IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF VERMONT

VERMONT ALLIANCE FOR ETHICAL HEALTHCARE, INC.; CHRISTIAN MEDICAL & DENTAL ASSOCIATIONS, INC.,

Plaintiffs,

v.

WILLIAM K. HOSER, in his official capacity as Chair of the Vermont Board of Medical Practice; MICHAEL A. DREW, M.D., ALLEN EVANS, FAISAL GILL, ROBERT G. HAYWARD, M.D., PATRICIA HUNTER, DAVID A. JENKINS, RICHARD CLATTENBURG, M.D., LEO LECOURS, SARAH MCCLAIN, CHRISTINE PAYNE, M.D., JOSHUA A. PLAVIN, M.D., HARVEY S. REICH, M.D., GARY BRENT BURGEE, M.D., MARGA S. SPROUL, M.D., RICHARD BERNSTEIN, M.D., DAVID LIEBOW, D.P.M., in their official capacities as Members of the Vermont Board of Medical Practice; JAMES C. CONDOS, in his official capacity as Secretary of State of Vermont; and COLIN R. BENJAMIN, in his official Capacity as Director of the Office of Professional Regulation,

Defendants.

Case No. 5:16-cv-205

DEFENDANT-INTERVENORS' MOTION TO STRIKE DOCKET ENTRY #57

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Monica van de Ven,[1] Benedict Underhill, Compassion & Choices, and Patient Choices Vermont ("Defendant-Intervenors"), by and through undersigned counsel, hereby move to strike Docket Entry #57, a document titled Consent Agreement and Stipulation (the "Consent Agreement") entered by Plaintiffs, Vermont Alliance for Ethical Healthcare, Inc. and Christian Medical & Dental Associations, Inc., and Defendants William K. Hoser, et al. ("Defendants"), without the participation of, or input from, the Defendants-Intervenors. The grounds for this motion are set forth below.

BACKGROUND

On December 1, 2016, this Court granted Defendant-Intervenors Motion to Intervene, and explicitly acknowledged that the "intervenors have strong personal reasons for resisting the type of silence or boycott which Plaintiffs seek to preserve for themselves on an issue of patient choice." *See* Decision on Motion to Intervene, Dec. 1, 2016 ("Decision"), at 4. However, notwithstanding this Court's finding that "[a]ll four intervenors have interests which could be impaired if Plaintiffs prevailed" with respect to their interpretation of Act 39, neither the Plaintiffs nor the Defendants informed Defendant-Intervenors that they were negotiating a Consent Agreement that could apply a restrictive interpretation to Act 39's informed consent requirement, against the interests of Defendant-Intervenors and terminally-ill patients in Vermont. *See* Decision at 5. Indeed, Defendant-Intervenors only inadvertently learned about the Consent Agreement on the evening before Plaintiffs' filing of the Consent Agreement with the

[1] Defendant-Intervenor Monica van de Ven passed away on January 27, 2017, and, accordingly, on April 4, 2017 Defendant-Intervenors filed a Notice of Passing. *See* Notice of Passing of Monica van de Ven, April 4, 2017, ECF No. 53. Pursuant to Rule 25(a), Defendant-Intervenors had 90 days after service of a statement noting a party's death in which to file a motion for substitution. *See* Fed. R. Civ. P. 25. In light of the Court's April 5, 2017 order dismissing the case, Defendant-Intervenors deemed it unnecessary to file a Rule 25(a) motion substituting Ms. van de Ven with an eligible party. In lieu of filing a Rule 25(a) motion at this juncture, the Court may treat this Motion to Strike as submitted by the surviving Defendant-Intervenors.

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Court on May 5, 2017. *See* Order Dismissing Complaint, Apr. 5, 2017 ("Order"). Defendant-Intervenors did not receive a copy of the Consent Agreement until the late afternoon of May 5, 2017—which was also the deadline to file an appeal of the Court's Order dismissing the case. Upon reading the Consent Agreement and recognizing the negative impact it could have on the citizens of Vermont, and to preserve the ability to contest the legality of the Consent Agreement, Defendant-Intervenors immediately filed an appeal of the Court's Order just hours before the May 5, 2017 appeal deadline. Defendant-Intervenors subsequently entered into a discussion with the Attorney General's office about the negative implications of the Consent Agreement, and subsequently moved to withdraw their appeal, which the Second Circuit granted on May 22, 2017.

ARGUMENT

This Court has the inherent right to manage its docket "with a view toward the efficient and expedient resolution of cases," which includes the right to strike any pleading that is improperly filed, or that contains inappropriate material. *Dietz v. Bouldin*, 136 S. Ct. 1885, 1892 (2016). The Consent Agreement, which was entered on May 5, 2017, provided those parties' stipulated "interpretation" of 18 V.S.A. § 5281-5293 ("Act 39"). *See* Consent Agreement, May 5, 2017, ECF No. 57. The Court should strike the Consent Agreement from the official record for the following reasons: (1) it improperly stipulates to a substantive interpretation of state law in this action where the Court only made a jurisdictional, non-substantive ruling, (2) the stipulation attempts to impact the public interest, in particular, the rights of terminally-ill patients without the input or consent of the Defendant-Intervenors, and (3) it attempts to establish a potentially unreasonably restrictive interpretation of Act 39 in direct contradiction of the plain language of the statute, as well as this Court's Order.

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I. Plaintiffs and Defendants Have no Authority to Stipulate to the Legal Meaning and Application of Act 39.

It is well-settled that litigants may not stipulate to what the law is, even if one of the party is the government. *See Sinicropi v. Milone*, 915 F.2d 66, 68 (2d Cir. 1990) ("A court, for example, is not bound to accept stipulations regarding questions of law") (citing *Estate of Sanford v. Comm'r of Internal Revenue*, 308 U.S. 39, 51, (1939)); *see also Albaum v. Carey*, 282 F. Supp. 3, 7 (E.D.N.Y. 1968) (holding that a district court is "not bound, particularly in a case involving the constitutionality of an important state statute, to accept the parties' agreement" as to their interpretation of that state statute). The parties' stipulation here is particularly egregious because it attempts to define, on the record, the legal meaning of Act 39, notwithstanding the fact that the Court dismissed this action on the purely jurisdictional question of standing, and declined to address the substantive merits of the parties' arguments regarding the interpretation and application of Act 39 to the citizens of Vermont. It is the right of the Vermont legislature to write the law, and that of the courts to interpret and apply the law—Plaintiffs and Defendants should not be permitted, by mere Consent Agreement, to circumvent the legislature and judiciary and establish the legal scope of a statute that will affect the healthcare rights of countless Vermont citizens. *See, e.g., Brigham v. State*, 166 Vt. 246, 692 A.2d 384 (Vt. 1997) (acknowledging that the remedy for addressing a system for funding public education found unconstitutional by the court "properly lies with the Legislature"). Further, interpreting Act 39 is primarily the province of Vermont courts, and should not be provided under the auspices of a federal court lacking subject-matter jurisdiction. *See Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 106, 104 S. Ct. 900, 911 (1984) ("[I]t is difficult to think of a greater intrusion on state sovereignty than when a federal court instructs state officials on how to

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conform their conduct to state law. Such a result conflicts directly with the principles of federalism that underlie the Eleventh Amendment.").

II. The Consent Agreement Improperly Infringes on the Rights and Interests of Individuals Who Are Not Party to the Agreement.

Similarly, stipulations that adversely impact the public interest are often deemed invalid. *See Mary R. v. B. & R. Corp.*, 149 Cal. App. 3d 308, 196 Cal. Rptr. 871 (Ct. App. 1983) (finding that a trial court's stipulated confidentiality order in a case involving allegations of sexual molestation of a patient by a physician was against public policy because it shielded the doctor from further governmental investigation). Courts are required to disregard stipulations which involve "matters of public interest transcending the rights of the litigants [] involved." *West v. Bank of Commerce & Trusts*, 167 F.2d 664, 666 (4th Cir. 1948). There can be no doubt that the Consent Agreement, which defines the "legal or professional obligation[s]" of medical providers under Act 39 transcends the rights of the stipulating parties. Consent Agreement, ECF No. 57 at A. For example, by stipulating that "medical providers do not have a legal or professional obligation to counsel and refer patients for the Patient Choice at End of Life process," the stipulating parties are curtailing the rights of Defendant-Intervenors and non-party terminally-ill patients to such counseling and referral. *See id.*; *see also Conant v. Walters*, 309 F.3d 629, 643-644 (9th Cir. 2002) (recognizing the First Amendment rights of patients to be fully informed of medically available options, including medical marijuana). The Consent Agreement may also impact the interests of organizations like Defendant-Intervenors Compassion & Choices and Patient Choices Vermont, which are committed to ensuring that terminally-ill patients are fully informed of all end-of-life options. While Plaintiffs and Defendants can stipulate to respective individual rights or obligations of the parties, they are not entitled to stipulate away the rights of others.

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III. The Consent Agreement Contradicts Both the Plain Language of Act 39 and This Court's Order.

The Consent Agreement attempts to improperly limit Act 39's informed consent obligation, and establish an unreasonably restrictive interpretation of Act 39 in direct contradiction of both the plain language of the statute and this Court's Order. Act 39 protects "[t]he rights of a patient under section 1871 of this title to be informed of **all available options** related to terminal care. . . **regardless of the purpose of the inquiry or the nature of the information**." 18 V.S.A. § 5282 (emphasis added). The Consent Agreement, however, could be interpreted as waiving all legal and professional obligations of medical providers to counsel or refer patients to End of Life processes except "upon a patient's request." Consent Agreement, ECF No. 57 at A. This is in sharp contrast with the Court's Order, which expressed doubts about adopting "restrictive view" of the law and noted that:

> [t]he court has doubts about whether it is true as a matter of law that the informed consent requirements which appears in 18 V.S.A. § 1871 and receives specific mention at 18 V.S.A. § 5282 has *no* application to Act 39. But it is unnecessary to rule in the abstract on this issue because there can be little doubt that no likelihood of professional discipline is present.

Order at 15. By attempting to limit Act 39's informed consent obligation—a critical aspect of the law—the Consent Agreement could not only interfere with the prerogatives of Vermont courts and the legislature, but also impede the successful implementation of the law.

IV. Maintaining the Consent Agreement on the Court's Official Record Creates a False and Damaging Impression of Legal Imprimatur.

Beyond the questionable legality of the Consent Agreement, allowing it to remain on the Court's official record has an important practical consequence: it gives the public a false impression of legal imprimatur. Press reports about the Consent Agreement by Plaintiffs and their supporters substantiate this concern. For example, an organization called "True Dignity," which opposes aid-in-dying, reported: "On May 23, 2017, a US Appellate Court **upheld a**

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Consent Agreement between the state and medical professionals to protect conscience rights of professionals who oppose assisted suicide." *A Court Victory for Opponents of Assisted Suicide? For Patients, Not So Much*, True Dignity (March 24, 2107) (emphasis added), available at http://www.truedignity.org/a-court-victory-for-opponents-of-assisted-suicide/. Similarly, a press-release linked to the Plaintiff's website proclaims that "[t]he withdrawal of the appeal by Compassion & Choices leaves in place **a consent agreement** between physician groups and the Vermont Attorney General's office, which agreed that the court was correct in deciding that the state's Act 39 does not force conscientious professionals to ensure all 'terminal' patients are informed about the availability of doctor-prescribed death." *Victory for Vermont health professionals after pro-suicide group drops appeal*, Alliance Defending Freedom (March 23, 2017) (emphasis added), available at http://www.adfmedia.org/News/PRDetail/10077. These and several other similar reports generate the false impression that the Court endorses the Consent Agreement, and its interpretation of Act 39. *See, e.g.*, *Vermont Assisted Suicide Law Can't Force Doctors to Refer Patients for Suicide*, Lifenews, May 23, 2017, http://www.lifenews.com/2017/05/23/vermont-assisted-suicide-law-cant-force-doctors-to-refer-patients-for-suicide/; Patients Rights Council, 2017, Vol. 31, No. 2, pgs. 1-2, available at http://www.patientsrightscouncil.org/site/wp-content/uploads/2017/06/Update_2017_2.pdf. While the dissemination of false information is beyond the Court's control, it could minimize its impact by removing the Consent Agreement from the record.

While the presence of the Consent Agreement in the Court's official record raises several legal and public policy concerns, striking it from the record does not implicate any. Indeed, even the State appears to agree that the Consent Agreement should not have been filed with the Court,

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and has indicated that it will not to oppose this motion. *See* Letter from Benjamin D. Battles, ¶ 6, (dated July 21, 2017), attached herein as Exhibit A.

For the at least the foregoing reasons, Defendant-Intervenors respectfully request that the Court strike the Consent Agreement.

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Respectfully submitted:

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