Case No. 16-15883

Jonee Fonseca, an individual and parent and guardian of Israel Stinson, a minor,

Plaintiff-Appellant,

v.

Kaiser Permanente Roseville Medical Center; Dr. Michael Myette; and Karen Smith, M.D., in her official capacity as Director of the California Department of Public Health,

Defendants-Appellees,

Interlocutory Appeal from a Decision of the United States District Court for the Eastern District of California, No. 2:16−CV-00889−KJM−EFB · Honorable Kimberly J. Mueller, United States District Court Judge

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EMERGENCY MOTION UNDER CIRCUIT RULE 27-3

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CIRCUIT RULE 27-3 CERTIFICATE

Pursuant to Circuit Rule 27-3(a)(3), Counsel for Plaintiff/Appellant, Jonee Fonseca, an individual and parent and guardian of Israel Stinson, a minor, hereby submits this Certificate.

DECLARATION OF KEVIN T. SNIDER

I, Kevin Snider, am an attorney for the Plaintiff/Appellant in the above-encaptioned case, and if called upon I could, and would, testify truthfully, as to my own personal knowledge, as follows:

1. The purpose of this declaration is to show "the existence and nature of the claimed emergency" as per Circuit Rule 27-3(a)(3)(ii).

2. On Wednesday April 27, 2016, I was out of town for a court hearing scheduled for the next morning in Santa Clara County Superior Court. A little after 10:30 p.m. I received an e-mail from an attorney, Alexandra Snyder of Life Legal Defense Foundation, requesting assistance in seeking a temporary restraining order in federal District Court for a two-year-old child (Israel Stinson) on life-support. The mother and Plaintiff is Jonee Fonseca.

3. Mrs. Snyder told me by telephone that a restraining order in Placerville Superior Court allowing the child to remain on life-support was going to dissolve on Friday morning (April 29) at 9:00 a.m. Mrs. Snyder sought the

assistance of my public interest firm, Pacific Justice Institute, to file the application for the restraining order because she was not admitted to the District Court in the Eastern District and also had no experience in federal court.

4. After my hearing on Thursday morning on April 28, 2016, I spoke with Mrs. Snyder by telephone about the case. Because I was traveling, I was unavailable to draft documents. I gave her general instructions about what papers are needed. I called the District Court and explained the nature of the temporary restraining order to a clerk and asked if there was a way to flag the filings so that it would receive immediate attention. She informed me that the papers need to be filed by 2 p.m. so that the application could be reviewed that day, rather than the next.

5. While on the train heading back to my primary office in Sacramento, I began to receive the papers from Mrs. Snyder around noon, skimmed them and made what small changes I could in a very short period of time. I filed the papers while on the train in order to make the 2 p.m. deadline.

6. At 5:40 p.m. that day, the Honorable Judge Troy Nunley[1] signed a temporary restraining order and further ordered the parties to appear in court on Monday, May 2, 2016.

[1] The case was assigned to the Honorable Kimberly Mueller. I was informed by her Clerk, that Judge Mueller was not able to review the application for the TRO because she was unavailable. As such, the matter was assigned to Judge Nunley.

7. I was present at the May 2 hearing with my client, the mother of the child, in Courtroom 3. At the hearing Judge Mueller ordered as follows:

- that the restraining order remain in place;
- that an amended complaint be filed by the close of business on the following day (Tuesday, May 3, 2016);
- that the parties meet for a settlement conference before Magistrate Judge Carolyn K. Delaney;
- that, by noon on Friday, May 6, 2016, Plaintif file a motion for a motion for a preliminary injunction to supersede the temporary restraining order;
- that Defendants file an opposition by noon on Tuesday, May 10, 2016; and,
- that a hearing on the motion be heard on Wednesday, May 11, 2016.

8. The parties complied with all of the above.

9. I was present at the hearing on May 11, 2016, in Courtroom 3 and participated in oral argument, before Judge Mueller. At the conclusion of argument, Judge Mueller took the matter under submission stating she expected to have a decision by the end of the week.

10. Just after 4:00 p.m. on Friday, May 13, 2016, Judge Mueller issued an order denying the motion. The order (a true and correct copy found in Appendix

A) kept the restraining order in place until the close of business on Friday, May 20, 2016, to allow the mother time to seek emergency relief from this Court.

11. On Saturday morning, May 14, I filed a notice of interlocutory appeal. Later that morning I called the emergency motions department of this Court and left a voice message explaining this matter and asking for direction as to when this present motion should be filed because I felt it vital that this Court be able to review and rule on it prior to the close of business on Friday, May 20, 2016.

12. In order to comply with Circuit Rule 27-1 and 27-3(a)(3)(iii), on Saturday morning, May 14, 2016, I sent an e-mail to the opposing and lead counsel, Jason Curliano, who represents the Defendants Kaiser Permanente Roseville Medical Center and Dr. Myette (collectively "Kaiser"), the text of which is as follows:

> Dear Mr. Curliano,
>
> My apologies for disturbing you during the weekend. Regrettably, in view of the posture of this litigation, this intrusion is unavoidable.
>
> As you are likely aware by now, in denying the motion for a preliminary injunction, Judge Mueller wrote as follows: "The court therefore provides that this order will not take effect, and the temporary restraining order will remain in place, until the close of business on Friday, May 20, 2016, to allow Ms. Fonseca time to seek emergency relief from the Ninth Circuit Court of Appeals." (Ct. doc. 48, 30:23-25).
>
> My client will be filing such a motion with the Ninth Circuit Court of Appeals. Pursuant to Circuit Rule 27-1 and 27-3 we are requesting that you let us know your clients' position on the motion, i.e., is the motion opposed.

Warmest regards,

Kevin

13. In the afternoon of May 14, 2016, I sent a similar e-mail to the attorneys (Ismael Castro and Ashante Norton) representing Defendant Dr. Karen Smith who serves as Director of the California Department of Public Health, the text of which is as follows:

> Dear Mr. Castro and Ms. Norton,
>
> I am sorry to bother you on a Saturday. But due to the posture of this litigation, this intrusion is unavoidable.
>
> As you are likely aware by now, in denying the motion for a preliminary injunction, Judge Mueller wrote as follows: "The court therefore provides that this order will not take effect, and the temporary restraining order will remain in place, until the close of business on Friday, May 20, 2016, to allow Ms. Fonseca time to seek emergency relief from the Ninth Circuit Court of Appeals." (Ct. doc. 48, 30:23-25).
>
> My client will be filing such a motion with the Ninth Circuit Court of Appeals. Pursuant to Circuit Rule 27-1 and 27-3 we are requesting that you let us know your clients' position on the motion, i.e., is the motion opposed.
>
> Warmest regards,
>
> Kevin

14. Mr. Curliano and I spoke by telephone in the afternoon and discussed a potential briefing schedule along with entering into a stipulation to request that the District Court to extend the time before dissolving the restraining

order now in place so that the parties have more time to draft the briefings and this Court has more time to review the motion.

15. Later that afternoon I received an e-mail from one of the attorneys (Deputy Attorney General Ismael Castro) representing the State Defendant, Karen Smith. Mr. Castro wrote: "Mr. Snider, I have received and reviewed your emails regarding the proposed briefing schedule on this emergency request for stay. I've forwarded this information to the Department and others for their information on this Saturday. Once I hear back from them, I'll let you know about our participation, if any, on the request for stay and on the briefing schedule. I appreciate the need for getting a firm idea on any schedule and any extension on the stay and I or Ashante will endeavor to get back to you asap. Ismael."

16. On Sunday morning Mr. Curliano sent an e-mail stating that he will be discussing this with his clients that morning and thus requested that I e-mail "the exact relief plaintiff will be requesting in her brief." I responded as follows "We will be filing an emergency motion with the 9th Cir to stay the dissolution of the restraining order while the interlocutory appeal is pending. In the alternative, if the motion is denied, we are asking that the restraining order not be dissolved until we are able to file a motion with Supreme Court."

17. That same morning I received an e-mail from another attorney (Deputy Attorney General Ashante Norton) representing the State Defendant,

which read, "I am making every effort to reach someone from the Department so that we can weigh in on the briefing schedule, if need be. ¶I will update you as soon as I can."

18. On Monday I had further correspondence with Mr. Curliano in which he proposed that Plaintiff file by noon on Tuesday and an opposition would be filed by 5:00 p.m. on Thursday. I placed a call to the emergency motions department of this Court and suggested said briefing schedule. The motions attorney said that she would check on whether this would work. Shortly thereafter she called me back stating that the proposed schedule was approved. I have notified the other three attorneys mentioned above of the briefing schedule. I can further represent that the lawyers for all of the parties have acted both expeditiously and in good faith.

19. I intend to serve this Emergency Motion by e-mail on the attorneys listed below within the hour of filing.

20. This present motion before the Court seeks relief that was available in the district court and that all grounds advanced in support in this Court were submitted to the district court. See, Circuit Rule 27-3(a)(4).

21. In sum, absent relief from the Courts, life-support will be disconnected from this toddler. A review of the evidence shows that Kaiser asserts that the child is brain dead. However, the mother has produced evidence disputing

that claim. If Kaiser is wrong and Israel is not brain dead, then disconnecting life support on Friday at the close of business will be an error that is irrevocable. The mother is making every effort to find another facility for the child. The record shows that she has life-flight transportation lined up. Ms. Fonseca wishes to have the child remain on life-support so he continues to be stable and his condition does not deteriorate while she finds another facility. That being said, she does not wish to have him at the Kaiser hospital indefinitely, but rather for as short a span of time as possible.

22. Pursuant to the requirements of Circuit Rule 27-3(a)(3)(ii), I have reviewed the docket from this case in the District Court. According to the docket, the names, firms, addresses, telephone numbers of the attorneys for the respective parties are as follows:

Plaintiff/Appellant:

JONEE FONSECA, AN INDIVIDUAL PARENT AND GUARDIAN OF ISRAEL STINSON, A MINOR

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on this seventeenth day of May, 2016.

s/ Kevin Snider

Kevin T. Snider, Declarant

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EMERGENCY MOTION

COMES NOW attorneys for Plaintiff/Appellant, Jonee Fonseca, an individual and parent and guardian of Israel Stinson, a minor, who hereby move this Court for an order to stay dissolution of the temporary restraining order imposed by the District Court, set to dissolve at the close of business on Friday, May 20, 2016, that would removal life support from Israel Stinson. Plaintiff/Appellant further moves that the order to stay remain in place during the pendency of this interlocutory appeal.

IN THE ALTERNATIVE, if this Court denies this emergency motion, attorneys for Plaintiff/Appellant, hereby move this Court to stay the order of the District Court set to dissolve the temporary restraining order at the close of business on May 20, 2016, to allow Ms. Fonseca time to seek emergency relief from the United States Supreme Court.

Dated: May 17, 2016

s/ Kevin Snider

Kevin T. Snider, Attorney for Plaintiff/Appellant

INTRODUCTION AND SUMMARY OF THE ARGUMENT

This Motion is necessary to prevent irremediable harm to a hospitalized toddler from the discontinuation of life support. Plaintiff was able to secure temporary restraining orders to prevent this harm for close to one month, but the denial of a preliminary injunction on May 13 now places 2-year-old Israel Stinson at imminent peril that his ventilator will be disconnected by Kaiser Permanente Roseville Medical Center (Kaiser) on May 20 causing his certain death.

This is an extraordinary case presenting difficult and novel questions for this Circuit. The young life at stake deserves a modicum of due process and serious consideration of the federal claims that has not yet been possible on expedited briefing and argument.

SUMMARY OF FACTS AND PROCEDURAL HISTORY

The facts are more fully set forth in the District Court's Order denying the preliminary injunction, attached hereto as Appendix A. For purposes of this motion, the following are the most pertinent of these facts and procedural history.

Plaintiff, Jonee Fonseca, took her young son Israel to Mercy General Hospital in Sacramento (Mercy) on April 1, 2016, with symptoms of an asthma attack. Upon examination in the emergency room, he was placed on a breathing

machine. Shortly thereafter he lost consciousness and was intubated. Doctors at Mercy then determined they lacked the pediatric facilities to treat Israel, and they had him transported to the University of California Davis Medical Center (Davis). The next day, the breathing tube was removed and Ms. Fonseca was told Israel had been stabilized. A respiratory therapist even told her that Israel might be discharged the following day. It was not to be.

The next day, April 3, when doctors were attempting to let Israel breathe on his own, his breathing stopped and he suffered cardiac arrest. Israel was revived through CPR but has not yet regained consciousness.

Over the next week, additional examinations, such as apnea and reflex testing were performed at Davis. When it became apparent to Ms. Fonseca that Davis physicians intended to discontinue treatment and declare her child dead even though he maintained vital signs, she had Israel transferred to Kaiser.

On April 11 Israel was taken via ambulance from Davis to Kaiser, where additional brain and other testing was performed. According to the Certificate of Death signed by Kaiser's Dr. Myette (Doc. 43-3 at box 114) Israel was alive on April 12 when he arrived at Kaiser. Two days later, at noon on April 14, a determination of brain death was made by Kaiser doctors pursuant to the protocol established by the California Uniform Determination of Death Act, Cal. Health &

Safety Code Section 7180, et seq. (CUDDA). That same day a Certificate of Death, provided by the California Department of Public Health, was prepared by Kaiser but not signed by Israel's parents since they continue to observe signs of life in him. Israel's heart and other organs continue to function with pulmonary support from the ventilator. Israel has also begun moving his upper body in response to his mother's touch and later her voice. Ms. Fonseca submitted video evidence to the Court of this phenomenon.[2]

Physicians independent of Kaiser have raised concerns that Israel may in fact be alive and would improve with treatment. The Declaration of Paul Byrne, M.D., questions whether Israel is brain dead (Doc. 36, ¶¶5, 9, 17-18, 22).[3] Plaintiff also submitted a statement by neurologist Thomas Zabiega, M.D., who viewed the videos. He writes that "the purposeful movements [of Israel] do not fulfill brain death criteria of the American Academy of Neurology" (Doc. 21-2).

The responsiveness of Israel to her touch and voice, coupled with the conflicting medical evidence, impel his mother with a moral and spiritual obligation to give her child the benefit of the medical doubt.

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[2]Declaration of Jonee Fonseca (Doc. 32) citing to https://youtu.be/rxOSv1DMyrI and https://youtu.be/AzQTzPgKgXw.

[3] Dr. Byrne, like some in the medical community, does not agree that *brain death* is the same as actual *biological death*. That notwithstanding, the paragraphs referenced in his declaration call into doubt whether Israel is in fact brain dead under California's own definition of that term.

Ms. Fonseca first sought and obtained a temporary restraining order from the Superior Court of Placer County.[4] The undersigned was contacted late on the evening of April 27 and initiated this action the following day, April 28, in the Eastern District of California. A temporary restraining order was immediately issued by Judge Troy Nunley. The parties appeared before Judge Mueller on May 2 and an expedited briefing schedule was established. A motion for preliminary injunction was filed on May 6, oral argument was held on May 11, and the motion was denied by written order on May 13.

Plaintiff filed her Notice of Appeal with this Court on Saturday morning, May 14, after receiving Judge Mueller's Order late Friday. This Motion followed as more fully explained in the Snider Declaration, *supra*.

Since Kaiser is seeking to disconnect Israel's ventilator as soon as the temporary restraining order expires on May 20, ensuring his demise, his family is actively seeking to arrange his transfer to another facility that will administer treatment and give him a chance to recover. They have been scouring the country and even other countries for an appropriate placement. In the meantime, although Israel is receiving ventilation, Kaiser will not administer nutrition, so he has gone many days without any nutrition other than a liquid sugar solution.

[4] Undersigned counsel did not represent her in that action, and with the expiration of the TRO there is no longer any case pending in the Superior Court.

In light of these circumstances, Israel will certainly die – by any definition – without this Court's issuance of a stay. It is therefore a matter of great urgency that the prior restraining orders be continued.

STANDARD FOR INJUNCTION PENDING APPEAL

Under Fed. R. App. Proc. 8, a motion for injunction may be filed with this Court. The standard differs little from preliminary injunctions in the District Court. *Sierra Forest Legacy v. Ray*, 691 F.Supp.2d 1204, 1207 (E.D.Cal. 2010) (citing *NRDC, Inc. v. Winter*, 555 U.S. 7 (2008)).

Under the traditional rule, an injunction is proper upon a clear showing that the movant is likely to succeed on the merits; that the movant will suffer irreparable harm absent the injunction; that the balance of hardships tips in the movant's favor; and that an injunction is in the public interest. *Alliance For The Wild Rockies v. Cottrell*, 632 F.3d 1127 (9th Cir. 2011). Yet, "serious questions" may be raised in lieu of likelihood of success, when there is a strong showing of the remaining three factors. *Id.* Stated another way, "[t]he standard does not require the petitioners to show that it is more likely than not that they will win on the merits." *Lair v. Bullock*, 697 F.3d 1200, 1204 (9th Cir. 2012).

In the present case, three of the four elements are not subject to dispute. The question before the District Court, and now this Court, is whether Plaintiff has

shown that serious questions go to the merits of her claim. *Shell Offshore, Inc. v. Greenpeace, Inc*., 709 F.3d 1281, 1291 (9th Cir. 2013). "It will ordinarily be enough that the plaintiff has raised questions going to the merits so serious, substantial, difficult and doubtful, as to make them a fair ground for litigation and thus for more deliberative investigation." *Republic of Philippines v. Marcos*, 862 F.2d 1355, 1362 (9th Cir. 1988) (en banc).

The Supreme Court took just such a step to delay enforcement of the contraceptive coverage mandate of the Affordable Care Act on religious ministries. *Little Sisters of the Poor Home for the Aged v. Sebelius*, 134 S.Ct. 893 (Dec. 31, 2013) (Sotomayor, J.) (granting injunction pending further order of the Court), 134 S.Ct. 1022 (January 24, 2014) (per curiam). The motion now pending in this Court concerns not just a matter of conscience or sanctity of life in the abstract, as important as those issues are, but a beating heart that now hangs in the balance.

I. IT HAS NOT BEEN SERIOUSLY DISPUTED THAT, IN THE ABSENCE OF AN INJUNCTION, PLAINTIFF WILL SUFFER IRREPARABLE HARM, THE BALANCE OF HARDSHIPS TIPS DECIDEDLY IN HER FAVOR, AND THE DISCONTINUATION OF ISRAEL'S LIFE SUPPORT IS IN THE PUBLIC INTEREST.

Of the four injunction factors, it has not been seriously contested that three strongly favor Plaintiff. Irreparable harm, hardship and public interest all tilt sharply toward the child on life support, to make sure both his care providers and the courts do not prematurely end his chance to live.

While there is a dispute about Israel's current chance of recovery, the parties agree that, if life support is removed at the end of this week, he will unequivocally and irreparably expire. The hardship to Kaiser from maintaining life support for a short duration versus the hardship that Israel and his family will face if he is allowed to stop breathing is not comparable.

To their credit, Kaiser and the District Court chose not to argue these three aspects of the injunction standard, focusing instead on likelihood of success and serious questions going to the merits. This motion will be similarly focused.

II. SERIOUS QUESTIONS WERE RAISED BY PLAINTIFF'S ALLEGATIONS UNDER THE EMERGENCY MEDICAL TREATMENT AND ACTIVE LABOR ACT - 42 U.S.C. 1395dd et seq.

In wrestling with the proper approach, the District Court recognized what was at stake. Ultimately, though, the Court was not comfortable venturing beyond where it felt this Circuit's jurisprudence has simply left unanswered important questions about the scope of state action and federal law.

The Court's candor on the lack of clarity in this area makes it imperative that this Court allow time for these questions to be resolved through adequate briefing and argument, rather than by default through the passing of Israel.

Consistent with EMTALA, Plaintiff proffers that Kaiser is a participating hospital subject to the statute; that it received Israel in an emergency medical

condition, i.e, a medical condition such that the absence of immediate medical attention could reasonably be expected to result in (ii) "serious impairment to bodily functions" or (iii) "serious dysfunction of any bodily organ or part." 42 USC 1395dd(e)(1)(A)(ii)(iii); that it is now seeking to de-stabilize his condition by turning off his ventilator and removing all life support (id., at (e)(3)); that Kaiser's proposed actions will cause material deterioration of Israel's condition (id.) before he can be transferred to another facility; and that both he and his family will experience grave personal harm if Kaiser is not enjoined.

The District Court acknowledged that this Circuit does not have a decision "on all fours" applying EMTALA's stabilization requirements to a situation like the present. Order, at 18. Instead, this Court – like most others applying EMTALA – have only had occasion to address its screening requirements. *See, e.g., Eberhart v. Los Angeles*, 62 F.3d 1253 (9th Cir. 1995); *Jackson v. East Bay Hosp.*, 246 F.3d 1248 (9th Cir. 2001). Factually, the case most like the present is *In re Baby K*, 16 F.3d 590 (4th Cir. 1994). As an anencephalic infant, Baby K had no cerebrum which rendered her permanently unconscious with no cognitive awareness or ability to interact with her environment. *Id.* at 592. Baby K was initially kept alive by a ventilator for diagnostic purposes. *Id.* After the mother resisted the hospital's recommendation that no further breathing support be provided, Baby K was transferred to a nursing home. She was readmitted to the

hospital three times with respiratory problems. *Id.* at 593. The hospital sought a declaratory judgment that it was not obligated to provide further respiratory treatment to Baby K that it deemed futile and inappropriate. *Id.*

Not unlike the present, the hospital insisted Congress could not have intended, through EMTALA, to require futile treatment that exceeded the prevailing standard of care. The court disagreed, holding that "stabilizing treatment" was required, and the court was without authority to rewrite the unambiguous language of the statute. *Id.* at 596. In sum, the court could not approve withholding a ventilator that would cause material deterioration of Baby K's condition in violation of EMTALA. *Id.* at 595-96.

Under its plain terms, EMTALA requires Kaiser to provide Israel with stabilizing treatment that will prevent his material deterioration while in the hospital's care. As with Baby K, here that means a ventilator. Under the statute, the hospital has the option of transferring Israel if such transfer can occur without his material deterioration. This is exactly what Ms. Fonseca has been seeking.

The District Court discussed EMTALA for nearly five pages, yet said very little about the facts of this case. The opinion reads that "after stabilizing Israel, Kaiser determined Israel's condition was no longer an emergency medical condition because it found Israel had suffered brain death." Order 21:4-5. For

purposes of the motion for preliminary injunction, evidence was proffered that there is a dispute as to whether Israel is still experiencing an emergency medical condition or is stabilized. Because of that dispute, the Plaintiff wishes to maintain stability and to avoid deterioration so she can effectuate a transfer to another facility. The Court next states that "EMTALA does not obligate Kaiser to maintain Israel on life support indefinitely." Order 21:11-12. Ms. Fonseca agrees. But that is not what she sought from the District Court or this Court. Finally, the Order states, "Plaintiff identifies no date by which she would agree Kaiser's obligations cease." Id. 21:12-13. Nowhere does the text of EMTALA require a patient to designate such a date. If it can be read into the statute, then the District Court should have simply declared what date it believed appropriate.

Instead of *Baby K*, the District Court relied primarily on another decision from the Fourth Circuit, *Bryan v. Rectors and Visitors of the Univ. of Va.*, 95 F.3d 349, 352 (4th Cir. 1996). There, the Fourth Circuit declined to extend EMTALA indefinitely in the case of an older patient with a "do not resuscitate" order. *Id.* at 350. Plaintiff maintained that this decision was far less factually similar to the present than *Baby K*, and this Court has only cited approvingly to *Baby K*.

While the District Court's Order was methodical in many respects, the abrupt ending to its conclusion on EMTALA leaves much to be desired. Order at 21. If anything, the absence of controlling authority in this Circuit, a dearth of

even persuasive authority nationwide, and a decision forbidding a hospital from discontinuing ventilator support for an infant with challenges similar to Israel's all point to serious questions. This, coupled with the three other injunction factors weighing heavily in Israel's favor, strongly support a stay while on appeal.

This claim certainly raises serious questions, and this Court has not yet had an opportunity to interpret the scope of EMTALA's stabilization provisions. The requested injunctive relief should therefore be issued while this Court takes a closer look at the application of EMTALA to this dire situation. The District Court cited to cases which look to Congressional intent, i.e, that "Congress enacted EMTALA to regulate emergency room care to prevent dumping of the uninsured." Order at 20. In contrast, Ms. Fonseca points to the four corners of EMTALA and that her son falls under its clear language. Under a plain reading of EMTALA, Ms. Fonseca has raised "questions serious enough to require litigation." *Pimentel v. Dreyfus*, 670 F.3d 1096, 1111 (9th Cir. 2012).

III. THE DISTRICT COURT'S DETERMINATION THAT THE CONSTITUTIONAL CLAIMS ARE BARRED BY LACK OF STATE ACTION DESERVES A SECOND LOOK THAT WILL ONLY BE POSSIBLE AFTER AN INJUNCTION PENDING APPEAL IS IN PLACE.

Lastly, and as will be more fully explained in Appellant's Opening Brief, the District Court too quickly rejected Plaintiff's constitutional claims based on a perceived lack of state action. The District Court relied on cases like *Blum v.*

Yaretsky, 457 U.S. 991 (1982) and *Sutton v. Providence St. Joseph Med. Ctr.*, 192 F.3d 826 (9th Cir. 1999) for the proposition that regulation of doctor and hospitals does not inexorably trigger state action. Order, at 9-13. However, Plaintiff did not debate this general proposition. Instead, Plaintiff pointed to the unique state involvement with death pronouncements reflected in CUDDA, and Kaiser's reliance on the same. In limited instances, entities much like Kaiser have indeed been deemed state actors. For example, in *George v. Sonoma County Sheriff's Dept.*, 732 F.Supp.2d 922 (N.D.Cal. 2010), the court held that Sutter Medical Center and its physicians could be state actors for purposes of their treatment of an inmate brought to the hospital. The court determined that a contract between Sutter and the county was sufficient to establish state action. In the present case, it is too early to tell whether Kaiser has similar arrangements with governmental entities, but it is known that Israel came to Kaiser from a public hospital – Davis – and his mother is seeking to prevent the completion of a state-issued death certificate and transfer of custody to the county coroner.

While the State has not historically borne the primary responsibility of providing medical treatment, it has defined and drawn distinctions as to the permissible and impermissible ending of life. *Vacco v. Quill*, 521 U.S. 793 (1997).

Kaiser may indeed be a state actor for the limited purposes before the Court, and Israel's life certainly should not be ended prematurely because it is unclear whether Kaiser will ultimately escape constitutional liability.

On the merits of the constitutional claims, the most important interests at stake are deprivation of life and denial of treatment. Not only has the Supreme Court spoken to the preeminence of preservation of life in cases like *Washington v. Glucksberg*, 521 U.S. 702 (1997) and *Cruzan v. Dir., Mo. Dpt. Of Health*, 497 U.S. 261 (1990), this Court has also addressed the substantive and procedural due process violations that flow from delay and denial of needed treatment. *Ore. Advocacy Ctr. v. Mink*, 322 F.3d 1101 (9th Cir. 2003) (finding substantive and procedural due process violations in delays of inmate transfers from jail to state hospital where they could receive mental health treatment). The violations so identified have parallels with the present, where Israel desperately needs to be transferred to a facility that will provide treatment and not give up on him. Israel's mother is undertaking heroic efforts to effectuate such a transfer.

In short, there are serious questions as to whether Kaiser's collaboration with the State in applying CUDDA implicate state action, and if so, whether Kaiser's delay in treatment will deprive Israel of life without due process. This case stands in sharp contrast to the high-profile Schiavo case, where the Court noted numerous proceedings over several years that preceded termination of life

support, *Schiavo ex rel. Schindler v. Schiavo*, 403 F.3d 1289, 1295-96 (11th Cir. 2005). Ms. Fonseca is not asking in this emergency motion for years or even months – just enough time to brief the serious questions she has raised and give her son a chance to live.

CONCLUSION

In its landmark life support case, the U.S. Supreme Court wisely cautioned:

> An erroneous decision not to terminate results in a maintenance of the status quo; the possibility of subsequent developments such as advancements in medical science,…changes in the law, or simply the unexpected death of the patient despite the administration of life-sustaining treatment at least create the potential that a wrong decision will eventually be corrected or its impact mitigated. An erroneous decision to withdraw life-sustaining treatment, however, is not susceptible of correction. *Cruzan*, 497 U.S. at 283.

The extraordinary and immediate effect of denial of a preliminary injunction and imminent dissolution of the temporary restraining order calls for an extraordinary remedy. That remedy is a stay pending appeal. Should the Court deny this Motion, attorneys for Ms. Fonseca ask in the alternative that a stay be granted while they seek emergency relief in the U.S. Supreme Court.

Dated: May 17, 2016.

Respectfully submitted,

s/ Kevin Snider

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CERTIFICATE OF SERVICE

Pursuant to Fed. R. App. P. 25(d) and Ninth Cir. R. 25-5(e) I hereby certify that on May 17, 2016, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

s/ Kevin Snider_____

APPENDIX A

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

JONEE FONSECA,

Plaintiff,

v.

KAISER PERMANENTE MEDICAL CENTER ROSEVILLE, et al.,

Defendants.

No. 2:16-cv-00889-KJM-EFB

ORDER

Approximately one month ago, doctors at a Kaiser Permanente hospital in Roseville, California determined that two-year-old Israel Stinson had suffered the irreversible cessation of all functions of his entire brain, including the brain stem. Under California law, this determination means Israel has suffered brain death and is no longer alive. But because Israel's heart is still beating and he is still breathing, with the support of a ventilator and careful, ongoing medical intervention, Israel's mother, Jonee Fonseca, asks this court to prohibit Kaiser from ending its life-support efforts. She argues California's definition of "death" violates the United States Constitution and deprives both her and Israel of due process. She also claims the defendants' actions have violated the California Constitution and the federal Emergency Treatment and Active Labor Act. She names Kaiser, one of its physicians, and the Director of the California Department of Health as defendants, and she requests a preliminary injunction to

maintain and improve Israel's condition during this lawsuit. Although Kaiser and Ms. Fonseca have been attempting to reach a mediated resolution to accomplish Ms. Fonseca's goal of transporting Israel to a different location, there currently is no concrete proposal identifying either a location that will receive Israel or a method of transport. The court therefore is called to resolve the parties' legal disputes.

To this end, the court held a hearing on the preliminary injunction request on May 11, 2016. Kevin Snider, Matthew McReynolds, and Alexandra Snyder appeared for Ms. Fonseca, and Jason Curliano appeared for Kaiser and Michael Myette, M.D. Ashante Norton and Ismael Castro appeared and observed on behalf of Karen Smith, M.D., the Director of California's Department of Public Health.

I. DETAILED BACKGROUND

On April 1, 2016, Ms. Fonseca took Israel to a local emergency room. Fonseca Decl. ¶ 1, ECF No. 3-2. He had displayed symptoms of an asthma attack. *Id.* He was transferred to the pediatric unit at the hospital for the University of California, Davis, and his condition stabilized at least somewhat. *Id.* ¶¶ 1–2. Later the same day, however, after arriving at U.C. Davis, his condition worsened, he went into cardiac arrest, and he fell unconscious. *See id.* ¶¶ 3-5. Doctors attempted to revive him, and then used an extracorporeal membrane oxygenation (ECMO) machine to provide cardiac and respiratory support. *Id.* ¶¶ 5–7. Within a few days, his heart and lungs were functioning again on their own, but he requires a ventilator to breathe. *See id.* ¶¶ 9–14. A doctor determined Israel had suffered brain death; he was therefore no longer alive within the meaning of the California Uniform Determination of Death Act (CUDDA), Cal. Health & Safety Code § 7180 *et seq.*[1] *See id.* ¶ 14; First Am. Compl. ¶¶ 14, 19, ECF No. 1. Israel was then transported to the Kaiser hospital in Roseville, where he has been attended to since April 11,

[1] *See* Cal. Health & Safety Code § 7180(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."); *see also id.* § 7181 ("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.").

2016. Doctors at Kaiser have twice independently confirmed he is brain dead. Fonseca Decl. ¶ 13; *see also* Myette Decl., ECF No. 43-1. The hospital completed its portion of a death certificate, which identifies the date of Israel's death as April 14, 2016, but other portions of the certificate remain incomplete. *See* Myette Decl. Ex. B, ECF No. 43-3 (incomplete portions include parents' names and information about the disposition). In light of its doctors' determinations, Kaiser intends to end life support efforts.

Ms. Fonseca believes Israel is not dead because his heart is beating and he is breathing, but if he no longer receives life support, he will then die. First Am. Compl. ¶ 3. She perceives that he responds to her voice and touch, and at times he appears to have taken breaths on his own. *See* Fonseca Decl., ECF No. 35. She therefore feels an imperative moral and spiritual obligation to ensure life support efforts for her son do not end. *Id.* ¶ 62.

Dr. Michael Myette, M.D. is the Medical Director for the Pediatric Intensive Care Unit at Kaiser in Roseville, the doctor ultimately responsible for Israel's care, and a defendant in this action. He explains his understanding of Israel's condition in basic terms: "Israel's brain is not telling his organs how to function." Myette Decl. ¶ 5. This means doctors must meticulously monitor and support his condition by adjusting his blood pressure and hormone levels pharmaceutically, providing support with a ventilator, and keeping his body warm with blankets. *Id.* ¶¶ 5–7. He is receiving only dextrose—sugar—for nutrition, but has not lost weight over the three to four weeks since he was admitted. *Id.* ¶ 9. Dr. Myette worries that if he fed Israel internally, complications would likely arise, including infection, which would be difficult to detect and combat. *Id.* ¶ 8. Israel does not respond to any stimulus. *Id.* ¶¶ 10, 12. Dr. Myette opines that although Ms. Fonseca believes Israel has taken breaths on his own, this is a misreading of the ventilator, which can be artificially triggered. *Id.* ¶ 14. The movements Israel makes in response to his mother's touch or voice are reflexes that originate in his spine; they also are triggered by more innocuous and lighter contact, for example, a bump on the side of his bed. *Id.* ¶¶ 10–12.

On April 14, 2016, after Kaiser completed its portion of the death certificate, Ms. Fonseca sought relief from the Placer County Superior Court on Israel's behalf. *See Fonseca*

ex rel. *Stinson v. U.C. Davis Children's Hosp.*, No. S-CV-0037673 (Placer Cty. Super. Ct. filed Apr. 14, 2016).[2] The superior court entered a temporary restraining order (TRO) requiring Kaiser to continue life support, and over a period of about two weeks during which the order was extended twice, Ms. Fonseca and Israel's biological father, Nathaniel Stinson, attempted unsuccessfully to arrange for Israel's transfer to another medical facility. *See generally* Curliano Decl. Exs. A–G, J–K, ECF No. 14-2 to -8 & -11 to -12. On April 29, the state court dismissed Ms. Fonseca's petition for relief and dissolved the TRO. ECF No. 19-1. The state court found California Health and Safety Code sections 7180 and 7181 had "been complied with." *Id.* at 2.

On April 28, 2016, the day before the Superior Court's restraining order was set to finally expire, Ms. Fonseca filed this lawsuit. *See* Compl., ECF No. 1. Her original complaint alleged claims directly under the U.S. Constitution, the federal Rehabilitation Act, and the Americans with Disabilities Act. The court granted a temporary restraining order until a hearing could be held on Monday, May 2, 2016. ECF No. 9. At the May 2 hearing, the court dismissed the original complaint by bench order, as the complaint's allegations did not show the court had jurisdiction. Minutes, ECF No. 22; Minute Order, ECF No. 23. The court ordered Ms. Fonseca to file a first amended complaint the next day. Kaiser did not object to an extension of the TRO through May 11, and a hearing was set for that day on a motion for a fully briefed preliminary injunction. The matter was also referred to emergency mediation before a magistrate judge of this court, but as noted the parties have been unable to reach an agreement so as to moot the current motion. Minutes, ECF No. 28.

Ms. Fonseca timely filed a first amended complaint, which includes five claims. First, she claims under 42 U.S.C. § 1983 that CUDDA is unconstitutional on its face under the Fifth and Fourteenth Amendments. First Am. Compl. ¶¶ 51–59. CUDDA provides that "death" is not just the cessation of breath and a heartbeat—the prior, historical conception—but also the absence of all functions of the brain and brain stem. *Id.* ¶ 56. Because the CUDDA provision is

[2] The court may take judicial notice of the filings in the state case. *See* Fed. R. Evid. 201(b) (governing judicial notice); *Asdar Grp. v. Pillsbury, Madison & Sutro*, 99 F.3d 289, 290 n.1 (9th Cir. 1996) (court filings and orders in related litigation may be subject to judicial notice).

broader than the historical conception and because it allows for no specific appeal of a death determination, Ms. Fonseca alleges it deprives Israel of due process. *Id.* ¶¶ 56–57. She asserts this claim against all the defendants: Kaiser, Dr. Myette, and Dr. Smith. *See id.* ¶¶ 5–6. Ms. Fonseca asks the court to declare CUDDA unconstitutional on its face, *id.* ¶ 59, and requests Kaiser be ordered to take certain steps to maintain and improve Israel's condition, *id.* ¶¶ 47–50.

Second, Ms. Fonseca alleges under 42 U.S.C. § 1983 that CUDDA deprives her of due process as Israel's parent. *Id.* ¶¶ 60–67. For this independent reason, she claims CUDDA is unconstitutional on its face. *Id.* ¶ 67. She alleges this claim against all the defendants.

Third, Ms. Fonseca alleges Kaiser violated the Emergency Medical Treatment and Active Labor Act (EMTALA), 42 U.S.C. § 1395dd *et seq.* First Am. Compl. ¶¶ 68–79. Under EMTALA, hospitals with emergency departments must perform appropriate medical screening to determine whether those who come to the hospital asking for treatment have an emergency medical condition. 42 U.S.C. § 1395dd(a). If the hospital discovers a medical emergency, it must examine, treat, and "stabilize" the patient's condition or, alternatively, transfer the person to another medical facility. *See id.* § 1395dd(b), (e). Ms. Fonseca alleges Kaiser has not and will not appropriately stabilize Israel's condition if it removes life support, and she alleges Kaiser has not otherwise made an appropriate effort to transfer Israel to another facility. First Am. Compl. ¶¶ 71–75. She asks for declaratory relief, money damages, and an injunction ordering Kaiser to comply with EMTALA and stabilize Israel's condition. *Id.* ¶¶ 77–79.

Fourth, Ms. Fonseca alleges under 42 U.S.C. § 1983 that Kaiser and Dr. Myette have deprived her and Israel of their rights to privacy under the Fourth Amendment. *Id.* ¶¶ 80-84. She refers specifically to her right and Israel's right to have control over Israel's healthcare.

Fifth, Ms. Fonseca alleges Kaiser and Dr. Myette have violated her right and Israel's right to privacy and autonomy under Article I of the California Constitution. *Id.* ¶¶ 85-88.

Ms. Fonseca's motion for a preliminary injunction was filed on May 6, 2016. *See* Mot. Prelim. Inj., ECF No. 33. She requests relief at this stage on the basis of her claims under the EMTALA and federal Constitution, but not under her California constitutional claim. Kaiser

and Dr. Myette filed an opposition on May 10, 2016, ECF No. 43, and the court allowed reply argument at the hearing on May 11, 2016.

II. JURISDICTION

Federal courts are courts of limited jurisdiction. Therefore, as in every case, the court first asks whether it has jurisdiction to hear and decide the dispute before it. As explained below, the court is satisfied it has jurisdiction over the claims and defendants, although federal question jurisdiction does not adhere to Kaiser and Dr. Myette based on the civil rights claims.

A. Rooker-Feldman

As a preliminary matter, in the May 2 hearing, the court voiced its concern that it lacks jurisdiction over this action under *Rooker v. Fidelity Trust Co.*, 263 U.S. 413 (1923), and *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462 (1983), two cases that form the basis of what courts call the *Rooker-Feldman* doctrine. On further review and in light of the allegations in the First Amended Complaint, the court is satisfied this doctrine does not deprive it of all jurisdiction over this case.

Under the *Rooker-Feldman* doctrine, federal district courts are without jurisdiction to hear direct and de facto appeals from the judgments of state courts. *Cooper v. Ramos*, 704 F.3d 772, 777 (9th Cir. 2012); *Noel v. Hall*, 341 F.3d 1148, 1155 (9th Cir. 2003). To determine whether an action functions as a de facto appeal, the court "pay[s] close attention to the relief sought by the federal-court plaintiff." *Id.* at 777–78 (quoting *Bianchi v. Rylaarsdam*, 334 F.3d 895, 900 (9th Cir. 2003)) (emphasis omitted). "It is a forbidden de facto appeal under *Rooker–Feldman* when the plaintiff in federal district court complains of a legal wrong allegedly committed by the state court, and seeks relief from the judgment of that court." *Id.* (quoting *Noel*, 341 F.3d at 1163). However, the *Rooker-Feldman* doctrine does not preclude a plaintiff from bringing an "independent claim" that, though raising similar or even identical to issues, was not the subject of a previous judgment by the state court. *Id.* at 778.

A review of *Feldman* itself is instructive here. In *Feldman*, two graduates of unaccredited law schools petitioned a local court for a waiver to permit them to sit for the bar. 460 U.S. at 466. After the local court rejected their claims, the graduates filed suit in federal

court. *Id.* at 468. The Supreme Court deemed the action a de facto appeal to the extent it sought review of the local court's denial. *Id.* at 482. On the other hand, as recounted by the Ninth Circuit in *Noel*, the Supreme Court allowed the "challenge to the local court's legislative act of promulgating its rule" prohibiting the graduates from sitting for the bar. *Noel*, 341 F.3d at 1157. This aspect of the lawsuit "was a challenge to the validity of the rule rather than a challenge to an application of the rule." *Id.*; *see also Feldman*, 460 U.S. at 487.

In some instances, the independent constitutional claims a plaintiff asserts in federal court may not be possible to disentangle from a state court's earlier decision. *See Feldman*, 460 U.S. at 482 n.16. If that is the case, then the federal district court may not review the state court decision. *Id.* This was true of only some of the claims before the *Feldman* Court; other claims could be separated from the de facto appeal, for example the graduates' claims that the District of Columbia's law-school requirement discriminated against them and impermissibly delegated authority to the American Bar Association to regulate the bar. *Id.* at 487–88.

Here, Ms. Fonseca challenges CUDDA's constitutionality generally. For the most part, she does not challenge CUDDA's particular application. *See* Mot. Prelim. Inj. at 12 ("At this stage of the proceedings, Plaintiff is not asserting that [Kaiser] has misread or misapplied CUDDA."); *but see*, *e.g.*, First Am. Compl. ¶ 32; Byrne Decl. ¶¶ 5, 12–15, ECF No. 36. Her constitutional claims here were not presented to the state superior court and except for the mandatory aspects of the injunction she proposes, discussed toward the end of this order, the relief she now seeks does not undermine the factual or legal conclusions the state court reached. The same is true of her non-constitutional claims; none was before the superior court.

Ms. Fonseca neither asserts legal error by the state court nor seeks relief from a state court judgment. If Ms. Fonseca can otherwise establish this court's subject matter jurisdiction over her claims, the *Rooker–Feldman* doctrine does not prevent her case from going forward.

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B. Standing

Next is the question of standing. Given Ms. Fonseca's status as Israel's mother and general guardian, she may litigate here on his behalf. *See* Fed. R. Civ. P. 17(c) (a general guardian may sue on behalf of a minor or incompetent person); *Doe* ex rel. *Sisco v. Weed Union Elementary Sch. Dist.*, No. 13-01145, 2013 WL 2666024, at *1 (E.D. Cal. June 12, 2013) ("Rule 17(c)(1)(A) permits a 'general guardian' to sue in federal court on behalf of a minor, and a parent is a guardian who may so sue." (citation and quotation marks omitted)). This presupposes that the rules of parental guardianship govern equally the relationship between a parent and a child whose death is disputed. Whatever the correct procedural method of representation, for purposes of this motion Ms. Fonseca may represent Israel's interests in this case. *See, e.g.*, *Lopez v. Cty. of L.A.*, No. 15-01745, 2015 WL 3913263, at *9 (C.D. Cal. June 25, 2015) (survival claims under Constitution by parent); *see also Williams v. Bradshaw*, 459 F.3d 846, 848 (8th Cir. 2006) ("Federal courts are to apply state law in deciding who may bring a § 1983 action on a decedent's behalf."); Cal. Civ. Proc. Code § 377.10, .20, .30 (governing survival claims); Cal. Prob. Code §§ 6401–02 (who may bring a survival action). She has standing. Her request to be appointed as Israel's guardian *ad litem* is therefore denied as moot. *See* Pet., ECF No. 31.

C. Federal Question Jurisdiction and Action Under Color of Law

Turning now to the complaint's substantive claims, Ms. Fonseca proposes three jurisdictional pillars to support her action in federal court.

1. EMTALA and § 1331

First, she cites her EMTALA claims and 28 U.S.C. § 1331, the latter of which establishes this court's jurisdiction over all claims arising under the Constitution, laws, and treaties of the United States. This court's jurisdiction to evaluate her EMTALA claim, which arises under a federal statute, is beyond dispute, as is this court's supplemental jurisdiction to consider any state-law claims that are a part of the same case or controversy. *See* 28 U.S.C. § 1367(a).

2. 42 U.S.C. § 1983

This leaves Ms. Fonseca's claims under § 1983, a broad federal civil rights statute. Any claim under that section must concern the defendants' actions under color of law. *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 946 (1982). State action is a "jurisdictional requisite" in any claim under § 1983. *Polk Cty. v. Dodson*, 454 U.S. 312, 315 (1981). In this regard, Ms. Fonseca notes her addition of Dr. Smith as a defendant. Dr. Smith is alleged to be the Director of the California Department of Public Health and is sued in her official capacity under 42 U.S.C. § 1983. First Am. Compl. ¶ 6.

a. Dr. Smith

"Claims under § 1983 are limited by the scope of the Eleventh Amendment."[3] *Doe v. Lawrence Livermore Nat. Lab.*, 131 F.3d 836, 839 (9th Cir. 1997). Specifically, states and state governmental entities are not "persons" within the meaning of § 1983. *Will v. Michigan Dep't of State Police*, 491 U.S. 58, 70 (1989). The Supreme Court has, however, interpreted the Eleventh Amendment as allowing federal courts to grant prospective injunctive relief against state officials acting "under color of law." *Va. Office for Prot. & Advocacy v. Stewart*, 563 U.S. 247, 255 (2011); *Ex parte Young*, 209 U.S. 123, 159–60 (1908). In short, "the Eleventh Amendment does not generally bar declaratory judgment actions against state officers." *Nat'l Audubon Soc'y, Inc. v. Davis*, 307 F.3d 835, 847 (9th Cir. 2002), *opinion amended on denial of reh'g*, 312 F.3d 416 (2002). This court therefore has jurisdiction to consider Ms. Fonseca's request for prospective declaratory relief against Dr. Smith, which targets an allegedly ongoing violation of federal constitutional law in the form of her application of CUDDA in the provision of procedures related to issuance of death certificates.

b. Kaiser and Dr. Myette

Kaiser and Dr. Myette, by contrast, have not in any way supported by the record acted "under color of law." Kaiser is a private hospital, and Dr. Myette is a private person.

[3] "The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign state." U.S. Const. amend. XI.

"[P]rivate parties are not generally acting under color of state law," *Price v. State of Haw.*, 939 F.2d 702, 707–08 (9th Cir. 1991), "no matter how discriminatory or wrongful" their actions may be, *Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 50 (1999) (citation and quotation marks omitted). But "[u]nder familiar principals, even a private entity can, in certain circumstances, be subject to liability under section 1983." *Villegas v. Gilroy Garlic Festival Ass'n*, 541 F.3d 950, 954 (9th Cir. 2008) (en banc). The basic question a court must answer is whether the private person's conduct "may be fairly characterized as 'state action'" or "fairly attributable to the State." *Lugar*, 457 U.S. at 924, 937. The phrase "under color of law" for purposes of a § 1983 claim has the same meaning as the phrase "state action" for purposes of the Fourteenth Amendment. *Id.* at 928.

At the outset, the Supreme Court has taken care to distinguish two related elements of "fair attribution" in a § 1983 claim: the plaintiff must show both that a "state action" has occurred and that the defendants acted "under color of law." *Id.* at 937; *Flagg Bros., Inc. v. Brooks*, 436 U.S. 149, 156 (1978). Here, a state has acted: California passed CUDDA, and the California Department of Public Health imposes procedural requirements related to the issuance of a death certificate, including for people who have suffered brain death under CUDDA. *See* First Am. Compl. ¶¶ 6, 21; *see also Am. Mfrs.*, 526 U.S. at 50 (a private person's actions "with the knowledge of and pursuant to" a statute shows "state action" occurred (citation and quotation marks omitted)). But these facts do not establish Kaiser's and Dr. Myette's action under color of law.

Federal courts have often been called on to decide whether doctors and hospitals have acted under color of law. In general, private doctors and hospitals are more commonly found not to be state actors. *See, e.g., Babchuk v. Indiana Univ. Health, Inc.*, 809 F.3d 966, 970-71 (7th Cir. 2016); *McGugan v. Aldana-Bernier*, 752 F.3d 224, 229–31 (2d Cir. 2014), *cert. denied*, 135 S. Ct. 1703 (2015); *Wittner v. Banner Health*, 720 F.3d 770, 775–81 (10th Cir. 2013); *Briley v. State of Cal.*, 564 F.2d 849, 855–56 (9th Cir. 1977) (noting that "private hospitals and physicians have consistently been dismissed from § 1983 actions for failing to come within the

color of state law requirement of this section" and collecting authority).[4] This is likely the result of two rules of thumb. First, the Supreme Court has "consistently held that '[t]he mere fact that a business is subject to state regulation does not by itself convert its action into that of the State for purposes of the Fourteenth Amendment." *Am. Mfrs.*, 526 U.S. at 52 (quoting *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 350 (1974), and citing *Blum v. Yaretsky*, 457 U.S. 991, 1004 (1982)) (alteration in original). On a related note, even though doctors' services are "affected with a public interest," the same may be said of many professions, and this does not automatically convert their every action into an action of the state. *See Jackson*, 419 U.S. at 354. Second, although doctors and hospitals are often the beneficiaries of state and federal funding, receipt of government funding alone does not make for action under color of law. *See Chudacoff v. Univ. Med. Ctr. of S. Nev.*, 649 F.3d 1143, 1149–50 (9th Cir. 2011) (collecting authority).

In addition, the choices a doctor or a hospital must make are often matters of discretion, informed by expertise, training, and the specifics of the patient presented to them, and for this reason, courts often hesitate to find a doctor's actions fairly attributable to the state. *See, e.g.*, *Blum*, 457 U.S. at 1008 (decisions that "ultimately turn on medical judgments made by private parties according to professional standards that are not established by the State" undercut claims of action under color of law); *Collyer v. Darling*, 98 F.3d 211, 232–33 (6th Cir. 1996) (noting the absence of any contractual relationship between the doctors and the state and the "independence with which the doctors completed their tasks"); *Pinhas v. Summit Health, Ltd.*, 894 F.2d 1024, 1034 (9th Cir. 1989) (a decision that "ultimately turned on the judgments made by private parties according to professional standards that are not established by the State," but flowed from a peer-review process created by statute, was not an action under color of law), *aff'd on unrelated question*, 500 U.S. 322 (1991).

At the same time, no categorical rule prevents the mixture of professional judgment and action under the color of law. *See, e.g.*, *West v. Atkins*, 487 U.S. 42, 51 (1988)

[4] Kaiser previously has been found by another district court not to be a state actor, in a case challenging California's statutory scheme governing medical peer review proceedings. *See generally Safari v. Kaiser Found. Health Plan*, No. 11-05371, 2012 WL 1669351 (N.D. Cal. May 11, 2012).

(explaining the court below misread Supreme Court precedent "as establishing the general principle that professionals do not act under color of state law when they act in their professional capacities"). Nevertheless, private doctors and hospitals do not even act under color of state law when they participate in the civil commitment of mentally ill patients. *See, e.g.*, *Bass v. Parkwood Hosp.*, 180 F.3d 234, 243 (5th Cir. 1999) (collecting authority).

By contrast, a doctor or hospital is much more likely to have acted under color of law when the hospital is a public hospital, or if it assumed that role for all practical purposes, for example when a doctor contracts with a state to provide medical services to the inmates of a state prison. *See generally West*, 487 U.S. 42; *see also Chudacoff*, 649 F.3d at 1150 (citing, *inter alia*, *Woodbury v. McKinnon*, 447 F.2d 839, 842 (5th Cir. 1971)). In these situations, the doctor or hospital has "exercised power possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law." *West*, 487 U.S. at 49 (citation and quotation marks omitted).

The Ninth Circuit case of *Sutton v. Providence St. Joseph Medical Center*, 192 F.3d 826 (9th Cir. 1999), provides a helpful framework. In *Sutton*, the Circuit considered in detail the potential liability of a private defendant under § 1983. It concluded "the mere fact that the government compelled a result does not suggest that the government's action is "fairly attributable" to the private defendant. *Id.* at 838. To find otherwise "would be to convert every employer—whether it has one employee or 1,000 employees—into a governmental actor every time it complies with a presumptively valid, generally applicable law, such as an environmental standard or a tax-withholding scheme." *Id.* The court emphasized the importance of "something more" between the state and private person: Did the defendant perform a public function? Did the government and defendants act together? Did the government compel or coerce the defendants? Or is there some other "nexus" between the government and the defendants? *See id.* at 835. The Circuit cited three cases as examples of this nexus: (1) *Adickes v. S.H. Kress & Co.*, 398 U.S. 144 (1970), where the Supreme Court relied on an alleged conspiracy between private and public actors; (2) *Lugar*, 457 U.S. 922, where the Court relied on official cooperation between the private and public actors; and (3) *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163

(1972), where the Court relied on the state's enforcement and ratification of the private person's actions. *See Sutton*, 192 F.3d at 839–41.

Here, Ms. Fonseca cites four facts to argue Kaiser's and Dr. Myette's determination of death is fairly attributable to the state: (1) "declarations of death are essentially a state-prescribed function"; (2) the defendants acted as "willful participants" in the State's determination of death; (3) the defendants had "no discretion to entertain independent medical judgment inconsistent with CUDDA's definition" and participated in a specific, state-defined protocol; and (4) Kaiser received Israel from one public institution, U.C. Davis, and is attempting to transfer him to another public official, the coroner. *See* Mot. Prelim. Inj. at 6–9.

These facts do not show Kaiser and Dr. Myette are state actors. Several relate to the question of whether a "state action" occurred, but not whether the defendants here acted "under color of law." In other words, it may be that a state normally prescribes the exact criteria for a doctor to check when deciding whether a patient is living, and it may be that Kaiser and Dr. Myette willfully complied with state laws and regulations, but these facts suggest only that a "state action" has occurred, not that Kaiser and Dr. Myette acted under color of law.

At most it can be said that California passed a law and that the defendants willfully complied with the law. *See, e.g.*, Cal. Health & Safety Code §§ 102800, 102825 (physicians' obligations related to a death certificate). As *Sutter* teaches, state compulsion does not establish a private defendant's actions under color of law; "something more" is necessary. *Sutton*, 192 F.3d at 835. If the facts here were enough to show Kaiser and Dr. Myette had acted under color of law, then a private person would act under color of law every time he or she obeyed laws or regulations of his or her own accord, which cannot be. *See Am. Mfrs.*, 526 U.S. at 52. Consider a lawyer who studies the California Code of Civil Procedure, or a driver who fills out the paperwork to apply for a driver's license. California defines its rules of procedure and a state agency creates the forms the driver fills out, but the lawyer is not a state actor when he follows the rules, and a driver is not a state actor when he fills out and turns in the form. Something more is required. The defendants suggest an analogy to a priest who completes a marriage license,

Opp'n at 1, which, though unsupported by citation to a specific authority, illustrates the same point.

The fact that Kaiser received and would transfer Israel to and from a state institution does not show the private defendants acted under color of law. It is a coincidence that Israel was transferred from a university hospital, and the presence of state entities in this respect cannot make for action under color of law.

Professional expertise, training, and discretion also show California played at most a minor role in Kaiser's and Dr. Myette's actions. CUDDA describes brain death in general terms—the "irreversible cessation of all functions of the entire brain, including the brain stem"—and it specifically refers to "accepted medical standards." *See* Cal. Health & Safety Code § 7180. California has not dictated which tests must be performed, how, when, or by whom. These specifics are all matters of private medical expertise and discretion. They are the subject of guidelines published by professional medical organizations. *See, e.g.*, Am. Acad. Pediatrics, *Clinical Report—Guidelines for the Determination of Brain Death in Infants and Children* (2011), ECF No. 36-1. The determination of Israel's brain death "ultimately turn[ed] on medical judgments made by private parties according to professional standards" that California did not establish. *Blum*, 457 U.S. at 1008.

Upon close review, this case contrasts with the others in which doctors and hospitals have been found to act under color of law. For example, drawing from those cited above, in *West v. Atkins*, the Supreme Court held that a doctor employed part-time by the state acted under color of law when he treated inmates in a state prison. *See generally* 487 U.S. 42. In *Chudacoff v. University Medical Center of South Nevada*, the Ninth Circuit described the defendant hospital as public "through and through," because it was "controlled and managed" by the state and the defendants' authority "flow[ed] directly from the state." 649 F.3d at 1150.

This case also contrasts with the general body of decisions based on action under color of law that occurred outside the hospital context. In the *Lugar* case on which plaintiff has relied, for example, the Supreme Court considered whether a private defendant who used an *ex parte* state procedure to obtain an order sequestering the plaintiff's property could be liable as a

state actor. 457 U.S. at 924–25. The Court reaffirmed that a private person could be held liable as a state actor in that situation, noting that the state's involvement was "overt" and "official" and that the private person participated jointly with the state in a seizure of property. *Id.* at 927–28, 941; *see also Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n*, 531 U.S. 288, 290–91 (2001) ("[T]he association in question here includes most public schools located within the State, acts through their representatives, draws its officers from them, is largely funded by their dues and income received in their stead, and has historically been seen to regulate in lieu of the State Board of Education's exercise of its own authority.").

Ms. Fonseca has not cited any case where a private doctor working at a private hospital providing treatment to a private person was found to have acted under color of law. The court's independent research has likewise produced no example. This is a case of private action, not public action. The § 1983 claims against Kaiser and Dr. Myette cannot support Ms. Fonseca's request for a preliminary injunction.

In determining whether an injunction should issue, therefore, the court considers only the EMTALA claim against Kaiser, which appears to be the claim on which plaintiff primarily relies, as well as the § 1983 claims against Dr. Smith.

III. LEGAL STANDARD

A preliminary injunction preserves the relative position of the parties until a trial is completed on the merits or the case is otherwise concluded. *See Univ. of Texas v. Camenisch*, 451 U.S. 390, 395 (1981). It is an extraordinary remedy awarded only upon a clear showing that the plaintiff is entitled to relief. *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 22 (2008). The plaintiff must show she is "likely to succeed on the merits," "likely to suffer irreparable harm in the absence of the preliminary relief," "the balance of equities tips in [her] favor," and "an injunction is in the public interest." *Id.* at 20. Alternatively, if a plaintiff cannot demonstrate she is likely to succeed on the merits of her claims, but can show at least (1) that "serious questions" go to the merits of her claims, (2) that the "balance of hardships tips *sharply*" in her favor, and (3) that the other two parts of the *Winter* test are satisfied, then a preliminary injunction may be proper nonetheless. *Shell Offshore, Inc. v. Greenpeace, Inc.*, 709 F.3d 1281, 1291 (9th Cir. 2013)

(quoting *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1134–35 (9th Cir. 2011)) (emphasis in *Shell*).

But if the plaintiff cannot show she has even a "fair chance of success on the merits," then it does not matter how the other parts of the *Winter* test may be resolved; "at an irreducible minimum the moving party must demonstrate a fair chance of success on the merits, or questions serious enough to require litigation." *Pimentel v. Dreyfus*, 670 F.3d 1096, 1111 (9th Cir. 2012) (quoting *Guzman v. Shewry*, 552 F.3d 941, 948 (9th Cir. 2009)) (internal quotation marks omitted).

When deciding whether to issue a preliminary injunction, the court may rely on declarations, affidavits, and exhibits, among other things, and this evidence need not conform to the standards that apply at summary judgment or trial. *Johnson v. Couturier*, 572 F.3d 1067, 1083 (9th Cir. 2009); *see also Flynt Distrib. Co. v. Harvey*, 734 F.2d 1389, 1394 (9th Cir. 1984) ("The trial court may give even inadmissible evidence some weight, when to do so serves the purpose of preventing irreparable harm before trial"); *Rubin* ex rel. *N.L.R.B. v. Vista Del Sol Health Servs., Inc.*, 80 F. Supp. 3d 1058, 1072 (C.D. Cal. 2015) ("It is well established that trial courts can consider otherwise inadmissible evidence in deciding whether or not to issue a preliminary injunction."). "A credibility determination is well within the court's province when ruling on a preliminary injunction motion . . . ." *N.E. England Braiding Co. v. A.W. Chesterton Co.*, 970 F.2d 878, 884 (Fed. Cir. 1992); *accord Oakland Tribune, Inc. v. Chronicle Pub. Co., Inc.*, 762 F.2d 1374, 1377 (9th Cir. 1985); 11A Charles A. Wright, et al., Federal Practice & Procedure § 2949 (3d ed. 2013). A district court may also hear oral testimony at a hearing. *Stanley v. Univ. of S. Cal.*, 13 F.3d 1313, 1326 (9th Cir. 1994). Oral testimony is unnecessary, however, if the parties had an adequate opportunity to submit written testimony and argue the matter. *Id.*

IV. DISCUSSION

A. EMTALA Claim Against Kaiser

Ms. Fonseca argues that under EMTALA, Kaiser is required to provide "stabilizing treatment" to Israel until he can be transferred. Mot. Prelim. Inj. at 10–11. She relies

heavily on the Fourth Circuit's decision in *In re Baby K*, 16 F.3d 590 (4th Cir. 1994), discussed below.

Congress enacted EMTALA over concerns that "hospitals were dumping patients who were unable to pay for care, either by refusing to provide emergency treatment to these patients, or by transferring the patients to other hospitals before the patients' conditions stabilized." *Jackson v. East Bay Hosp.*, 246 F.3d 1248, 1254 (9th Cir. 2001); *see* H.R. Rep. No. 241, 99th Cong., 1st Sess., Part I, at 27 (1985), reprinted in 1986 U.S. Code Cong. & Admin. News 579, 605. EMTALA provides,

> In the case of a hospital that has a hospital emergency department, if any individual (whether or not eligible for benefits under this subchapter) comes to the emergency department and a request is made on the individual's behalf for examination or treatment for a medical condition, the hospital must provide for an appropriate medical screening examination within the capability of the hospital's emergency department, including ancillary services routinely available to the emergency department, to determine whether or not an emergency medical condition (within the meaning of subsection (e)(1) of this section) exists.

42 U.S.C. § 1395dd(a).

If the hospital determines that the individual has an emergency medical condition, then the hospital must provide either

> (A) within the staff and facilities available at the hospital, for such further medical examination and such treatment as may be required to stabilize the medical condition, or
>
> (B) for transfer of the individual to another medical facility . . . .

Id. § 1395dd(b). An "emergency medical condition" is defined as

> a medical condition manifesting itself by acute symptoms of sufficient severity (including severe pain) such that the absence of immediate medical attention could reasonably be expected to result in—(i) placing the health of the individual (or, with respect to a pregnant woman, the health of the woman or her unborn child) in serious jeopardy, (ii) serious impairment to bodily functions, or (iii) serious dysfunction of any bodily organ or part . . . .

Id. § 1395dd(e)(1)(A). "To stabilize" and "stabilized" are also specifically defined:

> (A) The term "to stabilize" means, with respect to an emergency medical condition . . . , to provide such medical treatment of the

> condition as may be necessary to assure, within reasonable medical probability, that no material deterioration of the condition is likely to result from or occur during the transfer of the individual from a facility . . . .
>
> (B) The term "stabilized" means, with respect to an emergency medical condition . . . , that no material deterioration of the condition is likely, within reasonable medical probability, to result from or occur during the transfer of the individual from a facility . . . .

Id. § 1395dd(e)(3).

It appears there is no binding or persuasive authority on all fours with this case. As noted, Ms. Fonseca analogizes her case to that of the child in *Baby K*. Mot. Prelim. Inj. at 11. The patient in *Baby K* was an anencephalic[5] infant suffering from respiratory distress. 16 F.3d at 592–93. The hospital physicians informed Baby K's mother that most anencephalic infants die within a few days of birth due to breathing difficulties and other complications, and recommended that Baby K be provided only with supportive care in the form of nutrition, hydration and warmth. *Id.* at 592. Baby K's mother and physicians were not able to reach an agreement as to the appropriate care for Baby K; thus, Baby K's mother transferred her to a nursing home. *Id.* at 593. After the transfer, Baby K was readmitted to the hospital three times due to breathing difficulties. *Id.* Each time, after breathing assistance was provided and Baby K was stabilized, she was discharged to the nursing home. *Id.* Following Baby K's second admission, the hospital sought a declaratory judgment that it was not required to provide respiratory support to anencephalic infants. *Id.* The district court denied that relief, and the Fourth Circuit affirmed, observing:

> Congress rejected a case-by-case approach to determining what emergency medical treatment hospitals and physicians must provide and to whom they must provide it; instead, it required hospitals and physicians to provide stabilizing care to any individual presenting an emergency medical condition. EMTALA does not carve out an exception for anencephalic infants in respiratory distress any more

[5] Anencephaly is a congenital malformation where a major portion of the patient's brain, skull and scalp are missing. *Baby K*, 16 F.3d at 592. The presence of a brain stem supported Baby K's autonomic functions and reflex actions, but, without a cerebrum, the patient was permanently unconscious and had no cognitive abilities or awareness. *Id.* She could not see, hear, or interact with her surroundings. *Id.*

> than it carves out an exception for comatose patients, those with lung cancer, or those with muscular dystrophy—all of whom may repeatedly seek emergency stabilizing treatment for respiratory distress and also possess an underlying medical condition that severely affects their quality of life and ultimately may result in their death.

Id. at 598. EMTALA was therefore applicable and required the hospital to provide stabilizing care to Baby K when her mother sought emergency care. *Id.*

Two years later, the Fourth Circuit clarified its holding in *Baby K* and provided a narrowed reading of EMTALA. *See Bryan v. Rectors and Visitors of the Univ. of Va.*, 95 F.3d 349, 352 (4th Cir. 1996). In *Bryan*, the plaintiff argued that the hospital defendant violated EMTALA when, after treating the adult patient for an emergency condition for twelve days, it decided that no further efforts to prevent the patient's death should be made. *Id.* at 350, 352. The hospital refused to follow instructions from the patient's husband and family, and entered a "do not resuscitate" order against the family's wishes. *Id.* at 350. As a result, the patient's condition worsened, and she died a few days later. The Fourth Circuit found EMTALA did not apply and distinguished *Baby K*:

> Under the circumstances [in *Baby K*], the requirement was to provide stabilizing treatment of . . . respiratory distress, without regard to the fact that the patient was anencephalic or to the appropriate standards of care for that general condition.
>
> The holding in *Baby K* thus turned entirely on the substantive nature of the stabilizing treatment that EMTALA required for a particular emergency medical condition. The case did not present the issue of the temporal duration of that obligation, and certainly did not hold that it was of indefinite duration.

Id. at 352. The *Bryan* court went on to affirm the district court's order dismissing the case because the plaintiff had conceded that the patient received stabilizing treatment in accordance with EMTALA for twelve days. *Id.* at 353. The plaintiff's claim rested only on the "ultimate cessation of that or any further medical treatment upon entry of the anti-resuscitation order," which did not violate EMTALA. *Id.*

The Fourth Circuit further noted that EMTALA is "a limited 'anti-dumping' statute, not a federal malpractice statute." *Id.* at 351. It echoed the decisions of other circuit

courts, noting that EMTALA was enacted to prevent patients from being turned away from emergency rooms for lack of insurance or other non-medical reasons. *Id.*; *see also, e.g., Phillips v. Hillcrest Med. Ctr.*, 244 F.3d 790, 796 (10th Cir. 2001) (Congress enacted EMTALA to regulate emergency room care to prevent the dumping" of the uninsured); *Cherukuri v. Shalala*, 175 F.3d 446, 448 (6th Cir. 1999) (same). The Ninth Circuit, in finding EMTALA provides no private right of action against physicians, has characterized the law's purpose in the same way: "Congress enacted [EMTALA] in response to a growing concern about the provision of adequate emergency room medical services to individuals who seek care, particularly as to the indigent and uninsured." *Eberhardt v. City of L.A.*, 62 F.3d 1253, 1255 (9th Cir. 1995) (citation and quotation marks omitted). "Congress was concerned that hospitals were 'dumping' patients who were unable to pay, by either refusing to provide emergency medical treatment or transferring patients before their conditions were stabilized." *Id.*

Ultimately, the Fourth Circuit held in *Bryan* that once stabilizing treatment has been provided for a patient who arrives with an emergency condition, "the patient's care becomes the legal responsibility of the hospital and the treating physicians," and the legal adequacy of the subsequent care is no longer governed by EMTALA. 95 F.3d at 351. A hospital is not obligated to provide "stabilizing treatment" for a particular "emergency medical condition" for an indefinite duration, at least in terms of its liability under EMTALA. *See id.* at 352.

Here, after Israel's first admission to a local hospital for an asthma attack, then his loss of consciousness, intubation and transfer to U.C. Davis, followed by a brain death examination and apnea tests[6] at U.C. Davis, Israel was transferred to Kaiser on the eleventh day after his asthma attack. At Kaiser, stabilizing treatment was provided, another apnea test was performed, and after another three days, two doctors performed tests independently to determine whether Israel's brain was still functioning. Each doctor determined Israel had suffered brain

[6] In performing an apnea test, a doctor removes the ventilator and allows the carbon dioxide levels within a patient to rise in order to provoke a respiratory response. The First Amended Complaint appears to allege that Israel was not comatose at the time of this testing, but does not provide further clarification as to his actual state. FAC ¶ 19.

death as provided by CUDDA on April 14, 2016.[7] Kaiser completed a portion of a Certificate of Death for Israel soon afterward. ECF No. 43-3. Nonetheless, Kaiser has continued to provide support for Israel pending the parties' efforts at mediation and court decisions.

As a practical matter, after stabilizing Israel, Kaiser determined Israel's condition was no longer an emergency medical condition because it found Israel had suffered brain death. This determination distinguishes this case from *Baby K*, where the patient, despite breathing difficulties, was stabilized and discharged. Also, unlike *Baby K*, this is not a case where the patient still "seek[s] emergency stabilizing treatment for [medical] distress." *Baby K*, 16 F.3d at 598. Rather, Ms. Fonseca requests that Israel remain on a ventilator with additional treatment so he can be in his current condition once she has a plan for transfer. The dispute here, as in *Bryan*, raises at best a question of long-term care. *See id.* EMTALA does not obligate Kaiser to maintain Israel on life support indefinitely. Plaintiff identifies no date by which she would agree Kaiser's obligations cease. This case raises no serious questions under EMTALA.

B. Substantive Due Process Claim Against Dr. Smith

The complaint alleges generally that CUDDA deprives Ms. Fonseca of liberty and privacy and Israel of life without due process. *See* First Am. Compl. at 11–15. In her moving papers, Ms. Fonseca clarifies that she challenges CUDDA both as a matter of substance and with respect to the procedures CUDDA establishes. *See* Mot. Prelim. Inj. at 11–12. The court considers first, here, her substantive challenge. As explained below, the court does not enjoin CUDDA, and therefore does not provide Dr. Smith time to brief her position on plaintiff's claims against her.

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. U.S. Const. amend. XIV, § 1. The Clause has been construed to "protect[] individual liberty against certain government actions regardless of the fairness of the procedures used to implement them." *Collins v. City of Harker Heights, Tex.*, 503 U.S. 115, 125 (1992) (citation and quotation

[7] As the state court found, Kaiser thus provided the "independent confirmation" required by CUDDA. Cal. Health & Safety Code § 7181.

marks omitted). It "provides heightened protection against government interference with certain fundamental rights and liberty interests." *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997). Among these rights is a person's liberty interest in making certain decisions about medical treatment. *See id.* at 724–25 (citing *Cruzan by Cruzan v. Dir., Missouri Dep't of Health*, 497 U.S. 261, 279 (1990)).

1. Rights at Stake

When presented with a due process challenge, the court must take care to understand what right or liberty interest is at stake. *See id.* at 721 (referring to a "careful description" of the asserted fundamental liberty interest). Ms. Fonseca would define the interests in question here as Israel's right to live and her right to make decisions about his care; that is, she alleges CUDDA deprives her of a right to make healthcare decisions for Israel. *See* Mot. Prelim. Inj. at 11–16. For all practical purposes, these claims are the same: they are both challenges to California's decision to place brain death on equal footing with the prior legal understanding of death, as linked to breath and heartbeat. Although the court agrees Ms. Fonseca has a fundamental liberty interest "in the care, custody, and control of [her] children," *Troxel v. Granville*, 530 U.S. 57, 65 (2000), it does not follow that any person, parent or not, has a right to demand healthcare be administered to those who are not alive in the eyes of the state. Nevertheless, Ms. Fonseca's fundamental interests in the care of her son likely encompass her challenge to California's determination that he is not alive. For purposes of this motion, the court finds Ms. Fonseca may challenge CUDDA in her own right as well as on Israel's behalf. *But see Pickup v. Brown*, 740 F.3d 1208, 1235–36 (9th Cir.) (finding a parent has no fundamental right "to choose for a child a particular type of provider for a particular treatment that the state has deemed harmful"), *cert. denied*, 134 S. Ct. 2871, *and cert. denied sub nom. Welch v. Brown*, 134 S. Ct. 2881 (2014).

It goes without saying that the right to life is fundamental. The fundamental rights of parents have also been unquestioned for the better part of a century at least. *See, e.g., Troxel*, 530 U.S. at 65. This does not end this court's inquiry; whether a constitutional right has been violated is determined by balancing that right or liberty interest against the "relevant state

interests." *Cruzan*, 497 U.S. at 279 (quoting *Youngberg v. Romeo*, 457 U.S. 307, 321 (1982)). In other words, "[i]n determining whether a substantive right protected by the Due Process Clause has been violated, it is necessary to balance the liberty of the individual and the demands of an organized society." *Youngberg*, 456 U.S. at 320 (citation and quotation marks omitted).

2. Balancing of Interests

The particulars of the required balancing exercise are difficult to describe generally. The Supreme Court has engaged in balancing in three cases that are instructive here. In *Cruzan*, the Court balanced a competent person's "constitutionally protected liberty interest in refusing unwanted medical treatment" against Missouri's decision to require clear and convincing evidence that a person in a persistent vegetative state would have wanted to terminate treatment. 497 U.S. at 278–85. The Court considered the State's interests in safeguarding the deeply personal choice between life and death. *See id.* at 281. In *Youngberg*, the Court balanced a civilly committed person's interests in safety and freedom against the state's interests, for example in protecting others from violence, and concluded that the state was constitutionally required to ensure that the commitment decision was not made in reliance on a "substantial departure from accepted professional judgment, practice, or standards." 457 U.S. at 321–23. And in *Bell v. Wolfish*, 441 U.S. 520 (1979), the Court balanced the rights of pretrial detainees to be free from punishment against the state's interest in ensuring a defendant is present at trial, the state's "operational concerns," and other related interests. *Id.* at 539–40. Similarly, as the Ninth Circuit has observed, a parent's fundamental liberty interest in maintaining the family relationship is not absolute; when the state interferes with that relationship, the parents' interests must be balanced against those of the state. *See, e.g.*, *Woodrum v. Woodward Cty., Okl.*, 866 F.2d 1121, 1125 (9th Cir. 1989); *see also Pickup*, 740 F.3d at 1235 ("Parents have a constitutionally protected right to make decisions regarding the care, custody, and control of their children, but that right is not without limitations." (citation and quotation marks omitted)).

While the historical, common-law understanding, that death occurred after the permanent cessation of breath and blood flow, was generally in effect in this country for many years prior to the late 1900s, *see, e.g.*, *People v. Mitchell*, 132 Cal. App. 3d 389, 396–97 (1982)

(citing *Commonwealth v. Golston*, 373 Mass. 249 (1977)), the understanding of the human body's functioning is different today than it was when death was defined without reference to the brain. The previous legal understanding of death fit within a context when the heart, lungs, and other organs could not be sustained artificially. In the face of changing technology, California has a broad range of legitimate interests in drawing boundaries between life and that reflect current understanding. These interests include: for purposes of criminal law (has a murder occurred and when?), tort liability (has a doctor caused a death and when?), probate and the law of estates (what rights do heirs possess and when?), general healthcare and bioethics (how must the state and private medical providers allocate scarce resources among the ill and injured?), and as relevant here regulation of the medical profession (when may a doctor refuse treatment, and when must a doctor provide treatment?). *Cf. Glucksberg*, 521 U.S. at 731 (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").

Nothing before the court suggests CUDDA is arbitrary, unreasoned, or unsupported by medical science. Kansas was the first to adopt a statutory definition of death in 1970, including brain death. *See State v. Shaffer*, 223 Kan. 244, 249 (1977). Other states followed this lead, and the Uniform Determination of Death Act was adopted in 1980 by the National Conference of Commissions on Uniform Laws. David B. Sweet, *Homicide by Causing Victim's Brain-Dead Condition*, 42 A.L.R.4th 742 (orig. pub. 1985). The current version of the Act is the product of a long-debated agreement between the American Medical Association and the American Bar Association. *See id.*; 14 Witkin, Summary 10th, Wills, § 11, p. 69 (2005). Thirty-three states and the District of Columbia have formally adopted the Act. *See* U.L.A., Unif. Determination of Death Act, Refs. & Annos.; *see also In re Guardianship of Hailu*, 361 P.3d 524, 528 (Nev. 2015) ("The UDDA and similar brain death definitions have been uniformly accepted throughout the country."). California adopted the Act in 1982. *See* 1982 Cal. Stat. 3098.

Brain death itself is a widely recognized and accepted phenomenon, including in children and infants. *See, e.g.*, Am. Acad. Pediatrics, *Clinical Report—Guidelines for the Determination of Brain Death in Infants and Children* (2011), ECF No. 36-1 (affirming "the definition of death," the same definition used in CUDDA, which "had been established by multiple organizations including the American Medical Association, the American Bar Association, the National Conference of Commissioners on Uniform State Laws, the President's Commission for the Study of Ethical Problems in Medicine and Biomedical and Behavioral Research and the American Academy of Neurology"); James L. Bernat, *The Whole-Brain Concept of Death Remains Optimum Public Policy*, 34 J.L. Med. & Ethics 35, 36 (2006) ("The practice of determining human death using brain tests has become worldwide over the past several decades. The practice is enshrined in law in all 50 states in the United States and in approximately 80 other countries . . . .").

At the same time, the court recognizes the unease with which some regard brain death. *See, e.g.*, Bernat, *supra*, at 36 (referring to a "persistent group of critics"); Seema K. Shah, *Piercing the Veil: The Limits of Brain Death as a Legal Fiction*, 48 U. Mich. J. L. Reform 301, 302 (2015) (recognizing the "tremendous value of the legal standard of brain death in some contexts" but arguing brain death is a legal fiction and should not be recognized in certain cases, including where religious and moral objections are raised); D. Alan Shewmon, *"Brainstem Death," "Brain Death" and "Death": A Critical Re-Evaluation of the Purported Equivalence*, 14 Iss. L. & Med. 125 (1998) (advocating for a definition of death that looks to more than the brain). A California Court of Appeal has suggested "[p]arents do not lose all control once their child is determined brain dead," but also expressed uncertainty whether this right was born of the common law, the Constitution, logic, or simple decency. *Dority v. Superior Court*, 145 Cal. App. 3d 273, 279–80 (1983). Ms. Fonseca has presented the declaration of Dr. Paul Byrne, M.D., who believes Israel may recover some cognitive function with time and treatment. *See generally* Byrne Decl., ECF No. 36. Dr. Myette disagrees. *See* Myette Decl. ¶ 15. On balance, a professional doubt surrounding brain death as death, legally or medically, represents a minority position. Such doubt is unlikely to render CUDDA substantively unconstitutional on its face.

C. Procedural Due Process Claim against Dr. Smith

"A procedural due process claim has two elements: deprivation of a constitutionally protected liberty or property interest and denial of adequate procedural protection." *Krainski v. Nev.* ex rel. *Bd. of Regents of Nev. Sys. of Higher Educ.*, 616 F.3d 963, 970 (9th Cir. 2010). Here, as discussed, California is alleged to have deprived Israel of life and Ms. Fonseca of her fundamental interests in the care, custody, and control of her children. These are fundamental rights and interests the Constitution protects. Ms. Fonseca still must demonstrate she is likely to succeed in showing the process provided to Israel and herself has been inadequate.

"Due process, unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances. It is compounded of history, reason, the past course of decisions." *Cafeteria & Rest. Workers Union v. McElroy*, 367 U.S. 886, 895 (1961) (citation, alteration, and quotation marks omitted). "The fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner." *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976) (citation and quotation marks omitted). What process is due generally depends on three factors: (1) "the private interest that will be affected by the official action"; (2) "the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards"; and (3) "the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." *Id.* at 335.

CUDDA and other provisions of the Health and Safety Code provide several procedural safeguards:

(1) Health & Safety Code section 7180 allows a determination of death only "in accordance with accepted medical standards."

(2) "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." Cal. Health & Safety Code § 7181.

(3) Physicians involved in the determination of death must not participate in any procedures to remove or transplant the deceased person's organs. *Id.* § 7182.

(4) "Complete patient medical records required of a health facility pursuant to regulations adopted by the department in accordance with [California Health and Safety Code] Section 1275 shall be kept, maintained, and preserved" with respect to CUDDA's requirements in the case of a brain death. *Id.* § 7183.

(5) Hospitals must "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 . . . 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." *Id.* § 1254.4(a). "[A] 'reasonably brief period' means an amount of time afforded to gather family or next of kin at the patient's bedside." *Id.* § 1254.4(b). "[I]n determining what is reasonable, a hospital shall consider the needs of other patients and prospective patients in urgent need of care." *Id.* § 1254.4(d).

(6) The hospital must "provide the patient's . . . family or next of kin, if available, with a written statement of the [policy regarding a reasonably brief period of accommodation described in section 1254.4(a)], upon request, but no later than shortly after the treating physician has determined that the potential for brain death is imminent." *Id.* § 1254.4(c)(1). "If the patient's . . . family . . . voices any special religious or cultural practices and concerns of the patient or the patient's family surrounding the issue of death by reason of irreversible cessation of all functions of the entire brain of the patient, the hospital shall make reasonable efforts to accommodate those religious and cultural practices and concerns." *Id.* § 1254.4(c)(2).

(7) Section 1254.4 provides for no private right of action, as plaintiff stresses. *Id.* § 1254.4(e). But a state court may hear evidence and review a physician's determination that brain death has occurred. *See Dority*, 145 Cal. App. 3d at 280 ("The [trial] court, after hearing the medical evidence and taking into consideration the rights of all the parties involved, found

[the patient] was dead in accordance with the California statutes and ordered withdrawal of the life-support device. The court's order was proper and appropriate.").

Ms. Fonseca is unlikely to show the available protections are inadequate. Whether a person has suffered brain death is a medical determination that should involve a doctor, as CUDDA foresees. CUDDA creates a procedure that allows a determination to be verified quickly; false positives may mean a patient in critical condition receives no care. The law requires an independent confirmation of death in the case of suspected brain death; here at least three doctors have independently determined Israel is brain dead. Doctors who make the determination of death cannot be involved in any related transplant procedures; here the doctors are not. Family may gather at a patient's bedside, and hospitals must make reasonable accommodations for the religious or moral concerns of the patient's family or next of kin. The family has been provided more than a brief period of time to gather, and the state court considered and addressed Ms. Fonseca's moral and religious concerns during the time its TRO was in effect.

In addition, although section 1254.4 creates no private right of action, a California appellate court has determined that an interested person has some recourse to judicial review. Ms. Fonseca sought and received immediate protection from the Placer County Superior Court, which entered a TRO and allowed her to present evidence and seek relief over the course of two weeks. Although Ms. Fonseca has not appealed the state court's dismissal of her case, *Dority* signals she could. At hearing, her counsel in this case -- who is not counsel in her state case – suggested that a state appeal would be burdensome or unproductive, and exclaimed that taking that route generally is a "death knell for California working class families." While the full impact of his statement is not clear to this court, nothing in the record before it supports the conclusion that full procedural due process is unavailable with respect to CUDDA.

V. RELIEF SOUGHT

Ms. Fonseca has not borne her burden to show she is likely to succeed on the merits of the claims she relies on at this stage, and she has not presented sufficiently serious

questions to justify a preliminary injunction. This conclusion is bolstered by the fact that her claims do not appear to fit with the relief she seeks.

While Ms. Fonseca requests maintenance of ventilation, she also requests a mandatory injunction. *See* First Am. Compl. ¶¶ 48 (requesting an injunction that requires Kaiser to provide nutrition to Israel); Proposed Order, ECF No. 33-1 at 3. A mandatory injunction "orders a responsible party to take action." *Garcia v. Google, Inc.*, 786 F.3d 733, 740 (9th Cir. 2015) (citation and quotation marks omitted). This type of relief "goes well beyond simply maintaining the *status quo pendente lite* and is particularly disfavored." *Id.* (citation, quotation marks, and alterations omitted). Mandatory injunctions are incompatible with doubtful cases like this one. *Id.* Moreover, it seems unlikely this court would have jurisdiction to consider the specifics of what care Israel must receive. This question, among others, was the subject of the Placer County Superior Court's orders and hearings last month. The *Rooker-Feldman* doctrine or standard preclusion rules would likely apply. *See, e.g.*, *Cooper*, 704 F.3d at 777; *cf. Exxon Mobil Corp. v. Saudi Basic Indus. Corp.*, 544 U.S. 280, 284, 292–94 (2005) (referring to independent doctrines of preclusion, stay, and dismissal that may arise in the presence of parallel state court proceedings).

As noted, it appears the court lacks subject matter jurisdiction over the § 1983 claims against Kaiser and Dr. Myette, and EMTALA does not provide a basis for enjoining Kaiser on the facts here. Dr. Smith may be the only viable defendant in this action. An order requiring Kaiser to maintain Israel's condition could not properly be issued against Dr. Smith. If indeed CUDDA is facially unconstitutional, the court could at most declare that the certificate of Israel's death is void. Kaiser and its physicians would then remain subject to other provisions of California law that are not before this court. *See, e.g.*, Cal. Prob. Code §§ 4735 ("A health care provider or health care institution 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."); *id.* § 4654 ("[Division 4.7 of the Probate Code] does not authorize or require a

health care provider or health care institution to provide health care contrary to generally accepted health care standards applicable to the health care provider or health care institution.").

While Ms. Fonseca's maternal instincts and moral position are completely understandable, the concerns reviewed here suggest she is unlikely to obtain the relief she seeks, and weigh against a preliminary injunction based on the law this court is sworn to apply and uphold.

VI. CONTINUING TEMPORARY RELIEF

To date, the TRO the court previously issued has remained in effect. *See* Order Apr. 28, 2016, ECF No. 9; Minutes, ECF No. 22; Minutes, ECF No. 45. At the May 11, 2016 hearing, Ms. Fonseca indicated she would ask the court stay the effect of an order denying her request for a preliminary injunction to allow her to seek emergency relief from the Ninth Circuit Court of Appeals. The defendants expressed no objection to this request.

"While an appeal is pending from an interlocutory order . . . that . . . denies an injunction, the court may . . . grant an injunction on terms for bond or other terms that secure the opposing party's rights." Fed. R. Civ. P. 62(c). Under this rule, the court considers generally the same factors as in the context of a temporary restraining order or preliminary injunction. *See, e.g.*, *Protect Our Water v. Flowers*, 377 F. Supp. 2d 882, 883 (E.D. Cal. 2004). Nevertheless, when a court has attempted to answer a question of first impression, and when the practical consequences of its decision suggest caution, a plaintiff's likely success on the merits may not play so central a role. *See, e.g.*, *id.*; *Yamada v. Kuramoto*, 744 F. Supp. 2d 1075, 1087 (D. Haw. 2010). And in a case such as this one, "[a]n erroneous decision. . . is not susceptible of correction." *Cruzan*, 497 U.S. at 283.

The court therefore provides that this order will not take effect, and the temporary restraining order will remain in place, until the close of business on Friday, May 20, 2016, to allow Ms. Fonseca time to seek emergency relief from the Ninth Circuit Court of Appeals.

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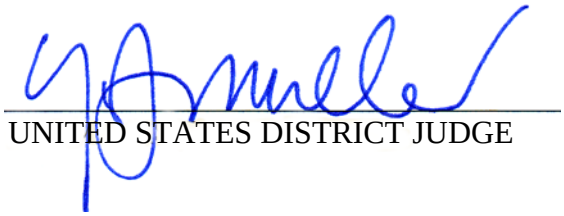
VII. CONCLUSION

The temporary restraining order currently in effect REMAINS IN PLACE until the close of business on Friday, May 20, 2016, at which point it will be dissolved. The motion for a preliminary injunction is DENIED.

This order resolves ECF Nos. 31 & 33.

IT IS SO ORDERED.

DATED: May 13, 2016.



UNITED STATES DISTRICT JUDGE