No. 17-17153

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JONEE FONSECA, an individual parent and guardian of I.S., a minor and LIFE LEGAL DEFENSE FOUNDATION,
Plaintiffs-Appellants,

v.

KAREN SMITH, M.D. in her official capacity as Director of the California Department of Public Health,
Defendant-Appellee.

APPEAL FROM THE U.S. DISTRICT COURT FOR THE EASTERN DISTRICT OF CALIFORNIA
KIMBERLY J. MUELLER, DISTRICT JUDGE • CASE NO. 2:16-CV-00889-KJM-EFB

BRIEF OF COMPASSION & CHOICES AS *AMICUS CURIAE* IN SUPPORT OF APPELLEE KAREN SMITH, M.D. AND SUPPORTING AFFIRMANCE OF THE JUDGMENT BELOW

LAW OFFICE OF JON B. EISENBERG
*JON B. EISENBERG
509 TUCKER STREET
HEALDSBURG, CALIFORNIA 95448
(707) 395-0111
JON@EISENBERGAPPEALS.COM

HANSON BRIDGETT LLP
ADAM W. HOFMANN
JOSEPHINE K. MASON
425 MARKET STREET, 26TH FLOOR
SAN FRANCISCO, CA 94105
(415) 995-5099
AHOFMANN@HANSONBRIDGETT.COM
JMASON@HANSONBRIDGETT.COM

COMPASSION & CHOICES
KEVIN DÍAZ
JONATHAN PATTERSON
4224 NE HALSEY STREET
PORTLAND, OR 97213
(503) 943-6534
KDIAZ@COMPASSIONANDCHOICES.ORG
JPATTERSON@COMPASSIONANDCHOICES.ORG

COUNSEL FOR *AMICUS CURIAE*
COMPASSION & CHOICES

FILED WITH CONSENT OF ALL PARTIES PURSUANT TO FEDERAL RULE OF APPELLATE PROCEDURE 29(A)

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29(a)(4)(A) of the Federal Rules of Appellate Procedure, Compassion & Choices makes the following disclosures:

1. For non-governmental corporate parties please list all parent corporations: None.

2. For non-governmental corporate parties please list all publicly held companies that hold 10% or more of the party's stock: None.

April 18, 2018

LAW OFFICE OF JON B. EISENBERG
JON B. EISENBERG

HANSON BRIDGETT LLP
ADAM W. HOFMANN
JOSEPHINE K. MASON

COMPASSION & CHOICES
KEVIN DÍAZ
JONATHAN PATTERSON

By: s/ Josephine K. Mason

Counsel for *Amicus Curiae*
COMPASSION & CHOICES

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

INTRODUCTION AND INTEREST OF *AMICUS CURIAE*[1]

Compassion & Choices, with more than 450,000 supporters, is the nation's oldest, largest, and most active nonprofit organization committed to improving care and decision-making at the end of life. Compassion & Choices aims to ensure that individuals nearing the end of life understand the benefits and burdens of all feasible treatment options, that treatment decisions are fully respected, that healthcare reflects a person's values and priorities for life's final chapter, and that the nature and quality of healthcare keeps pace with advances in medical technology and biomedical ethics.

Compassion & Choices offers free consultation, planning resources, referrals, assistance with advance directives, and support throughout the country through its End of Life Consultation Program. Advocating at the state and federal levels, Compassion & Choices pursues policies that empower individuals in relation to their healthcare decisions and, if

[1] No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution to fund the preparation or submission of this brief. No person or entity other than *amicus curiae* and its counsel made a monetary contribution to the preparation or submission of this brief. All parties have consented to the filing of this *amicus* brief.

necessary, litigates or participates as *amicus curiae* to achieve better care and access to a full range of end-of-life options.

Compassion & Choices submits that, in adjudicating this appeal, the Court should defer to the legislative factual finding and policy choice that underpin the California Uniform Determination of Death Act (the "Act"). The finding of legislative fact is that modern advances in medical technology have created a need to modernize the legal definition of death to include the irreversible cessation of all brain functions. The policy choice is that determinations of death are to be made by healthcare professionals in accordance with accepted medical standards—not by the State.

Compassion & Choices respectfully urges the Court to give appropriate deference to this legislative factual finding and policy choice. The Act is informed by decades of painstaking medical and bioethical research, and codifies modern medical understanding and practices regarding determinations of death. The Act also carries out important policy goals. Patients' wishes play a fundamental role in end-of-life healthcare decision-making; overturning the legislative guidance that

has codified current medical standards would ultimately serve to erode the rights of patients and their families.

ARGUMENT

I. FOR NEARLY HALF A CENTURY, DEATH HAS BEEN DEFINED TO INCLUDE PERMANENT BRAIN DEATH.

Defining death is crucial—to those for whom it is "one short sleep past,"[2] to their families, and to their physicians. Certainty and uniformity in the determination of death helps families through the process of implementing their loved ones' wishes and provides a legal framework to guide treating physicians.

The Act defines death as "either (1) irreversible cessation of circulatory and respiratory functions, or (2) irreversible cessation of all functions of the entire brain, including the brain stem[.]" Cal. Health & Safety Code § 7180(a). The Act was enacted in 1982 pursuant to the Uniform Determination of Death Act (the "Model Code"). Req. Jud. Notice, Exs. A & B. The purpose of the Model Code and the Act was to update laws defining death to reflect modern "accepted biomedical

[2] John Donne, *Death, be not proud (Holy Sonnet 10).*

practice" and to increase predictability and uniformity among the states' laws. *Id.*; *see* Ad Hoc Comm. of the Harvard Med. Sch. to Examine the Definition of Brain Death, *A Definition of Irreversible Coma*, 205 J. Am. Med. Ass'n 337, 338-40 (1968) ("Harvard Committee"); Ben Nipper, *Legislating Death: A Review and Proposed Refinement of the Uniform Determination of Death Act*, 17 Hous. J. Health L. & Pol'y 429, 432-33, 444-45 (2017).

The modern consensus that brain death is actual death derived from years of painstaking study and recommendations by dedicated medical and legal researchers. *See, e.g.*, Nipper, *supra*, at 446; Alexander Morgan Capron & Leon R. Kass, *A Statutory Definition of the Standards for Determining Human Death: An Appraisal and a Proposal*, 121 U. Pa. L. Rev. 87, 110 (1972); President's Comm'n for the Study of Ethical Problems in Med. & Biomed. & Behavioral Research, *Defining Death: A Report on the Medical, Legal and Ethical Issues in the Determination of Death* (July 1981) ("President's Commission").

By the 1960s and 1970s, medical technology had advanced to enable physicians to detect and monitor brain activity in humans. Nipper, *supra*, at 432 & n.13; Harvard Committee, *supra*, at 337. The Harvard

Medical School Ad Hoc Committee recommended that brain death be recognized based on advances in medical technology already in place in 1968. Harvard Committee, *supra*, at 337-38. As the Harvard Committee recognized, a comatose individual with no discernible central nervous system activity and no possibility of recovering is dead. *Id.* at 337. Further, the development of technologies that can artificially sustain a heartbeat and respiratory function have the potential to "mask" that death has already occurred. *Id.*; *see* President's Commission, *supra*, at 33. Due to these biomedical advances—and to increase uniformity among state laws—in 1980 the Model Code was proposed, with joint support from the American Medical Association, the American Bar Association, and the National Conference of Commissioners on Uniform State Laws. Req. Jud. Notice, Ex. A at 8-9, Ex. B. at 1-2.

In California, the notion of brain death predates even the Model Code. The State's definition of death to include brain death dates back to 1974. *See Barber v. Superior Court (People)*, 147 Cal. App. 3d 1006, 1013 (1983); Req. Jud. Notice Ex. A at 1. In 1982, in adopting the Model Code, California *added* to the definition of death—which already included brain death—the additional option for physicians to declare

death based on the "irreversible cessation of circulatory and respiratory functions." Req. Jud. Notice, Ex. A at 1. The California Legislature adopted the Model Code "to effectuate its general purpose to make uniform the law with respect to the subject of [the Act] among states enacting it." Cal. Health & Safety Code § 7180(b).

Despite the decades of painstaking medical and bioethical research that have led up to the Act, Appellants seek to challenge California's definition of "death," asking that this Court second-guess the Legislature's judgment. As the district court and Appellees' Brief explain, Appellants' challenge is not justiciable, and the judgment should be affirmed. Should this Court consider the merits, it should decline Appellants' request to substitute the Legislature's judgment and to invalidate California's longstanding definition of death.

II. THE COURT SHOULD DEFER TO THE SOUND LEGISLATIVE FACTUAL FINDING THAT UNDERPINS THE ACT, WHICH CONFORMS TO MODERN MEDICAL SCIENCE AND BIOETHICS.

The centerpiece of Appellants' third amended complaint is an allegation that the Act's "definition of brain death is fallacious." 2 ER 129. The third amended complaint asserts that death should be defined

only as "the cessation of biological functioning." 2 ER 132; *see also* Br. of App. 11 (assertion that the Act's definition of brain death is "inadequate").

As the Appellee's Answering Brief notes, this allegation—that the Act provides an incorrect definition of death—is a substantive due process claim. Answ. Br. 49. Appellee is right in asserting that this assertion fails to state a claim as a matter of law. *Id.* The Act's brain death provision arises from a finding of *legislative fact* to which the courts should defer—that modern advances in medical technology have created a need to modernize the legal definition of death to include the irreversible cessation of all brain functions. This finding was based on a body of research and careful study which revealed that modern medical technology that can artificially sustain a heartbeat and respiratory function can also "mask" that death has already occurred. Harvard Committee, *supra*, at 337; *see also, e.g.*, President's Commission, *supra*, at 33.

"States are not required to convince the courts of the correctness of their legislative judgments. Rather, 'those challenging the legislative judgment must convince the court that the legislative facts on which the

classification is apparently based could not reasonably be conceived to be true by the government decisionmaker.' " *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 464 (1981) (quoting *Vance v. Bradley*, 440 U.S. 93, 111 (1979)); *accord Spoklie v. Montana*, 411 F.3d 1051, 1059 (9th Cir. 2005). "So long as the question is 'at least debatable,' the courts may not substitute their evaluation of legislative facts for that of the legislature." *In re Lara*, 731 F.2d 1455, 1461 n.9 (9th Cir. 1984) (quoting *Clover Leaf Creamery*, 449 U.S. at 464). "Where there was evidence before the legislature reasonably supporting the classification, litigants may not procure invalidation of the legislation merely by tendering evidence in court that the legislature was mistaken." *Clover Leaf Creamery*, 449 U.S. at 464; *accord Lara*, 731 F.2d at 1461 n.9.

Here, under any standard of review—let alone the highly deferential *Clover Leaf* test—decades of solid science support the Act's definition of death. As discussed above in Section I, the California Legislature adopted the Model Code "to effectuate its general purpose to make uniform the law with respect to the subject of [the Act] among states enacting it." Cal. Health & Safety Code § 7180(b). The legislative fact-finding underlying the Act is set forth in a Prefatory Note to the

Model Code as promulgated by the National Conference of Commissioners on Uniform State Laws, which explains:

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

Req. Jud. Notice, Ex. B at 3, Uniform Determination of Death Act, Prefatory Note (Nat. Conf. of Comm'rs on Unif. State Acts 1980) (emphasis added) ("Prefatory Note").

The Act's legislative history mirrors this fact-finding. *See* Req. Jud. Notice, Ex. A at 3, Author's Stmt. for Sen. Bill 2004 ("The Act has been necessitated as a result of recent advances in life saving technology which have led to a potential disparity between current and accepted biomedical practice and existing law."); *id.* at 4, Sen. Com. on Health & Welfare, Staff Analysis of Sen. Bill No. 2004 (Beverly) as introduced March 22, 1982

("respiratory and cardiac functions can nowadays be perpetuated through artificial support").

Accordingly, the first of the Act's two definitions of death "codifies the existing common law basis for determining death—total failure of the cardiorespiratory system," and the second definition "extends the common law to include the new procedures for determination of death based upon irreversible loss of all brain functions." Req. Jud. Notice, Ex. B at 3, Prefatory Note. Death may be determined under the second definition "[w]hen artificial means of support preclude a determination under" the first definition. *Id.*

Thus, the legislative factual predicate for the Act's brain death provision is the rise of "modern advances in life-saving technology" that make it possible for a person to be "artificially supported for respiration and circulation after all brain functions cease irreversibly," which has created a need to bring the legal definition of death in line with "accepted biomedical practice." Req. Jud. Notice, Ex. B at 3, Prefatory Note. The Act's definition of death is based on solid science, spanning from the Harvard Committee and Presidential Commission's blue-ribbon panels to the Model Code, supported by the American Medical Association, the

American Bar Association, and the National Conference of Commissioners on Uniform State Laws. Req. Jud. Notice, Ex. A at 8-9, Ex. B at 1-2.

Appellants' preferred definition of death as simply "the cessation of biological functioning," 2 ER 132, is the traditional common law definition—"the cessation of all vital functions." *See, e.g.*, Nipper, *supra*, at 431-33 (tracing common law definitions of death). Appellants thus take issue with the legislative fact-finding underlying the Act—that modern advances in medical technology have created a need for a statutory enhancement of the common law definition.

But Appellants cannot demonstrate that this legislative finding of fact "could not reasonably be conceived to be true by the government decisionmaker." *Clover Leaf Creamery*, 449 U.S. at 464. Appellants can do no more than demonstrate that the question is "at least debatable," *id.*, based on Appellant Jonee Fonseca's personal religious conviction as "a devout Christian" who "believes in the healing power of God" and "believes that life does not end until the cessation of biological functioning." 2 ER 117-18 (third amended complaint ¶ 3). Ms. Fonseca's personal religious conviction cannot, however, support judicial

invalidation of the Act. Appellants' argument is simply that in adopting the Model Code's brain death provision, the California Legislature was, as a matter of religious dogma, "mistaken." *Clover Leaf Creamery*, 449 U.S. at 464. This argument fails because reasonable minds—both religious and secular—can and do differ in this regard.[3]

III. THE COURT SHOULD DEFER TO THE LEGISLATURE'S SOUND POLICY JUDGMENT THAT DETERMINATIONS OF DEATH SHOULD BE MADE BY HEALTHCARE PROFESSIONALS IN ACCORDANCE WITH ACCEPTED MEDICAL STANDARDS.

At bottom, Appellants' challenge to the Act is a policy disagreement with the Legislature's recognition of brain death in any circumstance. However, the Act merely accommodates multiple, medically recognized methods of declaring death; it expressly leaves the determination of death in any given case to the sound judgment of medical professionals. The Court should defer to this well-supported and well-balanced legislative policy judgment.

---

[3] For example, as the Harvard Committee observed, Pope Pius XII, in a 1957 address, concluded that verification of the moment of death can be determined, if at all, only by a physician; and that it was outside of the province of the Church to issue guidance on this question. Harvard Committee, *supra*, at 340 & n.1, citing Pius XII: *The Prolongation of Life, Pope Speaks* 4:393-98, No. 4 (1958).

The Act states: "A determination of death must be made in accordance with accepted medical standards." Cal. Health & Safety Code § 7180(a). Thus, the Act puts determinations of death in the hands of healthcare professionals, not the State. The Prefatory Note to the Model Code explains:

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

Req. Jud. Notice, Ex. B at 4, Prefatory Note.

The district court concluded that (1) the determination of death is left to the discretion of "third-party doctors implementing standards that the statute itself does not identify[,]" and (2) "Fonseca has not shown that a doctor's declaration of death, independently confirmed, necessarily leads to the withdrawal of life support." 1 ER 11-12. Thus, the district court concluded, the element of causation for purposes of Article III standing is absent here because the removal of life support turns on " 'independent actions of third parties that break the causal link' " between the Act and the purported injury. 1 ER 12 (quoting *Ass'n of Pub.*

Agency Customers v. Bonneville Power Admin., 733 F.3d 939, 953 (9th Cir. 2013)). Appellants challenge this conclusion on the ground that it "creates a perverse incentive for the State to take a hands-off approach when it comes to protecting patients." Br. of App. 16. According to Appellants, "the State occupies a central role in end-of-life decision-making." *Id.* at 12 (initial capitalization omitted).

The California Legislature, however, has made a policy judgment that patients and physicians—and not the State—should be at the helm when it comes to end-of-life decision-making. While State law defines the contours of what options are available at the end of life—including how death may be determined—the Act itself purposefully takes a "hands-off approach," Br. of App. 12, by putting the determination of death in the hands of healthcare professionals. *See* Cal. Health & Safety Code § 7180(a) (leaving determination of death to physicians to be made "in accordance with accepted medical standards"). Similarly, in the California Health Care Decisions Law ("HCDL") (Cal. Probate Code § 4600 *et seq.*), which governs surrogate exercise of the right to refuse medical treatment, the California Legislature has declared as a matter of policy that "[i]n the absence of controversy, a court is normally not the

proper forum in which to make health care decisions, including decisions regarding life-sustaining treatment." Cal. Probate Code § 4650(c). Thus, "[a] health care decision made by a surrogate for a patient is effective without judicial approval." *Id.* § 4750(c). The commission that drafted the HCDL explained that "judicial involvement in health care decision making is disfavored." Cal. Law Revision Com. to Cal. Probate Code § 4750 (1999).

The decisional law of California is in accord. In cases involving the right to refuse medical treatment, California's state appellate courts have repeatedly admonished that judges should not assume the role of healthcare decision maker. "Judicial intervention in 'right to die' cases should be minimal. 'Courts are not the proper place to resolve the agonizing personal problems that underlie these cases. Our legal system cannot replace the more intimate struggle that must be borne by the patient, those caring for the patient, and those who care about the patient.'" *Conservatorship of Morrison*, 206 Cal. App. 3d 304, 312 (1988) (quoting *In re Jobes*, 529 A.2d 434, 451 (N.J. 1987)); *accord Conservatorship of Drabick*, 200 Cal. App. 3d 185, 198-200 (1988); *Barber*, 147 Cal. App. 3d at 1021-22. Judges will not second-guess the

judgment of medical professionals when it comes to end-of-life decision-making.

These are *policy* choices to which the federal courts traditionally defer. The Supreme Court has observed that "our tradition of deferring to state legislatures in making and implementing such important policy decisions is longstanding." *Ewing v. California*, 538 U.S. 11, 24 (2003). "We do not sit as a 'superlegislature' to second-guess these policy choices." *Id.* at 28. "It is enough" that the state legislature have a "reasonable basis" for making its choice. *Id.* Not only does Appellants' challenge not belong in the courts, it certainly does not belong in the federal courts—especially when the state court has already spoken to the issue in this very case and rejected Appellants' position. *See* Answ. Br. at 36-40.

Accordingly, this Court must defer to the legislative policy judgment that determinations of death are to be made by healthcare professionals "in accordance with accepted medical standards." Cal. Health & Safety Code § 7180(a).

IV. CALIFORNIA LAW PROTECTS THE DIGNITY OF PATIENTS IN THE EVENT OF BRAIN DEATH.

Appellants frame their assault on the Act as an effort to restore Israel Stinson's "dignity," Br. of App. 1, 30-31, 36, and "to save Israel and other vulnerable patients from forcible withdrawal of life support," *id.* at 26. But the Act itself has a narrow focus: medical declarations of death. The Model Code's drafters explained:

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

Req. Jud. Notice, Ex. B, Prefatory Note 3.

The Act simply expands the traditional legal definition of death to account for modern advances in medical technology. It is neutral with regard to palliative care, medical aid-in-dying, withdrawal of life support, and similar end-of-life decision-making, which in California is governed by the HCDL. *See* Answ. Br. 59 (the Act "does not dictate what medical treatment should be provided or whether life-sustaining support should be removed").

While the focus of the Act is narrow—medical determination of death—other provisions of California law protect the dignity of individuals and their families in the event of a physician's declaration of brain death. California hospitals must provide a "reasonably brief period of accommodation" for families and next of kin to gather at the bedside of a decedent. Cal. Health & Safety Code § 1254.4(a). And if a surrogate decision-maker or family member voices religious or cultural concerns about brain death, the hospital must "make reasonable efforts to accommodate those religious and cultural practices and concerns." *Id.* § 1254.4(c)(2).

Rather than dictate any particular method of determining death, the Act offers a range of methods of determining death that is consistent with accepted modern medical practice and accommodates multiple viewpoints as to what it means to be allowed to pass away peacefully and with dignity. The Act represents years of thoughtful and balanced consideration by the Legislature and the Model Code's drafters. It should be upheld.

CONCLUSION

Amicus curiae respectfully requests that the Court affirm the district court's judgment.

April 18, 2018 By: s/ Josephine K. Mason

LAW OFFICE OF JON B. EISENBERG
JON B. EISENBERG

HANSON BRIDGETT LLP
ADAM W. HOFMANN
JOSEPHINE K. MASON

COMPASSION & CHOICES
KEVIN DIÁZ
JONATHAN PATTERSON

Counsel for *Amicus Curiae*
COMPASSION & CHOICES

CERTIFICATE OF SERVICE

In accordance with Federal Rule of Appellate Procedure 25, I hereby certify that I electronically filed this Brief with the Clerk of Court for the U.S. Court of Appeals for the Ninth Circuit by using the CM/ECF system on April 18, 2018. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

Dated: April 18, 2018 By: s/ Josephine K. Mason

LAW OFFICE OF JON B. EISENBERG
JON B. EISENBERG

HANSON BRIDGETT LLP
ADAM W. HOFMANN
JOSEPHINE K. MASON

COMPASSION & CHOICES
KEVIN DÍAZ
JONATHAN PATTERSON

Counsel for *Amicus Curiae*
COMPASSION & CHOICES

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the undersigned counsel certifies that this Brief: (i) complies with the typeface requirements of Rule 32(a)(5) and the type style requirements of Rule 32(a)(6) because it has been prepared using Microsoft Word and is set in Century Schoolbook font in a size equivalent to 14 points or larger; and (ii) complies with the length requirement of Rule 27(d)(2) because it is 3503 words in length.

Dated: April 18, 2018 By: s/ Josephine K. Mason

LAW OFFICE OF JON B. EISENBERG
JON B. EISENBERG

HANSON BRIDGETT LLP
ADAM W. HOFMANN
JOSEPHINE K. MASON

COMPASSION & CHOICES
KEVIN DÍAZ
JONATHAN PATTERSON

Counsel for *Amicus Curiae*
COMPASSION & CHOICES