APL-2016-00129
New York County Clerk's Index No. 151162/15

Court of Appeals

of the

State of New York

SARA MYERS and STEVE GOLDENBERG,

Plaintiffs,

ERIC A. SEIFF, HOWARD GROSSMAN, M.D., SAMUEL C. KLAGSBRUN, M.D., TIMOTHY E. QUILL, M.D., JUDITH K. SCHWARTZ, PH.D., CHARLES A. 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,

– and –

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 R. VANCE, JR., in his official capacity as District Attorney of New York County,

Defendants.

BRIEF FOR *AMICUS CURIAE* NEW YORK CHAPTER OF THE NATIONAL ACADEMY OF ELDER LAW ATTORNEYS

DRINKER BIDDLE & REATH LLP
Attorneys for Amicus Curiae
New York Chapter of the National Academy of Elder Law Attorneys
1177 Avenue of the Americas, 41st Floor
New York, New York 10036
Tel.: (212) 248-3140
Fax: (212) 248-3141

Dated: March 24, 2017

Corporate Disclosure Statement

The New York Chapter of the National Academy of Elder Law Attorneys is an independent professional association of attorneys with no parents or subsidiaries. It is affiliated with the National Academy of Elder Law Attorneys, a national independent professional association.

Dated: March 24, 2017
New York, New York

Respectfully submitted,

By:

Clay J. Pierce
DRINKER BIDDLE & REATH LLP
1177 Avenue of the Americas,
41st Floor
New York, New York 10036
Telephone: (212) 248-3186
Facsimile: (212) 248-3141

Attorney for Amicus Curiae
New York Chapter of the National Academy of Elder Law Attorneys

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

INTEREST OF AMICUS 1

SUMMARY OF POSITION 2

BACKGROUND 3

A. Appellants' Complaint 3

B. The Decisions Below. 4

ARGUMENT 6

I. A PROPER CONSTRUCTION OF THE ASSISTED SUICIDE STATUTE SHOULD BE INFORMED BY FACTS. 6

A. Appellants' Factual Allegations Should Have Been Accepted as True at This Stage of the Proceedings. 6

B. Appellants' Factual Allegations Are Relevant to a Proper Interpretation of the Assisted Suicide Statute. 7

C. This Court's Interpretation of the Penal Code Should Rest on a Complete Factual Record. 11

II. FACTS ARE CENTRAL TO A PROPER DETERMINATION OF APPELLANTS' CONSTITUTIONAL CLAIMS 14

A. Due Process. 15

B. Equal Protection. 19

CONCLUSION 20

TABLE OF AUTHORITIES

Page(s)

CASES

Armstrong v. Simon & Schuster,
85 N.Y.2d 373 (1995) 7

Campaign for Fiscal Equity, Inc. v. State,
86 N.Y.2d 307 (1995) 6, 7, 16, 18

Cooper v. Morin,
49 N.Y.2d 69 (1979) 19

DeCambre v. Brookline Housing Authority,
826 F.3d 1 (1st Cir. 2016), *cert. denied,* No. 16-495 (U.S. Jan. 17, 2017) 1

Edmond v. International Bus. Machines Corp.,
91 N.Y.2d 949 (1998) 7, 16

Farnham v. Kittinger,
83 N.Y.2d 520 (1994) 8, 9, 11

Held v. Kaufman,
91 N.Y.2d 425 (1998) 7, 16

Hughes v. McCarthy,
734 F.3d 473 (6th Cir. 2013) 1

Hurrell-Harring v. State,
15 N.Y.3d 8 (2010) 7, 18

Iannotti v. Consolidated Rail Corp.
74 N.Y.2d, 39 (1989) 9

Leon v. Martinez,
84 N.Y.2d 83 (1994) 7

Matter of Shah,
95 N.Y.2d 148 (2000) 1

Myers v. Schneiderman,
140 A.D.3d 51 (1st Dep't 2016) .... *passim*

People v. Barber,
289 N.Y. 378 (1943) 5

People v. Dietze,
75 N.Y.2d 47 (1989) 12

People v. LaValle,
3 N.Y.3d 88 (2004) 19

People v. New York City Transit Auth.,
59 N.Y.2d 343 (1983) 6

Rust v. Reyer,
235 A.D.2d 413 (App. Div. 1997) 10

Rust v. Reyer,
91 N.Y.2d 355 (1998) 10, 11

Saccone v. Board of Trustees of Police & Firemen's Retirement Sys.,
219 N.J. 369, 98 A.3d 1158 (2014) 1

Sharrock v. Dell Buick-Cadillac,
45 N.Y.2d 152 (1978) 19

Vacco v. Quill,
521 U.S. 793 (1997) 5, 11, 19

Washington v. Glucksberg,
521 U.S. 702 (1997) 5, 18

Zahner v. Secretary Pa. Dep't of Human Serv.,
802 F.3d 497 (3d Cir. 2015) 1

STATUTES, RULES & REGULATIONS

General Obligations Law § 9-103 .... 8, 9

General Obligations Law § 11-100[1] 10

N.Y. Public Health Law §§ 2294-d(1) and -d(5) 12

<u>INTEREST OF *AMICUS*</u>

The New York Chapter of the National Academy of Elder Law Attorneys ("the New York Chapter") consists of several hundred elder law and disability law practitioners in the State of New York who are experienced with end-of-life issues confronting clients and their families and loved ones. The National Academy, on behalf of elder law attorneys throughout the country, has filed amicus briefs on elder law issues in this Court, *Matter of Shah,* 95 N.Y.2d 148 (2000), and in other appellate courts that have cited such briefs as helpful. *See, e.g., Hughes v. McCarthy,* 734 F.3d 473, 480-81 (6th Cir. 2013); *DeCambre v. Brookline Housing Authority*, 826 F.3d 1, 15 n. 17 (1st Cir. 2016), *cert. denied,* No. 16-495 (U.S. Jan. 17, 2017); *Zahner v. Secretary Pa. Dep't of Human Serv.*, 802 F.3d 497, 508 n.14 (3d Cir. 2015); *Saccone v. Board of Trustees of Police & Firemen's Retirement Sys.*, 219 N.J. 369, 377-378, 98 A.3d 1158, 1163 (2014). This brief is submitted on behalf of the National Academy's New York Chapter only.

SUMMARY OF POSITION

This case, oddly, finds its way to this Court without any development of relevant facts. The Supreme Court gave no regard to the facts the Appellants, the plaintiffs below, pleaded in support of their requested interpretation of New York's "assisted suicide" statute and their claims to due process and equal protection. The Appellate Division, in affirming, did not ignore Appellants' factual averments but instead quarreled with them. Neither lower court proceeded correctly. This Court thus now faces important questions of first impression under New York's Penal Law and the State's Constitution—and sits awash in competing factual claims from parties and amici alike that have not been appropriately discovered, aired, tested or weighed below.

As an organization of lawyers who represent the elderly and persons with disabilities, the New York Chapter believes that a proper interpretation of New York's "assisted suicide" laws and due consideration of Appellants' constitutional challenges should be based on a fully developed factual record. These are issues of great moment to the elderly and those who love them and to the administration of justice in this State. This Court should have the benefit of a hearing and findings on relevant evidence before deciding them. It should, accordingly, reverse and remand this case for such further proceedings.

BACKGROUND

A. Appellants' Complaint.

Appellants' Complaint frames the threshold question as whether New York's assisted suicide statute prohibits "aid-in-dying," in which a mentally-competent, terminally ill patient nearing death may voluntarily request and obtain from a physician a prescription for medications the patient may thereafter elect to ingest to avoid further suffering. Complaint ¶¶ 37-38 (Record on Appeal ("R.") 36).[1] The Complaint identifies several situations that give rise to such voluntary requests for terminal medication, and pleads that the Appellants and other public health, medical, and mental health professionals confronting these situations do not regard the ingestion of such terminal medication by competent persons as suicide. The mentally-competent terminal patient does not face a suicide's choice between life and death; rather, Appellants claim, her choice is between a death with dignity and control over the time of her death and to avoid a death after prolonged pain and suffering. *Id.* ¶¶ 39-44 (R. 36-38).

---

[1] To avoid ambiguity, the New York Chapter uses the term "aid-in-dying" to refer to Appellants' position. Some amici have branded "aid-in-dying" a euphemism for doctor-assisted suicide. This simply begs the first question Appellants have asked the courts to decide—whether what Appellants describe as aid-in-dying *is* assisted suicide under New York's Penal Law.

Appellants would also show that in appropriate cases aid-in-dying is, in the professional judgment of a physician, a medically and ethically appropriate course of treatment, *id.* ¶¶ 45-46 (R. 38), and is appropriate for each named patient plaintiff. *Id.* ¶¶ 47-49 (R. 38-39). They allege that aid-in-dying is recognized in other jurisdictions, by judicial decision, referendum or statute, and supported by various medical associations and public surveys. *Id.* ¶ 50 (R. 39).

Each of these factual allegations was offered to bolster not only Appellants' proposed construction of the "assisted suicide" provisions of the Penal Law, but Appellants' claims that application of those provisions to aid-in-dying would violate the New York Constitution's guarantees of due process and equal protection. *Id.* ¶¶ 53-73 (R. 40-44). Each of Appellants' factual allegations was also supported by affidavits and exhibits filed in response to the motion to dismiss. *See* Appellants' Br. at 5-9, 16-18.

B. The Decisions Below.

On the State's motion to dismiss, the lower courts were obliged to accept the facts Appellants presented as true. But neither gave them due credence, if any consideration at all.

The Supreme Court did not address any of the particular facts that Appellants pleaded. Appellants sought a declaration that professionals would

not be criminally liable under the Penal Law for providing a prescription for terminal medication, but in the Supreme Court's view "The penal law as written is clear and concise" and foreclosed such relief. (R. 7-8, 12-13). The court further ruled, again without factual discussion, that Appellants' due process and equal protection claims were barred by *Vacco v. Quill*, 521 U.S. 793 (1997) and *Washington v. Glucksberg*, 521 U.S. 702 (1997), cases decided under the United States Constitution. (R. 15-17). These cases do not control Appellants' rights here. In challenges based on the New York Constitution, New York courts are "bound to exercise [their] independent judgment" and are "not bound by a decision of the Supreme Court of the United States limiting the scope of similar guarantees under the Constitution of the United States." *People v. Barber*, 289 N.Y. 378, 384 (1943).

The Appellate Division addressed some of Appellants' factual averments. *Myers v. Schneiderman,* 140 A.D.3d 51, 55-56 (1st Dep't 2016). But rather than crediting these allegations, the Appellate Division disputed and discounted them. The court argued, for instance, that Appellants' averments that various medical associations supported aid-in-dying failed to demonstrate that all of the associations' members concurred in that view, assuming that such unanimity would be possible. *Id.* at 62-63. It quarreled with Gallup and Pew Research polling data, because Appellants failed to show those answering were "fully

informed of the arguments . . . against permitting aid-in-dying." *Id.* at 63. It dismissed evidence of the experience in Canada and Oregon with aid-in-dying as "mere practical concerns." *Id.* at 64. After thus disposing of Appellants' facts, the Appellate Division ruled that on a "literal construction" the Penal Law prohibited aid-in-dying and this prohibition did not violate New York's guarantees of due process or equal protection. *Id.* at 57, 64.

Neither lower court proceeded correctly under New York law.

ARGUMENT

I. A PROPER CONSTRUCTION OF THE ASSISTED SUICIDE STATUTE SHOULD BE INFORMED BY FACTS.

A. Appellants' Factual Allegations Should Have Been Accepted as True at This Stage of the Proceedings.

On a motion to dismiss,

> [A court's] well-settled task is to determine whether, 'accepting as true the factual averments of the complaint, plaintiff can succeed upon any reasonable view of the facts stated.' . . . We are required to accord plaintiffs the benefit of all favorable inferences which may be drawn from their pleading, without expressing our opinion as to whether they can ultimately establish the truth of their allegations before the trier of fact.

Campaign for Fiscal Equity, Inc. v. State, 86 N.Y.2d 307, 318 (1995) (quoting *People v. New York City Transit Auth.*, 59 N.Y.2d 343, 348 (1983)).

The Supreme Court and the Appellate Division thus were not free to disregard Appellants' well-pleaded allegations, much less to quarrel with them.

Campaign for Fiscal Equity, 86 N.Y.2d at 318; *Held v. Kaufman*, 91 N.Y.2d 425, 432-33, (1998) (reversing the Appellate Division, because it was premature for the court to decide the merits of the plaintiff's underlying claim at the pleading stage); *Edmond v. International Bus. Machines Corp.*, 91 N.Y.2d 949, 951-52 (1998) (rejecting the defendant's causation argument because it was premature for the court to decide matters of proof at the pleading stage); *Leon v. Martinez*, 84 N.Y.2d 83, 87-88 (1994).

The lower courts' charge instead was to assess whether, taking as true the facts alleged and all possible favorable inferences drawn from them, Appellants could succeed on any cognizable legal theory. *Hurrell-Harring v. State,* 15 N.Y.3d 8, 20, 23 (2010) (reversing the Appellate Division because the pleadings could plausibly be construed as raising a constitutional violation). Appellants were entitled "to seek redress, and not have the courthouse doors closed at the very inception of an action, where the pleading meets a minimal standard necessary to resist dismissal of a complaint." *Campaign for Fiscal Equity,* 86 N.Y.2d at 318 (quoting *Armstrong v. Simon & Schuster*, 85 N.Y.2d 373, 379 (1995)).

B. Appellants' Factual Allegations Are Relevant to a Proper Interpretation of the Assisted Suicide Statute.

Both lower courts relied on an asserted "literal construction" to justify ignoring factual averments that bear on the interpretation of the "assisted

suicide" statute. *See* R.12-13 (Sup.Ct. Decision); 140 A.D.3d at 57-58. The Appellate Division's "literal construction" rests on a definition of "suicide" the New York legislature has repealed. Appellants' Br. at 16; Respondent's Br. at 24 n.9. As importantly, the definition does not answer whether a physician who prescribes terminal medication for a dying patient is assisting "the intentional taking" of a life, where the patient's life is already forfeit as a result of a terminal disease and he is choosing only the manner and time at which it will end. *See* Appellants' Br. at 16-17.

What would assist this Court in fairly construing the Penal Law are *facts* relating to aid-in-dying. While the language of the statute is the starting point for interpretation, its words do not exist in a vacuum. As this Court has frequently recognized, statutory meaning is informed by context and by facts.

Farnham v. Kittinger, 83 N.Y.2d 520 (1994), illustrates this. At issue was the scope of immunity granted to landowners for "motorized vehicle operation for recreational purposes" under General Obligations Law § 9-103. Plaintiffs were passengers in a four-wheel drive vehicle capable of off-road use. *Id.* at 523. They drove off the highway onto an access road on defendants' land to relieve themselves and were injured when they came to a creek that lacked a suitable bridge. *Id.* at 524.

The legislature extended landowner immunity to "motorized vehicle operation for recreational purposes" in 1971, and this Court had held this language covered motorcycles, minibikes, and all-terrain vehicles, even when used for transportation rather than recreation. *Iannotti v. Consolidated Rail Corp.* 74 N.Y.2d, 39, 47 (1989). The facts of the plaintiffs' claims, however, developed through discovery and summary judgment proceedings, brought the Court face-to-face with the reality that "Many automobiles . . . in today's market-place have been developed as multipurpose motorized vehicles for overlapping family, work and recreation. These vehicles are engineered with the capacity to leave paved road surfaces and venture up mountains, into woods and across streams . . . . The nature and fast-changing engineering and marketing of such vehicles cannot, however, automatically shift these vehicles into the inherently recreational type so plainly covered by General Obligations Law § 9-103." *Farnham,* 83 N.Y.2d at 526-27. The Court thus revisited § 9-103 in light of facts not appreciated at the time of the Court's decision in *Iannotti* five years earlier. *Id.* at 527. It abandoned its prior literal construction of the statute, and distinguished "inherently recreational vehicles," where no showing of recreational intent is required, and "noninherently recreational vehicles," where the user must have a recreational purpose for immunity to apply. *Id.* at 527-28.

Similarly, in *Rust v. Reyer*, 91 N.Y.2d 355 (1998), this Court relied on facts of record to further define the meaning of a statute. Reyer, a minor, had hosted a party at her house while her parents were away, and permitted a high school fraternity to bring kegs of beer to the gathering in return for a share of the proceeds from cup sales. *Id*. at 357. One guest was injured in an ensuing melee and sued Reyer, her parents and her assailant under General Obligations Law §11-100[1], which allows a right of action for damages for injuries arising out of "unlawfully furnishing" intoxicants to a minor. *Id.* at 358.

Reyer never served beer to any guest; the issue was whether she had nonetheless "furnished" beer at the party. *Id.* at 359-60. The Appellate Division construed the statute strictly as one in derogation of common law and held Reyer did not "furnish" because she did not supply or procure the alcohol. *Rust v. Reyer,* 235 A.D.2d 413 (App. Div. 1997).

This Court reversed, drawing on evidence established through discovery and summary judgment proceedings. While agreeing that the statute should be strictly construed and that dictionary definitions of "furnishing" did not clearly support liability, the Court decided that "furnishing," on the facts, embraced Reyer's conduct: "Reyer 'chose to participate in a scheme to furnish alcohol to underage individuals in return for . . . money' [and] without Reyer's advance permission, the beer could not be served as it ultimately was." *Rust*, 91 N.Y.2d

at 359-60. The purpose of the statute was to impose civil penalties to deter underage drinking, and this supported a modified reading of "furnishing." *Id.* at 360-61.

Accordingly, in construing the "assisted suicide" statute, facts and context are relevant: They may serve to circumscribe, as in *Farnham*, or re-interpret, as in *Rust*, a claimed "literal construction" of the law. Yet the lower courts here gave Appellants' factual allegations no meaningful consideration, and denied Appellants a chance to prove a relevant interpretive context and make a proper record.

C. This Court's Interpretation of the Penal Code Should Rest on a Complete Factual Record.

Appellants' statutory and constitutional claims present questions of first impression in New York.[2] The answers to those questions ought to rest on a fully developed and tested factual record.

For example, one set of facts the Appellants have advanced in support of their reading of the Penal Law concern other end-of-life procedures that Appellants claim are comparable to "aid-in-dying," but that medicine and law accept do not constitute assisted suicide. A doctor who, at a dying terminally-ill

---

[2] Appellants correctly note that in *Vacco v. Quill*, 521 U.S. 793 (1997), the federal courts simply assumed the "assisted suicide" statute applied even though no New York court had ever addressed that question. Appellants' Br. at 13 n.6.

patient's voluntary request, administers sufficient sedative medication to place the patient in a state of "terminal sedation" or withdraws life-sustaining medication, artificial feeding via naso-gastric or percutaneous endoscopy gastrostomy, or a ventilator to support breathing would ostensibly violate the Appellate Division's "literal construction" of the assisted suicide statute by causing "the intentional taking" of the patient's life. But none of these acts are deemed crimes. A "literal construction" that criminalizes what all agree is lawful conduct is not convincing. *See People v. Dietze,* 75 N.Y.2d 47, 51 (1989) (holding a penal statute criminalizing "abusive" speech, previously limited by judicial construction despite its plain meaning, is unconstitutional and invalid).

Appellants allege and offer to prove that, in fact, there is no meaningful distinction between a doctor who permits a mentally competent, terminally ill patient to end her life by assisting or enabling the withdrawal of life-sustaining treatment and one who permits such a patient to achieve the same end by prescribing her terminal medication.[3] The Appellants proffer detailed affidavits

[3] In New York, "terminal sedation" and the withdrawal of life support may be undertaken at the request of the patient or a "surrogate" under the Family Health Care Decisions Act. *See* N.Y. Public Health Law §§ 2294-d(1) and -d(5). In jurisdictions that permit aid-in-dying, the patient alone may seek such treatment and the patient alone must administer the treatment; hence, there are fewer controls for "terminal sedation" and the withdrawal of life support than

and supporting documents authored by patients, physicians, caregivers and other experts in medicine, ethics, palliative, hospice and other end-of-life care to support their position.

The State, if required to do so, would undoubtedly counter with its own evidence, expert and otherwise, seeking to demonstrate that the distinctions it draws between patient-directed and physician-mediated terminal sedation and the termination of life-sustaining medicines and devices and patient-directed and physician-mediated aid-in-dying are, in fact, genuine and justified. The parties would test one another's proofs, and the court would hear and then evaluate both sides' evidence before deciding whether it is lawful to treat physicians (and the interests of their dying patients) in these situations differently under the Penal Code. But this evidence is not before this Court, because the lower courts forestalled development of a complete record.

A second set of facts the lower courts foreclosed from consideration concerns whether the lower courts' application of the "assisted suicide" statute is consistent with the purposes of the Penal Law. Appellants allege facts they claim show that proscribing aid-in-dying as "assisted suicide" causes rather than prevents substantial harm to individuals and to the public interest. Their proofs include expert evidence from medical and other professional caregivers

---

exist for aid-in-dying. An evidentiary hearing would explore the import of these and other distinctions between the procedures.

that prescribing terminal medication in an appropriate case allows patients to avoid unbearable suffering in death and preserves the patient's sense of autonomy, dignity and self-worth. Appellants contend that criminalization, by promoting harm to patients, does not serve the purposes of the Penal Law and thus cannot be a valid construction of the "assisted suicide" statute. Appellants' Br. at 22-23.

Again, if required to do so, the State would test and counter these proofs with evidence of its own, so that the courts have a complete picture and can fairly consider whether the statute's application to aid-in-dying comports with the purposes of the Penal Law. But these factual matters, too, were not developed or considered by either lower court.

Appellants, accordingly, have stated a claim upon which relief *may* be granted. This Court should decide nothing more. At this early stage, the correct course was and is to allow the facts to be developed, aired and tested so that the Court might render an informed and just construction of the Penal Law.

II. FACTS ARE CENTRAL TO A PROPER DETERMINATION OF APPELLANTS' CONSTITUTIONAL CLAIMS.

The lower courts also erred in failing properly to consider the evidence Appellants offered in support of their due process and equal protection claims. The State's brief in fact underscores that these claims present factual issues that should have precluded summary dismissal of the Complaint.

A. Due Process.

Appellants claim that criminalizing aid-in-dying as "assisted suicide" impermissibly burdens a mentally competent, terminally-ill patient's fundamental rights to privacy and self-determination under the Due Process Clause of the New York Constitution, and is without rational basis. Complaint ¶¶ 67-72 (R. 43-44). Appellants allege factual information concerning the choices and consequences such patients face as they approach death, as well as evidence of evolving societal views on aid-in-dying and the adoption of supportive policies by various medical and health care groups. *Id.* ¶¶ 39-52 (R. 36-40). *See also* Appellants' Br. at 34-38.

While the Supreme Court gave no regard to these allegations in disposing of the due process claim, the Appellate Division quarreled with them, finding that Appellants "[do] not sufficiently demonstrate a societal evolution on the question of aid-in-dying," do not show that professional groups are unanimous on the question, and that their proofs might include polling data from groups that were not "fully informed of the arguments." 140 A.D.3d at 62-63. These assessments and critiques of the evidence are inappropriate at the pleadings stage. The due process claim and the facts supporting it have been duly pleaded; those facts and all possible favorable inferences from them control at this stage. The proofs—their weight and sufficiency—should be for a hearing.

Campaign for Fiscal Equity, 86 N.Y.2d at 318 (holding that the dissent's discussion of the plaintiffs' allegations was "premature" because the court should not be weighing or deciding factual issues at the pleading stage); *Held,* 91 N.Y.2d at 432-33 (reversing the Appellate Division, reasoning that it would be premature for the court to decide the merits of the plaintiff's underlying claim at the pleading stage); *Edmond,* 91 N.Y.2d at 951-52 (rejecting the defendant's argument about causation because it was premature for the court to decide an issue of proof at the pleading stage).

The State defends the decisions below not only by contesting Appellants' allegations, but by offering its own contrary evidence. For example, the State points to "the brief of the physician amici" to establish that "'aid-in-dying' is the same as euthanasia or physician-assisted suicide—practices long barred in New York." Respondent's Br. at 30. Facts and opinions advanced by some physician amici on the instant appeal are not a part of the limited record below or on this appeal. Moreover, the cited physicians' assertions are contradicted by the only facts that may be properly considered here, the allegations of the Complaint and the supporting affidavits of the Appellant physicians and other experts. These experts and the State's physician amici do not agree. *E.g.,* Complaint ¶¶ 43-47 (R. 37-39); Affidavit of Dr. T.E. Quill ¶ 23 (R. 433); Affidavit of Edwin G. Schallert, Exs 1-4 (R. 144-57). This disagreement

should be the subject of factual development and a hearing, and not justification for a preemptive dismissal.

The State likewise contends that New York's fundamental due process rights to self-determination with respect to one's body and to control one's medical treatment do not include aid-in-dying—although those rights do include "terminal sedation" and a withdrawal of life-sustaining medication or devices. Respondent's Br. at 36-38. The State seeks to distinguish a terminal patient refusing "unwarranted intrusion into" his body, which it agrees is lawful, from a terminal patient seeking "affirmative assistance" in bringing on his death, which it says is not. *Id.* at 37. But it is not clear how, in requesting her physician to inject sedatives to put her in a state of terminal sedation, a patient is refusing an "unwarranted intrusion into" her body; yet such sedation is regarded as lawful. Nor is it clear how in asking that life support devices be discontinued and prophylactic palliative care be administered, a patient is not seeking "affirmative assistance" of physicians and others to bring about her death; yet this too is lawful. Because these distinctions are not clear Appellants brought this suit—and should have chance to develop the facts and be heard on their claims.

Appellants also claim that there is no rational basis for a State prohibition of aid-in-dying, pointing to facts showing that, in jurisdictions that had accepted

aid-in-dying, a feared "slippery slope" of adverse consequences has not materialized. Complaint ¶ 71 (R. 43); Appellants' Br. at 39-42. The Appellate Division acknowledged that times had changed, but was "not persuaded from the record before us that . . . aid-in-dying is an issue where a legitimate consensus has formed." 140 A.D.3d at 65. The record before the lower court was a complaint, not evidence amassed in a hearing. On such a record the appellate court's discounting of survey and polling data and findings of no consensus were inappropriate.

In defending the lower court, the State argues that Appellants' allegations are inadequate because New York's demographics are not Oregon's. Respondent's Br. at 52-53 & n.20. The two states' demographics differ. But the State nowhere explains how or why this matters: In both states people age and die and in one, where aid-in-dying is allowed, Appellants assert that feared adverse consequences have not surfaced. Population density, race, and ethnicity appear immaterial. In any event, these matters should have been committed to discovery and a hearing, not dismissed out of hand. *Campaign for Fiscal Equity*, 86 N.Y.2d at 317-19; *Hurrell-Harring*, 15 N.Y.3d at 20, 23.

Finally, the State, like the Appellate Division, points to the United States Supreme Court's decision in *Washington v. Glucksberg* to argue that there is no due process right to aid-in-dying. *Glucksberg*, however, decided under the

Federal Constitution, does not control Appellants' rights under New York's Constitution. "'[O]n innumerable occasions this [C]ourt has given [our] State Constitution an independent construction, affording the rights and liberties of the citizens of this State even more protection than may be secured under the United States Constitution.'" *People v. LaValle,* 3 N.Y.3d 88, 129 (2004) (quoting *Sharrock v. Dell Buick-Cadillac*, 45 N.Y.2d 152, 159 (1978)). *See also Cooper v. Morin*, 49 N.Y.2d 69, 79 (1979) (underscoring that the Federal Constitution provides "the minimum level of individual rights" and leaves States free to provide greater protections through their Constitution and laws). A fully developed factual record would allow this Court fairly to determine whether this is another such occasion.

B. Equal Protection.

The courts below dismissed Appellants' equal protection claim based on *Vacco v. Quill*, which upheld New York's "assisted suicide" statutes under the Federal Constitution's Fourteenth Amendment. 140 A.D.3d at 62-63. But, again, Appellants rely on New York's equal protection guarantee, and challenge the law's distinction between terminally ill patients, some of whom may make medical decisions that will result in their deaths while others seeking aid-in-dying may not. Complaint ¶¶ 59-65 (R. 41-43); Appellants' Br. at 42-46.

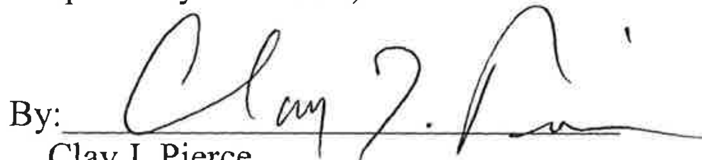
The facts underlying this claim are substantially those discussed with regard to Appellants' statutory interpretation and due process claims. And, the New York Chapter's position is the same: Appellants ought to have the chance they were denied below to demonstrate on a fully developed evidentiary record the constitutional violations they allege.

CONCLUSION

It may be that Appellants will not prevail on their claims. On this the New York Chapter takes no position. But it was not consistent with New York law for the lower courts, at the outset of the case, to deny Appellants the chance to make out those claims. The decision below therefore should be reversed and the case remanded for further proceedings on a proper factual record.

Dated: March 24, 2017
New York, New York

Respectfully submitted,



By: ______________________
Clay J. Pierce
DRINKER BIDDLE & REATH LLP
1177 Avenue of the Americas,
41st Floor
New York, New York 10036
Telephone: (212) 248-3186
Facsimile: (212) 248-3141

Attorney for Amicus Curiae
New York Chapter of the National Academy of Elder Law Attorneys

OF COUNSEL:
Wilson M. Brown, III
Nicholas J. Stevens

Certification

I certify pursuant to § 5001.13(c) of the Rules of Practice of this Court that the total word count for all printed text in the body of the brief is 4,320.

Dated: March 24, 2017
New York, New York

Clay J. Pierce
DRINKER BIDDLE & REATH LLP
1177 Avenue of the Americas,
41st Floor
New York, New York 10036
Telephone: (212) 248-3186
Facsimile: (212) 248-3141

Attorney for Amicus Curiae
New York Chapter of the National Academy of Elder Law Attorneys

OF COUNSEL:
Wilson M. Brown, III
Nicholas J. Stevens

COUNSEL PRESS
The Appellate Experts
460 WEST 34TH STREET, NEW YORK, NEW YORK 10001
(212) 685-9800; (716) 852-9800; (800) 4-APPEAL
www.counselpress.com
(272058)