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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

LONNY SHAVELSON, M.D.; SANDRA MORRIS; RHIANNON CERRETO; ROBERT USLANDER, M.D.; GARY PASTERNAK, M.D.; and RICHARD MENDIUS, M.D.; on behalf of themselves and all others similarly situated, Plaintiffs, v. STATE OF CALIFORNIA; ROBERT BONTA, Attorney General of the State of California, in his official capacity; NANCY O'MALLEY, Alameda County District Attorney, in her official capacity, Defendants.	Case No. 3:21-CV-06654-VC <u>Civil Rights</u> **PLAINTIFFS' CONSOLIDATED OPPOSITION TO MOTIONS TO DISMISS**

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Plaintiffs respectfully submit this Memorandum of Points and Authorities in opposition to the motions to dismiss filed by Defendants State of California and Robert Bonta ("State Motion") and by Defendant Nancy O'Malley ("O'Malley Motion").

INTRODUCTION AND SUMMARY OF ARGUMENT

Plaintiffs Sandra Morris and Rhiannon Cerreto suffer from serious, terminal illnesses. In order to live fulfilling lives as long as they are able, and then to avoid the most painful final stages of their conditions, they wish to avail themselves of California's End of Life Option Act ("EOLOA"). But Patient-Plaintiffs will not be able to do so at that point because their illnesses will render them unable to ingest their prescribed aid-in-dying ("AID") medication without assistance—and the EOLOA explicitly prohibits such assistance.

The Americans with Disabilities Act of 1990 ("ADA") and Section 504 of the Rehabilitation Act of 1973 ("Rehabilitation Act") generally proscribe shutting disabled people out of state programs on account of their disabilities. In response to these claims, Defendants raise a host of procedural and substantive arguments. Each of their contentions, however, is foreclosed by binding precedent.

The gist of Defendants' procedural arguments is that federal courts have no power to ensure that state actors comply with the mandates of federal law. That proposition contravenes more than a century of civil-rights jurisprudence. If Defendants' argument were correct, the federal courts would have needed to stand down when confronted with state laws that mandated racial segregation, voting-rights restrictions that violated federal law, and bans on abortion. In those cases, and here, too, the federal court has the responsibility to decide whether the challenged state schemes violate federal-law mandates. And if so, the federal court traditionally (1) declares unlawful the provision of state law, and (2) enjoins enforcement of that provision. Plaintiffs seek nothing more in this case.

Defendants' central response on the merits of the legal claims is that Plaintiffs seek an allowance for euthanasia, which would fundamentally alter the EOLOA. But their assertion is incorrect factually and legally. First, Plaintiffs do not seek to engage in euthanasia. Instead, they wish to self-administer their medication, with assistance. As described in the accompanying

declaration from one of the world's leading bioethicists, that is meaningfully different from euthanasia, insofar as the patient is actively participating in the ingestion of the medication.

Second, it is far too early in the case to decide whether allowing ingestion assistance would fundamentally alter the state statute. Fundamental-alteration analysis is a highly fact-specific inquiry that is particularly ill-suited for a motion to dismiss.

Even if this fact-dependent defense were properly raised at this stage of the case, Defendants have not satisfied their burden to show that any relief for the Plaintiffs must necessarily fundamentally alter the EOLOA. As discussed below, discovery will reveal myriad ways that the Patient-Plaintiffs could self-administer their medication with assistance. Allowing such minimal assistance, Plaintiffs will demonstrate in this case, would support and be consistent with the goals and purpose of the EOLOA program.

FACTS

I. THE EOLOA PROGRAM, AND ITS EFFECT ON PLAINTIFFS.

The EOLOA was enacted to empower terminally ill Californians with the option of achieving a more peaceful death through AID. Assem., third reading analysis, Assem. Bill No. ABX2 15 (2015-2016 Reg. Sess.), as amended Sept. 3, 2015, at 1. More specifically, it "allow[s] an adult in California with a terminal disease that has the capacity to make medical decisions and who has been given a prognosis of less than six months to live, to make end of life decisions. . . . by giving these patients the legal right to ask for and receive an aid-in-dying prescription from his/her physician . . . ." *Id.* at 10.

The process of qualifying for AID under the EOLOA is lengthy, requires detailed planning, and includes multiple checkpoints to confirm consent. Cal. Health & Safety Code. §§ 443 *et seq*. Patients must meet numerous criteria, including but not limited to: confirmation of a diagnosis of a terminal illness expected to result in death within six months; residency in California; the request for a prescription for AID medication made "solely and directly" by the patient; two oral requests by the patient for AID medication that are no less than two days apart, as well as a written request signed in front of two witnesses; and clearance by a mental-health specialist, if required by the patient's attending or consulting physician. *Id.* §§ 443.1, 443.2,

443.3, 443.5.

Ingestion of the AID medication has two further limitations. *First*, the individual must have "the physical and mental ability to self-administer" the AID medication. *Id.* § 443.2(a)(5). This is known as the "self-administration requirement." The act defines self-administration as an "affirmative, conscious, and physical act of administering and ingesting" the AID medication. *Id.* § 443.1(q). *Second*, no one can assist the patient with ingesting the medication. *Id.* § 443.14(a) (allowing people to be present for the self-administration, "so long as the person does not assist the qualified person in ingesting" the medication). This is known as the "assistance prohibition."

Plaintiffs do not challenge the self-administration provision. At the time they want to ingest AID medication, Patient-Plaintiffs will be able to take an "affirmative, conscious, and physical act of administering and ingesting" the medication.

Because of their physical disabilities, however, Patient-Plaintiffs will not be able to ingest the medication without assistance. That is, they can take an "affirmative, conscious, and physical act of administering and ingesting" the medication, but they will not have the dexterity and/or strength to ingest fully without assistance. Accordingly, the assistance prohibition will prevent them from accessing the benefits of the EOLOA program. *See, e.g.*, First Amended Complaint ("FAC") ¶ 39.

More specifically, because the assistance prohibition results in no one, including their physicians, being willing and able to assist Patient-Plaintiffs in the administration of the AID medication, Patient-Plaintiffs will be unable to ingest fully the AID medication at the time of their choosing. *Id.* ¶ 40. Thus, without judicial relief, Patient-Plaintiffs are forced to either end their lives before they want, depriving themselves and their loved ones of precious time together, or else suffer through the final ravages of their illnesses because they cannot receive assistance with ingesting their medication. This is a horrific choice that non-disabled patients do not have to make under the EOLOA.

II. RELIEF SOUGHT

Plaintiffs seek a reasonable modification to the EOLOA's assistance prohibition. They want assistance with ingesting their AID medication, when they still can take an "affirmative,

conscious, and physical act of administering and ingesting the aid-in-dying drug," Cal. Health & Safety Code § 443.1(q), but need assistance with the ingestion.

The above-referenced "affirmative, conscious, and physical act" can take various forms. It may include starting to press a plunger on a medicine-filled catheter with one's hand or finger; or pressing one's forehead or jaw into the hand of a treating physician to help depress a plunger, releasing the medication into the patient through a feeding or rectal tube. Other forms will be developed in discovery. Ultimately, Plaintiffs seek a reasonable modification for patients who can engage in self-administration (*i.e.*, they can make an "affirmative, conscious and physical act" initiating and contributing to the mechanics of delivering AID medication into their bodies). Plaintiffs do not seek such modification for patients who cannot meet this standard (*i.e.*, patients who are unable to take an affirmative, conscious and physical act in any way).[1]

Nor do Plaintiffs seek a re-writing of the EOLOA itself. Instead, Plaintiffs seek a declaration that the assistance prohibition violates the ADA for the above-referenced group of Plaintiffs, as well as an injunction prohibiting enforcement of criminal penalties for someone who provides them ingestion assistance within the limited circumstances and actions described above.

III. RELEVANT TERMINOLOGY AND PRACTICAL CONSIDERATIONS

Defendants use the phrase "active euthanasia" throughout their motions. However, that phrase has a specific meaning, and is not what Plaintiffs seek in this case.

Professor Thaddeus Mason Pope is one of the county's leading medical ethicists and a certified healthcare ethics consultant. Declaration of Thaddeus Mason Pope ("Pope Decl.") at ¶ 4

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[1] This is a more narrow request for relief than Plaintiffs advanced at the time of their motion for a preliminary injunction. At the time, Plaintiffs anticipated including patients who can communicate consent to receive assistance ingesting AID medication through physical acts, such as blinking one's eyes, but could not participate in the self-administration required by the EOLOA. Plaintiffs clarify in this Opposition that they seek relief only for patients who can take an affirmative, conscious, and physical act to initiate ingestion of AID medication.

While Plaintiffs still believe that the broader relief that was originally requested is consistent with the mandates of the ADA, they are mindful of the concerns expressed by the Court about the "Bay Bridge jumper." Order (Dkt. No. 28) at 4. By limiting relief to those who can take a physical act to initiate administration of the drug, Patient-Plaintiffs are not just climbing the ledge of the bridge, but actually jumping themselves.

& Exh. A. Professor Pope will provide more detailed expert testimony later in this case, but for present purposes, his simultaneously filed declaration makes clear that Plaintiffs are not seeking relief that amounts to "active euthanasia." *Id.* at ¶¶ 16-19.

It is commonly accepted, in both aid-in-dying statutes and otherwise, for disabled patients to take a physical act in support of ingestion, but to need assistance with completing the ingestion. *Id.* at ¶¶ 14-20. In such situations, despite the assistance, this ingestion is still considered, both medically and legally, to be "self-administration." *Id.* at ¶¶ 10-15.

Moreover, for those taking AID medication, this is not considered "active euthanasia." *Id.* at ¶¶ 18-19. Professor Pope provides some examples:

> [T]ake a patient who can both independently grasp a straw in her lips and swallow down the medication. She might only need help from the clinician to lift and hold the glass, so that she can grasp the straw in her lips. This is ingestion with assistance, not active euthanasia.
>
> Or take a patient with a feeding tube or rectal tube (used for patients who have lost swallowing ability or have other reasons where swallowing medication by mouth is not possible or efficacious). The patient might independently ingest 90% of the aid in dying medication by depressing a plunger. But, due to fatigue, exhaustion and/or weakness from her disability, she requires assistance to complete depressing the plunger the final 10% of the way. This is aid in dying, not active euthanasia.

Id. Assistance is vital for a patient who is able to take steps to ingest AID medication, but whose disability robs them of the dexterity or strength to finish ingesting the full dose of the medication. *Id.* Indeed, for such people, the assistance prohibition is particularly dangerous, as administration of only a partial dose of the medication could lead to paralysis or other very dangerous medical conditions. *Id.* at ¶ 19.

In response to concerns that a patient may change her mind in the process of receiving assistance with ingestion, Professor Pope explains that this is, practically, a non-issue. He reports that while there are thousands of individuals who have ingested AID medication in California and other states with aid-in-dying laws, there has not been a single known instance of a patient changing her mind after commencing ingestion of AID medication. *Id.* at ¶ 21-23.

ARGUMENT

I. PLAINTIFFS HAVE STANDING FOR THEIR CLAIMS.

Plaintiffs have standing if they have suffered "injury in fact," their alleged injury is "fairly traceable" to the conduct being challenged, and their injury likely would be "redressed" by a favorable decision. *Wittman v. Personhuballah*, 578 U.S. 539, 543 (2016); *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560-61 (1992). Plaintiffs satisfy standing. In short, they have alleged that (1) they imminently will be denied the ability to participate in the State's statutory regime that allows a dignified death via AID, solely on account of their disabilities; and (2) their requested relief, if granted, would permit them to ingest the medication that is allowed to others under state law. Nothing more is required to establish standing.

A. The Complaint Sufficiently Alleges "Injury in Fact."

Defendant O'Malley wrongly contends that Plaintiffs fail to allege "injury in fact" because there is no alleged threat of imminent prosecution for violating the EOLOA's assistance prohibition. (O'Malley Motion at 5-7.) This argument relies on a doctrine that is not applicable to this case. Unlike in a "pre-enforcement challenge," the Patient-Plaintiffs do not have a choice to violate the statute, and then await prosecution. The entire point of the case is that they cannot participate in the EOLOA because they cannot receive ingestion assistance from others. The Patient-Plaintiffs plainly have alleged an injury in fact.

Plaintiffs have standing to sue when they have alleged an "injury in fact"—a harm suffered by the plaintiff that is "concrete" and "actual or imminent, not 'conjectural' or 'hypothetical.'" *Steel Co v. Citizens for a Better Env't*, 523 U.S. 83, 103 (1998); *Whitmore v. Arkansas,* 495 U.S. 149, 155 (1990). To that end, when plaintiffs want to challenge the legality of a statute that attaches criminal penalties, but opt to file legal claims before transgressing the law—a so-called "pre-enforcement challenge"—a question arises about "whether the plaintiffs face a realistic danger of sustaining a direct injury as a result of the statute's operation or enforcement, . . . or whether the alleged injury is too 'imaginary' or 'speculative' to support jurisdiction." *Thomas v. Anchorage Equal Rights Comm'n*, 220 F.3d 1134, 1139 (9th Cir. 2000).

Defendant O'Malley assumes that this case is such a pre-enforcement challenge.

(O'Malley Motion at 5-6.) She then cites the test set forth in *Thomas* to determine whether a pre-enforcement challenge is permissible in this case, arguing that the test is not satisfied. (O'Malley Motion at 6-7.)

However, this is not a case concerning a pre-enforcement challenge, where the harm is hypothetical unless and until there is an imminent and credible threat of a prosecution. Rather, Patient-Plaintiffs allege that, due to the EOLOA's assistance prohibition, they will be unable to use the EOLOA at the point that they need assistance with ingestion. *See, e.g.*, Complaint ¶ 35, 36, 39, 44. No one is willing to assist as a result of the enforcement provision. *See id.*; *see also id.* ¶ 40. No enforcement, or threat of enforcement, will change this reality.[2]

As pled in the Complaint, absent judicial relief, the Patient-Plaintiffs will suffer an imminent injury. Their injury is neither imaginary or speculative. They have pled sufficient allegations to demonstrate their injury in fact.

B. Plaintiffs' Requested Relief Against the Named Defendants Would Redress Their Injury.

Defendants wrongly claim that Plaintiffs' injuries cannot be redressed. According to Defendants, separation-of-powers principles prohibit this Court from compelling Defendants to ensure that the EOLOA complies with the mandate of federal civil-rights laws. This argument contravenes clear Supreme Court and Ninth Circuit precedent. Quite simply: state law must

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[2] This section responds to O'Malley's injury-in-fact argument with a discussion of the Patient-Plaintiffs. Because the Patient-Plaintiffs have standing, as discussed above, the Court need not consider the standing of the Physician-Plaintiffs. *See, e.g.*, *Watt v. Energy Action Educ. Found.*, 454 U.S. 151, 160 (1981) ("There are three groups of plaintiffs in this litigation . . . . Because we find [that one of the groups] has standing, we do not consider the standing of the other plaintiffs."); *Chief Probation Officers v. Shalala*, 118 F.3d 1327, 1331(9th Cir. 1997) (White, Justice, by designation) (evaluation of the standing of a second plaintiff is "unnecessary to resolution of the case").

While binding case law counsels against assessing the standing of the Physician-Plaintiffs, they, too, have standing. These doctors need not risk spending years in prison in order to obtain a ruling about the legality of the assistance prohibition. Proving that point, all of the previous cases—filed by physicians and patients—to establish a federal constitutional right to the option of aid in dying were able to proceed to decision on the merits, despite the fact that they were affirmative challenges in federal court, not defenses in criminal prosecutions. *See, e.g.*, *Vacco v. Quill*, 521 U.S. 793 (1997); *Washington v. Glucksberg*, 521 U.S. 702 (1997).

comply with federal law; and when state law conflicts with federal law, it is the unique province of this Court to require compliance.

A basic premise of dual sovereignty is that federal law is supreme. *See, e.g.*, *Gonzales v. Raich*, 545 U.S. 1, 29 (2005). Federal laws preempt conflicting state laws under the Supremacy Clause. U.S. Const. Art. VI, cl. 2; *see also Gonzales*, 545 U.S. at 29 ("The Supremacy Clause provides that if there is any conflict between federal and state law, federal law shall prevail.").

The federal judiciary has both the power and obligation to ensure that a state's law complies with federal law. Indeed, case law is replete with federal courts ordering that state actors adhere to federal law when state law is to the contrary. *See, e.g.*, *Kolender v. Lawson*, 461 U.S. 352 (1982) (affirming holding that California criminal statute that required people to provide identification to police officers was unconstitutional, and enjoining law-enforcement officers from enforcing the statute); *Wisconsin v. Constantineau*, 400 U.S. 433 (1971) (striking down state statute as violation of federal constitution, and enjoining enforcement by law-enforcement officials); *Lassiter v. United States*, 371 U.S. 10 (1962), *aff'g* 203 F. Supp. 20 (W.D. La. 1962) (enjoining district attorney from enforcing violation of state statute that required racially segregated waiting areas in train stations, which violated the federal constitution). This is often accomplished without ordering the State to rewrite the challenged statute, and indeed, Plaintiffs do not seek a re-writing of the EOLOA. Rather, a court typically declares that a particular provision of a statute contravenes the dictates of federal law, and it enjoins enforcement of the unlawful provision. *Id.*[3]

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[3] The State Defendants note there are separate limits regarding orders of "intrusive affirmative relief" against state officials. (State Motion at 8:12 - 9:8.) However, as noted in the main case upon which the State Defendants rely for this point, an injunction that prohibits action illegal under federal law is not such "affirmative relief." *M.S. v. Brown*, 902 F.3d 1076, 1089 (9th Cir. 2018). "[R]equir[ing] state officials to repeal an existing law and enact a new law proposed by plaintiffs" would be an example of disfavored "intrusive affirmative relief." *Id.* On the other hand, an injunction that bars enforcement of a state statute declared unlawful pursuant to a federal act, as discussed above, is well-accepted relief from the federal courts.

Defendant O'Malley further claims that injunctive relief would be inappropriate because Plaintiffs have not alleged "irreparable injury." (O'Malley Motion at 14-15.) However, as this Court previously noted, "[t]here is no question that the plaintiffs will suffer irreparable harm

Moving even closer to this case, the same is true when a state statute violates the federal ADA and Rehabilitation Act. If a public entity's statutes, practices, or procedures deny people with disabilities meaningful access to its programs or services—causing a disparate impact—then federal courts require the entity to align its conduct to the federal mandate. *See, e.g.*, *Payan v. Los Angeles Cmty. College Dist.*, 11 F.4th 729, 738 (9th Cir. 2021); *Crowder v. Kitagawa*, 81 F.3d 1480, 1485 (9th Cir. 1996); *Green v. House Authority of Clackamas City,* 994 F. Supp. 1253, 1257 (D. Or. 1998) (noting that "the ADA must prevail over any conflicting state statute"). The Ninth Circuit has been clear: "[I]t is incumbent upon the courts to [e]nsure that the mandate of [the ADA] is achieved." *Crowder*, 81 F.3d at 1485.

In *Crowder*, the Hawaii legislature enacted a statute to protect against the importation of rabies, empowering the Hawaii Department of Agriculture to adopt rules for the quarantine of animals upon arrival in Hawaii. *Id.* at 1481-82. The quarantine rule, which resulted in a brief separation of blind people from their service dogs, was alleged to violate the ADA. *Id.* at 1481.

The Ninth Circuit held that the state's quarantine rule was subject to the ADA. *Id.* at 1483-86. Despite the fact that the state's quarantine framework was a considered decision of the state legislature on a public-health concern, the ADA required the federal court to consider whether the state's regime violates the federal civil-rights law. *Id.* at 1485. The Ninth Circuit noted: "[T]he district court concluded it could not assess the reasonableness of the plaintiffs' proposed modifications in light of the legislature's own consideration of the issue. Yet in virtually all controversies involving the ADA and state policies that discriminate against disabled persons, courts will be faced with legislative (or executive agency) deliberation over relevant statutes, rules and regulations." *Id.* Accordingly, the appellate court concluded, the federal judiciary's "obligation under the ADA and accompanying regulations is to ensure that the decision reached by the state authority is appropriate under the law and in light of proposed alternatives. Otherwise, any state could adopt requirements imposing unreasonable obstacles to the disabled, and when haled into court could evade the antidiscrimination mandate of the ADA

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absent an injunction—if they wish to avail themselves of the [EOLOA], they must end their lives earlier within the six-month window than they otherwise could." Order (Dkt. No. 28) at 4 n.3.

merely by explaining that the state authority considered possible modifications and rejected them." *Id.*

Contrary to Defendants' arguments, this Court is duty bound to assess whether the EOLOA's assistance prohibition violates the ADA. In fact, ensuring compliance with federal civil-rights laws is one of the primary functions of the federal courts. Accordingly, Plaintiffs seek relief that is well within the boundaries of this Court's power, and the alleged injury is redressable in this action.

II. PROSECUTORS DO NOT HAVE ABSOLUTE IMMUNITY FROM BEING ENJOINED FOR VIOLATING FEDERAL LAW.

Defendant O'Malley, the District Attorney for the County in which Dr. Shavelson resides, and Defendant Bonta, the State's Attorney General, claim that they—as prosecutors—have unfettered discretion and absolute immunity for alleged violations of federal law. (O'Malley Motion at 13-14; State Motion at 9-10.) Their argument is foreclosed by clear, binding precedent.

Prosecutors have absolute immunity for claims for monetary damages. *See, e.g.*, *Buckley v. Fitzsimmons*, 509 U.S. 259 (1993); *Imbler v. Pachtman*, 424 U.S. 409, 431 (1976). But they have no such immunity against claims for declaratory and/or injunctive relief. *See, e.g.*, *Fry v. Melaragno*, 939 F.2d 832, 839 (9th Cir. 1991) (citing cases); *see generally* Erwin Chemerinsky, 15 TOURO L. REV. 1643, 1645-46 (1999) ("Prosecutors have absolute immunity as to claims for money damages, but prosecutors have no immunity as to claims for injunctive relief. Indeed, *Ex Parte Young* long ago held that prosecutors can be sued for injunctive relief.").

Here, Plaintiffs seek solely declaratory and injunctive relief. They do not seek damages. Accordingly, Defendants Bonta and O'Malley are not entitled to absolute immunity.[4]

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[4] While Defendant O'Malley wrongly claims she is entitled to absolute immunity for her enforcement of violations of the EOLOA, she then makes the opposite argument: she has no liability here because she has no connection to the EOLOA claims. This ignores the fact that she, like Defendant Bonta, is charged with prosecuting physicians for the felony of unlawfully assisting someone with ingesting AID medication. Unless there is an injunction in this matter, Defendants Bonta and O'Malley would be able to prosecute Plaintiff Shavelson, for instance,

III. ABSTENTION DOES NOT APPLY TO THESE FEDERAL-LAW CLAIMS.

The State's abstention argument fares no better. Whereas *Burford* abstention compels deferral on some intricate state-law issues that are subject to prompt state-court review, they have no place in this federal-question case. The matter presented to this Court—whether a state statute conflicts with a federal civil-rights law —is a classic use of the federal courts.

Burford abstention allows the federal judiciary to "decline to rule on an essentially local issue arising out of a complicated state regulatory scheme." *United States v. Morros*, 268 F.3d 695, 705 (9th Cir. 2001). Invoked most frequently in federal lawsuits founded on diversity jurisdiction, it permits the federal judiciary to abstain from wading into complex questions of state law administered by state administrative agencies. In such cases, a federal court's ruling would potentially undermine the state's administrative process and disrupt the state's efforts to establish a coherent, uniform policy with respect to the matter at issue. *Burford v. Sun Oil Co.,* 319 U.S. 31 (1943).

Defendants do not cite the test the Ninth Circuit applies to determine whether *Burford* abstention is triggered. Abstention might be appropriate only when: (1) "the state has chosen to concentrate suits challenging the actions of the agency involved in a particular court"; (2) "federal issues could not be separated easily from complex state law issues with respect to which state courts might have special competence"; and (3) "federal review might disrupt state efforts to establish a coherent policy." *Morros*, 268 F.3d at 705 (quoting *Knudsen Corp. v. Nevada State Dairy Comm'n*, 676 F.2d 374, 377 (9th Cir. 1982)).

None of these criteria is satisfied in this case. Unlike in *Burford*, where Texas provided that orders of the Texas Railroad Commission would be venued in a particular state court, 319 U.S. at 326, here, no similar legal challenges are concentrated in a particular court. Moreover, the Ninth Circuit has been clear that a state law's alleged conflict with federal law—as alleged here—does not satisfy the latter two elements. *Morros*, 268 F.3d at 705. "[W]hether state law conflicts with federal law," which is the central issue in this case, "is plainly not an issue 'with

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who is the physician for Plaintiff Morris and others in her position, and who resides in Defendant O'Malley's county.

respect to which state courts might have special competence." *Id.* In such a situation, the Ninth Circuit concluded, "*Burford* abstention is particularly inappropriate." *Id.*

The Supreme Court, too, has suggested strongly that federal courts should not abstain when presented with a claim that federal law proscribes a particular state action or statute. *New Orleans Pub. Service, Inc. v. Council of City of New Orleans,* 491 U.S. 350, 362 (1989). While *Burford* is concerned with protecting complex state administrative processes from undue federal interference, it does not counsel abstention when it is alleged that the demand of a federal law conflicts with state regulatory law or policy. *Id*. Although the lawsuit might "result in an injunction against enforcement of the [state] order, . . . there is . . . no doctrine requiring abstention merely because resolution of a federal question may result in the overturning of a state policy." *Id.* at 363 (quoting *Zablocki v. Redhail,* 434 U.S. 374, 380 n.5 (1978)).

Here, Plaintiffs ask this Court to do what countless federal courts have done: determine whether a state law violates a federal civil-rights law. That respectful request is well within the purview—and great tradition—of the federal courts. This Court need not, and cannot, punt on that traditional function of the federal judiciary.

IV. PLAINTIFFS PLED COGNIZABLE CLAIMS FOR VIOLATIONS OF FEDERAL DISABILITY LAWS.

Turning to the merits, Plaintiffs sufficiently alleged claims for violations of the ADA and Rehabilitation Act. First, the EOLOA is a "program, service, or activity" under Title II of the ADA. The Ninth Circuit has been clear that a "program, service, or activity" encompasses virtually "anything a public entity does." *Barden v. City of Sacramento*, 292 F.3d 1073, 1076 (9th Cir. 2002). As it applies to this case, enacting a statutory scheme, choosing who can benefit from that scheme, and deciding who can be prosecuted for a felony of operating outside of that scheme is a classic example of "what a public entity does."

Second, Defendants have not established that the relief Plaintiffs seek will cause a "fundamental alteration" of the EOLOA. Such arguments are particularly inappropriate for resolution on a motion to dismiss, as the inquiry is inherently factual. Regardless, on the record before the Court, Defendants have not carried their burden of proving the affirmative defense of

"fundamental alteration" by showing that relief for Plaintiffs would be so at odds with the purposes of the EOLOA. In fact, Plaintiffs reasonably believe that discovery will demonstrate that the requested relief would be entirely consistent with the goals of the statutory scheme.

A. Plaintiffs Sufficiently Alleged They Imminently Will Be Excluded From a "Program, Service, or Activity."

Defendants contend that the EOLOA is not a benefit, program, or service under the ADA because it simply creates a safe harbor from criminal liability. (State's Motion at 14-15.) Their argument is contrary to both Ninth Circuit precedent and the ADA's purpose. Indeed, a benefit, program, or service includes virtually everything a public entity does. That plainly includes enacting laws; choosing who benefits from enacted laws; creating a regulatory program for collecting, reporting and publishing data of those participating in the program; and deciding who can be prosecuted for violations of its laws.

To state a *prima facie* case for a violation of Title II, a plaintiff must show: "(1) he is a qualified individual with a disability; (2) he was either excluded from participation in or denied the benefits of a public entity's services, programs, or activities, or was otherwise discriminated against by the public entity; and (3) such exclusion, denial of benefits, or discrimination was by reason of his disability." *Duvall v. County of Kitsap*, 260 F.3d 1124, 1135 (9th Cir. 2001) (internal quotation marks omitted). The elements of a Section 504 claim are similar. *Id.*

The stated purpose of the ADA is "to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities." *Karczewski v. DCH Mission Valley LLC*, 862 F.3d 1006, 1011-12 (9th Cir. 2017) (citing 42 U.S.C. § 12101(b)(1)). To effectuate that broad purpose, Ninth Circuit law explicitly rejects restrictive interpretations of the ADA. *See, e.g.*, *Cohen v. City of Culver City*, 754 F.3d 690, 695 (9th Cir. 2014) ("We construe the language of the ADA broadly to advance its remedial purpose.").

More particularly, the Ninth Circuit has construed the ADA's language of "program, service, or activity" under Title II to encompass virtually "anything a public entity does." *Barden*, 292 F.3d at 1076; *Lee v. City of Los Angeles*, 250 F.3d 668, 691 (9th Cir. 2001)). The

Rehabilitation Act has a similarly broad reach. 29 U.S.C. § 794(b)(1)(A) (defining "program or activity" as "all of the operations of . . . a State or of a local government").

The following are classic activities of a public entity: creating a statutory scheme, deciding who can benefit from that scheme; creating a regulatory program to collect, report and publish data about use of the program; deciding who is subject to criminal penalties; and permitting its enforcement (by the Attorney General and district attorneys). *Cf. Barden*, 292 F.3d at 1076 (cautioning against "needless hair-splitting arguments" in determining what is a program, service, or activity, and concluding that "the inquiry, therefore, is *not so much on whether a particular public function can technically be characterized as a service, program, or activity, but whether it is a normal function of a governmental entity*") (internal quotation marks omitted) (emphasis added). Thus, the EOLOA is a "program, service, or activity" under Title II of the ADA and the Rehabilitation Act.

The State Defendants argue that because the EOLOA is not an affirmative act or "output" of a public entity, it is not covered by Title II. (State Motion at 14:27-15:1 (citing *Zimmerman v. Oregon Dept. of Justice*, 170 F.3d 1169 (9th Cir. 1999)). That is both factually incorrect (legislation, regulation, and enforcement by criminal prosecution are plainly affirmative conduct and "outputs"), and legally wrong.

In *Zimmerman*, the Ninth Circuit held that employment by a public entity, which is covered by a different Title of the ADA (Title I), is not subject to Title II because the phrase "services, programs, and activities," refers "only to the 'outputs' of a public agency, not to 'inputs' such as employment." 170 F.3d at 1174. However, this case is easily distinguishable from an employment matter. Here, the benefits provided by the EOLOA are "outputs" that the State created and makes generally available to patients who choose to participate in or receive the benefit of such outputs. The primary benefit of the EOLOA is the empowerment of dying patients to choose a more peaceful death via AID, avoiding the final brutal ravages imposed by their terminal illness. A concomitant benefit is the provision of safe harbor from criminal prosecution for those involved in AID.

The State created a process in the EOLOA that confers significant benefits to suffering patients, and extends protection to those who help them exercise the option for AID. As such, the EOLOA is a service, program, or activity under the ADA and Section 504.

B. Plaintiffs Are Not Seeking Relief That Would Fundamentally Alter the EOLOA As a Matter of Law.

Defendants maintain that Plaintiffs cannot allege a viable ADA claim because the requested relief—as a matter of law—necessarily fundamentally alters the EOLOA. However, the issue of fundamental alteration is highly fact-specific and cannot be decided on a motion to dismiss. Moreover, even if the Court were inclined to consider the issue at this very early stage of the case, Defendants have not met their burden because they have not shown that providing a reasonable modification to the assistance prohibition for otherwise qualified, physically disabled patients who are able to communicate consent at the time of ingestion and take an affirmative, conscious, and physical act to ingest would necessarily fundamentally alter the EOLOA.

1. The Issue of Fundamental Alteration Cannot Be Decided on A Motion to Dismiss.

The fundamental-alteration defense is not susceptible to a decision on a motion to dismiss. When considering a Rule 12(b)(6) motion, a court "must accept as true all factual allegations . . . and draw all reasonable inferences in favor of the [plaintiffs]." *Retail Prop. Trust v. United Bhd. Of Carpenters & Joiners of Am.*, 768 F.3d 938, 945 (9th Cir. 2014). "Defendants cannot disprove . . . allegations merely by asserting fundamental alteration or undue burden in conflict with the pled facts, as such a claim is an affirmative defense for which the asserting public entity bears the burden of proof." *Martinez v. County of Alameda*, 512 F. Supp. 3d 978, 984-85 (N.D. Cal. 2021).

Determining whether a modification is reasonable or would result in fundamental alteration "is an intensively fact-based inquiry." *Martin v. PGA Tour, Inc.*, 204 F.3d 994, 1001 (9th Cir. 2000) *aff'd*, 532 U.S. 661 (2001) (emphasis added); *Lentini v. Cal. Ctr. for the Arts, Escondido*, 370 F.3d 837, 845 (9th Cir. 2004); *Crowder*, 81 F.3d at 1486. "Case law and ADA regulations underscore that whether a requested policy modification or auxiliary aid or service would result in a fundamental alteration or undue burden is a fundamentally factual question,

inappropriate for disposition prior to discovery." *Martinez*, 512 F. Supp. 3d at 985 (emphasis added).

To determine whether Plaintiffs' request for relief would fundamentally alter the nature of the statute, the Court must consider facts regarding the goals and nature of the benefits of the EOLOA, if and how a modification of the assistance prohibition for physically disabled patients would actually subvert the goals and benefits of the statute, the ways in which Plaintiffs could ingest AID medication with assistance, and whether the challenged prohibition actually produces the benefits that the law intends to confer. None, let alone all, of these considerations have been fully developed yet. Accordingly, it would not be proper to dismiss Plaintiffs' claims, without the benefit of discovery, based on this highly fact-dependent issue.

2. The State Has Failed To Meet Its Burden To Prove Plaintiffs' Requested Relief Would Fundamentally Alter The EOLOA.

Even if this fact-based inquiry were properly raised in a motion to dismiss, Defendants have failed to meet their burden. It is Defendants' burden to demonstrate that Plaintiffs' requested relief would fundamentally alter the state statute, *Martinez*, 512 F. Supp. 3d at 984-85, and Defendants have failed to meet their burden to prove any possible relief for Plaintiffs would fundamentally alter the state statute.

Under Title II, "[a] public entity shall make reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability, unless the public entity can demonstrate that making the modifications would fundamentally alter the nature of the service, program, or activity. 28 C.F.R. § 35.130(b)(7). A "fundamental alteration" is one that would "compromise[ ] the essential nature of the [overall] program . . . ." *Alexander v. Choate*, 469 U.S. 287, 300 (1985) (quoting *Se. Cmty. Coll. v. Davis*, 442 U.S. 397, 413-14 (1979)). "[T]he determination of what constitutes reasonable modification is highly fact-specific, requiring case-by-case inquiry." *Crowder*, 81 F.3d at 1486.

Cases interpreting assessing a fundamental-alteration defense reveal the fact-specific nature of the inquiry. In *PGA Tour, Inc. v. Martin*, 532 U.S. 661 (2001), the Supreme Court considered the question of whether, under the ADA, the PGA was required to accommodate

disabled golfer Casey Martin by allowing him to use a golf cart instead of walking the course. The PGA argued that walking the course—specifically the fatigue caused by walking the course—was an essential part of the tournament. *Id.* at 686. The *Martin* Court ultimately held that shot-making was the essence of the tournament and the game of golf generally, and that the fatigue brought on by walking without the assistance of a golf cart was a peripheral, not an essential, aspect of the tournament and the game. *Id.* at 683-84, 689. In so ruling, *Martin* cautioned that courts must "carefully weigh the purpose, as well as the letter, of [a given] rule before determining that no accommodation would be tolerable." *Id.* at 691.

In *Crowder*, the Ninth Circuit reversed summary judgment granted to the state, and remanded for factual findings regarding the reasonableness of the plaintiffs' proposed modifications to the state's challenged law. 81 F.3d at 1486. *Crowder* noted:

> The court's obligation under the ADA and accompanying regulations is to ensure that the decision reached by the state authority is appropriate under the law and in light of proposed alternatives. Otherwise, any state could adopt requirements imposing unreasonable obstacles to the disabled, and when haled into court could evade the antidiscrimination mandate of the ADA merely by explaining that the state authority considered possible modifications and rejected them.

Id. at 1485.

Hindel v. Husted, 875 F.3d 344 (6th Cir. 2017), is also instructive. In *Hindel*, blind voters in Ohio brought ADA claims to challenge the state statute that permitted only paper ballots for absentee voting. *Id.* at 345. The plaintiffs requested a modification of the statute's mandate, in the form of online ballots and online ballot marking tools in lieu of paper absentee ballots. *Id.* The state asserted a defense of fundamental alteration—claiming that the modification would have fundamentally altered Ohio's voting program—and the district court agreed, granting judgment on the pleadings. *Id.* at 346. Reversing that order, the Sixth Circuit observed that fundamental-alteration analysis is almost never "capable of resolution on the basis of the pleadings alone." *Id.* at 347 (citations omitted). Rather, "facts and evidence" are required in cases where an ADA defendant asserts the affirmative defense of fundamental alteration. *Id.* at 347-48. That determination should be made "only after discovery, expert testimony, an evidentiary hearing, or trial." *Id.* at 347.

It is far too early to conclude that Plaintiffs' requested relief would fundamentally alter the EOLOA. Indeed, to the contrary—and consistent with their allegations (FAC ¶ 44 (disclaiming fundamental alteration)—Plaintiffs contend their requested relief is consonant with the language, goals, and essential nature of the statute.

For example, partially depressing a feeding or rectal tube plunger, or pushing one's head against the plunger to initiate the administration (or against the physician's hand that is resting on the plunger), are ways to both exhibit consent and take an "affirmative, conscious, and physical act" in furtherance of ingesting the AID medication. Surely there are others that will be identified during discovery.

Moreover, Plaintiffs plan to prove through discovery that the assistance prohibition has no real-world grounding when combined with the self-administration requirement. Plaintiffs anticipate presenting facts to prove that, by the time a patient has gone through the extensive process to establish eligibility, obtain AID medication, and initiate ingestion, nobody has *ever* decided against completing it. *See also* Pope Decl. ¶ 23. While Plaintiffs take seriously the concerns of third-party coercion to end one's life, for the Patient-Plaintiffs in this case, the prohibition of assistance might well be an answer in search of a problem. For these patients, a reasonable modification would not fundamentally alter the EOLOA. *Cf. Crowder*, 81 F.3d at 1486 (stating that a fundamental-alteration decision must rest on "findings of fact" regarding the extent of the problem that grounds the rule, as well as the extent to which the proposed modification would actually undermine the objective).

In short, Plaintiffs have well-grounded reasons for engaging in discovery in order to refute Defendants' assertion that a reasonable modification of the assistance prohibition for patients with physical disabilities would fundamentally alter the EOLOA. The relief requested by Plaintiffs is fully consistent with the purpose of the EOLOA itself, including its foundational goals of honoring patient choice and autonomy. *See* California Health & Safety Code § 443.1(q) (defining self-administration as an "affirmative, conscious, and physical act"); *see also* S. Floor Analysis, ABX2 15, 2015-2016 Reg. Sess., at 8, 15 (2015) ("[H]ow each of us spends the end of our lives is a deeply personal decision. That decision should remain with the individual, as a

matter of personal freedom and liberty, without criminalizing those who help to honor our wishes and ease our suffering"; "this bill includes numerous safeguards to ensure that the medication is provided only to terminally ill individuals according to their own choice and knowing, well-considered decision after consideration of feasible alternatives and additional treatment opportunities.").

Discovery will establish that a reasonable modification will allow the physically disabled Patient-Plaintiffs (and putative class members, if a class is certified) the ability to access the EOLOA at the time of their choosing, in a manner consistent with the purpose and goals of the EOLOA. Until then, Defendants have not proven, in this fact-specific inquiry, that ordering relief for the Plaintiffs would fundamentally alter the EOLOA.

V. THE PROHIBITION ON ASSISTANCE WITH INGESTING AID MEDICATION DENIES PHYSICALLY DISABLED PATIENTS MEANINGFUL ACCESS TO THE BENEFITS OF THE EOLOA.

The State argues that the ADA is not violated when a program, service, or activity is not available to a disabled individual for a relatively short period of time. (State Motion at 15:2-13.) That argument does not set forth the proper analysis for an alleged ADA violation, and besides, the Ninth Circuit already has rejected the State's temporal argument.

Governmental entities cannot not meet their Title II obligations by merely providing *some* access to their services, programs, or activities—they must provide *meaningful access*. *See Choate*, 469 U.S. at 301. However, the State never sets forth this test, let alone applies it in support of its argument. Because the EOLOA's prohibition on assistance denies Patient-Plaintiffs a crucial benefit of the statute—the ability to take AID medication when they feel the time is appropriate—Patient-Plaintiffs have been denied "meaningful access" to the EOLOA.

The crux of the State's temporal argument is that the Patient-Plaintiffs have not been excluded at all times from the benefits of the EOLOA, but rather that the EOLOA's assistance prohibition effectively "plac[es] an outer limit on the time period during which Plaintiffs may avail themselves of the law's protections." (State Motion at 15:6-8). In short, the State Defendants argue that Sandra Morris, Rhiannon Cerreto, and the proposed Patient Class can take

advantage of the EOLOA, but they have less time to act and must take AID medication sooner than any nondisabled patient in the same situation—and sooner than they would prefer, depriving them and their loved ones of precious time together.

Not only does the State's argument fail the meaningful-access test, but it runs afoul of Ninth Circuit law. In *Crowder*, referenced above, the fact that the quarantine rule applied only for 120 days did not nullify the cognizable nature of the ADA claim. Even if someone were to move to Hawaii, and then live there for decades, being denied access to the state's programs, services, and activities for that short period of time was actionable.

Likewise, a governmental entity cannot add a ramp to the courthouse steps, but take it down during the hours of 10 AM – noon. Or a city cannot block all sidewalk curb cuts for one year every decade. These actions prohibit meaningful access to the entity's programs, services, and activities, even though the denial of access was limited temporally.

Here, too, allowing access to the EOLOA program for some period of time, but not toward the end of a disabled person's life—when he or she most wants it—does not permit meaningful access. (At the very least, this is a factual matter that cannot be adjudicated on a motion to dismiss.) Empowering patients to decide *when* they take AID medication is an integral part of the liberty and autonomy intended to be conferred by the EOLOA. Forcing patients to take AID medication prematurely, before they are ready, denies these patients one of the core benefits of the EOLOA, and thus fails to provide these patients with meaningful access to the benefits of the statute.

VI. PHYSICIAN-PLAINTIFFS HAVE ALLEGED A COGNIZABLE RETALIATION CLAIM.

Defendants contend that the Physician-Plaintiffs have not alleged a cognizable ADA claim. Not so. Under the ADA, people associated with disabled individuals are entitled to be free from retaliation as a result of the person's disability. Here, the FAC sufficiently alleges precisely that injury.

The ADA's anti-retaliation provision provides: "It shall be unlawful to coerce, intimidate, threaten, or interfere with any individual in the exercise or enjoyment of, or on account of his or

her having exercised or enjoyed, or on account of his or her having aided or encouraged any other individual in the exercise or enjoyment of, any right granted or protected by this Act." 42 U.S.C. § 12203(a). Here, criminalizing the Physician-Plaintiffs' assisting Patient-Plaintiffs with ingesting AID medication is "coercion," "threatening," or "interfering with" the aiding of Patient-Plaintiffs' rights under the ADA.

Defendants contend that the Physician-Plaintiffs do not allege to be "involved in a protected activity," which is a required element of a claim for retaliation under the ADA. (State Motion at 15:26-16:1 (quoting *Brown v. Tucson*, 336 F.3d 1181, 1187 (9th Cir. 2003); *Brooks v. San Mateo*, 229 F.3d 917, 928 (9th Cir. 2000)). However, the FAC plainly alleges this: Physician-Plaintiffs seek to engage in conduct that will preserve the Patient-Plaintiffs' rights under the ADA—namely, participating in the EOLOA, at the time of the patients' choosing, by assisting with them with ingesting the AID medication. FAC ¶ 40. Although Defendants deny this is protected activity because they disagree that the exclusion of disabled individuals violates the ADA, the central component of Plaintiffs' claims is that this exclusion violates the federal law. If Plaintiffs are correct on this central point, then the Physician-Plaintiffs are indeed involved in a "protected activity."[5]

The Physician-Plaintiffs allege that they are being threatened by or interfered with their assisting the Patient-Paintiffs ingest AID medication. That is a cognizable retaliation claim under the ADA.

[5] *See also* State Motion at 16 n.14 (recognizing that "the exception for criminal liability under EOLOA could be deemed a "benefit," which would disprove this particular argument of the Defendants).

CONCLUSION

For the reasons set forth above, the motions to dismiss should be denied.[6]

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Respectfully Submitted,

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[6] Should the Court find any material allegation lacking, Plaintiffs respectfully request the opportunity to amend their complaint. *Eminence Capital, LLC v. Aspeon, Inc.*, 316 F.3d 1048, 1051, 1052 (9th Cir. 2003) (noting that "[t]he policy of granting leave to amend is to be applied with extreme liberality" and "should, as the rules require, be freely given") (internal quotation marks omitted).