IN THE FLORIDA SUPREME COURT

BARRY KRISCHER, in his official capacity as State Attorney of the 15th Judicial Circuit,

Defendant-Appellant,

v.

CECIL McIVER, M.D., et al.,

Plaintiffs-Appellees.

CASE NO. 89,837

DISTRICT COURT OF APPEAL
FOURTH DISTRICT NO. 97-379

CIRCUIT COURT NO. CL-96-1504-AF

ON WRIT OF CERTIORARI
ON REVIEW CERTIFIED BY THE DISTRICT COURT OF APPEAL
OF THE TRIAL COURT JUDGMENT OF JANUARY 31, 1997

BRIEF AMICT CURIAE OF THE COMMISSION ON AGING WITH DIGNITY; THE NATIONAL LEGAL CENTER FOR THE MEDICALLY DEPENDENT & DISABLED, INC., on behalf of its client population, -especially those in Florida; LORRAINE BANKS, L.P.N.; SALLY BEACH, R.N., individually and on behalf of her patients with terminal conditions; JOHN CONNORS; JOHN THOMAS "JACK" DOUCETTE, by and through his guardian, Margaret Doucette; KATHLEEN LUMBRA; JOSE RODRIGUEZ, R. Ph.; and DR. DAVID L. VASTOLA, D.O., individually and on behalf of his patients with terminal conditions IN SUPPORT OF DEFENDANT-APPELLANT.

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INTERESTS OF THE AMICI CURIAE

Your amici include Florida citizens with terminal conditions and health care professionals or organizations that serve or represent such persons.[1]

A. Amicus the Commission on Aging with Dignity

Amicus the Commission on Aging with **Dignity** has **appropriate**ly responded to the call for assisted self-murder as a "call for help", for reform. The Commission is a privately funded, non-profit educational organization based in Florida that is committed to fostering and promoting a positive alternative -- a "Third Path" -- to the "pain or poison" dilemma that many Floridians fear they will face in the final stages of life. Rather than exploiting these fears and prescribing preemptive self-murder, the Commission seeks to address the problems out of-which these fears arise. As its name indicates, the Commission on Aging with Dignity recognizes that dying is a process and not a single moment in **time.** This non-partisan Commission brings together government, business, and religious leaders who agree on the need for constructive changes in the current approaches to care provided and available to persons in the final stages of their lives. Thus, the objectives of its "Third Path" program are three-fold:

'Motion to Appear filed by counsel for **amici** was granted by this Court on March 6, 1997.

Consent to file an amici brief in this matter was obtained from the parties. Letters documenting **same are** appended to the end of this brief.

The National Legal Center gratefully acknowledges the support and **commitment** of the Alliance Defense Fund that financed the drafting and filing of this brief.

1) to raise **awareness** about and challenge the current system of end-of-life care that often permits patients to suffer unnecessarily from untreated or undertreated pain, that often fails to adequately respect patient-centered decisionmaking, and that often treats a patient as **a** diagnosis rather than a person and overlooks the patient's important emotional needs;

2) to develop and demand improvements in these identified deficiency areas;

3) to empower patients to take control of their medical decisionmaking (e.g., through advance directives); to reach out to patients who are lonely, isolated, and ignored within the healthcare system in order to help improve the quality of their lives; to educate and inform patients about home- and hospice- based alternatives to the medicalized, hospital-based process of dying, and to ensure that Floridians have humane and dignified options in the final stages of their lives.

The Commission's interest in this case, then, is but an outgrowth of its overriding goal that suicide be deterred, and that society's response to despondency at the end-of-life be an investment of compassion to ensure dignity in the whole dying process, and not the prescription of a cheap; quick-fix, death-with-dignity poison pill.

B. Amicus the National Legal Center for the Medically Dependent & Disabled, on behalf of its clients population, especially those in Florida

Amicus the National Legal Center for the Medically Dependent & Disabled, Inc., is a non-for-profit 501(c)(3) public interest law firm. It is chartered to represent and defend the rights and interests of persons who are critically or terminally ill, or who are disabled and otherwise medically dependent to, inter alia: (a) obtain or maintain essential medical care and treatment, (b) prevent non-voluntary'and involuntary euthanasia and assisted suicide, and (c) challenge other forms of unjustifiable discrimination.

This case directly threatens the rights and interests of the National Legal Center's client population in Florida. This case also indirectly threatens the rights and interests of the National Legal Center's client population elsewhere, especially in those states which have a similar privacy clause in their state constitution.

C. Amici Patients

Several of your amici are Florida citizens who have terminal conditions within the meaning of Fla. Stat. § 765.101(15)(a) and who are, thus, similarly situated to plaintiff Charles Hall: Lorraine Banks (malignant breast cancer), John Connors (Parkinson's Disease), John Thomas "Jack" Doucette (insulin-dependent diabetes, i.e., he produces no insulin of his own), and Kathleen Lumbra (inoperable liver disease, i.e., primary biliary cirrhosis of the liver) (hereinafter "amici patients").

Unlike plaintiff Hall, however, the amici patients desire the continued protections of Florida law and justifiably fear the consequences of' exclusion from- the laws'. protections as intended by the plaintiffs. Although the amici-patients do not now-seek assistance in self-murder, those-of them with a history of depression (Ms. Banks, Mr. Connors, and Ms. Lumbra) fear that in a future depressive episode: if undiagnosed, they might request such assistance in self-murder and it will be granted; or, if diagnosed, they might be declared incompetent and a surrogate decisionmaker could request assisted self-murder on their behalf. Third party requests for assisted self-murder would also threaten the rights and interests of children, persons under guardianship

like amicus patient Mr. Doucette, and others whose medical treatment decisions are made others.

If the plaintiffs-appellees prevail, these amici and other similarly situated persons would, by operation and effect of the judgment, be threatened with: denial of their fundamental constitutional rights to equal protection of the law (most obviously, equal protection of Florida's ban on assisted self-murder), denial of due process protection of their right to live, and denial of their rights under the Americans with Disabilities Act against discrimination on the basis of their terminal disabilities.

D. Amici Healthcare Professionals

Amici Dr. David L. Vastola, D.O. (physician); Sally Beach, R.N. (nurse); and Jose Rodriguez, R. Ph. (pharmacist) (hereinafter "amici healthcare professionals") practice in Florida and render their professional services to persons-with terminal conditions within the meaning of Fla. Stat. § 765.101 (15). A judgment for the plaintiffs-appellees in this matter would by necessary implication affect the rights and interests of all persons similarly situated to the plaintiff physician-as well as persons whose professions would implicate them in providing assistance in self-murder by prescription: i.e., pharmacists (e.g., because they fill physician's prescriptions) and nurses (e.g., because they implement physicians' orders).

Although these amici healthcare professionals and others like them refuse to participate in or otherwise facilitate assisting self-murder on the basis of their religious beliefs and professional ethics, they would nevertheless be compelled to

participate in the practice if it were legalized. Thus, if the plaintiffs-appellees prevail, the amici healthcare professionals and similarly situated persons would, by operation and effect of the judgment, be threatened with: denial of their constitutional liberty interests in practicing their professions consistent with their personal and professional ethics and in maintaining the ethical integrity of their respective professions; denial of their constitutional free speech rights to refuse to participate in assisted suicide by advising, counselling, or speaking in their professional capacity to patients or collegues in a manner that promotes/facilitates assisted suicide or offers it as a treatment option; and denial of their constitutional free exercise rights to refuse to participate in or facilitate assisted suicide against their beliefs and consciences..

Amici healthcare professionals Dr. Vastola and Ms. Beach also represent the rights and interests of theirpatients with terminal conditions whose rights- and interests, like those of the amici patients, will be detrimentally affected by a judgment in favor of the plaintiffs-appellees in this matter.

STATEMENT OF THE CASE AND OF THE-FACTS

Your amici adopt the Statement of the Case and of-the Facts as stated by Defendant-Appellant.

SUMMARY OF ARGUMENT

This brief assumes for t&purpose -of argument that assisted self-murder is a constitutionally protected interest and addresses the legitimate, compelling, and overriding nature of the State's interests in prohibiting assisted self-murder.

The trial court rather summarily dismissed the State's interests although it characterized them as "legitimate and of extreme importance" and additionally noted that "safeguards against potential abuses . . . are necessary.." McIver, et al. v. Krischer, No. CL-96-1504-AF, slip op. at 19 n.6 (Palm Beach County Cir. Ct. Jan. 31, 1997) (hereinafter "Final Judgment"). Without even considering, let alone suggesting, how. the State might address its serious concerns and fears of abuses with anything short of a total ban on the practice of assisted suicide, the trial court concluded that the statute was unconstitutional "precisely because it is not narrowly tailored to address only the situations the State fears will take place." Final Judgment at 18.

As your amici will show, and the comprehensive report your amici file as supplemental authority supports:[2] 1) if assisted self-murder is a constitutionally protected right, it is nevertheless overridden by compelling State interests, and 2) if such a right is recognized only for a sub-class of persons -- namely, persons with terminal disabilities such-as plaintiff Hall and your amici patients -- selectively overriding an otherwise uniformly applicable criminal statute, it would violate the equal protection rights of such sub-class of persons and would so devalue the constitutional status of such persons and their rights that abuse and harm is certain to occur and meaningful regulation would be impossible.

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[2]New York State Task Force on Life and the Law, When Death is Sought: Assisted Suicide and Euthanasia in the Medical Context (May 1994) (hereinafter "When Death is Sought").

ARGUMENT

This appeal addresses the constitutionality-of Florida's uniformly applicable ban against assisted self-murder, Fla. Stat. § 782.08,[3] as applied to the circumstances of the plaintiffs: a person with a terminal condition who seeks a fatal dose of drugs and the physician who prescribes them.

Under these circumstances, the trial court held that the statute operates unconstitutionally in violation of the federal and state equal protection clauses.' Final Judgment at 10-11.

In addition, the trial court held that a "competent, terminally ill adult" has a constitution&l right under the Privacy Amendment of the Florida Constitution "to decide to terminate his suffering and determine the time and manner of his death", including the right to obtain "a lethal dosage of medication.11 Final Judgment at 23-24.

The other amici already advance the compelling arguments that the privacy clause may not be reasonably construed to protect a right to assisted self-murder. This brief will assume for the purpose of argument that there is a privacy interest and

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[3]"Every person deliberately assisting another in the commission of self-murder shall be guilty 'of manslaughter . . . "

[4]The U.S. Supreme Court is currently reviewing two federal assisted suicide cases in which the Equal Protection and Due Process Clauses of the U.S. Constitutionare implicated, and its judgment will be dispositive of these federal issues. See Quill v. Vacco, *80* F.3d 716 (2d Cir. 1996), *cert. granted sub nom.* Vacco v. Quill, ___ s. ct. ___ (U.S. Oct. 1, 1996) (No. 95-1858); Compassion in Dying v. Washington, cert. *granted sub nom.* Washington v. Glucksberg, ___ s. ct. ___ (U.S. Oct. 1, 1996) (No. 96-110). Thus, your amici urge this Court to delay reaching the federal constitutional issues in this appeal until the U.S. Supreme Court renders its decision in Glucksberg and Quill. This brief will address only the state law issues raised.

argue that: 1) the State's interests are nevertheless compelling and overriding, 2) that § 782.08 is the least restrictive means of protecting those interests, and 3) that any proposed limitation on the interest would be constitutionally impermissible.

I. IF A RIGHT TO ASSISTED SELF-MURDER IS CONSTITUTIONALLY PROTECTED, WHETHER THE TRIAL COURT FAILED TO CONSIDER ALL OF THE STATE'S COMPETING INTERESTS AND THEIR COMPELLING NATURE.'

Although the trial court characterized its holding "as applied", in dicta, it implicitly indicated that Florida's statutory proscription of assisted self-murder is unconstitutional in all of its applications:

> [T]he State's strong and particularly concerned opposition to suicide . . . . , the religious, moral, ethical, and legal grounds . . . , as well as the fear that abuses may arise. These concerns, which are acknowledged as legitimate and of extreme importance do not outweigh the Right of Privacy and Equal Protection.

Final Judgment at 19 (emphasis added). Thus, the lower court implicitly posited that once it is determined that a right is protected under the Privacy or the Equal Protection provisions, the State's interests must necessarily fail to override the right in any circumstance where the right might be exercised. It thus concluded that the State may only regulate the practice of assisted self-murder:

> The State, however, has the authority and responsibility to adopt regulations which safeguard against potential abuses. These safeguards are necessary, but should not unreasonably infringe upon the individual's rights of privacy and equal protection of the law.

Final Judgment at 19.

The trial court's analysis fails to appreciate that the recognition of a constitutional right is not dispositive -- nor

preempt ive -- of a balancing of interests. Proper constitutional analysis does not foreclose the possibility that the-state's interests may be so'compelling, and meaningful regulation to protect those interests so impossible, that nothing short of a total ban is nevertheless constitutionally permissible. Or, in the trial court's terms,. if this new right is simply an extension of an already recognized right to hasten death, then proper constitutional analysis would consider the entirety of the state's intrusion on that right and-determine whether the pro-scription on the assisted self-murder method is narrowly tailored to achieve compelling interests;

Although failing to identify all of the relevant compelling State interests at issue, the trial court nevertheless character-izing those it identified as "strong", "particularly concerned'!, "legitimate" and "of extreme importance". It thus implicitly conceded their compelling nature.

In addition, because the trial court failed to directly address the foundational issue in this case -- i.e., whether there is a constitutional privacy interest in assisted self-murder by lethal prescription -- it necessarily failed to identi-fy the State's other compelling interests implicated. The trial court's analysis thus begins by assuming its conclusions:

> Florida courts have held that an individual's right to control the time and manner of his or her own death requires a balancing of the patient's privacy interests against the state's interests in the preservation of life, the-preven-tion of suicide, the protection of innocent third parties, and the maintenance of the ethical integrity of the medical profession.

Final Judgment at 14 ¶ d. Having just recited the, litany of cases holding that Florida's Privacy Amendment protects a right

"to choose or refuse medical treatment" and "to control [one's] own medical care", the court simply superimposes on these cases a "right to control the time and manner of his or her own death," thereby avoiding having to address all of-the legal-issues implicit in arriving at such conclusion. At the same time, it assumes two additional conclusions from which a right to assisted self-murder logically follows and against which the State's competing interests must necessarily fail: 1) that assisted self-murder merely concerns the right to control the time and manner of one's death, a right already recognized and balanced in favor of the individual, and 2) that because assisted self-murder and treatment refusal concern the same privacy right, then the balancing test applicable in the treatment refusal context applies to assisted self-murder.

Your other amici ably argue the error in characterizing treatment refusal precedents as finding a "right to control the time and manner of one's death" and in equating assisted suicide with treatment refusal. Thus, your amici here simply add that, having never addressed a proposed right-to commit assisted suicide, the State should not be- hamstrung by a-pre-set catalog of its supposed interests. The relevant State interests at issue, also include, but are not limited to:

* its interest in protecting life,
* its interest in preventing homicide,
* its interest in maintaining-the rules. of law that recognize consent is no defense to homicide and actuarial status of the victim does not mitigate the crime,
* its interest in drug enforcement,
* its interest in protecting suicidal persons (as distinguished from its separate interest-in preventing suicide),
* its interest in supporting life-affirming options regarding end-of-life care, including improvements in pain management techniques and medicines and hospice,

* its interest in protecting patients against harmful medical conduct and in preventing h-armful: medical conduct, especially with regard to vulnerable patients,
* its interest in protecting patients against undue influence and psychological pressure to consent to their own deaths,
* its interest in protecting incompetent patients from misconduct by third party decisionmakers,
* its interest in protecting persons with disabilities from discrimination,
* its interest in protecting the poor and minorities from exploitation concerning access to quality medical care and from cost-containment interests of public and private health insurers,
* its interest in regulating the practice of medicine and in preventing a medical license from becoming a license to kill,
* its interest in maintaining high ethical standards within the medical profession and preventing abuses,
* its interest in preventing euthanasia, mercy-killing, and assisted suicide.

See, e.g., Compassion in Dying v. Washinaton, 49 F.3d at 592-93.

A. WHETHER THE TRIAL COURT SHOULD-HAVE APPLIED THE SAME ANALYSIS THIS COURT APPLIED IN JONES V. STATE BECAUSE THE NATURE AND DEGREE OF THE HARM OF ASSISTED SELF-MURDER OUTWEIGHS THE INTERESTS OF THE INDIVIDUAL.

This Court upheld the constitutionality of Florida's unqualified prohibition against sexual activity with minors despite numerous privacy interests implicated. Jones v. State, 640 So. 2d 1084 (Fla. 1994).

Similar to the case at hand, the perpetrators of the crime asserted their victim's privacy interests in-participating in the proscribed activity, arguing that their victims were not harmed or exploited by it and did not want the protections of the State: The victims desired the personal relationships they entered into with the perpetrators, they consented to the activity, they were psychologically mature despite their chronological age, and they were already unchaste.

This Court wisely responded:

> [T]he Florida legislature has established an unquestionably strong policy interest in protecting minors from-harmful sexual conduct . . . . "any type-of sexual conduct-involving a child constitutes an intrusion upon the rights of that child, whether or not the child consents . . .[S]ociety has a compelling interest in intervening to stop such misconduct." . . . . We are of the opinion that sexual activity with a child opens the door to sexual exploitation, physical harm, and sometimes psychological damage, regardless of the child's maturity or lack of chastity. . . . However, neither the level of intimacy nor the degree of harm'are relevant [in these circumstances]. The statutory protection offerred by [the statute] assures that, to the extent the law can prevent such activity, minors will not be sexually harmed. " . . . [T]he state unquestionably has a very compelling interest in preventing such conduct." The State has the prerogative to safeguard its citizens . . . from potential harm when such harm outweighs the interests of the individual. . . .The rights of privacy that have been granted to minors do not vitiate the legislature's efforts-and authority to protect minors from conduct of others.

Jones, 640 So. 2d at 1085-1087 (citations omitted) (emphasis added).

Like its prohibition against sexual activity with a minor, Florida's statutory ban against assisted suicide is unqualified. This was a considered and deliberate legislative policy decision of long-standing in Florida, and it is also one of wide acceptance, evidenced by the fact all of Florida's sister states uniformly, with few exceptions, prohibit the practice in unqualified terms and none currently recognizes the practice as legal. One need not look beyond the plain language of- the statute to discern the obvious legislative intent: to prohibit the practice of assisted suicide with respect to every assistor, every victim, and every method. Consequently, the harm to be avoided is not amenable to qualification or exception, nor is the penalty for causing the harm subject to mitigation.

As in Jones, then, giving due regard to the nature and degree of the harm prohibited, this Court's balancing of the

State and privacy interests at issue here must apply the same fundamental rules of criminal law: that the relationship between the perpetrator and the victim is irrelevant, that the victim's consent is irrelevant, that the victim's mental competency/maturity is irrelevant, that the victim's physical condition is irrelevant.

Thus, like the justifications for the State's compelling interest in preventing sexual activity with minors, the State's compelling interests are such that the State may legitimately maintain an unqualified prohibition against assisted self-murder, because "the harm outweighs the interests of the individual." See Jones, 640 So. 2d at 1086, citing Griffin v. State, 396 So. 2d 152 (Fla. 1981).

B. *WHETHER THE STATE'S INTERESTS IN PROHIBITING ASSISTED SELF-MURDER MAY BE QUALIFIED ON THE BASIS OF AN INVIDIOUS ASSESSMENT OF THE VICTIM'S QUALITY OF LIFE.*

The U.S. Supreme Court has held that "A State may properly decline to make judgments about the 'quality' of life...and may simply assert an unqualified interest in the preservation of human life." Cruzan v. Director, Mo. Dep't of Health, 497 U.S. 261, 282 (1990).

This Court, however, appears to have adopted for Florida a sliding scale rule for measuring the strength of the state's interest in the treatment refusal context. John F. Kennedy v. Bludworth, 452 So. 2d 921, 924 (Fla. 1984) ("[T]he state's interest against termination of extraordinary artificial life support weakens and the individual's right to privacy increases as the bodily invasion becomes greater and the prognosis dims.")

What is critical to note, however, is that this rule measures the state's interest in requiring that patients subject themselves to a bodily invasion of forced administration of treatment.' There is no analogous bodily invasion -- constituting the intrusion on privacy rights in the treatment refusal context -- at issue in the assisted self-murder context. It would be absurd to suggest that the State is seeking to "impose" life on suicidal persons -- they simply continue living untrammeled-by State intrusion on their bodily integrity. In any event,.this Court has only established application of this sliding scale rule to state actions seeking bodily invasions, i.e., forced administration of unwanted treatment. Thus, the lower court erred by assuming such sliding scale rule also applied in-the assisted suicide context.

Moreover, such a sliding scale rule is wholly inappropriate in the assisted suicide context because it would necessarily require an invidious assessment of the value of the person's very life and necessarily employ lethal disability-based discrimination.

By imputing to the Florida Constitution a sliding-scale standard for evaluating the worth of persons to the State, the trial court mischaracterizes Florida treatment refusal caselaw precedent as weighing the benefits and burdens of life itself rather than of treatment, and it uses Florida's equal protection clause as an instrument of unlawful discrimination,.

Such an incredible construction of the Florida Constitution transforms it from a shield that-recognizes the substantive worth of the life of each person into a sword that actually threatens the lives of those who fail to pass some quality-of-life test.

The Framers of the Florida Constitution, who wrote that "life" may not be deprived without due.process, could not have intended such a result. Nor could the Framers have intended to require that the State treat persons unequally on the basis of their physical condition.

Clearly, application of a sliding scale rule for evaluating the worth of a person's life to the State is a lethal form of invidious discrimination and an anathema to the Florida Constitution.

C. *WHETHER THE STATE'S UNQUALIFIED PROHIBITION 'AGAINST ASSISTED SELF-MURDER IS CONSISTENT WITH THE PSYCHOLOGICAL FACTS OF SUICIDE.*

Any "choice" for suicide, regardless of the person's condition, might very well be compromised by a treatable depression, rendering the choice the product of mental or emotional illness rather than a voluntary, competent decision.[5] Indeed, **this** prospect provides the rationale for Florida's civil commitment law, Fla. Stat, § 394.451 et Seq. under which suicidal persons are presumed to be suffering-from a mental or emotional illness that requires intervention, assessment, and-treatment. See When Death is Sought at 9.

However, recognition of a constitutional right to assisted suicide would necessarily abolish this presumption. The State could no more presume that a person seeking assisted suicide has

[5]A "choice" for assisted suicide might also be-compromised by other factors -- e.g., loss of insurance or lack of financial resources to pay for continued treatment or care; psychological pressure arising from their own feelings that they. are a burden to others; and psychological pressure from others that they are burdens or that they lack sufficient quality of life.

a mental or emotional illness than it could presume that a woman seeking an abortion or any person refusing' life-sustaining treatment is mentally or emotionally' ill because they seek to exercise the right.

Because they propose to exercise a constitutional right, the State could not subject them to evaluation, treatment, civil commitment, or any other form of intervention to prevent suicide without first demonstrating a compelling -justification. As a consequence, many suicidal persons with undiagnosed mental or emotional illnesses would die from preventable suicide.

There is no sub-group of suicidal persons that are clinically distinguishable from other suicidal persons. For example, with respect to suicidal persons with terminal conditions: "[L]ike other suicidal individuals, patients who desire an early death during a terminal illness are usually suffering from a treatable mental illness, most commonly a depressive condition." Herbert Hendin & Gerald Klerman, Phvsician-Assisted Suicide: The Dangers of Legalization, 150 Am. J. Psychiatry 143, 143 (1993); Tia Powell & Donald B. Kornfeld, On Promoting Rational Treatment, Not Rational Suicide, 4 J. Clin. Ethics 334, 334 (1993). Thus, abolishing the presumption of mental or emotional illness for any sub-group of suicidal persons, such as those with terminal conditions, would thus be inconsistent with psychological fact.

It is undisputed that the State has a strong interest in preventing suicide. Addington v. Texas, 441 U.S. 418, 427 (1979) ("The state has a legitimate interest-under its parens patriae powers in providing care to its citizens who...pose some danger to themselves.") As the Arizona Supreme Court observed, "[I]t

would be illogical indeed to suggest that the state's interest in preventing suicide magically disappears only when an individual becomes terminally ill and completes certain paperwork." Rasmussen v. Fleming, 741 P.2d at- 674, 685 (Ariz. 1987). -The U.S. Supreme Court has observed that the State's interest in suicide prevention prevails even-against claims based on the First Amendment's protection of-free exercise of religion. Reynolds v. United States, 98 U.S. 145, 166 (1878); Late Corporation of the Church of Jesus Christ of Latter-Day Saints v. United States, 136 U.S. 1, 49-50 (1890).

Moreover, when persons expressly declare their suicidal intent, the state's interest in the protection of life has been held to be overriding. See Donaldson, 4 Cal. Rptr. 2d at 63 (state's interest in preventing suicide "overrides any interest [that person with terminal condition] possesses in ending his life"); In re Caulk, 480 A.2d 9-3, -97 (N.H. 1384) (in view of "specific intent of causing.... death...,- the-state's interest in preserving life and preventing suicide dominates"); In re Von Holden, 87 A.D.2d 66, 450 N.Y.S.2d 623, 625-26 (1982) (and the cases there cited) ("It is self-evident that the right to privacy does not include the right to commit suicide... To. characterize a person's self-destructive acts as entitled to that Constitutional protection would be ludicrous... The preservation of life has a high social value in our culture and suicide is deemed a 'grave public wrong'.... [T]he case law of our-sister states indicates the universality of that principle."). But see Singletary v.

Costello, 665 So. 2d 1099 (Fla. 4th DCA 1996); however, this holding has been strongly criticized."

Moreover, it is a psychological axiom that suicidal persons are always ambivalent about their plans to commit suicide:

> Studies . . . show how ambivalence exists right until the fatal act. . . . [However,] there is a commonly held fallacy that all suicidal behavior is motivated by a desire for self-destruction. In fact, the exact opposite is often the case. Many writers in the field have emphasized that the underlying psychological process in most suicidal individuals is one of intense ambivalence, the internal conflict between the desire to live and the desire to die.

Suicide: The Will to Live vs. The Will to Die 46, 58-59 (Norman Linzer, ed., 1984) (emphasis added) (italics in original). Florida's statutory ban against assisted suicide, its civil commitment law, and its practice and programs regarding suicide operate to protect, promote, and encourage the will to live. By subverting and abolishing the protections of these laws, however, the legal judgment sought by plaintiffs would endorse their will to die. No suicidal person deserves to be abandoned to their suicidal impulses, especially persons in the final stages of life. They want, need, and have a right to the same protections

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[6]In his authoritative treatise, The Right to Die, Alan Meisel describes Singletary as a singular mistake:

> [The Sinaletarv] holding is- a very simplistic reading of both the cases involving hunger strikes by prisoners and the right-to-die cases. It reads the Florida constitutional right of privacy out of context, it too simply equates feeding tubes with treatment,-- it too readily dismisses the suicidal consequence of the prisoner's actions; [and] it overlooks the important differences between prisoner/patients . . . and prisoner/protestors. . , . 'The holding is plainly inconsistent with the majority trend, and it would be surprising if the case were not overturned on appeal.

I The Right to Die § 8.19, at 87 (2d ed.) (Supp. 1997).

that are afforded to all other persons in Florida,- If the plaintiffs prevail, then suicidal persons will be exposed to the very dangers and harms that these Florida laws and programs were intended to guard against.

> At any given point in time one or another of the drives [the drive to live and the drive to die] gains-ascendancy and we tend to think that that is the dominant motivational mode of the individual. . . . There is a zeitgeist in our country . . . which tends to ignore the crisis aspect as well as the underlying ambivalence and the complex nature of [suicidal] behavior. This zeitgeist has its roots in the democratic tradition of individual liberty, . . . individual choice, [and] the individual's right of self-determination.

Id. at 58-59. This is a serious error in the plaintiffs' argument. They would have this Court protect the drive to die in the name of "self-determination" despite the fact that-suicidal persons have a concommitant and competing drive to live which also reflects their "self-determination". As between these competing drives, Florida -- like virtually every other state in the nation -- has wisely, compassionately, and justifiably chosen to protect the drive to live.' Therefore, this Court should deny-the relief plaintiffs seek, because it would result in protecting only the drive to die of suicidal persons.

In sum, the only appropriate response to talk of suicide -- whether in the present legal context or in one-on-one crisis intervention -- is to assist the person in remembering their own strength to cope, not affirming-their belief that their life is not worth living. The very psychology of suicide, then, is reflected-in and underscores the psychological appropriateness of the State's response to assisted suicide: banning-the practice entirely.

D. ***WHETHER THE CIRCUMSTANCES OF THIS CASE AVOID THE VERY DANGERS THE STATE FEARS; AND, IF*** NOT, ***WHETHER THIS THEREBY DEMONSTRATES THE EXTREME*** RISK CREATED ***BY RECOGNXTION OF*** A ***CONSTITUTIONALLY PROTECTED RIGHT TO ASSISTED SELF-MURDER.***

This case is not merely one man's fight for judicial approval of a lethal option, it is an organized effort by the local chapters of two major national organizations to legalize assisted self-murder throughout Florida and, thus, craft-the "best case" scenerio.[7]

Nevertheless, the facts of plaintiffs' carefully constructed case themselves demonstrate the nature and severity of the abuses that will inevitably occur if assisted self-murder is legalized. If abuses can occur even in this "best case" scenerio, how can the State possibly prevent the potential for abuse short of a total ban on the practice? The following are some of those abuses with respect to patient plaintiff, Mr. Hall:'

1. Dr. McIver assented to assisting the suicide of an individual with whom he had no established physician-patient rela-

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[7] (This] suit was orchestrated by the state chapter of the Hemlock Society . . . wh-ich sought terminally ill people in Florida to participate. The Hemlock Society. and the American Civil Liberties Union are paying for the case, which ACLU attorney Rivas is working for -free,

Jay Croft, Doctor Fights for Assisted Suicide Law, Palm Beach Post, Mar. 24, 1996, at 1, 2O'A.

[8] The record was not available prior to the filing this brief. Therefore, references to evidence known to be included in the record could only be identified by the nature, title, and/or date of the document. Citations to the four versions of the complaint are as follows: (initial) Complaint ["C"] filed Feb. 16, 1996; Amended Complaint ["A.C."] filed March 18, 1997; Second Amended Complaint ["S.A.C."] filed June 21, 1996; Third Amended Complaint ["T.A.C."] filed Dec. 21, 1996.

tionship pursuant only to letters from and a telephone conversation(s) with such individual.

At the time the initial and amended complaint were filed, **Dr. McIver had only** "consulted" with the Mr. Hall by telephone and, on that basis alone, had "concluded" that Mr. Hall had a terminal condition and prognosis, that he-was "fully competent," and that in Dr. McIver's "professional judgment . . . it would be medically appropriate and ethical" to provide Mr. Hall with lethal drugs for the purpose of assisting his self-murder. See C. at 9, ¶ 36; C. at 8, ¶ 29.[9] Significantly, the court below observed that Dr. McIver "is not Mr. Hall's primary or treating physician." Final Judgment at 6, ¶ 8.

2. Dr. McIver failed to conduct an independent examination and evaluation of Mr. Hall and/or of his medical records before he assented to assist Mr. Hall's self-murder.

Both the initial complaint and the amended complaint state only that Dr. McIver "consulted" with Mr. Hall, and they provide no indication that Dr. McIver ever personally examined or evaluated Mr. Hall or even reviewed Mr. Hall's medical records prior to rendering his "professional judgment" that assisting Mr. Hall to kill himself would be "medically appropriate and ethical." C. at 9, ¶ 36; see also A.C. at 10, ¶ 37 (compare, A.C. at 10, ¶I 38).

[9]It is not even clear that such conversation(s) created a legally cognizable-physician-patient relationship. See Giallanza v. Sands, 316 So. 2d 77 (Fla. DCA-1975) (triable issue of fact existed whether physician-patient relationship is created where physician never examined patient, did not diagnose her condition, and did not have any contact with the patient, but had written in her chart and allowed his name to be used for purpose-of her emergency admission).

However, because Dr. McIver brought no professional expertise to bear in making that assessment, the mere fact that he is a physician does not transform a prejudicial assessment that "Mr. Hall. is right -- he is better off- dead" into professional -judgment that prescribing the fatal dose is "medically appropriate."

Indeed, it is not until the third version of the Complaint that plaintiffs even allege that Dr. McIver "examined" Mr. Hall. S.A.C. at 12, ¶ 53. However, this allegation is seemingly contradicted by the allegation, in the same document, that the elements of the crime that have or will take place in Palm Beach County include: the fact that "Dr. McIver's practice is located in Palm Beach County and he received correspondence and telephone calls [only] from Hall in Palm Beach County in which Hall sought his assistance." S.A.C. at 13, ¶ 59(a) (emphasis added). (Dr. McIver lives and practices in Palm Beach County, and Mr. Hall lives in Citrus County). The final judgment of the court below explicitly states among its findings that "Dr. McIver is not Mr. Hall's primary or treating physician" and merely states that Dr. McIver reviewed Mr. Hall's medical records, making no reference to any finding that Dr. McIver conducted an-independent examination of Mr. Hall. Final Judgment at 6, ¶ 8.

3. There was no professional psychiatric examination and evaluation of Mr. Hall and/or of his medical records to assess comsetencv prior to Dr. McIver's initial assent to assist Mr. Hall's self-murder.

Clearly, the plaintiffs' position is that the physician who dispenses-the lethal drugs can make his/her own assessment of the patient's mental competency and-may do so on the basis of a telephone conversation(s) and without consultation with the

Patient's primary or treating physician or the patient's medical records.

Although plaintiffs' third version of the Complaint includes the first mention that Mr. Hall's competency was assessed by a psychiatrist (A.C. at 10, ¶ 38), their subsequent versions of-the complaintpurposely omit mention of-this evaluation. The clear import of this omission is that plaintiffs seek to establish that no confirmation of mental competency or screening for depression and/or mental illness is necessary beyond the assessment of the physician who will prescribe the lethal drugs. Indeed, the psychiatric evaluation of Mr. Hall was-clearly an afterthought, and was conducted only after Dr. McIver had already concluded that assisting Mr. Hall to-commit assisted self-murder was medically and ethically appropriate: the initial complaint was filed on February 6, 1996; the psychiatrist's assessment of Mr. Hall was conducted on February 13; 199.6.

4. Dr. Fireman" conducted an inadequate assessment of Mr. Hall's competency and relied on the input of consultants with obvious conflicts of interests.

The consulting psychiatrist who assessed plaintiff Hall's competency, Dr. Alfred E. Fireman, relied solely on a one-time interview of uncertain duration with Mr. Hall and conversations with three other persons: Mr. Hall's spouse and two individuals -- Mr. Lees and Mrs. Grove. Dr. Fireman identifies the latter two individuals as affiliated with the Hemlock Society; indeed, both are or have been chapter chairpersons for their respective Hemlock Society community groups, as identified in Hemlock Society's national publication; Timelines, Nov. 1995 - Feb. 1996, at 13. Dr. Fireman's report fails to indicate whether

either one has an established relationship with Mr. Hall such that their input would be valuable.

While it is understandable why a psychiatrist might rely on the input of a client's spouse, it appears highly inappropriate that he also relied on information provided by two individuals with obvious conflicts of interests, insofar as they are affiliated with the Hemlock Society. Hemlock members orchestrated this case, provided and continue to provide financial backing for the case, and -- obviously -- have a vested interest in the success of 'the case, including a vested interest in-ensuring that Mr. Hall be found competent and unquestionably free of a treatable depression.

Furthermore, Dr. Fireman neglected to review Mr. Hall's medical and/or hospital records or to consult with Mr. Hall's primary and/or treating physician(s). Had Dr. Fireman consulted these sources, he would have discovered, for example, that Mr. Hall has a pertinent medical history of treatment for depression in 1994.[10]

Dr. Fireman also failed to note that Mr. Hall. had no present wish to die at the time of the assessment and to recommend that Mr. Hall's competency be assessed again at the time he requests a

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[10] See Medical Record/Progress Notes of-Charles H. Hall, dated Jan. 6, 1994 (pgs. 00730-00731), Jan. 20, 1994 (pg. 00729), and Mar. 31, 1994 (pgs. 00725-00726). Perhaps Mr. Hall's real needs -- perhaps for less drastic options -such as counselling; support group therapy; anti-depressant-medication; improved pain management; as well as opportunities, to educate the public about HIV, to work to end discrimination against those with the disease, and to continue helping-improve'the lives of others, etc. -- perhaps these needs were not considered in the rush to provide Mr. Hall lethal aid.

lethal prescription and perhaps 'again at the time he consumes the prescription.

Lastly, Dr. Fireman makes no recommendations that less drastic options be considered or that further consultation(s) was necessary, which is professionally irresponsible considering that Dr. Fireman knew he **was** declaring Mr. Hall competent for the purpose of killing himself. Dr. Fireman's psychiatric assessment represents nothing more than a result-oriented. finding of competency. Such a **casual** rubberstamping of a patient's competency to request for assisted suicide demonstrates how even the a "safeguard" such as psychiatric assessment is rendered meaningless in practice.'

5. Dr. McIver was a virtual stranger to Mr. Hall when he made the relevant assessments and rendered- his medical opinion that-it was appropriate to -assist Mr. Hall's self-murder.

Both the plaintiffs and the lower court plainly contemplate that a physician who is a complete stranger to a patient may nevertheless make the determinations that the patient'is terminal and competent and may assist the patient's self-murder,

There is no indication that Mr. Hall was- counselled about other options: consultation with- a pain management specialist, hospice, etc.

Lastly, Dr. McIver has publicly admitted that "he's unsure about [the] details of the actual procedure -of administering death." Jay Croft, Doctor Fights for Assisted Suicide Law, Palm Beach Post, Mar. 24, 1996, at 1, 20A.

6. The competency assessment(s) -- to-rule out, e.g., -treatable depression -- were made prematurely but used prospectively.

It is not surprising that Mr. Hall might be determined competent at the time of trial, because, as the court below concluded, "Mr. Hall is not suicidal." Final Judgment at 7, ¶ 12; see also Jay Croft, Doctor Fights for Assisted Suicide Law, Palm Beach Post, March 24, 1996 at 20A (referring to the unfinished part of his personal homemade AIDS memorial quilt -- a space for the date of his death -- Mr. Hall is quoted as saying, "I feel like if I finish it, my life is complete. And I'm not ready for that."). Indeed, the fact that Mr. Hall might have been competent at the time of trial is irrelevant. If competency to kill one's self is even theoretically possible, the critical time periods would be the times'at which; if and when, Mr. Hall actually requests a fatal prescription and when Mr. Hall self-administers the fatal prescription.

7. Physician prescription of a lethal dose of drugs without consideration or anticipation of the potential for failure.

Mr. Hall is presently taking twenty-one (21) separate medications. Fireman letter of Feb. 19, -19.96 at 2; Final Judgment at 5 ("numerous medications"); T.A.C. at 12, ¶ 47 ("large number of medications"). He is also taking "incremental doses of morphine." Fireman letter of -Feb. 19, 1996 at 2 (emphasis added). Mr. Hall is subject to seizures. T.A.C. at 12, ¶ 44. He has a cyst on his brain. T.A.C. at 12 ¶ 45. He -also has "sores in and about his mouth . . . [and] stomach pains." Final Judgment at 5. In addition, other ordinary. factors also relevant: the possibility of vomiting, whether as a -result of drugs consumed, stomach flu, prier intake of spoiled food, etc..

Despite all of these vitally import-ant factors each with the potential of affecting Mr. Hall's ability to properly ingest a lethal dose of drugs, the trial court-nevertheless dismissed the State's fears that Mr. Hall's assisted. suicide could go awry. Incredibly, without Dr. McIver ever disclosing the identity of the lethal drug to be used of the safeguards he-might employ to prevent these fears from being realized, the trial court concludes: "Dr. McIver testified that the methods-he proposes in Mr. Hall's case would be effective, and the Court accepts his testimony." Final Judgment at 8.

II. IF ASSISTED SELF-MURDER IS CONSTITUTIONALLY PROTECTED, WHETHER ITS EXERCISE COULD BE LIMITED TO A SUB-CLASS OF PERSONS WITH TERMINAL CONDITIONS, WHO ARE MENTALLY COMPETENT, AND WHO COMMIT THE FINAL FATAL ACT THEMSELVES.

A. *WHEXHER ANY.LIMITAXION BASED ON THE CONDITION OR THE STATUS OF THE SUICIDE VICTIM VIOLATES FEDERAL LAW AND THE FEDERAL AND SX-ATE CONSTITUTIONS.*

1. EQUAL PROTECTION-

If a-constitutionally protected right to assisted self-murder is recognized only for persons with terminal conditions, then the amici patients and other similarly situated persons will necessarily be denied equal protection of Florida's criminal law against assisted self-murder, Fla, Stat. § 782.08.. The deterrent effect of this law would no longer exist to protect persons with terminal conditions, law enforcement officers and others who would be able to interfere with an assisted suicide involving a non-terminally ill victim would be restrained from interfering

when a terminally ill victim is involved, and a constitutionally-based defense of consent will be available to any person charged with assisting the self-murder of any person with a terminal condition. Your amici patients and other similarly situated persons will thus be denied the same protection of Florida's criminal laws that are provided to all other persons -in Florida.

Moreover, as a necessary consequence of a judgment in favor of the plaintiffs, the amici patients and other similarly situated persons will be denied equal protection of other laws, including:

(1) Florida's civil commitment law, "The Baker Act", Fla. Stat. § 394.451 et seq. This law embodies the presumption that suicidal persons suffer from a mental and/or emotional disturbance requiring treatment; it provides for suicide prevention and intervention, psychological examination and--evaluation, and treatment programs providing comprehensive health, 'social, educational, and rehabilitation services designed to reduce the occurrence, severity, duration, and disabling aspects of suicidal ideation. The Baker Act would no longer provide the same protection for persons with terminal conditions-, including your amici patients, as it does for those-without' terminal conditions: A person exercising a constitutional right cannot be presumed to be mentally or emotionally ill for-proposing or attempting to , exercise that right.

(2) The Florida homicide code, F-la. Stat., chap. 782, including the police and prosecutorial enforcement and deterrent effect of these laws. Plaintiffs do- not state the type of lethal drug at issue (whether oral or injected). Nor do plaintiffs

clarify how patient plaintiffs intend to commit assisted self-murder -- whether the lethal drugs will be self-administered or administered by another person (-physician or other(s)). Thus, their claims implicitly include assertion of a constitutional right to homicide by consent.' As a result, your amici patients and other similarly situated persons will lose equal protection of the homicide code, because a constitutionally-based defense of consent will be available to any person charged.with killing a person with a terminal condition-- a defense unavailable to those who are charged with killing a person who does not have a terminal condition.

(3) Florida's Drug Abuse and Prevention Act, Fla. Stat. § 893.01 et seq., including the police and prosecutorial enforcement and deterrent effect of this law. Plaintiffs' assertion of a right to self-murder by "lethal dose of drugs prescribed by [their] doctor" includes the use of controlled substances. If plaintiffs prevail, then the otherwise uniform protections of this law will not apply to persons with terminal conditions including your amici patients;

(4) Florida law regarding medical malpractice, wrongful death, and related civil laws, that provide a deterrent effect and civil remedy for actions arising from assisted self-murder. No civil action could be taken for assisting in the exercise of a constitutional right. Thus, the amici' patients and'other similarly situated persons would be 'denied equal proteotion afforded all others in this regard.

(5) Florida's medical professional disciplinary laws that provide a deterrent effect with respect to actions constituting

assisting self-murder.. No disciplinary action could be taken against a medical professional for assisting in the exercise of a constitutional right.

Clearly, the aniici patients and- other similarly situated persons would be denied equal protection afforded ail others in this regard if the. plaintiffs prevail. Therefore, the relief that plaintiffs seek should be denied, because it would carve out an exception to Florida law that would violate the equal protection guarantees of the Florida and U.S. Constitutions; U.S. Const. amend. XIV; Florida Const. art. I, § 2 (Basic Rights Clause).

2. *THE BASIC RIGHTS CLAUSE OF THE FLORIDA CONSTITUTION*

The Basic Rights Clause of the-Florida Constitution guarantees that "[n]o person shall be deprived of any right because of . . . physical handicap." Fla. Const. art. I, § 2. A terminal condition obviously constitutes a physical handicap. Thus, persons with terminal conditions have a substantive right against discrimination based on their physical handicaps -- a right separate and distinct from, and in addition to, their federal and state constitutional rights to equal protection.

By concluding that the statutory prohibition does not apply to persons "under the circumstances of [the patient plaintiff]," the trial court's decision denies, on the basis of physical handicap, such class of persons equal protection of Florida's law against assisted suicide as well as other laws that would be implicated in such a crime -- including criminal, civil and administrative.. In addition, they will be denied, on the basis

of physical handicap, their right to equal protection of these laws and their due process right to life protected- under the **U.S.** and Florida Constitutions.

The Florida Privacy Clause may not be so construed to create a discriminatory exception to an otherwise uniformly applicable law in a manner explicitly prohibited under another constitutional provision (i.e., on the basis of-physical handicap). Courts are obliged to interpret laws so, as to avoid constitution&l infirmity, See Communications Workers of America v. Beck, 487 **U.S. 735, 762** (1988). It is self-evident that this obligation has even greater force with regard to two constitutional provisions that are rendered irreconcilable under a particular interpretation of a statute. Such a conflict cannot be resolved by recognizing that a latter provision overrules an earlier provision where they are in conflict.- Traylor v. State, 5.96 So. 2d 957, 963 (Fla. 1992) ("Every particular section of the Declaration of Rights stands on an equal-footing with every other section."). Thus, restricting a right to assisted self-murder to persons with terminal conditions is impermissible pursuant to the guarantees of the Basic Rights Clause.

3. THE AMERICANS WITH DISABILITIES ACT

A holding by this Court that persons with "terminal conditions" may not, as a matter of constitutional law, be provided equal protection of state assisted suicide bans would conflict with Congressional policy forbidding discrimination by public entities on the basis of disability as expressed-through the Americans with Disabilities Act of 1990 ("ADA"). Pub. L. No.

101-336, 104 Stat. 327 (codified at.42 U.S.C. §§ 12101-12213 and 47 U.S.C. § 225, 611).

The ADA itself provides that people with disabilities are "a discrete and insular minority" who have "been faced with restrictions and limitations, subjected-to a history of purposeful unequal treatment, and relegated to a position of political powerlessness". 42 U.S.C. § 12101(a)(7). In enacting the ADA, "Congress considered disability classifications to be just as serious and just as impermissible as racial categorizations". Timothy M. Cook, The Americans with Disabilities Act: The Move to Integration, 64 Temple L. Rev,. 393, 434 (1991); see also Amy Scott Lowndes, Note, The Americans-with Disabilities-Act of 1990: A Congressional Mandate for Heightened Judicial Protection of Disabled Persons, 44 Fla. L. Rev. 417 (1992) (discrimination on the basis of disability constitutes Congressionally-mandated "suspect classification"). Presumably, this Court would not permit the State to legislate a race-based exclusion. to the protection of assisted suicide b-ans — much less contemplate creating a constitutionally mandated, race-based exclusion-to such bans. In light of the ADA, neither should it create an exclusion based on the disability of a "terminal condition".

Under the ADA, a "disability" is any "physical or mental impairment that substantially limits one or more of the major life activities of [an] individual." 42 U.S.C. § 12102; see also Interpretive Guidelines on Title I of the ADA, 29 C.F.R. app. § 1630.2(j) (whether limitation is "substantial" is determined by the impairment's nature and degree, its expected or actual duration, and its permanence or long-term impact). Plainly, any

genuinely terminal condition thus qualifies as a "disability" under the ADA. See In re Baby K, 832 F.Supp. 1022, 1028-1029 (E.D. Va. 1993), aff'd on other grounds, 16 F.3d 590 (4th Cir. 1994), rev. denied sub nom. Baby K v. Ms. H, __ U.S. __, 115 s. Ct. 91 (1994) (denial of life-sustaining ventilator on the basis of anencephalic disability violates ADA).

The ADA prohibits actions by or policies of public entities that "exclude from participation in" or- "deny the benefits of" any program, service, or activity of the public entity or by which persons are "subjected to-discrimination by tiny such entity." 42 U.S.C. § 12132 (1995). As public entities, the States are thus obliged to afford the same treatment to suicidal persons with terminal disabilities as it does to others in its laws. and programs. A decision that would compel t-he-State to treat those with terminal conditions differently-under its laws and programs intended to protect against or prevent suicide or assisted suicide would thus run counter to the ADA.

If assisted suicide were recognized as a right for competent persons able to commit suicide by themselves, however,. then the ADA would require that direct lethal means must be permitted for persons who, due to disabilities, are unable to kill themselves. Otherwise, persons whose disabilities render self-killing impossible would be "exclud[ed] from participation in" and "den[ied] the benefits of" assisted suicide solely because of-disability. In sum, the ADA would require that homicide be allowed for otherwise qualified persons who, because of disability, are unable to kill themselves.

The ADA also provides that "[n]othing in this chapter shall be construed to require an individual with a disability-to accept an accommodation, aid, service, opportunity, or benefit which such individual chooses not to accept." 42 U.S.C. § 12201(d) (1995). Persons with terminal conditions would have no choice but to accept inferior assisted suicide protection and prevention services in a regime inspired by a holding that discounts the state's interest in protection of their lives.

In any case, conflict with the ADA cannot be avoided by claiming that recognition of a right, for the terminally ill would merely present them with a unique "choice" to decline the "benefits" of state suicide prevention and protection policies that is not accorded to others. It might just as easily be claimed that a policy that allowed only members of a-certain race to waive equal protection of state assisted. suicide bans and suicide prevention programs simply offers to that-race the "benefit" or "accommodation" of assisted self-killing. Such a race-based exclusion-would plainly be rejected by this Court — just as it should likewise reject the disability-based exclusion that recognition of a constitutional right or liberty to assisted suicide for the terminally ill would create....

The anti-discrimination policy embodied in the ADA would be undermined by any constitutional rule that mandated-the State to treat persons with terminal conditionsdifferently than others in assisted suicide and suicide prevention law and policy. A decision recognizing such a rule would, in-effect, declare that death is a "benefit" for this class of persons with disabilities, while it remains a harm for all others.- It would warrant the

"most pernicious discriminatory bias against the disabled that one can imagine... in the name of the disabled's right to die." Laurence H. Tribe, American Constitutional Law 1598-1599 (1988).

B. *RECOGNITION OF A -CONSTITUTIONAL RIGHT TO ASSISTED SELF-MURDER THAT DERIVES FROM TREATMENT REFUSAL PRECEDENTS MUST NECESSARILY EXTEND TO INCOMPETENT PERSONS EITHER BY WAY OF ADVANCE DIRECTIVE OR BY DECISION OF A THIRD-PARTY DECISIONMAKER (I.E. NONVOLUNTARY KILLING) AND TO PERSONS WHO ARE NOT TERMINALLY ILL..*

The lower court purports to restrict the-right to self-murder by prescription to "the circumstances of this case," namely, involving presently competent, consenting adults with terminal conditions who are imminently dying.[11] Any such limitation is illusory. Your amici have no need to resort to a "slippery slope" argument concerning hypothetical contingencies to demonstrate the dangerous scope of this newly-found right. The lower court's reasoning and the precedents on which it relies dictates that any right to assisted-,self-murder by -prescription that is recognized for competent, consenting, imminently-dying terminally ill persons, must necessarily sanction nonvoluntary killing of incompetent persons -- by consent of third party decisionmakers -- and persons who are not terminally ill.

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[11]The lower court states that its holding is limited to "these parties only", i.e., plaintiffs- Hall and McIver and "anyone who is present or who assists Mr. Hall." Final Judgment at 23, 25 (emphasis added). However, 'the concept of equal protection, upon which the lower court's judgment relies in part, applies only to the making of classifications, not-to the adjudication of individual situations. Nowak, Rotunda, and Young, Handbook on Constitional Law 519 (West Publ., 3d ed., 1986). Consequently, unless plaintiffs Hall and McIver are a class unto themselves, the lower court's holding actually affects all persons who are similarly situated -- in all legally relevant ways -- to the parties.

In reasoning why recognition of a right to assisted self-murder by prescription for competent, terminally ill adults logically flows from treatment refusal precedent, the lower court relies almost exclusively on cases involving-incompetent or non-terminal persons. See Final Judgment at 13-14, 22-23, citing to cases involving incompetent persons: In re Browning, 568 So. 2d 4 (Fla. 1990); Corbett v. D'Allessandro, 487 So. 2d 368 (Fla. 2d DCA 1986); In re Barry, 445 So. 2d 365 (Fla. 2d DCA 1984); John F. Kennedy Hosp., Inc. v. Bludworth, 452 So. 2d 92.1 (Fla. 1984); and citing to cases involving persons who. did not have terminal conditions: In re Dubreuil, 629 So. 2d 819 (Fla. 1993) (reasonable probability of recovery); Public Health Trust of Dade County v. Wons, 500 so. 2d 679 (Fla. 3d DCA 1987) (same); Singletary v. Costello, 665 So. 2d at 1105 (same). Thus, the lower court itself demonstrates that the treatment refusal cases-involving only competent, consenting, imminently dying, terminally ill persons cannot be distinquished from cases involving all other persons for the purpose of restricting the new right to persons comprising only the former class.

The very definition of "terminal condition" under Florida law includes incompetent persons:

(a) A condition caused by injury., disease, or illness from which there is no reasonable probability of recovery and which; without treatment, can be expected to cause death.

(b) A persistent vegetative state characterized-by a permanent and irreversible condition of unconsciousness in which there is:

(1) The absence of voluntary action or cognitive behavior of any kind; and

(2) An inability to communicate or interact purposefully with the environment.

Fla. Stat. § 765.101(15).

Moreover, the treatment refusal- caselaw, on which the' decision below largely rests for-its legitimacy, necessarily requires that any right recognized under Florida's privacy clause be extended to such other persons; including minors and never-competent persons, who will be able to-be killed by consent of a third party — someone appointed by the-affected person, by a court, or by operation of law. Moreover, constitutional immunity would protect these third parties and any fatal decisions they make just as readily as if the decision had been made. by the affected persons themselves.

This Court has concluded that the right'to refuse treatment "should not be lost" when a person's condition "prevents a conscious exercise of the choice". John F. Kennedy Memorial Hospital, Inc. v. Bludworth, 452 So. 2d at 924. Thus in Florida, "an incompetent person has the same-right to refuse medical treatment as a competent person" because "our cases have recognized no basis for drawing a constitutional line between the protections afforded to competent persons and incompetent persons." In re Browning, 568 So. 2d 4, 12 (Fla. 1990).

In addition, this Court has mandated the use of "substituted judgment" to effectuate an incompetent person's interest in refusing treatment. Bludworth, 452 So.2d at 926. The surrogate may exercise substituted judgment to withdraw treatment "even absent evidence of intention of the incompetent person" and, consequently, may do so on behalf of never-competent individuals, such as infants. In re Barry, 445 So: 2d 365, 371 (Fla. 2d DCA 1984).

Moreover, this Court has held that "the right involved here is one of self-determination that cannot be qualified by the condition of the patient." In re Browning, 568 So. 2d at 13. Thus, the right is possessed even by a healthy individual with no physical impairments. See Singletary v. Costello, 665 So.2d 1099 (Fla. 4th DCA 1996). This Court has left open the question of whether such a right can be exercised on behalf of those "who are mentally incapacitated but physically are in good health" (In re Browning, 568 So.2d at 12 n. 10), but its overall refusal to recognize any distinction between competent and incompetent persons leaves little doubt that surrogate refusals may be rendered on behalf of these persons as well. See In re T.W., 551 So. 2d 1186, 1193 (Fla. 1989) ("[B]ased on the unambiguous language of the amendment: The right of privacy extends to '[e]very natural born person.'").

Finally, this Court has declined to limit the surrogate's authority according to the type of treatment at issue. Seeing "no reason to qualify [the right to make treatment choices] on the basis of the denomination of a medical procedure as major or minor, ordinary or extraordinary, life-prolonging, life-maintaining, life-sustaining or otherwise", it has held that such a right "extends to all relevant decisions concerning one's health." In re Browning, 568 So.2d at 11 & n.6.

Importantly, these decisions may be based on a "substituted judgment" riddled with uninformed vagaries, idiosyncratic subjectivities, and personal bias. Such factors will more or less dominate according to just how much is objectively known or can be adduced regarding the incompetent person's wishes. In

many, if not most, cases the treatment decision will hinge on little more than the surrogate's notion that treatment no longer is merited in light of the patient's quality of life. Thus, surrogate decisions do not necessarily approximate the affected person's informed choice.

Thus, if assisted suicide is poured into the body of law dealing with treatment refusals,. nonvoluntary euthanasia- will result. Under equal protection guarantees, third-party decisionmakers will be empowered to select assisted suicide as just another "treatment option" -for their wards or principals, regardless of condition.

Likewise, suicidal persons who are deemed competent to request assisted suicide but who are physically incapable of administering the fatal dose will have-&equal protection right to have the poison administered by another person or to a lethal injection.

Still further, if the right to assisted suicide is truly a right "to determine the timing and manner of one's own death", then other fatal-methods must also be permitted.

Thus, if assisted suicide is recognized as a right analogous to the right to refuse treatment, then'any limitation on its exercise based on the victim's competency, or medical condition, method of assistance, etc. is illusory.

IV. CONCLUSION

Although the law clearly supports the State's position in this case, your amici nevertheless justifiably. fear that personal sympathies might lead- to an opposite result; Thus, your amici

respectfully close with the wise advice of the 9th Circuit's Justice Noonan (modified for the purposes of this case):

> Compassion . . . is "the most important, perhaps the sole law of human existence." No one can read the accounts of the sufferings of the deceased plaintiffs . . . , or the account[] of the sufferings of [Mr. Hall], without being moved by them. No one would inflict such sufferings on another or want them inflicted on him [or her]self; and since the horrors-recounted are those that could attend the end of life anyone who reads of -them must be aware that they could be attendant on his own death. . . . Compassion is a proper, desirable, even necessary component of judicial character; but compassion is not the most important and certainly not the sole law of human existence... 'Unrestrained by other virtues . . . it leads to catastrophe.. Justice, prudence, and fortitude are necessary too. 'Compassion cannot be the compass of a . . . judge. That compass in-the Constitution . . . . Where . . . [a] statute- comports with that compass, the validity of the statute must be upheld.

Comaassion in Dvinq v. Washinqton, 49 F.3d at 594. Based on the foregoing, your amici request that this Court deny the relief sought by the plaintiffs in this matter.

Respectfully submitted,

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Dated: March 10, 1997

The original and copies of this Motion were printed on 100% recycled paper containing a minimum content of 50% waste paper pursuant to Florida Rules of Judicial Administration Rule **2.055.**

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MAR 11 1997
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By _____ Chief Deputy Clerk

IN THE FLORIDA SUPREME COURT ,

BARRY KRISCHER, in his official capacity as State Attorney of the 15th Judicial Circuit,

Defendant-Appellant,

v.

CECIL McIVER, M.D., et al.,

Plaintiffs-Apmellees. /

CASE **NO.** 89,837

DISTRICT COURT OF APPEAL
FOURTH DISTRICT NO. 97-379

CIRCUIT COURT NO. CL-96-1504-AF

CERTIFICATE OF SERVICE

I, Jane E.T. Brockmann, hereby certify that a good and true copy of BRIEF AMICI CURIAE OF THE COMMISSION ON AGING WITH DIGNITY, ET AL. was served on March 10, 1997, on the following parties to this action or on their counsel of record by enclosing said documents in properly addressed envelopes affixed with adequate first class postage and causing said envelopes to be delivered by first class U.S. Mail and, in addition, a copy of same was served by facsimile to counsel for the plaintiffs:

Michael A. Gross
Office of the Attorney General
Department of Legal Affairs
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