17-17153

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JONEE FONSECA, AN INDIVIDUAL PARENT AND GUARDIAN OF I.S., A MINOR and LIFE LEGAL DEFENSE FOUNDATION,

Plaintiffs and Appellants,

v.

KAREN SMITH, M.D. IN HER OFFICIAL CAPACITY AS DIRECTOR OF THE CALIFORNIA DEPARTMENT OF PUBLIC HEALTH; AND DOES 2-10, INCLUSIVE,

Defendant and Appellee.

On Appeal from the United States District Court
for the Eastern District of California

No. 2:16-cv-00889-KJM-EFB
Honorable Kimberly J. Mueller, Judge

APPELLEE'S RESPONSIVE SUPPLEMENTAL BRIEF

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INTRODUCTION

On July 15, 2019, the Court directed Appellants Jonee Fonseca (Fonseca) and Life Legal Defense Foundation (LLDF) to address: (1) whether Appellant Jonee Fonseca's claims are moot in light of counsel's admission that an amended death certificate may not affect her likelihood of receiving government benefits or additional insurance coverage; and (2) whether the Court should alternatively affirm on the basis that Appellants failed to state a claim upon which relief can be granted. Defendant-Appellee Karen Smith, Director of the California Department of Public Health (Director), hereby submits this response to Appellants' Supplemental Brief (ASB).

Fonseca's claims for declaratory and injunctive relief are now moot. In the Third Amended Complaint (TAC) Fonseca asserts that she has been injured because the alleged erroneous date of death results in a loss of medical insurance coverage and government benefits. However, Fonseca now admits—by way of her counsel's argument—that there are no specific benefits at issue; rather, Fonseca seeks only to restore her dignity. *See* Oral Argument at 12:30-13:30, 16:40-17:08. With no remaining legally cognizable injury that could be redressed by this action, her claims against the Director are moot.

Alternatively, as set forth in full in the Director's Answering Brief, if this Court concludes that Appellants' claims are justiciable, the trial court's dismissal

should be affirmed because Appellants have failed to state a claim upon which relief can be granted. Appellants' procedural due process claims fail because, as a matter of law, California provides constitutionally sufficient procedures to challenge a determination of death. Indeed, prior to filing this case Fonseca utilized those procedures to challenge the doctors' determination of Israel's death in state court, notwithstanding that she did not obtain the relief she sought. Appellants' substantive due process claims fail because Appellants provide no facts suggesting that the California Uniform Determination of Death Act (CUDDA) is arbitrary, unreasoned, or unsupported by medical science. Finally, Appellants' privacy claims concerning the right to make medical decisions also fail because, as a matter of law, CUDDA does not direct or interfere with the decisions of doctors, exercising their medical judgment, concerning medical treatment.

The judgment should be affirmed.

ARGUMENT

I. FONSECA'S CLAIMS FOR INJUNCTIVE AND DECLARATORY RELIEF ARE MOOT

Appellants' concession at oral argument makes clear that Fonseca's claims against the Director, if they were ever justiciable, are now moot. "The inability of the federal judiciary to review moot cases derives from the requirement of [Article] III of the Constitution under which the exercise of judicial power depends upon the existence of a case or controversy." *Preiser v. Newkirk*, 422 U.S. 395, 401 (1975).

A controversy must be "definite and concrete" and "touch[] the legal relations of parties having adverse legal interests." *DeFunis v. Odegaard*, 416 U.S. 312, 317 (1974). Federal courts are powerless to "decide questions that cannot affect the rights of litigants in the case before them." *Preiser*, 422 U.S. at 401 (quotation marks omitted). A case becomes moot when it no longer satisfies the case or controversy requirement. Thus, plaintiffs must continue to have a personal stake in the outcome of a federal lawsuit through all stages of the judicial proceedings. "This means that, throughout the litigation, the plaintiff must have suffered, or be threatened with, an actual injury traceable to the defendant and likely to be redressed by a favorable judicial decision." *Spencer v. Kemna*, 523 U.S. 1, 7 (1998) (internal citation omitted). "If an event occurs that prevents the court from granting effective relief, the claim is moot and must be dismissed." *Am. Rivers v. Nat'l Marine Fisheries Serv.*, 126 F.3d 1118, 1123 (9th Cir. 1997); *see also Church of Scientology of Cal. v. United States*, 506 U.S. 9, 11 (1992) (case becomes moot if events following case filing make it impossible for the court to grant any meaningful relief).

A. Fonseca's Claim for Injunctive Relief Is Moot Because There Is No Remaining Injury that Can Be Redressed

Fonseca's claim for injunctive relief is now moot because there is no injury that can be redressed. Fonseca's original and Amended Complaint sought to prevent Kaiser from removing life support and to mandate nutritional and other

medical support. 6ER 1057, ¶¶ 1-2; 4ER 643-44, ¶¶ 1-2. When Fonseca took Israel to Guatemala, she filed a Second Amended Complaint asking to have the death certificate expunged because she maintained that he was alive. 3ER 285, 299. Following Israel's removal from life support and there being no dispute that Israel was deceased, Appellants filed a Third Amended Complaint. The TAC sought an injunction to change all records to reflect the date of death as the date that life support was removed, August 25, 2016, and not April 14, 2016, the date physicians made their medical determination that he died. 2ER 135, Prayer, ¶ 1. In support, Fonseca alleged that the "continued existence of government documents that certify that Israel died on April 14" injured her because it resulted in the "loss of medical insurance coverage and government benefits to the child and his family." 2ER 129, ¶ 63. She further alleged that a court order changing the date of death would remedy that injury by allowing her to recoup costs spent on keeping Israel on life support from April 14 through the date that it was disconnected. Oral Argument, 16:20-17:00.

Even assuming that the loss of medical coverage is a legally cognizable harm, and that a court order changing the date of Israel's death might redress it, Fonseca has now confirmed that she does not know of any benefits that would be due to the family if the death date is amended. Oral Argument at 12:30-13:30, 16:40-17:08. And, Fonseca has not corrected those statements. See ASB 4 (she "expresses no

position here as to [the] potential availability" of such benefits). Accordingly, there remains no injury to redress in this action.

Here, Fonseca's remaining generalized interests in seeing justice done and restoring her dignity are not sufficient to support Article III standing. *See Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 107 (1998) ("[P]sychic satisfaction is not an acceptable Article III remedy because it does not redress a cognizable Article III injury."). Accordingly, Fonseca has no remaining cognizable legal interest in changing the recorded date of death. With no actual injury to redress, the matter is moot.

B. Likewise, Fonseca's Claim for Declaratory Relief Is Moot and Should Be Dismissed

Fonseca seeks a declaration that CUDDA is unconstitutional either on its face or as applied. 2ER 135. Yet, as discussed above, because there is no longer a live controversy concerning a redressable injury, there is no basis for Fonseca to pursue her claim for declaratory relief.

"The limitations that Article III imposes upon federal court jurisdiction are not relaxed in the declaratory judgment context." *Gator.com Corp. v. L.L. Bean, Inc.*, 398 F.3d 1125, 1129 (9th Cir. 2005). "Indeed, the case-or-controversy requirement is incorporated into the language of the very statute that authorizes federal courts to issue declaratory relief." *Id.* (citing 28 U.S.C. § 2201 ("In a case of actual controversy within its jurisdiction, . . . any court of the United States,

upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration . . . .")). A case or controversy exists justifying declaratory relief only when the challenged activity "is not contingent, has not evaporated or disappeared, and, by its continuing and brooding presence, casts what may well be a substantial adverse effect on the interests of the petitioning parties." *Headwaters, Inc. v. Bureau of Land Mgmt.*, 893 F.2d 1012, 1015 (9th Cir. 1990) (citing *Super Tire Eng'g Co. v. McCorkle*, 416 U.S. 115, 122 (1974)). This adverse effect, however, must not be "so remote and speculative that there [is] no tangible prejudice to the existing interests of the parties." *Headwaters*, 893 F.2d at 1015. The parties must therefore have adverse legal interests "of sufficient *immediacy and reality* to warrant issuance of a declaratory judgment." *Biodiversity Legal Found. v. Badgley*, 309 F.3d 1166, 1174–75 (9th Cir. 2002) (emphasis added).

Here, the requisite "immediacy and reality" no longer exists. With Fonseca's admission that changing the death certificate may not affect her right to benefits, this matter lacks the requisite "live" controversy for declaratory resolution. To reach the merits of this claim would run afoul of the federal judiciary's obligation "to avoid advisory opinions on abstract propositions of law." *Hall v. Beals*, 396 U.S. 45, 48 (1969); *see also Thomas v. Anchorage Equal Rights Comm'n*, 220 F.3d 1134, 1138 (9th Cir. 2000) (en banc) ("Our role is neither to issue advisory

opinions nor to declare rights in hypothetical cases, but to adjudicate live cases or controversies consistent with the powers granted the judiciary in Article III of the Constitution.").

Fonseca's dignity interests are not justiciable. Fonseca seeks validation of her decision to transport Israel out of the country for treatment. ASB 7. The Court's jurisdiction, however, is limited to resolving "substantial controvers[ies] between the parties having adverse legal interests," *Biodiversity Legal Found.*, 309 F.3d at 1174–75, and it is improper to retain jurisdiction so that Fonseca is "justified" in securing treatment for her son.

Next, upsetting CUDDA will not affect the "lawfulness" of the physician's medical opinion. As emphasized throughout this litigation, CUDDA requires that any determination of death be made "in accordance with accepted medical standards." Cal. Health & Safety Code § 7180(a). And, in California, the recognition that death may be deemed to occur upon cessation of any brain activity predates CUDDA. *See Barber v. Superior Court* (*People*), 147 Cal. App. 3d 1006, 1013 (1983) (Prior to CUDDA's enactment, death occurred when a "person has suffered a total and irreversible cessation of brain function."). Fonseca's suggestion that but for CUDDA, physicians would have reached a different determination is unsupported.

Finally, Fonseca fails to support this Court's continued jurisdiction in light of counsel's admission that an amended death certificate may have no effect on her benefits or insurance. The cases on which Fonseca relies—*In re Thorpe Insulation Co*., 677 F.3d 869 (9th Cir. 2012) and *Church of Scientology,* 506 U.S. 9—are not only inapposite, but underscore the absence of a redressable injury in this case. *Thorpe* concerned a challenge to a sweeping bankruptcy and reorganization plan. When a group of non-settling debtors challenged the plan, the court considered whether the claim was moot because the plan had already become effective and the implementation was well underway. *Thorpe*, 677 F.3d at 880. That court, concluding that the matter was not moot, found that it could still reverse and modify the existing plan, thus—unlike here—providing specific, concrete relief to the requesting parties. *Id*.

Similarly, in *Church of Scientology*, the Court addressed whether any relief could be fashioned after the information which was the subject of the dispute had already been released. The Court determined that the action was not moot because it could still award the Church and the affected tax-filers specific relief in the form of an order that all illegally gained documents be returned. The Court emphasized that "taxpayers have an obvious possessory interest in their records," and that they suffer injury by the government's continued possession of the unlawfully obtained materials. *Church of Scientology*, 506 U.S. at 13.

A victory for Fonseca here, unlike for the appellants in *Thorpe* and *Church of Scientology*, would provide Fonseca with no legally cognizable relief. Declaring CUDDA unconstitutional would not establish that Israel was alive between April 14 and August 25, because that determination was not made by the Director or CUDDA but rather by non-party physicians based on prevailing medical standards. Further, even if Fonseca could change the date of death, that would not provide any financial relief or otherwise redress any legally cognizable injury to Fonseca. Any opinion rendered would therefore be an advisory opinion, which the Court does not have the authority to give. *Mills v. Green*, 159 U.S. 651, 653 (1895) (The court here has no authority "to give opinions upon moot questions or abstract propositions, or to declare principles or rules of law which cannot affect the matter in issue in the case before it."); *see also Preiser v. Newkirk*, 422 U.S. at 401.

C. Even if LLDF Had Standing (Which It Does Not), That Would Not Revive Fonseca's Distinct Claims

Appellants assert that LLDF has standing, and that this is sufficient to make this entire case justiciable even if Fonseca's claims are moot. ASB 10-11. That is incorrect.

As a threshold matter, for the reasons set forth in the Director's Answering Brief, LLDF lacks standing in this case. Answering Brief 40-43.

Additionally, even if LLDF had standing to bring certain claims, that would only provide justiciability for those specific claims, and would not extend to any

separate and distinct claims brought by Fonseca. "[A] plaintiff must demonstrate standing separately for each form of relief sought," *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 185 (2000), and "[a]t least one plaintiff must have standing to seek each form of relief requested in the complaint," *Town of Chester v. Laroe Estates, Inc.*, 137 S. Ct. 1645, 1650–51 (2017).

Here, Fonseca suggests that LLDF's organizational standing prevents her claims from being dismissed as moot. ASB 10. But even if LLDF had standing—which it does not—whether those claims are justiciable has no bearing on Fonseca's own distinct claims for relief. Here, the relief sought by LLDF is somewhat different from Fonseca's. Relying on organizational standing, LLDF seeks to invalidate CUDDA, alleging that it has standing because CUDDA has "caused a significant drain on LLDF's time and resources." 2ER 118, ¶ 4; *see also* ASB 10. Fonseca, meanwhile, raises additional claims and seeks additional relief beyond what LLDF seeks. Specifically, Fonseca raises procedural and substantive due process claims specific to Israel's determination of death, as well as privacy claims specific to her alleged right as a parent to make medical decisions. 2ER 131-135; *see also* ASB 15 (Fonseca asserts that "there is a medical dispute as to when Israel died"), 20 (alleging that "Israel was denied treatment and Fonseca was denied the right to make medical decisions on his behalf"); 22 (Fonseca alleges

"she had plenary authority to make medical decisions on [Israel's] behalf"). Further, Fonseca seeks to establish that Israel was alive between April 14 and April 25. ASB 7 (Fonseca "maintains that the death certificate of her son . . . is erroneous."). The Director knows of no authority—and Fonseca provides none—that excuses here her obligation to also meet the minimum Article III requirements as to her distinct claims. Thus, even if LLDF had standing, Fonseca could not bootstrap her distinct claims to LLDF's to defeat dismissal of her distinct claims.

D. The Capable of Repetition yet Evading Review Exception to Mootness Does Not Apply

Fonseca argues that the court can decide the declaratory relief claim because it falls within the exception to mootness for issues that are capable of repetition, yet evading review. ASB 7-10. Not so.

The "capable of repetition, yet evading review" exception "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 Appellants will be subjected to it again.'" *Biodiversity Legal Found.*, 309 F.3d at 1173 (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).

Fonseca's claims do not fit within the narrow parameters of the exception. Fonseca's claims are not a type that "inherently precludes" judicial review. *Id.* at

837. As observed by the district court, "life support can be continued after the determination of death," 1ER 10, and in this very case, Fonseca's ability to initiate several cases and successfully obtain stays from both federal and state courts while she pursued her claims proves that this is not a type of case that necessarily evades review.

Fonseca asserts that this case is a good fit for the exception. ASB 7. Likening this matter to *Roe v. Wade*, 410 U.S. 113 (1973), and certain end-of-life cases,[1] she concludes that the first prong of the exception is met. Fonseca's conclusions, however, do not satisfy her burden to demonstrate that the duration of this challenged action is too short to allow full litigation. As stated above, her access to the courts and the relief she received refutes her point. Nor do the cases she relies on support application of the exception here.

In *Roe*, the court reasoned that the short gestation period and the fact that "[p]regnancy often comes more than once to the same woman, and in the general population" were cause to apply the narrow exception. *Roe*, 410 U.S. at 125. Similarly, in *Compassion in Dying v. Washington*, 79 F.3d 790, 795-96 (9th Cir.

[1] Fonseca's reliance on *Bartling v. Superior Court*, 163 Cal. App. 3d 186 (1984) and *Dority v. Superior Court*, 145 Cal. App. 3d 273 (1983) is misplaced. Unlike the strict "case-or-controversy" limitation imposed by Article III on federal court jurisdiction, the standing requirements in California state courts are different and generally less exacting. *Jasmine Networks, Inc. v. Superior Court*, 180 Cal. App. 4th 980, 990 (2009); *People ex rel. Becerra v. Superior Court*, 29 Cal. App. 5th 486, 495-99 (2018).

1996), the court emphasized that like pregnancy, "terminal illnesses" will always be an issue faced by the general population. The circumstances of those cases are distinguishable from the facts here. Unlike the abortion and end-of-life cases, Fonseca has been able to secure relief as she litigated this case.

Finally, Fonseca has not shown that there is a "reasonable expectation" that *she* will again be faced with contesting a brain death declaration. *Spencer v. Kemna*, 523 U.S. at 17 (requiring a "reasonable expectation that the same complaining party [will] be subject to the same action again"). Accordingly, Fonseca has not satisfied her burden to place the declaratory relief claim within the exception to mootness. Fonseca's claims are beyond the Court's constitutionally assigned authority.

II. THE DISMISSAL MAY BE AFFIRMED ON THE ALTERNATE GROUND THAT APPELLANTS HAVE FAILED TO STATE A CLAIM AGAINST THE DIRECTOR AS A MATTER OF LAW

Even if this Court finds that the claims are justiciable, the dismissal may also be affirmed because Appellants have not shown that they can state cognizable claims against the Director for any asserted constitutional violation. This Court may affirm a dismissal for lack of subject matter jurisdiction on any basis fairly supported by the record. *Corrie v. Caterpillar, Inc.*, 503 F.3d 974, 979 (9th Cir. 2007). The record here supports affirmance on this alternate ground.

A. The First and Second Causes of Action for Violations of Due Process Under the Federal Constitution Fail to State a Claim

Appellants' First and Second Causes of Action allege generally that CUDDA deprived Israel of life and Fonseca of parental rights in violation of the due process clauses of the Fifth and Fourteenth Amendments. They 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, 2 ER 132, ¶¶ 72, 78; ASB 13, 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," 2 ER 132, ¶ 72. In their TAC, Appellants fail to set forth any sufficient facts to establish a constitutional procedural or substantive due process violation. Both contentions fail to state a claim as a matter of law.

1. Appellants fail to establish that California's procedures are constitutionally insufficient or that Fonseca did not receive the process to which she is due

Appellants argue that CUDDA is unlawful because its statutory scheme "provides no procedures or process by which a patient or advocate may independently challenge the determination of death." ASB 15. But they provide no support for their suggestion that due process requires that all protections have to be derived from the statute. Nor do they sufficiently address the fact that

California law provides—and Fonseca was in fact afforded—the right to independently challenge the determination of death.

While CUDDA itself does not expressly set forth procedures to challenge a determination of death, such procedures are provided under California law. *See Dority*, 145 Cal. App. 3d at 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."); *see also* 3ER 342-44 (in ruling on Fonseca's preliminary injunction motion, the district court noted that the "state court has jurisdiction to hear evidence and review physician's determination that brain death has occurred").

Further, CUDDA itself establishes 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. Cal. Health & Safety Code § 7180(a).[2] Second, in cases of brain death a single physician's

[2] All further statutory references are to the California Health & Safety Code, unless otherwise indicated.

opinion is insufficient; CUDDA requires *independent* confirmation by another physician. § 7181.[3]

Here, these procedures were followed and Fonseca exercised her right to challenge the doctors' determinations that Israel was deceased. In accord with California law, Fonseca was notified of the physicians' brain death determination. 2ER 122-23, ¶¶ 20-24. Fonseca then challenged that determination by filing suit in state court. She was granted a full evidentiary hearing, time to secure her own independent examination by a qualifying physician, as well as the opportunity to cross-examine Dr. Myette, the Kaiser physician that rendered the final determination of death. 4ER 762.

Fonseca argues that due process requires more, relying on *Cruzan v. Dir., Mo. Dep't of Health*, 497 U.S. 261 (1990) and *In re AMB*, 248 Mich. App. 144, 213, 640 N.W.2d 262, 299 (2001). These cases however, do not support Fonseca's contention. In *Cruzan*, parents of an adult daughter in a persistent vegetative state

[3] CUDDA provides a number of additional 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.

sought a court order directing the removal of her feeding and hydration tubes. At issue was whether Cruzan had a right under the United States Constitution to refuse life-sustaining treatment. The Court concluded that Cruzan possessed a liberty interest under the Due Process Clause, but that the inquiry does not end there; "whether respondent's constitutional rights have been violated must be determined by balancing [the] liberty interests against the relevant state interests." *Cruzan*, 497 U.S. at 279 (citing *Youngberg v. Romeo*, 457 U.S. 307, 321 (1982)). Because Cruzan was unable to assert those interests on her own behalf, the Court then turned to addressing the appropriate burden of proof in proceedings where a guardian seeks to assert those rights and discontinue nutrition and hydration. Appellants' reliance on *Cruzan* here is misplaced because the Court left unaddressed the question of what specific process is constitutionally required under those circumstances. If anything, *Cruzan* affirms that Fonseca received the process to which she was due. The parents in *Cruzan* participated in proceedings before the trial court where they had the opportunity to present evidence of Cruzan's wishes. Similarly, here, Fonseca filed suit in state court and she was given the opportunity to present evidence to challenge the determination that Israel was deceased.

Appellants' reliance on *AMB* is also misplaced. Even if this Court were bound by *AMB*—which it is not—it does not support Appellants' arguments.

Allison—the infant at issue—was conceived from the incestuous rape of her teen mother, who had developmental delays. As a result, both parents were found not competent to make decisions for Allison, who required extensive neonatal care and life-sustaining support. Following proceedings regarding Allison's condition and what was medically in her best interests, a caseworker sought and secured a court order authorizing the hospital to remove life support. Neither parent was notified or appeared at the hearing on whether life-sustaining support should be removed. Neither parent was represented by counsel. Life support was removed and Allison passed. The *AMB* court, in considering what process is due when withdrawing life support from a child who is the subject of a protective proceeding, determined that Allison's parents (regardless of any mental deficiency or alleged criminal wrongdoing) were entitled to notice of the proceedings and an opportunity to be heard. *AMB*, 248 Mich. App. at 211-12. Here, Fonseca received the very process identified by the *AMB* court; the determination of death was confirmed by another physician, Fonseca was notified of Kaiser's intention to remove life support, and she initiated and, with legal counsel, participated in the proceedings to challenge that determination.

Though Appellants suggest that some additional process is required, they fail to state what specific process was due Fonseca that she failed to receive. Even if Appellants could so state, it is settled that "[n]o 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). Ultimately, 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 CUDDA and other California law, Fonseca was accorded that opportunity, and therefore was provided the process to which she is due.

2. Appellants cannot demonstrate that CUDDA or the Director violated Israel's constitutional right to life

Appellants' substantive due process allegations also fail to state a claim as a matter of law. Appellants originally maintained that CUDDA violates substantive due process because it deprived Israel of life. 2ER 131. Appellants have not, and cannot, allege any facts showing that the Director or CUDDA deprived Israel of life. It is undisputed that the determination that Israel died and the decision to remove life support were made by third parties not before this court. 2ER 122, ¶¶ 20-23, 123, ¶ 24. As a matter of law, CUDDA did not direct or require these third parties to determine that Israel was deceased or to remove life support. *See* § 7180(a).

Next, Appellants argue that CUDDA "attempts to speak death into existence" and defines a person out of life. ASB 15-16. These allegations are incorrect and also fail to establish a substantive due process violation as a matter of law.

Foremost, this allegation does not sustain a claim that CUDDA or the Director has deprived Israel of life. Second, while CUDDA includes a definition of death, nothing in the Act requires physicians to declare persons deceased. More important, nothing prevents physicians from exercising their independent medical judgment as to whether a patient is deceased. The statute, by its plain terms, defers to the medical judgment of doctors. *See* § 7180(a).

Appellants, led by their disagreement with the notion of brain death, have consistently ignored CUDDA's express terms and failed to address the Director's arguments regarding what the Act does and does not do. Appellants' unsupported conclusions that Fonseca's and Israel's due process rights have been violated do not suffice, and dismissal is appropriate on these grounds. *Johnson v. Riverside Healthcare Sys., LP*, 534 F.3d 1116, 1121-22 (9th Cir. 2008) ("A Rule 12(b)(6) dismissal may be based on either a 'lack of a cognizable legal theory' or 'the absence of sufficient facts alleged under a cognizable legal theory.'").

Further, whether the constitutional rights at stake have been violated is determined by balancing them against the "relevant state interests." *Cruzan*, 497 U.S. at 279 (quoting *Youngberg v. Romeo*, 457 U.S. 307, 321 (1982)). As the district court noted, California "has a broad range of legitimate interests in drawing boundaries between life and death." 3ER 340; *see also Washington v. Glucksberg*, 521 U.S. 702, 731 (1997) (recognizing a state's interest in protecting "the integrity

and ethics of the medical profession" opposite an asserted fundamental right); *Goldfarb v. Va. State Bar*, 421 U.S. 773, 792 (1975) ("States have a compelling interest in the practice of professions within their boundaries."); *Varandani v. Bowen*, 824 F.2d 307, 311 (4th Cir. 1987) (recognizing a state's "compelling interest in assuring safe health care for the public"). The State also has a compelling interest in the quality of health and medical care received by its citizens. *Varandani*, 824 F.2d. at 311. Similarly, the State seeks to ensure that patients are treated with dignity, particularly during their end of life. *See* Cal. Prob. Code § 4650(b) (The "prolongation of the process of dying for a person for whom continued health care does not improve the prognosis for recovery may violate patient dignity and cause unnecessary pain and suffering, while providing nothing medically necessary or beneficial to the person."); *id.* § 4735 (health care provider "may decline to comply with an individual health care instruction or health care decision that requires medically ineffective health care or health care contrary to generally accepted health care standards applicable to the health care provider or institution"). And, it is well settled that the State has a legitimate interest in securing the public safety, peace, order, and welfare. *See Wisconsin v. Yoder*, 406 U.S. 205, 230 (1972); *Carnohan v. United States*, 616 F.2d 1120, 1122 (9th Cir. 1980) (no fundamental right to access drugs the FDA has not deemed safe and effective).

Appellants here fail to address the State's interests or allege any facts suggesting that CUDDA is arbitrary, unreasoned, or unsupported by medical science. Moreover, Appellants offer no response to the fact that CUDDA's definition of death is substantively identical to the definition agreed upon by the American Medical Association and the American Bar Association, which has been "uniformly accepted throughout the country." *In re Guardianship of Hailu*, 361 P.3d 524, 528 (Nev. 2015); *see also* RJN, Exhs. A & B. Appellants' disagreement with the prevailing definition of death cannot override the State's interests in enacting CUDDA. The substantive due process claim fails as a matter of law.

B. Appellants' Third Cause of Action for Deprivation of the Right to Life in Violation of the California Constitution Fails to State a Claim

Appellants' third claim alleges that CUDDA "deprived Israel of his right to life" in violation of section 1 of Article I of the California Constitution. 2ER 133-34, ¶¶ 81, 84. Again, Appellants leave unaddressed the Director's arguments that CUDDA did not cause Israel's death, nor did CUDDA compel the non-party physicians to run tests or determine that he suffered brain death. Instead, Appellants reiterate that CUDDA "removes the independent judgment of medical professionals." ASB 16. Yet, as discussed above, nothing in CUDDA requires physicians to act, and nothing in CUDDA *prevents* physicians from exercising their independent medical judgment as to whether a patient is deceased. Indeed,

CUDDA expressly affords physicians the discretion to so determine. *See* § 7180(a). Still, without support, Appellants hold CUDDA to blame.

It has long been recognized that—like the guarantees of the Federal Constitution—the State's "constitutional guarantees of life, liberty, and property are not absolute in the individual, but are always circumscribed by the requirements of the public good." *In re Moffett*, 19 Cal. App. 2d 7, 14 (1937). Thus, the Court, in determining whether a constitutional violation occurred, must balance the individual liberty interest at stake against the State's interests. *Cruzan*, 497 U.S. at 279; *Donaldson v. Lungren*, 2 Cal. App. 4th 1614, 1620 (1992). Again, Appellants offer no response to the Director's arguments concerning the State's interests. It remains that their disagreement with the prevailing definition of death cannot override the State's interests in enacting CUDDA.

Last, Appellants fail to support their conclusory contention that to hold that they have failed to state a claim under the California Constitution would "create a rift between federal and state holdings on end-of-life due process protections." ASB 17. Appellants fail to identify the purported conflict. Appellants have been given ample opportunity to support their right-to-life claim. Yet, they remain unable to do so.

C. Appellants' Fourth and Fifth Causes of Action, Which Allege that CUDDA Violates Fonseca's Right to Privacy, Fail to State a Claim

Appellants allege that health care decisions are part of the right to personal autonomy and privacy, and that CUDDA violated these rights by allegedly denying Israel treatment and Fonseca the right to make medical decisions on Israel's behalf. ASB 18; *see also* 2ER 134, ¶¶ 87-89, 92-94. Because CUDDA does not dictate—let alone address—such decisions, Appellants cannot establish that CUDDA violates Fonseca's or Israel's right to privacy as a matter of law.

Appellants maintain that CUDDA and/or the Director impede the right to choose whether to end life support. ASB 21. Still Appellants fail to provide any support for their contention. As noted above, the medical decisions at issue were made by doctors according to prevailing medical standards and were not dictated by CUDDA, which merely defines death. CUDDA does not dictate what medical treatment should be provided or whether or when life-sustaining support should be removed. Accordingly, CUDDA has not impeded Fonseca's or Israel's privacy rights. Appellants' Fourth and Fifth Causes of Action fail as a matter of law.

Further, to the extent CUDDA may be construed as impacting Fonseca's ability to make medical decisions following the doctors' determinations that Israel had died, her claims would still fail. The right to privacy may be outweighed by supervening public concerns. *Roe v. Wade*, 410 U.S. at 154-55; *Hill v. National*

Collegiate Athletic Assn., 7 Cal. 4th 1, 37, 40 (1994) ("A defendant may prevail in a state constitutional privacy case . . . by pleading and proving . . . that the invasion of privacy is justified because it substantively furthers one or more countervailing interests.").

Appellants overstate the scope of parental rights here by asserting that unless the courts have determined the parents to be incompetent, parents have carte blanche authority to make any and all decisions regarding their children. ASB 23-24. Appellants' reliance on *In re AMB* and *Dority* is misplaced. In both, the court sought to determine who was empowered to make the decision to withdraw life support when the parent was incompetent or legally unable to do so. They do not stand for the proposition that parents possess limitless decision-making authority. No such authority exists. The "state has a wide range of power for limiting parental freedom and authority in things affecting the child's welfare." *Prince v. Massachusetts*, 321 U.S. 158, 167 (1944). Parents undoubtedly have a right to the "custody, care and nurture of the child," *id.* at 166; *Troxel v. Granville*, 530 U.S. 57, 65 (2000), however, the "rights of parenthood are [not] beyond limitation," *Prince*, 321 U.S. at 167. Accordingly, Appellants are mistaken that Fonseca's right to dictate medical decisions and treatment on behalf of her son is essentially boundless. And, as noted above, Appellants provide no response to the Director's

demonstration that the State has a strong interest in defining the boundary between life and death.

Moreover, Appellants offer no authority in support of the suggestion underlying their claim that a parent has unfettered authority to dictate the continuation of life support after their child has been determined to be deceased and the challenge to that determination has been exhausted. The record here demonstrates that following the physicians' determination of death, Fonseca was given ample opportunity to refute those conclusions. Fonseca sued both Kaiser and UC Davis Children's Hospital in Placer County Superior Court in *Stinson v. UC Davis Children's Hospital, et al*., Case No. S-CV-0037673. 2ER 126, ¶ 43; 5ER 1007-13. Fonseca challenged the determination of death and sought to prevent Kaiser from removing life support while she secured an independent examination. The superior court granted a temporary restraining order (TRO) requiring Kaiser to maintain life support, 5ER 977-78, and allowed Fonseca time to find a physician to conduct an independent medical examination pursuant to § 7181, 5ER 909, 917-19, 997-98, 1001-06. Fonseca did not have Israel assessed by an independent physician. 5ER 917-19. The court then concluded that the determination of death was made in accordance with prevailing medical standards. 5ER 876-79. Fonseca did not appeal the trial court's decision. Accordingly, the determination of death was confirmed and final.

In light of these facts, and the established state interests, Fonseca cannot demonstrate that she possessed unilateral authority to mandate life support. As a matter of law, Appellants cannot show that *CUDDA* violated Fonseca's (or Israel's) right to privacy as afforded by the California or United States Constitutions. The Fourth and Fifth Causes of Action fail to state a claim as a matter of law.

CONCLUSION

Based on the foregoing, the Director requests that this Court affirm the district court's judgment in its entirety.

Dated: August 19, 2019

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FOR THE NINTH CIRCUIT

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