

**SECOND JUDICIAL DISTRICT COURT  
COUNTY OF BERNALILLO  
STATE OF NEW MEXICO**

**KATHERINE MORRIS, M.D., and  
AROOP MANGALIK, M.D.**

**Plaintiffs,**

**vs.**

**No.** \_\_\_\_\_

**KARI BRANDENBERG, in her official capacity as District Attorney for Bernalillo County, New Mexico, and GARY KING, in his official capacity as Attorney General of the State of New Mexico,**

**Defendants.**

**VERIFIED COMPLAINT FOR DECLARTORY AND INJUNCTIVE RELIEF**

**Introduction**

1. This action is brought by two New Mexico physicians who regularly care for terminally-ill patients to clarify that when physicians provide aid in dying, they do not violate New Mexico law. Specifically, this action alleges that NMSA 1978 § 30-2-4 (“Assisted Suicide Statute”), which makes it a fourth degree felony to “deliberately aid[ ] another in taking his own life,” does not encompass the conduct of a New Mexico licensed physician providing aid in dying to a mentally-competent, terminally-ill individual who has requested such aid because (1) aid in dying does not constitute “deliberately aiding another in taking his own life,” and (2) if it did, the Assisted Suicide Statute would violate multiple provisions of New Mexico’s Constitution.

2. The Plaintiffs seek a declaration that a physician who provides aid in dying to a mentally-competent, terminally-ill patient who has requested such aid is not criminally liable under New Mexico’s Assisted Suicide Statute and injunctive relief prohibiting Defendants from prosecuting physicians who aid a mentally-competent, terminally-ill patient in dying.

### **Jurisdiction and Venue**

3. This Court has jurisdiction of the subject matter of this action pursuant to the New Mexico Constitution, Art. VI, § 13 and NMSA 1978 § 38-3-1. This Court has personal jurisdiction over Plaintiffs and Defendants.

4. Venue is proper in this Court pursuant to NMSA 1978 § 38-3-1 because both Defendants maintain offices in this county, Defendant Brandenburg has authority to prosecute violations of New Mexico's Assisted Suicide Statute in this county, and Defendant Gary King has authority to prosecute the same if Defendant Brandenburg declines a prosecution under New Mexico's Assisted Suicide Statute.

### **Parties**

#### *The Plaintiffs*

5. Katherine T. Morris, M.D., F.A.C.S., is Board Certified by the American Board of Surgery and is licensed to practice medicine in New Mexico. She is a member of the American College of Surgeons, the American Association for Cancer Research, the American Hepato-Pancreato-Biliary Association, the Society of Surgical Oncology, and the American Society of Clinical Oncology. In 1996, she earned her medical degree from Oregon Health & Sciences University School of Medicine in Portland, Oregon. During her residence in Oregon, Dr. Morris held a license to practice medicine. Thereafter, she completed a Surgical Oncology Fellowship at Memorial Sloan Kettering Cancer Center, New York, New York. Throughout Dr. Morris Fellowship she was licensed to practice medicine in the state of New York. Dr. Morris is currently an Assistant Professor in the Division of Surgical Oncology, Department of Surgery at the University of New Mexico and also practices as a surgical oncologist at the University of New Mexico Health Sciences Center, Division of Surgical Oncology, in Albuquerque, New Mexico. Until 2010, Dr. Morris practiced surgical oncology in Oregon, where she was able to, and did, honor her patients' requests for aid in dying. Two of her patients chose that medical option. Since moving to New Mexico she has been reluctant to consider this otherwise appropriate care to be an option

available to her terminally ill patients because of the uncertainty over the applicability of the Assisted Suicide Statute. She has thus been unable to include all of the medically appropriate treatment options available to her patients.

6. In the course of her practice, Dr. Morris provides medical care to patients whom she knows to be mentally competent and terminally ill, who express the desire to have the option of aid in dying. Dr. Morris would be willing to provide aid in dying to such patients if no criminal prohibition would expose her to prosecution for doing so. Uncertainty about the application of New Mexico's Assisted Suicide Statute to aid in dying deters her from providing aid in dying.

7. Aroop Mangalik M.D. is licensed to practice medicine in New Mexico and Colorado. He has been in practice at the University of NM since 1981, serving as Professor of Medicine in the Department of Internal Medicine and as Clinical Director, Associate Professor, and Staff Physician in the University of New Mexico's Cancer Research & Treatment Center. Prior to moving to New Mexico, he was in practice in Colorado and on faculty at the University of Colorado Health Science Center, Denver, Colorado. Dr. Mangalik completed a hematology fellowship from 1964 to 1966 at the University of Utah, Salt Lake City, Utah. From 1996 to 2002, Dr. Magalik served as Chairman of the Ethics Committee at the University of New Mexico Health Sciences Center. He currently practices medicine at the Cancer Research & Treatment Center, Division of Hematology and Medical Oncology, University of New Mexico, in Albuquerque, NM.

8. In the course of his practice Dr. Mangalik provides medical care to patients whom he knows to be mentally competent and terminally ill, who express the desire to have the option of aid in dying. Dr. Mangalik would be willing to provide aid in dying to such patients if no criminal prohibition would expose him to prosecution for doing so. Uncertainty about the application of New Mexico's Assisted Suicide Statute to aid in dying deters him from providing aid in dying.

The Defendants

9. Defendant Kari Brandenburg is the District Attorney for the Second Judicial District, elected pursuant to the New Mexico Constitution, Article VI, § 24. She “prosecute(s) and defend(s) [ ] the state in all courts of record of the counties of h[er] district all cases, criminal and civil, in which the state or any county in his district may be a party or may be interested.” NMSA 1978 § 36-1-18.

10. If Kari Brandenburg fails or refuses to act in her official capacity in any criminal case, Defendant Gary King, as Attorney General for the State of New Mexico, is authorized to prosecute any criminal case that the county, state, or any department thereof is a party to or has interest in following thorough investigation. NMSA 1978 § 8-5-3. Further, the attorney general must investigate any matter or matters in which the county, state, or any department thereof may be interested if the governor directs him to do so. *Id.*

**General Allegations**

11. New Mexico’s Assisted Suicide Statute provides: “Assisting suicide consists of deliberately aiding another in the taking of his own life. Whoever commits assisting suicide is guilty of a fourth degree felony.” This statute does not reference a physician providing aid in dying to a terminally-ill and mentally-competent person.

12. “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 dying process unbearable. It is recognized that what is causing the death of a patient choosing aid in dying is the underlying terminal illness.

13. Terminal illness manifests in a variety of forms and end of life treatment varies dramatically. For the purpose of this Complaint, Plaintiffs draw attention to three end of life scenarios:

A. Patient A, on a life prolonging intervention, such as a ventilator or feeding tube, can direct withdrawal of the intervention or, if mentally incapacitated, others can direct the withdrawal of the intervention, thereby precipitating death;

B. Patient B, with refractory pain, can request total sedation (also called palliative sedation or sedation to unconsciousness), whereby his or her doctor induces an unconscious state via IV medication, withholds fluid/nutrition, and the patient is maintained in this state until death ensues;

C. And patient C, who is terminally ill, but does not have life prolonging intervention to withdraw and is ineligible for total sedation because he or she does not fit the medical criteria of refractory pain/symptoms or does not care to suffer the indignity of lingering unconsciousness and complete loss of control. This patient may find the dying process unbearable, yet has no means to precipitate death via certain and humane means.

14. In the course of their current medical practices, each of the Plaintiffs regularly encounters terminally-ill patients who have no chance of recovery and for whom medicine cannot offer any hope other than some degree of symptomatic relief. Indeed, in some cases, even symptomatic relief is impossible to achieve without the use of terminal sedation, a practice where the physician administers medications to render the patient unconscious, while nutrition and hydration are withheld until death occurs. The only choice available to such patients, therefore, is prolonged and unrelieved anguish on the one hand, or unconsciousness and total loss of control and personal dignity on the other. And at times, though death is imminent, the later scenario is not an option because the patient does not meet the criteria of refractory pain.

15. Faced with this reality, some terminally-ill patients would seek the choice of aid in dying.

16. In some cases, providing aid in dying is, in the professional judgment of a physician, a medically and ethically appropriate course of treatment.

17. In the course of their current medical practices, each of the Plaintiffs has treated patients faced with the choice described above.

18. In those circumstances, the professional judgment of each of the Plaintiffs was that access to aid in dying would be a medically and ethically appropriate option for those patients.

19. Each of the Plaintiffs has treated mentally-competent, terminally-ill adult patients who requested access to aid in dying, but were deterred from providing such treatment due to fear of potential prosecution under the Assisted Suicide Statute if the patient did ultimately self-administer life-ending medication.

20. Each of the Plaintiffs reasonably expects to encounter such patients in the future course of their respective medical practices due to the nature of their medical practices.

21. The existence and potential application of New Mexico's Assisted Suicide Statute deters the Plaintiffs from discussing and/or providing access to aid in dying and thereby prevents the Plaintiffs from offering medical care which, in their professional judgment, would otherwise be appropriate under the circumstances.

22. The Constitution of New Mexico requires the state to provide every person with the equal protection of the laws. Art. II, § 18. The New Mexico Constitution, Article II, § 18, further demands that "no person shall be denied life, liberty or property without due process of law." Additionally, "[e]very person may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of that right; and no law shall be passed to restrain or abridge the liberty of speech..." Art. II, § 17. These protections are independent of, and provide more protection than, the limitations placed on the powers of states by the Fourteenth Amendment to the United States Constitution because of flawed federal analysis, structural differences between the state and federal constitutional analogs, and/or distinctive state characteristics.

23. The New Mexico Constitution also provides that "all persons are born...with certain natural, inherent and inalienable rights, among which are the rights of enjoying and defending life and liberty...and of seeking and obtaining safety and happiness." Article II, § 4. This guarantee is independent of, and provides more protection than, the limitations placed on

the powers of states by the Fourteenth Amendment of the United States Constitution. Although the United States Constitution contains limitations on the powers of the state and federal governments related to due process, it does not contain any guarantee of the right to seek safety and happiness analogous to that in the New Mexico Constitution.

24. New Mexico public policy is found in the Constitution, statutes, court decisions and rules of the state. That public policy makes manifest that New Mexicans value privacy generally and autonomy in medical decision making specifically.

### **Count One: Statutory Construction**

25. Paragraphs 1-24 are hereby incorporated by reference and made paragraphs 1-24 of Count One as if fully set forth therein.

26. New Mexico's Assisted Suicide Statute does not provide a valid statutory basis to prosecute any licensed physician for providing aid in dying because the choice of a mentally competent terminally ill individual for a peaceful death as an alternative to enduring a dying process the patient finds unbearable does not constitute "suicide" within the meaning of NMSA 1978 § 30-2-4 when her physician concludes that her choice of a peaceful death is among the reasonable medical alternatives.

27. Because no court has had occasion prior to now to construe the meaning of the word "suicide" as used in New Mexico's Suicide Statute, there is substantial uncertainty over the legal rights and responsibilities of the parties as they relate to a physician who chooses to provide access to aid in dying to a mentally-competent, terminally-ill individual when that to treatment is otherwise medically appropriate.

28. The potential for prosecution under New Mexico's Assisted Suicide Statute for providing aid in dying harms the Plaintiffs in that it impairs their ability to provide adequate and appropriate medical care to their patients.

29. Accordingly, Plaintiffs are entitled to declaratory and injunctive relief as requested in this Complaint.

### **Count Two: Denial of Due Process of Law (Vagueness)**

30. Paragraphs 1-29 are hereby incorporated by reference and made paragraphs 1-24 of Count One as if fully set forth therein.

31. If term “suicide,” as used in New Mexico Assisted Suicide Statute, is interpreted to include the actions of a physician who provides aid in dying, then the statute does not allow individuals of ordinary intelligence a fair opportunity to determine whether their conduct is prohibited; permits police officers, prosecutors, judges, or juries to engage in arbitrary and discriminatory enforcement of the statute; and, therefore, deprives the Plaintiffs and their patients due process of law in violation of the Due Process Clause of the New Mexico Constitution.

32. Plaintiff physicians have standing to assert a claim for denial of due process of law on behalf of their patients.

33. If the term “suicide” in New Mexico’s Assisted Suicide Statute is interpreted to encompass a doctor providing aid in dying, Plaintiffs and Plaintiffs’ patients have or will be deprived of their right to due process under the law.

34. Accordingly, Plaintiffs are entitled to declaratory and injunctive relief as requested in this Complaint.

### **Count Three: Denial of Due Process of Law (Privacy)**

35. Paragraphs 1-34 are hereby incorporated by reference and made paragraphs 1-24 of Count One as if fully set forth therein.

36. If the term “suicide,” as used in New Mexico’s Assisted Suicide Statute, is interpreted to include the actions of a physician who provides aid in dying, then the statute violates Plaintiffs’ rights (and the rights of their patients) to privacy and other fundamental liberties without due process of law in violation of the Due Process Clause of the New Mexico Constitution.



37. Plaintiff physicians have standing to assert a claim for denial of due process of law on behalf of their patients.

38. If the term “suicide” in New Mexico’s Assisted Suicide Statute is interpreted to encompass a doctor providing access to aid in dying, this prohibition bears no rational relationship to any legitimate state interest, does not further any important state interest, nor is it the least restrictive means of advancing any compelling state interest.

39. If the term “suicide” in New Mexico’s Assisted Suicide Statute is interpreted to encompass a doctor providing access to aid in dying, Plaintiffs and Plaintiffs’ patients have or will be deprived of their right to due process under the law.

40. Accordingly, Plaintiffs are entitled to declaratory and injunctive relief as requested in this Complaint.

#### **Count Four: Denial of Equal Protection of the Laws**

41. Paragraphs 1-40 are hereby incorporated by reference and made paragraphs 1-24 of Count One as if fully set forth therein.

42. If the term “suicide,” as used in New Mexico’s Assisted Suicide Statute, is interpreted to include the actions of a physician who provides aid in dying, then the statute discriminates against Plaintiffs’ terminally ill patients who cannot direct that their life sustaining treatment be withdrawn to hasten death or are ineligible for or do not want terminal sedation, but seek aid in dying.

43. Plaintiff physicians have standing to assert a claim for denial of equal protection on behalf of their patients.

44. If the term “suicide,” as used in New Mexico’s Assisted Suicide Statute , is interpreted to include the actions of a physician who provides aid in dying, then the statute deprives those patients’ who seek physician aid in dying equal protection in violation of the New Mexico Constitution.

45. If the term “suicide” in New Mexico’s Assisted Suicide Statute , is interpreted to encompass a doctor providing access to aid in dying, this prohibition bears no rational relationship to any legitimate state interest, does not further any important state interest, nor is it the least restrictive means of advancing any compelling state interest.

46. Accordingly, Plaintiffs are entitled to declaratory and injunctive relief as requested in this Complaint.

#### **Count Five: Denial of Right to Free Speech**

47. Paragraphs 1-46 are hereby incorporated by reference and made paragraphs 1-24 of Count One as if fully set forth therein.

48. If the term “suicide,” as used in New Mexico’s Assisted Suicide Statute, is interpreted to include the actions of a physician who provides access to aid in dying, then the prohibition against Plaintiffs communicating what they believe to be an ethically and medically appropriate option of physician aid in dying to terminally ill patients constitutes a deprivation of the freedom of speech guaranteed in the New Mexico Constitution.

49. If the term “suicide” in New Mexico’s Assisted Suicide Statute, is interpreted to encompass a doctor providing aid in dying, this prohibition bears no rational relationship to any legitimate state interest, does not further any important government interest, nor is it the least restrictive means of advancing any compelling state interest.

50. Accordingly, Plaintiffs are entitled to declaratory and injunctive relief as requested in this Complaint.

#### **Count Six: Denial of Inherent and Inalienable Rights**

51. Paragraphs 1-50 are hereby incorporated by reference and made paragraphs 1-24 of Count One as if fully set forth therein.

52. If the term “suicide,” as used in New Mexico’s Assisted Suicide Statute, is interpreted to include the actions of a physician who provides aid in dying, then the statute

violates Plaintiffs' of the inherent and inalienable right to, inter alia, seek safety and happiness in violation of the New Mexico Constitution.

53. If the term "suicide," as used in New Mexico's Assisted Suicide Statute, is interpreted to include the actions of a physician who provides access to aid in dying, then the statute deprives those patients' of the inherent and inalienable right to, inter alia, seek safety and happiness in violation of the New Mexico Constitution.

54. Plaintiff physicians have standing to assert a claim for denial of inherent rights on behalf of their patients.

55. If the term "suicide" in New Mexico's Assisted Suicide Statute, is interpreted to encompass a doctor providing aid in dying, this prohibition bears no rational relationship to any legitimate state interest, does not further any important state interest, nor is it the least restrictive means of advancing any compelling state interest.

56. If the term "suicide" in New Mexico's Assisted Suicide Statute, is interpreted to encompass a doctor providing access to aid in dying, Plaintiffs and Plaintiffs' patients have or will be deprived of their right to their inherent rights under the law.

57. Accordingly, Plaintiffs are entitled to declaratory and injunctive relief as requested in this Complaint.

### **Prayer for Relief**

WHEREFORE, the Plaintiffs respectfully seek the following relief:

A. (1) A declaration that NMSA 1978 § 30-2-4 does not provide a valid statutory basis to prosecute any licensed physician for providing aid in dying because the choice of a mentally competent terminally ill individual for a peaceful death, as an alternative to enduring a dying process the patient finds unbearable, does not constitute "suicide" within the meaning of NMSA 1978 § 30-2-4, and further declaring that any such prosecution is void as a matter of law; or, in the alternative,

(2) A declaration that to the extent that NMSA 1978 § 30-2-4 prohibits a licensed physician from providing aid in dying, the application of that statute to such conduct violates the New Mexico Constitution as alleged; and

B. An order permanently enjoining the Defendants, their agents, employees, representatives, and all those acting in concert with them, from prosecuting any licensed physician for providing aid in dying to a mentally-competent, terminally-ill individual;

C. Costs of suit, including but not limited to attorneys' fees; and

D. Such further relief as the Court deems proper and the law allows.

Respectfully Submitted,

By /s/Laura Schauer Ives 3/15/12  
Laura Schauer Ives  
Alexandra Freedman Smith  
ACLU of New Mexico  
P.O. Box 566  
Albuquerque, NM 87103-0566  
Phone: (505) 266-5915 Ext. 1008  
Fax: (505) 266-5916  
[asmith@aclu-nm.org](mailto:asmith@aclu-nm.org)  
[lives@sclu-nm.org](mailto:lives@sclu-nm.org)

Maureen Sanders  
Sanders & Westbrook PC  
102 Granite Ave NW  
Albuquerque, NM 87102  
Phone: (505) 243-2243  
Fax: (505) 243-2750  
[m.sanderswestbrook@qwestoffice.net](mailto:m.sanderswestbrook@qwestoffice.net)  
*Of Counsel*

Kathryn L. Tucker  
Director of Legal Affairs  
Compassion & Choices  
P.O. Box 101810  
Denver, CO 80250  
Phone: 800.247.7421  
[ktucker@compassionandchoices.org](mailto:ktucker@compassionandchoices.org)  
*Pro Hac Vice Application Pending*