Docket No. 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 and LIFE LEGAL DEFENSE FOUNDATION,

Plaintiffs-Appellants,

v.

KAREN SMITH, M.D. in her official capacity as Director of the California Department of Public Health,

Defendant-Appellee.

Appeal from a Decision of the United States District Court for the Eastern District of California, No. 2:16-cv-00889-KJM-EFB · Honorable Kimberly J. Mueller

BRIEF OF APPELLANTS

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, Appellant Jonee Fonseca is a natural person and not a corporate entity. Appellant Life Legal Defense Foundation is a non-profit corporation that does not issue stock, and therefore does not have a parent corporation or publicly-traded corporation owning 10% or more of stock.

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INTRODUCTION

The toddler at the center of this case, Israel Stinson, has died. No human power can call him back to life. But his dignity can be reclaimed, his family's fundamental rights to self-determination restored, and the statutes that provided authority for the taking of his life rescinded. Appellants Jonee Fonseca, Israel's mother, and Life Legal Defense Foundation (LLDF) are challenging the constitutional validity of the statutory scheme that they allege led to his death. That scheme, known as the California Uniform Determination of Death Act (CUDDA) offered woefully inadequate safeguards that facilitated the forcible termination of his life support.

The District Court held that the injury in fact prong of Article III was satisfied by the death of the child, but it further held that neither Fonseca nor LLDF could demonstrate causation or redressability since the State did not require medical providers to end Israel's life support. As a result, the plaintiffs are without a remedy for the most serious of constitutional violations—the deprivation of life without due process of law.

Appellants maintain that, contrary to the decision below, doctors do not possess "broad and legitimate discretion" to end life. The State's constitutional role as protector of life does not permit it to stand by while its statutes are invoked

as authority for deprivation of life, violation of self-determination, and usurpation of fundamental parental rights.

STATEMENT OF JURISDICTION

Jurisdiction is proper under 28 U.S.C.A. § 1291. The District Court for the Eastern District of California granted the State's Motion to Dismiss the Third Amended Complaint pursuant to Fed. R. Civ. Proc. 12 without leave to amend and entered judgment for the State Defendants on September 25, 2017. Vol. 1, Excerpts of Record, page 1 (1 ER 1). The Notice of Appeal was timely filed on October 19, 2017. 2 ER 20-25.

STATEMENT OF THE ISSUES

The issues on appeal are:

1) Is the District Court's limitation of Article III standing as to causation and redressability consistent with this Circuit's jurisprudence?

   A) Does the State have any obligation to protect patients on life support, or are those patients' rights to self-determination entirely dependent on medical providers' choices and therefore non-justiciable?

   B) Do Doctors possess "broad and legitimate discretion" that forecloses constitutional inquiry when they end patients' life support?

C) Do differences in medical diagnosis sever any responsibility the State might otherwise have to prevent the deprivation of a patient's life?

D) Does the District Court's constriction of causation and redressability in the context of organizational standing place this Circuit in conflict with the D.C. Circuit?

2) Does the *Rooker-Feldman* doctrine prevent the court from even considering whether Fonseca's son was declared dead four months before he breathed his last?

STATEMENT OF THE CASE

In the spring of 2016, a flurry of litigation in this and other courts sought to prevent the removal of life support from a toddler, Israel Stinson. The child's medical journey is more fully set forth in the Statement of Facts, *infra*. The child's mother, Jonee Fonseca, initially sought emergency relief in pro per from the Superior Court of Placer County against Kaiser Permanente Roseville Medical Center ("Kaiser"). 5 ER 1036-39. A hearing was held and relief was temporarily granted. 3 ER 421-46; 4 ER 666. As of April 22, 2016, the Superior Court ordered Kaiser to continue cardiopulmonary support, medication and nutrition until April 27, with the parties agreeing to and contemplating transfer of Israel to Sacred Heart Medical Center in Spokane, Washington. 5 ER 1001-1003. After the

transfer to Sacred Heart fell through, the Superior Court further ordered on April 27 that the parents would be given until April 29 to transfer Israel to another facility, or else the TRO would automatically dissolve and Kaiser's care obligations would cease. 5 ER 1004-1006.

With the clock ticking, Fonseca obtained counsel, who filed a Complaint for Declaratory Relief and Request for Temporary Restraining Order in the United States District Court for the Eastern District of California on April 28, 2016. 5 ER 1040-1057. Relief was granted the same day. 5 ER 983-85, and hearings followed. The Eastern District ultimately denied a preliminary injunction on May 13, 3 ER 317-47, and scheduled its TRO to dissolve on May 20. 3 ER 347. An emergency interlocutory stay was sought in this Court on May 14, 2016, 3 ER 310-16, and was obtained before the District Court's order expired. *Fonseca v. Kaiser Permanente Med. Ctr., et al.,* No. 16-15883 (9th Cir. May 20, 2016). The crucial days secured by this Court's prior action and schedule for further briefing allowed the child to be moved to a hospital in Guatemala, whereupon this Court on May 26 granted Fonseca's request to withdraw her interlocutory appeal. 3 ER 306.

The new doctors in Guatemala undertook treatment of Israel, believing as did his parents, that although comatose and in a persistent vegetative state, he remained biologically alive with a chance of recovery. 2 ER 184-86. In August of 2016, the family was led to believe Israel could obtain treatment at Children's

Hospital Los Angeles. But after he was moved there and that facility became aware that the State had issued a death certificate months earlier, CHLA sought to end life support. The family again obtained emergency, albeit short-lived, relief from the Superior Court of Los Angeles County. 1 ER 5; 2 ER 264-282. Although the court had initially set the next hearing for September 9, it abruptly adopted CHLA's position and dissolved the TRO on August 25, with no time allotted for an emergency appeal. 2 ER 283. An attorney frantically raced to the Second District Court of Appeals. As that attorney was handing a clerk his credit card to process payment for an appeal and request for stay, the hospital forcibly removed life support and the child expired within minutes. 2 ER 129, ¶ 61.

Meanwhile, in the Eastern District, Fonseca stipulated to the dismissal of Kaiser and Dr. Myette. 3 ER 302-305. The Court then granted the State's Motion to Dismiss with leave to amend, to permit the plaintiff to add in the significant subsequent developments in this Court, in Guatemala, and at CHLA. 2 ER 137-149.

The Third Amended Complaint (TAC), is now the operative pleading before this Court. 2 ER 116-136. Plaintiff Fonseca has been joined by a new co-plaintiff, Life Legal Defense Foundation (LLDF), which advocates on behalf of families facing forcible withdrawal of life support from their loved ones. Together, the plaintiffs asserted five causes of action, as follows:

1) Deprivation of Life and Liberty in Violation of Due Process of Law Under the Fifth and Fourteenth Amendments, 2 ER 131-32, ¶¶ 71-74;

2) Deprivation of Parental Rights in Violation of Due Process of Law Under the Fifth and Fourteenth Amendments, 2 ER 132-33, ¶¶ 75-79;

3) Deprivation of Life Under California Constitution, Article I, Section 1, 2 ER 133034, ¶¶ 80-84;

4) Violation of Privacy Rights Protected by the United States Constitution, 2 ER 134, ¶¶ 85-89; and

5) Violation of Privacy Rights Protected by California Constitution, Article I, Section 1, 2 ER 134-35, ¶¶ 90-94.

The State then filed a further Motion to Dismiss the TAC. 2 ER 88-115. Following briefing and oral argument, the Court granted the Motion to Dismiss the Third Amended Complaint on September 25, 2017. 1 ER 2-16. This time the dismissal was without leave to amend. 1 ER 15. Judgment was entered the same day for the State. 1 ER 1. This appeal timely followed on October 19, 2017. 2 ER 20-25.

STATEMENT OF FACTS

The District Court properly accepted as true the material facts pled in the TAC for purposes of granting the Motion to Dismiss. 1 ER 6, 7. The following is a brief summary of those facts.

Jonee Fonseca's quest to find adequate medical care for her ailing toddler Israel began on April 1, 2016, when she took him to Mercy General Hospital in Sacramento with symptoms of an asthma attack. 2 ER 119 [TAC] ¶ 7. Once Mercy realized they could not adequately care for Israel, he was transferred to UC Davis Medical Center (UC Davis). *Id.*

Upon his arrival at UC Davis, physicians removed the breathing tube he was using, said that he was stable and could possibly discharge him the next day. 2 ER 120, ¶ 8. Shortly after being removed from stabilizing medication, Israel started having trouble breathing and began wheezing; a UC Davis physician delayed intervention to see if Israel could breathe on his own, which he could not. *Id.,* ¶ 9. Physicians eventually resuscitated him, and the doctor assured Fonseca that Israel was "going to make it" and would be put on an Extracorporeal Membrane Oxygenation machine to support his heart and lungs. *Id.,* ¶10.

On April 6, 2016, Israel was taken off of the ECMO machine because his heart and lungs were functioning properly on their own. Yet, further brain examinations showed swelling, herniation, and lack of oxygen to the brain. 2 ER 122 ¶ 20.

On April 11, 2016, Israel was transferred from UC Davis to Kaiser Permanente Roseville Medical Center ("Kaiser"). 2 ER 122 ¶ 20.

Israel was then administered an apnea test by two different doctors, and while both doctors say they saw no brain activity, neither performed an electroencephalogram (EEG) test to see if Israel had any brain waves. 2 ER 123 ¶ 24.

Kaiser then pressured Fonseca to terminate life support for Israel, but she wanted an independent medical examination of the child and sought to prevent termination of life support by resorting to the Superior Court as more fully described in the Statement of the Case, *supra*. With his heart still beating and other organs functioning, Kaiser issued a Certificate of Death pursuant to CUDDA that stated Israel was last seen alive on April 12, a day after he was brought to Kaiser. 2 ER 182. At the time the Certificate of Death was issued, and thereafter, Fonseca observed Israel responding to stimuli such as voice and touch. 2 ER 123 ¶ 26.

Fonseca fought to have her son remain on a ventilator to keep him alive, for she was aware of instances where patients declared brain dead later recovered. 2 ER 123 ¶ 29. However, Kaiser sought to disconnect Israel from his ventilator and claimed Fonseca had no right to make medical decisions about her son once he was declared brain dead under state law. 2 ER 124 ¶ 31. Fonseca then sought an independent medical opinion from a board certified neonatologist pediatrician and

Clinical Professor of Pediatrics, but Kaiser did not allow him to examine Israel. 2 ER 124 ¶ 32.

While the legal drama played out as described in the Statement of the Case, Fonseca undertook a global search for outside medical treatment that led to Juan Zaldana, a pediatric specialist, who agreed to admit Israel to his facility in Guatemala. 2 ER 126-27 ¶ 45. Due in large part to this Court's issuance of an emergency stay preventing Kaiser from terminating life support, Israel was flown by air ambulance to Guatemala in late May, 2016.

In Guatemala, Israel gained weight as he was given a feeding tube—which Kaiser had refused to insert. 2 ER 127 ¶ 46. Physicians continued performing exams on Israel confirming he had brain waves and was not dead. 1 ER 4; 2 ER 127 ¶ 47; 2 ER 184-86.

Over the next several weeks, Israel continued showing signs of improvement, with more purposeful movements, responding to his mother's voice, responding to some of his favorite music, and increasingly taking breaths off of his portable ventilator. 2 ER 127 ¶ 50. But Guatemala was not a viable long-term solution for Israel and his family.

After consulting with doctors from Children's Hospital of Los Angeles (CHLA) about Israel's improving condition, Fonseca secured his transport there in late summer. 2 ER 127 ¶ 50. Israel was flown to CHLA on August 6, 2016. 1 ER

4. However, once he arrived back in the United States at CHLA, his face and torso became red and swollen, and the hospital wanted to remove Israel from his ventilator. 2 ER 127-28 ¶ 51. Fonseca explored every legal avenue she could in trying to have her son sent home with her on a portable ventilator. 2 ER 128-29 ¶ 59. She found short-lived success; however, once attorneys from Children's Hospital presented a Judge of the Superior Court with the Certificate of Death, the Judge canceled further briefing that had been scheduled and simply adopted CHLA's position as her own. *Id.* On August 25, 2016, her son was removed from the ventilator against her will and quickly succumbed. 2 ER 129 ¶ 61.

SUMMARY OF THE ARGUMENT

This appeal centers on Article III standing.[1] The District Court granted the State's Motion to Dismiss because the Court accepted the State's theory that, as a matter of law, medical providers making life-and-death decisions such as termination of life support break the causal chain and likewise preclude redressability.

[1] The District Court did not reach the merits of the constitutional claims pled in the TAC. Fonseca will more fully brief the substance of these claims if remand is granted. Fonseca's focus in this brief on justiciability, in keeping with the decision below, should in no way be interpreted as waiver or abandonment of the merits of her federal or state constitutional claims.

The District Court's expansion of the concept of "broad and legitimate discretion" from its origins in separation of powers to now mean that doctors have unfettered discretion to end life support is unprecedented and untenable.

The District Court's absolution of the State from all constitutional responsibility for inadequate definitions and procedures surrounding declarations of death would reward the State for abdicating its duty. And it ignores this Court's holdings as to state-created dangers.

Where this Court has explained that Article III causation is something less than proximate cause, the District Court turned it into something more than proximate cause, letting the State off the hook unless it requires doctors to make certain end-of-life decisions.

Contrary to the decision below, statutory definitions can inflict great constitutional harm; to hold otherwise denies plaintiffs such as these any constitutional remedy for the most serious of deprivations.

Lastly, the District Court reversed course on the *Rooker-Feldman* doctrine, abruptly embracing it after initially rejecting its application. Plaintiffs submit that the Court's earlier instincts were correct.

ARGUMENT

I. THE STANDARD OF REVIEW IS DE NOVO.

Entry of judgment dismissing all causes of action based on lack of Article III standing is reviewed de novo. *Maya v. Centex Corp*., 658 F.3d 1060, 1067 (9th Cir., 2011). Moreover, "dismissal without leave to amend is improper unless it is clear, upon de novo review, that the complaint could not be saved by any amendment." *Id*. at 1072.

II. DEPRIVATION OF LIFE AND LIBERTY WITHOUT DUE PROCESS DOES NOT BECOME UNCHALLENGEABLE WHEN RELINQUISHED TO A THIRD PARTY.

A. The State Occupies a Central Role in End-of-Life Decision-Making.

For nearly a century, the Supreme Court has noted, "There is no right to practice medicine which is not subordinate to the police power of the states." *Lambert v. Yellowley*, 272 U.S. 581, 596 (1926). And this Court has more recently observed, "It is too well settled to require discussion at this day that the police power of the states extends to the regulation of certain trades and callings, particularly those which closely concern the public health." *Natl. Ass'n for Advancement of Psychoanalysis (NAAP) v. California Bd. of Psychol*., 228 F.3d 1043, 1054 (9th Cir. 2000) *quoting Watson v. Maryland,* 218 U.S. 173, 176 (1910).

To this end, CUDDA defines and dictates procedures for the determination of death. CUDDA's foundational definitional provision reads: "An individual who

has sustained either (1) irreversible cessation of circulatory and respiratory functions, or (2) irreversible cessation of all functions of the entire brain, including the brain stem, is dead." California Health & Safety Code §7180(a).

CUDDA then sets forth the procedure for confirmation of *death*. Sec. 7181. Under CUDDA, a medical facility must record, communicate with government entities, and maintain records relative to the "irreversible cessation of all functions of the entire brain." Sec. 7183. This includes filling out portions of the Certificate of Death provided by the Department of Public Health within 15 hours after death under (Sec. 102800) and that the medical facility register the death with county officials (Sec. 102775). County officials then jointly issue a death certificate with the State's Department of Vital Records directed by the Defendant, Karen Smith. 2 ER 182.

Notwithstanding the State's compelling interest and involvement with death procedures, the District Court instead focused on what it felt the statutes did not say:

> First, CUDDA does not require a declaration of death…. that determination "must be made in accordance with accepted medical standards." [citing Section 7180] This requirement leaves the ultimate decision to the discretion of third-party doctors implementing standards that the statute itself does not identify or define…. CUDDA does not prescribe a protocol. 1 ER 11.

The District Court's position is that statutes like these cannot be challenged when they create the conditions for, but stop short of mandating, the most serious

of all constitutional violations—the deprivation of life. As will be detailed in the ensuing pages, none of the authorities invoked by the lower court support its syllogism, and many others not mentioned by the court suggest the opposite.

B. *Lujan* Does Not Support the District Court's Denial of Standing to Appellants.

For the past quarter-century, analysis of Article III standing has revolved around the three-part test of *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992).

The test requires an injury in fact; a fairly traceable causal connection between the injury and the challenged action of the defendant; and a likelihood that the injury will be redressed by a favorable decision. *Id.* at 560-61.

The facts of *Lujan* are revealing. There, plaintiffs challenged involvement by the federal government in projects in Egypt and Sri Lanka. The projects were claimed to be environmentally harmful.

One plaintiff had traveled to Egypt in 1986 to observe the habitat of the Nile crocodile, and another plaintiff had traveled to Sri Lanka in 1981 to observe the habitats of endangered species such as Asian elephants and leopards. *Id.* at 563. Neither plaintiff succeeded the first time in spotting the endangered species. *Id.* Their hopes of returning to those countries at some point in the future and having better success, which they claimed would be made more difficult by the challenged projects, proved too much for the Justices to find injury, causation and redressability.

Below, the District Court was satisfied that the Plaintiffs had pled injury in fact, 1 ER 10, which is often the highest hurdle of the three. The death of the child was the realization of every parent's worst fears; it was anything but hypothetical.

The District Court, though, assumed the causal chain was severed by State inaction. As will be further explained below, none of this Court's precedents restrict Article III challenges to statutes that "require" or "prescribe" such egregious actions as the forcible deprivation of life.

C. The Fundamental Right to Self-Determination Cannot Be Made to Depend on the Choices of Medical Providers.

The courts of this state have declared, "If the right of the patient to self-determination in his own medical treatment is to have any meaning at all, it must be paramount to the interests of the patient's hospital and doctors." *Bartling v. Superior Court*, 163 Cal.App.3d 185, 195 (Cal.Ct. App. 2nd Dist. 1984).

Under the right of self-determination, emanating from the right to privacy, the choice of the patient or his legal surrogate whether to continue life-sustaining measures is not subject to veto by the medical profession or the judiciary. *Bouvia v. Superior Court*, 179 Cal.App.3d 1127, 1135 (Cal. Ct. App. 2d Dist. 1986).

Quite to the contrary, the District Court held that the fundamental rights to life and self-determination are entirely dependent on the choices of private medical providers, not patients or their families. 1 ER 11.

> A doctor may no longer face criminal or civil liability for withdrawing life support after a determination of death has been made, but "[t]his 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,] 280 [Cal. Ct. App. 4th Dist. 1983)]. A parent has a right to consultation and participation in the decision to withdraw life support. *Id.* In other words, the decision to withdraw life support is ordinarily the product of not only third-party doctors implementing independent standards while also consulting with the patient's family; to the extent that Fonseca alleges doctors did not properly consult her before withdrawing life support, her claim is against those doctors who allegedly failed to follow state law and not with the law itself. Thus, both steps in Fonseca's causal story turn on "independent actions of third parties that break the causal link between" CUDDA and Fonseca's injury. (internal quotes and citations omitted). 1 ER 12.

The decision below actually creates a perverse incentive for the State to take a hands-off approach when it comes to protecting patients. The District Court badly misread cases like *Dority* as placing all of the onus for carrying out constitutional end-of-life safeguards on private medical providers. This comports neither with common sense nor the realities of this case. A fundamental "right" that cannot be enforced is useless.

i. The origin of CUDDA as a legal fiction undercuts the notion that brain death is merely a medical and not legal concept.

The District Court's presumption that the courts could not speak to a deprivation of life by a physician is rebutted by such authorities as *Lambert* and *NAAP, supra* at Section II-A. But its presumption is also belied by the origins of CUDDA itself. In short, CUDDA was conceived not as a scientific breakthrough, but as a legal fiction. Seema K. Shah, *Piercing the Veil: The Limits of Brain Death*

as a Legal Fiction, 48 U. Mich. J. L. Reform 301, 320-21 (2015). Doctors derive their authority to declare brain death from the State, not the other way around. Acceptable medical standards and acceptable constitutional standards are inextricably linked.

ii. It is beyond dispute for purposes of this appeal that physicians and the courts relied on state law in forcibly ending the toddler's life support.

Beyond the statutory scheme itself, the material facts accepted as true by the District Court are 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. In Placer County Superior Court, the attorney for Kaiser told the Court, that "under Health and Safety Code [§§] 7180 and 7181, Israel has been found to be dead." 4 ER 760: 9-11.

Ultimately, when Israel's family made the ill-fated decision to return to the United States and seek treatment for Israel in Los Angeles, The State-issued Certificate of Death proved to be self-fulfilling. 2 ER 125-26 ¶39. CHLA's lodging of the Certificate of Death with the Superior Court may be found at 2 ER 182. As pled in the TAC, the State's role was crucial.

These facts were deemed true, but irrelevant, by the District Court. The upshot is that the court relied on presumptions rather than facts to establish causation. This was error.

iii. Diagnostic disagreements do not override the State's obligation to safeguard self-determination and due process in the deprivation of life.

To the extent physicians are currently permitted to act as both judge and executioner, due process demands they be restrained.

As the District Court was made aware, other appellate courts have recognized and expressed concern over the lack of uniformity with different protocols for declaring brain death. *Gebreyes v. Prime Healthcare Servs., LLC* (*In re Estate of Hailu*), 361 P.3d 524, 529 (Nev. 2015).

The District Court read the lack of uniformity as conferring discretion upon the medical community that the courts cannot presume to control. 1 ER 11. The District Court also pointed to disagreement between doctors in California and those in Guatemala about the child's condition as possible evidence that Kaiser had misdiagnosed the child, and therefore any remedy would lie only against Kaiser. The court declined to deal with the systemic, State-initiated deficiencies alleged in the TAC. Certainly, there was both a medical and legal dispute as to whether Israel was alive. 2 ER 129 ¶62. As it turned out, Fonseca's decision to err on the side of life was justified. 2 ER 123 ¶26.

Physicians in Guatemala ran two EEG tests and found that Israel was neither biologically nor brain dead, but in a persistent vegetative state. 2 ER 127 ¶47; 2 ER 184-86.

But because Kaiser already acted under State law, the medical providers at Children's Hospital would not accept the results of the two EEG tests, would not perform their own brain death examination, and would not allow the parents to bring in an eminent professor from UCLA's medical school to conduct an examination. 2 ER 128 ¶57. Instead, attorneys for Children's Hospital filed *ex parte* the death certificate signed by Kaiser and the death certificate from the Defendant's Department of Vital Records with the Superior Court in Los Angeles. 2 ER 128-29 ¶¶58-59. As a direct and proximate result of the death certificate issued through CUDDA, the Superior Court dissolved a temporary restraining order that the mother had secured in pro per and did not give even a 24-hour reprieve to seek emergency relief from a higher court. 2 ER 129 ¶60. By the authority vested in them by the State, two hours before the close of business that day, CHLA medical staff entered Israel's room and permanently ended his life support. 2 ER 129 ¶61.

The District Court simply put its presumptions ahead of the material facts pled in the TAC. As will be further explained, these presumptions are not supported by precedent.

D. The District Court Ignored the Holdings of This and Other Courts As To proximate causation, State-Created Dangers and the Object of the Statute.

Charting its own course on causation and redressability, the District Court brushed aside the countervailing authorities with which it was confronted. The decision below conspicuously fails to mention this Court's holding in *Maya v. Centex Corp*., 658 F.3d 1060 (9th Cir. 2011). The Court's comment in *Maya* could have described the wrong standard applied to Fonseca: "Defendants would have us require plaintiffs to demonstrate that defendants' actions are the 'proximate cause' of plaintiffs' injuries. Plaintiffs do not bear so heavy a burden." *Id.* At 1070.

The District Court relied earlier on *Maya.* 2 ER 146. Until, that is, it was pointed out at oral argument that Maya did not support the court's theory of causation. 2 ER 32. As a result, the court went a different direction and applied the wrong standard.

Moreover, when the plaintiff is the object of the regulation, there is little doubt regarding causation. *Lujan*, 504 U.S. at 562. The subject of CUDDA's definition is the individual whose life is at stake. Sec. 7180(a). The individual is also the focus of Sec. 7181 requiring independent confirmation of brain death. The minor patient, and his mother as medical decision-maker for him, should have been deemed the "objects of the action" under *Lujan*. The District Court erred by failing to consider this aspect of *Lujan* with which it was presented.

Fonseca and LLDF also pointed out below this Court's explanation of state-created dangers and the liability they can trigger.

According to *Chaudhry v. City of Los Angeles*, 751 F.3d 1096, 1103 (9th Cir. 2014), one of the primary rationales for Section 1983 is to provide a remedy for killings unconstitutionally caused *or acquiesced in* by the State. The District Court's ruling leaves no room for acquiescence as a basis for State liability. This Court has also held that even the commission of a crime by a third party does not break the causal chain when a state actor places the victim in greater danger than they otherwise would have experienced. *Wood v. Ostrander*, 879 F.2d 583, 594 (9th Cir. 1989). *Accord, L.W. v. Grubbs*, 974 F.2d 119 (9th Cir. 1992).

The decisions of this Court as to proximate cause in the Article III context and State-created dangers are consistent with decisions in other courts, such as the Seventh Circuit. In contrast to the District Court's rigid demarcation of State action versus inaction, the Seventh Circuit observed more candidly:

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

The District Court did not explain its disagreement with any of these principles—it simply ignored them. As a result, its ruling is irreconcilable with other Circuit precedent, and the case should be remanded.

E. The District Court Misread Circuit Precedent to Sharply Restrict Article III Causation.

The District Court overlooked *Maya, Chaudhry*, *Wood*, *Bowers*, and for that matter *Lujan.* Instead, the District Court sought justification in Circuit precedent that offers a poor fit. Most notably, the District Court constructed a much-narrowed view of causation and redressability it teased out of *Ass'n of Pub. Agency Customers v. Bonneville Power Admin*, 733 F.3d 939 (9th Cir. 2013), *Glanton ex rel. Alcoa Prescription Drug Plan v. Advance PCS, Inc.*, 465 F.3d 1123 (9th Cir. 2006), and *Native Village of Kivalina v. Exxon Mobil Corp.*, 696 F.3d 849, 853 (9th Cir. 2012). None of these precedents support the Order. 1 ER 7-12.

In *Native Village*, this Court considered the claims of an Alaskan coastal village alleging harm from storm surges from late-forming sea ice from global warming from greenhouse gases from (among many others) the defendant energy company.

This Court's decision that the putative causal chain was too attenuated is unsurprising and tracks *Lujan* in light of the global, undifferentiated nature of the alleged harm amongst countless potential wrongdoers. *Id.* at 868 (Concurrence).

Moreover, "Kivalina does not identify when their injury occurred nor tie it to Appellees' activities within this vast time frame." *Id.* at 868-69.

Fonseca's case does not suffer from a vast timeframe, infinite emissions in the air, innumerable potential tortfeasors, or a global scale. *Native Village*, relied upon in the Order at 1 ER 11, was hardly an appropriate basis on which to dismiss the TAC.

In *Glanton*, cited at 1 ER 12, this Court considered challenges by prescription plan participants against fiduciaries. The participants' assumption, which this Court disputed, was that holding the fiduciaries accountable would result in savings that would be then passed along to the consumers.

Glanton did not involve fundamental rights, or for that matter constitutional questions; it was focused on ERISA. The degree to which the plaintiffs needed to stretch in an attempt to satisfy Article III is illustrated by their analogy of their claims to qui tam actions. It didn't work. But this ERISA decision has little if anything to say about the viability of Fonseca's and LLDF's constitutional claims. The District Court missed another glaring difference in the cases—*Glanton* focused on a lack of injury in fact, while injury was established in the court below. The District Court's reading of *Glanton* to support "broad and legitimate discretion" for medical providers to end life, 1 ER 9, is serious error. The fallacy

of doctors possessing "broad and legitimate discretion" to end life is further discussed below in Section III-A.

Even the prospect of pass-through savings were deemed to satisfy Article III standing in *Assn. of Pub. Agency Customers v. Bonneville Power Admin*., 733 F.3d 939, 950 (9th Cir. 2013). That decision, which involved utility rate-making and regulations that this Court aptly described as "complicated," *id.* at 946, is an awkward fit for the present. For one thing, it did not involve constitutional claims, but agency actions. The Article III issue arose because the plaintiffs were customers of customers of the federal power agency they were suing; they were not in direct privity to the defendant. Still, after a thorough *Lujan* analysis, this Court found all three factors were satisfied. Causation existed because the rates paid by the plaintiffs were "correlated" to (but not mandated by) thhose set by the defendants. *Id.* At 954.

Strangely, the District Court believed *BPA* supported its denial of standing to Fonseca and LLDF. 1 ER 12. The District Court's reasoning, though, actually mirrors the dissent and not the majority. Judge Alarcon thought it determinative that there was no "guarantee" the claimed pass-through savings would reach the plaintiffs. *Id.* At 974. The majority disagreed.

Superficially, the Circuit authority that comes closest to supporting the District Court's ruling is *Harris v. Bd. of Supervisors, Los Angeles County*, 366

F.3d 754, 758 (9th Cir. 2004). 1 ER 8-9. There, the County of Los Angeles decided to close one of six county hospitals out of fear of budget deficits in the future, and removed 100 beds from another LA hospital. Plaintiffs were eight indigent and uninsured county residents with serious health problems who regularly rely upon the county health care system for routine, rehabilitative, and emergency care.

This Court acknowledged "uncertainty" as to when the plaintiffs would access the healthcare services they sought to preserve. *Id.* At 763. But the Court instead focused on the fact that "when they do seek those services, they may not be readily available." *Id.*

The District Court tried to squeeze out of *Harris*—and *BPA, Glanton* and *Native Village*—a restriction on Article III causation that is simply not there. This was error.

F. The District Court's Decision Needlessly Puts This Circuit on a Collision Course With the D.C. Circuit.

The District Court's decision, if affirmed, would put this Circuit in conflict with *Abigail Alliance for Better Access to Dev. Drugs v. Von Eschenbach*, 469 F.3d 129 (D.C. Cir. 2006).

There, a public Interest group sought to enjoin the FDA from erecting "many hurdles" that hindered patient access to investigative drug trials. *Id.* at 135. The

D.C. Circuit's holding was unambiguous. "This is sufficient to establish causation." *Id.*

There, as here, the government attempted to shift blame to the private sector, in the form of the drug makers. The appellate court was having none of it.

As in *Abigail Alliance*, LLDF pled that its mission to save Israel and other vulnerable patients from forcible withdrawal of life support is being frustrated by CUDDA. 2 ER 117, ¶4. But the District Court faulted the TAC for not identifying "a precise protocol that CUDDA requires." 1 ER 15.

The granting of the State's Motion to Dismiss here does not leave room for the possibility that bureaucratic hurdles or government inertia could lead to patient deaths and thereby demand a constitutional remedy. Instead, the District Court permits only direct State mandates to be challenged.

Appellants respectfully suggest that the thoroughness and reasoning of the D.C. Circuit stands on much firmer footing than the holding now before this Court.

III. THE DISTRICT COURT MISSED THE MARK ON REDRESSABILITY.

This Court has explained that the plaintiff's redressability burden is "relatively modest." *Renee v. Duncan*, 623 F.3d 787, 797 (9th Cir. 2012). There need not be a "guarantee" that their injuries will be redressed by a favorable decision. *Id.*

As with causation, the District Court's novel approach is hard to square with these principles.

A. The District Court's Expansion of "Broad and Legitimate Discretion" for Doctors to End Life Goes Well Beyond The Use of That Phrase By the Supreme Court or This Court.

For both causation and redressability, the District Court latched on to the phrase "broad and legitimate discretion" to describe doctors' roles in ending life—and defeat any responsibility the State might otherwise have for deprivation of life.

This language appears to have first been used by Justice Kennedy in *ASARCO, Inc. v. Kadish*, 490 U.S. 605 (1989). It was used to describe the discretion of state lawmakers to allocate taxes and spending. A teachers' union challenged state mining leases that were claimed to be undervalued and thus deprived the schools of funding.

The Supreme Court rejected the union's claims, explaining:

> Yet even if invalidation of the state law would create increased revenue for the school trust funds in the near future, an issue much disputed here, the allegations of economic harm rest on the same hypothetical assumptions as do the taxpayer claims. If respondents prevailed and increased revenues from state leases were available, maybe taxes would be reduced, or maybe the State would reduce support from other sources so that the money available for schools would be unchanged.
>
> Even if the State were to devote more money to schools, it does not follow that there would be an increase in teacher salaries or benefits. These policy decisions might be made in different ways by the governing officials, depending on their perceptions of wise state fiscal policy and myriad other circumstances. Whether the association's claims of economic injury would be redressed by a favorable decision in this case 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.* at 614-15.

Whatever the limits of broad and legitimate discretion may allow for deference to a coordinate branch of government, there can be no corollary discretion to end life. California regulates medical practices precisely because of the actual and potential harm to patients. *NAAP*, 228 F.3d at 1052. Going the opposite direction with a much-expanded concept of discretion was a faulty foundation on which to construct a new theory of non-redressability.

B. The District Court Misunderstood Both the Retrospective and Prospective Effects of the Requested Relief.

From its presumption of doctors' "broad and legitimate discretion" that it could not predict or control, the District Court further reasoned that striking down CUDDA would accomplish nothing. It held:

> Invalidating CUDDA would not reverse or otherwise impact the medical opinion that Israel died on April 14, 2016. Cf. Prior Order at 11. Due to an attenuated chain of causation, Fonseca has not shown a "substantial likelihood" that declaring CUDDA would redress her injury. *Id*. at 11-13 1 ER 12.

Yet Appellants are not seeking to coerce a certain medical opinion out of an unwilling doctor. Appellants oppose compelled speech, as they do forced death. Rather, they seek prospective constitutional safeguards and retrospective correction of a death certificate, issued and held by the State, premised on an unconstitutional

statute. In practical terms, the remedy differs little from a court-ordered change to a birth certificate to reflect a child's adoption, or an adult's changed understanding of his or her gender identity. Such a change would not require the delivery doctor to change the medical opinion held at the time of birth. If Kaiser doctors wish to cling to their demonstrably false view that Israel died on April 14, 2016, they are entitled to that opinion—but not to State confirmation of that opinion.

As to the prospective relief, Sec. 1983 by design serves as a deterrent to unconstitutional takings of life and liberty. *Chaudhry* at 1106. In contrast to the State's awkward attempt to minimize the influence of its end-of-life statutes, it is readily apparent that removing the cloak of legitimacy that CUDDA places over certain deprivations of life would most certainly deter physicians from pulling the plug prematurely.

A healthy fear of the legal consequences for violating state law has for decades deterred medical providers from ending life prematurely. *Cruzan by Cruzan v. Harmon*, 760 S.W.2d 408, 410 (Mo. 1988). *See also, Cruzan v. Dir., Mo. Dept. of Health*, 497 U.S. 261, 280 (1990).

In *Compassion in Dying v. Wash.*, five physicians who regularly treat patients with terminal illnesses wanted to assist their patients in dying, however "they have all been deterred from doing so by the existence of the Washington statute challenged in this case." *Compassion in Dying v. Wash.*, 850 F. Supp.

1454, 1458 (W.D. Wash. 1994), *aff'd* 79 F.3d 790 (9th Cir. 1996), *rev'd sub nom. Wash. V. Glucksberg,* 521 U.S. 702 (1997).

And in the realm of medical marijuana, courts accept that criminalization produced a chilling effect on doctors that legalization would lift. *Conant v. McCaffrey*, 172 F.R.D. 681, 690 (N.D. Cal. 1997). *See also, Conant v. Walters*, 309 F.3d 629, 639 (9th Cir. 2002), *cert denied* 540 U.S. 946 (2003). The notion that physicians do not change their behavior to reflect judicial interpretation of healthcare-related laws is flawed.

C. Restoration of Dignity is a Redressable Remedy.

Perplexingly, the District Court also did not address at all two of Fonseca's core explanations of State liability. First, Fonseca explained that State definitions that limit fundamental rights can indeed cause harm. This principle is illustrated by our nation's previous, misguided attempts to define certain races as non-persons, and by the more recent focus on the definition of marriage.

In *Obergefell v. Hodges*, 135 S.Ct. 2584 (2015), the Court felt it was important to extend marriage rights to the plaintiff even though his same-sex partner had died and no further union was possible. Id. at 2597, 2602. Under the State's theory, *Obergefell* would have been rejected before reaching the Supreme Court as non-redressable. On that issue though, the State has maintained the opposite view—that State definitions matter as a source of dignity, even when

rights are protected with other nomenclature. *See also, In re Marriage Cases,* 43 Cal.4th 757 (Cal. 2008).

CUDDA defines out of life persons who, having continued biological functioning, would have been considered alive at the adoption of the Fifth and Fourteenth Amendments, respectively.

The view of the State and the District Court that a definitional statute cannot cause harm calls to mind the dark days leading ultimately to the Fourteenth Amendment. "We think ['negroes of African descent']… were not intended to be included[] under the word 'citizens' in the Constitution, and can therefore claim none of the rights and privileges which that instrument provides for and secures to citizens… ." *Scott v. Sandford*, 60 U.S. 393, 404-05 (1857). Today, the notion that authorities once acquiesced in the deprivation of human beings' most basic liberties by defining them as non-citizens shocks the conscience.

We are not so far removed from this logic as we may think. The State drew a line declaring Israel to be no longer a legally-recognized person, regardless of continued biological functioning. The Fourteenth Amendment was enacted precisely to hold States accountable for laws permitting—not just requiring or prescribing—constitutional deprivations by private parties.

D. The Decision Below Renders Fundamental Constitutional Rights Non-Redressable.

Perhaps the most serious implication of the decision below is that it holds—without even a discussion of the merits—that patients like Israel and family decision-makers like Fonseca have no constitutional due process rights to resist the forced ending of their lives. Surely, this momentous question must be weighed on the merits.

The heart of Plaintiffs' procedural due process claim is that CUDDA lacks the safeguards necessary to ensure that the State's most vulnerable citizens are not deprived of life. 2 ER130 ¶65. The substantive claim is that innocent children like Israel have a fundamental right to life that does not yield to lesser interests such as the need for organ donors or economic efficiency. 2 ER 132, 133 ¶74, 83.

Our nation affords years of due process and multiple levels of review when the guilty are sentenced to death. *Roper v. Simmons*, 543 U.S. 551, 577 (2005). Even this is not enough to justify sentencing juveniles to death. *Id.* And it would not matter if the incarcerations or executions were outsourced to private contractors. The innocent facing termination of their life support deserve no less. They certainly deserve better than they are getting from a State that looks the other way and claims it is powerless to stay the hands of executioners in white coats.

Distinct but related constitutional values inhere when the patient is a minor and the decision-maker is their parent.

A fit parent has plenary authority over medical decisions for a small child. *In re Baby K*, 832 F. Supp. 1022, 1030 (E.D. Va. 1993). Fonseca felt a moral and spiritual duty to give her child every benefit of the medical doubt as to whether he could improve with additional treatment. 2 ER 125 ¶36.

By holding that Fonseca cannot even state, much less prove, such a claim, the District Court lost sight of its duty to safeguard fundamental rights. No heed was given to the path laid out by the Michigan Court of Appeals in a similar case, *Family Independence Agency v. A.M.B.* (*In re AMB*), 248 Mich. App. 144 (Mich Ct. App. 2001). There, the appellate court conducted an extensive post-mortem of the circumstances surrounding the withdrawal of life support from Baby Allison. The appellate court found serious due process violations in the manner that the decision to end Baby Allison's life was taken away from her parents, their serious shortcomings notwithstanding. Even though circumstantial evidence pointed to the parents' unfitness, clear and convincing evidence of the parents' incompetence was required to take away the decision from them. *Id.* At 204-205.

Liberty demands no less here. Fonseca's fitness was not in question and the State, through its statutory scheme, nevertheless took away her ability to make this monumental decision for her child. This was wrong, and it can and must be redressed.

IV. THE DISTRICT COURT'S ABOUT-FACE ON *ROOKER-FELDMAN* WAS UNTENABLE.

As an additional support for its reasoning on redressability, the District Court accepted the State's explanation of the *Rooker-Feldman* doctrine. 1 ER 12-13. This move was surprising, because the District Court had to that point rejected those same arguments. 2 ER 143-44; 3 ER 322-23.

Appellants explained the inapplicability of the doctrine based on the way it has been interpreted by the Supreme Court, and the different nature of what is being sought now versus earlier at desperate moments in the case. Simply put, the doctrine has been limited to the unique facts of the two cases from which it is derived, *Rooker v. Fid. Trust Co.*, 263 U.S. 413 (1923) and *D.C. Ct. of App. v. Feldman*, 460 U.S. 462 (1983).

The plaintiffs in both *Rooker* and *Feldman* demonstrated remarkable chutzpah that may explain why no other litigants have met the same fate at the Supreme Court. In *Rooker*, the plaintiff resorted to a federal district court after not only suffering an adverse state court judgment in Indiana, but then unsuccessfully appealing that decision first to the Indiana Supreme Court, and then having certiorari denied by the U.S. Supreme Court. Not surprisingly, the federal trial court balked at taking on a case that both Supreme Courts had already rejected. The Supreme Court ultimately agreed that, given this procedural history, federal jurisdiction was lacking.

In *Feldman*, the plaintiffs sought to goad the federal courts into overturning a decision of the D.C. Court of Appeals on a core issue of the latter court's authority—waiver of its admission rules and educational requirements for lawyers to practice before it.

The litigants urged the federal courts to overturn the state-equivalent court's decision as being unreasonable, arbitrary and discriminatory toward them. *Id.* at 486-87. This, the federal courts could not do.

Even so, 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. *Id.* at 486-87.

Consistently with *Feldman*, Appellants here are not asking this Court to deem the actions of either Superior Court arbitrary or unreasonable. Rather, they are going to the root of the problem—the unconstitutional state law that undergirded their actions. This is squarely within the doctrine.

More recently, the Supreme Court has taken pains to explain the limited nature of *Rooker-Feldman*: "The *Rooker–Feldman* doctrine, we hold today, is confined to cases of the kind from which the doctrine acquired its name…." *Exxon Mobil Corp. v. Saudi Basic Industries Corp.*, 544 U.S. 280, 284 (2005). And to underscore its point, the Court added, "Since *Feldman*, this Court has never applied *Rooker–Feldman* to dismiss an action for want of jurisdiction. The few

decisions that have mentioned *Rooker* and *Feldman* have done so only in passing or to explain why those cases did not dictate dismissal." *Id.* at 287.

Fonseca's two Superior Court cases were filed on an emergency basis, were directed at Kaiser Permanent Roseville Medical Center and Children's Hospital Los Angeles and sought to prevent the termination of life support. The medical providers are not defendants in the current action.

The emergency relief sought in both Superior Courts was to prevent the termination of life support. Tragically, that relief is no longer available. Indeed, the sudden, same-day dissolution of the TRO by the Superior Court of Los Angeles, 2 ER 283, denied Fonseca the ability to appeal to either state or federal court before her son's life was permanently ended.

The relief now available is a determination that CUDDA falls below the constitutional minimum for safeguarding life. Concomitantly, the State-issued death certificate should be remediated to reflect the true date of death at CHLA in august, not Kaiser four months earlier. The difference carries implications not only for benefits, as pled in the Prayer for Relief, but just as importantly, for dignity. As was validated by physicians in Guatemala, Fonseca's quest to save her son's life was not quixotic or unwarranted. The Court cannot call Israel back to life, but it can restore a constitutionally meaningful measure of dignity. And it can prevent the same tragedy from striking other families.

CONCLUSION

The decision below insulates the State from constitutional responsibility for statutes that led to the untimely death of a toddler. The decision is at odds with this Court's exposition of Article III standing, and it closes the courthouse door to fundamental rights claims of the highest order. It alternately overlooks and misreads this Circuit's precedent, and it creates needless conflict with other Circuits. The decision should be reversed and the case remanded for consideration on the merits.

Dated: January 29, 2018

/s/ Kevin T. Snider

/s/ Matthew B. McReynolds
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CERTIFICATE OF TYPE SIZE AND STYLE

This brief is composed in 14-point Times New Roman type.

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I certify that pursuant to Fed. R. App. P. 32 (a)(7)(C) and Ninth Circuit Rule 32-1, the attached opening brief is proportionately spaced, has a typeface of 14 points or more and contains no more than 14,000 words. According to Microsoft Word's "Statistics," this document contains 8,413 words.

Dated: January 29, 2018

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/s/ Matthew B. McReynolds
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Life Legal Defense Foundation

STATEMENT OF RELATED CASES

No other related cases are pending before this or any other court.

CERTIFICATE OF SERVICE

I hereby certify that on January 29, 2018, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

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

s/ Kirstin Largent