IN THE SUPREME COURT OF FLORIDA

KRISCHER, Appellant/Defendant v. McIVER, Appellee/Plaintiff	Supreme Court No. 89,837 District Court of Appeal 4th District No, 97-379 Circuit Court, Palm Beach County No. CL-96-1504-AF

BRIEF OF THE NATIONAL CATHOLIC OFFICE FOR PERSONS WITH DISABILITIES AND ITS FLORIDA NETWORK, AND THE KNIGHTS OF COLUMBUS AND ITS FLORIDA MEMBERS AS *AMICI CURIAE* IN SUPPORT OF APPELLANT

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INTERESTS OF THE AMICI CURIAE

The National Catholic Office for Persons with Disabilities (NCPD) is a non-profit organization established in 1982 to promote the inclusion of ten million Catholics with disabilities and their families into the mainstream of our society and the Catholic Church. NCPD offers its expertise and resources to a national network of disability offices. It works with several network members and offices within each of the Catholic dioceses in Florida, including the Diocese of Palm Beach. A critical aspect of NCPD's mission is to highlight the value of each life and to encourage the creation of environments which allow each individual to fulfill his or her potential. If a "right" to assisted suicide for the terminally ill is lodged in the Florida Constitution, then the goals and programs NCPD and its Florida affiliates are pursuing in the interest of persons with disabilities will be for nought. NCPD opposes the legal and social devaluation of persons with disabilities, many of whom have or are regarded as having terminal conditions. Such devaluation will surely result from a constitutional rule transforming their fundamental right to life from an unalienable right to a merely alienable interest based solely on life expectancy.

The Knights of Columbus is an international Catholic fraternal organization of 1.5 million members dedicated to advancing the ideals of charity, unity, fraternity, and patriotism through its activities around the world. The Knights of

Columbus engages in a broad range of social action programs to protect the family, and it devotes a considerable portion of its resources and volunteer efforts to aiding persons with illnesses and disabilities, as well as the less fortunate. Approximately 38,000 Knights reside in Florida. This brief was written with the support of funds provided by the Knights. The parties have consented to the filing of this brief.

SUMMARY OF ARGUMENT

This brief examines the right of privacy as intended to be established by the framers of Article I, section 23 of the Florida Constitution (hereinafter "Privacy Amendment") and as interpreted by the Florida courts. Based on the analysis and conclusions herein, your Amici urge this Court to reverse the ruling below because it erroneously finds a privacy right to obtain suicide assistance and thwarts the compelling objectives of Florida's ban on suicide assistance. § 782.08, Fla. Stat.

The trial court reached its decision without exploring the intended meaning and scope of a "right to be let alone" in matters concerning one's "private life" (Art. I, § 23, Fla. Const.). It underplayed the enormous social and legal consequences of equating a desire to avoid intrusive medical intervention with a desire to be killed. It dispensed with the necessary judicial preference for legislative policy choices by recognizing the novel claim before it.

Nothing in the record generated by the Amendment's framing reveals any intent to reverse centuries of legal and social

opposition to suicide, assisted suicide, and euthanasia. Instead, the framers endorsed a concept of privacy which depends heavily on accumulated developments in law and social policy to guide the courts in determining privacy's scope. Consistent with the framers' intent, and like the approach taken by this Court to evaluate novel claims in the common law, the Court should evaluate the novel constitutional claim before it in light of, and not in spite of, prevailing public policy.

Even if, as some have suggested, the framers intended to incorporate John Stuart Mill's philosophy on liberty – mainly, his view that liberty protects those actions posing no harm to others – then the analysis must also account for Mill's assertion that any actions alienating one's liberty are not themselves expressions of liberty. Assisted suicide alienates one's very right to live, which is the right to enjoy ail other rights including liberty, and thus may not be included within the zone of privacy without contradicting Mill himself. Such a distorted view of privacy renders entirely incoherent the very idea of liberty. A legitimate expectation of privacy may not be adduced from such a logical contradiction.

A constitutional rule on assisted suicide which refers to a person's life expectancy and incorporates discriminatory notions of quality of life threatens the status before the law of all vulnerable persons, especially those with terminal conditions or serious disabilities regarded as terminal. Such a rule should be rejected and Florida's assisted suicide ban upheld.

ARGUMENT

I. THE TRIAL COURT ERRED BY FINDING A RIGHT TO ASSISTED SUICIDE UNDER THE PRIVACY AMENDMENT OF THE FLORIDA CONSTITUTION.

The trial court engaged in a remarkably truncated analysis to conclude that § 782.08 violated article I, section 23 of the Florida Constitution. In just two paragraphs consisting of a smattering of quotations from a line of Florida cases dealing with the refusal of life-sustaining medical treatment, the trial court asserted more by implication than by demonstration that a zone of privacy encompassed assisted suicide. Final Judgment at 13. It focused on a reference by the Florida Supreme Court to a privacy "right extend[ing] to all relevant decisions concerning one's health" (id. quoting *In re 'Browning,* 568 So.2d 4, 11 (Fla. 1990)). Its analysis assumed that physician-assisted suicide would constitute "a relevant decision concerning-one's health" and thus automatically enjoy the same protection granted by the Supreme Court to treatment refusals.

Yet this Court has stated precisely the contrary. In the very same decision of *In re Browning,* the Supreme Court referred to § 782.08, which by banning suicide assistance makes "'[e]uthanasia . . . a crime in this state'" and legitimizes the "'concern that the "right to die" could become a license to kill.'" 568 So.2d at 13 (quoting *In re Browning, 543* So.2d 258, 269 (Fla.2d DCA 1989)). Thus the Supreme Court acknowledged the continuing validity of Florida's ban on assisted suicide at the same time it upheld the right to refuse treatment. This belies

any intent by the Supreme Court to embrace the crime of assisted suicide as an aspect of privacy.

The trial court claimed further that the State's interest in preventing suicide has "often" been found by the Florida courts to be outweighed by the individual's "right to control the time and manner of his or her own death". Final Judgment at 14. The trial court mischaracterized the Florida cases: They have invariably distinguished the choice to refuse treatment from suicide and thus never "balanced" suicide against the countervailing public interest in preventing suicide. See, e.g., *Satz v. Per&utter,* 362 So.2d 160, 162 (Fla. 4th DCA 1978), *adopted in 379* So.2d 359 (Fla. 1980) (holding that proof of a "basic wish to live, plus the fact that (the patient] did not self-induce his horrible affliction, precludes his further refusal of treatment being classed as-attempted suicide"); *In re Browning,* 568 So.2d at 14 (holding that "suicide is not an issue" in treatment refusal cases because death will result,, "if at all, from natural causes").[1]

In the end, the trial court attempted to resolve the privacy issue as if it were simply a matter of redefining the nature of suicide. In reality, the trial court's action, if upheld, portends immense changes in public policy. It characterized the

[1]The trial court complicated its own privacy analysis by summarily rejecting the claim of a fundamental right to "terminate life" under the Due Process Clause of the United States Constitution. Final Judgment at -10, 19-20. Thus, it created a right ex *nihilo,* lacking any roots in Florida law or federal law.

refusal of life-sustaining treatment as "suicide" – and thus extended the zone of privacy to encompass actions purposely and directly causing death. Final Judgment at 16.

Unless this Court is prepared to abolish the time-honored legal and ethical distinction between letting die and causing death – a distinction enjoying overwhelming acceptance[2] – it must acknowledge that the claim of privacy at stake in this case has never been recognized before in Florida law.. The trial court conflated the purposeful and direct taking of one's own life with other privacy interests, and its definitional sleight-of-hand avoided the real issue in this case. For the first time, the Florida courts are asked to embrace assistance in direct killing – euthanasia – as a positive social policy.

Establishing physician-assisted suicide for the terminally ill as an aspect of privacy would result in the wholesale abandonment of those precepts of Florida's law affirming the inalienable nature of fundamental human rights. It would jettison the corollary premise that all potential victims of homicidal acts are equal before the law. It would destabilize Florida's comprehensive controls governing drug safety and preventing drug abuse. It would also debase the ethical

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[2] *See* The New York State Task Force on Life and the Law, ***Assisted Suicide and Euthanasia in the Medical Context*** 111 (1994) (observing that "the distinction between killing and letting die, in general and in the context of medical decisions, is widely accepted and supported"); Yale Kamisar., ***The "Right to Die": On Drawing (and Erasing) Lines, 35*** Duquesne L. Rev. 481, 490 (1996) (noting that any constitutional policy blurring the distinction "shatters a general consensus").

integrity of the medical profession by allowing dot-tors who choose to assist in the killing of their patients to continue to trade on their profession's prestige as the guardian of health. These extraordinary shifts in public policy should be honestly addressed, and not swept beneath a technical discussion about competing definitions. Florida's longstanding and comprehensive policy against assisted suicide affirms the equal dignity of all persons. Florida citizens have a right to know why it should be subordinated, if at all, to other interests.

II. THE SUPREME COURT MUST CAREFULLY DELINEATE THE NATURE AND LIMIT OF THE GENERAL RIGHT TO PRIVACY GUARANTEED BY THE FLORIDA CONSTITUTION IN A CASE INVOLVING A NOVEL CLAIM OF A RIGHT TO ASSISTED SUICIDE.

On its face, the Florida Privacy Amendment provides little substantive guidance as to the breadth of the zone of privacy it guarantees. As broad as its language may be, it cannot and should not be construed as requiring the courts to give "talismanic effect to 'the right to be left alone,' 'intimate decisions,' or 'personal autonomy'". *State v. Mueller, 671* P.2d 1351, 1360 (Haw. 1983) (referring to Hawaii's privacy guarantee similar to Florida's Privacy Amendment). ***See also. Florida Board of Bar Examiners re: Applicant,*** **443** So.2d 71, 74 (Fla. 1983) (holding that the Florida Privacy Amendment-fails to provide an "absolute guarantee against all governmental intrusion"). Otherwise, the Privacy Amendment would permit the Florida courts to legislate at will **by** arrogating to the judiciary those powers to make social policy that as a constitutional matter belong, only

to the legislature. See Art. II, § 3, Fla. Const. ("No person belonging to one branch shall exercise any powers appertaining to either of the other branches unless expressly provided herein").[3]

As this Court recognized in *Satz v. Perlmutter,* the policy questions surrounding death and dying are "fraught with complexity" and are "not well-suited for resolution in an adversaryjudicial proceeding.! 379 So.2d at 360. Thus, a "preference for legislative treatment" will permit judicial resolution of novel privacy claims in the death and dying area only in the face of "legislative inaction". *Id.* Even then the courts must "proceed on a case by case method" rather than issue

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[3]The trial court assumed the legislative authority to decide whether and when to "leave the final determination of when to die to the privacy of the physician-patient relationship". Final Judgment at 22. Apparently, the court is prepared to exercise this authority on a case-by-case basis within the time it takes the legislature to rescind its uniform ban and replace it with a new law with defined exceptions. *Id.* at 19 n.6. In effect, the trial court has invited anyone in and outside Florida to come to Palm Beach and apply for judicial permission to violate § 782.08 within an interim period of uncertain-duration. Thus, its ruling raises considerable doubt as to whether and in what circumstances physician assistance with suicide would constitute a crime.

With one difference, this raises a separation-of-powers problem similar to that found in ***B.H. v. State, 645*** So.2d 987 (Fla. 1994). The Supreme Court held in ***B.H.*** that the Florida Constitution's "strict" separation-of-powers requirement evinces "one clear principle" – the "legislature may not delegate open-ended authority [to a judicial body]' such that 'no one can say with certainty, ***from the terms of the law itself,*** what would be deemed an infringement of the law'". *Id.* at 993. Such principle is violated by any attempt of the legislature to delegate to a judicial body the "power to define a crime". ***Id.*** Of course, the difference here is that the legislature's power to define the crime of assisted suicide was usurped by rather than'delegated to the trial court.

comprehensive guidelines applicable beyond the immediate case. *Id.* at 361. Yet the trial court below professed allegiance to the *Perlmutter* "case by case" approach only *after* it refused to apply a longstanding and uniformly applicable legislative policy to the case at hand. Final Judgment at 18-19.

The legislature has spoken definitively on the topic of assisted suicide by enacting § 782.08. As other amici will point out, the criminal ban on suicide assistance is only one, albeit the most important, facet of a broad range of official measures treating suicide as against public policy in Florida. See, *e.g.*, Brief of Amicus Curiae Florida Catholic Conference and Brief of Amici Curiae Florida Commission on Aging with Dignity, the National Legal Center for the Medically Dependent & Disabled, Inc., and several individual clients. Nevertheless, the trial court proceeded as if the judiciary alone were competent to weigh the numerous interests at stake, and issued its momentous ruling after admitting that it had failed to research most of the "voluminous" scholarly, legal, medical, and governmental materials introduced by the parties. Final Judgment at 2. So when the trial court asserted "[i]t is clear that the State has little reason" to enforce the assisted suicide ban in this case (*id.* at 16), it left no clue as to which sources in the law, medical ethics, or other expressions of Florida public policy moved the court to such conviction of clarity.

However, this Court must ground its analysis in something more than the personal sensibilities of its individual members.

Pursuant to its earlier holding in *Perlmutter,* this Court should affirm its "preference for legislative treatment" (379 So.2d at 360) and reject the novel claim of a right to assisted suicide.

III. THE DEBATE SURROUNDING THE PRIVACY AMENDMENT'S CREATION AND ENACTMENT NOWHERE EVINCES AN INTENT BY-ITS FRAMERS TO EXTEND CONSTITUTIONAL PROTECTION TO ASSISTED SUICIDE OR TO ANY OTHER FORM OF EUTHANASIA.

As this Court stated in *Winfield v. Division of Pari-Mutuel Wagering,* the Privacy Amendment "should be interpreted in accordance with the intent of its drafters." 447 So.2d 544, 548 (Fla. 1985). None of the source documents or records of proceedings produced by the Constitutional Revision Commission (CRC) or the Florida Legislature mentions suicide or assisted suicide.

Gerald Cope refers to one point during the CRC -debates when two commissioners expressed their opinion that the "right to privacy could . . . afford some additional protection for the doctor-patient relationship, where government agencies sought medical information without adequate confidentiality safeguards, or sought unnecessarily to restrict the prescription of some medicines." Gerald B. Cope, *To Be Let Alone: Florida's Proposed Right of Privacy,* 6 Fla. St. U. L. Rev. 671, 733. (1978) (hereinafter Cope, To *Be Let* Alone) (citing to Transcript of Fla. CRC proceedings at 28 (Jan. 9, 1.978) (containing remarks of Commissioners Douglas and Moyle, floor managers for the proposed amendment)).

Given the ensuing debate within the Commission over whether the proposed Amendment would "sweep too broadly if not qualified in some way" (id.), it is difficult to imagine that the Commissioners were expressing any intent to include physician prescriptions of lethal drug overdoses within the Amendment's ambit. Moreover, the Commissioners were likely addressing another issue, since the discussion took place at a time when the national controversy over the use of Laetrile for cancer relief and its prohibition by the federal government was at its height. ***See United States v. Rutherford,*** 442 U.S. 544 (1979) (upholding federal ban on interstate commerce of Laetrile as an unapproved drug); § 395.066, Fla. Stat. (1979) (authorizing Laetrile prescriptions but subsequently repealed); Comment, ***Laetrile: Statutory and Constitutional Limitations on the Regulation of Ineffective Drugs,*** 127 U. Pa. L. Rev. 233 (1978). Accordingly, the evidence fails to rise to the level. of a mandate for abolishing the fundamental rule that doctors shall not prescribe medicines to kill their patients.

A. *THE AMENDMENT'S FRAMERS INCORPORATED THE DOCTRINE OF PRIVACY AS DESCRIBED BY COOLEY, WARREN AND BRANDEIS, THEREBY PREFERRING A CONSERVATXVE APPROACH TO ANALYZING NOVEL PRIVACY CLAIMS.*

The framers of the Privacy Amendment chose the words "right to be let alone" because they best captured the concept of privacy enunciated by Thomas M. Cooley in his seminal ***Treatise on the Law of Torts*** in 1880 and by Samuel Warren and Louis Brandeis in their 1890 Harvard Law Review article ***The Right of Privacy.***

Cope, To *Be Let' Alone* at 731 n.343. The reference to these authors is significant. The process they utilized to give initial shape to privacy's substance suggested at most a desire "to reconceptualize certain then-existing legal rules". Gerald B. Cope, *Toward a Right of Privacy as a Matter of State Constitutional Law,* 5 Fla. St. U. L. Rev. 631, 648 (1977) (hereinafter Cope, *Toward a Right of Privacy).* Cope explains:

> Warren and Brandeis carefully analyzed a series of English and American common-law decisions . . . . The cases showed a consistent pattern of protection of privacy, but the courts had rested their decisions on theories of invasion of a-property interest or a breach of contract or trust. Warren and Brandeis argued that the interest really being protected was privacy. . . . Thus, argued the authors, there should be explicit recognition that the common-law had already conferred protection an privacy. interests.

Id. at 648-49. As Warren and Brandeis themselves wrote,

> The cases referred to above show that the common law has for a century and a half protected privacy in certain cases [involving personal writings and other productions of the intellect], and to grant the further protection now suggested [in cases involving personal appearance, sayings, acts, and relationships] would be merely another application of an existing rule.

The Right to Privacy, 4, Harv. L. Rev. 193, 213 & n.1 (1890).

This background suggests that the Privacy Amendment functions more as a magnifying glass which collects already existing rays of light from other sources of.law and broadens them — and less as a new source of lightignited by the judicial imagination. Thus, this Court has recognized privacy claims with clear antecedents in the federal law or in Florida common law,

while rejecting other claims lacking such pedigrees. See, e.g., *In re Browning,* 568 So.2d 4 (Fla. 1990) (incorporating common law right to refuse medical intrusions); see *also, e.g., Stall v. State,* 570 So.2d 257 (Fla. 1990) (rejecting right to purchase obscene materials because, among other reasons, no such right had been recognized under the federal constitution);-North *Miami v. Kurtz,* 653 So.2d 1025 (Fla. 1995) (rejecting right to smoke after examining widespread customs in Florida and elsewhere where smokers are repeatedly subject to public and private restrictions).

This Court's approach to adjudicating privacy claims in other cases bears little resemblance to the approach urged in this case. The plaintiffs-appellees would have this Court pursue a course of constitutional interpretation that breaks sharply from existing legal norms and underlying social policy. At stake here then is not "merely another application of an existing rule" (Warren & Brandeis supra), but a radical assault on the prevailing rule on assisted suicide. This Court should reject such a course and give considerable weight to the fact that assisted suicide has never before enjoyed legal protection in Florida and is directly opposed to Florida public policy.[4]

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[4]The U.S. Supreme Court has-yet to decide the assisted suicide cases presently before it, and thus a definitive federal right that could be incorporated into the Privacy Amendment does not yet exist. *Vacco v. Quill, No.* 95-1858 (U.S.); *Washington v.* Gfucksberg, No. 96-110 (U.S.); *see* Transcript of January 8, 1996, Oral Arguments in *Vacco* and *Glucksberg, in U.S. Supreme Court: Justices Hear Arguments on Laws Barring Physician-Assisted Suicide,* Chicago Daily Law Bull., Jan. 10, 1997, at 1. If the Supreme Court were to recognize a liberty interest in obtaining

B. *THIS COURT'S APPROACH IN IN RE T.A.C.P. REGARDING NOVEL COMMON LAW CLAIMS SHOULD BE FOLLOWED WITH RESPECT TO NOVEL "CONSTITUTIONAL CLAIMS.*

This Court should adopt as a guide for addressing novel constitutional claims the rule laid down in ***In re*** T.A.C.P., 609 So.2d 588 (Fla. 1992) (rejecting.petition to expand the common law definition of death to include anencephaly). The analysis in that case fully comports with a constitutional approach that preserves rather than abolishes longstanding public policy.

In ***In*** re T.A.C.P., this Court held that-it will not alter or expand the common law "unless demanded by public necessity." ***Id.*** at 595. Such necessity may be evidenced by a gap in otherwise binding legislative policy, thus forcing the courts to reach their own policy conclusions. ***Id.*** at-593. The case for finding public necessity is strengthened when the proposed innovation "merely formalizes what has been the common practice in this state". ***Id.*** at 594. Of course, no policy gap or commonly

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suicide assistance, then it would mark the first time that federal constitutional protection has-been extended to a claim lacking any nexus to the-freedoms to exist and to pursue social opportunities. Because assisted suicide is-an attack on life, rather than a way of life, its recognition under the U.S. Constitution is highly doubtful. See Daniel Avila, Is ***the Constitution a Suicide Pact?,*** 35 Duquesne L. Rev. 201, 240-44 (1996). Liberty and the "right to be let alone" must be understood in relation to the specific freedoms already granted constitutional protection – such as marriage; procreation, parenting, education, etc. – which are all closely related to social opportunity. ***Id.*** at 243. "In view of the nexus between these interests and one's social, existence; -a 'right to be let alone' must be understood as an interest in moving about freely in society without arbitrary or unjustified interference from the government, and not as an interest in precluding all social interaction whatsoever by killing one's self." ***Id.*** at-243-44.

approved practice exists regarding assisted suicide. Florida's policy and practice entirely oppose it.

Moreover, even when common law claims are based on "altruism" and "unquestioned motives", and are presented by individuals exhibiting "great humanity, compassion, and concern for others", they will not be granted in the-:-face of "unresolved controversy" within the relevant fields over the appropriateness of such claims. ***Id.*** When the novel claim is "weighed against . . . the utter lack of consensus" favoring such a claim, particularly in light of "the ethical issues involved" or "the legal and constitutional problems implicated", the claim must be rejected because then the courts- have "no basis to expand the common law." ***Id.*** at 595.

The case before this Court involves a controversial claim that opposes clearly defined and strongly compelling public policy. The number of amici briefs filed in this case urging the retention of current policy testifies to the level of controversy met by a claim of a right to assisted suicide within the medical, legal, moral, and philosophical fields. ***See also Special Issue:*** A ***Symposium on Physician-Assisted Suicide, 35*** Duquesne L. Rev. (Fall 1996) (presenting most recent and comprehensive collection of articles by experts opposed to a constitutional shift in public policy on assisted suicide). Consequently, if the claim is granted constitutional-protection, then it-would. occasion the dramatic and far-reaching reversal of prevailing-norms. Policies recognizing the inalienability of fundamental human rights, the

equality of lives before the law, the pervasive dangers of a commerce in lethal drugs and self-killing,.and the value of separating the health care provider's vocation'to nurture life from any role as killer would be irreparably thwarted. These factors provide all the more reason to take the approach followed in ***In*** re ***T.A.C.P.*** and to reject the extension of the constitutional doctrine of privacy to cover-the novel claim of a right to assisted suicide.

C. THE FRAMERS WERE URGED TO ESTABLISH A GUARANTEE OF PRIVACY BASED ON JOHN STUART MILL'S CONCEPT OF LIBERTY, WHICH SUPPOSEDLY SHIELDS FROM GOVERNMENT INTRUSIONS THOSE INDIVIDUAL ACTS OF SELF-HARM THAT DO NOT INJURE OTHERS, AND YET MILL ALSO REJECTED THE LIBERTY TO ALIENATE ONE'S FUNDAMENTAL FREEDOMS AS A SERIOUS FORM OF SELF-INDUCED HARM THAT ALMOST ALWAYS RESULTS IN "MISCHIEF" TO OTHERS AND CONTRADICTS THE PURPOSES OF RECOGNIZING LIBERTY IN THE FIRST PLACE.

In 1977, Gerald Cope testified before the CRC- that:

> At a more conceptual level, . . . the function of a declaration of rights within a constitution is to describe the relationship of the individual to his or her -government and to other members of the society. The optimum relationship was best described by John Stuart Mill's "one very simple principle": ["]That the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will is to prevent harm to others . . . . Over himself, over his own body -and mind, the individual is sovereign.["]

Cope, To ***Be Let Alone*** at 722 & n.303 (quoting John Stuart Mill, ***On Liberty*** 13 (Bobbs-Merrill ed., 1956)). Under this conception of privacy, would assisted suicide fall within-the zone of

protection because it purportedly involves only a decision to harm one's self?

Mill himself equivocated by observing that "it is impossible for a person to do anything seriously or permanently hurtful to himself without mischief reaching at least to his near connections, and often far beyond them." Mill, On Liberty at 97. The Supreme Court cited this language in *State* v. ***Eitel, 227*** So.2d 489 (Fla. 1969), when it upheld Florida's motorcycle helmet law and rejected a claim of privacy based squarely on Mill's view that only actions causing harm to others should be subject to regulation. ***Id.*** at 491. The Court asserted further "that society has an interest in the preservation of the life of the individual for his own sake. Suicide, for example, has been a common-law crime for centuries." ***Id.***

Eitel has drawn some criticism. -Cope has observed that "[t]he difficulty with the court's view is that it permits the state to substitute its judgment for that of the individual regarding what is in the individual's own best interest, a notion that cuts against generally held conceptions of individual liberty." Cope, To ***Be Let Alone*** at 709 n.228. At least one commentator has suggested that ***Eitel*** is no longer- good law because it conflicts with the Privacy Amendment by offending Mill's view regarding a supposed freedom to harm one's self, Joseph S. Jackson, ***Note, Interpreting Florida's New Constitutional Right of Privacy, 33*** U. Fla. L. Rev. 565, 587-88 (1981).

Neither this Court nor any other Florida court has expressly overruled ***Eitel***.[5] However, the analysis of privacy found in ***In re Browning*** and ***Singletary v. Costello, 665*** So.2d 1099 (Fla. 4th DCA 1996), may have altered the precedential impact of ***Eitel*** in a way that informs the debate over assisted suicide.

In ***In re Browning,*** the Supreme Court affirmed in a manner echoing Mill's liberty analysis that medical decisions – even those increasing the chances of the patient's hastened death (much like riding a motorcycle without a helmet will increase the chances of injury) – should be evaluated as a matter of individual self-determination and not according to "what is thought to be in the patient's best interests." 568 So.2d at 10.. In ***Singletary,*** the Court of Appeal carried this principle to. an extreme, upholding a prisoner's right under the Privacy Amendment to carry out a hunger strike to the point of starving himself to death. 665 So.2d at 1110. The court ruled that the State's interest in protecting the prisoner's life from his own behavior was not overriding because "the life that the state is seeking to protect is the life of the same person who has competently

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[5] "Without referring to ***Eitel,*** the Supreme Court has followed its reasoning in a case upholding a statutory rape law on the ground that adults should not be allowed to rely on a minor's consent as a basis for engaging.-in sexual intercourse because of the activity's inherently harmful impact on the minor. ***Jones v. State,*** 640 So.2d 1084 (Fla. 1990). Your Amici are unaware of any subsequent rulings by this Court involving self-regarding harmful actions by adults. However, Justice Kogan has characterized the right to privacy as "guaranteeing a right to structure one's life as one sees fit ***so*** long as ***no avoidable harm is done to self*** or others. The right prohibits the government from intervening in ***the noninjurious*** aspects of personal life. . . . . ." ***Stall v. State,*** 570 So.2d at 269 (Kogan, J., dissenting) (emphasis added).

decided to forgo the medical intervention [i.e., forced feeding]". *Id.* at 1109.

However, the opinions in *In re Browning* and *Singletary* have held the line at suicide. As already noted, in *In re Browning* the Supreme Court indicated that its recognition of a privacy interest in refusing treatment did not implicate and would be limited by § 782.08's ban on suicide assistance. 586 So.2d at 13.

Moreover, in *Singletary* the Court of Appeal ruled that the State had failed to prove the prisoner harbored a suicidal intent, and found instead that "the purpose of the hunger strike was to bring about change [in prison conditions], not death." 665 So.2d at 1109. The prisoner testified that he had conducted two other hunger strikes in the past that persuaded the'prison authorities to change other protested policies, and the prisoner had responded each time by ending the "fasts. By the time the *Singletary* case'reached the appellate court, the prisoner had succeeded yet again in obtaining a favorable response to his current protest, and had abandoned once again his hunger strike.[6]

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[6] *Id.* at 1102. According to one commentator,

> The definition of suicide requires that one's actions be carried out for the purpose -of bringing about death either as an end-or as a means. The soldier who throws himself on- the live grenade to save his companions, for example, is not aiming at death. That is, he does not intentionally-jump on the grenade for the purpose of bringing about his death, but rather for the purpose of saving his

consequently,. the legal doctrine against suicide-survived intact as the *Singletary* case was ultimately decided on its unique facts. The court agreed that not all persons initiating hunger strikes and refusing requisite medical intervention would be free to carry out their wishes. Proof that an individual "actually desired . . . to produce death" may warrant the State's protective intervention to thwart the individual's suicidal wishes. *Id.* at 1109, 1110.

Thus, as a result of the Privacy Amendment and the cases interpreting its scope, the Florida courts are -inclined to give more weight than before to an individual's right to privacy when balancing it against the State's interest in protecting persons from self-induced harm solely "for their own sake". But nothing in these recent cases dictates. the general conclusion that *all* forms of freely chosen, self-induced harm – regardless of severity or permanence of effect – should automatically be subsumed within the Privacy Amendment's protection.

> companions. This is clear if -one considers that, if he lives and his companions are saved, then he could have achieved his purpose without dying. For this reason, his act is not counted as -suicide. On the other hand, consider the man who kills himself so his family can enjoy the proceeds from his life insurance. Clearly, he intentionally carries out his actions for the purpose of bringing about his death. He is aiming at his death, -albeit as a means to another end: if he. lives, he would have failed in his purpose since, without his death, no inheritance will be forthcoming.

Manuel G. Velasquez, *Defining Suicide, 3* Issues in Law & Med. 37, 49 (1987).

Specifically, when an individual -freely-assumes personal risks that threaten the certain causationof -his or her death,' and the decision at stake embraces death as its object,' then self-regarding actions take on a different character altogether by ceasing to be acts of freedom.

As Mill explains in his classic discussion on liberty's conceptual limits:

> [I]n the laws probably, of every. country, it is sometimes considered a sufficient reason for releasing [individuals] from an engagement that it is injurious to themselves. In this and most other civilized countries, for example, an engagement by which a person should sell himself, or allow himself to be sold, as a slave would be null and void, neither enforced by law nor by opinion. The ground for thus limiting his power of voluntarily disposing of his own lot in life is apparent, and is very clearly seen in this extreme case. The reason for not interfering, unless for the sake of others; with a person's voluntary acts, is consideration for his liberty. His voluntary

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'For example, the Alaska Supreme -Court determined that marijuana use within the home is a-privacy right, after adopting Mill's principle of liberty that shields self-harming acts -from government intrusion. ***Ravin v. State,*** 537 P.2d 494 (Alaska 1975). Yet just three years later the same court rejected a claim of constitutional protection for the private use of cocaine. ***State v. Erickson,*** 574 P.2d 1 (Alaska 1978). The court found that "cocaine is substantially more of a threat [than marijuana] to health and welfare" because "[u]nlike marijuana, cocaine can cause death as a direct effect of the pharmacological action of the drug." ***Id.*** at 21. ***Cf. Maisler v. State, 425*** So.2d 107 (Fla. 1st DCA 1982), rev. ***denied 434*** So.2d 888 (Fla. 1983) (rejecting claim of right to use marijuana- under Florida's Privacy Amendment).

[8]Recharacterizing the object of assisted suicide as "choos[ing] . . . medical treatment" (Final Judgment at 13), or "terminat[ing] . , . suffering" ***(id.*** at 9), does not avoid the problem. Assisted suicide remains the intended ***means*** by which these other interests are supposedly effectuated.

> choice is evidence that what he so chooses is desirable, or at the least endurable, to him, and his good is on the whole. best provided for by allowing him to take his own means of pursuing it. But by selling himself for a. slave, he abdicates his liberty; he foregoes any future use of it beyond that single act. He therefore defeats, in his own-case, the very purpose which is the justification of allowing him to dispose of himself; He is no longer free, but is thenceforth in a position which has no longer the presumption in its favor that would be afforded by his voluntarily remaining in it. The principle of freedom cannot require that he should be free not to be free. It is not freedom to be allowed to alienate his freedom.

Mill, ***On Liberty*** **at** 124-25.

Thus Mill rejects categorically the use of liberty to renounce liberty. His analysis precludes the possibility that an individual's motives for alienating his or her freedom could be weighed in the **balance, as** if somehow by measuring extrinsic considerations one could conclude that in the "hard cases" or under sympathetic circumstances the zone of privacy would encompass an act of voluntary enslavement which intrinsically opposes the principle of freedom. It would no doubt strike Mill as remarkable if a court announced that it would entertain sundry petitions to be enslaved for the purpose- of weighing them against a public policy which- uniformly condemns slavery, and **granted or** rejected the petitions based on the quality of each petitioner's state of being free.

Mill never mentioned suicide or assisted suicide. However, **he did note that the** "reasons [for rejecting a supposed freedom not to be free], the force of which is so conspicuous in this

peculiar case, are evidently of far wider application". *Id.* at 125. What self-regarding action could be a more extreme form of slavery than self-killing, by which the right to have rights is totally and irreversibly renounced through the taking of one's life? See David Spitz, *Freedom and Individuality: Mill's* Liberty *in Retrospect, in A Norton Critical Edition: On Liberty* 203, 229 (David Spitz ed. 1975) -(asserting that if the state may interefere with an individual's attempt to be sold into slavery, then "how much more correct is it to assume that no rational man desires to commit suicide", thereby justifying the state's attempts to prevent a person from committing suicide).

Mill's analysis of why self-regarding freedom cannot. logically encompass voluntary enslavement bolsters the argument that suicide is not an act of freedom eligible for protection under the Privacy Amendment. Suicide annihilates individual freedom and for this reason is intrinsically different from all other choices shielded by the right to privacy. Moreover, such extrinsic factors as the quality or duration'of the life at stake fail to alter suicide's intrinsic dissimilarity with other protected freedoms. From this perspective, a rule of privacy permitting suicide assistance — whether promulgated by the legislature pursuant to a constitutional mandate or established independently by the courts contrary to legislative policy — is an utter contradiction.

There is another conceptual problem at issue here. The privacy claim in this case relies on the emotional force of

certain extrinsic considerations regarding feelings of worthlessness and indignity which in themselves challenge a basic presupposition of the "right to-be let alone". As noted by the trial court, Mr. Hall seeks the right "to precipitate his instant death . . . when he determines that he is not capable of functioning as a human being." Final Judgment at 5. The trial court contended that because Mr. Hall and other individuals may believe their life "has been physically destroyed and its quality, dignity and purpose gone", then the "final determination of when to die" by assisted suicide-must be protected as an aspect of privacy. ***Id.*** at 22.

In ***In re Browning***, however, this-Court observed that society's regard for "self determination as a basic principle in human relations" is grounded in "'the worth of the individual'". 568 So.2d at 10 (quoting President's Commission for the Study of Ethical Problems in Medicine, and Biomedical and Behavioral. Research, ***I Making Health Care Decisions*** (1982)). So how can a privacy right grounded in the "worth of the-individual" encompass a lethal decision that itself is prompted by the individual's feeling that he or she no longer has any worth?[9]

'This Court described in ***In re Browning*** a more accurate basis for the right to refuse treatment when it stated that, "A competent individual has the constitutional right to refuse medical treatment regardless of his or her medical condition." ***Id.*** at 10. The provision of medical" care will almost always involve an intrusion of some sort, and it is this intrusion — not the person's condition or subjective evaluation of that condition — which gives rise to an-interest in privacy in the medical context. ***Cruzan v. Director,*** Mo. ***Dep't of Health, 497*** U.S. 261, 278-79 (1990); ***Public Health Trust of Dade County v. Wons, 541*** So.2d 96, 100 (Fla. 1989) (Ehrlich, C.J., concurring).

A decision to kill one's self based on the desperate conviction that one's life is worthless and lacking in dignity contradicts the undeniable truth of each individual's unqualified worth and dignity, from which stems the guarantee of privacy. If in the name of privacy the law is forced to tolerate assisted suicides motivated by the victim's fear of the loss of.dignity, then paradoxically the law itself will destroy personal dignity by treating some lives as less worthy of protection.

The Privacy Amendment was intended "to enhance, not diminish the inalienable rights of all Floridians. ***Winfield,*** 477 So.2d at 548. The Amendment's mandate to broaden the-right of privacy in no way warrants an interpret.ation that-expands the borders of privacy so far that it becomes a contradiction.. A right to be free should not be distorted into a right to be killed with a corresponding duty on the part of the State to devalue the lives at risk. Instead, the Court should refuse to abandon terminally ill individuals to their suicidal urges under the banner of privacy:

> The deliberate taking of a human life should remain a crime. This rejection of a change in the law to permit doctors to intervene to end a person's life is' not just a subordination of individual well-being to social policy. It is instead an affirmation of the supreme value of the individual, no matter how worthless and hopeless that individual may feel.

British Medical Association, ***Euthanasia: Report of the Working Party to Review the-British Medical Association's Guidance on Euthanasia 69*** (1988).

D. ***GIVEN THE LAW'S UNIFORM PROHIBITION OF CONSENSUAL HOMICIDE AND EUTHANASIA, AND THE INCOHERENT NATURE OF A PROPOSED ZONE OF PRIVACY THAT NECESSARILY WILL BE SUBJECT TO EXTENSIVE AND INTRUSIVE REGULATION, AN INDIVIDUAL LACKS A LEGITIMATE EXPECTATION OF PRIVACY IN OBTAINING SUICIDE ASSISTANCE.***

The Privacy Amendment guarantees individual freedom only from governmental policies that intrude "into [one's] private life". Art. I, § 23, Fla, Const. Because the guarantee is not absolute, this Court must determine "whether a governmental entity is intruding into an aspect of [a person's] life in which she has a 'legitimate expectation of privacy'". ***North Miami v. Kurtz, 653*** So.2d at 1028. The requisite, analysis must consider "all the circumstances, especially objective manifestations of that expectation." ***Shaktman v. State, 553*** So.2d 148, 153 (Fla. 1989) (Ehrlich, J., concurring).

There is no better place to begin-than by referring to the exact interest that Mr. Hall seeks to exercise. According to the trial court, he claims a "right to choose to hasten his own death by seeking and obtaining from his physician a fatal dose of prescription drugs and then subsequently administering such drugs to himself." Final Judgment at 2. Plainly, such an interest lacks any legitimate expectation of privacy that warrants protection under the Privacy Amendment.

Three years before the Amendment was approved by the voters, the United States Supreme Court acknowledged that the federal right to privacy encompassed "the right to decide independently, with the advice of [a] physician, to acquire and to use-needed

medication", Whalen v. Roe, 429 U.S. 589, 603 (1977). However, the patient's desires and the physician's discretion are subject to the State's unquestioned authority to "prohibit entirely the use of particular [dangerous] drugs". *Id.* Thus, a patient's "selection of a particular treatment, or at least a medication, is within the area- of governmental interest in protecting public health." *Rutherford v. United States*, 616 F.2d 455, 457 (10th Cir.), *cert. denied, 449* U.S. 937 (1980). Consequently, the federal law fails to guarantee any right on behalf of Mr. Hall to obtain a lethal'dosage or brand of drugs with his physician's assistance when the State has prohibited such a choice.

Moreover, an expectation -of privacy cannot be derived from Florida's criminal law. Suicide assistance has been criminalized in Florida by statute since 1868, and-was a crime at common law before that. Thomas J. Marzen et, al, *Suicide:* A *Constitutional Right?* 1, 165 (1985); see *also* Thomas J. Marzen et. al, *"Suicide:* A *Constitutional Right?" - Reflections Eleven Years Later, 35* Duquesne L. Rev. '261 (1996). Nor has Florida criminal law recognized mercy killing as a defense to homicide. *Gilbert v. State,* 487 So.2d 1185, 1188, 1190 (Fla. 4th DCA), *rev. denied,* 494 So.2d 1150 (Fla. 1986) (rejecting "euthanasia" as a defense to homicide charges in case where defendant testified he shot his wife "to terminate her suffering"); *Griffith v. State, 548* So.2d 244, 247 (Fla. 3rd DCA 1989) ("Under no circumstances . . . [is a third party permitted], as it were, to take the law into his own hands by ending whatever precious attributes of earthly existence

which may remain. . . . We hold, in other words, that the tenuous nature of the victim's hold to life cannot be a defense to a homicide case ***of any type.***") (emphasis added).

Florida criminal law also holds that crimes cannot be excused or justified by the victim's consent. ***Gilbert v. State,*** 487 So. at 1191 (rejecting contention that a "mercy will" evidencing the murder victim's desire-to be killed immunized from criminal prosecution an individual who shot the victim to relieve her Suffering); ***Martin v. State, 377*** So.2d 706, 708 (Fla. 1979) (holding that person who distributed heroin to a person-who died from an overdose is liable for felony murder even though "the victim obtained, possessed and used the heroin voluntarily"; "to hold otherwise would undercut the operation of the -statute and thwart the obvious-legislative purpose").

Likewise, Florida civil law deems suicide. to be against public policy. ***Blackwood v. Jones, 111*** Fla. 528, 532-33, 149 So. 600, 601 (1933) (holding that judicial. notice may be taken that "an act of suicide arouses in the minds of those who become informed of it a feeling of repulsion, although it may be commingled with sentiments of pity"); ***Travelers' Insurance Co. v. Wilkes,*** 76 F.2d 701, 704 (5th Cir. 1935) (observing that presumption against suicide in Florida law "rests on the common knowledge . . . that sane persons do not ordinarily kill themselves"). Thus, suicidal intent cannot be presumed where it has not been otherwise definitively proven. ***Williston v. Cribbs,*** 82 So.2d 150, 152 (Fla. 1955) ("It is elementary that suicide is

never presumed."). Consistent with these expressions of public policy, the legislature has adopted numerous civil provisions treating suicide as a serious individual and social harm. See Brief of Amicus Curiae Florida Catholic Conference and Brief of Amici Curiae Florida Commission on Aging with Dignity, the National Legal Center for the Medically Dependent & Disabled, Inc., and several individual clients.

As a result, in Florida as elsewhere individuals are constantly subjected to a comprehensive array of policies discouraging suicide, assisted suicide, and euthanasia.. This reinforces the view that when suicide involves another's assistance, it becomes social in nature and ceases to be an isolated act involving only the suicidal person,. As the California Court of Appeal obse-rved: "It is one-thing to take one's own life, but quite another to allow a third person assisting in that suicide to be 'immune from investigation by the coroner or law enforcement agencies." *Donaldson v. Van de Kamp*, 4 Cal. Rptr.2d 59, 63 (Cal. App. 1992).

Mill himself conceded that choices depending on the assistance of others are "not strictly within the definition of individual liberty". Mill, *On Liberty* at 120. He-recognized that when others "make it an occupation" to assist individuals in harming themselves and thereby "promote what society and the State consider to be an evil . . , . a-new element of complication is introduced – namely, the existence of classes of persons with an interest opposed to what is considered as the

public weal, and whose mode of living is grounded on the counteraction of it." Id. He found "considerable force" (id. at 122) in the arguments favoring State interference with a person's attempts to solicit the help of others:.

> There can surely, it may be urged, be nothing lost, no sacrifice of good, by so ordering matters that persons shall make their election, either wisely or foolishly, on their own prompting, as free as possible from the arts of persons who stimulate their inclinations for interested purposes of their own. Thus (it may be said) . . . [those who make it a practice to assist others in engaging in harmful activities] may be compelled to conduct their operations with a certain degree of secrecy and mystery. . . .

Id. at 121.

Notably, if a right to assisted suicide is established, then its exercise will require the involvement of a broad range of persons extending far beyond the individual suicide victim. It will involve the physician who prescribes the drugs, the judge or other public official who approves the request, and the governmental licensing and medical boards who regulate the practice in order to "safeguard against potential abuses". See Final Judgment at 19 n.6. Personally intrusive safety measures will have to be established to accommodate society's serious concerns about the patient's competency, the possibility of depression, the existence of duress, and the danger posed by those who would assist in suicide for ulterior motives. Thus, creating a constitutional right to assisted suicide will transform this interest into the most public "intimacy" and intruded-upon freedom imaginable.

In sum, neither the law nor society has done anything to suggest that patients and physicians may reasonably expect free rein to engage in the commerce of killing. Moreover, logic would dispute any notion of a fundamental right that is so hostile to social norms that, unlike other fundamental rights, it must be tightly controlled by the invasive strictures of intense public scrutiny. In light of the array of legal and social restrictions already imposed on suicide assistance,- a more reasonable interpretation of the Privacy Amendment should exclude assisted suicide from the concept of privacy.

IV. LINKING A RIGHT TO OBTAIN SUICIDE ASSISTANCE, WHICH ALIENATES THE RIGHT TO LIVE, TO THE SUICIDE VICTIM'S NATURAL PROXIMITY TO DEATH WILL THREATEN THE WELFARE AND SAFETY OF ALL WLNERABLE PERSONS, ESPECIALLY PERSONS WITH DISABILITIES.

Your Amici are particularly concerned about the enormously negative impact that a constitutional policy favoring assisted suicide – especially as envisioned by the trial court below – will have on persons with disabilities. "The trial court linked the strength of the State's interest in protecting individuals from suicide to the victim's life expectancy and quality of life. In particularly ominous terms; the court reasoned that "the State's interests [in protecting life] are strengthened or weakened based upon a patient's -prognosis *for regained vitality and well-being.*" Final Judgment at 14 (emphasis added). The court noted approvingly Mr. Hall's testimony of a desire to die "where he will no longer fee.1 the comfort and assurance of knowing that his agony will be followed by a period of acceptably

renewed health." ***Id.*** at 4. Finally, the court contemplated the possibility that assisted suicide petitions will be granted on behalf of individuals with life expectancies ranging from "15 to 20 years, 15 to 20 months, or 15 to 20 days" whenever their "life [is adjudged to be] physically destroyed and its quality, dignity and purpose gone". ***Id.*** at 22. In short, the trial court envisioned a constitutional policy wholly offensive to the inalienable rights and interests of persons with disabilities.[10]

A. ***ASSISTED SUICIDE RESULTS IN THE ALIENATION OF THE RIGHT TO LIVE.***

When a potential victim of suicide rejects the criminal law's protection'by requesting another person's suicide assistance, this represents an attempt "to alienate the inalienable [right to live], to give away.what cannot properly be given away." Joel Feinberg, ***Voluntary Euthanasia and.the Inalienable Right to Life,*** 7 Philosophy & Public Affairs 93, 93 (1978). As one commentator explains, "What is given up in the case in which the right to life is waived . . . is not life itself; rather it is the *protection* of life that that right be-

[10]The trial court's broad conception'of who should enjoy the right to be killed renders any limitation based on "terminal condition" utterly meaningless. Even if this Court were somehow persuaded that suicide assistance should be availed only to the "truly" dying, then it must consider the empirical conclusions found in Joanne Lynn et al., ***Defining the "Terminally Ill:" Insights from SUPPORT, 35*** Duquesne L. Rev. 311 (1996). Based on an analysis of a large database collected from seriously ill hospitalized patients, the authors. concluded that every conceivable strategy for defining who is-terminally ill "is so problematic that it seems untenable to have physician-assisted suicide restricted to those classified as "terminally ill'". ***Id.*** at 312.

stows on its possessor." Terrence McConnell, *The Nature and Basis of Inalienable Rights,* 3 Law and Philosophy 25, 37 (1984). Consequently, the constitutional claim before this Court asserts in essence that at least some individuals should be empowered to forgo their right to be protected under the homicide code, thereby alienating their right to live.

If adopted by this Court, then a constitutional rule authorizing some individuals to alienate their right to live based on their life expectancy and quality of life would undermine the Declaration of Independence and the Florida Constitution, both of which affirm that all persons enjoy the inalienable right to live. *See The Declaration of Independence* para. 2 (U.S. 1776); Art. I, § 2, Fla. Const. As one commentator explained:

> [The Declaration] linked the unalienable rights of individuals with the people's right to rebel. In the background there is the basic idea that a social contract of some sort had been made in which the people transferred certain rights to government in return for something. . . . What rights the people transferred is less important than the rights they did *not* transfer because they were not transferable, that is to say, unalienable. Unalienable rights were thought to be held under *any* form of government so that when a government merely showed signs of wishing to invade these rights, it could be regarded as intending to reduce the people under absolute despotism.

Morton White, *The Philosophy of the American Revolution 239-40 (1978).*

In view of the nexus between unalienable rights and the limits an despotic governance, a constitutional policy endorsing the selective alienation of the right to-live raises profound

questions, As one commentator has observed", "[W]e must recall that [John Locke] puts the inalienability of the right to life to good purposes when he uses it to explain why a government can never legitimately acquire an absolute rule to dispose of the lives of its citizens." Lance K. Stell, ***Dueling and the Right to Life,*** 90 Ethics 7, 16 (1979). Thus, the right to live is a fundamental human interest "that no man ***should*** transfer to any person or any government." White, ***American Revolution*** at 220.

A constitutional rule favoring assisted suicide that is supposedly grounded in notions of autonomy and individual freedom will unjustifiably alter the legal status of those who have no desire to kill themselves, but who nevertheless will be swept into the category of persons deemed to have an alienable right to live. The right to live and all rights flowing therefrom will be rendered alienable not because an individual so chooses, but on account of the individual's condition. If- some persons with terminal conditions are permitted-to alienate their right to live because they are terminally ill, then all persons with terminal conditions will necessarily be free to make the same choice. As a consequence, by virtue of constitutional mandate and irrespective of individual desires, the right to live for all members of this class will be reduced to an inferior, alienable status.

Because every member of the affected class will no longer possess an unalienable right to live, each will be left with a weaker claim, or no claim at all, against tyrannical notions of

"normalcy" and "quality of life" policy-making.[11] In particular, this devaluation in legal status will place all persons deemed eligible for suicide assistance at a-considerable disadvantage in the health care rationing debate. See Susan M. Wolf, ***Physician-Assisted Suicide. in the Context of Managed Care,*** 35 Duquesne L. Rev. 455, 464 (1996) (noting that the bulk of patients requesting suicide assistance have illnesses that "are expensive to treat and can-extend for quite some time").

B. *A CONSTITUTIONAL RULE ESTABLISHING THE FREEDOM TO RENOUNCE SOCIETY'S PROTECTION OF ONE'S RIGHT TO LIVE WOULD RATIFY THE MOST EXTREME FORM OF SOCIAL AND POLITICAL ALIENATION.*

A constitutional analysis which ties the strength of one's right to live to one's proximity to death raises serious concerns regarding those persons in society whose disabilities leave them with an already precarious hold on life. Every person with a disabling condition is already more intensely aware than most of

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[11]One commentator has noted:

> . . . just how dangerous enforced physiological normality is when the definition of its parameters falls into the hands of politicians and bureaucrats. . . . . [T]he war against "abnormality" implies a dangerous kind of politics, which begins with a fear of difference and eventuates in a tyranny of the normal. That tyranny, moreover, is sustained by creating in those outside the norm shame and self-hatred — particularly if they happen to suffer from that vast majority of "deformities" which we still cannot prevent or cure.

Leslie A. Fiedler, ***The Tyranny of the Normal,*** Hastings Center Report, Apr. 1984, at 40, 41, 42.

life's contingent nature, even if his or her -present condition is not certifiably terminal. Some persons were'disabled by accidents and thus have peered through the gates of death before medicine made survival possible. Others rely on high tech interventions to survive, to breathe or to eat, and they are constantly reminded by the nature of their ongoing care that without proper treatment or care they would soon die. Most depend on the assistance of family, friends; and professional caregivers and must orchestrate ever-shifting schedules simply to meet the minimum requirements of daily living. Many, like the actor Christopher Reeve who was recently paralyzed in a horse-riding accident, cannot function without substantial medical and personal assistance. The overwhelming majority, however, are far less capable than a wealthy movie star -of meeting the financial burdens of their care, and few enjoy the same public esteem. Thus persons with disabilities as a class are unquestionably vulnerable to discrimination and social alienation.

As a result, many persons with disabilities exist in a state of "virtual terminality" because the frailty of their physical condition and the specter of death are so intimately interwoven. Moreover, in the public mind many persons with disabilities are regarded as being terminally ili or-as proper candidates for a hastened death because of their disabled condition.[12] In turn,

[12]Even Mr. Reeve has been subject-to the invidious association of disability with the "need" to die. According to one commentator:

a constitutional decision asserting that their right to live is constitutionally disposable makes them "virtual aliens" because their most fundamental right – the protection of life – would hang only by the single thread of their own resolve to keep it. They will be left far less secure against both internal and external pressures to give away this right to the unjust advantage of others.

In the end, a condition-based rule in favor of assisted suicide would pour into the Florida Constitution a poisonous concoction of warm-hearted, misguided pity and cold-hearted utilitarianism. The questionof "whether we as a society are willing to excuse the terminally ill for deciding that their lives are no longer worth living" would be mixed-inextricably with the question of whether assisted suicide should serve as a means "for housecleaning, cost-cutting and burden shifting – a

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> The connection of disability with suicide in the popular media was -dramatically-shown in the fall of 1995 when actor Christopher Reeve gave his first interview after being paralyzed in a fall from a horse. Though Reeve made only one passing remark in the hour long interview about considering suicide after his accident, that sound bite appeared in almost every commercial advertising it, the introductory piece preceding it, in the lead of the Associated press-piece about it and in several headlines reporting it. . . . Perhaps most ominously, Geoffrey Fieger, the attorney for "suicide doctor! Jack Kevorkian, cited Reeve as the kind of patient Kevorkian would help commit suicide.

Adam A. Milani, ***Better Off Dead Than Disabled?.: Should Courts Recognize a "Wrongful Living" Cause of Action,*** 54 wash. & Lee L. Rev. (to be published in 1997) (citations omitted).

way to get rid of those whose lives we deem worthless." *Compassion in Dying v. Washington, 79* F.3d 790, 856-57 (9th Cir. 1996) (Beezer, J., dissenting). Who stands to benefit most from a constitutional policy by which the right to live of vulnerable persons is reduced to an alienable inte-rest? Is it the person with a terminal condition bent on-suicide regardless of what the Constitution holds, or is it a cost-conscious society seeking more ways to ration its generosity? A policy- which permits lethal assistance for some, but not for the majority, implicates the view that those left free to obtain the lethal assistance are less worthy or deserving of protection, and that their lives have less value under the law. Such a policy would fundamentally thwart Florida's commitment to providing equal protection to vulnerable persons. See, *e.g., B.B. v. State,.659* So.2d 256 (Fla. 1995) (Kogan, J., concurring). (criticizing Florida statute for protecting "chaste" minors but not "unchaste" minors from sexual activity because it "suggests discrimination. . . . Laws should protect everyone, not merely a favored group").

By uniformly forbidding suicide assistance, § 782.08 preserves the unalienability of the right to live and respects the equal dignity of all persons. Consequently, this Court should uphold the statute by refusing to qualify Florida's commitment to these essential values.

CONCLUSION

For the foregoing reasons, the judgment below should be reversed.

Respectfully submitted,

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