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UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF IDAHO

NICHOLE JAMES and HEMENE JAMES, wife and husband, Plaintiffs, vs. KOOTENAI COUNTY, a political subdivision of the State of Idaho, KOOTENAI COUNTY CORONER'S OFFICE, a department of Kootenai County, and WARREN KEENE, in his individual and official capacity as KOOTENAI COUNTY CORONER, Defendants.	Case No. 2:19-cv-00460-BLW **DEFENDANTS' REPLY MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT** **[DKT. 35]**

Defendants, by and through their attorneys of record, Peter C. Erbland and Katharine B. Brereton of Lake City Law Group PLLC, hereby submit this Reply Memorandum in Support of Motion for Summary Judgment pursuant to Federal Rule of Civil Procedure 56.

I. INTRODUCTION

The analysis and arguments presented in the previously filed Supporting Memorandum set forth the grounds on which this Court may grant summary judgment in Defendants' favor, and this Reply incorporates those arguments and provides further specific analysis for the Court's

consideration. Though Plaintiffs bear the ultimate burden of proof at trial, they have skirted significant legal issues and have failed to prove there is a genuine issue of material fact that necessitates a trial. Plaintiffs' case is built on unreasonable speculation and conclusions that are unsupported by actual admissible proof and relies upon incomplete and flawed interpretations of the law. This Court should not be persuaded by such arguments.

II. ARGUMENT

A. There Is No Genuine Issue Of Material Fact And This Case May Be Decided As A Matter Of Law.

Summary judgment is appropriate where a party can show that, as to any claim or defense, "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). Defendants have addressed Plaintiffs' Statement of Disputed Facts (Dkt. 39) in a separately filed Response. That Response is incorporated herein by reference.

In sum, Plaintiffs have not supported their assertion that there are facts which are genuinely disputed in accordance with Fed. R. Civ. P. 56(c) and (e). The facts Plaintiffs claim are disputed or mischaracterized are not facts which are material, amount to disputes which do not affect the outcome of this suit, are merely Plaintiffs' competing characterization of the evidence, and are insufficiently supported. Because Plaintiffs only submitted a Statement of Disputed Facts, and such disputes do not amount to genuine issues of material facts, Defendants' Statement of Undisputed Facts can be considered undisputed. Fed. R. Civ. P. 56(e). There are no genuine issues of the material facts, and as will demonstrated herein, Defendants are entitled to judgment as a matter of law.

B. Plaintiffs Have Failed To Establish A Violation Of Their First Amendment Rights.

1. Plaintiffs' Arguments that Idaho Code §§ 19-4301 and 19-4301B Are Not Facially Neutral and Generally Applicable Are Meritless.

a. Plaintiffs' Arguments Were Not Asserted in their Complaint and May Not Be Raised for the First Time in their Response Brief.

For the first time in their Response to Defendants' Motion for Summary Judgment, Plaintiffs allege that Idaho Code §§ 19-4301 and 19-4301B are not facially neutral and generally applicable. *See* Dkt. 1, Dkt. 35-1 at 6-7, Dkt. 37 at 4-9. Under controlling Ninth Circuit precedent, it is prejudicial to a defendant to allow a plaintiff to assert a new theory of liability at the summary judgment stage and after the close of discovery. *Coleman v. Quaker Oats Co*., 232 F.3d 1271, 1292 (9th Cir. 2000). Plaintiffs' Complaint should "give fair notice and state the elements of the claim plainly and succinctly." *Lynn v. Sheet Metal Workers' Int'l Asso.*, 804 F.2d 1472, 1482 (9th Cir. 1986) (internal quotations and citations omitted). Pursuant to Rule 8(a)(2), the complaint should not only provide fair notice of the plaintiff's claim, but also the grounds upon which the claim rests. *Pickern v. Pier 1 Imps. (U.S.), Inc.*, 457 F.3d 963, 968 (9th Cir. 2006).

Nowhere in Plaintiffs' Complaint are there any allegations that the laws which authorize a coroner to investigate deaths and perform an autopsy are not facially neutral and generally applicable, nor did Plaintiffs claim that Defendant Keene exercised his discretion in a manner that infringed upon Plaintiffs' religious beliefs. The lack of allegations providing Defendants fair notice that Plaintiffs would proceed under a theory that Defendants' conduct must be justified by a compelling interest and narrowly tailored to advance that interest is prejudicial. *Coleman*, 232 F.3d at 1292. Plaintiffs' Complaint merely alleged that,

> The wrongful conduct of Defendants…constitute violations under the color of state law and 42 U.S.C. § 1983, in that with deliberate and callous indifference to a *known right*, Defendants deprived the Jameses of their rights, privileges and immunities secured by the Constitution of the United States. The Jameses are entitled to practice their religious beliefs and *refuse an autopsy* based upon those beliefs. The acts and omissions of Defendants in *refusing to provide the Jameses with Olivia's body* for burial trampled upon the Jameses' religious freedoms and violated the requirements of the 1st and 14th Amendment rights held by the Jameses…

Dkt. 1 at 9-10. The allegations simply put Defendants on notice that Plaintiffs believed clearly established First Amendment law protected a right to refuse an autopsy and a right to have Olivia's body returned to them in a specific timeframe.

The Complaint guided Defendants' discovery and its determination of what evidence was needed to properly defend against the claims asserted. *See* 232 F.3d at 1292. The evidence needed to demonstrate that Defendants' conduct was justified by a compelling interest and narrowly tailored to advance that interest is not going to be the same as the evidence needed when such conduct is subject to only rational basis review. Likewise, because of Plaintiffs' surprise theory of liability at the summary judgment stage, Defendants are now required to also address this basis in the reply, in addition to the other grounds in Plaintiffs' Response that were responsive to its Supporting Memorandum. Plaintiff should be precluded from raising this new theory of liability in its response briefing.

b. Strict Scrutiny Does Not Apply.

Plaintiffs' claim that the laws which authorize Defendant Keene to investigate deaths and perform an autopsy are not facially neutral and generally applicable, that Defendant Keene exercised his discretion in a manner that infringed upon Plaintiffs' religious beliefs, and that there was no compelling reason to insist upon an autopsy. Dkt. 37 at 4-9.

Plaintiffs' argument that strict scrutiny applies is legally flawed, as is Plaintiffs' reliance on *Fulton v. City of Philadelphia*, 141 S. Ct. 1868 (2021). *Fulton* was decided in June 2021, three years after Olivia's death, and therefore was not clearly established law in 2018.[1] Plaintiffs'

[1] Reliance upon *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n*, 138 S. Ct. 1719 (2018), is similarly misplaced because it was decided on June 4, 2018, and cannot be considered part of the clearly established law for purposes of this case.

approach in cherry-picking the legal authority relied upon by the *Fulton* Court and their misunderstanding of the law is of no help to their claims. Plaintiffs' arguments are based on their conclusion that when any amount of discretion is allowed to the government, then the resulting conduct must be justified by a compelling government interest and narrowly tailored. First Amendment jurisprudence does not support such a conclusion.

At bottom, merely because a law involves some discretion or provides for an exemption does not subject it to strict scrutiny. *Stormans, Inc. v. Wiesman*, 794 F.3d 1064, 1082 (9th Cir. 2015) ("*Stormans II*"); *see Stormans, Inc. v. Selecky*, 586 F.3d 1137 (9th Cir. 2009) ("*Stormans I*"). Idaho Code §§ 19-4301 and 19-4301B do not involve individualized exemptions that take into consideration another party's conduct. *Cf. Thomas v. Review Bd. of Ind. Emp't Sec. Div.*, 450 U.S. 707 (1981) (good cause standard applicable to eligibility for unemployment benefits created a mechanism for individualized exemptions); *Sherbert v. Verner*, 374 U.S. 398 (1963) (good cause standard allowed for individualized government assessment of the reasons for the relevant conduct); *Hobbie v. Unemp't Appeals Comm'n*, 480 U.S. 136 (1987) (state's denial of benefits to a claimant whose employment was terminated because she refused to work on Saturday, as required by her religion, was unconstitutional).

Contrary to Plaintiffs' contention that Idaho Code § 19-4301 provides the coroner with "wide discretion," the statute does not in that it *requires* the coroner to investigate certain deaths. Likewise, the only consideration for the coroner when deciding whether to order an autopsy is "if it is deemed necessary accurately and scientifically to determine the cause of death." I.C. § 19-4301B. The discretion exercised by the coroner in deciding whether to order an autopsy has been narrowly limited by the legislature. In reality, the law does not afford the coroner with "unfettered discretion that could lead to religious discrimination" because the discretion to order an autopsy is

tied to particularized criteria. *Stormans II*, 794 F.3d at 1081-82. Furthermore, when deciding whether to order an autopsy, such discretion does not take into consideration whether the next of kin, or anyone else, thinks an autopsy is warranted or not. In not providing a mechanism to account for the next of kin's agreement with or objection to an autopsy, the law plainly does not involve individualized exemptions. The provision here is decidedly distinct from other cases in which a law invited individualized exemptions that considered the underlying circumstances of a particular case involving another party and involved a purely discretionary standard like "good cause". *See Thomas*, 450 U.S. 707; *Sherbert*, 374 U.S. 398.

Nothing in the text of Idaho Code §§ 19-4301 and 19-4301B supports the conclusion that the object of either statute is to prohibit the exercise of religion. *Smith*, 494 U.S. at 878. Even though a particular group, motivated by religion, may be burdened disproportionately by § 19-4301B, that does not undermine the law's neutrality, nor does it offend the Free Exercise clause. *Stormans II*, 794 F.3d at 1077. Moreover, Plaintiffs have presented no evidence that in exercising the discretion to order an autopsy, Defendant Keene afforded an exemption for secular reasons but not for religious reasons. *Id*. at 1082. Section 19-4301B is a law governing a general practice and nothing in the text imposes a burden only on conduct motivated by a person's religious beliefs. *Stormans I*, 586 F.3d at 1128, 1134.

Like the plaintiffs in *Bowen v. Roy* and *Smith*, Plaintiffs here actually sought an exemption from the applicability of Idaho Code § 19-4301B, and apparently, § 19-4301. *See* 476 U.S. 693, 695-696, 703 (1986) (Appellees sought government benefits and to be excused from requirement to comply with condition to provide social security number); *Employment Div., Dep't of Human Resources of Oregon v. Smith*, 494 U.S. 872, 875 (1990) (Respondents sought religious exemption for sacramental use of peyote). However, the Supreme Court does not interpret the First

Amendment to "require the Government itself to behave in ways that the individual believes will further his or her spiritual development or that of his or her family." *Bowen*, 476 U.S. at 699. The government's refusal to grant a special exemption from a generally applicable law does not violate the Free Exercise clause. *Smith*, 494 U.S. at 883-84, 890; *Bowen*, 476 U.S. at 712; *Stormans I*, 586 F.3d at 1128. Plaintiffs also presume that they had the right to dictate the conduct of Defendant Keene. *Bowen*, 476 U.S. at 699-700. The Free Exercise clause, however, does not provide for such a right. *Id*. The burden on religious beliefs imposed by § 19-4301B is not the object of the law, but merely an incidental effect, and such burden does not offend the First Amendment. *Smith*, 494 U.S. at 878.

Plaintiffs claim that the record demonstrates that Defendant Keene, in the exercise of his discretion, "ordered an autopsy after he was advised that delaying burial violated the Plaintiffs' religious customs" and that this supports a finding that Defendant Keene violated Plaintiffs' First Amendment Rights. Dkt. 37 at 8. Plaintiffs invite the Court to speculate that Defendant Keene's motive for ordering the autopsy was something other than what he stated in June 2018 and at his deposition in 2021. Such speculation is unwarranted and wholly unsupported by the record.

The evidence demonstrates that Defendant Keene insisted upon an autopsy to carry out his duties as the coroner to accurately and scientifically determine the cause of death. Defendant Keene had implemented a policy to have an autopsy performed in all cases of fatalities from car accidents. Dkt. 35-2, Defendants' SUMF, ¶ 12. In his Affidavit submitted to the District Court of Kootenai County in June 2018, Defendant Keene stated that it was his "professional medical opinion and coroner opinion that an autopsy [was] warranted" for the unattended death, and that he had ordered an autopsy based on his finding that it was necessary to accurately and scientifically determine the cause of death. Dkt. 35-3, 35-5, Brereton Decl., Ex. N, ¶¶ 4, 9-10. Defendant Keene

explained to the court why he had deemed it necessary to have an autopsy performed to determine the cause of Olivia's death: the crash occurred at a high rate of speed with no braking, he did not know if there was an unknown medical event, if Olivia had been injured someplace else and succumbed to those injuries, if a side effect from a medication was a factor, or if other chemicals were involved. *Id*; Dkt. 35-3, 35-4, Ex. C, 25:16-26-5, 127:17-131:6. Defendant Keene further stated that he would find it unacceptable to set a precedent in which "a family member of a decedent would be able to dictate who my office may or may not autopsy." *Id*. at ¶ 13. Defendant Keene explained his standpoint: "There are a myriad of instances in which an autopsy can reveal a cause of death that is not otherwise apparent, and in some instances, may lead to discovery of the commission of a crime." *Id*.

As set forth above, Plaintiffs have not offered any admissible evidence to dispute Defendants' Statement of Undisputed Material Facts, and therefore those facts may be considered uncontroverted. The record reflects that Defendant Keene did not order an autopsy *after* he was advised that delaying burial violated Plaintiffs' religious customs. Dkt. 37 at 8. Specifically, Plaintiffs do not dispute that Ms. Porter informed Plaintiff Nicky James at the accident scene on June 1, 2018, that an autopsy would be conducted because Olivia had died in a motor vehicle accident; that Ms. Porter confirmed with Defendant Keene the need for an autopsy and sent a request to the medical examiner's office on June 1; that Plaintiffs knew on the morning of June 2, 2018, that an autopsy was scheduled to be performed; that Plaintiff Nicky James attempted to contact the Coroner's office on June 2 to express her objections to an autopsy; and that *after* Defendant Keene spoke with Mr. SiJohn, he made the decision to *delay the autopsy*. Dkt. 35-2, Defendants' SUMF, ¶¶ 13, 17, 19, 20; Dkt. 35-3, 35-5, Brereton Decl., Ex. N. ¶¶ 6, 7.

It is disingenuous for Plaintiffs to claim on the one hand that they attempted to contact the Coroner's office on Saturday, June 2, 2018, to inform the coroner of their religious objections to an autopsy, which unequivocally demonstrates their knowledge that the Coroner's office had already ordered an autopsy, and then on the other hand represent that Defendant Keene only decided to order an autopsy after he spoke with Mr. SiJohn on Sunday, June 3, 2018. *See* Dkt. 35-2, Defendants' SUMF, ¶ 19. The undisputed record reflects that the decision to order an autopsy had nothing to do with any objection made by Plaintiffs; it had already been determined that an autopsy was necessary before Defendant Keene ever spoke with Mr. SiJohn on June 3, 2018. Plaintiffs conveniently disregard that after Defendant Keene spoke with Mr. SiJohn, he made the decision to have the autopsy delayed. Dkt. 35-2, Defendants' SUMF, ¶ 20; Dkt. 35-3, 35-5, Brereton Decl., Ex. N, ¶ 7.

Plaintiffs have presented no admissible evidence that the decision to order an autopsy, or to go forward with the autopsy after Defendant Keene's conversation with Mr. SiJohn had any nexus at all to Plaintiffs' religious beliefs or that Defendant Keene's motive for insisting on an autopsy had anything to do with Plaintiffs' religious beliefs. Rather, the record indisputably demonstrates that the request for an autopsy and Defendant Keene's insistence upon an autopsy was based on his belief that there was insufficient evidence upon which he could determine the cause of death. Dkt. 35-2, Defendants' SUMF, ¶¶ 10, 12-13, 17, 20, 25; Dkt. 35-3, 35-5, Brereton Decl., Ex. N, ¶¶ 3-4, 9-10. Plaintiffs' self-serving and conclusory arguments fail to meet their burden on summary judgment. *FTC v. Publ'g Clearing House, Inc.*, 104 F.3d 1168, 1171 (9th Cir. 1997); *see also Carmen v. S.F. Unified Sch. Dist.*, 237 F.3d 1026, 1028 (9th Cir. 2001) ("A plaintiff's belief that a defendant acted from an unlawful motive, without evidence supporting that

belief, is no more than speculation or unfounded accusation about whether the defendant really did act from an unlawful motive.").

Finally, Plaintiffs' reliance upon the testimony of Ms. Porter[2] to support their argument that Defendant Keene lacked a "compelling reason" to insist upon an autopsy is misguided. Ms. Porter is not the elected coroner; she is a deputy coroner and does not have the equivalent training and experience of Dr. Keene, a board-certified physician in family medicine and board-certified by the American Board of Medicolegal Death Investigators. Dkt. 35-2, Defendants' SUMF, ¶ 4; Dkt. 35-3, 35-4, Brereton Decl., Ex. D, 9:10-18. Prior to joining the Coroner's office as a deputy coroner, Ms. Porter was employed as a Certified Nursing Assistant, and in June 2018 she was still relatively new to the Coroner's office and was being supervised by another deputy coroner. Dkt. 35-3, 35-4, Brereton Decl., Ex. C, 27:19-28:1, 69:9-70:7; Ex. D, 9:10-18.

For purposes of determining that the manner and cause of death were apparent, Ms. Porter is not a competent witness. Fed. R. Evid. 701. Moreover, Defendant Keene, as the elected coroner, has a statutory duty to determine the cause of death, unlike the deputy coroners who are employed in the Coroner's office. Plaintiffs offer no admissible evidence to support their conclusion that the manner and cause of death were apparent at the scene. *Publ'g Clearing House*, 104 F.3d at 1171; *Samuels v. Doctors Hosp. Inc*., 588 F.2d 485, 486 n.2 (1979) ("The requirement of Rule 56(e) that affidavit testimony be competent and admissible evidence applies with equal force to deposition testimony.").

[2] At Ms. Porter's deposition she did not testify that Olivia's death was apparent at the scene. The cited testimony by Plaintiffs is Ms. Porter's response to questions regarding whether it appeared that Olivia's body had suffered trauma and what observations Ms. Porter had made of the accident scene.

Since strict scrutiny does not apply, Defendant Keene's decision to insist on an autopsy does not have be to be justified by a compelling reason, only a legitimate governmental purpose. *Stormans II*, 794 F.3d at 1084. Under this standard, it is Plaintiffs who "have the burden to negate every conceivable basis which might support" Defendant Keene's decision, and they have failed to meet that burden. *Id* (internal quotations and citations omitted). Under the applicable standard of rational basis review, no evidence supports a finding that Defendant Keene's conduct violated the First Amendment rights of Plaintiffs.

2. Any Alleged Violation of Idaho Code §§ 19-4301 *et seq*. Does Not Give Rise to a Claim Pursuant to 42 U.S.C. § 1983.

Plaintiffs dispute that violations of state law cannot serve as the basis for a claim pursuant 42 U.S.C. § 1983, relying on *Hallstrom v. City of Garden City*, 991 F.2d 1473, 1482 n. 22 (9th Cir. 1993). Dkt. 37 at 9. Plaintiffs' interpretation of *Hallstrom* is legally unsound. In a footnote, the Ninth Circuit stated, "This court has held that 'a violation of state…law can serve as the basis of a Section 1983 action where the violation of state law causes the deprivation of rights protected by the Constitution.'" 991 F.2d at 1482 n. 22 (quoting *Draper v. Coombs*, 792 F.2d 915, 921 (9th Cir. 1986) (cleaned up)).

The Ninth Circuit later clarified *Hallstrom* stating the case "merely provides that a violation of state law that results in the deprivation of federally protected constitutional rights *may* give rise to a § 1983 claim for the *deprivation of a property or liberty interest*." *Guatay Christian Fellowship v. Cty. of San Diego*, 670 F.3d 957, 987 (9th Cir. 2011) (emphasis added). *Hallstrom* in no way changes the limitations of § 1983 claims to "rights secured by the federal 'Constitution and laws.'" *Lovell v. Poway Unified Sch. Dist.*, 90 F.3d 367, 370-71 (9th Cir. 1996). As more fully discussed below and in Defendants' Supporting Memorandum, Plaintiffs have not identified

any clearly established law that would give Plaintiffs a First Amendment right to refuse an autopsy or to have Olivia's body released to them in a certain period of time. All of Plaintiffs' claims for violations of Idaho state law are insufficient to give rise to liability pursuant to 42 U.S.C. § 1983.

3. Plaintiffs' Have Failed to Demonstrate a Violation of their First Amendment Rights and Defendant Keene is Entitled to Qualified Immunity.

The plaintiff bears the burden of proving that the right allegedly violated was clearly established at the time of the violation. *Kramer v. Cullinan*, 878 F.3d 1156, 1164 (9th Cir. 2018). Plaintiffs have not met this burden and because they have not, Defendant Keene is entitled to qualified immunity and Defendants are entitled to summary judgment as a matter of law.

While Plaintiffs are correct that the Ninth Circuit recognized in *Marsh v. Cty. of San Diego* that the right to non-interference with a family's remembrance of a decedent was constitutionally protected in that case, the Court's decision is unhelpful to Plaintiffs. 680 F.3d 1148 (9th Cir. 2012). The Court in *Marsh* recognized the right under the Fourteenth Amendment's privacy protections and substantive due process rights. 680 F.3d at 1153-55. The *Marsh* case, however, said nothing about the right to non-interference with a family's remembrance of a decedent being protected by the First Amendment's Free Exercise clause.[3] Plaintiffs have not claimed a violation of the Fourteenth Amendment's privacy protections or stated a claim for violation of their substantive due process rights. The only Constitutional claim is one for violation of their First Amendment Free Exercise rights. As discussed above, Plaintiffs cannot assert a new theory of

[3] *Walter v. Cty. of San Diego*, 2020 U.S. Dist. LEXIS 223203 (S.D. Cal. 2020) is inapplicable not only because it was decided in 2020, but also because the analysis of parental rights was based on a claimed violation of substantive due process rights. The case did not involve an alleged First Amendment right to object to an autopsy or have the body of a decedent returned to the next of kin in a certain period of time.

liability at the summary judgment stage and after the close of discovery. *Coleman*, 232 F.3d at 1292. As such, the Ninth Circuit's analysis in *Marsh* is inapplicable.

For purposes of this case, in which Plaintiffs have claimed they had a First Amendment right to refuse an autopsy or a right to have Olivia's body returned to them in a certain period of time, Plaintiffs have not come forward with any applicable precedent which demonstrates that, as of June 2018, such a constitutional right was held by Plaintiffs and was placed beyond debate. *Ashcroft v. al-Kidd*, 563 U.S. 731, 741 (2001). Of the cases that have analyzed the specific contours of the rights claimed by Plaintiffs, what is clearly established is that the First Amendment *does not* afford Plaintiffs a right to refuse an autopsy or a right to have the body of a decedent returned to them in a certain period of time. *Chaudhry v. City of Los Angeles*, 573 Fed. Appx. 628 (9th Cir. 2014); *Safouane v. King County*, 27 Fed. Appx. 780, 781-82 (9th Cir. 2001), *cert. denied* 535 U.S. 1036; *Arnaud v. Odom*, 870 F.2d 304, 306 (5th Cir. 1989) (analysis of both substantive due process and First Amendment rights), *cert. denied sub nom. Tolliver v. Odom*, 493 U.S. 855 (1989); *Fuller v. Marx*, 724 F.2d 717, 718, 720 (8th Cir. 1984); *WTC Families for a Proper Burial, Inc. v. City of N.Y.*, 567 F. Supp. 2d 529 (S.D.N.Y. 2008); *Kickapoo Traditional Tribe v. Chacon*, 46 F. Supp. 2d 644, 645 (W.D. Tex. 1999); *Montgomery v. Cty. of Clinton*, 743 F. Supp. 1253, 1255 (W.D. Mich. 1990), *affirmed by* 940 F.2d 661 (6th Cir. 1991); *Yang v. Sturner*, 750 F. Supp. 558 (D.R.I. 1990); *Keller v. Finks*, 2014 U.S. Dist. LEXIS 42998 (C.D. Ill. 2014); *Taylor v. Zumwalt*, 2005 U.S. Dist. LEXIS 62436 (D.N.M. 2005).

Defendant Keene did not violate the First Amendment Free Exercise rights of Plaintiffs, the claimed right was not clearly established, and Defendant Keene is entitled to qualified immunity. In order to succeed on their § 1983 claim, Plaintiffs must prove the essential element of a deprivation of a right secured by the Constitution or laws of the United States. *West v. Atkins*,

487 U.S. 42, 48 (1988). Because Plaintiffs have failed to prove each essential element of their claim, Defendants are entitled to summary judgment. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986).

4. Plaintiffs Have Failed to Establish Municipal Liability.

Nothing in Plaintiffs' Response establishes that Kootenai County may be subject to municipal liability pursuant to *Monell v. New York City Dept. of Social Services*, 436 U.S. 658 (1978). Plaintiffs' argument that Defendant Keene's implementation of a policy that an autopsy is performed on any person who dies as a result of a car accident, and that he proceeded to implement this policy after he became aware that it would violate Plaintiffs' right to freely exercise their religious beliefs is unsupported by the undisputed record. *See discussion supra* at 4-10, 12-13.

A plaintiff is required to provide evidence of a "formal policy" or "widespread practice" in order for a local government to be held liable under § 1983. *Nadell v. Las Vegas Metropolitan Police Dept*., 268 F.3d 924, 929 (9th Cir. 2001). Municipal liability rests on actions of the municipality and not the actions of the employees of the municipality. *Connick v. Thompson*, 563 U.S. 51, 60-61 (2011). Liability will only attach where the public entity's policy evinces deliberate indifference to a clearly established constitutional right and the policy is the moving force behind the constitutional violation. *Edgerly v. San Francisco*, 599 F.3d 946, 960 (9th Cir. 2010). The policy itself must be a repudiation of the constitutional right at issue. *Hansen v. Black*, 885 F.2d 642, 646 (9th Cir. 1989) (internal citations and quotations omitted).

For Plaintiffs to establish deliberate indifference, they must have come forward with evidence that Defendant Kootenai County actually knew of the risk of harm, yet failed to take reasonable steps to eliminate that risk. *Farmer v. Brennan*, 511 U.S. 825, 837 (1994). Offering

no evidence that specifically rebuts facts submitted by a defendant is not sufficient to defeat a motion for summary judgment. *Kardoh v. U.S.*, 572 F.3d 697, 702 (9th Cir. 2009).

Not only does Plaintiffs' claim against Kootenai County fail because there is no underlying constitutional violation, but it also likewise fails because the policy identified by Plaintiffs does not "repudiate" a clearly established constitutional right. *Hansen*, 885 F.2d at 646. Nothing about Defendant Keene's policy to have an autopsy conducted on all traffic fatalities establishes the County's deliberate indifference to a right protected by the First Amendment. Plaintiffs have offered no evidence of any other claimed policy, of deliberate indifference, or evidence of causation, and the law squarely does not support their legal position. Plaintiffs' *Monell* claim fails as a matter of law, and Kootenai County is entitled to summary judgment.

C. Plaintiffs' State Law Claims Are Barred And Must Also Be Dismissed Because They Have Failed To Present Any Evidence In Support Of Their Claims.

With respect to the arguments raised in Plaintiffs' Response regarding the inapplicability of Idaho Code § 6-904(1) and Defendants' entitlement to immunity, Defendants maintain that the Idaho Tort Claims Act shields Defendants from liability for Defendant Keene's insistence on an autopsy. *See* Dkt. 35-1 at 17-18. Plaintiffs' contention that Idaho Code § 19-4301B does not immunize Defendant Keene from liability because an autopsy was not actually performed is nonsensical. It would be an absurd interpretation of the law that Defendant Keene would be immune from liability if the autopsy had actually been performed, but he's not entitled to immunity because the autopsy was enjoined by the District Court.

Plaintiffs' arguments regarding their assertion that Defendant Keene violated Idaho Code § 19-4301C are futile and unsupported. Plaintiffs do not dispute that, according to their own testimony, they retrieved Olivia's body the day after Plaintiffs Nicky James' brother allegedly

spoke to Defendant Keene and requested Olivia's body to be released for burial. *See* Dkt. 35-1 at 19-20. Plaintiffs contend that because Plaintiff Nicky James called the Coroner's office on June 2, 2018, and she was going to request the release of Olivia's body, this phone call served as a request for purposes of § 19-4301C. Defendant Keene recounted the message Plaintiff Nicky James left on his office voicemail on June 2, 2018, in his Affidavit filed with the District Court of Kootenai County. In that message she was "inquiring about the autopsy and could we call her back as soon as possible." Dkt. 35-3, 35-5, Brereton Decl., Ex. N, ¶ 6. Plaintiffs offer no admissible evidence to rebut this fact. Because Plaintiffs offer no evidence in support of their position, it is evident that their claim is legally untenable. Plaintiffs also fail to account for the undisputed fact that Defendant Keene did, in fact, petition the District Court for an extension of time pursuant to Idaho Code § 19-4301C. Dkt. 35-2, Defendants' SUMF, ¶ 25. Furthermore, Plaintiffs' do not actually identify any specific law that would give them a private right of action for the violation of Idaho Code § 19-4301C, and their argument is therefore meritless.

For the same reasons as set forth in Defendant's Supporting Memorandum, Plaintiffs' state law claims are barred for their failure to comply with Idaho Code § 6-610. Plaintiffs' inaccurate analysis disregards that "law enforcement officer" has a broad definition in § 6-610 that includes court personnel, a city attorney, the attorney general, and "any person charged with the duty of enforcement of the criminal, traffic or penal laws of this state". Plaintiffs conveniently ignore the coroner's statutory duties of enforcement of the penal laws as detailed in Defendants' Supporting Memorandum, which include the ability to subpoena witnesses and punish a witness who does not comply with the subpoena, to issue an arrest warrant, and to act as the substitute for the sheriff in certain circumstances. Dkt. 35-1 at 20-21. Notably, when the coroner must act as sheriff, his

duties would include preserving the peace and those other law enforcement duties identified in Idaho Code § 31-2202 (Duties of sheriff).

Finally, all of Plaintiffs' arguments regarding their negligent and intentional infliction of emotional distress claims are focused on Defendants' defenses to liability. Nowhere in their briefing do Plaintiffs present any argument, analysis, or evidence to substantiate their claims. Plaintiffs have wholly failed to identify a legal duty recognized by law, what constitutes a breach of that duty, causation, damages, the physical manifestation of any alleged emotional injury, the reckless or intentional conduct of any defendant, how such conduct was extreme and outrageous, or how Plaintiffs' alleged emotional distress is severe. *See Frogley v. Meridian Joint Sch. Dist. No. 2*, 155 Idaho 558, 569, 314 P.3d 613, 624 (2013) (elements of negligent inflict of emotional distress); *Curtis v. Firth*, 123 Idaho 598, 601, 850 P.2d 749, 752 (1993) (elements of intentional infliction of emotional distress).

At the summary judgment stage, Plaintiffs must establish "beyond controversy every essential element" of their claims. *S. Cal. Gas Co. v. City of Santa Ana*, 336 F.3d 885, 888 (9th Cir. 2003). There is no genuine issue for trial on Plaintiffs' state law claims because the "complete failure of proof" concerning the essential elements of their claims renders any other fact immaterial. *Celotex*, 477 U.S. at 322-23. Defendant is entitled to summary judgment on Plaintiffs' state law claims as a matter of law. *Id*. at 323.

D. This Court Lacks The Authority To Provide Plaintiffs The Injunctive Relief They Seek.

Plaintiffs claim they are simply seeking for the Court to require Defendant Keene "to comply with Idaho Code and supply the necessary medical data to the registrar of vital records by removing intoxication as a cause of death of Olivia on the death certificate." Dkt. 37 at 19.

Plaintiffs want the Court to direct Defendant Keene to seek an amendment of the death certificate, pursuant to Idaho Code § 39-250 because, as Plaintiffs claim, he failed to submit the necessary information to the state registrar. The purpose of injunctive relief is to require a person to refrain from some act, not to order a person to do a certain act. *See Brinton v. Steele*, 19 Idaho 71, 74, 112 P. 319, 320 (1910). Additionally, Plaintiffs fail to explain why the Court should order Defendant Keene to seek an amendment to the death certificate when nothing in the law prevents Plaintiffs from doing so.

Defendant Keene provided the Bureau of Vital Records and Health Statistics with the information he had obtained pursuant to his investigation, including the toxicology results from NMS Labs. Dkt. 35-2, Defendants' SUMF, ¶¶ 32-33. Plaintiffs' "belief" that alcohol intoxication was not a significant condition contributing to Olivia's death is merely their subjective feeling. *See* I.C. § 39-240. Plaintiffs do not direct the Court's attention to any admissible evidence that suggests otherwise. There is no legal basis for ordering Defendant Keene to seek an amendment of the death certificate and the Court must deny Plaintiffs' request for injunctive relief.

III. CONCLUSION

For the reasons set forth herein and in Defendants' previously filed Supporting Memorandum, Defendants are entitled to summary judgment on all of Plaintiffs' claims. Defendants respectfully request that Plaintiffs' claims be dismissed in their entirety with prejudice.

DATED this 14th day of February, 2022.

LAKE CITY LAW GROUP PLLC

/s/ *Katharine B. Brereton*
KATHARINE B. BRERETON
Attorney for Defendants

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 14th day of February, 2022, I filed the foregoing electronically through the CM/ECF system, which caused the following parties or counsel to be served by electronic means, as more fully reflected on the Notice of Electronic Filing:

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