

IN THE SUPREME COURT OF THE STATE OF MONTANA  
No. DA 09-0051

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ROBERT BAXTER, STEVEN	)	BRIEF <i>AMICUS CURIAE</i> OF
STOELB, STEPHEN SPECKHART,	)	MONTANA LEGISLATORS IN
M.D., C. PAUL LOEHNEN, M.D., LAR	)	SUPPORT OF PRIVACY AND
AUTIO, M.D., GEORGE RISI, JR.,	)	DIGNITY IN SUPPORT OF
M.D., and COMPASSION & CHOICES,	)	PLAINTIFFS/APPELLEES
	)	
Plaintiffs and Appellees,	)	
	)	
v.	)	
	)	
STATE OF MONTANA and STEVE	)	
BULLOCK,	)	
	)	
Defendants and Appellants.	)	

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ON APPEAL FROM THE FIRST JUDICIAL DISTRICT COURT  
LEWIS AND CLARK COUNTY, CAUSE NO. ADV-2007-78

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## **STATEMENT OF INTEREST**

The Montana Legislators in Support of Privacy and Dignity (“Legislators”) is a bipartisan coalition of 31 legislators with a strong interest in the right to aid in dying.<sup>1</sup> Their interest and duty is to respect and protect the rights granted by the Montana Constitution, including the rights to privacy, individual dignity, and equal protection.

Recognition of a right to aid in dying will provide an option to alleviate unnecessary pain and indignity for competent, terminally-ill patients and their families. In keeping with Montana’s traditions of individualism and strong constitutional rights, Legislators believe that the Court should uphold the lower court’s ruling. If the Court does so, the Legislature will need to assess whether any safeguards are necessary so that citizens are free to exercise the right while remaining protected from potential abuses. The Legislators take this role seriously and are confident in their ability to fulfill it.

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<sup>1</sup> Since requesting leave to file this *amicus* brief on June 1, 2009, Senator Gary Branae, Representative Bob Ebinger, Senator Steve Gallus, Representative Galen Hollenbaugh, Representative Edith McClafferty, Senator Lynda Moss, Representative Diane Sands, Representative Jon Sesso, and Representative Brady Wiseman have joined the Legislators in Support of Privacy and Dignity.

## SUMMARY OF ARGUMENT

The State concedes that there is no genuine issue of material fact. Brief of Appellants 11. It does not contend that this is not a proper as-applied challenge, and it does not dispute that the doctor plaintiffs have or will have patients who are in fact competent and in fact imminently terminal. The State attacks only strawmen and the possibility, as with all freedoms, of mistakes or abuse. The State also does not dispute that some of those competent but terminal patients are suffering or will suffer from types of terminal illness that do not allow them to take control of the end of their lives by directing the removal of life-supporting technologies or requesting or at least accepting “dual-effect” narcotics that they and their doctors know will result in death. As for the remaining class of competent, terminal Montanans, the State leaves them a legal option of ending their lives without doctors, apparently by bullet, knife, noose, or the like. They may not obtain access to prescription drugs to avoid the pain, horror, unreliability, and indignity of those methods.

The State admits that the Montana Constitution protects “personal-autonomy privacy,” *id.* 15, and, even while relying on federal tests developed under constitutional language narrower than Montana’s, the State admits that an important factor is whether individuals and society have reasonable expectations of privacy and autonomy. But the State then ignores its own opening paean to

assuring “a humane death,” *id.* 2, as well as its recognition of privacy and autonomy in the life-support termination and dual-effect situations. The State cannot explain why *Armstrong*’s general standard does not apply. *Id.* 18. Suicide is legal, and some doctors are willing, absent threat of imprisonment, to assist in a humane death for competent, terminal Montanans whose pain is short of that for which the strongest opiates can be rationalized as a pain-control technique, who do not want such pain to get that far, or who wish to control the timing of death so as to assure privacy or the presence and comfort of family and friends. The decision to access such assistance is entitled to privacy and protection.

The fundamental weakness of the State’s position is shown by the State’s eagerness to assert that humane alternatives exist and its inability to articulate a difference between the interests of those competent, terminal citizens allowed to end their lives by directing a doctor to end life-sustaining treatment, a right granted by the Legislature, or to prescribe dual-effect drugs, a right granted by the Executive, and those precluded by state action from requesting a prescription that will result in a dignified and less painful death at a time controlled by the citizen to assure privacy or final association with friends or family.

Nor can the State articulate any reason why one group is more susceptible to abuse than the others. Indeed, the State goes out of its way to laud the judgment of doctors when they respond to requests to end life-sustaining (and expensive)

treatment or to prescribe dual-effect drugs, and it does not suggest that in those circumstances only certain types of doctors should be involved or that their professional judgment must be subjected to an “evaluation process,” “written report,” or “second opinion.” Brief of Appellants 5, 6, & 27. Perhaps those requirements should be imposed in all end-of-life situations, but it is not logical to say that the same doctors who can be trusted in one situation will be abusive in another.

The main argument of the State is not that a humane death should not be a right but that it should not be the Court that recognizes it as such and initially measures against the right the potential risk of abuse that cannot be controlled short of an absolute ban. These Legislators believe that it is an entirely proper exercise of the Court’s “institutional role as partners in a larger [constitutional] dialogue” to enunciate what the Constitution means when applied to this test case, and that because constitutional protection “cannot be secured by courts alone.” Jack M. Balkin & Reva B. Siegel, Introduction, *The Constitution in 2020*, at 6 (2009). It is the role of *amici* and their colleagues in the Legislature to then make a determination, subject to judicial review, of how much farther to push back the homicide statute and what protections against abuse to impose in its absence. *Id.* This is not “the exclusion of a fully informed democratic debate.” Brief of Appellants 11. It is simply the recognition that such a debate cannot exclude the

Constitution and the role of the courts in defining and enforcing constitutional rights. Like the district court, these *amici* welcome such a constitutional dialogue between court and legislature.

## ARGUMENT

### **I. THE RIGHT TO AID IN DYING IS PROTECTED UNDER THE PRIVACY, DIGNITY, AND EQUAL PROTECTION CLAUSES OF THE MONTANA CONSTITUTION**

#### **A. The Right to Aid in Dying Is Protected Under the Privacy Clause**

Montana is one of only ten states that afford explicit constitutional protection of privacy. Mont. Const. art. II, § 10; National Conference of State Legislators, Privacy Protections in State Constitutions, *available at* <http://www.ncsl.org/programs/lis/privacy/stateconstpriv03.htm> (last visited June 15, 2009). That explicitness indicates that the right is intended to be more expansive than that afforded by the federal or other states' constitutions. *Armstrong v. State*, 1999 MT 261, ¶ 34, 296 Mont. 361, ¶ 34, 989 P.2d 364, ¶ 34 (“Montana adheres to one of the most stringent protections of its citizens’ right to privacy in the United States — exceeding even that provided by the federal constitution”).

This Court first acknowledged the personal autonomy aspect of the right to privacy in *Gryczan v. State* (1997), recognizing a right of same-gender consenting adults to engage in private sexual conduct. 283 Mont. 433, 942 P.2d 112. Since

then, the personal autonomy component has protected citizens against forced medical examinations and ensured a woman's right to reproductive choice. *Simms v. Mont. 18<sup>th</sup> Judicial Dist. Court*, 2003 MT 89, 315 Mont. 135, 68 P.3d 678; *Armstrong*, 1999 MT 261, 296 Mont. 361, 989 P.2d 364.

Appellants assert that aid in dying is not within the personal autonomy described in *Armstrong*. Brief of Appellants 18. However, the Court's language applies here, *Armstrong*, ¶ 72 (personal judgments affecting one's health and bodily integrity are "most personal and private matters" requiring "the government to leave us alone"), and the Court made clear that it was not confining the right, and expected other aspects to evolve in the future. *Armstrong*, ¶ 36. Acknowledging a right to aid in dying does not amount to the "unlimited application" of the right to privacy, Brief of Appellants at 20, but is a logical extension of the *Armstrong* line of cases. The concepts of bodily integrity and autonomy over the course of one's medical treatment underlie these decisions, and they should guide the Court's decision.

That the United States Supreme Court or a few courts in other states have come to different conclusions hardly ends the analysis under Montana's Constitution. *Compare* Brief of Appellants 21-23. Not only has Montana repeatedly affirmed that it is "not compelled to march lock-step with pronouncements of the United States Supreme Court" with regard to constitutional

rights, but the Court has acknowledged privacy rights that have then been echoed by that court. *See State v. Martinez*, 2003 MT 65, 314 Mont. 434, 67 P.3d 207; *Gryczan*, 283 Mont. 433, 942 P.2d 112 (affirming a right to same gender, consensual sexual conduct six years before United States Supreme Court did so).

The Court has defined the contours of a robust right to privacy that reflects Montana’s traditions of individualism and limited government. In keeping with those traditions, the principles that inform *Armstrong*, and the rights recognized in the Montana Rights of the Terminally Ill Act (“RTI”), Mont. Code Ann. § 50-9-101 *et seq.* (2007), and in the dual-effect situation,<sup>2</sup> that right must be read to include a fundamental right to aid in dying where necessary to autonomy and a humane death.

In Montana, government intrusion upon the fundamental right of privacy must satisfy strict scrutiny. *Gryczan*, 283 Mont. at 449, 942 P.2d at 122. This means that if state action — such as the homicide statute — infringes upon the

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<sup>2</sup> The announcement that “foreseeably hasten[ing] death,” Brief of Appellants 3, is not “knowingly caus[ing] death,” Mont. Code Ann. § 45-5-102(1)(a), is contrary to traditional standards of scienter but is an understandable attempt to reduce the tension between the homicide statute and the Constitution. The distinction between dual effect and the felony murder rule, Mont. Code Ann. § 45-5-102(1)(b), however, is logical only if the State acknowledges “mitigation, excuse, or justification” in a citizen’s end-of-life circumstances. If completely ending pain is a sufficient justification, that is only because of social recognition of a right to control, even if the result is not a “natural death,” that aspect of human autonomy and dignity.

right to privacy, such infringement will only be upheld if it serves a compelling interest and is narrowly tailored to effectuate that interest. *See, e.g., State v. Siegal* (1997), 281 Mont. 250, 263, 934 P.2d 176, 184 (citing *State v. Pastos* (1994), 269 Mont. 43, 47, 887 P.2d 199, 202), *overruled in part by State v. Kuneff*, 1998 MT 287, ¶ 17, 291 Mont. 474, ¶ 17, 970 P.2d 556, ¶ 17.

Appellants posit three state interests in support of the existing homicide laws: preserving human life; protecting vulnerable groups from potential abuse; and protecting the integrity of the medical profession. Brief of Appellants 31.

Appellants charge that the state interest in preserving human life that justifies homicide laws also forms the basis for prohibiting aid in dying. But death is already imminent for the patients who seek aid in dying, whereas homicide laws are designed to protect citizens whose lives are not at an end and have not made an affirmative decision about how their lives should end. As the lower court noted, if a terminally-ill patient comes to a point when each moment brings nothing but pain, indignity, and continued suffering, it is impossible to imagine any conceivable interest the government could have in forcing her to stay alive against her will. Appellants' App. 1 at 20.

The lower court determined that the remaining two state interests could be adequately served by legislative safeguards. The Legislature is well-equipped to craft such legislation. Appellants contend that the lower court did not perform a

sufficient narrow tailoring analysis. Brief of Appellants 30. But a flat prohibition of the exercise by some citizens of a fundamental right is not tailored at all and so cannot survive strict scrutiny, irrespective of whether the state's interests in creating those laws are found to be compelling. Consequently, the existing homicide laws present an impermissible infringement upon the fundamental right to aid in dying.

**B. The Right to Aid in Dying Is Protected Under the Individual Dignity Clause**

Article II, § 4, of the Montana Constitution is entitled “Individual Dignity” and states, in relevant part, that “[t]he dignity of the human being is inviolable.” Nowhere in the United States Constitution is there an explicit right to individual dignity, much less an inviolable one. This Court has treated individual dignity as an independent fundamental right, apart from privacy and equal protection. *Armstrong*, ¶ 72. “Respect for the dignity of each individual...demands that people have for themselves the moral right and moral responsibility to confront the most fundamental questions about the meaning and value of their own lives and the intrinsic value of life in general, answering to their own consciences and convictions.” *Id.*

Here, failure to recognize a right to aid in dying would directly conflict with this notion of individual dignity. Decisions about how best to deal with suffering and loss of faculties and functions near the end of life are among the most

fundamental questions about the meaning and value of one’s life. Even the State agrees that there is an interest in a “humane death.” Brief of Appellants 2. In those few cases where a patient has no hope for recovery, dying with the aid of a physician may allow for the greatest achievable individual dignity, some control over the time and circumstance of death. Based on the Court’s definition of “individual dignity,” denial of the right to aid in dying amounts to denial of the constitutionally protected right.

When fundamental rights are at issue, as is the case here, the government must justify its infringement on a right by showing that it had a compelling interest and that the legislation or policy in question was narrowly tailored to serve that interest. *Snetsinger v. Mont. Univ. Syst.*, 2004 MT 390, ¶ 17, 325 Mont. 148, ¶ 17, 104 P.3d 445, ¶ 17. As argued above, while certain compelling interests may be implicated, an outright ban on a fundamental and “inviolable” right can never be narrowly tailored to serve those compelling interests.

### **C. The Right to Aid in Dying Is Protected by the Equal Protection Clause**

The Court has held that the Equal Protection Clause contained in article II, § 4, “provides even more individual protection than the Equal Protection Clause in the Fourteenth Amendment of the United States Constitution.” *Snetsinger*, ¶ 15. The Equal Protection Clause is read in light of the Individual Dignity Clause, while the United States Constitution has no such explicit guarantee of individual dignity.

This Court has found that “Equal protection...requires that people have an equal right to form and to follow their own values in profoundly spiritual matters.” *Armstrong*, ¶ 72.

The guarantee of equal protection is violated if state action creates classes of citizens who are similarly situated but are treated disparately, *Snetsinger*, ¶¶ 15–16, particularly as to their dignity or other constitutional rights. The first step, then, in analyzing an equal protection claim, is to identify the classes involved and determine whether they are similarly situated. *Id.*, ¶ 16. Here, there are two favored groups.

First, the RTI creates an exception to the homicide statute, allowing a terminally ill patient whose treatment involves life-sustaining procedures to request physician assistance in, and with the intention of causing, death. Mont. Code Ann. §§ 50-9-205, 50-10-104 (2007) .<sup>3</sup> Other Montanans, whose illnesses are equally severe but do not involve life-sustaining treatment, may not choose the time and circumstances of death. Citizens in both of these classes are terminally ill (and those in the RTI class need not even be competent), are suffering pain or loss of dignity, and desire to exercise some last autonomy. The statutes require that those

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<sup>3</sup> As shown by its title, the “right” enforced in the RTI deals with end-of-life control and decision-making, not just the right of Montanans, terminal or not, to reject bodily intrusions.

who happen to have the “wrong” kind of illness endure suffering that those who have the “right” kind of illness need not.

Second, the State says it has carved out of the homicide statute an exception for that class of patients whose pain is sufficient to entitle them to physician assistance with medication that may “incidentally” or even “foreseeably” result in death. Brief of Appellants 3, 28-30. In fact, Appellants justify this exception by pointing to the same interests in humane death asserted by Appellees. *Id.* Presumably, these patients understand the incidental or foreseeable consequences as part of informed consent, and Appellants all but admit that some such patients desire that result. There is no indication that the physician is disabled from providing such assistance once the patient embraces the consequences. The citizens in each class are identical in that they are terminally ill and desire to end their suffering or indignity, even if doing so requires death. The sole difference has to do with the imputed intent of physicians and whether the patient’s terminal illness imposes sufficient pain, as opposed to other indignities.

“Strict scrutiny applies if a suspect class or fundamental right is affected.” *Snetsinger*, ¶ 17. Here, the fundamental rights of privacy and dignity are affected. The State has the burden of showing that the law or policy in question is narrowly tailored to serve a compelling state interest. *Id.* As argued above, even if compelling interests are implicated, an outright ban is the antithesis of narrow

tailoring. Moreover, the existing exceptions to the homicide law are available without any of the safeguards against abuse that the State catalogs in its brief, and the dual-effect “wink and a nod” exception drives the decision-making under the table where potential abuse is even more difficult to address.

Because the legislative and executive exceptions to the homicide statute treat similarly situated classes differently, and that disparate treatment is not justified through narrowly tailored legislation that serves any compelling interests, the homicide statute results in a violation of equal protection under article II, section 4, of the Montana Constitution.

## **II. IT IS THE CORE ROLE OF THE JUDICIARY TO INTERPRET THE SCOPE OF RIGHTS UNDER THE MONTANA CONSTITUTION**

At issue is whether Montanans have *any* right to aid in dying under the Privacy, Dignity, and Equal Protection Clauses. Determining that is quintessentially a task for the Court. *State v. Guillaume*, 1999 MT 29, ¶ 14, 293 Mont. 224, ¶ 14, 975 P.2d 312, ¶ 14. While both the State and its *amici* Legislators assert that it is inappropriate for the Court to determine this issue, they provide no legal argument. They do not explicitly argue that Plaintiffs lack standing or that the issue before the Court is not justiciable. Instead, the State questions whether “these issues present constitutional questions this Court must resolve” and asserts that judicial resolution would be to “the exclusion of a fully informed democratic debate.” Brief of Appellants 11. The Montana Legislators in support of

Appellants also simply assert that the “decision of whether our citizens have a ‘right to die’ rests with the legislature, and not a court.” Amicus Curiae Brief of Coalition of 28 Bi-Partisan Montana Legislators 4 (“Brief of 28 Legislators”). These assertions are not legal arguments and are contrary to the Court’s established precedent. The Court has not ignored its duty to determine the scope of fundamental rights in similar cases. *See, e.g., Gryczan v. State* (1997), 283 Mont. 433, 942 P.2d 112 (privacy right to same gender consensual sexual conduct), *Armstrong v. State*, 1999 MT 261, 296 Mont. 361, 989 P.2d 364 (privacy right to terminate pre-viability pregnancy).

Moreover, the prohibition against aid in dying has been part of Montana law since 1895, long before the Montana Constitution of 1972. Brief of Appellants 4. The Montana Rights of the Terminally Act was enacted in the 1985. Mont. Code Ann. § § 50-9-101 *et seq.* (2007). And the dual-effect exception is a product of post-Constitution efforts to provide a humane end of life, even where “artificial” death is foreseeable, to at least some competent, terminal Montanans. Consequently, it is appropriate for the Court to review what of the homicide law still intercepts physicians from providing aid in dying to the suffering, terminally ill patients not within the exceptions carved out of the statute to date.

### **III. THE RIGHTS GUARANTEED BY THE MONTANA CONSTITUTION ARE STRENGTHENED, NOT UNDERCUT, BY AFFIRMING A RIGHT TO AID IN DYING**

*Amici* from the Institute for the Study of Disability and Bioethics, et al. (“Institute *Amici*”) express concern that further acknowledgement of a right to aid in dying will somehow undermine citizens’ rights to life and liberty. Brief of Institute *Amici* 4. To the contrary, the Montana Constitution cannot alter whether any citizen has become terminal, and the inalienable right to life appropriately includes a right to aid in dying, as decisions regarding a humane death are made during life and are among the most important questions one will consider. *See, e.g.,* Appellants’ App. 1 at 16-17; Laurence Tribe, *American Constitutional Law* 1337-38 (2d. ed. 1988) (the question of “when and how...there is no question of ‘whether’ — one’s body is to terminate its organic life” is one of “the most profound and intimate” “decisions a person makes about his or her body”). By granting a mentally competent, terminally ill citizen the right to direct the course of medical treatment, up to and including the ability to choose the time and manner of death, that individual’s constitutional rights and final days are enhanced, not eroded.

Although Institute *Amici* do not agree with the choice to request aid in dying, it is no more the State’s role to dictate the answers to personal end-of-life decisions than it is to impose upon citizens how best to exercise other inalienable

rights, such as how to acquire property or seek happiness. Mont. Const. art. II, § 3. The Court has previously rejected such an “innovative attempt” by the State “to define individual values, and to condemn those found to be socially repugnant or politically unpopular.” *Armstrong*, ¶ 38. The matter at hand is no different.

#### **IV. THE MONTANA LEGISLATURE CAN BUILD UPON OTHER STATES’ EXPERIENCE IN SAFEGUARDING THE RIGHT**

While these Montana Legislators believe that it is appropriate and necessary for the Court to recognize a right to aid in dying, they acknowledge that the Legislature will have a role in providing a structure in which that right can be exercised without abuse. “That the government is separated into three distinct powers does not mean that there is or can be no connection or the slightest degree of dependence of one branch upon another.” *Powder River County v. State*, 2002 MT 259, ¶ 113, 312 Mont. 198, ¶ 113, 60 P.3d 357, ¶ 113.

##### **A. Oregon’s Death with Dignity Act and the “Laboratory of the States”**

In 1997, the United States Supreme Court left issues surrounding aid in dying to the “laboratory of the States.” *Washington v. Glucksberg*, 521 U.S. 702, 737 (1997) (O’Connor, J., concurring). While the Court was unwilling to find a right to aid in dying under the Federal Constitution, at least beyond the dual-effect situation, it encouraged states to grapple with the issue.

Later that year, Oregon implemented the Death with Dignity Act (“ODDA”), becoming the first “laboratory” to provide citizens with access to aid in dying while protecting them from abuse.<sup>4</sup> Or. Rev. Stat. §§ 127.800-127.897. More than ten years later, the data from firsthand sources indicates that the Oregon experience has been a success. *See, e.g.*, ODHS, *Death with Dignity Act Ann. Reps.*, available at <http://oregon.gov/DHS/ph/pas/ar-index.shtml> (last visited June 15, 2009); Linda Ganzini, et al., *Experiences of Oregon Nurses and Social Workers with Hospice Patients Who Requested Assistance with Suicide*, 347 *New Eng. J. Med.* 582 (2002); Or. Hospice Ass’n, *Data, Research, and Law*, available at [http://www.oregonhospice.org/data\\_research\\_law.htm](http://www.oregonhospice.org/data_research_law.htm) (last visited June 17, 2009). In 2008, the neighboring citizens of Washington looked at this history and adopted by initiative the similar Washington Death with Dignity Act. Wash. Rev. Code § 70.245 (2008).

The ODDA exactly regulates exercise of the right, ensuring that patients are beyond the point of curative treatment (two physicians must confirm a terminal disease that will produce death within six months); informed of options (including

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<sup>4</sup> The DWDA first passed in 1994 through a citizens’ initiative, but was enjoined. The Ninth Circuit lifted the injunction in October 1997; voters re-approved the initiative in November 1997; and the DWDA then became effective. ODHS, *Death with Dignity Act history*, available at [www.oregon.gov/DHS/ph/pas/docs/History.pdf](http://www.oregon.gov/DHS/ph/pas/docs/History.pdf) (last visited June 11, 2009).

hospice care and pain relief); and thoughtful in their decision-making (the patient must make two requests, and be referred to counseling if either physician believes that a psychiatric or psychological disorder or depression could impair judgment). Or. Rev. Stat. §§ 127.805, 127.815, 127.840, 127.825. Such comprehensive protections do not exist in Montana under the RTI or the dual-effect exception.

*Amici* from the “International Task Force on Euthanasia & Assisted Suicide” (“Task Force *Amici*”) allege that such safeguards “give the illusion of protection.” Brief of Task Force *Amici* 11. However, logic and a decade of data from Oregon confirm that the protection is real.

Task Force *Amici* claim that “Oregon’s ‘laboratory’ results are inconclusive” and “based on self-reports by the same doctors who are carrying out” aid in dying. *Id.* 4, 6. The State, however, expresses complete confidence in the very same physicians in the RTI and dual-effect situations. *See, e.g.*, Brief of Appellants 2-3. Given patient privacy and ethical rules governing the doctor-patient relationship, self-reported information typically is the basis for medical studies. *See* Mont. Code Ann. § 50-16-525 (2007); HIPPA, 42 USC § 201 *et seq.*; AMA Code of Medical Ethics, Opinion 5.05, available at <http://www.ama-assn.org/ama/pub/physician-resources/medical-ethics/code-medical-ethics.shtml> (last visited June 16, 2009). To question the integrity of these reports is to question the integrity of medical reports in any context. Additionally, Task Force *Amici*

overlook independent studies of hospice care nurses, social workers, and chaplains who have worked closely with these patients. *See* Ganzini, *supra*, at 19; Bryant Carlson, et al., *Oregon Hospice Chaplains' Experiences with Patients Requested Physician-Assisted Suicide*, 8 J. Palliat. Med. 1160 (2005); Or. Hospice Ass'n, *supra*, at 19; *see also* Ann Jackson, *The Inevitable — Death: Oregon's End-of-Life Choices* 45 Willamette L. Rev. 137 (2008).

The data do not corroborate fears that aid in dying leads to abuse. Rather, patients who have chosen aid in dying have been white, well-educated, insured, enrolled in hospice care, and not disproportionately poor. *See, e.g.*, ODHS, *Summary of Eleventh Ann. Rep. on Oregon's Death with Dignity Act* (March 2009), available at <http://oregon.gov/DHS/ph/pas/docs/year11.pdf> (last visited June 16, 2009). Nor has aid in dying had a negative effect on hospice care and pain management. End-of-life care in Oregon is among the best in the nation. *See* The Nat'l Program Office for Cmty-State P'ships to Improve End-of-Life Care, *Using Qualitative Data to Shape Policy Change*, in *State Initiatives in End-of-Life Care, Focus: Oregon*, June 1998, at 3; Last Acts, *Means to a Better End: A Report on Dying in America Today* (2002) (ranking Oregon second in the nation on end-of-life care); Matthew Herper & Aude Lagorce, *Best Places to Die*, *Forbes.com*, Apr. 20, 2004, <http://www.forbes.com/2004/08/11/b2dieland.html> (ranking Oregon second).

Despite the availability of aid in dying, its usage remains rare. The number of deaths under the ODDA has increased slightly over the course of ten years, but still comprises far less than 1% of all deaths in the state of Oregon. ODHS, *supra*. Many patients who receive prescriptions under the ODDA choose not to use them. *Id.* This fact suggests that the right to aid in dying is important because it provides comfort and autonomy to suffering terminally ill patients, even if some ultimately choose not to exercise the option.

**B. The Legislature Can Craft Safeguards for the Right to Aid in Dying**

Appellants provide a litany of concerns regarding the implementation of a right to aid in dying. Brief of Appellants 31–34. Yet, they offer no reason to believe that legislators are incapable of adequately regulating these concerns once the Court establishes the constitutional framework. Montana legislators opposed to the right to aid in dying assert that the state’s “interests cannot be mitigated.” Brief of 28 Legislators 15. But they cannot explain this, and experience proves otherwise. If the Court affirms the fundamental right to aid in dying, and if safeguards against abuse are needed, the Legislature is wholly capable of studying and improving upon the experience gained in Oregon to create a regulatory scheme that will properly address valid critiques, comport with the constitutional protections of this state, and protect Montanan citizens from potential abuses.

Fears of abuse that can be addressed through thoughtful lawmaking cannot justify sitting idle while terminally ill Montanans endure their final days in suffering.

### **CONCLUSION**

The Montana Legislators in Support of Privacy and Dignity respectfully ask the Court to recognize a fundamental right to aid in dying under the privacy, dignity, and equal protection guarantees of the Montana Constitution.

Respectfully submitted this 22nd day of June, 2009.

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**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing *Brief Amicus Curiae of Montana Legislators in Support of Privacy and Dignity* was mailed, postage fully prepaid thereon at Missoula, Montana, on the 22nd day of June, 2009, to:

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## **CERTIFICATE OF COMPLIANCE**

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this Brief Amicus Curiae is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double-spaced except for footnotes and quoted and indented material; and the word count calculated by Microsoft Word for Windows is not more than 5,000 words, excluding caption, table of contents, table of authorities, certificate of service, and certificate of compliance.

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