KAMALA D. HARRIS
Attorney General of California
ISMAEL A. CASTRO, State Bar No. 85452
Supervising Deputy Attorney General
ASHANTE L. NORTON, State Bar No. 203836
Deputy Attorney General
1300 I Street, Suite 125
P.O. Box 944255
Sacramento, CA 94244-2550
Telephone: (916) 322-2197
Fax: (916) 324-5567
E-mail: Ashante.Norton@doj.ca.gov
Attorneys for Defendant

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 SECOND AMENDED COMPLAINT** Date: October 7, 2016 Time: 10:00 a.m. Courtroom: 3 Judge: Hon. Kimberly J. Mueller Trial Date: none set Action Filed: May 9, 2016

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

PLEASE TAKE NOTICE THAT on October 7, 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

/ / /

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

This motion to dismiss is brought on the grounds that there is no case or controversy and plaintiff does not have standing to pursue this matter; therefore, the court lacks jurisdiction to hear plaintiff's complaint. The motion is also brought on the ground that plaintiff fails to state a claim for relief. This motion is based on this Notice, the Memorandum of Points and Authorities, the Request for Judicial Notice 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 contacted plaintiff in an effort to meet and confer regarding the underlying merits of defendant's motion to dismiss. On July 8, 2016, and again on August 26, 2016, the parties met and conferred telephonically and by electronic mail. Plaintiff has 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: August 31, 2016

Respectfully Submitted,

KAMALA D. HARRIS
Attorney General of California
ISMAEL A. CASTRO
Supervising Deputy Attorney General

/s/ Ashante L. Norton

ASHANTE L. NORTON
Deputy Attorney General
Attorneys for Defendant

SA2016102013
12408549.doc

KAMALA D. HARRIS
Attorney General of California
ISMAEL A. CASTRO, State Bar No. 85452
Supervising Deputy Attorney General
ASHANTE L. NORTON, State Bar No. 203836
Deputy Attorney General
1300 I Street, Suite 125
P.O. Box 944255
Sacramento, CA 94244-2550
Telephone: (916) 322-2197
Fax: (916) 324-5567
E-mail: Ashante.Norton@doj.ca.gov
Attorneys for Defendant

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 DEPARTMENT OF PUBLIC HEALTH; AND DOES 2 THROUGH 10, INCLUSIVE,** Defendant.	2:16-cv-00889-KJM-EFB **MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO DISMISS SECOND AMENDED COMPLAINT** **[Fed.R.Civ. Proc. 12(b)(1), (6)]** Date: October 7, 2016 Time: 10:00 a.m. Dept: 3 Judge: Hon. Kimberly J. Mueller Trial Date: none set Action Filed: 5/9/2016

TABLE OF CONTENTS

Page

Memorandum of Points and Authorities 1
Introduction 1
Legal and Factual Background 3
I. The California Uniform Determination of Death Act 3
II. Factual Background 4
III. Overview of State and Federal Court Proceedings 5
A. Placer County Superior Court 5
B. Eastern District And The Ninth Circuit Court of Appeal 5
C. Los Angeles Superior Court 6
IV. Plaintiff's Current Claims Before This Court 7
Standard 7
Argument 7
I. There is No Justiciable Controversy; Plaintiff Now Seeks an Improper Advisory Opinion. 9
II. Plaintiff Lacks Article III Standing Because The Director Has Not Caused Plaintiff Harm Nor Will a Favorable Outcome Redress Plaintiff's Alleged Injury 10
A. Plaintiff fails to allege a sufficient nexus between Israel's death and any state action. 11
B. A favorable decision would not redress plaintiff's alleged injury. 11
III. The First and Second Causes of Action Fail to State a Claim Against The Director and Should be Dismissed 12
A. California's Procedures are Constitutionally Sufficient 13
1. Plaintiff's facial challenge lacks merit. 13
2. Plaintiff's "as applied" challenge fails. 14
B. Plaintiff's Substantive Due Process Allegations Fail to State a Claim. 15
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. 17
V. CUDDA Does Not Violate Plaintiff's Right to Privacy and Therefore the Fourth and Fifth Causes of Action Should be Dismissed 17
VI. "As Applied" Claims in the First and Second Causes of Action are Barred by The Rooker-Feldman Doctrine 18
Conclusion 20

TABLE OF AUTHORITIES

Page

CASES

Adams v. Johnson
355 F.3d 1179 (9th Cir. 2004) 7

Aetna Life Ins. Co. of Hartford, Conn. v. Haworth
300 U.S. 227 (1937) 9, 10

Allah v. Superior Court
871 F.2d 887 (9th Cir.1989) 18

Ashcroft v. Iqbal
556 U.S. 662 (2009) 7

Bianchi v. Rylaarsdam
334 F.3d 895 (9th Cir. 2003) 18, 19

Biodiversity Legal Found. v. Badgley
309 F.3d 1166 (9th Cir. 2002) 10

Cantrell v. City of Long Beach
241 F.3d 674 (9th Cir. 2001) 10

Carnohan v. United States
616 F.2d 1120 (1980) 16

Collins v. Harker Heights
503 U.S. 115 (1992) 15

Cook Inlet Treaty Tribes v. Shalala
166 F.3d 986 (9th Cir. 1999) 9

Cruzan by Cruzan v. Dir., Missouri Dep't of Health
497 U.S. 261 (1990) 16

Dority v. Superior Court
145 Cal. App. 3d 273 (1983) 4, 5, 13, 14

Fayer v. Vaughn
649 F.3d 1061 (9th Cir. 2011) (per curiam) 7

Foti v. City of Menlo Park
146 F.3d 629 (9th Cir. 1998) 13

Hoye v. City of Oakland
653 F.3d 835 (9th Cir. 2011) 13, 14

TABLE OF AUTHORITIES
(continued)

Page

Kremer v. Chemical Const. Corp.
456 U.S. 461 (1982) 13

Lazy Y Ranch Ltd. v. Behrens
546 F.3d 580 (9th Cir. 2008) 7

Linda R.S. v. Richard D.
410 U.S. 614 (1973) 11

Lujan v. Defenders of Life
504 U.S. 555 (1992) 11

Maryland Cas. Co. v. Pacific Coal & Oil Co.
312 U.S. 270 (1941) 9

Mathews v. Eldridge
424 U.S. 319 (1976) 13

McQuillion v. Schwarzenegger
369 F.3d 1091 (9th Cir. 2004) 9

Native Vill. of Kivalina v. ExxonMobil Corp.
696 F.3d 849 (9th Cir. 2012) 12

Noel v. Hall
341 F.3d 1148 (9th Cir. 2003) 19

North Star Int'l v. Ariz. Corp. Comm'n
720 F.2d 578 (9th Cir. 1983) 7

Protectmarriage.com – Yes on 8 v. Bowen
752 F.3d 827 (9th Cir. 2014) 10

Roe v. Wade
410 U.S. 113 (1973) 17

Ruvalcaba v. City of L.A.
167 F.3d 514 (9th Cir. 1999) 9, 10

Sanchez v. City of Fresno
914 F. Supp. 2d 1079 (E.D. Cal. 2012) 17

Schroeder v. McDonald
55 F.3d 454 (9th Cir.1995) 19

TABLE OF AUTHORITIES
(continued)

Page

U.S. v. Salerno
481 U.S. 739 (1987) 13

Washington Envtl. Council v. Bellon
732 F.3d 1131 (9th Cir. 2013) 12

Washington v. Glucksberg
521 U.S. 702 (1997) 15

Watison v. Carter
668 F.3d 1108 (9th Cir. 2012) 7

Wisconsin v. Yoder
406 U.S. 205 16

Wolfson v. Brammer
616 F.3d 1045 (9th Cir. 2010) 11

Worldwide Church of God v. McNair
805 F.2d 888 (9th Cir.1986) 19

STATUTES

United States Code Title 42

§ 1395 6

Federal Rule of Civil Procedure 12(b)(6) 7

California Health and Safety Code 1, 4

§ 7180 1

§ 7180(a) ..... *passim*

§ 7182 4

§ 7183 ..... 4, 14

§ 1254.4 4

§ 1254.4(a) 14

§ 1254.4 (b) 14

§ 1254.4(c)(2) 14

TABLE OF AUTHORITIES
(continued)

Page

California Probate Code

§ 4650 (b) 16

CONSTITUTIONAL PROVISIONS

California Constitution

Article I, § 1 17

United States Constitution

Article III, § 2 ..... 9, 10

Amend. XIV, § 1 ..... 2, 15

MEMORANDUM OF POINTS AND AUTHORITIES

INTRODUCTION

Three decades ago, California enacted the Uniform Determination of Death Act (Act or CUDDA), which modified the definition of death to conform with the definition adopted by the National Commission on Uniform State Laws. The Act defines death as 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 *et seq.*[1] The Act requires that any determination of death be made by physicians in "accordance with accepted medical standards," and in the event of a brain death diagnosis, confirmed by an independent physician. *See* § 7180(a); *see also* § 7181. The Act is silent concerning the medical criteria for determining death and post-mortem decisions about whether or not to continue artificial life-sustaining measures. As described in more detail below, this is legally significant: plaintiff's claims fail because the alleged injuries are not caused by CUDDA or any state action, but rather by the decisions of individual physicians.

Following a series of unfortunate circumstances, in April 2016, Israel Stinson's attending physician determined that he suffered irreversible brain death and pronounced him dead. As required, the determination was made in accordance with accepted medical standards and confirmed by an independent physician. Since that time, plaintiff Fonseca has petitioned both state and federal courts attempting to reverse that determination. The gravamen of each case was the same: plaintiff did not believe that Israel was deceased and sought an order in one fashion or another to reverse the determination of death.

Following the first state court ruling affirming that Israel is deceased, plaintiff filed this action contending that the uniform definition of death is contrary to her personal beliefs and violates the state and federal Constitutions. In the operative Second Amended Complaint (SAC), plaintiff asks this Court to strike down the uniform definition adopted by the medical community as well as nearly every other state. Plaintiff contends that CUDDA deprived Israel of life without

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

due process and her right to make decisions on Israel's behalf in violation of the Fifth and Fourteenth Amendments of the United States Constitution, and the right to privacy as guaranteed by the United States and California Constitutions. Plaintiff's complaint for declaratory and injunctive relief should be dismissed for a number of reasons.

Foremost, there is no longer a case in controversy. On August 25, 2016, Israel was removed from life support and all circulatory and respiratory functions irreversibly ceased. Thus, there is no longer any dispute that he is deceased and plaintiff's claims are moot.

Next, even if the court determines that there remains a justiciable controversy, plaintiff does not have standing to pursue this action. Plaintiff's chief complaint is that physicians had determined that Israel is dead, when she believed he was not. She attacks the process by which death is determined and alleges that she lacked an adequate opportunity to challenge that determination. Because the decisions of which plaintiff complains are made by physicians in accordance with medical standards, plaintiff cannot establish that *CUDDA* itself caused the injury at issue (the medical determination that Israel is deceased). Additionally, because this critical determination was based upon prevailing medical standards, the declaration that CUDDA is unconstitutional would not have reversed that determination. The lack of redressability is fatal to plaintiff's claims.

Even if plaintiff has standing, her claims fail as a matter of law. Plaintiff's First, Second and Third Causes of Action contend that CUDDA deprived Israel of life and plaintiff 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*, plaintiff cannot demonstrate that the Director — via CUDDA— deprived Israel or plaintiff of any liberties secured by United States or California Constitutions. Additionally, plaintiff fails to allege facts showing that CUDDA is facially unconstitutional, or that she has been denied any process due under the circumstances.

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

Finally, plaintiff's "as applied" challenges to the determination of death are barred by the *Rooker-Feldman* doctrine because they constitute a collateral attack on an underlying state court judgment upholding the physicians' determination that Israel is deceased.

Because plaintiff's claims cannot be cured by any further amendment, the complaint should be dismissed with prejudice.

LEGAL AND FACTUAL BACKGROUND

I. THE CALIFORNIA UNIFORM DETERMINATION OF DEATH ACT

The Uniform Determination of Death Act, the act upon which CUDDA is modeled, was approved by the National Conference of Commissioners on Uniform Laws in 1980. Request for Judicial Notice (RJN), Ex. B; *see also*, 14 Witkin, Summary 10th Wills § 11 (2005). The definition of death codified by the Uniform Act is the result of the agreement between the American Bar Association (ABA) and the American Medical Association (AMA). RJN, Ex. B, at 3. It was enacted with understanding that it "does not concern itself with living wills, death with dignity, euthanasia, rules on death certificates, maintaining life support by beyond brain death in cases of pregnant women or of organ donors, and protection of the dead body." *Id.*, at 4. The drafters intended that those post-mortem determinations "are left to other law." *Id.* Further, the uniform act does not comment on "acceptable medical diagnosis or procedures;" it offers nothing more than "the general legal standard for determining death," and not the medical criteria for doing so. *Id.*

CUDDA was enacted in 1982 to conform to the uniform definition. RJN, Ex. A, at 1. CUDDA specified requirements relating to the independent confirmation of brain death and the maintenance of medical records in the event of a brain death determination. *Id.*, at 3-5.[2] The need for a uniform definition arose as a result of advances in technology that make it possible to have cardio-respiratory function aided by equipment even though the brain had ceased to function.

[2] Prior to CUDDA, the definition adopted by California referred only to brain death. RJN, Ex. A, at 1 (death is "a person who has suffered a total and irreversible cessation of brain function ….") AB 2004 added to California law, the common law definition of cessation of cardio-respiratory functions and conformed to the definition used by other jurisdictions which included both definitions. *Id.* Therefore, California recognized that brain death is death *prior* to CUDDA's enactment.

Id., at 3. CUDDA aimed to resolve the "potential disparity between current and accepted biomedical practice and existing law." *Id.*, Ex. A, at 3.

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 organs are donated, the physician making the independent confirmation cannot 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.[3]

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

II. 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. SAC ¶ 6. 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. SAC ¶ 19. The following day, Israel was transferred to Kaiser Permanente Roseville Medical Center (Kaiser). *Id.*

[3] Section 1254.4 provides: "A general acute care hospital shall adopt a policy for providing family or next of kin with a reasonably brief period of accommodation, … from the time that a patient is declared dead by reason of irreversible cessation of all functions of the entire brain, including the brain stem, in accordance with Section 7180, through discontinuation of cardiopulmonary support for the patient. During this reasonably brief period of accommodation, a hospital is required to continue only previously ordered cardiopulmonary support. No other medical intervention is required."

¶ 20. 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*. ¶¶ 21-23. 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*., ¶36.

III. OVERVIEW OF STATE AND FEDERAL COURT PROCEEDINGS

A. Placer County Superior Court

Following Dr. Myette's determination that Israel was deceased, plaintiff initiated *Israel Stinson v. UC Davis Children's Hospital; Kaiser Permanente Roseville*, Case No. S-CV-0037673. Styled as an application for a temporary restraining order directed at Kaiser, plaintiff requested time to find a physician to conduct an independent medical examination pursuant to § 7181. ECF No. 14-2. Plaintiff asserted that in accordance with *Dority*, "the court has jurisdiction over whether a person is 'brain dead' or not pursuant to [CUDDA]." *Id*., at 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 plaintiff 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. Plaintiff did not appeal.

B. Eastern District and the Ninth Circuit Court of Appeal

On April 28, 2016, plaintiff 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.

On May 2, 2016, the court dismissed plaintiff's complaint. ECF No. 23. The following day, plaintiff 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, plaintiff 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. *Id*., No. 48.

Plaintiff filed a notice of interlocutory appeal on May 14, 2016 seeking relief from the Order denying the motion for preliminary injunction. ECF No. 49. Plaintiff also requested an order requiring Kaiser to continue the life support until plaintiff 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, plaintiff withdrew the motion as Israel was flown to a facility out of the country. ECF 60, SAC ¶ 42. The appeal was thereafter dismissed.

C. Los Angeles Superior Court

On August 6, 2016, Israel returned to the United States and was admitted to Children's Hospital, Los Angeles (CHLA). RJN, Ex. C, at 3:19-21. On August 16, 2016, plaintiff was informed that the hospital intended to remove Israel's ventilator. *Id*., at 4:3-4. On August 18, 2016, plaintiff initiated *Israel 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. *Id*., Ex. C. The court issued a TRO requiring the CHLA to refrain from removing Israel from the ventilator and to cooperate with plaintiff to facilitate an independent evaluation of Israel. *Id*., Ex. D, p. 2.

On August 25, 2016, the court dissolved its TRO. RJN, Ex. E. CHLA subsequently removed Israel from the ventilator and there is no longer any dispute that Israel is deceased.

/ / /

/ / /

IV. PLAINTIFF'S CURRENT CLAIMS BEFORE THIS COURT

Following Kaiser's dismissal, plaintiff amended her complaint for the second time. The Second Amended Complaint asserts 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.

STANDARD

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

Regardless of how the complaint is styled, this challenge aims to undo the medical determination of death made by third party *physicians*, and plaintiff's complaint against the Director should be dismissed for several reasons. As a threshold matter, following Israel's recent removal from life support on August 25, 2016, all parties agree that Israel is now deceased, and

thus there is no longer a justiciable controversy before this court. Further, plaintiff lacks standing to pursue this action against the Director because plaintiff's alleged injury—the physicians' medical determination in April 2016 that Israel was deceased—was not caused by CUDDA and is not redressable in this case, as it resulted from the independent medical decisions of Israel's doctors who are not before this court.

Plaintiff's claims also fail as a matter of law on their merits. Plaintiff alleges violations of due process, the right to life, and the right to privacy based on plaintiff's contentions that death should not be defined to include brain death, SAC ¶ 49, or in the alternative that Israel was "misdiagnosed as being brain dead when he was not," SAC ¶ 50. Plaintiff's procedural due process claims fail because California law provides reasonable and constitutionally sufficient procedures to challenge a determination of death in the state superior court—procedures that plaintiff in fact utilized following the doctors' determination of Israel's death. And plaintiff's substantive due process claims fail because California has a legitimate interest in defining death, in accordance with accepted medical standards and nearly every other state, to include the "irreversible cessation of all functions of the entire brain, including the brain stem," particularly where that definition is qualified by the requirement that in all cases "[a] determination of death must be made in accordance with accepted medical standards." § 7180(a). To the extent that plaintiff alleges Israel's brain death was not irreversible, *see* SAC ¶ 50, plaintiff's complaint does not implicate CUDDA—which expressly requires that brain death be "irreversible." If plaintiff intends to allege that a mistake was made, she has sued the wrong party.

Plaintiff's right-to-life claim is analyzed under the same standards as her due process claims, and accordingly fails for the same reasons.

Plaintiff's privacy claims are premised on her assertion that she has an absolute right to make all decisions concerning Israel's medical treatment. Those claims fail for at least two reasons. First, they do not implicate the Director or CUDDA because the decision whether to continue treating a person who is brain dead is entirely left to the medical professionals, and is not addressed by CUDDA. Second, the right to make medical decisions is not absolute, and may be overridden by competing state interests. Here, to the extent that state action, rather than the

independent actions of the physicians, is responsible for overriding plaintiff's preferences concerning medical care, the State's legitimate interests in drawing boundaries between life and death, ensuring that patients at the end of their lives are treated with dignity, and ensuring that medical resources are devoted to treating living patients, and not the deceased, all significantly outweigh plaintiff's interest in making medical decisions on Israel's behalf.

Finally, plaintiff's "as applied" claims are barred by the *Rooker-Feldman* doctrine, as they amount to a collateral attack on the state superior court's judgment upholding the physicians' determination of death.

For these reasons, the Director's motion should be granted and the complaint dismissed without leave to amend.

I. THERE IS NO JUSTICIABLE CONTROVERSY; PLAINTIFF NOW SEEKS AN IMPROPER ADVISORY OPINION.

It is well-settled that an actual justiciable controversy must be present in order to satisfy the constitutional limitations on the judicial power set out in Article III, section 2, of the United States Constitution. *Aetna Life Ins. Co. of Hartford, Conn. v. Haworth*, 300 U.S. 227 (1937). "[T]he question in each case is whether the facts alleged, under all the circumstances, show that there is a substantial controversy, between the parties … of sufficient immediacy and reality to warrant the issuance of a declaratory judgment." *Maryland Cas. Co. v. Pacific Coal & Oil Co.*, 312 U.S. 270, 273 (1941). The "requisite personal interest that must exist at the commencement of the litigation (standing) must continue throughout its existence (mootness)." *Cook Inlet Treaty Tribes v. Shalala*, 166 F.3d 986, 989 (9th Cir. 1999). Where a litigant has standing at the outset of the litigation, but loses her legally cognizable interest in the outcome during the pendency of the litigation and thus cannot obtain relief, the case becomes moot and should be dismissed for lack of subject-matter jurisdiction. *See McQuillion v. Schwarzenegger*, 369 F.3d 1091, 1095 (9th Cir. 2004) ("[D]eclaratory judgment without the possibility of prospective effect would be superfluous."); *Ruvalcaba v. City of L.A.*, 167 F.3d 514, 521 (9th Cir. 1999).

/ / /

/ / /

The court lacks jurisdiction to hear this matter because there is no longer a justiciable controversy between the parties. Plaintiff exclusively seeks injunctive and declaratory relief related to the determination that Israel is deceased. Prayer ¶¶ 1-3. Plaintiff sues to "expunge all records archived or under the control of [the Director] that state that [Israel] is deceased." *Id*. Now that all parties agree that Israel is deceased, plaintiff no longer has a legally cognizable interest in the relief sought by this action.

Plaintiff's claims do not fit within the narrow parameters of the "capable of repetition, yet evading review" exception to the mootness doctrine, which "applies only where '(1) the duration of the challenged action is too short to allow full litigation before it ceases, and (2) there is a reasonable expectation that the plaintiffs will be subjected to it again.'" *Biodiversity Legal Found. v. Badgley*, 309 F.3d 1166, 1173 (9th Cir. 2002) (quoting *Greenpeace Action v. Franklin*, 14 F.3d 1324, 1329 (9th Cir. 1993)). Courts apply this exception "sparingly, and only in 'exceptional situations.'" *Protectmarriage.com – Yes on 8 v. Bowen*, 752 F.3d 827, 836-37 (9th Cir. 2014). Here, plaintiff's claims are not a type that "inherently precludes" judicial review, *id*, at 837. Additionally, there is no reasonable expectation that plaintiff will again be faced with these issues concerning the determination of death under CUDDA. With no relief to provide, plaintiff's complaint is academic and amounts to an impermissible advisory opinion. *Aetna*, 300 U.S. at 240-41. The complaint should be dismissed.

II. PLAINTIFF LACKS ARTICLE III STANDING BECAUSE THE DIRECTOR HAS NOT CAUSED PLAINTIFF HARM NOR WILL A FAVORABLE OUTCOME REDRESS PLAINTIFF'S ALLEGED INJURY

To satisfy Article III's standing requirements, a plaintiff must show: (1) an "injury in fact" that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision. *Cantrell v. City of Long Beach*, 241 F.3d 674, 679 (9th Cir. 2001).

Here, plaintiff lacks standing to sue the Director because the injury alleged—the determination by several physicians that Israel is deceased—was not caused by the Director or CUDDA and would not be redressed even if plaintiff prevailed in this case. The harm alleged

here was caused by, and is redressable only by challenging, the independent medical decisions of the physicians who assessed Israel. As discussed below, plaintiff has sued the wrong party.

A. Plaintiff Fails to Allege a Sufficient Nexus between Israel's Death and any State Action.

Plaintiff must show that the injury—determination of death—stems from compliance with CUDDA, and is not the result of conduct of some third party not before the court. *See Linda R.S. v. Richard D.* 410 U.S. 614, 618 (1973); *see also Lujan v. Defenders of Life,* 504 U.S. 555, 560–61 (1992). Here, Israel's death determination was a medical decision made by third party physicians. CUDDA did not cause Israel's harm.

The injury complained of is the determination that Israel is deceased. *See* SAC. That determination was initially made by three physicians, none of whom are before this court. They made that determination based upon prevailing medical standards after administering tests recommended by the American Academy of Pediatrics and the Society of Critical Care Medicine. SAC ¶ 21. While plaintiff alleges that this determination was caused by CUDDA, SAC ¶ 35, that is incorrect as a matter of law. CUDDA merely codifies the prevailing definition of death that has long been accepted by the medical community, RJN Ex. B, and CUDDA does not itself impose any requirements on physicians in making a determination of death. Instead, CUDDA ultimately defers to physicians' medical judgment in making that determination, expressly providing that "[a] determination of death must be made *in accordance with accepted medical standards*." § 7180(a) (emphasis added). Accordingly, CUDDA is not the cause of plaintiff's alleged injury, and thus plaintiff lacks standing to challenge the constitutionality of CUDDA.

B. A Favorable Decision Would not Redress Plaintiff's Alleged Injury.

Even if plaintiff could demonstrate an adequate link between the determination of death and CUDDA/the Director, she cannot show that a favorable decision will redress that injury. The redressability prong analyzes the connection between the alleged injury and requested judicial relief. It requires a likelihood that the injury will be redressed by a favorable judicial decision. *Wolfson v. Brammer*, 616 F.3d 1045, 1056 (9th Cir. 2010). Accordingly, here plaintiff must show

/ / /

that a favorable decision by this court will likely reverse the medical determination that Israel is deceased. *See Washington Envtl. Council v. Bellon*, 732 F.3d 1131, 1146 (9th Cir. 2013).

As addressed above, plaintiff seeks to reverse the medical determination that Israel is dead. Plaintiff seeks an order expunging all records that state that Israel is deceased. Prayer, ¶ 1. She also seeks a declaration that CUDDA is unconstitutional on its face and as applied. *Id*., Prayer, ¶¶ 2-3. However, should plaintiff receive the relief she seeks, it will not undo the physicians' determination that Israel is no longer living. Even if CUDDA is found unconstitutional, physicians must still make determinations of death in accordance with accepted medical standards. Moreover, brain death was recognized as a means to determine death well before CUDDA's enactment. *See* RJN, Exs. B, at 3. Thus, plaintiff cannot allege that but for CUDDA, Israel would be alive. A judgment against the Director will not have the force and effect to compel the 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 or the medical opinions of the three physicians. Plaintiff fails to satisfy the "redressability" requirement for standing and the action should be dismissed.

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

Even if plaintiff had standing, the complaint should still be dismissed because it fails to state any claims against the Director as a matter of law. Plaintiff's First and Second Causes of Action allege generally that CUDDA deprived Israel of life and plaintiff of parental rights in violation of the due process clauses of the Fifth and Fourteenth Amendments. Though not entirely clear, plaintiff appears 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, SAC ¶ 60, 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." SAC ¶ 54. 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 plaintiff has received all the process to which she is due.

1. Plaintiff's facial challenge lacks merit.

To mount a successful facial challenge to CUDDA, plaintiff "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)). Plaintiff cannot meet her burden and her 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, plaintiff has 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.[4] 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. Plaintiff's "as applied" challenge fails.

Plaintiff's "as applied" challenge meets the same fate. Plaintiff 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. SAC ¶¶ 17-23. Following the third pronouncement, plaintiff contested the determination by initiating the Placer County Superior Court action. *Id*., 40-41; *see also* ECF 14-2. Plaintiff 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, plaintiff has not, nor can she, demonstrate that these procedures are constitutionally inadequate.

/ / /

[4] 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

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

Plaintiff's 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 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.

Plaintiff contends that under CUDDA an advocate for a patient is not allowed to bring in her own physician to contest the findings, SAC ¶¶ 49, 50, and that CUDDA prevents a physician from exercising his or her independent judgment as to whether a patient is dead, SAC ¶ 54. 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 state which physicians are permitted to examine the patient. Thus, *CUDDA*, does not prevent advocates from securing their own medical opinions.

Even if plaintiff could allege sufficient governmental encroachment (which she cannot), plaintiff's 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 also 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 observed, plaintiff provides no facts that "suggest [] CUDDA is arbitrary, unreasoned, or unsupported by medical science." ECF No. 48, at 24:17-18. This definition is the result of the agreement between the AMA and ABA and 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)). Plaintiff has not alleged any additional facts to sustain her claim. It remains that plaintiff's disagreement with the prevailing definition of death cannot override the

/ / /

State's interests in enacting CUDDA. Plaintiff's 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 her first claim, plaintiff, in support of the third claim, asserts that CUDDA deprived Israel of his right to life. SAC ¶ 66. 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, plaintiff's Third Cause of Action should also be dismissed.

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

Plaintiff alleges that health care decisions are part of the right to personal autonomy and privacy, and that CUDDA violated these rights by allegedly denying plaintiff the right to make medical decisions on Israel's behalf. SAC ¶¶ 69, 73-74. 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 her complaint, plaintiff contends that one's right to dictate medical decisions and treatment is boundless. SAC ¶¶ 69, 71, 74, 76. Plaintiff is 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 plaintiff, was provided ample opportunity to refute that determination, plaintiff did not do so. In light of these facts, and the competing state interests, plaintiff cannot demonstrate that CUDDA violated Israel's right to continued privacy as afforded by the California or United States Constitutions. Plaintiff's 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

The *Rooker-Feldman* doctrine precludes this court from considering plaintiff's "as applied" challenges to the constitutionality of CUDDA in the First and Second Causes of Action. In April 2016, plaintiff expressly challenged the determination of death in state court alleging that the brain death declaration was wrong. After affording plaintiff time to secure her own medical opinion, the court upheld the determination of death. Plaintiff did not appeal the trial court's decision. Instead, plaintiff filed series of complaints, the latest of which directly challenged the physician's determination of death. Plaintiff'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 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, plaintiff expressly asserts an "as applied" challenge to CUDDA. SAC ¶¶ 49-50, 55, 60.[5] Identical to plaintiff's state court petition, plaintiff First and Second Causes of Action allege there is a medical dispute of fact as to whether Israel is dead or alive. *See* SAC ¶¶ 55, 65. Additionally, the remedy she 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 (Plaintiff seeks "[a]n order expunging all records … which state or imply that Israel is deceased."). This most recent complaint is simply an improper appeal from the state court decision that CUDDA was appropriately complied with and Israel is deceased. Thus, plaintiff is

/ / /

[5] This court previously rejected application of *Rooker-Feldman* noting plaintiff challenged CUDDA's constitutionality generally, not CUDDA's particular application to this case. ECF 48, at 7:14-17.

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 Second Amended Complaint without leave to amend.

Dated: August 31, 2016

Respectfully Submitted,

KAMALA D. HARRIS
Attorney General of California
ISMAEL A. CASTRO
Supervising Deputy Attorney General

/s/ Ashante L. Norton

ASHANTE L. NORTON
Deputy Attorney General
Attorneys for Defendant

SA2016102013
12401526.doc

KAMALA D. HARRIS
Attorney General of California
ISMAEL A. CASTRO, State Bar No. 85452
Supervising Deputy Attorney General
ASHANTE L. NORTON, State Bar No. 203836
Deputy Attorney General
1300 I Street, Suite 125
P.O. Box 944255
Sacramento, CA 94244-2550
Telephone: (916) 322-2197
Fax: (916) 324-5567
E-mail: Ashante.Norton@doj.ca.gov
Attorneys for Defendant

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

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 **REQUEST FOR JUDICIAL NOTICE IN SUPPORT OF DEFENDANT'S MOTION TO DISMISS SECOND AMENDED COMPLAINT** Date: October 7, 2016 Time: 10:00 a.m. Courtroom: 3 Judge: Hon. Kimberly J. Mueller Trial Date: none set Action Filed: May 9, 2016

Defendant Karen Smith, M.D., in her official capacity as Director of the California Department of Public Health respectfully requests that the court take judicial notice, pursuant to Rule 201 of the Federal Rules of Evidence, of the documents listed below.

Judicial notice is appropriate where the fact is not subject to reasonable dispute because it is "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." Fed. R. Evid. 201(b)(2). Federal courts routinely take judicial notice of state court records. *Harris v. County of Orange,* 682 F.3d 1126, 1132 (9th Cir. 2012); *Cachil Dehe Band of Wintun Indians v. California*, 547 F.3d 962, 968 n. 4 (9th Cir. 2008) (taking judicial notice of state records); *United States v. Black*, 482 F.3d 1035, 1041 (9th Cir. 2007) (noting that a

court "may take notice of proceedings in other courts, both within and without the federal judicial system, if those proceedings have a direct relation to matters at issue"); *Reyn's Pasta Bella, LLC v. Visa USA, Inc.*, 442 F.3d 741, 746 n. 6 (9th Cir. 2006) (taking judicial notice of pleadings, memoranda, and other court filings); *Asdar Group v. Pillsbury, Madison & Sutro*, 99 F.3d 289, 290 n. 1 (9th Cir. 1996) (court may take judicial notice of pleadings and court orders in related proceedings).

Judicial notice of documents constituting legislative history is appropriate. These materials are not subject to reasonable dispute and "can be accurately and readily determined from sources whose accuracy cannot be questioned." Fed. R. Evid. 201(b)(2); *See Chaker v. Crogan*, 428 F.3d 1215, 1223 n. 8 (9th Cir. 2005) (taking judicial notice of the legislative history of a state statute); *see also Joseph v. J.J. Mac Intyre Companies, L.L.C.*, 238 F. Supp. 2d 1158, 1165 n. 5 (N.D. Cal. 2002). Additionally, the court may take judicial notice of "matters of public record. " *Lee v. City of L.A.*, 250 F.3d 668, 689 (9th Cir.2001). This includes public records of a governmental entity that is available from reliable sources. *See Daniels-Hall v. Nat'l Educ. Ass'n*, 629 F.3d 992, 999, 1004-05 (9th Cir. 2010)

On a Rule 12(b)(6) motion to dismiss, a court may take judicial notice of another court's opinion. *Lee v. City of Los Angeles*, 250 F.3d 668, 690 (9th Cir. 2001). "It may do so 'not for the truth of the facts recited therein, but for the existence of the opinion, which is not subject to reasonable dispute over its authenticity.'" *Id*. citing *Southern Cross Overseas Agencies, Inc. v. Wah Kwong Shipping Group Ltd*., 181 F.3d 410, 426–27 (3rd Cir.1999).

Judicial notice by a court is mandatory "if requested by a party and supplied with the necessary information." Fed. R. Evid. 201(c)(2). Therefore, the Director requests that the court take judicial notice of the following 5 items:

1. Attached as Exhibit A are true and correct copies of documents from the Assembly Health Committee Analysis of Senate Bill 2004 (May 1982).

2. Attached as Exhibit B is a true and correct copy of the Uniform Determination of Death Act drafted by the National Conference of Commissioners on Uniform State Laws. The Uniform Act is also contained as part of the Assembly Health Committee Analysis of Senate Bill

2004 (May 1982). Exhibit B is separately noticed for ease of reference by the parties and the court. A copy can also be found at:

http://www.uniformlaws.org/shared/docs/determination%20of%20death/udda80.pdf

3. Attached as Exhibit C is a true and correct copy of the Verified Ex Parte Petition for Temporary Restraining Order/Injunction: Request for Order of Independent Neurological Exam filed August 18, 21016, in *Fonseca v. Children's Hospital Los Angeles,* Los Angeles County Superior Court, Case no. BS164387.[1]

4. Attached as Exhibit D is a true and correct copy of the Temporary Restraining Order and Order to Show Cause Re Preliminary Injunction filed August 18, 2016, in *Fonseca v. Children's Hospital Los Angeles,* Los Angeles County Superior Court, Case no. BS164387.

5. Attached as Exhibit E is a true and correct copy of the Order on Ex Parte Application to Dissolve Temporary Restraining Order filed August 25, 2016, in *Fonseca v. Children's Hospital Los Angeles,* Los Angeles County Superior Court, Case no. BS164387.

CONCLUSION

For the foregoing reasons, the Director respectfully requests that the Court take judicial notice of the above referenced documents and further, that the Court consider the above referenced documents in connection with Defendant's Motion to Dismiss Plaintiff's Second Amended Complaint.

Dated: August 31, 2016

Respectfully submitted,

KAMALA D. HARRIS
Attorney General of California
ISMAEL A. CASTRO
Supervising Deputy Attorney General

/s/ Ashante L. Norton

ASHANTE L. NORTON
Deputy Attorney General
Attorneys for Defendant

SA2016102013
12403863.doc

[1] Exhibits to the Petition have been omitted.

Exhibit A

ASSEMBLY HEALTH COMMITTEE
ART TORRES, CHAIRMAN

SB 2004

ANALYSIS: SB 2004 (BEVERLY) AS AMENDED MAY 12, 1982

SUBJECT: Determination of Death - Conformance with National Commission on Uniform State Laws Definition

DIGEST: Existing law authorizes physicians to pronounce death of a person who has suffered a total and irreversible cessation of brain function and requires the independent confirmation by another physician. In addition, the physicians making such determination when the deceased is a donor of anatomical gift may not participate in the procedures for removing or transplanting the part.

This bill would repeal existing law and substitute language that would define death as either:
(1) An irreversible cessation of circulatory and respiratory functions, or
(2) ~~An irreversible cessation of all functions of the entire brain, including the brain stem.~~

Existing law regarding confirmation of death of a transplant donor and the maintenance of medical records is retained.

STAFF COMMENTARY: This bill was introduced at the request of the California Commission on Uniform State Laws. In many states, the definition of death is limited to an irreversible cessation of vital functions (cardio-respiratory) in accordance with common law. In California, death is determined when there is an irreversible cessation of brain function.

Although there can be no brain function without cardio-respiratory support, it is possible to have cardio-respiratory function aided by equipment without brain function.

This bill, therefore, adds to California law the common law definition of cessation of cardio-respiratory functions and would thus conform this state to other jurisdictions using the national uniform definition.

POSITIONS: Support: California Commission on Uniform State laws

Oppose: None received

CONSULTANT: Paul Press SB 2004

AUTHOR'S STATEMENT FOR

SENATE BILL 2004

Senate Bill 2004 enacts the Uniform Death Act, which modifies the definition of death in state law to conform with the definition as adopted by the National Conference of Commissioners on Uniform State Laws. The measure also specifies that when an individual is pronounced dead by determining that the individual has sustained an irreversible cessation of all brain functions, independent confirmation by another physician will be required.

The Uniform Death Act provides a comprehensive basis for determining death in all situations. It is based on a ten year evolution of statutory language on the subject. The Act has been necessitated as a result of recent advances in life saving technology which have led to a potential disparity between current and accepted biomedical practice and existing law.

This Act contains language that is the result of agreement between the American Bar Association, the American Medical Association and the National Conference of Commissioners on Uniform State Laws.

SUPPORT: California Commission on Uniform State Laws (sponsor Osteopathic Physicians and Surgeons of California

OPPOSE: No known.

PASSED: Senate Health and Welfare 5-0, Senate Floor 37-0

BRM:cv

SENATE COMMITTEE ON
HEALTH AND WELFARE

JU

STAFF ANALYSIS OF SENATE BILL NO. 2004 (BEVERLY)
AS INTRODUCED MARCH 22, 1982

S
B

2
0
0
4

SUBJECT

Confirmation of death

PURPOSE

Technical: to conform language of the state's Uniform Determination of Death Act with language used by other states.

DESCRIPTION

The bill makes technical changes to the state's Uniform Determination of Death Act, to conform with the current definition of death that has been approved by the National Commission on Uniform State Laws.

The technical language changes add, in the definition of the determination of death, the "irreversible cessation of circulatory and respiratory functions." This has been added to the existing definition of the "irreversible cessation of all functions of the entire brain, including the brain stem."

BACKGROUND

The common law standard for determining death is the cessation of all vital functions, traditionally demonstrated by an absence of spontaneous respiratory and cardiac functions. This definition is not in the current state law, which only refers to brain death. However, respiratory and cardiac functions can nowadays be perpetuated through artificial support.

The new wording therefore codifies the existing common law basis for determining death; total failure of the cardio-respiratory system. Thus, if the person's brain or brain stem is totally dead, the person is legally considered dead, even if the person is also receiving artificial support to keep the respiratory and cardiac functions operating.

- MORE -

COMMENTS

Under the current law, a person's death must be confirmed by another physician. The new rewriting of Section 7180 under 2004, however, does not require the confirmation of another physician. A second physician's confirmation would only be required if the deceased were to undergo organ removal for purposes of transplantation.

If the Legislature feels that confirmation of death in cases other than those where the deceased will undergo organ removal should also require the confirmation of a second physician, this should be clarified in Section 7181 of the bill, by adding the requirement for a second physicians' confirmation for "non-doner" deaths.

POSITIONS

SUPPORT: None reported.

OPPOSE: None reported.

* * * * * * * * *

Hearing Date: May 05, 1982

PLEASE RETURN AS SOON AS POSSIBLE TO:

Assemblyman Art Torres, Chairman
Assembly Health Committee
Room 2160, State Capitol

BILL ANALYSIS WORK SHEET

MEASURE: SB 2004 AUTHOR: Beverly

1. Origin of the bill:

   (a) What is the source of the bill? (What person, organization or governmental entity, if any, requested introduction?)
   California Commission on Uniform State Laws (Bion Gregory)

   (b) Has a similar measure been before the Legislature either this session or a previous session? If so, please identify the session, bill number and disposition of the bill.
   No.

   (c) Has there been an interim committee report on the bill? If so, please identify the report.
   No.

   ~~(d) Please attach copies of letters from any group or governmental agency who has contacted you, indicating a position on the bill.~~

2. Problem or deficiency in present law which the bill seeks to remedy: SB 2004 enacts the Uniform Determination of Death Act, which modifies the definition of death in state law to conform with the definition as adopted by the National Conference of Commissioners on Uniform State Laws.

3. Please attach a copy of any background material in explanation of the bill or state where such material may be available.

4. Hearing:

   (a) Approximate amount of time necessary for hearing bill:
   10 minutes.
   (b) Names of witnesses to testify at hearing:

IF BILL IS TO BE AMENDED BEFORE THE HEARING, PLEASE CONTACT THE COMMITTEE AS SOON AS POSSIBLE SO THE ANALYSIS WILL REFLECT THE PROPOSED AMENDMENTS. AMENDMENTS, IN LEGISLATIVE COUNSEL FORM, MUST BE RECEIVED BY THE COMMITTEE NO LATER THAN WEDNESDAY BEFORE THE HEARING.

OPSC

A DIVISIONAL AFFILIATE OF THE AMERICAN OSTEOPATHIC ASSOCIATION

C ...opathic Physicians and Surgeo...
of California

Matt Weyuker
Executive Director

April 21, 1982

RECEIVED
APR 23 1982
CAPITOL OFFICE

Honorable Robert G. Beverly
Member of the Senate
State Capitol, Room 2054
Sacramento, CA 95814

Dear Senator Beverly:

Legislation which you introduced on March 22, 1982 (SB 2004) will soon be coming before the Senate Health & Welfare Committee, chaired by Senator Diane Watson.

The Osteopathic Physicians and Surgeons of California is in support of this measure as it is one which is of benefit to the people and the osteopathic profession here in California.

Please feel free to contact me if there is anything I can do to aid in the passage of this bill or if you need any further comments.

Sincerely,

Matt Weyuker
Executive Director

MW:cpr
cc: Senator Diane Watson,
Chairman of Senate Health
& Welfare Committee

File SB 2004

UNIFORM DETERMINATION OF DEATH ACT

Drafted by the

NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

and by it

APPROVED AND RECOMMENDED FOR ENACTMENT
IN ALL THE STATES

at its

ANNUAL CONFERENCE
MEETING IN ITS EIGHTY-NINTH YEAR
ON KAUAI, HAWAII
JULY 26 - AUGUST 1, 1980

Uniform Law Commissioners

WITH PREFATORY NOTE

Approved by the American Medical Association
October 19, 1980
Approved by the American Bar Association
February 10, 1981

COUNSEL

The Committee which acted for the National Conference of Commissioners on Uniform State Laws in preparing the Uniform Determination of Death Act was as follows:

GEORGE C. KEELY, 1600 Colorado National Building, 950 Seventeenth Street, Denver, CO 80202, *Chairman*

ANNE MCGILL GORSUCH, 243 South Fairfax, Denver, CO 80222

JOHN M. MCCABE, Room 510, 645 North Michigan Avenue, Chicago, IL 60611, *Legal Counsel*

WILLIAM H. WOOD, 208 Walnut Street, Harrisburg, PA 17108

JOHN C. DEACON, P.O. Box 1245, Jonesboro, AR 72401, *President, Ex Officio*

M. KING HILL, JR., 6th Floor, 100 Light Street, Baltimore, MD 21202, *Chairman, Executive Committee, Ex Officio*

WILLIAM J. PIERCE, University of Michigan, School of Law, Ann Arbor, MI 48109, *Executive Director, Ex Officio*

PETER F. LANCROCK, P.O. Drawer 351, Middlebury, VT 05753, *Chairman, Division E, Ex Officio*

Copies of all Uniform and Model Acts and other printed matter issued by the Conference may be obtained from:

NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS
645 North Michigan Avenue, Suite 510
Chicago, Illinois 60611

PREFATORY NOTE

This Act provides comprehensive bases for determining death in all situations. It is based on a ten-year evolution of statutory language on this subject. The first statute passed in Kansas in 1970. In 1972, Professor Alexander Capron and Dr. Leon Kass refined the concept further in "A Statutory Definition of the Standards for Determining Human Death: An Appraisal and a Proposal," 121 Pa. L. Rev. 87. In 1975, the Law and Medicine Committee of the American Bar Association (ABA) drafted a Model Definition of Death Act. In 1978, the National Conference of Commissioners on Uniform State Laws (NCCUSL) completed the Uniform Brain Death Act. It was based on the prior work of the ABA. In 1979, the American Medical Association (AMA) created its own Model Determination of Death statute. In the meantime, some twenty-five state legislatures adopted statutes based on one or another of the existing models.

The interest in these statutes arises from modern advances in life-saving technology. A person may be artificially supported for respiration and circulation after all brain functions cease irreversibly. The medical profession, also, has developed techniques for determining loss of brain functions while cardiorespiratory support is administered. At the same time, the common law definition of death cannot assume recognition of these techniques. The common law standard for determining death is the cessation of all vital functions, traditionally demonstrated by "an absence of spontaneous respiratory and cardiac functions." There is, then, a potential disparity between current and accepted biomedical practice and the common law.

The proliferation of model acts and uniform acts, while indicating a legislative need, also may be confusing. All existing acts have the same principal goal—extension of the common law to include the new techniques for determination of death. With no essential disagreement on policy, the associations which have drafted statutes met to find common language. This Act contains that common language, and is the result of agreement between the ABA, AMA, and NCCUSL.

Part (1) codifies the existing common law basis for determining death—total failure of the cardiorespiratory system. Part (2) extends the common law to include the new procedures for determination of death based upon irreversible loss of all brain functions. The overwhelming majority of cases will continue to be determined according to part (1). When artificial means of support preclude a determination under part (1), the Act recognizes that death can be determined by the alternative procedures.

Under part (2), the entire brain must cease to function, irreversibly. The "entire brain" includes the brain stem, as well as the neocortex. The concept of "entire brain" distinguishes determination of death under this Act from "neocortical death" or "persistent vegetative state." These are not deemed valid medical or legal bases for determining death.

This Act also does not concern itself with living wills, death with dignity, euthanasia, rules on death certificates, maintaining life support beyond brain death in cases of pregnant women or of organ donors, and protection for the dead body. These subjects are left to other law.

This Act is silent on acceptable diagnostic tests and medical procedures. It sets the general legal standard for determining death, but not the medical criteria for doing so. The medical profession remains free to formulate acceptable medical practices and to utilize new biomedical knowledge, diagnostic tests, and equipment.

It is unnecessary for the Act to address specifically the liability of persons who make determinations. No person authorized by law to determine death, who makes such a determination in accordance with the Act, should, or will be, liable for damages in any civil action or subject to prosecution in any criminal proceeding for his acts or the acts of others based on that determination. No person who acts in good faith, in reliance on a determination of death, should, or will be, liable for damages in any civil action or subject to prosecution in any criminal proceeding for his acts. There is no need to deal with these issues in the text of this Act.

Time of death, also, is not specifically addressed. In those instances in which time of death affects legal rights, this Act states the bases for determining death. Time of death is a fact to be determined with all others in each individual case, and may be resolved, when in doubt, upon expert testimony before the appropriate court.

Finally, since this Act should apply to all situations, it should not be joined with the Uniform Anatomical Gift Act so that its application is limited to cases of organ donation.

UNIFORM DETERMINATION OF DEATH ACT

§1. [*Determination of Death.*] An individual who has sustained either (1) irreversible cessation of circulatory and respiratory functions, or (2) irreversible cessation of all functions of the entire brain, including the brain stem, is dead. A determination of death must be made in accordance with accepted medical standards.

§2. [*Uniformity of Construction and Application.*] This Act shall be applied and construed to effectuate its general purpose to make uniform the law with respect to the subject of this Act among states enacting it.

§3. [*Short Title.*] This Act may be cited as the Uniform Determination of Death Act

Uniform Law Memo

Published by the National Conference of Commissioners on Uniform State Laws · Winter 1980

Law recognizes Brain Death

By Ronald E. Cranford and John M. McCabe

Only 20 years ago, a victim of a cardiac arrest suffered outside a hospital had virtually no chance. Today, up to one in five cardiac arrest victims go back to their homes and jobs.

But there are tragic byproducts of the technology that's responsible for these "medical miracles." They include "brain death" and the "persistent vegetative state." For example, some urban medical centers blessed with the latest life-saving equipment now classify about one in 20 deaths as brain death — a term that didn't even exist until a few years ago. And the concept couldn't have been imagined when the common law description of death as cessation of heart-lung activity was developed. Ancient law's ignorance of 20th Century advances in medical hardware and skill still is reflected in *Black's Law Dictionary* which relies exclusively on

(See BRAIN DEATH, page 2)

Should respirators be used on the "brain dead," or should they be reserved for those with some chance for life?

Three adoptions

Nevada's Legislature and the supreme courts of Colorado and Arizona have brought the Uniform Brain Death Act to their states.

Nevada's legislators acted early in 1979, and the high courts of Colorado and Arizona handed down decisions in October that recognized the Uniform Brain Death Act's definition of brain death as having equal standing with the traditional definition of death — cessation of respiration and circulation.

Twenty-four other states use other language to define "brain death." The Conference believes its simple act that points up the significance of the brain stem — and avoids confusion over the legal standing of the common law definition of death — is superior to earlier efforts of states to deal with the problem. Therefore, uniform law commissioners are urging every state to adopt the Uniform Brain Death Act.

Brain Death

the cardiorespiratory standard in describing death as:

"The cessation of life; the ceasing to exist; defined by physicians as a total stoppage of the circulation of the blood, and a cessation of the animal and vital functions consequent thereon, . . . respiration, pulsation, etc."

The centuries-old cardiorespiratory factors still are valid for most determinations of death. But physicians now have tools capable of bringing some patients back from the common law concept of death. These modern miracles usually have a happy ending with victims rehabilitated and playing productive roles in society.

Critical minutes

But not always. Sometimes the medical arsenal of respirators, intubation and cardiopulmonary resuscitation manages to maintain heartbeat and breathing in patients who have suffered massive, irreversible brain damage. That can mean brain death.

How does it happen? In acute emergencies, such as cardiac arrest or severe head injuries, medical teams concentrate on stabilizing vital cardiorespiratory functions while diagnosing and treating potentially reversible causes of brain dysfunction. During those critical early minutes which often stretch into hours, there's little time to ascertain the extent of irreversible brain damage. Only after other factors have stabilized can the medical team assess the extent of permanent damage. That assessment might take a few hours, several days, weeks, and, in some cases, months.

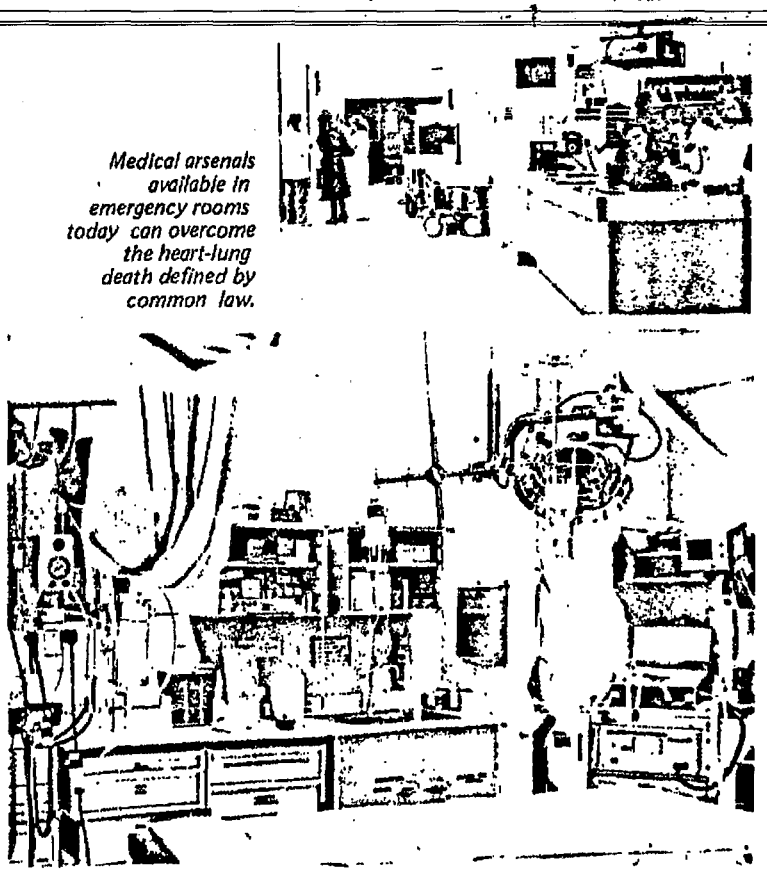
The three most common causes of brain death are (1) head injuries such as those sustained in auto accidents and shootings; (2) massive spontaneous brain hemorrhage which usually is secondary to complications of hypertension or rupture of a congenital berry aneurysm; and (3) lack of blood pumped into the brain because of cardiac arrest or systemic hypotension.

Whatever the cause, a severe insult to the brain often produces swelling (cerebral edema). When swelling is so severe that the pressure within the cranial cavity exceeds the systolic blood pressure, blood flow to the brain — including the brain stem — ceases. When cerebral circulation stops, all brain functions cease within a matter of minutes to a few hours. This characteristic sequence of events occurs in the majority of cases of brain death and is fundamental to an understanding of the certainty of prognosis in these cases.

No response

Clinical examination of the patients in this condition reveals no evidence of brain functions. They are in the deepest possible coma; totally unaware of themselves or their environment. Intense stimulation brings no response or voluntary motor movements.

However, some movements or reflexes originating in the spinal cord may be present, because the brain and spinal cord have separate circulatory systems. That means the spinal cord is unaffected by the massive increase



Medical arsenals available in emergency rooms today can overcome the heart-lung death defined by common law.

in intracranial pressure, and blood flow to the spinal cord may be normal. In that case, the cord would not suffer the widespread destruction sustained by the brain. Nevertheless, even in the presence of these persisting spinal cord responses, the patient's brain is definitely and irremediably destroyed. This condition can be described as "physiological decapitation."

All brain stem functions are absent. Pupils do not respond to light. There are no eye movements at the brain stem level. Spontaneous respiration ceases because the vital respiratory centers of the lower brain are destroyed. Therefore, the patient depends entirely on mechanical respiratory support to maintain the appearance, if not the substance, of life.

Heart may continue

Although spontaneous respiratory function depends totally on the brain and cannot exist without a functioning brain stem, that's not true of the heart. Normal cardiac functioning can occur in the presence of total brain destruction. For example, when a patient is pronounced dead using accepted medical criteria for brain death and the respirator is discontinued, the heart may continue to function for up to an hour.

Because of the sequence of events — primary injury, brain swelling, increased intracranial pressure, loss of cerebral blood flow and, finally, irreversible cessation of all brain functions — the prognosis for recovery of brain functions usually can be determined within the first few days after primary injury. The time period varies depending on rapidity and magnitude of brain swelling and other pathologic changes. Normally, brain swelling begins soon after the primary insult and reaches its greatest intensity within 12 to 24 hours. That means stoppage of cerebral blood flow typically occurs during the second or third day after a patient is hospitalized. But it can happen more quickly.

Confirmation needed

The bedside clinical examination necessary to confirm the absence of all brain functions can be performed within a matter of minutes. But establishment of an irreversible process as the basis for cessation of brain functions may require several days. Reversible loss of brain functions usually involves ingestion of suppressant drugs, such as barbituates, though it also is theoretically possible to experience temporary suspension of all brain functions because of hypothermia — low body temperature.

Therefore, when a patient's history can't be determined, it's necessary to exclude such possibilities before a patient may be pronounced "brain dead." Even laboratory screening of drugs can't be trusted completely. Physicians must wait several days to ensure that any drugs have been cleared from the body or, in some cases, document a total cessation of cerebral blood flow.

But in the great majority of cases, the cause of brain injuries can be ascertained within the first few hours. For example, when a head is split open as a side effect of a collision between a motorcycle and a utility pole, there's no reasonable doubt about the cause of the loss of brain function.

New diagnostic tools

New medical tools have increased diagnostic accuracy early in the treatment process. For example, CAT (computerized

Kansas led 26 other states in recognizing brain death

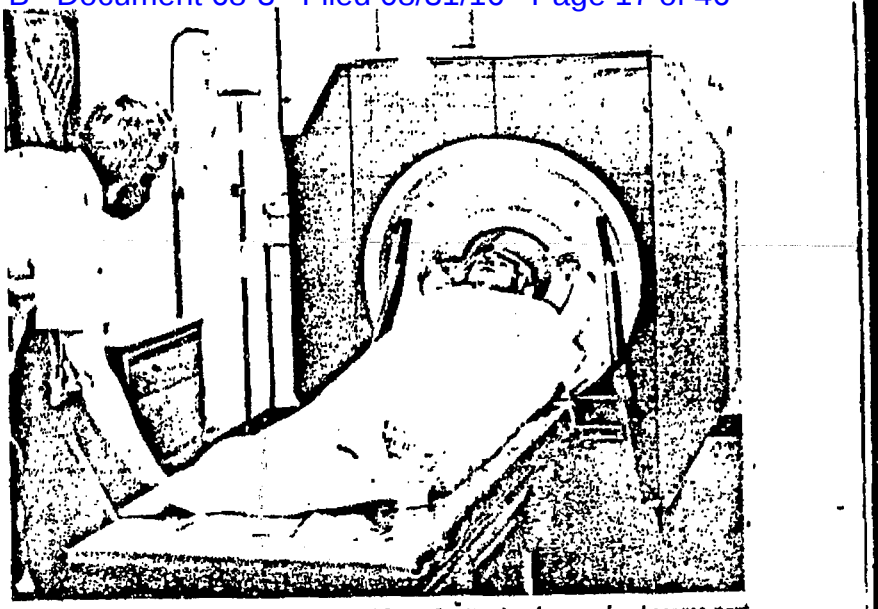
Kansas was the first state to adopt brain death legislation. That state's 1971 act set up a two-tier definition of death. Some experts feel the Kansas statute could be construed as creating a "special category" of death — one designed to encourage transplants of viable vital organs.

In 1972, law professor Alexander Morgan Capron of the University of Pennsylvania and physician Leon R. Kass developed a model statute aimed at eliminating the duality problem. The Capron-Kass proposal was adopted by at least eight states.

In 1975, the American Bar Association sought to simplify earlier brain death legislation. It approved a model used by at least two states, but also asked the Uniform Law Commissioners to refine the proposal. The American Medical Association's board of trustees recently approved another model which no state has reported adopting.

The key difference between the ABA and AMA models and the Uniform Act is the phrase "including the brain stem" — which draws a clear legal line between brain death and the persistent vegetative state.

Brain Death



The CAT Scanner—which won a Nobel Prize for its developers—has become part of the diagnostic arsenal available to physicians in major medical centers.

axial tomography) scanning enables physicians to visualize the size, location and effect of a massive intracranial hemorrhage. And without moving a patient, bedside radioisotope tests can determine if there has been a total interruption of blood flow to the brain.

Survival time limit

Sophisticated medical therapy is necessary to maintain cardiac function in brain death victims for even short periods of time. Prolonged maintenance of heartbeat and circulation is possible in theory. But when the brain stem is destroyed, cardiac function usually can be maintained for only hours or days. As many as one-fourth of all brain death victims may suffer a cardiac arrest while physicians are determining that brain death has occurred.

This limit on "survival time" points up an important distinction between brain death and the persistent vegetative state.

Unlike the multiple causes of brain death, the persistent vegetative state ordinarily results from a cardiac arrest that produces "ischemic encephalopathy" — brain damage secondary to lack of blood. In such cases, brain damage occurs primarily in the cerebral cortex which suffers more from lack of blood than the brain stem.

Fifteen to 20 minutes of total cessation of blood flow will destroy the entire brain, including the brain stem, to produce brain death. But if there is a total interruption of no more than four to six minutes, the result can be severe and irreversible structural damage to the cerebral cortex, resulting in the persistent vegetative state. Most neurologists use that term to describe a medical condition in which the patient demonstrates no behavioral responses even during periods of apparent "wakefulness."

Patient seems "normal"

The appearance of a patient existing in a persistent vegetative state contrasts with the profound coma of brain death. There may be spontaneous movements of eyes, changes in facial expression, movement of the extremities and even sleep-wake cycles. In other words, the patient at first glance might appear to be "normal." But detailed neurologic examinations over a prolonged period will demonstrate a total lack of

John M. McCabe...

. . . serves as legal counsel and legislative director for the NCCUSL. He joined the Conference in 1972 to head up legislative activities. His duties now include working with Uniform Law Commissioners; committees and advisors to state legislatures; state officials; and national, state and local interest groups to develop and urge enactment of NCCUSL-drafted legislation. He came to the Conference from the University of Montana where he served as assistant dean and taught local government law, torts, and professional responsibility. He also served as consultant to Montana state advisory committees on legislative planning and mined land reclamation.

awareness of self and environment even though the patient is not in a coma.

The cortex may be destroyed, but the brain stem functions even though it may have been depressed enough to produce a coma requiring respirator support shortly after the inital injury. Recovery of brain stem function is signaled by a return to "normal" wakefulness. This phenomenon can play a cruel trick on the patient's family when they interpret it as "improvement." But in reality the change only amounts to evolution into the persistent vegetative state. At this point, most patients no longer depend on a respirator. This has been demonstrated graphically in the case of Karen Ann Quinlan.

Prognosis takes longer

And in contrast to brain death when a prognosis usually requires only a few days, it's much later in the course of the illness before a prognosis for recovery of cognitive or other intellectual functions can be made. Considerations involved in dealing with this condition are entirely different from those involved in brain death.

Differences hinge on the fact that accepted medical standards for determination of death, using either cardiorespiratory or brain standards, draw a careful line between severe dysfunction and no function at all. That's why a patient suffering from severe, intractable heart failure with an extraordinarily poor prognosis continues to receive treatment while an individual whose heart no longer functions at all must be pronounced dead.

Both medical and legal authorities have applied that general principle to brain death. A patient with overwhelmingly severe, irreversible brain damage, no matter how poor the prognosis, no matter how poorly the brain is functioning, still is considered a living person. But once the entire brain – including the brain stem – ceases to function, an individual is medically and legally dead.

Uniform Act's 38 words

That distinction is the basis for the Uniform Brain Death Act which the Conference adopted in 1978. Its one operative section states simply:

"For legal and medical purposes, an individual who has sustained irreversible cessation of all functioning of the brain, including the brain stem, is dead. A determination under this section must be made in accordance with reasonable medical standards."

This gives brain death equal legal standing with the common law's heart-lung death. By including the reference to the brain stem, the Conference eliminated any possible confusion of brain death with the persistent vegetative state.

The act is short, simple and narrow. Commissioners chose not to clutter it and possibly confuse issues by trying to deal with related problems such as living wills, death with dignity, euthanasia, rules on death certificates, maintaining life support beyond brain death in pregnant women or organ donors, and protection of the decedent. These important subjects were left to other law.

And the Conference did not try to establish medical criteria for brain death. That was left to the medical profession which is constantly working to expand its horizons through development of new knowledge and diagnostic equipment.

Five per cent question

Drafters also emphasized that the tried and true common law standard of heart-lung cessation still is valid in at least 95 per cent of determinations of death.

Why should every state adopt legislation making it clear that brain death is as certain and final as cardiorespiratory death? The Conference first asked that question of itself when it was drafting the Uniform Anatomical Gift Act. In the final 1968 draft of that act, drafters commented they had made "no attempt. . . to

Ronald E. Cranford...

. . . served as advisor to the NCCUSL committee that prepared preliminary drafts of the Uniform Brain Death Act. He is associate physician in neurology and a director of the Neurological Intensive Care Unit at Hennepin County (Minn.) Medical Center and has taught neurology at the University of Minnesota since 1971. He is chairman of the Minnesota Medical Association Ad Hoc Committee on Death and the American Academy of Neurology Ethics Committee. He serves as faculty advisor to the University of Minnesota Medical School's program in biomedical ethics and is a member of the Minnesota Interreligious Committee on Biomedical Ethics.

Brain Death

define the uncertain point in time when life terminates...No reasonable statutory definition is possible. The answer depends upon many variables, differing from case to case."

Clear delineation

In 1968, the Conference felt pronouncement of death should be strictly a medical decision. It still does. But it now recognizes that a large portion of the lay public and too many lawyers don't understand the medical fact of brair death. The Uniform Brain Death Act provides legal support for the medical reality by carefully delineating the line between brain death and the persistent vegetative state through a specific reference to a non-functional brain stem.

This distinction should eliminate problems encountered now in trying to explain the medical fact of brain death in some state courts. Such problems have arisen in frivolous malpractice suits equating the removal of a respirator or "beating heart" with unreasonable medical practice. Ignorance of the fact of brain death also has impeded prosecution of criminal cases when the defense is based on the irrational claim that the physician performing a transplant and not the accused murderer was responsible for the crime.

Professional decision

Most important of all, the uniform act makes it clear that determination of brain death should be a medical decision as is determination of cardio-respiratory death. In too many states, physicians are forced to involve grieving "next of kin" in determinations of brain death. Laymen should not face the agony of such a decision which amounts only to postponment of the time when death's reality must be faced and accepted. The act promotes societal acceptance of the concept of brain death assisting families in coming to grips with the death of a loved one.

Legal delays can postpone medical decisions affecting the viability of life-giving transplantations — a kidney, or a skin graft for a burn victim — that may tip the scales toward life for another critically ill patient.

No matter how elaborate the life-support paraphernalia may seem, it always remains secondary to the relationship between physician, patient and family. The Uniform Brain Death Act helps rather than hinders this relationship.

A gift of life

Legal as well as medical acknowledgement of brain death should hasten permission for anatomical donations before degeneration makes them useless. Such gifts often help overcome the despair of the decedent's family and friends, who can find consolation in knowing that their loved one was able to pass on the torch of life. ●

Exhibit B

File SB 2004

UNIFORM DETERMINATION OF DEATH ACT

Drafted by the

NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

and by it

APPROVED AND RECOMMENDED FOR ENACTMENT
IN ALL THE STATES

at its

ANNUAL CONFERENCE
MEETING IN ITS EIGHTY-NINTH YEAR
ON KAUAI, HAWAII
JULY 26 - AUGUST 1, 1980

Uniform Law Commissioners

WITH PREFATORY NOTE

Approved by the American Medical Association
October 19, 1980
Approved by the American Bar Association
February 10, 1981

COUNSEL

The Committee which acted for the National Conference of Commissioners on Uniform State Laws in preparing the Uniform Determination of Death Act was as follows:

GEORGE C. KEELY, 1600 Colorado National Building, 950 Seventeenth Street, Denver, CO 80202, *Chairman*

ANNE MCGILL GORSUCH, 243 South Fairfax, Denver, CO 80222

JOHN M. MCCABE, Room 510, 645 North Michigan Avenue, Chicago, IL 60611, *Legal Counsel*

WILLIAM H. WOOD, 208 Walnut Street, Harrisburg, PA 17108

JOHN C. DEACON, P.O. Box 1245, Jonesboro, AR 72401, *President, Ex Officio*

M. KING HILL, JR., 6th Floor, 100 Light Street, Baltimore, MD 21202, *Chairman, Executive Committee, Ex Officio*

WILLIAM J. PIERCE, University of Michigan, School of Law, Ann Arbor, MI 48109, *Executive Director, Ex Officio*

PETER F. LANCROCK, P.O. Drawer 351, Middlebury, VT 05753, *Chairman, Division E, Ex Officio*

Copies of all Uniform and Model Acts and other printed matter issued by the Conference may be obtained from:

NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS
645 North Michigan Avenue, Suite 510
Chicago, Illinois 60611

PREFATORY NOTE

This Act provides comprehensive bases for determining death in all situations. It is based on a ten-year evolution of statutory language on this subject. The first statute passed in Kansas in 1970. In 1972, Professor Alexander Capron and Dr. Leon Kass refined the concept further in "A Statutory Definition of the Standards for Determining Human Death: An Appraisal and a Proposal," 121 Pa. L. Rev. 87. In 1975, the Law and Medicine Committee of the American Bar Association (ABA) drafted a Model Definition of Death Act. In 1978, the National Conference of Commissioners on Uniform State Laws (NCCUSL) completed the Uniform Brain Death Act. It was based on the prior work of the ABA. In 1979, the American Medical Association (AMA) created its own Model Determination of Death statute. In the meantime, some twenty-five state legislatures adopted statutes based on one or another of the existing models.

The interest in these statutes arises from modern advances in life-saving technology. A person may be artificially supported for respiration and circulation after all brain functions cease irreversibly. The medical profession, also, has developed techniques for determining loss of brain functions while cardiorespiratory support is administered. At the same time, the common law definition of death cannot assume recognition of these techniques. The common law standard for determining death is the cessation of all vital functions, traditionally demonstrated by "an absence of spontaneous respiratory and cardiac functions." There is, then, a potential disparity between current and accepted biomedical practice and the common law.

The proliferation of model acts and uniform acts, while indicating a legislative need, also may be confusing. All existing acts have the same principal goal—extension of the common law to include the new techniques for determination of death. With no essential disagreement on policy, the associations which have drafted statutes met to find common language. This Act contains that common language, and is the result of agreement between the ABA, AMA, and NCCUSL.

Part (1) codifies the existing common law basis for determining death—total failure of the cardiorespiratory system. Part (2) extends the common law to include the new procedures for determination of death based upon irreversible loss of all brain functions. The overwhelming majority of cases will continue to be determined according to part (1). When artificial means of support preclude a determination under part (1), the Act recognizes that death can be determined by the alternative procedures.

Under part (2), the entire brain must cease to function, irreversibly. The "entire brain" includes the brain stem, as well as the neocortex. The concept of "entire brain" distinguishes determination of death under this Act from "neocortical death" or "persistent vegetative state." These are not deemed valid medical or legal bases for determining death.

This Act also does not concern itself with living wills, death with dignity, euthanasia, rules on death certificates, maintaining life support beyond brain death in cases of pregnant women or of organ donors, and protection for the dead body. These subjects are left to other law.

This Act is silent on acceptable diagnostic tests and medical procedures. It sets the general legal standard for determining death, but not the medical criteria for doing so. The medical profession remains free to formulate acceptable medical practices and to utilize new biomedical knowledge, diagnostic tests, and equipment.

It is unnecessary for the Act to address specifically the liability of persons who make determinations. No person authorized by law to determine death, who makes such a determination in accordance with the Act, should, or will be, liable for damages in any civil action or subject to prosecution in any criminal proceeding for his acts or the acts of others based on that determination. No person who acts in good faith, in reliance on a determination of death, should, or will be, liable for damages in any civil action or subject to prosecution in any criminal proceeding for his acts. There is no need to deal with these issues in the text of this Act.

Time of death, also, is not specifically addressed. In those instances in which time of death affects legal rights, this Act states the bases for determining death. Time of death is a fact to be determined with all others in each individual case, and may be resolved, when in doubt, upon expert testimony before the appropriate court.

Finally, since this Act should apply to all situations, it should not be joined with the Uniform Anatomical Gift Act so that its application is limited to cases of organ donation.

UNIFORM DETERMINATION OF DEATH ACT

§1. [*Determination of Death.*] An individual who has sustained either (1) irreversible cessation of circulatory and respiratory functions, or (2) irreversible cessation of all functions of the entire brain, including the brain stem, is dead. A determination of death must be made in accordance with accepted medical standards.

§2. [*Uniformity of Construction and Application.*] This Act shall be applied and construed to effectuate its general purpose to make uniform the law with respect to the subject of this Act among states enacting it.

§3. [*Short Title.*] This Act may be cited as the Uniform Determination of Death Act

Exhibit C

FEE WAIVER

Filed in Forma Pauperis (GC 68511.3, et seq.) per order dated: AUG 18 2016

Amount recoverable pursuant to GC §68637 $435

Plus a one time administrative fee upon judgment if the party becomes a judgment creditor (GC §68108.5, 68638

Jonee Fonseca
Mother of Israel Stinson
P.O. Box 2105
Napa, CA 94558
707.450.6900
joneefonseca@yahoo.com

FILED
Superior Court of California
County of Los Angeles

AUG 18 2016

Sherri R. Carter, Executive Officer/Clerk
By Nancy DiGiambattista Deputy
N. DiGiambattista

IN THE SUPERIOR COURT OF CALIFORNIA

IN AND FOR THE COUNTY OF LOS ANGELES

UNLIMITED CIVIL JURISDICTION

Israel Stinson, a minor, by Jonee Fonseca his mother.

Petitioner,

v.

Children's Hospital Los Angeles.

Respondent.

Case No. BS 164887

VERIFIED EX PARTE PETITION FOR TEMPORARY RESTRAINING ORDER/INJUNCTION: REQUEST FOR ORDER OF INDEPENDENT NEUROLOGICAL EXAM; REQUEST FOR ORDER TO MAINTAIN LEVEL OF MEDICAL CARE;

D 8/16

I, Jonee Fonseca, am the mother of Israel Stinson, who on August 7 was admitted to Children's Hospital of Los Angeles ("Children's) for treatment and care pending transfer to home care. Israel suffered an asthma attack while at UC Davis Children's Hospital in Sacramento that resulted in a temporary lack of oxygen to Israel's brain. Israel was placed on a ventilator and has needed ventilator support since the injury.

Because Israel is a Medi-Cal patient with Kaiser Permanente, Israel was transferred to Kaiser Permanente Medical Center in Roseville ("Kaiser") for treatment on April 12, 2016. Dr. Michael Myette, a pediatric intensivist at Kaiser, did not treat Israel, but instead performed a brain death exam. On April 13, I was told Israel would be removed from his ventilator. I obtained a court order keeping Israel alive while I sought a physician who could perform an independent examination. I found several physicians willing to examine Israel, but Kaiser refused to allow the independent exam.

After doing much research on caring for patients with serious brain injuries, I decided that I wished for Israel to be cared for at home. However, in order for Israel to be transferred to home care, he required a breathing tube and feeding tube ("g-tube"). Kaiser refused to perform these procedures. Dr. Myette said that Israel's digestive system was "dead" and that trying to feed him would be "catastrophic." Dr. Myette also said the only reason Israel was alive is because he was continually adjusting Israel's blood pressure through medication. These statements were later proved to be inaccurate.

I began looking for another hospital that would accept Israel as a patient in order to provide the procedures needed for Israel to be cared for at home.

Dr. Juan Zaldana, a pediatric specialist at Sanatorio Nuestra Señora del Pilar ("del Pilar") in Guatemala City, Guatemala, agreed to admit Israel and provide the breathing tube and g-tube. On May 21, 2016, Israel was transported to Guatemala City and was admitted to del Pilar.

Because Kaiser refused to feed my son, Israel had not received any nutrition in almost six weeks. He was on dextrose (sugar water) for hydration.

Shortly after Israel was transferred to del Pilar, Dr. Zaldana performed a tracheotomy and gastrostomy to provide Israel with a breathing tube and feeding tube. Israel responded very well

to the procedures and to receiving nutrition. Within one week, he was off of the blood pressure medication and was able to regulate his blood pressure on his own. He was also able to regulate his body temperature on his own. Israel also increased his movements in response to my voice and touch. He is able to move his upper body and his arms and legs. He recently started to squeeze his hands and make a fist.

Dr. Zaldana, and Dr. Francisco Montiel, a pediatric neurologist at del Pilar, performed numerous exams on Israel, including two EEGs. Both doctors concluded that Israel's condition was inconsistent with the criteria for brain death (see attached). They determined that Israel is in a "persistent vegetative state." This was confirmed by Dr. Rubén Posadas, a neurologist at del Pilar (see attached).

We remained in Guatemala with Israel for approximately 2 1/2 months. During that time we made arrangements for Israel's return to the U.S.

In July, I was told that Children's Hospital of Los Angeles (Children's) consulted with Dr. Zaldana regarding Israel's condition. After speaking with Dr. Zaldana, Children's agreed to accept Israel as a transfer patient for treatment.

On Saturday, August 6, Israel was transported by air ambulance from Guatemala City to Children's. He was admitted to Children's the morning of August 7. That same day, Dr. Ashraf Abou-Zamzam, Israel's attending physician at Children's, told me that Israel's sodium levels were high.

Over the next few days, Israel's face and torso became increasingly red and swollen. I was shocked by his appearance, as Israel had never had this reaction before. Israel was able to maintain proper sodium levels, blood pressure, and temperature without medication while at del

Pilar (see attached). On August 9, I was told that Children's stopped feeding Israel because of his sodium levels. On August 15, limited feeding was reinstated.

On August 16, Children's informed me that it intended to remove Israel's ventilator, which will almost certainly result in my son's death.

MEMORANDUM OF POINTS AND AUTHORITIES

California Health and Safety Code Section 7180 (a) (The Uniform Determination of Death Act) provides for a legal determination of brain death as follows; "(a) An individual who has sustained either (1) irreversible cessation of circulatory and respiratory functions, or (2) irreversible cessation of all functions of the entire brain, including the brain stem, is dead. A determination of death must be made in accordance with accepted medical standards."

Health and Safety Code Section 7181 provides for an "independent" verification of any such determination stating; "When an individual is pronounced dead by determining that the individual has sustained an irreversible cessation of all functions of the entire brain, including the brain stem, there shall be ***independent confirmation*** by another physician."

As established by the Court in *Dority v Superior Court* (1983) 145 Cal.App.3d 273, 278, this Court has jurisdiction over the issue of whether a person is "brain dead" or not pursuant to Health and Safety Code Sections 7180 & 7181. Acknowledging the moral and religious implications of such a diagnosis and conclusion, the *Dority* court determined that it would be "unwise" to deny courts the authority to make such a determination when circumstances warranted.

Here, Kaiser performed a brain death exam and declared that Israel was brain dead, but refused to allow for an independent examination. Kaiser also said that as a result of Israel's brain

injury, his condition would deteriorate. Dr. Myette said that Israel's digestive system was "dead." Not only did Israel's condition not deteriorate, but he began improving. After Israel began receiving nutrition at del Pilar, he no longer required medication to stabilize his blood pressure, heart rate, or sodium levels. He was also able to regulate his own body temperature without artificial devices (i.e., "Bare Hugger"). Only Kaiser physicians have examined Israel is regards to possible brain death.

Israel received an independent examination by three physicians—Dr. Juan Zaldana, a pediatric specialist; Dr. Francisco Montriel, a pediatric neurologist; and Dr. Ruben Posadas, a neurologist. All three have determined that while Israel has a serious brain injury, he is not brain dead. Israel's EEGs show brain activity. This is not consistent with brain death.

Children's accepted Israel for treatment based on reports by these physicians. The admitting physician personally talked with Dr. Zaldana about Israel's condition and prognosis. Israel's condition has significantly worsened since being under the care of Dr. Abou-Zamzam at Children's. Now Children's wants to remove Israel's ventilator, which will most likely cause Israel's death by suffocation.

I had Israel transferred to Children's, as I believed the medical staff would provide him with care and treatment, while I made arrangements for Israel to be cared for at home. Instead, Children's is planning to put Israel to death.

My son responds to treatment. He is able to move his upper body, turn his head, and move his arms and legs in response to my voice and touch. The fact that he responds to my voice indicates, at the very minimum, brain stem activity. Section 7180, requires the cessation of *all* functions of the brain, including the brain stem.

At this time, I do not trust Children's to provide an independent evaluation of Israel. Because Israel's condition has worsened since being admitted to Children's, the hospital has a conflict of interest in determining his condition. If Children's can make a finding of brain death, they no longer have to pay for any of his care, while if he is severely brain damaged, but not brain dead, they may be legally liable to provide his ongoing care and treatment at Children's or elsewhere.

Only one other case of this type is on record in California, namely the case of Jahi McMath which was heard in Alameda County in December of 2013. That case, one of first impression, where Nailah Winkfield challenged Children's Hospital Oakland's determination of brain death after they negligently treated her daughter, Jahi, led to an Order, issued by Hon E. Grillo, holding that an independent determination is one which is performed by a physician with no affiliation with the hospital facility (in that case Children's Hospital Oakland) which was believed to have committed the malpractice which led to the debilitating brain injuries Jahi suffered. A true and correct copy of Judge Grillo's Order is attached to this Petition. In the *McMath* case, the Trial Court rejected the Hospital's position that the Court had no jurisdiction over the determination of whether not Jahi McMath was "brain dead" or not.

In *McMath*, Judge Grillo stated that the Section 7180's language regarding "accepted medical standards" permitted an inquiry into whether the second physician (also affiliated with Children's Hospital Oakland) was "independent" as that term was defined under Section 7181. Judge Grillo determined that the petitioner's due process rights would be protected by a focused proceeding providing limited discovery and the right to the presentation of evidence.

The Court determined that, under circumstances which are strikingly similar to those which present themselves here, the conflict presented was such that the court found that the

Petitioner was entitled to have an independent physician, unaffiliated with Children's Hospital Oakland, preform neurological testing, an EEG and a cerebral blood flow study. Indeed, the Court Ordered Children's Hospital Oakland to permit the Court's own court appointed expert to be given temporary privileges and access to the Hospital's facilities, diagnostic equipment, and technicians necessary to perform an "independent" exam.

In a Nevada Supreme Court case with similar facts, the court unanimously questioned whether the American Association of Neurology guidelines that are used to determine brain death in both Nevada and California, "adequately measure all functions of the entire brain, including the brain stem." *In re Guardianship of Hailu*, 131 Nev. Adv. Op. 89. (Nov. 16, 2015). In that case, Aden Hailu, a young college student, went into cardiac arrest during emergency surgery for severe stomach pain and subsequently suffered a brain injury. The hospital performed three EEGs, which showed some brain activity, yet doctors still proceeded to declare her brain dead pursuant to Nevada's brain death statute, which is identical to California's. Both states use the same guidelines to determine brain death, namely those developed by the American Association of Neurology.

In this case, Children's wants to remove my son from his ventilator, even though three separate independent examinations have concluded that he is not brain dead and two EEGs show brain activity.

As in *Dority* and *McMath*, the unique circumstances of this case invoke the Court's jurisdiction and due process considerations require that this Court grant my Petition for a Temporary Restraining Order and order that Children's Hospital of Los Angeles recognize the independent examinations performed by Drs. Zaldana, Montriel, and Posadas, or permit Dr. Alan

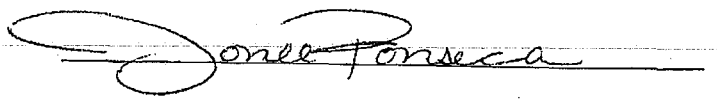
Shewmon to conduct another independent examination with the assistance of Children's diagnostic equipment and technicians necessary to carry out a repeat EEG.

In order to provide the requisite physical conditions for a reliable set of tests to be performed, Israel Stinson should continue to be treated so as to provide his optimum physical health and in such a manner so as to not interfere with the neurological testing (such as the use of sedatives or paralytics).

WHEREFORE, petitioner prays:

1) That a Temporary Restraining Order be issued precluding Respondents from performing any apnea tests on Israel Stinson be issued;
2) That an Order be issued precluding Respondents from removing Israel Stinson from respiratory support, or removing or withholding medical treatment;
3) That an Order be issued that Respondents are to provide Israel Stinson treatment to maintain his optimum physical health, including nutrition and thyroid hormone as needed, in such a manner so as to not interfere with the neurological testing (such as the use of sedatives or paralytics in such a manner and/or at such time that they may interfere with the accuracy of the results).
4) That an Order be issued that Petitioner is entitled to an independent neurological examination, by Dr. Alan Shewmon with the assistance of Childrens diagnostic equipment and technicians necessary to carry out a repeat EEG.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on August 17, 2016, at Los Angeles, California.



Jonee Fonseca

Jonee Fonseca
Mother of Israel Stinson
P.O. Box 2105
Napa, CA 94558
707.450.6900
joneefonseca@yahoo.com

IN THE SUPERIOR COURT OF CALIFORNIA

IN AND FOR THE COUNTY OF LOS ANGELES

UNLIMITED CIVIL JURISDICTION

Israel Stinson, a minor, by Jonee Fonseca his mother. Petitioner, v. Children's Hospital Los Angeles Dr. Ashraf Abou-Zamzam Respondent.	Case No. DECLARATION OF JONEE FONSECA IN SUPPORT OF EX-PARTE PETITION FOR TEMPORARY RESTRAINING ORDER/ INJUNCTION: REQUEST FOR ORDER OF INDEPENDENT NEUROLOGICAL EXAM; REQUEST FOR ORDER TO MAINTAIN LEVEL OF MEDICAL CARE ; REQUEST FOR ORDER TO FACILITATE TRANSFER TO ANOTHER FACILITY OR TO HOME CARE

I; Jonee Fonseca, declare that I am the mother of petitioner Israel Stinson.

1. On April 2, 2016, my son Israel Stinson suffered an asthma attack while being treated at UC Davis Children's Hospital in Sacramento, CA. It took several minutes for a doctor to

respond to my calls for help and by that time, Israel had stopped breathing. Doctors were able to resuscitate him, but he suffered a brain injury due to lack of oxygen.

2. Israel is insured through Medi-Cal with Kaiser Permanente so he was transferred to Kaiser Permanente Medical Center ("Kaiser") in Roseville, CA for treatment.

3. Within 24 hours of his arrival at Kaiser, the admitting physician, Dr. Michael Myette, performed a brain death exam. I was told my son would be removed from life support on April 14.

4. I then sought an independent evaluation of Israel's condition and obtained a court order to keep my son on the ventilator until another doctor could be found.

5. Although I found several doctors who were willing to provide an independent examination, Kaiser refused to allow them to examine Israel.

6. My intention was—and is—to have Israel cared for at home. In order for Israel to be cared for at home, Israel needed a breathing tube and feeding tube ("g-tube").

7. I asked Kaiser to perform the procedures, but Doctor Myette said that Israel's digestive system was not functional and that trying to feed him would be "catastrophic." He also said that Israel would not survive the tracheotomy procedure to provide him with a breathing tube.

8. During the nearly six weeks that Israel was at Kaiser, the hospital refused to provide him with any nutrition. He was only on a dextrose solution for hydration.

9. Kaiser also refused to do the two procedures necessary for Israel to be transferred to home care.

10. Dr. Myette told me the only reason Israel was alive was because he was making continual adjustments to his blood pressure medication, primarily vasopressin.

11. Dr. Juan Zaldana, a pediatric specialist at Sanatorio Nuestra Señora del Pilar ("del Pilar") in Guatemala City, Guatemala, agreed to admit Israel and provide the breathing tube and g-tube.

12. On May 21, Israel was transported by air ambulance (AirCARE One) to Guatemala City and admitted to del Pilar.

13. It took about five days for Israel to become stable enough to have the procedures. Both the tracheotomy and the gastrostomy were performed on the same day.

14. Israel responded very well to finally receiving nutrition. Within one week, he was off of all of the vasopressors and was able to regulate his blood pressure on his own. He was also able to regulate his body temperature on his own. Israel also increased his movements in response to my voice and touch. He is able to move his upper body and his arms and legs. He recently started to squeeze his hands and make a fist.

15. Dr. Zaldana, and Dr. Francisco Montiel, a pediatric neurologist at del Pilar, performed numerous exams on Israel, including two EEGs. Both doctors concluded that Israel's condition was inconsistent with the criteria for brain death (see emails, attached). They determined that Israel is in a "persistent vegetative state." This was confirmed by Dr. Rubén Posadas, a neurologist at del Pilar (see email, attached).

16. We remained in Guatemala with Israel for approximately 2 1/2 months. During that time we made arrangements for Israel's return to the U.S.

17. In July, I was told that Children's Hospital of Los Angeles (Children's) consulted with Dr. Zaldana regarding Israel's condition. After speaking with Dr. Zaldana, Children's agreed to accept Israel as a transfer patient.

18. On Saturday, August 6, Israel was transported by air ambulance from Guatemala City to Children's.

19. On Sunday, August 7, Dr. Ashraf Abou-Zamzam, Israel's attending physician at Children's told me that Israel's sodium levels were high. Israel's face and torso were red and swollen. This had never occurred at del Pilar.

20. On August 9, I was told that Children's stopped feeding Israel because of his sodium levels. On August 15, limited feeding was reinstated.

21. I have requested that Israel be examined by an independent physician. Dr. Alan Shewmon, a neurologist with UCLA Medical Center, is willing to examine Israel (see attached). Dr. Shewmon is a highly qualified and respected neurologist who serves as Professor Emeritus of Neurology and Pediatrics at UCLA's David Geffen School of Medicine. Children's refused to allow Dr. Shewmon temporary admitting privileges for the purpose of examining Israel.

22. I have also been informed that Totally Kids, a long-term care facility for children with severe brain injuries, is expecting to have a bed open for Israel early next month. If Israel cannot be transferred to home care, I would like him to go to a facility that specializes in children with special needs.

23. On August 16, I was told that Children's is planning to remove Israel from ventilator support tomorrow, August 18.

24. I am hereby asking that Children's Hospital of Los Angeles be prevented from removing my son, Israel Stinson, from the ventilator.

25. If Children's removes Israel from the ventilator and he stops breathing, they will have ended his life as well as their responsibility to provide care for the harm their negligence caused. For this reason I hereby request that an independent examination be performed, including the use of an EEG.

26. I also request that Children's be prevented from performing an "apnea test" on Israel during which he would be removed from the ventilator.

27. I also request that Children's be ordered to continue to provide such care and treatment to Israel that is necessary to maintain his physical health and promote any opportunity for healing and recovery of his brain and body, including nutrition and thyroid hormone as needed.

28. I also request that Children's Hospital of Los Angeles be ordered to facilitate Israel's transfer to either a long-term care facility or home care as soon as possible.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on August 17, 2016, in Los Angeles, California.

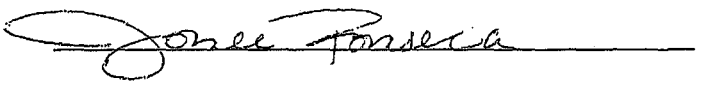
_____

Jonee Fonseca

26. I also request that Children's be ordered to continue to provide such care and treatment to Israel that is necessary to maintain his physical health and promote any opportunity for healing and recovery of his brain and body, including nutrition and thyroid hormone as needed.

27. I also request that Children's Hospital of Los Angeles be ordered to facilitate Israel's transfer to either a long-term, subacute care facility or home care as soon as possible.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on August 17, 2016, in Los Angeles, California.



Jonee Fonseca

Exhibit D

Israel Stinson, a minor, by Jonee Fonseca his mother, Petitioner, v. Children's Hospital Los Angeles, Respondent.	Case No.: BS164387 Judge Amy D. Hogue Hearing Date: August 18, 2016 Time: 11:15 a.m. Dept.: 86 TEMPORARY RESTRAINING ORDER AND ORDER TO SHOW CAUSE RE PRELIMINARY INJUNCTION

FILED
Superior Court of California
County of Los Angeles
AUG 18 2016
Sherri R. Carter, Executive Officer/Clerk
By [signature] Deputy
N. DiGiambattista

Jonee Fonseca, appearing on behalf of her son, Petitioner, seeks a temporary restraining order and an order permitting independent neurological examination of Petitioner Israel Stinson. Fonseca states in her Verified Ex Parte Application and Declaration that Respondent Children's Hospital Los Angeles (Hospital") advised her on August 16 that it intends "to remove Israel's ventilator which will almost certainly result in [her] son's death." Fonseca states that Israel suffered severe brain damage as a result of an asthma attack and has been comatose ever since. Although his condition was stable while hospitalized in Guatemala, it has deteriorated since his transfer to the Hospital in July.

As the court noted in *Dority v. Superior Court* (1983) 145 Cal.App.3d 273, 280, "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." Under Health & Safety Code §§ 7181, a pronouncement of death based on "irreversible cessation of all functions of the entire brain including the brain stem" requires "independent confirmation by another physician."

Fonseca avers that Respondent has violated section 7181 by failing to obtain or permit an independent evaluation. She asserts that the Hospital has an inherent conflict of interest because it may be responsible to provide ongoing care if he is not declared dead. She also advises that

Dr. Alan Shewman, a neurologist with UCLA Medical Center, is willing to examine Israel for purposes of an independent evaluation.

This Court finds that Fonseca has made a sufficient showing of emergency and the possibility of irreparable harm to justify the issuance of a temporary restraining order requiring the Hospital to (1) refrain from removing Israel from the ventilator, (2) take reasonable measures necessary to maintain Israel in a stable condition pending a hearing before this court, and (3) cooperate with Fonseca to facilitate an independent evaluation of Israel by Dr. Shewman.

The Court further orders the Hospital to show cause, at 9:30 a.m. on September 9, 2016, why a preliminary injunction to the same effect shall not issue. The Hospital is ordered to file any written opposition on or before September 1, 2016. Any reply memorandum must be filed on or before September 6, 2016.

Petitioner is order to personally serve the Hospital with the Petition and all supporting papers in accordance with California Code of Civil Procedure 413.10 et seq.

Petitioner is hereby appointed guardian ad litem for her minor child, Israel, based on her sworn statement to the court that she is his natural mother. In all further proceedings, the guardian ad litem must be represented by counsel and cannot represent the minor child as a self-represented litigant.

Dates: August 18, 2016

SUPERIOR COURT · LOS ANGELES COUNTY · CALIFORNIA

Amy D. Hogue
Judge of the Superior Court

Exhibit E

CARROLL, KELLY, TROTTER, FRANZEN, McKENNA & PEABODY
RICHARD D. CARROLL (SBN 116913)
DAVID P. PRUETT (SBN 155849)
111 West Ocean Boulevard, 14th Floor
Post Office Box 22636
Long Beach, California 90801-5636
Telephone No. (562) 432-5855 / Facsimile No. (562) 432-8785

Attorneys for Respondent, CHILDREN'S HOSPITAL LOS ANGELES

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

ISRAEL STINSON, a minor, by Jonee Fonseca his mother,

Petitioner,

vs.

CHILDREN'S HOSPITAL LOS ANGELES

Respondent.

CASE NO.: BS164387

ORDER ON EX PARTE APPLICATION TO DISSOLVE TEMPORARY RESTRAINING ORDER [PROPOSED]

DATE: AUGUST 25, 2016
TIME: 8:30 A.M.
DEPT: 86

ASSIGNED FOR ALL PURPOSES TO:
JUDGE AMY D. HOGUE
DEPARTMENT 86

For the reasons stated in the ex parte application of Children's Hospital Los Angeles, the temporary restraining order of August 18, 2016 is dissolved and the action is dismissed.

AMY D. HOGUE, JUDGE

DATED: August 25, 2016

AMY D. HOGUE
JUDGE OF THE SUPERIOR COURT