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MORRIS V. BRANDENBURG: DEPARTING FROM FEDERAL PRECEDENT TO DECLARE PHYSICIAN ASSISTED SUICIDE A FUNDAMENTAL RIGHT UNDER NEW MEXICO'S CONSTITUTION

Paola V. Jaime Saenz*

ABSTRACT

*New Mexico statute Section 30-2-4 makes assisted suicide a fourth degree felony. In *Morris v. Brandenburg*, Dr. Katherine Morris, Dr. Aroop Mangalik and cancer patient Aja Riggs challenged the statute in court, alleging that the statute (i) does not apply to physician-assisted suicide due to its specific language and, (ii) if it does, it is unconstitutional under two provisions of New Mexico's Constitution. On January 31, 2014, the district court held physician-assisted suicide to be a fundamental liberty interest, and the New Mexico Court of Appeals reversed on August 11, 2015. The New Mexico Supreme Court decided on June 30, 2016, that there is no right to physician-assisted suicide under New Mexico's Constitution. As of January 2018, six jurisdictions—Washington, Oregon, Vermont, California, Colorado, and District of Columbia—statutorily permit physician-assisted suicide, and Montana permits it only as a statutory defense to homicide. The remaining states prohibit the practice through manslaughter statutes, similar to New Mexico's Section 30-2-4.*

*This Article explores whether there is support for a finding of a right to physician-assisted suicide under New Mexico's Constitution, which is arguably more expansive in its coverage of due process rights and liberties than the Constitution of the United States. In 1997 in *Washington v. Glucksberg*, the United States Supreme Court held that there is no right to physician-assisted suicide under the Fourteenth Amendment of the U.S. Constitution. However, New Mexico courts are not definitively bound by federal precedent. Under an interstitial approach, federal case law can be instructive, but New Mexico courts may depart from federal precedent under specific circumstances. This Article first examines the existing state and national environments and their respective support for the practice of physician-assisted suicide, as well as the *Morris* case from trial through appeal. Next, this*

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Article engages in an analysis of the New Mexico Supreme Court's decision in Morris, and the legal avenues left unexplored. Finally, this Article argues that the New Mexico Supreme Court should have analyzed the existence of a right to physician-assisted suicide under New Mexico's due process clause, as supplemented and expanded by New Mexico's inherent rights clause.

Constitutional protections, as well as society's constructions of rights and liberties, are not fully static; rather, they are somewhat mobile with changing values and time. When the U.S. Supreme Court rejected a finding of a right to physician-assisted suicide in 1997, they did so without the backdrop of a functional practice. Today, physician-assisted suicide is legally practiced in seven jurisdictions, and during the past two decades, an exhaustive record and a detailed standard of care has developed in the medical community. New Mexico's more expansive Constitution could provide protection for a decision that is intricately intimate and which belongs in the private realm of the individual and his or her physician.

INTRODUCTION

When a terminally ill patient reaches a point of intolerable pain, discomfort and a loss of dignity, is it legally permissible for him or her to consciously opt for physician-assisted suicide? In most of the United States, the answer is no, but in the state of New Mexico the question was recently challenged anew in courts. Without specifically referencing physicians, New Mexico statute Section 30-2-4 makes any assisted suicide a fourth degree felony and defines assisted suicide as “deliberately aiding another in the taking of his own life.”¹ Physician assisted suicide is authorized by statute in Vermont, Oregon, California, Washington, Colorado, and the District of Columbia, and it is a valid statutory defense to homicide in Montana.² In the remaining jurisdictions, physician-assisted suicide is potentially prohibited by blanket manslaughter statutes similar to New Mexico's Section 30-2-4.³

In a challenge to Section 30-2-4's meaning and constitutionality, Dr. Katherine Morris, Dr. Aroop Mangalik, and Aja Riggs alleged that the statute (i) does not apply to physician-assisted suicide⁴ due to its specific language, and if it

1. N.M. STAT. ANN. § 30-2-4 (West 2016).

2. See CAL. HEALTH & SAFETY CODE §§ 443-444.12 (West 2015); COLO. REV. STAT. §§ 25-48-101 to -123 (2016); D.C. CODE §§ 7-661.01 to -661.17 (2017); OR. REV. STAT. §§ 127.800-.897 (2017); VT. STAT. ANN. tit. 18, §§ 5281-5293 (2013); WASH. REV. CODE §§ 70.245.10-904 (2009); Baxter v. Montana, 2009 MT 449, ¶ 50, 224 P.3d 1211.

3. See *Morris v. Brandenburg*, 2015-NMCA-100, ¶ 3, 356 P.3d 564 (citing CAL. PENAL CODE § 401 (1905)).

4. The term “aid in dying” is used by the plaintiffs in *Morris* to distinguish the practice from the act of suicide. To avoid confusion, this article will use the standard term “physician-assisted suicide,” which was used by the United States Supreme Court in *Washington v. Glucksberg*, 521 U.S. 702 (1997). The use of this term does not indicate the author's specific preference for it; the author is aware of the medical community's increased efforts to eradicate this term in medical journals, but the term is used in this article to avoid confusion with other “right to die” terms.

does, (ii) it is unconstitutional under two provisions of New Mexico's Constitution. The Second Judicial District Court of New Mexico held that Section 30-2-4 prohibits physician-assisted suicide and that it is unconstitutional under Article II, Section 4 and Article II, Section 18⁵ of New Mexico's Constitution.⁶ The New Mexico Court of Appeals reversed and held that (i) physician-assisted suicide is not a fundamental liberty interest under New Mexico's Constitution, as it is contrary to New Mexico's constitutional protection of life,⁷ (ii) applies only to a specific class of citizens,⁸ and (iii) is contrary to standing federal precedent. The New Mexico Supreme Court, in a unanimous opinion, determined that there is no important or fundamental right to physician-assisted suicide under either Section 4 or Section 18 of New Mexico's Constitution.⁹ Although the New Mexico Supreme Court engaged in a full analysis under Section 4 and Section 18 as independent clauses, it mentioned, without analyzing, that Section 4 may be used to expand the due process protections of Section 18.¹⁰

Article II, Section 18 of the New Mexico Constitution mirrors the federal due process clause closely, while Article II, Section 4 is an inherent rights clause with no federal analogue. Arguably, Section 4 could provide a basis for broader constitutional protections than those provided by the U.S. Constitution, but New Mexico courts have been careful to limit the provision's scope. The *Morris* decision relied on the analogous federal case, *Washington v. Glucksberg*,¹¹ which evaluated the constitutionality of physician-assisted suicide on due process grounds, and which foreclosed a right to physician-assisted suicide under the U.S. Constitution. In *Morris*, the New Mexico Supreme Court could have departed from federal precedent under an interstitial approach by using Section 4, by itself, or Section 4 as an extension of Section 18. Instead, the New Mexico Supreme Court adhered to the *Glucksberg* decision, finding that there was no right to physician-assisted suicide under Section 4 as an independent clause, and that Section 18 did not provide the distinct state characteristic required to depart from federal precedent.¹²

This Article first closely examines the existing state and federal environment with respect to the legality and acceptance of physician-assisted

5. As will be described in detail in the proceeding Background section, Article II, Section 4 is New Mexico's Inherent Rights Clause ("All persons are born equally free, and have certain natural, inherent and inalienable rights, among which are the rights of enjoying and defending life and liberty, of acquiring, possessing and protecting property, and of seeking and obtaining safety and happiness."), and Article II, Section 18 is New Mexico's Due Process Clause ("No person shall be deprived of life, liberty or property without due process of law; nor shall any person be denied equal protection of the laws. Equality of rights under law shall not be denied on account of the sex of any person.").

6. *Morris v. Brandenburg*, No. D-202-CV-2012-02909, 2014 WL 10672977 (N.M. 2d Jud. Dist. Ct. Jan. 31, 2014).

7. *Morris*, 2015-NMCA-100, ¶ 39 ("We decline to recognize Article II, Section 4 as protecting a fundamental interest in hastening another person's death because such an interest is diametrically opposed to the express interest in protecting life.") (internal quotations omitted).

8. Both the majority and concurring opinions emphasized the concern that the right would apply only to some New Mexicans. *See id.* ¶¶ 44, 64.

9. *Morris v. Brandenburg*, 2016-NMSC-027, 376 P.3d 836.

10. *Id.* ¶ 51.

11. 521 U.S. 702 (1997).

12. *Morris*, 2016-NMSC-027, ¶¶ 38, 51, 58.

suicide, including the support, education and safeguards that have developed in the medical community and in society as a whole—in New Mexico and in the United States—which are increasingly supportive of physician-assisted suicide as a practice and as a legal concept. Second, this Article discusses the *Morris v. Brandenburg* case, from trial through appeal, in extensive detail. Third, this Article examines whether Article II, Section 4 or Article II, Section 18 of New Mexico’s Constitution can be used to depart from federal precedent, and thus to protect a terminally ill patient’s right to physician-assisted suicide. Finally, this Article discusses the legal avenue left unexplored by the New Mexico Supreme Court, and argues that Section 4 and Section 18 could be used in conjunction to expand New Mexico’s due process protections.

The terminally ill patients described by the physicians in *Morris* reach points of exhaustion, excruciating pain, and loss of dignity. Many yearn to have some control over the way in which their last moments are spent, and they wish to have autonomy and dignity during the last stretch of their lives. While withholding life-sustaining care is legal in New Mexico,¹³ physician-assisted suicide with prescribed medication is not. Not all New Mexicans are faced with or affected by the desperation and difficulty of a terminal illness; however, all New Mexicans face the possibility of either having a terminal illness or of knowing a loved friend or family member that is terminally ill. The question of the legal permissibility of physician-assisted suicide is not only of great importance for New Mexicans; it is of emerging importance and significance around the United States.

BACKGROUND

I. PHYSICIAN ASSISTED SUICIDE: THE CURRENT NATIONAL LANDSCAPE

As states across the country begin to adopt statutory schemes, or statutory defenses, that permit the practice of physician-assisted suicide, the national landscape is increasingly divided. There is no recognized right to physician-assisted suicide under the United States Constitution, and while some state constitutions provide more expansive individual rights protections, physician-assisted suicide has not been declared a fundamental right by any superior state court. In order to understand the holdings of *Morris v. Brandenburg*, it is important to understand the full state and national context in which the case emerged.

A. New Mexico’s Landscape: Assisted Suicide Statute, Relevant Constitutional Provisions, and History of Respect for Patient Autonomy

a. Section 30-2-4: New Mexico’s General Prohibition on Assisted Suicide

New Mexico joins a majority of states that either expressly prohibit physician-assisted suicide¹⁴ or prohibit physician-assisted suicide “by blanket

13. See generally N.M. STAT. ANN. §§ 24-7A-1 to -18 (West 2011 & Supp. 2017).

14. See ARK. CODE ANN. § 5-10-106 (2007); GA. CODE ANN. §16-5-5(b), (d) (2012); IDAHO CODE § 18-4017 (2013); N.D. CENT. CODE § 12.1-16-04 (2008); R.I. GEN. LAWS § 11-60-3 (2017).

manslaughter statutes.”¹⁵ New Mexico statute Section 30-2-4, enacted in 1963, makes assisting suicide a fourth degree felony and describes assisted suicide as “deliberately aiding another in the taking of his own life.”¹⁶ Whether the statute’s general prohibition on assisted suicide applies to physician-assisted suicide was a preliminary question in *Morris v. Brandenburg*. Notably, while New Mexico law prohibits assisted suicide generally, New Mexico law allows a mentally competent patient to opt for withdrawal of life-sustaining treatment.¹⁷

b. New Mexico’s Constitution: Due Process and the Inherent Rights Clause

The state constitutional provisions in question in *Morris v. Brandenburg* were Article II, Section 18 and Article II, Section 4 of the New Mexico Constitution. Section 18—which is analogous to the Fourteenth Amendment of the United States Constitution—provides that “no person shall be deprived of life, liberty or property without due process of law; nor shall any person be denied equal protection of the laws.”¹⁸ Section 18 has language that expands on its federal analogue, stating that “[e]quality of rights under law shall not be denied on account of the sex of any person.”¹⁹ This specific textual difference identifying gender equality, along with the amendment’s history, was critical to a finding of broader state constitutional protections for abortion funding.²⁰

Article II, Section 4—New Mexico’s inherent rights clause—states that “[a]ll persons are born equally free, and have certain natural, inherent and inalienable rights, among which are the rights of enjoying and defending life and liberty, of acquiring, possessing and protecting property, and of seeking and obtaining safety and happiness.”²¹ The inherent-rights guarantee has no enumerated federal constitutional analogue.²² New Mexico courts have not interpreted Section 4 to provide constitutional protections beyond the due process protections existing under federal law. While parties have argued broader state protections under Section 4, New Mexico courts have rarely elaborated on nor found expansive constitutional protections under this provision.²³ Until *Morris v. Brandenburg*, Section 4 and its scope had been “sparsely interpreted.”²⁴ The provision’s interpretation was limited

15. See *Morris*, 2015-NMCA-100, ¶ 3 (citing CAL. PENAL CODE § 401 (1905)).

16. N.M. STAT. ANN. § 30-2-4 (West 2016).

17. See generally N.M. STAT. ANN. §§ 24-7A-1 to -18 (West 2011 & Supp. 2017).

18. N.M. CONST. art. II, § 18.

19. *Id.*

20. See *New Mexico Right to Choose/NARAL v. Johnson*, 1999-NMSC-005, ¶ 31, 975 P.2d 841.

21. N.M. CONST. art. II, § 4.

22. *Morris v. Brandenburg*, 2015-NMCA-100, ¶ 21, 356 P.3d 564.

23. See *NARAL*, 1999-NMSC-005, ¶ 3 (“It is unnecessary for us to reach the broader questions raised by [the Article II, Section 4] argument . . . because we decide this appeal based upon the Department’s violation of the Equal Rights Amendment to Article II, Section 18 of our state constitution.”); *State v. Madalena*, 1995-NMCA-122, 908 P.2d 756 (finding no support in the language of Article II, Section 4 nor in defendant’s argument for broader protections in the context of search and seizure; moving straight into an in depth Article II, Section 10 analysis); *Browning v. Melton*, No. 29,919, mem. op. at 3 (N.M. Ct. App. Jan. 6, 2010).

24. *Morris*, 2015-NMCA-100, ¶ 39 (citing *Reed v. State ex rel. Ortiz*, 1997-NMSC-055, ¶ 105, 947 P.2d 86, *rev’d sub nom. on other grounds*, 524 U.S. 151 (1998)); see also *Lucero v. Salazar*, 1994-NMCA-

to a recognition of some expansive language²⁵ and to an instruction of being “mindful of the more intimate relationship existing between a state government and its people, as well as the more expansive roles states traditionally have played in keeping and maintaining the peace within their borders” when engaging in its interpretation.²⁶ Vague references to safety or happiness under Section 4 have been held insufficient for valid claims.²⁷

c. Support for Physical Autonomy in New Mexico

i. New Mexico Legislative Actions Relating to Patient Autonomy.

The plaintiffs in *Morris* suggested that New Mexico “has a long, extraordinary history of respecting patient autonomy and dignity at the end of life.”²⁸ New Mexico’s first legislative recognition of patient autonomy arose through the Right to Die Act in 1977.²⁹ Through the Act, New Mexico became one of the first three states to recognize advance directives in any form.³⁰ The Right to Die Act allowed individuals suffering from a terminal illness or an irreversible coma to direct that medical treatment not be used to prolong their lives.³¹ An “adult of sound mind could execute a document” in advance with the directive that life-sustaining treatment not be used if they were to be certified under the Act.³² To be certified as terminally ill or being in an irreversible coma, the Act required written confirmation by two physicians—one being the patient’s treating physician—that the patient was in fact in an irreversible coma or terminally ill.³³ For an incompetent person who had not executed a document in advance, the Act allowed removal of care “when all family members who [could] be contacted through reasonable diligence agree[d] in good faith that the patient, if competent, would [have] choose[n] to forego that treatment.”³⁴ There are no reported judicial decisions under the Right to Die Act of 1977.³⁵

The Right to Die Act was repealed in 1997 and replaced by the Uniform Health-Care Decisions Act,³⁶ which provides “broader coverage and less

066, ¶ 6, 877 P.2d 1106 (“The scope of the right to enjoy life and pursue happiness stated in Article II, Section 4 of the New Mexico Constitution . . . has not been determined.”).

25. See *California First Bank v. State*, 1990-NMSC-106, ¶ 44, 801 P.2d 646 (“Unlike the language of the fourteenth amendment, however, Article II, Section 4 expressly guarantees the right ‘of seeking and obtaining safety.’”).

26. *Id.*; see also *Reed*, 1997-NMSC-055, ¶ 105.

27. See *Blea v. City of Espanola*, 1994-NMCA-008, ¶ 20, 870 P.2d 755 (discussing Article II, Section 4 and the Tort Claims Act).

28. Petitioners’ Supplemental Brief at 33, *Morris v. Brandenburg*, 2016-NMSC-027, 376 P.3d 836, No. S-1-SC-35478.

29. N.M. STAT. ANN. §§ 24-7A-1 to -11 (West 2011 & Supp. 2017).

30. See Petitioners’ Supplemental Brief, *supra* note 28, at 34.

31. *Prot. & Advocacy Sys., Inc. v. Presbyterian Healthcare Servs.*, 1999-NMCA-122, ¶ 7, 989 P.2d 890.

32. *Id.*

33. *Id.*

34. *Id.* (quoting § 24-7-8.1(A)).

35. *Id.*

36. N.M. STAT. ANN. §§ 24-7A-1 to 24-7A-18 (West 2011 & Supp. 2017).

formality.”³⁷ Unlike the Right to Die Act, the Uniform Health-Care Decisions Act (UHCD Act) applies to all healthcare decisions and is not limited to patients who are terminally ill or in an irreversible coma.³⁸ The UHCD Act in New Mexico closely follows its national counterpart of the same name. The national Uniform Health-Care Decisions Act (the Uniform Act) was approved in 1983 by the National Conference of Commissioners on Uniform State Laws,³⁹ and New Mexico was the first state to adopt the Uniform Act.⁴⁰

The UHCD Act states that an adult or emancipated minor “has the right to make his or her own health-care decisions”⁴¹ and allows an individual to give an “advance health-care directive, which is an [oral or written] individual instruction or a power of attorney for health care.”⁴² The UHCD Act allows for the withdrawal or withholding of life-sustaining medical treatment⁴³ and for the patient’s acceptance or rejection of “programs of medication.”⁴⁴ All health care decisions are subject to a patient’s capacity; the statute’s provisions otherwise equally apply to an incompetent patient’s or a minor’s surrogate, agent or legal guardian.⁴⁵ The statute “does not authorize mercy killing, assisted suicide, euthanasia or the provision, withholding or withdrawal of health care, to the extent prohibited by other statutes of this state.”⁴⁶ Death resulting from withdrawal or withholding of life-sustaining care in accordance with the UHCD Act does not constitute suicide.⁴⁷

New Mexico’s adoption of the UHCD Act was followed by its adoption of the Pain Relief Act⁴⁸ in 1999, which allows a patient to seek adequate pain relief and protects health care providers who prescribe, dispense or administer the medical treatment from disciplinary board action or criminal prosecution, so long as the actions are within the governing guidelines and standards of practice.⁴⁹ The New Mexico Legislature has also recognized physical autonomy in specific areas of health care, including family planning,⁵⁰ mental health,⁵¹ and sterilization.⁵² While these statutory pronouncements do not concern the withdrawal of treatment, they nevertheless reflect New Mexico’s respect for physical autonomy and patient decision-making, including for those who are terminally ill.

37. *Prot. & Advocacy Sys., Inc.*, 1999-NMCA-122, ¶ 8.

38. *Id.* ¶ 15.

39. *Id.* ¶ 6.

40. *Id.*

41. § 24-7A-2.

42. *Prot. & Advocacy Sys., Inc.*, 1999-NMCA-122, ¶ 8 (internal quotations omitted) (quoting § 24-7A-1A).

43. See N.M. STAT. ANN. §§ 24-7A-1, 4, 6.1 ((West 2011 & Supp. 2017).

44. *Id.* § 24-7A-1.

45. See *id.* § 24-7A-11; see also *id.* §§ 24-7A-5, -6.

46. *Id.* § 24-7A-13(C).

47. *Id.* § 24-7A-13(B)(1).

48. *Id.* § 24-2D-1 to 6.

49. *Id.* § 24-2D-3.

50. *Id.* § 24-8-3 (stating that family planning is “recognized nationally and internationally as a universal human right”).

51. *Id.* § 24-7B-4.

52. *Id.* § 24-9-1.

ii. New Mexico Health Care Organizations' Support for Physician Assisted Suicide

With respect to assisted suicide by physician-prescribed medication, various New Mexico health care organizations have expressed support for a finding of a right to physician-assisted suicide. Such support demonstrates a local environment that is friendly towards and prepared for the practice's availability. The American Medical Women's Association, the American Medical Student Association and the New Mexico Public Health Association jointly filed an amicus brief with the New Mexico Court of Appeals in support of the plaintiffs in *Morris*.⁵³ The organizations noted the positive effects of physician-assisted suicide in states where it is lawful, such as a higher quality of symptom control and preparedness for death experienced by patients, an improvement of end-of-life care overall, and increased feelings of acceptance by family members.⁵⁴ The organizations also discussed the growing trend of medical professional and public health organizations to support physician-assisted suicide.⁵⁵ The New Mexico Psychological Association also expressed support for the plaintiffs, noting that as "the largest organization of professional doctorate-level psychologists in New Mexico," they had unanimous support for the availability of physician-assisted suicide and a unanimous understanding that death with a physician's assistance was fundamentally different from suicide.⁵⁶ The New Mexico Chapter of the ALS Association expressed support for the Plaintiffs-Petitioners, stating that ALS patients suffer a particularly "torturous" end of life and are the second most common group—after cancer patients—to request physician-assisted suicide in the states where it is legally permissible.⁵⁷ New Mexico's ALS Association Chapter stated that physician-assisted suicide is a private and intimate decision, which should be protected from the state.⁵⁸

In contrast, the Christian Medical and Dental Associations joined five New Mexico Senators and six New Mexico Representatives in an amicus brief in support of the State.⁵⁹ The brief expressed the Christian Medical and Dental Associations' interest "in affirming the medical profession as a healing profession with the duty to 'do no harm.'"⁶⁰ The brief expressed a concern for vulnerable groups—including concern for the abuse of elder adults, the exploitation of persons with disabilities,

53. Amicus Curiae Brief of American Medical Women's Association, American Medical Student Association and New Mexico Public Health Association, *Morris v. Brandenburg*, 2015-NMCA-100, 356 P.3d 564 (No. 33,630).

54. *Id.* at 6–11.

55. *Id.* at 5.

56. Brief of Amicus New Mexico Psychological Association in Support of the Plaintiffs-Appellees at 1–4, *Morris v. Brandenburg*, 2015-NMCA-100, 356 P.3d 564 (No. 33,630).

57. Amicus Curiae Brief of the ALS Association New Mexico Chapter in Support of Plaintiffs-Appellees at 1, 4, *Morris v. Brandenburg*, 2015-NMCA-100, 356 P.3d 564 (No. 33,630).

58. *Id.* at 5.

59. Brief of Amici Curiae: State of New Mexico Senators Mark Moores, Stephen P. Neville, and William E. Sharer; New Mexico State Representatives David M. Gallegos, Jason C. Harper, Yvette Herrell, and James R.J. Strickler; and Christian Medical and Dental Associations, *Morris v. Brandenburg*, 2015-NMCA-100, 356 P.3d 564 (No. 33,630).

60. *Id.* at 5.

and situations involving patients with depression⁶¹—and argued that policy questions should be left with the legislature.⁶² The American Association of People with Disabilities, ADAPT, Not Dead Yet, the Autistic Self Advocacy Network, the Disability Rights Education and Defense Fund, the National Council on Independent Living, and the United Spinal Association also expressed a concern for the implications of physician-assisted suicide on vulnerable individuals.⁶³

B. Support for Physician Assisted Suicide in Other States

Physician assisted suicide has become legal in certain states through the legislative process. California, Colorado, the District of Columbia, Oregon, Washington, and Vermont currently allow physician-assisted suicide for mentally competent, terminally ill patients.⁶⁴ In Montana, physician-assisted suicide is recognized as a valid statutory defense to homicide.⁶⁵

a. Oregon

Oregon was the first state in the United States to make physician-assisted suicide legally permissible, and has since established a comprehensive record of the practice. Oregon enacted the Death With Dignity Act (“ODWDA”)⁶⁶ in 1997, which legally permits the practice of physician-assisted suicide for terminally ill, mentally competent patients. The plaintiffs in *Morris* presented a lengthy record at the district court bench trial—the first trial record in the nation to compile, transcribe and evaluate the existing practice of physician-assisted suicide as a whole.⁶⁷ The trial record included the testimony of three physicians who had practiced end-of-life care in Oregon, and who had prescribed physician-assisted suicide medication to various patients, or evaluated patients for their qualification for physician-assisted suicide,

61. *Id.* at 24–33

62. *Id.* at 39–44.

63. Amicus Brief of Disability Rights Amici: Not Dead Yet, ADAPT, American Association of People with Disabilities, Autistic Self Advocacy Network, Disability Rights Education and Defense Fund, National Council on Independent Living, and the United Spinal Association at 7–11, *Morris v. Brandenburg*, 2015-NMCA-100, 356 P.3d 564 (No. 33,630).

64. See CAL. HEALTH & SAFETY CODE §§ 443–444.12 (West 2015) (allowing a terminally ill, mentally competent, resident of California to voluntarily request and self-administer an “aid-in-dying” drug); COLO. REV. STAT §§ 25-48-101–123 (2016) (allowing a terminally ill, mentally competent adult to receive aid-in-dying medication if the request is not due to age or disability); D.C. CODE §§ 7-661.01–.16 (2017) (allowing an adult of “sound mind” who is terminally ill and fully aware of his or her diagnosis to request medication that will end his or her life “in a humane and peaceful manner”); OR. REV. STAT. §§ 127.800–897 (2017) (allowing a capable adult who is informed and terminally ill to make a written request for medication to terminate his or her life); VT. STAT. ANN. tit. 18, §§ 5281–5292 (2013) (allowing physicians, without civil or criminal consequences, to prescribe self-administered medication to hasten the death of a terminally ill patient upon his or her oral and written request); WASH. REV. CODE §§ 70.245.10–904 (2009) (allowing a competent and terminally ill adult to make a written request for medication to terminate his or her life).

65. See *Baxter v. Montana*, 2009 MT 449, ¶ 50, 224 P.3d 1211 (“[A] terminally ill patient’s consent to physician aid in dying constitutes a statutory defense to a charge of homicide against the aiding physician when no other consent exceptions apply. . . .”).

66. See OR. REV. STAT. ANN. §§ 127.800–897 (2017).

67. Interview with Laura Schauer Ives, Partner, Kennedy, Kennedy, & Ives, in Albuquerque, NM (Oct. 21, 2017).

within the parameters of ODWDA.⁶⁸ The physicians described their experience with patients in terminal stages of illness in great detail, the physician-assisted suicide methods of practice and the standard of care as established by Oregon and as used in other states where physician-assisted suicide is permitted, their practice and familiarity with palliative sedation and withdrawal of care, Oregon's comprehensively compiled data, and the overall positive experience that patients and their families have when physician-assisted suicide is an available option.⁶⁹

Accordingly, there is currently ample evidence that Oregon, in being the first state to legally permit physician-assisted suicide twenty years ago, has been a leader in the practice of physician-assisted suicide with respect to the standard of care and guidelines, the medical and psychiatric research, and physician-to-physician education. Oregon's data, which has been compiled since its practice of physician-assisted suicide began in 1997, shows that 1,967 people received prescriptions under ODWDA between 1997 and 2017, and that 1,275 of those patients died from ingesting the medication.⁷⁰ At the time of the *Morris* trial, 1,050 patients had requested physician-assisted suicide under ODWDA and received the medication. Of the 1,050 patients, only 700 ingested the medication, resulting in an ingestion percentage of about sixty-seven percent.⁷¹

b. Montana

Similar to New Mexico, Montana has a homicide statute effectively prohibiting assisted suicide.⁷² In 2009, the Montana Supreme Court evaluated the statute's constitutionality and the plaintiffs' claims that a right to die with dignity existed under Article II, Section 4 and Article II, Section 10 of the Montana Constitution.⁷³ Article II, Section 4, of Montana's Constitution is an individual dignity provision which provides: "The dignity of the human being is inviolable. No person shall be denied the equal protection of the laws."⁷⁴ Article II, Section 10, of Montana's Constitution is a right of privacy provision which provides: "The right of privacy is essential to the well-being of a free society and shall not be infringed without the showing of a compelling state interest."⁷⁵ The court did not engage in an analysis of whether there was a constitutionally protected right to die with dignity—instead, the court resolved the issue from a statutory standpoint.

68. See Transcript of Record, Vol. 2, *Morris v. Brandenburg*, 2014 WL 10672986 (N.M. 2d Jud. Dist. Ct. Jan. 13, 2014) (No. D-202-CV-2012-02909) [hereinafter Transcript of Record, Vol. 2]; Transcript of Record, Vol. 3, *Morris v. Brandenburg*, 2014 WL 10672986 (N.M. 2d Jud. Dist. Ct. Jan. 13, 2014) (No. D-202-CV-2012-02909) [hereinafter Transcript of Record, Vol. 3].

69. See Transcript of Record, Vol. 2, *supra* note 68, at 1–192 and Transcript of Record, Vol. 3, *supra* note 68, at 1–70.

70. See OR. HEALTH AUTHORITY, OREGON DEATH WITH DIGNITY ACT 2017 DATA SUMMARY 5 (2018), <http://www.oregon.gov/OHA/PH/ProviderPartnerResources/EvaluationResearch/DeathwithDignityAct/pages/index.aspx>; see also Transcript of Record, Vol. 3, *supra* note 68, at 44.

71. Transcript of Record, Vol. 3, *supra* note 68, at 44.

72. See MONT. CODE ANN. § 45-5-102 (2013).

73. See *Baxter v. Montana*, 2009-MT-449, ¶ 6, 224 P.3d 1211.

74. MONT. CONST. art. II, § 4.

75. *Id.* § 10.

The court found that Montana's Rights for the Terminally Ill Act,⁷⁶ dictating procedures for withdrawal of care and patient choices, indicated "legislative respect for a patient's autonomous right to decide if and how he will receive medical treatment at the end of his life" and that the Act "explicitly shields physicians from liability for acting in accordance with a patient's end-of-life wishes."⁷⁷ With respect to physician-assisted suicide, the court held that patient consent was a valid statutory defense to a charge of homicide against the aiding physician.⁷⁸

Although the discussion of a fundamental right was not reached, the court made statements that indicated support for the practice of physician-assisted suicide. Notably, it stated that in physician suicide, "it is the patient—not the physician—[who] commits the final death-causing act by self-administering a lethal dose of medicine."⁷⁹ While Montana's Supreme Court decision does not provide guidance for the analysis of physician-assisted suicide under a state constitution, it demonstrates court-ordered approval of the practice. Furthermore, Montana is an example of a state that has fully adopted Oregon's standard of care in the practice of physician-assisted suicide, since it does not have a statutory scheme of its own outlining the practice's standards.

c. Other States and the Shift Toward Acceptance

The state of Washington passed legislation permitting physician-assisted suicide in 2009,⁸⁰ Vermont did so in 2013,⁸¹ and California followed in 2015.⁸² Colorado and the District of Columbia became the fifth and sixth jurisdictions to pursue a legislative avenue, passing statutes in 2016 and 2017 respectively.⁸³ Like the statute in Oregon, all enacted physician-assisted suicide statutes require that patients be classified as terminally ill by a physician, be mentally competent, and request and administer the medication themselves.⁸⁴

There was a significant gap in time between Oregon's adoption of ODWDA in 1997 and Washington's adoption of a similar statute in 2009. Since ODWDA's enactment, Oregon has compiled extensive data on every single patient who has been prescribed physician-assisted suicide medication.⁸⁵ This compilation of data enabled Oregon physicians to track and develop an effective standard of care, and helped prompt the legalization of physician-assisted suicide in other states, as well as the education of physicians in those states.⁸⁶ It is likely that with a body of data, research, and knowledge that continues to expand, more states will opt to legalize physician-

76. MONT. CODE ANN. §§ 50-9-101 to -505.

77. *Baxter*, 2009-MT-449, ¶ 50.

78. *Id.*

79. *Id.* ¶ 49.

80. WASH. REV. CODE §§ 70.245.10–904 (2009).

81. VT. STAT. ANN. tit. 18, §§ 5281–5293 (2013).

82. CAL. HEALTH & SAFETY CODE §§ 443–444.12 (West 2015).

83. COLO. REV. STAT. §§ 25-48-101 to -123 (2016); D.C. CODE §§ 7-661.01–.17 (2017).

84. *See, e.g.*, CAL. HEALTH & SAFETY CODE § 443.2 (West 2015).

85. *See* Transcript of Record, Vol. 2, *supra* note 68, at 164 (testimony of Dr. Eric Kress describing Oregon's gradual accumulation of a "body of knowledge, a database of . . . patients.").

86. *See id.*

assisted suicide by statutory means, using Oregon's experience as the backbone for a thoroughly developed standard of care. To date, however, there has been no recognition of physician-assisted suicide as a fundamental right under any state constitutions.

C. The Federal Landscape: *Glucksberg* and the Right to Privacy

The U.S. Supreme Court has recognized a right to refuse unwanted life-sustaining medical treatment under the Due Process Clause of the Fourteenth Amendment.⁸⁷ There is also broad support of a right to refuse treatment across multiple states.⁸⁸ Despite argued similarities between a passive withdrawal of care and an active hastening of death, the U.S. Supreme Court has noted distinct differences between the two and has refused to recognize a constitutionally protected liberty interest and right to physician-assisted suicide.⁸⁹ The attainability of physician-assisted suicide as a medical option—as provided in California, Colorado, the District of Columbia, Oregon, Washington, and Vermont—hinges on a patient's status as both competent and terminally ill.⁹⁰ Similarly, the right to withdrawal of care or refusal of medical treatment is sometimes dependent on the existence of a terminal illness.⁹¹ Despite the similarities, under the current national context, the right to die by withdrawal of life-sustaining treatment is a recognized due process liberty interest, while physician-assisted suicide is not.

a. Glucksberg: physician-assisted suicide not protected under federal due

87. See *Cruzan v. Dir., Missouri Dept. of Health*, 497 U.S. 261, 277 (1990) (“[T]he common law doctrine of informed consent is viewed as generally encompassing the right of a competent individual to refuse medical treatment.”).

88. See, e.g., ALASKA STAT. ANN. § 18.15.380 (West 2007); N.J. STAT. ANN. § 26:2H-67 (West 2007); VT. STAT. ANN. tit. 18, § 1852 (West 2007); *Woods v. Com.*, 142 S.W.3d 24, 31–32 (Ky. 2004) (“[T]he right of a competent person to forego treatment . . . derives from the common law rights of self-determination and informed consent . . . and in the liberty interest protected by the Fourteenth Amendment.”); *Steele v. Hamilton Cty. Cmty. Mental Health Bd.*, 2000-Ohio-47, 180, 736 N.E.2d 10, 15 (“[T]he right to refuse medical treatment is a fundamental right in our country . . . the Ohio Constitution encompasses due process language that provides substantially the same safeguards as does the Fourteenth Amendment.”).

89. *Washington v. Glucksberg*, 521 U.S. 702, 720–25 (1997) (“[T]he Due Process Clause protects the traditional right to refuse unwanted lifesaving medical treatment. . . . [But] the asserted ‘right’ to assistance in committing suicide is not a fundamental liberty interest protected by the Due Process Clause. . . . Indeed, the two acts are widely and reasonably regarded as quite distinct.”).

90. COLO. REV. STAT. §§ 25-48-101 to -123 (2016); D.C. CODE §§ 7-661.01–.17 (2017); OR. REV. STAT. §§ 127.800–.897 (2017); VT. STAT. ANN. tit. 18, §§ 5281–5293 (2013); WASH. REV. CODE §§ 70.245.10–.904 (2009).

91. Compare *In re Estate of Greenspan*, 558 N.E.2d 1194, 1201 (Ill. 1990) (limiting the scope of the right to discontinue treatment to “terminally ill” patients as defined by statute), and N.J. STAT. ANN. § 26:2H-67 (West 2007) (limiting withdrawal of life sustaining treatments to a patient in terminal condition), with N.M. STAT. ANN. § 30-2-4 (West 2016) (not limiting withdrawal of life-sustaining treatment to patients that are terminally ill), and *Delio v. Westchester Cty. Medical Ctr.*, 516 N.Y.S.2d 677, 691 (N.Y. App. Div. 1987) (finding “no practical or logical reason to limit the exercise of the right of self-determination with respect to one’s body to terminally ill patients”).

process

The United States Supreme Court decided in 1997 that there is no federal right to physician-assisted suicide. *Glucksberg* was decided the same year that Oregon passed its Death With Dignity Act (ODWDA).⁹² In *Glucksberg*, the U.S. Supreme Court evaluated the constitutionality of a Washington state statute prohibiting physician-assisted suicide.⁹³ The Supreme Court found that under the U.S. Constitution's Due Process Clause, there was no fundamental liberty interest in physician-assisted suicide and that Washington's ban on assisted suicide was at least reasonably related to important and legitimate government interests in the preservation of life, the prevention of suicide, the protection of vulnerable groups and the protection of the integrity and ethics of the medical profession.⁹⁴ *Glucksberg* carefully distinguished *Cruzan v. Director, Missouri Dept. of Health*⁹⁵—the Supreme Court decision finding a federally protected fundamental liberty interest in the withdrawal of life-sustaining care—by noting that forced medication is battery and by relying on the difference between a physician actively hastening death and passively hastening death.⁹⁶ For its assertion that there was no fundamental liberty interest in assisted suicide, the Supreme Court relied primarily on a lack of historical support.⁹⁷ Then, the majority engaged in an exhaustive review of the state's interests, holding that Washington had met its burden.⁹⁸ Most importantly, however, the Court ended on the following note: “Americans are engaged in an earnest and profound debate about the morality, legality, and practicality of physician-assisted suicide. Our holding permits the debate to continue, as it should in a democratic society.”⁹⁹

b. The right to privacy: withdrawal of care and abortion case law

Federal withdrawal of care and abortion case law provide critical guidance given the relative novelty of a right to physician-assisted suicide as a legal concept. Right to die by withdrawal of care cases and abortion cases have examined state interests in protecting life, the protection of medical ethics, the protection of third parties, and an individual's right to self-determination and privacy.¹⁰⁰ The United States Supreme Court has recognized the right to refuse medical treatment and to withdraw life-sustaining care as a “constitutionally-protected due process liberty interest.”¹⁰¹ The right to withdraw life-sustaining care is grounded in constitutional and common law sources that protect a right to privacy and an individual's right to

92. OR. REV. STAT. §§ 127.800–897 (2017).

93. See 521 U.S. 702.

94. *Id.* at 728–35.

95. 497 U.S. 261 (1990).

96. *Glucksberg*, 521 U.S. at 725.

97. *Id.* at 727–28.

98. *Id.* at 728–35.

99. *Id.* (emphasis added).

100. *Physician-Assisted Suicide and the Right to Die with Assistance*, 105 HARV. L. REV. 2021, 2032–33 (1992); see also *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 852 (1992).

101. *Physician-Assisted Suicide and the Right to Die with Assistance*, *supra* note 100, at 2025 (citing *Cruzan v. Dir., Miss. Dep't of Health*, 497 U.S. 261, 277–78 (1990)).

self-determination.¹⁰² Similarly, the right possessed by women to make decisions about abortion has been grounded in a right of privacy.¹⁰³ Finally, the withdrawal of care and abortion cases have historically relied on a balance of the individual and state interests involved.¹⁰⁴ Thus, existing precedent on abortion and withdrawal of care is immensely instructive when analyzing the existence of a right to physician-assisted suicide, which is also a concept grounded in self-determination and privacy.

II. *MORRIS V. BRANDENBURG*: FACTUAL AND PROCEDURAL OVERVIEW OF THE CASE FROM TRIAL THROUGH APPEAL

Dr. Katherine Morris, a surgical oncologist at the University of New Mexico Hospital, Dr. Aroop Mangalik, a physician at the University of New Mexico Hospital, and Aja Riggs, a New Mexico resident with uterine cancer, filed a lawsuit on March 22, 2012, against the state of New Mexico challenging the constitutionality of New Mexico statute Section 30-2-4, which prohibits assisted suicide. The parties, seeking recognition of a fundamental right in physician-assisted suicide for patients that are terminally ill and mentally competent, went to trial on December 11, 2013, at the Second Judicial District Court of New Mexico.¹⁰⁵

The trial record was extensive and significant for the plaintiffs' case, as it compiled testimony from physicians, including named plaintiff Dr. Morris, who were familiar with physician-assisted suicide in states that statutorily permit the practice.¹⁰⁶ On January 31, 2014, the district court ruled in favor of the plaintiffs, holding: (i) the plain language of Section 30-2-4 encompasses the practice of physician-assisted suicide, and (ii) physician-assisted suicide for terminally ill patients is a fundamental right under the inherent-rights guarantee of Article II, Section 4 and the substantive due process protections afforded by Article II, Section 18 of the New Mexico Constitution.¹⁰⁷ On August 11, 2015, the New Mexico Court of Appeals overturned the District Court decision that physician-assisted suicide is a protected fundamental right under New Mexico's Constitution.¹⁰⁸ The New Mexico Supreme Court ruled on June 30, 2016, that physician-assisted suicide is not a fundamental or important right under the inherent rights clause of New Mexico's

102. *Id.*; see also *Matter of Quinlan*, 70 N.J. 10, 355 A.2d 647 (1976) (recognizing that a decision to withdraw treatment was within the patient's right to privacy).

103. See *Casey*, 505 U.S. at 839; *Roe v. Wade*, 410 U.S. 113, 154 (1973) ("We, therefore, conclude that the right of personal privacy includes the abortion decision[.]").

104. *Physician-Assisted Suicide and the Right to Die with Assistance*, *supra* note 100, at 2032–33; see also *Casey*, 505 U.S. at 874.

105. Transcript of Record, Vol. 2, *supra* note 68, at 4.

106. The following physicians testified at trial: Dr. Nicholas Gideonse, a practicing physician in Oregon, named plaintiff Dr. Katherine Morris, who had previously practiced in Oregon and is currently practicing in New Mexico, Dr. David Pollack, a psychiatrist who has practiced in Oregon for forty years, and Dr. Eric Kress, a practicing hospice physician in Montana. See Transcript of Record, Vol. 2, *supra* note 68, at 1–192; Transcript of Record, Vol. 3, *supra* note 68, at 1–70.

107. See *Morris v. Brandenburg*, No. D-202-CV-2012-02909, 2014 WL 10672977, at 1 (N.M. 2d Jud. Dist. Ct. Jan. 31, 2014); see also *Morris v. Brandenburg*, No. D-202-CV-2012-02909, 2014 WL 10672986 (N.M. 2d Jud. Dist. Ct. Jan. 13, 2014).

108. See *Morris*, 2015-NMCA-100, ¶ 54.

Constitution, and that the statute prohibiting assisted suicide was constitutional under the due process clause of New Mexico's Constitution.¹⁰⁹

A. The Trial

a. *Testimony at trial: medical experts and personal experiences*

The *Morris v. Brandenburg* bench trial began on December 11, 2013, in front of the Honorable Nan G. Nash in the Second Judicial District Court of New Mexico.¹¹⁰ The plaintiffs had six witnesses: Katherine Morris, M.D., Aja Riggs, David A. Pollack, M.D., Adrienne Dare, Eric Kress, M.D., and Nicholas L. Gideonse, M.D.¹¹¹ Taken together, the witnesses' testimony illustrated the various challenges of end of life care, the processes and benefits of physician-assisted suicide in different states, the distinction between suicide and physician-assisted suicide, and the effect of physician-assisted suicide on the friends and families of patients. Scott Fuqua, Assistant Attorney General of New Mexico, cross-examined the witnesses but did not present witnesses for the state.¹¹²

In the plaintiffs' opening statement, attorney Laura Schauer Ives of the ACLU of New Mexico stated "[t]his case is about choice."¹¹³ Ms. Ives explained that named plaintiff Aja Riggs, a New Mexico resident and uterine cancer patient, "simply wants a choice of how much suffering she has to endure at the end of her life."¹¹⁴ Ms. Ives added that named plaintiffs Dr. Morris and Dr. Mangalik "want to be able to provide the medically valid choice of aid in dying to competent, terminally-ill patients if they want it."¹¹⁵ The opening statement focused on the distinction between suicide and physician-assisted suicide, and emphasized that there is now a "well-accepted standard of care" in states that allow the practice.¹¹⁶ Mr. Fuqua's opening statement for the state of New Mexico focused on the separation of powers and the important role of the state legislature for matters like physician-assisted suicide.¹¹⁷

Plaintiff Dr. Morris was the first witness to testify at trial. Dr. Morris is a surgical oncologist who attended medical school in Oregon and practiced as an attending surgical oncologist in Portland, Oregon, for five years prior to moving to New Mexico.¹¹⁸ At the time of the trial, Dr. Morris was working at the University of New Mexico Hospital, where she was an assistant professor in the Department of Surgery.¹¹⁹ On the basis of her extensive experience with terminally ill patients, Dr. Morris testified that the loss of autonomy at the end of a patient's life can be rapid

109. See *Morris*, 2016-NMSC-027, ¶ 58.

110. See Transcript of Record, Vol. 2, *supra* note 68; see also Transcript of Record, Vol. 3, *supra* note 68.

111. See Transcript of Record, Vol. 2, *supra* note 68; Transcript of Record, Vol. 3, *supra* note 68.

112. See Transcript of Record, Vol. 2, *supra* note 68; Transcript of Record, Vol. 3, *supra* note 68.

113. Transcript of Record, Vol. 2, *supra* note 68, at 6.

114. *Id.*

115. *Id.*

116. *Id.* at 7–9.

117. *Id.* at 12–14.

118. *Id.* at 17.

119. *Id.*

and extremely difficult.¹²⁰ Dr. Morris described the experiences of a handful of former terminally ill patients in excruciating detail, including a woman who had a rotting tumor in her chest wall, and who could not eat as a consequence of the smell.¹²¹

Because of her practice as an attending surgical oncologist in Oregon, Dr. Morris was familiar with, and had prescribed medication under, Oregon's ODWDA.¹²² While in Oregon, Dr. Morris prescribed the medication on two occasions.¹²³ One of the patients, who had been declared terminally ill as a result of her advanced liver cancer, was the subject of the documentary *How to Die in Oregon*.¹²⁴ Dr. Morris explained that this patient was surrounded by her family when she took the medication, and that she took the medication "to end her suffering, not her life."¹²⁵ Additionally, Dr. Morris noted that the patient's death certificate listed the terminal cancer, rather than the physician-assisted suicide medication, as the cause of death.¹²⁶

Plaintiff Aja Riggs, a New Mexico resident and uterine cancer patient, was the second witness to testify at trial. Ms. Riggs was diagnosed with uterine cancer in 2011, and immediately underwent surgery, chemotherapy, and radiation, to treat the cancer.¹²⁷ After the treatment, Ms. Riggs developed a "chemo-resistant" tumor with a poor prognosis.¹²⁸ While Ms. Riggs was undergoing additional radiation and chemotherapy, she heard about the *Morris* lawsuit and joined as a plaintiff.¹²⁹ Ms. Riggs explained that while she was in treatment, she contemplated what dying in pain, and without autonomy, might mean.¹³⁰ Ms. Riggs understood, however, that assisted suicide was illegal in New Mexico, and therefore, she "didn't want to implicate anyone else in what might be a crime."¹³¹ As a result, Ms. Riggs did not speak with anyone—loved ones or physicians—about assisted suicide until she made the decision to join the *Morris* lawsuit.¹³²

Additional medical testimony was provided by Dr. Pollack, Dr. Kress, and Dr. Gideonse. At the time of the trial, Dr. Pollack had been a practicing psychiatrist for forty years in Portland, Oregon and taught at the Oregon Health and Sciences University, Center for Ethics and Healthcare.¹³³ Specifically, Dr. Pollack taught medical students about end of life care and ethical decisions in healthcare settings, and published various articles about physician-assisted suicide.¹³⁴ Dr. Pollack's

120. *Id.* at 24.

121. *Id.* at 21.

122. *Id.* at 24.

123. *Id.*

124. *Id.* at 25–26.

125. *Id.* at 28.

126. *Id.* at 29.

127. *Id.* at 54–55.

128. *Id.* at 57–58.

129. *Id.* at 58–59.

130. *Id.* at 60–61.

131. *Id.* at 61.

132. *Id.*

133. *Id.* at 68–69.

134. *Id.* at 70–71.

testimony centered on the evaluation of a patient's competency under Oregon's ODWDA, when that patient requests medication to end their life.¹³⁵ Dr. Pollack explained that when evaluating competency, Oregon psychiatrists and physicians seek to establish "whether the [patient] has some kind of psychiatric condition [or external influence] that might be interfering with their judgment or contributing to their [choice]," such that the choice to take the medication is not by the patient's free will.¹³⁶

Dr. Kress, who, at the time of the trial, practiced end of life hospice care in Montana, where physician-assisted suicide is permitted by statutory defense, provided additional testimony on specific examples of the practice of physician-assisted suicide.¹³⁷ In his practice, Dr. Kress provided a variety of end of life care, including palliative sedation, withdrawal of care, and physician-assisted suicide medication.¹³⁸ Dr. Kress explained that in Montana, he was asked for end of life medication by fifteen patients, and he prescribed it to four.¹³⁹ Most importantly, Dr. Kress testified that Oregon has developed an extensive body of knowledge, and a database of over 600 patients who have used physician-assisted suicide medication.¹⁴⁰ Dr. Kress explained that because there is no statutory scheme for the administration of physician-assisted suicide medication in Montana, its physicians have relied extensively on the standard of care developed in Oregon.¹⁴¹

Finally, Dr. Gideonse, an Oregon-based family physician, testified that over his professional career, he counseled "a couple hundred" patients on physician-assisted suicide, and prescribed the medication to forty or fifty patients.¹⁴² Dr. Gideonse stated he was present at about twenty physician-assisted suicide deaths, that he helped educate physicians in Vermont about physician-assisted suicide, and that he has testified about physician-assisted suicide in front of various legislative bodies.¹⁴³ Dr. Gideonse testified about the criteria for physician-assisted suicide in Oregon, including the declaration that a patient be terminally ill, and the requirement that a patient be competent.¹⁴⁴ Like Dr. Kress, Dr. Gideonse noted that Oregon's extensive database of patient information and codified standard of care have provided guidelines for other states, such as Washington, Montana, and Vermont.¹⁴⁵

b. The District Court's decision: physician-assisted suicide is a

135. *Id.* at 72–86.

136. *Id.* at 75.

137. *Id.* at 159–178.

138. *Id.* at 147–49.

139. *Id.* at 150.

140. *Id.* at 164.

141. *Id.* at 164–66.

142. Transcript of Record, Vol. 3, *supra* note 68, at 6–9.

143. *Id.* at 9, 11–12.

144. *Id.* at 25–28.

145. *See id.* at 29–30.

fundamental right in New Mexico

On January 13, 2014, Judge Nash entered findings of fact and conclusions of law for the *Morris v. Brandenburg* case.¹⁴⁶ Judge Nash found that “[s]ome 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.”¹⁴⁷ Judge Nash found that the deaths of terminally ill patients following a withdrawal of life sustaining care, or palliative sedation, “are not considered suicide and are not subject to prosecution under NMSA 1987, § 30-2-4.”¹⁴⁸ Judge Nash found that the underlying terminal illness, rather than the removal of life support or the administration of palliative sedation, is the cause of death in a terminally ill patient.¹⁴⁹ Additionally, Judge Nash found that “[a] standard of care for physician aid in dying, informed by clinician practices and authoritative literature, including Clinical Practice Guidelines, has developed.”¹⁵⁰ Finally, Judge Nash found that the benefits of physician-assisted suicide, to both the terminally ill patient and to their loved ones, include “peaceful, dignified deaths” and improved end of life and pain management practices.¹⁵¹

On January 31, 2014, Judge Nash entered a final declaratory judgment and permanent injunction.¹⁵² Judge Nash concluded that NMSA 1978, Section 30-2-4, New Mexico’s statute prohibiting assisted suicide, encompasses, and thus prohibits, physician-assisted suicide.¹⁵³ Additionally, Judge Nash concluded that Section 30-2-4 violates the New Mexico Constitution as applied to physician-assisted suicide.¹⁵⁴ Judge Nash held that a terminally ill, mentally competent patient “has a fundamental right to choose aid in dying pursuant to the New Mexico Constitution’s guarantee to protect life, liberty, and seeking and obtaining happiness, [Article II, Section 4], and its substantive due process protections, [Article II, Section 18].”¹⁵⁵

B. Appeal to the New Mexico Court of Appeals

The State of New Mexico appealed the district court decision, arguing: (i) there is no fundamental right to physician-assisted suicide, and (ii) the district court’s ruling “violates the doctrine of separation of powers by legalizing conduct that is designated to be a crime by the Legislature.”¹⁵⁶ The State argued specifically that while end-of-life decisions generally implicate an important and fundamental right,

146. *Morris v. Brandenburg*, No. D-202-CV 2012-02909, 2014 WL 10672986 (N.M. 2d Jud. Dist. Ct. Jan. 13, 2014).

147. *Id.* at 2.

148. *Id.*

149. *Id.* at 3.

150. *Id.* at 3.

151. *See id.* at 5–6.

152. *Morris v. Brandenburg*, No. D-202-CV-2012-02909, 2014 WL 10672977 (N.M. 2d Jud. Dist. Ct. Jan. 31, 2014).

153. *Id.* at 1.

154. *Id.*

155. *Id.*

156. *Morris v. Brandenburg*, 2015-NMCA-100, ¶ 14, 356 P.3d 564, 570.

“that right does not encompass the affirmative aid of third parties.”¹⁵⁷ The State asserted that the appropriate standard to apply to an evaluation of Section 30-2-4’s constitutionality is the rational basis test, since no fundamental rights are implicated.¹⁵⁸ Furthermore, the State argued that the District Court “lacked a sufficient basis” for departing from federal precedent and for finding greater protection under New Mexico’s Constitution.¹⁵⁹ Finally, the State alleged that the permissibility of physician-assisted suicide is a “quintessential legislative determination.”¹⁶⁰

The plaintiffs’ arguments on appeal, as presented in the district court, remained the same: the Legislature’s use of the term “suicide” in Section 30-2-4 does not encompass the unique act of “aid in dying” (a term assigned by plaintiffs to the practice of physician-assisted suicide), and if it does, Section 30-2-4’s “criminalization of aid in dying” violates Article II, Section 4 and Article II, Section 18 of the New Mexico Constitution.¹⁶¹ The plaintiffs did not assert a right to physician-assisted suicide under federal law; rather, they asserted that the right is protected by New Mexico’s more expansive constitutional provisions.¹⁶² Specifically, the plaintiffs identified the implicated fundamental rights as “the right to autonomous medical decision making” and “the right to a dignified peaceful death.”¹⁶³ The alleged liberty interest was narrowly defined by plaintiffs as applicable only when: (i) a mentally competent, (ii) terminally ill patient (iii) requests a prescription for medication that will end his or her life, (iv) which a “willing physician applying the proper standard of care” determines is appropriate.¹⁶⁴ The plaintiffs argued that departure from existing federal physician-assisted suicide precedent was appropriate because of New Mexico’s “distinctive state characteristics,” and because there is presently an extensive history of the medical practice in the United States which was not available at the time of the Supreme Court’s holding in *Glucksberg*.¹⁶⁵

On August 11, 2015, the New Mexico Court of Appeals published its decision.¹⁶⁶ The Court of Appeals overturned the district court decision that physician-assisted suicide is a protected fundamental right under New Mexico’s Constitution,¹⁶⁷ but the decision was split by differing opinions on the appropriate standard of constitutional review, on the issue of separation of powers, and on the result. Judge Timothy L. Garcia wrote for the majority, Judge J. Miles Hanissee wrote a concurrence, and Judge Linda M. Vanzi dissented.

157. Defendant-Appellant’s Brief in Chief at 3, *Morris v. Brandenburg*, 2015-NMCA-100, 356 P.3d 564 (No. 33,630).

158. *Id.* at 4.

159. *Id.* at 9–11.

160. *Id.* at 18.

161. *Morris*, 2015-NMCA-100, ¶¶ 17, 21.

162. *See id.* ¶ 21.

163. *Id.* ¶ 26 (internal quotations omitted).

164. *Id.* ¶ 27.

165. Petitioners’ Supplemental Brief, *supra* note 28, at 31.

166. *See Morris*, 2015-NMCA-100.

167. *Id.* ¶ 54.

With respect to the plaintiff's statutory construction argument, the Court of Appeals agreed with the district court that, as a textual matter, Section 30-2-4 encompassed and prohibited the specific practice of physician-assisted suicide.¹⁶⁸ Moving to the constitutional analysis, the majority determined that the existing federal precedent "provided a substantive due process answer to a factually identical scenario that has never been rejected by any state appellate court."¹⁶⁹ Noting that physician-assisted suicide is a new legal consideration, the majority stated that it "must be weighted against longstanding societal principles," such as the preservation of life and the prevention of suicide.¹⁷⁰ Holding that existing federal precedent continues to provide New Mexico courts with "principled authority," the majority concluded that there is no fundamental right to physician-assisted suicide under New Mexico's due process provision.¹⁷¹ With respect to the inherent rights clause, the majority declined to recognize Article II, Section 4 "as protecting a fundamental interest in hastening another person's death because such an interest is diametrically opposed to the express interest in protecting life."¹⁷² The majority determined that, because no fundamental interest in physician-assisted suicide existed, the district court should have applied an intermediate standard of constitutional review.¹⁷³

Concurring in part with the majority, Judge Hanisee discussed his agreement with the result, and his disagreement with the standard of review and disagreement with the analysis of the issue of separation of powers. Judge Hanisee agreed with the statutory construction of Section 30-2-4 as being inclusive of physician-assisted suicide.¹⁷⁴ Judge Hanisee expressed discomfort that a class of citizens—mentally competent, terminally ill adults—would "possess a right that would be denied to other[s]."¹⁷⁵ Finally, Judge Hanisee noted that the legality of physician-assisted suicide should be addressed by the legislature, and concluded that Section 30-2-4 should be upheld under a rational basis review, which applies to neither important nor fundamental rights.¹⁷⁶

Judge Vanzi's dissent expressed her disagreement with the majority and concurring opinions with respect to the existence of a protected fundamental right in physician-assisted suicide and therefore, with respect to the appropriate standard of constitutional review. Judge Vanzi responded to Judge Hanisee's discussion of a specially-protected class by asserting that "all New Mexicans" possess the right to physician-assisted suicide.¹⁷⁷ Judge Vanzi stated that history is not always binding, noting that "when new insight reveals discord between the Constitution's central protections and a received legal stricture, a claim to liberty must be addressed."¹⁷⁸

168. *Id.* ¶ 19 ("[S]tatutory language that is clear and unambiguous must be given effect. . . ." (citing *V.P. Clarence Co. v. Colgate*, 1993-NMSC-022, ¶ 8, 853 P.2d 722)).

169. *Id.* ¶ 34.

170. *Id.* ¶ 37.

171. *Id.* ¶ 38.

172. *Id.* ¶ 39 (internal quotations omitted).

173. *See id.* ¶ 52.

174. *Id.* ¶ 56 (Hanisee, J. concurring in part).

175. *Id.* ¶ 64.

176. *Id.* ¶¶ 56, 70.

177. *Id.* ¶ 73 (Vanzi, J. dissenting) (emphasis in original).

178. *Id.* ¶¶ 86–89.

Article II, Section 18 is more expansive than its federal counterpart, Judge Vanzi stated, and Article II, Section 4, which has no federal analogue, provides the “distinctive characteristic” needed to depart from existing federal precedent.¹⁷⁹ In Judge Vanzi’s view, Article II, Section 4 “supplements and expands the liberty rights afforded by Section 18.”¹⁸⁰ Judge Vanzi rejected Judge Hanisee’s argument that the issue should be left to the legislative branch, and stated that Section 30-2-4 should be subjected to a heightened level of scrutiny.¹⁸¹ “The suffering of these citizens,” Judge Vanzi concluded, “is too intimate and personal for the State to insist, without more, upon its own vision . . . however dominant that vision been in the course of our history and our culture.”¹⁸²

C. Appeal to the New Mexico Supreme Court

The *Morris* plaintiffs appealed the Court of Appeals decision to the New Mexico Supreme Court. Oral arguments were held on October 26, 2015, and the New Mexico Supreme Court issued its decision on June 30, 2016.¹⁸³ The New Mexico Supreme Court held that although physician-assisted suicide “falls within the proscription of Section 30-2-4,” physician-assisted suicide is not a fundamental or important right under New Mexico’s Constitution, and Section 30-2-4 is not unconstitutional under a rational basis review.¹⁸⁴

Because New Mexico’s due process clause—Article II, Section 18—is analogous to the due process guarantees provided under the U.S. Constitution, the New Mexico Supreme Court used an interstitial approach to evaluate whether physician-assisted suicide was protected by New Mexico’s due process clause.¹⁸⁵ Under an interstitial approach, if the right is not protected by the U.S. Constitution, then the state court must determine “whether ‘flawed federal analysis, structural differences between state and federal government, or distinctive state characteristics’ require a divergence from established federal precedent in determining whether the New Mexico Constitution protects the right.”¹⁸⁶ Citing *Glucksberg*¹⁸⁷ for the determination that physician-assisted suicide is not currently protected as a fundamental right under the federal due process clause, the New Mexico Supreme Court held that it would not depart from federal precedent because the analysis in *Glucksberg* was not flawed, and because there were no distinctive state characteristics that justified departure from *Glucksberg*.¹⁸⁸

With respect to New Mexico’s inherent rights clause—Article II, Section 4—which has no federal analogue, the New Mexico Supreme Court provided extensive guidance on the meaning of the clause, and rejected the plaintiffs’

179. *Id.* ¶ 106.

180. *Id.* ¶ 113.

181. *Id.* ¶ 147–48.

182. *Id.* ¶ 148 (citing *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992)).

183. *Morris v. Brandenburg*, 2016-NMSC-027, 376 P.3d 836.

184. *Id.* ¶ 58.

185. *Id.* ¶¶ 18–19.

186. *Id.* ¶ 19 (citing *State v. Gomez*, 1997-NMSC-006, ¶ 19, 932 P.2d 1).

187. *Washington v. Glucksberg*, 521 U.S. 702 (1997).

188. *Morris*, 2016-NMSC-027, ¶¶ 31–38.

argument that the clause provides an independent basis on which to find a fundamental right to physician-assisted suicide.¹⁸⁹ The Court began by examining the history of New Mexico's inherent rights clause, and explained that Section 4 is not an "enforceable independent source of individual rights," but rather an "overarching principle which inform[s] the equal protection guarantee of our Constitution."¹⁹⁰ Although the Court unmistakably concluded that Section 4, on its own, was not a source under which to find a right to physician-assisted suicide, the Court stated that the clause "may . . . ultimately be a source of greater due process protections than those provided under federal law."¹⁹¹

ANALYSIS

The New Mexico Supreme Court should have examined whether Article II, Section 4, as a supplement or expansion to Article II, Section 18, could have provided a ground for departing from federal precedent, for the purpose of analyzing whether physician-assisted suicide could be recognized as an important or fundamental right under New Mexico's Constitution. Although the scope of the Article II, Section 4, inherent rights clause is narrow, the clause could provide broader, and more expansive protections than the U.S. Constitution if used in conjunction with the due process clause of Article II, Section 18. Additionally, New Mexico has a legislative, medical, and social environment that supports a patient's physical autonomy and dignity. Palliative sedation, when a doctor induces unconsciousness (sometimes resulting in death), and withdrawal of life-sustaining care are current alternatives to prescribing medication to end the patient's life; both are legally practiced in New Mexico and across the United States. Like the right to decide to withdraw medical treatment and the right a pregnant woman possesses, up until fetal viability, to decide to have an abortion, requesting death-inducing medication is an intimate decision that should be protected by the right of privacy. An appropriate standard of care, if physician-assisted suicide had been permitted in New Mexico, would mirror that of the state of Oregon.

I. SUPPORT FOR PHYSICIAN ASSISTED SUICIDE IS INCREASING IN THE UNITED STATES

Physician assisted suicide has become permissible in certain states through the legislative process. The present available legislative history in the United States is increasingly supportive of a finding of a fundamental right or an important interest in physician-assisted suicide. In 1997, when the United States Supreme Court found in *Glucksberg* that there was no right to physician-assisted suicide under the federal Constitution, the legal practice of physician-assisted suicide had not yet been established. Today, the availability of data and working models in seven states provide support that a state's interest in the regulation of medical standards can be preserved while a terminally ill patient's right to privacy is simultaneously safeguarded.

189. *Id.* ¶¶ 39–51.

190. *Id.* ¶ 49.

191. *Id.* ¶ 51.

Twenty-one years ago, the *Glucksberg* opinion indicated that there was room for future experimentation and reevaluation; the trial record in *Morris* lends extensive and explicit support that since *Glucksberg*, the practice of physician-assisted suicide is gaining frequency, respect, demand and clarity. The testimony from Dr. Morris, Dr. Kress, Dr. Gideonse, and Dr. Pollack, demonstrates that over the last two decades, Oregon's codified statutory scheme has provided a basis for the development of medical guidelines and a standard of care for physician-assisted suicide in the states that permit it.¹⁹² Physicians in the state of Montana, which does not have a statutory scheme regulating physician-assisted suicide, have been able to develop the practice of physician-assisted suicide with the existing Oregon standard of care.¹⁹³ Likewise, if in *Morris* the New Mexico Supreme Court had found a right to physician-assisted suicide, or if it had recognized a consent defense like the Montana court in *Baxter*,¹⁹⁴ New Mexico physicians could have adopted Oregon's standard of care, despite the lack of a statutory scheme.

II. THE ANALYSIS UNDER NEW MEXICO'S CONSTITUTION

A. Federal Law Is Not Binding

An interstitial approach mandates that the court ask first whether a right is protected under the federal Constitution.¹⁹⁵ If the right is protected under the federal Constitution, the state constitutional claim is not reached.¹⁹⁶ If the right is not protected under the federal Constitution, the state's constitution is examined.¹⁹⁷ Even if a right is not protected under the federal Constitution, a state court may depart from federal precedent for three reasons: "a flawed federal analysis, structural differences between state and federal government, or distinctive state characteristics."¹⁹⁸

Here, Article II, Section 18 of the New Mexico Constitution mirrors the Fourteenth Amendment's Due Process Clause. A claim under Section 18, thus, requires a preliminary examination of the federal Constitution. It is clear, as was determined by *Glucksberg*, that there is currently no federally protected right for physician-assisted suicide under the Fourteenth Amendment's Due Process Clause. The U.S. Supreme Court did not close the door on the matter, but the issue has not been revisited by the Supreme Court since *Glucksberg*. The New Mexico Supreme Court's *Morris* opinion discussed *Glucksberg* at length, ultimately concluding that "*Glucksberg* controls" because there is no basis upon which to diverge from the *Glucksberg* precedent with respect to Section 18, as a stand-alone clause.¹⁹⁹

Although a constitutional analysis under Article II, Section 4, standing alone, does not require an interstitial approach because there is no federal analogue,

192. See, e.g., Transcript of Record, Vol. 2, *supra* note 68, at 164–66.

193. See *id.*

194. *Baxter v. Montana*, 2009 MT 449, ¶ 50, 224 P.3d 1211.

195. *State v. Garcia*, 2009-NMSC-046, ¶ 13, 217 P.3d 1032.

196. *Id.*

197. *Id.*

198. *State v. Sanchez*, 2015-NMSC-018, ¶ 22, 350 P.3d 1169.

199. *Morris v. Brandenburg*, 2016-NMSC-027, ¶¶ 31–38, 376 P.3d 836.

the Court likewise declined to find a right to physician-assisted suicide under Section 4.²⁰⁰ Seeking to clarify the purpose and scope of Section 4, the Court explained that the clause “inform[s] our understanding of New Mexico’s equal protection guarantee,” but does not stand alone as an independent source of individual rights.²⁰¹ The Court left one avenue of analysis, however, unexplored: the use of Section 4 as a supplement or expansion to the Section 18 due process clause. After concluding that Section 4, by itself, did not establish an important or fundamental right for physician-assisted suicide, the Court stated unambiguously that “[Section 4] may also ultimately be a source of greater due process protections than those provided under federal law.”²⁰² In other words, the Court indicated that Section 4 could be used to expand the due process protections afforded to New Mexico citizens. Following this statement, however, the Court did not proceed to analyze whether the inherent rights clause, used in conjunction with the Section 18 due process clause, could establish a right to physician-assisted suicide in New Mexico. Instead of using the inherent rights clause’s expansive potential as the needed distinctive characteristic to depart from the federal *Glucksberg* precedent, it is possible that with the use of the word “ultimately,” the Court left the potential analysis for a future case.²⁰³

B. Expansion of the Federal Baseline: Using Article II, Section 4, to Expand Article II, Section 18, and As a Point of Divergence from Federal Law

In the New Mexico Court of Appeals *Morris* decision, Judge Vanzi wrote a dissenting opinion that described and evaluated the option of using New Mexico’s inherent rights clause as an expansion of its due process clause.²⁰⁴ Judge Vanzi stated “it is plain that Section 4 supplements and expands the liberty rights afforded by Section 18’s due process clause to ensure maximum protection for the lives and liberty of New Mexicans.”²⁰⁵ Judge Vanzi asserted that whether taken on its own, or as an expansion of Section 18’s due process clause, Section 4 was the “distinctive characteristic” needed for the Court of Appeals to depart from the *Glucksberg* federal precedent.²⁰⁶ In Judge Vanzi’s opinion, the Section 4 inherent rights clause “affords New Mexico citizens the right and agency to defend their lives and liberty by availing themselves of aid in dying.”²⁰⁷

On review, the New Mexico Supreme Court did not substantively address Judge Vanzi’s analysis regarding the use of Section 4 and Section 18 in conjunction, or foreclose the possibility of Section 4 as an expansion of the Section 18 due process clause. Instead, the Supreme Court fully analyzed the right of physician-assisted suicide under Section 4 and Section 18 as independent clauses, and then only acknowledged the possibility that Section 4 could, in fact, expand New Mexico’s

200. *Id.* ¶ 51.

201. *Id.* ¶¶ 50–51.

202. *Id.* ¶ 51.

203. *Id.* (emphasis added).

204. *Morris v. Brandenburg*, 2015-NMCA-100, ¶¶ 110–14, 356 P.3d 564.

205. *Id.* ¶ 113.

206. *Id.*

207. *Id.*

due process clause.²⁰⁸ Had the Supreme Court engaged in an analysis beyond a mere acknowledgment, it may have reached the same conclusion as Judge Vanzi: Section 4's expansion of Section 18's due process clause establishes a distinctive characteristic that allows the Court to depart from *Glucksberg*. Departing from *Glucksberg*, the New Mexico Supreme Court could have determined that New Mexican's have a right to physician-assisted suicide under the New Mexico Constitution.

Finding a right to physician-assisted suicide under an expanded due process clause would not be a stretch under existing legal principles. The right to withdrawal of care and to abortion before fetal viability are inherent due process liberties that have been grounded in the right of privacy. *Roe v. Wade*²⁰⁹ and *Planned Parenthood of Southeastern Pennsylvania v. Casey*²¹⁰ were pivotal federal abortion cases, decided by the U.S. Supreme Court, which found protection of physical autonomy under the federal Due Process Clause. Both cases recognized a right of privacy rooted, at least in part, in the Fourteenth Amendment's Due Process Clause.²¹¹ The right to withdrawal of care has similarly been recognized under a right to privacy found in the Fourteenth Amendment. In *Cruzan v. Director, Missouri Dept. of Health*, the Supreme Court held that a competent person has a constitutionally protected liberty interest in refusing unwanted medical treatment.²¹² The Court stated that "the choice between life and death is a deeply personal decision of obvious and overwhelming finality."²¹³ Similarly, the Supreme Court of New Jersey held that the withdrawal of life-sustaining care of a woman in a non-cognitive vegetative state was grounded in a right to privacy in *Matter of Quinlan* in 1976.²¹⁴ Removal of life-sustaining care has also been included within a due process right to self-determination.²¹⁵ Finally, the most recent federal guidance on fundamental liberty interests under the federal Due Process Clause is in the decision of *Obergefell v. Hodges*.²¹⁶ In *Obergefell*, the Supreme Court held that there is a protected fundamental liberty interest in marrying a person of the same sex.²¹⁷ The Court stated that "history and tradition guide and discipline this inquiry but do not set its outer boundaries."²¹⁸

Accordingly, while the New Mexico Supreme Court had an opportunity to determine whether Section 4 expands on Section 18's due process clause, it chose not to do so. By affirming that Section 4 may expand New Mexico's due process clause, the New Mexico Supreme Court left open an avenue for future consideration.

208. *See id.*

209. 410 U.S. 113 (1973).

210. 505 U.S. 833 (1992).

211. *See* *Washington v. Glucksberg*, 521 U.S. 702, 719–20 (discussing Due Process Clause liberties and *Casey*); *Roe*, 410 U.S. at 726–27 (discussing the multiple roots of the right of privacy, including the Fourteenth Amendment's concept of personal liberties).

212. 497 U.S. 261 (1990).

213. *Id.* at 281.

214. 355 A.2d 647 (N.J. Sup. Ct. 1976).

215. *Matter of Conroy*, 486 A.2d 1209 (N.J. Sup. Ct. 1985).

216. 135 S. Ct. 2584 (2015).

217. *Id.* at 2604–05.

218. *Id.* at 2598.

The legal background of due process liberties grounded in the right of privacy, such as the rights to withdrawal of care and abortion, would help inform the inquiry of how a right to physician-assisted suicide can fit within the parameters of New Mexico's due process clause.

CONCLUSION

Few things are as private and critical as a patient's end-of-life decisions during terminal illness. Terminal illness can subject a person to final days, weeks or months of agonizing pain in which induced comas or extremely high—and often ineffective—amounts of pain killers are the only available relief. Physician assisted suicide provides a terminally ill patient control and consciousness at the end of their lives, so that they may adequately bid farewell to their loved ones and so that they may spend their last moments as they choose. New Mexico's Constitution arguably provides broader due process protections than the U.S. Constitution. New Mexico courts are at liberty to define and proscribe the fundamental liberties and rights that should be protected from the infringement of majorities and government. The New Mexico Supreme Court affirmed that New Mexico's due process clause may be expanded by the inherent rights clause. It is possible that this expansion would yield the distinctive state characteristic necessary for New Mexico courts to depart from existing federal physician-assisted suicide precedent.