To Be Argued By:
EDWIN G. SCHALLERT
Time Requested: 25 Minutes

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

Court of Appeals

STATE OF NEW YORK

SARA MYERS, STEVE GOLDENBERG,

Plaintiffs,

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

REPLY BRIEF FOR PLAINTIFFS-APPELLANTS

EDWIN G. SCHALLERT
JARED I. KAGAN
OLENA RIPNICK-O'FARRELL
DEBEVOISE & PLIMPTON LLP
919 Third Avenue
New York, New York 10022
Telephone: (212) 909-6000
Facsimile: (212) 909-6836

KATHRYN L. TUCKER
(admitted *pro hac vice*)
END OF LIFE LIBERTY PROJECT
4128 Interlake Avenue N
Seattle, Washington 98103
Telephone: (206) 595-0097

Attorneys for Plaintiffs-Appellants

February 14, 2017

CORPORATE DISCLOSURE STATEMENT

Plaintiff-Appellant End of Life Choices New York is an independent non-profit organization with no parents, subsidiaries, or affiliates.

Dated: February 14, 2017
New York, New York

Respectfully submitted,

DEBEVOISE & PLIMPTON LLP

By: Edwin G. Schallert

Edwin G. Schallert
Jared I. Kagan
Olena Ripnick-O'Farrell
919 Third Avenue
New York, New York 10022
(212) 909-6000
egschallert@debevoise.com
jikagan@debevoise.com
ovripnickofarrell@debevoise.com

Kathryn L. Tucker
(admitted *pro hac vice*)
End of Life Liberty Project
4128 Interlake Avenue N
Seattle, Washington 98103
(206) 595-0097
ellp@cascadianow.org

Attorneys for Plaintiffs-Appellants

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

FOREIGN CASES

STATUTES

OTHER AUTHORITIES

Plaintiffs-Appellants ("Plaintiffs") submit this brief in reply to the Brief for Respondent ("Def. Br.") and in further support of their appeal from the June 3, 2016 Order.[1]

PRELIMINARY STATEMENT

The novel questions presented by this appeal – whether aid-in-dying violates the Assisted Suicide Statute and, if so, whether application of the Statute would violate New York's Constitution – raise factual issues that should never have been decided on a motion to dismiss. The Complaint alleges in detail why a physician who provides aid-in-dying is not assisting a suicide under the Statute. The Complaint and supporting affidavits also explain that lawful end-of-life medical care is not limited to mere refusals of life-sustaining treatment but also includes affirmative steps that hasten death. Any attempt to differentiate aid-in-dying from other lawful end-of-life options necessarily implicates issues of intent and causation that are singularly ill-suited to resolution on a motion to dismiss.

Plaintiffs also allege facts to establish that the application of the Assisted Suicide Statute to aid-in-dying would violate the Due Process and Equal Protection Clauses of the New York Constitution by infringing New York's longstanding fundamental right to self-determination with respect to one's body and to control

[1] This brief uses the same defined terms as the Brief for Plaintiffs-Appellants dated November 15, 2016 ("Pl. Br.").

the course of one's medical treatment – not a contrived "right to take one's own life." Def. Br. at 32. The Supreme Court's twenty-year old decisions on which Defendant primarily relies addressed only federal constitutional claims, not rights under the New York Constitution, and expressly left open the potential for a future challenge.[2] Moreover, Defendant never mentions that those cases were decided on motions for summary judgment, *not* on motions to dismiss. Plaintiffs should be allowed to prove why Defendant's stated interests in depriving Plaintiffs of their constitutional rights do not pass muster under any level of scrutiny. It would be a travesty to deprive terminally-ill patients and their physicians the opportunity to prove their well-pled allegations.

Defendant suggests that this Court should refuse to grapple with the issues raised in this appeal and let the Legislature do so. Def. Br. at 2, 53, 60. However, interpreting the meaning of a statute – and deciding whether the application of a statute would violate constitutional rights – are quintessential judicial functions. *See Campaign for Fiscal Equity, Inc. v. State*, 100 N.Y.2d 893, 925 (2003) ("[I]t is the province of the Judicial branch to define, and safeguard, rights provided by the New York State Constitution . . . ."); *Matter of Eichner (Fox)*, 73 A.D.2d 431, 452-53 (2d Dep't 1980) ("[W]hen appropriate litigants present the court with a vital

---

[2] *See Washington v. Glucksberg*, 521 U.S. 702 (1997); *Vacco v. Quill*, 521 U.S. 793 (1997).

problem involving private rights as well as public policy, we would be remiss if we declined to act. . . . '[T]his power of interpretation must be lodged somewhere, and the custom of the constitution has lodged it in the judges.'" (quoting Cardozo, The Nature of the Judicial Process, 135-36)), order modified by, *Matter of Storar*, 52 N.Y.2d 363 (1981).

Defendant cloaks its brief in the State's professed concern for protecting the lives of all citizens. Def. Br. at 34, 43. Forcing terminally-ill patients to endure unbearable suffering or to end their final days in a coma as their bodies shrivel to dust is a perverse notion of protection. Plaintiffs have alleged – and have provided evidentiary support – that aid-in-dying can extend the lives of terminally-ill patients and that a bar against aid-in-dying can lead to the premature loss of lives through violent means. A fully developed factual record would put to the test the State's asserted concern.

ARGUMENT

I. THE APPELLATE DIVISION ERRED IN HOLDING, AS A MATTER OF LAW, THAT THE ASSISTED SUICIDE STATUTE PROHIBITS AID-IN-DYING.

A. The Appellate Division's "Literal" Interpretation Of The Assisted Suicide Statute Is Flawed And Does Not Justify Dismissal Of The Complaint.

The conduct that Plaintiffs propose hardly satisfies any "well-recognized and commonly understood definition of the term 'suicide.'" Def. Br. at 25. Aid-in-dying is a "medically and ethically appropriate course of treatment" that is indistinguishable from other end-of-life options that are openly practiced in New York. Compl. ¶ 45 (R. 38). Plaintiffs' well-pled factual allegations are assumed to be true on a motion to dismiss and go well beyond legal conclusions. No New York court has ever held that a physician providing any medical treatment violates the Assisted Suicide Statute.

Defendant asserts *ipse dixit* that aid-in-dying is assisted suicide because of the "ordinary meaning" and dictionary definitions of "suicide" and "assist." Def. Br. at 23 & n.8. However, Defendant largely ignores the factual issues inherent in applying those definitions identified in Plaintiffs' opening brief. Pl. Br. at 16-17. Plaintiffs have alleged that the patients' lives are being "taken" by terminal diseases and that the intent of patients who choose aid-in-dying is to avoid unbearable suffering and not to take their lives, so that aid-in-dying is not the intentional taking of one's own life. *Id.* Because those allegations are assumed to

be true on a motion to dismiss, the Complaint should never have been dismissed. The lower court rulings are all the more indefensible because Plaintiffs did not rely simply on the Complaint but supplemented it with affidavits, pronouncements by medical, mental health and public health officials and other evidence that aid-in-dying does not involve "suicide."

Plaintiffs' opening brief further explained that the Appellate Division's "literal" approach to the Assisted Suicide Statute – whether there is a "direct causative link" between physicians' acts and "their patients' demise," Order at 9-10 (R. 470-71) – would make criminal many accepted end-of-life care practices. Pl. Br. at 18-19. Defendant does not even address this absurd result or the Appellate Division's "causative link" test, yet Defendant relies on a similar literal approach as if it were somehow dispositive of the issues on this appeal.

Defendant's formulation of the "ordinary meaning" of the statutory terms reinforces Plaintiffs' argument. For example, Defendant states that one can assist a suicide through "active or passive means." Def. Br. at 23. This formulation would encompass not merely "active" steps like withdrawing a respirator but also "passive" methods like failing to provide artificial nutrition and hydration, even though those are accepted forms of end-of-life care for terminally-ill patients. Defendant equates suicide with "[h]astening the death of a person who is terminally ill." *Id.* at 30. However, a wide array of end-of-life medical options

hasten the death of patients but are not considered illegal under the Assisted Suicide Statute.[3]

Defendant attempts to distinguish a "decision to refuse life-sustaining treatment" from suicide. Def. Br. at 10. However, refusing life-sustaining treatment, such as a respirator or artificial hydration and nutrition, results in "ending the person's life" – Defendant's litmus test for "suicide." *Id.* at 24. Those end-of-life practices are lawful not because of a literal reading of the law but rather because the Legislature presumably intended them to fall outside the scope of the Assisted Suicide Statute for terminally-ill patients or because the Statute is not specific enough to be applied. This conclusion is bolstered by the Legislature's decision to repeal a dictionary definition of "suicide."[4]

In any event, lawful end-of-life options that precipitate death go well beyond a mere refusal of life-sustaining treatment. For example, terminal sedation invariably results in death from a doctor's intravenous administration of sedatives that render the patient unconscious while at the same time withholding food and fluid. Defendant suggests that terminal sedation is like a refusal of treatment by making a crucial misstatement of fact that the practice involves a terminally-ill

---

[3] *See* Quill Aff. ¶ 24 (R. 433); Kress Aff. ¶ 9 (R. 438-39); Morris Aff. ¶ 17 (R. 446).

[4] Defendant is correct that the language was repealed in 1965, not 1919. Def. Br. at 24 n.9.

patient "who has lost the ability to eat or drink on her own." Def. Br. at 56. In fact, patients who receive terminal sedation can eat and drink on their own, and the ability to do so has nothing to do with the selection of this treatment. The distinctive and qualifying symptom of such patients is refractory pain, not an inability to chew or swallow. Compl. ¶ 41 (R. 37).

In a similar vein, this Court deemed a prison inmate's decision to stop eating food (a "hunger strike") a suicidal act in *Matter of Bezio v. Dorsey*, 21 N.Y.3d 93 (2013). Yet, mentally capable, terminally-ill patients can decide to voluntarily stop eating and drinking – it's called "VSED" rather than a hunger strike – and the practice is not considered to be suicide.[5] (Note that this practice is distinct from withdrawing *artificial* nutrition and hydration, which is more akin to refusing a life-sustaining treatment.) In short, a developed factual record would debunk Defendant's attempt to categorize all lawful forms of end-of-life care as mere refusals of life-sustaining treatment.

The Supreme Court attempted to differentiate aid-in-dying from certain other lawful end-of-life options on the basis of "causation and intent." *Vacco*, 521 U.S. at 801. Defendant similarly argued in the trial court that aid-in-dying could be distinguished from other end-of-life options on the basis of causation and intent.

---

[5] R. 340 (end-of-life options include "voluntarily stopping eating and drinking"); Quill Aff. ¶ 23 (R. 432) (stopping eating and drinking was "the only clear legal option" that a terminally-ill patient had).

Def. Mem. in Support of Motion to Dismiss (Apr. 14, 2015) (NYSCEF Doc. # 32) at 17-18. However, issues of causation and intent are intensely factual and ill-suited to resolution on a motion to dismiss. *E.g. PMJ Capital Corp. v. PAF Capital, LLC*, 98 A.D.3d 429, 431 (1st Dep't 2012) (issues of intent were factual in nature, "preventing dismissal of the complaint at this stage"); *Petrosky v. Brasner*, 279 A.D.2d 75, 78 (1st Dep't 2001) (causation is a "factual issue[] to be resolved on a case-by-case basis by the fact finder"). Plaintiffs have alleged ample facts showing that the intent of a physician who prescribes aid-in-dying is not to end a life and that the cause of death of a patient who receives aid-in-dying is the underlying illness.[6]

At the end of its brief, Defendant asserts that Plaintiffs "did not raise a factual issue warranting further development" as to causation. Def. Br. at 59. Defendant asserts that the cause of death is a "legal conclusion" and that "the question of legal cause may be decided as a matter of law." *Id.* at 59, 60 (citing *Derdiarian v. Felix Constr. Corp.*, 51 N.Y.2d 308, 315 (1980). Defendant ignores this Court's observation in *Derdiarian* that, "[g]iven the unique nature of the inquiry in each case, it is for the finder of fact to determine legal cause." *Id.* The question of legal cause may only be decided as a matter of law "where only one

---

[6] *E.g.*, Compl. ¶¶ 38, 44 (R. 36, 38); Kress Aff. ¶¶ 7, 12, (R. 437-38, 439-40); Morris Aff. ¶ 12 (R. 444); Quill Aff. ¶ 19 (R. 431); Schallert Aff. Ex. 8 at 48-49 (R. 326-27).

conclusion may be drawn from the established facts." *Derdiarian*, 51 N.Y.2d at 315. Plaintiffs have pointed to a host of facts leading to the conclusion that aid-in-dying is not a legal cause of death. Indeed, since nearly 40% of patients prescribed aid-in-dying ultimately do not ingest the medication, it would be absurd to decide – on a motion to dismiss – that aid-in-dying is the legal cause of death whenever it is prescribed. Moreover, even when patients ingest the prescribed medication, the legal cause of death is considered to be the patient's underlying illness. *See* Pl. Br. at 16-17.[7]

Defendant notes that, absent a statutory definition, New York courts often consider the common law definition of statutory terms. Def. Br. at 25 (citing *People v. King*, 61 N.Y.2d 550, 554-55 (1984)). However, the common law definition of suicide was "one who, being of the years of discretion and sound mind, destroys himself. And the act itself is defined to be, 'designedly destroying one's own life.'" *Weber v. Supreme Tent of the Knights of the Maccabees of the*

---

[7] Defendant suggests that Plaintiffs' theory of causation would excuse negligent acts that cause death. Def. Br. 59 n.23. However, the case Defendant cites holds that, "when a defendant's *wrongful* act causes injury, he is fully liable for the resulting damage" regardless of a pre-existing condition. *Maurer v. U.S.*, 668 F.2d 98, 99-100 (2d Cir. 1981) (emphasis added). Appropriate end-of-life treatments done with a patient's consent are not wrongful and are thus distinguishable from negligent acts. That is why patients receiving such treatments are deemed to have died from their underlying diseases.

World, 172 N.Y. 490, 493 (1902). Aid-in-dying is not an act of self-destruction. To the contrary, aid-in-dying allows a terminally-ill patient to "preserv[e] the coherence and integrity of the life the patient has lived." Compl. ¶ 44 (R. 38).

B. The Appellate Division's Interpretation Of The Statute Is At Odds With Its Purpose And Legislative History.

This Court has placed particular emphasis on the purpose of laws in interpreting their meaning. The fundamental purpose of the Penal Law – "[t]o prescribe conduct which unjustifiably and inexcusably causes or threatens substantial harm to individual or public interests" – is undermined by applying the Assisted Suicide Statute to aid-in-dying because the practice of aid-in-dying *avoids* the brutal harm of a torturous dying process being forced upon individuals who want do not want to endure it and is consistent with the highest standards of medical practice. Pl. Br. at 22-23. Moreover, a prohibition of aid-in-dying causes some patients to take their own lives prematurely by violent or uncertain means and fosters a covert, underground practice of physicians helping terminally-ill patients to hasten their deaths (a harm to the practice of medicine). *Id.* at 23-25.

Defendant makes the circular assertion that the "purpose" of the Penal Law's prohibitions shows that "the Legislature intended to cover all instances of assisting a suicide" (Def. Br. at 27), thus assuming the conclusion that aid-in-dying is assisted suicide. Defendant nowhere addresses the actual purpose of the Penal

Laws, *see* N.Y. PENAL LAW § 1.05(1), nor does Defendant address the ways in which a prohibition of aid-in-dying undermines the statutory purpose.

Defendant also dwells at length on the history of prohibitions of assisted suicide dating back "700 years" and to legislative enactments "back to the colonial period." Def. Br. at 27; *see id.* at 4-7. This extended history lesson simply confirms Judge Calabresi's observation that the statutes at issue "were born in another age." *Quill v. Vacco*, 80 F.3d 716, 732 (2d Cir. 1996) (Calabresi, J., concurring). The fact that King George could seize the property of a peasant who killed himself has no bearing whatsoever on the issues in this appeal. The Assisted Suicide Statute was last amended more than a quarter century before aid-in-dying was first discussed in the medical literature as a form of end-of-life care. Pl. Br. at 26-27. Defendant is thus wrong that aid-in-dying "has always qualified as aiding another person to commit suicide." Def. Br. at 30-31. Defendant does not dispute Plaintiffs' assertion that no physician has ever been convicted in New York for assisting suicide. Pl. Br. at 27 n.14. It is striking that Defendant cannot point to a single New York case where a doctor has been prosecuted for violating the Assisted Suicide Statute – let alone a case where a doctor had prescribed medication to a terminally-ill patient.

The issue is whether the Assisted Suicide Statute applies to a medically appropriate end-of-life treatment chosen by mentally-competent, terminally-ill

patients confronted by the reality of horrendous deaths. Plaintiffs have not sought a blanket repeal of laws dealing with assisting suicide and agree that there are appropriate applications of the Statute. Pl. Br. at 20-21. Nor have Plaintiffs sought an exemption from the Statute for physicians, as Defendant suggests. Def. Br. at 25. Instead, Plaintiffs' argument is that the Assisted Suicide Statute does not proscribe aid-in-dying. The 1994 Task Force Report on which Defendant relies heavily recognized the ambiguity of the Statute. "There are no reported convictions in New York State for this offense, and the scope of liability under this provision is therefore not entirely clear."[8] Defendant is thus left grasping at straws: a 53-year old reference to a someone motivated by "sympathetic concerns" in Staff Notes to the Commission on Revision of Penal Law and Criminal Code (Def. Br. at 7-8), a 50-year-old Practice Commentary describing a lay person's act of providing a drug to a terminally-ill spouse (*id.* at 26), and a 1919 newspaper article. *Id.* at 6.[9]

The New York Legislature's failure to enact a law explicitly authorizing aid-in-dying (*id.* at 13-14, 28) says little about the Legislature's intent. This Court has repeatedly and justifiably "decline[d] to attribute any definitive meaning to the

---

[8] N.Y. State Task Force on Life & the Law, WHEN DEATH IS SOUGHT: ASSISTED SUICIDE AND EUTHANASIA IN THE MEDICAL CONTEXT 59 (May 1994).

[9] N.Y. Sun, *Anti-Suicide Law Is Now Repealed* (Sept. 2, 1919).

Legislature's failure to enact any of the proposed amendments," *Cricchio v. Pennisi*, 90 N.Y.2d 296, 308 n.5 (1997), and explained that "[l]egislative inaction is a weak reed upon which to lean in determining legislative intent." *Flannigan v. Mount Eden Gen. Hosp.*, 24 N.Y.2d 427, 433 (1969). "The practicalities of the legislative process furnish many reasons for the lack of success of a measure other than legislative dislike for the principle involved in the legislation. *Id.*; *accord Matter of NYC C.L.A.S.H., Inc. v. N.Y. State Off. of Parks, Recreation and Historic Preserv.*, 27 N.Y.3d 174, 184 (2016) ("Legislative inaction, because of its inherent ambiguity, affords the most dubious foundation for drawing positive inferences.").

Legislative inaction is a two-edged sword in this case because several other states have enacted laws that expressly prohibit aid-in-dying.[10] New York's failure to enact such a specific prohibition could readily be viewed as the Legislature simply not speaking on the issue. Should this Court determine that the existing

[10] *See* ARK. CODE ANN. § 5-10-106(b) (2007) (making illegal the act of a "physician or health care provider to commit the offense of physician-assisted suicide by (1) [p]rescribing any drug, compound, or substance to a patient with the express purpose of assisting a patient to intentionally end the patient's life"); S.C. CODE ANN. § 16-3-1090(G) (1998) (explicitly applying the assisted suicide criminal statute to "a licensed health care professional who assists in a suicide"); IDAHO CODE ANN. §§ 18-4017(1), (3) (2011) (applying the assisted suicide statute to "a health care professional").

statute does not reach aid-in-dying, the Legislature could, if it wished, enact a sufficiently specific prohibition.[11]

II. THE APPELLATE DIVISION ERRED IN DISMISSING PLAINTIFFS' CLAIMS UNDER THE DUE PROCESS CLAUSE OF NEW YORK'S CONSTITUTION.

A. Application Of The Assisted Suicide Statute To Aid-In-Dying Would Burden A Fundamental Right.

Plaintiffs' constitutional arguments rest on New York's broad fundamental right to self-determination with respect to one's body and to control the course of one's medical treatment. Pl. Br. at 29-31; *see Rivers v. Katz*, 67 N.Y.2d 485, 492 (1986). Defendant invents and attacks a straw man in arguing that "New York law does not recognize a fundamental right to take one's own life." Def. Br. at 32; *see id.* at 32-36. Plaintiffs do not ask the Court to recognize a new fundamental right but simply to hold that they have alleged facts that place a patient's choice of aid-in-dying within the existing right.

Defendant eventually addresses the fundamental right to self-determination by asserting that the right is "not absolute" and "may have to yield to superior interests of the State." *Id.* at 36 (quoting *Matter of Fosmire v. Nicoleau*, 75 N.Y.2d 218, 226 (1990)). That is true of any fundamental right, which can always be overcome by a statute that is "narrowly tailored to serve a compelling state

[11] Whether such an enactment would survive constitutional scrutiny is doubtful, as discussed below. However that question could be postponed to a later date should this Court decide the case on statutory grounds.

interest." *Hernandez v. Robles*, 7 N.Y.3d 338, 375 (2006). In *Fosmire*, the Court acknowledged the State's "well-recognized interest in protecting and preserving the lives of its citizens" but held that "the inquiry must focus on whether the State's interest is sufficiently substantial to outweigh the individual's right." 75 N.Y.2d at 227. Although the Court noted that the State's interest was "manifest" when "the individual's conduct threatens injury to others," the State "rarely acts to protect individuals from themselves, indicating that the State's interest is less substantial when there is little or no risk of direct injury to the public." *Id.* Here, it is indisputable that a patient's choice of a more peaceful death through aid-in-dying presents no risk of injury to others. Plaintiffs expressly allege that any asserted State interest is insufficient to outweigh the right of a patient to exercise autonomy and decide how much suffering to bear in the final stages of a terminal illness. Compl. ¶ 71 (R. 43-44). Any balancing of the State's and individuals' interests must be done on a fully developed record – not on a motion to dismiss.

Defendant seeks to confine the fundamental right to self-determination to a right to refuse medical treatment that "concerns a person's ability to resist an unwanted invasion into his body." Def. Br. at 37. However, this Court has framed the right in much broader terms: "every individual of adult years and sound mind has the right to determine what shall be done with his own body and to control the course of his medical treatment." *Rivers*, 67 N.Y.2d at 492. The right is premised

on "notions of individual autonomy and free choice"; "it is the individual who must have the final say in respect to decisions regarding his medical treatment in order to insure the greatest possible protection is accorded his autonomy and freedom from unwanted interference with the furtherance of his own desires." *Id.* at 493.

The Complaint alleges that aid-in-dying directly implicates a patient's autonomy and free choice. Those interests are not limited to situations where a patient refuses certain medical treatment. Rather, the choice of end-of-life options affects how much suffering to endure in the final ravages of the dying process, and individuals who choose aid-in-dying do so overwhelmingly to avoid a loss of autonomy. Pl. Br. at 31. Autonomy and freedom are implicated as much by receiving treatment as by refusing it. "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." *Delio v. Westchester Cty. Med. Ctr.*, 129 A.D.2d 1, 16 (2d Dep't 1987).

This Court's decision in *Matter of Bezio,* which involved a hunger strike by a prisoner (Def. Br. at 38) in no way alters this conclusion. *See* Pl. Br. at 33. The Court there distinguished a prisoner from terminally-ill patients, noting that the latter "were suffering from dire medical conditions that were not of their own making" (21 N.Y.3d at 102) – the same situation the patient Plaintiffs face. The

distinction is crucial because the state may not intervene in terminally-ill patients' decisions to voluntarily stop eating and drinking in order to end their lives.[12]

Defendant also points to the Supreme Court's twenty-year-old decision in *Glucksberg* (Def. Br. at 39) without acknowledging that the right to self-determination under New York's Constitution is broader than the federal due process right considered in that case. Defendant ignores how the Appellate Division expressly and improperly weighed the "evidence" of evolving societal views that would change the outcome in *Glucksberg* if it were decided today. Order at 18 (R. 479). Defendant asserts that the evidence marshaled in the Complaint and supporting affidavits is somehow "legally insufficient" (Def. Br. at 40), but nowhere does Defendant explain how it can reach this conclusion on a motion to dismiss.

For example, polling data show overwhelming support for aid-in-dying as well as a significant increase in such support over the past twenty years. Pl. Br. at 36-37. This shift is undoubtedly based on intervening experience in the United States – not available when the Supreme Court considered this issue – which makes clear that the availability of aid-in-dying provides important benefits to

---

[12] *See* David Margolick, *Judge Says Ailing Man, 85, May Fast to Death*, N.Y. Times (Feb. 3, 1984) (N.Y. State Supreme Court permitted 85-year-old former college president in a Syracuse nursing home to fast in order to hasten his death).

patients and the practice of medicine, and no harms to either. The Appellate Division's quibbles with the polling data were meritless, *id.*; Defendant does not suggest otherwise. Nor does Defendant address the impropriety of the Appellate Division's assessment of "evidence" of a societal evolution on a motion to dismiss.

B. A Prohibition On Aid-In-Dying Cannot Survive Rational Basis Scrutiny.

Defendant asserts that a prohibition on aid-in-dying advances a host of legitimate state interests recited in *Vacco*, 521 U.S. at 808-09. Def. Br. at 42. Those interests were asserted *before* any state had an open practice of aid-in-dying; experience over the past twenty years in states where the practice is an available end-of-life option has thoroughly rebutted each of the asserted state interests. A plaintiff is entitled to "negative every conceivable basis which might support" a law. *Affronti v. Crosson*, 95 N.Y.2d 713, 719 (2001) (upholding constitutionality of statute on rational basis review following trial). Plaintiffs were never given this opportunity because a factual record was never fully developed.

For example, Plaintiffs' allegations demonstrate that the State's asserted interest in "preserving life" would be advanced if aid-in-dying were lawful. Pl. Br. at 40. Terminally-ill patients with access to aid-in-dying can live longer free of the anxiety of a horrendous death and may not take their lives prematurely for fear that they would be incapable of doing so when suffering becomes intolerable. *See*

Quill Aff. ¶ 19 (R. 431). Where aid-in-dying is available, end-of-life care improves in measurable ways with more frequent and earlier referrals to hospice and better palliative care and communication between patient and physician. Defendant mentions the potential of palliative care (Def. Br. at 45) while oblivious to studies showing that palliative care improves where aid-in-dying is available. *E.g.*, Schallert Aff., Ex. 1 (R. 145).

Defendant asserts that individuals may commit suicide based on the mistaken belief that they are dying of cancer. Def. Br. at 44. First, it should be recognized that suicide itself has not been illegal for a century. Second, and most importantly, aid-in-dying can be effected only with the assistance of a doctor, who presumably can help a patient understand if a belief in imminent death is mistaken. One reason patients panic and end their lives prematurely is precisely because they can envision a far more protracted and painful death and want to act to avoid this before their progressive and inexorable deterioration renders them unable to do so – a factual finding that the Canadian Supreme Court upheld in permitting aid-in-dying. [13]

[13] *See Carter v. Canada (Attorney General)*, 2015 SCC 5 (2015) (R. 162). The importance of evidence and a fully developed record is exemplified by the *Carter* decision where the Canadian Supreme Court cited fifty times to facts found in the proceedings below.

As for the protection of vulnerable populations, Defendant repeats stale speculations of the 1994 Task Force Report that predated any actual experience in the United States with aid-in-dying. Def. Br. at 47. Data from states where the practice is lawful have shown those speculations to be unfounded: no evidence whatsoever of any heightened risk for a wide array of such individuals has been detected in two decades of closely watched open practice with aid-in-dying. Pl. Br. at 39. Defendant goes outside the record to argue that a state like Oregon where the practice is lawful has different demographic characteristics than New York. Def. Br. at 52-53 & n.20. However, precisely the same concerns about vulnerable populations were expressed in Oregon before it enacted the Death With Dignity Act ("DWDA"), and "commentators who articulated concerns about the DWDA have publicly stated that their fears about abuse of the vulnerable have not materialized." R. 411. In any event, Defendant's methodological challenges as well as its reliance on the views of amici simply show that there are factual issues that should have defeated a motion to dismiss.

Defendant also asserts that aid-in-dying could lead to euthanasia. Def. Br. at 42, 43, 47. There is not a shred of evidence that this has happened in any of the six states where aid-in-dying is lawful. Defendant relies on an amicus brief of a small group of individual physicians to argue that a ban on aid-in-dying is needed to protect the ethics of the medical profession. *Id.* at 48. However, Plaintiffs'

allegations and supporting affidavits show that aid-in-dying is an ethically appropriate course of treatment supported by a majority of physicians and by policies adopted by many major national associations of physicians and health policy experts. Crediting a plaintiff's factual allegations – rather than accepting factual claims advanced by an amicus that are disputed – is required when deciding a motion to dismiss.

III. THE APPELLATE DIVISION ERRED IN DISMISSING PLAINTIFFS' CLAIMS UNDER THE EQUAL PROTECTION CLAUSE OF THE NEW YORK CONSTITUTION.

Plaintiffs sufficiently plead a violation of the Equal Protection Clause because the Assisted Suicide Statute, if applied to aid-in-dying, would burden a fundamental right. Even if no fundamental right were implicated, the Assisted Suicide Statute improperly treats similarly situated terminally-ill patients differently. Defendant asserts that the law appropriately distinguishes between aid-in-dying and a decision to "refuse unwanted lifesaving medical treatment." Def. Br. at 55 (quoting *Vacco*, 521 U.S. at 800). "[P]ermitting an illness to run its course, even when death is inevitable, is distinct from intervening with a prescribed medication to hasten death." *Id.*

However, Defendant's argument raises a host of factual issues that should never have been decided on a motion to dismiss. To begin with, Defendant's characterization of all lawful end-of-life options as a mere refusal of medical

treatment that permits an illness to run its course cannot be reconciled with the Complaint's allegations. For example, the intravenous administration of medication to render the patient unconscious in terminal sedation (with the concomitant withholding of nutrition and hydration) is manifestly not a "mere refusal" of treatment. The sedative alone can result in death, and the withholding of nutrition and hydration invariably produces death, precisely so that the underlying illness does *not* "run its course." Pl. Br. at 18. The patient is "*receiving* life-ending treatment," not "exercising a right to *refuse* medical treatment" – in contrast to Defendant's factual claim. Def. Br. at 56 n.21 (emphasis in original).

Defendant seeks to obfuscate the distinction by asserting inaccurately that terminal sedation is administered to a terminally-ill patient "who has lost the ability to eat and drink on her own." *Id.* at 56. In fact, terminal sedation is often administered to patients who can eat or drink on their own. Other terminally-ill patients who can eat or drink on their own choose not to in order to hasten their deaths – another lawful practice.

Defendant claims that the "intent" of terminal sedation "is to relieve pain and suffering, not to end the patient's life." *Id.* at 57 (quoting the Council for Ethical and Judicial Affairs of the Am. Med. Ass'n). That is precisely the intent of the physician who prescribes medication the patient could ingest to avoid suffering

the patient finds unbearable, as the Complaint and supporting affidavits make clear. Pl. Br. at 17. Indeed, while terminal sedation always results in the death of the patient, nearly 40% of patients prescribed medication for aid-in-dying never take it, so the intent of the physician plainly is to provide relief from anxiety and the comforting possibility of an "escape" if truly unbearable suffering arises. *Id.* at 19.

Defendant makes no mention of Justice Stevens' explanation why there is no difference in the intent of a physician who prescribes aid-in-dying from one who provides terminal sedation. *See id.* at 45-46 (quoting *Glucksberg*, 521 U.S. at 750-51 (Stevens, J., concurring)). As Justice Stevens observed, the "same intent and causation may exist" with aid-in-dying as with terminal sedation. If Plaintiffs' allegation to that effect is credited, then there can be no rational basis for disparately treating aid-in-dying, and the Complaint should be allowed to proceed to discovery so that a fuller record can be developed.

Indeed, *Vacco* and *Glucksberg* were both adjudicated not on motions to dismiss but rather on motions for summary judgment. In each case, the parties were thus allowed to develop a factual record that permitted more informed consideration of the issues presented. Yet Defendant and the lower courts refuse to acknowledge the existence of factual issues even though extensive experience with aid-in-dying in the United States would provide vastly more informed

consideration of the practice. If permitted, Plaintiffs will proceed to trial so the finder of fact has testimony of witnesses adduced in the courtroom before making essential factual findings.

CONCLUSION

This case implicates one of the most deeply and profoundly personal decisions New Yorkers will make in their lifetime: how much suffering to endure before crossing the threshold to death when brought inexorably to that threshold by terminal illness. Deciding how to answer that question will turn on the individual's most deeply held preferences, values and beliefs, which deserve careful consideration by a fact-finder. Whether the State can articulate reasons sufficient to deny mentally competent dying patients the choice of a more peaceful death through aid-in-dying requires consideration of a host of facts. Such factual inquiry must delve into the state's articulated reasons for this denial of liberty, and whether the articulated reasons are in fact advanced by the denial, rendering resolution on a motion to dismiss clearly erroneous.

For the foregoing reasons, and for those stated in Plaintiffs' opening brief, this Court should reverse the lower court's order dismissing Plaintiffs' Complaint.

Dated: February 14, 2017
New York, New York

Respectfully submitted,

DEBEVOISE & PLIMPTON LLP

By: 

Edwin G. Schallert
Jared I. Kagan
Olena Ripnick-O'Farrell
919 Third Avenue
New York, New York 10022
(212) 909-6000
egschallert@debevoise.com
jikagan@debevoise.com
ovripnickofarrell@debevoise.com

Kathryn L. Tucker
(admitted *pro hac vice*)
End of Life Liberty Project
4128 Interlake Avenue N
Seattle, Washington 98103
(206) 595-0097
ellp@cascadianow.org

Attorneys for Plaintiffs-Appellants

CERTIFICATION

I certify pursuant to 500.13(c)(1) that the total word count for all printed text in the body of the brief, exclusive of the statement of the status of related litigation; the corporate disclosure statement; the table of contents, the table of cases and authorities and the statement of questions presented required by subsection (a) of this section; and any addendum containing material required by subsection 500.1(h) of this Part is 5,631 words.

Dated: February 14, 2017
New York, New York

Respectfully submitted,

DEBEVOISE & PLIMPTON LLP

By: 

Edwin G. Schallert
Jared I. Kagan
Olena Ripnick-O'Farrell
919 Third Avenue
New York, New York 10022
(212) 909-6000
egschallert@debevoise.com
jikagan@debevoise.com
ovripnickofarrell@debevoise.com

Kathryn L. Tucker
(admitted *pro hac vice*)
End of Life Liberty Project
4128 Interlake Avenue N
Seattle, Washington 98103
(206) 595-0097
ellp@cascadianow.org

Attorneys for Plaintiffs-Appellants