

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

COURT OF APPEALS
STATE OF NEW YORK

MYERS,

Appellant,

-against-

SCHNEIDERMAN,

Respondent.

NO. 77

20 Eagle Street
Albany, New York
May 30, 2017

Before:

ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE LESLIE E. STEIN
ASSOCIATE JUDGE EUGENE M. FAHEY
ASSOCIATE JUDGE MICHAEL J. GARCIA
ASSOCIATE JUDGE ROWAN D. WILSON

Appearances:

EDWIN G. SCHALLERT, ESQ.
DEBEVOISE & PLIMPTON LLP
Attorney for Appellant
919 Third Avenue
New York, NY 10022

ANISHA S. DASGUPTA, DSG
ATTORNEY GENERAL OF THE STATE OF NEW YORK
Attorney for Respondent
120 Broadway
New York, NY 10271

Meir Sabbah
Official Court Transcriber

1 JUDGE RIVERA: Last case on today, Myers v.
2 Schneiderman.

3 MR. SCHALLERT: Good afternoon, Your Honors, I'd
4 like to reserve three minutes for rebuttal.

5 JUDGE RIVERA: Thank you.

6 MR. SCHALLERT: Edwin Schallert, on behalf of the
7 plaintiffs.

8 This appeal implicates the fundamental liberty
9 interest this court has recognized for New Yorkers to make
10 decisions about their medical treatment.

11 The twenty-six-page compl~~ai~~aiant supplemented by
12 314 pages of affidavits and exhibits, explains why aid-in-
13 dying is a medically and ethically appropriate treatment
14 for some mentally-competent terminally-ill patients.

15 JUDGE STEIN: Does this - - - does this boil down
16 to a question of whether this aid-in-dying is the same as
17 assisted suicide? Is that what this boils down to?

18 MR. SCHALLERT: The statutory issue, Your Honor -
19 - -

20 JUDGE STEIN: Okay.

21 MR. SCHALLERT: - - - boils down to whether it's
22 deemed to violate the criminal Statute, assisted suicide.
23 If it does - - -

24 JUDGE STEIN: And would you agree that's a legal
25 issue, not a factual issue?

1 MR. SCHALLERT: Well, no, Your Honor, because the
 2 Appellate Division held that aid-in-dying involves suicide
 3 because it constitutes the act of taking one's own life
 4 intentionally, but that holding raises disputed issues of
 5 causation and intent. Plaintiffs allege that
 6 terminally-ill patients' lives are being taken by the
 7 underlying diseases.

8 JUDGE RIVERA: Isn't that argument really
 9 foreclosed by the statement in Duffy, and its reference to
 10 the staff notes about the Statute?

11 MR. SCHALLERT: No, Your Honor.

12 JUDGE RIVERA: That it recognizes assisting
 13 someone even - - - even the most well-intentioned
 14 assistance, for example, to the terminally ill and ending
 15 their life, falls within the parameters of the Statute.

16 MR. SCHALLERT: Your Honor, Duffy, as you know,
 17 involves radically different facts.

18 JUDGE RIVERA: No, I understand that.

19 MR. SCHALLERT: And the - - - and the reference
 20 in Duffy to the staff notes involves a layperson. We're
 21 talking about a totally different context here.

22 JUDGE RIVERA: But the Statute - - -

23 MR. SCHALLERT: We're talking about - - -

24 JUDGE RIVERA: - - - doesn't - - -

25 MR. SCHALLERT: - - - a medical - - -

1 JUDGE RIVERA: - - - but the Statute says
2 everyone. I mean, the Statute doesn't make any distinction
3 between someone who's got a particular type of training,
4 medical or otherwise; it can be anyone.

5 MR. SCHALLERT: Fair. The criminal statutes make
6 those distinctions all the time.

7 JUDGE RIVERA: Well, I understand, but this one
8 doesn't.

9 MR. SCHALLERT: Amputation is first-degree
10 assault under the Statute, but when a doctor does it, it's
11 not - - -

12 JUDGE RIVERA: But counsel, aren't you - - -

13 MR. SCHALLERT: - - - first-degree assault.

14 JUDGE RIVERA: - - - asking us to read into the
15 Statute, except physicians?

16 MR. SCHALLERT: No, Your Honor. What we're
17 saying is that a medical treatment, a medically and
18 ethically appropriate - - -

19 JUDGE RIVERA: Um-hum.

20 MR. SCHALLERT: - - - and that's what's alleged,
21 and it has to be credited, that states a claim just as - -
22 -

23 JUDGE STEIN: But isn't this distinction between
24 amputation and - - - and other kinds of assault, the - - -
25 the intent of the actor?

1 MR. SCHALLERT: Precisely, Your Honor. And
2 that's why the complaint further alleges that aid-in-dying
3 is indistinguishable from other lawful end-of-life
4 treatments that result in the terminally-ill patient's
5 death.

6 Take terminal sedation, and there's a reason it's
7 called terminal sedation. That's a treatment, infusion of
8 sedatives that place the patient in a coma while
9 withholding food and water. That is lawful and not - - -
10 does not violate the Statute.

11 Why, because the intent of the patient choosing
12 terminal sedation is to end pain, and the patient is deemed
13 to have died of the underlying disease. That's our
14 allegation about aid-in-dying. The intent of the patient
15 is to avoid unbearable suffering, and the underlying
16 illness should be deemed the cause of death.

17 JUDGE RIVERA: Yes, but - - - but the lethal dose
18 is what brings about the death.

19 MR. SCHALLERT: Your Honor, the infusion of
20 sedatives often causes - - -

21 JUDGE RIVERA: May also.

22 MR. SCHALLERT: - - - the death of the patient.

23 JUDGE RIVERA: Um-hum.

24 MR. SCHALLERT: It causes death of the patient.

25 And by the way, Your Honor, the relationship is

1 more direct with terminal sedation, because recall that
2 we've alleged, in states like Oregon, where the practice is
3 legal, nearly forty percent of the patients never even take
4 the medication.

5 JUDGE STEIN: Let's talk about Oregon.

6 MR. SCHALLERT: So how can that be assisted
7 suicide?

8 JUDGE STEIN: Let's talk about Oregon - - -

9 MR. SCHALLERT: Yes, Your Honor.

10 JUDGE STEIN: - - - for a section - - - for a
11 second, and - - - and all of the other states that have
12 allowed aid-in-dying.

13 MR. SCHALLERT: Yes.

14 JUDGE STEIN: Have any of them done so by finding
15 it to be a fundamental or other Constitutional right?

16 MR. SCHALLERT: Well, Your Honor, it's been
17 enacted by Statute in Montana - - -

18 JUDGE FAHEY: Well, in Montana it wasn't.

19 MR. SCHALLERT: - - - in Montana it was - - -

20 JUDGE FAHEY: Montana it wasn't.

21 MR. SCHALLERT: - - - a - - - a specific ruling
22 on the - - -

23 JUDGE STEIN: But not based on the - - - not
24 based on the Constitutional - - -

25 MR. SCHALLERT: No, and - - - and - - -

1 JUDGE STEIN: - - - right; it was based on a - -
2 - a criminal statute that made it a defense to consent,
3 correct?

4 MR. SCHALLERT: Yes, Your Honor.

5 JUDGE STEIN: Okay. So - - -

6 MR. SCHALLERT: And obviously, no other state has
7 the type of history and the importance of the liberty
8 interest that this court - - -

9 JUDGE STEIN: Well, that's a good point - - -

10 MR. SCHALLERT: - - - has recognized.

11 JUDGE STEIN: - - - haven't we always, however,
12 made a clear distinction between refusing treatment and - -
13 - and - - - and - - - and aiding or assisting suicide?

14 MR. SCHALLERT: Well, Your Honor, first of all,
15 what it underlies that right, though, is the autonomy and
16 free choice. That's what animates the right. And aid-in-
17 dying directly implicates those interests; autonomy and
18 freedom are implicated - - -

19 JUDGE GARCIA: Those arguments have been - - -

20 MR. SCHALLERT: - - - as much by receiving the
21 treatment - - -

22 JUDGE GARCIA: Excuse me.

23 MR. SCHALLERT: - - - and - - -

24 JUDGE GARCIA: Those arguments have been rejected
25 by, certainly the Supreme Court, the arguments you're

1 making now, right? So you're asking us to interpret, as I
2 understand your argument, our State Constitution. And
3 again, going to Judge Stein's point, that we've made this
4 distinction in our State so clear, I don't - - - I'm - - -
5 I'm having some trouble seeing the State road, the State
6 Constitutional road to the end that you are seeking here.

7 MR. SCHALLERT: Well, first of all, Your Honor,
8 we think Quill and Glucksberg are not remotely controlling.
9 This court has a proud tradition of interpreting the State
10 Constitution - - -

11 JUDGE GARCIA: Well, they're certainly
12 controlling - - -

13 MR. SCHALLERT: - - - independently.

14 JUDGE GARCIA: - - - on the Federal
15 Constitutional level.

16 MR. SCHALLERT: Pardon?

17 JUDGE GARCIA: They're certainly controlling as a
18 matter of Federal - - -

19 MR. SCHALLERT: No. Well, so Your Honor - - -

20 JUDGE GARCIA: - - - Constitutional - - -

21 MR. SCHALLERT: - - - even if you want to confine
22 the analysis to federal law, Quill and Glucksberg would not
23 be controlling today.

24 First, both cases reside - - -

25 JUDGE RIVERA: But your claim is on the State

1 Constitution.

2 MR. SCHALLERT: Yes, Your Honor. But I'm making
3 the point that even if you thought Quill and Glucksberg
4 were persuasive, they wouldn't be controlling today,
5 because first - - -

6 JUDGE FAHEY: Well, we acknowledge they're not
7 controlling today.

8 MR. SCHALLERT: Well - - -

9 JUDGE FAHEY: We - - - we know it's a question of
10 State Constitutional Law; I wouldn't waste your time on
11 that. I think you really got to say where in New York
12 jurisprudence there's a basis for what you're arguing for.

13 MR. SCHALLERT: But, Your Honor - - -

14 JUDGE RIVERA: Before you answer that, can I just
15 be clear?

16 MR. SCHALLERT: Yes.

17 JUDGE RIVERA: Is your point that there's - - -
18 the patient has this right, as you have described it, as
19 long as they are competent and terminally ill, regardless
20 of where on the spectrum their illness has left their body?

21 In other words, does it matter whether or not you
22 are perfectly healthy, although you may have gotten - - -
23 healthy in the sense of, you're able to function and so
24 forth, as opposed to you're literally on your deathbed,
25 there - - - there is no recourse, there is no cure to this

1 pain, it's just a matter of days.

2 Are you saying it's the right - - - the interest
3 from the State doesn't change and the right doesn't change
4 throughout that whole period of time?

5 MR. SCHALLERT: We are saying, Your Honor, that
6 the right is triggered when the person is terminally ill,
7 mentally competent, and is facing otherwise to the prospect
8 of an unbearable suffering. Take Sara Myers - - -

9 JUDGE RIVERA: No, I understand that. But when
10 you first get that diagnosis, that unbearable suffering
11 you're talking about may be in the distance.

12 MR. SCHALLERT: Yes, Your Honor.

13 JUDGE RIVERA: Right. So are you saying that the
14 State's interest is - - - is not superior to the patient
15 throughout this entire period?

16 MR. SCHALLERT: Your Honor - - - and by the way,
17 at that point, what people now do is they often take their
18 life precisely because they anticipate that ending. That's
19 what the record in the Canadian trial court concluded,
20 where the Canadian Supreme Court - - -

21 JUDGE STEIN: So the question is though - - -

22 MR. SCHALLERT: - - - cited fifty times precisely
23 that point.

24 JUDGE RIVERA: But I'm - - -

25 MR. SCHALLERT: Another - - -

1 JUDGE STEIN: Your question is to whether there
2 is a right to have someone else assist you in doing that,
3 even though the time may not have come?

4 MR. SCHALLERT: Well, Your Honor, recall to, and
5 this is where I get the distinction between this treatment
6 and other totally appropriate treatments, forty percent of
7 the cases, people don't even take the medication, but they
8 have the comfort of knowing they have that option. And - -
9 -

10 JUDGE STEIN: Well, what if I find out - - -

11 MR. SCHALLERT: - - - whereas with terminal
12 sedation - - -

13 JUDGE STEIN: What if I find out - - -

14 MR. SCHALLERT: - - - the patient always does.

15 JUDGE STEIN: - - - that I have an inherited gene
16 - - -

17 MR. SCHALLERT: Yes, Your Honor.

18 JUDGE STEIN: - - - and it is vastly - - - the
19 chances of my getting this horrible disease are very, very
20 great.

21 MR. SCHALLERT: Right.

22 JUDGE STEIN: But there's no indication yet that
23 I have the disease. So then at that point, can I say, I
24 want to make sure I never have to go through this horrible,
25 horrible disease, and this horrible, horrible death, and

1 get a doctor to then prescribe for me medication that, just
2 in case, I can then take, if I want to end my life?

3 MR. SCHALLERT: Well, another thing, Your Honor,
4 this is precisely why a fully-developed factual record
5 would be extremely helpful to the court - - -

6 JUDGE FAHEY: You see, that - - -

7 MR. SCHALLERT: - - - to decide these
8 (indiscernible).

9 JUDGE RIVERA: That person is not terminally ill.

10 JUDGE FAHEY: Excuse me.

11 MR. SCHALLERT: Because - - -

12 JUDGE FAHEY: Excuse me. Let me just get this
13 question out.

14 That takes us back to the original question that
15 Judge Stein ad - - - asked, which is, are - - - are we
16 really talking about is there a difference between aid-in-
17 dying and assisted suicide. You're saying, yes, there is.
18 But how does a development of a record help us make a
19 statutory determination as to how we read this? In other
20 words, why isn't this clearly a pure legal question?

21 MR. SCHALLERT: Because, Your Honor, issues of
22 causation and intent are what differentiate lawful
23 treatments from unlawful treatments. And we say - - -

24 JUDGE FAHEY: Well, that would apply in
25 individual cases, and you would certainly look at someone's

1 intent perhaps in prosecuting the penal statute. But as to
2 what the meaning of the words are - - -

3 MR. SCHALLERT: Yes, Your Honor.

4 JUDGE FAHEY: - - - that's purely a legal
5 question, isn't it?

6 MR. SCHALLERT: No, but Your Honor, to apply that
7 is to - - -

8 JUDGE FAHEY: Applying it is different. The
9 meaning of the words is what I'm asking you.

10 MR. SCHALLERT: Because we don't view it as
11 suicide, Your Honor. We view this as something completely
12 different from suicide. It's a medically and ethically
13 appropriate treatment.

14 JUDGE FAHEY: So - - -

15 MR. SCHALLERT: And this court - - - no court has
16 ever held - - -

17 JUDGE FAHEY: No, I - - - I understand your
18 argument.

19 MR. SCHALLERT: - - - that a medical treatment -
20 - - -

21 JUDGE FAHEY: No, I do - - -

22 MR. SCHALLERT: - - - is appropriate.

23 JUDGE FAHEY: - - - understand your argument, but
24 what I'm saying is, is it our obligation then to simply
25 say, we have to say, is aid-in-dying equivalent to assisted

1 suicide or not; do those words mean essentially the same
2 thing.

3 MR. SCHALLERT: That - - - that is a statutory
4 issue. And if so, Your Honor, then our argument is, that
5 violates Constitutional rights of both under the due
6 process and under equal protection.

7 And let me just come back, your Honor, I know you
8 said that Quill and Glucksberg aren't controlling, but it's
9 more than that. Glucksberg left open the possibility that
10 a plaintiff could prevail on a "more particularized
11 challenge," that's the language.

12 JUDGE FAHEY: Um-hum.

13 MR. SCHALLERT: Deciding this case on a motion to
14 dismiss deprives the plaintiffs of the opportunity to make
15 such a challenge.

16 JUDGE GARCIA: They seemed to have been talking
17 about an as-applied challenge, there, perhaps, right, in
18 the language that you quoted - - -

19 MR. SCHALLERT: Yes.

20 JUDGE GARCIA: - - - rather than a broader
21 challenge. But to go back to what I think Judge Fahey was
22 also saying, and some of your responses about forty percent
23 and, you know, different medical view points on this, and
24 you're saying this is all for a record to be developed in
25 court. It really strikes me though as that's all for a

1 record to be developed in the legislature.

2 MR. SCHALLERT: No, Your Honor.

3 JUDGE GARCIA: Because if you look at the Oregon
4 Statute, and I think it's fairly representative of others,
5 and these were all, again, done in response to the
6 legislative enactments, not a declaration that they're
7 statutory and Constitutional, it's more than ten pages. It
8 goes to issues of notification and counseling, and who has
9 - - - who can consent, and what the exact form is, I think,
10 for consent in some of them. And what would this court do?

11 MR. SCHALLERT: Your Honor, in Montana, it's
12 governed by professional standards of care, the same way
13 other medical treatments are governed. There's no need - -
14 -

15 JUDGE GARCIA: This is a very different - - -

16 MR. SCHALLERT: - - - for the court - - -

17 JUDGE GARCIA: - - - medical treatment.

18 MR. SCHALLERT: But, Your Honor, that is
19 precisely - - - doctors are engaged in all kinds of
20 decisions that have life-and-death consequences - - -

21 JUDGE GARCIA: Right, but not ones - - -

22 MR. SCHALLERT: - - - hence governed by - - -

23 JUDGE GARCIA: - - - that violate the criminal
24 law, as it's written. So if we're going to say it's a
25 Constitutional right, as you describe it, we would be

1 saying that fairly broadly, right?

2 MR. SCHALLERT: We're saying that a particular
3 plaintiff can make a showing that if the Statute applies to
4 their conduct, it violates their ability to exercise the
5 liberty interest of freedom of choice - - -

6 JUDGE GARCIA: And then would the procedure be -
7 - -

8 MR. SCHALLERT: - - - of their medical treatment.

9 JUDGE GARCIA: - - - for each person who wants to
10 do this to come into court and get the particularized
11 judicial determination - - -

12 MR. SCHALLERT: Well - - -

13 JUDGE GARCIA: - - - that they can do it?

14 MR. SCHALLERT: We have plaintiffs who are asking
15 the court to make that particularized showing. And that's
16 what the Supreme Court left open even at the federal level,
17 and that was before we had an open practice of aid-in-dying
18 over the last twenty years.

19 JUDGE RIVERA: But again, isn't your argument
20 that, as you said before, every competent adult who's
21 terminally ill has this right, regardless of the - - - the
22 state of their health, other than they've been diagnosed as
23 terminally ill, so they could be someone whose illness
24 might not actually catch up with them for another ten
25 years, is your argument not that as long as they are

1 diagnosed terminally ill, and competent to make this
2 choice, they could make that choice, even if this disease
3 will not take away their life for another decade?

4 MR. SCHALLERT: No, Your Honor. We've - - - we
5 have focused on plaintiffs who are facing the burden of
6 unbearable deaths, and we're not talking about someone
7 who's gotten an initial diagnosis that can change; that's
8 not our case, Your Honor. Sara Myers had diagnoses of ALS;
9 that was and is fatal. And rather than spending her - - -

10 JUDGE RIVERA: Yes, but she lived for some time.
11 I mean, all three of the named plaintiffs, of course, are
12 now deceased, but they lived for some time.

13 MR. SCHALLERT: Two of them are, Your Honor. But
14 instead - - -

15 JUDGE RIVERA: I'm sorry.

16 MR. SCHALLERT: - - - of spending her last hours
17 alert at home with - - - surrounded by families and
18 friends, she died alone in an institution in a stupor.
19 That's what she was trying to avoid, Your Honor, and that
20 right - - -

21 JUDGE RIVERA: And what's the condition of that
22 third plaintiff who is still alive?

23 MR. SCHALLERT: He is currently in remission,
24 Your Honor. But there is - - - obviously, he's been told
25 it can reoccur. And that's - - -

1 JUDGE FAHEY: A judge - - -

2 MR. SCHALLERT: - - - the one plaintiff who is
3 still alive at this - - -

4 JUDGE FAHEY: Judge, I - - - I see he's got the
5 red light on. Can I ask one more question?

6 JUDGE RIVERA: Yes.

7 JUDGE FAHEY: It's just, and this is off a little
8 bit, so just to prepare you for the switch of argument.
9 One of the amicus briefs argue that the Assisted Suicide
10 Penal Statute is a violation of the Establishment Clause.

11 MR. SCHALLERT: I hear.

12 JUDGE FAHEY: Basically, it's an outgrowth of
13 Roman Catholic Canon Law. Did - - - have you taken a
14 position on that?

15 MR. SCHALLERT: We did not argue that - - -

16 JUDGE FAHEY: All right.

17 MR. SCHALLERT: - - - Your Honor.

18 JUDGE FAHEY: I just wanted to clarify that for
19 myself.

20 MR. SCHALLERT: Sure.

21 JUDGE FAHEY: Thank you. I won't ask about it
22 then.

23 MS. DASGUPTA: Good afternoon, Your Honors.

24 Anisha Dasgupta for the State of New York.

25 In an effort to accommodate different competing

1 concerns, the legislature has decided that no one should be
2 permitted to assist in a suicide.

3 JUDGE RIVERA: So - - - but what's the State's
4 interest? You've heard my - - - my series of questions to
5 counsel. What's the State's interest? I - - - I
6 understand the interest when death is far out in the
7 horizon. What's the State's interest when there's very
8 little time, as in hours, days, weeks, the person is in
9 agonizing death, there is no cure, there is no recourse?
10 What's the State's interest in prolonging that life?

11 MS. DASGUPTA: The State has a significant and
12 longstanding interest in protecting the lives of all of
13 their citizens, regardless of their mental or physical
14 condition. So for example, if someone were to kill a
15 terminally ill person, that would be treated as a homicide.
16 Just because that person happens to have a terminal
17 diagnosis, or perhaps even be near death, the State doesn't
18 treat their demise as any less a cause for (indiscernible).

19 JUDGE RIVERA: What about here, the argument,
20 right, is the patient has a right that we have recognized
21 to decide what happens to their body, to decide the choice
22 of their medical care. So my question to you is, what is
23 the State's interest when we are left with nothing but the
24 clock ticking at this very late stage. It is the final
25 stage of this life, and the person is in agonizing pain?

1 What is the State's interest there?

2 Beyond what you are arguing, and I appreciate
3 what you're arguing, the sanctity of life, because of
4 course, the State allows the person to make a choice, and
5 for the physician to assist in pulling out all forms of
6 artificial machinery that prolongs life, even in this very
7 late stage. And when the State allows terminal sedation,
8 what - - - how is that not, at least somehow, equivalent to
9 a patient saying, I don't want to be sedated for two weeks
10 until my body emaciates and I die; I'd rather just make
11 that decision now and avoid all this pain to me and my
12 family.

13 What's the State's interest in prolonging for two
14 weeks the inevitable that will happen with terminal
15 sedation?

16 MS. DASGUPTA: There a couple of different - - -

17 JUDGE RIVERA: Yes.

18 MS. DASGUPTA: - - - questions bound up in Your
19 Honor's question.

20 JUDGE RIVERA: Yes, absolutely.

21 MS. DASGUPTA: And I'd like to take them one - -
22 - one at a time.

23 JUDGE RIVERA: Please.

24 MS. DASGUPTA: First, in the instance of someone
25 who refuses medical treatment, it's not that the State

1 interest in absent; it's that the State - - - that the
2 legislature has conducted a balancing analysis, and it's
3 determined that in view of the longstanding common law
4 right to avoid unwanted bodily invasions, there should be a
5 statutory right to refuse unwanted treatment.

6 And the legislature has expressly created
7 statutory right. So at the threshold, a person who has - -
8 -

9 JUDGE RIVERA: I understand. But isn't the
10 State's position that you're limiting the options that the
11 patient has, you're forcing the choice of sedation or
12 agonizing pain to the end?

13 MS. DASGUPTA: Well, there goes to one of my
14 second points, your Honor, which is that nobody should have
15 to be in agonizing pain, because pain relief is always
16 available. And the practice that plaintiffs refer to as -
17 - -

18 JUDGE RIVERA: Well, what - - - what would that
19 be, that works every time?

20 MS. DASGUPTA: Well, the practice that plaintiffs
21 refer to as terminal sedation is also known as palliative
22 sedation. And as plaintiffs acknowledge, what that
23 practice is is that for someone who is in great pain, so
24 much pain that it can't be relieved through ordinary means,
25 that person can be - - -

1 JUDGE FAHEY: I - - - I guess that the - - -

2 MS. DASGUPTA: - - - fully sedated.

3 JUDGE FAHEY: - - - the way I - - - the way I
4 understand that this argument is that there's no meaningful
5 distinction between the passive act of pulling the plug of
6 palliative sedation and medical aid-in-dying, which is - -
7 - which involves an action. The only - - - the only basis
8 for the distinction, the way I understand the argument, is
9 is that one, the legislature allows, and one, the
10 legislature doesn't.

11 MS. DASGUPTA: That's - - - that's not correct,
12 Your Honor.

13 JUDGE FAHEY: Okay.

14 MS. DASGUPTA: There are practical and ethical
15 distinctions as well. The importance of the legislature
16 allowing it goes to the point that the existence of the
17 ability - - -

18 JUDGE FAHEY: Well, let's take a step back.
19 Could the legislature modify the Statute and say, a
20 physician could aid a patient in dying under a model, say,
21 in the Oregon Statute?

22 MS. DASGUPTA: Certainly. It's not the State's -
23 - -

24 JUDGE FAHEY: So they - - - so they could do
25 that.

1 MS. DASGUPTA: Yeah.

2 JUDGE FAHEY: Yes.

3 MS. DASGUPTA: It is not the State's position
4 that the Constitution prohibit this - - -

5 JUDGE FAHEY: So - - -

6 MS. DASGUPTA: - - - prohibits this.

7 JUDGE FAHEY: - - - so if they - - -

8 MS. DASGUPTA: It's merely that - - -

9 JUDGE FAHEY: - - - so then - - - so then we're
10 not into the - - - we're into what the legislature can or
11 can't do; we're not into really the ethical issues. It's
12 really a question of policy.

13 MS. DASGUPTA: Well, there are ethical issues
14 bound up in the policy determination. The reason why this
15 is a matter for the legislature is that there is no
16 Constitutional right. And the answer to your question,
17 Judge Fahey, overlaps, in part, with the remainder of my
18 answer to Judge Rivera's question, which is that - - -

19 JUDGE FAHEY: Go ahead.

20 MS. DASGUPTA: - - - there are - - - there are
21 real distinctions between the end of life practices that
22 the legislature has chosen to allow and disallow, and the
23 Constitution doesn't prohibit those lines in this area. So
24 as to distinctions - - -

25 JUDGE RIVERA: I guess that's why I'm asking why

1 is that so. Because if the point of the Constitution
2 doesn't prohibit it is the strength of - - - and the
3 compelling nature of the State's interest, does that
4 interest not fade as you get closer to this very end, when
5 someone is, again, in agonizing pain?

6 MS. DASGUPTA: The State's interest in life is
7 not - - -

8 JUDGE RIVERA: And if you've already conceded
9 that the legislature could make that choice, what possible
10 interest could you have?

11 MS. DASGUPTA: When the legislature makes that
12 choice, it's not because it ignores the existence of a
13 state interest, just as when the legislature decided to
14 allow health care proxies to discontinue life-giving
15 treatment. At that moment, the legislature also declared
16 in that very same statute that its intention was not to
17 permit or encourage suicide, assisted suicide, or
18 euthanasia.

19 JUDGE FAHEY: So - - - so - - -

20 MS. DASGUPTA: There are real practical - - -

21 JUDGE FAHEY: - - - so your argument is - - - so
22 your argument is, it's not a fundamental right. So then
23 we're into the question of whether or not the State has
24 made a rational decision. And that's what we're limited
25 by.

1 MS. DASGUPTA: That's right, Your Honor, and in
2 addition to the State's compelling interest in protecting
3 the lives of all the citizens, there are practical and
4 ethical distinctions between these types of practices. So
5 from a practical standpoint, the risks are different.
6 Withdrawal of treatment or palliative sedation concern
7 people who have a particularly grave medical condition.

8 So with withdrawal of treatment, that only
9 relates to someone who cannot live without continuous
10 invasive medical treatment. Death is not going to result
11 from the withdrawal unless there's an underlying pathology.
12 With palliative sedation, it has to be someone whose pain
13 is so great that it cannot be relieved through the anything
14 except inducing unconsciousness. And that patient has to
15 be someone who has elected not to have invasive medical
16 measures like artificial hydration and nutrition.

17 Assisted suicide, on the other hand, could touch
18 anybody. And so the risks and the dangers are much
19 greater. That's one practical distinction.

20 From an ethical standpoint, administering an
21 assisted suicide regime inevitably entails assessments
22 about the value of the life being terminated. So legally -
23 - - legalizing assisted suicide here would require the
24 legislature to determine that some people's desire to die
25 is rational, and that the State will not seek to prevent

1 it. However, that is a line-drawing exercise that is
2 fraught with ethical complications, and it has spillover
3 effects for people outside the category - - -

4 JUDGE RIVERA: I understand, but and I - - - I
5 have - - - I find the State's argument extremely compelling
6 until we get to terminal sedation. And then I just have
7 great difficulty in appreciating the State interest that
8 you say is overwhelming and outweighs any possible inter -
9 - - that satisfies to the rational basis that's going to
10 sort of - - - the - - - the lowest threshold that you have
11 to meet, when all that that does is prolong the inevitable.

12 MS. DASGUPTA: Well, if I understand Your Honor's
13 question correctly - - -

14 JUDGE RIVERA: Yeah.

15 MS. DASGUPTA: - - - your - - - you're asking
16 whether - - -

17 JUDGE RIVERA: I - - - I'm saying - - -

18 MS. DASGUPTA: - - - people (indiscernible)
19 Constitutional right.

20 JUDGE RIVERA: - - - once the State has decided
21 that you can use terminal sedation, I don't see how you can
22 argue that the interest is greater in prohibiting someone
23 from taking a lethal dosage.

24 MS. DASGUPTA: It's because this - - - the great
25 - - - the greatness or lessness of the State's interest is

1 not what makes the difference in the balancing. The
2 State's interest remains constant throughout one's life.
3 What changes are the circumstances. So in the case of
4 someone who is sedated and chooses to resist unwanted
5 medical treatment, that person is asserting a statutory
6 right that has a venerable common law basis that this court
7 has always distinguished - - -

8 JUDGE RIVERA: Um-hum.

9 MS. DASGUPTA: - - - from the right to commit
10 suicide or to receive assistance in doing so. And the
11 spillovers and the other concerns implicated here cannot be
12 likely discounted.

13 I would urge this court to read, if it hasn't
14 already, the amicus brief submitted by the Disability
15 Rights Group.

16 JUDGE RIVERA: Um-hum.

17 MS. DASGUPTA: And they point out the problems
18 with making judgments about the value of a person's life
19 based on disability and incapacity.

20 JUDGE STEIN: Are - - - are you talking about the
21 kind of a slippery-slope argument; is that - - - is that
22 one of the State's asserted interests, that if - - - if we
23 allow it in this situation, then what about the next
24 situation, and - - - and what are the consequences going to
25 be; is that - - - is that one of the interests that you say

1 supports this distinction?

2 MS. DASGUPTA: It - - - it is an interest in
3 their slippery-slope arguments, and the slippery slope also
4 highlights why there is no Constitutional right here. And
5 that's that there is no freestanding, longstanding
6 Constitutional right to suicide. So this court would have
7 to create it out of whole cloth. And the problem with
8 creating it out of whole cloth is that in the absence of
9 clear limiting principles, there are going to be other
10 independent concerns about this slippery slope. And in
11 this case - - -

12 JUDGE FAHEY: Can - - - can we just stay oin the
13 slippery slope for one second? If you could, would you
14 address some of the experience in other states? Because it
15 seems like the experience in other states does not support
16 a slippery-slope argument, that it really hasn't turned out
17 to be that way. I - - - I did read the Disability amici
18 brief, and I agree with you, it was compelling. Go ahead.

19 MS. DASGUPTA: The state laws that plaintiffs
20 point to as a model, on their face, create the kinds of
21 risks that were identified in Vacco and Glucksberg, and
22 that the legislature was entitled to take into account
23 here.

24 So for example, all of the state laws here
25 acknowledge that there is an inevitable risk of medical

1 error, and they provide immunity for good-faith mistakes on
2 matters such as diagnosis, prognosis, and mental capacity.

3 None of these state laws require any minimum
4 doctor-patient relationship, and none require referrals
5 from mental-health evaluation to determine if the person
6 seeking suicide is just suffering from treatable
7 depression.

8 So as Vacco and Glucksberg noted, and as was
9 noted in the New York Task Force report, the State has a
10 legitimate concern that if assisted suicide is available,
11 some terminally-ill people will not get appropriate care
12 for depression, pain, or their physical symptoms.

13 In addition, none of these state statutes, except
14 Vermont, requires a physician to inform a person requesting
15 death that predictions of life expectancy are an estimate,
16 and that the patient could live much longer.

17 And finally, none require - - -

18 JUDGE RIVERA: You see, isn't that my - - - isn't
19 that my point, about the State's interest, because I
20 absolutely disagree with the way you've analyzed that
21 particular Constitutional rule. The State's interest, when
22 someone is looking at ten years down the road living with
23 an ailment, I mean, certainly the - - - the - - - at least
24 two of those plaintiffs have lived - - - or had lived with
25 that disease and their ailments for some period of time,

1 and they enjoyed fully life, and were enjoying fully life
2 until the end.

3 But isn't the State's interest different when
4 you're talking about just at that late stage of being in
5 agonizing pain? And once the State has approved terminal
6 sedation, I - - - I don't see how your - - - and admits
7 that the State, of course, could choose to exclude
8 physicians from the Statute - - -

9 MS. DASGUPTA: Again, it's - - -

10 JUDGE RIVERA: - - - and wholly approve and,
11 frankly, regulate this, I don't - - - I don't see how you
12 can make this distinction about the State's interest.

13 Life, absolutely, there's sanctity of life;
14 there's no doubt about that. Once the State made this
15 choice about terminal sedation, I don't see how you can
16 make this distinction anymore.

17 MS. DASGUPTA: I would come back to, Your Honor,
18 the fact that nobody has to be in unbearable pain that
19 might pose independent issues. And as to the nature - - -

20 JUDGE RIVERA: Can a patient request terminal
21 sedation even if they're not in pain? Can they ask for a
22 coma to be induced which will eventually result in their
23 death if they're not in pain?

24 MS. DASGUPTA: That doesn't sound like it would
25 be an appropriate medical treatment, Your Honor.

1 JUDGE RIVERA: You're saying - - -

2 MS. DASGUPTA: I mean, the nature - - -

3 JUDGE RIVERA: - - - it would not be appropriate.

4 MS. DASGUPTA: The nature of and appropriate
5 medical treatment is that it has to be administered to
6 someone who needs that. There are numerous laws and
7 regulations then determine when a particular treatment can
8 be imposed, and what's the - - - what's appropriate and - -
9 -

10 JUDGE RIVERA: They have some pain; it's not
11 agonizing pain. Their doctor approves.

12 MS. DASGUPTA: The standard of care is going to
13 involve some assessment of whether the pain medication - -
14 -

15 JUDGE RIVERA: Um-hum.

16 MS. DASGUPTA: - - - is proportionate to the pain
17 being suffered, and that's independent of the terminal
18 context, in part, first, because any administration of the
19 medication involves risks, and so there are rules to make
20 sure that those risks are limited, but also, because the
21 administration - - -

22 JUDGE RIVERA: So then are they right that they
23 should not have been granted a motion to dismiss, because
24 they should be able to develop the record that - - - that
25 what they're describing, the act that they're describing,

1 is instead considered by medical professionals to be an
2 option, an end-of-life option, as opposed to phys - - -
3 what - - - what has been called physician-assisted suicide?

4 MS. DASGUPTA: Again, Your Honor's question
5 contains a number of - - -

6 JUDGE RIVERA: I know.

7 MS. DASGUPTA: - - - smaller questions that I'll
8 take one by one. First as to whether this is
9 physician-assisted suicide, it plainly does fall within
10 that terms of New York Statute. There is nothing novel
11 about plaintiff's proposed conduct or their arguments.

12 New York's laws, on their face, take into account
13 debates about whether there should be a different rule for
14 people who are grievously ill and close to dying.

15 JUDGE STEIN: Well, let me stop you there, for a
16 second, about the Statute. Because I'm very intrigued by
17 this question of where in our law does it make it clear
18 that a physician can amputate somebody's leg or stick a
19 needle in somebody's arm, and that that's not a violation
20 of the penal law?

21 MS. DASGUPTA: In - - - there are a couple of
22 different interrelated statutory schemes. So when someone
23 sues someone - - - when - - - when a person sues an
24 individual who causes aof battery, there's going to be a
25 question about whether that was consented to, about - - -

1 JUDGE STEIN: Right. Okay.

2 MS. DASGUPTA: - - - the context in which - - -

3 JUDGE STEIN: I'm talking about - - - I'm talking
4 the criminal law. Why could not a doctor be charged with
5 assault, or battery, or - - - or something of that nature
6 for doing any one of those acts?

7 MS. DASGUPTA: When - - - when the legislature
8 authorizes particular acts, it has often created immunity
9 within those acts from the criminal law. So for example,
10 when the legislature authorized the - - - the
11 discontinuation of medical treatment, it - - - it included
12 there a specific immunity - - -

13 JUDGE STEIN: I understand.

14 MS. DASGUPTA: - - - from criminal law - - -

15 JUDGE STEIN: But in the assault and battery
16 penal law provisions, it doesn't explicitly except
17 physicians from those, or as, perhaps in Montana, I haven't
18 studied the Montana law too well, said that consent is - -
19 - is a defense to that, under certain circumstances.

20 So I'm trying to understand. I know the argument
21 is that this particular statute says, any person, and any
22 person invo - - - includes a physician, unless excepted.
23 But that's not true for other penal law provisions. So why
24 do we interpret it that way? That - - - that's my
25 question.

1 MS. DASGUPTA: Penal law provisions will explain
2 who they applied to. In - - - in the case of assault or
3 battery, there's going to be some assessment of - - - of
4 whether it was voluntary or not. New York does have some
5 consent defenses, for example, for sports fighting or
6 participation in certain - - - in certain dangerous
7 activities.

8 I don't know what the specific carve outs are for
9 assault and battery, but New York Law takes into account
10 that there are situations where the legislature has
11 authorized people to engage in certain activities, or
12 common law does, in the case of a physician who performs a
13 medical procedure on someone with that person's consent,
14 that - - - that physician may not satisfy the elements for
15 assault and battery.

16 Here, New York Law makes clear that even in
17 sympathetic cases, assisting a suicide is going to be
18 considered a homicide. And if it's done with no duress or
19 deception, then it will be manslaughter rather than murder.
20 But New York speaks to the different - - - New York Law
21 speaks to the difference in culpability between different
22 categories of behavior, and has indicated - - - the
23 legislature has shown that it intends to cover this
24 particular conduct.

25 And as to the remainder of Judge Rivera's

1 questions, fact finding isn't required here because the
2 Supreme Court - - - the U.S. Supreme Court and this court
3 have resolved every single legal issue that plaintiffs
4 raise. Their - - - their claim of aid-in-dying, it's not
5 new conduct; it's just conduct that's been relabeled.

6 JUDGE GARCIA: What about the as-applied language
7 that your adversary pointed to in one of those Supreme
8 Court decisions?

9 MS. DASGUPTA: That's - - -

10 JUDGE GARCIA: Is that open, is that left open by
11 those decisions?

12 MS. DASGUPTA: The very nature of the due process
13 framework always leaves open the possibility of an
14 as-applied challenge, or even about change over time. But
15 what plaintiffs have brought here is a request for a
16 categorical carve out, an entire category of behavior that
17 they want to be except - - - excepted from the Statute.
18 That anytime a physician prescribes a lethal medication to
19 a terminally-ill person with the knowledge that that person
20 is going to use it to take his or her life, and the
21 intention that regardless of the condition of that patient
22 or the circumstances, it shouldn't be covered. And this
23 goes back - - -

24 JUDGE GARCIA: But they have - - -

25 MS. DASGUPTA: - - - to the slippery - - -

1 JUDGE GARCIA: - - - pled three - - - they have
2 three plaintiffs, right? And they're saying as this is
3 applied to those three plaintiffs. It's unconstitutional,
4 right?

5 MS. DASGUPTA: Their claim is framed in terms of
6 a declaration that this conduct is either not covered by
7 the penal law at all, or that it is inconsistent with the
8 due process or equal protection clause. They may have
9 individual plaintiffs in the case, and make individual
10 facts, but the relief that they seek here is categorical
11 relief; it's not a carve out of these individual
12 plaintiffs.

13 But even if it were, there are other
14 considerations that this court would need to take into
15 account. For example, the fact that because there are no
16 legal guideposts to this right in creating it, there would
17 be serious questions about how to delineate it.

18 Judge Garcia, you asked some questions earlier
19 about how a court could possibly say who should be eligible
20 for this and what procedure should be applied, and that's
21 exactly the problem here. That a right which is based in
22 bodily integrity can't be easily restricted to the mentally
23 competent.

24 And an economy-based right can't be easily
25 restricted to the terminally ill. And we see this in, for

1 example, the amicus brief of the Catholic Conference Group,
2 which - - -

3 JUDGE RIVERA: But isn't that, again, true with
4 any of these medical diagnoses? That could be true when
5 someone is diagnosed with the kind of pain you've already
6 attempted to describe, that would permit, as you say, under
7 the law, for someone to request, and that request to be
8 granted for terminal sedat - - -

9 Isn't that always true, that there's always this
10 possibility? And don't we, as the law, leave it to that
11 medical judgment, unless that's challenged, in particular,
12 and then it may come to a judge?

13 MS. DASGUPTA: Sometimes it's left to the
14 physician. Sometimes the legislature conducts that
15 balancing.

16 JUDGE RIVERA: Um-hum.

17 MS. DASGUPTA: When the Constitution doesn't
18 dictate the outcome, then the question of how a particular
19 practice should be treated, and what should be the limits
20 on that practice, are policy judgments for the legislature.
21 And here, the question to the court is - - -

22 JUDGE RIVERA: No, no, no but my - - - that's not
23 my question. I - - - you are correct about that. My
24 question was about those decisions that you say, that's
25 where the error comes in. There may be an error about

1 whether or not someone is terminally ill. This is what I
2 understand your argument to be; you can correct me if I'm
3 wrong.

4 The - - - the physician may be wrong, or there
5 may be coercion, or there may be pressure, right-? And - -
6 - and so my question, isn't that true for all the other
7 types of medical care that's provided, which can result, if
8 not in the way that the lethal dosage does here, and result
9 in the hastening of death. Don't we just let that get
10 regulated?

11 MS. DASGUPTA: Well, Your Honor's final
12 observation is crucial here.

13 JUDGE RIVERA: Go ahead.

14 MS. DASGUPTA: And it's the fact that with aid-
15 in-dying, the sum and substance of it is dying, and the
16 lethal medication creates a permanence to this. There may
17 be other kinds of medical treatments that because of the
18 inevitable risk of misdiagnosis or medical error, sometimes
19 people may be subjected to medical treatments
20 unnecessarily, but - - -

21 JUDGE RIVERA: But then that would be true - - -
22 that's what I'm saying. If there's an error with respect
23 to terminal sedation, wouldn't that be true if there's an
24 error with respect to removing someone from a ventilator or
25 removing nourishment; isn't that always true, again, it's a

1 small category, it's not - - - I get your point. But these
2 small categories of these medical efficiencies that hasten
3 death.

4 MS. DASGUPTA: That's right, Your Honor. That
5 risks can never be eliminated, and that's why a legislature
6 always has to balance them. It's for a legislature to do a
7 deep dive and determine what are the competing concerns,
8 how do you assess the risks, and how are you going to
9 balance interests - - -

10 JUDGE RIVERA: Um-hum.

11 MS. DASGUPTA: - - - that are keenly felt and
12 very important. The State doesn't discount - - -

13 JUDGE RIVERA: Um-hum.

14 MS. DASGUPTA: - - - the importance of what
15 plaintiffs are saying here, but rather, it's that the
16 Constitution doesn't address this conduct, and the
17 legislature's obligation is to take into account all of the
18 citizens of this State, all of their concerns, and all of
19 the concerns that a particular practice may cause. And
20 here, the legislature could rationally conclude that line
21 drawing exercises are too difficult to administer properly,
22 and that a bright-line prohibition against the involvement
23 of anyone with a suicide is the most prudent approach. And
24 the Constitution simply - - -

25 JUDGE RIVERA: But they could also decide in the

1 future that they could draw the line.

2 MS. DASGUPTA: They could, Your Honor.

3 JUDGE RIVERA: Your position is not that the line
4 can never be drawn.

5 MS. DASGUPTA: That's exactly right. It's that
6 it's for the legislature to draw that line.

7 JUDGE RIVERA: Okay. Thank you, counsel.

8 MS. DASGUPTA: Thank you.

9 MR. SCHALLERT: Your Honor, very clear. This is
10 an as-applied challenge to these particular facts; it is
11 not a facial challenge like Quill and Glucksberg.

12 The more particularized challenge was left open
13 by Glucksberg. That is where we want a factual record to
14 provide. And indeed, Your Honor, part of that challenge
15 we'd look to balancing, and Your Honor is exactly right;
16 they talk about an interest in preserving human life. But
17 a terminally-ill patient on the verge of death, suffering
18 in agony, the notion that that's the interest that needs to
19 be preserved is medieval, and would, by the way, bar many
20 other forms of end-of-life treatment. We've talked about
21 terminal sedation.

22 In Bezio, this court held that a hunger strike
23 was a suicidal act, but terminally-ill patients engage in
24 hunger strikes all the time; it's called VSED, Voluntarily
25 Stop Eating and Drinking; it's perfectly lawful, Your

1 Honor. Part of the factual nuance that's missed by these
2 kinds of - - -

3 JUDGE RIVERA: But there were other institutional
4 - - - in Bezio, there were other institutional state
5 interests, right, because that's the person who is
6 incarcerated - - -

7 MR. SCHALLERT: Exactly, Your Honor.

8 JUDGE RIVERA: - - - has impact on - - - on - - -
9 on the institution.

10 MR. SCHALLERT: Exactly, Your Honor. And in
11 fact, the court distinguished that present situation from
12 those of terminally-ill patients whose conditions were - -
13 -

14 JUDGE STEIN: But - - -

15 MR. SCHALLERT: - - - beyond their control, which
16 is our patient-plaintiffs, Your Honor.

17 JUDGE STEIN: Counselor, isn't - - - isn't the
18 question before us - - - one of the questions before us
19 whether a - - - whether the State could rationally conclude
20 that that is an appropriate place to draw the line?

21 MR. SCHALLERT: Well - - -

22 JUDGE STEIN: So in other words, let me say this.
23 No question that - - - that terminal sedation may lead to
24 the same thing as aid-in-dying, and - - - and may be very
25 close to the same thing as aid-in-dying under certain

1 circumstances. But the legislature has chosen to make that
2 the line because - - - for - - - for any number of reasons
3 which we have heard. Isn't the question before us whether
4 that's a rational line, not whether it is a line?

5 MR. SCHALLERT: The - - - the real question is,
6 have we stated a claim. And let me tell you, we stated a
7 claim both under equal protection because we say that line
8 is irrational even under rational-basis scrutiny. Read
9 Justice Stevens' consent in Glucksberg - - -

10 JUDGE STEIN: Okay. But that's the - - - that's
11 the question.

12 MR. SCHALLERT: And - - - yes.

13 JUDGE STEIN: Okay.

14 MR. SCHALLERT: No, no, Your Honor. We would
15 also say that because it implicates a fundamental right,
16 it's not enough to just have a rational interest; it has to
17 be a compelling state interest. So we argue at every
18 single level, and we would like to develop a factual record
19 to flesh that out, which we've been prevented from doing.

20 So the only issue at this stage of litigation, is
21 accepting as true the factual allegations of the complaint,
22 and affording the plaintiff the benefit of all favorable
23 inferences - - -

24 JUDGE RIVERA: So let me ask you this.

25 MR. SCHALLERT: - - - can plaintiffs - - -

1 JUDGE RIVERA: Since you say it's not a facial
2 challenge.

3 MR. SCHALLERT: No.

4 JUDGE RIVERA: You say it's an as-applied
5 challenge.

6 MR. SCHALLERT: Absolutely, Your Honor.

7 JUDGE RIVERA: So for the plaintiff who is in
8 remission, how do they survive? Sorry. How was that in
9 as-applied challenge to them; what - - - what are they
10 going to argue - - -

11 MR. SCHALLERT: Your Honor.

12 JUDGE RIVERA: - - - since now, they're in
13 remission?

14 MR. SCHALLERT: Because it could come back. They
15 want to be able to - - - and in fact, Your Honor - - -

16 JUDGE RIVERA: But then don't they then have to
17 waive - - -

18 MR. SCHALLERT: - - - we have other - - -

19 JUDGE RIVERA: - - - a case - - - because it may
20 never come back.

21 MR. SCHALLERT: We have a - - -

22 JUDGE RIVERA: - - - in case it does come back.

23 MR. SCHALLERT: We have plenty of other
24 plaintiffs, Your Honor, and one problem is, they do die in
25 this litigation precisely because they were suffering from

1 terminal illnesses. We have many other patient-plaintiffs
2 who will come into the case in order to litigate those set
3 of issues.

4 And frankly, Your Honor, even before Sara Myers
5 died, we deposed her so that a court would have the benefit
6 of hearing the testimony of someone who is confronting this
7 incredibly painful choice. Because there are people who,
8 by the way, do not respond to palliative care. And with
9 ALS, of course, you're talking about someone whose mind is
10 still alert, but their body is shutting down. Ultimately,
11 they typically die of suffocation because the muscles in
12 their lungs fail to act. That's what she wanted to avoid -
13 - -

14 JUDGE RIVERA: I'm sorry. Can - - - can - - -

15 MR. SCHALLERT: - - - by having his option.

16 JUDGE RIVERA: When you say palliative care,
17 you're now referring - - - because she's called a
18 palliative sedation, you're not referring to the palliative
19 sedation.

20 MR. SCHALLERT: I'm talking about all types of
21 palliative care, Your Honor. There are some patients who
22 don't respond to it, and indeed, the characteristic for a
23 terminal sedation is typically what's called refractory
24 pain, so you need to have a level of pain to qualify for
25 it.

1 Some people though, do not want to choose to be
2 put into a coma, have food and fluid withheld - - - there
3 is a factual mistake in the Attorney General's brief. They
4 say these people are getting any artificial - - - the only
5 reason they need artificial nutrition is because they're in
6 a coma. They're perfectly capable of eating. It's not an
7 inability to eat, it's not a withdrawal of treatment; it's
8 an injection of sedatives.

9 JUDGE STEIN: So what you're saying is that there
10 is a fundamental Constitutional right to end your life with
11 - - - with a prescribed drug as opposed to end your life in
12 a - - - in a state of sedation where you're not feeling any
13 pain, but you're still alive.

14 MR. SCHALLERT: Let me just say, Your Honor, the
15 right is the autonomy and freedom of choice that this court
16 has repeatedly articulated. Its application in our case,
17 which we would prove with evidence, is that those interests
18 are implicated in precisely that decision by no more
19 intimate or personal decision than a patient's decision
20 about how they're going to cross the threshold to death.
21 Is there a more personal decision that implicates autonomy
22 and freedom, I can't think of it, and - - -

23 JUDGE STEIN: Why - - - why does that - - -

24 MR. SCHALLERT: - - - I've been thinking about
25 this case for a while.

1 JUDGE STEIN: Then why does that choice only come
2 into play when - - - when you have a terminal illness? In
3 other words, we're all going to die at some point.

4 MR. SCHALLERT: Right, Your Honor.

5 JUDGE STEIN: Right. So why don't - - - why
6 doesn't everybody get to make that choice whenever they
7 want to make it. In a - - - in a healthcare directive, in
8 a - - - something like that. When my time comes, this is
9 how I want to go. Why can't we do that?

10 MR. SCHALLERT: Your Honor, I'm glad that Your
11 Honor wants to - - -

12 JUDGE STEIN: Or is that what - - -

13 MR. SCHALLERT: - - - ~~convey~~create a broader
14 right.

15 JUDGE STEIN: - - - or is that what you think is
16 - - -

17 MR. SCHALLERT: My point is that with our
18 plaintiffs, these are people who wanted to live. Mr.
19 Greenberg (sic) was spending nineteen hours a day of sleep
20 - - -

21 JUDGE STEIN: No, I understand.

22 MR. SCHALLERT: - - - getting up, and taking - -
23 -

24 JUDGE STEIN: But if you say - - -

25 MR. SCHALLERT: - - - thirty medications.

1 JUDGE STEIN: I - - - counselor - - -

2 MR. SCHALLERT: - - - he wanted to live.

3 JUDGE STEIN: Counselor, I understand. I - - -
4 believe me, I understand, and I - - - I sympathize; I have
5 great sympathy. But I'm trying to understand where that
6 line gets drawn. I know where you're drawing it now - - -

7 MR. SCHALLERT: Right.

8 JUDGE STEIN: - - - but doesn't that inevitably
9 lead - - - if it's a fundamental right for your clients in
10 this particular case, isn't it a fundamental right for
11 every one of us?

12 MR. SCHALLERT: We are asserting, Your Honor,
13 that it is for people who are facing - - - who are - - -
14 have mentally competent, terminally ill, on the verge of
15 death. That's how we have framed it, that was the
16 challenge we brought. I do think that anyone who finds
17 themselves in that situation should have that right.

18 JUDGE RIVERA: Counsel, isn't really the line - - -
19 - I - - - I may have misunderstood you, but I - - - I
20 thought the line was for those who would be eligible for
21 terminal sedation, because that's where the State has
22 already drawn the line and decided that the interest of the
23 patient - - -

24 MR. SCHALLERT: Right.

25 JUDGE RIVERA: - - - outweighs any State interest

1 that can be identified. I thought that's the line.

2 MR. SCHALLERT: That is a particular application
3 of what we're talking about, Your Honor. So yes, that is
4 the line. But it's illustrative of the fact that other
5 forms of acceptable medical treatment are not considered to
6 be assisted suicide. That's our point, Your Honor, as a
7 statutory matter, but also as a Constitutional matter. And
8 finally, Your Honor, let me say - - -

9 JUDGE RIVERA: Your last point, counsel.

10 MR. SCHALLERT: - - - interpreting meaning and
11 reach of a statute and deciding whether application of this
12 statute violate Constitutional rights are quintessential
13 judicial functions not for the legislature to decide. And
14 at this stage of the proceeding, all that's required is
15 whether plaintiffs can succeed on any cognizable theory.
16 That's an issue uniquely qualified for courts to address,
17 obviously not for the legislature to address.

18 Thank you, Your Honors, for your time and
19 patience.

20 JUDGE RIVERA: Thank you, counsel.

21 (Court is adjourned)

22

23

24

25

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

C E R T I F I C A T I O N

I, Meir Sabbah, certify that the foregoing transcript of proceedings in the Court of Appeals of Myers v. Schneiderman, No. 77 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



Signature: _____

Agency Name: eScribers
Address of Agency: 352 Seventh Avenue
Suite 604
New York, NY 10001
Date: June 05, 2017