

CIVIL COVER SHEET

The JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. (SEE INSTRUCTIONS ON NEXT PAGE OF THIS FORM.)

I. (a) PLAINTIFFS

*Dr. David Donald Winkler, MD as individual
and as general partner of Jabi Health, a minor*

(b) County of Residence of First Listed Plaintiff *Alameda*
(EXCEPT IN U.S. PLAINTIFF CASES)

(c) Attorneys (Firm Name, Address, and Telephone Number)
*415-421-2800
Polson Law Firm
1438 Market St
SF CA 94102*

DEFENDANTS

*Children's Hospital Oakland,
Dr. David Donald M.D. and Does I through
10 inclusive*

County of Residence of First Listed Defendant *Alameda*
(IN U.S. PLAINTIFF CASES ONLY)

NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE TRACT OF LAND INVOLVED.

Attorneys (If Known) *Douglas Straus Esq
Archer Norris
2033 North Main Street Ste 800
Walnut Creek CA 94598*

II. BASIS OF JURISDICTION (Place an "X" in One Box Only)

- 1 U.S. Government Plaintiff
- 3 Federal Question (U.S. Government Not a Party)
- 2 U.S. Government Defendant
- 4 Diversity (Indicate Citizenship of Parties in Item III)

III. CITIZENSHIP OF PRINCIPAL PARTIES (Place an "X" in One Box for Plaintiff and One Box for Defendant)

	PTF	DEF		PTF	DEF
Citizen of This State	<input checked="" type="checkbox"/> 1	<input checked="" type="checkbox"/> 1	Incorporated or Principal Place of Business In This State	<input type="checkbox"/> 4	<input type="checkbox"/> 4
Citizen of Another State	<input type="checkbox"/> 2	<input type="checkbox"/> 2	Incorporated and Principal Place of Business In Another State	<input type="checkbox"/> 5	<input type="checkbox"/> 5
Citizen or Subject of a Foreign Country	<input type="checkbox"/> 3	<input type="checkbox"/> 3	Foreign Nation	<input type="checkbox"/> 6	<input type="checkbox"/> 6

IV. NATURE OF SUIT (Place an "X" in One Box Only)

CONTRACT	TORTS	FORFEITURE/PENALTY	BANKRUPTCY	OTHER STATUTES	
<input type="checkbox"/> 110 Insurance <input type="checkbox"/> 120 Marine <input type="checkbox"/> 130 Miller Act <input type="checkbox"/> 140 Negotiable Instrument <input type="checkbox"/> 150 Recovery of Overpayment & Enforcement of Judgment <input type="checkbox"/> 151 Medicare Act <input type="checkbox"/> 152 Recovery of Defaulted Student Loans (Excludes Veterans) <input type="checkbox"/> 153 Recovery of Overpayment of Veteran's Benefits <input type="checkbox"/> 160 Stockholders' Suits <input type="checkbox"/> 190 Other Contract <input type="checkbox"/> 195 Contract Product Liability <input type="checkbox"/> 196 Franchise	PERSONAL INJURY <input type="checkbox"/> 310 Airplane <input type="checkbox"/> 315 Airplane Product Liability <input type="checkbox"/> 320 Assault, Libel & Slander <input type="checkbox"/> 330 Federal Employers' Liability <input type="checkbox"/> 340 Marine <input type="checkbox"/> 345 Marine Product Liability <input type="checkbox"/> 350 Motor Vehicle <input type="checkbox"/> 355 Motor Vehicle Product Liability <input type="checkbox"/> 360 Other Personal Injury <input checked="" type="checkbox"/> 362 Personal Injury - Medical Malpractice	<input type="checkbox"/> 365 Personal Injury - Product Liability <input type="checkbox"/> 367 Health Care/Pharmaceutical Personal Injury Product Liability <input type="checkbox"/> 368 Asbestos Personal Injury Product Liability PERSONAL PROPERTY <input type="checkbox"/> 370 Other Fraud <input type="checkbox"/> 371 Truth in Lending <input type="checkbox"/> 380 Other Personal Property Damage <input type="checkbox"/> 385 Property Damage Product Liability	<input type="checkbox"/> 625 Drug Related Seizure of Property 21 USC 881 <input type="checkbox"/> 690 Other LABOR <input type="checkbox"/> 710 Fair Labor Standards Act <input type="checkbox"/> 720 Labor/Management Relations <input type="checkbox"/> 740 Railway Labor Act <input type="checkbox"/> 751 Family and Medical Leave Act <input type="checkbox"/> 790 Other Labor Litigation <input type="checkbox"/> 791 Employee Retirement Income Security Act IMMIGRATION <input type="checkbox"/> 462 Naturalization Application <input type="checkbox"/> 465 Other Immigration Actions	<input type="checkbox"/> 422 Appeal 28 USC 158 <input type="checkbox"/> 423 Withdrawal 28 USC 157 PROPERTY RIGHTS <input type="checkbox"/> 820 Copyrights <input type="checkbox"/> 830 Patent <input type="checkbox"/> 840 Trademark SOCIAL SECURITY <input type="checkbox"/> 861 HIA (1395ff) <input type="checkbox"/> 862 Black Lung (923) <input type="checkbox"/> 863 DIWC/DIWW (405(g)) <input type="checkbox"/> 864 SSID Title XVI <input type="checkbox"/> 865 RSI (405(g)) FEDERAL TAX SUITS <input type="checkbox"/> 870 Taxes (U.S. Plaintiff or Defendant) <input type="checkbox"/> 871 IRS—Third Party 26 USC 7609	<input type="checkbox"/> 375 False Claims Act <input type="checkbox"/> 400 State Reapportionment <input type="checkbox"/> 410 Antitrust <input type="checkbox"/> 430 Banks and Banking <input type="checkbox"/> 450 Commerce <input type="checkbox"/> 460 Deportation <input type="checkbox"/> 470 Racketeer Influenced and Corrupt Organizations <input type="checkbox"/> 480 Consumer Credit <input type="checkbox"/> 490 Cable/Sat TV <input type="checkbox"/> 850 Securities/Commodities/Exchange <input type="checkbox"/> 890 Other Statutory Actions <input type="checkbox"/> 891 Agricultural Acts <input type="checkbox"/> 893 Environmental Matters <input type="checkbox"/> 895 Freedom of Information Act <input type="checkbox"/> 896 Arbitration <input type="checkbox"/> 899 Administrative Procedure Act/Review or Appeal of Agency Decision <input type="checkbox"/> 950 Constitutionality of State Statutes
REAL PROPERTY <input type="checkbox"/> 210 Land Condemnation <input type="checkbox"/> 220 Foreclosure <input type="checkbox"/> 230 Rent Lease & Ejectment <input type="checkbox"/> 240 Torts to Land <input type="checkbox"/> 245 Tort Product Liability <input type="checkbox"/> 290 All Other Real Property	CIVIL RIGHTS <input checked="" type="checkbox"/> 440 Other Civil Rights <input type="checkbox"/> 441 Voting <input type="checkbox"/> 442 Employment <input type="checkbox"/> 443 Housing/Accommodations <input type="checkbox"/> 445 Amer. w/Disabilities - Employment <input checked="" type="checkbox"/> 446 Amer. w/Disabilities - Other <input type="checkbox"/> 448 Education	PRISONER PETITIONS Habeas Corpus: <input type="checkbox"/> 463 Alien Detainee <input type="checkbox"/> 510 Motions to Vacate Sentence <input type="checkbox"/> 530 General <input type="checkbox"/> 535 Death Penalty Other: <input type="checkbox"/> 540 Mandamus & Other <input type="checkbox"/> 550 Civil Rights <input type="checkbox"/> 555 Prison Condition <input type="checkbox"/> 560 Civil Detainee - Conditions of Confinement			

V. ORIGIN (Place an "X" in One Box Only)

- 1 Original Proceeding
- 2 Removed from State Court
- 3 Remanded from Appellate Court
- 4 Reinstated or Reopened
- 5 Transferred from Another District (specify)
- 6 Multidistrict Litigation

VI. CAUSE OF ACTION
 Cite the U.S. Civil Statute under which you are filing (Do not cite jurisdictional statutes unless diversity):
US Const. under Amendment 1, 9th, 14th, 24th, USC. 799, 42 U.S.C. 12101/059
 Brief description of cause:

VII. REQUESTED IN COMPLAINT:
 CHECK IF THIS IS A CLASS ACTION UNDER RULE 23, F.R.Cv.P. DEMAND \$ _____ CHECK YES only if demanded in complaint:
 JURY DEMAND: Yes No

VIII. RELATED CASE(S) IF ANY (See instructions):
 JUDGE _____ DOCKET NUMBER _____

DATE *12-30-13* SIGNATURE OF ATTORNEY OF RECORD *Christopher Bidolan SB 165358*

IX. DIVISIONAL ASSIGNMENT (Civil L.R. 3-2)
 (Place an "X" in One Box Only)
 SAN FRANCISCO/OAKLAND SAN JOSE EUREKA

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2 Quinton B. Cutlip, Esq. (SBN 168030)
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8 Attorneys for Plaintiffs
9 LATASHA WINKFIELD

FILED

DEC 30 2013

RICHARD W. WIEKING
CLERK, U.S. DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
OAKLAND

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NP

10 UNITED STATES DISTRICT COURT

11 NORTHERN DISTRICT OF CALIFORNIA OAKLAND

12 LATASHA WINKFIELD, an individual)
13 parent and guardian of Jahi McMath, a)
14 minor)

15 Plaintiff,)

16 v.)

17 CHILDRENS HOSPITAL OAKLAND, Dr.)
18 David Durand M.D. and DOES 1 through)
19 10, inclusive)

20 Defendants)
21)
22)
23)
24)
25)
26)
27)
28)

Case No. 13-59934 SBA

**COMPLAINT FOR DECLARATORY
RELIEF AND REQUEST FOR
TEMPORARY RESTRAINING ORDER
AND INJUNCTIVE RELIEF**

1. Violation of the Free Exercise Clause of First Amendment of the United States Constitution
2. Violation of the Right to Privacy Guaranteed Under the Fourth Amendment of the United States Constitution
3. Violation of the Right to Privacy Guaranteed under the Fourteenth Amendment of the United States Constitution
4. Violation of Section 504 of The Rehabilitation Act of 1973 (29 U.S.C. § 794)
5. Violation of The American's With Disabilities Act 42 U.S.C. §12101 et seq.

**REQUEST FOR EMERGENCY
TEMPORARY RESTRAINING ORDER
INJUNCTIVE RELIEF - RCFC 65**

1 Plaintiffs, and each of them, allege the following:

2 **JURISDICTION**

3 1. Counts in this Action arise out of the First, Fourth and Fourteenth Amendments to
4 the United States Constitution, The Rehabilitation Act of 1973 (29 U.S.C. § 794) and The
5 American's With Disabilities Act 42 U.S.C. §12101 et seq.
6

7 **VENUE**

8 2. Venue is proper in the United States District Court for the Northern District of
9 California, pursuant to 28 U.S.C. sections 84 and 1391. The events that gave rise to this complaint
10 are occurring in Oakland, Alameda County, in the State of California, and one or more of the
11 defendants has its Principal Place of Business in Oakland, Alameda County, California.
12

13 **INTRADISTRICT ASSIGNMENT**

14 3. The actions that gave rise to this complaint occurred in Oakland, Alameda County,
15 California. Assignment of this action to either the San Francisco Division or Oakland Division of
16 this Court is appropriate according to Local Rule 3-2(d).
17

18 **PARTIES**

19 4. Latasha Winkfield is an adult and a resident of the State of California. She is the
20 mother of Jahi McMath. Pursuant to the California Family Code § 6910 she is the healthcare
21 decision maker for Jahi McMath, a minor.

22 6. Defendant CHILDREN'S HOSPITAL OAKLAND (CHO) is a non-profit hospital
23 corporation with its principal place of business in Oakland, California. Plaintiff is informed and
24 believes, and on the basis of said information and belief, alleged that CHO receives funding from
25 the state and federal government which is used to directly and indirectly provide healthcare
26 services to individuals including but not limited to the Jahi McMath.
27

28 8. Plaintiff is informed and believes that Defendant DR. DAVID DURAND is a

1 resident of Alameda County in California. He is the Chief of Pediatrics of Children's Hospital
2 Oakland.

3 9. Plaintiffs are ignorant of the true names and capacities of defendants sued herein as
4 Does 1 through 10, inclusive, and therefore sue these defendants by such fictitious names and
5 capacities. Plaintiffs are informed and believe and based thereon allege that each of the fictitiously
6 named defendants is responsible in some manner for the occurrences herein alleged, and that
7 plaintiffs' injuries as herein alleged were proximately caused by the actions and/or in-actions of
8 said Doe defendants. Plaintiffs will amend this complaint to include the true identities of said doe
9 defendants when they are ascertained.
10

11 10. At all times mentioned, each of the defendants was acting as the agent, principal,
12 employee, and/or employer of one or more of the remaining defendants and was, at all times herein
13 alleged, acting within the purpose, course, and scope of such agency and/or employment for
14 purposes of respondent superior and/or vicarious liability as to all other defendants.
15

16 11. At all times mentioned herein, the defendants, and each of them, employed, hired,
17 trained, retained, and/or controlled the actions of all other defendants, and each of them.
18

19 **FACTS**

20 12. On December 9, 2013 Jahi McMath underwent a routine tonsillectomy at
21 Children's Hospital Oakland.

22 13. Following the procedure Jahi suffered a large blood loss and, as a result, she
23 suffered a heart attack and a loss of oxygen to her brain. Plaintiff Latasha Winkfield is ignorant of
24 the cause of said bleeding at this time but understands it stems from the surgery.
25

26 14. Jahi suffered brain damage and has been maintained on a respirator requiring
27 ventilation support. With pulmonary support provided by the ventilator her heart and other organs
28 are functioning. She has undergone certain tests which have demonstrated brain damage from the

1 lack of oxygen. She is totally disabled at this time and is severely limited in all major life
2 activities being unable to do anything of her own volition.

3 15. California Health and Safety Code § 7180. In force and effect, at all times material
4 to this action provides that “An individual who has sustained either (1) irreversible cessation of
5 circulatory and respiratory functions, or (2) irreversible cessation of all functions of the entire
6 brain, including the brain stem, is dead. A determination of death must be made in accordance
7 with accepted medical standards.”
8

9 16. California Health and Safety Code § 7181 provides that an individual can be
10 pronounced dead by a determination of “irreversible cessation of all functions of the entire brain,
11 including brain stem.” It requires “independent” confirmation by another physician.
12

13 17. Defendants Children’s Hospital by and through its Chief of Pediatrics Defendant
14 Durand, has informed Plaintiff Latasha Winkfield that Jahi is “Dead, Dead, Dead, Dead” utilizing
15 the definition of “brain death” derived from Cal. Health & Safety Code § 7180.

16 18. Plaintiffs are Christians with firm religious beliefs that as long as the heart is beating,
17 Jahi is alive. Plaintiff Winkfield has personal knowledge of other who had been diagnosed as brain
18 dead, where the decision makers were encouraged to “pull the plug” yet they didn’t and their loved
19 one emerged from legal brain death to where they had cognitive ability and some even fully
20 recovering. These religious beliefs involve providing all treatment, care, and nutrition to a body
21 that is living, treating it with respect and seeking to encourage its healing.
22

23 19. Defendants have informed Latasha Winkfield that they intend to disconnect the
24 ventilator that Jahi McMath is relying upon to breath claiming that she is brain dead pursuant to
25 California Health and Safety Code § 7180.
26

27 20. Defendants claim that, since they have pronounced Jahi dead that Latasha Winkfield
28 has no right to exercise any decision making authority vis-à-vis maintaining her daughter on a

1 ventilator.

2 21. Defendants have indicated that they wish to remove life support within the next 24
3 hours if possible and definitely before Christmas.

4 22. To stop Defendants from terminating Jahi's ventilator support, on December 20th,
5 2013, Plaintiff Winkfield filed a verified petition and ex parte application seeking an order (1)
6 authorizing the petitioner (Jahi's mother) to make medical care decisions for Jahi and for an
7 injunction under to prohibit respondent CHO from withholding life support from Jahi. (Probate
8 Code 3201, 4776, 4770.) The court set the application for hearing at 1:30 p.m. on December 20,
9 2013, in Department 31, and requested respondent CHO to submit written opposition to
10 petitioner's ex parte application.
11

12 23. On December 20, 2013, the court temporarily restrained CHO from changing Jahi's
13 level of medial support. The order stated in part: "Respondent CHO, its agents, employees,
14 servants and independent contractors are ordered to continue to provide Jahi McMath with the
15 treatment and support which is currently being provided as per the current medications and
16 physician's orders until further order of the court." The Court denied Plaintiff (Petitioner)
17 Winkfield's request that Jahi be provided a nasal-gastric tube or other medical treatment in
18 addition to the maintenance of "status quo" medical treatment. The order also continued the
19 hearing to Monday, December 23, 2013.
20

21 24. On December 23, 2103 Judge Grillo appointed Dr. Paul Fisher as an independent
22 expert to con Pursuant to that order, Dr. Fisher examined Jahi the afternoon of December 23,
23 2013. The court also continued the hearing to December 24, 2013, to receive Dr. Fisher's report
24 and testimony from a CHO physician (Dr. Shanahan) who first determined that Jahi was brain
25 dead, as of December 11, 2013. By separate order dated December 23, 2013, the court extended
26 the restraining order through December 30, 2013, or such other date as the court might later
27
28

1 determine.

2 25. On December 24, 2013, the court, during closed and public sessions received
3 testimony from Dr. Shanahan and Dr. Fisher and ruled that Jahi McMath was “brain dead” under
4 California Health and Safety Code Sections 7080 & 7081 then denied the petition and dissolved
5 the TRO effective 5:00 p.m. December 30, 2013 thereby ruling that after that time Children’s
6 Hospital was no longer required to provide any further care or treatment to Jahi McMath and
7 could thereafter cease offering of cardio-pulmonary ventilator support.
8

9 26. Plaintiff Latasha Winkfield has asked that her child be given nutritional feeding
10 through a nasal-gastric tube or gastric tube to provide her with nutrients. She has also asked for
11 care to be administered to her daughter to maintain her heart, tissues, organs, etc. The Defendants
12 have refused to provide such treatment stating that they do not “treat dead people” nor do they feed
13 them. They have denied her ability to make decisions over the health care of her daughter. Plaintiff
14 Winkfield has sought alternate placement of her daughter, outside the Defendant’s facility but,
15 because of her unfamiliarity with such matters, the holiday period, and the requirement that Jahi
16 have a tracheostomy tube and a gastric tube inserted for stable delivery of air and nutrition to Jahi.
17 Plaintiff has now secured such alternate placement and transportation but requires time for that to
18 occur. If the defendants proceed with their plans she will expire.
19
20

21 27. Plaintiff Latasha Winkfield vehemently opposes the efforts of the Defendants to
22 exclude her from the decision making regarding her daughter and their insistence that she has no
23 right vis-à-vis the decision to disconnect the ventilator that provides oxygen necessary for the heart
24 to beat and the organs to be kept perfused with blood. Plaintiff Latasha Winkfield has expressly
25 forbidden the defendants from removing life support. Defendants have refused her requests for
26 nutritional support and the placement of a tracheostomy tube and a gastric tube stating that she
27 has no rights to request medical care for her daughter as she is dead and that “CHO does not treat
28

1 dead people. She has video evidence demonstrating movement of her child which Dr. Paul Byrne
2 has indicated is proof of her being alive and not dead.

3 28. The State definition which Defendants are relying upon is in stark and material
4 difference to the religious beliefs of Latasha Winkfield and her Daughter. She feels that
5 disconnection of the ventilator is tantamount to killing Jahi.
6

7
8 **FACTS WARRANTING EMERGENCY TEMPORARY RESTRAINING ORDER AND**
9 **INJUNCTIVE RELIEF**

10 29. There is a substantial likelihood of success on the merits given the wealth of decisional
11 authority, both in the Court of Appeal, and the U.S. Supreme Court demonstrating the
12 constitutional rights people have over their decision making role in their healthcare and for parents
13 over the healthcare decisions concerning their children
14

15 30. The injuries threatened of the conduct is not enjoined will be irrevocable and
16 irreparable, Jahi McMath will be taken off a ventilator, her heart will stop beating and she will
17 cease to show any signs associated with a living body. If she is prohibited from making healthcare
18 decisions re nutrition, medications, etc., he daughter will starve and he electrolytes will get out of
19 balance and other complications will arise that will hasten, and ultimately lead to, Jahi's death.
20

21 31. The threatened injury is death to Jahi and loss of a daughter to Latasha. Defendants
22 have stated no reason they would suffer a loss other than its demoralizing to treat a dead person.

23 32. This case is one of national interest and the issue of the right to participate in
24 healthcare decisions is one of great public concern. Therefore, granting of preliminary injunction
25 is in the public interest.
26

27 **TERMS OF THE PROPOSED RESTRAINING ORDER**

28 33. Plaintiffs seek to have defendants be restrained from removing the ventilator.

1 34. Plaintiffs seek to have defendants initiate the provision of nutrition to Jahi.

2 35. Plaintiffs seek to have to take all medically available steps/measures to seek to improve
3 her health and prolong her life including nutrition including the insertion of a tracheostomy tube
4 and a gastric tube.

5 36. Plaintiff seeks to be provided ample time and support (including the placement of the
6 tracheostomy tube and the gastric tube) to try and locate a facility that will accept her as a patient
7 to treat her and provide her vent support
8

9 **FIRST COUNT**

10 **(Violation of First Amendment Rights – Free Exercise of Religion)**

11 37. Plaintiffs incorporate by reference as if fully set forth herein paragraphs 1-36.

12 38. This action arises under the United States Constitution, particularly under the
13 provisions of the Free Exercise Clause of the First Amendment to the Constitution of the United
14 States.
15

16 39. The acts complained of herein are being committed by the Defendants, and are
17 depriving Plaintiff WINKFIELD and Jahi McMath of their rights to freely express their religious
18 beliefs. The denial of these rights threatens the very existence of Jahi and will completely sever
19 the relationship that still endures between Latasha and Jahi.
20

21 40. The Defendants, and each of them, knowingly and willfully conspired and agreed
22 among themselves to violate Plaintiffs' civil rights so as to injure Plaintiffs, and each of them.

23 41. As a proximate cause of the Defendants' conduct, Plaintiffs, and each of them, are
24 incurring attorney fees and litigation costs, including the costs of retaining experts.
25

26 42. Plaintiffs pray for relief in the form of a declaration of the right of Plaintiff Latasha
27 Winkfield to exercise control over the determination of the healthcare to be provided to and
28 received by Jahi McMath and a declaration that the application of California Health and Safety

1 Code § 7181, as defendants seek to do, giving them the right to discontinue ventilator support over
2 the objection of Plaintiff Winkfield, is unconstitutional as an interference with Plaintiffs exercise
3 of their religious beliefs.

4 43. Plaintiff prays for an injunction prohibiting Defendants from removing ventilator
5 support and an order that they institute nutritional support and other medical treatments to as to
6 provide her with proper care and treatment designed promote her maximum level of medical
7 improvement, to insert a tracheostomy tube and a gastric tube, and to provide Plaintiff a reasonable
8 time to locate an alternate facility to care for her child in accordance with her religious beliefs.
9

10 **SECOND COUNT**

11 **(Violation of Fourth Amendment Rights – Privacy Rights)**

12
13 44. Plaintiffs incorporate, herein by reference, paragraphs 1 through 43 as though fully
14 set forth herein.

15
16 45. This action arises under the United States Constitution, particularly under the
17 provisions of the Privacy Rights established and recognized as existing within and flowing from
18 Fourth Amendment to the Constitution of the United States.

19 46. Each of the acts complained of herein was committed by the Defendants, and each
20 of them, and by seeking to deny Latasha Winkfield and Jahi McMath of the rights to privacy
21 including but not limited to their rights to have control over their health care, by refusing to
22 provide health care to them, and by denying them the right to have control over the health care
23 decisions affecting Jahi, which are recognized under the Fourth Amendment of the U.S.
24 Constitution.
25

26 47. The conduct of the Defendants, and each of them, has deprived Plaintiffs of the
27 rights of privacy that they have over their medical decisions.
28

1 48. As a direct and proximate result of the Defendants' conduct, as alleged herein,
2 Plaintiffs are in great risk of the death of Jahi McMath occurring. She has been suffering, as has
3 Latasha Winkfield by being prohibited from obtaining proper care for Jahi and by being deprived
4 of the right of knowing that Jahi was being cared for and, instead, fearing that she was becoming
5 weaker and dying because of the refusal of the defendants to provide treatment.
6

7 49. As a direct and proximate result of the Defendants' conduct, the Plaintiffs have
8 suffered past and future general damages in amounts to be determined by proof at trial.

9 50. As a proximate cause of the Defendants' conduct, Plaintiffs, and each of them, are
10 incurring attorney fees and litigation costs, including the costs of retaining experts.

11 51. Plaintiffs pray for relief in the form of a declaration of their rights of privacy
12 relating to their rights to control over their medical decisions and choices. Plaintiff further request
13 declaratory relief that the application of the determination of the healthcare to be provided to and
14 be received by Jahi McMath and a declaration that the application of California Health and Safety
15 Code § 7181, in the manner in which Defendants seek to do so, so as to deprive Plaintiffs of their
16 ability to choose to remain on ventilator support is an unconstitutional interference with Plaintiffs
17 exercise of rights to privacy.
18

19 52. Plaintiff prays for an injunction prohibiting Defendants from removing ventilator
20 support and an order that they institute nutritional support and other medical treatments to as to
21 provide her with proper care and treatment designed to promote her maximum level of medical
22 improvement, to insert a tracheostomy tube and a gastric tube, and to provide Plaintiff a reasonable
23 time to locate an alternate facility to care for her child in accordance with her religious beliefs.
24

25
26 **THIRD COUNT**
 (Violation of Fourteenth Amendment Rights to Privacy)

27 53. Plaintiffs incorporate, herein by reference, paragraphs 1 through 52 as though fully
28

1 set forth herein.

2 54. This action arises under the United States Constitution, particularly under the
3 provisions of the Fourteenth amendment and its right to privacy.

4 55. Each of the acts complained of herein was committed by the Defendants, and each
5 of them, and by seeking to deny Latasha Winkfield and Jahi McMath of the rights to privacy
6 including but not limited to their rights to have control over their health care, by refusing to
7 provide health care to them, and by denying them the right to have control over the health care
8 decisions affecting Jahi, which are recognized under the Fourteenth Amendment of the U.S.
9 Constitution.

10
11 56. As a proximate cause of the Defendants' conduct, Plaintiffs, and each of them, are
12 incurring attorney fees and litigation costs, including the costs of retaining experts.

13
14 57. Plaintiffs pray for relief in the form of a declaration of their rights Privacy over the
15 healthcare decisions concerning Jahi's rights to exercise control over her medical decisions and
16 that the efforts to/ decision of CHO to unilaterally remove Jahi from the ventilator under
17 California Health and Safety Code § 7181, are an unconstitutional interference with Plaintiff's
18 Privacy rights.

19
20 58. Plaintiff prays for an injunction prohibiting Defendants from removing ventilator
21 support and an order that they institute nutritional support and other medical treatments so as to
22 provide her with proper care and treatment designed to promote her maximum level of medical
23 improvement, to insert a tracheostomy tube and a gastric tube, and to provide Plaintiff a reasonable
24 time to locate an alternate facility to care for her child in accordance with her religious beliefs.

25
26 **FOURTH COUNT**

27 **(Violation of the Federal Rehabilitation Act)**

28 59. Plaintiffs incorporate, herein by reference, paragraphs 1 through 60 as though fully

1 set forth herein.

2 60. Jahi McMath is a handicapped and/or disabled individual as that term is defined
3 under both the Rehabilitation Act of 1973.

4 61. Section 504 of the Rehabilitation Act prohibits discrimination against an “otherwise
5 qualified” handicapped individual, solely by reason of his or her handicap, under any program or
6 activity receiving federal financial assistance.
7

8 62. Hospitals such Defendant Children’s Hospital Oakland, that accepts Medicare and
9 Medicaid funding, is subject to the Rehabilitation Act.

10 63. The Hospital has admitted that the sole reason it wishes to withhold ventilator
11 treatment and the sole reason that it refuses to provide nutrition and other medical treatment for
12 Jahi McMath over her mother's objections, is because of Jahi’s brain injury—her handicap and
13 disability.
14

15 64. Jahi is “otherwise qualified” to receive treatment dismal long term prospects of
16 living.
17

18 65. Thus, the Hospital's desire to withhold ventilator treatment, nutritional support, and
19 other medical treatment, from Jahi over her mother's objections, violates the Rehabilitation Act.

20 66. As a proximate cause of the Defendants’ conduct, Plaintiffs, and each of them, are
21 incurring attorney fees and litigation costs, including the costs of retaining experts.

22 67. Plaintiffs pray for relief in the form of a declaration the effort to remove Jahi from
23 her ventilator under California Health and Safety Code § 7181, and their refusal to provide her
24 with medical care and nutritional support violates the Rehabilitation Act and, therefore,
25 Defendants should be ordered to continue said support and to provide nutritional support and other
26 medical support designed to allow Jahi to continue existing and to have a best chance of regaining
27 some brain function.
28

1 accommodation of any place of public accommodations by any person who owns, leases (or leases
2 to), or operates a place of public accommodation. 42 U.S.C. § 12182(a).

3 75. In contrast to the Rehabilitation Act, the ADA does not require that a handicapped
4 individual be “otherwise qualified” to receive the benefits of participation. Further, section
5 302(b)(1)(A) of the ADA states that “[i]t shall be discriminatory to subject an individual or class
6 of individuals on the basis of a disability ... to a denial of the opportunity of the individual or class
7 to participate in or benefit from the goods, services, facilities, privileges, advantages, or
8 accommodations of an entity.” 42 U.S.C. § 12182(b)(1)(A)(i).

10 76. The Hospital seeks to deny Jahi McMath the benefits of ventilator services, nutrition
11 and other medical treatment to Jahi McMath by reason of her disability. The Hospital's claim is
12 that it is “futile” to keep alive a “brain dead” baby, even though the mother has requested such
13 treatment. But the plain language of the ADA does not permit the denial of ventilator services, and
14 other medical services such as the provision of nutrition and medical treatment that would keep
15 alive a brain injured child when those life-saving services would otherwise be provided to a baby
16 without disabilities at the parent's request. The Hospital's reasoning would lead to the denial of
17 medical services to brain injured individuals as a class of disabled individuals. Such discrimination
18 against a vulnerable population class is exactly what the American with Disabilities Act was
19 enacted to prohibit. The Hospital would therefore violate the ADA if it were to withhold ventilator
20 treatment, nutrition and other medical treatment to Jahi McMath.

23 77. As a proximate cause of the Defendants’ conduct, Plaintiffs, and each of them, are
24 incurring attorney fees and litigation costs, including the costs of retaining experts.

26 78. Plaintiffs pray for relief in the form of a declaration that the efforts of Defendants, and
27 each of them, to remove Jahi from her ventilator under California Health and Safety Code § 7181,
28 and their refusal to provide her with medical care and nutritional support violates the ADA and,

1 therefore, Defendants should be ordered to continue said support and to provide nutritional support
2 and other medical support designed to allow Jahi to continue existing and to have a best chance of
3 regaining brain function.

4 79. Plaintiff prays for an injunction prohibiting Defendants from removing ventilator
5 support and an order that they institute nutritional support and other medical treatments so as to
6 provide her with proper care and treatment designed to promote her maximum level of medical
7 improvement, to insert a tracheostomy tube and a gastric tube, and to provide Plaintiff a reasonable
8 time to locate an alternate facility to care for her child in accordance with her religious beliefs.
9

10 **PRAYER**

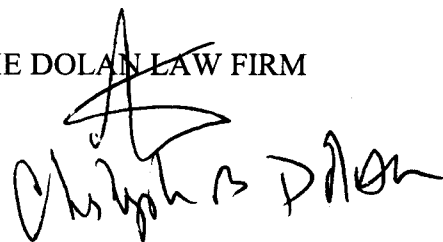
11 Wherefore, Plaintiffs pray for judgment against the Defendants as follows:

12 **Counts One through Five .**

- 13 1. Declaratory Relief;
- 14 2. Attorney fees;
- 15 3. Injunctive relief including, but not limited, to injunctions precluding removal of
16 ventilator support and mandating introduction of nutritional support, insertion of a
17 tracheostomy tube, gastric tube, and to provide other medical treatments and
18 protocols designed to promote her maximum level of medical improvement and
19 provision of sufficient time for Plaintiff to locate an alternate facility to care for her
20 child in accordance with her religious beliefs.
- 21 4. Plaintiffs also request that the Court issue whatever additional injunctive relief the
22 Court deems appropriate; and
- 23 5. For such other and further relief as the court may deem proper.

24 Dated: December 29, 2013

25 THE DOLAN LAW FIRM

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By _____
Christopher B. Dolan, Esq. Attorneys for
Latasha Winkfield

1 Christopher B. Dolan (#165358)
2 **THE DOLAN LAW FIRM**
3 1438 Market Street
4 San Francisco, California 94102
5 Telephone: (415) 421-2800
6 Facsimile: (415) 421-2830

7 Attorneys for Plaintiff

E-Filing

FILED

DEC 30 2013

RICHARD W. WIEKING
CLERK, U.S. DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
OAKLAND

8 **UNITED STATES DISTRICT COURT OF CALIFORNIA**
9 **OAKLAND**

10 LATASHA WINKFIELD, as an Individual,
11 and as Guardian Ad Litem and mother of Jahi
12 McMath,

13 Plaintiff,

14 v.

15 CHILDREN'S HOSPITAL & RESEARCH
16 CENTER AT OAKLAND; DR. DAVID
17 DURAND, and
18 Does 1-100, Inclusive

Case No. **13-5993**

SBA

Ex Parte Application for a Temporary
Restraining Order to Enjoin Defendants from
Ending Life Support, Memorandum of Points
and Authorities in Support Thereof, Declaration
of Christopher B. Dolan Re Notice and
Proposed Order

[Filed Concurrently with Plaintiff's Complaint]

19 TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD IN THIS ACTION:

20 YOU ARE HEREBY NOTIFIED that on December 30³⁰, 2013, at _____, or as soon
21 thereafter as this matter may be heard in Courtroom _____ of the United States District Court,
22 Northern District of California, located at 1301 Clay Street, Oakland, CA, Plaintiff LATASHA
23 WINKFIELD, will hereby move this Court ex parte for a temporary restraining order restraining
24 Defendant CHILDREN'S HOSPITAL & RESEARCH CENTER AT OAKLAND; and DR. DAVID
25 DURAND from ending Life Support for the minor Jahi McMath and request for provision of
26 nutrition and other medical treatment to provide optimize her physical condition and avoid
27 conditions like hypothyroidism, while the Court makes its ruling. Plaintiff also seeks an order
28

1 compelling placement of a tracheostomy tube and gastric feeding tube into Jahi McMath so that she
2 can be provided proper respiratory support and nutrition and so that she can meet the conditions
3 required for transfer to another facility.

4
5 This application is made pursuant to Federal Rules of Civil Procedure Rule 65(b) and U.S.
6 Dist. Court, Northern District of California, Local Rule 65-1. The ex parte relief requested is
7 appropriate because, absent an injunction prohibiting Defendants from proceeding with ending life
8 support measures, Defendants are going to terminate Jahi McMath's ventilator support at 5:00 p.m.
9 on December 30, 2013 (this day) thereby leading to the inevitable, and immediate, cessation of the
10 beating of her heart. Plaintiff will likely suffer irreparable harm in that her daughter will die, whereas
11 the only harm to Defendants will be the resulting continuation of the status quo of allowing the
12 minor to remain on life support.

13
14 Further, Plaintiff has a likelihood of succeeding on the merits of her case because, inter alia,
15 Defendants proposed action, i.e., removal of cardio pulmonary support, over the objection of Nailah
16 Winkfield, the health care decision maker for her minor child Jahi based upon the classification of
17 Jahi as brain dead pursuant to California Health and Safety Code 7180 &7821 and against her
18 religious principals, is unconstitutional in so far as it interferes with Plaintiff's exercise of her rights
19 to freedom of religion under the first amendment and interference with her privacy rights under the
20 Fourth and Fourteenth Amendments recognized rights to privacy in health care decisions and
21 determination over ones medical treatment. The Plaintiff is actively seeking alternate arrangements
22 for her daughter and failure to institute a TRO and Injunction will make the matter moot as Jahi
23 McMath will cease to have a heart beat and will have expired. Also, the public interest will be
24 served, as granting this Temporary Restraining Order will allow the public to have a clear
25 understanding as o the rights of a parent to continue mechanical support of the life of a loved one as
26 defined by their religious.

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1 Counsel for Plaintiff properly provided Defendant CHILDREN'S HOSPITAL &
2 RESEARCH CENTER AT OAKLAND, and DR. DURAND with ex parte notice pursuant to
3 Federal Rules of Civil Procedure Rule 65(b)(1). (See, The Declaration of Christopher B. Dolan
4 (hereinafter "Dolan Decl.") ¶ 2.)
5

6 This ex parte application is made pursuant to Federal Rules of Civil Procedure Rule 65(b)
7 and U.S. Dist. Court, Northern District of California, Local Rule 65-1, and is based upon this notice,
8 the attached memorandum of points and authorities, the attached Declaration of Christopher Dolan,
9 the complete records, pleadings, documents and papers on file, and upon such other matters which
10 may properly come before this Court at the hearing of this application.
11

12 Dated: December 27, 2013 THE DOLAN LAW FIRM

13
14 By: _____
15 Christopher Dolan, Esq.
16 Attorneys for the Plaintiff

17 **MEMORANDUM OF POINTS AND AUTHORITIES**

18 **I. INTRODUCTION**

19 On December 9, 2013, Jahi McMath went in for a routine procedure to have her tonsils
20 removed in hopes that it would assist with her sleep apnea. Jahi is 13 years old, and is in the 8th
21 grade. On December 12, 2013 the Defendants declared Jahi brain dead after her tonsil surgery ended
22 with her bleeding profusely, going into cardiac arrest, and needing life-support. Currently, Jahi
23 McMath remains on life-support at Defendant's Hospital. (See, Dolan Decl. at ¶ 3.)
24
25

26 Initially, a TRO was obtained in the Superior Court of the State of California for the County
27 of Alameda pending a hearing on a finding of "brain death" pursuant to California Health and Safety
28 Code 7180 & 7181. On December 24, 2013, the Hon. Evelio Grillo, in and for the Superior Court

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1 for the County of Alameda, found that Jahi McMath was brain dead pursuant to California Health
2 and Safety Code Section 7080 & 7081 and extended a temporary restraining order requiring that the
3 Defendant continue to provide ventilator support and maintain the status quo of medical treatment
4 through December 30, 2012. After such time the Hospital is free to remove the ventilator support
5 from Jahi McMath and, without such support her heart will cease beating.
6

7 Prior to the filing of this action Plaintiff's Counsel informed Defendant that the family is
8 undertaking efforts to locate an alternate placement for Jahi so that she can be removed from the
9 facility. Plaintiff is currently awaiting response from one or more facilities but, given the holidays,
10 reaching key personnel has been very difficult. Plaintiff has asked her daughter's health care
11 providers to provide continued ventilator support, nutritional support, a gastric feeding tube,
12 tracheostomy tube, and other medical support to optimize Jahi's chances for survival. Those health
13 care providers have refused to do so and have indicated an intent to withdraw said support at the
14 expiration of the State issued TRO at 5:00 on Monday December 30, 2013.
15

16 **II. LEGAL DISCUSSION**

17 **A. Federal Law Authorizes the Relief Requested.**

18 "The purpose of a temporary restraining order is to preserve an existing situation in status
19 quo until the court has an opportunity to pass upon the merits of the demand for a preliminary
20 injunction." (*Pan American World Airways, Inc. v. Flight Engineers' Int'l Assoc.*, (2nd Cir.1962) 306
21 F.2d 840, 842.) Federal Rules of Civil Procedure Rule 65(b)(1) permits a temporary restraining order
22 to be granted ex parte if:
23
24

- 25 (A) Specific facts in an affidavit or a verified complaint clearly show that
26 immediate and irreparable injury, loss, or damage will result to the movant
27 before the adverse party can be heard in opposition; and
28

- (B) The movant's attorney certifies in writing any efforts made to give notice

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and the reasons why it should not be required.

A temporary restraining order is appropriate if there is proof of: (1) a likelihood of success on the merits; (2) a substantial threat that plaintiff will suffer irreparable injury if the injunction is denied; (3) the threat of injury outweighs any damage the injunction might cause defendant, and (4) the injunction will not disserve the public interest. (*See Sugar Busters, LLC v. Brennan* (5th Cir.1999) 177 F.3d. 258, 265; *CityFed Fin'l Corp. v Office of Thrift Supervision* (DC Cir. 1995) 58 F.3d. 738, 746.)

B. Plaintiff Will Suffer a Great Or Irreparable Injury Before This Matter Can Be Heard On Notice Motion.

Absent an injunction, 13 year old Jahi McMath will be taken off life-support immediately by the Defendants. There can be no greater irreparable harm than death. (See, Dolan Decl. at ¶ 4.) This is even more troublesome when Plaintiff is exploring viable options to continue life support outside of the facility that she has alleged injured her daughter. These efforts have proven difficult given the holidays.

C. Plaintiff Will Succeed On the Merits of Her Case

The Ninth Circuit Court of Appeals provides that only a reasonable probability of success is required to support a preliminary injunction. (*Gilder v. PGA Tour, Inc.*, 936 F2d 417, 422 (9th Cir. 1991).) In fact, a “fair chance on the merits” is sufficient for preliminary injunction purposes. (*See Johnson v. Cal State Fort of Accounting*, 72 F. 3d 1427, 1429 (9th Cir. 1995).) The trial court may give even inadmissible evidence some weight, when doing so serves the purpose of preventing irreparable harm before trial. (*See Flynt Distributing Co., Inc. v. Harvey*, 734 F.2d 1389, 1394 (9th Cir. 1984).)

At the very least, the Plaintiff enjoys a “fair chance” of success on the merits, if not a reasonable possibility of prevailing.

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1 Further, "Though it is not apparent from the face of 28 U.S.C. § 2284(b)(3), some courts
 2 have emphasized that a temporary restraining order will issue only when the party seeking it is likely
 3 to succeed on the merits. ... This court thinks that the better-reasoned view, however, is that the
 4 likelihood of success on the merits should be a minor factor, especially where the potential injury is
 5 great." (Palmigiano v. Travisono, 317 F. Supp. 776, 787 (D.R.I. 1970)). Here, the same hospital that
 6 is alleged to have cause harm to this little girl seeks to proceed unilaterally with ending her life
 7 without an opportunity for the only Court with Jurisdiction considering whether or not the
 8 Constitution has been violated and taking a careful look at legislation who's purpose was never to
 9 limit damages in a situation where a hospital is alleged to have rendered a little girl gravely injured. .
 10

11
 12 **D. The Threatened Injury Outweighs any Damage That the Injunction Might Cause to**
 13 **Defendants.**

14 A balancing of the relative hardships on the parties favors granting the requested temporary
 15 restraining order. There is absolutely no damage that the Defendants can claim that would override
 16 improperly ending life-support measures on 13 year old Jahi. (See, Dolan Decl. at ¶ 5.) Further,
 17 because Plaintiff seeks to discharge her daughter to an alternate environment there is absolutely no
 18 legitimate argument Defendants can make regarding damages they will suffer.
 19

20 **E. The Public Interest is Served by Allowing Plaintiff's Claims to be Fully Heard.**

21 The issues raised in Plaintiff's Complaint and in this restraining order are matters of great
 22 public concern as indicated by the amount of media coverage which has been generated by this case.
 23 This is an issue of first impression; does a parent, once a legal determination of brain death is made,
 24 lose all rights concerning the care to be provided to their child who's heart still beats assisted by a
 25 ventilator. Does a parent of such a child have a right to object and resist a hospital's decision to
 26 withdraw life support over and against her objections and religious beliefs? Does the proposed
 27 conduct of the Defendant's violate the rehabilitation act and/or the ADA? How much time should a
 28

1 family be provided to locate alternate arrangements that are consistent with their religious beliefs?

2 **F. Plaintiff Should Not Be Required to Post a Security Bond as Defendant Would Suffer**
3 **No or Little Injury as a Result of the Institution of the Temporary Restraining Order**

4 Though Federal Rules of Civil Procedure Rule 65(c) asks courts to require a security bond
5 in conjunction with a temporary restraining order, courts are given wide discretion in the form the
6 bond may take. (Continental Oil Co. v. Frontier Refining Co., (10th Cir. 1964) 338 F.2d 780, 783.)

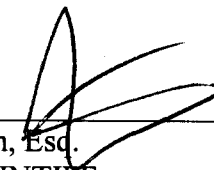
7 In fact, in situations where the likelihood of harm to defendant is small, courts are not obliged to
8 require a bond to be issued at all. (*Id.*) Presently, the only harm that would come to Defendants
9 should the temporary restraining order be granted would be the minimal cost continuing life-support
10 measures. (See, Dolan Decl. at ¶ 6.)
11

12 **III. CONCLUSION**

13 Based on the foregoing, Plaintiff respectfully requests that this Court issue a temporary
14 restraining order and an order to show cause why a preliminary injunction should not be issued
15 against Defendants as detailed herein.
16

17 Dated: December 23, 2013

THE DOLAN LAW FIRM

18 By: 
19 Christopher Dolan, Esq.
20 Attorney for PLAINTIFF
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7 Attorneys for Plaintiff

8 **UNITED STATES DISTRICT COURT OF CALIFORNIA**
9 **OAKLAND**

10 LATASHA WINKFIELD, as an Individual,
11 and as Guardian Ad Litem and mother of Jahi
12 McMath,

13 Plaintiff,

14 v.

15 CHILDREN'S HOSPITAL & RESEARCH
16 CENTER AT OAKLAND CHILDREN'S
17 HOSPITAL & RESEARCH CENTER AT
18 OAKLAND; DR. DAVID DURAND, and
19 Does 1-100, Inclusive

Case No.:

Declaration of Christopher B. Dolan In Support
of Plaintiff's Ex Parte Application for a
Temporary Restraining Order to Enjoin
Defendants from Ending Life Support

20 I, CHRISTOPHER B. DOLAN, declare as follows:

- 21 1. I am counsel of record for the Plaintiff, and a member in good standing with the State of
22 California Bar and The Federal Court for the Northern District of California. I make this
23 declaration in support of Plaintiff's Ex Parte Application For A Temporary Restraining Order
24 And Order To Show Cause Re: Preliminary Injunction. The facts stated herein are known to
25 me personally and, if called as a witness, I could and would testify competently thereto.
- 26 2. I provided actual notice of my intent and served this Ex Parte Application and the Compliant
27 on counsel for the Defendants this morning. I presume they will oppose this Ex Parte and
28

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1 will be attending the hearing. Accordingly, proper notice was provided under the Federal
2 Rules of Evidence.

- 3 3. On December 9, 2013, Jahi McMath went in for a routine procedure to have her tonsils
4 removed in hopes that it would assist with her sleep apnea. Jahi is 13 years old, and is in the
5 8th grade. On December 12, 2013 the Defendants declared Jahi brain dead after her tonsil
6 surgery ended with her bleeding profusely, going into cardiac arrest, and needing life-
7 support. Currently, Jahi McMath remains on life-support at Defendant's Hospital.
- 8 4. Plaintiff is actively seeking alternate placement for her child. I myself have tried to assist in
9 that endeavor and have been informed that sub-acute facilities require that a patient have a
10 tracheostomy tube and a gastric tube inserted prior to transfer and admission.
- 11 5. Defendant has refused to follow the directions of Plaintiff to insert such tubes so she can
12 transfer her daughter because they "won't provide medical treatment to a dead person."
- 13 6. Absent an injunction, this 13 year old girl will be taken off life-support immediately by the
14 Defendants. There can be no greater irreparable harm than death.
- 15 7. A balancing of the relative hardships on the parties favors granting the requested temporary
16 restraining order. There is absolutely no damage that the Defendants can claim that would
17 override improperly ending life-support measures on child.
- 18 8. I have informed the Hospital Defendants that the family is actively seeking to re-locate their
19 daughter to an alternate care facility but, given the holidays, and the emotional difficulties
20 accompanying this most critical and catastrophic injury, and the relative naiveté of the
21 Plaintiff over medical issues, the family, despite best efforts, has been unable to locate
22 alternate arrangements. All facilities which I have spoken to have stated that as a
23 precondition of transfer they would require that a tracheostomy tube and gastric tube be
24 placed into Jahi McMath.
- 25
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1 9. I am currently in discussions with healthcare facilities in New York and Phoenix Arizona. I
2 have provided Dr. Fisher's most recent neurological evaluation to these facilities. I can
3 provide, in camera, correspondence with that Phoenix facility. I do not wish to reveal the
4 name of the facility publically as they are concerned about the large media interest and do not
5 want a horde of reporters descending on their facility. This prospect of media attention has
6 already led to two facilities informing me that a factor in their withdraw of their original
7 tentative agreement to accept Jahi was the potential for disruption and invasion of the privacy
8 rights of their current patients and their families. Additionally, I have provided the family
9 with information on how to apply for In Home Support Services IHSS through the state of
10 California.
11

12
13 10. Attached as Exhibit A is a letter from a facility in New York willing to accept Jahi.

14 11. Attached as Exhibit B are two Declarations filed by Angela Clement attesting that she has
15 located a facility which will accept Jahi McMath documenting that arrangements have been
16 made to transport Jahi to New York if necessary.
17

18 12. Attached as Exhibit C is a true and correct copy of an estimate demonstrating that an air
19 ambulance has been arranged to transport Jahi to New York and a letter attesting to the
20 services to be provided in the transport of Jahi. I am aware that sufficient funds exist to pay
21 for the cost of this flight,
22

23 13. I am in possession of a video taken within the last 24 hours showing Jahi moving her head
24 and leg while her mother's voice is nearby. This, according to Dr. Byrne, demonstrates that
25 she is not dead. I will present a copy of that video to the court and counsel.

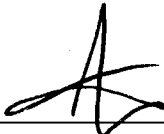
26 14. Additional time is needed to execute on these plans. The Holidays have made the making of
27 arrangements very difficult. The family only had six days to execute on the very difficult
28 series of negotiations and arrangements. This time will result in meeting the hospital's

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objectives of having Jahi removed from their facility and will meet the family's objectives of keeping Jahi's physical body intact so that recovery may take place.

15. On behalf of the family, as their designated legal representative, I have requested that measures be taken to allow ventilation support to continue and to support the physical health of Jahi McMath by installing a feeding tube, provide nutrition and place a more permanent measure to allow oxygen to be delivered.

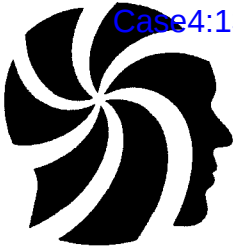
I declare that the foregoing is true and correct under the penalty of perjury under the laws of the State of California. Executed on December 29, 2013, in San Francisco, California.

By:  _____

CHRISTOPHER B. DOLAN
DOLAN LAW FIRM
Attorney for Plaintiff

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Exhibit A



New Beginnings Community Center
12-B Platinum Court
Medford, NY 11763

"In each loss there is a gain as in every gain there is a loss and with each ending comes a new beginning"

December 29, 2013

Dear Attorney Dolan,

New Beginnings is an outpatient severe traumatic brain injury center. We are currently building and near completion of The Brendan House which will be a long-term private inpatient center that will act as a long term subacute care inpatient center caring for the severely brain injured patients.

We are aware of Jahi McMath's dire situation and we are willing to open our outpatient facility to provide 24 hour care as an inpatient long-term facility for Jahi with the required and appropriate medical staff that she depends upon. When the Brendan House is completed which will be very soon we will be able to transfer her to our Brendan House facility.

We will be providing Jahi McMath 24 hour licensed nursing staff and licensed respiratory therapists. We are also hiring a pediatrician who will accept her as his patient. If you identify any additional needs that we have not addressed in this letter please notify us immediately so that we can take care of any further requirements that are needed for your clients and Jahi McMath.

Please contact me at your earliest convenience so that we can further discuss this with you and your clients.

We appreciate the opportunity to assist you and your clients in this dire situation.

Respectfully Submitted,

Allyson Scerri

Allyson Scerri
Founder & President

(631) 286-6166 phone

Allyson Scerri
Founder, CEO, President

www.nbli.org

Steve Scerri
Executive Vice President

(631) 286-6168 fax

Kate DiMeglio
Executive Director

Exhibit B

EXHIBIT B

DECLARATION OF ANGELA CLEMENTE

I, Angela Clemente, declare and state the following:

1. On December 17, 2013 I was made aware of Jahi McMath delicate medical situation and the treating hospital's position. On that same day I contacted Chris Dolan the attorney representing her interests and offered my assistance and explained to Mr. Dolan that I can pull a team of specialized experts on this type of subject matter both legally and medically to assist him with his client's needs.
2. I then immediately began to notify each party whose expertise handles the life flight transportation needs, forensic, legal, medical and death experts, housing needs for the family, fundraising, media relations and both acute care and sub-acute care facilities that are open to accepting Jahi McMath into their facility for placing a PEG and Tracheostomy and for long-term care.
3. As an experienced expert in the subject matter of legal, medical, congressional and judicial issues surrounding patients in these similar situations I understand that courts, hospitals, and attorneys are not always aware that there are teams of skilled and specialized experts who specifically step in as a team effort to address the needs of medically vulnerable patients who face the same obstacles as Jahi McMath is facing now. This declaration serves as a formal notice to the court that Jahi McMath does indeed now have a full team of experts supporting all her needs identified in paragraph 2. I will outline within this declaration for the court the expertise and organization[s] and/or individuals who are now working on her behalf.
4. The medically appropriate life flight transportation needs for Jahi McMath from California to New York will be fully covered through our teams efforts.
5. We currently have one confirmed long term care facility that has offered to care for Jahi McMath and we have an additional potential long term care facility. The accepting facility's formal written acceptance letter will be provided to the court with this declaration as an additional exhibit identified as exhibit A.
6. The housing needs for the family of Jahi McMath has also been provided by our team. The address for their residence in New York is as follows: 4079 Sound Avenue Riverhead, New York 11901.

7. Our team will continue to follow through with other unanticipated needs that may arise for Jahi McMath and her family.

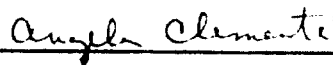
Hereafter is a summary of our team of specialized experts:

- **David Hammons MD is a retired Emergency Medicine specialist, previously board certified. He has more than 20 years' experience on his hospital's ethics committee and took the National Catholic Bioethics Center's one year certification course in Catholic Bioethics. He taught for 9 years on the faculty of the Kaiser-Stanford University Emergency Medicine residency program. He has given talks on end of life care from a medical, legal, and ethical perspective.**
- **Steve Sanborn has extensive experience with life flight transportation needs, emergent fundraising, and media relations. Mr. Sanborn and I handled in full one of the most significant and successful cases in the United States related to out-of-state transfers and acceptance of a critical patient receiving blood and respirator dependent who was declared medically futile. Prior to the patients release and move from the hospital whose care the patient was under we successfully launched a federal investigation into the county hospital's substandard care and fraudulent Medicare practices resulting in Medicare forcing the hospital to return \$284,106.20 back into the patients Medicare account and escalating the federal violation against the hospital under Part A Tier 2 as "severe" and sending a federal investigator in to the hospital to initiate and force "provider education" without which the hospital's doors would be closed.**
- **Angela Clemente is a Forensic Intelligence Analyst, Congressional Consultant and Paralegal. I have worked with the executive, judicial, and legislative branches of the government on many high-profile cases on criminal violations related to federal crimes in both medical and criminal cases. I have twenty years' experience in the field of pathology, clinical laboratory, and emergency medicine. Additionally, I have extensive experience working with the Department of Justice Office of Inspector General, the U.S. House of Representatives and U.S. Senate on legislative needs, congressional investigations pertaining to systemic criminal and medical problems and advising on and launching state and federal prosecutions against official misconduct. In the year 2008 to the present date I launch and lead the team efforts with uniquely qualified experts in the fields**

identified in paragraph 2 for assisting vulnerable patients in identical and similar medical states as Jahi McMath. Additionally, I assess, review, identify and advise on medical negligence cases also aiding in the launch of forensic criminal investigations on these same subject matters.

- Bobby Schindler and The Terri Schiavo Life & Hope Network is a national enetwork of resources and support for the medically-dependent, persons with disabilities and the incapacitated who are in or potentially facing life-threatening situations. It has communicated with and supported more than 1,000 families, and has been involved in hundreds of cases since Terri's March 2005 death.
- Dana Cody- Life Legal Defense Foundation is a public interest law firm that provides resources to defend the lives of vulnerable human beings who are under threat of death because life-sustaining care is not being provided. LLDF provides continuing legal education on the issue of forced death. Notably, LLDF helped support the defense of Terri Schindler Schiavo's life. LLDF has been a part of the effort to defend Jahi McMath's life and continues to support efforts to see Jahi moved to a facility that will treat her with the dignity she deserves.
- The Wrongful Death and Injury Institute is multifaceted organization that specializes in the unethical and unprincipled practices of the healthcare industry and unregulated death investigation system nationwide within hospitals, prisons, jails, nursing homes, and assisted living residences.
- Dr. Paul A. Byrne is a neonatologist and a Clinical Professor of Pediatrics. He is past President of the Catholic Medical Association. He is the producer of the film Continuum of Life and the author of Life, Life Support and Death, Beyond Brain Death, and Brain Death is Not Death. Dr. Byrne has presented testimony on life-death issues to nine state legislatures beginning in 1967. He opposed Dr. Jack Kevorkian on Cross-Fire, and has appeared on Good Morning America, the British Broadcasting Corporation (BBC) documentary, "Are the donors really dead?", and public Television in Japan. He is the author of many articles in medical and law journals and the lay press.

I declare under penalty of perjury that the foregoing information is true and correct.
Executed this 29th day of December 2013.



Angela Clemente

DECLARATION OF ANGELA CLEMENTE

I, Angela Clemente, declare and state the following:

1. On December 17, 2013 I was made aware of Jahi McMath delicate medical situation and the treating hospital's position. On that same day I contacted Chris Dolan the attorney representing her interests and offered my assistance and explained to Mr. Dolan that I can pull a team of specialized experts on this type of subject matter both legally and medically to assist him with his client's needs.
2. I then immediately began to notify each party whose expertise handles the life flight transportation needs, forensic, legal, medical and death experts, housing needs for the family, fundraising, media relations and both acute care and sub-acute care facilities that are open to accepting Jahi McMath into their facility for placing a PEG and Tracheostomy and for long-term care.
3. As an experienced expert in the subject matter of legal, medical, congressional and judicial issues surrounding patients in these similar situations I understand that courts, hospitals, and attorneys are not always aware that there are teams of skilled and specialized experts who specifically step in as a team effort to address the needs of medically vulnerable patients who face the same obstacles as Jahi McMath is facing now. This declaration serves as a formal notice to the court that Jahi McMath does indeed now have a full team of experts supporting all her needs identified in paragraph 2.
4. I am personally coordinating all efforts on Jahi McMath's transfer and required medical care.
5. My background is the following- Angela Clemente is a Forensic Intelligence Analyst, Congressional Consultant and Paralegal. I have worked with or assisted the executive, judicial, and legislative branches of the government on many high-profile cases on criminal violations related to federal crimes in both medical and criminal cases. I have twenty years' experience in the field of pathology, clinical laboratory, and emergency medicine. Additionally, I have extensive experience working with the Department of Justice Office of Inspector General, the U.S. House of Representatives and U.S. Senate on legislative needs, congressional investigations pertaining to systemic criminal and medical problems and advising on and launching state and federal prosecutions against official misconduct. In

the year 2008 to the present date I launch and lead the team efforts with uniquely qualified experts in the fields identified in paragraph 2 for assisting vulnerable patients in identical and similar medical states as Jahi McMath. Additionally, I assess, review, identify and advise on medical negligence cases also aiding in the launch of forensic criminal investigations on these same subject matters.

6. I have spoken with Dr. Paul Byrne who assessed Jahi McMath's medical condition this morning and he is currently working with assisting New Beginnings a long-term care facility that is willing to accept and care for Jahi McMath immediately and indefinitely.
7. My team has also coordinated an appropriate medical flight and we have an estimate and documentation to provide this court and Oakland Hospital upon request.
8. We have housing being provided to Jahi McMath's family upon their arrival in New York. We can provide the court with the address upon request.

I declare under penalty of perjury that the foregoing information is true and correct.
Executed this 30th day of December 2013 under penalty of perjury pursuant to the laws of the State of California.



Angela Clemente

EXHIBIT C



Date: December 29, 2013

To : Chris Dolan

From: Medway Air Ambulance, Inc.

Re: Air Ambulance – Jahi McMadh

MedWay Air Ambulance makes the following proposal for air ambulance transport from Oakland, Ca to Long Island, NY:

- Aircraft: Private Lear Jet Aircraft - 5:35 hours 1 stop
- Medical: ICU RN / Respiratory Therapist
- Equipment: AIS incl oxygen and ventilator
- Ground Transportation: included in Oakland and Long Island
- Passengers: 2
- Luggage 3 medium size suit cases

Cost of the transport : \$31,910.00USD.
Discount Available: 12/31- \$27,950.00.

All licenses, insurance, and information available at www.medwayairambulance.com

Thank you for the opportunity to quote this transport, and should you or the family have any further questions please contact us at 800-233-0655 24hours a day 7 days a week.

Sincerely,
Rick Moore
President

PO Box 490907
Lawrenceville, GA 30049-0907
800-233-0655 770-963-1412 Fax 770-962-3253
Email: medwayair@aol.com

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4 San Francisco, California 94102
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6 Fax: (415) 421-2830

7 Attorneys for Plaintiffs
8 LATASHA WINKFIELD

9 UNITED STATES DISTRICT COURT
10 NORTHERN DISTRICT OF CALIFORNIA

11	LATASHA WINKFIELD, an individual)	Case No.
12	parent and guardian of Jahi McMath, a)	
13	minor)	Declaration of Paul Byrne M.D.
14)	
15	Plaintiff,)	
16)	
17	v.)	
18)	
19	CHILDRENS HOSPITAL OAKLAND, Dr.)	
20	David Durand M.D. and DOES 1 through)	
21	10, inclusive)	
22)	
23	Defendants)	
24	_____)	
25)	
26)	
27)	
28)	

1). I Dr. Paul Byrne am a medical doctor, Board Certified in Pediatrics with a sub-board in Neonatal-Perinatal Medicine of American Board of Pediatrics.

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- 2). I have served in many academic positions including as the Director of Neonatology, St. Charles Mercy Hospital, October 2000-2012, Oregon, OH Neonatologist, St. Charles Mercy Hospital, 1991-2012, Oregon, OH.
- 3). I am licensed to practice medicine in Ohio, Nebraska and Missouri.
- 4) I have published articles on brain death and related topics in the medical literature, law literature and the lay press for more than thirty years.
- 5). I have been qualified as an expert in matters related to central nervous system dysfunction in Michigan, Ohio and Virginia.
- 6). I have examined and treated children that have been diagnosed as "brain dead" and have, with proper treatment, seen them recover from Brain death to varying degrees including one patient which recovered to finish school, get married and have children and live an otherwise productive life.
- 7). Although not licensed in Virginia, I provided expert testimony in the case of the Matter of Baby K, 832 F.Supp 1022 (E.D.Va.,1993), wherein the issue of brain death in a child was the central issue. In Baby K the Hospital sought declaratory relief that it had no obligation to continue to provide respiratory support to an anencephalic child (congenital defect where there is a brain stem but cerebral cortex is absent). The hospital in Baby K., like the hospital here, encouraged her mother to remove her from a ventilator stating that such treatment was "futile" and decided to "wait a reasonable time for the caregiver to terminate aggressive therapy." The court in Baby K, stated, Reflecting the constitutional principles of family autonomy and the presumption in favor of life, courts have generally scrutinized a family's decision only where the family has sought to terminate or withhold medical treatment for an incompetent minor or incompetent adult. See, e.g., Cruzan, 497 U.S. at 270-75, 110 S.Ct. at 2847-49 (and

1 cases cited therein). In a recent case in which a hospital sought to terminate life-
2 supporting ventilation over the objections of the patient's husband, a Minnesota state
3 court refused to remove decision making authority from the husband. In re Wanglie,
4 No. PX-91-283 (Prob.Ct., Hennepin Co., Minn., June 28, 1991). Likewise, where
5 parents disagreed over whether to continue life-supporting mechanical ventilation,
6 nutrition, and hydration for a minor child in an irreversible stupor or coma, a Georgia
7 state court gave effect to the decision of the parent opting in favor of life support.
8
9 (Matter of Baby K 832 F.Supp. 1022, 1031.

10 8) I have personally seen, but have not conducted a full physical examination of Jahi
11 McMath because I am not licensed to practice medicine in California. I have also e
12 reviewed Dr. Fischer's medical examination record dated 12/23/2013. I have read
13 excerpts of Dr. Shannahan's deposition testimony including the following;
14

15 Q. . If you look at your second examination, please,
16 12/12/2013. The third paragraph down you wrote in the
17 last two sentences: Her diabetes insipidus suggests
18 hypothalamic death; can you tell us what that means,
19 please.

20 A. So she was excreting much more urine than a
21 normal person should and not being able to retain a normal
22 amount of water, which indicates that she was missing a
23 hormone excreted by the hypothalamus and that the
24 hypothalamus was not working correctly.

25 Q. Is there an examination that can measure that in
26 some sort of a device, machine or otherwise?

27 A. Yes, it's blood tests measuring the sodium level
28 and the concentration of the urine, so it's an inability
to concentrate the urine, and then there is rising sodium
blood levels as a consequence, and that can be treated
with a medication and corrected.

Q. Did you examine any of the blood tests to see
whether or not there was confirmation of your
suggestion?

A. Yes.

Q. Is that reported in here?

A. No, it is not.

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Q. What tests did you review?
A. The urine concentration and sodium levels that were part of her lab tests.
Q. In the -- did you request any type of medications to be given to address that hypothalamic condition?
A. No.

8). I have reviewed the literature published in the Journal of Neurology including articles written in 2008 and 2010 which demonstrate that there no consensus in the medical field as to what constitutes death, whether it is brain death, cessation of the heart, etc.

9). I have, by invitation of the mother been bedside to see Jahi McMath. I personally observed that when the grandmother stimulated Jahi with her voice and touch, Jahi moved her arms and legs with a squirming movement- in my opinion this signifies that she is not dead

10). EEG measurements are measurement of only the 1cm outer region of the brain and provides no information of the interior function of the brain

11). In my professional opinion she is not a cadaver- her heart beats thousands of times a day and has done so since this event- she is a living person- she is not dead

12). She should receive treatment as she is alive just like anyone else with severe head injury. Jahi has not had nutrition for two weeks she needs nutrition, proteins necessary for the recovery of the brain- thyroid and adrenal hormones and evaluations for blood gasses and electrolytes and have necessary adjustments made to help her get well

13) If she gets treatment she will have a chance to recover brain function.

Signed under penalty of perjury this 30th day of December, 2013, in Oakland California.

Paul A. Byrne MD 12/30/2013
Dr. Paul Byrne

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DEC 30 2013

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CLERK, U.S. DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
OAKLAND

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7 CENTER AT OAKLAND

8 UNITED STATES DISTRICT COURT
9 NORTHERN DISTRICT OF CALIFORNIA

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LATASHA WINKFIELD, an individual
parent and guardian of Jahi McMath, a
minor,

Plaintiff,

v.

CHILDRENS HOSPITAL OAKLAND,
DR. DAVID DURAND, M.D. and DOES
1 through 10, inclusive,

Defendant.

Case No. **613-5993** SBA

**OPPOSITION TO PROPOSED
TEMPORARY RESTRAINING ORDER
AND INJUNCTIVE RELIEF**

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INTRODUCTION

1
2 Plaintiff Latasha Winkfield’s request for an extremely broad temporary order compelling
3 Children’s Hospital & Research Center at Oakland (“Children’s Hospital”) to: (i) keep Plaintiff’s
4 deceased daughter Jahi McMath on a ventilator for an indefinite period of time, (ii) provide
5 nutrition to a deceased body and (iii) perform surgical procedures on that body should be denied
6 for multiple reasons:
7

- 8 • Because Ms. McMath has already died, no irreparable harm results from turning
9 off her ventilator.
- 10 • There is no due process violation here because the State court conducted an
11 evidentiary hearing, received evidence from three physicians (Plaintiff offered no
12 contrary evidence) and required Children’s Hospital to prove the fact of death by
13 clear and convincing evidence.
- 14 • There is no violation of religious rights here because there is no religious right to
15 reject the scientific definition of death developed by medical professionals and
16 enacted by the California Legislature into State law with appropriate safeguards.
- 17 • There is no violation of the right to privacy because there is no privacy right that
18 allows a family to require ongoing medical treatment of a dead body.
- 19 • There is no violation of the right to privacy because there is no privacy right that
20 allows a family to require ongoing medical treatment of a dead body.
- 21 • There is no violation of the Federal Rehabilitation Act or the Americans With
22 Disabilities Act because death is not a “disability.”

23 A California State Court correctly concluded, after three days of hearings and based on
24 uncontroverted evidence, that Ms. McMath is, sadly, deceased. Her brain has not received
25 oxygen for well over two weeks according to the State Court-appointed expert, Stanford
26 neurologist Paul Fisher. Accordingly, the State Court ruled that the decedent’s ventilator can be
27 turned off after 5:00 P.M. today. Turning off a ventilator that assists in delivery of oxygen to a
28

1 dead person causes no irreparable harm—regardless of the religious beliefs of the decedent’s
2 family.

3 California Health & Safety Code sections 7180-81 defining death and Alameda County
4 Superior Court Judge Evelio Grillo’s decision that Ms. McMath is dead do not violate any
5 constitutional or due process right of Ms. McMath or Plaintiff. There is no constitutional right to
6 define death based on religious belief rather than medical science. Plaintiff was afforded an
7 evidentiary hearing in State court as well as the benefit of a Court-appointed expert. There was
8 ample evidence before Judge Grillo that Ms. McMath had died—that she had suffered total and
9 irreparable cessation of brain function. Despite hearings conducted over three days, Plaintiff
10 offered no contrary evidence. The constitutional challenges are without merit. Moreover,
11 Plaintiff failed to raise these constitutional claims in the prior state court action.
12

13
14 Plaintiff has had ample time to find another facility that might accept her deceased
15 daughter’s body. No such facility has been identified and it is not plausible that a medical facility
16 will be located that is willing to care for such a deceased person. Ordering any further protection
17 for Ms. McMath’s body would imply that it is plausible that the United States Constitution allows
18 parents/family members, not State legislatures and medical professionals, to define death.
19

20 Plaintiff’s moving papers cite not a single legal authority that supports any prong of her
21 preposterous constitutional and statutory claims. Because there is neither precedent nor logic for
22 the outlandish assertion that a family has a legal right to compel continuing treatment of a dead
23 person, Ms. Winkfield’s constitutional and statutory challenge lacks any probability of success on
24 the merits--despite the tragedy of her daughter’s death. And because Ms. Winkfield’s daughter is
25 irreversibly dead, no irreparable harm is threatened by allowing the temporary restraining order to
26 expire at 5:00 PM today. Given that these essential prerequisites of injunctive relief are not
27 present, the petition should be denied.
28

BACKGROUND

1
2 The California Legislature has declared that “An individual who has sustained . . .
3 irreversible cessation of all functions of the entire brain, including the brain stem, is dead.” Cal.
4 Health & Safety Code § 7180(a).¹ Three doctors, including a court-appointed child neurologist
5 from Stanford University Medical Center, have determined and stated under oath that thirteen-
6 year-old Jahi McMath has sustained an irreversible cessation of all functions of the brain,
7 including the brain stem. To put it more plainly, the three doctors have determined that Ms.
8 McMath is, unfortunately, dead. There is no contrary evidence.

9
10 After the initial diagnosis of death by treating physicians, Plaintiff Latasha Winkfield
11 applied for, and the Alameda County Superior Court issued, a temporary restraining order,
12 requiring Respondent Children’s Hospital to maintain Ms. McMath on a ventilator pending
13 further proceedings. The Superior Court subsequently appointed a preeminent child neurologist,
14 Dr. Paul Fisher, to provide an independent examination of Ms. McMath. Dr. Fisher determined
15 that Ms. McMath has suffered a “known, irreversible brain injury” meeting “all criteria” for brain
16 death. Dr. Fisher testified to that effect in court, including responding to cross-examination by
17 Ms. Winkfield’s counsel.² Other testimony was taken, evidence received, and the matter
18 submitted to the Superior Court for decision.

19
20 The Superior Court, applying a clear and convincing evidence standard, ruled that the
21 temporary restraining order should be lifted because such evidence leads inexorably to a single
22 conclusion, “that [Ms. McMath] suffered brain death and was deceased” Death having been
23 confirmed, the Superior Court ruled that the temporary restraining order will expire at 5:00 p.m.
24

25
26 ¹ All further statutory references are to the California Health & Safety Code unless
otherwise indicated.

27 ² Plaintiff stipulated that Dr. Fisher had conducted a proper examination and followed
28 accepted procedures in determining that Ms. McMath had died.

1 on Monday, December 30, 2013. In other words, given the irrefutable fact of Ms. McMath's
2 death, then after such time, Children's Hospital is no longer under any court order to keep the
3 ventilator going.

4 It is against this factual and procedural background that Ms. Winkfield asks this Court to
5 postpone the removal of the ventilator by issuing another temporary restraining order. Her
6 request is based upon her desire that her daughter be maintained on a ventilator indefinitely,
7 despite the confirmation of death. As difficult as it undoubtedly is to accept given the sudden
8 nature of the tragedy, Ms. McMath is dead.

9 A temporary restraining order will only issue if the plaintiff has established: (1) a
10 likelihood of success on the merits and the possibility of immediate irreparable injury, or (2) the
11 existence of serious questions going to the merits and that the balance of hardships tips heavily in
12 its favor. *See Metro Publishing, Ltd. v. San Jose Mercury News*, 987 F.2d 637, 639 (9th Cir.
13 1993). Whatever effort a plaintiff makes, at an "irreducible minimum," there must be a "fair
14 chance of success on the merits." *National Wildlife Federation v. Coston*, 773 F.2d 1513, 1517
15 (9th Cir. 1985). No such showing has been made here.

16 Here, there is no threat of irreparable harm to justify injunctive relief. Nor is there any
17 serious question of a constitutional right to compel medical professionals to disregard science and
18 law and continue ministering to a deceased body. However the claim is styled, there is no fair
19 chance of success on the merits.

20 **PROCEDURAL HISTORY & STATEMENT OF FACTS**

21 On December 9, 2013, Jahi McMath, a minor, was admitted to Children's Hospital to
22 undergo a complicated surgical procedure. (Exh. 3, p. 20, line 3) On December 11, 2013,
23 following that procedure, Ms. McMath was determined to be brain dead by Dr. Shanahan, a
24 physician with privileges at Children's Hospital. (Exh. 9, p. 48) This conclusion was confirmed
25
26
27
28

1 by an independent evaluation, conducted by Dr. Heidersbach the following day. (Exh. 8, p. 45)
2 After providing at least eight days for Ms. McMath's family to absorb this horrible shock,
3 Children's Hospital notified the family of its intention to withdraw the ventilator that is supplying
4 oxygen to Ms. McMath's body. (Exh. 10, p. 51)

5
6 On Friday, December 20, 2013, Latasha Winkfield, the mother of Jahi McMath, filed a
7 verified petition and ex parte application with the Superior Court for Alameda County, seeking
8 (1) an order authorizing Ms. Winkfield to make medical care decisions for Ms. McMath and (2)
9 an injunction prohibiting Children's Hospital from removing Ms. McMath from the ventilator.
10 (Exhs. 1-6) Children's Hospital filed its opposition to the petition and application that same day.
11 (Exh. 7, p. 36) In its opposition, Children's Hospital argued that there were no medical care
12 decisions left to be made for Ms. McMath because she was "brain dead" within the meaning of
13 the applicable California statute—California Health and Safety Code section 7180. (Exh. 7, pp.
14 39-41) Children's Hospital further argued that all of the proper procedures for such a diagnosis—
15 including independent confirmation by another physician, a diagnosis made in accordance with
16 accepted medical standards, and a reasonably brief period of accommodation for the family of the
17 deceased—had been followed. (*Id.*, citing Cal. Health & Safety Code §§ 7180, 7181, 1254.4)

18
19 The matter was heard by the court that same day and, following the hearing, the court
20 issued an order temporarily restraining Children's Hospital from changing Ms. McMath's level of
21 support. (Exh. 11, pp. 56-57) The order also continued the hearing to Monday, December 23,
22 2013, and directed the parties to attempt to contact other physicians, unaffiliated with Children's
23 Hospital, and determine whether any of them would be available to conduct yet another
24 evaluation of Ms. McMath. (*Id.*)

25
26 On December 23, the court reconvened the hearing. At the hearing, the Court ordered that
27 Dr. Paul Fisher, a physician and the Chief of Child Neurology for the Stanford University School
28

1 of Medicine, be appointed a Court expert to conduct another independent evaluation of Ms.
2 McMath. (Exh. 16, pp. 117-18) Dr. Fisher examined Ms. McMath that same afternoon. The
3 December 23rd order also continued the hearing to the next day and, by separate order, the court
4 extended the restraining order until December 30, 2013. (Exh. 16, p. 118; Exh. 17, pp. 119-20)
5

6 At the continued hearing on December 24, the court received several exhibits and heard
7 testimony from Drs. Shanahan and Fisher. (See Exh. 26, pp. 171-73; see also Exhs. 19-25
8 [exhibits received by court]) Both doctors described their examination of Ms. McMath, discussed
9 the established medical procedures for determining brain death and testified that Ms. McMath
10 was brain dead. (Exh. 26, pp. 171-73) The court took the matter under submission. (*Id.*)
11

12 In a verbal ruling from the bench on December 24, 2013 that was confirmed by a
13 subsequent written order, the court denied Ms. Winkfield's petition to be appointed to make
14 healthcare decisions for Ms. McMath because Ms. McMath was deceased and denied the request
15 an injunction prohibiting Children's Hospital from removing Ms. McMath from the ventilator,
16 but stayed the effect of the order until Monday, December 30, 2013, at 5:00 p.m., when the
17 previously-extended temporary restraining order would no longer be in effect. (Exh. 26, pp. 184-
18 85)

19 LEGAL ARGUMENT

20 A state court has already determined, by clear and convincing evidence, that Ms. McMath
21 is dead. (See Exh. 26, p. 182, lines 11-13) It appointed a well-respected neurologist from
22 Stanford Medical Center, Dr. Paul Fisher, to conduct an independent examination of Ms. McMath.
23 In so ruling, the state court acknowledged the essential fact that should not be lost on this Court
24 when examining Ms. Winkfield's claim of irreparable harm—dead people do not need additional
25 health care treatment:
26

27 It would appear to be self-evident that where legal death has
28 occurred, one cannot . . . make health care decisions on behalf of a

1 deceased person, *i.e.*, a person for whom additional medical
2 treatment would be futile.

3 (See Exh. 26, p. 169, lines 20-22, fn. 2, italics original)

4 Yet that is what this Court is now being asked to do—issue a court order requiring that
5 Children’s Hospital continue to treat Ms. McMath as if she were still alive. Issuance of an
6 injunction would mean that Children’s Hospital must continue to administer futile additional
7 treatment simply because Ms. Winkfield insists—all evidence to the contrary-- that her daughter
8 is not dead. (See Exh. 3, p. 21, lines 21-25; p. 22, line 1; p. 23, lines 1-21) No irreparable harm
9 can come to a *dead person* from the failure to provide *additional* medical care aimed at sustaining
10 *life*. And assuming that the question of Ms. McMath’s death may have been open when Ms.
11 Winkfield first went to state court seeking injunctive relief, that question has now been
12 definitively closed. There is nothing left to resolve with respect to medical treatment or the
13 question of whether Ms. McMath is dead. And because she is dead, there is no basis to order
14 Children’s Hospital to refrain from taking Ms. McMath off of the ventilator.

15
16
17 **I. Ms. Winkfield Has Not Suffered Any Violation of Her Procedural Due Process
18 Rights**

19 To the extent Ms. Winkfield is seeking injunctive relief based on an asserted violation of
20 her procedural due process rights, no such violation has occurred. There is no question that every
21 statutory procedure that needed to be followed has been followed here and that due process was
22 provided. And the Legislature has never provided a parental veto when it comes to terminating
23 cardiopulmonary support following a proper determination of death.

24 **A. California’s statutes have been followed and that Ms. McMath is dead.**

25 Section 7180 provides that “[a]n individual who has sustained . . . irreversible cessation of
26 all functions of the entire brain, including the brain stem, is dead.” § 7180(a). That section also
27 states that “[a] determination of death must be made in accordance with accepted medical
28

1 standards. *Id.* And section 7181 requires “independent confirmation by another physician” when
2 a determination of brain death has been made. § 7181. Notably, section 7181 does not require
3 confirmation by an independent physician (i.e., a physician who is not affiliated with the hospital
4 where the original diagnosis of death was made). *See United States v. Humphries*, 728 F.3d 1028,
5 1032 (9th Cir. 2013) (explaining that the first step in interpreting a statute is to determine whether
6 the language at issue has a plain and unambiguous meaning with regard to the particular dispute
7 in the case and, if it does, the court’s inquiry is at an end) (citing *Robinson v. Shell Oil Co.*, 519
8 U.S. 337, 340 (1997)). Rather, as its language plainly states, section 7181 requires only an
9 “independent *confirmation by another* physician.” § 7181 (emphasis added).

11 Children’s Hospital followed this statutory requirement *before* Ms. Winkfield went to
12 court. On December 11, 2013, Dr. Robin Shanahan made a determination that Ms. McMath had
13 suffered “irreversible cessation of all functions of her entire brain, including her brain stem.”
14 (See Exh. 9, p. 48, lines 12-14) The very next day, “another physician”—Dr. Robert
15 Heidersbach—“independently confirmed” through his own examination that Ms. McMath had
16 suffered “an irreversible cessation of all the functions of the entire brain, including her brain stem
17 and had no respiratory brain stem function.” (See Exh. 8, p. 45, lines 18-20)

19 Nonetheless, the Superior Court appointed Dr. Paul Fisher to conduct his own
20 independent examination of Ms. McMath pursuant to sections 7180 and 7181. (See Exh. 16, p.
21 117 [erroneously referring to sections “7800 and 7801”]; see also Exh. 26, p. 171, lines 16-18
22 [explaining that Dr. Fisher was appointed as “the independent 7181 physician”])

24 That same day, Dr. Fisher performed an independent examination of Ms. McMath for the
25 purpose of determining whether, under the applicable medical standards, she was brain dead. His
26 conclusion that Ms. McMath is brain dead is unequivocal:

27 Overall, unfortunate circumstances in 13-year-old with known,
28 *irreversible brain injury* and now complete absence of . . .

1 brainstem function. Child meets all criteria for brain death, by
2 professional societies and State of California. . . . By my
independent exam, child [is] brain dead

3 (See Exh. 19, p. 128, emphasis added)

4 On December 24, 2013, the Superior Court conducted a hearing that included the
5 testimony (and cross-examination by Winkfield's counsel) of Dr. Fisher and Dr. Shanahan. (See
6 Exh. 26, p. 171, line 24 through p. 173, line 18) The court admitted into evidence Dr. Shanahan's
7 and Dr. Fisher's examination notes, a litany of exhibits on brain death from medical journals and
8 similar sources, and Dr. Shanahan's declaration as well as consultation and examination notes.
9 (Exh. 26, p. 171, line 25 through p. 172, line 11) Ms. Winkfield's counsel cross-examined both
10 Dr. Fisher and Dr. Shanahan. (Exh. 26, p. 172, lines 11-20) And, as the court's order indicates,
11 "[a]t the conclusion of Dr. Fisher's cross-examination, [Ms. Winkfield's] counsel stipulated that
12 Dr. Fisher conducted the brain death examination and made his brain death diagnosis in accord
13 with accepted medical standards." (Exh. 26, p. 172, lines 16-20.) Dr. Fisher testified that Ms.
14 McMath is brain dead under accepted medical standards. (Exh. 26, p. 172, lines 19-20) After
15 further proceedings, Dr. Shanahan also testified that Ms. McMath is brain dead under accepted
16 medical standards. (Exh. 26, p. 173, lines 13-14)

17
18
19 There have been three separate determinations that Ms. McMath is brain dead: one by Dr.
20 Shanahan, one by Dr. Heidersbach, and one by Dr. Fisher. The Legislature requires only two: an
21 initial diagnosis and "independent confirmation by another physician." § 7181. By its plain
22 language, section 7181 does not require an "independent physician" (i.e., a physician who is not
23 affiliated with the hospital where the original diagnosis of death was made); instead, it requires
24 only an "independent confirmation." *Id.* Here, Dr. Shanahan made the initial determination and
25 Dr. Heidersbach provided the independent confirmation. Yet erring on the side of due process
26 and caution, the Superior Court provided for an additional determination by an independent,
27
28

1 court-appointed expert—the preeminent child neurologist, Dr. Fisher. He too determined that Ms.
2 McMath is brain dead.

3 Life-sustaining medical treatments—such as a ventilator—serve no purpose when a
4 patient is dead. Neither does a TRO when the sole purpose of the limited duration injunction is to
5 ensure that the determination of death had been correctly made. Here, there is no room to dispute
6 the thrice-confirmed diagnosis of death. Therefore, given that the Superior Court provided due
7 process in the form of a contested hearing with procedural safeguards such as testimony under
8 oath and cross-examination and a requirement of proof by clear and convincing evidence, this
9 Court should reject any argument by Ms. Winkfield that procedural due process was denied.
10

11
12 **B. The Legislature has never provided a long-lasting parental veto when it**
13 **comes to terminating the operation of a ventilator *after* a proper**
14 **determination of death.**

15 Given that Ms. McMath is dead, the only other possible due process question before this
16 Court is who gets to decide when to terminate a ventilator—the parents of the deceased or a
17 hospital? The gravamen of Ms. Winkfield’s current request for an injunction boils down to her
18 assertion that diagnosis of death notwithstanding, it is the parents of the deceased that have an
19 enduring right to decide *when* a ventilator can be removed. There is no statutory support for such
20 a contention, and as argued in Section III *infra*, no substantive due process right either.

21 Section 1254.4, enacted in 2008, strikes the appropriate balance between a family’s need
22 for “a reasonably brief period” of time to handle the shock of death and the right of the hospital to
23 terminate a ventilator at a time it deems appropriate. Section 1254.4(a) states that “A general
24 acute care hospital shall adopt a policy for providing family or next of kin with a reasonably brief
25 period of accommodation . . . from the time that a patient is declared dead by reason of
26 irreversible cessation of all functions of the entire brain, including the brain stem, in accordance
27 with Section 7180, through discontinuation of cardiopulmonary support of the patient.”
28

1 Subdivision (b) defines a reasonably brief period very specifically and narrowly: “a ‘reasonably
2 brief period’ means an amount of time afforded to *gather* family or next of kin *at the patient’s*
3 *bedside.*” § 1254.4(b) (emphasis added). And during this “reasonably brief period of
4 accommodation,” a hospital is required to continue “*only* previously ordered cardiopulmonary
5 support.” §1254.4(a) (emphasis added). “No other medical intervention is required.” *Id.*

7 This statutory scheme makes it clear that it is the hospital—not the decedent’s family or
8 next of kin—that retains the right to discontinue cardiopulmonary support. As to *when* such
9 support is terminated, the statute provides that the hospital’s exercise of its professional discretion
10 is subject only to providing a “reasonably brief period” for family and next of kin to gather to be
11 with the deceased patient at bedside.

12 A fortiori, section 1254.4 does not require an *indefinite* period for purposes *other than*
13 gathering at bedside, such as maintaining a ventilator until a parent decides to terminate support
14 or completes a search for an alternative facility willing to receive the now-deceased patient and
15 continue ventilation indefinitely. Nor does the statute vest the final decision in the parents. The
16 plain language of the statute also makes another thing abundantly clear: no hospital is required to
17 provide any medical intervention beyond the preexisting cardiopulmonary support. Thus, despite
18 Ms. Winkfield’s plan to move Ms. McMath to another facility, any procedures that might be
19 needed to prepare a deceased patient for transport to a different hospital are also *not* required of
20 Children’s Hospital.

22 Here, Children’s Hospital provided Ms. Winkfield and the other family/next of kin with
23 well in excess of the statutorily required period of accommodation. As the Division Chief of the
24 Critical Care Division, Dr. Sharon Williams, stated under oath, Children’s Hospital provided the
25 family and next of kin “with far more time than the ‘reasonably brief period of accommodation’
26 for the family to gather at Ms. McMath’s bedside called for by the CHO Guidelines and
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1 California Health & Safety Code section 1254.4.” (See Exh. 10, p. 51, lines 6-11) Dr. Williams,
2 who signed her declaration some eight days after hospital staff informed Ms. McMath’s family
3 and next of kin of her death, noted that the eight-day time period was “far in excess of the 2-3
4 days that Children’s [Hospital] has considered to be reasonable accommodation in all brain death
5 cases in the past 10 years.” (*Id.*) Ms. Winkfield never objected to Dr. Williams’ testimony
6 during the Superior Court proceedings.
7

8 Taken together, sections 7180, 7181 and 1254.4 demonstrate that Ms. Winkfield does *not*
9 possess any statutory right to tell Children’s Hospital when it can terminate the ventilator. As
10 with the determination of death, Children’s Hospital has at all times complied with the statutory
11 requirements and procedural due process. And because Ms. Winkfield has no statutory right to
12 define death or to decide when the ventilator can be removed from her deceased daughter, there is
13 no basis for a temporary restraining order aimed at enabling her to achieve those very ends.
14

15 **II. Plaintiff’s Substantive Due Process and First Amendment Claims, Which**
16 **Involve the Same Primary Right and Seek the Same Injunctive Relief as Those**
17 **Sought in Her Prior State Court Action, Are Barred by the Doctrine of Res**
18 **Judicata**

19 Prior to initiating this lawsuit, Ms. Winkfield sought a preliminary injunction in State
20 court to prevent Children’s Hospital from removing Ms. McMath from the ventilator. The state
21 court denied her request. (Exh. 26, pp. 167, 184-85) Although she easily could have, Ms.
22 Winkfield did not raise the constitutional and federal civil rights claims she is now attempting to
23 assert in this lawsuit. Accordingly, this Court should find that Ms. Winkfield is barred by the
24 doctrine of res judicata from pursuing these new theories in federal court.

25 Federal courts give preclusive effect to a state court judgment whenever the courts of that
26 state would do so. *Marrese v. American Academy of Orthopaedic Surgeons*, 470 U.S. 373, 380
27 (1985). In California, an action is barred by res judicata if: (1) the decision in the prior
28

1 proceeding is final and on the merits; (2) the present proceeding is on the same cause of action as
2 the prior proceeding; and (3) the parties in the present proceeding, or parties in privity with them,
3 were parties in the prior proceeding. *Fed'n of Hillside & Canyon Assn's v. City of L.A.*, 126 Cal.
4 App. 4th 1180, 1202 (2004). "Res judicata bars the litigation not only of issues that were *actually*
5 litigated but also issues that *could have been* litigated." *Id.* (emphasis added). And there is no
6 exception to res judicata simply because the newly asserted claim involves a statute's
7 unconstitutionality. *Gospel Missions of America v. City of Los Angeles*, 328 F.3d 548, 556 (9th
8 Cir. 2001). Here, all three elements of res judicata have been satisfied. Thus, this Court should
9 give preclusive effect to the state court's denial of Ms. Winkfield's preliminary injunction.
10

11 First, as to finality, the denial of a preliminary injunction is considered "final" for
12 purposes of res judicata when "it appears that the court intended a final adjudication of the issue
13 involved" See *Huntingdon Life Sciences, Inc. v. Stop Huntingdon Animal Cruelty USA, Inc.*,
14 129 Cal. App. 4th 1228, 1248-49 (2005). That is undeniably the case here. In the prior state
15 court action, Ms. Winkfield essentially asked the court to find that she had the right to make
16 medical decisions for her daughter, including the right to veto the decision by Children's Hospital
17 to remove Ms. McMath from the ventilator once brain death had been confirmed. The state
18 court's denial of this request amounted to a final adjudication of the rights and interests of both
19 parties—Winkfield does *not* have the right to override the hospital's decision, and Children's
20 Hospital *does* have the right to remove Ms. McMath from the ventilator. No other issues remain
21 to be resolved in the prior state court action. This fact is made abundantly clear by the state
22 court's order, which will allow Children's Hospital to carry out its plan to remove the ventilator
23 come 5:00 p.m. on Monday, December 30. (Exh. 26, pp. 184-85) Thus, the finality requirement
24 for res judicata is met.
25
26

27 As to the second element of res judicata, California courts determine whether the "same"
28

1 cause of action is involved in the two actions by focusing on whether the same “primary right” is
2 at stake. *Eichman v. Fotomat Corp.*, 147 Cal. App. 3d 1170, 1174 (1983). “[I]f two actions
3 involve the same injury to the plaintiff and the same wrong by the defendant then the same
4 primary right is at stake even if in the second suit the plaintiff pleads different theories of
5 recovery, seeks different forms of relief and/or adds new facts supporting recovery.” *Id.* “[T]he
6 harm suffered” is “the significant factor” in determining the primary right. *Craig v. Cnty. of Los*
7 *Angeles*, 221 Cal. App. 3d 1294, 1301 (1990).

9 This second element is easily satisfied here. The harm that Ms. Winkfield is alleging she
10 will suffer is the same in this lawsuit as in the prior state court action—the “death” of her already-
11 deceased daughter. To prevent this alleged harm, Ms. Winkfield is seeking to enforce the same
12 right that she sought to enforce in the prior state court action—the right to prevent Children’s
13 Hospital from removing the ventilator. Thus, the same “primary right” is at stake here as in the
14 prior state court action, and the second element of res judicata is satisfied.

16 Third, and finally, the parties involved in this action are indisputably the same parties that
17 were involved in the prior state court action. Thus, the third element of res judicata is easily
18 satisfied as well.

19 Therefore, the state court’s denial of Ms. Winkfield’s prior request for injunctive relief
20 amounts to a final decision on the merits that is subject to res judicata in other California state
21 courts. And because federal courts give preclusive effect to a state court judgment whenever the
22 courts of that state would do so, this Court should also find that Plaintiff is barred from raising
23 these constitutional challenges here.
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1 **III. There Is No Fundamental Right or First Amendment Right Conferring Upon**
2 **a Parent Control Over Removal of Ventilation From a Brain-Dead Patient**

3 **A. Parents Do Not Possess Fundamental Rights to Define Death,**
4 **Determine Death, and To Decide When a Hospital Can Remove a**
5 **Ventilator from a Brain-Dead Patient**

6 It is true that “the Due Process Clause provides heightened protection against
7 governmental interference with certain fundamental rights and liberty interests.” *Washington v.*
8 *Glucksberg*, 521 U.S. 702, 720 (1997). However, as the nation’s highest court put it, “we ‘have
9 always been reluctant to expand the concept of substantive due process because guideposts for
10 responsible decision making in [the unchartered area of medical self-determination] are scarce
11 and open-ended.’” *Id.* Courts “must therefore ‘exercise the utmost care when asked to break new
12 ground in this field’” *Id.*

13 Substantive due process analysis contains two primary features—a “careful description”
14 of the asserted fundamental interest and an examination of whether the right as *narrowly defined*
15 is “‘deeply rooted in this Nation’s history and tradition,’ . . . such that ‘neither liberty nor justice
16 would exist if they were sacrificed.’” *Id.* at 720-21. Where the nation’s history and traditions
17 tend to demonstrate the contrary of the asserted right, no such right will be found. *Id.* at 723.
18 This is particularly true when to announce a new fundamental right, a court “would have to
19 reverse centuries of legal doctrine and practice, and strike down the considered policy choice of
20 almost every State.” *Id.* at 723.

21 Here, the gravamen of Ms. Winkfield’s constitutional claims is presumably that under the
22 Due Process Clause and/or First Amendment, a parent, not a state legislature, should define death.
23 And similarly, a parent’s *beliefs*, not accepted medical practices, should *determine* when death
24 has occurred. Thus, goes Ms. Winkfield’s constitutional reasoning, a parent—not a hospital—has
25 a fundamental right to decide when her deceased child will be taken off of a ventilator.
26
27
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1 Even the most cursory examination of the Nation's history and traditions confirms there is
2 no such fundamental right. Rather, history is replete with examples of legislative prerogatives
3 taking precedence over parental control. In the health care arena, for example, parental rights
4 have long yielded to state legislative powers. *Pickup v. Brown*, 728 F.3d 1042, 1060 (9th Cir.
5 2013). So while parents do have a constitutionally-protected right regarding the care, custody,
6 and control of living children, "that right is 'not without limitations.'" *Id.* Thus, over parental
7 objection, states may require compulsory vaccination of children. *Prince v. Massachusetts*, 321
8 U.S. 158, 166 (1944). And parental beliefs notwithstanding, states may also intervene when a
9 parent refuses necessary medical care based on spiritual beliefs. *Jehovah's Witnesses of*
10 *Washington v. King Cnty. Hosp.*, 278 F. Supp. 488, 504 (W.D. Wash. 1967) (per curiam), *aff'd*,
11 390 U.S. 598 (1968) (per curiam). Indeed, it has always been regarded as constitutionally
12 unremarkable that a state has "control over parental discretion in dealing with children when their
13 physical or mental health is jeopardized." *Parham v. J.R.*, 442 U.S. 584, 603 (1979). In all such
14 instances, the state's interest does not give way to that of a child's parent.
15

16
17 The constitution does not even provide a fundamental right for patients to *choose* a
18 particular form or method of health care treatment for *themselves*. *Nat'l Ass'n for the*
19 *Advancement of Psychoanalysis v. California Bd. of Psychology*, 228 F.3d 1043, 1050 (9th Cir.
20 2000); *Mitchell v. Clayton*, 995 F.2d 772, 775 (7th Cir. 1993). Even when *terminally ill* patients
21 have asserted substantive due process rights to certain drugs and treatments that states have
22 refused to allow them to take, courts have rejected such claims as falling well "within the area of
23 governmental interest in protecting public health." *Rutherford v. United States*, 616 F.2d 455,
24 457 (10th Cir. 1980); *see also Carnohan v. United States*, 616 F.2d 1120, 1122 (9th Cir. 1980)
25 (per curiam). Thus, "that many of the rights and liberties protected by the Due Process Clause
26 sound in personal autonomy does not warrant the sweeping conclusion that any and all important,
27
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1 intimate and personal decisions are so protected” *Glucksberg*, 521 U.S. at 727-28.

2 If parental beliefs concerning their *living* children’s health must often yield to legislative
3 mandates contrary to such beliefs, then surely their beliefs as to when a child is dead and when a
4 ventilator can be removed will also similarly yield to legislative judgments. In other words, there
5 can be no fundamental right of the sort Ms. Winkfield urges this Court to create. After all, there
6 can be no question that state legislatures can regulate the determination of *when* death has
7 occurred, *how* that determination is made and *when* a ventilator can be removed from a brain dead
8 patient. “It is too well settled to require discussion at this day that the police power of the states
9 extends to the regulation of certain trades and callings, particularly those which closely concern
10 the public health.” *Watson v. Maryland*, 218 U.S. 173, 177 (1910).

11
12 At bottom, the governmental action that Ms. Winkfield challenges in claiming a
13 fundamental right is the State of California’s enactment of the definition of a dead person under
14 Health and Safety Code section 7180. Section 7180 provides that “[a]n individual who has
15 sustained . . . irreversible cessation of all functions of the entire brain, including the brain stem, is
16 dead.”³ § 7180(a). Section 7180 also states that “[a] determination of death must be made in
17 accordance with accepted medical standards.” *Id.* And section 7181 requires “independent
18 confirmation by another physician” when a determination of brain death has been made. § 7181.
19
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21 Section 7180 is found in “Article 1. Uniform Determination of Death Act” in California’s
22 Health and Safety Code. As Witkin states, the Uniform Determination of Death Act (“UDDA”)
23 upon which California’s statute is modeled (and similarly named) “was approved by the National
24 Conference of Commissioners on Uniform State Laws in 1980.” 14 Witkin Sum. Cal. Law Wills
25

26 ³ As one appellate court put it, California’s enactment of section 7180 “is a clear
27 recognition of the fact that the real seat of ‘life’ is brain function rather than mere
28 metabolic processes which result from respiration and circulation.” *Barber v. Superior
Court*, 147 Cal. App. 3d 1006, 1014 (1983).

1 § 11 (10th ed. 2010). California is not alone in adopting the UDDA—far from it. “Forty-five
2 U.S. jurisdictions have adopted a determination of death act that is either identical to, or shares
3 basic elements with, the UDDA.” *Controversies in the Determination of Death*, The President’s
4 Council on Bioethics (January 2009),
5 <http://bioethics.georgetown.edu/pcbe/reports/death/chapter1.html>, n. ii.
6

7 For substantive due process analysis purposes, the widespread adoption of the statutory
8 definition of brain death by 45 states runs contrary to Ms. Winkfield’s parental and personal
9 definitions of death. History and tradition go against her. There is no history or tradition in this
10 country of a parental veto over properly-trained medical doctor determinations of death. As the
11 California Court of Appeal put it when construing sections 7180 and 7181, a determination of
12 death is made in accordance with ““accepted medical standards.”” *Dority v. Superior Court*, 145
13 Cal. App. 3d 273, 278 (1983). And when a treating and consulting physician agree that brain
14 death has occurred, “the medical profession need not go into court every time it declares brain
15 death where the diagnostic test results are irrefutable.” *Id.*
16

17 From time immemorial, physicians have determined when people are dead and have
18 accordingly ceased giving treatment. Here, the treating physician and consulting physician both
19 determined that Ms. Winkfield’s daughter is brain dead. (Exh. 8, p. 45; Exh. 9, p. 48) Then, after
20 Ms. Winkfield went to court, a preeminent, *court-appointed* child neurologist from Stanford
21 Medical Center also determined that Ms. Winkfield’s daughter is dead. (Exh. 19, p. 128)

22
23 As the Court of Appeal in *Barber* observed, physicians have “no duty to continue [life
24 sustaining machinery] once it has become futile in the opinion of qualified medical personnel.”
25 *Barber*, 147 Cal. App. 3d at 1014. But Ms. Winkfield refuses to believe her daughter is dead, and
26 invites this Court to create a new, fundamental parental right to veto such scientific
27 determinations based on her *personal* beliefs. As the Ninth Circuit very recently put it, a
28

1 substantive due process claim will be rejected when to hold otherwise would be to “compel the
2 California legislature, in shaping its regulation of . . . health providers, to accept Plaintiff’s views”
3 on the subject. *Pickup*, 728 F.3d at 1061. Ms. Winkfield seeks injunctive relief based upon a
4 similar argument that she possesses a constitutional right, vested in the Due Process Clause or the
5 First Amendment, not only to define and determine death, but also to control when a ventilator
6 will be removed from a brain dead child. Since there is no such fundamental right, there is *zero*
7 probability of success on the merits. The petition should be denied.
8

9
10 **B. The California Statutes Defining Death and Creating a Reasonably**
11 **Brief Period for Family To Gather at Bedside Before Ventilation Can**
12 **Be Removed Do Not Implicate the First Amendment, the Fourth**
13 **Amendment or the Fourteenth Amendment**

14 The Supreme Court has held that the Free Exercise Clause of the First Amendment
15 provides an absolute constitutional protection against governmental regulation of religious *beliefs*.
16 *Employment Div. v. Smith*, 494 U.S. 872, 877 (1990) (superseded by statute as applied to federal
17 government regulation of religious beliefs as stated in *Cutter v. Wilkinson*, 544 U.S. 709, 714-15
18 (2005)). However, the Court distinguishes protection of religious belief from protection of the
19 *conduct* that one performs, or abstains from performing, in *exercising* one’s religious beliefs.
20 *Smith*, 494 U.S. at 877. Underlying the Court’s jurisprudence in this area is the principle that the
21 Free Exercise Clause “embraces two concepts—freedom to believe and freedom to act.”
22 *Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1128 (9th Cir. 2009). But the Court has “*never* held
23 that an individual’s religious beliefs excuse her from compliance with an otherwise valid law
24 prohibiting conduct that the State is free to regulate.” *Smith*, 494 U.S. at 878-79 (emphasis
25 added). To the contrary, the Court has held that “the right of free exercise does not relieve an
26 individual of the obligation to comply with a ‘valid and neutral law of general applicability on the
27 ground that the law proscribes (or prescribes) conduct that her religion prescribes (or proscribes).”
28

1 *Id.* at 879.

2 A parent is not relieved of the obligation to comply with mandatory state laws affecting
3 her child simply because the laws require conduct that does not comport with the parent's
4 exercise of their religious beliefs. In an analogous case, the Third Circuit denied a group of
5 parents' First Amendment Free Exercise Clause challenge to a Pennsylvania statute that required
6 mandatory review and reporting for all children receiving homeschooling within the state. *Combs*
7 *v. Homer-Center Sch. Dist.*, 540 F.3d 231, 234 (3d Cir. 2008). The parents held a common
8 religious belief that all education was religion and that God assigned religious matters to the
9 exclusive jurisdiction of the family; thus, according to the parents, the statute establishing
10 homeschool review requirements violated their free exercise of religion. *Id.* The court found the
11 statute at issue to be a neutral law of general applicability. "A law is "neutral" if it does not
12 target religiously motivated conduct either on its face or as applied in practice." *Id.* at 241-42,
13 quoting *Blackhawk v. Pennsylvania*, 381 F.3d 202, 209 (3d Cir. 2004). The statute at issue in
14 *Combs* neither targeted religious practice nor selectively imposed burdens on religiously
15 motivated conduct. Instead, it imposed the same requirements on parents who home-schooled
16 their children for secular reasons as those imposed on parents who home-schooled their children
17 for religious reasons. Furthermore, nothing in the record suggested school officials discriminated
18 against religiously-motivated home education programs. *Id.* at 242.

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22 Finding the laws to be neutral and of general applicability, the *Combs* court applied
23 rational basis review to determine whether the laws violated the parents' First Amendment rights.
24 *Id.* at 243. "[R]ational basis review requires merely that the action be rationally related to a
25 legitimate government objective." *Id.* The court explained that the state had a legitimate interest
26 in ensuring that children who are taught under home education programs are achieving minimum
27 educational standards and are demonstrating sustained progress in their educational program. *Id.*
28

1 The court further explained that the statute's disclosure requirements and corresponding school
2 district review rationally further these legitimate state interests. Thus, the statute survived
3 rational review and did not violate the parents' First Amendment rights under the Free Exercise
4 Clause. *Combs*, 540 F.3d at 243.

5
6 Here, Ms. Winkfield asks this Court to relieve her from Children Hospital's policy
7 regarding discontinuation of cardiopulmonary support, implemented pursuant to the requirements
8 of California Health and Safety Code sections 7180, 7181 and 1254.4, because the law requires
9 her, and all persons within the State, to allow medical professionals to make a determination of
10 death and take subsequent action that does not comport with Winkfield's religious belief about
11 her child's death. But it is not enough that Ms. Winkfield's religious beliefs about how to define
12 "death" conflict with California's statutory definition and its attendant procedures. As the Ninth
13 Circuit articulated, "the mere possession of religious convictions which contradict the relevant
14 concerns of a political society does not relieve the citizen from the discharge of political
15 responsibilities." *Stormans*, 586 F.3d at 1129. Ms. Winkfield's individual religious beliefs do
16 not excuse her from compliance with an otherwise valid law regulating conduct that does not
17 interfere with her religious beliefs.
18

19 Health and Safety Code section 1254.4 is a valid law that regulates the conduct of all
20 general acute care hospitals in the State and requires hospitals to provide family or next of kin of
21 a person who has been declared dead, by reason of irreversible cessation of all functions of the
22 brain, with a reasonably brief period of accommodation to gather at the patient's bedside. §
23 1254.4. The statute is neutral as to religious beliefs and applies to all hospitals within the State.
24 A state or local law that is neutral in its text and in its effect is only subject to rational basis
25 review to be upheld as constitutional. *Stormans*, 586 F.3d at 1130. Additionally, a law that is
26 neutral and of general applicability is not required to pass strict scrutiny review and need not be
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28

1 justified by a compelling governmental interest even if the law has the incidental effect of
2 burdening a particular religious practice. *Id.* at 1129; *Church of Lukumi Babalu Aye v. City of*
3 *Hialeah*, 508 U.S. 520, 531 (1993).

4 Health and Safety Code section 1254.4 does not target religious practices nor selectively
5 impose burdens on religiously motivated conduct. *See Combs*, 540 F.3d at 242. Instead, it vests
6 hospitals, not families or next of kin, with the discretion to decide what are “reasonable”
7 accommodations to allow the family and next of kin to gather at the bedside of a deceased, and to
8 make reasonable accommodations for those who voice a request for “any special religious or
9 cultural practices” related to paying last respects. § 1254.4(c)(2). Section 1254.4 also *guides* the
10 exercise of that discretion, providing that hospitals “shall consider the needs of other patients and
11 prospective patients in urgent need of care” in determining what is “reasonable,” § 1254.4(d),
12 thereby implicitly recognizing that hospitals are in the best position to make such determinations.

13
14
15 Since section 12454.4 is a neutral law of general applicability, the only question that
16 remains is whether it is rationally related to a legitimate government objective. *See Combs*, 540
17 F.3d at 242-43. Undoubtedly, it is. Specifically, section 1254.4 serves the legitimate state
18 interest of allowing hospitals to establish procedures to follow once a patient is dead and no
19 longer requires medical treatment. The statute, which balances the needs of family members and
20 next of kin who wish to gather by the bedside of their deceased family member, and the needs of
21 other patients and prospective patients in urgent need of care, is rationally related to this
22 legitimate state interest. And although the hospital’s policy may have the incidental effect of
23 burdening Ms. Winkfield’s particular religious practice, it does not infringe on her First
24 Amendment rights.

25
26 Ms. Winkfield wants Children’s Hospital, in defiance of state law, to conform to her
27 religious practices by indefinitely prolonging the time her deceased child’s body remains on
28

1 cardiopulmonary support. The First Amendment protects Ms. Winkfield's freedom to believe
2 that her child is not dead. However, the First Amendment does not permit Ms. Winkfield to act
3 on her beliefs by compelling Children's Hospital to disregard a valid state law that serves a
4 legitimate state objective. Nor does it to allow her to practice religious beliefs in contradiction to
5 Children's Hospital policies and expertise. There is no such First Amendment right; so there is
6 zero probability of success on the merits.
7

8 The Fourth and Fourteenth Amendment analysis is no different. Contrary to Plaintiff's
9 allegations, the constitutional rights to privacy under the Fourth and Fourteenth Amendments do
10 not grant parents the right to have total control over medical treatment decisions of their children.
11 In fact, the Supreme Court has held that claims concerning medical treatments "are properly
12 analyzed in terms of a Fourteenth Amendment liberty interest, rather than in terms of a privacy
13 interest." *Blouin v. Spitzer*, 356 F.3d 348, 361 (2d Cir. 2004). This liberty interest is not absolute.
14 The failure of a healthcare provider to agree with a patient's unreasonable demand for medical
15 treatment is a consequence of the exercise of professional judgment, not a basis for a claim the
16 patient's constitutional right of privacy and decision making was violated. There is simply no
17 recognized constitutional privacy right that allows a party to impose its private, scientifically
18 unfounded definition of death upon society as a whole. Plaintiff cites no authority for the general
19 proposition that she has a constitutional right to deny that her daughter has died and prevent the
20 body from being handled in the manner of all deceased bodies.
21
22

23 Here, the privacy argument advanced by Plaintiff has broader implications. Plaintiff is
24 demanding that this Court force Children's to continue ventilation, provide nutrition to a dead
25 body and perform surgical and other medical procedures on that dead body. Even if there were a
26 right of privacy that allowed each individual to define death in a personal manner (a specious,
27 unwarranted assumption), there would be no right to impose one's personal definition of death on
28

1 others to compel them to treat a dead body as if it were alive.

2 There is no colorable merit to the constitutional claims. The petition should be denied.

3 **C. Death is not a Disability.**

4 Plaintiff asserts that the refusal to provide medical treatment to her daughter's dead body
5 somehow violates section 504 of the Rehabilitation Act of 1973 (29 U.S.C. § 794) and the
6 Americans With Disabilities Act (42 § U.S.C. §12101, et seq.). These statutes protect individuals
7 with "disabilities." No court has ever found that death is a disability; nor could a court logically
8 do. Plaintiff's argument is based on the false premise that her daughter is alive and disabled.
9 Because Jahi McMath is dead, this argument lacks even a scintilla of merit.
10

11 **CONCLUSION**

12
13 There is no doubt that Jahi McMath is dead. As tragic as her death is, her mother does not
14 possess a constitutional right to redefine death, determine when death has occurred, or determine
15 when a ventilator can be removed. Therefore, there is no valid reason for this Court to issue a
16 temporary restraining order.

17 Dated: December 30, 2013

ARCHER NORRIS

18 

19 _____
20 Douglas C. Straus
21 Attorneys for Defendant
22 CHILDREN'S HOSPITAL & RESEARCH
23 CENTER AT OAKLAND
24
25
26
27
28

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

LATASHA WINKFIELD, as an individual and as guardian ad litem and mother of Jahi McMath,

Plaintiff,

v.

CHILDREN'S HOSPITAL & RESEARCH CENTER AT OAKLAND; DR. DAVID DURAND,

Defendants.

No. C 13-5993 SBA

ORDER DEFERRING IN PART AND DENYING IN PART PLAINTIFF'S APPLICATION FOR A TEMPORARY RESTRAINING ORDER (Docket No. 2)

United States District Court
For the Northern District of California

On December 30, 2013, Plaintiff Latasha Winkfield moved ex parte for a temporary restraining order (TRO) seeking to keep Jahi McMath on cardio pulmonary support and to insert a gastric tube and a tracheostomy tube to allow her to be transferred to another facility. Defendants Children's Hospital & Research Center at Oakland and Dr. David Durand filed an opposition. On the same day, the Alameda County Superior Court entered an order extending its TRO requiring Defendants to maintain the status quo of treatment provided to McMath, but declining to order insertion of a gastric tube or a tracheostomy tube.

To qualify for a temporary restraining order, the moving party must demonstrate "(1) a likelihood of success on the merits; (2) a significant threat of irreparable injury; (3) that the balance of hardships favors the applicant; and (4) whether any public interest favors granting an injunction." Raich v. Ashcroft, 352 F.3d 1222, 1227 (9th Cir. 2003); see also Winter v. Natural Res. Def. Council, Inc., 129 S. Ct. 365, 374 (2008).

1 Alternatively, a temporary restraining order could issue where
2 "the likelihood of success is such that serious questions going to
3 the merits were raised and the balance of hardships tips sharply
4 in plaintiff's favor," so long as the plaintiff demonstrates
5 irreparable harm and shows that the injunction is in the public
6 interest. Alliance for the Wild Rockies v. Cottrell, 632 F.3d
7 1127, 1131 (9th Cir. 2011) (citation and internal quotation and
8 editing marks omitted).

9 After considering the papers and the impact of the
10 continuation of the state court's TRO, the Court defers
11 consideration of the application with respect to maintaining the
12 status quo of treatment provided to McMath, and DENIES Plaintiff's
13 application with regard to insertion of a gastric tube and a
14 tracheostomy tube. The Court will consider a motion for
15 preliminary injunction at a hearing before Judge Armstrong on
16 January 7, 2014 at 1:00 PM. Plaintiff may file a brief no later
17 than January 2, 2014 at 12:00 PM. Defendants may file a response
18 no later than January 3, 2014 at 5:00 PM. Plaintiff may file a
19 reply no later than January 6, 2014 at 9:00 AM.

20 IT IS SO ORDERED.

21
22 Dated: 12/30/2013

23
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25
26
27
28

CLAUDIA WILKEN
United States District Judge

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E-Filing

FILED

DEC 30 2013

RICHARD W. WIEKING
CLERK, U.S. DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
OAKLAND

8 Attorneys for Defendant
9 CHILDREN'S HOSPITAL & RESEARCH
10 CENTER AT OAKLAND

11 UNITED STATES DISTRICT COURT
12 NORTHERN DISTRICT OF CALIFORNIA

Case No. **013-5993 SBA**

13 LATASHA WINKFIELD, an individual
14 parent and guardian of Jahi McMath, a
15 minor,

16 Plaintiff,

17 v.

18 CHILDRENS HOSPITAL OAKLAND,
19 DR. DAVID DURAND, M.D. and DOES
20 1 through 10, inclusive,

21 Defendant.

**DECLARATION OF DOUGLAS C.
STRAUS IN OPPOSITION TO PROPOSED
TEMPORARY RESTRAINING ORDER
AND INJUNCTIVE RELIEF**

22 I, Douglas C. Straus, hereby declare:

23 1. I am counsel for CHILDREN'S HOSPITAL & RESEARCH CENTER AT
24 OAKLAND (Children's Hospital). If called as a witness, I would competently testify to the
25 following facts, all of which are within my own personal knowledge.

26 2. Attached hereto as pages 1 through 211 is an accurate copy of documents filed by
27 the parties, issued by the Court or proceedings transcribed in Alameda County Superior Court
28 Action No. RP 13707598 (Bates Numbered 00001-00185). Given the short amount of notice
received, I cannot be 100% certain but I believe all exhibits, declarations and other evidentiary
materials are attached. Not all transcripts have been completed. Portions of transcripts
designated as confidential in the State court proceeding have not been attached.

1 3. Jahi McMath has been determined to be dead by three separate physicians,
2 including a court-appointed expert, Stanford neurologist Paul Fisher. Plaintiff stipulated that Dr.
3 Fisher performed a competent examination and followed recognized medical protocols in
4 determining that Ms. McMath was deceased. Plaintiff presented no medical evidence in State
5 court that Ms. McMath was still alive.

6 4. Alameda County Superior Court Judge Grillo ruled that Ms. McMath was, very
7 sadly, dead. He expressly rejected Plaintiff's demand that her body be provided nutrients and
8 declined to order any further procedures be performed on that body. Children's Hospital is fully
9 complying with Judge Grillo's Order.

10 5. Children's Hospital has repeatedly informed Plaintiff's counsel that Children's
11 Hospital cannot possibly consider whether to perform medical procedures on the body of Ms.
12 McMath until: (a) a facility has been identified that will accept the body; (b) the facility has
13 established the conditions required for acceptance of the body; (c) there is a defined, lawful
14 transportation plan to take the body from Children's Hospital to the facility; and (d) if the facility
15 is outside California, the coroner has consented to such a transfer.

16 6. Plaintiff has never identified any facility willing to accept the body. So there has
17 been no occasion to even explore what steps, if any, might be required to prepare the body for
18 transfer.

19 I declare under penalty of perjury under the laws of the State of California and the laws of
20 the United States that the foregoing is true and correct.

21 Executed this 30th day of December, 2013 in Walnut Creek, California.

22
23 

24 _____
25 Douglas C. Straus