Kevin T. Snider, State Bar No. 170988[1]
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
Email: ksnider@pji.org

Alexander M. Snyder (SBN 252058)
Life Legal Defense Foundation
P.O. Box 2015
Napa, CA 94558
Tel: 707.224.6675
asnyder@lldf.org

Attorneys for Plaintiff

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

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

Plaintiffs,

v.

Kaiser Permanente Medical Center Roseville, Dr. Michael Myette M.D., Karen Smith, M.D. in her official capacity as Director of the California Department of Public Health; and Does 2 through 10, inclusive,

Defendants.

Case No.: 2:16-cv-00889 – KJM-EFB

PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION; MEMORANDUM IN SUPPORT

Date: May 11, 2016
Time: 3:30 p.m.
Ctrm: 3
Hon.: Kimberly J. Mueller

[1] *Counsel of record*

1
2 **NOTICE OF MOTION AND MOTION**
3 TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD HEREIN
4 PLEASE TAKE NOTICE that on May 11, 2016, at 3:30 p.m., this matter is set
5 to be heard in Courtroom 3 of this Court on the 15th Floor, located at 501 I Street
6 Sacramento, CA 95814. Pursuant to Rule 65 of the Federal Rules of Civil Procedure
7 and Civil Local Rules 65-2, Plaintiff, Jonee Fonseca, an individual parent and
8 guardian of Israel Stinson, a minor, by and through her counsel, will and hereby does,
9 move this Court to supersede the temporary restraining order now in place by a
10 preliminary injunction restraining Defendant, Kaiser Permanente Medical Center
11 Roseville, and all persons acting at its behest or direction.
12 This Motion is made on the grounds that Plaintiff is likely to succeed on the
13 merits and irreparable injury will result if life-support is removed from Israel Stinson.
14 In addition, the balance of hardships weighs sharply in Plaintiff's favor, and it is in the
15 public interest that a preliminary injunction be issued.
16 This Application is based on this Notice of Motion and Motion, the Amended
17 Complaint For Injunctive And Declaratory Relief, the Memorandum of Points and
18 Authorities, the declarations and exhibits and other papers previously filed with the
19 Court and on such further evidence and argument as may be presented at the hearing.
20 Respectfully submitted on this sixth day of May, 2016.
21
22 S/ Kevin T. Snider___________________
Kevin T. Snider
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Attorney for Plaintiff
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INTRODUCTION & SUMMARY OF THE ARGUMENT

Counsel for Plaintiff, Jonee Fonseca ("Ms. Fonseca") submits this Motion pursuant to the Court's order of May 2, 2016, and the initial granting of the Temporary Restraining Order. This continues to be an extraordinarily time-sensitive case seeking to preserve life-support for toddler Israel Stinson. In her Amended Complaint filed May 3, Ms. Fonseca has dropped her First Amendment, ADA and Rehabilitation Act claims. Plaintiff has added, though, significant new claims based on privacy, due process and the Emergency Medical Treatment and Active Labor Act. The refinement of Ms. Fonseca's claims provide a solid foundation for the Court to grant the preliminary injunction that would extend life-sustaining treatment for Israel.

FACTS[2]

On April 1, 2016, Ms. Fonseca took Israel to Mercy General Hospital ("Mercy") with symptoms of an asthma attack. Upon examination in the emergency room, he was placed on a breathing machine. Shortly thereafter he began shivering, his lips turned purple, eyes rolled back and he lost consciousness. He had an intubation performed on him. Doctors then told Ms. Fonseca they had to transfer Israel to the University of California Davis Medical Center, Sacramento ("UC Davis") because Mercy did not have a pediatric unit. Taken by ambulance to UC Davis, he was admitted to the pediatric intensive care unit.

The next day the tube was removed. The respiratory therapist said that Israel was stable and that he could possibly be discharged the following day, April

[2] The facts are set forth in detail in the Amended Complaint and the declarations previously filed with the Court. Additionally, Ms. Fonseca is available to testify at the hearing.

3. The doctors at UC Davis put Israel on albuterol for one hour, and then wanted to take him off albuterol for an hour. About 30 minutes later while off albuterol, Israel's mother noticed that he began to wheeze and have trouble breathing. The nurse came back in and put Israel on the albuterol machine. Within a few minutes the monitor started beeping. The nurse came in and repositioned the mask on Israel, then left the room. Within minutes of the nurse leaving the room, Israel started to shiver and went limp in his mother's arms. She pressed the nurses' button, and screamed for help. A different nurse came in, and Ms. Fonseca asked to see a doctor.

Dr. Meteev came to the room and said she did not want to intubate Israel to see if he could breathe on his own without the tube. Because Israel was not breathing on his own, doctors performed CPR and were able to resuscitate him. Dr. Meteev told Ms. Fonseca that Israel was "going to make it" and that he would be put on ECMO[3] to support his heart and lungs.

That day a brain test was conducted to determine the possibility of brain damage while he was hooked up to a ECMO machine. The following day the same tests were performed when he was taken off the machine. On April 6, Israel was taken off ECMO because his heart and lungs were functioning on their own. The next day, a radioactive test was performed to determine blood flow to the brain. A UC Davis physician performed a brain death exam on April 8, pursuant to the California Uniform Determination of Death Act ("CUDDA").

On April 11, 2016, Israel was transferred via ambulance from UC Davis to Defendant Kaiser Permanente Roseville Medical Center -- Women and Children's Center ("KPRMC") for additional treatment. Upon his arrival at KPRMC, another

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[3] Extracorporeal Membrane Oxygenation

reflex test was done, in addition to an apnea test. On April 14, 2016, an additional reflex test was performed for determination of brain death in conjunction with the CUDDA protocol. That same day a Certificate of Death, provided by the California Department of Public Health, was issued.

The family was notified by KPRMC as per the State's directive found in Health and Safety Code §1254.4. The State of California requires KPRMC to adopt a policy for providing family or next of kin with a reasonably brief period of accommodation to gather family at the bedside of the patient after declaration of death, pursuant to CUDDA.

With pulmonary support provided by the ventilator, Israel's heart and other organs continue to function well. Israel has also begun moving his upper body in response to his mother's voice and touch. Nonetheless, Israel has undergone certain tests which have demonstrated brain damage from lack of oxygen. He is totally disabled at this time and is severely limited in all major life activities. Other than the movements in response to his mother's voice and touch, he is unable to feed himself or do anything of his own volition.

Defendant Dr. Myette, has informed Ms. Fonseca that Israel is brain dead, utilizing the definition of "brain death" derived from CUDDA. Israel's mother and father are Christians with firm religious beliefs that as long as the heart is beating, Israel is alive. Based upon CUDDA, KPRMC has informed Ms. Fonseca that it intends to imminently disconnect the ventilator that Israel is relying upon to breath. Ms. Fonseca has contacted three physicians outside of the KPRMC system for second opinions.[4] Based upon CUDDA, KPRMC claims that, since its

[4] See the declarations of Drs. Paul Byrne (Ct. doc. 3-1), Thomas Zabiega (Ct. doc. 21, 21-1 & 21-2), and Peter Mathews (Ct. doc. 15).

medical doctors have pronounced Israel brain dead, Ms. Fonseca has no right to exercise any decision making authority.

Ms. Fonseca has repeatedly asked that her child be given nutrition, including protein and fats. She has also asked that he be provided nutritional feeding through a nasal-gastric tube or gastric tube to provide him with nutrients as soon as possible. She has also asked for care to be administered to her son to maintain his heart, tissues, organs, etc. KPRMC has refused to provide such treatment stating that they do not treat or feed brain dead patients. They have denied her ability to make decisions over the health care of her son. Ms. Fonseca has sought alternate placement of her son, outside the KPRMC's facility. To this end she has secured transportation and is seeking alternative placement but requires time for that to occur. If KPRMC proceeds with its plans, Israel will expire.

KPRMC and UC Davis physician's were not exercising autonomous professional judgment. Instead, they were acting jointly, and/or on behalf of the State by carrying out the function of determining death in a manner that the State prescribes under CUDDA.

Since the issuance of the death certificate, Israel has shown movement in direct response to the voice and touch of his mother. He has taken breathes off of the ventilator. Further, two physicians, independent of KPRMC and UC Davis, have raised concerns that Israel may in fact be alive and would improve with treatment. In that there is a dispute of fact between medical doctors, Israel's mother believes that she has a moral and spiritual obligation to give her child the benefit of the medical doubt.

Officials with the State have jointly participated with KPRMC in

1 implementing the policies and procedures surrounding the determination and
2 processing of Israel's death under CUDDA.

3 ## ARGUMENT

4
5 ### I. THE COURT HAS ARTICLE III JURISDICTION

6 #### a. The Amended Complaint raises federal questions under the
7 Emergency Medical Treatment and Active Labor Act.

8 In the Amended Complaint, Ms. Fonseca has added a crucial claim under
9 42 U.S.C. 1395dd et seq., the Emergency Medical Treatment and Active Labor
10 Act ("EMTAALA"). Following the initial, emergency filing of the Complaint on
11 April 28, it has become clear to Plaintiff's counsel that the EMTAALA has
12 significant bearing on this case, as is more fully explained in Section II(a)(i)(1)
13 below. The EMTAALA provides federal question jurisdiction to the Court as well
14 as an independent, statutory basis for injunctive relief.

15
16 #### b. The Amended Complaint now includes a State Defendant and
challenges the constitutionality of a California Act.

17 The Amended Complaint also now directly challenges the constitutionality
18 of CUDDA. The suit adds as a defendant the state official in charge of the
19 Department of Public Health, Dr. Karen Smith. As more fully set forth below, the
20 statute violates due process by providing no avenues of appeal of a life-and-death
21 decision. The constitutionality of the statute is a federal question squarely before
22 the Court.

23 #### c. The conduct of KPRMC under CUDDA constitutes state action.

24 Lastly, the actions of KPRMC that Ms. Fonseca seeks to enjoin can be
25 characterized as state action subject to constitutional safeguards, even in the
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absence of the EMTAALA, the State defendant, and the direct constitutional challenges to the underlying statute.

The Supreme Court and Ninth Circuit have addressed state action on a number of occasions, leading to some fine distinctions. To be sure, state regulation of an industry is not enough to establish state action. *Jackson v. Metro. Edison Co*., 419 U.S. 345 (1974); *Blum v. Yaretsky*, 457 U.S. 991 (1982). Plaintiff is therefore not arguing that regulation alone transforms KPRMC into a state actor. Rather, it is the coercive nature of the challenged statute and the degree to which the state and KPRMC are entwined in these types of life-and-death decisions.

The Court explained in *Blum* that coercive statutes could transform healthcare decision-making into state action. There was no state action because the patients in *Blum* did "not challeng[e] particular state regulations or procedures." *Blum*, 457 U.S. at 1003 (emphasis added). *Blum* rejected a broader claim that the regulatory system itself created state action. The Court was not willing to turn heavily-regulated industries like healthcare, comprising 1/6 of the national economy, into state actors for all purposes. However, the Court opened the door to state action in limited circumstances involving coercive statutes.

Here, KPRMC has sought to defend its actions by making just such a claim. KPRMC's attempt to deflect responsibility onto CUDDA reinforces the reality that declarations of death are essentially a state-prescribed function. Unlike in *Blum*, under these facts before this Court, the State is responsible for the specific conduct of which Plaintiff complains. *Blum*, 457 U.S. at 1004. CUDDA is in no way like the utility company whose conduct was merely "permissible under state

law." *Jackson*, 419 U.S. at 358. Instead, there is an extremely "close nexus between the State and the challenged action." *Id.*, 351.

In the present matter, the State has "exercised coercive power or has provided such significant [overt] encouragement" that the actions of KPRMC are to be deemed that of the State. *Brentwood Acad. v. Tenn. Sch. Ath. Ass'n*, 531 U.S. 288, 297 (2001). The State, through CUDDA, is not merely approving or acquiescing to the independent judgment of medical professionals relative to Israel. *Flagg Bros. v. Brooks*, 436 U.S. 149, 164 (1978).[5] Thus, KPRMC's conduct is rightly understood as performed under color of law.

Under *Lugar v. Edmonson Oil Co.*, 457 U.S. 922 (1982), the Supreme Court explained that "state action" is present when a private actor operates as a "willful participant in joint activity with the State or its agents." *Id.*, at 941. In acting pursuant to CUDDA, such describes the conduct of KPRMC. CUDDA defines *death*. Health & Safety Code §7180. KPRMC has no discretion to entertain independent medical judgment inconsistent with CUDDA's definition. CUDDA prescribes the protocol for confirmation of *death*. Health & Safety Code §7181. KPRMC undertakes to perform the confirmation of brain function cessation as per CUDDA. Under CUDDA, a medical facility must then record, communicate with government entities, and maintain records relative to the "irreversible cessation of all functions of the entire brain." Health & Safety Code §7183. Such includes

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[5] *See also*, the concurrence of Justice White in *Rendell-Baker v. Kohn*, 457 U.S. 830, 843 (1982), in which he compares private employment decisions with independent medical decisions. Also, in *Rendell-Baker* employees claimed that a private school's employment decisions were state action because a large portion of funding and student referrals came from Massachusetts. That was rejected by the high court and that rationale is not offered here.

1 filling out portions of the Certificate of Death provided by the Department of
2 Public Health within 15 hours after death under (Health & Safety Code §102800)
3 and that KPRMC register the death with local officials (Health & Safety Code
4 §102775).

5 It is not necessary in this case for the Court to designate KPRMC as a state
6 actor for all purposes. Indeed, the Court should decline to so rule. *Safari v.*
7 *Kaiser Found. Health Plan*, 2012 U.S. Dist. LEXIS 67059 (N.D. Cal. May 11,
8 2012).[6]

9 It has become clear that individuals may be considered state actors for
10 limited purposes even when much of their conduct would not be attributable to the
11 State. For instance, in *West v. Atkins*, 487 U.S. 42 (1988), a doctor who was an
12 independent contractor was deemed a state actor in his delivery of services to
13 prison inmates. And in *Chudacoff v. Univ. Med. Ctr*., 649 F.3d 1143 (9th Cir.
14 2011), the physicians' status as independent decision-makers did not shield their
15 conduct from being considered state action when their authority to make the
16 challenged employment decision ultimately derived from the state. KPRMC need
17 not be a state actor across the board – the death decision is uniquely derivative of a
18 coercive state statute, and it should be treated as such.

19 Additionally, the Supreme Court held in *Brentwood Academy*, that private
20 entities may be so entwined with the government that decisions become state
21 action. Id., 531 U.S. at 303. Here, KPRMC received Israel from one public
22 institution, the UC Davis Medical Center, and is attempting to hand him over to
23 another public official, the coroner. The State prescribes the condition under
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25 [6] Although *Safari v. Kaiser* is unpublished, the Court has brought this case to the
26 attention of the parties at the May 2, 2016, hearing.
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which both of these transfers take place. Few medical decisions receive the level of involvement and interest that the State takes in the declaration of death, and for good reason. The State's interest in the preservation of life is at the apex of governmental interests. The declaration of death should therefore be declared state action because it is orchestrated by KPRMC via CUDDA.

In sum, the Court has Article III jurisdiction for three reasons: the Amended Complaint pleads a cause of action under the federal EMTAALA; the Amended Complaint now directly challenges the constitutionality of a statute and names the state official responsible for enforcement of that statute; and the declaration of death should be deemed state action under both the coercion and entwinement aspects of state action jurisprudence.

II. A Preliminary Injunction Is Crucial To Preserve The Status Quo

a. Standard Of Review

The standard for granting a preliminary injunction is set forth in *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20-22 (2008). Under *Winter*, a preliminary injunction should be granted upon a clear showing by the plaintiff 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."

i. Plaintiff Is Likely To Succeed On The Merits

The likelihood of success standard is met when there are serious questions going to the merits. *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1132 (9th Cir. 2011). "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." *Hamilton*

Watch Co. v. Benrus Watch Co., 206 F.2d 738, 740 (2d Cir. 1953) (quoted in *Republic of Philippines v. Marcos*, 862 F.2d 1355, 1362 (9th Cir. 1988) (en banc)).

1. The facts of the case fall under EMTAALA.

Pursuant to EMTAALA, the Amended Complaint alleges that KPRMC is a participating hospital subject to the statute; that it received Israel in an emergency medical condition; that it is now seeking to de-stabilize his condition by turning off his ventilator and removing all life support; that KPRMC's proposed actions will cause material deterioration of Israel's condition; and that both he and his mother will experience grave personal harm from KPRMC's action if they are not enjoined.

The leading case applying EMTAALA to a severely disabled child like Israel is *In re Baby K*, 16 F.3d 590 (4th Cir. 1994), *cert. denied*, 1994 U.S. Lexis 5641. The facts of that case have striking similarities to the present. Baby K was born with a diagnosis of encephala, with no cerebrum, 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 filed suit seeking a declaratory judgment that it was not obligated to provide further respiratory treatment to Baby K that it considered futile. *Id.*

The main thrust of the hospital's argument was that EMTAALA should not be interpreted to require it or its physicians to provide treatment they deemed medically and ethically inappropriate. *Id.* Expanding on this argument, the

hospital insisted Congress could not have intended to require it to provide futile treatment that exceeded the prevailing standard of care. The court disagreed, holding that "stabilizing treatment" was required under EMTAALA, 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 of respiratory assistance, including a ventilator, that would cause material deterioration of Baby K's condition in violation of EMTAALA. *Id.* at 595-96.

The West Coast does not appear to have had a case as similar to the present as *Baby K*, but the Ninth Circuit cited it approvingly in *Eberhart v. Los Angeles*, 62 F.3d 1253 (9th Cir. 1995) (addressing screening provisions of EMTAALA).

Under its plain terms, as pled in the Amended Complaint, EMTAALA requires KPRMC to provide Israel with stabilizing treatment that will prevent his material deterioration while in the hospital's care. In this case, as with Baby K, that means a ventilator and (as the hospital conceded in that case) warmth, nutrition and hydration. Under the statute, the hospital has the option of transferring Israel if such transfer can be accomplished without his material deterioration. This is exactly what Ms. Fonseca has been seeking.

EMTAALA certainly raises serious questions; arguably, it goes beyond that, and the leading case on this issue makes it likely Ms. Fonseca will ultimately prevail on the merits. The requested injunctive relief should therefore be issued.

2. Serious questions are raised as to whether CUDDA is consistent with substantive and procedural due process.

"No State shall make or enforce any law which shall…deprive any person of life…without due process of law." U.S. Const., Amendment XIV. In *Washington v. Glucksberg*, 521 U.S. 702 (1997), the Supreme Court declined to

1 create a fundamental right to hasten one's death, in large part because the
2 American tradition has long recognized the opposite – the highest interest in
3 preserving life. *Id*. at 728. "As a general matter, the States – indeed, all civilized
4 nations – demonstrate their commitment to life." *Cruzan v. Dir., Mo. Dept. of*
5 *Health*, 497 U.S. 261, 280 (1990). The challenged statutes purport to both reverse
6 the fundamental presumption that life should be protected and preserved if at all
7 possible, and (as will further be seen in the next section) takes away the
8 fundamental rights of fit parents to make major medical decisions for their young
9 children.

10 Plaintiff brings a facial challenge to a statutory scheme relative to the death
11 event. KPRMC has noted – correctly – that "historically, death has been defined
12 as the cessation of heart and respiratory functions." Kaiser Brief at p. 10 (Ct. doc,
13 14). California's statutory scheme broadens the definition of *death*. Under
14 section 7181 determination as to whether a person has sustained an irreversible
15 cessation of all functions of the entire brain is made by "independent confirmation
16 of another physician." Under CUDDA, neither the patient nor the patient's
17 representative is provided any mechanism to challenge the findings. This is true
18 whether or not the patient's representative both understands and agrees with the
19 State's definition of *death*. In the present case, Ms. Fonseca wishes to bring in her
20 own physician to examine Israel. KPRMC will not consent to such, for nothing on
21 the face of the text would indicate that the independent physician be someone
22 chosen by the family of the patient. At this stage of the proceedings, Plaintiff is
23 not asserting that KPRMC has misread or misapplied CUDDA.

24 CUDDA provides no opportunity for Israel's mother to be heard. "The
25 opportunity to be heard must be tailored to the capacities and circumstances of
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27

1 those who are to be heard." *Goldberg v. Kelly*, 397 U.S. 254, 268-69 (1970). If
2 such is true for the receipt of welfare benefits under *Goldberg*, how much more so
3 when the matter at issue is the loss of life.
4 The essence of due process is the requirement that "a person in jeopardy of
5 serious loss [be given] notice of the case against him and opportunity to meet it."
6 *Joint Anti-Fascist Comm. v. McGrath*, 341 U.S. 123, 171-172 (1951) (Frankfurter,
7 J., concurring). Here the statutory scheme expedites the determination of *death* by
8 not including cessation or breathing and heartbeat within the definition. This
9 lessoned standard of *death* provides no process by which the patient's advocate
10 can obtain a different independent medical opinion by the physician of her
11 choosing or even challenge the findings. This raises a serious question of law
12 which requires that the status quo be preserved until resolved.
13
14 **3. Serious questions are raised as to the authority of the State to overrule a fit parent on major medical decisions for her child.**
15
16 The Plaintiff further challenges CUDDA because a parent naturally has a
17 profound emotional bond with her child. In addition to that, this parent – Ms.
18 Fonseca – believes she has a moral and spiritual obligation to give her child every
19 benefit of the doubt before disconnecting life support. "The choice between life
20 and death is a deeply personal decision of obvious overwhelming finality."
21 *Cruzan*, 497 U.S. at 281. In the present case, the facts are that the parent has a
22 sincerely held religious belief that life does not end until the heart ceases to beat.
23 Moreover, Israel responds to her voice and touch.[7] On occasion, Israel has taken
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25
26 [7] Declaration of Alexandra Snyder regarding Video Footage, Photo And Movement Exhibited By Israel Stinson ¶¶2-5 (Ct. doc. 18)
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breathes on his own.[8] Additionally, the facts are that a physician believes that the child is not dead[9] and Israel's condition can improve with further treatment.[10]

Typically, a fit parent has plenary authority over medical decisions for a small child. As stated above and further articulated in her pro per filings in the Superior Court, Ms. Fonseca has a moral and spiritual obligation to give her child every benefit of the medical doubt as to whether the child is in fact dead or can improve with additional treatment.

In rare situations, the courts have allowed the State to intervene to administer treatment to a child when the parent refuses treatment. *In re Long Island Jewish Med. Ctr.*, 147 Misc.2d 724 (N.Y. Supreme Ct. 1990) (ordering blood transfusions for 17-year-old cancer patient against his will). It is a tragic irony that here, the hospital is refusing treatment and the parent is fighting for treatment. In such a case, the Court should be no less willing to authorize life-sustaining treatment for the child.

However, KPRMC is bound by the State scheme for a death event. The scheme excludes this parent from any due process in the decision making. This raises serious legal questions under the standard set forth in *Alliance for the Wild Rockies*, 632 F.3d at 1132.

In *Family Independence Agency v. A.M.B.* (*In re AMB*), 248 Mich. App. 144 (Mich Ct. App. 2001), the appellate court conducted an extensive post-mortem of the circumstances surrounding the withdrawal of life support from Baby Allison. Baby Allison's life and death landed in Family Court because

[8] Id.
[9] Declaration of Paul A. Byrne, M.D., p. 4, ¶15.
[10] Id. at ¶12.

1 Allison's teenage mother was severely mentally challenged, and the child had
2 apparently been conceived through incest and rape perpetrated by her father, who
3 was incarcerated as soon as this was suspected.

4 The appellate court found serious due process violations in the manner that
5 the decision to end Baby Allison's life was taken away from her parents. "If the
6 facts surrounding Baby Allison's conception are tragic, the circumstances leading
7 to her death are doubly so. Through unredeemably flawed Family Court
8 proceedings, the Family Independence Agency (FIA) acquired what appeared to
9 be an order that authorized Children's Hospital staff to take the child off life
10 support equipment and medication provided that comfort care is provided."
11 Although the order gave 7 days for the parties to appeal, life support was ended
12 the next day at the direction of the mother's aunts, and she died within 2 hours.
13 *Id.* at 150.

14 The Family Court authorized the termination of life support after a doctor
15 testified by phone that being on the ventilator was not in the child's best interests
16 because its deformed heart could not support long-term survival. *Id.* at 160.

17 Although the court's order stated that it would take effect in 7 days, during
18 which time an appeal could be filed, it was carried out the next day. The attorney
19 appointed for Baby Allison filed an appeal within the week specified by the court,
20 but it was too late since the order was executed prematurely. *Id.* at 161-62.

21 On appeal, the court sought to prevent future tragedies and received
22 considerable *amicus* input. The court considered a number of statutes governing
23 the authority of the Family Court and other arguments for reversal, including the
24 EMTAALA and the ADA. Ultimately, the court zeroed in on the presumption
25 that to establish incompetency for the parent who would otherwise have a
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Fourteenth Amendment liberty interest in making medical decisions for their child, the evidence must be clear and convincing. *Id*. at 204-5.

"Any lower evidentiary standard brings with it a potential for abuse leading to irreparable harm because there typically is no adequate remedy for an erroneous order withdrawing life support." *Id.* at 204-5. "Further, making a decision to withdraw life support is so serious that it is unlike any other decision a Family Court has to make." *Id.* at 205.

Thus, the court held that, even though circumstantial and hearsay evidence pointed to the parents' inability to make life-and-death decisions for their child, much more formal adjudication of the parents' incompetence was required to take away the decision from them. *Id.* The same is much more true here, where Ms. Fonseca's fitness is not in question and KPRMC is seeking to take away this mother's ability to make this monumental decision for her child. The irreparable harm recognized by the Michigan Court of Appeals that inheres in the decision to terminate life support for a child weighs strongly in favor of granting the preliminary injunction to ensure adequate adjudication, consistency with due process and deference to parental rights under the Fourteenth Amendment.

ii. Israel Will Suffer Irreparable Harm If Life-Support Is Removed.

The Fourteenth Amendment guarantees that "[n]o State shall make or enforce any law which shall…deprive any person of life…without due process of law." The Clause provides "heightened protection against government interference with certain fundamental rights and liberties." *Glucksberg*, 521 U.S. at 720. It is well established that the loss of core constitutional freedoms, for even minimal periods of time, constitutes irreparable harm. *Elrod v. Burns*, 427 U.S.

347, 373 (1976).

If the Court determines there is no state action present, the harm of loss of life is nonetheless irreparable even at the hand of a private actor. No amount of monetary damages or other corrective relief during the course of litigation is adequate. *Los Angeles Memorial Coliseum Com. v. National Football League*, 634 F.2d 1197, 1202 (9th Cir. 1980). In view of that, this Court can exercise equitable powers to maintain the status quo under the non-1983 claims.

iii. The Balance Of Hardships Tips Sharply In Favor Of The Plaintiff.

A preliminary injunction should supersede the temporary restraining order. If the TRO is dissolved, it is highly probable that all of Israel's organs will quickly cease to function. He will be dead – under any medical definition of the word. But if the status quo remains in place while factual and legal issues are resolved during this suit, Israel's organs will continue to function and his parents can continue to seek placement for him in an institution that is not bound by CUDDA. In balancing the hardships, neither KPRMC – or its agents – die nor will they suffer the loss of a child. In the factual dispute between KPRMC and Ms. Fonseca's physicians who question KPRMC's findings, an error by the latter will render little harm – if any. In stark and profound contrast, if KPRMC is in medical error, Israel will have lost his life without due process of law. The Supreme Court explained:

> 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

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> decision to withdraw life-sustaining treatment, however, is not susceptible of correction. *Cruzan*, 497 U.S. at 283.

In view of that, a decision to "discontinue hydration and nutrition of a patient" is irrevocable. Id.

Thus, in weighing the respective interests of the parties on the scales of justice, the balance of hardships tips heavily in favor of the Plaintiff. *Winter,* 555 U.S. at 20-22.

iv. An Injunction Against KPRMC Is In The Public Interest.[11]

The "general public has an interest in the health" of state residents. *Golden Gate Rest. Ass'n v. City of San Francisco*, 512 F.3d 1112, 1126 (9th Cir. 2008). If such is the case for health, it is all the more so for life. Unquestionably, public policy favors the preserving of life. *United States v. Ferron*, 2013 U.S. Dist. LEXIS 93962 (D. Ariz. July 3, 2013). As the Supreme Court explained in an end-of-life case, "We think it self-evident that the interests at stake in the instant proceedings are more substantial, both on an individual and societal level, than those involved in a run-of-the-mine civil dispute." *Cruzan*, 497 U.S. at 283.

Even if there was conceivably some reason why there is no public interest in due process regarding Israel, such would not be dispositive. A preliminary injunction in this case would be limited to this child. At this conjuncture, Plaintiff is not seeking a declaration that CUDDA is unconstitutional. Further, this case is not brought as a class action. See generally *Zepeda v. INS*, 753 F.2d 719, 727-28 (9th Cir. 1984) ("A federal court may issue an injunction if it has personal jurisdiction over the parties and subject matter jurisdiction over the claim; it may

[11] The Court need not reach this inquiry because the public interest can be subsumed in the balancing of the hardships prong. *Caribbean Marine Servs. Co. v. Baldrige*, 844 F.2d 668, 674 (9th Cir. 1980).

not attempt to determine the rights of persons not before the court. . . . The district court must, therefore, tailor the injunction to affect only those persons over which it has power."

III. THE ROOKER-FELDMAN DOCTRINE DOES NOT APPLY.[12]

Because of the prior actions taken by the Superior Court to preserve Israel's life, this Court has raised concerns as to whether the *Rooker-Feldman* doctrine bars jurisdiction. It does not.

In one of its more recent decisions expounding on *Rooker-Feldman*, the Supreme Court explained that the doctrine serves to prevent losers of state court actions from asking the federal courts to act as *de facto* appellate courts in reviewing the adverse state court judgment. *Exxon-Mobil Corp. v. Saudi Basic Indus. Corp*., 544 U.S. 280 (2005). It has no bearing where, as here, Ms. Fonseca did not lose in state court – she obtained a temporary restraining order – and this Court is not being asked to reconsider or reverse any aspect of the Superior Court's actions. *Bianchi v. Rylaarsdam*, 334 F.3d 895, 898 (9th Cir. 2003).

The Ninth Circuit has explained that *Rooker-Feldman* "applies only when the federal plaintiff both asserts as her injury legal error…by the state court *and* seeks as her remedy relief from state court judgment." *Kougasian v. TMSL, Inc*., 359 F.3d 1136 (9th Cir. 2004) (emphasis in original). Neither of those two elements is in play in the present case.

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[12] *Rooker v. Fidelity Trust Co*., 263 U.S. 413 (1923) and *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462 (1983).

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CONCLUSION

Plaintiffs have raised serious legal questions. Because disruption of the status quo would be profound and irreversible, the equities tip sharply in Israel's favor.

Respectfully submitted on this sixth day of May, 2016.

S/ Kevin Snider
S/ Matthew McReynolds
Attorney for Plaintiffs