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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

JAHI McMATH, et al.

Plaintiffs,

v.

STATE OF CALIFORNIA, et al.

Defendants.

Case No. 3:15-cv-06042-HSG

COUNTY DEFENDANTS' REPLY IN SUPPORT OF MOTION TO DISMISS COMPLAINT

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

Complaint Filed: December 23, 2015

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I.
INTRODUCTION

On page 9 of their opposition, Plaintiffs state that there is a "single question of fact which is relevant to this proceeding: Does Jahi McMath exhibit some signs of function of any portion of her brain?" This issue is the crux of their claim for relief seeking a judicial declaration from this Court that "JAHI McMath is not dead and that her Death Certificate is inaccurate, facially deficient, and invalid" and that she has "exhibited by acceptable medical standards clear signs of brain function." As to why the County Defendants are sued, Plaintiffs seek a Court order "requiring Defendants to expunge any and all records relating to the issuance of [the] Certificate of Death."

The course taken by Plaintiffs towards this requested relief is as circuitous as Odysseus' voyage home to Ithaca. After initial proceedings in December 2013 and January 2014 in Superior Court and the Northern District, and their own request that the County issue a death certificate, not only did Plaintiffs venture again into Superior Court in Alameda County in October 2014 with a petition for a writ or error *coram nobis*, and then abandon that instrument and forum, they now have filed this present suit in the Northern District, letting more than a year elapse after their *coram nobis* abandonment. Instead of pursuing that matter they reopened in Superior Court in October 2014, and instead of seeking direct judicial review by the Superior Court of more recent administrative action by the County and State, Plaintiffs have alleged here numerous federal causes of action that go to the issues of due process, privacy, religious expression, accommodation of disabilities, institutional care and rehabilitation. And they name as defendants a swath of County employees including the Director of Public Health, the Coroner, the County Clerk, Sheriff and County Counsel that have been only tangentially involved in the issue of whether Jahi McMath is alive or dead under California law, of whom none were parties to the prior actions.

Indeed, the very premise of Plaintiffs' complaint flatters the County Defendants with far more authority about the "single question of fact which is relevant" than these defendants actually have. None of the County Defendants had any part in declaring Ms. McMath dead under

California law in December 2013. Rather, it was one or more physicians unaffiliated with the County who initially declared her brain dead in December 2013, not the defendant director of the Public Health Department, the Coroner, the County Clerk, the Sheriff, or the County Counsel. Shortly thereafter, in evidentiary proceedings instituted by Plaintiffs, the Superior Court also declared Ms. McMath brain dead under California law, but none of the County Defendants were parties in that action. Given the physicians' determinations of brain death, the Superior Court's ruling, and upon the Plaintiffs' own request intended to facilitate the removal of Ms. McMath's body out-of-state, the Coroner obliged Plaintiffs by issuing a death certificate.

Nor do the County Defendants even have the authority to declare Jahi McMath alive or dead. First, the law governing the determination of death, Health & Safety Code §§ 7180 & 7181, requires two physicians to make a determination of brain death in accordance with accepted medical standards. If this is done, then the Coroner, whose expertise is forensic pathology and is responsible for persons declared dead, has duties such as ascertaining the cause of death in certain circumstances. Gov't Code § 27491. Ascertaining the cause of death is quite a different exercise from determining whether someone is dead or alive under California law. Second, in the present case, the Superior Court determined Ms. McMath to be dead under the law of California. This determination was made after an evidentiary proceeding in which the opinions of experts in the study of brain death were heard. The County Defendants simply do not have the legal authority to reverse or contradict these determinations made by physicians and the Superior Court. If the County Defendants do not have the authority to reverse the determination of the physicians or the Superior Court, there is no relief that this Court can provide to compel the County Defendants to take action that they cannot take. All Plaintiffs' federal causes of action, all County Defendants' powers, and all the authority of this Court under the claims plead, even together, cannot here change the death certificate to state that Ms. McMath is now alive.

With respect to judicial review, the "single question of fact which is relevant to this proceeding" is a matter for the Superior Court that reviewed this issue the first time around and issued a ruling and a judgment then. As the procedural history of the several actions involving Ms. McMath indicate, that court has the authority to revisit a ruling or judgment that it itself

made. In October 2014, the Superior Court considered Latasha Winkfield's petition for a Writ of Error *Coram Nobis* that sought "to reverse the brain death determination of Jahi McMath." The Superior Court immediately scheduled a hearing on the writ, but Petitioner's counsel took the hearing off calendar. The Superior Court's order then left the door open for the Petitioner to reopen the case. Instead, more than a year later, Plaintiffs filed this federal action.

This lawsuit, with its panoply of government defendants and myriad of fancy but ill-fitting constitutional and statutory claims, and its federal forum, is improper. This is a matter for the Superior Court that rendered the ruling and judgment that would have to be set aside before any amendment to Ms. McMath's death certificate could be considered by a County or State official. The County Defendants, who are not vested with the authority to make determinations of whether someone is brain dead, should not be put in the position of defending an expensive lawsuit that seeks to compel them to undo something they did not do and to compel them to do something they cannot do.

Moreover, Plaintiffs' opposition demonstrates their inability to meet essential elements of their constitutional and statutory claims. Because the missing elements require facts that are contrary to existing law -- such as characterizing "brain death" as a "disability" -- amending the Complaint will not cure these deficiencies.

For these reasons, the County Defendants request the Court to dismiss this action on federal abstention grounds. Abstention is appropriate under various doctrines, as discussed below.

II. DISCUSSION

A. *Rooker Feldman*

The County Defendants have asked this Court to dismiss this action on the basis of the *Rooker Feldman* abstention doctrine. This doctrine "prevents federal courts from second-guessing state court decisions by barring the lower federal courts from hearing de facto appeals from state court judgments." *Bianchi v. Ryaarsdam*, 334 F.3d 895, 898 (9th Cir. 2003). Under this doctrine, lower federal courts may not exercise jurisdiction "over any claim that is

'inextricably intertwined' with the decision of a state court." *Id*. at 900 n.4. In December 2013, the state court ruled that Ms. McMath "had suffered brain death and was deceased as defined under Health and Safety Code sections 7180 and 7181." RJN, Exhibits B & C at 16.

Given the single question of fact at issue and the relief sought by Plaintiffs here, there can be no question that a determination by this Court of whether Ms. McMath is alive or dead under California law would be "inextricably intertwined" with the Superior Court's decision on the very same subject. Certainly, the same governing statutes, Health & Safety Code §§ 7180 & 7181, would again be at issue. Certainly, the same medical facts, albeit updated, would be at issue. Were this Court to conduct an evidentiary hearing on whether Ms. McMath is alive or dead under California law, it would certainly trod the same paths trod by the Superior Court on its way to its prior decision.

Plaintiffs' efforts in their opposition to distinguish the Superior Court proceedings as "then is then, but now is now" is without merit. Opposition at 13-15. While there may be new facts to consider since the Superior Court decision more than two years ago, the relief granted, if any, would certainly have to address the standing Superior Court ruling and judgment. As this Court does not have the authority to vacate, set-aside or enjoin the prior ruling or judgment of the Superior Court, any new judgment by this Court would be either duplicative or contradictory to the Superior Court ruling or judgment, and two judgments by two different courts would be potentially enforceable and perhaps at odds. Thus, the "then is then, but now is now" argument is logistically ill-conceived. The *Rooker-Feldman* doctrine is intended to avoid exactly these issues and is applicable here.

Plaintiffs' efforts to distinguish this suit as a means to review the County Defendants' actions rather than the Superior Court decision is also without merit. The County Defendants, of course, have to respect a ruling and judgment of the Superior Court and are not free on their own to ignore that ruling and judgment, even given the passage of two years. Even were they vested with the power to determine issues of life and death – which, as the Coroner's office is engaged in forensic pathology as to the cause of death, they are not – the County Defendants simply do not have the legal authority to contradict a finding of the Superior Court.

B. *Younger* Doctrine

Younger espouses "a strong federal policy against federal-court interference with pending state judicial proceedings, absent extraordinary circumstances." *Middlesex County Ethics Committee v. Garden State Bar Association*, 457 U.S. 423, 431 (1982). As Plaintiffs acknowledge, the doctrine applies when there are ongoing state proceedings. Plaintiffs argue that there is only one ongoing state proceeding, the medical malpractice action, but that is different because it does not involve the defendants in the present case, it seeks money damages, and is being litigated by other lawyers.

These are distinctions without a difference. What is relevant is that the issue of whether Ms. McMath is alive or dead under California law is at issue in that case and is being addressed now by the courts. On March 14, 2016, the Superior Court, Judge Freedman presiding, overruled a demurrer by the hospital to Ms. McMath's personal injury causes of action. See Request For Judicial Notice In Support Of Motion To Intervene and Motion To Dismiss By Children's Hospital and Dr. Rosen (Docket #52), Exhibits W, X & Y (Docket # 52-6). Judge Freedman also certified the issue for review, and the hospital thereafter filed a petition for writ of mandate for review of Judge Freedman's ruling. Declaration of Dana L. Stenvick In Support Of Reply To Motion To Intervene, Ex. A (Docket ##, 65, 65-1). The court of appeal has issued a *Palma* notice with respect to the writ. *Id*. Ex. C (Docket ##, 65, 65-3). These courts, presumably, will determine if Judge Grillo's decision that Ms. McMath has suffered brain death has preclusive effect and conclusively establishes her death, or whether an evidentiary hearing has to be held on the matter. If an evidentiary hearing is to be held, it will necessarily consider the issue of whether Mr. McMath is alive and so can maintain a personal injury cause of action, or whether she is dead and so the wrongful death claim is the appropriate remedy.

Further, the law under *Younger* is that "ongoing" means that state proceedings have been initiated "before any proceedings of substance on the merits have taken place in federal court." *Fresh Int'l Corp. v. Agric. Labor Relations Bd.*, 805 F.2d 1353, 1358 (9th Cir. 1986). In this respect, the prior probate action instituted by Plaintiffs in the Superior Court qualifies as an ongoing action.

Plaintiffs also contend that the present action does not implicate "important state interests" because at issue is a determination of whether Ms. McMath is alive or dead under California law. The important state interest, clearly, is whether the ruling by the Superior Court that a person is deceased under California law is determinative of death, and whether a county coroner, public health officer or county counsel have the authority to change this determination on allegedly new facts. Further, there are important state issues because, among other claims, Plaintiffs have asserted causes of action for violation of constitutionally protected due process, the freedom of religious expression, and privacy against government entities and employees.

C. *Pullman*

Abstention under *Railroad Commission of Texas v. Pullman Co.*, 312 U.S. 496 (1941) is appropriate when three concurrent criteria are satisfied: (1) the complaint involves a sensitive area of social policy that is best left to the states to address (i.e., one which federal courts ought not to enter unless no alternative to its adjudication is open); (2) a federal constitutional issue could be mooted or narrowed by a definitive state court ruling on state law issues; and (3) proper resolution of the potentially determinative state law issue is uncertain. *Fireman's Fund Ins. Co. v. City of Lodi*, 302 F3d 928, 939-40 (9th Cir. 2002)

Plaintiffs argue that the second and third prongs "clearly do not apply here" and so this Court should not abstain. Opposition at 19. To the contrary, with respect to the second prong, Plaintiffs' constitutional claims – due process, religious expression, privacy – could certainly be mooted by a ruling by the Superior Court on the issue of whether Ms. McMath is alive or dead under California law. As for the third prong, the resolution of the determinative state law issue is uncertain, as the Superior Court has already ruled that Ms. McMath is brain dead but Plaintiffs proffer further evidence to the contrary.

D. *Colorado River*

On page 20 of their opposition, the Plaintiffs have confused the *Colorado River* doctrine with the *Pullman*, *Thibodaux*, *Burford* and *Younger* abstention doctrines. They quote from the Supreme Court's review of these other abstention doctrines in *Colorado River Water Conservation Dist. v. United States* 424 U.S. 800, 814-17 (1976), but omit any discussion of the

Supreme Court's discussion of abstention that has come to be known as *Colorado River* abstention, found later in the opinion. Under the *Colorado River* doctrine, federal courts may stay a case involving a question of federal law where a concurrent state action is pending. "In assessing the appropriateness of dismissal in the event of an exercise of concurrent jurisdiction, a federal court may also consider such factors as the inconvenience of the federal forum . . . ; the desirability of avoiding piecemeal litigation . . . ; and the order in which jurisdiction was obtained by the concurrent forums . . . . No one factor is necessarily determinative; a carefully considered judgment taking into account both the obligation to exercise jurisdiction and the combination of factors counselling against that exercise is required." *Id*. at 818-19 (citations omitted).

Plaintiffs argue that the issues before the Superior Court in the medical malpractice case will not determine the issues in the present case and so abstention is not appropriate. To the contrary, the Superior Court will have to determine whether Ms. McMath is alive or dead in order to untangle the unusual pleading of both a personal injury and a wrongful death claim in the very same complaint. In fact, these issues are being considered by the Court of Appeal in a petition for writ of mandate taken from Judge Freedman's order overruling the hospital's demurrer. See Request For Judicial Notice In Support Of Motion To Intervene and Motion To Dismiss By Children's Hospital and Dr. Rosen (Docket #52), Exhibits W, X & Y (Docket # 52-6); Declaration of Dana L. Stenvick In Support Of Reply To Motion To Intervene, Ex. A (Docket ##, 65, 65-1).

Further, Plaintiffs can seek again to reopen the Superior Court probate proceeding before Judge Grillo under a writ of *coram nobis*. As the procedural history of the probate action indicates, that court has the authority to revisit a ruling that it itself made. As discussed in the County Defendants' opening brief, on October 3, 2014, Latasha Winkfield filed a petition for a Writ of Error *Coram Nobis* that included extensive exhibits, including declarations from medical doctors. In that petition, Ms. Winkfield sought a writ "to reverse the brain death determination of Jahi McMath." RJN, Exhibit N at 1:23-25. Ms. Winkfield requested a "hearing/reconsideration of this court's determination of her being brain dead pursuant to California Health and Safety Code Section 7181." *Id*. at 11:14-15. The Superior Court immediately scheduled a hearing on

the writ, but Petitioner's counsel took the hearing off calendar. The Superior Court's order then left the door open for the Petitioner to reopen the case at some later date. *Coram nobis* is a writ of error used to obtain relief from the Superior Court from errors of fact that are unrecognized during trial court proceedings, and which lead to the conclusion that the judgment should be reversed. *Los Angeles Airways, Inc. v. Hughes Tool Co.*, 95 Cal.App.3d 1, 8 (1979); see *Betz v. Pankow*, 16 Cal.App.4th 931, 941 n.5 (1993) ("The common law writ of error *coram nobis* is used to secure relief, in the same court in which a judgment was entered, from an error of fact alleged to have occurred at trial."). It would seem that there could be no better purpose for this writ than to permit a superior court to consider whether a person once declared dead might be alive.

E. *Burford*

Burford abstention is appropriate when a case involves complex questions of state law administered by state administrative agencies, and subject to timely and adequate state court review. *Burford v. Sun Oil Co.*, 319 US 315, 334 (1943). In the present matter, there is a complex question of state law – the determination of brain death under Health & Safety Code §§ 7180 and 7181 – and the powers and procedures of state and county agencies respecting the issuance and amendment of death certificates. The relief sought by the Plaintiffs includes a Court order "requiring Defendants to expunge any and all records relating to the issuance of [the] Certificate of Death." This prayer for relief requests this Court to order state and county administrative agencies to take very specific administrative action.

The Supreme Court summarized the *Burford* abstention doctrine in the case cited by Plaintiffs, *New Orleans Public Service, Inc. v. Council of City of New Orleans*, 491 U.S. 350 (1989): "Where timely and adequate state-court review is available, a federal court sitting in equity must decline to interfere with the proceedings or orders of state administrative agencies: (1) when there are 'difficult questions of state law bearing on policy problems of substantial public import whose importance transcends the result in the case then at bar'; or (2) where the 'exercise of federal review of the question in a case and in similar cases would be disruptive of state efforts to establish a coherent policy with respect to a matter of substantial public concern.'"

Id. at 361 (quoting *Colorado River*, 424 U.S. at 814.)

In the present case, Plaintiffs have access to timely and adequate state-court review within the context of either the ongoing medical malpractice action or by reopening the probate action. Additionally, it may be noted that Plaintiffs have raised the issue of Medi-Cal eligibility in their papers opposing the hospital's motion to intervene. They state: "If Jahi is proven to be alive, at this time, and under existing law, Jahi's benefits under Medi-Cal, which she lost when she was declared dead, will most assuredly be reinstated when she arrives back in California. The County and State Defendants will then, regardless of the state court action, be compelled to pay for her medical care." Plaintiff's Opposition To Motion To Intervene Filed By Dr. Frederick S. Rosen and UCSF Benioff Children's Hospital Oakland (Docket # 58) at 12. By raising this issue, Plaintiffs implicate the administrative procedures for seeking Medi-Cal benefits, including the availability of an administrative hearing and judicial review of any administrative determination regarding whether Ms. McMath would be eligible for Medi-Cal benefits or whether she would be denied such benefits on the grounds that she is not alive. See Welf. & Inst. Code § 10950 (applicant for social services entitled to hearing); 22 Cal. Code Reg. § 50173 (Eligibility Determination); *id*. § 50182 (Corrective Action on Denied Applications).

In these respects, exercise of federal review by this Court would be disruptive of state efforts to establish important state policy both on the subject of brain death, benefits available to a person declared brain dead, and procedures for amending death certificates. Plaintiffs' statement that they "do not seek to interfere with the proceedings of any state administrative agency" is simply not supported by the relief they claim.

F. Plaintiff's Statutory Claims Do Not Satisfy the Liberal Pleading Standard

In their Opposition to the County Defendants' Motion to Dismiss, Plaintiffs urge the Court to read their Complaint "liberally" and draw the inferences necessary to find that they have sufficiently pled their claims under the Religious Land Use and Institutionalized Persons Act ("RLUIPA"), 42 U.S.C. § 2000cc *et seq*., the Americans with Disabilities Act and the Rehabilitation Act.

The Supreme Court has made clear, however, that "[a]lthough for the purposes of a

motion to dismiss [the court] must take all of the factual allegations in the complaint as true, [the court is] not bound to accept as true a legal conclusion couched as a factual allegation." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). As the Court notes:

> In keeping with these principles a court considering a motion to dismiss can choose to begin by identifying pleadings that, because they are no more than conclusions, are not entitled to the assumption of truth. While legal conclusions can provide the framework of a complaint, they must be supported by factual allegations. When there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief.

Id. As explained in greater detail below, Plaintiffs' threadbare claims cannot "plausibly give rise to an entitlement to relief" because each statutory claim lacks a required element.

1. **Including Temporary Hospital Stays Within The Religious Land Use and Institutionalized Persons Act Rubric Cannot Be Reconciled With Congressional Intent**

The common thread that runs through those "institutions" statutorily mandated to be governed by the Religious Land Use and Institutionalized Persons Act ("RLUIPA"), 42 U.S.C. § 2000cc *et seq*., is that they are facilities where a person may be made to reside, or similarly to be held for materially significant periods of time. The RLUIPA was designed to protect persons residing in government-controlled facilities. The co-sponsors of the RLUIPA, Senators Orrin Hatch and Edward Kennedy, explained that the Act targeted, "persons in prisons, mental hospitals, and similar state institutions," because, "[f]ar more than any other Americans, persons ***residing in institutions*** are subject to the authority of one or a few local officials. ***Institutional residents***' right to practice their faith is at the mercy of those running the institution, and their experience is very mixed." 146 Cong. Rec. S7774-01, 146 Cong. Rec. S7774-01, 2000 WL 1079346 (daily ed. July 27, 2000) (Joint Statement of Sen. Hatch and Sen. Kennedy) (emphasis added).

Therefore, it is clear that the scope of the Act was limited to those persons residing in, or similarly confined for materially significant periods of time in government-operated facilities. *See Singson v. Norris*, 553 F.3d 660, 662 (8th Cir. 2009) ("Congress enacted RLUIPA to provide additional protection for institutionalized persons' religious freedom.").

Given that RLUIPA only applies to institutionalized persons, *i.e.*, those residing in a government-controlled facility, Plaintiffs cannot cure the deficiencies in their Complaint regarding their RLUIPA claim. The facts are uncontroverted that Children's Hospital was not a government-owned facility designed to provide long-term care to residents as contemplated by Congress in passing RLUIPA. Moreover, Ms. McMath's brief treatment at Children's Hospital was not equivalent to the residential care contemplated by Congress in passing RLUIPA.

Absent the essential element of an "institution" or "institutionalized person," Plaintiffs' Sixth Claim for violation of the Religious Land Use and Institutionalized Persons Act cannot "plausibly give rise to an entitlement to relief" and therefore should be dismissed.

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

Plaintiffs Fourth and Fifth Claims for Violations of the Rehabilitation Act and Americans with Disabilities Act are as flawed as its RLUIPA claim. As discussed in County Defendants' Motion to Dismiss, in order to state a claim under either the ADA or Rehabilitation Act, Plaintiffs must establish that: (1) Ms. McMath is an individual with a disability; (2) she is otherwise qualified to receive the program's benefit; (3) she was excluded from, denied the benefits of, or subject to discrimination under the program solely by reason of her disability; and (4) the program receives federal financial assistance. *J.W. ex rel. J.E.W. v. Fresno Unified Sch. Dist.*, 570 F.Supp.2d 1212, 1226 (E.D. Cal. 2008 (citing *Duvall v. County of Kitsap*, 260 F.3d 1124, 1135 (9th Cir. 2001)).

As noted previously, Plaintiffs' Complaint not only fails to identify any actual program from which Ms. McMath was excluded and for which she was otherwise qualified, but fails to demonstrate that Ms. McMath is an individual with a disability. Rather than identify the program from which Ms. McMath was excluded, Plaintiffs' Opposition simply states that if Ms. McMath were reclassified as a live person she would be "'otherwise qualified' to participate in some federal assistance program . . . ." Opposition at 24:25-28. In other words, if the Court were to allow Plaintiffs' case to proceed and if they were ultimately successful in re-litigating the Superior Court's decision that Ms. McMath has suffered "brain death," then Ms. McMath could

be characterized as having a disability and would qualify to participate in a yet to be determined federal assistance program.

Even with the liberal reading and favorable inferences that Plaintiffs request, their Complaint amounts to nothing more than conclusions couched as factual assertions. As such, they are not entitled to the assumption of truth. *Ashcroft*, 556 U.S. 662, 679 ("In keeping with these principles a court considering a motion to dismiss can choose to begin by identifying pleadings that, because they are no more than conclusions, are not entitled to the assumption of truth."). Plaintiffs are only entitled to seek relief for harms that have actually occurred, not those harms that could have possibly occurred under a completely different set of facts that have yet to materialize. *See Whitmore v. Arkansas*, 495 U.S. 149 (1990)(" To establish an Art. III case or controversy, a litigant first must clearly demonstrate that he has suffered an 'injury in fact.' That injury, we have emphasized repeatedly, must be concrete in both a qualitative and temporal sense. The complainant must allege an injury to himself that is 'distinct and palpable,' … as opposed to merely '[a]bstract,'… and the alleged harm must be actual or imminent, not 'conjectural' or 'hypothetical.'" (internal citations omitted)).

The law as it currently exists requires the presence of an individual with a disability that is otherwise qualified to receive a federally-assisted program's benefit but is excluded from, denied the benefits of, or subject to discrimination under the program solely by reason of her disability. Here, Plaintiff's Opposition all but concedes that Ms. McMath neither suffers from a legally-recognized disability nor has she been denied benefits from any identifiable federally-assisted program because of a disability.

Absent the ability to satisfy those prima facie elements of their claims, Plaintiffs Fourth and Fifth Claims for violations of the Rehabilitation Act and Americans with Disabilities Act cannot "plausibly give rise to an entitlement to relief" and should be dismissed.

III.
CONCLUSION

In this latest action, the Plaintiffs have sued a swath of county employees for an array of causes of action, all to get review of a "single question of fact which is relevant to this

proceeding: Does Jahi McMath exhibit some signs of function of any portion of her brain?" The declaratory relief they seek is reversal of a determination not even made by any of the County Defendants, that is, the determination that Ms. McMath is brain dead. The injunctive relief they seek is an order compelling the County Defendants to amend the death certificate issued for Ms. McMath and to expunge all records of that death certificate. But the County Defendants were not the physicians that declared Ms. McMath dead under California law and, further, the Superior Court has ruled that Ms. McMath is brain dead. Because the County Defendants cannot just disregard the binding ruling of the Superior Court and rescind the death certificate in contradiction to that ruling, the County Defendants cannot do as Plaintiffs ask. Because the County Defendants cannot reverse what the physicians and the Superior Court have done, this Court, too, cannot compel the County Defendants to take action that would be, ultimately, *ultra vires*. The Plaintiffs' fundamental dispute appears to be with the physicians and the Court that declared Ms. McMath brain dead. By filing this federal action, the Plaintiffs are drawing the County Defendants into the cross-fire of that dispute, and are trying to end-run the Superior Court's ruling. They seek federal judicial authority to contradict a ruling of the Superior Court, and are using the County defendants as a vehicle to drive that end-run. The County Defendants ask that the Court remove them from this cross-fire by abstaining from this action under the federal abstention doctrines addressed in the County Defendants' motion to dismiss.

Dated: May 2, 2016

ARCHER NORRIS

/s/ *John L. Kortum*
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COUNTY OF ALAMEDA, et al.