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12 UNITED STATES DISTRICT COURT
13 NORTHERN DISTRICT OF CALIFORNIA

14 LONNY SHAVELSON, M.D.; JANE DOE;
15 SANDRA MORRIS; ROBERT
16 USLANDER, M.D.; GARY PASTERNAK,
17 M.D.; and RICHARD MENDIUS, M.D.; on
18 behalf of themselves and all others similarly
19 situated,

19 Plaintiffs,

20 v.

22 CALIFORNIA DEPARTMENT OF
23 HEALTH CARE SERVICES; ROBERT
24 BONTA, ATTORNEY GENERAL
25 OF THE STATE OF CALIFORNIA, IN HIS
26 OFFICIAL CAPACITY,

26 Defendants.

) Case No. 3:21-CV-06654-VC
)
) Civil Rights
) **PLAINTIFFS' NOTICE OF MOTION;**
) **EX PARTE MOTION FOR**
) **TEMPORARY RESTRAINING ORDER**
) **AND/OR ORDER TO SHOW CAUSE**
) **AND FOR PRELIMINARY**
) **INJUNCTION; MEMORANDUM OF**
) **POINTS AND AUTHORITIES IN**
) **SUPPORT THEREOF**

1 **TO THE COURT, DEFENDANTS, AND THEIR ATTORNEYS OF RECORD:**

2 **PLEASE TAKE NOTICE** that, at the earliest time possible designated by the Court, in
3 Courtroom 4 of the Honorable Vince Chhabria at the United States District Court for the
4 Northern District of California, 17th Floor, 450 Golden Gate Avenue, San Francisco, CA 94102,
5 Plaintiffs Doe and Morris shall and hereby do move the Court pursuant to Federal Rule of Civil
6 Procedure 65 for a temporary restraining order (TRO) and/or order to show cause and for a
7 preliminary injunction. More specifically, Plaintiffs Doe and Morris seek an exception (or other
8 reasonable accommodation) from the provision of California’s End of Life Options Act
9 (“EOLOA”) that prohibits assistance with ingesting aid-in-dying drugs, even for those people
10 (like Plaintiffs Doe and Morris) whose physical disability prevents them from being able to
11 ingest without assistance.

12 Plaintiffs are likely to succeed on their legal claims, and absent a TRO or preliminary
13 injunction, Plaintiffs Doe and Morris will suffer grave irreparable harm in the form of either
14 (1) dying prematurely; or (2) being forced to endure the final physical and emotional ravages of
15 their illness, which they desperately want to avoid.

16 This motion is based on this Notice of Motion and supporting Memorandum of Points
17 and Authorities; the Declaration of Jane Doe; the Declaration of Sandra Morris; and any other
18 written or oral evidence or argument as may be presented at or before the time this motion is
19 taken under submission by the Court.

20 Plaintiffs’ counsel has conferred about this Motion on numerous occasions with
21 Defendants’ counsel. Counsel have spoken productively and professionally about the merits of
22 this motion, but, to date, have not been able to agree on resolution of the motion.

23
24 Respectfully Submitted,

25 Dated: September 14, 2021

PEIFFER WOLF CARR KANE & CONWAY,
LLP

26 By: /s/ Adam Wolf
27 Adam B. Wolf

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BACKGROUND

1
2 The stakes of this motion cannot be overstated: if it is granted, Plaintiffs Jane Doe and
3 Sandra Morris will be able to enjoy the remainder of their lives with their family and friends. If it
4 is denied, they either will die imminently (as early as next Tuesday) or live with unbearable
5 physical and emotional pain.

6 Ms. Doe and Ms. Morris are fully mentally competent and are in the terminal phase of
7 their illnesses (multiple sclerosis (“MS”) and amyotrophic lateral sclerosis (“ALS”),
8 respectively). As such, they are eligible to avail themselves of California’s End of Life Options
9 Act (“EOLOA”), Cal. Health & Safety Code § 443 *et seq.* The EOLOA provides that “an adult
10 with the capacity to make medical decisions and with a terminal disease may make a request to
11 receive a prescription for an aid-in-dying drug,” provided he or she is a California resident and
12 “has the physical and mental ability to self-administer the aid-in-dying drug.” Cal. Health &
13 Safety Code § 443.2(a) (emphasis added). The EOLOA also provides that “[a] person who is
14 present may, without civil or criminal liability, assist the qualified individual by preparing the
15 aid-in-dying drug so long as the person does not assist the qualified person in ingesting the aid-
16 in-dying drug.” *Id.* at § 443.14 (emphasis added).

17 Without the EOLOA, Ms. Doe and Ms. Morris will die slow and horrific deaths.
18 Accordingly, they wish to avail themselves of this state law just before the burden imposed by
19 their diseases becomes unbearable. However, by that point, the physical disability imposed by
20 their progressive illnesses will have rendered them physically unable to ingest the aid in dying
21 (“AID”) medications without assistance. And because the statute shuts out people who are
22 physically unable to ingest without assistance, Ms. Doe’s and Ms. Morris’s physical disabilities
23 will prevent them from utilizing the EOLOA at the time of their choosing. Accordingly, without
24 judicial intervention, Plaintiffs must decide now whether they will ingest the drugs promptly
25 (before they want to die) or whether they will suffer the brutal final ravages imposed by their
26 illnesses, which they fervently wish to avoid.

27 A TRO and preliminary injunction would provide immeasurable relief to both Ms. Doe
28 and Ms. Morris, allowing them the ability to access the AID medications when they are ready to

1 achieve a peaceful death. Such relief should issue because Plaintiffs are likely to prevail on their
 2 claims and the balance of hardships tips sharply in Plaintiffs' favor. Numerous laws prevent the
 3 disability discrimination and unequal treatment that Ms. Doe and Ms. Morris face, and the
 4 equities overwhelmingly favor the Plaintiffs. Without a TRO and preliminary injunction, these
 5 two Plaintiffs will either die sooner than they wish or be forced into a brutal final period of
 6 suffering before death arrives.

7 FACTS

8 **I. PLAINTIFF JANE DOE**

9 Jane Doe is a 74-year-old woman with advanced secondary progressive MS. Declaration
 10 of Jane Doe ("Doe Decl.") ¶ 3. She has endured the inexorable progress of this disease for
 11 decades. *Id.* She has almost no control over her body, including her hands. She presently has the
 12 ability to swallow. *Id.* at ¶ 9.

13 Now enrolled in hospice care, she has seen friends with MS who have died slow and very
 14 painful deaths. *Id.* at ¶ 3. She desperately wants to avoid living through that agonizing phase of
 15 this illness. *Id.*

16 To avoid the emotionally and physically horrific death she has witnessed other MS
 17 patients suffer through, she wants to—*at the right time for her*—avail herself of the EOLOA. *Id.*
 18 at ¶¶ 4-7. To that end, she has discussed her desire for AID with her physician, and she has taken
 19 all the pre-requisite steps for doing so. *Id.* at ¶ 5.

20 Ms. Doe is presently able to ingest the AID medications without assistance. *Id.* at ¶ 6. But
 21 she will not be able to do so very soon—likely by the end of this month. *Id.*

22 Ms. Doe does not want to die this month. *Id.* at ¶ 7. She wants to fight on—and to spend
 23 precious time with family and friends while she still can enjoy life. *Id.* In her own words:

24 I want to live longer, so that I can be with friends and family. But I also want to
 25 utilize the EOLOA/AID before my worsening condition makes life too painful and
 26 unbearable. Under the current law, I am being forced to choose between spending
 27 more time with my loved ones and being able to take advantage of the benefits of
 28 the EOLOA while I am able to self-administer AID and ingest the medication
 without assistance. This is a choice that terminally ill Californians who do not have
 physical disabilities do not have to make.

1 **Without the Court’s allowing someone to assist me with ingesting the AID**
 2 **medications in the future, I plan to self-administer the AID medicine on**
 3 **September 21, 2021. I desperately want to live months longer than September**
 4 **21.**

4 *Id.* at ¶¶ 7-8 (emphasis added).

5 **II. PLAINTIFF SANDRA MORRIS**

6 Plaintiff Sandra Morris was diagnosed with ALS in 2018, when she was 51 years old.
 7 Declaration of Sandra Morris (“Morris Decl.”) ¶ 3. Since her diagnosis, she has experienced the
 8 debilitating and inexorable progress of this illness. *Id.* at ¶ 2.

9 At some point in the near future, Ms. Morris wants the option of AID that is available
 10 under the EOLOA. *Id.* at ¶¶ 5, 10. She is qualified to avail herself of the EOLOA, and she is
 11 presently able to ingest the AID medications without assistance. *Id.* at ¶ 6.

12 But Ms. Morris does not want to ingest the AID medication at present. *Id.* at ¶ 10. A
 13 mother of three children and the wife of a doting husband, she wants to live until the cumulative
 14 burden of her disease becomes unbearable for her. *Id.* at ¶¶ 3, 8, 10, 11. She loves her family; she
 15 soaks up all the time she spends with them. *Id.* at ¶¶ 10, 11.

16 For Ms. Morris (like Ms. Doe), she would like to live beyond the time that she can ingest
 17 the AID medication without assistance. *Id.* at ¶ 11. That is, she wants to enjoy the loving
 18 company of her family and friends, even after the point in time that her illness will rob her of the
 19 ability to ingest the medication without assistance. *Id.*

20 Absent judicial intervention, EOLOA’s assistance prohibition will force Ms. Morris to
 21 (1) precipitate her death sooner than she otherwise would, while she still has the physical ability
 22 to do so, depriving her of the coveted, valuable time with her family and loved ones; or (2) wait
 23 until her progressive illness will take away the physical ability to use AID, forcing her to endure
 24 the final ravages of this terminal illness, which she wants to avoid at all costs. *Id.* at ¶ 16. The
 25 time for that decision is imminent; Ms. Morris will need to make this excruciating decision very
 26 soon. *Id.*

27 Like Plaintiff Jane Doe and other terminally ill Californians who qualify under the
 28 EOLOA, Ms. Morris wants to ingest the AID medications when she wants them—not

1 beforehand. *Id.* at ¶¶ 10, 17. She does not want her advancing physical disability to prevent her
2 from accessing AID. *Id.*

3 LEGAL STANDARD

4 A party seeking a temporary restraining order or a preliminary injunction must satisfy the
5 same requirements. *Stuhlbarg Int'l Sales Co., Inc. v. John D. Brush & Co.*, 240 F.3d 832, 839 n.7
6 (9th Cir. 2001) (“Because our analysis is substantially identical for the injunction and the TRO,
7 we do not address the TRO separately.”); *Rovio Ent't Ltd. v. Royal Plush Toys, Inc.*, 907 F.
8 Supp. 2d 1086, 1092 (N.D. Cal. 2012). The movant typically must “establish that he is likely to
9 succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary
10 relief, that the balance of equities tips in his favor, and that an injunction is in the public
11 interest.” *Winter v. Nat. Res. Defense Council, Inc.*, 555 U.S. 7, 20 (2008). However,
12 “‘likelihood’ of success per se is not an absolute requirement.” *Drakes Bay Oyster Co. v. Jewell*,
13 747 F.3d 1073, 1085 (9th Cir. 2014). “Rather, ‘serious questions going to the merits’ and a
14 hardship balance that tips sharply toward the plaintiff can support issuance of an injunction,
15 assuming the other two elements of the *Winter* test are also met.” *Id.* (quoting *Alliance for the*
16 *Wild Rockies v. Cottrell*, 632 F.3d 1127, 1132 (9th Cir. 2011)).

17 Accordingly, the Ninth Circuit has instructed that these factors should be assessed with a
18 “sliding scale approach,” under which the “elements of the preliminary injunction test are
19 balanced, so that a stronger showing of one element may offset a weaker showing of another.”
20 *Alliance for the Wild Rockies*, 632 F.3d at 1131; *see also Arc of Calif. v. Douglas*, 757 F.3d 975,
21 983 (9th Cir. 2014). Under this approach, “the greater the relative hardship to the party seeking
22 the preliminary injunction, the less probability of success” must be established by the party.
23 *Clear Channel Outdoor, Inc. v. City of Los Angeles*, 340 F.3d 810, 813 (9th Cir. 2003) (internal
24 brackets omitted).

25 Ultimately, crafting a preliminary injunction “is an exercise of discretion and judgment,
26 often dependent as much on the equities of a given case as the substance of the legal issues it
27 presents.” *Trump v. Int'l Refugee Assistance Project*, 137 S. Ct. 2080, 2087 (2017) (per curiam).
28 “The purpose of such interim equitable relief is not to conclusively determine the rights of the

1 parties, but to balance the equities as the litigation moves forward. *Id.* (internal citation omitted).

2 **ARGUMENT**

3 Plaintiffs satisfy each of the factors for issuance of a TRO and preliminary injunction. As
4 an initial matter, they are likely to succeed on the merits of their claims. Once the California
5 legislature has made the policy choice to allow people with terminal illnesses to achieve a
6 peaceful death, there is no justification to prevent Ms. Doe and Ms. Morris from accessing this
7 state program, solely on account of their physical disabilities.

8 At the very least, Plaintiffs have presented “serious questions going to the merits,” in this
9 case where the equities tip quite sharply in their favor. These two Plaintiffs face the ultimate
10 irreparable harm: the possibility that they may die without judicial relief. Without judicial
11 intervention, they are certain to either die prematurely or face devastating suffering during their
12 final days. This is a choice that nobody should face.

13 **I. PLAINTIFFS ARE LIKELY TO SUCCEED ON THE MERITS, OR AT LEAST**
14 **RAISE “SERIOUS QUESTIONS” WITH THEIR CLAIMS.**

15 Ms. Doe and Ms. Morris are likely to succeed on the merits of their claims. They wish to
16 avail themselves of the EOLOA in order to die on their own terms. But unlike their peers, they
17 will be prevented from doing so at the time of their choosing simply because of their physical
18 disabilities. No state program, including the EOLOA, should exclude disabled individuals.
19 Plaintiffs are likely to prevail on their claims.

20 As a threshold matter, Plaintiffs note that this case is not about the wisdom or politics of
21 the EOLOA. The California Legislature has determined that mentally competent people with
22 terminal illnesses should have the ability to choose to ingest medication to achieve a peaceful,
23 dignified death. Taking that as a given, the question presented in this case is simply whether
24 mentally competent adults who desire to avail themselves of the EOLOA should be prohibited
25 from doing so only because of their physical disability.

26 Plaintiffs have brought claims for violations of Title II of the ADA, California
27 Government Code Section 11135, California’s Unruh Act, and the Equal Protection Clause of
28 the California Constitution. Each of these legal mandates proscribes the disability discrimination

1 at issue here.

2 Pursuant to Title II of the ADA, no qualified individual with a disability shall, by reason
 3 of such disability, be excluded from participation in or be denied the benefits of the services,
 4 programs, or activities of a public entity, or be subjected to discrimination by any such entity. 42
 5 U.S.C. § 12132. To state a *prima facie* case for a violation of Title II of the ADA, a plaintiff
 6 must show that: “(1) he is an individual with a disability; (2) he is otherwise qualified to
 7 participate in or receive the benefit of some public entity’s services, programs or activities; (3) he
 8 was either excluded from participation in or denied the benefits of the public entity’s services,
 9 programs or activities, or was otherwise discriminated against by the public entity; and (4) such
 10 exclusion, denial of benefits or discrimination was by reason of his disability.” *O’Guinn v.*
 11 *Lovelock Corr. Ctr.*, 502 F.3d 1056, 1060 (9th Cir. 2007) (internal quotation marks omitted);
 12 *D.K. ex rel. G.M. v. Solano Cty. Ofc. of Educ.*, 667 F. Supp. 2d 1184, 1190 (E.D. Cal. 2009).¹

13 Ms. Morris and Ms. Doe are very likely to satisfy each element of their ADA claims.
 14 *First*, they are individuals with disabilities. Doe Decl. ¶ 3; Morris Decl. ¶ 3, 8, 13. *Second*, they
 15 are eligible to avail themselves of the EOLOA because they have terminal diseases, have the
 16 capacity to make medical decisions for themselves, and—at present—have the ability to self-
 17 administer the aid-in-dying drug. Doe Decl. ¶¶ 3-6; Morris Decl. ¶ 3, 5-6, 8; Cal. Health &
 18 Safety Code § 443.2(a).

19 *Third* and *fourth*, both Plaintiffs will be excluded from participating in the EOLOA
 20 program because their illnesses imminently will prevent them from ingesting the AID medicine
 21
 22

23 ¹ A Title II claim “may be based on one of three theories of liability: disparate treatment,
 24 disparate impact, or failure to make a reasonable accommodation.” *Payan v. Los Angeles Cmty.*
 25 *College Dist.*, ___ F.4th ___, 2021 WL 3730692 at *7 (9th Cir. Aug. 24, 2021) (quotations and
 26 citations omitted). “[A]lthough failure to make a reasonable accommodation and disparate
 27 impact are two different theories of a Title II claim, a public entity may be required to make
 28 reasonable modifications to its facially neutral policies which disparately impact people with
 disabilities.” *Id.*, WL 3730692 at *8 (citing *Crowder v. Kitigawa*, 81 F.3d 1480, 1484-85 (9th
 Cir. 1996)). Here, Ms. Morris and Ms. Doe do not seek any change to the statute or
 accommodation, other than being allowed to have assistance with the ingestion of the medication
 at the time of their choosing.

1 without assistance. Doe Decl. ¶¶ 6-7, 9; Morris Decl. ¶ 10, 16. That is, their disabilities will
2 preclude them from accessing this state program.

3 Because the EOLOA prohibits assistance with ingesting AID medication, the benefits of
4 the EOLOA are inaccessible to physically disabled terminally ill persons whose disability, as
5 with Ms. Morris and Ms. Doe in the very near future, thwarts ingestion without assistance.
6 Accordingly, the assistance provision violates the ADA.

7 Similarly, Government Code Section 11135 prohibits entities receiving funding from
8 California from discriminating on the basis of disability and medical condition. The statute is
9 “coextensive with the ADA because it incorporates the protections and prohibitions of the ADA
10 and its implementing regulations.” *Bassilios v. City of Torrance, CA*, 166 F. Supp. 3d 1061, 1084
11 (C.D. Cal. 2015) (citing Cal. Gov’t Code § 11135(b)).

12 The State Defendants, like the State legislature, receive financial assistance from the
13 State of California. Accordingly, since Doe and Morris are otherwise qualified individuals with
14 disabilities excluded from benefits of the EOLOA by reason of their disabilities, a violation of
15 Government Code Section 11135 has occurred.

16 California’s Unruh Civil Rights Act provides:

17 All persons within the jurisdiction of this state are free and equal, and no matter
18 what their . . . disability . . . [or] medical condition . . . are entitled to the full and
19 equal accommodations, advantages, facilities, privileges, or services in all
20 business establishments of every kind whatsoever.

21 Cal. Civil Code § 51(b). A violation of an individual’s rights under the ADA is also a violation
22 of the Unruh Civil Rights Act (Unruh Act). Cal. Civ. Code § 51(f). *See also, e.g., Montoya v.*
23 *City of San Diego*, 434 F. Supp. 3d 830, 852 (S.D. Cal. 2020) (“The Ninth Circuit has held that
24 violating the ADA is a *per se* violation of the Unruh Act.”).

25 In this case, Plaintiffs claim a violation of the Unruh Act occurred because, as explained
26 above, the defendants violated the Title II of the ADA.

27 The Equal Protection Clause of California’s Constitution guarantees equal protection
28 under the law to all persons. Cal. Const. Art. 1 § 7. The Equal Protection Clause “applies
to laws that discriminate explicitly between groups of people, as well as laws that, though

1 evenhanded on their face, in operation have a disproportionate impact on certain groups.”
2 *Vergara v. Cal.*, 246 Cal. App. 4th 619, 644 (2016), *as modified* (May 3, 2016) (internal
3 quotation marks omitted). The “first prerequisite” to an equal protection claim is “a showing that
4 the state has adopted a classification that affects two or more similarly situated groups in an
5 unequal manner.” *Id.* As discussed above, the EOLOA prohibition on assistance
6 disproportionately impacts disabled individuals whose disability prevents them from ingesting
7 the AID medication on their own.

8 The guarantee of equal protection coexists, of course, with the reality that “most
9 legislation classifies for some purpose or another” *Romer v. Evans*, 517 U.S. 620, 631
10 (1996). However, “when a statute provides that one class shall receive different treatment than
11 another, [the California] constitutional provisions demand more than nondiscriminatory
12 application within the class established they also impose a requirement of some rationality in the
13 nature of the class singled out.” *Brown v. Merlo*, 8 Cal. 3d 855, 861 (1973) (ellipses, brackets,
14 and internal quotation marks omitted).

15 Even under that relatively deferential standard of review, the assistance provision of the
16 EOLOA violates the State Constitution’s Equal Protection Clause, as applied to Ms. Doe and
17 Ms. Morris. This classification bears no rational relationship to any legitimate state interest, as
18 applied to Ms. Morris and Ms. Doe. The supporting evidence dispels any suggestion, for
19 instance, that anyone is coercing Ms. Morris or Ms. Doe to ingest the medication against their
20 will. Without any reason for prohibiting Ms. Morris or Ms. Doe from receiving assistance with
21 ingesting the medication—at the time of their choosing—the statute’s classification violates the
22 Equal Protection Clause of California’s Constitution.

23 At the very least, Plaintiffs’ claims—or even just one of them²—present the requisite
24 “serious question on the merits.” A “serious question” is one on which the movant “has a fair
25 chance of success on the merits.” *Sierra On-Line, Inc. v. Phoenix Software, Inc.*, 739 F.2d 1415,

26 ² Where, as here, there are multiple claims, Plaintiffs need establish that only one of their
27 claims meets this relatively low threshold. *See Rodde v. Bonta*, 357 F.3d 988, 998 n.13 (9th Cir.
28 2004) (“Because we conclude that plaintiffs’ ADA claim adequately supports the preliminary
injunction, we need not address plaintiffs’ Medicaid claims.”).

1 1421 (9th Cir. 1984); *Reyes v. Bonnar*, 362 F. Supp. 3d 762, 772 (N.D. Cal. 2019). While Ms.
2 Morris and Ms. Doe are very likely to prevail on their claims, there is—at the very least—a
3 “serious question” as to whether the EOLOA’s assistance prohibition discriminates against these
4 two Plaintiffs, in violation of their statutory and constitutional rights.

5 **II. PLAINTIFFS WILL SUFFER IRREPARABLE HARM WITHOUT A TRO AND**
6 **PRELIMINARY INJUNCTION.**

7 Ms. Doe and Ms. Morris will suffer irreparable harm if a TRO and preliminary injunction
8 does not issue. Whereas “plaintiffs must establish that irreparable harm is likely, not just
9 possible,” *Alliance*, 632 F.3d at 1131 (emphasis omitted), in this case, the irreparable harm
10 would be certain.

11 Numerous federal courts, including this District, have “recognized that the reduction or
12 elimination of public medical benefits irreparably harms the participants in the programs being
13 cut.” *V.L. v. Wagner*, 669 F. Supp. 2d 1106, 1121 (N.D. Cal. 2009) (citing multiple cases,
14 including *Beltran v. Meyers*, 677 F.2d 1317, 1322 (9th Cir. 1982)); *see also Brantley v. Maxwell-*
15 *Jolly*, 656 F. Supp. 2d 1161, 1176 (N.D. Cal. 2009) . The Ninth Circuit also has held that
16 “delayed and/or complete lack of necessary treatment, and increased pain and medical
17 complications,” is irreparable harm. *Rodde*, 357 F.3d at 999.

18 The harm to Ms. Doe and Ms. Morris would be particularly irreparable and imminent.
19 Both of these women are in the advanced stages of their terminal illnesses. Ms. Doe and Ms.
20 Morris imminently will be unable to ingest AID medication without assistance. Doe Decl. ¶ 6;
21 Morris Decl. ¶ 10. Without a TRO and preliminary injunctive relief, these women will be
22 deprived of the benefits of the EOLOA afforded to terminally ill Californians who are not
23 disabled, or they will be forced to act prematurely to take advantage of the EOLOA’s benefits as
24 the statute is currently drafted. In more concrete terms, absent a preliminary injunction, Ms. Doe
25 will die next week. Doe Decl. ¶ 8. Ms. Morris will either die imminently or endure the final,
26 painful ravages of her terminal illness if the injunction does not issue. Morris Decl. ¶ 16.

27 Accordingly, irreparable harm is *certain* if the motion is not granted.
28

1 **III. THE BALANCE OF HARMS AND PUBLIC INTEREST STRONGLY SUPPORT**
 2 **THE ISSUANCE OF A TRO AND PRELIMINARY INJUNCTION.**

3 The balance of equities and public interest tip sharply in favor of issuing a TRO and
 4 preliminary injunction. This motion is literally a matter of life or death for the Plaintiffs. At the
 5 same time, there is a great public interest in vindicating civil-rights laws and eliminating
 6 disability discrimination.

7 “The final two inquiries. . . are whether the balance of hardships tips sharply in
 8 [plaintiffs’] favor and whether the public will benefit from the proposed preliminary injunction.”
 9 *Brantley*, 656 F. Supp. 2d at 1177. These factors are viewed together when the government is a
 10 party. *Drakes Bay*, 747 F.3d at 1092.

11 The balance of hardships militates strongly in favor of Plaintiffs. After all, Plaintiffs’
 12 lives are at stake. Without the TRO/injunction, one of the Plaintiffs will not live past next
 13 Tuesday (September 21). Doe Decl. ¶ 8. The other Plaintiff would need to decide imminently
 14 between dying prematurely or living her remaining days subject to the great suffering she wants
 15 to avoid. Morris Decl. ¶ 16.

16 The public-interest factor likewise supports a TRO and preliminary injunction. The Ninth
 17 Circuit has been clear that the public’s interest in enforcing the ADA and eliminating
 18 discrimination supports issuing a preliminary injunction. *Enyart v. Nat’l Conference of Bar*
 19 *Examiners, Inc.*, 630 F.3d 1153, 1167 (9th Cir. 2011) (noting further that “[i]n enacting the
 20 ADA, Congress demonstrated its view that the public has an interest in ensuring the eradication
 21 of discrimination on the basis of disabilities.”). Similarly, vindicating constitutional and other
 22 civil rights is in the public interest. *Arizona Dream Act Coal. v. Brewer*, 757 F.3d 1053, 1069
 23 (9th Cir. 2014) (quoting *Valle del Sol Inc. v. Whiting*, 732 F.3d 1006, 1029 (9th Cir. 2013)).
 24 Here, too, the public interest is served by enforcing the ADA, Section 11135, the Unruh Act, and
 25 the California Constitution to eliminate discrimination on the basis of disability.

26 Moreover, the California legislature has expressed a clear public interest in allowing
 27 terminally ill Californians to choose a dignified death via AID. This lawsuit seeks to support that
 28 goal, by ensuring *all* terminally ill Californians have equal access to this program provided by

1 the State.

2 Plaintiffs Doe and Morris are terminally ill. Their death is certain. If they are unable to
3 avail themselves of the EOLOA, their suffering will be prolonged needlessly simply because
4 they are too disabled to be afforded the same opportunities as other individuals; or they will be
5 forced to act prematurely and lose valuable time with loved ones so they may take advantage of
6 the benefits of the EOLOA. Accordingly, the balance of hardship and public interest strongly
7 favor granting a TRO and preliminary injunction.

8 **CONCLUSION**

9 For the reasons set forth above, Plaintiffs' motion should be granted. Plaintiffs should be
10 granted an exemption from the assistance prohibition of the EOLOA (or offered another such
11 reasonable accommodation) to allow their participation in the EOLOA—at the time of their
12 choosing—despite their physical disabilities.

13
14
15 Dated: September 14, 2021

Respectfully Submitted,
PEIFFER WOLF CARR KANE & CONWAY,
LLP

16
17 By: /s/ Adam Wolf
Adam B. Wolf

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13 UNITED STATES DISTRICT COURT
14 NORTHERN DISTRICT OF CALIFORNIA
15

16 LONNY SHAVELSON, M.D.; JANE DOE;
17 SANDRA MORRIS; ROBERT
18 USLANDER, M.D.; GARY PASTERNAK,
19 M.D.; and RICHARD MENDIUS, M.D.; on
20 behalf of themselves and all others similarly
21 situated,

21 Plaintiffs,

22 v.

23 CALIFORNIA DEPARTMENT OF
24 HEALTH CARE SERVICES; ROBERT
25 BONTA, Attorney General
26 of the State of California, in his official
27 capacity,

28 Defendant.

) Case No. 3:21-cv-06654-
)
) Civil Rights
)
) **REDACTED**
) **DECLARATION OF PLAINTIFF JANE**
) **DOE**

1 I, Jane Doe, declare:

2 1. For the purposes of this case, my name is Jane Doe, and I am a plaintiff in this
3 action. I make this declaration based on personal knowledge.

4 2. I hold a degree in mathematics, as well as an MBA in finance and accounting.

5 3. I have advanced secondary progressive multiple sclerosis (MS). I was first
6 diagnosed with MS in 1976, when I was 30 years old. I have endured this progressive disease for
7 44 years. As early as 1995 I could not transfer myself out of my wheelchair, although I retained
8 use of my hands and driving my wheelchair until 2005. While I could drive my wheelchair I
9 could not do anything related to my activities of daily living without assistance. Now at age 74,
10 enrolled in hospice care, the cumulative burden of suffering with this progressing illness is
11 unbearable. I have had friends with MS who can no longer talk or swallow and seen them
12 hooked up to tubes, dying slowly; I do not want that for myself.

13 4. I am aware of California's End of Life Options Act (EOLOA), which creates a
14 regimen for aid in dying (AID) in California. I believe that all patients with terminal illness who
15 so choose ought to be able to take advantage of the benefits of the EOLOA and achieve a more
16 peaceful death via AID. I want this option available to me, so that I can avoid the final ravages of
17 my illness.

18 5. My attending physician and I have fully discussed my desire for AID and have
19 taken all the steps required by the EOLOA. I am a "qualified individual" under the terms of the
20 EOLOA.

21 6. I am presently able to self-administer AID and ingest the medications without
22 assistance. But I understand that I will not be able to do so very soon—likely by the end of this
23 month (September 2021).

24 7. I want to live longer, so that I can be with friends and family. But I also want to
25 utilize the EOLOA/AID before my worsening condition makes life too painful and unbearable.
26 Under the current law, I am being forced to choose between spending more time with my loved
27 ones and being able to take advantage of the benefits of the EOLOA while I am able to self-

1 administer AID and ingest the medication without assistance. This is a choice that terminally ill
2 Californians who do not have physical disabilities do not have to make.

3 8. Without the Court's allowing someone to assist me with ingesting the AID
4 medications in the future, I plan to self-administer the AID medicine on September 21, 2021. I
5 desperately want to live months longer than September 21.

6 9. I want to be able to make this decision independent of the knowledge of the
7 unknown progression of my disease in the future (*i.e.*, the ability to swallow). But because of the
8 current law I do not have this option. Because I do not have use of my hands I do not have the
9 option of depressing a plunger on a feeding tube to self-administer the medicine in to my body.

10 I declare under penalty of perjury under the laws of the United States of America and the
11 State of California that the foregoing is true and correct, and that this declaration is executed on
12 September ^{09/1}, 2021, at Berkeley, California.

13 
14 Plaintiff Jane Doe

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13 UNITED STATES DISTRICT COURT
14 NORTHERN DISTRICT OF CALIFORNIA

15 LONNY SHAVELSON, M.D.; ROBERT)
16 USLANDER, M.D.; GARY PASTERNAK,)
17 M.D.; RICHARD MENDIUS, M.D.;)
18 SANDRA MORRIS; and JANE DOE; on)
19 behalf of themselves and all others similarly)
20 situated,)

20 Plaintiffs,)

21 v.)
22)

23 CALIFORNIA DEPARTMENT OF)
24 HEALTH CARE SERVICES; ROBERT)
25 BONTA, Attorney General)
26 of the State of California, in his official)
27 capacity,)

26 Defendant.)
27)

) Case No. 3:21-cv-06654-

) Civil Rights

) **DECLARATION OF PLAINTIFF**
) **SANDRA MORRIS**

1 I, Sandra Morris, declare:

2 1. My name is Sandra Morris. I am a plaintiff in this action. I make this declaration
3 based on my personal knowledge, and if called to testify, could and would testify as stated
4 herein.

5 2. I live in Sierraville, California and have advanced amyotrophic lateral sclerosis
6 (ALS). Since my diagnosis, I have experienced the debilitating and inexorable progress of this
7 illness, which has imposed a severe physical disability on me.

8 3. I was diagnosed with ALS in 2018, when I was 51 years old. I lived a charmed
9 life before my ALS diagnosis. I met and married my best friend 28 years ago, and we had three
10 incredible children. They are now ages 22, 24 and 20. I worked at Hewlett Packard for 28 years.
11 I love my marriage. I adore my children. And I so enjoyed my job.

12 4. I used to be very physically active. One year I ran the Lake Tahoe marathon. I had
13 a full life of friends and family and travel. I would say my life was about as perfect as you could
14 get prior to my diagnosis.

15 5. I am aware that California enacted the End of Life Options Act (EOLOA) in
16 2015, and that it became effective in 2016, creating a legal regimen for aid in dying (AID) in
17 California. I believe that all patients with terminal illness who so choose ought to be able to take
18 advantage of the benefits of the EOLOA and choose a more peaceful death via AID. I want this
19 option available to me, so that I can avoid the final ravages of the brutal illness I am enduring.

20 6. Dr. Lonny Shavelson, who is also a plaintiff in this action, is my attending
21 physician for AID. We have fully discussed my desire for AID and have taken all the steps
22 required by the EOLOA. I am a “qualified individual” under the terms of the EOLOA and am
23 presently able to self-administer AID medication and ingest it without assistance.

24 7. I wanted, and I still want, to live. I want to live because I have much-loved
25 family, friends, and a beautiful life. There is nothing about me that ever wanted to leave this life
26 early. I jumped into the best clinical trial that I could find—a bone marrow aspiration, three
27 spinal infusions, and four lumbar punctures. My family and I flew to South Korea four times to
28 get into a stem-cell trial. I feel good about the attempts that I made to stay in this life.

1 8. My body is crumbling, all the while my mind is sharp, watching the demise of my
2 body. I am now at the tail end of ALS, and very close to ALS fully incapacitating me physically.
3 I would like to control the end of my life and not allow ALS to suffocate me to death the way it
4 will.

5 9. The EOLOA is so incredibly important to me because it gave me the bravery to
6 live through this disease. Knowing that at the end of my life, I could control it my way. It is the
7 reason that I was able to live the last four years comfortably, to know that I would be able to take
8 medications to end my life the way I wanted to, and not have my children and my husband watch
9 me gasp for my last breath. But the part of this law that is so incredibly cruel for ALS patients, is
10 that nobody can help them take these medications. If anyone assists me with my medication, they
11 are at risk of going to jail or being held liable for my death—when it is absolutely what I have
12 already chosen. And I can't express to you just how unfair that feels.

13 10. I do not want to ingest the AID medications at present because I still am enjoying
14 time with my loved ones. But unless the Court allows it otherwise, I will have to leave this world
15 earlier than I want to, because I have to be able to swallow the medication or use my thumb to
16 press that medication into my body. Today, I still have the use of my right thumb and my left
17 hand, and I still have the ability to swallow and move my neck in a limited manner. But I know
18 that I won't have that ability—likely within a month or so.

19 11. It feels so cruel to me that because of the way the EOLOA is written, that I will
20 have to tell my children that I have to leave them earlier while I still have the use of my hands,
21 and while I can still swallow the medication—rather than having the assistance I need with
22 ingestion so I can stay with them a few extra weeks, or days, or hours. I love my family and want
23 to soak up all the time I can to spend with them. I want to live beyond the time that I can ingest
24 the AID medications without assistance. That is, I want to enjoy the loving company of my
25 family and friends, even after the point in time that my illness will rob me of the ability to ingest
26 the AID medication without assistance.

27 12. I should not be asked to die early just because I'm severely physically disabled. I
28 feel I am being discriminated against because I shortly will not be able to swallow or move my

1 thumb. I want to have the same rights as others who have chosen this as their end of life option
2 and are not physically disabled.

3 13. I need assistance with absolutely everything in my day now that I am at the tail
4 end of this disease. I need assistance to eat, to go to the bathroom, to put a pillow under my head,
5 to scratch my nose. Everything I do involves another person's assistance. It is ironic to me that I
6 am being denied this assistance at the very end.

7 14. As grateful as I am to have this end of life option available for me, I am terrified
8 to think that if I wait too long, or if I wake up tomorrow or the next day and can't move my
9 thumb or swallow, that suddenly, this is no longer an option for me. And there is nothing that
10 scares me more than that. I want the ability not to be rushed. It is important to me to be able to
11 leave with peace.

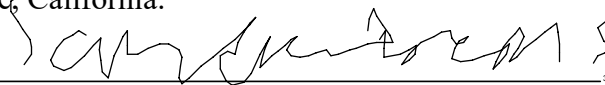
12 15. People with other terminal illnesses—who are not physically disabled—are fully
13 able to use this law. I want the EOLOA to stop discriminating against people like me. I have
14 lived out this disease to the best of my ability with bravery, with grace and with dignity. I only
15 ask that I be allowed to end my life the same way and with the protections and benefits that the
16 EOLOA provides to all other terminally ill and mentally capable Californians. I am asking the
17 court to recognize that this law must no longer discriminate against those who are physically
18 disabled to the point where they could no longer ingest the AID medication without assistance.

19 16. Absent direction from the court, EOLOA's assistance prohibition will force me to
20 (a) act to precipitate my death sooner than I otherwise would, while I still have the physical
21 ability to do so, depriving me of the coveted, valuable time with my family and loved ones; or
22 (b) wait until my progressive illness will take away the physical ability to use AID, forcing me to
23 endure the final, painful ravages of this terminal illness, which I want to avoid at all costs. The
24 time for that decision is imminent; I will need to make this excruciating decision. Other
25 terminally ill and mentally capable Californians without physical disabilities are not forced to
26 make this choice.

27 17. I do not want my advancing physical disability to prevent me from accessing
28 AID. I implore the court to determine that patients like me are empowered to have the assistance

1 that they need to achieve a peaceful death via AID, so that they don't have to leave their loved
2 ones and this beautiful world early, but they can go on their own time—and with the peace of
3 mind to know that that assistance is there to help them out gracefully. And then I can picture my
4 death, my end of life option, as beautiful as my life has been.

5 I declare under penalty of perjury under the laws of the United States of America and the
6 State of California that the foregoing is true and correct and that this declaration is executed on
7 September 10, 2021, in Sierraville, California.

8  2021-09-10 18:53:18 UTC - 73.202.121.105
9 AssureSign® 33000a05-a832-4932-b440-ad9f0115e99e

10 Plaintiff Sandra Morris

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20 LONNY SHAVELSON, M.D.; JANE DOE;
21 SANDRA MORRIS; ROBERT
22 USLANDER, M.D.; GARY PASTERNAK,
23 M.D.; & RICHARD MENDIUS, M.D.; on
24 behalf of themselves and all others similarly
25 situated,

26 Plaintiffs,

27 v.

28 CALIFORNIA DEPARTMENT OF
HEALTH CARE SERVICES; ROBERT
BONTA, Attorney General
of the State of California, in his official
capacity,

Defendants.

) Case No.

) Civil Rights

) **CLASS ACTION COMPLAINT FOR
DECLARATORY AND INJUNCTIVE
RELIEF**

- 1. Violation of Title II of the Americans with Disabilities Act of 1990 (42 U.S.C. §§ 12101 *et seq.*)
- 2. Violation of California Government Code Section 11135
- 3. Violation of the California Unruh Act (Cal. Civil Code § 51 *et seq.*)
- 4. Violation of the California Constitution (Equal Protection)

1 Plaintiffs, on behalf of themselves and all others similarly situated, hereby file this class
2 action complaint, and allege as follows:

3 **INTRODUCTION**

4 1. California’s End of Life Options Act (“EOLOA”), Cal. Health & Safety Code
5 § 443 *et seq.*, allows mentally competent, terminally ill adults to choose peaceful and dignified
6 deaths. Under the EOLOA, such patients can request from their physicians prescription
7 medication that can be ingested to achieve a peaceful death. This option is known as aid in dying
8 (“AID”) and is one type of health-care service available to terminally ill patients.

9 2. However, there is one group of Californians who cannot avail themselves of the
10 benefits of this compassionate law: physically disabled individuals whose disability prevents
11 them from self-administering the AID medication without assistance. Because the EOLOA
12 requires patients to self-administer AID drugs *and prohibits any assistance*, patients whose
13 disability hinders their hand strength or mobility are excluded from this State program.

14 3. Plaintiff-patients are mentally competent Californians with terminal illnesses that
15 cause progressive loss of bodily function, and who want to avoid the final ravages of their
16 illnesses by availing themselves of AID under the EOLOA, but because of their progressive
17 illness and advancing disability, they either (1) cannot self-administer the AID medicine without
18 assistance, or (2) will not be able to self-administer the AID medication without assistance at the
19 time they wish to do so. For the latter group, Plaintiffs are faced with a perverse choice: act to
20 ingest the AID medication earlier than they would like—while they retain the physical ability to
21 do so—or else suffer a death they hope to avoid because they will lack the ability to self-
22 administer without assistance.

23 4. This civil rights class action seeks to rectify the exclusion of physically disabled
24 individuals from the EOLOA. More specifically, this lawsuit challenges the State of California’s
25 (“the State’s”) failure to ensure that its legislation does not discriminate against physically
26 disabled individuals and/or provides reasonable disability accommodations required under
27 federal and California law—specifically, the State’s failure to ensure physically disabled
28 Californians are afforded equal benefit of and access to the EOLOA.

1 § 11135 (“Section 11135”). Ms. Morris has lost use of her legs; cannot stand or walk; has limited
2 use of her hands and arms; requires use of a wheelchair for mobility; and requires assistance with
3 every activity of daily living. Ms. Morris is a resident of Sierraville, California.

4 15. Plaintiff Morris was diagnosed with ALS in January 2018, when she was 51 years
5 old. Since her diagnosis, she has experienced the progress of this illness. Ms. Morris wants the
6 option of AID under the EOLOA available to her. Absent judicial intervention, the assistance
7 prohibition will force her to (1) act to precipitate her death sooner than she otherwise would,
8 while she still has the physical ability to do so, depriving her of some valuable time with her
9 family and loved ones; or (2) to wait until her progressive illness will rob her of the physical
10 ability to use AID, forcing her to endure the final ravages of this terminal illness, which she
11 wants to avoid at all costs. Like other terminally ill Californians who qualify under the EOLOA,
12 Ms. Morris wants to ingest the AID medications when she wants it—not beforehand. She does
13 not want her advancing physical disability to prevent her from accessing AID.

14 16. According to Dr. Shavelson, if Ms. Morris loses her ability to ingest AID as her
15 ALS symptoms progress, she imminently will be forced to endure the sort of death by
16 suffocation she wants to avoid.

17 17. Plaintiff Robert Uslander, M.D. is a resident of San Diego, California. Dr.
18 Uslander provides Integrated MD Care. Dr. Uslander includes providing AID in his medical
19 practice. In his practice Dr. Uslander has seen the assistance prohibition in the EOLOA operate
20 to discriminate against and adversely affect many physically disabled patients—forcing them to
21 choose to act sooner while physically able to do so; or to wait, and then lose the ability to access
22 AID, enduring the prolonged sort of death they wished to avoid.

23 18. Plaintiff Gary Pasternak, M.D., MPH, is a resident of Los Gatos, California. Dr.
24 Pasternak is the Medical Director at Mission Hospice in San Mateo, California. He is Board
25 certified in Internal Medicine, Hospice and Palliative Medicine, Geriatrics, and Occupational and
26 Environmental Medicine. Dr. Pasternak graduated from University of California at San Diego
27 School of Medicine and completed his residency training in internal medicine at University of
28 West Virginia and University of North Carolina, Chapel Hill. He received his Master’s of Public

1 Health from UC Berkeley. In 2007, he was ordained at the Chaplaincy Institute for Arts and
2 Interfaith Ministries in Berkeley. Like the other Physician Plaintiffs in this case, Dr. Pasternak
3 has seen the assistance prohibition in the EOLOA operate to discriminate against and adversely
4 affect many of his physically disabled patients—forcing them to choose to act sooner while
5 physically able to do so; or to wait, and then lose the ability to access AID, enduring the
6 prolonged sort of death they wished to avoid.

7 19. Plaintiff Richard Mendius, M.D., is a resident of San Anselmo, California. Dr.
8 Mendius is a neurologist with a specific interest in the diagnosis and treatment of ALS. He is
9 also one of the leading aid-in-dying physicians in Sonoma County and has extensive aid-in-dying
10 experience. Like the other Physician Plaintiffs in this case, Dr. Mendius has seen (and continues
11 to see) the assistance prohibition in the EOLOA operate to discriminate against and adversely
12 affect many of his physically disabled patients—forcing them to choose to act sooner while
13 physically able to do so; or to wait, and then lose the ability to access AID, enduring the
14 prolonged sort of death they wished to avoid.

15 20. Defendant California Department of Health Care Services (“DHCS”) is the
16 department within the State of California (“the State”) charged with overseeing the EOLOA. The
17 DHCS is an arm of the State of California, which is responsible for the actions, omissions,
18 policies, procedures, practices, and customs of its various agents, agencies, and employees,
19 including the California Legislature. At all relevant times, the DHCS and the State were
20 responsible for ensuring that their actions, omissions, policies, procedures, practices, and
21 customs—and those of their agents, agencies, and employees—comply with the laws of the
22 United States and the State.

23 21. Defendant Robert Bonta is the Attorney General of the State. He is charged with
24 criminally prosecuting anyone providing assistance to physically disabled, terminally ill patients
25 who are unable to ingest AID medication without assistance. He is sued in his official capacity.

26 **BRIEF STATUTORY BACKGROUND**

27 22. Under the EOLOA “an adult with the capacity to make medical decisions and
28 with a terminal disease may make a request to receive a prescription for an aid-in-dying drug,”

1 provided he or she is a California resident, and “has the physical and mental ability to self-
2 administer the aid-in-dying drug.” Cal. Health & Safety Code § 443.2(a).

3 23. Attending physicians are protected from civil, criminal, and professional liability,
4 but *only* to the extent they comply with the provisions of the Act. *See id.* at § 443.14 (c) (“a
5 health care provider shall not be subject to civil, criminal, administrative . . . or other liability for
6 participating in this part”); *See also id.* at § 443.16 (c) (“Notwithstanding any contrary provision
7 in this section, the immunities and prohibitions on sanctions of a health care provider are solely
8 reserved for actions of a health care provider taken pursuant to this part.”)

9 24. In the Act’s current form, no one can assist the patient in ingesting the AID
10 medication and be in compliance with the Act. *See id.* at § 443.14(a) (protecting individuals
11 “present when the qualified individual self-administers the prescribed [AID] drug . . . so long as
12 the person does not assist the qualified person in ingesting the [AID] drug.”).

13 25. Title II of the ADA protects disabled individuals from discrimination by public
14 entities: “no qualified individual with a disability shall by reason of such disability be excluded
15 from participation in or be denied the benefits of the services, programs or activities of a public
16 entity, or be subjected to discrimination by any such entity.” 42 U.S.C. § 12132. The
17 implementing regulations of the ADA further define discrimination by a Title II entity, including
18 without limitation: denying disabled individuals the opportunity to participate in or benefit from
19 an aid, benefit, or service; otherwise limiting disabled individuals in the enjoyment of any right,
20 privilege, advantage, or opportunity enjoyed by others; utilizing criteria or methods of
21 administration that have the effect of subjecting individuals with disabilities to discrimination;
22 failing to make reasonable modifications in policies, practices, or procedures to accommodate
23 disabled individuals, unless the modifications would fundamentally alter the nature of the
24 services; and imposing or applying eligibility criteria that screen out or tend to screen out an
25 individual with a disability or any class of individuals with disabilities from fully and equally
26 enjoying any service, program, or activity, unless such criteria can be shown to be necessary for
27 the provision of the service, program, or activity being offered. *See* 28 C.F.R. § 35.130.

FACTUAL ALLEGATIONS

1
2 26. The State discriminates against Plaintiffs Morris and Doe, as well as similarly
3 situated Californians with terminal illnesses involving progressive loss of physical ability, by
4 enacting the EOLOA in a way that excludes physically disabled individuals who are unable to
5 self-administer AID medication without assistance and failing to make reasonable modifications
6 in policies, practices, or procedures to accommodate Plaintiff Morris, Plaintiff Doe, and others
7 like them. The State has failed to make these reasonable modifications/accommodations, even
8 though doing so is feasible and readily achievable, and the State cannot demonstrate that making
9 the requested modifications/accommodations would fundamentally alter the nature of the
10 EOLOA.

11 27. The State has knowingly and intentionally denied these physically disabled
12 persons the full and equal enjoyment of its services, privileges, advantages, businesses, and
13 accommodations. The State has engaged in this discriminatory conduct, despite the fact that its
14 programs and services could easily be brought into compliance with the ADA and California
15 law, and despite the fact that the State is and has been fully aware that its conduct and practices
16 have and continue to cause harm these physically disabled individuals, including segregation and
17 exclusion.

18 28. The EOLOA has improved the well-being of Californians by providing them with
19 the comfort of knowing that they can choose to seek medication to precipitate a peaceful death if
20 they find themselves trapped in an unbearable dying process. The principal reasons patients
21 choose AID are existential suffering, inability to enjoy life, and loss of autonomy. Whether or
22 not a patient chooses to ingest the medication, the mere fact that the patient has the ability to do
23 so—and thus control end-of-life decisions (*i.e.*, retain some measure of autonomy)—gives the
24 patient great peace of mind.

25 29. The EOLOA requires that the medication be self-administered *and forbids*
26 *assistance with ingestion*. The EOLOA uses the term “ingest” throughout. This usually means
27 the patient will drink the medication from a cup or straw, but some patients cannot consume the
28 medication orally, and thus “ingest” the medication by pressing a plunger on a feeding tube or a

1 rectal tube.

2 30. The prohibition on assistance with ingestion functions to prevent dying
3 individuals with certain physical disabilities, such as Plaintiffs Morris and Doe, and members of
4 the Plaintiff-Patient Class, from accessing AID. Patients dying of ALS and MS, for example,
5 experience progressive loss of bodily function and integrity, losing the ability to control and/or
6 move their bodies. In advanced ALS and/or MS, patients may retain only the ability to make eye
7 movements.

8 31. Under the EOLOA, terminally ill individuals with physical disabilities like
9 Plaintiffs Morris and Doe are denied the option of AID because of their extreme physical
10 disability. This denial of an option afforded to other terminally ill Californians discriminates
11 against people with disabilities, in violation of state and federal law.

12 32. The State also has discriminated against and continues to discriminate against the
13 Physician Plaintiffs and the proposed Physician Class, based on these physicians' association
14 with disabled individuals. Physician Plaintiffs and the proposed Physician Class are unable to
15 provide equal care to their physically disabled patients when compared to the care they are able
16 to provide able-bodied patients under the EOLOA. The Physician Plaintiffs and the proposed
17 Physician Class face criminal prosecution if they attempt to provide AID to physically disabled
18 patients who cannot self-administer the medication without assistance.

19 33. In the course of their medical practices, the Physician Plaintiffs often provide care
20 to patients dying of terminal neuromuscular diseases. These include, but are not limited to:

- 21 • ALS - amyotrophic lateral sclerosis
- 22 • MS - multiple sclerosis
- 23 • PSP - progressive supranuclear palsy
- 24 • MSA - multiple system atrophy
- 25 • Huntington's disease
- 26 • Muscular dystrophies
- 27 • Cerebral palsy
- 28 • Paralysis from strokes and brain cancers

- 1 • Parkinson's disease and related disorders
- 2 • Myasthenia Gravis
- 3 • SMA -- Spinal muscular atrophy
- 4 • Mitochondrial and other myopathies
- 5 • Ataxias

6 34. Patients with these conditions experience the progressive loss of bodily function
7 and integrity, while remaining fully mentally intact. Because of the prohibition in the EOLOA on
8 assistance with ingestion of the AID medication, some patients who are eligible for AID and
9 want to achieve a peaceful death via AID are unable to do so because they do not have the
10 physical ability to ingest without assistance. The Physician Plaintiffs currently have patients in
11 this position, and they will have such patients in the near- and long-term future.

12 35. Because of this problem created by the assistance prohibition—specifically,
13 criminal prosecution of any clinician assisting a physically disabled patient—the Physician
14 Plaintiffs, and other clinicians like them, cannot—and do not—provide patients with these AID
15 services. They would like to do so, and believes it is their professional responsibility to do so, but
16 cannot unless and until this Court permits it.

17 36. Plaintiffs suffer continuous and ongoing/imminent discrimination. Plaintiff Morris
18 faces the imminent harm of not being able to take advantage of the benefits of the EOLOA (and
19 thus living a physically and emotionally painful life), or else ending life before she prefers.

20 37. Plaintiff Doe suffers continuous and ongoing/imminent discrimination. Plaintiff
21 Doe is unable to take advantage of the benefits of the EOLOA without some modicum of
22 assistance with ingesting the medication

23 38. The Physician Plaintiffs suffer continuous and ongoing / imminent injury by
24 being unable to provide care to his physically disabled patients who are unable to self-administer
25 AID medication under the EOLOA.

26 39. If the State would allow for accommodations to be made for physically disabled
27 patients otherwise qualified to benefit from the EOLOA, such as Plaintiff Morris, neither they
28 nor their physicians would suffer the injuries described herein.

1 46. **Questions of Fact and Law Common to the Class.** All members of the Patient
2 Class have been and continue to be denied their civil rights to full and equal access to the
3 benefits of the EOLOA because of the violations of disability nondiscrimination laws alleged
4 herein. There are numerous questions of law and fact common to the classes, including, but not
5 limited to, the following:

- 6 a. Whether the State is a covered entity under Title II of the ADA, the Unruh Act,
7 and Section 11135;
- 8 b. Whether the State’s enactment of the EOLOA violates the ADA, the Unruh Act,
9 and Section 11135;
- 10 c. Whether the assistance prohibition of the EOLOA violates Article 1, Section 7 of
11 the California Constitution by infringing on the rights of members of the Patient
12 Class, who cannot ingest the AID medications without assistance due to their
13 physical disabilities;
- 14 d. Whether the assistance prohibition of the EOLOA violates Article 1, Section 7 of
15 the California Constitution by infringing on the rights of members of the
16 Physician Class, who provide end of life care to patients who cannot ingest the
17 AID medications without assistance due to their physical disabilities;
- 18 e. Whether Defendants have made reasonable modifications in their policies,
19 procedures, and practices to ensure that physically disabled individuals have full
20 and equal access to the benefits of the EOLOA;
- 21 f. Whether the State’s failure to accommodate patients who are physically unable to
22 self-administer AID medication without assistance under the EOLOA violates the
23 ADA, the Unruh Act, and Section 11135;
- 24 g. Whether Plaintiffs’ requested accommodation—specifically, a limited exception
25 to the prohibition in the EOLOA to assist an individual with ingesting AID
26 medications when the patient is physically disabled but otherwise qualified under
27 the EOLOA—fundamentally alters the EOLOA;
- 28 h. Whether the Physician Plaintiffs and the proposed Physician Class are entitled to

1 relief under associational or third party standing; and

- 2 i. Whether Plaintiffs and the members of the putative classes are entitled to
3 declaratory and/or injunctive relief, and the nature of such relief.

4 47. **Typicality.** The claims of the named Plaintiffs are typical of those of the classes.
5 Plaintiffs' claims are typical of the claims of the proposed classes in the following ways:

6 (a) Plaintiffs are members of their respective proposed classes; (b) Plaintiffs' claims arise from
7 the same legislation enacted by the State and criminal penalties under State law; (c) Plaintiffs'
8 claims are based on the same legal theories as those of the proposed classes and involve similar
9 factual circumstances; (d) the injuries suffered by the named Plaintiffs are similar to the injuries
10 suffered by the proposed class members; and (e) the relief sought herein will benefit the named
11 Plaintiffs and all class members alike. The claims of Plaintiffs are typical of those of the
12 proposed classes of persons who would like the benefit of the EOLOA and the physicians who
13 treat these patients.

14 48. **Adequacy.** The named Plaintiffs will fairly and adequately represent the interests
15 of their respective classes. They have no interests adverse to the interests of other members of
16 the proposed classes and have retained counsel who are competent and experienced in litigating
17 complex class actions and civil rights claims, including large-scale disability rights class actions.

18 49. **Federal Rule of Civil Procedure 23(b)(1).** Prosecuting separate actions by
19 individual class members would create a risk of inconsistent or varying adjudications with
20 respect to individual class members that would establish incompatible standards of conduct for
21 the State.

22 50. **Federal Rule of Civil Procedure 23(b)(2).** The State has acted and/or refused to
23 act on grounds that apply generally to the class, so that final injunctive relief or corresponding
24 declaratory relief is appropriate respecting the class as a whole.

25 51. Absent judicial relief that applies to the proposed classes, the State will continue
26 in its illegal course of conduct, which will result in further damages and injuries to the Plaintiffs
27 and the proposed classes.

FIRST CLAIM:

VIOLATION OF THE ADA, TITLE II, 42 USC §§ 12201 *et seq.*

[All Plaintiffs/Classes]

52. Plaintiffs replead and incorporate by reference, as if fully set forth hereafter, the allegations contained in all paragraphs of this Complaint and incorporate them herein as if separately replead.

53. Effective January 26, 1992, Plaintiffs were entitled to the protections of the “Public Services” provision of Title II of the Americans with Disabilities Act of 1990. Title II, Subpart A prohibits discrimination by any “public entity,” including any state or local government, as defined by 42 U.S.C. § 12131.

54. Pursuant to Title II of the ADA (42 U.S.C. § 12132), no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.

55. Patient Plaintiffs Morris and Doe were at all relevant times qualified individuals with a disability as defined by the ADA.

56. Defendants were and are at all relevant times public entities covered by Title II of the ADA and its accompanying regulations.

57. Defendants have violated Title II of the ADA by discriminating against physically disabled terminally ill Californians in enacting the EOLOA without accommodation to enable access. Defendants also have failed in their responsibilities under Title II of the ADA to provide their services, programs and activities in a full and equal manner to disabled persons as described herein, including, without limitation, failing to ensure that physically disabled terminally ill patients may take advantage of the EOLOA; to provide reasonable accommodations to physically disabled terminally ill Californians; and/or to modify its programs, services and activities to make the EOLOA accessible to physically disabled terminally ill persons, including Plaintiffs Morris and Doe. As a proximate result of the Defendants’ actions and omissions, Morris, Doe, and the proposed Patient Class were discriminated against in violation of Title II of

1 the ADA and of the regulations adopted to implement the ADA.

2 58. Under the implementing regulation governing “[g]eneral prohibitions against
3 discrimination” under Title II of the ADA:

- 4 ○ “[n]o qualified individual with a disability shall, on the basis of disability, be
5 excluded from participation in or be denied the benefits of the services, programs,
6 or activities of a public entity, or be subjected to discrimination by any public
7 entity,” 28 C.F.R. § 35.130(a);
- 8 ○ “[a] public entity, in providing any aid, benefit, or service, may not, directly or
9 through contractual, licensing, or other arrangements, on the basis of disability –”:
 - 10 ▪ “[d]eny a qualified individual with a disability the opportunity to
11 participate in or benefit from the aid, benefit, or service,” *id.* §
12 35.130(b)(1)(i); or
 - 13 ▪ “[o]therwise limit a qualified individual with a disability in the enjoyment
14 of any right, privilege, advantage, or opportunity enjoyed by others
15 receiving the aid, benefit, or service,” *id.* § 35.130(b)(1)(vii);
- 16 ○ “[a] public entity may not, directly or through contractual or other arrangements,
17 utilize criteria or methods of administration:”
 - 18 ▪ “[t]hat have the effect of subjecting qualified individuals with disabilities
19 to discrimination on the basis of disability,” *id.* § 35.130(b)(3)(i); or
 - 20 ▪ “[t]hat have the purpose or effect of defeating or substantially impairing
21 accomplishment of the objectives of the public entity's program with
22 respect to individuals with disabilities,” *id.* § 35.130(b)(3)(ii);
- 23 ○ “[a] public entity shall make reasonable modifications in policies, practices, or
24 procedures when the modifications are necessary to avoid discrimination on the
25 basis of disability, unless the public entity can demonstrate that making the
26 modifications would fundamentally alter the nature of the service, program, or
27 activity,” *id.* § 35.130(b)(7)(i); and
- 28 ○ “[a] public entity shall not impose or apply eligibility criteria that screen out or

1 tend to screen out an individual with a disability or any class of individuals with
2 disabilities from fully and equally enjoying any service, program, or activity,
3 unless such criteria can be shown to be necessary for the provision of the service,
4 program, or activity being offered,” *id.* § 35.130(b)(8).

5 59. The United States Court of Appeals for the Ninth Circuit Court has been clear that
6 a public entity may violate the ADA even if no regulation expressly proscribes its particular
7 conduct. *Barden v. City of Sacramento*, 292 F.3d 1073, 1076-78 (9th Cir. 2002).

8 60. The benefits of the EOLOA are inaccessible to physically disabled terminally ill
9 persons whose disability precludes their self-administration without assistance of AID
10 medications. For Ms. Morris, she imminently will be unable to achieve equal access to the
11 benefits of the EOLOA, unless and until the State permits an accommodation for her or
12 otherwise allows her to benefit from the EOLOA at the point that she is unable to administer
13 AID medications without assistance.

14 61. Ms. Morris intends to take advantage of the benefits of the EOLOA once her
15 medical conditions progress to the point that she cannot self-administer AID medication. The
16 acts of the State will cause irreparable injury imminently to Ms. Morris if not enjoined by this
17 Court.

18 62. The benefits of the EOLOA are inaccessible to physically disabled terminally ill
19 persons whose disability precludes their self-administration without assistance of AID
20 medications. For Ms. Doe she is unable to achieve equal access to the benefits of the EOLOA,
21 unless and until the State permits an accommodation for her or otherwise allows her to benefit
22 from the EOLOA as she is unable to self-administer AID medications without assistance.

23 63. The Physician Plaintiffs seek relief pursuant to remedies set forth in 42 U.S.C.
24 § 12203. They have been, and imminently will be, discriminated against in their attempts to treat
25 patients in Ms. Morris’s and/or Ms. Doe’s position, and assist them with accessing the benefits of
26 EOLOA. They have experienced specific, direct, and separate injury as a result of treating
27 physically disabled individuals like Ms. Morris and Ms. Doe. The Physician Plaintiffs face
28 criminal prosecution if they attempt to assist Ms. Morris, Ms. Doe, or any of their patients who

1 cannot self-administer AID medication without assistance.

2 64. Per § 12133 of the ADA, as a result of such discrimination, in violation of §
3 12132 of the ADA, Plaintiffs are entitled to the remedies, procedures and rights set forth in
4 Section 505 of the Rehabilitation Act of 1973 (29 USC § 794a).

5 **SECOND CLAIM:**

6 **VIOLATION OF CALIFORNIA GOVERNMENT CODE SECTION 11135**

7 **[Plaintiff Sandra Morris, Plaintiff Jane Doe, And The Patient Class]**

8 65. Plaintiffs replead and incorporate by reference, as if fully set forth again herein,
9 the allegations contained in all paragraphs of this Complaint and incorporates them herein as if
10 separately repled.

11 66. The DHCS, like the State legislature, receives financial assistance from the State
12 of California.

13 67. Ms. Morris and Ms. Doe are persons with a disability within the meaning of
14 California Government Code section 11135. The State will imminently deny Ms. Morris and Ms.
15 Doe full access to the benefits of its programs and activities for which the State receives financial
16 assistance from the State of California, and unlawfully subjected Ms. Morris, Ms. Doe, and other
17 persons with such physical disabilities to discrimination within the meaning of California
18 Government Code section 11135(a) based on their disabilities.

19 68. Ms. Morris and Ms. Doe's injuries are imminent, and they will be ongoing, so
20 long as the State does not modify the EOLOA or provide physically disabled Californians who
21 are otherwise eligible for the benefits of the EOLOA necessary accommodations.

22 **THIRD CLAIM:**

23 **VIOLATION OF UNRUH CIVIL RIGHTS ACT, Cal. Civil Code §§ 51 *et seq.***

24 **[All Plaintiffs/Classes]**

25 69. Plaintiffs replead and incorporate by reference, as if fully set forth again herein,
26 the allegations contained in all paragraphs of this Complaint and incorporate them herein by
27 reference as if separately repled hereafter.

28 70. The Unruh Act, California Civil Code 51(b), provides that:

1 All persons within the jurisdiction of this state are free and equal, and no matter
2 what their sex, race, color, religion, ancestry, national origin, disability, or medical
3 condition are entitled to the full and equal accommodations, advantages, facilities,
4 privileges, or services in all business establishments of every kind whatsoever.

5 71. The State is a business establishment within the meaning of the Unruh Act. The
6 State is an owner and operator of a business establishment.

7 72. The State violated the Unruh Act by its acts and omissions, as follows:

- 8 A. Failure to enact the EOLOA in a way that includes patients with physical
9 disabilities that limit their ability to self-administer AID medication
10 without assistance but who are otherwise eligible to the benefits of the
11 EOLOA;
- 12 B. Failure to modify policies and procedures as necessary to ensure Plaintiffs
13 full and equal access to the accommodations, advantages, facilities,
14 privileges, and/or services of the EOLOA;
- 15 C. Failure to provide reasonable accommodations to patients with physical
16 disabilities that limit their ability to self-administer AID medication
17 without assistance but who are otherwise eligible to the benefits of the
18 EOLOA; and
- 19 D. Violation of the ADA (as pled in the First Claim, *supra*), a violation of
20 which is a violation of the Unruh Act. Cal. Civil Code § 51(f).

21 73. With respect to the State's violations of the Unruh Act that are not predicated on
22 violations of the ADA, the State's behavior was intentional: it was aware of and/or was made
23 aware of its duties to refrain from establishing discriminatory policies and barriers that prevent
24 persons with physical disabilities like Ms. Morris and Ms. Doe from obtaining full and equal
25 access to the EOLOA. The State's discriminatory practices and/or policies that deny full
26 enjoyment of its legislation like the EOLOA to persons with physical disabilities indicates actual
27 and implied malice and conscious disregard for the rights of Ms. Morris, Ms. Doe and other
28 similarly disabled individuals. At all times herein mentioned, the State knew, or in the exercise

1 of reasonable diligence should have known, that the EOLOA violated disabled access
2 requirements and standards and had a discriminatory impact upon Plaintiffs, other persons with
3 physical disabilities similar to plaintiffs Morris and Doe and treating physicians like the
4 Physician Plaintiffs but the State failed to rectify the violations, and presently continues such a
5 course of illegal conduct in maintaining barriers that discriminate against plaintiffs Ms. Morris,
6 Doe, and similarly-situated terminally ill disabled persons, and their treating physicians like the
7 Physician Plaintiffs. Accordingly, the State has engaged in willful affirmative misconduct in
8 violating the Unruh Act.

9 74. As of the date of the filing of this Complaint, the EOLOA has not been amended
10 to allow Ms. Morris, Ms. Doe, and the putative Patient Class to benefit from the EOLOA. Nor
11 has it been amended to permit the Physician Plaintiffs and the putative Physician Class to
12 provide the appropriate and necessary care to their patients. Likewise, no accommodations have
13 been made to allow Plaintiffs and the putative classes to avail themselves of the EOLOA.
14 Plaintiffs’ injuries are ongoing so long as the State does not modify its policies and procedures to
15 allow Ms. Morris, Ms. Doe and other persons with physical disabilities to benefit from the
16 EOLOA.

17 **FOURTH CLAIM:**
18 **VIOLATION OF CONSTITUTIONAL RIGHT TO EQUAL PROTECTION**
19 **Cal. Const. Art. 1 § 7**
20 **[All Plaintiffs/Classes]**

21 75. Plaintiffs replead and incorporate by reference, as if fully set forth again herein,
22 the allegations contained in all paragraphs of this Complaint and incorporate them herein by
23 reference as if separately repled hereafter.

24 76. California’s Constitution guarantees equal protection under the law to all persons.
25 Cal. Const. Art. 1 § 7.

26 77. Through the EOLOA assistance prohibition, otherwise qualified patients whose
27 disability hinders their hand strength or mobility are excluded from this State program. As a
28

1 result, the EOLOA discriminates against members of the Patient Class in violation of the
2 California Constitution.

3 78. The EOLOA's assistance prohibition also discriminates against members of the
4 Physician Plaintiffs, and the class they represent, who provide end of life care to patients who
5 cannot ingest the AID medications without assistance due to their physical disabilities, in
6 violation of the California Constitution.

7 79. The EOLOA's assistance prohibition bears no rational relationship to any
8 legitimate state interest, does not further any compelling state interest, nor is it the least
9 restrictive means of advancing any compelling state interest.

10 **PRAYER**

11 1. Plaintiffs have no adequate remedy at law to redress the wrongs suffered as set
12 forth in this Complaint. Plaintiffs have suffered and will continue to suffer irreparable injury as a
13 result of the unlawful acts, omissions, policies, and practices alleged herein, unless Plaintiffs are
14 granted the relief they request. Plaintiffs and Defendants have an actual controversy and
15 opposing legal positions regarding the alleged legal violations. The need for relief is critical
16 because the rights at issue are paramount under the laws of the United States and the State of
17 California.

18 WHEREFORE, Plaintiffs and the putative classes pray for judgment and the following
19 specific relief:

20 2. A declaratory judgment that the actions, omissions, and failures complained over
21 herein violated (and continue to violate) the ADA, California Government Code, Unruh Act, and
22 the California Constitution, insofar as the State enacted legislation that discriminates against
23 terminally ill individuals based on physical disability; fails to make reasonable modifications in
24 policy and practice for Plaintiffs and other similarly situated persons; and fails to modify its
25 programs, services, and activities to make the EOLOA accessible to terminally ill, physically
26 disabled persons.

27 3. An order requiring that Defendants, their agents, officials, employees, and all
28 persons and entities acting in concert with them:

- a. Cease the unlawful acts, conditions, and practices described in this Complaint;
- b. Provide reasonable accommodation within the EOLOA for persons with physical disabilities that prevent them from self-administering AID medication without assistance;
- c. Ensure that terminally ill persons with disabilities are not denied the benefits of, or participation in, programs, services, and activities of the EOLOA; and/or
- d. Implement non-discriminating protocols, policies, and practices for accommodating terminally ill persons with physical disabilities within the EOLOA.

4. Certify the requested classes, subject to any modification that the Court believes appropriate.

5. Appoint Plaintiffs’ counsel as Class Counsel.

6. Retain jurisdiction until the Court is satisfied that the unlawful policies, practices, acts, and omissions as complained of herein no longer occur, and cannot recur.

7. Award to Plaintiffs all reasonable attorney fees, litigation expenses, and costs of this proceeding as provided by law, including but not limited to the ADA, 42 U.S.C. § 12205; the Unruh Act, California Civil Code § 52; and “public interest” attorney fees, litigation expenses and costs pursuant to California Code of Civil Procedure § 1021.5.

8. Grant such other and further relief as this Court may deem just and proper.

Dated: August 27, 2021

PEIFFER WOLF CARR KANE & CONWAY, LLP

By: /s/ Catherine Cabalo

Catherine Cabalo

Attorneys for Plaintiffs

1 After reviewing the papers, this Court concludes that Plaintiffs Jane Doe and Sandra
2 Morris (“Plaintiffs”) have established sufficient cause and have made a showing of irreparable
3 harm if a temporary restraining order (“TRO”) is not issued immediately. The prohibition on
4 receiving assistance with ingesting aid-in-dying (“AID”) medication under California’s End of
5 Life Options Act (“EOLOA”) excludes Californians with physical disabilities that prevent them
6 from being able to ingest the medication without assistance. Plaintiffs are likely to succeed on
7 their legal claims, and absent a TRO or preliminary injunction, Plaintiffs will suffer grave
8 irreparable harm in the form of either (1) dying prematurely; or (2) being forced to endure the
9 final ravages of their illness, which they want to avoid.

10 THEREFORE, IT IS HEREBY ORDERED:

- 11 1. That Plaintiffs be allowed to use and receive the benefits offered by the EOLOA
12 without the prohibition on assistance in ingesting AID medication from their treating
13 physician.
- 14 2. That Defendants, together with their officers, agents, servants, employees, and
15 attorneys, are ENJOINED and RESTRAINED from taking any action against
16 Plaintiffs or their treating physicians on account of their treating physicians’
17 assistance to Plaintiffs with ingesting AID medication under the EOLOA.
- 18 3. That Defendants shall show cause as to why a preliminary injunction should not
19 issue: (a) allowing Plaintiffs to use and receive the benefits offered by the EOLOA
20 without the prohibition on assistance in ingesting AID medication from their treating
21 physicians; and (b) enjoining them, their officers, agents, servants, employees, and
22 attorneys from taking any action against Plaintiffs or their treating physicians on
23 account of their treating physicians’ assistance to Plaintiffs with ingesting AID
24 medication under the EOLOA.
- 25 4. Plaintiffs shall file a proof of service of their moving papers and this Order on or
26 before _____, 2021. Defendants’ opposition papers shall be filed on or

1 before _____, 2021, and Plaintiffs' reply shall be filed on or before
2 _____, 2021. The hearing shall be held on _____ 2021, at
3 _____ a.m./p.m., in Courtroom 4, of the Honorable Vince Chhabria at the United
4 States District Court for the Northern District of California, 17th Floor, 450 Golden
5 Gate Avenue, San Francisco, CA 94102.

6 **IT IS SO ORDERED.**

7
8 Dated: September ____, 2021

9 _____
10 The Honorable Vince Chhabria
11 United States District Judge
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