NOTIFY

COMMONWEALTH OF MASSACHUSETTS

SUFOLK, ss.

SUPERIOR COURT
CIVIL ACTION
NO. 2016-03254-F

ROGER KLIGLER & another[1]

vs.

MAURA T. HEALEY, in her official capacity,[2]
& another[3]

MEMORANDUM OF DECISION AND ORDER ON
THE PARTIES' CROSS-MOTIONS FOR SUMMARY JUDGMENT

In recent years there has been growing public acceptance of physician assisted suicide or Medical Aid in Dying (MAID). The practice is now permitted and regulated in Oregon, Washington, Vermont, Colorado, California, Hawaii, Maine, and New Jersey as well as in Washington D.C.[4] Plaintiffs Roger Kligler, M.D., who is suffering from Stage 4 Metastatic Prostate Cancer, and Alan Steinbach, M.D., who treats competent, terminally ill patients (including Dr. Kligler) considering end-of-life issues, filed this action against Attorney General Maura Healey (AG) and Cape and Islands District Attorney Michael O'Keefe (DA) seeking a determination as to whether there is a right to physician assisted suicide or Medical Aid in Dying (MAID) reflected in Massachusetts law and/or the Massachusetts Constitution. Specifically,

[1] Dr. Alan Steinbach.

[2] As the Attorney General of the Commonwealth of Massachusetts.

[3] Michael O'Keefe, in his official capacity as District Attorney of Cape & Island District.

[4] Both the Maine and New Jersey laws went into effect this year (2019). The Court also notes that Montana's Supreme Court determined in 2009 that pursuant to a Montana statute providing a consent defense to homicide, patient consent could constitute a defense to a homicide charge against a physician who engages in MAID. See *Baxter* v. *Montana*, 354 Mont. 234, 224 (2009).

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they seek declarations on whether the practice of MAID constitutes involuntary manslaughter and if so, whether application of the law of involuntary manslaughter to MAID violates the Massachusetts Constitution. They also seek a declaration that a physician is free to provide information and advice about MAID to terminally ill patients. The matter is now before the Court on the plaintiffs' Motion for Partial Summary Judgment on their equal protection and free speech claims and the defendants' Cross-Motion for Summary Judgment on All Counts. This court has immense compassion for Dr. Kligler's desire to avoid a potentially painful death and for Dr. Steinbach's desire to ease his patients' suffering, however, the Court concludes, for the reasons discussed below, that the plaintiffs' arguments concerning the right to utilize MAID are unavailing. The Court further concludes that providing advice and information about MAID is permitted in the Commonwealth. Accordingly, the parties' motions are **ALLOWED** in part and **DENIED** in part.

## BACKGROUND

Dr. Kligler is diagnosed with Stage 4 Prostate Cancer, which has metastasized to his bones. Dr. Kligler's physician, Dr. Christopher Sweeney, estimates that there is a 50 percent chance that Dr. Kligler will die within five years. Dr. Sweeney further cautions that the prognosis for cancer patients can quickly turn negative. Due to the uncertainty in predicting the course of any cancer, Dr. Sweeney checks Dr. Kligler's condition every three months.

Dr. Kligler wants to consult with his physicians about the full range of end-of-life options and ultimately obtain a prescription for lethal medication. According to Dr. Kligler, such medication will alleviate anxiety related to the dying process and allow him to live his final days confident that if his suffering becomes too great, he may self-administer a prescription that will end his life. Dr. Kligler's desire to have access to the medication stems, in part, from his own



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experiences as a physician where he witnessed the suffering of terminally ill patients. Dr. Kligler believes he may be unable to find a doctor in Massachusetts who is willing to provide the prescription due to fear of criminal prosecution.

Dr. Steinbach is a licensed Massachusetts physician. Some of the patients he has cared for have considered end-of-life issues in connection with organ system failure. As of the date of his deposition, Dr. Steinbach did not have any current patients with a six-month prognosis, although he has cared for patients with a six-month or shorter prognosis in the past. Dr. Steinbach wishes, if requested, to provide information regarding, and write prescriptions for, lethal medication for purposes of MAID. He does not currently provide information regarding MAID or write MAID prescriptions because he fears criminal prosecution.

Doctors Kligler and Steinbach filed this action against the AG and the DA on October 24, 2016. Their complaint asserts six counts for declaratory and injunctive relief.

Count I of the complaint seeks a declaration that "manslaughter charges are not applicable to physicians who follow a medical standard of care and write a prescription to terminally ill, competent adults who request such aid and may choose to self-administer the medication consistent with the practice of [MAID]." Complaint at ¶ 43. The plaintiffs define the term MAID in their complaint to mean "the recognized medical practice of allowing mentally competent, terminally ill adults to obtain medication that they may choose to take to bring about a quick and peaceful death." *Id.* at ¶ 2.

Count II asserts that the application of common law manslaughter to a physician who engages in the conduct described above violates the Massachusetts Constitution because the law is impermissibly vague. Counts III and IV allege that the application of common law manslaughter to such a physician impermissibly restricts a patient's constitutional right to



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privacy "by interfering with [their] basic autonomy in deciding how to confront their own mortality and choose their own destiny," Complaint at ¶ 51, and impermissibly restricts a patient's fundamental liberty interests, namely, "the right of competent adults to control decisions relating to the rendering of their own health care," *id.* at ¶ 55. Counts II, III, and IV each request a declaration "that physicians who follow a medical standard of care and write a prescription pursuant to the practice of [MAID] to terminally ill, competent adults who request such aid do not violate criminal law, including the common-law crime of manslaughter." Complaint at ¶¶ 47, 52, 57. Each count also seeks an injunction prohibiting the AG and the DA from prosecuting physicians who engage in that conduct.

Count V asserts that the application of common law manslaughter to a physician based on his or her provision of information and advice about MAID to competent, terminally ill patients, who later voluntarily ingest lethal prescribed medication, constitutes an unlawful restraint on the constitutional right to freedom of speech by hindering physicians' ability to discuss medically appropriate end-of-life treatment options. Count V seeks a declaration that giving such advice is not manslaughter and an injunction prohibiting the AG and the DA from prosecuting physicians who inform, advise, or counsel patients about MAID.

Lastly, Count VI asserts that the application of common law manslaughter to physicians who follow a medical standard of care and provide MAID violates the constitutional right to the equal protection of law by treating differently terminally ill adults who wish to receive MAID and terminally ill adults who wish to hasten death by the voluntarily stopping of eating and drinking (VSED), withdrawal of life support, or palliative sedation. Count VI seeks a declaration that physician assisted suicide is not manslaughter as well as an injunction against prosecution.



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## DISCUSSION

The parties have filed cross motions for summary judgment. The plaintiffs seek summary judgment on their equal protection and free speech claims. The defendants seek summary judgment on all of the plaintiffs' claims. The Court concludes that although the plaintiffs are entitled to summary judgment on Count V, the defendants are entitled to summary judgment on all other counts.[5]

A. Applicability of Common Law Involuntary Manslaughter to MAID (Count I)

Involuntary manslaughter involves "an unlawful homicide unintentionally caused by wanton or reckless conduct." *Commonwealth* v. *Catalina*, 407 Mass. 779, 789 (1990). See also *Commonwealth* v. *Life Care Centers of America, Inc.*, 456 Mass. 826, 832 (2010), quoting *Commonwealth* v. *Gonzalez*, 443 Mass. 799, 808 (2005) (defining involuntary manslaughter as "an unlawful homicide unintentionally caused by an act which constitutes such a disregard of probable harmful consequences to another as to amount to wanton or reckless conduct."). "Wanton or reckless conduct" for purposes of the crime is "intentional conduct, by way either of commission or of omission where there is a duty to act, which conduct involves a high degree of likelihood that substantial harm will result to another." *Catalina*, 407 Mass. at 789, quoting *Commonwealth* v. *Welansky*, 316 Mass. 383, 399 (1944). Whether conduct is reckless or wonton may be determined on a subjective basis (the defendant was actually aware of the potential harm from his or her conduct) or on an objective basis (a reasonable person would be aware of such potential harm). *Commonwealth* v. *Perry*, 34 Mass. App. Ct. 127, 129-130 (1993).

[5] Although the counts in the plaintiffs' complaint reference common law manslaughter, the defendants only contend that physicians who provide MAID may be charged with involuntary manslaughter. They do not contend that voluntary manslaughter or any other crime is applicable. As a result, when analyzing plaintiffs' claims, the parties largely focus on the crime of involuntary manslaughter. The Court does the same.



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In relation to Count I, the plaintiffs seek a declaration that physicians who follow a medical standard of care and write lethal prescriptions to competent, terminally ill adults who may choose to self-administer the medication (i.e., who engage in MAID) cannot be criminally prosecuted for common law involuntary manslaughter. The plaintiffs argue that MAID cannot constitute involuntary manslaughter for three reasons. None are availing.

The plaintiffs first argue that two decisions in *Carter v. Commonwealth* stand for the proposition that a defendant who participates in another's suicide can only be liable for involuntary manslaughter if the defendant occasions the suicide by "overcoming the individual's will to live" (i.e., coerces the victim) and that therefore MAID can never constitute involuntary manslaughter because the practice does not involve any coercion. See *Commonwealth* v. *Carter*, 474 Mass. 624 (2016) (*Carter I*); *Commonwealth* v. *Carter,* 481 Mass. 352 (2019) (*Carter II*). The plaintiffs, however, misread the *Carter* decisions.

The two decisions concerned a defendant who was charged and convicted of involuntary manslaughter after she encouraged and directed her boyfriend via cellphone text messages and voice calls to complete a suicide attempt while it was in progress. In *Carter I*, the Supreme Judicial Court (SJC) rejected the defendant's contention that verbally encouraging someone to commit suicide, no matter how forcefully, could not constitute wanton or reckless conduct for purposes of involuntary manslaughter, and held that there was probable cause to sustain the indictment against the defendant because the evidence before the grand jury suggested that she "overbore the victim's willpower" at the moment the victim was expressing reservations about committing suicide.[6] 474 Mass. at 635. The SJC explained that the "defendant's virtual

[6] The victim was using a water pump to generate carbon monoxide in his truck. At one point, the victim expressed reservations about going through with the suicide and got out of the truck. The defendant instructed him to return to the truck and he died shortly thereafter. *Carter I,* 474 Mass. at 625, 629.



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presence [via cellphone] at the time of the suicide, the previous constant pressure the defendant had put on the victim [to commit suicide], … [the victim's] already delicate mental state" and their romantic relationship lent a "coercive quality" to the defendant's words that caused the victim to follow through with his suicide. *Id.* at 634-636. In *Carter II*, the SJC upheld the defendant's conviction for involuntary manslaughter because the evidence showed that: the defendant was the victim's "girlfriend and closest, if not only, confidant in this suicidal planning;" that the defendant "had been constantly pressuring him to complete their often discussed plan, fulfill his promise to her, and finally commit suicide;" and that when the victim abandoned his suicide attempt, the defendant "badgered" him into resuming it and thereafter "did absolutely nothing to help him…." 481 Mass. at 363. The SJC also rejected the defendant's arguments that common law involuntary manslaughter was constitutionally vague as applied to her and that the conviction violated her free speech rights. *Id.* at 363-369.

Neither decision purported to establish a new involuntary manslaughter analysis in the suicide context more generally. Rather, the cases were narrowly focused on whether the use of *words alone* could constitute involuntary manslaughter. MAID comprises of more than words; it involves *conduct* – the prescription of lethal medication to patients in order to provide them with an otherwise unavailable means to end their own lives. Thus, the *Carter* decisions do not, as the plaintiffs contend, suggest that the crime requires coercion in the assisted suicide context.

The plaintiffs next argue that MAID is not punishable as involuntary manslaughter because the act of providing a lethal prescription cannot constitute "wanton and reckless conduct." The Court disagrees. As noted above, "wanton or reckless conduct" for purposes of the crime is "intentional conduct, by way either of commission or of omission where there is a duty to act, which conduct involves a high degree of likelihood that substantial harm will result



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to another." *Catalina*, 407 Mass. at 789, quoting *Welansky*, 316 Mass. at 399. See also *Commonwealth* v. *Carrillo*, 483 Mass. 269, 275-277 (2019) (explaining meaning of "wanton or reckless conduct"). The writing of a lethal prescription is an intentional action that, given its very purpose, is highly likely to result in death. Cf. *Carrillo*, 483 Mass. at 287, clarifying scope of *Catalina* ("Where there is specific evidence that the defendant knew or should have known that his or her conduct created a high degree of likelihood that substantial harm will result, the Commonwealth may indeed convict the person who sold or gave the heroin to the decedent of involuntary manslaughter.") (internal quotation marks and citation omitted).

Lastly, the plaintiffs argue that a physician cannot be liable for prescribing lethal medication for purposes of MAID because the patient's self-administration of the medication is an independent intervening cause of death. The Court disagrees. The causation element of involuntary manslaughter can be satisfied even where the intervening conduct by the victim leads to death as long as the intervening conduct was "reasonably foreseeable." *Catelina*, 407 Mass at 791. In the context of MAID, it is reasonably foreseeable that the patient will self-administer the lethal medication, causing his or her own death. Compare *id.* (causal link between defendant's sale of heroin to the victim and the victim's death from the heroin was not broken by the victim's intervening conduct of injecting herself). See also *Carrillo*, 483 Mass. at 287.

B. Vagueness (Count II)

"A statute is unconstitutionally vague if men of common intelligence must necessarily guess at its meaning." *Commonwealth* v. *Crawford*, 430 Mass. 683, 689 (2000). In connection with Count II of their complaint, the plaintiffs maintain that common law involuntary manslaughter is unconstitutionally vague as applied to MAID. This argument is unpersuasive.



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"Manslaughter is a common-law crime that has not been codified by statute in Massachusetts. It has long been established in our common law that wanton or reckless conduct that causes a person's death constitutes involuntary manslaughter." *Carter II*, 481 Mass. at 364 (internal quotations and citations omitted). Analogous conduct has been deemed unlawful. See *Catelina* at 407 Mass at 791 (defendant could be charged with involuntary manslaughter for sale of heroin to the victim who died from overdose); *Carrillo*, 483 Mass. at 287 ("Where there is specific evidence that the defendant knew or should have known that his or her conduct created a high degree of likelihood that substantial harm will result, the Commonwealth may indeed convict the person who sold or gave the heroin to the decedent of involuntary manslaughter.") (internal quotation marks and citation omitted); *Commonwealth* v. *Atencio*, 345 Mass. 627, 629 (1963) (individuals who cooperated in bringing about suicide by participation in Russian roulette game could be convicted of involuntary manslaughter). Cf. *Carter II*, 481 Mass. at 364, quoting *Crawford*, 430 Mass. at 689 ("If a statute has been clarified by judicial explanation … it will withstand a challenge on grounds of unconstitutional vagueness."). Thus, the common law provides sufficient notice that a physician might be charged with involuntary manslaughter for engaging in MAID. The law is not unconstitutionally vague as applied to MAID.

As with Count I, the plaintiffs rely on the *Carter* decisions to support their vagueness argument. In *Carter I*, the SJC concluded its decision by stating the following:

> It is important to articulate what this case is not about. It is not about a person seeking to ameliorate the anguish of someone coping with a terminal illness and questioning the value of life. Nor is it about a person offering support, comfort, and even assistance to a mature adult who, confronted with such circumstances, has decided to end his or her life. These situations are easily distinguishable from the present case, in which the grand jury heard evidence suggesting a systematic campaign of coercion on which the virtually present defendant embarked – captured and preserved through her text messages – that targeted the equivocating young victim's insecurities and acted to subvert his willpower in favor of her own.



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474 Mass. at 636. Subsequently, in *Carter II*, in rejecting the defendant's contention that her conviction violated her free speech rights, the SJC cited to the above comments in *Carter I* and "reemphasize[d]" that:

> [T]his case does not involve the prosecution of end-of-life discussions between a doctor, family member, or friend and a mature, terminally ill adult confronting the difficult personal choices that must be made when faced with the certain physical and mental suffering brought upon by impending death. Nor does it involve prosecutions of general discussions about euthanasia or suicide targeting the ideas themselves. . . . Nothing in *Carter I*, our decision today, or our earlier involuntary manslaughter cases involving verbal conduct suggests that involuntary manslaughter prosecutions could be brought in these very different contexts without raising important First Amendment concerns.... [T]he verbal conduct targeted here and in our past involuntary manslaughter cases is different in kind and not degree, and raises no such concerns. Only the wanton or reckless pressuring of a person to commit suicide that overpowers that person's will to live has been proscribed.

481 Mass. at 368 & n.15 (internal citations omitted). Based on these comments, the plaintiffs suggest that the decisions have rendered it unclear whether involuntary manslaughter applies to MAID. The plaintiffs, however, misunderstand these passages. Read together and viewed in the context of the issue before the SJC (whether the use of words alone could constitute involuntary manslaughter), it is evident that the SJC's comments were not intended to suggest that MAID may never constitute involuntary manslaughter, but rather to ensure that the *Carter* decisions were not interpreted to prohibit *speech* associated with physician assisted suicide (e.g., a physician informing a terminally ill patient where MAID is legal or advising the patient to travel to a state where MAID is legal).

C. Freedom of Speech (Count V)

With regard to Count V, the plaintiffs assert that the application of common law involuntary manslaughter to a physician based on his/her provision of information and advice about MAID to competent, terminally ill patients, who then voluntarily ingest lethal prescribed



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medication, constitutes an unlawful restraint on the constitutional right to freedom of speech by hindering the physician's ability to discuss medically appropriate end-of-life treatment options. As made plain by *Carter II*, the plaintiffs are correct that the law of involuntary manslaughter does not prohibit such provision of information and advice. See *Carter II*, 481 Mass. at 368. Indeed, the Commonwealth does not contend otherwise. Any physician is free to provide information on the jurisdictions where MAID is legal, guidance and information on the procedures and requirements in those jurisdictions, and referrals to physicians who can provide MAID in those jurisdictions. Such conduct, without more, does not constitute involuntary manslaughter.[7] However, this Court declines to issue an injunction because there now appears little or no risk that such prosecutions will occur.

D. Due Process and Equal Protection (Counts III, and IV, and VI)

With regard to Counts III, IV, and VI, the plaintiffs assert that the application of involuntary manslaughter to MAID: (1) impermissibly restricts the plaintiffs' fundamental liberty interests and thereby violates their due process rights; and (2) violates their rights to equal protection because it treats differently terminally ill adults who wish to receive MAID and terminally ill adults who wish to hasten death by VSED, withdrawal of life support, or palliative sedation.[8] As explained below, the Court concludes this is not the case.

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[7] In their complaint, plaintiffs seek, in addition to declaratory relief, an injunction prohibiting the AG and the DA from prosecuting physicians who inform, advise, or counsel patients about MAID. Although "[t]rial judges have broad discretion to grant or deny injunctive relief," "[a] permanent injunction should not be granted to prohibit acts that there is no reasonable basis to fear will occur." *Lightlab Imaging, Inc.* v. *Axsun Techs., Inc.*, 469 Mass. 181, 194 (2014). The Court declines to issue an injunction because there now appears little or no risk that such prosecutions will occur.

[8] As noted above, Count III alleges that application of common law manslaughter to a physician that practices MAID impermissibly restricts the constitutional right to privacy "by interfering with a person's basic autonomy in deciding how to confront their own mortality and choose their own destiny." Complaint at ¶ 51. Count IV similarly alleges that it impermissibly restricts fundamental liberty interests, namely, "the right of competent adults to control



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1. *Standard of Review*

In order to determine whether the application of common law involuntary manslaughter to MAID violates the plaintiffs' equal protection and due process rights under the Massachusetts Constitution, the Court must first examine which standard of review is applicable – strict scrutiny review, which is required if a statute burdens a suspect group or a fundamental right, or rational basis review, which is the default form of review. See *Goodridge* v. *Department of Pub. Health*, 440 Mass. 309, 330 (2003) ("Where a statute implicates a fundamental right or uses a suspect classification, we employ strict judicial scrutiny. . . . For all other statutes, we employ the rational basis test.) (internal quotation marks and citation omitted). The plaintiffs argue that strict scrutiny applies because the prohibition against MAID implicates a fundamental right, which they define as "Dr. Kliger's fundamental right of self-determination and individual autonomy in making end-of-life medical decisions. . . . ." Pl. Opp. Brief at 5. The Court disagrees.

At the outset, the Court notes that the United States Supreme Court (Supreme Court) has already determined that an individual does not have a fundamental right to MAID under the U.S. Constitution. See *Washington* v. *Glucksberg*, 521 U.S. 702 (1997); *Vacco* v. *Quill*, 521 U.S. 793 (1997). In *Glucksberg*, the Supreme Court held that Washington state's law prohibiting assisted suicide did not violate the substantive due process rights of physicians who wished to provide lethal medications to their competent, terminally ill patients.[9] In so ruling, the Court looked to the "Nation's traditions" to determine whether the right to physician assisted suicide was a fundamental liberty interest protected by the Fourteenth Amendment's Due Process Clause and

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decisions relating to the rendering of their own health care." Id. at ¶ 55. Both the Commonwealth and the plaintiffs appear to treat these Counts as asserting substantive due process claims.

[9] The ban has since been overturned by legislation in that state.



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determined that it was not because there was an "almost universal tradition that has long rejected the asserted right, and continues explicitly to reject it today." 521 U.S. at 723, 728. The Court explained that even though "many rights and liberties protected by the Due Process Clause [of the Fourteenth Amendment] sound in personal autonomy" not "all important, intimate, and personal decisions" were similarly protected. *Id.* at 727. The Court then went on to apply the rational basis test and conclude that Washington's assisted suicide ban was rationally related to legitimate government interests, including: an unqualified interest in the preservation of human life; an interest in preventing suicide, and in studying, identifying, and treating its causes; an interest in protecting the integrity and ethics of the medical profession; an interest in protecting vulnerable groups (e.g., the poor, the elderly, and disabled persons) from abuse, neglect, and mistakes; and an interest in preventing the societal acceptance of voluntary and involuntary euthanasia. *Id.* at 728-735.

In *Vacco*, decided on the same day as *Glucksberg*, the Supreme Court rejected the plaintiffs' contention that New York's law against assisted suicide, as applied to physician assisted suicide, violated the Fourteenth Amendment's Equal Protection Clause by differently treating mentally competent, terminally ill patients seeking to self-administer prescribed lethal medication and mentally competent, terminally ill patients who refused life-saving medical treatment. 521 U.S. at 799-809. The Supreme Court reiterated that the law did not "infringe fundamental rights" and, applying the rational basis review standard, concluded that the law "follow[ed] a longstanding and rational distinction." Id. at 799, 808. In so ruling, the Supreme Court stated that drawing a distinction between assisting suicide and withdrawing life-sustaining treatment "comports with fundamental legal principles of causation and intent." *Id.* at 801. It explained that:



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> First, when a patient refuses life-sustaining medical treatment, he dies from an underlying fatal disease or pathology; but if a patient ingests lethal medication prescribed by a physician, he is killed by that medication. . . . Furthermore, a physician who withdraws, or honors a patient's refusal to begin, life-sustaining medical treatment purposefully intends, or may so intend, only to respect his patient's wishes and to cease doing useless and futile or degrading things to the patient when [the patient] no longer stands to benefit from them. . . . The same is true when a doctor provides aggressive palliative care; in some cases, pain killing drugs may hasten a patient's death, but the physician's purpose and intent is, or may be, only to ease his patient's pain. A doctor who assists a suicide, however, must, necessarily and indubitably, intend primarily that the patient be made dead. . . . Similarly, a patient who commits suicide with a doctor's aid necessarily has the specific intent to end his or her own life, while a patient who refuses or discontinues treatment might not. . . . The law has long used actors' intent or purpose to distinguish between two acts that may have the same result. . . . Put differently, the law distinguishes actions taken because of a given end from actions taken in spite of their unintended but foreseen consequences.

*Id.* at 801-803 (internal quotation marks and citations omitted).

This Court also notes that since the rulings in *Glucksberg* and *Vacco*, other state appellate courts have either concluded for the first time or reaffirmed that MAID does not implicate a fundamental right. See, e.g., *Morris* v. *Brandenburg*, 376 P. 3d 836 (N.M. 2016); *Myers* v. *Schneiderman*, 31 N.Y.S. 3d 45 (2016); *Donorovich-Odonnell* v. *Harris*, 241 Cal. App. 4th 1118 (2015); *Sampson* v. *State*, 31 P. 3d 88 (Alaska 2001); *Krischer* v. *McIver*, 697 So. 2d 97 (Fla. 1997). Indeed, despite the apparent growing acceptance of MAID, no state appellate court has yet to render a ruling inconsistent with *Glucksberg* or *Vacco*. See *Morris*, 376 P. 3d at 839 ("No appellate court has held that there is a constitutional right to physician aid in dying."); *Baxter* v. *Montana*, 354 Mont. 234, 239 (2009) (finding that a statutory consent defense to a homicide charge could apply to physicians who practiced MAID but declining to address the parties' constitutional arguments).

The plaintiffs acknowledge the rulings in *Glucksberg* and *Vacco* but point to the SJC's recognition in *Goodridge* that the "Massachusetts Constitution is in some instances more



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protective of individual liberty interests than is the Federal Constitution" even in instances "where both Constitutions employ essentially the same language." 440 Mass. at 328. See also *Commonwealth* v. *Freeman*, 472 Mass. 503, 505 n.5 (2015). The plaintiffs maintain that, although our Appellate Courts have not directly addressed MAID, the holdings of *Superintendent* v. *Saikewicz*, 373 Mass. 728 (1977) and *Brophy* v. *New Engl. Sinai Hosp.*, 398 Mass. 417 (1986), "make clear that restricting a patient's decision to accept or reject treatment implicates a fundamental right" and that therefore prohibiting MAID implicates a fundamental right because it "restricts a patient's decision to accept a medical treatment." Pl. Opp. Br. at 6-7 (internal quotation marks omitted). However, neither *Saikewicz* nor *Brophy* go as far as the plaintiffs suggest.

*Saikewicz* concerned a severely mentally handicapped individual who suffered from a form of leukemia, which if left untreated, would likely cause him to die within weeks or several months without pain. 373 Mass. at 731-734. Chemotherapy would temporarily prolong his life but could also result in significant adverse side effects and discomfort. *Id.* The question before the SJC was whether the individual, through his guardian ad litem, could refuse chemotherapy treatment. The SJC held that the individual could do so. *Id.* at 730, 759. In rendering its ruling, the SJC explained that in situations in which a patient refuses medical intervention and treatment both the patient and the State have countervailing interests which must be balanced. *Id.* at 744. The patient has a right "to reject, or refuse to consent to, intrusions of his bodily integrity and privacy" rooted in the common law and in a constitutional right to privacy. *Id.* at 738-740, 745. The State, on the other hand, has an interest in "(1) the preservation of life; (2) the protection of the interests of innocent third parties; (3) the prevention of suicide; and (4) maintaining the



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ethical integrity of the medical profession." *Id.* at 741. The SJC found that in the case before it, the balance favored permitting the individual to forgo treatment. *Id.* at 744-745, 759.

Similarly, in *Brophy*, the SJC held that a patient's guardian could remove a gastrostomy tube through which the patient received nutrition and hydration that artificially continued his life where there was no hope of his recovery from a persistent vegetative state. 398 Mass. at 421-422. It balanced the patient's "right to refuse medical treatment" against the four State interests discussed in *Saikewicz* and concluded that the Commonwealth's interests did not overcome the patient's right, as represented by his guardian, to discontinue treatment. *Id.* at 429-440.

Both of these decisions were narrowly focused on a patient's right to bodily integrity (the freedom to avoid medical treatment as a form of unwanted touching), rather than, as is the case with MAID, a patient's desire to have medical treatment to end his or her life. And in each decision, the SJC was careful not to suggest that the right to refuse medical treatment encompasses or relates to the right to assisted suicide. It took pains to preserve what it viewed as a meaningful distinction between death that results naturally from the withdrawal of medical equipment and death that results from affirmative human efforts. In *Saikewicz*, the SJC, in concluding that the Commonwealth's interest in preventing suicide was "inapplicable" to the case before it, explained that:

> In the case of the competent adult's refusing medical treatment such an act does not necessarily constitute suicide since (1) in refusing treatment the patient may not have the specific intent to die, and (2) even if he did, to the extent that the cause of death was from natural causes the patient did not set the death producing agent in motion with the intent of causing his own death. . . . Furthermore, the underlying State interest in this area lies in the prevention of irrational self-destruction. What we consider here is a competent, rational decision to refuse treatment when death is inevitable and the treatment offers no hope of cure or preservation of life. There is no connection between the conduct here in issue and any State concern to prevent suicide.

373 Mass. at 743 n.11 (internal citation omitted). The SJC similarly explained in *Brophy*:



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> [W]e [do not] consider [the patient's] death to be against the State's interest in the prevention of suicide. [The patient] suffers an affliction, . . . which makes him incapable of swallowing. The discontinuance of the G-tube feedings will not be the death producing agent set in motion with the intent of causing his own death .... Prevention of suicide is . . . an inapplicable consideration. . . . A death which occurs after the removal of life sustaining systems is from natural causes, neither set in motion nor intended by the patient. . . . [D]eclining life-sustaining medical treatment may not properly be viewed as an attempt to commit suicide. Refusing medical intervention merely allows the disease to take its natural course; if death were eventually to occur, it would be the result, primarily, of the underlying disease, and not the result of a self-inflicted injury.

398 Mass. at 439 (internal quotation marks and citations omitted). Significantly, the SJC in *Brophy* also acknowledged that although the "law recognizes the individual's right to preserve his humanity, even if to preserve his humanity means to allow the natural processes of a disease or affliction to bring about a death with dignity," the law "does not permit suicide" and thus, "unlimited self-determination," or "unqualified free choice over life." *Id.* at 434 & n.29.

Neither decision suggests that the principles that underlie the right to refuse medical treatment apply to the affirmative act of taking one's own life with the assistance of a willing physician. Instead, they signal that the SJC, if directly faced with the issue, would rule in a manner consistent with *Vacco* and *Glucksberg*, which also maintained a strong distinction between MAID, and the withdrawal of treatment and palliative care. Compare *Glucksberg*, 521 U.S. at 727 ("That many of the rights and liberties protected by the Due Process Clause sound in personal autonomy does not warrant the sweeping conclusion that any and all important, intimate, and personal decisions are so protected."), with *Brophy*, 398 at 434 n.29 (individuals do not have "unlimited self-determination" or an "unqualified free choice over life").

The Court acknowledges that these decisions were issued more than thirty years ago and may not reflect the SJC's current thinking on the issue. Moreover, since *Glucksberg* and *Vacco*, the Supreme Court recognized that in identifying fundamental rights, a court may consider



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evolving social views in addition to history and tradition. See *Obergefell* v. *Hodges*, 135 S. Ct. 2584, 2598, 2602 (2015) (noting that "[h]istory and tradition guide and discipline [the fundamental rights] inquiry but do not set its outer boundaries" and explaining that although the *Glucksberg*'s "central reference to specific historical practices" may have been appropriate for the right in that case, it was inconsistent with the Court's approach in discussing "other fundamental rights"). Our own courts have indicated they would perhaps apply this same analysis. See *Goodridge*, 440 Mass. at 328 ("history must yield to a more fully developed understanding of the invidious quality of the discrimination"). But see *Gillespie* v. *Northampton*, 460 Mass. 148, 153 (2011) ("fundamental right is one that is deeply rooted in this Nation's history and tradition") (internal quotation marks omitted); *Doe* v. *Secretary of Educ.*, 479 Mass. 375, 392 n. 29 (2018), citing *Obergefell* 135 S. Ct. at 2598 ("In addition to those rights afforded explicit protection under our Constitution, [h]istory and tradition guide and discipline the process of identifying and protecting fundamental rights implicit in liberty") (internal quotation marks omitted). However, the evidence before the Court does not sufficiently establish that the prohibition on MAID represents an outmoded viewpoint and that therefore the distinction established in our case law between MAID and other end of life options should be disregarded. Compare *Obergefell*, 135 S. Ct. at 2602 (right to same-sex marriage arises, in part, "from a better informed understanding of how constitutional imperatives define a liberty that remains urgent in our own era"). Indeed, although this issue has been repeatedly litigated, the plaintiffs are unable to cite to any jurisdiction where its appellate courts have concluded otherwise.[10]

[10] The Court finds the plaintiffs' reliance on the SJC's decision in *Goodridge* and the Supreme Court's decision in *Obergefell* addressing the right to same-sex marriage unpersuasive. In those cases, the courts were faced with the question of whether a state could exclude certain persons from obtaining state-sanctioned marriage licenses or put differently, whether the constitution required an extension of an already established right. In this case, the plaintiffs seek the declaration of a right that has never been previously recognized for any person.



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Accordingly, the Court concludes that a prohibition against MAID does not implicate a fundamental right and that therefore the plaintiffs' due process and equal protection claims are subject to a rational basis review and not a strict scrutiny analysis.

2. *Rational Basis Analysis*

"For due process claims, rational basis analysis requires that [laws] bear[] a real and substantial relation to the public health, safety, morals, or some other phase of the general welfare. . . ." *Goodridge*, 440 Mass. at 330 (internal quotation marks omitted). Similarly, "[f]or equal protection challenges, the rational basis test requires that an impartial lawmaker could logically believe that the classification would serve a legitimate public purpose that transcends the harm to the members of the disadvantaged class." *Id.* (internal quotation marks omitted). See also *Chebacco Liquor Mart, Inc.* v. *Alcoholic Beverages Control Comm'n*, 429 Mass. 721, 723 (1999) ("A classification will be considered rationally related to a legitimate purpose if there is any reasonably conceivable state of facts that could provide a rational basis for the classification.") (internal quotation marks omitted); *Marshfield Family Skateland, Inc.* v. *Marshfield*, 389 Mass. 436, 446 (1983), quoting *Commonwealth* v. *Henry's Drywall Co.*, 366 Mass. 539, 541 (1974) ("a statutory classification will not be set aside as a denial of equal protection or due process if any state of facts reasonably may be conceived to justify it."). In conducting this analysis, the Court does not "weigh conflicting evidence supporting or opposing a legislative enactment." *Shell Oil Co.* v. *City of Revere*, 383 Mass. 682, 687 (1981). The Court concludes that the Commonwealth's prohibition on MAID, meets the rational basis test for both due process and equal protection. [11]

[11] Given the nature of the rational basis analysis, the Court rejects the plaintiffs' assertion that summary judgment in favor of the defendants should be denied because there are "at a minimum, factual disputes relating to" the evidence



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First, the Legislature could rationally conclude that difficulty in determining and ensuring that a patient is "mentally competent" warrants the continued prohibition of MAID. There is expert testimony in the record that many patients faced with a diagnosis of terminal illness are depressed, that this depression and accompanying demoralization may interfere with their ability to make a rational choice between MAID and other available alternatives, and that most Massachusetts physicians are unaware of the best practices in responding to requests for MAID given this context. See Forrow Aff., Joint Appendix (J.A.) Ex. 39, at ¶ 14; Greene Aff., J.A. Ex. 40, at ¶ 6; Forrow Disclosure, J.A. Ex. 13, at ¶ 3(a).[12] There is also evidence that the problem of competency is particularly acute at the time at which a patient self-administers the medication because patients may be alone or accompanied by those who support his or her end-of-life decision. See Oregon Health Authority, 2014-17 Data Summaries, J.A. Ex. 20 (prescribing physician present at time of death in the case of only 13.9% of patients in 2014; 10.8% in 2015; 10.1% in 2016; 16.1% in 2017); Green Disclosure, J.A. Ex. 14, at 6; Green Aff., J.A. Ex. 40, at ¶ 11; Forrow Aff., J.A. Ex. 39, at ¶ 22. In such a situation, there is a greater risk that temporary anger, depression, a misunderstanding of one's prognosis, ignorance of alternatives, financial considerations, strain on family members or significant others, or improper persuasion may impact the decision. The concern that the decision will be motivated by financial considerations are potentially heightened when MAID is being used by members of disadvantaged socio-

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the defendants have put forward to support their contention that the prohibition on MAID has a rational basis. See Pl. Opp. Brief at 21.

[12] The Alaskan Supreme Court has expressed similar concerns about competency. It has explained that: "While mental competency is certainly well accepted as a measure for determining when physicians may render life-prolonging medical treatment, it is potentially far more controversial as a measure for determining when a physician is entitled to terminate a patient's life. This is so not only because the prescription of life-ending medication is a unique and absolute form of medical 'treatment,' but also because the mental competency of terminally ill patients is uniquely difficult to determine." *Sampson*, 31 P.3d at 97.



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economic groups. See Forrow Disclosure, J.A. Ex. 13, at ¶ 9(d); Greene Depo., J.A. Ex. 7, at 129-130.

Second, the Legislature could rationally conclude that predicting when a patient has six months to live is too difficult and risky for purposes of MAID, given that it involves the irreversible use of a lethal prescription. The Commonwealth put forward expert testimony that while doctors may be able to accurately predict death within two or three weeks of its occurrence, predictions of death beyond that time frame are likely to be inaccurate. See Greene Disclosure, J.A. Ex. 14, at 5 ("Research has shown that physicians cannot predict imminent death sooner than a few weeks before the event. . . . At six months, a fatal outcome is wholly unpredictable other than recognizing the presence of an incurable condition."); Green Aff., J.A. Ex. 40, at ¶ 7; Green Depo., J.A. Ex. 7, 76-79; Forrow Aff., J.A. Ex. 39, at ¶ 17 ("It is crucial to recognize that the limits in any physician's ability to predict a patient's future have *dramatically* different implications when what is at stake is possible referral to hospice, rather than the possible provision of a lethal prescription").[13]

Third, the Legislature could rationally conclude that a general medical standard of care is not sufficient to protect those seeking MAID. The Commonwealth put forward expert testimony that MAID "is neither a medical treatment nor a medical procedure and thus there can be no applicable medical standard of care" and that "[t]he legalization of [MAID] is an attempt to carve out a special case outside of the norms of medical practice." Greene Disclosure, J.A. Ex. 14, at 7. See also Forrow Rebuttal Disclosure, J.A. Ex. 15, at 10 ("In states where [MAID] has been legalized by statute, the standard of care consists of doing it in accordance with regulations

[13] The Court notes that the plaintiffs seek a declaration that would apply to all physicians, even though most physicians likely do not have substantial experience dealing with terminal stages of disease. See Green Disclosure, J.A. Ex 14, at 6.



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that the law put in place. There would be no analogous standard of care if [MAID] were legalized by court order. . . . The average doctor in Massachusetts does not have the experience and expertise required to provide [MAID] responsibly. . . ."); Forrow Aff., J.A. Ex. 39, at ¶¶ 19-20.[14] The Commonwealth also put forward evidence that regulating MAID is difficult even where statutory standards, such as those in Oregon, are in place. Its expert opined that: "Data collected [in Oregon] paint[s] a picture of patients receiving [MAID] for whom alternative approaches have not been exhausted. Psychological referrals are scant. The cited basis for requests largely consists of problems that are manageable via palliative care and hospice. What Oregon officials do not do is monitor the actual process for terminating patients. Yet the data that is available is troubling." Green Disclosure, J.A. Ex. 14, at 8. See also Green Aff., J.A. Ex. 40, at ¶ 11.

Lastly, the Legislature could rationally conclude that MAID is not equivalent to permissible alternatives. The Commonwealth introduced expert testimony that both VSED and withdrawal of life support differ significantly from MAID because both VSED and withdrawal of life support concern the recognized right to discontinue unwanted treatment and in neither circumstance does the physician necessarily act for the purpose of causing the patient's death. See Forrow Aff., J.A. Ex. 39, at ¶ 6; Green Disclosure, J.A. Ex. 16, at ¶¶ 1, 10. The doctor's role, particularly in VSED, is to ensure that the patient's symptoms are controlled. Forrow Aff., J.A. Ex. 39, at ¶ 6; Green Disclosure, J.A. Ex. 16, at 10. The Commonwealth also introduced expert testimony that palliative sedation is different from MAID because it does not necessarily involve an intent to shorten life nor does it necessarily cause or hasten death. See Forrow Aff.,

[14] The Court notes that the Vermont Legislature included a regulatory sunset provision in the statute that authorized MAID, 2013 Vt. Acts 39, but then repealed that sunset provision. See 2015 Vt. Acts 27.22. This provides further evidence that a general standard of care is not appropriate for MAID.



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J.A. Ex. 39, at ¶ 8; Greene Depo., J.A. Ex. 7, at 92-95; Greene Aff., J.A. Ex. 40, at ¶ 8. Rather, palliative sedation may be conducted in such a fashion as to ensure that the underlying disease, not the sedation is the cause of death. Greene Aff., J.A. Ex. 40, ¶ 8; Forrow Aff., J.A. Ex. 39, at ¶ 9. Finally, the Commonwealth produced expert testimony that the permissible end-of-life alternatives potentially involve far less risk than MAID because they occur in hospitals or other institutions devoted to medical treatment and involve numerous physician and staff personnel, which together provide an environment that lends itself to oversight and responsibility. Forrow Aff. ¶¶ 8, 16; Green Aff., J.A. Ex. 40, ¶ 5. MAID, on the other hand, potentially takes place in an uncontrolled environment, without assurance that the patient will administer the medication when close to death, and without physician oversight.

In light of these legitimate public interests that are served by prohibiting MAID, the Court concludes that the plaintiffs failed to demonstrate a violation of their due process or equal protection rights.[15]

E. Conclusion

In concluding that MAID is not authorized under Massachusetts law, the Court notes that there appears to be a broad consensus that this issue is not best addressed by the judiciary. See, e.g., Morris, 376 P. 3d at 838 (indicating that legality of MAID is an issue for the political branches); Myers, 31 N.Y.S. 3d at 64-65 (same); Donorovich-Odonnell, 241 Cal. App. 4th at 1124-1125, 1140 (same); Sampson, 31 P. 3d at 98 (same); Krischer, 697 So. 2d at 104 (same). MAID raises difficult moral, societal, and governmental questions, the resolution of which require the type of robust public debate the courts are ill-suited to accommodate. Although

[15] The Court acknowledges the countervailing expert testimony provided by the plaintiffs. However, this testimony merely indicates that the plaintiffs' views on MAID are reasonable not that the state's decision to prohibit MAID is without rational basis.



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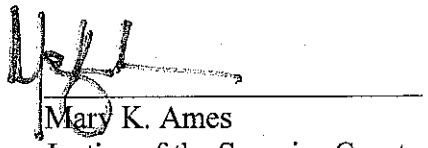
plaintiffs have presented several strong arguments for making MAID a legal option for those suffering from terminal illness, there are equally strong arguments for prohibiting MAID or ensuring that MAID occurs in an environment in which clear, thoughtful, and mandatory standards are in place to protect terminally ill patients who wish to make an irreversible decision. The Legislature, not the Court, is ideally positioned to weigh these arguments and determine whether and if so, under what restrictions, MAID should be legally authorized.

**ORDER**

For the forgoing reasons:

1. The defendants' motion for summary judgment is **ALLOWED** as to Counts I, II, III, IV and VI, but **DENIED IN PART** as to Count V;
2. The plaintiffs' motion for partial summary judgment is **ALLOWED IN PART** as to Count V but otherwise **DENIED**. The Court declines to issue injunctive relief.

It is further **ORDERED**, **ADJUDGED**, and **DECLARED** that: None of the arguments advanced in this action preclude the defendants from prosecuting physicians who prescribe lethal medication for purposes of Medical Aid in Dying; this, however, does not apply to physicians who provide information and advice on Medical Aid in Dying to terminally ill, competent adults.



Mary K. Ames
Justice of the Superior Court

Dated: December 31, 2019



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