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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

CHRISTIAN MEDICAL & DENTAL ASSOCIATIONS, et al., Plaintiffs, v. **ROB BONTA, et al.**, Defendants.	Case No. 5:22-cv-00335-FLA-GJS **NOTICE OF MOTION; MOTION TO INTERVENE** Judge: Hon. Fernando L. Aenlle-Rocha Date: July 8, 2022 Time: 1:30 p.m. Courtroom: 6B

TO ALL PARTIES AND THEIR COUNSEL OF RECORD:

PLEASE TAKE NOTICE that on July 8, 2022, at 1:30 p.m., or as soon thereafter as counsel may be heard, before the Honorable Fernando L. Aenlle-Rocha, in the above-titled court, Courtroom 6B, Compassion & Choices Action Network (CCAN), Andrew Flack, Chandana Banerjee, M.D., and Catherine Sonquist Forest, M.D. ("Intervenors"), will, and hereby do, move for leave to intervene as of right as

defendants in the above-captioned matter based on their legally protected rights pursuant to Federal Rule of Civil Procedure 24(a), in accordance with Intervenors' Motion to Intervene. Alternatively, Intervenors move for permission to intervene pursuant to Federal Rule of Civil Procedure 24(b).

This motion is made following the conference of counsel pursuant to Local Rule 7-3, which took place on May 10 & 11, 2022, and through subsequent email communications. Plaintiffs have advised that they oppose; Defendants have advised that they take no position.

DATED: May 18, 2022

Respectfully submitted,

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I. INTRODUCTION

Knowing you can choose death is a constant reminder to choose life. This is certainly the case for Andrew Flack ("Flack," as his hockey coaches, teammates, and friends refer to him). Flack is a thirty-three-year-old special education teacher, son/grandson/brother/fun-uncle, hockey player, and dog lover who has spent the past eighteen months living with a terminal prognosis from colorectal cancer. *See* Declaration of Andrew Flack (Ex. A) ¶¶ 2, 8, 13. Flack's cancer is aggressive and rare, but so is his will to live. In fact, Flack heroically completed his first round of oral chemo, radiation, and removal surgery while teaching high school special education. *Id.* ¶ 7. Since then he has been through two brutal rounds of intravenous chemotherapy, another round of radiation, and another major removal surgery, with plenty of other minor procedures, surgeries, and hospitalizations in between. *Id.* ¶¶ 7-8. The most recent major surgery left him unable to sit for over a year due to a wound-site infection that developed during chemotherapy. *Id.* ¶ 7. That surgery also revealed that the cancer had metastasized throughout his pelvic region, including into his bones. *Id.* It was the moment that Flack's doctors told him they could not cure his cancer. *Id.*

When Flack first requested medical aid in dying in December 2020, he had just received a terminal prognosis after being hospitalized for a painful and debilitating kidney infection. *Id.* ¶¶ 9-10. His doctor explained that these bouts of illness and hospitalizations would continue as the cancer ravaged his body. *Id.* ¶ 8. Flack's doctor also explained that for a young man with a strong will to live, death could be particularly slow and agonizing. *Id.* Flack could not bear the thought of his family and friends seeing him as a shell of himself, laying helpless in a hospital bed as he suffered excruciating pain. *Id.* ¶ 16. So at that moment, he made his first request for medical aid in dying. *Id.* ¶ 10. But he was determined to make it six more months—to his thirty-third birthday—at which point his doctor would revisit the aid-in-dying

conversation. *Id.* That mindset served Flack well. He made it to his thirty-third birthday and has since revisited the aid-in-dying conversation with his physician *twice*. *Id.*

Flack has an unfilled prescription for a medical aid-in-dying drug. *Id.* ¶ 4. He may never fill it. *Id.* ¶ 11. But knowing he has the option to choose how he will die and on his own terms has helped him choose life, and to live each day he has remaining to the fullest. *Id.* ¶ 13. Of course, death will come for Flack one day, as it does for us all. And when it does, Flack would like the option to die the way he has lived: on his own terms. *Id.* ¶¶ 6, 15.

Plaintiffs want to take this option away from Mr. Flack. They aim to invalidate California Senate Bill 380 ("SB 380"), which amended California's End of Life Option Act ("EOLOA"). *See* Cal. Health & Safety Code § 443 *et seq*. Plaintiffs claim that SB 380 infringes upon their First Amendment rights of free exercise and free speech, and their Fourteenth Amendment rights of due process and equal protection. *See* Dkt. 1 at 28. Plaintiffs ask the court to declare SB 380 unconstitutional, and to enjoin Defendants—the California Attorney General, the Director of the California Department of Public Health, and the members of the Medical Board of California—from enforcing the provisions of SB 380 applicable to objecting providers. *Id.*; *see also* Dkt. 50-1 (motion for a preliminary injunction).

Defendants have filed their oppositions to Plaintiffs' injunctive motion, which demonstrate Plaintiffs' misunderstanding of the statutory framework, and that the minimal, affirmative requirements SB 380 imposes on non-participating providers like Plaintiffs are, at most, incidental infringements that are constitutionally permitted in regulating the practice of medicine. *See* Dkt. 53; Dkt. 55. But what's missing from this dispute are the perspectives of those most invested in SB 380—the bill's sponsor; the patients whose interests are literally a matter of life and death; and the physicians who provide end-of-life care and consider the ability to offer medical aid in dying instrumental to how they practice medicine and treat terminally ill patients.

Accordingly, pursuant to Rule 24 of the Federal Rules of Civil Procedure, Compassion & Choices Action Network (CCAN), Andrew Flack, Chandana Banerjee, M.D., and Catherine Sonquist Forest, M.D. ("Intervenors") seek leave to intervene as defendants, by right, in the above-captioned proceeding. CCAN advocates and lobbies for laws that protect and expand end-of-life options. CCAN is entitled to intervene in this action as a matter of right because it sponsored SB 380, the measure being challenged in this litigation. Request for Judicial Notice, Ex. 1 at 18 ¶ 3. Andrew Flack is a thirty-three-year-old California resident and cancer patient with a terminal prognosis and an unfilled prescription for a medical aid-in-dying drug. Ex. A ¶¶ 2, 4, 8. Dr. Chandana Banerjee treats terminally ill patients and serves as an assistant clinical professor of supportive care medicine—a role through which she developed and leads a hospice and palliative medicine fellowship. Declaration of Chandana Banerjee, M.D., (Ex. B) ¶¶ 3-4. Dr. Banerjee is also First Vice Chair of the Board of Directors at Compassion & Choices. *Id.* ¶ 3. Dr. Catherine Sonquist Forest treats terminally ill patients and serves as a clinical associate professor of family medicine. Declaration of Catherine Forest, M.D. (Ex. C) ¶¶ 3-4. Dr. Forest also has personal experience with medical aid in dying because her husband, Will, utilized the End of Life Option Act when his rapidly progressing unclassified motor neuron disease became unbearable. *Id.* ¶ 7.

Intervenors are directly affected by Plaintiffs' case, which seeks to enjoin SB 380. Because Defendants may not adequately represent Intervenors' narrower and more parochial interests, Intervenors' timely motion to intervene as a matter of right should be granted under Rule 24(a) of the Federal Rules of Civil Procedure. Alternatively, the Court should exercise its discretion to grant Intervenors permission to intervene pursuant to Rule 24(b).

II. LEGAL STANDARD

Intervenors are entitled to intervene in this proceeding as a matter of right, pursuant to Fed. Rule Civ. P. 24(a), which provides, in pertinent part:

> On timely motion, the court must permit anyone to intervene who . . . (2) claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest.

The Ninth Circuit has held that, pursuant to Rule 24, the qualification for intervention as a matter of right depends on four factors: (1) whether the motion is timely; (2) whether the applicant has a significant, protectable interest relating to the subject of the litigation; (3) whether that interest will be practically impaired if intervention is not granted; and (4) whether the applicant's interest is adequately represented by the parties to the action. *Californians For Safe & Competitive Dump Truck Transp. v. Mendonca*, 152 F.3d 1184, 1189 (9th Cir. 1998). The Ninth Circuit construes this test broadly in favor of intervention. *See United States v. Oregon*, 913 F.2d 576, 588 (9th Cir. 1990). Each of these four factors weighs in favor of Intervenors' request to intervene as a matter of right in this proceeding.

III. ARGUMENT

A. Intervenors Should Be Allowed to Intervene As a Matter of Right Under Federal Rule of Civil Procedure 24(a)

1. Intervenors' Motion for Intervention Is Timely

To determine whether a motion to intervene is timely, the Ninth Circuit considers three factors: (1) the stage of the proceedings at which an applicant seeks to intervene; (2) the prejudice to other parties; and (3) the reason for and length of delay. *Oregon*, 913 F.2d at 588-89. Intervenors meet the requirements for timely intervention. This motion is filed at an early stage in this litigation—less than three months after Plaintiffs filed their complaint, before responsive pleadings are due, and before any substantive rulings have been made. Thus, there is no delay or prejudice caused by the timing of Intervenors' motion. *See, e.g.*, *Northwest Forest Resource Council v. Glickman*, 82 F.3d 825, 837 (9th Cir. 1996), *as amended on denial of*

reh'g (May 30, 1996) (motion to intervene deemed timely and "does not appear to have prejudiced either party in the lawsuit, since the motion was filed before the district court had made any substantive rulings").

2. Intervenors Have a Significant, Protectable Interest in the Litigation

As to the second factor, a significant protectable interest, a proposed intervenor "must establish that the interest is protectable under some law and that there is a relationship between the legally protected interest and the claims at issue." *Citizens for Balanced Use v. Montana Wilderness Ass'n*, 647 F.3d 893, 897 (9th Cir. 2003) (quoting *Nw. Forest Res. Council*, 82 F.3d at 837). "Whether an applicant for intervention as of right demonstrates sufficient interest in an action is a 'practical, threshold inquiry,' and 'no specific legal or equitable interest need be established.'" *Nw. Forest Res. Council*, 82 F.3d at 837 (quoting *Greene v. United States*, 996 F.2d 973, 976 (9th Cir.1993), *aff'd*, 64 F.3d 1266 (9th Cir.1995)).

As to Flack, "there is a direct, antagonistic relationship" between his interest in obtaining medical aid-in-dying drugs and Plaintiffs' request to enjoin SB 380. *Kalbers v. United States Dep't of Just.*, 22 F.4th 816, 827 (9th Cir. 2021) (permitting intervention where VW sought to keep confidential the documents that were the subject of plaintiff's FOIA request). Moreover, patients like Flack usually have numerous medical providers and their care is dependent on the timely transfer of records between those providers. *See, e.g.*, Ex. A ¶ 5. Similarly, Drs. Banerjee and Forest's interests in offering the option of aid in dying as part of their medical practices are threatened by Plaintiffs' requested relief. As for CCAN, a "public interest group is entitled as a matter of right to intervene in an action challenging the legality of a measure it has supported." *Idaho Farm Bureau Fed'n v. Babbitt*, 58 F.3d 1392, 1397 (9th Cir. 1995) (citing *Sagebrush Rebellion, Inc. v. Watt*, 713 F.2d 525, 527 (9th Cir.1983)). *See also, e.g.*, *Apr. in Paris v. Becerra*, No. 2:19-cv-02471-KJM-CKD, 2020 WL 2404620, at *3 (E.D. Cal. May 12, 2020) (applicants had a

significantly protectable interest where they "fought for the bill that ultimately passed"); *Pac. Gas & Elec. Co. v. Lynch*, 216 F. Supp. 2d 1016, 1025 (N.D. Cal. 2002) (applicant had an interest where it "was the acknowledged author and leading proponent" of one of the central actions challenged by plaintiffs). Here, CCAN was not just a supporter, but the *sponsor* of SB 380, the measure being challenged in this action. *See* Request for Judicial Notice, Ex. 1 at 18 ¶ 3. Accordingly, Intervenors have significantly protectable interests that are threatened by Plaintiffs' claims and requested relief.

3. Intervenors' Interests Will Be Impaired If Intervention Is Denied

Once a court has found that a prospective intervenor has a significant protectable interest, it should have "little difficulty concluding that the disposition of the case may, as a practical matter, affect it." *Citizens for Balanced Use,* 647 F.3d at 898 (quoting *California ex rel. Lockyer v. United States*, 450 F.3d 436, 442 (9th Cir. 2006)). Here, Intervenors' interests would "obviously" be impaired by an injunction, or by a judgment declaring the EOLOA unconstitutional. *Kalbers*, 22 F.4th at 828.

4. Defendants May Not Adequately Represent Intervenors' Interests

The burden of demonstrating inadequate representation is minimal. Intervenors need only show that their interests are sufficiently different from the existing parties such that their representation "may be" inadequate. *Trbovich v. United Mine Workers of Am.*, 404 U.S. 528, 538 n.10 (1972); *see Sagebrush Rebellion*, 713 F.2d at 528 (citing *Trbovich*). Specifically, the Ninth Circuit weighs three factors: "(1) whether the interest of a present party is such that it will undoubtedly make all of a proposed intervenor's arguments; (2) whether the present party is capable and willing to make such arguments; and (3) whether a proposed intervenor would offer any necessary elements to the proceeding that other parties would neglect." *Arakaki v. Cayetano*, 324 F.3d 1078, 1086 (9th Cir. 2003) (citation omitted).

There is a presumption of adequate representation when the applicant and an existing party "have the same ultimate objective," or "when the government is acting on behalf of a constituency that it represents." *Id.* (citing *United States v. City of Los Angeles, Cal.*, 288 F.3d 391, 401 (9th Cir. 2002)). However, where an applicant's interests are "potentially more narrow and parochial than the interests of the public at large," representation may be inadequate. *Mendonca*, 152 F.3d at 1190 (union could intervene of right in action alleging federal preemption of California's Prevailing Wage Law because its members had a substantial interest in receiving the prevailing wage for their services and the government-defendants' representation "may have been inadequate"). "The Ninth Circuit has found that the latter interest is potentially narrower than the former in a way that meets the fourth prong of the Rule 24(a)(2) intervention test." *Home Care Ass'n of Am. v. Newsom*, No. 1:19-CV-0929 AWI EPG, 2019 WL 5960141, at *3 (E.D. Cal. Nov. 13, 2019) (finding no presumption of adequate representation where an intervenor "is trying to obtain the benefits of the law for itself or its members").

Here, each intervenor's interest in medical aid in dying is narrower than Defendants' interest in defending the enforceability of the EOLOA. *Id.* "[I]t is no novel legal conclusion to determine that a neutral governmental body's interests sufficiently diverge from those of an organization representing a specific sub-set of the public to satisfy the inadequate representation prong." *Barke v. Banks*, No. 8:20-cv-00358-JLS-ADS, 2020 WL 2315857, at *3 (C.D. Cal. May 7, 2020) (finding various teachers' unions had a right to intervene in action challenging the constitutionality of California Government Code Section 3550). Defendants' oppositions show that they are concerned about "statewide medical practices at large" and the possibility that an "injunction would significantly undercut the existing statutory framework authorizing enforcement actions to protect the public from unprofessional providers." Dkt. 53 at 23; Dkt. 55 at 23. These interests are much more expansive than an individual patient's interest in obtaining, or an individual physician's interest in offering, medical aid in

dying. Indeed, Defendants' oppositions devote only one paragraph to terminally ill Californians' interest in this dispute, and offer no patient declarations in support of those interests. *See* Dkt. 53 at 23-24 (discussing, without explaining why, the EOLOA is "critical to thousands of the State's citizens' end-of-life care"); Dkt. 55 at 24 (same). Moreover, despite offering two physician declarations, Defendants do not offer the perspective of physicians who treat terminally ill patients and who consider medical aid in dying integral to how they practice medicine and provide end-of-life care.

More importantly, while Defendants acknowledge that an injunction would be "allowing providers to unreasonably obstruct and delay a patient's individual choice to obtain aid-in-dying medication" (Dkt. 53 at 24; Dkt. 55 at 24), they fail to articulate what the fallout of such an injunction would look like for the patients and providers involved. Defendants cannot offer the perspective of Dr. Catherine Forest and her late husband, Will. When a rapidly progressing unclassified motor neuron disease caused his bodily function to deteriorate, threatening to leave him paralyzed and wasting away while fully mentally aware, Will utilized the End of Life Option Act. Ex. C ¶¶ 7-9. Defendants cannot tell the court that the alternative for Will was not just death, but a terrifying death where he would have choked on his own saliva and spent his final moments suffocating and unable to focus on his family, who would have endured their own agony watching him suffer. *Id.* Defendants cannot tell the court that Will almost ran out of time to utilize the EOLOA because his non-participating primary care provider did not document his first medical aid-in-dying request. *Id.* ¶ 9. And Defendants cannot tell the court about the anxiety that Will endured as he fought against the unnecessary delays caused by his non-participating provider and medical group—anxiety that ate into the precious little time he had remaining with his family. *Id.* SB 380 was designed to eliminate these delays and the very real, very sad human consequences that accompany them. These are interests that the court needs to consider and the viewpoint that only Intervenors can provide.

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Defendants also fail to articulate that the alternative to medical aid in dying is more than just a painful and terrifying death. The alternative for many patients is that they spend what little time they have left agonizing about what awaits them instead of focusing on enjoying the people and things they love. *See* Ex. A ¶ 12; Ex. C ¶ 9. And the alternative for physicians who treat terminally ill patients—physicians like Drs. Banerjee and Forest—is to be deprived of one of the most important tools in their practice of medicine: the ability to offer options. Physicians like Drs. Banerjee and Forest consider medical aid in dying an important part of end-of-life care even for patients who never consider the option for themselves. Oftentimes, simply talking about the option enables patients to regain a lost sense of autonomy and better participate in determining what their end-of-life care plan should be, regardless of whether that plan includes medical aid in dying. Ex. B ¶ 6; Ex. C ¶ 5.

Defendants are not at fault for not presenting these interests to the court—they simply are not Defendants' concern. But they are important interests that should be represented in this litigation. *See Sagebrush Rebellion*, 713 F.2d at 528 (permitting intervention of right where national wildlife organization offered "a perspective which differs materially from that of the present parties to this litigation"). Thus, Intervenors meet the "minimal" burden of showing that their interests may not be adequately represented by Defendants.

B. In the Alternative, the Court Should Permit Intervention Pursuant to Federal Rule of Civil Procedure 24(b)

In the event this Court finds that Intervenors are not entitled to intervene as a matter of right, Intervenors should still be entitled to permissive intervention under Fed. R. Civ. P. 24(b), which provides, in pertinent part: "On timely motion, the court may permit anyone to intervene who…(B) has a claim or defense that shares with the main action a common question of law or fact." "Thus, 'a court may grant permissive intervention where the applicant for intervention shows (1) independent grounds for jurisdiction; (2) the motion is timely; and (3) the applicant's claim or

defense, and the main action, have a question of law or a question of fact in common.'" *City of Los Angeles*, 288 F.3d at 403 (quoting *Nw. Forest Res. Council*, 82 F.3d at 839).

First, the Ninth Circuit has clarified that "the independent jurisdictional grounds requirement does not apply to proposed intervenors in federal-question cases when the proposed intervenor is not raising new claims." *Freedom from Religion Found., Inc. v. Geithner*, 644 F.3d 836, 844 (9th Cir. 2011). This is a federal-question case because each of Plaintiffs' claims arises under the US Constitution. Dkt. 1 ¶5. Intervenors are not raising any new claims. Thus, the first factor of independent jurisdictional grounds does not apply.

Second, Intervenors' motion is timely. As explained above, Intervenors' motion is filed less than three months after Plaintiffs filed their Complaint, and no substantive ruling has been issued. Given the early stages of the litigation, intervention will not unduly delay or prejudice the adjudication of the rights of the original parties. Given Intervenors' interests in the outcome of the dispute, their alternative motion for permissive intervention at this early stage in the case is particularly justified. *See, e.g.*, *City of Los Angeles*, 288 F.3d at 403–04 ("In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.") (remanding to district court to reconsider request for permissive intervention by police league and community intervenors who "have some of the strongest interests in the outcome").

Finally, common questions of law and fact exist because the rights of the parties all arise from the question of whether certain provisions of SB 380 are constitutional. Thus, Intervenors' defenses turn on the same legal and factual issues raised by Plaintiffs' claims, including whether the minimal requirements imposed on Plaintiffs by SB 380 are unconstitutional infringements of their speech or permissible government regulation of their profession as medical providers. Accordingly, if

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intervention by matter of right is denied, it would nevertheless be appropriate for this court to grant Intervenors' request for permissive intervention.

IV. CONCLUSION

Intervenors are entitled to intervene in the above-captioned litigation as a matter of right. Intervenors have timely filed their motion. They each possess a cognizable interest in this lawsuit. Their interests will invariably be impaired as a result of this litigation. Further, their interests may not be adequately protected by Defendants, who are more concerned with preserving their ability to regulate the statewide practice of medicine. In the alternative, Intervenors should be permitted to intervene because their defenses share common questions of law and fact with Defendants, and because this motion is timely and will not delay resolution of this case.

DATED: May 18, 2022

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