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

APPELLANTS' SUPPLEMENTAL BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CONSTITUTION AND STATUTES

CASES

INTRODUCTION AND SUMMARY OF THE ARGUMENT

Following oral argument in January of this year, on July 15 the Court requested supplemental briefing on mootness and failure to state a claim.

The case is not moot because the availability or unavailability of monetary relief at a later time in a different case is distinct from the injunctive and declaratory relief that can and should be awarded in the present case. Moreover, the injury is capable of repetition yet evading review. Lastly, organizational standing for Life Legal Defense Foundation ensures an ongoing controversy in need of resolution by the Court.

On the merits, Fonseca has pled viable claims for breach of due process, privacy, and parental rights. A contrary holding would dangerously narrow the scope of these fundamental rights and bring this Court into conflict with the state courts.

ARGUMENT

I. THIS CASE IS FAR FROM MOOT.

A. Demonstrating Mootness is a Heavy Burden.

It is axiomatic that a plaintiff in federal court must demonstrate Article III standing with the requisite degree of evidence at each successive stage of the litigation. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992). But the burden shifts when it comes to mootness. Typically, a "party moving for dismissal

on mootness grounds bears a heavy burden." *Motor Vehicle Cas. Co. v. Thorpe Insulation Co. (In re Thorpe Insulation Co.)*, 677 F.3d 869, 880 (9th Cir. 2012) (quoting *Jacobus v. Alaska*, 338 F.3d 1095, 1103 (9th Cir. 2003)). Here, that heavy burden should be borne by the Defendants-Appellees, as the parties anticipated to assert mootness. *See also, Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 189 (2000) (discussing heavy burden on party asserting mootness in context of voluntary cessation argument).

While Appellants believe they could meet a heavy burden in this case for overcoming mootness, it would be error to hold them to a standard higher than what precedent has prescribed.

B. This action seeks declaratory and injunctive relief; the availability of monetary relief in other potential actions should have no effect on the mootness inquiry.

The colloquy from oral argument, referenced in the Court's Order for this supplemental briefing, focused on Fonseca's dignity interests and the availability of other potential monetary relief.

The equitable powers of this Court and the District Court are considerable. "Once invoked, the scope of a district court's equitable powers to remedy past wrongs is broad, for breadth and flexibility are inherent in equitable remedies." *Milliken v. Bradley*, 433 U.S. 267, 281 (1977) (internal citations omitted).

Equitable relief is exactly what Fonseca and LLDF have sought in the Prayer for Relief. 2 ER 135.

"The test for mootness of an appeal is whether the appellate court can give the appellant *any* effective relief in the event that it decides the matter on the merits in his favor. If it can grant such relief, the matter is not moot." *Motor Vehicle Cas. Co. v. Thorpe Insulation Co. (In re Thorpe Insulation Co.)*, 677 F.3d 869, 880 (9th Cir. 2012) (emphasis added) (internal quotations and citations omitted).

This case would avert mootness even if a partial remedy were still available. *Church of Scientology of Cal. v. United States*, 506 U.S. 9, 13 (1992). More will be said about this authority in the next section on redressability.

Moreover, mootness of injunctive relief does not necessarily moot declaratory relief. *Super Tire Eng'g Co. v. McCorkle*, 416 U.S. 115, 121–122 (1974). *Biodiversity Legal Found. v. Badgley*, 284 F.3d 1046, 1054 (9th Cir. 2002).

The Appellants here face fewer obstacles than did the plaintiffs in the foregoing cases. The available remedies would offer the complete relief sought in the Third Amended Complaint, not partial relief, and the Defendants have certainly not abandoned their defense or ceased implementation of the challenged statutes.

The interchange at oral argument could have prompted confusion in that the standing question intersects with Eleventh Amendment considerations. In its decisions *Edelman v. Jordan,* 415 U.S. 651 (1978) and *Quern v. Jordan*, 440 U.S. 332 (1979), the Supreme Court explained that monetary relief, typically barred by the Eleventh Amendment in a federal action against state defendants, can be obtained only indirectly and if "ancillary" to equitable relief. *Quern*, 440 U.S. at 349. In light of these limitations, Fonseca sought only equitable relief in the instant action. Counsel expresses no position here as to its potential availability in a subsequent suit. It would be strange indeed if monetary relief rendered largely unavailable by the Eleventh Amendment were now deemed to be essential in order to avoid mootness. Such a holding would greatly undermine what this Court and the Supreme Court have long said about the independent importance of equitable relief.

C. Redressability further defeats mootness.

Mootness and redressability are closely linked. *Motor Vehicle Cas. Co.,* 677 F.3d at 880 (availability of "any effective relief" means case is not moot).

Fonseca will not repeat her arguments set forth in Section III of the AOB and Section II of the RB, except to note that the rationales are interrelated.

The District Court raised but did not resolve mootness, 1 ER 10 n. 5, and the first part of its discussion is relevant here.[1]

In the *ProtectMarriage.com* decision cited by the District Court, this Court held it could not grant relief where the information sought to be reclaimed by the plaintiffs had been widely disseminated on the internet and was impossible to fully retrieve. *ProtectMarriage.com - Yes on 8 v. Bowen*, 752 F.3d 827, 835 (9th Cir. 2014). In dissent, Judge Wallace cogently explained why that result was inconsistent with the Supreme Court's holding in *Church of Scientology. ProtectMarriage.com*, 752 F.3d at 842. That dispute need not be resolved here,

[1] For ease of reference, the District Court's complete discussion of mootness is as follows: Although the parties did not raise the issue, the withdrawal of life support might moot this case. See *Protectmarriage.com-Yes on 8 v. Bowen*, 752 F.3d 827, 834 (9th Cir. 2014) (citations omitted) (case moot where "federal court can no longer effectively remedy a 'present controversy' between the parties"). This case might trigger the "capable of repetition, yet evading review" exception to mootness, because life support was maintained only by removing Israel from this country. See also *McMath v. California*, 15-CV-06042-HSG, 2016 WL 7188019, at *1 (N.D. Cal. Dec. 12, 2016) (brain dead patient sustained on life support by moving her to state with religious exception for determination of death). On the other hand, because life support can be continued after the determination of death, this case may not be of "inherently limited duration" to trigger that exception. *Bowen*, 752 F.3d at 836 (quoting *Doe No. 1 v. Reed*, 697 F.3d 1235, 1240 (9th Cir. 2012)). Alternatively, the addition of an organizational plaintiff here may create an ongoing controversy. See *Abigail All. for Better Access to Developmental Drugs v. Eschenbach*, 469 F.3d 129, 132-33 (D.C. Cir. 2006) (organization that assisted terminally ill patient had standing to challenge FDA policies without regard to whether organization's members continued to live). The court need not resolve this question, as both plaintiffs here lack standing in the first instance.

because the present case is more akin to *Church of Scientology* than with *ProtectMarriage.com*.

Justice Stevens wrote for a unanimous Court rejecting mootness in *Church of Scientology*. The dispute there centered around recorded attorney-client conversations sought by the IRS and reluctantly turned over by the church. The government urged that, because the IRS had already obtained the disputed records, the proverbial cat was out of the bag and the church's efforts to protect the privileged information had become moot. *Church of Scientology*, 506 U.S. at 12. Not so, held the Court. *Id*. at 18. The government's retention of the church records represented an "affront" to the church's privacy interests, *id.* at 13, much as the Director's retention of the erroneous death certificate represents an affront to Fonseca's autonomy privacy, dignity, and related constitutional interests. The Court also observed that the protracted litigation in which the government sough to retain the records demonstrated that they were not insignificant. *Id.* The lower court still possessed the power to order the records, if deemed wrongfully obtained and held by the agency, to be returned or destroyed, a remedy still existed. *Id.* Even if the Court could not return the parties to the status quo ante, "[T]he availability of [a] possible remedy is sufficient to prevent [a] case from becoming moot." *Id.*

By contrast, in *ProtectMarriage.com*, the plaintiffs sought to shield information from the public. The Court reasoned that no relief was available because the information had already been so widely redistributed on the internet to countless third parties that it could not be retrieved and protected in any meaningful way. *ProtectMarriage.com*, 752 F.3d at 834-35. The fears and harm sought to be remedied by those plaintiffs is qualitatively different than what Fonseca alleges and seeks. She maintains that the death certificate of her son held by the Defendant is erroneous. The discrepancy reflects the difference between whether his life ended lawfully or unlawfully, at a Kaiser hospital in Northern California or at Children's Hospital Los Angeles, who is ultimately responsible for that death, and whether the family was justified in its considerable efforts to transport Israel out of the country for further treatment. The controversy will continue until it is resolved on the merits.

The Court's ability to order the Director to correct the death certificate, and its obligation to address the constitutionality of the challenged statutes, render this case both redressable and not moot.

D. End-of-life cases like this are a good fit for the mootness exception capable of repetition yet evading review.

The District Court also noted that this case might fall within the exception to mootness for cases that are capable of repetition yet evading review. 1 ER 10 n. 5, reprinted at s*upra*, n.1. While Fonseca believes her case is not moot in light of the

foregoing discussion of injury and redressability, should the Court deem this case to be in need of an exception, she certainly meets those criteria.

In the early 1970s, with its nascent abortion cases, the Supreme Court adjusted its formulation of the mootness doctrine to allow constitutionally significant but time-sensitive cases to be fully litigated. To that end, abortion claims have been deemed justiciable because an interest in declaratory relief remained and litigation would seldom be completed otherwise. *Roe v. Wade*, 410 U.S. 113, 125 (1973); *Doe v. Bolton,* 410 U.S. 179 (1973).

"A case is capable of repetition when the defendants are challenging an ongoing government policy . . . We [have] held that although the particular situation precipitating a constitutional challenge to a government policy may have become moot, the case does not become moot if the policy is ongoing." *United States v. Howard*, 480 F.3d 1005, 1010 (9th Cir. 2007) (internal quotations omitted).

A similar need has been recognized in a number of end-of-life cases.

The state courts have had much to say in this regard for cases like the present. In *Dority v. Superior Court*, 145 Cal. App. 3d 273 (Cal. Ct. App. 4th Dist. 1983), the infant expired on its own while the parents were seeking to prevent life support from being removed. The court observed, "The novel medical, legal and

ethical issues presented in this case are no doubt capable of repetition and therefore should not be ignored by relying on the mootness doctrine." *Id.* at 276.

Likewise, in *Bartling v. Superior Court*, 163 Cal. App. 3d 186 (Cal. Ct. App. 2nd Dist. 1984), the patient fighting for self-determination over his life support died the day before the appellate hearing. *Id.* at 189. The court quoted the passage from *Dority* set forth above and similarly proceeded to the merits. *Id.*

This Court and other Circuits have held similarly in end-of-life cases. In *Compassion in Dying v. Wash.*, 79 F.3d 790, 795-796 (9th Cir. 1996), *rev'd on other grounds*, *Wash. v. Glucksberg*, 521 U.S. 702 (1997), this Court relied on *Roe* to find that end-of-life challenges faced similar obstacles and therefore were not moot.

This problem—and solution—were also recognized in *Abigail Alliance for Better Access to Deve. Drugs v. Von Eschenbach*, 469 F.3d 129 (D.C. Cir. 2006), where some of the Alliance members died after providing affidavits but before a Complaint could be filed, and another key member died during the litigation. *Id.* at 136. There, the court held:

> Even if the Alliance could not supply a particular terminally-ill member, at each moment, who has exhausted all conventional treatments but has not died, this is a classic case of a situation "capable of repetition, yet evading review." [citations omitted] By the very nature of its membership, the Alliance has a reasonable

> expectation that its members will continue to suffer the same short-lived injuries that this doctrine addresses.

Id. at 136.

As some of the foregoing federal cases illustrate, organizational standing is an alternative avenue by which the courts have reached important constitutional issues, notwithstanding patients' deaths. This option will therefore be addressed next.

E. The organizational standing of LLDF independently defeats mootness.

The District Court surmised the organizational interests of LLDF might also prevent mootness, consistent with *Abigail Alliance*.

The District Court's instincts were correct. LLDF has pled ongoing injury to its clients. The TAC states:

> Life Legal Defense Foundation ("LLDF") is organized under section 501(c)(3) of the Internal Revenue Code. The mission of LLDF focuses on preservation of the lives of the most vulnerable members of society, including the very young and those facing the end of life. LLDF closely assisted the family of Israel in the present matter. Sadly, the facts presented in this case are not an outlier for LLDF. The organization attempts to protect members of the public facing withdrawal of life-support from loved ones. Due to the CUDDA protocol described herein, LLDF's work in this regard has been profoundly frustrated. CUDDA has caused a significant drain on LLDF's time and resources to address the burdensome undertaking of resisting attempts by medical facilities to remove life-support for members of the public whose loved ones are declared brain dead, though they are not biologically dead. This includes counseling the

> families, negotiating with hospitals, litigation, and raising funds for these purposes.

Id. at 2 ER 118.

This is indeed consistent with the holding in *Abigail Alliance*. There, the D.C. Circuit determined:

> That Oppenheim died before the lawsuit was resolved does not divest the federal courts of jurisdiction. If the Alliance establishes a "continuing interest" that survives Oppenheim's death, *Friends of the Earth*, 528 U.S. at 191-92; *see Sosna v. Iowa*, 419 U.S. 393, 402, 95 S. Ct. 553, 42 L. Ed. 2d 532 (1975), then the court may continue to hear the case.

Id. at 136.

While LLDF endeavored to provide general allegations appropriate to the pleading stage, *Lujan*, 504 U.S. at 561, if more facts and details are deemed necessary by the Court, such could be supplied through further amendment to the Complaint. Either way a contrary holding would contradict the D.C. Circuit, this Court's own prior decisions, and the Supreme Court's articulation of organizational and associational standing. *See, e.g., Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982) (frustration of purpose and expenditure of resources suffices for Article III organizational standing).

II. A HOLDING THAT FONSECA HAS FAILED TO STATE A CLAIM WOULD RENDER CORE ASPECTS OF DUE PROCESS, SELF-DETERMINATION AND PARENTAL RIGHTS UNENFORCEABLE.

The gravamen of the Third Amended Complaint is that the forced withdrawal of life support from the toddler at the center of this case was carried out under color of State law and did violence to the most fundamental precepts of due process, self-determination, and parental rights. The TAC breaks down these violations into five counts, 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.

While pled distinctly and having independent force, because the state courts have thus far not drawn sharp distinctions between application of the similar state and federal constitutional claims. This brief will largely follow that approach.

A. A holding that the State has no duties to prevent deprivations of life and liberty without due process would create a conflict with the state courts.

i. Deprivation of life requires more—not fewer—safeguards than deprivations of other liberties.

The Supreme Court's first major decision involving end-of-life decisions was *Cruzan v. Dir., Mo. Dept. of Health*, 497 U.S. 261 (1990), and it deserves careful consideration. The Court first traced the then-recent development of end-of-life decisions at the state level, beginning with the "seminal" decision *In re Quinlan*, 355 A.2d 647 (N.J. 1976), *cert. denied sub nom. Garger v. New Jersey*, 429 U.S. 922 (1976). *Cruzan*, 497 U.S. at 270. The Supreme Court noted that state courts had at times relied on common-law concepts of informed consent, self-determination, privacy, and even state statutes. The Court deemed it best to ground its own analysis in due process under the Fourteenth Amendment. *Id.* at 278.

In the first count, Fonseca and LLDF have pled that, under the Fifth and Fourteenth Amendments to the U.S. Constitution, a person may not be deprived of life and liberty without due process of law. 2 ER 131, ¶ 72. Indeed, few rights are more fundamental or precious than the right to life. 2 ER 131-32, ¶ 73.

In *Cruzan*, the Supreme Court began its due process analysis by reviewing bodily integrity and autonomy decisions such as *Jacobson v. Massachusetts*, 197 U.S. 11, 24-30 (1905)*; Vitek v. Jones*, 445 U.S. 480 (1980); and *Parham v. J. R.*,

442 U.S. 584 (1979). These decisions, together with many others, developed both procedural and substantive rights safeguarding autonomy.

Procedural due process demands notice and opportunity to respond commensurate with the magnitude of the deprivation. *See, e.g., Mathews v. Eldridge*, 424 U.S. 319, 341 (1976); *Goldberg v. Kelly*, 397 U.S. 254, 268-69 (1970) (loss of welfare benefits).

Contrasting end-of-life decisions with other important but not fatal deprivations, the *Cruzan* Court then noted:

> We think it self-evident that the interests at stake in the instant proceedings are more substantial, both on an individual and societal level, than those involved in a run-of-the-mine civil dispute. . . . We believe that Missouri may permissibly place an increased risk of an erroneous decision on those seeking to terminate an incompetent individual's life-sustaining treatment. An erroneous decision not to terminate results in a maintenance of the status quo . . . An erroneous decision to withdraw life-sustaining treatment, however, is not susceptible of correction.
>
> *Cruzan*, 497 U.S. at 283.

Following the Supreme Court's lead, other appellate courts have held that denying parents notice and opportunity to participate in the decision to end life support for their infant is a constitutional due process violation. *Family Independence Agency v. A.M.B. (In re A.M.B.)*, 248 Mich. App. 144, 213 (Mich. Ct. App. 2001).

The intractable problem with the CUDDA scheme now before this Court is that its conception of due process is irreconcilable with the principles set forth in *Cruzan* and its progeny. The CUDDA statutory scheme provides no procedures or process by which a patient or advocate may independently challenge the determination of death. 2 ER 131, ¶ 72.

The State's essential position, AAB at 49-50, that the statutes need not offer much in the way of safeguards, since desperate family members may seek emergency relief in state court, is premised on the notion that the federal constitutional rights are of little consequence. A holding that Fonseca cannot state a procedural due process claim would validate the State's deeply disturbing views.

ii. Deprivation of life cannot simply be justified by claiming that through CUDDA, the State has changed the definition of death.

The procedural due process violations are weighty. But they are by no means the only type of due process violation at stake. CUDDA attempts to speak death into existence and the patient out of existence, despite the continuation of biological life. 2 ER 132, ¶ 74. The TAC establishes a medical dispute as to when Israel died. 2 ER 131-32, ¶ 73. In essence, it is alleged that through the legal fiction of brain death and premature official certification of such death, the State deprives individuals like Israel of life and liberty without due process. 2 ER 132, ¶ 74.

Fonseca submits that defining a person out of life raises no less serious questions than did now-overturned definitions restricting the statuses of marriage and citizenship. RB at 27-28 (citing *Obergefell v. Hodges*, 135 S. Ct. 1039 (2015) and *Scott v. Sandford*, 60 U.S. 393 (1857)).

The Director's reasoning is alternately circular and conflicting. On the one hand, she asks the court to accept that brain death is a reality because the State has declared it to be so. On the other hand, she suggests the statutory definition of death is of little consequence. Neither illogicism should be validated by this Court.

iii. A holding that Fonseca fails to state a claim for violation of the California Constitution would create conflict with the state courts.

In the third count, Appellants have pled deprivation of life in violation of the California Constitution, Article I, Section 1. This provision provides that all people are by nature free, independent and have inalienable rights, including "enjoying and defending life." Cal. Const. Art. I, Sec. 1, quoted in 2 ER 133, ¶ 81. Under this count, Fonseca similarly pleads that CUDDA is inconsistent with the constitutional definition of life; it deprives individuals of life while they are still biologically functioning; CUDDA provides no procedures or process whereby individuals or their advocates may challenge determinations of death; CUDDA removes the independent judgment of medical professionals; there is a medical

dispute as to when Israel died; and the State therefore deprived Israel of life in violation of its own constitution. 2 ER 133-34, ¶¶ 82-84.

To date, the state courts have presumed a symbiotic relationship between state and federal constitutional protections for end-of-life decisions. *Donaldson v. Lungren*, 2 Cal. App. 4th 1614, 1619-1620 (Cal. Ct. App. 1992) (discussing and relying on *Cruzan* to interpret state constitutional rights). The federal courts have likewise recognized the relevance of state court holdings in this sensitive area. *See, e.g., Cruzan, 497 U.S.* at 275-76, discussing *Conservatorship of Drabick,* 200 Cal. App. 3d 185 (Cal. Ct. App. 1988). A holding that Appellants here cannot state a claim under Article I, Section 1 would create a rift between federal and state holdings on end-of-life due process protections. At the Motion to Dismiss stage, such a ruling would be unnecessary and inappropriate. A retreat on end-of-life due process leaving the State as its lone protector would also mark an abandonment of this Court's historic role as a leading defender of such rights.

B. Fundamental precepts of self-determination arising under privacy are paramount in both state and federal constitutional law.

i. Coercion and involuntary ending of life have been chief concerns in the development of the Supreme Court's end-of-life jurisprudence.

The Fourth Count in the TAC pleads a violation of privacy rights pursuant to 42 U.S.C. Section 1983. 2 ER 134, ¶¶ 85-89. This right to privacy has been articulated by the Supreme Court as arising from the penumbra of rights set forth

in the U.S. Constitution. *Id.* ¶ 87. Health care decisions are part of personal autonomy and privacy. *Id.* The TAC pleads that, as a direct and proximate cause of the Act, Israel was deprived of treatment and his mother was deprived of her own privacy right and the privacy right to make medical decisions on his behalf. *Id.* ¶¶ 87-89.

Since *Cruzan*, the Supreme Court's leading decision on the so-called "right to die," and correspondingly the right to medical self-determination, has been *Washington v. Glucksberg*, 521 U.S. 702 (1997). There, the Justices unanimously upheld Washington State's bar on assisted suicide. The Justices offered varying opinions about the future legality of assisted suicide, but a unifying theme running through all of the opinions is concern that, were a state's protection of life overturned, involuntary death could result.

In the lead opinion, Chief Justice Rehnquist, joined by Justices Scalia, Thomas, and Kennedy, opined, "We have recognized, however, the real risk of subtle coercion and undue influence in end-of-life situations." *Id*. at 732. Justice O'Connor, joined by Justice Ginsburg, observed:

> The difficulty in defining terminal illness and the risk that a dying patient's request for assistance in ending his or her life might not be truly voluntary justifies the prohibitions on assisted suicide we uphold here.
>
> *Id.* at 738.

The same could be said of the difficulties and disagreement in the diagnosis of brain death, and the involuntary ending of life support.

Justice Stevens would have kept the door open for assisted suicide in the future but also acknowledged the State's interest in ensuring voluntary decisions and protecting the vulnerable against coercion. *Id.* at 747. Justice Souter believed the desire to protect terminally ill patients from involuntary death was "dispositive." *Id.* at 782. He worried "the barrier between assisted suicide and euthanasia could become porous, and the line between voluntary and involuntary euthanasia as well." *Id.* at 784-85.

The concerns expressed by all the Justices were prescient; involuntariness of the ending of life support is exactly the type of claim now before this Court.

While much emphasis and debate has surrounded the so-called "right to die," self-determination is no less important for those pursuing the right to live. The D.C. Circuit summarized it this way:

> [T]he Alliance seeks to enforce "the right of terminally ill patients to make an informed decision that may prolong life." [citations omitted] As their lives hang in the balance, they ask "that the decision to assume . . . known or unknown risks be left to the terminally ill patient and not to the FDA." [citation omitted] So described, this right to self-determination is so fundamental that it is no wonder that no federal law has needed to articulate its precise boundaries.
>
> *Abigail Alliance*, 469 F.3d at 137.

To hold that Fonseca and LLDF cannot state a claim would contradict the principles of self-determination and autonomy privacy set forth above.

ii. The California state courts have even more adamantly expressed the right of self-determination under both the federal and state constitutions.

If anything, the state courts have been even more articulate and forceful in their exposition of self-determination rights at the end of life.

If the patient's right to self-determination means anything, "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); *see also, Donaldson v. Lungren*, 2 Cal. App. 4th 1614, 1620 (1992).

This is equally true when guardians or surrogates assert the right on behalf of the minor or incapacitated patient. *Id.* at 1619.

The Fifth Count therefore asserts violation of privacy rights arising under the California Constitution, Article I, Section 1. As with federal privacy rights, the state privacy rights include personal autonomy to make healthcare decisions on one's own behalf or, as in this case, by a fit parent on behalf of a minor child. 2 ER 135, ¶¶ 92-93. A fallacious declaration of death constitutes a serious invasion of privacy; as a direct and proximate cause of the Act, Israel was denied treatment, and Fonseca was denied the right to make medical decisions on his behalf. *Id.* ¶¶ 93-94.

As described by the California state courts, the right of self-determination emanates from the constitutional right to privacy and constrains both the medical community and the judiciary. *Bouvia v. Superior Court*, 179 Cal. App. 3d 1127, 1135 (Cal. Ct. App. 2d Dist. 1986).

Indeed, "The State may also decline to assess the quality of a particular human life and assert an unqualified general interest in the preservation of human life to be balanced against the individual's constitutional rights." *Donaldson* at 1620 (citing *Cruzan*).

In this litigation, the Director seeks to unilaterally abandon the unbroken pronouncements of the state courts on the inviolate self-determination of patients and their surrogates in choosing whether to end life support. Yet she is not a law unto herself, and she cannot credibly explain how the asserted interests of the State have suddenly reversed course. Surely, it cannot simply be the recent allowance for assisted suicide in California; as the Justices' consensus in *Glucksberg* attests, allowing assistance to those who choose death affords no justification for coercing those who have not chosen death.

A holding that Fonseca cannot state a claim for violation of self-determination and privacy pursuant to the California Constitution would contradict *Bartling, Bouvia*, and *Donaldson*—to name just a few.

C. The parental rights claim is potent and poignant.

The Second Count is for deprivation of Fonseca's parental rights in violation of due process pursuant to the Fifth and Fourteenth Amendments to the U.S. Constitution. 2 ER 132-33, ¶¶ 75-79.

While the near-universal recognition of parental rights is age-old, the Supreme Court began to articulate them as a matter of fundamental constitutional rights in the 1920s. In a string of cases, most notably *Meyer v. Nebraska*, 262 U.S. 390 (1923) and *Pierce v. Society of Sisters*, 268 U.S. 510 (1925), the Court captured the long-held understanding that a "child is not the mere creature of the State." *Id.* at 535. Parents have fundamental rights to direct the education, and indeed the destiny of their children. *Id.* at 534-35. *See also, Wisconsin v. Yoder*, 406 U.S. 205 (1972). These decisions arose in the context of private schooling and educational decisions made by the parents. Much more do these principles apply when life-and-death decisions must be made on a child's behalf.

Fonseca pleads that, as the fit parent of a young child, she had plenary authority to make medical decisions on his behalf. 2 ER 132, ¶ 76. She believes she has a moral and spiritual obligation to give her child every benefit of the medical doubt before disconnecting his life support. *Id.* at ¶ 77. On its face and as applied, CUDDA affords no due process by allowing parents to contest medical findings (such as brain death) and bring in their own physician for a second

opinion. 2 ER 132-33, ¶ 78. Alternatively, she pleads a close nexus between Kaiser, Dr. Myette, and the State that deprived Israel of treatment. 2 ER 133, ¶ 79.

Parents like Fonseca who have not been adjudicated unfit are presumed to act in the best interests of their children. *Troxel v. Granville*, 530 U.S. 57 (2000); *Parham v. J.R*, 442 U.S. 584 (1979).

In the end-of-life context for young children, *Dority* declined to cabin the parents' or guardian's right to a particular constitutional or common law principle. The Court stated:

> Parents do not lose all control once their child is determined brain dead. We recognize the parent should have and is accorded the right to be fully informed of the child's condition and the right to participate in a decision of removing the life-support devices. . . . Whether we tie this right of consultation to an inherent parental right, the Constitution, logic, or decency, the treating hospital and physicians should allow the parents to participate in this decision. . . . We are in accord with the Loma Linda University Medical Center policy of deferring to parental wishes until the initial shock of the diagnosis dissipates; and would encourage other health care providers to adopt a similar policy.
>
> *Id*. at 279-80.

Even where the parents are suspected for causing the child's injuries, the parental rights must be formally terminated or transferred by a court—not a hospital or doctor acting on their own. *Dority v. Superior Court*, 145 Cal. App. 3d 273.

Instructive is the extensive reasoning of the court in *Family Independence Agency v. A.M.B.* (*In re AMB*), 248 Mich. App. 144, 204-205 (Mich. Ct. App. 2001). There, the appellate court held that the decision to withdraw life support from an infant should not have been taken away from parents, even though their fitness was doubtful, without formal adjudication. That appellate court required clear and convincing evidence from the record in order for it and not the parents or a surrogate to make the decision to withdraw life support. *Id.* at 206.

The court then concluded, "[The] parents also had a virtually exclusive interest in making a decision to withdraw life support, rendering judicial involvement in the decision not only rare, but of significant consequence for their rights as parents." *Id.* at 211.

Were this Court to hold that Fonseca can plead no set of facts in support of her parental rights, it would break new and dangerous ground that would be inconsistent with state decisions.

CONCLUSION

Not only does this case continue to present palpable controversy necessitating injunctive and declaratory relief, but it is also capable of repetition while evading review, and co-Plaintiff-Appellant LLDF can demonstrate organizational standing.

A holding that Fonseca and LLDF cannot state a claim would do violence to fundamental principles of procedural and substantive due process; self-determination and privacy; and parental rights. The manner in which a life-and-death decision for her child was wrenched from Fonseca is utterly incompatible with the overwhelming pronunciations of these basic rights to this point. The decision of the District Court should be reversed.

Date: August 5, 2019.

/s/ Kevin T. Snider

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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 7,000 words. According to Microsoft Word's "Statistics," this document contains 5,624 words.

August 5, 2019

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CERTIFICATE OF SERVICE

I hereby certify that on August 5, 2019, 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.

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