APL-2016-00129
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Court of Appeals
STATE OF NEW YORK

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,

Plaintiffs-Appellants,

—against—

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 AMICUS CURIAE

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May 10, 2017

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CORPORATE DISCLOSURE STATEMENT

Amicus curiae Compassion & Choices is an independent non-profit organization with no parents or subsidiaries. Compassion & Choices Action Network is a 501(c)(4) organization affiliated with Compassion & Choices.

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INTEREST OF AMICUS CURIAE

Compassion & Choices is a national non-profit organization dedicated to improving care and expanding choice at the end of life. *See* Aff. of Kevin Díaz ("Díaz Aff.") ¶ 2, filed contemporaneously herewith. Compassion & Choices is the oldest and largest non-profit organization dedicated to such advocacy, with more than 4,850 active volunteers throughout the United States. *Id.* It is the national leader in advocating for the rights of terminally ill patients and provides free information and education to the public through its End-of-Life Information Center and End-of-Life Consultation Service. *Id.*

Compassion & Choices has a deep interest in reversing the decision below: should this decision stand, it will continue to deprive terminally ill patients of their constitutionally protected right to make fully informed healthcare decisions at the end of their lives, and will significantly impede Compassion & Choices' efforts to ensure the best possible care for terminally ill patients.

Compassion & Choices respectfully submits this brief in support of Plaintiffs-Appellants, and along with Plaintiffs-Appellants, respectfully requests that this Court reverse the judgment of the Appellate Division, First Department. Compassion & Choices supports the arguments made by Plaintiffs-Appellants in their Opening Brief, and will not repeat them here. Rather, Compassion & Choices submits this brief to supplement those arguments with additional factors that this

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Court should consider before ruling on this appeal. In particular, Compassion & Choices wishes to ensure the constitutionally protected freedom of physicians to discuss freely with their patients all of their end-of-life medical care options without fear of criminal prosecution under Penal Law §§ 120.30 and 125.15.[1]

SUMMARY OF ARGUMENT

As Plaintiffs-Appellants detail in their Opening Brief, Penal Law §§ 120.30 and 125.15 as interpreted by the Appellate Division violate the Due Process Clause and the Equal Protection Clause of New York State's Constitution. In addition, as explained below, Penal Law §§ 120.30 and 125.15 further violate the free speech protections of the New York Constitution.

As interpreted by the Appellate Division, numerous vital communications between a physician and a patient could potentially be forbidden or severely burdened by Penal Law §§ 120.30 and 125.15. Such communications could include discussion of available options in states where medical aid in dying is explicitly authorized, the pros and cons of obtaining medical aid in dying medication versus other palliative care options such as palliative sedation,

[1] New York Penal Law Sections 120.30 and 125.15 ("Penal Law §§ 120.30 and 125.15" or the "Statute") provide that it is a felony to "promot[e] a suicide attempt" by "intentionally caus[ing] or aid[ing] another person to attempt suicide." *See* N.Y. Penal Law § 125.15 ("[a] person is guilty of manslaughter in the second degree when: … 1. he recklessly causes the death of another person; or … 3. he intentionally causes or aids another person to commit suicide"); N.Y. Penal Law § 120.30 ("A person is guilty of promoting a suicide attempt when he intentionally causes or aids another person to attempt suicide.").

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information about the possibly lethal and unintended side effects of lawfully prescribed drugs, as well as other healthcare decisions or treatments that might knowingly lead to death despite being intended to treat pain and ease suffering. Under the lower courts' interpretation of Penal Law §§ 120.30 and 125.15, all such communications could be considered to "promot[e] a suicide attempt" by "intentionally caus[ing] or aid[ing] another person to attempt suicide" or "to commit suicide," and therefore could subject physicians to criminal prosecution for the content of their speech. N.Y. Penal Law §§ 120.30 and 125.15.

However, courts have long accorded free speech protections to doctor-patient communications, particularly given the critical role of candid communication between a patient and her doctor. *See, e.g.*, *Conant v. Walters*, 309 F.3d 629, 636 (9th Cir. 2002) ("Physicians must be able to speak frankly and openly to patients"); *Planned Parenthood Minnesota, North Dakota, South Dakota v. Rounds*, 686 F.3d 889, 893 (8th Cir. 2012) (noting that the State cannot compel a physician to "speak the State's ideological message"). Because Penal Law §§ 120.30 and 125.15, as interpreted by the Appellate Division, include a content-based regulation of speech, they cannot be justified under the free speech provisions of the New York State Constitution unless they are narrowly tailored to serve a compelling state interest. Penal Law §§ 120.30 and 125.15 are not so tailored: the integrity of the medical profession may be more narrowly and directly

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controlled through medical professional standards that do not suffer the same constitutional infirmities as this Statute. Additionally, Penal Law §§ 120.30 and 125.15 infringe the free speech rights of *patients* to receive candid advice from their physicians. Thus, Penal Law §§ 120.30 and 125.15 are unconstitutional for violating the free speech protections of Article I, Section 8 of the New York Constitution.

Moreover, this Court need not—and should not—wait for the legislature to address the vital issue of infringed constitutional rights raised by this litigation. Courts regularly consider issues of important public policy, and a decision by this Court now to recognize the constitutional rights of terminally ill patients and their doctors will protect those patients and doctors from deprivation of those rights while they wait for the legislature to address this issue—a wait that many terminally ill patients simply cannot afford. Thus, this Court should act now to protect terminally ill patients' rights—including their rights to freedom of speech, due process, or equal protection—and reverse the decision of the Appellate Division. And at a minimum, this Court should ensure that any decision reached does not impede the full, honest, and constitutionally-protected communication between a doctor and a patient about a full range of end-of-life options.

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ARGUMENT

I. PENAL LAW §§ 120.30 AND 125.15 VIOLATE THE FREE SPEECH PROVISIONS OF THE NEW YORK CONSTITUTION

The New York Constitution prohibits the enactment of laws abridging freedom of speech. N.Y. Const. art. I, § 8. As a general matter, a government regulation "must not be aimed at suppressing the content" of speech. *See Town of Islip v. Caviglia*, 73 N.Y.2d 544, 551 (1989). If a law "imposes a restriction on the content of protected speech, it is invalid unless" the government "can demonstrate that it passes strict scrutiny—that is, unless it is justified by a compelling government interest and is narrowly drawn to serve that interest." *People v. Marquan M.*, 24 N.Y.3d 1, 10 (2014) (quoting *Brown v. Entm't Merchs. Ass'n*, 564 U.S. 786, 799 (2011)); *see also Town of Islip*, 73 N.Y.2d at 556 n.5. Indeed, the protection afforded by the guarantees of free press and speech in the New York Constitution is often broader than what is required by the Federal Constitution. *See, e.g.*, *People ex rel. Arcara v. Cloud Books*, 68 N.Y.2d 553, 557-558 (1986) ("[T]he minimal national standard established by the Supreme Court for First Amendment rights cannot be considered dispositive in determining the scope of this State's constitutional guarantee of freedom of expression.").

As interpreted by the Appellate Division, Penal Law §§ 120.30 and 125.15 would effectively prevent physicians from discussing various end-of-life options, including medical aid in dying, with their patients because of the risk that such

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speech could be found to "promot[e] a suicide attempt." N.Y. Penal Law § 120.30. Such a restriction on doctor-patient communication is content-based regulation, which clearly violates the free speech protections enshrined in the New York Constitution. Penal Law §§ 120.30 and 125.15 are not narrowly tailored to fulfill a compelling state interest, and are therefore not constitutional.

A. The Appellate Division's ruling would prevent physicians from providing information related to medical aid in dying to terminally ill patients.

The Appellate Division's ruling that Penal Law §§ 120.30 and 125.15 prohibit medical aid in dying effectively prevents a physician from providing information about all relevant end-of-life medical options.[2] For example, as the Statute has been interpreted by the Appellate Division, a doctor may well hesitate to discuss specifics of various medical options, including medical aid in dying, because of a legitimate fear of prosecution should a patient ultimately act upon that information. Although the Appellate Division did not specifically address the free speech implications of its ruling, that ruling was not limited to the physical act of writing a prescription. *See generally*, *Myers v. Schneiderman*, 140 A.D.3d 51 (N.Y. App. Div. 2016). As discussed in detail below, Penal Law §§ 120.30 and 125.15, as interpreted by the Appellate Division, not only cover writing a

[2] This potentially encompasses providing information about medical aid-in-dying options in states where such treatment has been authorized. For example, a physician could potentially be prosecuted if a patient lawfully obtained aid-in-dying medication because of information provided by that physician and were in New York when they self-administered the medication.

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prescription, but apply to information from a physician that would ease anxiety and suffering but could result in a patient taking their own life. Hence, under the ruling below, a physician could be prosecuted for communicating information related to various end-of-life options, including aid in dying, because it would be considered to be "aid[ing] or "caus[ing]" another to commit suicide. In addition, such a wide net does nothing to recognize the distinct nature of a physician providing information related to the option of medical aid in dying compared to a non-physician goading a physically healthy person in mental distress to commit suicide. *See* N.Y. Penal Law § 120.30. Such concern by a physician would improperly chill their speech based on the content of that speech, even when it is the physician's intent to provide information that could enable terminally ill patients to make appropriate healthcare decisions.

If the lower court's ruling stands, Penal Law §§ 120.30 and 125.15 would prohibit discussions of medical aid in dying between a physician and a patient despite the fact that medical aid in dying is already explicitly authorized in seven U.S. jurisdictions.[3] Indeed, New York courts have previously held that a person may be criminally accountable for someone's death if it can be demonstrated that

[3] Medical aid in dying is authorized in California, Colorado, Montana, Oregon, Vermont, Washington state and Washington, D.C. *See Understanding Medical Aid In Dying*, COMPASSION & CHOICES, https://www.compassionandchoices.org/understanding-medical-aid-in-dying/ (last accessed Apr. 18, 2017).

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her actions were "an actual contributory cause of death, in the sense that they forged a link in the chain of causes which actually brought about the death." *People v. Duffy*, 79 N.Y.2d 611, 616 (1992) (internal quotation marks omitted). Thus, even if the decedent's own actions were the immediate cause of death, a defendant who contributed to that death could potentially be found liable if it were foreseeable that the decedent would end her own life. *See id.* A physician in New York could be reasonably concerned that she may be prosecuted on the grounds that it would have been foreseeable that a terminally ill patient would take her life after receiving information from the physician about medical aid in dying. Moreover, New York courts have concluded that "aiding … another person to commit suicide … encompasses both active and passive assistance." *People v. Minor*, 111 A.D.3d 198, 204-05 (N.Y. App. Div. 2013) (internal quotation marks omitted). Thus, even if a physician did not "actively" assist a patient in taking her life, the physician may be liable for passively assisting suicide by providing information which could be relied upon to bring about death. Indeed, the Second Circuit in *Quill v. Vacco* speculated, based on the 1937 New York Law Revision Report, that Penal Law §§ 120.30 and 125.15(3) seemed to be "concerned primarily with those who *talked others* into killing themselves." *Quill v. Vacco*, 80 F.3d 716, 734 n.6 (2d Cir. 1996) (Calabresi, J., concurring) (emphasis added), *rev'd on other grounds*, 521 U.S. 793 (1997). *See also id.* ("[The Law Revision

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Report] noted the important difference between aiding someone who had a mind-set to commit suicide and the 'more dangerous' person 'working upon the mind of a susceptible person to induce suicide.'"). That is a far cry from a physician answering basic questions from terminally ill patients about end-of-life medical care, and yet, such speech could lead to prosecution. In sum, based on New York courts' interpretations of Penal Law §§ 120.30 and 125.15 to date, a physician could reasonably conclude that discussions of medical aid in dying with a patient may lead to criminal prosecution under this Statute.

The fact that Penal Law §§ 120.30 and 125.15 could be interpreted to cover physician speech is consistent with the fact that other states have recognized the need to specifically *limit* the scope of criminalized "assistance" in their statutes that potentially implicate medical aid in dying to avoid violating freedom of speech. For example, Georgia revised its statute related to assisted suicide after it was invalidated by the Georgia Supreme Court for unconstitutionally proscribing certain types of speech. *See* Ga. Code § 16-5-5; *Final Exit Network, Inc. v. State*, 722 S.E.2d 722, 725 (Ga. 2012). Similarly, the Minnesota Supreme Court found that a state statute violated free speech to the extent that that statute punished "advising" or "encouraging" taking one's own life. *State v. Melchert-Dinkel*, 844 N.W.2d 13, 23-24 (Minn. 2014). Because Penal Law §§ 120.30 and 125.15 likewise apply to such speech, a physician in New York may reasonably fear

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liability for a patient's death based on speech alone. Indeed, unlike the updated law in Georgia, which requires knowing and willful assistance with "actual knowledge that a person intends to commit suicide," New York law permits a finding of liability for mere recklessness. *See* Ga. Code § 16-5-5; Penal Law § 125.15; *Duffy*, 79 N.Y.2d 611, 616 (concluding that a defendant can be convicted for "reckless conduct which results in another person's committing suicide" under N.Y. Penal § 125.15(1)).

Given the wide scope of Penal Law §§ 120.30 and 125.15, the Appellate Division's finding that this law applies to medical aid in dying prevents physicians from freely informing terminally ill patients about all available end-of-life medical care options.

B. The New York Constitution protects the ability of physicians to freely discuss truthful end-of-life healthcare decisions, including aid in dying, with terminally ill patients.

It is well established that prohibitions of pure speech must be "sharply limited to words which, by their utterance alone, inflict injury or tend naturally to evoke immediate violence or other breach of the peace[.]" *People v. Dietze*, 75 N.Y.2d 47, 52 (1989). The free speech provision of the New York Constitution provides even broader protection than is provided under the Federal Constitution.[4]

[4] Under the First Amendment of the U.S. Constitution, the government generally "has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *United States v. Stevens*, 559 U.S. 460, 468 (2010) (internal quotation marks omitted).

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See N.Y. Const. art. 1, § 8 ("Every citizen may freely speak, write and publish his or her sentiments on all subjects, being responsible for the abuse of that right; and no law shall be passed to restrain or abridge the liberty of speech or of the press."); *Town of Islip*, 73 N.Y.2d at 574 ("This court has repeatedly stated that New York State offers greater freedom of speech guarantees under our State Constitution than the minimal protection afforded individuals under the Federal Constitution."); *Cloud Books*, 68 N.Y.2d at 557–59 (finding that the New York Constitution's free speech provision would be violated if an adult book store was shut down by the State for illegal sexual activities on its premises where the Supreme Court did not find a violation of the First Amendment); *People v. Schrader*, 162 Misc. 2d 789, 795 (N.Y. Crim. Ct. 1994) ("Even if begging were not protected speech under the First Amendment, it would be protected speech under the greater protection of the New York Constitution."). As *Schrader* explains:

> The language of Article 1, § 8 is not only unique from that of the First Amendment but is also an express grant of the right to speak freely. … By comparison, the First Amendment is only a restraint on the government's power to make no laws "abridging the freedom of speech". Accordingly, [New York courts have] the authority to find a broader free speech protection under the New York Constitution.

Id.; *see also O'Neill v. Oakgrove Constr.*, 71 N.Y.2d 521, 528–29 (1988) (recognizing "the expansive language of our State constitutional [free speech] guarantee" in comparison with the First Amendment of the U.S. Constitution).

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In addition to recognizing the importance of free speech generally, courts have also long accorded free speech protections in particular to doctor-patient communications, recognizing the critical role of candid communication between a doctor and a patient in what is often, by its very nature, a highly personal relationship. *Conant*, 309 F.3d at 636 ("Physicians must be able to speak frankly and openly to patients. That need has been recognized by the courts through the application of the common law doctor-patient privilege."); *see also Planned Parenthood*, 686 F.3d at 893 (noting that under the First Amendment, the State cannot compel a physician to "speak the State's ideological message," but it can "require a physician to provide truthful, non-misleading information" to the patient). For example, the United States Supreme Court has found that provisions of a law that prohibited advertising and promotion of particular compounded drugs violated the First Amendment. *See Thompson v. Western States Medical Ctr*., 535 U.S. 357, 377 (2002). Similarly, in *Conant v. Walters*, the Ninth Circuit protected physicians' First Amendment rights by enjoining the federal government from initiating proceedings against physicians for recommending the use of medical marijuana. 309 F.3d at 638-639.

New York, in particular, has recognized the importance of doctor-patient communications. In fact, New York was the first state in the country to enact a statutory privilege protecting the confidentiality of information acquired by

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physicians while treating patients. *See Dillenbeck v. Hess*, 73 N.Y.2d 278, 284 (1989). In discussing the doctor-patient privilege, this Court has held that "[t]he rationale supporting it is that the protection of confidential information from involuntary disclosure will promote uninhibited communication between patient and physician for the purpose of obtaining appropriate medical treatment." *People v. Sinski*, 88 N.Y.2d 487, 491 (1996).

A physician's ability to freely and thoroughly discuss all end-of-life medical treatment options, including medical aid in dying, with a terminally ill patient—perhaps one of the most profound and personal conversations a physician can have with a patient—falls squarely within confidentiality protections of doctor-patient communications. It is a conversation that is fundamental to the operation of well-settled law: New York citizens have a broad fundamental right to bodily self-determination and to control the course of their own medical treatment. *See Rivers v. Katz*, 67 N.Y.2d 485, 492 (1996). In particular, under free speech protections, a physician cannot be prohibited from dispensing medically accurate information, such as what might be a lethal dose of a drug, by the assumption that a patient may be harmed by consuming the lethal dose. In fact, such specific information might be compelled by a standard of care so that patients do not consume medications that could unintentionally cause harm. Both *Conant* and *Thompson* rejected the argument that the First Amendment rights of physicians can be restricted under the

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assumption that "people would make bad decisions if given truthful information." *See Conant*, 309 F.3d at 637 (quoting *Thompson*, 535 U.S. at 359). Indeed, there could be several responses by a patient to a physician's discussion of medical aid in dying apart from actually obtaining and self-administering a lethal dosage of medication. For example, a patient interested in controlling pain or anxiety may be warned about not over-dosing on a medication. Or a request for medical aid in dying could prompt a discussion that could reveal an unmet need or concern of the patient that then could be treated. Additionally, a patient interested in seeking medical aid in dying could petition the government to change the law based on information received from a doctor about medical aid in dying. As the Ninth Circuit has recognized, restricting these types of discussions "compromises a patient's meaningful participation in public discourse," contrary to the goals of the First Amendment. *See Conant*, 309 F.3d at 634.

In sum, a physician's communication to a terminally ill patient about all aspects of end-of-life medical care, including medical aid in dying, is speech protected by the New York Constitution.

C. Penal Law §§ 120.30 and 125.15 involve content-based regulation, and are not narrowly tailored to serve the state's interests.

If a law "imposes a restriction on the content of protected speech, it is invalid unless" the government "can demonstrate that it passes strict scrutiny—that is, unless it is justified by a compelling government interest and is narrowly drawn

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to serve that interest." *Marquan M.*, 24 N.Y.3d at 10 (quoting *Brown*, 564 U.S. at 799**)**. Penal Law §§ 120.30 and 125.15 are unconstitutional because they regulate physicians' speech based on content, and are not narrowly tailored to serve the state's interests.

It is clear that Penal Law §§ 120.30 and 125.15 regulate speech based on the content of the speech. Indeed, it is similar to the federal policy in *Conant*, which proscribed a doctor's "action of recommending … Schedule I controlled substances," a policy that was found to unconstitutionally impinge on free speech rights. *Conant*, 309 F.3d at 632. Like the challenged policy in *Conant*, Penal Law §§ 120.30 and 125.15 seek "to punish physicians [based] on the content of doctor-patient communications." *Id.* at 637. Like *Conant*, where "[o]nly doctor-patient conversations that include[d] discussions of the medical use of marijuana trigger[ed] the policy," *id.*, only certain doctor-patient communications that are deemed related to aiding patients in dying are implicated by Penal Law §§ 120.30 and 125.15.

As content-based regulation, Penal Law §§ 120.30 and 125.15 must satisfy strict scrutiny, and can only do so if the State establishes that they are narrowly tailored to serve the State's compelling interests. Penal Law §§ 120.30 and 125.15 clearly fail this requirement. Courts have repeatedly held truthful speech cannot be prohibited merely based on the listener's reaction to it. *See United States v.*

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Caronia, 703 F.3d 149, 167 (2d Cir. 2012) (quoting *Thompson*, 535 U.S. at 367, as "discussing the 'general rule' that 'the speaker and the audience, not the government, assess the value of the information presented'"); *see also Virginia Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 769-70 (1976) (holding that the legislature may not restrict compounded drug advertising based on fear that the advertising will fool "too many unwitting customers"). Moreover, if the State is concerned with the integrity of the medical profession or with patients being unfairly persuaded, these concerns can be addressed and controlled by standards within the medical profession regarding informed, truthful medical opinions and advice. *See* Brief of Plaintiffs, pg. 21 (citing Kress Aff. ¶ 12 (R. 439-40); Morris Aff. ¶ 16 (R. 445-46)). While doctor-patient communications are not immune to proper, narrowly-tailored regulations, Penal Law §§ 120.30 and 125.15 are overbroad because they sweep within their scope a substantial amount of protected speech. By not providing a clear distinction between allowable versus prohibited discussions of end-of-life healthcare options, "the statute … leaves doctors and patients 'no security for free discussion.'" *Conant*, 309 F.3d at 639.

Moreover, the State cannot avoid free speech scrutiny by arguing that "the impact of the State's action is not direct but only incidental." *Cloud Books*, 68 N.Y.2d at 558. As this Court has stated previously, "[t]he crucial factor in determining whether State action affects freedom of expression is the impact of the

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action on the protected activity and not the nature of the activity which prompted the government to act. The test, in traditional terms, is not who is aimed at but who is hit." *Id.* "It is also settled that when government regulation designed to carry out a legitimate and important State objective would incidentally burden free expression, the government's action cannot be sustained unless the State can prove that it is no broader than needed to achieve its purpose[.]" *Id.* at 558.

Thus, Penal Law §§ 120.30 and 125.15 violate the free speech provisions of the New York Constitution by imposing a content-based restriction on physician communications that cannot withstand strict scrutiny.

D. Penal Law §§ 120.30 and 125.15 unconstitutionally limit the rights of patients to medical information.

Under the free speech provisions of the New York Constitution, there is not only a right of free speech, but also a right to listen and be informed. This Court explicitly recognized a right to receive information in *Matter of Von Wiegen*, 63 N.Y.2d 163 (1984), by holding that a blanket prohibition on the solicitation by mail of accident victims violated rights of free expression under the First Amendment. Specifically, this Court held that "the State cannot establish interests of sufficient magnitude to override *the public's interest in receiving information* on the availability of legal services." *Id.* at 175 (emphasis added). *See also Rand v. Hearst Corp.*, 298 N.Y.S.2d 405, 409 (N.Y. Sup. Ct. 1969) *aff'd*, 26 N.Y.2d 806 (N.Y. Sup. Ct. 1970) (holding that a law proscribing use of a person's name or

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picture in advertising must be "construed narrowly and not used to curtail the right of free speech, or free press, or to shut off the publication of matters newsworthy or of public interest, or to prevent comment on matters in which the public has an interest or the *right to be informed*" (emphasis added)).[5]

Thus, it is not merely the right of physicians to speak that is protected by free speech rights—the rights of willing patients to listen to and receive information from their physicians are implicated equally, if not more so. Patients' rights to listen to information have even been recognized in the Federal context. *See Conant*, 309 F.3d at 636 (noting that a government policy forbidding the recommendation of medical marijuana "strike[s] at core First Amendment interests of doctors and *patients*.") (emphasis added). This is particularly telling, given that free speech protections under the New York Constitution are broader than those under the Federal Constitution. *See, e.g., Town of Islip*, 73 N.Y.2d at 574; *Cloud Books*, 68 N.Y.2d at 557-558; *Schrader*, 162 Misc.2d at 795. Indeed, it is the patients who face the greatest risk of harm when these rights are not protected, as Judge Kozinszki articulately noted in his concurrence in *Conant*:

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[5] *See also, e.g., Virginia*, 425 U.S. at 756 ("[W]here a speaker exists, as is the case here, the protection afforded is to the communication, to its source and to its recipients both."); *Pac. Gas & Elec. Co. v. Pub. Utilities Comm'n of California*, 475 U.S. 1, 8 (1986) ("The constitutional guarantee of free speech serves significant societal interests *wholly apart from* the speaker's interest in self-expression." (emphasis added)); *Bd. of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico*, 457 U.S. 853, 867 (1982) (stating that the "right to receive information and ideas … is an inherent corollary of the rights of free speech and press that are explicitly guaranteed by the Constitution").

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> Those immediately and directly affected by the federal government's policy are the patients, who will be denied information crucial to their well-being[.] … Enforcement of the federal policy will cut such patients off from competent medical advice and leave them to decide on their own whether to use marijuana to alleviate excruciating pain, nausea, anorexia or similar symptoms. … A far more likely consequence is that, in the absence of sound medical advice, many patients desperate for relief from debilitating pain or nausea would self-medicate, and wind up administering the wrong dose or frequency, or use the drug where a physician would advise against it.

309 F.3d at 640, 644. Under the free speech protections of the New York Constitution, then, patients have a right to receive candid medical advice from their doctors about end-of-life options, including medical aid in dying, which is independent of and beyond their doctors' right to provide that advice. Without such advice, patients would be confronted with the inability to make fully informed end-of-life medical treatment choices. Penal Law §§ 120.30 and 125.15 violate these patients' free speech rights to receive this candid medical advice, and are therefore unconstitutional and invalid.

* * *

For the foregoing reasons, this Court should find Penal Law §§ 120.30 and 125.15 unconstitutional as a violation of free speech under the New York Constitution. As discussed, New York would not be the first state in the country to find laws related to assisted suicide unconstitutional as a violation of free speech, as the State Supreme Courts of Georgia and Minnesota have already concluded that these laws risk violating free speech rights if not carefully limited. *See supra*

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§ I.A. However, if the court declines to reach this issue because it was not raised by the Plaintiffs-Appellants, any ruling by this Court should specifically preserve this issue so that it can be addressed at a later date. Nonetheless, amicus believes that New York should rule that Penal Law §§ 120.30 and 125.15 are unconstitutional, and reverse the lower courts' dismissal of Plaintiffs-Appellants' Complaint.

II. THE COURT NEED NOT AND SHOULD NOT WAIT FOR THE LEGISLATURE TO ADDRESS THIS ISSUE

A. The courts can and should evaluate the public policy implications of Plaintiffs-Appellants' arguments.

The Court should not delegate its duty to protect the constitutional rights of physicians and terminally ill patients to the legislature merely because this case raises questions of public policy. This Court has recognized that its duty to decide questions of law and public policy, such as whether terminally ill patients have a right to medical aid in dying, or information about medical aid in dying, is not impeded by the possibility that the question may, at some point, also be addressed by the legislature. *People v. Ohrenstein*, 153 A.D.2d 342, 411 (1989), *aff'd* 77 N.Y.2d 38 (1990) ("Merely because a case may have political overtones, involve public policy, or implicate some seemingly internal affairs of the executive or legislative branches does not, however, render the matter nonjusticiable. Courts still have the responsibility to decide questions of law, even if the particular case

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also involves a political issue or legislative matter.") This duty has been recognized by the United States Supreme Court as well. Indeed, in *Obergefell v. Hodges*, the U.S. Supreme Court emphasized the long-accepted principle that matters concerning constitutional rights are justiciable irrespective of whether the rights may later be addressed by some act of the legislature. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2605 (2015) ("The dynamic of our constitutional system is that individuals need not await legislative action before asserting a fundamental right. … An individual can invoke a right to constitutional protection when he or she is harmed, even if the broader public disagrees and even if the legislature refuses to act.")

Moreover, New York courts consider public policy as a matter of course in determining many legal questions. When determining whether injunctions should be granted, for example (which is not at issue in this matter), one prong of legal analysis is whether there is a "balance of equities tipping in the moving party's favor." *Doe v. Axelrod*, 73 N.Y.2d 748, 750 (1988). Of relevance to this matter, this "balance of equities" consideration within the overall injunctive relief analysis requires the court to contemplate public policy by "weigh[ing] the interest of the general public as well as the interests of the parties to the litigation." *Destiny USA Holdings, LLC v. Citigroup Global Markets Realty Corp.*, 69 A.D.3d 212, 223 (N.Y. App. Div. 2009). New York courts also consider public policy implications

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of legal decisions regarding the enforcement of contracts, *see, e.g., N.Y. City Transit Auth. v. Transp. Workers Union of Am., Local 100, AFL-CIO*, 99 N.Y.2d 1, 6-7 (2002), and certain arbitration orders, *see, e.g., N.Y. State Corr. Officers & Police Benevolent Ass'n, Inc. v. State*, 94 N.Y.2d 321, 327 (1999). In addition, courts must decide whether a matter is "of great public interest" when deciding whether a citizen may maintain a mandamus proceeding to compel a public officer to do his or her duty with respect to that matter. *Marone v. Nassau County*, 39 Misc.3d 1034, 1040 (N.Y. Sup. Ct. 2013). Addressing issues that implicate public policy is not the exclusive domain of the legislature, and the Court can and must consider the full breadth of public policy supporting medical aid in dying that has developed in New York since *Vacco v. Quill* was decided in 1997. *See generally Vacco v. Quill*, 521 U.S. 793 (1997).

Suffering patients who develop terminal diseases and wish to avail themselves of medical aid in dying before the New York legislature is willing to address the issue are appropriately before this Court seeking redress of their rights. The lack of urgency with which the legislature seeks to clarify the law does nothing to bar the courts from protecting the rights of individuals within their jurisdictions. Regardless of the ultimate ruling, this Court should not infringe the right of New York patients to obtain truthful answers and full information from their physicians when it comes to their end-of-life medical care options. The

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United States Supreme Court in *Obergefell*, while protecting the rights of same-sex couples to marry, recognized the harm that results from delaying judicial action to protect rights:

> This is not the first time the Court has been asked to adopt a cautious approach to recognizing and protecting fundamental rights. In [*Bowers v. Hardwick*, 478 U.S. 186 (1986)], a bare majority upheld a law criminalizing same-sex intimacy. … That approach might have been viewed as a cautious endorsement of the democratic process, which had only just begun to consider the rights of gays and lesbians. Yet, in effect, *Bowers* upheld state action that denied gays and lesbians a fundamental right and caused them pain and humiliation. … Although Bowers was eventually repudiated in [*Lawrence v. Texas*, 539 U.S. 558 (2003)], men and women were harmed in the interim, and the substantial effects of these injuries no doubt lingered long after Bowers was overruled. Dignitary wounds cannot always be healed with the stroke of a pen.

Obergefell, 135 S. Ct. at 2606. Similarly, terminally ill patients who wish to exercise their fundamental right to self-determination over their bodies by opting for medical aid in dying will suffer needlessly should this Court decide to wait for the legislative process to enact a statute that provides for medical aid in dying.

B. Judicial recognition of the rights of terminally ill patients need not deter legislative attention to the need for appropriate regulation.

To the extent this Court is concerned with the need for regulation of medical aid in dying beyond the medical standard of care, judicial recognition that terminally ill patients have a right to information and the option of medical aid in dying is likely to stimulate—and will almost certainly not deter—careful legislative action. The judicial and political branches are partners, not adversaries,

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in guaranteeing citizens' fundamental rights and protecting those rights against infringement or abuse. *See* William Bradford, *"Another Such Victory and We Are Undone": A Call to An American Indian Declaration of Independence*, 40 TULSA L. REV. 71, 106 n.204 (2004) ("In other words, the U.S. legal system, through the exercise of judicial review, simultaneously promotes the responsiveness of the political branches to the collective interests of majorities while ensuring that the fundamental rights of minorities are protected against majoritarian incursions."). For example, the Connecticut legislature codified the legality of same-sex marriage following the Connecticut Supreme Court's decision in *Kerrigan v. Commissioner of Public Health*, 957 A.2d 407 (Conn. 2008), which held that Connecticut's state constitution required equal marriage rights for same-sex couples. *See* Conn. Gen. Stat. § 46b-20 (2009) (redefining "marriage" as "the legal union of two persons"). Presently, the New York legislature is considering a bill that would permit mentally capable, terminally ill patients to request a prescription from their physicians for medication which, upon self-administration, would bring about death and thus end their suffering. *See* N.Y. Senate-Assembly Bill S3151, A2383. Known as the "Medical Aid in Dying Act," this bill passed in the Assembly Health Committee by a vote in 2016 of 14 to 11,[6] and contains numerous procedures

[6] *See Medical Aid In Dying Act Wins Swift Assembly Committee Vote*, COMPASSION & CHOICES, https://www.compassionandchoices.org/medical-aid-in-dying-act-wins-swift-assembly-committee-vote/ (May 23, 2016); *see also* Díaz Aff. ¶ 3.

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intended to codify and supplement the medical standard of care.[7] This Court's recognition of the important right to medical aid in dying will encourage the legislature to act further on this legislation and ensure the proper regulation of this right, as opposed to maintaining the unconstitutional status quo. And, if this court so desires, the effective date of any decision could allow for a reasonable opportunity for the legislature to enact legislation consistent with this Court's ruling.

CONCLUSION

For the reasons stated herein and in the brief of Plaintiffs-Appellants, this Court should reverse the judgment of the Appellate Division. At a minimum, this Court should find that Penal Law §§ 120.30 and 125.15 do not restrict the ability of physicians to discuss freely with their patients all of their end-of-life medical care options without fear of criminal prosecution.

[7] *See, e.g.*, N.Y. Senate-Assembly Bill S3151, A2383 at § 2899-i ("[I]f the attending physician or the consulting physician believes that the patient may lack capacity, such physician shall refer the patient to a mental health professional for a determination of whether the patient has capacity.").

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Respectfully submitted,

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