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DIVISION TWO

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August 30, 2018

N O T I C E

Dear Counsel:

You are invited to participate in oral argument, and you will be notified approximately 30 days in advance of the date and time of oral argument. Enclosed is the tentative opinion of the panel hearing the case to help you focus your argument.

The following procedures and policies apply to oral argument:

(1) Since the tentative opinion focuses oral argument, no more than 15 minutes of oral argument will be allowed for each side, except for good cause. (Cal. Rules of Court, rule 8.256(c); Ct. App., Fourth Dist., Div. Two, Misc. Order 18-6.)

(2) Counsel should respond to the tentative opinion and avoid unreasonable repetition of arguments raised in counsel's briefs.

(3) No supplemental briefing will be accepted because counsel may raise those issues during oral argument. However, counsel should refrain from raising new issues not briefed. (*People v. Pena* (2004) 32 Cal.4th 389, 403.)

(4) No continuances will be permitted except for good cause shown.

PLEASE NOTE: Counsel for amicus in support of your position in this case *will not* receive a separate copy of this tentative opinion. It is your responsibility to provide amicus with a copy if you so desire. In the event oral argument is requested by any party, if you wish to share your allotted oral argument time (15 minutes) with counsel for amicus, it is your responsibility to: (1) Work out the allocation of your

time with amicus; (2) advise amicus to use the tentative opinion to help focus its arguments in accordance with the principles set out in this letter; and (3) ADVISE THE CLERK OF THIS COURT *NO LATER THAN NOON ON THE FRIDAY BEFORE ORAL ARGUMENT* THAT YOU WILL BE SHARING YOUR TIME WITH AMICUS AND HOW THAT TIME IS TO BE ALLOCATED. Failure to comply with this provision may preclude counsel for amicus from presenting oral argument.

CONSIDERING PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE ex rel. XAVIER BECERRA, as Attorney General etc., Petitioners, v. THE SUPERIOR COURT OF RIVERSIDE COUNTY, Respondent; SANG-HOON AHN et al., Real Parties in Interest.	E070545 (Super.Ct.No. RIC1607135) TENTATIVE OPINION

ORIGINAL PROCEEDINGS; petition for writ of mandate. Daniel A. Ottolia, Judge. Petition granted.

Xavier Becerra, Attorney General, Julie Weng-Gutierrez, Senior Assistant Attorney General, Joshua A. Klein, Deputy Solicitor General, and Niromi W. Pfeiffer, Gregory D. Brown and Darrell W. Spence, Deputy Attorneys General, for Petitioners.

No appearance for Respondent.

Larson O'Brien, Stephen G. Larson, Robert C. O'Brien, Steven E. Bledsoe, and Erica R. Graves; Life Legal Defense Foundation, Catherine W. Short, Allison K. Aranda, and Alexandra Snyder; and Karen M. Kitterman for Real Parties in Interest Sang-Hoon Ahn, Laurence Boggeln, George Delgado, Phil Dreisbach, Vincent Fortanasce, Vincent Nguyen, and the Christian Medical and Dental Society d/b/a the American Academy of Medical Ethics.

Law Office of Jon B. Eisenberg, Jon B. Eisenberg, O'Melveny & Myers, John Kappos, Bo Moon, Jason A. Orr, Tyler H. Hunt, and Kevin Díaz (admitted pro hac vice) for Real Parties in Interest Matthew Fairchild, Joan Nelson, and Catherine S. Forest.

Diane F. Boyer-Vine, Legislative Counsel, Robert A. Pratt, Principal Deputy Legislative Counsel, and Aaron D. Silva, Chief Deputy Legislative Counsel; Strumwasser & Woocher, Fredric D.Woocher, and Michael J. Strumwasser for the California State Senate and State Assembly as Amici Curiae on behalf of Petitioners.

Andrea Saltzman, in pro. per., as Amica Curiae on behalf of Petitioners.

Simpson Thacher & Bartlett and Simona G. Strauss for Death with Dignity National Center as amicus curiae on behalf of Petitioners.

In 2015, the Governor called a special session of the Legislature for certain specified purposes, including to "[i]mprove the efficiency and efficacy of the health care system, reduce the cost of providing health care services, and improve the health of Californians." {Exs. **216-217**} During that session, the Legislature enacted the End of

Life Option Act (Health & Saf. Code, §§ 443-443.22) (Act), which legalized physician-assisted suicide[1] for the terminally ill.

In the action below, the trial court entered judgment on the pleadings, enjoining enforcement of the Act on the ground that it was not within the scope of the proclamation calling the special session, and therefore it was in violation of article IV, section 3, subdivision (b) of the California Constitution.

This extraordinary writ proceeding presents two key issues:

1. Have the parties challenging the constitutionality of the Act adequately alleged that they have standing to do so?

2. Was the trial court correct in ruling that the Act is unconstitutional?

We will hold that the challengers do not appear to have standing. Hence, we do not reach the constitutional question.

I

FACTUAL BACKGROUND

Because we are reviewing a judgment on the pleadings, we take the facts from the complaint, as well as from matters of which we may take judicial notice. (*People ex rel. Alzayat v. Hebb* (2017) 18 Cal.App.5th 801, 811 {Fourth Dist., Div. Two}.)

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[1] The terminology in this area is highly politicized. Proponents of the concept prefer "aid in dying" or "death with dignity"; opponents prefer "assisted suicide" or "euthanasia." There does not seem to be any wholly neutral term.

Google reports about 142,000,000 search results for "assisted suicide" and only about 256,000 for "aid in dying." Moreover, the Wikipedia article on the subject is entitled "Assisted suicide." We will use "assisted suicide" because it is the more common term, without intending to express any other opinion.

On June 16, 2015, the Governor issued a proclamation convening a special session of the Legislature for certain specified purposes, including to "[i]mprove the efficiency and efficacy of the health care system, reduce the cost of providing health care services, and improve the health of Californians." {Exs. 17, ¶ 8, 29-30, **216-217**, 339-340}

On September 11, 2015, during the special session, the Legislature passed the Act. (Assembly Weekly History, Apr. 4, 2016, p. 14.) {Exs. 17, ¶ 9, 232} On October 5, 2015, the Governor signed it into law. (Stats. 2015-2016, 2nd Ex. Sess., ch. 1.) It went into effect on June 9, 2016. (Cal. Const., art. IV, § 8, subd. (c)(1); see Assembly Concurrent Resolution No. 1 (2015-2016 2nd Ex. Sess.); Assembly Weekly History (2015-2016 2nd Ex. Sess.), Apr. 4, 2016, p. 16.) {Exs. 234}

The Act allows an individual who has complied with all of its requirements to obtain and to use an "aid-in-dying drug." "Aid-in-dying drug" is defined, in part, as a drug that may be "self-administer[ed] to bring about . . . death . . . ." (Health & Saf. Code, § 443.1, subd. (b).)

First, the individual's attending physician must diagnose the individual as having a terminal disease. (Health & Saf. Code, § 443.2, subd. (a)(1).) "Terminal disease" is defined as "an incurable and irreversible disease that has been medically confirmed and will, within reasonable medical judgment, result in death within six months." (Health & Saf. Code, § 443.1, subd. (q).) At that point, the individual may make a request to the attending physician for an aid-in-dying drug. (Health & Saf. Code, §§ 443.2, subd. (a), 443.3, subd. (a).)

The attending physician must refer the individual to a consulting physician (Health & Saf. Code, § 443.5, subd. (a)(3)), who must also diagnose the individual as having a terminal disease. (Health & Saf. Code, § 443.6, subd. (b).) If either the attending or the consulting physician finds indications that the individual has a mental disorder, he or she must refer the individual for a mental health specialist assessment. (Health & Saf. Code, §§ 443.5, subd (a)(1)(A)(ii), 443.6, subd (d).) {Exs. 18, ¶ 13} There are many other steps that must be taken to ensure that the request is voluntary and not the product of a mental disorder, coercion, or a whim. (Health & Saf. Code, §§ 443.3, 443.4, 443.5, subd. (a), 443.6, 443.7, 443.8, 443.10, 443.11, 443.17, subd. (d).)

If all the conditions of the Act are met, the attending physician may prescribe an aid-in-dying drug to the qualified individual. (Health & Saf. Code, § 443.5, subd. (b).) The qualified individual may then self-administer the aid-in-dying drug. (See Health & Saf. Code, §§ 443.1, subd. (b), 443.13, subd. (a)(2), 443.14, subd. (a).)

"Actions taken in accordance with [the Act] shall not, for any purposes, constitute suicide . . . , homicide, or elder abuse under the law." (Health & Saf. Code, § 443.18; see also Health & Saf. Code, § 443.14, subd. (d)(2).)

A physician who participates in the process prescribed by the Act is immune from virtually all adverse legal consequences. (Health & Saf. Code, §§ 443.1, subd. (h), 443.14, subd. (c).) {Exs. 18, ¶ 15} On the other hand, a physician is equally immune from "refusing to participate in activities authorized under this part, including, but not limited to, refusing to inform a patient regarding his or her rights under this part, and not

referring an individual to a physician who participates in activities authorized under this part." (Health & Saf. Code, §§ 443.14, subd. (e)(2), 443.1, subd. (h).)

"Participation in activities authorized [by the Act] shall be voluntary. . . . [A] person or entity that elects, for reasons of conscience, morality, or ethics, not to engage in activities authorized [by the Act] is not required to take any action in support of an individual's decision under [the Act]." (Health & Saf. Code, § 443.14, subd. (e)(1).)

II

PROCEDURAL BACKGROUND

A. *Events in the Trial Court*.

This action below was filed in June 2016. {Exs. 13-30} The plaintiffs are five individual physicians[2] along with a professional organization that promotes ethical standards in the medical profession[3] (collectively the Ahn parties). {Exs. 13, 16, ¶¶ 3-4} They asserted causes of action for violations of due process, of equal protection, and of California constitutional limitations on the power of the Legislature to act in special session. {Exs. 21-26, ¶¶ 25-49}

Initially, the only named defendant was Michael Hestrin, in his capacity as District Attorney of Riverside County. {Exs. 13, 16, ¶ 5} By stipulation, however, the Attorney General and "[t]he State of California . . . by and through the California Department of

[2] Dr. Sang-Hoon Ahn, Dr. Laurence Boggeln, Dr. George Delgado, Dr. Philip Dreisbach, Dr. Vincent Fortanasce, and Dr. Vincent Nguyen. {Exs. 13, 16, ¶ 4}

[3] The Christian Medical and Dental Society, d/b/a the American Academy of Medical Ethics (Academy). {Exs. 13, 16, ¶ 3}

Public Health" {Exs. 35, ¶ 2} (collectively the State) intervened as defendants. {Exs. 34-47}

In February 2018, the Ahn parties filed a motion for judgment on the pleadings. {Exs. 187-261} On May 15, 2018, after hearing argument, the trial court ruled that it would grant the motion, without leave to amend. {Exs. 399-403, 409} On May 21, 2018, it entered a formal written order to that effect. {Exs. 415-418} On May 24, 2018, it entered judgment in favor of the Ahn parties and against Hestrin and the State. {Supp. 30-39} In the judgment, it enjoined enforcement of the Act.[4] {Supp. 31}

On May 29, 2018, three nonparties[5] (collectively the Fairchild parties) filed an ex parte application to vacate the judgment. {Supp. 145-402} They supported the Act and argued that the judgment was erroneous. {Supp. 154-160} On May 30, 2017, the trial court denied the application.[6] {Sup. 411, 421; see also Sup. 413-414}

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[4] As the State points out {Pet. 40}, the judgment was poorly drafted. For example, it did not enjoin enforcement of the Act in so many words; rather, it recited that enforcement of the Act had *already* been enjoined {Supp. 30}, even though it had not. {See Exs. 416} The parties agree that the judgment is, in effect, an injunction. {Pet. 12, 27; ARet. 45; Fret. 24-25}

Likewise, the judgment enjoined both Hestrin and the State, yet it stated that it was a judgment against the State alone. {Supp. 30} We construe it as a judgment against both.

[5] Matthew Fairchild and Dr. Joan Nelson, who have been diagnosed with terminal diseases and want to have access to assisted suicide, and Dr. Catherine S. Forest, a physician who treats patients with terminal diseases and wants to provide them with access to assisted suicide. {Sup. 152-153}

[6] The trial court did allow the Fairchild parties to bring a noticed motion to vacate the judgment on shortened time; it set a hearing on June 29, 2018. {Sup. 414, 419} This hearing never took place because we issued a stay. (See part II.B, *post*.)

B. *Events in This Court*.

On May 21, 2018, the State filed a petition for writ of mandate in this court, along with a request for an immediate stay. {Pet.} Initially, we denied a stay. {Ord. filed 5/23/18} On June 8, 2018, however, the State filed an amended petition along with a renewed request for an immediate stay. {Req. filed 6/8/18} On June 15, 2018, we issued an order to show cause and granted a temporary stay. {Ord. filed 6/15/18}

Meanwhile on June 6, 2018, the Fairchild parties filed an appeal from the judgment. {Sup. 424-427} We ordered that the appeal and this writ proceeding be considered together. We did not consolidate them. {Ord. filed 6/19/18} Nevertheless, from this point on, the parties served their filings in the writ proceeding on the Fairchild parties. {E.g., Req. for Jud. Not. filed 6/26/18; ARet.} Moreover, the Fairchild parties filed a return to the petition. {FRet.} None of the parties objected to this.

III

THE STATUS OF THE FAIRCHILD PARTIES

In their separate appeal, the Fairchild parties contend that, as a result of the denial of their ex parte application to vacate the judgment, they have standing to appeal and, in that appeal, to challenge the judgment on the merits. {E070634 AOB 11; E070634 ARB 7-8} The Ahn parties dispute this. {E070634 RB 15}

The issue for us, however, is not whether the Fairchild parties are parties to the appeal, but only whether they are parties to this writ proceeding.

A party to a writ proceeding does not necessarily have to have been a party to the proceeding in the tribunal below. (*Sonoma County Nuclear Free Zone v. Superior Court* (1987) 189 Cal.App.3d 167, 173, fn. 3; *Monterey Club v. Superior Court of Los Angeles* (1941) 48 Cal.App.2d 131, 143.) "In writ proceedings, ""'real party in interest' has been generally defined as 'any person or entity whose interest will be directly affected by the proceeding . . . .' [Citation.] While the real party in interest is 'usually the other party to the lawsuit or proceeding being challenged' [citation], it may be . . . 'anyone having a direct interest in the result' [citation] . . . .'"" [Citation.]" (*Tabarrejo v. Superior Court* (2014) 232 Cal.App.4th 849, 859.) The Fairchild parties claim such a direct interest, in that they want access to assisted suicide under the Act, but the judgment enjoins enforcement of the Act.

Admittedly, the State's writ petition did not name the Fairchild parties (see *Tabarrejo v. Superior Court*, *supra*, 232 Cal.App.4th at p. 859), nor did the Fairchild parties formally move to intervene (see *Wright v. Jordan* (1923) 192 Cal. 704, 708-709, 714.) However, a person can become a party to an action, even if not named in the complaint, by appearing and participating without any objection by the other parties. (*Fireman's Fund Ins. Co. v. Sparks Construction, Inc.* (2004) 114 Cal.App.4th 1135, 1145-1147 {Fourth Dist., Div. Two} and cases cited.) We see no reason why this principle should not also apply to a writ proceeding.

This is not to say that they are necessarily *proper* parties. It may be that, if their participation had been challenged, we would conclude that their joinder is improper. We

simply conclude that they are parties for such purposes as whether they are subject to our jurisdiction, whether they are entitled to notice, and whether we can consider their return.

IV

THE PROPRIETY OF WRIT REVIEW

The State contends that review by writ is appropriate in this case. {Pet. 41-44} The other parties do not dispute this. {See ARet., FRet.} Nevertheless, we address it briefly, because it goes to our jurisdiction.

It goes without saying that the judgment was appealable. (Code Civ. Proc., § 904.1, subd. (a)(1).) Indeed, both the State and the Fairchild parties have appealed from it.

"Extraordinary writ review by way of a petition for writ of mandate is ordinarily available only if the petitioner has no adequate legal remedy. [Citation.] An immediate direct appeal is presumed to be an adequate legal remedy. [Citation.] Writ review is appropriate, however, if . . . the issues presented are of great public importance and require prompt resolution. [Citation.]" (*Henry M. Lee Law Corp. v. Superior Court* (2012) 204 Cal.App.4th 1375, 1382-1383.)

Here, the availability of assisted suicide to terminally ill patients is an issue of great public importance. Moreover, because terminally ill patients, by definition, are expected to die within six months, time is of the essence. "Our receipt of numerous amicus curiae briefs underscores the importance of th[e] issue." (*Corbett v. Superior*

Court (2002) 101 Cal.App.4th 649, 657.) We therefore exercise our discretion in favor of writ review.

V

STANDING IN THE TRIAL COURT

The State contends that the Ahn parties do not have standing to challenge the Act. {Pet. 37-40}

A. *Additional Factual and Procedural Background*.

The Ahn parties alleged that they are California physicians (or, in the case of the Academy, that it has members who are California physicians) who have patients with terminal diseases within the meaning of the Act. "They bring this action to protect the rights of their patients to be protected by 1aw . . . from being assisted and abetted in committing suicide, from receiving substandard medical care, and from having depression and medical conditions leading to suicide left untreated." {Exs. 16, ¶¶ 3-**4**}

The Academy additionally alleged that it "promote[s] ethical standards in the medical profession" and "lobbies for ethical government policy consistent with the Hippocratic tradition of preserving life." {Exs. 16, ¶ **3**}

The State responded with a general denial of these (and all other) allegations of the complaint. {Exs. 40, ¶ 20} Moreover, in opposition to the motion for judgment on the pleadings, it argued that the Ahn parties lacked standing. {Exs. 269-271, 275-277}

The trial court ruled that the Ahn parties did have standing: "[W]here a constitutional challenge is involved, a party whose own rights are not impacted, but

whose challenge is raised on behalf of absent third parties, has sufficient standing if the relationship between the litigant and the absent third party whose rights the litigant asserts is so close that the litigant is fully or very nearly as effective a proponent of the right as would be the absent party, and there are obstacles to prevent the third parties from bringing suit themselves.

"The plaintiffs in this case are doctors whose actions are not only covered under the Act, but who have a close enough relationship to their patients to bring them within the ambit of the Act.

"Furthermore, the Act impacts terminally ill patients who are not in a position to challenge the law because their illnesses and their shortened life expectancy present significant obstacles in bringing suit themselves." {Exs. **400-401**}

B. *Discussion*.

1. *General standing principles*.

"[S]tanding concerns a specific party's interest in the outcome of a lawsuit. [Citations.] We . . . require a party to show that he or she is sufficiently interested as a prerequisite to deciding, on the merits, whether a party's challenge to legislative or executive action independently has merit. [Citation.]" (*Weatherford v. City of San Rafael* (2017) 2 Cal.5th 1241, 1247-1248.) "Standing is a threshold issue necessary to maintain a cause of action, and the burden to allege and establish standing lies with the plaintiff. [Citations.]" (*Mendoza v. JPMorgan Chase Bank, N.A.* (2016) 6 Cal.App.5th 802, 810.)

"""As a general principle, standing to invoke the judicial process requires an actual justiciable controversy as to which the complainant has a real interest in the ultimate adjudication because he or she has either suffered or is about to suffer an injury of sufficient magnitude reasonably to assure that all of the relevant facts and issues will be adequately presented to the adjudicator. [Citations.] To have standing, a party must be beneficially interested in the controversy; that is, he or she must have 'some special interest to be served or some particular right to be preserved and protected over and above the interest held in common with the public at large.' [Citation.] The party must be able to demonstrate that he or she has some such beneficial interest that is concrete and actual, and not conjectural or hypothetical." [Citation.]' [Citation.]" (*City of Palm Springs v. Luna Crest Inc.* (2016) 245 Cal.App.4th 879, 883 {Fourth Dist., Div. Two}.)

2. *The effect of the State's general denial*.

Preliminarily, the trial court should have denied judgment on the pleadings for the simple reason that the State denied all of the Ahn parties' allegations. "A plaintiff's motion for judgment on the pleadings is analogous to a plaintiff's demurrer to an answer and is evaluated by the same standards. [Citations.] The motion should be denied if the defendant's pleadings raise a material issue or set up affirmative matter constituting a defense; for purposes of ruling on the motion, the trial court must treat all of the defendant's allegations as being true. [Citation.]" (*Allstate Ins. Co. v. Kim W.* (1984) 160 Cal.App.3d 326, 330-331, italics omitted.) Here, the State denied all of the Ahn

parties' allegations, including as to standing. The trial court had to accept this denial as true. This alone should have precluded judgment on the pleadings.

3. *The Ahn parties' allegations regarding standing*.

The Ahn parties also lack standing for a more fundamental reason: They did not allege it adequately in their complaint.

a. *Third-party standing*.

The allegations of the complaint are clearly intended to assert third-party standing. Moreover, the trial court ruled that the Ahn parties had standing on this theory.

"As a general rule, a third party does not have standing to bring a claim asserting a violation of someone else's rights. [Citation.]" (*Brenner v. Universal Health Services of Rancho Springs, Inc.* (2017) 12 Cal.App.5th 589, 605.) However, an exception to this general rule applies when "'(1) the litigant suffers a distinct and palpable injury in fact, thus giving him or her a concrete interest in the outcome of the dispute; (2) the litigant has a close relationship to the third party such that the two share a common interest; and (3) there is some hindrance to the third party's ability to protect his or her own interests. [Citations.]' [Citation.]" (*Yelp Inc. v. Superior Court* (2017) 17 Cal.App.5th 1, 7; accord, *Sanchez v. City of Modesto* (2006) 145 Cal.App.4th 660, 674-677; *Novartis Vaccines & Diagnostics, Inc. v. Stop Huntingdon Animal Cruelty USA, Inc.* (2006) 143 Cal.App.4th 1284, 1297-1298.)

For example, in *Lewis v. Superior Court* (2017) 3 Cal.5th 561, the State Medical Board, as part of its investigation of a doctor, obtained his patients' prescription records

from a centralized database. (*Id*. at pp. 565-567.) The Supreme Court held that the doctor had standing to assert that this was a violation of his patients' state constitutional right to privacy. (*Id*. at pp. 569-571.) It explained that "'[w]here the constitutionally protected privacy interests of absent patients are coincident with the interests of the doctor, the doctor must be permitted to speak for them.' [Citation.]" (*Id*. at p. 570.) It reasoned, in part, that the doctor's interests were not "at odds with his patients' interests." (*Ibid*.)

Here, the requisite commonality of interest is missing. The Ahn parties' terminally ill patients may be divided into two groups. One group, upon receiving their diagnosis, will want to request assisted suicide. The Ahn parties, however, brought this action to prevent them from doing so. They cannot possibly "speak for" this group of patients, even if they claim to be doing so for their benefit. The other group will not want to request assisted suicide. In that event, however, all they have to do is not request it. The Act simply does not affect them; thus, it also does not affect the Ahn parties.

The State sums this up well in its petition: "If neither the real party physicians nor their patients want aid-in-dying to be a part of their professional relationship, then neither group suffers any injury due to the Act. Alternatively, if the real party physicians do not want to provide aid-in-dying, but their patients do want aid-in-dying, the physicians' interests are not aligned with those of their patients and third-party standing would not lie." {Pet. **40**}

b. *Personal standing*.

The Ahn parties also argue that they have personal standing, on three theories.

First, they claim that they "regularly" diagnose terminal diseases. {ARet. **39**} They claim that, if they diagnose a patient as having a terminal disease, "that make[s] th[e] patient[s] eligible to receive fatal drugs." {ARet. **40**} They argue that this impacts their "professional obligations and duties to clients." {ARet. **40**}

One problem with this argument is that the Ahn parties did not allege that they regularly (or ever) diagnose terminal diseases. Even assuming they do, however, it is simply not true that that diagnosis makes the patient eligible for aid-in-dying. The patient still has to jump through a number of hoops, and the Ahn parties are free to refuse to participate in that process. Once they refuse, if the patient still wants aid-in-dying, he or she must get a new attending physician, who must also diagnose the patient as having a terminal disease. (Health & Saf. Code, § 443.5, subd. (a)(1)(B).) Moreover, the attending physician must refer the patient to a consulting physician, and the consulting physician, too, must diagnose the patient as having a terminal disease. (Health & Saf. Code, §§ 443.1, subd. (j), 443.5, subd. (a)(3), 443.6, subd. (b).)

At this point, the Ahn parties' responsibility for the patient's choice of assisted suicide is attenuated, at best. We may assume that they would feel some reluctance to diagnose a patient as having a terminal disease, because one possible outcome is that the patient will start the aid-in-dying process (albeit with a different attending physician). Even so, there are many other reasons why a physician might be reluctant to diagnose a

terminal disease — not least, that the patient might choose to commit *unassisted* suicide. These "conjectural" and "hypothetical" possibilities do not give rise to standing.

Under the AMA Code of Medical Ethics, a physician has a duty to communicate an honest diagnosis: "Except in emergency situations in which a patient is incapable of making an informed decision, withholding information without the patient's knowledge or consent is ethically unacceptable." (Code of Medical Ethics Opinion 2.1.3.[7]). Compliance might make the Ahn parties feel bad, but they cite no authority for the proposition that bad feelings can be sufficient to confer standing.

Second, the Ahn parties argue that the Act requires them to allow their employees to provide information about aid-in-dying and to provide referrals to other physicians for aid-in-dying. They cite the following provisions of the Act on this point.

Health and Safety Code section 443.15 provides:

"[N]otwithstanding any other law, a health care provider may prohibit its employees . . . from participating in activities under this part while on premises owned or under the management or direct control of that prohibiting health care provider or while acting within the course and scope of any employment by, or contract with, the prohibiting health care provider." (Health & Saf. Code, § 443.15, subd. (a).)

However, the same section also provides:

"For purposes of this section: [¶] . . . [¶] . . .

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[7] Available at <https://www.ama-assn.org/delivering-care/withholding-information-patients>, as of Aug. 30, 2018.

"'Participating, or entering into an agreement to participate, in activities under this part' does not include . . . : [¶] . . .

"(B) Providing information to a patient about this part.

"(C) Providing a patient, upon the patient's request, with a referral to another health care provider for the purposes of participating in the activities authorized by this part." (Health & Saf. Code, § 443.15, subd. (f)(3).)

In sum, then, this section *allows* a health care provider to prohibit its employees from "participating in activities under this part," while it carves out providing information and providing a referral from the definition of "participating in activities under this part." But just because something is not expressly allowed does not mean it is forbidden. What is absent is any general rule *against* prohibiting an employee from providing information or providing a referral. Admittedly, a *health care provider* cannot be subjected to any sanctions — including employment sanctions — for providing information or providing a referral. (Health & Saf. Code, §§ 443.14, subd. (c), 443.16, subd. (a).) However, the Act provides no similar safe harbor for the *employee* of a health care provider.

In any event, even assuming the Act does require a health care provider to allow its employees to provide information and to provide referrals, the complaint fails to allege standing on this basis. It does not allege that the Ahn parties even *have* any employees, much less that such employees want to provide information and referrals against their employers' wishes.

Third, the Ahn parties argue that the Act is vague with respect to whether, once they refuse to participate in aid-in-dying, they are required to refer the patient to a health care provider who will. That is incorrect. The Act specifically says that they cannot be sanctioned for not making such a referral. (Health & Saf. Code, § 443.14, subd. (e)(2).)

c. *Public-interest standing*.

Finally, the Ahn parties argue that they have public-interest standing to sue to enforce a public duty.

In mandate cases, the Supreme Court has held that "'"where the question is one of public right and the object of the mandamus is to procure the enforcement of a public duty, the [petitioner] need not show that he has any legal or special interest in the result, since it is sufficient that he is interested as a citizen in having the laws executed and the duty in question enforced."' [Citation.] . . . We refer to this variety of standing as 'public interest standing.' [Citation.]" (*Save the Plastic Bag Coalition v. City of Manhattan Beach* (2011) 52 Cal.4th 155, 166.)

Public-interest standing, however, is available only in a mandate proceeding, not in an ordinary civil action. (*Reynolds v. City of Calistoga* (2014) 223 Cal.App.4th 865, 873-874.) Here, the complaint does not include a cause of action for a writ of mandate. It is hard to see how it could. A mandate petition must allege that the respondent is failing to perform a ministerial duty. (Code Civ. Proc., § 1085, subd. (a); *Orange Unified School Dist. v. Rancho Santiago Community College Dist.* (1997) 54 Cal.App.4th 750, 765.) "'A ministerial duty is one that is required to be performed in a prescribed manner

under the mandate of legal authority without the exercise of discretion or judgment.' [Citation.]" (*Cape Concord Homeowners Assn. v. City of Escondido* (2017) 7 Cal.App.5th 180, 189.) The Ahn parties sought to enjoin District Attorney Hestrin "from recognizing any exceptions to the criminal law created by the Act . . . ." {Exs. **27**} By virtue of his prosecutorial discretion, however, he has no ministerial duty to prosecute assisted suicide cases. Thus, we see no way to construe the complaint as a mandate petition.

In sum, then, we conclude that the Ahn parties lack standing on any of the theories that they assert.

VI

DISPOSITION

Let a writ of mandate issue, directing the superior court to vacate its order granting the motion for judgment on the pleadings and to vacate the judgment. Our temporary stay is dissolved.

The State is directed to prepare the writ of mandate, to have it issued, to serve copies, and to file the original, with proof of service, with the clerk of this court. The State is awarded its costs in this writ proceeding against the Ahn parties. (Cal. Rules of Court, rule 8.493, subd. (a).) Costs are not awarded for or against the Fairchild parties.

CONSIDERING PUBLICATION