OA 5-8-97

IN THE SUPREME COURT OF THE STATE OF FLORIDA

Barry Krischer, in his official capacity as State Attorney of the 15th Judicial Circuit,

Appellant,

v.

Case No. 89,837

Cecil B. McIver, M.D., and **Charles Hall,**

Appellees.

APPEAL FROM THE FIFTEENTH JUDICIAL CIRCUIT OF PALM BEACH COUNTY

BRIEF AMICI CURIAE OF A BI-PARTISAN GROUP OF FLORIDA STATE LEGISLATORS IN SUPPORT OF APPELLANT

Counsel for the Amici Curiae
Certain Florida State Legislators

David J. Busch, Esq.
3428 Robinhood Road
Tallahassee, FL 323 12
(904) 3867062
Florida Bar # 140945

Of Counsel
Michael W. McConnell
202 Law Building
345 South University Street
Salt Lake City, UT 84112

Nikolas T. Nikas
Clarke D. Forsythe
AMERICANS UNITED FOR LIFE
343 S. Dearborn Street
Suite 1804
Chicago, IL 60604
(3 12) 786-9494

TABLE OF CONTENTS

TABLE OF AUTHORITIES

INTEREST OF THE AMICI

The *amici*, certain Florida state legislators (listed on the next page), have a substantial interest in this appeal. *Amici* strongly support the public policy embodied in the Florida statute prohibiting assisted suicide and vigorously oppose efforts to legalize assisted suicide. *Amici* have a direct stake in the outcome of this appeal because it will directly bear on the authority and ability of the Florida Legislature to enact legislation that protects the State's compelling interest in safeguarding life and protecting the vulnerable of society. An adverse decision by this Court would undermine that legitimate interest.

Amici also firmly believe that there is no social, economic or medical need to permit physician-assisted suicide under any circumstances, and that to allow suicide assistance, even for mentally competent, terminally ill adults, would lead to grave abuses and exploitation of the most vulnerable members of our community, as it already has in the Netherlands. *Amici* fully concur with the warning of the New York State Task Force on Life and Law that creation of a right to suicide "would carry us into new terrain."

> American society has never sanctioned suicide or mercy killing. We believe that the practices would be profoundly dangerous for large segments of the population, especially in light of the widespread failure of American medicine to treat pain adequately or to diagnose and treat depression in many cases.

> would be most severe for those whose autonomy and well-being are already compromised by poverty, lack of access to good medical care, or membership in a stigmatized social group. The risks of legalizing assisted suicide and euthanasia for these individuals, in a health care system and society that cannot effectively protect against the impact of inadequate resources and ingrained social disadvantage, are likely to be extraordinary.

When Death is Sought: Assisted Suicide and Euthanasia in the Medical Context vi-vii (May 1994). This Court should heed their warning and not recognize a right to suicide or suicide assistance.'

AMICI CURIAE

Senator John Grant (Rep.)	District 13
Senator Donald Sullivan, M.D.(Rep.)	District 22
Representative Daniel Webster (Rep.).	District 41
Representative Michael Fasano (Rep.)	District 45
Representative Keith Arnold (Dem.)	District 73
Representative Jerry Burroughs (Rep.)	District 1
Representative John Cosgrove (Dem.)	District 119
Representative Jorge Rodriguez-Chomat (Rep.)	District 114
Representative Fred Lippman (Dem.)	District 100
Representative Bob Starks (Rep.)	District 34
Representative Steve Wise (Rep.)	District 13
Representative Tom Feeney (Rep.)	District 33

[1] The parties, through counsel, have consented to the filing of this brief by the amici curiae.

STATEMENT OF THE CASE

Plaintiffs, a physician and three terminally ill adult patients[2], brought an action in the Circuit Court of Palm Beach County against defendant, Barry Krischer, the State Attorney for the Fifteenth Circuit of Palm Beach County, seeking declaratory and injunctive relief against enforcement of section 782.08 of the Florida Statutes, which makes it a crime to assist another in committing "self-murder."

The trial court posed the issue presented as "[w]hether a competent adult, who is terminally ill, imminently dying, and acting under no undue influence, has a constitutional 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 Declaratory Judgment and Injunctive Decree ("Final Judgment") at 2. Answering the issue affirmatively, the lower court declared that Mr. Hall "has a constitutional right under the Privacy Amendment of the Florida Constitution, Article I, section 23, to decide to terminate his suffering and determine the time and manner of his death." The lower court further declared that Mr. Hall has a right to seek from Dr. McIver a prescription for a lethal dose of drugs to be

[2] Two of the plaintiff-patients, C.B. "Chuck" Castonguay and Robert Cron, died prior to trial and were dismissed upon stipulation of counsel prior to the entry of the Final Judgement. As of the date of this brief, the remaining plaintiff-patient, Charles E. Hall, is still alive, Mr. Hall and his physician Dr. Cecil McIver are appellees before this Court.

self-administered by Mr. Hall. Final Judgement at 23-24. The lower court also permanently enjoined enforcement of section 782.08, Fla. Stat., against Dr. McIver for assisting Mr. Hall in killing himself.[3]

The State of Florida appealed to the District Court of Appeal, Fourth District, who certified, pursuant to Article V, section 3(b)(5) of the Florida Constitution, that the case presented a question of great public importance requiring immediate resolution by this Court. This court accepted jurisdiction and stayed the judgment below pending appeal.

SUMMARY OF ARGUMENT

The laws against assisted suicide have substantial moral and political justifications. These laws cannot be dismissed as arbitrary, antiquated, or unthinking. While there are many arguments in favor of laws prohibiting assisted suicide, four are especially compelling.

First, even assuming *arguendo* that in a limited number of cases assisted suicide might be ethically permissible, many knowledgeable observers believe that the problems of abuse would be so widespread and uncontrollable that formal legal

---

[3] The trial court also found that section 782.08 denies Mr. Hall the "equal protection of the law as provided under the Fourteenth Amendment of the United States Constitution." Final Judgment at 24. Because the "equal protection" argument is likely to be definitively resolved by the United States Supreme Court, this brief will only address the Florida constitutional issue.

and ethical prohibitions remains necessary. For every suffering person who makes a rational, informed choice to die, there will be others - perhaps many times as many - on whom that "choice" is effectively imposed.

Second, if patients' requests for assistance in suicide are honored, many will die unnecessarily. According to medical experts, the desire to commit suicide (even among the terminally ill) is typically associated with clinical depression, which is a treatable disease. Much of the desire to commit suicide is also traceable to insufficiently aggressive measures to alleviate pain. To give patients the "right" to obtain assistance in suicide is to license the killing of persons who often are simply in need of help, which modern medicine can give.

Third, if death is defined as a "mercy," it will be difficult to justify refusing this mercy to broader and broader categories of sufferers, It is therefore misleading to confine one's attention (as the lower court did) to a "competent," "terminally ill," "adult" who desires 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, 23.

Fourth, and most fundamentally, by making death a legally available "choice," we will inevitably change the way our culture perceives the final stages of life. If assisted suicide is recognized as a "right," it will become both routinized and

common. It is not obvious that patients would be better off.

Amici do not ask this Court to adopt our view of the moral consequences of legalized assisted suicide. Indeed, the point we wish to make is that this case should not be decided on the basis of this Court's own assessment of the weight of the competing moral arguments. Rather, as members of the legislative branch of government, *amici* believe this issue should be decided by the people through their elected representatives.

There is every reason for this Court, indeed courts in general, to be wary about overturning duly enacted legislation on the basis of untried and uncertain moral and philosophical arguments, where the result is bereft of support in directly relevant and express constitutional text or in state or national experience.

The great institutional strengths of courts is their ability to provide uniform enforcement of legal principles, with consistency, treating like cases alike. Where operative principles are in flux and the consequences of new approaches are unpredictable, however, that virtue becomes a vice.

This Court should be reluctant to embrace novel constitutional doctrines that may require modification in the future.

ARGUMENT

I. THE ISSUE OF PHYSICIAN-ASSISTED SUICIDE INVOLVES PASSIONATELY DEBATED QUESTIONS OF MORALITY AND PUBLIC POLICY. WHICH THE JUDICIAL BRANCH IS ILL-SUITED TO RESOLVE

A. LAWS AGAINST ASSISTED SUICIDE ARE SUPPORTED BY SERIOUS AND SUBSTANTIAL ETHICAL JUSTIFICATIONS

Amici begin with a statement that may seem obvious, but must be the starting point for thinking about this constitutional controversy: the laws against assisted suicide have substantial moral and political justifications. These laws cannot be dismissed as arbitrary, antiquated, or unthinking. Thoughtful and experienced doctors, ethicists, philosophers, lawyers, theologians, and advocates for patients have offered cogent reasons why assisted suicide should not receive the formal sanction of law. The professional association in the disciplines closest to the problem - the American Medical Association, the American Geriatric Society, and the American Bar Association among them - have all concluded that assisted suicide should not be made legal, The two most thorough and distinguished studies undertaken of the issue - one under the auspices of the State of New York and one under the auspices of the British House of Lords - both resulted in unanimous recommendations that laws against assisted suicide (as well as euthanasia) should be retained. New York State Task Force on Life and the Law, *When Death Is Sought:*

Assisted Suicide and Euthanasia in the Medical Context (1994) [hereinafter cited as *"New* York Report"], *Report of the Select Committee on Medical Ethics,* House of Lords, Sess 1993-94. On April 29, 1996, the Subcommittee on the Constitution of the Committee on the Judiciary of the House of Representatives conducted hearings in which ethicists, physicians, legal experts, and specialists in the care of terminally ill, suffering, and disabled patients presented their perspectives on the issue. *Assisted Suicide in the United States:* Hearings Before the Subcommittee on the Constitution of the House Committee on the Judiciary, 104th Cong., 2d Sess. (1996) [hereinafter cited as "House Hearings"]. *Amici* commend those reports and hearings to this Court's attention.

We will briefly summarize some of the reasons for prohibiting assisted suicide set forth in these sources, not because we believe this Court should resolve the underlying moral-political dispute, but because the lower court's decision failed to value the State's interest sufficiently. Although there are many arguments in favor of laws prohibiting assisted suicide, we will summarize four of the most important.

First, even assuming *arguendo* that in a limited number of cases assisted suicide might be ethically permissible, many knowledgeable observers believe that the problems of abuse would be so widespread and uncontrollable that formal legal

and ethical prohibitions remains necessary.[4] The harsh reality is that a more expeditious death for terminally ill patients would often serve the interests of others, especially in the era of managed care and exploding medical costs. A patient weakened by illness and pain is peculiarly susceptible to influence from family members or doctors who are in a position of trust. It will not be difficult for these individuals, for their own reasons, to exert subtle - but powerful - pressure on a frail patient to "choose" the convenient option of a speedy death. Even the suggestion by a well-meaning doctor that a patient should consider the option of death will inevitably convey the message that - in the doctor's informed professional opinion - her life is no longer worth living.[5]

For every suffering person who makes a rational, informed choice to die, there will be others - perhaps many times as many - on whom that "choice" is effectively imposed. And there will be no effective way to tell the difference.

Safeguards, no doubt, will be proposed. Tndeed, the lower court professed faith that sufficient protections can be enacted. Final Judgment at 18, 19, n. 6. Unfortunately, these were expressions of hope rather than descriptions of

---

[4] See New York Report, at *xii, 102,* 119-20,140.

[5] See Testimony of Dr. Hebert Hendin, House Hearings at 113; Leon Kass & Nelson Lund, *Physician-Assisted Suicide, Medical Ethics and the Future of the Medical Profession, 35 Duq. L. Rev. 395, 409 (1996).*

experience. Many physicians and ethicists doubt that effective safeguards can be devised or enforced - especially since typically no one involved in the death will have the incentive to expose wrongdoing, and the interactions involved are cloaked in the confidentiality of the doctor-client relationship. The American Medical Association's code of Medical Ethics, for example, rules out physician-assisted suicide partly on the grounds that it "would be difficult or impossible to control."[6] Even a prominent legal scholar who supports physician-assisted suicide has observed:

> [T]he judiciary's silence regarding [the right to determine when and how to die] probably reflects a concern that, once recognized, rights to die might be uncontainable and might prove susceptible to grave abuse * * * [T]he resulting deference to legislatures may prove wise in light of the complex character of the rights at stake and the statutory guidelines and gradually evolved procedural controls, legalizing euthanasia, rather than respecting persons, may endanger personhood.

Laurence H. Tribe, *American Constitutional Law*, section 15-11, at 1370-71 (2d . ed, 1988).

The specter of widespread abuse and exploitation is not based on mere

---

[6] Opinion of the Council on Ethical and Judicial Affairs, American Medical Association, Opinion 2.211. For the most extensive discussion of these issues, see Daniel Callahan & Margot White, *The Legalization of Physician-Assisted Suicide: Creating a Regulatory Potemkin Village*, 30 U. Rich. L. Rev. 1 (1996). See also New York Report, at 73; Testimony of Dr. Lonnie Bristow on behalf of the American Medical Association, house Hearings at 3 16-3 17 ("it is difficult to imagine adequate safeguards which could effectively guarantee that patients' decisions to request assisted suicide were unambivalent, informed and free of coercion"); Testimony of Dr. Herbert Hendin, House Hearings at 115.

speculation. Studies of assisted suicide and euthanasia in the Netherlands, where safeguards are stringent on paper, show that those safeguards are routinely disregarded. Although medical guidelines recognize the right to die only based on the patient's own informed and voluntary decision, a survey of 300 physicians disclosed that over 40 percent had performed euthanasia *without* explicit consent. In 1990, in addition to 2,300 cases of active euthanasia with consent and over 400 cases of assisted suicide, there were over 1,000 cases of active nonvoluntary euthanasia performed without the patient's knowledge or consent, including roughly 140 (14 percent) where the patient was fully competent. Comparable rates of nonvoluntary euthanasia in the United States would be roughly 20,000 per year? And these numbers do not even include cases where "consent" was extracted by means of undue influence, psychological coercion, or skewed information.

Giving choices to the vulnerable is not always liberating. A young woman is not more "free" if the law allows her to contract with a pimp; a young man is not more "free" if a pusher can sell him crack cocaine; a child is not more "free" if he or she can "consent" to sexual advances by adults; people are not more "free" if they

---

[7] See John Keown, *Further Reflections on Euthanasia in the Netherlands in the Light of the Remmelink Report and the Var Der Maas Survey, in* Kucke Gormally, ed., *Euthanasia: Clinical Practice and the Law* 193, 209, *221-25* (1994); Callahan & White, *supra,* 30 U. Rich. L. Rev. at 15-18. *See* also Carlos F. Gomez, *Regulating Death : Euthanasia and the Case of the Netherlands* (199 1); Testimony of Dr. Herbert Hendin, House Hearings at 106- 13, 114- 15.

can voluntarily sell themselves into slavery. Nor is an ill person necessarily more "free" if he can agree to kill himself. Indeed, the mere availability of assisted suicide as a socially-legitimated alternative may impel some who would prefer to live to accept this course out of feelings of guilt or shame about the burdens (financial and otherwise) that the choice of continued living would impose on their families. These laws arc not an instance of some people "imposing their morality" on others. They result from citizens, through their legislature, reflecting on the conditions that they may face at the end of life, and establishing rules that will protect all of us, when we are weakest and most vulnerable.

Second, if patients' requests for assistance in suicide are honored, many will die unnecessarily. According to medical experts, the desire to commit suicide (even among the terminally ill) is typically associated with clinical depression, which is a treatable disease.' The New York State Task Force reported: "Studies that examine the psychological background of individuals who kill themselves show that 95 percent have a diagnosable mental disorder at the time of death. Depression, accompanied by symptoms of hopelessness and helplessness, is the most prevalent condition among individuals who commit suicide." New York Report at 11; see also *id*. at 13 ("In one study of terminally ill patients, of those who expressed a wish to

[8] See Testimony of Dr. Herbert Hendin, House Hearings at 103-06.

die, all met diagnostic criteria for major depression"); J.H. Brown, *et. al., Is It Normal for Terminally Ill Patients to Desire Death?,* 143 Am. J. of Psychiatry 208 (1986). When treated for depression, patients typically cease to desire suicide. New York Report at 26 (treatment of depression "resulted in the cessation of suicidal ideation for 90 percents of these patients").

Much of the desire to commit suicide is also traceable to insufficiently aggressive measures to alleviate pain? When a suicidal patient is helped to deal with pain and depression, he or she typically is restored to the natural desire to live. To give patients the "right" to obtain assistance in suicide is to license the killing of persons who often are simply in need of help, which modern medicine can give. Professor Herbert Hendin, a professor of psychiatry at New York Medical College, testified:

> Patients who request euthanasia are usually asking in the strongest way they know for mental and physical relief from suffering. When that request is made to a caring, sensitive, and knowledgeable physician who can address their fear, relieve their suffering, and assure them that he or she will remain with them to the end, most patients no longer want to die and are grateful for the time remaining to them.

House Hearings at 115-16.

Since American doctors are notoriously uninformed about proper pain

---

[9] New York Report, at 16- 17; Testimony of Dr. Lonnie Bristow on behalf of the American Medical Association, House Hearings at 309-10.

prevention techniques,[10] as well as depression," it is almost certain that many people will be induced to die when instead they could receive effective palliative treatment. [12] The ethical problem is magnified by the fact that economically disadvantaged patients and members of racial and ethnic minorities are the most likely to lack proper treatment for pain and depression,[13] and thus the most likely to "choose" - unnecessarily - to die. Other groups especially at risk are women and the elderly.[14]

Third, if death is defined as a "mercy," it will be difficult to justify refusing this mercy to broader and broader categories of sufferers, It is therefore misleading to confine one's attention (as the lower court did) to a '"competent," "terminally ill," "adult" who desires to " hasten his own death by seeking and obtaining from his physician a fatal dose of prescription drugs and then subsequently administering

---

[10] New York Report, at 33 ("pain is often overlooked by health care providers"); ***id*** at 43 ("the delivery of pain relief is grossly inadequate in clinical practice"); Testimony of Dr. Kathleen Foley, Chief of Pain Service at Memorial Sloan-Kettering Cancer Center, House Hearings at 18-20.

[11] New York Report, at 32; *id.* at 32-33 (study found that fewer than 15 percent of depressed residents of a nursing home for the elderly had been treated for depression).

[12] See New York Report, at 40 ("modem pain relief techniques can alleviate pain in all but extremely rare cases"); Testimony of Dr. Lonnie Bristow on behalf of the American Medical Association, House Hearings at 3 10, 3 14-15.

[13] New York Report, at 44, 46; Testimony of Dr. Carlos Gomez, House Hearings at 412.

[14] New York Report at 44; see also *id.* at 33.

such drugs to himself."[15] Final Judgment at 2, 23. For example, the moral arguments supporting assisted suicide for terminally ill patients who are able to self-administer the killing agent apply just as strongly to similar patients who cannot do the deed for themselves. Thus, assisted suicide will merge into voluntary active euthanasia.[16] And the moral arguments supporting assisted suicide for the terminally ill apply with as much force - maybe more - to persons who face not a few weeks or months, but years of pain that seems to the intolerable. Thus, assisted suicide for the terminally ill will almost surely merge into assisted suicide for those with incurable chronic conditions.[17] Persons with serious disabilities will be particularly at risk.[18] And, the argument for assisted suicide for competent adults will apply with seemingly equal force to those unable to consent for themselves, whose "right to die" will be exercised by surrogates. If death is seen as a mercy, why confine it to those fortunate enough to be able to consent? The same corrosive skepticism that the

---

[15] It is a striking example of the illogic of the decision below that it declares the long-standing distinction between assisted suicide and refusal of life-sustaining treatment to be a "difference without distinction," (Final Judgment at 16), only to propose new distinctions that have far less logical, empirical, or ethical justifications. See Yale Kamisar, *The Right to Die: On Drawing (And Erasing;) Lines*, 35 Duq. L. Rev. 481 (1996).

[16] *Id.* At 5 13-19; Dan W. Brock, *Voluntary Active Euthanasia*, Hastings Center Rep., Mar.-Apr. 1992.

[17] *See* Kamisar, *supra*, 35 Duq. L. Rev. at 502-13.

[18] Testimony of Diane Coleman, in House Hearings, at 53-54; Statement of Diane Coleman and Carol Gill, *id.* At 53-70.

lower court below evinced toward the distinction between refusal of treatment and active assisted suicide will be equally potent to dissolve all of the other limitations on this newfound right.

It is even difficult to understand why, under the reasoning of the lower court, the mercy of assisted suicide should be denied to persons who, for reasons other than ill health, conclude that the suffering of life is unbearable. Physical pain and impending death are not the only - and not necessarily the most serious - reasons to desire a release from these mortal coils, What about suicide for reasons of honor, guilt, or grief? Once we conclude that death is a matter of personal autonomy - of privacy - where can we stop?

Fourth, and most fundamentally, by making death a legally available "choice," we will inevitably change the way our culture perceives the final stages of life. When death is not an official option, the focus of the patient, the patient's family the doctor, and the system is on what can be done to make the patient's life easier and better. If death becomes an approved social option, both the patient and the system will tend, instead, to focus on whether continued care is "worth it." The patient, aware of the burden she is imposing on loved ones, may well conclude that she "owes it" to her family to commit suicide, The decision to cling to life may come to be regarded as wasteful, irrational, and selfish. In the uniquely vulnerable

circumstances of the lingering patient, the "right to die" will become, for many, the duty to die. See New York Report at 95. One blessing of the current law is that it relieves the elderly and the infirm of the need to justify their continued existence. Even if the laws against assisted suicide are rarely enforced, they still have the effect of expressing society's deep commitment to the protection of human life. In combination with the ethical precepts of the medical profession, these laws ensure that assited suicide remains a highly exceptional activity, rarely suggested or initated by physicians, If assisted suicide is recognized as a "right," it will become both routine and common. It is not obvious that patients would be better off.

These are among the reasons that have persuaded the people of Florida, through their elected representatives, to retain section 782.08 Fla. Stat. prohibiting assited suicide. *Amici* find the arguments compelling. We fear the consequence of the liberation of death, especially for the most vulnerable among us. But we do not ask this Court to adopt our view of the moral consequences of legalized assisted suicide. Indeed, the point we wish to make is that this case should not be decided on the basis of this Court's own assessment of the weight of the competing moral arguments. Rather, as members of the legislative branch of government, *amici* maintain that this not a question

for courts to decide; instead, the nature of physician-assisted suicide requires that the

legislative branch resolve this issue.

B. CONSTITUTIONAL JUDICIAL REVIEW IS TOO INFLEXIBLE AN INSTRUMENT FOR THE DECISION OF SUCH QUESTIONS

Even apart from the specifics of constitutional doctrine," there is every reason for this Court, indeed courts in general, to be wary about overturning duly enacted legislation on the basis of untried and uncertain moral and philosophical arguments, where the result is bereft of support in directly relevant and express constitutional text or in state or national experience. It may well be true that attitudes about the end of life have changed, or will change, in response to technological developments and their attendant economic and emotional consequences. But it would be a grave mistake for the Florida courts to leap in and attempt, prematurely, to resolve the issue or to accelerate the pace of change. Even on the heuristic assumption that laws against assisted suicide should be relaxed (which these *amici* doubt), it is better that reform take place in the legislature.

The great institutional strengths of courts is their ability to provide uniform enforcement of legal principles, with consistency, treating like cases alike. Where operative principles are in flux and the consequences of new approaches are

---

[19] *Amici* will leave it to others to discuss the constitutional analysis engaged in by the lower court.

unpredictable, however, that virtue becomes a vice. Constitutional judicial review is too inflexible a process to deal sensitively and appropriately with a matter such as this.

First, by locating the right to die in the state constitution, the lower court eliminated the possibility of legislative variation and experimentation. To treat this social policy question as controlled by state constitutional law is to eliminate the possibility of a multiplicity of approaches, in light of differences in social and moral perceptions.

Even a leading advocate of physician-assisted suicide has recognized that the right to die should be subject to legislative reform rather than judicial fiat:

> Legalization of physician assisted suicide should be understood *not as a matter of recognizing rights* but as a policy aimed at making available a compassionate option of last resort for competent, terminally ill patients. Since we do not know whether such a policy will produce more good than harm, it should be viewed as an experiment * * * In the case of a morally controversial issue, subject to competing arguments pro and con, it is better that policy experimentation occur piecemeal, by *the various decisions of the legislatures or voters of the states, rather than wholesale, by means of the constitutional adjudication of the . . , courts.*

Franklin G. Miller, *Legalizing Physician-Assisted Suicide by Judicial Decisions: A Critical Appraisal*, 2 Biolaw S: 136, S 144 (Special Section, July-Aug. 1996) (emphasis added).

Second, by their nature, constitutional judicial decisions must be grounded in

principle; they may not be compromises with social and political pressures. The lines drawn by this Court, under the Florida Constitution, must be defensible at the level of constitutional principle.

Yet not every aspect of social life can be governed by crisp and principled rules. Sometimes, the best and most peaceful solution to contentious moral conflicts in society is not to award the brass ring to one side or the other, but to construct compromises that allow each contending force to believe that the system has been responsive to their deeply held convictions. Legislatures are good at that. Whatever one may think of legislators as moral deliberators, few would dispute that they have the expertise and incentive to resolve social conflict in a way that minimizes political opposition and resistance, The legislative answer may not appear pure from a philosophical or analytical perspective, but it is likely to reduce social discord. And even if the Florida Legislature proves unable to forge a stable consensus, contending social forces are more likely to accept the outcome of a process in which their voices were heard than an imposed solution in which their elected representatives were not entitled to a significant role.

The right to die may well be such an issue. Certainly, the public is seriously divided. Passions run high. The various lines that might be drawn - refusal of treatment versus suicide, assisted suicide versus active euthanasia, terminal illness

versus chronic pain or disability, actual consent versus implied consent, intolerable pain versus other conditions that harm the quality of life, one set of safeguards versus another, and so forth ▪ are, each of them, arbitrary in their own way. Each of them attempts to allow the dying patient some greater degree of control over the circumstances of his death, while at the same time upholding the society's obligation to honor life and protect the vulnerable. Each tries to reconcile two honorable impulses: autonomy and protection, Prudential compromises are difficult to justify as interpretations of the Florida Constitution, but are the everyday product of the Florida Legislature.

Third, and most importantly, this Court is seriously constrained in its ability to change its policy in response to experience and criticism. Each constitutional decision of this Court is said to be based on an interpretation of the Florida Constitution, and it strains public credulity that the meaning of such a document would change very rapidly, very often. The doctrine of *stare decisis* thus creates a presumption in favor of existing doctrine, Stability is a source of judicial strength and legitimacy. But with this strength comes a caution: just as this Court is properly reluctant to jetison a constitutional doctrine that it has embraced, this Court should be reluctant to embrace novel constitutional doctrines that may require modification in the future.

This case is a perfect example, If this Court joins the lower court in creating a right to assisted suicide, the Florida Legislature will be foreclosed from exploring contrary policies. If that judgment proves to be misguided, great injury will have been done to many vulnerable persons, until this Court brings itself to acknowledge the mistake and reverse the decision. On the other hand, if this Court reverses the judgment below, debate on the issue will proceed. The people of Florida, through their legislature, will be free to pass laws upholding, modifying or repealing section 782.08 Fla. Stat., in such circumstances and under such safeguards as they may deem advisable. If the Florida Legislature were to experiment with liberalized laws on this subject and such laws proved acceptable, then the will of the people would have been respected. If, however, such laws proved misguided (as we expect), the Florida Legislature can reverse course.

One final observation about the institutional capacities of this Court and the Florida Legislature bears mention, Prominent strains of constitutional theory have maintained that the judiciary should be most willing to intervene in cases where the adverse consequences of the challenged law are borne by discrete and insular minorities whose interests may not have received their just weight in legislative deliberations. See generally John Hart Ely, *Democracy and Distrust* (1980). Whatever the merits of that view, *amici* wish to stress that it has no application to

this case. When the Florida Legislature enacted various laws reaffirming the difference between withdrawal or refusal of treatment and assisted suicide and euthanasia, it was not legislating for a discrete and insular minority. It was legislating for the people of Florida and for itself, behind a veil of ignorance that denies all of us the knowledge of what our condition may be in the final days of our lives. There is no reason to distrust the conclusions that the Florida Legislature reached or would reach in the future.

Conclusion

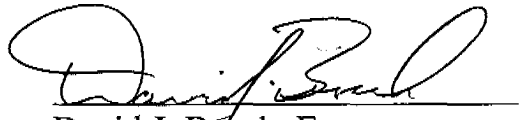
For the foregoing reasons, *amici* respectfully request that this Court reverse the judgment below.

David J. Busch, Esq.
3428 Robinhood Road
Tallahassee, FL 323 12
(904) 3 86-7062
Florida Bar # 140945

Counsel for the *Amici Curiae*

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing, Brief Amici Curiae of a Bi-Partisan Group of Florida State Legislators In Support of Appellant, has been furnished by U.S. Mail to Robert Rivas, Esq., Rivas & Rivas, P.A., P.O. Box 2077, Boca Raton, Florida 33427-2 177 and Michael A. Gross, Esq., Assistant Attorney General, PL-01, The Capitol, Tallahassee, FL 32399-1050 this 17th day of March, 1997.



David J. Busch, Esq.
Florida Bar # 140945
3428 Robinhood Road
Tallahassee, FL 323 12
(904) 386- 7062