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IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

SACRAMENTO DIVISION

JONEE FONSECA, AN INDIVIDUAL PARENT AND GUARDIAN OF ISRAEL STINSON, A MINOR, Plaintiff, **v.** **KAREN SMITH, M.D. IN HER OFFICIAL CAPACITY AS DIRECTOR OF THE CALIFORNIA,** Defendant.	2:16-cv-00889-KJM-EFB **NOTICE OF MOTION AND MOTION TO DISMISS THIRD AMENDED COMPLAINT** Date: August 11, 2017 Time: 10:00 a.m. Courtroom: 3 Judge: Hon. Kimberly J. Mueller Trial Date: Action Filed: May 9, 2016

TO ALL PARTIES, THEIR COUNSEL OF RECORD, AND THE CLERK OF THE COURT:

PLEASE TAKE NOTICE THAT on August 11, 2016 at 10:00 a.m., or as soon thereafter as the matter may be heard before the Honorable Judge Kimberly Mueller in Courtroom 3 of the United States District Court for the Eastern District of California, located at 501 I Street, Sacramento, California 95814, defendant Karen Smith, M.D., Director of the California

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Department of Public Health, will move this Court to dismiss without leave to amend plaintiffs' third amended complaint, pursuant to Federal Rules of Civil Procedure 12(b)(1) and (6).

This motion to dismiss is brought on the grounds that plaintiffs do not have standing to pursue this matter; therefore, the court lacks jurisdiction to hear plaintiffs' complaint. The motion is also brought on the ground that plaintiffs fail to state a claim for relief. This motion is based on this Notice and the Memorandum of Points and Authorities filed in support of this motion, the papers and pleadings on file in this action, and upon such matters as may be presented to the Court at the time of the hearing.

Pursuant to the honorable Judge Mueller's standing orders, defendant has conferred with plaintiffs regarding the underlying merits of defendant's motion to dismiss. The parties have conferred regarding the merits of plaintiffs' claims and the date of hearing in this matter on several occasions. On July 8, 2016, and again on August 26, 2016, the parties met and conferred telephonically and by electronic mail. On April 26, 2017, and again on May 17, 2017, defendant notified plaintiffs that it planned to file a motion to dismiss, addressing the same issues raised by the motion to dismiss the prior complaint. Plaintiffs have not committed to address the numerous deficiencies outlined in defendant's motion to dismiss. As such, defendant is forced to bring this motion to dismiss.

Dated: May 19, 2017

Respectfully Submitted,

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IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

JONEE FONSECA, AN INDIVIDUAL PARENT AND GUARDIAN OF ISRAEL STINSON, A MINOR; LIFE LEGAL DEFENSE FOUNDATION, Plaintiffs, **v.** **KAREN SMITH, M.D. IN HER OFFICIAL CAPACITY AS DIRECTOR OF THE CALIFORNIA DEPARTMENT OF HEALTH CARE SERVICES,** Defendant.	2:16-cv-00889-KJM-EFB **MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO DISMISS PLAINTIFFS' THIRD AMENDED COMPLAINT FOR EQUITABLE RELIEF** Date: August 11, 2017 Time: 10:00 a.m. Dept: 3 Judge: The Honorable Kimberly J. Mueller Trial Date: not set Action Filed: 5/9/2016

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MEMORANDUM OF POINTS AND AUTHORITIES
INTRODUCTION

One year ago, Plaintiff Jonee Fonseca (Fonseca) sought to enjoin Kaiser, the hospital where her son, Israel, was being cared for, from removing him from life support. Fonseca maintained that Israel was alive in spite of physicians' declarations to the contrary, and their pronouncement that he suffered irreversible brain death on April 14, 2016. Fonseca also joined to the action, Karen Smith, M.D., Director of the California Department of Public Health (Director) and alleged that the California Uniform Determination of Death Act (CUDDA), the statute that defines death, was unconstitutional.

In August 2016, Israel was removed from life support and, thus, there remained no dispute that he was deceased. Fonseca, however, continued with her challenge to CUDDA to secure a declaration that Israel died on August 25, the day the life-sustaining support was removed, and not April 14, the date stated on the death certificate and as declared by Kaiser physicians. The Director filed a motion to dismiss asserting, among other arguments, that Fonseca did not have standing to pursue her action.

In its order granting Director's motion, this Court stated that Fonseca's Second Amended Complaint (SAC) did not satisfy the causation and redressability prongs of Article III standing. In particular, the Court concluded that the alleged injury—the determination of when Israel died—was not caused by CUDDA. Additionally, this court found that Fonseca did not establish that her desired relief—invalidation of CUDDA—would redress her injury. Fonseca, however, was given leave to amend her Complaint.

Notwithstanding the court's ruling, Fonseca and now Life Legal Defense Foundation (LLDF) (collectively "plaintiffs") filed essentially the same complaint as in the previous action.[1] In this Third Amended Complaint (TAC), plaintiffs continue to maintain that CUDDA is unconstitutional. Plaintiffs allege that CUDDA caused physicians to declare that Israel died on

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[1] Life Legal Defense Foundation is an organization focused on resisting attempts by medical facilities from removing individuals from life-support. Third Amended Complaint, ¶ 4.

April 14, 2016 and that its protocols deprive patients—in this case, Israel—of life.[2] Plaintiffs, however, offer no new allegations that would cure the lack of standing discussed in this Court's earlier ruling. Fonseca makes no showing that the determination that Israel died on April 14, 2016, was caused by the Director or by operation of CUDDA, rather than the independent medical decisions of non-party doctors. The same goes for Fonseca's assertion that CUDDA ended Israel's life. Nor can she establish redressability, as there is no indication that the physicians who determined Israel's date of death would reach a different conclusion in the absence of CUDDA.

LLDF lacks standing for similar reasons, as it fails to allege sufficient facts that CUDDA directs physician's medical opinions or that these physicians would act differently in the absence of CUDDA.

Standing remains a bar to this action.

Finally, even if plaintiffs could establish standing, they have not alleged cognizable claims against the Director for any constitutional violation. The First, Second and Third Causes of Action contend that CUDDA deprived Israel of life and Fonseca of her right to make decisions on his behalf. Again, because CUDDA is definitional only, and the decisions at issue are made by physicians in accordance with accepted medical standards, plaintiffs cannot demonstrate that the Director — via CUDDA— deprived Israel of life or Fonseca of any liberties secured by the United States or California Constitutions. Additionally, plaintiffs fail to allege facts showing that CUDDA is facially unconstitutional or that Fonseca has been denied any process due under the circumstances.

Further, the Fourth and Fifth claims for violation of privacy are also without merit. When balanced against the competing state interests, Fonseca's assertion that she, as Israel's proxy, was entitled to dictate medical decisions under the circumstances fails as a matter of law.

[2] Fonseca appears to allege that she (on behalf of Israel) has been injured in two respects: (1) physicians determined that Israel died on April 14, the date that is recorded on official documents and (2) CUDDA's protocols deprived Israel of life. The TAC is primarily focused on the alleged mistaken determination of death on April 14, 2016. TAC p. 1:6-10; ¶¶ 39-41, 62-63-73, 83, Prayer ¶ 1). Plaintiffs also sporadically allege that CUDDA actually deprived Israel of life. *Id*. ¶¶ 65, 74, 84.

Plaintiffs, though provided ample opportunity, have failed to assert a viable cause of action. Because plaintiffs' claims cannot be cured by any further amendment, this TAC should be dismissed with prejudice.

LEGAL AND FACTUAL BACKGROUND

I. THE CALIFORNIA UNIFORM DETERMINATION OF DEATH ACT[3]

CUDDA defines death as occurring when an individual 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. Cal. Health & Safety Code § 7180(a).[4] "A determination of death must be made in accordance with accepted medical standards." *Ibid.*

CUDDA also contains a number of patient protections. It requires "independent confirmation by another physician" when an individual is pronounced dead by determining that the individual has sustained irreversible cessation of brain function. § 7181. In the event that organs are donated, the physician making the independent confirmation may not participate in the procedures for removing or transplanting the organs. § 7182. Additionally, complete medical records shall be "kept, maintained, and preserved" with respect to the determination of brain death. § 7183. And, following determinations of death under CUDDA, families must receive a reasonable period of accommodation. § 1254.4.

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

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[3] CUDDA was enacted in 1982 to conform to the Uniform Determination of Death Act that was approved by the National Conference of Commissioners on Uniform State Laws. 14 Witkin, Summary 10th Wills § 11, p. 69 (2005). The Court previously recognized that California is one of thirty-three states that have formally adopted the Act. ECF No. 48, p. 24:25-28.

[4] All further references are to the Health and Safety Code unless otherwise specified.

II. FACTUAL BACKGROUND

On April 1, 2016, Israel suffered a severe asthma attack and was taken to Mercy General Hospital where he was placed on a breathing machine. TAC ¶ 7. He was eventually transferred to University of California, Davis Medical Center (UC Davis). *Id*. After a series of tests, physicians at UC Davis concluded on April 10, that Israel suffered brain death. TAC ¶ 20. The following day, Israel was transferred to Kaiser Permanente Roseville Medical Center (Kaiser). *Id.* ¶ 21. Kaiser physicians, following all procedures recommended by the American Academy of Pediatrics and the Society of Critical Care Medicine, determined that Israel was brain dead. *Id.* ¶¶ 22-24. Israel's attending physician, Dr. Michael Steven Myette, completed the physician's certification portion of the death certificate attesting that as of April 14, 2016, Israel was deceased. *Id*. ¶ 39.

On May 21, 2016, Israel was flown to a facility in Guatemala for examination and treatment. TAC ¶ 45. On August 6, 2016, Israel returned to the United States and was admitted to Children's Hospital of Los Angeles (CHLA). *Id.* ¶ 52. On August 25, 2016, Israel was removed from life support. *Id*. ¶ 61.

III. OVERVIEW OF STATE AND FEDERAL COURT PROCEEDINGS

A. Placer County Superior Court

Following Dr. Myette's determination that Israel was deceased, Fonseca initiated *Stinson v. UC Davis Children's Hospital; Kaiser Permanente Roseville*, Case No. S-CV-0037673. TAC ¶43; ECF No. 14-2. Styled as an application for a temporary restraining order directed at Kaiser, Fonseca requested time to find a physician to conduct an independent medical examination pursuant to § 7181. ECF No. 14-2. Fonseca asserted that in accordance with *Dority*, "the court has jurisdiction over whether a person is 'brain dead' or not pursuant to [CUDDA]." *Id*., 5:13-15. The court issued a temporary restraining order (TRO) requiring Kaiser to maintain life support. ECF No. 14-3. The TRO was extended over two weeks to afford Fonseca time to secure an independent examination or relocate Israel. See ECF. No. 14-5, 14-7, 14-11.

The matter was reconvened on April 29, 2016, during which the court concluded that "a determination of death [] has been made in accordance with accepted medical standards under

[Section] 7181…." ECF 14-8, 75:21-76:9. The court determined that CUDDA had been complied with and ordered the petition dismissed. ECF 19-1, 2:5-6. Fonseca did not appeal.

B. Eastern District and the Ninth Circuit Court of Appeals

On April 28, 2016, Fonseca filed this action against Kaiser alleging claims under the federal Constitution, the federal Rehabilitation Act, and the Americans with Disabilities Act. ECF No. 1. The court granted a temporary restraining order. ECF No. 23.

However, on May 2, 2016, the court dismissed Fonseca's complaint. ECF No. 23. The following day, Fonseca amended the complaint to include the Director and asserted five claims: Deprivation of Life in Violation of Due Process (against all defendants); Deprivation of Parental Rights in Violation of Due Process (against all defendants); violation of the Emergency Medical Treatment and Active Labor Act (42 U.S.C § 1395dd et seq.) (against Kaiser); and violation of the right privacy under the United States Constitution and in violation of the California Constitution (against all defendants). ECF No. 29. The complaint sought, among other things, an order preventing Kaiser from removing life-sustaining support and a declaration that CUDDA is unconstitutional on its face. *Id*. at 17-18.

On May 6, 2016, Fonseca filed a motion for preliminary injunction against Kaiser seeking an order restraining Kaiser from removing ventilation from Israel. ECF No. 33. Kaiser opposed the motion and the matter was heard on May 11, 2016. The court issued an order denying the motion on May 13, 2016. ECF No. 48.

Fonseca filed a notice of interlocutory appeal on May 14, 2016 seeking relief from the Order denying the motion for preliminary injunction. ECF No. 49. Fonseca also requested an order requiring Kaiser to continue the life support until she could locate another facility to care for Israel. See *id*. No. 55. The Ninth Circuit stayed dissolution of this court's TRO to afford it time to review the matter. *Id*. Days later, Fonseca withdrew the motion as Israel was flown to a facility out of the country. ECF 60, TAC ¶ 45. The appeal was thereafter dismissed.

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C. Los Angeles Superior Court

On August 6, 2016, Israel returned to the United States and was admitted to CHLA.[5] TAC, ¶ 52. On August 16, 2016, Fonseca was informed that the hospital intended to remove Israel's ventilator. *Id.*, at ¶ 54. On August 18, 2016, plaintiff initiated *Stinson v. Children's Hospital Los Angeles, Los Angeles County* Superior Court Case No. BS164387, alleging that CHLA violated CUDDA by failing to obtain or permit an independent evaluation. ECF No. 68-3, Ex. C. The court issued a TRO requiring the CHLA to refrain from removing Israel from the ventilator and to cooperate with Fonseca to facilitate an independent evaluation of Israel. *Id.*, Ex. D, p. 2.

On August 25, 2016, the court dissolved its TRO. ECF No. 68-3, Ex. E. CHLA subsequently removed Israel from the ventilator eliminating any dispute that Israel is deceased.

D. The SAC and TAC

1. Fonseca's SAC

Following Kaiser's dismissal, Fonseca amended her complaint for the second time. The SAC asserted five claims against the Director as the sole defendant: (1) Deprivation of Life in Violation of Due Process under the Fifth and Fourteenth Amendments; (2) Deprivation of Parental Rights in Violation of Due Process of Law under the Fifth and Fourteenth Amendments; (3) Deprivation of Life under the California Constitution; (4) Violation of Privacy Rights under the United States Constitution; and (5) Violation of Privacy Rights under the California Constitution. ECF No. 64.

The Director filed a Motion to Dismiss and on March 28, 2017, the Court granted the Director's motion. ECF No. 79. The Court determined that Fonseca's allegations were insufficient to establish that CUDDA caused her injury—the Kaiser physician's determination that Israel had died—or, that invalidating CUDDA would redress that injury. *Id.* 11-13. Because it found that Fonseca did not have standing, the Court declined to address the Director's other arguments for dismissal. *Id.*, at p. 13. The Court gave Fonseca leave to amend. *Ibid.*

[5] The court previously took judicial notice of the state court filings from *Israel Stinson v. Children's Hospital, Los Angeles*, Los Angeles Superior Court Case No. BS164387. See ECF No. 79 (March 28, 2017, Order at p. 2); ECF No. 68-2, 68-3, Ex. C. The Director also relies on these previously noticed state court filings.

2. Plaintiffs' TAC

Fonseca, along with LLDF, filed the TAC that alleges that CUDDA is unconstitutional. In spite of the court's ruling, the TAC alleges the exact same causes of action and is nearly identical to the SAC, the notable difference being that plaintiffs updated the allegations to include the events that took place after Israel's return to the United States, and his eventual removal from life support. See TAC ¶¶ 45-61.

Plaintiffs here seek extraordinary relief: (1) an injunction directing Director to expunge all records that state that Israel died on April 14, 2016; (2) an injunction directing that all records be amended to reflect that Israel died on August 25, 2016; and (3) a judicial declaration that CUDDA is unconstitutional on its face and as applied. ECF No. 80, Prayer ¶¶ 1-3.

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

STANDARD

Federal Rule of Civil Procedure 12(b)(1) authorizes a motion to dismiss for "lack of subject-matter jurisdiction."

As the Supreme Court has "repeatedly said: 'Federal courts are courts of limited jurisdiction.'" *Rasul v. Bush*, 542 U.S. 466, 489 (2004) (citations omitted). "A federal court is presumed to lack jurisdiction in a particular case unless the contrary affirmatively appears." *Stock West, Inc. v. Confederated Tribes*, 873 F.2d 1221, 1225 (9th Cir. 1989). A plaintiff bears the burden to establish that subject matter jurisdiction is proper. *Kokkonen v. Guardian Life Ins. Co. of America*, 511 U.S. 375, 377 (1994).

The purpose of a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6) "is to test the legal sufficiency of the complaint." See *North Star Int'l v. Ariz. Corp. Comm'n*, 720 F.2d 578, 581 (9th Cir. 1983). "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Ashcroft v.*

Iqbal, 556 U.S. 662, 678 (2009) (citations and quotations omitted). The court accepts as true all material allegations in the complaint and construes those allegations in the light most favorable to the plaintiff. See *Lazy Y Ranch Ltd. v. Behrens*, 546 F.3d 580, 588 (9th Cir. 2008). But the court is not required to "assume the truth of legal conclusions merely because they are cast in the form of factual allegations." *Fayer v. Vaughn*, 649 F.3d 1061, 1064 (9th Cir. 2011) (per curiam) (citations and quotations omitted). Mere "conclusory allegations of law and unwarranted inferences are insufficient to defeat a motion to dismiss." *Adams v. Johnson*, 355 F.3d 1179, 1183 (9th Cir. 2004).

Dismissal without leave to amend is appropriate when deficiencies in the complaint could not possibly be cured by amendment. See *Watison v. Carter*, 668 F.3d 1108, 1117 (9th Cir. 2012).

ARGUMENT

I. FONSECA HAS NOT SATISFIED THE CAUSATION AND REDRESSABILITY PRONGS OF ARTICLE III STANDING

A. Fonseca Has Not Sufficiently Alleged that CUDDA Caused Her Harm.

Standing is a jurisdictional requirement, and a party invoking federal jurisdiction has the burden of establishing standing. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992). The Article III standing test requires Fonseca to demonstrate that there is a causal connection between her alleged injury and the conduct complained of; the injury has to be "fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court." *Id.* at 560 (citations omitted).

Fonseca brings this constitutional challenge to CUDDA because she believes that Israel died on August 25, 2016, and not on April 14, 2016 as determined by Kaiser's physicians. TAC, p. 1:1-10, ¶¶ 62-63. As previously recognized by this Court, to sustain this action, Fonseca's injury—determination of death— must be "fairly traceable to the challenged action of the defendant," rather than the result of "the independent actions of some third party not before the court." ECF No. 79, 10:6-9 citing *Ass'n of Pub. Agency Customers v. Bonneville Power Admin.*, 733 F.3d 939, 953 (9th Cir. 2013). Accordingly, here, Fonseca must demonstrate that the medical

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determination that Israel died on April 14 stems from compliance with CUDDA and was not the result of conduct of some third party not before the court. Fonseca has not met her burden.

Fonseca has not established that CUDDA caused or was the reason why Kaiser physicians determined that Israel died on April 14. Fonseca alleges in conclusory fashion that CUDDA directs physicians to make a declaration of death even in situations where the brain injury is reversible. TAC ¶ 64. Fonseca's allegations, however, are belied by the plain text of CUDDA, which defines death as the "irreversible cessation" of all brain activity. Cal. Health & Safety Code § 7181. Thus, as a matter of law, an individual with *reversible* injuries would not meet CUDDA's definition of death. Moreover, any determination of death must be made according to accepted medical standards and, in the case of brain death, confirmed by an independent medical opinion, thus again ensuring that the determination is consistent with medical certainty. §§ 7180, 7181. Fonseca, by targeting CUDDA, continues to miss the point. The determination that Israel died on April 14 was not directed by CUDDA or the Director. That medical determination was made by third party physicians and in accordance with accepted medical standards.

Additionally, Fonseca cannot establish that CUDDA ended Israel's life. CUDDA does not direct physicians or hospitals to remove life-sustaining support. Nothing in CUDDA requires that life-sustaining support be removed once a determination of death is made. Thus, any decision to remove life-support is left to the physicians, hospitals, and the patient's family.

Moreover, to the extent Fonseca asserts that the Kaiser physicians were mistaken about their determination that Israel suffered brain death, nothing in CUDDA prevented her from securing an independent medical assessment of Israel. In fact, Fonseca requested and was afforded that very opportunity by the Placer County Superior Court in April 2016. TAC 43, ECF, Nos. 14-2, 14-5, 14-7, 14-11. It remains that Fonseca has not and cannot show that the determination by third party physicians that Israel died on April 14 was caused by the Director or CUDDA.

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B. Fonseca Has Not Alleged That Her Dispute Concerning Israel's Date of Death Can Be Redressed By A Favorable Decision.

Fonseca has not alleged that her injury can be redressed by a favorable decision, namely, that the medical determination that Israel died on April 14 would be reversed if she prevailed in this case. See *Wolfson v. Brammer*, 616 F.3d 1045, 1056 (9th Cir. 2010). The medical determination that Israel died on April 14 is redressable only by challenging the independent medical decisions of the physicians who assessed Israel. A judgment against the Director will not compel these physicians to reverse their medical opinions. See *Native Vill. of Kivalina v. ExxonMobil Corp*., 696 F.3d 849, 867 (9th Cir. 2012) (Standing is lacking when the injury is "th[e] result [of] the independent action of some third party not before the court."). A favorable decision by this court will not invalidate the prevailing medical standards of the medical community or the medical opinions of the three physicians who determined that Israel died.

Even if this court were to invalidate CUDDA, Fonseca has not alleged that the physicians who rendered the determination that Israel died on April 14 would reverse their medical opinion. As this Court previously noted courts consistently find that "any pleading directed at the likely actions of third parties would almost necessarily be conclusory and speculative" absent supporting factual allegations. ECF No. 79, citing *Levine v. Vilsack*, 587 F.3d 986, 997 (2009). Fonseca has not pled here that the medical determination would be reversed if she prevailed in this case. Simply put, Fonseca has sued the wrong party to affect the change she wants.

Because Fonseca has failed to assert any additional facts that would establish Article III standing here, this action must be dismissed without leave to amend.

II. LLDF Also Lacks Article III Standing Because It Fails to Allege That CUDDA Has Caused Its Injury Or that It Would Be Redressed By This Action

LLDF joins this challenge to CUDDA and asserts that, due to CUDDA's protocols, its mission has been frustrated and its time and resources have been drained. TAC ¶ 4. LLDF is an organization that "focuses on preservation of the lives of the most vulnerable members of society, including the very young and those facing the end of life." *Ibid.* An organization, such as LLDF, must meet the same Article III test that applies to individuals. *Havens Realty Corp. v. Coleman*,

455 U.S. 363, 378–79 (1982). Accordingly, LLDF must also establish that CUDDA caused its injury—frustration of its mission—and that the injury will be redressed by this action. Like Fonseca, LLDF has not met its burden.

LLDF contends that due to CUDDA's "protocols," its work in protecting members of the public from withdrawal of life-support is frustrated. TAC ¶ 4. LLDF asserts CUDDA is a barrier to LLDF's ability to ensure that life-sustaining support is continued. *Ibid*. These allegations are insufficient and will not satisfy standing because CUDDA has not caused LLDF's alleged harm. Again, nothing in CUDDA prescribes how or when a physician must issue its medical determination that a person has died. Nor does it direct physicians and hospitals to remove life-sustaining support. Instead, CUDDA defers to the medical community requiring that any determination of death be made in "accordance with accepted medical standards," and in the event of a brain death diagnosis, confirmed by an independent physician. See §§ 7180(a), 7181. Accordingly, any frustration of LLDF's mission is the result of the independent decisions of medical professionals and hospitals, and not the result of CUDDA's mandate.

To the extent LLDF asserts CUDDA's post death protocols have frustrated its mission, these protocols have no effect on the alleged injury. CUDDA's mandate that records be maintained (§ 7183) and the State's requirement that a death certificate be completed and registered (Cal. Health & Saf. Code §§ 102775, 102800), do not direct or affect the physician's medical opinion that a person has died, and have no bearing on whether an individual remains on life-support. Accordingly, it remains that LLDF has not shown that CUDDA caused its alleged injury.

Finally, LLDF cannot show that invalidating CUDDA will affect the change it desires. LLDF believes that brain death is not death and works to prevent physicians and hospitals from removing individuals from life-support. TAC ¶ 4. Thus, to satisfy standing, LLDF must show that invalidating CUDDA will likely eliminate or reduce its need to resist attempts made by medical facilities to cease life-support measures. LLDF has not sufficiently alleged that invalidating CUDDA will impact this mission.

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While LLDF maintains that CUDDA is the root of its frustrated purpose, the actual decisions that are at issue are *medical determinations* made by *medical professions* in response to the prevailing medical and ethical standards of the medical community. Thus, the relief that LLDF seeks depends entirely on independent decisions of third parties, not before this court. Where redressability hinges on the choices of independent actors, a plaintiff must show that those actors will change course and act in a manner that affords the relief requested. See *Levine, supra* at p. 993. LLDF has not met that burden. LLDF has not established that if CUDDA were eliminated, the medical community could cease recognizing brain death as death. Nor has it alleged that this action will force a change in the hospitals' polices and decisions regarding life-support.

Here, LLDF lacks standing to pursue this action because CUDDA has not caused LLDF's purported injuries, nor has LLDF alleged that CUDDA's invalidation will affect the change it desires.

III. THE FIRST AND SECOND CAUSES OF ACTION FAIL TO STATE A CLAIM AGAINST THE DIRECTOR AND SHOULD BE DISMISSED

Even if plaintiffs had standing, the complaint should still be dismissed because it fails to state any claims against the Director as a matter of law. Plaintiffs' First and Second Causes of Action allege generally that CUDDA deprived Israel of life and Fonseca of parental rights in violation of the due process clauses of the Fifth and Fourteenth Amendments. Though not entirely clear, plaintiffs appear to allege (1) a procedural due process claim that CUDDA provides no process or procedures by which a patient or advocate can challenge the determination of death, TAC ¶¶ 72, 78, and (2) a substantive due process claim that CUDDA provides an incorrect definition of death and "removes the independent judgment of medical professionals as to whether a patient is dead." TAC ¶ 72. As explained below, both contentions fail to state a claim as a matter of law.

A. California's Procedures Are Constitutionally Sufficient.

"No single model of procedural fairness, let alone a particular form of procedure, is dictated by the Due Process Clause." *Kremer v. Chemical Const. Corp.*, 456 U.S. 461, 483 (1982).

Instead, the "fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner." *Mathews v. Eldridg*e, 424 U.S. 319, 333 (1976) (citations omitted). Under California law, the procedures concerning determinations of death are constitutionally adequate and Fonseca has received all the process to which she is due.

1. Plaintiffs' facial challenge lacks merit.

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

While CUDDA itself does not expressly set forth procedures to challenge a determination of death, such procedures are provided under California law. *See Dority v. Superior Court*, 145 Cal. App. 3d 273, 280 (1983) ("The jurisdiction of the court can be invoked upon a sufficient showing that it is reasonably probable that a mistake has been made in the diagnosis of brain death or where the diagnosis was not made in accord with accepted medical standards."); *see also* ECF No. 48, at 26-28 (in ruling on plaintiffs' preliminary injunction motion, this court noted that the "state court has jurisdiction to hear evidence and review physician's determination that brain death has occurred"). Indeed, plaintiffs have invoked these procedures to challenge the doctors' determinations that Israel is deceased on two separate occasions, filing suits in Placer County Superior Court to challenge Drs. Myette's and Maselink's determination, in case No. S-CV-0037673, and more recently filing suit in Los Angeles County Superior Court to challenge CHLA's physicians' determination in case no. BS164387.

Further, CUDDA itself provides certain preliminary procedures that must be followed at the time of the initial determination of death. First, all determinations of death must be made by

physicians in accordance with prevailing medical standards. § 7180(a). Second, in cases of brain death a single physician's opinion is insufficient; CUDDA requires *independent* confirmation by another physician. *Id*., § 7181.[6] These procedures and the right to contest a determination of death in the superior court, *see Dority*, *supra*, are more than sufficient to satisfy all constitutional procedural due process requirements.

2. Plaintiffs' "as applied" challenge fails.

Plaintiffs' "as applied" challenge meets the same fate. Plaintiffs cannot demonstrate that CUDDA, as applied to the facts of this case, is unconstitutional. *See Hoye*, *supra*, at 857. Here, three physicians performed the requisite tests and independently concluded that Israel suffered irreversible brain death. TAC ¶¶ 20-24. Following the third pronouncement, Fonseca contested the determination by initiating the Placer County Superior Court action. *Id*., 43-44; *see also* ECF 14-2. Fonseca was given a full evidentiary hearing. She was given time to secure her own independent examination by a qualifying physician, as well as the opportunity to cross-examine Dr. Myette, Israel's attending physician. After considering the evidence before it, the court concluded that there was no basis to question the medical determination that Israel was deceased. *See* ECF No. 19-1. Given these facts, plaintiffs have not, nor can they, demonstrate that these procedures are constitutionally inadequate.

B. Plaintiffs' Substantive Due Process Allegations Fail to State a Claim.

Plaintiffs' substantive due process allegations also fail to state a claim as a matter of law. As this Court has previously noted, the Due Process Clause of the Fourteenth Amendment prohibits states from making or enforcing laws that deprive a person of life, liberty, or property without due process. ECF 48, 21:22-24; U.S. Const. amend, XIV, section 1. The substantive due

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

process right "protects individual liberty against 'certain government actions regardless of the fairness of the procedures used to implement them.'" *Collins v. Harker Heights*, 503 U.S. 115, 125 (1992) (quoting *Daniels v. Williams*, 474 U.S. 327, 331 (1986)). It "provides heightened protection against government interference with certain fundamental rights and liberty interests." *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997). Inherent in this protection is the notion that a state by law or enforcement actually *deprives* a person of life, liberty, or property.

As a preliminary matter, Plaintiffs' claim that CUDDA actually deprived Israel of life fails. Plaintiffs cannot establish that the Director or *CUDDA* deprived Israel of life. The determination that Israel died was made by third party physicians. Similarly, the decision to remove life-sustaining support was made by third parties not before this court. CUDDA did not direct or require these third parties to remove the support which ultimately lead to the cessation of all bodily function.

Next, Plaintiffs contend that under CUDDA an advocate for a patient is not allowed to bring in their own physician to contest the findings, TAC ¶¶ 72, 78, and that CUDDA prevents a physician from exercising his or her independent judgment as to whether a patient is dead, TAC ¶ 72. Both allegations are incorrect as a matter of law.

Nothing in CUDDA prevents physicians from exercising their independent medical judgment as to whether a patient is deceased or precludes an advocate from seeking an independent opinion. As discussed above, CUDDA expressly provides that "[a] determination of death must be made *in accordance with accepted medical standards*. § 7180(a) (emphasis added). In cases of brain death, CUDDA also requires that before a patient is declared deceased "there shall be *independent* confirmation by another physician." *Id.*, § 7181 (emphasis added). Accordingly, the statute, by its plain terms, defers to the medical judgment of doctors. Nothing in CUDDA dictates or directs any physician concerning when an inquiry of death should ensue, which tests to perform, or whether an actual declaration of death should be made. It provides a general definition of brain death, but leaves the ultimate determination to the discretion of doctors "in accordance with accepted medical standards." *Id.*, § 7180(a). Moreover, the statute does not

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state which physicians are permitted to examine the patient. Thus, *CUDDA*, does not prevent advocates from securing their own medical opinions.

Even if plaintiffs could allege sufficient governmental encroachment (which they cannot), plaintiffs' substantive due process claim still fails. Whether the constitutional rights at stake have been violated is determined by balancing them against the "relevant state interests." *Cruzan by Cruzan v. Dir., Missouri Dep't of Health*, 497 U.S. 261, 279 (1990) (quoting *Youngberg v. Romeo*, 457 U.S. 307, 321 (1982)). As this court previously noted, California "has a broad range of legitimate interests in drawing boundaries between life and death." ECF No. 48, at 24:4-16 (recognizing the state's interest in the context of criminal law, probate and estates law, and general healthcare and bioethics). The State also has a compelling interest in the quality of health and medical care received by its citizens. ECF No. 48, at 24:14-15 (citing *Varandani v. Bowen*, 824 F.2d. 307, 311 (4th Cir. 1987)). Similarly, the State seeks to ensure that patients are treated with dignity, particularly during their end of life. *See* Cal. Prob. Code § 4650 (b) (The "prolongation of the process of dying for a person for whom continued health care does not improve the prognosis for recovery may violate patient dignity and cause unnecessary pain and suffering, while providing nothing medically necessary or beneficial to the person."); *id.*, § 4735 (health care provider "may decline to comply with an individual health care instruction or health care decision that requires medically ineffective health care or health care contrary to generally accepted health care standards applicable to the health care provider or institution"). And it is well settled that the State has a legitimate interest in securing the public safety, peace, order, and welfare. *See Wisconsin v. Yoder*, 406 U.S. 205, 230; *Carnohan v. United States*, 616 F.2d 1120, 1122 (1980) (no fundamental right to access drugs the FDA has not deemed safe and effective).

As this court previously observed, Fonseca provides no facts that "suggest [] CUDDA is arbitrary, unreasoned, or unsupported by medical science." ECF No. 48, at 24:17-18. CUDDA's definition of death is substantively identical to the definition agreed upon by the American Medical Association and the American Bar Association, which has been "uniformly accepted throughout the country." ECF No. 48, at 24:22-28 (quoting *In re Guardianship of Hailu*, 361 P.3d 524, 528 (Nev. 2015)). Plaintiffs here have not alleged any additional facts to sustain this

claim. It remains that plaintiffs' disagreement with the prevailing definition of death cannot override the State's interests in enacting CUDDA. The substantive due process claim fails as a matter of law.

IV. THE COMPLAINT'S THIRD CAUSE OF ACTION FOR DEPRIVATION OF RIGHT TO LIFE IN VIOLATION OF THE CALIFORNIA CONSTITUTION ALSO FAILS TO STATE A CLAIM

Identical to the first claim, plaintiffs, in support of the third claim, asserts that CUDDA deprived Israel of his right to life. TAC ¶ 84. The California Constitution also protects persons from deprivation of life, liberty, or property without due process of law and is "identical in scope with the federal due process clause." *Sanchez v. City of Fresno*, 914 F. Supp. 2d 1079, 1116 (E.D. Cal. 2012) citing *Owens v. City of Signal Hill*, 154 Cal.App.3d 123, 127 n. 2, (1984). Accordingly, for the reasons articulated above as to First and Second Causes of Action, plaintiffs' Third Cause of Action should also be dismissed.

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

Plaintiffs allege that health care decisions are part of the right to personal autonomy and privacy, and that CUDDA violated these rights by allegedly denying plaintiffs the right to make medical decisions on Israel's behalf. TAC ¶¶ 87-89, 92-94. This claim fails because the medical decisions in question were not dictated by CUDDA but rather made by doctors, using their medical judgment, and plaintiff had the right to challenge those medical decisions through appropriate avenues.

Article I, section 1 of the California Constitution provides: "All people are by nature free and independent and have inalienable rights. Among these are enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety, happiness, *and privacy*." (Emphasis added.) The federal Constitution does not expressly mention the right to privacy but recognizes a realm of personal liberties upon which the government may not intrude. *Roe v. Wade*, 410 U.S. 113, 152 (1973). However, this right is not absolute; one's right to dictate medical treatment may be outweighed by supervening public concerns. *Roe*, *supra*, at 155. Thus, as with the due process claims, the court is charged with balancing the liberty at stake against the State's interests in limiting that right.

In the complaint, plaintiffs contend that Fonseca's right to dictate medical decisions and treatment on behalf of her son is boundless. TAC ¶¶ 87, 89, 92, 94. Plaintiffs are mistaken. As articulated above, the State's interests in defining death and limiting a parent's right to make medical decisions are vast. *See infra.*, Part, III.B. In the case at bar, the right to dictate medical decisions gave way once three physicians determined that Israel suffered irreversible cessation of brain activity and is, therefore, deceased. Additionally, though Fonseca was provided ample opportunity to refute that determination, she did not do so. In light of these facts, and the competing state interests, plaintiffs cannot demonstrate that CUDDA violated Israel's right to continued privacy as afforded by the California or United States Constitutions. The Fourth and Fifth Causes of Action should be dismissed.

VI. "AS APPLIED" CLAIMS IN THE FIRST AND SECOND CAUSES OF ACTION ARE BARRED BY THE *ROOKER-FELDMAN* DOCTRINE[7]

The *Rooker-Feldman* doctrine precludes this court from considering Fonseca's "as applied" challenges to the constitutionality of CUDDA in the First and Second Causes of Action. In April 2016, Fonseca expressly challenged the determination of death in state court alleging that the brain death declaration was wrong. After affording Fonseca time to secure her own medical opinion, the court upheld the determination of death. Fonseca did not appeal the trial court's decision. Instead, she filed a series of complaints, the latest of which directly challenged the physician's determination of death. Fonseca's newly asserted "as applied" claims are nothing more than an impermissible challenge to the state trial court's decision.

"Stated plainly, *Rooker–Feldman* bars any suit that seeks to disrupt or 'undo' a prior state-court judgment, regardless of whether the state-court proceeding afforded the federal-court plaintiff a full and fair opportunity to litigate her claims." *Bianchi v. Rylaarsdam,* 334 F.3d 895, 900 (9th Cir. 2003) (citation omitted). Unlike res judicata, the *Rooker–Feldman* doctrine is not limited to claims that were actually decided by the state courts, but rather it precludes review of

[7] The court, in its March 28, 2017, order on the Director's motion to dismiss the SAC, determined that the Rooker-Feldman doctrine is inapplicable to this case. ECF No. 79, 8:25. The Director reasserts this argument for purposes of preserving this issue on appeal.

all state court decisions. *Id.* The doctrine "applies even though the direct challenge is anchored to alleged deprivations of federally protected due process and equal protection rights." *Allah v. Superior Court*, 871 F.2d 887, 891 (9th Cir.1989), superseded by statute on other grounds as stated in *Schroeder v. McDonald*, 55 F.3d 454, 458 (9th Cir.1995); *Worldwide Church of God v. McNair*, 805 F.2d 888, 891 (9th Cir.1986) ("This doctrine applies even when the challenge to the state court decision involves federal constitutional issues.").

The *Rooker–Feldman* doctrine precludes the exercise of jurisdiction not only over claims that are de facto appeals of a state court decision but also over suits that raise issues that are "inextricably intertwined" with an issue resolved by the state court. *See Feldman*, 460 U.S. at 483 n. 16; *Noel v. Hall*, 341 F.3d 1148, 1158 (9th Cir. 2003). As the Ninth Circuit has explained: "If claims raised in the federal court action are 'inextricably intertwined' with the state court's decision such that the adjudication of the federal claims would undercut the state ruling or require the district court to interpret the application of state laws or procedural rules, then the federal complaint must be dismissed for lack of subject matter jurisdiction." *Bianchi, supra*, at 898. In determining whether a plaintiff's federal claims are "inextricably intertwined" with a state court decision, "a court must do more than simply 'compare the issues involved in the state-court proceeding to those raised in the federal-court plaintiff.'" *Id.* at 900 (quoting *Kenmen Engineering v. City of Union*, 314 F.3d 468, 476 (10th Cir.2002)). Rather, it must "'pay close attention to the relief sought by the federal-court plaintiff.'" *Id.*

In this newly amended action, Fonseca expressly asserts an "as applied" challenge to CUDDA. TAC ¶¶ 62, 64-65, 73, 78. Identical to Fonseca's state court petition, the First and Second Causes of Action allege there is a medical dispute of fact as to whether Israel was dead or alive between April 14 and August 25, 2016. *See* TAC ¶¶ 62, 73. Additionally, the remedy Fonseca seeks reveals that this action is a direct challenge to the determination of death and the superior court's order upholding the determination. Prayer, ¶ 1 (Fonseca seeks "[a]n order expunging all records … which state or imply that Israel died on April 14, 2016 . . ."). This most recent complaint is simply an effort to set aside the determination that Israel died on April 14, a matter already adjudicated by the Placer County Superior Court. Thus, Fonseca is barred from

seeking what in substance would be appellate review of a state judgment in federal district court, even if she contends the state judgment violated her federal rights.

CONCLUSION

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

Dated: May 19, 2017

Respectfully Submitted,

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CERTIFICATE OF SERVICE

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

I hereby certify that on May 19, 2017, I electronically filed the following documents with the Clerk of the Court by using the CM/ECF system:

- **NOTICE OF MOTION AND MOTION TO DISMISS THIRD AMENDED COMPLAINT**
- **MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO DISMISS PLAINTIFFS' THIRD AMENDED COMPLAINT FOR EQUITABLE RELIEF**

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

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on May 19, 2017, at Sacramento, California.

Bryn Barton	***/s/ Bryn Barton***
Declarant	Signature

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