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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

JAHI MCMATH, a minor; NAILAH WINKFIELD, an individual, as parent, as guardian, and as next friend of JAHI McMath, a minor

Plaintiffs,

v.

STATE OF CALIFORNIA; COUNTY OF ALAMEDA, et al

Defendants.

Case No. 3:15-cv-06042 HSG

PLAINTIFF'S OPPOSITION TO COUNTY DEFENDANTS' MOTION TO DISMISS

Date: May 12, 2016

Time: 2:00 p.m.

Action Filed: December 23, 2015

Trial Date: None Set

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I. OVERVIEW AND RELIEF REQUESTED

Jahi McMath is alive under the laws of each of the United States. As such, she has a constitutional "inalienable right" to life and a right to travel freely within the United States. In particular, she has a right to travel with her mother back to the place of her birth and into the bosom of her family. Plaintiff Nailah Winkfield (WINKFIELD), Jahi's mother, has traveled an exhaustive road seeking to obtain due process. What she seeks is to present undisputed medical testimony that, today, Jahi does not meet California's definition of brain death, no matter what her condition was on December 23rd 2013. Jahi shows numerous objective signs of brain activity, including: brain wave activity on an EEG, cerebral blood flow, intact brain matter, an ability to respond to her mother's voice as demonstrated by an increase in her heart rate and the ability to respond to her mother's request to move specific body parts. (Please refer to videos identified as exhibit A.)[1]

California Health and Safety Code Section 7180 (hereinafter "§7180") states in relevant part: "(a) An individual who has sustained either (1) irreversible cessation of circulatory and respiratory functions, or (2) irreversible cessation of all functions of the entire brain, including the brain stem, is dead." The statute contemplates a situation, like Jahi's, where neurological activity returns but provides no mechanism to bring evidence of that resolution before any official or court. The facts pled in the complaint demonstrate that Jahi McMath is alive and that the defendants to this action have stonewalled WINKFIELD at every turn, as she has sought to

[1] Plaintiffs are unable to attach these videos to this pleading, which is being filed with the Court's electronic system. The videos referred to in the document uploaded as Exhibit A were all taken after Jahi's transfer to a hospital in New Jersey. They will be delivered to the Court on a thumb drive with the courtesy copy of this pleading on April 19, 2016, as well as mailed to opposing Counsel on the same date.

prove that her daughter is not dead. If, after receipt of due process WINKFIELD is proven wrong, then Jahi will stay in her state of legal death in California. If the defendants are wrong, and their efforts at continuing to deny WINKFIELD any opportunity to prove Jahi's existence are successful, then the gravest of injustices will be revisited on her and her mother.

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

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

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

her brain, and the cessation of her vital organs' ability to function. Instead, Jahi has grown and has survived long enough that she now can be examined, after two years of recovery.

Defendants' characterizations of Plaintiffs' 2013/2014 legal challenges misstate what occurred. In December 2013 a number of legal steps were taken to keep Children's Hospital from disconnecting Jahi from life support. Brain death is binary under § 7180. If there is any neurological activity, which Jahi currently exhibits, a person is not brain dead. All Plaintiff sought in 2013 and early 2014, was a TRO preventing Children's from removing Jahi from life support. Plaintiffs, with the help of Magistrate Judge Ryu, reached a settlement where Jahi could be removed from Children's. Days later, she was. This, as reflected by Judge Armstrong's ruling, rendered the issue moot. Recovery of Jahi's brain function was never briefed or argued. Nailah Winkfield could not seek an appeal from the December, 2013, Judgment within the 60 days required by California Law because the facts simply did not exist at the end of that period to demonstrate recovery of brain function (and thus, reversibility of her condition in December, 2013) until the fall of 2014 well after the time for an appeal had passed.

Thus, in September 2014, Plaintiff WINKFIELD filed a request for a writ of error corum novis in the Superior Court. This request was never considered by the court, and no matter ever was presented to the court, because WINKFIELD -- contrary to the Defendants' assertions -- continued the matter and asked Judge Grillo to allow her to contact the court-appointed expert, to establish a dialogue between him and the physicians who had examined after her recovery of neurologic function. Judge Grillo never acted upon that request, WINKFIELD withdrew that request, WINKFIELD sought to resolve the matter through administrative means, and only when all that failed, WINKFIRLD sought relief in this forum from the Defendants who, to a one, shut the door in her face without ever considering the evidence. As a result, no evidence of Jahi's

recovery has ever been considered by any court, no hearing has ever been provided, and no ruling has ever been issued as to whether Jahi has experienced any recovery of brain function, even though any such recovery would change her status under §7180 from brain dead to alive.

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

II. RELEVANT PROCEDURAL HISTORY

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

On December 12, 2103, Jahi McMath suffered catastrophic but partially reversible brain injury after undergoing ENT surgery at CHO on December 9, 2013. Soon thereafter, two physicians chosen by CHO declared Jahi brain dead and notified WINKFIELD that they intended to remove Jahi from the ventilator, thereby causing her certain cardio-pulmonary death within minutes. In order to prevent this removal of necessary life support, on December 20, 2013, WINKFIELD sought and received a Temporary Restraining Order in the Superior Court of Alameda County (Case number RP-13-707598). This enjoined CHO from withdrawing ventilator support Jahi. Once this immediate threat to her daughter's life was removed, WINKFIELD turned her attention to transporting Jahi to the state of New Jersey, one state which recognizes a religious belief component in its codification of the Uniform Determination of Death Act.

Subsequent to issuing the TRO, the court took testimony from Dr. Paul Fischer, its expert. The court on December 26, 2013, without explicitly ruling that Jahi's brain damage was "irreversible," found that Jahi at that time "had suffered brain death and was deceased as defined under Health and Safety Code sections 7180 and 7181." No evidence regarding Jahi's neurological function has been heard by any court subsequent to this hearing, two years ago.

On December 30, 2013, WINKFIELD filed a complaint in the U.S. District Court for the Northern District of California (case number 4:13-cv-05993-SBA), seeking more time to move Jahi. Judge Saundra Brown Armstrong granted WINKFIELD's request in part, enjoining CHO from removing Jahi's ventilator and setting a preliminary injunction hearing on January 7, 2013. Fortunately, Judge Armstrong also appointed Magistrate Judge Donna M. Ryu to see if an agreement could be reached so that WINKFIELD could move her daughter. Judge Ryu scheduled a settlement conference for January 3, 2014. At this conference, with Judge Ryu's input, WINKFIELD and CHO were able finally to resolve matter, and Jahi finally could be moved to a facility that would give her the care she needed. After this agreement was in place, WINKFIELD **dismissed the federal action voluntarily and without prejudice before the opposing party had served an answer** or a MSJ (Document 22, Case number 4:13-cv-05993-SBA, Exhibit B). No evidence was ever considered by the court in this federal proceeding.

Before CHO would release Jahi's body, the Alameda County Coroner a deatj, simply to comply with formalities then required by CHO to allow Jahi to be moved and receive the care she required (CHO had stopped providing nutrition and curative care on December 12, 2013.). In order to allow Jahi to be removed before she suffered cardiopulmonary death, Plaintiff, under protest, sought a "Disposition Permit" from the coroner.

To obtain a Disposition Permit WINKFIELD had to obtain a death certificate, which she did, under protest. That Death Certificate was never finalized. It was never signed by an attesting physician and clearly was marked "Pending Investigation" under the cause of death. (*See* Death Certificate, Exhibit C.) After the disposition permit was obtained, and pursuant to the settlement agreement, Jahi was removed from CHO and was transported to a hospital where she could receive such care. Soon thereafter, the initial Superior Court proceeding was closed. A judgment in that matter was entered on Jnuary 17, 2014, after Jahi had left the state, without the presentation of any additional evidence.

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

By the fall of 2014, Jahi had shown signs of improving neurological function in many portions of her brain, including the motor cortex; the auditory cortex; the hypothalamus; the pituitary region; and the brainstem. These signs (described in detail in the Complaint and its attached exhibits) included intermittent purposeful movements, the ability of her nervous system to regulate her temperature and heart rate, reactions to the presence and voice of her mother, and the onset of menstruation. Having seen this change in her daughter's neurological condition, WINKFIELD filed a Writ of Error Corum Novis.

Once WINKFIELD filed this petition, Dr. Fischer was reappointed as the court's expert, and WINKFIELD's attorney attempted to contact Dr. Fischer, in order to arrange an opportunity for the court's expert to discuss Jahi's condition with the numerous physicians who had examined Jahi during the nine months which had elapsed since Dr. Fischer's pronouncement in December, 2013, that Jahi had suffered "irreversible cessation of function of the entire brain." (Dolan Declaration, ¶ 8.) When this attempt at communication failed, WINKFIELD filed a

motion to continue the proceedings, in order to allow Dr. Fischer "an opportunity for a frank and unscripted dialogue with the experts who are opining that the newly obtained evidence supports a finding that Jahi is not brain dead" (Exhibit D, p. 2). This proceeding was terminated without the presentation of any evidence regarding Jahi's neurological condition to the court, and without any ruling that Jahi at that time was "brain dead."

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

As Jahi continued to show neurological improvement. WINKFIELD, with the assistance of counsel, also sought the rescission through administrative means of Jahi's death certificate so that they could rejoin their family. As described in detail in the Complaint (¶¶ 121-189) and the Declaration of Christopher Dolan, which accompanied the Response to State Defendants' Motion to Dismiss, and was filed on April 15, Plaintiffs' counsel then began an administrative odyssey to try and have Jahi's death certificate corrected. These administrative steps were undertaken because during the time when the Writ of Error Corum Novis was being pursued, Alameda County Counsel, at one hearing in that matter, informed Plaintiffs' Counsel that there was nothing that the County could do to change the Death Certificate, as the Certificate had been already "sent to Sacramento." and therefore any relief relating to the Death Certificate would have to come from the California Department of Health ("DOH"). (Dolan Declaration, ¶ 9.)

On May 22, 2015, Plaintiffs' Counsel submitted an extensive written request that the DOH correct Jahi's death certificate (Complaint, ¶ 121). Defendant AGURTO rejected this request, indicating that Plaintiffs' request required the signature of Alameda County Coroner, Defendant MUNTU DAVIS (Complaint, ¶ 160). Plaintiffs then submitted their request to Defendant DAVIS at the Alameda County Medical Examiner's office on June 18, 2015

(Complaint, ¶ 173). As described in detail in the Complaint (¶¶ 169-182), Defendant DAVIS never responded to Plaintiffs' request, and when Plaintiffs' counsel contacted Defendant DAVIS's office they were directed to Defendant NEFOUSE's office (Complaint, ¶ 175).

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

Thus, having had their request rejected at both the state and county levels by named defendants in this action, Plaintiffs were forced to seek redress for the violation of their federal rights in this venue. Plaintiffs in this action request that this Court for the first time consider the overwhelming scientific evidence that for the past year and a half, Jahi has exhibited function of numerous portions of her brain and therefore is a living person, per § 7180.

No court has ever heard any evidence of Jahi's neurological function subsequent to the December 26, 2013, determination that Jahi then satisfied §7180's criteria for "brain death." No Defendant named in this complaint has ever been a party to any legal action involving either Plaintiff.

III. MOTION TO STRIKE

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

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

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

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

In the instant matter, Defendants urge this Court to consider many matters not contained in the challenged pleading and apparently expect this Court to wade through hundreds of pages of hearsay prior to making a determination of whether or not Plaintiffs have properly pled any of their causes of action. However, only materials which are a part of the complaint may be considered in a motion to dismiss. See *Branch v. Tunnell*, 14 F.3d 449, 453 (9th Cir. 1994) (overruled on other grounds by Galbraith v. Santa Clara, 307 F.3d 119 (9th Cir. 2002)); see also *Gibb v. Scott*, 958 F.2d 814, 816 (8th Cir. 1992) (any written or oral evidence in support of or in opposition to the pleading that provides some substantiation for and does not merely reiterate

what is said in the pleadings constituted matters outside the pleadings); *MacArthur v. San Juan*, 309 F.3d 1216, 1221 (10th Cir. 2002) (court should not look beyond the confines of the complaint itself in deciding motion to dismiss); *Schmitz v. Mars. Inc*., 261 F.Supp.2d 1226, 1229 (D. Or. 2003) (citing *Cooper v. Pickett*, 137 F.3d 616, 622 (9th Cir. 1997) for the proposition that a Court must limit its review of the contents of the complaint itself on a motion to dismiss).

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

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

IV. Legal Standard

Dismissal for failure to state a claim under Fed. R. Civ. P. 12(b)(6) is a disfavored remedy and may only be granted in extraordinary circumstances. *Broam v. Bogan*, 320 F.3d 1023 (9th Cir. 2003); *United States v. Redwood*, 640 F.2d 963,966 (9th Cir. 1981). On this motion, all allegations of material fact must be accepted as true and construed in the light most favorable to Plaintiffs. *Cahill v. Liberty Mut. Ins. Co*., 80 F.3d 336, 337-8 (9th Cir. 1996).

The Court's role at the 12(b)(6) stage is not to evaluate the strength or weakness of claims. *Jacobson v. Hughes Aircraft Co*., 105 F.3d 1288, 1292 (9th Cir. 1997). At this stage, all

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

If this Court finds the Complaint inadequate, it should "freely give leave to amend when there is no undue delay, bad faith, dilatory motive, undue prejudice to the opposing party by virtue of.... the amendment, [or] futility of the amendment." Fed.R.Civ.P. 15(a); *Foman v. Davis*, 371 U.S. 178, 182 (1962).

V. ARGUMENT

A. Plaintiffs Are Not Required To Exhaust State Court Procedures Prior To Filing This Suit, As They Seek Enforcement Of Their Rights Under The US Constitution And Federal Statutes

Plaintiffs are seeking redress of violations of their rights under the U.S. Constitution, the "supreme Law of the Land," U.S. Constitution, Article VI, Clause 2). Despite this fundamental principle of American democracy, County Defendants claim that this matter should be dismissed because "it is improper to bring [federal claims] in this Court when procedures under state law

are appropriate and adequate." (County Defendants' Amended Motion to Dismiss, hereinafter "MOTION," p. 16) This assertion is not correct. The rights plaintiff seeks to enforce here are Federal rights. Defendants have made it clear, in their demurrers to the state court Malpractice Action, that their position is that the December 2013 Order, and January 2014 Judgment ***bar* any relief** in that court. Their argument is plain and simple: put this back in state court where we can claim the matter is barred by the doctrine of collateral estopple; Jahi was pronounced dead by the Court over two years ago, and she will have no right, ever, to claim anything different. Defendants point to no specific process or procedure for any evidentiary hearing on the matter: i.e., no due process right to Jahi and her mother to show that a prong of Section 7180, of the California Welfare and Institutions Code, irreversibility, has changed. Jahi, through her mother, plead to this court to provide due process refused to her by the state statute, the state and county entities being sued and the state court. And even if such exhaustion were required, County Defendants cannot even specifically articulate what procedure is available to Plaintiffs at the state and county levels, much less to indicate what specific procedures should or must be followed in order to allow them access to the federal courts (see MOTION, p. 16, where four separate "administrative processes" are listed, without any indication of how they are required prior to filing this lawsuit or how these processes will provide redress to plaintiffs from the harm that they continue to suffer). In fact, Plaintiffs were forced to file this lawsuit only *after exhausting all administrative procedures* of which they could avail themselves at the county level.

Exhaustion of administrative remedies is required **only when Congress explicitly requires exhaustion** as a prerequisite to bringing an action in federal court. *McCarthy v. Madigan*, 503 U.S. 140, 144 (1991). Such an expression must be specific and clear. *Id.* Such

language reflects Congress' intent to require exhaustion in all cases and to eliminate any discretion to permit exceptions. See *Porter v. Nussle*, 534 U.S. 516 (2002); *Booth v. Churner*, 532 U.S. 731 (2001). No such requirement exists in the instant matter, since "administrative exhaustion" is in no manner implicated in the redress of any of the constitutional harms suffered by Plaintiffs, and none of the statutory causes of action explicitly requires such exhaustion.

B. The Complaint Is Not Barred By The Rooker-Feldman Doctrine

County Defendants, through the submission of hundreds of pages of exhibits, including at least one final state court judgment, apparently wish to frame the instant proceeding as an attempt by Plaintiffs to seek "federal review of administrative action by a state and a county and judicial action by a state court (MOTION, p. 3). Such a characterization is inaccurate. Plaintiffs, in the instant proceeding, are seeking to present to a court for the first time evidence of Jahi McMath's neurological function subsequent to the issuance of her facially invalid death certificate. Plaintiffs do not invite this Court to second-guess any state court decision, since not one piece of evidence which Plaintiffs wish to present to this Court has any bearing on the validity of the Superior Court's December, 2013, finding that at that time, Jahi McMath did not exhibit any signs of brain function and was not expected to exhibit such signs in the future.

As such, Plaintiffs do not complain to this Court of any injury caused by a state court judgment. They instead complain of ongoing injuries caused by the Defendants' refusal to recognize Jahi McMath's right to life. Plaintiffs' claims are not barred by *Rooker*: "where the federal plaintiff does not complain of a legal injury caused by a state court judgment, but rather of a legal injury caused by an adverse party, *Rooker–Feldman* does not bar jurisdiction." *Noel v. Hall* (9th Cir. 2003) 341 F.3d 1148, 1163.

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

The Supreme Court clarified this distinction in *Exxon Mobil Corp*., 544 U.S. at 293. In doing so, the Court stated the doctrine does not apply in federal cases that merely attack the legal conclusions of the state court without seeking relief from the state court judgment. *Id*. As to such cases, the Court noted, federal jurisdiction exists. See *id*. *Rooker* is applicable only to *de facto* appeals of state court decisions, when federal claims are "inextricably intertwined" with the state court's decision, such that adjudication of federal claims would undercut the state ruling or require the district court to interpret the application of state laws. *Noel v. Hall*, 341 F.3d 1148, 1158 (9th Cir. 2003). However, as Plaintiffs herein wish to present *only* evidence which did not exist in December, 2013, the instant proceedings *cannot be "inextricably intertwined"* with any prior state court judgment, since "an issue cannot be inextricably intertwined with a state court judgment if the plaintiff did not have a reasonable opportunity to raise the issue in state court proceedings. Absent such an opportunity, it is impossible to conclude that the issue was

inextricably intertwined with the state court judgment." *Long v. Shorebank Development Corp*. (7th Cir. 1999) 182 F.3d 548, 558. Plaintiffs obviously had no opportunity whatsoever to raise the issue of, or to present facts regarding, Jahi McMath's neurological function subsequent to March, 2014, at the December, 2013, hearing. As such, the present federal court proceedings are in no way "inextricably intertwined" with the December, 2013, state court judgment.

Plaintiffs in this action seek relief from no prior state court judgment and do not attack the legal conclusions of any such judgment. Plaintiffs merely are seeking the first judicial determination of the current state of Jahi McMath's cerebral function, the first judicial determination of her cerebral function in over two years. Plaintiffs do not seek to re-litigate any prior state court judgment. As such, *Rooker–Feldman* cannot bar Plaintiffs' claims , because "there is simply "no state court judgment from which" [Plaintiffs] seek relief." *R.R. Street & Co. Inc. v. Transport Ins. Co*. (9th Cir. 2011) 656 F.3d 966, 974 (*Citing Vacation Vill., Inc. v. Clark Cnty.*, 497 F.3d 902, 911 (9th Cir.2007). This court has subject matter jurisdiction to address every issue raised in the Complaint.

C. The *Younger* Abstention Doctrine Does Not Justify This Court's Abstention

County Defendants admit that "*Younger* abstention is appropriate only where important state interests would be affected by the federal action." (MOTION, p. 20, emphasis added.) Then they go on again to misstate the whole point of the instant action by stating that Plaintiffs "appear to be arguing that the California [determination of death] statute should be applied in a manner similar to the way the [corresponding] New Jersey statute is written" (MOTION, p. 21). This completely misses the point of this lawsuit. Plaintiffs hereby seek the restoration of Jahi McMath's most fundamental human right, her right to life. In order to obtain this restoration,

Plaintiffs seek judicial acknowledgement of the fact that Jahi, by California's definition of "brain death under § 7180, is not "brain dead."

Younger abstention is appropriate only in cases where state proceedings are ongoing. County Defendants then go on to point to at least one state proceeding which is not ongoing, in order to bolster their argument that *Younger* applies. Just to be clear: there is only one ongoing state court action, the medical malpractice action. The gravamen of that action concerns whether there was medical negligence which resulted in injury to Jahi. That is not the gravamen of this complaint. The State Court complaint is being litigated by lawyers unrelated to Jahi's lawyers in this action. This action literally deals with the life or death of Jahi: is she alive or not. The medical negligence case does not involve any of the defendants to this action. That case seeks money damages against private parties for their tortious acts. The malpractice action has been before the Alameda Superior Court for over a year. Yet as of now: no evidence regarding Jahi's brain function has been presented to the court; demurrers are still pending in the malpractice case; no answer has been filed in that case; and thus, the matter is not even at issue. Procedurally the malpractice action is at exactly the same stage as this case. It is almost certain that the malpractice case, which raises multiple complicated factual and standard of care issues which do not in any way apply to this action will not be decided within a year. This case, involving the constitutional evaluation of Jahi's personhood, should and could proceed with an expedited procedure to be resolved in six months. Plaintiff has, in her complaint, produced reams of evidence, signed declarations, and has proffered the foremost brain death expert in the world, Dr. Calixto Machado, from Cuba, for the defendants to depose at the outset of the case so that it the factual issue of life or death could be evaluated to determine if the case was frivolous or not. It was Defendants who opposed this idea instead seeking to bar that analysis from ever occurring.

Furthermore, the instant matter does not implicate "important state interests" in the manner required for *Younger* abstention to be justified. *Younger* applies "only if the federal action would affect important state interests that are vital to the operation of state government." *Polykoff v. Collins,* 816 F.2d 1326, 1332 (internal quotation marks omitted). In *AmerisourceBergen Corp. v. Roden*, 495 F3d 1143, the Ninth Circuit found that *Younger* did not apply because, *inter alia,* no important state interest was implicated. ***Id.*** "The second threshold element of Younger is satisfied when "the State's interests in the [ongoing] proceeding are so important that exercise of the federal judicial power would disregard the comity between the States and the National Government."" *Id.* at 1149, citing *Pennzoil Co. v. Texaco, Inc*., 481 U.S. 1, 11, 107 S.Ct. 1519, 95 L.Ed.2d 1 (1987).

No such overwhelming state interest is implicated here, since this action, at its essence, is merely a request for this Court to review for the first time new evidence of Jahi McMath's current state of brain activity. The state issue which might be implicated is damages, a contingent issue at best. Plaintiff in that case must first prove there was medical negligence, then prove that it cause harm and then, and only then, would the issue of damages be put before a jury. Since this matter has never been taken up by any California state court, and since the County Defendants have failed to state the manner in which they reviewed this material, there is no possibility that doing so would in any manner "disregard the comity," *id.*, between the federal and state government.

Finally, *Younger* abstention is inappropriate because the litigation of this action will not in any manner "enjoin, or have the practical effect of enjoining, ongoing state court proceedings." *AmerisourceBergen,* 495 F3d. at 1149. Plaintiffs have not named *a single defendant* in the state court malpractice issue as defendant in this matter, so issues of claim or

issue preclusion should not be implicated. However, even if they were, the Ninth Circuit has made clear that the potential for claim preclusion or issue preclusion is insufficient as a matter of law to satisfy the requirements for Younger abstention. See *Green v. City of Tucson*, 255 F.3d 1086, 1097 (9th Cir. 2001) (en banc), overruled on other grounds by *Gilbertson v. Albright*, 381 F.3d 965, 968-69 (9th Cir. 2004).

Younger abstention is not warranted here, as two of the three prongs cited by County Defendants do not apply.

D. Abstention Is Not Justified Under The *Pullman*, *Colorado River*, Or *Burford* Abstention Doctrines

County Defendants, in less than one page, seek to implicate three other Abstention Doctrines, seeking dismissal "under these various abstention doctrines" (MOTION, p. 22) without specifically explaining how a single one of the doctrines is implicated in this matter (and devoting only seven sentences to the analysis of these three complicated constitutional abstention doctrines.

1. The Pullman Doctrine Does Not Apply Here

Pullman abstention should rarely be applied, to "give due respect to a suitor's choice of a federal forum for the hearing and decision of his federal constitutional claims," *Zwickler v. Koota*, 389 U.S. 241, 248 (1967). Abstention under Pullman is appropriate only if each of the following three factors is present: "(1) the case touches on a sensitive area of social policy upon which the federal courts ought not enter unless no alternative to its adjudication is open, (2) constitutional adjudication plainly can be avoided if a definite ruling on the state issue would terminate the controversy, and (3) [the proper resolution of] the possible determinative issue of state law is uncertain." Thus, the absence of any one of these three factors is sufficient to prevent

the application of Pullman abstention. *Porter v. Jones*, 319 F.3d 483, 492 (9th Cir. 2003); see also *Richardson v. Koshiba*, 693 F.2d 911, 915 (9th Cir. 1982).

The central issue at question in this case – "does Jahi McMath currently exhibit any function of any portion of her brain" – is so different from the myriad questions (duty of care, standard of care, breach of duty, damages, apportionment of damages, comparative negligence, etc.) which ultimately may become at issue (if the defendants ever file an answer) in the state court medical malpractice case. It is clear that the malpractice case may well be resolved without that court's ever examining the question of Jahi's current state of brain function – if the state court finds no negligence on the part of the various defendants named in that case, there will be no reason to address the issue of damages, and thus Jahi's current condition will be completely irrelevant to the state proceedings. Yet Jahi's life will still have meaning even if she does not get an award of damages. She will be able to return to California and have all manner of benefits allowed to each and every other citizen of the United States and the State of California. Thus, the second and third prongs of the Ninth Circuits holding in *Pullman* clearly do not apply here, and *Pullman* Abstention is not warranted.

2. The Colorado River Doctrine Does Not Apply Here

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

court would clearly serve an important countervailing interest." *Id.* Abstention under *Colorado River* is appropriate in only three general circumstances:

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

Id. at 814-817.

The instant matter has no relation to any state criminal proceedings, does not present any federal constitutional issue which may be mooted or presented in a different posture by a state court determination of pertinent state law, and does not present any difficult and transcendent questions of state law. As such, *Colorado River* abstention does not apply. Nevertheless, Defendants request that this Court abstain from deciding the instant matter under *Colorado River* without indicating how even one of the three requirements set by the *Colorado River* Court for abstention applies to the instant matter. As the principal factual question at issue in the instant matter is whether or not Jahi McMath currently exhibits some degree of brain function, it is clear that none of the *Colorado River* Court's three criteria for invoking the Doctrine is met in the instant matter.

Furthermore, it is not at all clear that in fact the "Second Superior Court Proceeding" (Motion, p. 11) ever will decide the issue of Jahi's current level of brain activity. This medical malpractice case was filed over a year ago, and as of this date no testimony regarding Jahi's

brain function has been taken. The medical malpractice case is still at the demurrer stage (Motion, p. 5), and no hearing is at this time scheduled to address the issue of Jahi's current brain function. Most medical malpractice cases settle without going to trial – in that event, it is likely that no question of fact will be decided by the Superior Court having jurisdiction over the medical malpractice action. Additionally, the defendants in that action (none of whom were named in this matter) vigorously deny that they are liable in any manner for the injuries that Jahi sustained, claiming that they were not negligent in her care. Finally, it is possible that the Superior Court will bifurcate its proceedings, so that the question of liability is tried separately from and prior to the issue of damages (in fact, such a motion was before the Superior Court until April 13, 2016, as reflected in Exhibit E to this response, when it was withdrawn after new parties were named so that they could have an opportunity to participate in the motion practice). If this is the case, the question of Jahi's brain function will not be addressed by the Superior Court until after the issue of liability has been completely litigated in that venue.

If the Superior Court rules in favor of the malpractice defendants' demurrers for a second time, or if the parties to the malpractice suit come to a settlement of the claims, or if the malpractice case goes to a jury (likely years from now) which finds that the defendants in that case were not negligent, the issue of Jahi's current state of brain function – the central question of the instant proceedings – almost certainly will never be resolved by the Superior Court. In that event, a stay in the current proceedings will only ensure that this Court then again will be faced with precisely the same question of fact – Is Jahi McMath alive, under California's Uniform Determination of Death Act - after Jahi and her mother will have endured more years of exile from their home. In this case, there is no "exceptional circumstance" or "important

countervailing interest" which justifies "order[ing] to repair to the state court" for the redress of their federal civil rights claims. *Id.*

3. The Burford Abstention Doctrine Does Not Apply Here

Although County Defendants ask this Court to take the extraordinary step of dismissing this case on *Burford* "administrative abstention" grounds, they rely only on sweeping generalities about federalism and comity. Their motion fails entirely to confront--let alone overcome--the strict limits on abstention articulated by the Supreme Court. For example, in *McNeese v. Bd. of Educ.*, 373 U.S. 668, 674 & n.6 (1963), the Court held that Burford abstention was inappropriate in a constitutional challenge to a state's segregated school system, despite the possibility of interference with state administrative procedures. "[W]herever the Federal courts sit," the Court announced, "rights under the Federal Constitution are always a proper subject for adjudication, and . . . we have not the right to decline the exercise of that jurisdiction simply because the rights asserted may be adjudicated in some other forum." *Id.* Similarly, in *Zablocki v. Redhail*, 434 U.S. 374 (1978), the Court rejected *Burford* abstention in a challenge to state marriage licensing requirements, declaring that there is "no doctrine requiring abstention merely because resolution of a federal question may result in the overturning of a state policy." *Id.* at 379 n.5.

More recently, in *New Orleans Pub. Serv., Inc. v. Council of City of New Orleans*, 491 U.S. 350, 361 (1989), the Court provided a distillation of "the principle now commonly referred to as the *Burford* doctrine." *Burford*, the Court explained, applies "[w]here timely and adequate state-court review is available" and "a federal court sitting in equity" is asked "to interfere with the proceedings or orders of state administrative agencies." *Id.* In such situations, abstention is appropriate only where there are difficult state-law questions whose importance transcends the

particular case or where federal review would disrupt efforts to establish a coherent state policy, and then only if state administrative law material is "entangled in a skein" of the federal suit. *Id.* at 361.

Plaintiffs in this matter do not seek to interfere with the proceedings of any state administrative agency. They do not seek to disrupt California's efforts to establish a coherent state policy. They primarily seek this Court to review, for the first time, the overwhelming evidence that Jahi McMath's brain is functioning and to issue a declaration of its findings.

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

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

The RLUPA defines "institution" as "any facility or institution … which … provides services on behalf of any State or political subdivision of a State and which is … providing skilled nursing … care." 42 U.S.C. § 1997 "Definitions." Plaintiffs are informed and believe that CHO regularly provides over two million dollars in medical services per year on behalf of the State of California and Alameda County, through the California Children's Services Program, thereby satisfying the requirement of providing services on behalf of the State or a political subdivision thereof. (In fact, but for Jahi's current miscategorization as "brain dead," Plaintiffs are informed and believe that Jahi herself would qualify for the provision of medical services under the Children's Services Program. Plaintiffs are further informed and believe that CHO, at

the time of Jahi's hospitalization provided "skilled nursing care." Further, the Complaint clearly states that Jahi's "Certificate of Death [] was issued at a time when JAHI was institutionalized at and was confined in CH[O]" (¶ 283). As such, it is clear that the Complaint, on its face, alleges that at that time, CHO was an institution, in the context of pleading a violation of the RLUPA. As such, again reading the pleading liberally and making minimal inferences in favor of Plaintiffs, the Complaint, on its face, makes adequate allegations to invoke the protections of the RLUPA. In the event that this Court finds the inferences requested by Plaintiffs to be unreasonable, Plaintiffs request an opportunity to amend the Complaint.

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

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

which either "receives federal financial assistance (for the Rehabilitation Act claim), or is a public entity (for the ADA claim)" (Motion, p. 9). As such, the Complaint, read in the light required at the 12(b)(6) stage, does cite the four elements of a claim under the Rehabilitation Act or the ADA. In the event that this Court finds the two inferences referred to above are unreasonable to make, the proper remedy is to allow Plaintiffs to amend their complaint, in order specifically to state the four elements listed by Defendants.

VI. CONCLUSION

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

Dated: April 18, 2016

THE DOLAN LAW FIRM

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