SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

SARA MYERS, STEVE GOLDENBERG, 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,	:	Index No. 151162/2015
-against-	:	
ERIC SCHNEIDERMAN, in his official capacity as ATTORNEY-GENERAL OF THE STATE OF NEW YORK, 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 B. VANCE, JR., in his official capacity as DISTRICT ATTORNEY OF NEW YORK COUNTY,	:	
Defendants.	:	

DEFENDANT ERIC T. SCHNEIDERMAN'S
MEMORANDUM OF LAW IN SUPPORT OF HIS MOTION TO DISMISS

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Defendant Eric T. Schneiderman, in his capacity as the Attorney General of the State of New York ("Attorney General"), respectfully submits this memorandum of law in support of the motion to dismiss the Complaint.

PRELIMINARY STATEMENT

New York has a longstanding commitment to the preservation of life, the prevention of suicide, and the protection of individuals in the vulnerable position of making end-of-life decisions. That commitment is embodied in the prohibition against assisted suicide found at §§ 120.30 and 125.15 of the New York Penal Law ("Assisted Suicide Statute"). Plaintiffs challenge the Assisted Suicide Statute on statutory construction and constitutional grounds, claiming that these provisions should not be interpreted to prohibit a physician's prescription of lethal medications to a terminally ill patient who wishes to end his own life, and if they are so interpreted, that these provisions violate equal protection and due process under the State Constitution. The U.S. Supreme Court, however, has already addressed and rejected Plaintiffs' claims, upholding the Assisted Suicide Statute as constitutional. In detailed, comprehensive opinions that fully explored the issue of physician-assisted suicide for terminally ill patients, the U.S. Supreme Court concluded that a prohibition of such conduct violates neither equal protection nor due process under the U.S. Constitution. This Court has no reason to interpret the State Constitution any differently.

If Plaintiffs seek to legalize physician-assisted suicide, they must turn to the State Legislature. The question of physician-assisted suicide involves weighty issues—the balance between personal autonomy and the State's interest in the protection of vulnerable individuals against potential abuse, the historical and regulated role of the physician, and the value of human life. These are precisely the types of public policy questions that a legislature is designed to

deliberate and address. Plaintiffs, by filing this action, attempt to bypass a fundamental component of the democratic process. Their Complaint must be dismissed.

BACKGROUND

Allegations in the Complaint

Plaintiffs identify themselves as two mentally competent individuals diagnosed with terminal illnesses (Sara Myers and Steve Goldenberg), one mentally competent individual diagnosed with a potentially terminal illness (Eric A. Seiff), five physicians and nurses who have terminally ill patients (Howard Grossman, M.D., Samuel C. Klagsbrun, M.D., Timothy E. Quill, M.D., Judith K. Schwarz, Ph.D., and Charles A. Thornton, M.D.), and an organization, End of Life Choices New York, that engages in advocacy relating to end-of-life decision-making.[1] Compl. ¶¶ 5-13. The Complaint alleges that Plaintiffs Myers, Goldenberg and Seiff want to know that physician-assisted suicide is an available option should they determine that their suffering has become unbearable. *Id.* ¶ 49. The Complaint further alleges that each of the physician Plaintiffs has treated mentally competent, terminally ill patients who have requested assistance in ending their lives, and that the physician Plaintiffs share the professional judgment that such assistance is medically and ethically appropriate for those patients. *Id.* ¶¶ 46-47.

Plaintiffs challenge two provisions in the New York Penal Law, §§ 120.30 and 125.15. Section 120.30 is entitled "Promoting a suicide attempt" and provides that "[a] person is guilty of promoting a suicide attempt when he intentionally causes or aids another person to attempt suicide. Promoting a suicide attempt is a class E felony." N.Y. Penal L. § 120.30. Section 125.15 is entitled "Manslaughter in the second degree," and provides that "[a] person is guilty of

[1] The Attorney General assumes the truth of the allegations for purposes of this motion only, without conceding their truth. *Nonnon v. City of N.Y.*, 9 N.Y.3d 825, 827 (2007).

manslaughter in the second degree when . . . (3) [h]e intentionally causes or aids another person to commit suicide. Manslaughter in the second degree is a class C felony." *Id.* § 125.15(3).

New York's Longstanding Opposition to Assisted Suicide

Sections 120.30 and 125.15 of the New York Penal Law, which were codified as part of the complete revision of the criminal law in 1965, took effect in 1967. 1965 N.Y. Laws ch. 1030, codified at N.Y. Penal L. §§ 120.30, 125.15(3).[2] The prohibition of assisted suicide, however, dates to 1788, when a New York statute recognized the criminal common law prohibition of assisting suicide and assisting attempted suicide—the earliest American statute to do so explicitly. Act of Feb. 21, 1788, ch. 37, § 2, 1788 N.Y. Laws 664, 665. In 1828, New York codified this prohibition in its Penal Code. N.Y. Rev. Stat. pt. IV, ch. 1, tit. 2, art. 1, § 7 (1829). A revision of the Penal Code in 1881 retained the prohibition. *See* N.Y. Penal L. tit. X, ch. 1, §§ 175, 176 (1882). *See Washington v. Glucksberg*, 521 U.S. 702, 715-16 (1997) (surveying history of New York's assisted suicide laws); *id.* at 774-75 & n.13 (Souter, J., concurring) (same).

Commentaries for §§ 120.30 and 125.15, contemporaneous with their enactment, make clear that the Assisted Suicide Statute applies not only to malicious conduct, but also to ending another person's life out of compassion or mercy. The Practice Commentary for § 125.15 states that the "rule is designed to restrict the more sympathetic cases to manslaughter," rather than murder, and that § 125.15 encompasses a "man who, upon the plea of his incurably ill wife, brings her a lethal drug in order to aid her in ending a tortured existence." Denzer & McQuillan, Practice Commentary, McKinney's Cons. Laws of N.Y., Book 39, at 226-27 (1967); *see also* Staff Notes of Comm'n on Revision of Penal Law and Crim. Code, Proposed N.Y. Penal Law,

[2] Courtesy copies of the relevant sections of the 1965 Laws, along with certain other legal sources cited herein that are subject to judicial notice upon a motion to dismiss, are included in the Appendix to this memorandum.

McKinney's Cons. Laws of N.Y., Spec. Pamphlet, at 339 (1964). This acknowledgment of the circumstances under which such cases arise is reflected in N.Y. Penal Law § 125.25(1)(b), according to which aiding another person in committing suicide is an affirmative defense to murder in the second degree. The Penal Law thereby reduces assisted suicide from murder in the second degree under § 125.25 to manslaughter as set forth in § 125.15—but nonetheless maintains the criminal prohibition of assisted suicide. In other words, the Legislature considered the countervailing factors of preserving human life and showing compassion for those suffering from the agonies of terminal illnesses, and found a way to balance them.

The State of New York has repeatedly reaffirmed the commitment to the preservation of life that is embodied in the Assisted Suicide Statute. Since 1967, multiple attempts to amend New York law to decriminalize physician-assisted suicide through the prescription of lethal medications have failed. The New York Legislature has had ample opportunity to consider the legalization of physician-assisted suicide; three bills have been proposed this year alone. *See, e.g.*, N.Y. Assembly Bills A5261 (Feb. 13, 2015) (proposal to amend the public health law to authorize physicians to prescribe medications that assist a patient in ending his life), A2129 (Jan. 15, 2015) (same), A9360 (Feb. 22, 2012) (same), A6333 (Mar. 22, 1995) (same, through amendment of the public health law and the penal law); N.Y. Senate Bills S3685 (Feb. 13, 2015) (same, through amendment of the public health law), S677 (Jan. 9, 2001) (same, through amendment of the civil rights law), S7396 (Apr. 12, 2000) (same), S1683 (Feb. 1, 1995) (same, through amendment of the public health law and penal law), S5024 (May 3, 1995) (same), S7986 (May 3, 1994) (same). None of these bills have been enacted.

The State's opposition to assisted suicide has also been confirmed from a health policy perspective. In 1994, the New York State Task Force on Life and the Law ("Task Force") issued

a report that examined the issue of physician-assisted suicide from the point of view of medical professional standards and public policy. *See* N.Y. State Task Force on Life and the Law, "When Death Is Sought: Assisted Suicide and Euthanasia in the Medical Context" (1994) (hereinafter "N.Y. State Task Force Report"), *cited in Glucksberg*, 521 U.S. at 711, 719, 729-34, 747, 749.[3] The Task Force concluded unanimously that New York law should continue to prohibit physicians from assisting terminally ill patients in ending their lives.

Procedural History

Plaintiffs filed the instant Complaint on February 4, 2015, raising three claims. In their statutory construction claim (Count One), Plaintiffs seek a declaration that the term "suicide" in N.Y. Penal Law §§ 120.30 and 125.15 does not encompass a terminally ill patient ingesting lethal medications prescribed by a physician for the purpose of ending the patient's life. Plaintiffs' Count Two is that the Assisted Suicide Statute violates the equal protection clause of the State Constitution. The Complaint alleges that New York law discriminates against the patient Plaintiffs because individuals with terminal illnesses on artificial life support are allowed to end their lives by withdrawing that support, while the patient Plaintiffs—who are not on artificial life support—cannot end their lives by ingesting lethal medications prescribed by their physicians for the purpose of ending their lives. Plaintiffs' substantive due process claim (Count Three) maintains that terminally ill patients have a liberty interest in being able to end their lives through physician-assisted suicide, and that the Assisted Suicide Statute infringes upon this liberty in violation of the State Constitution's due process clause. Plaintiffs request a permanent injunction against the prosecution of the physician Plaintiffs for helping their terminally ill

[3] The New York State Task Force on Life and the Law was convened in 1985 to develop public policy on issues arising at the interface of medicine, law, and ethics. Since the publication of the N.Y. State Task Force Report on assisted suicide in 1994, the Task Force has not rescinded or amended its conclusions, and the Report remains publicly available on the New York State Department of Health's website. *See* N.Y. State Task Force Report, *available at* https://www.health.ny.gov/regulations/task_force/reports_publications/when_death_is_sought.

patients to end their lives.

This action echoes a nearly identical suit brought in federal district court in 1994—one that challenged the same provisions of the New York Penal Law, that made constitutional claims on equal protection and due process grounds (though under the U.S. Constitution), and indeed, included one of the very same plaintiffs (Timothy Quill). *See Quill v. Koppell*, No. 94-cv-5321 (S.D.N.Y. filed July 20, 1994). The case was ultimately appealed to the U.S. Supreme Court, which issued a unanimous 9-0 judgment upholding the constitutionality of Penal Law §§ 120.30 and 125.15 on federal equal protection grounds. *Vacco v. Quill*, 521 U.S. 793 (1997). The due process challenge to New York's Assisted Suicide Statute was decided in a separate (also unanimous) judgment issued the same day, *Washington v. Glucksberg*, 521 U.S. 702, which found that the statutory prohibition against physician-assisted suicide does not violate the U.S. Constitution's due process clause.

STANDARD OF REVIEW

A court must grant a motion to dismiss pursuant to CPLR 3211(a)(2) where there is no "justiciable controversy" pursuant to CPLR 3001, leaving the court with no subject matter jurisdiction. *Donaldson v. State*, 156 A.D.2d 290, 292 (1st Dep't 1989); *see also N.Y. State Inspection, Sec. and Law Enforcement Emp., et al. v. Cuomo*, 64 N.Y.2d 233, 241 n.3 (1984) ("Since nonjusticiability . . . implicates the subject matter jurisdiction of the court, respondents properly predicated their motion to dismiss upon CPLR 3211(a)(2).").

On a motion to dismiss pursuant to CPLR 3211(a)(7), a court must dismiss a complaint that fails to state a claim as a matter of law. Although "the pleading is to be afforded a liberal construction" on a motion to dismiss, and "the facts as alleged in the complaint [are presumed] as true," *Leon v. Martinez*, 84 N.Y.2d 83, 87 (1994), the complaint must be dismissed if a

plaintiff fails to adequately plead a legally cognizable cause of action. *P.T. Bank Cent. Asia v. ABN AMRO Bank N.V.*, 301 A.D.2d 373, 376 (1st Dep't 2003).

ARGUMENT

POINT I

PLAINTIFFS FAIL TO PLEAD A JUSTICIABLE CONTROVERSY

The claims in the Complaint are not justiciable because Plaintiffs show nothing more than a speculative possibility of prosecution. The Complaint alleges that the physician Plaintiffs have treated terminally ill patients who have requested access to lethal medications in order to end their lives, but that the physicians have been deterred from providing such treatment "due to fear of *potential* prosecution" under the Assisted Suicide Statute. Compl. ¶ 47 (emphasis added). The Complaint does not allege that any Plaintiff has been prosecuted or threatened with prosecution under the Assisted Suicide Statute. Because Plaintiffs have failed to identify a case or controversy, their claims must be dismissed pursuant to CPLR 3211(a)(2).

In order to satisfy CPLR 3001, it is fundamental that a plaintiff must present a justiciable controversy. *N.Y. State Inspection*, 64 N.Y.2d at 240. To establish an actual controversy in an action seeking a declaration that a criminal statute is unconstitutional, "the plaintiffs must show that either they have in fact been arrested, prosecuted or threatened with prosecution under this statute or that they, at least, have some reasonable fear, which is not purely 'imaginary' or 'speculative' that they will be prosecuted under this statute in the future." *Cherry v. Koch*, 126 A.D.2d 346, 350 (2d Dep't 1987). In *Cherry*, the Second Department concluded that without an actual or threatened prosecution for violations of the anti-prostitution laws, the court could not adjudicate constitutional challenges brought by an alleged prostitute and alleged patron of prostitutes. *Id.* at 347-48, 350. Similarly, this Court cannot adjudicate Plaintiffs' claims without

allegations of actual or threatened prosecution under Penal Law §§ 120.30 and 125.15.

An exception to the rule limiting a court's jurisdiction to actual controversies, allowing a court to review "particular issues which are recurring, substantial and novel, and typically evade review," is inapplicable here. *Matter of David C.*, 69 N.Y.2d 796, 798 (1987). Plaintiffs do not allege that their Complaint raises such issues. Indeed, a challenge to a criminal prosecution statute does not present a situation which "typically evades review." *Cherry*, 126 A.D.2d at 351. Any defendant charged with aiding another person to commit or attempt suicide may raise as a defense the unconstitutionality of the statute. *See id.*

POINT II

THE COMPLAINT FAILS TO STATE A CLAIM THAT THE PENAL LAW CANNOT BE STATUTORILY CONSTRUCTED TO PROHIBIT PHYSICIAN-ASSISTED SUICIDE

Plaintiffs' request for a declaration that §§ 120.30 and 125.15 cannot be statutorily constructed to prohibit physician-assisted suicide (Count One) is unsupportable. Not only is the Assisted Suicide Statute unambiguous, but it has consistently been interpreted to apply even to those who wish to aid patients facing painful and debilitating terminal illnesses.

A. <u>The Plain Language of the Assisted Suicide Statute Prohibits the Prescription of Lethal Medications Intended to Cause a Patient's Death</u>

The first (and often only) step in adjudicating a statutory construction claim is to look at the language of the statute itself. Where the language is plain, courts should "construe words of ordinary import with their usual and commonly understood meaning." *Rosner v. Metro. Prop. & Liab. Ins. Co.*, 96 N.Y.2d 475, 479-80 (2001); *see also* McKinney's Cons. Laws of N.Y., Book 1, Statutes § 94 ("[T]he statutory language is generally construed according to its natural and most obvious sense, without resorting to an artificial or forced construction."). Penal Law § 120.30 plainly makes it unlawful to "intentionally cause[ ] or aid[ ] another person to attempt

suicide," while § 125.15 makes it unlawful to "intentionally cause[ ] or aid[ ] another person to commit suicide."

The only term in the Assisted Suicide Statute that the Complaint alleges to be ambiguous is the word "suicide" (Compl. ¶ 54), but this assertion of ambiguity is not plausible. Suicide is defined very simply to mean "the act of taking one's own life." *Black's Law Dictionary* 1662 (10th ed. 2014). "Assisted suicide" is defined more pointedly to mean "[t]he intentional act of providing a person *with the medical means* or the medical knowledge to commit suicide," and encompasses "physician-assisted suicide." *Id.* (emphasis added); *see also People v. Minor*, 111 A.D.3d 198, 204-05 (1st Dep't 2013) (finding that the term "aiding . . . another person to commit suicide" is unambiguous and includes a defendant complying with a request to hold a knife steady, while another person leaned into the knife to end his own life). One way that New York courts have illustrated the meaning of suicide is to distinguish it from other end-of-life decisions. As the U.S. Supreme Court noted in *Quill*, New York courts "have carefully distinguished" suicide from refusing life-sustaining treatment. 521 U.S. at 803 (citing *Fosmire v. Nicoleau*, 75 N.Y.2d 218, 227 & n.2 (1990)). In *Fosmire*, the Court of Appeals concluded that "[m]erely declining medical . . . care is not considered a suicidal act." 75 N.Y.2d at 227. To be suicide, the act must be "self-inflicted" and the patient must "want to die." *Id.* at 227 n.2.

The act of intentionally ingesting lethal medications in order to end one's own life—even if the motive is to avoid the ravages of a terminal illness—is clearly encompassed in this definition of suicide. The U.S. Supreme Court in *Quill* interpreted §§ 120.30 and 125.15 to encompass "a patient who commits suicide . . . [by] ingest[ing] lethal medication prescribed by a physician." 521 U.S. at 801-02. New York courts have reached the same conclusion. *See In re Eichner on behalf of Fox*, 73 A.D.2d 431, 450 (2d Dep't 1980) ("'[M]ercy killing' is

consequently proscribed by the criminal law. . . ."), *modified on other grounds and otherwise affirmed*, 52 N.Y.2d 363 (1981); *Matter of N.Y. City Asbestos Litig.*, 32 Misc. 3d 161, 166 (Sup. Ct. N.Y. Co. 2011) (noting that physician-assisted suicide is prohibited by §§ 120.30 and 125.15); *Konopka-Sauer v. Colgate-Palmolive Co.*, No. 190078/08, 2011 N.Y. Misc. LEXIS 1015, at *8 (Sup. Ct. N.Y. Co. Mar. 11, 2011) (same).

Instead of accepting the clear meaning of "suicide," the Complaint offers an alternative definition of "suicide": an act that "precipitates a premature death of a life of otherwise indefinite duration, often motivated by treatable depression." Compl. ¶ 44. This definition fails for several reasons. First, Plaintiffs identify no basis for this definition, other than unnamed "[p]ublic health, medical, and mental health professionals." *Id.* Such vague allegations, in the face of the plain meaning of the statutory provisions and the legal precedent that has interpreted them, do not suffice to state a statutory construction claim. Second, Plaintiffs fail to allege why their definition of "suicide" does not in fact encompass the intentional self-inflicted death of a terminally ill person. To the extent that a terminally ill person ends his own life before the illness will otherwise do so, that death is also "premature." *Id.* Third, Plaintiffs' attempt to distinguish a physician's "aid-in-dying" from suicide based on mental illness is unavailing. Plaintiffs allege that suicide is "often" motivated by treatable depression, *id.*, but they do not and cannot allege that mental illness is a necessary condition for suicide as the Complaint defines it. Nor does the Complaint allege that mental illness does not or cannot play a role in a terminally ill patient's decision to end his life.[4]

B. <u>Legislative History Confirms the Prohibition of Physician-Assisted Suicide</u>

Because the Assisted Suicide Statute is unambiguous, the Court need not examine the

[4] The Complaint's allegation that the patient Plaintiffs are "mentally-competent," Compl. ¶¶ 22, 25, 29, does not necessarily signify the absence of mental illness or depression. *Rivers v. Katz*, 67 N.Y.2d 485, 493-94 (1986).

statute's legislative history. *Roberts v. Tishman Speyer Props., L.P.*, 13 N.Y.3d 270, 286 (2009). Even if the Assisted Suicide Statute were ambiguous, legislative history would confirm that §§ 120.30 and 125.15 encompass physician-assisted suicide. As noted, *see supra* at 3-4, commentaries underscore that § 125.15(3) applies even to a husband who brings a lethal drug to his terminally ill wife, upon her request, "in order to aid her in ending a tortured existence." Denzer & McQuillan, Practice Commentary, at 226-27. If the husband in this hypothetical is prohibited from delivering lethal drugs to his wife, then an even stronger case can be made to prohibit physicians from doing so, where the State has a strong interest in maintaining the integrity of the medical profession. *See infra* at 27-28. The Court of Appeals pointed to these comments as support for the principle that § 125.15(3) proscribes assisted suicide even "where the defendant is motivated by 'sympathetic' concerns, such as the desire to relieve a terminally ill person from the agony of a painful disease." *People v. Duffy*, 79 N.Y.2d 611, 615 (1992) (also citing Staff Notes of Comm'n on Revision of Penal Law and Crim. Code, Proposed N.Y. Penal Law, McKinney's Cons. Laws of N.Y., Spec. Pamphlet, at 339 (1964)).

The Penal Law's clear prohibition of physician-assisted suicide is further indicated by the many unsuccessful attempts over the years to amend New York law to legalize such conduct. At least four attempts have been made in the Assembly, and at least six such attempts in the Senate. *See supra* at 4 (surveying proposed legislation). These legislative proposals would be unnecessary but for the Assisted Suicide Statute's unambiguous prohibition of physician-assisted suicide. This legislative silence is particularly significant given the extant case law interpreting these statutory provisions. The U.S. Supreme Court ruled in 1997 that §§ 120.30 and 125.15 constitutionally prohibit physician-assisted suicide for persons with terminal illnesses. *Quill*, 521 U.S. 793. If the State Legislature disagreed with the Court's understanding of the Assisted

Suicide Statute, it could have amended the Penal Law to permit physician-assisted death. The Legislature has not done so, confirming that it accepts the Supreme Court's reading. *See Knight-Ridder Broad., Inc. v. Greenberg*, 70 N.Y.2d 151, 157 (1987) (holding that the Legislature is presumed to be familiar with case law interpreting a statute, and—if the Legislature subsequently left the statute unchanged—to have accepted those interpretations) ("Where the interpretation of a statute is well settled and accepted across the State, it is as much a part of the enactment as if incorporated into the language of the act itself.").

C. Plaintiffs' Attempt to Rewrite the Penal Law Must Be Rejected

What Plaintiffs ultimately seek is not a finding that the Assisted Suicide Statute does not *in fact* prohibit a physician from prescribing lethal medications to terminally ill patients—but rather, a finding that as a matter of public policy, the Assisted Suicide Statute *should* not prohibit such conduct. *See* Compl. ¶ 50. Nothing in the statute or legislative history justifies such an exclusion. Thus, Plaintiffs ask this Court to engage in a "rewriting of the statute," which "can only be accomplished by the Legislature." *Desiderio v. Ochs*, 100 N.Y.2d 159, 170 n.5 (2003).

POINT III

THE COMPLAINT FAILS TO STATE A CLAIM THAT THE ASSISTED SUICIDE STATUTE VIOLATES EQUAL PROTECTION

Plaintiffs' second cause of action, alleging that the Assisted Suicide Statute violates equal protection under the State Constitution, has no legal merit because federal and state constitutional law together foreclose this claim. The State Constitution's equal protection clause provides no more protection than the federal clause, and the U.S. Supreme Court has held that New York's Assisted Suicide Statute does not violate federal equal protection law.

A. The State Equal Protection Clause Is No Broader Than the Federal Clause

The State Constitution directs that "[n]o person shall be denied the equal protection of the

laws of this state or any subdivision thereof." N.Y. Const. art. I, § 11. The equal protection clause "is essentially a direction that all persons similarly situated should be treated alike." *Hernandez v. Robles*, 7 N.Y.3d 338, 375 (2006) (internal quotations omitted). Where a classification "is not based on an inherently suspect characteristic and does not impermissibly interfere with the exercise of a fundamental right," then it need only satisfy rational basis review to be upheld as constitutional. *Affronti v. Crosson*, 95 N.Y.2d 713, 718-19 (2001); *see also Hernandez*, 7 N.Y.3d at 364 (2006) (rational basis level of scrutiny is appropriate "where individuals in the group affected by a law have distinguishing characteristics relevant to interests the State has the authority to implement"). The rational basis standard of review is "a paradigm of judicial restraint." *Affronti*, 95 N.Y.2d at 719 (internal quotations omitted).

The New York Court of Appeals has consistently held that the State Constitution's equal protection clause is coextensive with—and "no broader" than—the equal protection clause of the U.S. Constitution, to which it is identical. *Esler v. Walters*, 56 N.Y.2d 306, 313-14 (1982). The basis for this conclusion is, in part, the original purpose of the State clause, which was "to afford coverage as broad as that provided by the Fourteenth Amendment to the United States Constitution." *Brown v. State*, 89 N.Y.2d 172, 190 (1996). The clause "was not prompted by any perceived inadequacy in the Supreme Court's delineation of the right," but rather, "to make it clear that this State, like the Federal Government, is affirmatively committed to equal protection." *Esler*, 56 N.Y.2d at 313-14.

B. <u>The Decision in *Quill* Forecloses Plaintiffs' Equal Protection Claim</u>

The U.S. Supreme Court's decision in *Quill* squarely addressed the question of whether New York's Assisted Suicide Statute violates equal protection, holding that the prohibition against prescribing lethal medications to terminally ill patients is a reasonable and supportable

one, and that New York State has a legitimate, indeed compelling, interest in making that prohibition. 521 U.S. 793; *see infra* Point III.C (discussing the *Quill* ruling in detail with respect to each of the elements of an equal protection claim). Because the U.S. Supreme Court held that New York's Assisted Suicide Statute does not violate federal equal protection, and because the State clause provides no broader protection than the federal clause, Plaintiffs fail to state an equal protection claim. On this basis alone, this Court need not engage in an independent analysis of Plaintiffs' equal protection claim.

C. The Assisted Suicide Statute Does Not Violate the Equal Protection Clause

The Supreme Court's reasoning in *Quill* demonstrates that the Assisted Suicide Statute does not violate equal protection. Not only do Plaintiffs fail to allege a classification that can be challenged on equal protection grounds, but any distinctions drawn by the provisions are rationally related to legitimate, indeed compelling, State interests.

1. The Assisted Suicide Statute does not create a classification that can be challenged on the basis of equal protection

The classification that the Complaint challenges for equal protection purposes is between the following: a terminally ill patient on life support who can end his life by directing withdrawal of "life-prolonging intervention"; a terminally ill patient who receives palliative sedation until he loses consciousness, and whose nutrition and fluids are withheld until he dies; and a terminally ill patient who wants to obtain a prescription from his physician for lethal medications intended to end the patient's life. Compl. ¶¶ 1, 39-42. Plaintiffs maintain that the Penal Law's prohibition of assisted suicide at §§ 120.30 and 125.15 unconstitutionally discriminates against this last category of individuals. The Complaint, by drawing this distinction, presumably invokes New York common law, which has found that the termination of life support does not constitute suicide, and that a patient has a right to decline life-saving

treatments. *Fosmire*, 75 N.Y.2d at 227 & n.2.

Plaintiffs fail to satisfy the threshold pleading requirements for an equal protection challenge because they do not and cannot allege that §§ 120.30 and 125.15 make any classification of persons whatsoever. Rather, the prohibition against assisted suicide applies to *all* individuals in the State—regardless of the physical condition of those whose death they seek to hasten. As the Supreme Court reasoned in *Quill*, in New York, "*[e]veryone*, regardless of physical condition, is entitled, if competent, to refuse unwanted lifesaving medical treatment; *no one* is permitted to assist a suicide." 521 U.S. at 800 (emphasis in original). Such universal proscriptions do not violate equal protection, even when they may affect one group of individuals more than another. *See, e.g.*, *Personnel Adm'r of Mass. v. Feeney*, 442 U.S. 256, 271-72 (1979) ("Many [laws] affect certain groups unevenly, even though the law itself treats them no differently from all other members of the class described by the law."); *N.Y. City Transit Auth. v. Beazer*, 440 U.S. 568, 587 (1979) ("General rules that apply evenhandedly to all . . . unquestionably comply with [the equal protection clause]."); *McGann v. Inc. Vill. of Old Westbury*, 256 A.D.2d 556, 557 (2d Dep't 1998) (holding that the challenged cemeteries law applied to all cemeteries equally, regardless of religious affiliation).

Furthermore, the patient Plaintiffs are not similarly situated to those patients who receive artificial life support or palliative sedation. A patient who seeks physician-assisted suicide through lethal medications can survive without artificial life support; by contrast, a patient on artificial life support would die as a natural result of his illness or condition, but for such support. *See Quill*, 521 U.S. at 798, 800 (reversing Second Circuit's decision, which had concluded that individuals requesting physician-assisted suicide are similarly situated to those who decline artificial life support); *Kevorkian v. Thompson*, 947 F. Supp. 1152, 1173 (E.D. Mich. 1997)

(concluding that individuals who permit the withdrawal of life support are not similarly situated to individuals who affirmatively commit suicide). Moreover, as discussed *infra* Point III.C.3, the situations are distinguishable on the basis of causation and intent. Because the Complaint fails to identify a classification of similarly situated persons, the equal protection claim can be dismissed on this basis alone. *See Affronti*, 95 N.Y.2d at 718 (plaintiffs "did not meet their threshold burden of demonstrating that they . . . were similarly situated" to the comparator group).

2. The challenged provisions are subject to rational basis review and are entitled to a strong presumption of validity

Even if the Assisted Suicide Statute did effect a classification between persons, such a classification would be subject to rational basis review. The only classification challenged by Plaintiffs is based on "mentally-competent, terminally ill individuals . . . who seek a peaceful death" through lethal medications prescribed by their physicians. Compl. ¶¶ 63, 64. A classification based on these circumstances implicates neither an inherently suspect characteristic, *see Quill*, 521 U.S. at 799, nor a fundamental right, *see id.* (citing *Glucksberg*, 521 U.S. 702) & *infra* Point IV.B (discussing whether the Assisted Suicide Statute implicates a fundamental right for substantive due process purposes). Rather, these issues "address matters of profound significance to all New Yorkers alike." *Quill*, 521 U.S. at 799.

Because the Assisted Suicide Statute is subject to rational basis review, it is "presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest." *Hernandez*, 7 N.Y.3d at 365 (quoting *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985)); *Quill*, 521 U.S. at 799-800 (the Assisted Suicide Statute is "entitled to a strong presumption of validity") (internal quotations omitted). Courts presume "that the Legislature has investigated and found the existence of a situation showing . . . the need for or desirability of the legislation," and will strike down a statute "only as a last unavoidable

result." *Van Berkel v. Power*, 16 N.Y.2d 37, 40 (1965).

3. Any distinctions (if any) drawn by the Assisted Suicide Statute are rational

To the extent that the Assisted Suicide Statute treats certain conduct differently—allowing a patient to die naturally through the termination of life support or prescribing palliative medication to ease a patient's pain, while prohibiting the prescription of lethal medications intended to end a patient's life—that distinction is fully supported by multiple considerations. As the Supreme Court recognized, this distinction between the termination of life support and the prescription of lethal medications is "both important and logical." *Quill*, 521 U.S. at 800-01, 808-09.

First, the distinction between refusing life-sustaining treatment and assisting suicide "comports with fundamental legal principles of causation." *Quill*, 521 U.S. at 801. When a patient refuses life-sustaining medical treatment, the cause of death is the patient's disease or pathology. *Id.* (citing case law and medical authorities). This includes a death that follows the refusal of artificial nutrition and hydration. In those instances, "the patients were suffering from dire medical conditions that were not of their own making and that prevented them from eating and drinking of their own accord." *Bezio v. Dorsey*, 21 N.Y.3d 93, 103 (2013). Thus, "the underlying illness or injury . . . created the need for artificial hydration and nutrition as a form of life-sustaining medical treatment," and thus caused the death when that hydration and nutrition were withheld. *Id.* By contrast, when a patient requests lethal medications to cause death more quickly than his terminal illness will, the cause of death is the medication, not the underlying illness. *Quill*, 521 U.S. at 801.

Second, the distinction is consistent with the legal significance of intent. Statutory and common law frequently and historically look to an actor's intent to distinguish between two acts

that may have the same result. *Quill*, 521 U.S. at 802 (citing the distinction in common law homicide between knowingly causing a person's death and specifically intending to cause a person's death). Here, the intent behind the administration of lethal medications is clear. A physician who prescribes lethal medications in order to assist a patient in ending his life must "intend primarily that the patient be dead." *Id.* (quoting testimony of Dr. Leon R. Kass from a U.S. House of Representatives hearing on assisted suicide). By contrast, when a physician administers painkilling drugs to a patient in order to provide aggressive palliative care, which may hasten a patient's death, the physician's intent is to ease his patient's pain, not to end his patient's life. *Id*. Likewise, a patient who takes lethal medications has the specific intent to end his life, while a patient who refuses life-sustaining treatment may "fervently wish to live, but to do so free of unwanted medical technology, surgery, or drugs." *Id.* (internal quotations omitted). The Complaint alleges no facts that contradict these rational bases for distinguishing the administration of lethal medications from other forms of end-of-life treatment.

4. The State's interest in preventing assisted suicide has long been recognized as compelling and justifiable

The State's interests in preventing assisted suicide—including a physician's prescription of lethal medications to terminally ill patients—are not only legitimate, but "valid and important public interests." *Quill*, 521 U.S. at 800-01, 808-09. Those interests, discussed *infra* Point IV.C, include an interest in the prohibition of intentional killing and the preservation of life, in maintaining the physician's role as his patients' healer, and in protecting vulnerable patients from various pressures to end their lives. Any of these would more than satisfy the constitutional requirement that a legislative classification bear a rational relation to some legitimate end.

POINT IV

THE COMPLAINT FAILS TO STATE A CLAIM THAT THE ASSISTED SUICIDE STATUTE VIOLATES DUE PROCESS

Plaintiffs fail to satisfy the demanding requirements for stating a substantive due process claim on right to privacy grounds (Count Three). As the Supreme Court recognized in *Glucksberg*, physician-assisted suicide does not implicate a fundamental right, and the State has a legitimate interest in prohibiting physicians from intentionally causing the deaths of their patients, even those suffering from terminal illnesses.

A. Substantive Due Process Claims Have Demanding Pleading Requirements

New York's due process clause provides that "[n]o person shall be deprived of life, liberty or property without due process of law." N.Y. Const., art I, § 6. This clause contains both a procedural and a substantive component, the latter of which provides heightened protection against a government's interference with certain fundamental rights. *Hernandez*, 7 N.Y.3d at 362. New York courts use the same analytical framework in evaluating substantive due process claims as the U.S. Supreme Court. *Id*. A law that does not impinge on a fundamental right "is valid if it bears a rational relationship to [a governmental] interest." *Hope v. Perales*, 83 N.Y.2d 563, 577 (1994). By contrast, a law that impinges upon a "fundamental right" is subject to strict scrutiny, meaning that it must be narrowly tailored to serve a compelling government interest. *Price v. N.Y. City Bd. of Educ.*, 51 A.D.3d 277, 290 (1st Dep't 2008) (citing *Carey v. Population Servs. Int'l*, 431 U.S. 678, 686 (1977)). Fundamental rights are those "personal immunities 'so rooted in the traditions and conscience of our people as to be ranked as fundamental.'" *People v. Isaacson*, 44 N.Y.2d 511, 520 (1978) (quoting *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934)).

Courts "use great caution" when asked to recognize a new fundamental right. *Samuels v.*

N.Y. State Dep't of Health, 29 A.D.3d 9, 13-14 (3d Dep't 2006); *see also Anonymous v. City of Rochester*, 13 N.Y.3d 35, 48 (2009) ("[R]eflexive labeling of a fundamental right, and accompanying analysis under strict scrutiny, is inadequate for taking into account the complexities and governmental concerns of this kind of regulation . . . ."); *People v. Knox*, 12 N.Y.3d 60, 67 (2009) ("[A] fundamental right is not implicated every time a governmental regulation intrudes on an individual's liberty . . . .") (internal quotations omitted). This caution is particularly necessary when a plaintiff asks the court to recognize a new perspective on the right to privacy. *See Pharm. Mfrs. Ass'n v. Whalen*, 54 N.Y.2d 486, 496 (1981) (declining to acknowledge a "right to privacy between pharmacist and patient"); *People v. Onofre*, 51 N.Y.2d 476, 486 (1980) (noting that the right to privacy typically encompasses only matters relating to marriage, procreation, contraception, family relationships, and child rearing and education).

When a plaintiff asks a court to recognize a right as fundamental where no New York court has done so before, such recognition should be made first by the Court of Appeals. *See, e.g., Masi Mgmt., Inc. v. Town of Ogden*, 180 Misc. 2d 881, 896-97 (Sup. Ct. Monroe Co. 1999) ("In the absence of a clear signal from the Court of Appeals in the substantive due process context, however, this nisi prius court should not announce a novel constitutional rule."). And where, as here, federal courts have expressly declined to acknowledge the asserted right as fundamental, a plaintiff must demonstrate why State constitutional law should impose a standard different from that provided by the U.S. Constitution. *People v. Paris*, 229 A.D.2d 926, 927 (4th Dep't 1996). Plaintiffs can make no such demonstration here.

B. <u>Plaintiffs Fail to Plead the Infringement of a Fundamental Right</u>

New York law does not recognize a fundamental right to receive assistance from another person in committing suicide, even if that assistance is provided by a physician.

1. New York law does not recognize a fundamental right to assistance in committing suicide

The threshold issue in assessing a litigant's assertion of a fundamental right is to define the purported right in question. Although Plaintiffs assert that at issue is a right to "aid in dying," Compl. ¶ 67, the U.S. Supreme Court defined the issue more narrowly to be whether due process protects "a right to commit suicide which itself includes a right to assistance in doing so." *Glucksberg*, 521 U.S. at 723. This latter formulation is consistent with the judicial tradition "of carefully formulating the interest at stake in substantive-due-process cases." *Id.* at 722. *See also Cruzan v. Dir., Mo. Dep't of Health*, 497 U.S. 261, 277, 279 (1990) (framing the right at issue as a "constitutionally protected right to refuse lifesaving hydration and nutrition," and rejecting plaintiffs' formulation based on a "right to die").

Applying this formulation to New York law makes clear that the State's traditions do not reflect a fundamental right to assistance in committing suicide. Indeed, the State has prohibited assisted suicide by statute for more than two hundred years, prior to which the common law did the same. *See supra* at 3-4 (discussing lengthy history of New York's assisted suicide laws); *Glucksberg*, 521 U.S. at 715 (noting that New York had the earliest American statute explicitly outlawing assisted suicide). Suicide itself is an act that New York laws have historically either prohibited or discouraged,[5] and statutes in effect today continue to value the prevention of suicide in multiple contexts. *See, e.g.*, N.Y. Pub. Health L. § 2989(3) ("This article is not intended to permit or promote suicide, assisted suicide, or euthanasia."); N.Y. Mental Hygiene L. §§ 9.37, 9.39, 9.41 (a person may be involuntarily committed if he has a mental illness likely to

[5] New York law once prohibited suicide. *See Shipman v. Protected Home Circle*, 174 N.Y. 398, 406 (1903) (describing the rule of the common law declared suicide to be *malum in se*, and referring to suicide as an "illegal act"). Although these laws were abandoned because of the view that punishing the person's family for that person's suicide was unfair, *Glucksberg*, 521 U.S. at 713, courts have historically referred to suicide as "a grave public wrong." *Von Holden v. Chapman*, 87 A.D.2d 66, 68 (4th Dep't 1982) (internal quotations omitted). The right to privacy "does not include the right to commit suicide." *Id.*

result in serious harm to himself); N.Y. Penal L. § 35.10(4) (a person is justified in using physical force necessary to thwart a person who is about to commit suicide); N.Y. Corr. L. §§ 402(9), 508(3) (an inmate may be transferred to a psychiatric hospital when it appears likely that he will cause serious harm to himself). The continuing import of this historical opposition to assisted suicide was confirmed by the New York State Task Force on Life and the Law: "[T]he ban against assisted suicide and euthanasia shores up the notion of limits in human relationships. It reflects the gravity with which we view the decision to take one's own life or the life of another, and our reluctance to encourage or promote these decisions." N.Y. State Task Force Report at 131-32, *quoted in Glucksberg*, 521 U.S. at 729.

Nor is New York's historical prohibition of assisted suicide unique among American legal traditions. The U.S. Supreme Court concluded that "for over 700 years, the Anglo-American common-law tradition has punished or otherwise disapproved of both suicide and assisting suicide." *Glucksberg*, 521 U.S. at 711. The States demonstrate a nearly universal commitment to the preservation of life and opposition to assisted suicide, even when a person is experiencing terminal illness or deteriorating physical conditions. *Id*. at 723. This commitment is reflected in the Model Penal Code, which prompts States to enact or revise assisted suicide bans. Model Penal Code § 210.5. These laws are necessary "even though the act may be accomplished with the consent, or at the request, of the suicide victim." Model Penal Code and Commentaries (1980), § 210.5, Comment 5, at 100, *quoted in Glucksberg*, 521 U.S. at 728-29.

The Complaint fails to allege that a new tradition has formed recognizing physician-assisted as a fundamental right. *See* Compl. ¶ 50 (alleging merely that support for physician-assisted suicide is gaining momentum in various States and jurisdictions). None of the States' highest courts, for instance, have overturned a statute prohibiting physician-assisted suicide on

constitutional grounds, and some have expressly affirmed the constitutionality of such statutes. *See, e.g., Sampson v. State*, 31 P.3d 88 (Alaska 2001) (upholding constitutionality of state law prohibiting physician-assisted suicide); *Krischer v. McIver*, 697 So. 2d 97 (Fla. 1997) (same); *People v. Kevorkian*, 447 Mich. 436 (Mich. 1994) (same). Montana, the only State whose highest court has determined that physician-assisted suicide is legal in that State, held merely on statutory grounds that Montana's criminal law permitted such assistance. *Baxter v. Montana*, 354 Mont. 234, 239, 251 (2009) (declining to reach any constitutional issues relating to physician-assisted suicide).

2. Federal case law further confirms that substantive due process does not protect a right to assistance in committing suicide

In evaluating the scope of the fundamental rights protected by New York's due process clause, New York courts are guided by federal case law. The U.S. Supreme Court's opinion in *Glucksberg*, 521 U.S. 702, which held that physician-assisted suicide is not a fundamental right encompassed in the right to privacy under the U.S. Constitution, provides such guidance.

a. *Federal law guides the interpretation of New York's due process clause*

To the extent that Plaintiffs contend that New York's substantive due process law should differ from federal due process law, they are mistaken. The Court of Appeals has made clear that "both New York and federal decisions guide us in applying the Due Process . . . clause[ ]," *Hernandez*, 7 N.Y.3d at 362, although it has recognized that while the State Constitution cannot afford less protection to New York's citizens than the U.S. Constitution does, it can give more. *People v. P.J. Video, Inc.*, 68 N.Y.2d 296, 302 (1986), *cited in Hernandez*, 7 N.Y.3d at 361-62. Before concluding that the State's due process clause provides greater protection in a particular area, a court must consider whether "there are fundamental justice and fairness concerns of this State which are left unaddressed under prevailing Federal law." *People v. Kohl*, 72 N.Y.2d 191,

197 (1988). Relevant considerations include "whether the right at issue has historically been afforded greater protection in New York than is presently required under the Federal Constitution, whether the right is 'of peculiar State or local concern,' or whether the State citizenry has 'distinctive attitudes' toward the right." *People v. Alvarez*, 70 N.Y.2d 375, 379 (1987). Added to these concerns are "practical considerations of the need for Federal-State uniformity." *Id.*

Applying those principles, New York courts look to federal case law when interpreting the State Constitution. *See Hernandez*, 7 N.Y.3d at 362 (looking to federal jurisprudence in defining the scope of the right at issue); *Doe v. Coughlin*, 71 N.Y.2d 48, 56 (1987) (analyzing federal law before concluding that prisoners do not have a fundamental right to marital intimacy); *Onofre*, 51 N.Y.2d at 486-87 (analyzing U.S. Supreme Court case law before interpreting the scope of the right to privacy under New York due process). Indeed, many cases have interpreted the New York due process clause to have the same application as federal due process. *See, e.g.*, *Kohl*, 72 N.Y.2d at 197 (concluding that federal law satisfies New York's interest in fairness for criminal defendants asserting an insanity defense); *Alvarez*, 70 N.Y.2d at 379-80 (finding no reason to disagree with U.S. Supreme Court's conclusion regarding criminal procedure rules for breathalyzer tests).

Where courts have interpreted New York's due process clause to offer broader protection than the federal clause, this has typically been limited to two circumstances. First, courts have applied New York due process law more broadly where the text of the clauses is different. *See Sharrock v. Dell Buick-Cadillac*, 45 N.Y.2d 152, 159-60 (1978) (concluding that because the federal due process clause includes the word "state," New York's state action requirement is less demanding than federal law). Second, courts have applied New York due process law more

broadly where the case implicates the rights of criminal defendants, prisoners or detainees. *Hernandez*, 7 N.Y.3d at 362. For example, in *People v. LaValle*, 3 N.Y.3d 88, 129 (2004), the Court of Appeals concluded that New York procedural due process required certain jury instructions in criminal cases, though not required by federal law, while in *Cooper v. Morin*, 49 N.Y.2d 69, 79 (1979), the Court applied a higher standard of review for the deprivation of a pre-trial detainee's rights to contact visitation with her family. Even in *Cooper*, however, the Court of Appeals agreed with federal law as to the scope of the fundamental right. *Id.* at 80 (citing five U.S. Supreme Court decisions). Few, if any, cases have identified a fundamental right protected by New York due process that is not likewise protected by the federal due process clause.

b. *The U.S. Supreme Court has provided detailed and compelling guidance on why assistance in committing suicide is not a fundamental right*

Because State courts have followed federal law in defining the scope of fundamental rights under the due process clause, this Court need not engage in extensive analysis of whether due process protects a right to assistance in committing suicide. This very proposition was examined in considerable detail by the U.S. Supreme Court in *Glucksberg*, and was rejected. The "asserted 'right' to assistance in committing suicide is not a fundamental liberty interest protected by the Due Process Clause." *Glucksberg*, 521 U.S. at 728.

To reach this conclusion, the Supreme Court performed a comprehensive analysis of common law and statutory traditions in the United States, with a particular focus on State-level legal approaches to suicide and assisted suicide. The Court found that a long-standing commitment to the preservation of life was reflected in laws across the country prohibiting assisted suicide, including in New York. *See Glucksberg*, 521 U.S. at 710-16. The Court also found that these prohibitions against assisted suicide "never contained exceptions for those who were [already] near death." *Id.* at 714. "Rather, 'the life of those to whom life had become a

burden—of those who [were] hopefully diseased or fatally wounded—nay, even the lives of criminals condemned to death, [were] under the protection of law.'" *Id.* at 714-15 (quoting *Blackburn v. Ohio*, 23 Ohio St. 146, 163 (1872)). In the eighteen years since *Glucksberg* was decided, New York courts have consistently looked to that decision in defining the contours of the New York due process clause—especially with respect to whether a right is "fundamental." *See, e.g., Hernandez*, 7 N.Y.3d at 362 (relying on *Glucksberg* for guidance in whether to expand the scope of substantive due process); *Knox*, 12 N.Y.3d at 67 (same); *People v. Taylor*, 42 A.D.3d 13, 15 (2d Dep't 2007) (citing *Glucksberg* as authority for applying rational basis review to New York's Sex Offender Registration Act); *Samuels*, 29 A.D.3d at 13-14 (citing *Glucksberg* as authority for exercising caution before recognizing new fundamental rights).

C. <u>The State Has a Legitimate Interest in Prohibiting Assisted Suicide</u>

Because Plaintiffs have failed to identify a fundamental right at stake in this action, the Assisted Suicide Statute is constitutional so long as it serves a legitimate government interest. *Hope*, 83 N.Y.2d at 577. This it clearly does. Even if Plaintiffs had established physician-assisted suicide as a fundamental right, the Assisted Suicide Statute would nevertheless survive strict scrutiny because it serves several compelling State interests. These numerous interests are discussed fully by the Supreme Court in *Glucksberg*, 521 U.S. at 728-35, as well as in New York's Task Force Report on assisted suicide that *Glucksberg* cites extensively.

First, the State has an interest in the preservation of life. *See Matter of Storar*, 52 N.Y.2d 363, 377 (1981) ("The State has a legitimate interest in protecting the lives of its citizens."); *Glucksberg*, 521 U.S. at 728 (the prohibition of assisted suicide both reflects and advances this commitment); Model Penal Code and Commentaries (1980), § 210.5, Comment 5, at 100 ("The interests in the sanctity of life . . . are threatened by one who expresses a willingness to

participate in taking the life of another."). This commitment to the preservation of life has not been limited to those in good health; the State has an interest in ensuring 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. Other New York statutes reflect this same commitment. *See supra* at 21-22 (citing N.Y. Pub. Health L. § 2989(3), N.Y. Mental Hygiene L. §§ 9.37, 9.39, 9.41, N.Y. Penal L. § 35.10(4), and N.Y. Corr. L. §§ 402(9), 508(3)).

The Assisted Suicide Statute also furthers the State's more specific interest in preventing suicide as a public health problem. This is true not just for suicide generally, but also for suicide committed by persons with illnesses. *See Bezio*, 21 N.Y.3d at 101 ("[T]he 'State will intervene to prevent suicide . . . or the self-inflicted injuries of the mentally deranged.'") (quoting *Fosmire*, 75 N.Y.2d at 227); *Von Holden*, 87 A.D.2d at 68 ("[T]he State has a legitimate and compelling interest in preventing suicide."); N.Y. State Task Force Report at 10, 23-33, *cited in Glucksberg*, 521 U.S. at 730 (cautioning that uncontrolled pain is a risk factor among the terminally ill because it contributes to depression). Because depression is difficult to diagnose, legalizing physician-assisted suicide may make it more difficult to protect depressed persons with terminal illnesses from suicide impulses that they would not have in the absence of mental illness. *See* N.Y. State Task Force Report at 175, *cited in Glucksberg*, 521 U.S. at 731.

Furthermore, as the Supreme Court recognized, the State has an interest in protecting "the integrity and ethics of the medical profession." *Glucksberg*, 521 U.S. at 731. The American Medical Association has concluded that a physician's administration of lethal medications in order to end the life of a patient suffering from a terminal illness "is fundamentally incompatible with the physician's role as healer." Am. Medical Ass'n, Code of Medical Ethics § 2.211 (1996), *cited in Glucksberg*, 521 U.S. at 731, *also available at* http://www.ama-

assn.org/ama/pub/physician-resources/medical-ethics/code-medical-ethics/opinion221.page. The State carefully regulates and monitors the role of physicians practicing medicine in the State. *See Koch v. Sheehan*, 21 N.Y.3d 697, 701 (2013) (describing comprehensive regulations of medical professionals in the State); *Doe v. Axelrod*, 71 N.Y.2d 484, 488 (1988) (underscoring State's role in regulating conduct in the medical profession).

The prohibition of physician-assisted suicide also furthers the State's compelling interest in protecting vulnerable patients from various pressures to end their lives, including indifference, prejudice, or psychological and financial pressure. *Glucksberg*, 521 U.S. at 731-32; *see also Cruzan*, 497 U.S. at 281 (finding that a "State is entitled to guard against potential abuses in" end-of-life situations). The Task Force warned that risks from physician-assisted suicide are greatest for the poor, the elderly, those lacking access to good medical care, and members of stigmatized groups. N.Y. State Task Force Report at 120, *cited in Glucksberg*, 521 U.S. at 732. For instance, some facing terminal illnesses might choose physician-assisted in order to spare their families the financial burden of end-of-life treatments. *Glucksberg*, 521 U.S. at 732. The State's interest in protecting vulnerable individuals in the face of end-of-life treatments is reflected in other statutes, such as the Surrogate's Court Procedure Act, which governs end-of-life decision-making on behalf of persons with mental disabilities. *See, e.g.*, *Matter of M.B.*, 6 N.Y.3d 437, 451 (2006) (describing the Act's "strict . . . procedures").

Finally, the State has an interest in maintaining clear rules regarding assisted suicide that will prevent a dangerous expansion of the purported liberty interest at stake. *Glucksberg*, 521 U.S. at 732-33. Courts may have difficulty distinguishing what Plaintiffs frame as a right to "aid-in-dying" from a right to assistance from family members or friends, or from a right to not only the prescription but also the direct administration of lethal medications. This expansion

could become very difficult to police, with devastating consequences. *Id*. at 733.

D. Plaintiffs' Advocacy for a Change in Public Policy Should Be Directed to the Legislature Rather than the Judiciary

In order to avoid decision-making based on public policy preferences, a court must exercise caution in deciding whether to strike down a statute on substantive due process grounds. Public debate and legislative action are the proper mechanisms for considering the issue of physician-assisted suicide, which touches on so many complex subjects—the historical and regulated role of the physician, the value of human life, and the balance between personal autonomy and the protection of vulnerable individuals against potential abuse. The Complaint itself refers to the democratic process at work in this regard, alleging an increasing number of States legalizing physician-assisted suicide through legislation. Compl. ¶ 50. As noted in *Glucksberg*, "[b]y extending constitutional protection to an asserted right or liberty interest, we, to a great extent, place the matter outside the arena of public debate and legislative action." 521 U.S. at 720. When asked to "break new ground" in this arena, courts must "exercise the utmost care . . . lest the liberty protected by the Due Process Clause be subtly transformed into the policy preferences of the members of this Court." *Id.* (internal quotations omitted).

Even if physician-assisted suicide were consistent with the legal norms and public policy preferences of New York citizens, addressing such complex issues would require a detailed, comprehensive statutory scheme in order to protect terminally ill individuals from abuse. For instance, Oregon, one of only four States that have legalized physician-assisted suicide in some way, has done so through a detailed statutory scheme that requires demanding conditions to be met before physician assistance can be provided. Oregon Rev. Stat. §§ 127.800-127.897; *see also* N.Y. Surrogate's Court Procedure Act § 1750-b (providing a detailed statutory scheme to govern end-of-life decision-making on behalf of mentally disabled persons). Designing such a

scheme is the task of the legislative branch, which can collect data on the populations affected by a new policy and prescribe the conditions that will allow for the policy's safe implementation.

The posture of this case is similar to that of *People v. Shepard*, 50 N.Y.2d 640 (1980), which described the role of the courts in reviewing criminal laws on public policy grounds: "[W]e clearly lack the right to substitute our own sense . . . for the considered judgment of the Legislature. . . . The sphere within which we may properly declare a legislative act unconstitutional is extremely limited and clearly does not encompass this case." *Id.* at 645-46; *see also Glucksberg*, 521 U.S. at 735 ("Our holding permits this debate to continue, as it should in a democratic society."). Similarly, the Legislature has made a considered judgment to prohibit assisted suicide. Proposals to make an exception to that rule for physician-assisted suicide are currently pending before both the Assembly and the Senate. *See supra* at 4. Removing this issue from the Legislature's consideration by recognizing a fundamental right to physician-assisted suicide would curtail this democratic debate. This Court has no reason to intervene in this ongoing policy discussion where, as here, Plaintiffs' constitutional claims have no legal support.

CONCLUSION

For the foregoing reasons, the Attorney General respectfully requests that the Court dismiss Plaintiffs' claims, together with such other relief as the Court deems just and proper.

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Respectfully submitted,

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