No. 33,630

IN THE COURT OF APPEALS
OF THE STATE OF NEW MEXICO

KATHERINE MORRIS, M.D., AROOP MANGALIK, M.D., and AJA RIGGS,

Plaintiffs-Appellees,

vs.

GARY K. KING, Attorney General of the State of New Mexico,

Defendant-Appellant.

ON APPEAL FROM THE 2ND JUDICIAL DISTRICT, BERNALILLO COUNTY, NEW MEXICO

DEFENDANT-APPELLANT'S REPLY BRIEF

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ORAL ARGUMENT IS REQUESTED

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INTRODUCTION

Following the District Court's decision, it is now legal in the Second Judicial District for a physician to prescribe a lethal medication to a patient for the sole purpose of aiding that patient in taking his or her own life. That decision represents an unprecedented expansion of a New Mexico constitutional right that, until now, had found virtually no expression, and it functionally overturns decades of New Mexico law. As compelling as the arguments in favor of legalizing "aid in dying" may be, they are not arguments sufficient to overcome the clear expression of legislative intent found in NMSA 1978, § 30-4-2.

ARGUMENT

Appellees improperly and incorrectly challenge the District Court's determination that Section 30-4-2 criminalizes "aid in dying." Because that criminalization does not infringe on a fundamental right, the District Court erred in applying strict scrutiny to the statute. Under the rational basis test, New Mexico's decades-old prohibition on assisted suicide passes constitutional muster.

I. THE QUESTION OF WHETHER SECTION 30-2-4 CRIMINALIZES "AID IN DYING" IS NOT PROPERLY BEFORE THE COURT, BUT THE DISTRICT COURT RULED CORRECTLY ON THE ISSUE IN ANY EVENT.

In Section II of their Answer Brief, Appellees contend that Section 30-2-4 does not prohibit the conduct Appellees describe as "aid in dying." (Answer Brief, pp. 42-46. This issue is not properly before the Court. The District Court

concluded that Section 30-2-4 does criminalize aid in dying. (RP 226.) Appellees filed no notice of appeal or cross appeal to challenge this finding. To the extent Appellees would rely on Rule 12-201(C) to challenge the District Court's conclusion, they do so in error.

That rule reads:

> An appellee may, without taking a cross-appeal or filing a docketing statement or statement of the issues, raise issues on appeal for the purpose of enabling the appellate court to affirm, or raise issues for determination only if the appellate court should reverse, in whole or in part, the judgment or order appealed from.

Rule 12-201(C) NMRA. There are thus only two purposes for which an appellee may raise issues not otherwise appealed by an appellant without having filed its own cross appeal: (1) when the issues would permit this Court to affirm; or (2) when those new issues would be relevant in the event this Court reversed. The question of whether Section 30-4-2 encompasses "aid in dying" meets neither condition.

The first condition set forth in Rule 12-201(C) cannot apply because if this Court were to hold that Section 30-4-2 did not encompass "aid in dying," in so holding the Court would ***reverse*** the District Court, not affirm it. The second condition cannot apply because the issue of Section 30-4-2's scope would not become relevant if the Court were to reverse the District Court's holding that Section 30-4-2 is unconstitutional. Indeed, that outcome is logically impossible: to

reverse the District Court's constitutional holding this Court must necessarily find that Section 30-4-2 encompasses "aid in dying" or there is no constitutional question to consider (and on which to reverse). Because Appellees have not properly presented this issue on appeal, the Court need not consider it.

Even assuming that Appellees have appropriately raised this issue, the District Court was right to conclude that Section 30-4-2 encompasses "aid in dying." Section 30-4-2 reads, in its entirety: "Assisting suicide consists of deliberately aiding another in the taking of his own life. Whoever commits assisting suicide is guilty of a fourth degree felony." In arguing that the District Court erroneously construed this provision, Appellees ignore its plain language, ignore the statutory context in which it appears, and conflate a medical standard with a legal one.

First, as Appellees themselves describe the conduct of "aid in dying," it plainly falls within the prohibition in Section 30-4-2:

> "Aid in dying" is a recognized term of art for the medical practice of providing a mentally-competent, terminally-ill patient with a prescription for medication that the patient may choose to take in order to bring about a peaceful death if the patient finds his dying process unbearable.

(RP 004.) Thus, the medication prescribed in furtherance of "aid in dying" is not prescribed for purposes of pain control or symptom control and is obviously not prescribed in any curative capacity. It is, instead, prescribed for a single purpose:

the death of the patient. A physician who has prescribed medication for the purpose of allowing the patient to commit suicide using that medication has "deliberately aid[ed] another in the taking of his own life." NMSA 1978, § 30-2-4. Appellees do not contend that the act of writing the prescription is anything other than deliberate, and openly admit that the sole purpose of the prescription is to allow the patient to take his or her own life.

Second, as the District Court pointed out in its Findings of Fact and Conclusions of Law, since the enactment in 1963 of Section 30-2-4, the legislature has twice distinguished "assisted suicide" from other end-of-life treatment options. (RP 226.) Both of the statutes making that distinction – the Uniform Health-Care Decisions Act, NMSA 1978, § 24-7A-1 to -18, and the Mental Healthcare Decisions Act, NMSA 1978, § 24-7B-1 to -16 – do "not authorize . . . assisted suicide . . . to the extent prohibited by other statutes of this state." NMSA 1978, § 24-7A-13(C); NMSA 1978, § 24-7B-15(C). The "other statute[] of this state" that prohibits assisted suicide is, of course, Section 30-4-2. This context provides additional clarity (in the event any is necessary) to the prohibition on assisted suicide found there.

Finally, in seeking to overturn the District Court's determination that Section 30-4-2 prohibits "aid in dying," Appellees rely on medical and psychological standards in conflict with the pertinent legal ones. Specifically, Appellees urge

this Court to find that "aid in dying" is not suicide on the strength of differences that the medical community has identified between the two behaviors. (Answer Brief, pg. 43.) Those differences, while compelling, are entirely irrelevant from a legal standpoint. Dr. David Pollack – whose testimony Appellees cite in their brief on this point – acknowledged at trial that his expert opinion about the differences between "aid in dying" and suicide was a medical opinion, not a legal one. (TR Vol. II[1], 113:6-24.) Indeed, Dr. Pollack candidly admitted that he lacked the qualifications to offer a legal opinion. (TR Vol. II, 113:23-24.) Not surprisingly, none of the physicians who testified on behalf of Appellees offered a legal opinion of the difference between "aid in dying" and suicide. *See* Testimony of Dr. Nicholas Gideonse (TR Vol. III, 57:9 – 58:3.)

"Aid in dying" is deliberate conduct undertaken for the specific and intended purpose of helping a patient end his or her life. Legally, it is assisted suicide. This Court should accordingly affirm the District Court's determination to that effect.

II. THE RIGHT TO CONTROL THE END OF ONE'S LIFE DOES NOT ENCOMPASS THE AID OF A THIRD PARTY.

Appellees focus in their brief on the District Court's determination that "aid in dying" was a fundamental right protected by Article II, Section 4 of the New

1 Though the trial transcript is contained in only two volumes, those volumes are labeled as "Volume 2 of 3" and "Volume 3 of 3." In keeping with that labeling, citations to the first volume are to "Volume II."

Mexico Constitution.[2] Appellees do not, however, offer a direct response to Appellant's contention that the District Court erred in determining that any provision of the New Mexico Constitution guarantees a fundamental right to the assistance of a third party in bringing about the end a person's life. New Mexico law does not recognize such a fundamental right and the District Court incorrectly applied strict scrutiny to Section 30-2-4. Applying the appropriate standard – the rational basis test – the statute constitutionally prohibits "aid in dying."

A. Article II, Section 4 Of The New Mexico Constitution Does Not Guarantee A Fundamental Right To A Physician's Assistance In Ending One's Own Life.

Appellees contend that two of the cases cited in the Brief in Chief concerning the construction of Article II, Section 4 "do not inform this Court's inquiry because neither of the cases confronted the scope of the rights protected by that provision." (Answer Brief, pg. 31.) Appellees are wrong to give such short

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2 Appellees wrongly suggest that the District Court also found that "aid in dying" was a fundamental right under the equal protection guarantees of Article II, Section 18 of the New Mexico Constitution. (Answer Brief, pg. 20.) The District Court grounded its holding that the New Mexico Constitution includes a fundamental right to "aid in dying" in the guarantees of liberty, safety, and happiness found in Article II, Section 4, not in Article II, Section 18. (RP 229.) Having found a fundamental right in Article II, Section 4, the District Court then relied on Article II, Section 18 to apply strict scrutiny to the restriction on that fundamental right. (*Id.*) Thus, according to the District Court, "aid in dying" is a fundamental right protected by Article II, Section 4 that is subject to strict scrutiny by virtue of being fundamental. While that strict scrutiny analysis proceeds in the framework established under Article II, Section 18, Article II, Section 18 does not provide any independent basis for finding "aid in dying" to be a fundamental right, and the District Court did not construe Article II, Section 18 as doing so.

shrift to the only New Mexico cases interpreting the constitutional provision on which they must rely. Moreover, the lack of case law interpreting that provision should provide little comfort to Appellees in their effort to find enshrined therein a fundamental right to the assistance of a physician in ending one's own life.

Appellees suggest that *Lucero v. Salazar*, 1994-NMCA-066, 117 N.M. 803, 877 P.2d 1106, implicitly recognized a cause of action under Article II, Section 4 for the family members of a man whose father was shot and killed by the police, but because those family members were not foreseeable injured parties, they could not recover damages. (Answer Brief, pp. 31-32.) But the case has more to say about the scope of Article II, Section 4 than Appellees care to admit.

Specifically, the *Lucero* Court held that it was "clear, however, that mere references to the right to enjoy life and seek and obtain safety and happiness are not sufficient to serve as a basis for a waiver of sovereign immunity under Section 41-4-12." 117 N.M. at 804. This is not, as Appellees suggest, just a holding that the plaintiffs could not recover because they were unforeseeable injured parties. It is, instead, a plain statement that the right of happiness found in Article II, Section does not overcome the State's sovereign immunity.

That was true despite the fact that the plaintiffs asserted a violation of "their personal rights to associate with their father and receive his love, guidance, and protection" – rights of fundamental importance. *Lucero*, 117 N.M. At 804. And

yet those rights remained unvindicated in the face of sovereign immunity because Article II, Section 4 found no legal application of any kind. Appellees are at a loss to explain why Article II, Section 4 should be given any different (and significantly more expansive) application here.

B. New Mexico's Due Process Clause Is Not More Protective Of Assisted Suicide Than The Fourteenth Amendment.

As the Court is aware, the United States Supreme Court in *Washington v. Glucksberg*, 521 U.S. 702, 728 (1997) held that "the asserted 'right' to assistance in committing suicide is not a fundamental liberty interest protected by the Due Process Clause." The District Court rejected this conclusion in favor of finding greater protection under Article II, Section 18 for "aid in dying" than the United States Supreme Court found in *Glucksberg*.[3]

Appellees take issue with Appellant's reading of *Richardson v. Carnegie Library Restaurant, Inc.*, 1988-NMSC-084, 107 N.M. 688, 763 P.2d 1153, as holding that only those rights guaranteed by the Constitution are "fundamental," flatly asserting that Appellant is wrong about that holding. (Answer Brief, pg. 28.) Appellees then provide a laundry list of federal and New Mexico cases recognizing fundamental rights to a host of things and conclude by noting that each right was found to be implicit in "the due process clause" - *i.e.,* implicit in the ***Constitution***.

3 As discussed above, the District Court did not find in Article II, Section 18 an independent basis on which to declare "aid in dying" a fundamental right. Appellant addresses the issue here only to the extent that this Court might explore doing so.

(*Id.* at 29.) Perhaps Appellees misunderstand Appellant's argument, because they seem to agree with it: if the Constitution protects a right, either explicitly or implicitly, it is fundamental. Otherwise, it is not. And as noted above, the New Mexico Constitution does not include a right to "aid in dying" any more than does the United States Constitution.

Appellees recognize the only three circumstances under which New Mexico's interstitial approach will lead a court to depart from federal precedent interpreting a federal provision analogous to a provision of our state constitution: a flawed federal analysis, structural differences between the state and federal governments, or distinctive state characteristics. *See Gomez v. State*, 1997-NMSC-006, ¶ 19, 122 N.M. 777, 932 P.2d 1.

Appellees argue for a departure from federal precedent – specifically *Glucksberg*, where the United States Supreme Court held that the Fourteenth Amendment did not contain a fundamental right to physician assisted suicide – on two bases. First, Appellees contend that the case is flawed. Second, they contend that New Mexico's distinct characteristics demand a departure from federal precedent. Appellees are wrong on both counts.

1. *Glucksberg* is not flawed federal precedent.

Appellees suggest that the *Glucksberg* Court ruled "in a vacuum" without the benefit of statistical evidence showing that "aid in dying" is not used to coerce

vulnerable populations such as the poor and elderly into taking their own lives. (Answer Brief, pg. 22.) Appellees also point out that concerns about involuntary euthanasia have failed to materialize. (*Id.* at 24.)

But these were hardly the only concerns voiced by the *Glucksberg* Court. The Court also identified a general concern for the preservation of human life, a concern for preventing suicide and treating its causes, and a concern for protecting the integrity and ethics of the medical profession. *Glucksberg*, 521 U.S. at 728-31. These concerns are also present in New Mexico, and indicate that New Mexico should adhere to federal precedent declining to find a fundamental right to "aid in dying" in the federal analogue to Article II, Section 18.

2. No New Mexico characteristics counsel in favor of departing from *Glucksberg*.

Appellees next contend that New Mexico's "long, proud, extraordinary history of respecting patient autonomy and dignity at the end of life" provide a basis for ignoring *Glucksberg* in favor of a different interpretation of Article II, Section 18. (Answer Brief, pg. 24.) But the primary statutory provision on which Appellees rely in making this argument – the Uniform Health-Care Decisions Act – expressly does ***not*** legalize physician assisted suicide. *See* NMSA 1978, § 24-7A-13(C) ("The Uniform Health-Care Decisions Act does not authorize mercy killing, assisted suicide, euthanasia or the provision, withholding or withdrawal of health care, to the extent prohibited by other statutes of this state."). It also goes so

far as to carve out the withholding or withdrawal of life-sustaining treatment to the extent other New Mexico provisions prohibit such conduct (which they do not). This is an inadequate basis on which to determine that New Mexico's approach to end-of-life treatment is so vastly different from federal law as to justify the wholesale rejection of United States Supreme Court precedent that thoroughly and thoughtfully delves into the history of prohibitions on assisted suicide and the reasons those prohibitions exist.

C. Section 30-2-4 Passes The Rational Basis Test.

"Aid in dying" does not implicate any fundamental right guaranteed by the New Mexico Supreme Court. Strict scrutiny analysis of Section 30-4-2 is thus inappropriate. Subjecting the statute to the correct level of scrutiny – the rational basis test – leads inevitably to the conclusion that Section 30-4-2 is constitutional.

New Mexico has the same interests in prohibiting assisted suicide as those identified by the *Glucksberg* Court and noted in Section II(B)(2) above. Appellees attack the State's rational basis by arguing that "aid in dying" improves end-of-life care and by noting that there is little substantive difference between terminal sedation and the withdrawal of life-sustaining treatment on the one hand (both legal courses of conduct) and "aid in dying" on the other. (Answer Brief, pg. 41.)

There is, however, a legally significant distinction between the three end-of-life options Appellees describe. With terminal sedation and the withdrawal of life-

sustaining treatment, it is not the affirmative act of a physician that brings about the patient's death. It is, instead, the underlying condition that is allowed to run its course. In the case of "aid in dying," the prescribing physician takes the affirmative act of prescribing a lethal does of a barbituate for the sole purpose of aiding the patient in ending his or her own life. While some may medically consider the cause of death in a case of "aid in dying" to be the underlying condition, there is no getting around the fact that the lethal barbituate dose interrupts the process that would otherwise play out with either terminal sedation or the withdrawal of life-sustaining treatment.

The fact that "aid in dying" involves such an affirmative act by a physician explains why, as a society, we have been so cautious about legalizing it and less cautious about permitting terminal sedation and the withdrawal of life-sustaining treatment. And, contrary to Appellees' contention, it highlights the rational basis New Mexico has for treating these three things differently and continuing to prohibit "aid in dying."

New Mexico does have a rational basis for that prohibition. Section 30-4-2 thus constitutionally criminalizes "aid in dying" and the Court should accordingly reverse.

III. THE DISTRICT COURT IMPERMISSIBLY INTRUDED ON THE EXCLUSIVE PROVINCE OF THE LEGISLATURE.

In response to Appellant's argument that the District Court violated the separation of powers by decriminalizing conduct the legislature has otherwise outlawed, Appellees offer nothing more than a salutory citation to *Marbury v. Madison* and the assertion that the District Court here did nothing more than declare what the law is. (Answer Brief, pp. 46-47.)

Appellees fail entirely to come to grips with the argument that the District Court did more than merely pronounce the law; it changed it. Assisted suicide has been illegal for decades in New Mexico. With the metaphorical stroke of a pen, the District Court decriminalized it, and did so in a way that introduces substantial uncertainty into what New Mexico law is concerning "aid in dying." Only the legislature can resolve that uncertainty. Indeed, constitutionally, only the legislature *can* resolve it.

Appellees offer no response to the argument that in declaring Section 30-4-2 unconstitutional, the District Court did not just interpret a provision of law, but instead substantively amended it. Just as the legislative and executive branches operate under the restrictions of the Constitution, so too does the judicial branch. A court cannot, under guise of interpreting or applying the law, do so in a way that crosses the line into amendment. The District Court here crossed that line.

As Appellees have done, it would be easy to ignore this point and decide that what the District Court did here is no different than what courts do every time they strike down as unconstitutional a criminal prohibition. But it would wrong. The length of New Mexico's prohibition on assisted suicide, the genuine policy differences evidenced by the various *amici* participating in this case, the near-universal prohibition on "aid in dying" in our sister states, and the entirely novel way in which the District Court interpreted Article II, Section 4 all weigh in favor of the determination that the District Court here did more than the judiciary may constitutionally do. The District Court substantively changed New Mexico law, a power only the legislature may wield.

The need for direct legislative involvement is all the more pressing because of the lack of enforceable standards in New Mexico to police the conduct of "aid in dying." Appellees offer the cold comfort of best medical practice, but self-enforced ethical obligations of a profession are a far cry from the kind of clear, black and white directives only a legislature may provide. If "aid in dying" is to be legal in New Mexico, it must be as the result of legislative, not judicial, action.

CONCLUSION

For the foregoing reasons, the Attorney General of New Mexico respectfully requests that this Court declaring NMSA 1978, § 30-2-4 to be constitutional as applied to "aid in dying."

STATEMENT CONCERNING ORAL ARGUMENT

This case presents an issue of first impression, both in terms of the legality of physician assisted suicide, or aid in dying, and in terms of the scope of Article II, Section 4 of the New Mexico Constitution. Appellant respectfully submits that oral argument would aid the Court in considering the issues presented by this appeal.

Respectfully submitted,

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