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KAISER PERMANENTE MEDICAL CENTER
ROSEVILLE (a non-legal entity) and DR. MICHAEL MYETTE

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

JONEE FONSECA, Plaintiff, v. KAISER PERMANENTE MEDICAL CENTER ROSEVILLE, DR. MICHAEL MYETTE M.D., and DOES 1 THROUGH 10, INCLUSIVE, Defendants.	Case No: 2:16-CV-00889-KJM-EFB **KAISER ROSEVILLE AND DR. MICHAEL MYETTE'S OPPOSITION TO REQUEST FOR TEMPORARY RESTRAINING ORDER AND FURTHER INJUNCTIVE RELIEF** Date: May 2, 2016 Time: 1:30 p.m. Courtroom: 3 Hon. Kimberly J. Mueller Complaint Filed: April 28, 2016

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I. INTRODUCTION

In the universe of tragedies a parent can experience during their lifetime, perhaps no event is more tragic than the death of a child. Kaiser Roseville (hereinafter the use of "Kaiser Roseville" refers to the specific Kaiser Permanente medical facility where Israel was transferred) and its physicians, nurses and other caregivers understand and sympathize with the severity of the plaintiff Jonee Fonseca's heartbreaking circumstances. However, physicians must make medical determinations of when death occurs. In doing so, they must follow certain procedures and make certain determinations under California Health & Safety Code section 7180 *et seq.* (hereinafter in places referred to as the California Uniform Determination of Death Act or "CUDDA") as passed by the California Legislature. [1]

Following a series of medical events and treatment that occurred outside of Kaiser Roseville at other medical institutions, including a finding of brain death by another hospital, Kaiser Roseville agreed to accept the transfer of Israel from the University of California Davis Medical Center in Sacramento ("UCD Medical Center"). The purpose of the transfer was for Kaiser Roseville to further evaluate Israel and to provide independent confirmation that Israel experienced brain death as defined under CUDDA and the Guidelines for the Determination of Brain Death in Infants and Children (hereinafter referred to as "Guidelines"). [2] On April 8, 2016, prior to the transfer, UCD Medical Center made its own determination that Israel experienced brain death.

CUDDA provides a set of statutory rules created by the California Legislature for determining when an individual is medically deceased. Kaiser Roseville followed the procedures under CUDDA. The issue of whether the rules were correctly followed was fully litigated in Placer County Superior Court. On April 29, 2016, after multiple hearings and providing plaintiff and her legal team with two weeks to gather and present evidence, the trial court ruled there was no evidence the doctors and caregivers at Kaiser Roseville failed to comply with CUDDA and the Guidelines in

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[1] The determination of death by neurological criteria, e.g., "brain death", has been determined toconstitute death in all jurisdictions in the United States and in most other developed countries. *See* J.L. Bernat, The Whole-Brain Concept of Death Remains Optimum Public Policy, 34(1) J.L. Med. & Ethics 35-43 (2006); D. Gardner, *et al.*, International Perspective on the Diagnosis of Death, 108 British J. Anesthesia i14-i28 (2012).

[2] See Nakagawa, TA. *Guidelines for the Determination of Brain Death in Infants and Children: An Update of the 1987 Task Force Recommendations –Executive Summary*, Annals of Neurology, 2012, Vol. 71, pp. 573-585.

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determining that Israel had experienced brain death. In fact, the record shows that during the two week period and over the course of multiple court hearings, plaintiff did not present a single live witness, and did not present a physician capable of conducting an independent evaluation of Israel consistent with accepted medical standards.[3] Nor did plaintiff direct the trial court's attention to any mistake or lapse in following accepted medical standards by the doctors at Kaiser Roseville.[4] (*See Dority v. Superior Ct.* (1983) 145 Cal.App.3d 273 [the jurisdiction of a California Superior Court "can be invoked upon a sufficient showing that it is reasonably probable that a mistake has been made in the diagnosis of brain death or where the diagnosis was not made in accord with accepted medical standards."] The trial court's ruling found that "Health and Safety Code sections 7080 and 7181 have been complied with" by Israel's medical providers in concluding that Israel experienced brain death. Plaintiff now seeks further relief on these issues in federal court.

II. ISSUES PRESENTED

Here, plaintiff does not appear to be attempting to relitigate the final determination that was made by the state court on April 29, 2016; namely, that Kaiser Roseville's physicians and caregivers complied with CUDDA and the Guidelines in determining that Israel experienced brain death. Although plaintiff's papers are not a model of clarity, the primary argument is that the United States Constitution, in particular the Free Exercise of Religion Clause of the First Amendment, mandates a religious exemption to the determination of brain death under CUDDA. Although this appears to be an issue of first impression, controlling legal authority analyzing the narrow scope of the free exercise clause as it relates to invalidating a facially neutral state law compels a finding that CUDDA is constitutional on its face and it serves a legitimate government interest in regulating medical treatment and having consistency in the decision as to when individuals in California can be declared

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[3] The only "medical" evidence presented by plaintiff in the state court action was in the form of a declaration from Dr. Paul Byrne, a retired pediatrician and neonatologist. This same declaration was submitted by plaintiff as part of the papers she filed in federal court. Dr. Byrne is not licensed to practice in the State of California and he has no specialty in neurology. Additional, his opinions, as expressed in Paragraphs 14 and 15, are really that California law iswrong because he believes there can be no finding of death, including brain death, if a patient still breaths and has a beating heart, even though these functions are being sustained by artificial means like they are in Israel's case.

[4] The record shows that Kaiser Roseville was ready to provide medical privileges at its facility to an appropriately qualified physician identified by plaintiff. The record also shows that KaiserRoseville worked with plaintiff and her attorneys in putting the staffing in place to assist in transferring Israel to a medical facility that agreed to accept Israel. Plaintiff was apparently unable to obtain confirmation from an appropriate medical facility that it would accept Israel.

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legally dead. There is also no violation of plaintiff's or Israel's constitutional right to privacy following a determination by physicians and the court that he experienced brain death. Israel also does not suffer from a "disability" that requires some type of an accommodation by Kaiser Roseville.

III. PROCEDURAL AND FACTUAL HISTORY

A. Chronology of medical treatment

As stated in the Complaint filed in the United States District Court for the Eastern District of California, Israel presented to the emergency room at Mercy Hospital on April 1, 2016. Israel's medical record documents that less than four months prior to this most recent emergency admission, Israel presented to Kaiser Vacaville's Emergency Department with a severe asthma attack. In January 2016, the parents and Child Protective Services were informed that Israel's medical history and the failure to comply with medical recommendations were weakening Israel's lung capacity so much so that Israel might, at some point, not be able to recover from a severe bronchospasm event.

Given the severity of his condition on April 1, 2016, Mercy Hospital transferred Israel to the Pediatric Intensive Care Unit at UCD Medical Center. While undergoing care at UCD Medical Center, Israel suffered a severe bronchospasm, which progressed to a cardiac arrest. While Israel's caregivers struggled to save his life, his lungs were so weak, and his health so poor, that he could not adequately respond to medical treatment. After more than 40 minutes of CPR, UC Davis physicians managed to restore cardio-pulmonary functioning with mechanical support. Given the length of time Israel was without oxygen, UC Davis physicians were concerned the anoxic episode had resulted in brain death. The physicians performed an examination to determine his neurological status. The results were consistent with brain death. In addition, a nuclear medicine flow study showed no evidence of cerebral profusion. Israel could not be saved, despite heroic efforts by his many caregivers at UCD Medical Center.

UC Davis physicians advised Israel's parents they intended to perform a second brain death examination. They explained an unfavorable result in a second brain death examination would result in Israel being declared legally dead. Prior to UC Davis physicians performing a second brain death

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examination, Israel's parents arranged to have him, while on mechanical cardio-pulmonary support, transferred to Kaiser Roseville for a second opinion.

On April 12, 2016, Kaiser Roseville admitted Israel with his parent's consent to perform a second brain death examination. That evening, Kaiser Roseville performed a brain death examination, which included a clinical exam, neurological evaluation and apnea test. The results indicated brain death.[5] On April 14, 2016, the physicians at the hospital performed yet another examination, Israel's third determination for brain death. The third examination once again confirmed brain death. In accordance with well-accepted medical standards, a declaration of death was issued.[6] The family was notified, and the "reasonably brief period of accommodation" under Health and Safety Code section 1254.4, which is intended to allow the family and next of kin time to gather at the patient's bedside, began.

Maintaining Israel's organ functions requires constant monitoring and adjustment to his medications, glucose, salt, water and adrenaline. While this constant monitoring and adjustment may be sufficient to delay (but not prevent) the inevitable decay of his organs' function, it is not possible to replicate all the complex chemical, hormonal and other processes that a live, functioning brain regulates and controls. Through the state action and now the federal case, Kaiser Roseville continues to provide extraordinary efforts to maintain Israel's cardio-pulmonary support, even though there is still no evidence to question the determination of brain death made by physicians at UCD Medical Center and at Kaiser Roseville. As plaintiff's counsel advised the state court on several occasions, plaintiff and the family recognize the efforts that have been taken by Kaiser Roseville in this very difficult situation and they are appreciative of those efforts and the care that has been provided by the doctors and staff at Kaiser Roseville.

B. The filing of the state court action

Shortly after Israel was declared brain dead on April 14, 2016, plaintiff petitioned the

[5] Sedative medication was last administered on April 2, 2016.

[6] Israel met the clinical criteria for brain death as laid out and accepted by the medical community, including the: 1) Pediatric Section of the Society of Critical Care Medicine, Mount Prospect, IL; 2) Section on Critical Care Medicine of the American Academy of Pediatrics, Elk Grove Village, IL; 3) Section on Neurology of the American Academy of Pediatrics, Elk Grove Village, IL; and 4) Child Neurology Society, St. Paul, MN.

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Superior Court in Placer County for a temporary restraining order preventing Kaiser Roseville from withdrawing cardio-pulmonary support. Plaintiff also requested time for an independent neurological exam and requested that Kaiser Roseville maintain the level of care Israel had been receiving prior to being declared dead. The Hon. Alan V. Pineschi granted plaintiff's request for a temporary restraining order and assigned the matter to The Hon. Michael W. Jones for hearing on April 15, 2016. The order required Kaiser Roseville to continue providing cardio-pulmonary support and to continue providing medications currently administered, with necessary adjustments to maintain his condition.

On April 15, 2016, the parties, including plaintiff and Nathaniel Stinson, Israel's father, appeared for the hearing in state court. Plaintiff was represented by Alexandra Snyder. Plaintiff requested a two-week continuance of the temporary restraining order in order to have an independent brain death determination performed. Counsel represented that petitioners were being advised by an out of state physician who would find a physician licensed in California to perform an independent examination. During the proceeding, Kaiser Roseville offered testimony from Dr. Myette, Israel's attending physician. Dr. Myette described Israel's clinical course starting from April 1, 2016. He also explained that a determination of brain death in children is a clinical diagnosis based on the absence of neurologic function. The Guidelines recommend two examinations, including apnea testing, with each examination separated by an observation period.

The neurological examination described by Dr. Myette involves a finding of complete loss of consciousness, vocalization, and volitional activities. The patient must lack evidence of responsiveness with an absence of eye opening or moving in response to noxious stimulant.[7] The examination also assesses for the loss of all brainstem reflexes including: no response by the pupils to light, the absence of movement of bulbar musculature including facial and oropharyngeal muscles, no grimacing or facial movements in response to deep pressure on the condyles and supraorbital ridge, the absence of gag, cough, sucking and rooting reflex, the absence of corneal reflexes, and the

[7] Even in brain death, certain non-purposeful muscular movements may occur. These movements do not negate the diagnosis of brain death. Plaintiff has not identified any California licensed physician who will provide competent medical testimony to the contrary. No such testimony or evidence was provided in the state court case.

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absence of oculovestibular reflexes. The apnea test measures the existence or absence of a patient's breathing drive (the ability to draw a breath) by challenging the respiratory system with CO2.

Taken together, the clinical evaluation, neurological examination and apnea test evaluate for brain death. The neurological examination should be performed by different attending physicians. The apnea test may be performed by the same physician. After listening to Dr. Myette and giving plaintiff the opportunity to present any evidence or testimony in support of her case, neither of which was done, the court issued an order continuing the restraining order for one week to April 22, 2016. The additional time was to provide plaintiff with an opportunity to have an independent examination performed.

On April 22, 2016, the parties appeared for the continued hearing on the temporary restraining order. Plaintiff's counsel advised that the family intended to transfer Israel to Sacred Heart Medical Center in Spokane, Washington. To facilitate the transfer, the parties entered into a detailed stipulation, which the court incorporated into an order. The restraining order and related conditions were to stay in effect until April 27, 2016. The parties agreed and were ordered to work together to facilitate the transfer, which they did. Ultimately, Sacred Heart declined Israel's admission. Israel continued to remain at Kaiser Roseville.

On April 27, 2016, the parties appeared for yet another hearing on the temporary restraining order. Plaintiff's counsel requested a continuance of two more weeks to continue her efforts to find a suitable facility to transfer Israel to and to find a physician who would perform another brain death evaluation. Plaintiff also requested that Kaiser Roseville be ordered to install a percutaneous endoscopic gastrostomy tube or "PEG tube" and a tracheostomy tube, upon the representation that it would help to facilitate transfer to another facility or to home care. Plaintiff only provided declarations from Dr. Byrne (see ft. nt. 3) and a critical care coordinator to support her request for an additional continuance. The court found that plaintiff had failed to present competent medical evidence showing a mistake in the determination of brain death or a failure to use accepted medical standards in making that determination. The court also denied plaintiff's request for an order directing physicians at Kaiser Roseville to insert a PEG tube or a tracheostomy tube. The court

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ordered that the restraining order would remain in effect until April 29, 2016, in order to fulfill Kaiser Roseville's obligation to provide the family with a reasonably brief period of time under Health & Safety Code section 1254.4 to gather at Israel's bedside.

On April 28, 2016, plaintiff filed her lawsuit in federal court with a request for a temporary restraining order. Pursuant to plaintiff's ex parte request, The Hon. Troy Nunley issued a temporary restraining order and set a hearing for May 1, 2016.

On April 29, 2016, the parties appeared in state court once again. At this final hearing, the court dissolved the temporary restraining order issued on April 27, 2016 and ruled that "Health and Safety Code sections 7180 and 7181 have been complied with" by Kaiser Roseville and its physicians. The determination of brain death that was challenged by plaintiff and supported by the state court is the only medical determination of brain death relating to Israel. The determinations made by UCD Medical Center and Kaiser Roseville both still stand. To the extent plaintiff believes the trial court erred in making this determination, the remedy is to take a direct appeal in state court of the trial court's decision. Kaiser Roseville is not aware of any appeal having been filed. Additionally, plaintiff did not make a request of the trial court at the hearing on April 29th that the court stay dissolving its restraining order for a relatively brief period of time so that plaintiff could file an appeal in state court and make a request that the court of appeal keep the restraining order in place until the appeal could be heard on the merits. Nor did they ever present a competent expert to perform another examination.

IV. LEGAL ANALYSIS

A. Plaintiff's claims are not asserted against the right legal party since Kaiser Roseville and Dr. Myette are not state or government actors that have allegedly violated plaintiff's constitutional rights.

Plaintiff only named Kaiser Permanente Medical Center Roseville (which is not a legal entity) and Dr. Michael Myette in her lawsuit.[8] Although plaintiff makes a vague allegation in Paragraph 4 of her complaint that "KPRMC receives funding from the state and federal government

[8] Plaintiff also failed to provide notice to the Attorney General of the State of California, thereby prejudicing the State's right to intervene and defend plaintiff's Constitutional attack on CUDDA. See local rule 132, United State District Court, Eastern District of California; 28 USC section 2403; and Federal Rules of Civil Procedure, rule 5.1

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which is used to directly and indirectly provide healthcare services to individuals including but not limited to Israel Stinson," this general statement does not come close to establishing that Kaiser Roseville is a state or government entity against whom a lawsuit for an alleged violation of plaintiff's or Israel's Constitutional rights can be asserted. With respect to Dr. Myette, there is no allegation that he is a state actor. *See Shaw v. Delta Airlines*, 463 U.S. 85, 96 n.14 (1983); *California Shock Trauma Air Rescue v. State Compensation Insurance Fund*, 636 F.3d 538, 544 (9th Cir. 2011); *New Orleans & Gulf Coast Ry. Co. v. Barrios*, 533 F.3d 321, 330 (5th Cir. 2008); *Colonial Penn Grp., Inc. v. Colonial Deposit Co.*, 834 F.2d 229, 237 (1st Cir.1987) ["Jurisdiction over actions for declarations of pre-emption can logically only be asserted where a state official is the defendant"]; and *Lloyd's Aviation, Inc. v. Center for Environmental Health*, 2011 WL 497866 (E.D. Calif. 2011) [the action alleging a Constitutional violation must be one against state officials and not private parties].

There is no specific or detailed allegation in the Complaint that Kaiser Roseville or Dr. Myette are state actors or that either defendant stands in the shoes of the state for purposes of plaintiff seeking injunctive relief against an alleged violation of plaintiff's constitutional rights or the rights of Israel. As the Supreme Court stated in *Brentwood Academy v. Tennessee Secondary School Athletic Association, et al.*, 531 U.S. 288 (2001):

> If the Fourteenth Amendment is not to be displaced, therefore, its ambit cannot be a simple line between States and people operating outside formally governmental organizations, and the deed of an ostensibly private organization or individual is to be treated sometimes as if a State had caused it to be performed. Thus, we say that state action may be found if, though only if, there is such a "close nexus between the State and the challenged action" that seemingly private behavior "may be fairly treated as that of the State itself.

Citations and quotation marks omitted.

Plaintiff has not pled in her Complaint, nor has she submitted any evidence in support of her request for injunctive relief, to establish that Kaiser Roseville or Dr. Myette are state actors that can be enjoined from allegedly violating plaintiff's or Israel's rights under the Constitution. Without a proper factual or legal basis for invoking federal court jurisdiction on the Constitutional claims,

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plaintiff does not have a basis for arguing that injunctive relief is appropriate in this case. In *Jackson v. East Bay Hospital,* 980 F. Supp. 1341, 1357-58 (N.D. Cal. 1997), the Court held that a private hospital "cannot be deemed a state actor merely because they are recipients of state or federal funding...such as Medicare, Medicaid, or Hill-Burton funds." *See also Taylor v. St. Vincent's Hospital,* 523 F.2d 75, 77 (9th Cir. 1975) [receipt of public funds under the Hill-Burton Act was not proper grounds for finding a private hospital to be a state actor for purposes of 42 U.S.C. section 1983]; *Rendell-Baker v. Kohn,* 457 U.S. 830, 840 (1982) [privately operated school not deemed to be a state actor even though "virtually all of the school's income was derived from government funding"].

B. Plaintiff is unable to establish a substantial likelihood of success on the merits or that there are serious questions going to the merits of her claims.

A plaintiff moving for injunctive relief is required to make a very specific showing in support of the request. Rule 65(b) of the Federal Rules of Civil Procedure governs the issuance of temporary protective orders and injunctive relief. The elements required to obtain a preliminary injunction are well-settled: "A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Winter v. Natural Resources Defense Council, Inc.*, 555 U.S. 7, 20 (2008) (citing *Munaf v. Geren,* 553 U.S. 674, 689-690 (2008); *Amoco Production Co. v. Gambell,* 480 U.S. 531, 542 (1987); *Weinberger v. Romero–Barcelo,* 456 U.S. 305, 311–312 (1982).

A preliminary injunction is an extraordinary remedy never awarded as a matter of right. *Winter*, *supra* at 555 U.S. at 553 (citing *Munaf,* 553 U.S., at 689-690). In the Ninth Circuit, the "serious questions" prong of the sliding scale test arguably survived the holding in *Winter*. Thus, a preliminary injunction is only appropriate when a plaintiff demonstrates that serious questions going to the merits have been raised and the balance of hardships tips sharply in the plaintiff's favor. *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1134-35 (9th Cir. 2011). The petitioner is required to make a showing on all four prongs. *Id.* at 1135. Here, although the events themselves are

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obviously serious and tragic, plaintiff fails to raise "serious questions" going to the merits of her claims as that term has been legally defined.

1. CUDDA provides a legislatively mandated statutory framework within which physicians in the State of California are required to make determinations regarding whether a patient is legally dead.

Modern medicine and technological advancements have enabled physicians to prolong the organ function even after the brain ceases to function and the patient is clinically and legally dead. *Dority v. Superior Court*, 145 Cal.App.3d 273, 277 (1983). Such circumstances often arise out of tragic events. Health & Safety Code section 7180(a)(2) provides, "An individual who has sustained…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." Although historically, death has been defined as the cessation of heart and respiratory functions, the California Legislature in enacting CUDDA provided an alternative definition of death as an irreversible cessation of all brain function. See *Barber v. Superior Court,* 147 Cal.App.3d 1006, 1013 (1983). As the court stated in *Barber*, in enacting Health and Safety Code section 7019, the Legislature made a "clear recognition of the fact that the real seat of 'life' is brain function rather than mere metabolic processes which result from respiration and circulation." *Id.* For more than twenty years since the enactment of CUDDA, California hospitals and physicians have been determining death by virtue of irreversible cessation of brain function. This has occurred in countless unfortunate situations involving individuals holding various types and degrees of religious beliefs.

Under well-established medical guidelines, a determination of brain death in children is a clinical diagnosis based on the absence of neurologic function with a known irreversible cause of coma. (*Nakagawa, TA. Guidelines for the Determination of Brain Death in Infants and Children: An Update of the 1987 Task Force Recommendations –Executive Summary*, Annals of Neurology, 2012, Vol. 71, pp. 573-585.) As explained by Dr. Myette in the state court action, the Guidelines recommend two examinations, including apnea testing, with each examination separated by an observation period. *Id.* The neurological examination involves a finding of complete loss of

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consciousness, vocalization, and volitional activities. The patient must lack all evidence of responsiveness with an absence of eye opening or movement in response to noxious stimulant. The examination also assesses for the loss of all brainstem reflexes including: no response by the pupils to light, the absence of movement of bulbar musculature including facial and oropharyngeal muscles, no grimacing or facial movements in response to deep pressure on the condyles and supraorbital ridge, the absence of gag, cough, sucking and rooting reflex, the absence of corneal reflexes, and the absence of oculovestibular reflexes. The apnea test measures the existence or absence of a patient's breathing drive (the ability to draw a breath) by challenging the respiratory system with CO2. Taken together, the clinical evaluation, neurological examination and apnea test evaluate for brain death. The neurological examination should be performed by different attending physicians. *Id.* The apnea test may be performed by the same physician. *Id.* Unfortunately, the unrefuted medical evidence in the case establishes that Israel meets the aforementioned criteria for brain death.

Both UCD Medical Center and Kaiser Roseville followed the well-established examination protocol to determine brain death. All results were consistent with brain death. In addition, a nuclear medicine radionuclide scan revealed no profusion in Israel's brain. MRI and CT scans of Israel's head showed a herniated brain stem. Kaiser Roseville performed the brain death examination twice. The second examination at Kaiser Roseville was administered after an appropriate waiting period and by a different attending physician. Each physician conducted the examinations in full compliance with the Guidelines on brain death examinations.

Health & Safety Code section 7181provides, "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." In most cases, a different physician from the same treating facility provides the independent confirmation. Here, Israel suffered his anoxic event on April 2, 2016. His first brain death examination occurred on April 8, 2016 at UCD Medical Center. A second brain death examination occurred on April 12, 2016 at Kaiser Roseville. A third brain death examination occurred at Kaiser Roseville on April 14, 2016. Three different physicians have administered brain death examinations

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and each found the results to be consistent with brain death. Other tests, such as MRI/CT scans and nuclear medicine radionuclide scans corroborate the finding of brain death. Neither the results of the tests nor the manner in which they were conducted have been challenged by plaintiff. The state court found the examinations complied with CUDDA.

This is not a situation involving a person in a persistent vegetative state, where the person is in an unconscious wakeful state with a diminished level of brain activity. Rather, Israel's brain has permanently and completely stopped functioning. When a person in a persistent vegetative state is on cardio-pulmonary support, the patient's maintenance requires keeping a relatively stable individual on a machine and checking the patient's vital signs. Because Israel's brain is no longer communicating to his organs or functioning at all, many metabolic functions and chemical processes will not occur without mechanical support and will degrade over time. Maintaining support to Israel's organs requires constant monitoring and adjustments to his glucose, salt, medication, adrenaline and other hormone levels. Continued cardio-pulmonary support, medication and nutrition is a futile effort. Israel's condition cannot and will not improve over time, because he has suffered permanent, irreversible and total cessation of all brain functions. While the death of a child is always tragic, futile care deprives Israel the dignity of his death.

2. Kaiser Roseville provided plaintiff and Israel's family with a period of time to accommodate the religious practices and concerns of plaintiff and her family.

Kaiser Roseville has been sensitive to the concerns raised by plaintiff. It provided plaintiff with a reasonable period of time to make arrangements for Israel which could have included transferring him to another medical facility, even though a determination was made by physicians at both Kaiser Roseville and UCD Medical Center that Israel was unfortunately brain dead. The state court supervised the timing and allowed plaintiff the additional time that the court felt was reasonable under the circumstances. Health & Safety Code section 1254.4, which became law on January 1, 2009, requires a hospital covered by CUDDA to provide a "reasonably brief period" of time for the parents and family to gather at the patient's bedside. *Id.* It also requires a covered hospital to make "reasonable efforts to accommodate those religious and cultural practices and

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concerns" expressed by the parents and family. In determining what is "reasonable" a hospital "shall consider the needs of other patients and prospective patients in urgent need of care." *Id.* The state court found that Kaiser Roseville had satisfied this statutory requirement to provide a reasonably brief period of accommodation.

3. Kaiser Roseville physicians have provided appropriate care to Israel and this care should not include placement of a PEG tube or a tracheostomy tube.

a. The state court has already ruled that Kaiser Roseville physicians cannot be directed to place a PEG tube or a tracheostomy tube.

Plaintiff suggests in her Complaint and declarations filed in federal court that Kaiser Roseville is required to accommodate plaintiff by conducting medical procedures its physicians believe, in the exercise of their clinical judgment would be medically futile, given the finding of brain death. Plaintiff also asserts that Kaiser Roseville physicians are required to indefinitely keep Israel on artificial physiological support until he can be transferred, or until the condition of his body deteriorates to the point where it meets plaintiff's definition of death, e.g., when the heart goes into cardiac arrest and breathing can no longer be artificially maintained. The trial court specifically ruled that requiring Kaiser Roseville doctors to conduct these procedures would create significant ethical concerns. Plaintiff should not be permitted to relitigate this issue in her federal court case.

Plaintiff is now making the same request in a different forum. Plaintiff made this request in state court and Judge Jones denied her request, finding Health & Safety Code section 1254.4, did not require Kaiser to provide any additional medical care. Collateral estoppel precludes relitigation of issues argued and necessarily decided in prior proceedings. *Ivanova v. Columbia Pictures Industries, Inc.* 217 F.R.D. 501 (2003). Federal courts must accord a state court judgment or determination the same preclusive effect that the judgment or determination would receive in the rendering state's courts. *Skysign Int'l, Inc. v. City & Cty. of Honolulu*, 276 F.3d 1109, 1115 (9th Cir. 2002) (citing 28 U.S.C. section 1738). In *Lucido v. Sup. Ct.* (1990) 51 Cal.3d. 335, 341-43, the California Supreme Court articulated six criteria required for the application of issue preclusion: (1) the issue "must be identical to that decided in a former proceeding"; (2) it "must have been actually litigated in the

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former proceeding"; (3) it "must have been necessarily decided in the former proceeding"; (4) "the decision in the former proceeding must be final and on the merits"; (5) "the party against whom preclusion is sought must be the same as, or in privity with, the party to the former proceeding"; and (6) application of issue preclusion must be consistent with the public policies of "preservation of the integrity of the judicial system, promotion of judicial economy, and protection of litigants from harassment by vexatious litigation." Here, the criteria for issue preclusion are met. Plaintiff sought the same injunctive relief in the state court proceeding. She provided declarations supporting the placement of a PEG tube and tracheostomy tube. Judge Jones considered her request and expressly denied the relief sought. By dissolving the temporary restraining order, Judge Jones' decision became final. The parties are the same and the application of issue preclusion is consistent with the public policy of preventing an unsuccessful litigant from "shopping around" for relief after an unfavorable decision. See *B & B Hardware, Inc. v. Gargis Industries, Inc.*, 135 S.Ct. 1293, 1299 (2015).

b. Under California law physicians are not required to participate in medical procedures they believe would not improve the condition of the patient.

Plaintiff provided no legal support in the state court action, nor has she provided any in her moving papers in this case, to support a request to have physicians perform invasive medical procedures on Israel who has been declared legally dead. There is nothing in the language of Health & Safety Code section 1254.4 that requires this to be done. California has enacted a fairly detailed statutory framework governing when a physician may refuse to provide medical care that the physician believes would not improve the condition of the patient. Probate Code section 4735 provides "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." In addition, Probate Code section 4654 states, "This division 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."

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Finally, Probate Code section 4736 provides guidelines for the transfer of a patient with respect to pain medication and palliative care.

In *Barber v. Superior Court*, *supra* 147 Cal.App.3d at 1018, a criminal case against two physicians, the court affirmed the general principle that a physician has no duty to continue treatment that is ineffective:

> A physician is authorized under the standards of medical practice to discontinue a form of therapy which in his medical judgment is useless.... If the treating physicians have determined that continued use of a respirator is useless, then they may decide to discontinue it without fear of civil or criminal liability. By useless is meant that the continued use of the therapy cannot and does not improve the prognosis for recovery. (Horan, Euthanasia and Brain Death: Ethical and Legal Considerations (1978) 315 Annals N.Y.Acad. **217 Sci. 363, 367, as quoted in President's Commission, supra, ch. 5, p. 191, fn. 50.)

In this case, although plaintiff honestly believes placement of a PEG tube and tracheostomy tube will improve Israel's condition, no competent medical testimony has been presented by plaintiff to support this belief. Unfortunately, Israel has been determined to be brain dead. This determination was made first by physicians at UCD Medical Center on April 8th and again by physicians at Kaiser Roseville back on April 14th. Dr. Myette testified in state court that the physical damage done to Israel before he presented to Kaiser Roseville is irreversible. There is nothing medicine can do to change this unfortunate fact.

4. Plaintiff's claim alleging a violation of the Free Exercise Clause of the First Amendment of the United States Constitution is not substantially likely to succeed and it does not raise a serious questions going to the merits.

The Free Exercise Clause of the First Amendment provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof...." United States Constitution, Amendment I. The Free Exercise Clause is applicable to the States by its incorporation into the Fourteenth Amendment. *Cantwell v. Connecticut,* 310 U.S. 296, 303 (1940). Despite the broad language of the Constitution, the right to exercise one's religion freely is not unlimited. In *Emp't Div., Dep't of Human Res. Of Ore. v. Smith*, 494 U.S. 872, 879 (1990), the Supreme Court

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explained the right of free exercise does not relieve an individual of the obligation to comply with a valid and neutral law of general applicability on the grounds that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes). *Smith*, 494 U.S. at 879. Additionally, the state enacting the law that is being challenged is not required by the Constitution to create a religious practice exemption. *Smith, supra* at 890; *A Woman's Friend Pregnancy Resource Center v. Attorney General of the State of California*, 2015 WL 9274116 (E.D. Calif. 2015), citing to and relying on *Smith.*

When a challenged law is neutral on its face, as it is in this case, the question for the court is whether it can survive a rational basis standard of review. *Stormans, Inc. v. Weisman*, 794 F.3d 1064, 1075-76 (9th Cir.2015). The law must be upheld if it is rationally related to a legitimate governmental purpose. *Id.* at 1084, citing *Gadda v. State Bar. Of Cal.* 511 F.3d 933, 938 (9th Cir.2007). In challenging the law and whether a rational basis exists, plaintiff has the "burden to negat[e] every conceivable basis which might support [the rules]. *Id.*, *quoting FCC v. Beach Commc'ns. Inc.*, 508 U.S. 307, 315 (1993). Additionally, because plaintiff is seeking injunctive relief, plaintiff must demonstrate that the balance of hardships tips "sharply" in her favor, as well as the likelihood of irreparable injury and that the injunction is in the public interest. *Alliance for the Wild Rockies v. Cottrell, supra* at 1134-35 (9th Cir. 2011).

California has a rational basis for defining when death occurs. *In re Christopher*, 106 Cal.App.4th 533, 550 (2003) ["The California Legislature has recognized that medical technology may prolong the process of dying and that continued health care that does not improve the prognosis for recovery may violate patient dignity and cause unnecessary pain and suffering, while providing nothing medically necessary or beneficial to the person."]; *Dority, supra* 145 Cal.App.3d 273. In *Dority*, a guardian was appointed to make medical decisions for a 19 day old infant after the parents were placed in custody for child abuse. After conducting an appropriate medical examination under Health & Safety Code section 7180, *et seq.*, the attending doctors concluded the infant was brain dead as that term is defined under California law. The guardian appointed by the court became involved to decide whether the child should be removed from life support. After a hearing at which

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unrefuted medical testimony established the infant was brain dead, the court directed the guardian to authorize the removal of all artificial support being provided to the infant. The parents objected to consent being given. Although the court of appeal was unable to rule on the legal issues before the infant passed away, the court determined that important public policy issues raised in the case warranted a decision even after the infant had passed.

The Court in *Dority* discussed the competing interests in determining whether or not life support should be removed when a child is declared brain dead, as well as the question of what safeguards are in place to have this decision reviewed by the courts. The court in *Dority* stated:

> Many times prolonging this biological existence with life-support devices only prolongs suffering, adding economical and emotional burden to all concerned. Conversely, a decision to withdraw these devices which would eventually result in the cessation of all bodily functions even though no life is left may cause equal emotional trauma.

The court went on to acknowledge the need in situations like this for the doctors and hospital to involve the parents in the process. *Id.* at 279. However, where there is a disagreement over the medical determination of brain death in a child, "the jurisdiction of the court can be involved upon a sufficient showing that it is reasonably probable that a mistake has been made in the diagnosis of brain death or where the diagnosis was not made in accord with accepted medical standards." *Id.* at 280. The Court then went on to hold that given the competing interests and rights of the parties and after hearing unrefuted medical testimony that the infant was brain dead, including testimony from the medical providers, it was within the court's power to find the infant had been determined to be brain dead and that artificial support was appropriately ordered by the trial court to be removed. *Id.* at 280. The decision made by the Court in *Dority* is the same decision that was made by the state court in this case.

The California Legislature, along with the overwhelming majority of other states (see ft. nt.1), have made a determination that irreversible cessation of all functions of the brain, including the brain stem, constitutes death in the eyes of the law. Health & Safety Code section 7180(a)(2). There is a rational basis for the Legislature's decision to so define death. See Probate Code sections 4654, 4735, 4736; *Barber, supra,* at 147 Cal.App.3d 1983; *Dority, supra,* at 145 Cal.App.3d 273;

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and *In re Christopher, supra,* at 106 Cal.App.4th 533. Plaintiff will be unable to meet her "burden to negat[e] every conceivable basis which might support [the rules]." *Stormans, supra,* at 1075-76.

The legal definition of brain death under CUDDA aligns with the medical reality that the brain is the orchestrator of all other bodily functions, such that an inert brain can no longer sustain life nor be considered itself to be alive. The law also recognizes that modern medical technology can artificially maintain organ function and bodily activities even in a person who has no hope of ever regaining the ability to perform any of these things on their own. As applied to health care providers, an expectation that such persons be deemed alive places ethical burdens on individuals whose mission is to heal, treat pain, and assist people in giving birth and ending life, not to mention the resource strain such an expectation would impose on the health care system.

5. Plaintiff's claim alleging a violation of her Right to Privacy under the Fourth and Fourteenth Amendments to the United States Constitution is not substantially likely to succeed and it does not raise a serious questions going to the merits.

With respect to both plaintiff's Third and Fourth Count in her Complaint, plaintiff alleges on her behalf and on behalf of Israel that their "right to privacy" was denied by defendants. See Complaint, pg. 12:5-10 and pg. 13:17-22. There is no statement by plaintiff regarding the healthcare that is allegedly being denied or how a privacy interest is being denied with respect to making decisions for Israel. A medical determination has been made that Israel is brain dead. Plaintiff sought review of this decision in state court where the determination made by both UCD Medical Center and Kaiser Roseville was affirmed.

To the extent plaintiff's allegations are raising a claim of a denial of substantive due process, the Supreme Court "require[s] in substantive due-process cases a 'careful description' of the asserted fundamental liberty interest." *Washington v. Glucksberg*, 521 U.S. 01, 728 (1997). The substantive due process right being asserted by plaintiff "must be carefully stated and narrowly identified before the ensuing analysis can proceed." *Raich v. Gonzales*, 500 F3d 850, 864 (9th Cir.2007). If plaintiff is alleging that she has a substantive due process right to redefine the definition of brain death that has been established by the California Legislature under CUDDA, she

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has provided absolutely no citation to controlling or even instructive legal authority, nor is there any legal analysis in her ex-parte papers. Moreover, Dr. Myette and Kaiser Roseville are not the proper parties to this case since they both simply followed the mandatory statutory rules promulgated by the California Legislature. Plaintiff's issues are with the Legislature and its enactment of CUDDA.

Plaintiff has failed to clearly define what substantive right she is asking the court to find is protected by her right to privacy or any right to privacy that may be held by Israel. The Supreme Court has cautioned that restraint should be exercised in finding substantive due process rights "because guideposts for responsible decision making in this uncharted area are scarce and open-ended" and because judicial extension of constitutional protection for an asserted substantive due process right "place[s] the matter outside the arena of public debate and legislative action" (citations omitted)); *Glucksberg*, *supra*, 521 U.S. at 720; *Reno v. Flores*, 507 U.S. 292, 302 (1993) (noting that "[t]he doctrine of judicial self-restraint requires us to exercise the utmost care whenever we are asked to break new ground in this field" (quoting *Collins v. Harker Heights*, 503 U.S. 115, 125 (1992).

6. There is no basis for asserting a claim under the Rehabilitation Act and the ADA under the facts alleged in this case.

It is not at all clear how plaintiff can assert claims under the Americans with Disability Act ("ADA") as embodied in 42 U.S.C. section 12101 *et seq.* or the Federal Rehabilitation Act as embodied in 29 U.S.C. section 794 *et seq*. See *Thompson v. Davis*, 295 F.3d 890, 895 (9th Cir.2002) discussing factors needed to assert an ADA claim.

7. The abstention doctrine under Colorado River v. United States should result in the staying of any federal court proceedings until the state court proceedings are concluded.

On April 29, 2016, the state court issued its final ruling. Plaintiff has a right to appeal that ruling in state court. During the hearing on April 29th plaintiff did not make a request that the trial court stay its order dissolving the temporary restraining order until a notice of appeal could be filed the following week. That appeal would involve the issues decided by the state court concerning state law; specifically California's adoption and implementation of CUDDA, and whether there

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should be a religious exemption to the definition of brain death under CUDDA. Plaintiff now seeks an adjudication of those issues in federal court instead of utilizing the proper state appellate process. When an issue or claim is raised in a federal court case that is also the subject of a state court proceeding, federal courts should abstain from adjudicating the issues that are pending in state court. *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 817 (1976). Plaintiff's Complaint only seeks declaratory relief. There is no claim being made for damages. Following the doctrine of abstention is particularly appropriate when (1) the issue raised is one of state law, (2) the state court case is more developed than the case in federal court, and (3) the federal court case seeks declaratory relief on the issues that are pending in state court. *Id.* at 818; *R.R. Street & Co. v. Transport Ins. Co.*, 656 F3d 966, 980-981 (9th Cir.2011); *Snodgrass v. Provident Life & Accident Ins. Co.*, 147 F.3d 1163, 1167-1168 (9th Cir.1988). Accordingly, to the extent this court is inclined to adjudicate the issues and claim for relief in plaintiff's Complaint, the court should stay the proceeding and abstain from taking any further action while plaintiff prosecutes her right to an appeal in state court.

V. CONCLUSION

For all the foregoing reasons, Kaiser Roseville and Dr. Myette believe the requested injunctive relief should be denied in its entirety.

DATED: May 1, 2016

BUTY & CURLIANO LLP

By: _____
JASON J. CURLIANO
Attorneys for Defendants
KAISER PERMANENTE MEDICAL CENTER ROSEVILLE (a non-legal entity) and DR. MICHAEL MYETTE

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PROOF OF SERVICE

I am employed in the County of Alameda, State of California. I am over the age of eighteen years and not a party to the within entitled cause; my business address is 516 16th Street, Oakland, CA 94612.

On May 1, 2016, I caused to be served the following document:

KAISER ROSEVILLE AND DR. MICHAEL MYETTE'S OPPOSITION TO REQUEST FOR TEMPORARY RESTRAINING ORDER AND FURTHER INJUNCTIVE RELIEF

on the interested parties in said cause, by: placing a true copy thereof enclosed in a sealed envelope addressed as follows and I caused delivery to be made by the mode of service indicated below:

Kevin T. Snider, State Bar No. 170988
Michael J. Peffer, State Bar. No. 192265
Matthew B. McReynolds, State Bar No. 234797
PACIFIC JUSTICE INSTITUTE
P.O. Box 276600
Sacramento, CA 95827
Tel. (916) 857-6900
Fax (916) 857-6902
Email: ksnider@pji.org

X I caused a true and correct copy of the aforementioned document(s) to be transmitted electronically to all parties designated on the United States Eastern District Court CM/ECF website.

___ (By Mail) on all parties in said action in accordance with Code of Civil Procedure Section 1013, by placing a true and correct copy thereof enclosed in a sealed envelope in a designated area for outgoing mail, addressed as set forth above, at Buty & Curliano, which mail placed in that designated area is given the correct amount of postage and is deposited that same day, in the ordinary course of business, in a United States mailbox in the County of Alameda.

____ (By Email): On May 1, 2016 I caused a copy of the document(s) described on the attached document list, together with a copy of this declaration, to be emailed listed on the attached service list.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on May 1, 2016, at Oakland, California.

Susan Truax

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