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

Court of Appeals
of the 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.

***AMICUS CURIAE* BRIEF OF SURVIVING FAMILY MEMBERS**

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PRELIMINARY STATEMENT

Surviving Family Members respectfully submit this *Amicus Curiae* brief in support of Plaintiffs-Appellants. Surviving Family Members have been directly and tragically affected by the current ambiguities in New York State's statutory law and constitutional protections, having watched their family members suffer before death without the aid in dying they requested. Surviving Family Members believe that, at the very least, the important question of statutory interpretation regarding the Assisted Suicide Statute and important questions regarding the reach of Due Process and Equal Protection protections afforded by the New York Constitution were not correctly decided on motion to dismiss. This Court has ruled on questions involving medical intervention at the end of life, but it has never done so without a full evidentiary record. Furthermore, strong precedent from this Court supports a ruling that New York criminal law does not reach medical aid in dying for consenting, mentally competent, and terminally-ill patients represented by Plaintiffs-Appellants and *Amici* Surviving Family Members herein. In addition, *Amici* believe that the New York Constitution protects individual autonomy to choose medical aid in dying in these specific circumstances. *Amici* believe that New York's Constitution, as interpreted by this Court, protects dying New Yorkers, and does not require New Yorkers to suffer cruelly before death if they and their doctors believe that suffering to be pointless.

INTEREST OF AMICUS CURIAE

Amici Surviving Family Members provide the Court not with hypothetical extremes and not with abstract views of history.[1] In a case seeking the right of mentally competent, terminally-ill patients justifiably requesting to end *their own* pointless suffering at the end of *their own* lives, the *Amici* are the loved ones of just such patients. The *Amici* represent the real people affected by the trial court and Appellate Division decisions to dismiss their cause without a trial of the issues.

The *Amici* in support of Defendant-Respondent ask the Court to consider persons not at issue in this case, *i.e.* those who do not want aid in dying for themselves, those who do not have capacity to consent, those who are not terminally ill, those who are not suffering physically but simply depressed or inappropriately pressured by circumstance, and those doctors who do not want to provide aid in dying. Yet the case at issue is solely the case presented by Plaintiffs-Appellants and *Amici* Surviving Family Members who have personally suffered under the current state of the law.

Amici Surviving Family Members are the voices of their mentally competent, terminally-ill loved ones. Those loved ones lived successful lives and found themselves burdened with illnesses like cancer, AIDS and ALS. Having given every

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[1] The affidavits of the Surviving Family Members are provided to the Court in the accompanying Appendix.

effort to fighting their illnesses, they were unable to prolong their lives. In order to maintain control and die with dignity – *e.g.*, not "in a stupor" in a hospital or in physical anguish – they requested medical aid in dying to shorten awful deaths. The lives and deaths reported by the Surviving Family Members could be our own family members, our own dear friends, and at some point ourselves. Many rational citizens of this State have requested and will request aid in dying from willing physicians when the only other option for those citizens is pointless suffering before inevitable death. *Amici* submit that it is not the proper role of government to deny choice in these circumstances. There is nothing shocking or inappropriate about the actual considerations these patients made. There is nothing shocking or inappropriate about the request for a simple prescription of medication they could self-administer in the ultimate exercise of personal autonomy at a moment of zero state interest, when there was no life left to live in that person's estimation and in the objective judgment of his or her physician. The protections of privacy, liberty, and equal protection afforded New York's citizens cannot be so ephemeral that New York's courts would insist that these patients continue to suffer without the requested aid in dying.

Amici Surviving Family Members are New Yorkers, some of them prominent journalists and lawyers, and all of them now advocates for aid in dying, having watched their loved ones' reasonable wishes for their deaths not be fulfilled:

- Betty Rollin: A television journalist and author whose indomitable mother had undergone all the grueling treatments for ovarian cancer and, faced with suffering before an inevitable death, asked for aid in dying: "I've had a wonderful life, but now it's over, or it should be. I'm not afraid to die, but I'm afraid of this illness, what it's doing to me…There's never any relief from it now. Nothing but nausea and pain. The pain— it never stops. There won't be any more chemotherapy. There's no more treatment anymore… I know what happens. I'll die slowly. I don't want that." Ironically, only a US-trained physician living abroad would provide her with the medical information she needed to overdose on prescribed medication. Given the state of New York law, she died alone. Affidavit of Betty Rollin (dated April 7, 2017) ("Rollin Aff.").
- Gail Sheehy: An award-winning reporter and author of 17 books who was the primary caregiver to her husband, the legendary founder, publisher and editor of New York magazine, who struggled to survive throat cancer for almost 17 years, until he had no options left for survival

and would have taken a prescription of pills to end his suffering had the law permitted him to do so. Instead, he pulled out his feeding tube twice, only to have it re-inserted by his physician, and eventually died after suffering for days through a final pneumonia that he refused to treat. Affidavit of Gail Sheehy (dated April 17, 2017) ("Sheehy Aff.").

- Charles Ross: A criminal defense lawyer whose wife, an original Plaintiff here, suffered from ALS and became an advocate for the cause of aid in dying. She had worked as an administrator in the federal defender program and as a physical therapist, in addition to being a leader in community, philanthropic, and trade organizations. After years of living with ALS, "she joked, half-heartedly that she was like a potted plant that needed watering and food, but did not do much else— except of course that her brain was fully functioning and she knew what was happening to her." She was always in pain that varied from tolerable to severe. She rejected terminal sedation and VSED because she did not want to die "in a stupor" and instead

sought to gather her friends and family around her and die peacefully, with aid in dying, in her home. Without the aid she sought, she refused to let anyone see her in the last week of life, and agreed to go to palliative care and be sedated. She died alone at 60 years old and "in a stupor" in an institution, exactly what she had fought against. Affidavit of Charles Ross (dated April 6, 2017) ("Ross Aff.").

- Stacey Gibson: The spouse of a retired corporate president and community volunteer with spino cerebella ataxia, a degenerative motor neuron disease. Eight years after diagnosis, he was wheelchair bound, had lost bladder and bowel control, his arms and legs atrophied, and he had lost even the ability to cough up food that went into his lungs. "Everything which he had previously identified as degrading about dying happened to him. Meanwhile, he could not enjoy the little things that he had enjoyed about everyday life, such as a meal or a cigar…He did not want to die; but his life became something that was not worth experiencing anymore." Ultimately, without the choice of

aid in dying that he wanted, he chose voluntarily stopping eating and drinking ("VSED"), essentially death by dehydration, something society does not permit us "to inflict…on our pets". It took him 12 days to die from VSED. He remained conscious, but developed terminal agitation and was subject to "sudden, uncontrollable fits of yelling and violent thrashing" and needed to be "strapped to his bed." This was a horrific death for him, and his entire family. Affidavit of Stacey Gibson (dated April 6, 2017) ("Gibson Aff.).

- David Buraszeski: The 25-year partner of a man dying of AIDS and original Plaintiff in this case, who had suffered through diabetes, meningitis, gangrene, and cancer of the larynx, and through treatments resulting in amputations, radiation burns, extraction of teeth, broken bones in his neck and back, and dozens of trips to the emergency room. At the end, he was always in a certain amount of pain while awake, so he slept 18-19 hours a day. Without the aid in dying at home that he wanted, he chose to go to hospice. While he wanted to be conscious and aware of his

partner's presence when he died, he was instead heavily sedated, uncommunicative, and in and out of consciousness until death. Affidavit of David Buraszeski (dated April 7, 2017) ("Buraszeski Aff.").

- Scott Barraco: The boyfriend of a 44 year-old woman with throat cancer whose cancer treatment involved surgeries that left her unable to eat, drink, smell, or speak, and with an open neck wound that would not heal. She considered dying through asphyxiation, either by putting a plastic bag over her head or sitting in her garage with the car running, but thought from information obtained on the internet that she could overdose with pills and alcohol. Her attempt failed, and doctors told her she was lucky the attempt had not left her brain damaged. Why would our society "require the terminally-ill either to suffer, to linger in unconsciousness before death, or to die alone by suicide"? Denied the aid in dying she wanted, she died only after suffering through grand mal seizures and having to be taken to hospice and sedated until death. Affidavit of Scott Barraco (dated April 6, 2017) ("Barraco Aff.").

As the *Amici* show, the medically-aided deaths permitted under the current state of the law, *i.e*. terminal sedation and voluntary stopping of eating and drinking with attendant injections of sedatives or morphine and, occasionally, the application of restraints, are intrusive and occasionally violent, while prolonging death. Aid in dying, on the other hand, offers a private, dignified, and mercifully brief death for a consenting terminally-ill patient who is suffering needlessly.

ARGUMENT

The arguments presented by Defendant-Respondent attempt to resolve issues of fact for which there is no proof in this case, and attempt to sweep away the Court's obligation to determine, on a full record, the statutory and constitutional questions concerning the extent of personal autonomy at the end of life.

I. The Law Applicable to Aid in Dying Cannot Be Decided Without a Full Evidentiary Record

The overarching concern in this appeal must be the procedural posture of this case. Such important statutory and far-reaching constitutional questions cannot be decided on the limited record afforded on motion to dismiss. The applicable precedents here all involved evidentiary hearings. *See River v. Katz,* 67 N.Y.2d 485, 493 (1986), ("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"); *Matter of Storar*, 52 N.Y.2d 363, 377 (1981) (state interest in "preserv[ing] the patient's life" does not outweigh "the patient's right to determine the course of his own medical treatment"); *Delio v. Westchester Cty. Med. Ctr.*, 129 A.D.2d 1, 16 (2d Dep't 1987) ("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"); *Matter of Eichner (Fox)*, 73 A.D.2d 431, 459 (2d Dep't 1980), ("[I]ndividuals have an inherent right to prevent pointless, even cruel, prolongation of the act of dying.") (Citations and internal quotation marks omitted.), *modified sub nom. Matter of Storar,* 52 N.Y.2d 363 (1981).

Defendant-Respondent relies on *Washington v. Glucksberg*, 521 U.S. 702 (1997), to support the notion that a full evidentiary record is not required to decide that Plaintiffs-Appellants have no rights under the New York Constitution. On the contrary, the instant case requires applying the specific set of facts presented by witnesses for both sides against the more expansive New York Constitution. *Glucksberg* was a challenge, first, under the federal Constitution and not the New York Constitution, and, second, it was a facial challenge. Most importantly, the justices ruling in *Glucksberg* understood that they were not the final word with respect to federal law, much less state law, on this issue.

First, there is no doubt that the New York Constitution may very well be more expansive than the federal Constitution on the matter of aid in dying, as it is in other subject matter. *See Sharrock V. Dell Buick-Cadillac, Inc.*, 45 N.Y.2d 152, 160 (1978); *Immuno, AG v. Moor-Janowski,* 77 N.Y.2d 235 (1991). As the late Justice of this Court, Stewart Hancock, noted with respect to New York's constitutional protections afforded individuals, over and above federal protections:

> *[W]hen a New York court concludes that an individual has rights that are not protected under the federal Constitution, but should be under the New York Constitution, the court will afford that person the greater protection as a matter of state constitutional law*. It is simply a matter of fairness and common sense. As Judge Kaye noted in her concurring opinion in People v. Scott—responding to the arguments raised in the dissent against giving a defendant the protection of the state constitution for rights not covered under the federal Constitution—such independent state constitutionalism in no way demeans the Supreme Court as the nation's highest court, or challenges the authority of its decisions as the supreme law of the United States, or offends the Justices. *Today, New York courts accept and routinely apply state constitutionalism when necessary to effectively safeguard individual rights and liberties*.

Stewart F. Hancock, Jr., *New York State Constitutional Law—Today Unquestionably Accepted and Applied As A Vital And Essential Part Of New York Jurisprudence*, 77 Alb. L. Rev. 1331 (2014) (emphasis added); *see* Judith S. Kaye, *Contributions of State Constitutional Law to the Third Century of American Federalism*, 13 Vt. L.

Rev. 49, 52-56 (1988) (New York courts provide more directly for the interests of their citizens).

Second, the challenge in *Glucksberg* was a facial challenge. "A facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid." *United States v. Salerno*, 481 U.S. 739 (1987). However, an as-applied challenge deals only with the facts presented by plaintiffs, and requires a full examination of how a statute is applied to those facts in order to determine that those facts do or do not warrant constitutional protection. For example, in *Amazon.com, LLC v New York State Dept. of Taxation & Fin*., 81 A.D.3d 183 (1st Dep't 2010), *aff'd on other grounds*, 20 N.Y.3d 590 (2013), the Appellate Division upheld the trial court's grant of dismissal for failure to state a cause of action as to facial challenges of New York tax law on the basis of the federal and state due process clauses, but sent the case back to the trial court "so that plaintiffs can make their record" on the as-applied challenge. It stands to reason that an *as-applied* challenge, particularly of the kind presented here, must have a concrete evidentiary record upon which to determine how the statute is actually *being applied* and with what effect on constitutionally protected activity.

Finally, *Glucksberg* did not purport to end the question of constitutional protection for aid in dying. While the majority concluded that a state *could* have a

prohibition, it in no way precluded states from permitting it or determining it to be protected under state constitutions. Notably, Justice Rehnquist concluded his opinion for the majority by suggesting that states could go their own way on the issue:

> 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.

521 U.S. 702, 735 (1997).

Justice O'Connor went on in a concurring opinion to note that on the facial challenge presented in that case, the Court had not reached "the narrower question whether a mentally competent person who is experiencing great suffering has a constitutionally cognizable interest in controlling the circumstances of his or her imminent death." This question, Justice O'Connor suggests, is explicitly left to states such as New York to determine.

> There is no reason to think the democratic process will not strike the proper balance between the interests of terminally ill, mentally competent individuals who would seek to end their suffering and the State's interests in protecting those who might seek to end life mistakenly or under pressure. *As the Court recognizes, States are presently undertaking extensive and serious evaluation of physician-assisted suicide and other related issues*. *Ante*, at 716-718; *see post*, at 785-788 (Souter, J., concurring in judgment). *In such circumstances, 'the ... challenging task*

> *of crafting* appropriate procedures for *safeguarding ... liberty interests is entrusted to the "laboratory" of the States ... in the first instance.' Cruzan v. Director, Mo. Dept. of Health*, 497 U. S. 261, 292 (1990) (O'Connor, J., concurring) (citing *New State Ice Co. v. Liebmann*, 285 U. S. 262, 311 (1932)).

521 U.S. at 737 (O'Connor, J., concurring)(emphasis added).

Justice Stevens reiterated the limited scope of the majority's holding even with respect to future federal constitutional cases, much less a case under state law: The majority's "holding, however, does not foreclose the possibility that some applications of the statute might well be invalid." 521 U.S. at 739 (Stevens, J., concurring). Of course, the Court's later cases on federal substantive due process rights cast doubt on whether *Glucksberg* itself remains good law; *see, e.g.*, *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015); *Lawrence v. Texas,* 539 U.S. 558 (2003).

Thus, Plaintiffs-Appellants and *Amici* here, to use Justice O'Connor's words, ask the Court to "undertak[e] extensive and serious evaluation" of the legality of, and constitutional protections afforded to, aid in dying. Such an undertaking requires a full evidentiary record on what the "'laboratory'" of New York State has proved with respect to aid in dying, now 20 years after *Glucksberg*.

II. Precedents Point to Obvious Distinctions Between Behavior Criminalized in the Assisted Suicide Statute and Medical Aid in Dying at the End of Life

Suicide is a waste of life that can and should be prevented with treatments including anti-depressants and psychological counseling. It is an irrational and tragic act by an emotionally distraught person, which in no way should be assisted by anyone. *See, e.g., People v. Duffy*, 79 N.Y.2d 611, 613 (1992). The assisted suicide rightly criminalized by statute bears no relationship to a physician's aid in response to the rational decision of a terminally-ill person who has struggled against a terrible disease but, despite the desire to live, will die, and believes that the best outcome is to shorten an awful dying process.

Defendant-Respondent and his *amici* pretend that there is clarity on the Assisted Suicide Statute covering the aid in dying sought here, by citing irrelevant cases. In fact, the precedent of this Court provides plenty of clarity the other way: that medical aid in dying at the end of terminal illness is not intended to be criminalized by the Assisted Suicide Statute. Most of the elements of the aid in dying sought here have already been expressly validated by New York courts.

First, contrary to Respondent-Defendant and his *amici*, there is no open question with respect to the ability of medical science to determine terminal illness. This Court has long recognized that physicians can and do diagnose terminal illness. *See Matter of Storar*, 52 N.Y.2d 363, 364, 374 (1981) (considering the question of

hastening death in "patients who were diagnosed as fatally ill with no reasonable chance of recovery", one with "terminal" and "irreversible" bladder cancer and a "very limited life span" of "between 3 and 6 months").

Second, this Court has long held that life for its own sake is not an absolute value, and that the state interest in preserving life is outweighed by personal autonomy for dying patients. *Id*. at 377 (state interest in "preserv[ing] the patient's life" does not outweigh "the patient's right to determine the course of his own medical treatment"). Indeed, hastened death by removal of hydration and nourishment has been upheld in patients who may survive indefinitely in persistent vegetative states with "no hope of recovery", when there is evidence that continuing life would have been regarded by the patient as "degrading, demeaning and totally nonpurposeful." *Delio v. Westchester Cty. Med. Ctr.*, 129 A.D.2d 1, 3 (2d Dep't. 1987); *see Matter of Storar*, 52 N.Y.2d 363, 364 (1981) (Brother Fox was "fatally ill" in a vegetative coma, but there was no finding that he was near death); *Matter of Eichner (Fox),* 73 A.D.2d at 459 (2d Dep't 1980) ("Individuals have an inherent right to prevent pointless, even cruel, prolongation of the act of dying.").

Third, the Court has long held that people may make rational decisions, based on their personal value systems, to hasten their own deaths. *See Matter of Storar*, 52 N.Y.2d at 372, 379 (validating Brother Fox's decision not to have any "extraordinary business" done for him if he were in a vegetative state, a decision

being "supported by his religious beliefs" and "not inconsistent with his life of unselfish religious devotion").

Fourth, the Court has held that affirmative medical assistance may be provided for the purpose of hastening death and not run afoul of the prohibitions against "one person . . . causing the death of another" as per "the homicide laws." *Id.* at 378.

Indeed, the only distinguishing factor between permitting hastened death in *Matter of Eichner*, and not permitting it in *Matter of Storar*, was the compelling evidence of consent in *Eichner* and its absence in *Storar*. *See id*. at 379. Consent, of course, is not an issue in the instant case. In fact, this case and these *Amici* present the Court with compelling, terminal cases, rational decisions and physicians who would help them but for the state of the law.

Thus, most of the factors which Defendant-Respondent and his *Amici* seek to put in issue again have already been decided by this Court in Plaintiffs-Appellants' favor.

The only question here is whether the Court would find criminal liability in the distinction between the physician who hastens a terminal patient's death by personally disconnecting and removing life-support equipment, by personally injecting breath-suppressing sedatives, and, when necessary, strapping patients to their beds; and the same physician providing a prescription to a suffering, terminally-

ill, and consenting patient who may choose to self-administer the prescription to end the process of dying in the privacy of his or her own home and in the presence of family. Such a distinction would be dubious, at best, and certainly cannot be supported under current New York law and without evidence.

III. New York's Privacy and Liberty Rights Protect New Yorkers Who Suffer at the End of Life and Seek Aid in Dying

There can be no doubt that Plaintiffs have raised an issue of fact on the important question under New York constitutional law of whether the State can impose continued pain and suffering on terminally-ill patients by denying them a prescription of medication from their doctors that they may use to hasten their own deaths.

After *Matter of Storar*, the Court of Appeals revisited the question of individual autonomy in matters of medical treatment in *Rivers v. Katz*, 67 N.Y.2d 485 (1986). In that case, the Court recognized the right to bring on death by refusing medical treatment not only as a "fundamental common-law right" but also as "coextensive with [a] patient's liberty interest protected by the due process clause of our State Constitution." *Id*. at 493. The Court's language in *Rivers* is entirely prescient of Plaintiffs-Appellants' and *Amici*'s views in this case:

> In our system of a free government, where notions of individual autonomy and free choice are cherished, *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. (emphasis added).

The New York Constitution is at least as protective of individual liberty as the federal Constitution, and federal constitutional law protects patients from pain and suffering that they seek to avoid with affirmative medical assistance, even if the natural course of events is altered. *See Casey v. Planned Parenthood*, 505 U.S. 833, 853 (1992) (the state may not insist that plaintiff be denied the medical procedure sought and instead bear the "intimate and personal" suffering of "anxieties," "physical constraints," and "pain"; instead plaintiff may determine her own "destiny" based on "her own spiritual imperatives".)

IV. Given the More Expansive Rights Afforded Under New York's Equal Protection Clause, This Court Is Free to Follow the Reasoning of the Second Circuit in *Quill v. Vacco*

Above we have discussed the limitations in using the United States Supreme Court decision in *Glucksberg* in 1997 as precedent here on the privacy and liberty interest questions under New York State law, given that Court's explicit reference to state law being a matter for state determination in this area, and given that New York's Constitution is more expansive. Similarly, with respect to the State Equal Protection Clause, this Court is entirely free to rule that denial of aid in dying to Plaintiffs-Appellants fails a rational basis test, as the Second Circuit did in *Quill v.*

Vacco, 80 F.3d 716 (2d Cir. 1996), notwithstanding reversal on federal grounds in 521 U.S. 793 (1997). New York's rational basis test may well be more expansive as applied here.

The U.S. Supreme Court in *Vacco* admitted that "the line between" refusing "lifesaving medical treatment" and the aid in dying requested here "may not be clear". *Vacco v. Quill*, 521 U.S. 793, 807-808 (1997). Plaintiffs-Appellants have certainly raised an issue of fact in this case that there is no clear line, given the great amount of affirmative medical intervention required to hasten death in cases involving removal of life support, involving inducing terminal sedation until death, and involving the voluntary stopping of eating and drinking until death.

New York equal protection analysis might very well regard the lack of a clear line between the different kinds of medically-assisted deaths permitted and that sought herein as the Second Circuit did in *Quill*:

> *[I]t seems clear that New York does not treat similarly circumstanced persons alike: those in the final stages of terminal illness who are on life-support systems are allowed to hasten their deaths by directing the removal of such systems; but those who are similarly situated, except for the previous attachment of life-sustaining equipment, are not allowed to hasten death by self-administering prescribed drugs.* * * *
>
> Indeed, there is nothing 'natural' about causing death by means other than the original illness or its complications. The withdrawal of nutrition brings on death by starvation, the withdrawal of hydration brings on

> death by dehydration, and the withdrawal of ventilation brings about respiratory failure. By ordering the discontinuance of these artificial life-sustaining processes or refusing to accept them in the first place, a patient hastens his death by means that are not natural in any sense. It certainly cannot be said that the death that immediately ensues is the natural result of the progression of the disease or condition from which the patient suffers.
>
> Moreover, *the writing of a prescription to hasten death, after consultation with a patient, involves a far less active role for the physician than is required in bringing about death through asphyxiation, starvation and/or dehydration*. Withdrawal of life support requires physicians or those acting at their direction physically to remove equipment and, often, to administer palliative drugs which may themselves contribute to death. The ending of life by these means is nothing more nor less than assisted suicide. *It simply cannot be said that those mentally competent, terminally-ill persons who seek to hasten death but whose treatment does not include life support are treated equally*.

80 F.3d at 730 (emphasis added).

Amici Surviving Family Members believe New York State would find zero state interest in preserving life in the circumstances Plaintiffs-Appellants and *Amici* describe. The Second Circuit found that the State has *no interest* in forcing the continuation of lives that are at the point of requesting aid in dying.

> A finding of unequal treatment does not, of course, end the inquiry, unless it is determined that the inequality is not rationally related to some legitimate state interest. * * * *But what interest can the state possibly have in requiring the prolongation of a life that is all but ended?*

> Surely, the state's interest lessens as the potential for life diminishes. *See In re Quinlan*, 70 N.J. 10, 41, 355 A.2d 647, cert. denied, 429 U.S. 922, 97 S.Ct. 319, 50 L.Ed.2d 289 (1976). *And what business is it of the state to require the continuation of agony when the result is imminent and inevitable?* What concern prompts the state to interfere with a mentally competent patient's 'right to define [his] own concept of existence, of meaning, of the universe, and of the mystery of human life,' *Planned Parenthood v. Casey*, 505 U.S. 833, 851, 112 S.Ct. 2791, 2807, 120 L.Ed.2d 674 (1992), when the patient seeks to have drugs prescribed to end life during the final stages of a terminal illness? *The greatly reduced interest of the state in preserving life compels the answer to these questions: "None."*

80 F.3d at 730-731 (emphasis added).

New York law would concur. This Court has already held that the state interest in preserving life yields to the "paramount" interest of a patient to "determine the course of his own medical treatment" when there is consent and "no reasonable chance of recovery". *Matter of Storar*, 52 N.Y.2d at 377, 366-367; *see Delio*, 129 A.D.2d at 24 (quoting *In re Quinlan,* 70 N.J. 10, 41, 355 A.2d 647, 664 (1976) ("the State's interest…weakens and the individual's right to privacy grows as…the prognosis dims")); *cf. Roe v. Wade*, 410 U.S. 113, 164 (1973) ("With respect to the State's important and legitimate interest in potential life, the 'compelling' point is at viability.")

Amici believe that this Court, alone charged with determining the rights of suffering, terminally-ill, and dying New Yorkers, will find that this State has no interest in requiring "the continuation of agony" before certain death.

CONCLUSION

For the foregoing reasons, the decision of the Appellate Division should be reversed and the case remanded for trial

Dated: April 19, 2017
New York, New York

Respectfully submitted,

By: _____

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CERTIFICATE OF COMPLIANCE

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 cover, table of contents, and table of authorities required by subsection (a) of this is section is 5190.

2. This brief complies with the typeface requirements and type style requirements of 500.1(j)(1) because the body of this brief has been prepared in a proportionally space typeface using Microsoft Word in 14-point Times New Roman and the footnotes are printed in 12-point Times New Roman.

Dated: April 19, 2017

_____

Carla Kerr Stearns
Attorney for *Amici Curiae*