

INTRODUCTION

1. Vermont has been a leader in recognizing the right of mentally competent, terminally ill patients to seek medical aid in dying from their physicians. In 2013, the state legislature passed the Patient Choice and Control at the End of Life Act (“the Act”). With the passage, Vermont became the first state legislature and fourth state in the country to allow qualified patients to obtain a prescription from their physician to ease suffering during their final moments of life. But access to this end-of-life care is denied to nonresident patients under Vermont law, even if these patients otherwise qualify for a prescription under the Act. This denial violates the United States Constitution.

2. Plaintiffs Lynda Bluestein and Dr. Diana Barnard bring this action to challenge the constitutionality of the Act, particularly the Act’s residency requirements. First, the Act’s definition of a “patient” at 18 V.S.A. 5281(8), as a “person who is 18 years of age or older, a resident of Vermont, and under the care of a physician,” unconstitutionally limits the Act’s protection to Vermont residents. Second, the Act’s additional explicit residency requirement, codified at 18 V.S.A. § 5283(a)(5)(E), similarly violates the U.S. Constitution.

3. By using residency status to prospectively deny otherwise qualified patients like Ms. Bluestein access to medical care and physicians like Dr. Barnard the ability to provide that care, the Act violates the Privileges and Immunities Clause (Art. IV, § 2), the Commerce Clause (Article I, § 8), and the Equal Protection Clause (Amend. XIV, § 2) of the United States Constitution.

4. Plaintiffs seek declaratory and injunctive relief to prevent enforcement of the Act’s unconstitutional residency requirement.

THE PARTIES

5. Plaintiff Lynda Bluestein is a seventy-five-year-old retired public health professional who resides in Bridgeport, Connecticut. Ms. Bluestein has been diagnosed with Stage 3 fallopian tube cancer. Ms. Bluestein is actively undergoing treatment and was given a best-case prognosis of three years, depending on her response to chemotherapy. Ms. Bluestein has lived a happy and meaningful life and does not want to die. Should her suffering become unbearable, however, she wishes to have the option of medical aid in dying available to her. Because no statute authorizing medical aid in dying exists in Connecticut, Ms. Bluestein would like the option of accessing medical care in Vermont. However, due to the Act's unconstitutional residency requirement, Ms. Bluestein is prohibited from access to medical aid in dying in Vermont.

6. Plaintiff Diana Barnard is a physician and an associate professor of family medicine, licensed to practice medicine in Vermont. Her practice includes hospice and palliative medicine and care, community education, and family medicine. Dr. Barnard works at University of Vermont Health Network - Porter Medical Center and Helen Porter Rehabilitation & Nursing, both located in Middlebury, Vermont. At these facilities, she regularly provides consultative services to terminally ill patients, some of whom live out-of-state. Dr. Barnard faces criminal and civil penalties as well as potential medical board disciplinary actions, including the loss of her license to practice medicine, if she provides medical aid in dying to non-Vermont residents who otherwise qualify for such care under the Act. Therefore, the Act prevents Dr. Barnard from providing her non-resident patients with care consistent with her best medical judgment at one of the most important moments in their lives. Instead, she is forced to disrupt the continuum of care and attempt to refer such patients to another healthcare provider. The disruption in care

harms both her ability to manage and provide patient care. Without the Act's residency requirement, Dr. Barnard would be able to provide medical aid in dying by writing prescriptions for qualified non-resident patients pursuant to the same medical standard of care for her patients residing in Vermont. Dr. Barnard brings this suit on her behalf and on behalf of her patients residing outside of Vermont.

7. Defendant Phillip Brian Scott ("Governor Scott") is sued in his official capacity as Governor of the State of Vermont. He is vested with the chief executive power of the State and is required to see that Vermont's laws—including laws related to health care—are faithfully executed. VT. CONST. ch. II, §§ 1, 3, 20. Governor Scott is a person within the meaning of 42 U.S.C. § 1983 and is acting under color of state law at all times relevant to this complaint.

8. Defendant Susanne Young ("AG Young") is sued in her official capacity as Attorney General of the State of Vermont. AG Young represents the State of Vermont in all civil and criminal matters in which the State is a party or has an interest. VT. Stat. §§ 152, 157. AG Young also has general supervision of criminal prosecutions. VT. Stat. § 153. AG Young is a person within the meaning of 42 U.S.C. § 1983 and is acting under color of state law at all times relevant to this complaint.

9. Defendant Mark Levine ("Commissioner Levine") is sued in his official capacity as Commissioner of the Vermont Department of Health (VTDH). The VTDH is responsible for supervising and directing the execution of all laws relating to public health in Vermont. 18 V.S.A. § 1. Commissioner Levine is a person within the meaning of 42 U.S.C. § 1983 and is acting under color of state law at all times relevant to his complaint.

10. Defendant David K. Herlihy is sued in his official capacity as the Executive Director of the Vermont Board of Medical Practice (VBMP). The VBMP has the power and

duty to license and certify health professionals, to investigate and hold hearings regarding complaints and charges of unprofessional conduct and illegal practice of medicine, and to refer substantiated complaints to the appropriate prosecutorial authority. 26 V.S.A. § 1353. Director Herlihy is a person within the meaning of 42 U.S.C. § 1983 and was acting under color of state law at all times relevant to his complaint

11. Defendants, through their respective duties and obligations, are responsible for enforcing the Act. Each defendant, and those subject to their direction, supervision, and control, have the responsibility to intentionally perform, participate in, aid and/or abet in the enforcement of the Act in some manner.

JURISDICTION AND VENUE

12. Plaintiffs bring this action under 42 U.S.C. § 1983 to redress the deprivation of rights secured by the United States Constitution, under color of state law.

13. This Court has original subject matter jurisdiction over this action under 28 U.S.C. §§ 1331 and 1343 because the matters in controversy arise under the Constitution and laws of the United States.

14. Venue is proper in this Court under 28 U.S.C. § 1391(b)(1) and (2) because (1) all Defendants reside within the state of Vermont and (2) a substantial part of the events giving rise to Plaintiffs' claims will occur in this District.

FACTUAL BACKGROUND

Lynda Bluestein

15. Lynda Bluestein is a fully competent, seventy-five-year-old retired public health professional. Ms. Bluestein has resided in Bridgeport, Connecticut for approximately ten years. She has been happily married for forty years and has two children and two grandchildren.

16. On March 15, 2021, Ms. Bluestein was diagnosed with Stage 3 fallopian tube cancer. She has been given a prognosis of six months-to-three years, depending on the efficacy of her chemotherapy treatments.

17. Ms. Bluestein does not want to die. However, she understands that her time left to live is limited. It is important to Ms. Bluestein that she maintain control of her medical decisions during the entire course of her treatment, which includes medical decisions surrounding her death. Ms. Bluestein wants to direct and control her end-of-life care.

18. A graduate of UCLA's school of Public Health, Ms. Bluestein has been a longtime advocate for public health access. The death of her mother from cancer in the summer of 1979, as she was in agonizing and needless pain and being held by Ms. Bluestein, had a profound effect on her. She also later witnessed her father suffer as he died from end-stage chronic obstructive pulmonary disease. Finally, she recently witnessed her dear friend struggle with the Act's residency requirement as she was in her third year of suffering from lung cancer and desperately seeking medical aid in dying. With these personal experiences, in addition to her recent involvement in cancer support groups at the Smilow Cancer Treatment Center in Fairfield, Connecticut, in mind, when Ms. Bluestein decides that her suffering has become too unbearable, she wishes to have the option to use medical aid in dying to secure a peaceful death.

19. Further, Ms. Bluestein believes that merely knowing she has the option of medical aid in dying will provide a palliative effect. It will reduce her anxiety by providing her with peace of mind to know that she will not have to suffer needlessly.

20. Ms. Bluestein lives within driving distance of Vermont. Aside from the residency requirement, Ms. Bluestein could meet all the prerequisites for medical aid in dying when her disease progresses. She is over 18 years old, capable of making an informed decision, and under

the care of a physician for a terminal illness. *See* 18 V.S.A. § 5283(a)(5). The only thing that would prevent Ms. Bluestein from accessing the medical aid she desires—were her prognosis to worsen—is the Act’s unconstitutional residency requirement. *See* 18 V.S.A. § 5283(a)(5)(E).

21. Given her current prognosis, Ms. Bluestein is at the point in her life where she would like to start making end-of-life arrangements now, including finding a supportive physician in the state of Vermont. However, the unconstitutional residency requirement in the statute precludes her from taking those steps, and the statute is thereby causing her needless stress and uncertainty. Ms. Bluestein would very much like the option of accessing medical aid in dying should her prognosis be six months or fewer left to live. Ms. Bluestein does not want to – and, indeed, cannot – wait to start this legal process only after such an unfortunate eventuality and, as a consequence of such delay, thereby lose any hope of timely accessing her desired end-of-life care. Therefore, she brings the case now in hopes of achieving a timely resolution of this critical constitutional issue while she still can. If medical aid in dying were available to non-Vermont-residents, Ms. Bluestein would promptly exercise the option of finding a Vermont-based physician who would support her through the process of evaluating and qualifying her for this end-of-life option as appropriate.

Diana Barnard

22. Dr. Diana Barnard has been practicing medicine in Vermont for over 30 years. Her focus is on hospice and palliative care and medicine, community education, and family medicine.

23. The majority of Dr. Barnard’s practice is dedicated to providing palliative care and consultation at University of Vermont Health Network-Porter Medical Center and Helen Porter Rehabilitation and Nursing. In this capacity, she provides comprehensive supportive

services to patients and families living with serious and terminal illnesses, by counseling them on symptom management, assisting with treatment choices, assessing goals of care, facilitating psychosocial support, managing grief and coping challenges, leading family meetings, and assisting with complex discharge planning.

24. Dr. Barnard has also worked as a professor at the University of Vermont for over a decade, first as an assistant professor of family medicine and now as an associate professor of family medicine.

25. To be an effective clinician, Dr. Barnard must establish trusting relationships with patients, families, and providers at a medically complex and highly emotional time.

26. Dr. Barnard is licensed to practice medicine in Vermont but not in any other jurisdictions.

27. The University of Vermont Health Network is an integrated academic health system that serves more than one million residents across Vermont and Northern New York. Dr. Barnard primarily practices in Middlebury, Vermont, which is approximately twenty miles from the New York border.

28. It is typical for Dr. Barnard to provide consultative services to over 200 patients receiving end-of-life care at any given point. This care generally includes certifying patient terminality, treating their underlying conditions if so desired, and providing palliative and hospice care when appropriate. In a typical year approximately 80 of Dr. Barnard's patients die.

29. Dr. Barnard has significant experience with the process of medical aid in dying. In addition to caring for many patients who have sought medical aid in dying, she participated in the Vermont Department of Health's committee that developed forms and FAQs for the law. Dr. Barnard wrote and facilitated adoption of University of Vermont Medical Center's (UVMHC)

Policy and Procedure on medical aid in dying. She also developed a core curriculum presentation about end-of-life suffering and medical aid in dying, and she has given several presentations on the subject within the UVMMC health network, across the state of Vermont, and in the Northeast region.

30. Due to her expertise, Dr. Barnard regularly fields inquiries from other physicians about the practice of medical aid in dying. In this capacity, Dr. Barnard assists with questions about eligibility and helps to navigate the nuts and bolts of clinical practice, such as how to properly complete paperwork. Dr. Barnard also regularly advises resident physicians at UVMMC on the use of medical aid in dying. On average, Dr. Barnard fields questions about the practice of medical aid in dying for two to five cases a month.

31. At any given time, Dr. Barnard typically has at least one patient engaged in the process of pursuing medical aid in dying. She writes approximately four prescriptions pursuant to the Act per year.

32. The VT DH provides Dr. Barnard with forms that are to be completed when assisting a patient with medical aid in dying. One of these forms, the Physician Reporting Form, contains a checklist of actions she must take to comply with the Act. One of those checkboxes requires her to confirm that the patient requesting medical aid in dying is a resident of Vermont.

33. Many northern New York residents have their primary healthcare needs met through the UVMMC, the largest healthcare system in the region. As a result, Dr. Barnard routinely provides consultative services to patients residing in New York.

34. Dr. Barnard's terminally ill patients who reside in New York have regularly inquired about the availability of medical aid in dying. Had they been residents of Vermont, Dr. Barnard would have treated them as she did any other resident patient. Because they were non-

residents, however, she was required to deny these patients appropriate medical care solely due to their residency status. When faced with these inquiries, Dr. Barnard has replied that the patients are ineligible for the treatment and informs them of other options for treating their suffering. This news can be very distressing for those patients and can erode the trust and confidence necessary to achieve a harmonious end-of-life care treatment.

35. Since the Act passed in 2013, Dr. Barnard has received numerous requests from non-residents seeking a prescription for medical aid in dying under the Act. Despite the likelihood that these individuals were otherwise eligible for medical aid in dying, Dr. Barnard has been unable to even consider these requests solely based on the prospective patients' residency.

36. Thus, Dr. Barnard is barred from providing medical aid in dying to non-resident patients who would otherwise be eligible to receive that care. Medical aid in dying is the only medical procedure in Dr. Barnard's day-to-day practice for which a patient's lack of Vermont residency categorically denies the otherwise appropriate care that she can provide.

37. Dr. Barnard intends to continue treating New York patients and desires to present those patients with the full range of medically appropriate options available to them at the end of life, including, when requested, medical aid in dying.

38. Dr. Barnard's inability to offer medical aid in dying to non-Vermonters interferes with her ability to transact and engage in commerce because it limits the number of patients she can treat and forces her to decline to treat non-Vermont-resident patients who seek medical aid in dying.

FIRST CAUSE OF ACTION

(The Act Violates the U.S. Constitution’s Privileges and Immunities Clause)

39. Plaintiffs hereby reallege and incorporate by reference all preceding paragraphs, as if set fully set forth herein.

40. Plaintiffs state this cause of action against Defendants in their official capacities for purposes of seeking declaratory and injunctive relief.

41. The Privileges and Immunities Clause in Article IV of the United States Constitution provides that “[t]he Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.” U.S. Const. art IV, § 2.

42. Thus, there are explicit protections for citizens of one State who travel in another State, intending to return home at the end of their journey. These protections allow the visitor to enjoy the “Privileges and Immunities of Citizens in the several States” that they visit. As such, the Privileges and Immunities Clause prohibits differential treatment of in-state and out-of-state residents that infringes on the fundamental right to travel.

43. The Privileges and Immunities Clause and 42 U.S.C. § 1983 prohibit state officials from restricting non-resident visitors access to medical care within its borders absent a substantial state interest and restrictions narrowly tailored to those interests.

44. The Act’s definition of “patient” and residency requirement violate the Privileges and Immunities Clause by limiting the availability of medical aid in dying to residents of Vermont. Specifically, Ms. Bluestein is injured by her inability to access medical aid in dying based solely on her Connecticut residency. Connecticut does not offer medical aid in dying, so she will not be able to access this care—in Connecticut or in Vermont—even though an identical Vermont resident could access the care.

45. Dr. Barnard's non-Vermont resident patients are also injured by their inability to pursue medical aid in dying from Dr. Barnard solely due to the Act's definition of "patient" and residency restriction.

46. The definition of "patient" and residency requirement also prevent Dr. Barnard from treating non-Vermont-resident patients according to the same medical standard of care she applies to Vermont residents for fear of civil or criminal consequence, including the threat of discipline from Defendants.

47. The Act creates an invidious classification that impinges on the right to interstate travel by denying non-residents access to Vermont's medical care.

48. The Act constitutes a failure to accord residents and non-residents, including Ms. Bluestein and Dr. Barnard's patients, equal treatment.

49. The Act restricts out-of-state residents' ability to access medical services.

50. The Act's definition of "patient" and residency requirement inhibit the ability of Ms. Bluestein and of Dr. Barnard's patients to receive medical care in Vermont.

51. The differential treatment between resident and non-resident patients established by the Act is not necessary to achieve any substantial state interest. Nor is the differential treatment between resident and non-resident patients established by the Act necessary to achieve any legitimate state interest.

52. Plaintiffs are entitled to a declaration that the Act's residency requirement violates the Privileges and Immunities Clause on its face and as applied and is therefore unconstitutional.

53. Plaintiffs are entitled to a permanent injunction enjoining Defendants from enforcing the Act's residency requirement.

SECOND CAUSE OF ACTION

(The Act Violates the U.S. Constitution's Dormant Commerce Clause)

54. Plaintiffs hereby reallege and incorporate by reference all preceding paragraphs, as if set fully set forth herein.

55. Plaintiffs state this cause of action against Defendants in their official capacities for purposes of seeking declaratory and injunctive relief.

56. The Commerce Clause of Article I, Section 8 of the U.S. Constitution and 42 U.S.C. § 1983 bar state officials from enacting laws that discriminate against interstate commerce.

57. The Act has a substantial effect on interstate commerce in the form of medical care. The Act prevents Ms. Bluestein from receiving specific medical care after crossing state lines into Vermont, even though she would otherwise qualify for this care. The Act discriminates against Ms. Bluestein by preventing her from transacting in interstate commerce by restricting access to the purchase of medical care solely on the basis of her residency.

58. The Act also prevents Dr. Barnard from providing specific medical services to existing patients crossing state lines from New York to Vermont. The Act also prevents Dr. Barnard from offering consultation to prospective out-of-state patients who would otherwise procure her services were she permitted to assist them with medical aid in dying. Further, the Act violates the Dormant Commerce Clause because it prevents Dr. Barnard's patients who reside in New York from procuring services in Vermont solely on the basis of their residency.

59. The Act discriminates against interstate commerce on its face. By its terms, the Act distinguishes between Vermont residents and out-of-state residents. In doing so, the Act restricts an out-of-state resident's ability to access Vermont medical care. In the same manner,

the Act restricts a physician in Vermont from providing out-of-state residents with access to medical care afforded to otherwise identical Vermont residents.

60. Alternatively, the Act substantially burdens interstate commerce by discouraging non-residents from traveling to Vermont. In the same manner, the Act also substantially burdens interstate commerce by discouraging physicians practicing in Vermont from attending to patients who do not meet the requirements of Vermont residency. That burden exceeds the benefits, if any, provided by the Act's residency requirement.

61. Plaintiffs are entitled to a declaration that the Act's residency requirement violates the Dormant Commerce Clause on its face and as applied and is therefore unconstitutional.

62. Plaintiffs are entitled to a permanent injunction enjoining Defendants from enforcing the Act's residency requirement.

THIRD CAUSE OF ACTION

(The Act Violates the U.S. Constitution's Equal Protection Clause)

63. Plaintiffs hereby reallege and incorporate by reference all preceding paragraphs, as if set fully set forth herein.

64. Plaintiffs state this cause of action against Defendants in their official capacities for purposes of seeking declaratory and injunctive relief.

65. The Equal Protection Clause of the Fourteenth Amendment of the U.S. Constitution and 42 U.S.C. § 1983 mandate that state and local government officials treat all similarly situated persons alike and broadly restricts invidious discrimination of individuals based on membership in a class, absent a legitimate state interest.

66. The Act's definition of "patient" and residency requirement violate the Equal Protection Clause because the provisions invidiously discriminate against non-residents of

Vermont without a legitimate state interest. Specifically, because they are members of a class of non-Vermont-residents, Ms. Bluestein and Dr. Barnard's patients are injured by their inability to access medical aid in dying. They are discriminated against by the state of Vermont, based solely on their lack of residency status. Connecticut and New York have not authorized medical aid in dying, so neither Ms. Bluestein nor Dr. Barnard's patients will be able to access this care—in Connecticut, New York, or in Vermont—even though a similarly situated Vermont resident would be able to access the exact same care.

67. The Act results in invidious discrimination against a class of non-Vermont-residents that impinges on the right to interstate travel, a fundamental right.

68. Alternatively, even if not a fundamental right, the Act results in invidious discrimination against a class of non-Vermont-residents that impinges on a benefit conferred upon similarly situated Vermont residents. The Act also restricts out-of-state residents' ability to access medical services.

69. The Act constitutes a failure to accord residents and non-residents equal protection under federal law. Specifically, the Act denies Ms. Bluestein and Dr. Barnard's patients the ability to access end-of-life care in Vermont, even though identical Vermont residents may access exactly this care.

70. The differential treatment between resident and non-resident patients established by the Act is not necessary to achieve any legitimate state interest.

71. Plaintiffs are entitled to a declaration that the Act's residency requirement violates the Constitution's Equal Protection Clause and is therefore unconstitutional.

72. Plaintiffs are entitled to a permanent injunction enjoining Defendants from enforcing the Act's residency requirement.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs pray for judgment as follows:

1. On Plaintiffs' First, Second, and Third Causes of Action as follows:
 - a. For declaratory and injunctive relief as follows:
 - i. a declaration that the Act's definition of "patient" and residency requirement violate the Privileges and Immunities Clause of Art. IV, § 2 of the United States Constitution;
 - ii. a declaration that the Act's definition of "patient" and residency requirement violate the Commerce Clause of Article I, Section 8 of the United States Constitution;
 - iii. a declaration that the Act's definition of "patient" and residency requirement violate Equal Protection Clause of the United States Constitution;
 - iv. a declaration that each statutory and regulatory provision complained herein violates the Privileges and Immunities Clause, the Dormant Commerce Clause, and the Equal Protection Clause of the United States Constitution;
 - v. an order permanently enjoining Defendants from enforcing the Act's residency requirement;
 - b. awarding Plaintiffs their reasonable attorneys' fees and costs pursuant to 42 U.S.C. § 1988; and
2. All such further relief as the Court may deem equitable and proper.

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Respectfully Submitted,



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