

IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 09-0051

ROBERT BAXTER, STEPHEN SPECKART, M.D.,
C. PAUL LOEHNEN, M.D., LAR AUTIO, M.D.,
GEORGE RISI, JR., M.D., and COMPASSION & CHOICES,

Plaintiffs/Appellees

v.

STATE OF MONTANA AND STEVE BULLOCK,

Defendants/Appellants.

BRIEF OF APPELLEES

ON APPEAL FROM THE FIRST JUDICIAL DISTRICT COURT
LEWIS AND CLARK COUNTY, CAUSE NO. ADV-2007-787

Honorable Dorothy McCarter, Presiding

APPEARANCES

Mark S. Connell
Connell Law Firm
P.O. Box 9108
Missoula, MT 59807-9108
msc.clf@bigsky.net

Kathryn L. Tucker
Compassion & Choices
PMB 415
6312 SW Capitol Hwy.
Portland, OR 97239
ktucker@compassionandchoices.org

Counsel for Plaintiffs/Appellees

Steve Bullock, Attorney General
Anthony Johnstone, Solicitor
Jennifer Anders, Assistant Attorney
General
P.O. Box 201401
Helena, MT 59620-1404
sbullock@mt.gov
ajohnston@mt.gov

Counsel for Defendants/Appellants

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STATEMENT OF THE ISSUES

1. Whether Montanans' right to aid in dying is protected under the Montana Constitution's guarantees of privacy, dignity and/or equal protection.
2. Whether a Montana physician who provides aid in dying can be prosecuted under Montana's homicide law.
3. Whether plaintiffs are entitled to attorneys' fees.

STATEMENT OF THE CASE AND FACTS

Plaintiffs filed this case as a declaratory judgment action, asking the court to rule that aid in dying may not be prosecuted as a violation of the homicide statutes in Montana, as to do so would deny them rights guaranteed by the Montana Constitution. In addition or alternatively, they requested a ruling that, in recognition of those rights, it is the public policy of the State to allow a physician to provide aid in dying to qualified patients. (Confirmation of this public policy would provide a consent defense to doctors prosecuted for aid in dying. MCA § 45-2-211(2)(d) (2007).) Plaintiffs also sought an injunction prohibiting prosecutions of doctors under such circumstances. Compl. 8.

The State maintains that a physician who provides aid in dying for his patient violates Montana's homicide laws, is subject to prosecution, and is not protected by the Montana Constitution. Answer ¶¶ 25, 26, 27; Affirmative Defense No. 3; Def. Trial Court Reply Br. 7, 14 *et seq.*

In light of the State's position, physicians such as Drs. Speckart, Loehnen, Autio and Risi have been left with three options: deny their patients' requests for aid in dying to avoid exposing themselves to the risk of prosecution, thereby bowing to the deterrent effect of the homicide statutes; grant their patients' requests, risking prosecution and severe potential consequences; or bring this action to court. All four physician plaintiffs have

received requests for aid in dying but have been deterred from providing it by the threat of criminal prosecution. Speckart Aff. 4-6; Loehnen Aff. 4; Autio Aff. 3; Risi Aff. 5-7. If that threat is removed, they will be free, as their professional judgment dictates, to provide aid in dying to mentally competent, terminally ill patients who request it, so that those patients can then decide for themselves whether to take medications to bring about a peaceful death. A ruling on these issues, therefore, will establish the rights of both patients and doctors in Montana.

Plaintiffs have challenged the homicide statutes only to the extent they apply to deter doctors from providing aid in dying. The challenge is to the statutes as they are applied to physicians under these limited circumstances, and *not* as applied to anyone else or to any other activities. Compl. 2, 8. If Plaintiffs prevail, the statutes will continue to apply to other conduct.¹

The parties filed competing motions for summary judgment. The district court granted summary judgment for plaintiffs, holding that terminally ill Montanans have the right to aid in dying under the fundamental state constitutional rights of privacy and dignity. The State's motion for stay was denied, and the lower court awarded plaintiffs attorney fees and expenses of litigation as prevailing parties. The State appealed.

¹ The State's citation to the *Bischoff* case, State Brief ("St. Br.") 4, 21, is perplexing, as that case appears to represent an appropriate application of the homicide laws as viewed by both sets of parties. In *Bischoff*, a physician personally injected lethal drugs into a noncommunicative, mentally incompetent patient with a chronic, but not terminal, condition (Alzheimer's) to cause death. The right to choose aid in dying applies only to mentally competent, terminally ill patients who request medication that they can self-administer to bring about a peaceful death. Recognizing the rights claimed herein would not have shielded Dr. Bischoff from prosecution under the homicide laws.

STANDARD OF REVIEW

The district court's order granting summary judgment is reviewed de novo, using the same standards that were applied by the lower court under Mont. R. Civ. P. ("Rule") 56. Where, as here, there were cross motions for summary judgment, the Court reviews the district court's decision to determine whether its conclusions were correct. *Bud-Kal v. City of Kalispell*, 2009 MT 93, ¶ 15, 350 Mont. 25, 204 P.3d 738, ¶ 15.

If the homicide statutes, as applied here, impinge upon a fundamental right explicitly or implicitly secured by the Montana Constitution, they are presumptively unconstitutional. *Wicklund v. State*, 1998 Mont. Dist. LEXIS 227, at *3 (Mont. Dist. Ct. Feb 13, 1998); *City of Mobile v. Bolden*, 446 U.S. 55, 76 (1980).

A grant or denial of a request for attorney fees is a discretionary ruling that is reviewed for abuse of discretion. *Trus. of Ind. Univ. v. Buxbaum*, 2003 MT 97, ¶ 15, 315 Mont. 210, 69 P.3d 663.

ARGUMENT

"Over himself, over his own body and mind, the individual is sovereign."
—John Stuart Mill

Aid in dying, as used throughout this case, refers to the right of a mentally competent, terminally ill Montanan to obtain a prescription for medication from a doctor, which the individual may elect to take to bring about a peaceful death in the face of suffering the patient finds unbearable. Compl. 1-2.¹ The decision about how to cross the threshold to death when delivered there

¹ See Am. Med. Women's Ass'n, Position Statement on Aid in Dying (2007), available at www.amwa-doc.org (when a physician provides, but does not administer, medications or equipment, or informs the patient of the most efficacious use of already available means, for the sole purpose of assisting the patient to hasten his/her death) . The State and its amici refer to the practice as "assisted suicide," a term which has, over time, been rejected by courts as well

by terminal illness is a profoundly personal one. Some will choose to cling to life even in the face of unremitting agony. Others will seek a measure of control over the time and manner of death, and the amount of suffering to be endured during their final days, by obtaining medication they can take to hasten death if suffering becomes intolerable.

If the Montana Constitution's guarantees of privacy and dignity protect any decision, surely they protect this one. To hold otherwise would represent a significant retreat by this Court from its distinguished tradition of zealously protecting a core sphere of personal autonomy and dignity.

Patients will inevitably confront the question of whether to choose aid in dying in different ways. This is as it should be. Because individual lives, deaths and consciences are at stake, each individual bears the consequences of his/her decision. The question before this Court is whether individuals who want aid in dying will be allowed to choose it, or whether the government will be permitted to make the choice for them and flatly ban the option.

The only possible justifications for the State to criminalize aid in dying are to vindicate a specific moral view and to protect patients from their own actions. Imposing the moral judgment of the majority upon a minority is prohibited by the Montana Constitution. *Gryczan v. State* (1997), 283 Mont. 433, 454-55, 942 P.2d 112, 125. As far as protecting citizens from their own decisions is concerned, where they and only they will be affected, Justice Brandeis's classic warning still resonates: "Experience should teach us to be most on our guard to protect liberty when the government's purposes are beneficent." *Olmstead v. United States*, 277 U.S. 438, 479 (1928) (Brandeis, J., dissenting) (overruled in part by *Katz v. United States*, 389 U.S. 347 (1967)),

as professional associations of medical, mental health, and health policy experts, as inaccurate and emotionally charged.

quoted in *Cruzan v. Director, Mo. Dep't of Health*, 497 U.S. 261, 330 (1990) (Brennan, J., dissenting).²

"The [1972] Montana Constitution is to be given a broad and liberal interpretation." *Bryan v. Yellowstone County Elem. Sch. Dist. No. 2*, 2002 MT 264, ¶ 23, 312 Mont. 257, 60 P.3d 381, ¶ 23. It protects the decision-making power of its citizens in the most intimate and fundamental areas of their lives, particularly where the overlapping rights of privacy, individual dignity, equal protection, and due process are concerned.³ Former Chief Justice Turnage foresaw the relevance of these constitutional guarantees to the instant issue, stating:

The majority opinion cites with approval the District Court's statement that "a person's decision as to sexual matters is probably one of the most private areas of a person's life." This statement is correct. However, there is something in the lives of people equally private and more important—the right to life or death.

Gryczan, 283 Mont. at 458, 942 P.2d at 127 (Turnage, C.J., concurring and dissenting).

This is undeniably true. Deciding how much suffering to endure in the final ravages of terminal illness is without doubt among the most private, personal, and important decisions of a lifetime. The right to choose aid in dying warrants constitutional protection and should not be usurped by the State.

THE PROPER ROLES OF THE COURT AND LEGISLATURE

The State complains that plaintiffs have brought these issues to this Court "[r]ather than engaging the people of Montana with their arguments," St. Br. 11-12, and asserts that the debate properly belongs in the legislature

² See Brief Amicus Curiae Women's Rights Groups ("Br. Women's Rights") 10.

³ See Brief Amicus Curiae of Legal Scholars ("Br. Legal Scholars").

rather than the courthouse. *Id.* at 37. The duty to interpret the constitution and determine the existence and breadth of constitutional rights, however, lies exclusively with the judiciary. *In re Lacy* (1989), 239 Mont. 321, 325-26, 780 P.2d 186, 189. "[I]t remains the obligation of the courts—and of this Court in particular—to scrupulously support, protect and defend those rights and liberties guaranteed to all persons under our Constitution." *Gryczan*, 283 Mont., at 454-55, 942 P.2d at 125; *Armstrong v. State*, 1999 MT 261, ¶ 38, 296 Mont. 361, 989 P.2d 364 (right to privacy is as broad as the State's attempts to "dictate in matters of conscience, to define individual values, and to condemn those found to be socially repugnant or politically unpopular"). *See also* Br. Legal Scholars 6-7; Brief Amicus Curiae Montana Legislators in Support of Privacy and Dignity ("Br. Mont. Legis.") 13-14.

It is axiomatic that the Montana Constitution is the supreme law of the State and governs, limits, and restricts the acts of the legislative and executive branches. "The state constitution is the mandate of a sovereign people to its servants and representatives. No one of them has a right to ignore or disregard its mandates, and the legislature, the executive officers, and the judiciary cannot lawfully act beyond its limitations." *Columbia Falls Elem. Sch. Dist. No. 6 v. State*, 2005 MT 69, ¶ 52, 326 Mont. 304, 109 P.3d 257, ¶ 52 (Nelson, J., concurring) (quoting *Gen. Agric. Corp. v. Moore* (1975), 166 Mont. 510, 516, 534 P.2d 859, 862-63). This Court has "the final obligation to guard, enforce, and protect every right granted or secured by the Constitution." *Id.* ¶ 18 (internal quotation marks and citation omitted). The State fails to appreciate that constitutional issues are *supposed* to be raised and decided in this forum.

None of this suggests that the legislature is without a role to play in regulating the right plaintiffs seek to vindicate. Once the court identifies and

defines a constitutional right, the legislature may regulate the right in order to advance compelling state interests, as long as this is accomplished with narrowly tailored regulation. *Gryczan*, 283 Mont. 433, 942 P.2d 112; *Armstrong*, 1999 MT 261. *See also* Br. Mont. Legis.

Examples of the court recognizing a constitutional right and the legislature then acting to regulate it abound. Rights of access to contraception, abortion, equal educational opportunity, freedom of religious practice, possession of firearms, and a wide variety of search and seizure issues are all areas where federal and state courts have defined constitutional rights, and the legislature subsequently enacted regulations to promote public welfare, order, and safety, subject to constitutional limits. In Montana, equal educational opportunity and school funding, the right to a clean and healthful environment, and the public's right to access navigable streams all involved constitutional pronouncements followed by legislative and/or administrative action to regulate the rights created.

The State complains that the lower court decision recognizes a right to aid in dying but that there are no requirements for "written report[s]," "reporting requirements," "procedures for requesting" the medication, or "second opinion[s]." St. Br. 5-7. The State might be able to articulate compelling interests in requiring such, and if it can accomplish this with narrowly tailored measures it may do so. More than one-fifth of Montana state legislators have joined an amicus brief in support of plaintiffs, attesting to their ability to enact constitutionally permissible measures. *See* Br. Mont. Legis.

**THE HOMICIDE STATUTES ARE PRESUMED
UNCONSTITUTIONAL AS APPLIED TO PLAINTIFFS**

The homicide statutes as they relate to aid in dying are not entitled to a presumption of validity. The State's assertion that these statutes should be

accorded a presumption of constitutionality, St. Br. 11, conflicts with its own recognition that no such presumption applies where a fundamental right is infringed. *Id.* "It is well settled that . . . if a law impinges upon a fundamental right explicitly or implicitly secured by the Constitution [it] is presumptively unconstitutional." *Harris v. McRae*, 448 U.S. 297, 312 (1980) (internal quotation marks and citation omitted); *Wicklund v. State*, 1998 Mont. Dist. LEXIS 227, at *10.

All of the rights invoked by plaintiffs, the rights of privacy, individual dignity and equal protection, are enumerated rights included in article II of the Montana Constitution and are considered fundamental. *Dorwart v. Caraway*, 2002 MT 240, ¶ 96, 312 Mont. 1, 58 P.3d 128, ¶ 96 (Nelson, J., concurring); *Mont. Envtl. Info. Ctr. v. Dep't of Envtl. Quality*, 1999 MT 248, ¶ 56, 296 Mont. 207, 988 P.2d 1236; *Gryczan*, 283 Mont. at 449, 942 P.2d at 122. The lower court properly found that the choice of aid in dying "certainly is one of personal autonomy and privacy," Op. 16, and concluded, "[t]his right is fundamental." Op. 19. The homicide statutes impinge upon the exercise of this right by terminally ill patients and their doctors, and therefore are presumed unconstitutional.

THE STATE MISCHARACTERIZES THE NATURE AND RELATIONSHIP BETWEEN AID IN DYING AND PALLIATIVE CARE

The State argues that because palliative care is available to terminally ill patients in Montana, there is no need for the relief sought. *See, e.g.*, St. Br. 12, 14-15, 29. This is a non sequitur. It is akin to suggesting that because a woman facing unwanted pregnancy has the option of placing a baby for adoption, there is no need to protect her right to abortion; that because gay people can opt for heterosexual relationships, there is no need to respect their choice for a same-sex partner; or that because a woman can obtain an abortion from a physician,

there is no need to respect her choice of a physician's assistant as her provider. The fact that alternatives exist does not obviate the need to recognize that the choice sought is deserving of constitutional protection and is reserved to the individual.

It is true that some terminally ill patients will obtain sufficient relief with palliative care and will not seek aid in dying to avoid prolonged suffering. Other patients, however, will not find adequate relief despite excellent palliative care, and fervently want and need the option of aid in dying. *See* Speckart Aff. 3-6; King Aff. 2-3. The experience in Oregon, where aid in dying has been available since 1998, bears this out. Almost all of the patients there who choose aid in dying are enrolled in hospice and receiving comprehensive palliative care.⁴ Eighmey Aff. 5-6 & Ex. A.

The fact that some patients want aid in dying, even when receiving excellent palliative care, has been recognized widely in the medical profession and has led many national medical groups to adopt policies in support of patients having the option of aid in dying, including the American Public Health Association.⁵ *See also* Brief Amicus Curiae of American Medical Women's Association et al. ("Br. AMWA"). These policies refute the contention of the State (and its amici) that aid in dying is "contrary to the positions of mainstream health care professional associations." St. Br. 8; *see also* Brief Amicus Curiae of Montana Bioethicists ("Br. Bioeth.").

⁴ In 2008, 98% of the patients who used the DWDA were receiving hospice care. *See* <http://oregon.gov/DHS/ph/pas/index.shtml>.

⁵ <http://www.apha.org/advocacy/policy/policysearch/default.htm?id=1372>; Plaintiff's Combined Br. 28; Speckart Supp. Aff. 2. *See also* Kathryn L. Tucker, At the Very End of Life: The Emergence of Policy Supporting Aid in Dying Among Mainstream Medical and Health Policy Associations, *Harv. Health Pol'y Rev.*, Spring 2009, at 45-47.

Palliative care is intended to relieve pain and other forms of suffering for a dying patient when medicine offers no further hope for a cure. *See* Br. AMWA. In order to deal with the pain and symptoms experienced by some terminally ill patients, it may be necessary to medicate them to the point of causing death, typically by depressing respiration. This occurs frequently in hospital environments and is accepted as a necessary byproduct of treating suffering. Speckart Aff. 4; Coughlan Aff. 4-5; Plaintiffs' Resp. to Req. for Admis. Nos. 2-4. *See* Br. AMWA. It is sometimes the case, however, that drugs and other forms of palliative care are not able to alleviate suffering, or can do so only with unacceptable side effects, and that patients in this situation die "tortured deaths." Speckart Aff. 3-6; Speckart Supp. Aff. 2.⁶ *See also* Br. AMWA. Medical authorities estimate, for example, that even with excellent pain and symptom management, up to 10 percent of dying cancer patients experience inadequate pain relief.⁷

The options available for these patients are (1) continued, unrelenting suffering; (2) palliative or terminal sedation; or (3) aid in dying. Palliative or terminal sedation, a type of palliative care, involves the intravenous administration of medication to render a patient unconscious. The benefit is that he or she presumably cannot feel pain while unconscious. The cost of that relief, however, is surrender of all awareness, ability to interact, and dignity. Artificial nutrition and hydration are withheld from the unconscious patient until he or she dies, a process that can take weeks. Baxter Supp. Aff. 2-3; Speckart Supp. Aff. 2; Eighmey Aff. 6. *See also* Br. AMWA.

⁶ The State acknowledges as much. Coughlan Aff. 3: "The symptoms and suffering of the patients can be extraordinary."

⁷ Speckart Suppl. Aff. 2.

Plaintiff Robert Baxter objected strenuously to the notion, promoted by the State below, that he be relegated to the option of terminal sedation. His views, representative of the feelings of many others, are set forth in his supplemental affidavit:

I am appalled by this suggestion [that there is no need for the Court to determine the constitutionality of aid in dying, given the availability of terminal sedation] and the loss of personal autonomy it involves. I understand that terminal or palliative sedation would involve administering intravenous medication to me for the purpose of rendering me unconscious, and then withholding fluids and nutrition until I died, a process that may take weeks. During this final period of my life I would remain unconscious, unaware of my situation or surroundings, unresponsive from a cognitive or volitional standpoint, and uninvolved in my own death. My ability to maintain personal hygiene would be lost and I would be dependent on others to clean my body. My family would be forced to stand a horrible vigil while my unconscious body was maintained in this condition, wasting away from starvation and dehydration, while they waited for me to die. I would want to do whatever I could to avoid subjecting my family to such a painful and pointless ordeal. I feel strongly that my privacy, dignity and sense of self-autonomy will be forfeit if my life has to end in a state of terminal sedation.

Baxter Supp. Aff. 2-3.

The State's assertions that plaintiffs seek a right for physicians to "kill" and/or "commit homicide," St. Br. 8, 9, 15, are shrill mischaracterizations. A doctor who provides aid in dying is not seeking to "kill" the patient. Instead, acting with the same intent to relieve suffering that underlies all forms of palliative care, the doctor provides the patient with an option that can be exercised if the patient so chooses. It is the patient's life, suffering, and death that are involved; aid in dying gives the patient a choice that under the Montana Constitution should be the patient's to make.

One of the important benefits of access to aid in dying is the sense of dignity, control, and autonomy it provides.⁸ Armed with the knowledge that this is an option if suffering becomes unbearable, many terminally ill Oregonians, for example, never ingest the medications they have obtained. Eighmey Aff. 7; Coughlan Aff. 8. However, they, like Robert Baxter here, do not wish to be limited to the choice of unrelenting suffering on the one hand, or prolonged unconscious wasting away on the other. Baxter Supp. Aff. 2-3.

PRIVACY

The State raises four arguments in response to plaintiffs' privacy claims. The first is based on *Gryczan* and considers whether, under either the *Katz* or the *Palko* tests, society recognizes a privacy interest in the conduct at issue. St. Br. 16-17. The State's contention relating to *Katz* is that any expectation the plaintiffs have that their dealings with their doctors or patients should remain private and free from governmental control is objectively unreasonable. Under *Palko*, the State argues that the criminalization of aid in dying does not violate fundamental principles of liberty and justice that lie at the base of our civil and political institutions. It notes in support of both points that the Montana Rights of the Terminally Ill Act, MCA § 50-9-101 *et seq.* (2007) ("MRTIA") expressly states that it does not condone, authorize, or approve mercy killing or euthanasia. *Id.*

The reference to MRTIA can be disposed of quickly. Aid in dying is neither mercy killing nor euthanasia, both of which involve one person ending

⁸ See, e.g., Speckart Aff. 5: "Often patients simply want to know that they have a choice so that they can decide to end their suffering if they reach a point where it becomes unbearable. The comfort this brings to their last days can be an enormous contribution to easing their extreme fears." See also Stoelb Aff. 4; Eighmey Aff. 7. See 2008 Summary of DWDA, available at www.Oregon.gov/DHS/ph/pas/docs/year11.pdf.

the life of another. Aid in dying, in contrast, involves a dying patient ingesting medication *himself* to gain control over the time and manner of death. The moral and legal differences between the two are evident.

More fundamentally, however, plaintiffs assert that the language used by this Court in *Gryczan*, which establishes a constitutional right to privacy covering private, same-gender sexual conduct, is broad enough to encompass aid in dying as well. The *Gryczan* court concluded:

It cannot seriously be argued that [Appellees] do not have a subjective or actual expectation of privacy in their sexual activities. With few exceptions not at issue here, all adults regardless of gender, fully and properly expect that their consensual sexual activities will not be subject to the prying eyes of others or to governmental snooping or regulation. Quite simply, consenting adults expect that neither the state nor their neighbors will be co-habitants of their bedrooms.

283 Mont. at 450, 942 P.2d at 122.

The same is true with respect to the sanctity of what goes on between physician and patient, whether in the doctor's office, hospital, or patient's home. There are few things Montanans consider more private and deserving of confidentiality than a person's health and medical status, the interactions between doctor and patient, and the records associated with both. A host of state statutes reflect this, including MCA § 26-1-805, which codifies the doctor-patient privilege; § 50-16-525, which prohibits a health care provider from disclosing medical information without a patient's written authorization; and § 50-16-502, which represents a legislative finding that "health care information is personal and sensitive information that if improperly used or released may do significant harm to a patient's interests in privacy and health care or other interests." With certain narrowly drawn exceptions, these statutes lay out the reasonable expectation of Montanans that their interactions with doctors are private and will remain confidential.

Two cases confirm the constitutional support for this understanding, as it relates to the contents of medical providers' records. In *State v. Nelson* (1997), 283 Mont. 231, 941 P.2d 441, the court cited with approval a California decision holding that the state constitutional right of privacy extended to a patient's medical history and records. Noting that "[m]edical records are quintessentially 'private' and deserve the utmost constitutional protection," the court held that "Article II, Section 10's guarantee of privacy encompasses not only 'autonomy privacy' but confidential 'informational privacy' as well." *Id.* at 242, 941 P.2d at 448. And further, "[i]f the right of informational privacy is to have any meaning it must, at a minimum, encompass the sanctity of one's medical records." *Id.*, 941 P.2d at 448. *See also State v. Bilant*, 2001 MT 249, ¶ 17, 307 Mont. 113, 36 P.3d 883. If the information contained in medical records is protected by the constitutional right of privacy, it is clear that the circumstances and events themselves that are described in the records, and the patient-physician interactions associated with them, enjoy at least equally protected status.

Gryczan also applied the *Palko* test as another means of determining whether the conduct the government sought to prohibit invoked the right of privacy. That test required assessing whether the government's acts violate those fundamental principles of liberty and justice that lie at the base of all our civil and political institutions. 283 Mont. at 449-50, 942 P.2d at 122. The court found that they did: "It is hard to imagine any activity that adults would consider more fundamental, more private and, thus, more deserving of protection from governmental interference than non-commercial, consensual adult sexual activity." *Id.* at 451, 942 P.2d at 123.

As Chief Justice Turnage noted in *Gryczan*, however, "there is something in the lives of people equally private and more important [than sexual matters]—the right to life or death." *Id.* at 458, 942 P.2d at 127. The right to make intensely personal and private decisions involving those issues at the end of life is at least as fundamental, private, and deserving of protection as the sexual conduct at issue in *Gryczan*. As such, aid in dying readily satisfies both the *Katz* and the *Palko* tests and must be protected from governmental usurpation by the right to privacy.

Armstrong involved the same kind of privacy issue implicated in this case, one in which the legislature had criminalized an aspect of medical care and interfered with patient decision-making. In finding for the plaintiff, the court spoke resoundingly in terms that apply equally to the question of whether aid in dying qualifies for privacy protection. *Armstrong* holds that article II, section 10 guarantees to each individual "the right to make medical judgments affecting her or his bodily integrity and health in partnership with a chosen health care provider free from the interference of the government." *Armstrong*, ¶ 75. The controlling factor in all these most personal and private matters, the court recognized, was the individual patient's "moral right and moral responsibility to decide [medical issues] in the context of her individual values, her beliefs as to the sanctity of life, and her personal situation." *Armstrong*, ¶¶ 49, 72. If the right to privacy extends to a woman's choice of an abortion provider under these standards, as it did in *Armstrong*, it clearly applies to a terminally ill patient's right to choose aid in dying when the patient finds the process of dying unbearable. Whether to endure further suffering or, instead, to cut it short is an intensely personal, private decision that an individual makes based upon his or her most deeply held values and beliefs. If Montanans' right

of privacy protects anything, surely it protects this decision. *See* Br. Women's Rights; Br. Legal Scholars; Brief Amicus Curiae ACLU of Montana ("Br. ACLU").

At least one member of the *Armstrong* court foresaw that its reasoning would reach the issue presented in this case. In a concurring opinion that agreed with the holding but objected to the scope of the court's language, Chief Justice Gray stated: "In concluding that Article II, Section 10 broadly 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, the Court's opinion sweeps so broadly as to encompass and decide such issues as the right to physician-assisted suicide." *Armstrong*, ¶ 77 (Gray, J., concurring). The parallels to then-Chief Justice Turnage's concurring opinion in *Gryczan*, in which he came to the same conclusion based on the majority's language in that case, are remarkable.

The State's efforts to distinguish *Armstrong* are unavailing. First, it quotes from a section of the opinion describing why medical decisions in particular fall within the realm of autonomy-based privacy: "It is the individual making the decision, and no one else, who, if he or she survives, *must live with the results of that decision.*" St. Br. 18 (emphasis added) (internal quotation marks and citation omitted). The State argues that the court's reasoning cannot apply to aid in dying, since a patient who has availed himself of that right will not be alive to live with the result. The State misunderstands the essence of aid in dying. A doctor who provides aid in dying gives the patient a *choice*, as well as a means of carrying out the decision depending on how the patient chooses. As indicated previously, in many cases the patient will benefit from the comfort of knowing the decision is in his or her hands and never fill the prescription or

take the medication. Such a patient *will* in fact "live with the results of [her] decision," to use *Armstrong's* language. *Armstrong*, ¶ 54. In any case, however, the phrase quoted by the State includes the additional clause "if he or she survives," which contemplates the possibility that the patient may end up dying as a result of the choice made. This result, too, was expressly contemplated by *Armstrong*, and the court's rationale applies in both cases. The essential point here is that it is the *patient's* right to choose which course to take, and the *patient's* right to make critical medical judgments, free from the interference of the government.

The State mistakenly contends that *Armstrong* applies only to procreative autonomy. St. Br. 19. Yet nothing in *Armstrong* suggests that the holding or reasoning is limited to situations involving reproductive health services. The court's reasoning and holding plainly are broad enough to encompass other situations, as the following passage makes clear:

We hold that the personal autonomy component of [the right of individual privacy] broadly guarantees each individual the right to make medical judgments affecting her or his bodily integrity and health in partnership with a chosen health care provider free from the interference of the government, except in very limited circumstances not at issue here. More narrowly, we hold that Article II, Section 10, protects a woman's right of procreative autonomy.

Armstrong, ¶ 75. The "broad guarantee" applies to all medical issues and circumstances that might be covered by its terms in the future. The narrow ruling applied that rule to the particular facts presented in *Armstrong*. If, as the State would have it, the decision were intended to apply only to women seeking an abortion, there would be no need for the court to even articulate the broader rule. Moreover, the court explicitly refers to the constitutional guarantee it had defined as protecting an individual's right to make medical decisions affecting "her *or his*" bodily integrity and health; men, of course, do not confront the

possibility of needing an abortion. Plainly *Armstrong* cannot be confined only to reproductive autonomy.

In another attempt to avoid the application of *Armstrong*, the State asserts that it cannot apply to aid in dying because *Armstrong* must be read as guaranteeing access to legal medical procedures only, whereas aid in dying is illegal. St. Br. 19. This begs the question. *Gryczan* and *Armstrong* make clear that the State cannot outlaw conduct that is protected by a constitutional right to privacy. If, as the State urges, the right to privacy only protects "*legal*" acts and choices, then the *Gryczan* and *Armstrong* decisions are superfluous because they can never apply. Each of the cases invalidated a statute and made something legal that had previously been prohibited.

The State erroneously claims: "This Court's privacy jurisprudence rules . . . out" the right to aid in dying (citing *Wiser v. State*). St. Br. 12. *Wiser* is inapposite. That case involved a challenge to the constitutionality of the Partial Denture Rule, which required patients to obtain a referral from a dentist prior to seeking partial denture treatment by a denturist. The district court rejected the claim, and an appeal was brought. *Wiser v. State, Dep't of Commerce*, 2006 MT 20, 331 Mont. 28, 129 P.3d 133. The relevant issue on appeal was whether the Partial Denture Rule impermissibly infringed on the right of denture patients to be treated by the provider of their choice. The court held that under *Armstrong*, privacy is a fundamental right under the Montana Constitution but not every restriction on medical care impermissibly infringes upon that right. *Id.* ¶ 15. *Armstrong's* right to privacy in health care choices, it stated, protects the right to see a health care provider determined to be "'competent' by the medical community and 'licensed' to perform the procedure desired." *Id.* ¶ 16. Individuals have the right to obtain and reject medical treatment, the court held,

but they do not have the right to be treated by an unlicensed professional. *Id.* ¶ 17.

The Court's finding in *Wiser* that there is no fundamental right to seek medical care from unlicensed professionals has no bearing on this case. Mr. Baxter sought to receive aid in dying from a licensed physician, and the physician plaintiffs themselves are all properly trained, competent and licensed. The decision below does not permit unlicensed or incompetent physicians to provide aid in dying, and plaintiffs do not seek such a right.

THE DECISIONS OF OTHER STATE COURTS ARE INAPPOSITE

The State cites two cases in which the high courts of other states have declined to find a state constitutional right to aid in dying. These cases are distinguishable for a number of reasons. First, each state's constitution is unique; their approaches and commitment to the expansion of state constitutional rights vary. Montana considers its right of privacy as among the most protective in the nation, *State v. Burns* (1992), 253 Mont. 37, 40, 830 P.2d 1318, 1320, and one of the single most important rights guaranteed to the citizens of this state. *Gryczan*, 283 Mont. at 455, 942 P.2d at 125. It is, as Legal Scholar Amicus points out, self-executing, whereas in contrast the Alaska Constitution is not. *See Br. Legal Scholars* 18.

Second, the Montana Supreme Court has a remarkable and unique record in developing state constitutional law, especially where the rights of privacy and individual dignity are concerned. *See State v. Goetz*, 2008 MT 296, ¶ 23, 345 Mont. 421, 191 P.3d 489 (noting consistent trend protecting privacy interests); *Brady v. PPL Mont., LLC*, 2008 MT 177, ¶ 16, 343 Mont. 405, 185 P.3d 330. This is at least partly based on the court's perception of Montanans' "historical abhorrence and distrust of excessive governmental interference in

their personal lives," *Gryczan*, 283 Mont. at 455, 942 P.2d at 125; its citizens' continuous and zealous protection of a core sphere of personal autonomy and dignity, *Armstrong*, ¶ 36; and its conviction that Montanans continue to cherish the privacy guaranteed them by the Montana Constitution, *Goetz*, ¶ 35.

The legislative history of article II, section 10 provides additional grounds for considering Montana's privacy right to be exceptionally vigorous. As noted in *Dorwart*, ¶ 76, "[t]he right to privacy, to be left alone, is precious. It is essential to our quality of life. No one was more aware of that than the authors of our Constitution who went to great and conspicuous lengths to preserve it in the face of what they correctly anticipated would be increasing political pressure and the developing technological ability to erode it." *See also Armstrong*, ¶ 48, referring to the Constitutional Convention's "unmistakable intent to textualize this tradition [of individual privacy] by explicitly protecting citizens from legislation and governmental practices that interfere with the autonomy of each individual to make decisions in matters generally considered private." *See also Br. Legal Scholars*.

The Florida case can also be distinguished because Florida courts employ an entirely different test in reviewing claims under the Florida Constitution's privacy clause than do courts in Montana applying Montana law. In Florida, the state need only show a compelling state interest in defending a challenged statute, with no further analysis required. *Krishcher v. McIver*, 697 So.2d 97, 102-03 (Fla. 1997) (finding compelling state interest and upholding challenged statute with no examination of whether a less restrictive alternative exists). In stark contrast, Montana jurisprudence requires that in cases involving a privacy interest, "the legislation must be justified by a compelling state interest and must be narrowly tailored to effectuate only that compelling interest."

Armstrong, ¶ 34 (citing *Gryczan*, 283 Mont. at 449, 942 P.2d at 122).

Additionally, the Florida decision improperly deferred to the legislature. See Br. Legal Scholars 20.

Finally, it is critical to note that the Alaska and Florida cases were both decided before data from Oregon's experience with aid in dying became available. Those cases, like *Washington v. Glucksberg*, 521 U.S. 702 (1997), were decided in a data vacuum; there was no, or very limited, evidence to assess the argument that aid in dying would put patients or the medical profession at risk. This Court considers the issue in a completely different landscape and can benefit from the "laboratory of the States," as the U.S. Supreme Court encouraged in *Glucksberg*. 521 U.S. at 737 (O'Connor, J., concurring). It is remarkable that the State's brief fails to even mention the Oregon data or any of the authoritative literature discussing and evaluating it. The data, as reflected in the record below, conclusively demonstrates that the concerns the State raises are not valid. See, e.g., Eighmey Aff. 4-6. Oregon's experience is highly relevant in evaluating the merit of the State's assertion that the ban on aid in dying is necessary to further state interests such as protecting vulnerable citizens. St. Br. 31-32. See also Br. Mont. Legis.; Br. Bioeth.; Br. AMWA.

In short, neither Florida nor Alaska has constitutional text or jurisprudence that comes close to matching Montana's.⁹ In light of the expansive language in *Gryczan* and *Armstrong*, and the mandate that article II rights be given a broad and liberal interpretation in our state, fidelity to text,

⁹ The Alaska decision in *Sampson* has been resoundingly criticized by leading constitutional scholars, including amici herein. See Br. Legal Scholars 19; see also Erwin Chemerinsky, *Privacy and the Alaska Constitution: Failing to Fulfill the Promise*, 20 Alaska L. Rev. 29 (2003).

principle, and precedent leads inexorably to the conclusion that Montana's constitutional guarantee of privacy protects the right of Montanans to choose aid in dying. *See also* Br. Legal Scholars 9 (to hold otherwise would "signify a retreat from Montana's robust privacy jurisprudence.")

THE INTERESTS THE STATE CLAIMS ARE COMPELLING ARE NOT JEOPARDIZED BY AID IN DYING

To support its claim of a compelling interest in criminalizing aid in dying, the State cites (1) its right to enforce the criminal laws for the benefit and protection of its citizens; (2) its interest in protecting vulnerable groups; and (3) its concern for the integrity and ethics of the medical profession. St. Br. 31-36. While these may be legitimate governmental interests, none is threatened by the right plaintiffs assert.

The State speculates that aid in dying may have negative consequences for vulnerable populations such as the elderly, disabled and terminally ill. St. Br. 31-34. This was clearly of concern to the U.S. Supreme Court when it decided *Glucksberg* and declined to establish a federal constitutional right to aid in dying, inviting the states to evaluate the issue on their own.¹⁰ The difficulty it faced was that there was no way to evaluate the risk at the time because aid in dying was not legal anywhere in the United States.

This Court is in an entirely different position. The U.S. Supreme Court's invitation to the states was taken up by Oregon, which began implementing its Death with Dignity Act in 1998 ("DWDA"). Oregon has more than a decade of experience with this practice, and there is extensive documentation of how things have worked. Each year the Oregon Department of Human Services

¹⁰ Justice Souter noted that it was the substantiality of the factual dispute concerning the risks the defendants had raised that influenced him to vote as he did. *Glucksberg*, 521 U.S. at 788.

issues a report that presents and evaluates the data, which conclusively demonstrates that aid in dying does not put vulnerable populations at risk.¹¹ This has prompted the trend of support among medical and health policy associations for aid in dying, noted above.¹² The adoption of policies supporting aid in dying reflects growing societal support for, and acceptance of, this option. Such support is also reflected in the adoption of an Oregon-style law in Washington in 2008.¹³ Washington's law was the subject of vigorous debate and the concerns raised by the State were closely examined. A strong majority of voters supported adoption of the law, reflecting that when the issue is considered carefully in light of the evidence, there is no support for the speculation that aid in dying puts patients or society at risk. *See* Br. Bioeth.; Br. AMWA. Not only has harm failed to materialize in Oregon with the legalization of aid in dying, but the DWDA has produced distinct and measurable benefits. *See* Eighmey Aff. 5-6. The Executive Director of the

¹¹ Eighmey Aff. 4-6 & Ex. A; Or. Dept. of Human Servs., *Death with Dignity Act Annual Reports*, available at <http://oregon.gov/dhs/ph/pas/ar-index.shtml>; Margaret Battin et al., *Legal Physician-Assisted Dying in Oregon and the Netherlands: Evidence Concerning the Impact on Patients in Vulnerable Groups*, 33 J. Med. Ethics 591 (2007); Ann Jackson, *The Inevitable—Death: Oregon's End-of-Life Choices*, 45 Willamette L. Rev. 137 (2009); Ronald A. Lindsay, *Oregon's Experience: Evaluating the Record*, The American Journal of Bioethics, Mar. 2009, at 19-27; Vt. Legislative Council, *Oregon's Death with Dignity Law and Euthanasia in the Netherlands: Factual Disputes*, § 3E (2004), available at http://www.leg.state.vt.us/reports/05Death/Death_With_Dignity_Report.htm ("It is quiet [sic] apparent from credible sources in and out of Oregon that the [DWDA] has not had an adverse impact on end-of-life care and in all probability has enhanced the other options.").

¹² *See* Br. AMWA et al.

¹³ Wash. Rev. Code § 70.245.

Oregon Hospice Association has been in a unique position to observe these beneficial developments and appears as amici in support of plaintiffs.¹⁴

A significant percentage of physicians provide aid in dying where this choice is not protected by the courts or statute; in this covert, underground practice, complications occur.¹⁵ As in the era of criminalized abortion, the question is not whether aid in dying will occur, but whether it will occur in a regulated and controlled fashion with safeguards and scrutiny, or in a random, dangerous and unregulated manner. The interests the State has articulated can best be addressed when the practice is not taking place underground.

In short, the data available to this Court (but not available to the Supreme Court when *Glucksberg* was considered, or to the state courts in Florida and Alaska) demonstrate that making aid in dying available has posed no harm where it is an option. It has instead brought improvements in end-of-life care and widespread benefits for all terminally ill patients, thereby vitiating one of the State's central arguments against recognizing the right. The concerns articulated by the State as justifications for its blanket ban on aid in dying are illusory. *See* Br. ACLU 17 ("[D]emonstrating a compelling state interest entails something more than simply saying it is so . . . the State's argument of a compelling state interest [is based upon] speculation and fear about possible, but unsupported, scenarios."); Br. AMWA 16-17; Br. Mont. Legis. 8-9.

THE CHALLENGED STATUTES ARE NOT NARROWLY TAILORED

The State does not seek to vindicate its interests in a narrowly tailored fashion that regulates, but does not destroy, constitutional rights as the law

¹⁴ *See* Br AMWA. *See also*, Ann Jackson, *The Inevitable—Death: Oregon's End-of-Life Choices*, 45 Willamette L. Rev. 137 (2009).

¹⁵ Eighmey Aff. 6.

requires. *Armstrong*, ¶ 34; *Gryczan*, 283 Mont. at 449, 942 P. 2d at 122. Instead, it employs a total prohibition that eliminates a patient's right of autonomy and self-determination entirely. Applying the homicide statutes in this fashion destroys more rights than it preserves, and far more rights than necessary to accomplish any legitimate goals. *See* Br. AMWA 16-17; Br. Women's Rights 9; Br. Mont. Legis. 9-10.

INDIVIDUAL DIGNITY

The State takes the remarkable position that the individual dignity clause of the Montana Constitution is nothing more than "prefatory" to the equal protection clause, and it characterizes the right to dignity as a "novelty." *St. Br. 23*. This approach has been rejected by leading Montana constitutional scholars, as it trivializes a key provision of the Montana Constitution, which—alone among all article II rights—is described as "inviolable." *See* Br Legal Scholars; *see also* Matthew O. Clifford & 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, 305 (2000). Huff notes that dignity is violated when individuals "are denied the opportunity to direct or control their own lives . . . when the loss of autonomy undermines the fundamental conditions of a self-directed life . . . [and] by treatment which is paternalistic—treating adults like children incapable of making autonomous decisions for themselves, or by trivializing what choices they do make about how to live their lives." *Id.* at 308. Preventing a mentally competent person from making the decision about how much suffering to endure in the final stage of a progressive and inexorable journey to death due to terminal illness is surely an affront to dignity. To hold otherwise would nullify the dignity clause. *See* Br. Legal Scholars.

Six justices of this Court accepted dignity as one of the overlapping constitutional rights at issue in *Armstrong*, along with its requirement 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." *Armstrong*, ¶ 72. The same is true with respect to *Walker v. State*, 2003 MT 134, ¶ 84, 316 Mont. 103, 68 P.3d 872, in which the same justices found a violation of the plaintiff's right to dignity, although using a slightly different definition of the right.

It is true that in both cases other constitutional rights were involved in addition to dignity, and this Court accordingly was not required to base its ruling on the right of dignity alone. *Walker* in particular, however, imparts the strong sense that this Court would have ruled the same way if dignity had been the sole basis for the decision. Plaintiffs contend that the right to aid in dying can be protected under the separate guarantees of privacy *or* dignity; either provision alone is a sufficient basis to support it. *See* Br. Legal Scholars 17 ("The guarantee of the inviolability of individual dignity thus is sufficient, on its own, as a basis for the right of a competent, terminally ill Montanan to choose to die with dignity."); *see also* Br. Mont. Legis 9; Br. ACLU 11.

EQUAL PROTECTION

Plaintiffs concur that equal protection also provides an independent ground on which to find that aid in dying is protected conduct, and refer the Court to the excellent arguments set forth in briefs of amici. Br. Mont. Legis. 10-13; Br. AMWA 18-22; Br. Bioeth. 8-13.

PLAINTIFFS ARE ENTITLED TO ATTORNEYS' FEES

Plaintiffs have maintained a claim for fees throughout the litigation. Following entry of judgment on the constitutional claims, plaintiffs moved to amend under Rule 59(g) to include an award of fees, basing their motion on the private attorney general doctrine and the court's power to award fees as supplemental relief under MCA § 27-8-313 of the Uniform Declaratory Judgments Act ("UDJA"). The district court granted the motion over the State's objection, awarding plaintiffs fees and costs. Pursuant to stipulation, the process of quantifying fees was stayed until resolution of the appeal. Order, Mar. 20, 2009.

Montana courts generally follow the "American rule" providing that a successful litigant in a civil action ordinarily cannot recover attorneys' fees from the opposing party unless a statute or contractual term expressly gives that right. *Id.* at ¶ 19; *Mountain W. Farm Bureau Mut. Ins. Co. v. Hall*, 2001 MT 314, ¶ 13, 308 Mont. 29, 38 P.3d 825. A number of equitable exceptions exist, however, and two of the most prominent apply in this case.

In *Montanans for Responsible Use of School Trust v. State ex rel. Board of Land Commissioners*, 1999 MT 263, 296 Mont. 402, 989 P.2d 800 ("*Montrust*"), a public interest group challenged the constitutionality of various Montana statutes. The district court found for the plaintiff on the majority of its claims but declined to award fees based on MCA § 25-10-711, which states that a party suing the State is entitled to fees if it prevails in the litigation and the government's claims or defenses were "frivolous or pursued in bad faith." Finding no such improper tactics or motives in the case, the court concluded that the statute precluded awarding fees. *Id.*, ¶ 60.

On cross-appeal, *Montrust* argued that § 25-10-711 did not provide the exclusive basis for a fee award against the State, and that the private attorney

general doctrine also applied. This Court agreed, noting that the doctrine "is normally utilized when the government, for some reason, fails to properly enforce interests which are significant to its citizens." *Id.*, ¶ 64 (quoting *In re Dearborn Drainage Area* (1989), 240 Mont. 39, 43, 782 P.2d 898, 900). It ruled that the applicability of the doctrine depended upon consideration of three factors: (1) the strength or societal importance of the public policy vindicated by the litigation; (2) the necessity for private enforcement and the magnitude of the resultant burden on the plaintiff; and (3) the number of people standing to benefit from the decision. *Id.* ¶ 66. In language that applies directly to the instant case, the *Montrust* court concluded that the plaintiff had satisfied all three factors and was entitled to fees because it had "successfully litigated issues of importance to all Montanans and incurred significant legal costs" in doing so. *Id.* ¶ 69.

The private attorney general doctrine, its three-factored analysis, and its applicability "when the government, for some reason, fails to properly enforce interests which are significant to its citizens," have been confirmed repeatedly over the past decade. Two significant clarifications include *American Cancer Society v. State*, 2004 MT 376, ¶ 21, 325 Mont. 70, 103 P.3d 1085, holding that the "public policy" vindicated by the litigation must be based on constitutional rather than statutory rights; and *Sunburst School District No. 2 v. Texaco, Inc.*, 2007 MT 183, ¶ 91, 338 Mont. 259, 165 P.3d 1079, adding the limitation that plaintiffs who recover a substantial amount of compensatory damages are ineligible for an award of fees, given the purpose of the private attorney general doctrine to provide "an incentive for parties to bring public interest related litigation that might otherwise be too costly to bring."

Like the advocacy group in *Montrust*, plaintiffs herein satisfy each of the three elements required for an award of fees under the private attorney general doctrine. First, they have litigated important public policies that are recognized as fundamental rights by Montana's Constitution. Privacy is "one of the most important rights guaranteed to the citizens of this State," *Gryczan*, 283 Mont. at 455, 942 P.2d at 125, and dignity is the only right the framers described as "inviolable." It is difficult to imagine a stronger case demonstrating that "important public policies" have been vindicated.

The second prong of the private attorney general doctrine is the necessity for private enforcement of the rights involved and the magnitude of the resultant burden on the plaintiff. *Montrust*, ¶ 66. This is a case of first impression in Montana. If plaintiffs had not stepped forward and sought recognition of the right of Montanans to aid in dying, no one else would have done so, and the State would have maintained its longstanding position that such intervention constitutes homicide. Where the State has taken such a strong and consistent position on an issue and done everything in its power to contest the constitutional claims being asserted, the need for private litigants to enforce their rights is apparent. The magnitude of the resulting burden on those private litigants is also obvious. It is neither easy nor cheap for private parties to sue the State in a major piece of litigation, supported as it is by the staff and resources of the Montana Attorney General's Office. The prospect of a fee award for those who do so and prevail, vindicating the rights of their fellow citizens in the process, makes such cases feasible. *Connell Aff.* 1-3.

The final consideration for applying the private attorney general doctrine is the number of people standing to benefit from the court's decision. *Montrust*, ¶ 66. Appellants contend that the only person who could have benefited from

the district court's decision was Robert Baxter, the named plaintiff who died on the day Judge McCarter's decision was announced. While Mr. Baxter earnestly sought the right that would have made his very difficult death considerably easier, he was far from its only beneficiary.

First, it is important to note that the group of plaintiffs includes four physicians who have standing to litigate the issues in light of the "special relationship" they have with their current and future terminally ill patients. Decision and Order 3-5. More significantly, however, it is clear that all Montanans, present and future, stand to benefit from the constitutional rights the district court has recognized. The great majority of the state's citizens, no matter their station or circumstance, are assured of one day having to confront terminal illness and the decision of how much suffering to endure. The right to aid in dying, if confirmed by this Court, will be an essential option for countless people in the years ahead. It is also noteworthy that Compassion & Choices, the national nonprofit organization dedicated to improving care and expanding choices at the end of life, is another named plaintiff. Compl. p. 3. It and its thousands of members across the country—including those in Montana—will also benefit from this Court's decision.

All three elements of the private attorney general doctrine as articulated in *Montrust* are present in this case: (1) important constitutional rights—among the *most* important rights inserted by the framers, in fact—will be vindicated if the district court is affirmed; (2) private enforcement of the rights has been essential, and the magnitude of the burden on the plaintiffs has been substantial; and (3) the number of people standing to benefit from the decision is large. An award of fees and costs of litigation to plaintiffs is necessary, appropriate, and

in accordance with the longstanding policy to encourage enforcement of fundamental constitutional rights.

Appellants raise three arguments why the private attorney general doctrine should not apply, and these may be disposed of quickly. First, the State cites § 25-10-711 for the proposition that a court may not award fees against the State unless it finds that its claim or defense was frivolous or pursued in bad faith. Appellants' Br. 40. As was recognized in *Montrust* itself, however, § 25-10-711 is only one of several options for an award of fees against the State. Others, including the private attorney general doctrine, may also apply as in this case. *Montrust*, ¶¶ 60-69.

Next, the State complains that it has been serving competing interests in the death with dignity context, fulfilling its responsibilities to defend the homicide statutes on behalf of the medical community and potentially vulnerable citizens. Appellants' Br. 41. Given the interests that exist on both sides of the issue, it suggests, the Court should avoid taking sides by awarding fees to plaintiffs, thereby making a judgment call as to which set of interests is more important—a task it describes as "closely approaching that of the legislative function." *Id.*

It is hornbook law, however, that it is the province of the courts to decide issues of constitutionality such as these, not the legislature. *Every* constitutional challenge involves the weighing of competing rights and interests. Under the rule of *Montrust* and its progeny, a party that successfully upholds important constitutional rights where they clash against other, lesser rights is entitled to recover fees if it can satisfy the three-part test described above. It is no answer to complain that the State should not have to pay fees due under the law when it deprives citizens of their constitutional rights, simply because it felt other rights

were more important and is now disappointed to find the courts disagree. The entire thrust of the district court's decision is that the fundamental rights of privacy and dignity control over the State's purported interests, which the court found can be protected through other, less restrictive means.

Finally, the State complains that an award of fees would "encourage" other groups to "completely bypass the democratic process on the way to this Court." Appellant's Br. 41. This mirrors Appellants' argument that the judiciary should defer to the legislature in this case, no matter what constitutional principles may be involved. Those arguments were unsuccessful below, and should be equally unsuccessful on appeal. It is the courts that must determine the meaning and reach of the constitution.

Plaintiffs have also asserted a right to recover fees under MCA § 27-8-313, MCA. That statute gives a court discretion to award "supplemental relief" in a declaratory judgment action whenever it is "necessary or proper." This Court, emphasizing that the UDJA is to be "liberally construed and administered," has held that the available supplemental relief under such circumstances may include attorneys' fees. *Tr. of Ind. Univ. v. Buxbaum*, 2003 MT 97, ¶¶ 41, 42, 46, 315 Mont. 210, 69 P.3d 663,; *Mountain W. Farm Bureau Mut. Ins. Co. v. Brewer*, 2003 MT 98, ¶ 41, 315 Mont. 231, 69 P.3d 652. Fees are particularly appropriate for consideration when the declaration sought is "necessary in order to change the status quo" or "necessary or proper to afford meaningful relief." *Buxbaum*, ¶ 45. The first of these two elements clearly applies, as the declaratory judgment the district court rendered has unquestionably changed the status quo.

Plaintiffs urge the Court to affirm the district court's determination that fees and expenses of litigation be awarded to Plaintiffs.

CONCLUSION

Plaintiffs request this Court to affirm the decision below, and hold that the choice of a mentally competent, terminally ill Montanan to obtain medication for the purpose of bringing about a peaceful death is a right protected by the Montana Constitution's guarantees of privacy, dignity and/or equal protection; and that plaintiffs should recover attorneys' fees and expenses of litigation as prevailing parties.

DATED this ___ day of August, 2009.

CONNELL LAW FIRM

By: _____
Mark S. Connell

Kathryn L. Tucker, Esq.
Compassion & Choices

Attorneys for Appellees

CERTIFICATE OF SERVICE

I, Marie Hartig, legal assistant of the Connell Law Firm, do hereby state that on this date, I served a true and correct copy of the foregoing document upon the individuals listed below, via the following means:

Jennifer Anders
Anthony Johnstone
Attorney General's Office
P.O. Box 201401
Helena, MT 59620-1401

- U.S. Mail
- Facsimile
- Certified Mail
- Hand Delivery
- Electronic Mail

DATED this ___ day of August, 2009.

Marie Hartig, Legal Assistant

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11(4)(d), M.R. App. P., I hereby certify that this principal brief is printed with a proportionately spaced Times New Roman typeface of 14 points; that it is double-spaced except for footnotes and quoted and indented material; and that the word count is 9,982 words, excluding table of contents, table of authorities, certificate of service and certificate of compliance.

DATED this ___ day of August, 2009.

CONNELL LAW FIRM

By: _____
Mark S. Connell

Kathryn L. Tucker, Esq.
Compassion & Choices

Attorneys for Appellees