

1 Kevin T. Snider, State Bar No. 170988
Counsel of record
2 Michael J. Pepper, State Bar No. 192265
3 Matthew B. McReynolds, State Bar No. 234797
PACIFIC JUSTICE INSTITUTE
4 P.O. Box 276600
5 Sacramento, CA 95827
6 Tel. (916) 857-6900
7 Fax (916) 857-6902
Email: ksnider@pji.org

8 Alexandra M. Snyder, State Bar No. 252058
9 LIFE LEGAL DEFENSE FOUNDATION
P.O. BOX 2015
10 Napa, CA 94558
11 Tel. (202) 717-7371
12 Email: asnyder@lldf.org

13 Attorneys for Plaintiffs

14
15 **IN THE UNITED STATES DISTRICT COURT**
16 **FOR THE EASTERN DISTRICT OF CALIFORNIA**

| | | | |
|----|--|---|-------------------------------------|
| 17 | Jonee Fonseca, an individual parent |) | Case No.: 2:16-cv-00889-KJM-EFB |
| 18 | and guardian of Israel Stinson, a |) | |
| 19 | minor, |) | |
| 20 | Plaintiff, |) | Second Amended Complaint for |
| 21 | |) | Equitable Relief |
| 22 | v. |) | REQUEST FOR JURY TRIAL |
| 23 | Karen Smith, M.D. in her official |) | |
| 24 | capacity as Director of the California |) | |
| 25 | Department of Public Health; and Does |) | |
| 26 | 2 through 10, inclusive, |) | |
| 27 | <u>Defendant.</u> |) | |

1 **INTRODUCTION**

2 A toddler, Israel Stinson, has been declared brain dead pursuant to the
3 California Uniform Determination of Death Act (“CUDDA” or “Act”). The child
4 lives. This action is brought through his mother to expunge all records archived or
5 under the control of the Director of the California Department of Public Health that
6 state that the child is deceased. To this end, the Plaintiff challenges the
7 constitutionality of the Act.

8 **JURISDICTION**

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10 1. This Court has federal question jurisdiction over Plaintiff’s claims
11 arising under the Fifth and Fourteenth Amendments of the United States
12 Constitution and 42 U.S.C. §1983. Jurisdiction is therefore proper under 28 U.S.C.
13 §1331. This Court has supplemental jurisdiction over Plaintiff’s claims arising
14 under the Constitution of the State of California pursuant to 28 U.S.C. §1337.

15 **VENUE**

16 2. Venue is proper in the United States District Court for the Eastern
17 District of California, pursuant to 28 U.S.C. sections 84 and 1391. The events that
18 gave rise to this complaint did and are occurring in Sacramento and Placer Counties,
19 in the State of California, and the Defendant has her principal place of business in
20 Sacramento, California.

21 **PARTIES**

22 3. Plaintiff, JONEE FONSECA, is an adult and a resident of the State of
23 California. She is the mother of Israel Stinson and the healthcare decision maker for
24 Israel Stinson, a minor. Ms. Fonseca is a devout Christian and believes in the
25 healing power of God. She also believes that life does not end until the cessation of
26 biological functioning. In all interactions with medical providers as described more
27 fully below, she has consistently requested that her son not be removed from life
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1 support. She believes that removing him from such would be tantamount to ending
2 his life.

3 4. Defendant, KAREN SMITH, M.D., serves as the Director of the
4 California Department of Public Health. The Department which she heads has
5 supervisory, regulatory and enforcement roles over California hospitals. Further,
6 the Department issues death certificates, requires compliance by hospitals and
7 physicians in the manner in which death certificates are filled out and recorded. Dr.
8 Smith's Department enforces the requirement that hospitals, physicians, and
9 coroners use California's definition of death and that the determination of death be
10 performed in a manner consistent with the State's statutory protocol. The
11 definitions and protocol are part of CUDDA. The Department that she heads has
12 created and dispatched to physicians and hospitals, a mandatory form known as a
13 Certificate of Death – State of California. Acting pursuant to the Act, she requires
14 that medical doctors and hospitals use the operational definition of death found in
15 Health & Safety Code §7180 and that procedures are followed under Health &
16 Safety Code §7181 and that recordation be provided on the Certificate of Death.
17 Pursuant to Health & Safety Code §7183 she requires that medical providers
18 maintain records, in accordance to regulations that her Department adopts, regarding
19 individuals who have been pronounced dead under the definition of death found in
20 CUDDA. Further, her Department also requires that medical providers fill out the
21 Certificate of Death within 15 hours after death under (Health & Safety Code
22 §102800) and that medical providers register the death with local officials (Health &
23 Safety Code §102775). All of the conduct is done under color of law. Dr. Smith is
24 sued in her official capacity.

25 5. Plaintiff is ignorant of the true names and capacities of defendants sued
26 herein as Does 2 through 10, inclusive, and therefore sue these defendants by such
27 fictitious names and capacities. Plaintiff is informed and believes and thereon
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1 alleges that each fictitiously named defendant is responsible in some manner for the
2 occurrences herein alleged, and that Plaintiff's injuries as herein alleged were
3 proximately caused by the actions and/or in-actions of said Doe defendants. Plaintiff
4 will amend this complaint to include the true identities of said doe defendants when
5 they are ascertained.

6 **FACTS**

7 6. On April 1, 2016, Ms. Fonseca took her son, Israel Stinson, to Mercy
8 General Hospital ("Mercy") with symptoms of an asthma attack. The medical
9 personnel in the emergency room examined him and placed him on a breathing
10 machine. He underwent x-rays. Shortly thereafter he began shivering, his lips
11 turned purple, his eyes rolled back and he lost consciousness. He had an intubation
12 performed on him. Doctors then told Ms. Fonseca they had to transfer her son to the
13 University of California Davis Medical Center in Sacramento ("UC Davis") because
14 Mercy did not have a pediatric unit. He was then taken to UC Davis via ambulance
15 and admitted to the pediatric intensive care unit.

16 7. The next day, the tube was removed from the child at UC Davis. The
17 respiratory therapist said that the patient was stable and that they could possibly
18 discharge him the following day, Sunday April 3. The doctors at UC Davis put him
19 on albuterol for one hour, and then wanted to take him off albuterol for an hour.
20 About 30 minutes later while off the albuterol, Ms. Fonseca noticed that he began to
21 wheeze and have trouble breathing. The nurse came back in and put him on the
22 albuterol machine. Within a few minutes the monitor started beeping. The nurse
23 came in and repositioned the mask, then left the room. Minutes after the nurse left
24 the room, the child started to shiver and went limp in his mother's arms. He
25 suffered a bronchospasm (squeezing of the airway, preventing air from passing).
26 Ms. Fonseca pressed the nurses' button, and screamed for help, but no one came to
27 the room. A different nurse entered, and Ms. Fonseca asked to see a doctor.

1 8. The doctor, Stephanie Meteev, came to the room and said she did not
2 want to intubate the child to see if he could breathe on his own without the tube. The
3 child was not breathing on his own.

4 9. Ms. Fonseca had to leave the room to compose herself. When Ms.
5 Fonseca came back into the room five minutes later, the doctors were performing
6 CPR on him. The doctors dismissed Ms. Fonseca from the room again while they
7 continued to perform CPR. The doctors were able to resuscitate him. Dr. Meteev
8 told Ms. Fonseca that the child was “going to make it” and that he would be put on
9 Extracorporeal Membrane Oxygenation (“ECMO”) machine to support his heart and
10 lungs. Initially, doctors thought the patient might have a lung blockage, but no such
11 blockage was found by the pulmonologist who examined him.

12 10. Dr. Meteev then indicated that there was a possibility that the child will
13 have brain damage. He was sedated twice due to his blood pressure being high, and
14 was placed on an ECMO machine and ventilator machine.

15 11. Two brain tests were performed on April 3 and 4 respectively. The
16 tests included touching his eye with a Q-tip, striking his knee, shining a light in his
17 eye, flushing cold water down his ear, and inserting a stick down his throat to check
18 his gag reflexes.

19 12. On Sunday April 3, 2016, a brain test was conducted to determine the
20 possibility of brain damage while he was hooked up to the ECMO machine.

21 13. On April 4, 2016, the same tests were performed when he was taken off
22 the ECMO machine.

23 14. Prior to the first brain death examination, a UC Davis nurse contacted
24 an organ donor company.

25 15. California Health and Safety Code §7180, which was in force and
26 effect, at all times material to this action, provides that “An individual who has
27 sustained either (1) irreversible cessation of circulatory and respiratory functions, or
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1 (2) irreversible cessation of all functions of the entire brain, including the brain
2 stem, is dead. A determination of death must be made in accordance with accepted
3 medical standards.” Section 7180 is part of CUDDA and UC Davis medical staff
4 conducted the tests for death pursuant to that section.

5 16. California Health and Safety Code §7181 provides that an individual
6 can be pronounced dead by a determination of “irreversible cessation of all
7 functions of the entire brain, including brain stem.” CUDDA requires
8 “independent” confirmation by another physician. Section 7181 is also part of the
9 Act.

10 17. On April 6, 2016, the child was taken off the ECMO machine because
11 his heart and lungs were functioning on their own. The next day, a radioactive test
12 was performed to determine blood flow to the brain.

13 18. On April 7 a radionuclide test was performed to determine the blood
14 flow to the brain; doctors claimed the test showed no uptake of oxygen or nutrients
15 in the child’s brain.

16 19. On April 10 a magnetic resonance imaging (“MRI”) and computed
17 tomography (“CT”) scan were performed on the patient; doctors asserted the MRI
18 and CT scan confirmed “diffused brain swelling,” “severe global injury,” and
19 transforaminal herniation across the foramen of the brain stem. As a result of these
20 tests, physicians at UC Davis found that the patient’s condition was consistent with
21 brain death.

22 20. On April 11, 2016, child was transferred via ambulance from UC Davis
23 to Defendant Kaiser Permanente Roseville Medical Center – Women and Children’s
24 Center (“Kaiser”) for additional treatment. Upon his arrival at Kaiser, another reflex
25 test was done, in addition to an apnea test. On April 14, 2016, a further reflex test
26 was performed for determination of brain death in conjunction with protocol
27 directed by the State of California and enforced by Defendant Smith’s Department.
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1 21. Dr. Myette testified in Superior Court that the hospital followed all
2 procedures recommended by the American Academy of Pediatrics, the Society of
3 Child Neurology, and the Society of Critical Care Medicine. This included
4 regulating the patient’s body temperature and sodium levels prior to testing.

5 22. The apnea test lasted for seven and a half minutes, and the patient was
6 on 100 percent oxygen; the carbon dioxide level in his blood at the beginning of the
7 test ranged between 35 and 45, and at the end of the test his carbon dioxide level
8 was 85. In court, Dr. Myette testified that such a level would cause “anybody with
9 any function of their brain stem” to breath. Dr. Myette testified that no brain
10 activity was found, and had he “discovered that there was some activity in [the
11 patient’s] brain” doctors would not have declared him dead.

12 23. Dr. Myette testified that a second confirmatory exam was performed by
13 his colleague Brian Masselink. (The Physician in Chief, Shelly Garone, was present
14 along with the child’s great aunt and one of his grandmothers). Dr. Masselink is a
15 board certified pediatric neurologist. Medical records state that Dr. Masselink found
16 no evidence of any brain function.

17 24. That same day a Certificate of Death was issued.

18 25. That notwithstanding, at the time of the issuance of the Certificate of
19 Death, with pulmonary support provided by the ventilator, the child’s heart and
20 other organs functioned well, and continue to function to this day. He has also
21 begun moving his upper body in response to his mother’s voice and touch.

22 26. Ms. Fonseca has knowledge of other patients who had been diagnosed
23 as brain dead, using the same criteria as in her son’s case. In some of those cases,
24 where the decision makers were encouraged to consent to the withdrawal of life
25 support, the patients emerged from legal brain death to where they had cognitive
26 ability and some even fully recovering. Such cases are fully medically documented.

27 27. Plaintiff is a Christian with firm religious beliefs that as long as the
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1 heart is beating, her child is alive. These religious beliefs involve providing all
2 treatment, care, and nutrition to a body that is living, treating it with respect and
3 seeking to encourage healing.

4 28. Kaiser informed Ms. Fonseca that it intended to disconnect the
5 ventilator that her son was relying upon to breath claiming that he is brain dead
6 pursuant to California Health and Safety Code §7180.

7 29. Kaiser claims that, since its medical doctors have declared the child as
8 brain dead, his mother has no right to exercise any decision making authority vis-a-
9 vis maintaining her son on a ventilator.

10 30. Ms. Fonseca contacted Paul Byrne, a board certified neonatologist,
11 pediatrician, and Clinical Professor of Pediatrics at University of Toledo, College of
12 Medicine. However, Kaiser would not allow Dr. Byrne to examine Israel or even be
13 present during an examination, as he is not a California licensed physician.

14 31. Ms. Fonseca repeatedly asked Kaiser's medical staff that her child be
15 given nutrition, including protein and fats. She also asked that he be provided
16 nutritional feeding through a nasal-gastric tube or gastric tube to provide him with
17 nutrients as soon as possible. She further requested that care be administered to her
18 son to maintain his heart, tissues and organs. Kaiser refused to provide such
19 treatment stating that they do not treat or feed brain dead patients. Because of this
20 Kaiser denied her ability to make decisions over the health care of her son. Ms.
21 Fonseca therefore sought alternate placement of her son, outside a Kaiser facility.

22 32. Ms. Fonseca vehemently opposed the efforts to exclude her from the
23 decision making regarding her son and Kaiser's insistence that she has no right vis-
24 a-vis the decision to disconnect the ventilator that provides oxygen necessary for her
25 son's heart to beat and the organs to be kept profused with blood. She expressly
26 forbade the hospital from removing life support. Kaiser refused her requests for
27 nutritional support and the placement of a tracheostomy tube and a gastric tube
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1 stating that she has no rights to request medical care for her son as he is brain dead.
2 Kaiser's position is that under California law, the removal of mechanical life
3 support does not require consent by the patient's advocate – the parent in this case –
4 if there has been a declaration of brain death under CUDDA.

5 33. Despite Kaiser's insistence that Israel Stinson is dead, at that time he
6 moved his upper body in response to his mother's voice and touch. Dr. Byrne
7 communicated to the parents that the child is alive. In view of her child's
8 movements and a physician's opinion that the boy is alive, Ms. Fonseca believes
9 that she has a moral and spiritual obligation to give her child the benefit of the
10 medical doubt.

11 34. The State definition of death is in stark and material difference to the
12 religious beliefs of Ms. Fonseca. She believes that the disconnection of life support
13 would be tantamount to killing her son.

14 35. The State of California, acting by and through the Department of Public
15 Health, has not authorized physicians to exercise independent professional judgment
16 regarding determination of death. The State specifically defines death and requires
17 physicians to practice medicine in accordance to that definition, regardless of
18 medical opinion or evidence to the contrary.

19 36. In accordance to the definition of death under CUDDA, On April 14,
20 2016, Dr. Myette filled out and signed a Certificate of Death which declared that
21 Israel Stinson is deceased. The Certificate of Death is provided by the California
22 Department of Public Health. Additionally, the Certificate of Death was
23 subsequently submitted to the Department of Vital Statistics which is a subdivision
24 of the Department of Public Health and under the supervision of Defendant, Dr.
25 Smith.

26 37. Per the requirements of the laws of California, Kaiser communicated to
27 the Placer County Coroner's office that Israel Stinson is dead.

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1 38. Despite an official determination that Israel Stinson is dead, the child
2 has shown movement in direct response to the voice and touch of his mother.

3 39. Since the issuance of the Certificate of Death, three physicians,
4 independent of Kaiser and UC Davis, have given their medical judgment that this
5 child is in fact alive.

6 40. Because Kaiser insists that Israel Stinson is dead according to the Act,
7 Kaiser sought to remove life support from him. On April 14, in an act of
8 desperation, Ms. Fonseca filed – in pro per – papers in the Superior Court in which
9 she pleaded with the Court to spare the life of her child.

10 41. The Superior Court granted temporary relief. However, based upon the
11 testimony of Dr. Myette, the Superior Court determined that all medical protocols
12 were met and the child was dead pursuant to the definition under CUDDA.

13 42. Ms. Fonseca retained new counsel and filed this action in this Court.
14 She received temporary relief in this Court against Kaiser, but her request for a
15 preliminary injunction was denied. This Court granted her a stay while emergency
16 relief was sought in the Ninth Circuit Court of Appeals. While the emergency
17 motion was still under review, Ms. Fonseca was able to find another medical facility
18 outside of the United States which admitted her son as a patient.

19 43. A tracheotomy was performed and a feeding tube inserted at the
20 facility. He has stabilized and has gained weight. Kaiser physicians refused to
21 provide this treatment because they claim that it is unethical to treat a dead person.

22 44. An electroencephalogram (“EEG”) was performed on the child. The
23 EEG revealed that he has brain waves. Physicians have informed the parents that he
24 is not dead, but is in a persistent vegetative state.

25 45. As of the filing of this Second Amended Complaint the child is
26 increasingly having more purposeful movements. In addition to the prior
27 movements that he had at Kaiser in April, he now moves his arms, hands, legs and
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1 toes. Further, these movements are not random. They occur primarily in response
2 to voices and music. A song that the child knows was played. He begins to move
3 at the sound of the music.

4 46. He is now on a portable ventilator and is increasingly taking breaths off
5 of the ventilator.

6 47. There is an actual dispute between the parties. California has officially
7 certified that Israel Stinson is deceased. Plaintiff asserts that he is alive, now in fact
8 having brain waves. This is a dispute of fact.

9 48. The continued existence of government documents that certify that
10 Israel Stinson is dead causes actual injury. This results in the loss of medical
11 insurance coverage and government benefits to the child and his family. In the
12 future, he will be unable to enroll in school, meet the identity requirements for
13 employment, marry, obtain a driver license, register to vote, qualify for a credit card,
14 or secure a home loan if he remains officially deceased.

15 49. Plaintiff is informed and believes and thereon alleges that the definition
16 of death is fallacious. In essence, the presupposition is that the cessation of all
17 functions of the entire brain – including the brain stem – is per se irreversible.
18 However, Plaintiff is informed and believes and thereon alleges that brain waves
19 return in rare cases after having disappeared. Nonetheless, California law directs
20 that such a person be deemed dead. CUDDA requires independent confirmation by
21 another physician. But that confirmation is exclusively confined to the definition of
22 death in the statute. Hence it is a tautology. On its face and as applied, under
23 CUDDA an advocate for a patient is not allowed to bring in their own physician to
24 contest the findings. In this case, Kaiser used two of its own doctors for the tests.
25 As such, it asserted in Superior Court that it is the independent evaluation under
26 CUDDA.

27 50. In the alternative, Plaintiff alleges that the definition of death under
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1 CUDDA is correct but that Ms. Fonseca's child was misdiagnosed as being brain
2 dead when he was not. The Act, either on its face or under its application, does not
3 provide for an advocate of the patient to retain a doctor, at the advocate's own
4 expense, to examine the patient and contest the findings.

5 51. There is verifiable evidence that persons who have been declared brain
6 dead have in fact not died. Some have recovered.

7 52. The aforementioned conduct was done under color of state law and by
8 state actors. Such includes the implementation and enforcement of CUDDA.

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10 **FIRST COUNT**

11 **Deprivation of Life and Liberty in Violation of Due Process of Law under the**
12 **Fifth and Fourteenth Amendments (42 U.S.C. §1983)**

13 53. The Plaintiff incorporates by reference as if fully set forth herein the
14 foregoing paragraphs.

15 54. Under the Fifth and Fourteenth Amendments, a citizen cannot be
16 deprived of life or liberty without due process of law. Historically, death has been
17 defined as the cessation of breath and the beating of the heart. Such understanding
18 was true at the ratification of said Amendments. The State of California has defined
19 death in a matter that is broader than the historical definition. The State's statutory
20 scheme related to the definition of death and how it is determined have provided no
21 procedures or process by which a patient or their advocate can independently
22 challenge the findings of death. Further, the statutory scheme removes the
23 independent judgment of medical professionals as to whether a patient is dead.

24 55. Under the facts described herein, there is a medical dispute of fact as to
25 whether Israel Stinson is dead or alive. On this Earth, there can be few rights more
26 precious than the liberty interest in life. Life is a fundamental right that finds
27 explicit protection in the U.S. Constitution.

1 56. The enactment and enforcement of CUDDA deprives Israel Stinson of
2 his right to life without due process of law. The Act defines death and requires that
3 physicians declare a person as dead when the conditions found in the definition are
4 met. But because a patient is declared dead by California does not make the patient
5 become biologically dead. Death is the cessation of biological functioning. By
6 State action, the Act requires a declaration that a person is deceased at a point in
7 time earlier than the cessation of biological functioning. This is what happened to
8 Israel Stinson. Such a premature official certification of death deprives an
9 individual of the liberty interest in life in a manner that is inconsistent with the Fifth
10 and Fourteenth Amendments.

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12 **SECOND COUNT**

13 **Deprivation of Parental Rights in Violation of Due Process of Law under**
14 **the Fifth and Fourteenth Amendments (42 U.S.C. §1983)**

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16 57. Plaintiffs incorporate by reference as if fully set forth herein the
17 foregoing paragraphs.

18 58. As the fit parent of Israel Stinson, Ms. Fonseca has plenary authority
19 over medical decision relative to her 2-year-old child.

20 59. In addition to the natural profound bounds of affection between parent
21 and child, Ms. Fonseca believes that she has a moral and spiritual obligation to give
22 her child every benefit of the medical doubt before disconnecting life support.

23 60. On its face and as applied the Act provides no due process for a parent
24 to contest the medical findings by bringing in her own physician for a second
25 opinion. Because as a fit parent she is completely cut off under the State's protocol,
26 she is being deprived of her parental rights.

27 61. In addition and in the alternative, there is a close nexus between the
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1 conduct of Kaiser, Dr. Myette and the State of California. The child was deprived
2 of medical treatment because medical professionals at Kaiser assert that treating a
3 dead person violates medical ethics.

4 **THIRD COUNT**

5 **Deprivation of Life**

6 **CA Const. Art. I §1**

7 62. Plaintiff incorporates, herein by reference, the foregoing paragraphs.

8 63. This count arises under the right to life enumerated in the California
9 Constitution which provides as follows: “[a]ll people are by nature free and
10 independent and have inalienable rights. Among these are enjoying and defending
11 life... .” CA Const. Art. I §1.

12 64. The State of California has defined death in a matter that is broader
13 than the historical definition. The State’s statutory scheme related to the definition
14 of death and how it is determined have provided no procedures or process by which
15 a patient or their advocate can independently challenge the findings of death.
16 Further, the statutory scheme removes the independent judgment of medical
17 professionals as to whether a patient is dead.

18 65. Under the facts described herein, there is a medical dispute of fact as to
19 whether Israel Stinson is dead or alive. On this Earth, there can be few rights more
20 precious than the liberty interest in life. Life is a fundamental right that finds
21 explicit protection in the California Constitution.

22 66. The enactment and enforcement of the CUDDA deprives Israel Stinson
23 of his right to life. The Act defines death and requires that physicians declare a
24 person as dead when the conditions found in the definition are met. But because a
25 patient is declared dead does not make the patient become biologically dead when in
26 fact the person was and is alive. By State action, the Act requires a declaration that
27 a person is deceased at a point in time earlier than the cessation of biological

1 functioning.

2 **FOURTH COUNT**

3 **Violation of Privacy Rights**

4 **(42 U.S.C. §1983)**

5 67. Plaintiff incorporates, herein by reference, the foregoing paragraphs.

6 68. This count arises under the right to privacy protected by the United
7 States Constitution.

8 69. Under the penumbra of rights guaranteed under the United States
9 Constitution, health care decisions are part of the right to personal autonomy and
10 privacy. As a fit parent, Ms. Fonseca has plenary authority over the health care
11 decisions of her child.

12 70. As a direct and proximate cause of the compliance with the Act, health
13 care treatment was denied to Israel Stinson because he was declared dead.

14 71. His mother was deprived of the rights of privacy that she enjoys and
15 seeks to exercise over on behalf of her child, relative to medical decisions.

16 **FIFTH COUNT**

17 **Violation of Privacy Rights**

18 **CA Const. Art. I §1**

19 72. Plaintiff incorporates, herein by reference, the foregoing paragraphs.

20 73. This count arises under the right to life enumerated in the California
21 Constitution which provides as follows: “[a]ll people are by nature free and
22 independent and have inalienable rights. Among these are... privacy.” CA Const.
23 Art. I §1.

24 74. Under the California Constitution, health care decisions are part of the
25 right to personal autonomy and privacy. As a fit parent, Ms. Fonseca has plenary
26 authority over the health care decisions of her child. She possesses a reasonable
27 expectation of exercising personal autonomy and privacy on behalf of her son.

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1 75. As a direct and proximate cause of the compliance with the Act, health
2 care treatment was denied to Israel Stinson because he was declared dead.

3 76. A fallacious declaration of death constitutes a serious invasion of the
4 liberty interest in privacy. As such, Ms. Fonseca was deprived of the rights of
5 privacy that she enjoys and seeks to exercise on behalf of her child relative to
6 medical decisions.

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PRAYER

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

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Dated: July 1, 2016

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/S/ Kevin Snider

Kevin T. Snider

Attorney for Plaintiffs

REQUEST FOR A JURY TRIAL

Plaintiff hereby respectfully requests a jury trial.

DATED: July 1, 2016

S/ Kevin Snider
Kevin T. Snider
Attorney for Plaintiffs

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