To Be Argued By:
EDWIN G. SCHALLERT

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New York Supreme Court

APPELLATE DIVISION—FIRST DEPARTMENT

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-Appellants,

—against—

ERIC SCHNEIDERMAN, in his official capacity as ATTORNEY GENERAL OF THE STATE OF NEW YORK,

Defendant-Respondent,

JANET DIFIORE, in her official capacity as DISTRICT ATTORNEY OF WESTCHESTER COUNTY, SANDRA DOORLEY, in her official capacity as DISTRICT ATTORNEY OF MONROE COUNTY, KAREN HEGGEN, in her official capacity as DISTRICT ATTORNEY OF SARATOGA COUNTY, ROBERT JOHNSON, in his official capacity as DISTRICT ATTORNEY OF BRONX COUNTY and CYRUS R. VANCE, JR., in his official capacity as DISTRICT ATTORNEY OF NEW YORK COUNTY,

Defendants.

BRIEF FOR PLAINTIFFS-APPELLANTS

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PRELIMINARY STATEMENT

This action was brought by terminally-ill, mentally-competent patients and by medical professionals who regularly care for or counsel such patients. The patients seek to exercise control, avoid a loss of dignity and reduce unbearable suffering as they approach death by obtaining a prescription from their physicians for medication they could ingest to achieve a peaceful death – a practice known as aid-in-dying. The Complaint sought (i) a declaration that a physician who provides aid-in-dying does not violate New York's Assisted Suicide Statute[1]; (ii) a declaration that, if the Assisted Suicide Statute applies to aid-in-dying, the Statute would violate the Due Process Clause of New York's Constitution; and (iii) a declaration that, if the Assisted Suicide Statute applies to aid-in-dying, the Statute would violate the Equal Protection Clause of New York's Constitution.

The trial court erroneously granted Defendant's motion to dismiss the Complaint for failure to state a cause of action. In dismissing Plaintiffs' statutory claim, the trial court failed to credit or even to address the Complaint's factual allegations that aid-in-dying is not assisted suicide and that aid-in-dying is indistinguishable from other lawful medical practices. For example, the Complaint

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[1] New York Penal Law §§ 120.30 and 125.15 (the "Assisted Suicide Statute" or the "Statute") provide that "promoting a suicide attempt" by "intentionally caus[ing] or aid[ing] another person to attempt suicide" or "to commit suicide" constitute felonies.

as well as supporting affidavits explained that aid-in-dying is a medically and ethically appropriate course of treatment for patients facing unbearable suffering in the final stages of the dying process; that medical and public health professionals reject the use of the term "suicide" to refer to aid-in-dying; and that aid-in-dying is indistinguishable from other lawful practices like terminal sedation – the administration of drugs to keep the patient continuously in deep sedation, with food and fluid withheld until death results.

The trial court further erred by dismissing Plaintiffs' causes of action alleging violations of the Due Process Clause and the Equal Protection Clause of the New York Constitution. New York has long recognized a common law fundamental right to self-determination with respect to one's body and to control the course of one's medical treatment. The Complaint pleads facts to establish that application of the Assisted Suicide Statute to aid-in-dying would infringe this right in violation of the Due Process and Equal Protection Clauses of the New York Constitution.

In assessing Plaintiffs' constitutional claims, questions regarding Plaintiffs' privacy and liberty interests and any State interest that may exist in prohibiting aid-in-dying necessarily require development of an evidentiary record, not dismissal of the Complaint at the pleading stage. Moreover, the trial court did not discuss Plaintiffs' due process claim and dismissed Plaintiffs' equal protection claim based

upon inapposite authority that did not involve application of the New York Constitution to aid-in-dying.

The facts alleged in the Complaint, and the affidavits submitted in opposition to Defendant's motion to dismiss, more than suffice to state justiciable statutory and constitutional claims. Plaintiffs' claims should proceed so that Plaintiffs have their day in court to present the profoundly important issues raised by this lawsuit.

QUESTIONS PRESENTED

1. Did the trial court err in dismissing Plaintiffs' claim that the Assisted Suicide Statute does not apply to aid-in-dying when it failed to credit the Complaint's factual allegations that aid-in-dying is not suicide and that aid-in-dying is indistinguishable from other lawful conduct?
2. Did the trial court err in dismissing Plaintiffs' claims that the Assisted Suicide Statute, if applied to aid-in-dying, violates the Due Process Clause and the Equal Protection Clause of the New York Constitution when it (i) failed to consider New York's broad fundamental right to self-determination, (ii) failed to acknowledge the need for a developed record concerning Plaintiffs' privacy and liberty interests and any State interest in prohibiting aid-in-dying, and (iii) relied on inapposite legal authority?

STATEMENT OF THE NATURE OF THE CASE AND THE FACTS

Plaintiffs are mentally-competent patients with terminal illnesses and medical professionals who regularly care for or counsel such patients. On February 4, 2015, Plaintiffs filed in New York Supreme Court, New York County a three-count Complaint seeking a declaration that "the Assisted Suicide Statute does not encompass the conduct of a New York licensed physician who provides aid-in-dying to a mentally-competent, terminally-ill individual who has requested such aid." Compl. ¶ 3 (R. 23). The Complaint also seeks a declaration that the application of the Assisted Suicide Statute to aid-in-dying would violate the Due Process and Equal Protection provisions of New York's Constitution. *Id.* [2]

The Complaint includes numerous factual allegations that aid-in-dying is not assisted suicide and that aid-in-dying is indistinguishable from other lawful practices, such as terminal sedation. *See, e.g.*, Compl. ¶ 38 (R. 36) (Aid-in-dying is "a recognized term of art for the medical practice of providing a mentally-competent, terminally-ill patient with a prescription for medication that the patient

[2] The Complaint named as defendants the New York State Attorney General and the District Attorneys for each district in which a Plaintiff resides. Rather than burdening the Court with additional filings, Plaintiffs and the District Attorneys entered into a stipulation that they would be bound by any result reached in the litigation between Plaintiffs and the Attorney General. As part of the stipulation, this action was discontinued without prejudice as to the District Attorney defendants.

may choose to take in order to bring about a peaceful death if the patient finds his or her dying process unbearable….It is recognized that what is causing the death of a patient choosing aid-in-dying is the underlying terminal illness."); *id.* ¶ 44 (R. 38) ("Public health, medical, and mental health professionals . . . recognize that the choice of a dying patient for a peaceful death through aid-in-dying is not suicide, just as withholding or withdrawal of treatment or the choice of terminal or palliative sedation is not suicide.").

On April 13, 2015, Defendant Eric T. Schneiderman filed a motion to dismiss the Complaint pursuant to CPLR § 3211 (a)(7) on the ground that the Complaint failed to state a cause of action, and pursuant to CPLR § 3211(a)(2) on the ground that the Complaint does not present a justiciable controversy. (R. 47). Plaintiffs opposed Defendant's motion and requested oral argument. Plaintiffs also submitted affidavits from three medical professionals who regularly treat patients with terminal illnesses that explain why aid-in-dying is not suicide and why aid-in-dying is indistinguishable from other lawful conduct.

On October 23, 2015, without oral argument, the trial court issued a decision and order granting Defendant's motion to dismiss pursuant to CPLR § 3211 (a)(7). Although the trial court held that Plaintiffs "successfully pled that they are entitled to judicial review of the statutes in question," (Order at 6) (R. 11) the court concluded that the Complaint failed to state a cause of action. The trial court's

decision neither addressed nor credited the factual allegations of the Complaint. The trial court also failed to address Plaintiffs' cause of action alleging a violation of Plaintiffs' due process rights.

Plaintiffs timely filed a notice of appeal and now seek reversal of the trial court's dismissal of the Complaint.

ARGUMENT

I. THE TRIAL COURT IGNORED THE COMPLAINT'S FACTUAL ALLEGATIONS AND ERRONEOUSLY DISMISSED PLAINTIFFS' CLAIM FOR DECLARATORY RELIEF CONCERNING THE MEANING OF THE ASSISTED SUICIDE STATUTE.

The trial court made a passing reference to – but failed to follow – the standard of review on a motion to dismiss under CPLR § 3211 (a)(7). A complaint should "be construed liberally," and the court must "accept as true not only the complaint's material allegations but also whatever can be reasonably inferred therefrom in favor of the pleader." *P.T. Bank Cent. Asia v. ABN Amro Bank N.V.*, 301 A.D.2d 373, 375-76 (1st Dep't 2003) (citation and quotation marks omitted). A plaintiff is entitled to "the benefit of every possible favorable inference," and the Court's analysis is limited to determining "only whether the facts alleged fit within any cognizable legal theory." *Leon v. Martinez*, 84 N.Y.2d 83, 87-88 (1994) (citation and quotation marks omitted).

Moreover, on a motion to dismiss a declaratory judgment action, "[t]he sole consideration . . . is whether a cause of action for declaratory relief is set forth, not

the question of whether the plaintiff is entitled to a favorable declaration." *M.H. Mandelbaum Orthotic & Prosthetic Svcs., Inc. v. Werner*, 126 A.D.3d 857, at 858 (2d Dep't 2015) (citation and quotation marks omitted). A motion to dismiss a declaratory judgment action should be denied "where a cause of action is sufficient to invoke the court's power to render a declaratory judgment . . . as to the rights and other legal relations of the parties to a justiciable controversy . . . ." *DiGiorgio v. 1109-1113 Manhattan Ave. Partners, LLC*, 102 A.D.3d 725, 728 (2d Dep't 2013) (citation and quotation marks omitted) (alteration in original).

The trial court entirely failed to address, much less credit, the Complaint's factual allegations concerning aid-in-dying. The trial court's decision includes no discussion of Plaintiffs' factual allegations. Instead, the trial court engaged in an abstract discussion of statutory interpretation and prosecutorial discretion unrelated to the Assisted Suicide Statute or to aid-in-dying. Order at 7-9 (R. 12-14).

The only question at this stage of the proceedings is whether Plaintiffs have stated a claim. In dismissing the Complaint, the trial court ignored this Court's mandate that "[i]n a declaratory judgment action, the material facts and circumstances should be fully developed before the rights of the parties are adjudicated." *Wolff v. 969 Park Corp.*, 86 A.D.2d 519, 520 (1st Dep't 1982).

A. The Complaint Alleges That Aid-In-Dying Is Not Assisted Suicide.

Whether the Assisted Suicide Statute applies to aid-in-dying implicates factual issues that the trial court ignored and that cannot be resolved on a motion to dismiss. The Complaint alleges that "[i]n some cases, providing aid-in-dying is, in the professional judgment of a physician, a medically and ethically appropriate course of treatment." Compl. ¶ 45 (R. 38). Moreover, the Complaint expressly alleges that "[p]ublic health, medical, and mental health professionals, including the physician Plaintiffs, recognize that the choice of a dying patient for a peaceful death through aid-in-dying is not suicide." Compl. ¶ 44 (R. 38).

On Defendant's motion to dismiss, Plaintiffs provided the trial court with affidavits and additional evidence concerning aid-in-dying – none of which the trial court mentioned – to support the Complaint's allegations that aid-in-dying is not assisted suicide. *See Leon v. Martinez*, 84 N.Y.2d at 88 (on a motion to dismiss, a court "may freely consider affidavits submitted by the plaintiffs" (citation and quotation marks omitted)). For example, Plaintiffs provided evidence that professional organizations such as the American Public Health Association ("APHA") "[r]eject[ ] the use of inaccurate terms such as 'suicide' or 'assisted suicide' to refer to the choice of a mentally competent terminally ill patient to seek medications to bring about a peaceful and dignified death." Schallert Aff. Ex. 1 (APHA Policy No. 20086) (R. 145). Other professional organizations – such as

the American Medical Women's Association, the American Medical Student Association and the American College of Legal Medicine – have reached a similar conclusion and determined that aid-in-dying is an appropriate medical option for mentally-competent patients with terminal illnesses who are facing unbearable suffering in the final stages of the dying process. *Id.* Exs. 2, 3, 4 (R. 144-155). In states such as Oregon and Washington where aid-in-dying has been deemed lawful, the death certificates of patients who choose it as an option identify the cause of death as the patient's underlying disease, rather than "suicide" or the medication that is ingested. *See, e.g.*, Wash. Rev. Code Ann. § 70.245.040 ("the patient's death certificate . . . shall list the underlying terminal disease as the cause of death"); Schallert Aff. Ex. 8 at 48-49 (The Oregon Death with Dignity Act: A Guidebook for Health Care Professionals) (R. 326-327) ("the attending physician [should] complete the death certificate with the underlying terminal condition(s) as the cause of death, and the manner of death as 'natural').

The conclusion that aid-in-dying is not assisted suicide was reinforced by the expert affidavits of Dr. Eric Kress and Dr. Katherine Morris provided to the trial court. Based on his experience in Montana, where the Montana Supreme Court held that physicians providing aid-in-dying are not subject to criminal prosecution (*Baxter v. State*, 224 P.3d 1211 (Mont. 2009)), Dr. Kress opined that aid-in-dying is "one compassionate medical treatment option for dying patients" that should not

be considered suicide (Kress Aff. ¶ 9) (R. 438-439), that patients choosing aid-in-dying are "not suicidal" (*Id.* ¶ 10) (R. 439), that survivors of patients who choose aid-in-dying do not experience the adverse impact known to afflict survivors of someone who commits suicide (*Id.* ¶ 13) (R. 440), and that the practice is governed by professional standards. *Id.* ¶¶ 5, 12 (R. 437, 439). Based on her experience in other states where the practice is also lawful, Dr. Morris opined that she does not consider the deaths of her patients who choose aid-in-dying to be "any sort of 'suicide'" (Morris Aff. ¶ 12) (R. 444), that she attributes the cause of death of such patients to their underlying illnesses (*Id.*), and that aid-in-dying is governed – as is all of medical practice – by professional practice standards, also referred to as "best practices" and "standard of care." *Id.* ¶ 17 (R. 446). [3]

As other courts have recognized, the opinions of medical professionals are entitled to great weight in matters such as this.

> The judicial process has classically deferred to the medical profession to provide guidelines in determining questions involving medical standards; court decisions are ultimately shaped by medical opinions and properly so. No one can seriously doubt that medical questions of life and death, particularly the proprietary of medical

[3] Since briefing was completed on Defendant's motion, the *Journal of Palliative Medicine* released an article ahead of print in November 2015 that provides additional evidence that aid-in-dying is governed by clinical criteria and medical standards of care. *See* David Orentlicher, MD, et al., *Clinical Criteria for Physician Aid in Dying*, J. of Palliative Med., *available at* http://online.liebertpub.com/doi/abs/10.1089/jpm.2015.0092

> treatment for the terminally ill, are matters calling for the consideration of professional medical opinion.

Matter of Eichner (Fox), 73 A.D.2d 431, 462 (2d Dep't 1980) (citations omitted), order modified by, *Matter of Storar*, 52 N.Y.2d 363 (1981). The evidence submitted to the trial court is more than sufficient to support Plaintiffs' claim at the pleading stage.

B. The Complaint Alleges That Aid-In-Dying Is Indistinguishable From Other Lawful Practices.

The Complaint and the affidavits of Dr. Kress, Dr. Morris and Dr. Timothy Quill also explain why as a factual matter aid-in-dying is indistinguishable from other medical practices that are not considered suicide. Compl. ¶¶ 40-44 (R. 36-38); Kress Aff. ¶ 9 (R. 438); Morris Aff. ¶ 17 (R. 446); Quill Aff. ¶ 24 (R. 433). One such lawful option is terminal sedation – the administration of drugs to keep the patient continuously in deep sedation, with food and fluid withheld until death results. If the trial court had credited these factual allegations, Plaintiffs clearly plead that aid-in-dying is not unlawful. Indeed, the Supreme Court of Canada recently upheld the findings of a trial judge, after considering "the evidence of physicians and ethicists," that "there is no ethical distinction between physician-assisted death and other end-of-life practices whose outcome is highly likely to be death." *Carter v. Canada (Attorney General)*, 2015 SCC 5, ¶ 23 (2015) (attached as Exhibit 6 to the Schallert Affirmation) (R. 162).

Justice Stevens' concurrence in *Washington v. Glucksberg*, 521 U.S. 702, 750-51 (1997) (Stevens, J., concurring), a case that analyzed aid-in-dying under the federal constitution, similarly undermines any such distinctions:

> There may be little distinction between the intent of a terminally ill patient who decides to remove her life support and one who seeks the assistance of a doctor in ending her life; in both situations, the patient is seeking to hasten a certain, impending death. The doctor's intent might also be the same in prescribing lethal medication as it is in terminating life support. A doctor who fails to administer medical treatment to one who is dying from a disease could be doing so with an intent to harm or kill that patient. Conversely, a doctor who prescribes lethal medication does not necessarily intend the patient's death – rather that doctor may seek simply to ease the patient's suffering and to comply with her wishes. The illusory character of any differences in intent or causation is confirmed by the fact that the American Medical Association unequivocally endorses the practice of terminal sedation – the administration of sufficient dosages of pain-killing medication to terminally ill patients to protect them from excruciating pain even when it is clear that the time of death will be advanced. The purpose of terminal sedation is to ease the suffering of the patient and comply with her wishes, and the actual cause of death is the administration of heavy doses of lethal sedatives. This same intent and causation may exist when a doctor complies with a patient's request for lethal medication to hasten her death.

C. The Trial Court's Discussion Of The Law Was Flawed.

Instead of addressing the well-pleaded factual allegations of the Complaint, the trial court made several legal observations that were wrong or irrelevant.

First, the trial court asserted that the Complaint sought to rewrite "a portion of the language" of the Assisted Suicide Statute. Order at 7 (R.12). This is simply inaccurate. The Complaint asked the court to decide whether the Assisted Suicide Statute applies to the underlying facts; no rewriting of the law is needed to declare Plaintiffs' rights under the Statute.

Second, the trial court stated that the penal law as written was "clear and concise" (Order at 8) (R. 13) without any discussion of whether it applied to aid-in-dying. The Assisted Suicide Statute, on its face, does not purport to address aid-in-dying, nor has it been applied by any New York court to a physician providing aid-in-dying since its first codification nearly two hundred years ago. *See* Act of Dec. 10, 1828, ch. 20, § 4 1828 N.Y. Laws 19 (codified at N.Y. Rev. Stat. pt. 4, ch.1, tit. 2, art. 1, § 7, p. 661 (1829)). Indeed, aid-in-dying was not even a recognized concept in 1965 when the Assisted Suicide Statute obtained its current wording with the enactment of the present New York Penal Code. Whether the Assisted Suicide Statue is "clear and concise" is hardly determinative of Plaintiffs' rights at the pleading stage.

Third, the trial court observed that "courts lack the authority to compel the prosecution of criminal actions" and that a court acts "beyond its jurisdiction" when it "assumes the role of the district attorney by compelling prosecution." Order at 9 (R. 14). These propositions may be correct, but they are entirely irrelevant to this case because the Complaint did not seek an order compelling prosecution of criminal actions.

Fourth, the trial court asserted that "to prohibit a district attorney from prosecuting an alleged violation of law" would "exceed" the Court's jurisdiction. Order at 9 (R.14). The trial court, however, manifestly has jurisdiction to determine whether the Assisted Suicide Statute applies to aid-in-dying and to determine whether any such application is constitutional. *See Matter of Eichner (Fox)*, 73 A.D.2d at 452-53 ("[W]hen appropriate litigants present the court with a vital problem involving private rights as well as public policy, we would be remiss if we declined to act. . . . [T]his power of interpretation must be lodged somewhere, and the custom of the constitution has lodged in the judges."). The trial court acknowledged as much when it held that "Plaintiffs have successfully pled that they are entitled to judicial review of the statutes in question." Order at 6 (R.11).

II. THE TRIAL COURT ERRONEOUSLY DISMISSED PLAINTIFFS' CLAIMS FOR VIOLATIONS OF THE DUE PROCESS CLAUSE AND THE EQUAL PROTECTION CLAUSE OF NEW YORK'S CONSTITUTION.

The Complaint alleges that application of the Assisted Suicide Statute to aid-in-dying would violate Plaintiffs' rights to privacy and other fundamental liberties without due process of law in violation of the Due Process Clause of the New York Constitution, article I, § 6. *See* Compl. ¶¶ 66-73 (R. 43-44). The Complaint also alleges that applying the Assisted Suicide Statute to physicians providing aid-in-dying would violate the Equal Protection Clause of the New York Constitution, article I, § 11, because the Assisted Suicide Statute would not treat equally all similarly situated patients who are in the final stages of a fatal illness. *See* Compl. ¶¶ 58-65 (R. 41-43).

When a statute burdens a fundamental right protected under the Due Process Clause, or when it treats differently similarly situated classes of individuals in a manner that burdens a fundamental right, it is subjected to strict scrutiny, "meaning that it will be sustained only if it is narrowly tailored to serve a compelling state interest." *Hernandez v. Robles*, 7 N.Y.3d 338, 375 (2006) (citation and quotation marks omitted). The trial court ignored New York's longstanding fundamental right to self-determination with respect to one's body and to control the course of his medical treatment, which is sufficiently broad to encompass aid-in-dying. Plaintiffs have pled facts to establish an infringement of this right to self-

determination in violation of both the Due Process Clause and Equal Protection Clause of the New York Constitution, if the Assisted Suicide Statute is applied to aid-in-dying.

Even if aid-in-dying is found not to implicate a fundamental right, Plaintiffs may succeed on their constitutional claims if they can demonstrate that a prohibition on aid-in-dying or that the distinctions drawn by the Assisted Suicide Statute are not rationally related to a legitimate government interest. *Hernandez*, 374 N.Y.3d at 375. This inquiry inherently requires development of a factual record, the resolution of which is wholly improper on a pre-answer motion to dismiss. The trial court failed to address these factual issues. The trial court also did not even mention Plaintiffs' Due Process claim and relied upon – and misconstrued – inapposite authority in disposing of Plaintiffs' Equal Protection claim.

A. The Trial Court Failed To Consider New York's Broad Fundamental Right To Self-Determination, Which Encompasses Aid-In Dying.

New York has long recognized a fundamental common law right to self-determination with respect to one's body and to control the course of his medical treatment. *See Rivers v. Katz*, 67 N.Y.2d 485, 492 (1986) ("It is a firmly established principle of the common law of New York that every individual of adult years and sound mind has a right to determine what shall be done with his

own body and to control the course of his medical treatment." (citations and quotation marks omitted)); *Matter of Delio v. Westchester Cnty. Med. Ctr.*, 129 A.D.2d 1, 13 (2d Dep't 1987) ("The right to self-determination with respect to one's body has a firmly established foundation in the common law.").

The Court of Appeals has broadly described the right to self-determination:

> In our system of a free government, where notions of individual autonomy and free choice are cherished, it is the individual who must have the final say in respect to decisions regarding his medical treatment in order to insure the greatest possible protection is accorded his autonomy and freedom from unwanted interference with the furtherance of his own desires.

Rivers, 67 N.Y.2d at 493 (citations and quotation marks omitted). This fundamental right to self-determination is described more broadly than the privacy rights recognized under the Federal Constitution. Although New York courts have not yet addressed the specific question of whether aid-in-dying is a fundamental right, the fundamental right to self-determination is certainly broad enough to encompass aid-in-dying. *See Delio*, 129 A.D.2d at 16 ("The primary focus evident in the Court of Appeals analysis is upon the patient's desires and his right to direct the course of his medical treatment rather than upon the specific treatment involved.").

Indeed, patients who seek aid-in-dying have the same stake as others in the autonomy, privacy, bodily integrity, and self-determination protected by the

fundamental liberties recognized in New York. *See Eichner*, 73 A.D.2d at 459 ("Individuals have an inherent right to prevent pointless, even cruel, prolongation of the act of dying. . . . [A] competent adult who is incurably and terminally ill has the right, if he so chooses, not to resist death and to die with dignity.") (citations and quotation marks omitted).

Prohibiting patients from choosing aid-in-dying would severely infringe these rights. *See Rivers*, 67 N.Y.2d at 493 (recognizing the "fundamental common-law right [to self-determination] is coextensive with the patient's liberty interest protected by the due process clause of our State Constitution" in context of refusing medical treatment (citation omitted)). Without having access to this medically and ethically appropriate end-of-life care, patients for whom aid-in-dying would be an appropriate option likely face further severe and needless suffering. *See, e.g.*, Compl. ¶¶ 43 (R. 37); Quill Aff. ¶ 6, 24 (R. 428, 433). They face the real possibility that their death will be drawn out, unbearable, and lacking in dignity and peace. *See, e.g.*, Compl. ¶ 33 (R. 32-33).

The Complaint alleges that patients who seek aid-in-dying are exercising a fundamental right to privacy and that any law prohibiting them from exercising that right is a violation of the due process guarantees of the New York Constitution. Compl. ¶ 67 (R. 43). The Complaint also alleges that, if the Assisted Suicide Statute is interpreted to encompass aid-in-dying, it deprives Plaintiffs of

equal protection of the law in violation of the New York Constitution. *Id.* ¶ 63 (R. 42). The Complaint further alleges that such prohibitions are not the least restrictive means of advancing a compelling state interest. *Id.* ¶¶ 64, 71 (R. 42-43). Plaintiffs' claims under the New York Constitution are properly pled.

B. Plaintiffs' Constitutional Claims Require Development Of An Evidentiary Record, Not Dismissal At The Pleading Stage.

Even if aid-in-dying is found not to involve a fundamental right, Plaintiffs may still succeed on their constitutional claims if they can show that a prohibition on aid-in-dying is not rationally related to a legitimate government interest. *Hernandez*, 374 N.Y.3d at 375. The Complaint alleges that a State prohibition on aid-in-dying has no rational basis (Compl. ¶¶ 64, 71) (R. 42-43); questions regarding whether any legitimate interest exists requires development of an evidentiary record.

Defendant argued to the trial court that it has an interest in preserving life, protecting the integrity and ethics of the medical profession, protecting vulnerable patients, and maintaining clear rules regarding assisted suicide. Although Plaintiffs are not required to present evidence at the pleading stage to survive a motion to dismiss, Plaintiffs provided the trial court with evidence that would rebut these asserted interests. For example, there is abundant evidence from Oregon that, since aid-in-dying became available, end-of-life care has improved in measurable ways: referrals to hospice care occur more often and earlier, and

palliative care and communication between patient and physician have improved. All of these developments improve quality of life of patients with terminal illnesses. *See, e.g.*, Quill Aff. ¶ 19 (R. 431); Morris Aff. ¶ 15 (R. 445); Schallert Aff. Ex. 9, at 4 (R. 409).

Extensive experience has also shown that where aid-in-dying is openly practiced, life may be extended, not shortened. In such states, "there is evidence that some patients may even survive longer because they have the option of dying on their own terms. Freed of the anxiety over loss of control and unbearable suffering, patients' remaining days are of higher quality." Quill Aff. ¶ 19 (R. 431). The Supreme Court of Canada recently upheld a trial court's factual finding, based on hearing extensive testimony from witnesses and experts, that "the prohibition on physician-assisted dying had the effect of forcing some individuals to take their own lives prematurely, for fear that they would be incapable of doing so when they reached the point where suffering was intolerable." *Carter*, 2015 SCC 5, at ¶ 57 (R. 206). The development of an evidentiary record was crucial, as the Canadian Supreme Court's decision cited over fifty times to the factual conclusions of the trial court that were based on the evidence presented. Plaintiffs are entitled to present similar evidence on a full record here.

Plaintiffs are also entitled to present evidence concerning how access to aid-in-dying affects their privacy and liberty interests that are at stake. For example,

the trial court should have the benefit of Plaintiffs' testimony concerning how access to aid-in-dying would provide the patient Plaintiffs with individual autonomy, free choice, privacy, and dignity as they approach the final stages of the dying process. The trial court should also have the benefit of testimony concerning how the uncertainty surrounding the legality of aid-in-dying has deprived the patient Plaintiffs of their fundamental right to self-determination and their right to life, liberty and happiness.

Only upon a developed evidentiary record can the State's interests in prohibiting aid-in-dying be weighed against Plaintiffs' privacy and liberty interests. Plaintiffs have asserted that the violation of their rights is not rationally related to any legitimate state interest, does not further an important state interest, nor is it the least restrictive means of advancing any compelling state interest. Compl. ¶¶ 64, 71 (R. 42-43). The trial court was required to credit these allegations on Defendant's motion to dismiss.

C. The Trial Court Ignored Plaintiffs' Due Process Claim And Relied Upon Inapposite Authority In Dismissing Plaintiffs' Equal Protection Claim.

The trial court entirely failed to address Plaintiffs' Due Process claim and articulated no basis for dismissing it. This was error. Plaintiffs have pled a claim for the violation of their due process rights for the reasons explained above. In dismissing Plaintiffs' Equal Protection claim, the trial court relied on *Bezio v.*

Dorsey, 21 N.Y.3d 93 (2013) and *Vacco v. Quill*, 521 U.S. 793 (1997). Those cases do not foreclose Plaintiffs' Equal Protection claim as a matter of law.

The trial court erroneously stated that "Plaintiffs' equal protection contentions were recently analyzed in *Bezio v. Dorsey*." Order at 10-11 (R. 14-15). *Bezio*, however, did not address aid-in-dying but instead addressed whether the rights of an inmate who undertook a hunger strike were violated by a judicial order permitting the State to feed him by nasogastric tube after his health devolved to the point that his condition became life threatening. *Bezio*, 21 N.Y.3d at 96. Although the court in *Bezio* rejected the prisoner's constitutional claims, it specifically distinguished his situation from that of "terminally-ill patients or those in an irreversible incapacitated condition as a result of illnesses or injuries beyond their control." *Id.* at 102-03. The court observed that "[i]n those circumstances, unlike this one, the patients were suffering from dire medical conditions that were not of their own making . . . ." *Id.* at 103. The Complaint in this case clearly alleges that Plaintiffs are afflicted with terminal illnesses; *Bezio* thus has no bearing on Plaintiffs' Equal Protection claim.

The trial court also erred when it stated that this case is "factually and legally indistinguishable from *Vacco.*" The claims in *Vacco* were brought under the United States Constitution, not the New York State Constitution. In any event, although the U.S. Supreme Court declined at the time to find a *federal*

constitutional right to choose aid-in-dying in *Vacco* (and in the companion case *Washington v. Glucksberg*), it left the matter open for states to determine the legality for themselves. *See Washington v. Glucksberg*, 521 U.S. 702, 735 (1997) ("Throughout the Nation, Americans are engaged in an earnest and profound debate about the morality, legality, and practicality of physician-assisted suicide. Our holding permits this debate to continue, as it should in a democratic society."); *Vacco*, 521 U.S. at 737 ("States are presently undertaking extensive and serious evaluation of physician-assisted suicide and other related issues. . . . In such circumstances, the . . . challenging task of crafting appropriate procedures for safeguarding . . . liberty interests is entrusted to the 'laboratory' of the States . . . ." (O'Connor, J., concurring) (second and third omissions in original) (citation and internal quotation marks omitted)).

The Supreme Court also carefully reserved the possibility that it might in the future, based upon particular circumstances, find that a prohibition on aid-in-dying violated the Equal Protection Clause of the Federal Constitution. *See Vacco*, 521 U.S. at 809 n.13 ("Justice Stevens observes that our holding today 'does not foreclose the possibility that some application of the New York statute may impose an intolerable intrusion on the patient's freedom.' This is true . . . .") (citations and quotation marks omitted). Accordingly, *Vacco* clearly does not foreclose a New

York court from finding that Plaintiffs' rights will be violated under the New York Constitution if the Assisted Suicide Statute is applied to aid-in-dying.

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

If the U.S. Supreme Court were today faced with the issues that were presented in *Vacco*, it would have the benefit of evidence of evolving societal views over the past eighteen years, including the adoption of policies by various medical associations that support aid-in-dying (Schallert Aff. Exs. 1, 2, 3, 4.) (R. 144-155), polls reflecting public acceptance of aid-in-dying (*see, e.g.*, Compl. ¶ 50) (R. 39), and developments in other countries that have recognized the right of a patient to physician assistance in achieving a peaceful death. *See, e.g.*, *Carter v.*

Canada (Attorney General), 2015 SCC 5 (2015) (R. 162) (striking down Canada's assisted suicide statute). The trial court's reliance on *Vacco* was thus misplaced.

CONCLUSION

For the foregoing reasons, this Court should reverse the trial court's order dismissing Plaintiffs' Complaint.

Dated: November 23, 2015
New York, New York

Respectfully submitted,

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STATEMENT PURSUANT TO CPLR 5531

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION—FIRST DEPARTMENT

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-Appellants,

—against—

Eric Schneiderman, in his official capacity as Attorney General of The State of New York,

Defendant-Respondent,

Janet DiFiore, in her official capacity as District Attorney of Westchester County, Sandra Doorley, in her official capacity as District Attorney of Monroe County, Karen Heggen, in her official capacity as District Attorney of Saratoga County, Robert Johnson, in his official capacity as District Attorney of Bronx County and Cyrus R. Vance, Jr., in his official capacity as District Attorney of New York County,

Defendants.

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1. The Index Number in the trial court was 151162/15.

2. The full names of the parties are as stated in caption above. The Attorney General's Office and Plaintiffs-Appellants voluntarily discontinued the action without prejudice against the following District Attorney Defendants: Janet DiFiori (Westchester County), Sandra Doorley (Monroe County), Karen Heggen (Saratoga County), Robert Johnson (Bronx County), and Cyrus Vance, Jr. (New York County).

3. The action was commenced in the Supreme Court, New York County.

4. The summons and complaint were served on all Defendants-Respondents on February 4, 2015. No answer has been served.

5. Plaintiffs-Appellants seek a declaration that a physician who provides aid-in-dying to a patient who has requested such aid does not violate New York Penal Law §§ 120.30 and 125.15 (the "Assisted Suicide Statute"). Plaintiffs-Appellants seek, in the alternative, a declaration that the application of the Assisted Suicide Statute to aid-in-dying violates the

Due Process and Equal Protection provisions of the New York State Constitution. Plaintiffs-Appellants seek an order permanently enjoining the Defendants, their, agents, and all those acting in concert with them, from prosecuting Plaintiffs-Appellants under the Assisted Suicide Statute for providing aid-in-dying to mentally-competent, terminally-ill individuals.

6. The appeal is from an order of the Supreme Court of the County of New York, Joan M. Kenney, J., dated October 16, 2015, entered in the New York County Clerk's Office on October 19, 2015.

7. The appeal is being perfected on the full record method.