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FILED
SUPERIOR COURT OF CALIFORNIA
COUNTY OF RIVERSIDE

JUN 08 2016

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17 SUPERIOR COURT OF THE STATE OF CALIFORNIA
18 IN AND FOR THE COUNTY OF RIVERSIDE

19 DR. SANG-HOON AHN, DR. LAURENCE
BOGGELN, DR. GEORGE DELGADO, DR.
20 PHIL DREISBACH, DR. VINCENT
FORTANASCE, DR. VINCENT NGUYEN,
21 and AMERICAN ACADEMY OF
MEDICAL ETHICS, d/b/a of CHRISTIAN
22 MEDICAL AND DENTAL SOCIETY

23 Plaintiffs,

24 v.

25 MICHAEL HESTRIN, in his official capacity
as District Attorney of Riverside County,

26 Defendant
27
28

Case No.: PIC 1607135

**PLAINTIFFS' EX PARTE
APPLICATION FOR A TEMPORARY
RESTRAINING ORDER AND ORDER
TO SHOW CAUSE RE PRELIMINARY
INJUNCTION; MEMORANDUM OF
POINTS AND AUTHORITIES IN
SUPPORT THEREOF**

Date: June 9, 2016

Time: 8:30 AM

Dept.:

1 TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

2 PLEASE TAKE NOTICE that on June 9, 2016, at 8:30 AM, in Department __ of the
3 above-entitled court, Plaintiffs SANG-HOON AHN, M.D., LAURENCE BOGGELN, M.D.,
4 GEORGE DELGADO, M.D., PHILIP DREISBACH, M.D., VINCENT FORTANASCE, M.D.,
5 VINCENT NGUYEN, D.O., and the AMERICAN ACADEMY OF MEDICAL ETHICS, d/b/a
6 of the CHRISTIAN MEDICAL AND DENTAL SOCIETY (collectively, "Plaintiffs") will and
7 hereby make this *ex parte* application for a temporary restraining order ("TRO") enjoining
8 Defendant Michael Hestrin, in his official capacity as District Attorney of the County of
9 Riverside, from recognizing any exception created by the "End of Life Option Act" (the "Act")
10 to any criminal law, including California Penal Code Section 401, in the exercise of Defendant's
11 criminal law enforcement duties. The Act is unconstitutional as it violates the due process and
12 equal protection guarantees of the California Constitution.

13 Concurrently, Plaintiffs hereby apply for an Order to Show Cause why a preliminary
14 injunction should not be granted enjoining Defendant from recognizing any exceptions to
15 criminal laws contained in the Act.

16 This Application is made pursuant to Code of Civil Procedure Sections 526 and 527, and
17 California Rules of Court 3.1150 and 3.1200 et seq., on the grounds that good cause exists for
18 the Court to issue a TRO and preliminary injunction, because, among other reasons:

19 1. The Act violates the equal protection and due process guarantees of the California
20 Constitution in that it fails to make rational distinctions between Labeled Individuals with
21 supposedly terminal diseases, and the vast majority of Californians not covered by the Act. The
22 Act's legal distinctions are not based in any rational, but instead adopt a vague and arbitrary cut-
23 off to determine eligibility.

24 2. The California State Legislature passed the Act *ultra vires*, as its subject matter
25 was not within the express reasons for convening the extraordinary session. The California
26 Constitution establishes that the Legislature has no power to pass a law in an extraordinary
27 session outside of the express purpose of the session.

28

1 3. Irreparable harm will result if relief is not granted. Indeed, the Act permits
2 Labeled Individuals to procure the means of ending their own lives within 15 days after it takes
3 effect. An injunction is crucial to maintaining the status quo until the Act's legality is
4 determined.

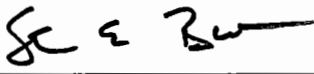
5 This application will be based on this Notice, the attached Memorandum of Points and
6 Authorities in support thereof, the supporting Declarations filed with the Memorandum, all
7 pleadings and papers on file in this action, and upon any oral argument and evidence that may be
8 presented at the hearing of this Application.

9 Pursuant to California Rule of Court 3.1203(a), notice of this application was made on
10 June 7, 2016, when Plaintiffs' counsel provided both written and telephonic notice to Defendant
11 that Plaintiffs would be appearing on an ex parte basis on June 9, 2016 at 8:30 AM seeking the
12 above-described TRO and OSC.

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Dated: June 8, 2016

LARSON O'BRIEN, LLP

By: 

Stephen G. Larson
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Steven E. Bledsoe

LIFE LEGAL DEFENSE FOUNDATION
Catherine W. Short
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Attorneys for Plaintiffs

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1 In September 2015, proponents of physician-assisted suicide, after failing to pass a bill in
2 California’s regular legislative session, hijacked the extraordinary legislative session convened
3 for the purpose of passing legislation to secure funding for health care and “promote the health of
4 Californians,” and instead passed AB2x15, the End of Life Option Act (“the Act”).

5 Contrary to the professed purpose of the extraordinary session, the Act does not fund, or
6 even improve, Californians’ health care. Instead, it allows physicians to prescribe lethal drugs to
7 individuals who meet certain statutorily-defined criteria, even though the physician knows that
8 the defined individuals receiving those drugs intend to use them to end, or at least attempt to end,
9 their own lives. The Act, passed in the haste of an extraordinary session, raises grave concerns
10 of constitutional import.

11 The first is that the Act carves out arbitrary distinctions between those who are denied the
12 protections derived from laws relating to suicide and assisted suicide and those who are fully
13 protected by those same laws. Plaintiffs are doctors who regularly treat seriously ill individuals.
14 The Act defines some of these individuals as having a “terminal disease” because a doctor may
15 give them six months or less to live. But the business of prognosticating a patient’s future
16 lifespan is inherently limited, if not altogether flawed. While some “qualified individuals” will
17 die within six months, many will not. Some may live months or years longer than once
18 expected. In some cases, with appropriate medical intervention, so-called “qualified individuals”
19 may live indefinitely.

20 Despite all of this uncertainty, patients who are given a six-month prognosis are denied
21 protections afforded by laws covering a range of topics, including suicide, homicide, mental
22 illness, and elder abuse. They further lose legal protections requiring doctors to provide
23 reasonable professional care in executing their duties under the Act.¹ And the Legislature has
24 stripped these rights from the citizens the Act targets at the very time when these citizens most
25 need competent medical care and thorough legal protection. The arbitrary nature of the labels
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27 ¹ Indeed, this must be so by definition, since the Legislature has decided to override the medical
28 profession’s judgment that rendering suicide aid is not consistent with any reasonable standard of
care. (See Declaration of Philip Dreisbach (“Dreisbach Decl.”), ¶¶ 7-12.)

1 placed on these vulnerable patients violates both due process and equal protection principles
2 guaranteed by the United States and California Constitutions.

3 Moreover, the Legislature's departure from the express purposes for convening the
4 extraordinary session violated Article 4, Section 3(b) of the California Constitution. An
5 extraordinary session can only be convened for an express purpose. Because the Act was outside
6 of the scope of the extraordinary legislative session, it must be stricken.

7 **I. STATEMENT OF FACTS**

8 **A. The Parties**

9 Plaintiffs are California doctors, or in the case of the American Academy of Medical
10 Ethics, an organization with California doctors as part of its membership, who treat patients
11 meeting the Act's arbitrary definition of having a "terminal disease." They bring this action to
12 protect the rights of their patients to be protected by law, like other California citizens, from
13 being assisted in committing suicide, from receiving substandard medical care, and from having
14 untreated depression and mental conditions lead to suicide. Defendant is the District Attorney of
15 Riverside County, charged with enforcing provisions of criminal law to which the Act creates an
16 exception.

17 **B. The Legislative Process**

18 For two decades, the Legislature has intermittently attempted to legalize physician-
19 assisted suicide. [Assem. Bill No. 1080 (1995-1996 Reg. Sess.) [The Death With Dignity Act];
20 Assem. Bill No. 1310 (1995-1995 Reg. Sess.) [same]; Assem. Bill No. 1592 (1999-2000 Reg.
21 Sess.) [same]; Assem. Bill No. 654 (2005-2006 Reg. Sess. [California Compassionate Choices
22 Act]); Assem. Bill No. 651 (2005-2006 Reg. Sess. [same]); Assem. Bill No. 374 (2007-2008
23 Reg. Sess.) [same]. These attempts followed California voters' rejection of Proposition 161, an
24 initiative that would have legalized the practice of physician-assisted suicide.

25 Proponents of assisted suicide suffered their most recent defeat in 2015, when, in July
26 2015, Senate Bill No. 128 failed to garner the necessary votes in the Assembly Health
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28

1 Committee to pass out of that Committee.² SB 128 was referred to the 19-member Assembly
2 Health Committee on June 11, 2015 and was scheduled for a vote only days later. Members of
3 the Assembly Health Committee expressed such grave concerns about SB 128 that the bill's
4 author cancelled a June 23 hearing and vote. The cancelled hearing was rescheduled for July 7,
5 2015; however, it too was cancelled because a majority of the Assembly Health Committee
6 continued to oppose the bill.³

7 On June 16, 2015, Governor Jerry Brown issued a proclamation convening an
8 extraordinary legislative session to confront budget shortfalls threatening the provision of health
9 care services to low-income Californians. On June 24, 2015, the day after the Assembly Health
10 Committee cancelled the first vote on SB 128, a 13-member Extraordinary Session Public Health
11 Committee was formed for the extraordinary session. On September 11, 2015, the Legislature,
12 sitting in extraordinary session, passed AB2x15, the Act. Three weeks later, Governor Brown
13 signed AB2x15 into law. The Act comes into effect on June 9, 2016, 90 days after the
14 extraordinary legislative session closed.

15 C. The Act

16 The Act's main purposes are to (1) allow terminally ill persons to ingest drugs prescribed
17 by a physician that will end their lives, and (2) reclassify deaths committed under the Act as non-
18 suicide, as it remains a felony in California to assist or abet "suicide." The Act's key provision is
19 to label certain individuals with a "terminal disease," thus removing them from a panoply of
20 protections otherwise present in California law.

21 D. The Labeled Individual

22 An adult resident of California qualifies to receive lethal drugs if (1) he or she is
23 diagnosed with a "terminal disease;" (2) two oral requests are made at least 15 days apart, in
24

25 _____
26 ² Alexei Koseff, *California Assisted Death Bill Appears Finished For The Year*, SACRAMENTO
27 BEE (July 7, 2015), available at [http://www.sacbee.com/news/politics-government/capitol-
28 alert/article26660032.html](http://www.sacbee.com/news/politics-government/capitol-alert/article26660032.html).

³ See [http://www.leginfo.ca.gov/pub/15-16/bill/sen/sb_0101-
0150/sb_128_bill_20150707_history.html](http://www.leginfo.ca.gov/pub/15-16/bill/sen/sb_0101-0150/sb_128_bill_20150707_history.html) (last visited 6/2/2016); see also *supra* note 2.

1 addition to one written request on a state-mandated form; and (3) the resident has the physical
2 and mental ability to self-administer the drugs.⁴ (Cal. Health & Safety Code §§ 443.2, 443.3).

3 The Act defines “terminal disease” as “an incurable and irreversible disease that has been
4 medically confirmed and will, within reasonable medical judgment, result in death within six
5 months.” (*Id.* at § 443.1(q).)

6 E. Duties of the Prescribing Physician

7 Before prescribing lethal drugs, a physician participating in the Act must determine if the
8 individual has a terminal disease and “has the capacity to make medical decisions.” (*Id.* at §§
9 443.1(d), 443.5(a).) Only if the prescribing physician is alert to pre-existing indications of a
10 mental disorder must the requesting individual be referred for assessment by a mental health
11 specialist. (*Id.* at § 443.1(k).) If such a referral is made, no lethal drugs may be prescribed until
12 the specialist determines that the individual has the capacity to make medical decisions and is not
13 suffering from impaired judgment due to a mental disorder. (*Id.*)

14 In addition to providing the individual with certain information, the prescribing physician
15 must also refer the individual to a second physician to confirm the diagnosis and prognosis of the
16 terminal disease, and to confirm that the individual has the capacity to make medical decisions.
17 (*Id.* at § 443.5 (a)(3).) In contrast to the prescribing physician, who needs no particular specialty
18 at all, the second physician must be “qualified by specialty or experience to make a professional
19 diagnosis and prognosis regarding an individual’s terminal disease.” (*Id.*) However, the Act
20 does not specify any objective standards for such qualifications.

21 The prescribing physician is also tasked with confirming that the individual’s request
22 “does not arise from coercion or undue influence by another person.” (*Id.* at 443.5(a).) There is
23 no requirement that either the prescribing or the consulting physician need have any training in
24 detecting coercion or undue influence, nor is he or she required to take any steps beyond
25 speaking with the patient out of the presence of others (other than an interpreter).

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28 ⁴ For this reason, while the law takes effect on June 9, 2016, the earliest someone can receive
drugs for the purpose of committing suicide is June 24, 2016.

1 F. Witnesses

2 The Act requires that two individuals “witness” the Labeled Individual’s written request
3 for lethal drugs. (*Id.* at § 443.3(c)(1-2).) Persons “entitled to a portion of the individual’s estate
4 upon death” or who own “a health care facility where the individual is receiving medical
5 treatment or resides” may be witnesses. (*Id.*; *cf.* Cal. Prob. Code § 6112 [creating presumption
6 that interested witness to will obtained bequest “by duress, menace, fraud, or undue influence”].)
7 Witnesses need not know or have even spoken with the Labeled Individual, yet the Act allows
8 witnesses to attest that the Labeled Individual voluntarily signed the request, is believed to be of
9 sound mind, and is not under the influence of duress, fraud, or undue influence. (Cal. Health &
10 Safety Code § 443.3(c)(1-2).)

11 G. “Humane and Dignified Death”

12 The Act provides exact language for the written request forms. A form must state that
13 the request is for “an aid-in-dying drug that will end my life in a humane and dignified manner.”
14 (*Id.* at § 443.11(a).) But published reports demonstrate that even the most common assisted-
15 suicide drugs (and the Act does not restrict what drugs physicians may prescribe) can cause
16 numerous complications considered neither “humane” nor “dignified” by most patients. The
17 New England Journal of Medicine, for instance, has reported numerous problems with assisted
18 suicide from physicians’ experiences in the Netherlands.⁵ Its report found that 23% of
19 physician-assisted suicide cases were complicated by vomiting or other problems with
20 completion. Chillingly, in most of these cases, physicians intervened to end the person’s life
21 with a lethal injection, which thus became cases of euthanasia. (*Id.*)

22 Likewise, Oregon’s annual reports on its assisted suicide law indicate numerous
23 complications from the drugs prescribed there, with patients reportedly vomiting up and
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26 ⁵ See Johanna H. Groenewoud, *et al.*, “Clinical Problems with the Performance of Euthanasia
27 and Physician-Assisted Suicide in the Netherlands,” 342 *New England J. of Med.* (Feb. 24,
28 2000), pp. 553-55, available at
<http://www.nejm.org/doi/full/10.1056/NEJM200002243420805#t=article>.

1 regurgitating the drugs, going into comas, lingering for days to months, recovering and dying of
2 natural causes later, and sometimes simply not dying at all.⁶

3 H. Ingestion of Drugs

4 Once in possession of the lethal drugs, the Labeled Individual may ingest them days,
5 weeks, or months after receiving them. The Act does not require that ingestion take place under
6 a physician's supervision, nor does it make any other provision to protect the patients that may
7 later ingest the drugs under undue influence, depression or mental and/or emotional disability, or
8 even by way of involuntary administration at the hands of another. The Act states that
9 physicians should give patients a "final attestation form" to be filled out within "48 hours prior to
10 the qualified individual choosing to self-administer the aid-in-dying drug." (Cal. Health &
11 Safety Code § 443.5(12).) But there is no repercussion if the patient does not fill out the form,
12 and no additional investigation into the death takes place.

13 I. Immunities

14 The Act provides for a wide swath of criminal and civil immunity, as well as immunity
15 from administrative or professional penalties, arising from any diagnosis, prognosis, or judgment
16 of capacity made under the Act. (*Id.* at § 443.16(a).) Under the Act, physicians are not even
17 held to a good faith standard; they can act negligently, incompetently, or maliciously and still
18 enjoy nearly complete immunity, so long as the Act's formalities are observed. (*Id.*)

19 J. The Lack Of Rational Basis For The Act

20 The Act is based on a number of surmises and assumptions not reflected in real-world
21 medical practice. Potential coverage under the Act triggers when a doctor gives a prognosis of
22 six months or less to live. (*Id.* at § 443.19.) But it is nearly impossible for doctors to accurately
23 predict how long a seriously ill person may live. (Declaration of George Delgado, M.D.
24 ("Delgado Decl."), ¶ 6; Declaration of Sang-Hoon Ahn, M.D. ("Ahn Decl."), ¶¶ 10-11;
25 Dreisbach Decl., ¶¶ 15-16.) In the example of hospice care, for instance, Medicare requires

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27 ⁶ The State of Oregon has published 18 annual reports on assisted suicide. See Death with
28 Dignity Annual Reports, Oregon Health Authority, available at
<https://public.health.oregon.gov/ProviderPartnerResources/EvaluationResearch/DeathwithDignityAct/Pages/ar-index.aspx>.

1 hospice patients to be certified as having less than six months to live. (Delgado Decl., ¶ 7.)
2 Nonetheless, 30% of patients who enter hospice care live longer than six months. (*Id.*) In some
3 cases, patients out-live their expected prognosis not merely by days, but by decades. (*Id.*) And,
4 in any event, responsible doctors do not offer declarative statements on individual patient
5 prognoses. (Dreisbach Decl., ¶ 16.)

6 The subjective nature of the prognosis required by the Act is magnified by the natural
7 trust and reliance that patients put in their doctors. (Delgado Decl., ¶ 12; Ahn Decl., ¶ 14.)
8 Patients are extremely sensitive to suggestions made by their physicians. (*Id.*) There is
9 significant risk that patients will read too much into a doctor's statements (*Id.*)

10 Despite these realities, the Act presumes that a person facing a six-month diagnosis is
11 mentally prepared and freely able to make his or her choice to seek suicide assistance, absent
12 some vague notion of "mental disorder." (Cal. Health & Safety Code ¶ 443.7.) Hence, the Act
13 requires no consultation with a mental-health specialist unless, in the prescribing physician's
14 subjective judgment, there is some pre-existing or express sign of mental disorder. (*Id.*) But in
15 reality, there is an unbreakable causal link between mental disorders like depression and suicidal
16 thoughts. Depression is the foremost cause of suicide, and a vast majority of suicides are
17 associated with mental disorders. (Declaration of Aaron Kheriaty, M.D. ("Kheriaty Decl."), ¶¶ 5-
18 6.) Fifty-nine percent of those who commit suicide suffer from depression. (*Id.*) Suicides rarely
19 occur in the absence of depression, and patients are naturally fearful and depressed when they
20 receive news of serious illness. (*Id.*) Their suggestiveness to extreme measures, as in the option
21 of suicide, is at its height.⁷ (*Id.*, ¶¶ 11-12, 17-18; Delgado Decl., ¶14; Toffler Decl., ¶¶ 13-15.)

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25 ⁷ This problem is exacerbated because the Act's flaws will lead many doctors to refuse patient
26 assistance. If the doctor most familiar with the patient, his health history, and his family
27 situation decides that the individual is not qualified to receive drugs under the Act, a different
28 "participating" doctor can write the prescription. This is precisely what happened with the first
patient to receive lethal drugs in Oregon. (Declaration of William Toffler ("Toffler Decl."), ¶
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II. LEGAL STANDARD

Among other circumstances, injunctive relief is appropriate when a threatened action would violate “the rights of another party to the action respecting the subject of the action, [] tending to render the judgment ineffectual.” (Cal. Civ. Proc. Code § 526 (a)(2)-(4); see also *White v. Davis* (2003) 30 Cal.4th 528, 554.) A superior court must evaluate two interrelated factors when ruling on a request for a temporary restraining order or a preliminary injunction: (1) the likelihood that the plaintiff will prevail on the merits at trial and (2) the interim harm that the plaintiff [would be] likely to sustain if the injunction were denied as compared to the harm that the defendant [would be] likely to suffer if the preliminary injunction were issued.” (*Id.* at 554.) The greater the plaintiff’s showing on one of these elements, the less must be shown on the other to support an injunction. (*Church of Christ in Hollywood v. Superior Court* (2002) 99 Cal.App.4th 1244, 1251-52; *Butt v. State of Calif.* (1992) 4 Cal.4th 668, 678.) The general purpose of injunctive relief is to preserve the status quo until a final determination can be made on the merits of the action, thereby minimizing the harm that an erroneous interim decision may cause. (See *Continental Baking Co. v. Katz* (1968) 68 Cal.2d 512, 528; *White*, 30 Cal.4th at 554.)

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III. ARGUMENT

A. Plaintiffs Are Likely To Prevail On Their Claims

To obtain a temporary restraining order, Plaintiffs need only show a “reasonable probability” that they will be successful in asserting their rights. (*Continental Baking*, 68 Cal.2d at 528.) Plaintiffs meet this standard.

1. AB 2x15 Violates Article I, Section 7 of the California Constitution Guaranteeing Equal Protection of All California Citizens

The California Constitution’s equal protection guarantee, found in Article 1, section 7, means that “no person or class of persons shall be denied the same protection of the laws which is enjoyed by other persons or other classes of persons in like circumstances in their lives, liberty and property and in their pursuit of happiness.” (*People v. Wutzke* (2002) 28 Cal.4th 923, 943, quoting *People v. Romo* (1975) 14 Cal.3d 189, 196.) The section, along with Article IV, section

1 16, provides “substantially the same protection and evokes substantially the same standards
2 as under the Fourteenth Amendment. (*Cohan v. Alvord* (1984) 162 Cal.App.3d 176, 181.)

3 The courts of this State generally apply two principal standards or tests in reviewing
4 classifications challenged under Article I, section 7. “The first is the basic and conventional
5 standard for reviewing economic and social welfare legislation in which there is a
6 ‘discrimination’ or differentiation of treatment between classes or individuals. It manifests
7 restraint by the judiciary in relation to the discretionary act of a co-equal branch of government;
8 in so doing it invests legislation involving such differentiated treatment with a presumption of
9 constitutionality and ‘[requires] merely that distinctions drawn by a challenged statute bear some
10 rational relationship to a conceivable legitimate state purpose.’” (*D’Amico v. Bd. of Medical*
11 *Examiners* (1974) 11 Cal.3d 1, 16.)

12 However, “[a] more stringent test is applied . . . in cases involving ‘suspect
13 classifications’ or touching on ‘fundamental interests.’ Here the courts adopt ‘an attitude of
14 active and critical analysis, subjecting the classification to strict scrutiny. . . . Under the strict
15 standard applied in such cases, *the state* bears the burden of establishing not only that it has
16 a *compelling* interest which justifies the law but that the distinctions drawn by the law
17 are *necessary* to further its purpose.” (*Id.* at 17, emphasis in original; *Warden v. State*
18 *Bar* (1999) 21 Cal.4th 628, 641 (same); *see also In re Brian J.* (2007) 150 Cal.App.4th 97, 125-
19 126 [“Distinctions in statutes that involve suspect classifications or touch upon fundamental
20 interests are subject to strict scrutiny, and can be sustained only if they are necessary to achieve a
21 compelling state interest.”], quoting *People v. Hofsheier* (2006) 37 Cal.4th 1185, 1200.)

22 2. Strict Scrutiny is Warranted, But the Act Does Not Pass Rational Basis Review

23 As a threshold matter, the Act warrants the more stringent “strict scrutiny” standard of
24 review. This is no mere “economic or social welfare legislation.” Instead, the Act implicates the
25 most fundamental interest imaginable: the rights to personal life and liberty. Article I, Section 1
26 of the California Constitution lists the right to enjoy life among the “inalienable” rights that
27 Californians enjoy. These rights are undoubtedly threatened by the Act, as the Act impinges on
28 life and threatens the liberty of vulnerable California citizens.

1 And even if this Court does not find that the law implicates a strict-scrutiny analysis,
2 there remains no rational basis for depriving individuals meeting the Act’s definition of
3 “terminal illness” from the equal protection of the laws against assisted suicide or homicide.
4 Indeed, a federal district court employing rational basis review found that Oregon’s physician
5 assisted suicide law, which is nearly identical to the Act, was unconstitutional under the Equal
6 Protection Clause of the federal constitution. (See *Lee v. Oregon* (1995) 891 F.Supp. 1429, *rev’d*
7 *on other grounds*, 107 F.3d 1382 (9th Cir. 1997).)

8 3. The Act Distinguishes Between California Residents in an Arbitrary and
9 Capricious Manner

10 California protects its citizens from suicide in numerous ways, chiefly through Penal
11 Code Section 401, which makes it a felony for any person to deliberately aid, advise, or
12 encourage another to commit suicide. Section 401 serves the critical state interests of preserving
13 human life, preventing suicide, protecting innocent third parties such as children, and
14 maintaining the ethical integrity of the medical profession. (*Donaldson v. Lungren* (1992) 2
15 Cal.App.4th 1614, 1620 [“Pertinent state interests include preserving human life, preventing
16 suicide, protecting innocent third parties such as children, and maintaining the ethical integrity of
17 the medical profession.”].) Recently, the California Court of Appeal again confirmed that
18 California law admitted no exception for physicians who wished to assist their patients to take
19 their own lives. (*Donorovich-Odonnell v. Harris* (2015) 241 Cal.App.4th 1118.)

20 Likewise, in cases where a person is considered a physical danger to themselves or to
21 others, California law provides for emergency commitment proceedings. Such persons are
22 evaluated by a psychiatrist and/or psychologist to determine if hospitalization is necessary for
23 their own protection. (Cal. Wel. & Inst. Code § 5150.) A desire to ingest lethal drugs to end
24 one’s life is the ultimate expression of self-harm and under normal circumstances, entitles those
25 who make such threats increased medical oversight and legal protections. (See Kheriaty Decl.,
26 ¶¶ 11, 19.) And yet, under the Act, a physician is not required to refer a patient with a “terminal
27 disease” for any kind of mental health assessment unless the physician subjectively believes that
28 there are previous “indications of a mental disorder.” The Act relies on physicians who are not

1 qualified psychiatrists, psychologists, or counselors to make an initial diagnosis of “mental
2 disorder,”—with little if any guidance as to what that term means—and only then are patients
3 referred for evaluation to an expert in mental health.

4 There is no rational basis, much less a compelling reason satisfying strict scrutiny, for the
5 State to treat those diagnosed with what the Act calls a “terminal disease” differently from other
6 California citizens. As described in some detail above, doctors’ prognoses as to expected life
7 span—regardless of expertise or experience in any particular field—are uncertain and frequently
8 erroneous. (Delgado Decl., ¶ 6; Ahn Decl., ¶ 10-11; Dreisbach Decl., ¶¶ 15-16.) They have little
9 predictive value, and do not justify the differential treatment California law now imposes upon
10 patients who have received a “terminal” diagnosis as opposed to those that have not.

11 The Act’s treatment of those with potential mental illness or disorders is similarly
12 arbitrary, in that the Act puts the cart fully before the horse. Suicide, or at the very least, suicidal
13 thoughts, generally results from mental depression and other indicia of mental distress.
14 (Kheriaty Decl., ¶¶ 5-6, 10-11.) This problem becomes more acute given the Act’s failure to
15 require the physician prescribing the drugs to have any pre-existing relationship with the patient.
16 In this context, and based on a doctor’s arbitrary prognosis, the law ceases to express concern for
17 preserving those who may be acting not out of free will, but out of natural mental distress. (*Id.*, ¶
18 11.) This will result in numerous requests for assisted suicide being granted when depression is
19 present but goes undiagnosed or, worse, ignored, in the lead-up to prescribing and ingesting a
20 fatal, self-administered dose.

21 The resulting law purports to give certain terminal patients an “option,” but the
22 combination of the Act’s flaws demonstrates that many Labeled Individuals will have only the
23 illusion of choice. The Act contemplates that doctors will give their patients a false, medically-
24 unnecessary prognosis likely to drive already vulnerable patients into depression and despair.
25 (*Id.*; Ahn Decl., ¶ 13; Delgado Decl., ¶ 12.) Physicians are then asked to vaguely and
26 subjectively determine whether patients are expressing some sign of “mental disorder,” when
27 patients subjected to such a subjective prognosis are likely to have increased anxiety and
28

1 depression as a result. The result is suicide not by free choice, but by self-fulfilling prophecy.

2 (*Id.*)

3 Even more surprising, the Act not only premises its denial of equal protection on an
4 inherently arbitrary and ambiguous classification, but it also removes all requirements that
5 physicians who perform these functions under the Act need exercise the traditional standard of
6 reasonable professional care. Put simply, the Act does not hold physicians to the traditional
7 standard of care in determining who ends up being a Labeled Individual in the first place and
8 thus given this so-called choice.

9 In place of those traditional legal safeguards, the Act instead implements a broad swath
10 of criminal and civil immunity, as well as immunity from administrative or professional
11 penalties, arising from the terminal diagnosis and prognosis and determining the capacity of an
12 individual seeking lethal drugs. (Cal. Health & Safety Code § 443.14(c).) This is truly
13 irrational, and dangerous, precedent. As the district court in *Lee v. Oregon* explained in
14 reviewing Oregon's similar law:

15 The plain inference from [Oregon's Death With Dignity Act] is that
16 it is irrelevant whether physicians objectively act reasonably, or
17 instead act negligently. The court finds that there is no set of facts
18 under which it would be rational for terminally ill patients under [the
19 DWD Act] to receive a standard of care from their physicians under
20 which it did not matter whether they acted with objective
21 reasonableness, according to professional standards. This defect
22 goes to the very heart of the state's reliance on a person's consent to
die. The physician is allowed to negligently misdiagnose a person's
condition and competency and negligently prescribe a drug
overdose, so long as those actions are in good faith. This distinction
in the physician's standard of care under Measure 16 is not rationally
related to any legitimate state interest.

23 (891 F.Supp. at 1437.) Indeed, under the Act, physicians are not even held to a good faith
24 standard; a physician can act negligently, incompetently, or maliciously and still enjoy complete
25 immunity for prescribing lethal medications to individuals, as long as the physician observes the
26 statute's rote formalities. (Cal. Health & Safety Code § 443.14.) Thus, the Act perpetrates an
27 even grosser denial of equal protection and due process to individuals than the Oregon statutory
28 scheme found to violate the parallel federal constitutional protections.

1 Nor does the Act have any effective safeguards to ensure that individuals who are
2 prescribed lethal drugs are acting competently and voluntarily when they finally take the drugs.
3 As the *Lee* court further explained:

4 [T]here is no requirement that the person take the lethal overdose at
5 the time of the prescription or under the supervision of a physician.
6 . . . [the DWD Act] does nothing to ensure that the decision to
7 commit suicide is rationally and voluntarily made at the time of
8 death. As a result [the DWD Act] purports to recognize a competent
9 terminally ill person's choice to obtain the means to end their life
10 should they commit suicide while competent, incompetent, or
unduly influenced at some future time, including hours, days,
weeks, or months later. A person decides when, where, and most
important, whether to take the prescribed drug without any legal
protection.

11 (*Id.*)

12 The absence of safeguards is particularly significant because proponents of physician-
13 assisted suicide argue that possession of the prescribed lethal drugs gives the Labeled Individual
14 "peace of mind" or "comfort."⁸ Indeed, the Act does not require Labeled Individuals to indicate
15 any intention to use the prescribed lethal drugs in the near future, or even at all.

16 But if Labeled Individuals do ingest the drugs, the Act gives them documentation
17 equivalent to a state-sanctioned, and unquestioned, suicide note. It virtually guarantees that no
18 "aid-in-dying drug" death will be investigated by the coroner or law enforcement agencies. Even
19 if the individual requested the drugs for "peace of mind" rather than for use, the Act presumes
20 that the individual's subsequent death, weeks or months later, was a voluntary, state-sanctioned
21 "non-suicide." The danger of permitting such action to go unchecked by appropriate
22 administrative and legal review is extreme. (See *Donaldson*, 2 Cal.App.4th at 1622
23 ["Nevertheless, even if we were to characterize Donaldson's taking his own life as the exercise
24 of a fundamental right, it does not follow that he may implement the right in the manner he

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26 ⁸ See, e.g., Senate Rules Committee, Bill Analysis, at p. 15, available at
27 [http://www.leginfo.ca.gov/pub/15-16/bill/asm/ab_0001-](http://www.leginfo.ca.gov/pub/15-16/bill/asm/ab_0001-0050/abx2_15_cfa_20150910_233634_sen_floor.html)
28 [0050/abx2_15_cfa_20150910_233634_sen_floor.html](http://www.leginfo.ca.gov/pub/15-16/bill/asm/ab_0001-0050/abx2_15_cfa_20150910_233634_sen_floor.html) ("According to Compassion and Choices
less than one percent of dying Californians would take the medication, but many people would
benefit from the peace of mind of having access to it if they need and want it. Simply knowing
the option is available can provide a palliative effect for dying people.").

1 wishes here. It is one thing to take one's own life, but quite another to allow a third person
2 assisting in that suicide to be immune from investigation by the coroner or law enforcement
3 agencies."].) There is little, if any, protection for involuntary ingestion as a result of coercion,
4 undue influence, or other wrongful act. Again, the *Lee* court offered instructive insight:

5 There is no set of facts under which it would be rational to conclude
6 that a state may sanction providing people the means to commit
7 suicide without consideration of their circumstances ***at the time of***
8 ***the suicide***. This is not simply a matter of an 'imperfect fit' between
9 the classification of 'terminally ill patient' and a goal of permitting
10 assisted suicide. Given the imprecision and inadequacy of
11 protections leading to the prescription of drugs, the relationship
12 between [the DWD Acts'] classification and the goal of permitting
13 assisted suicide is too attenuated without some protection at the time
14 of taking the fatal drug dosage.

11 (891 F.Supp. at 1437, emphasis added.)

12 The combination of these factors—reliance on an irrational prognosis scheme, the failure
13 to rationally account for mental disorder, and the failure to consider the patient's circumstances
14 at the time of the suicide—and others, renders the Act irrational, and violates equal protection.

15 B. The California Constitution Guarantees Due Process Before an Individual Is Deprived of a
16 Fundamental or Constitutional Right

17 California citizens are also entitled to substantive due process before the Legislature can
18 impose on fundamental rights. (See *People v. Olivas* (1976) 17 Cal.3d 236, 249-250 [holding
19 that constitutional rights are more than "a mere procedural nicety," but instead "implicitly
20 recognize the fundamental importance of personal liberty"]; *In re Marilyn H.* (1993) 5 Cal.4th
21 295, 306 ["Substantive due process prohibits governmental interference with a person's
22 fundamental right to life, liberty, or property by unreasonable or arbitrary legislation."].) Due
23 process is flexible and calls for such procedural protections as the particular situation demands.
24 (*People v. Ramirez* (1979) 25 Cal.3d 260, 268.)

25 Case law sets forth several factors for determining whether due process has been
26 satisfied. First, a court considers the private interest that will be affected by the action. Then, it
27 reviews the "risk of an erroneous deprivation of such interest through the procedures used, and
28

1 the probable value, if any, of additional or substitute procedural safeguards.” Third, it analyzes
2 the “dignitary interest” in informing individuals of the nature, grounds and consequences of the
3 action and in enabling them to present their side of the story before a responsible governmental
4 official; and the government interest, including the function involved and the fiscal and
5 administrative burdens that the additional or substitute procedural requirements would entail.”
6 (*Ramirez*, 25 Cal.3d at 269, citing *Civil Service Assn. v. City and County of San Francisco*
7 (1978) 22 Cal.3d 552, 561.) This analytical framework has been applied in many contexts,
8 including in the area of involuntary civil commitment and treatment. (*People v. Litmon* (2008)
9 162 Cal.App.4th 383.)

10 In applying this analysis to the facts, the private interest affected is fundamental—it is the
11 right to life itself. The risk that the Act will erroneously deprive California citizens of this right
12 is extremely high because the Act uses the vague and arbitrary terms previously described. (See
13 Part I.A.) In contrast, the value of additional safeguards, including precise legal and medical
14 definitions, is indisputably high. In short, if the government intends to draw distinctions between
15 citizens for the purpose of calling some suicides “dignified” and “humane,” while calling others
16 felonies, it must be exceedingly precise in its methods of doing so.

17 Furthermore, any burden on the government in ensuring that there are sufficient
18 procedural safeguards is *de minimis*. Indeed, the government already has laws in place to
19 adequately protect California citizens in this very situation. These safeguards already support the
20 government’s own interests in protecting human life, preventing abuses, and maintaining social
21 order through effective enforcement of criminal laws protecting the vulnerable.

22 C. The Act Fails to Satisfy Due Process Because It Is Vague and Conflicting

23 Likewise, a law failing to give a person of ordinary intelligence a reasonable opportunity
24 to know what is prohibited, or in this case what is authorized and/or who is eligible to participate
25 under the Act, violates due process under both the federal and California Constitutions. (*Kasler*
26 *v. Lockyer* (2000) 23 Cal.4th 472, 498-499, citing *Grayned v. City of Rockford* (1972) 408 U.S.
27 104, 108; *People v. Heitzman* (1994) 9 Cal.4th 189, 199.)

1 Here, the Act’s use of the phrase “terminal disease” is unconstitutionally vague. The Act
2 defines “terminal disease” as “an incurable and irreversible disease that has been medically
3 confirmed and will, within reasonable medical judgment, result in death within six months.”
4 (Cal. Health & Safety Code § 443.1(q).) But in addition to being an arbitrary measure of actual
5 life expectancy, it fails to specify whether the six-month prognosis assumes any medical
6 intervention. This failure to specify renders the definition of terminal disease susceptible to
7 including chronic illnesses, such as diabetes or kidney disease, treatable in form and function but
8 which can cause death without appropriate treatment. This vagueness deprives individuals the
9 protection of previously-existing California laws against assisted suicide by unconstitutionally
10 creating a class of persons again based on arbitrary, unreasonable, and irrational distinctions.

11 D. The Legislature Lacked Constitutional Authority to Legislate on Physician Assisted
12 Suicide in the Extraordinary Legislative Session

13 The Legislature’s extraordinary session convened to consider and act upon legislation
14 necessary to “enact permanent and sustainable funding from a new managed care organization
15 tax and/or alternative fund source,” as well as legislation to establish mechanism to ensure that
16 any rate increases expand access to services, improve services provided to consumers with
17 developmental disabilities, and improve the efficiency of the health care system and the health of
18 Californians. The Legislature has “no power to legislate on any subject not specified in the
19 proclamation.” (Cal. Const., Art. IV, sec. 3(b); *see also People v. Curry* (1900) 130 Cal. 82.)
20 The Legislature’s mandatory duty while sitting in special session is to confine itself to the
21 subject matter of the call. (*Id.*; *Martin v. Riley* (1942) 20 Cal.2d 29, 39.) Because the
22 Legislature has no power to legislate on any subjects other than those specified in the
23 proclamation, the law must be stricken for this reason as well. (Cal. Const., Art. IV, Sec. 3(b).)

24 E. Plaintiffs and Their Patients Will Suffer Irreparable Injury If the Act Is Not Enjoined

25 In deciding whether to enter any kind of preliminary injunction, a trial court exercises its
26 discretion in determining whether the “interim harm that the plaintiff is likely to sustain if the
27 injunction were denied as compared to the harm that the defendant is likely to suffer if the
28 preliminary injunction were issued.” (*Nutro Products, Inc. v. Cole Grain Co.* (1992) 3

1 Cal.App.4th 860, 865.) But discretion should be exercised “in favor of the party most likely to
2 be injured.” (*Robbins v. Superior Court* (1985) 38 Cal.3d 199, 205.) If the denial of an
3 injunction would result in great harm to the Plaintiffs’ patients, while defendants would suffer
4 little harm if the injunction were granted, it is an abuse of discretion to fail to grant the
5 preliminary injunction. (*Id.*)

6 There is no doubt that in this case, this balancing test favors the issuance of the
7 injunction. Defendants will suffer little to no prejudice should the injunction issue, as there are
8 already civil and criminal laws protecting individuals affected by the Act. Plaintiffs and their
9 patients, on the other hand, will suffer severe prejudice should the Act’s immunities come into
10 effect, up to and including the irreversibility of lives lost to currently unlawful acts of assisting
11 suicide. Thus, the balancing of potential harms weighs on the side of halting recognition of the
12 Act’s provisions granting criminal and civil immunity to allow for a full consideration of the
13 legal issues raised in this case.

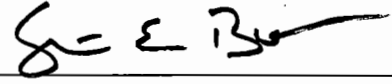
14 IV. CONCLUSION

15 Based on the foregoing, Plaintiffs respectfully request this Court grant their request for a
16 temporary restraining order enjoining Defendants from recognizing any part of the Act, and issue
17 an order to show cause why a preliminary injunction should not issue enjoining Defendants from
18 recognizing the constitutionality of the Act in their criminal enforcement functions for the
19 pendency of this action.

1 Dated: June 8, 2016

LARSON O'BRIEN, LLP

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