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**THE COURT OF APPEALS OF THE STATE OF NEW MEXICO**

**KATHERINE MORRIS, M.D.,  
AGROOP MANGALIK, M.D. and  
AJA RIGGS,**

**Plaintiffs-Appellees,**

v.

**No. 33,630**

**KARI BRANDENBERG and  
GARY KING,**

**Defendants-Appellants.**

COURT OF APPEALS OF NEW MEXICO  
ALBUQUERQUE  
FILED

SEP 12 2014

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**AMICUS CURIAE BRIEF OF  
THE ALS ASSOCIATION NEW MEXICO CHAPTER  
IN SUPPORT OF PLAINTIFFS-APPELLEES**

On Appeal from the Second Judicial District Court  
County of Bernalillo, Case No. D-202-CV-2012-02909  
The Honorable Nan G. Nash

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## **CERTIFICATE OF COMPLIANCE**

As required by Rule 12-213(G) NMRA, The ALS Association New Mexico Chapter certifies that the body of this amicus brief, as defined by Rule 12-213(F)(1) NMRA, complies with the type-volume limitation of Rule 12-213(F)(3) because it contains 5,869 words and was prepared in Times New Roman, a proportionally-spaced typeface.

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New Mexico Case

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Wash. State Dept. of Health,  
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## INTRODUCTION<sup>1</sup>

Amyotrophic Lateral Sclerosis (“ALS”), commonly referred to as Lou Gehrig’s disease, is a progressive neurodegenerative disease that causes the nerve cells in the brain and the spinal cord to die. ALS Association, *About ALS, What is ALS?*, <http://www.alsa.org/about-als/what-is-als.html> (last visited Sept. 7, 2014). Motor neurons from the brain reach the spinal cord and from there flow to all the muscles in the body. *Id.* When the motor neurons die, the brain can no longer initiate and control muscle movement throughout the body, causing muscles to atrophy. *Id.* Patients with ALS experience progressive loss of muscle movement, eventually becoming totally paralyzed. *Id.* The ultimate end of this process is inevitable death. *Id.*

The journey to death from ALS can be torturous. Not only do ALS patients lose control of voluntary muscle movement as they eventually become paralyzed, they also suffer twitching and cramping of muscles, thick speech and difficulty talking, along with trouble breathing, chewing, and swallowing. *See* ALS Association, *About ALS, Symptoms*, <http://www.alsa.org/about-als/symptoms.html>

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<sup>1</sup> No party’s counsel authored any part of this brief, and no counsel, party, or other person or organization made any monetary contribution to fund the preparation or the submission of this brief. This disclosure is made pursuant to Rule 12-215(F) NMRA. All parties received adequate notice pursuant to Rule 12-215(B) and agreement of the parties of The Association’s intention to file an amicus brief.

(last visited Sept. 7, 2014). Death often comes from a slow suffocation; once the breathing muscles are affected, permanent ventilatory support is needed to survive.

*Id.* At the trial of this case, Dr. Eric Kress, M.D., who was qualified by the district court as an expert in “end-of-life care, generally, and aid in dying, in particular, in Montana and the process” [12-11-13 2 Tr. 151:20-25], described ALS as follows

[I]t’s basically a disease where there is no cure. Once you’re diagnosed, it’s inevitably fatal. And it’s a slow deterioration in nerve function, and it generally starts in the extremities and goes up, and then the last thing that happens is you stop breathing because of your muscles of respiration. But along the way you aspirate, you can’t swallow, and obviously by then you’re not walking, that sort of thing.

[12-11-13 2 Tr. 160:2-10] There is no cure for ALS and no treatment that halts or reverses the degeneration of motor neurons. ALS Association, *About ALS, What is ALS?*, <http://www.alsa.org/about-als/what-is-als.html>.

Despite losing physical control of their bodies, ALS patients typically retain mental competency throughout their illness. “Patients in the later stages of the disease are totally paralyzed, yet in most cases, their minds remain sharp and alert.” ALS Association New Mexico Chapter, *About Us, What We Do, Quick Facts about ALS*, [http://webnm.alsa.org/site/PageServer/?pagename=NM\\_2\\_quickfacts.html](http://webnm.alsa.org/site/PageServer/?pagename=NM_2_quickfacts.html) (last visited Sept. 7, 2014). A person’s sense of sight, touch, hearing, taste, and smell also remain unaffected. ALS Association, *About ALS, Symptoms*, <http://www.alsa.org/about-als/symptoms.html>. Thus, ALS patients are

fully aware of the progress of their disease and the inexorable loss of bodily integrity and autonomy.

### INTEREST OF AMICUS CURIAE

The ALS Association New Mexico Chapter (“The Association”) is the local chapter of the only not-for-profit health organization dedicated solely to the fight against ALS, The ALS Association. *See* ALS Association New Mexico Chapter, *About Us*, [http://webnm.alsa.org/site/PageServer?pagename=NM\\_2\\_about\\_our\\_chapter](http://webnm.alsa.org/site/PageServer?pagename=NM_2_about_our_chapter) (last visited Sept. 7, 2014). The Association shares its mission with the National Association: “Leading the fight to treat and cure ALS through global research and nationwide advocacy while also empowering people with Lou Gehrig’s Disease and their families to live fuller lives by providing them with compassionate care and support.” ALS Association, <http://www.alsa.org/> (last visited Sept. 7, 2014).

The New Mexico Chapter was founded in 1999 by New Mexicans whose lives had been touched by ALS and who wanted to help local ALS patients and their families. ALS Association New Mexico Chapter, *About Us*, [http://webnm.alsa.org/site/PageServer?pagename=NM\\_2\\_about\\_our\\_chapter](http://webnm.alsa.org/site/PageServer?pagename=NM_2_about_our_chapter). Together with the National Office, The Association strives to help people living with ALS and to search for a cure. *Id.* While the National Office focuses on research and advocacy,

the New Mexico Chapter concentrates on helping New Mexican ALS patients and their families by providing compassionate care and support. *Id.*

The Association supports Plaintiffs-Appellees in this case. ALS patients are the second most common group (after cancer patients) to request aid in dying in those states where the option is available. *See, e.g.,* Or. Pub. Health Div., *Oregon's Death with Dignity Act--2013* 6 (2014), <http://public.health.oregon.gov/ProviderPartnerResources/EvaluationResearch/DeathwithDignityAct/Documents/year16.pdf>; Wash. State Dep't of Health, *Washington State Department of Health 2013 Death With Dignity Act Report, Executive Summary* 1, 5 (2014), <http://www.doh.wa.gov/portals/1/Documents/Pubs/422-109-DeathWithDignityAct2013.pdf>. [**See also RP 218, ¶ 2**] When asked to identify the most common underlying illnesses of those who seek aid in dying, Dr. Nicholas L. Gideonse, M.D., who was qualified by the district court as an expert in “end-of-life care, the medical practice of aid in dying, and its implementation in Oregon,” [12-12-13 3 Tr. 12:8-12], testified that, after cancer:

The next most common is Lou Gehrig's disease, or ALS. . . And it's particularly notable in that it's the illness for which the highest percentage of people choose aid in dying. In other words, cancer is the most common diagnosis, but a lot of people get cancer. Lou Gehrig's disease is very rare, but for those who have it, it's much more common, and the rate that people use it is the highest.

[12-12-13 3 Tr. 46:6-14] Accordingly, ALS patients have a unique and informed perspective on aid in dying.

How a person faces their own death is a private and intimate decision that should be made by that person and that person alone. Nobody else, particularly the state, should have the power to take away that most private and intimate decision. The Association believes that New Mexicans with ALS should be able to seek aid in dying if they so choose. The Association also believes that the physicians who treat New Mexicans with ALS should be able to provide aid in dying counseling and prescriptions without fear of criminal prosecution under NMSA 1978, § 30-2-4. Finally, The Association believes that the Amicus Brief of Disability Rights Amici: Not Dead Yet, et al. (“Disability Rights Amici Brief”) does not accurately state the position of New Mexican ALS patients who are disabled and wishes to speak on behalf of those individuals. Clearly, the resolution of this case is important to the ALS community in New Mexico represented by The Association.<sup>2</sup>

### **SUMMARY OF PROCEEDINGS**

The Association adopts the summary of proceedings as set out in the Introduction of Plaintiffs-Appellees’ Answer Brief. [*See* **AB 1-17**]

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<sup>2</sup> The Association files this brief conditionally as the Court has not yet ruled on The Association’s Unopposed Motion for Leave to File Amicus Curiae Brief, which was filed August 29, 2014.

## ARGUMENT

At issue in this case is the question of whether mentally competent, terminally ill patients in New Mexico may choose aid in dying to achieve a peaceful death in the face of suffering they find unbearable. For the reasons that follow, The Association urges the Court to affirm the holdings of the district court and hold in favor of Plaintiffs-Appellees.

I. THE COURT SHOULD AFFIRM THE DISTRICT COURT'S RULING THAT MENTALLY COMPETENT, TERMINALLY ILL PATIENTS HAVE A FUNDAMENTAL RIGHT UNDER THE NEW MEXICO CONSTITUTION TO SEEK AID IN DYING.

The Association asks the Court to affirm the district court's decision finding Section 30-2-4 unconstitutional as applied to aid in dying. [See RP 232, ¶¶ 4-7] At the heart of the district court's decision is the conclusion that mentally competent, terminally ill New Mexicans have a fundamental right to seek a peaceful death through aid in dying under Article II, Sections 4 and 18 of the New Mexico Constitution. [RP 232, ¶ 5] The Association agrees with the district court's conclusion based not only on the applicable law but also, and more importantly, on its knowledge of the process of dying from ALS and how that process is experienced by ALS patients and their families.

**A. The District Court Correctly Departed from Federal Law and Applied Strict Scrutiny to Hold that the State's Interest in Section 30-2-4 Is Outweighed by the Interests of Mentally Competent, Terminally Ill Patients.**

The state has no compelling interest in denying its mentally competent citizens, suffering from a debilitating terminal illness, from achieving a peaceful death. *See ACLU of N.M. v. City of Albuquerque*, 2006-NMCA-078, ¶ 19, 139 N.M. 761, 137 P.3d 1215 (applying strict scrutiny where the right being violated is fundamental). Any possible interest that the state may have in denying that right, whether it be a general interest in preserving life or in preventing suicide, without placing those interests in any particular context, is significantly outweighed by the interests the dying have in exercising a measure of control over their own deaths. The Association agrees with and adopts Plaintiffs-Appellees' constitutional analysis of this issue. [**See AB 20-41**]

The Association further states that, with respect to ALS patients, the interest in ending suffering by choosing a controlled and pain-free death far outweighs the miniscule interest that the state has in preserving what remnants of life, remnants replete with pain, fear, and strife, remain. Indeed, with ALS, with each day that the disease progresses, the potential for life diminishes, and with it the state's interest in preserving life. *In re Quinlan*, 355 A.2d 647, 664 (N.J. 1976). Thus, any interest the state has in Section 30-2-4 survives no level of scrutiny when

applied to ALS and other mentally competent, terminally ill patients. [See AB 36-41]

**B. The Experiences of ALS Patients Demonstrate Why the District Court’s Conclusion that the Right to Aid in Dying Is Fundamental Under the New Mexico Constitution Is Correct.**

The Association is the voice of New Mexican ALS patients, as well as the voices of their families. The perspective of people who have experienced the horrors of death by ALS, as recounted here by The Association, is relevant and necessary to a full consideration of the issues presented. The experiences of these ALS patients reflect the extraordinarily private nature of the right at issue here—how a person chooses to face his or her own death—and confirm that medical decisions related to terminal illness and death should be left to the individual. The experiences of these ALS patients also confirm that denying aid in dying to ALS patients infringes on their rights to liberty, due process, and happiness. The experiences of these ALS patients also confirm that the choice of a mentally competent patient dying of ALS for aid in dying is not “suicide.”

**1. ALS patients who are denied aid in dying may be forced to take their deaths into their own hands.**

“It is undeniable that people facing a debilitating, terminal illness frequently try to end their lives, sometimes violently and gruesomely.” Brief of Amicus Curiae Surviving Family Members in Support of Aid in Dying in Support of

Plaintiffs-Appellees, *Baxter v. State*, 2009 MT 449, 224 P.3d 1211 (No. 09-051), 2009 WL 1967450 at \*12 (citing authorities). At any given moment, there are ALS patients who want to end their suffering by ingesting medications to bring about a peaceful death, but are denied the right to do so because of uncertainty in the law. That was the case for an ALS patient in Montana whose widow submitted an amicus brief in support of aid in dying in the *Baxter* case after her husband took an overdose of sleeping pills to end his suffering from late stage ALS when aid in dying was unavailable. *See id.* at \*2.

In her personal statement for that brief, Joan Perry described how her husband stockpiled sleeping pills for over a year in preparation for his death and how awful that process was for both of them. *Id.* at \*12. She confessed that:

David and I did discuss what could happen if the pills did not work. . . We talked about whether I should be prepared to put a plastic bag over his head, an act that is too horrible to even contemplate. We also talked about whether he would have to “go outside” and end his life in a violent fashion. This made both of us very anxious—it was extremely unsettling.

*Id.* She also lamented that “we should not have had to go through this process on our own without the help of our physician. We should not have had to worry about plastic bags or violent means of death.” *Id.* Mrs. Perry concluded that her husband’s death would have been “much more dignified and peaceful” if they had had access to aid in dying. *Id.*

Dr. Kress, one of Plaintiffs-Appellees' experts, shared a similar story at the trial of this case. The first patient who ever asked Dr. Kress for aid in dying was a man with ALS. **[See 12-11-13 2 Tr. 159:19-160:2]** It was in approximately 2011 and the man was 70 years old. **[Id.]** Dr. Kress stated that:

There was no question this gentleman was terminal. He had formerly been a very vigorous, athletic man and, you know, over 6 feet tall, 200-plus pounds, and now he weighed 120 pounds. His muscles had deteriorated so much he just looked like skin and bones. He had numerous bruises all over him because he was a very intensely proud man and he would try to keep walking, but he would just, you know, face-plant on a daily basis. And he was sort of that kind of person, he just wanted to do his own thing.

**[12-11-13 2 Tr. 160:12-20]**

Dr. Kress had no doubt that the ALS patient understood what he was requesting in asking for aid in dying: "He was generating the request and repeatedly asking me for it over and over." **[12-11-13 2 Tr. 161:11-13]** Unfortunately, Dr. Kress was unable to provide aid in dying to this patient due to his lack of familiarity with the legality of aid in dying, which was new in Montana, as well as lack of knowledge about the process itself. **[See 12-11-13 2 Tr. 161:24-162:]** Dr. Kress testified that the patient was very angry with him when he refused to provide aid in dying: "He got quite mad and he called me a coward." **[12-11-13 2 Tr. 162:24-24]**

Dr. Kress suspects that the ALS patient then took matters into his own hands. Dr. Kress testified that the patient died about three to four weeks after he was refused aid in dying and that “he’s someone that we strongly suspect was stockpiling his medications and then he – we think it’s very likely he ended his life by basically stockpiling his medications and then putting them down his tube feeder.” [12-11-13 2 Tr. 163:2-6] While he has no regrets about the first patient to whom he actually provided aid in dying, Dr. Kress was left unsettled by the case of the ALS patient: “[T]he first case kind of haunted me a little bit because I was called a coward and this gentleman was angry with me, who I respected a great deal in life, and so that was upsetting to me, and I spent a few nights staring at the ceiling.” [12-11-13 2 Tr. 174:2-6]

These accounts of ALS patients who were forced to precipitate death alone exemplify the importance of empowering mentally competent, terminally ill patients with the option of aid in dying. Neither the state nor this Court can stop terminally ill New Mexicans from hastening their deaths; that is a matter of free will. But this Court can ensure that the manner in which death comes to those terminally ill, mentally competent New Mexicans who choose to control their death is safe, peaceful, and dignified. As demonstrated, denying the option of aid in dying leads to untenable results and violates an individual’s rights to happiness and due process. Recognizing the right as protected by the New Mexico

Constitution will guarantee that mentally competent, terminally ill patients who wish to avoid further suffering before death will die a peaceful death with the assistance of their physicians and surrounded by their loved ones.

**2. ALS patients in New Mexico want to have the right to choose to end their suffering and die peacefully through aid in dying.**

The Association counsels and supports numerous ALS patients in New Mexico who want aid in dying. Death by ALS is a horrific experience: a patient in the late stages of ALS generally is paralyzed, cannot eat, cannot speak, and cannot breathe. As Dr. Gideonse explained at trial:

[W]ith ALS, there is a progressive point at which the weakness begins to affect your breathing and you have a very clear decision about ventilator dependency or not. And both of those situations can be pretty hard to endure when, again, there is no curative option, no way out at the end of that.

**[12-12-13 3 Tr. 47:14-19]**

Once an ALS patient reaches a certain progression of the disease, there is simply nothing that can be done. To make matters worse, the ALS patient is keenly aware of every debilitating step and new indignity because the disease typically does not affect mental competency. The awfulness of losing all control over one's body and thus losing autonomy over daily life is magnified by the knowledge that death is imminent and the anxiety that comes with that knowledge. ALS patients find themselves trapped in a state of complete dependency with no

autonomy and only the prospect of even greater suffering before death finally arrives.

Loey Cohen Kirk was one New Mexican who experienced the misery of dying from ALS and who wished for access to aid in dying. The personal statement of her daughter, Melanie Kirk, and her son, Neal Samuel Cohen Kirk, is attached as Appendix 1 to this brief. Melanie and Neal sacrifice their privacy and that of their mother in hopes of securing the right to aid in dying in New Mexico.

Loey Kirk was a resident of Albuquerque, New Mexico. Appendix 1, ¶ 2. She loved life. *Id.* ¶ 3. She loved travel and found adventure in everything she did. *Id.* She passed away on August 30, 2014 from complications due to ALS. *Id.* ¶ 2. She was 64 years old. *Id.*

Loey was diagnosed with ALS in December of 2009. *Id.* ¶ 4. For many years, she lived with a slow progression of the disease and was able to retain a good deal of autonomy. *Id.* In the months leading up to her death, however, the disease progressed much more quickly. *Id.* ¶ 5. During that time, she lost her ability to do many tasks herself. *Id.* After she lost the ability to drive she was dependent on her friends and family for even simple tasks such as grocery shopping. *Id.* She then lost her ability to walk all together. *Id.* She was unable to use the bathroom on her own, limiting her independence even more. *Id.* She

began losing the use of her hands and had little appetite. *Id.* She began to suffer greatly. *Id.*

Even early in the course of the disease she expressed an adamant desire to avoid the available medical means of extending life to patients with ALS. *Id.* ¶ 6. She did not want a feeding tube, catheters, or breathing assistance. *Id.* As the disease progressed and her faculties slipped away, Loey became increasingly vocal about her wish to hasten her death. *Id.*

She did not want to become a prisoner in her own body, and have the disease progress beyond her own means of deliverance. *Id.* ¶ 7. She was very open with her family about wanting to have control over her death and about wanting to make the decisions about how she would face her last moments. *Id.* She wanted autonomy.

Loey consulted with her doctor about her wish to hasten her death. *Id.* ¶ 8. She wanted to be able to ingest medications to bring about a peaceful death, but was told that physicians in New Mexico do not yet feel safe in prescribing for this purpose. *Id.* After being denied aid in dying, Loey expressed concern to her family about having the ability to determine for herself how her life would end before she was no longer able to make such choices. *Id.* ¶ 9. She understood that even if aid in dying eventually became available in New Mexico, by that point there was a good chance that she would not be able to take advantage of it if her

ALS had progressed such that it prevented her from administering the medicine herself. *Id.*

With no access to aid in dying, and feeling anxious about qualifying for such care in the event it became available, Loey began looking into ways she could achieve death without the assistance of a physician. *Id.* ¶ 10. She did not try to hide what she was doing from her family. *Id.* She was clear that it was important to her to be able to choose how and when she would die. *Id.*

Loey's doctor ultimately dissuaded her from precipitating her own death. *Id.* ¶ 11. He explained how difficult death under such circumstances can be for both the terminally ill patient and their families. *Id.* Loey did not want to put her doctor or anyone else at risk of criminal prosecution by hastening her own death. *Id.*

Loey had always said that if she ever became incapacitated by illness or disability of any kind, it was her wish not to live under such circumstances, *id.* ¶ 3, but she was forced to do exactly that. Having access to aid in dying would have provided great comfort to Loey in her last few months of life. *Id.* ¶ 12. It would have lessened her suffering and anxiety. *Id.* Knowing that aid in dying was an option would have quieted her worries, allowing her to more fully enjoy the time before the end of her life. *Id.* Instead, she was forced to bear the progression of her disease and to face horrific suffering. *Id.* Her final wishes for autonomy were thwarted; she died the death she hoped to avoid. *Id.*

Aid in dying also would have been a comfort to Loey's family. *Id.* ¶ 13. It was incredibly painful for Melanie, Neal, and the rest of Loey's family to watch their mother suffer, particularly because they knew that Loey had wanted the right to die with dignity. *Id.* Melanie and Neal strongly believe that New Mexico should provide mentally competent, terminally ill patients with the right to aid in dying. *Id.* They wish that their mother's passing could have been a more peaceful experience through aid in dying. *Id.*

II. THE ARGUMENTS ADVANCED BY THE DISABILITY RIGHTS AMICI PROVIDE NO BASIS FOR REVERSAL OF THE DISTRICT COURT'S RULINGS.

"People with disabilities do not speak with one voice on whether individuals with terminal illnesses should be permitted to end their own suffering with the assistance [of] of their physicians and to choose death with dignity." Brief for the Amici Curiae: Gay Men's Health Crisis, et al. In Support of Respondents, *Washington v. Glucksberg*, 521 U.S. 702 (1997) (Nos. 96-110, 95-1858), 1996 WL 711205 at \*1 ("*Glucksberg* Amici Brief"). That fact was true nearly twenty years ago when a group of disabled citizens filed an amicus brief in support of aid in dying in *Glucksberg*, *see id.*, and it is true today. The Association represents a group of disabled people who favor aid in dying and support Plaintiffs-Appellees in this case. The Association disagrees with the position of the Disability Rights Amici and asks the Court to be mindful that they do not represent the interests of

all disabled people. They certainly do not speak to or advance the interests of patients disabled by the ravages of ALS.

**A. Aid in Dying Does Not Discriminate Against or Otherwise Adversely Affect People with Disabilities.**

The Disability Rights Amici contend that upholding the district court's conclusion that the right to aid in dying is a fundamental right in New Mexico will result in a parade of horrors for the disabled community. *See, e.g.*, Disability Rights Amici Brief at 2 (listing the "issues" that the Disability Rights Amici claim the Court will soon face if it affirms the district court). That is simply not true. Indeed, the objections of the Disability Rights Amici to aid in dying are without foundation and easily rebutted.

First, the issue before this Court is a narrow one: whether mentally competent, terminally ill patients whose deaths are inevitable and imminent have the right to die with dignity. It concerns only those people for whom the process of death has already begun. It therefore does *not* concern the great majority of the disabled community because they are not terminally ill. Rather, most disabled persons have a static condition, and would not be eligible for aid in dying unless and until they are dying of a terminal illness. The overwhelming majority of disabled people would be eligible for aid in dying as defined by the district court only if they developed a terminal illness making death imminent and inevitable.

[See **RP 231, ¶ 2**] As stated by disabled amici in *Glucksberg*, the right to aid in dying “is more appropriately viewed as an interest held by all individuals that may be exercised as a right if and when they become terminally ill, rather than a right held by terminally ill individuals and not others.” *Glucksberg* Amici Brief, 1996 WL 711205 at \*18. Persons with mental disabilities likewise would not be eligible for aid in dying as contemplated by the district court’s decision because mental competency is a requirement. [**RP 231, ¶ 2**] The Disability Rights Amici’s fears that aid in dying would be extended to all disabled persons therefore is unfounded.

Second, the fundamental right to aid in dying found by the district court is not derived from quality of life considerations as suggested by the Disability Rights Amici. *See* Disability Rights Amici Brief at 5-9. Instead, the fundamental right arises from the New Mexico Constitution’s guarantees to due process of law and the right to seek and obtain safety and happiness. [**RP 223-229**] As the district court held, there is no right “more fundamental, more private or more integral to the liberty, safety and happiness of a New Mexican than the right of a competent, terminally ill patient to choose aid in dying.” [**RP 228, ¶ HH**] The right is based on the autonomy of the individual.

The interests do not derive in any way from any perceived diminished quality of life for individuals with disabilities or terminal illnesses. Quality of life is a subjective valuation belonging to the individual, not the courts or the states. Whether the quality of the life remaining for a terminally ill person is sufficient to justify whatever pain and

suffering he or she may be enduring is a decision for that person, and that person alone.

*Glucksberg Amici Brief*, 1996 WL 711205 at \*16. Because the district court’s decision that mentally competent, terminally ill patients have a fundamental right to aid in dying is not based on a judgment about quality of life, it does not further discrimination against disabled persons contrary to the arguments of the Disability Rights Amici.

Third, contrary to the Disability Rights Amici’s concerns, *see* Disability Rights Amici Brief at 11-14, 17-21, there is *no* evidence that when aid in dying is available persons with disabilities are forced or encouraged to choose aid in dying. Researchers have found “no evidence of a heightened risk” to patients with non-terminal physical disabilities or mental disabilities (or other “vulnerable” groups). *See* Margaret Battin, et al., *Legal Physician-Assisted Dying in Oregon and the Netherlands: Evidence Concerning the Impact on Patients in “Vulnerable” Groups*, 33 J. Med. Ethics 591 (2007). The researchers, who examined data from Oregon and the Netherlands, “found no evidence to justify the grave and important concern often expressed about the potential for abuse—namely, the fear that legalized physician-assisted dying will target the vulnerable or pose the greatest risk to people in vulnerable groups.” *Id.* at 597. The Disability Rights Amici have pointed to no evidence that contradicts the findings of the report. In fact, the

executive director of a disability advocacy group similar to the Disability Rights Amici, Disability Rights Oregon, acknowledged this in proceedings before the American Public Health Association in 2007. See Barbara Coombs Lee, *Oregon's Experience with Aid in Dying: Findings from the Death with Dignity Laboratory*, Ann. N.Y. Acad. Sci. (July 31, 2014) (epub ahead of print). Thus, aid in dying poses no threat to persons who have disabilities who are not eligible for the option and poses no threat to those who would not want the option if they were eligible.

Finally, the right to aid in dying does not deprive people with disabilities of any benefit that is available to other individuals as argued by the Disability Rights Amici. See Disability Rights Amici Brief at 8-11. Rather, the right “does not deny any benefit to any person with a disability, nor does it exclude any person with a disability from participation in any state program, service or activity.” *Glucksberg* Amici Brief, 1996 WL 711205 at \*18. It does not deprive disabled persons of protection from murder. The laws of homicide still apply. It does not deprive them of suicide prevention services. In short, it deprives them of nothing. Aid in dying is a *benefit* to those disabled people who are eligible for it, namely those who, like ALS patients, are mentally competent, terminally ill individuals.

**B. Denying Aid in Dying to ALS Patients on the Basis of Their Disability Does Not Serve Their Interests.**

ALS patients suffer many profound disabilities as their disease progresses. They are partially or totally paralyzed, confined to wheelchairs and often to bed, they lose the power of speech, and require assistance with virtually every activity of daily living. There is no question that ALS patients qualify as disabled. However, unlike the majority of disabled people, ALS patients also have an inexorably progressive terminal illness that will lead inevitably to their deaths. Accordingly, disabled ALS patients are not necessarily similarly situated to other disabled people. Unlike the disabled persons represented by the Disability Rights Amici, ALS patients strongly believe that having a disability ought not deprive them of the choice for a peaceful death or the desire to exercise autonomy over medical decision making and bodily autonomy.

This view is consistent with the view of many other disabled people. In *Glucksberg*, disabled amici, citing to data and personal experience, asserted that “it is clear that people with disabilities, like the public at large, believe that the state should not be allowed to interfere with a terminally ill individual’s personal decision of how and when to die.” *Glucksberg* Amici Brief, 1996 WL 711205 at \*5-6. The Association agrees.

In essence, those disability rights advocates opposing the right to assisted suicide appear to be saying that the individual with a

disability should have control over every decision in his or her life, except for the decision of whether to live in the face of a terminal illness. This blatant contradiction is glaring and unacceptable to a substantial majority of people with disabilities.

*Id.* at \*6. The Association hopes that the Court will not be misled by the Disability Rights Amici Brief; not all disabled persons oppose the right to aid in dying. The disabled amici in *Glucksberg* stated that they were “offended that, on the basis of their disabilities, others [we]re attempting to deny them and all other Americans the right to end their lives with dignity if they become terminally ill.” *Id.* at \*8. The Association shares that sentiment—based on its experience with ALS patients, it believes that ALS patients should not be denied the right to aid in dying for *any* reason, much less because they are disabled by their disease.

### III. THE COURT MAY AFFIRM ALTERNATELY ON STATUTORY GROUNDS BECAUSE AID IN DYING IS NOT SUICIDE.

As Plaintiffs-Appellees did [**AB 42**], The Association recognizes that the Court may opt not to reach the constitutional issues presented by this case. In that event, The Association urges the Court hold that NMSA 1978, § 30-2-4, properly construed, does not prohibit aid in dying. The Association adopts Plaintiffs-Appellees’ analysis on this point [*see* **AB 42-46**], and wishes only to add that from the perspective of The Association, a mentally competent, terminally ill New Mexican with ALS who chooses to die peacefully through aid in dying is *not* committing “suicide.”

The Association agrees with Amicus Curiae New Mexico Psychological Association that aid in dying is fundamentally different than suicide. *See generally* Brief of Amicus New Mexico Psychological Association. ALS patients who seek aid in dying are *already in the process of dying*. Unlike other suicidal individuals, for mentally competent, terminally ill ALS patients, death is inevitable and imminent. They therefore are uniquely positioned to choose death over life in a rational manner, particularly if they can opt for a more peaceful and dignified death in order to free themselves, and their families, from unnecessary suffering.

The Association thus submits that the term “suicide” should not be used in reference to aid in dying. As Justice James C. Nelson so eloquently stated in

*Baxter*:

“Suicide” is a pejorative term in our society. . . . The term denigrates the complex individual circumstances that drive persons generally—and, in particular, those who are incurably ill and face prolonged illness and agonizing death—to take their own lives. The term is used to generate antipathy, and it does. [Mentally competent, terminally ill patients] do not seek to commit “suicide.” Rather, they acknowledge that death within a relatively short time is inescapable because of their illness or disease. And with that fact in mind, they seek the ability to self-administer, at a time and place of their choosing, a physician-prescribed medication that will assist them in preserving their own human dignity during the inevitable process of dying. Having come to grips with the inexorability of their death, they simply ask the government not to force them to suffer and die in an agonizing, degrading, humiliating, and undignified manner. They seek nothing more nor less; that is all this case is about.

2009 MT 449, ¶ 71 (Nelson, J., specially concurring).

The Association agrees with Justice Nelson that ALS patients who seek aid in dying do not seek to commit suicide. The Association considers it to be inappropriate, inaccurate, and condescending to call aid in dying “suicide” when that rational choice is made by a mentally competent ALS patient who faces horrific suffering and prefers to die peacefully. This view is shared by a multitude of medical and health policy organizations. *See, e.g., Amicus Curiae* Brief of American Medical Women’s Association, American Medical Student Association and New Mexico Public Health Association. If aid in dying does not constitute suicide—and The Association believes that it does *not*—then it is not prohibited by Section 30-2-4. If the legislature wants to prohibit this compassionate option, it must do so with sufficiently specific legislation.

### **CONCLUSION**

For all these reasons, Amicus Curiae The ALS Association New Mexico Chapter respectfully requests that the Court affirm the ruling of the district court in its entirety.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I hereby certify that I caused a true and correct copy of the foregoing was served via U.S. Mail Postage Prepaid on the following on September 10, 2014:

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## Appendix 1



3. Loey was a very independent woman who loved life. She loved to travel, she found adventure in everything she did. We remember her telling us as early as 2000 that if she ever became incapacitated by illness or disability of any kind, it was her wish not to live like that.

4. Loey was diagnosed with ALS in December of 2009. For many years, she lived with a slow progression of the disease and was able to retain a good deal of autonomy.

5. In the months leading up to her death, however, the disease progressed much more quickly. We cared for her during that time and watched as she lost her ability to do many tasks herself. After she lost the ability to drive she was dependent on her friends and family for even simple tasks such as grocery shopping. She then lost her ability to walk all together. She was unable to use the bathroom on her own, limiting her independence even more. Then she began losing the use of her hands and had little appetite. She was visibly suffering.

6. Even early in the course of the disease she expressed an adamant desire to avoid the available medical means of extending life to patients with ALS. She did not want a feeding tube, catheters, or breathing assistance. As the disease progressed and her faculties slipped away, our mom became increasingly vocal about her wish to hasten her death.

7. She did not want to become a prisoner in her own body, and have the disease progress beyond her own means of deliverance. She was very open with us about wanting to have control over her death and about wanting to make the decisions about how she would face her last moments with us.

8. Loey consulted with her doctor about her wish to hasten her death. She wanted to be able to ingest medications to bring about a peaceful death, but was told that physicians in New Mexico do not yet feel safe in prescribing for this purpose.

9. She expressed concern to us and others about having the ability to determine for herself how her life would end before she was no longer able to make such choices. She understood that even if aid in dying eventually became available in New Mexico, by that point there was a good chance that she would not be able to take advantage of it if her ALS had progressed to the point where it prevented her from administering the medicine herself.

10. With no access to aid in dying, and feeling anxious about qualifying for such care in the event it became available, Loey began looking into ways she could achieve death without the assistance of a physician. She did not try to hide what she was doing from us. She was clear that it was important to her to be able to choose how she would die.

11. Her doctor ultimately dissuaded her from taking her life into her own hands by explaining how difficult death under such circumstances can be for both the terminally ill patient and for their families. Our mother did not want to put her doctor or anyone else at risk of criminal prosecution.

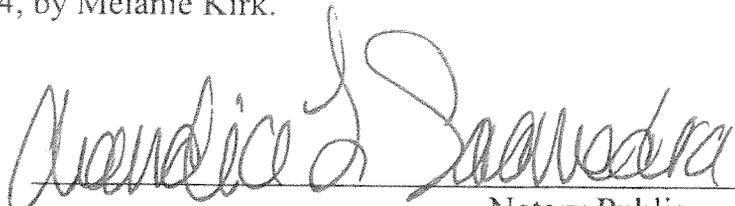
12. We believe that having access to aid in dying would have provided great comfort to Loey in her last few months of life. It would have lessened her suffering and anxiety. Knowing that aid in dying was an option would have quieted her worries, allowing her to more fully enjoy the end of her life. Instead, she was forced to bear the progression of her disease and continued horrific suffering. Her final wishes for autonomy were thwarted; she died a death she hoped to avoid.

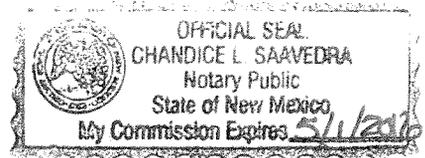
13. We, too, would have been comforted if aid in dying had been available to our mother. It was incredibly painful to watch her suffering, confusion, and frustration. We believe that this was also very hard for other family members as we all were keenly aware of Loey's desire to have the right to die with dignity. We strongly believe that New Mexico should provide mentally competent, terminally ill patients with the right to aid in dying in the same way that Oregon provides such a right to its residents. We know that aid in dying would have made our mother's passing a more peaceful experience for her, for us, and our family.

FURTHER AFFIANTS SAYETH NAUGHT.

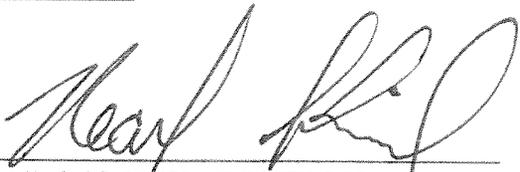
  
MELANIE KIRK

SUBSCRIBED AND SWORN TO before me this 9th day of September,  
2014, by Melanie Kirk.

  
Notary Public

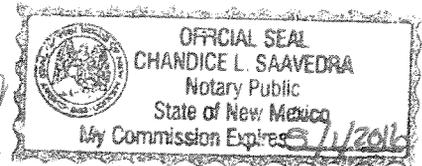


My Commission Expires: 5/1/2016

  
NEAL SAMUEL COHEN KIRK

SUBSCRIBED AND SWORN TO before me this 9th day of September,  
2014, by Neal Samuel Cohen Kirk:

  
Notary Public



My Commission Expires: 5/1/2016