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SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF RIVERSIDE

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

Plaintiffs,

v.

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

Defendant

Case No.: RIC 1607135

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

Date: June 9, 2016
Time: 8:30 AM
Dept.:

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

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

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

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

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

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

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

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

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

Dated: June 8, 2016

LARSON O'BRIEN, LLP

By: _____

Stephen G. Larson
Robert C. O'Brien
Steven E. Bledsoe

LIFE LEGAL DEFENSE FOUNDATION
Catherine W. Short
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In September 2015, proponents of physician-assisted suicide, after failing to pass a bill in California's regular legislative session, hijacked the extraordinary legislative session convened for the purpose of passing legislation to secure funding for health care and "promote the health of Californians," and instead passed AB2x15, the End of Life Option Act ("the Act").

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

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

Despite all of this uncertainty, patients who are given a six-month prognosis are denied protections afforded by laws covering a range of topics, including suicide, homicide, mental illness, and elder abuse. They further lose legal protections requiring doctors to provide reasonable professional care in executing their duties under the Act.[1] And the Legislature has stripped these rights from the citizens the Act targets at the very time when these citizens most need competent medical care and thorough legal protection. The arbitrary nature of the labels

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[1] Indeed, this must be so by definition, since the Legislature has decided to override the medical 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.)

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

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

I. STATEMENT OF FACTS

A. The Parties

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

B. The Legislative Process

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

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

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

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

C. The Act

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

D. The Labeled Individual

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

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[2] Alexei Koseff, *California Assisted Death Bill Appears Finished For The Year*, SACRAMENTO BEE (July 7, 2015), available at 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 (last visited 6/2/2016); see also *supra* note 2.

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

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

E. Duties of the Prescribing Physician

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

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

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

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[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.

F. Witnesses

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

G. "Humane and Dignified Death"

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

Likewise, Oregon's annual reports on its assisted suicide law indicate numerous complications from the drugs prescribed there, with patients reportedly vomiting up and

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[5] See Johanna H. Groenewoud, *et al.*, "Clinical Problems with the Performance of Euthanasia and Physician-Assisted Suicide in the Netherlands," 342 *New England J. of Med.* (Feb. 24, 2000), pp. 553-55, available at http://www.nejm.org/doi/full/10.1056/NEJM200002243420805#t=article.

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

H. Ingestion of Drugs

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

I. Immunities

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

J. The Lack Of Rational Basis For The Act

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

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

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

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

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

[7] This problem is exacerbated because the Act's flaws will lead many doctors to refuse patient assistance. If the doctor most familiar with the patient, his health history, and his family situation decides that the individual is not qualified to receive drugs under the Act, a different "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."), ¶ 16.)

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.)

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

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

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

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

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

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

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

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

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

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

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

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

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

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

depression as a result. The result is suicide not by free choice, but by self-fulfilling prophecy. (*Id.*)

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

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

> The plain inference from [Oregon's Death With Dignity Act] is that it is irrelevant whether physicians objectively act reasonably, or instead act negligently. The court finds that there is no set of facts under which it would be rational for terminally ill patients under [the DWD Act] to receive a standard of care from their physicians under which it did not matter whether they acted with objective reasonableness, according to professional standards. This defect 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.

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

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

> [T]here is no requirement that the person take the lethal overdose at the time of the prescription or under the supervision of a physician. . . . [the DWD Act] does nothing to ensure that the decision to commit suicide is rationally and voluntarily made at the time of death. As a result [the DWD Act] purports to recognize a competent terminally ill person's choice to obtain the means to end their life 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.

(*Id.*)

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

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

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[8] See, *e.g.*, Senate Rules Committee, Bill Analysis, at p. 15, available at 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.").

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

IV. CONCLUSION

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

Dated: June 8, 2016

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