SUPREME COURT OF THE UNITED STATES

Nos. 96–110 AND 95–1858

WASHINGTON, ET AL., PETITIONERS
96–110 *v.*
HAROLD GLUCKSBERG ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

DENNIS C. VACCO, ATTORNEY GENERAL OF NEW YORK, ET AL., PETITIONERS
95–1858 *v.*
TIMOTHY E. QUILL ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

[June 26, 1997]

JUSTICE BREYER, concurring in the judgments.

I believe that JUSTICE O'CONNOR's views, which I share, have greater legal significance than the Court's opinion suggests. I join her separate opinion, except insofar as it joins the majority. And I concur in the judgments. I shall briefly explain how I differ from the Court.

I agree with the Court in *Vacco* v. *Quill, ante,* that the articulated state interests justify the distinction drawn between physician assisted suicide and withdrawal of life-support. I also agree with the Court that the critical question in both of the cases before us is whether "the 'liberty' specially protected by the Due Process Clause includes a right" of the sort that the respondents assert. *Washington* v. *Glucksberg, ante,* at 19. I do not agree, however, with the Court's formula-

tion of that claimed "liberty" interest. The Court describes it as a "right to commit suicide with another's assistance." *Ante,* at 20. But I would not reject the respondents' claim without considering a different formulation, for which our legal tradition may provide greater support. That formulation would use words roughly like a "right to die with dignity." But irrespective of the exact words used, at its core would lie personal control over the manner of death, professional medical assistance, and the avoidance of unnecessary and severe physical suffering—combined.

As JUSTICE SOUTER points out, *ante* at 13–16 (SOUTER, J., concurring in the judgment), Justice Harlan's dissenting opinion in *Poe* v. *Ullman,* 367 U. S. 497 (1961), offers some support for such a claim. In that opinion, Justice Harlan referred to the "liberty" that the Fourteenth Amendment protects as including "a freedom from all substantial arbitrary impositions and purposeless restraints" and also as recognizing that "*certain interests* require particularly careful scrutiny of the state needs asserted to justify their abridgment." *Id.,* at 543. The "certain interests" to which Justice Harlan referred may well be similar (perhaps identical) to the rights, liberties, or interests that the Court today, as in the past, regards as "fundamental." *Ante,* at 15; see also *Planned Parenthood of Southeastern Pa.* v. *Casey,* 505 U. S. 833 (1992); *Eisenstadt* v. *Baird,* 405 U. S. 438 (1972); *Griswold* v. *Connecticut,* 381 U. S. 479 (1965); *Rochin* v. *California,* 342 U. S. 165 (1952); *Skinner* v. *Oklahoma ex rel. Williamson,* 316 U. S. 535 (1942).

Justice Harlan concluded that marital privacy was such a "special interest." He found in the Constitution a right of "privacy of the home"—with the home, the bedroom, and "intimate details of the marital relation" at its heart—by examining the protection that the law had earlier provided for related, but not identical, interests described by such words as "privacy," "home," and "family." 367 U. S., at 548, 552; cf. *Casey, supra,* at 851. The respondents here essentially ask us to do the same. They argue that one can find a "right to die with dignity" by examining the protection the law has provided for related, but not identical, interests relating to personal dignity, medical treatment, and freedom from state-inflicted pain. See *Ingraham* v. *Wright,* 430 U. S. 651 (1977); *Cruzan* v. *Director, Mo. Dept. of Health,* 497 U. S. 261 (1990); *Casey, supra.*

I do not believe, however, that this Court need or now should decide whether or a not such a right is "fundamental." That is because, in my view, the avoidance of severe physical pain (connected with death) would have to comprise an essential part of any successful claim and because, as JUSTICE O'CONNOR points out, the laws before us do not *force* a dying person to undergo that kind of pain. *Ante,* at 2 (O'CONNOR, J., concurring). Rather, the laws of New York and of Washington do not prohibit doctors from providing patients with drugs sufficient to control pain despite the risk that those drugs themselves will kill. Cf. New York State Task Force on Life and the Law, When Death Is Sought: Assisted Suicide and Euthanasia in the Medical Context 163, n. 29 (May 1994). And under these circumstances the laws of New York and Washington would overcome any remaining significant interests and would be justified, regardless.

Medical technology, we are repeatedly told, makes the administration of pain-relieving drugs sufficient, except for a very few individuals for whom the ineffectiveness of pain control medicines can mean, not pain, but the need for sedation which can end in a coma. Brief for National Hospice Organization 8; Brief for the American Medical Association (AMA) et al. as *Amici Curiae* 6; see also Byock, Consciously Walking the Fine Line: Thoughts on a Hospice Response to Assisted Suicide and Euthanasia, 9 J. Palliative Care 25, 26 (1993); New York

State Task Force, at 44, and n. 37. We are also told that there are many instances in which patients do not receive the palliative care that, in principle, is available, *id.*, at 43–47; Brief for AMA as *Amici Curiae* 6; Brief for Choice in Dying, Inc., as *Amici Curiae* 20, but that is so for institutional reasons or inadequacies or obstacles, which would seem possible to overcome, and which do *not* include *a prohibitive set of laws*. *Ante*, at 2 (O'CONNOR, J., concurring); see also 2 House of Lords, Session 1993–1994 Report of Select Committee on Medical Ethics 113 (1994) (indicating that the number of palliative care centers in the United Kingdom, where physician assisted suicide is illegal, significantly exceeds that in the Netherlands, where such practices are legal).

This legal circumstance means that the state laws before us do not infringe directly upon the (assumed) central interest (what I have called the core of the interest in dying with dignity) as, by way of contrast, the state anticontraceptive laws at issue in *Poe* did interfere with the central interest there at stake—by bringing the State's police powers to bear upon the marital bedroom.

Were the legal circumstances different—for example, were state law to prevent the provision of palliative care, including the administration of drugs as needed to avoid pain at the end of life—then the law's impact upon serious and otherwise unavoidable physical pain (accompanying death) would be more directly at issue. And as JUSTICE O'CONNOR suggests, the Court might have to revisit its conclusions in these cases.