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No. 96-110

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STATE OF WASHINGTON, CHRISTINE O. GREGOIRE, Attorney General of Washington, Petitioners, v. HAROLD GLUCKSBERG, M.D., ABIGAIL HALPERIN, M.D., THOMAS A. PRESTON, M.D., and PETER SHALIT, M.D., Ph.D., Respondents.

Type: Brief

Prior History: [*1] On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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Counsel

KIRK B. JOHNSON, MICHAEL L. ILE, BRUCE D. BLEHART, AMERICAN MEDICAL ASSOCIATION, 515 North State Street, Chicago, IL 60610, (312) 464-5000

CARTER G. PHILLIPS, MARK E. HADDAD, * PAUL E. KALB, KATHERINE L. ADAMS, CHRISTOPHER D. MOORE, SIDLEY & AUSTIN, 1722 Eye Street, N.W., Washington, D.C. 20006, (202) 736-8000

NEWTON N. MINOW, JACK R. BIERIG, SIDLEY & AUSTIN, One First National Plaza, Chicago, IL 60603, (312) 853-7000, Attorneys for Amici Curiae

Title

BRIEF OF THE AMERICAN MEDICAL ASSOCIATION, THE AMERICAN NURSES ASSOCIATION, AND THE AMERICAN PSYCHIATRIC ASSOCIATION, ET AL. AS AMICI CURIAE IN SUPPORT OF PETITIONERS

Text

INTRODUCTION AND INTEREST OF AMICI

The right to control one's medical treatment is among the most important rights that the law affords each person. The associations of health care professionals that are submitting this brief strongly [*7] support the recognition and enforcement of that right. Health care professionals are committed to their ethical and legal obligations to honor patient requests to withhold or withdraw unwanted life-prolonging treatment and to provide patients with all medication necessary to alleviate physical pain, even in circumstances where such medication might hasten

* Counsel of Record

death. Through these means, patients can avoid entrapment in a prolonged, painful, or overly medicalized dying process.

The decision below, however, takes the unprecedented step of announcing a constitutional right to control the timing and manner of one's death through the use of physician-assisted suicide. The court of appeals would confer upon health care professionals the awesome responsibility of deciding who, among the many patients who would request physician-assisted suicide, are eligible to obtain the assistance of a physician in killing themselves. The power to assist in intentionally taking the life of a patient is antithetical to the central mission of healing that guides both medicine and nursing. It is a power that most health care professionals do not want and could not control. Once established, the right to physician-assisted [*8] suicide would create profound danger for many ill persons with undiagnosed depression and inadequately treated pain, for whom physician-assisted suicide rather than good palliative care could become the norm. At greatest risk would be those with the least access to palliative care--the poor, the elderly, and members of minority groups.

The American Medical Association ("AMA"), the American Nurses Association ("ANA"), the American Psychiatric Association ("APA"), and 43 other national specialty and state medical societies that are submitting this brief ¹ represent hundreds of thousands of health care professionals who care each day for millions of Americans. Our members have deep compassion for those who are suffering the pain and torment of chronic or terminal illness. We have learned much in recent years about palliative care. Our experience is that a desire for physician-assisted suicide does not persist in patients who receive good palliative care.

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Amici acknowledge that many patients today do not receive proper treatment for their pain, depression, or psychological distress. Nevertheless, physician-assisted suicide is not the right answer to the problem of inadequate care. Although for some patients it might appear compassionate intentionally to cause death, institutionalizing physician-assisted suicide as a medical treatment would put many more patients at serious risk for unwanted and unnecessary death. Rather than recognize a right to physician-assisted suicide, our society instead should recognize the urgent necessity of extending to all patients the palliative care they need and redouble our efforts to provide such care to all.

To explain more fully the bases for amici's position, we begin with a discussion of important aspects of caring for seriously ill patients who request physician-assisted suicide that were misapprehended by the court below.

HEALTH CARE BACKGROUND

The core of the Ninth Circuit's opinion is its view that each individual has a fundamental liberty interest "in choosing the timing and manner of one's death." Pet. App. A-21. While the phrase is superficially appealing, it belies the sad reality [*10] that none of us has the power completely to control the circumstances of our death. Illness, itself only one potential cause of death, comes unbidden and with unpredictable effect. The Ninth Circuit's argument thus rests, at bottom, on an unrealistic assumption about our ability to control death.

At the same time, the Ninth Circuit overlooked the degree to which -- without resorting to physician-assisted suicide -- patients already can control aspects of the dying process. By recognizing patients' rights to refuse unwanted medical treatment or to have such treatment withdrawn, and by providing adequate pain relief, the health care professions have the capacity to prevent a prolonged and painful dying process. While much more remains to be done to ensure that all patients have access to good palliative care and effective advance care

¹ Pursuant to Rule 37.3 of the Rules of this Court, the parties have consented to the filing of this brief. The parties' letters of consent have been filed with the Court. A brief description of each amicus appears in Appendix A to this brief.

planning, see page 15, *infra*, experience to date shows that properly trained health care professionals can effectively meet their patients' needs for compassionate end-of-life care without acceding to requests for suicide.

A. Commitment To Patient Autonomy

The health care professions' ethical commitment to the principle of patient autonomy plays [*11] a vital role in providing patients with the ability to control their course of treatment. This commitment is expressed, for example, in Opinion 2.20 of the AMA Code of Medical Ethics. Opinion 2.20 provides, in part, that "the principle of patient autonomy requires that physicians respect the decision to forgo life-sustaining treatment of a patient who possesses decisionmaking capacity." AMA Council on Ethical and Judicial Affairs, Code of Medical Ethics: Current Opinions § 2.20 (App. 11a-12a); see also ANA, Code for Nurses with Interpretive Statements § 1.1 (App. 19a) (patients "have the moral right to determine what will be done with their own person" and "to accept, refuse, or terminate treatment without coercion").

Opinion 2.20 has great significance for patients near the end of life. To those who fear unwanted medical intervention in the dying process, the message of Opinion 2.20 is that a patient need not accept, and physicians must not impose, a medical treatment that the patient does not want. As a practical matter, this means that a patient can refuse not only mechanical interventions such as respirators, feeding tubes, or dialysis, but also chemotherapy, antibiotics, or [*12] any other treatment that would have the effect of prolonging the patient's life. App. 12a. Through such means, persons suffering from chronic diseases (such as multiple sclerosis or amyotrophic lateral sclerosis) as well as terminal diseases can plan with their physicians which life-sustaining treatment to accept.

Opinion 2.20 unequivocally establishes that "physicians have an obligation to relieve pain and suffering and to promote the dignity and autonomy of dying patients in their care" and, significantly, that this obligation "includes providing palliative treatment even though it may foreseeably hasten death." App. 13a; see also App. 19a-20a (ANA Position Statement on Promotion of Comfort and Relief of Pain in Dying Patients). Although criticized by the Ninth Circuit as illogical, the recognition that physicians should provide patients pain medication sufficient to ease their pain, even where that may serve to hasten death, is vital to ensuring that no patient suffer from physical pain.

The principle of patient autonomy, however, has never been understood to give patients the right to every procedure or treatment they might demand. For example, physicians need not provide futile [*13] treatment -- that is, treatment that has no reasonable chance of helping the patient. Code of Medical Ethics § 2.035 (App. 15a). Similarly, physicians should not provide patients with treatments that are known to be ineffective or harmful. Such limitations are important. If a patient may demand and receive anything from a health care professional, individuals who practice the healing arts will cease being professionals.

B. Physician-Assisted Suicide

Long viewed as outside the realm of legitimate health care, physician-assisted suicide occurs "when a physician facilitates a patient's death by providing the necessary means and/or information to enable the patient to perform the life-ending act." Code of Medical Ethics § 2.211 (App. 11a); AMA Council on Ethical and Judicial Affairs, Physician-Assisted Suicide, 10 *Issues in L. & Med.* 91, 92 (1994). The practice involves physicians intentionally providing patients with the means for suicide, such as prescribing barbiturates in an amount certain to cause death and for the purpose of causing death. See, e.g., Quill, *Death and Dignity: A Case of Individualized Decision Making*, 324 *New Eng. J. Med.* 691 (1991).

The [*14] ethical prohibition against physician-assisted suicide is a cornerstone of medical ethics. Its roots are as ancient as the Hippocratic Oath that a physician "will neither give a deadly drug to anybody if asked for it,

nor . . . make a suggestion to this effect,” and the merits of the ban have been debated repeatedly in this nation since the late nineteenth century. Most recently, the AMA has reexamined and reaffirmed the ethical prohibition against physician-assisted suicide in 1977, 1988, 1991, 1993, and 1996.² Physician-assisted suicide remains “fundamentally incompatible with the physician’s role as healer, would be difficult or impossible to control, and would pose serious societal risks.” Code of Medical Ethics § 2.211 (App. 11a). Other health care professions have similar tenets. See, e.g., App. 19a (ANA Position Statement on Assisted Suicide). Physicians and nurses have the ability to respond sensitively to the concerns of seriously ill and dying patients and can meet their patients’ needs without acceding to requests for suicide.

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C. Requests for Physician-Assisted Suicide

The Ninth Circuit’s decision rests in substantial part on the assumption that there are “growing number of terminally ill patients who die protracted and painful deaths,” Pet. App. A-53, and who, absent physician-assisted suicide, are condemned to face “unmitigated torture” before they die. Pet. App. A-106. Implicit in the court’s holding are the views that those who request suicide do so to avoid excruciating pain, and that health care professionals can do nothing compassionate in response other than to assist in suicide. The court cited no evidence to support these views. In fact, available information demonstrates that these views are misguided.

1. There is no evidence that increasing numbers of patients are dying in severe pain. To the contrary, “the potential for management of pain has recently improved, both through the development of better techniques and through enhanced care delivery through hospice and palliative care efforts.” AMA Council on Scientific Affairs, *Good Care of the Dying Patient*, 275 JAMA 474, 475 (1996). The pain of most terminally ill patients can be controlled throughout the dying process [*16] without heavy sedation or anesthesia. *Id.*; see, e.g., Byock, *Consciously Walking the Fine Line: Thoughts on a Hospice Response to Assisted Suicide and Euthanasia*, 9 J. Pall. Care 25, 26 (1993); Foley, *The Relationship of Pain and Symptom Management to Patient Requests for Physician-Assisted Suicide*, 6 J. Pain & Symp. Mgmt. 289 (1991); Levy, *Pharmacologic Treatment of Cancer Pain*, 335 New Eng. J. Med. 1124 (1996). For a very few patients, however, sedation to a sleep-like state may be necessary in the last days or weeks of life to prevent the patient from experiencing severe pain. N.Y. State Task Force, *When Death Is Sought: Assisted Suicide and Euthanasia in the Medical Context* 40 & n.21 (1994). Notably, when pain medication is properly administered, for most patients the risk of respiratory depression that hastens death is minimal. N.Y. State Task Force at 162.

Given the increasing ability to control pain, it is not surprising that, contrary to the Ninth Circuit’s assumption, the demand for physician-assisted suicide does not come principally from those seeking relief from physical pain. A recent study of such requests in Washington State found that “neither severe [*17] pain nor dyspnea was a common patient concern, suggesting that intolerable physical symptoms are not the reason most patients request physician-assisted suicide or euthanasia.” Back et al., *Physician-Assisted Suicide and Euthanasia in Washington State*, 275 JAMA 919, 924 (1996). This finding is consistent with a report from *Compassion-in-Dying*, see Preston & Mero, *Observations Concerning Terminally Ill Patients Who Choose Suicide*, 4 J. Pharm. Care & Pain Symp. Control 183, 187 (1996) (“in no patient was pain the primary reason for suicide”); with other studies of patients and physicians, see Emanuel et al., *Euthanasia and Physician-Assisted Suicide: Attitudes and Experiences of Oncology Patients, Oncologists, and the Public*, 347 Lancet 1805, 1809 & nn.6, 12 (1996) (“patients experiencing pain were not inclined to euthanasia or physician-assisted suicide”); as well as with studies of Holland’s experience, see Van der Maas et al., *Euthanasia and Other Medical Decisions Concerning*

² AMA Council on Scientific Affairs, *Good Care of the Dying Patient*, 275 JAMA 474, 477 (1996). Most recently, in the aftermath of the decision below, the AMA’s House of Delegates in June 1996 overwhelmingly endorsed a recommendation to affirm the ban on physician-assisted suicide.

the End of Life, 338 *Lancet* 669, 672 (1991) (relief from pain was mentioned as a factor in fewer than half of cases, and was the sole factor in only five percent of cases).

This is not to say that [*18] all patients have access to and actually receive adequate pain relief and good palliative care. They do not. The delivery of such care is "grossly inadequate" today, and efforts to make such care universally available have not yet succeeded. N.Y. State Task Force at 43-47; Connors et al., *A Controlled Trial to Improve Care for Seriously Ill Hospitalized Patients*, 274 *JAMA* 1591 (1995). There are many obstacles to the delivery of adequate pain management. These include a lack of professional training and knowledge, misconceptions about the risks of addiction and respiratory depression associated with pain medication, inadequate communication (reflecting both inadequate attention from health care professionals and undue reluctance of patients and their families to use pain relief medication), and concern over criminal or licensure actions against the prescribing physicians. N.Y. State Task Force at 44-47; AMA Council, 275 *JAMA* at 476. Of further concern, individuals treated at centers that serve predominantly minority patients are more likely than others to receive inadequate pain treatment; the same is true for elderly and female patients. N.Y. State Task Force [*19] at 44 & n.37. Yet for "many patients, pain and suffering could be alleviated using medications and techniques that have been widely publicized and require only modest resources." *Id.* at 35. There is, in short, compelling evidence of the need to ensure that all patients have access to quality palliative care, but not of any need for physician-assisted suicide in order to control pain.

2. Most patients that request suicide do so out of concerns that, in the future, their pain may become intolerable, they may suffer a loss of dignity and become dependent upon others, or they will excessively burden their families. Back et al., 275 *JAMA* at 921; Emanuel et al., 347 *Lancet* at 1807. The suffering that such concerns may cause is real. But if the anticipatory and existential nature of that suffering is recognized and addressed, it can often effectively be alleviated. Foley, 6 *J. Pain & Symp. Mgmt.* at 289-90; N.Y. State Task Force at x, 181.

Concerns about future loss of control, loss of dignity, or pain frequently can be met by reassuring the patient of a continuing commitment to attentive comfort care and by assisting the patient to confront an underlying and unspoken fear [*20] of death. "Many patients and physicians displace anxieties about death onto the circumstances of dying: pain, dependence, loss of dignity, and the unpleasant side effects of medical treatments. Focusing on or becoming enraged at the process distracts from the fear of death itself." Hendin, *Suicide, Assisted Suicide, and Euthanasia: Lessons from the Dutch Experience*, Summary of Testimony Presented to House Subcommittee on the Constitution 1 (1996). A full approach to palliative care addresses spiritual and existential feelings as well as personal and social burdens, using a team approach that draws on social workers and pastors as well as physicians and nurses. Clinicians with experience assisting dying patients to confront such concerns report that the desire for death passes, and that patients say they have found unexpected meaning in their lives that makes their final days worth living. E.g., Cundiff, *Euthanasia Is Not the Answer* 29-39 (1992).

The anxieties that can accompany serious illness are often complicated, however, by the onset of depression. Depression is the single factor found to be a significant predictor of the desire for death. Emanuel et al., 347 *Lancet* at 1809; [*21] Chochinov et al., *Desire for Death in the Terminally Ill*, 152 *Am. J. Psych.* 1185, 1190 (1995). In one study of 44 terminally ill patients, all but one of the eleven patients with "clinical depressive illness" expressed some wish for death, while none of the remaining 33 expressed such a wish. Brown et al., *Is it Normal for Terminally Ill Patients to Desire Death?*, 143 *Am. J. Psych.* 208, 210 (1986); see also Conwell & Caine, *Rational Suicide and the Right to Die: Reality and Myth*, 325 *New Eng. J. Med.* 1100, 1101 (1991) ("of 44 patients in the later stages of cancer, only 3 had considered suicide, and each of them had a severe clinical depression"); AMA Council, 275 *JAMA* at 475; Chochinov et al., 152 *Am. J. Psych.* 1185. In this regard, those with terminal or chronic illness are no different than others who express suicidal wishes. Most who commit suicide suffer from depression or some other diagnosable psychiatric illness, which generally is treatable. Hendin, *Suicide and the Request for Suicide: Meaning and Motivation*, [35 *Duq. L. Rev.* 285, 285 \(1996\)](#); N.Y. State Task Force at 13, 180.

It is clear that "a [*22] substantial proportion of terminally ill patients who express a desire to die could potentially benefit from a trial of treatment for depression." Chochinov et al., 152 Am. J. Psych. at 1190. For example, "the elderly appear to be more prone than younger victims to take their lives during the type of acute depressive episode that responds most effectively to available, modern treatments." Conwell & Caine, 325 New Eng. J. Med. at 1101. Nevertheless, most physicians fail to recognize depression, thereby precluding the opportunity for effective treatment. Id. at 1101-02.

3. The demand for physician-assisted suicide among the terminally ill is thus best understood not as a necessary response to untreatable pain uniquely felt by the dying, but in the broader context of requests for suicide generally. "Among all suicides, only two percent to four percent are terminally ill." N.Y. State Task Force at 12. Moreover, while severe chronic or terminal illness is a risk factor for suicide, "only a small percentage of terminally ill or severely ill patients attempt or commit suicide." Id. at 9, 13. And those patients are similar to physically healthy individuals [*23] who contemplate suicide -- they "are usually suffering from a treatable mental illness, most commonly depression." Id.

Thus, contrary to the Ninth Circuit's most basic premise, terminal illness does not present a special case for physician-assisted suicide. Patients with chronic or terminal illness who seek physician-assisted suicide are typically depressed or anticipating extreme suffering. Their needs and concerns are ones that health care professionals can meet with compassionate care. There may be, even in a system that provides optimal palliative care to all patients, individuals whose pain may not be treatable absent sedation and whose wish for physician-assisted suicide to avoid sedation is sincere. But the number of such individuals is likely to be very small, and the social cost of accommodating their preference for physician-assisted suicide over sedation and withdrawal of treatment is likely to be high. For reasons that follow, even if physician-assisted suicide were thought appropriate for such patients, no one can predict with any confidence that physician-assisted suicide, if authorized by the state, could reliably be limited to them.

D. The Inherent Difficulty [*24] In Regulating Physician-Assisted Suicide

Proponents of physician-assisted suicide agree that lines must be drawn between categories of individuals for whom physician-assisted suicide is to be deemed acceptable or unacceptable. The Ninth Circuit permitted physician-assisted suicide for those with a "terminal illness." Pet. App. A-113 to A-114. In *Vacco v. Quill*, No. 95-1858, the Second Circuit purported to restrict physician-assisted suicide narrowly to those who were "in the final stages of terminal illness." Pet. App., No. 95-1858, at 4a. Both courts expressly limited their holdings to the provision of physician-assisted suicide (Pet. App., No. 95-1858, at 32a-34a & n.3; Pet. App. A-104), but the Ninth Circuit candidly expressed its doubt that any reasonable distinction could be maintained between physician-assisted suicide and voluntary euthanasia. Pet. App. A-100. The "critical line," the Ninth Circuit stated, was between the "voluntary and involuntary termination of an individual's life." Id.

The Ninth Circuit declared that "while there is always room for error in any human endeavor, we believe that sufficient protections can and will be developed by the various states. [*25] " Pet. App. A-103 to A-104. As two commenters note, however: "Where? Which state has done so? In its 153-page opinion, not once does the Ninth Circuit attempt to show how this might be accomplished." Callahan & White, *The Legalization of Physician-Assisted Suicide: Creating a Regulatory Potemkin Village*, [30 U. Rich. L. Rev. 1, 83 \(1996\)](#). Existing rules limiting physician-assisted suicide are not being followed today. AMA Bd. of Trustees, *Euthanasia/Physician-Assisted Suicide: Lessons in the Dutch Experience*, 10 *Issues in L. & Med.* 81 (1994). For example, the study of euthanasia and physician-assisted suicide commissioned by the Dutch government showed that approximately one in four cases of euthanasia did not qualify as voluntary under the guidelines. Van der Maas et al., 338 *Lancet* at 671; Kass & Lund, *Physician-Assisted Suicide, Medical Ethics and the Future of the Medical Profession*, [35 Duq. L. Rev. 395, 412-13 & nn.29-30 \(1996\)](#). Different social circumstances in

the United States make effective regulation even less likely here than in Holland. See AMA Bd. of Trustees, 10 Issues in L. & Med. at 88-89. Difficulties inherent in the regulation of physician-assisted [*26] suicide suggest that even strenuous efforts to regulate such a practice will not succeed.

1. One proposed restriction is to limit physician-assisted suicide to those in the last stages of a terminal illness. An initial difficulty arises, however, in identifying the eligible class. Available evidence suggests "that physicians' predictions of expected remaining life are generally inaccurate." Callahan & White, [30 U. Rich. L. Rev. at 46 & n.202](#). For example, while admission to hospice is contingent on a diagnosis of six or fewer months to live, a recent study showed that 15 percent of hospice patients survived longer than six months and eight percent survived longer than one year. Christakis & Escarce, Survival of Medicare Patients after Enrollment in Hospice Programs, 335 New Eng. J. Med. 172 (1996); see Lynn et al., Defining the "Terminally Ill": Insights from SUPPORT, [35 Duq. L. Rev. 311 \(1996\)](#). Life expectancy is thus inherently problematic as a criterion for establishing eligibility to exercise a constitutional right.

The lack of clear-cut lines between those who are terminally ill and those who are in the last stages of a terminal illness [*27] suggests that any attempt to limit the availability of physician-assisted suicide to the latter would be arbitrary. But the same is true for the line between the terminally ill and the chronically ill. No one can confidently say that the degree of pain or suffering experienced by a person in the last stages of a terminal disease is greater than that experienced by someone at an earlier stage of terminal illness, or by someone who is chronically ill. Moreover, if the pain or suffering is thought to be irremediable, then the longer the patient's life expectancy, logically the more pain and suffering awaits the patient. Kamisar, Against Assisted Suicide--Even a Very Limited Form, [72 U. Det. Mercy L. Rev. 735, 737, 740-41 \(1995\)](#). There would thus be little to prevent expansion of physician-assisted suicide beyond the confines of the last stages of terminal illness.

The experience in the Netherlands illustrates the difficulty of hewing to particular guidelines. Physician-assisted suicide and euthanasia remain unlawful but are not prosecuted if performed by a physician in accordance with established procedures. Keown, "Some Reflections on Euthanasia in the Netherlands," in [*28] Euthanasia, Clinical Practice and the Law 193, 197 (Gormally ed., 1994). In one recent, much-discussed case, a physician, who assisted in the suicide of a physically healthy, 50-year-old woman who sought death in the aftermath of the death of her two sons, was acquitted by a three-judge court in Assen of charges that he had violated the Dutch procedures. The Assen case is significant in that it "marked Dutch acceptance of depressed suicidal patients as eligible for assisted suicide or euthanasia," Hendin, Seduced by Death: Doctors, Patients, and the Dutch Cure, 10 Issues in L. & Med. 123, 129 (1994), and thereby demonstrated the difficulty of restricting the availability of physician-assisted suicide even to those with a physical illness.

2. There are also formidable obstacles to restricting physician-assisted suicide only to those patients who voluntarily request it. First, the fact that many patients do not receive adequate pain relief or suffer from undiagnosed and untreated depression puts undue pressure on them to seek physician-assisted suicide. A substantial percentage of elderly patients suffer mental confusion that also routinely goes undiagnosed. Francis et al., A Prospective [*29] Study of Delirium in Hospitalized Elderly, 263 JAMA 1097 (1990). Moreover, poor and minority individuals are at the greatest risk for receiving inadequate care and thus may feel the greatest pressure to request physician-assisted suicide.

Pressure to contain health care costs exacerbates the problem. Even if, as one would expect, health care insurers would consciously seek to avoid suggesting to patients or physicians that they consider financial costs in making a decision to hasten death, the continuing pressure to reduce costs can only constrain the availability and quality of palliative care and support services that patients and families need. Wolf, Physician-Assisted Suicide in the Context of Managed Care, [35 Duq. L. Rev. 455 \(1996\)](#). These limitations on the availability of proper care clearly can place pressure on patients to express a wish for suicide that they might not otherwise feel. As the

Chief of the Pain Service at Memorial Sloan-Kettering Cancer Center reports, "we commonly see [requests for physician-assisted suicide] dissolve with adequate control of pain and other symptoms." Foley, 6 J. Pain & Symp. Mgmt. at 290.

Providers willing to [*30] comply with requests for suicide may be among those least sensitive to the impact of these pressures and least familiar with alternative responses to their patients' needs. A recent study shows that support for physician-assisted suicide was highest among those health care professionals least knowledgeable about pain symptom management and least capable (due to emotional exhaustion) of empathizing with the patient. Portenoy et al., Determinants of the Willingness to Endorse Assisted Suicide: A Survey of Physicians, Nurses, and Social Workers, -- Psychosomatics -- (forthcoming April 1997); see also Bachman et al., Attitudes of Michigan Physicians and the Public toward Legalizing Physician-Assisted Suicide and Voluntary Euthanasia, 334 New Eng. J. Med. 303, 308 (1996) ("doctors who had the least contact with terminally ill patients were the most likely to support the legalization of assisted suicide"). There is thus added reason to doubt that patients seeking physician-assisted suicide would receive adequate palliative care before such a request is granted.

Second, separating the wishes of the patient from those of the family is extremely problematic. One of the most common [*31] reasons why patients request suicide is to spare their families and loved ones the burdens and expense of caring for them. See, e.g., Blendon et al., Should Physicians Aid their Patients in Dying?, 267 JAMA 2658, 2660-61 (1992); Emanuel, Cost Savings at the End of Life: What Do the Data Show?, 275 JAMA 1907 (1996). But to what extent are these feelings the result of the family's expectations? In one recent study, families of elderly, terminally ill patients were significantly more likely than the patients themselves to express support for physician-assisted suicide. Koenig et al., Attitudes of Elderly Patients and Their Families toward Physician-Assisted Suicide, 156 Arch. Int. Med. 2240, 2244 (1996). Families, especially when confronted with the expense and burden of caring for a terminally ill family member, may be beset with conflicting feelings about hastening a family member's death, as recent cases vividly illustrate. E.g., "Countdown to a Suicide," The New York Times, Dec. 20, 1995, at A-20 (Delury case). Even those family members consciously committed to preserving their loved one's sense of dignity and autonomy may needlessly acquiesce in or encourage [*32] a suicide that could be avoided by assuring the patient that, in their eyes, illness has not compromised his or her dignity. Byock, "Physician-Assisted Suicide Is Not an Acceptable Practice for Physicians," in Physician-Assisted Suicide: Ethical Positions, Medical Practices, and Public Policy Options -- (Weir ed., forthcoming May 1997).

Third, experience to date provides little basis for confidence that health care professionals can reliably determine whether patients have provided truly informed consent for assisted suicide. Frank, sensitive, and extended conversations between physicians and patients are presumptively antecedents to such a determination. Such conversations would be infinitely more complex than any that regularly occur today. For example, ineffective communication remains a major obstacle to achieving pain management, American Pain Society Quality of Care Committee, Quality Improvement Guidelines for the Treatment of Acute Pain and Cancer Pain, 274 JAMA 1874, 1874 (1995), even though pain relief is plainly a goal shared by both health care professionals and patients. And despite their importance, discussions about advance care planning are rare and poorly [*33] handled, which hampers effective and responsive end-of-life care. Emanuel, "Advance Directives," in Principles and Practice of Supportive Oncology -- (Berger et al. eds., forthcoming 1996).

The well-established phenomena of transference and countertransference further complicate the problem of relying upon physicians and nurses to identify voluntary requests. Miles, Physicians and Their Patients' Suicides, 271 JAMA 1786 (1994). Particularly when caring for chronically ill, dying, or suicidal patients, caregivers often have "difficulty tolerating such patients' dependency." Id. at 1786 (footnote omitted). Their "feelings of frustration and inadequacy occasioned by irreversible medical problems" sometimes lead them "to withdraw from such patients or see them as hopelessly or rationally suicidal" when in fact they are not, which "in turn may precipitate suicides." Id. As one physician with extensive experience caring for dying patients has

observed, "only because I knew that I could not and would not kill my patients was I able to enter most fully and intimately into caring for them as they lay dying." Miles, quoted in Kass & Lund, [35 Duq. L. Rev. at 418](#). [*34]

Health care professionals also experience great frustration at not being able to offer the patient a cure. For some, the ability to offer the patient the "treatment" of assisted suicide may provide a sense of "mastery over the disease and the accompanying feelings of helplessness." Hendin, *Seduced by Death*, 10 *Issues in L. & Med.* at 129. This may cause health care professionals or a patient's family to endorse and reinforce requests for suicide more readily than the patient's own ambivalent feelings would warrant. Miles, 271 *JAMA* at 1786. Published accounts of physician-assisted suicide reveal that even those physicians who consciously seek only to implement a patient's voluntary request overlook ways in which their recommendation and support of physician-assisted suicide reinforced the patient's decision for death and left unexamined indications that the patient really did not want to die. Hendin, *Selling Death and Dignity*, 25 *Hast. Ctr. Rep.* 19 (1995); Hendin, *Seduced by Death*, 10 *Issues in L. & Med.* at 125-29.

3. The obstacles to identifying and restricting physician-assisted suicide to those patients who meet criteria of terminality and voluntariness are not likely [*35] to be overcome simply by devoting more resources to oversight of treatment decisions. Indeed, the unprecedented intrusion into the physician-patient relationship needed independently to regulate such treatment decisions would be fundamentally inconsistent with the private nature of health care treatment, and all too likely to undermine what progress has been made in decisions to withdraw or withhold life-sustaining treatment and to use effective pain control. Callahan & White, [30 U. Rich. L. Rev. at 67, 80](#).

Transforming physician-assisted suicide into a medical procedure would create momentum in favor of its use that regulation could not reverse. Were physician-assisted suicide to become a legitimate medical option, then a decision not to select that option would make many patients feel responsible for their own suffering and for the burden they impose on others. Once a patient can choose physician-assisted suicide, it is but a short step to ask a patient why he or she has not done so. Indeed, it seems likely the patient would feel pressure to revisit the question repeatedly, perhaps every day. Many patients thus will "experience -- and be helped [by their families [*36] or physicians] to experience -- their right to choose physician-assisted death as a duty to do so." Kass & Lund, [35 Duq. L. Rev. at 407](#).

SUMMARY OF ARGUMENT

In announcing that the Due Process Clause affords every individual "a liberty interest in choosing the timing and manner of one's death" (Pet. App. A-21), the Ninth Court was moved by the condition of the individual patients seeking judicial relief. The court of appeals failed, however, to examine the broader context in which these patients acted and the circumstances of many other patients who will be affected by its judgment. It also failed to articulate a persuasive constitutional or moral basis for invalidating these longstanding laws. The ancient prohibition on physician-assisted suicide reflects a deeply rooted antipathy to the intentional taking of human life, even when described as "mercy killing." None of the decisions of this Court cited below establishes a basis in the Constitution for invalidating state laws that maintain this prohibition.

Moreover, even if a liberty interest in committing suicide were recognized, the interests of states in adhering to the prohibition against physician [*37] assistance have grown, if anything, stronger in recent years. Advances in palliative care make it possible to control most patients' pain without resort to heavy sedation, and further improvements in the provision of appropriate pain relief and compassionate end-of-life care will happen. In acting precipitously to declare a constitutional right to physician-assisted suicide, the Ninth Circuit's judgment may slow the momentum of such efforts. This Court should refrain from a constitutional ruling that "may be

fraught with serious consequences to the nation.” [New State Ice Co. v. Liebmann, 285 U.S. 262, 311 \(1932\)](#) (Brandeis, J., dissenting).

ARGUMENT

THIS COURT’S DUE PROCESS JURISPRUDENCE DOES NOT PROVIDE A BASIS FOR FINDING A CONSTITUTIONAL LIBERTY INTEREST IN OBTAINING A PHYSICIAN’S ASSISTANCE TO COMMIT SUICIDE.

As a constitutional matter, neither this Court’s jurisprudence nor any other legal principle supports the inference of a novel and potentially harmful right to physician-assisted suicide. The prohibition against physician-assisted suicide serves a vital social function that, once lost, will result in incalculable and severe damage to patients [*38] and to the health care profession.

A. The Individual’s Fourteenth Amendment Liberty Interest In Refusing Medical Treatment Does Not Encompass The Right To Physician Assistance In Committing Suicide.

In finding a liberty interest in controlling the timing and manner of one’s death, the Ninth Circuit relied initially upon this Court’s decision in [Cruzan v. Director, Missouri Department of Health, 497 U.S. 261 \(1990\)](#). Pet. App. A-61. The Cruzan case concerned the plight of Nancy Cruzan, who, at the age of 25, suffered an automobile accident that left her permanently unconscious, existing in what is termed a persistent vegetative state. She was kept alive by means of a surgically implanted feeding tube for six years after the accident, during which time she never regained consciousness. [497 U.S. at 266](#). When it became clear that Nancy’s condition would never improve, her parents, seeking to implement the treatment decision they believed she would have made, sought to discontinue life support functions. [Id. at 268](#).

Cruzan thus presented the Court with the profoundly difficult question of whether and in what manner a state could refuse [*39] to honor the request of an incompetent patient’s surrogate that life support functions be discontinued. In a careful and narrowly drawn opinion, the Court suggested that “the forced administration of life-sustaining medical treatment, and even of artificially-delivered food and water essential to life, would implicate a competent person’s liberty interest,” but that “the dramatic consequences involved in refusal of such treatment would inform the inquiry as to whether the deprivation of that interest is constitutionally permissible.” [Id. at 279](#). The Court then upheld the State of Missouri’s requirement that an incompetent patient’s wish to cease treatment be proved by clear and convincing evidence. [Id. at 280-82](#).

The liberty interest discussed in Cruzan is grounded in the common law protection afforded to every person to refuse unwanted medical treatment. [Id. at 269-70](#). Medical treatment performed without the patient’s consent historically has been treated as a battery, excusable only in emergency circumstances. [Id. at 270](#); Keeton et al., Prosser and Keeton on the Law of Torts 39-42, 190 (5th ed. 1984); [Winters v. Miller, 446 F.2d 65, 68](#) [*40] (2d Cir.), cert. denied, [404 U.S. 985 \(1971\)](#). The right to refuse treatment is the “logical corollary” of the prohibition against medical treatment without the patient’s informed consent. [Cruzan, 497 U.S. at 270](#). These principles constitute fundamental tenets of the health care professions and are readily embraced by amici as a matter of both common law and constitutional right.

Physician-assisted suicide does not involve the imposition of treatment against the patient’s will. It involves instead the furnishing of assistance that is (at least in theory) desired by the patient. Thus, the rationale that unwanted medical treatment can be refused because it amounts to a common law assault and battery provides no legal or logical basis for finding a right to physician-assisted suicide.

In other contexts, courts, including this one, have been reluctant to find a right to obtain medical treatment. See [New York State Ophthalmological Soc’y v. Bowen, 854 F.2d 1379, 1389-92 \(D.C. Cir. 1988\)](#), cert. denied, [490](#)

U.S. 1098 (1989); cf. *United States v. Rutherford*, 442 U.S. 544 (1979) (terminally ill cancer patients not [*41] entitled to a drug that has not been approved by the Food and Drug Administration). Amici believe there should be constitutional protection for the “freedom to determine the course of [one’s] own treatment.” *Cruzan*, 497 U.S. at 289 (O’Connor, J., concurring). The assistance sought in this case, however, is to a procedure that neither state law nor the medical profession has ever considered to be a legitimate medical treatment. It would be particularly ironic, therefore, if the first “treatment” to which patients were held to have a constitutional right were physician-assisted suicide.

The Ninth Circuit also relied upon broader linguistic formulations of the sources of the right to refuse treatment, such as the “right to be let alone,” *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting), or the right of every adult “to determine what shall be done with his own body,” *Schloendorff v. Society of New York Hosp.*, 105 N.E. 92, 93 (N.Y. 1914) (Cardozo, J.). These formulations are rightly looked to as indicative of the importance and centrality of the autonomy principle. But the paradox of invoking autonomy as justification [*42] for killing oneself has long been noted.³ And in practice, the principle has never been interpreted as sweepingly as the Ninth Circuit proposes. *Cruzan* itself alluded to the limits of the autonomy principle, noting that the consequences of a particular procedure “would inform the inquiry” as to whether treatment can be refused. 497 U.S. at 279. This Court has repeatedly recognized other limits as well. For example, laws prohibiting prostitution or use of illicit drugs, or mandating vaccinations or blood tests, have never been considered constitutionally infirm. See, e.g., *Washington v. Harper*, 494 U.S. 210, 221-22 (1990) (state may administer antipsychotic medicine to mentally ill prisoner over his objection); *Jacobson v. Massachusetts*, 197 U.S. 11, 24-30 (1905) (state may require vaccinations because Fourteenth Amendment “does not import an absolute right” to be “wholly freed from restraint”); *Schmerber v. California*, 384 U.S. 757 (1966) (police may perform alcohol-blood test of suspect over his objection); *Breithaupt v. Abram*, 352 U.S. 432, 439 (1957) (same); cf. *Employment Div. v. Smith*, 494 U.S. 872, 878 (1990) [*43] (state may prohibit use of peyote even as part of religious ritual). Accordingly, the principle of bodily integrity, while of central and vital importance, does not in itself justify a constitutional right to physician-assisted suicide.

B. Physician-Assisted Suicide Lies Outside The Continuum Of Liberty Interests That This Court Has Previously Recognized As Constitutionally Protected.

1. The Ninth Circuit also relied more broadly on the balance of this Court’s due process jurisprudence. Heightened judicial protection is provided for some rights that have no textual support in the Constitution if they are “implicit in the concept of ordered liberty,” such that “neither liberty nor [*44] justice would exist if they were sacrificed.” *Palko v. Connecticut*, 302 U.S. 319, 325-26 (1937). These liberties, which are “deeply rooted in this Nation’s history and tradition,” *Moore v. City of East Cleveland*, 431 U.S. 494, 503 (1977) (footnote omitted), may be located on a “rational continuum which, broadly speaking, includes a freedom from all substantial arbitrary impositions and purposeless restraints” *Poe v. Ullman*, 367 U.S. 497, 543 (1961) (Harlan, J., dissenting); see Pet. App., No. 95-1858, at 17a-18a (identifying previously recognized rights).

Asserted rights that are absent from both the text of the Constitution and the traditions of our nation lie at the furthest edge of the continuum. *Moore*, 431 U.S. at 503. And the constitutional stature of conduct that has long been prohibited by state law is even more tenuous. Physician-assisted suicide is not a right that our society historically has protected against state interference. Both suicide and attempted suicide were unlawful under the Common Law of England and the laws of the colonies. See 4 Blackstone, Commentaries on the Laws of

³ Whether the principle of autonomy can support a right to take one’s life is an issue on which eminent philosophers disagree. See, e.g., N.Y. State Task Force at 81 (contrasting Kant’s view that “taking one’s own life was inconsistent with the notion of autonomy” with Hume’s view that “when life is most plagued by suffering, suicide is most acceptable”). Surely, given a choice between Kant and Hume, the Constitution allows state legislatures, and not federal courts, to make the decision.

England 89 (1978); [*45] Marzen et al., *Suicide: A Constitutional Right?*, 24 *Duq. L. Rev.* 1, 56-57 (1985). Although all states have chosen to decriminalize both suicide and attempted suicide, 35 states continue to proscribe assisting in another's suicide, and eight other states prohibit it as a common law crime. 2 Meisel, *The Right to Die* § 18.17, at 478 Table 18-1 (2d ed. 1995). This long-standing governmental and societal antipathy to aiding in a suicide, while perhaps not conclusive, counsels strongly against finding the liberty interest urged by respondents here.⁴

2. Nevertheless, the Ninth Circuit identified a right to physician-assisted suicide by relying heavily upon *Planned Parenthood v. Casey*, 505 U.S. 833 (1992). In *Casey*, the Court reaffirmed that women have a constitutionally protected liberty interest in obtaining an abortion that states may not unduly burden. 505 U.S. at 869. In so holding, the Court stated [*46] that abortion was akin to "personal decisions relating to marriage, ... child rearing, and education," which involve "the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy," and which are "central to the liberty protected by the Fourteenth Amendment." *Id.* at 851. The Court further stated that "at the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life." *Id.* From this, the Ninth Circuit concluded that a right to physician-assisted suicide falls within the ambit of personal liberty protected by the Fourteenth Amendment.

Casey and this Court's other substantive due process decisions should not be read so broadly. First, whatever interpretation the quoted language may bear in the abstract, its meaning ought not be understood apart from its context. *Casey* narrowly reaffirmed an existing liberty interest principally on grounds of stare decisis. And while the more sweeping argument that the Due Process Clause creates a broad realm of autonomy in making personal choices has been made to the Court on a number of occasions, the Court [*47] has never embraced this principle in this open-ended form. See, e.g., *Cruzan*, 497 U.S. at 279 n.7. Presumably this is because, read broadly, the quoted language would encompass not simply the decisions of the terminally ill, but a broad range of decisions, including any person's choice to terminate his or her life at any time. See Pet. App. A-28 to A-29. Thus, for example, a depressed 25-year-old, who has not received appropriate psychiatric treatment, would have a liberty interest in obtaining assistance in committing suicide. As discussed above, such a right has never been recognized by this Court, by any courts at common law, or indeed, by respondents.

Second, as a factual matter, a woman's right to choose to have an abortion differs materially from a patient's right to physician-assisted suicide. In the physician-assisted suicide context, the procedure at issue has no life- or health-promoting benefits whatsoever; its sole function is to achieve the death of the patient. In the abortion context, however, the procedure itself is medical and cannot be performed by an unqualified person without extreme risk of permanently injuring or killing the woman. It is instructive [*48] in this regard to recall the Court's recognition in *Roe v. Wade*, 410 U.S. 113, 163-64 (1973), that the state has a compelling interest in preserving the fetus once the fetus is viable. Neither *Roe* nor *Casey* authorizes any person to assist in killing an independent human life.

Third, *Casey* rests in substantial measure on the recognition that undue obstacles to obtaining an abortion, by restricting a woman's "ability to control [her] reproductive life," compromise her "ability to participate equally in the economic and social life of the Nation." *Casey*, 505 U.S. at 856. Preserving the right of choice prevents the state from imposing "its own vision of women's role" in society. *Id.* at 852. The Court's explicit recognition of this dimension of the right to choice makes clear that the *Roe* and *Casey* decisions must be understood as grounded in part on the need to afford women liberty to participate in society equal to that of men. Others of

⁴ Although the Ninth Circuit relied on survey data to suggest a change in popular views, Pet. App. A-48 to A-49, it cited no reason why popular preferences could not be vindicated through changes in state law by the political branches.

this Court's privacy decisions have also served to invalidate similar discriminatory legislation.⁵ No comparable rationale applies to physician-assisted suicide.

[*49]

Finally, in contrast to other liberty interests previously recognized by this Court, the liberty interest asserted here is unique in that the state concededly has compelling reasons to prohibit its exercise by most who would seek to invoke it. To begin with, the right to control the timing and manner of one's death is not limited to "physician-assisted suicide" for "terminally ill competent adults who wish to hasten their deaths with medication prescribed by their physicians." Pet. App. A-113 to A-114. The Ninth Circuit acknowledged that this formulation of the right was only a starting point, and that the right was likely to be broadened over time. Without resolving the issue, the Ninth Circuit signalled that it was likely in the future to invalidate any proposed distinction between physician-assisted suicide and voluntary euthanasia for patients who could not carry out a suicide themselves. Pet. App. A-100 to A-101. And, while the Ninth Circuit did not directly acknowledge the problematic nature of restricting the right only to the terminally ill, the court did admit that, in its view, the critical dividing line was between voluntary and involuntary termination of life. Id. at [*50] A-100 & n.120. This admission reflects the fact that profound suffering that can prompt a request for suicide arises not simply in the terminally ill but in the chronically ill and physically healthy as well. E.g., Kamisar, [72 U. Det. Mercy L. Rev. at 739](#).

At the same time, the Ninth Circuit recognized that physician-assisted suicide was unjustifiable for many people, and proposed to rely on states and the medical profession to develop procedural safeguards to prevent individuals that did not meet criteria from receiving assistance in committing suicide. Admission of the need for extensive regulation and safeguards to prevent most who would seek to exercise this right from doing so is, however, strong reason to doubt that any such right can fairly be viewed as "implicit in the concept of ordered liberty." [Palko, 302 U.S. at 325-26](#). It is inconsistent with the nature of a fundamental right that its exercise is so troubling and susceptible to abuse that extensive state regulation and proscription is justifiable. The admitted need for extensive state regulation also illustrates why, far from being an essentially "private" matter, physician-assisted suicide [*51] is a public act with wide-ranging and profound consequences for families, health care professionals, and society.

C. States Have Strong Interests In Prohibiting Physicians And Nurses From Assisting In Suicides.

Because all agree that the states have strong interests in regulating life-and-death decisionmaking, the salient question is where the Constitution permits the state to draw the line. Amici urge the Court to permit states to prohibit physician-assisted suicide outright. This approach is supported by at least three strong state interests.

1. First, states have an overwhelming interest in avoiding preventable suicides. For many reasons, a state could reasonably conclude that, once physician-assisted suicide is permitted for any class of patients, the number of patients committing suicide with the assistance of a physician will substantially increase no matter how narrowly the initial restrictions are drawn, and will involve patients in circumstances far removed from those surrounding the respondents.

To begin with, states could justifiably conclude that relatively few, if any, patients would ever legitimately meet the kind of strict criteria that a state might seek [*52] to impose in lieu of banning physician-assisted suicide

⁵ Thus, the Court's decision in [Loving v. Virginia, 388 U.S. 1 \(1967\)](#), struck down a ban on interracial marriage that not only invaded the right to marital privacy but perpetuated discrimination against black Americans. Similarly, the decision in [Griswold v. Connecticut, 381 U.S. 479 \(1965\)](#), removed the heavy burden that lack of access to birth control placed on women's social, economic, and political opportunities. Cf. [Romer v. Evans, 116 S. Ct. 1620, 1625 \(1996\)](#). Terminal illness and death, by contrast, do not discriminate, and laws prohibiting physician-assisted suicide have no disproportionate impact upon any particular class of historically disadvantaged individuals. To the contrary, the risk that physician-assisted suicide will occur more frequently among disadvantaged patients should counsel restraint in constitutionalizing the issue.

outright. Most terminally ill patients do not raise the issue of physician-assisted suicide and, given advances in palliative care, it is unlikely that the needs of those who do raise the issue cannot be met through other means.

States could also reasonably conclude, however, that restrictions intended to limit physician-assisted suicide to a narrow class of patients would not work. The demand for physician-assisted suicide principally comes not from the patients in actual and untreatable pain at the very end of life, but from those, whether healthy, chronically ill, or terminally ill, who are depressed, or who fear future pain, loss of dignity, or unduly burdening their families. Once physician-assisted suicide becomes available, many patients whose needs could have been met through appropriate palliative care will instead be directed toward physician-assisted suicide. States could further conclude that the many pressures on patients that may lead to consideration of suicide would, if suicide were officially blessed as a medical treatment, exert powerful pressure on patients to accept suicide more as a duty than as a right. [*53]

In this regard, the requirement that such requests be deemed voluntary by one or more physicians is not likely to provide an effective safeguard. For example, terminally ill patients typically are highly dependent upon, and vulnerable to influence by, the very individuals--family and physician--who often have conflicting feelings about pursuing treatment options that could reduce the patient's desire for suicide. To pursue alternatives is to increase the likelihood of extending the patient's life and, necessarily, the obligation of caring for the patient. The family may, entirely unconsciously but nevertheless powerfully, find such an outcome acutely burdensome and therefore subtly encourage the patient to accept death and thereby promote the patient's interest in suicide. The physician is typically in no position to discern the operation of such pressures, and may have his or her own reasons for not attending to them. Absent the kind of due process safeguards that attend decisions by the state to terminate life, which are antithetical to the privacy of the physician-patient relationship, there is little likelihood that an inappropriate exercise of physician-assisted suicide will [*54] ever come to light. Cf. [*Bowen v. American Hosp. Ass'n*, 476 U.S. 610 \(1986\)](#).

States also have a strong interest in drawing a defensible line. The one they now rely upon is well established in the common law and medical ethics. For example, although the provision of medication in doses strong enough to relieve pain typically will not bring about a patient's death, such a result can occur. As long as the physician's intent is to ease the patient's pain and not to cause death, the administration of such medication is ethical and fully consistent with a physician's role as healer. Indeed, the provision of such medication is in principle no different than the provision of chemotherapy that is intended to heal but could have the unintended effect of hastening death.

Although the Ninth Circuit criticized this doctrine of double effect, the doctrine's reliance upon intent is solidly grounded in principles of law and morality. Pet. App. A-163 (Kleinfeld, J., dissenting). The Ninth Circuit proposed no better alternative, and tacitly admitted that its own line was flawed. Pet. App. A-100 to A-101. Once physician-assisted suicide is recognized, how can the right to voluntary [*55] euthanasia be denied to those who lack the physical ability to administer the life-ending drug to themselves? And once such a right is recognized for those who are terminally ill, how can it be denied to those who, chronically ill or irremediably depressed, claim to be suffering comparably unendurable pain? Even the ultimate stopping point proposed by the Ninth Circuit--between voluntary and involuntary patient requests (*id.*)--is not secure. It rests on a determination of patient intent that is at least as problematic as the determination of physician intent. Thus, not only does the Ninth Circuit's line lack any basis in the common law, it is as vulnerable to the Ninth Circuit's own analysis as is the line states draw today.

2. Second, states can argue strongly that abandoning the prohibition on physician-assisted suicide will undermine efforts to expand the provision of palliative care to all patients. Although such efforts would not end if physician-assisted suicide were permitted, the prohibition on physician-assisted suicide provides health care

professionals with a tremendous incentive to improve and expand the availability of palliative care. Permitting physician-assisted suicide [*56] would also jeopardize the hard-won advances firmly to establish for all patients a right not only to have unwanted medical treatment withheld or withdrawn but also to receive pain medication sufficient to ease pain, even if that would hasten the patient's death. The widespread acceptance of these rights by health care professionals, courts, legislatures, and the public depended upon the recognition and acceptance of the distinction between these rights and physician-assisted suicide. See generally 2 Meisel § 18.18, at 479-85. If that important boundary is lost, much support for withholding and withdrawing treatment or providing ample pain medication may be lost as well.

3. Finally, states have a strong interest in avoiding the damage to the health care professions and their ability to serve patients that would flow from an abandonment of the prohibition against physician-assisted suicide. E.g., *Semler v. Oregon State Bd. of Dental Examiners*, 294 U.S. 608, 612-13 (1935) (state's strong interest in "maintenance of professional standards" permits it to enforce "a general rule even though in particular instances there might be no actual" harm); *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 460 (1978) [*57] (state interest in "maintaining standards among members of the licensed professions" is "particularly strong"); *Shapero v. Kentucky Bar Ass'n*, 486 U.S. 466, 485 (1988) (O'Connor, J., dissenting) (state "should have considerable latitude to ban" conduct that "undermines the substantial government interest in promoting the high ethical standards" of a profession). Health care professionals have long understood that with the right to practice comes enormous responsibility. Patients come to physicians and nurses at times of greatest need and vulnerability, depending on them to respond to their needs capably and faithfully. Many patients may understandably wonder, finding themselves badly injured and in the care of a physician they do not know but whose license permits him or her to assist in taking the lives of patients, whether that physician will truly act only to preserve their lives. Will they be confident, as they watch a physician draw a dose of morphine, that the physician is committed only to easing their pain and not to taking their lives? See Kass & Lund, *35 Duq. L. Rev. at 408*. The ban on physician-assisted suicide helps ensure that patients will [*58] never lose the trust that must exist for the relationships between health care professionals and patients to flourish.

CONCLUSION

For the reasons stated above, the judgment of the court of appeals should be reversed.

Respectfully submitted,

KIRK B. JOHNSON, MICHAEL L. ILE, BRUCE D. BLEHART, AMERICAN MEDICAL ASSOCIATION,
515 North State Street, Chicago, IL 60610, (312) 464-5000

CARTER G. PHILLIPS, MARK E. HADDAD, * PAUL E. KALB, KATHERINE L. ADAMS, CHRISTOPHER
D. MOORE SIDLEY & AUSTIN, 1722 Eye Street, N.W., Washington, D.C. 20006, (202) 736-8000

NEWTON N. MINOW, JACK R. BIERIG, SIDLEY & AUSTIN, One First National Plaza, Chicago, IL 60603,
(312) 853-7000

Attorneys for Amici Curiae

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APPENDICES

* Counsel of Record

APPENDIX A

AMICI CURIAE

The **American Medical Association (AMA)** is a private, voluntary, non-profit organization of physicians. The AMA was founded in 1847 to promote the science and art of medicine and to improve the public health. The 290,000 members of the AMA practice in all states and in all fields of medical specialization. Among other efforts, the AMA is working with the Robert Wood Johnson [*59] Foundation in the development of an education program on advance care planning and palliative medicine designed to reach every physician and to improve the quality of patient care for individuals at the end of life.

The **American Nurses Association (ANA)** is an association of registered nurses that is dedicated to the advancement of the goals and interests of registered nurses and of the nursing profession generally. It was founded in 1897 to promote the professional and educational advancement of nurses and to establish and maintain a code of ethics for the nursing profession. The ANA has 180,000 members and represents registered nurses in the United States and its territories through its 53 constituent member organizations. The ANA establishes professional standards for nursing practice, nursing education, nursing services and a code of ethical conduct for nurses, and the Association is dedicated to meeting the needs of nurses as well as the needs of patients and families.

The **American Association of Critical-Care Nurses (AACN)** is the world's largest specialty nursing organization with more than 76,000 members. Founded in 1969, the Association now has more than 270 [*60] chapters worldwide and is working toward a healthcare system driven by patient's needs where critical care professionals make their optimal contribution.

The **Hospice Nurses Association (HNA)** was founded in 1986 and is a non-profit professional association. The HNA is an international professional association with a mission of promoting excellence in hospice nursing. The HNA is the nation's largest hospice nursing association and it is governed by an all nurse board of directors.

The **Oncology Nurses Society (ONS)**, incorporated in 1975, is a national organization of more than 25,000 registered nurses specializing in cancer and dedicated to excellence in patient care, teaching, research and education in the field of oncology. The ONS has 185 local chapters that provide community networks for education and peer support. Oncology nurses are at the forefront of promoting quality of life as an essential component of cancer care.

The **American Osteopathic Association (AOA)**, celebrating its centennial in 1997, represents the nation's 40,000 osteopathic (D.O.s). The AOA is organized to advance the philosophy and practice of osteopathic medicine by promoting excellence [*61] in education, research, and the delivery of quality and cost-effective health care in a distinct, unified profession.

The **American Psychiatric Association (APA)**, with approximately 42,000 members, is the nation's leading organization of physicians specializing in psychiatry. The APA follows the ethics standards of the American Medical Association. Physician-assisted suicide inevitably presents issues concerning the assessment of patient competence, the determination of voluntariness, and the diagnosis and treatment of depression or other mental illness afflicting patients who may request assistance for suicide. As doctors who would be called upon to play a critical role in such matters, the APA's members have a strong interest in this case.

The **American Academy of Hospice and Palliative Medicine (AAHPM)**, originally organized as the Academy of Hospice Physicians in 1988, was established to bring together physicians interested and/or involved in the hospice/palliative care approach to patient care and committed to improvement of care for the dying. The

AAHPM is the only such organization in the United States that offers support to physicians dedicated to the advancement [*62] of hospice/palliative medicine, its practice, research and education. Its 1,500 member physicians represent nearly all medical specialties.

The **American Academy of Pain Management** was incorporated in 1988 as a voluntary, not-for-profit organization for the purpose of credentialing multidisciplinary pain practitioners, and to further the practice of pain management through the development of standards, education, and advocacy in the field of pain management. The Academy's Board of Advisors are prominent individuals in their respective disciplines and all are interested in furthering our knowledge and management of pain complaints. The intent of the Academy is to be inclusionary, not restrictive to any specialty, and the goal of the Academy is to bring together the many professionals who work with patients in pain and to assist in the creation of quality services for those individuals.

The **American Academy of Pain Medicine** is a medical specialty society of 900 physicians who specialize in the prevention, evaluation, diagnosis, treatment and rehabilitation of painful disorders. The pain physician serves as a consultant to other physicians but is often the principal treating [*63] physician and may provide care at various levels, such as direct treatment, prescribing medication, prescribing rehabilitative services, performing pain relieving procedures, counseling of patients and families, direction of a multidisciplinary team, coordination of care with other health care providers and consultative services to public and private agencies pursuant to optimal health care delivery to the patient suffering from a painful disorder.

The **American Academy of Orthopaedic Surgeons** is a not-for-profit organization that represents over 17,000 members. The Academy provides educational programs for orthopaedic surgeons, allied health professionals, and the public. The Academy is an advocate for improved patient care.

The **American Academy of Physical Medicine and Rehabilitation** is a national medical specialty society representing more than 5,000 physicians who specialize in physical medicine and rehabilitation (physiatry), the branch of medicine emphasizing the prevention, diagnosis and treatment of disorders that may produce temporary or permanent impairment. Physiatry provides integrated care in the treatment of all neurologic and musculoskeletal disabilities [*64] from traumatic brain injury to lower back pain. The specialty focuses on the restoration of function to people with problems ranging from simple physical mobility issues to those with complex cognitive involvement.

The **Society of Critical Care Medicine (SCCM)** is the premier professional international organization devoted exclusively to the advancement of multidisciplinary critical care through excellence in patient care, education, research and advocacy. The nearly 9,000 members of SCCM--the intensivists, nurses and allied health professionals involved in the care of the critically ill and injured--blend their knowledge, skill, and expertise into a coordinated effort to achieve the best possible outcome for the patient.

The **American Academy of Neurology** is a non-profit organization of approximately 14,000 neurologists who practice throughout the United States and beyond. The Academy strives to serve the broad educational needs of its members; to encourage the highest standards of clinical care, education, and research in the field of neurology; and to advance the specialty of neurology and the well-being of those served by it. The Academy has taken a leadership role [*65] in developing substantive and procedural guidelines for patient care and decision-making in such circumstances as persistent vegetative state, advanced dementia, profound and irreversible paralysis ("locked-in syndrome"), and anencephaly.

The **American Neurological Association** was founded in 1875 and today represents over 1,100 academic neurologists.

The **American Society of Anesthesiologists** was founded in 1905 in New York and currently has more than 34,000 members. It is a scientific and educational association of anesthesiologists that was organized to advance the practice of anesthesiology and to improve the quality of care of the anesthetized patient. It is the largest organization of anesthesiologists in the world.

The **American Society of Clinical Pathologists (ASCP)** is a non-profit medical specialty society organized for educational and scientific purposes. The 75,000 members of the ASCP include board certified pathologists, other physicians, clinical scientists, and certified technologists and technicians. These professionals recognize the Society as the principal source of continuing education in pathology and as the leading organization for the certification [*66] of laboratory personnel. ASCP's certifying board registers more than 150,000 laboratory professionals annually.

The **College of American Pathologists (CAP)** is a medical society serving more than 15,000 physician members and the laboratory community throughout the world. Incorporated in 1947, the College is a not-for-profit organization. CAP is the world's largest association composed exclusively of pathologists and is widely considered to be the leader in laboratory quality assurance. The CAP is an advocate for high quality and cost-effective patient care. The mission of the College is to represent the interests of patients, the public and pathologists by fostering excellence in the practice of pathology worldwide.

The **American Society of Abdominal Surgeons (ASAS)**, founded in 1959, is a private, voluntary, non-profit organization of physicians. Its mission is to develop a strong continuing surgical education program for the unique specialty of abdominal surgery. The 4,000 members of the ASAS practice in all states, Canada, and Mexico.

The **American Association of Clinical Endocrinologists (AACE)** is an international medical association devoted to the field of clinical [*67] endocrinology. Its more than 2,500 members are physicians with special education, training and interest in the practice of endocrinology. AACE members are clinicians and educators in areas such as diabetes, thyroid illnesses, lipid profiles, reproductive disorders, obesity, and nutrition.

The **California Medical Association (CMA)** is a non-profit incorporated professional association of approximately 33,000 physicians practicing in the State of California. The CMA is the largest state medical association in the country, and the membership includes most California physicians engaged in the private practice of medicine, in all specialties. CMA's primary purposes are ". . . to promote the science and art of medicine, the care and well-being of patients, the protection of public health, and the betterment of the medical profession." CMA and its members share the objective of promoting high quality, cost-effective health care for the people of California.

The **Medical Society of the State of New York** was organized in 1807 and is incorporated and operated under the state's Not-for-Profit Corporation Law. The Society has approximately 27,000 member physicians, representing physicians [*68] in all specialties. The purposes of the Medical Society include: "To enhance the delivery of medical care of high quality to all people in the most economical manner, and to act to promote and maintain high standards in medical education and in the practice of medicine in an effort to ensure that quality medical care is available to the public."

The **Medical Association of the State of Alabama** is a non-profit professional association of licensed physicians representing 5,600 members in the State. The Association was founded in 1873 and it is the premiere medical professional association in the State of Alabama.

The **Arkansas Medical Society** organized in 1875, is a non-profit, professional organization representing 3,857 licensed physicians in the State of Arkansas.

The **Medical Association of Georgia**, formed in 1849, is a non-profit professional association of approximately 7,500 licensed physicians who provide patient care in all aspects of medical practice in the State of Georgia.

The **Illinois State Medical Society** is a non-profit professional association of licensed physicians, residents and medical students, founded in 1840, and representing more than [*69] 18,000 members in the State of Illinois.

The **Indiana State Medical Association** is a non-profit, professional association of licensed physicians founded in 1849, and representing 7,200 physicians in all areas of medical practice in the State.

The **Iowa Medical Society** is a non-profit, professional association of licensed physicians founded in 1860, and representing 4,000 physicians in all areas of medical practice in the State.

The **Louisiana State Medical Society**, founded in 1878 and representing 6,340 physicians and medical students in Louisiana, is a non-profit, tax-exempt professional association.

The **Louisiana State Medical Society** provides leadership for the advancement of the health of the people of Louisiana and is the premier advocate in Louisiana for patients and physicians.

The **Massachusetts Medical Society** is the oldest, continuous non-profit, professional medical association in the United States. Founded in 1781, it represents approximately 16,000 members in the State.

The **Mississippi State Medical Association** is a private, voluntary, non-profit organization, which was founded in 1856 to promote the extension of medical knowledge, [*70] the advancement of medical science, the elevation of the standard of medical education, the enactment of just medical laws and the improvement of public health. The Association's membership consists of approximately 3,000 physicians licensed to practice medicine in the State of Mississippi.

The **Missouri State Medical Association** is a non-profit professional association of physicians licensed to practice medicine in Missouri and students training in the state's accredited medical schools. The Missouri State Medical Association was founded in 1850 and currently represents and serves approximately 6,300 members.

The **Montana Medical Association** is a non-profit organization comprised of physician members. The Association was chartered in 1878 and represents 960 licensed physicians in the State of Montana.

The **Nebraska Medical Association** is a non-profit, professional association of licensed physicians founded in 1868, and representing 1,952 members in the State.

The **Medical Society of New Jersey** is the nation's first medical society, founded in 1766. With more than 9,500 physician members, the Society is the State's leading voice in the health care field. [*71] The Society's mission is to promote the quality of New Jersey health care and health services for all of the citizens of the state through leadership and assistance to its physician members.

The **New Mexico Medical Society** is a non-profit, professional association of licensed physicians founded over 100 years ago, and representing 2,800 members in the State.

The **North Carolina Medical Society** is a non-profit, professional association which represents physicians in North Carolina and has approximately 9,000 members. The Society was incorporated by an Act of the North Carolina General Assembly in 1858.

The **Ohio State Medical Association (OSMA)** is a non-profit professional association of approximately 16,000 physicians, medical residents and medical students. OSMA's membership includes physicians in all specialties engaged in the private practice of medicine in the State of Ohio. OSMA's purposes are to: improve public health

through education, encourage interchange of ideas among members and maintain and advance the standards of practice by requiring members to adhere to the concepts of professional ethics.

The **Tennessee Medical Association** is a non-profit [*72] corporation formed in 1830 and is composed of approximately 6,800 medical doctors licensed in Tennessee, including medical students and medical residents seeking licensure.

The **Texas Medical Association** is a private, voluntary, non-profit organization of physicians founded in 1853 to serve the people of Texas in matters of medical care, prevention and cure of disease, and the improvement of public health. It has approximately 34,000 members representing 84% of all licensed physicians practicing in Texas.

The **Vermont Medical Society** is a non-profit professional association of licensed physicians. The Society was founded in 1784 and represents over 1,100 members.

The **Medical Society of the State of Virginia** is a not-for-profit professional association of over 6,500 member physicians representing every medical specialty and proportionally represented throughout Virginia. The mission of the Society is to: preserve, defend and enhance the doctor-patient relationship; promote better health and health care for all Virginians; support the discovery and dissemination of new knowledge of human death and disease; and in all these things to articulate the position of organized [*73] medicine, consistent with the highest standards of the medical profession.

The **West Virginia Medical Association**, founded in 1867, is a non-profit professional Association of licensed physicians and represents 2,100 members in the State.

The **Society of Medical Consultants to the Armed Forces** was formed in 1946. The goals of the society include: assisting in the development and maintenance of the highest standards of medical practice in the Armed Forces; and providing advice and assistance to the Surgeons' General on problems of professional importance in the Armed Forces.

The **American Institute of Life-Threatening Illness and Loss**, a division of the Foundation of Thanatology which was incorporated in 1967 in the State of New York, is dedicated to promoting vastly improved psychosocial and medical care for patients critically ill or dying from (among multiple diseases) cancer, heart disease, AIDS, stroke, end stage renal disease, and emphysema. A major emphasis of the Foundation is on medical education and quality of life studies. Over the past 25 years, the Foundation has held over 115 national symposia and published over 115 related books.

The **National [*74] Hispanic Council on Aging** is a private organization that works to promote the well-being of older Hispanics. It was founded in 1980, and there are approximately 5,000 members throughout the United States, Puerto Rico, and Mexico.

APPENDIX B

OPINIONS OF THE COUNCIL ON ETHICAL AND JUDICIAL AFFAIRS AMERICAN MEDICAL ASSOCIATION

Opinion 2.211--Physician Assisted Suicide. Physician-assisted suicide occurs when a physician facilitates a patient's death by providing the necessary means and/or information to enable the patient to perform the life-ending act (e.g., the physician provides sleeping pills and information about the lethal dose, while aware that the patient may commit suicide).

It is understandable, though tragic, that some patients in extreme duress, such as those suffering from a terminal, painful, debilitating illness, may come to decide that death is preferable to life. However, allowing physicians to participate in assisted suicide would cause more harm than good. Physician assisted suicide is fundamentally incompatible with the physician's role as healer, would be difficult or impossible to control, and would pose serious societal risks.

Instead of [*75] participating in assisted suicide, physicians must aggressively respond to the needs of patients at the end of life. Patients should not be abandoned once it is determined that cure is impossible. Multidisciplinary interventions should be sought including specialty consultation, hospice care, pastoral support, family counseling, and other modalities. Patients near the end of life must continue to receive emotional support, comfort care, adequate pain control, respect for patient autonomy, and good communication. Issued June 1994 based on the reports "Decisions Near the End of Life," issued June 1991, and "Physician-Assisted Suicide," issued December 1993; Updated June 1996. (I, IV)

Opinion 2.20--Withholding or Withdrawing Life-Sustaining Medical Treatment. The social commitment of the physician is to sustain life and relieve suffering. Where the performance of one duty conflicts with the other, the preferences of the patient should prevail. The principle of patient autonomy requires that physicians respect the decision to forgo life-sustaining treatment of a patient who possesses decisionmaking capacity. Life-sustaining treatment is any treatment that serves to prolong life [*76] without reversing the underlying medical condition. Life-sustaining treatment may include, but is not limited to, mechanical ventilation, renal dialysis, chemotherapy, antibiotics, and artificial nutrition and hydration.

There is no ethical distinction between withdrawing and withholding life-sustaining treatment.

A competent, adult patient may, in advance, formulate and provide a valid consent to the withholding or withdrawal of life-support systems in the event that injury or illness renders that individual incompetent to make such a decision. A patient may also appoint a surrogate decisionmaker in accordance with state law.

If the patient receiving life-sustaining treatment is incompetent, a surrogate decisionmaker should be identified. Without an advance directive that designates a proxy, the patient's family should become the surrogate decisionmaker. Family includes persons with whom the patient is closely associated. In the case when there is no person closely associated with the patient, but there are persons who both care about the patient and have sufficient relevant knowledge of the patient, such persons may be appropriate surrogates. Physicians should provide all relevant [*77] medical information and explain to surrogate decisionmakers that decisions regarding withholding or withdrawing life-sustaining treatment should be based on substituted judgment (what the patient would have decided) when there is evidence of the patient's preferences and values. In making a substituted judgment, decisionmakers may consider the patient's advance directive (if any); the patient's values about life and the way it should be lived; and the patient's attitudes towards sickness, suffering, medical procedures, and death. If there is not adequate evidence of the incompetent patient's preferences and values, the decision should be based on the best interests of the patient (what outcome would most likely promote the patient's well-being).

Though the surrogate's decision for the incompetent patient should always be accepted by the physician, there are four situations that may require either institutional or judicial review and/or intervention in the decisionmaking process: (a) there is no available family member willing to be the patient's surrogate decisionmaker, (b) there is a dispute among family members and there is no decisionmaker designated in an advance directive, (c) [*78] a health provider believes that the family's decision is clearly not what the patient would have decided if competent, and (d) a health care provider believes that the decision is not a decision that could reasonably be judged to be in the patient's best interests. When there are disputes among family members or between family health care providers, the use of ethics committees specifically designed to facilitate sound decisionmaking is recommended before resorting to the courts.

When a permanently unconscious patient was never competent or had not left any evidence of previous preferences or values, since there is no objective way to ascertain the best interests of the patient, the surrogate's decision should not be challenged as long as the decision is based on the decisionmaker's true concern for what would be best for the patient.

Physicians have an obligation to relieve pain and suffering and to promote the dignity and autonomy of dying patients in their care. This includes providing palliative treatment even though it may foreseeably hasten death. Even if the patient is not terminally ill or permanently unconscious, it is not unethical to discontinue all means of life-sustaining [*79] medical treatment in accordance with a proper substituted judgment or best interests analysis. Issued March 1981 (Opinion 2.11: Terminal Illness) and December 1984 (Opinion 2.19: Withholding or Withdrawing Life-Prolonging Medical Treatment: Patient's Preferences). Updated June 1994 based on the reports "Decisions Near the End of Life" and "Decisions to Forgo Life-Sustaining Treatment for Incompetent Patient," both issued June 1991; and Updated June 1996. (I, III, IV, V)

Opinion 2.22--Do-Not-Resuscitate Orders. Efforts should be made to resuscitate patients who suffer cardiac or respiratory arrest except when circumstances indicate that cardiopulmonary resuscitation (CPR) would be inappropriate or not in accord with the desires or best interests of the patient.

Patients at risk of cardiac or respiratory failure should be encouraged to express in advance their preferences regarding the use of CPR and this should be documented in the patient's medical record. These discussions should include a description of the procedures encompassed by CPR and, when possible, should occur in an outpatient setting when general treatment preferences are discussed, or as early as possible during [*80] hospitalization. The physician has an ethical obligation to honor the resuscitation preferences expressed by the patient. Physicians should not permit their personal value judgments about quality of life to obstruct the implementation of a patient's preferences regarding the use of CPR.

If a patient is incapable of rendering a decision regarding the use of CPR, a decision may be made by a surrogate decisionmaker, based upon the previously expressed preferences of the patient or, if such preferences are unknown, in accordance with the patient's best interests. If, in the judgment of the attending physician, it would be inappropriate to pursue CPR, the attending physician may enter a do-not-resuscitate (DNR) order into the patient's record. Resuscitative efforts should be considered inappropriate by the attending physician only if they cannot be expected either to restore cardiac or respiratory function to the patient or to meet established ethical criteria, as defined in the Principles of Medical Ethics and Opinions 2.03 and 2.095. When there is adequate time to do so, the physician must first inform the patient, or the incompetent patient's surrogate, of the content of the DNR order, [*81] as well as the basis for its implementation. The physician also should be prepared to discuss appropriate alternatives, such as obtaining a second opinion (e.g., consulting a bioethics committee) or arranging for transfer of care to another physician.

DNR orders, as well as the basis for their implementation, should be entered by the attending physician in the patient's medical record.

DNR orders only preclude resuscitative efforts in the event of cardiopulmonary arrest and should not influence other therapeutic interventions that may be appropriate for the patient. Issued March 1992 based on the report "Guidelines for the Appropriate Use of Do-Not-Resuscitate Orders," issued December 1990. Updated June 1994. (I, IV)

Opinion 2.035--Futile Care. Physicians are not ethically obligated to deliver care that, in their best professional judgment, will not have a reasonable chance of benefiting their patients. Patients should not be given treatments simply because they demand them. Denial of treatment should be justified by reliance on openly stated ethical

principles and acceptable standards of care, as defined in opinions 2.03 and 2.095, not on the concept of "futility," which [*82] cannot be meaningfully defined. Issued June 1994. (I, IV)

Opinion 2.21--Euthanasia. Euthanasia is the administration of a lethal agent by another person to a patient for the purpose of relieving the patient's intolerable and incurable suffering.

It is understandable, though tragic, that some patients in extreme duress--such as those suffering from a terminal, painful, debilitating illness--may come to decide that death is preferable to life. However, permitting physicians to engage in euthanasia would ultimately cause more harm than good. Euthanasia is fundamentally incompatible with the physician's role as healer, would be difficult or impossible to control, and would pose serious societal risks.

The involvement of physicians in euthanasia heightens the significance of its ethical prohibition. The physician who performs euthanasia assumes unique responsibility for the act of ending the patient's life. Euthanasia could also readily be extended to incompetent patients and other vulnerable populations.

Instead of engaging in euthanasia, physicians must aggressively respond to the needs of patients at the end of life. Patients should not be abandoned once it is determined [*83] that cure is impossible. Patients near the end of life must continue to receive emotional support, comfort care, adequate pain control, respect for patient autonomy, and good communication. Issued June 1994 based on the report "Decisions Near the End of Life," issued June 1991; Updated June 1996. (I, IV)

Opinion 2.06--Capital Punishment. An individual's opinion on capital punishment is the personal moral decision of the individual. A physician, as a member of a profession dedicated to preserving life when there is hope of doing so, should not be a participant in a legally authorized execution. Physician participation in execution is defined generally as actions which would fall into one or more of the following categories: (1) an action which would directly cause the death of the condemned; (2) an action which would assist, supervise, or contribute to the ability of another individual to directly cause the death of the condemned; (3) an action which could automatically cause an execution to be carried out on a condemned prisoner.

Physician participation in an execution includes, but is not limited to, the following actions: prescribing or administering tranquilizers and other [*84] psychotropic agents and medications that are part of the execution procedure; monitoring vital signs on site or remotely (including monitoring electrocardiograms); attending or observing an execution as a physician; and rendering of technical advice regarding execution.

In the case where the method of execution is lethal injection, the following actions by the physician would also constitute physician participation in execution: selecting injection sites; starting intravenous lines as a port for a lethal injection device; prescribing, preparing, administering, or supervising injection drugs or their doses or types; inspecting, testing, or maintaining lethal injection devices; and consulting with or supervising lethal injection personnel.

The following actions do not constitute physician participation in execution: (1) testifying as to medical diagnoses as they relate to competence to stand trial, testifying as to relevant medical evidence during trial, testifying as to medical aspects of aggravating or mitigating circumstances during the penalty phase of a capital case, or testifying to the medical diagnoses as they relate to the legal assessment of competence for execution; (2) [*85] certifying death, provided that the condemned has been declared dead by another person; (3) witnessing an execution in a totally nonprofessional capacity; (4) witnessing an execution at the specific voluntary request of the condemned person, provided that the physician observes the execution in a nonprofessional capacity; and (5) relieving the acute suffering of a condemned person while awaiting execution,

including providing tranquilizers at the specific voluntary request of the condemned person to help relieve pain or anxiety in anticipation of the execution.

When a condemned prisoner has been declared incompetent to be executed, physicians should not treat the prisoner to restore competence unless a commutation order is issued. However, if the incompetent prisoner is undergoing extreme suffering as a result of psychosis or any other illness, medical intervention intended to mitigate the level of suffering is ethically permissible. Provision of medical testimony in the reevaluation of the prisoner's legal competence to be executed should be provided by an independent physician examiner. A physician cannot be compelled to provide medical testimony as it relates to legal competence [*86] for execution if it is contrary to the physician's personal beliefs.

Organ donation by condemned prisoners is permissible only if (1) the decision to donate was made before the prisoner's conviction, (2) the donated tissue is harvested after the prisoner has been pronounced dead and the body removed from the death chamber, and (3) physicians do not provide advice on modifying the method of execution for any individual to facilitate donation. Issued July 1980. Updated June 1994 based on the report "Physician Participation in Capital Punishment," issued December 1992 (JAMA. 1993; 270: 365-368), and updated June 1996 based on the report "Physician Participation in Capital Punishment: Evaluations of Prisoner Competence to be Executed; Treatment to Restore Competence to be Executed," issued in June 1995. (I)

APPENDIX C

AMERICAN NURSES ASSOCIATION

CODE FOR NURSES WITH INTERPRETIVE STATEMENTS

1.1 Respect for Human Dignity

* * * Clients have the moral right to determine what will be done with their own person; to be given accurate information, and all the information necessary for making informed judgments; to be assisted with weighing the benefits and burdens of options [*87] in their treatment; to accept, refuse, or terminate treatment without coercion; and to be given necessary emotional support.

* * * *

POSITION STATEMENT ON ASSISTED SUICIDE

SUMMARY: The American Nurses Association (ANA) believes that the nurse should not participate in assisted suicide. Such an act is in violation of the Code for Nurses with Interpretive Statements (Code for Nurses) and the ethical traditions of the profession. Nurses, individually and collectively, have an obligation to provide comprehensive and compassionate end-of-life care which includes the promotion of comfort and the relief of pain, and at times, foregoing life-sustaining treatments.

* * * *

POSITION STATEMENT ON PROMOTION OF COMFORT AND RELIEF OF PAIN IN DYING PATIENTS

Summary: The American Nurses Association (ANA) believes that the promotion of comfort and aggressive efforts to relieve pain and other symptoms in dying patients are obligations of the nurse. Nurses should not hesitate to use full and effective doses of pain medication for the proper management of pain in the dying patient. The increasing titration of medication to achieve adequate symptom control, even at the expense of life, thus [*88] hastening death secondarily, is ethically justified.

* * * *

POSITION STATEMENT ON ACTIVE EUTHANASIA

SUMMARY: The American Nurses Association (ANA) believes that the nurse should not participate in active euthanasia because such an act is in direct violation of the Code for Nurses with Interpretive Statements (Code for Nurses), the ethical traditions and goals of the profession, and its covenant with society. Nurses have an obligation to provide timely, humane, comprehensive and compassionate end-of-life care.

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