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JAHI MCMATH, a minor
and NAILAH WINKFIELD

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

| | |
|---|---|
| JAHI MCMATH, a minor; NAILAH WINKFIELD, an individual, as parent, as guardian, and as next friend of JAHI McMath, a minor<br><br>Plaintiffs,<br><br>v.<br><br>STATE OF CALIFORNIA; COUNTY OF ALAMEDA, et al<br><br>Defendants. | Case No. 3:15-cv-06042 HSG<br><br>**PLAINTIFF'S OPPOSITION TO STATE DEFENDANTS' MOTION TO DISMISS**<br><br>Date: May 12, 2016<br><br>Time: 2:00 p.m.<br><br>Action Filed: December 23, 2015<br><br>Trial Date: None Set |

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## I. OVERVIEW AND RELIEF REQUESTED

Jahi McMath is alive under the laws of each of the United States. As such, she has a constitutional "inalienable right" to life and a right to travel freely within the United States. In particular, she has a right to travel with her mother back to the place of her birth and into the bosom of her family. Plaintiff Nailah Winkfield (WINKFIELD), Jahi's mother, has traveled an exhaustive road seeking to obtain due process. What she seeks is to present undisputed medical testimony that, today, Jahi does not meet California's definition of brain death, no matter what her condition was on December 23rd 2013. Jahi shows numerous objective signs of brain activity, including: brain wave activity on an EEG, cerebral blood flow, intact brain matter, an ability to respond to her mother's voice as demonstrated by an increase in her heart rate and the ability to respond to her mother's request to move specific body parts. (See attached video.)

California Health and Safety Code Section 7180 (hereinafter "§ 7180") states in relevant part: "(a) 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." The statute contemplates a situation, like Jahi's, where a condition, i.e., the lack of any neurological activity, although once existent, later resolves. Yet the statute provides no mechanism to bring evidence of that resolution before any official or court. The facts plead in Plaintiff's complaint, including the sworn declarations of a host of qualified physicians and scientists, experts in the area of brain death, demonstrate that Jahi McMath is alive and that the defendants to this action have stonewalled WINKFIELD at every turn, as she seeks to prove that her daughter is not dead. If, after receipt of due process WINKFIELD is proven wrong, then Jahi will stay in her state of legal death in California, yet alive in New Jersey. If the defendants are wrong, and their efforts at continuing to deny WINKFIELD any

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opportunity to prove Jahi's existence are successful, then the gravest of injustices will be revisited on her and her mother.

What harm is there in a public review of the evidence attached to Plaintiff's complaint? None. What harm is there in denying due process? The denial of the most basic right, enumerated in the Declaration of Independence, the rights to life and liberty: everything that this country and its justice system proudly stand for.

As reflected by the allegations and documentary support included in and with the Complaint, WINKFIELD repeatedly has presented this evidence to the defendants and repeatedly has requested review of the facts demonstrating neurologic activity. The Defendants repeatedly have denied her, as they do again here, any such process. In short, the Defendants wish to eliminate the word "irreversible" from the statute and to say that, no matter what may have changed, dead is dead and you don't have any right or mechanism to prove otherwise.

Despite Defendants' mischaracterization of this proceeding, this is not a request for this court to act as a court of appeal. Nor is it an attempt to have the Federal Court contradict Judge Grillo's December 23, 2013, order. Plaintiff need not and, for the purposes of this case, does not allege that Judge Grillo got it wrong over two years ago. The question is not whether Jahi McMath met the definition of brain death in December of 2013. The question before this court is: **does she meet that definition under § 7180 now**. The evidence showing reversibility (in reality, recovery of substantial brain function) did not exist in December of 2013. It first came to light in the fall of 2104, when Jahi, contrary to every proclamation by Children's Hospital of Oakland ("CHO"), and the court expert, Dr. Fischer, did not "inevitably suffer" the decomposition of her body, the liquefaction of her brain, and the cessation of her vital organs'

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ability to function. Instead, Jahi has grown stronger and has survived long enough that she now can be examined, after this two years of recovery.

Defendants characterizations of Plaintiff's 2013/2014 legal challenges misstates what occurred. In December 2013 a number of legal approaches were taken to keep Children's Hospital from disconnecting Jahi from life support because her mother believed her daughter was not dead and could recover. Brain death is binary under 7180. If there is absolutely no neurological activity, there is brain death. If there is any neurological activity, which Jahi currently exhibits, a person is not brain dead. As the facts below show, all Plaintiff sought in 2013 and early 2014, was a TRO preventing Children's from removing Jahi from life support. Plaintiff's, with the help of Magistrate Judge Ryu, reached a settlement where Jahi could be removed from Children's. Days later, she was. This, as reflected by Judge Armstrong's ruling, rendered the issue moot. Recovery of Jahi's brain function was never briefed or argued. Nailah Winkfield could not seek an appeal from the December, 2013, Judgment within 60 days as required by California Law because the facts simply did not exist at the end of that period to demonstrate recovery of brain function (and thus, reversibility of her condition in December, 2013) until the fall of 2014 well after the time for an appeal had passed.

Thus, in September 2014, Plaintiff WINKFIELD filed a request for a writ of error corum novis in the Superior Court. This request was never considered by the court and no evidence on the matter ever was presented to the court, because WINKFIELD -- contrary to the State Defendants' assertions -- continued the matter and asked Judge Grillo to issue an order allowing the her to contact Dr. Fischer and to establish a dialogue between him and the numerous physicians who had examined and studied Jahi after her body was given medical treatment which allowed her to recover some neurologic function. Judge Grillo never acted upon that

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request, Dr. Fischer never spoke with these physicians, and WINKFIRLD then sought relief from the Defendants who, to a one, shut the door in her face without ever considering the evidence. As a result, no evidence of Jahi's recovery has ever been considered by any court, no hearing has ever been provided, and no ruling has ever been issued as to whether Jahi has experienced any recovery of brain function, even though any such recovery would change her status under §7180 from brain dead to alive.

Plaintiffs' Complaint, and the allegations and facts therein, when given the weight they are entitled to under the law demonstrate that Defendant's 12(b)(6) Motion should be denied. In the alternative, Plaintiff requests that the Court grant leave to amend any defective portions of the Complaint.

## II. RELEVANT PROCEDURAL HISTORY

### A. Jahi's Brain Injury And The Hearings Which Allowed Her Family To Remove Her From Children's Hospital Of Oakland

On December 12, 2103, Jahi McMath suffered catastrophic but partially reversible brain injury after undergoing ENT surgery at CHO on December 9, 2013. Soon thereafter, two physicians chosen by CHO declared Jahi brain dead and notified WINKFIELD that, contrary to her wishes and in violation of her religious beliefs, they intended to remove Jahi from the ventilator, thereby causing her certain cardio-pulmonary death within minutes. In order to prevent this removal of necessary life support, on December 20, 2013, WINKFIELD sought and received a Temporary Restraining Order in the Superior Court of Alameda County (Case number RP-13-707598). This TRO enjoined CHO from withdrawing ventilator support from Jahi but allowed CHO to continue to deny Jahi nutritional support and necessary antibiotics.

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Once this immediate threat to her daughter's life was removed, WINKFIELD turned her attention to transporting Jahi to the state of New Jersey, one state which recognizes a religious belief component in its codification of the Uniform Determination of Death Act. Proceedings in the Superior Court continued while she sought to arrange these difficult logisticsr. These proceedings included the appointment of an independent expert to examine Jahi, and an evidentiary hearing on December 24, 2013, to determine Jahi's neurological status at that time.

At this hearing, the Superior Court took testimony from Dr. Paul Fischer, its court-appointed expert. The court on December 26, 2013, without explicitly ruling that Jahi's brain damage was "irreversible," found that Jahi at that time "had suffered brain death and was deceased as defined under Health and Safety Code sections 7180 and 7181." No evidence regarding Jahi's state of neurological function has been heard by any court in any jurisdiction subsequent to this hearing, which was held more than two years ago.

Subsequent to this hearing, on December 30, 2013, WINKFIELD filed a complaint in the U.S. District Court for the Northern District of California (case number 4:13-cv-05993-SBA), seeking a Federal TRO for more time to move Jahi. On that day, Judge Saundra Brown Armstrong granted WINKFIELD's request in part, enjoining CHO from removing Jahi's ventilator and setting a preliminary injunction hearing on January 7, 2013. Fortunately for Jahi, Judge Armstrong also appointed Magistrate Judge Donna M. to see if an agreement could be reached that would provide WINKFIELD with the relief she requested, more time to try and move her daughter. Judge Ryu took matters in hand and scheduled a settlement conference for January 3, 2014. At this conference, with Judge Ryu's input, WINKFIELD and CHO were able finally to resolve matters in a way which allowed Jahi to continue to receive life support until her family could arrange her transport to a facility which would provide her the treatment she

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required. This agreement was stipulated to by WINKFIELD and CHO, and WINKFIELD **subsequently dismissed this federal action voluntarily and without prejudice before the opposing party had served an answer** or a MSJ (Document 22, Case number 4:13-cv-05993-SBA, Exhibit A). No evidence was ever considered by the court in this federal proceeding.

As part of the settlement, before CHO would release Jahi's body, the Alameda County Coroner "needed to "sign something" (*i.e.,* a death certificate)" (State Defendants' Motion to Dismiss, hereinafter "MOTION," p. 4) in order to comply with formalities then required by CHO to allow Jahi to be moved to a hospital where she could receive the care she required (CHO had stopped providing nutrition and curative care on December 12, 2013.). In order to reach a settlement allowing Jahi to be removed before she suffered cardiopulmonary death, Plaintiff, under protest, sought a "Disposition Permit" from the coroner. (Such permits are used to obtain possession of a body for preparation or sacraments prior to internment or cremation. This was the only way that WINKFIELD could remove Jahi.) To obtain a Disposition Permit WINKFIELD had to obtain a death certificate, which she did, under protest. That Death Certificate was never finalized. It was never signed by an attesting physician and clearly was marked "Pending Investigation" under the cause of death. (*See* Death Certificate, Exhibit B.) After the disposition permit was obtained, and pursuant to the settlement agreement, Jahi was removed from CHO and was transported to a hospital where she could receive such care. Soon thereafter, the initial Superior Court proceeding was closed. A judgment in that matter was entered on Jnuary 17, 2014, after Jahi had left the state, without the presentation of any additional evidence.

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**B. When Jahi Shows Signs Of Neurological Improvement, WINKFIELD Filed A Writ Of Error Corum Novis.**

By the fall of 2014, Jahi had shown signs of improving neurological function in many portions of her brain, including the motor cortex; the auditory cortex; the hypothalamus; the pituitary region; and the brainstem. These signs (described in detail in the Complaint and its attached exhibits) included intermittent purposeful movements, the ability of her nervous system to regulate her temperature and heart rate, reactions to the presence and voice of her mother, and the onset of menstruation. Having seen this change in her daughter's neurological condition, WINKFIELD filed a Writ of Error Corum Novis, an arcane pleading where a petitioner asks the court to consider new, previously unavailable, evidence and to consider whether if it had information at the time of its initial ruling, would the court have ruled differently.

Once WINKFIELD filed this petition, Dr. Fischer was reappointed as the court's expert, and WINKFIELD's attorney in this matter attempted to contact Dr. Fischer, in order to arrange an opportunity for the court's expert to discuss Jahi's condition with the numerous physicians who had examined Jahi during the nine months which had elapsed since Dr. Fischer's pronouncement in December, 2013, that Jahi had suffered "irreversible cessation of function of the entire brain." (Dolan Declaration, ¶ xxxx.) When this attempt at communication failed, WINKFIELD filed a motion to continue the proceedings, in order to allow Dr. Fischer "an opportunity for a frank and unscripted dialogue with the experts who are opining that the newly obtained evidence supports a finding that Jahi is not brain dead" (Exhibit C, p. 2). This proceeding was terminated without the presentation of any evidence regarding Jahi's neurological condition to the court, and without any ruling that Jahi at that time was "brain dead."

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**C. Having Observed Continued Improvement In Jahi's Condition, WINKFIELD Seeks Administrative Review of Jahi's Facially Defective Death Certificate, In Order To Allow Her To Move Back To California.**

As Jahi continued to show neurological improvement. WINKFIELD, with the assistance of counsel, also sought the rescission through administrative means of Jahi's facially defective death certificate so that she and her daughter could rejoin their family. As described in detail in the Complaint (¶¶ 121-189) and the Declaration of Christopher Dolan, which accompanies this Response Brief, Plaintiffs' counsel then began an administrative odyssey to try and have Jahi's inaccurate death certificate corrected. These administrative steps were undertaken because during the time when the Writ of Error Corum Novis was being pursued, Alameda County Counsel, at one hearing in that matter, informed Plaintiffs' Counsel that there was nothing that the County could do to change the Death Certificate, as the Certificate had been already "sent to Sacramento." and therefore any relief relating to the Death Certificate would have to come from the California Department of Health ("DOH"). (Dolan Declaration, ¶ xxxx.)

On May 22, 2015, Plaintiffs' Counsel submitted an extensive written request that the DOH correct Jahi's death certificate (Complaint, ¶ 121). This request was rejected by the Deputy Chief of Vital Records of the DOH because it did not contain certain required special symbols (Complaint, ¶ 155). May 29, 2015, Plaintiffs then resubmitted the request to the DOH in the format so requested. This request was summarily rejected by Defendant AGURTO, on June 10, 2015, as described in detail in the Complaint (¶ 128).

Defendant AGURTO's rejection indicated that Plaintiffs' request required the signature of Alameda County Coroner, Defendant MUNTU DAVIS (Complaint, ¶ 160). Based on Defendant AGURTO's statement, Plaintiffs then submitted their request to Defendant DAVIS at the Alameda County Medical Examiner's office on June 18, 2015 (Complaint, ¶ 173). As described in detail in

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the Complaint (¶¶ 169-182), Defendant DAVIS never responded to Plaintiffs' request, and when Plaintiffs' counsel contacted Defendant DAVIS's office they were directed to Defendant NEFOUSE's office (Complaint, ¶ 175).

On September 4, 2015, three and a half months after contacting Alameda County as directed by Defendant AGURTO, Plaintiffs finally received a response from the County's representative, which directed Plaintiffs to contact another attorney in the Alameda County Counsel's office, Mr. Scott Dickey, which he did (Complaint, ¶ 177). For the next nineteen days, Plaintiffs received no response from Mr. Dickey (Complaint, ¶ 178). They then re-contacted Defendant NEFOUSE and informed him of their inability to contact Mr. Dickey (Complaint, ¶ 179). On October 9, 2015, Plaintiffs finally heard back from Defendant NEFOUSE, who stated that Alameda County found "no basis to make any changes to and/or nullify or rescind the death certificate of Ms. McMath." (Complaint, ¶ 180).

Thus, having had their request rejected at both the state and county levels by named defendants in this action, Plaintiffs were forced to seek redress for the ongoing violation of their federal constitutional and statutory rights in this venue.

Plaintiffs in this action request that this Court for the first time consider the overwhelming scientific evidence that for the past year and a half, Jahi has exhibited function of numerous portions of her brain and therefore is a living person, per § 7180 .No court has ever heard any evidence of Jahi's neurological function subsequent to the December 26, 2013, determination that Jahi then satisfied §7180's criteria for "brain death." No Defendant named in this complaint has ever been a party to any legal action involving either Plaintiff.

## III. MOTION TO STRIKE

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Fed. R. Civ. P. 12(d) requires that if prior to a Rule 12 motion,

> "matters outside the pleadings are presented to and not excluded by the court, the motion must be treated as one for summary judgment under Rule 56. All parties must be given a reasonable opportunity to present all the material that is pertinent to the motion."

In the instant matter, the State and County Defendants, along with putative Intervenors Rosen and Children's Hospital of Oakland have submitted over four hundred pages of material to this Court, requesting that this Court take judicial notice thereof. In doing so, the Defendants and putative Intervenors have inundated both this Court and Plaintiffs with volumes of material, much of which is only peripherally related to the single question of fact which is relevant to this proceeding: Does Jahi McMath exhibit some signs of function of any portion of her brain?

When matters outside the challenged document (in this case the Complaint) are presented, the Court must either exclude the additional material and decide the matter based on the Complaint alone or convert the motion to dismiss to a motion for summary judgment under Rule 56 and afford the Plaintiff the opportunity to present supporting materials. *Friedl v. New York*, 210 F.3d 79, 84 (2d Cir. 2000); see also Wright & Miller Federal Practice & Procedure, § 1366 (3d Ed.).

In the instant matter, Defendants urge this Court to consider many matters not contained in the challenged pleading and apparently expect this Court to wade through hundreds of pages of hearsay prior to making a determination of whether or not Plaintiffs have properly pled any of their causes of action. However, only materials which are a part of the complaint may be considered when ruling on a motion to dismiss. See *Branch v. Tunnell*, 14 F.3d 449, 453 (9th Cir. 1994) (overruled on other grounds by Galbraith v. Santa Clara, 307 F.3d 119 (9th Cir.

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2002)); see also *Gibb v. Scott*, 958 F.2d 814, 816 (8th Cir. 1992) (any written or oral evidence in support of or in opposition to the pleading that provides some substantiation for and does not merely reiterate what is said in the pleadings constituted matters outside the pleadings); *MacArthur v. San Juan*, 309 F.3d 1216, 1221 (10th Cir. 2002) (court should not look beyond the confines of the complaint itself in deciding motion to dismiss); *Schmitz v. Mars. Inc.*, 261 F.Supp.2d 1226, 1229 (D. Or. 2003) (citing *Cooper v. Pickett*, 137 F.3d 616, 622 (9th Cir. 1997) for the proposition that a Court must limit its review of the contents of the complaint itself on a motion to dismiss).

In contrast, Documents incorporated by reference as part of a complaint are not considered matters outside the pleadings, as they are a part of the challenged pleading itself. *In re: Silicon Graphics Inc. Securities Litigation*, 183 F.3d 970, 986 (9th Cir. 1999). As such, it is proper for this Court to consider the medical material incorporated by reference into Plaintiffs' Complaint when considering the instant motion.

Therefore, Plaintiffs request that this Court limit its consideration to material contained in the Complaint and its attached documentation, and specifically that it not consider any matter outside the pleadings in making its ruling, since doing so would require conversion of the instant motion to a motion to dismiss, thereby requiring notice and a reasonable opportunity for discovery.

## IV. Legal Standard

Dismissal for failure to state a claim under Fed. R. Civ. P. 12(b)(6) is a disfavored remedy and may only be granted in extraordinary circumstances. *Broam v. Bogan*, 320 F.3d 1023 (9th Cir. 2003); *United States v. Redwood*, 640 F.2d 963,966 (9th Cir. 1981). On a motion

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to dismiss for failure to state a claim under Rule 12(b)(6), all allegations of material fact must be accepted as true and construed in the light most favorable to the nonmoving party. *Cahill v. Liberty Mut. Ins. Co.*, 80 F.3d 336, 337-8 (9th Cir. 1996). A complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations unless fraud is involved.

The Court's role at the 12(b)(6) stage is not to evaluate the strength or weakness of claims. *Jacobson v. Hughes Aircraft Co.*, 105 F.3d 1288, 1292 (9th Cir. 1997). At this stage, all material allegations in the complaint must be taken as true and construed in the light most favorable to plaintiff. *In re Silicon Graphics, Inc. Sec Litig.*, 183 F.3d 970, 983 (9th Cir. 1999). The Court must accept as true all factual allegations contained in a Complaint and draw all reasonable inferences in favor of the non-moving party. *Ashcroft v. Iqbal*, 556 U.S. 662, 668 (2009); *Matsushita Elec. Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). "When there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they possibly give rise to an entitlement to relief." *Iqbal,* 556 U.S. at 679. The "test is whether the facts, as alleged, support any valid claim entitling plaintiff to relief...not necessarily the one intended by plaintiff. Thus, a complaint should not be dismissed because plaintiff erroneously relies on the wrong legal theory if the facts alleged support any valid theory." *Haddock v. Bd. of Dental Exam'rs*, 777 F.2d 462, 464 (9th Cir. 1985).

If this Court finds the Complaint inadequate, it should "freely give leave to amend when there is no undue delay, bad faith, dilatory motive, undue prejudice to the opposing party by virtue of.... the amendment, [or] futility of the amendment." Fed.R.Civ.P. 15(a); *Foman v. Davis*, 371 U.S. 178, 182 (1962). Generally, leave to amend is only denied when it is clear that the deficiencies of the complaint cannot be cured by amendment. *DeSoto v. Yellow Freight Sys., Inc.*, 957 F.2d 655, 658 (9th Cir. 1992).

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## V. ARGUMENT

### A. The Complaint Is Not Barred By The Rooker-Feldman Doctrine

State Defendants, through the submission of hundreds of pages of exhibits, including at least one final state court judgment, apparently wish to frame the instant proceeding as an attempt by Plaintiffs to have this Court "review [a] final state court judgment" (MOTION, p. 6). Such a characterization is inaccurate. Plaintiffs, in the instant proceeding, are seeking to present to a court for the first time evidence of Jahi McMath's neurological function subsequent to the issuance of her facially invalid death certificate. Plaintiffs do not invite this Court to "second-guess" (MOTION, p. 6) any state court decision. Plaintiffs do not hereby "complain[] of a legal wrong allegedly committed by [any] state court" (MOTION, p. 6). And, as described in more detail below, Plaintiffs do not herein seek any relief or make any claims which "are 'inextricably intertwined' with [any prior] state court's ruling" (MOTION, p. 6).

State Defendants claim that "[h]ere, the complaint and each of its causes of action directly challenges" a finding of the California Superior Court (MOTION, p. 7). This is inaccurate, because Plaintiffs in this case request only that this Court examine evidence regarding Jahi McMath's brain function subsequent to the Superior Court's ruling. As such, not one piece of evidence which Plaintiffs wish to present to this Court has any bearing on the validity of the Superior Court's December, 2013, finding that at that time, and to a reasonable degree of medical certainty, Jahi McMath did not exhibit any signs of brain function and was not expected to exhibit such signs at any time in the future.

As such, Plaintiffs do not complain to this Court of any injury caused by a state court judgment. They complain of ongoing injuries caused by the Defendants' refusal to recognize Jahi

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McMath's very existence as a human, as reflected in their refusal to recognize her most basic right to life. Plaintiffs' claims therefore are not barred by the Rooker-Feldman doctrine: "where the federal plaintiff does not complain of a legal injury caused by a state court judgment, but rather of a legal injury caused by an adverse party, *Rooker–Feldman* does not bar jurisdiction." *Noel v. Hall* (9th Cir. 2003) 341 F.3d 1148, 1163. In fact, the *Rooker-Feldman* doctrine does not even bar the simultaneous pursuit of similar claims in state and federal court. See, e.g., *Atlantic Coast Line R. Co. v. Brotherhood of Locomotive Engineers* (1970) 398 U.S. 281: "the state and federal courts had concurrent jurisdiction in this case," and the parties could "simultaneously pursu[e] claims in both courts." (*Citing Kline v. Burke Constr. Co.,* 260 U.S. 226 (1922); *Donovan v. City of Dallas*, 377 U.S. 408 (1964)).

The Rooker–Feldman doctrine is a very limited doctrine which only precludes lower federal courts from exercising jurisdiction over actions seeking review of, or relief from, state court judgments. See *Exxon Mobil Corp. v. Saudi Basic Indus. Corp.*, 544 U.S. 280, 291–93, 125 S.Ct. 1517, 161 L.Ed.2d 454 (2005). The doctrine is limited in scope and does not bar jurisdiction over actions alleging independent claims arising from conduct in underlying state proceedings. The boundaries for application of the doctrine depend upon the nature of the federal claims and whether the plaintiff in federal court, in fact, seeks relief from the state court judgment. "If a federal plaintiff asserts as a legal wrong an allegedly erroneous decision by a state court, and seeks relief from a state court judgment based on that decision, Rooker–Feldman bars subject matter jurisdiction in federal district court. If, on the other hand, a federal plaintiff asserts as a legal wrong an allegedly illegal act or omission by an adverse party, *Rooker–Feldman* does not bar jurisdiction." *Noel v. Hall*, 341 F.3d 1148, 1164 (9th Cir.2003) (cited favorably in *Exxon*, 544 U.S. at 293, 125 S.Ct. 1517).

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The Supreme Court clarified this distinction in *Exxon Mobil Corp.*, when confined application of the doctrine to federal actions seeking review of and relief from state court judgments. 544 U.S. at 293. In doing so, the Court stated the doctrine does not apply in federal cases that merely attack the legal conclusions of the state court without seeking relief from the state court judgment. *Id.* As to such cases, the Court noted, federal jurisdiction exists. See *id.* As such, the *Rooker-Feldman* doctrine is applicable only to *de facto* appeals of state court decisions, such as occur when federal claims are "inextricably intertwined" with the state court's decision. This occurs when adjudication of federal claims would undercut the state ruling or require the district court to interpret the application of state laws or procedural rules. *Noel v. Hall*, 341 F.3d 1148, 1158 (9th Cir. 2003). The only state court ruling which is at all implicated here is the Superior Court's December 26, 2013, ruling that Jahi did not at that time exhibit any brain function and that at that time, Jahi, to a reasonable medical certainty, was not expected to regain any brain function. Plaintiffs do not contest the December, 2013, ruling. They do, however, request the opportunity to present to this Court evidence which did not exist in December, 2013, regarding the *present state* of Jahi's neurological function. Since Plaintiffs wish to present *only* evidence which did not exist in December, 2013, the instant proceedings *cannot be "inextricably intertwined"* with the prior state court judgment, since "an issue cannot be inextricably intertwined with a state court judgment if the plaintiff did not have a reasonable opportunity to raise the issue in state court proceedings. Absent such an opportunity, it is impossible to conclude that the issue was inextricably intertwined with the state court judgment." *Long v. Shorebank Development Corp.* (7th Cir. 1999) 182 F.3d 548, 558. Plaintiffs obviously had no opportunity whatsoever to raise the issue of, or to present facts regarding, Jahi McMath's neurological function subsequent to March, 2014, at the December, 2013, hearing. As such, the

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present federal court proceedings are in no way "inextricably intertwined" with the December, 2013, state court judgment.

Plaintiffs in this action seek relief from no prior state court judgment and do not even attack the legal conclusions of the Superior Court's December 26, 2013, ruling. Plaintiffs merely are seeking the first judicial determination of the current state of Jahi McMath's cerebral function, the first judicial determination of her cerebral function in over two years. Plaintiffs do not seek to relitigate any prior state court judgment, since no judgment was ever made regarding her current neurological function. Plaintiffs simply seek judicial declaration that, as of today, Jahi McMath exhibits signs of brain function and therefore is not "dead" per pertinent California statute. As such, *Rooker–Feldman* cannot bar Plaintiffs' claims in the instant matter, because "there is simply "no state court judgment from which" [Plaintiffs] seek relief." *R.R. Street & Co. Inc. v. Transport Ins. Co.* (9th Cir. 2011) 656 F.3d 966, 974 (*Citing Vacation Vill., Inc. v. Clark Cnty.*, 497 F.3d 902, 911 (9th Cir.2007). Deciding the issues pled in the instant matter will not "require review of a [prior state court] judicial decision." *Noel v. Hall* (9th Cir. 2003) 341 F.3d 1148, 1157 (*citing District of Columbia Court of Appeals v. Feldman* (1983) 460 U.S. 462, 486-7). Therefore, this court has subject matter jurisdiction to address every issue raised in the Complaint. *Id.*

*Even if* Plaintiffs sought to set aside a prior state court judgment, the Ninth Circuit has held that such an action would not implicate the Rooker-Feldman Doctrine: "for Rooker–Feldman to apply, a plaintiff must seek not only to set aside a state court judgment; he or she must also allege a legal error by the state court as the basis for that relief." *Kougasian v. TMSL, Inc.* (9th Cir. 2004) 359 F.3d 1136, 1140. Here, Plaintiffs do not seek to set aside any state court

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judgment, and they certainly do not allege any legal error by the Superior Court of California as the basis of the relief sought. Plaintiffs here, after meeting the refusal of State and County Defendants to evaluate the medical evidence which clearly shows that Jahi McMath currently exhibits some degree of brain function, seek relief from this Court in the form of a judicial determination that Jahi is alive. The basis for this relief is the reinstitution of Jahi's most basic constitutional right – the right to life. Plaintiffs are seeking nothing more than the first judicial determination of Jahi's neurological function, as of today. Plaintiffs are seeking nothing less than the restoration of Jahi's right to life.

B. The Complaint Is Not Barred By The Eleventh Amendment To The U.S. Constitution

State Defendants state that Plaintiffs claims are barred by the Eleventh Amendment. This claim contradicts over a century of Supreme Court precedent: "since [*Ex parte Young* was decided in 1908] it has been settled that the Eleventh Amendment provides no shield for a state official confronted by a claim that he had deprived another of a federal right under the color of state law." *Scheuer v. Rhodes*, 416 U.S. 232, 237 (1974) (*citing Ex parte Young,* 209 U.S. 123 (1908)). "State officials, sued in their individual capacities, are "persons" within the meaning of § 1983. The Eleventh Amendment does not bar such suits, nor are state officers absolutely immune from personal liability under § 1983 solely by virtue of the "official" nature of their acts." *Hafer v. Melo*, 502 U.S. 21, 31 (1991).

Plaintiffs have named two specific state officials in both their personal and official capacities as defendants in this lawsuit because these two officials have deprived Jahi McMath of federal rights under color of state law. As described in detail in paragraphs 117-171, Defendant AGURTO, State Registrar and Assistant Deputy Director for Health Statistics and Informatics at

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the California Department of Health, summarily denied Plaintiffs' application to the California Department of Public Health, to amend Jahi's death certificate with no due process and apparently based on three inaccurate interpretations of California law (Complaint, paragraphs 157-159). Defendant AGURTO's nexus to the harms complained of therein is clear: Plaintiffs, faced with an inaccurate death certificate, and in accordance with California Health and Safety Code (HSC) Sections 103225 and 103240, filed an affidavit with the State Registrar seeking that the certificate be amended. Defendant AGURTO, violated Jahi's rights under the U.S. Constitution when he refused to "review [Plaintiffs' petition] for acceptance," as he was required to do by HSC § 103240, stating that he was "unable to process [Plaintiffs'] request" for reasons which appear to be based on material misrepresentations or misinterpretations of pertinent California law (Complaint, ¶¶ 159-171). Defendant AGURTO personally violated Jahi McMath's civil rights under the color of state law and has no immunity from lawsuit in his personal capacity.

Furthermore, Defendant AGURTO's actions, taken in his official capacity and in violation of Jahi's constitutional rights, allow Plaintiffs to sue him for injunctive relief, since state officials sued in their official capacity for injunctive relief are persons for purposes of § 1983. See *Will v. Mich. Dept. State Police*, 491 U.S. 58, 71 n.10; *Flint v. Dennison*, 488 F.3d 816, 825; *Doe v. Lawrence Livermore Nat'l Lab.*, 131 F.3d 836, 839 (9th Cir. 1997); *Guam Soc'y of Obstetricians & Gynecologists v. Ada*, 962 F.2d 1366, 1371 (9th Cir. 1992). As pled, and taking Defendant AGURTO's statements to Plaintiffs at face value, his actions appear to have been consistent with the policy or custom of the California Department of Health at the time when he summarily refused to process Plaintiffs' request to amend Jahi's death certificate.

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As such, construing the COMPLAINT liberally and making reasonable inferences in favor of Plaintiffs, Defendants AGURTO and SMITH (the Director of the California Department of Health) are both liable under § 1983 and each other statute under which Plaintiffs' action was based in their official capacities, which allows Plaintiffs an alternative way of pleading an action against the entity of which these Defendants are officers. See *Hafer v. Melo*, 502 U.S. 21, 25 (1991); *Kentucky v. Graham*, 473 U.S. 159, 165 (1985). As Plaintiffs are seeking only prospective declaratory and injunctive relief in this action, the Eleventh Amendment does not bar this lawsuit on the basis of its allegations against these defendants. See *Idaho v. Coeur d'Alene Tribe of Idaho,* 521 U.S. 261, 269 (1997); *Pennhurst State Sch. & Hosp. v. 44 Halderman*, 465 U.S. 89, 102-06 (1984); *Flint v. Dennison*, 488 F.3d 816, 825 (9th Cir. 2007; *Doe v. Lawrence Livermore Nat'l Lab.*, 131 F.3d 836, 839 (9th Cir. 1997); *Armstrong v. Wilson,* 124 F.3d 1019, 1025 (9th Cir. 1997).

C. The Complaint's First, Second, Third, Fourth, Fifth, and Sixth Causes of Action Properly State Claims Upon Which Relief May Be Granted

*1. The First, Second, and Third Causes Of Action Properly State Claims Under 42 U.S.C. § 1983*

"[T]he Eleventh Amendment does not bar actions against state officers in their official capacities if the plaintiffs seek only a declaratory judgment or injunctive relief." *Jackson v. Hayakawa,* 682 F.2d 1344, 1350 (9th Cir.1982) (cited by *Southern Pacific Transp. Co. v. City of Los Angeles*, 922 F.2d 498, 508(9th Cir. 1990)). Defendants AGURTO and SMITH in their individual capacity are "persons" for the purposes of 42 U.S.C. § 1983. Thus, the Eleventh Amendment does not bar the instant proceeding against either named State Defendant in either their individual or their official capacity.

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Defendant AGURTO's specific actions which make him individually liable for the violation of Jahi's constitutional rights under § 1983 are included in the Complaint and its exhibits. They are detailed in Section V.B., *supra*. Contrary to State Defendants' assertion (Motion, p. 9), Defendant ARGUTO's actions which violated Plaintiffs' constitutional rights are not alleged in a "vague or conclusory" manner and area adequately pled to survive summary judgment. Per the Complaint, liberally interpreted as required at this stage, these actions were made in a manner consistent with the custom and practice of the California Department of Health. Therefore both Defendant AGURTO and Defendant SMITH, the Director of the Department of Health, are liable to Plaintiffs for prospective injunctive and declaratory relief under § 1983 in their official capacities.

In the event that this Court finds Plaintiffs' allegations inadequately detailed as regards either named State Defendants, the proper remedy at this stage would be to allow Plaintiffs to amend the Complaint, in order to plead with more specificity, as well as to specifically allege that the named Defendants' actions were consistent with the custom and practice of the California Department of Health, rather than dismissing the complaint as against either named defendant.

*2. In The Event That This Court Finds That Plaintiffs' Claims Under The Rehabilitation Act And The ADA (The Fourth And Fifth Causes Of Action) Are Inadequately Pled, The Proper Remedy Is Allowing Plaintiffs An Opportunity To Amend The Complaint, Not Dismissal*

State Defendants list four elements which they state are requried to plead a prima facie case under both the ADA and the Rehabilitation Act, despite the lack of such a requirement in

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either statute, citing *Zukle v. Regents of Univ. of Cal.*, 166 F.3d 1041, 1045 (9th Cir. 1999). As pled, the Complaint explicitly states that Jahi is a "handicapped and/or disabled individual as that term is defined under the Rehabilitation Act of 1973" (¶ 256) and that Jahi suffers from "[b]rain damage from lack of oxygen" (¶ 271). It states that only because of her classification by the State of California as "brain dead," she is denied "the opportunity to benefit from the goods, services, facilities, privileges, advantages, or accommodations of any hospital or health care facility outside the states of New Jersey and New York" (¶ 275). As such, reading the pleading liberally and making minimal reasonable inferences in favor of Plaintiffs, it is clear that this Court can infer from the Complaint that Jahi, if properly classified as a live person, would be "otherwise qualified" to participate in *some federal assistance program* for the provision of healthcare, which either "receives federal financial assistance (for the Rehabilitation Act claim), or is a public entity (for the ADA claim)" (Motion, p. 9). As such, the Complaint, read in the light required at the 12(b)(6) stage, does cite the four elements of a claim under the Rehabilitation Act or the ADA, as specified by State Defendants.

In the event that this Court finds the two inferences referred to in the preceding paragraph unreasonable to make, the proper remedy would be to allow Plaintiffs to amend their complaint, in order specifically to state the four elements listed by State Defendants.

3. RLUPA DOES Apply Because CHO Is An "Institution"

The question of whether or not CHO is an "Institution" is one of fact and should not be decided at this stage, since Plaintiffs have not introduced evidence regarding the services provided by CHO at the time of Jahi's hospitalization there, nor have they introduced evidence regarding the manner in which CHO provides "services on behalf of" the State of California and Alameda County.

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The RLUPA defines "institution" as "any facility or institution … which … provides services on behalf of any State or political subdivision of a State and which is … providing skilled nursing … care." 42 U.S.C. § 1997 "Definitions." Plaintiffs are informed and believe that CHO regularly provides over two million dollars in medical services per year on behalf of the State of California and Alameda County, through the California Children's Services Program, thereby satisfying the requirement of providing services on behalf of the State or a political subdivision thereof. (In fact, but for Jahi's current miscategorization as "brain dead," Plaintiffs are informed and believe that Jahi herself would qualify for the provision of medical services under the Children's Services Program. Plaintiffs are further informed and believe that CHO, at the time of Jahi's hospitalization provided "skilled nursing care." Further, the Complaint clearly states that Jahi's "Certificate of Death [] was issued at a time when JAHI was institutionalized at and was confined in CH[O]" (¶ 283). As such, it is clear that the Complaint, on its face, alleges that at that time, CHO was an institution, in the context of pleading a violation of the RLUPA. As such, again reading the pleading liberally and making minimal inferences in favor of Plaintiffs, the Complaint, on its face, makes adequate allegations to invoke the protections of the RLUPA.

Again, in the event that this Court finds the inferences requested by Plaintiffs to be unreasonable, Plaintiffs request an opportunity to amend the Complaint, in order to make specific claims regarding CHO's funding and nursing services, in order to avoid running afoul of the *Iqbal* pleading standard as alleged by State Defendants.

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D. There Is No Good Reason For This Court To Stay Further Proceedings Under The Colorado River Abstention Doctrine

The *Colorado River* Abstention Doctrine is "an extraordinary and narrow exception to the duty of a District Court to adjudicate a controversy properly before it." *Colorado River Water Conservation District v. United States,* 424 U.S. 800, 813 (1976). "Abdication of the obligation to decide cases can be justified under [the *Colorado River*] doctrine only in the exceptional circumstances where the order to the parties to repair to the state court would clearly serve an important countervailing interest." *Id.* Abstention under *Colorado River* is appropriate in only three general circumstances:

> "(a) Abstention is appropriate in cases presenting a federal constitutional issue which might be mooted or presented in a different posture by a state court determination of pertinent state law. …
>
> (b) Abstention is also appropriate where there have been presented difficult questions of state law bearing on policy problems of substantial public import whose importance transcends the result in the case then at bar. …
>
> (c) Finally, abstention is appropriate where, absent bad faith, harassment, or a patently invalid state statute, federal jurisdiction has been invoked for the purpose of restraining state criminal proceedings."

*Id.* at 814-817.

The instant matter has no relation to any state criminal proceedings, does not present any federal constitutional issue which may be mooted or presented in a different posture by a state court determination of pertinent state law, and does not present any difficult and transcendent questions of state law. As such, *Colorado River* abstention does not apply. Nevertheless, State Defendants request that this Court abstain from deciding the instant matter under *Colorado River* without indicating how even one of the three requirements set by the *Colorado River* Court for

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abstention applies to the instant matter. As the principal factual question at issue in the instant matter is whether or not Jahi McMath currently exhibits some degree of brain function, it is clear that none of the *Colorado River* Court's three criteria for invoking the Doctrine is met in the instant matter.

Furthermore, it is not at all clear that in fact the "Second Superior Court Proceeding" (Motion, p. 11) ever will decide the issue of Jahi's current level of brain activity. This medical malpractice case was filed over a year ago, and as of this date no testimony regarding Jahi's brain function has been taken. The medical malpractice case is still at the demurrer stage (Motion, p. 5), and no hearing is at this time scheduled to address the issue of Jahi's current brain function. Most medical malpractice cases settle without going to trial – in that event, it is likely that no question of fact will be decided by the Superior Court having jurisdiction over the medical malpractice action. Additionally, the defendants in that action (none of whom were named in this matter) vigorously deny that they are liable in any manner for the injuries that Jahi sustained, claiming that they were not negligent in her care. Finally, it is possible that the Superior Court will bifurcate its proceedings, so that the question of liability is tried separately from and prior to the issue of damages (in fact, such a motion was before the Superior Court until April 13, 2016, when it was withdrawn, apparently for procedural reasons). If this is the case, the question of Jahi's brain function will not be addressed by the Superior Court until after the issue of liability has been completely litigated in that venue.

If the Superior Court rules in favor of the malpractice defendants' demurrers for a second time, or if the parties to the malpractice suit come to a settlement of the claims, or if the malpractice case goes to a jury (likely years from now) which finds that the defendants in that case were not negligent, the issue of Jahi's current state of brain function – the central question

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of the instant proceedings – almost certainly will never be resolved by the Superior Court. In that event, a stay in the current proceedings will only ensure that this Court then again will be faced with precisely the same question of fact – Is Jahi McMath alive, under California's Uniform Determination of Death Act - after Jahi and her mother will have endured more years of exile from their home. In this case, there is no "exceptional circumstance" or "important countervailing interest" which justifies "order[ing] to repair to the state court" for the redress of their federal civil rights claims. *Id.*

## VI. CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that this Court deny State Defendants' motion to dismiss and that this Court not stay this matter pending the outcome of the state medical malpractice trial. In the event that this Court finds that Plaintiffs have not complied with the standards for notice pleading, Plaintiffs request that they be allowed to amend the operative Complaint.

Dated: April 15, 2016

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