STATE OF NEW MEXICO
COUNTY OF BERNALILLO
SECOND JUDICIAL DISTRICT COURT

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

Plaintiffs,

vs. **No. D-202-CV 2012-02909**

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

Defendants.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

THIS MATTER came on for trial before the Court on December 11th and December 12th, 2013. Plaintiffs are represented by ACLU of New Mexico (Laura Schauer Ives and Alexandra Freedman Smith), Compassion & Choices (Kathryn L. Tucker) and Sanders and Westbrook PC (Maureen Sanders). Defendants are represented by the New Mexico Attorney General's Office (Scott Fuqua). Amicus Curiae New Mexico Psychological Association is represented byDuhigg, Cronin, Spring & Berlin, P.A. (Frank L. Spring) and Robert Schwartz. The Court, having considered the pleadings and file, the testimony and evidence presented, the arguments of counsel and being otherwise fully informed, now enters its FINDINGS OF FACT and CONCLUSIONS OF LAW.

FINDINGS OF FACT

1. The issues presented herein, as the Court is acutely aware, challenge the very core of our principles as they require us to consider the question of how we die. Cases across the nation are compelling the courts to become ever more involved in these difficult decisions.

2. At any given moment in New Mexico there are mentally competent, terminally ill patients. Typically these patients are facing terminal cancer, amyotrophic lateral sclerosis ("ALS") or some other similar condition.

3. Once diagnosed, these patients are subjected to invasive medical tests and procedures, loss of autonomy and control, extreme pain and other equally insidious indignities. When given their terminal diagnosis, they must say good bye to friends and loved ones, put their affairs in order, come to terms with their imminent death and await the inevitable. The activities which give their lives meaning are stripped away, one after the other, as their disease progresses.

4. These patients are granted limited control of their own inevitable destiny by the medical profession and even less by the State. They know they are going to die from their terminal illness, yet are prohibited from choosing the time, place and means to achieve a peaceful end.

5. Some terminally ill patients find the suffering caused by their illness to be unbearable, despite the best efforts of the medical profession to relieve their pain and other distressing symptoms.

6. Some terminally ill patients are able to receive medical assistance which inevitably leads to death and be given supportive comfort care until death arrives. For example, patients who are dependent upon a feeding tube, a ventilator, dialysis, medications, or a cardiac device are able to direct, personally or through a representative, the withdrawal of the life sustaining intervention and receive aggressive pain and symptom management until death arrives. Such deaths are not considered "suicide" and are not subject to prosecution under NMSA 1978, § 30-2-4 (1963), New Mexico's Assisted Suicide Statute.

7. Some terminally ill patients have pain that cannot be relieved despite the best efforts of the medical profession to do so. These patients, or their representatives, are able to choose

sedation to unconsciousness as a means of alleviating pain, with nutrition and hydration withheld, until death arrives. This option is known as palliative sedation and is accepted in law and medicine. Such deaths are not considered "suicide" and are not subject to prosecution under NMSA 1978, § 30-2-4.

8. While the withdrawal of life-sustaining treatment and the provision of palliative sedation do not directly cause the death of the terminally ill patient, it is recognized and accepted that the withdrawal of life sustaining intervention and palliative sedation hasten the inevitable death of the terminally ill patient.

9. The cause of the death of a terminally ill patient who directs (or whose representative directs) the removal of life support, the administration of palliative sedation, or who refuses potentially life saving or prolonging treatment, is the underlying terminal disease or condition.

10. Some terminally ill patients want the option of "Physician Aid in Dying" (hereinafter "aid in dying").

11. Aid in dying refers to the practice of a physician providing a mentally competent, terminally ill patient with a prescription for medication which the patient may choose to ingest to achieve a peaceful death and thereby avoid further suffering.

12. Plaintiff Aja Riggs was diagnosed with uterine cancer in August 2011. While Aja Riggs' cancer is currently in remission, she fears its return.

13. Plaintiff Aja Riggs wants the "peace of mind" of knowing that aid in dying would be an option available to her if she finds her suffering in the terminal stage of her cancer unbearable. Like many of us, Aja Riggs does not want to suffer needlessly if her cancer returns and she receives a terminal diagnosis. She seeks a peaceful, dignified death.

14. Medical and mental health professionals, including Plaintiffs' experts and Amicus Curiae New Mexico Psychological Association, distinguish aid in dying from suicide.

15. Plaintiff Katherine Morris, M.D. (hereinafter "Dr. Morris"), the New Mexico Psychological Association, and other professionals, and societies of professionals, believe that a mentally competent, terminally ill patient who has elected aid in dying has not committed suicide. They are uncertain whether providing aid in dying to patients who request it could expose them to prosecution for "assisting" a "suicide" under NMSA 1978, § 30-2-4.

16. Given this uncertainty, those who would be willing to provide aid in dying are deterred from providing this option to their patients who request it.

17. While practicing in New Mexico, Dr. Morris has treated patients who have expressed interest in aid in dying, but she has not provided this treatment because of the uncertainty regarding the scope of NMSA 1978, § 30-2-4.

18. NMSA 1978, § 30-2-4 currently prevents terminally ill New Mexicans, at their most vulnerable time, from seeking relief which is medically recognized and medically available.

19. Physicians have provided, and continue to provide, aid in dying to qualified patients in states where there is explicit statutory authorization (Oregon, Washington, and Vermont); pursuant to a state supreme court opinion (Montana); and in one state where there is no criminal prohibition against assisted suicide (Hawaii). In those states there is no uncertainty in the law and the practice has developed as one of the standard of care options for mentally competent, terminally ill patients at the end of life.

20. In administering an aid in dying prescription to a mentally competent, terminally ill patient, a physician is providing the means for the patient to achieve that patient's death, albeit

peaceful and dignified, and therefore deliberately aiding that patient in ending her or his life. Providing the means for a patient to achieve a death is the goal of aid in dying.

21. A standard of care for physician aid in dying, informed by clinician practices and authoritative literature, including Clinical Practice Guidelines, has developed.

22. In addition to these developed professional practices directly related to aid in dying, physicians must often assess their patients' competence to make life altering or ending decisions and have the necessary training to do so.

23. Some state legislatures, including Arkansas and Idaho, have enacted laws with specificity to make clear their state's prohibition against aid in dying. These states did so despite their preexisting prohibition against assisted suicide. Statutes which specifically include aid in dying as assisting suicide are more specific than NMSA 1978, § 30-2-4.

24. When aid in dying is an openly available practice, end of life care for all terminally ill patients improves through better pain treatment, earlier and increased referrals to hospice and better dialogues between physicians and their terminally ill patients about end of life care and wishes.

25. When aid in dying is available, patients who choose it are most often dying of cancer.

26. Patients choose aid in dying for a wide range of reasons, including but not limited to the loss of autonomy, loss of ability to engage in activities that make life enjoyable, loss of control of bodily functions and the pain occasioned by terminal illness such as cancer.

27. Patients who obtain the medications for aid in dying often do not ultimately ingest them but are comforted to have the option.

28. Survivors (family members and loved ones) of patients who choose aid in dying rarely suffer the adverse mental health effects commonly experienced by survivors of persons who commit suicide.

29. Survivors (family members and loved ones) of patients who choose aid in dying feel more prepared for the death, more accepting of it, and are glad that their loved one was able to make the choice he or she wanted about how much suffering to endure, and achieve a peaceful death.

30. Patients who choose aid in dying typically choose to die at home, in familiar surroundings, with loved ones present. These are peaceful, dignified deaths.

31. Where it is permitted, the application for an aid in dying prescription must be made by the mentally competent, terminally ill patient and cannot be made by a surrogate decision maker.

32. Where it is permitted, an aid in dying prescription must be self-administered by the mentally competent, terminally ill patient and cannot be administered by a surrogate decision maker.

33. The available studies regarding who elects to utilize aid in dying do not demonstrate any overuse by especially vulnerable groups. There is no evidence that vulnerable groups are targeted by caregivers, family members or physicians who utilize aid in dying to hasten the deaths of vulnerable, terminally ill patients.

II. CONCLUSIONS OF LAW

A. NMSA 1978, § 30-2-4 Assisting Suicide defines assisting suicide as the act of "deliberately aiding another in the taking of his own life." The statute makes assisting suicide a fourth degree felony in New Mexico.

B. Acts of suicide and attempted suicide are not criminal offenses in New Mexico.

Statutory Interpretation

C. The goal in statutory interpretation is ascertaining and giving effect to the intent of the Legislature. *State v. Smith*, 2004-NMSC-032, ¶ 8, 136 N.M. 372, 98 P.3d 1022.

D. The beginning point for construing a statute is looking at the language of the statute itself. *Id*. ¶ 9.

E. "[I]f the meaning of a statute is truly clear—not vague, uncertain, ambiguous, or otherwise doubtful—it is of course the responsibility of the judiciary to apply the statute as written…" *Bishop v. Evangelical Good Samaritan Soc'y,* 2009-NMSC-036, ¶ 10, 146 N.M. 473, 212 P.3d 361 (quoting *State ex rel. Helman v. Gallegos*, 1994-NMSC-023, ¶ 22, 117 N.M. 346, 871 P.2d 1352).

F. The New Mexico appellate courts have reaffirmed this role in numerous decisions throughout the years. *Diamond v. Diamond*, 2012-NMSC-022, ¶ 25, __ N.M. __, 283 P.3d 260; *Truong v. Allstate Ins. Co.*, 2010-NMSC-009, ¶ 37, 147 N.M. 583, 227 P.3d 73; *State ex rel. State Eng'r v. Lewis*, 1996-NMCA-019, ¶ 7, 121 N.M. 323, 910 P.2d 957.

G. The Court should, however, exercise caution in applying the plain meaning rule. "Its beguiling simplicity may mask a host of reasons why a statute, apparently clear and ambiguous on its face, may for one reason or another give rise to legitimate (i.e., nonfrivolous) differences of opinion concerning the statute's meaning." *Smith*, 2004-NMSC-032, ¶ 9 (quoting *State ex rel. Helman*, 1994-NMSC-023, ¶ 23). The plain meaning rule "must yield on occasion to an intention otherwise discerned in terms of equity, legislative history or other sources." *Sims v. Sims*, 1996-NMSC-078, ¶ 21, 122 N.M. 618, 930 P.2d 153 (citation and quotation marks omitted).

H. "[W]hen the literal meaning of a statute would be absurd, unreasonable, or

otherwise inappropriate in application, we go beyond the mere text of the statute." *Bishop*, 2009-NMSC-036, ¶ 11 (citation omitted). The Court must therefore begin with the language of the statute and additionally consider the practical implications and the legislative purpose. *Id.*

I. NMSA 1978, § 30-2-4 was enacted in 1963. The legislative purpose is ascertainable only through the statute's language as no other evidence was presented or appears to be available.[1]

J. When construing a statute, the Court may look to statutes involving the same general subject matter. *Oldham v.* Oldham, 2011-NMSC-007, ¶ 11, 149 N.M. 215, 247 P.3d 736.

K. In 1995, New Mexico became the first state to adopt the Uniform Health-Care Decisions Act ("UHCDA"), NMSA 1978, § 24-7A-1 to 18 (1995, as amended through 2009).[2] *Prot. & Advocacy Sys. v. Presbyterian Healthcare Servs.*, 1999-NMCA-122, ¶ 6, 128 N.M. 73, 989 P.2d 890. The UHCDA authorizes competent adults to make their own health care decisions and provide advanced directives, including the decision and directive to withhold or withdraw care to hasten death. *See* NMSA 1978, § 24-7A-2(A) (1995).

L. When called upon to interpret the UHCDA's application to a developmentally disabled patient whose family wished to terminate nutrition and hydration, the Court of Appeals recognized that "[a]s medical science has become ever more adept at prolonging life through artificial means, the courts have become increasingly involved in the profound question of when such means should be discontinued for particular patients." *Prot. & Advocacy Sys.*, 1999-NMCA-122, ¶ 7. The Court further recognized the ability of different patients to make different,

[1] The United States Supreme Court in *Washington v. Glucksberg*, 521 U.S. 702, 117 S. Ct. 2258, 138 L. Ed. 2d 772 (1997) discusses at some length the nation's and its states' historic disapproval of both suicide and assisting suicide.

[2] The UHCDA actually replaced New Mexico's Right to Die Act, NMSA 1978, §§ 24-7-1 to -11 (1977, as amended through 1995) (repealed 1997).

yet reasonable, choices, at the end of life, based upon their own assessment of a multitude of factors. *Id.* ¶ 16.

M. Medical practices, medical treatment and medical ethics have changed radically over the past fifty years. Certainly the medical and legal ethical considerations regarding end of life care have changed over the past fifty years.

N. New Mexico Courts and the New Mexico Legislature have evidenced a desire to respect a terminally ill patient's end of life choices since the passage of NMSA 1978, § 30-2-4 fifty years ago. Aid in dying falls within the medical ambit of end of life choices available to a terminally ill patient.

O. Despite this stated respect, the availability of aid in dying as a medical option, the desire of terminally ill patients to have the full range of medial options available to the them at the end of their lives, and the desire of New Mexico physicians to be able to provide them the full range of options, the plain language of NMSA 1978, § 30-2-4 prohibits aid in dying.

P. Through the practice of aid in dying a physician deliberately aids the terminally ill patient in taking of his own life bringing the practice of aid in dying within the definition of assisting suicide contained in NMSA 1978, § 30-2-4.

Q. Despite the testimony that some physicians do not consider aid in dying to be suicide, NMSA 1978, § 30-2-4 is not ambiguous.

R. Distinguishing aid in dying from suicide does not remove aid in dying from the definition of assisting suicide found in NMSA 1978, § 30-2-4.

S. The New Mexico Legislature considered the practice of assisted suicide in the healthcare context when it adopted the UHCDA in 1997, and in 2006 when it enacted the Mental HealthCare Decisions Act, NMSA 1978, §§ 24-7B-1 to -16 (2006, as amended through 2009).

T. UHCDA and the Mental HealthCare Decisions Act do "not authorize … assisted suicide … to the extent prohibited by other statutes of this state." NMSA 1978 § 24-7A-13(C) (1997); NMSA 1978, § 24-7B-15(C) (2006).

U. Thus, since enacting section 30-2-4 in 1963, the Legislature twice has used the term "assisted suicide" in the health care context, distinguishing it from other end of life treatment options such as withholding or withdrawal of healthcare. This supports the Court's conclusion that the term "assisting suicide" in section 30-2-4 includes the practice of physician aid in dying.

V. NMSA 1978, § 30-2-4 continues to provide a basis for the prosecution of any physician providing aid in dying to a mentally competent, terminally ill patient who seeks a peaceful death as an alternative to enduring a dying process the patient finds unbearable.

Fundamental Right/Substantive Due Process

W. The United States Supreme Court has found that a competent person has a constitutionally protected liberty interest in refusing unwanted medical treatment. *Cruzan v. Dir., Mo. Dep't. of Health*, 497 U.S. 261, 278, 110 S. Ct. 2841, 2851, 111 L.Ed.2d 224 (1990).[3]

X. The United States Supreme Court declined to find the right to aid in dying to be similarly protected by the federal Constitution. *Glucksberg*, 521 U.S. 702 at 725 ("The decision to commit suicide with the assistance of another may be just as personal and profound as the decision to refuse unwanted medical treatment, but it has never enjoyed similar legal protection.").

Y. The United States Supreme Court has recognized, however, that state courts have legal resources available for making decisions which are not available to it. *Cruzan*, 497 U.S. at 277. Recognizing the "extensive and serious evaluation of physician-assisted suicide" taking

[3] In *Glucksberg*, the Court states that "[w]e have also assumed, and strongly suggested, that the Due Process Clause protects the traditional right to refuse unwanted lifesaving medical treatment." *Glucksberg*, 521 U.S. at 720.

place in the states, Justice O'Connor entrusted the challenge of safeguarding liberty interests to the "laboratory" of the States, in her *Glucksberg* concurrence. *Glucksberg*, 521 U.S. at 737 (citation omitted) (O'Connor, J., concurring).

Z. New Mexico has the inherent power as a separate sovereign in our federalist system to provide more liberty than is mandated by the United States Constitution. *State v. Gomez*, 1997-NMSC-006, ¶ 17, 122 N.M. 777, 932 P.2d 1. For example, the New Mexico Supreme Court recognized that our New Mexico Constitution provides greater rights to New Mexico defendants than those rights provided in the federal constitution in many instances. *Montoya v. Ulibarri*, 2007-NMSC-035, ¶ 22, 142 N.M. 89, 163 P. 3d 476.

AA. In *Gomez* the New Mexico Supreme Court adopted an interstitial approach to questions of independent constitutional interpretation. *Gomez*, 1997-NMSC-006, ¶¶ 20–21.

BB. Under this approach the Court must first ask whether the right being asserted is protected under the federal constitution. If it is, the state constitutional claim is not reached. *Id.* ¶ 19. When, as here, the right being asserted is not protected under the federal constitution, the state constitution is examined. *Id.*

CC. A state court "may diverge from federal precedent for three reasons: a flawed federal analysis, structural differences between state and federal government, or distinctive state characteristics." *Id.* (citation omitted); *see also New Mexico Right to Choose/NARAL v. Johnson*, 1999-NMSC-005, ¶ 28, 126 N.M. 788, 875 P.2d 841.

DD. Like its federal counterpart, New Mexico's Constitution prohibits the state from depriving any person of life, liberty or property without due process of law. N.M. Const. art. II, § 18.

EE. New Mexico's Constitution additionally guarantees its citizens "certain, natural, inherent and inalienable rights, among which are the rights of enjoying … life and liberty… and of seeking and obtaining safety and happiness." N.M. Const. art. II, § 4. These guarantees are distinct additions to those found in the federal constitution, allowing the Court to diverge from federal precedent.

FF. The right to enjoy life and liberty and to seek and obtain safety and happiness has not been fully defined by New Mexico Courts.[4]

GG. New Mexico has recognized that "a fundamental right is that which the Constitution explicitly or implicitly guarantees." *Richardson*, 1998-NMSC-031, ¶ 28. "Substantive due process cases inquire whether a statute or governmental action shocks the conscience or interferes with rights implicit in the concept of ordered liberty." *Bounds v. State ex rel. D'Antonio*, 2013-NMSC-037, ¶ 50, __ N.M. __, 306 P.3d 457 (citation and quotation marks omitted). Most fundamental rights have been attached to our system of government and an inherent concept of liberty. Some rights have been of a more personal nature such as the right of parents in the care, custody and control of their children, *In Re Pamela A. G.*, 2006-NMSC-019, ¶ 11, 139 N.M. 459, 134 P.3d 746, the freedom of personal choice in matters of family life, *Jaramillo v. Jaramillo*, 1991-NMSC-101, ¶ 20, 113 N.M. 57, 823 P.2d 299, and the right to family integrity, *Oldfield v. Benavidez*, 1994-NMSC-006, ¶ 14, 116 N.M. 785, 867 P.2d 1167.

HH. This Court cannot envision a right more fundamental, more private or more integral to the liberty, safety and happiness of a New Mexican than the right of a competent, terminally ill patient to choose aid in dying. If decisions made in the shadow of one's imminent death regarding how they and their loved ones will face that death are not fundamental and at the

[4] The Court has declined to apply this provision to implicitly guarantee a right to full recovery in tort actions. *Richardson v. Carnegie Library Rest., Inc.*, 1998-NMSC-084, ¶ 29, 107 N.M. 688, 763 P.2d 1153, *overruled on other grounds by Trujillo v. City of Albuquerque*, 1998-NMSC-031, 125 N.M. 721, 965 P.2d 305.

core of these constitutional guarantees, than what decisions are? As recognized by the United States Supreme Court in *Cruzan* "[t]he choice between life and death is a deeply personal decision of obvious and overwhelming finality." *Cruzan*, 497 U.S. at 281.

II. The Court therefore declares that the liberty, safety and happiness interest of a competent, terminally ill patient to choose aid in dying is a fundamental right under our New Mexico Constitution.

JJ. Substantive due process protects fundamental rights and focuses on the validity of legislation as it equally burdens all persons in the exercise of a specific right. *ACLU of NM v. City of Albuquerque,* 2006-NMCA-078, ¶ 16, 139 N.M. 761, 137 P.3d 1215.

KK. Legislation that affects the exercise of a fundamental right is subject to strict scrutiny. *Breen v. Carlsbad Mun. Schs.*, 2005-NMSC-028, ¶ 12, 138 N.M. 331, 120 P.3d 413 (citation and quotation marks omitted). "Under strict scrutiny, the government bears the burden to demonstrate a compelling state interest supporting the challenged scheme, and to show that the statute accomplishes its purpose by the least restrictive means." *ACLU of N.M.*, 2006-NMCA-078, ¶ 19 (citation omitted).

LL. Defendants failed to prove that NMSA 1978, § 30-2-4 furthers a compelling state interest by criminalizing physician aid in dying.

MM. Absent a compelling state interest, NMSA 1978, §30-2-4 unduly burdens the exercise of a mentally competent, terminally ill New Mexican patient to choose aid in dying.

NN. NMSA 1978, §30-2-4 therefore violates our State constitution when applied to aid in dying.

Conclusions

OO. For the reasons stated herein, the Court grants Plaintiffs the requested injunctive relief prohibiting Defendants from prosecuting physicians who provide aid in dying to mentally-competent, terminally-ill patients.

PP. The Defendants, their agents, employees, representatives, and all those acting in concert with them, shall be permanently enjoined from prosecuting any physician for providing aid in dying to a mentally-competent, terminally-ill individual.

QQ. Plaintiffs' counsel shall prepare a judgment reflecting the Court's Findings and Conclusions within fifteen (15) days of their entry.

RR. Each party shall pay its own fees and costs of suit.

NAN G. NASH
DISTRICT COURT JUDGE