AN UNFORTUNATE MISSTEP: THE NEW YORK COURT OF APPEALS' REJECTION OF AID-IN-DYING IN *MYERS V. SCHNEIDERMAN*

Edwin G. Schallert[*]
Kathryn L. Tucker[**]

INTRODUCTION

The New York Court of Appeals recently considered a challenge to the validity and constitutionality of New York's Assisted Suicide Statute as applied to aid-in-dying—the medical practice of providing a mentally-competent, terminally-ill patient with a prescription for lethal medication that the patient may choose to take in order to bring about a peaceful death if the patient finds his or her dying process unbearable. In considering this important issue, the court had an opportunity to be at the forefront of the tide of change in public policy and opinion concerning aid-in-dying. Instead, the court declined to uphold the fundamental liberties enshrined in the New York Constitution. Without the benefit of a factual record, the court held that the New York Constitution does not protect a dying patient's right to control the course of his or her medical treatment through aid-in-dying.[1] It affirmed dismissal of the case in a decision "that future generations will look back on . . . as an unfortunate misstep."[2]

[*] Edwin G. Schallert is a partner at the international law firm of Debevoise & Plimpton LLP. Schallert was counsel for the plaintiffs in *Myers v. Schneiderman*.

[**] Kathryn L. Tucker is Executive Director of the End of Life Liberty Project, an advocacy organization dedicated to protecting and expanding the rights of the terminally ill, which she founded during her tenure as Executive Director of the Disability Rights Legal Center, a leading disability rights advocacy organization. Tucker frequently represents physicians and patients seeking to expand end of life liberty, and served in this capacity in a number of the cases discussed herein, including *Myers v. Schneiderman*. The authors would like to gratefully acknowledge the significant contributions of Jared I. Kagan, Olena V. Ripnick-O'Farrell, and Brooke J. Willig, associates at the law firm of Debevoise & Plimpton LLP.

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

[2] *See* Hernandez v. Robles, 855 N.E.2d 1, 5 (2006) ; *Id.* at 34 (Kaye, C.J., dissenting) (criticizing the Court's decision that New York's constitution does not compel recognition of same-sex marriage).

Plaintiffs in this case were patients who sought aid-in-dying and physicians and medical professionals whose ability to practice medicine and exercise professional judgment was hampered by the Assisted Suicide Statute.[3] Together they sought an affirmative judicial declaration that the Assisted Suicide Statute does not apply to aid-in-dying because (i) the term "suicide" in the Assisted Suicide Statute does not, as a matter of statutory construction, encompass aid-in-dying; and (ii) in the alternative, criminal proscription of aid-in-dying violates the New York State Constitution's guarantees of equal protection and due process.[4]

Shortly after the complaint was filed, the State filed a pre-answer motion to dismiss for failure to state a claim, arguing that aid-in-dying, by its nature and as a matter of law, constituted "assisted suicide" and that none of the complaint's allegations provided any reason to stray from New York's longstanding opposition to "assisted suicide."[5] The motion court, the New York Supreme Court of New York County, agreed, holding that plaintiffs had failed to state a claim, and rejected the state constitutional claims.[6]

The Appellate Division for the First Department affirmed the trial court dismissal, holding that the Assisted Suicide Statue provides a valid statutory basis to prosecute physicians offering aid-in-dying and that such a prosecution would not violate the New York State Constitution.[7] The Appellate Division flatly rejected the possibility of a distinction between aid-in-dying and suicide and found no violation of equal protection or due process.[8]

In a per curiam opinion, the Court of Appeals affirmed the Appellate Division, by flatly rejecting the possibility of a distinction between aid-in-dying and suicide and reiterating that, as a matter of law, aid-in-dying could be lawfully prosecuted under the Assisted Suicide Statute.[9]

The New York Court of Appeals erred for three reasons. First, the court applied the incorrect standard of review at the motion to

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

[4] *See id.* at 61, 62 (citations omitted).

[5] *See id.* at 60 (citation omitted); Memorandum of Law in Support of Motion to Dismiss at 8–12, Myers v. Schneiderman, 2015 WL 6126959, 2015 N.Y. Slip Op. 31931(U) (N.Y. Sup. Ct. 2015) (No. 151162/15).

[6] *See* Myers v. Schneiderman, 2015 N.Y. Misc. LEXIS 3770, at *10–11, *12 (N.Y. Sup. Ct. Oct. 16, 2015) (citations omitted).

[7] *See* Myers v. Schneiderman, 31 N.Y.S.3d 45, 55–56 (N.Y. App. Div. 2016) (citing N.Y. PENAL LAW §§ 120.30, 125.15 (McKinney 2018)).

[8] *See id.* at 50, 52–53, 55–56 (citations omitted).

[9] *See Myers*, 85 N.E.3d at 62, 65.

dismiss stage. Second, the court mischaracterized the fundamental right at issue in the case. Finally, the court failed to recognize changing circumstances and shifting public attitudes towards aid-in-dying. In doing so, the court not only disregarded well-established precedent,[10] but ignored unique aspects of the New York State Constitution critical to the resolution of this case and failed to honor New York's "proud tradition" of protecting fundamental liberties.[11]

I. A BRIEF EXPLANATION OF AID-IN-DYING

A. What Is Aid-In-Dying?

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 may choose to take in order to bring about a peaceful death if the patient finds his or her dying process unbearable.[12] Aid-in-dying is a medically and an ethically appropriate treatment option for patients facing unbearable suffering in the final stages of the dying process, one governed by professional practice standards and by the medical standard of care.[13] A patient who requests aid-in-dying must first be determined to be mentally competent, as assessed through a number of established medical tests, and certified to be terminally ill.[14] Once determined to

[10] *See* Washington v. Glucksberg, 521 U.S. 702, 705–06 (1997); Vacco v. Quill, 521 U.S. 793, 797 (1997); Cruzan v. Dir., Mo. Dep't of Heath, 497 U.S. 261, 269, 273–74, 275, 283 (1990) (citations omitted); *Myers*, 85 N.E.3d at 66 (Rivera, J., concurring) ("[T]he State already permits a physician to take affirmative steps to comply with a patient's request to hasten death.").

[11] *See* Hernandez v. Robles, 855 N.E.2d 1, 22 (N.Y. 2006) (Kaye, C.J., dissenting) ("This state has a proud tradition of affording equal rights to all New Yorkers.").

[12] This is a term that has become widely accepted, including by the American Medical Women's Association, the American Medical Students' Association, and the American Public Health Association, among others. *See* Kathryn L. Tucker, *At the Very End of Life: The Emergence of Policy Supporting Aid in Dying Among Mainstream Medical & Health Policy Associations*, 10 HARV. HEALTH POL'Y REV. 45, 45 (2009). In the past, this option was sometimes referred to as "[p]hysician-[a]ssisted [s]uicide" but that term has since been rejected as inaccurate and pejorative. *See id.* at 46 n.6. In fact, the American Association of Suicidology recently recognized that the choice of a dying patient for a peaceful death is not, and ought not be referred to as, suicide. *See* AM. ASS'N OF SUICIDOLOGY, STATEMENT OF THE AMERICAN ASSOCIATION OF SUICIDOLOGY: "SUICIDE" IS NOT THE SAME AS "PHYSICIAN AID IN DYING" 1 (2017), https://ohiooptions.org/wp-content/uploads/2016/02/AAS-PAD-Statement-Approved-10.30.17-ed-10-30-17.pdf [hereinafter "SUICIDE" IS NOT THE SAME AS "PHYSICIAN AID IN DYING"].

[13] Clinical practice guidelines have been published which reflect the emerging standard of care. *See, e.g.*, David Orentlichner, et al., *Clinical Criteria for Physician Aid in Dying*, 19 J. PALLIATIVE MED. 259, 259–60, 261.

[14] *See id.* at 260. New York law defines a "terminal illness or condition [as one] which can reasonably be expected to cause death within six months, whether or not treatment is provided." N.Y. PUB. HEALTH LAW § 2997-c(1)(d) (McKinney 2018).

be mentally competent and terminally ill, the patient receives a prescription for a medication that, if ingested, will enable the patient to achieve a peaceful death at the time of his or her choosing.[15] Whether the patient ultimately decides to ingest the medication is a decision and act of autonomy left to the patient.[16]

Aid-in-dying is largely indistinguishable from other medical practices that result in a patient's death but that are currently lawful in New York. For example, mentally competent patients who require life-prolonging intervention, such as a ventilator or feeding tube, can direct withdrawal of the intervention and provide a "Do Not Resuscitate" direction, thereby causing death by suffocation, starvation or dehydration.[17] Similarly, mentally competent, terminally ill patients can choose to engage in a practice known as VSED, "Voluntary Stopping Eating and Drinking," whereby nutrition and liquids are withheld until the patient dehydrates.[18] Patients with unmanageable pain can likewise request a therapy known as terminal or palliative sedation, whereby the patient is rendered unconscious by intravenously-administered sedation and is then deprived of nutrition and fluids until death invariably arrives.[19] Each of these practices is considered a lawful refusal of medical treatment rather than an act of suicide, despite the active measures taken at the patient's direction in order to precipitate the patient's death.

Like these medical practices, aid-in-dying is considered by practitioners to be a form of hastening the patient's death at the hands of the terminal illness, not an act of suicide or assisted suicide. Whereas "[s]uicide precipitates a premature death of a life of otherwise indefinite duration," often as a result of mental illness, aid-in-dying allows individuals facing impending death to make a rational choice to succumb to their terminal illness sooner rather than later.[20] Thus, patients who choose aid-in-dying are not considered "suicidal," and the death of a person who chooses aid-in-

[15] *See* Tucker, *supra* note 11, at 45.

[16] *See* OREGON HEALTH AUTH.: PUB. HEALTH DIV., CTR. HEALTH STATISTICS, OREGON DEATH WITH DIGNITY ACT: DATA SUMMARY 2016 5, 6 (2017)For example, in Oregon in 2016 of the 204 patients who received the prescription, thirty-six did not ingest and died of other causes. *See id.* at 5.

[17] *See* Complaint at 16, Myers v. Schneiderman, 2015 N.Y. Misc. LEXIS 3770, (N.Y. Sup. Ct. Oct. 16, 2015) (No. 151162/15). If the patient is mentally incapacitated, New York law permits others with legal authority to direct the withdrawal of the intervention and precipitate death. *Id.*

[18] *See id.* at 17.

[19] *See id.*

[20] *Id.* at 18.

dying is understood to be, and formally recognized as, caused by the patient's underlying terminal illness—not the medication the person ingests to achieve a peaceful death.[21] In each of the currently lawful medical practices, however, death is often painful, protracted, and wrenching.[22] By contrast, aid-in-dying provides patients with a peaceful death on their own terms.

B. Legal Status of Aid-In-Dying

Conversations about aid-in-dying have been going on in the United States for more than a century. The first attempt to legislate aid-in-dying in the United States was swiftly defeated by the Ohio legislature in 1906.[23] More than half a century later, in 1967, a right to die bill was introduced in the Florida legislature, despite sparking extensive debate, the bill was unsuccessful.[24]

After a number of unsuccessful attempts, Oregon became the first state to legalize aid-in-dying by ballot initiative in 1994.[25] The legislation faced a number of challenges, including from the U.S. Attorney General, who ordered Federal Drug Enforcement Agents to prosecute physicians and pharmacists for practicing under Oregon's Death with Dignity law.[26] The law did not go in effect until 2006, after the U.S. Supreme Court held in a 6–3 decision in *Gonzales v. Oregon*[27] that the Controlled Substances Act did not give the federal government the authority to interfere with physicians obeying state law and to overrule state laws on the appropriate use of

[21] *See, e.g.*, WASH. REV. CODE § 70.245.040(2) (2018) ("[T]he patient's death certificate . . . shall list the underlying terminal disease as the cause of death."); *see* Affidavit of Dr. Eric Kress in Opposition to Defendant's Motion to Dismiss at 5, *Myers*, 2015 N.Y. Misc. LEXIS 3770 (No. 151162/15); Affidavit of Dr. Katherine Morris in Opposition to Defendant's Motion to Dismiss at 4, *Myers*, 2015 N.Y. Misc. LEXIS 3770 (No. 151162/15); "SUICIDE" IS NOT THE SAME AS "PHYSICIAN AID IN DYING," *supra* note 11, at 1; David C. Leven & Timothy E. Quill, *The Clinical, Ethical and Legislative Case for Medical Aid in Dying in New York*, 22 NYSBA HEALTH L. J. 27, 27–28 (2017).

[22] *See* Complaint, *supra* note 16, at 16, 17.

[23] *See* COMPASSION & CHOICES, AID IN DYING: HISTORY & BACKGROUND FOR STUDENTS, ACTIVISTS AND PROFESSIONALS 6 (available at https://www.compassionandchoices.org/wp-content/uploads/2016/02/Aid-in-Dying-History-and-Background.pdf) [hereinafter AID IN DYING: HISTORY & BACKGROUND].

[24] *See Chronology of Assisted Dying*, DEATH WITH DIGNITY, https://www.deathwithdignity.org/assisted-dying-chronology/ (last visited Apr. 18, 2018).

[25] *See* AID IN DYING: HISTORY & BACKGROUND, *supra* note 22, at 7.

[26] *See* Amy Howe, *Tomorrow's Argument: Gonzalez v. Oregon*, SCOTUSBLOG (Oct. 4, 2005), http://www.scotusblog.com/2005/10/tomorrows-argument-gonzales-v-oregon/; *Oregon Death with Dignity Act: A History*, DEATH WITH DIGNITY, https://www.deathwithdignity.org/oregon-death-with-dignity-act-history/ (last visited Apr. 18, 2018).

[27] Gonzales v. Oregon, 546 U.S. 243 (2006).

medications.[28]

Prior to *Gonzales*, the Court considered, in a pair of companion cases, *Washington v. Glucksberg* and *Vacco v. Quill*, whether state laws banning aid-in-dying violated the Due Process and Equal Protection Clauses of the United States Constitution.[29] Although the Supreme Court refrained from finding federal constitutional protection at the time,[30] it left the matter open for states to determine for themselves the legality of aid-in-dying, carefully preserving the possibility that it would find constitutional protection in a future case.[31]

Since *Quill* and *Glucksberg* were decided, aid-in-dying has been expressly permitted in Oregon, Washington, Vermont, California, Colorado, and Washington, D.C. through either legislation or ballot initiative.[32] In Montana, aid-in-dying is permitted through a state supreme court ruling.[33] Presently, there are legislative efforts to legalize aid-in-dying in states that include Massachusetts, New York, New Jersey, and Hawaii.[34]

Public attitudes towards aid-in-dying have shifted significantly since *Quill* and *Glucksberg* were decided. In 2013, a pair of polls

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[28] *See id.* at 274–75; Kathryn L. Tucker, *U.S. Supreme Court Ruling Preserves Oregon's Landmark Death with Dignity Law*, 2 NAELA J. 291, 293–94 (2006).

[29] *See* Vacco v. Quill, 521 U.S. 793, 797 (1997); Washington v. Glucksberg, 521 U.S. 702, 705–06 (1997).

[30] *See Quill*, 521 U.S. at 808–09 (citation omitted) (holding that New York's prohibition on assisted suicide did not violate the Equal Protection Clause of the Fourteenth Amendment when applied to a physician who provides aid-in-dying); *Glucksberg*, 521 U.S. at 735 (citations omitted) (holding that Washington's ban on assisted suicide did not violate substantive due process under the U.S. Constitution).

[31] *See Quill*, 117 S. Ct. at 2303 (O'Connor, J., concurring) (citing *Glucksberg*, 521 U.S. at 737 (O'Connor, J., concurring); then quoting Cruzan v. Dir., Mo. Dept. of Health, 497 U.S. 261, 292 (1990) (O'Connor, J., concurring)) ("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.'"); *Glucksberg*, 521 U.S. at 735 ("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.").

[32] *See* CAL. HEALTH & SAFETY CODE § 443.2(a) (Deering 2018); COLO. REV. STAT. § 25-48-103(1) (2018); D.C. CODE § 7-661.01(c) (2018); OR. REV. STAT. § 127.805(1) (2018); VT. STAT. ANN. tit. 18, § 5283(a) (2018); WASH. REV. CODE § 70.245.020(1) (2018).

[33] *See* Baxter v. Montana, 2009 MT 449, ¶¶ 49–50, 354 Mont. 234, 250–51, 224 P.3d 1211, 1222 (2009) (finding that aid-in-dying is neither illegal nor against public policy under a state statute and existing legal precedent).

[34] *See* Melissa Bailey, *Aid-in-Dying Advocates Target Next Battleground States*, CNN (Jan. 26, 2018), https://www.cnn.com/2018/01/25/health/aid-in-dying-battleground-states/index.html. After this article was submitted for publication, Hawaii legalized aid-in-dying. *See, e.g.*, Associated Press, *Hawaii Becomes Latest State to Legalize Medically Assisted Suicide*, CBS L.A. (Apr. 8, 2018), https://losangeles.cbslocal.com/2018/04/08/hawaii-assisted-suicide/.

found significant public support for aid-in dying.[35] More recently, a two separate 2016 polls found that 69 percent of Americans support aid-in-dying,[36] as do 56 percent of doctors.[37]

II. *MYERS V. SCHNEIDERMAN*

A. Theory of the Case

Myers v. Schneiderman centered on a challenge to New York's Assisted Suicide Statute, which criminalizes "intentionally caus[ing] or aid[ing] another person to [commit or] attempt suicide.[38] Because the statute's broad terms can be read to apply to the medical practice of providing mentally-competent, terminally-ill patients with prescriptions for life-ending medication,[39] the statute has effectively deterred physicians in New York from providing aid-in-dying to patients who would seek it.

A number of patients, doctors, and advocacy organizations consequently came together to challenge the validity and constitutionality of the statute as applied to aid-in-dying.[40] The plaintiffs included, among others, physicians whose ability to practice medicine and exercise professional judgment had been hampered by the Assisted Suicide Statute, including one nationally renowned palliative care specialist, Dr. Timothy Quill.[41] As plaintiffs, Dr. Quill, who had been subjected to possible prosecution

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[35] *See* Lydia Saad, *U.S. Support for Euthanasia Hinges on How It's Described*, GALLUP (May 29, 2013), http://www.gallup.com/poll/162815/support-euthanasia-hinges-described.aspx ("[70 percent of respondents agreed that w]hen a person has a disease that cannot be cured, doctors should be allowed by law to end the patient's life by some painless means, if the patient and his or her family request it."); *Views on End-of-Life Medical Treatments*, PEW RES. CTR. (Nov. 21, 2013), http://www.pewforum.org/2013/11/21/views-on-end-of-life-medical-treatments/ ("About six-in-ten adults (62%) [of those polled said] that a person suffering from a great deal of pain with no hope of improvement has a moral right to commit suicide.").

[36] *See* Art Swift, *Euthanasia Still Acceptable to Solid Majority in U.S.*, GALLUP (June 24, 2016), http://news.gallup.com/poll/193082/euthanasia-acceptable-solid-majority.aspx.

[37] *See* Alicia Ault, *Doctor Support for Assisted Death Rises, but Debate Continues*, MEDSCAPE (July 7, 2017), https://www.medscape.com/viewarticle/882334.

[38] *See* N.Y. PENAL LAW § 125.30 (McKinney 2018). Section 125.15 of the N.Y. Penal Law permits conviction for manslaughter in the second degree, a class C felony, when a person "intentionally causes or aids another person to commit suicide." *Id.* § 125.15(3); *see* Myers v. Schneiderman, 85 N.E.3d 57, 60 (N.Y. 2017) (citations omitted).

[39] *See* PENAL LAW §§ 120.30, 125.15(3); *Myers*, 85 N.E.3d at 62 (citations omitted).

[40] *See* Record on Appeal at 23–25, *Myers*, 85 N.E.3d 57 (No. 151162/15).

[41] *See* Myers v. Schneiderman, 2015 N.Y. Misc. LEXIS 3770, at *1–2, *3, *10 n.2 (N.Y. Sup. Ct. Oct. 15, 2015) (quoting Bezio v. Dorsey, 989 N.E.2d 942, 949 (N.Y. 2013)); *Quill Cited as Top Leader in Hospice and Palliative Medicine*, U. ROCHESTER MED. CTR. (Oct. 1, 2013), https://www.urmc.rochester.edu/news/story/3943/quill-cited-as-top-leader-in-hospice-and-palliative-medicine.aspx.

under the Assisted Suicide Statute,[42] and several patients suffering from terminal illnesses sought the right to be able to control the course of their medical treatment and as they approached the end of their life.[43]

Steve Goldenberg, one of the patient plaintiffs, suffered from AIDS and from a number of health complications arising from that disease, including coronary artery disease, diabetes mellitus, macular degeneration, chronic obstructive pulmonary disease, and chronic bronchitis.[44] He had also been diagnosed with cancer of the vocal cords, the treatment of which resulted in his undergoing a tracheotomy, becoming unable to swallow food, and severely limiting his ability to speak.[45] Sara Myers, the lead plaintiff, suffered from amyotrophic lateral sclerosis, also known as ALS or Lou Gehrig's disease,[46] a terminal neurodegenerative condition that causes inexorable loss of bodily function, leading to paralysis and respiratory failure.[47] As the patient's body increasingly fails, however, her mind remains unaffected, leading Sara Myers to describe her condition as being "trapped in a torture chamber of her own deteriorating body[,] . . . hav[ing] to endure a horrible, slow death that would . . . deprive her of the integrity and dignity she ha[d] left."[48] Both plaintiffs joined the lawsuit in the hope that they would be able to choose whether to achieve a peaceful death on their own terms.[49] Both, however, succumbed to their illnesses before the litigation concluded.[50]

Plaintiffs' complaint, filed in the New York State Supreme Court of New York County in February 2015, sought an affirmative judicial declaration that the Assisted Suicide Statute did not reach a "physician who provides aid-in-dying to a mentally-competent, terminally-ill individual who has requested such aid," and that neither a patient who requested aid-in-dying an a patient who compiled with that request would be subject to prosecution under the

[42] *See Myers*, 2015 N.Y. Misc. LEXIS 3770, at *2, *10 n.2 (N.Y. Sup. Ct. 2015) quoting *Bezio*, 989 N.E.2d at 949); Lawrence K. Altman, *Jury Declines to Indict a Doctor Who Said He Aided in a Suicide*, N.Y. TIMES (July 27, 1991), https://www.nytimes.com/1991/07/27/nyregion/jury-declines-to-indict-a-doctor-who-said-he-aided-in-a-suicide.html.

[43] *See* Record on Appeal, *supra* note 41, at 23–24.

[44] *See* Complaint, *supra* note 16, at 7–8.

[45] *Id.* at 8, 9.

[46] *Id.* at 6.

[47] *See id.*

[48] *Id.* at 6, 7.

[49] *See id.* at 7, 9.

[50] Brief for Plaintiffs-Appellants at 8 n.4, *Myers*, 85 N.E.3d 57 (No. 151162/15).

statute.[51] First, plaintiffs alleged that the term "suicide" in the Assisted Suicide Statute does not, as a matter of statutory construction, encompass aid-in-dying.[52] Alternatively, plaintiffs alleged that criminal proscription of aid-in-dying would violate the New York State Constitution's guarantees of equal protection and due process.[53] With respect to equal protection, plaintiffs pointed to the life-ending measures that the State currently permits patients and physicians to undertake, including terminal sedation and withdrawal of nutrition or treatment, and explained that maintaining a criminal distinction between the practices would serve no rational basis and would unlawfully discriminate against aid-in-dying.[54] With regard to due process, they alleged that a criminal prohibition on aid-in-dying would infringe on an individual's fundamental right to self-determination, a right enshrined in New York's Constitution.[55]

B. The Case Is Dismissed

Shortly after the complaint was filed, the State filed a pre-answer motion to dismiss for failure to state a claim,[56] arguing that aid-in-dying, by its nature and as a matter of law, constituted "[a]ssisted suicide" and that none of the complaint's allegations provided any reason to stray from New York's longstanding opposition to "[a]ssisted suicide."[57] Plaintiffs opposed the motion and, in accordance with settled New York law, submitted affidavits buttressing the allegations of the complaint.[58] More than 300 pages

[51] Complaint, *supra* note 16, at 1, 3, 24–25.

[52] *See id.* at 20.

[53] *See id.* at 22, 23.

[54] *See* Brief for Plaintiffs-Appellants, *supra* note 50, at 42–43.

[55] *See id.* at 3.

[56] *See* Defendant Eric T. Schneiderman's Memorandum of Law in Support of Motion to Dismiss at 8, Myers v. Schneiderman, 2015 N.Y. Misc. LEXIS 3770 (N.Y. Sup. Ct. 2015) (No. 151162/15). The complaint named as defendants the New York State Attorney General and the District Attorneys for each district in which a plaintiff resided. *See* Complaint, *supra* note 16, at 3–5. Plaintiffs and the District Attorneys entered into a stipulation whereby plaintiffs agreed to discontinue the case without prejudice as to the District Attorneys and the District Attorneys agreed that they would be bound by any result reached in the litigation between plaintiffs and the Attorney General. Myers v. Schneiderman, 31 N.Y.S.3d 45, 48 (N.Y. App. Div. 2016). One of the named defendants, Jane DiFiore, subsequently was appointed as the Chief Judge to the Court of Appeals, and she recused herself from consideration of *Myers*. *Myers*, 85 N.E.3d at 59.

[57] *See* Defendant Eric T. Schneiderman's Memorandum of Law in Support of Motion to Dismiss, *supra* note 57, at 9–10, 12.

[58] *See* Plaintiffs' Memorandum of Law in Opposition to Defendant's Motion to Dismiss at 1, 3, *Myers*, 2015 N.Y. Misc. LEXIS 3770 (No. 151162/15). *See also* Leon v. Martinez, 638 N.E.2d

of evidentiary submissions included a plethora of assertions by medical professionals and organizations attesting to aid-in-dying as a medically accepted practice and distinguishing between aid-in-dying and suicide.[59] In reliance on these extensive factual allegations—which a court evaluating a motion to dismiss must credit—plaintiffs maintained that the relationship between aid-in-dying and suicide presented a factual question that warranted development of a full evidentiary record.[60]

The motion court disagreed, holding that plaintiffs had failed to state a claim.[61] In a brief, abstruse opinion, the court concluded that "[t]he penal law as written is clear and concise," and therefore "to prohibit [the] district attorney from prosecuting an alleged violation of the penal law[, an act within the wide ambit of prosecutorial discretion] would . . . exceed this Court's jurisdiction."[62] The court also rejected the state constitutional claims out of hand, finding the case "factually and legally indistinguishable from *Vacco*" and quoting at length from that decision by way of explanation.[63] The court further compared the case to *Bezio v. Dorsey*,[64] a recent decision in

511, 513 (1994) (citation omitted) ("[A] court may freely consider affidavits submitted by the plaintiff ").

[59] For example, plaintiffs submitted: materials from the American Public Health Association "[r]eject[ing] the use of inaccurate terms such as 'suicide' an '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." *See* Record on Appeal, *supra* note 41, at 145. *See* Brief for American Medical Student Association et al. as Amici Curiae Supporting Plaintiffs-Appellants at 3–4, *Myers*, 85 N.E.3d 57 (N.Y. 2017) (No. 151162/15), for a discussion of the American Medical Women's Association, American Medical Student Association and American College of Legal Medicine distinguishing between aid-in-dying and assisted suicide. In states where aid-in-dying is lawful, the cause of death for patients who choose aid-in-dying is listed as the underlying terminal disease rather than the act of taking prescription medicine. *See* Record on Appeal, *supra* note 41, at 36. *See* Brief for Plaintiffs-Appellants, *supra* note 50, at 9–10, 11, for a discussion of the expert affidavits from physicians, submitted by the plaintiffs, explaining that aid-in-dying is part of accepted medical practice governed by professional standards.

[60] *See* Plaintiffs' Memorandum of Law in Opposition to Defendant's Motion to Dismiss, *supra* note 59 at 1–2, 6.

[61] *See Myers*, 2015 N.Y. Misc. LEXIS 3770, at *12. The court did, however, reject the State's argument that the case should be dismissed for lack of a justiciable controversy, finding that plaintiffs had successfully pled entitlement to judicial review of the statutes in question. *Id.* at *5 (citation omitted).

[62] *Id.* at *8, *9 (citing Soares v. Carter, 32 N.E.3d 390, 392 (N.Y. 2015)).

[63] *Myers*, 2015 N.Y. Misc. LEXIS 3770, at *4–5 (citation omitted). *Vacco*, of course, involved a challenge to the Assisted Suicide Statute under the federal, rather than state, constitution, and it considered only equal protection, not due process, grounds for the challenge. *See* Vacco v. Quill, 521 U.S. 793, 796 (1997). Along with its companion case, *Glucksberg*, *Quill* also left open "the possibility that some applications of the New York statute may impose an intolerable intrusion on the patient's freedom" even under the federal constitution. *See id.* at 809 (Stevens, J., concurring); Washington v. Glucksberg, 521 U.S. 702, 751–52 (1997).

[64] *See Myers*, 2015 N.Y. Misc. LEXIS 3770, at *9–10 (quoting Bezio v. Dorsey, 989 N.E.2d 942, 947–48 (N.Y. 2013)).

which the Court of Appeals permitted the State to intervene in an inmate's hunger strike to prevent his death, and emphasized that the Court's jurisprudence allows only the refusal of medical treatment rather than any "self-inflicted" acts.[65] It consequently dismissed the case.[66]

C. The Appellate Division Affirms

Plaintiffs appealed as of right to the Appellate Division, First Department, challenging both the statutory and constitutional determinations made by the Supreme Court.[67] First, plaintiffs pointed to the wealth of factual allegations and evidentiary submissions supporting the conclusion that aid-in-dying is not assisted suicide within the meaning of the statute, and argued that the motion court had failed to address, much less credit, these assertions and had thereby improperly dismissed the complaint.[68] Plaintiffs likewise pointed to numerous factual allegations—also overlooked by the trial court—that aid-in-dying is indistinguishable from currently lawful forms of medical treatment and that legal distinctions between the two may be discriminatory.[69] Finally, plaintiffs criticized the court's failure to take seriously—or even address—their due process claim.[70] In particular, plaintiffs argued the motion court ignored New York's longstanding recognition of a "fundamental right to self-determination with respect to one's body and to control the course of one's medical treatment[,]" a right broader than those recognized under the Federal Constitution and one broad enough to encompass aid-in-dying.[71]

The Appellate Division, however, affirmed dismissal of the

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[65] *See Myers*, 2015 N.Y. Misc. LEXIS 3770, at *9–10 (citations omitted); *Bezio*, 989 N.E.2d at 947–48, 952 (citations omitted).

[66] *See Bezio*, 989 N.E.2d 942 at 953.

[67] *See* Brief for Plaintiffs-Appellants, *supra* note 50, at 1, 3, 4–5.

[68] *See id.* at 2.

[69] *See id.* at 2–3.

[70] *See id.* at 3.

[71] *Id. See also* Rivers v. Katz, 495 N.E.2d 337, 341 (N.Y. 1986) (internal citations omitted) ("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. . . . [I]t is the individual who must have the final say in respect to decisions regarding his medical treatment in order to insure that the greatest possible protection is accorded his autonomy and freedom from unwanted interference with the furtherance of his own desires."); Delio v. Westchester Cty. Med. Ctr., 516 N.Y.S.2d 677, 685–86, 687–88 (N.Y. App. Div. 1987) ("The right to self-determination with respect to one's body has a firmly established foundation in the common law. . . . The primary focus . . . is upon the patient's desires and his right to direct the course of his medical treatment rather than upon the specific treatment involved.").

complaint, holding that the Assisted Suicide Statute provides a valid statutory basis to prosecute physicians offering aid-in-dying and that such a prosecution would not violate the New York State Constitution.[72] The Appellate Division flatly rejected the possibility of a distinction between aid-in-dying and suicide, finding that aid-in-dying fits the "literal description" of assisting suicide, a "straightforward" term, "since there is a direct causative link between the medication proposed to be administered by plaintiff physicians and their patients' demise."[73] Relying on a case applying the Assisted Suicide Statute to a defendant who recklessly encouraged an emotionally distraught teenager to commit suicide, the court further rejected as grounds for non-application of the statute the fact that physician prescribing the medication does not intend to cause the plaintiff's death, essentially finding irrelevant the medical context of aid-in-dying.[74]

Having upheld application of the Assisted Suicide Statute to aid-in-dying, the Appellate Division then quickly found no violation of equal protection, on the ground that New York's "Equal Protection Clause 'is no broader in coverage than the Federal provision'" and the Supreme Court in *Vacco* had already rejected an equal-protection challenge to the statute.[75] It then addressed plaintiffs' due process challenge, acknowledging that "the State Due Process Clause may be more protective of rights than its federal counterpart."[76] It nevertheless went on find that clause insufficient to encompass a right to aid-in-dying.[77] Instead, the Appellate Division took a narrower view of the constitutional right to self-determination, framing it as merely a patient's "right to refuse [medical] treatment, and let nature take its course," a right that cannot involve affirmative acts of autonomy involving "receiv[ing] treatment."[78] Finally, the Appellate Division rejected plaintiffs' allegations that a restriction on aid-in-dying serves no rational basis, finding plaintiffs' evidentiary submissions subject to critique and inadequate to support that conclusion.[79]

[72] *See* Myers v. Schneiderman, 31 N.Y.S.3d 45, 55–56 (App. Div. 2016).
[73] *Id.* at 50.
[74] *See id.* (citing People v. Duffy, 595 N.E.2d 814, 815 (1992)).
[75] *Myers*, 31 N.Y.S.3d at 52, 54 (quoting Hernandez v. Robles, 855 N.E.2d 1, 9 (2006)).
[76] *Myers*, 31 N.Y.S.3d at 52 (citing *Hernandez*, 855 N.E.2d at 9 (2006)).
[77] *See Myers*, 31 N.Y.S.3d at 52–53 (citations omitted).
[78] *See id.* at 52, 53 (citations omitted).
[79] *See id.* at 53, 54, 55 (citations omitted).

D. The Court of Appeals Affirms in a Per Curiam Opinion

Plaintiffs again appealed as of right to the New York Court of Appeals, challenging both statutory and constitutional grounds for the decision, and arguing that a full factual record was necessary to properly evaluate the merits of all three claims.[80] First, plaintiffs criticized the Appellate Division's reliance on a dictionary definition of suicide and a literal approach to the law, which ignored the factual nuances of aid-in-dying, changing cultural understandings of the meaning of "suicide," and the underlying purpose and legislative history of the statute.[81] Moreover, such an approach, plaintiffs argued, could place currently lawful forms of medical treatment—such as terminal sedation and withdrawal of treatment—within the scope of assisted suicide, rendering the approach necessarily flawed and inappropriate.[82]

Second, plaintiffs challenged again the dismissal of their equal protection claim, arguing that the legal distinctions between terminally ill patients choosing end-of-life care permitted by the statute could not be sustained under the same theory.[83] Finally, plaintiffs took issue with the narrowness of the Appellate Division's conception of New York's right to self-determination, insisting that that fundamental right "encompasses a patient's deeply and profoundly personal choice about how much suffering to endure in the final ravages of the dying process, just as it encompasses a patient's right to choose other end-of-life options that precipitate death."[84] Plaintiffs also rejected the suggestion that *Glucksberg* and *Vacco* should bear on (let alone control) the court's decision, emphasizing the greater breadth of New York's Due Process Clause.[85] The material changes in the Supreme Court's jurisprudence on fundamental liberties in the wake of its decisions on assisted suicide, and the development of evidence that the concerns critical in causing the Supreme Court to defer to the "laboratory of the states" were without foundation.[86]

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[80] *See* Myers v. Schneiderman, 85 N.E.3d 57, 61 (N.Y. 2017) (per curiam); Brief for Plaintiffs-Appellants, *supra* note 50, at 29. *See also* N.Y. C.P.L.R. § 5601(b)(1) (McKinney 2018) ("An appeal may be taken to the court of appeals as of right: from an order of the appellate division which finally determines an action where there is directly involved the construction of the constitution of the state or of the United States.").

[81] *See* Brief for Plaintiffs-Appellants, *supra* note 50, at 15.

[82] *See id.* at 17–18.

[83] *See id.* at 43.

[84] *Id.* at 30.

[85] *See id.* at 33–34, 35, 39 n.19.

[86] *See id.*; Obergefell v. Hodges, 135 S. Ct. 2584, 2602 (2015). The inquiry into the existence

A large number of amici supported plaintiffs' appeal, including medical organizations,[87] state legislators,[88] the New York Civil Liberties Union,[89] the National Association of Criminal Defense Lawyers,[90] the New York chapter of the National Association of Elder Law Attorneys,[91] New York law professors,[92] and religious and ethics entities argued for reversal on varied grounds,[93] including arguments based on statutory construction, privacy interests, the importance of independent state constitutional jurisprudence, and ethical considerations.[94]

The Court of Appeals[95] nevertheless affirmed the Appellate Division's ruling in a per curiam opinion.[96] In its fourteen-page

of fundamental rights properly calls for consideration of evolving societal views the recognition that fundamental rights "rise, too, from a better informed understanding of how constitutional imperative define a liberty that remains urgent in our own era." *Obergefell*, 135 S. Ct. at 2602; *see also* Lawrence v. Texas, 539 U.S. 558, 571–72 (2003) ("In all events we think that our laws and traditions in the past half century are of most relevance here.").

[87] *See* Brief for American Medical Student Association et al. as Amici Curiae Supporting Plaintiffs-Appellants, *supra* note 60; Brief for the 39 Physicians Amici Curiae as Amici Curiae Supporting Defendant-Respondent, *Myers*, 85 N.E.3d 57 (No. 151162/15).

[88] *See* Brief for New York State Assembly Members as Amici Curiae Supporting Appellants at 2, *Myers*, 85 N.E.3d 57 (No. 151162/15).

[89] *See* Brief for New York Civil Liberties Union as Amici Curiae Supporting Appellants, *Myers*, 85 N.E.3d 57 (No. 151633/14).

[90] *See* Brief for Nat'l Ass'n of Criminal Def. Lawyers as Amici Curiae Supporting Plaintiffs-Appellants, *Myers*, 85 N.E.3d 57 (No. 151162/15).

[91] *See* Brief for New York Chapter of the Nat'l Acad. of Elder Law Attorneys as Amici Curiae, *Myers*, 85 N.E.3d 57 (No. 151162/15).

[92] *See* Brief for New York Law Professors as Amici Curiae Supporting Plaintiffs-Appellants, *Myers*, 85 N.E.3d 57 (No. 151162/15).

[93] *See* Brief for Unitarian Universalist Assoc. et al. as Amici Curiae Supporting Appellants at 1, 4–7, *Myers*, 85 N.E.3d 57 (No. 151162/15).

[94] *See* Brief for Alan & Charise Pfeffer as Amici Curiae Supporting Appellants at 14, 18, 25, *Myers*, 85 N.E.3d 57 (No. 151162/15); Brief for American Med. Student Assoc. et al., *supra* note 87, at 13–16, 22–24; Brief for Compassion & Choices as Amici Curiae at 19, *Myers*, 85 N.E.3d 57 (No. 151162/15); Brief for Nat'l Assoc. of Criminal Def. Lawyers, *supra* note 90, at 2, 3; Brief for New York Civil Liberties Union, *supra* note 89, at 7, 21–25; Brief for New York Chapter of the Nat'l Acad. of Elder Law Attorneys, *supra* note 91, at 6, 7, 14–19; Brief for New York Law Professors, *supra* note 92, at 4–5, 7, 15; Brief for New York State Assembly Members, *supra* note 88, at 2, 4, 21; Brief for Surviving Family Members as Amici Curiae at 3, 17–22, *Myers*, 85 N.E.3d 57 (No. 151162/15); Brief for Unitarian Universalist Assoc. et al., *supra* note 93, at 1, 4–7. Several briefs were filed in support of Defendant's position. *See* Brief for Agudath Israel of America as Amici Curiae Supporting Defendants-Respondents, *Myers*, 85 N.E.3d 57 (No. 151162/15); Brief for Disability Rights Amici et al. as Amici Curiae, *Myers*, 85 N.E.3d 57 (No. 151162/15); Brief for New York State Catholic Conference as Amici Curiae Supporting Defendant-Respondent, *Myers*, 85 N.E.3d 57 (No. 151162/15).

[95] The Court rendered its decision with a five-judge panel as a result of Chief Judge DiFiore's recusal, and the untimely death of Judge Abdul-Salaam, which created an unfilled vacancy at the time of decision. *See Myers*, 85 N.E.3d at 59; Matthew Haag & William K. Rashgaum, *Sheila Abdus-Salaam, Judge on New York's Top Court, Is Found Dead in Hudson River*, N.Y. TIMES (Apr. 12, 2017), https://www.nytimes.com/2017/04/12/nyregion/judge-dead-hudson-river-sheila-abdus-salaam.html.

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

decision, the court rejected plaintiffs' arguments that the lower courts improperly resolved numerous factual issues and instead reiterated that, as a matter of law, aid-in-dying could be lawfully prosecuted under the Assisted Suicide Statute.[97] Like the Appellate Division, the Court of Appeals relied on a dictionary definition of "suicide" to promptly find that aid-in-dying "falls squarely within the ordinary meaning of the statutory prohibition on assisting a suicide,"[98] and it relied on the Supreme Court's decision in *Vacco* to dismiss Plaintiff's equal protection claim essentially without discussion.[99]

In declining to entertain a due process challenge, the court likewise articulated a narrow understanding of the state constitution's right to self-determination, characterizing it as a "right to choose among medical treatments, or to refuse life-saving medical treatments."[100] In so doing, the court also expressed a cramped, narrow conception of the right put forward by plaintiffs: whereas plaintiffs sought to characterize a right to aid-in-dying as a species of well-established rights to control one's medical treatment and to exercise personal autonomy, the Court of Appeals described the right at issue as a "right to die, or [a] still broader right to obtain assistance from another to end one's life."[101] Finding no fundamental right to aid-in-dying, the court proceeded to find the State's interests in prohibiting aid-in-dying—guarding against the risks of mistake and abuse, preserving life, and preventing suicide—legitimate and rationally related to the statute's means.[102] The court looked to history to support this conclusion, pointing to the State's longstanding prohibitions on assisted suicide and rejecting plaintiffs' arguments concerning changing cultural understandings of assisted suicide and aid-in-dying.[103]

Three judges concurred in the judgment,[104] offering strikingly different views on the Court's decision. Judge Fahey penned a lengthy concurrence to "expand on certain risks that would be associated with legalizing physician-assisted suicide in New York and that justify its prohibition," discussing at length the experiences of other jurisdictions that have legalized forms of "physician-assisted

[97] *Id.* at 61–62.
[98] *Id.* at 62.
[99] *See id.* (citing Vacco v. Quill, 521 U.S. 793, 797 (1997)).
[100] *Myers*, 85 N.E.3d at 63.
[101] *Id* at 63.
[102] *See id.* at 64 (citations omitted).
[103] *See id.* at 64–65 (citations omitted).
[104] *Id.* at 65.

suicide."[105] Judge Garcia offered a separate concurrence to "expressly reach[ ]and reject," the possibility that plaintiffs could "assert a more particularized challenge to the assisted suicide statutes," that would show the statutes to be constitutionally infirm.[106] Turning again to the State's longstanding history of criminalizing suicide and its interest in preserving life, Judge Garcia reiterated that neither the State nor the state constitution need permit "physician-assisted suicide" and that plaintiffs' claims were "better addressed to the Legislature."[107]

Judge Rivera, on the other hand, concurred in the decision "on constraint of th[e] prior case law,"[108] but essentially endorsed some form of aid-in-dying, laying out the circumstances under which she believed application of the Assisted Suicide Statute to patients seeking end-of-life care would, in fact, violate the New York constitution.[109] Starting from the premise that New York's constitutional guarantee of Due Process exceeds the Federal Constitution's, Judge Rivera affirmed that the "liberty interest protected by our State Constitution is broader than the right to decline medical treatment[,]" and "includes the freedom to make decisions about how to die just as [a] surely as it includes decision-making about life's most private matters . . . ."[110]

Although Judge Rivera conceded that the State retains legitimate interests that may counsel against aid-in-dying, she emphasized that the State's interests "are not absolute or unconditional[, and] diminish when a mentally-competent, terminally-ill person approaches the final stage of the dying process,"[111] and "seeks access to medical treatment options that end pain and hasten death, with the consent of a treating physician acting on best professional judgment."[112] At that point, Judge Rivera stated, "the State's interest is diminished and outweighed by the patient's liberty interest in personal autonomy,"[113] and "the State may not unduly burden a

[105] *Id.* at 78 (Fahey, J., concurring) (citations omitted).

[106] *Id.* at 87, 92 (Garcia, J., concurring).

[107] *Id.* at 90, 94–95 (citations omitted). These statements of course reflect a shocking abdication of an essential function of the courts to protect individual interests under the state constitution.

[108] *Id.* at 69 (Rivera, J., concurring).

[109] *See id.* at 69, 77–78.

[110] *Id.* at 69, 70, 71 ("The State argues a dichotomy between active and passive physician conduct differentiates aid-in-dying from other sanctioned end-of-life treatments. This binary is unpersuasive in this context.").

[111] *Id.* at 66.

[112] *Id.* 69.

[113] *Id.*

terminally-ill patient's access to physician-prescribed medication that allows the patient in the last painful stage of life to achieve a peaceful death as the end draws near."[114]

Judge Rivera also rejected several of the State's and per curiam's arguments in support of prohibiting aid-in-dying, finding no distinction between "active and passive" measures taken to end one's life or between a physician providing aid-in-dying and one providing lawful medical treatments like terminal sedation.[115] She therefore would have held that the "State Constitution protects the rights of these terminally-ill patients to make the deeply personal choice of how they define and experience their final moments."[116]

Plaintiffs moved for re-argument of the Court of Appeals' decision, calling out the court's flawed narrowing of the right at issue and noting that "[a] cramped approach in expounding state constitutional rights has not served this Court well in the past."[117] The Court of Appeals, however, denied leave for re-argument.[118]

III. THE COURT OF APPEALS ERRED

The Court of Appeals erred in dismissing the *Myers* case. In doing so, the court not only disregarded its well-established precedent, but it ignored unique aspects of the New York State Constitution critical to the resolution of this case. In particular, the court (1) applied the incorrect standard of review at the motion to dismiss stage; (2) mischaracterized the fundamental right at issue; and (3) failed to recognize changing circumstances and shifting public attitudes towards aid-in-dying.

Under the appropriate standard of review on a motion to dismiss, a complaint should "be construed 'liberally,' and the court must

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[114] *Id.* at 66.

[115] *See id.* at 71–72.

[116] *Id.* at 78.

[117] Motion for Reargument at 3, *Myers*, 85 N.E.3d 57 (No. 151162/15). In *Hernandez*, the Court of Appeals held that the fundamental right to marry did not apply to same-sex couples because "[t]he right to marry someone of the same sex . . . is not 'deeply rooted.'" *See* Hernandez v. Robles, 855 N.E.2d 1, 9, 10 (N.Y. 2005). The United States Supreme Court recognized such a right just ten years later in *Obergefell v. Hodges*, leaving *Hernandez* as a case "that future generations will look back on . . . as an unfortunate misstep." Obergefell v. Hodges, 135 S. Ct. 2584, 2608 (2015); *Hernandez*, 855 N.E.2d at 34 (Kaye, C.J., dissenting).

[118] *Myers*, 88 N.E.3d at 390. At the time of plaintiffs' request for re-argument, the vacancy on the court had been filled and this important matter could have been reargued to a nearly full bench. *See Myers*, 88 N.E.3d at 390, Press Release, Governor's Press Office, Governor Cuomo to Nominate Justice Paul G. Feinman as Associate Judge on New York State Court of Appeals (June 15, 2017) (on file at https://www.governor.ny.gov/news/governor-cuomo-nominate-justice-paul-g-feinman-associate-judge-new-york-state-court-appeals).

accept as true not only 'the complaint's material allegations' but also 'whatever can be reasonably inferred therefrom in favor of the pleader.'"[119] 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 as alleged fit within any cognizable legal theory."[120]

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."[121] 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."[122] Further, even on a rational basis review, a plaintiff is entitled to develop facts in order "to negative every conceivable basis which might support [a law]."[123]

The court's decision overlooked this well-settled legal principle that a complaint should not be dismissed at the pleading stage unless a plaintiff can prove no set of facts to support a claim for relief. Its decision failed to credit the allegations of the physician plaintiffs, who presented facts to support such a claim.[124] Moreover, other courts that have addressed aid-in-dying have done so on a developed factual record.[125]

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[119] *See* P.T. Bank Cent. Asia v. ABN Amro Bank N.V., 754 N.Y.S.2d 245, 250 (App. Div. 2003) (internal citations omitted) (citing N.Y. C.P.L.R. § 3026 (McKinney 2018); N.Y. Trap Rock Corp. v. Clarkstown, 85 N.E.2d 873, 875 (N.Y. 1949); then quoting McGill v. Parker, 582 N.Y.S.2d 91, 95 (App. Div. 1992)).

[120] *See* Leon v. Martinez, 638 N.E.2d 511, 513 (N.Y. 1994) (citing Morone v. Morone, 413 N.E.2d 1154, 1155 (N.Y. 1980); Rovello v. Orofino Realty Co., 357 N.E.2d 970, 971 (N.Y. 1976)).

[121] M.H. Mandelbaum Orthotic & Prosthetic Servs., Inc. v. Werner, 2 N.Y.S.3d 909, 910 (App. Div. 2015) (internal citations and quotation marks omitted) (quoting Minovici v. Belkin BV, 971 N.Y.S.2d 103, 108 (App. Div. 2013); then citing Rockland Power & Light Co. v. New York, 43 N.E.2d 803, 806 (N.Y. 1942); N. Shore Towers Apartments Inc. v. Three Towers Ass'n, 961 N.Y.S.2d 504, 506 (App. Div. 2013); DiGiorgio v. 1109-1113 Manhattan Ave. Partners, LLC, 958 N.Y.S.2d 417, 421 (App. Div. 2013); Tilcon N.Y., Inc. v. Town of Poughkeepsie, 930 N.Y.S.2d 34, 36 (App. Div. 2011)).

[122] *DiGiorgio*, 958 N.Y.S.2d at 421 (internal citations and quotation marks omitted) (quoting Tilcon N.Y., Inc. v. Poughkeepsie, 930 N.Y.S.2d 34, 36–37 (App. Div. 2011); then citing St. Lawrence Univ. v. Trs. of Theological Sch. of St. Lawrence Univ., 229 N.E.2d 431, 435 (N.Y. 1967); Rockland Power & Light Co. v. New York, 43 N.E.2d 803, 806 (N.Y. 1942)).

[123] Affronti v. Crosson, 746 N.E.2d 1049, 1050, 1051, 1052 (N.Y. 2001) (quoting Heller v. Doe, 509 U.S. 312, 320–21 (1993)) (upholding the constitutionality of a statute on rational basis review *following trial*).

[124] *See* Plaintiffs' Memorandum of Law in Opposition to Defendant's Motion to Dismiss, *supra* note 59, at 6.

[125] *See, e.g.*, Carter v. Canada (Att'y Gen.), [2015] 1 S.C.R. 331, 343 (Can. B.C.) (S.C.C.) (following a full trial the court struck down Canada's assisted suicide statute as impinging on

Judge Rivera's concurrence recognized one such set of facts that was already presented by the physician plaintiffs in the complaint—namely, a scenario involving a patient facing an excruciating and impending death seeking aid-in-dying.[126] Rather than credit physician plaintiffs' allegations that they "regularly encounter[ed] mentally-competent, terminally-ill patients who have no chance of recovery and for whom medicine cannot offer any hope other than some degree of symptomatic relief[,]"[127] the court denied plaintiffs the ability to put forward proof and to make the "more particularized challenge" that the U.S. Supreme Court acknowledged in *Glucksberg* could establish a constitutional violation.[128]

The court further mischaracterized the fundamental right at issue in this case—the well-established and broad fundamental right to self-determination with respect to one's body and to control the course of one's medical treatment—as a "fundamental right to physician-assisted suicide."[129] The Court of Appeals has long held that "[i]t 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."[130] *Rivers* recognized that the "common-law right is coextensive with the patient's liberty interest protected by the due process clause of our State Constitution."[131] The

liberty); *see also* Morris v. Brandenburg, 376 P.3d 836, 841 (N.M. 2016) (citations omitted) (affirming a reversal of lower court decision, following a full trial, that a dying patient has a fundamental right protected by the New Mexico constitution to choose a more peaceful death via aid-in-dying). In a somewhat similar case in Massachusetts, a physician brought a declaratory judgment action seeking judicial recognition that there was no basis for criminal prosecution of a physician for providing aid-in-dying. *See* Kligler v. Healy, No. SUCV2016-03254-F, 2017 Mass. Super. LEXIS 56, at *2 (Super. Ct. 2017). The trial court there properly refused a motion to dismiss sought by the state. *See id.* at *18–19 ("[T]his Court is not ruling on the merits of . . . [the] constitutional claim at this time. The court concludes only that the plaintiffs have satisfied their minimal burden to allege jurisdiction over their complaint for declaratory relief."). This would have been the appropriate ruling at the motion to dismiss stage in *Myers*.

[126] *See* Myers v. Schneiderman, 85 N.E.3d 57, 66 (N.Y. 2017) (Rivera, J., concurring) ("Considering the State's sanctioning of terminal sedation in particular, the statute does not survive rational basis review. . . . Therefore, in my view, the State may not unduly burden a terminally-ill patient's access to physician-prescribed medication that allows the patient in the last painful stage of life to achieve a peaceful death as the end draws near.").

[127] Record on Appeal, *supra* note 41, at 37.

[128] *See* Washington v. Glucksberg, 521 U.S.702, 735 n.24 (citation omitted); *Myers*, 85 N.E.3d at 60 (citation omitted).

[129] *Myers*, 85 N.E.3d at 61.

[130] Rivers v. Katz, 495 N.E.2d 337, 341 (N.Y. 1986) (internal citation omitted) (quoting Schloendorff v Soc'y of N.Y. Hosp., 105 N.E. 92, 93 (N.Y. 1914); then citing *In re* Storar, 420 N.E.2d 64, 70 (N.Y. 1981)).

[131] *Rivers*, 495 N.E.2d at 341.

court broadly described the right to self-determination stating:

> 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 that the greatest possible protection is accorded his autonomy and freedom from unwanted interference with the furtherance of his own desires.[132]

The court's jurisprudence indicates that the fundamental right as articulated by the court encompasses a patient's deeply and profoundly personal choice about how much suffering to endure in the final ravages of the dying process, just as it encompasses a patient's right to choose other end-of-life options that precipitate death.[133] In mischaracterizing the right at issue as a new "fundamental right to physician-assisted suicide,"[134] the court made the same mistake that it did in *Hernandez v. Robles*, where it "recast[ ] plaintiffs' invocation of their fundamental right to marry as a request for recognition of a 'new' right to same-sex marriage [which] misapprehend[ed] the nature of the liberty interest at stake."[135] There, the court's holding that the fundamental right to marry did not to apply to same-sex couples because "[t]he right to marry someone of the same sex . . . is not 'deeply rooted,'"[136] was rebuked just ten years later by the U.S. Supreme Court, which recognized such a right in *Obergefell v. Hodges*.[137] As was the case in *Hernandez*, the court's flawed characterization of the fundamental right in *Myers* not only failed to accord with its own firmly established principles of law, but it also failed to honor New York's "proud tradition" of protecting fundamental liberties.

Finally, the court erred by failing to recognize changing circumstances and shifting public attitudes towards aid-in-dying. The court's recent jurisprudence on statutory construction recognizes that the meaning of undefined statutory terms may evolve over

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[132] *Rivers*, 495 N.E.2d at 341 (internal citations omitted) (citing Erickson v. Dilgard, 252 N.Y.S.2d 705, 706 (Sup. Ct. 1962)).

[133] *See* Delio v. Westchester Cty. Med. Ctr., 516 N.Y.S. 677, 687–88, 691 (App. Div. 1987) ("The primary focus evident in the Court of Appeals analysis is upon the patient's desires and his right to direct the course of his medical treatment rather than upon the specific treatment involved.").

[134] *Myers*, 85 N.E.3d at 61.

[135] Hernandez v. Robles, 855 N.E.2d 1, 23 (N.Y. 2005) (Kaye, C.J., dissenting).

[136] *Id.* at 9.

[137] Obergefell v. Hodges, 135 S. Ct. 2584, 2608 (2015).

time.[138] In particular, in *Brooke S.B. v. Elizabeth A.C.C.*, the court adopted Judge Kaye's dissent in *Alison D. v. Virginia M.*,[139] and held that the term "parent" under the Domestic Relations Law is not limited to a biological parent.[140] In particular, the court held that it "agree[d] that, in light of more recently delineated legal principles, the definition of 'parent' established by this Court 25 years ago in *Alison D.* has become unworkable when applied to increasingly varied familial relationships."[141]

The court's holding in *Myers* thus stands in stark contrast to its established precedent that statutory terms may evolve. In holding that "[a]id-indying [sic] falls squarely within the ordinary meaning of the statutory prohibition on assisting a suicide[,]"[142] the court ignored the fact that aid-in-dying was not even a recognized medical concept that could have been contemplated by the Legislature as a "suicide" when it revised the Assisted Suicide Statute over fifty years ago.[143] The court further failed to credit any of the evidence of changing attitudes toward, and growing societal support for, aid-in-dying submitted by the plaintiffs, including the recent polls that a clear majority of doctors and the public support aid-in-dying.[144]

CONCLUSION

The Court of Appeals failed to stand as a bulwark of protection for the fundamental rights of New Yorkers to free choice and autonomy, specifically in medical decision making. The promise of liberty under the New York Constitution was not realized in the context of end-of-life liberty, which undermines New York constitutional jurisprudence and leaves suffering dying patients without the

[138] *See, e.g.*, Brooke S.B. v. Elizabeth A.C.C., 61 N.E.3d 488, 490 (N.Y. 2016) (citations omitted).

[139] Alison D. v. Virginia M., 572 N.E.2d 27, 31 (N.Y. 1991) ("[I]n the absence of express legislative direction [we] have attempted to read otherwise undefined words of the statute so as to effectuate the legislative purposes.").

[140] *See Brook S.B.*, 61 N.E.3d at 490.

[141] *Id.*

[142] Myers v. Schneiderman, 85 N.E.3d 57, 62 (N.Y. 2017).

[143] *See* AID IN DYING: HISTORY & BACKGROUND, *supra* note 22, at 9 (noting that the choice-in-dying movement did not gain momentum until the 1990s, which is way after the Assisted Suicide State was enacted).

[144] *See* Ault, *supra* note 38; Swift, *supra* note 37. Growing societal support for a practice is accepted as a reason to extend federal constitutional protection, as the Supreme Court noted in *Lawrence v. Texas*. 539 U.S. 558, 572 (2003) (citations omitted). The *Myers* court, which ostensibly was deferential to the Supreme Court decisions in *Quill* and *Glucksberg*, failed to acknowledge that the Supreme Court's jurisprudential approach to articulating rights worthy of protection under the United States Constitution had evolved in the years since *Glucksberg* to take such growing societal acceptance into account.

autonomy to decide the profoundly personal matter of how much suffering to endure before death. This opinion will serve as an example of failed jurisprudence, an example which any sister court considering this issue under its own constitution would be wise to avoid.

Aid-in-dying is gaining recognition across the country as a medically and ethically appropriate treatment, and the Court of Appeals' decision undoubtedly will be looked back upon as an unfortunate and embarrassing misstep by the court.