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16 **UNITED STATES DISTRICT COURT**
17 **CENTRAL DISTRICT OF CALIFORNIA**
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**CHRISTIAN MEDICAL &
DENTAL ASSOCIATIONS**, et al.,
Plaintiffs,
v.
ROB BONTA, et al.,
Defendants.

Case No. 5-22-cv-00335-FLA (GSJx)

**BRIEF IN SUPPORT OF
MOTION FOR PRELIMINARY
INJUNCTION**

Motion Hearing on May 27, 2022, at
1:30pm, as Noticed with Judicial
Officer Twyla Freeman

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1 **INTRODUCTION**

2 For 2,500 years the medical profession has forbidden doctors from giving patients
3 lethal drugs. Society relies on this prohibition—trusting physicians to be healers
4 when possible and to provide comfort when healing is no longer possible. In the last
5 30 to 40 years, hospice and palliative care organizations have developed advanced
6 techniques to control the physical, psychological, social, and spiritual distresses that
7 so often affect individuals approaching death. The common goal is life with dignity
8 until natural death occurs.

9 This life-affirming care for the dying is embodied in the Hippocratic Oath.
10 Various translations of the original Oath are available, but they all contain something
11 like the following: “I will not give a lethal drug to anyone if I am asked, nor will I
12 advise such a plan[.]” Michael North, *Greek Medicine*, NATIONAL LIBRARY OF
13 MEDICINE (2002), <https://bit.ly/3KH2Lkp>.

14 Despite historical condemnations of physician involvement in suicide, California
15 legalized it in 2015. CAL. HEALTH & SAFETY CODE § 443 (End of Life Options Act).
16 The original Act included important safeguards to ensure that healthcare
17 professionals would not have to participate. But six years later, SB 380 redefined
18 “participation” in a way that removes those safeguards. Religious objectors now
19 must provide information about suicide availability to requesting patients and
20 participate in the prescribed process for subjecting terminally ill patients to drugs
21 enabling them to kill themselves.

22 Christian Medical & Dental Associations’ members, including Leslee Cochrane,
23 M.D. (collectively “CMDA” or “CMDA members”) have personal religious

1 convictions and professional ethical beliefs opposing the practice of assisted suicide.
2 They cannot facilitate it in any way. So SB 380 is violating and chilling CMDA
3 members' fundamental constitutional rights protected by the First and Fourteenth
4 Amendments. An injunction is required to stop this irreparable harm while litigating
5 this case.

6 **STATEMENT OF FACTS¹**

7 ***CMDA members' religious and ethical convictions***

8 CMDA members like Dr. Cochrane live out their Christian beliefs in their
9 practice of health care, including their belief in the sanctity of human life. It would
10 violate their consciences to participate in assisted suicide in any way. CMDA
11 members in California work in the hospice setting or specialize in oncology so they
12 often treat patients with terminal diseases. Others work in specialties including
13 cardiology, internal medicine, and family medicine, and also treat patients with
14 terminal diseases. Over 90% of CMDA members would rather stop practicing
15 medicine than participate in assisted suicide.

16 One of those California members, Dr. Leslee Cochrane, M.D., is a full-time
17 hospice physician who is board certified in family medicine with a certificate of
18 additional qualification in hospice and palliative medicine. In his job as a full-time
19 hospice physician, Dr. Cochrane sees terminally ill patients daily and must engage
20 in discussions with them about their diagnosis, prognosis, and treatment options. He
21 works in a hospice that does not provide assisted suicide, though it does serve
22

23 ¹ Facts in this brief are in the Verified Complaint unless otherwise indicated.

1 patients interested in it. Neither he nor any other physician at the hospice will
2 participate in assisted suicide in any way.

3 Some of Dr. Cochrane’s terminally ill patients can experience temporary
4 physical, mental, or emotional distress that lasts longer than the two da waiting
5 period for access to suicide drugs. This distress may cause exhaustion that leaves
6 them vulnerable to being easily manipulated to commit suicide.

7 ***The original End of Life Options Act***

8 Despite the historical prohibition against physician participation in suicide, the
9 End of Life Options Act took effect in 2016, legally authorizing the practice of
10 physician-assisted suicide in California. *See* CAL. HEALTH & SAFETY CODE §§ 443,
11 *et seq.* The original Act provided broad protections for conscientiously declining
12 “participation” with no caveats:

13 Notwithstanding any other law, a health care provider is not subject to
14 civil, criminal, administrative, disciplinary, employment, credentialing,
15 professional discipline, contractual liability, or medical staff action,
16 sanction, or penalty or other liability for refusing to participate in
17 activities authorized under this part, including, but not limited to,
refusing to inform a patient regarding his or her rights under this part,
and not referring an individual to a physician who participates in
activities authorized under this part.

18 *Id.* at § 443.14(e)(2) (as enacted in 2015, available at <https://bit.ly/35fDUER>).

19 ***SB 380’s amendments to the End of Life Options Act***

20 SB 380 amended the Act to require a physician whose patient requests assisted
21 suicide to document the request in that patient’s medical record, even if the physician
22 objects to facilitating assisted suicide in any way. *Id.* at § 443.14(e)(2). That
23

1 documentation will satisfy the first of two oral request requirements for assisted
2 suicide. *Id.* at § 443.3(a).

3 SB 380 also requires a conscientiously objecting “health care provider” to “at a
4 minimum, inform the individual that they do not participate in [assisted suicide],
5 ...and transfer the individual’s relevant medical record upon request.” *Id.* at §
6 443.14(e)(1), (2). Another provision of SB 380 requires objecting physicians to
7 timely refer the patient to a physician who will participate. *Id.* at § 443.15(f)(3)(C).
8 They also must diagnose the terminal illness, inform the patient of the diagnosis,
9 determine the patient’s capacity, and provide the patient information about assisted
10 suicide. *Id.* at § 443.15(f)(3)(A) & (B).

11 Physicians, such as Plaintiffs, who refuse to participate in assisted suicide in these
12 ways are open to “civil, criminal, administrative, disciplinary, employment,
13 credentialing, professional discipline, contractual liability, or medical staff action,
14 sanction, or penalty or other liability[.]” *Id.* at § 443.14(e)(3). And they do not have
15 the same protection from Medical Board complaints that participating physicians do.
16 *Id.* at § 443.15(g) (“The fact that a health care provider participates under
17 [California’s physician-assisted laws] shall not be the sole basis for a complaint or
18 report of unprofessional or dishonest conduct” in violation of California’s Business
19 and Professions Code).

20 ***SB 380’s effect on the Plaintiffs***

21 SB 380 requires objecting physicians like CMDA members to participate in
22 assisted suicide by:

- 23 a. Documenting the date of a patient’s initial assisted suicide request;

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ANALYSIS

The U.S. Supreme Court specifically recognized protection for medical professionals’ conscientious objection to taking a life in *Roe v. Wade*. It quoted the AMA House of Delegates resolution that, “[N]o physician or other professional personnel shall be compelled to perform any act which violates his good medical judgment. Neither physician, hospital, nor hospital personnel shall be required to perform any act violative of personally-held moral principles.” 410 U.S. 113, 143 n. 38 (1973).

Protecting health care professionals from forced participation in acts that violate their “good medical judgment” or “personally-held moral principles” is prevalent in our laws and jurisprudence. Since the 1970s, the “Church Amendments” (42 U.S.C. §§ 300a-7(b)–(e)), the Weldon Amendment (Sec. 507(d) of Title V of Division H (Departments of Labor, Health and Human Services, and Education, and Related Agencies Appropriations Act) of the Consolidated Appropriations Act, 2016 Pub. L. No. 114-113), and the Affordable Care Act (42 U.S.C. §§ 18023(b)(4), 18113(a)), have all contained provisions protecting medical rights of conscience.

When the U.S. Supreme Court considered whether there is a “fundamental right” to physician-assisted suicide in *Washington v. Glucksberg*, it agreed with the AMA that “[p]hysician-assisted suicide is fundamentally incompatible with the physician’s role as healer.” 521 U.S. 702, 731 (1997) (quoting AMERICAN MEDICAL ASSOCIATION, CODE OF MEDICAL ETHICS § 2.211 (1994), available at

1 <https://bit.ly/35gicR9>).² This is consistent with the Court’s staunch protection
2 conscientious objectors in other areas like refusing to work on the Sabbath and
3 production of war materials. *Sherbert v. Verner*, 374 U.S. 398 (1963) (coercing
4 employees to work on the Sabbath Day in order to obtain unemployment benefits
5 violated the Free Exercise Clause); *Thomas v. Rev. Bd. of Ind. Emp. Sec. Div.*, 450
6 U.S. 707 (1981) (similar holding regarding producing tank turrets).

7 **I. The Plaintiffs are likely to succeed on the merits of their constitutional claims.**

8 **A. Plaintiffs are likely to succeed on the merits of their free exercise**
9 **claim because SB 380 treats secular doctors better than religious**
10 **doctors and treats some religious beliefs more favorably than others.**

11 The Free Exercise Clause forbids the government from imposing “special
12 disabilities on the basis of religious views or religious status.” *Emp. Div., Dep’t of*
13 *Human Res. of Or. v. Smith*, 494 U.S. 872, 877 (1990). Laws that burden religiously
14 motivated conduct are subject to strict scrutiny if they are not generally applicable
15 or not religiously neutral. *Church of the Lukumi Babalu v. City of Hialeah*, 508 U.S.
16 520, 546 (1993). SB 380 fails this test.

17 _____
18 ² AMA’s code of ethics still holds that “[p]hysician assisted suicide is fundamentally
19 incompatible with the physician’s role as healer, would be difficult or impossible to
20 control, and would pose serious societal risks.” AMERICAN MEDICAL ASSOCIATION,
21 CODE OF MEDICAL ETHICS § 5.7. The Code also says, “Preserving opportunity for
22 physicians to act (or refrain from acting) in accordance with the dictates of
23 conscience...is important for preserving the integrity of the medical profession
...[P]hysicians should have considerable latitude to practice in accord with well-
considered, deeply held beliefs that are central to their self-identities.” CAL. HEALTH
& SAFETY CODE § 1.1.7.

1 Laws targeting religion are only the baseline of what the Free Exercise Clause of
2 the First Amendment protects. In other words, “[b]ad motive may be one way to
3 pursue a violation, but first and foremost, *Smith-Lukumi* is about objectively unequal
4 treatment of religion and analogous secular activities.” Douglas Laycock, *Theology*
5 *Scholarships, the Pledge of Allegiance, and Religious Liberty: Avoiding the*
6 *Extremes but Missing the Liberty*, 118 HARV. L. REV. 155, 210 (2004). Laws
7 burdening religiously motivated conduct are subject to the highest level of scrutiny
8 under the Free Exercise Clause when they lack neutrality or general applicability.
9 *Smith*, 494 U.S. at 879.

10 **1. SB 380 impermissibly burdens CMDA members’ exercise of**
11 **religion.**

12 To trigger Free Exercise protection, CMDA need only show that SB 380 burdens
13 its members’ religion. *Lukumi*, 508 U.S. at 531. SB 380 burdens CMDA members’
14 free exercise of religion by requiring them to facilitate assisted suicide. CAL. HEALTH
15 & SAFETY CODE §§ 443.14(e)(2), 443.14(e)(4), 443.15(f)(3). This is a prototypical
16 burden that is substantial. *See Burwell v. Hobby Lobby Stores*, 573 U.S. 682, 720-22
17 (2014) (requiring companies to cover abortifacients in their employee health
18 insurance plans substantially burdened their religious beliefs not to facilitate
19 abortion).

20 **2. SB 380 is neither neutral nor generally applicable.**

21 SB 380 is not neutral and generally applicable because it: (1) is gerrymandered
22 to single out religious conduct for disfavored treatment, *Lukumi*, 508 U.S. at 532–
23 40; and (2) applies differential treatment among religions. *Id.* at 536.

1 **a. SB 380 is impermissibly gerrymandered.**

2 A law is impermissibly gerrymandered against religious individuals like CMDA
3 members when it favors secular conduct, *Lukumi*, 508 U.S. at 537, or “proscribe[s]
4 more religious conduct than is necessary to achieve [its] stated ends.” *Id.* at 538. SB
5 380 suffers from both maladies.

6 SB 380 protects physicians participating in assisted suicide from “censure,
7 discipline, suspension, loss of license, loss of privileges, loss of membership, or
8 other penalty” with no exceptions. § 443.14(b)-(c). But protection for religiously
9 objecting, non-participating physicians is limited. SB 380 parrots the original Act’s
10 promise that “a person or entity that elects, for reasons of conscience, morality, or
11 ethics, not to participate is not required to.” CAL. HEALTH & SAFETY CODE §
12 443.14(e)(1), (2). But it redefines “participate” to leave those non-participating
13 physicians open to “civil, criminal, administrative, disciplinary, employment,
14 credentialing, professional discipline, contractual liability, or medical staff action,
15 sanction, or penalty or other liability” for failing to take actions that facilitate assisted
16 suicide. *Id.* at § 443.14(e)(3).

17 The allowance for not having to “participate,” as now defined by SB380, is
18 drafted so narrowly that it requires CMDA member complicity in the very thing their
19 beliefs prohibit. They now must fulfill requirements for and participate in the
20 approval process of assisted suicide through diagnosing the terminal illness,
21 documenting the suicide request (which is the first of two oral request requirements),
22 providing information about assisted suicide availability, and referring to a doctor
23 who will provide it. *Id.* at §§ 443.14(e)(1)-(2) & 445.15(f)(3).

1 Moreover, non-objecting physicians who fully participate have added protection
2 from Medical Board of California complaints. “The fact that a health care provider
3 participates under [California’s physician-assisted laws] shall not be the sole basis
4 for a complaint or report of unprofessional or dishonest conduct” in violation of
5 California’s Business and Professions Code. *Id.* at § 443.15(g). No such protection
6 exists for religiously objecting physicians whose failure to participate *can* be the sole
7 basis for a complaint of unprofessional or dishonest conduct.

8 SB 380 also violates more religious convictions than necessary to achieve its goal
9 of ensuring easier access to assisted suicide. *Lukumi*, 508 U.S. at 542 (law hindering
10 “much more religious conduct than is necessary in order to achieve the legitimate
11 ends asserted in [its] defense,” is “not neutral.”). The original End of Life Options
12 Act provided broad protections for physicians conscientiously declining
13 participation. CAL. HEALTH & SAFETY CODE at §§ 443.14(e)(2) (as enacted in 2015,
14 available at <https://bit.ly/35fDUER>). There were no exceptions requiring physicians
15 to facilitate assisted suicide through diagnosis, documentation, provision of
16 information, and referral. SB 380’s new protections for religious objectors are not
17 supported by legislative findings that the previous comprehensive protection was
18 problematic. In other words, the Act now violates more religious exercise than
19 necessary to achieve its ends. This is evidence of improper religious targeting subject
20 to strict scrutiny. *Lukumi*, 508 U.S. at 538 (“We also find significant evidence of the
21 ordinance’s improper targeting of Santeria sacrifice in the fact that they proscribe
22 more religious conduct than is necessary to achieve their stated ends.”)

23

1 In fact, the Senate Committee on Health’s analysis of the bill warned that the
2 California Medical Association would likely not support SB 380’s limited
3 conscience protection: “This bill redefines ‘participation,’ including the requirement
4 of informing and referring, which would severely threaten the autonomy of
5 physicians, removing a true conscious objection and opt out.” Senate Judiciary
6 Committee Executive Summary on SB-380 at 8-9, CALIFORNIA LEGISLATIVE
7 INFORMATION (April 16, 2021), <https://bit.ly/3H1KbBj>. The analysis admitted that
8 such a requirement “arguably did not strike the right balance” and “raised
9 constitutional questions with respect to freedom of speech and the free exercise of
10 religion.” *Id.*

11 SB 380 is not neutral. It is strategically gerrymandered to subject CMDA
12 members to liability because their religious beliefs prohibit participating in assisted
13 suicide through diagnosis, documentation, provision of information, and referral.

14 **b. SB 380 treats some religiously objecting physicians more**
15 **favorably than others.**

16 A second way to prove a law is not neutral is to show that it produces “differential
17 treatment of two religions.” *Lukumi*, 508 U.S. at 536. There is no need to show the
18 government favors one creed over another. *Larson v. Valente*, 456 U.S. 228, 246
19 (1982) (striking law treating “well-established churches” more favorably than
20 “churches which are new”); *Colo. Christian Univ. v. Weaver*, 534 F.3d 1245, 1258
21 (10th Cir. 2008) (striking law treating “sectarian” universities more favorably than
22 “pervasively sectarian” universities).

23

1 As shown in the previous subsection, SB 380 allows physicians to not participate
2 in assisted suicide so long as the physicians’ beliefs align with the more narrow
3 definition of “participate.” SB 380 accommodates those who don’t object to
4 referring for assisted suicide, providing information about its availability, and
5 documenting patient assisted-suicide requests. But SB 380 does not accommodate
6 physicians like CMDA members whose religious convictions prohibit facilitating
7 assisted suicide in these ways. This discriminatory treatment shows SB 380 is not
8 neutral and generally applicable and therefore violates CMDA’s free exercise
9 rights.³

10 **3. SB 380 violates the Free Exercise Clause because respect for**
11 **rights of conscience is rooted in the Religion Clauses.**

12 SB 380 does not respect rights of conscience which are rooted in the Religion
13 Clauses. In *Thomas*, the Court protected an employee’s religious conviction not to
14 participate in the taking of life by making weapons of war. 450 U.S. at 714. That
15 holding furthered the Free Exercise Clause’s protection of religious liberty and was
16 consistent with the Establishment Clause principle of neutrality. *Id.* at 718-20.

17 *Smith* did not overrule *Thomas* but distinguished it because denial of
18 unemployment benefits based on religious belief is not “an across-the-board criminal
19 prohibition on a particular form of conduct.” 494 U.S. at. 884. Thirty-one years later,

20 ³ *Smith* should be overruled because it distorts a proper understanding of the Free
21 Exercise Clause. In *Kennedy v. Bremerton Sch. District*, U.S. Supreme Court No.
22 18-12, four Justices suggested that a future case should revisit that decision. 139 S.
23 Ct. 634 (Mem) (2019) (Alito, J., joined by Thomas, J., Gorsuch, J., and Kavanaugh,
J.). See generally Michael W. McConnell, *Free Exercise Revisionism and the Smith
Decision*, 57 U. CHI. L. REV. 1109 (1990).

1 the Court clarified that even “a neutral law of general applicability” is
2 unconstitutional if it violates engrained First Amendment principles. “The
3 contention that *Smith* forecloses recognition of a ministerial exception rooted in the
4 Religion Clauses has no merit.” *Hosanna-Tabor Evangelical Lutheran Church &*
5 *Sch. v. EEOC*, 565 U.S. 171, 190 (2012). *See also Trinity Lutheran Church of*
6 *Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2021 n.2 (2017) (refuting the notion “that
7 any application of a valid and neutral law of general applicability is necessarily
8 constitutional under the Free Exercise Clause.”) That is why the government cannot
9 use even neutral, generally applicable nondiscrimination laws to compel clergy “to
10 perform” a same-sex wedding. *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights*
11 *Comm’n*, 138 S. Ct. 1719, 1727 (2018).

12 Like the employee in *Thomas*, CMDA members’ religiously motivated
13 conscientious refusal to facilitate taking a life is rooted in the First Amendment
14 Religion Clauses. Respecting it furthers religious liberty protected by the Free
15 Exercise Clause and complies with the government’s obligation to remain neutral in
16 matters of religion required by the Establishment Clause. “A regulation neutral on
17 its face may, in its application, nonetheless offend the constitutional requirement for
18 governmental neutrality if it unduly burdens the free exercise of religion.” *Wisconsin*
19 *v. Yoder*, 406 U.S. 205, 220-21 (1972) (cleaned up) (striking down mandatory high
20 school education law’s application to Amish children because it violated the
21 Religion Clauses).

22 Moreover, compelled speech that violates religious beliefs is unconstitutional. *W.*
23 *Va. Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943) (striking mandatory pledge

1 of allegiance recitation because it violated students’ religious beliefs prohibiting
2 swearing allegiance to any entity other than God). This makes sense because the
3 freedom to communicate one’s beliefs—and to decline to contradict them—is a core
4 component of the right to “profess whatever religious doctrine one desires.” *Smith*,
5 494 U.S. at 877.⁴

6 Physicians’ refusal to assist with suicide is nothing new. They have taken
7 Hippocrates’ Oath for two millennia, swearing, “To please no one will I prescribe a
8 deadly drug nor give advice which may cause his death.” HISTORY OF EUTHANASIA,
9 <https://bit.ly/3KMkJlx> (last visited March 24, 2022). And “for over 700 years, the
10 Anglo-American common-law tradition has punished or otherwise disapproved of
11 both suicide and assisting suicide.” *Glucksberg*, 521 U.S. at 711. In fact, “[b]y the
12 time the Fourteenth Amendment was ratified [in 1868], it was a crime in most States
13 to assist a suicide.” *Id.* at 715. And nearly a hundred years later, the first Model Penal
14 Code included assisted suicide as a crime. Thaddeus Pope, *Legal History of Medical*
15 *Aid in Dying: Physician Assisted Death in U.S. Courts and Legislatures*, 38 N.M. L.
16 REV. 267, 272 (2018), available at <https://bit.ly/36m1v7H>. Limited acceptance of
17 physician-assisted suicide is a very recent phenomenon and still a minority view. It
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21 ⁴ At a minimum, CMDA’s claim “falls into the class of ‘hybrid situations’ in which
22 ‘the Free Exercise Clause in conjunction with other constitutional protections, such
23 as freedom of speech,’ can ‘bar application of a neutral, generally applicable law.’”
Telescope Media Grp. v. Lucero, 936 F.3d 740, 759 (8th Cir. 2019) (quoting *Smith*,
494 U.S. at 881–82) (cleaned up)..

1 came on the scene in the 1980s and 90s, *id.* at 274-82, and only 10 states and the
2 District of Columbia now permit it under limited circumstances.⁵

3 SB 380’s dismissal of thousands of years of medical tradition amplifies the
4 violation. CMDA’s conscience rights rooted in the Religion Clauses along with SB
5 380’s lack of neutrality and general applicability require strict scrutiny. *Lukumi*, 508
6 U.S. at 546. CMDA is likely to succeed on its free exercise claim because
7 Defendants cannot clear this highest of constitutional bars.

8 **4. SB 380 cannot survive strict scrutiny.**

9 Under strict scrutiny, “a law restrictive of religious practice must advance
10 interests of the highest order and must be narrowly tailored in pursuit of those
11 interests.” *Lukumi*, 508 U.S. at 546 (cleaned up). In applying strict scrutiny, courts
12 “look[] beyond broadly formulated interests” and instead “scrutinize [] the asserted
13 harm of granting specific exemptions to particular religious claimants.” *Gonzales v.*
14 *O Centro Espirita Beneficente Uniao do Vogetal*, 546 U.S. 418, 431 (2006).

15 California must “identify an ‘actual problem’ in need of solving.” *Brown v. Ent.*
16 *Merchs. Ass’n*, 564 U.S. 786, 799 (2011). It has not done so here. There is no
17 rational, much less compelling, reason to discontinue or narrow the original Act’s
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19 ⁵ CAL. HEALTH & SAFETY CODE §§ 443 to 443.9 (West 2016); 2016 COLO. REV.
20 STAT. §§ 25-48-101 to 25-48-123; D.C. CODE §§ 7-661.01 to 7-661.16 (2017); HAW.
21 REV. STAT. §§ 327L-1 to 327L-25 (2019); ME. STAT. tit. 22 § 2140 (2019); N.J. REV.
22 STAT. §§ 26:16-1 to 26:16-20 (2019); N.M. STAT. ANN. §§ 24-7C-1 to 24-7C-8
23 (West 2021); OR. REV. STAT. §§ 127.800 to 127.897 (2017); VT. STAT ANN. tit. 18
§§ 5281 to 5293 (West 2013); WASH. REV. CODE §§ 70.245.010 to 70.245.903
(2009). *Baxter v. State*, 354 Mont. 234, 239, 251 (Mont. 2009), allows physicians to
raise a consent defense in assisted suicide cases.

1 conscience protections. And there is no compelling interest to support the differential
2 treatment of religious objectors based on how complicit they are willing to be with
3 physician-assisted suicide.

4 Under strict scrutiny, the government must also show the law “is the least
5 restrictive means of achieving” its interests. *Thomas*, 450 U.S. at 718. If means less
6 burdensome on religious freedom exist, the government “must use [them].” *United*
7 *States v. Playboy Entm’t Grp., Inc.*, 529 U.S. 803, 813 (2000). California previously
8 protected religious objectors from facilitating physician-assisted suicide and no
9 evidence shows that protection caused any harm to the State’s interests. *Hobby*
10 *Lobby*, 573 U.S. at 730–31 (noting that the government had shown its ability to
11 provide an exemption to the Petitioners because it had granted such an exemption to
12 a different class of religious objectors). This protection was “workable,” *Grutter v.*
13 *Bollinger*, 539 U.S. 306, 339 (2003), and much “less restrictive” of religious
14 freedom, *Playboy*, 529 U.S. at 824. SB 380 is not narrowly tailored so it fails strict
15 scrutiny. CMDA is likely to succeed on its free exercise claim.

16 **B. Plaintiffs are likely to succeed on their free speech claim because**
17 **SB 380 compels speech facilitating assisted suicide and**
18 **discriminates against CMDA members based on speech content**
and viewpoint.

19 **1. SB 380 unconstitutionally coerces CMDA members to speak the**
State’s message on assisted suicide to their patients.

20 The “right to speak and the right to refrain from speaking are complementary
21 components of the broader concept of ‘individual freedom of mind.’” *Wooley v.*
22 *Maynard*, 430 U.S. 705, 714 (1977) (citing *Barnette*, 319 U.S. at 637). As a result,
23 the First Amendment protects not only the right of a speaker to choose what to say,

1 but also the right of the speaker to decide “what not to say.” *Hurley v. Irish-Am. Gay,*
2 *Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557, 573 (1995) (quoting *Pac. Gas &*
3 *Elec. Co. v. Pub. Util. Comm’n of Cal.*, 475 U.S. 1, 16 (1986)) (cleaned up).

4 SB 380 requires CMDA members to provide information about the availability
5 of, and refer for, assisted suicide. CAL. HEALTH & SAFETY CODE §§ 443.14(e)(2),
6 443.14(e)(4), 443.15(f)(3). But healthcare professionals enjoy First Amendment
7 rights within their practice and content-based professional speech regulations are
8 subject to strict scrutiny. *Nat’l Inst. of Family and Life Advoc. v. Becerra*, 138 S. Ct.
9 2361, 2371-72 (2018) (enjoining law requiring pro-life medical facilities to refer for
10 abortion). Even a doctor who publicly advocates a treatment the medical
11 establishment considers outside the mainstream is entitled to robust protection under
12 the First Amendment. *Conant v. Walters*, 309 F.3d 629, 639 (9th Cir. 2002)
13 (affirming injunction prohibiting government from threatening revocation of a
14 physician’s license for recommending medical use of marijuana). So too here where
15 CMDA members’ views are mainstream. The Supreme Court agrees with the AMA
16 that “[p]hysician-assisted suicide is fundamentally incompatible with the
17 physician’s role as healer.” *Glucksberg*, 521 U.S. at 731 (quoting AMA, Code of
18 Ethics § 2.211 (1994)).

19 SB 380 forces physicians to affirm that assisted suicide may be indicated for a
20 six-months “terminal” condition, and suggest that assisted suicide is morally
21 appropriate for a diagnosed “terminal” condition. CMDA members strenuously
22 disagree with both statements as a matter of medical practice and as a matter of
23 medical ethics, and desire to remain silent on the subject or only engage in speech

1 that discourages suicide. Declaration of Jeffrey Barrows, D.O. ¶ 5.

2 That a healthcare professional may also express his or her own conflicting views
3 to the patient is irrelevant for First Amendment purposes. “One who chooses to
4 speak may also decide what not to say.” *Stuart v. Camnitz*, 774 F.3d 238, 245 (4th
5 Cir. 2014). Listeners may think the message is the healthcare professional’s speech,
6 and thereby impute the State’s message to the healthcare provider. *Id.* at 246.
7 Regardless, healthcare providers need not “affirm in one breath that which they deny
8 in the next.” *Hurley*, 515 U.S. at 576. That violates speaker “autonomy.” *Id.*

9 Patients put their trust in physicians and healthcare professionals, and tend to
10 regard their statements with a heightened degree of credulity. Barrows Decl. ¶ 6.
11 “The court can and should take into account the effect of the regulation on the
12 intended recipient of the compelled speech, especially where she is a captive
13 listener.” *Stuart*, 774 F.3d at 250; *Miami Herald Pub. Co. v. Tornillo*, 418 U.S. 241,
14 256–57 (1974) (forcefully rejecting attempt to “[c]ompel[] editors or publishers to
15 publish that which ‘reason tells them should not be published’”).

16 Likewise, in *Riley*, the Supreme Court recognized that forcing a speaker to begin
17 his relationship with an unwanted disclosure, as the state tried to do with charitable
18 solicitors in that case, imposes a severe harm to free speech rights because a negative
19 message may end the communicative relationship before it begins. *Riley v. Nat’l*
20 *Fed. of the Blind of N.C. Inc.*, 487 U.S. 781, 799-800 (1988).

21 Because SB 380 coerces CMDA members to communicate messages that
22 facilitate assisted suicide even though they believe it to be medically contraindicated
23 and morally wrong, SB 380 likely violates the First Amendment’s protection against

1 compelled speech.

2 **2. SB 380 unconstitutionally regulates and compels speech**
3 **based on content and viewpoint.**

4 “Mandating speech that a speaker would not otherwise make necessarily alters
5 the content of the speech.” *Riley*, 487 U.S. at 795. “We therefore consider [laws
6 mandating speech]’ to be ‘content-based regulations.’” *Evergreen Ass’n v. City of*
7 *New York*, 740 F.3d 233, 244 (2d Cir. 2014) (quoting *Riley*). Content-based speech
8 regulations are, in turn, presumptively unconstitutional. *Reed v. Town of Gilbert*, 135
9 S. Ct. 2218, 2226 (2015); *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992); *see*
10 *also Conant*, 309 F.3d at 637–38 (deeming content-based restrictions on professional
11 speech presumptively invalid).

12 SB 380 is also directed against the viewpoint of religious healthcare professionals
13 regarding assisted suicide. *Conant*, 309 F.3d at 637 (policy against discussing
14 medical marijuana was viewpoint-based because it condemned expression of a
15 particular viewpoint, “i.e., that medical marijuana would likely help a specific
16 patient”). Physicians who document assisted suicide requests, provide information
17 about its availability, and refer to physicians who will provide it are under no threat
18 from the State because SB 380 removed civil, criminal and regulatory liability for
19 such conversations. CAL. HEALTH & SAFETY CODE § 443.14(c). But those who refuse
20 to engage in this speech for reasons of conscience risk losing their livelihoods.

21 “Viewpoint discrimination is [] an egregious form of content discrimination. The
22 government must abstain from regulating speech when the specific motivating
23 ideology or the opinion or perspective of the speaker is the rationale for the
restriction.” *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829

1 (1995). Viewpoint discrimination is a “blatant” First Amendment violation. *Id.*

2 “In the ordinary case it is all but dispositive to conclude that a law is content-
3 based and, in practice, viewpoint-discriminatory.” *Sorrell v. IMA Health, Inc.*, 564
4 U.S. 552, 571 (2011); *Playboy*, 529 U.S. at 817-18 (viewpoint and content-based
5 speech restrictions are presumed unconstitutional). But at the very least, “[l]aws that
6 compel speakers to utter or distribute speech bearing a particular message are subject
7 to the same rigorous scrutiny” as those “that suppress, disadvantage, or impose
8 differential burdens upon speech because of its content.” *Turner Broad. Sys., Inc. v.*
9 *FCC*, 512 U.S. 624, 642 (1994).

10 While the State has identified no “actual problem” that needs “solving,” *see*
11 Section I(A)(4), it certainly cannot show that the “curtailment of free speech” is
12 “necessary” to address the issue, *Brown*, 564 U.S. at 799. Indeed, “It is rare that a
13 regulation restricting speech because of its content will ever be permissible.” *Id.*
14 (citing *Playboy*, 529 U.S. at 818). Plaintiffs are likely to succeed on their free speech
15 claim.

16 **C. Plaintiffs are likely to succeed on their claim that SB 380 violates**
17 **their due process right to be free from impermissibly vague laws.**

18 The Due Process Clause requires that laws “give the person of ordinary
19 intelligence a reasonable opportunity to know what is prohibited, so that he may act
20 accordingly” and do not “impermissibly delegate[] basic policy matters to
21 policemen, judges, and juries for resolution on an ad hoc and subjective basis, with
22 the attendant dangers of arbitrary and discriminatory application.” *Grayned v. City*
23 *of Rockford*, 408 U.S. 104, 108–09 (1972).

1 Several terms and provisions of SB 380 are unconstitutionally vague and
2 ambiguous and subject CMDA members to civil, criminal, and professional
3 disciplinary action resulting in the potential deprivation of their livelihoods. No
4 reasonable health care professional in CMDA members' position could understand
5 the meaning of the terms "terminal disease" and "participation," as defined and used
6 by SB 380.

7 "Terminal disease" is vague and ambiguous because no reasonable health care
8 professional in CMDA members' position could know whether it means a disease
9 that will "result in death within six months" with treatment or without treatment.
10 CAL. HEALTH & SAFETY CODE § 443.1(r). Moreover, a national study of live
11 discharges from hospices in 2010 found that, although there were variations based
12 on geography and based on the type of hospice and how long it had been operating,
13 about 1 in 5 hospice patients were discharged alive. Joan M. Teno, et al., *A National*
14 *Study of Live Discharges from Hospice*, JOURNAL OF PALLIATIVE MEDICINE (October
15 2014), <https://bit.ly/3LP57z1>. No reasonable health care professional in CMDA
16 members' position could know whether a disease is likely to "result in death within
17 six months" to any degree of medical certainty. *Id.*

18 And no reasonable health care professional in CMDA members' position could
19 understand the meaning of the phrase "[p]roviding information to a patient about
20 this part" as used in the statute. It is unclear how much and what type of information
21 a physician must provide to patients.

22 Finally, the term "participating," as used and defined by SB 380, is vague and
23 ambiguous because no reasonable health care professional in CMDA members'

1 position could know what that term includes and does not include. For example,
2 § 443.14(e)(2) says participation is not required “as defined in subdivision (f) of
3 Section 443.15.” That subdivision says “participating” does *not* include diagnosing,
4 providing information, or referral. CAL. HEALTH & SAFETY CODE § 443.15(f)(3). But
5 the next provision of § 443.14(e) says physicians are not subject to liability for not
6 participating “as defined in paragraph (2) of subdivision (f) of Section 443.15.”
7 Paragraph (2) only defines what “participating” is. It makes no mention of what it is
8 not like paragraph (3). It is not clear whether (2) necessarily includes paragraph (3),
9 leaving CMDA members to guess if different “participating” definitions apply to §
10 443.15(e)(2) and (3).

11 Plaintiffs are likely to succeed on their claim that key provisions of SB 380 are
12 impermissibly vague.

13 **D. Plaintiffs are likely to succeed on their claim that SB 380 violates**
14 **the guarantee of equal protection of the laws.**

15 SB 380 treats similarly situated individuals and organizations differently in
16 violation of the Equal Protection Clause of the Fourteenth Amendment, which
17 “directs that all persons similarly circumstanced shall be treated alike.” *Plyler v.*
18 *Doe*, 457 U.S. 202, 216 (1982) (cleaned up). CMDA can “prevail on [its] equal
19 protection claim by showing that a class that is similarly situated has been treated
20 disparately.” *Ariz. Dream Act Coal. v. Brewer*, 757 F.3d 1053, 1063 (9th Cir. 2014)
21 (cleaned up). Distinctions among similarly situated groups that affect fundamental
22 rights “are given the most exacting scrutiny,” *Clark v. Jeter*, 486 U.S. 456, 461
23 (1988), and discriminatory intent is presumed, *Plyler*, 457 U.S. at 216–17.

1 As shown in Section I(A)(2)(b) above, SB 380 favors and protects physicians
2 unwilling to prescribe assisted suicide drugs but willing to diagnose the six-month
3 terminal disease, record suicide requests, provide information about suicide
4 availability, and refer to a physician who will provide it. SB 380 does not protect
5 similarly situated objecting physicians unwilling to facilitate assisted suicide in some
6 or all of those ways.

7 SB 380 also protects California physicians who participate in assisted suicide
8 from criminal, civil, administrative, and professional liability. CAL. HEALTH &
9 SAFETY CODE § 443.14(c). But no protection is provided for objecting physicians
10 who refuse to participate in assisted suicide by diagnosing terminal illness,
11 informing the patient of the illness, assessing the patient’s capacity, informing the
12 patient about assisted suicide availability, documenting a patient’s request for
13 assisted suicide, transferring a requesting patient’s file, or referring the patient to a
14 physician that will provide assisted suicide. *Id.* at §§ 443.14(e)(3), 443.15(f)(3).

15 SB 380 also states: “The fact that a health care provider participates under
16 [California’s assisted suicide laws] shall not be the sole basis for a complaint or
17 report of unprofessional or dishonest conduct” in violation of California’s Business
18 and Professions Code. § 443.15(g). There is no corresponding protection for
19 physicians who refuse to participate in assisted suicide.

20 Because SB 380 treats similarly situated physicians dissimilarly based on
21 fundamental rights (religious freedom and free speech), it is subject to strict scrutiny
22 that it cannot meet. Plaintiffs are likely to succeed on their claim that SB 380 violates
23 the Equal Protection Clause.

1 **II. SB 380’s severe infringement of Plaintiffs’ fundamental First and**
2 **Fourteenth Amendment rights causes irreparable harm.**

3 “It is well established that the deprivation of constitutional rights
4 unquestionably constitutes irreparable injury.” *Hernandez v. Sessions*, 872 F.3d
5 976, 994 (9th Cir. 2017) (cleaned up). This specifically includes “[t]he loss of First
6 Amendment freedoms, for even minimal periods of time[.]” *Klein v. City of San*
7 *Clemente*, 584 F.3d 1196, 1208 (9th Cir. 2009) (cleaned up). As established above,
8 SB 380’s discriminatory provisions deprive CMDA members of their First
9 Amendment rights to free exercise of religion and freedom of speech, as well as
10 their Fourteenth Amendment rights to equal protection of the law and procedural
11 due process. The deprivation of those constitutional rights is an irreparable injury.

12 **III. The balance of the equities and the public interest tip decidedly in**
13 **CMDA’s favor.**

14 “The balance of equities and the public interest . . . tip sharply in favor of
15 enjoining” a law that “infringes on the free speech rights not only of [the Plaintiff]
16 but also of anyone seeking to express their views in” a particular manner. *Klein*, 584
17 F.3d at 1208.

18 First, as to the balance of the equities, any potential hardship on the government
19 with respect to facilitating access to assisted suicide is outweighed by CMDA
20 members’ “First Amendment rights being chilled” by a law that “imposes criminal
21 sanctions for failure to comply.” *Doe v. Harris*, 772 F.3d 563, 583 (9th Cir. 2014).
22 And SB 380 exceed chilling CMDA members’ speech. They face a choice between
23 practicing medicine according to their conscience but in violation of a law subjecting
them to penalties, and not practicing their livelihood in California.

1 Second, the court must also consider the public interest, an inquiry which
2 “primarily addresses impact on non-parties rather than parties.” *Sammartano v. First*
3 *Jud. Dist. Ct.*, 303 F.3d 959, 974 (9th Cir. 2002), abrogated on other grounds by
4 *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 22 (2008). The Ninth Circuit has
5 “consistently recognized the ‘significant public interest’ in upholding free speech
6 principles, as the ‘ongoing enforcement of the potentially unconstitutional [law] . . .
7 would infringe not only the free expression interests of [plaintiffs], but also the
8 interests of other people’ subjected to the same restrictions.” *Klein*, 584 F.3d at 1208
9 (quoting *Sammartano*, 303 F.3d at 974). It has even gone so far as to say that “it is
10 always in the public interest to prevent the violation of a party’s constitutional
11 rights.” *Am. Beverage Ass’n v. City & County of San Francisco*, 916 F.3d 749, 758
12 (9th Cir. 2019) (cleaned up).

13 **CONCLUSION**

14 CMDA members are likely to succeed on their constitutional claims because SB
15 380 violates historical policies opposing physician participation in patient suicide
16 and legal protection for doctors who believe it is religiously, morally, and ethically
17 reprehensible. A preliminary injunction would protect these rights from irreparable
18 harm and further the public’s interest in avoiding constitutional violations.

19 Respectfully submitted this 24th day of March, 2022.

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+Motion *pro hac vice* forthcoming
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CERTIFICATE OF SERVICE

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I hereby certify that on this 24th day of March, 2022, I electronically filed Plaintiffs’ Memorandum of Law in support of their Motion for Preliminary Injunction with the Clerk of the Court using the CM/ECF system, which will send notifications of such filing to and serve all parties.

s/Denise M. Harle
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