JOHN KAPPOS (Cal. S.B. #171977)
jkappos@omm.com
O'MELVENY & MYERS LLP
2501 North Harwood Street, Suite 1700
Dallas, Texas 75201
Telephone: (972) 360-1900
Facsimile: (972) 360-1901

KEVIN DÍAZ (*pro hac vice*)
kdiaz@compassionandchoices.org
JESSICA PEZLEY (*pro hac vice*)
jpezley@compassionandchoices.org
COMPASSION & CHOICES
101 SW Madison Street, #8009
Portland, Oregon 97207
Telephone: (503) 943-6532

Attorneys for Intervenors

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

UNITED SPINAL ASSOCIATION, et al., Plaintiffs, v. STATE OF CALIFORNIA, et al., Defendants.	Case No. 2:23-cv-03107-FLA (GJSx) **[PROPOSED] MOTION TO DISMISS** Judge: Hon. Fernando L. Aenlle-Rocha Date: October 20, 2023 Time: 1:30 p.m. Courtroom: 6B, 6th Floor

NOTICE OF MOTION AND MOTION TO DISMISS

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

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

Dated: September 21, 2023

JOHN KAPPOS
O'MELVENY & MYERS LLP

By: /s/ *John Kappos*
John Kappos

Attorney for Intervenors

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I. INTRODUCTION

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

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

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

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

II. BACKGROUND

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

III. LEGAL STANDARD

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

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

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

IV. ARGUMENT

A. Plaintiffs fail to state a violation of the ADA

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

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

1. The EOLOA unequivocally benefits terminally ill patients

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

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

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

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

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

2. The EOLOA contains numerous safeguards that prevent discrimination

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

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

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

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

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

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

C. Plaintiffs' equal protection claim fails

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

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

1. The proposed classes are not similarly situated

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

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

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

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

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

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

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

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

3. The EOLOA satisfies any level of means-ends scrutiny

a. The Court should apply rational basis review

The law is abundantly clear that "unless a classification warrants some form of heightened review because it jeopardizes exercise of a fundamental right or categorizes on the basis of an inherently suspect characteristic, the Equal Protection Clause requires only that the classification rationally further a legitimate state interest." *Nordlinger*, 505 U.S. at 10.

Plaintiffs argue that the EOLOA implicates the fundamental right "to live" (Dkt. 1 ¶¶ 189, 192), and that the EOLOA "interferes with the State's interest in suicide prevention by authorizing the act of helping someone else kill themselves based on the perceived nature and duration of their physical health and disability." *Id*. ¶ 191. The EOLOA, however, does not implicate a fundamental right to live—EOLOA participation is entirely voluntary, and those who want to live out their natural life and die from their disease are free to do so. The EOLOA simply confers additional benefits for end-of-life care. *See supra* at 10-11.

Furthermore, Plaintiffs' claim that the EOLOA necessarily interferes with a state interest in suicide prevention ignores findings by other courts that the EOLOA "carefully regulates" and limits "who can be prescribed such medication and how they can take it." *Shavelson*, 608 F. Supp. 3d at 924 (N.D. Cal. 2022); *id*. (the EOLOA "sets out a series of hurdles that otherwise qualified people must clear"). As demonstrated above, the EOLOA was drafted with numerous guidelines that ensure that access to aid-in-dying medication is strictly voluntary and available only to individuals who comply with its myriad procedural requirements, including attestation and evaluation by multiple witnesses and physicians. Indeed, knowing violations of the EOLOA's requirements are punishable as felonies under the Act. *See* Cal. Health & Safety Code § 443.17. And proposed modifications to the law that would come close to "sanctioning the act of helping someone else kill themselves" have been rejected in recent litigation. *Shavelson*, 608 F. Supp. 3d at

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

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

b. The EOLOA satisfies strict scrutiny in any event

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

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

D. Plaintiffs' due process claim fails

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

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

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

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

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

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

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

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

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

V. CONCLUSION

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

Dated: September 21, 2023

s/ John Kappos

O'MELVENY & MYERS LLP
John Kappos (SBN 171977)
jkappos@omm.com
2501 North Harwood Street, 17th Floor
Dallas, TX 75201
Telephone: (972) 360-1900
Facsimile: (972) 360-1901

COMPASSION & CHOICES
Kevin Díaz (*pro hac vice*)
kdiaz@compassionandchoices.org
Jessica Pezley (*pro hac vice*)
jpezley@compassionandchoices.org
101 SW Madison Street, #8009
Portland, OR 97207
Telephone: (503) 943-6532

Attorneys for Intervenors

CERTIFICATE OF COMPLIANCE

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

Dated: September 21, 2023

/s/ John Kappos

O'MELVENY & MYERS LLP
John Kappos (SBN 171977)
jkappos@omm.com
2501 North Harwood Street, 17th Floor
Dallas, TX 75201
Telephone: (972) 360-1900
Facsimile: (972) 360-1901

COMPASSION & CHOICES
Kevin Díaz (*pro hac vice*)
kdiaz@compassionandchoices.org
Jessica Pezley (*pro hac vice*)
jpezley@compassionandchoices.org
101 SW Madison Street, #8009
Portland, OR 97207
Telephone: (503) 943-6532

Attorneys for Intervenors Lambert "Burt" Bassler, Judith Coburn, Peter Sussman, Chandana Banerjee, MD, MPH, HMDC, FAAHPM, Catherine Sonquist Forest, MD, MPH, FAAFP, and Compassion & Choices Action Network (CCAN)