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

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CP COUNSEL PRESS · (213) 680-2300 PRINTED ON RECYCLED PAPER

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INTRODUCTION AND SUMMARY OF THE ARGUMENT

Appellee's Answering Brief (AAB) is a mix of repetition without rebuttal, of continued minimization of the Director's role, and of major new arguments never addressed by the court below.

On Article III standing, the AAB has offered surprisingly little. The Director largely parrots the errors of the District Court that were deconstructed in Appellants' Opening Brief (AOB). The Director makes almost no attempt to rehabilitate the authorities on which the District Court relied. Instead, she retreats to general propositions on standing with no clear application to the present.

The Director takes a similar approach with the *Rooker-Feldman* doctrine. Eschewing case discussion, she puts forward principles lifted out of context. And she skirts the Supreme Court's most recent, controlling holding that sharply limits extension of the doctrine.

The Director instead puts much of her energy into two new areas of argument: the Eleventh Amendment and the merits. As to the Eleventh Amendment, the Director oversimplifies the analysis and seems unaware that many of the precedents on which she relies deny the immunity she seeks. She also puts forward the notion that she does not enforce the statutes being challenged here. She seems not to realize that this Court has rejected nearly identical arguments.

Lastly, the Director invites this Court to consider the merits, even though the District Court did not. Fonseca will briefly counter the description of "vast" state interests advanced by the Director. Some of these interests are either legitimate, and insufficient to overcome fundamental rights, while others are stated as compelling but with no attempt to satisfy the second half of the analysis, least restrictive means. Consideration of the merits should either be deferred to the District Court, or at the very least based on further, supplemental briefing.

ARGUMENT

I. THE DIRECTOR'S REPETITION OF THE DISTRICT COURT'S CIRCULAR REASONING ON ARTICLE III CAUSATION DOES NOT HELP ITS CAUSE.

The parties agree that the Article III analysis begins with *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992). AAB at 20 (citing *Lujan*). From there, their paths diverge as the Director contents herself with restating the general principles set forth in *Lujan* and its progeny, while Fonseca has gone further and explained why the authorities relied on by the District Court and now the Director do not support dismissal of her Fifth and Fourteenth Amendment claims, as well as related claims arising from the California Constitution, Article I, Section 1, under Fed. R. Civ. P. 12.

The AAB largely repackages the District Court's holding on standing. Her arguments overlap but can be roughly categorized as follows:

- The Director does not enforce the challenged statutes.

- CUDDA was not enacted for the benefit of the patient and family.
- There can be no Article III causation because CUDDA does not dictate, require or mandate doctors' determinations of death or decisions to terminate life support.
- The statute defers to accepted medical standards.
- No facts support a state-created danger theory.

The Director avoids any in-depth discussion of precedent; digging beneath these surface arguments undermines each of her contentions.

A. The Director's Connection to the Challenged Statutes is anything but Attenuated and Supports Article III Standing.

It is axiomatic that injuries must be "fairly traceable" to the Defendant's conduct and "not attenuated" in order to satisfy Article III. *Lujan*, at 560; AAB at 21. The Director believes her claimed lack of enforcement of the challenged statute immunizes her from constitutional accountability for the deprivation of life that it facilitates.

This is erroneous for at least two reasons. First, as a statutory matter, the Director maintains significant authority over the medical providers making life-and-death decisions. Second, the new authorities she presents to support her Eleventh Amendment argument actually underscore the errors of her enforcement arguments for Article III as well. Her reasoning is circular; claiming she does not

enforce the challenged statutes does not address whether she has a constitutional role in doing so.

First, the statutory scheme paints a different picture of the Director's duties than what she puts forward to evade responsibility in this case.

As State Registrar of Vital Statistics, the director holds the power to investigate cases of irregularity or statutory violations; such are to be referred by her to district attorneys or the Attorney General for appropriate legal proceedings. Cal. Health and Safety Code (HSC) §§102185-102195.

The director is to ensure uniform compliance as she sets all standards and issues detailed instructions for record forms in regards to mandatory format, quality, and *content* of the records. HSC §§102200-102205 (emphasis added). The director is also tasked with consulting local registrars to promote uniformity of policy and procedure throughout the State and discuss problems with vital registration of deaths and fetal deaths as such problems arise. The director is required to "carefully examine" the death certificates received from the local registrars. If any detail is incomplete or unsatisfactory, the director must acquire any additional information necessary to have a complete and satisfactory certificate HSC §§102215-102220.

The Director's minimization of her role as merely a record-keeper with no enforcement responsibility, and no ability to lift a finger to remedy the erroneous declaration of death which ultimately cost Israel his life, is not credible.

The Director further disclaims any responsibility over doctors at all. AAB at 22. But in addition to the foregoing, her Department of Public Health provides certification and licensing to medical facilities and health care professionals for the purpose of regulatory oversight.[1]

Further, the Director's argument on lack of enforcement as a means of avoiding Article III causation mirrors her argument that non-enforceability of a statute triggers Eleventh Amendment immunity. This Court rejected such a notion in *L.A. County Bar Ass'n v. Eu*, 979 F.2d 697, 704 (9th Cir. 1992):

> The lack of any enforcement proceeding by Eu and Wilson against the Bar Association under the challenged statute does not preclude this suit. Government Code section 69586 is currently being given effect by state officials, including Eu and Wilson. It is simply not the type of statute that gives rise to enforcement proceedings.

This Court held similarly in *Association des Eleveurs de Canards et d'Oies du Quebec v. Harris*, 729 F.3d 937 (9th Cir. 2013). There, this Court rejected the Attorney General's argument that she had not shown an intent to enforce the challenged statute; such an argument should be raised if at all as ripeness, not immunity. *Id.* at 944.

This and similar authorities will be explored in much more depth *infra*, at Section IV. For the present discussion, Fonseca perceives no reason why the enforceability analysis would have a different outcome under Article III causation than under the Eleventh Amendment.

B. The Director Goes to Surprising Lengths to Disclaim Patient Protection.

The Director also has a remarkable response to Fonseca's discussion of *Lujan* approving standing where plaintiffs are the object of the statute or regulation. *Lujan*, 504 U.S. at 562. The AOB sets forth what Fonseca and LLDF thought was an unremarkable proposition: the subject of CUDDA's definition is the individual whose life is at stake.

The Director acknowledges, "CUDDA contains a number of patient protections." AAB at 7-8 (citing HSC §§7181, 7182, 7183, 1254.4, and 103225 et seq.). From there, the Director makes an abrupt u-turn with the claim that the patient is not the object of CUDDA's protections. AAB at 29. Nor does the Director offer any viable substitute. The subject of §7180 is encapsulated in its first two words, "An individual …." This individual is indisputably not the doctor, nor the hospital, nor the State. It is the patient.

[1] [1] https://www.cdph.ca.gov/Programs/CEH/Pages/CLPR.aspx.

Later, Dr. Smith swings back in the opposite direction when arguing the merits. She highlights the patient protections in CUDDA and related statutes as proof that it comports with procedural due process. AAB at 51 and fn. 9. The intellectual whiplash of the Director's evasive maneuvers is astonishing. And thoroughly unconvincing.

C. The AAB Doubles Down on the District Court's Misreading of This Court's Article III Precedents on Causation.

The Director continues the District Court's assumption that absence of mandates, dictates and requirements necessarily mean absence of causation. This, too, is wrong both factually and legally.

Fonseca has explained in detail why several of this Court's Article III precedents that were relied on by the District Court offer no foundation for its decision. AOB at 22-25.

Lujan itself certainly does not demand the denial of Article III standing to Fonseca and LLDF; that decision doubted causation where the U.S. government held a minimal role in projects on the other side of the world, and the projects were largely being carried out by foreign governments and entities far beyond the reach of federal courts. The Director does not explain how this and similar cases are analogous to the present.

Fonseca also went through the backgrounds, among others, of *Ass'n of Pub. Agency Customers (APAC) 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).

Dr. Smith continues invoking *Native Village* and *APAC* in particular. Fonseca previously noted that, unlike *Native Village*, the present action "does not suffer from a vast timeframe, infinite emissions in the air, innumerable potential tortfeasors, or a global scale." AOB at 23. Smith makes no attempt to explain otherwise.

The same is even truer for *APAC*. Fonseca pointed out that the District Court's reasoning is more akin to the dissent. AOB at 24 (citing *APAC* at 974 (Alarcon, J., dissenting)). No response from the AAB. Fonseca further noted that this Court accepted correlation—not just mandates or dictates—to establish causation. *APAC* at 954. Again, deafening silence from the Director—just more parroting of a debunked premise.

The AAB makes an awkward attempt to discuss *Maya v. Centex Corp*., 658 F.3d 1060, 1070 (9th Cir. 2011), where this Court pushed back against a similar move to cabin Article III causation, stating, "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." In response, Dr. Smith misreads the AOB as arguing that the District Court here required proximate

causation. Not quite. Fonseca's argument is that the District Court's insistence on mandates, requirements and directives resulted in a standard that is akin to direct liability, *more than* proximate causation, and in either event more stringent than what this Court has said about Article III causation being *less than* proximate causation. Fonseca is not asking for more leniency or a different standard than what this Court has articulated. Rather, Fonseca is asking for a consistent and common-sense application of the causation standard.

The Director needed to rehabilitate, not rehash, the District Court's faulty foundation. Instead, the Director only confirms that the reliance is indeed misplaced.

D. The Ambiguity of "Accepted Medical Standards" Does Not Justify Deprivations of Life Without Due Process.

The Director also believes that the statutory deference to "accepted medical standards" absolves her of any constitutional culpability for deprivations of life. Yet this phrase is more of a problem than a solution for Dr. Smith.

The ambiguity in differing criteria and standards for declaring brain death deeply troubled the Nevada Supreme Court. After extensively surveying the state of the law, and in particular the differing guidelines that might or might not e deemed "accepted medical standards," it declared:

> Based on the foregoing, and the record before us, we are not convinced that the AAN guidelines are considered the accepted medical standard that can be applied in a way to make Nevada's Determination of Death Act uniform

> with states that have adopted it, as the UDDA requires. NRS 451.007(3) (recognizing that the purpose of adopting the UDDA in Nevada "is to make uniform among the states which enact it the law regarding the determination of death").

Gebreyes v. Prime Healthcare Servs., LLC (*In re Estate of Hailu*), 361 P.3d 524, 529 (Nev. 2015).

The facts of this case as pled in the TAC and accepted as true for purposes of the Motion to Dismiss are that the supposed "accepted medical standards" allow for different types of tests to justify declarations of death, which in Israel's case meant the difference between continuing or terminating life support.

Kaiser doctors refused to perform an electroencephalogram (EEG) test (which the Nevada Supreme Court felt was important) before declaring Israel brain dead and moving to end his life support. 2 ER 123 ¶ 24.

Physicians in Guatemala ran two EEG tests and found that Israel was neither biologically nor brain dead. 2 ER 127 ¶47; 2 ER 184-86. Then, CHLA would not accept the results of the two EEG tests, would not perform their own, 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. The life-and-death differences in what can constitute "accepted medical standards" under the statute must be scrutinized to ascertain whether they are consistent with due process.

The Director's elevation of "accepted medical standards" above all else is impossible to square with the holdings of the courts of this state that, 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).

E. The Answering Brief offers no answer as to State-Created Dangers and acquiescence as a basis for constitutional liability.

In the AOB, Fonseca and LLDF reiterated their argument on state-created dangers. AOB at 20. The District Court ignored these precedents entirely, and the Director does little better. Instead of distinguishing *Chaudhry v. City of Los Angeles*, 751 F.3d 1096, 1103 (9th Cir. 2014) (acquiescence); *Wood v. Ostrander*, 879 F.2d 583, 594 (9th Cir. 1989) (third-party commission of crime); *accord, L.W. v. Grubbs*, 974 F.2d 119 (9th Cir. 1992); *Bowers v. Devito*, 686 F.2d 616, 618 (7th Cir. 1982).

The AAB's terse response to these authorities is to wave them off in footnote 4 (AAB at 27) with the conclusory, boilerplate response that no facts were alleged to support the theory. A single sentence in a footnote is no substitute for actual argument; the point should be deemed conceded.

Both the statutory scheme and the state-sanctioned Certificate of Death gave Kaiser and CHLA the cover they needed to pursue termination of life support. It is Fonseca's contention that this placed Israel in grave danger and ultimately deprived him of life when he otherwise would not have been.

F. The AAB does nothing to diminish the looming conflict on organizational standing between this Circuit and the D.C. Circuit, should the decision below be affirmed.

In the AOB, Fonseca and LLDF argued that the decision below puts this Circuit on a collision course with *Abigail Alliance for Better Access to Dev. Drugs v. Von Eschenbach*, 469 F.3d 129 (D.C. Cir. 2006). AOB at 25-26. There, the D.C. Circuit held that bureaucratic "hurdles" were sufficient to establish causation for purposes of organizational standing. *Id.* at 135. Thus, "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.'" AOB at 26, quoting 1 ER 15.

Somehow, the Director reads this section of the AOB as an abandonment of LLDF's organizational standing argument. Hardly. Unfortunately, with this cop-out, the Director believed she need not rebut Fonseca's and LLDF's argument. As a result, the clash with the D.C. Circuit still looms.

II. THE DIRECTOR FAILS TO REBUT THE AOB ON REDRESSABILITY.

The AAB completely ignores the principle that the Article III showing for redressability is "relatively modest." *Renee v. Duncan*, 623 F.3d 787, 797 (9th Cir. 2012). As a result, the Director advances a version of redressability that does not comport with this Court's precedents.

A. The Director Invokes the District Court's Expansion of "Broad and Legitimate Discretion," With No Answer to Fonseca's Deconstruction of the Premise.

The District Court latched on to the phrase "broad and legitimate discretion" to buttress doctors' roles in ending life—and defeat any responsibility the State might otherwise have for deprivation of life. The AAB mechanically repeats the same phrase, while failing to address Fonseca's explanation that this concept was never envisioned as justification for a deprivation of life.

The AOB traced the origins of this phrase to *ASARCO, Inc. v. Kadish*, 490 U.S. 605, 614-15 (1989), a separation of powers decision that does not translate to the heavily-regulated medical profession. By failing to address this important distinction, The Director exposes the shallowness of her position. Nor does the Director even attempt to revive *Glanton ex rel. Alcoa*, on which it and the District Court have relied. Fonseca carefully explained the differing context of *Glanton*. The Director offers nothing to explain why it is controlling here, beyond general rule statements.

B. The Director's Continued Insistence That a Favorable Ruling Would Accomplish Nothing Defies Logic.

The Director leans heavily on the District Court's faulty assumption that a ruling in Fonseca's and LLDF's favor would change nothing. 1 ER 12; AAB at 31.

The Director repeats the same mantra that she could not change the doctors' medical opinions, while failing to explain why this would be any different from,

for instance, changes to birth certificates that do not require the original attending physicians to change their minds about a child's gender or parentage. As set forth above in Section I-A, corrections, dictating content and demanding more satisfactory information are all squarely within the Director's duties. Pleading an inability to influence either the physicians or correct the records is unpersuasive.

Dr. Smith also persists in the anomalous view that striking down CUDDA would make no difference to doctors who seek to end life support without a patient's consent. AAB at 32-34.

The State's significant role in regulating the practice of medicine is undeniable, as reflected in well-established precedents such as *Lambert v. Yellowley*, 272 U.S. 581 (1926), and *Watson v. Maryland,* 218 U.S. 173, 176 (1910). Fonseca previously explained that CUDDA originated not as a medical breakthrough, but a legal fiction. AOB at 16-17. The legal sanction was deemed essential to the medical community.

The AAB waves off *Cruzan by Cruzan v. Harmon*, 760 S.W.2d 408, 410 (Mo. 1988), and *Cruzan v. Dir., Mo. Dept. of Health*, 497 U.S. 261, 280 (1990); *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 *Conant v. McCaffrey*, 172 F.R.D. 681, 690 (N.D. Cal. 1997), *rev'd*

Conant v. Walters, 309 F.3d 629, 639 (9th Cir. 2002), *cert denied* 540 U.S. 946 (2003).

The deterrence factor of a favorable ruling in this case is not so easily dismissed. In seeking to distinguish these cases as involving criminal statutes, the Director fails to mention that her duties include referrals to local district attorneys and the Attorney General for irregularities and violations of the certification statutes. HSC §§102185-95.

More fundamentally, the AAB ignores decisions such as *Donaldson*, where litigants resorted to the courts precisely because they feared prosecution if their end-of-life decisions were not clearly approved by statute.

Elsewhere, the Director and District Court take nearly the opposite view, that absence of penalties or liability does not mean hospitals or doctors are given the "green light" to disconnect life support without the patient's consent. 1 ER 12; AAB at 24 (quoting *Dority v. Superior Court*, 145 Cal. App.3d 273, 280 (Cal. Ct. App. 4th Dist. 1983)). They can't have it both ways.

The attempt to argue that doctors have broad discretion for purposes of causation, but less so when the State is trying to shift the onus onto them as potential defendants, does not work. Blame-shifting is not the same as rebuttal.

III. THE APPELLEE'S ANSWER ON *ROOKER-FELDMAN* DOES NOT DEAL WITH ITS MAJOR LIMITATIONS.

The Director's approach to the *Rooker-Feldman* doctrine follows her now-familiar pattern of repeating generalities while assiduously avoiding the considerable nuances on which the doctrine depends. The doctrine, if it can still be called such, is comprised primarily of the two cases that bear its name, *Rooker v. Fid. Trust Co.*, 263 U.S. 413 (1923) and *D.C. Ct. of App. v. Feldman*, 460 U.S. 462 (1983).

The Supreme Court's most recent, most authoritative holding in this area, *Saudi Basic Industries Corp.*, 544 U.S. 280, 284 (2005), has all but gutted the doctrine. "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.

The AAB does not seriously attempt to bring the present case within the first half of the doctrine, *Rooker*, and for good reason—the extensive procedural history of that case, encompassing every level of the state judiciary, stand in marked contrast to the short-lived initial forays by Fonseca into state court. Dr. Smith strives to analogize the present action to *Feldman.* The analytical gap quickly becomes apparent. *Feldman* cannot be divorced from its context—a federal attack on a state-level court's decision concerning one of its core exercises of authority—

the admission of lawyers. Even so, the Court was open to constitutional challenges to the D.C. Court of Appeal's admission rules. *Id.* at 486-87.

This Circuit's precedents do not hold otherwise. In *Bianchi v. Rylaarsdam*, 334 F.3d 895 (9th Cir. 2003), this Court rejected a federal suit that challenged a state appellate judge's failure to recuse himself after he had been disqualified at the trial level. The plaintiff named as defendants the three judges of the state appellate panel. This was clearly out of bounds for a federal court to entertain, and squarely within the holding of *Feldman*. But *Bianchi* is a poor fit for the present case, where Fonseca is not suing state court judges or anything of the sort.

Unlike *Rooker*, 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. Nor was the dissolution of the TRO by the Superior Court of Placer County, 5 ER 1004-1006, anything like the judgments with which *Rooker*, *Feldman*, and their progeny are concerned. There is no sound basis on which to extend the doctrine to the present.

IV. THE DIRECTOR'S NEW ARGUMENT ON ELEVENTH AMENDMENT IMMUNITY ONLY UNDERSCORES HER FLAWED APPROACH.

In the AAB, The Director presents an entirely new alternative argument on the Eleventh Amendment. AAB at 44-48. This argument was never raised by the Director below and was not addressed by the District Court.

The Supreme Court explained the history of the Eleventh Amendment in *Edelman v. Jordan*, 415 U.S. 651 (1978). The text of the Amendment itself does not bar suits in federal court by citizens against their own state. However, over time the Court has developed such an interpretation when monies would need to be withdrawn from the State treasury to satisfy the federal claim. *Id.* at 659.

The major exception to this interpretation of the Eleventh Amendment begins with *Ex parte Young*, 209 U.S. 123 (1908).

As the Director aptly explains, "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.'" (Citing *Coal. to Defend Affirmative Action v. Brown*, 674 F.3d 1128, 1134 (9th Cir. 2012)). AAB at 45.

In *Edelman*, the litigants sought to get around the Eleventh Amendment bar and come within *Ex Parte Young* by recasting their demand for back payments of welfare funds as equitable relief. The Court was not fooled. Because the relief sought by the plaintiffs differed little from damages, relabeling it equitable relief did not change application of the rule.

Since Fonseca has never sought monetary relief in this suit, the State's reliance on *Edelman* is off the mark. If anything, the detailed history presented in

that case of the Eleventh Amendment's origins and development demonstrates why the State's argument is misplaced.

The Court followed up *Edelman* with *Quern v. Jordan*, 440 U.S. 332 (1979). This time, the Court approved prospective relief against the state official in the form of required notices to welfare beneficiaries of the potential benefits available to them. Although the relief could indirectly result in payment from the state treasury, the Court was more comfortable with this type of relief being awarded by a federal court. The reach of *Edelman* is limited, and it does not reach the present case.

The essence of the Director's argument is that, "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." AAB at 47-48.

This Court rejected similar arguments in *L.A. County Bar Ass'n v. Eu*, 979 F.2d 697, 704 (9th Cir. 1992), quoted above in Section I-A.

Eu was no aberration; this Court reiterated its position more recently in *Coal. to Defend Affirmative Action v. Brown*, 674 F.3d 1128, 1134 (9th Cir. 2012), on which the Director relies:

> Applying *Ex parte Young* and *Eu*, we hold that Yudof is not immune from Plaintiff's suit seeking prospective declaratory and injunctive relief relating to the admission criteria of the university of which he is president …. Yudof's argument that he is merely "implementing," not "enforcing" section

31, minimizes his role as President of the University and is inconsistent with *Eu*.

As the Director points out, this Court has regularly (though not always) granted Eleventh Amendment immunity to the Governor. AAB at 46 (citing *Association des Eleveurs de Canards et d'Oies du Quebec v. Harris*, 729 F.3d 937, 943 (9th Cir. 2013)). Yet the Director fails to recognize that department heads are held responsible for the laws overseen by their respective agencies, in ways that the Governor is not. *See, e.g., Los Angeles Branch NAACP v. Los Angeles Unified Sch. Dist.*, 714 F.2d 946, 952-54 (9th Cir. 1983) (extending Eleventh Amendment immunity to Governor in school desegregation challenge, but not to California Superintendent of Public Instruction). *See also, Association des Eleveurs de Canards et d'Oies du Quebec v. Harris*, 729 F.3d 937, 943-44 (9th Cir. 2013) (Governor but not Attorney General entitled to Eleventh Amendment immunity).

Even so, the Governor has not entirely escaped. *See, Eu* (Denying Eleventh Amendment immunity to both Governor and Secretary of State in challenge to apportionment of Superior Court judges).

Other cases relied on by the Director are further afield. In *S. Pac. Transp. Co. v. City of L.A.*, 922F.2d 498, 508 (9th Cir. 1990), a just compensation case, the plaintiff's mistake lay in suing a state agency rather than its Director. That mistake has not been repeated here.

The Director also relies on *Pennhurst*, which followed *Edelman*. There, the Supreme Court declined to extend the doctrine of *Ex Parte Young* to federal suits against state officials based on state law. Nor does the Director get any further with *College Savings Bank v. Florida Prepaid Postsecondary Education Expense Bd.* 527 U.S. 666 (1999). There, the issue was whether a state agency's market participation changed the ordinary analysis of an Eleventh Amendment claim. Here, Fonseca is not relying on a market participant theory.

Lastly, in *Snoeck v. Brussa*, 153 F.3d 984, 986 (9th Cir. 1998), this Court conferred Eleventh Amendment immunity on members of a judicial disciplinary commission. The plaintiffs challenged a confidentiality provision for complaints to the commission. The problem for the plaintiffs, this Court held, was that the rules were enforced through contempt proceedings by the Nevada Supreme Court. *Snoeck* actually parallels the principles of federalism in the *Rooker* and especially *Feldman* cases discussed *supra*. As this Court memorably put it, "The Nevada Supreme Court does not need our advice whatever it might be." *Id.* at 988.

In sum, the Director's authorities for the Eleventh Amendment establish the opposite of what she had hoped. As the head of the Department that gives effect to CUDDA, regardless of whether it is the type of statute that is enforced in the strictest sense, she is the proper defendant to be held accountable for its

unconstitutionality. By raising this argument, she has inadvertently supplied additional reasons why her hands-off theory on Article III causation is also fallacious.

V. THE DIRECTOR'S LAST-DITCH ATTEMPT TO HAVE THIS COURT CONSIDER THE MERITS IN THE FIRST INSTANCE IS ILL-CONCEIVED.

The Director makes another major departure from both the decision below and the issues raised on appeal by arguing the merits. This is also the primary focus of the amicus brief filed in support of Dr. Smith. Fonseca submits that the weighty issues presented by her claims are not best addressed in the first instance by a court of review. However, should the Court take plenary review, Fonseca requests an opportunity to submit supplemental briefing, rather than being limited to arguing the merits of her five constitutional causes of action in one section of this Reply.

A. The Option of Going to State Court Does Not Preclude Going to Federal Court on a Federal Due Process Claim.

The gravamen of Dr. Smith's argument on procedural due process is that, "Fonseca has received all the process to which she is due." AAB at 49.

The Director then reasserts her argument (and that of the District Court) that,

"While CUDDA itself does not expressly set forth procedures to challenge a determination of death, such procedures are provided under California law." AAB at 50 (citing *Dority v. Superior Court*, 145 Cal. App. 3d 273, 280 (1983)).

But the Director concludes from this holding that the option of invoking state court jurisdiction necessarily excludes any federal jurisdiction, even where federal constitutional rights are being pled. AAB at 50-52. This is plainly erroneous. Fonseca knows of no authority, and the Director offers none, for the sweeping proposition that availability of state court adjudication of federal constitutional claims precludes federal jurisdiction.

The Director also perpetuates the myth that Fonseca was afforded the opportunity to have Israel independently examined. AAB at 61. As the TAC pleads, this claim is a farce as first Kaiser and later CHLA rebuffed Fonseca's attempts to bring in eminent experts. 2 ER 124 ¶ 32, ¶ 57.

The Director's position that Fonseca cannot state a claim for violation of procedural due process proves too much.

B. The Director's Laundry List of Asserted Interests Do Not Overcome the Fundamental Rights at Stake.

As to substantive due process, the Director first rehashes her arguments on causation. AAB at 54. She attempts to add to this a factual dispute over whether Fonseca was permitted to have an independent physician examine Israel at Kaiser. *Id.* at 54-55. These points have been discussed above and will not be repeated here.

The Director is coy as to whether she believes Israel actually has a constitutional right to life. She appears to concede the point and focuses

instead on the interests she believes outweigh his rights. The asserted interests, many taken from the District Court's opinion, are set forth at AAB 56-57 and can be summarized as follows:

- The State has a legitimate interest in securing the public safety, peace, order and welfare.
- California has a broad range of legitimate interests in drawing boundaries between life and death.
- CUDDA is not arbitrary, unreasoned, or unsupported by science.
- California has a compelling interest in the practice of professions within its borders.
- California has a compelling interest in the quality of medical care received by its citizens.

i. Legitimate interests do not overcome fundamental rights.

The first few interests asserted by the State do not come close to outweighing fundamental rights, as the Director's own authorities attest. If anything, the claimed broad range of legitimate interests hearken back to the "broad and legitimate discretion" discredited above in Section II-A. The Director relies on *Blucksberg* for the interest in drawing boundaries between life and death, which emphasized the importance of state interests in preserving life, not ending it. She also points to *Wisconsin v. Yoder*, 406 U.S. 205, 230 (1972), for the state

interest in securing public safety, peace, order and welfare. She overlooks the fact that *Yoder* was a landmark decision advancing the very parental rights she devalues.

The amicus also expends considerable energy to defend the Director's proposition that CUDDA is not arbitrary, unreasoned or unsupported by science. The argument seems to be that, since the American Bar Association and the American Medical Association agreed to limit patients' rights more than 35 years ago, and most of the states have complied, the constitutional question whether patients are being deprived of life and liberty without due process of law cannot even be asked.

There are several problems with this theory. First, whether the law is arbitrary or unreasoned would be relevant if no fundamental rights were at stake, but it is misdirected here. Second, the passage of time can reveal problems with earlier presuppositions limiting fundamental rights. The universality and thousands of years of history did not stop the Supreme Court from determining that heteronormative definitions of marriage must fall. *Obergefell v. Hodges*, 135 S. Ct. 2548 (2015). The scholarly literature brought in by amicus is countered by criticisms of brain death as a legal fiction. AOB 16-17 (citing 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)).

And the legislative history invoked repeatedly by the Director and amicus appears to omit at least half of the debate, much less any current concerns about the brain death regime. Lastly, the authority on which the Director leans for the uniformity of UDDA actually raises questions, particularly about conflicts among "accepted medical practices," that she cannot and will not answer. *Gebreyes v. Prime Healthcare Servs., LLC* (*In re Estate of Hailu*), 361 P.3d 524, 529 (Nev. 2015). For these and many other reasons, the Director's claim that Fonseca cannot state a constitutional claim must be given more serious consideration.

ii. Authorities generally upholding professional regulations do not answer the weighty questions at stake in this case, where the Director has actually disclaimed enforcement powers over medical professionals.

The Director also grounds her asserted compelling interest in professional regulation cases like *Goldfarb v. Va. State Bar*, 421 U.S. 773, 792 (1975) and *Varandani v. Bowen*, 824 F.2d 307, 311 (4th Cir. 1987). Professional regulation is, of course, a broad subject the nuances of which are well beyond the scope of this subsection—one of many reasons why supplemental briefing should be allowed if the Court is inclined to rule on the merits. Suffice it to say here that the general interests in regulating the medical profession do not begin to answer the question whether CUDDA is the least restrictive means to accomplish the asserted interests. Indeed, the Director does not even attempt a complete fundamental rights analysis, omitting any discussion of this crucial second half of the equation. Nor does she

explain how her compelling interests in regulating the medical profession support her hands-off approach when it comes to Article III standing and Eleventh Amendment immunity.

iii. Dignity interests must be patient-centered, not State-centered.

The Director further asserts an interest in ensuring "patients are treated with dignity, particularly during their end of life." AAB 56 (citing Cal. Prob. Code § 4650(b) and 4735). The Director fails to mention subsections (a) and (c) of Section 4650, perhaps because they reveal the statute is actually patient-focused and relies on the principles of autonomy and self-determination that she here seeks to diminish.

The Director also waves off Fonseca's comparisons to the recent prominence of dignity in the same-sex marriage decision, *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).

The Director regards this as inapt because plaintiffs other than Obergefell had standing. Surely the Director does not mean that Mr. Obergefell's dignity was of no concern to the Court. Indeed, it is impossible to read the decision in full and reach such a conclusion.

Meanwhile, the Director made no attempt to counter the parallels drawn between the present case and our nation's previous attempts to define certain races

as non-persons for purposes of constitutional protection. AOB at 31 (quoting *Scott v. Sandford*, 60 U.S. 393, 404-05 (1857)).

Assuming *arguendo* that Fonseca and LLDF have Article III standing, Israel's dignity interests mean nothing if the State or his doctors have the sole discretion to determine his biological life is not worth continuing. This is the opposite of what the state courts have said in the authorities discussed next. And it is the opposite of the understanding of "life" at the time the Fourteenth Amendment was ratified.

Patient autonomy, also called medical self-determination, has been described as the ultimate exercise of the right to privacy. *Donaldson v. Lungren*, 2 Cal. App. 4th 1614, 1620 (1992).

This is equally true of guardians or surrogates asserting the right on behalf of the minor or incapacitated patient. I*d.* at 1619.

The right of self-determination emanates from the constitutional right to privacy and constrains (at least, in theory) both the medical community and the judiciary. *Bouvia v. Superior Court*, 179 Cal.App.3d 1127, 1135 (Cal. Ct. App. 2d Dist. 1986).

What was asserted in *Donaldson* and until quite recently was something very different. 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." Donal*dson,* at 1620 (citing *Cruzan).* The director cannot explain why the asserted interests of the State have reversed course and managed to remain just as compelling.

C. The Asserted State Interests Take No Account of Parental Rights.

For Fonseca's and LLDF's remaining three constitutional claims, the Director regurgitates her position on Causation and the interests identified in her argument on substantive due process.

What she does not do is deal with the parental rights at stake in this litigation. Remarkably, she invokes *Yoder* to support generalized state interests in public safety, peace, order and welfare. She overlooks the fact that *Yoder* strongly supports the very parental rights she denies here.

Nor does the Director mention the salient decision of the Michigan Court of Appeal in a strikingly 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 an infant. The appellate court found serious due process and parental rights violations in the manner that the decision to end Baby Allison's life was taken away from her parents, their 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.

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. *Cf., Dority* (transferring parental decision-making to guardian where parents were suspected of causing child's life-threatening injuries).

The Director's treatment of the asserted parental and privacy rights is the truism that they are "not absolute." AAB 58, 60. Instead of addressing the asserted claims, she reverts to hyperbolic claims that the rights sought by Fonseca are "boundless." AAB 61. Surely, these weighty questions deserve more than the perfunctory treatment the Director gives them, and askes this Court to give them.

CONCLUSION

The Answering Brief confirms that the decision below is indefensible. The Director urges a restriction of Article III causation that is incongruent with the decisions of this Circuit. The Director's minimization of her own role to avoid causation and redressability are untenable and internally inconsistent. Her effort to resurrect the *Rooker-Feldman* doctrine clashes with the latest holdings of the Supreme Court. Her new arguments on the Eleventh Amendment fail to account for this Court's explanation of enforceability. And her attempts to argue the merits of the case only underscore why much more attention should be given these issues,

either on remand or at the very least in supplemental briefing. The decision below should be reversed.

Date: May 16, 2018.

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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 6,735 words.

May 16, 2018

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CERTIFICATE OF SERVICE

I hereby certify that on May 16, 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.

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