death in state court, and Fonseca in fact utilized those procedures prior to filing this case. Plaintiffs' substantive due process claims fail because Plaintiffs have not alleged any facts showing that CUDDA—which adopts the medical standards approved by the AMA, ABA, and the majority of all States—is arbitrary, unreasoned, or not

supported by medical science. And Plaintiffs' privacy claims asserting a violation of the right to make medical decisions fail because CUDDA does not interfere with physicians' medical decisions concerning what treatment to provide.

For these reasons, the judgment of the district court should be affirmed.

ARGUMENT

I. THE DISTRICT COURT PROPERLY DETERMINED THAT PLAINTIFFS LACK ARTICLE III STANDING TO BRING THEIR CLAIMS AGAINST THE DIRECTOR

The district court properly determined that Plaintiffs lack Article III standing to bring their claims against the Director. "[T]he irreducible constitutional minimum of [Article III] standing contains three elements." *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992). "First, the plaintiff must have suffered an 'injury in fact'—an invasion of a legally protected interest which is (a) concrete and particularized, and (b) 'actual or imminent, not conjectural or hypothetical.'" *Id.* "Second, there must be a causal connection between the injury 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.'" *Id.* (citations omitted). "Third, it must be 'likely,' as opposed to merely 'speculative,' that the injury will be redressed by a favorable

decision." *Id.* at 561; see also *City of Sausalito v. O'Neill*, 386 F.3d 1186, 1197 (9th Cir. 2004).

As explained below, Fonseca cannot establish the causation or redressability required for standing to bring her claims against the Director, and Plaintiffs have waived any challenge to the district court's ruling that LLDF lacks organizational standing.

A. Fonseca Cannot Demonstrate that the Alleged Injuries Are Fairly Traceable to the Director or CUDDA and Not the Result of Independent Decisions by Third Party Physicians

Fonseca lacks standing because she cannot establish that the injuries she alleges—the determination that Israel died on April 14, 2016, and the decision to remove him from life support—were caused by the Director or CUDDA. To establish causation, Fonseca must show that the "alleged injury [is] 'fairly traceable to the challenged action of the defendant,' rather than to 'the independent actions of some third party not before the court.'" *Ass'n of Pub. Agency Customers v. Bonneville Power Admin.*, 733 F.3d 939, 953 (9th Cir. 2013) (quoting *Lujan*, 504 U.S. at 560). "The 'line of causation' between the defendant's action and the plaintiff's harm must be 'more than attenuated.'" *Native Vill. of Kivalina v. ExxonMobil Corp.*, 696 F.3d 849, 867 (9th Cir. 2012) (citations and internal quotation marks

omitted). A "causal chain does not fail simply because it has several links, provided those links are not hypothetical or tenuous and remain plausible.'" *Id.* "But where the causal chain involves numerous third parties whose independent decisions collectively have a significant effect on plaintiffs' injuries, . . . the causal chain is too weak to support standing at the pleading stage." *Id.*

Here, Fonseca contends that CUDDA causes doctors to declare a brain dead patient to be dead, which in turn causes doctors to withdraw life support. 1ER 124, 132-134. As explained below, multiple links in the chain are speculative, and thus the requisite causal connection is absent.

1. The Director does not have any causal connection to Plaintiffs' alleged injuries

As a threshold matter, the Director does not have any causal connection to Plaintiffs' alleged injuries because the Director does not enforce CUDDA or otherwise make or direct determinations of death. The Director's role relating to determinations of death is limited to implementing and enforcing recordkeeping requirements. *See* § 102175 et seq. The determination of death is made by physicians in accordance with accepted medical standards, which the Director does not regulate, enforce, or direct. *See* §§ 7180(a) (determination must be made "in accordance with accepted medical

standards"), 102825 (time of death must be specified by "[t]he physician or surgeon last in attendance" except in deaths required to be investigated by the coroner).

2. CUDDA does not have any causal connection to Plaintiffs' alleged injuries

Plaintiffs also cannot show causation because CUDDA does not dictate when a physician must make a determination of death, or what procedures should be followed to make such a determination, but instead leaves these decisions to the discretion of medical professionals. Specifically, CUDDA states that "[a] determination of death must be made *in accordance with accepted medical standards*." § 7180(a) (emphasis added). Thus, while CUDDA provides a general definition of death based upon the medical standards set forth in the Uniform Death Act, CUDDA leaves the ultimate decision to the discretion of third-party doctors, to be made in accordance with "accepted medical standards," which CUDDA does not identify or define. *Id.* Nothing in CUDDA requires doctors to test for brain death or to issue a declaration of death if they believe that brain death has occurred. Further, "[w]hen an individual is pronounced dead by determining that the individual has sustained an irreversible cessation of all functions of the entire brain, including the brain stem, there shall be *independent*

confirmation by another physician." § 7181 (emphasis added). Accordingly, any determination of death based upon brain death requires an independent determination by at least two physicians, exercising their medical judgment based on accepted medical standards. Thus, a determination of death is caused by the independent decisions of these third party physicians, and not by CUDDA.

Similarly, Fonseca cannot show that CUDDA caused Israel's treating physicians to remove life support. CUDDA does not direct physicians or hospitals to remove life-sustaining support, and nothing in CUDDA requires that life-sustaining support be removed once a determination of death is made. Thus, any decision to remove life-support is left to the physicians, hospitals, and the patient's family. A determination of death "does not mean the hospital or doctors are given the green light to disconnect a life-support device." *Dority v. Superior Court*, 145 Cal. App. 3d 273, 279 (1983). A parent has the right to consultation and participation in the decision to withdraw life support. *Id.* at 279-280.

Indeed, the Third Amended Complaint contains allegations that establish beyond dispute that third party doctors made the decisions at issue in this case. Kaiser physicians made the medical declaration that Israel died on April 14, 2016. 1ER 122-123. Months later, the doctors at CHLA

determined that life support should be removed, and removed support based on their medical determination that Israel was deceased. 1ER 128. Fonseca challenges CUDDA, but nothing in CUDDA directed these decisions.

On appeal, Plaintiffs contend that Fonseca meets the causation requirement for standing because CUDDA "defines and dictates procedures for the determination of death" (AOB 12), such as requiring independent confirmation of brain death by another physician (§ 7181), that medical records of patients determined to be brain dead be maintained (§ 7183), that doctors fill out portions of the Certificate of Death provided by the Department within 15 hours of the patient's death (§ 102800), and that the medical facility register the death with county officials (§102775). AOB 12-14. But section 7181's requirements simply reaffirm that a determination of death must be based on the medical judgment of physicians, and in cases of brain death, at least two independent physicians. And the remaining *post*-determination-of-death recordkeeping procedures have no effect on the determination of death itself—they do not direct or affect the physician's medical opinion that a person has died, nor do they direct decisions on whether an individual remains on life support. And as a matter of law, the determination of death itself is not mandated by CUDDA, but rather left to the discretion of the treating physicians "in accordance with accepted

medical standards." § 7180(a). As Plaintiffs concede, CUDDA "stop[s] short of mandating" a determination of death. AOB 13-14.

Plaintiffs also contend that they can satisfy the causation requirement by recasting their claim as challenging the State's *inaction* in failing to prohibit doctors from making determinations of death based on brain death, and deferring to the medical community on how to make this determination. AOB 13-16, 18, 21. This is incorrect. Plaintiffs did not plead such an "inaction" claim in the operative Third Amended Complaint, nor did they seek leave to amend to add such a claim, and thus any such claim has been waived. *Singleton v. Wulff*, 428 U.S. 106, 120 (1976) (failure to raise an issue before the district court so as to afford the district court the opportunity to decide the issue will generally result in a waiver of the issue on appeal).[3] And, even if Plaintiffs could raise such a claim for the first time on appeal, they would still lack standing because the chain of causation from the State's alleged inaction to the alleged injury would be broken by the intervening

[3] Indeed, by seeking to recast their claims to involve state inaction, Plaintiffs essentially concede that their alleged injury was caused by the doctors' medical decisions, and not by CUDDA or the Director.

medical decisions of the third party physicians that the Director does not regulate. *Native Vill. of Kivalina*, 696 F.3d at 867.[4]

Plaintiffs also argue that it is "[u]ndisputed" that "Kaiser relied on CUDDA to make its initial move toward declaring brain death and ending life support, and CHLA further relied on the State-issued Certificate of Death to terminate Israel's life support." AOB 17-18. But Plaintiffs have not alleged any facts to support these conclusory assertions that the physicians' decisions were based on CUDDA, rather than their independent medical judgment. And as a matter of law, the physicians were required to exercise their independent medical judgment, in accordance with accepted medical standards, in making these decisions. § 7180(a).

Further, Plaintiffs assert that there are medical disputes as to whether Israel was brain dead or in a persistent vegetative state, and whether CHLA conducted the proper tests to assess Israel before removing life support.

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[4] Plaintiffs cite several cases holding that a state actor may be liable for harms caused by a third party when the state actor places the victim in harm's way and fails to protect him. AOB 21 (citing *Bowers v. Devito*, 686 F.2d 616 (7th Cir. 1982), *Wood v. Ostrander*, 879 F.2d 583 (9th Cir. 1989), and *L.W. v. Grubbs*, 974 F.2d 119 (9th Cir. 1992)). Here, however, Plaintiffs have not alleged any facts showing that the State placed Israel in harm's way.

AOB 16-17, 19. But these disputes do not support Plaintiffs' challenges *to CUDDA* or as to the Director of the Department of Public Health (which does not regulate doctors in any manner), but instead should have been raised in Plaintiffs' state court challenges *to the physicians' determinations of death*.[5] Indeed, because CUDDA's definition of brain death requires the "*irreversible* cessation of all functions of the entire brain, including the brain stem," § 7180(a), if Plaintiffs are correct that Israel was not brain dead, but instead in a potentially reversible persistent vegetative state, then CUDDA's definition of death would not apply. Plaintiffs' claims, if any, lie against the physicians who made the determination of death, not against CUDDA.

Additionally, Plaintiffs contend that the district court applied the wrong standard on causation because, they allege, the district court required Fonseca to establish proximate causation. AOB 20 (citing *Maya v. Centex Corp*., 658 F.3d 1060 (9th Cir. 2011)); AOB 22-25. But Plaintiffs' premise is incorrect, as the district court did not require proximate causation, but only that there be a "fairly traceable causal chain between [Fonseca's] injury and defendant's conduct, unbroken by the independent actions of some third

[5] In fact, Fonseca had the opportunity to have Israel assessed by independent physicians, and to directly challenge the determination that Israel was brain dead. 5ER 999, 1001, 1004.

party." 1ER 11. The district court applied the proper causation standard, consistent with *Maya* and well settled law governing the causation requirement. *See Maya*, 658 F.3d at 1070 (plaintiffs must establish a "line of causation" between defendants' action and their alleged harm that is more than "attenuated" and not disrupted by the "independent decisions" of third parties); *Native Vill. of Kivalina*, 696 F.3d at 867; *see also Bonneville Power Admin.*, 733 F.3d at 953. Plaintiffs' suggestion that this Court should disregard these standards in favor of a more lenient causation approach is without support.[6]

Plaintiffs next assert that when the plaintiff is the "object of the regulation, there is little doubt regarding causation." AOB 20 (citing *Lujan*, 504 U.S. at 562). But Plaintiffs misconstrue *Lujan's* discussion of the "object" of the regulation. Here, the object of CUDDA's "regulation" is not patients or families; indeed, CUDDA does not actually *regulate* the conduct of anyone, but merely provides a general definition of death while expressly

[6] Plaintiffs also suggest that the well-settled causation standards articulated by this Court and relied on by the district court should be disregarded because those cases did not involve constitutional claims. AOB 23-24. Plaintiffs, however, provide no authority that causation standards vary depending on the claims asserted or that a more lenient standard should be applied here.

deferring to the independent medical judgment of physicians in making determinations of death. *See* § 7180(a). As *Lujan* states: "When . . . a plaintiff's asserted injury arises from the government's allegedly unlawful regulation (or lack of regulation) of *someone else*," causation is not presumed and "much more is needed" to establish standing. *Lujan*, 504 U.S. at 562. Under such circumstances, "causation and redressability ordinarily hinge on the response of the regulated third party to the government action or inaction—and perhaps on the response of others as well," and "the existence of one or more of the essential elements of standing 'depends on the unfettered choices made by independent actors not before the courts and whose exercise of broad and legitimate discretion the courts cannot presume either to control or to predict.'" *Id.* Here, Plaintiffs are not the "object" of the challenged regulation, and thus there is no presumption of causation.

Finally, Plaintiffs contend that the district court's decision conflicts with the D.C. Circuit's opinion in *Abigail Alliance for Better Access to Developmental Drugs v. Von Eschenbach*, 469 F.3d 129 (D.C.Cir. 2006), which they contend held that the FDA's imposition of "many hurdles" to patients accessing experimental drug trials was sufficient to establish causation. AOB 25-26. Here, CUDDA has not enacted any hurdles to a doctor making a determination of death in accordance with accepted medical

standards. Plaintiffs' disagreement with the accepted medical standards concerning the determination of death, and with the doctors' application of those standards to Israel's case, might provide standing to sue the doctors to challenge their medical decisions, but does not establish standing to challenge CUDDA.

B. Fonseca Cannot Demonstrate that the Alleged Injuries Can Be Redressed by this Action.

Fonseca lacks standing to bring her claims against the Director for the additional reason that the Director is not in a position to redress Fonseca's injuries, as required by Article III. To establish redressability, Fonseca must show "a substantial likelihood that the relief sought would redress the injury." *Mayfield v. United States*, 599 F.3d 964, 971 (9th Cir. 2010) (citation omitted). As a matter of law, Fonseca cannot do so.

The Third Amended Complaint seeks two forms of relief: (1) a declaration that CUDDA is unconstitutional either on its face or as applied, and (2) an order amending Israel's medical records to indicate August 25, 2016 as the date of death. 1ER 135 (Prayer ¶¶ 1-3). The first remedy would not redress Fonseca's injury, as Fonseca has not shown a "substantial likelihood" that invalidating CUDDA would change the physicians' medical opinions that Israel died on April 14, 2016. And the Court lacks jurisdiction

to grant the second remedy, as Plaintiffs' challenge to the determination of death is barred by the *Rooker-Feldman* doctrine.

1. Invalidating CUDDA would not redress Fonseca's alleged injury

Invalidating CUDDA would not reverse the Kaiser doctors' determination that Israel died on April 14, 2016. "There is no redressability, and thus no standing, where . . . any prospective benefits depend on an independent actor who retains 'broad and legitimate discretion the courts cannot presume either to control or to predict.'" *Glanton ex rel. ALCOA Prescription Drug Plan v. AdvancePCS Inc.*, 465 F.3d 1123, 1124 (9th Cir. 2006).

Fonseca contends that it is improper for CUDDA to give discretion to doctors, and that the State should be required to override doctors' determinations concerning brain death. AOB 27-29. But invalidating CUDDA would not accomplish this, but instead would create a vacuum where doctors' discretion would still prevail.

Plaintiffs further argue that invalidating CUDDA would remove a "cloak of legitimacy" from doctors' decisions, which might "deter physicians from pulling the plug prematurely." AOB 29-30. But these assertions are entirely speculative, and Plaintiffs have not shown any

likelihood that invalidating CUDDA would cause doctors to change their medical opinions regarding brain death. *See Lujan*, 504 U.S. at 561 ("[I]t must be 'likely,' as opposed to merely 'speculative,' that the injury will be redressed by a favorable decision."). Fonseca has not pled that the medical community is likely to cease making brain death determinations should CUDDA be invalidated. Nor can she. The uniform definition of death, upon which CUDDA is modeled, has been approved by the AMA and widely adopted by many other states. See RJN, Exhs. A and B.

Plaintiffs cite several cases involving state laws that criminalized certain medical procedures and treatments. AOB 29-30. But the notion that without CUDDA the medical community will fear legal consequences for making brain death determinations is conjecture. And, the cases cited by Fonseca offer no support because the statutes or policies at issue in those cases either prohibited or criminalized conduct. *See Cruzan by Cruzan v. Harmon*, 760 S.W.2d 408, 410 (Mo. 1988) (statutes set forth a public policy of the General Assembly prohibiting the withholding and withdrawal of nutrition and hydration under all circumstances); *Compassion in Dying v. Wash.*, 850 F. Supp. 1454, 1458 (W.D. Wash. 1994) (subject statute criminalized physician-assisted suicide); *Conant v. Walters*, 309 F.3d 629 (9th Cir. 2002) (federal policy required prosecution of physicians who

recommended the use of medical marijuana). That is not the case here. Thus, there 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.

Fonseca also contends that her and Israel's dignity can be restored by a favorable ruling. AOB 30-31. But a plaintiff's abstract interest in the dignity of having the law conform to her personal beliefs is not an "injury in fact" sufficient to confer standing. Redressability asks whether the *injury in fact* is redressable, not whether some other interest that does not meet the constitutional injury-in-fact requirement might be redressable. Here, the alleged injury in fact is the doctors' determination that Israel died on April 14, 2016, and that is not redressable. Fonseca cites *Obergefell v. Hodges*, 135 S. Ct 2584 (2015), for the proposition that a plaintiff can have standing to redress a dignity interest even if his or her injury-in-fact is not redressable, but nothing in *Obergefell* holds or even implies such a rule. There, the petitioners included 14 same-sex couples whose injuries were indisputably redressable by the Court's decision, and thus the Court did not (and had no need to) address whether two additional petitioners, whose same-sex partners were deceased, also had standing. *Obergefell*, 135 S. Ct. 2584, 2593. Here, Fonseca's alleged injury in fact is the determination that

Israel died on April 14, 2016, rather than August 25, 2016, and that injury is not redressable in this action.

Finally, Fonseca contends that the district court's decision renders fundamental constitutional rights non-redressable. AOB 32-33. That is incorrect. If a state agency, official, or statute were in fact causing the injury alleged and the plaintiff's lawsuit would redress it, then that plaintiff would generally have Article III standing to challenge that state action. The deficiency here is that Fonseca has not shown, and cannot show, that any state action, rather than the independent actions of third party physicians, is the cause of the injury alleged—the determination of death on April 14, 2016—or that any order invalidating CUDDA would redress this injury.

Further, Fonseca had the right to challenge the determination of death in court, and she exercised that right by bringing two separate law suits in state court to specifically raise these claims. The fact that Fonseca lacks standing to bring her current claims against the Director does not render her injury unredressable. It just means she has sued the wrong party, on the wrong claims.

Finally, Fonseca contends that the district court took a "novel approach" to her burden on redressability, arguing that it was improper for the court to look to the "broad and legitimate discretion" given to doctors to

make determinations of death in accordance with accepted medical standards. AOB 27. Thus, Fonseca argues that her injuries are redressable because the Department should be ordered to amend the death certificate to indicate August 25, 2016 as the date of death, notwithstanding the treating physicians' opinion that the date of death was April 14, 2016. That is incorrect. Invalidating CUDDA would not accomplish this result, as there is no indication that the physicians' would change their medical opinions concerning the date of death if CUDDA were invalidated. And, as discussed in the next section, Plaintiffs' request for an order amending the date of death is barred by the *Rooker-Feldman* doctrine. *See infra* Part I.B.2. Finally, Plaintiffs' assertion that the district court adopted a "novel approach" is simply incorrect, as the district court applied the well-settled standards for redressability under *Lujan* and its progeny, stating: "To establish redressability, Fonseca must show 'a substantial likelihood that the relief sought would redress the injury.'" 1ER 12 (quoting *Mayfield v. United States*, 599 F.3d 964, 971 (9th Cir. 2010)).

2. Under the *Rooker-Feldman* doctrine, the district court lacks the power to amend the declaration of death

The district court lacked jurisdiction to grant the second remedy Plaintiffs seek—amending the determination of death—because such relief

is barred by the *Rooker-Feldman* doctrine.[7] "*Rooker-Feldman* is a powerful doctrine that prevents federal courts from second-guessing state court decisions by barring the lower federal courts from hearing de facto appeals from state-court judgments." *Bianchi v. Rylaarsdam*, 334 F.3d 895, 898 (9th Cir. 2003). "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 . . . then the federal complaint must be dismissed for lack of subject matter jurisdiction." *Id.* "Stated plainly, *Rooker-Feldman* bars any suit that seeks to disrupt or 'undo' a prior state-court judgment." *Id.* at 900.

Here, Plaintiffs' challenges to the determination of death are barred by *Rooker-Feldman* because two state courts have reviewed and upheld the determination of death, and thus Plaintiffs are asking the federal District Court to act as a de facto appellate court to review those state court judgments. In the Placer County action, Fonseca expressly challenged the determination of death, alleging that the doctors' brain death determination was incorrect. 5ER 1007. The Placer County Superior Court upheld the

[7] The doctrine is derived from *Rooker v. Fidelity Trust Co.*, 263 U.S. 413 (1923), and *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462 (1983).

doctors' determination of death, and Fonseca did not appeal that judgment. 5ER 874-878, 929-930. In the Los Angeles County action, Fonseca again sought to challenge the determination of death, and the action was dismissed on August 25, 2016. 2ER 128-129, ¶¶ 59-60; 2ER 264-283.

Plaintiffs contend that *Rooker-Feldman* does not apply because of "the different nature of what is being sought now versus earlier at desperate moments in the case," arguing that the earlier actions merely sought to prevent the termination of life support, while the current action seeks to challenge the determination of death on April 14, 2016. AOB 34, 36. However, the two prior state court actions were not limited to seeking to prevent the termination of life support, but instead specifically sought to challenge the physicians' determination that Israel was deceased on April 14, 2016. 5ER 1007-1013, 1012 (Fonseca sought an independent evaluation to contest Kaiser's determination of death); 2ER 264-272, 271 (Fonseca sought an independent medical examination in accordance with *Dority*). That is precisely the relief that Plaintiffs now seek in asking the federal courts to declare that Israel's date of death was August 25, 2016, rather than April 14, 2016. 1ER 135 (Prayer, ¶ 1).

Plaintiffs also contend that *Rooker-Feldman* has been limited to the unique facts of the two cases from which it is derived, contending that "no

other litigants have met the same fate at the Supreme Court." AOB 34. But Plaintiffs do not, and cannot, explain how *Rooker* and *Feldman* are distinguishable, or why the doctrine would not apply here. The doctrine bars federal courts from hearing de facto appeals from state court judgments (*Feldman*, 460 U.S. at 483; *Rooker*, 263 U.S. at 415-416), and that is precisely what Plaintiffs have asked the district court to do in this case.

Additionally, Plaintiffs state that in *Feldman*, the Supreme Court "made clear that federal constitutional challenges could be entertained to the D.C. Court of Appeals' rules—just not to its decision on particular petitions." AOB 35. This argument does not address the issues raised in this appeal, as Plaintiffs appear to misunderstand the district court's *Rooker-Feldman* ruling in this case, which is virtually identical to *Feldman*: the district court held that *Rooker-Feldman* does not bar Plaintiffs' constitutional challenge to CUDDA, but does bar Plaintiffs' challenge to the determination of death on April 14, 2016, which was upheld by two state courts. 1ER 12-13.

Finally, Plaintiffs cite *Exxon Mobil Corp. v. Saudi Basic Industries Corp.*, 544 U.S 280 (2005), for the proposition that *Rooker-Feldman* is strictly limited and "confined to cases of the kind from which the doctrine acquired its name." AOB 35-36 (quoting *Exxon Mobil*, 544 U.S. at 284). There is no dispute that the *Rooker-Feldman* doctrine is limited, but

Plaintiffs do not, and cannot, explain how those limitations would preclude its application here, where Plaintiffs have asked the federal courts to reverse a determination of death that has been reviewed and upheld by two state courts.

Plaintiffs argue that they do not seek a reversal of the doctors' medical opinion, but rather a "retrospective correction" of the death certificate. AOB 28. But the death certificate is a written recording of the physician's medical determination of death. 3ER 447; *see also* § 102825 ("The physician or surgeon last in attendance . . . shall . . . specify . . . the hour and day on which death occurred, except in deaths required to be investigated by the coroner."). Thus, it cannot be "corrected" without changing or overruling the certifying physician's opinion.

Fonseca has not met her burden to establish redressability.

C. The District Court Correctly Determined that LLDF Lacks Organizational Standing

1. Plaintiffs have waived any challenge to the district court's determination that LLDF lacks organizational standing

Plaintiffs' opening brief does not challenge the district court's determination that LLDF lacks organizational standing, and accordingly Plaintiffs have waived any claim that LLDF has standing to bring this action.

Because district court decisions are presumed correct, each matter sought to be reviewed must be specifically raised and distinctly argued. Fed. R. App. P. 28(a) (requiring "appellant's contentions and the reasons for them"); *United States v. Kama*, 394 F.3d 1236, 1238 (9th Cir. 2005) ("Generally, an issue is waived when the appellant does not specifically and distinctly argue the issue in his or her opening brief."); *Sekiya v. Gates*, 508 F.3d 1198, 1200 (9th Cir. 2007); *Int'l Union of Bricklayers v. Martin Jaska, Inc.*, 752 F.2d 1401, 1404 (9th Cir. 1985) (holding that claims of error on appeal "'must be specific'") (citing *Kopczynski v. The Jacqueline*, 742 F.2d 555, 560 (9th Cir. 1984)).

This Court "reasonably require[s]" appellants to preserve valid issues by raising them in the opening brief to prevent prejudice to the responding party. *Brown v. Rawson-Neal Psychiatric Hosp.*, 840 F.3d 1146, 1149 (9th Cir. 2016). When courts consider issues not raised, the responding party is prejudiced because he is unfairly forced to guess "what arguments . . . might have [been] made, had [the appellant] addressed the issue, and then refute them," all "without the benefit of anything to argue against." *Id*. (declining to assume a lack of prejudice simply because the responding party "had the foresight to attempt to address the issue unprompted"). Accordingly, Plaintiffs' failure to address the district court's determination that LLDF

lacks standing waives any challenge on appeal. *MacKay v. Pfeil*, 827 F.2d 540, 542 n.2 (9th Cir. 1987).

2. LLDF lacks organizational standing

Should this Court reach the merits of LLDF's organizational standing, no error occurred. To sue on behalf of its members, LLDF must show that (1) its members would otherwise have standing to sue in their own right, (2) the interests at stake are germane to the organization's purpose, and (3) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit. *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 181 (2000) (citing *Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333, 343 (1977)). Here, as the district court correctly determined, LLDF's organizational standing fails at the first element because LLDF has not alleged any facts showing that its members have standing. Indeed, the Third Amended Complaint does not identify any members, and the only "client" identified by counsel at the hearing in the district court is Fonseca. _ER __ [Order at 13]. And Fonseca lacks standing for the reasons discussed above. *See supra* Parts I.A & I.B.

LLDF's claim of standing to sue on behalf of itself suffers the same fate. An organization, such as LLDF, must meet the same Article III test

that applies to individuals: (1) injury in fact, (2) causation, and (3) redressability. *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 378–379 (1982). Here, as the district court correctly determined, LLDF lacks standing because, like Fonseca, it cannot establish causation or redressability.

The Third Amended Complaint alleges that LLDF is an organization that "focuses on preservation of the lives of the most vulnerable members of society, including the very young and those facing the end of life." 2 ER 118 ¶ 4. LLDF claims that due to CUDDA's protocols, its mission has been frustrated and its time and resources have been drained. 2ER 118 ¶ 4. However, LLDF cannot show that this alleged injury is caused by CUDDA, as LLDF's causal story turns on the independent actions of third-party doctors, implementing medical standards that CUDDA does not define or require. *See supra* Part I.A. Similarly, LLDF also cannot show a "substantial likelihood" that an order invalidating CUDDA would redress the frustration of LLDF's mission or its expenditure of resources, as there is no indication that invalidating CUDDA would change the accepted medical standards concerning brain death. *See supra* Part I.B. Accordingly, LLDF lacks Article III standing to bring this lawsuit against the Director.

II. THE DISMISSAL MAY BE AFFIRMED ON THE ALTERNATIVE GROUND THAT PLAINTIFFS' CLAIMS ARE BARRED BY THE ELEVENTH AMENDMENT

The dismissal also should be affirmed on the alternative ground that Plaintiffs' claims against the Director are barred by the State's sovereign immunity under the Eleventh Amendment.[8] This immunity bars lawsuits against States in federal court unless the State has unequivocally consented. *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 100 (1984). The Eleventh Amendment likewise "bars a suit against state officials when the state is the real, substantial party in interest." *Id.* at 101 (internal citations and quotations omitted). The Eleventh Amendment's jurisdictional bar applies regardless of the nature of the relief sought, including declaratory and injunctive relief. *Id.*; *see also S. Pac. Transp. Co. v. City of L.A.*, 922 F.2d 498, 508 (9th Cir. 1990) (affirming dismissal of declaratory and injunctive relief claims).

The State of California—through its Legislature—has neither consented to, nor waived its sovereign immunity as to, the legal claims

[8] Although the Director did not raise this argument in the district court, Eleventh Amendment immunity may be raised for the first time on appeal. "[T]he Eleventh Amendment defense sufficiently partakes of the nature of a jurisdictional bar so that it need not be raised in the trial court." *Edelman v. Jordan*, 415 U.S. 651, 678 (1974).

raised against the Director here. Nor has the Director consented to or waived immunity as to Plaintiffs' claims. Waivers of sovereign immunity may not be inferred, and are found "only where stated 'by the most express language or by such overwhelming implications from the text as (will) leave no room for any other reasonable construction.'" *Edelman v. Jordan*, 415 U.S. 651, 673 (1974) (quoting *Murray v. Wilson Distilling Co.*, 213 U.S. 151, 171 (1909)); *see also College Savings Bank v. Florida Prepaid Postsecondary Education Expense Bd.*, 527 U.S. 666, 681-682 (1999) (waivers of sovereign immunity are not implied). Nor did Congress abrogate States' Eleventh Amendment immunity when it enacted 42 U.S.C. § 1983. *Quern v. Jordan*, 440 U.S. 332, 341 (1979). In short, neither the State nor the Director has consented to be sued on the claims for relief in this case.

And, while the Supreme Court recognized an exception to Eleventh Amendment immunity in *Ex parte Young*, 209 U.S. 123 (1908), the exception does not apply here. The *Ex parte Young* exception allows "actions for prospective declaratory or injunctive relief against state officers in their official capacities for their alleged violations of federal law." *Coal. to Defend Affirmative Action v. Brown*, 674 F.3d 1128, 1134 (9th Cir. 2012). This exception is based upon a "fiction" that a state officer who enforces an

unconstitutional law is "'stripped of his official or representative character,'" and thus the State's sovereign immunity does not necessarily bar an action seeking to prospectively prevent such a state officer from acting unconstitutionally. *Pennhurst*, 465 U.S. at 104-105 (quoting *Ex parte Young*, 209 U.S. at 160). The central component of this exception is the officer's threatened *enforcement* of the law in question: "[I]t is plain that such officer must have some connection with the enforcement of the act, or else it is merely making him a party as a representative of the State, and thereby attempting to make the State a party." *Snoeck v. Brussa*, 153 F.3d 984, 986 (9th Cir. 1998) (internal quotations omitted). Further, "[t]his connection must be fairly direct; a generalized duty to enforce state law or general supervisory power over the persons responsible for enforcing the challenged provision will not subject an official to suit." *L.A. County Bar Ass'n v. Eu*, 979 F.2d 697, 704 (9th Cir. 1992) (internal citations omitted); *see also Association des Eleveurs de Canards et d'Oies du Quebec v. Harris*, 729 F.3d 937, 943 (9th Cir. 2013) (Governor entitled to Eleventh Amendment immunity where his only connection to a statute being challenged was his general duty to enforce California law) (citing *Nat'l Audubon Soc'y, Inc. v. Davis*, 307 F.3d 835, 846-47 (9th Cir. 2002), opinion amended on denial of reh'g, 312 F.3d 416 (9th Cir. 2002)).

Here, Plaintiffs allege that the Director is connected to CUDDA because "the Department issues death certificates, requires compliance by hospitals and physicians in the manner in which death certificates are filled out and recorded," and "enforces the requirement that hospitals, physicians, and coroners use California's definition of death and that the determination of death be performed in a manner consistent with the State's statutory protocol" under CUDDA. 2ER 118. Plaintiffs also point out that the Department enforces recordkeeping requirements for issuing and maintaining Certificates of Death. 2ER 119.

However, Plaintiffs cannot establish the requisite nexus between the Director and any "enforcement" of CUDDA or any determination of death by the non-party physicians. Plaintiffs' conclusory assertion that the Director "enforces" CUDDA's definition of death (2ER 118) is wrong as a matter of law, as CUDDA's statutory text makes clear that it merely provides a definition and does not impose any enforceable requirements. Specifically, determinations of death must be made "in accordance with accepted medical standards," and those standards are not identified or defined by CUDDA but instead left to the discretion of the medical community. § 7180(a). Because Plaintiffs cannot show that the Director enforces CUDDA in any way, Plaintiffs cannot invoke the exception under

Ex parte Young to sue the Director to challenge CUDDA. The Court should therefore affirm the district court's dismissal for the additional reason that Plaintiffs' claims against the Director are barred by the Eleventh Amendment.

III. THE DISMISSAL MAY BE AFFIRMED ON THE ALTERNATIVE GROUNDS THAT PLAINTIFFS HAVE FAILED TO STATE A CLAIM AGAINST THE DIRECTOR AS A MATTER OF LAW

Even if Plaintiffs' claims were justiciable, the Third Amended Complaint should still be dismissed because it fails to state a claim against the Director as a matter of law. Although the district court did not address the merits because it dismissed the case for lack of standing, this Court may affirm the dismissal on any basis supported by the record, *Thompson v. Paul*, 547 F.3d 1055, 1058-1059 (9th Cir. 2008), and the record here supports affirmance on such alternative grounds.

A. Plaintiffs' First and Second Causes of Action, for Violations of Due Process Under the Federal Constitution, Fail to State a Claim

Plaintiffs' First and Second Causes of Action allege generally that CUDDA deprived Israel of life and Fonseca of parental rights in violation of the due process clauses of the Fifth and Fourteenth Amendments. Though not entirely clear, Plaintiffs appear to allege (1) a procedural due process claim that CUDDA provides no process or procedures by which a patient or

advocate can challenge the determination of death, 2 ER 132 ¶¶ 72, 78, and (2) a substantive due process claim that CUDDA provides an incorrect definition of death and "removes the independent judgment of medical professionals as to whether a patient is dead." 2 ER 132 ¶ 72. Both contentions fail to state a claim as a matter of law.

1. California's procedures are constitutionally sufficient

Plaintiffs' procedural due process claims fail to state a claim because California's procedures concerning determinations of death are constitutionally sufficient as a matter of law. "No single model of procedural fairness, let alone a particular form of procedure, is dictated by the Due Process Clause." *Kremer v. Chemical Const. Corp.*, 456 U.S. 461, 483 (1982). Instead, the "fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner." *Mathews v. Eldridg*e, 424 U.S. 319, 333 (1976) (citations omitted). Under California law, the procedures concerning determinations of death are constitutionally adequate and Fonseca has received all the process to which she is due.

a. Plaintiffs' facial challenge lacks merit

To mount a successful facial challenge to the procedures concerning determinations of death under CUDDA, Plaintiffs "must establish that no set of circumstances exists under which the [procedures] would be valid." *U.S. v. Salerno*, 481 U.S. 739, 745 (1987). A statute is facially unconstitutional if "it is unconstitutional in every conceivable application, or it seeks to prohibit such a broad range of protected conduct that it is unconstitutionally overbroad." *Foti v. City of Menlo Park*, 146 F.3d 629, 635 (9th Cir. 1998) (internal quotation marks omitted). Where, however, a statute has "a plainly legitimate sweep," the challenge must fail. *Hoye v. City of Oakland*, 653 F.3d 835, 857 (9th Cir. 2011) (quoting *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 449 (2008)). Plaintiffs cannot meet their burden and the facial procedural due process challenge to CUDDA fails.

While CUDDA itself does not expressly set forth procedures to challenge a determination of death, such procedures are provided under California law. *See Dority v. Superior Court*, 145 Cal. App. 3d 273, 280 (1983) ("The jurisdiction of the court can be invoked upon a sufficient showing that it is reasonably probable that a mistake has been made in the diagnosis of brain death or where the diagnosis was not made in accord with accepted medical standards."); *see also* 3ER 342-344 (in ruling on plaintiffs' preliminary injunction motion, the district court noted that the "state court

has jurisdiction to hear evidence and review physician's determination that brain death has occurred"). Indeed, Plaintiffs have invoked these procedures to challenge the doctors' determinations that Israel is deceased on two separate occasions, filing suits in Placer County Superior Court to challenge Drs. Myette's and Maselink's determination, in Case No. S-CV-0037673, and more recently filing suit in Los Angeles County Superior Court to challenge CHLA's physicians' determination in Case No. BS164387. 2ER 264-272; 5ER 1007-1013.

Further, CUDDA itself provides certain preliminary procedures that must be followed at the time of the initial determination of death. First, all determinations of death must be made by physicians in accordance with prevailing medical standards. § 7180(a). Second, in cases of brain death a single physician's opinion is insufficient; CUDDA requires *independent* confirmation by another physician. § 7181.[9] These procedures and the right

[9] CUDDA provides a number of additional procedural protections. For example, § 7182 forbids physicians involved in the determination of death from participating in any procedures to remove or transplant the deceased person's organ; § 7183 requires the hospital to keep, maintain and preserve patient medical records in the case of brain death; § 1254.4(a) requires hospitals to "adopt a policy for providing family or next of kin with a reasonably brief period of accommodation . . ."; § 1254.4 (b) requires the hospital to provide the patient's family with a written statement of the policy regarding a reasonably brief accommodation period; and § 1254.4(c)(2)

to contest a determination of death in the superior court, *see Dority*, 145 Cal. App. 3d at 280, are more than sufficient to satisfy all constitutional procedural due process requirements.

b. Plaintiffs' "as applied" challenge lacks merit

Plaintiffs' "as applied" challenge meets the same fate. Plaintiffs cannot demonstrate that CUDDA, as applied to the facts of this case, violates Plaintiffs' procedural due process rights. *See Hoye*, 653 F.3d at 857 (an as-applied attack challenges "the application of the statute to a specific factual circumstance"). Here, three physicians performed medically appropriate tests, and each independently concluded that Israel suffered irreversible brain death. 2ER 122-123 ¶¶ 20-24. Following the third pronouncement, Fonseca contested the determination by initiating the Placer County Superior Court action. 2ER 126 ¶¶ 43-44. Dr. Myette testified regarding his determination that Israel suffered brain death. 4ER 725-762. Also, Fonseca was offered the opportunity to have a full evidentiary hearing in response to Dr. Myette's testimony. 4ER 762. She was given time to secure her own independent examination by a qualifying physician, as well as the opportunity to cross-examine Dr. Myette, Israel's attending physician. 4ER

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requires the hospital to make reasonable efforts to accommodate a family's religious and cultural practices and concerns.

762. Fonseca, however, did not have Israel reassessed. After considering the evidence before it, the state trial court concluded that there was no basis to question the medical determination that Israel was deceased. *See* 5ER 670-671. Given these facts, Plaintiffs have not, nor can they, demonstrate that these procedures were constitutionally inadequate.

2. Plaintiffs' substantive due process allegations fail to state a claim

Plaintiffs' substantive due process allegations also fail to state a claim as a matter of law. The Due Process Clause of the Fourteenth Amendment prohibits states from making or enforcing laws that deprive a person of life, liberty, or property without due process. U.S. Const. amend, XIV, section 1. The substantive due process right "protects individual liberty against 'certain government actions regardless of the fairness of the procedures used to implement them.'" *Collins v. Harker Heights*, 503 U.S. 115, 125 (1992) (quoting *Daniels v. Williams*, 474 U.S. 327, 331 (1986)). It "provides heightened protection against government interference with certain fundamental rights and liberty interests." *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997). When no fundamental right is infringed, a plaintiff must show that the regulation is "clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general

welfare." *Samson v. City of Bainbridge Island*, 683 F3d 1051, 1058 (9th Cir. 2012). And even if a plaintiff can make a threshold showing that a fundamental right is implicated, whether a constitutional right has been violated is determined by balancing that right or liberty interest against the "relevant state interests." *Cruzan by Cruzan v. Dir., Missouri Dep't of Health*, 497 U.S. 261, 279 (1990) (quoting *Youngberg v. Romeo*, 457 U.S. 307, 321 (1982)). "In determining whether a substantive right protected by the Due Process Clause has been violated, it is necessary to balance the liberty of the individual and the demands of an organized society." *Youngberg*, 456 U.S. at 320 (citation and quotation marks omitted).

Plaintiffs first claim that CUDDA violates substantive due process because it deprived Israel of life. 2ER 131. However, Plaintiffs have not, and cannot, allege any facts showing that the Director or CUDDA deprived Israel of life. It is undisputed that the determination that Israel died and the decision to remove life support were made by third parties not before this court. 2ER 122 ¶¶ 20-23, 123 ¶ 24. As a matter of law, CUDDA did not direct or require these third parties to determine that Israel was deceased or to remove life support. *See* § 7180(a).

Next, Plaintiffs contend that under CUDDA an advocate for a patient is not allowed to bring in their own physician to contest the findings, 2ER 131-

132 ¶¶ 72, 78, and that CUDDA prevents a physician from exercising his or her independent judgment as to whether a patient is dead, ER 131 ¶ 72. Both allegations are incorrect as a matter of law.

Nothing in CUDDA precludes an advocate from seeking an independent opinion. The statute is silent as to which physicians are permitted to examine the patient, *see* § 7180 et seq., thereby leaving this decision to the discretion of patients and their families or representatives. Indeed, in the Placer County action the court extended the TRO by two weeks specifically to give Fonseca time to find a physician to conduct an independent medical examination pursuant to § 7181, 5ER 99, 1001, 1004, 1007-1013, but Fonseca failed to do so.

Nor does CUDDA prevent physicians from exercising their independent medical judgment as to whether a patient is deceased. As discussed above, 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." § 7181 (emphasis added). Accordingly, the statute, by its plain terms, defers to the medical judgment of doctors.

Even if plaintiffs could allege that CUDDA directs the actions of which they complain (which they cannot), plaintiffs' substantive due process claim still fails. Whether the constitutional rights at stake have been violated is determined by balancing them against the "relevant state interests." *Cruzan* 497 U.S. at 279 (quoting *Youngberg v. Romeo*, 457 U.S. at 321). As the district court noted, California "has a broad range of legitimate interests in drawing boundaries between life and death." *Glucksberg*, 521 U.S. at 731 (recognizing a state's interest in protecting "the integrity and ethics of the medical profession" opposite an asserted fundamental right); *Goldfarb v. Va. State Bar*, 421 U.S. 773, 792 (1975) ("States have a compelling interest in the practice of professions within their boundaries."); *Varandani v. Bowen*, 824 F.2d 307, 311 (4th Cir. 1987) (recognizing a state's "compelling interest in assuring safe health care for the public"). The State also has a compelling interest in the quality of health and medical care received by its citizens. *Varandani*, 824 F.2d. at 311. Similarly, the State seeks to ensure that patients are treated with dignity, particularly during their end of life. *See* Cal. Prob. Code § 4650(b) (The "prolongation of the process of dying for a person for whom continued health care does not improve the prognosis for recovery may violate patient dignity and cause unnecessary pain and suffering, while providing nothing medically necessary or beneficial to the

person."); *id.*, § 4735 (health care provider "may decline to comply with an individual health care instruction or health care decision that requires medically ineffective health care or health care contrary to generally accepted health care standards applicable to the health care provider or institution"). And it is well settled that the State has a legitimate interest in securing the public safety, peace, order, and welfare. *See Wisconsin v. Yoder*, 406 U.S. 205, 230; *Carnohan v. United States*, 616 F.2d 1120, 1122 (1980) (no fundamental right to access drugs the FDA has not deemed safe and effective).

As the district court previously observed, Fonseca provides no facts that "suggest [] CUDDA is arbitrary, unreasoned, or unsupported by medical science." 3ER 340. CUDDA's definition of death is substantively identical to the definition agreed upon by the American Medical Association and the American Bar Association, which has been "uniformly accepted throughout the country." *In re Guardianship of Hailu*, 361 P.3d 524, 528 (Nev. 2015); see also RJN, Exhs. A & B. Plaintiffs here have not alleged any additional facts to sustain this claim. It remains that Plaintiffs' disagreement with the prevailing definition of death cannot override the State's interests in enacting CUDDA. The substantive due process claim fails as a matter of law.

B. Plaintiffs' Third Cause of Action for Deprivation of the Right to Life in Violation of the California Constitution Fails to State a Claim

Plaintiffs' third claim alleges that CUDDA "deprived Israel of his right to life" in violation of section 1 of Article I of the California Constitution. 2ER 133-134 ¶¶ 81, 84. Plaintiffs' claim based on the loss of Israel's life fails because CUDDA did not cause Israel's death, nor did CUDDA compel the non-party physicians to run tests or determine that he suffered brain death. As a matter of law, 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. Indeed, as discussed above, CUDDA expressly affords physicians the discretion to so determine. *See* § 7180(a).

Even if Plaintiffs could show that the State caused the physicians to declare Israel dead when he was not, it has long been recognized that—like the federal constitution—the State's "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, the Court, in determining whether a constitutional violation occurred, must balance the individual liberty interest at stake against the State's interests. *Cruzan*, 497 U.S. at 279; *Donaldson v.*

Lungren, 2 Cal. App. 4th 1614, 1620 (1992). As articulated above, the State's interests here 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. *See supra* Part III.A.2. Plaintiffs state no facts showing that CUDDA is unreasonable or arbitrary. Accordingly, Plaintiffs have failed to state a deprivation of life claim under the California Constitution.

C. Plaintiffs' Fourth and Fifth Causes of Action, Which Allege that CUDDA Violates Fonseca's Right to Privacy, Fail to State a Claim

Plaintiffs' Fourth and Fifth Causes of Action, which allege that CUDDA violates Fonseca's right to privacy, fail to state a claim. Plaintiffs allege that health care decisions are part of the right to personal autonomy and privacy, and that CUDDA violated these rights by allegedly denying Fonseca the right to make medical decisions on Israel's behalf. 2ER 134 ¶¶ 87-89, 92-94. These claims fail as a matter of law because CUDDA merely defines death, and does not dictate what medical treatment should be provided or whether life-sustaining support should be removed. As discussed above, the medical decisions in question here were not dictated by CUDDA, but rather made by doctors, using their medical judgment, and

Fonseca had the right to, and in fact did, challenge those medical decisions through appropriate avenues.

Further, even if CUDDA interfered with Fonseca's ability to make medical decisions following the doctors' determination that Israel died, her claims would still fail. Article I, section 1 of the California Constitution bestows certain inalienable rights, including "enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety, happiness, *and privacy*." (Emphasis added.) The federal Constitution also recognizes a realm of personal liberties—including the right to privacy—upon which the government may not intrude. *Roe v. Wade*, 410 U.S. 113, 152 (1973). However, this right is not absolute; one's right to privacy may be outweighed by supervening public concerns. *Id.* at 154-155 (the State's limitation of the right to privacy may be justified by a compelling state interest); *Hill v. National Collegiate Athletic Assn.*, 7 Cal. 4th 1, 37, 40 (1994) ("A defendant may prevail in a state constitutional privacy case . . . by pleading and proving . . . that the invasion of privacy is justified because it substantively furthers one or more countervailing interests.").

Accordingly, Plaintiffs are mistaken that Fonseca's right to dictate medical decisions and treatment on behalf of her son is essentially

boundless. 2ER 134-135 ¶¶ 87, 89, 92, 94. Here, Fonseca disagreed with the doctors' medical determination that Israel was deceased. She was then afforded ample opportunity to refute that determination; she did not do so. In light of these facts, and the competing state interests, Plaintiffs cannot demonstrate that CUDDA violated Fonseca's (or Israel's) right to continued privacy as afforded by the California or United States Constitutions. The Fourth and Fifth Causes of Action fail to state a claim as a matter of law.

CONCLUSION

Based on the foregoing, the Director requests that this Court affirm the district court's judgment in its entirety.

Dated: April 11, 2018

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17-17153

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JONEE FONSECA, AN INDIVIDUAL PARENTAND GUARDIAN OF I.S., A MINOR,

Plaintiff and Appellant,

v.

KAREN SMITH, M.D. IN HER OFFICIAL) CAPACITY AS DIRECTOR OF THE) CALIFORNIA DEPARTMENT OF PUBLIC) HEALTH; AND DOES 2-10, INCLUSIVE,

Defendant and Appellee.

STATEMENT OF RELATED CASES

To the best of our knowledge, there are no related cases.

Dated: April 11, 2018

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CERTIFICATE OF SERVICE

Case Name: **Jonee Fonseca v. Karen Smith Director of CDPH, et al.** No. **17-17153**

I hereby certify that on April 11, 2018, I electronically filed the following documents with the Clerk of the Court by using the CM/ECF system:

ANSWERING BRIEF

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 April 11, 2018, at Sacramento, California.

S O'Mary	*/s/ S O'Mary*
Declarant	Signature

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Signature of Attorney or Unrepresented Litigant [/s/ Ashante L. Norton] Date [April 11, 2018]

("s/" plus typed name is acceptable for electronically-filed documents)