SUPERIOR COURT - STATE OF CALIFORNIA

COUNTY OF RIVERSIDE

DR. SANG-HOON AHN, DR. LAURENCE BOGGELN, DR. GEORGE DELGADO, DR. PHIL DREISBACH, DR. VINCENT FORTANASCE, DR. VINCENT NGUYEN, and AMERICAN ACADEMY OF MEDICAL ETHICS, d/b/a CHRISTIAN MEDICAL AND DENTAL SOCIETY,	)	
Plaintiff,	)	
vs.	)	Case No. RIC 1607135
MICHAEL HESTRIN, in his official capacity as District Attorney of Riverside County; ATTORNEY GENERAL OF THE STATE OF CALIFORNIA, KAMALA D. HARRIS, and the STATE OF CALIFORNIA by and through the CALIFORNIA DEPARTMENT OF PUBLIC HEALTH,	)	
Defendants.	)	

REPORTER'S TRANSCRIPT OF PROCEEDINGS

BEFORE THE HONORABLE DANIEL A. OTTOLIA

August 26, 2016

APPEARANCES:

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For State of California:	STATE OF CALIFORNIA Department of Justice Office of the Attorney General By: KATHLEEN A. LYNCH JUDY Y. WONG 1300 I Street Sacramento, California 94244

RIVERSIDE, CALIFORNIA; AUGUST 26, 2016

BEFORE THE HONORABLE DANIEL A. OTTOLIA

THE COURT: Good morning. Welcome to Department 4.

The Court will now call the case of Ahn versus Hestrin, RIC 1607135. If I could please have appearances for the record.

MR. LARSON: Good morning, your Honor. Stephen Larson and Steven Haskins on behalf of the plaintiffs.

MS. SHORT: Catherine Short on behalf of the plaintiffs.

MS. KITTERMAN: Karen Kitterman on behalf of the plaintiffs.

MS. CATLETT: Good morning, your Honor. Kelli Catlett, Deputy District Attorney, on behalf of Michael Hestrin, defendant.

MS. FITZPATRICK: Ivy Fitzpatrick, Deputy District Attorney, on behalf of defendant, Michael Hestrin.

MS. LYNCH: Good morning. Katherine Lynch on behalf of the intervenors.

MS. WONG: Judy Wong on behalf of the intervenors.

THE COURT: All right. Thank you.

Now, I have been handed few cards here from counsel. I would ask that only one attorney from the plaintiffs' side speak and one attorney from the District Attorney's office and one attorney for the State of California.

The Court does understand that this is a case of wide interest and deals with issues of life and death. So this is a serious matter. The Court has read all the briefs.

The Court has read all the declarations. I would ask members of the audience to please refrain from saying anything or disrupting the proceedings.

All right. The matters before the Court this morning are a demurrer to the complaint of plaintiff by the -- by Mr. Hestrin and also the hearing on the injunction this morning. So I thought we'd start with the demurrer first.

MS. FITZPATRICK: Your Honor, good morning. Ivy Fitzpatrick on behalf of the District Attorney.

I want to say and start off by, you know, while the defendant, the District Attorney, understands and appreciates the obviously strong opinions on this law from the plaintiffs' side, and particularly given their chosen occupations, some of the people they treat, the fact remains that they haven't presented this Court with a justiciable controversy. There is no standing.

They're asking this Court to take an extraordinary step of enjoining a public official, the District Attorney of Riverside County, from following presumptively a legislatively enacted law. But they have no standing, no actual patient, no actual doctor, who is going to prescribe the medication, no actual justiciable controversy before this Court, no standing, no ripeness.

Essentially they're asking this Court to take that extraordinary step based on a hypothetical state of facts and a disagreement with the law. And while I just stated that we understand that they disagree with the law, there was a number of legislative hearings on this and then other lawsuits prior

to this one and before the lawsuit [*sic*] was enacted, and there has been great controversy on the law. We understand that.

However, the Court here is in the position of deciding the case, not deciding the merits of arguments on one side of an issue or not. And the problem here is that it's inescapable. We can't get around the fact that there's no standing and no ripeness, and courts can't issue advisory opinions, and that is exactly what they're asking this Court to do.

One could imagine a ripe case, one where there was standing, a patient who has a particular terminal illness, a particular doctor who is willing to prescribe medication under the Act; and a family member perhaps who doesn't agree with the terminally ill patient's decision to end their life, while perhaps another doctor in the same practice maybe or in the same hospital that knows the situation that doesn't agree with that doctor's chosen action with that patient. So we can imagine situations where there could be standing, there could be ripeness, but there's just not here. This is an association, doctors who treat terminally ill patients, no doubt. And the situation for those terminally ill patients is dire and horrible, and all of us are empathetic to their situation.

Again, this Court is in the situation of having to decide a case where the issues are ripe enough for this Court to actually make a decision.

I don't want to read my entire brief, but I want to

point out a few cases for the Court. And I think -- when I was looking it over again, I was struck by some of the language in the cases and how applicable it is to this particular case.

On page 6 of the People's opposition to the preliminary injunction -- I believe it's the same page for the demurrer -- the People laid out some of the law on ripeness and standing, which all of us learned in our first year of law school, harkening back. And the proper -- the quote is from the *City of Santa Monica versus Stewart* case, and it talks about ripeness. It says, "The proper role of the judiciary does not extend to the resolution of abstract differences of opinion."

We clearly have a difference of opinion on a very serious issue here.

"And it prevents the judicial consideration of lawsuits that seek only to obtain general guidance rather than to resolve specific legal disputes."

And what the two-prong test the Court considers is whether the dispute is sufficiently concrete so that the relief requested is appropriate and whether the parties will suffer hardship if judicial consideration is withheld.

Which party is going to actually suffer the hardship? If we had a patient here or a family member or an actual case, not a hypothetical situation, one could possibly see that. But what we're dealing with, grappling with, what is this hypothetical situation that the plaintiffs are -- the plaintiffs are telling this Court there are patients who might

do this. There are patients who might fall into this category. There might be people who disagree with it. There might be an inappropriate use of the Act, but where? Where? Where is that actual situation that's been brought to this Court so the Court can make an informed decision on concrete facts, which is what the Court's are designed to do in this country. They're not designed to meddle into differences of opinion that are laid out and argued in the legislative arena. The Court is supposed to be deciding facts based on the law and then creating an actual judgment for parties with actual interests.

THE COURT: Ms. Fitzpatrick, I would agree that there is an issue of public interest.

MS. FITZPATRICK: Absolutely. Like we said from the very beginning, absolutely.

THE COURT: Doesn't that go into the equation of ripeness?

MS. FITZPATRICK: No, because it goes into the equation of standing and ripeness. And there's a case, and I was just about to get to that, the *Boorstein versus CBS Interactive* case. It talks about as a general principle, okay, to have standing, a party must be beneficially interested in the controversy. That is, here she must have some special interest to be served or some particular right to be preserved or protected over and above the interest held in common with the public at large.

So there can be a public interest, but the people that are bringing the lawsuit, the people who are asking this

Court to act, have to have something more than that. I think the public at large in the state of California is interested in this issue. It's an important issue. But what is the particular right? What is the particular decision that this Court is being asked to make? What particular interest do they have above and beyond a member of the public? And which harm, particular harm, are they asking this Court to rectify or prevent? And that is really the question.

I understand the plaintiffs are going to argue associational standing. But, again, with the associational standing, you have to have at least one member, not simply -- and one patient where this is going to be actually affected.

Again, I'm not -- I'm not trying to dictate how the plaintiffs bring their lawsuits, but in this particular instance, there is simply not a justiciable controversy for this Court, and there is not associational standing. For associational standing, there has to be -- one of the members has to be suffering immediate or threatened injury, and as a result of the challenged action of the sort that would make it justiciable had the members themselves brought suit. We simply don't have this here.

So with no standing and no ripeness, there's no controversy for this Court to settle, and the demurrer has to be sustained.

I would be happy to take the Court's questions.

THE COURT: All right. The Court does not have any questions at this time.

Let me hear from Mr. Larson.

MR. LARSON: Thank you, your Honor. Your Honor, I also want to begin with the recognition that this is a very challenging case. I understand there are very strong opinions on both sides. Counsel for the plaintiffs in this case have an extraordinary amount of empathy and concern for the countervailing positions. In fact, part of that controversy, your Honor, part of that interest, as you pointed out, goes to the issue of ripeness. I think counsel is conflating ripeness and standing, and they're two separate justiciable concepts. The ripeness is satisfied by the clear public interest. There is no question that this case is ripe.

This is not a situation where the legislature may pass something or that a bill may be enacted or something in the future. This is something which has been enacted. We're now getting death certificates. Real people are dying. Real doctors are being confronted with this decision. It is clearly ripe.

On the standing issue, your Honor, I think we set forth clearly in our briefs -- I'm not going to repeat all of the law or the argument there -- two separate bases for standing. One is third-party standing and the other is the direct standing of the doctors involved.

Now, counsel suggests that I don't have a particular doctor who would prescribe the medication. No, I'm not. Those kinds of doctors are probably not going to be challenging this particular Act. It is the doctors who are opposed for the reasons set forth in the brief to doing so that are being subjected essentially to the regulations of

this Act, being undermined by the regulations of this Act, that are being directly challenged by it.

Third-party standing in California, the law is quite liberal. It's not the standing law that we learned in law school when we were being taught the federal standing. The Oregon case, that was the fatal flaw there. The District Court judge in Oregon, faced with a very similar statute, had no problem finding this to be a massive constitutional violation. It went to the Ninth Circuit, that applied the federal standing requirements.

THE COURT: You're referring to *Lee vs. Oregon*?

MR. LARSON: Oh, yes, I'm referring to the *Lee* case, your Honor, which we're going to refer to a lot at the hearing this morning, because I do believe the District Court judge got it right up there. And I'm not even saying the Ninth Circuit got it wrong. They were applying --

THE COURT: And that case was vacated and remanded, Mr. Larson.

MR. LARSON: I'm sorry?

THE COURT: That case was vacated and remanded.

MR. LARSON: Was vacated and remanded, and it was vacated on the standing issue. And it was applying the federal standing requirements, not under California law.

Under California law, as this Court knows, for third-party standing, we must show two elements, that the plaintiffs's relationship with the third party is sufficiently close to make them as effective a proponent of the right as the acts of third parties. In this case, your Honor, there is

no closer relationship than the doctor and patient. And I would submit that's particularly close at end of life or in the types of situations we have here. I cannot imagine any closer relationship. I would like to think attorney-client relationships are close. They're nothing compared with that doctor-patient. It even really borders on that marital relationship in certain circumstances.

The second element, of course, is where the party has an obstacle to bringing the suit. The obstacle, your Honor, in these cases is self-evident. The doctors speak for the patients. The doctors are in the best position to represent those interests. I submit that the *Lungren* case and the *Wood* case, which are both cited in our briefs, speak to this.

In addition to the third-party standing, though, your Honor, as I indicated a moment ago, you have the direct standing of the doctors themselves. That medical relationship has become completely undermined here for the various reasons set forth in our brief.

Your Honor, unless the Court has any other questions, I think both ripeness and standing are clear here, and we need to get on the merits of this motion for preliminary injunction.

THE COURT: All right. Thank you, Mr. Larson.

The Court would like to issue its ruling with respect to the demurrer.

In the demurrer, the District Attorney argues that the Court has no power to order injunctive relief against it

because of the separation of powers, and points to CCP section 526(b)(4) and Civil Code section 3423, which forbids an injunction to prevent execution of a public statute by an officer of the law for the public benefit.

The DA argues, correctly, that only the electorate can remove the District Attorney from his job. But plaintiffs are also correct that this Court has the authority to enjoin enforcement of unconstitutional laws. The cases and authorities cited by the District Attorney refer to the Court's lack of authority to prevent enforcement of valid and constitutional laws only. So the Court finds that this Court has full authority to enjoin the execution of an unconstitutional enactment.

With respect to the issue of standing and ripeness, the District Attorney has argued this morning that there is no justiciable controversy based on the standing or ripeness because plaintiffs do not allege that they are treating an actual patient who has sought relief under the Act. A justiciable controversy refers to an actual controversy and it involves ripeness and standing. Standing depends on whether there is a "real interest in the ultimate adjudication because plaintiff has neither suffered nor is about to suffer any injury of sufficient magnitude." Citing the *Schmier versus Superior Court* case, 78 Cal.App.4th 703, a 2000 case.

Ripeness requires plaintiff to show that, one, a dispute is sufficiently concrete so that relief is available and, two, the parties will suffer hardship if judicial consideration is withheld. *City of Santa Monica versus*

Stewart, 126 Cal.App.4th 43, a 2005 case.

Ripeness is a matter of discretion and will not prevent the Court from resolving concrete disputes if deferring a decision leads to lingering uncertainty, when there is widespread public interest in the answer to a particular legal question. Citing the *Pacific Legal Foundation versus California Coastal Commission* case, 33 Cal.3d 158, a 1982 case.

As the opposition correctly points out, assisted suicide is a widespread public interest, and plaintiffs have patients who fall under the Act's definition of a terminal disease. So the applicability of the Act is not merely hypothetical, as the District Attorney argues.

As to standing, where a constitutional challenge is involved, such challenges are allowed where the relationship of plaintiff with a third party is so close that the litigant is fully, or very nearly, as effective a proponent of the right and, two, the third parties have obstacles bringing suit themselves. Also citing city of *Santa Monica versus Stewart* case.

Therefore, the Court will overrule the demurrer on these grounds and find there is a justiciable controversy because the plaintiffs have standing and the matter is ripe.

The Act is now in effect regarding a subject of public interest. The plaintiffs are physicians whose actions are not only covered under the Act, but who have a close enough relationship to their patients to bring them within the ambit of the Act.

Therefore, the demurrer is overruled, and the defendant is to answer within 30 days.

All right. Next, we go to the injunction. I think the best way to handle this is to let the Court read its decision with respect to the injunction, and then I'll let the parties state what you want for the record.

All right. This motion for a preliminary injunction was brought by plaintiffs to prevent enforcement of the End of Life Option Act by the District Attorney of Riverside County. The Attorney General, State of California, has also filed a complaint in intervention and opposes the preliminary injunction. An amicus brief has been filed by Compassion & Choices, also opposing the motion, and another amicus brief has also been filed by Mr. David S. Killoran.

Plaintiffs allege that the Act is unconstitutional because it denies equal protection to those defined as having a terminal disease because those with such a terminal illness are protected by other California -- I'm sorry, because those without such a terminal illness are protected by other California laws, which generally prohibit and criminalize assisted suicide, such as Penal Code 401 and Welfare and Institutions Code section 5150.

Plaintiffs also argue that the Act has no standards for the physician to follow, and the physicians are often in error regarding estimating the timing of the end of life based on disease.

Plaintiffs also argue that the Act violates due process because the Act does not provide for a fundamental

safeguard before the individual is deprived of life. They argue that the Act is unconstitutionally vague because it fails to specify whether the six-month prognosis assumes there will or will not be medical interventions to preserve life. Therefore, the definition is susceptible to encompassing chronic illnesses such as diabetes or kidney disease.

The plaintiffs also allege that the Act was improperly adopted in an extraordinary session of the legislature. The Act was improperly adopted because an extraordinary session is limited to the subject for which the session was commenced, and here it was commenced to consider funding health care and promoting the health of Californians.

When the proponents of the Act failed to obtain passage by the legislature of an assisted suicide law, and California voters rejected an initiative for assisted suicide, plaintiffs allege the extraordinary session was used to avoid the debate and consideration of the assisted suicide issue which would have occurred at a regular session of the legislature.

The complaint states three causes of action for violation of California Constitution, Article I, section 7, equal protection, violation of California Constitution, Article I, section 7, due process, and violation of California Constitution Article IV, section 3.

All right. In determining whether or not to issue an injunction, the Court must evaluate the reasonable probability or likelihood that plaintiff will prevail, and the Court must balance the harms to the parties if the injunction

issues. There is no rule as to the relative weight of the two factors. A greater showing of one factor could reduce the showing on the other factor.

Health and Safety Code section 443, et seq., the End of Life Option Act, which we shall refer to as the "Act" from here on out, was added at an extraordinary session of the California Legislature and became effective on June 9, 2016. The Act decriminalizes assisted suicide in situations where a doctor has determined that a patient has a terminal disease within reasonable medical judgment.

"Terminal disease" is defined under the statute as "an incurable and irreversible disease that has been medically confirmed and will, within reasonable medical judgment, result in death within six months." Health and Safety Code section 443.1, subdivision (q).

The State of California requests judicial notice of the legislative history of the Act, and the request is granted pursuant to Evidence Code section 452 and 453.

Plaintiffs' request for judicial notice is denied, as newspaper articles and press releases are not proper subjects for judicial notice.

With respect to standing and ripeness, the Court has already pronounced on that with respect to the demurrer, so I'm not going to go over those arguments.

Let's look at first with respect to the issue of was the Act properly adopted at an extraordinary session. Article I, section 3, of the California Constitution provides that "On extraordinary occasions, the governor by proclamation may

cause the legislature to assemble in special session and, if so assembled, has power to legislate only on subjects specified in the proclamation."

Governor Brown authorized the session at issue here by proclamation, which stated the session concerned healthcare coverage under Medi-Cal and generally to "improve the efficiency and efficacy of the healthcare system, reduce the costs of providing healthcare services, and improve the health of Californians."

The scope of an extraordinary session has been broadly interpreted. The Court would cite the *Sturgeon versus County of Los Angeles* case, 191 Cal.App.4th 344, a 2010 case. When 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. Citing the *Martin versus Riley* case, 20 Cal.2d 28, a 1942 case.

Even 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 healthcare system for the Court to consider the Act to be within the scope of the authorization for the session.

Here, the governor's proclamation concerning the health of Californians and the subject is sufficiently broad to include the legislation concerning assisted suicide. So the Court concludes that the Act was properly adopted.

The next issue the Court looks at is whether equal

protection rights have been violated under the Act. Under equal protection analysis, to succeed, a plaintiff must show that the state has adopted a classification that affects two or more similarly situated groups in an unequal manner. *In re Brian J.*, 150 Cal.App.4th 97, a 2007 case.

The issue is whether they are similarly situated for purposes of the law and not for all purposes. Once the determination is made that similarly situated groups are treated differently, then the Court must determine which level of analysis to apply.

The Court concludes that the rational basis test applies to the analysis of the Act because the Act neither infringes upon a fundamental right nor involves a suspect classification and because it constitutes economic and social welfare legislation.

The rational basis test has been met because the legislature has a legitimate objective in giving its citizens an option to end their life in the event of a terminal disease, and the Act provides a reasonable method of achieving that objective.

Next, the Court would look at whether due process has been violated by the Act. Plaintiffs also argue due process rights are violated by the Act. The federal due process clause imposes constraints on governmental decisions that deprive individuals of liberty or property interests, within the meaning of the due process clause of the Fifth and Fourteenth Amendments. *Mathews versus Eldridge*, 424 U.S. 319, a 1976 case.

The California Constitution also has due process safeguards, which are stated in Article I, section 7. Due process has been described as "fundamental fairness." *Lassiter versus Department of Social Services of Durham County, North Carolina*, 452 U.S. 18; 1981.

Due process is categorized as procedural or substantive. Here, plaintiffs argue that the due process violation is substantive in nature. Substantive due process prohibits governmental interference with a person's fundamental right to life, liberty, or property by unreasonable or arbitrary legislation.

The Court concludes that there is no due process violation. The Act does not deny those patients who want to exercise their rights under the Act from any of the same benefits that other patients receive. Nothing is denied to them and nothing is mandated. The physician and patient are free to not utilize the Act and are free to impose more stringent requirements.

In addition, the procedure is one that requires the physician to seek the advice of a consulting physician and places numerous safeguards in the process before the lethal drug is prescribed.

The Act provides that for an individual to qualify, the individual must be competent, suffering from a terminal illness, and voluntarily ask for the medication. The Act prohibits requests made by others, even if they have a power of attorney.

The Act includes second opinions, waiting periods,

medical record documentation, witnesses, counseling when appropriate, and confirmation before the prescription is written.

The phrase "terminal disease" under the Act is not unconstitutionally vague because the Act defines terminal disease as "an incurable and irreversible disease that has been medically confirmed and will within reasonable medical judgment result in death within six months."

The declarations of the doctors filed in support of the preliminary injunction who have actually treated terminally ill patients express a strong basis for their refusal to participate in assisted suicide and multiple reasons for not assisting suicide, and they are very persuasive. But their declarations do not bear on the issue here of whether the Act should be enforced. The declarations support an argument that the legislature should not have adopted the Act in the first instance and should repeal the Act, but they are not related to the enforcement of the Act now that it has been adopted.

Therefore, the Court concludes that plaintiffs have failed to demonstrate that they have a probability of success regarding their challenges to the constitutionality of the Act either on procedural or substantive grounds.

With respect to the second part of the analysis, the balancing of harms, here, plaintiffs are free to say and do whatever they choose regarding assisted suicide and to advocate to their patients their belief that assisted suicide should be rejected for religious, ethical, moral, or other

reasons.

Plaintiffs' Hippocratic Oath is not violated by the Act. Physicians are not compelled to assist terminally ill patients. It is the terminally ill individuals who want to end their lives for reasons personal to them that will be harmed by the delay.

Preventing the enforcement of the Act would elevate the interests of those without a terminal illness over those with such an illness. To the extent such individuals suffering from a terminal illness base their decisions to end life on the pain they're suffering, an injunction would force them to suffer additional pain.

Therefore, the Court concludes that the balance-of-harm analysis favors enforcement of the Act. For these reasons, the Court would deny the request for preliminary injunction.

Mr. Larson.

MR. LARSON: Thank you, your Honor.

You know, it's clear that your Honor has read the briefs and put time and you've written an opinion. I have enough experience to know that the Court has made a decision. But, as you pointed out at the outset, this is a matter of life and death, and so I feel obligated to at least present some argument, if not so much to change your mind today, your Honor, to keep in mind as this case goes forward. This is the beginning of a very long process. It's not the end, and that's the first point that I would want to make. Whatever decision your Honor ultimately makes today, you are going to

be establishing the status quo going forward.

For over 5,000 years, your Honor, based on cultural values, moral values, and legal values, our society and the societies of which the vast majority of Americans come from, have treated life and end-of-life decisions in a certain way. Suicide and assisting in suicide is something which has been forbidden, whether it be legally, morally, culturally, by whichever way.

That cultural norm, that moral norm, that legal norm, is subject to some change, but there's a tremendous presumption in doing that, and we need to be very careful and make sure that that change is consistent with and conforms with our Constitution, the State Constitution and the United States Constitution.

We have brought what I believe is a very reasonable and serious challenge to the constitutionality of this Act. So if the Court is going to preserve anything for the duration of this litigation, I respectfully submit that you should be preserving the status quo as it has existed, as opposed to something that was changed, even by the defendant's recognition, by this extraordinary session. It was rejected by a vote of the people of the State of California, rejected, as I understand it, repeatedly by general sessions of the legislature. This was, as even the L.A. Times editorial said yesterday, it was -- it's how unpopular legislation gets passed through or snuck through and passed to the people of California. And I think that --

THE COURT: And the Court is disturbed by the way it

was passed.

MR. LARSON: Well, it should be disturbed. And I -- there's got to be a lot more argument. We have to develop the record here. There is a case to be presented. But I'm just suggesting here at the outset of this case, when this Court has the very momentous decision of deciding what to preserve, the status quo as it has existed or this Act that was passed under questionable circumstances. So that's my first point, your Honor.

My second point, I guess, has to do with the Court's treatment of rational basis. We all remember -- there was a reference to law school. We learned the three levels of review and rational basis. In some court opinions, it almost seems to become a joke. Anything can be a rational basis.

Other court opinions from the Supreme Court and other courts have suggested there needs to be some meat there. There's got to be something, not just in the purpose, but as this Court just recognized a few moments ago, in the method of achieving that purpose. It's not sufficient to state a reason. Any lawyer can come up with a reason for something; right? That's what we're paid to do.

But the Court also needs to carefully examine whether the method adopted by the legislature is reasonably related to achieving and furthering that purpose. And it's this method, specifically the methods outlined in the Act, not in the language of the Act so much as requiring this Court to look below the language. And I want to give one example. And I do appreciate that I'm on the bottom of the hill looking up

on this.

I was given something this morning. I provided a copy to the defense counsel. It's a certified copy from the County of Ventura of a death certificate. I'll put it on the ELMO here, your Honor.

THE COURT: All right. Go ahead.

MR. LARSON: It's the death certificate of Mary Elizabeth Davis, who many people have read about in the paper. She was at least the first publicly reported, from our perspective, victim of this. You know, reading those articles are heart-wrenching. I suppose if every circumstance was as well documented and had that much attention, you know, that might be one case. That's not the case, sadly, for the vast majority of people who are suffering from terminal illness. That's a big part of our argument.

Something struck me in looking at this death certificate. I'm going to put it on the ELMO here, your Honor. It's the cause of death. We all know, anyone who's read these newspapers -- and I'm not suggesting the Court to take judicial notice of a newspaper article. But I think it's pretty well understood that she committed suicide or she ingested the disease [*sic*].

But if you look, your Honor, here, it describes the cause of death as ALS. And there's a series of boxes checked here on the far right, and they're all checked "No." I'm going to try to zoom in if I can on that. And it's, you know, was the death reported to the coroner? No. Was a biopsy performed? No. Was an autopsy performed? No?

And this underscores the problem, your Honor. The California Department of Public Health is given a directive to physicians that they should not report the cause of death as pursuant to the End of Life Option Act. In fact, what they're being directed to do is pretend that the person didn't die from what they actually died from, but from the underlying terminal illness.

I remember reading "Animal Farm" in high school and being struck by that book and thinking -- wondering kind of in my life, would I even encounter that type of government -- governmental doublespeak. This Act reeks of that "Animal Farm" mentality.

We're going to pretend, your Honor, that this person, and the hundreds or thousands of other people who are going to be subjected to this, are not going to die from what they died. We're going to change our government records to reflect something else. Doctors are going to be told what they can and cannot write on death certificates, not for medical reasons, but for political reasons, and that should scare and give pause to anybody.

The concern I have is not so much for a case as well documented as this, but for the situation that is described by our experts. When you have people trying to end prematurely the life of an elderly relative, someone where there is financial gain. I know this Court, I'm sure, has had experience with the awful experience of going through probate trials or contested trust trials and the nightmare that goes on in those types of situations. When you interject this Act

into those circumstances, the opportunities for abuse, given the language of this Act, given what -- I just can't describe it any other way as the horrible standards.

Your Honor, in your order you refer to the definition of "terminal illness" and the safeguards. What we're trying to show through this case, your Honor, is that is just language. It's like the language of "Animal Farm." It's like the language of this death certificate. It doesn't really mean what it says. It says a terminal illness. We should think, well, gosh, if it's really terminal illness, why shouldn't they have this right? But I think we demonstrated, pretty convincingly, that the scientific consensus is nowhere near certain that that is an appropriate definition of "terminal illness." Maybe within two weeks of death that decision can be made with a certain degree of scientific certainty.

I mean, there's a lot of ridicule of those that oppose the whole global warming and make a mockery of science. Well, this Act makes a mockery of science, and it's that mockery of science, it's the mockery of the reality, which we believe is the disconnect in this method and the disconnect to rationality, and that is what we are challenging.

Your Honor, it is -- the three points that I would want to just underscore is the arbitrariness of this definition of "terminal illness," the fact that it can be made by any doctor, whether qualified or not to make that definition, and the complete lacking of any scientific basis to define "terminal illness" in those terms.

Keep in mind, this is terminal illness with or without treatment. So the Type 1 diabetic theoretically can be diagnosed as terminally ill because six months without medication, he or she is going to die.

And I would like to say that, oh, we can just trust the medical doctors to always do the right thing. And as we said, somewhat sardonically -- I think Mr. Haskins deserves the credit for this -- in one of our footnotes, three words, "medical marijuana cards." We understand that that can't be trusted, and we are very concerned about a whole cottage industry of doctors, unfortunately, who will not.

You couple that with my second point, that the doctors are immune from liability. This isn't just a decreased standard of care, both the diagnosing and the prescribing of these deadly medications is immune. And you put those two things together with this amorphous, arbitrary definition of "terminal illness," coupled with no accountability for the definition, I just don't see how that can be anything but arbitrary and capricious in terms of the method.

And the final point, your Honor, there is no safeguards regarding the ingestion of the drugs themselves, and the nightmarish circumstances have been well documented by the declarants attached to our motion for preliminary injunction.

So those are my points, your Honor. I know that you have a difficult decision to make, but I really submit that the presumption should favor preserving the status quo as it

has always existed, preserving the safeguards. I mean, it's -- the language that the Court uses seems to accept the defendant's characterization of what we're trying to seek here. What we're trying to avoid, your Honor, is the abrogation. What we're trying to enjoin is the abrogation of very important laws that have been enacted to protect the elderly, to protect the terminally ill. That's what this is doing. It's not so much providing a right to die as it is an abrogation of the law. The actual effect, the most direct effect of the law on the District Attorney, on the State of California, is an abrogation of these protections. That's what this Court is doing. And perhaps in Ms. Davis' case, that's not so much the issue. But I can't think but that we're going to have a pile of these death certificates with all three of those boxes checked "No." It's a brave new world.

THE COURT: Thank you, Mr. Larson.

Let me hear from Ms. Lynch.

MS. LYNCH: Yes, thank you, your Honor.

First of all, I need to address the status quo here.

THE COURT: Please speak into the microphone.

MS. LYNCH: As your Honor realizes and knows, in California, we have a healthcare decision law, and that allows an individual to withdraw or withhold medical treatment, life sustaining medical treatment. That's the status quo. That's the status quo in this country, that we are able to make these life affirming -- we're allowed to have autonomy and respect, and we're allowed to make these end-of-life decisions. The

Act is simply an extension of that.

The Act, as this Court also knows, it's been almost a year since the legislature heard this. It was signed in October and it's been in effect for three months. So the status quo is really to give people choices, to give people options.

This Act is completely voluntary. No person has to -- no physician has to prescribe drugs, and-in-dying drugs. No -- as the Court has pointed out, no doctor has to discuss the subject. No individual has to avail themselves of the law.

What counsel is really talking about here is just a fear, a fear that our doctors are going to abandon their professional responsibilities and their medical standards of care, and that's just not true, your Honor.

And there are many, many safeguards in this Act that the Court went over, and I'd like to go through a few of them because -- and I would also like to -- before I go on that, we talked a little bit about the *Lee versus State of Oregon* case. I realize that is a federal case and it's a different standing. But in that case, the court had an actual patient, and they went through what would have to happen for this person to ingest an aid-in-dying drug, contrary to their true intent.

It's very similar to the law that we have in California. It is very similar. The arguments that are being presented by plaintiffs are similar to the arguments that were presented to the legislature in this bill and the one

preceding bill, and that has been going on for the last 20 years. This just did not occur.

They looked at the safeguards. A person has to be terminally ill. Let's talk about that. "Terminal illness" is defined as incurable, irreversible, and it has to be medically confirmed. "Medically confirmed" means treating physician -- and this is not an ER doctor, this is a doctor that is treating that patient. This is a person that is working hand-in-glove with that patient, whether it is an oncologist or whatever specialist it is. This is the person that knows about this particular illness and has to counsel this particular person. This is a specialist, for the most part, in this area, deals with -- dealt with patients that have the physical and the mental aspects of the disease.

Then you have the consulting physician, who is an expert in the field, and he or she also reviews the medical records and examines. If there is any, any indication of a mental disorder, then they must go to a mental health specialist, who has to be a psychiatrist or a psychologist. Nobody will get a drug, an aid-in-dying drug, unless they have mental capacity.

"Mental capacity" is defined as it is in the Probate Code; you know the nature and extent of your illness, you understand the ramifications of that, and you can communicate with your doctor.

"Informed consent" means you understand the diagnosis, you understand the prognosis, you understand what you are -- the decision you are making. It requires that the

patient asks for the aid-in-dying drugs three times, two times orally, 15 days apart, once in writing. When they do this in writing, there are two witnesses there. That writing, that form, which is in the Health and Safety Code, says "I am a patient. I understand my prognosis. I understand my diagnosis. I am of sound mind. I am not being coerced."

Then there are two additional witnesses, one of which cannot be related by blood or marriage. That person also attests and says, "I know you. I know this person. I believe them to be of sound mind. I believe they are not coerced."

There's also a provision where the doctor has to talk to the patient outside of others to make sure there is no coercion. There is also 48 hours before the medication is even prescribed, the doctor has to, once again, make sure that all of this -- the patient has mental capacity, informed consent.

So there are many, many safeguards in the Act, and these are the safeguards that were very, very important to the legislature. When this was going on in the Capitol about a year ago, there were so many hearings and testimony, and even one of the plaintiff physicians testified. So this wasn't just decided in extraordinary session. There was a session before that. And, as the plaintiffs pointed out, there were six -- I think six pieces of legislation that have gone through over the last 20 years.

There are also two cases that I found very instructive here because they span a period of almost 20 years

and goes back -- and it's the *Donaldson* case, your Honor, 1992. And in that case, the court -- let me give you the cite. It is in the brief, but I'll give it. It's 2 Cal.App.4th 1614, point page 1623.

The Court says, "It is unfortunate for Donaldson that courts cannot always accommodate the special needs of an individual. We realize that time is critical to Donaldson, but the legal and philosophical problems posed by his predicament are a legislative matter rather than a judicial one."

That was in 1992. Let's move forward to 2015, and we have the *Donorovich versus O'Donnell* [*sic*] case at 241 Cal.App.4th 11118 [*sic*], and the point page is 1124, 1125. "We agree with defendants that physician aid-in-dying and attendant procedures and safeguards against abuse are matters for the legislature."

And that's where I would like to end. It is clear that the physicians, the plaintiffs, are morally and personally opposed to this legislation and that they disagree with the legislative policy. That is not a basis for this Court to find this law unconstitutional. All deference goes to the legislature in this regard, and it is not for this Court, these plaintiffs, to question that.

MR. LARSON: Very briefly, if I might?

THE COURT: Do you wish to respond?

MR. LARSON: I'm sorry, your Honor, just very briefly.

I think that what you just heard there, which was a

lot of almost idealogic or aspirational talk about what they think the Act is going to do, is belied very readily by the simple exhibit that I showed you in my statement.

She talked about this treating doctor who spent all this time and knew the patient and knew the circumstances. But even in Ms. Davis's case, I was struck by the fact that, according to the death certificate, she suffered ALS for three years. Yet look at the length of time that this Dr. Dial, who signed the death certificate, was actually attending to her, June 30, 2016, to her death date, July 24, 2016. Even in this highly publicized case, less than a month, your Honor.

Where is the final attestation that you spoke about, and what enforcement if it's never filled out? There is no biopsy, there's no coroner, there's no autopsy. That's the problem. The language, like the language in "Animal Farm," sounds wonderful. It sounds all reassuring, and that's what you heard.

I'm going to be standing before your Honor probably with a stack of these in a few months. There's one right now. We're asking you to enjoin this, to stop this, and make sure that we have an opportunity to fully vet this with evidence.

THE COURT: Thank you, Mr. Larson.

Does the District Attorney's office wish to be heard?

MS. FITZPATRICK: We join the AG, your Honor.

THE COURT: The Court reiterates once again that this is a very difficult issue. It's emotionally charged. We understand that. However, the Court is not going to change

its tentative ruling. The Court is going to deny the injunction request at this time.

It looks like we have a case management conference set for December 5th. I believe that's our next appearance.

MS. LYNCH: December 5th, your Honor?

THE COURT: Yes.

MS. LYNCH: 8:30.

THE COURT: That's at 8:30 in this department.

Thank you. Thank you, Counsel.

MR. LARSON: Thank you, your Honor.

MS. LYNCH: Thank you, your Honor.

(Proceedings concluded.)

REPORTER'S CERTIFICATE

DR. SANG-HOON AHN, DR. LAURENCE BOGGELN, DR. GEORGE DELGADO, DR. PHIL DREISBACH, DR. VINCENT FORTANASCE, DR. VINCENT NGUYEN, and AMERICAN ACADEMY OF MEDICAL ETHICS, d/b/a CHRISTIAN MEDICAL AND DENTAL SOCIETY,	)	
Plaintiff,	)	
vs.	)	Case No. RIC 1607135
MICHAEL HESTRIN, in his official capacity as District Attorney of Riverside County; ATTORNEY GENERAL OF THE STATE OF CALIFORNIA, KAMALA D. HARRIS, and the STATE OF CALIFORNIA by and through the CALIFORNIA DEPARTMENT OF PUBLIC HEALTH,	)	
Defendants.	)	

I, SUSAN L. NORRIS, Certified Shorthand Reporter of the Superior Court of the State of California, County of Riverside, do hereby certify:

That on August 26, 2016, in the County of Riverside, State of California, I took in shorthand a true and correct report of the proceedings had in the above-entitled case, and that the foregoing pages, 1 through 32, inclusive, are a true and accurate transcription of my shorthand notes.

DATED: Riverside, California, August 26, 2016.

/s/ Susan L. Norris

SUSAN L. NORRIS, CSR NO. 5167