STATE OF NEW YORK
OFFICE OF THE ATTORNEY GENERAL

ERIC T. SCHNEIDERMAN
ATTORNEY GENERAL

BARBARA D. UNDERWOOD
SOLICITOR GENERAL

June 27, 2016

The Honorable John P. Asiello
Clerk of the Court
New York Court of Appeals
20 Eagle Street
Albany, NY 12207-1095

Re: *Myers v. Schneiderman,* Index No. 151162/15 (Sup Ct. N.Y. County)

Dear Mr. Asiello:

I write on behalf of respondent the State of New York. As explained below, this Court should dismiss the above-captioned appeal because no substantial constitutional question is directly involved in the decision of the Appellate Division, First Department.

Background

To effectuate New York's longstanding and legitimate concern for the lives of its citizens, the State has taken various measures to prevent suicides and to protect individuals in the vulnerable position of making end-of-life decisions. These measures include the enactment of Penal Law §§ 120.30 and 125.15(3), which prohibit aiding another person's efforts to commit suicide. Section 120.30 provides that "[a] person is guilty of promoting a suicide attempt when he intentionally causes or aids another person to attempt suicide." Section 125.15(3) provides that "[a] person is guilty of manslaughter in the second degree when," among other things, "[h]e intentionally causes or aids another person to commit suicide." Violation of either provision constitutes a felony.

Plaintiffs[1] seek to except from Penal Law §§ 120.30 and 125.15(3) the conduct of prescribing a lethal dose of medication for a terminally ill person to use in ending his or her own life. Plaintiffs argue that those provisions do not by their terms apply to such conduct, and that any such application would be inconsistent with the New York Constitution's guarantees of equal protection and due process. (Preliminary Appeal Statement; App. Div. Br. for Appellants ("Br.") at 8, 15; App. Div. Record on Appeal (R.) 7, 9, 41–44.)

In a carefully reasoned opinion that follows well-established state and federal law, the Appellate Division, First Department, rejected plaintiffs' claims and affirmed the trial court's dismissal of plaintiffs' complaint. *See Myers v. Schneiderman,* 2016 N.Y. Slip Op. 03457 (1st Dep't May 3, 2016). Plaintiffs now seek to appeal this decision as of right under C.P.L.R. 5601(b).

Discussion

Plaintiffs' appeal must be dismissed because settled law renders their constitutional claims undebatable and their arguments for a departure from that law are entirely without merit. Consequently their appeal does not raise a substantial constitutional question as required for an appeal as of right to this Court under C.P.L.R. 5601(b). *See* Arthur Karger, *The Powers of the New York Court of Appeals* § 7:5, at 226 (3d ed. 2005).

The U.S. Supreme Court has already determined that New York's prohibition on physician-assisted suicide does not violate the Equal Protection Clause of the United States Constitution, which is equivalent in scope to New York's Equal Protection Clause. *See Myers*, 2016 N.Y. Slip Op. 03457, at *12–*14 (citing *Vacco v. Quill*, 521 U.S. 793 (1997)). That Court has also held that a state prohibition on physician-assisted suicide does not violate federal due process protections, because such a prohibition implicates no fundamental rights and is rationally related to a legitimate government purpose. *See id.* at *14 (citing *Washington v. Glucksberg*, 521 U.S. 702 (1997)).

This Court has repeatedly endorsed the principles set forth in *Vacco* and *Glucksberg*, including as recently as 2013. *See Myers*, 2016 N.Y. Slip Op. 03457, at *17; *Matter of Bezio v. Dorsey*, 21 N.Y.3d 93, 103–04 (2013). Moreover, the Court has "not hesitated to dismiss appeals for want of substantiality" where "a statute under attack has previously been sustained as against the same or equivalent constitutional objections." Karger, *supra*, § 7:5, at 227.

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[1] Plaintiffs are a terminally ill adult, an adult with an illness that he is concerned may progress to a terminal stage, several medical professionals who regularly treat terminally ill patients, and an advocacy group.

1. The Penal Law's Prohibition on Assisting in a Suicide

Plaintiffs argued below—and assert in their preliminary appeal statement—that Penal Law §§ 120.30 and 125.15(3) do not prohibit a physician from prescribing a lethal dose of medication for a terminally ill person to use in ending his or her own life, because that act is not assisting in a "suicide." This is, of course, an issue of statutory interpretation rather than a matter involving "the construction of the constitution of the state," C.P.L.R. 5601(b)(1), and therefore is not a claim that qualifies for appeal as of right to this Court. But in any event, plaintiffs' argument must be rejected because the common meaning of the word "suicide" leaves no doubt that Penal Law §§ 120.30 and 125.15(3) prohibit the practice that plaintiffs wish to allow, and which they label "aid-in-dying." *See Myers*, 2016 N.Y. Slip Op. 03457, at *9–*12.

2. Equal Protection

Plaintiffs have contended (Br. at 15; R. 41–42 (Complaint)) that New York's Equal Protection Clause forbids the legal distinction that the State has drawn between refusing unwanted medical care—a permissible act—and taking one's life by ingesting lethal medication, an act that Penal Law §§ 120.30 and 125.15(3) seek to prevent. Yet this Court and the U.S. Supreme Court have made clear that the distinction between those acts is "constitutionally[ ]permissible," *Matter of Bezio*, 21 N.Y.3d at 103, as well as "widely recognized and endorsed in the medical profession and in our legal traditions," *Vacco*, 521 U.S. at 800. As this Court has explained, the right to avoid medical intervention is "based on the common law and statutory right of informed consent," but there is no equivalent right of any kind to commit self-harm or to take one's own life. *Matter of Bezio*, 21 N.Y.3d at 101–02; *see also Matter of Fosmire v. Nicoleau*, 75 N.Y.2d 218, 226–27 (1990); *Matter of Storar*, 52 N.Y.2d 363, 377 (1981).

As this Court and the U.S. Supreme Court have also recognized, settled principles of causation further support the State's different treatment of the act of refusing medical treatment and the act of taking one's own life. When a patient dies after refusing life-sustaining medical treatment, he dies because of the underlying disease or pathology that created the need for that treatment. *Vacco*, 521 U.S. at 801; *see also Matter of Bezio*, 21 N.Y.3d at 103. But when a patient dies after ingesting lethal medication, it is that medication and not the underlying condition that has ended the patient's life. *Vacco*, 521 U.S. at 801.

To be sure, *Matter of Bezio* was focused on the scope of the right to refuse unwanted medical treatment, and not the scope of any right to assistance with taking one's own life. *See* 21 N.Y.3d at 96; *Myers*, 2016 N.Y. Slip Op. 03457, at *8 (describing plaintiffs' attempt to distinguish *Matter of Bezio*). But *Vacco* squarely holds that "refusing lifesaving medical treatment and assisted suicide" are readily differentiated, and that "New York may therefore, consistent with the [United

States] Constitution, treat them differently." 521 U.S. at 807–08. It is well established that New York's Equal Protection Clause "is no more broad in coverage than its Federal prototype." *Dorsey v. Stuyvesant Town Corp.*, 299 N.Y. 512, 530 (1949); *accord Matter of Esler v. Walters*, 56 N.Y.2d 306, 313–14 (1982). Plaintiffs' equal protection arguments accordingly raise no substantial constitutional question.

3. Due Process

Legislation is consistent with the New York Constitution's Due Process Clause "where no fundamental right is infringed" and the legislation "is rationally related to legitimate government interests." *People v. Knox*, 12 N.Y.3d 60, 67 (2009).

In evaluating claims that a statute implicates a fundamental right, New York courts look to whether the asserted right is "'deeply rooted'" in "'history and tradition.'" *Knox*, 12 N.Y.3d at 67 (quoting *Glucksberg*, 521 U.S. at 721). Here, "a consistent and almost universal tradition" has "long rejected" the proposition that there is any right to take one's own life, "even for terminally ill, mentally competent adults." *Glucksberg*, 521 U.S. at 723. The U.S. Supreme Court has thus held that there is no federal due process "right to commit suicide" or any related "right to assistance in doing so." *Id.*; *see also id.* at 728 ("[T]he asserted 'right' to assistance in committing suicide is not a fundamental liberty interest protected by the Due Process Clause."). Plaintiffs argued below that New York's due process guarantee should be construed more broadly because New York has long recognized a right to self-determination that includes the right to refuse unwanted medical treatment. *See Myers*, 2016 N.Y. Slip Op. 03457, at *15; Br. at 15–17. But this Court's precedents are clear that "a right to refuse medical treatment is not the equivalent of a right to commit suicide," and that the State can properly act to prevent suicide. *Matter of Bezio*, 21 N.Y.3d at 101, 103; *see also Matter of Fosmire*, 75 N.Y.2d at 226 (noting that even the right to determine the course of one's medical treatment "is not absolute and in some circumstances may have to yield to superior interests of the State").

Indeed, New York has never recognized a right to take one's own life or receive assistance with taking one's own life. *See, e.g.*, *Glucksberg*, 521 U.S. at 710–16. Until the early nineteenth century, New York applied the common-law prohibitions on those acts, which "never contained exceptions for those who were near death," *id.* at 714. *See* App. Div. Br. for Resp. at 4–5. In 1828, New York passed the first American statute explicitly outlawing the act of helping another to end his or her life. *See Glucksberg*, 521 U.S. at 715. And since then, New York has repeatedly declined to lift that criminal prohibition. *See id.*; Penal Law § 2305 (1909); Ch. 1030, 1965 N.Y. Laws 2343, 2385, 2387 (codified at Penal Law §§ 120.30, 125.15(3)); *see also* App. Div. Br. for Resp. at 10, 10–11 n.2, 17–18, 18 n.6 (summarizing failed legislative proposals to amend the penal law).

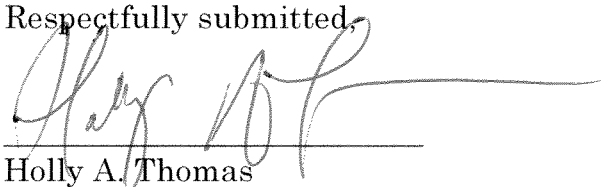
Plaintiffs have not sufficiently alleged any evolution of social views that would warrant departing from "centuries of legal doctrine and practice" to "strike down the considered policy choice" of the State, *Glucksberg*, 521 U.S. at 703. (*See* R. 40.) *See also* Br. at 24; *Myers*, 2016 N.Y. Slip Op. 03457, at *8, *18 (rejecting plaintiffs' arguments about evolving social views). As the Appellate Division noted, the opinion data that plaintiffs relied upon below does not clearly show any significant change in the views of medical practitioners or the public. *Myers*, 2016 N.Y. Slip Op. 03457, at *18–*19. Moreover, although four states have passed legislation allowing physicians to prescribe lethal medications to terminally ill patients, no state court of final resort has overturned a statute prohibiting physician-assisted suicide on constitutional grounds, and several state courts of last resort have expressly affirmed the constitutionality of such statutes. *See* Resp. App. Div. Br. at 28–29 & nn. 8–9.

In any event, this Court has already recognized that the State has a significant interest in protecting the lives of its citizens, including those with terminal illnesses. *See Matter of Bezio*, 21 N.Y.3d at 104; *Matter of Storar*, 52 N.Y.2d at 377, 381–82. And the U.S. Supreme Court has already determined that the State's prohibition on physician-assisted suicide serves the legitimate state interests of "prohibiting intentional killing and preserving life; preventing suicide; maintaining physicians' role as their patients' healers; protecting vulnerable people from indifference, prejudice, and psychological and financial pressure to end their lives; and avoiding a possible slide towards euthanasia." *Vacco*, 521 U.S. at 808-09.

Plaintiffs' due process challenge thus also raises no substantial constitutional issue. *See Myers*, 2016 N.Y. Slip Op. 03457, at *23. It is well settled that there is nothing irrational about the State's policy judgment that "all persons' lives, from beginning to end, regardless of physical or mental condition, are under the full protection of the law," *Glucksberg*, 521 U.S. at 729.

Because no substantial constitutional question is involved in this appeal, which raises only straightforward application of settled legal principles, plaintiffs have not met the requirements for appeal as of right under C.P.L.R. 5601(b) and this Court should dismiss the appeal.

Respectfully submitted,



Holly A. Thomas
Special Counsel to
the Solicitor General
(212) 416-6279
holly.thomas@ag.ny.gov

cc: Edwin G. Schallert
Debevoise & Plimpton LLP
919 Third Avenue
New York, New York 10022
Attorney for Petitioners