Case No. E075547

In the
Court of Appeal
of the
State of California
Fourth Appellate District, Division Two

SANG-HOON AHN, ET AL.
Plaintiffs and Appellants,

v.

MICHAEL HESTRIN, ETC., ET AL.,
Defendants.

SUPERIOR COURT OF THE STATE OF CALIFORNIA, COUNTY OF RIVERSIDE,
DEPT. 5, CASE NO. RIC1607135, HON. IRMA POOLE ASBERRY, JUDGE

APPELLANTS' OPENING BRIEF

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TO BE FILED IN THE COURT OF APPEAL

APP-008

COURT OF APPEAL FOURTH APPELLATE DISTRICT, DIVISION TWO	COURT OF APPEAL CASE NUMBER: E075547
ATTORNEY OR PARTY WITHOUT ATTORNEY: STATE BAR NUMBER: 122651 NAME: Daniel Mansueto FIRM NAME: STREET ADDRESS: 907 Westwood Boulevard, #1026 CITY: Los Angeles STATE: CA ZIP CODE: 90024 TELEPHONE NO.: 310-903-0580 FAX NO.: E-MAIL ADDRESS: dmansueto@outlook.com ATTORNEY FOR (*name*): Plaintiffs/Appellants	SUPERIOR COURT CASE NUMBER: RIC 1607135
APPELLANT/ PETITIONER: Dr. Sang-Hoon Ahn, et al. RESPONDENT/ REAL PARTY IN INTEREST: Michael Hestrin, etc., et al.	

CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

(*Check one*): [X] INITIAL CERTIFICATE [ ] SUPPLEMENTAL CERTIFICATE

Notice: Please read rules 8.208 and 8.488 before completing this form. You may use this form for the initial certificate in an appeal when you file your brief or a prebriefing motion, application, or opposition to such a motion or application in the Court of Appeal, and when you file a petition for an extraordinary writ. You may also use this form as a supplemental certificate when you learn of changed or additional information that must be disclosed.

1. This form is being submitted on behalf of the following party (*name*): Dr. Sang-Hoon Ahn, et al. (see Attachment 1)

2. a. [X] There are no interested entities or persons that must be listed in this certificate under rule 8.208.
   b. [ ] Interested entities or persons required to be listed under rule 8.208 are as follows:

	Full name of interested entity or person	Nature of interest (*Explain*):
(1)		
(2)		
(3)		
(4)		
(5)		

[ ] Continued on attachment 2.

The undersigned certifies that the above-listed persons or entities (corporations, partnerships, firms, or any other association, but not including government entities or their agencies) have either (1) an ownership interest of 10 percent or more in the party if it is an entity; or (2) a financial or other interest in the outcome of the proceeding that the justices should consider in determining whether to disqualify themselves, as defined in rule 8.208(e)(2).

Date: January 27, 2021

Daniel Mansueto
(TYPE OR PRINT NAME)

(SIGNATURE OF APPELLANT OR ATTORNEY)

ATTACHMENT TO ITEM NO. 1 OF CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

Dr. Sang-Hoon Ahn

Dr. Laurence Boggeln

Dr. George Delgado

Dr. Philip Dreisbach

Dr. Vincent Fortanasce

Dr. Vincent Nguyen

American Academy Of Medical Ethics, d/b/a of Christian Medical and Dental Society

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I. Introduction

This case concerns the End of Life Options Act (the "EOLOA"), which legalizes physician-assisted suicide. Plaintiffs (Appellants) filed this action to invalidate the EOLOA on the ground that it contravenes the California Constitution. Plaintiffs' claims include a claim premised on article IV, section 3(b), which states that "[o]n extraordinary occasions the Governor by proclamation may cause the Legislature to assemble in special session" and that when so assembled the Legislature "has power to legislate only on subjects specified in the proclamation but may provide for expenses and other matters incidental to the session." The gubernatorial Proclamation that called the special legislative session that enacted the EOLOA concerned funding for three social programs that have nothing to do with physician-assisted suicide. The EOLOA is far outside the scope of the gubernatorial Proclamation and therefore violates article IV, section 3(b).

By this appeal Plaintiffs seek reversal of trial court orders dismissing Plaintiffs' case and allowing Matthew Fairchild to intervene. This is the second time this case has become before this Court following a trial court judgment. The first time was after the trial court, in granting Plaintiffs' motion for judgment on the pleadings, upheld on the merits Plaintiffs' contention that the EOLOA was enacted in violation of article IV, section 3(b). In ruling on a writ petition filed by the Attorney General,

this Court found that the merits could not be reached because Plaintiffs had not adequately alleged standing. (*People ex rel. Becerra v. Superior Court* (2018) 29 Cal.App.5th 486 ["*Becerra*"], 489, 494-505) On remand Plaintiffs amended their complaint to bolster their standing allegations and the trial court again reached the merits of the article IV, section 3(b) issue. In a 180-degree reversal from the trial court's previous ruling, a different trial judge this time found that the EOLOA was not enacted in violation of article IV, section 3(b).

This brief demonstrates that the trial court was right the first time and erred the second time. There is no factual or standing issue that prevents this Court from ruling on the merits concerning the article IV, section 3(b) issue. The issue is a pure issue of law. The trial court and all parties have acknowledged Plaintiffs' standing by addressing the merits of the article IV, section 3(b) issue. This brief nevertheless addresses standing to demonstrate that Plaintiffs have standing as to all the issues in the case. This brief also demonstrates that the trial court erred in allowing Matthew Fairchild to intervene.

This appeal underscores the importance of the rule of law in deciding controversial matters. In the 2016 regular legislative session, the bill that ultimately resulted in the EOLOA died in the Assembly Health Committee. (Appellants' Appendix ("AA") 2508-2509) The proponents of the EOLOA however used the special session, which did not include the Assembly Health Committee, to effect an end run around the

regular session. The enactment of the EOLOA in violation of article IV, section 3(b) of the Constitution thus was not a mere technical but inconsequential failure to adhere to a prescribed procedure. Rather, it was an undemocratic misuse of the political process and the means by which the proponents of the EOLOA achieved what they could not achieve by the ordinary political process. Our society is deeply divided over the issue of physician-assisted suicide. In view of this if the issue is to be resolved politically it is particularly important that democratic procedural safeguards be honored and enforced in the process. For that reason, it is critically important that this Court rectify the article IV, section 3(b) violation that occurred in this case.

II. Procedural History

A. Initial Complaint And Proceedings Thereon

Plaintiffs are six individual doctors and the American Academy of Medical Ethics. (AA 0059-0062, 0458-0461, 1289-1290) On June 8, 2016, Plaintiffs filed their complaint seeking to enjoin the District Attorney of Riverside County from enforcing the EOLOA. (AA 0059-0076) The Attorney General of the State of California and the State of California through the Department of Public Health (collectively "the Intervenor State Defendants") intervened as Defendants in the lawsuit soon thereafter. (AA 0078-0091)

On February 9, 2018, Plaintiffs filed a motion for judgment on the pleadings arguing that the passage of the EOLOA violated article IV, section 3(b) of the California Constitution and was therefore *ultra vires*. (AGAA[1] 186-210) The trial court granted the motion for judgment on the pleadings, ruling that the Governor's proclamation had not empowered the California Legislature to pass the EOLOA. (AGAA 396-413, AA 0093-0094) On May 24, 2018, the trial court entered judgment in Plaintiffs' favor. (AA 0098-0102)

B. The Proceedings In The Court of Appeal And Supreme Court

On May 21, 2018, the Attorney General on behalf of the State of California filed a petition for writ of mandate seeking to overturn the trial court's order granting Plaintiffs' motion for judgment on the pleadings (the Attorney General subsequently amended the writ petition). (*See Becerra, supra,* 29 Cal.App.5th at 492.) After briefing and oral argument, this Court issued an opinion granting the writ. (*Becerra, supra,* 29 Cal.App.5th 486.)

Each justice issued a separate opinion. The majority opinion, written by Justice Ramirez and joined by Justice Fields, held that Plaintiffs lacked standing to pursue their claims. First, the majority opinion held that the trial court should have denied

[1] The term "AAGA" is used to refer to the Appendix that the Attorney General filed in Court of Appeal Case No. E070745. Plaintiffs have incorporated by reference the record from that case into this case. (AA 2258-2259)

judgment on the pleadings because the State had denied Plaintiffs' allegations, including those relating to standing. (*Becerra, supra,* 29 Cal.App.5th at 499.) It held that Plaintiffs' disputed standing was at most a matter for factual development that could not be decided on a motion for judgment on the pleadings. (*See id.*) It also held that Plaintiffs lacked standing because they "did not allege it adequately in their complaint." (*Id.*) The majority ordered the case remanded to the trial court for further proceedings. (*See id.* at 504-505.) Justice Fields wrote separately in a concurring opinion to explain why it was not appropriate to reach the merits "at this time" and "why remand is appropriate to allow the trial court to determine whether [the Plaintiffs] are able to demonstrate that they have standing to challenge [the Act] and that there is, therefore, a justiciable controversy for this Court to determine." (*Id.*, at 505.)

In dissent, Justice Slough explained that she parted ways "with the majority on just about every principal point of their analysis." (*Becerra, supra,* 29 Cal.App.5th at 507.) She found that Plaintiffs had pled standing because they alleged they are "participating physicians who have direct standing because EOLOA regulates the way they practice medicine to their detriment." (*Id.*) The dissent also determined that Plaintiffs had successfully alleged third-party standing by alleging that "some of their patients are unable to protect their own interests in litigation due to their illnesses." (*Id.*)

Justice Slough also disagreed with the majority opinion's conclusion that Plaintiffs' disputed standing barred the Court of

Appeal from deciding the "purely legal constitutional challenge" to the EOLOA. (*Becerra, supra,* 29 Cal.App.5th at 508.) Instead, the dissent held that this Court should have reached the underlying merits of the constitutional challenge, no matter the ultimate result. (*Id.*) Finding that any "standing problems the majority has identified are technical and temporary and do not warrant abandoning the public to continued uncertainty," Justice Slough called upon the power of the California courts to "address matters of great public interest or importance" even if there are "problems with traditional standing." (*Id.*, 528-531.) Justice Slough would have found that the Legislature acted within its authority when enacting the EOLOA. (*Id.*, at 534-539.)

Plaintiffs sought review in the Supreme Court. The Supreme Court denied Plaintiffs' petition for review.

C. Proceedings After Remand

1. Filing Of First Amended Complaint

After remand, Plaintiffs moved for, and were granted, leave to file a First Amended Complaint. (AA 0451, 0455) Plaintiffs' First Amended Complaint, unlike the original complaint, expressly seeks mandamus and alleges taxpayer standing. (AA 0459-0464, 0474-0475) Plaintiffs' First Amended Complaint also included other new allegations that bear on, and change the legal analysis concerning, standing. These allegations included the following:

1. Plaintiffs are physicians who sometimes refer patients subject to a terminal illness diagnosis to other physicians for treatment and wish to be certain that such other physicians cannot assist the suicide of the referred patient.

2. The EOLOA injures Plaintiffs by inhibiting their ability to refer their patients to any and all other physicians with certainty that the other physicians will abide by the Hippocratic tradition and will not assist in the suicide of the referred patient.

3. Plaintiffs are informed and believe, and thereon allege, that a substantial percentage of California physicians are willing to participate in the EOLOA and/or provide information about the EOLOA and/or provide referrals to physicians who will participate in the EOLOA, and that, as a consequence, to the detriment of both Plaintiffs and the patients of Plaintiffs, the EOLOA substantially reduces the number of physicians to whom Plaintiffs can refer patients without risk of facilitating the suicide of the patients.

4. Plaintiffs bring this action to protect the rights of their patients, particularly when referred to other physicians, to ensure that the EOLOA does not reduce the number of physicians to whom they can be referred without concern that the physician to whom they are referred is not committed to the Hippocratic tradition.

5. Plaintiffs bring this action on their own behalf as health care providers. At least some of the Plaintiffs have employees. The EOLOA injures these Plaintiffs in that it is subject to being construed as barring them from prohibiting their

employees from providing information to a patient about the EOLOA, and from prohibiting their employees from providing a patient with a referral to another health care provider for the purposes of participating in the activities authorized by the EOLOA.

6. Plaintiffs bring this action on their own behalf as health care providers who seek to eliminate the EOLOA's wrongful interference with the medical advice that they give to their patients and thereby avoid damage to and/or loss of the physician-patient relationship that they have with their patients.

7. Plaintiffs bring this action as California citizens acting in the public interest and as taxpayers to vindicate the public right to the protection, without unconstitutional abridgement by the EOLOA, of the laws protecting against aiding and abetting suicide and elder abuse. Plaintiffs seek to compel the Defendants' public and mandatory duties, including those under article V, section 13 of the California Constitution, article XX, section 3 of the California Constitution and California Government Code section 26500, to follow the law, and thus, when enforcing the law to disregard the EOLOA in its entirety due to the violation of article IV, section 3 of the California in the EOLOA's passage and to disregard the unconstitutional and unlawful provisions of the EOLOA due to their contravention of Article 1, section 1, of the California Constitution.
(AA 0462-0464)

Plaintiff AAME made analogous new allegations on behalf of its physician members. (AA 0460-0462)

In granting Plaintiffs leave to file the First Amended Complaint, the trial court found that the First Amended Complaint had, relative to the original Complaint, added allegations that "were new and different and do allege standing." (AA 0453)

2. Leave To Intervene Granted To Matthew Fairchild and Andrea Salzman And Denied to Dr. Forest

After remand by this Court, Dr. Catherine Forest, Matthew Fairchild and Andrea Salzman (the "Proposed Private Party Intervenors") filed a motion to intervene. (AA 0113-0131) The Proposed Private Party Intervenors argued that they have an interest "in the outcome of this litigation" sufficient to permit intervention in that they "will be barred from seeking or providing the medical aid in dying contemplated by [the EOLOA]" if Plaintiffs "succeed in their challenge to the EOLOA." (AA 0123) Matthew Fairchild and Andrea Salzman argued that "the outcome of this action could determine whether they have peace of mind while they are dying because they know they will not be left to suffer needlessly." (*Id.*) Citing federal case law, the Proposed Private Party Intervenors argued that the arguments and issues that they present would not be the same as those presented by the Intervenor State Defendants and that, for that reason, they are not adequately represented by those defendants. (AA 0123-0127) The Proposed Private Party Intervenors also

argued the trial court should allow permissive intervention. (AA 0128-0130)

Plaintiffs opposed the motion to intervene. Relying primarily on *Perry v. Brown* (2011) 52 Cal.4th 1116 ["*Perry*"], they argued that the intervention of the Proposed Private Party Intervenors in this case would be inappropriate, and must be denied, because the intervention seeks to have private parties fulfill the public function of law enforcement and that the Attorney General's representation was adequate for purposes of intervention analysis. (AA 0394-0397)

At a hearing held on July 5, 2019, the trial court, adopting a tentative ruling, granted the motion to intervene as to Matthew Fairchild and Andrea Salzman but denied the motion as to Dr. Forest. (AA 0426-0429, 0443-0447) The trial court found that *Perry* "is not applicable to [this] matter." (AA 0426, 0446) This is so, the trial court found, because *Perry* involved a voter-approved initiative while this case involves a statute enacted in a Special Session of the Legislature. (AA 0426-0427, 0446-0447) The trial court concluded that the "holding in *Perry* applies to the narrow issue of whether the official proponents of an initiative measure have standing to defend the validity of that initiative after [it] is passed into law." (AA 0427, 0447)

In addressing the positions of Matthew Fairchild and Andrea Salzman, the trial court concluded that they had satisfied Code of Civil Procedure section 387's requirements for mandatory and permissive intervention. (AA 0427-0428, 0447) In reaching this conclusion, the trial court found that Intervenors "Fairchild

and Saltzman … are not attempting to fulfill the public function of law enforcement" but instead "they seek to intervene to assert their own personal interest in the Act[']s validity." (AA 0427, 0447) The trial court also found that "Fairchild and Saltzman are directly benefitted by the Act and are better situated to present the position of an individual who would seek the opportunities afforded by the Act," and their "situations are such that disposition of this action may impair or impede their ability to protect their interests." (AA 0427-0428, 0447) In addition, the trial court, after stating that "Fairchild and Saltzman are both cancer patients," found that their "interest are not adequately represented by the Attorney General." (AA 0428, 0447) The trial court found that "[t]heir arguments, positions and interest are unique from that of the Attorney General and their interest will be impaired if intervention is denied." (AA 0428, 0447)

As to Dr. Forest, the trial court found that she "does not satisfy the requirement." (AA 0428, 0447) The trial court found that Dr. Forest "is [a] practicing physician who treats terminally ill patients." (AA 0428-0429, 0447) The trial court then concluded that "[h]er interest are not unique as those of Fairchild and Saltzman" and that the "State Defendants who are defending the Act are situated to represent her interest adequately." (AA 0429, 0447)

On August 8, 2019, the trial court signed and filed a written order, submitted by counsel for the Proposed Private Party Intervenors, that incorporated the tentative ruling that the

trial court adopted as its ruling at the July 5, 2019 hearing. (AA 0443-0449)

Dr. Forest appealed the trial court's August 8, 2019 order denying her intervention. In an unpublished opinion, this Court affirmed the trial court's order as to Dr. Forest. (Opinion, Case No. E07353) In doing so, this Court found, among other things, that Dr. Forest had not rebutted the presumption that the Attorney General adequately represented her (and hence that the trial court correctly denied mandatory intervention) and that Dr. Forest had not disputed implied findings that the trial court had made justifying denial of permissive intervention. (*Id.*, at 5-12.)

Dr. Forest has filed a petition for review in the Supreme Court. The petition is pending as of the time of the filing of this brief.

3. Demurrers To First Amended Complaint And Filing Of Second Amended Complaint

On September 26, 2019, the Intervenor State Defendants filed a demurrer to each cause of action in the First Amended Complaint (the "FAC Demurrer") and on the same date Matthew Fairchild also filed a demurrer to each cause of action in the First Amended Complaint (the "Fairchild FAC Demurrer"). (AA 0487-0886) Defendant Riverside County District Attorney filed a joinder in the FAC Demurrer. (AA 0887-0900) Although originally noticed for December 17, 2019, pursuant to the request

of Matthew Fairchild's counsel the hearing for both demurrers was continued to January 23, 2020. (AA 1228-1231)

On November 8, 2019, while the demurrers to the First Amended Complaint were pending and before opposition to them was due, Plaintiffs filed a motion for leave to file a Second Amended Complaint that sought to add the quondam Director of the State Department of Public Health (Sonia Angell) (the "Director") as a defendant but did not seek to make any other amendments to the First Amended Complaint (the "Motion For Leave To File SAC"). (AA 0916-0959) Plaintiffs noticed the Motion For Leave To File SAC for hearing on December 17, 2019. (AA 0916-0917) The trial court however scheduled the Motion For Leave To File SAC for hearing on February 4, 2020 (later continued by agreement of counsel to February 20, 2020 (AA 1264-1267)), rather than December 17, 2019, as originally noticed by Plaintiffs. (See AA 0962-0962)

On January 23, 2020, the trial court sustained the FAC Demurrer, with 30 days leave to amend in certain respects concerning standing as to the first and second causes of action (equal protection and due process) and without leave to amend as to the third cause of action (special session); sustained the Fairchild FAC Demurrer without leave to amend as to the third cause of action; and found that the Fairchild FAC Demurrer was moot as to the first and second causes of action. (Reporter's Transcript on Appeal ("RT") 58:6-59:4; AA 1257-1261) The trial court filed a follow-up written order on March 9, 2020 as to the FAC Demurrer. (AA 1347-1354)

In ruling on the FAC Demurrer as to the first and second causes of action (equal protection and due process), the trial court addressed only standing issues. The 30 days leave to amend that the trial allowed as to the first and second causes of action was limited to "third-party standing, for the group of patients who may share commonality with the plaintiffs (i.e., do not want to participate in assisted suicide) but may be subject to undue influence from family members or others." (AA 1348, 1352) The trial court found that "it appears Plaintiffs could allege that they had patients who did not want to participate in assisted-suicide (or were not capable of making that decision) but were subject to being pressured by their family members or others into doing so and being taken to doctors who would do so and that the Act lacks sufficient procedural safeguards to protect them from such undue influence." (AA 1352) The trial court however found that as to first and second causes of action the "defects relating to personal standing and public interest / taxpayer standing are incurable." (AA 1351)

The trial court reached the merits of the third cause of action. In doing so, it noted that "State Defendants do not challenge Plaintiffs' standing to pursue this claim, but argue that it fails on the merits as a matter of law." (AA 1352) The trial court found that the "question is whether the Act comes within the final approved subject in the proclamation, 'legislation necessary to . . . [i]mprove the efficiency and efficacy of the health care system, reduce the cost of providing health care services, and improve the health of Californians.'" (AA 1353) The trial court

concluded that the "special session was convened to broadly address health care issues being faced by citizens of the State of California" and that "[b]ecause the Act is reasonably germane to the subject matter of the special session, it was reasonable for the Legislature to conclude that aid-in-dying legislation concerns a subject germane to improving the effective delivery of health care services to benefit Californians, thus not enacted in violation of the Constitution." (AA 1353-1354)

On February 20, 2020, the Court granted the Motion For Leave To File SAC and, pursuant to stipulation of the parties, established February 24, 2020, as the deadline for amending both pursuant to the Court's January 23, 2020 ruling on the State Defendants' Demurrer and pursuant to the ruling on the Motion For Leave To File SAC. (AA 1281-1282, 1284; RT 60:18-62:1.)

On February 24, 2020, Plaintiffs filed a Second Amended Complaint. (AA 1289-1314) Pursuant to the Court's ruling on the Motion For Leave To File SAC, the Second Amended Complaint adds as a defendant the Director. (AA 1291-1292) Plaintiffs elected not to amend pursuant to the Court's January 23, 2020 ruling on the State Defendants' Demurrer and expressly so stated in the Second Amended Complaint. (*Id.*)

4. Motion To File Third Amended Complaint And Demurrers To And Motion To Strike Second Amended Complaint

On May 11, 2020, Plaintiffs filed a motion for leave to file a Third Amended Complaint and noticed it for hearing on June 8, 2020. (AA 1373-1486) The amendments sought by the motion were to correct references in the Second Amended Complaint to the enforcement of the criminal law and to clarify that Plaintiffs seek to bar the Director's civil, not criminal, enforcement of the EOLOA. (*See* AA 1422-1442)

On May 28, 2020 Matthew Fairchild filed a demurrer to the Second Amended Complaint ("Fairchild SAC Demurrer") and noticed it for hearing on July 2, 2020. (AA 1569-1843)

On June 8, 2020, the trial court continued to July 22, 2020 the hearing on Plaintiffs' motion for leave to file a Third Amended Complaint (although the tentative, on which Plaintiffs' counsel submitted, was to continue the hearing to July 2, 2020, when the challenges to the Second Amended Complaint were to be heard). (AA 1929-1930, 1932)

On June 9, 2020, the Attorney General, the Department of Public Health and the Director (collectively, the "Sate Defendants") filed a demurrer to the Second Amended Complaint (the "SAC Demurrer") and a Motion to Strike the Second Amended Complaint (the "SAC Motion To Strike"), noticing both for hearing on July 2, 2020. (AA 1938-2109) The Riverside County District Attorney filed joinders in both the SAC Demurrer

and the SAC Motion To Strike. (AA 2110-2113, 2114-2117) In support of the SAC Demurrer the State Defendants argued, among other things, that Plaintiffs' election not to amend in response to the January 22, 2020 demurrer ruling established that Plaintiffs cannot establish standing and that the January 22, 2020 demurrer ruling dismissed the third cause of action (for violation of California Constitution artitcle IV, section 3(b)) with prejudice. (AA 2022, 2026-2027) The premise of the SAC Motion To Strike was that the Second Amended Complaint exceeded the leave granted by the Court in ruling on the FAC Demurrer. (AA 1940, 1942-1943)

On July 1, 2020 the trial court issued a tentative ruling on the SAC Motion To Strike. (AA 2234-2236) The tentative was to grant the motion with 20 days leave to amend limited to: "1) to cure the defects related to third-party standing and to the 1st and 2nd causes of action only; 2) add Sonia Angell in her official capacity as Director of the California Department of Public Health; 3) fix any clerical errors." (AA 2235) In addition, the tentative granted the Riverside County District Attorney's joinder in the SAC Motion To Strike, and found that the Fairchild SAC Demurrer and the Riverside County District Attorney's Joinder in the SAC Demurrer were moot. (*Id.*)

On July 2, 2020, the trial court, ruling from the bench, adopted the July 1, 2020 tentative except for the provision concerning the addition of Sonia Angell (the Director was already named in the Second Amended Complaint). (RT 79:9-80:9) Subsequently, the trial court modified, signed and filed a

proposed order that the Attorney General had lodged with the SAC Motion To Strike (the "July 2, 2020 Order"). (AA 2238-2239) This written and signed order, referring to the ruling from the bench, granted the SAC Motion To Strike with 20 days leave to amend limited to third-party standing for the first and second causes of action only and to correct any clerical errors. (AA 2239) Plaintiffs elected not to amend the Second Amended Complaint within the allotted 20 days or otherwise. The State Defendants filed and served notice of the July 2, 2020 Order on July 21, 2020. (AA 2243-2249) The trial court issued a written order dated August 7, 2020 granting the Riverside County District Attorney's joinder in the State Defendants' motion to strike. (AA 2257-2258)

5. Orders Of Dismissal And Appeals

On or about September 14, 2020, the State Defendants filed an *ex parte* application for an order of dismissal with prejudice ("*Ex Parte* Application For Order Of Dismissal"). (AA 2268-2284, 2288-2305) On or about September 15, 2020, the Riverside County District Attorney filed an *ex parte* application to join in the *Ex Parte* Application For Order Of Dismissal. (AA 2306-2337)

On September 16, 2020, the trial court granted the *Ex Parte* Application For Order Of Dismissal and the Riverside County District Attorney's related *ex parte* application. (RT 85:22-91:4.) In doing so, the trial court signed and filed two orders: (1) the proposed order, captioned "Order Granting Ex Parte Application For Order Of Dismissal With Prejudice," that

had been submitted by the State Defendants (the "September 16, 2020 State Defendants Order"), and (2) the proposed order, submitted by the Riverside County District Attorney, captioned "Order Granting Joinder In The Attorney General's Ex Parte Application For An Order Of Dismissal With Prejudice" (the "September 16, 2020 District Attorney Order"). (AA 2338-2343) The September 16, 2020 State Defendants Order states that "Plaintiffs' action is dismissed with prejudice." (AA 2340) The September 16, 2020 District Attorney Order states that "Defendant District Attorney's request for joinder is granted and … the action is dismissed with prejudice as to the District Attorney and judgment is entered accordingly." (AA 2343)

Plaintiffs have filed notices of appeal from the July 2, 2020 Order (notice of appeal filed August 18, 2020 (AA 2263-2264)), the September 16, 2020 State Defendants Order (notice of appeal filed September 25, 2020 (AA 2345-2346)) and the September 16, 2020 District Attorney Order (notice of appeal filed October 5, 2020 (AA 2364-2365)).

III. Appealability

The July 2, 2020 Order, which grants a motion to strike, is under the authority of *Kuperman v. Great Republic Life* (1987) 195 Cal.App.3d 943, subject to being deemed appealable under Code of Civil Procedure section 904.1. The September 16, 2020 State Defendants Order is a final judgment that is appealable under Code of Civil Procedure section 904.1(a)(1). The

September 16, 2020 District Attorney Order is subject to being deemed a final separate judgment that is appealable under Code of Civil Procedure section 904.1(a)(1).

IV. Orders For Which Review Is Sought

Plaintiffs seek review and reversal of the following trial court rulings and orders: (1) the trial court's January 23, 2020 ruling on the FAC Demurrer and the Fairchild FAC Demurrer, and the trial court's March 9, 2020 order on the FAC Demurrer; (2) the trial court's July 5, 2019 ruling on Matthew Fairchild's motion for leave to intervene and the trial court's August 9, 2019 order on Matthew Fairchild's motion for leave to intervene; (3) the July 2, 2020 Order; (4) the September 16, 2020 State Defendants Order; and (5) the September 16, 2020 District Attorney Order.

V. Standards Of Review

A. Demurrers

On appeal after a demurrer has been sustained, the Court of Appeal determines *de novo* whether the complaint states facts sufficient to constitute a cause of action. (*E.g.*, *Alborzi v. University of Southern California* (2020) 55 Cal.App.5th 155, 168.) The court assumes the truth of the complaint's properly pleaded or implied factual allegations. (*Id.*)

B. Motions To Intervene

"California cases are not settled on whether [the Court of Appeal] review[s] the denial of a request for mandatory intervention pursuant to section 387 de novo or for abuse of discretion" and denial of permissive intervention is reviewed under an abuse of discretion standard. (*Edwards v. Heartland Payment Systems, Inc.* (2018) 29 Cal.App.5th 725 ["*Edwards"*], 733, 736.)

Plaintiffs submit that the mandatory intervention issues are legal issues that do not involve disputed facts and as such are subject to *de novo* review. (*E.g. Edgemont Community Services District v. City of Moreno Valley* (1995) 36 Cal.App.4th 1157, 1166.) The legal issues subject to *de novo* review are: (1) Whether the defense of a statute is a public function the responsibility for which belongs exclusively to the Attorney General, and for that reason both mandatory and permissive intervention of a private party such as Matthew Fairchild to defend the EOLOA are inappropriate (*see infra* at Section VI(C)(1)), and (2) Whether the Attorney General's representation is as a matter of law adequate given that the Attorney General and Matthew Fairchild share a common litigation objective -- upholding the constitutionality of the EOLOA -- and there is no evidence that the Attorney General's representation is not adequate (*see infra* at Section VI(C)(2)).

VI. Argument

A. Because The EOLOA Violates Cal. Const. Article IV, §3(b) As A Matter Of Law The Trial Court's Rulings Premised On The Contrary Conclusion Must Be Reversed

The trial court's January 23, 2020 ruling on the Fairchild FAC Demurrer, January 23, 2020 ruling and March 9, 2020 order on the FAC Demurrer, the July 2, 2020 Order, the September 16, 2020 State Defendants Order and the September 16, 2020 District Attorney Order must all be reversed. This is because these rulings and orders all stem from the trial court's conclusion that the EOLOA does not violate article IV, section 3(b) of the California Constitution[2]. This conclusion, which is subject to *de novo* review, is wrong.

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[2] The July 2, 2020 Order and the judgments entered thereon are also in error insofar as they are premised on the erroneous finding that Plaintiffs exceeded the leave granted to them when the trial court sustained the Intervenor State Defendants' FAC demurrer. In the Second Amended Complaint Plaintiffs expressly stated that they were declining to amend against the Intervenor State Defendants and as consequence the charging allegations in the Second Amended Complaint were only against the Director, who was not named in the First Amended Complaint. (AA 1290-1291, 1300, 1303, 1305) Thus in the Second Amended Complaint as to those defendants Plaintiffs did not exceed the leave granted to them. As to the Director, Plaintiffs were entitled to a *de novo* determination as to whether the limitations of the previously granted leave were applicable because the Director was not a party when that leave was

The EOLOA violates article IV, section 3(b) of the California Constitution as a matter of law. Article IV, section 3(b) provides that "[o]n extraordinary occasions the Governor by proclamation may cause the Legislature to assemble in special session" and that when so assembled the Legislature "has power to legislate only on subjects specified in the proclamation but may provide for expenses and other matters incidental to the session." The EOLOA was enacted in a special session held pursuant to a gubernatorial Proclamation that specifies both the "extraordinary circumstances" requiring the special session and the legislation needed to address those "extraordinary circumstances." (AA 0813, 0819, 0831-0832) The "extraordinary circumstances" are said to be a shortfall in funding for Medi-Cal and two other social service programs (regional centers for the developmentally disabled and an in-home services program) due to the addition of four million Californians to Medi-Cal coverage and federal restriction of the "managed care organization tax." (AA 0831) The Proclamation specifies that it is these particular "extraordinary circumstances" – none of which pertain to assisted suicide –

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granted (and, moreover, the trial court could change its previously ruling since judgment had not been entered either at the time Plaintiffs filed their Second Amended Complaint or as of when the trial made the July 2, 2020 Order). However, Plaintiffs' contention that First Amended Complaint states a cause of action and for that reason the FAC Demurrers should have been overruled moots the issue of whether Plaintiffs exceeded the leave previously granted by the trial court.

that "require the Legislature of the State of California to be convened in a special session." (*Id.*) The needed legislation to address the funding shortfall constituting the "extraordinary circumstances" is said in the Proclamation to be (1) legislation that would "enact permanent and sustainable funding from a new managed care organization tax and/or alternative fund sources," and (2) legislation that would (a) establish mechanisms so that any additional rate increases expand access to services; (b) increase oversight and effective management of services provided through regional centers to the developmentally disabled; and (c) improve the "efficiency and efficacy of the health care system, reduce the cost of providing health care services, and improve the health of Californians." (AA 0831-0832) None of these circumstances has anything to do with physician-assisted suicide. The EOLOA's enactment accordingly violates article IV section 3(b)'s requirement that special session legislation be "only on subjects specified in the proclamation."

The trial court's reading of the Proclamation is not tenable. The trial court found that "it was reasonable for the Legislature to conclude that aid-in-dying legislation concerns a subject germane to improving the effective delivery of health care services to benefit Californians." The trial court thus read the subject matter of Proclamation as including any legislation that could be deemed to fall within the reference at the end of the Proclamation to legislation that would increase the efficiency and efficacy of health care system, reduce the cost of

health care services, and "improve the health of Californians." This reading violates the principle of California law that "[t]he words of [a] statute must be construed in context, keeping in mind the statutory purpose, and statutes or statutory sections relating to the same subject must be harmonized, both internally and with each other, to the extent possible." (*Dyna-Med, Inc. v. Fair Employment & Housing Com*. (1987) 43 Cal.3d 1379 ["*Dyna-Med*"], 1387.) Here the relevant context is that the Proclamation itself specifies that the special session was "required" due to the shortfall in funding for Medi-Cal and the regional center and in-home programs. The reference to legislation needed to increase efficiency and efficacy, reduce costs and improve health accordingly can only be read to mean that the legislation should do so for purposes of alleviating the Medi-Cal, regional center and in-homes services funding shortfall. The trial court did not find that the EOLOA serves that purpose. Nor could it. The proposal to legalize physician-assisted suicide long pre-dates the Medi-Cal funding shortfall that prompted the legislative special session that enacted the EOLOA. Moreover, it would shock the conscience – and thus violate substantive due process – if the state authorized killing the infirm as a means of reducing Medi-Cal costs.

Significantly, the Proclamation itself contradicts the trial court's interpretation. According to the trial court, the "special session was convened to broadly address health care issues being faced by citizens of the State of California." (AA 1353) The Proclamation however says something quite different. It states

that specified "extraordinary circumstances require the Legislature of the State of California to be convened in a special session." The "extraordinary circumstances" referred to concern funding for Medi-Cal and two other programs. They do not include any generalized health care circumstances unrelated to that funding.

The trial court's interpretation of the Proclamation also violates the "extraordinary occasions" limitation in article IV section 3(b). Article IV, section 3(b) of the California Constitution authorizes the Governor to call a special session not for any and all circumstances but only for "extraordinary occasions." For this reason, the Proclamation can convene the Legislature to address an emergency funding shortfall – that is something that can reasonably be deemed to be an "extraordinary occasion" – but cannot convene the Legislature "to broadly address health care issues" without regard to whether the health care issues are germane to an "extraordinary occasion" justifying a special session. The Proclamation does the former, not the latter, and the trial court misconstrued the Proclamation in concluding otherwise. But even if the Proclamation could be read as convening the Legislature "to broadly address health care issues," the enactment of the EOLOA would still violate article IV, section 3(b) as a consequence of being untethered to any "extraordinary occasion" justifying the special session.

The doctrine of *ejusdem generis* corroborates the conclusion that assisted suicide is not within the plain meaning

of the Proclamation.[3] Under the doctrine of *ejusdem generis,* "when general terms follow a list of specific items or categories … the general term is 'restricted to those things that are similar to those which are enumerated specifically.'" (*People v. Diaz* (2012) 207 Cal.App.4th 396, 401.) The doctrine of *ejusdem generis* prohibits interpreting the "improve the health of Californians" category as encompassing physician-assisted suicide because that category is part of a general one that follows a list of specific categories that have nothing to do with physician-assisted suicide. The list of specific categories concerns the funding for, and/or cost of, Medi-Cal, regional centers and in-home services. Thus, under the doctrine of *ejusdem generis*, the general phrase "improve the health of Californians" is limited to matters relating to the funding of, and/or cost, of those three programs.

It is also evident from the context of the general category of which it is a part that the phrase "improve the health of Californians" refers to improvements that are to be achieved through cost savings and increased efficiency and efficacy. The

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[3] Courts apply canons of construction such as *ejusdem generis* to interpret not only ambiguous texts but also to ascertain the plain meaning of non-ambiguous texts. (*E.g., International Federation of Professional & Technical Engineers v. Superior Court* (2007) 42 Cal.4th 319, 341-342; *People v. Garcia* (2016) 62 Cal.4th 1116, 1124.) Where courts have rejected application of *ejusdem generis* due to lack of "ambiguity" they are doing nothing more than applying the principle that *ejusdem generis* cannot be used to override plain meaning. (*In Re Tobacco Cases I* (2010) 186 Cal.App.4th 42, 47-50; *Dyna-Med, supra,* 43 Cal.3d at 1391.)

category has three components, the first two of which expressly and exclusively concern efficiency, efficacy or cost issues: (1) "Improve the efficiency and efficacy of the health care system," and (2) "reduce the cost of providing health care services." The phrase "improve the health of Californians" comes at the end of this category, as a catch-all within a catchall that relates to a funding shortfall for specified government health care programs.

Martin v. Riley (1942) 20 Cal.2d 28 ["*Martin*"], and *Sturgeon v. County of Los Angeles* (2010) 191 Cal.App.4th 344 ["*Sturgeon*"] are not contrary to Plaintiffs' position. In neither case was there the type of radical disconnect that exists here between, on the one hand, funding for Medi-Cal and two other programs, and, on the other hand, legalization of physician-assisted suicide. In *Martin* a proclamation, prompted by the extraordinary occasion of the bombing of Pearl Harbor, authorizing legislation concerning the organization of the State Guard was found adequate to authorize amendment of the Military and Veterans Code. (*Martin, supra,* 20 Cal.2d at 30.) In *Sturgeon* a proclamation authorizing legislation to "streamline" state and local governments was found to adequate to authorize legislation concerning the judiciary. (*Sturgeon, supra,* 191 Cal.App.4th at 349, 352.)

In the trial court the defendants misleadingly suggested that the Governor and the Legislature expressly found that the EOLOA is within the scope off the Proclamation. (AA 0513, 0631-0632, 0642-0643) Neither the Governor nor the

Legislature made any such finding. The purported basis of the defendants' claim to the contrary is a "signing statement" that Governor Brown made and a vote on a chairperson ruling during an Assembly hearing. (*See id.*) Governor Brown's statement does not mention the Proclamation, much less argue that the EOLOA is within its scope. (AA 0592) An Assembly vote on a chairperson ruling is not an act of the entire legislature. Moreover, the mere adoption of special session legislation proves nothing as that will have happened in every case that comes before a court[4]. This Court, not the Governor or the Assembly, determines whether the EOLOA violates article IV, section 3(b). The whole purpose of judicial review is for the judiciary to put a check on the other branches where, as here, they fail to follow the Constitution.

B. Plaintiffs Have Alleged Facts That Establish Standing

As demonstrated below, Plaintiffs successfully have alleged personal, third party, public interest, and taxpayer standing to assert all their claims.

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[4] The concurring opinion in *Martin* has never been endorsed by a Supreme Court majority or a Court of Appeal. (*See also Coastside Fishing Club v. Cal. Resources Agency* (2008) 158 Cal.App.4th 1183, 1196 fn.7 ["[w]e do not think a Governor's post hoc signing statement is ordinarily a reliable indication of legislative intent"].)

1. Plaintiffs Have Alleged Facts Demonstrating Personal Standing

Plaintiffs have cured the insufficiency that this Court in *Becerra* found as to personal standing in Plaintiffs' original Complaint and in doing so successfully have alleged standing. In considering personal standing, this Court found that Plaintiffs had alleged only that they regularly diagnose terminal diseases and that this alone was not sufficient to demonstrate injury in the form of responsibility for a patient's decision to participate in the EOLOA. (*Becerra, supra*, 29 Cal.App.5th at 500-501.) Plaintiffs' First Amended Complaint addresses this by alleging much more than the mere fact that Plaintiffs make diagnoses that might result in such responsibility. Plaintiffs also allege that the EOLOA impairs their practice of medicine and their patient relationships by reducing specialists available for referral and by inhibiting their ability to prohibit employees from participating in physician assisted suicide through referrals and provision of information. (AA 0460-0464, 1291-1295) These allegations, which must be accepted as true on demurrer, demonstrate that Plaintiffs have injury and interest sufficient to confer personal standing.

The trial court's legal reasoning concerning standing is flawed. By reaching the merits of the special session issue the trial court effectively recognized Plaintiffs' standing to assert their article IV, section 3(b) claim even though it also expressly found that Plaintiffs had not successfully alleged standing to

assert their equal protection and due process claims. The trial court adopted the argument, advanced by the Intervenor State Defendants in support of the FAC Demurrer, that Plaintiffs' patients but not the Plaintiffs themselves suffer the specific harm associated with their equal protection and due process claims. (AA 1259, 1350-1351) In doing so, the trial court erred. Standing turns not on the issue asserted but the injury suffered. "The issue of whether a party has standing focuses on the plaintiff, not the issues he or she seeks to have determined. California decisions generally require a plaintiff to have a personal interest in the litigation's outcome." (*Blumhorst v. Jewish Family Services of Los Angeles* (2005) 126 Cal. App. 4th 993, 1001.) The Court of Appeal confirmed this in this case, finding that "[s]tanding concerns a specific party's interest in the outcome of a lawsuit. [Citations]." (*Becerra, supra*, 29 Cal.App.5th at 495.)

The article IV, section 3(b) special session issue highlights the flaw in the reasoning of the trial court and State Defendants. The trial court and Intervenor State Defendants did not and could not purport to extend to the special session issue the argument that the constitutional violation is suffered only by the patients. They cannot do so because the Legislature's violation of article IV, section 3(b) is suffered in equal degree by all. This demonstrates that standing depends not on the *issue* – how and what provision of the Constitution is violated – but, rather, on the existence of harm from the law[5].

[5] The Intervenor State Defendants' argument would fail even if the appropriate focus were the issue rather than the

In erroneously concluding that Plaintiffs had not adequately alleged equal protection and due process injury, the trial court both mischaracterized Plaintiffs' allegations and violated the cardinal principle that on demurrer factual allegations must be accepted as true. The trial found that what Plaintiffs alleged concerning the EOLOA's adverse impact on patient referrals "is not concrete and actual, but conjectural or hypothetical" and that "Plaintiffs merely speculate that most physicians will participate in the Act." (AA 1259, 1351) Plaintiffs' First Amended Complaint however does not "conjecture" but makes what can only be called allegations of facts: It alleges that a substantial percentage of California physicians are willing to participate in the EOLOA and/or provide information about the EOLOA and/or provide referrals to physicians who will participate in the EOLOA, and that, as a consequence, to the detriment of both Plaintiffs and the patients of Plaintiffs, the EOLOA substantially reduces the number of physicians to whom Plaintiffs can refer patients without risk of facilitating the suicide of the patients. (AA 0460-0464) In finding that these factual allegations are not "concrete" or "actual" or that they are "conjectural, hypothetical" or speculative, the trial court made a judgment on whether the allegations are likely to be true. This is reversible error. (*E.g., Hayter Trucking, Inc. v. Shell Western E&P, Inc.* (1993) 18 Cal.App.4th 1, 12 ["For purposes of a

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harm. The interference with patient relationships and referrals that Plaintiffs have alleged would not occur in the absence of the equal protection and due process violations.

demurrer, [the complaint's] allegations must be assumed as true and the court's rejection of such allegations as a factual matter constitutes reversible error."]; *Del E. Webb Corp. v. Structural Materials Co.* (1981) 123 Cal.App.3d 593, 604 [in holding that trial court improperly sustained demurrer Court of Appeal cites principle that "in testing a pleading against a demurrer the facts alleged in the pleading are deemed to be true, however improbable they may be"]; *Barefoot v. Jennings* (2020) 8 Cal.5th 822, 827 ["When a demurrer or pretrial motion to dismiss challenges a complaint on standing grounds, the court may not simply assume the allegations supporting standing lack merit and dismiss the complaint."].)

Plaintiffs also have personal standing based on their allegations that the EOLOA injures Plaintiffs with employees in that the EOLOA is "subject to being construed as barring them from prohibiting their employees from providing a patient with a referral to another health care provider for the purposes of participating in the activities authorized by the Act." (AA 0462-0463) This Court in *Becerra* left open the possibility that the EOLOA would be so construed. (*Becerra, supra,* 29 Cal.App.5th at 502 and 502 note 7.) Plaintiffs would have standing based on the employee-related allegations even if this Court unequivocally declared that the EOLOA is not subject to being construed as barring Plaintiffs from prohibiting their employees from providing a patient with a referral to another health care provider for the purposes of participating in the activities authorized by the EOLOA. This is because this Court's

interpretation in this regard would be subject to being overturned by the Supreme Court.

Plaintiffs' employee-related allegations are also otherwise sufficient. In *Becerra*, this Court found that "even assuming the Act does require a health care provider to allow its employees to provide information and to provide referrals, the complaint fails to allege standing on this basis" in that it "does not allege that the Ahn parties even have any employees, much less that any of their employees are health care providers or that any of their employees want to provide information and referrals against their employers' wishes." (*Becerra, supra,* 29 Cal.App.5th at 502.) The Plaintiffs include Plaintiffs who in their amended pleadings have alleged that they have employees. (AA 0462, 1293) They do not allege, as suggested by dictum in the *Becerra* opinion, that they have employees who are health care providers or that they have employees who want to provide information and referrals against their employers' wishes. Such allegations are not necessary to establish standing. Regardless of whether Plaintiffs currently have employees who wish to direct patients to doctors who will administer the EOLOA, the EOLOA injures Plaintiffs because it can be construed as prohibiting Plaintiffs from adopting employment policies that bar participation in the EOLOA. The injury is the EOLOA's bar on Plaintiffs' policies rather than violation of those policies.

2. Plaintiffs Have Alleged Facts Demonstrating Third Party Standing

Plaintiffs have successfully alleged third-party standing in their amended complaints. Third party standing exists when the following three requirements are met: (1) the litigant suffers a distinct and palpable injury in fact, thus giving him or her a concrete interest in the outcome of the dispute; (2) the litigant has a close relationship to the third party such that the two share a common interest; and (3) there is some hindrance to the third party's ability to protect his or her own interests. (*Becerra, supra,* 29 Cal.App.5th at 499-500.) This Court found that the allegations of Plaintiffs' original Complaint failed to establish third-party standing because the requirement of commonality of interest was not met. (*Becerra, supra,* 29 Cal.App.5th at 500.) The Court found that Plaintiffs would not have commonality of interest with patients who want physician-assisted suicide and that patients who do not want it are not injured because they do not need to seek it. (*Id.*) Plaintiffs' amended pleadings cure this defect by alleging that the EOLOA injures Plaintiffs in that they cannot refer their patients to other physicians with certainty that the other physicians will not assist in the suicide of the referred patient, and that Plaintiffs are consequently restricted in the choice of doctors to whom they can refer. (AA 0461-0463, 1291-1294) This allegation, which must be accepted as true on demurrer, satisfies both the injury and the commonality requirements. Plaintiffs and their patients who oppose

physician-assisted suicide are injured by the reduced pool of doctors to whom to refer and share an interest in the largest possible pool of referral physicians. (*See, e.g.*, "Referral of Patients to Specialists: Factors Affecting Choice Of Specialist By Primary Care Physicians," *Annals of Family Medicine*, 2(3): 245-252 (May 2004) ["Referral of patients from primary care physicians to specialists may affect the process of patient evaluation, treatment, and continuity of care and can affect clinical outcomes and costs …. For the primary care physician, the referral decision involves not only whether the patient needs to be referred to a specialist, but also which specialists should be chosen to see the patient. The latter question has taken on increasing importance as the growth in the number and types of health plan arrangements has altered traditional referral relationships between primary care physicians and specialists."].)

The remaining element of third party standing – hindrance to the third party's ability to protect his or her own interests – has not been contested nor could it be. The individual Plaintiffs have alleged that many of their "patients are unable to bring suit on their own due to illness or lack of financial means." (AA 0462, 1293) This allegation is sufficient as a matter of law to establish the "hindrance" requirement. (*Glassdoor, Inc. v. Superior Court* (2017) 9 Cal.App.5th 623, 632-633.)

The trial court's ruling on the FAC Demurrer contains no support for the trial court's conclusion that Plaintiffs failed to allege third party standing. The adopted tentative and written order contain only a conclusory statement that the facts alleged

concerning physician referrals "are insufficient to establish a commonality of interest so as to confer standing." (AA 1258, 1351) The trial court provided no reasoning to support this conclusion and failed to address the sufficiency of the allegations in support of third party standing. The trial court instead restricted third-party standing to a different and far too narrow situation that Plaintiffs had not alleged. The trial court allowed that "it appears that Plaintiffs could allege that they had patients who did not want to participate in assisted-suicide (or were not capable of making that decision) but were subject to being pressured by their family members or others into doing so and being taken to doctors who do so and that the Act lacks sufficient procedural safeguards to protect them from undue influence." (AA 1258, 1350) The trial court allowed Plaintiffs leave to amend but only to make those allegations. (AA 1257, 1348, 1354) Plaintiffs declined to amend pursuant to this leave because these allegations are not necessary to establish standing. Plaintiffs' allegations that the EOLOA restricts the ability to refer establishes a sufficient injury and implicates an interest in which both Plaintiffs and their patients share.

3. Plaintiffs' Allegations Establish Both Taxpayer and Public Interest Standing

Plaintiffs demonstrate below that in their amended pleadings they successfully have alleged both taxpayer and public

interest standing, and that nothing in this Court's decision in *Becerra* dictates any different conclusion.

a. Plaintiffs Have Alleged Both Common Law And Statutory Taxpayer Standing

Plaintiffs have alleged the required elements of taxpayer standing, which this Court in *Becerra* did not address as it had not been alleged in Plaintiffs' original Complaint. *Ultra vires* government expenditure and payment of the requisite taxes, both of which are alleged in paragraphs 3 and 4 of the First and Second Amended Complaints, establish both statutory and common law taxpayer standing. (Code Civ. Proc. § 526a; *California DUI Lawyers Assn. v. Department of Motor Vehicles* (2018) 20 Cal.App.5th 1247 ["*California DUI Lawyers*"], 1264.) Like public interest standing, taxpayer standing exists to allow citizens to challenge unconstitutional statutes. (*E.g., California DUI Lawyers, supra,* 20 Cal.App.5th at 1257-1265; *Connerly v. State Personnel Bd.* (2001) 92 Cal.App.4th 16 ["*Connerly*"], 29-31.) This includes constitutional challenges to statutes that allow exercises of discretion. (*California DUI Lawyers, supra,* 20 Cal.App.5th at 1257-1265 [rejecting DMV's argument that DMV's discretion under challenged statute precluded taxpayer standing].)

Plaintiffs' amended complaints meet the requirements of statutory taxpayer standing. Code of Civil Procedure section 526a authorizes certain residents who have paid certain taxes to

maintain an "action to obtain a judgment, restraining and preventing any illegal expenditure" of the public entity defendant. This is precisely what Plaintiffs' amended pleadings seek to do. Plaintiffs allege that they are suing "as taxpayers to vindicate the public right to the protection, without unconstitutional abridgement by the Act, of the laws protecting against aiding and abetting suicide and elder abuse," and that the defendants "have expended, and continue to expend, taxpayer funds to implement, administer and enforce the unconstitutional provisions in the Act and seek to restrain" them "from any further such expenditures."[6] (AA 0462, 0464, 01292, 1295)

Plaintiffs also allege the requisite payment of taxes. To establish taxpayer standing, a plaintiff must allege payment

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[6] The Second Amended Complaint added the Director to allegations that refer to the defendants as a group and to enforcement of the criminal law. Plaintiffs moved for leave to file a Third Amended Complaint to correct references in the Second Amended Complaint to the enforcement of the criminal law and to clarify that Plaintiffs seek to bar the Director's civil, not criminal, enforcement of the EOLOA. (AA 1374-1441) Plaintiffs noticed the motion for June 8, 2020 so that it would be heard and decided before the trial court ruled on the challenges heard on July 2, 2020 to the Second Amended Complaint. (AA 1374-1375) However, the trial court continued Plaintiffs' motion to July 22, 2020 (AA1932) and then found that its July 2, 2020 Order, which granted leave to amend to make certain allegations concerning standing and to correct typographical errors, mooted Plaintiffs' motion for leave to file the Third Amended Complaint (RT 79:26-28; AA 2447). The leave to correct typographical errors however would not have permitted Plaintiffs to pursue taxpayer standing as the trial court had ruled that the deficiencies it found concerning taxpayer standing were "incurable" and that it would not change its ruling. (AA 1257, 1352, 2235, 2429; RT 84:25-85:3.)

within a year of filing suit of a tax that funds the public entity whose action is at issue. (Code of Civ. Proc. §526a.) Plaintiffs have done so. The individual doctor plaintiffs allege that "[w]ithin one year of filing this action" they "paid California income tax, certain sales and use taxes, property taxes and/or a business tax, and are informed and believe, and thereon allege, that such taxes that they have paid fund the Riverside County District Attorney's Office and/or other Defendants." (AA 0464, 1295) Plaintiff AAME makes the same allegation except as to payment of state income taxes. (AA 0462, 1293)

California case law confirms that there is taxpayer standing where, as here, a plaintiff premises taxpayer standing on the cost of enforcing a statutory scheme claimed to be unconstitutional. (*California DUI Lawyers, supra,* 20 Cal.App.5th at 1257-1265.) The operation of the District Attorney's office entails expense associated with the District Attorney's mandatory duty to enforce all laws, even if the enforcement should take the form of deciding not to bring cases. The taxpayer standing that Plaintiffs have established against the California Department of Public Health and its Director is especially incontestable. Those defendants have a mandatory duty under the EOLOA to collect data submitted by physicians participating in the EOLOA, make an annual report based on the data, and the report and data on the Internet. (H&S Code §§ 443.19(a)-(c).) The cost associated with the collection and reporting of data is waste that establishes taxpayer standing where, as here, it is

done pursuant to a statute that is claimed to be unconstitutional. (*California DUI Lawyers, supra,* 20 Cal.App.5th at 1257-1265.)

b. Plaintiffs' Allegations Establish Public Interest Standing

Plaintiffs meet the public interest standing doctrine requirements both in letter and in spirit. The doctrine applies only where mandate is sought and is an exception to the general rule that a writ of mandate will be issued only to persons who are "beneficially interested." (Code of Civ. Proc. § 1086; *Green v. Obledo* (1981) 29 Cal.3d 126 ["*Green*"], 144.) The exception applies "where the question is one of public right and the object of mandamus is to procure enforcement of a public duty." (*Green, supra,* 29 Cal.3d at 144 [internal quotes and citation omitted].) Here the question is one of "public right" – the public's right to the benefit of the protection of the criminal law without unconstitutional abridgement – and seeks by way of mandamus to procure enforcement of the public and mandatory duty to recognize the validity of that law. This accordingly is an appropriate case for public interest standing. (*E.g.*, *Anderson v. Phillips* (1975) 13 Cal.3d 733, 735-741 ["*Anderson*"] [mandate, and hence public interest standing, lies to correct erroneous interpretation of California Constitution]; *Connerly, supra,* 92 Cal.App.4th at 29-31 [claim that statute violates equal protection is "precisely the type of claim to which citizen and taxpayer standing rules apply"]; *Amending Proposition L v. City of Pomona*

(2018) 28 Cal.App.5th 1159 [public interest standing exists to compel duty to act in accordance with the law].)

The Supreme Court's decision in *Anderson, supra*, 13 Cal.3d 733 establishes that mandate lies where, as here, a plaintiff seeks to compel a proper interpretation of the California Constitution. *Anderson* involved an appointed judge's claim to compel a presiding judge to exercise the presiding judge's statutory duty to "distribute the business of the court among the judges." (*Anderson, supra,* 13 Cal.3d at 736.) The presiding judge had refused to assign cases to the appointed judge because the presiding judge, based on an interpretation of the constitutional provision pertaining to judges' terms of office, had concluded that the appointed judge's term had expired. (*Id.* at 735-737.) The appointed judge was seeking to compel exercise of the presiding judge's "wholly discretionary" duty, but the Court of Appeal held that mandate could not control the presiding judge's exercise of discretion. (*Id.* at 737.) Reversing the lower court's decision, the Supreme Court held that mandate was appropriate "to compel an officer both to exercise his discretion and to exercise it under a proper interpretation of the applicable law." (*Id.*) Therefore, "since [the presiding judge's] refusal to assign court business to [the appointed judge] is based on his determination that [the appointed judge] is not now a judge of the Alameda Superior Court, the writ will lie if that determination is erroneous." (*Id.*) The presiding judge's interpretation of the California constitutional provision at issue was found erroneous

and, accordingly, the appointed judge was entitled to relief. (*Id.* at 737-741.)

The Court of Appeal's decision in *Connerly, supra,* 92 Cal.App.4th 16, corroborates the conclusion that constitutional correction is itself a basis for public interest standing. In *Connerly* the Court of Appeal found that a claim that a statute violates equal protection is "precisely the type of claim to which citizen and taxpayer standing rules apply," even in absence of "proof that [defendants] are in fact engaging in unconstitutional behavior." (*Connerly, supra,* 92 Cal.App.4th at 29-31.)

Anderson and *Connerly* compel the conclusion that mandate lies to compel the relief Plaintiffs seek. The gist of Plaintiffs' claim is that, due to a failure to recognize the EOLOA's unconstitutionality, the District Attorney incorrectly concludes that, by virtue of the EOLOA, the statute that outlaws assisted suicide no longer applies to physician-assisted suicide. In other words, the District Attorney is not recognizing the pre-existing criminal law as a result of misreading what the Constitution requires. *Anderson* establishes that mandate lies to correct failure to recognize a statute when the failure is due to a misreading of the Constitution, even when the statute involves an exercise of discretion. *Connerly* holds that this is so even in absence of "proof that [defendants] are in fact engaging in unconstitutional behavior." (*Connerly, supra,* 92 Cal.App.4th at 29-31.)

In considering the issue of standing, the Court must distinguish between standing and the merits. Plaintiffs here

claim violation of a public right and seek to procure enforcement of a public duty. This entitles them to standing regardless of whether their mandate claim is meritorious. The Supreme Court's decision in *Common Cause v. Board of Supervisors* (1989) 49 Cal.3d 432 supports this conclusion. In *Common Cause*, the Supreme Court found that public interest standing existed even though it went on to find on the merits that mandate was not available because the statute at issue afforded discretion to act. (*Id.* at 439-447.)

c. This Court's Decision In *Becerra* Does Not Preclude Either Taxpayer Standing or Public Interest Standing

Contrary to what the trial court found, this Court's ruling in *Becerra* does not preclude alleging public interest and taxpayer standing based on the mandatory duty to follow the Constitution. This Court in *Becerra* ruled at a time when Plaintiffs' complaint, unlike Plaintiffs' subsequent amended complaints, contained no express claim for a writ of mandate. This Court nevertheless considered mandate hypothetically and found that "mandate cannot be used to compel a district attorney to exercise his or her discretion in any particular way" and that the District Attorney might never act. (*Becerra, supra,* 29 Cal.App.5th at 504.) Plaintiffs' new pleading clarifies that Plaintiffs do not seek to compel the exercise of prosecutorial discretion or to compel a particular enforcement. The duty that Plaintiffs allege in their

new pleading is the mandatory duty to recognize the correct law in any and all cases regardless of whether action may or may not be taken. *Becerra* in its consideration of a different and hypothetical mandate claim did not address that duty. As demonstrated above in Section VI(B)(3)(b), the duty to interpret the law correctly exists regardless of whether a prosecutor may or may not take an action under the law.

This Court's reasoning in *Becerra* is wholly inapplicable to Plaintiffs' claims against the California Department of Public Health and the Director of the California Department of Public Health. Those defendants have a duty under the EOLOA to collect, report and publish data. (H&S Code §§ 443.19(a)-(c).) That duty is ministerial, not discretionary. Accordingly, even if it could be said that mandate does not lie against the District Attorney due to lack of a mandatory duty, the same cannot be said of the California Department of Public Health and the Director of the California Department of Public Health.

4. Defendants' Denials Do Not Preclude Reaching The Merits

While in *Becerra* this Court held that issues of fact raised by the denial in the State's answer precluded judgment on the pleadings in Plaintiffs' favor (*Becerra, supra,* 29 Cal.App.5th at 499), that holding does not bar consideration of the merits on the present appeal. This is because this appeal, unlike the appeal at issue in *Becerra,* concerns demurrers in which the defendants themselves requested the trial court to address the merits of the

article IV, section 3 issue without challenging standing. In this circumstance it is appropriate for the Court of Appeal to review the trial court's determination on the merits. It would be appropriate even if standing also had been challenged. (*See e.g. Bell v. Blue Cross of California* (2005) 131 Cal.App.4th 211, 221 [where defendant challenged standing and also argued merits "assuming [plaintiff's] standing," Court of Appeal finds that in sustaining demurrer trial court erred both on standing issues and on the merits]; *Drum v. San Fernando Valley Bar Assn.* (2010) 182 Cal.App.4th 247, 252 ["Whether a plaintiff has standing to sue under the UCL and whether an alleged business practice violated the UCL both may be resolved at the demurrer stage in appropriate cases."]; *Charpentier v. L.A. Rams Football Co.* (1999) 75 Cal. App. 4th 301, 307-308 [Court of Appeal reaches merits of demurrer notwithstanding challenge to standing]; *Brown v. Deutsche Bank National Trust Co.* (2016) 247 Cal.App.4th 275, 280-281 [same].)

C. The Trial Court's Order Granting Matthew Fairchild Leave To Intervene Should Be Reversed

The trial court erred in allowing Matthew Fairchild leave to intervene.

Code of Civil Procedure section 387(d) sets forth the standards governing nonparty mandatory and permissive intervention. Subsection (d)(1), which sets forth the standard for mandatory intervention, provides in part (B) that the court shall, upon timely application, permit a nonparty to intervene in the

action or proceeding if the "person seeking intervention claims an interest relating to the property or transaction that is the subject of the action and that person is so situated that the disposition of the action may impair or impede that person's ability to protect that interest, unless that person's interest is adequately represented by one or more of the existing parties." (*See also Edwards, supra,* 29 Cal.App.5th at 733 [setting forth requirements for mandatory intervention].)

Subsection (d)(2) of Code of Civil Procedure section 387 sets forth the standard for permissive intervention. It provides that the "court may, upon timely application, permit a nonparty to intervene in the action or proceeding if the person has an interest in the matter in litigation, or in the success of either of the parties, or an interest against both." Under this provision, a trial court has discretion to permit a nonparty to intervene where the following factors are met: (1) the proper procedures have been followed; (2) the nonparty has a direct and immediate interest in the action; (3) the intervention will not enlarge the issues in the litigation; and (4) the reasons for the intervention outweigh any opposition by the parties presently in the action. (*Edwards, supra,* 29 Cal.App.5th at 735.)

1. Both Permissive And Mandatory Intervention Are Inappropriate For Private Party Intervenors Who Seek To Defend The Constitutionality Of A Statute

The intervention of Matthew Fairchild in this case is inappropriate, and should have been denied, because the intervention seeks to have a private party fulfill the public function of law enforcement. Unlike Plaintiffs, Matthew Fairchild has no complaint about the EOLOA – Matthew Fairchild supports it and seeks only its enforcement. Unlike a challenge to a statute, the enforcement of a statute is an executive function. The California Constitution specifies that the "supreme executive power" is "vested in the Governor" who "shall see that the law is faithfully executed"; that "[s]ubject to the powers and duties of the Governor, the Attorney General shall be the chief law officer of the State"; and that it "shall be the duty of the Attorney General to see that the laws of the State are uniformly and adequately enforced." (Cal. Constitution Article V, sections I and 13.) The executive function of law enforcement is thus a public matter that belongs to the executive and not to private parties. (*See also* Government Code sections 12511 [the Attorney General has charge, as attorney, of all legal matters in which the State is interested] and 12512 [the Attorney General shall defend all causes to which the State, or any State officer is a party in his or her official capacity], and Code of Civil Procedure section 902.1 [authorizing Attorney General to intervene and participate in any appeal in any proceeding in which a state

statute has been declared unconstitutional].) This is especially the case where, as here, the involved representatives of the executive branch (the Attorney General, the California Department of Public Health and its Director, and the Riverside County District Attorney) are vigorously defending the statute. Even if they were not, private individuals have no right to step in. Were the executive to decline to defend a statute enacted by the Legislature, the Legislature, not private individuals, would be the appropriate party to defend. (*See Perry, supra,* 52 Cal.4th at 1156-1157 [Legislature may, and could be expected, to step into litigation to defend its legislation without violating separation of powers].)

The Supreme Court's decision in *Perry v. Brown, supra,* 52 Cal.4th 1116 corroborates the conclusion that it is not appropriate for private individuals such as Matthew Fairchild to involve themselves in the executive's public duty to enforce a state statute.

In *Perry* the Supreme Court found that the official proponents of a ballot initiative approved by the voters can assert the State's interest in upholding an initiative when the Attorney General refuses to defend it in court. The import of that decision is that purely private parties have no role in exercising the executive function of upholding state law. The Supreme Court found that ballot initiative proponents were proper parties to defend an initiative that the Attorney General would not defend because the State Constitution and the Election Code gave them an official role in the ballot initiative process. (*Perry,*

supra, 52 Cal.2d at 1140-1152, 1159-1160.) This legislatively prescribed role, the Supreme Court found, protected against the danger that the proponents might act as "de facto public officials." (*Id.*, at 1159.) The Supreme Court also indicated that in the case of a statute enacted by the Legislature, the Legislature would be the appropriate party to defend a statute that the executive refused to defend. (*Id.*, at 1156-1159.) The Supreme Court in *Perry* limited its holding to circumstances in which the executive was not defending the ballot initiative at issue.

In emphasizing that ballot initiative proponents and the Legislature have official legislative roles and are therefore the appropriate defenders of state law when the executive is absent, the Supreme Court in *Perry* recognized that ordinarily it is the executive's function – and not that of private citizens or political groups – to defend the validity of a state law. (*See also Perry, supra,* 52 Cal.4th at 1153 ["the constitutional and statutory provisions [establishing that it is the duty of the Governor and Attorney General to enforce the law] establish that in a judicial proceeding in which the validity of a state law is challenged, the state's interest in the validity of the law is ordinarily asserted by the state Attorney General"].) Consistent with this, the *Perry* court confirmed that, unlike official proponents of a ballot initiative, advocacy groups are not qualified by their partisan interest in defending an enacted initiative. (*Perry*, *supra*, 52 Cal.4th at 1144 note 14.)

The State's interest in enforcing, defending and applying the law is a generalized public interest that does not belong to particular individuals. Apart from specific exceptions authorized by law (such as Private Attorneys General Act lawsuits under Labor Code section 2698 *et seq*., public interest lawsuits and taxpayer lawsuits), it is for the executive branch of government, not self-selected individuals, to decide if and how to enforce, defend, and apply statutes. Matthew Fairchild did not invoke any of the authorized exceptions in the trial court. Rather, he advanced, and the trial court adopted, semantical arguments that fail to address the issue of whether it is ever appropriate for a private party to assume the Attorney General's responsibility for defending statutes. Matthew Fairchild argued that he is not seeking to "enforce" the statute but, rather, is seeking to "defend" its constitutionality and assert his "own personal interest" in the statute's validity. (AA 0407) The trial court similarly found that Intervenors "Fairchild and Saltzman … are not attempting to fulfill the public function of law enforcement" but instead "they seek to intervene to assert their own personal interest in the Act's validity." (AA 0427, 0447) However, Plaintiffs' challenge does not turn on whether what Matthew Fairchild seeks to do can be labelled as "enforcement" or on the nature of Matthew Fairchild's claimed personal interest in the statute. It instead rests on the principle that the defense of the constitutionality of a statute is a public function reserved to the Attorney General. It is indisputable that Matthew Fairchild seeks to participate in that public function, regardless of whether it is characterized as

"enforcement" and regardless of whether he has a personal interest in the statute[7].

The public nature of upholding the law as established in the California Constitution and recognized in *Perry* precludes Matthew Fairchild from both intervention as of right and permissive intervention. Under Code of Civil Procedure section 387(d)(1)(B) intervention as of right is not allowed if the interest of the party seeking intervention "is adequately represented by one or more of the existing parties."[8] Such is the case here. The relevant interest here is the State's interest in the validity of a statute, and the executive is engaged in defending that interest. The executive is not only an "adequate" representative, but as the California Constitution and *Perry* reflect, the sole appropriate representative. *Perry* recognizes the exception where the executive declines to fulfill its law enforcement function. That

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[7] The trial court and Matthew Fairchild's semantical distinction between "enforcement" of the EOLOA and Matthew Fairchild's defense of the EOLOA is in any event premised on an inappropriately narrow interpretation of the meaning of the word "enforcement." "Enforcement" encompasses defense of the constitutionality of a statute to ensure its enforceability where, as here, the enforceability of the statute is being challenged on constitutional grounds. The quondam Attorney General herself interpreted the word as such in this case, characterizing her intervention to be pursuant to her legal obligation to "enforce" statutes. (AA 0079, 0083.)

[8] Code of Civil Procedure section 387(d)(1)(A) allows intervention as of right if a "provision of law confers an unconditional right to intervene." Matthew Fairchild has not claimed a right to intervene on this basis.

exception does not apply here. The Attorney General is vigorously defending the statute. Even if the Attorney General were not, however, the Legislature – and not private individuals such as Matthew Fairchild – would be the appropriate party to intervene.

Permissive intervention is inappropriate for the same reasons. By law, permissive intervention is to be denied where "the reasons for the intervention outweigh any opposition by the parties presently in the action." (*Edwards, supra,* 29 Cal.App.5th at 735.) Such is the case. The Attorney General has sole responsibility for defending the constitutionality of the EOLOA and is in fact fulfilling that responsibility. (*See also Perry v. Proposition 8 Official Proponents,* (9th Cir. 2009) 587 F.3d 947 ["*Proposition 8 Official Proponents*"], 955 [trial court properly denied permissive intervention to organization that sought to aid constitutional defense of a law].)

Matthew Fairchild's own arguments in the trial court underscore why allowing him to intervene would be inappropriate. Matthew Fairchild argued below that his positions are "deeply personal" and differ from those of the Attorney General, who is charged by law to defend this case on behalf of all the People. (AA 0125, 0128) It is the Attorney General's role to speak for the State, not self-selected individuals who are pursuing personal concerns that, by their own admission, conflict with those of the State.

Intervenors in this case are seeking to fulfill the public function of enforcement of a statute. They admit that they are acting as independent private support to the Attorney General's

effort in this case to uphold the constitutionality of the EOLOA. In the trial court they highlighted this role, emphasizing they were raising issues and arguments that they claimed were more effective than those that the Attorney General had raised. (AA 0126-0128)

The distinction drawn by the trial court and Matthew Fairchild between "enforcement" and the defense of a statute is also legally erroneous. As the Attorney General has asserted, the Attorney General's effort to uphold the statute is part of its duty to "enforce" the law. (AA 0079, 0083)

2. *Perry* Aside, The Trial Court Erred In Allowing Matthew Fairchild's Intervention

The trial court's findings of intervention as of right and permissive intervention would need to be reversed even if *Perry* did not dictate it. As demonstrated below in Section VI(C)(2)(a), there is no basis for finding intervention as of right because there is a presumption that the Attorney General's defense of the EOLOA is adequate and there is no evidence in the record that rebuts this presumption. This precludes intervention as of right because such intervention requires a finding that existing representation is not adequate. As discussed in Section VI(C)(2)(b), given this Court's ruling on Dr. Forest's appeal, which upheld denial of permissive intervention, it is an abuse of discretion to allow permissive intervention to Matthew Fairchild.

a. There Is No Evidence That Rebuts The Presumption That The Attorney General's Representation Is Adequate

i. The Attorney General's Representation Is Presumed To Be Adequate

This Court's decision on Dr. Forest's appeal establishes that the Attorney General's representation is presumed to be adequate. As this Court found in ruling on Dr. Forest's appeal, federal cases hold that "'[i]f an applicant for intervention and an existing party share the same ultimate objective, a presumption of adequacy of representation arises.'" (Opinion, at p. 9 [citations omitted]; see also *Freedom from Religion Found., Inc. v. Geithner* (2011 9th Cir.) 644 F.3d 836 ["*Freedom from Religion*"]) This Court observed that "it does not appear that these cases use 'ultimate objective' to mean anything different from 'outcome'" and that Dr. Forest "and the Attorney General seek the same outcome (i.e., upholding the Act)." (*Id.*) The same is true of Matthew Fairchild. In this litigation he, like Dr. Forest, shares the Attorney General's objective in upholding the EOLOA. A second presumption, also recognized by this Court on Dr. Forest's appeal, applies here: that the government is an adequate representative. (Opinion, at p. 10.)

The record in this case establishes that Matthew Fairchild and the Attorney General are pursuing the identical objective of having the EOLOA upheld as constitutional. The outcome that the Attorney General seeks in this case is to have the EOLOA

upheld as constitutional. (AA 0079-0084) Matthew Fairchild likewise has said his interest is in the outcome of this litigation -- *i.e.*, that his objective is in having the EOLOA upheld. (AA 0118 (Matthew Fairchild requests "leave to intervene … for the purpose of defending the End of Life Options Act")) There is no evidence that Matthew Fairchild has or claims any other objective. He has never asked the trial court for an outcome that differs from that sought by the Attorney General. Further, Matthew Fairchild has not contended that the Attorney General has not been competently pursuing that outcome.

ii. There Is No Evidence In The Record That Overcomes The Presumption Of Adequate Existing Representation

Regardless of whether the record is reviewed de novo or for abuse of discretion, the trial court's implied finding that the Attorney General's representation is inadequate has no evidentiary support and therefore must be reversed. On Dr. Forest's appeal this Court recognized that the Attorney General's representation is adequate to protect Dr. Forest's interests. In ruling on Dr. Forest's appeal, the Court distinguished Dr. Forest's circumstances from those of cancer patients on the ground that the latter might have an interest in expediting resolution of the case. However, this distinction cannot serve as a basis for finding that Matthew Fairchild, who is a cancer patient,

has overcome the presumption that the Attorney General's representation is adequate.

One reason that the "expedition" issue does not support the trial court's order is that it is contrary to the facts in the record. When Matthew Fairchild moved to intervene, the judgment in Plaintiffs' favor had been reversed and the EOLOA was in effect. At that point, he had nothing to gain by advancing the case. Indeed, after intervening his counsel slowed resolution of the case by requesting a six-week continuance of the hearing on the FAC Demurrer and the Fairchild FAC Demurrer. There is no evidence in the record that at the time of the trial court's ruling on the motion to intervene, or at any time thereafter, Matthew Fairchild sought to move the litigation forward more quickly than the Attorney General was doing.

Even if there were disagreement about the pace at which to conduct litigation, that would not be a valid basis for finding inadequate representation. As this Court found in ruling on Dr. Forest's appeal, a "difference of opinion concerning litigation strategy … does not overcome the presumption of adequate representation." (Opinion, p. 10.) The pace at which litigation is conducted is matter of strategy and tactics, and not a difference concerning the outcome that is sought. It is the latter, and not the former, on which adequacy of representation is judged. E.g., *Proposition 8 Official Proponents, supra,* 587 F.3d 947, 949 "Divergence of tactics and litigation strategy is not tantamount to divergence over the ultimate objective of the suit.")

b. For The Same Reasons That Dr. Forest Was Denied Intervention, It Is An Abuse Of Discretion To Allow Matthew Fairchild To Intervene

The trial court abused its discretion in allowing Matthew Fairchild permissive intervention. As this Court's ruling on Dr. Forest's appeal reflects, the trial court properly denied permissive intervention to Dr. Forest and in doing so impliedly found that permissive intervention would enlarge the scope of the action or broaden the issues, or that the interests of the original litigants outweigh the intervenors' concerns. (Opinion, pp. 5-6.) As to these issues, the trial court did not make, and could not have impliedly made, any different findings. Matthew Fairchild has precisely the same objective in the litigation as Dr. Forest: upholding the EOLOA. For this reason, the trial court's implied findings as to Dr. Forest concerning the scope of the action, the breadth of the issues, and the interests of the original litigants apply with equal force to Matthew Fairchild. Matthew Fairchild's motivation for wanting the EOLOA upheld is entirely irrelevant. This Court recognized as much in ruling on Dr. Forest's appeal, finding that "it does not appear that [the cases cited by the Court] use 'ultimate objective' to mean anything different from 'outcome.'" (Opinion, pp. 9-10.)

VI. Conclusion

For the foregoing reasons, Plaintiffs respectfully request that this Court reverse the trial court orders and rulings identified in Section IV of this brief and direct the trial court to enter judgment granting the relief requested in Plaintiffs' First and Second Amended Complaints.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE
[Cal. Rule of Court 8.504(d)(1)]

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PROOF OF SERVICE

I am a citizen of the United States. My business mailing address is 907 Westwood Boulevard, #1026, Los Angeles, CA 90024. I work in the County of Los Angeles where this service occurs. I am over the age of 18 years, and not a party to the within cause. My electronic email address is *dmansueto@outlook.com*.

On the date set forth below, according to ordinary business practice, I serving the foregoing document(s) described as:

APPELLANTS' OPENING BRIEF

(BY ELECTRONIC SERVICE) On this date, a true and correct copy of the above-referenced APPELLANTS' OPENING BRIEF is to be filed using TrueFiling and thereby electronically served on counsel as indicated on the Service List below.

(BY U.S. Mail) On this date, I placed in the U.S. Mail the APPELLANTS' OPENING BRIEF in an envelope with sufficient postage addressed as indicated on the attached Service List for the Hon. Irma Poole Asberry c/o Clerk of the Riverside County Superior Court.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on January 28, 2021 at Los Angeles, California.

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