

# Medical Futility Dispute Resolution Options in the United States: Law & Ethics Fundamentals

ICEL3 (March 8, 2019)

Thaddeus Mason Pope

Too

slow

Expanding

EOL liberty

Too

fast

Limiting

EOL liberty

Medical  
futility  
conflicts



**SCOTLAND**

**NORTHERN  
IRELAND**

**REPUBLIC OF  
IRELAND  
(ÈIRE)**

**WALES**

**ENGLAND**

Charlie  
Gard





Alfie  
Evans



**Clinician**

**CMO**

**Surrogate**

**LSMT**

**Appropriate**

**Inappropriate**

**Beneficial**

**Non-  
beneficial**

**Proportionate**

**Disproportionate**

Not  
therapeutically  
obstinate

Therapeutically  
obstinate

Charlie  
Gard



Alfie  
Evans





**Supreme Court of the United Kingdom**

**Court of Appeal**

Criminal Division

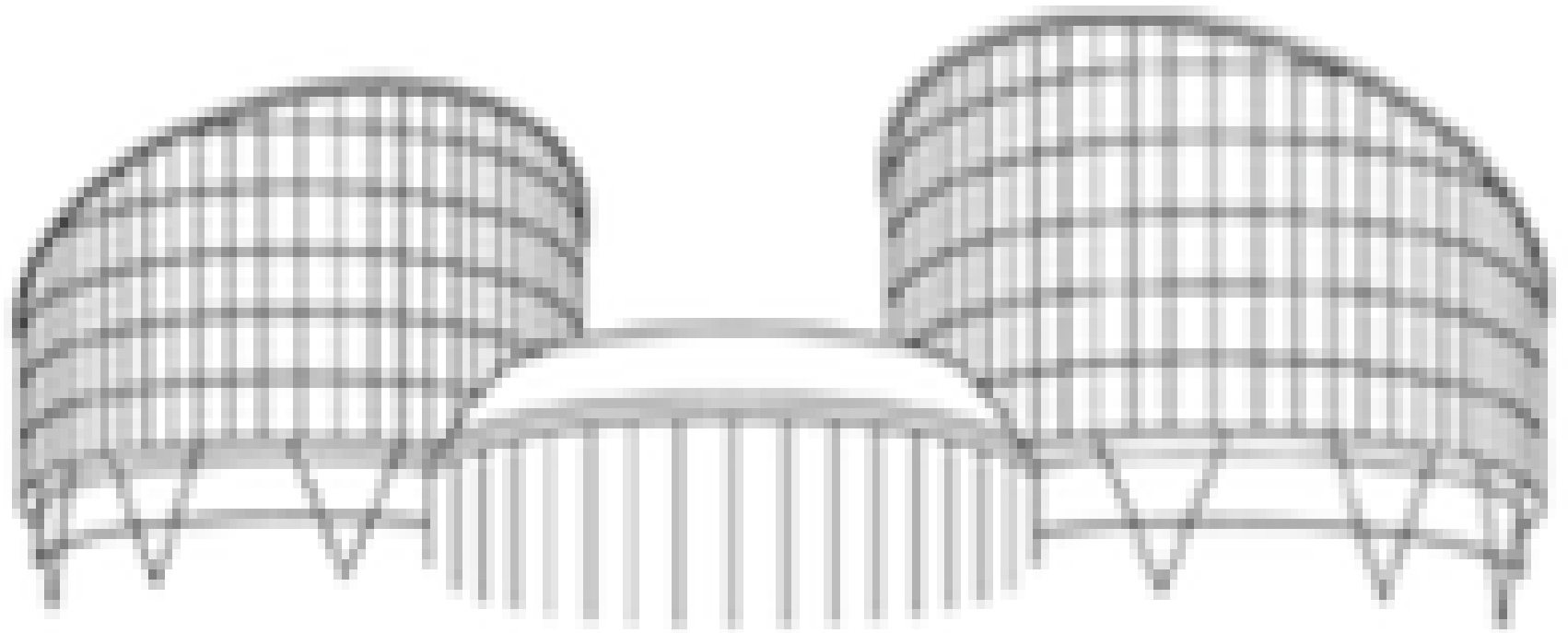
Civil Division

**High Court of Justice**

Queen's Bench  
Division

Chancery Division

Family Division



**EUROPEAN COURT  
OF HUMAN RIGHTS**

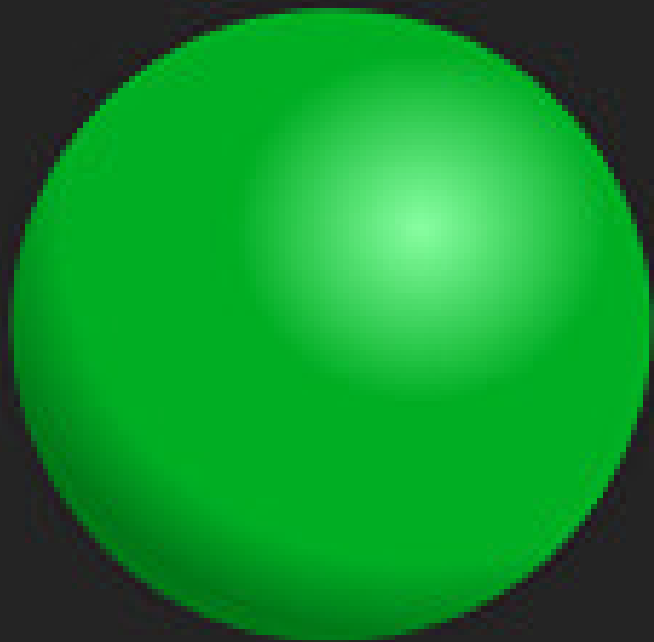
exceptions

95%

50%

Options in  
**intractable**  
conflicts





Clinician may  
proceed **without**  
consent



Clinician may  
**not** proceed  
without consent





No

permission

No

prohibition

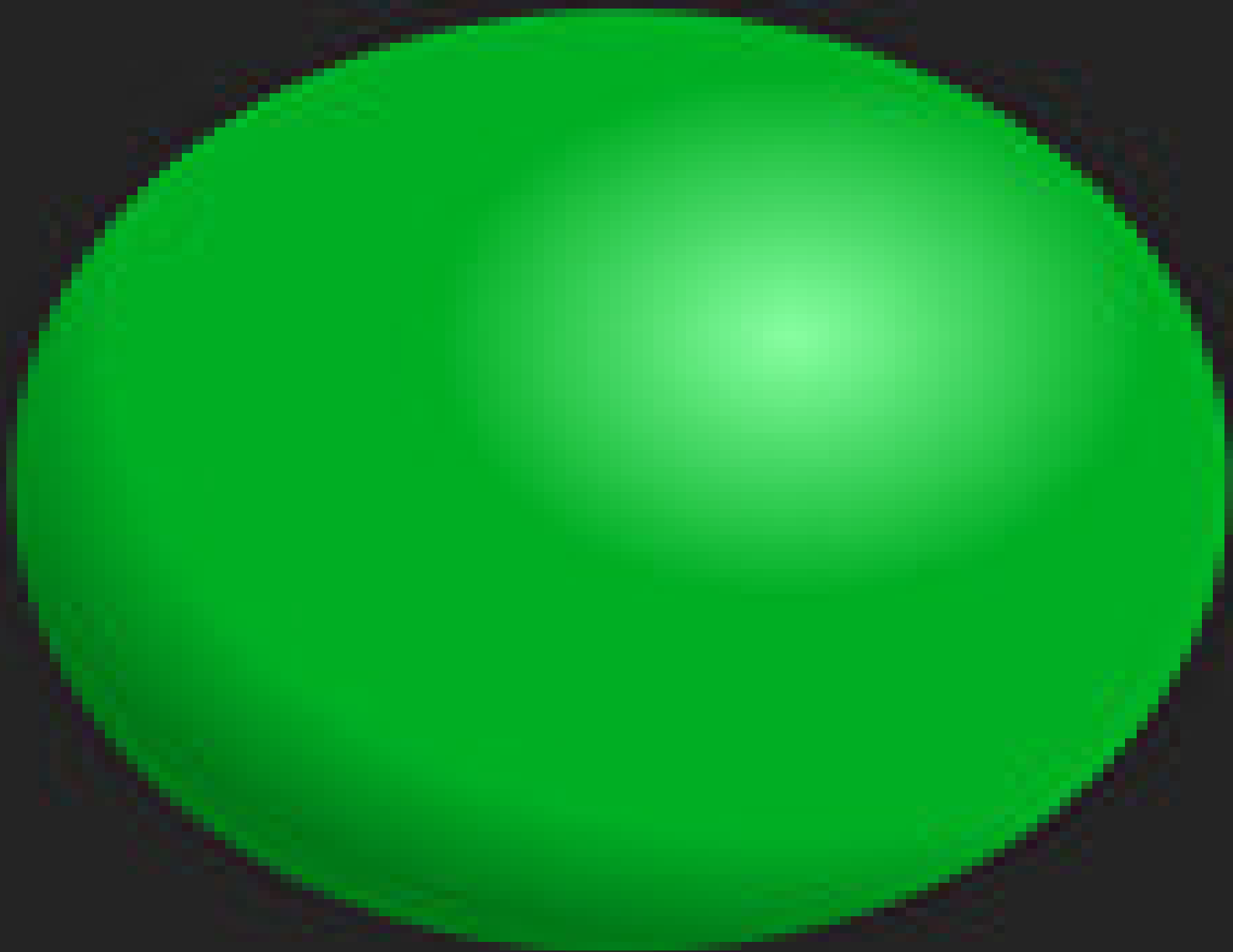
# Roadmap

3

Green lights

Red lights

Why more red



TEXAS



The Lone Star State

Stop LSMT

**without**

consent

**any reason**

if hospital review

committee agrees



**NOT TEXAS**

**TEXAS**



2018



Virginia

20 years

**“conflict remains  
unresolved, . . . make a  
reasonable effort to  
transfer the patient. . .  
not less than 14 days”**

Day 15 ?

March 19, 2018  
Eff. July 1, 2018



“end of the 14-day  
period . . . conflict  
**remains unresolved** . . .  
unable to identify . . .  
facility willing . . .”



“**may cease**

to provide

the treatment”

VA = TX

2018



**CALIFORNIA**

20 years

“health care provider  
... **may decline to  
comply** ... health  
care decision that ...”

“requires **medically ineffective** health care”

“health care **contrary to generally accepted health care standards**”

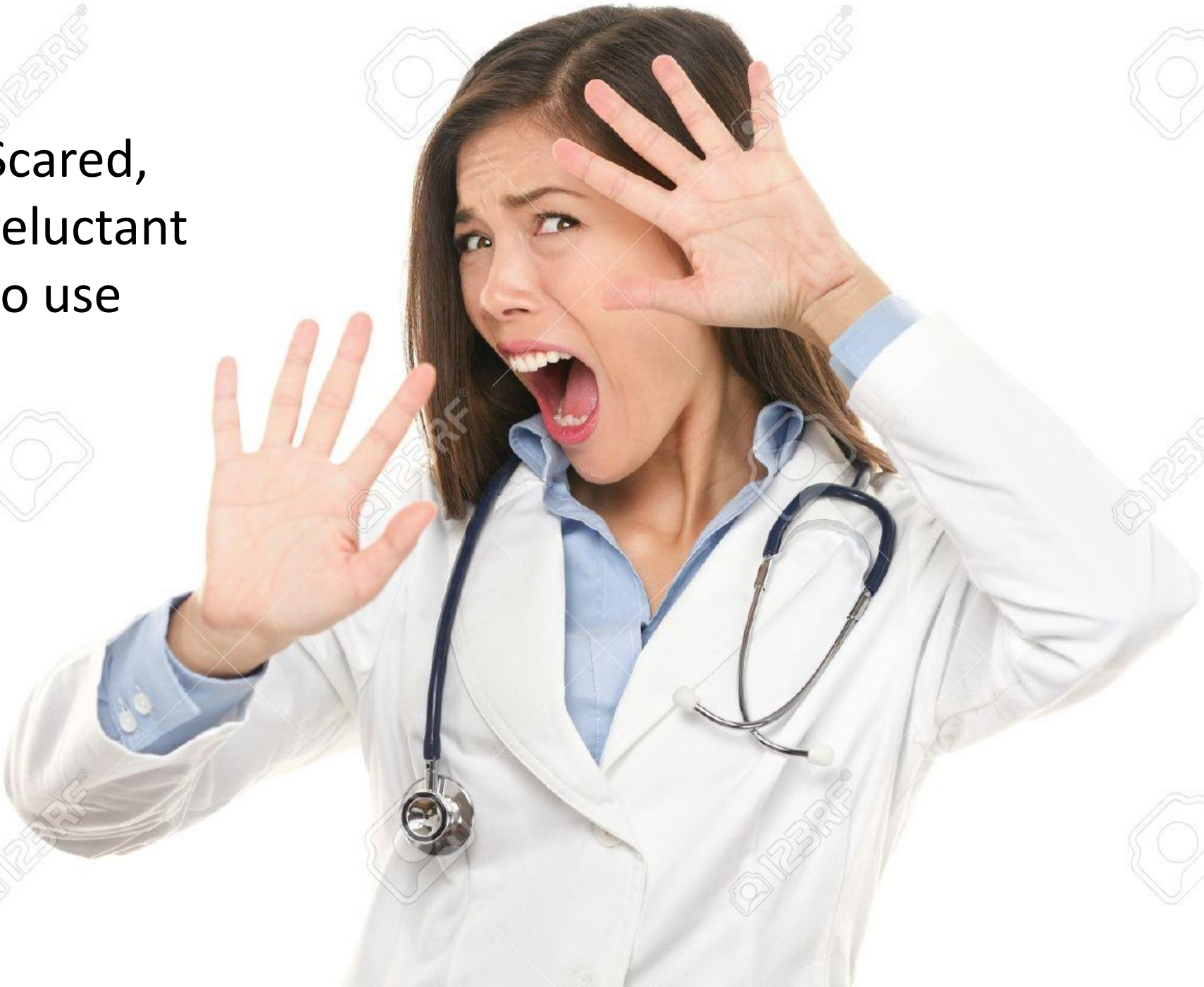
PLUS



“**not subject** to civil  
or criminal liability  
or to discipline for  
unprofessional conduct”

**BUT**

Scared,  
reluctant  
to use





 Scripps  
HEALTH

9888

 First Magnet Hospital  
Second Time Around  
A Magnet Recognition Program Award

Elizabeth Alexander

70 years old

end-stage pancreatic  
cancer

“Clearly an individual who should not undergo aggressive resuscitation”

“She is frail, debilitated, and . . . metastasis . . . extensive.”

# Both

Advance directive

Agent

**“all measures  
to prolong life”**



Appropriate care  
committee

DNR

Entered

Patient dies

Family sues &

loses

9 SUPERIOR COURT OF CALIFORNIA, COUNTY OF SAN DIEGO

10 CENTRAL DIVISION

11  
12 ESTATE OF ELIZABETH ALEXANDER,  
13 and CLENTON ALEXANDER, HEIR,

14 Plaintiffs,

15 v.

16 SCRIPPS MEMORIAL HOSPITAL LA  
17 JOLLA, a California corporation; DONALD  
18 RITT, an individual; GUSTAVO LUGO, an  
19 individual; CHRISTOPHER WIESNER, an  
20 individual; PREETI MEHTA, an individual;  
21 MARIE SHIEH, an individual; SHAWN  
22 EVANS, an individual; MARIE SHIEH, an  
23 individual; AYANA BOYD KING, an  
individual; ERNEST PUND, an individual;  
CHARLES ETTARI, an individual; KAREN  
KNIGHT, an individual; and DOES 1 through  
15, inclusive,

Defendants.

CASE NO. 37-2014-00016257-CU-MM-CTL

**NOTICE OF MOTION AND MOTION FOR  
SUMMARY JUDGMENT OR, IN THE  
ALTERNATIVE, SUMMARY  
ADJUDICATION BY SCRIPPS  
DEFENDANTS**

**IMAGED FILE**

DATE: June 3, 2016  
TIME: 11 a.m.  
DEPT: C-70  
IC JUDGE: Hon. Randa Trapp  
  
CASE FILED: May 20, 2014  
TRIAL DATE: September 9, 2016

“**immune** from  
liability under  
section 4740”

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

CHRISTOPHER ALEXANDER et al.,

Plaintiffs and Appellants,

v.

SCRIPPS MEMORIAL HOSPITAL LA  
JOLLA et al.,

Defendants and Respondents.

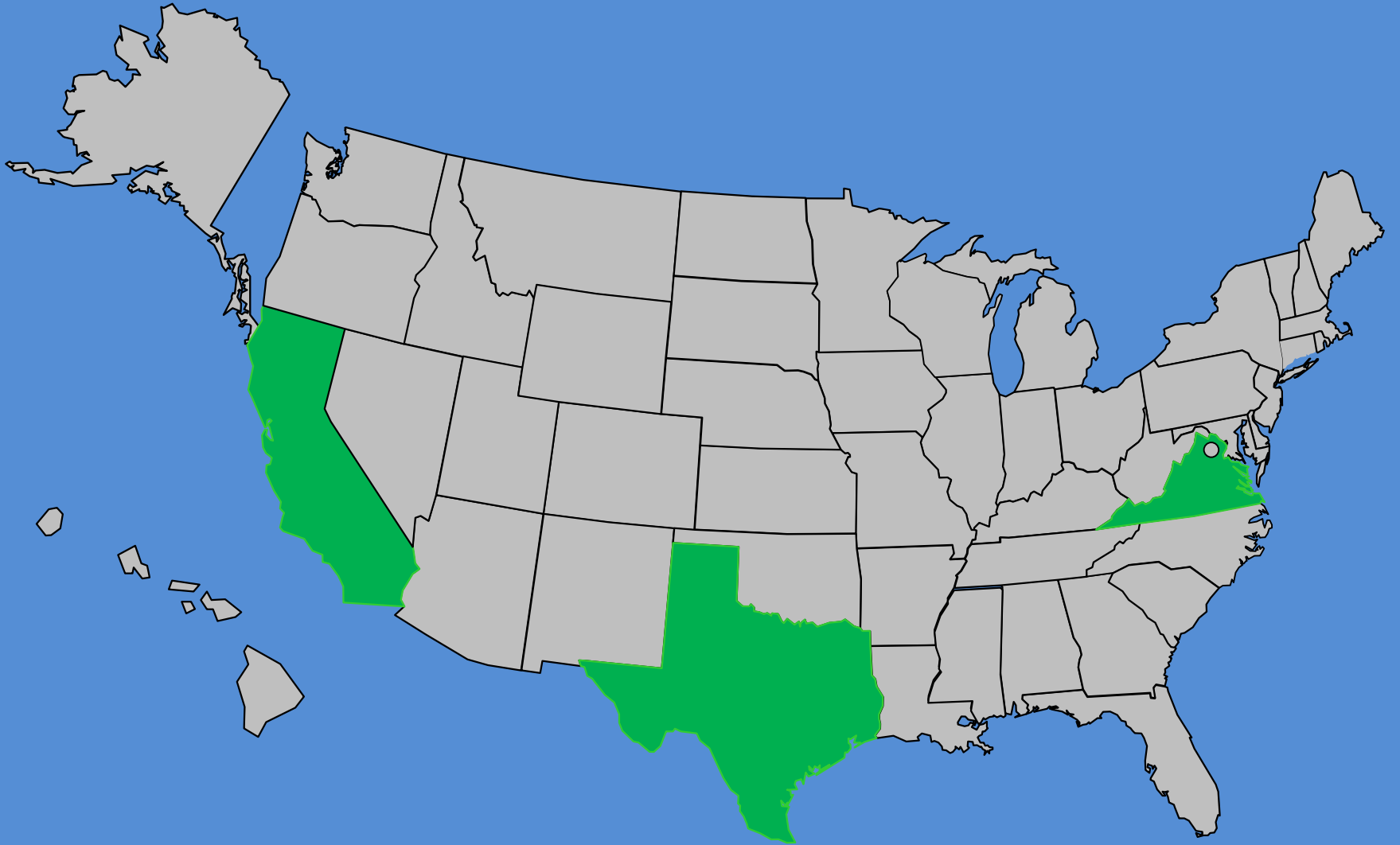
D071001

(Super. Ct. No.  
37-2014-00016257-CU-MM-CTL)

April 16, 2018



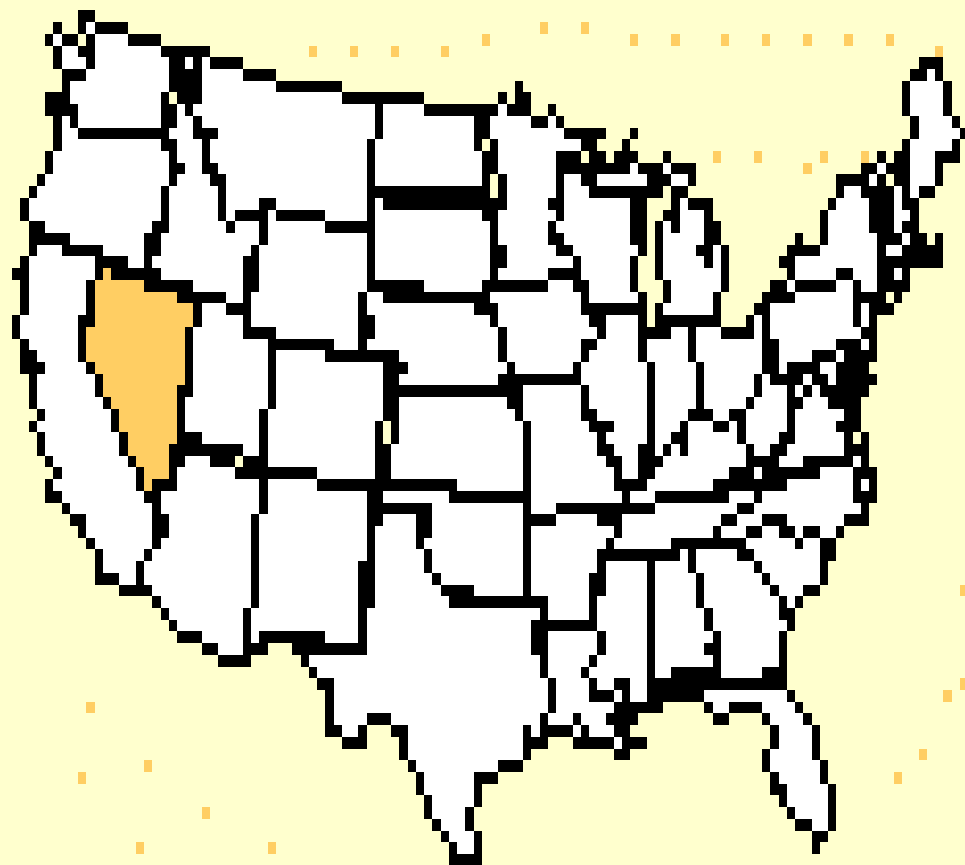
CA = TX





2019

# Nevada



Carson City

“immune from . . .  
liability for refusing  
to provide . . .  
treatment requested”

Procedures  
**weaker**  
than TX, VA

Obtain another medical opinion

**or**

Obtain an opinion from a  
committee

**or**

Transfer the patient

That's enough  
green lights



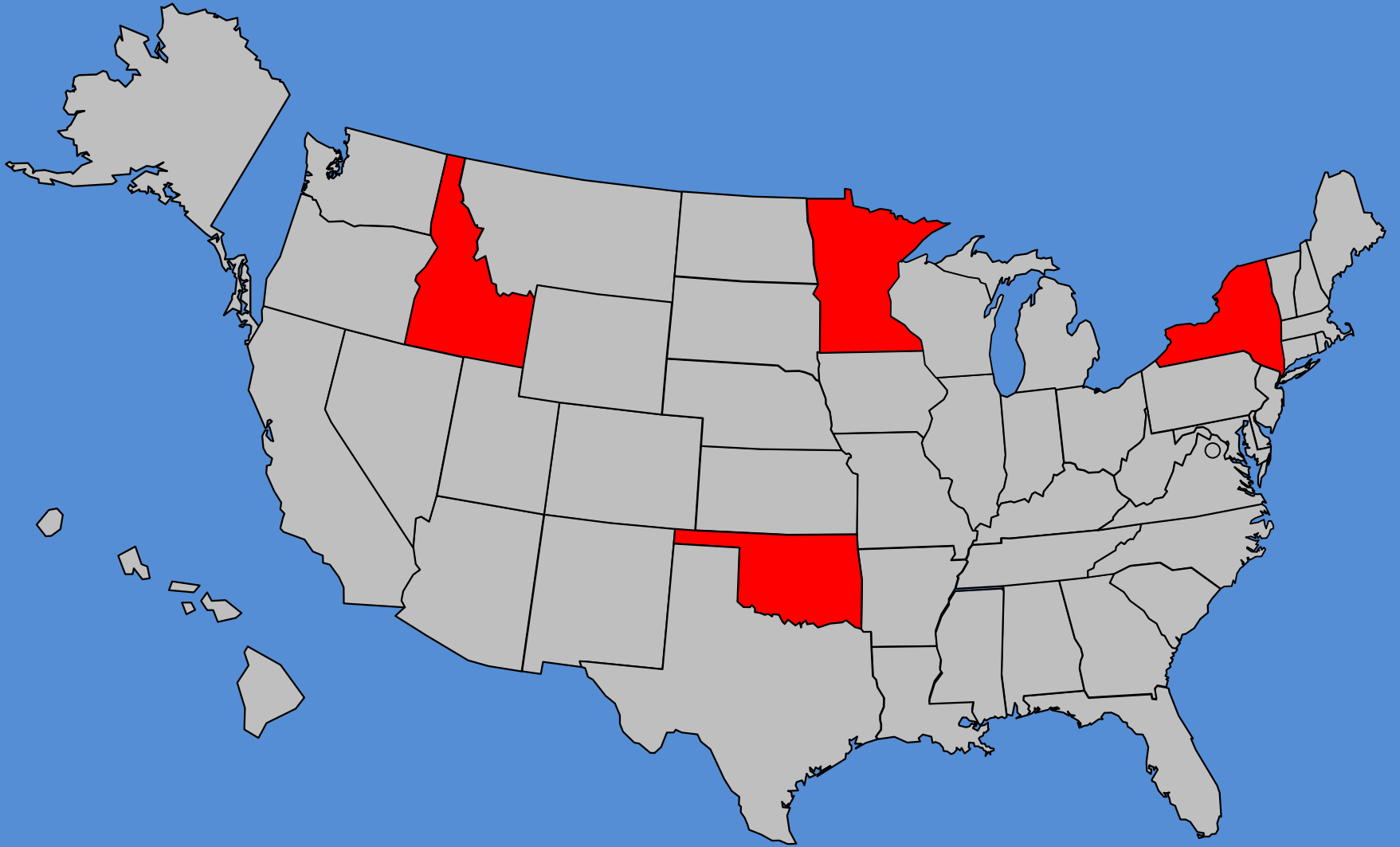
Consent

**always**











OKLAHOMA

# Nondiscrimination in Treatment Act

November 2013

“health care provider

**shall not deny** . . .

life-preserving health

care . . . directed by the

patient or [surrogate]”

# Medical Treatment Laws Information Act

November 2014

# Oklahoma Health Care Providers' Responsibilities and Rights Under Certain Medical Treatment Laws







NEW YORK  
EMPIRE STATE

ALBANY

“If surrogate directs  
[LST] . . . provider that  
does not wish to provide  
. . . **shall nonetheless  
comply . . .**”



# Discrimination in Denial of Life Preserving Treatment Act

“Health care . . .  
. **may not be . . .**  
**denied** if . . .  
directed by . . .  
surrogate”



2018

# Simon's Law

# Kansas





Simon  
Crosier



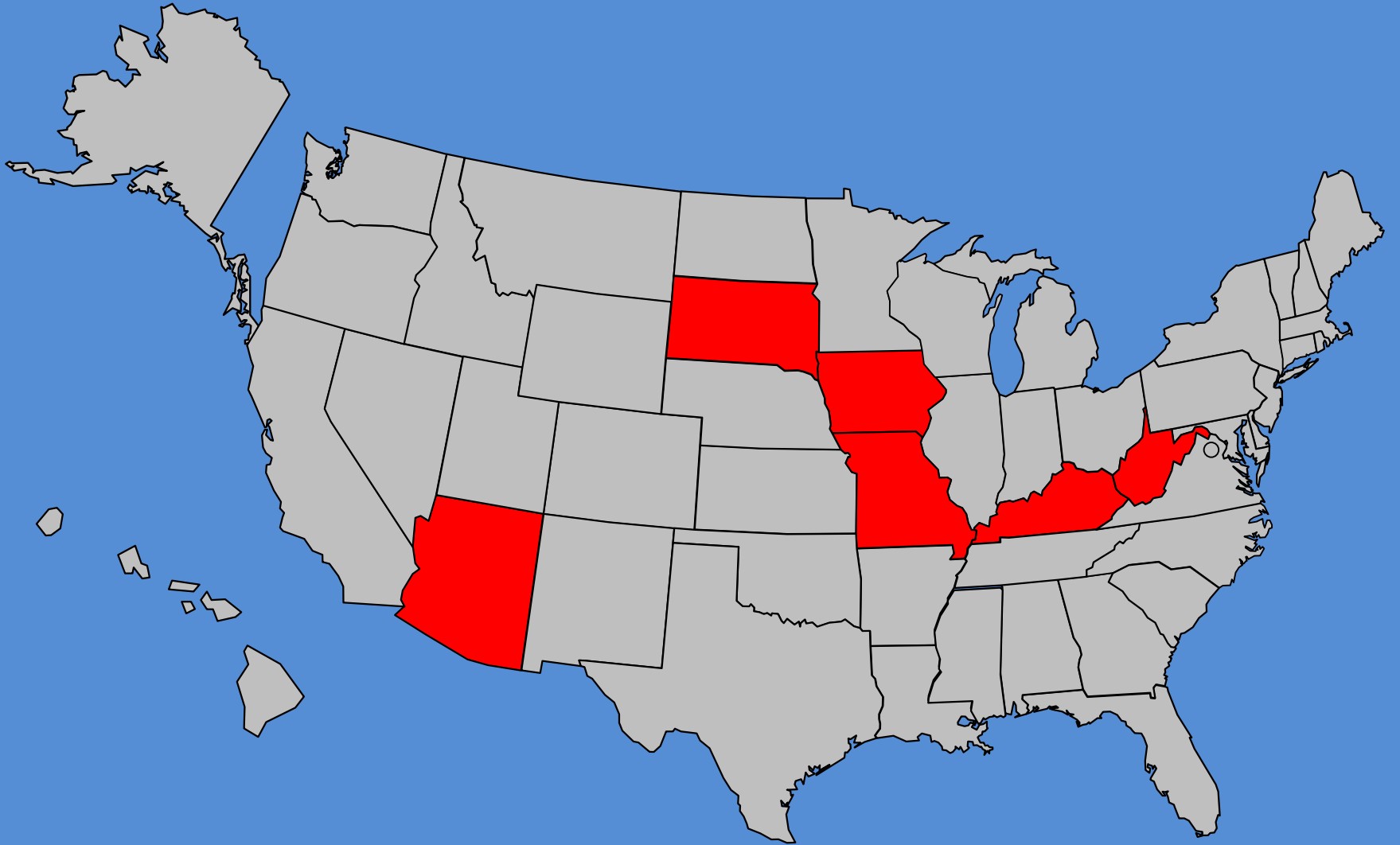
DNR without  
parents'  
consent or  
knowledge

# Simon's Law

# addresses

# this

“No healthcare . . . staff  
shall withhold, withdraw or  
. . . life-sustaining  
measures. . . under 18  
years . . . without . . .  
**written permission . . . .”**



THE PEOPLE OF  
IOWA  
WELCOME YOU



Fields of Opportunities

**Not even a court**

may order

withdrawal of LSMT

over parental

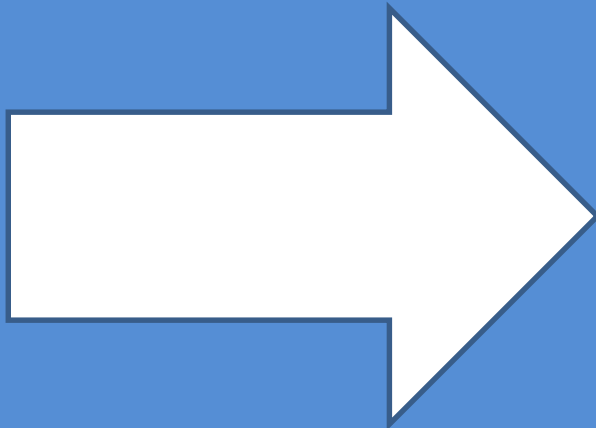
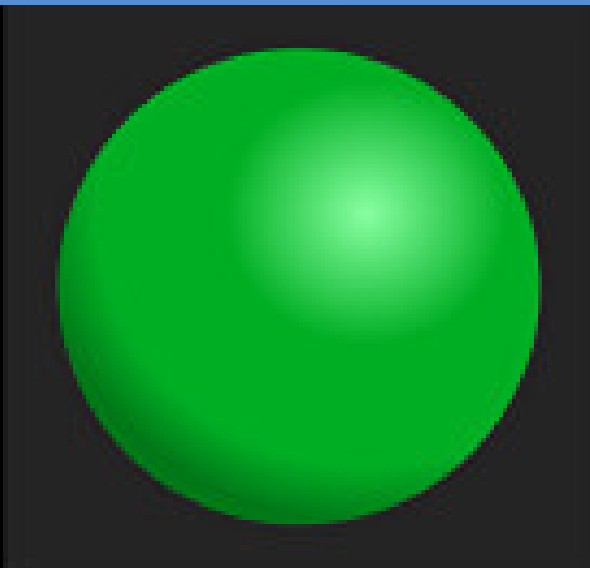
objections

TEXAS



The Lone Star State





TX green light

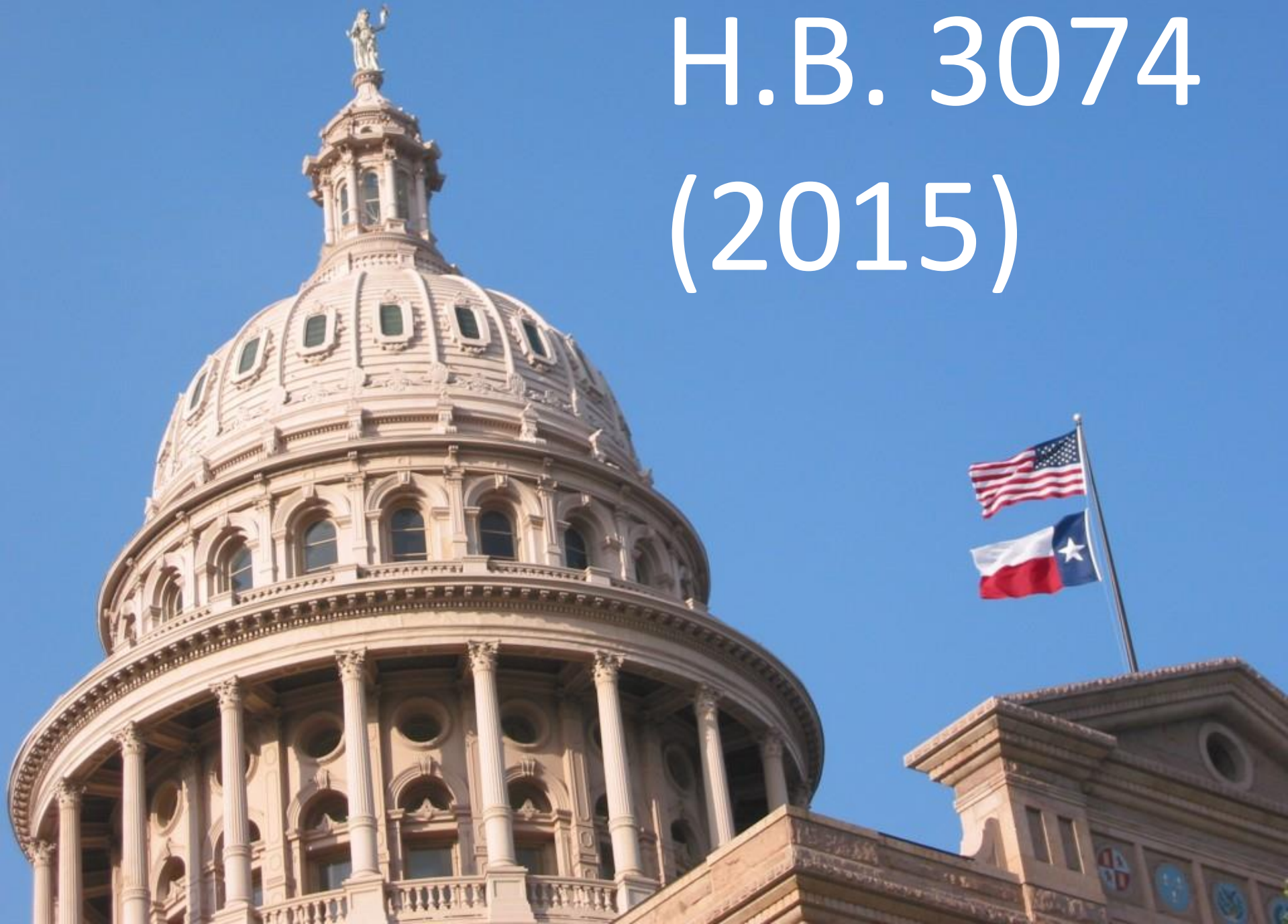
MV dialysis

CPR CANH



1

# H.B. 3074 (2015)



artificially  
administered  
nutrition &  
hydration

2

# TEXAS REGISTER

Sept.  
2018

Volume 43 Number 37

September 14, 2018

Pages 5875 - 6028



Caroline Kirsch  
11th Grade



DNR

3



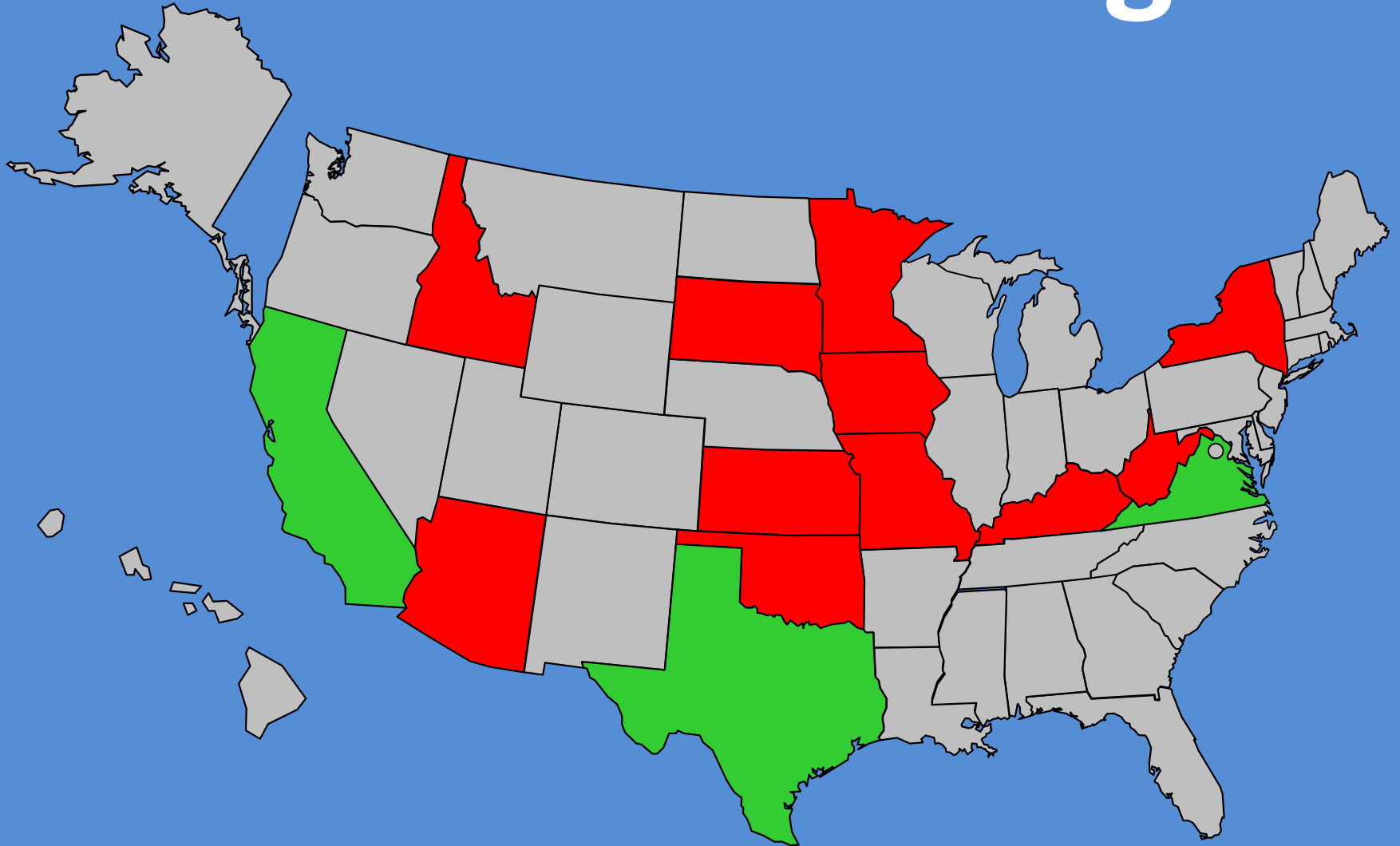
Chris Dunn constitutional challenge

**Mar. 19  
2019**



**Court of Appeals  
First District  
301 Fannin Street  
Houston, Texas 77002-2066**

# More red lights



Why?

**Not** a  
medical  
judgment

**Value**

judgment



Disputed  
treatment  
**might** keep  
patient alive.

Is that chance  
or outcome  
**worthwhile**

That question  
is for patients  
& families

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