New York County Clerk's Index No. 151633/14

COURT OF APPEALS
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,

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 DISTRIT 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 OF AMICUS CURIAE NEW YORK CIVIL LIBERTIES UNION

NEW YORK CIVIL LIBERTIES
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RULE OF PRACTICE 500.1(f) DISCLOSURE STATEMENT

The New York Civil Liberties Union (the "NYCLU") is a non-profit 501(c)(4) organization and does not have subsidiaries or affiliates. The NYCLU is the New York State affiliate of the American Civil Liberties Union.

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INTRODUCTION

Before the Court is one of the most private, intimate decisions made in a lifetime—how an individual faces her own death. For terminally ill patients, life will soon end. Such patients have typically fought long and hard to cure their illnesses, enduring surgery, chemotherapy, radiation, or other aggressive medical interventions. The lives of such patients are being taken by the inexorable progression of their terminal diseases. Medicine cannot change that fact. At life's end, these patients want simply to exercise over how the inevitable will occur.

The immediate question presented in this matter is whether New York Penal Law §§120.30 and 125.15(3) may constitutionally be applied to criminalize a willing physician's act of providing "aid in dying" at the request of a mentally competent, terminally ill patient who wishes a peaceful end of life as an alternative to being forced to endure an unbearable dying process. But at issue in this case is no more and no less than whether a mentally competent, terminally ill person has a liberty interest protected by the Due Process Clause of New York State's Constitution, Article I, § 6 to hasten the timing of an inevitable death and whether a state's interests can justify a blanket prohibition on physicians providing assistance in the exercise of such a liberty interest.

The question of how much suffering to bear before death arrives is intensely personal, turning on values and beliefs an individual has developed over the course

of a lifetime. The exercise of this right is as central to personal autonomy and bodily integrity as rights safeguarded by this Court's decisions relating to marriage, family relationships, procreation, contraception, child rearing and the refusal or termination of life-saving medical treatment. New York State's categorical ban on physician aid in dying substantially interferes with this protected liberty interest and cannot be sustained. Though New York State has significant interests in ensuring that the right at issue here is not abused or misused, an absolute ban on physician assistance unduly burdens the proper exercise of the right of competent, terminally ill patients to control the circumstances of impending death.

The First Department wrongly concluded that the United States Supreme Court's 1997 decision in *Washington v. Glucksberg*, 521 U.S. 702, 735 (1997), addressing due process rights under the federal Constitution, was dispositive. The Myers plaintiffs' claims are grounded in the New York State Constitution and this Court has long interpreted the Due Process provision of the New York State Constitution as more vigorously protective of New Yorkers. Moreover, the Supreme Court's most recent substantive due process decisions make plain that the *Glucksberg* analysis would not today control substantive due process analysis as a matter of federal constitutional law or as a matter of New York State constitutional law to the extent fundamental right analysis rests on the federal analysis.

In the absence of a fully developed trial record, the First Department did not examine the State's asserted interests at all, accepting *Glucksberg*'s holding that a ban on aid in dying was rationally related to a state's "interest in preserving human life, protecting the integrity and ethics of the medical profession and ensuring the welfare of vulnerable groups" R.475,[1] because a state's interest in preserving human life "is symbolic and aspirational as well as practical." R.482.

The First Department erroneously "defer[ed] to the political branches of government on the question of whether aid-in-dying should be considered a prosecutable offense" in New York State. R. 484-485. It is emphatically the province and duty of the court of this State to hold either that Penal Law §§120.30 and 125.15(3) violate the rights of its citizens, or that they do not.

INTEREST OF AMICUS CURIAE

The New York Civil Liberties Union ("NYCLU") is the American Civil Liberties Union of New York State. The NYCLU is a non-profit, non-partisan organization with more than 80,000 members across the State. One of the nation's foremost defenders of civil liberties and civil rights, the NYCLU supports the right of a competent adult who is terminally ill to choose the time, place and manner of her impending death and to obtain the assistance of a willing, and medically qualified, physician in carrying out her decision. These rights are grounded in the

[1] References to R. ___ are to the Record on Appeal filed with the Court.

civil liberties interests protecting the fundamental right to individual autonomy to direct the course of one's own medical treatment.

The NYCLU acknowledges that safeguards must ensure that the right to aid in dying not adversely affect persons who are or perceived to be vulnerable because of impairment, discrimination, disadvantage or stigmatization. Any mechanism established by the government to make it possible for competent and terminally ill adults to exercise their right of autonomy must also protect the right to continue to live. Indeed, the Supreme Court noted in *Cruzan v. Director, Missouri Dept. of Health*, 497 U.S. 261, 287 n.12 (1990) that "[t]he differences between the choice made by a competent person to refuse medical treatment, and the choice made for an incompetent person by someone else to refuse medical treatment, are so obviously different that the State is warranted in establishing rigorous procedures for the latter class of cases which do not apply to the former class." In this case, however, we are dealing with the exercise of autonomy by a competent person.

As set forth below, there is no evidence of any harm to people with disabilities in those locales where aid in dying is available. That being said, it is important to acknowledge that certain bedrock principles, including both personal and medical autonomy, underlie both the disability rights movement and the end of life rights movement.

The disability rights movement is founded on an appropriate and outright rejection of the "medical model of disability." Under that construct, any illness or disability that is a physical condition intrinsic to the individual (i.e. part of that individual's own body) is deemed to reduce the individual's quality of life and to cause clear disadvantages to the individual. The "rights based model of disability" conceptualizes the notion of "disability" as a socio-political construct within a rights-based discourse. Disability activists have adopted the strategies used by other social movements commanding human and civil rights against such phenomena as sexism and racism. This emphasis has permitted the shift from dependence to independence, as people with disability have become vocal and politically active against social forces of ableism.

Refusing to allow the choice to exercise a right to aid in dying to all New Yorkers undermines the fundamental principles of individual control and self determination, the critical autonomy and liberty rights which both adherents of the disability rights movement and the end of life movement are committed to supporting and advancing.

The NYCLU appeared as counsel in *Hope v. Perales*, 83 N.Y.2d 563 (1994) and as *amicus* in *Arcara v. Cloud Books*, 68 N.Y.2d 553 (1986), *Hernandez v.*

Robles, 7 N.Y.3d 33 (2006), and *Campaign for Fiscal Equity, Inc. v. State of New York*, 100 N.Y.2d 893 (2003).[2]

The NYCLU was a member of the New York State Task Force on Life and the Law and participated in the preparation of that Task Force's 1994 Report, "When Death is Sought: Assisted Suicide and Euthanasia in the Medical Context" (the "1994 Task Force Report"). The NYCLU was also actively involved in the drafting, and passage, of the New York State Family Health Care Decisions Act, N.Y. Public Health Law §2994-b, and the Health Care Decisions Act MR, N.Y. Surrogate Court Procedures Act §1750-b.

Finally, since 1972, the NYCLU has been co-plaintiffs' counsel in the landmark Willowbrook class-action litigation on behalf of people with intellectual disabilities, a class action that was in the vanguard of the civil rights movement for people with disabilities.[3]

[2] The ACLU, with a variety of ACLU state affiliates including the NYCLU, have appeared as counsel in numerous substantive due process cases, including *Cruzan*, *supra* and *Glucksberg*, *supra.*

[3] The Willowbrook case, bearing the caption *New York State Assoc. for Retarded Children v. Cuomo*, Nos. 72 Civ. 356/7, 393 F. Supp. 715 (E.D.N.Y. 1975) (the "Willowbrook litigation"), is still pending in the United States District Court before the Hon. Raymond J. Dearie. The goals of the litigation were then virtually unheard of -- deinstitutionalization, normalization and community integration - but they have been effectuated through a series of orders entered in the Willowbrook Litigation, culminating in a March 1993 Permanent Injunction. The NYCLU continues to monitor the State's compliance with that 1993 injunction on behalf of over 2600 individuals with intellectual and/or developmental disabilities living all across New York State.

ARGUMENT

I. The Due Process Clause of the New York State Constitution Protects the Personal Choice of a Mentally Competent, Terminally Ill Individual to Aid in Dying

Article I, § 6 of the New York Constitution provides that "no person shall be deprived of life, liberty or property without due process of law." Protection for certain fundamental rights is implicit within this crucial constitutional clause. *Hope v. Perales*, 83 N.Y.2d 563, 575 (1994). In examining rights afforded New Yorkers under the State's Due Process Clause, New York courts have adopted a different and far broader view than their federal counterparts as to what constitutes a reasonable expectation of privacy and how much state interference is acceptable in a free and open society. The New York State Constitution has historically provided an independent and broader basis for a fundamental right of privacy, affording New Yorkers expansive rights in matters of marriage and child rearing,[4] procreative choice,[5] bodily integrity and control over the course of one's medical treatment.

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[4] The common and statutory law of New York provides for a right of privacy in familial relationships, *see, e.g. Cooper v. Morin*, 49 N.Y.2d 69 (1979), *cert. denied*, 446 U.S. 984 (1980)(pre-trial detainee has "fundamental right to marriage, family life . . . and to bear and rear children") and *In re Marie B.*, 62 N.Y.2d 352 (1984)(right to be free from interference in familial relationships is "fundamental and can only be abridged when the state can show by clear and convincing evidence a compelling state interest").

[5] The fundamental right of procreative choice is inherent in the statutory framework of New York law without regard to Supreme Court decisional law. N.Y. Penal Law §125.05(3) was enacted three years before the United States Supreme Court decision in *Roe v. Wade*, 410 U.S.

A. The Substantive Due Process Clause of Article I, §6 Protects the Fundamental Right of Competent, Terminally Ill New Yorkers to Bodily Integrity and Control Over the Course of Medical Treatment. This Due Process Right Encompasses a Patient's Right to Choose Aid in Dying, Just as It Encompasses a Patient's Right to Choose Other End-of-Life Options.

The right of capable persons who reside in the community to accept or reject medical treatment, even if their decision appears to others risky or unwise, was established in 1914 in New York with Justice Cardozo's famous articulation of the doctrine in *Schloendorff v. Society of New York Hospital*, 211 N.Y. 125, 129-130 (1914) that "[e]very human being of adult years and sound mind has a right to determine what shall be done with his own body."

By 1986, when this Court decided *Rivers v. Katz*, 67 N.Y.2d 485 (1986), holding that the due process clause of the State Constitution affords involuntarily committed mental patients a fundamental right to refuse antipsychotic medication, the right of capable persons in the community to accept or reject medical treatment was long established. In articulating its holding, the *Rivers* Court took great pains to emphasize how fundamental is the right of bodily integrity and right to direct one's course of medical treatment to New Yorkers.

The *Rivers* Court first affirmed that the common law of New York afforded "every individual of adult years and sound mind . . . 'a right to determine what

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113 (1973) and provides for access to abortion services within twenty-four weeks of the beginning of a pregnancy.

shall be done with his own body,"' which necessarily includes the right to control his medical treatment. *Id.* at 492. The *Rivers* Court then noted that "it 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**." *Id.* at 493 [emphasis supplied]. The *Rivers* Court rejected the argument that the plaintiffs' states of mental illness decreased their "fundamental liberty interest to reject" medical treatment. *Id.* at 495. The *Rivers* Court held that in order to override the patient's wishes, the state must show a compelling interest. *Id.* at 495-96.[6]

This Court had already determined, prior to *Rivers*, that compelling state interests, while including the right to protect the health of the citizenry, do not include preventing the natural death of the patient. The "patient's right to determine the course of his own medical treatment [is] paramount to what might otherwise be the doctor's obligation to provide needed medical care." *In re Storar*, 52 N.Y.2d 363, 377 (1981). *See also Matter of Eichner (Fox*), 73 A.D.2d 431, 459 (2d Dept. 1980), *order modified by Storar, supra* ("[i]ndividuals have an inherent right to prevent pointless, even cruel, prolongation of the act of dying."

[6] The *Rivers* court mandated that the state prove any such compelling interest by clear and convincing evidence, with treatment narrowly tailored to give as much effect as possible under the circumstances to the patient's wishes. *Id.* at 497.

(citations and quotation marks omitted.)). Further, the patient's wishes will be recognized even after the patient has become incompetent when they are made known by means of a living will or other clear and convincing proof. *See, e.g., In re O'Connor,* 72 N.Y.2d 517, 530 (1988) ("no one should be denied essential medical care unless the evidence clearly and convincingly shows that the patient intended to decline the treatment . . ."). *See also Delio v. Westchester Cty. Med. Ctr.*, 129 A.D.2d 1, 16 (2d Dep't 1987) ("The primary focus evident in the Court of Appeals analysis is upon the patient's desires and **his right to direct the course of his medical treatment** rather than upon the specific treatment involved." (emphasis supplied)).

New York also has a demonstrably long history of respecting patient autonomy and dignity up to and through the end of life. New York State affirmatively promotes and defends a patient's right to decide about medical treatment, including withdrawal or withholding of life sustaining measures. Law in this State establishes procedures for do-not-resuscitate orders both in health care facilities and in community settings and New Yorkers are authorized to create health care proxies with or without advance directives. *See* N.Y. Public Health Law Articles 29-B and 29-C. The Family Health Care Decisions Act, N.Y. Public Health Law §2994-b and the Health Care Decisions Act, N.Y. Surrogate Court Procedures Act §1750-b, grants family members and others close to the patient the

authority to decide about treatment, including life-sustaining measures, for individuals who are either too young or too ill or indeed never capable to decide for themselves and who have not left advance treatment instructions or signed a health care proxy.

New York's long-standing respect for patient autonomy can guide this Court's decision in its recognition that individual autonomy and dignity are deeply important within our culture and inherent in the concept of personhood. The importance of such autonomy supports a finding that control of one's own body is a fundamental right within the New York constitutional framework. This Due Process right encompasses a patient's right to choose aid in dying, just as it encompasses a patient's right to choose whether to terminate or continue other end-of-life options.[7] Aid in dying is, as a trial would have clarified, actually factually indistinguishable from other lawful and extremely common medical practices that result in a patient's death, such as terminal sedation; cessation of nutrition and hydration and withdrawal from ventilator leading to asphyxiation. As

[7] The First Department's reliance on *Matter of Bezio v. Dorsey*, 21 N.Y.3d 93 (2013), to support a distinction between refusing treatment and aid-in-dying was inappropriate. *Bezio* addressed whether the rights of an inmate on a hunger strike were violated by a judicial order permitting the State to force feed him after his health deteriorated to a point that was life-threatening. *Id.* at 96. The *Bezio* Court considered this inmate's hunger strike an attempt to commit suicide but took specific pains to distinguish the inmate's situation from that of "terminally-ill patients or those in irreversible incapacitated condition as a result of illnesses or injuries beyond their control," observing that "[i]n those circumstances, unlike this one, the patients were suffering from direct medical conditions that were not of their own making." *Id.* at 102-03 (citations omitted).

Appellants' principal brief sets forth more fully, "writing a prescription empowering a suffering dying patient with the option of a peaceful death involves a less active role for the physician than is required for other end-of-life options that precipitate death. Withdrawal of life support requires physicians, or those acting at their direction, physically to remove equipment; terminal sedation requires the intravenous administration of sedating drugs by the physician."[8]

B. Federal Caselaw is Not Controlling[9]

The courts below wrongly concluded that the Supreme Court's 1997 decision in *Washington v. Glucksberg*, 521 U.S. 702 (1997) is dispositive. In *Glucksberg*, the Supreme Court determined that "the asserted 'right' to assistance in committing suicide is not a fundamental liberty interest protected by the [federal] Due Process Clause," and that "[the state]'s assisted suicide ban [is] rationally related to legitimate government interests." *Id.* at 728. But *Glucksberg* is not dispositive for at least two reasons. First, the Myers plaintiffs' claims are grounded in the New York State, not federal, Constitution and this Court has long

[8] Plaintiffs' principal brief at 19. For all of the reason set forth in their principal brief, the Myers plaintiffs were entitled to present evidence concerning how access to aid in dying affects the privacy and liberty interests that are at stake here.

[9] Nearly 20 years ago, the U.S. Supreme Court determined that Washington State's ban on aid in dying, since overturned by legislation in that state, did not violate substantive due process under the U.S. Constitution. *Washington v. Glucksberg*, 521 US 702, 705-706 (1997). In *Glucksberg's* companion case, *Vacco v. Quill*, 521 US 793 (1997), the Supreme Court determined that New York's Penal Law prohibitions against aid in dying did not violate the Equal Protection Clause of the Fourteenth Amendment of the federal Constitution.

interpreted provisions of the New York State Constitution to be more vigorously protective of the rights of New Yorkers. Second, the Supreme Court's most recent substantive due process decisions make plain that the *Glucksberg* analysis would not today control substantive due process analysis as a matter of federal constitutional law or New York State constitutional law, to the extent that New York jurisprudence in this area rests on federal jurisprudence.

1. This Court has Long Recognized that the New York State Constitution Protects Individual Rights More Vigorously than does the Federal Constitution.

The Myers plaintiffs' claims are grounded in the Due Process Clause of the New York State Constitution, Article I, §6. This Court has instructed New York Court not to follow federal analysis of parallel constitutional provisions in "lock-step." *Sharrock v. Dell Buick-Cadillac, Inc.*, 45 N.Y.2d 152, 160 (1978) (interpreting New York Due Process clause more broadly than federal clause, noting "[t]his independent construction finds its genesis specifically in the unique language of the due process clause of the New York Constitution as well as the long history of due process protections afforded the citizens of this State and, more generally, in fundamental principles of federalism"). *See also People v. P.J. Video*, 68 N.Y.2d 296, 303 (1986) (New York's Constitution has frequently been applied in cases to provide broader protection of individual rights and liberties than federal Constitution); *Arcara v. Cloud Books*, 68 N.Y.2d 553, 557-558 (1986)

(holding that New York's Constitution provides greater protection for freedom of expression).

This Court has commented frequently on its obligation where, as here, a provision of New York's Constitution is at issue, to undertake an "independent analysis" of that provision. *See People v. Alvarez*, 70 N.Y.2d 375,379 (1987)("[e]ven if parallel to a Federal constitutional provision, a State constitutional provision's presence in the document alone signifies its special meaning to the People of New York; thus the failure to perform an independent analysis under the State Constitution would improperly relegate many of its provisions to redundancy."). *See also People v. Scott*, 79 N.Y.2d 474, 496 (1992) (*id*). This state law analysis must supplement the Federal standards so as to "meet the needs and expectations of th[is] particular State." *Arcara*, 68 N.Y.2d at 557.[10] Thus, even when Federal case law may be well-developed on an issue, conducting

[10] This Court has a long history reading the State Constitution as more broadly protective than the federal Constitution in the criminal context. *See People v. Bigelow*, 66 N.Y. 2d 417 (1988) (rejecting Supreme Court's good-faith exception to warrant requirement); *People v. Bing*, 76 N.Y.2d 331 (1990) (right to assistance of counsel, due process under New York constitution "far more expansive than Federal counterpart"); *People v. Claudio*, 83 N.Y.2d 76 (1993) (("[T]he New York State right to counsel has always been deemed to be broader than its Federal counterpart"); *People v. Caban*, 5 N.Y.3d 143 (2005) (New York standard for demonstrating lack of meaningful assistance of counsel always more demanding than federal standard).

But, the Court's expansive reading of the New York Constitution is not limited exclusively to the criminal context. *See, e.g., Immuno AG v. Moor-Janowski*, 77 N.Y.2d 235 (1991) (protection of free speech and press under New York Constitution often broader than federal Constitution.); *Cooper v. Morin*, 49 N.Y. 2d 69 (1979) (New York Due Process clause requires prisoner contact visits not demanded by federal Constitution). *See also People v. Pavone*, 26 N.Y.3d 629, 639-40) (2015)(summarizing cases).

an independent analysis under the New York Constitution is a mandate that presents no constitutional infirmity.[11]

While the Supreme Court declined to find a federal constitutional right to choose aid in dying in *Glucksberg*, it left the matter for states to determine its legality for themselves. "Throughout the Nation, Americans are engaged in an earnest and profound debate about the morality, legality, and practicality of physician assisted suicide. Our holding permits this debate to continue, as it should in a democratic society." *Glucksberg* at 719, 735. Almost a decade later, the Supreme Court rejected an attempt to nullify the decision Oregon made to permit

[11] The writings of many former members of the New York Court of Appeals on this issue are abundant. *See, e.g.*, Judith S. Kaye (2012) "Dual Constitutionalism in Practice and Principle," St. John's Law Review: Vol. 61: No. 3, Article 3 (policy considerations rooted in state constitution routinely has caused New York Court of Appeals to depart from federal precedent); Joseph W. Bellacosa, "A New York State Constitution Touch of Class," 59 NYS Bar J. 14, 16 (1987) (citing examples where New York Court of Appeals used procedural aspect of Supreme Court case to provide greater liberties than federal law); Stewart Hancock, Jr., "The State Constitution, a Criminal Lawyer's First Line of Defense," 57 Alb. L. Rev. 271, 279 (1993) (New York Court of Appeals led way in protecting civil rights through state constitution in areas of right to counsel and self-incrimination); Judith S. Kaye, "Foreword: The Common Law and State Constitutional Law as Full Partners in the Protection of Individual Rights," 23 Rutgers L. Rev. 727, 744 (1992)(New York courts recognize rights and liberties under independent state grounds in area of privacy); Vito J. Titone, "State Constitutional Interpretation: The Search for an Anchor in a Rough Sea," 61 St. John's L. Rev. 431, 465-66 (1987) (New York's traditional concern for rights of privacy and personal liberty led to development of right to counsel and prisoners' rights based on state law); Sol Wachtler, "Constitutional Rights: Resuming the States' Role," 15 Intergovernmental Persp. 23, 25 (1989)("due process concept said to have been derived from a statute enacted in New York and it always has had a special significance in this state […] [t]he ideal of basic fairness which is at the core of due process, applies across the spectrum of civil and criminal cases"); Judith S. Kaye, "Contributions of State Constitutional Law to the Third Century of American Federalism," 13 Vt. L. Rev. 49, 52-56 (1988)(state courts such as New York's provide more directly for interests of their citizens). Sol Wachtler, "Our Constitutions - Alive and Well," 61 St. John's L. Rev. 381, 397 (1987)(state constitution most immediate protector of individual rights).

aid in dying, and recognized that aid in dying could be a legitimate medical practice. *Gonzales v. Oregon*, 546 U.S. 243, 267 (2006).[12]

Accordingly, a determination by this Court that Penal Law §§120.30 and 125.15(3) are unconstitutional as applied to the Myers plaintiffs would fall well within the right of New York State independent to determine the legality of the practice.

2. The Supreme Court's *Glucksberg* Analysis is Incompatible with the Court's More Recent Substantive Due Process Decisions and Reliance upon that Analysis by the Court Below was Error.

Long before it decided *Glucksberg*, the Supreme Court interpreted the substantive component of the due process clause to protect very broad aspects of personal autonomy as "fundamental rights" (notwithstanding that they are not mentioned in the text of the Bill of Rights) with which the government may not interfere unless it meets its burden under the strict scrutiny standard to prove that the infringing statute is narrowly tailored to serve a compelling governmental interest. *See, e.g. Planned Parenthood of Se. Pa. v. Casey,* 505 U.S. 833, 84 (1992)(explaining that Supreme Court has never accepted the view that "liberty encompasses no more than those rights already guaranteed to the individual against [governmental] interference by the express provisions of the first eight

[12] In *Gonzales*, then-US Attorneys General Alberto Gonzales and John Ashcroft attempted to enforce the federal Controlled Substances Act against physicians who prescribed drugs, in compliance with Oregon state law, for aid in dying to the terminally ill.

Amendments to the Constitution"). Supreme Court jurisprudence informed by *Griswold v. Connecticut*, 381 U.S. 479, 499 (1965) (recognizing a married couple's privacy right in their intimate relationship has clearly established that individuals have an "interest in independence in making certain kinds of important decisions"), *Whalen v. Roe*, 429 U.S. 589, 599-600 (1977) (same); *Carey v. Population Servs. Int'l*, 431 U.S. 678, 684-85 (1977)(same) and that "[i]t is a promise of the Constitution that there is a realm of personal liberty which the government may not enter[,]" *Casey*, 505 U.S. at 847. The Court's interest in self-definition, which is "the heart of liberty," is no less than "the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life." *Id.* at 851. In *Casey*, the Court described *Roe v. Wade*, 410 U.S. 113, 165-66 (1973) "not only as an exemplar of Griswold liberty but as a rule [...] of personal autonomy and bodily integrity, with doctrinal affinity to cases recognizing limits on governmental power to mandate medical treatment or to bar its rejection." *Casey*, 505 U.S. at 857.[13] In *Cruzan ex rel. Cruzan v. Director, Missouri Dep't of*

[13] It is important to note that substantive due process decisions pre-dating *Glucksberg* also clearly recognized, as part of the protected liberty interest, the right to the necessary assistance of a physician. In *Carey*, 431 U.S. at 684-90, the Court emphasized, in holding that restrictions on the distribution of contraceptives must satisfy strict scrutiny because they clearly burden the fundamental right to make decisions concerning reproduction, that strict scrutiny also applies to state regulations that burden the fundamental right to make such decisions "by substantially limiting access to the means of effectuating that decision." *Roe* and *Casey* similarly held that the right encompasses the assistance of a physician necessary to exercise it, "vindicat[ing] the right of the physician to administer medical treatment according to his professional judgment up to the

Health, 497 U.S. 261, 279, 278, 302, 344 (1990), the Court stated that "[t]he principle that a competent person has a constitutionally protected liberty interest in refusing unwanted medical treatment may be inferred from our prior decisions." As Justice O'Connor explained in her concurring opinion in *Cruzan*,

> [t]he State's imposition of medical treatment on an unwilling competent adult necessarily involves some form of restraint and intrusion. A seriously ill or dying patient whose wishes are not honored may feel a captive of the machinery required for life-sustaining measures or other medical interventions. Such forced treatment may burden that individual's liberty interests as much as any state coercion. The State's artificial provision of nutrition and hydration implicates identical concerns… Requiring a competent adult to endure such procedures against her will burdens the patient's liberty, dignity, and freedom to determine the course of her own treatment.

Id. at 289 (O'Connor, J., concurring).

In *Bowers v. Hardwick*, 478 U.S. 186, 190-91 (1986), the Court abruptly rejected the substantive due process analysis it had previously applied in addressing fundamental rights. Recasting the respondent's claim as an asserted "fundamental right to engage in homosexual sodomy," *id.* at 191, the Court dismissed the right as "at best, facetious because homosexual sodomy was not "deeply rooted in this Nation's history and tradition." *Id*. at 192, 194 (internal quotation marks and citation omitted). The *Glucksberg* Court similarly criticized a lower federal court for defining the right at issue too broadly as a "right to die."

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points where important state interests provide compelling justifications for intervention." *Roe*, 410 U.S. at 165-66.

Rather the right at issue in *Glucksberg*, the Court said, was really the "right to commit suicide," and that right lacked a "deeply rooted" historical antecedent. *Glucksberg*, 521 U.S. at 721.

In 2003, the Court overruled *Bowers*, emphatically rejecting its narrow characterization of the right at issue and its rigid adherence to, and exclusive focus on, an historical analysis in deciding substantive due process claims. *Lawrence v. Texas*, 539 U.S. 558, 577-78 (2003). The *Lawrence* Court ruled *Bowers* "was not correct when it was decided, and it is not correct today." *Lawrence,* 539 U.S. at 578. Rather, the *Lawrence* Court adopted Justice Stevens' dissent in *Bowers*, which recognized that "the fact that the governing majority in a [s]tate has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice[.]" *Lawrence*, 539 U.S. at 577-78 (internal quotation marks and citation omitted). Stating that "[t]he issue is whether the majority may use the power of the [s]tate to enforce these views on the whole society through operation of the criminal law[,]" the *Lawrence* Court re-embraced *Casey*, re-emphasizing the Court's obligation to "define the liberty of all, not to mandate our own moral code " and re-establishing the due process liberty interest as protecting "the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life." *Lawrence*, 539 U.S. at 571, 574. Reiterating *Casey*'s pronouncement that "'[i]t is a promise of the

Constitution that there is a realm of personal liberty which the government may not enter[,]'" the *Lawrence* Court concluded:

> [h]ad those who drew and ratified the Due Process Clauses . . . known the components of liberty in its manifold possibilities, they might have been more specific. They did not presume to have this insight. They knew times can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress. As the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom.

Lawrence, 539 U.S. at 578-79.

The Supreme Court strongly re-affirmed its rejection of a rigid historical analysis as dispositive of substantive due process rights in *Obergefell v. Hodges*, 576 U.S. ___, 135 S. Ct. 2584 (2015)(federal due process clause protects liberty interest in marrying person of same sex and requires states to license and recognize such marriages). The *Obergefell* Court explained that the liberty interests protected by the federal due process clause "extend to certain personal choices central to individual dignity and autonomy, including intimate choices that define personal identity and beliefs[,]" *Obergefell* at 2597 (*citing Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972); *Griswold*, 381 U.S. at 484-86)). The Court noted that "[t]he identification and protection of fundamental rights is an enduring part of the judicial duty to interpret the Constitution." *Id. at* 2598. The Court emphasized that the task of fulfilling that judicial responsibility "has not been reduced to any formula," but rather "requires courts to exercise reasoned judgment in identifying

interests of the person so fundamental that the State must accord them its respect." *Id.* "History and tradition guide and discipline this inquiry but do not set its outer boundaries." *Id.* The proper method of analysis "respects our history and learns from it without allowing the past alone to rule the present." *Id.* The Court reasoned:

> The nature of injustice is that we may not always see it in our own times. The generations that wrote and ratified the Bill of Rights and the Fourteenth Amendment did not presume to know the extent of freedom in all of its dimensions, and so they entrusted to future generations a chapter protecting the right of all persons to enjoy liberty as we learn its meaning. When new insight reveals discord between the Constitution's central protections and a received legal stricture, a claim to liberty must be addressed.

Id.

Accordingly, *Glucksberg* now is entirely out of step with subsequent Supreme Court's doctrinal development of due process autonomy principles. Given that *Lawrence* and *Obergefell* emphatically rejected an analysis focusing solely on the historical roots of the asserted right (the very analysis upon which *Glucksberg*, like *Bowers*, relied) and just as emphatically embraced analytical principles that *Glucksberg* rejected (the liberty rights analysis of *Casey* and other due process liberty interest decisions), it would appear impossible to conclude that the due process analysis applied in *Glucksberg* is dispositive of the underlying issue today. How an individual faces her own death is one of the most private, intimate decisions made in a lifetime, implicating deeply personal choices central

to individual dignity and autonomy, thus falling well within the category of "interests of the person so fundamental that the State must accord them its respect." *Obergefell*, 135 S.Ct. at 2597.

New York jurisprudence on substantive due process and fundamental rights rests on the *Glucksberg* analysis that has been rejected by *Lawrence* and *Obergefell*. *Hernandez v. Robles,* 7 N.Y.3d 33, 362, 821 N.Y.S. 2d 770, 855 N.E.2d 1 (2006) (*citing Glucksberg*, "[i]n deciding the validity of legislation under the Due Process Clause, courts first inquire whether the legislation restricts the exercise of a fundamental right, one that is 'deeply rooted in this Nation's history and tradition'"). Accordingly, to the extent that New York jurisprudence in this area should rest on federal jurisprudence, *Lawrence* and *Obergefell* must lead to the modification of this Court's substantive due process analysis.

C. The State's Asserted Interests In §§120.30 And 125.15(3) Do Not Outweigh The Right Of A Terminally Ill, Competent Patient To Choose Aid In Dying Under Any Level Of Scrutiny But Without A Fully Developed Trial Record there can be No Finding that State Interests Prevail over Individual Rights of Autonomy and Dignity.

A law that impinges upon a fundamental right is subject to strict scrutiny, whereas one that does not burden "a fundamental right ... is valid if it bears a rational relationship to [a governmental] interest." *Hope v. Perales*, 83 NY2d 563, 577 (1994); *Hernandez, supra*, 374 N.Y.3d at 375.

The courts below considered the State's asserted interests in the absence of a fully developed trial record.[14] Questions regarding whether any legitimate New York State interest exists requires development of an evidentiary record.[15] Upon a fully developed trial record, the court would have had, *inter alia*, the benefit of years of data demonstrating that aid in dying has not produced any of the feared harms posited by the *Glucksberg* Court in 1997 or indeed by the 1994 Task Force Report. [16]

All of the data from Oregon over the past eighteen years has shown that such concerns were unwarranted.[17] There is no evidence that vulnerable groups are targeted by caregivers, family members or physicians who utilize aid in dying to hasten the deaths of vulnerable, terminally ill patients. It is not the advanced elderly who most avail themselves of aid in dying: most are aged sixty-five or

[14] The First Department did not examine the State's asserted interests at all. Rather, citing *Glucksberg*, the court below refused to permit the development of the record, because "the issue before us transcends mere practical concerns" and the State's interest in preserving human life "is symbolic and aspirational as well as practical." R. 483.

[15] For example, in finding that aid in dying was a fundamental right in *Carter v. Canada (Attorney General),* 2015 SCC 5 (2015), the Canadian Supreme Court cited to the record over 50 times.

[16] The First Department relied extensively on the 1994 Task Force Report. R. 483. The 1994 Task Force Report articulated the same concerns, in the same informational vacuum, as the *Glucksberg* Court. It was inappropriate for the courts below simply to presume that the conclusions and recommendations set forth in the 1994 Task Force Report would persist today in light of the data that has emerged in the two decades since that report issued.

[17] See Oregon Public Health Authority, Death with Dignity Act Annual Reports, Year 1 (1999) through Year 18 (21015) available at https://public.health.oregon.gov/ProviderPartnerResources/EvaluationResearch/DeathwithDignityAct/Pages/ar-index.aspx.

older. Those seeking aid in dying are generally highly educated: between 43-50% hold bachelor's degrees, about double the average in the general population. The patients are well insured: 99.2% of patients in 2015 had health insurance to pay for continued aggressive treatment until death [in prior years, between 97% and 100% were insured]. In Oregon, patients seeking aid in dying are predominantly white.

Additionally, the *Glucksberg* Court was concerned that permitting patients to choose aid in dying might start "down the path to voluntary and perhaps even involuntary euthanasia." *Id.* at 732. However, there is no evidence that aid in dying has been utilized in any way other than in accordance with the standard of care developed in Oregon: limited to terminally ill, mentally competent patients who are able to self-administer the medication.[18]

The Myers plaintiffs have asserted that the violation of their rights is not rationally related to any legitimate state interest, does not further an important state interest, nor is it the least restrictive means of advancing any compelling state interest. R. 42-44. Only upon a developed evidentiary record can New York State's interests in prohibiting aid in dying be weighed against the Myers plaintiffs' privacy and liberty interests. No such record has been developed in this case.

[18] Similar data is reported in the Washington State Department of Health's *Death with Dignity Data Reports*, Years 2009-2015, *available at* http://www.doh.wa.gov/YouandYourFamily/IllnessandDisease/DeathwithDignityAct/DeathwithDignityData.

II. The Courts of New York State Have an Obligation to Enforce Constitutional Rights and Cannot Ignore that Obligation by Simply Deferring to the Legislature.

Finally, the First Department erroneously "defer[ed] to the political branches of government on the question of whether aid-in-dying should be considered a prosecutable offense" in New York State. R. 484-85. Yet it is emphatically the province and duty of the court of this State to either hold that Penal Law §§120.30 and 125.15(3) violate the rights of its citizens, or that they do not.[19] "[I]t is the province of the Judicial branch to define, and safeguard, rights provided by the New York State Constitution, and order redress for violation of them." *Campaign for Fiscal Equity, Inc. v. State of New York*, 100 N.Y.2d 893, 925 (2003). "The role of the judiciary is to enforce statutes and to rule on challenges to their constitutionality either on their face, or as applied in accordance with their provisions." *Benson Realty Corp. v. Beame*, 50 N.Y.2d 994, 996 (1980), *app. dism. sub nom. Benson Realty Corp. v. Koch*, 449 U.S. 1119 (1981). *See also People v. LaValle*, 3 N.Y.3d 88, 128 (2004)(" Court […] plays a crucial and necessary function in our system of checks and balances. It is the responsibility of the judiciary to safeguard the rights afforded under our State Constitution").

[19] As noted in the appellants' principal brief, it would be proper for this Court merely to resolve the issues presented in this case under the doctrine of constitutional avoidance. *See* McKinney's Cons Laws of NY, Book 1, Statutes § 150 (c).

Both the IAS Court and the First Department chose to ignore the competing obligations between the judiciary's responsibility to safeguard rights and the necessary deference to be paid to the policies of the other two branches of government as articulated by this Court in *Campaign for Fiscal Equity*. Simply put, and as this Court ultimately determined in *Campaign for Fiscal Equity*, "[w]hen [the courts] review the acts of the Legislature and the Executive, **we do so to protect rights**, not to make policy." *Campaign for Fiscal Equity*, 8 N.Y.3d at 28 [emphasis supplied]. To protect the rights of plaintiffs in this case, this Court should at the very least remand the matter to the trial court for development of the record.

CONCLUSION

The decision of the Appellate Division should be reversed and the

case remanded to Supreme Court, New York County.

Dated: New York, New York
February 6, 2017

Respectfully submitted,
s/ Beth Haroules

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WITH 22 NYCRR § 500.1 and 500.13 (c)(1)

I hereby certify that:

1. This brief complies with the type-volume limitation of 500.13 (c)(1) because the total word count for all printed text in the body of the brief, exclusive of the corporate disclosure statement; the table of contents, the table of cases and authorities required by subsection (a) of this section is 6931.

2. This brief complies with the typeface requirements of and the type style requirements of 500.1(j)(1) because the body of this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2007 in l4-point Times New Roman and the footnotes are printed in 12-point Times New Roman.

/s/ Beth Haroules

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Dated: February 6, 2017