APL-2016-00129

Supreme Court, New York County, Index No. 151162/15

**State of New York**

**Court of Appeals**

SARA MYERS, STEVE GOLDENBERG,

*Plaintiffs,*

ERIC A. SEIFF, HOWARD GROSSMAN, M.D., SAMUEL C. KLAGSBRUN, M.D.,   
TIMOTHY E. QUILL, M.D., JUDITH K. SCHWARZ, PH.D.,

CHARLES A. THORNTON, M.D., and END OF LIFE CHOICES NEW YORK,

—against— *Plaintiffs-Appellants,*

ERIC SCHNEIDERMAN, in his official capacity as   
ATTORNEY GENERAL OF THE STATE OF NEW YORK,

*Defendant-Respondent,*

JANET DIFIORE, in her official capacity as DISTRICT ATTORNEY OF WESTCHESTER COUNTY, SANDRA DOORLEY, in her official capacity as DISTRICT ATTORNEY OF MONROE COUNTY, KAREN HEGGEN, in her official capacity as DISTRICT ATTORNEY OF SARATOGA COUNTY, ROBERT JOHNSON, in his official capacity as DISTRICT ATTORNEY OF BRONX COUNTY and CYRUS R. VANCE, JR., in his official capacity as DISTRICT ATTORNEY OF NEW YORK COUNTY, *Defendants.*

**BRIEF FOR AMICI CURIAE,**

**UNITARIAN UNIVERSALIST ASSOCIATION,**

**NEW YORK SOCIETY FOR ETHICAL CULTURE, and**

**PROFESSOR ROBERT A. THURMAN**

**IN SUPPORT OF PLAINTIFFS/APPELLANTS**

Thomas O. Bean PATRICIA HENNESSEY

(admitted *pro hac vice*) HENNESSEY & BIENSTOCK LLP

Verrill Dana LLP 551 Madison Avenue, 11th Floor

One Boston Place, Suite 1600 New Yok, NY 10022-3266

Boston, MA 02108 Phone: (212) 512-0804

(617) 309-2600 (Tele) Fax: (212) 764-3925

(617) 309-2601 (Fax)

April 20, 2017 *Attorneys for Amicus Curiae*

**CORPORATE DISCLOSURE STATEMENT**

Amici Curiae, Unitarian Universalist Association and New York Society for Ethical Culture, are independent non- profit organization with no parents, subsidiaries, or affiliates.

Dated: April 20, 2017   
New York, New York

Respectfully submitted,

**HENNESSEY & BIENSTOCK LLP**

By: \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

Patricia Hennessey, Esq.

551 Madison Avenue, 11th Floor

New Yok, NY 10022-3266

Phone: (212) 512-0804

Fax: (212) 764-3925

phennessey@hblawny.com

Thomas O. Bean

(admitted *pro hac vice*)

Verrill Dana LLP

One Boston Place, Suite 1600

Boston, MA 02108

(617) 309-2600 (Tele)

(617) 309-2601 (Fax)

*Attorneys for Amicus Curiae*

**TABLE OF CONTENTS**

TABLE OF CONTENTS ………………………………………………………………………....i

TABLE OF AUTHORITIES ……………………………………………………………………..ii

[STATEMENT OF INTEREST OF AMICI 1](#_Toc480287513)

[ARGUMENT 8](#_Toc480287514)

[I. This Court Should Construe the Assisted Suicide Statute as not Prohibiting Aid-in-Dying to Avoid Having to Decide the Constitutionality of that Statute. 8](#_Toc480287515)

[II. Upholding the Appellate Division’s Decision Would Mean, Contrary to the View of the United States Supreme Court, that there is No Set of Facts Under Which the Assisted Suicide Statute Would Violate a Patient’s Right to Equal Protection and Due Process. 10](#_Toc480287516)

[III. If the Assisted Suicide Statute Does Cover Aid-in-Dying, It Violates the Establishment Clause by Preferring One Religious Tradition Over Another. 11](#_Toc480287517)

[A. The Assisted Suicide Statute is Rooted in Roman Catholic Canon Law. 12](#_Toc480287518)

[B. The Assisted Suicide Statute Compels Compliance with a Statute Rooted in Catholic Doctrine by Imposing Criminal Sanctions for Violating It. 15](#_Toc480287519)

CONCLUSION………………………………………………………………………..………....16

**TABLE OF AUTHORITIES**

Cases

*511 W. 232nd Owners Corp. v. Jennifer Realty Co.*,

98 N.Y.2d 144 (2002) 9

*Compassion in Dying v. Washington,*

79 F.3d 790 (9th Cir. 1996) 13, 14

*Cruzan v. Director, Missouri Dept. of Health*,

497 U.S. 261 (1990) 12

*Edwards v. Aguilar*,

482 U.S. 578 (1987) 11

*Everson v. Board of Educ.*,

330 U.S. 1 (1968) 11

*Griffin v. Coughlin*,

88 N.Y 2d 674 (1996) 12

*Grumet v. Pataki*,

93 N.Y.S.2d 677 (1999) 11

*Hales v. Petit,*

75 Eng. Rep. 387 (1562) 14

*Lemon v. Kurtzman,*

403 U.S. 602 (1971) 11

*McCreary Cty. Ky. v. American Civil Liberties Union of Ky.*,

545 U.S. 844 (2005) 11, 12

*Myers v. Schneiderman*,

31 N.Y.3d 45 (2016) 9, 11

*People v. Correa*,

15 N.Y.3d 213 (2010) 8

*People v. Dietze*,

75 N.Y.2d 47 (1989) 9

*Quill v. Vacco*,

80 F.3d 716 (2d Cir. 1996), *rev’d on other grounds sub nom.*, *Vacco v. Quill*, 521 U.S. 793 (1997) 15

*Vacco v. Quill*,

521 U.S. 793 (1997) 3, 10, 15

*Washington v. Glucksberg*,

521 U.S. 702 (1997) 10, 13

Statutes

Establishment Clause 88 N.Y.S.2d 16

New York Penal Law

§ 120.03 5

§ 120.30 8

§ 125.15(3) 5, 8, 15

Other Authorities

Aquinas, St. Thomas, *Sunmma Theologica* II-II, q. 64, art. 5 (Fathers of the English Dominican Province eds., vol. 2,1947) 14

Blackstone, William, *Commentaries* ch. 14, (1765) 15

Bracton, H. de, *De Legibus et Consuetudinibus Angliae* 505 (Sir Travers Twiss ed. 1879) 14

Green Jr., Rev. Johnnie, *Let Gravely Ill N.Y.ers speed their deaths*, New York Daily News (2017) 4

Hale, Sir Matthew, *Historia Placitorum Coronӕ* \*411-12 (1736) 15

Larue, Gerald*, Playing God: 50 Religions’ Views on Your Right to Die* 420-22 (1996) 13

Marzen, Thomas *et al., Suicide: A Constitutional Right?,* 24 Duq. L. Rev. 1 (1985) 13, 14

Neander, A. , *General History of the Christian Religion and Church* 141 (Joseph Torrey trans. 1865) 14

Neeley, Steven G., *The Right to Self-Directed Death: Reconsidering an Ancient Proscription,*

36 Cath. Law. 111 (1995) 13, 14

Oregon Health Authority, Public Health Division, *Oregon Death with Dignity Act – Data Summary 2016*, (2017) 3

Pew Forum on Religion and Public Life, *U.S. Religious Landscape Survey* (2014). 5

Spong, John Shelby, *Address to The Hemlock Society of San Diego* (2003) 4

St. John-Stevas, Norman, *Life, Death and the Law: Law and*

*Christian Morals in England and the United States* 233 (1961) 14

The American Ethical Union Board of Directors, *Resolution 3-03* (2003) 7

Williams, Glanville, The *Sanctity of Life and the Criminal Law* 254-55 (1957) 13, 14

UUA General Assembly Resolution, *The Right to Die With Dignity* (1988). 6

# STATEMENT OF INTEREST OF AMICI

The interest of *amici* in this case is to advocate for the freedom of competent, terminally ill New Yorkers of diverse religious backgrounds to make informed, voluntary decisions about the time, place, and manner of their own deaths, empowering them to conform to their own deeply personal religious, ethical and spiritual values. While the government may properly regulate this choice to ensure that it is truly voluntary and informed, the government may not proscribe the choice altogether. To do so undermines privacy, liberty, and autonomy interests protected by the Constitution of the State of New York, and impermissibly furthers the establishment of Catholic doctrine now codified in State law.

THE UNITARIAN UNIVERSALIST ASSOCIATION is a religious association formed from the consolidation of two religions: Unitarianism and Universalism. The Universalist Church of America was founded in 1793, and the American Unitarian Association in 1825. These faiths formed the Unitarian Universalist Association (“UUA”) when they consolidated in 1961. Both groups trace their roots in North America to the early Massachusetts settlers and the Framers of the Constitution.  Across the globe, the UUA legacy reaches back centuries to liberal religious pioneers in England, Poland, and Transylvania. Today, Unitarian Universalists include people from many faiths who share UU values. UUA congregations covenant to affirm and promote Seven Principles including: the inherent worth and dignity of every person; justice, equity and compassion in human relations; and a free and responsible search for truth and meaning.

NEW YORK SOCIETY FOR ETHICAL CULTURE (“Ethical Culture”) is a humanist community founded in 1876 and dedicated to ethics, social justice, and education. Ethical Culture is a religion centered on ethics, not theology, whose mission is to encourage respect for humanity and nature and to create a better world. Ethical Culture core religious beliefs include the inherent worth and dignity of every individual, the potential to grow and change, a responsibility to strive for ethical growth, and a responsibility to create a better world. The American Ethical Union is the federation of Ethical Culture Societies within the United States of which the New York Society for Ethical Culture is a member.

Prof. Robert A. F. Thurman, is the Jey Tsong Khapa Chair in Indo-Tibetan Buddhist Studies at Columbia University. Professor Thurman holds the first endowed chair in Buddhist Studies in the West. Educated at Philips Exeter and Harvard, he then studied Tibet, Tibetan Buddhism, and Asian languages and histories for fifty years with many teachers, including His Holiness the Dalai Lama (C. U. Ph.D., hc, 1989). He has written substantial scholarly works, founding and editing a new series through Columbia University Press, *Treasury of the Buddhist Sciences*. He also writes popular books, lecturing all over the world in the "public intellectual" tradition, with special concern for ethics and human rights.

**RELIGIOUS TRADITIONS HOLD VARYING BELIEFS ON AID-IN-DYING**

A range of views exists throughout religious communities on aid-in-dying, a medical practice available only to mentally competent, terminally ill persons. The views of the Roman Catholic Church are set forth in an Amicus Curiae Brief filed with this Court on December 30, 2016 by The New York State Catholic Conference in support of Defendant-Respondent. Here, *amici* offer the Court perspectives from other faith traditions in support of aid-in-dying, in particular, those of Unitarian Universalists, Buddhists, and the New York Society for Ethical Culture. The support of other religious traditions for competent, terminally ill persons to voluntarily access aid-in-dying is documented in, for example, the *Brief of Religious Amici Curiae on Behalf of Baxter* filed in 2009 with the Supreme Court of the State of Montana, Case No. DA 09-0051, and signed by Priests, Reverends and Ministers of the Episcopal, United Church of Christ, and Disciples of Christ Protestant denominations. Also in the *Brief of 36 Religious Organizations, Leaders and Scholars as Amici Curiae in Support of Respondents* filed with the United States Supreme Court in *Vacco v. Quill,* 1996 WL 711178 (December 10, 1996), and signed by numerous religious organizations and leaders in support of aid-in-dying, including The American Humanist Association, The Board of Directors of the Society for Humanistic Judaism, The Cathar Church, The Congress of Secular Jewish Organizations, the Unitarian Universalist Association, and The Episcopal Diocese of Newark.

The decision whether to seek aid-in-dying and whether to follow through on that decision[[1]](#footnote-2) will be resolved differently by different individuals based on their own most deeply held philosophical, ethical, and religious beliefs. Some may reject aid-in-dying as contrary to the teachings of their religion. That decision is entitled to respect. Others may be members of a religious community in which aid-in-dying is not contrary to the teachings of their faith or may be members of a religious community holding divergent positions on aid-in-dying, and they may (or may not) conclude that aid-in-dying is an appropriate choice for themselves considering their personal beliefs, experiences and their faith. Still others, despite the teachings of their religion, may support aid in dying, as, for example, is the case with a majority of Catholics in New York State. These decisions too, are entitled to respect by the government. In addition, the views of people who are not members of religious communities who view aid-in-dying as acceptable for themselves must be respected.

As the Rev. Johnnie Green Jr., Senior Pastor of Mount Neboh Baptist Church of Harlem and President of Mobilizing Preachers and Communities, wrote in the March 8, 2017 edition of the New York Daily News:

Many people believe with every fiber of their being, and frequently informed by their faith, that it is absolutely wrong to end life prematurely, even when you are in agonizing pain and facing a terminal illness. They are entitled to that belief. My faith leads me to another conclusion. I believe that in the name of mercy and human decency, all terminally ill individuals of sound mind should have the option of aid in dying, with the choice guided by their faith and in consultation with their family and doctor.[[2]](#footnote-3)

The Episcopal Church’s Eighth Bishop of Newark, John Shelby Spong, made the following remarks in a 2003 address to The Hemlock Society of San Diego:

That is the only way I know that would allow me to honor the God in whose image I believe I was created…. I think this choice should be legal. I will work…to create a world where…physicians will assist those, who choose to do so, with the ability to die at the appropriate time. I also think the choice to do this should be acclaimed as both moral and ethical, a human right if you will….The God whom I experience can surely not be served by those in whom death is simply postponed or not allowed to served its natural function.  
  
I am a Christian whose faith has led him to champion the legal, moral, and ethical right that I believe every individual should be given – to die with dignity and to have the freedom to choose when and how that dignified death might be accomplished.[[3]](#footnote-4)

He made the following comments in his testimony before Congress:

I come to these conclusions as a Christian…My personal creed asserts that every person is sacred. I see the holiness of life enhanced, not diminished, by letting people have a say in how they choose to die. Many of us want the moral and legal right to choose to die with our faculties intact, surrounded by those we love before we are reduced to breathing cadavers, with no human dignity attached to our final days…Life must not be identified with the extension of biological existence.[[4]](#footnote-5)

Notwithstanding the range of religious faiths and views on aid-in-dying, New York Penal Law §§ 120.03 and 125.15(3) will dictate, if this Court affirms the Appellate Division, only one answer to persons of *all* religious faiths and those of no religious faith – it operates as a total ban on aid-in-dying.[[5]](#footnote-6)

The religious diversity of New Yorkers is apparent from survey findings published in 2014 by the Pew Forum on Religion and Public Life in *U.S. Religious Landscape Survey*.[[6]](#footnote-7) The survey found that New Yorkers identify as follows:

Christian - 60%

Roman Catholic - 31%

Protestant - 26%

Other Christian - 3%

Non-Religious - 27%

Jewish - 7%

Muslim - 2%

Buddhist - 1%

Hindu – 1%

Other Religions - 2%

Among this religiously diverse population, a 2015 poll of New Yorkers found that 77% of New Yorkers think that “when a mentally competent adult is dying from a terminal illness that cannot be cured, the adult should be allowed the option to request a prescription for life ending medication from their doctor, and decide whether and when to use that medication to end their suffering in their final stages of dying.”[[7]](#footnote-8)

*Amici* advocate for the freedom of competent, terminally ill New Yorkers of diverse religious traditions to make their own informed, voluntary decisions about aid-in-dying. The Court has before it the Amicus Curiae Brief of the New York State Catholic Conference opposing aid-in-dying in any circumstance for any person regardless of that individual’s religious, ethical and spiritual beliefs and practices. The Court’s consideration of the Roman Catholic position on aid-in-dying should be informed by consideration of beliefs from other religious traditions. *Amici* have presented above an overview of that diversity of religious belief and present more in-depth insights into the beliefs of the Unitarian Universalist, Buddhist, and American Ethical Union (and its affiliated New York Society for Ethical Culture) religious communities with respect to lawful access to aid-in-dying when voluntarily requested by competent, terminally ill New Yorkers.

UNITARIAN UNIVERSALIST ASSOCIATION

The UUA adopted a general resolution at its 1988 General Assembly on the right to die with dignity. In particular, the resolution states in relevant part as follows:

**WHEREAS**, differences exist among people over religious, moral, and legal implications of administering aid in dying when an individual of sound mind has voluntarily asked for such aid; and…

**BE IT FURTHER RESOLVED**: That Unitarian Universalists advocate the right to self-determination in dying, and the release from civil or criminal penalties of those who, under proper safeguards, act to honor the right of terminally ill patients to select the time of their own deaths; and

**BE IT FURTHER RESOLVED**: That Unitarian Universalists advocate safeguards against abuses by those who would hasten death contrary to an individual’s desires[.][[8]](#footnote-9)

Unitarian Universalist teachings have supported aid-in-dying for three decades. This support is not without limit, as the resolutions indicate. Unitarian Universalists expect that proper safeguards against abuses would be in place to ensure that only competent, terminally ill persons who ask for such aid may lawfully access aid-in-dying.

BUDDHIST THEOLOGY

Professor Thurman shared the following insights on Buddhist theology:

On the Buddhist theological level, aid-in-dying cannot be considered suicide, since a person in that circumstance is not considering their “self” to be their body. "Sui-cide" means "self-killing," from its Latin root etymology, which is a mortal sin in Catholic theology, and is also considered a "karmic" (i.e. spiritually evolutionary) mistake in Buddhist ethics. However, a person who identifies the "self" (in the Buddhist case what they call the "conventional self" or "personal mental continuum") as a subtle, "soul"-like continuum (not a fixed or static identity), is not "killing the self" when consciously departing the physical body.

In a theistic system recognizing an "immortal soul," a dying person is leaving their earthly body to go to heaven (as they surely hope, with Jesus' help in the Christian case, with God’s help in other theisms). Even convinced materialists, who deny any immortal soul or personal spiritual continuum, are consciously identifying their "real selves" with the state of unconsciousness they expect to ensue (like a deep sleep) when the brain has ceased. By requesting aid-in-dying, materialists are seeking that unconsciousness as a relief from mortal suffering and path to a better place for their theoretically non-existent selves.

Therefore, to dogmatically insist that the physician who complies with a competent, terminally ill patient’s wish to sever their self-connection to a suffering body by writing a prescription for possible consumption by the patient at the patient’s total discretion, is committing a crime, is irrational when considered from a Buddhist theological perspective.

AMERICAL ETHICAL UNION; NEW YORK STATE SOCIETY FOR ETHICAL CULTURE

The American Ethical Union is the federation of Ethical Culture Societies within the United States of which *amicus,* the New York Society for Ethical Culture, is a member. The American Ethical Union passed the following Board of Directors Resolution (Resolution 3-03) on March 15, 2003 documenting the support of itself and its constituent Ethical Culture Societies for aid-in-dying in certain carefully monitored circumstances:

“**Resolved**, that the American Ethical Union (AEU) hereby supports the decriminalization of the furnishing of a prescription for a lethal dose of drugs by a physician to an adult patient with full decision-making capacity, at such patient’s insistent and repeated request, where such patient is not treatably depressed and is either terminally ill (within six months of expected death) or in intractable suffering, with reasonable protections against abuse.”

“**Further Resolved**, that such protections may well be modeled on those of the Oregon Death With Dignity Act and thus include the requirement of a second physician’s opinion, full disclosure of alternatives, waiting period, full recording of all interactions with patient in medical record and report of the furnishing of such prescriptions to responsible authorities.”

As its resolutions indicate, the American Ethical Union is supportive of aid-in-dying for competent adults who seek a more peaceful death through aid-in-dying. It supports such access when protections are in place, to ensure that the patient not be suffering from a treatable depression, to confirm diagnosis and prognosis, require disclosure of alternatives, impose a reasonable a waiting period, and reporting data on who chooses aid in dying to authorities would be reasonable and appropriate protections.

# ARGUMENT

## I. This Court Should Construe the Assisted Suicide Statute as not Prohibiting Aid-in-Dying to Avoid Having to Decide the Constitutionality of that Statute.

The threshold question in this appeal is whether N.Y. Penal Law §§ 120.30 and 125.15(3) (the “Assisted Suicide Statute”), which by their express terms apply only to “suicide,” encompass the practice known as “aid-in-dying.” Two well-established principles should guide the Court’s resolution of this question at this stage of the case. First, “[w]here the language of a statute is susceptible of two constructions, the courts will adopt that which avoids injustice, hardship, constitutional doubts or other objectionable results.” *People v. Correa*, 15 N.Y.3d 213, 232, 933 N.E.2d 705, 717 (2010) (citations omitted). To achieve this goal, this Court has said, “[i]f we are to take seriously our obligation to construe a statute to avoid constitutional infirmities, then we must be willing to incorporate constitutional limitations into language that might have a broader scope if we were to rely only on ‘dictionary definitions.’” *People v. Dietze*, 75 N.Y.2d 47, 56, 549 N.E.2d 1166, 1171 (1989). Second, the Court must accept as true at the pre-answer motion to dismiss phase of this case, the factual allegations of Plaintiffs’ Complaint and submissions in opposition to the motion to dismiss[[9]](#footnote-10) that aver that the practice of “aid-in-dying” is different from assisted suicide.[[10]](#footnote-11)

If the Court concludes that the Assisted Suicide Statute *does* cover aid-in-dying, the Court will need to reach Plaintiffs’/Appellants’ argument that the statutory provisions violate the Equal Protection and Due Process clauses of the New York Constitution, and *amici*’s argument in part III hereof that it violates that Establishment Clause because the Assisted Suicide Statute advances a religious preference for Catholic doctrine. Accordingly, application of the first principle above demonstrates that the Court should imply constitutional limitations in construing the word “suicide” as used in the Assisted Suicide Statute. The Court should thus *not* rely exclusively on the dictionary definition of the term as the Appellate Division did,[[11]](#footnote-12) and conclude that “suicide” does *not* cover aid-in-dying.

Application of the second principle leads to the same result. As noted, Plaintiffs have alleged facts in their Complaint and in submissions in opposition to the Motion to Dismiss that suicide is different from aid-in-dying. *See*, *supra*, n.10. Accepting these factual allegations as true requires this Court to conclude, at least at this stage of the case, that the Assisted Suicide Statute does *not* embrace aid-in-dying. Accordingly, the Court should reverse the Appellate Division’s decision, and remand the case for further proceedings.

## II. Upholding the Appellate Division’s Decision Would Mean, Contrary to the View of the United States Supreme Court, that there is No Set of Facts Under Which the Assisted Suicide Statute Would Violate a Patient’s Right to Equal Protection and Due Process.

While Plaintiffs/Appellants maintain that a patient’s choices and protections under the New York Constitution are broader than those under the federal Constitution, the Supreme Court has recognized that under the federal Constitution, there may be circumstances when a patient has a constitutional right to aid-in-dying. In his concurrence in *Washington v. Glucksberg*, 521 U.S. 702, 750-52 (1997), Justice Stevens opined that he was not “persuaded that in all cases there will in fact be a significant difference between . . . the intent of a terminally ill patient who decides to remove her life support and one who seeks the assistance of a doctor in ending her life; in both situations, the patient is seeking to hasten a certain, impending death. The doctor's intent might also be the same in prescribing lethal medication as it is in terminating life support.” He concluded that the Supreme Court’s holding in *Vacco v. Quill*, 521 U.S. 793, 803-10 (1997)—that New York’s distinction between the rights of competent, terminally ill persons who wish to hasten their deaths by self-administering prescribed drugs and the rights of those who wish to do so by directing the removal of life-support systems did not violate the Equal Protection Clause— “does not foreclose the possibility that an individual plaintiff seeking to hasten her death, or a doctor whose assistance was sought, could prevail in a more particularized challenge.” *Glucksberg*, 521 US at 750. *The Court agreed with Justice Stevens on this point.* *Id.* at 735, n. 24 (“Our opinion does not absolutely foreclose such a claim.”)

If this Court were to affirm the Appellate Division, it would foreclose the possibility under the New York Constitution that the Supreme Court said it had *not* foreclosed under federal constitution, thus resulting in a narrower interpretation under the state constitution. That is because the Appellate Division, unlike the Supreme Court, did not leave the door open for challenges based on a particular individual’s personal circumstances. *See generally, Myers*, 31 N.Y.3d 45. The Court should not bar such a possibility when several of the patient plaintiffs have alleged facts specific to their illnesses and personal circumstances, which must be taken as true at this procedural stage of the case. *See* Complaint, ¶¶ 22-30, 49. Accordingly, the Court should reverse the decision of the Appellate Division, and remand this case for further proceedings.

## III. If the Assisted Suicide Statute Does Cover Aid-in-Dying, It Violates the Establishment Clause by Preferring One Religious Tradition Over Another.

“The Establishment Clause ensures that neither the State nor the Federal government ‘can pass laws which aid one religion, aid all religions, or prefer one religion over another.’” *Grumet v. Pataki*, 93 N.Y.S.2d 677, 688 (1999) quoting *Everson v. Board of Educ.*, 330 U.S. 1, 15 (1968). In applying the first prong of the three-part *Lemon v. Kurtzman* test, 403 U.S. 602, 612-13 (1971), courts consider whether the primary or principal purpose of the statute is to advance or in inhibit religion. “In determining the legislative purpose of a statute, the Supreme Court [, in addition to considering the text of the statute,] has *also* considered the historical context of the statute, and the specific sequence of events leading to the passage of the statute.” *Edwards v. Aguilar*, 482 U.S. 578, 595 (1987) (emphasis added) (internal citations omitted); *McCreary Cty. Ky. v. American Civil Liberties Union of Ky.*, 545 U.S. 844, 862 (2005) (quoting same in parenthetical). It has ruled that courts may not “turn a blind eye to the context in which [a] policy arose.” *McCreary Cty,* 545 U.S. at 866 (quotation and citation omitted).

This Court has written similarly, “[a]n endorsement violating the Establishment Clause can be determined by examining whether the message that the government’s practice communicates may be fairly understood as favoring or promoting religion.” *Griffin v. Coughlin*, 88 N.Y.2d 674, 691 (1996). Thus, this Court must ascertain whether “the challenged governmental action is sufficiently likely to be perceived by adherents of the controlling denominations as an endorsement, and by the non-adherents as a disapproval of their individual religious choices.” *Id*. (quotation and citation omitted). As such, the government may not use failure to comply with religiously based laws as a basis for the imposition of, among other things, penalties such as a crime. *Id*. at 694.

Here, the historical context of the Assisted Suicide Statute as being rooted in Catholic canon law, and the perception of it by non-adherents as being based on Catholic doctrine, in conjunction with the compulsion to comply with it under threat of criminal sanction, demonstrates that the Assisted Suicide Statute not only advances Catholic doctrine, but establishes a preference for Catholicism to other faiths, in violation of the Establishment Clause.[[12]](#footnote-13)

### A. The Assisted Suicide Statute is Rooted in Roman Catholic Canon Law.

There is nothing in the Bible suggesting that suicide was viewed as sinful or even disfavored. “There is nothing in the Old Testament which can clearly be understood as offering explicit judgment on the ancient Judaic view of suicide”; nor is there any “offering in the New Testament to suggest a condemnation of suicide.” G. Steven Neeley, *The Right to Self-Directed Death: Reconsidering an Ancient Proscription,* 36 Cath. Law. 111, 121 (1995). In fact, “[i]n the Bible, five people are reported to have ended their own lives (I Samuel 31, II Samuel 17, 1 Kings 16 and Matthew 27), and the fact of their action is simply reported with no moral judgment implied; at no point is condemnation expressed for their having done so.” Gerald Larue, *Playing God: 50 Religions’ Views on Your Right to Die* 420-22 (1996)*,* quoting Rev. Sallierae Henderson.

Indeed, suicide was not particularly unusual among early Christians. Because “the supreme duty in this life was to avoid the sin which would result in eternal damnation,” the early Christians considered it permissible to commit suicide rather than risk condemnation. Neeley, 36 Cath. Law. at 121-22. Indeed, given that martyrdom at the hands of infidels was an especially prized end, “fanatical Christians”-in particular, a sect known as the Circumcelliones-would invite their own death by “taunt[ing] their Roman persecutors into acts of violence.” *Id.* at 122; *see also* Glanville Williams, The *Sanctity of Life and the Criminal Law* 254-55 (1957); *Compassion in Dying v. Washington,* 79 F.3d 790, 808 (9th Cir. 1996) (*en banc*), *rev’d on other grounds*, *Washington v. Glucksberg*, 521 U.S. 702 (1997).

It was not until St. Augustine, who served as “the chief architect” of the Roman Catholic view that suicide is encompassed by God’s Commandment against killing, that suicide was considered a wrong. G. Williams, *Sanctity of Life* at 255. “St. Augustine argued that committing suicide was a ‘detestable and damnable wickedness' and was able to help turn the tide of public opinion” against suicide.” *Compassion in Dying v. Washington,* 79 F.3d 790, 808 (9th Cir. 1996)*,* 79 F.3d at 808 (citing Thomas Marzen *et al., Suicide: A Constitutional Right?,* 24 Duq. L. Rev. 1, 27 (1985)). His views on suicide were eventually incorporated into the canon law of the Catholic Church. *See* Norman St. John-Stevas, *Life, Death and the Law: Law and Christian Morals in England and the United States* 233, 249 (1961) (citing 5 A. Neander, *General History of the Christian Religion and Church* 141 (Joseph Torrey trans. 1865)). In the year 673, the Council of Hereford adopted the Roman Catholic canon law, including its prohibition against suicide, into England. *See* G. Williams, *Sanctity of Life* at 257. King Edgar formalized this prohibition in the year 967. *See* Neely, 36 Cath. Law. at 128.[[13]](#footnote-14)

One of the first English law treatises, written most likely between 1220 and 1260, explained that suicide was criminalized because of the Augustinian rationale: “In the same way, in which a person may commit a felony by killing another, so he may commit a felony by killing himself, which felony indeed is said to be committed against himself.” 2 H. de Bracton, *De Legibus et Consuetudinibus Angliae* 505 (Sir Travers Twiss ed. 1879). Similarly, the Court of King's Bench, writing in 1562, explained the rationale for the legal prohibition on suicide. Central to the court's analysis was the view that suicide was an “offence . . . against God” as well as “against nature” and “against the King.” The Court explained that suicide was “against God” because “it is a breach of His commandment, *thou shalt not kill;* and to kill himself, by which act he kills in presumption his own soul, is a greater offence than to kill another.” *Hales v. Petit,* 75 Eng. Rep. 387, 400 (1562).[[14]](#footnote-15)

Later English legal scholars echoed the same ecclesiastical underpinnings for the laws against suicide. Sir Matthew Hale explained that the prohibition upon suicide was grounded in principal part upon religious objections: “No man hath the absolute interest of himself but: 1. God almighty hath an interest and propriety in him, and therefore self-murder is a sin against God.” (I Sir Matthew Hale, *Historia Placitorum Coronӕ* \*411-12 (1736)). Blackstone, too, explicitly recognized that this aspect of the common law was bottomed on “religiou[s]” reasons: “[T]he law of England wisely *and religiously* considers, that no man hath a power to destroy life, but by commission from God.” (4 William Blackstone, *Commentaries* ch. 14, \*189 (1765) (emphasis added).) Blackstone thus called suicide a “spiritual” “offence,” in that the person committing suicide was guilty of “invading the prerogative of the Almighty, and rushing into [H]is immediate presence uncalled for.” *Id.*

St. Augustine’s Roman Catholic Teachings, which became rooted in the English common law, became the basis for what the Respondents argue is the Assisted Suicide Statute’s prohibitions against aid-in-dying. *See* Br. of Respondents at 27 (these prohibitions “are a codification of the long-standing common-law bar on assisting suicide . . .”) Indeed, Respondents trace the current Assisted Suicide Statute back to statutes adopted shortly after the colonial period. (*Id.* at 28 (“The earliest American statute explicitly to outlaw assisting suicide was enacted in New York in 1828”); *see Quill v. Vacco*, 80 F3d 716, 732 (2d Cir. 1996) (Calabresi, J., concurring) *rev’d on other grounds sub nom.*, *Vacco v. Quill*, 521 U.S. 793 (1997) (the statutes prohibiting assisted suicide “were born in another age”) Thus, there can be no dispute that the Assisted Suicide Statute stems from, and thus advances, the Roman Catholic doctrine[[15]](#footnote-16) that became embedded in the common law and was ultimately codified in the Assisted Suicide Statute.

### B. The Assisted Suicide Statute Compels Compliance with a Statute Rooted in Catholic Doctrine by Imposing Criminal Sanctions for Violating It.

As noted above, this Court in *Griffin* held that imposition of “penalties” for failure to comply with religious requirements or practices violates the Establishment Clause. Here, New York Penal Law 125.30 provides that “A person is guilty of promoting a suicide attempt when he intentionally causes or aids another person to attempt suicide. Promoting a suicide attempt is a class E felony.” Similarly, N.Y. Penal Law 125.15(3) provides that “A person is guilty of manslaughter in the second degree when: . . . 3. He intentionally causes or aids another person to commit suicide. Manslaughter in the second degree is a class C felony.” Thus, because the Assisted Suicide Statute codified common law principles based on long-standing Catholic doctrine and includes criminal penalties for violators, the statute violates the Establishment Clause. Further, non-Catholics, such as amici, perceive that statute and its threat of criminal sanction as compelling a preference for compliance with a particular religious doctrine, and disapproval of their contrary religious beliefs.

This is not simply a matter of the Assisted Suicide Statute being congruent with Catholic doctrine. It is a matter of the statute (a) being based on long-standing and clearly articulated Catholic doctrine; and (b) requiring all people, regardless of their religious beliefs, to comply with that doctrine through threat of criminal sanction. The combination of religious teachings with coercive pressure to comply with those teachings caused this Court in *Griffin* to conclude that requiring an inmate to participate in a prison’s Alcoholics Anonymous program that expressed belief in a higher being as a condition of eligibility for a family reunion program violated the Establishment Clause. 88 N.Y.S.2d at 692-93. The same is true here. New Yorkers are required to comply with Catholic doctrine, regardless of their beliefs, or face criminal sanction. As such, the Assisted Suicide Statute violates the Establishment Clause.

**CONCLUSION**

For all these reasons, Amicus Curiae, Unitarian Universalist Association, the Ethical Culture Society of New York, and Prof. Robert Thurman, respectfully request that this Court reverse the ruling by the Appellate Division and remand this case to the New York Supreme Court for further proceedings.

Dated: April 20, 2017

New York, New York

Respectfully submitted,

**HENNESSEY & BIENSTOCK LLP**

By: \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

Patricia Hennessey, Esq.

551 Madison Avenue, 11th Floor

New Yok, NY 10022-3266

Phone: (212) 512-0804

Fax: (212) 764-3925

phennessey@hblawny.com

Thomas O. Bean

(admitted *pro hac vice*)

Verrill Dana LLP

One Boston Place, Suite 1600

Boston, MA 02108

(617) 309-2600 (Tele)

(617) 309-2601 (Fax)

tbean@verrilldana.com

**CERTIFICATION**

I certify pursuant to 500.13(c)(1) of the Rules of Practice of this Court that the total word count for all printed text in the body of the brief is 5292 words.

Dated: April 20, 2017

New York, New York

Respectfully submitted,

**HENNESSEY & BIENSTOCK LLP**

By: \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

Patricia Hennessey, Esq.

551 Madison Avenue, 11th Floor

New Yok, NY 10022-3266

Phone: (212) 512-0804

Fax: (212) 764-3925

phennessey@hblawny.com

Thomas O. Bean

(admitted *pro hac vice*)

Verrill Dana LLP

One Boston Place, Suite 1600

Boston, MA 02108

(617) 309-2600 (Tele)

(617) 309-2601 (Fax)

tbean@verrilldana.com

1. In a multi-year study in Oregon, which has permitted aid-in-dying for nearly two decades, only approximately sixty percent of persons who receive prescription medication actually die from taking it. Oregon Death with Dignity Act – Data Summary 2016, published by the Oregon Health Authority, Public Health Division, February 10, 2017,available at https://public.health.oregon.gov/ProviderPartnerResources/EvaluationResearch/DeathwithDignityAct/Documents/year19.pdf [accessed April 16, 2017].) [↑](#footnote-ref-2)
2. Rev. Johnnie Green Jr., “Let Gravely Ill N.Y.ers speed their deaths*,*” *New York Daily News*, March 8, 2017, available at http://www.nydailynews.com/opinion/gravely-ill-n-y-ers-speed-deaths-article-1.2991264 [accessed April 16, 2017]. [↑](#footnote-ref-3)
3. Available at http://www.hemlocksocietysandiego.org/christian.htm [accessed April 3, 2017]. [↑](#footnote-ref-4)
4. *Id.* [↑](#footnote-ref-5)
5. Amici recognize that Plaintiffs/Appellants ask this court to determine the scope of the challenged statute, asserting that it does not reach the conduct of a physician providing aid in dying. Amici discuss this below at 8 or 10. [↑](#footnote-ref-6)
6. Available at http://www.pewforum.org/religious-landscape-study/state/new-york/ [accessed April 17, 2017].) [↑](#footnote-ref-7)
7. Polling on Voter Support for Medical Aid in Dying for Terminally Ill Adults[January 18, 2017], available at https://www.compassionandchoices.org/wp-content/uploads/2016/07/FS-Medical-Aid-in-Dying-Survey-Results-FINAL-1.18.17-Approved-for-Public-Distribution.pdf [accessed April 16, 2017]. [↑](#footnote-ref-8)
8. Available at http://www.uua.org/statements/right-die-dignity [accessed April 16, 2017]. [↑](#footnote-ref-9)
9. *511 W. 232nd Owners Corp. v. Jennifer Realty Co.*, 98 N.Y.2d 144, 152 (2002). [↑](#footnote-ref-10)
10. *See, e.g.*, Complaint, ¶¶ 37-44. [↑](#footnote-ref-11)
11. *Myers v. Schneiderman*, 31 N.Y.3d 45, 50 (2016). [↑](#footnote-ref-12)
12. Justice Stevens wrote, “[N]ot much may be said with confidence about death unless it is said from faith . . .” *Cruzan v. Director, Missouri Dept. of Health*, 497 U.S. 261, 343 (1990). (Stevens, J. dissenting). He was right. Death is the ultimate unknowable. As such, views on death must necessarily be based on faith. [↑](#footnote-ref-13)
13. *Compassion in Dying,* 79 F3d at 845 (Beezer, J., dissenting) (“Between the decline of the Roman Empire and the rise of the Common Law, ecclesiastical law was a dominant force in the English legal order.”). [↑](#footnote-ref-14)
14. These three reasons were exactly the same ones articulated by St. Thomas Aquinas in his theological treatise, *Summa Theologica:* “[I]t is altogether unlawful to kill oneself for three reasons ... [first] suicide is contrary to the inclination of nature ... [second,] every man is part of the community ... by killing himself he injures the community ... [third,] because life is God's gift to man ... whoever takes his own life, sins against God.” St. Thomas Aquinas, *Sunmma Theologica* II-II, q. 64, art. 5 (Fathers of the English Dominican Province eds., vol. 2, pp. 1465 *et seq.,* 1947). *See also Compassion in Dying,* 79 F.3d at 845-46 (Beezer, J., dissenting); Marzen *et al., Suicide: A Constitutional Right,* 24 Duq. L. Rev. 1, 29 (1985). [↑](#footnote-ref-15)
15. *See* *amicus curiae* brief of The New York Catholic Conference at 3 (“The Catholic Church has always taught that the direct, intended taking of an innocent human life is gravely immoral.”) [↑](#footnote-ref-16)