IMMEDIATE STAY OF ORDER REQUESTED

***PALMA* WRIT REQUESTED**

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT, DIVISION TWO

ATTORNEY GENERAL OF THE STATE OF CALIFORNIA, XAVIER BECERRA, et al., Defendants/Intervenors and Petitioners, **v.** **SUPERIOR COURT OF CALIFORNIA, COUNTY OF RIVERSIDE,** Respondent, **DR. SANG-HOON AHN, et al.,** Plaintiffs and Real Parties in Interest.	Case No.

Superior Court of California, County of Riverside, Case No. RIC 1607135
Daniel A. Ottolia, Judge, Dept. 4, (951) 777-3073
Order Entered on May 21, 2018

PETITION FOR WRIT OF MANDATE AND/OR PROHIBITION OR OTHER APPROPRIATE RELIEF AND REQUEST FOR IMMEDIATE STAY; MEMORANDUM OF POINTS AND AUTHORITIES (EXHIBITS FILED UNDER SEPARATE COVER)

Received by Fourth District Court of Appeal, Division Two

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TABLE OF CONTENTS

Page

Table of Contents 3
Introduction 9
Petition for Writ of Mandate and/or Prohibition or Other Appropriate Relief 12
I. Petitioners, Respondents, and Real Parties in Interest 12
II. Authenticity of Exhibits 12
III. Timeliness of the Petition 13
IV. Chronology of Pertinent Events 13
V. Inadequacy of Remedy by Appeal 19
VI. Request for Peremptory Writ in the First Instance 20
VII. Bases for Relief 21
Prayer 21
Memorandum of Points and Authorities 24
I. There are Sufficient Grounds for Writ Review of This Case 24
A. The Omaha Factors Weigh in Favor of Writ Review, and Not Extraordinary Writ 24
B. The Court Should Issue a Writ in the First Instance 26
II. Standard of Review 26
III. the Superior Court Erred in Granting the Motion for Judgment on the Pleadings 27
A. The Act Was Properly Enacted During the Extraordinary Legislative Session for Health Care 27
1. The Act Falls Within the Scope of the Governor's Proclamation 28
2. The Superior Court's Understanding of "Health" is Unreasonably Narrow 31

TABLE OF CONTENTS
(continued)

Page

3. Even if the Call of the Special Session Emphasized Health Care Funding, the Act is Within the Scope of the Call 33

B. Real Parties in Interest Cannot Establish as a Matter of Law That They Have Standing 34

1. Real Parties in Interest Do Not Adequately Allege that They Have Been Personally Injured by the Act 34

2. Real Parties in Interest Cannot Assert Standing on Behalf of Others 35

Conclusion 37

TABLE OF AUTHORITIES

Page

Cases

Ahn et al. v. Hestrin
Riverside Superior Court Case No. RIC 1607135 12

American Academy of Pediatrics v. Lungren
(1997) 16 Cal.4th 307 36

Blumhorst v. Jewish Family Servs. of Los Angeles
(2005) 126 Cal.App.4th 993 ..... 34, 35

California End of Life Option Act 2016 Data Report,
https://www.cdph.ca.gov/Programs/CHSI/CDPH%20Document%20Library/CDPH%20End%20of%20Life%20Option%20Act%20Report.pdf 10

California Redevelopment Assn. v Matosantos
(2011) 53 Cal.4th 231 27

Californians for an Open Primary v. McPherson
(2006) 38 Cal.4th 735 30

Doe v. Bolton
(1973) 410 U.S. 179 31

Donorovich-Odonnell v. Harris
(2015) 241 Cal.App.4th 1118 32

Ellerbee v. County of Los Angeles
(2010) 187 Cal.App.4th 1206 19

Gerawan Farming, Inc. v. Lyons
(2000) 24 Cal.4th 468 26

Higgins v. City of Santa Monica
(1964) 62 Cal.2d 24 27

TABLE OF AUTHORITIES
(continued)

Page

Lewis v. Superior Court
(1999) 19 Cal.4th 1232 20

Lungren v. Superior Court
(1996) 48 Cal.App.4th 435 20

Manduley v. Superior Court
(2002) 27 Cal.4th 537 30

Martin v. Riley
(1942) 20 Cal.2d 28 .... *passim*

Methodist Hosp. of Sacramento v. Saylor
(1971) 5 Cal.3d 685 27

Ng v. Superior Court
(1992) 4 Cal.4th 29 .... 20, 26

Nougues v. Douglass
(1857) 7 Cal. 65 27

Novartis Vaccines & Diagnostics, Inc. v. Stop Huntingdon Animal Cruelty USA, Inc.
(2006) 143 Cal.App.4th 1284 35

Omaha Indem. Co. v. Superior Court
(1989) 209 Cal.App.3d 1266 .... 24, 25, 26

Palma v. U.S. Industrial Fasteners, Inc.
(1984) 36 Cal.3d 171, 177-178 .... 20, 26

People v. Belous
(1969) 71 Cal.2d 954 36

People v. Falsetta
(1999) 21 Cal.4th 903 27

People v. Hazelton
(1996) 14 Cal.4th 101 36

TABLE OF AUTHORITIES
(continued)

Page

Phelan v. Superior Court
(1950) 35 Cal.2d 363 .... 20, 24

Schmier v. Supreme Court
(2000) 78 Cal.App.4th 703 34

Sebago, Inc. v. City of Alameda
(1989) 211 Cal.App.3d 1372 .... 26, 27

Sturgeon v. Cty. of Los Angeles
(2010) 191 Cal.App.4th 344 .... 29, 30

United States v. Vuitch
(1971) 402 U.S. 62 31

STATUTES

Act. Laws 9

Code Civil Procedure § 904.1 .... 19, 24

Health & Saf. Code, §§ 443-443.22 13

Health & Saf. Code, § 443, *et seq.* 10

Health & Saf. Code, § 443.2 .... 13, 14

Health and Safety Code
§ 443.14, subd. (b)-(e) 35
§ 443.14, subd. (e)(1) 16, 35
§ 443.16 35

Life Option Act
.... 9, 11, 13, 25

Military and Veterans Code 28

Probate Code
§ 4600, *et seq.* 31

TABLE OF AUTHORITIES
(continued)

Page

CONSTITUTIONAL PROVISIONS

California Constitution Article IV, § 3(b) 18

California Constitution Article IV § 3, subd. (b) 28, 30, 33

California Constitution Article IV, § (b) 16

OTHER AUTHORITIES

2nd Ex. Sess., 2015-2016 13

INTRODUCTION

On May 21, 2018, the Superior Court of Riverside County invalidated the End of Life Option Act (the Act) on the ground that it was not sufficiently related to the subject matter of the special legislative session called by the Governor to address health care-related issues. This ruling was erroneous – it contradicts both the deference owed the legislature and an earlier finding by the same court that the Act was within the scope of the special session. The enactment fell within the scope of the special session called, in part, to consider efforts to "improve the efficiency and efficacy of the health care system . . . and improve the health of Californians." (Petitioners' Exhibits (Exh.) Supporting Petn. For Writ of Mandate, Exh. 1.)[1]

Upon signing the Act into law on October 5, 2015, Governor Brown took the atypical step of releasing a signing message. It read, in part:

> ABx2 15 is not an ordinary bill because it deals with life and death. The crux of the matter is whether the State of California should continue to make it a crime for a dying person to end his life, no matter how great his pain or suffering. [] I do not know what I would do if I were dying in prolonged and excruciating pain. I am certain, however, that it would be a comfort to be able to consider the options afforded by this bill. And I wouldn't deny that right to others.

(Exh. 2.) As the Governor indicated, the Act deals with pain, suffering, and the comfort of having the health care options afforded by the Act. Laws enacted during a special session can be broadly germane to, and have a natural connection with, the subject matter of that session. In applying that test, courts are expressly reluctant to hold that legislative actions are not embraced in the call of a special session, and will not so

[1] Unless otherwise noted, all of the exhibits cited in this brief are contained in Petitioners' Exhibits Supporting Writ of Mandate.

declare unless the subject "manifestly and clearly is not embraced therein." (*Martin v. Riley* (1942) 20 Cal.2d 28, 40.) Thus, the Act is embraced by the Governor's June 16, 2015 call – for laws to "improve the efficiency and efficacy of the health care system . . . and improve the health of Californians" – and was a proper subject for the special legislative session. The Superior Court, which initially acknowledged that interpretation, later contradicted itself when it misapplied the operative legal test, and should be reversed.

The impact of the Superior Court's ruling is immediate and profound. For the past two years, the Act has provided terminally ill patients, diagnosed with six months or less to live, with a choice to seek an aid-in-dying prescription, allowing them to avoid prolonged suffering at the end-stage of their illness. (Health & Saf. Code, § 443, *et seq.*) Roughly 200 terminally ill patients received prescriptions under the Act between June 9, 2016, and December 31, 2016.[2] The option of aid-in-dying improves patient care during the final stages of a terminal illness. The Superior Court's order, however, creates widespread confusion regarding the legal status of the Act for patients, health care providers, insurers, law enforcement, and the general public. If the Act is overturned, or remains in limbo, mentally competent, terminally ill patients will be denied the right to even consider and discuss with their physicians (much less choose) the health care option of a peaceful death with dignity.

The ordinary appeal process provides an inadequate remedy for these harms. Qualified terminally ill patients who seek the options afforded by

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[2] California Department of Public Health, *California End of Life Option Act 2016 Data Report*, https://www.cdph.ca.gov/Programs/CHSI/CDPH%20Document%20Library/CDPH%20End%20of%20Life%20Option%20Act%20Report.pdf (last visited May 20, 2018.)

the Act may die an excruciating, painful death before this Court will be able to grant them effective relief under the normal appellate process.

Additionally, health care practitioners – who now may face the possibility of criminal prosecution for providing their qualified patients with information and assistance pursuant to the Act – have an immediate need for clarity about the state of the law.

Petitioners, respectfully, seek immediate relief requesting this Court to issue a peremptory writ, requiring the Respondent Superior Court to vacate and reverse its order granting the plaintiffs' motion for judgment on the pleadings. Because of the harm and uncertainty caused by the Superior Court's order, Petitioners also request, in the interim, an immediate stay of the Superior Court's ruling pending this Court's review.

This Court should grant immediate relief to resolve the core constitutional question regarding the enactment of the End of Life Option Act during a special session, and issue an immediate stay of the Superior Court's ruling to maintain the status quo for patients, health care providers, insurers, and law enforcement, and the general public.

Moreover, the Superior Court's order fails to address a significant jurisdictional issue that should have precluded any consideration of the merits: Real Parties in Interest lack standing as they cannot allege that they have been personally injured by the Act, and their interests are fundamentally misaligned with the patients that they purport to represent. Real Parties in Interest's Complaint fails to allege that they have been personally injured by the Act, and Petitioners' Complaint-in-Intervention alleges otherwise. Indeed, because the rights provided by the Act are completely optional, Real Parties in Interest cannot establish injury due to the Act, either personally or to their patients. The Real Parties in Interest-physicians do not want to provide aid-in-dying, so if their patients do not want aid-in-dying, the patients will suffer no injury due to the Act. And

where the Real Parties in Interest-physicians do not want to provide aid-in-dying under the Act, but their patients *do* want aid-in-dying, the physicians' interests are not aligned with those of their patients, and thus third-party standing would not lie. Under both scenarios, Real Parties in Interest lack standing, either personally or on behalf of their patients. This Court should therefore issue a peremptory writ ordering the Superior Court to vacate its order and render a new order denying Real Parties in Interest's motion for judgment on the pleadings.

PETITION FOR WRIT OF MANDATE AND/OR PROHIBITION OR OTHER APPROPRIATE RELIEF

Petitioners allege as follows:

I. PETITIONERS, RESPONDENTS, AND REAL PARTIES IN INTEREST

1. Petitioners, the Attorney General of the State of California and the State of California, by and through the California Department of Public Health, are the defendants/intervenors in *Ahn et al. v. Hestrin,* Riverside Superior Court Case No. RIC 1607135, in which an order granting the plaintiffs' motion for judgment on the pleadings was entered on May 21, 2018. The District Attorney of Riverside County, Michael Hestrin, is a defendant in the case. The plaintiffs in the action, Dr. Sang-Hoon Ahn, Dr. Laurence Boggeln, Dr. George Delgado, Dr. Philip Dreisbach, Dr. Vincent Fortanasce, Dr. Vincent Nguyen, and the American Academy of Medical Ethics, are named herein as the real parties in interest. The respondent is the Superior Court of the State of California for the County of Riverside.

II. AUTHENTICITY OF EXHIBITS

2. The exhibits accompanying this petition are true copies of original documents on file with Respondent Superior Court and the original reporter's transcript of the hearing in Superior Court. The exhibits are incorporated herein by reference as though fully set forth in this petition.

The exhibits are paginated consecutively, and page references in this petition are to the consecutive pagination.

III. Timeliness of the Petition

3. Because of the urgent nature of this petition for writ of mandate and/or prohibition or other appropriate relief, it is filed on the same day that the challenged order was entered. It is timely.

IV. Chronology of Pertinent Events

4. On September 11, 2015, the California Legislature enacted the Act during a special session convened by the Governor to address issues related to health care. (2nd Ex. Sess., 2015-2016, (ABX2-15); Health & Saf. Code, §§ 443-443.22.)

5. The Governor signed the End of Life Option Act on October 5, 2015. (Exh. 2, p. 10.)

6. The Act authorizes a mentally competent adult who has been determined by his or her attending physician to be suffering from a terminal, irreversible disease that will result in death within six months, to make a request for an aid-in-dying drug. (Health & Saf. Code, § 443.2.) The provisions and protections of the Act are triggered by a patient request. (*Id.*, § 443.2, subd. (a).) Before a patient can receive a prescription for an aid-in-dying drug, the patient's attending physician must diagnose the individual with a terminal disease as defined by the Act. (*Id.*, § 443.2, subd. (a)(1).) "'Terminal disease' means an incurable and irreversible disease that has been medically confirmed and will, within reasonable medical judgment, will result in death within six months." (*Id.*, § 443.1, subd. (q).)

7. The patient must voluntarily express the wish to receive a prescription for an aid-in-dying drug. (*Id.*, § 443.2, subd. (a)(2).) "'Aid-in-dying drug' means a drug determined and prescribed by a physician for a

qualified individual, which the qualified individual may choose to self-administer to bring about his or her death due to a terminal disease." (*Id.*, (§ 443.1, subd. (b).) "'Qualified individual' means an adult who has the capacity to make medical decisions, is a resident of California, and has satisfied the requirements" of the Act. (*Id.*, § 443.1, subd. (o).) And the patient must have the physical and mental ability to self-administer the aid-in-dying drug. (*Id.*, § 443.2, subd. (a)(5).)

8. The patient must make two oral requests for the aid-in-dying drug, at least 15 days apart, and one written request on a legislatively specified form directly to the patient's attending physician. (*Id.*, § 443.3, subd. (a).) The patient must sign and date the request for the aid-in-dying drug in the presence of two witnesses. (*Id.*, § 443.3, subd. (b)(2).) The request must also be witnessed by at least two other adult persons who, in the presence of the patient, attest that to the best of their knowledge that the patient is who he or she claims to be, that the patient has voluntarily signed the request in their presence, and that they believe the patient to be of sound mind and not under duress, fraud, or undue influence. (*Id.*, § 443.3, subds. (b)(3)(A), (B), (C).) The witnesses may not be the attending physician, consulting physician or health specialist. (*Id.*, § 443.3, subd. (b)(3)(D).) The request for a prescription for an aid-in-dying drug can only be made solely and directly by the patient diagnosed with the terminal disease and cannot be made on behalf of the patient. (*Id.*, § 443.2, subd. (c).)

9. Before prescribing an aid-in-dying drug, the attending physician must make the initial diagnosis that the patient has a terminal disease and determine that the adult patient has the capacity to make medical decisions. (*Id.*, §§ 443.5, 443.6.) If there are indications of a mental disorder, the attending physician must refer the patient for a mental health specialist assessment. (*Id.*, § 443.5.) The mental health specialist must independently assess whether the patient has the mental capacity to make

an end-of-life decision. (*Id.*, §§ 443.5, 443.7.) No aid-in-dying drug 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, subd. (a)(1)(A)(i-iii).) The attending physician must also determine, among other things, that the patient is qualified for the prescription; is making an informed decision; has a terminal disease as defined by the Act; and has voluntarily made the request for an aid-in-dying drug. (*Id.*, § 443.5, subds. (a)(1)(B), (C), (D) & (a)(2).) Physicians are required to submit an attending physician checklist and compliance form to the California Department of Public Health to ensure compliance with statutory safeguards. (*Id.*, §§ 443.5, 443.22.)

10. But before a qualified patient can obtain the prescription for an aid-in-dying drug from the attending physician, a second consulting physician must examine the patient and his or her relevant medical records; must confirm in writing the attending physician's diagnosis and prognosis; must determine that the patient has the capacity to make medical decisions, is acting voluntarily and has made an informed decision; and if there are indications of a mental disorder, must refer the individual for a mental health specialist assessment. (*Id.*, § 443.6.) The consulting physician must then submit a compliance form to the attending physician. (*Ibid.*) The attending physician must also transmit, within 30 days of prescribing, the patient's written request, physician check list and compliance form, and the consulting physician compliance form to the California Department of Public Health. (*Id.*, § 443.9.)

11. Health care providers are free to decline to prescribe aid-in-dying drugs or to otherwise be involved with a patient's decision to exercise his or her end-of-life choice under the Act. (*Id.*, § 443.14.) Specifically, "a person or entity that elects, for reasons of conscience,

morality, or ethics, not to engage in activities authorized pursuant to this part is not required to take any action in support of an individual's decision under this part." (*Id.*, § 443.14, subd. (e)(1).)

12. The Act also ensures that physicians who prescribe aid-in-dying drugs and individuals who participate in the end-of-life decisions and discussions of another in accordance with the Act are in no way civilly or criminally liable due to the patient's consumption of the prescribed aid-in-dying drugs: "A person who is present may, without civil or criminal liability, assist the qualified individual by preparing the aid-in-dying drug so long as the person does not assist the qualified person in ingesting the aid-in-dying drug." (*Id.*, § 443.14, subd. (a).) Further, participating health care providers shall not be subject to discipline, liability or otherwise sanctioned for their voluntary participation in prescribing an aid-in-dying drug or participating in the end-of-life decision making process of a patient. (*Id.*, §§ 443.14, subds. (b)-(e), 443.16.) And a health care provider or professional organization or association shall not subject an individual to censure, discipline, suspension, loss of license, loss of privileges, loss of membership, or other penalty for participating in good faith compliance with the Act. (*Id.*, § 443.14, subd. (b).) However, these statutory immunities only apply if the aid-in-dying drugs are prescribed pursuant to the very specific requirements of the Act. If physicians and others do not comply with the strict requirements of the Act, they may be subject to civil and criminal sanctions and prosecution. (*Id.*, §§ 443.16, subd. (c), 443.17.)

13. The instant case was filed in the Superior Court on June 8, 2016. The complaint seeks declaratory relief and alleges that the Act violates the equal protection and due process guarantees of the California Constitution. (Exh. 3, p. 12.) The complaint further alleges that the Act was improperly enacted during a special legislative session for health care funding in violation of Article IV, section (b) of the California Constitution.

(*Id.*) The complaint also seeks a permanent injunction to enjoin District Attorney of Riverside County, Michael Hestrin, "from recognizing any exceptions to the criminal law created by the Act, in the exercise of his criminal enforcement duties." (*Id.*)

14. Real Parties in Interest Dr. Sang-Hoon Ahn, Dr. Laurence Boggeln, Dr. George Delgado, Dr. Philip Dreisbach, Dr. Vincent Fortanasce, and Dr. Vincent Nguyen are physicians who claim to "treat patients meeting the Act's definition of having a terminal disease" and "bring this action to protect the rights of their patients to be protected . . . from being assisted and abetted in committing suicide, from receiving substandard care, and from having depression and mental conditions leading to suicide left untreated." (*Id.*)

15. Real Party in Interest, American Academy of Medical Ethics (AAME), brings this action on behalf of its members. AAME is an organization that claims to represent physicians and health-care professionals nationwide to promote ethical standards in the medical profession. AAME claims that its membership includes California physicians "whose patients meet the Act's definition of having a terminal disease." (*Id.*)

16. Riverside District Attorney Michael Hestrin was the sole named defendant in the case. (*Id.*)

17. Petitioners, the Attorney General for the State of California and the State of California, by and through the California Department of Public Health, intervened in the case as defendants/intervenors. (Exh. 4, p. 33.)

18. Real Parties in Interest sought a preliminary injunction against the District Attorney of Riverside from recognizing the Act or any exceptions to criminal law provided for by the Act. (Exh. 5, p. 48.)

19. One of the bases for the motion for preliminary injunction was Real Parties in Interest's claim that the Act was invalidly enacted during the

special legislative session called by the Governor for health care issues. Pursuant to Article IV, Section 3(b) of the California Constitution, legislation passed during a special session must be within the scope of the Governor's proclamation granting the special session the authority to legislate. Real Parties in Interest argued that the subject of the Governor's proclamation was health care funding, and that decriminalization of suicide was not embraced by any reasonable construction of the proclamation. (*Id.*)

20. The Superior Court denied the motion for preliminary injunction. (Exh. 6, p. 79.) In denying the motion, Superior Court ruled that: "[e]ven though improving the health of Californians might seem far removed from assisted suicide, it is sufficiently related to health care and the efficiency and efficacy of the health care system for the Court to consider the Act to be within the scope of the authorization for the session." (*Id.*)

21. Subsequently, Petitioners filed a motion for judgment on the pleadings, arguing that the Act was within the scope of the Governor's proclamation. (Exhs. 7-8, pp. 115-151.) The Superior Court denied the motion, and in doing so, found that the Act was *not* within the scope of the authorization for the special session. (Exh. 9, p. 152.) In so finding, the Superior Court explained: "Well, . . . just so you understand, the Court has not reached the merits of whether [the Act] falls within the legislative power. I'm simply looking at whether they've alleged sufficient information to actually get to a trial on the matter." (*Id.*, p. 170:17-21.)

22. Subsequently, Real Parties in Interest filed an offensive motion for judgment on the pleadings, arguing again that the Act is unconstitutional because it falls outside of the scope of the call for the special session. (Exh. 10, p. 186.) Petitioners opposed the motion. (Exh. 12, p. 262.)

23. At a hearing on May 15, 2018, the Superior Court indicated that it would grant the motion, but would wait five days after the hearing to file the order granting the motion for judgment on the pleadings. (Exh. 16, p 411:5-6.) Petitioners made an oral request for a stay of the order, which the Superior Court denied. (*Id.*, p. 411:10-11.) In rejecting the request, the Superior Court stated: "[t]hat's the idea behind the five days, so you can prepare a writ. When the Court enters the order in five days, essentially you can head over to the DCA and file your paperwork." (*Id.*, p. 411:19-22.)

24. Today, on May 21, 2018, the Superior Court entered the order granting the motion for judgment on the pleadings. (Exh. 17.)

25. The Superior Court has not yet entered a judgment in the case, nor indicated when it will do so.

V. Inadequacy of Remedy by Appeal

26. Although an appeal lies from the judgment yet to be entered after the Superior Court granted Real Parties in Interest's motion for judgment on the pleadings (Code of Civ. Proc., § 904.1; *Ellerbee v. County of Los Angeles* (2010) 187 Cal.App.4th 1206, 1212-1213), review by appeal is an inadequate remedy for Petitioners, given the urgent need to prevent the Act – a law dealing with life and death – from being essentially nullified, as well as the need for immediate clarity regarding the effect of the entry of the Court's order. During the normal course of review by appeal, many mentally competent, terminally ill patients who would otherwise have availed themselves of the right to aid-in-dying under the Act may instead be forced to live out the remainder of their lives in excruciating pain while the appeal process goes forward, not even being able to discuss the options afforded by the Act with their physicians. Accordingly, in addition to consigning these absent third parties to avoidable pain and suffering, allowing the normal appeal process to

proceed would moot their ability to exercise the legal rights that the Legislature created for them.

27. Even where an appeal lies from a final judgment, review may nevertheless proceed by extraordinary writ petition where, as here, there is a "special reason" why review by appeal "is rendered inadequate by the particular circumstances of [the] case." (*Phelan v. Superior Court* (1950) 35 Cal.2d 363, 370; *see, e.g., Lungren v. Superior Court* (1996) 48 Cal.App.4th 435, 438 [writ review granted where order compelling revision of ballot initiative's title and label was appealable but remedy by appeal was inadequate because ballot's printing had to commence imminently].) Here, the imminence of death for the terminally ill patients who seek to exercise their rights under the Act makes review by appeal an inadequate remedy.

VI. Request for Peremptory Writ in the First Instance

28. This petition seeks a peremptory writ in the first instance, in lieu of the issuance of an alternative writ or order to show cause. (*Palma v. U.S. Industrial Fasteners, Inc.* (1984) 36 Cal.3d 171, 177-178.) Given the pain, suffering, and short life expectancy for the terminally ill patients who seek aid-in-dying under the Act, "there is an unusual urgency requiring acceleration of the normal process" of writ review. (*Ng v. Superior Court* (1992) 4 Cal.4th 29, 35.) Absent review by a peremptory writ in the first instance, some of these terminally ill patients may die a painful death before this Court will be able to preserve their legal rights.

29. Because of the urgent need for expeditious action in this proceeding, this court may wish to exercise its discretion to issue a preemptory writ in the first instance without hearing oral argument. (*See Lewis v. Superior Court* (1999) 19 Cal.4th 1232, 1236-1237.) Counsel for Petitioners, however, are willing and prepared to present oral argument on short notice should the Court wish to hear oral argument.

VII. BASES FOR RELIEF

30. The first basis for relief is that Real Parties in Interest lack standing. Real Parties in Interest failed to meet their preliminary burden to establish that the Act injured them or their patients. Unless and until a party suffers a concrete injury of sufficient magnitude, the party lacks standing. Because the rights provided by the Act are entirely optional, Real Parties in Interest cannot allege any injury due to the Act.

31. The second basis for relief is that the Act was validly enacted pursuant to the requirements governing a special session. Courts must presume that laws enacted during a special session are within the scope of the call for that session, and uphold them if they arguably bear a reasonable relation to, or are incidental to, the subject of the session. The Governor's proclamation called for the Legislature to consider efforts to "improve the . . . efficacy of the health care system . . . and improve the health of Californians." (Exh. 1.) As the Governor discussed in his signing message, the Act deals with life, death, pain, suffering, and the comfort of being able to consider the options afforded by the Act. (Exh. 2.) These subjects are related, or at a minimum, incidental to the efficacy of the health care system and the health of Californians. Indeed, the fact that the Superior Court previously found the Act to be within the scope of the special session demonstrates that the Act manifestly bears a reasonable relation to the call of the session. Thus, the Act was a proper subject for the special legislative session, and was validly enacted.

PRAYER

Petitioners pray that this Court:

1. Issue a peremptory writ in the first instance directing Respondent superior court to vacate and reverse its order and render an

order denying Real Parties in Interest's motion for judgment on the pleadings;

2. Immediately stay the Superior Court's order granting Real Parties in Interest's motion for judgment on the pleadings while writ review is pending; and,

3. Grant such other relief as may be just and proper.

Dated: May 21, 2018

Respectfully submitted,

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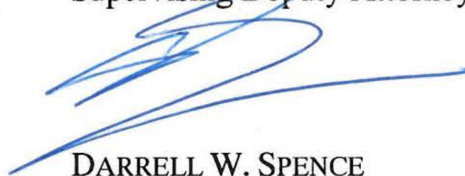

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VERIFICATION

I, Darrell W. Spence, declare as follows:

I am one of the attorneys for Petitioners. I have read the foregoing Petition for Writ of Mandate and/or Prohibition or Other Appropriate Relief and know its contents. The facts alleged in the petition are within my own knowledge, and I know these facts to be true. Because of my familiarity with the relevant facts pertaining to the trial court proceedings, I, rather than Petitioners, verify this petition.

I declare under penalty of perjury that the foregoing is true and correct and that this verification was executed on May 21, 2018, in Sacramento, California.

Darrell W. Spence

MEMORANDUM OF POINTS AND AUTHORITIES

I. THERE ARE SUFFICIENT GROUNDS FOR WRIT REVIEW OF THIS CASE

A. The *Omaha* Factors Weigh in Favor of Writ Review, and Not Extraordinary Writ

Where a motion for judgment on the pleadings is granted without leave to amend, review normally lies only by appeal from the subsequent judgment. (Code Civ. Proc., § 904.1.) However, writ review is appropriate notwithstanding an immediate right of appeal where a petitioner can show some special reason why appeal is rendered inadequate by the particular circumstances of the case. (*Phelan v. Superior Court* (1950) 35 Cal.2d 363, 370-371.)

Appellate courts consider the following general criteria for determining the propriety of writ review:

(1) the issue tendered in the writ petition is of widespread interest or presents a significant and novel constitutional issue;

(2) the petitioner will suffer harm or prejudice in a manner that cannot be corrected on appeal;

(3) the trial court's order deprived petitioner of an opportunity to present a substantial portion of his cause of action;

(4) conflicting trial court interpretations of the law require a resolution of the conflict;

(5) the trial court's order is both clearly erroneous as a matter of law and substantially prejudices petitioner' case; and,

(6) the party seeking the writ lacks an adequate means, such as a direct appeal, by which to attain relief. (*Omaha Indem. Co. v. Superior Court* (1989) 209 Cal.App.3d 1266, 1273-1274 [summarizing Supreme Court authorities].) The extent to which these criteria apply depends on the

facts and circumstances of the case. (*Ibid.*) In this case, the balance of the applicable factors weighs in favor of granting writ review.

First, the issues raised in this case are of widespread interest *and* are significant and novel constitutional issues – albeit ones that should clearly be resolved in favor of Petitioners. California patients and their families, health care providers, insurers, law enforcement, and the general public will be significantly and adversely impacted if the Act is held unconstitutional.

Second, with respect to the harm or prejudice that would result if writ review were not granted, absent writ review, officers of the State may conclude that they are compelled to investigate and prosecute physicians and health care providers who do no more than provide to their patients with the information to empower them to make important health care decisions, and to navigate the options that the Legislature has determined those patients are entitled to in order to avoid suffering in the end-stage of terminal illness. This represents not only a significant intrusion on the official prosecutorial policy of the State of California, and a significant harm to those health care providers, but also a severe harm to qualified terminally ill patients who wish to avoid suffering but would be forced to die a painful death before this Court will be able to grant them effective relief. These harms make review by the ordinary appeal process an inadequate remedy for them.

Third, the Superior Court's ruling is "clearly erroneous." As the trial court itself found earlier in the case, the legislative and executive branches are vested with broad discretion to decide what bills fall within the scope of a special session. (*Martin, supra,* 20 Cal.2d at 39-40.) That discretion was soundly exercised in passing and enacting the End of Life Option Act. Further, Real Parties in Interest lack standing and cannot show an actual injury because the options provided under the Act are completely voluntary for both patients and physicians.

Finally, Petitioners have no other adequate means to attain immediate relief. Hundreds of competent, qualified, terminally ill Californians are relying on the Act to obtain aid-in-dying medication. For many of these people, death and suffering is imminent. If the issues raised in this petition are decided by appeal rather than by writ review, a number of mentally competent, terminally ill patients who would have otherwise availed themselves of aid-in-dying under the Act will instead die without the comfort of the option of aid-in-dying before the appeal process is completed.

Application of the *Omaha* factors to the circumstances of this case confirms that writ review is the appropriate vehicle to decide the issues raised in this petition. Accordingly, writ review should be granted.

B. The Court Should Issue a Writ in the First Instance

Petitioners ask this Court to issue a peremptory writ in the first instance. Such relief is available where there is an unusual urgency requiring acceleration of the normal process of writ review. (*Palma, supra,* 36 Cal.3d at 177-178; *Ng, supra,* 4 Cal.4th at 35.) Given the imminence of death for terminally ill patients who seek aid-in-dying under the Act, the issuance of a peremptory writ in the first instance is appropriate.

II. STANDARD OF REVIEW

The granting of a motion for judgment on the pleadings is subject to de novo review. (*Gerawan Farming, Inc. v. Lyons* (2000) 24 Cal.4th 468, 515.) "Motions for judgment on the pleadings are usually made by defendants. In such instances the motion is the equivalent of a general demurrer, and on appeal from the judgment the appellate court will assume the truth of all facts properly pleaded in the complaint." (*Sebago, Inc. v. City of Alameda* (1989) 211 Cal.App.3d 1372, 1379.) Where, as here, a plaintiff files a motion for judgment on the pleadings, this is "the equivalent

of a demurrer to an answer, and the standard of review is obverse: the appellate court will assume the truth of all facts properly pleaded in the answer and will disregard the controverted allegations of the complaint." (*Id.* at 1380.)

III. THE SUPERIOR COURT ERRED IN GRANTING THE MOTION FOR JUDGMENT ON THE PLEADINGS

A. The Act was Properly Enacted During the Extraordinary Legislative Session for Health Care

Courts must presume that a statute is valid "unless its unconstitutionality clearly, positively, and unmistakably appears." (*People v. Falsetta* (1999) 21 Cal.4th 903, 913.) "Of significance, the legislative power the State Constitution vests is plenary." (*California Redevelopment Assn. v Matosantos* (2011) 53 Cal.4th 231, 254.) "[T]he entire law-making authority of the state, except the people's right of initiative and referendum, is vested in the Legislature, and that body may exercise any and all legislative powers which are not expressly or by necessary implication denied to it by the Constitution." (*Methodist Hosp. of Sacramento v. Saylor* (1971) 5 Cal.3d 685, 691.) Any "restrictions and limitations [imposed by the Constitution] are to be construed strictly, and are not to be extended to include matters not covered by the language used." (*California Redevelopment Assn.* at p. 253.) "If there is any doubt as to the Legislature's power to act in any given case, the doubt should be resolved in favor of the Legislature's action." (*Methodist Hosp.* at p. 691.)

The core of the legislative power is the authority to make laws. (*Nougues v. Douglass* (1857) 7 Cal. 65, 70.) The presumption of constitutionality requires that a legislative act "be deemed to have been enacted on the basis of any state of facts supporting it that reasonably can be conceived." (*Higgins v. City of Santa Monica* (1964) 62 Cal.2d 24, 30, 41.)

1. The Act Falls within the Scope of the Governor's Proclamation

The order granting the motion for judgment on the pleadings should be vacated because the Act falls within the scope of the Governor's proclamation. The Governor's proclamation called for the Legislature to consider efforts to "improve the efficiency and efficacy of the health care system . . . and improve the health of Californians. (Exh. 1.) The purpose of the Act is embraced by this proclamation and thus was a proper subject for the special legislative session.

Real Parties in Interest argue that that the scope of the Governor's proclamation was limited to issues related to health care funding and that the Act goes beyond this call because the subject of aid in dying, and the related immunity from prosecution provisions for physicians who prescribe aid-in-dying drugs under the Act, were not specifically articulated in the proclamation. However, Article IV, section 3, subdivision (b), of the California Constitution allows for extraordinary legislative sessions to be called by the Governor's proclamation, and gives the Legislature both the "power to legislate only on subjects specified in the proclamation" and "other matters incidental to the session."

In *Martin v. Riley* (1942) 20 Cal.2d 28, the California Supreme Court upheld a law enacted in a special session where the Governor's proclamation called for the Legislature "[t]o consider and act upon legislation augmenting the appropriation for the operation, maintenance and organization of the State Guard . . . and amending [various sections] of the Military and Veterans Code, with respect to pay, privileges, allowances, and rights for the State Guard." The special session law at issue related, in large part, to reorganization of the State Guard. (*Id.* at 38.) The petitioner claimed that "the Legislature had no power to reorganize the State Guard because such reorganization was not within the subjects of the proclamation;

that all the Legislature could do at said session was to increase the appropriation for the operation, maintenance and organization of the State Guard and amend the Military and Veterans Code in the respects noted in the call and in the Governor's message to the special session." (*Id.* at pp. 38-39.)

In rejecting this argument, the Supreme Court refused to adopt such a narrow reading of the proclamation and reaffirmed the most basic of legislative presumptions: the presumption of "constitutionality of an act passed at regular session apply to acts passed at a special session." (*Martin, supra,* 20 Cal.2d at p. 39.) The Court explained that when the Legislature, acting under a special call, undertakes "to consider subjects and pass laws in response thereto, and such laws receive the approval of the executive, courts are and should of right be reluctant to hold that such action is not embraced in such call, and will not so declare unless the subject manifestly and clearly is not embraced therein." (*Id.* at pp. 39-40.) The Court reasoned that the proclamation's call for "legislation augmenting the appropriation" "should not be considered in a narrow sense," and the "Legislature was not thereby necessarily restricted to enacting provisions for a direct increase of the previous appropriation." (*Id.* At p. 40.) The Court then articulated the pragmatic legal standard that special session legislation "will be held to be constitutional if by *any* reasonable construction of the language of the proclamation it can be said that the subject of the legislation is embraced therein." (*Ibid.* [emphasis added].) Applying this standard, the Court held that the enactment was valid. (*Id.* at pp. 40-41; *see also Sturgeon v. Cty. of Los Angeles* (2010) 191 Cal.App.4th 344, 351 "[W]hen the governor has submitted a subject to the Legislature, the designation of that subject opens for legislative consideration matters relating to, germane to and having a natural connection with the subject

proper. Any matter of restriction or limitation becomes advisory or recommendatory only and not binding on the Legislature."].)

In the present case, the special session was convened to broadly address health care issues. (Exh. 1.) Among other things, the Proclamation commands the Legislature to consider and act upon legislation" that would "[i]mprove the efficiency and efficacy of the health care system; reduce the cost of providing health care services, and improve the health of Californians." (*Id.*) The Act falls squarely within this mandate.

The Act is part and parcel of the health care system and expands health care options for terminally ill patients. The ability to care for terminally ill patients affects the overall mental and physical health of the patient and includes the right to consider, to discuss, to obtain, and if that patient so chooses, to use aid-in-dying drugs. By extension, this includes physician immunity for prescribing such aid-in-dying drugs.

Moreover, the Constitution gives the Legislature the authority to address all "other matters incidental to the session." (Cal. Const. art. IV, § 3, subd. (b).) This language provides a broad, permissive standard for determining when the Legislature can enact legislation related to a special session. In *Martin*, the Court explained that once a subject has been submitted to the Legislature, "the designation of that subject opens for legislative consideration matters relating to, germane to and having a natural connection with the subject proper." (*Martin, supra,* 20 Cal.2d 28 at p. 39.) This is akin to the "reasonably germane" standard used in determining whether legislation violates the single subject rule, which the Supreme Court has repeatedly said must be construed leniently. (*Californians for an Open Primary v. McPherson* (2006) 38 Cal.4th 735, 764; *accord, Manduley v. Superior Court* (2002) 27 Cal.4th 537, 547.)

Here, the Act governs the conduct of physicians and the care they provide to terminally ill patients, and therefore is reasonably germane to the

health care subject matter of the extraordinary session. Indeed, the fact that the Superior Court previously found the Act to be within the scope of the special session demonstrates that the Act arguably bears a reasonable relation to the call of the session. (Exh. 9, p. 170:17-21.) For this reason, the order granting the motion for judgment on the pleadings should be vacated.

2. The Superior Court's Understanding of "Health" is Unreasonably Narrow

In Real Parties in Interests' view, health care never encompasses the ending stages of one's life because a law that enables suicide cannot improve the health of Californians. California courts do not take such a rigid view of health care and end-of-life discussions and decisions.

California has long recognized that "health" is not merely defined as being free from illness and injury, but also includes the right to seek comfort and pain relief (palliative care), and the right to consider and to refuse life-sustaining medical treatment for the purpose of maintaining autonomy and dignity. (*See* Prob. Code, § 4600, *et seq.* [Health Care Decisions Law].) Similarly, the United States Supreme Court has recognized a broad understanding of "health." Beginning with *United States v. Vuitch* (1971) 402 U.S. 62, the Supreme Court has noted that "health" includes psychological as well as physical "soundness." (*Id.* at p. 72.) In *Doe v. Bolton* (1973) 410 U.S. 179, the Court expanded on this idea to hold that physical, emotional, psychological, and familial factors are all relevant to the well-being of the patient: "[a]ll these factors relate to health." (*Id.* P. at 192.)

Real Party in Interest' narrow definition of "health" should be rejected: the psychological comfort that a person with a terminal disease may experience by virtue of having the option of administration of an aid-in-dying drug, along with other options, is reasonably related to "health."

(See *Donorovich-Odonnell v. Harris*, *supra*, 241 Cal.App.4th at p. 1125 ["Having a prescription for a lethal dose of drugs 'they could self-administer if their suffering became too great in the final days would provide great comfort to them and would alleviate some anxiety related to the dying process.'"] Certainly, the option of taking an aid-in-dying drug is no less related to "health" than the option to forgo any treatment, or to agree to comfort-centered palliative care but forego life-extending treatment. In all cases, the patient is seeking to manage the course of his or her life in the face of terminal disease.

As the Governor stated in his signing message: "I do not know what I would do if I were dying in prolonged and excruciating pain. I am certain, however, that it would be a comfort to be able to consider the options afforded by this bill." (Exh. 2.) The fact that the Governor himself signed the Act into law after the special session, and noted the Act's ability to provide comfort to terminally ill Californians, evidences that the Act is within the scope of the Governor's call. (*See Martin*, *supra*, 20 Cal.2d at p. 42 (Carter, J., concurring) ["the [bill] contains provisions which can reasonably be said to cover subjects not embraced within the purview of the Governor's proclamation calling the special session, ... But since the Governor could have included such subjects in his proclamation, and he having approved the legislation by signing the bill embracing such subjects, I am forced to conclude that he considered his proclamation sufficiently broad to cover the subjects embraced in the bill"].)

Real Parties in Interest's definition of "health," which was adopted by the Superior Court, is unduly focused on ameloriative treatment for the underlying condition, and fails to take a holistic view of patient care. By contrast, the Governor in signing the bill recognized that the Act fell within the definition of the health care of Californians when he called for an extraordinary session of the Legislature. The special session was convened

to broadly address health care issues, which includes end-of-life health care options. The Act falls squarely within this mandate. For this reason, the order entering the motion for judgment on the pleadings should be vacated.

3. Even if the Call of the Special Session Emphasized Health Care Funding, the Act is Within the Scope of the Call

Real Parties in Interest also argue that the purpose of the special session was to address health care funding, and especially a funding shortfall affecting Medi-Cal. Real Parties in Interest claim that since the Act has nothing to do with Medi-Cal funding, or health care funding generally, the Act is outside the scope of the call for the special session. Their position is incorrect on several counts.

The special session was called to "Improve the efficiency and efficacy of the health care system, reduce the cost of providing health care services, and improve the health of Californians." (Ex. 10, p. __.) During the special session, the Legislature debated the proposed Act (ABx2-15) and considered it within the context of health care and health care cost. (Petitioners' Request for Judicial Notice, Exh. A.)

Given the broad language of the call, the deference afforded to the legislative branch under article IV, section 3(b), and that the Legislature considered the Act in terms of health care and health care costs, the Act plainly is embraced by the call of the special session, even if the special session was convened to address health care costs only. A terminal diagnosis inherently involves interaction with the health care systems and resulting costs – whether that involves treating the underlying illness, palliative treatment, undertaking the various medical procedures prerequisite to considering or invoking the options supplied by physicians under the Act. Accordingly, the Act was validly enacted.

B. Real Parties in Interest Cannot Establish as a Matter of Law That They Have Standing

1. Real Parties in Interest Do Not Adequately Allege that They Have Been Personally Injured by the Act

A litigant's standing to sue is a threshold issue to be resolved before the matter can be reached on the merits. (*Blumhorst v. Jewish Family Servs. of Los Angeles* (2005) 126 Cal.App.4th 993, 1000.) Standing "goes to the existence of a cause of action." (*Ibid.*) If a court concludes that a plaintiff does not have standing to maintain the action, not having been personally damaged by the defendant's conduct, then it is improper for the court to exercise jurisdiction over the case. (*Ibid.*)

A person who invokes the judicial process lacks standing if he or she "does not have a real interest in the ultimate adjudication because [he or she] has neither suffered nor is about to suffer any injury of sufficient magnitude . . . ." (*Schmier v. Supreme Court* (2000) 78 Cal.App.4th 703, 707.) To illustrate, in *Blumhorst*, *supra*, the plaintiff, a man, sued women's shelters for gender discrimination because the shelters refused to admit him as a victim of domestic violence. (126 Cal.App.4th at 993.) The plaintiff admitted that at the time he sought admission into the shelters, he was not seeking to escape domestic violence; rather, he was acting as a "tester" on behalf of an organization that decided to test state-funded domestic violence shelters to document whether they discriminate by sex. (*Id.* at p. 1003.) The plaintiff claimed that he had standing because "he alleged an actual injury, and in any event, he had standing as a tester who was denied shelter on the basis [that the] shelter was unavailable to men." (*Id.*) The court rejected these arguments and held that the plaintiff lacked standing because he was not "personally aggrieved" by the shelters' alleged unlawful discriminatory practices. (*Ibid.*)

Real Parties in Interest's claims are similarly defective. Real Parties in Interest – a group of physicians and a physician lobbying organization – have not been personally injured by the Act and bring the action on behalf of their non-party patients, not themselves. Their Complaint contains no facts or allegations that show how the Real Parties in Interest-physicians have suffered, or are about to suffer, any personal injury as a result of Act. These Real Parties in Interest-physicians are not required to prescribe aid-in-dying drugs to any patient under the Act. (Health & Saf. Code, § 443.14, subd. (e)(1) ["a person or entity that elects, for reasons of conscience, morality, or ethics, not to engage in activities authorized pursuant to this part is not required to take any action in support of an individual's decision under this part."].) And if they do prescribe aid-in-dying medication, they are immune from prosecution or professional censure or discipline so long as their conduct was in accordance with the procedural requirements of the Act. (Health & Saf. Code, § 443.14, subds. (b)-(e), 443.16.) Real Parties in Interest thus have no standing to bring this action challenging the constitutionality of the Act in their own capacity, and have not claimed otherwise.

2. Real Parties in Interest Cannot Assert Standing on Behalf of Others

The complaint claims that the Real Parties in Interest-physicians are protecting the rights of their patients. But in the circumstances of this case, that allegation is insufficient. "In general, a plaintiff may assert a claim on behalf of a third party only when (1) the plaintiff has suffered an injury in fact; (2) the plaintiff has a relationship with the third party so that it can, and will, effectively present the third party's rights; and (3) obstacles exist preventing the third party from asserting his own rights." (*Novartis Vaccines & Diagnostics, Inc. v. Stop Huntingdon Animal Cruelty USA, Inc.* (2006) 143 Cal.App.4th 1284, 1297.) Here, none of these three elements

exist. As discussed above, the Real Parties in Interest-physicians will not suffer any personal injury under the Act, as they are free, as matter of law, to not participate in the end-of-life activities of their patients. Nor will any of their patients be compelled to receive information regarding the option of aid-in-dying, or a prescription for aid-in-dying medication. It is an entirely personal choice to receive information about the health care options afforded by the Act, just as it is an entirely personal choice to obtain aid-in-dying. And needless to say, a patient who does not wish to undergo aid-in-dying, and does not undergo it, has suffered no harm at all.

Additionally, Real Parties in Interest have alleged no facts showing why any real or even perceived obstacle prevents their alleged patients from suing on their own behalf. More specific to this case, constitutional rights are "generally personal" and cannot be asserted on behalf of others except according to certain well-defined exceptions permitting third-party standing. (*See People v. Hazelton* (1996) 14 Cal.4th 101, 109.) While courts have permitted physicians to assert their patients' autonomy interests in making certain types of personal decisions involving, for example, contraception and reproduction, in such cases, the physicians' and patients' interests are aligned: the physician wishes to provide certain services or advice, the patients wish to receive those services or advice, and the challenged law directly interferes in this medical relationship. (*See People v. Belous* (1969) 71 Cal.2d 954, 959-960; *American Academy of Pediatrics v. Lungren* (1997) 16 Cal.4th 307, 322, fn. 8, 332.)

Such circumstances are not present here. The Complaint does not identify any situation where the law is interfering with Real Parties in Interest-physicians' ability to communicate with and assist their terminally ill patients in exercising those patients' own rights and interests. Moreover, since the Real Parties in Interest-physicians do not want to provide aid-in-dying, if their patients do not want aid-in-dying, neither group has nor will

suffer any injury due to the Act. Alternatively, if the Real Parties in Interest-physicians do not want to provide aid-in-dying, but their patients *do* want aid-in-dying, the physicians' interests are not aligned with those of their patients, and thus third-party standing would not lie. Under both scenarios, Real Parties in Interest lack standing.

The Superior Court disregarded this standing defect and instead found that "the Act impacts terminally ill patients who are not in a position to challenge the law because their illnesses and their shortened life expectancy present significant obstacles in bringing suit themselves. Therefore, the Court rejects the lack of standing argument." (Exh. 16, p. 401:4-7.) The Superior Court's reasoning ignores the requirement that the alleged patients must first suffer injury due to the Act before anyone can bring a claim on their behalf. Because the Act is completely optional, Real Parties in Interest are unable to meet this requirement. Because standing is lacking, the order granting judgment on the pleadings is improper.

CONCLUSION

For all the reasons stated, this Court should issue a peremptory writ directing the Superior Court to vacate and reverse its order granting the motion for judgment on the pleadings and render a new order denying the motion for judgment on the pleadings; and should immediately stay the operation of the Superior Court's order while writ review is pending.

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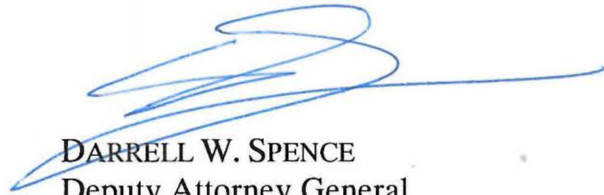

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CERTIFICATE OF COMPLIANCE

I certify that the attached PETITION FOR WRIT OF MANDATE AND/OR PROHIBITION OR OTHER APPROPRIATE RELIEF AND REQUEST FOR IMMEDIATE STAY; MEMORANDUM OF POINTS AND AUTHORITIES uses a 13 point Times New Roman font and contains 8,530 words.

Dated: May 21, 2018

XAVIER BECERRA
Attorney General of California

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Attorneys for Defendants-Intervenors

DECLARATION OF ELECTRONIC SERVICE AND SERVICE BY MESSENGER

Case Name: **Attorney General of the State of California v. Superior Court of California, County of Riverside; Ahn, et al.**

Case No.:

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collecting and processing electronic and physical correspondence. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service with postage thereon fully prepaid that same day in the ordinary course of business. Correspondence that is submitted electronically is transmitted using the TrueFiling electronic filing system. Participants who are registered with TrueFiling will be served electronically. Participants in this case who are not registered with TrueFiling will receive hard copies of said correspondence through the mail via the United States Postal Service or a commercial carrier.

On May 21, 2018, I electronically served the attached **PETITION FOR WRIT OF MANDATE AND/OR PROHIBITION OR OTHER APPROPRIATE RELIEF AND REQUEST FOR IMMEDIATE STAY; MEMORANDUM OF POINTS AND AUTHORITIES (EXHIBITS FILED UNDER SEPARATE COVER)** by transmitting a true copy via this Court's TrueFiling system. Because one or more of the participants in this case have not registered with the Court's TrueFiling system or are unable to receive electronic correspondence, on May 21, 2018, I caused the attached **PETITION FOR WRIT OF MANDATE AND/OR PROHIBITION OR OTHER APPROPRIATE RELIEF AND REQUEST FOR IMMEDIATE STAY; MEMORANDUM OF POINTS AND AUTHORITIES (EXHIBITS FILED UNDER SEPARATE COVER)** to be personally served by **ACE ATTORNEY SERVICE** by placing a true copy thereof for delivery to the following person(s) at the address(es) as follows::

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I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on May 21, 2018, at Sacramento, California.

N. Sherman	
Declarant	Signature

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