APL-2016-00129
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Court of Appeals

STATE OF NEW YORK

SARA MYERS and STEVE GOLDENBERG,

Plaintiffs,

ERIC SEIFF; HOWARD GROSSMAN, M.D.; SAMUEL KLAGSBRUN, M.D.; TIMOTHY QUILL, M.D.; JUDITH SCHWARTZ, PHD; CHARLES THORNTON, M.D.; and END OF LIFE CHOICES NEW YORK,

Plaintiffs-Appellants,

—against—

ERIC SCHNEIDERMAN, in his official capacity as Attorney General of the State of New York,

Defendant-Respondent,

JANET DIFIORE, in her official capacity as District Attorney of Westchester County, SANDRA DOORLEY, in her official capacity as District Attorney of Monroe County, KAREN HEGGEN, in her official capacity as District Attorney of Saratoga County, ROBERT JOHNSON, in his official capacity as District Attorney of Bronx County, and CYRUS VANCE, JR., in his official capacity as District Attorney of New York County,

Defendants.

BRIEF FOR *AMICI CURIAE* NEW YORK LAW PROFESSORS IN SUPPORT OF PLAINTIFFS-APPELLANTS

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April 20, 2017

"[T]he struggle of medical science against death has resulted in its own peculiar horrors."

~ Donald G. Collester, Jr.
Death, Dying and the Law (1976).

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QUESTION PRESENTED

The patient plaintiffs who filed this suit—Myers, Goldenberg, and Seiff—suffer from slow-acting, debilitating, terminal illnesses. They want to control the time and manner of their deaths; they want to die peacefully. Their doctors are uncertain of what advice they can offer in light of New York's penal law, which prohibits assisting a suicide.

Question

Does a mentally competent, terminally ill person who wishes to choose the time and manner of her death have the right to a willing doctor's assistance in doing so?

Answer

Under New York law, patients have a fundamental right to control their medical decisions, even if their choices cause death. In *amici*'s view, the penal law impermissibly burdens these patients' fundamental rights.

INTEREST OF *AMICI CURIAE*

Amici teach constitutional law, civil rights, criminal law, and health law at law schools throughout New York. The *amici* are:

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Amici's titles and institutional affiliations are for identification purposes only. *Amici* appear in their individual capacities, and not as representatives of their schools.

Amici object not only to the result reached below, but also to the manner in which the Appellate Division reached that result. *Amici* believe that the court below gave far too much deference to decisions based on federal law. The rights of New Yorkers under state constitutional law should not turn on federal-court decisions. New York has a rich history of developing its own constitutional law, and *amici* wish to see that history honored and continued in this case and future cases.

PRELIMINARY STATEMENT

The New York Court of Appeals should decide questions of state constitutional law based on its own views about fundamental rights. The decisions of the U.S. Supreme Court are not binding on how this Court interprets the State Constitution. A federal decision, even one based on identical constitutional language, is only as persuasive as its reasoning.

Despite this, the Appellate Division's opinion is written as though *Washington v. Glucksberg*, 521 U.S. 702 (1997), controls here absent some good reason to reach a contrary result. The government's brief in this Court makes a similar error by urging this Court to apply the same test for identifying fundamental rights that the Supreme Court used in *Glucksberg*. Neither approach is correct and this Court should pointedly decline to follow them. Instead, this Court should determine for itself the scope of our State's Constitution.

Turning to whether terminally ill patients have a fundamental right to the assistance of a physician in peacefully ending their lives, this Court should hold that they do. Patients in New York are generally at liberty to make their own medical choices, even choosing to die rather

than live under certain conditions. That liberty is grounded in this State's respect for personal autonomy and freedom. A compelling interest is required in order for the government to overrule such a personal choice. For mentally competent, terminally ill patients like the plaintiffs here, the government does not have any such interest.

Finally, the Court can rule for the plaintiffs under New York's long-recognized common-law right to self-determination in medical decisions without striking down the anti-suicide statute as unconstitutional.

ARGUMENT

I. Our federal system relies on the States to exercise independent judgment in developing their own constitutional law.

It is well-established that New York need not adopt federal decisions that it believes are unwise. *See, e.g.*, *People v. P.J. Video*, 68 N.Y.2d 296 (1986) (declining to follow Supreme Court decision that "muddied" judicial review of warrants). New York has a long history of deciding for itself what state constitutional rights its citizens possess. The New York Court of Appeals has led the nation in establishing

rights to privacy, religious liberty, and various others.[1] Indeed, before the 14th Amendment "incorporated" the federal Bill of Rights so that it applied to the States, the federal Constitution had little to say about state constitutional rights, and state constitutions were the main source of citizens' rights against state actors.

A system of government in which each State develops its own constitutional law has many virtues. "It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country." *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting). Constitutional law is one of those experiments. New York can, by its example, convince other courts to adopt positions that are consistent with our deepest values, such as when this Court held that sanity is an element of any crime and therefore must be proven beyond a reasonable doubt—now a universal position. *See People v. McCann*, 16 N.Y. 58 (1857). Consistent, respectful criticism from state courts can even lead

[1] *See generally* Stewart F. Hancock, Jr., *New York State Constitutional Law*, 77 Alb. L. Rev. 1331 (2014); Vincent Martin Bonventre, *State Constitutionalism in New York: A Non-Reactive Tradition*, 2 Emerging Issues St. Const. L. 31 (1989).

the Supreme Court to change its view. *See West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937) (overruling *Lochner* and citing this Court repeatedly); *see also Arizona v. Gant*, 556 U.S. 332, 347 n.8 (2009) (reversing rule permitting suspicionless car searches, citing *People v. Blasich*, 73 N.Y.2d 673 (1989), among others).

Federal courts honor the States' role by refusing to decide issues of state law. "The State courts are the appropriate tribunals, as this court has repeatedly held, for the decision of questions arising under their local law, whether statutory or otherwise." *Murdock v. Memphis*, 87 U.S. 590, 626 (1875). The decisions of state courts "are conclusive if not violative of Federal law." *P. J. Video, Inc.*, 68 N.Y.2d at 301–02. Even when a state constitution uses the same language as the federal Constitution, the Supreme Court abstains from deciding issues of state constitutional law. "It is fundamental that state courts be left free and unfettered by us in interpreting their state constitutions." *Minnesota v. Nat'l Tea Co.*, 309 U.S. 551, 557 (1940); *see also Michigan v. Long*, 463 U.S. 1032, 1041 (1983) (no federal review of decisions that are based on independent and adequate state grounds).

This interplay between federal and state constitutional law is a "two-way street." *Massachusetts v. Upton*, 466 U.S. 727, 736–37 (1984) (Stevens, J., concurring). It is up to the States to exercise their prerogative of developing their own law. If State courts fail in that duty, they fail to safeguard the rights and protections to which their citizens are entitled. "Whatever protections [state law] does confer are surely disparaged when [a state court] refuses to adjudicate their very existence because of the enumeration of certain rights in the Constitution of the United States." *Id.* at 738.

State courts can, of course, rely on decisions of the Supreme Court for their persuasive power, just as they can rely on decisions from other States. But while a state court may choose to provide greater, lesser, or simply different rights under state law, the determination of what a state constitution does provide "can come only from the exercise of a state court's *independent judgment*." Vincent Martin Bonventre, *Beyond the Reemergence – "Inverse Incorporation" and Other Prospects for State Constitutional Law*, 53 Alb. L. Rev. 403, 406 (1989). *See also People v. Scott*, 79 N.Y.2d 474, 504–06 (1992) (Kaye, J., concurring) (state and federal courts must enforce their respective constitutional guarantees,

consistent with their precedents and own best human judgments in applying them); *People v. Barber*, 289 N.Y. 378, 384 (1943).

Of course, there are hard questions to answer about how a court should respectfully discharge its independent judgment. These tensions are the inevitable consequence of dual sovereignty.

But what a State's highest court cannot do—at least not without abdicating its duty to exercise its independent judgment—is defer to a federal decision merely because language in the two constitutions is the same. Achieving "uniformity" between federal and state law in this manner is a serious error.

This sort of uniformity is incompatible with federalism. The States and the United States are both sovereigns. When state courts adopt federal decisions in the interest of "uniformity," they smother state constitutional rights that an independent court might have recognized. *See People v. Alvarez*, 70 N.Y.2d 375, 379 n.* (1987) ("[F]ailure to perform an independent analysis under the State Constitution would improperly relegate many of its provisions to redundancy.") Such uniformity incorrectly privileges federal decisions over state decisions.

In addition, any benefits of uniformity are outweighed by its costs. Applying one body of law is naturally easier than learning two. But the cost of uniformity is that state citizens are deprived of rights they would otherwise enjoy. For example, the Supreme Court has held that the right to counsel does not extend to post-conviction filings, while some state courts have held otherwise under their state constitutions. *Compare Pennsylvania v. Finley*, 481 U.S. 551, 555 (1987) (finding no such right) *with Jackson v. State*, 732 So. 2d 187 (Miss. 1999) (finding such a right). If a state court reversed itself in the name of uniformity, then many prisoners would be left unable to challenge their unconstitutional convictions. Uniformity is simply never a sufficient reason to abrogate *state constitutional* rights.

In this case, the decision as to how to die is one of the most personal, intimate decisions imaginable. If state constitutional law gives a mentally competent, terminally ill person the right to make that decision—as *amici* believe it does—then "uniformity" is no reason to avoid recognizing that right.

Notably, this Court has refused to accept the uniformity argument in the area of law where it could have the most force: search-and-

seizure law. Joint task forces between state police and federal agents are common, and the work of these groups is surely complicated when different task-force members are subject to different rules. Even in purely state matters, it would be easier for the police to follow just one body of law. But that has not stopped this Court from sharply criticizing the Supreme Court's search-and-seizure decisions, or recognizing greater constitutional protections for New Yorkers where appropriate.

There was a time when this Court considered uniformity to be an important factor in deciding issues of state constitutional law. When state and federal constitutional language was the same, this Court would hesitate before departing from existing federal interpretations. *See, e.g.*, *P.J. Video*, 68 N.Y.2d at 302. Three judges even went so far as to say that this Court would not disregard the Supreme Court's decisions "merely because it disagrees with them or dislikes the result reached." *People v. Vilardi*, 76 N.Y.2d 67, 80 (1990) (Simons, J., concurring, joined by Wachtler, C.J., and Bellacosa, J.).[2]

[2] This statement from *Vilardi* is startling. When an earlier decision is not binding, then disagreeing with it is an excellent reason for a court to choose not to follow it. The benefit of reaching differing results is maximized, not minimized, when different constitutions share the same language.

Fortunately, this Court appears to have abandoned the *Vilardi* line of cases. *See Scott*, 79 N.Y.2d at 504–06 (Kaye, J., concurring). A federal decision, even one based on identical constitutional language, deserves no deference except so far as its reasoning convinces this Court.

Nonetheless, the Appellate Division succumbed to the call for uniformity in this case by relying too heavily on the Supreme Court's judgment about the scope of constitutional freedoms. And the government's brief in this case encourages this Court to make a similar mistake. This Court should not fall into these traps but should apply its own judgment as to the rights afforded by New York's Constitution.

II. The Appellate Division erred by relying too heavily on federal constitutional law, and the government makes a similar mistake here.

As Justice Brennan explained, the Supreme Court's decisions "are not, and should not be, dispositive of questions regarding rights guaranteed by counterpart provisions of state law. Accordingly, such decisions are not mechanically applicable to state law issues, and state court judges and the members of the bar seriously err if they so treat

them." William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 Harv. L. Rev. 489, 502 (1977).

The Appellate Division's decision seriously errs by treating New York constitutional law as unimportant in light of decisions interpreting the U.S. Constitution. The opinion opens with a focus on federal decisions: "Nearly 20 years ago, the United States Supreme Court held…." (R.473–76.) The opinion reviews the *Vacco* and *Glucksberg* opinions in detail; none of this Court's decisions receive similar treatment. Most tellingly, the opinion states, without any citation, that the plaintiffs "start from a position of relative weakness" because the Supreme Court had already decided the legal question under the federal Constitution. (R.473.)[3] This is simply not so. The current case is, or at least should be, a case of first impression.

[3] *Glucksberg* was decided before any State had experience with allowing aid-in-dying. While the result was unanimous, the reasoning was not, and several key arguments did not carry a five-vote majority. For example, the lead opinion says that the case is a challenge by an entire class of terminally ill, mentally competent plaintiffs. *Glucksberg*, 521 U.S. at 709 n.6. But five justices rejected this description of the suit. *See id.* at 736 (O'Connor, Ginsberg, Breyer, JJ., concurring) ("the facial challenges…at issue here"); 739 (Stevens, J., concurring) (case presents a challenge to statute "on its face"); 753 (Souter, J., concurring) ("I see the challenge . . . in narrower terms than those accepted by the Court."). Also, five justices left open the possibility of recognizing a right to assisted suicide in a future case. *Glucksberg*, at 736–37 (O'Connor, Ginsberg, Breyer, JJ., concurring) (refusing to consider certain arguments in light of the fact that plaintiffs faced no barrier to obtaining pain medication); 750 (Stevens, J., concurring) ("an individual plaintiff . . . could prevail

The government's brief urges this Court to make a different version of the same mistake. The government argues that this Court should apply the same *theory* of rights used in *Glucksberg* and, thereby, reach the same answer as the U.S. Supreme Court did.

In *Glucksberg*, the Supreme Court wrote that fundamental rights are limited to those that are "deeply rooted in this Nation's history and tradition." 521 U.S. at 720–21. Under that test, there was no right to assisted suicide. There had never been a need for one; the founding fathers did not have ventilators or feeding tubes. But the *Glucksberg* test has always been controversial, and it has led to controversial decisions. *E.g.*, *Bowers v. Hardwick*, 478 U.S. 186, 192 (1986) (applying same test to approve the criminalization of private sexual activity). Recently, the Supreme Court criticized the *Glucksberg* approach, reasoning that while it "may have been appropriate for the asserted right there involved . . . , it is inconsistent with the approach this Court has used in discussing other fundamental rights." *Obergefell v. Hodges*,

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in a more particularized challenge"); 782 (Souter, J., concurring) (whether plaintiffs' interests might prevail in some circumstances "is not, however, a conclusion that I need draw here"); *see also* Martha Minow, *Which Questions—Which Lie—Reflections on the Physician-Assisted Suicide Cases*, 1997, Sup. Ct. Rev. 1, 11 (1997) ("[A]t least five Justices make it clear that some kind of interest could indeed obtain constitutional solicitude in another, future case.")

576 U.S. __, 135 S. Ct. 2584, 2602 (2015). *See also* NYCLU *Amici* Brief at 16–22.

The government's brief relies heavily on cases in which this Court cited the *Glucksberg* test without elaboration. *See People v. Knox*, 12 N.Y.3d 60, 67 (2009); *Hernandez v. Robles*, 7 N.Y.3d 338, 362 (2006); *see also* R.475 (opinion below says that this Court uses the same "analytical framework" as the Supreme Court in deciding due-process cases). But the government offers no reason why this Court should use a test that was designed for the federal Constitution and that apparently has been abandoned by the Supreme Court itself.

There is no convincing reason to do so. All the authorities cited above regarding this Court's duty to exercise independent judgment apply with equal force to evaluating theories of rights. There is no reason to think the Supreme Court's now-abandoned approach is the right one for New York. "The Supreme Court of the United States has the last word on the meaning of the federal Constitution, but it really has no authority at all, nothing whatsoever, to say about the meaning of the state constitution." Symposium, *Exceeding Federal Standards*, 77 Alb. L. Rev. 1247, 1288 (2014) (remarks of Solicitor General Barbara

Underwood). Even the language of the test (referring this *Nation's* history as opposed to this *State's* history) does not fit here.

Instead, this Court should embrace its heritage as a common-law court. The next section of this brief discusses this Court's "medical autonomy" cases, a line of cases more than a century old. In none of these cases did this Court feel the need to announce a grand theory of rights that would be applicable in all future cases. Instead, this Court considered the *reason* for its previous decisions—the *ratio decidendi*—and then asked whether that reasoning should control the current case. "The requirements of due process are not static; they vary with the elements of the ambience in which they arise." *Cooper v. Morin*, 49 N.Y.2d 69, 79 (1979) (quoting *Wilkinson v Skinner*, 34 N.Y.2d 53, 58 (1974)). That approach is the appropriate one to take here.

III. This Court should recognize under New York constitutional law the right of a mentally competent, terminally ill person to control the manner of their death.

Many people are felled suddenly—by heart attacks, strokes, pneumonia, or similar maladies. But increasingly, people die from

illnesses that are diagnosed ahead of time. They know that death is coming, and they know what it will look like.

The choice of how to respond to an impending, inevitable death is possibly the most personal choice that a human being can make. Great works of literature discuss how we face death. Do we regret the choices we have made, like Tolstoy's Ivan Ilyich? Do we rage against the dying of the light, as Dylan Thomas urged his father to do? Do we accept that our failing bodies may rob us of our dignity? Do we suffer? Or do we choose a time, aided by willing doctors and surrounded by family and friends, to say goodbye and accept death on our own terms?

This case was brought by three patients who would choose the last option, and the doctors who would help them, if only their government would allow them to do so. They claim a right that this Court has long recognized and lauded: the right to make such decisions for oneself.

1. This Court has repeatedly recognized a fundamental right to control one's own medical decisions.

The foundational case in this area is this Court's century-old decision in *Schloendorff v. The Society of the New York Hospital*, where a patient consented to an examination but not an operation. When the

doctor nonetheless operated, this Court held that the act was not merely negligence but a trespass on the patient's rights. "Every human being of adult years and sound mind has a right to determine what shall be done with his own body." 211 N.Y. 125, 129 (1914) (Cardozo, J.).

The combined cases of *In re Storar* and *In re Eichner* involved patients who were unable to decline continued medical care due to incapacity. This Court held that as long as the patient's wishes were clearly expressed before the incapacity, then the patient's right "to control the course of his medical treatment" prevailed. 52 N.Y.2d 363, 376 (1981). This Court rejected the argument that the State's interest in preserving life overrode the patient's choice to end life-sustaining treatment.

In *Rivers v. Katz*, this Court addressed whether the State could forcibly administer antipsychotic drugs to patients who were involuntarily confined to a State facility. Explicitly relying on the due-process clause of the State Constitution, this Court again upheld the patients' right to control their own bodies. The Court explained that autonomy and freedom provide the basis for this constitutional right: "[I]t is the individual who must have the final say in respect to decisions

regarding his medical treatment in order to insure that the greatest possible protection is accorded his autonomy and freedom from unwanted interference with the furtherance of his own desires." 67 N.Y.2d 485, 493 (1986); *see also Delio v. Westchester Cnty. Med. Ctr.*, 516 N.Y.S.2d 677, 691–92 (2d Dep't 1987) (explaining that the State cannot lessen the value of a patient's life by denying him the right to choose the course of his medical treatment).

Finally, in *Fosmire v. Nicoleau*, this Court considered the rights of a Jehovah's Witness who gave birth via cesarean section and then refused a blood transfusion. 75 N.Y.2d 218 (1990). The hospital argued that the State's interest in preserving the life of an otherwise healthy young mother outweighed her personal desires. This Court disagreed, explaining that it was not the "worth" of the remaining life that mattered, but rather the *value of the right* of an individual to decide what type of treatment to receive. *Id.* at 228–29. "The policy of New York, as reflected in the existing law, is to permit all competent adults to make their own personal health care decisions without interference from the State." *Id.* at 231.

This Court has clearly and repeatedly held that this right to make one's own medical decisions is of constitutional dimension. *Rivers v. Katz* involved a regulation, which would have controlled absent an overriding, constitutional right. In that case, this Court squarely confirmed that the right was constitutional in nature: "This fundamental common-law right is coextensive with the patient's liberty interest protected by the due process clause of our State Constitution." 67 N.Y.2d at 493; *see also Grace Plaza v. Elbaum*, 82 N.Y.2d 10, 15–16 (1993) ("New York law has long recognized the right of competent individuals to decide what happens to their bodies. That right to personal autonomy is rooted not only in common law but also in the Constitution." (citations omitted)).

The State argues that there is no fundamental right to take one's own life or choose one form of death over another. But this Court has never limited the right to the particular medical procedure at issue. This Court has never described the issue as a right to remove a ventilator (*Eichner*) or a right to refuse blood transfusions (*Fosmire*). Instead, this Court has repeatedly articulated the right broadly, and when properly articulated, the right covers the current case. The right

at stake is the right to make decisions about one's own body without interference from the government. *Rivers*, 67 N.Y.2d at 493.

Admittedly, this Court has always been careful to say that the right to control one's own body is not absolute. *Storar*, 52 N.Y.2d 377. This Court has recognized certain state interests which could override this fundamental right, at least in theory (though rarely in practice). We next turn to an analysis of those interests.

2. The State's interests are not sufficiently compelling to overcome the patient plaintiffs' right to control their medical choices.

In previous cases, this Court has considered various state interests that might override a patient's medical choices, including the interests of preserving life, avoiding suicide, and preserving the integrity of the medical profession.[4] *See, e.g.*, *Fosmire*, 75 N.Y.2d at 226–27. None of these interests overrides the patient plaintiffs' choices here. But if an asserted interest might outweigh the patients' rights, assuming certain facts were true, then this case would raise mixed

[4] The State's interest in protecting third parties is not implicated here because no third parties are involved. That interest was discussed in *Fosmire*, where the patient had a young child, and it may be applicable in cases of compulsory vaccination of children. *See Viemeister v. White*, 179 N.Y. 235 (1904) (upholding vaccination law).

questions of law and fact more properly decided on a remand to the trial court.

Preserving life. All human life is valuable, and the State has an interest in protecting life for its own sake and for the sake of others who derive joy from that life. But that interest is not sufficient to override even a healthy patient's choices (*Fosmire*), and courts in this State have recognized that the State's interests are further diminished as the patient's prognosis dims, *Delio*, 516 N.Y.S.2d at 691–92. *See also In re Quinlan*, 355 A.2d 647, 663 (N.J. 1976). Here, the patient plaintiffs have terminal illnesses: it is not a question of "if" their illness will lead to their death but "when and how?"

This lessening of the State's interest is not the same as a decrease in the value of life. The N.Y.S. Catholic *Amici* Brief argues (at p.18) that permitting aid-in-dying signals that that life is unworthy of protection. Not so. Again, this is not about debating the "worth" of a life that is nearly over; it is about the value of the right *to choose* how and when to bring one's life to close in a humane fashion. *See Delio*, 516 N.Y.S.2d at 692 (prolonging plaintiff's life "would serve merely to lessen the value of

his life *by denying him the right to choose* the course of his medical treatment.") (emphasis added).

Preventing Suicide. The state has an undeniable interest in preventing suicide. *Amici* do not challenge that interest, nor is it actually implicated by this case. "Suicide," as that term is commonly used, involves the intentional ending of a life of otherwise indefinite duration. The patient plaintiffs are simply not in that situation. They are dying, and the only issue for them is whether they can control the manner of their death.

The State's interest in preventing suicide is more applicable in cases like *Bezio v. Dorsey*, 21 N.Y.3d 93 (2013), where this Court held that the Department of Corrections could force-feed an inmate on a hunger strike. There, the inmate's condition was of his own making and, but for his hunger strike, he would have been healthy. In contrast, the patient plaintiffs here did not choose their diseases, and the diseases cannot be cured. *See also* Part IV, below (discussing definition of "suicide").

Integrity of medical profession. The physician plaintiffs argue that current law forces them to violate medical ethics by not providing

the care they think best. But the State and several *amici* argue that allowing aid-in-dying will degrade the integrity of the medical profession because the practice will not be limited to patients in similar conditions. Rather, under this theory, doctors will lose their roles as healers and will begin euthanizing non-terminal patients, patients not in severe pain, and even non-consenting patients.

As for non-terminal patients, such cases would be distinguishable on their facts, and the State's interest in preserving life would undeniably be higher.

As for patients not in severe pain, this should not be a criterion in the first place. When people conclude that they do not want to live in a vegetative state, society accepts their judgment, even if we would not share it. We do not say that their wishes will be ignored, absent unbearable pain. As the Disability Rights *Amici* Brief points out (at p.10), a primary reason why people in Oregon request aid-in-dying is that they are no longer able to participate in activities that make life enjoyable. But this shows only that patients believe there is more to life than avoiding physical pain.

As for non-consenting patients, the very idea of euthanizing a non-consenting patient cuts against the basis for this entire area of law. In cases where the patient's wishes are questioned, this Court demands clear and convincing evidence before any action can be taken. *See In re Westchester Cnty. Med. Ctr.*, 72 N.Y.2d 517 (1988). The Legislature responded to this Court's strict standards by providing for "living wills" that help clarify patient wishes, and the Legislature may enact similar clarifying legislation here.

In sum, the only cases in which this Court has refused to enforce the patient's choices involved patients who had not provided clear evidence regarding their wishes (*Westchester*), who were infants or incompetents and thus unable to express their wishes (*Storar*), or who were otherwise healthy and had brought their condition on themselves (*Bezio*). Otherwise, this Court has *always* upheld the right to direct one's own medical treatment. The Court should continue that unbroken tradition in this case.

3. Aid-in-dying is an acceptable medical choice, and other medical options permitted under New York law are insufficient.

Patients' right to control their own bodies, and the State's competing interests in preserving life, must be judged in the context of the available care options. Unless aid-in-dying is permitted, the patient plaintiffs have no medical option that is suitable for them.

New York currently allows a patient to request comprehensive pain relief ("palliative care") or to refuse all medical care.

The right to palliative care means the right to receive medication until all pain is relieved or the patient is comatose. This option is sufficient for patients who seek only relief from their pain. But it is not useful for those who are not in pain (like Myers (R.26–27)) or who do not want relief from pain at the price of stupor (like Goldberg (R.27–29)). Concerns about quality of life—not just avoiding pain—are real concerns that courts have no right to reject and indeed have recognized in cases like *Delio*, 516 N.Y.S.2d at 692. *Compare with* Disability Rights *Amici* Brief (arguing throughout that quality-of-life concerns are not rational).

As for the right to refuse all medical care, it also offers no help to certain patients. For example, the Quill Affidavit (R.427) describes a patient whose bones were so riddled with cancer that they would spontaneously break, even when not bearing weight. The patient could do nothing but lie in bed and wait for the cancer to kill him. Although he asked his doctor for assistance in choosing a peaceful death, he was receiving no medical assistance that could be withdrawn. The only legal option that his doctor could offer was to advise him to stop eating. Starving to death should not be the limit of a patient's medical choices. Starving can be horribly painful and not very quick. Unless aid-in-dying is permitted, no other suitable option is available to these patients.

The physician plaintiffs affirm that the practice of aid-in dying is consistent with the highest standards of medical practice, and that distinguished medical societies approve of it. (R.31–38.) That statement should be sufficient for this Court. "This court has rejected judicial attempts to formulate detailed legal standards governing procedures leading to medical diagnoses." *People v. Eulo*, 63 N.Y.2d 341, 358 n.29 (1984); *see also Fiorentino v. Wenger*, 19 N.Y.2d 407, 416–17 (1967) (New York's focus is on the informed consent of the patient, not the

medical profession's view of whether a procedure is acceptable); *In re Hofbauer*, 47 N.Y.2d 648, 656 (1979) (no liability for using treatment that was recommended by a licensed physician and that had not been totally rejected by all responsible medical authority).

The government argues that there are unsolvable problems with aid-in-dying. First, the government contends that future physicians might misdiagnose non-terminal patients. Second, the government claims that patients' choices may not be reliable—that patients may suffer from undiagnosed mental illnesses, depression, or social pressure that cause them to request death unadvisedly.[5]

As for misdiagnoses, the same concern is present in cases of withdrawing medical treatment, yet the government is not permitted to intervene as long as clear and convincing evidence supports the request. In any event, this is an appeal from a motion to dismiss, where the Court must accept as fact that *these plaintiffs* were correctly diagnosed. Indeed, plaintiffs Sara Myers and Steve Goldenberg died of their

[5] The government also suggests that aid-in-dying is not an acceptable medical practice. *See* State's Brief at 48 (citing the 39 Physician's *Amici* Brief on this point, but not the complaint). Statements like this are clearly out of bounds on an appeal from a motion to dismiss.

diseases while this case was pending. Surely the government is not arguing that they were misdiagnosed.

As for unreliable patient wishes, again, the same concern exists in cases of withdrawing treatment—for example, patients who say they do not want life-prolonging treatment, like a ventilator, because it would burden their families. Yet this Court has always accepted a patient's clearly stated medical wishes. *See In re Westchester Cnty. Med. Ctr.*, 72 N.Y.2d 517, 531 ("The ideal situation is one in which the patient's wishes were expressed in some form of writing…."). Here, the plaintiffs all felt so strongly about this issue that they filed a lawsuit. The government has no right to second guess their decisions.

On the other side of the ledger, *amici* are concerned that, like abortion in the era before *Roe*, there will be a hierarchy of access, where some patients—often wealthy and well-connected—can obtain the help they seek. *See, e.g.*, Michael Lewis, The Undoing Project: A Friendship That Changed Our Minds 349 (2017) (stating that famed psychologist Amos Tversky, dying of cancer in California, had "obtained the drugs he needed to end his own life" and died peacefully at home). But other patients may attempt to precipitate death on their own, perhaps

harming themselves badly in the attempt. *See* Kenneth A. Briggs, *Suicide Pact Preceded Deaths of Dr. Van Dusen and His Wife*, N.Y. Times, Feb. 26, 1975. This inequality will naturally result when people are denied the right to make such a personal choice.

IV. This Court may also rely on its power to shape the common law.

Although *amici* believe that the right to control one's body rises to the level of a constitutional right, this Court need not make a constitutional decision. Instead, this Court could avoid a conflict between the penal law and the plaintiffs' rights either by narrowly construing the challenged statute or by recognizing a common-law defense that covers aid-in-dying.[6] This approach leaves the Legislature room to respond and clarify whether a constitutional decision is necessary.

When medical practice and the penal law intersect, common sense is needed.[7] An excellent example of this intersection is found in *People*

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[6] The plaintiffs present a similar "statutory" argument that the penal law does not cover their actions.

[7] *See generally* Judith S. Kaye, *State Courts at the Dawn of a New Century: Common Law Courts Reading Statutes and Constitutions*, 70 N.Y.U. L. Rev. 1, 16–17 (1995) (discussing the advantage of defining rights via the common law); Judith S. Kaye, *Foreward, The Common Law and State Constitutional Law as Full Partners in the*

v. Eulo, 63 N.Y.2d 341 (1984). In that case, a young woman was declared brain dead after being shot by her boyfriend, but she was kept alive on a ventilator. She was still "breathing" and her heart continued to beat. After two days, her parents agreed to end further medical treatment. She was wheeled into an operating room, and the doctors began removing her organs to preserve them for donation *before* disconnecting her ventilator.

At trial, the boyfriend argued that he had not caused the victim's death; rather, her death was caused by the removal of her heart and lungs. On appeal, this Court ruled that the Legislature had not defined "death" and that the historic criteria identifying death were not immutable. *Id.* at 356–57. So this Court construed "death" to include a "loss of brain functions" *when caused by a defendant*. This construction fulfilled the Penal Law's goal to "proscribe conduct which unjustifiably and inexcusably causes or threatens substantial harm to individual or public interests." *Id.* at 357 (quoting Penal Law § 1.05). *Compare with* N.Y.S. Catholic *Amici* Brief at 12 (arguing that other states allow

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Protection of Individual Rights, 23 Rutgers L.J. 727 (1992) (praising common-law decision making, particularly in medical cases).

doctors to make "manifestly false statements" by listing the terminal disease on the death certificate when aid-in-dying occurs)

Just as in *Eulo*, here there is no statutory definition of a key term: suicide. This Court can define what "suicide" means, and what values New York seeks to promote by forbidding citizens from assisting a suicide. Clearly, convincing an otherwise healthy person to commit suicide should be criminally punishable (as in *People v. Duffy*, 79 N.Y.2d 611 (1992)). But "suicide" should not cover situations like the ones presented here, where terminal medical patients are not deciding *whether* to die, but *how*. The two situations are simply not comparable. (*See* R.427–31 (Affidavit of Quill tells the story of a New York grand jury refusing to indict him for assisting a patient's death).) By construing the term "suicide" to exclude a dying patient's choice of a more peaceful death through aid-in-dying, this Court could avoid a conflict between the Penal Law and a fundamental right.

This Court also has the power to develop criminal defenses. For example, New York courts have created the "battered person" defense. In doing so, the courts relied on developments in psychology to expand the objective defense of justification to include a subjective variant for

people who, as a result of repeated abuse, perceive danger in the face of otherwise non-deadly force. *See People v. Ciervo*, 506 N.Y.S.2d 462 (2d Dep't 1986); *see also People v. Torres*, 488 N.Y.S.2d 358, 360 (Sup. Ct. Bronx Cnty. 1985).

Similarly, this Court, in light of developments in medical practice, could recognize a defense for physicians who aid their terminally ill patients in dying peacefully. Such a defense would recognize that physicians who provide such assistance are not morally blameworthy.

Another option is for this Court to hold that the Penal Law is presumed not to cover the acts of doctors who carry out the wishes of their terminally ill patients. This would create, essentially, a "consent" defense that would only be available to physicians. *See Baxter v. Montana*, 224 P.3d 1211 (Mont. 2009) (finding that aid-in-dying fell within the defense of consent); *see also Morgan v. New York*, 90 N.Y.2d 471 (1997) (consent to risk in sports).

The criminal law already implicitly recognizes such a defense. A physician who removes a ventilator that is artificially supporting a patient's breathing thereby causes the patient's death. Yet the physician is not guilty of murder as long as he was carrying out the

patient's wishes. In fact, we say that the underlying illness caused the patient's death, not the doctor's actions. In contrast, if a layperson entered a hospital and removed a patient's ventilator, he could be charged with murder. *Compare with* State's Brief at 55–57 (discussing intent). The fact that a *physician* is acting makes an important difference. We do not prosecute surgeons when the patient dies (assuming, of course, there was no professional misconduct). We recognize that physicians sometime cause death and we implicitly exempt them from the Penal Law's consequences. On this appeal, this Court could make that presumption explicit.

CONCLUSION

This Court should follow its own star in deciding questions of state constitutional law, including the question whether mentally competent, terminally ill patients have a fundamental right to the assistance of a physician in dying peacefully. The government and its supporters argue that allowing physicians to assist their patients with dying evinces a low regard for human life. To the contrary, recognizing this right would evince the highest regard for human autonomy in the face of death's inevitability.

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Respectfully submitted:

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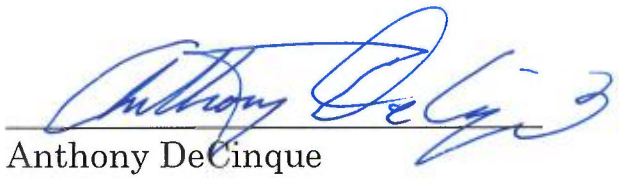
AFFIRMATION OF COMPLIANCE

I certify that, as required by the Rules of Practice of the New York Court of Appeals (22 N.Y.C.R.R.) § 500.13(c)(1), the total word count for all printed text in the body of this brief is 6,693 words, which complies with the 7,000-word limit for amicus briefs provided in that rule.



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