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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

UNITED SPINAL ASSOCIATION, et al.,

Plaintiffs,

v.

STATE OF CALIFORNIA, et al.,

Defendants.

Case No. 2:23-cv-03107-FLA (GJSx)

NOTICE OF MOTION AND MOTION TO INTERVENE; MEMORANDUM OF POINTS AND AUTHORITIES

Judge: Hon. Fernando L. Aenlle-Rocha

Date: October 20, 2023
Time: 1:30 p.m.
Courtroom: 6B, 6th Floor

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NOTICE OF MOTION AND MOTION TO INTERVENE

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on October 20, 2023 at 1:30 p.m., or at such other time as the Court shall order, in Courtroom 6B of the above-entitled Court, located at First Street Courthouse, 350 W. 1st Street, Los Angeles, California 90012, the Honorable Fernando L. Aenlle-Rocha, United States District Judge, presiding, Intervenors Burt Bassler, Judith Coburn, Peter Sussman, Chandana Banerjee, MD, MPH, HMDC, FAAHPM, Catherine Sonquist Forest, MD, MPH, FAAFP, and Compassion & Choices Action Network (CCAN) will and hereby do move under Federal Rule of Civil Procedure Rule 24 for leave to intervene as defendants, by right, or, in the alternative, by permissive intervention in the above-captioned proceeding. This motion is made following conferences of counsel pursuant to L.R. 7-3, which took place on August 31 and September 1, 2023. Counsel for Plaintiffs indicated they will oppose the motion. Counsel for Defendants stated that they take no position on the motion until after they review this filing.

Dated: September 21, 2023

JOHN KAPPOS
O'MELVENY & MYERS LLP

By: /s/ *John Kappos*
John Kappos

Attorney for Intervenors

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Terminally ill patients should have as much control as possible over their medical decisions. The California End of Life Option Act (EOLOA) gives them that right, in the form of authority to obtain aid-in-dying medication. Plaintiffs seek to take this option away from patients like Burt Bassler, Peter Sussman, and Judith Coburn—the proposed patient intervenors in this action.

Plaintiffs aim to have the EOLOA declared unconstitutional and thus barred from operation. *See* Dkt. 1, ¶ 91. Accordingly, under Rule 24 of the Federal Rules of Civil Procedure, Burt Bassler, Judith Coburn, Peter Sussman, Chandana Banerjee, MD, MPH, HMDC, FAAHPM, Catherine Sonquist Forest, MD, MPH, FAAFP, and Compassion & Choices Action Network (CCAN) ("Intervenors") seek leave to intervene as defendants, by right, in the above-captioned proceeding.

Burt Bassler is an 87-year-old California resident with amyloidosis, a progressive disease that is likely to become terminal. Ex. A (Decl. of Burt Bassler) ¶¶ 2, 3. Judith Coburn is a 79-year-old California resident and cancer patient with progressive arthritis, a condition likely to become terminal if her cancer returns. Ex. B (Decl. of Judith Coburn) ¶¶ 2-5, 8, 16. Peter Sussman is an 82-year-old California resident and spinal malformation patient with arachnoiditis and severe neuropathy; he would likely face immense pain if he were to be diagnosed with a terminal disease. Ex. C (Decl. of Peter Sussman) ¶¶ 2, 40.

Dr. Chandana Banerjee treats terminally ill patients and serves as an associate clinical professor of supportive care medicine—a role through which she developed and leads fellowship in hospice and palliative medicine. Ex. D (Decl. of Chandana Banerjee, MD, MPH, HMDC, FAAHPM) ¶ 3. Dr. Catherine Sonquist Forest treats terminally ill patients and serves as a clinical associate professor of family medicine. Ex. E (Decl. of Catherine S. Forest, MD, MPH, FAAFP) ¶¶ 3-4. Dr. Forest also has personal experience with medical aid in dying because her

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husband, Will, exercised his right under the EOLOA to obtain aid-in-dying medication when his rapidly progressing, unclassified motor neuron disease became unbearable. *Id.* ¶¶ 30-34.

Compassion & Choices Action Network (CCAN) advocates and lobbies for laws that protect and expand end-of-life options. CCAN is entitled to intervene in this action as a matter of right because it, along with its affiliate Compassion & Choices California, sponsored the EOLOA, the statute being challenged in this litigation. *See* Kappos Decl. Exs. 1-4.

Intervenors are directly affected by Plaintiffs' case, which seeks to enjoin the EOLOA. Because Defendants might not adequately represent Intervenors' narrower and more personal interests, the Court should grant Intervenors' timely motion to intervene as a matter of right under Rule 24(a) of the Federal Rules of Civil Procedure. Alternatively, the Court should exercise its discretion to grant Intervenors permission to intervene under Rule 24(b).

II. PATIENT INTERVENORS

Lambert Bassler ("Burt," as his friends and family have referred to him since his 20s) is an 87-year-old emeritus member on the board of the Hospice of the East Bay who was diagnosed with amyloidosis, a rare progressive disease with symptoms that mimic congestive heart failure. Ex. A ¶¶ 2, 14. Since Burt's diagnosis in 2019, his heart has become increasingly stiff, weak, and inefficient. *Id.* ¶ 5. This has caused him to experience significant weight loss as well as overall weakness and shortness of breath during daily activities, such as getting dressed in the morning. *Id.* ¶¶ 5-8. Burt is disabled as that term is defined in the ADA[1] because his weakness and shortness of breath are physical impairments that

[1] An individual with a disability is defined by the ADA as a person who has a physical or mental impairment that substantially limits one or more major life activities, a person who has a history or record of such an impairment, or a person who is perceived by others as having such an impairment. 42 U.S.C.A. § 12102. The ADA does not specifically name all of the impairments that are covered. *See id.*

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substantially limit his major life activities.

Burt sees several doctors to manage his condition, including a cardiologist, an amyloidosis specialist, and a primary care doctor. *Id.* ¶ 10. Although Burt takes a drug that may slow the advance of his disease, his condition is progressive and will likely result in a terminal diagnosis. *Id.* ¶¶ 3, 9, 19.

Judith Coburn is a 79-year-old California resident who enjoys gardening, spending time with her friends, and volunteering with Ashby Village, an organization in Berkeley, California that helps elderly individuals stay in their homes by providing them with companionship and day-to-day assistance. Ex. B ¶¶ 2, 23. In 2019, Judith was diagnosed with ovarian clear cell carcinoma—a rare and aggressive form of ovarian cancer. *Id.* ¶ 3. Judith had surgery to remove the tumor the day after it was identified and, for the next three months, underwent chemotherapy to treat the cancer. *Id.* As a result, she developed chemotherapy-induced peripheral neuropathy in her hands and feet, which causes numbness and intense, electric-shock-like sensations. *Id.* ¶ 7. Due to the neuropathy, Judith cannot complete simple tasks such as buttoning her shirt and writing, and she frequently drops objects. *Id.* Judith also suffers from arthritis, a progressive condition that requires her to use a walker or cane in order to walk. *Id.* ¶ 8. In September 2020, Judith underwent a total hip replacement surgery because of the arthritis. *Id.* ¶ 9. Due to complications from the surgery, which included a broken femur, Judith lives every day with around-the-clock pain. *Id.* ¶¶ 9-10. Judith is disabled as that term is defined in the ADA because Judith's neuropathy and arthritis are physical impairments that substantially limit her major life activities.

If Judith's cancer returns, she would face a grim prognosis. *Id.* ¶ 4. Judith does not want to live the final months of her life in misery, battling the disease to the very last minute in unbearable pain due to her pre-existing conditions. *Id.* ¶ 16. Judith knows that if her cancer returns, it will almost certainly kill her. *Id.* She does not want to die, but without the option of medical aid in dying, she will be

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forced to endure not only intense physical pain, but also the anxiety inherent in being forced to endure that pain until cancer takes her life. *Id.* ¶¶ 16-19.

Peter Sussman is an 82-year-old retired, award-winning journalist and author with a long history of advocacy and expertise on journalism ethics, diversity, and freedom of information. Ex. C ¶ 3. He spent 29 years as an editor at the San Francisco Chronicle before leaving to pursue an independent career in writing and editing. *Id.* Peter has lived with spinal problems all his life, and has lived with his current condition for over 22 years. *Id.* ¶ 4. In 2001, Peter was informed by several spinal doctors and a neurologist that he faced potential paralysis and had no choice but to undergo immediate, major reconstructive surgery. *Id.* ¶ 6. That surgery—a three-level lumbar sacral laminectomy infusion—was the first of a series of seven surgeries to address his spinal malformation. *Id.* ¶¶ 6-19. During the course of the procedures, Peter developed arachnoiditis—a rare pain disorder caused by inflammation of membranes in the spinal cord—and severe neuropathy. *Id.* ¶¶ 20-22. Peter is disabled as that term is defined in the ADA because his spinal conditions cause physical impairment that substantially limits his major life activities.

Because of Peter's incurable spinal conditions, he would be faced with the prospect of dealing with a compounded level of pain at the end of his life if he were to develop a terminal disease. *Id.* ¶ 34. Peter has a palliative team that helps support and manage his constant pain and strain, enabling him to continue to live a happy and meaningful life—which he hopes to do for as long as possible. *Id.* ¶ 32. Having watched people he loves struggle through terminal diagnoses, it is vital for Peter to maintain a sense of agency in the circumstances of his own dying. *Id.* ¶¶ 35-36.

If and when Burt, Judith, and Peter receive a terminal diagnosis, they intend to obtain prescriptions for aid-in-dying medication. None of them fear being tricked, coerced, or compelled to take advantage of medical aid in dying, which

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they view as an option for a peaceful end-of-life experience if their respective conditions ever become unbearable. Ex. A ¶¶ 15-17; Ex. B ¶¶ 17, 26; Ex. C ¶¶ 39, 43.

III. LEGAL STANDARD

Intervenors are entitled to intervene in this proceeding as a matter of right under Fed. R. Civ. P. 24(a), which provides, in pertinent part:

> On timely motion, the court must permit anyone to intervene who . . . (2) claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest.

In applying Rule 24, the Ninth Circuit has held that the qualification for intervention as a matter of right depends on four factors: (1) whether the motion is timely; (2) whether the applicant has a significant, protectable interest relating to the subject of the litigation; (3) whether that interest will be practically impaired if intervention is not granted; and (4) whether the applicant's interest is adequately represented by the parties to the action. *Sagebrush Rebellion, Inc. v. Watt*, 713 F.2d 525, 527-28 (9th Cir. 1983) (holding an entity was entitled to intervene on behalf of defendants to protect its interest in the preservation of birds and their habitats); *Californians for Safe & Competitive Dump Truck Transp. v. Mendonca*, 152 F.3d 1184, 1189 (9th Cir. 1998) (holding an entity could intervene where the Ninth Circuit's four-part test was satisfied). The Ninth Circuit construes this test broadly in favor of intervention. *See Wash. State Bldg. & Constr. Trades Council, AFL-CIO v. Spellman*, 684 F.2d 627, 629-30 (9th Cir. 1982) (holding that a public interest group was entitled as a matter of right to intervene in an action challenging the legality of a measure which it had supported). Each of these four factors weighs in favor of Intervenors' request to intervene here.

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IV. ARGUMENT

A. Intervenors Should Be Allowed to Intervene As a Matter of Right Under Federal Rule of Civil Procedure 24(a)

1. Intervenors' Motion for Intervention Is Timely.

Intervenors file this motion at the earliest stage of litigation, so it is timely. To determine whether a motion to intervene is timely, Ninth Circuit precedent requires consideration of three factors: (1) the stage of the proceedings at which an applicant seeks to intervene; (2) the prejudice to other parties; and (3) the reason for and length of delay. *United States v. State of Oregon*, 913 F.2d 576, 588-89 (9th Cir. 1990). Intervenors filed this motion before any defendant has answered the complaint, before the Court has set a scheduling order for trial, before discovery has opened, and before the Court has ruled on Defendants' motions to dismiss. Thus, there is no delay or prejudice caused by the timing of Intervenors' motion. *See, e.g.*, *Nw. Forest Res. Council v. Glickman*, 82 F.3d 825, 837 (9th Cir.), *as amended on denial of reh'g* (May 30, 1996) (motion to intervene deemed timely and "does not appear to have prejudiced either party in the lawsuit, since the motion was filed before the district court had made any substantive rulings").

2. Intervenors Have a Significant, Protectable Interest in the Litigation.

Intervenors have obvious, significant, and protectable interests here, as this litigation affects their personal end-of-life decisions, their medical practices, and legislation they sponsored. A proposed intervenor "must establish that the interest is protectable under some law and that there is a relationship between the legally protected interest and the claims at issue." *Citizens for Balanced Use v. Mont. Wilderness Ass'n*, 647 F.3d 893, 897 (9th Cir. 2011) (quoting *Nw. Forest Res. Council*, 82 F.3d at 837). "Whether an applicant for intervention as of right demonstrates sufficient interest in an action is a 'practical, threshold inquiry,' and 'no specific legal or equitable interest need be established.'" *Nw. Forest Res.*

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1 *Council*, 82 F.3d at 837 (quoting *Greene v. United States*, 996 F.2d 973, 976 (9th
2 Cir.1993)).
3 For Burt, Judith, and Peter, there is a "direct, antagonistic relationship"
4 between their interest in obtaining medical aid in dying and Plaintiffs' attempt to
5 deny them the ability to obtain those medications. Courts routinely find that
6 intervention is proper where such a relationship exists between a party's requested
7 relief and a potential intervenor's interest. *E.g.*, *Kalbers v. U.S. Dep't of Just*., 22
8 F.4th 816, 827 (9th Cir. 2021) (permitting intervention where Volkswagen AG
9 sought to keep confidential the documents that were the subject of plaintiff's FOIA
10 request); *see also Sagebrush Rebellion*, 713 F.2d at 527-28 (permitting intervention
11 where an adverse decision in the suit would impair a society's interest in the
12 preservation of birds and their habitats); *Chandler v. Cal. Dep't of Corr. & Rehab.*,
13 2023 WL 5353212, at *1, 3-4, 8 (E.D. Cal. Aug. 21, 2023) (holding four
14 incarcerated transgender women and the Transgender Gender-Variant & Intersex
15 Justice Project had protectible interests in defending the Transgender Respect,
16 Agency, and Dignity Act (S.B. 132) from a constitutional challenge). Burt, Judith,
17 and Peter are disabled Californians, as that term is defined in the ADA, who want to
18 have the option of availing themselves of the EOLOA if needed, and therefore have
19 at least as much, if not more, of a protectable interest as the disabled plaintiffs who
20 filed this action and who, by their own admission, have no interest in obtaining a
21 prescription under the Act.
22 Similarly, Drs. Banerjee and Forest's interests in offering the option of aid in
23 dying as part of their medical practices are threatened by Plaintiffs' requested relief.
24 Both doctors counsel aging and disabled patients about end-of-life options. Here,
25 they represent not only their own interests but those of their patients who are too
26 weak and near death to join this litigation. Patients who are diagnosed with a
27 terminal disease and have less than a six-month prognosis will likely die before the
28 Court can resolve this dispute, but they nevertheless have a strong interest in

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maintaining the availability of all options for end-of-life care. *See WomanCare of Southfield, P.C. v. Granholm*, 143 F. Supp. 2d 827, 839 (E.D. Mich. 2000) (holding physician plaintiffs had *jus tertii* standing to challenge the constitutionality of the Michigan Infant Protection Act on behalf of their pregnant patients); *Brandt v. Rutledge*, 551 F. Supp. 3d 882, 888 (E.D. Ark. 2021) (holding physicians had third-party standing to challenge Act 626 on behalf of their patients because they alleged a close relationship with their patients and a hindrance to their patients' ability to protect their interests because of the risk of discrimination and their patients' desire to protect their privacy); *cf. Sorrell v. IMS Health Inc.*, 564 U.S. 552, 572 (2011) (assuming "for many reasons" that physicians maintain certain interests regarding their patients' rights).

As for CCAN, it has the right to intervene here because it sponsored the law that Plaintiffs challenge. A "public interest group is entitled as a matter of right to intervene in an action challenging the legality of a measure it has supported." *Idaho Farm Bureau Fed'n v. Babbitt*, 58 F.3d 1392, 1397 (9th Cir. 1995) (citing *Sagebrush Rebellion*, 713 F.2d at 527) (permitting intervention in a case challenging the listing of the Springs Snail as an endangered species where the intervening entity was active in the process of listing the snail); *Apr. in Paris v. Becerra*, 2020 WL 2404620, at *3 (E.D. Cal. May 12, 2020) (applicants had a significantly protectable interest where they "fought for the bill that ultimately passed"); *Pac. Gas & Elec. Co. v. Lynch*, 216 F. Supp. 2d 1016, 1025 (N.D. Cal. 2002) (applicant had an interest where it "was the acknowledged author and leading proponent" of one of the central actions challenged by plaintiffs). Here, CCAN not only supported but *sponsored* SB 380 and lobbied in support of EOLOA. *See* Kappos Decl. Exs. 1-4 (documenting CCAN's support of the EOLOA via lobbying funds); *Missouri v. Harris*, 2014 WL 2506606, at *5 (E.D. Cal. June 3, 2014) (holding that party could intervene as of right where it lobbied legislators to pass the challenged statute).

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3. Intervenors' Interests Will Be Impaired If Intervention Is Denied.

Once a court has found that a prospective intervenor has a significant protectable interest, it should have "little difficulty concluding that the disposition of the case may, as a practical matter, affect it." *Citizens for Balanced Use*, 647 F.3d at 898 (quoting *Cal. ex rel. Lockyer v. United States*, 450 F.3d 436, 442 (9th Cir. 2006)). Here, Intervenors' interests would obviously be impaired by a judgment declaring the EOLOA unconstitutional. *Kalbers*, 22 F.4th at 828 (finding that intervenor's interest in keeping documents confidential "would obviously be impaired by an order to disclose").

4. Defendants May Not Adequately Represent Intervenors' Interests.

Intervenors have deeply personal interests in continued access to medical aid in dying—interests Defendants here lack and may not adequately represent. The burden of demonstrating inadequate representation is minimal. Intervenors need only show that their interests are sufficiently different from the existing parties such that their representation "may be" inadequate. *Trbovich v. United Mine Workers of Am.*, 404 U.S. 528, 538 n.10 (1972); *see Sagebrush Rebellion*, 713 F.2d at 528. The Ninth Circuit weighs three factors here: "(1) whether the interest of a present party is such that it will undoubtedly make all of a proposed intervenor's arguments; (2) whether the present party is capable and willing to make such arguments; and (3) whether a proposed intervenor would offer any necessary elements to the proceeding that other parties would neglect." *Arakaki v. Cayetano*, 324 F.3d 1078, 1086 (9th Cir. 2003) (citation omitted).

Where an applicant demonstrates that its interests are "more narrow and parochial than the interests of the public at large," representation is properly found to be inadequate. *Mendonca*, 152 F.3d at 1190 (union could intervene by right in action alleging federal preemption of California's Prevailing Wage Law because its

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members had a substantial interest in receiving the prevailing wage and the government-defendants' representation "may have been inadequate"). In *Home Care Ass'n of Am. v. Newsom*, for example, the court held that when a state "is trying to defend the enforceability of its law" while a potential intervenor "is trying to obtain the benefits of the law for itself or its members," the intervenor's interest is "narrower than the former in a way that meets the fourth prong of the Rule 24(a)(2) intervention test." 2019 WL 5960141, at *3 (E.D. Cal. Nov. 13, 2019).

That is the case here—each intervenor's interest in medical aid in dying is narrower than Defendants' interest in defending the enforceability of the EOLOA. *Id*. "[I]t is no novel legal conclusion to determine that a neutral governmental body's interests sufficiently diverge from those of an organization representing a specific sub-set of the public to satisfy the inadequate representation prong." *Barke v. Banks*, 2020 WL 2315857, at *3 (C.D. Cal. May 7, 2020) (finding various teachers' unions had a right to intervene in action challenging the constitutionality of law that prohibits the state from discouraging union membership). Defendants' motion to dismiss briefing shows that their interests are much more expansive than an individual patient's interest in obtaining medical aid in dying or an individual physician's interest in offering that aid. For instance, while Defendants' briefing acknowledges that the EOLOA gives certain terminally ill patients the right to obtain aid-in-dying medication, it offers no patient declarations in support of this important option. Dkt. 20-1 at 1; *see also* Dkt. 24. The proposed patient intervenors—Burt, Judith, and Peter—will offer the perspective of what aid-in-dying medication means to individuals with disabilities who want to avail themselves of this option to avoid unbearable suffering at their end of life. These intervenors will explain how the availability of aid in dying can alleviate anxiety and give peace of mind that will allow them to live their lives to the fullest in their remaining days. Similarly, the proposed physician intervenors will offer the perspective of physicians who treat terminally ill patients and who consider medical

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aid in dying integral to how they practice medicine and provide end-of-life care—another perspective absent from Defendants' briefing. *Id.*

Just as Defendants do not present these perspectives, they fail to articulate what Plaintiffs' requested relief would mean for terminally ill patients, their families, and their care providers. Defendants cannot offer the perspective of Dr. Catherine S. Forest and her late husband, Will. When a rapidly progressing unclassified motor neuron disease threatened to leave him paralyzed and wasting away while fully mentally aware, Will exercised his right under the EOLOA to obtain aid-in-dying medication. Ex. E ¶¶ 30-34. Defendants cannot tell the Court that the alternative for Will was not just death but a terrifying death where he would have choked on his own saliva and spent his final moments suffocating and unable to enjoy time with his family, who would have endured their own agony watching him suffer. *Id*. ¶¶ 30-31. Defendants cannot tell the Court that Will almost ran out of time to utilize the EOLOA because his non-participating primary care provider did not document his first medical aid-in-dying request. *Id*. ¶ 32. And Defendants cannot tell the Court about the anxiety that Will endured as he fought against the unnecessary delays caused by his non-participating provider and medical group—anxiety that ate into the precious little time he had remaining with his family. *Id*. These are interests that the Court should consider and viewpoints that only Intervenors can provide.

Defendants also fail to articulate that the alternative to medical aid in dying is more than just a painful and terrifying death. The alternative for many patients is to spend what little time they have left agonizing about what awaits them instead of focusing on enjoying the people and things they love. *See* Ex. A ¶¶ 17-18; Ex. B ¶¶ 19, 23-24; Ex. C ¶¶ 35, 38; Ex. E ¶ 33. And the alternative for physicians who treat terminally ill patients—physicians like Drs. Banerjee and Forest—is to be deprived of one of the most important tools in their practice of medicine: the ability to offer options. Physicians like Drs. Banerjee and Forest consider medical aid in

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dying an important part of end-of-life care even for patients who never consider the option for themselves. Ex. D ¶¶ 5-6; Ex. E ¶¶ 5-6. Simply talking about the option often helps patients to regain a lost sense of autonomy and better participate in determining what their end-of-life care plan should be, regardless of whether that plan includes medical aid in dying. Ex. D ¶ 6; Ex. E ¶ 5.

Defendants are not at fault for not presenting these interests to the Court—they are simply not Defendants' concern. But they are important interests that should be represented in this litigation, particularly because they offer "a perspective which differs materially from that of the present parties." *Sagebrush Rebellion*, 713 F.2d at 528. Thus, Intervenors meet the "minimal" burden of showing that their interests may not be adequately represented by Defendants.

B. In the Alternative, the Court Should Permit Intervention Pursuant to Federal Rule of Civil Procedure 24(b)

If the court were to find that Intervenors are not entitled to intervene as a matter of right, it should still allow Intervenors to intervene under Fed. R. Civ. P. 24(b). This rule provides, in pertinent part, that courts "may permit anyone to intervene who … (1)(B) has a claim or defense that shares with the main action a common question of law or fact." Courts can grant this permissive intervention "'where the applicant for intervention shows (1) independent grounds for jurisdiction; (2) the motion is timely; and (3) the applicant's claim or defense, and the main action, have a question of law or a question of fact in common.'" *United States v. City of Los Angeles*, 288 F.3d 391, 403 (9th Cir. 2002) (quoting *Nw. Forest Res. Council*, 82 F.3d at 839).

First, the Ninth Circuit has clarified that "the independent jurisdictional grounds requirement does not apply to proposed intervenors in federal-question cases when the proposed intervenor is not raising new claims." *Freedom from Religion Found., Inc. v. Geithner*, 644 F.3d 836, 844 (9th Cir. 2011). This is a federal-question case because each of Plaintiffs' claims arises under the U.S.

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Constitution. Dkt. 1. Intervenors are not raising any new claims. Thus, the first factor of independent jurisdictional grounds does not apply.

Second, Intervenors' motion is timely. Again, Intervenors filed their motion before any defendant has answered the complaint, before the Court has set a scheduling order, before discovery has opened, and before the Court has ruled on Defendants' motions to dismiss. Given the early stage of this litigation, intervention will not unduly delay or prejudice the adjudication of the rights of the original parties. And given Intervenors' interests in the outcome of the dispute, their alternative motion for permissive intervention at this early stage in the case is particularly justified. *See*, *e.g.*, *City of Los Angeles*, 288 F.3d at 403–04 ("In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.") (remanding to district court to reconsider request for permissive intervention by police league and community intervenors who "have some of the strongest interests in the outcome").

Third, common questions of law and fact exist because the rights of the parties all arise from the question of whether the EOLOA is constitutional or violative of federal statutes. So Intervenors' defenses turn on the same legal and factual issues raised by Plaintiffs' claims, including whether, despite the "numerous safeguards in the [EOLOA] statute to ensure that, at every stage of the process, a person demonstrates their voluntary consent," *Shavelson v. Bonta*, 608 F. Supp. 3d 919, 928 (N.D. Cal. 2022), the EOLOA disadvantages a class of disabled individuals.

Accordingly, even if the Court denies intervention by matter of right, it would still be appropriate to grant Intervenors' request for permissive intervention.

V. CONCLUSION

For the foregoing reasons, the Court should grant Intervenors' motion to intervene as of right under Rule 24(a). In the alternative, the Court should allow

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them permissive intervention under Rule 24(b).

Dated: September 21, 2023 *<u>/s/ John Kappos</u>*

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CERTIFICATE OF COMPLIANCE

The undersigned, counsel of record for Intervenors Lambert ("Burt") Bassler, Judith Coburn, Peter Sussman, Chandana Banerjee, MD, MPH, HMDC, FAAHPM, Catherine Sonquist Forest, MD, MPH, FAAFP, and Compassion & Choices Action Network (CCAN), certifies that this brief contains 4,412 words, which complies with the word limit of L.R. 11-6.1.

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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

UNITED SPINAL ASSOCIATION, et al.,

Plaintiffs,

v.

STATE OF CALIFORNIA, et al.,

Defendants.

Case No. 2:23-cv-03107-FLA (GJSx)

[PROPOSED] MOTION TO DISMISS

Judge: Hon. Fernando L. Aenlle-Rocha

Date: October 20, 2023
Time: 1:30 p.m.
Courtroom: 6B, 6th Floor

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NOTICE OF MOTION AND MOTION TO DISMISS

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on October 20, 2023 at 1:30 p.m., or at such other time as the Court shall order, in Courtroom 6B of the above-entitled Court, located at First Street Courthouse, 350 W. 1st Street, Los Angeles, California 90012, the Honorable Fernando L. Aenlle-Rocha, United States District Judge, presiding, Intervenors Burt Bassler, Judith Coburn, Peter Sussman, Chandana Banerjee, MD, MPH, HMDC, FAAHPM, Catherine Sonquist Forest, MD, MPH, FAAFP, and Compassion & Choices Action Network (CCAN) will and hereby do move under Federal Rule of Civil Procedure Rule 24 for leave to intervene as defendants, by right, in the above-captioned proceeding. This motion is made following conferences of counsel pursuant to L.R. 7-3, which took place on August 31 and September 1, 2023. Counsel for Plaintiffs indicated they will oppose the motion. Counsel for Defendants stated that they take no position on the motion until after they review this filing.

Dated: September 21, 2023

JOHN KAPPOS
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By: /s/ *John Kappos*
John Kappos

Attorney for Intervenors

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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 California's End of Life Option Act ("EOLOA" or "the Act")[1] provides
4 qualified California residents with an end-of-life *option*: In addition to comfort
5 care, hospice care, palliative care, and pain control, a terminally ill patient can
6 choose to request and, separately, decide to ingest aid-in-dying medication to die
7 peacefully. Participation is *entirely voluntary*—as a requirement to receive aid-in-
8 dying medication, the individual must have "voluntarily expressed the wish to
9 receive a prescription for an aid in dying drug," Act at 443.2(2), and "may choose
10 to obtain the aid in dying drug but not take it," Act at 443.5(2)(D). The Act offers
11 peace of mind to individuals diagnosed with a terminal illness and who satisfy
12 myriad requirements, including a determination by two doctors that the individual
13 is mentally competent and shows no indication they are suffering impaired
14 judgment due to a mental disorder. Absent a terminal illness, an individual cannot
15 qualify based on age or disability alone. The option of medical aid in dying, as
16 authorized by the EOLOA, is one of many end-of-life care options employed by
17 hospice and palliative care providers to ensure that patients' lives resound with
18 quality and comfort—all the more so at the end of their lives. Ex. D (Decl. of
19 Chandana Banerjee, MD, MPH, HMDC, FAAHPM) ¶ 5.

20 Plaintiffs are four disability rights organizations and two individuals who
21 seek to challenge the Act on constitutional and statutory grounds. Plaintiffs' claims
22 suffer from multiple technical and substantive flaws. The complaint must be
23 dismissed on all counts because it fails to allege that no circumstances exist under
24 which the EOLOA would be valid, as required by binding Supreme Court and
25 Ninth Circuit precedent. Because the EOLOA grants terminally ill patients
26 *additional* options to direct their medical care at the end of life, Plaintiffs do not
27 and cannot demonstrate that the EOLOA unlawfully discriminates against disabled

28 [1] Cal. Health & Safety Code § 443 *et seq.*

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1 individuals under Title II of the Americans with Disabilities Act ("ADA") or
2 Section 504 of the Rehabilitation Act. The equal protection claim also fails for
3 various reasons, including that Plaintiffs fail to show that their proposed classes are
4 similarly situated or that the statute fails under any level of scrutiny. Finally, the
5 plain text of the EOLOA directly contradicts Plaintiffs' due process allegations and
6 therefore requires dismissal of that claim.

7 **II. BACKGROUND**

8 Intervenors presume the Court is familiar with the EOLOA and its
9 background from the parties' Motion to Dismiss briefing.

10 **III. LEGAL STANDARD**

11 Under Federal Rule of Civil Procedure 12(b)(6), dismissal is appropriate
12 where there is either "lack of a cognizable legal theory or the absence of sufficient
13 facts alleged under a cognizable legal theory." *Balistreri v. Pacifica Police Dep't*,
14 901 F.2d 696, 699 (9th Cir. 1988). And while the Court must accept well-pleaded
15 facts as true, "conclusory allegations without more are insufficient to defeat a
16 motion to dismiss." *McGlinchy v. Shell Chem. Co.*, 845 F.2d 802, 810 (9th Cir.
17 1988). Accordingly, the Court should not assume the truth of legal conclusions
18 merely because they are pleaded in the form of factual allegations, nor accept as
19 true allegations contradicted by judicially noticeable facts. *Ashcroft v. Iqbal*, 556
20 U.S. 662, 677-79 (2009); *Shaw v. Hahn*, 56 F.3d 1128, 1129 n.1 (9th Cir. 1995).
21 As the Supreme Court has cautioned, "plaintiff's obligation to provide the
22 'grounds' of his 'entitle[ment] to relief' requires more than labels and conclusions,
23 and a formulaic recitation of the elements of a cause of action will not do." *Bell
24 Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007).

25 Further, to state a plausible basis for relief under a facial challenge to a state
26 law, Plaintiffs must establish that "no set of circumstances exists under which the
27 Act would be valid." *United States v. Salerno*, 481 U.S. 739, 745 (1987); *S.D.
28 Myers, Inc. v. City & Cnty. of S.F.*, 253 F.3d 461, 467-68 (9th Cir. 2001) (applying

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1 *Salerno* standard to facial challenge of local ordinance, and rejecting argument for
2 alternative standard). The *Salerno* standard applies not only to facial constitutional
3 challenges, but also to laws or ordinances claimed to be facially invalid under a
4 federal statute such as the ADA. *See Anderson v. Edwards*, 514 U.S. 143, 155 n.6
5 (1995); *Sprint Telephony PCS, L.P. v. Cnty. of San Diego*, 543 F.3d 571, 579 (9th
6 Cir. 2008) (en banc); *Witzke v. Idaho State Bar*, __ F. Supp. 3d __, 2022 WL
7 17340272, at *13 (D. Idaho Nov. 29, 2022) (applying *Salerno* standard to facial
8 ADA challenge); *Yount v. Regent Univ.*, 2008 WL 4104102, at *3 (D. Ariz. Aug.
9 22, 2008) (same, and denying a plaintiff's motion for summary judgment because
10 his claims that a university policy facially violated the ADA did not meet the
11 *Salerno* standard). When "assessing whether a statute meets [the *Salerno*]
12 standard," courts consider "applications of the statute in which it actually authorizes
13 or prohibits conduct"—in other words, the "proper focus of the constitutional
14 inquiry is the group for whom the law is a restriction, not the group for whom the
15 law is irrelevant." *City of Los Angeles v. Patel*, 576 U.S. 409, 418 (2015).

16 **IV. ARGUMENT**

17 **A. Plaintiffs fail to state a violation of the ADA**

18 Plaintiffs fail to state a claim under the ADA because the EOLOA does the
19 opposite of what they allege: It benefits, rather than discriminates against, disabled
20 individuals who qualify under the Act because they are terminally ill. Plaintiffs
21 assert that the EOLOA is facially discriminatory under the ADA because it
22 allegedly denies eligible disabled persons the benefits of various state laws, public
23 services, and programs that together aim to prevent suicide. Dkt. 1 ¶¶ 170-72, 174,
24 182-84, 185. Both the case law and the statutory language foreclose Plaintiffs'
25 claim. First, the EOLOA confers *additional* end-of-life options for certain disabled
26 persons who qualify for and desire aid-in-dying medication, and therefore does not
27 discriminate against those individuals. Second, the EOLOA contains numerous
28 safeguards to ensure that eligible individuals are not disadvantaged by the Act, and

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1 all medically appropriate government services remain accessible and available for
2 terminally ill patients.[2]

3 **1. The EOLOA unequivocally benefits terminally ill patients**

4 Plaintiffs base their claim on an implausible premise: that the EOLOA
5 violates the ADA because it gives *additional* options to certain disabled persons
6 who qualify for and desire aid-in-dying medication. Their argument is absurd and
7 contrary to the applicable case law.

8 In *Roy v. Barr*, the Ninth Circuit held a constitutional challenge failed where
9 the challenged statute actually provided the class at issue with more, not less, legal
10 protections. 960 F.3d 1175, 1184 (9th Cir. 2020). There the petitioner argued that
11 8 U.S.C. § 1432(a)(3) unconstitutionally failed "to recognize the rights of fathers
12 who act as sole caretakers for their out-of-wedlock children." *Id.* at 1180. But the
13 Ninth Circuit held that the statute did not impose a categorical bar against unwed
14 fathers passing citizenship to children born out of wedlock and thus did not
15 discriminate against them or their children. *Id.* at 1184. Rather, the Ninth Circuit
16 observed that § 1432(a)(3) offers two potential paths to citizenship for a child born
17 outside the United States to non-U.S.-citizen parents: "the naturalization of the
18 parent having legal custody of the child when there has been a legal separation of
19 the parents or *the naturalization of the mother if the child was born out of wedlock*
20 *and the paternity of the child has not been established by legitimation*. *Id.* at 1181
21 (emphasis in original). As the court reasoned, "[i]f anything, § 1432(a)(3)'s second
22 clause gives children born to unmarried parents 'an extra route to citizenship, one
23 not enjoyed by legitimate (or legitimated) offspring.'" *Id.*

24

25 [2] Plaintiffs allege that the Mental Health Services Oversight & Accountability
26 Commission "explicitly carves out physician-assisted suicide from the protection of its suicide prevention services," Dkt. 1 ¶ 102, but provide no facts in support.
27 Further, Plaintiffs do not allege that this "carve out" in any way prevents patients from undergoing the mental health evaluations *required* by the EOLOA if the
28 consulting or attending physicians observe any indication of a mental disorder. *See* Cal. Health & Safety Code § 443.6(d).

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Other Circuits have also held that state laws and ordinances by definition cannot be discriminatory where they treat the individuals alleging discrimination more favorably than others. For example, in *Sailboat Bend Sober Living, LLC v. City of Fort Lauderdale*, the Eleventh Circuit held that a zoning ordinance was not facially discriminatory under either the FHA or ADA because "the Zoning Ordinance undeniably treat[ed] individuals with disabilities more favorably than it treat[ed] similarly situated, non-disabled individuals." 46 F.4th 1268, 1274 (11th Cir. 2022); *see also Bangerter v. Orem City Corp.*, 46 F.3d 1491, 1504 (10th Cir. 1995) ("the FHAA should not be interpreted to preclude special restrictions upon the disabled that are really beneficial to, rather than discriminatory against, the handicapped"); *Oxford House-C v. City of St. Louis*, 77 F.3d 249, 251–52 (8th Cir. 1996) ("Rather than discriminating against Oxford House residents, the City's zoning code favors them on its face.").

Likewise, because on its face the EOLOA unequivocally *benefits* terminally ill patients by granting them an additional end-of-life option, Plaintiffs do not and cannot allege a viable claim for disability discrimination under the ADA.

2. The EOLOA contains numerous safeguards that prevent discrimination

The EOLOA is also structurally incapable of discriminating against a class of disabled individuals because it was carefully constructed to provide people with the *option* of a peaceful death while protecting against abuse or coercion. *Shavelson v. Bonta*, 608 F. Supp. 3d 919, 924 (N.D. Cal. 2022) (the EOLOA "carefully regulates the prescription and administration of aid in dying medication, limiting who can be prescribed such medication and how they can take it"); *id.* (the EOLOA "sets out a series of hurdles that otherwise qualified people must clear").

The EOLOA explicitly includes procedures for psychiatric referrals if any doctor suspects mental health issues affecting decision making during the course of the qualification process for aid-in-dying medication. *E.g.*, Cal. Health & Safety

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1 Code § 443.6(c) (consulting physician must determine "that the individual has the
2 capacity to make medical decisions, is acting voluntarily, and has made an
3 informed decision"); *id.* § 443.6(d) ("If there are indications of a mental disorder,"
4 consulting physician must "refer the individual for a mental health specialist
5 assessment"); *id.* § 443.7(a)-(d) (mental health specialist, upon referral from
6 attending or consulting physician, must "[e]xamine the qualified individual and his
7 or her relevant medical records," determine "that the individual has mental capacity
8 to make medical decisions, act voluntarily, and make an informed decision,"
9 determine "that the individual is not suffering from impaired judgment due to a
10 mental disorder," and fulfill all "record documentation requirements" of the
11 statute). And even beyond mental health evaluations, the legislature "included
12 numerous safeguards in the [EOLOA] statute to ensure that, at every stage of the
13 process, a person demonstrates their voluntary consent." *Shavelson*, 608 F. Supp.
14 3d at 928. For an eligible terminally ill person to obtain an aid-in-dying
15 prescription under the EOLOA, they must strictly comply with myriad rigorous
16 requirements, all of which serve to make certain the person's decision is voluntary.
17 *See* Cal. Health & Safety Code §§ 443.3-443.6.

18 These "numerous safeguards" ensure that the EOLOA cannot disadvantage a
19 class of disabled individuals.

20 **B. Plaintiffs fail to state a violation of the Rehabilitation Act**

21 Because Plaintiffs fail to state a claim under the ADA, they also fail to state a
22 claim under the Rehabilitation Act for the same reasons. *Vinson v. Thomas*, 288
23 F.3d 1145, 1152 n.7 (9th Cir. 2002) (explaining that "there is no significant
24 difference in the analysis of right and obligations created by the two Acts"); *Zukle*
25 *v. Regents of Univ. of Cal.*, 166 F.3d 1041, 1045 n.11 (9th Cir. 1999).

26 **C. Plaintiffs' equal protection claim fails**

27 Plaintiffs fail to state an equal protection claim for at least three reasons.
28 They allege that the EOLOA "violates the rights of people with terminal disabilities

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to equal protection under the law," Dkt. 1 ¶ 90, because it "facially and intentionally discriminates on the basis of physical health" by "denying protections and safeguards to those diagnosed with a 'terminal disease.'" *Id.* ¶ 191. Plaintiffs' claim fails on these grounds because (1) their proposed classes are not similarly situated, (2) the EOLOA affords *additional* end-of-life options to people with terminal diseases without withholding other protections, and (3) the EOLOA satisfies any level of means-ends scrutiny.

1. The proposed classes are not similarly situated

Plaintiffs' equal protection claim fails because they do not establish that their proposed classes are similarly situated and have been treated disparately. *Roy*, 960 F.3d at 1181. The Equal Protection Clause "does not forbid classifications"—it "simply keeps governmental decisionmakers from treating differently persons who are in all relevant respects alike." *Nordlinger v. Hahn*, 505 U.S. 1, 10 (1992). "In other words, the 'similarly situated' analysis must focus on factors of similarity and distinction pertinent to the state's policy, not factors outside the realm of its authority and concern." *Ariz. Dream Act Coal. v. Brewer*, 855 F.3d 957, 967 (9th Cir. 2017).

Here, Plaintiffs claim that one class—"people with terminal diseases"—is treated differently from another class—"people ineligible to participate in [the] EOLOA who nevertheless share similar concerns about losing autonomy, the loss of dignity, losing control of bodily functions, becoming a burden on caregivers, pain, and/or the financial costs associated with continued living." Dkt. 1 ¶ 191. Nevertheless, Plaintiffs' two proposed groups undermine their equal protection claim at the threshold because the second group is, by its own terms, "*not eligible* to participate in EOLOA," thus placing its members entirely "outside the realm of [the state policy's] authority and concern." *Ariz. Dream Act*, 855 F.3d at 967.[3]

---

[3] Whether they intend to or not, Plaintiffs also appear to argue that the EOLOA is somehow unconstitutional because it does not make aid-in-dying medication more

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1 Plaintiffs would have the Court ignore a fundamental and obvious difference
2 between the two classes—one has terminal diseases, one does not. *See* Act at
3 443.1(r) ("'Terminal disease' means an incurable and irreversible disease that has
4 been medically confirmed and will, within reasonable medical judgment, result in
5 death within six months."). Patients with terminal diseases are faced with the
6 potential for unique anxiety that comes with the prospect of unbearable suffering at
7 the end of life. *See*, *e.g.*, Ex. E (Decl. of Catherine S. Forest, MD, MPH, FAAFP)
8 ¶ 33; Ex. A (Decl. of Burt Bassler) ¶¶ 17-18; Ex. B (Decl. of Judith Coburn) ¶¶ 19,
9 23-24; Ex. C (Decl. of Peter Sussman) ¶¶ 34-37. The EOLOA provides "peace of
10 mind to many people [in this class] who would otherwise face a prolonged and
11 painful death." *Shavelson*, 608 F. Supp. 3d at 923. Moreover, the government's
12 interest in protecting human life wanes when death is certain and imminent, at
13 which point the question is not *whether* in the (potentially distant) future, but *when*
14 in the very immediate term, the person will die. *See Cruzan by Cruzan v. Dir., Mo.*
15 *Dep't of Health*, 497 U.S. 261, 270 (1990) ("the State's interest weakens … as the
16 … prognosis dims") (citation and internal quotations omitted); *Tune v. Walter Reed*
17 *Army Med. Hosp.*, 602 F. Supp. 1452, 1456 (D.D.C. 1985) (finding that "various
18 state interests, viewed singly or in combination," were "insufficient to outweigh
19 plaintiff's interest in dying as she chooses"). Plaintiffs inappropriately compare the
20 class of terminally ill people with "groups of people *ineligible* to participate in
21 EOLOA" (Dkt. 1 ¶ 191)—that is, those without terminal diagnoses who have not
22 requested aid-in-dying medication (the Act requires multiple requests), and who
23 would not self-ingest the medication even if they were somehow able to obtain and
24 fill the prescription. And in making that inappropriate comparison, Plaintiffs ignore
25 the reality faced by terminally ill patients. The two groups are not similarly
26 situated. Plaintiffs' equal protection claim fails on this independent basis.
27

28 widely available, but instead restricts availability to terminally ill adults.

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2. The EOLOA affords additional end-of-life options to people with terminal diseases, but does not withhold protections

Plaintiffs' classes are not treated disparately under the statute in a way that amounts to discrimination. Again, the EOLOA affords individuals with terminal illnesses the *additional* benefit of directing their medical care at the end of life. Numerous courts have found that laws that provide additional rights to uniquely situated classes do not violate equal protection, particularly when conferring those additional rights does not take away from rights available to other classes. *E.g.*, *Roy*, 960 F.3d at 1184; *Sailboat Bend Sober Living*, 46 F.4th at 1274; *Bangerter*, 46 F.3d at 1504; *Oxford House-C*, 77 F.3d at 251–52.

No reading of the EOLOA supports Plaintiffs' assertion that it deprives individuals with terminal diseases from "protection and public services" that are available to people who do not have terminal diagnoses. Indeed, the statute facially protects terminally ill patients through multiple procedural mechanisms that ensure aid-in-dying medication is not provided to individuals "suffering from impaired judgment due to a mental disorder." Cal. Health & Safety Code § 443.5(a)(1)(A)(iii). Before prescribing an aid-in-dying medication, the attending physician must determine that the requesting patient "has the capacity to make medical decisions," and if "there are indications of a mental disorder, the physician shall refer the individual for a mental health specialist assessment." *Id*; *see also supra* at 11-12. If such a referral is made, "no aid in dying drugs shall be prescribed until the mental health 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*. § 443.5(a)(1)(A)(iii). Plaintiffs make no allegations—nor can they—that these requirements amount to a "den[ial of] protections and safeguards," Dkt. 1 ¶ 190, meant to prevent suicide.

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1 **3. The EOLOA satisfies any level of means-ends scrutiny**
2 **a. The Court should apply rational basis review**
3 The law is abundantly clear that "unless a classification warrants some form
4 of heightened review because it jeopardizes exercise of a fundamental right or
5 categorizes on the basis of an inherently suspect characteristic, the Equal Protection
6 Clause requires only that the classification rationally further a legitimate state
7 interest." *Nordlinger*, 505 U.S. at 10.
8 Plaintiffs argue that the EOLOA implicates the fundamental right "to live"
9 (Dkt. 1 ¶¶ 189, 192), and that the EOLOA "interferes with the State's interest in
10 suicide prevention by authorizing the act of helping someone else kill themselves
11 based on the perceived nature and duration of their physical health and disability."
12 *Id*. ¶ 191. The EOLOA, however, does not implicate a fundamental right to live—
13 EOLOA participation is entirely voluntary, and those who want to live out their
14 natural life and die from their disease are free to do so. The EOLOA simply
15 confers additional benefits for end-of-life care. *See supra* at 10-11.
16 Furthermore, Plaintiffs' claim that the EOLOA necessarily interferes with a
17 state interest in suicide prevention ignores findings by other courts that the EOLOA
18 "carefully regulates" and limits "who can be prescribed such medication and how
19 they can take it." *Shavelson*, 608 F. Supp. 3d at 924 (N.D. Cal. 2022); *id*. (the
20 EOLOA "sets out a series of hurdles that otherwise qualified people must clear").
21 As demonstrated above, the EOLOA was drafted with numerous guidelines that
22 ensure that access to aid-in-dying medication is strictly voluntary and available only
23 to individuals who comply with its myriad procedural requirements, including
24 attestation and evaluation by multiple witnesses and physicians. Indeed, knowing
25 violations of the EOLOA's requirements are punishable as felonies under the Act.
26 *See* Cal. Health & Safety Code § 443.17. And proposed modifications to the law
27 that would come close to "sanctioning the act of helping someone else kill
28 themselves" have been rejected in recent litigation. *Shavelson*, 608 F. Supp. 3d at

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1 927 (declining accommodation to "permit physicians to administer aid in dying
2 medication" because doing so would "transform[] the benefit available under the
3 Act from the ability to end your own life to the ability to have someone else end it
4 for you").

5 Under rational basis scrutiny, the EOLOA's carefully regulated differential
6 treatment of terminally ill patients serves California's legitimate interest in
7 providing for the general welfare of its citizens. This rationally includes ensuring
8 that qualifying terminally ill patients benefit from the palliative effect of not having
9 to fear they will suffer needlessly and to have the option to avoid suffering drawn-
10 out or overly painful deaths. And because the EOLOA provides additional end-of-
11 life options to certain terminally ill patients at the end of their lives, it also serves
12 California's interests in providing those patients with the personal autonomy to
13 approach their diagnoses on their own terms. The EOLOA grants qualifying
14 patients the peace of mind that comes with knowing they will have the choice to
15 forgo an otherwise painful death—it does not strip those patients of rights that
16 would otherwise apply to them. This is enough to satisfy the rational basis test.

17 **b. The EOLOA satisfies strict scrutiny in any event**

18 Even if the EOLOA were subject to strict scrutiny, the EOLOA satisfies that
19 test because it is narrowly tailored to serve a compelling state interest. *Plyler v.*
20 *Doe*, 457 U.S. 202, 216-17 (1982). The examination of "claims under broad
21 provisions of the Constitution … must not be applied out of context in disregard of
22 variant controlling facts." *Gomillion v. Lightfoot*, 364 U.S. 339, 343–344 (1960).
23 Strict scrutiny "is designed to provide a framework for carefully examining the
24 importance and the sincerity of the reasons advanced by the governmental
25 decisionmaker … in that particular context." *Grutter v. Bollinger*, 539 U.S. 306,
26 327 (2003). Narrow tailoring "does not require exhaustion of every conceivable …
27 alternative," only "serious, good faith consideration of workable … alternatives"
28 that will achieve the compelling state interest sought. *Id*. at 339-40.

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1 The EOLOA is narrowly tailored because participation is entirely voluntary
2 and the option is available only to those with a verified diagnosis of an incurable
3 disease that will lead to death in six months or less, and who are able to satisfy the
4 Act's multiple procedural requirements. This narrow class of terminally ill patients
5 is the group that is highly likely to experience unbearable suffering in their final
6 weeks and days. And, as explained above, this narrow class is subject to "a series
7 of hurdles" that they must clear, despite being "otherwise qualified." *Shavelson*,
8 608 F. Supp. 3d at 924. Thus, the equal protection claim fails for this independent
9 reason.

10 **D. Plaintiffs' due process claim fails**

11 Finally, Plaintiffs' due process claim fails because they cannot demonstrate
12 an inevitable danger or even identify a single involuntary death under the EOLOA.
13 Plaintiffs allege that the EOLOA "violates the Due Process Clause by denying the
14 fundamental interest in the preservation of life to individuals whose doctors
15 diagnose them with a terminal disease and prescribe lethal drugs on that basis."
16 Dkt. 1 ¶ 197. Plaintiffs also claim the EOLOA lacks "sufficient safeguards" to
17 ensure that "waiver" of this fundamental right is made "with adequate due process,"
18 because the Act fails to "require that people meaningfully consider, exhaust, and/or
19 knowingly reject less restrictive alternatives to assisted suicide, including suicide
20 prevention services, medical and nursing support services, hospice care, and other
21 personal support services." *Id.* ¶ 198. And, according to Plaintiffs, due process is
22 denied to individuals diagnosed with terminal diseases because the EOLOA
23 "implicates the state-created danger" doctrine. *Id.* ¶ 197.

24 Plaintiffs' claim fails under the *Salerno* doctrine. Plaintiffs do not and
25 cannot allege the EOLOA results in involuntary deaths in *every single application*
26 of the statute, as required to state a plausible basis for relief under *Salerno*. In fact,
27 quite the opposite is true—Plaintiffs make no allegation that *any* individual in
28 California eligible under the EOLOA has ever faced an involuntary death, let alone

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that such an occurrence is likely in every application of the statute. For example, there would be no credible assertion of an equal protection violation in the case of Will Forest, who received aid-in-dying medication to end his life peacefully at home, on his own terms, surrounded by his loving family. Ex. E ¶¶ 30, 33-34. Although Mr. Forest's physician diagnosed him in mid-April 2020 with a terminal condition—a rapidly progressing, unclassified neuron disease—Mr. Forest was forced to wait over a month to receive his prescription because his primary care physician was part of a nonparticipating medical group. *Id.* ¶ 32. Despite these delays, Will received the medical aid-in-dying medication in time to avoid a terrifying death from suffocation or choking on his own saliva. *Id*. ¶ 33. Will made a voluntary request to alleviate suffering and anxiety for himself and his family. *Id*. ¶¶ 32-33. He was mentally competent, and had a confirmed diagnosis of a disease that would have taken his life within six months of the request. *Id*. ¶ 32. Plaintiffs cannot claim that Will's experience was the result of a mistake, coercion, or abuse. That a statute "might operate unconstitutionally under some conceivable set of circumstances is insufficient to render it wholly invalid." *Salerno*, 481 U.S. at 745. The due process claim must be dismissed on this ground alone.

Cruzan is particularly instructive here. 497 U.S. at 270. In *Cruzan*, the Supreme Court upheld a Missouri statute that included a "procedural safeguard" to ensure that a surrogate's decision to withdraw life-sustaining treatment from an incompetent individual conformed "at best it may to the wishes expressed by the patient while competent." *Id.* at 280. Such a safeguard, the Court explained, "guard[s] against potential abuses" and protects "the personal element of an individual's choice between life and death." *Id.* at 262. The same is true for the safeguards built into the EOLOA, which includes numerous guidelines and requirements meant to ensure that individuals with a terminal illness do not unwillingly or involuntarily obtain and ingest aid-in-dying medication. And unlike in *Cruzan* where a surrogate was required to put forth evidence of an incompetent

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patient's wishes, under the EOLOA the terminally ill patient must be competent and must themself make the request, fill the prescription, and then self-ingest the medication—eliminating any evidentiary question about the patient's wishes. Once again, Plaintiffs do not make allegations sufficient to allow the Court to invalidate the EOLOA because Plaintiffs cannot "establish that no set of circumstances exist under which [the EOLOA] would be valid." *S.D. Myers*, 253 F.3d at 472 (citing *Salerno*).

Indeed, Plaintiffs' allegations reflect a disregard for the numerous EOLOA requirements that were purposefully drafted to avoid the very danger that Plaintiffs must demonstrate is inevitable. For example, Plaintiffs' claim that the EOLOA fails to require that people "consider, exhaust, and/or knowingly reject less restrictive alternatives" runs headlong into the statute's *requirement* that an attending physician determine at the threshold that the qualifying individual makes an informed decision by discussing "[t]he feasible alternatives or additional treatment options, including, but not limited to, comfort care, hospice care, palliative care, and pain control." Act at 443.5(a)(1)(E).

Nor do Plaintiffs sufficiently allege the EOLOA constitutes a "state-created danger." Plaintiffs cite *Martinez v. City of Clovis*, 943 F.3d 1260, 1271 (9th Cir. 2019), which requires them to establish that (1) state officials' affirmative actions created or exposed the plaintiff to actual, particularized danger that the plaintiff would not have otherwise faced; (2) the injury suffered by the plaintiff was foreseeable; and (3) the state officials were deliberately indifferent to the known danger. *Martinez*, 943 F.3d at 1271.

Plaintiffs do not establish any of these elements. No Plaintiff is alleged to have suffered any injury, let alone a foreseeable injury. Instead, Plaintiffs speculate about a possible future injury. In *Martinez*, the Ninth Circuit found that a reasonable jury could find that police officers violated a domestic violence victim's due process rights by disclosing her complaint to her abuser while declining to

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arrest him, therefore affirmatively increasing the victim's "known and obvious" danger in an objectively foreseeable manner, which ultimately led to two subsequent assaults by her abuser. 943 F.3d at 1272-1724. No analogous facts are present here. Plaintiffs cannot in good faith argue the EOLOA was drafted with "deliberate indifference toward the risk" of involuntary access to and ingestion of aid-in-dying medication. Indeed, the EOLOA's "numerous safeguards ... ensure that, at every stage of the process, a person demonstrates their voluntary consent." *Shavelson*, 608 F. Supp. 3d at 928. Far from an *affirmative action* that places individuals at risk of an *actual, particularized* danger, the EOLOA creates multiple barriers and requirements to access aid-in-dying medication in order to ensure that individuals with terminal illnesses make "informed medical decisions regarding [their] treatment." *Christian Med. & Dental Ass'n v. Bonta*, 625 F. Supp. 3d 1018, 1038 (C.D. Cal. 2022).

V. CONCLUSION

For all the reasons stated above, Plaintiffs fail to state a claim and their Complaint should be dismissed.

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s/ John Kappos

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CERTIFICATE OF COMPLIANCE

The undersigned, counsel of record for Intervenors Lambert ("Burt") Bassler, Judith Coburn, Peter Sussman, Chandana Banerjee, MD, MPH, HMDC, FAAHPM, Catherine Sonquist Forest, MD, MPH, FAAFP, and Compassion & Choices Action Network (CCAN), certifies that this brief contains 4,788 words, which complies with the word limit of L.R. 11-6.1.

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