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9 MONTANA FIRST JUDICIAL DISTRICT COURT,
LEWIS AND CLARK COUNTY

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

14 Plaintiffs,

15 v.

STATE OF MONTANA and MIKE
16 MCGRATH, ATTORNEY GENERAL,

17 Defendants.

Judge: Dorothy McCarter
Cause No. DV 2007-787

PLAINTIFFS' BRIEF IN SUPPORT OF
MOTION FOR SUMMARY JUDGMENT

18 INTRODUCTION

19 This is a case of first impression in Montana, involving the most important issues a
20 number of its citizens will face at any time in their lives: how and under what circumstances they
21 will die; how much pain they will endure before their lives end; and who will control how these
22 decisions are made. The issues revolve around several of the most precious rights guaranteed by
23 the Montana Constitution, some of which have established parameters, and others which are just
24

1 beginning to receive judicial attention.

2 This case presents the question of whether a mentally competent, terminally ill patient
3 who is facing an exceptionally painful or otherwise difficult death has the right to obtain a
4 prescription for medication from a cooperating doctor which the patient can self-administer to
5 bring about a peaceful death. The patient – and the patient alone – has the choice to use or not
6 use the drugs: to advance, incrementally, the timing of a death which is about to occur from the
7 underlying disease in any event, in order to avoid prolonged suffering that has become
8 unbearable to the individual; or to take comfort from the right to choose but allow the medication
9 to go unused. *See* answer to Interrogatory No. 1, Plaintiffs’ Responses to State of Montana’s
10 First Discovery Requests.

11 This case is being brought by two terminally ill Montanans, and four physicians who treat
12 terminally ill patients in the state, to establish their respective constitutional rights to receive and
13 provide aid in dying. It is based on the Montana Constitution’s fundamental guarantees of
14 privacy, individual dignity, due process, equal protection of the law, and the right to seek safety,
15 health and happiness in all lawful ways.

16 The plaintiffs seek declaratory judgment and injunctive relief to prevent the application of
17 Montana’s criminal homicide statutes against physicians who wish to help their patients achieve
18 a peaceful and humane death by providing aid in dying assistance. The defendants have denied
19 the plaintiffs’ entitlement to any of the relief requested. Plaintiffs have now moved for summary
20 judgment, asserting their right to prevail under the provisions of the Montana Constitution they
21 have cited.

22 **STANDARDS FOR DECIDING SUMMARY JUDGMENT**

23 Rule 56(c), M.R.Civ.P. describes the circumstances under which summary judgment may
24 be awarded: “The judgment shall be rendered forthwith if the pleadings, depositions, answers to

1 interrogatories, and admissions on file, together with the affidavits, if any, show that there is no
2 genuine issue as to any material fact and that the moving party is entitled to a judgment as a
3 matter of law.” The Montana Supreme Court has described the proper analytical process as
4 follows:

5 The movant must demonstrate that no genuine issues of material
6 fact exist. Once this has been accomplished, the burden then shifts
7 to the non-moving party to prove, by more than mere denial and
8 speculation, that a genuine issue does exist. Having determined
9 that genuine issues of fact do not exist, the court must then
10 determine whether the moving party is entitled to judgment as a
11 matter of law.

12 *Gryczan v. State*, 283 Mont. 433, 440, 942 P.2d 112, 116-117 (1997) (citing *Bruner v.*
13 *Yellowstone County*, 272 Mont. 261, 264, 900 P.2d 901, 903 (1995)).

14 As noted by the United States Supreme Court in *Celotex Corp. v. Catrett*, interpreting an
15 identical federal rule, “[s]ummary judgment procedure is properly regarded not as a disfavored
16 procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are
17 designed ‘to secure the just, speedy and inexpensive determination of every action.’” 477 U.S.
18 317, 327 (1986) (citation omitted).

19 Professor Moore explains the purpose of the rule in the following terms:

20 In many cases there is no genuine issue of fact, although such an
21 issue appears to be raised by the formal pleadings. The purpose of
22 Rule 56 is to eliminate a trial in these cases, since an unnecessary
23 trial results in delay and expense. . . . To this end, the rule permits
24 a party to pierce the allegations of fact in the pleadings and to
25 obtain relief by summary judgment when facts set forth in detail in
26 affidavits, depositions, answers to interrogatories, and admissions
27 on file show that there are no genuine issues of material fact to be
28 tried. In this situation, summary judgment is properly granted
29 regardless of the sufficiency of the allegations of the complaint or
30 the fact that an issue is formally raised by the pleadings.

31 2 Moore’s Manual of Federal Practice and Procedure at 17-3 to 17-6 (1994).

1 deterioration. The pain is with him every moment, day and night, and is sometimes excruciating.
2 Medication to treat the pain is foreclosed by Mr. Stoelb's inability to tolerate the side-effects.
3 These symptoms continue to worsen with time, and the periods during which they are less severe
4 are shortening. Stoelb Affidavit, pp. 2-3.

5 The other four named plaintiffs are board-certified Montana physicians who frequently
6 treat terminally ill patients as part of their practices. Dr. Stephen Speckart is an internist and
7 oncologist with a specialty in hematology, who helped start the hospice organization in Missoula
8 and served on its board and as its medical director for a number of years. He has retired from
9 active practice since the lawsuit was filed, but may continue to do volunteer medical work in the
10 future. Dr. Paul Loehnen is an internal medicine doctor and pulmonologist. Dr. George Risi is
11 an internist and specialist in infectious diseases and HIV / AIDS. Dr. Lar Autio is a family
12 practitioner who has spent many years as the medical director of two different nursing homes.

13 Until the beginning of the last century, communicable diseases were the leading causes of
14 death in the United States, average life spans were much shorter than today, and the majority of
15 people died relatively quickly once they became sick. Changing social conditions and advances
16 in medicine over the succeeding decades, however, changed things dramatically. Statistics
17 indicate that 80 percent of deaths now result from chronic non-communicable illness, and
18 patients are living longer with life-threatening and terminal diseases than ever before. Dallner &
19 Manning, *Death With Dignity in Montana*, 65 Mont. L. Rev. 309, 311 (2004). This increase in
20 longevity, as described by one set of commentators, has been accompanied by "the emergence of
21 long-term, chronic disease as the major pattern of death." *Id.* at 310. With undertones many
22 would prefer to ignore, they note that "[u]nlike earlier times, most of us will die slowly." *Id.*

23 New drugs and advances in medical technology have helped increase both the functioning
24 and comfort level of dying people. There remain limits to what physicians can do under these

1 circumstances, however, and certain types of ailments are resistant to medical intervention.
2 Patients dying of cancer, for example, are often afflicted with unrelenting pain, exhaustion and
3 nausea. Lung diseases can cause a wracking cough or shortness of breath that goes on endlessly
4 without respite. Congestive heart failure is often characterized by a persistent and terrifying
5 drowning sensation and gasping for air.

6 A dying person experiencing severe pain, agitation or other forms of acute discomfort at
7 the end of life can be treated in several ways. The most common course is to administer strong
8 narcotic pain medications, which depending upon the cause and source of the pain may be largely
9 effective in resolving the patient's problems, although often with the unwanted side-effect of
10 decrease in mental alertness. When normal doses are not sufficient and the patient is in extreme,
11 unrelieved distress, doctors sometimes increase the level of morphine to the point where it
12 interferes with respiratory and heart function, even to the point of death. This is known in
13 medical ethics as the "dual effect doctrine", which accepts the patient's death as a byproduct of
14 the primary goal, the reduction of pain. It is common practice in terminal cases and is approved
15 as ethical and appropriate by medical authorities. Affidavit of Dr. Stephen Speckart, p. 4;
16 Affidavit of Dr. George Risi, p. 5; plaintiffs' responses to Requests for Admission No.s 3 and 4.

17 A third alternative exists which fits somewhere between the two described above. Where
18 a terminally ill patient's pain or other symptoms are impervious to drugs, the treating physician,
19 in an effort to provide relief short of causing immediate death, may elect to sedate the patient into
20 unconsciousness until he or she eventually dies from the underlying disease or a combination of
21 dehydration and starvation. This is known as "terminal sedation", and while it is often effective
22 in relieving agonal sensations, it comes as a tremendous cost to many patients who wish to
23 remain sentient and aware – to the extent possible – as their life ends. Affidavit of Dr. Stephen
24 Speckart, pp. 3-4.

1 Doctors have an ethical obligation to relieve pain and suffering, as well as promote the
2 dignity and autonomy of patients in their care. Affidavit of Dr. Stephen Speckart, p. 4; Affidavit
3 of Dr. George Risi, p. 5; plaintiffs' Response to Request for Admission No. 16. A conflict of
4 interest arises, however, when a patient, faced with the unenviable choice of further prolonged
5 suffering on the one hand, or an indeterminate period of induced unconsciousness leading to
6 death on the other, asks the physician for help in bringing the dying process to an end. As
7 indicated in their affidavits, all four of the plaintiff doctors have encountered patients dying
8 under such circumstances who have asked for help in accelerating their imminent deaths, due to
9 suffering the physicians were unable to relieve through conventional means. In each case, the
10 doctors were unable to provide aid in dying assistance for their patients for fear that doing so
11 would expose them to criminal prosecution.

12 Montana has three categories of homicide in its criminal code, which vary according to
13 the degree of moral fault attributed to the defendant. A person who purposely or knowingly
14 causes the death of another human being commits the offense of Deliberate Homicide. Section
15 45-5-102(1), MCA. A person who does so while under the influence of extreme mental or
16 emotional stress for which there is reasonable explanation or excuse commits the offense of
17 Mitigated Deliberate Homicide. Section 45-5-103(1), MCA. A person who negligently causes
18 the death of another human being is guilty of Negligent Homicide. Section 45-5-104, MCA. In
19 all three instances, conduct is considered the legal cause of another's death if without the conduct
20 the death would not have occurred. Section 45-2-201(1)(a), MCA. Given this definition, a
21 physician who provides aid in dying to a terminally ill patient who dies as a result, under
22 circumstances in which the patient would not have died at that time without such assistance, may
23 be prosecuted for homicide. *See* Commission Comment to Section 45-5-105, MCA: "If the
24 conduct of the offender made him the agent of the death, the offense is criminal homicide

1 notwithstanding the consent or even the solicitations of the victim.”

2 The consent of a victim to another’s conduct or its result is normally a defense to a
3 criminal charge in Montana. Section 45-2-211(1), MCA. Such consent, however, is deemed
4 ineffective if it is against public policy to permit the conduct or the resulting harm, even though
5 consented to. Section 45-2-211(2(d), MCA. The plaintiffs contend that it is, or in light of the
6 rights guaranteed by the Montana Constitution should be declared to be, the public policy of the
7 state to allow physicians to provide aid in dying to their mentally competent, terminally ill adult
8 patients who are experiencing severe suffering at the end of life and request such assistance.
9 Complaint, ¶ 23. Defendants have denied this claim. Answer, ¶ 23. If the Court rules against
10 plaintiffs and in favor of the state on the public policy issue, then a patient’s consent to the aid in
11 dying provided by his physician will be deemed ineffective, and the consent defense itself will be
12 rejected. The result will be to leave the physician exposed to a conviction for criminal homicide,
13 despite the fact that the patient – the nominal “victim” – sought and expressly agreed to the
14 doctor’s conduct. Plaintiffs’ Answer to Interrogatory 15. If the Court agrees with the plaintiffs
15 on this issue, on the other hand, doctors will be immunized from prosecution and patients will be
16 free to seek physicians for aid in dying assistance.

17 The very real, substantial and immediate nature of this controversy, therefore – as it
18 relates to both Mr. Baxter and Mr. Stoelb, who themselves are terminally ill and approaching the
19 end of their lives, and to the four physician plaintiffs who regularly treat dying patients – is clear.
20 The Court has two alternatives available to recognize the legality of aid in dying in Montana. It
21 may rule, based on the provisions of the Montana Constitution cited by plaintiffs, that the
22 criminal homicide statutes are unconstitutional as applied to doctors who provide aid in dying to
23 their patients. The result will be to eliminate the deterrent effect of the criminal statutes that
24 currently forecloses aid in dying as an option in the state. Alternatively, citing the same or other

1 authorities, the Court may hold that the public policy of Montana is to allow aid in dying despite
2 the fact that it accelerates the timing of an individual patient's death, a decision which would
3 have the effect of approving the use of the consent defense for any physician who assists his
4 patient in this way. Either approach, or both, will expand and clarify the law in this respect, and
5 materially affect the rights of terminally ill people facing a difficult dying process.

6 THE STANDING OF THE PHYSICIAN PLAINTIFFS

7 A threshold issue that merits attention is the right of the physician plaintiffs to appear as
8 parties in this action. Mr. Baxter and Mr. Stoelb, as terminally ill individuals who are facing the
9 precise issues aid in dying is designed to address, have an obvious personal stake in the case.
10 The legal interests of the four doctors, however, may be less immediately apparent.

11 The physicians' right to standing in this type of situation was established by the Montana
12 Supreme Court nearly a decade ago in *Armstrong v. State*, 1999 MT 261, 296 Mont. 361, 989
13 P.2d 364. That case involved a closely analogous fact pattern in which two physicians, a
14 physician assistant and a medical clinic filed suit to challenge the constitutionality of a state
15 statute that prohibited physician assistants from performing abortions. The primary legal theory
16 advanced, the right of privacy guaranteed by Article II, Section 10 of the Montana Constitution,
17 is likewise a key issue in this case.

18 The Montana Supreme Court began its analysis of standing by noting the obvious, that
19 the plaintiffs were medical providers who performed abortions for their patients, but were not
20 themselves the people whose medical care was actually at issue. The Court thereupon defined
21 the general standing issue as follows: "Do the plaintiff health care providers have standing to
22 assert the privacy rights of their women patients?" *Armstrong*, ¶ 3. That question was then
23 refined to a slightly more specific one: "Where governmental regulation directed at health care
24 providers impacts the constitutional rights of women patients, may a health care provider litigate

1 the infringement of these rights on behalf of the women or must the women aggrieved assert their
2 own rights?” *Id.* at ¶ 8. The Court answered both questions solidly in the affirmative and
3 conferred standing on the providers. *Id.* at ¶¶ 10, 13. Substituting “terminally ill” for “women”,
4 the exact same two questions can be asked in this case as well, and the answers will be the same.

5 The *Armstrong* court pulled from its earlier decisions two criteria that must be met in
6 order to establish standing when governmental action is being challenged: “(1) the complaining
7 party must clearly allege past, present or threatened injury to a property or civil right; and (2) the
8 alleged injury must be distinguishable from the injury to the public generally, but the injury need
9 not be exclusive to the complaining party.” *Id.* at ¶ 6 (citations omitted). It then noted that this
10 second element had later been broadened to “include harm that is common to the general public
11 but that can still affect the individual taxpayer in ways that are not common to the public.” *Id.* at
12 ¶ 7.

13 The *Armstrong* court found no Montana precedent directly on point applying these tests
14 to the facts at hand. Federal law on the issue, however, was found to be supportive of standing,
15 based particularly on United States Supreme Court cases that cited the “closeness of the
16 relationship” or the “special relationship” between doctors and patients whose rights had been
17 infringed by governmental regulation; the fact that the constitutional issue was “one in which the
18 physician is intimately involved” ; and the conclusion that “[a]side from the woman herself ... the
19 physician is uniquely qualified to litigate the constitutionality of the State’s interference with, or
20 discrimination against”, the patient’s right to make her own health care decisions. *Id.* at ¶¶ 9-10
21 (citing *Singleton v. Wulff*, 428 U.S. 106, 117-18 (1976), and *Cruzan v. Director, Missouri Dept.*
22 *of Health*, 497 U.S. 261, 340 n.12 (1990)). Drawing upon these sources, the Montana Supreme
23 Court adopted the federal reasoning to hold that the health care providers in *Armstrong* had
24 standing to assert their patients’ privacy rights in the context of constitutional litigation.

1 *Armstrong*, ¶ 13.

2 The fact pattern in *Armstrong* and the U.S. Supreme Court cases cited in it involved
3 statutes that “directly interdict[ed] the normal functioning of the physician-patient relationship by
4 criminalizing certain procedures.” *Id.* at ¶ 12. That, of course, is exactly what is involved in this
5 case as well, as the Montana criminal homicide statutes, construed broadly, criminalize the acts
6 of a physician who seeks to use his medical training and judgment to provide aid in dying to
7 patients who request it. Because the physician plaintiffs in this case are “intimately involved” in
8 the aid in dying process in the same way as the doctors in *Armstrong* were involved in providing
9 abortions, they have the same right to help litigate the issues at hand on behalf of their current
10 and future patients. In allowing them to do so, the Court will benefit substantially from the
11 perspective and experience they bring to bear on the issues.

12 A second consideration also exists. By its very nature, a terminally ill patient’s need for
13 aid in dying arises only toward the end of his or her life. Unless the doctors are allowed to
14 participate in the case, it is possible the death of the two patient plaintiffs before the case reaches
15 its end could lead to a claim of mootness by the defendants. In such a situation, the Supreme
16 Court has expressed its willingness to bypass the finer points of standing and mootness in order
17 to decide constitutional issues that might otherwise evade review. *In Re Mental Health of*
18 *K.G.F.*, 2001 MT 140, ¶¶ 18-20, 306 Mont. 1, ¶¶ 18-20, 29 P.3d 485, ¶¶ 18-20. Allowing the
19 doctors to participate as parties and advocate for the rights of their current and future patients
20 will help promote that goal.

21 THE MONTANA CONSTITUTION AND ITS APPLICATION

22 This action is focused on legal rights guaranteed by the Montana Constitution. As we
23 begin the analysis of the plaintiffs’ claims, it is helpful to first examine the general nature and
24 approach of the constitution, and how courts have interpreted and applied it, before moving

1 ahead to consider each of the particular rights asserted.

2 A state may not restrict the rights guaranteed by the United States Constitution, but it can
3 expand them. In our federal system, individual states are free to grant their citizens more or
4 broader rights under their own constitutions than the rights provided by the federal counterpart.
5 *State v. Bullock*, 272 Mont. 361, 384, 901 P.2d 61, 75 (1995). Montana is one of the states that
6 has chosen to do so, and its Supreme Court has refused to “march lock-step” with the U.S.
7 Supreme Court in its constitutional jurisprudence, even when applying nearly identical
8 constitutional language. *Id.* at 382, 901 P.2d at 74.

9 The current Montana Constitution, which was ratified in 1972, has been described as one
10 of the most modern and innovative in the nation. Dallner & Manning, 65 Mont. L. Rev. at 328.
11 A convention of elected citizens, acting in a remarkably non-partisan manner, crafted a document
12 with the specific intent to expand the rights of individuals available under Montana’s 1889
13 constitution and the U.S. Constitution. *Id.* Their efforts resulted in a new Declaration of Rights
14 section (Article II) that includes no less than 17 provisions that have no parallel in the federal Bill
15 of Rights. *Id.* at 65-66.

16 The separation of powers doctrine reserves a special role for the courts in interpreting and
17 guarding the people’s rights. “[T]he courts, as final interpreters of the Constitution, have the
18 final ‘obligation to guard, enforce, and protect every right granted or secured by the
19 Constitution.’” *Columbia Falls Elementary School Dist. No. 6 v. State*, 2005 MT 69, ¶ 18, 326
20 Mont. 304, ¶ 18, 109 P.3d 257, ¶ 18 (citation omitted).

21 The supremacy of constitutional mandates is too well established
22 to require citation.... “A written constitution is not only the direct
23 and basic expression of the sovereign will, it is also the absolute
24 rule of action and decision for all departments and offices of
government with respect to all matters covered by it, and must
control as it is written until it is changed by the authority which
established it. No function of government can be discharged in

1 disregard of or in opposition to the fundamental law. The state
2 constitution is the mandate of a sovereign people to its servants and
3 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.”

4 *Id.* at ¶ 52 (Rice, J., concurring) (quoting *General Agric. Corp. v. Moore*, 166 Mont. 510, 515-16,
5 534 P.2d 859, 862-63 (1975)). “While the legislature is free to pass laws implementing
6 constitutional provisions, its interpretations and restrictions will not be elevated over the
7 protections found within the Constitution.” *In re Lacy*, 239 Mont. 321, 325, 780 P.2d 186, 188
8 (1989). The courts’ role in protecting personal rights, it is important to note, is especially
9 important in those instances where the legislature has codified the morals of the majority and
10 seeks to impose them upon citizens with a different view. *Gryczan*, 283 Mont. at 454-55, 942
11 P.2d at 125.

12 In applying the constitution’s provisions, the courts have relied upon certain bedrock
13 rules of construction. Predominant among these is that the Montana Constitution is to be given a
14 “broad and liberal interpretation”. *Bryan v. Yellowstone County Elementary School Dist. No. 2*,
15 2002 MT 264, ¶ 23, 312 Mont. 257, ¶ 23, 60 P.3d 381, ¶ 23 (relying upon *SJL of Mont. Assoc. v.*
16 *City of Billings*, 263 Mont. 142, 146, 867 P.2d 1084, 1086 (1993)). *See also Fleenor v. Darby*
17 *School Dist.*, 2006 MT 31, ¶ 8, 331 Mont. 124, ¶ 8, 128 P.3d 1048, ¶ 8. Expanding upon this
18 principle in an earlier case just three years after the adoption of the 1972 constitution, the
19 Montana Supreme Court noted:

20 ...[t]he Constitution must receive a broad and liberal interpretation
21 consistent with the purpose of the framers and the people in
22 adopting it, that it may serve the needs of a growing state; ‘the
23 proper interpretation of any constitutional provision requires us to
24 remember that it is a part of the organic law – organic not only in
 the sense that it is fundamental, but also in the sense that it is a
 living thing designed to meet the needs of a progressive society,
 amid all the detail changes to which a progressive society is
 subject.’ *State ex rel. Fenner v. Keating*, 53 Mont. 371, 163 P.

1 1156, 1158.

2 *Board of Regents of Higher Education v. Judge*, 168 Mont. 433, 443-44, 543 P.2d 1323, 1329-30
3 (1975) (quoting *Arps v. State Highway Commission*, 90 Mont. 152, 160, 300 P. 549, 553 (1931)).

4 Second, as indicated above, the rights contained in Article II of the Montana Constitution
5 are not necessarily limited to the breadth of the corresponding rights found in the United States
6 Constitution. The right to privacy set forth in Section 10 of Article II, as one example, has
7 consistently been held to be broader than the implied right of privacy found in the federal
8 constitution. *Gryczan*, 283 Mont. at 448, 942 P.2d at 121.

9 Third, the Article II rights are not required to be considered in strict isolation from each
10 other. Instead, Article II “encompasses a cohesive set of principles, carefully drafted and
11 committed to an abstract ideal of just government. It is a compact of overlapping and redundant
12 rights and guarantees.” *Armstrong*, ¶ 71 (citation omitted).

13 And finally – and of utmost significance in this case – the rights found in Article II are
14 considered “fundamental” for purposes of gauging their relative constitutional importance, and
15 determining how the competing personal and governmental interests arising out of them are to be
16 balanced. *Gryczan*, 283 Mont. at 449, 942 P.2d at 122; *Montana Env'tl. Info. Ctr. v. Dept. of*
17 *Env'tl. Quality*, 1999 MT 248, ¶ 56, 296 Mont. 207, ¶ 56, 988 P.2d 1236, ¶ 56; *Dorwart v.*
18 *Caraway*, 2002 MT 240, ¶ 96, 312 Mont. 1, ¶ 96, 58 P.3d 128, ¶ 96 (Nelson, J., concurring).

19 The Montana Supreme Court has been zealous in promoting and protecting rights found
20 in Article II of the constitution. *See, e.g., Brady v. PPL Montana*, 2008 MT 177, ¶ 16, 343 Mont.
21 405, ¶ 16, ___ P.3d ___, ¶ 16 (Gray, C.J., dissenting), in which Chief Justice Gray referred to
22 “this Court, so committed to Montana’s constitution and the development of Montana
23 constitutional law....”

24 **THE RIGHTS OF PRIVACY, INDIVIDUAL DIGNITY AND EQUAL PROTECTION**

1 Article II of the Montana Constitution contains more than a dozen separate provisions
2 that have no parallel in the U.S. Bill of Rights. Foremost among these, for purposes of this case,
3 are the rights of privacy, individual dignity and equal protection. Each represents a remarkable
4 limitation on the power of the state that goes well beyond anything found in the federal
5 Constitution.

6 **A. The Right of Privacy**

7 Article II, Section 10 states: “Right of privacy. The right of individual privacy is essential
8 to the well-being of a free society and shall not be infringed without the showing of a compelling
9 state interest.” This provision has been interpreted by the Montana Supreme Court in a series of
10 important cases over the past two decades. These decisions have taken privacy well beyond its
11 traditional meaning of protecting information from inspection and disclosure, and deeply into the
12 realm of preserving the individual’s right of self-autonomy and right to be let alone. The result
13 has been a consistent expansion of the rights of Montanans to make profoundly personal
14 decisions about their lives and how they will live them, and a corresponding limitation on the
15 power of the state to control such decisions.

16 Montana’s protection of the right of privacy is one of the broadest in the nation. *State v.*
17 *Burns*, 253 Mont. 37, 40, 830 P.2d 1318, 1320 (1992). Given its explicit nature and setting in
18 the Declaration of Rights, Montana courts have consistently held that it provides significantly
19 broader protection than the inferred right of privacy found in the penumbras of the First and
20 Fourth Amendments. *Bullock*, 272 Mont. at 385, 901 P.2d at 75; *Armstrong*, ¶ 34; *Griswold v.*
21 *Conn.*, 381 U.S. 479, 484 (1965)(holding that “specific guarantees in the Bill of Rights have
22 penumbras, formed by emanations from those guarantees that help give them life and
23 substance”).

24 Twenty-one years ago, in *Cottrill v. Cottrill Sodding Service*, the Montana Supreme Court

1 first categorized privacy as a right of the very highest constitutional order – a “fundamental right”
2 – for purposes of constitutional analysis. 229 Mont. 40, 43, 744 P.2d 895, 897 (1987). The court
3 has assiduously maintained that position ever since. *See, e.g., Gryczan*, 283 Mont. at 449, 942
4 P.2d at 122; *Armstrong*, ¶ 34.

5 In 1997, in the seminal case of *Gryczan v. State*, the Montana Supreme Court began to
6 define the “personal autonomy component” of privacy, the aspect that applies most directly to the
7 present case. *Gryczan* involved a challenge to the deviate sexual conduct section of the Montana
8 criminal code, which prohibited and punished homosexual acts even when performed by
9 consenting adults in private. In addressing the issue, the court adopted a two-part analysis. The
10 first step required it to determine whether the plaintiffs’ sexual conduct was protected by the
11 right of privacy in the first place. If it was, the next step was to decide whether the state had
12 demonstrated the required “compelling interest” to infringe the right. 283 Mont. at 447, 942 P.2d
13 at 121.

14 The *Gryczan* court applied a test borrowed from federal law known as the *Katz* test to
15 answer the question of whether the plaintiffs’ conduct was covered by the right of privacy. The
16 *Katz* test required first that the person asserting the right have a subjective expectation of privacy;
17 and second that the expectation be one that society is prepared to recognize as reasonable. *Id.* at
18 447-48, 942 P.2d at 121. “It cannot seriously be argued,” the court held, “that Respondents do
19 not have a subjective or actual expectation of privacy in their sexual activities. With few
20 exceptions not at issue here, all adults regardless of gender, fully and properly expect that their
21 consensual sexual activities will not be subject to the prying eyes of others or to governmental
22 snooping or regulation.” And society as a whole, it further found, shared this view. As a result,
23 the court concluded that the plaintiffs’ constitutional right of privacy included the right to engage
24 in private consensual sexual conduct with other adults, whatever their sexual orientation, free

1 from governmental interference or regulation. *Id.* at 450-51, 942 P.2d at 122-23. In reaching
2 these conclusions, the court noted – in language significant to the case at bar – that “it is hard to
3 imagine any activity that adults would consider more fundamental, more private and, thus, more
4 deserving of protection from governmental interference than non-commercial, consensual adult
5 sexual activity.” *Id.* at 451, 942 P.2d at 123.

6 The *Gryczan* inquiry then proceeded to the second part of the analysis, whether the state
7 had demonstrated a compelling interest to justify its intrusion into the plaintiffs’ private
8 activities. The court held it had not, citing faulty logic and misleading arguments that essentially
9 covered up for the fact that what the state was trying to do was legislate public morality. In a
10 series of statements that have resonated through the years that followed, the court explained its
11 view of the proper roles of the legislature and judiciary in regulating morality:

12 We do not deny the legislature’s public policy-making
13 power, nor do we dispute that public policy and the laws
14 implementing it may often reflect majority will and prevailing
15 notions of morality. Nevertheless, it is axiomatic that under our
16 system of laws, the parameters of the legislature’s policy-making
17 power are defined by the Constitution and that its ability to regulate
18 morals and to enact laws reflecting moral choices is not without
19 limits. As the Tennessee Court of Appeals pointed out in
20 *Campbell*:

21 With respect to regulation of morals, the police
22 power should properly be exercised to protect each
23 individual’s right to be free from interference in
24 defining and pursuing his own morality but not to
25 enforce a majority morality on persons whose
conduct does not harm others....

Campbell, 926 S.W.2d at 265-66 (quoting *Commonwealth v. Bonadio* (1980), 490 Pa. 91, 415 A.2d 47, 50).

26 We agree with the State and with amicus that it is not the
27 function of this or of any court to interpret the law on the basis of
28 what may be morally acceptable or unacceptable to society at any
29 given time. It is not the judiciary’s prerogative to condone or
30 condemn a particular lifestyle and the behaviors associated

1 therewith upon the basis of moral belief. That said, it does not
2 follow, however, that simply because the legislature has enacted as
3 law what may be a moral choice of the majority, the courts are,
4 thereafter, bound to simply acquiesce. Our Constitution does not
5 protect morality; it does, however, guarantee to all persons,
6 whether in the majority or in a minority, those certain basic
7 freedoms and rights which are set forth in the Declaration of
8 Rights, not the least of which is the right of individual privacy.
9 Regardless that majoritarian morality may be expressed in the
10 public-policy pronouncements of the legislature, it remains the
11 obligation of the courts – and of this court in particular – to
12 scrupulously support, protect and defend those rights and liberties
13 guaranteed to all persons under our Constitution.

14 283 Mont. at 454-55, 942 P.2d at 125.

15 As a parting shot, the *Gryczan* court stressed one last time its view of the supreme
16 importance of the right of privacy in modern society:

17 [I]n this State, under Montana’s Constitution, the right of
18 individual privacy – that is, the right of personal autonomy or the
19 right to be let alone – is fundamental. It is, perhaps, one of the
20 most important rights guaranteed to the citizens of this State, and
21 its separate textual protection in our Constitution reflects
22 Montanans’ historical abhorrence and distrust of excessive
23 governmental interference in their personal lives. That such
24 interference is because the majority wills it is no less pernicious.

25 *Id.* at 455, 942 P.2d at 125.

In 2002, the Montana Supreme Court renewed its commitment to the importance of
privacy and the need to protect and nurture it. *Dorwart v. Caraway*, 2002 MT 240, 312 Mont. 1,
58 P.3d 128, established that a right to monetary damages exists for violation of certain
constitutional rights, including the right of privacy. At the end of its opinion, the court issued a
rousing call to continued judicial vigilance:

The 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.

1 Invasion of individual privacy by a fellow citizen is a bad thing.
2 Invasion by the state or its agents is worse. A culture of
3 governmental disregard for the right to privacy would be worst of
4 all. To avoid that possibility in the face of sometimes short-sighted
5 popular and political sentiment will take a vigilant judiciary with a
6 full arsenal of remedies. Today, in recognition of this year's
7 thirtieth anniversary of our state constitution and those far-sighted
8 delegates who crafted it, we add the cause of action for damages to
9 that arsenal.

6 *Id.* at ¶¶ 76-77.

7 *Gryczan* was followed most immediately by *Armstrong*. As detailed above, *Armstrong*
8 addressed the state statute that prohibited physician assistants from providing abortions. It is one
9 of the key decisions on the personal autonomy component of privacy, and its language applies
10 directly to the issues now before this court.

11 *Armstrong* traced the right of privacy from the political theories of John Locke and John
12 Stuart Mill through the 1972 Montana Constitutional Convention and the later writings of
13 Ronald Dworkin. It examined the breadth of the right as it expanded from its early emphasis on
14 information gathering to its later focus on protecting citizens from legislation and government
15 practices that “interfere with the autonomy of each individual to make decisions in matters
16 generally considered private.” *Armstrong*, ¶ 33. It described the issues as reflecting Montanans’
17 “continuous and zealous protection of a core sphere of personal autonomy and dignity”; and John
18 Stuart Mill’s concept that “[o]ver himself, over his own body and mind, the individual is
19 sovereign.” *Id.* at ¶¶ 36-37. The breadth of the right of privacy, the court concluded, is varying:

20 as narrow as is necessary to protect against a specific unlawful
21 infringement of individual duty and personal autonomy by the
22 government – as in *Gryczan* – and as broad as are the State’s ever
23 innovative attempts to dictate in matters of conscience, to define
24 individual values, and to condemn those found to be socially
25 repugnant or politically unpopular.

23 *Id.* at ¶ 38.

1 The court noted that few matters more directly implicate personal autonomy and
2 individual privacy than medical decisions. What was at stake, the court ruled, was “*the right of*
3 *each individual to make medical judgments affecting her or his bodily integrity and health in*
4 *partnership with a chosen health care provider free from the interference of the government.*”
5 *Id.* at ¶ 39 (emphasis added). The importance of these medical treatment decisions for purposes
6 of the privacy analysis, it explained, stemmed from the fact that they

7 are, to an extraordinary degree, intrinsically personal. It is the
8 individual making the decision, and no one else, who lives with the
9 pain and disease. It is the individual making the decision, and no
10 one else, who must undergo or forego the treatment. And it is the
11 individual making the decision, and no one else, who, if he or she
12 survives, must live with the results of that decision. One’s health is
13 a uniquely personal possession. The decision of how to treat that
14 possession is of a no less personal nature.

15 ...The decision can either produce or eliminate physical,
16 psychological, and emotional ruin. It can destroy one’s economic
17 stability. It is, for some, the difference between a life of pain and a
18 life of pleasure. It is, for others, the difference between life and
19 death.

20 *Id.* at ¶ 54. As a result, the right to make these types of private medical judgments free from
21 governmental control was held to be a protected privacy interest under Article II, Section 10. *Id.*
22 at ¶ 39.

23 In deciding *Armstrong*, the Montana Supreme Court ruled that the Montana
24 Constitution’s privacy clause protects a woman’s right to choose an abortion and an abortion
25 provider, because it 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.” *Id.* at ¶ 75. “Just as the government has no
business in the bedrooms of consenting adults, *Gryczan*, neither does it have any business in the
treatment rooms of their health care providers” (with certain narrow exceptions not applying

1 here). *Armstrong*, ¶ 61. More generally, the court concluded that the right of privacy “requires
2 the government to leave us alone in all these most personal and private matters.” *Id.* at ¶ 72.
3 Implicit in this decision-making process is the individual woman’s “*moral right and moral*
4 *responsibility to decide ... what her pregnancy demands of her in the context of her individual*
5 *values, her beliefs as to the sanctity of life, and her personal situation.*” *Id.* at ¶ 49 (emphasis
6 added).

7 The second prong of the decision rested on the other side of the equation, the state’s
8 attempt to demonstrate that the statute in question was justified by a “compelling interest which
9 was narrowly tailored to effectuate only that compelling interest” – the required showing where a
10 fundamental right is involved. *Id.* at ¶ 34. The definition of “compelling interest” is one to be
11 made on a case-by-case basis. The court did say, however, that to be compelling the state interest
12 must represent, “at a minimum”, an interest ““of the highest order and ... not otherwise served,
13 or ‘the gravest abuse, endangering [a] paramount [government] interest.’” *Id.* at ¶ 41 n.6
14 (citations omitted). The state was in any event unable to meet that burden, the court held, as the
15 evidence it presented failed to support its contentions. When its true motivations were examined,
16 their sectarian and political underpinnings were obvious and insufficient:

17 The government can demonstrate no compelling interest for
18 legislating on the basis of any sectarian doctrine nor may the state
19 infringe individual liberty and personal autonomy because of
20 majoritarian demands to safeguard some intrinsic value unrelated
21 to the protection of the rights and interests of persons with
22 constitutional status.

23 *Id.* at ¶ 69. The court held that the statute was unconstitutional.

24 One additional point made by the *Armstrong* court merits attention. The court pointed
25 out that the state had no greater interest in a pregnancy a woman sought to terminate than one she
chose to carry to term. This is critical, the court said, because a government that has the power to

1 pass laws prohibiting abortion necessarily also has the power to pass laws *requiring* it. *Id.* at
2 ¶ 49. One is as legal or illegal as the other. “If one accepts the former,” it noted, “then
3 imposition of the latter is no more remote than a change in prevailing political ideology.” *Id.* In
4 other words, a personal decision of this nature is either none of the government’s business, or it
5 is *entirely* its business, for better or for worse.

6 *Armstrong* demonstrates the constitution’s strong presumption in favor of the individual’s
7 right to privacy and autonomy over his or her physical being, especially where medical
8 judgments and procedures are involved. Rather than characterize an act such as terminating a
9 pregnancy as something a woman may not do unless the state affirmatively gives her that right,
10 the court recognizes the power in her hands and places the burden on the state to show a
11 compelling interest justifying its interference or prohibition.

12 The parallels between *Armstrong* and the case at bar are striking. Once the plaintiffs’
13 affidavits are digested – both patients’ and doctors’ – the patients’ right to autonomy in making
14 the decisions that only they can rightfully make in their difficult circumstances becomes clear.
15 Given the forceful and sweeping language cited above, it is difficult to imagine the Supreme
16 Court *not* recognizing the right of mentally competent, terminally ill patients to exercise control
17 over their lives and bodies in the same way as the pregnant woman in *Armstrong*. Like a woman
18 faced with the difficult decision of whether to terminate a pregnancy, the plaintiffs have the same
19 “moral right and moral responsibility” to determine where the ongoing pain and debilitation of
20 their illnesses will take them, acting “in the context of [their] individual values, [their] beliefs as
21 to the sanctity of life, and [their] personal situation.” *Id.* Indeed, the fact that when a terminally
22 ill patient makes a decision about his body no one else’s body is simultaneously affected
23 (whether that of another human being or only a potential human being), means that the issue is
24 significantly less complex than the question of a woman’s right to choose, where the interests of

1 a potential second life are necessarily implicated.

2 The court in *Armstrong* could find no compelling state interest to justify infringing on a
3 woman's decision to terminate her pregnancy after consultation with her chosen medical
4 provider. Fidelity to precedent leads to the conclusion that the court would be equally unlikely to
5 find a compelling state interest in the cases of Mr. Baxter or Mr. Stoelb, or any of the current or
6 future patients of the physician plaintiffs, as they decide whether to exercise their right to aid in
7 dying. The Supreme Court's decision in *Armstrong* makes it clear that neither majoritarian nor
8 sectarian considerations may justify state intervention under either set of circumstances.

9 The court's warning concerning the double-edged danger of a compelling state interest
10 qualifying to halt an abortion applies with equally chilling implications to aid in dying. As the
11 court stated in *Armstrong*, either the state has no interest allowing it to interfere in a decision
12 covered by the right of privacy, or if it has an interest the interest can be used to compel choice in
13 either direction. If the state can act to prohibit aid in dying, therefore, it would presumably have
14 an equal power to *compel* aid in dying should the political forces reverse themselves at some
15 point and it desires to do so. Such a right, of course, would be repugnant and unimaginable in a
16 free society. The lesson, therefore, is that no such right should be found to exist to overcome the
17 privacy interests in either situation.

18 Interestingly, one of the Montana Supreme Court's most recent cases addressing the right
19 to privacy involved an individual's right to die, albeit indirectly. In *State v. Dawson*, 2006 MT
20 69, 331 Mont. 444, 133 P.3d 236, the Supreme Court held that a prisoner facing the death penalty
21 had the right to withdraw his appeal as long as he was mentally competent. He also had the right
22 to refuse, on the grounds of privacy, additional medical examinations designed to test his mental
23 status and determine whether he might be incompetent to withdraw his appeal. *Dawson* does not
24 address an individual's entitlement to aid in dying in the context of the privacy clause. It does,

1 however, emphasize the court's unwavering respect for the right of individuals to exercise
2 autonomy over their own bodies, even where that exercise makes death certain.

3 One final case in the privacy realm is worth discussing, as it was decided by this Court.
4 *Wicklund v. State*, No. ADV 97-671, 1998 Mont. Dist. LEXIS 227 (1st Judicial Dist. Ct., Lewis &
5 Clark County, Feb. 13, 1998). *Wicklund* involved a challenge to the constitutionality of the
6 Montana Parental Notice of Abortion Act. The plaintiffs, all of whom were physicians or other
7 medical providers, contended that requiring pregnant girls to give advance notice to their parents
8 or guardians before obtaining an abortion violated their state constitutional right of privacy.

9 Judge McCarter, who presided over the case, began by recognizing that the Montana
10 Constitution expressly protects the personal autonomy form of privacy as a fundamental right,
11 given its placement in Article II. She also noted that Montana's right to privacy is one of the
12 strongest in the nation, and more protective than the corresponding right originating in the U.S.
13 Constitution. With those principles as a backdrop, she quoted *Mobile v. Bolden*, 446 U.S. 55, 76
14 (1980) for the proposition that if a law "impinges upon a fundamental right explicitly or
15 implicitly secured by the Constitution [it] is presumptively unconstitutional." *Wicklund*, 1998
16 Mont. Dist. LEXIS 227, at *8.

17 Reviewing the act's provisions, Judge McCarter found that it clearly burdened and
18 infringed upon the minors' right to privacy. She then examined the state's purported justification
19 for the statute, which she found lacking. Relying upon *Gryczan*, Judge McCarter ruled that in
20 order to withstand the required strict scrutiny, "the legislation must be justified by a compelling
21 state interest and be narrowly tailored to effectuate only that compelling interest." *Wicklund*,
22 1998 Mont. Dist. LEXIS 227, at *10. She concluded that the state had failed to satisfy the
23 demands of strict scrutiny and accordingly issued a preliminary injunction enjoined the state from
24 enforcing the act pending a further hearing.

1 A copy of Judge McCarter's February 13, 1998 order in *Wicklund* is attached to this brief
2 for the Court's reference. Plaintiffs respectfully submit that the methodology followed in it, if
3 applied to the case at bar, will yield the exact same result. In both cases, the claimants'
4 fundamental interests in the control of their own bodies, and the right "to make medical
5 judgments affecting her or his bodily integrity and health in partnership with a chosen health care
6 provider free from the interference of the government," is protected under Article II, Section 10
7 of the Montana Constitution. *Armstrong*, ¶ 39. The statutes involved must therefore give way.

8 **B. The Right of Individual Dignity**

9 As touched upon in an earlier section of this brief, the Supreme Court has emphasized the
10 interactive and overlapping nature of a number of rights contained in Article II. *Armstrong*, ¶ 71.
11 One of the rights that is often found to overlap and share meaning with privacy is the right of
12 individual dignity.

13 Article II, Section 4 reads as follows:

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

20 The Montana Constitution's right of individual dignity has no counterpart in the federal
21 Constitution, whether express or inferred. It is an emerging doctrine whose precise meaning is
22 less evolved than the right to privacy, and fewer cases have applied it to date. It is clear from
23 those that have, however, that individual dignity is a fundamental, freestanding right that, like the
24 right of privacy, triggers the highest possible level of scrutiny and protection. *Armstrong*, ¶ 72;
25 *Walker v. State*, 2003 MT 134, ¶ 74, 316 Mont. 103, ¶ 74, 68 P.3d 872, ¶ 74. In addition, while
the right to privacy, by its express terms, may be overcome by the showing of a compelling state

1 interest, the right to dignity is described as “inviolable”. “Inviolable”, according to Black’s Law
2 Dictionary, means that the right is “incapable of being violated.” *Snetsinger v. Montana*
3 *University System*, 2004 MT 390, ¶ 75, 325 Mont. 148, ¶ 75, 104 P.3d 445, ¶ 75 (2004). Given
4 that definition, it appears that once a person’s right to dignity has been abridged, the balancing
5 test that typically determines the defendant’s culpability in other types of constitutional violations
6 does not apply, and liability is absolute.

7 Dignity has been defined for constitutional purposes in two different Montana Supreme
8 Court cases. *Walker v. State*, a 2003 decision, involved a claim of severe mistreatment of a
9 mentally ill prisoner at Montana State Prison. In finding that the plaintiff’s constitutional right of
10 dignity had been violated, the Supreme Court described protecting dignity in terms of treating the
11 prisoner in a way that did not degrade his humanity, deprive him of basic human needs, or violate
12 his intrinsic worth. *Walker*, ¶ 81.

13 The second case, *Armstrong v. State*, holds that respect for the dignity of the individual
14 “demands that people have for themselves the moral right and moral responsibility to confront
15 the most fundamental questions about the meaning and value of their own lives and the intrinsic
16 value of life in general, answering to their own consciences and convictions.” *Armstrong*, ¶ 72;
17 *see also In re Mental Health of K.G.F.*, ¶ 45.

18 These definitions could not be a more perfect fit for the rights plaintiffs are seeking to
19 vindicate in this case. As indicated in their respective affidavits, Mr. Baxter and Mr. Stoelb – as
20 well as the patients of the four physician plaintiffs as they reach the same point in their respective
21 journeys – are terminally ill, facing the end of their lives with no hope of cure or improvement,
22 and in a position where they must very rapidly come to grips with a choice of extraordinary
23 dimensions. As their pain, discomfort, physical deterioration and loss of functioning increase,
24 they recognize they may reach a point at which the residual benefits of living are more than

1 outweighed by the sheer misery of the physical experience. If their doctors are unable to relieve
2 their symptoms, they will have no option but to choose among the only three possibilities
3 available to them at that point: prolonged and perhaps unbearable pain, agitation and discomfort
4 continuing to the moment of death; terminal sedation, in which they will be medicated into
5 unconsciousness and die without control or awareness; or aid in dying, the alternative which
6 allows them a peaceful, humane, dignified death at a time and circumstances of their choosing.
7 Knowing there is that choice, knowing they can bring an end to the suffering if they so choose,
8 and knowing that it is within their power to affect their own destiny, will have a tremendous
9 benefit to their peace of mind. In making this decision – if it becomes legally available to them –
10 they will draw on their personal views of life, death and suffering, consult their consciences,
11 loved ones and spiritual and medical advisors, and take comfort that matters at that point are in
12 their own hands. That, in a nutshell, is what aid in dying is designed to do: to enhance the
13 terminally ill person’s dignity and autonomy at the end of life. To deny the plaintiffs that right
14 through the coercive effect of the criminal law is to deny them their constitutional right to dignity
15 under Article II, Section 4.

16 **C. Equal Protection of the Law**

17 The equal protection clause of the Montana Constitution is found in Article II, Section 4,
18 a portion of which reads: “No person shall be denied the equal protection of the laws.” Because
19 this right, like the others cited above, is part of the Declaration of Rights, it is considered a
20 fundamental right for purposes of constitutional analysis. It is applied by Montana courts so as to
21 provide more individual protection than given by the federal equal protection clause. *Bean v.*
22 *State*, 2008 MT 67, ¶ 11, 342 Mont. 85, ¶ 11, 179 P.3d 524, ¶ 11.

23 The basic rule of equal protection is that “persons similarly situated with respect to a
24 legitimate governmental purpose of the law must receive like treatment.” *Hoberson v. U.S. Dept.*

1 *Of Agriculture*, 2007 MT 293, ¶ 19, 339 Mont. 519, ¶ 19, 171 P.3d 715, ¶ 19.

2 Under the Montana Rights of the Terminally Ill Act, it is legal and does not constitute a
3 suicide or homicide for any purpose for medical care providers to withhold life-sustaining
4 treatment and procedures, as well as withdraw them once they are in place, under certain
5 specified circumstances. Sections 50-9-205 and 50-10-104, MCA. A terminally ill Montanan
6 who is suffering extreme pain and discomfort at the end of life and whose medical treatment
7 involves life-sustaining mechanical or other forms of intervention, therefore, can direct his
8 physician to remove the interventions so he can precipitate death and avoid continued suffering.
9 The physician is immune from prosecution for providing that assistance. Section 50-9-204,
10 MCA. A terminally ill Montanan whose condition is equally severe but does not happen to
11 involve these types of interventions, however, and who may be experiencing the same degree of
12 pain and discomfort and have the same desire to hasten death, is not allowed to obtain assistance
13 for that purpose from his physician without exposing the physician to potential criminal
14 prosecution. The result is that the first patient receives help in ending his suffering and achieving
15 a peaceful death, but the second is unable to do so because his physician is deterred from helping
16 him by the force of the law. The different treatment accorded by the law to patients in these two
17 situations constitutes a violation of equal protection.

18
19 CONCLUSION

20 A number of dying Montanans, even with excellent pain and symptom management, will
21 confront a prolonged dying process marked by extreme suffering and deterioration. Some of
22 these patients, based on their values and beliefs, will determine that hastening their impending
23 death is their best course. Two of these patients, and the doctors for many others, are now before
24 this Court to ask that the choice of aid in dying be made available to them. Recognizing their

1 right to do so is consistent with tradition, precedent, and the letter and spirit of the Montana
2 Constitution.

3 The explicit guarantees of privacy, individual dignity and equal protection in the Montana
4 Constitution, which have been assiduously guarded by the state's courts, have provided broad
5 protection for life-shaping decisions by Montanans. The choice of aid in dying falls well within
6 the sphere of individual decision-making protected by the Montana Supreme Court. This Court
7 should recognize the right of mentally competent, terminally ill Montanans to choose aid in dying
8 and grant summary judgment for plaintiffs on their claims.

9 DATED this 1st day of July, 2008.

10 CONNELL LAW FIRM

11
12 By: 
13 Mark S. Connell

14 Kathryn Tucker, Esq.
15 Compassion & Choices

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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 individual listed below, via the following means:

Jennifer Anders
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- U.S. Mail
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Dated this 1ST day of July, 2008.


Marie Hartig, Legal Assistant