

IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 09-0051

ROBERT BAXTER, STEVEN STOELB,
STEPHEN SPECKART, M.D.,
C. PAUL LOEHNEN, M.D., LAR AUTIO, M.D.,
GEORGE RISI, JR., M.D., and COMPASSION & CHOICES,

Plaintiffs and Appellees,

v.

STATE OF MONTANA and STEVE BULLOCK,

Defendants and Appellants.

REPLY BRIEF OF APPELLANT

On Appeal from the Montana First Judicial District Court,
Lewis and Clark County, The Honorable Dorothy McCarter, Presiding

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INTRODUCTION

The great public interest in this case shows that it comes closer to the beginning, not the end, of Montanans' consideration of the weighty policy questions surrounding physician-assisted suicide. The questions posed are important, and each person's reactions to them are deeply felt, but the answers are not to be found anywhere in the history, text, or interpretation of the Montana Constitution. "[T]he 'earnest and profound debate about the morality, legality, and practicality of physician-assisted suicide' belongs among state lawmakers." Oregon v. Ashcroft, 368 F.3d 1118, 1123-24 (9th Cir. Or. 2004), quoting Washington v. Glucksberg, 521 U.S. 702, 735, affirmed by Gonzales v. Oregon, 546 U.S. 243 (2006); see also Cass Sunstein, The Right to Die, 106 Yale L.J. 1123 (1997). In other words, "[u]ltimately, physician-assisted suicide should be a Montana issue, decided by its voters as expressed by their elected representatives." Scott A. Fisk, "The Last Best Place to Die," 59 Mont. L. Rev. 301, 340 (1998);

Plaintiffs and amici debate at length the semantic questions surrounding the unspecified acts they call "aid in dying." Compare State's Br. at 4-8 (raising detailed questions about the scope of the right) with Pls.' Br. at 3 n.1 (not answering them). This Court, however, must confront a legal question that euphemisms cannot illuminate: whether the homicide laws are unconstitutional across a broad set of vaguely defined circumstances Plaintiffs have so far refused to specify.

This is not a “shrill mischaracterization” of Plaintiffs’ case. Pls.’ Br. at 11. The Complaint pleads a direct challenge not only to Mont. Code Ann. § 45-5-102 (deliberate homicide), but also to Mont. Code Ann. §§ 45-5-103 (mitigated deliberate homicide) and 45-5-104 (negligent homicide). (D.C. Doc. 1 at 8.) Plaintiffs left no doubt in discovery that “a physician who provides aid in dying to a terminally ill patient who dies as a result, under circumstances in which the patient would not have died at that time without such assistance, may be prosecuted for homicide.” (D.C. Doc. 17, Ex. 3 at 6.) In their constitutional challenge they insist on meeting the elements of “[t]he homicide statutes as they relate to aid in dying.” Pls.’ Br. at 7.

The State is aware of no other case in which a plaintiff has sought the constitutional right to intentionally cause the death of another human being. Nor have earlier attempts to win a right to physician-assisted suicide involved challenges to the homicide laws. See Washington v. Glucksberg, 521 U.S. 702, 707 (1997) (law against “promoting a suicide attempt”); Vacco v. Quill, 521 U.S. 793, 796 n.1 (New York law against same); Sampson v. State, 31 P.3d 88, 91 (Alaska 2001) (law against “intentionally aid[ing] another to commit suicide); Krischer v. McIver, 607 So. 2d 97 (Fla. 1997) (law against “deliberately assisting another in the commission of self murder”); Donaldson v. Lungren, 2 Cal. App. 4th 1614, 1624 (Cal. App. 2d Dist. 1992) (law against “aid[ing], advis[ing], or

encourag[ing] another to commit suicide”); People v. Kevorkian, 527 N.W.2d 714, 719 n.14 (Mich. 1994) (law against “provid[ing] the physical means” or “participat[ing] in the physical acts” of a suicide). Montana also prohibits assisting a suicide, which unlike the homicide statutes is limited to purposeful attempts to aid or solicit suicide, Mont. Code Ann. § 45-5-105, but Plaintiffs challenge only the homicide laws. The Court should reject Plaintiffs’ unprecedented claims.

I. PLAINTIFFS HAVE NOT ESTABLISHED THAT THE HOMICIDE LAWS VIOLATE THE MONTANA CONSTITUTION.

Plaintiffs incorrectly assert that “[t]he homicide statutes are presumed unconstitutional.” Pls.’ Br. at 7-8. As this Court recently noted, its constitutional analysis of fundamental rights “start[s] with the presumption that all legislative enactments comply with Montana’s constitution” and “[t]he party challenging a statute bears the burden of establishing the statute’s unconstitutionality beyond a reasonable doubt.” Disability Rights Montana v. State, 2009 MT 100, ¶ 18, 350 Mont. 101, 207 P.3d 1092. The State need not justify the duly enacted laws of its legislature unless and until a plaintiff establishes an unavoidable violation of a clear constitutional right. Id. Plaintiffs have not done so.

A. The Homicide Laws Do Not Violate the Privacy Right.

The Montana Constitution recognizes that privacy “is essential to the well-being of a free society.” Art. II, § 10. Consistent with this, the right to

privacy does not mean “that every restriction on medical care impermissibly infringes that right.” Wiser v. State, 2006 MT 20, ¶ 15, 331 Mont. 28, 129 P.3d 133. Plaintiffs ignore this Court’s instruction and instead claim under Gryczan and Armstrong an unlimited guarantee of bodily integrity “free from governmental control” that “applies to all medical issues and circumstances that might be covered by its terms in the future.” Pls.’ Br. at 12, 17. Unconstrained by the history of privacy and the practice of medicine in Montana, Plaintiffs’ principle would extend beyond physician-assisted suicide to medical marijuana (as a constitutional matter), the sale of organs, and human cloning. This absolute conception of liberty is alien to this Court’s privacy jurisprudence.

1. Gryczan Recognizes Protection From “Governmental Snooping” into Sexual Relationships, Not Life and Death “Free From Governmental Control.”

Plaintiffs assert that the Court’s invalidation of a narrow and never-enforced deviate sexual relations statute “is broad enough” to invalidate the homicide statutes. Pls.’ Br. at 13, citing Gryczan v. State, 283 Mont. 433, 450, 942 P.2d 112 (1997). Gryczan recognized that Montanans “fully and properly expect” sexual autonomy without “governmental snooping or regulation.” Id. Plaintiffs cannot say the same about physician-assisted suicide. States that allow it require governmental snooping into and regulation of the physician-patient relationship. Pls.’ Br. at 22-23, citing “extensive documentation” by the government under

Oregon's Death With Dignity Act; see also Or. Rev. Stat. §§ 127.800-860 (extensive regulations of physician-patient relationship). Gryczan also relied on the Palko test, under which Washington v. Glucksberg, 521 U.S. 702, 721 (1997), rejected Plaintiffs' alleged right one week before Gryczan was decided.

Plaintiffs ignore that Montanans expect their physicians not to commit homicide, but "to diagnose, treat, or correct human conditions, ailments, diseases, injuries, or infirmities." Mont. Code Ann. § 37-3-102(8). In the context of terminal illness in particular, we expect physicians "to provide treatment, including nutrition and hydration, for a patient's comfort care or alleviation of pain," Mont. Code Ann. § 50-9-202(2), with all necessary use of controlled substances to treat intractable pain, Mont. Bd. Med. Exmrs., Statement on the Use of Controlled Substances in the Treatment of Intractable Pain, State's Br. App. 3. Plaintiffs have not challenged these fundamental legal definitions of medical practice. Nor can the right of informational privacy in medical records support a right to commit acts that are not recognized as the practice of medicine. Pls.' Br. at 13-14.

2. Armstrong Recognizes a Right to "A Particular Lawful Medical Procedure," Not a Prohibition on Regulation of the Medical Profession.

Physician-assisted suicide is in no way a lawful "medical judgment" contemplated or protected by this Court's privacy doctrine. Pls.' Br. at 17; Armstrong v. State, 1999 MT 261, ¶ 62, 296 Mont. 361, 989 P.2d 365. This does

not mean that the right to privacy “only protects ‘legal acts.’” Pls.’ Br. at 18. It does mean, however, that “the standards for reasonable medical practice and procedure in this State” should be set “by the medical community in the exercise of its collective professional expertise and judgment, acting through the state’s medical examining and licensing authorities.” Armstrong, ¶ 15.

The law at issue in Armstrong targeted a single qualified medical professional, and there was no medical testimony in support of the bill. Id., ¶¶ 20, 23. If Armstrong adopted a rule that medical professionals can provide any service to their patients within their own subjective “medical judgments, free from the interference of the government,” Pls.’ Br. at 17, Wiser would have come out differently. Instead, the Court specifically rejected the “proposition that patients have a fundamental right to obtain medical care from professionals” regardless of the regulating authority. Wiser, ¶ 17.

The law and the medical community have expressly recognized the procedure at issue in Armstrong ever since the constitutional rights at issue took effect. See Montana Abortion Control Act, 1974 Mont. Laws Ch. 284, § 13; see also Roe v. Wade, 410 U.S. 113, 143 (1973) (noting the American Medical Association’s recognition “that abortion is a medical procedure”). On the other hand, the AMA opposes “physician-assisted suicide” (the physicians’ term) as “fundamentally incompatible with the physician’s role as healer.” D.C. Doc. 17, Ex. 3 at 15,

quoting American Medical Association, Current Opinions of the Council of Ethical and Judicial Affairs, E-2.211, Physician-Assisted Suicide; see also 2/21/09 MMA Policy upon Physician Assisted Suicide, Physicians' Amicus Br. at App. B.

3. Sampson and Other Cases Are Instructive.

Plaintiffs ask the Court to ignore its brethren in states that share strong privacy guarantees, and only allude to the most recent case addressing the question. See Sampson v. Alaska, 31 P.3d 88 (Alaska 2001). Plaintiffs incorrectly claim that Alaska's privacy provision is not self-executing. Pls.' Br. at 19; but see Alaska v. Planned Parenthood, 35 P.3d 30, 38 (Alaska 2001) ("three decades of cases" establish its privacy right as self-executing). They incorrectly claim Sampson was "decided before data from Oregon's experience with aid in dying became available." Pls.' Br. at 21. Oregon's assisted-suicide law had been in effect for nearly four years when Sampson was decided, and the Sampson plaintiffs extensively relied on the "Oregon evidence," just as Plaintiffs do here. 2000 WL 35515728 (Sampson's Reply) at *6. Plaintiffs also suggest that unlike Alaska and Florida, privacy in Montana is "given a broad and liberal interpretation in our state." Pls.' Br. at 21. As the Sampson plaintiffs argued, Alaska also has "a long and deeply rooted judicial tradition of protecting privacy, liberty and equal protection interests." 2000 WL 35515726 (Sampson's Br.) at *12-13. For these and other reasons, Sampson is instructive. State's Br. at 21-23.

B. The Recognition of Human Dignity Does Not Limit the Homicide Laws.

Plaintiffs claim that any other position on article II, section 4 but theirs “would nullify the dignity clause.” Pls.’ Br. at 25. The State takes the same position on section 4 as the Delegates who proposed it, the Convention that debated it, and the People of Montana who ratified it. The declaration of dignity as being “inviolable” rather than a right, command, or prohibition is not nullifying, but framing in a manner common to other sections. See, e.g., Mont. Const. Art. II, § 1 (“all political power is vested in and derived from the people”); § 10 (“The right of individual privacy is essential to the well-being of a free society”).

This position is consistent with this Court’s jurisprudence on dignity which, “has, for the most part, treated the human dignity clause, not as a fundamental value to be recognized in its own right.” Snetsinger v. Montana Univ. Sys., 2004 MT 390, ¶ 65, 325 Mont. 148, 104 P.3d 445 (Nelson, J., specially concurring). Neither Plaintiffs nor amici offer any evidence that the delegates intended, the convention proposed, or the People of Montana understood their new section 4 to abrogate in part Montana’s century-old (at the time) prohibition on intentional killing. See Buhmann v. State, 2008 MT 465, ¶ 68, 348 Mont. 205, 201 P.3d 70 (relying on the constitutional debate to reject expansive interpretation of “or damaged” language beyond the scope of article II, section 29).

1. **Plaintiffs Disregard the People Who Established the Constitution.**

The People of Montana who debated and ratified the Constitution are conspicuously absent from Plaintiffs' arguments. Scattered references to dignity outside the framing of section 4, Professors' Br. at 16, are irrelevant. The only joint dignity and privacy proposal that might have supported Plaintiffs' position was rejected. I Const. Conv. 127. To the extent the delegates themselves cited "the dignity and rights of the individual" as well as "man's right of self-determination," it was in a minority report proposing a "right to work." II Const. Conv. 694-95.

The Constitution did not omit a right to physician-assisted suicide out of ignorance of the issues raised by end-of-life suffering and suicide. Indeed, the Bill of Rights Committee heard and rejected two proposals by the same citizen on euthanasia, II Const. Conv. 653-54, two proposals for a right to die, *id.* at 653 & 656, and a proposal for a right to live, *id.* at 653. There was no further discussion about physician-assisted suicide. Cf. Montana Env'tl. Info. Ctr. v. Department of Env'tl. Quality, 1999 MT 248, ¶¶ 66-76, 296 Mont. 207, 988 P.2d 1236 (reciting extensive constitutional discussion of "the right to a clean and healthful environment"). The Constitution did not take sides on the issue.

2. Secondary Sources Do Not Support Plaintiffs' Reading of the Dignity Provision.

Plaintiffs rest their reading of section 4 on a law review article that acknowledges “nothing in the drafting or adoption record, including the very limited debate, which would indicate any sort of novel or radical meaning for the dignity clause” beyond its “ordinary meaning as a principal ideal of our ethical tradition naturally associated with equal protection and nondiscrimination.”

Matthew O. Clifford & Thomas P. Huff, Some Thoughts on the Meaning and Scope of the Montana Constitution's “Dignity” Clause with Possible Applications, 61 Mont. L. Rev. 301, 317 (2000). Their arguments for taking the dignity provision beyond its ordinary meaning are rooted in the Puerto Rico Constitution, and theories of various philosophers. Id. at 318-23.

Although section 4 was drawn from Puerto Rico's similar anti-discrimination provision, Verb. Tr. at 1642, there was no discussion of Puerto Rico law during the Convention or ratification process. Still, the Puerto Rico Supreme Court interprets its dignity provision as an anti-discrimination provision. See Clifford & Huff, at 322-23. That court has not held it provides “an independent and fundamental guarantee of human dignity” beyond equal protection. Professors' Br. at 15, citing Puerto Rico Urban Renewal Housing Corporation v. Pena Ubiles, 95 P.R.R. 301 (1967). Pena Ubiles is contract case that nowhere cites the dignity provision.

Compare Id., 95 D.P.R. 311 (1967) with P.R. Const. art. II, § 1 (“La dignidad del ser humano es inviolable”).

Plaintiffs and their amici also rely on controversial philosophical beliefs without any proof that the delegates or ratifying voters shared those beliefs or embedded them in the Constitution. Pls.’ Br. at 3 (citing John Stuart Mill); Professors’ Br. at 16 (citing Immanuel Kant). The Court should eschew philosophy in constitutional decisions. First, philosophical concepts can be misused; Kant and Mill opposed suicide even to escape suffering. See Kant, Fundamental Principles of the Metaphysics of Morals 57 (Thomas Kingsmill Abbott Trans. 4th ed. 1889), <http://oll.libertyfund.org/title/360/61768> (accessed 08/26/09) (a man who “destroys himself in order to escape from painful circumstances” wrongly uses his own body “merely as a means” rather than “as an end in itself”); Mill, On Liberty V ¶ 11 (1869), <http://www.bartleby.com/130/5.html> (accessed 08/26/09) (for “limiting [a man’s] power of voluntarily disposing of his own lot in life”). Second, philosophy is legally indeterminate; Plaintiffs’ philosophical view of dignity opens constitutional interpretation to subjective policymaking. Pls.’ Br. at 25; see generally, Neomi Rao, A Backdoor to Policy Making: The Use of Philosophers by the Supreme Court, 65 U. Chi. L. Rev. 1371 (1998) (defending rejection of philosophical arguments in Glucksberg). Third, and most importantly, the Constitution is not

intended to embody one philosophical system, but “is made for people of fundamentally differing views.” Lochner v. New York, 198 U.S. 45, 76 (1905) (Holmes, J., dissenting). Montanans’ ratification of section 4 no more enacted a particular moral philosophy than the Fourteenth Amendment enacted a particular economic theory. Id.

C. No Other Rights Are at Issue.

Plaintiffs nod to, but do not articulate, the equal protection arguments made by their amici. Pls.’ Br. at 26. The Complaint stated a separate claim for a violation of “the right to equal protection of the laws” (D.C. Doc. 1 at 7), but the district court correctly rejected it. State’s App. A at 13; see also Vacco v. Quill, 521 U.S. 793 (1997). Plaintiffs did not cross-appeal their equal protection claim, and therefore have waived it. Revelation Indus. v. Saint Paul Fire & Marine Co., 2009 MT 123, ¶ 48, 350 Mont. 184, 206 P.3d 919.

In any event, the homicide laws at issue do not discriminate in who they protect: “[t]he great majority of the state’s citizens, no matter their station or circumstances.” Pls.’ Br. at 30; (D.C. Doc. 17, Ex. 3 at 16). Cf. Snetsinger, ¶ 27 (applying equal protection to minority group). To the extent Plaintiffs rest their equal protection claim on the treatment of individuals under the Rights of the Terminally Ill Act, they failed to call into question that Act. See Bean v. State, 2008 MT 67, ¶ 23, 342 Mont. 85, 179 P.3d 524 (Cotter, J.,

concurring) (equal protection remedy invalidates the law making the classification).

II. THE RECORD REVEALS A NASCENT POLICY DEBATE, NOT AN ESTABLISHED CONSTITUTIONAL VIOLATION.

The District Court recognized the State's compelling interests in protecting its citizens and the integrity and ethics of the medical profession. State's App. A at 20-21. Plaintiffs do not dispute these interests. Instead, they argue that Montana should address these interests by becoming more like Oregon and Washington, whose citizens vigorously debated and approved, without constitutional mandate, laws providing for physician-assisted suicide. Pls.' Br. at 23. They argue, in effect, that because Oregon and Washington's citizens already have examined the policy implications of physician-assisted suicide, Montana's citizens do not need to. Plaintiffs' heavy reliance on nonrecord commentary introduced in footnotes and amicus briefs highlights how "these issues flow quickly away from questions of the law and lapse seamlessly into questions of morality, medical ethics, and contemporary social norms," and become "a quintessentially legislative matter." Sampson, 31 P.3d at 98.

A. Plaintiffs and Amici Bypass the Record on the State's Compelling Interests.

Although Plaintiffs claim that none of the governmental interests at issue “is threatened by the right plaintiffs assert,” they only discuss one of three. They do not explain why, in their view, the homicide laws do not vindicate the State’s compelling interest in protecting other fundamental rights of its citizens. State’s Br. at 30-31; citing Mont. Const. art. II, §§ 3, 17. Nor do they address the inconsistency of physician-assisted suicide with the panoply of uncontested state laws and policies that define the practice of medicine and make suicide prevention a statewide priority, reflecting compelling and dispositive state interests. State’s Br. at 35-37. With respect to the only compelling interest they address, concern about “negative consequences for vulnerable populations such as the elderly, disabled and terminally ill,” Pls.’ Br. at 22, they ignore the record in favor of contraverted commentary by amici.

1. The Bases for the State’s Concerns are Undisputed.

Plaintiffs dismiss the State’s concerns about vulnerable patients as speculation. Pls.’ Br. at 22. The Court should consider this claim in light of the record. See Mont. R. App. P. 8. It is undisputed that one of the two Plaintiff Patients claimed to be a “competent terminally ill adult” eligible for physician-assisted suicide by Plaintiffs--four physicians and the leading physician-assisted suicide counseling organization--was in fact chronically

depressed and not terminally ill. State's Br. at 32-33. Not only do Plaintiffs refuse to address this grave error, but they continue to suggest that patient's eligibility for physician-assisted suicide. Pls.' Br. at 12 n.8. The incident proves the dangers in recognizing the vaguely-defined right Plaintiffs seek.

Plaintiffs also attempt to distinguish the Bischoff case as on the other side of multiple bright lines. Pls.' Br. at 2 n.1. Those lines "tacitly acknowledge both that assisted suicide generally poses a significant risk of harm to potentially vulnerable persons and that a corresponding need exists for state regulation except in the narrow class of cases that [Plaintiffs] view to be relatively risk-free." Sampson, 31 P.3d at 96. Yet the lines blur in application. Plaintiffs prohibit physician involvement in administering the lethal dose, thereby denying their asserted right to a physically disabled patient who cannot "ingest[] the medicine himself." Pls.' Br. at 13; see Sampson, 31 P.3d at 97 (noting the constitutional inconsistency of denying the alleged right to the disabled). They would leave able-bodied patients to prepare and administer the lethal overdose without supervision, a situation amicus ACLU has claimed violates "the right to die with dignity" elsewhere. See Smith v. Ferriter, No. ADV 2008-303, Compl. ¶ 15 (1st Jud. Dist. Apr. 3, 2008), <http://www.aclumontana.org/images/stories/documents/080503-complaint.pdf> (accessed Aug. 26, 2009) (preparation and administration of barbiturates "requires specialized knowledge and skill").

Plaintiffs further deny their alleged right to patients who are mentally incompetent at the time of their request, but ignore whether a patient becomes mentally incompetent before he attempts to self-administer the lethal overdose weeks, months, and possibly years after the physician's assistance is complete. They admit that their alleged right covers terminally ill patients regardless of physical suffering, Pls.' Br. at 8-9, while also leaving the door open to physician-assisted suicide for all mentally or physically suffering persons regardless of terminal illness, Pls.' Br. at 12 n.8 (citing *Stoelb Aff.*). Finally, they reject the sufficiency of any palliative treatment that may "surrender all awareness, ability to interact, and dignity" in favor of death and the certain surrender of these qualities. Pls.' Br. at 10. These self-contradictions would not arise from any coherent theory of constitutional rights. Rather, they reflect the necessarily legislative nature of any legal recognition of physician-assisted suicide, and illustrate that investigations like the Bischoff case would not be so cut-and-dried if physicians could claim a constitutional defense under the alleged right.

The only physician on the record who was board-certified in palliative care attested that end-of-life care as practiced in Montana is adequate to protect patients from suffering at the end of life, State's App. 2, ¶¶ 8-12, that the experience in Oregon and other jurisdictions to have legalized physician-assisted suicide raises serious concerns about vulnerable patients, ¶¶ 15-16, and that the leading

associations of physicians, psychiatrists, nurses, and palliative care practitioners oppose physician-assisted suicide ¶ 18. Plaintiffs did not address this evidence in the district court, and do not do so here. The Physician Plaintiffs acknowledged the general efficacy of palliative care, and instead focused their concerns on whether the patient could be conscious at his own death. *Autio Aff.* ¶ 14; *Loehnen Aff.* ¶ 19; *Risi Aff.* ¶ 24-25; *Speckart* ¶¶ 19-20 (D.C. Docs. 11-14).

2. The Nonrecord Assertions of Amici Do Not Support Plaintiffs.

Plaintiffs have deluged the sparse record they made in district court with volumes of contested commentary on appeal. At best the amicus briefs show a vigorous debate joined by all sectors of civil society, with every bioethical question joined by expert advocates on both sides. There is no genuine dispute, however, that the medical consensus opposes physician-assisted suicide. *State's App. 2*, ¶ 18; *cf.* *Mont. R. Civ. P. 56(c)*. At most, a few limited-membership medical associations support a legislative solution as adopted in Oregon or Washington. *See* *AMWA Br. App.*, *AAHPM Position Stmt.* (“AAHPM takes a position of ‘studied neutrality’ on the subject of whether PAD should be legally regulated or prohibited”), *ACLM Position Stmt.* (recognizing procedure only if “such person strictly complies with law specifically enacted to regulate and control such a right”), *AMSA Principles* (“SUPPORTS passage of aid in dying laws”); *AMWA Position* (“AMWA supports the passage of aid in dying laws”); *APHA Policy*

Stmt. (supports procedure with safeguards “defined in state statutes,” subject to “a moratorium” if harm shown).

B. Plaintiffs Make No Serious Argument That the Homicide Statutes Are Not Narrowly Tailored.

Plaintiffs do not explain why a prohibition on intentional killing is not narrowly tailored to the State’s compelling interests. Instead they assert without authority that the application of the homicide laws “destroys more rights than it preserves, and far more rights than necessary to accomplish any legitimate goals.” Pls.’ Br. at 25. The State is not required, however, to “shoulder the burden of demonstrating that no less restrictive set of qualifications for a license could serve the state’s interest in protecting the health of its citizens.” Wiser, ¶ 18 (quotation omitted). Otherwise, “regulation of health care professions necessary for the public’s protection would become very difficult, if not impossible, for the State to undertake.” Id. Consequently, as long as they serve this interest, the homicide laws and the entire set of statutes regulating the practice of medicine withstand constitutional scrutiny.

III. PLAINTIFFS’ PROPOSED REMEDY DISRESPECTS THE JUDICIAL AND LEGISLATIVE POWERS.

Plaintiffs claim that the Court has a duty to “determine the existence” of the right they assert. Pls.’ Br. at 6. Properly, this Court has refused to exceed its

judicial powers in that way, and instead has limited itself to interpreting the rights provided by the Constitution according to its clear language. In re Lacy, 239 Mont. 321, 325, 780 P.2d 186, 188 (1989); General Agric. Corp. v. Moore, 166 Mont. 510, 516, 534 P.2d 859, 863 (1975). Just as the People may not exercise the judicial power, Town of Whitehall v. Preece, 1998 MT 53, ¶ 23, 288 Mont. 55, 956 P.2d 743, the Court may not exercise the People’s power to enact laws and revise, alter, or amend the constitution. See Mont. Const. art. III, § 4; Mont. Const. art. XIV, §§ 2, 9. The “public policy-making power” belongs to the Legislature and the People rather than the courts. Gryczan, 283 Mont. at 454. Therefore the State has defended the laws at issue because in the case of homicide “it is against public policy to permit the conduct or the resulting harm, even though consented to.” Mont. Code Ann. § 45-2-211.

The Court also “should avoid constitutional issues whenever possible.” State v. Adkins, 2009 MT 71, ¶ 13, 349 Mont. 444, 204 P.3d 1; see also Brady v. PPL Mont., Inc., 2008 MT 177, ¶ 6, 343 Mont. 405, 185 P.3d 330 (the Court will not decide significant constitutional questions on an insufficient record). If the Court finds Plaintiffs’ policy views compelling, it could avoid Plaintiffs’ insufficiently supported constitutional arguments by recognizing a narrowly tailored consent defense to homicide where a patient faces imminent death and intractable pain not subject to palliation by medical means. Mont. Code

Ann. § 45-2-211(2)(a), (b), and (c). While such an interpretation of the consent statute would be in tension with the statutes regulating medical practice, it would at least allow the Legislature or the People to resolve that tension by addressing the underlying public policy questions, thereby preserving the proper role of the Court.

Short of a statutory consent defense, this Court should decline Plaintiffs' invitation to compel legislative action. It has never recognized its "proper role" as instructing its coequal branch the Legislature to revise facially valid laws. Pls.' Br. at 6-7. In Armstrong, this Court invalidated specific legislative amendments as unconstitutional on their face while leaving the rest of the regulatory scheme in place. Id., ¶ 75; see also Gryczan, 283 Mont. at 456 (invalidating prohibition on same-sex "deviate sexual relations" in all otherwise legal applications). That opportunity is not present here, where Plaintiffs raise a vague as-applied challenge to the generally applicable homicide statutes. The Court has refused to grant broad prospective relief in as-applied challenges that depend on a "myriad of future factual scenarios to which [a law] must be applied." See Disability Rights, ¶ 23; see also Montana Env'tl. Info. Ctr., ¶ 80 (invalidating statute "to the extent" it violates the constitution "as applied to the facts in this case"). At most, Plaintiffs' as-applied challenge would entitle them to a constitutional defense in a future case, and would not warrant injunctive or prospective relief in future criminal investigations and prosecutions. State's Br. at 38.

IV. PLAINTIFFS' CLAIMS CAN BE DECIDED WITHOUT FEES.

The masses of amici curiae disprove Plaintiffs' claim that "no one else" would have brought this case without fees approaching half a million dollars for two rounds of briefing. Pls.' Br. at 29. Almost 50 attorneys, and dozens more professionals, have stepped forward to participate in this case without any prospect of compensation. Plaintiffs' counsel has litigated and studied these issues for a dozen years without taxpayer remuneration. An award of attorneys fees in this procedurally simple case would stretch the policy goals of the private attorney general exception, typically applied in heavily litigated cases, beyond recognition. See Sunburst Sch. Dist. No. 2 v. Texaco, Inc., 2007 MT 183, ¶ 91, 338 Mont. 259, 165 P.3d 1079 (the doctrine "provides an incentive for parties to bring public interest related litigation that might otherwise be too costly to bring").

Plaintiffs acknowledge that "[t]his is a case of first impression" then make the contradictory claim that but for their action "the State would have maintained its longstanding position" against physician-assisted suicide. Pls.' Br. at 29. Yet it is Plaintiffs who chose to frame an attack on the homicide laws without attempting to raise their concerns with the Legislature. There has never been a prosecution under the 130-year-old prohibition at issue that "deprives citizens of their constitutional rights" in the way Plaintiffs claim. Pls.' Br. at 31. The State's commitment to this case arises from the Attorney General's duty to defend the

constitutionality of statutes and supervise enforcement of the criminal laws as Montana's chief law enforcement officer. Mont. Code Ann. § 2-15-501; Finke v. State ex rel. McGrath, 2003 MT 48, ¶ 8, 314 Mont. 314, 65 P.3d 576. Had Plaintiffs won their right in the Legislature, the Attorney General would vigorously defend that law too, so long as a good faith defense could be made of it. Assessing attorney fees in this case profoundly distorts a constitutional system under which citizens petition their government first, and seek judicial redress only when political processes are unavailing.

Respectfully submitted this 28th day of August, 2009.

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CERTIFICATE OF SERVICE

I hereby certify that I caused a true and accurate copy of the foregoing

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this reply brief is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double-spaced except for footnotes and for quoted and indented material; and the word count calculated by Microsoft Word for Windows is not more than 4,957 words, not averaging more than 280 words per page, excluding certificate of service and certificate of compliance.

ANTHONY JOHNSTONE