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Court of Appeal
First Appellate District
Division One
350 McAllister Street
San Francisco, CA 94102-4797

Re: UCSF Benioff Children's Hospital Oakland et al. v. Superior Court of Alameda County, Case No. A147989

Letter of *Amici Curiae* in Support of the Petition for Writ of Mandate or Other Appropriate Relief

Dear Presiding Justice Humes and Associate Justices:

The California Medical Association, California Dental Association, California Hospital Association, and American Medical Association urge this Court to grant the Petition for Writ of Mandate or Other Appropriate Relief in *UCSF Benioff Children's Hospital Oakland et al. v. Superior Court of Alameda County*. California's courts, attorneys, litigants, and healthcare providers need clarity on the propriety of reopening a brain-death determination made according to California law and previously adjudicated on the merits to final judgment.

INTERESTS OF *AMICI CURIAE*

California Medical Association ("CMA") is a non-profit incorporated professional association of more than 40,000 member physicians practicing in California, in all specialties. California Dental Association ("CDA") represents over 24,000 California dentists, 70% of

the dentists practicing in this state. CMA's and CDA's membership includes most of the physicians and dentists who are engaged in the private practices of medicine and dentistry in California. California Hospital Association ("CHA") represents the interests of nearly 400 hospitals and health systems in California, including virtually all of the state's acute care hospitals. CMA, CDA, and CHA have been active before the California Legislature, the Supreme Court of California, and the California Courts of Appeal in areas of concern to healthcare providers.

The American Medical Association ("AMA") is the largest professional association of physicians, residents, and medical students in the United States. Additionally, through state and specialty medical societies and other physician groups seated in its House of Delegates, substantially all U.S. physicians, residents, and medical students are represented in the AMA's policy making process. The objectives of the AMA are to promote the science and art of medicine and the betterment of public health.

The AMA joins this brief on its own behalf and as a representative of the Litigation Center of the American Medical Association and the State Medical Societies. The Litigation Center is a coalition among the AMA and the medical societies of each state, plus the District of Columbia, whose purpose is to represent the viewpoint of organized medicine in the courts.

Thus the CMA, CDA, CHA, and AMA ("*Amici*") represent a wide variety of healthcare providers and hospitals affected by the Superior Court's ruling. *Amici* have a strong interest in correcting the Superior Court's decision allowing collateral attack of a determination of brain death, because it undermines the determination of death and brain death that is accepted within the medical community, incorporated into the law, and routinely relied on by healthcare professionals. Moreover, the

Superior Court's ruling denies finality to the myriad people and parties involved in reaching a determination of brain death, despite a full and final adjudication of that issue.

Some funding for this letter was provided by organizations and entities that share *Amici*'s interests, including physician-owned and other medical and dental professional liability organizations and non-profit and governmental entities engaging physicians for the provision of medical services, specifically: The Dentists Insurance Company; The Doctors Company; Kaiser Foundation Health Plan, Inc.; Medical Insurance Exchange of California; The Mutual Risk Retention Group, Inc.; and NORCAL Mutual Insurance Company.

No party or counsel for a party authored this letter in whole or in part, nor has any party or counsel for any party made a monetary contribution intended to fund this letter's preparation or submission.

JAHI MCMATH HAS BEEN DECLARED BRAIN DEAD

Physicians declared Jahi McMath brain dead nearly 30 months ago. After her family sought court intervention, the Alameda County Probate Court adjudicated and confirmed her brain death and a death certificate was issued. McMath's family agreed to have her body released to the Alameda County Coroner's office and then transferred to family members, and they did not appeal the final judgment. Months later they approached the Probate Court with what they described as new evidence of brain activity and, in October 2014, filed a Petition for Writ of Error Coram Nobis asking that court to reconsider its finding of brain death. The family withdrew that petition without a formal ruling, however, after the court's independent expert reported that the family's additional evidence did not alter the brain-death determination. The family then filed the personal injury suit from which this Petition arises on February 2, 2015, alleging on McMath's behalf that she is alive and entitled to

monetary damages from Dr. Rosen and Children's Hospital. They also filed an action in federal court to invalidate the death certificate.

Neither the finding of brain death nor the death certificate has been withdrawn or set aside. The question now before this Court is what effect they have in a subsequent personal injury lawsuit. Or, in the words of the Superior Court, the issue is whether the prior order and judgment finding brain death constitute "a determination that should be accorded finality for all purposes pertaining to the individual's asserted 'brain death' status unless the determination is set aside on appeal or otherwise."

The answer to that question must be "yes." According the prior adjudication and judgment anything less than finality would disrupt longstanding principles of finality and respect for prior judgments and, specific to these circumstances, ignore the proper roles of the medical community and the court system in determining that a person has suffered brain death. Allowing successive collateral attacks in countless courts and contexts would deny finality for everyone, leaving medical professionals, county employees, and others involved in the decision that brain death has occurred in a state of limbo with no appreciable end. That outcome has no basis in law or equity.

1. Death occurs when brain activity irreversibly ceases.

California recognizes that biological death occurs when brain function ceases. The state adopted the Uniform Determination of Death Act in 1982, which provides that a medical determination of biological death may be based on cardiorespiratory function or neurological function:

> An individual who has sustained either (1) irreversible cessation of circulatory and respiratory functions, or (2) irreversible cessation of all functions of the entire brain, including the brain stem, is dead.

Health & Safety Code § 7180(a). Though the cardiorespiratory definition of death has long been recognized under the common law, "it has more recently been the law's determination that brain death is the legal equivalent of death because—under current medical science—the capacity for life is irretrievably lost when the entire brain, including the brain stem, has ceased functioning." 22A Am. Jur. 2d *Death* § 384 (footnote omitted).

Brain death is distinct from coma or a persistent vegetative state, which involve some level of continued neurological activity. The Court of Appeal has characterized patients in a persistent vegetative state as being "still in some senses alive," whereas a patient whose brain ceases to function is, as a matter of law and established medical practice, dead. *See Dority v. Superior Court* (1983) 145 Cal.App.3d 273, 277-78. In the highly publicized controversies over continuation of care for Terri Schiavo, Karen Ann Quinlan, and Nancy Cruzan, for example, each was determined to be in a persistent vegetative state, not brain dead. *See Cruzan v. Missouri Dept. of Health* (1990) 497 U.S. 261; *In re Quinlan* (N.J. 1976) 355 A.2d 647; *In re Schiavo* (Fla. App. 2001) 780 So.2d 176.

Brain death is different; "medically speaking when the brain dies, the patient dies." *Petition of Jones* (N.Y. Sup. Ct. 1980) 433 N.Y.S.2d 984, 986.

2. Brain death is determined by physicians, subject to limited judicial review as a safeguard.

In addition to recognizing the existence of brain death as a matter of law, California codifies *who* determines that brain death has occurred: physicians. The Code provides that any death determination "must be made in accordance with accepted medical standards," Health & Safety Code § 7180, and that a determination of brain death requires "independent confirmation by another physician." Health & Safety Code §

7181. By not specifying the precise means of diagnosis, the Code recognizes and allows for advancements in technology and diagnostic tools.

The Health and Safety Code is silent on whether the court system plays any role in determining that brain death has occurred, and, in many cases, it does not. The Court of Appeal has previously explained that court involvement is not required and, often, not appropriate. "We find no authority mandating that a court must make a determination brain death has occurred. Section 7180 requires only that the determination be made in accordance with accepted medical standards. . . . This is, and should be, a medical problem and we find it completely unnecessary to require a judicial 'rubber stamp' on this medical determination." *Dority*, 145 Cal.App.3d at 278. Other courts agree that diagnosing brain death is an issue squarely within the expertise and authority of physicians, holding that "when a patient is dead is a medical matter which should be left to the expertise of the medical profession." *Jones*, 433 N.Y.S.2d at 986. *See also In re Welfare of Bowman* (Wash. 1980) 617 P.2d 731, 732 ("We hold that it is for the law to define the standard of death, that the brain death standard should be adopted, and that it is for the medical profession to determine the applicable criteria – in accordance with accepted medical standards – for deciding whether brain death is present."). Indeed, the Probate Court here correctly recognized that "physicians, and not the courts, are uniquely qualified (and authorized by statute) to make the determination of brain death." (2 AA 350.)[1]

A brain-death determination is not "insulated from all judicial review," *id.*, but it is clear that the judiciary's role is narrowly prescribed in the event it becomes involved. The *Dority* court determined that a

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[1] Citations to "AA" refer to the Appendix of Exhibits filed with the Petition for Writ of Mandate or Other Appropriate Relief.

court may intervene in limited circumstances: (1) where there is a sufficient showing of reasonably probability that a mistake has been made in the diagnosis of brain death, or (2) where a determination of brain death was not made according to accepted medical standards, as the statute requires. *Dority*, 145 Cal.App.3d at 280; *see also Bowman*, 617 P.2d at 732; *Jones*, 433 N.Y.S.2d at 986 ("Judicial intervention should be limited to review of the procedures followed and a determination that the findings are consistent with the established medical criteria."); *In the Matter of Long Island Jewish Med. Ctr.* (N.Y. Sup. Ct. 1996) 641 N.Y.S.2d 989, 991 (finding "[t]here is nothing to indicate that [the physicians'] findings were anything other than 'made in accordance with accepted medical standards'" and allowing withdrawal of artificial respiratory support).

The judiciary's role in a brain-death determination is thus a limited one: ensuring that the process conforms to the requirements of Health and Safety Code sections 7180 and 7181, and guarding against clearly erroneous determinations.

3. A brain-death determination must be given full effect against collateral attacks.

The McMath family's personal injury lawsuit shifts the question from the initial adjudication of brain death to the propriety of relitigating that determination in collateral actions. A determination that a person has neurologically died is, by its nature and by definition, final. *See* Health & Safety Code § 7180(a) ("An individual who has sustained . . . *irreversible* cessation of all functions of the entire brain, including the brain stem, is dead.") (emphasis added). Petitioners aptly explain the collateral estoppel effect of the Probate Court's determination of brain death, and *Amici* agree that the McMath family, including anyone purporting to act in the name of McMath herself, should be collaterally estopped from relitigating the issue of brain death.

The Probate Court's earlier determination and judgment is also entitled to finality under broader principles of finality of judgments and estoppel. This case is not one in which the brain-death determination now being questioned was made privately, outside of the judicial process. To the contrary, McMath's family already invoked the authority of the courts to adjudicate the issue, and the Probate Court issued a final, unappealed judgment. The court expressly predicated the judgment on its factual finding that McMath is brain dead, explaining that the family's petition "necessarily required the court to reach the threshold issue of whether petitioner's daughter was legally dead." (2 AA 345.)

"A judgment rendered in one department of the superior court is binding on that matter upon all other departments until such time as the judgment is overturned." *Glade v. Glade* (1995) 38 Cal.App.4th 1441, 1450. Having asked the Probate Court to make a determination as to whether McMath was dead under California law and having elected not to appeal that court's final judgment, her family may not argue that the determination should "be ignored [or] overlooked" by another department in the Superior Court or any other court. *See id.* at 1449; *see also Estate of Bowles* (2008) 169 Cal.App.4th 684, 695 (probate court is not a distinct tribunal, but instead a department within the Superior Court). By doing so, the family essentially seeks de novo determination of McMath's brain-death status without regard for the prior final judgment that decided this factual dispute.

Estoppel is particularly appropriate given the McMath family's treatment of the new evidence they claim undermines the Probate Court's prior determination. The family initially sought direct reconsideration from the Probate Court, presenting their evidence in a Petition for Writ of Error Corum Nobis and requesting a full evidentiary hearing. The court's independent expert reviewed the new evidence and reported no change in his opinion that McMath is brain dead. The McMath family responded

not by awaiting a final ruling and the opportunity to appeal or seek other review, but by instead withdrawing the petition entirely and, four months later, initiating this personal injury suit raising the same core question. Though the family alleges that their new evidence should be heard, they had a forum for just that in the Probate Court but elected to withdraw from that proceeding because they disliked the anticipated outcome. They should not now be permitted to seek adjudication of the same issue from a different judge; "to hold otherwise would permit the parties to trifle with the courts." *Law Offices of Stanley J. Bell v. Shine, Browne & Diamond* (1995) 36 Cal.App.4th 1011, 1023 (finding estoppel of challenges to procedure in excess of a court's jurisdiction where the parties agreed to the procedure).

"The 'estoppel' principle is particularly compelling where, as here, what is involved is a collateral attack." *Id.* at 1024. Collateral attacks are highly disfavored and are permitted in only limited circumstances. "A collateral attack will lie only for a claim that the judgment is void on its face for lack of personal or subject matter jurisdiction or for the granting of relief which the court has no power to grant." *Molen v. Friedman* (1998) 64 Cal.App.4th 1149, 1156-57; *see also* 8 Witkin, Cal. Proc. 5th (2008) Attack, § 6, p. 590 (citing case law showing that "collateral attack is not available . . . to challenge nonjurisdictional errors"). "[I]f the order was within the jurisdiction of the probate court, it is conclusive." *In re Tourny's Estate* (1957) 154 Cal.App.2d 501, 505.

Far from challenging the Probate Court's jurisdiction to make a death determination, the McMath family itself invoked the power of that court initially in December 2013 and again with the October 2014 Writ of Error Corum Nobis. Moreover, the new evidence they now wish to put before the Superior Court is not permitted for purposes of a collateral attack. *See Superior Motels, Inc. v. Rinn Motor Hotels, Inc.* (1987) 195 Cal.App.3d 1032, 1049-50 (holding evidence outside the prior decision's

judgment roll "is wholly inadmissible" and "cannot be considered," even where it shows that jurisdiction did not exist). Having failed to submit their evidence for full adjudication by the Probate Court or to employ any other direct challenge, they should be estopped from trying to relitigate the same issue in the shadow of a personal injury lawsuit. *Cf. Law Offices of Stanley J. Bell*, 36 Cal.App.4th at 1024-25 (collateral attack not permitted where direct attack was available, even where prior judgment exceeded the court's authority). To the extent there is any avenue for a court to revisit the determination that McMath is brain dead, a collateral attack in the form of a personal injury suit is not it.

4. The parties need finality.

In the eyes of the law and under established principles of medicine, McMath died more than two years ago. That modern medical technology has allowed mechanical support to maintain some biological functions does not change that fact. Nor does her family's protracted refusal to accept the brain-death determination. As a matter of equity and to afford finality to the physicians, nurses, and additional healthcare providers, the law cannot treat McMath as alive simply because her family chooses to do so.

The Court need look no further than the current case to understand the need for clarity on this point. McMath's family has filed multiple actions, in multiple courts, in the nearly 30 months since McMath was declared brain dead. Despite having received full judicial adjudication of McMath's brain death in the initial probate proceeding, electing not to appeal the final judgment, and prematurely terminating that court's review of updated evidence, McMath's family continues to treat her brain death as an open question. It is not.

The physicians and other healthcare providers involved should not be forced to litigate the question of brain death anew with each lawsuit

McMath's family initiates. The determination of brain death must be conclusive, at least as to providers and facilities involved in McMath's care, and the family certainly should not be permitted to attack that adjudicated fact under the auspices of a personal injury lawsuit. Everyone involved must be afforded finality and confidence that, years later, they can rely on a final court order and judgment determining that McMath's brain ceased to function in December 2013.

For these reasons, *Amici* respectfully urge this Court to grant the Petition for Writ of Mandate or Other Appropriate Relief.

Respectfully,

TUCKER ELLIS LLP

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PROOF OF SERVICE

I am employed in the County of San Francisco, State of California and over the age of eighteen years. I am not a party to the within action. My business address is One Market Plaza, Steuart Tower, Suite 700, San Francisco, CA 94105.

I am readily familiar with the practice of Tucker Ellis LLP for collection and processing of correspondence for mailing with the United States Postal Service. In the ordinary course of business, such correspondence would be deposited with the United States Postal Service, with postage thereon fully prepaid, the same day I submit it for collection and processing for mailing. I served the document(s) listed below by placing a true copy thereof in a sealed envelope with postage thereon fully prepaid, addressed as follows:

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Document Served: Letter of Amici Curiae in Support of the Petition for Writ of Mandate or Other Appropriate Relief

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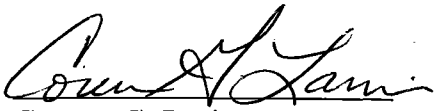
(State) I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on May 12, 2016, at San Francisco, California.



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