

1 Kenneth C. Ward (Bar No. 63131)  
keward@archernorris.com  
2 John L. Kortum (Bar No. 148573)  
jkortum@archernorris.com  
3 Patrice N. Harper (Bar No. 225573)  
pharper@archernorris.com  
4 ARCHER NORRIS  
2033 North Main Street, Suite 800  
5 Walnut Creek, CA 94596-3759  
Telephone: 925.930.6600  
6 Facsimile: 925.930.6620

7 **Attorneys for County Defendants**  
COUNTY OF ALAMEDA, ALAMEDA COUNTY  
8 DEPARTMENT OF PUBLIC HEALTH, MUNTU  
DAVIS, M.D. (individually and in his capacity as  
9 ALAMEDA COUNTY PUBLIC HEALTH  
DEPARTMENT DIRECTOR & HEALTH  
10 OFFICER), ALAMEDA COUNTY CORONER &  
MEDICAL EXAMINER, ALAMEDA COUNTY  
11 COUNSEL, DAVID NEFOUSE, SCOTT DICKEY,  
(individually and in their capacity as DEPUTY  
12 ALAMEDA COUNTY COUNSEL), ALAMEDA  
COUNTY CLERK'S OFFICE; PATRICK  
13 O'CONNELL (individually and in his capacity as  
ALAMEDA COUNTY CLERK-RECORDER);  
14 ALAMEDA COUNTY SHERIFF'S OFFICE;  
JESSICA D. HORN (individually and in her  
15 capacity as ALAMEDA COUNTY DEPUTY  
SHERIFF)  
16

17 UNITED STATES DISTRICT COURT  
18 NORTHERN DISTRICT OF CALIFORNIA  
19 SAN FRANCISCO DIVISION  
20

21 JAHl McMATH, et al.  
22 Plaintiffs,  
23 v.  
24 STATE OF CALIFORNIA, et al.  
25 \_\_\_\_\_  
26  
27  
28

Case No. 15-cv-06042-HSG

**COUNTY DEFENDANTS'  
MEMORANDUM OF POINTS AND  
AUTHORITIES IN SUPPORT OF  
MOTION TO DISMISS COMPLAINT FOR  
DECLARATORY AND INJUNCTIVE  
RELIEF**

**Date: May 12, 2016  
Time: 2:00 p.m.  
Location: Courtroom 10 (19<sup>th</sup> Floor)  
Judge: Hon. Haywood S. Gilliam, Jr.**

**TABLE OF CONTENTS**

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

	<b>Page</b>
I. INTRODUCTION .....	1
II. SUMMARY OF THE FACTS.....	3
A. First Round Of Proceedings Before Judge Grillo In The Superior Court, County of Alameda: December 2013 And January 2014 .....	3
B. Actions By County Personnel: December 2013 and January 2014 .....	4
C. Federal Court Action: December 2013 and January 2014 .....	5
D. Second Round Of Proceedings Before Judge Grillo: September And October 2014.....	6
E. Actions By County Personnel: June to October 2015.....	8
F. Proceedings Before Judge Freedman In The Superior Court, County of Alameda: March 2015 to Present.....	9
G. Allegations In The Present Federal Court Complaint.....	12
III. DISCUSSION .....	13
A. Plaintiffs Bears The Burden Of Proof Regarding Jurisdiction .....	13
B. Plaintiffs Have Adequate State Court Procedures To Obtain Review, And Have Not Exhausted Those Procedures, So Their Pleaded Causes Of Action In This Federal Action Are Improper.....	14
C. The Court Lacks Subject Matter Jurisdiction Under The Rooker-Feldman Abstention Doctrine .....	17
D. This Court Should Abstain From Considering This Matter Under The Younger Abstention Doctrine .....	19
1. The State Proceedings Were Commenced Before This Action And Are Ongoing.....	19
2. The Proceedings Implicate Important State Interests .....	20
3. The State Proceedings Provide An Adequate Opportunity To Raise Federal Questions.....	21
E. Other Grounds For Abstention.....	21
F. The Federal Questions In This Suit Will Be Narrowed By The Likely Dismissal Of Statutory Claims.....	22
1. Ms. McMath Was Not Institutionalized For Purposes Of The Religious Land Use and Institutionalized Persons Act .....	22
2. Plaintiffs Fourth and Fifth Claims for Relief for Violations of the Rehabilitation Act and Americans With Disabilities Act Should Be Dismissed .....	24
IV. CONCLUSION.....	25

**TABLE OF AUTHORITIES**

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

**Page**

**Cases**

*Beltran v. State of Calif.*, 871 F.2d 777, 782 (9th Cir. 1988)..... 15

*Bianchi v. Ryaarsdam*, 334 F.3d 895, 898 (9th Cir. 2003) ..... 2, 18

*Burford v. Sun Oil Co.*, 319 US 315, 334 (1943) ..... 24

*City of Oakland v. Oakland Police and Fire Retirement System*  
(2014) 224 Cal.App.4th 210, 230.) ..... 12, 22

*Colorado River Water Conservation Dist. v. United States* 424 U.S. 800, 815 (1976)..... 24

*Communications Telesystems Int'l v. California Pub. Util. Comm'n*,  
196 F.3d 1011, 1020 (9th Cir. 1999)..... 23

*Doe & Associates Law Office v. Napolitano*, 252 F.3d 1026, 1030 (9<sup>th</sup> Cir. 2001) ..... 19

*Doe v. Mann*, 415 F.3d 1038, 1041 (9th Cir. 2005)..... 20

*Doe v. Univ. of Maryland Med. Sys. Corp.*, 50 F.3d 1261, 1265 n.9 (4th Cir. 1995)..... 27

*Duvall v. County of Kitsap*, 260 F.3d 1124, 1135 (9th Cir. 2001)..... 27

*Fireman's Fund Ins. Co. v. City of Lodi*, 302 F.3d 928, 939-40 (9th Cir. 2002)..... 24

*Fresh International Corp. v. Agricultural Labor Relations Board*,  
805 F.2d 1353, 1357-58 (9th Cir.1986) ..... 21

*Fresh International*, 805 F.2d at 1358 ..... 21

*Gibson v. Berryhill*, 411 US 564, 577 (1973) ..... 15

*Hamilton v. Brown*, 630 F.3d 889, 893 (9th Cir. 2011)..... 15

*Hicks v. Miranda*, 422 U.S. 332, 349 (1975) ..... 21

*Holt v. Grand Lake Mental Health Ctr., Inc.*, 443 F.3d 762, 765 (10th Cir. 2006)..... 28

*In re Gilead Scis. Sec. Litig.*, 536 F.3d 1049, 1055 (9th Cir. 2008)..... 15

*J.E.W. v. Fresno Unified Sch. Dist.*, 570 F. Supp. 2d 1212, 1226 (E.D. Cal. 2008)..... 27

*Juidice v. Vail*, 430 U.S. 327, 337 (1977)..... 3, 20

*Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994) ..... 14

*Middlesex County Ethics Committee v. Garden State Bar Association*, 457 U.S. 423, 431 (1982).2

*Noel v. Hall*, 341 F.3d 1148, 1164 (9th Cir. 2003) ..... 19

**TABLE OF AUTHORITIES**

**Page**

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

*Ohio Civil Rights Commission v. Dayton Christian Schools, Inc.*, 477 U.S. 619, 627 (1986) ..... 22

*Pennzoil Co. v. Texaco, Inc.* (1987) 481 US 1 ..... 23

*Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706 717-722 (1996) ..... 15

*Vinson v. Thomas*, 288 F.3d 1145, 1152 n.7 (9th Cir. 2002) ..... 27

*Warren v. Fox Family Worldwide, Inc.*, 328 F.3d 1136, 1139 (9th Cir. 2003). ..... 14

*Winkfield v. Children’s Hospital Oakland, et al.* (Case No. RP13-707598) ..... 4

*Winkfield v. Children’s Hospital Oakland, et al.*, Case No. 4:13-cv-05993-SBA ..... 6

*Winkfield, et al. v. Rosen, et al.* (Case No. RG15-760730) ..... 10

*Younger v. Harris*, 401 U.S. 37 (1971) ..... 2, 20

*Zamani v. Carnes*, 491 F.3d 990, 996 (9th Cir. 2007) ..... 15

*Zukle v. Regents of Univ. of Cal.*, 166 F.3d 1041, 1045 n.11 (9th Cir. 1999) ..... 27

**Statutes**

29 C.F.R. § 1630.2 (h)(1)-(2) ..... 25

29 U.S.C. § 794(a) ..... 24

42 U.S.C. § 12102 ..... 25

42 U.S.C. § 1983 ..... 15

42 U.S.C. § 2000cc-1(a) ..... 23

42 U.S.C.A. § 1997(1) ..... 23

**Other Authorities**

California Health & Safety Code § 7180 ..... 2

California Health and Safety Code Section 7181 ..... 18

California Health and Safety Code. Section 103225 ..... 15

Deprivation of Civil Rights in Violation of 42 U.S.C. § 1983 ..... 21

Health and Safety Codes §§ 7180 and 7181 ..... 4

N.J. Stat. Ann. § 26:6A-5 ..... 21

Rehabilitation Act of 1973 (29 U.S.C. § 794) ..... 1, 5

Americans With Disabilities Act 42 U.S.C. § 1 ..... 6

**Rules**

Code Civ. Proc. §§ 1084 *et seq.* ..... 16

**I.**  
**INTRODUCTION**

1  
2 Plaintiffs seek a judicial declaration from this Court that “JAHl McMath is not dead and  
3 that her Death Certificate is inaccurate, facially deficient, and invalid” and that she has “exhibited  
4 by acceptable medical standards clear signs of brain function.” Plaintiffs also seek an injunction  
5 from this Court “requiring Defendants to expunge any and all records relating to the issuance of  
6 [the] Certificate of Death.”

7 At its crux, the relief sought is federal review of administrative action by a state and a  
8 county and judicial action by a state court. As the Complaint details, the issue of whether Jahi  
9 McMath is dead or not dead under the laws of the State of California has been the subject of  
10 several state court judicial proceedings in which a judgment has been entered, challenged on a  
11 summarily denied writ, and re-examined almost a year later by the same state court, and never  
12 appealed. Moreover, there is an ongoing case in Alameda County Superior Court, *Spears v.*  
13 *Rosen*, in which the issue of whether Ms. McMath is dead pursuant to state law is at issue.

14 The same issue was considered on the administrative level by the County of Alameda  
15 when the Death Certificate was issued in early 2014 and, more recently, when Plaintiffs sought a  
16 re-examination of the Death Certificate in the second half of 2015. After examination of copious  
17 materials presented by the Plaintiffs, the County concluded, again, that Ms. McMath is dead  
18 pursuant to State law. The Health & Safety Code contains a provision that authorizes a petition in  
19 superior court respecting a death certificate, albeit specifically one that is missing, and the  
20 ordinary state court procedures of writ of mandate, injunction and declaratory relief are available  
21 to Plaintiffs for review of administrative action.

22 Despite this plenitude of state court procedures, Plaintiffs now hope to use the Federal 42  
23 U.S.C. § 1983, the Rehabilitation Act of 1973, the Americans With Disabilities Act, and the  
24 Religious Land Use and Institutionalized Persons Act as vehicles for federal review by this Court  
25 of matters of state concern considered already by state court and by state and county  
26 administrative action. By raising due process, free exercise of religion, privacy, discrimination  
27 and accommodation issues, Plaintiffs seek the substantive relief of a federal revocation of a  
28

1 county-issued death certificate.

2 In circumstances such as these, federal courts abstain from interfering in State issues. The  
3 abstention doctrines are several -- *Rooker-Feldman*, *Younger*, *Pullman*, *Colorado River*, and  
4 *Burford* – but they all come down to a federal court respect for and comity toward state action.  
5 The *Rooker-Feldman* abstention is triggered where the District Court is asked to review a state  
6 court judgment, the *Younger* abstention where there are pending state proceedings, the *Pullman*  
7 abstention where federal issues are dependent on interpretation of unsettled state law, the  
8 *Colorado River* abstention where a pending state case raises identical issues, and the *Burford*  
9 abstention where there are complex questions of state law administered by state administrative  
10 agencies and subject to judicial review.

11 The *Rooker-Feldman* abstention doctrine goes to the question of whether the Court has  
12 subject matter jurisdiction. “*Rooker-Feldman* is a powerful doctrine that prevents federal courts  
13 from second-guessing state court decisions by barring the lower federal courts from hearing de  
14 facto appeals from state court judgments[.]” *Bianchi v. Ryaarsdam*, 334 F.3d 895, 898 (9th Cir.  
15 2003). The Court lacks subject matter jurisdiction under the *Rooker-Feldman* doctrine because  
16 Plaintiffs here are asking the Court to review a state court determination regarding whether Ms.  
17 McMath is dead under state law.

18 The *Younger* abstention doctrine counsels against federal court interference with pending  
19 state judicial proceedings. *Younger v. Harris*, 401 U.S. 37 (1971) “and its progeny espouse a  
20 strong federal policy against federal-court interference with pending state judicial proceedings,  
21 absent extraordinary circumstances.” *Middlesex County Ethics Committee v. Garden State Bar*  
22 *Association*, 457 U.S. 423, 431 (1982). When a case is subject to *Younger* abstention, a district  
23 court should dismiss the federal action. *See Juidice v. Vail*, 430 U.S. 327, 337 (1977)  
24 (“Presumptively, therefore, the principles which underlie *Younger* call for dismissal of the  
25 action.”).

26 At least with respect to the relief sought, at issue in the present case is whether Ms.  
27 McMath is legally dead under the state law governing determination of death, California Health  
28 & Safety Code § 7180 and therefore whether the Death Certificate should be rescinded. This is a

1 complex issue of state concern, administered by state and county agencies, which has been dealt  
 2 with in pending state proceedings, and which has received judicial review that has resulted in a  
 3 judgment. The County Defendants therefore request the Court to abstain in this matter and to  
 4 dismiss the present complaint.

5 Further, the need for a federal court to adjudicate the federal question claims plead is  
 6 diminished by likelihood of dismissal of several of the claims. With respect to the alleged  
 7 violation of the Religious Land Use And Institutionalized Persons Act, Children's Hospital was  
 8 not "owned, operated, managed by, or providing services on behalf of any State or political  
 9 subdivision of a State," and so would not qualify as an "institution" for purposes of that statute  
 10 and, in addition, the hospital did not provide the type of long-term care contemplated by the  
 11 statute, i.e., custodial or residential care for the chronically ill or incarcerated. With respect to the  
 12 alleged violations of the Rehabilitation Act and the Americans with Disabilities Act, Plaintiffs'  
 13 claims suffer from the flaw that "brain death" does not constitute a "physical or mental  
 14 impairment" recognized under the law.

## 15 II. 16 SUMMARY OF THE FACTS

17 On December 9, 2013, Ms. McMath, a thirteen year old child, had a tonsillectomy  
 18 performed at Children's Hospital of Oakland. Complications ensued including loss of blood. On  
 19 December 11 and 12, 2013, Dr. Robert Heidersbach and Dr. Robin Shanahan examined Ms.  
 20 McMath and concluded that she had suffered brain death under accepted medical standards.  
 21 These events have given rise to several legal proceedings besides this one, as outlined below.

### 22 A. First Round Of Proceedings Before Judge Grillo In The Superior Court, County of Alameda: December 2013 And January 2014

23 The first legal proceeding was filed in the Superior Court, County of Alameda, and was  
 24 heard by Judge Evelio M. Grillo. On December 20, 2013, Ms. McMath's biological mother,  
 25 Latasha Winkfield, filed an action in the Superior Court for the County of Alameda seeking to  
 26 compel Children's Hospital to provide medical treatment to Ms. McMath. *Winkfield v.*  
 27 *Children's Hospital Oakland, et al.* (Case No. RP13-707598). See Request for Judicial Notice in  
 28 Support of Motion to Dismiss Complaint for Declaratory and Injunctive Relief ("RJN"), Exhibit

1 A. The parties agreed to an examination of Ms. McMath by Paul Fisher, MD, the Chief of Child  
2 Neurology for the Stanford University School of Medicine to provide an independent opinion  
3 pursuant to Health and Safety Code § 7181. Dr. Fisher examined Ms. McMath the afternoon of  
4 December 23, 2013. Dr. Fisher opined that Ms. McMath was brain dead under accepted medical  
5 standards. On December 24, 2014, the court held a hearing and then announced from the bench  
6 that the court's order was to deny the petition for medical treatment.

7 On December 26, 2013, the court issued a written order that denied the petition for  
8 medical treatment. In the course of addressing the claims in the petition, the court found that Ms.  
9 McMath had suffered brain death as defined by Health and Safety Codes §§ 7180 and 7181.  
10 RJN, Exhibit B. This order was reissued in corrected form on January 2, 2014. RJN, Exhibit C.

11 On January 3, 2014, Judge Grillo held a hearing and issued an order that denied  
12 Petitioner's motion for a court order ordering either that Children's Hospital insert a feeding tube  
13 and a tracheal tube into the body of Ms. McMath or that the hospital permit Petitioner to have a  
14 physician insert a feeding tube and a tracheal tube into the body of Ms. McMath at the hospital.  
15 In explaining that decision, the court stated, "Jahi McMath has been found to be brain dead  
16 pursuant to Health and Safety Code sections 7180-7181." RJN, Exhibit D.

17 On January 17, 2014, the Superior Court entered a "Final Judgment" in the case. The  
18 judgment states, in part, "the Petition of Latasha Winkfield as mother of Jahi McMath, a minor, is  
19 DENIED" and "the motions of petitioner that respondent perform or permit surgical procedures  
20 was DENIED as stated in the order dated January 17, 2014." RJN, Exhibit E.

21 **B. Actions By County Personnel: December 2013 and January 2014**

22 Ms. McMath was determined brain dead by physicians at Children's Hospital and the  
23 death was reported to the Coroner on December 12, 2013. The Coroner took jurisdiction over  
24 Ms. McMath's remains for the purpose of determining the cause, manner, and circumstances of  
25 her death.

26 Prior to making a determination as to the case, manner, and circumstances of Ms.  
27 McMath's death, the Court intervened at the request of Ms. McMath's family and an independent  
28 "competent medical authority," Dr. Fisher, determined Ms. McMath was in fact "brain dead" and



1 a judicial order was entered, declaring Ms. McMath brain dead on December 26, 2013.

2 After the judicial determination of brain death, counsel for Ms. McMath, Christopher B.  
3 Dolan, contacted the Coroner's Bureau on or about December 27, 2013, to request that the  
4 Coroner release the body and custody of Ms. McMath to the family of Ms. McMath. The  
5 Coroner informed Mr. Dolan that it could not release the body to the family of Ms. McMath  
6 without a death certificate.

7 At that point, the Coroner as required by statute, and at the request of counsel for Ms.  
8 McMath's family in order to get custody of Ms. McMath's body, issued the death certificate for  
9 Ms. McMath on January 3, 2014, noting the cause of death as pending. The Death Certificate  
10 contained the name of the local registrar, Muntu Davis, MD, and the name of the Deputy  
11 Coroner, Jessica D. Horn, both named as defendants in the present action. Complaint, Ex. A.

12 In addition, the Coroner agreed to transfer the custody of the body of Ms. McMath to her  
13 family, on the condition that Mr. Dolan would agree he would notify the Coroner when the body  
14 was moved to a facility other than the immediate transfer facility and that upon physical death  
15 Ms. McMath's body would be returned to Alameda County.

16 On the same day, January 3, 2014, representatives from the Alameda County Public  
17 Health Department's Vital Registration Office transmitted the death certificate to the State of  
18 California, consistent with statutory authority. On January 5, 2014, the Coroner transferred  
19 custody of the body to Ms. McMath's family. RJN, Exhibit O.

20 **C. Federal Court Action: December 2013 and January 2014**

21 On December 30, 2013, Latasha Winkfield filed an action in the United States District  
22 Court, Northern District of California, against Children's Hospital. *Winkfield v. Children's*  
23 *Hospital Oakland*, et al., Case No. 4:13-cv-05993-SBA. This action alleged causes of action for:  
24 (1) Violation of the Free Exercise Clause of First Amendment of the United States Constitution;  
25 (2) Violation of the Right to Privacy Guaranteed Under the Fourth Amendment of the United  
26 States Constitution; (3) Violation of the Right to Privacy Guaranteed under the Fourteenth  
27 Amendment of the United States Constitution; (4) Violation of Section 504 of The Rehabilitation  
28 Act of 1973 (29 U.S.C. § 794); and (5) Violation of The Americans With Disabilities Act 42

1 U.S.C. § 12101 *et seq.* RJN, Exhibit L.

2 On January 23, 2014, Judge Sandra Brown Armstrong filed an Order to Show Cause Re  
3 Dismissal, which raised questions whether the court lacked jurisdiction to consider the action due  
4 to mootness and the *Rooker-Feldman* abstention doctrine. RJN, Exhibit M. The court noted that  
5 “[a]t a minimum, the claims herein appear to be ‘inextricably intertwined’ with the state court  
6 action, thereby triggering application of the *Rooker-Feldman* doctrine.” *Id.* at 5:11-13.

7 **D. Second Round Of Proceedings Before Judge Grillo: September And October 2014**

8 Some nine months after its initial resolution, the proceeding before Judge Grillo was  
9 reopened for reconsideration of the issue of whether Ms. McMath was alive or dead, but the  
10 representatives of Ms. McMath withdrew the request for reconsideration. On Wednesday  
11 September 24, 2014, counsel for Latasha Winkfield, Mr. Dolan, sent an email to the Superior  
12 Court that stated, in part, “From preliminary information I have received, to be soon verified, I  
13 believe that I will be asking the court to reverse its ruling on brain death.” RJN, Exhibit G.

14 On Tuesday, September 30, 2014, the Superior Court held a case management conference  
15 to discuss procedural matters. On Wednesday, October 1, 2014, the Superior Court entered a  
16 written order that set a briefing schedule for any motion or application that petitioner might bring  
17 and outlined the court’s procedural concerns. *Id.*

18 On Friday, October 3, 2014, Latasha Winkfield filed a petition for a Writ of Error *Corum*  
19 *Nobis* that included extensive exhibits, including declarations from medical doctors. In this  
20 petition, Latasha Winkfield petitioned for a writ “to reverse the brain death determination of Jahi  
21 McMath.” RJN, Exhibit N at 1:23-25. Ms. Winkfield requested a “hearing/reconsideration of  
22 this court’s determination of her being brain dead pursuant to California Health and Safety Code  
23 Section 7181.” *Id.* at 11:14-15.

24 The hearing was scheduled for Thursday, October 9, 2014. On Monday, October 6, 2014,  
25 the Superior Court entered an order re-appointing Paul Fisher MD as the court’s independent  
26 expert under Evidence Code § 730. This order attached a letter from Dr. Fisher explaining his  
27 concerns with the evidence presented in support of the petition for a writ of error *corum nobis*.  
28 RJN, Exhibit G.

1 On Wednesday, October 8, 2014, Latasha Winkfield filed an objection to the court's order  
2 appointing Dr. Fisher as the court's independent expert and separately filed a notice of motion to  
3 continue the hearing set for Thursday, October 9, 2014. *Id.* On Wednesday, October 8, 2014,  
4 Petitioner's counsel sent an email to the court at 9:57 a.m. stating:

5 Counsel:

6 It is my intention to try and take the hearing on the Writ off  
7 calendar for tomorrow and re-file it, requesting a hearing date of  
8 November 14. This will give every party ample time to brief the  
9 very complex issues in this matter.

10 On Wednesday, October 8, 2014, court staff sent an email to counsel at 10:21 a.m. stating:

11 Counsel,

12 Regarding Mr. Dolan's recent email, I have conferred with Judge  
13 Grillo. He states:

- 14 1. Petitioner may unilaterally DROP the pending petition/motion.  
This will take the matter off the court's calendar.
- 15 2. Petitioner may seek to CONTINUE the pending petition/motion.  
This will require consent of the parties or an order of the court. If  
16 the parties agree to a continuance the court will continue the  
17 pending petition/motion. If the parties do not agree to a  
18 continuance then the pending petition/motion will remain on  
19 calendar for 10/9/14 and the court will hear petitioner's request for  
20 a continuance that that time.
- 21 3. Petitioner must inform the parties and the court as soon as  
22 possible whether petitioner wants to DROP or to CONTINUE the  
23 pending petition/motion. The other parties do not need to file their  
24 briefs (scheduled to be due today at 12:00 noon) until after  
25 petitioner makes that decision.

26 *Id.*

27 On Wednesday, October 8, 2014, Petitioner sent an email to the court at 11:04 a.m.  
28 stating:

Although Petitioner is withdrawing its petition/motion, we request  
that the Court convene with the parties at the scheduled time  
tomorrow for the limited purpose of discussing if the various  
medical experts can communicate with Dr. Fisher to discuss his  
findings and concerns.

Given that Dr. Fisher is the Court appointed expert, Petitioner  
requests permission from the Court to allow the various experts to

1 contact Dr. Fisher.

2 *Id.*

3 All of the above emails were copied to all counsel in the case, including counsel for non-  
4 parties the Alameda County Coroner or the California Department of Public Health. By order  
5 dated October 8, 2014, Judge Grillo ordered as follows:

6 Petitioner withdrew the petition set for 10/9/14. The court will, at  
7 petitioner's request, drop that hearing.

8 The court will not hold a CMC in this case on 10/9/14. If petitioner  
9 elects to seek relief in this case, then petitioner may request a CMC  
10 at a later date in this case. At any such CMC the court will decide  
11 whether to set the matter for further hearing and set any briefing  
12 schedule.

13 If petitioner elects to file a different case, then any CMC regarding  
14 proceedings in that case should be held in that case.

15 If petitioner elects to file a different case, then petitioner must file a  
16 notice of related case informing the court of this case. (CRC  
17 3.300.)

18 *Id.*

19 In short, Judge Grillo had set a hearing to consider the issues raised in the Writ of Error  
20 *Corum Nobis*, but the matter was never heard because the petitioners withdrew the petition. The  
21 correspondence and order makes clear that Judge Grillo left the door open to petitioners to come  
22 back with a renewed petition.

23 **E. Actions By County Personnel: June to October 2015**

24 A year and a half later, after Ms. McMath had been moved to the East Coast, counsel for  
25 Ms. McMath contacted Muntu Davis, MD, the Public Health Director and County Health Officer  
26 of Alameda County, regarding Ms. McMath's status. By letter dated June 18, 2015, counsel  
27 asked Dr. Muntu to consider various declarations relating to Ms. McMath's then current status,  
28 which were enclosed, and also provided a DVD of video clips of Ms. McMath. See Complaint  
Ex. G. The letter also asserted that the "As the Death Certificate was never complete and/or  
finalized, is missing critical certification and verification, in the face of this contrary evidence, the  
moniker of death should be removed from Jahi so she can return to California." *Id.*

The County responded by letter dated October 9, 2015 from County Counsel, signed by

1 Defendant L. David Nefouse, to Mr. Dolan. This letter stated in part:

2 After reviewing the legal materials you provided with your Request  
 3 (specifically, at the bottom of page 8 through page 12 of the 90  
 4 pages provided in the Request), the Coroner and Public Health  
 5 Department find no basis to make any changes to and/or nullify or  
 6 rescind the death certificate of Ms. McMath. Indeed, nothing in  
 7 your legal materials demonstrates that the Coroner and/or Public  
 8 Health Department failed to properly issue the death certificate for  
 9 Ms. McMath under the California Health and Safety Code.

10 And, critically, on January 17, 2014, Alameda County Superior  
 11 Court Judge Evelio M. Grillo issued a judgment finding Jahi  
 12 McMath to be brain dead pursuant to California Health and Safety  
 13 Code sections 7180, 7181 (the "Judgment"). Your office initially  
 14 attempted to appeal the Judgment in January 2014 to no avail. In  
 15 October 2014, your office once again attempted to challenge the  
 16 Judgment, however, you withdrew your writ prior to any hearing  
 17 taking place on that matter. Any opportunity to overturn the  
 18 Court's holding that Jahi McMath is brain dead has long expired,  
 19 and that Judgment is now the final and controlling authority on this  
 20 question. Accordingly, the Coroner and Public Health Department  
 21 have not legal basis to "rescind, revise, change, or invalidate" the  
 22 death certificate for Ms. McMath.

23 Complaint, Ex. L.

24 To the County Defendants' knowledge, Ms. McMath's representatives have taken no legal  
 25 action to obtain review of this determination except for the filing of the present federal lawsuit.

26 **F. Proceedings Before Judge Freedman In The Superior Court, County of Alameda:  
 27 March 2015 to Present**

28 In March 2015, Ms. McMath's mother, Latasha Nailah Spears Winkfield, her step-father  
 Marvin Winkfield, her biological maternal grandmother Sandra Chatman and Ms. McMath filed  
 suit in Superior Court, County of Alameda, naming as defendants Fredrick Rosen, MD and  
 Children's Hospital Oakland. *Winkfield, et al. v. Rosen, et al.* (Case No. RG15-760730). A First  
 Amended Complaint For Damages For Medical Malpractice was filed in this action on November  
 4, 2015. This amended complaint contains three causes of action: "First Cause of Action For  
 Personal Injuries On Behalf Of Jahi McMath"; "Second Cause of Action For Negligent Infliction  
 Of Emotional Distress On Behalf Of Plaintiffs Latasha Nailah Spears Winkfield and Chatman";  
 and "Third Cause of Action For Wrongful Death On Behalf Of Plaintiff Latasha Nailah Spears  
 Winkfield." This action was assigned to Judge Robert Freedman.

Given that the amended complaint alleges causes of action for both personal injury and

1 wrongful death, the complaint necessarily addresses the issue of whether Ms. McMath is alive or  
2 dead. In so doing, the complaint alleges in part nearly the same claims as in the present federal  
3 case here:

4 27. On January 3, 2014, Deputy Coroner for the County  
5 of Alameda Jessica D. Horn issued a death certificate for JAH  
6 noting a date of death of December 12, 2013, at 15:00 hrs.  
7 However, the Certificate of Death did not state a cause of death and  
8 instead notes under the Immediate Cause of Death "pending  
9 investigation." The death certificate, therefore, was invalid and  
10 violated California Health & Safety Code § 102875. The  
11 Certificate of Death also failed to include a physician's certification  
12 and contains no signature of a physician certifying to the death, as  
13 required by California Health & Safety Code § 102825.

14 28. On May 29, 2015, the State of California  
15 Department of Vital Records, the Chief of the Death and Fetal  
16 Death Registration Section and the Center for Health Statistics and  
17 Information were petitioned to rescind, cancel, void or amend  
18 JAH's death certificate. These departments wrote back that they  
19 lacked standing to take such action and that the request should be  
20 directed to the coroner who issued the Certificate of Death.

21 29. On June 18, 2015, Muntu Davis, M.D., Health  
22 Officer for the Alameda County Health Care Service Agency and  
23 the local Registrar of Births and Deaths, was petitioned to rescind,  
24 cancel, void or amend JAH's death certificate. Dr. Davis had  
25 previously indicated that the request should be directed to the state  
26 agencies. To date, Muntu Davis, M.D., has not acted on the  
27 request.

28 30. Since the Certificate of Death was issued, JAH has  
29 been examined by a physician duly licensed to practice in the State  
30 of California who is an experienced pediatric neurologist with triple  
31 Board Certifications in Pediatrics, Neurology (with special  
32 competence in Child Neurology), and Electroencephalography.  
33 The physician has a subspecialty in brain death and has published  
34 and lectured extensively on the topic, both nationally and  
35 internationally. This physician has personally examined JAH and  
36 has reviewed a number of her medical records and studies  
37 performed, including an MRI/MRA done at Rutgers University  
38 Medical Center on September 26, 2014. This doctor has also  
39 examined 22 videotapes of JAH responding to specific requests to  
40 respond and move.

41 31. The MRI scan of September 26, 2014, is not  
42 consistent with chronic brain death MRI scans. Instead, JAH's  
43 MRI demonstrates vast areas of structurally and relatively  
44 preserved brain, particularly in the cerebral cortex, basal ganglia  
45 and cerebellum.

46 32. The MRA or MR angiogram performed on  
47 September 26, 2014, nearly 10 months after JAH's anoxic-

1 ischemic event, demonstrates intracranial blood flow, which is  
2 consistent with the integrity of the MRI and inconsistent with brain  
3 death.

4 33. JAHl's medical records also document that  
5 approximately eight months after the anoxic-ischemic event, JAHl  
6 underwent menarche (her first ovulation cycle) with her first  
7 menstrual period beginning August 6, 2014. JAHl also began  
8 breast development after the diagnosis of brain death. There is no  
9 report in JAHl's medical records from CHO that JAHl had began  
10 pubertal development. Over the course of the subsequent year  
11 since her anoxic-ischemic event at CHO, JAHl has gradually  
12 developed breasts and as of early December 2014, the physician  
13 found her to have a Tanner Stage 3 breast development.

14 34. The female menstrual cycle involves hormonal  
15 interaction between the hypothalamus (part of the brain), the  
16 pituitary gland, and the ovaries. Other aspects of pubertal  
17 development also require hypothalamic function. Corpses do not  
18 menstruate. Neither do corpses undergo sexual maturation. There  
19 is no precedent in the medical literature of a brain dead body  
20 developing the onset of menarche and thelarche.

21 35. Based upon the pediatric neurologist's evaluation of  
22 JAHl, JAHl no longer fulfills standard brain death criteria on  
23 account of her ability to specifically respond to stimuli. The  
24 distinction between random cord-originating movements and true  
25 responses to command is extremely important for the diagnosis of  
26 brain death. JAHl is capable of intermittently responding  
27 intentionally to a verbal command.

28 36. In the opinion of the pediatric neurologist who has  
examined JAHl, having spent hours with her and reviewed  
numerous videotapes of her, that time has proven that JAHl has not  
followed the trajectory of imminent total body deterioration and  
collapsed that was predicted back in December of 2013, based on  
the diagnosis of brain death. Her brain is alive in the  
neuropathological sense and it is not necrotic. At this time, JAHl  
does not fulfill California's statutory definition of death, which  
requires the irreversible absence of *all* brain function, because she  
exhibits hypothalamic function and intermittent responsiveness to  
verbal commands.

RJN, Exhibit I.

The defendants in this medical malpractice case brought a demurrer to the first cause of  
action on the grounds that the death certificate established that Ms. McMath is dead and therefore  
would not have standing to pursue a personal injury claim. While the court has not issued a final  
ruling on the demurrer, the court's tentative ruling gives some indication that court will consider  
an evidentiary hearing in order to reexamine the issue of whether Ms. McMath is brain dead:

1 Further, as both sides recognize (and as Judge Grillo noted in his  
 2 Order Following Case Management Conference issued on October  
 3 1, 2014), California law on issue preclusion permits “reexamination  
 4 of the same questions between the same parties where in the interim  
 the facts have changed or new facts have occurred which may alter  
 the legal rights of the parties.” (*City of Oakland v. Oakland Police  
 and Fire Retirement System* (2014) 224 Cal.App.4th 210, 230.)

5 RJN, Exhibit K.

6 **G. Allegations In The Present Federal Court Complaint**

7 The Complaint in this federal action alleges, among other things, that the Death Certificate  
 8 issued for Ms. McMath is facially defective because it fails to include necessary information.  
 9 Plaintiffs therefore have requested this federal Court to declare that the County issued death  
 10 certificate is invalid. The allegations about the Death Certificate include:

11 73. This required paperwork included a purported  
 12 “Certificate of Death” number 002381866 (Exhibit A), which was  
 13 issued by The Office of Clerk-Recorder, County of Alameda, and  
 14 which is a Vital Record of the State of California, dated 11/3/2014,  
 15 which did not contain any attestation of a physician who ever was  
 in attendance of JAHl, gave 12/11/2013 at 15:00 as JAHl’s time of  
 death. Indeed there is no signature, only a computer generated  
 reference to Dr. Muntu Davis who was not even present at the time  
 the Death Certificate was printed.

16 80. Certificate of Death number 002381866 does not  
 17 contain “medical and health section data” or a “time of death”  
 18 which was completed and attested to by the physician or surgeon  
 19 last in attendance of JAHl McMath prior to 15:00 pm on December  
 20 12, 2013. Indeed there is no identification of any such physician or  
 21 surgeon anywhere on JAHl’s Death Certificate.

22 95. Certificate of Death number 002381866, in violation  
 23 of California HSC § 10285, was not signed by “[t]he physician and  
 24 surgeon last in attendance” on JAHl, nor does it “specify the time  
 25 [any such physician was] in attendance [or] the time he or she last  
 26 saw [JAHl] alive.”

27 97. Thus, based solely on information which was  
 28 available no later than January, 2014, the Alameda County Office  
 of Clerk-Recorder issued an incomplete and facially insufficient  
 Certificate of Death which did not contain a Physician’s  
 Certification, a Cause of Death, or a description of any injuries that  
 were purported to have led to the death of JAHl.

Complaint ¶¶ 73, 80, 95, 97.

Plaintiffs also challenge the action of the County Defendants, or some of them, in denying  
 their request for reconsideration and rescission of the Death Certificate. Plaintiffs allege the



1 County’s action violated their rights of due process:

2 180. On October 9, 2015, Plaintiffs finally received a  
3 definitive response from Mr. Nefouse, attached hereto as Exhibit  
4 “L,” which indicated that Alameda County found “no basis to make  
any changes to and/or nullify or rescind the death certificate of Ms.  
McMath.”

5 181. This letter inaccurately described the basis for  
6 Plaintiffs’ request, which was made on substantive grounds and  
7 which relied on information which became available to Plaintiffs  
8 subsequent to February 1, 2014, when the letter stated that the  
9 County’s review of Plaintiffs’ “legal materials demonstrates that the  
Coroner and/or Public Health department ... properly issue[d] the  
death certificate for Ms. McMath [on January 3, 2013] under the  
California Health and Safety Code.”

10 182. This letter did not indicate what criteria had been  
11 applied in its determination, did not specify any findings of fact or  
12 law, did not specify a legal standard of proof that was used, and did  
not inform Plaintiffs of any appeals procedure available to them.  
As such, it was arbitrary and capricious and a violation of  
Plaintiffs’ due process rights.

13 183. This letter failed to address the substantive medical  
14 content of Plaintiffs’ voluminous submission, rather it seemed to  
15 apply something akin to “res judicata” to the ongoing, changing,  
and improving condition of JAHl McMath’s brain function.

16 188. This letter also failed to inform Plaintiffs of the  
17 process used to arrive at this conclusory legal opinion, or to inform  
18 them of any procedural safeguards or appeals process available to  
19 them, in order to safeguard JAHl’s most fundamental civil right,  
her very right to life.

19 189. As such, this decision was made in violation of the  
20 most basic requirements of due process.

20 Complaint ¶¶ 180-183, 188-189.

21 **III.**  
22 **DISCUSSION**

23 **A. Plaintiffs Bears The Burden Of Proof Regarding Jurisdiction**

24 The party asserting federal subject matter jurisdiction bears the burden of establishing its  
25 existence. *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994). A  
26 jurisdictional challenge under Rule 12(b)(1) may be made either on the face of the pleadings or  
27 based upon extrinsic evidence. *Warren v. Fox Family Worldwide, Inc.*, 328 F.3d 1136, 1139 (9th  
28 Cir. 2003).

1           When the relief sought is equitable or otherwise discretionary, federal courts invoking  
 2 abstention principles have discretion to either stay the action or decline jurisdiction altogether by  
 3 dismissing the action or, in removal cases, remanding it to state court. *Quackenbush v. Allstate*  
 4 *Ins. Co.*, 517 U.S. 706 717-722 (1996); *Gibson v. Berryhill*, 411 US 564, 577 (1973); *Beltran v.*  
 5 *State of Calif.*, 871 F2d 777, 782 (9th Cir. 1988).

6           A complaint may be dismissed under Rule 12(b)(6) for failure to state a claim “where  
 7 there is no cognizable legal theory or an absence of sufficient facts alleged to support a  
 8 cognizable legal theory.” *Zamani v. Carnes*, 491 F.3d 990, 996 (9th Cir. 2007). In considering  
 9 whether a complaint states a claim, a court must accept as true all of the material factual  
 10 allegations in it. *Hamilton v. Brown*, 630 F.3d 889, 893 (9th Cir. 2011). However, the Court  
 11 need not accept as true “allegations that are merely conclusory, unwarranted deductions of fact, or  
 12 unreasonable inferences.” *In re Gilead Scis. Sec. Litig.*, 536 F.3d 1049, 1055 (9th Cir. 2008).

13 **B. Plaintiffs Have Adequate State Court Procedures To Obtain Review, And Have Not**  
 14 **Exhausted Those Procedures, So Their Pleaded Causes Of Action In This Federal**  
 15 **Action Are Improper**

16           Plaintiffs here directly challenge two administrative actions. First, the Plaintiffs challenge  
 17 the validity of the Death Certificate on its face, claiming that it lacks required information and is  
 18 therefore invalid. They allege in the Complaint that “based solely on information which was  
 19 available no later than January, 2014, the Alameda County Office of Clerk-Recorder issued an  
 20 incomplete and facially insufficient Certificate of Death which did not contain a Physician’s  
 21 Certification, a Cause of Death, or a description of any injuries that were purported to have led to  
 22 the death of JAHL.” Complaint ¶ 97.

23           Second, Plaintiffs challenge the due process they were accorded by the Defendants in  
 24 connection with their 2015 request for rescission of the Death Certificate. They claim that the  
 25 County’s letter dated October 9, 2015, in which the County found “no basis to make any changes  
 26 to and/or nullify or rescind the death certificate of Ms. McMath” violated their rights to due  
 27 process:

28                           182. This letter did not indicate what criteria had been  
 applied in its determination, did not specify any findings of fact or  
 law, did not specify a legal standard of proof that was used, and did

1 not inform Plaintiffs of any appeals procedure available to them.  
 2 As such, it was arbitrary and capricious and a violation of  
 Plaintiffs' due process rights.

3 Complaint ¶ 182.

4 Plaintiffs seek judicial review of both administrative actions in this federal forum through  
 5 various causes of action that are fundamentally different from typical review by mandamus. As  
 6 defined by the causes of action plead, those issues are violation of constitutionally protected due  
 7 process, religious expression, and privacy under 42 U.S.C. § 1983, and violation of the ADA,  
 8 Rehabilitation Act, and the Institutionalized Persons Act.

9 With respect to relief, Plaintiffs seek a judicial declaration from this Court that "JAH  
 10 McMath is not dead and that her Death Certificate is inaccurate, facially deficient, and invalid"  
 11 and that she has "exhibited by acceptable medical standards clear signs of brain function."  
 12 Plaintiffs also seek an injunction from this Court "requiring Defendants to expunge any and all  
 13 records relating to the issuance of [the] Certificate of Death." Complaint ¶¶ 287, 295, 303.

14 Amendments to and corrections of Death certificates are governed by procedures set forth  
 15 in the California Health and Safety Code. Section 103225 of that code permits a person to submit  
 16 affidavits to the state or local registrar to correct an error:

17 Whenever the facts are not correctly stated in any certificate of  
 18 birth, death, fetal death, or marriage already registered, the person  
 19 asserting that the error exists may make an affidavit under oath  
 20 stating the changes necessary to make the record correct, that shall  
 be supported by the affidavit of one other credible person having  
 knowledge of the facts, and file it with the state or local registrar.

21 Health and Safety Code § 103225. Then, "[i]f the amendment relates to a certificate that has been  
 22 transmitted to the State Registrar, the amendment shall be transmitted to the State Registrar who  
 23 shall review it for acceptance for filing." *Id.* § 103240. After review by State Registrar, "[i]f the  
 24 amendment is accepted, the State Registrar shall transmit copies of the amendment to the local  
 25 registrar and county recorder in whose offices copies of the original record and information are on  
 26 file." *Id.* § 103245. The changes are to be documented with a declaration by "the certifying  
 27 physician or coroner having knowledge" about the changes:

28 Notwithstanding other provisions in this part relative to amendment  
 of records, whenever the information originally furnished in the

1 medical and health data section of any record of death, fetal death  
2 or live birth is modified by supplemental information relative  
3 thereto, the certifying physician or coroner having knowledge of  
4 this information may make a declaration as provided in Section  
2015.5 of the Code of Civil Procedure stating the changes necessary  
to make the information correct and file it with the state or local  
registrar.

5 *Id.* § 103245.

6 The Health & Safety Code also authorizes the filing of a petition “to judicially establish  
7 the fact of, and the time and place of, a birth, death, or marriage that is not registered or for which  
8 a certified copy is not obtainable”:

9 (a) A verified petition may be filed by any beneficially  
10 interested person with the clerk of the superior court in and for (1)  
11 the county in which the birth, death, or marriage is alleged to have  
12 occurred, (2) the county of residence of the person whose birth or  
13 marriage it is sought to establish, or (3) the county in which the  
person was domiciled at the date of death for an order to judicially  
establish the fact of, and the time and place of, a birth, death, or  
marriage that is not registered or for which a certified copy is not  
obtainable.

14 *Id.* § 103450. The code states that the “petition shall be verified and shall contain all the facts  
15 necessary to enable the court to determine the fact of and the time and place of the birth, death, or  
16 marriage upon the proofs adduced in behalf of the petitioner at the hearing.” *Id.* § 103455. While  
17 these provisions address the circumstance when a death certificate is missing, they nonetheless  
18 provide a means for review of death certificate issues which could be exemplary here.

19 As plead in the Complaint here, Plaintiffs submitted several declarations regarding Ms.  
20 McMath’s status with their request for reconsideration of the Death Certificate. However, after  
21 receiving the County’s letter of October 9, 2015, Plaintiffs did not follow up with a verified  
22 petition to the Superior Court but, rather, filed this federal court action.

23 At its crux, Plaintiffs are seeking federal court review of administrative actions by state  
24 and county personnel. They are asking this Court to rescind or nullify a state and county  
25 instrument. This is relief appropriately sought under the procedures set forth in California law for  
26 review of state and county actions. The procedures might include those for a verified petition  
27 under Section 103450, discussed above, a petition for writ of mandate (Code Civ. Proc. §§ 1084  
28 *et seq.*), for injunctive relief (Code Civ. Proc. §§ 525 *et seq.*) and for declaratory relief (Code Civ.

1 Proc. §§ 1060 *et seq.*). It is improper to bring multiple Section 1983 claims, and other federal  
2 statutory claims, in this Court when procedures under state law are appropriate and adequate.

3 **C. The Court Lacks Subject Matter Jurisdiction Under The *Rooker-Feldman***  
4 **Abstention Doctrine**

5 The Court lacks subject matter jurisdiction under the *Rooker-Feldman* doctrine because  
6 plaintiffs here are asking the Court to review state court determinations. “*Rooker-Feldman* is a  
7 powerful doctrine that prevents federal courts from second-guessing state court decisions by  
8 barring the lower federal courts from hearing de facto appeals from state court judgments[.]”  
9 *Bianchi v. Ryaarsdam*, 334 F.3d 895, 898 (9th Cir. 2003).

10 Before filing his federal action, the plaintiff in *Bianchi* had sought transfer of his case  
11 pending in the California Court of Appeal on grounds of alleged bias of one of the justices.  
12 “After losing on two separate occasions, he filed a federal civil rights suit, which, in this case, is  
13 the functional equivalent of an appeal of the state court decision.” *Id.* at 896. Because under  
14 “*Rooker-Feldman*, a federal district court is without subject matter jurisdiction to hear an appeal  
15 from the judgment of a state court,” the District Court dismissed plaintiff Bianchi’s complaint and  
16 the Court of Appeals for the Ninth Circuit affirmed. *Id.*

17 “It is a forbidden de facto appeal under *Rooker-Feldman* when the plaintiff in federal  
18 district court complains of a legal wrong allegedly committed by the state court, and seeks relief  
19 from the judgment of that court.” *Noel v. Hall*, 341 F.3d 1148, 1164 (9th Cir. 2003). The fact  
20 that plaintiff is bringing constitutional claims does not preclude application of the doctrine where  
21 the claims are “inextricably intertwined” with the state court’s ruling. See *Bianchi*, 334 F.3d at  
22 900 n.4 (“It is immaterial that Bianchi frames his federal complaint as a constitutional challenge  
23 to the state courts’ decisions, rather than as a direct appeal of those decisions. The *Rooker-*  
24 *Feldman* doctrine prevents lower federal courts from exercising jurisdiction over any claim that is  
25 ‘inextricably intertwined’ with the decision of a state court, even where the party does not directly  
26 challenge the merits of the state court’s decision but rather brings an indirect challenge based on  
27 constitutional principles.”).<sup>1</sup>

28 <sup>1</sup> The Ninth Circuit has applied the *Rooker-Feldman* doctrine to interlocutory state court

1 A comparison of Plaintiffs' pleadings in state court and federal court reveals that the  
2 constitutional claims and related claims in this federal suit are inextricably intertwined with the  
3 state court's denial of relief. On December 23-24, 2013, the state court ruled that Ms. McMath  
4 "had suffered brain death and was deceased as defined under Health and Safety Code 7180 and  
5 7181," and on that basis, denied Plaintiff's request for a TRO. RJN, Exhibit B at 16:11-13. In  
6 the Writ of Error *Corum Nobis* filed on or about October 3, 2014, Latasha Winkfield petitioned  
7 for a writ "to reverse the brain death determination of Jahi McMath." RJN, Exhibit N at 1:23-25).  
8 Ms. Winkfield requested a "hearing/reconsideration of this court's determination of her being  
9 brain dead pursuant to California Health and Safety Code Section 7181." *Id.* at 11:14-15. Ms.  
10 Winkfield withdrew this petition and the court, at petitioner's request, dropped the hearing that  
11 had been scheduled. Thus, the Superior Court's prior ruling remained standing.

12 The present action, likewise, seeks a judicial declaration that Ms. McMath is not brain  
13 dead and that the death certificate should be rescinded. For example, Paragraph 295 of the  
14 Complaint states: "Plaintiffs seek declaratory relief from this Court in the form of a judicial  
15 declaration that JAHl McMath is not dead and that her Death Certificate is inaccurate, facially  
16 deficient, and invalid." Complaint ¶ 295. Similarly, Paragraph 303 of the Complaint states:  
17 "Plaintiffs seek declaratory relief from this Court in the form of a judicial declaration that JAHl  
18 McMath has exhibited by acceptable medical standards clear signs of brain function subsequent  
19 to December 23, 2013, and that she does not have irreversible cessation all functions of the entire  
20 brain, including the brain stem." Complaint ¶ 303.

21 At a minimum, the claims herein appear to be "inextricably intertwined" with the state  
22 court action, thereby triggering application of the *Rooker-Feldman* doctrine.<sup>2</sup> *Doe v. Mann*, 415  
23 F.3d 1038, 1041 (9th Cir. 2005) (where *Rooker-Feldman* applies, a federal court "must also

24  
25 decisions. *Doe & Associates Law Office v. Napolitano*, 252 F.3d 1026, 1030 (9<sup>th</sup> Cir. 2001)  
26 (applying doctrine to state court denial of motion to quash.

27 <sup>2</sup> The fact that the relief sought by Plaintiff from this Court is identical to relief sought in state  
28 court also supports application of the *Rooker-Feldman* bar. *Bianchi*, 334 F.3d at 900 (noting that  
in determining the applicability of *Rooker-Feldman*, the court must pay close attention to the  
relief sought by the federal-court plaintiff.").

1 refuse to decide any issue raised in the suit that is ‘inextricably intertwined’ with an issue  
2 resolved by the state court in its judicial decision.”).

3 **D. This Court Should Abstain From Considering This Matter Under The *Younger***  
4 **Abstention Doctrine**

5 *Younger v. Harris*, 401 U.S. 37 (1971) “and its progeny espouse a strong federal policy  
6 against federal-court interference with pending state judicial proceedings, absent extraordinary  
7 circumstances.” *Middlesex County Ethics Committee v. Garden State Bar Association*, 457 U.S.  
8 423, 431 (1982). When a case is subject to *Younger* abstention, a district court should dismiss the  
9 federal action. See *Juidice v. Vail*, 430 U.S. 327, 337 (1977).

10 Under the three-pronged test established by the Supreme Court, *Younger* “abstention is  
11 appropriate in favor of a state court proceeding if (1) the state proceedings are ongoing; (2) the  
12 proceedings implicate important state interests; and (3) the state proceedings provide an adequate  
13 opportunity to raise federal questions.” *Fresh International Corp. v. Agricultural Labor*  
14 *Relations Board*, 805 F.2d 1353, 1357-58 (9th Cir.1986) (citing *Middlesex*, 457 U.S. at 432).

15 1. **The State Proceedings Were Commenced Before This Action And Are**  
16 **Ongoing**

17 The first prong of the *Younger* abstention is a determination of whether the state  
18 proceedings are ongoing. “Abstention is required only when the state proceedings have been  
19 initiated ‘before any proceedings of substance on the merits have taken place in federal court.’”  
20 *Fresh International*, 805 F.2d at 1358 (quoting *Hicks v. Miranda*, 422 U.S. 332, 349 (1975)).

21 In the present case, state proceedings were underway long before the filing of this action.  
22 The first state court action, pending before Judge Grillo, was commenced in December 2013, and  
23 reopened in October 2014 with the Writ of Error *Corum Nobis*. RJN, Exhibit N. In this writ, Ms.  
24 Winkfield requested a “hearing/reconsideration of this court’s determination of her being brain  
25 dead pursuant to California Health and Safety Code Section 7181.” *Id.* at 11:14-15. Ms.  
26 Winkfield withdrew this petition and the court, at petitioner’s request, dropped the hearing that  
27 had been scheduled. The court, however, opened the door to subsequent proceedings, stating  
28 that: “If petitioner elects to seek relief in this case, then petitioner may request a CMC at a later  
date in this case. At any such CMC the court will decide whether to set the matter for further

1 hearing and set any briefing schedule. [¶] If petitioner elects to file a different case, then any  
2 CMC regarding proceedings in that case should be held in that case.” RJN, Exhibit G.

3 The second state court action was filed on March 3, 2015, and is now in the pleading  
4 stage, with a ruling on a demurrer pending. The First Amended Complaint, filed on November 4,  
5 2015, pleads three causes of action, personal injuries, negligent infliction of emotional distress,  
6 and wrongful death. The defendants in this medical malpractice case brought a demurrer to the  
7 first cause of action on the grounds that the death certificate established that Ms. McMath is dead  
8 and therefore would not have standing to pursue a personal injury claim. While the court has not  
9 issued a final ruling on the demurrer, the court’s tentative ruling gives some indication that court  
10 will consider an evidentiary hearing in order to reexamine the issue of whether Ms. McMath is  
11 brain dead:

12 Further, as both sides recognize (and as Judge Grillo noted in his  
13 Order Following Case Management Conference issued on October  
14 1, 2014), California law on issue preclusion permits “reexamination  
15 of the same questions between the same parties where in the interim  
the facts have changed or new facts have occurred which may alter  
the legal rights of the parties.” (*City of Oakland v. Oakland Police  
and Fire Retirement System* (2014) 224 Cal.App.4th 210, 230.)

16 RJN, Exhibit K.

17 Thus, at least one or more proceedings have been started and are ongoing in state court  
18 that have, likely will, or could consider the merits of the issue of whether Ms. McMath is alive or  
19 dead under state law.

## 20 2. The Proceedings Implicate Important State Interests

21 *Younger* abstention is appropriate only where important state interests would be affected  
22 by the federal action. See *Ohio Civil Rights Commission v. Dayton Christian Schools, Inc.*, 477  
23 U.S. 619, 627 (1986) (“We have applied the *Younger* principle to civil proceedings in which  
24 important state interests are involved.”). In the present action, plaintiffs challenge, among other  
25 things, a death certificate issued by the Alameda County Coroner and certified by the State of  
26 California. Determination of death is a state action governed by state law, specifically, Health  
27 and Safety Codes §§ 7180 and 7181. Different states have different statutes, for example, New  
28 Jersey has a religious belief exception to the determination of brain death:



1 The death of an individual shall not be declared upon the basis of  
 2 neurological criteria pursuant to sections 3 and 4 of this act when  
 3 the licensed physician authorized to declare death, has reason to  
 4 believe, on the basis of information in the individual's available  
 5 medical records, or information provided by a member of the  
 6 individual's family or any other person knowledgeable about the  
 7 individual's personal religious beliefs that such a declaration would  
 8 violate the personal religious beliefs of the individual. In these  
 9 cases, death shall be declared, and the time of death fixed, solely  
 10 upon the basis of cardio-respiratory criteria pursuant to section 2 of  
 11 this act.

12 N.J. Stat. Ann. § 26:6A-5. California, by choice of its Legislature, has no such exception in its  
 13 statute. Plaintiffs in this action are challenging the application of the California statute by state  
 14 and county employees in their second cause of action for Deprivation of Civil Rights in Violation  
 15 of 42 U.S.C. § 1983: Violation of the First Amendment Right of Free Exercise of Religion and in  
 16 other causes. Complaint ¶¶ 224-239. They appear to be arguing that the California statute should  
 17 be applied in a manner similar to the way the New Jersey statute is written and that this Court  
 18 should order so. The application of a determination of death statute is a matter of important state  
 19 interests and a federal court should abstain from the issue.

### 15 3. The State Proceedings Provide An Adequate Opportunity To Raise Federal 16 Questions

17 The third prong of the *Younger* abstention doctrine is whether the plaintiff has or had  
 18 adequate opportunity to raise federal questions in the state proceeding. *Middlesex*, 457 U.S. at  
 19 435. There is simply no bar to Plaintiffs here raising valid constitutional issues in state court.  
 20 State court proceedings are presumed adequate to raise the federal claim "in the absence of  
 21 unambiguous authority to the contrary." *Pennzoil Co. v. Texaco, Inc.* (1987) 481 US 1, 15;  
 22 *Communications Telesystems Int'l v. California Pub. Util. Comm'n*, 196 F3d 1011, 1020 (9th Cir.  
 23 1999) (state judicial review deemed adequate despite court's practice of summarily denying  
 24 petitions for review of CPUC decisions).

### 25 E. Other Grounds For Abstention

26 Abstention may also be appropriate under other abstention doctrines besides *Rooker-*  
 27 *Feldman* and *Younger*. For one, *Pullman* abstention is appropriate when three concurrent criteria  
 28 are satisfied: (1) the complaint involves a sensitive area of social policy that is best left to the

1 states to address (i.e., one which federal courts ought not to enter unless no alternative to its  
 2 adjudication is open); (2) a federal constitutional issue could be mooted or narrowed by a  
 3 definitive state court ruling on state law issues; and (3) proper resolution of the potentially  
 4 determinative state law issue is uncertain. *Fireman's Fund Ins. Co. v. City of Lodi*, 302 F3d 928,  
 5 939-40 (9th Cir. 2002). The present matter certainly involves “a sensitive area of social policy”  
 6 because it concerns determinations of death, including the constitutionality of California’s  
 7 determination of death statute. A state law ruling could moot any constitutional concerns, but the  
 8 outcome of such a state court case is uncertain.

9 For another, under the *Colorado River* doctrine, federal courts may stay a case involving a  
 10 question of federal law where a concurrent state action is pending in which the identical issues are  
 11 raised. *Colorado River Water Conservation Dist. v. United States* 424 U.S. 800, 815 (1976). As  
 12 discussed in the summary of facts of this memorandum, the issues raised in this federal action are  
 13 identical to issues raised in the actions before Judges Grillo and Freedman.

14 For a third ground, *Burford* abstention is appropriate when a case involves complex  
 15 questions of state law administered by state administrative agencies, and subject to timely and  
 16 adequate state court review. *Burford v. Sun Oil Co.*, 319 US 315, 334 (1943). In the present  
 17 matter, there is a complex question of state law – the determination of death – administered by  
 18 state and county agencies.

19 Under these various abstention doctrines, as well as under *Rooker-Feldman* and *Younger*,  
 20 this matter should be dismissed.

21 **F. The Federal Questions In This Suit Will Be Narrowed By The Likely Dismissal Of**  
 22 **Statutory Claims**

23 Plaintiffs’ claims under the Religious Land Use And Institutionalized Persons Act, the  
 24 Americans With Disabilities Act, and the Rehabilitation Act should be dismissed for reasons set  
 25 forth below. If so, the federal question statutory issues before the Court will be narrowed and  
 26 abstention is further warranted.

27 1. **Ms. McMath Was Not Institutionalized For Purposes Of The Religious Land**  
 28 **Use and Institutionalized Persons Act**

The Religious Land Use and Institutionalized Persons Act (“RLUIPA”), 42 U.S.C. §

1 2000cc et seq., prohibits the government from imposing “a substantial burden on the religious  
 2 exercise of a person residing in or confined to an institution” unless the government  
 3 “demonstrates that imposition of the burden on that person (1) is in furtherance of a compelling  
 4 governmental interest; and (2) is the least restrictive means of furthering that compelling  
 5 governmental interest.” 42 U.S.C. § 2000cc-1(a).

6 By its terms, RLUIPA applies to those facilities or institutions “owned, operated, managed  
 7 by, or providing services on behalf of any State or political subdivision of a State” and “which is”  
 8 (emphasis added):

9 (i) for persons who are mentally ill, disabled, or retarded, or  
 10 chronically ill or handicapped;

11 (ii) a jail, prison, or other correctional facility;

12 (iii) a pretrial detention facility;

13 (iv) for juveniles--

14 (I) held awaiting trial;

15 (II) residing in such facility or institution for purposes of receiving  
 care or treatment; or

16 (III) residing for any State purpose in such facility or institution  
 17 (other than a residential facility providing only elementary or  
 18 secondary education that is not an institution in which reside  
 19 juveniles who are adjudicated delinquent, in need of supervision,  
 neglected, placed in State custody, mentally ill or disabled,  
 mentally retarded, or chronically ill or handicapped); or

20 (v) providing skilled nursing, intermediate or long-term care, or  
 custodial or residential care.

21 42 U.S.C.A. § 1997(1).

22 At the time of Ms. McMath’s treatment at Children’s Hospital, the hospital was not  
 23 “owned, operated, managed by, or providing services on behalf of any State or political  
 24 subdivision of a State.” Even if it were somehow deemed to be an agent of the State, however, it  
 25 still would not qualify as an “institution” for purposes of RLUIPA because it was not designed to  
 26 provide the type of long-term care contemplated by the statute, i.e., custodial or residential care  
 27 for the chronically ill or incarcerated.

28 Consequently, Children’s Hospital does not qualify as an institution and Ms. McMath’s

1 brief treatment at Children’s Hospital does not qualify her as an “institutionalized person” for  
 2 purposes of RLUIPA. As a result, Plaintiffs’ Sixth Claim for violation of the Religious Land Use  
 3 and Institutionalized Persons Act should be dismissed.

4 **2. Plaintiffs Fourth and Fifth Claims for Relief for Violations of the**  
 5 **Rehabilitation Act and Americans With Disabilities Act Should Be Dismissed**

6 Section 504 of the Rehabilitation Act provides that: “No otherwise qualified individual  
 7 with a disability ... shall, solely by reason of her or his disability, be excluded from the  
 8 participation in, be denied the benefits of, or be subjected to discrimination under any program or  
 9 activity receiving Federal financial assistance....” 29 U.S.C. § 794(a). Similarly, the Americans  
 10 with Disabilities Act requires that “no qualified individual with a disability shall, by reason of  
 11 such disability, be excluded from participation in or be denied the benefits of the services,  
 12 programs, or activities of a public entity, or be subjected to discrimination by any such entity.”  
 13 42 U.S.C. § 12132.

14 “There is no significant difference in analysis of the rights and obligations created by the  
 15 ADA and the Rehabilitation Act....” *Zukle v. Regents of Univ. of Cal.*, 166 F.3d 1041, 1045 n.11  
 16 (9th Cir. 1999). Courts accordingly apply the same analysis to claims brought under both  
 17 statutes. *Id.*; see also *Vinson v. Thomas*, 288 F.3d 1145, 1152 n.7 (9th Cir. 2002); *Doe v. Univ. of*  
 18 *Maryland Med. Sys. Corp.*, 50 F.3d 1261, 1265 n.9 (4th Cir. 1995) (“Because the language of the  
 19 two statutes is substantially the same, we apply the same analysis to both.”). As such, County  
 20 Defendants herein address Plaintiffs’ Fourth Claim for Relief under Section 504 and Fifth Claim  
 21 for Relief under the ADA together.

22 To state a Section 504 claim, Plaintiffs must establish that: (1) Ms. McMath is an  
 23 individual with a disability; (2) she is otherwise qualified to receive the program’s benefit; (3) she  
 24 was excluded from, denied the benefits of, or subject to discrimination under the program solely  
 25 by reason of her disability; and (4) the program receives federal financial assistance. *J.W. ex rel.*  
 26 *J.E.W. v. Fresno Unified Sch. Dist.*, 570 F. Supp. 2d 1212, 1226 (E.D. Cal. 2008) (citing *Duvall*  
 27 *v. County of Kitsap*, 260 F.3d 1124, 1135 (9th Cir. 2001)).

28 In the instant action, the Complaint not only fails to identify any actual program from

1 which Ms. McMath was excluded and for which she was otherwise qualified but fails to  
 2 demonstrate that Ms. McMath is an individual with a disability. To survive a 12(b)(6) motion to  
 3 dismiss Plaintiffs' Rehabilitation Act and ADA claims, Plaintiffs must plead that Ms. McMath is  
 4 an individual with a disability. *Duvall*, supra, 260 F.3d at 1135. The ADA defines "disability"  
 5 as, "with respect to an individual--a physical or mental impairment that substantially limits one or  
 6 more major life activities of such individual." 42 U.S.C. § 12102. (emphasis added) "To satisfy  
 7 the ADA's definition of disability, a plaintiff must (1) have a recognized impairment, (2) identify  
 8 one or more appropriate major life activities, and (3) show the impairment substantially limits one  
 9 or more of those activities." *Holt v. Grand Lake Mental Health Ctr., Inc.*, 443 F.3d 762, 765  
 10 (10th Cir. 2006).

11 Here, Plaintiffs' claims suffer from a crucial flaw – the fact that Plaintiffs cannot prevail  
 12 on the ADA and Rehabilitation Act claims because "brain death" does not constitute a "physical  
 13 or mental impairment" recognized under the law. See 29 C.F.R. § 1630.2 (h)(1)-(2) (providing  
 14 the definition of physical or mental impairment). Consequently, Plaintiffs' inability to set forth  
 15 the required elements necessitates dismissal of Plaintiffs' ADA and Rehabilitation Act claims.

#### 16 IV. 17 CONCLUSION

18 For the foregoing reasons, the County Defendants request the Court to abstain from  
 19 hearing the present action. Given the State statutory scheme for amendment of a death certificate,  
 20 the availability of state court review of the death certificate issues, the availability of state court  
 21 review of administrative action, and the previously filed, still open and ongoing proceedings in  
 22 state court that have, are, or will address the issues sought as relief in this federal court action, the  
 23 County Defendants suggest this Court abstain from this action.

24 Dated: March 14, 2016

ARCHER NORRIS

*/s/ John L. Kortum*

**Attorneys for County Defendants**  
 COUNTY OF ALAMEDA, et al.