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-	:	Hon. Joan M. Kenney IAS Part 8
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,	:	NYSCEF Case
Defendants.	:	

DEFENDANT ERIC T. SCHNEIDERMAN'S REPLY MEMORANDUM OF LAW IN FURTHER 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 reply memorandum of law in further support of the motion to dismiss the Complaint.

Plaintiffs' opposition to the motion to dismiss offers no legal bases for their claims, especially in light of the U.S. Supreme Court's clear guidance in *Vacco v. Quill*, 521 U.S. 793 (1997) and *Washington v. Glucksberg*, 521 U.S. 702 (1997). In fact, the opposition illuminates the many reasons why physician-assisted suicide poses questions for the Legislature, not the courts. By asking this Court to legalize physician-assisted suicide, Plaintiffs seek the creation a new constitutional right heretofore never recognized in the State of New York. Safe implementation of such a major policy shift would require designing detailed protocols that would protect vulnerable patients facing end-of-life decisions—a task for the legislative branch. Plaintiffs try to evade these legal shortcomings by invoking the need for discovery, but no amount of factual development will save Plaintiffs' unsuccessful attempt to constitutionalize their own public policy preferences. The Complaint, with its request for a judicial remedy on an issue that should instead be resolved through democratic debate, must be dismissed.

ARGUMENT

POINT I

PLAINTIFFS CANNOT CORRECT THEIR FAILURE TO PLEAD A JUSTICIABLE CONTROVERSY

Plaintiffs' claims must be dismissed for failure to plead a justiciable controversy. The Attorney General's opening brief demonstrated that Plaintiffs fail to plead a reasonable fear that they will be prosecuted under N.Y. Penal Code §§ 120.30 and 125.15 ("Assisted Suicide Statute"). Def.'s Mem. of Law in Supp. of Mot. to Dismiss (Doc. No. 32) ("Def.'s Br.") at 7 (citing *Cherry v. Koch*, 126 A.D.2d 346, 350 (2d Dep't 1987)). Plaintiffs contend that this

standard is too "demanding," but they fail to articulate any other basis on which to judge the justiciability of Plaintiffs' claims. *See* Pls.' Mem. of Law in Opp. to Mot. to Dismiss (Doc. No. 50) ("Pls.' Opp.") at 4-5. In fact, the two cases cited by Plaintiffs are consistent with the standard articulated in *Cherry* because they involved an explicit threat of prosecution. In *Bunis v. Conway*, the plaintiff sought a declaratory judgment regarding the lawfulness of his conduct, but his complaint specifically alleged that the county's prosecutor had threatened plaintiff with prosecution. 17 A.D.2d 207, 207 (4th Dep't 1962), *cited in* Pls.' Opp. 5; *see also DeVeau v. Braisted*, 5 A.D.2d 603, 606 (2d Dep't 1958), *cited in* Pls.' Opp. 5 (noting that the assistant district attorney had threatened to prosecute plaintiff for violation of the statute). Plaintiffs present no cases upholding a challenge to a criminal statute in the absence of a reasonable fear of prosecution.[1]

Plaintiffs' opposition fails to demonstrate any basis on which they meet this standard for justiciability. Plaintiffs offer only the affidavit of one plaintiff, Dr. Timothy Quill, which describes Monroe County's attempt in 1991 to prosecute Dr. Quill for assisting a patient in dying by prescribing lethal medication. Aff. of Timothy E. Quill (Doc. No. 46) ¶ 15. An attempted indictment from twenty-four years ago does not suffice to correct the Complaint's failure to plead a reasonable fear of prosecution. Also, the attempted indictment in 1991 was at issue before the Supreme Court in *Quill*, and therefore at most, the prosecution arguably supported Dr. Quill's prior litigation, but cannot provide the basis for his challenge here.

[1] Plaintiffs argue that the Attorney General cannot raise a justiciability challenge while at the same time arguing that the Assisted Suicide Statute prohibits physician-assisted suicide as a matter of law. Pls.' Opp. 5. Justiciability, however, does not concern the legal meaning of the statute that a plaintiff seeks to challenge. Here, there is no doubt that the Assisted Suicide Statute prohibits the conduct in question. *See* Def.'s Br. 8-12 & *infra* Point II. Rather, justiciability is a threshold issue that concerns the efficient use of judicial resources, and that precludes a plaintiff from seeking judicial rulings on criminal statutes unless and until a concrete criminal enforcement issue arises. *See Cuomo v. Long Island Lighting Co.*, 71 N.Y.2d 349, 354 (1988) ("This rule [of justiciability] not only prevents dissipation of judicial resources, but more importantly, it prevents devaluation of the force of judicial decrees which decide concrete disputes.").

POINT II

PLAINTIFFS FAIL TO PLEAD AMBIGUITY IN THE STATUTE THAT WOULD SUPPORT THEIR STATUTORY CONSTRUCTION CLAIM

Plaintiffs' opposition with respect to their statutory argument—that the Assisted Suicide Statute cannot or should not be interpreted to apply to physician-assisted suicide—can be quickly dismissed. The Assisted Suicide Statute is unambiguous in its use of the word "suicide." That term has been consistently defined as the act of taking one's own life, and the Assisted Suicide Statute has been consistently read as prohibiting physician-assisted suicide. Def.'s Br. 8-10. Plaintiffs' opposition fails to introduce any ambiguity in the face of this clarity.

A. Plaintiffs' Request for Declaratory Relief Should Be Resolved as a Matter of Law

Plaintiffs' threshold argument for their statutory construction claim is one of deflection—that this claim should survive to see another day because, according to Plaintiffs, the Court's construction of the Assisted Suicide Statute requires factual development rather than legal rulings. Pls.' Opp. 6-10. Plaintiffs are incorrect.

The parties have no factual dispute as to the scope of the conduct at issue. Pls.' Opp. 6. Notwithstanding the different terms employed by the parties—Plaintiffs use "aid-in-dying" while the Attorney General uses "physician-assisted suicide"— the terms describe the same act. Plaintiffs ask this Court to declare that "terminally-ill, mentally-competent New Yorkers who wish to exercise control, avoid a perceived loss of dignity and reduce suffering they find unbearable as they approach death due to terminal illness may obtain a prescription from their physicians for medication they could ingest to achieve a peaceful death," and that this act does not constitute "suicide" within the meaning of N.Y. Penal Code §§ 120.30 and 125.15. Compl. ¶¶ 1, 54. This request, which applies to a broad category of conduct, does not require inquiry into the "facts as to a patient's condition and appropriate medical treatment." Pls.' Opp. 6. Even

if Plaintiffs proceeded to discovery on the issues highlighted in their opposition (the suffering that terminal illnesses may cause, for instance, or various medical opinions regarding the meaning of suicide), this would have no effect on the Court's ability today to construe the statute with respect to the conduct pleaded in the Complaint.

Indeed, the remedy that Plaintiffs seek—a declaration regarding the legal meaning of a criminal statute—can *only* be obtained through a legal ruling. Plaintiffs cannot request such a remedy where it depends on factual development regarding specific applications. The remedy of a declaratory judgment "is not available to restrain the enforcement of a criminal prosecution where the facts are in dispute, or open to different interpretations." *N.Y. Foreign Trade Zone Operators, Inc. v. State Liquor Auth.*, 285 N.Y. 272, 276 (1941). If "a claim of unconstitutional application of a criminal statute involves factual as well as legal questions," then it should be resolved "within the criminal proceeding itself." *Church of St. Paul & St. Andrew v. Barwick*, 67 N.Y.2d 510, 523 (1986). "[I]f the crucial question is *one of law*," however, then, and only then, can civil courts make a declaration as to a statute's meaning. *Bunis*, 17 A.D.2d at 208-09 (emphasis added). Plaintiffs can either seek a declaration from this Court regarding the meaning of the Assisted Suicide Statute as a matter of law, or they can raise disputes of fact during a criminal prosecution. Plaintiffs have chosen to pursue the former, and as a result, a legal ruling on a motion to dismiss is proper.

B. The Assisted Suicide Statute Is Unambiguous in Its Prohibition of Physician-Assisted Suicide

Because Plaintiffs seek the Court's construction of a legal term, the Court must rule on the statutory construction claim as a matter of law. And because there can be no dispute as to the meaning of "suicide" and whether it applies to the conduct that Plaintiffs seek to protect, Plaintiffs' claim must be dismissed. "Suicide" is an unambiguous term, and in the federal and

State case law discussing New York's Assisted Suicide Statute (including the U.S. Supreme Court's decision in *Quill*), the term has been neither contested nor criticized as vague.

Plaintiffs offer no reason why the widely accepted definition of suicide as "the act of taking one's own life," where the person must "want to die," is improper, unclear, misleading, or overinclusive in any way. Def.'s Br. 9 (quoting *Black's Law Dictionary* 1662 (10th ed. 2014) & *Fosmire v. Nicoleau*, 75 N.Y.2d 219, 227 n.2 (1990)). Plaintiffs criticize the citation to *Black's Law Dictionary*, but for no reason beyond a general, unexplained assertion that dictionary definitions fail to provide "clarity." Pls.' Opp. 11. Plaintiffs then assert that this definition was repealed by the New York legislature. *See id.* But the Legislature did not repeal the definition of suicide; it repealed the criminal prohibition of the act of attempted suicide. *See* 1919 N.Y. Laws 1193, *cited in Glucksberg*, 521 U.S. at 774 n.13. The unambiguous meaning of "suicide" remains unchallenged, with Plaintiffs' opposition offering no alternative definition of the term.

Plaintiffs' opposition reflects agreement that "aid-in-dying" (as Plaintiffs define it) is encompassed in this clear meaning of the term "suicide." Plaintiffs assert that the patients who choose physician-assisted suicide, unlike the patient in *Fosmire*, 75 N.Y.2d at 227 n.2, do not "want to die" and would choose life if it were an option. Pls.' Opp. 9. But *Fosmire* simply signifies that the person must have a specific intent to cause his own death, notwithstanding the difficult circumstances that lead to that choice. This concept is mirrored in the language of the Complaint itself, which refers to a "*choice* of . . . a peaceful death." Pls.' Opp. 9; Compl. ¶ 54 (emphasis added).[2] Likewise, Plaintiffs try to argue that under *Matter of Storar*, 52 N.Y.2d 363, 377 n.6 (1981), a suicidal act is "self-inflicted," while a patient's terminal illness is not. Pls.' Opp. 9. Plaintiffs acknowledge, however, that the choice to ingest lethal medications is a self-

[2] Plaintiffs' opposition focuses only on the word "peaceful" here, but they cannot dispute that Complaint's definition of the act also involves "death," over which patients want to exercise control.

inflicted act, and one that causes the patient's death. *See* Pls.' Opp. 6 (quoting Ex. 1 to Schallert Aff.) (aid-in-dying is "the choice . . . to *bring about* a peaceful and dignified death") (emphasis added). Indeed, those states that have legalized physician-assisted suicide have had to specify *by statute* that the cause of death was anything other than the ingestion of lethal medications—superseding the medical process of determining cause of death. *See, e.g.*, Wash. Rev. Code Ann. § 70.245 (the cause of death in the death certificate will be the terminal illness).

Under well-settled principles of statutory construction, because the term "suicide" is unambiguous, the Court need not turn to any secondary sources in construing the term. Def.'s Br. 8. In any event, the legislative history merely confirms the plain meaning of "suicide." Plaintiffs contend that legislative history is silent as to whether the Assisted Suicide Statute prohibits physician-assisted suicide. Pls.' Opp. 14. Even if that were so, which it is not, *see* Def.'s Br. 10-12, Plaintiffs, not the Attorney General, have the burden of pointing to some indication from the Legislature that the statutory term "suicide" has anything other than its plain meaning. Plaintiffs fail to do so. Nor do Plaintiffs counter the Legislature's decision not to amend the statute in light of the *Quill* and *Glucksberg* opinions. Def.'s Br. 11-12. Plaintiffs cite general cautions against interpreting a legislature's failure to enact a provision, but none of those involve failure to *amend* a statute after it has been interpreted a particular way by the courts. Pls.' Opp. 16. In the latter circumstance, a legislature's failure to amend a statute signifies that the courts' interpretation is "incorporated into the language of the act itself." Def.'s Br. 11-12 (quoting *Knight-Ridder Broad., Inc. v. Greenberg*, 70 N.Y.2d 151, 157 (1987)). Here, the Legislature's silence in the aftermath of *Quill* and *Glucksberg* is authoritative.

Because Plaintiffs seek declaratory relief as to the interpretation of the Assisted Suicide Statute, and because the meaning of "suicide" is clear from the face of the statute, not to mention

its legislative history, the Court needs no further development of a factual record. Consequently, the affidavits of Drs. Kress, Morris and Quill (Doc. Nos. 46, 47, 48) regarding their own views on the meaning of "suicide" may be disregarded, as can the policy statements submitted by Plaintiffs (attached as Exs. 1-4 to Schallert Aff. (Doc. Nos. 36-39)).

POINT III

PLAINTIFFS FAIL TO DISPUTE THAT THE EQUAL PROTECTION CLAIM IS FORECLOSED BY FEDERAL LAW

In the opening brief, the Attorney General presented irrefutable authority that Plaintiffs' equal protection claim was foreclosed by federal law. The Attorney General demonstrated that (1) the State's equal protection claim is coextensive with, and no broader than, the U.S. Constitution's equal protection clause, (2) the U.S. Supreme Court has ruled that New York's Assisted Suicide Statute does not violate the U.S. Constitution's equal protection clause, and it therefore follows that (3) the Assisted Suicide Statute does not violate the State's equal protection clause. Def.'s Br. 12-14. Plaintiffs have not rebutted the Attorney General's showing that the clauses are coextensive; nor do Plaintiffs dispute that as decided in *Quill*, 521 U.S. 793, the Assisted Suicide Statute does not violate federal equal protection law. *See* Pls.' Opp. 23-25. Plaintiffs therefore cannot defend their State equal protection claim.

Plaintiffs' main argument is a misguided attempt to distinguish *Quill* on the grounds that *Quill* and this action involve different classifications of persons. On the contrary, the equal protection claims in both complaints are based on the very same classifications. In *Quill*, Dr. Quill and other plaintiffs alleged that "mentally competent, terminally ill patients . . . who are suffering great pain and desire a doctor's help in taking their own lives" are treated differently from "competent persons [who] refuse life-sustaining medical treatment." *Quill*, 521 U.S. at 797

(citing Dr. Quill's appellate brief).[3] Here, Dr. Quill and other plaintiffs merely bring the same allegations, now in State court: that "mentally-competent, terminally-ill New Yorkers who wish to . . . obtain a prescription from their physicians for medications they could ingest to achieve a peaceful death" are treated differently from those patients who can "direct that their life-sustaining treatment be withdrawn" or who are eligible for "terminal sedation." Compl. ¶¶ 1, 59. Plaintiffs point to Justice Stevens's concurring opinion, stating that *Quill* does not foreclose "the possibility that some application" of the Assisted Suicide statute may implicate intolerable intrusions on a patient's freedom. Pls.' Opp. 26 (citing *Quill*, 521 U.S. at 809 n.13). Setting aside the obvious fact that Justice Stevens's footnoted dicta was not part of the Court's holding, Plaintiffs do not show how the Complaint's allegations are different in any way from those discussed explicitly and in some detail by the Supreme Court. The holding in *Quill* applies directly to this case.

Notably, Plaintiffs fail to contest the Supreme Court's discussion of the rational basis for the Assisted Suicide Statute, including the multiple reasons for distinguishing physician-assisted suicide from withdrawing life-saving treatment. Pls.' Opp. 24-25; Def.'s Br. 17-18. Nor do Plaintiffs contest the Supreme Court's recognition of New York's important public interest in preventing physician-assisted suicide. Pls.' Opp. 24-25; Def.'s Br. 18-19. Instead, Plaintiffs rely on the procedural posture of a motion to dismiss, claiming vaguely that this action presents questions of "fact" not presented to in *Quill*. Pls.' Opp. 24. Plaintiffs, however, fail to identify one allegation of fact not presented to and addressed by *Quill*. The Supreme Court was fully equipped to evaluate the motion to dismiss Dr. Quill's federal complaint without proceeding to discovery. This Court may do the same with Dr. Quill's State proceeding.

[3] *Quill* addressed not only the withdrawal of life-sustaining treatment, but also palliative sedation. *See* Def.'s Br. 17-18 (citing *Quill*, 521 U.S. at 802).

POINT IV

PLAINTIFFS FAIL TO PLEAD A VIOLATION OF A RIGHT TO SUBSTANTIVE DUE PROCESS

Plaintiffs' opposition does nothing to refute the Attorney General's clear showing that the Complaint fails as a matter of law in pleading a substantive due process violation.

A. Federal Law Provides Clear Guidance on Plaintiffs' Due Process Claim

First, Plaintiffs fail to contest the close alignment between federal and State due process law. While State substantive due process law has at times provided more protections than federal due process law, those extensions have been limited to the state action requirement and criminal proceedings. Def.'s Br. 24-25. Indeed, Plaintiffs cite the same cases that were cited and distinguished in the Attorney General's opening brief. *See id.* at 24-25 (discussing *People v. LaValle*, 3 N.Y.3d 88 (2004), *Cooper v. Morin*, 49 N.Y.2d 69 (1979), and *Sharrock v. Dell Buick-Cadillac*, 45 N.Y.2d 152 (1978)); Pls.' Opp. 19 (same). In *Sharrock*, for instance, the holding was limited to the scope of the state action requirements in the clauses, given that the New York clause excluded the word "state." Def.'s Br. 24. *LaValle* and *Cooper* both involve the rights of criminal defendants, prisoners or detainees. Def.'s Br. 24-25. Neither of those instances applies here.

Plaintiffs therefore fail to explain why New York courts should not be guided by the Supreme Court's holding in *Glucksberg*, 521 U.S. 702, just as they have been guided by federal law in assessing a multitude of other substantive due process claims. *See* Def.'s Br. 24. Plaintiffs merely cite dicta in *Glucksberg* allowing that the deliberation of physician-assisted suicide should continue. Pls.' Opp. 25. But *Glucksberg* referred expressly to a "debate"—a matter of legislative decision-making, not constitutional law. 521 U.S. at 735. Plaintiffs' Complaint is an attempt to bypass that debate. Plaintiffs also underscore that *Glucksberg* applied

to a "particular class," Pls.' Opp. 26 (citing *Glucksberg*, 521 U.S. at 735 n.4), implying that the Supreme Court's conclusions should not apply to the Plaintiffs here, but Plaintiffs fail to articulate how they are any different from the group that brought the *Glucksberg* action.

B. Plaintiffs' Opposition Fails to Articulate a Fundamental Right

Because Plaintiffs' opposition again fails to articulate a fundamental right acknowledged by New York law, Plaintiffs' substantive due process claim fails. Plaintiffs refer generally to the right to "privacy," "bodily integrity," and "self-determination with respect to one's body and to control the course of his medical treatment." Pls.' Opp. 18, 20. None of these characterizations, however, define the right that they in fact seek to have recognized, let alone define the right with the specificity required for substantive due process claims. Def.'s Br. 21. Plaintiffs seek to have this Court recognize a right to "aid-in-dying," which the Complaint defines as a right of "terminally-ill, mentally-competent New Yorkers . . . [to] obtain a prescription from their physicians for medication they could ingest to achieve a peaceful death." Compl. ¶ 1.[4] The opposition does not claim that New York law has ever recognized this conduct as a fundamental right. *See* Pls.' Opp. 18-21. Nor does the opposition point to any state whose highest court has recognized this conduct as a fundamental right. Vermont, Washington, and Oregon have addressed physician-assisted suicide through statutes, *id.* at 27; Montana has done so based on a statutory interpretation of the applicable criminal law, Def.'s Br. 23; and in New Mexico, only one lower court has addressed the issue, Pls.' Opp. 27.

Plaintiffs' contention that the right to certain types of medical choices should be

[4] Plaintiffs' opposition does not deny that this is the proper formulation of the right that they seek. They merely criticize the Attorney General's articulation of Plaintiffs' position as endorsing a purported right to "assisted suicide." Pls.' Opp. 21. In fact, the opening brief used the definition of the right articulated by the U.S. Supreme Court in *Glucksberg*, Def.'s Br. 21, but whether the right is described as a right to assistance in committing "suicide" or as a right to assistance in "achiev[ing] a peaceful death" is a rhetorical choice. *See supra* at 3-4.

extended—for the first time, by this Court—to a terminally ill patient who wants to receive a physician's assistance in committing suicide should be rejected. Pls.' Opp. 20. Plaintiffs suggest that fundamental rights should be defined not by the legal traditions of the State, but by polling data and magazine articles. *Id.* at 15 (citing an article in *The New Yorker*) & 27 (citing polling data that reflects a growing acceptance of aid-in-dying). Constitutional freedoms are not defined by trends in public opinion, but rather, by the extent to which the right is rooted in the State's traditions. Def.'s Br. 19-20.

This is one of the many reasons why *Lawrence v. Texas*, 539 U.S. 558 (2003), which held that Texas's anti-sodomy law violated the federal due process clause, is distinguishable from this case. Plaintiffs point to *Lawrence* as an example of a shift in thinking regarding the scope of a constitutional right. Pls.' Opp. 26-27. But *Lawrence* involved a right that federal law had acknowledged as fundamental for decades—a right of individuals to "choose to enter upon [a personal] relationship in the confines of their homes and their own private lives." *Lawrence*, 539 U.S. at 567. As such, the fundamental right alleged in *Lawrence* fell squarely within a long line of substantive due process cases. *Id.* at 564-65 (citing *Griswold v. Connecticut*, 381 U.S. 479 (1965), *Eisenstadt v. Baird*, 405 U.S. 438 (1972) & *Roe v. Wade*, 410 U.S. 113 (1973)). In overruling its decision in *Bowers v. Hardwick*, 478 U.S. 186 (1986), the Court found that "*Bowers* was not correct when it was decided" because it improperly defined the right in question and failed to recognize that the right was fundamental. *Lawrence*, 539 U.S. at 578. Thus, *Lawrence* does not signify a legal transformation, but rather, a correction of the Court's previous failure to recognize the right as one rooted in the nation's traditions. By contrast, Plaintiffs ask the Court to recognize a right that has never been recognized under New York's due process clause, let alone one rooted in the State's traditions.

Lawrence is also distinguishable with respect to the legal landscape in the years leading up to the decision. *Lawrence* noted that *Bowers* had been widely criticized and repudiated. 539 U.S. at 576. Between 1986 and 2003, twelve states had removed their anti-sodomy laws, and five state courts had declined to follow *Bowers* in interpreting their own states' parallel due process provisions. *Id.* at 575, 576. By contrast, *Glucksberg* has been widely followed by the states, none of whose highest courts have declined to follow *Glucksberg* in interpreting their due process provisions with respect to prohibitions of physician-assisted suicide. Def.'s Br. 23, 26. And Plaintiffs have not even attempted to argue that New York has ever recognized a fundamental right to assistance from a physician to terminate one's life, which, as the Supreme Court's discussion in *Quill* demonstrates, it has not.

C. Plaintiffs Cannot Contest the Important State Interests Served by the Prohibition of Physician-Assisted Suicide

Without pleading the implication of a fundamental right, the Assisted Suicide Statute is subject to rational basis review, which it more than satisfies. Def.'s Br. 26. In sum, Plaintiffs fail to identify any basis for contesting that, as recognized by the Supreme Court, the State has several important, legitimate interests that are served by prohibiting the prescription of lethal medications to terminally ill patients. The Attorney General's opening brief identified no less than five such interests: an interest in the preservation of life, preventing suicide as a public health problem (one often related to mental health issues), preserving the integrity and ethics of the medical profession, protecting vulnerable patients from various pressures to end their lives, and preventing a dangerous expansion of the practice. Def.'s Br. 26-29. Plaintiffs do not deny that these are important State interests, or that the Supreme Court concluded in *Glucksberg* that these interests are rationally furthered by a criminal prohibition of physician-assisted suicide. Pls.' Opp. 21-22.

The only arguments Plaintiffs do present are unpersuasive. First, Plaintiffs argue that since the *Glucksberg* ruling, new data is available regarding the positive effect that physician-assisted suicide has on patients and physicians. Pls.' Opp. 22. This contention is inapposite to the Court's analysis. Rational basis review does not entail fact-finding by the courts to weigh the wisdom of a policy choice. In rational basis review, as the Court of Appeals has underscored, a legislative choice "is *not subject to courtroom factfinding* and may be based on *rational speculation* unsupported by evidence or empirical data." *Affronti v. Crosson*, 95 N.Y.2d 713, 719 (2001) (emphasis in original) (internal quotations omitted). Whether or not State interests would be furthered by the legalization of physician-assisted suicide is not relevant. Nor indeed would it be relevant if, on balance, the State had a *greater* interest in legalizing the conduct, compared to continuing to prohibit the conduct. All that is relevant is whether Plaintiffs can plead that *no* State interest is furthered by the prohibition of physician-assisted suicide. *See Heller v. Doe*, 509 U.S. 312, 320 (1993) ("[A] classification must be upheld . . . if there is any reasonably conceivable state of facts that could provide a rational basis for the classification.") (internal quotations omitted); *Hernandez v. Robles*, 7 N.Y.3d 338, 365 (2006) ("Rational basis scrutiny is highly indulgent towards the State's classifications."). Plaintiffs do not even attempt to meet this standard. Nor could they, as the State interests furthered here are more than legitimate, as recognized by the Supreme Court.

Plaintiffs also argue that the State's concerns about the dangers of physician-assisted suicide have been addressed by the "aid-in-dying" statutory schemes enacted in other states, such as Oregon, and that the Supreme Court's fears outlined in *Glucksberg* have not materialized. Pls.' Opp. 22, 27. This contention provides no comfort here, where Plaintiffs seek judicial action. The states that have legalized physician-assisted suicide with statutory schemes have

created a variety of protocols to protect vulnerable individuals facing end-of-life decisions. In Oregon, for instance, the physician-assisted suicide statute specifies procedures for, inter alia, who may request medication, the form of the request, physician responsibilities, the elements of an informed decision, family notifications, rescinding requests, and waiting periods. *See* Or. Rev. Stat. §§ 127.800-127.897. In other words, because Plaintiffs seek a judicial remedy, rather than a detailed legislative design, there is no reason to believe that ruling in their favor would not result in the same risks underscored in *Glucksberg*. Def.'s Br. 29-30.

Plaintiffs cite the recent opinion from the Supreme Court of Canada finding that under the Canadian Charter, terminally ill individuals have a constitutional right to a physician's assistance in dying. Pls.' Opp. 22, 27 (citing *Carter v. Canada (Attorney General)*, 2015 S.C.C. 5 (2015) ("*Carter*") (attached as Ex. 6 to Schallert Aff. (Doc. No. 41))). The Canadian decision is irrelevant here for many reasons. For instance, Canadian constitutional law employs a different standard of review for alleged violations of personal liberties. Instead of subjecting laws to rational basis review, the Canadian courts impose a much more demanding standard that strikes down a law that imposes on certain liberties if the law is arbitrary, overbroad, or with consequences that are grossly disproportionate to their object. *Carter* ¶ 72. Also, the *Carter* decision framed the governmental interest in preventing physician-assisted suicide much more narrowly—to protect vulnerable persons from being induced to commit suicide at a time of weakness—than the Supreme Court has done in *Glucksberg*. *See id.* ¶ 78; Def.'s Br. 26-29. In any event, even if the *Carter* opinion had persuasive weight here, which it does not, Canada's Supreme Court implicitly acknowledged that it could not permit physician-assisted suicide using judicial authority alone. The decision suspended the declaration of the statute's invalidity for *twelve months* so that the national legislature could develop a detailed statutory scheme that

would protect the individuals affected by such a practice. *Carter* ¶ 128. In other words, Plaintiffs' reference to other jurisdictions does nothing to explain why New York's courts should use judicial authority to legalize this long-prohibited conduct.

D. Plaintiffs' Opposition Confirms the Central Role of the State Legislature in Addressing Plaintiffs' Concerns

As discussed in the opening brief, physician-assisted suicide raises serious concerns about, for instance, potential abuse, mental health, and the role of the physician in ending another person's life. These concerns not only illustrate a rational basis for prohibiting physician-assisted suicide, but also explain why legalizing such a practice requires careful regulation by the Legislature, not the courts. Def.'s Br. 26-30. Plaintiffs themselves make clear at several points in their opposition that what they seek cannot be accomplished through a judicial remedy. They refer to growing data regarding the effect of physician-assisted suicide on vulnerable populations, Pls.' Opp. 22-23, but data analysis is inherently better suited to the Legislature, which can consider broad consequences of policy decisions without being limited to the particularized circumstances of the litigants in a case. *See Higby v. Mahoney*, 48 N.Y.2d 15, 18-19 (1979) ("[T]he Legislature has far greater capabilities to gather relevant data and to elicit expressions of pertinent opinion on the issues at hand . . . .").

Plaintiffs also deny that comprehensive statutory schemes are required for other medical decisions regarding end-of-life treatments, Pls.' Opp. 28-29, but their examples all involve legislative guidance. Plaintiffs point to New York's Public Health Law regarding resuscitation of patients as an example of legislative deference to medical professionals, *id.* at 29, but the provisions provide yet another example of why legislation is necessary. The statute's provisions on resuscitation comprise nineteen individual sections, with a variety of specific rules and affirmative obligations designed by the Legislature to protect the patients. *See* N.Y. Pub. Health

L. §§ 2960-2979. Plaintiffs also refer to the "the experience with an open practice of aid-in-dying in Oregon, Washington, [and] Vermont," but these states have addressed the issue with statutory schemes. Pls.' Opp. 25. The experiences there tell the Court nothing about the effects of a judicial remedy on the practice of physician-assisted suicide. Plaintiffs also cite the Vermont statutory provision that allows medical best practices to govern the practice of physician-assisted suicide, but Plaintiffs acknowledge that this occurs only after three years of regulatory oversight. *Id.* at 29. Thus, none of the examples cited by Plaintiffs reflect an intention to allow "medical practice [to] evolve[] organically," as Plaintiffs request this Court to do. *Id.* A legislature can specify detailed provisions, or delegate rule-making to a state agency. This Court, which has only the very blunt instrument of striking down a statute's application, lacks the ability to create the detailed rules that Plaintiffs themselves applaud.

CONCLUSION

For the foregoing reasons, and for those set forth in the Attorney General's opening brief, 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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