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NORTHERN DISTRICT OF CALIFORNIA
OAKLAND

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

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. C13-5993 SBA

OPPOSITION TO PROPOSED TEMPORARY RESTRAINING ORDER AND INJUNCTIVE RELIEF

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INTRODUCTION

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

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

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

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

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

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

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

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

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

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

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

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

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

PROCEDURAL HISTORY & STATEMENT OF FACTS

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

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

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

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

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

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

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

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

LEGAL ARGUMENT

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

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

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

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

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

I. Ms. Winkfield Has Not Suffered Any Violation of Her Procedural Due Process Rights

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

A. California's statutes have been followed and that Ms. McMath is dead.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Here, Children's Hospital provided Ms. Winkfield and the other family/next of kin with well in excess of the statutorily required period of accommodation. As the Division Chief of the Critical Care Division, Dr. Sharon Williams, stated under oath, Children's Hospital provided the family and next of kin "with far more time than the 'reasonably brief period of accommodation' for the family to gather at Ms. McMath's bedside called for by the CHO Guidelines and

California Health & Safety Code section 1254.4." (See Exh. 10, p. 51, lines 6-11) Dr. Williams, who signed her declaration some eight days after hospital staff informed Ms. McMath's family and next of kin of her death, noted that the eight-day time period was "far in excess of the 2-3 days that Children's [Hospital] has considered to be reasonable accommodation in all brain death cases in the past 10 years." (*Id.*) Ms. Winkfield never objected to Dr. Williams' testimony during the Superior Court proceedings.

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

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

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

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

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 As to the second element of res judicata, California courts determine whether the "same"
27
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cause of action is involved in the two actions by focusing on whether the same "primary right" is at stake. *Eichman v. Fotomat Corp.*, 147 Cal. App. 3d 1170, 1174 (1983). "[I]f two actions involve the same injury to the plaintiff and the same wrong by the defendant then the same primary right is at stake even if in the second suit the plaintiff pleads different theories of recovery, seeks different forms of relief and/or adds new facts supporting recovery." *Id.* "[T]he harm suffered" is "the significant factor" in determining the primary right. *Craig v. Cnty. of Los Angeles*, 221 Cal. App. 3d 1294, 1301 (1990).

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

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

Therefore, the state court's denial of Ms. Winkfield's prior request for injunctive relief amounts to a final decision on the merits that is subject to res judicata in other California state courts. And because federal courts give preclusive effect to a state court judgment whenever the courts of that state would do so, this Court should also find that Plaintiff is barred from raising these constitutional challenges here.

III. There Is No Fundamental Right or First Amendment Right Conferring Upon a Parent Control Over Removal of Ventilation From a Brain-Dead Patient

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

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

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

Here, the gravamen of Ms. Winkfield's constitutional claims is presumably that under the Due Process Clause and/or First Amendment, a parent, not a state legislature, should define death. And similarly, a parent's *beliefs*, not accepted medical practices, should *determine* when death has occurred. Thus, goes Ms. Winkfield's constitutional reasoning, a parent—not a hospital—has a fundamental right to decide when her deceased child will be taken off of a ventilator.

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

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

At bottom, the governmental action that Ms. Winkfield challenges in claiming a fundamental right is the State of California's enactment of the definition of a dead person under Health and Safety Code section 7180. Section 7180 provides that "[a]n individual who has sustained . . . irreversible cessation of all functions of the entire brain, including the brain stem, is dead."[3] § 7180(a). Section 7180 also states that "[a] determination of death must be made in accordance with accepted medical standards." *Id.* And section 7181 requires "independent confirmation by another physician" when a determination of brain death has been made. § 7181.

Section 7180 is found in "Article 1. Uniform Determination of Death Act" in California's Health and Safety Code. As Witkin states, the Uniform Determination of Death Act ("UDDA") upon which California's statute is modeled (and similarly named) "was approved by the National Conference of Commissioners on Uniform State Laws in 1980." 14 Witkin Sum. Cal. Law Wills

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

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

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

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

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

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

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

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

Id. at 879.

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

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

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

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

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

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
5 Health and Safety Code section 1254.4 does not target religious practices nor selectively
6 impose burdens on religiously motivated conduct. *See Combs*, 540 F.3d at 242. Instead, it vests
7 hospitals, not families or next of kin, with the discretion to decide what are "reasonable"
8 accommodations to allow the family and next of kin to gather at the bedside of a deceased, and to
9 make reasonable accommodations for those who voice a request for "any special religious or
10 cultural practices" related to paying last respects. § 1254.4(c)(2). Section 1254.4 also *guides* the
11 exercise of that discretion, providing that hospitals "shall consider the needs of other patients and
12 prospective patients in urgent need of care" in determining what is "reasonable," § 1254.4(d),
13 thereby implicitly recognizing that hospitals are in the best position to make such determinations.
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
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cardiopulmonary support. The First Amendment protects Ms. Winkfield's freedom to believe that her child is not dead. However, the First Amendment does not permit Ms. Winkfield to act on her beliefs by compelling Children's Hospital to disregard a valid state law that serves a legitimate state objective. Nor does it to allow her to practice religious beliefs in contradiction to Children's Hospital policies and expertise. There is no such First Amendment right; so there is zero probability of success on the merits.

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

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

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

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