IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

KATHERINE MORRIS, M.D., AROOP MANGALIK, M.D., and AJA RIGGS,

Petitioners,

v.

S. Ct. No. _____
Court of Appeals No. 33,630

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,

Respondents.

EMERGENCY VERIFIED PETITION FOR SUPERINTENDING CONTROL

Appeal from the Opinion issued in the Court of Appeals of the State of New Mexico, Morris v. Brandenburg, Slip Opinion filed on August 11, 2015

Petitioners request oral argument pursuant to Rule 12-214(B)(1)NMRA

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COME NOW, Petitioners, Katherine Morris, M.D., Aroop Mangalik, M.D., and Aja Riggs, pursuant to Article VI, Sections 3 and 20 of the New Mexico Constitution and Rule 12-504 NMRA, to petition this Court for a Writ of Superintending Control from the New Mexico Court of Appeal's fractured decision in the above-captioned case, reversing the district court's judgment that New Mexicans have a fundamental right to determine how much suffering to endure before death due to terminal illness.

INTRODUCTION

Before the Court is one of the most private, intimate decisions made in a lifetime—how we face our own deaths. That decision should be reserved to the individual, not majority vote, informed by our most deeply held values, beliefs, and unique circumstances. Susan Brown[1] is terminally ill, and her life will soon end. She seeks some control over the inevitable and wants the option of ingesting medication to achieve a peaceful death should her suffering become unbearable. If she is lawfully able to do so, she would not be "taking" her own life. Her life is being taken by the inexorable progression of her terminal disease. For her, and others like her, medicine cannot change that fact. Indeed, she has fought long and hard to cure her illness, enduring numerous surgeries, years of chemotherapy and

[1] See **Exhibit 1**, Affidavit of Susan Brown, a terminally ill Bernalillo County resident.

radiation, and additional, aggressive medical interventions. Now, she seeks the comfort of knowing she will not have to suffer unbearably through the final ravages of her illness before death arrives.

The Court of Appeals opinion on this issue of great public importance presents a host of exigencies justifying this Court's extraordinary and immediate review.[2] To begin with, in reversing the district court's judgement[3] and finding that under the New Mexico Constitution there is no fundamental right for competent, terminally ill patients to ingest medication to achieve a peaceful death,[4] the majority included the State of New Mexico's untenable, dangerous position that terminally ill New Mexicans have the option to stockpile medication—medication that is necessary to treat serious symptoms, which symptoms would necessarily be left untreated while stockpiling—and overdose on that medication to end suffering. Though this shadow practice is for some terminally ill patients the only means of ending suffering, this should not be. Overdose on controlled narcotics does not always have the desired effect. It is backwards that the State and the Court of

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[2] See **Exhibit 2**, Morris v. Brandenburg, 2015-NMCA-___, No. 33,630 (August 11, 2015).

[3] See **Exhibit 3**, Record Proper at [RP0223-0229].

[4] The parties have stipulated that physician aid in dying constitutes a willing physician prescribing lethal medication to a competent, terminally ill patient who may self-ingest that medication to end their suffering by hastening their inevitable death.

Appeals have presented this shadow practice as a reasonable end-of-life option, yet declined to afford terminally ill, competent New Mexicans the safe and medically supervised death physician aid in dying affords. More importantly, it puts New Mexicans in peril.

Additionally, even in its reversal, a majority of the court held that there is, or may be, a constitutional right to aid in dying. Without swift resolution, terminally ill patients, like Ms. Brown, who by definition have an estimated six month or less life expectancy, may die without the basic dignity that the Court of Appeals believes our constitution may or does afford.

The majority also held that because there was federal precedent contrary to Petitioners' requested relief and the question before it involved a matter of great public importance, "the ultimate arbiter of the meaning of the New Mexico Constitution is our New Mexico Supreme Court." Given there may be a constitutional right of the utmost consequence at issue and the Court of Appeals did not believe it the appropriate court to address the scope of that right, this Court should expedite review.

Most significantly, however, there are currently terminally ill New Mexicans like Ms. Brown who want the option of aid in dying; New Mexico's Constitution requires that qualified patients have the option; and for twenty intervening months since the district court's opinion, they did. This writ presents the Court with the

opportunity to swiftly fulfill New Mexico's constitutional commitment to these patients, patients who will otherwise be forced to endure suffering they find unbearable. Law and justice demand a speedy, definitive resolution of this matter: terminally ill New Mexicans who just last week enjoyed the right to a peaceful dying process deserve it.

JURISDICTION

Article VI, § 3 of the New Mexico Constitution provides "[t]he supreme court shall have…superintending control over all inferior courts; it shall also have power to issue…writs necessary or proper for the complete exercise of its jurisdiction and to hear and determine the same." This power is extraordinary, "bounded only by the exigencies which call for its exercise." State v. Roy, 1936-NMSC-048, ¶ 94, 40 N.M. 397. And this court has used it to expedite review of New Mexico Court of Appeals decisions. See, e.g., State ex rel. Schwartz v. Kennedy, 1995-NMSC-069, ¶ 7, 120 N.M. 619 (stating that the New Mexico Supreme Court has "superintending control over *all inferior courts*" and "[t]he power of superintending control is an extraordinary power. It is hampered by no specific rules or means for its exercise.") (emphasis added) (citations omitted).

RELEVANT BACKGROUND

Petitioners filed the action below in the Spring of 2012. Petitioners sought declaration that New Mexico's criminal prohibition against assisted suicide,

NMSA 1978, Section 30-2-4 ("Section 30-2-4"), does not extend to the right for mentally competent, terminally ill patients to request life ending medication if they want it and, if it does, that prohibition is unconstitutional as applied to these patients and their physicians.

Following a two-day trial on the merits in December 2013—the first and only trial in the country concerning the practice of aid in dying—District Court Judge Nash found that Section 30-2-4 prohibited aid in dying, but that prohibition violated New Mexico's constitutional guarantees of the rights to happiness and due process. **Exhibit 3** [RP0223-0229]. Consistent with the testimony presented,[5] the district court stated it, "[could not] envision a right more fundamental, more private or more integral to the liberty, safety and happiness of a New Mexican than the right of a competent, terminally ill patient to choose aid in dying." **Exhibit 3** [RP0228]. Strictly scrutinizing Section 30-2-4's infringement on the fundamental right to aid in dying, the district court held the State had not fulfilled its burden to prove Section 30-2-4, as applied to aid in dying, furthered a compelling interest by the least restrictive means. Thus, the district court permanently enjoined the State from prosecuting physicians who provide qualified patients with aid in dying.

[5] Petitioners incorporate their summation of the evidence in Appellees' Answer Brief. See **Exhibit 4**, pp. 2-16.

The State appealed. On August 11, 2015, the Court of Appeals issued an opinion reversing the district court. Each judge wrote an opinion. In short, two judges held that aid in dying was not a fundamental right under the New Mexico Constitution, but one of those judges held open the possibility that the New Mexico Constitution protected the practice under a different level of scrutiny or constitutional provision than the district court had relied upon. Judge Vanzi dissented, rightly recognizing that "mentally competent, terminally ill citizens have a fundamental right to decide for themselves when and how to end their lives" and that the State has no interest, and could not identify an interest apart from generalities, in preventing such citizens from making this deeply personal decision. See **Exhibit 2**, ¶ 148. Petitioner details the Opinion, Concurrence, and Dissent below.

Judge Garcia wrote the majority opinion. Before turning to the constitutional question, the majority contextualized the end-of-life options available to patients, including the State's suggestion that "patients may [legally, according to the State] bring about the end of their own lives by stockpiling morphine lawfully prescribed by a physician and ultimately ingesting a lethal dosage." Id., ¶ 28.

The majority then held that there is no fundamental right under New Mexico's Constitution to physician aid in dying, principally relying on the near two decades past decision in Washington v. Glucksberg, 521 U.S. 702, 725 (1997),

where the United States Supreme Court held there was not a constitutional right to suicide because it is not long and historically protected. See, e.g., **Exhibit 2**, ¶¶ 29, 32. Unwilling to be the first court to recognize the right to physician aid in dying as constitutionally protected,[6] acknowledge that this is the first jurisdiction presented with a substantial record demonstrating the safety and importance of the practice, or to protect this personal decision from majority vote,[7] the majority pointed to Glucksberg and the lack of jurisprudence plainly stating that there is a right to choose a peaceful death to support its decision. Id., ¶ 32.

The majority also relied on the recent United States Supreme Court's holding in Obergefell v. Hodges, 135 S. Ct. 2584 (2015). Though the Obergefell Court did not have the twenty years of actual practice of physician aid in dying before it (or even the issue of whether aid in dying was constitutional), the majority found that Obergefell suggested Glucksberg's rigid analysis remained unchanged. **Exhibit 2**, ¶ 35. In Obergefell, however, in the context of same-sex marriage, the Court rejected a constitutional approach bound to historical recognition of a right, and acknowledged that constitutional interpretation must address "new dimensions of freedom" over time. Obergefell, 135 S. Ct. at 2596.

[6] **Exhibit 2**, ¶ 37.

[7] Id.

Seeking a case directly on point and characterizing the Petitioners and the Dissent's argument that aid in dying is constitutionally protected as "new," the majority readily dismissed this Court's and the United States Supreme Court's longstanding protection of the right to autonomy in medical decision-making and privacy, generally. **Exhibit 2**, ¶¶ 31, 36. Though it recognized that with medical advances the dying process has changed, giving rise to pain, suffering, indignity, and lack of autonomy at the end of our now often extended lives, Id., ¶ 35 (citing Cruzan by Cruzan v. Dir., Missouri Dept. of Health, 497 U.S. 261, 270 (1990)), the majority viewed those significant concerns as mere "modern desire to hasten death." Id., ¶ 43.

While holding that there was no fundamental right to aid in dying, the majority expressed repeated concern that Petitioners had not defined the right more broadly.[8] See, e.g., id., ¶¶ 26, 27, 44. Initially citing to Petitioners' evidence addressing the speculative state interests articulated in Glucksberg that vulnerable populations may be targeted if aid in dying were permitted—specifically the Oregon evidence that largely white, collage educated, insured persons generally availed themselves of aid in dying in that state—to suggest the use was not widespread enough, the court then detailed its concerns that the right would not

[8] Petitioners did not define aid in dying. Practicing physicians have.

extend to persons who were not terminally ill, incompetent, and unable to self-ingest. Id., ¶ 45. The Court was also troubled that only physicians would be protected from criminal prosecution if Petitioners prevailed. Id., ¶ 46. Given this narrowing, the majority concluded because only some persons would qualify for the right by Petitioners' definition, the right was therefore not fundamental. Id., ¶¶ 44-47.

Petitioners have not sought the "right to death." (We will all die and do not require State protection to ensure that certainty.) Petitioners instead seek the right for a terminal patient to choose a peaceful, dignified death. Still, the majority seized on a lack of precedent supporting the "right to death." **Exhibit 2**, ¶ 36. Employing interstitial analysis to Article II, Section 4, a clause without federal analogue, the majority noted that the New Mexico Constitution does not enumerate the right to "death," but does specify the protection of "life," which is antithetical to death. Id., ¶¶ 39, 43.

The majority also held that this Court is the only court empowered to interpret the New Mexico State Constitution where there is federal precedent it alleges has been plainly established. Id., ¶¶ 37-38 ("where it appears that an uncertain state of law should not exist and because avoidance of the same involves an issue of substantial public interest, the matters raised on appeal should be resolved by the [New Mexico] Supreme Court").

And Judge Garcia, though not joined by the concurrence, also found that Petitioners may prevail under a different level of scrutiny or constitutional provision. Id., ¶ 52. However, because the district court had not addressed all levels of scrutiny or reached Petitioners' alternative arguments that Section 30-2-4 may be unconstitutionally vague and/or violate the New Mexico Constitution's guarantee of equal protection, Judge Garcia would remand the case for the district court to decide those issues. Id., ¶¶ 51-53. The two other judges did not join Judge Garcia's call for remand, however. Id., ¶¶ 56, 138.

In his concurrence, Judge Hanisee agreed with Judge Garcia that there is no fundamental right to aid in dying. Id., ¶ 58. But he went further, stating that he would not find a right at any level of scrutiny or under any constitutional provision. Id., ¶¶ 58, 60, 67. Instead, he believes it the Legislature's domain to determine the issue by popular vote. Id., ¶ 67.

At the outset, Judge Vanzi, dissenting, addressed the majority's contention that fundamental rights are only rights enjoyed by all and that Petitioners defined physician aid in dying too narrowly. Id., ¶ 73. First, she explained that the right would belong to all New Mexicans, noting "[t]he fact that it may be invoked only by some people who find themselves in certain circumstances is also true of other constitutional rights." Id. This, she described, is true for reproductive rights and the right to terminate life-sustaining medical treatment, for example. Id.

Judge Vanzi then turned to federal due process precedent. Rejecting the majority's opinion that a right must be historically recognized to find protection under the federal constitution, she rightly identified Glucksberg and Bowers v. Hardwick, 478 U.S. 186, 190-91 (1986), overruled by Lawrence v. Texas, 539 U.S. 558 (2003)—where the Court refused to recognize a liberty interest in sodomy because there was not a historical tradition of protecting sodomy—as outliers. **Exhibit 2**, ¶¶ 79-85. And she pointed to Obergefell as the most recent example of many rejecting "a rigid historical analysis as dispositive of substantive due process rights." Id., ¶ 96, pp. 91-92 (quoting Obergefell, 135 S. Ct. at 2602: "[R]ights come not from ancient sources alone. They rise, too, from a better informed understanding of how constitutional imperatives define a liberty that remains urgent in our own era.").

Taking issue with the majority's reliance on Glucksberg and insistence Petitioner cite "authority for the proposition that death or aid in dying in New Mexico have…been recognized as embedded principles within our democratic society," Judge Vanzi explained, "[o]ur interstitial approach does not require (or even permit) us to treat Glucksberg as dispositive simply because it exists." Id., ¶ 109. Indeed, "even accepting the State's conclusory assertion that Glucksberg is not 'flawed,' neither the State nor majority or concurring opinions offer any reason why it should be treated as persuasive, given the United States Supreme Court's

current analysis of due process liberty interests and over seventeen years of experience (and evidence) with aid in dying, which the Glucksberg Court did not have before it." Id., ¶ 102.

Rejecting Glucksberg as either flawed—because it adhered to a rigid historical analysis of the right to die—or unpersuasive—because it did not have evidence of the practice of aid in dying before it—Judge Vanzi would find that physician aid in dying is a fundamental, or at least important, right under New Mexico's Constitution. Id., ¶ 104.

Looking to Article II, Section 4's text, Judge Vanzi would hold, "that Section 4 supplements and expands the liberty rights afforded by Section 18's due process clause to ensure maximum protection for the lives and liberty of New Mexicans…[and] affords New Mexic[ans] the right and agency to defend their lives and liberty by availing themselves of aid in dying." Id., ¶ 113. And, as such, the State must have an interest to prohibit the practice.

Applying the facts presented to the district court, including that aid in dying is not suicide, is safe and subject to a well-developed standard of care, provides patients enormous comfort, has not resulted in the abuse of vulnerable populations, corrupted the medical profession, or progressed to euthanasia,[9] Judge Vanzi

[9] Euthanasia is a distinct medical practice from aid in dying, not practiced in the United States.

rejected the State's alleged, general interest in life and preventing suicide as justification to prohibit aid in dying. She also noted, "the State and amici have not provided a single example of abuse in any United States jurisdiction where aid in dying is legal." Id., ¶ 132. Therefore, Judge Vanzi would uphold the district court's judgment and permit qualified New Mexicans to avail themselves of physician aid in dying.

From the time the district court issued its opinion until the majority reversed it, the district court's decision was not stayed and the practice of aid in dying was authorized in, at least, Bernalillo County. During that time, terminally ill patients enjoyed the comfort of knowing if their dying process became unbearable, they could ingest a lethal medication to achieve a peaceful death. Now, this practice has been forced back into the shadows.

ARGUMENT

I. A Writ of Superintending Control and Definitive, Constitutional Resolution of the Issues Presented is Appropriate Given the Exceptional Circumstances and the Great Public Importance of the Issue Presented in this Case

This Court should issue a writ of superintending control to definitively resolve whether aid in dying is a constitutionally protected practice in New Mexico. Two Court of Appeals judges held it was or may be; the Opinion's author believed this Court to be the ultimate arbiter of this question; the State and the Court of Appeals identified the significantly less-safe practice of terminally ill

patients stockpiling controlled narcotics to use for an overdose without medical supervision as a reasonable end-of-life option; and of the greatest significance are the terminal patients who want the option of aid in dying and will die during the timespan of a traditional appeal. Alone, the burden on these patients warrants exercise by this Court of its extraordinary power "to control the course of ordinary litigation in inferior courts," but taken in combination with the other exigencies presented by the Court of Appeals opinion on this issue of great public importance, it demands it. See generally Roy, 1936-NMSC-048, ¶ 94, 40 N.M. 397.

This Court has limited the exercise of its power of superintending control to exceptional circumstances or to matters of great public importance. See generally State ex rel. Transcon. Bus Serv. v. Carmody, 1949-NMSC-047, 53 N.M. 367, 208 P.2d 1073; Dist. Court of Second Judicial Dist. v. McKenna, 1994-NMSC-102, 118 N.M. 402. Both are plainly present here. Indeed, the issue presented in this Petition is of greater importance than issues presented in cases where the Court has issued writs of superintending control. For example, in McKenna, the Second Judicial District Court petitioned for a writ of superintending control, "asking generally for guidance and assistance" in handling a petition for a grand jury to investigate one or more of the court's judges. Id., ¶ 1. This Court issued the writ, finding the matter of sufficient "great public importance" to justify the exercise of its "boundless" superintending authority. Id., ¶ 4.

Similarly, in State ex rel Schwartz v. Kennedy, 1995-NMSC-069, 120 N.M. 619, this Court held "we may exercise our power of superintending control even when there is a remedy by appeal, where it is deemed in the public interest to settle the question involved at the earliest moment." Id., ¶ 8 (internal quotation marks and quoted authority omitted). The Schwartz Court found it appropriate to exercise superintending control to decide whether a license revocation and a prosecution for DWI constitute double jeopardy. Schwartz relied on State Racing Comm'n v. McManus, 1970-NMSC-134, ¶ 9, 82 N.M. 108, which held that questions of "great public importance" may require this Court to use its power of superintending control. In McManus, the question was whether a jockey had to exhaust administrative remedies in front of the State Racing Commission before seeking judicial relief. Id., ¶ 4. Surely the right of terminally ill patients to safely end their suffering in extremis is of equal or greater public importance than those matters.

The great importance of aid in dying is manifest. The majority identified it as an issue of "substantial public importance" that this Court should resolve. **Exhibit 2**, ¶ 38 (quoting Archibeque v. Homrich, 1975-NMCA-023, ¶ 5, 87 N.M 265 (per curiam). It also inspired the Court of Appeals to author three separate opinions, and a majority of those judges held that the right was, or may be, protected by our constitution.

The urgency here is evident, best demonstrated by considering terminal patients, like Susan Brown, who will not survive traditional appeal. Petitioners' brief details some of the incredible indignities suffered by these patients, as does the Court of Appeals. See **Exhibit 4**, Appellees' Answer Brief at 2-16; see also **Exhibit 2**, ¶ 5. Petitioners will not reiterate those indignities here. Those who are presently suffering are the same patients who, until a week ago, enjoyed the right to avail themselves of physician aid in dying.

The State's response to these patients is callous. It suggests they hoard medication and overdose, and the Court of Appeals included that suggestion in detailing end-of-life options. **Exhibit 2**, ¶ 28. Though the shadow practice is the only means by which many terminally ill patients are able to effectuate a peaceful death, the practice isolates patients who do not want to implicate loved ones and, because medical personnel are uninvolved, it is sometimes ineffective. This essential State cosign to unsupervised overdose is of enormous public concern and presents exceptional circumstances. This cannot stand.

For the above reasons, Petitioner respectfully requests that this Court exercise superintending control over the Court of Appeals and accept this emergency writ, hearing and resolving the case as expeditiously as possible.

Petitioner now turns to its constitutional argument, incorporating by reference, Judge Vanzi's dissenting opinion in whole. **Exhibit 2**, ¶¶ 71-148.

II. The New Mexico Constitution protects a qualifying patient's right to choose aid in dying.

Petitioners, the Court of Appeals, and the State agree that the extended dying process is a modern conundrum and in that process terminal patients are sometimes left to suffer through the final ravages of their illness until death, inexorably, arrives. This Court cannot avoid its quintessential province in this case simply because the conundrum is modern any more than the Court could refuse to analyze the application of the New Mexico Constitution's Fourth Amendment analogue to searches of images on computers or cell phones. The Court must be guided by the principles held paramount in our constitution. The principles of liberty, autonomy, and due process of law embodied in Article II, Sections 4 and 18, protect the intimate decisions of competent, terminally ill patients regarding the nature and manner of their death.

The right of a terminally ill, competent adult to choose aid in dying is fundamental or, at the very least, important under the New Mexico Constitution. The State cannot demonstrate that preventing a competent, terminally ill adult from electing aid in dying furthers any interest, important, compelling or otherwise.

A. Federal law is not controlling.

As Judge Vanzi aptly explains in her dissent, the majority wrongly relies on Glucksberg, 521 U.S. 702, 735, to reverse the trial court's judgment. **Exhibit 2**, ¶¶ 90-102. In Glucksberg, the exceedingly unclear majority pointed to the lack of

historical protection of suicide to support its holding that there was no constitutional right to physician aid in dying. However, Glucksberg is not dispositive for two reasons. First, Glucksberg left open the debate to the States. Glucksberg, 521 U.S. at 735. Second, Petitioners do not bring a claim under the United States Constitution. Instead, Plaintiffs bring claims pursuant to Sections 4 and 18 of Article II of the New Mexico Constitution. And, those independent constitutional protections command that terminally ill, competent patients who seek a peaceful end can do so without undue state interference.

New Mexico courts do not follow federal analysis of parallel constitutional provisions in lock-step. Instead, "New Mexico courts independently analyze state constitutional guarantees when federal law begins to encroach on the sanctity of those guarantees." State v. Granville, 2006-NMCA-098, ¶ 14, 140 N.M. 345 (internal quotation marks and quoted authority omitted). Here, the federal analysis is flawed and unpersuasive, and this Court should reject it.

As the dissent explained, "[t]he assumption that a fundamental right exists only if there is a history and tradition of protecting it, shared by Bowers and Glucksberg, does not comport with the Supreme Court's analysis of due process liberty rights in decisions issued before and afterward." **Exhibit 2**, ¶¶ 95.

Moreover, when the Glucksberg Court ruled, it did so in a vacuum, without information about how the practice of aid in dying would impact patients and end-

of-life care because at that time there was no open practice in the U.S. The Glucksberg Court was concerned with the possibility that "vulnerable groups-including the poor, the elderly, and disabled persons" could be subject to "coercion and undue influence in end-of-life situations," including aid in dying. Glucksberg, 521 U.S. at 731-32. The Court feared aid in dying would become a cost-saving measure for families. Id. at 732. Over the seventeen years that aid in dying has been legal, the Oregon data has shown that these fears were unwarranted.

The Glucksberg Court was also concerned that permitting patients to choose aid in dying might start "down the path to voluntary and perhaps even involuntary euthanasia." Id. at 732. That fear has not materialized either. Unlike the Glucksberg Court, this Court has the benefit of years of data demonstrating that aid in dying has not produced any of the feared harms.

Therefore, this Court can rule on entirely independent state constitutional grounds or depart from the federal precedent as it is either flawed or unpersuasive.

B. There is a fundamental right to choose aid in dying pursuant to Article II, Sections 18 and 4.

The right to aid in dying is rooted in the liberty interest found in the due process clause of Article II, Section 18, and the protection of "natural, inherent and inalienable rights" articulated in Article II, Section 4. The record and the established law of this jurisdiction compel reversal of the Court of Appeals.

1. *The substantive due process clause of Article II, Section 18 protects the fundamental right of competent terminal patients to aid in dying.*

Barring competent, terminally ill adults from seeking aid in dying violates the distinct guarantees of Article II, Section 18's substantive due process clause by depriving them of the fundamental right to autonomous medical decision-making and a dignified, peaceful death. "A fundamental right is that which the Constitution explicitly or implicitly guarantees." Howell v. Heim, 1994-NMSC-103, ¶ 14, 118 N.M. 500 (internal quotation marks and quoted authority omitted).

"In examining the constitutionality of a statute for substantive due process, [a court] determine[s], as a threshold matter, the nature of the private interest at stake." State v. Druktenis, 2004-NMCA-032, ¶ 52, 135 N.M. 223. Namely, whether the right is fundamental or important and therefore afforded more exacting review. In general, fundamental rights are those "that are so 'implicit in the concept of ordered liberty' that 'neither liberty nor justice would exist if they were sacrificed.'" ACLU of NM v. City of Albuquerque, 2006-NMCA-078, ¶ 16, 139 N.M. 761 (quoting Glucksberg, 521 U.S. at 721).

The United States Supreme Court has recognized a variety of fundamental liberties under the due process clause that are not explicit, including the right to marital privacy, Griswold v. Connecticut, 381 U.S. 479 (1965); to have children Skinner v. Oklahoma ex rel. Williamson, 316 U.S. 535 (1942); to direct education

and upbringing of one's children, Meyer v. Nebraska, 262 U.S. 390 (1923); and to bodily integrity, Rochin v. California, 342 U.S. 165 (1952).

New Mexico courts have also recognized fundamental personal rights, including "the rights of parents in the care, custody, and control of their children, In Re Pamela G., 2006-NMSC-019, ¶ 11, 139 N.M. 459; the freedom of personal choice in matters of family life, Jaramillo v. Jaramillo, 1991-NMSC-101, ¶ 20, 113 N.M. 57, and the right to family integrity. Oldfield v. Benavidez, 1994-NMSC-006, ¶ 14, 116 N.M. 785.

Moreover, the U.S. Supreme Court has repeatedly recognized that individual rights to privacy and bodily integrity are fundamental. See, e.g., Roe v. Wade, 410 U.S. 113 (1973) (recognizing the right of privacy protects a woman's right to choose to terminate a pregnancy); Cruzan by Cruzan v. Director, Missouri Dept. of Health, 497 U.S. 261 (1990) (suggesting the Due Process Clause protects an interest in refusing medical care, even if that precipitates the individual's death); Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833, 849 (1992) ("It is settled now…that the Constitution places limits on a State's right to interfere with a person's most basic decisions about…bodily integrity."); Washington v. Harper, 494 U.S. 210 (1990) (recognizing a constitutionally protected interest in bodily integrity). In the Roe decision, the Supreme Court also "stressed the importance of the relationship between the patient and physician."

Glucksberg, 521 U.S. 702, 778 (Souter, J., concurring) (citing Roe, 410 U.S. at 153, 156). Furthermore, the Supreme Court has "assumed, and strongly suggested, that the Due Process Clause protects the traditional right to refuse unwanted lifesaving medical treatment." Glucksberg, 521 U.S. at 720 (citing Cruzan, 497 U.S. at 278-279).

Thus, the U.S. Supreme Court's explicit recognition of a patient's right to bodily integrity and right to refuse life-sustaining treatment, coupled with New Mexico's heightened protections under its due process clause, see Montoya, 2007-NMSC-035, ¶ 22, demonstrate that the right to aid in dying is another of the implicit and fundamental rights protected by the New Mexico Constitution. See also Glucksberg, 521 U.S. at 777 (Souter, J., concurring) ("[e]very human being of adult years and sound mind has a right to determine what shall be done with his own body.")

2. *The inherent rights guaranteed by Article II, Section 4 also protect the fundamental right to aid in dying.*

In Griego, 2014-NMSC-003, ¶ 1, this Court opened its landmark decision declaring the unconstitutionality of this state's marriage laws with the text of Section 4. Section 4's prominence in that opinion demonstrates the Court's commitment to recognizing the expanded, independent rights New Mexicans enjoy under their constitution. The Griego court ultimately ruled on equal protection grounds, id., ¶ 67, but not without recognizing the inherent rights guaranteed under

Section 4 that either stand alone, or as testament to, our constitution's heightened protections.

C. The State's interest in Section 30-2-4 does not outweigh the right of a terminally ill, competent patient to choose aid in dying under any level of scrutiny.

In their Answer Brief Petitioners set forth the tests for strict, intermediate, and rational basis scrutiny. See **Exhibit 4**, Appellees' Answer Brief at 33-41. In sum, and as this Court has directed in the past, the deference this Court affords the State's alleged interests in prohibiting a given practice is dependent upon the importance of the right at issue. Instead of reiterating that analysis, Petitioner refers this Court to that briefing, but takes this opportunity to address the State's interests as understood by the Court of Appeals. Because the State does not, and cannot, justify its prohibition of aid in dying, the prohibition fails at any level of scrutiny.

This analysis benefits from comparing the right Petitioners request to the far-reaching right the majority contemplates, a far-reaching right that would implicate state interests. The right to aid in dying, however, does not. In its opinion, the majority expressed repeated concern that Petitioners had limited this right to terminally ill, competent patients who can self-ingest life ending medication prescribed by a physician. Petitioners limit the right to those patients because the well-established standard of care limits physician aid in dying to only those

patients, but also because the state does not have any interest in protecting these particular patients.

When patients are terminally ill, they are, by definition, already dying in the near future; and, as a result, experts view aid in dying as another end-of-life option to alleviate suffering. Other, lawful, options include withdrawing of life-sustaining intervention or terminal sedation. In all instances—withdrawing life-sustaining treatment, terminal sedation, and aid in dying—the cause of death is the underlying disease. If the majority's broad definition were adopted, however, physicians would be cutting a life short, and the state would have an interest in preventing premature death.

Further, it is clear when competent, terminally ill patients self-ingest medication to ease their suffering they have made this extremely important decision for themselves. This exclusion of incompetent patients who cannot self-ingest, ensures that the concerns articulated in Glucksberg do not materialize. Petitioners do not seek the right to euthanasia and appreciate that vulnerable populations could be impacted if this decision were not left to competent individuals.

Also, physicians must provide this care because it is medical care involving the prescription of a controlled narcotic. In fact, it is medical care that has greatly improved end of life care in Oregon overall. **Exhibit 3** [RP0221].

Turning to the State's alleged, but what it concedes is admittedly weak in this instance, interest in preserving life, "the State has no legitimate general interest in someone's life, completely abstracted from the interest of the person living that life." Cruzan by Cruzan v. Dir., Missouri Dep't of Health, 497 U.S. 261, 313 (1990) (Brennen, J., dissenting). Aid in dying is a well-considered act intended to preserve one's coherent sense of self. These patients desperately wish that they could continue living; but they cannot. In contrast, a person who commits suicide usually has a psychiatric condition, often depression, and acts impulsively. A suicide represents a life cut short, an act of destruction. The state has an interest in preventing suicide. Aid in dying is not suicide, however.

REQUESTED RELIEF

Petitioners respectfully request this Court:

1. issue this writ of superintending control to expedite hearing and decision on this matter of great public importance;

2. if it believes it necessary for the parties to present additional briefing to the Court, issue an expedited supplemental briefing and oral argument schedule, including directive to any potential amici; and

3. reverse the Court of Appeals and find that New Mexicans enjoy a constitutionally protected right to aid in dying.

STATEMENT OF COMPLIANCE RULE 12-504(H)

As required by Rule 12-504(H) NMRA Petitioners certify that the body of this brief complies with Rule 12-504(G)(3) NMRA because:

1. The body of this brief contains a total of 5967 words excluding the parts of the brief exempted by Rule 12-504(G)(1) NMRA.
2. This brief has been prepared in a proportionally spaced typeface using Microsoft Word 2013 in 14 point Times New Roman.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of this petition was served on Special Assistant Attorney General Scott Fuqua via first-class mail, postage prepaid, and electronic mail on August 19, 2015.

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