PHYSICIAN-ASSISTED SUICIDE AND THE NEW YORK STATE CONSTITUTION

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On September 7, 2017, the New York State Court of Appeals ruled on the most significant state constitutional case that it had been presented in several years. In *Myers v. Schneiderman*,[1] the Court unanimously rejected a request to legalize physician-assisted suicide ("PAS"). This article will examine the background and the legal grounds of that historic ruling, as well as some reflections on our involvement in the case.

I. THE BACK STORY

For decades, advocates have been campaigning for the legalization of PAS.[2] In the early 1990s, this gained considerable public attention due to the activities of Dr. Jack Kevorkian.[3] Oregon legalized assisted suicide by legislation in 1994, and was the first state to do so.[4] Other legislative efforts failed, however, most prominently in unsuccessful ballot initiatives in Washington in 1991 and California in 1992.[5]

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[1] Myers v. Schneiderman, 85 N.E.3d 57 (N.Y. 2017).

[2] The advocates typically reject the term "suicide" and instead prefer neologisms like "medical aid in dying." As noted below, the courts in New York have categorically rejected this attempt to change the meaning of the well-understood word "suicide" in the Penal Law.

[3] *See Jack Kevorkian: Doctor (1928-2011)*, BIOGRAPHY, https://www.biography.com/people/jack-kevorkian-9364141 (last updated Dec. 3, 2015).

[4] *See 20 Years with Oregon's Assisted Suicide Law*, OR. RIGHT TO LIFE (Oct. 25, 2017), https://www.ortl.org/2017/10/pasdwdapress/.

[5] *See California Proposition 161, the Aid-in-Dying Act (1992)*, BALLOTPEDIA, https://ballotpedia.org/California_Proposition_161,_the_Aid-in-Dying_Act_(1992) (last visited Apr. 17, 2018); *Washington Aid-in-Dying, Initiative 119 (1991)*, BALLOTPEDIA, https://ballotpedia.org/Washington_Aid-in-Dying,_Initiative_119_(1991) (last visited Apr. 17,

In New York, the legalization effort was stymied in the legislative arena thanks to a report by the New York State Task Force on Life and the Law in 1994.[6] The Task Force is an advisory body with medical, legal, and ethical experts appointed by the Governor "who assist the State in developing public policy on issues related to medicine, law, and ethics."[7] After substantial consultation and deliberation, the Task Force came to a very strong unanimous conclusion:

> [T]he Task Force members unanimously recommend that existing law should not be changed to permit assisted suicide or euthanasia. Legalizing assisted suicide and euthanasia would pose profound risks to many individuals who are ill and vulnerable. The Task Force members concluded that the potential dangers of this dramatic change in public policy would outweigh any benefit that might be achieved.[8]

PAS advocates also pursued a litigation strategy. In 1994, lawsuits were filed in Washington and New York seeking to convince the federal courts that PAS was a protected right under the United States Constitution.[9] This was decisively defeated in 1997 when a unanimous Supreme Court rejected the federal constitutional arguments in *Washington v. Glucksberg*[10] and *Vacco v. Quill*.[11]

Undaunted, advocates returned to the legislative arena. Helped by the publicity surrounding the assisted suicide of Brittany Maynard in 2014,[12] they have been met with some successes.[13] They have so

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[6] *See Task Force on Life and the Law*, N.Y. STATE DEP'T OF HEALTH, https://www.health.ny.gov/regulations/task_force/ (last visited Apr. 17, 2018).

[7] *See About the Task Force on Life and the Law*, N.Y. STATE DEP'T OF HEALTH, https://www.health.ny.gov/regulations/task_force/about.htm (last visited Apr. 17, 2018).

[8] N.Y. STATE TASK FORCE ON LIFE AND THE LAW, WHEN DEATH IS SOUGHT: ASSISTED SUICIDE AND EUTHANASIA IN THE MEDICAL CONTEXT 120 (1994).

[9] *See* Ronald Sullivan, *Suit Challenges New York's Law Banning Doctor-Assisted Suicide*, N.Y. TIMES, July 22, 1994, at B3.

[10] Washington v. Glucksberg, 521 U.S. 702, 728 (1997).

[11] Vacco v. Quill, 521 U.S. 793, 809 (1997).

[12] *See* Lindsey Beyer, *Brittany Maynard, as Promised, Ends Her Life at 29*, WASH. POST (Nov. 2, 2014), https://www.washingtonpost.com/news/morning-mix/wp/2014/11/02/brittany-maynard-as-promised-ends-her-life-at-29/?utm_term=.d2e712ff9ae4.

[13] Legislative measures were passed in Washington (2008 by referendum), Vermont (2013), California (2015), Colorado (2016 by referendum), and the District of Columbia (2017). Bills and referenda have failed in many other states. *See California*, DEATH WITH DIGNITY, https://www.deathwithdignity.org/states/California/ (last visited Apr. 17, 2018); *Colorado*, DEATH WITH DIGNITY, https://www.deathwithdignity.org/states/colorado/ (last visited Apr. 17, 2018); *District of Columbia*, DEATH WITH DIGNITY, https://www.deathwithdignity.org/states/district-of-columbia/ (last visited Apr. 17, 2018); *Vermont*, DEATH WITH DIGNITY, https://www.deathwithdignity.org/states/vermont/ (last visited Apr. 17, 2018); *Washington*, DEATH WITH DIGNITY, https://www.deathwithdignity.org/states/vermont/ (last visited Apr. 17,

far made no progress in New York—their principal bill has only made minimal progress in the Assembly and none in the Senate.[14]

The bill is supported in New York primarily by End of Life Choices, a local advocacy group, and the New York chapter of Compassion & Choices, the leading national advocate for legalization of PAS.[15] There is a coalition in opposition that operates under the name New York Alliance Against Assisted Suicide, which includes disabilities rights groups such as Not Dead Yet, the Center for Disability Rights, and the New York Association on Independent Living; religious institutions like the New York State Catholic Conference, New Yorkers for Constitutional Freedoms (an evangelical Christian organization), and Agudath Israel (which represents Orthodox Jewish concerns); as well as secular groups like Democrats for Life of New York.[16] On the national level, leading medical organizations are opposed to legalizing PAS, such as the American Medical Association, the National Hospice & Palliative Care Organization, and the American Nurses Association, as well as disabilities rights and religious organizations.[17]

II. THE *MYERS* LITIGATION

The advocates have also turned to the courts to seek legalization under state constitutions, but their arguments have been uniformly rejected by state high courts.[18] In 2015, End of Life Choices New York, along with several doctors and patients, filed suit in state court seeking to overturn New York's ban on assisted suicide.[19] The case essentially argued that the word "suicide" in the Penal Law did not encompass PAS and, in the alternative, the ban violated the rights of

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[14] The bill was approved once in the Assembly Health Committee in 2016, but no further action was taken on the bill. *See* Assemb. B. 10059, 239th Legis. Reg. Sess. (N.Y. 2016); S.B. 7579, 239th Legis. Reg. Sess. (N.Y. 2016).

[15] *See Aid in Dying*, END OF LIFE CHOICES N.Y., http://endoflifechoicesny.org/advocacy/proposed-legislation/aid-in-dying/ (last visited Apr. 17, 2018); *Campaign Updates*, COMPASSION & CHOICES, https://www.compassionandchoices.org/new-york/campaign-updates/ (last visited Apr. 17, 2018).

[16] *See About New York Alliance Against Assisted Suicide*, N.Y. ALLIANCE AGAINST ASSISTED SUICIDE, https://nosuicideny.org/about/ (last visited Apr. 17, 2018).

[17] *See id.*

[18] *See* Sampson v. State, 31 P.3d 88, 99–100 (Alaska 2001); Krischer v. McIver, 697 So. 2d 97, 104 (Fla. 1997); People v. Kevorkian, 527 N.W.2d 714, 724 (Mich. 1994); Morris v. Brandenburg, 2016-NMSC-027, 376 P.3d 836, 857; *see also* Donaldson v. Lungren, 4 Cal. Rptr. 2d 59, 65 (Ct. App. 1992) (citations omitted) (refusing to grant constitutional protection, an appellate court rather than the state high court).

[19] *See* Myers v. Schneiderman, 85 N.E.3d 57, 60 (N.Y. 2017).

terminally-ill patients under the New York State Constitution's Due Process[20] and Equal Protection Clauses.[21]

Initially, we were concerned about whether the Attorney General would defend the current law.[22] In a series of same-sex marriage cases, the United States and state attorney generals declined to defend their laws,[23] which suggested the possibility that New York's progressive Attorney General might follow suit. However, the Attorney General's staff defended the state law vigorously and with great skill throughout the litigation. The plaintiffs, too, were very well represented.

The plaintiffs met with defeat from the start. Ruling on a motion to dismiss, the Supreme Court rejected all the plaintiffs' arguments.[24] The plaintiffs appealed, again presenting their constitutional and statutory arguments.[25] The Appellate Division also rejected all the plaintiffs' arguments and unanimously affirmed the judgment of the trial court.[26] At that point, it appeared that the case was at an end.

However, the Court of Appeals granted leave to appeal.[27] This was deeply concerning to PAS opponents. The conventional wisdom, at least with the U.S. Supreme Court, is that when a court of last resort takes a discretionary case, it is likely to reverse the lower court.[28] It indeed seemed strange that the Court of Appeals would take up a case that five lower court judges had found to be without merit.[29]

The case attracted considerable attention once it reached the Court of Appeals. Fourteen *amicus curiae* briefs were filed by disabilities

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[20] *See id.* at 61.

[21] *See id.*

[22] The initial named defendants included several county District Attorneys, but the Attorney General took over the full defense of the case. Myers v. Schneiderman, No. 151162/15, 2015 N.Y. Misc. LEXIS 3770, at *1 n.1 (Sup. Ct. Oct. 16, 2015).

[23] *See* Matt Apuzzo, *Holder Sees Way to Curb Bans on Gay Marriage*, N.Y. TIMES (Feb. 24, 2014), https://www.nytimes.com/2014/02/25/us/holder-says-state-attorneys-general-dont-have-to-defend-gay-marriage-bans.html.

[24] *See Myers*, 2015 N.Y. Misc. LEXIS 3770, at *12. In addition to the arguments we discuss, there were also procedural arguments in both the trial court and on appeal that are not of interest to this article. *See id.* at *4–5.

[25] *See* Myers v. Schneiderman, 31 N.Y.S.3d 45, 49 (App. Div. 2016).

[26] *See id.* at 55–56.

[27] *See* Myers v. Schneiderman, 85 N.E.3d 57, 61 (N.Y. 2017).

[28] *See* Casey C. Sullivan, *The Sixth Circuit Is the Most Reversed Appeals Court, if You Care*, FINDLAW: U.S. SIXTH CIR. (Feb. 17, 2017), http://blogs.findlaw.com/sixth_circuit/ 2017/02/the-sixth-circuit-is-the-most-reversed-appeals-court-if-you-care.html ("[W]hen the Supreme Court takes up a case, reversal is the norm."); *see also* Kedar S. Bhatia, *Stat Pack for October Term 2016*, SCOTUSBLOG 3 (June 28, 2017), http://www.scotusblog.com/wp-content/uploads/2017/06/SB_Stat_Pack_2017.06.28.pdf (finding that seventy-nine percent of cases were reversed by the United States Supreme Court during the October 2016 term).

[29] *Myers*, 31 N.Y.S.3d at 55–56; Myers v. Schneiderman, No. 151162/15, 2015 N.Y. Misc. LEXIS 3770, at *12 (Sup. Ct. Oct. 16, 2015).

rights, religious, legal, and medical groups.[30] Some of the briefs in support of the plaintiffs were filed by parties that we expected to have great influence on the Court, including the New York Civil Liberties Union, leaders of the New York State Assembly, and Professor Vincent Bonventre.[31]

The oral argument showed that the five judges of the Court[32] were deeply interested and engaged in the issue, and we were unable to discern a clear sense of where the Court might be leaning as a result of the arguments. It thus came as quite a surprise that the Court of Appeals also unanimously rejected all of the plaintiff's arguments.[33]

This article will focus on the Court's *per curiam* opinion, fleshing out their analysis with our additional legal and factual observations.

III. ASSISTED SUICIDE AND THE CONSTITUTION

Prior to *Myers*, the last major constitutional decision by the Court of Appeals was *Hernandez v. Robles*,[34] in which the Court declined to find a right to same-sex marriage.[35] In *Hernandez*, the Court began its analysis with an evaluation of the reasons underlying the law, and then went on to determine which constitutional standards to apply.[36] Although the *per curiam* opinion in *Myers* is organized differently, we consider it to be analytically clearer to follow the *Hernandez* outline.

Clear Definitions Produce Clear Thinking and Clear Law

Regardless of whether the Court was going to decide the case on Equal Protection or Due Process grounds, the critical question was the basis for the current law. In that analysis, clear definitions are the indispensable prerequisite for clear reasoning. This was

[30] The briefs can be found by searching at the Court of Appeals website for the *Myers* case at https://www.nycourts.gov/ctapps/courtpass/Public_search.aspx.

[31] Brief for New York Law Professors as Amici Curiae Supporting Plaintiffs-Appellants at 1, *Myers*, 85 N.E.3d (No. 151162/15); Brief for Amicus Curiae New York Civil Liberties Union, *Myers*, 85 N.E.3d (No. 115162/15); Brief for Amici Curiae in Support of Appellants at 1, *Myers*, 85 N.E.3d, 85 N.E.3d 57 (N.Y. 2017) (No. 151162/15).

[32] Chief Judge Janet DiFiore recused herself because she was a named defendant when she was the Westchester County District Attorney, and there was a vacancy due to the death of Judge Sheila Abdus-Salaam. *See* Claire Hughes, *N.Y.'s Highest Court to Hear "Aid in Dying" Appeal*, TIMES UNION, May 29, 2017, https://www.timesunion.com/local/article/N-Y-s-highest-court-to-hear-aid-in-dying-appeal-11181154.php.

[33] *Myers*, 85 N.E.3d at 60.

[34] Hernandez v. Robles, 855 N.E.2d 1 (N.Y. 2006).

[35] *Id.* at 5.

[36] *Id.* at 6.

particularly important, since the *Myers* plaintiffs relied heavily on confused and misleading definitions.[37]

IV. SUICIDE IS STILL REALLY SUICIDE

In their legislative efforts, as well as in both *Myers* and the New Mexico case, PAS advocates relied heavily on an argument that the word "suicide" does not encompass conduct that they define as "medical aid in dying."[38] All of the judges at every level who ruled on the *Myers* case flatly rejected this attempt of linguistic circumvention.[39]

The standard meaning of "suicide" is to take one's own life, and the meaning of "assisted suicide" certainly encompasses physicians who provide patients with lethal doses of medication to end their lives.[40] The relevant section of the New York Penal Law is very clear in defining assisted suicide as when one "intentionally . . . aids another person to commit suicide."[41] The drafters of the Penal Law specifically envisioned that the statute would encompass those who gave assistance in "the more sympathetic cases (e.g., suicide pacts, assistance rendered at the request of a person tortured by painful disease, and the like)."[42] This logically includes physicians. Moreover, in *Glucksberg*, the Court even noted that "for over 700 years, the Anglo-American common-law tradition has punished or otherwise disapproved of both suicide and assisting suicide."[43] Accordingly, "the prohibitions against assisting suicide never contained exceptions for those who were near death," including "those who [were] hopelessly diseased or fatally wounded."[44]

However, plaintiffs argued that a physician prescribing lethal medication to patients for the purpose of ending their lives is not assisted suicide but instead is "[medical] aid-in-dying."[45] For

[37] *See Myers*, 85 N.E.3d at 60.

[38] *See* Morris v. Brandenburg, 2016-NMSC-027, 376. P.3d 836, 841 (N.M. 2015); *Myers*, 85 N.E.3d at 61; Assemb. B. 10059, 239th Legis. Reg. Sess. § 2899-O(1)(B) (N.Y. 2016).

[39] *Myers*, 85 N.E.3d at 62; Myers v. Schneiderman, 31 N.Y.S.3d 45, 50 (App. Div. 2016); Myers v. Schneiderman, No. 151162/15, 2015 N.Y. Misc. LEXIS 3770, at *8 (Sup. Ct. Oct. 16, 2015). The Plaintiffs offered this primarily as a statutory argument. *Myers*, 85 N.E.3d at 61. But it is also very significant for the constitutional arguments and we address it as such.

[40] *See Myers*, 85 N.E.3d at 62.

[41] N.Y. PENAL LAW § 125.15(3) (McKinney 2018).

[42] *Id.* § 125.25 (Commission Staff Notes).

[43] Washington v. Glucksberg, 521 U.S. 702, 711 (1997) (citing Cruzan v. Dir., Mo. Dep't of Health, 497 U.S. 261, 294–95 (1990) (Scalia, J., concurring)).

[44] *Glucksberg*, 521 U.S. at 714–15 (quoting Blackburn v. State, 23 Ohio St. 146, 163 (1872)).

[45] *See* Brief of Plaintiffs-Appellants at 17, Myers v. Schneiderman, 85 N.E.3d 57 (N.Y. 2017) (No. 151162/15).

example, in New York State, the bill seeking to legalize PAS uses this terminology, in which "medical aid in dying" is defined as "the medical practice of a physician prescribing medication to a qualified individual that the individual may choose to self-administer to bring about death."[46]

Yet there is no reason for a physician to provide such medication in these circumstances, other than to assist patients in suicide. Based on the proposed legislation, the physician has to certify that he informed the patient of "the probable result of taking the medication"[47] — that is, the patient's death — and the patient has to make a specific request for "medication for the purpose of ending his or her life."[48] In other words, the physician is directly in the line of causality that brings about a patient's death. He is providing the patient with the instrumentality that he knows the patient will use to commit suicide. This process is explicitly within the standard meaning of assisted suicide as defined in the statute and would be a perfect example of accessorial liability for any other offense in the Penal Law.[49]

This attempt to redefine "suicide" into something else was thus properly rejected by the Court of Appeals, the Appellate Division, and the Supreme Court of New York, New York County.[50] The traditional legal wisdom of giving words their ordinary meaning held firm.[51]

V. ASSISTED SUICIDE IS NOT THE SAME AS PERMISSIBLE PALLIATIVE CARE

One of the central arguments offered by the Plaintiffs, before each court, was that a procedure they called "terminal sedation" was a lawful form of medical treatment.[52] They defined this term as "the administration of drugs to keep the patient continuously in deep

[46] Assemb. B. 10059, 239th Legis. Reg. Sess., § 2899-D(8) (N.Y. 2016).

[47] *Id.* § 2899-D(7)(c).

[48] *Id.* § 2899-E(1).

[49] *See* N.Y. PENAL LAW § 20.00 (McKinney 2018) ("When one person engages in conduct which constitutes an offense, another person is criminally liable for such conduct when, acting with the mental culpability required for the commission thereof, he . . . intentionally aids such person to engage in such conduct.").

[50] *Myers*, 85 N.E.3d at 62; Myers v. Schneiderman, 31 N.Y.S.3d 45, 51 (App. Div. 2016); Myers v. Schneiderman, No. 151162/15, 2015 N.Y. Misc. LEXIS 3770, at *12 (Sup. Ct. Oct. 16, 2015).

[51] *Myers*, 85 N.E.3d at 62; *Myers*, 31 N.Y.S.3d at 51; *Myers*, 2015 N.Y. Misc. LEXIS 3770, at *8.

[52] *See Myers*, 85 N.E.3d at 72; *Myers*, 31 N.Y.S.3d at 48–49.

sedation, with food and fluid withheld until death arrives."[53] They relied on this definition to try to draw an analogy with PAS to argue that if the first is acceptable then the second should be.[54]

But this obfuscates a crucial ethical and legal distinction between palliative sedation to unconsciousness and assisted suicide, by failing to account for the intention of the physician in providing the sedation. The American Medical Association's Code of Ethics states that while sedation to unconsciousness may be ethical under certain circumstances, it "must never be used to intentionally cause a patient's death."[55] Thus, the relevant distinction is between (a) sedation to unconsciousness *with* the intent to cause death and (b) sedation to unconsciousness *without* the intent to cause death. Since assisted suicide is explicitly used to intentionally cause death, it is actually analogous to the unethical practice of (a), not the ethical practice of (b).

Their argument also fails to account for the critical difference between a situation where death is accepted and death is caused. In the case of ethical palliative sedation, it is understood that death will happen due to other causes, such as the underlying illness.[56] In assisted suicide or palliative sedation with intent to cause death, the act of the doctor is materially different—the cause of death is no longer the underlying illness or the withholding of nutrition or hydration, but the death is directly caused by the doctor's use of the sedative.[57] Plaintiffs attempted to argue that in "aid-in-dying" the cause of death was still the underlying ailment, but the Court of Appeals, and the courts below, found this argument to have so little merit that they did not even discuss it.

Similar to medical ethics, the law recognizes the crucial distinction between sedation to unconsciousness *with* the intent to cause death and sedation to unconsciousness *without* the intent to cause death.[58] In *Vacco*, the Court noted that there are instances where physicians prescribe painkilling drugs that may also—as an incidental effect—

[53] Brief of Plaintiffs-Appellants at 6, *Myers*, 85 N.E.3d (No. 151162/15).

[54] *Id.* at 6–7.

[55] *Sedation to Unconsciousness in End-of-Life Care*, AM. MED. ASS'N, https://www.ama-assn.org/delivering-care/sedation-unconsciousness-end-life-care (last visited Apr. 18, 2018).

[56] Press Release, Ctr. to Advance Palliative Care, Palliative Sedation: Myth vs. Fact (Jan. 6, 2010), https://www.capc.org/about/press-media/press-releases/2010-1-6/palliative-sedation-myth-vs-fact/.

[57] *Palliative Sedation: The Ethical Controversy*, MEDSCAPE, https://www.medscape.org/viewarticle/499472 (last visited Apr. 18, 2018).

[58] Vacco v. Quill, 521 U.S. 793, 802 (1997).

"hasten a patient's death."[59] However, if the physician is acting in accord with the AMA Code of Ethics, then the physician's intent is "only to ease his patient's pain"[60] and not to intentionally cause death. In contrast, if the physician is prescribing the painkilling drugs to cause death, then the physician is engaging in an act of homicide—PAS if the patient requested it, but murder if the patient did not.

The analogy that is crucial to the plaintiffs' argument thus utterly fails. As noted by Judge Garcia in *Myers*, a physician who "administers terminal sedation does not intend to kill the patient, though that may be the eventual result."[61] Instead, the physician "intends only to respect the patient's right to die naturally and free from intrusion, and to alleviate any pain or discomfort that may accompany that decision."[62] The Court thus properly rejected Plaintiff's attempt to conflate the assisted suicide and palliative sedation.

VI. SUICIDE IS NOT THE SAME AS DECLINING MEDICAL TREATMENT

Although they both may result in death, PAS and declining unwanted medical treatment are not the same and cannot be treated as such. There are key distinctions in terms of causality and intent. These distinctions have been recognized by the Court of Appeals.[63]

In his concurrence in *Myers*, Judge Garcia explained that "[w]hen a patient refuses life-sustaining treatment and succumbs to illness, the cause of death is the underlying disease."[64] In contrast, when "lethal medication is ingested, the cause of death is not the pre-existing illness, but rather, the prescribed medication."[65] In other words, when a patient declines medical treatment, such as a ventilator, the patient dies from his underlying illness. There is no external agent or entity that brings about death. However, in assisted suicide, the doctor's prescription of the lethal medication is directly in the line of causality that leads to death—without the

[59] *Id.*

[60] *Id.*

[61] Myers v. Schneiderman, 85 N.E.3d 57, 89 (N.Y. 2017) (Garcia, J., concurring).

[62] *Id.*

[63] *See* Rivers v. Katz, 495 N.E.2d 337, 341 (N.Y. 1986) (citing *In re* Storar, 420 N.E.2d 64, 71 (N.Y. 1981)) ("[T]he right of a competent adult to refuse medical treatment must be honored, even though the recommended treatment may be beneficial or even necessary to preserve the patient's life.").

[64] *Myers*, 85 N.E.3d at 89 (Garcia, J., concurring).

[65] *Id.*

physician issuing the prescription the patient would not have died.

The commission of assisted suicide and the declining of medical treatment are also distinguished with regards to intent. In general, there is a difference between intentionally and unintentionally causing death: "[t]he law has long used actors' intent or purpose to distinguish between two acts that may have the same result."[66] For example, under the Penal Law, unintentional killings are treated differently than those that are done intentionally.[67] When applied to PAS, the intent to cause death are shared by both the physician who prescribes lethal medication and the patient himself. When a patient declines medical treatment, he does not intend death, but simply may want to avoid a burdensome treatment or accept death from the underlying condition. The physician likewise does not intend the patient's death, but rather intends to put the patient's decision into effect.

VII. THE STRONG JUSTIFICATIONS FOR THE CURRENT LAW

The Court of Appeals saw those distinctions properly and, thus, rejected the plaintiffs' attempt at definitional legerdemain. In the *per curiam* opinion, the Court summarized many policy reasons underlying the current ban on PAS. These include: "prohibiting intentional killing and preserving life; preventing suicide; maintaining physicians' role as their patients' healers; protecting vulnerable people from indifference, prejudice, and psychological and financial pressure to end their lives; and avoiding a possible slide towards euthanasia."[68] Because the Court cited these reasons in a rather conclusory fashion, we believe it is important and valuable to explain some of them more fully.

A. The PAS Ban Supports Current Efforts to Prevent Suicides

Suicide is a serious public health concern. It is the second leading non-disease cause of death for whites and for all those ages ten to fifty-four;[69] it kills almost as many people as homicides and motor

[66] Vacco v. Quill, 521 U.S. 793, 802 (1997) (citation omitted).

[67] *Compare* N.Y. PENAL LAW § 125.10 (McKinney 2018) (defining criminally negligent homicide), *with id.* § 125.25 (2018) (defining second degree murder, requiring intent on the part of the actor).

[68] *Myers*, 85 N.E.3d at 64 (quoting *Vacco*, 521 U.S. at 808–09).

[69] OFFICE OF QUALITY AND PATIENT SAFETY, N.Y. STATE DEP'T OF HEALTH, ANNUAL REPORT OF VITAL STATISTICS: NEW YORK STATE 2014 53 (2016).

vehicle accidents combined;[70] and the number of deaths from suicide has increased over twenty-six percent over the previous decade.[71] In response, clear messages to discourage suicide are ubiquitous in New York, such as billboards, signs on bridges, and posters on mass transit urging people who are contemplating suicide that "life is worth living." The New York State Office of Mental Health recently issued a comprehensive plan to prevent suicides across the state.[72] Suicide prevention is also a major component of state initiatives aimed at schools.[73] Legalization of PAS, even for a small class of persons, would contradict and undermine current efforts to prevent suicide.

Legalization, and the inevitable publicity surrounding cases of PAS, would also likely lead to an increase in suicides in general. Studies have shown that when assisted suicide is legalized, overall suicide rates are higher than in the general population.[74] In Oregon, for example, the overall suicide rate is forty-two percent higher than the national average.[75] While correlation is not proof of causation, this pattern cannot be easily dismissed as coincidence. The phenomena of "suicide contagion" and "suicide clusters", in which one suicide leads to others within a social group, is well recognized as a substantial danger.[76] Even popular culture is aware of it, for example in the increase in suicides after a suicide of a prominent celebrity.[77] The current ban on assisted suicide is thus a way to prevent an increased suicide rate, which would be undermined by legalizing PAS.

B. PAS Cannot Be Limited

Judge Fahey grounded his concurrence on the fact that a right to PAS would inevitably expand beyond the terminally-ill who face imminent death, to those who experience what they consider

[70] *Id.*

[71] *Id.* at 56.

[72] *See* SUICIDE PREVENTION OFFICE, N.Y. STATE OFFICE OF MENTAL HEALTH, 1,700 TOO MANY: NEW YORK STATE'S SUICIDE PREVENTION PLAN 2016-2017 (2016).

[73] *See, e.g.*, N.Y.'S SAFE SCHOOLS, SUICIDE: SCHOOL GUIDE FOR PREVENTING SUICIDE, https://safeschools.ny.gov/sites/default/files/Suicide.pdf.

[74] David Albert Jones & David Paton, *How Does Legalization of Physician-Assisted Suicide Affect Rates of Suicide?*, 108 S. MED. J. 599, 599, 602–03 (2015).

[75] XUN SHEN & LISA MILLET, OR. HEALTH AUTH., SUICIDES IN OREGON: TRENDS AND ASSOCIATED FACTORS 2003-2012 3 (2012).

[76] *See* Madelyn S. Gould & Alison M. Lake, *The Contagion of Suicidal Behavior*, *in* INST. OF MED. & NAT'L RES. COUNCIL, CONTAGION OF VIOLENCE: WORKSHOP SUMMARY 68, 68, 70 (2013), https://www.ncbi.nlm.nih.gov/books/NBK207262/ (last visited Mar. 19, 2018).

[77] *See id.* at 69.

"unbearable suffering."[78] In countries where it has been legalized, there has been a recent surge in support of extending PAS to those who simply feel old, isolated, or experience various forms of psychiatric suffering.[79] Belgium and the Netherlands have even gone so far as allowing involuntary euthanasia—killing people who did not even ask for death, including children.[80] Oregon regularly reports that the great majority of people who request deadly medicine are not doing so because of imminent death or intractable pain, but rather "the three most frequently reported end-of-life concerns were decreasing ability to participate in activities that made life enjoyable (88.1 percent), loss of autonomy (87.4 percent), and loss of dignity (67.1 percent)."[81]

Ultimately, there is a fine line between assisted suicide and euthanasia. In voluntary euthanasia, the physician brings about the patient's death directly at the patient's request.[82] Yet "[t]he common thread, more significant than the conceptual difference, is the use of a lethal dosage of medication intended to end the patient's life."[83] Judge Fahey mused that, "[i]f a person has the statutory or other right to physician-assisted suicide, does she lose the right to die if she suddenly becomes too physically weak to self-administer lethal prescribed drugs?"[84] Once legalized, assisted suicide cannot be effectively contained.

There is also no limiting principle for what constitutes a subjective state of "unbearable suffering." The views of different patients and different physicians will inevitably vary. This raises concerns as to who decides what suffering qualifies and what kinds of suffering actually qualify. Similarly, Judge Garcia noted that physicians may be "unable to accurately ascertain how much time a terminally-ill patient has remaining, or may misdiagnose an illness as terminal, thereby creating a risk that patients will elect assisted suicide based on inaccurate or misleading information."[85] In Oregon, some patients who requested lethal drugs did not use them until almost three years

[78] Myers v. Schneiderman, 85 N.E.3d 57, 80 (N.Y. 2017) (Fahey, J., concurring).

[79] *See id.* at 85–86.

[80] *See id.* at 82.

[81] PUB. HEALTH DIV., OR. HEALTH AUTH., OREGON DEATH WITH DIGNITY ACT: 2017 DATA SUMMARY 6 (2017). Only 21 percent cited "Inadequate pain control or concern about it." *Id.* at 10.

[82] *Myers*, 85 N.E.3d at 78, 79 (Fahey, J., concurring).

[83] *Id.* at 78.

[84] *Id.* at 81.

[85] *Id.* at 91 (Garcia, J., concurring) (citation omitted).

after their first request,[86] even though the law is supposed to encompass those whose prognosis is death within six months.[87] Yet advocates have openly and repeatedly stated that their ultimate goal is to permit assisted suicide for anyone who desires it, regardless of their medical condition.[88]

Efforts to create procedural protections are also likely to fail. Indeed, PAS advocates openly state that they reject any legislative protections, which they call "barriers,"[89] and would prefer for there to be no legal limits and for the medical community to self-regulate.[90] This is unequivocally at odds with the state interest in preventing mistakes and abuse of discretion, let alone the state interest in preserving life.

The question of whether legalized PAS could be limited was the subject of an interesting internal debate between Judge Rivera and Judge Garcia.[91] Although Judge Rivera concurred in the *per curiam* judgment, she raised the question of whether PAS could be legalized for those who are at the very end of life and in unbearable pain.[92] Yet Judge Garcia countered that the State's interests in preserving life and protecting the vulnerable still persist "irrespective of a patient's proximity to death or eligibility for terminal sedation."[93] As such, the State views the PAS ban as encouraging "the unconditional treatment of the terminally-ill and preserv[ing] the critical element of trust in a doctor-patient relationship at a time often marked by intense fear, uncertainty, and vulnerability."[94]

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[86] PUB. HEALTH DIV., OR. HEALTH AUTH., *supra* note 81, at 11.

[87] *Id.* at 4.

[88] SECRETARIAT OF PRO-LIFE ACTIVITIES, U.S. CONFERENCE OF CATHOLIC BISHOPS, ASSISTED SUICIDE AND EUTHANASIA: BEYOND TERMINAL ILLNESS 2, 5 (2017), http://www.usccb.org/issues-and-action/human-life-and-dignity/assisted-suicide/to-live-each-day/upload/suicidenonterminal2014edits.pdf ("A Dutch 'End-of-Life Clinic,' established by a pro-euthanasia group in 2012, provides euthanasia for patients whose regular physicians deny their request, including cases of 'a psychiatric or psychological condiction, dementia, or being tired of living.'").

[89] Kathryn L. Tucker, *End of Life Liberty in DC*, JURIST (Dec. 15, 2016), http://www.jurist.org/hotline/2016/12/end-of-life-liberty-in-dc.php.

[90] *Id.* Ms. Tucker is a leading advocate for PAS and was an attorney for the *Myers* Plaintiffs. *Id.*; Brief of Plaintiffs-Appellants at i, *Myers*, 85 N.E.3d (No. 151162/15).

[91] *See Myers*, 85 N.E.3d at 69–70, 74 (Rivera, J. concurring) (arguing that the state's interest in protecting life diminishes as the patient gets closer to death and that at the last stages before death the state's interest may be outweighed by the liberty interest of the patient); *id.* at 94 (Garcia, J., concurring) (disagreeing with Judge Rivera's assertion that the interest of the state diminishes as the patient nears death).

[92] *Id.* at 74 (Rivera, J., concurring).

[93] *Id.* at 93 (Garcia, J., concurring).

[94] *Id.* at 94.

C. The PAS Ban Upholds the State's Duty to Protect Vulnerable People

The ban on assisted suicide is supported by a well-established and legitimate state interest in protecting vulnerable persons.[95] Studies consistently show that disparities exist in access to, and quality of, healthcare across demographic categories, particularly race, sex, socioeconomic status, and geographic location.[96] These inequities are exacerbated by the economic pressures of the current medical system, where cost containment is a priority.[97] In this environment, pressure will inevitably be felt by low-income patients to choose suicide rather than putting an economic burden on their families. In fact, there have been several reported cases where insurance companies have denied coverage for life-sustaining treatments, only to offer to cover suicide drugs instead.[98] Over time, this could lead "to a particular risk of non-voluntary euthanasia when a patient's socioeconomic disadvantages, uninsured status, and/or dementia or mental incompetence make it impossible for the patient to advocate vigorously for his or her health care."[99]

Likewise, the risks presented by assisted suicide present a special danger for the elderly, people suffering from mental illness, and disabled people. The widespread and under-reported problem of elder abuse highlights the risk of undue influence in end-of-life decisions.[100] People with mental illness are also at a higher risk. A large number of people who request assisted suicide are suffering from treatable depression.[101] Indeed, legalized assisted suicide in the Netherlands has "already descended to the level of condoning the suicide or killing of people whose primary suffering is not physical

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[95] *Id.* at 64 (per curiam) (quoting Vacco v. Quill, 521 U.S. 793, 808–09 (1997)).

[96] *See, e.g.*, U.S. DEP'T OF HEALTH AND HUM. SERVS., 2014 NATIONAL HEALTHCARE QUALITY AND DISPARITIES REPORT 6 (2015).

[97] *See, e.g.*, Katrina Trinko, *How California's New Assisted Suicide Law Could Especially Hurt the Poor*, DAILY SIGNAL (Oct. 6, 2015), http://dailysignal.com/2015/10/06/how-californias-new-assisted-suicide-law-could-especially-hurt-poor/.

[98] *See id.*

[99] *Myers*, 85 N.E.3d at 83 (Fahey, J., concurring).

[100] LIFESPAN OF GREATER ROCHESTER, WEILL CORNELL MED. CTR. OF CORNELL UNIV. & N.Y.C. DEP'T FOR THE AGING, UNDER THE RADAR: NEW YORK STATE ELDER ABUSE PREVALENCE STUDY: SELF-REPORTED PREVALENCE AND DOCUMENTED CASE SURVEYS, 2–3 (2011), https://ocfs.ny.gov/main/reports/Under%20the%20Radar%2005%2012%2011%20final%20report.pdf ("141 out of 1,000 older New Yorkers have experienced an elder abuse event since turning age 60.").

[101] *See* HERBERT HENDIN, SEDUCED BY DEATH: DOCTORS, PATIENTS, AND ASSISTED SUICIDE, 34–35 (1998).

pain, but chronic depression."[102] Depressed individuals who request physician-assisted suicide generally are not likely to be treated for the underlying depressive disorder.[103] In Oregon, only 3.5% of those who request the drugs are referred for psychiatric evaluation in 2017.[104]

Disabled people are especially vulnerable. Legalizing assisted suicide would "convey a societal value judgment that such 'indignities' as physical vulnerability and dependence mean that life no longer has any intrinsic value."[105] Indeed, as seen in Oregon, that is precisely the message that is being received, since the vast majority of requests for lethal drugs are due to concerns about losing life functions—essentially, a fear of becoming disabled.[106] Yet as Judge Fahey noted, "[t]here is no lack of nobility or true dignity in being dependent on others . . . . It would be a profound mistake to equate limits imposed on a person's life with the conclusion that such a life has no value."[107]

VIII. THE CONSTITUTIONAL ANALYSIS

Having outlined the reasons and justifications for the law, the constitutional analysis can then fall into place. The plaintiffs claimed violations of both the Due Process and Equal Protection Clauses of the State Constitution.[108] The Court of Appeals has been firm that the New York State Constitution provides independent protections for individual rights.[109] The Court has maintained that it "is the final authority as to the meaning of the New York Constitution";[110] although it is not bound to follow the standards set by the United States Supreme Court, it does rely heavily on it:

> The governing principle is that our Constitution cannot afford less protection to our citizens than the Federal Constitution does, but it can give more. We have at times found our Due Process Clause to be more protective of rights than its federal

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[102] *Myers*, 85 N.E.3d at 85 (Fahey, J., concurring).

[103] *See* HENDIN, *supra* note 101, at 34–36.

[104] PUB. HEALTH DIV., OR. HEALTH AUTH., *supra* note 81, at 10.

[105] *Myers*, 85 N.E.3d at 84 (Fahey, J., concurring).

[106] *See* PUB. HEALTH DIV., OR. HEALTH AUTH., *supra* note 81, at 6.

[107] *Myers*, 85 N.E.3d at 84 (Fahey, J., concurring).

[108] *Id.* at 62 (per curiam).

[109] *See, e.g.*, People v. P.J. Video, Inc., 501 N.E.2d 556, 561 (N.Y. 1986) ("[W]e have frequently applied the State Constitution, in both civil and criminal matters, to define a broader scope of protection than that accorded by the Federal Constitution in cases concerning individual rights and liberties.").

[110] Hernandez, v. Robles, 855 N.E.2d 1, 9 (N.Y. 2006).

> counterpart, usually in cases involving the rights of criminal defendants or prisoners. In general, we have used the same analytical framework as the Supreme Court in considering due process cases, though our analysis may lead to different results. By contrast, we have held that our Equal Protection Clause "is no broader in coverage than the Federal provision.[111]

A. PAS Fails the Fundamental Right Tests

The threshold question is whether PAS is an unenumerated "fundamental right" under the state constitution and thus is protected under the Due Process Clause.[112] The question of how to identify and define a "fundamental right" has long bedeviled the courts. The very legitimacy of different levels of scrutiny for regulations of different kinds of unenumerated rights has itself been hotly contested.[113]

In recent years, scholars have identified two major—and arguably incompatible—conceptual approaches to this issue, each associated with a particular Supreme Court decision—*Obergefell*[114] and *Glucksberg*.[115] The *Glucksberg* test is whether the claimed right is "objectively, 'deeply rooted in this Nation's history and tradition,' and 'implicit in the concept of ordered liberty,' such that 'neither liberty nor justice would exist if they were sacrificed.'"[116] On the other hand, *Obergefell* applied a broader standard in determining if a liberty interest constitutes a fundamental right, saying that "[h]istory and tradition guide and discipline [our] inquiry but do not set its outer boundaries."[117] However, in *Obergefell* the Supreme Court specifically excluded its earlier rulings on assisted suicide from being affected by its new standard, stating that its reasoning in *Glucksberg* regarding assisted suicide remained "appropriate," as opposed to

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[111] *Id.* (first citing *P.J. Video*, 501 N.E.2d at 560; then quoting Under 21, Catholic Home Bureau for Dependent Children v. New York, 482 N.E.2d 1, 7 n.6) (internal citations omitted).

[112] *Myers*, 85 N.E.3d at 63.

[113] *See, e.g.*, Whole Women's Health v. Hellerstedt, 136 S. Ct. 2292, 2326–28 (2016) (Thomas, J., dissenting).

[114] Obergefell v. Hodges, 135 S. Ct. 2584 (2015).

[115] Washington v. Glucksberg, 521 U.S. 702 (1997); *see, e.g.*, Katherine Watson, Note & Comment, *When Substantive Due Process Meets Equal Protection: Reconciling* Obergefell *and* Glucksberg, 21 LEWIS & CLARK L. REV. 245, 247, 249–50 (2017) (exploring *Obergefell*'s and *Glucksberg*'s divergent approaches to Due Process analysis).

[116] *Glucksberg*, 521 U.S. at 720–21 (first quoting Moore v. East Cleveland, 431 U.S. 494, 503 (1977); then citing Snyder v. Massachusetts, 291 U.S. 97, 105 (1934); then quoting Palko v. Connecticut, 302 U.S. 319, 325, 326 (1937)) (internal citations omitted).

[117] *Obergefell*, 135 S. Ct. at 2598 (citing Lawrence v. Texas, 539 U.S. 558, 572 (2003)).

"other fundamental rights, including marriage and intimacy."[118]

Despite being asked to do so by the plaintiffs, the courts at all levels of the *Myers* litigation held to the *Glucksberg* test and refused to apply the more expansive approach of *Obergefell*.[119] In fact, aside from two brief and tangential references in one of the concurrences,[120] the Court of Appeals did not even discuss *Obergefell*.

Having made this critical choice of the standard of review, the Court of Appeals, and the lower courts before it, had no trouble in agreeing with the Supreme Court and finding that PAS fails the *Glucksberg* test.[121] In *Glucksberg*, the Supreme Court exhaustively catalogued the rejection of assisted suicide in Anglo-American legal history,[122] and the Court of Appeals in *Myers* adopted that analysis.[123] That history is unequivocal in rejecting any notion of a right to commit suicide, much less enlisting the assistance of another to do so.[124] The Court's conclusion is also supported by the fact that in the twenty years since *Glucksberg* and *Vacco*, every other state's highest court that has been asked to recognize PAS as a constitutional right has refused to do so.[125]

The plaintiffs' attempt to analogize PAS to a patient's right to decline medical treatment[126] was unpersuasive. The Court of Appeals has "never defined one's right to choose among medical treatments, or to refuse life-saving medical treatments, to include any broader 'right to die' or still broader right to obtain assistance from another to end one's life."[127] This is a crucial point, because it implicitly denies that assisted suicide is even a constitutionally-recognizable liberty interest, which is an indispensable requirement if it were to be considered a fundamental right.[128]

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[118] *Id.* at 2602. Justice Roberts, in dissent, argued that the Court had effectively overruled *Glucksberg*. *Id.* at 2621 (Roberts, C.J., dissenting). The Court of Appeals certainly did not see it that way. *See* Myers v. Schneiderman, 85 N.E.3d 57, 63 (N.Y. 2017) (quoting *Glucksberg*, 521 U.S. at 710, 728) (applying *Glucksberg* standard).

[119] *Myers*, 85 N.E.3d at 63 (quoting *Glucksberg*, 521 U.S. at 710, 728); Myers v. Schneiderman, 31 N.Y.S.3d 45, 49, 51–52 (App. Div. 2016); Myers v. Schneiderman, No. 151162/15, 2015 N.Y. Misc. LEXIS 3770, at *10–12 (Sup. Ct. 2015) (finding the case indistinguishable from *Vacco*, where the U.S. Supreme Court cited *Glucksberg* to support that New York's assisted suicide statute does not infringe on any fundamental rights).

[120] *See Myers*, 85 N.E.3d at 65, 75 (Rivera, J., concurring).

[121] *See id.* at 63 (per curiam).

[122] *Glucksberg*, 521 U.S. at 710–18.

[123] *See Myers*, 85 N.E.3d at 63 (quoting *Glucksberg*, 521 U.S. at 710, 728).

[124] *See Glucksberg*, 521 U.S. at 710–18.

[125] *See supra* note 18 and accompanying text.

[126] *Myers*, 85 N.E.3d at 63 (citations omitted).

[127] *Id.*

[128] *Cf. id.* (quoting *Glucksberg*, 521 U.S. 702, 710, 728 (1997)) ("In *Washington v. Glucksberg*, the United States Supreme Court 'examin[ed] our Nation's history, legal traditions, and

In fact, even the right to decline treatment has not been held to be a fundamental right, but rather has been considered just a liberty interest.[129] So if the Court accepted the plaintiffs' flawed analogy between PAS and declining treatment, it would still not support the notion that PAS is a fundamental right. Indeed, to grant the plaintiffs the ruling they desired[130] would produce an absurd result—the right to PAS would be given greater constitutional protection than the right to decline treatment.[131]

Even if the Court had applied the *Obergefell* test, the case would not have come out differently. *Obergefell* addressed whether to recognize social evolution about marriage, an existing institution that had already been deeply established in the law and long recognized as a fundamental right and a crucial component of society.[132] It built on a series of major decisions going back over fifty years that expanded notions of liberty in sexual and intimate relationships, in recent years particularly centering on marriage and homosexuality.[133] *Obergefell* was specifically dedicated to eliminating barriers to marriage for a class of persons who had experienced a history of disparate legal treatment and social obloquy, and to protect their dignity and that of their children so they could be full participants in society in the future.[134] Assisted suicide plainly has none of these characteristics, and there is thus no reason for a court to stretch the *Obergefell* standard so broadly as to encompass it. Indeed, outside of the area of sexuality and intimate relationships, the Supreme Court has not identified any new fundamental rights in decades.[135]

Having rejected the idea that PAS was a fundamental right, the Court was thus obliged to apply the rational basis standard in its Due

practices,' and concluded that 'the asserted "right" to assistance in committing suicide is not a fundamental liberty interest protected by the Due Process Clause' of the Federal Constitution.").

[129] *See*, *e.g.*, Rivers v. Katz, 495 N.E.2d 337, 341 (N.Y. 1986) (citations omitted).

[130] *Myers*, 85 N.E.3d at 60.

[131] *Compare id.* at 63 (articulating plaintiffs' argument that assisted suicide is a fundamental right), *with Rivers*, 495 N.E.2d at 341 (stating that the right to decline medical treatment is only a liberty interest).

[132] *See* Obergefell v. Hodges, 135 S. Ct. 2584, 2593, 2595, 2604 (2015).

[133] *See id.* at 2598–99 (citing Loving v. Virginia, 388 U.S. 1, 12 (1967); Zablocki v. Redhail, 434 U.S. 374, 384 (1978); Turner v. Safley, 482 U.S. 78, 95 (1987)).

[134] *See Obergefell*, 135 S. Ct. at 2600, 2604.

[135] *See 14th Amendment Timeline*, AM. BAR ASS'N, https://www.americanbar.org/groups/public_education/initiatives_awards/law-day-2017/fourteenth_amendmenttimeline.html (last visited Apr. 18, 2018) (providing a chronological overview of Supreme Court Fourteenth Amendment jurisprudence).

Process analysis.[136] Rational basis gives great weight to the judgment of the legislature, and will invalidate a statute only if it bears no rational relationship to a legitimate government purpose.[137] As the Court of Appeals has said, "[r]ational basis scrutiny is highly indulgent towards the State's classifications. Indeed, it is 'a paradigm of judicial restraint.'"[138] The *Myers* Court said that the challenger "bears the heavy burden of showing that a statute is so unrelated to the achievement of any combination of legitimate purposes as to be irrational[.]"[139]

Using this standard, the *Myers* court easily found the ban on PAS to be rationally related to many legitimate government objectives. As discussed at length above, the state has strong interests in protecting vulnerable people from potential abuse, preventing suicide in the general population, and more.[140] Relying also on interests identified by the Supreme Court in *Vacco*, the Court easily concluded that "the Legislature of this State has permissibly concluded that an absolute ban on assisted suicide is the most reliable, effective, and administrable means of protecting against its dangers."[141]

B. For Equal Protection: Distinctions Matter

The plaintiffs also claimed that the ban on assisted suicide violated the state Equal Protection Clause, arguing that the current law treated terminally-ill patients, who wished aid in dying, differently from patients who wished to decline life-sustaining treatment.[142]

In evaluating Equal Protection claims, the Court of Appeals has followed the approach of the Supreme Court: "we have held that our Equal Protection Clause 'is no broader in coverage than the Federal provision[.]'"[143] The Supreme Court has described this standard:

> [A] classification neither involving fundamental rights nor proceeding along suspect lines is accorded a strong presumption of validity. Such a classification cannot run afoul of the Equal Protection Clause if there is a rational

[136] *Myers*, 85 N.E.3d at 64 (citing People v. Knox, 903 N.E.3d 1149, 1152 (N.Y. 2009)).

[137] *Myers*, 85 N.E.3d at 64.

[138] Hernandez v. Robles, 855 N.E.2d 1, 12 (N.Y. 2006) (first citing Heller v. Doe, 509 U.S. 312, 320–21 (1993); then quoting Affronti v. Crosson, 746 N.E.2d 1049, 1052 (N.Y. 2001)) (internal citations omitted).

[139] *Myers*, 85 N.E.3d at 64 (quoting *Knox*, 903 N.E.3d at 1154).

[140] *Myers*, 85 N.E.3d at 64 (quoting Vacco v. Quill, 521 U.S. 793, 808–09 (1997)).

[141] *Myers*, 85 N.E.3d at 65 (citing Washington v. Glucksberg, 521 U.S. 702, 731–33 (1997)).

[142] *Myers*, 85 N.E.3d at 62.

[143] *Hernandez*, 855 N.E.2d at 9 (*quoting* Under 21, Catholic Home Bureau for Dependent Children v. New York, 482 N.E.2d 1, 7 n.6 (1985)).

> relationship between the disparity of treatment and some legitimate governmental purpose. . . . Instead, a classification "must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification."[144]

Since the Court found that PAS is not a fundamental right, the rational basis test is applied to the Equal Protection analysis just as it was to the Due Process analysis.[145] Again, this standard is extremely deferential to the judgment of the legislature: "a statutory classification that neither proceeds along suspect lines nor infringes fundamental constitutional rights must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification."[146]

Given the clear and rational distinction between declining treatment and suicide, the Court of Appeals and the lower courts before it had no trouble dismissing the plaintiffs' arguments.[147] As noted above, this contention was based on misleading analogies and definitions, particularly their failure to appreciate the ethical and legal significance of causation and intent in making this distinction. Once the proper definitions were understood, it was clear that the law was not irrationally treating similar persons differently, but rather was treating different cases differently—an entirely legitimate legislative act. Indeed, the Court found so little merit in the Equal Protection claim that it dealt with it in two perfunctory paragraphs.[148] The concurring opinions did not even discuss the Equal Protection argument at all except to assert agreement with the *per curiam* opinion.[149]

IX. CONCLUSION

The Court's *per curiam* opinion in *Myers* was brief and unequivocal, and was strengthened by the concurrences of Judges Fahey and Garcia. Together with the Supreme Court Justice and the Justices

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[144] Heller v. Doe, 509 U.S. 312, 319–20 (1993) (quoting Fed. Commc'ns Comm'n v. Beach Commc'ns, 508 U.S. 307, 313 (1993)) (internal citations omitted).

[145] *See Myers*, 85 N.E.3d at 62 (citing *Vacco*, 521 U.S. at 793, 797).

[146] *Beach Commc'ns*, 508 U.S. at 313 (1993) (citing Sullivan v. Stroop, 496 U.S. 478, 485 (1990); Bowen v. Gilliard, 483 U.S. 587, 600–03 (1987); United States R.R. Ret. Bd. v. Fritz, 449 U.S. 166, 174–79 (1980); Dandridge v. Williams, 397 U.S. 471, 484–85 (1970)).

[147] *Myers*, 85 N.E.3d at 65.

[148] *Myers*, 85 N.E.3d at 62.

[149] *Id.* at 66 n.2 (Rivera, J., concurring); *id.* at 78 (Fahey, J., concurring); *id.* at 87 (Garcia, J., concurring).

of the Appellate Division, the five Judges of the Court of Appeals presented a unified front—every Judge who considered Plaintiffs' arguments rejected them.[150]

The decision in *Myers* was a decisive defeat for PAS. Together with the earlier defeat in New Mexico, we hope that it will have the same effect as *Glucksberg* and *Vacco* and demonstrate that there is no basis for courts to discover a right to PAS in state constitutions. The strong *per curiam* opinion and concurrences of Judges Fahey and Garcia provide a template for other state courts to rule on similar cases. The Court of Appeals wisely held that the debate over assisted suicide belongs in the legislative arena based on policy arguments, and should not be terminated by courts by constitutionalizing it.

[150] *Id.* at 57, 60.