In The Supreme Court of Montana

No. DA 09-0051

State of Montana and Steve Bullock, in his official capacity as Attorney General for the State of Montana, Defendants-Appellants,	)	On Appeal from the First Judicial District, Lewis & Clark County
vs.	)	
Robert Baxter, Steven Stoelb, Stephen Speckart, M.D., C. Paul Loehnen, M.D., Lar Autio, M.D., George Risi, Jr., M.D., and Compassion & Choices, Plaintiffs-Appellees.	)	Hon. Dorothy McCarter, Judge Presiding

Brief of Physicians for Compassionate Care Education Foundation as *Amicus Curiae* in Support of Defendants-Appellants

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Statement of Issues Presented for Review

Whether the prohibition of assisted suicide violates the right of privacy guaranteed by art. II, § 10, of the Montana Constitution.

Whether the prohibition of assisted suicide violates the dignity of the human being recognized by art. II, § 4, of the Montana Constitution.

Statement of the Case

Amicus curiae generally adopts defendants' Statement of the Case.

Statement of the Facts

Amicus curiae generally adopts defendants' Statement of the Facts.

Statement of the Standard of Review

The standard of review with respect to both issues is plenary. *Wilkes v. Montana State Fund*, 2008 MT 29, ¶ 8, 341 Mont. 292, ¶ 8, 177 P.3d 483, ¶ 8.

Interest of the *Amicus*

Physicians for Compassionate Care Education Foundation is an association of physicians, including primary care specialists, and other health care professionals dedicated to preserving the traditional relation of the physician and patient as one in which the physician's primary task is to heal when possible, comfort always and never intentionally harm. The Foundation promotes the health and well being of patients by encouraging physicians to comfort patients and to assist those who are dying by providing support systems, minimizing pain and treating depression. The Foundation affirms the health restoring role of the physician and works to educate the profession and the public regarding the dangers of euthanasia and physician-assisted suicide.

Physicians have the duty to safeguard human life, especially the lives of the most vulnerable members of our society–the sick, the elderly, the disabled, the poor, ethnic minorities and those whom society may consider unproductive and burdensome. Physicians should use their knowledge, skills and compassion in caring for and supporting their patients. The practice of medicine should never be used intentionally to cause death. The relationship of trust between physician and patient is the most important asset of physicians and is intended for the protection of their patients.

Physicians for Compassionate Care Education Foundation opposes physician-assisted suicide. The legalization of physician-assisted suicide would undermine trust in the patient-physician relationship; change the role of the physician in society from the traditional one of healer to that of one who facilitates killing; and endanger the value that society places on life, especially for those who are most vulnerable and who are near the end of life.

Summary of Argument

This appeal presents the stark and somber question whether Montana shall become the first State in the Nation to authorize the practice of physician-assisted suicide by judicial fiat, not by a vote of the people or their elected representatives. The district court held that the prohibition of physician-assisted suicide, in the case of terminally ill, mentally competent patients, violates the right of privacy guaranteed by art. II, § 10, of the Montana Constitution, when considered together with the recognition of human dignity set forth in art. II, § 4. *Amicus curiae* strongly disputes that holding.

First, nothing in the state constitutional right of privacy (art. II, § 10) secures a right to assistance in committing suicide. The district court's reliance upon this Court's decision in *Armstrong v. State*, 1999 MT 261, 296 Mont. 361, 989 P.2d 364, in support of its holding was misplaced. The narrow holding in *Armstrong* upheld the right of a patient to obtain an otherwise *lawful* procedure (an abortion) from a health care professional (a physician's assistant) who was licensed and trained to perform the procedure. Assisted suicide, however, is *un*lawful and physicians are *not* licensed or trained to assist their patients in killing themselves. Physician-assisted suicide is antithetical to the nature of medicine as a healing profession.

The broader holding of *Armstrong*, recognizing a person's right "to make medical judgments affecting his or her bodily integrity and health in partnership with a chosen health care provider free from government interference," ¶ 14, does not extend to a decision to kill oneself with the assistance of a physician. The State has an overriding interest in "interfering" with an individual's privacy right to obtain a particular treatment or procedure when there is a "medically-recognized, *bona fide* health risk." *Armstrong*, ¶ 62. Assisting a person in committing suicide obviously presents such a risk.

Second, the district court's reliance upon the "dignity" language of art. II, § 4, was also misplaced. The first sentence of § 4, which recognizes the dignity of human beings as "inviolable," expresses a core constitutional value. Protection of that value is secured by the language of § 4 guaranteeing equal protection of the laws (second sentence) and prohibiting discrimination in the exercise of civil and political rights on the basis of specified categories (third sentence). The constitutional history of § 4, as reflected in the proceedings of the Montana Constitutional Convention, leaves no doubt that the operative language of § 4 is embodied in the equal protection guarantee and the prohibition of certain forms of discrimination, neither of which is implicated by the prohibition of assisted suicide. Accordingly, the judgment of the district court should be reversed.

ARGUMENT

I. THE PROHIBITION OF ASSISTED SUICIDE DOES NOT VIOLATE ART. II, § 10, OF THE MONTANA CONSTITUTION.

The district court held that the prohibition of physician-assisted suicide, at least with respect to terminally ill, mentally competent patients, violates the right of privacy secured by art. II, § 10 of the Montana Constitution, when considered together with the recognition of individual dignity set forth in art. II, § 4. Decision & Order at 17, 19, 23. *Amicus* submits that neither art. II, § 10 nor art. II, § 4, considered separately or together, supports a right to assisted suicide, even in the limited circumstances proposed by plaintiffs.

Article II, § 10, provides: "The right of individual privacy is essential to the well being of a free society and shall not be infringed without the showing of a compelling state interest." MONT. CONST. art. II, § 10 (2008). The district court's privacy analysis relied principally upon this Court's decision in *Armstrong v. State*, 1999 MT 261, 296 Mont. 361, 989 P.2d 364. Decision & Order at 15-19. *Armstrong*, however, does not support a right to physician-assisted suicide.

First, the narrow question decided in *Armstrong* was that art. II, § 10, "protects a woman's right of procreative autonomy–i.e., here, the right to seek and to obtain a specific *lawful* medical procedure, a pre-viability abortion, from a

health care provider of her choice." *Armstrong*, ¶ 14 (emphasis added). *Id*. at ¶ 62 (referring to an "individual's fundamental privacy right to obtain a particular *lawful* medical procedure") (emphasis added). Unlike abortion, however, assisted suicide is *not* a "lawful" medical procedure.

Second, the broader formulation adopted in *Armstrong*, that art. II, § 10, "guarantees each individual the right to make medical judgments affecting his or her bodily integrity and health in partnership with a chosen health care provider free from government interference," *Armstrong*, ¶ 14, does not support the district court's holding, either. Protection of the individual's right "to make medical judgments affecting his or her bodily integrity and health" differs radically from an asserted right in self-destruction where not health, but death, is the desideratum. *Armstrong* itself recognized that the State has an overriding interest in "interfering" with an individual's privacy right to obtain a particular medical procedure or treatment when there is a "medically-recognized, *bona fide* health risk, clearly and convincingly demonstrated." *Id.*, ¶ 62. It would be difficult to imagine a more "*bona fide* health risk" than prescribing a drug that is intended to cause the death of the patient.

Third, "it does not necessarily follow from the existence of the right to privacy that every restriction on medical care impermissibly infringes [upon] that

right." *Wiser v. State of Montana*, *Dep't of Commerce*, 2006 MT 20, ¶ 15, 331 Mont. 28, ¶ 15, 129 P.3d 133, ¶ 15. For example, whether marijuana may be used for medical purposes is a policy matter for the legislature to address,[1] not a legal right to be conferred by the courts under the rubric of privacy.[2] Similarly, there is no privacy right to use laetrile to treat cancer.[3] So, too, whether physician-assisted suicide should be allowed is a legislative choice, not a judicial imperative.

Fourth, while recognizing that the right of privacy is implicated in health care choices, this Court "specifically defined the right as guaranteeing access to a chosen health care professional who had been determined 'competent' by the medical community and 'licensed' to perform the procedure desired." *Wiser*, ¶ 15, quoting *Armstrong*, ¶ 62. But physicians are not "licensed" to assist their patients

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[1] *See State v. Nelson*, 2008 MT 359, ¶¶ 21-37, 346 Mont. 366, ¶¶ 21-37, 195 P.3d 826, ¶¶ 21-37, interpreting the Medical Marijuana Act, MONT. CODE ANN. § 50-46-101 *et seq*. (2008).

[2] *See Raich v. Ashcroft*, 248 F. Supp.2d 918, 928 (N.D. Cal. 2003) (constitutional rights of privacy and personal liberty did not afford plaintiff the right to obtain and use marijuana for medical purposes in violation of the federal Controlled Substances Act), *rev'd and remanded*, 352 F.3d 1222 (9th Cir. 2003), *vacated and remanded*, 545 U.S. 1 (2005), *on remand*, 500 F.3d 850, 866 (9th Cir. 2007) (same).

[3] *See Carnohan v. United States*, 616 F.2d 1120, 1122 (9th Cir. 1980) (cancer patient had no privacy right "to obtain laetrile free of the lawful exercise of government police power), cited with approval in *Wiser,* ¶ 17 fn. 1.

in killing themselves. Such assistance not only violates the criminal law, but also contravenes ethical standards governing the profession of medicine that go back to the time of Hippocrates. The American Medical Association, the American Psychiatric Association, the American College of Physicians, the American Academy of Geriatrics and the American Pain Society, among other health care associations, have all issued position statements against physician-assisted suicide. Defendants' Motion for Summary Judgment, Exhibit No. 1 (Affidavit of Dr. Thomas V. Caughlan, ¶ 18). Indeed, the concept of physician-assisted suicide is antithetical to the very nature of medical practice. *See* John M. Dolan, *Is Physician-Assisted Suicide Possible?*, 35 DUQUESNE L. REV. 355 (1996).[4]

Finally, as the district court itself recognized, Decision & Order at 9-10,

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[4] The problematics of sanctioning a regime of physician-assisted suicide are aggravated by the nature of the relief plaintiffs sought in this case. Plaintiffs challenged the homicide statutes which, when construed together with the statute on causation, MONT. CODE ANN. § 45-2-201(a) (2008), prohibit assisted suicide. *See* Complaint, Prayer for Relief, ¶¶ 2, 3. Plaintiffs, however, did *not* challenge the statute prohibiting aiding or soliciting suicide, MONT. CODE ANN. § 45-5-105, which applies when "such suicide does not occur." Under the relief sought by plaintiffs, therefore, physicians would *not* be subject to prosecution if their patients succeeded in committing suicide with their assistance (by ingesting the lethal drugs prescribed for them), but they *would* be subject to prosecution if their patients chose not to take those drugs (or died of other causes first). As a result, physicians would have a direct personal and professional interest in ensuring that patients for whom they prescribed lethal drugs committed suicide. Needless to say, that interest would fatally undermine the integrity of the medical profession.

three state reviewing courts, interpreting express privacy language in their state constitutions, have held that there is no right to assistance in committing suicide, even for terminally ill, mentally competent patients, and that any such right, if it does exist, is outweighed by the State's interests in preserving human life, preventing suicide, protecting innocent third parties and maintaining the ethical integrity of the medical profession. *Sampson v. State*, 31 P.3d 88, 91-98 (Alaska 2001), *Donaldson v. Van de Kamp*, 4 Cal. Rptr. 2d 59, 61-65 (Ct. App. 1992), and *Krischer v. McIver*, 697 So.2d 97, 100-04 (Fla. 1997). Together with the other factors discussed above, those decisions are persuasive precedents that the right of privacy guaranteed by art. II, § 10, does not extend to physician-assisted suicide.

II. THE PROHIBITION OF ASSISTED SUICIDE DOES NOT VIOLATE ART. II, § 4, OF THE MONTANA CONSTITUTION.

The district court, as previously noted, held that the prohibition of assisted suicide, at least in the circumstances sought by plaintiffs, violates the right of privacy of the Montana Constitution (art. II, § 10), when considered together with the recognition of individual dignity in art. II, § 4. Decision & Order at 17. The privacy guarantee of the state constitution, as interpreted by this Court in *Armstrong*, does not secure a right to physician-assisted suicide. Nor does the constitution's recognition of individual dignity.

Article II, § 4, provides:

> **Individual Dignity**. The dignity of the human being is inviolable. No person shall be denied the equal protection of the laws. Neither the state nor any person, firm, corporation, or institution shall discriminate against any person in the exercise of his civil or political rights on account of race, color, sex, culture, social origin or condition, or political or religious ideas.

MONT. CONST. art. II, § 4 (2008).

The district court recognized that three States "that have an explicit right to privacy in their state constitutions" have rejected privacy-based challenges to their statutes prohibiting assisted suicide. Decision & Order at 9-10, citing *Sampson*, *Donaldson* and *Krischer*. The court sought to distinguish these authorities, however, noting that, unlike the Montana Constitution (art. II, § 4), there is no explicit guarantee of individual dignity in the constitutions of Alaska, California and Florida.[5] The persuasive value of these opinions, however, cannot be so easily dismissed. Although there is no *explicit* guarantee of individual dignity in their constitutions, the supreme courts of all three States have recognized human dignity as an *implicit* value their privacy guarantees are intended to protect. The Alaska Supreme Court has explained that "the primary purpose of this section

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[5] "It is . . . this addition of the personal integrity clause to the privacy clause that distinguishes the analysis in this case from that of the Florida, Alaska and California decisions." Decision & Order at 17.

[referring to the privacy guarantee of art. I, § 22] is to protect Alaskans' personal privacy and *dignity* against unwarranted intrusions by the State." *State v. Planned Parenthood of Alaska*, 171 P.3d 577, 581 (Alaska 2007) (citation and internal quotation marks omitted) (emphasis added). In its recent decision requiring the State to recognize same-sex marriages, the California Supreme Court held that one of the "core elements" of the state constitutional right to marry guaranteed by the privacy (art. I, § 1) and due process (art. I, § 7) provisions of the state constitution is "the right of same-sex couples to have their official family relationship accorded the same *dignity*, respect, and stature as that accorded to all other officially recognized family relationships." *In re Marriage Cases*, 183 P.3d 384, 434 (Cal. 2008) (emphasis added).[6] And in a decision striking down the State's parental consent statute, the Florida Supreme Court held that the state right of privacy (art. I, § 23), protects "*individual dignity* and autonomy." *In re T.W.*, 551 So.2d 1186, 1193 (Fla. 1989) (citation and internal quotation marks omitted) (emphasis added).

The Alaska Supreme Court, the California Court of Appeal and the Florida Supreme Court have all refused to recognize a privacy-based right to physician-assisted suicide, even though the constitution of each State has been interpreted to

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[6] The majority opinion is replete with references to "dignity" as a value the state privacy and due process guarantees were intended to protect. *See In re Marriage Cases*, 182 P.3d at 399-401, 428-29, 434, 444-46, 452.

protect human dignity as a core constitutional value. The Supreme Court of the United States, the Supreme Court of Canada and the European Court of Human Rights have also rejected privacy-based challenges to laws prohibiting physician-assisted suicide,[7] even in the circumstances proposed by plaintiffs, despite their recognition (in the same or other cases) of human dignity as a value protected by, respectively, the United States Constitution,[8] the Canadian Charter of Rights and Freedoms,[9] and the European Convention for the Protection of Human Rights and Fundamental Freedoms.[10] *Washington v. Glucksberg*, *Rodriguez v. British Columbia* and *R. v. United Kingdom* are all persuasive precedents that the constitutional value of human dignity does not require recognition of physician-

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[7] *See Washington v. Glucksberg*, 521 U.S. 701 (1997); *Rodriguez v. British Columbia* (*Attorney General*) [1993] 3 S.C.R. 519; *R. v. United Kingdom*, App. No. 10083/82, 33 Eur. Comm'n H.R. Dec. & Rep. 270 (1983).

[8] *Planned Parenthood v. Casey*, 505 U.S. 833, 851 (1992) (referring to the "choices central to personal dignity and autonomy [that] are central to [the] liberty protected by the Fourteenth Amendment") (reaffirming right to choose childbirth or abortion).

[9] *Rodriguez v. British Columbia* (*Attorney General*), [1993] 3 S.C.R. 519, 542 (Can.) ("[r]espect for human dignity underlies many of the rights and freedoms in the Charter"); *R. v. Morgentaler*, [1988] 1 S.C.R. 30, 164 (Can.) (Wilson, J., concurring) ("[t]he Charter and the right to individual liberty guaranteed under it are inextricably tied to the concept of human dignity").

[10] *SW v. United Kingdom*, 21 Eur. Ct. H.R. 363, 402 (1996) (identifying "respect for dignity and human freedom" as the "very essence" of the Convention).

assisted suicide.

Neither the parties, in their trial briefs, nor the district court examined the constitutional history of the individual dignity language of art. II, § 4.[11] That history, however, demonstrates that the first sentence of § 4 expresses a constitutional principle (or value) that is given effect by the two sentences that follow.[12] In other words, "[t]he dignity of the human being" is secured by treating him or her equally with others and by prohibiting discrimination. Properly

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[11] Nor, for that matter, has this Court in the few decisions to date in which it has discussed the "dignity" language of art. II, § 4. *State v. Herrick*, 2004 MT 323, ¶ 35, 324 Mont. 76, ¶ 35, 101 P.3d 755, ¶ 35 (dignity of criminal defendant was not violated by being forced to wear leg restraints at his trial where there was no evidence that the jurors ever saw the restraints); *Walker v. State*, 2003 MT 134, ¶¶ 52-84, 316 Mont. 134, ¶¶ 52-84, 68 P.3d 872, ¶¶ 52-84 (behavior modification program used in a prison setting violated both the dignity clause, art. II, § 4, and the prohibition of cruel and unusual punishments, art. II, § 22); *In re Mental Health of K.G.F.*, 2001 MT 140, ¶¶ 45-60, 306 Mont. 1, ¶¶ 45-60, 29 P.3d 485, ¶¶ 45-60 (dignity of persons subject to involuntary mental health commitment requires effective assistance of counsel and appropriate due process); *Armstrong,* ¶ 72 (dictum); *Oberg v. City of Billings*, 207 Mont. 277, 280, 674 P.2d 494, 495 (1983) (right not to be subjected to a polygraph examination as a condition of employment). None of these decisions rested solely on the "dignity" language of art. II, § 4.

[12] Whether the "individual dignity" language of art. II, § 4, provides meaningful guidance for judicial enforcement was debated by Justices Nelson and Rice in their concurring and dissenting opinions in *Snetsinger v. Montana University System*, 2004 MT 390, 325 Mont. 148, 104 P.3d 445. *Compare Snetsinger*, ¶¶ 71-79 (Nelson, J., specially concurring) (first sentence of art. II, § 4, is enforceable independently of the two sentences guaranteeing equal protection and prohibiting discrimination), *with* ¶¶ 157-58 (Rice, J., dissenting) (*contra*).

understood, therefore, § 4 should be regarded as a general guarantee of equal protection, combined with a prohibition of discrimination on specified grounds,[13] as several commentators have noted.[14]

What ultimately became art. II, § 4, was proposed by Delegates Richard J. Champoux, William A. Burkhardt and Marshall Murray. MONTANA CONSTITUTIONAL CONVENTION 1971-1972 (hereinafter MCC), Vol. I, p. 161 (Delegate Proposal No. 61). Their proposal, slightly modified, was adopted by the Bill of Rights Committee. MCC, Vol. II, pp. 620, 628. As modified, § 4 stated:

> The dignity of the human being is inviolable. No person shall be denied the equal protection of the law, nor be discriminated against in the exercise of his civil or political rights on account of race, color, sex, culture, social origin or condition, or political or religious ideas, by any person, firm, corporation, or institution; or by the state, its agencies or subdivisions.

Id.

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[13] As is the "Right to Individual Dignity" guarantee of the Louisiana Constitution, LA. CONST. art. I, § 3 (West 2006), the operative clauses of which guarantee equal protection and prohibit discrimination. *See State v. Granger*, 982 So.2d 779, 788-89 (La. 2008) (discussing standards of review under art. I, § 3).

[14] Larry M. Elison and Fritz Snyder, THE MONTANA STATE CONSTITUTION 35 (Westport, Conn. 2001) ("[t]he language [of art. II, § 4] is unique to the extent that it recognizes human dignity *as a dimension of*, *or corollary to*, the concept of equal protection of the law") (emphasis added); Tia Rikel Robbin, *Untouched Protection from Discrimination*: *Private Action in Montana's Individual Dignity Clause*, 51 MONT. L. REV. 553, 559-62 (1990) (intent of framers of art. II, § 4, was to eradicate discrimination).

The Bill of Rights Committee adopted § 4 "with the intent of providing a Constitutional impetus for the eradication of public and private discrimination based on race, color, sex, culture, social origin or condition, or political or religious ideas." MCC, Vol. II, p. 628. "The provision," the Committee explained, is aimed at prohibiting private as well as public discrimination in civil and political rights." *Id*. The Committee heard "[c]onsiderable testimony" on "the need to include sex in any equal protection or freedom from discrimination provisions." *Id*. The word "culture" was added to the proposal "to cover groups whose cultural base is distinct from mainstream Montana, especially the American Indians." *Id*. "Social origin or condition" was included "to cover discrimination based on status of income and standard of living." *Id*. Finally, the language "political or religious ideas" was added "to prohibit public and private concerns discriminating against persons because of their political or religious beliefs." *Id*. After noting that the wording of § 4 was derived "almost verbatim from Delegate Proposal No. 61," the Committee expressed the view that the proposed language "incorporated all the features of all the Delegate Proposals . . . on the subjects of equal protection of the laws and the freedom from discrimination." *Id*.

It is apparent from the Bill of Rights Committee Report that "[t]he dignity of the human being" recognized as "inviolable" in the first sentence of art. II, § 4,

was to be secured by the second sentence, as proposed,[15] which guarantees every person the equal protection of the law and prohibits discrimination against anyone "in the exercise of his civil or political rights" on account of "race, color, sex, culture, social origin or condition, or political or religious ideas." Thus, the first sentence of § 4 expresses a principle (or constitutional value) which was to be given effect by the second sentence (as proposed).[16] If a given statute does not deny equal protection of the law and does not discriminate on any of grounds identified in § 4, then the dignity of the person has not been violated. This is confirmed by a review of the debate on art. II, § 4, in the Committee of the Whole.

In introducing § 4 of the Bill of Rights Committee Proposal, Delegate Mansfield reiterated that the Committee had adopted this section "with the intent of providing a constitutional impetus for the eradication of public and private discrimination based on race, color, sex, culture, social origin or condition, or

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[15] As noted below, the second sentence was later divided into two separate sentences by the Committee on Style and Drafting.

[16] There is nothing novel or even particularly unusual about a constitutional provision expressing a principle that, in itself, does not create any judicially enforceable rights. For example, it is clear from the convention debates that the right "of pursuing life's basic necessities," art. II, § 3, is a "statement of principle" that was not intended "to create a substantive right for all the necessities of life to be provided by the public treasury." MCC, Vol. V, pp. 1636 (remarks of Delegate Monroe). *See Butte Community Union v. Lewis*, 219 Mont. 426, 430-31, 712 P.2d 1309, 1311-12 (1986) (citing debates).

political or religious ideas." MCC, Vol. V, p. 1642 (remarks of Delegate Mansfield). After Delegate Mansfield recited the Bill of Rights Committee Comments on § 4, the Committee of the Whole considered and rejected an amendment proposed by Delegate Habedank to strike the words "by any person, firm, corporation or institution; or" from the second sentence, as proposed. *Id.*, Vol. V, pp. 1642-46. In the course of the debate over the proposed amendment, Wade Dahood, Chairman of the Bill of Rights Committee, stated that "[t]he intent of Section 4 is simply to provide that every individual in the State of Montana, as a citizen of this state, may pursue his inalienable rights without having any shadows cast upon his dignity *through unwarranted discrimination*." *Id.*, Vol. V, p. 1643 (emphasis added). The Committee of the Whole thereafter recommended that the Convention adopt § 4. *Id.*, Vol. V, p. 1646.

The Committee on Style and Drafting recommended revising § 4 of the proposed Bill of Rights by splitting the second sentence into two sentences, rephrasing the section and deleting unnecessary language. MCC, Vol. II, pp. 957, 962, 967, 969. The Committee of the Whole accepted these revisions, *id.*, Vol. VII, pp. 2477, 2501, 2630-31, 2921, which put § 4 into its current form. The Convention thereafter adopted art. II, including § 4. *Id.*, Vol. VII, pp.2933-34.

Given the Comments of the Bill of Rights Committee, as well as Chairman

Dahood's statement that § 4 was intended to allow Montanans to pursue their "inalienable rights" without having their dignity overshadowed by "unwarranted discrimination," the Convention would have understood that the operative provisions of § 4 guaranteed equal protection and prohibited discrimination.[17] Those provisions are the judicially enforceable *means* by which the *end* of preserving human dignity is achieved.[18]

Article II, § 4, was derived from art. II, § 1, of the Puerto Rico Constitution. MCC, Vol. V, p. 1642. Art. II, § 1, provides:

> The dignity of the human being is inviolable. All men are equal before the law. No discrimination shall be made on account of race, color, sex, birth, social origin or condition, or political or religious ideas. Both the laws and the system of public education shall embody these principles of essential human equality.

P.R. CONST. ANN. art. II, § 1 (2008). The last sentence of this section expresses

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[17] That may also have represented the understanding of the voters who were informed that art. II, § 4, was a "[n]ew provision prohibiting public and private discrimination in civil and political rights." *Proposed 1972 Constitution for the State of Montana*, *Official Text with Explanation*, p. 6.

[18] The prohibition of assisted suicide does not violate the equal protection guarantee of the second sentence of § 4. *See* Decision & Order at 11-13; *Vacco v. Quill*, 521 U.S. 793 (1997). The third sentence (prohibiting discrimination) is not implicated. The Bill of Rights Committee rejected a proposal (Delegate Proposal No. 103) that would have recognized the right of the "incurably ill" not to be "kept alive" by "extraordinary means," MCC, Vol. I, p. 223; Vol. II, p. 649, which suggests that the Committee did not intend to create a right to assisted suicide.

the understanding of the drafters that § 1 sets forth "principles of essential human equality."[19] Consistent with that understanding, and apart from privacy interests separately protected by art. II, § 8,[20] the case law interpreting § 1 has largely involved claims of discrimination. *See*, *e.g.*, *Comm'n for Women's Affairs ex rel. A.I.A.R v. Secretary of Justice*, 9 P.R. Offic. Trans. 954, 975 (1980) (striking down rule of procedure requiring, in certain rape prosecutions, corroboration of the victim's testimony).[21]

Amicus concurs with Justice Rice's understanding of the "individual

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[19] *See* Juan M. Garcia-Passalacqua, PUERTO RICAN CONSTITUTIONAL LAW 41 (1974) (concept of the dignity of the human being is "the moral basis for democratic government," and implies the "essential equality" of all people before the law").

[20] "In our jurisdiction the concept of privacy of the human being has an express constitutional origin." *People v. Duarte Mendoza*, 9 P.R. Offic. Trans. 797, 802 n. 5 (1980), citing P.R. CONST. ANN. art. II, § 8 (2008), which provides: "Every person has the right to the protection of law against abusive attacks on his honor, reputation and private or family law." P.R. CONST. Ann. art. II, § 8 (2008).

[21] Contrary to the suggestion of some, *see* Matthew O. Clifford and Thomas P. Huff, *Some Thoughts on the Meaning and Scope of the Montana Constitution's "Dignity" Clause with Possible Applications*, 61 MONT. L. REV. 301, 323-24 (2000), the Puerto Rico Supreme Court's decision in *Puerto Rico Urban Renewal & Housing Corp. v. Pena Ubiles*, 95 P.R.R. 301 (1967), was not based on the "dignity" language of art. II, § 1, which was not even cited in the opinion, but upon due process. *Id*. at 306. The same court's decision in *Figueroa Ferrer v. Commonwealth*, 7 P.R. Offic. Trans. 278 (1978), which recognized a right to no-fault divorce, was principally based on art. II, § 8, not art. II, § 1. *Id*. at 281-87.

dignity" language of art. II, § 4:

> Of course, dignity undergirds the Constitution and is part of the philosophical foundation of our Constitution. We would desire that all would be treated with dignity and work toward such end under the law, but that is something far different than interpreting the law to require all outcomes to be consistent with dignity–whatever that would mean, and this is the problem. Elevating the dignity provision to such a place would inevitably require that a judge's subjective feelings about how a person should be treated be enshrined in law, and that without limits, because "human dignity may not be violated–no exceptions."

Snetsinger, ¶ 158 (Rice, J., dissenting) (quoting Nelson, J., specially concurring, ¶ 77).[22]

Neither the right of privacy guaranteed by art. II, § 10, nor the recognition of individual dignity set forth in art. II, § 4, protects a right to physician-assisted suicide. Accordingly, the judgment of the district court should be reversed.

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[22] Justice Rice was addressing an *alternative* argument advanced by Justice Nelson in support of the majority opinion. *See Snetsinger*, ¶¶ 71-79 (Nelson, J., specially concurring).

CONCLUSION

For the foregoing reasons, *amicus curiae* respectfully requests that this Honorable Court reverse the judgment of the district court.

Respectfully submitted,

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Proof of Service

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Certificate of Compliance

Pursuant to Rule 11(4)(d) of the Montana Rules of Appellate Procedure, I hereby certify that the Brief *Amicus Curiae* of Physicians for Compassionate Care Education Foundation in Support of Defendants-Appellants is double-spaced, proportionately spaced, using Times New Roman typeface and 14-point type, and, according to the word count of the processing software used to prepare the brief (Word Perfect 12.0), contains 5,000 words, exclusive of the cover, inside cover, table of contents, table of authorities, proof of service, certificate of compliance and the signature block.

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