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IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 09-0051

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

Plaintiffs and Appellees,

v.

STATE OF MONTANA and STEVE BULLOCK,

Defendants and Appellants.

**AMICI CURIAE BRIEF OF THE INSTITUTE FOR THE STUDY OF
DISABILITY & BIOETHICS, THE BIOETHICS DEFENSE FUND, THE
PRO-LIFE LEGAL DEFENSE FUND, AND PROF. KRISTEN JURAS IN
SUPPORT OF THE STATE OF MONTANA AND ATTORNEY GENERAL
STEVE BULLOCK**

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INTRODUCTION AND SUMMARY OF ARGUMENT

The Montana Constitution recognizes that “all persons . . . have certain inalienable rights” including the right to “enjoying and defending their lives and

liberties.”¹ Inalienable rights are intrinsically valuable human interests that the right-holder cannot relinquish. Nor can the government rely on the consent of the right-holder in a bid to treat the right as having been alienated. A government that is empowered by popular consent cannot assume any authority that is premised on an attempted or otherwise claimed alienation of inalienable rights. A government that respects inalienable rights will be limited because it will never act as if the fundamental right at stake has been waived. The Montana Constitution’s recognition of inalienable rights thus presupposes limited government.

The relief sought in this case, a judicial authorization of suicide assistance, would have this Court endorse a theory of personal autonomy so broad as to privilege the alienation of the right to the defense of life. A freedom fashioned this expansively would necessarily include the right to consent to one’s enslavement or dictatorial subjection by the government, thus inviting unlimited intrusions upon liberty. This implicates a state interest that has not been considered in this kind of case before—an interest in preserving limited government.

This state interest is compelling and overriding especially in light of the nature and scope of the personal claim being raised in this case. Suicide assistance

¹ Mont. Const. Art. II, § 3. This provision adopts in large measure the words penned by John Adams as part of the Massachusetts Constitution. Mass. Const. Pt. I, Art. I (referring to “certain natural, essential, and unalienable rights; among which may be reckoned the right of enjoying and defending their lives and liberties”).

has as its object the death of the person to whom such assistance is rendered, thus distinguishing the claim of a right to suicide assistance from all other privacy and autonomy claims given constitutional protection, all of which pertain to life-related occupations and endeavors. An assisted suicide claim also wrongly assumes that the law's regard for the equal dignity of persons is a matter generally considered private, such that individuals could dictate the law's disregard for the lives of all similarly-situated persons with respect to suicide. Finally, an assisted suicide claim is not self-regarding because its judicial recognition will alter the status under the law of others unwillingly designated to be likewise eligible to waive their right to the defense of life and liberty.

The core function of limited government is to protect its citizens. The legalization of suicide assistance for a category of persons deemed to have only alienable interests in the defense of life and liberty strikes at the heart of the relationship between the individual and the government by removing some, including those who object, from the law's full protection. The way is opened thereby to further governmental incursions on personal dignity. This Court should reverse the trial court's order and decision in order to preserve limited government in Montana.

ARGUMENT

I. Granting A Right to Suicide Assistance Would Conflict With The People’s Constitutionally Protected Interest In Limited Government.

A. The Purported Right to Assisted Suicide Presupposes an Autonomy Interest Broad Enough to Privilege One’s Consent to Slavery and Dictatorship.

The trial court countenanced a “right to die” broad enough to shield physicians who assist in suicides by persons with terminal conditions from liability under Montana’s homicide statutes.² Such a “right” would impose a duty on state officials to not punish or otherwise prevent suicide assistance conducted within the described parameters. By lodging this personal “right to die” and its corresponding governmental duty within the provisions of Montana’s Constitution, the trial court attributed to the state the power to legally effectuate individual waivers of the right to the defense of one’s life. Thus envisioned is a regimen of government collaboration involving the alienation of an interest that the framers of Montana’s Constitution regarded as inalienable.³

The trial court considered this constitutional result to be warranted by the nature of the personal interests asserted to be at stake. Terminally ill patients contemplating suicide possess as citizens, according to the trial court, “the moral

² Baxter v. State, No. ADV-2007-787, slip op. at 23 (Mont. 1st Dist. Ct. Lewis & Clark County Dec. 5, 2008).

³ The Montana Constitution recognizes the “inalienable” right of persons to the defending of their lives and liberty. Mont. Const. Art. II, § 3.

right and moral responsibility to confront the most fundamental questions of life in general, answering to their own consciences and convictions.”⁴ Moreover, the court viewed these individuals as enjoying “the right to define one’s own concept of existence, of meaning, of the universe, and of the mystery of human life” in matters involving “the most intimate and personal choices a person may make in a lifetime[.]”⁵

If such interests encompass the decision to renounce the law’s protection of one’s life, then they are capacious enough to include the choice to renounce the law’s protection of one’s liberty. Since liberty is contingent upon existence, the renunciation of the protection of life—leading to one’s death and thus to the loss of one’s liberty—necessarily implicates the consensual taking of one’s right to liberty. One who is regarded as having a constitutionally protectable interest in alienating the right to the defense of one’s life must be regarded as also having the protected interest in alienating one’s right not to be enslaved. If the choice between life and death is considered to be “fundamental,” “intimate,” and “personal,” then so is the choice between freedom and slavery.

Further, if the enforceable personal interests are purportedly broad enough so as to allow an individual to dictate the government’s cooperation in either case,

⁴ *Baxter v. State*, slip op. at 13 (citation omitted).

⁵ *Id.* at 15 (citation omitted).

thus empowering the government to effectuate an agreement among private parties concerning the removal of protection of one's life or liberty, then the interests at stake are broad enough also to privilege the people's handing over of their political liberty to the control of a dictatorship, or like form of unlimited government.⁶

A right conceived so broadly as that pronounced by the trial court is necessarily of such magnitude as to implicate the renunciation of limited government. In other words, "to consent away one's life implies a right to consent to unlimited government."⁷

This integral link between suicide and dictatorship was precisely the concern of John Locke,⁸ who refers to the link repeatedly in his *Second Treatise on Government*.⁹ "Through the prohibition of suicide, Locke shows the limits of the individual's right to consent, and this prohibition is the indispensable logical and moral basis of (1) his argument against slavery, (2) his defense of the right of

⁶ "If voluntary slavery was possible for an individual, so it was for an entire people." Richard Tuck, *Natural Rights Theories* 56 (1979) (summarizing view of Francisco Suarez in justifying Spanish slave trade).

⁷ Gary D. Glenn, "Inalienable Rights and Locke's Argument for Limited Government: Political Implications of a Right to Suicide," 46 *J. Pol.* 80, 89 (1984) [hereinafter Glenn, "Political Implications"] (accessible through JSTOR.org).

⁸ This Court has cited Locke as an important source for interpreting the privacy provisions of Montana's Constitution. *Armstrong v. State*, 269 Mont. 361, 371, 989 P.2d 364, 372 (1999) ("Modern legal notions of the right of privacy trace their roots to the political theory of English philosopher John Locke.").

⁹ John Locke, *Second Treatise on Government* §§ 6, 22, 23, 135, 149, 168, 172 (1st ed. 1690). See also Bradford William Short, "The Healing Philosopher: John Locke's Medical Ethics," 20 *Issues in Law & Med.* 103, 131-140 (2004).

revolution, (3) his argument that men have some duty to care about their fellow men, and (4) his teaching that the legitimate powers of government are limited.”¹⁰

Some insist that a decision to take one’s own life does not implicate inalienable rights. Joel Feinberg has argued that the right to life is discretionary, and can only be alienated when the discretion to choose between life and death itself is renounced or handed to another.¹¹ That is, according to Feinberg’s reasoning, the only truly inalienable interest is the right to choose between life and death.

Yet this still amounts to a justification for using discretion “to end forever the possibility of discretion” through choosing to end one’s life.¹² If one may exercise discretion to end all possibility of further exercises of discretion by choosing death, then there is no principled distinction between a discretion that destroys itself through irrevocable death and a discretion that abdicates itself through one’s consent to slavery or “absolute, arbitrary government.”¹³ “If Locke’s argument is correct, it shows that while at one level arguments like

¹⁰ Glenn, “Political Implications,” supra note 7, at 80.

¹¹ Joel Feinberg, “Voluntary Euthanasia and the Inalienable Right to Life,” 7 *Phil. & Pub. Aff.* 93, 111 (1978).

¹² Glenn, “Political Implications,” supra note 7, at 103.

¹³ *Id.*, supra note 7, at 103.

Feinberg's aim to expand individual liberty, at another level they prepare public opinion for unlimited government."¹⁴

B. Montana Has an Overriding Interest in Preserving Limited Government By Declining to Give Legal Effect to the Attempted Alienation of the Right to the Defense of Life and Liberty.

The Montana people's interest in preserving limited government is implicated by an individual's desire to alienate the fundamental right to the defense of life and liberty. Limitations on government that are foundational in character include 1) the people's right to consent to the laws to which they will be subject,¹⁵ and 2) the government's duty to exercise only those powers that the people themselves possess and transfer.¹⁶ A petition for judicial authorization of a request for suicide assistance seeks the exercise of a power that the government, and by extension the judiciary, lacks entirely.

Article II, Section 3 of the Montana Constitution affirms that the right to the defense of one's life and liberty is inalienable. By implication, the framers adopted the view that the people do not possess the authority to alienate this right and thus can transfer no power to effectuate the right's alienation to the government. A strict constitutional interpretation thus leads to the conclusion that the government

¹⁴ Id., supra note 7, at 104.

¹⁵ Mont. Const. Art. II, §§ 1, 2 (recognizing that government derives its power from the people who retain the exclusive right in self-governance).

¹⁶ Mont. Const. Art. II, §§ 3, 4 (recognizing that certain rights are inalienable and that human dignity is inviolable).

lacks the power to give legal effect to an individual's attempted alienation of this right through a judicial order.

Even assuming that the Montana judiciary is empowered to entertain an assisted suicide claim in order to weigh the competing individual and state interests, the balance in this case tilts decidedly towards favoring the latter.¹⁷ The state interest in preserving limited government is compelling and overriding.

To the extent that an assisted suicide claim is based ostensibly on assertions of privacy, autonomy and dignity, several factors subvert its force: 1) death eliminates the possibility of engaging in the range of activities typically shielded from governmental interference on the basis of these asserted interests; 2) the law's regard for the value and equal dignity of human lives is not a "private" possession; and 3) granting to a category of persons a right to decide whether to obtain suicide assistance is not self-regarding since all categorically-eligible individuals, whether they seek or oppose suicide, will have to be treated as lacking a right to the defense of life that is inalienable.

¹⁷ Your Amici leaves to others the task of addressing other state interests. See *Baxter v. State*, slip op. at 19-23 (referring to preserving life, preventing abuse, and protecting the medical profession's integrity and ethics).

i. Assisted Suicide Lacks Any Connection To “The Common Occupations of Life.”

Assisted suicide is an attack on life rather than a way of life. In this respect, the constitutional claim in this case differs from all other personal autonomy interests recognized as constitutional rights.¹⁸ Suicide fails to facilitate the victim’s ability to “engage in any of the common occupations of life.”¹⁹ No other interest heretofore declared to be constitutionally cognizable so utterly lacks a nexus with the capacity to exist, move freely, and form attachments in society as does assisted suicide.²⁰ The “right to be left alone” has merited protection only when conceived as an interest in moving within society free of arbitrary or unjustified interference from the government, and not as an interest in precluding all social interaction whatsoever by killing one’s self with another’s assistance.²¹

¹⁸ Daniel Avila, “Is the Constitution a Suicide Pact?,” 35 *Duquesne L. Rev.* 201, 240-244 (1996).

¹⁹ *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923) (listing several federally cognizable liberty interests, all of which presuppose life as a necessary condition of their enjoyment).

²⁰ See Avila, *supra* note 18, at 243-44 (surveying various liberty and privacy interests).

²¹ Thus, the case at bar differs from litigation involving a death row inmate who decides to abandon further appeals in the face of a pending execution, where the inmate is not suicidal, there is no evidence of any conditions causing the inmate to abandon the desire to live, and the inmate expresses an intent not to die, but rather to accept punishment. *State v. Dawson*, 331 Mont. 444, 451, 457, 460, 133 P. 3d 236, 243, 246, 248 (2006).

ii. The Law's Regard for The Equal Dignity of Human Life Is Not a Private Matter.

Through the filing of this lawsuit, the plaintiffs are asking the state to become a willing partner in recognizing the private devaluation of their patients' human life, demoting life in some cases into an interest no longer to be afforded protection against suicide assistance. When the trial court opined that the state's interest in protecting life from assisted suicide "diminishes" according to the life expectancy of the individual and the degree of the individual's disease-related "indignity" (slip op. at 20), it adopted the plaintiff-physicians' private calculations of the value of their suicidal patients' lives as a measure of and rationale for lowering the state's official estimation of life's worth under the law for a class of all terminally ill persons in given circumstances.

However one may assess the value of one's own life and corresponding dignity, that personal assessment cannot be held to alter the value of life as a measure of dignity under the law. That is, the dignity provision of the Montana Constitution must be read in harmony with the inalienable rights provision. One's inviolable dignity as regarded by the law must include reference to the inalienability of one's right to the defense of life and liberty. "In this account,

inalienable rights themselves constitute the moral dignity of persons rather than flow from that dignity.”²²

A decision of the state, acting through its judiciary to remove the law’s inalienable right to the defense of life in a category of cases defined according to one’s condition, thereby treating that right as legally alienable, violates human dignity. The judicial authorization and the provision of suicide assistance are based on the assumption that the life at stake is so lacking in value due to the qualifying condition as to be downgraded from an inalienable to an alienable interest. Thus the approval of suicide assistance by the courts for a class of persons now deemed eligible because of their presumed sub-quality of life, itself constitutes “treatment which degrades or demeans persons, that is, [it] deliberately reduces the value of persons, and . . . fails to acknowledge their worth as persons.”²³

iii. Legalizing Suicide Assistance Is Not Self-Regarding Because It Reduces the Right to the Defense of Life and Liberty from an Inalienable to an Alienable Interest for All Similarly-Situated Individuals.

Plaintiffs contended before the trial court that the claim at stake in this case is self-regarding, and thus properly within the sphere of privacy, in “that when a

²² Craig A. Stern & Gregory M. Jones, “The Coherence of Natural Inalienable Rights,” 76 U. Mo. Kans. City L. Rev. 939, 958 (2008).

²³ Walker v. State, 316 Mont. 103, 122, 68 P.3d 872, 884 (2003) (citation omitted).

terminally ill patient makes a decision about his body no one else's body is simultaneously affected.”²⁴ However, in seeking judicial authorization for suicide assistance, the plaintiff-patients saw themselves as representing a class of “terminally ill” persons whose interests supposedly would be vindicated by a precedent-setting ruling favorable to the plaintiffs.²⁵ The categorization of condition-related eligibility requirements, as expressed in precedent-setting decisions of a governmental body, moves far beyond the borders of self-regarding privacy.²⁶

If this Court upholds the trial court's ruling, then by virtue of setting a legal precedent that will alter government policy going forward, all “terminally ill” persons in Montana would lose the constitutional status of being regarded as having the inalienable right to the protection of their life and liberty. All such persons, whether or not they agree, will become candidates deemed legally eligible

²⁴ Plaintiffs' Brief in Support of Motion for Summary Judgment at 22.

²⁵ Plaintiffs' Responses to State of Montana's First Discovery Requests, Answer to Interrogatory No. 4.

²⁶ Further, John Stuart Mill recognized that choices depending on the assistance of others are “not strictly within the definition of individual liberty” and that when others “make it an occupation” to assist individuals in harming themselves and thereby “promote what society and the State consider to be an evil . . . a new element of complication is introduced—namely, the existence of classes of persons with an interest opposed to what is considered as the public weal, and whose mode of living is grounded on the counteraction of it.” John Stuart Mill, *On Liberty* 120 (Bobbs-Merrill ed. 1956).

to choose lethal assistance, a choice the state will have to treat with official, dismissive indifference.²⁷

The trouble is, as others will inform this Court,²⁸ not every person with the qualifying condition will want the state to consider him or her to be a potential candidate for state-authorized suicide assistance. Many terminally ill persons will oppose their inclusion within the class of individuals regarded as no longer possessing an inalienable right to the protection of life and liberty, an interest that the state nonetheless must continue to honor as inalienable for the non-terminally ill.

Those falling within the suicide-eligible class can rightly complain that such a judicial precedent will declare them, against their will, and solely because of their life-threatening disabilities, to be outside the full protection of Montana's homicide laws. By carving an exception to the reach of these laws, the state encourages the view that the lives at stake are not worthy of full protection and exposes the entire class to greater risks of inducement, mistake and bias.

From the perspective of individuals who cherish the status of being regarded as having inalienable rights, the guarantee of limited government, a constitutional

²⁷ See generally Daniel Avila, "Assisted Suicide and the Inalienable Right to Life," 16 *Issues in Law & Med.* 111 (2000).

²⁸ Your amici refer specifically to those briefs to be filed by and on behalf of persons with life-threatening conditions in opposition to the ruling below.

duty that prohibits the state from infringing upon the inviolable dignity of individuals, will be breached. Because the interests of other terminally ill persons beyond those who seek suicide assistance will be affected, a ruling in favor of plaintiffs in this case will not be self-regarding and its effectuation thus fails to fall within any reasonable expectation of privacy as a matter “generally considered private.”²⁹

II. This Court Should Preserve Limited Government By Reversing The Trial Court And By Denying Any Claim That Seeks To Alienate The Right To The Defense of Life And Liberty.

Those Montanans who reject the devaluation in legal status from once being regarded as having an inalienable right to the protection of life to now being regarded as worthy only of alienable, that is, *contingent* protection, suffer tangible injury as a result of the trial court’s ruling in this case. Because of the resulting court-dictated position of governmental indifference as to whether terminally-ill persons will choose to live or instead die by suicide, such persons are less protected than before and more vulnerable to external and internal pressures to give in to suicidal urges or to heed the implicit message that they are “better off dead.”

²⁹ *Armstrong v. State*, 269 Mont. 361, 373, 374, 378, 379, 989 P. 2d 364, 373, 374, 376, 377 (2006) (referring to the Court’s central criterion of privacy recognition). See also *Mill, On Liberty*, *supra* note 26, at 125 (“The principle of freedom cannot require that [one] should be free not to be free. It is not freedom to be allowed to alienate [one’s] freedom.”).

As voiced by John Adams, whose references to inalienable rights are incorporated into the Montana Constitution,³⁰ the American Revolution of 1776 sprang from the patriots' conviction that the King of England had "declared us out of his protection."³¹ In his study of the principles of the Declaration of Independence, Michael Zuckert discussed the implications of Adams's complaint:

[W]ith the institution of government a whole new class of rights emerges, not so much from nature itself, as from the nature of the formation of government, from the universal consent or agreement that institutes government. The individuals, now citizens, have a new right, the civil right to protection in their natural rights. This right, although not natural, is in principle universal, once it is recognized what the purpose of government is. . . . The duty-bearer in this case is not another individual but the new collectivity, the state, brought into existence or rationalized by the social contract. . . . Thus as a first consequence of the making or rationalizing of the state, individuals acquire a right to the protection of the laws. Such a right is strictly reciprocal with the duty in the citizens of allegiance.³²

The trial court's ruling, if upheld by this Court, would have the effect of declaring those deemed eligible for choosing suicide assistance to be outside the criminal and civil codes' full protection, thereby reneging on the fundamental premise and promise first expressed in the Declaration of Independence and adopted anew by the framers of the Montana Constitution.

³⁰ See supra note 1.

³¹ Remarks of John Adams during the 1776 debate in the continental congress, noted in Thomas Jefferson, *Autobiography 1743-1790*, in Thomas Jefferson, *Writings* 3, 15 (Merrill D. Peterson ed. 1984).

³² Michael P. Zuckert, *The Natural Rights Republic* 85-86 (1996).

No longer would all lives in Montana be regarded as possessing the inalienable right to the law's full protection. Thus the legalization of assisted suicide strikes at the heart of the relationship between the government and the individual by qualifying the law's full protection against killing according to one's physical qualities and proximity to death.

Besides directly affecting the interests of those included within the designated class of suicide-eligible candidates, the trial court's ruling lays the groundwork for the further dismantling of Montana's social compact. If government can be called upon to facilitate suicide requests based on an undue judicial regard for unbounded autonomy, then in principle the constitutional bulwark against "consensual" slavery and dictatorship is itself removed. The precedent will be established for the exercise of unlimited government in other areas of personal and political liberty, based on the conceit that Montana's courts are fully empowered to act as if some people have conferred upon government the power to destroy rights for all those similarly situated, notwithstanding existing constitutional guarantees of inalienable protections against precisely this result.

CONCLUSION

For the foregoing reasons, your Amici urge this Court to reverse the trial court's order and decision and deny plaintiffs' constitutional claim as

incompatible with the premise and promise of limited government reflected in Montana's constitutional recognition of inalienable rights.

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 14 and Rule 11 of the Montana Rules of Appellate Procedure, I certify that the foregoing Amici Curiae Brief of the Institute For The Study Of Disability & Bioethics, the Bioethics Defense Fund, the Pro-Life Legal Defense Fund, and Prof. Kristen Juras in Support of the State of Montana and Attorney General Steve Bullock is printed with a proportionately spaced Times Roman text typeface of 14 points; is double spaced; and the word count calculated by Microsoft Word excluding the captions, tables of contents and authorities, and certificates of compliance and service is 3,968 words.

Dated: _____

Daniel Avila

CERTIFICATE OF SERVICE

I hereby certify that I caused this day a true and accurate copy of the foregoing Amici Curiae Brief of the Institute For The Study Of Disability & Bioethics, the Bioethics Defense Fund, the Pro-Life Legal Defense Fund, and Prof. Kristen Juras in Support of the State of Montana and Attorney General Steve

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