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June 24, 2016

BY FEDEX

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Court of Appeals of the State of New York
20 Eagle Street
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Myers et al. v. Schneiderman at al.,
New York County Clerk's Index No. 151162/15

Dear Mr. Asiello:

Plaintiffs-Appellants write in response to the Court's June 16, 2016 letter seeking justification for the Court's retention of subject matter jurisdiction over their appeal. As explained below, substantial constitutional questions are directly involved in this appeal. Pursuant to CPLR Section 5601(b)(1), Plaintiffs are entitled to an appeal as of right from the May 3, 2016 order of the Appellate Division (the "Order").

I. The Constitutional Claims.

Plaintiffs are terminally-ill, mentally-competent adult patients and medical professionals who regularly care for or counsel such patients. The patients brought this action to exercise control, avoid a loss of dignity and reduce unbearable suffering as they near death by obtaining a prescription from their physicians for medication they can ingest to achieve a peaceful death – a practice known as aid-in-dying. The Complaint and supporting affidavits explain that aid-in-dying can be, "in the professional judgment of a physician, a medically and ethically appropriate course of treatment" (Compl. ¶ 45 (R. 38)) that is "consistent with the highest standards of medical practice" (Compl. ¶¶ 31, 32, 33, 34, 35, 36 (R. 31-35)) as well as a "compassionate medical treatment option for dying patients" that is governed by professional standards. Kress Aff. ¶ 9 (R. 438); *see also* Morris Aff. ¶ 9 (R. 443).[1]

[1] Citations to "(R. __)" are to the Record on Appeal to the Appellate Division, First Department in this action, a copy of which is enclosed herewith.

The Complaint sought declarations that (i) application of the Assisted Suicide Statute[2] to aid-in-dying violates the Due Process Clause of the New York State Constitution, Art. I, § 6; (ii) application of the Statute to aid-in-dying violates the Equal Protection Clause of the New York State Constitution, Art. I. § 11; and (iii) a physician who provides aid-in-dying does not violate the Statute. *See* Compl. (R. 21-46).

Plaintiffs seek reversal of the Order, which affirmed dismissal of the Complaint on a motion to dismiss. The Appellate Division adjudicated the constitutional rights of Plaintiffs without a developed factual record concerning the practice of aid-in-dying. The Court held that application of the Assisted Suicide Statute to prohibit aid-in-dying "does not violate the New York State Constitution." Order at 24. The Order raises questions under the New York Constitution that have *never* previously been addressed by *any* court. The substantial constitutional issues were necessarily decided by the lower courts and are directly involved in this appeal.

II. Plaintiffs' Appeal Involves Substantial Constitutional Questions.

This appeal raises important questions under the New York State Constitution concerning fundamental liberties and equal protection under the law with respect to a dying patient's autonomy, privacy, bodily integrity, and self-determination to control the choice of medical treatment, how much suffering to endure prior to death, and how one will cross the threshold to death.

Appeals have been taken as of right to this Court in cases that have raised analogous questions involving individuals' fundamental rights under the Due Process and Equal Protection Clauses of the New York State Constitution. *See, e.g.*, *Anonymous v. City of Rochester*, 13 N.Y.3d 35 (2009) (appeal taken as of right challenging on due process grounds the constitutionality of a statute imposing a curfew on minors, based on right of minors to enjoy freedom of movement and of parents to control the upbringing of their children); *Hernandez v. Robles*, 7 N.Y.3d 338 (2006) (appeal taken as of right challenging on due process and equal protection grounds the constitutionality of a statute limiting marriage to opposite-sex couples, based on right to marry); *Hope v. Perales*, 83 N.Y.2d 563 (1994) (appeal taken as of right challenging on due process and equal protection grounds the constitutionality of a statute concerning abortion funding, based on right to choose an abortion).

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[2] New York Penal Law §§ 120.30 and 125.15 provide that "promoting a suicide attempt" by "intentionally caus[ing] or aid[ing] another person to attempt suicide" or "to commit suicide" constitute felonies.

A. This Appeal Raises Substantial Constitutional Questions Concerning A Fundamental Right Under New York Law.

New York courts have long recognized a fundamental right to self-determination with respect to one's body and to control the course of one's medical treatment. *See Rivers v. Katz*, 67 N.Y.2d 485, 492 (1986) ("It is a firmly established principle of the common law of New York that every individual of adult years and sound mind has a right to determine what shall be done with his own body and to control the course of his medical treatment." (citations and quotation marks omitted)). This "common-law right is co-extensive with the patient's liberty interest protected by the due process clause of our State Constitution." *Id.* at 493. When a statute burdens a fundamental right, "it is subjected to strict scrutiny meaning that it will be sustained only if it is narrowly tailored to serve a compelling state interest." *Hernandez v. Robles*, 7 NY.3d 338, 375 (2006).

This Court has broadly described the right to self-determination:

> 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 the greatest possible protection is accorded his autonomy and freedom from unwanted interference with the furtherance of his own desires.

Rivers, 67 N.Y.2d at 493 (citations and quotation marks omitted).

This fundamental right to self-determination is broader than the privacy rights recognized under the Federal Constitution, as the Appellate Division acknowledged. *See* Order at 15 ("[P]laintiffs note that New York has for a long time treated a person's freedom of choice with respect to his or her own body and medical treatment as a vitally important right to be subordinated to the State's prerogatives under only compelling circumstances. This is unquestionably so."). No court has previously addressed whether this fundamental right protects a patient's choice for aid-in dying.[3]

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[3] This Court may certainly interpret rights under the New York Constitution more broadly than rights under the United States Constitution. *See People v. LaValle*, 3 N.Y.3d 88, 129 (2004) ("It bears reiterating here that 'on innumerable occasions this [C]ourt has given [the] State Constitution an independent construction, affording the rights and liberties of the citizens of this State even more protection than may be secured under the United States Constitution." (citation omitted)); *Cooper v. Morin*, 49 N.Y.2d 69, 79 (1979) ("We have not hesitated when we concluded that the Federal Constitution as

The fundamental right should encompass a patient's right to choose aid-in-dying, just as it encompasses a patient's right to choose other end-of-life treatments. *See 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."). The Complaint and supporting affidavits establish that aid-in-dying is an appropriate medical option for terminally ill patients otherwise facing the prospect of a dying process they find unbearable, involving progressive and inexorable loss of bodily function and integrity, and increasing pain and other distressing symptoms, in the final throes of terminal illness. Under these circumstances, the fundamental right to self-determination should allow a patient to choose aid-in-dying. *See Matter of Eichner (Fox)*, 73 A.D.2d 431, 459 (2d Dep't 1987) ("Individuals have an inherent right to prevent pointless, even cruel, prolongation of the act of dying." (citations and quotation marks omitted)).

Although the Appellate Division acknowledged the existence of this fundamental right, it drew a spurious distinction between a "right to refuse treatment, and let nature take its course" and "the affirmative act of taking one's own life." Order at 16.[4] As the Complaint and supporting affidavits make clear, several *lawful* end-of-life medical practices involve "affirmative acts" that precipitate a patient's death. For example, the lawful practice of "terminal sedation" involves sedating a patient to unconsciousness, while withholding food and fluid until death arrives; the sedatives can result in nearly immediate death. *See* Compl. ¶ 41 (R. 37); Kress Aff. ¶ 9 (R. 438-39). Similarly, when a physician turns off a ventilator, there is a "direct causative link" between the physician's act and the patient's death through

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interpreted by the Supreme Court fell short of adequate protection for our citizens to rely upon the principle that that document defines the minimum level of individual rights and leaves the States free to provide greater rights for its citizens through its Constitution, statutes, or rule-making authority.").

[4] In support of this distinction, the Appellate Division relied on *Matter of Bezio v. Dorsey*. 21 N.Y.3d 93 (2013). *Bezio*, however, did not address aid-in-dying but instead addressed whether the rights of an inmate who undertook a hunger strike were violated by a judicial order permitting the State to feed him by nasogastric tube after his health devolved to the point that his condition became life-threatening. *Id.* at 96. Although the court in *Bezio* rejected the prisoner's constitutional claims, it specifically distinguished his situation from that of "terminally-ill patients or those in an irreversible incapacitated condition as a result of illnesses or injuries beyond their control." *Id.* at 102-03 (citations omitted). The court observed that "[i]n those circumstances, unlike this one, the patients were suffering from dire medical conditions that were not of their own making . . . ." *Id.* at 103 (citations omitted).

asphyxiation – the linchpin for the Appellate Division's "literal" definition of suicide. Order at 9. Indeed, the writing of a prescription to permit a peaceful death involves a less active physician role than is required for many other lawful end-of-life treatments. Terminal sedation requires the IV administration of medication by the physician; withdrawal of life support requires physicians or those acting at their direction physically to remove medical equipment.[5]

Moreover, "nature" involves the progression of an illness or its complications. The withdrawal of nutrition precipitates death by starvation; the withdrawal of hydration precipitates death by dehydration; the withdrawal of ventilation causes respiratory failure. It certainly cannot be said that the death that ensues is the natural result of the progression of the disease or condition from which the patient suffers. *See* Note, *Physician Assisted Suicide and the Right to Die with Assistance*, 105 Harv. L. Rev. 2021, 2029 (1992) ("[T]he patient's interest in dying cannot . . . be divided into an interest in 'refusing' and an interest in 'receiving' treatment. The patient has a single, undivided interest in controlling what happens to her body.").

B. This Appeal Raises Additional Substantial Constitutional Questions.

Even if New York did not recognize a fundamental right to self-determination, this appeal would still present substantial issues under the Due Process and Equal Protection Clauses of New York's Constitution. The Appellate Division rejected Plaintiffs' claims based primarily on two nineteen-year-old U.S. Supreme Court decisions involving *federal* constitutional claims. *See Vacco v. Quill*, 521 U.S. 793 (1997); *Washington v. Glucksberg*, 521 U.S. 702 (1997). However, those decisions are hardly dispositive.

First, although the Supreme Court declined to find a federal constitutional right to choose aid-in-dying, it left the matter open to states for further development of the law. *See Glucksberg*, 521 U.S. at 737 ("States are presently undertaking extensive and serious evaluation of physician-assisted suicide and other related issues.") (O'Connor, J., concurring) (citation and internal quotation marks omitted)); *see also id.* at 735. Indeed, the highest courts of other states have filled the void and grappled with similar issues under their respective state constitutions. For example, the Supreme Court of Montana addressed the issue of aid-in-dying after having received "extensive briefing by the parties and amici on the constitutional issues." *Baxter v. State*, 224 P.3d 1211, 1214 (Mont. 2009). In October 2015, the Supreme

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[5] The Appellate Division mischaracterized aid-in-dying in stating that medication would be "administered by plaintiff physicians." Order at 9. In fact, the physician merely prescribes medication that a patient may choose to self-administer, or not.

Court of New Mexico heard oral argument in *Morris v. New Mexico* to decide whether a fundamental right exists under the New Mexico State Constitution for a mentally-competent, terminally-ill patient to choose aid-in-dying. (The Court has not yet ruled.)

Second, the Supreme Court carefully reserved the possibility that it might in the future, based upon particularized circumstances, find that a prohibition on aid-in-dying violates the Equal Protection Clause and Due Process Clause of the Federal Constitution. *Vacco*, 521 U.S. at 809 n.13 ("Justice Stevens observes that our holding today 'does not foreclose the possibility that some applications of the New York statute may impose an intolerable intrusion on the patient's freedom.' This is true . . . ." (citation omitted)); *Glucksberg*, 521 U.S. at 735 n.24 ("Our opinion does not absolutely foreclose such a claim [for a Due Process violation].").

To the extent the Supreme Court's jurisprudence informs the interpretation of the New York State Constitution, its analysis of fundamental liberties has evolved since it decided *Vacco* and *Glucksberg* over nineteen years ago. More recent cases such as *Lawrence v. Texas*, 539 U.S. 558 (2003) and *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015) recognize that the inquiry into the existence of fundamental rights properly calls for consideration of evolving societal views. *See Obergefell*, 135 S. Ct. at 2602 ("[Fundamental rights] rise, too, from a better informed understanding of how constitutional imperatives define a liberty that remains urgent in our own era."); *Lawrence*, 539 U.S. at 571-72 ("In all events we think that our laws and traditions in the past half century are of most relevance here.").

If the Supreme Court today were faced with the issues that were presented in *Vacco* and *Glucksberg*, it would have the benefit of evidence of evolving societal views over the past nineteen years. As described in the Complaint and supporting affidavits, this evidence includes the adoption of policies by leading medical associations that support aid-in-dying, polls reflecting public acceptance of aid-in-dying, positive experiences with aid-in-dying in states where the practice is lawful, and developments in other countries that have recognized the right of a patient to aid-in-dying. *See, e.g.*, *Carter v. Canada (Attorney General)*, 2015 SCC 5 (2015) (R. 162) (striking down Canada's assisted suicide statute).

Even if this Court ultimately were to conclude on the merits that the Supreme Court had somehow finally resolved all of the constitutional issues presented by this appeal under the Federal Constitution – which Plaintiffs maintain it did not – this Court would still have subject matter jurisdiction over this appeal as of right to expound the New York State Constitution. *See O'Neill v. Oakgrove Constr., Inc.*, 71 N.Y.2d 521, 524 (1988) (appeal taken as of right; "Our decision is based on an adequate and independent ground under our State Constitution. Nevertheless, we are noting our agreement with the Federal courts that have reached the same result under the Federal Constitution in order that we might express our view . . . .This practice is in accord with our proper role in helping to expound the Federal, as well as our State

Constitution and, as some of the commentators have explained, it contributes to the development of a body of case law of potential use to federal and other state courts.").

The present appeal presents novel issues concerning the constitutionality of the application of the Assisted Suicide Statute to aid-in-dying that no court has previously addressed. Accordingly, it hardly can be said that these issues are "so clearly not debatable and utterly lacking in merit as to require dismissal for lack of substance." *Hamilton v. Regents of the Univ. of Calif.*, 293 U.S. 245, 258 (1934). Nor can it be said that the "dispositive constitutional issues underlying this appeal are no more than a mere restatement of questions whose merits has been clearly resolved against appellant[s'] position, and must be held to lack the degree of substantiality necessary to sustain this appeal as of right under CPLR 5601." *Matter of David A.C.*, 43 N.Y.2d 708, 709 (1977) (citations omitted).

Whether these important State constitutional issues of first impression are ultimately resolved in Plaintiffs' favor does not determine whether the issues are substantial. *See Matter of Davega City Radio, Inc. v. State Labor Relations Bd.*, 281 N.Y. 13, 19 (1939) ("The appeal to this court is taken as of right on the ground that a substantial constitutional question is involved, as will presently appear. The fact that we decide the constitutional question against appellant does not make it the less a ground for appeal. No appellant should be required to insure that his answer to the constitutional question will be adopted by the court.").

C. There Are Additional Indicia of the Substantial Nature of the Constitutional Questions.

Additional indicia reinforce the substantial nature of the constitutional questions raised by this appeal.

First, Defendant-Respondent's brief in the Appellate Division devoted 19 pages of a 23-page argument to the constitutional issues. *See* Brief for Respondent at 19-38 (Jan. 6, 2016). It hardly takes 19 pages to address insubstantial issues. Similarly, the Appellate Division devoted 10 of its 14 pages of analysis to the constitutional issues. Order at 12-22. Again, courts can readily dispose of insubstantial issues with fewer words.

Second, although the Supreme Court ultimately ruled against plaintiffs in *Vacco* and *Glucksberg*, the United States Court of Appeals for the Second Circuit and the United States Court of Appeals for the Ninth Circuit (sitting *en banc*) had upheld constitutional challenges based on the Equal Protection and Due Process clauses, respectively. *Quill v. Vacco*, 80 F.3d 716 (2d Cir. 1996); *Compassion in Dying v. Washington*, 79 F.3d 790 (9th Cir. 1996) (*en banc*). The well-reasoned opinions of these federal courts reinforce the substantial nature of the constitutional questions involved. It would be implausible to suggest that both federal courts had embraced insubstantial constitutional claims.

III. The Interpretation Of The New York State Constitution Is Directly Involved In This Appeal.

The constitutional questions at issue are directly involved in this appeal and have been directly involved at every stage of the proceedings. The Complaint in this action sought declarations that (i) the application of the Assisted Suicide Statute to aid-in-dying violates the Due Process Clause of the New York State Constitution; and (ii) the application of the Statute to aid-in-dying violates the Equal Protection Clause of the New York State Constitution.

The IAS Court granted Defendant-Respondent's pre-answer motion to dismiss and dismissed Plaintiffs' Complaint in its entirety. Decision and Order (Oct. 16, 2015) (R. 6). Plaintiffs appealed to the Appellate Division from "each and every part" of the IAS Court's Decision and Order. Notice of Appeal to Appellate Division (Oct. 23, 2015) (R. 3). The constitutional issues were addressed in detail in the briefing to the Appellate Division (*see* Brief for Plaintiffs at 15-25 (Nov. 23, 2015)), and the Appellate Division extensively discussed, and expressly decided, the constitutional issues that were presented. Order at 12-22, 24 ("the application of [the Assisted Suicide Statute] to such conduct does not violate the New York State Constitution . . . ."). Plaintiffs now appeal "from each and every part of the Order of the Appellate Division, as well as from the whole order." Notice of Appeal to Court of Appeals (Jun. 3, 2016).

That the Appellate Division also ruled on an issue of statutory construction in no way affects the direct involvement of the constitutional questions. *See* Arthur Karger, THE POWERS OF THE NEW YORK COURT OF APPEALS § 7:9 (2015) ("Where a case involves a constitutional, as well as a nonconstitutional, question and the determination of the Appellate Division necessarily rests on a decision of both questions, the constitutional question is held to be directly involved . . . .").

* * *

Per the Court's request, enclosed with this letter is one copy of the Disclosure Statement Pursuant to 22 NYCRR 500.1(f), dated June 9, 2016, that was previously filed with Plaintiffs-Appellants' Preliminary Appeal Statement,[6] and the following documents filed in the Appellate Division, First Department: (1) Brief for Plaintiffs, dated November 23, 2015; (2) Brief for Respondent, dated January 6, 2016; (3) Reply Brief for Plaintiffs, dated January 15, 2016; (4) Record on Appeal; (5) Brief for *Amicus Curiae* New York Catholic Conference, dated December 30, 2015; and (6) Amicus Brief of Disability Rights Amici, dated January 6, 2015.

Respectfully submitted,

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Enclosures

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6 In the interest of full disclosure, Plaintiff-Appellant Eric A. Seiff has been appointed by this Court as the Chairman of the Lawyers' Fund for Client Protection.

STATE OF NEW YORK
COURT OF APPEALS

SARA MYERS, 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, STEVE GOLDENBERG, Plaintiff, -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.	New York County Clerk's Index No. 151162/15

ATTORNEY'S AFFIRMATION OF SERVICE BY MAIL

I, Jared I. Kagan, an attorney-at-law of the State of New York, affirm under the penalty of perjury that:

On June 24, 2016, I served the within **LETTER, dated June 24, 2016**

upon Defendant-Respondent at the following addresses:

ERIC T. SCHNEIDERMAN
Attorney General of the State of New York
ATTN: Anisha Dasgupta, Esq.
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said addresses having been designated by them for that purpose, by depositing a true copy of same in postpaid properly addressed wrappers in an official depository under the exclusive care and custody of the United States Postal Service within the State of New York.

Dated: New York, New York
June 24, 2016

Jared I. Kagan
Attorney-at-Law