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URGENT: *PALMA* WRIT REQUESTED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT, DIVISION ONE

CHRISTY LYNNE DONOROVICH-ODONNELL and LYNETTE CAROL CEDERQUIST,
Petitioners,

v.

SUPERIOR COURT OF CALIFORNIA FOR THE COUNTY OF SAN DIEGO,
Respondent,

KAMALA D. HARRIS, in her official capacity as the Attorney General of the State of California, and JACKIE LACEY, in her official capacity as the District Attorney for the County of Los Angeles,
Real Parties in Interest.

SUPERIOR COURT OF CALIFORNIA, COUNTY OF SAN DIEGO • CASE NO. 37-2015-00016404
GREGORY W. POLLACK, JUDGE • DEPARTMENT 71 • TELEPHONE NO. (619) 450-5007

PETITION FOR WRIT OF MANDATE AND/OR PROHIBITION OR OTHER APPROPRIATE RELIEF; MEMORANDUM OF POINTS AND AUTHORITIES

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TO BE FILED IN THE COURT OF APPEAL **APP-008**

COURT OF APPEAL, Fourth **APPELLATE DISTRICT, DIVISION** One	Court of Appeal Case Number: D_____
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APPELLANT/PETITIONER: Christy Lynne Donorovich-Odonnell, et al. RESPONDENT / REAL PARTY IN INTEREST: Superior Court of the State of California/Kamala D. Harris, et al.	

CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

(Check one): ☒ INITIAL CERTIFICATE ☐ SUPPLEMENTAL CERTIFICATE

Notice: Please read rules 8.208 and 8.488 before completing this form. You may use this form for the initial certificate in an appeal when you file your brief or a prebriefing motion, application, or opposition to such a motion or application in the Court of Appeal, and when you file a petition for an extraordinary writ. You may also use this form as a supplemental certificate when you learn of changed or additional information that must be disclosed.

1. This form is being submitted on behalf of the following party *(name)*: Christy Lynne Donorovich-Odonnell and Lynette Carol Cederquist

2. a. ☒ There are no interested entities or persons that must be listed in this certificate under rule 8.208.
   b. ☐ Interested entities or persons required to be listed under rule 8.208 are as follows:

Full name of interested entity or person	Nature of interest *(Explain):*
(1)	
(2)	
(3)	
(4)	
(5)	

☐ Continued on attachment 2

The undersigned certifies that the above-listed persons or entities (corporations, partnerships, firms, or any other association, but not including government entities or their agencies) have either (1) an ownership interest of 10 percent or more in the party if it is an entity; or (2) a financial or other interest in the outcome of the proceeding that the justices should consider in determining whether to disqualify themselves, as defined in rule 8.208(e)(2).

Date: August 27, 2015

Jon B. Eisenberg ▶ Jon B. Eisenberg

(TYPE OR PRINT NAME) (SIGNATURE OF PARTY OR ATTORNEY)

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IN THE COURT OF APPEAL
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Real Parties in Interest.

PETITION FOR WRIT OF MANDATE AND/OR PROHIBITION OR OTHER APPROPRIATE RELIEF

INTRODUCTION: WHY A WRIT SHOULD ISSUE

Christy Lynne Donorovich-Odonnell has terminal cancer. She is dying—painfully. Her death will occur, to a reasonable degree of medical certainty, just a few months from now. As she nears death, her pain will become more excruciating and very likely incapable of

alleviation with palliative care. Christy fears an excruciatingly painful and prolonged death.

If Christy's pain becomes unbearable, she will want what is commonly known as physician "aid-in-dying"—the medical practice of providing a mentally competent, terminally ill adult with a prescription for medication that the patient may choose to self-administer in order to bring about a peaceful death if the patient ever finds his or her suffering from the dying process to be intolerable.

Dr. Lynette Carol Cederquist is prepared to write patients (including Christy) a prescription for barbiturates, knowing that the patient might (or might not) fill the prescription and self-administer the medication in a fatal dose. But Dr. Cederquist will not currently write such a prescription because if she does, she will surely be prosecuted for purportedly violating California's statutory prohibition against aiding or abetting a suicide, Penal Code section 401, which states: "Every person who deliberately aids, or advises, or encourages another to commit suicide, is guilty of a felony." Because the Attorney General of the State of California interprets section 401 as prohibiting aid-in-dying, Christy is presently unable to choose a peaceful death over one that is excruciatingly protracted and painful.

The present writ petition seeks to enable Dr. Cederquist to provide, and Christy to receive, aid-in-dying, by resolving a legal question of first impression in California: whether physicians can be held liable for violating section 401 if they write a prescription for a mentally competent, terminally ill adult suffering from

intractable pain—knowing that the patient might (or might never) decide to fill the prescription and self-administer a fatal dose—but do not directly participate in the patient's ultimate decision whether to fill the prescription and ingest the medication.

This writ petition breaks new ground by demonstrating that section 401 cannot apply to aid-in-dying because the statute was never intended to penalize those who just *furnish the means* for dying. This conclusion is compelled by a fact of which no previous California court seems to have been made aware: In 1874, when the California Legislature enacted a provision of a model penal code making it a crime to *aid or abet* a suicide, the Legislature chose *not* to enact a separate provision of that model code making it a crime to *furnish a weapon or drug* for another person's use in committing suicide. Under established principles of statutory construction, this is strong evidence that in rejecting that separate model provision, the Legislature intended *not* to criminalize the mere act of furnishing a weapon or drug for use in committing suicide.

Moreover, California law requires *direct participation* in the events leading to death for there to be a violation of section 401. The statute does not apply to aid-in-dying, because such conduct is only *indirect* participation.

When section 401 was enacted in 1874, a doctor's prescription was not even needed to obtain drugs. Doctors as well as apothecaries freely sold drugs of all sorts (including narcotics) directly to the public. At that time, if a physician had only written a patient a prescription for medication to be furnished by a third party, California law would have treated the third party's

furnishing of the medication as an intervening event, making the physician's writing of the prescription too remote for imposition of liability.

For each of these reasons, when the California Legislature adopted section 401 in 1874, the Legislature could not have possibly intended that a physician might violate that statute by writing a prescription to provide aid-in-dying for a competent adult who independently makes the final decision whether to ingest the medication. At the very least, section 401—especially when viewed in light of legislative history that has not previously been brought to the attention of any California court—is reasonably susceptible of two meanings, one of which makes the statute inapplicable to aid-in-dying. Consequently, because section 401 is at least ambiguous as to its application to aid-in-dying, the rule of lenity requires that the ambiguity be resolved against such application.

This proceeding also presents a constitutional issue of first impression in California: whether section 401, if construed as prohibiting aid-in-dying, violates the fundamental right to privacy guaranteed by the California Constitution, which the California Supreme Court has held applies to personal "autonomy privacy." But the constitutional issue need not be addressed if this court concludes that section 401 cannot be so construed—for it is well-settled that statutes should be construed, whenever possible, to avoid serious constitutional questions.

This constitutional issue *is* profoundly serious, given the substantial body of precedent protecting personal autonomy privacy. California courts have held that the California Constitution's

privacy clause protects two privacy rights that are closely analogous to the right to aid-in-dying: the right of women to reproductive choice; and the right of persons who are terminally ill, or are suffering from a devastating health condition that has made life unendurable, to bring an end to life by refusing medical treatment, including artificial nutrition and hydration. Those courts have concluded that, in those circumstances, (1) the right of personal autonomy privacy may be infringed only where a compelling state interest exists, and (2) no such interest—such as the interest in protecting life and preventing suicide—overcomes the constitutional right of personal autonomy privacy. This petition shows why those courts' decisions logically apply with at least equal force to aid-in-dying for Christy.

This writ petition is filed because the imminence of Christy's death makes review by appeal an inadequate remedy for her. Further, given the imminence of Christy's death, this petition seeks a peremptory writ in the first instance (*Palma v. U.S. Industrial Fasteners, Inc.* (1984) 36 Cal.3d 171, 177-178 (*Palma*)) on the ground "there is an unusual urgency requiring acceleration of the normal process" of writ review (*Ng v. Superior Court* (1992) 4 Cal.4th 29, 35 (*Ng*)). Absent review by a peremptory writ in the first instance, Christy will, to a reasonable degree of medical certainty, die before this court will be able to grant her effective relief.

Before turning to these profoundly important issues, we acknowledge that the questions raised in this proceeding could—and should—be addressed legislatively. Indeed, as of this writing,

proposed legislation is pending in the Legislature which, if enacted, would address these questions by regulating aid-in-dying in a manner similar to legislation currently in effect in Oregon and Washington. (See Exh. 11, pp. 103-112.) But the proposed legislation faces an uncertain fate, and in any event its enactment and effectiveness is highly unlikely to come quickly enough to meet Christy's immediate needs.

More fundamentally, recognition of Christy's right to end her suffering in a peaceful and pain-free manner at a time of her choosing is in no way incompatible with the Legislature's important role in addressing these issues. The current proposed legislation is exceedingly detailed and contains numerous protections against misuse. Judicial recognition that California's constitutional right of personal autonomy privacy applies to aid-in-dying is likely to stimulate—and will certainly not deter—careful legislative attention to the need for appropriate regulation. In this field, as is so often the case, the judicial and political branches are partners—not adversaries—in the guarantee of fundamental individual rights and the protection against their abuse.

PETITION FOR WRIT OF MANDATE AND/OR PROHIBITION OR OTHER APPROPRIATE RELIEF

Petitioners Christy Lynne Donorovich-Odonnell and Lynette Carol Cederquist, M.D., allege as follows:

Petitioners, respondents, and real parties in interest

1. Petitioners Christy Lynne Donorovich-Odonnell (hereafter Christy) and Lynette Carol Cederquist, M.D. (hereafter Dr. Cederquist) are two of the plaintiffs in *Donorovich-Odonnell v. Harris*, San Diego Superior Court Case No. 37-2015-00016404-CU-CR-CTL, in which a judgment for defendants was entered on August 10, 2015. Two of the defendants in that action, Kamala D. Harris (in her official capacity as the Attorney General of the State of California) and Jackie Lacey (in her official capacity as the District Attorney for the County of Los Angeles), are named herein as the real parties in interest. The respondent is the Superior Court of the State of California for the County of San Diego.

Authenticity of exhibits

2. The exhibits accompanying this petition are true copies of original documents on file with respondent court and the original reporter's transcript of the hearing in respondent court. The exhibits are incorporated herein by reference as though fully set

forth in this petition. The exhibits are paginated consecutively, and page references in this petition are to the consecutive pagination.

Timeliness of the petition

3. Because of the urgent nature of this writ petition, it is filed just 17 days after entry of the challenged judgment. Its filing is timely.

Chronology of pertinent events

4. Christy is an attorney who formerly served as a detective with the Los Angeles Police Department. (Exh. 18, pp. 262-263.) She has been diagnosed with stage IV adenocarcinoma of the left lung, which has metastasized to her brain, liver, spine, and rib. In May of this year, her doctors told her that she had less than six months to live. (Exh. 1, p. 6; exh. 2, pp. 19-20.) Half of that time has now passed, and it is highly unlikely she will survive beyond November. Christy is morphine intolerant and cannot benefit from many of the most common and effective forms of pain management. (Exh. 1, p. 6.) Dr. Cederquist is willing to write patients like Christy a prescription for barbiturates—knowing that the patient might self-administer the medication in a fatal dose—upon this court's determination that her doing so will not expose her to prosecution for violating Penal Code section 401. (Exh. 1, p. 7.)

5. On May 15, 2015, Christy and Dr. Cederquist, along with Elizabeth Antoinette Melanie Gobertina Wallner and Wolf

Alexander Breiman, who are also suffering from cancer, filed a complaint in San Diego Superior Court against Harris, Lacey, and the district attorneys of San Diego County and Sacramento County, seeking declaratory and injunctive relief establishing (1) that section 401 does not apply to physicians who participate in aid-in-dying for a terminally ill, competent adult, or (2) alternatively, that section 401 as applied to physicians providing such care violates the California Constitution. (Exh. 1, pp. 5-16.) Because of Christy's dire condition, plaintiffs filed an application for preference and trial setting. (Exh. 2, pp. 17-24.)

6. Each of the defendants demurred to the complaint. (Exhs. 6-10, pp. 49-98.) The superior court expedited the hearing on the demurrers. (Exh. 5, p. 48-A.) On July 24, 2015, the superior court sustained the demurrers without leave to amend. (Exhs. 16 & 17, pp. 204-223.) On August 10, 2015, the court entered judgment for the defendants. (Exh. 20, pp. 274-275.)

7. On August 20, 2015, all four plaintiffs filed a notice of appeal from the judgment. (Exh. 21, p. 301-302.) Christy, however, will surely die before the normal process of review by appeal has run its course.

Inadequacy of remedy by appeal

8. Although an appeal lies (and has been taken) from the judgment entered on August 10, 2015, review by appeal is an inadequate remedy for Christy, given the imminence of her death. In the normal course of review by appeal—including briefing on the

usual schedule of 40 days for the appellants' opening brief, 30 days for the respondents' brief, and 20 days for the appellants' reply brief (Cal. Rules of Court, rule 8.212(a)), oral argument, the 90-day period for this court's rendition of judgment (Cal. Const., art. VI, § 19), and then the 30-day period for finality of the court's decision (Cal. Rules of Court, rule 8.264(b)(1))—Christy will likely die several months before the judgment on appeal is final. And even if briefing, oral argument, and the decision on appeal were accelerated to a pace comparable to writ proceedings, this court still would be powerless to shorten the 30-day finality period for decision by appeal. In contrast, on writ review the court can order early or immediate finality "[i]f necessary to prevent mootness or frustration of the relief granted or to otherwise promote the interests of justice." (Cal. Rules of Court, rule 8.490(b)(2)(A).) For Christy, that 30-day finality period is the difference between a peaceful passing or a death accompanied by horrific suffering, the death Christy prefers or the death she fears, effective judicial relief or mootness.

9. Even where an appeal lies from a final judgment, review may nevertheless proceed by extraordinary writ petition where, as here, there is a "special reason" why review by appeal "is rendered inadequate by the particular circumstances of [the] case." (*Phelan v. Superior Court* (1950) 35 Cal.2d 363, 370; see, e.g., *Lungren v. Superior Court* (1996) 48 Cal.App.4th 435, 438 [writ review granted where order compelling revision of ballot initiative's title and label was appealable but remedy by appeal was inadequate because ballot's printing had to commence imminently]; *Zenide v. Superior Court* (1994) 22 Cal.App.4th 1287, 1293 [writ review

granted where child custody order in mother's favor was appealable but remedy by appeal was inadequate because children had not had significant contact with their mother for three years].) Here, the imminence of Christy's death makes review by appeal an inadequate remedy for her.

Request for peremptory writ in the first instance

10. This petition seeks a peremptory writ in the first instance, in lieu of the issuance of an alternative writ or order to show cause, pursuant to *Palma, supra,* 36 Cal.3d at pages 177-178. The imminence of Christy's death constitutes "an unusual urgency requiring acceleration of the normal process" of writ review. (*Ng, supra,* 4 Cal.4th at p. 35.)

11. Because of the urgent need for expeditious action in this proceeding, this court may wish to exercise its discretion to issue a preemptory writ in the first instance without hearing oral argument. (See *Lewis v. Superior Court* (1999) 19 Cal.4th 1232, 1236-1237.) Counsel for petitioners, however, are willing and prepared to present oral argument on short notice should the court wish to hear oral argument.

Bases for relief

12. When enacting Penal Code section 401 in 1874, the Legislature cannot have intended to criminalize conduct like aid-in-dying, because the Legislature chose to enact a provision of a model

penal code making it a crime to *aid or abet* a suicide, but chose *not* to enact a separate model code provision making it a crime to *furnish a weapon or drug* for another person to use in committing suicide. For there to be a violation of section 401, California law requires *direct participation* in the events leading to death. The statute cannot apply to physician aid-in-dying because the physician's conduct is only *indirect* participation. Further, when section 401 was enacted, if a physician had merely written a patient a prescription for medication to be furnished by a third party, California law would have treated the third party's furnishing of the medication as an intervening event, making the physician's writing of the prescription too remote for imposition of liability.

13. Alternatively, to the extent section 401 might be construed as prohibiting the physician from acceding to a competent, terminally ill adult's voluntary request for the prescription, the statute violates the California Constitution as applied to the physician and patient.

PRAYER

Petitioners pray that this court:

1. Issue a peremptory writ in the first instance directing respondent superior court to vacate its judgment and render a new and different judgment granting declaratory and injunctive relief as prayed in petitioners' complaint;

2. Award petitioners their costs pursuant to rule 8.490 of the California Rules of Court; and

3. Grant such other relief as may be just and proper.

August 27, 2015

Respectfully submitted,

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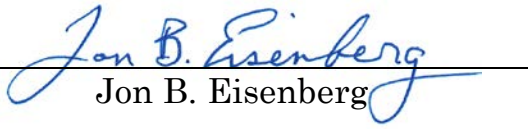
By: 
Jon B. Eisenberg

Attorneys for Petitioners
CHRISTY LYNNE DONOROVICH-ODONNELL and LYNETTE CAROL CEDERQUIST

VERIFICATION

I, John Kappos, declare as follows:

I am one of the attorneys for petitioners Christy Lynne Donorovich-Odonnell and Lynette Carol Cederquist, M.D. I have read the foregoing Petition for Writ of Mandate and/or Prohibition or Other Appropriate Relief and know its contents. The facts alleged in the petition are within my own knowledge, and I know these facts to be true. Because of my familiarity with the relevant facts pertaining to the trial court proceedings, I, rather than petitioners, verify this petition.

I declare under penalty of perjury that the foregoing is true and correct and that this verification was executed on August 27, 2015 in Newport Beach, California.

/s/ John Kappos
John Kappos

MEMORANDUM OF POINTS AND AUTHORITIES

I. PENAL CODE SECTION 401 DOES NOT APPLY TO PHYSICIAN AID-IN-DYING.

A. Section 401 was never intended to penalize persons who just furnish the means for another person to use in acting on an independent decision to die.

1. In 1874, when the California Legislature enacted a provision of the model 1865 Field Penal Code making it a crime to *aid or abet* a suicide, the Legislature chose *not* to enact a separate provision of that code making it a crime to *furnish the means* for committing suicide.

Penal Code section 401 was enacted in 1874 as part of a comprehensive overhaul of California's statutes by the 1870-1874 Code Commission. Based on the commission's work, the Legislature adopted a new Penal Code in 1872 and then amended it during the Legislature's 1873-1874 session. (See Kleps, *The Revision and Codification of California Statutes 1849-1953*, 42 Cal. L.Rev. 766, 772-779 (1954) (hereafter Kleps).) Section 401, which appeared in the 1873-1874 amendments (Code Amends. 1873-1874, ch. 614, § 34, p. 433), was originally designated as Penal Code section 400 but was subsequently renumbered as section 401 in 1905 (Stats. 1905, ch. 573, § 11, p. 770).

The language of Penal Code section 401—"deliberately aids, or advises, or encourages another to commit suicide"—is reasonably susceptible to multiple interpretations. On its face, the statute may or may not require that the defendant specifically intended a suicide, that the defendant actively and directly participated in the suicide, or that the victim actually committed an act of suicide. The courts have interpreted the statute to require all three (*In re Ryan N.* (2001) 92 Cal.App.4th 1359, 1375 (*Ryan N.*), but other ambiguities remain unresolved.

One unresolved question, the one presented here, is whether the statute applies to a physician who writes a prescription for a terminally ill patient—knowing that the patient might independently decide to fill the prescription and self-administer a fatal dose—but does not personally furnish the medication or participate in the patient's independent decision. The plain language of section 401 does not answer that question. This court therefore may consider section 401's legislative history as an aid to interpretation. (*People v. Cornett* (2012) 53 Cal.4th 1261, 1265.) And where, as here, an ambiguous statute traces back to California's 1872 codes, it should be interpreted in accordance with its legislative history and what the legislators intended *at the time of enactment*. (See *Fluor Corp. v. Superior Court* (Aug. 20, 2015, S205889) ___ Cal.App.4th ___ [2015 WL 4938295, at pp. *17, *26, *27] (*Fluor*) [rejecting party's argument that "with regard to statutes tracing back to the original Civil Code of 1872, the common law is expected to evolve and differ from—and, as appropriate, even control over—those original Civil Code provisions"].)

The 1872 Penal Code, including its 1873-1874 amendments, was modeled on the 1865 proposed Penal Code of the State of New York, which was championed by David Dudley Field and is sometimes referred to as the "Field Penal Code." (See Marzen et al., *Suicide: A Constitutional Right?* 24 Duq. L.Rev. 1, 76 (1985).) The Field Penal Code subsequently served as a model for criminal codes adopted in a number of other states during the late 19th and early 20th centuries, although it was not adopted in New York until 1881. (See *Washington v. Glucksberg* (1997) 521 U.S. 702, 715 [117 S.Ct. 2258, 138 L.Ed.2d 772] (*Glucksberg*).)

The Field Penal Code contained two separate provisions making "aiding suicide" a crime. The first provision was section 230, which stated: "Every person who willfully, in any manner, *advises, encourages, abets or assists another person in taking his own life*, is guilty of aiding suicide." (Commissioners of the Code, The Penal Code of the State of New York (1865) § 230, p. 80, emphasis added.) The second provision was section 231, which stated: "Every person who willfully *furnishes another person with any deadly weapon or poisonous drug*, knowing that such person intends to use such weapon or drug in taking his own life, is guilty of aiding suicide, if such person thereafter employs such instrument or drug in taking his own life." (*Id.,* § 231, emphasis added.)

Apparently, this drafting history has never been called to the attention of a California court. But it shows that, in the view of the Field Penal Code's drafters, section 230's prohibition against *advising, encouraging, abetting or assisting* a suicide was not to be construed as encompassing *furnishing the means* for committing

suicide—for, if section 230 had been so construed, the language of section 231 would have been mere surplusage. (See, e.g., *Arnett v. Dal Cielo* (1996) 14 Cal.4th 4, 22 [courts should avoid a statutory construction that makes any word surplusage].) A separate provision was deemed necessary to criminalize the furnishing of the means of suicide.[1]

During its 1873-1874 session, the California Legislature enacted a version of Field Penal Code section 230, which the Code Commission slightly modified as follows: "Every person who deliberately *aids, or advises, or encourages another to commit suicide*, is guilty of a felony." (Pen. Code, § 401, emphasis added.) The phrase "aids, or advises, or encourages another" in Penal Code section 401 is essentially the same as the phrase "advises, encourages, aids or abets another" in Field Penal Code section 230.

But, significantly, the 1873-1874 California Legislature chose *not* to enact a version of Field Penal Code section 231 criminalizing the act of *furnishing another person with the means* to commit

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[1] The first judicial decision to draw the distinction between *aiding or abetting* and *furnishing the means* seems to have been *Blackburn v. State* (1872) 23 Ohio St. 146, 163, which commented that one could commit murder via administration of poison by either "furnish[ing] the poison to the deceased for the purpose and with the intent that she should with it commit suicide" or by being "present at the taking thereof by the deceased" and "participating, by persuasion, force, threats, or otherwise, in the taking thereof . . . ." Given that the Field Penal Code was published seven years earlier, we can reasonably surmise that it was *Blackburn*'s source.

suicide.[2] Evidently this was no oversight. The Code Commission's report to the Legislature explained that "many definitions taken from the Proposed Codes of New York, which had never been enacted there, did not stand the test of examination," and thus the commissioners "proposed to change many of these provisions." (Field et al., Report of the Commissioners to Examine the Codes (1873) pp. 3-4.) It seems that, in the Code Commission's view, Field Penal Code section 231 "did not stand the test of examination." (*Id.* at p. 3.)[3]

The circumstances of Penal Code section 401's enactment in 1874—when the Legislature chose to adopt a version of Field Penal Code section 230 but *not* a version of Field Penal Code section 231—are strong evidence that the Legislature intended *not* to criminalize the act of furnishing a weapon or drug for use in committing suicide. (See *Doe v. Saenz* (2006) 140 Cal.App.4th 960, 985 ["As a general principle, the Legislature's rejection of specific language constitutes persuasive evidence a statute should not be interpreted to include the omitted language"]; cf. *Agnew v. Federal Deposit Ins. Corp.* (N.D.Cal. 1982) 548 F.Supp. 1234, 1238 [when Legislature adopted Uniform Commercial Code (UCC) in 1963 but deleted certain words

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[2] At least two other states subsequently enacted legislation containing the language of Field Penal Code section 230 but omitting the language of Field Penal Code section 231. (See Miss. Code, §97-3-49; S.D. Codified Laws, § 22-16-37.)

[3] We can do no more than surmise this, because "[v]ery little record remains of the internal functioning of the 1870-74 Code Commission . . . ." (Kleps, *supra*, 42 Cal. L.Rev. at p. 773.)

from UCC section 5114, subdivision 2(b), "[t]he California legislature could not have spoken more clearly"].)[4]

2. Courts that have interpreted section 401 were evidently unaware of its legislative history and erroneously assumed that it proscribes furnishing the means of death.

The first published decision to address Penal Code section 401 was *People v. Matlock* (1959) 51 Cal.2d 682 (*Matlock*), in which the defendant had "actively strangled" the victim, purportedly at her request. (See *id.* at pp. 687, 694.) Rejecting the defendant's argument that the trial judge erred in refusing to give a jury instruction based on section 401 in addition to instructions on murder, the Supreme Court quoted *State v. Bouse* (1953) 199 Or. 676, 702-703 [264 P.2d 800, 812] (*Bouse*), for the proposition that aiding or abetting a suicide " 'does not contemplate active

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[4] In contrast, current statutes in several other jurisdictions embrace the Field Penal Code's twofold treatment of assisting a suicide, explicitly criminalizing both *aiding or abetting* and *furnishing the means*. (See La. Rev. Stat., §14:32.12, subds. (A)(1) & (2) ["providing the physical means" and "participat[ing] in any physical act"]; Okla. Stat., tit. 21, §§ 813, 814 ["advises, encourages, abets, or assists" and "'furnishes another person with any deadly weapon or poisonous drug"]; N.D. Cent. Code, § 12.1-16-04 ["aids, abets, facilitates, solicits, or incites" and "provides to, delivers to, procures for, or prescribes for another person any drug or instrument"]; Ohio Rev. Code Ann., § 3795.01, subd. (A)(1), (2) ["[p]roviding the physical means" and "[p]articipating in a physical act"].)

participation by one in the overt act directly causing death,' " but only " 'contemplates *some participation in the events leading up to* the commission of the final overt act.' " (*Matlock*, at p. 694, emphasis added.) In *Matlock*, the defendant's active strangling of the victim made the crime murder, not aiding or abetting a suicide.

Unfortunately, *Matlock*'s quotation from *Bouse* also included a few words that were dicta in the context of *Matlock* and were contrary to the legislative history of section 401, of which the *Matlock* court was evidently unaware. *Bouse* had observed that the Oregon statute governing that case—which made it a crime for a person to " 'procure another' " or " 'assist another' " to commit suicide—" 'contemplates some participation in the events leading up to the commission of the final overt act, *such as furnishing the means for bringing about death*,—the gun, the knife, the poison, or providing the water, for the use of the person who himself commits the act of self-murder.' " (*Bouse, supra,* 264 P.2d at p. 812, emphasis added.) *Matlock* quoted this statement in its entirety, including the example of " 'furnishing the means for bringing about death.' " (*Matlock, supra,* 51 Cal.2d at p. 694.)

In *Bouse*, the "furnishing" example was consistent with the Oregon statute, which simply made it a crime to promote or assist a suicide and did not distinguish between *aiding or abetting* and *furnishing the means*, as did the Field Penal Code. But the "furnishing" example is *not* consistent with the legislative history of Penal Code section 401, which demonstrates that the California Legislature, when it enacted section 401, chose *not* to make it a crime to furnish the means for committing suicide.

This subtle misstep in *Matlock*, although just a dictum, has been repeated several times in subsequent California cases. In all but one of those cases, the repetition was likewise a dictum because the facts involved more than just furnishing the means of suicide. (See *In re Joseph G.* (1983) 34 Cal.3d 429, 436 (*Joseph G.*) [sole survivor of two-person suicide pact drove vehicle over cliff]; *Donaldson v. Lungren* (1992) 2 Cal.App.4th 1614, 1625 (*Donaldson*) [plaintiff sought judicial determination that assistance of others with process of "cryogenic suspension premortum" would not violate section 401]; *McCollum v. CBS, Inc.* (1988) 202 Cal.App.3d 989, 1007 (*McCollum*) [plaintiffs alleged decedent committed suicide after listening to defendants' music encouraging it]; *Bouvia v. Superior Court* (1986) 179 Cal.App.3d 1127, 1145 (*Bouvia*) [petitioner sought preliminary injunction ordering removal of feeding tube].)

Only one published California decision, *Ryan N., supra,* 92 Cal.App.4th 1359, repeated *Matlock*'s misstep not as a dictum but as a *holding*. In *Ryan N.,* the court found the appellant liable for aiding or abetting a suicide where the victim stole a bottle of over-the-counter medication, the appellant simultaneously purchased a second bottle of the same medication, and then the appellant combined the ingredients of both bottles in a single container and handed the container to the victim for her to ingest its contents. (*Id.* at pp. 1367-1368.) *Ryan N.*, too, asserted the *Matlock* dictum suggesting that liability attaches when the defendant furnishes the victim with the means of suicide. (*Id.* at p. 1375.) But because the appellant in *Ryan N.* had actually provided the victim with one of

the bottles of medication, that assertion was not just a dictum, but a holding.

Given Penal Code section 401's legislative history, which no previous court has addressed, this court should disregard the *Matlock* dictum and decline to follow its repetition as a holding in *Ryan N.* It is demonstrably wrong. (Cf. *Fluor, supra,* 2015 WL 4938295, at pp. *1, *27-*28 [relying on "relative[ly] obscur[e]" 1872 statute to overrule 2003 decision where parties to 2003 decision had not informed court of statute's existence and court had not considered it].)[5]

[5] Observing that the Legislature has never amended section 401 since its adoption in 1874, the trial court in the present case cited *People v. Hallner* (1954) 43 Cal.2d 715 for the proposition that "[w]here a statute has been construed by judicial decision, and that construction is not altered by subsequent legislation, it must be presumed that the Legislature is aware of the judicial construction and approves it." (*Id.* at p. 719; see exh. 16, p. 216.) But this rule of statutory construction applies only where a statute has been judicially construed and the Legislature thereafter *reenacts* or *amends* the statute without changing the judicially construed portions. (*People v. Bouzas* (1991) 53 Cal.3d 467, 475; see *People v. Chenze* (2002) 97 Cal.App.4th 521, 527.) The rule has no application where, as here, the statute has never been reenacted or amended at all.

B. Section 401 penalizes only *direct* participation in events leading to death, not a physician's *indirect* participation where a third party furnishes the means and the patient independently decides whether to use the means.

1. Case law construes section 401 as requiring *direct participation* in the events leading to death.

Even if, despite the foregoing legislative history, Penal Code section 401 could reasonably be construed as a prohibition against furnishing the means of suicide such as a gun or a lethal drug, the statute still would not apply to aid-in-dying—because a third party (e.g., a pharmacist), not the physician, actually furnishes the means of dying.

According to the post-*Matlock* decisions, liability under section 401 for furnishing the means of dying could only be incurred through *direct participation* in furnishing the means. *Bouvia* observed "it is significant that the instances and the means discussed [in *Joseph G.*] all involved affirmative, assertive, proximate, *direct conduct* . . . ." (*Bouvia, supra,* 179 Cal.App.3d at p. 1145, emphasis added.) *McCollum* similarly stated that the California Supreme Court has construed section 401 "as proscribing the *direct* aiding and abetting of a specific suicidal act," so that a prosecution for violating section 401 requires a showing that the defendant "had a *direct participation*" in the events leading up to

the overt act. (*McCollum, supra,* 202 Cal.App.3d at p. 1007, emphasis added.) *Donaldson* likewise noted that "[o]ur Supreme Court has interpreted section 401 to require affirmative and *direct* conduct . . . ." (*Donaldson, supra,* 2 Cal.App.4th. at p. 1625, emphasis added.) And according to *Ryan N.*, "the courts have interpreted the statute as proscribing 'the *direct*' . . . *and intentional participation* in the events leading to the suicide." (*Ryan N., supra,* 92 Cal.App.4th at p. 1359.).

For example, in *Joseph G.*, the appellant had directly participated in the events leading to suicide by personally driving himself and the victim over a cliff. (*Joseph G. supra,* 34 Cal.3d at pp. 431-432.) In *Ryan N.*, the appellant had directly participated in the events leading to the victim's attempted suicide by combining, in a single container, pills he had purchased and pills the victim had stolen, handing the container to her, and then urging her to ingest all of the pills quickly. (*Ryan N., supra,* 92 Cal.App.4th at pp. 1367-1368.) Here, in contrast, there is no direct participation.

2. A physician who provides aid-in-dying participates only *indirectly* in events that could lead to death.

The trial court correctly acknowledged that *direct participation* is required to support a conviction for violating section 401. (Exh. 16, p. 215.) The court went astray, however, by concluding that "[w]riting a prescription is direct participation." (Exh. 18, p. 237.)

In so concluding, the trial court relied on *Donaldson* but misunderstood the facts in that case. According to the trial court, in *Donaldson* the appellant's plan was "to terminate his life by a lethal dose of drugs with the assistance of a third party." (Exh. 16, p. 206.) This description is inaccurate. *Donaldson* itself explained: "Donaldson seeks a judicial declaration that he has a constitutional right to cryogenic suspension premortem with the assistance of others. Alternatively, he asserts he will end his life by a lethal dose of drugs." (*Donaldson, supra,* 2 Cal.App.4th at p. 1618.) Thus, although Donaldson had sought "the assistance of others" with the cryogenic suspension process, the court's opinion does not indicate that he had also sought the assistance of others with his alternative plan to "end his life by a lethal dose of drugs" if he did not obtain the desired judicial declaration. (*Ibid.*) The opinion says nothing about how Donaldson planned to obtain the drugs.[6]

Consequently, *Donaldson* did not address the question whether a physician violates section 401 by writing a prescription

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[6] The opening brief on appeal in *Donaldson* confirms that Donaldson had not sought judicial approval for the assistance of a physician (or anyone else) in obtaining drugs. The opening brief quotes Donaldson's first amended complaint as follows: "Assuming arguendo that plaintiffs are not afforded judicial protection arising from their intention to tangibly (physically) aid Donaldson in achieving a 'dead' state by cryonically suspending him pre-mortem, . . .[¶] . . . Donaldson intends to procure sufficient appropriate drugs and intravenous injection equipment to permit him to administer to himself a lethal dose of some substance in order to rapidly bring about his death." (Exh. 13, p. 173.) Evidently Donaldson's plan, if his quest for judicial approval was unsuccessful, was to obtain and ingest a lethal dose of medication *without assistance from anyone*.

for a terminally ill patient knowing that the patient might (or might not) fill the prescription and self-administer a fatal dose of the medication. *Donaldson* is pertinent only to the extent it requires *direct participation* in order to support a conviction under section 401. (*Donaldson, supra,* 2 Cal.App.4th at p. 1625.) *Donaldson* does *not* support the trial court's conclusion that "[w]riting a prescription is direct participation." (Exh. 18, p. 237.) No published California decision has ever addressed that point.

The Montana Supreme Court, however, addressed the point in *Baxter v. State* (2009) 354 Mont. 234 [224 P.3d 1211] (*Baxter*). The *Baxter* court determined that "a physician who aids a terminally ill patient in dying [by prescribing medication] is *not directly involved* in the final decision *or* the final act." (*Id.* at p. 1217, first emphasis added.) Although the physician "create[s] a means by which the patient can be in control of his own mortality," the patient "carr[ies] out the decision himself with self-administered medicine and *no immediate or direct physician assistance*." (*Id.* at p. 1218, emphasis added.)[7]

This is common sense. A physician who *prescribes medication*, not knowing whether or not the patient will fill the prescription and self-administer a fatal dose, does *not* furnish the means for dying—because the physician *does not actually furnish the medication*. Rather, the physician just makes it possible for the

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[7] *Baxter* held that under Montana law, a terminally ill patient's consent to physician aid-in-dying may constitute a statutory defense to a charge of homicide against the physician. (See *Baxter, supra,* 224 P.3d at p. 1222.)

patient to obtain the medication *from someone else*. The physician's assistance is *indirect*, not direct.

3. The Legislature in 1874 could not have intended that a physician could violate section 401 by prescribing medication to be furnished by a third party, because the law in 1874 would have treated the third party's conduct as breaking the chain of causation.

In 1874, a doctor's prescription was not needed to obtain drugs. Doctors as well as apothecaries personally sold drugs of all sorts (including narcotics) directly to the public. (See Higby, *Chemistry and the 19th-Century American Pharmacist* (2003) 28 Bull. Hist. Chem. 9 [in nineteenth century America, apothecaries freely sold drugs to the general public and doctors "dispensed their own medicines" directly from "doctor's shops"]; Temin, Taking Your Medicine: Drug Regulation in the United States (1980) 22-23 [in the late nineteenth century, "[a]ny drug that could be obtained with a prescription could also be obtained without one"].) If, however, a doctor in 1874 had given a patient a prescription for a controlled substance (although there was no such thing at that time) to be *furnished by a third party* such as an apothecary, the California courts would likely have treated the third party's conduct as an *intervening cause* that *broke the chain of causation* between any injury suffered by the patient and a previous act of which the injury was a remote consequence.

An exemplary case of that time was *Ryan v. New York Cen. R.R. Co.* (1866) 35 N.Y. 210 (*Ryan*), in which the defendants' negligent operation of a locomotive engine caused their woodshed to catch fire, which then spread to and destroyed the plaintiff's house located 130 feet away. The New York Court of Appeals, citing the "general principle" that a person is "liable in damages for the proximate results of his own acts, but not for remote damages" (*id.* at p. 210), concluded that "this action cannot be sustained, for the reason that the damages incurred are not the immediate but the remote result of the negligence of the defendants" (*id.* at p. 213). The court reasoned that although the spread of a fire from one building to another is "possible" and "not unfrequent," it was not a "*necessary*" result of the defendants' negligence, and the defendants had "no control" over the spread of the fire from their woodshed to the plaintiff's house. (*Id.* at p. 212, emphasis added.)

In 1870, the Pennsylvania Supreme Court relied on *Ryan* to reach a similar conclusion in *Pennsylvania R. Co. v. Kerr* (1870) 62 Pa. 353 (*Kerr*), in which sparks produced by the defendants' negligent operation of their locomotive caused a warehouse to catch fire, which then spread to a hotel and destroyed the plaintiff's furniture. As in *Ryan*, the Pennsylvania Supreme Court concluded that the defendants' negligence was not the proximate cause of the plaintiff's injury, but only a "remote cause." (*Id.* at p. 367 ["As there was an immediate agent or cause of the destruction, between the sparks and the destruction of the hotel, it is obvious that that was the proximate cause of its destruction, and the negligent emission of sparks the remote cause."].) The pivotal question was " 'did the

cause alleged produce its effects without another cause intervening, or was it made to operate only through or by means of this intervening cause?' " (*Id.* at p. 366.) The court concluded that the plaintiff's injury resulted from an intervening (or "secondary") cause—"namely, the burning of the warehouse"—and thus the sparks from the locomotive were only a "remote cause—*the cause of the cause* of the hotel being burned." (*Id.* at pp. 366-367, emphasis added.) The court quoted a "common law maxim, *causa proxima non remota spectatur*—the immediate and not the remote cause is to be considered." (*Id.* at p. 364.)

Of course, such a restrictive view of proximate cause is now ancient legal history. Today, the touchstone of proximate cause is foreseeability. (See, e.g., *People v. Brady* (2005) 129 Cal.App.4th 1314, 1325-1326.) Throughout the nineteenth century, however, the maxim *causa proxima non remota spectatur* was generally regarded as "a well-established principle of [the common] law." (*Waters v. Merchants' Louisville Ins. Co.* (1837) 36 U.S. 213, 223 [9 L.Ed. 691]; accord, *General Mut. Ins. Co. v. Sherwood* (1852) 55 U.S. 351, 364 [14 L.Ed. 452].) The maxim was cited in briefing before the California Supreme Court as early as 1859. (See *Parks v. Alta California Telegraph Company* (1859) 13 Cal. 422, 423.) The California Supreme Court expressly asserted it in 1916, quoting a contemporary treatise on the law of torts as follows: " 'It is well settled that if injury has resulted in consequence of a certain unlawful act or omission, but only through or by means of some intervening cause, from which last cause the injury followed as a direct and immediate consequence, the law will refer the damage to

the last or proximate cause, and refuse to trace it to that which was more remote.' " (*Trice v. Southern Pacific Co.* (1916) 174 Cal. 89, 96.)[8]

For these reasons, when section 401 was enacted in 1874, the Legislature would not have expected the courts to extend liability to a physician who prescribed medication to be furnished by a third party. The third party's furnishing of the medication would have

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[8] This language originally appeared in the first edition of Cooley, A Treatise on the Law of Torts or the Wrongs Which Arise Independent of Contract (1880) at pages 68-69 (hereafter Cooley). The Cooley treatise further explained that "the law always refers the injury to the proximate, not to the remote cause. . . . The chief and sufficient reason for this rule is to be found in the impossibility of tracing consequences through successive steps to the remote cause . . . ." (*Ibid.*) The Cooley treatise noted, however, that with regard to the specific facts of *Ryan* and *Kerr*, "a different view prevails in England and in most of the American States," by which "[t]he negligent fire is regarded as a unity: it reaches the last building as a direct and proximate result of the original negligence . . . ." (*Id.* at pp. 76-77.)

The Cooley treatise also includes a glimmer of today's law of foreseeability with regard to proximate cause, observing that there may be liability for "an injury that should have been foreseen by ordinary forecast; and the circumstances conjoined with it to produce the injury being perfectly natural," so that "these circumstances should have been anticipated." (Cooley, *supra*, at p. 72.) But the maxim *causa proxima non remota spectatur* was still alive and well in those days, and it would have taken a remarkably prescient legislator in 1874 to anticipate how the law of proximate cause would develop in the next century. *Palsgraf* did not appear for another 54 years, and even there Justice Cardozo concluded it was not foreseeable that the shock of an explosion at one end of a train platform would cause scales at the other end of the platform to strike and injure the plaintiff. (See *Palsgraf v. Long Is. R. Co.* (1928) 248 N.Y. 339 [162 N.E. 99].)

been seen as an intervening (and, assuming the lack of requisite intent, lawful[9]) cause, and the physician's writing of the prescription would have been viewed as a remote act. As in *Ryan*, the third party's furnishing the medication and the patient's ingesting it would not have been considered a "necessary" result of the physician's writing the prescription, but rather a result over which the physician had "no control" (*Ryan, supra,* 35 N.Y. at p. 212), because the patient might never have filled the prescription or might have done so but never ingested the medication. As in *Kerr*, the writing of the prescription would have been seen as merely a remote "cause of the cause" of death. (*Kerr, supra,* 62 Pa. at p. 366.)

C. Any ambiguity in section 401 should be resolved by applying the rule of lenity.

The legislative history and historical legal context of section 401 indicates that it would have been inconceivable to members of

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[9] Where a third party such as a pharmacist just fills the prescription, that person cannot have any criminal liability because he or she lacks the requisite intent to make the act unlawful. It is basic criminal jurisprudence that a conviction for a malum in se offense requires a union of actus reus (the deed) and mens rea (the state of mind that makes the deed a crime). (Pen. Code, § 20.) "This principle applies to aiding and abetting liability as well as direct liability. An aider and abettor must do something *and* have a certain mental state." (*People v. McCoy* (2001) 25 Cal.4th 1111, 1117.) The union of actus reus and mens rea is absent when a pharmacist just fills a prescription written by a physician. The pharmacist commits the act of furnishing the medication (the actus reus) but does not have the requisite intent to aid or abet a suicide (the mens rea).

the California Legislature in 1874—and thus cannot have been anticipated or intended—that a physician might violate section 401 by giving a patient a prescription for a controlled substance to be obtained from a third party. (See *Fluor, supra,* ___ Cal.App.4th ___ [2015 WL 4938295, at pp. *17, *26, *27] [1872 codes should be interpreted in accordance with legislative intent at time of statute's enactment].)

But even short of that conclusion, section 401 is at the very least *susceptible to construction* as not encompassing aid-in-dying—which makes the statute ambiguous. And because section 401 is a penal statute, such ambiguity requires application of the rule of lenity, according to which "ambiguity in a criminal statute should be resolved in favor of lenity, giving the defendant the benefit of every reasonable doubt on questions of interpretation." (*People v. Nuckles* (2013) 56 Cal.4th 601, 611, internal quotation marks omitted; accord, *Harrott v. County of Kings* (2001) 25 Cal.4th 1138, 1154.)

This is an additional, compelling reason why section 401 must be construed as being inapplicable to aid-in-dying.

D. A person who furnishes the means of dying in conjunction with *other conduct* that aids or abets a suicide *does* violate section 401.

This writ petition breaks new ground by demonstrating that section 401 was never intended to apply to furnishing the means of

dying. What might this mean for the future application of section 401?

It is understandable that the trial judge would voice concern for the need to protect vulnerable Californians from coercion by "greedy heirs-in-waiting" and insurance companies bent on "cost containment strategies." (Exh. 16, p. 211.) But even without the unintended prohibition on furnishing the means for dying, section 401 and existing case law still provide full protection against such coercion, yielding the same result in the previous cases that have found liability under section 401. (See, e.g., *Ryan N., supra,* 92 Cal.App.4th at pp. 1367-1368 [appellant *directly participated* in victim's attempted suicide by combining, in a single container, pills he had purchased and pills she had stolen, handing the container to her, and then urging her to ingest all of the pills quickly].) Coercion to commit suicide is appropriately treated as *direct participation* in the events leading to the suicide, which the case law makes clear is a violation of section 401. (See *ante*, pp. 35-36.)

Aid-in-dying, however, is not in and of itself coercive. Indeed, the physician has an ethical duty to help safeguard *against* coercion by others. Aid-in-dying can become coercive only if, for example, the physician expressly urges the patient to end his or her life or personally administers the fatal dose of medication. In contrast, no coercion is involved when the patient voluntarily requests aid-in-dying, voluntarily fills the prescription, and then, if the patient decides to, self-administers the medication without any urging or assistance by the physician in administering the medication. And if there is any outside coercion by "greedy heirs-in-waiting" or

insurance company executives bent on "cost containment strategies" (Exh. 16, p. 211), *they* may be held liable for violating section 401.

This case presents only the narrow question whether a physician violates section 401 by prescribing medication, in the course of medical treatment, for a competent, terminally ill patient, knowing that the patient might fill the prescription and ingest a fatal dose in order to avoid unbearable suffering at the end of her life. This court should decide *only* that narrow question and answer "no." That answer is consistent with the context in which section 401 was enacted. It is also, for Christy, the compassionate answer.[10]

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This case also implicates the issue whether Penal Code section 401, as applied to Christy and Dr. Cederquist, violates the California Constitution. The adjudication of a constitutional issue, however, is to be avoided unless absolutely necessary. (*Palermo v. Stockton Theatres, Inc.* (1948) 32 Cal.2d 53, 64-65; see *Conservatorship of Wendland* (2001) 26 Cal.4th 519, 548 (*Wendland*) [statutory construction to avoid creating "a serious risk

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[10] Finally, we note that, strictly speaking, the choice of a competent, terminally-ill patient to end his or her life via physician aid-in-dying is not even properly characterized as "suicide." (See *Morris v. Brandenburg* (N.M.Ct.App., Aug. 11, 2015) ___ P.3d ___ [2015 WL 4757633, at p. *46] (dis. opn. of Vanzi, J.).) As our Supreme Court has observed, in the United States, suicide is " 'considered an expression of mental illness.' " (*Joseph G., supra,* 34 Cal.3d at p. 433.) It is not an act of mental illness for a competent, terminally ill patient to choose physician aid-in-dying as an alternative to unbearable suffering.

that the law will be unconstitutionally applied in some cases"].) If this court agrees that section 401 does not apply to aid-in-dying, the court need not reach the constitutional issue. Thus, although we address the constitutional issue below, we do so only in the alternative, should it become necessary for the court to reach that issue.

II. ALTERNATIVELY, AS APPLIED TO AID-IN-DYING FOR A COMPETENT, FREELY CONSENTING, TERMINALLY ILL ADULT, PENAL CODE SECTION 401 VIOLATES THE CALIFORNIA CONSTITUTION.

A. The California Constitution protects the right of privacy more broadly than the United States Constitution.

This proceeding is an *as-applied* challenge under the California Constitution. It does not arise under the United States Constitution. Thus, the United States Supreme Court cases addressing aid-in-dying—*Glucksberg, supra,* 521 U.S. 702, and *Vacco v. Quill* (1997) 521 U.S. 793 [117 S.Ct. 2293, 138 L.E.2d 834] (*Quill*)—are not controlling here, because they arose only under the United States Constitution. Moreover, even *Glucksberg* and *Quill* left open the possibility that laws against aid-in-dying could have unconstitutional applications, such as where a dying patient's request is truly voluntary. (See Gorsuch, *The Right to Assisted*

Suicide and Euthanasia (2000) 23 Harv. J.L. & Pub. Pol'y 599, 616-617.)

Unlike the United States Constitution, the California Constitution *explicitly* protects the right of privacy.[11] California's voters included privacy among the fundamental rights protected by the California Constitution, by an initiative adopted on November 7, 1972. (*Hill v. National Collegiate Athletic Assn.* (1994) 7 Cal.4th 1, 15 (*Hill*).) Since then, our Supreme Court has observed that "[l]egally recognized privacy interests are generally of two classes: (1) interests in precluding the dissemination or misuse of sensitive and confidential information ('informational privacy'); and (2) *interests in making intimate personal decisions or conducting personal activities without . . . intrusion, or interference ('autonomy privacy').*" (*Id.* at p. 35, emphasis added; accord, *American Academy of Pediatrics v. Lungren* (1997) 16 Cal.4th 307, 326 (*Lungren*) (plur. opn. of George, C. J.); see also *id.* at pp. 368-369 (conc. opn. of Kennard, J.).)[12]

The California Constitution is a document of independent force which in many instances protects fundamental rights more broadly than the United States Constitution. (*Lungren, supra*, 16

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[11] Article I, section 1 of the California Constitution provides: "All people are by nature free and independent and have inalienable rights. Among these are enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety, happiness, and privacy."

[12] Some citations to *Lungren* in this petition include references to both the plurality opinion for three justices and a concurring opinion by a fourth justice, which together constitute a holding.

Cal.4th at pp. 325-326 [California Constitution is "broader and more protective of privacy than the federal constitutional right of privacy as interpreted by the federal courts"]; see generally Falk, *The State Constitution: A More Than "Adequate" Nonfederal Ground* (1973) 61 Cal. L.Rev. 273.) With respect to the right of privacy, "there is a clear and substantial difference in the applicable language of the federal and state Constitutions." (*Lungren*, at p. 326 (plur. opn. of George, C.J.); see also *id.* at p. 368 (conc. opn. of Kennard, J.).) California courts "repeatedly and uniformly have recognized that 'our state Constitution has been construed to provide California citizens with privacy protections . . . *broader, indeed, than those recognized by the federal Constitution*.' " (*Id.* at p. 327, quoting *Johnson v. Calvert* (1993) 5 Cal.4th 84, 100.) Accordingly, the present case requires an examination of the right to privacy—in particular, personal "autonomy privacy"—expressly secured by the California Constitution since 1972.

The constitutional issues presented here are of first impression in California: *First*, does a mentally competent, terminally ill patient who concludes that the pain and anguish—both physical and emotional—caused by her illness have become unbearable have a right under the personal "autonomy privacy" aspect of article I, section 1 to bring a peaceful and dignified end to her life by taking a fatal dose of medication? *Second*, if so, does she have a right under article I, section 1 to the assistance of her licensed physician—who has made a professional judgment that she is indeed terminally ill and has made a competent, knowing and voluntary choice—to use medication the physician prescribes to end

her life at a time of her own choosing?[13] Although no reported California decision has resolved these questions, principles established in other personal autonomy privacy cases decided under article I, section 1 compel affirmative answers to both questions.

B. The California Constitution affords a mentally competent, terminally ill patient, who is suffering unbearable pain and anguish, the "autonomy privacy" right to bring a peaceful and dignified end to her life by taking a fatal dose of medication.

1. The right to aid-in-dying is fundamental to personal autonomy.

Although not " 'every assertion of a privacy interest under article I, section 1, [can only] be overcome by a compelling interest" ' (*Lungren, supra*, 16 Cal.4th at p. 329), the California Supreme Court "recognized in *Hill* that when a challenged action or regulation directly invades 'an interest fundamental to personal autonomy, . . . a "compelling interest" must be present to overcome the vital privacy interest.' " (*Id.* at p. 330 (plur. opn. of George, C. J.), quoting *Hill, supra*, 7 Cal.4th at p. 34; see also, *id.* at pp. 375-

[13] Notably, this case presents no issue as to *surrogate* decision-making for a terminally ill person, whether pursuant to a formal health care directive or by a court-appointed conservator. Christy is fully alert and capable of making an intelligent, voluntary decision with respect to the timing and manner of her inevitable and imminent death. (Exh. 1, p. 9.)

376 (conc. opn. of Kennard, J.).) The present case involves an interest *at least* as "fundamental to personal autonomy" as those in cases where the California courts have recognized such interests.

For example, several California cases "firmly and unequivocally establish that the interest in autonomy privacy protected by the California constitutional privacy clause includes a pregnant woman's right to choose whether or not to continue her pregnancy." (*Lungren, supra*, 16 Cal.4th at p. 332, citing *People v. Belous* (1969) 71 Cal.2d 954, 963-964, *Committee to Defend Reproductive Rights v. Myers* (1981) 29 Cal.3d 252, 274-275, *People v. Barksdale* (1972) 8 Cal.3d 320, 326-327, and *Ballard v. Anderson* (1971) 4 Cal.3d 873, 879-881.) "As these decisions explain, the right to choose whether to continue or to terminate a pregnancy implicates a woman's fundamental interest in the preservation of her personal health (and in some instances the preservation of her life), her interest in retaining personal control over the integrity of her own body, and her interest in deciding for herself whether to parent a child." (*Lungren,* at pp. 332-333 (plur. opn. of George, C. J.), fns. omitted; see also *id.* at pp. 372-373 (conc. opn. of Kennard, J.).) According to these authorities, the fundamental right to personal autonomy protected by article I, section 1 prevents the state from compelling a woman to endure an undesired pregnancy by precluding her from obtaining a timely abortion.

The California Supreme Court has also applied the privacy clause of article I, section 1 to invalidate a statute broadly prohibiting the conservators of a developmentally disabled woman from consenting on her behalf to a tubal ligation that would prevent

her from conceiving a child. (*Conservatorship of Valerie N.* (1985) 40 Cal.3d 143.) The court held that the privacy clause protects a woman's right "to choose not to bear children, and to implement that choice by use of contraceptive devices or medication . . . ." (*Id.* at p. 161.) "[S]terilization is encompassed within the right to privacy . . . ." (*Ibid.*)

Similarly, numerous California cases establish the right of terminally ill persons, or persons suffering from a physical or medical condition that has made life unendurable, to bring an end to their life by refusing medical treatment. (E.g., *Thor v. Superior Court* (1993) 5 Cal.4th 725 (*Thor*); *Bouvia, supra,* 179 Cal.App.3d 1127; *Bartling v. Superior Court* (1984) 163 Cal.App.3d 186 (*Bartling*).) This right is founded on "a fundamental right of self-determination" which, for example, entitles (1) a quadriplegic inmate in a state prison to cause his own death by refusing medical treatment, including artificial nutrition and hydration (*Thor,* at p. 732); (2) a man connected to a life-sustaining ventilator to demand that it be disconnected (*Bartling,* at p. 189); and (3) a young woman paralyzed by the effects of cerebral palsy to compel the cessation of artificial nutrition and hydration (*Bouvia*, at pp. 1134-1135 [petitioner's right to self-determination was "exclusively hers" and "neither the medical profession nor the judiciary have any veto power" over it]). (See generally *Wendland, supra,* 26 Cal.4th at p. 532 ["the competent adult's decision to refuse life-sustaining

medical treatment must also be seen as fundamental" under article I, section 1].)[14]

The superior court distinguished these authorities based on what it regarded as a "crucial distinction between, on the one hand, one's admittedly constitutional right to discontinue treatment even if such discontinuance results in death, and, on the other hand, the active causing of that death." (Exh. 15, p. 207.) Quoting *Quill*, the court asserted the " 'distinction between letting a patient die and making that patient die.' " (*Ibid.*, bolding omitted.) That is a "distinction" the United States Supreme Court drew in *Glucksberg* and *Quill*, but it is not "crucial"—or even material—for purposes of the autonomy privacy guaranteed by article I, section 1 of the California Constitution.

Philosophers may debate which is the greater violation of human dignity and autonomy: being precluded from obtaining

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[14] Although not the subject of any reported decision under article 1, section 1, it is now well-recognized that the right of personal autonomy privacy also protects the right of a terminally ill patient to obtain what has been described as "terminal sedation" in conjunction with a voluntary choice to refuse or terminate all medical treatment, including artificial nutrition and hydration. (See generally Orentlicher, *The Supreme Court and Terminal Sedation: Rejecting Assisted Suicide, Embracing Euthanasia* (1997) 24 Hast. Const. L.Q. 947, 948.) "Terminal sedation is offered to dying patients who are suffering greatly and for whom conventional treatments are inadequate to relieve their suffering. With terminal sedation, patients are sedated—sometimes to unconsciousness—so that they are no longer aware of their suffering." (*Id.* at p. 948, fn. 6; see also *Quill*, *supra,* 521 U.S. at p. 807, fn. 11; McStay, *Terminal Sedation: Palliative Care for Intractable Pain, Post* Glucksberg *and* Quill (2003) 29 Am. J.L. & Med. 45.)

contraceptives or a sterilization procedure to avoid an unwanted pregnancy; being compelled to bear an unwanted child; being tube-fed against one's will; or being forced to suffer days, weeks or months of pain and distress—both emotional and physical—caused by a terminal illness before an inevitable death brings relief. This court need not enter that debate; it is quite enough to say that each of these ghastly circumstances is not one any of us would wish for ourselves, a loved one, or even an enemy.

The key point here is that decisions of the California courts have confirmed that in the first three of those circumstances, the fundamental guarantee of autonomy privacy applies. The fourth circumstance—the one presented in this case—is a comparable insult to autonomy and human dignity.[15]

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[15] A leading constitutional scholar, Erwin Chemerinsky, has made the point eloquently: "[I]f privacy means anything, it is the right of individuals to have the autonomy to make crucial decisions concerning their lives. The [United States] Supreme Court has protected these crucial decisions in a human being's life by recognizing rights such as the right to marry, the right to raise children, and the right to reproductive autonomy. Certainly, the choice of whether to live or to die is of equal importance. Indeed, it is difficult to imagine any aspect of autonomy more basic than the ability to choose whether to continue one's life. If any aspect of autonomy is to be deemed fundamental, surely it is the right to choose to die. It is important to recognize that this is the type of reasoning courts always engage in, looking to prior decisions and deciding whether the current matter is sufficiently analogous. In *Glucksberg*, the essential question—and one not faced by the majority—was whether the right to assisted death is comparable in its importance in a person's life to other aspects of liberty already protected." (Chemerinsky, Washington v. Glucksberg *Was*

(continued...)

2. No compelling state interest warrants denial of the autonomy privacy right of a competent, terminally ill adult to self-administer a fatal dose of medication in order to bring a peaceful and dignified end to her life.

"[S]tatutory provisions that intrude or impinge upon . . . a fundamental autonomy privacy interest properly must be evaluated under the 'compelling interest' standard, i.e., the defendant must demonstrate 'a "compelling" state interest which justifies the [intrusion] and which cannot be served by alternative means less intrusive on fundamental rights.' " (*Lungren, supra*, 16 Cal.4th at pp. 340-341, quoting *White v. Davis* (1975) 13 Cal.3d 757, 772.) "Four state interests generally identify the countervailing considerations in determining the scope of patient autonomy: preserving life, preventing suicide, maintaining the integrity of the medical profession, and protecting innocent third parties." (*Thor, supra*, 5 Cal.4th at p. 738.) None of these interests outweighs the terminally ill patient's autonomy interest asserted here.

Preserving life: *Thor* acknowledged that "[t]he state's paramount concern" is for preserving the life of a particular patient and "an interest in preserving the sanctity of all life." (*Thor, supra,* 5 Cal.4th at p. 738.) But, *Thor* said, when asserted as reasons for compelling a quadriplegic prisoner to endure life-sustaining medical

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(...continued)
Tragically Wrong (2008) 106 Mich. L.Rev. 1501, 1507 (hereafter Chemerinsky).

treatment, including artificial nutrition and hydration, "these considerations can only assert themselves at the expense of self-determination and bodily integrity, matters all the more intensely personal when disease or physical disability renders normal health and vitality impossible." (*Id.* at p. 739.) " '[I]t is for the patient to decide such issues.' " (*Ibid.*) This self-evaluation of one's "perception of a meaningful existence" is " 'the essence of self-determination.' " (*Ibid.*) Even though respect for the patient's autonomy "may cause or hasten death," that fact "does not qualify the right to make th[e] decision in the first instance." (*Ibid.*) Accordingly, *Thor* found "no countervailing state interest in the preservation of life sufficient to sustain a duty on the part of [the patient] superseding the right to refuse unwanted medical treatment." (*Id.* at p. 740.)[16] The prisoner's "right of self-determination and bodily integrity prevails over any countervailing [state] duty to preserve life." (*Id.* at p. 741.)[17]

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[16] Notably, *Thor* rejected an argument that the state's interest in preserving life was greater in that case than in *Bouvia* and *Bartling* because in those cases the patients experienced "chronic pain and dependence [that] made life hopeless and 'intolerable' " whereas the prisoner in *Thor* did not "endure their 'unending agony.' " (*Thor, supra,* 5 Cal.4th at p. 741.) *Thor* responded that "[f]or self-determination to have any meaning, it cannot be subject to the scrutiny of anyone else's conscience or sensibilities." (*Ibid.*)

[17] Again, this case only involves the right of a competent, terminally ill patient to obtain a physician's assistance in achieving a peaceful, dignified death at a time of the patient' own choosing. "Undoubtedly, in the abstract, preserving human life is a compelling government interest. But context is crucial. The question is whether the state has a compelling interest in prolonging lives of terminally ill patients who wish to die. A (continued...)

***Preventing suicide*:** *Thor* had little difficulty in finding that the state's interest in preventing suicide is "a limited interest at best since [the state] imposes no criminal or civil sanction for intentional acts of self-destruction. Moreover, '[n]o state interest is compromised by allowing [an individual] to experience a dignified death rather than an excruciatingly painful life.' " (*Thor, supra,* 5 Cal.4th at p. 741, quoting *Donaldson, supra,* 2 Cal.App.4th at p. 1622.)

***Maintaining the integrity of the medical profession*:** *Thor* found "no threat" to the interest in "maintaining the ethical integrity of the medical profession" as a result of "upholding the individual's right to self-determination in medical decisionmaking, including the right to decline life-sustaining treatment." (*Thor*, *supra*, 5 Cal.4th at p. 742.) The decision is ultimately made by the patient, not the doctor. The doctor's obligation is "to advise patients fully of those matters relevant and necessary to making a voluntary and intelligent choice. Once that obligation is fulfilled, '[i]f the patient rejected the doctor's advice, the onus of that decision would rest on the patient, not the doctor.' " (*Id.* at pp. 742-743.) "The right to refuse medical treatment is basic and fundamental. . . . [Citations.] *Its exercise requires no one's approval. It is not merely*

(...continued)
terminally ill patient, by definition, will die relatively soon. . . .With non-terminally ill patients, denying assisted dying will mean that the person likely will live many more years or even decades." (Chemerinsky, *supra*, 106 Mich. L.Rev at p.1509.) As applied to a terminally ill person enduring what that patient deems unendurable pain and suffering, "the government's interest [in protecting life] is far weaker." (*Ibid.*)

one vote subject to being overridden by medical opinion." (*Bouvia, supra*, 179 Cal.App.3d at p. 1137, emphasis added.)

Lungren addressed a contention that the state had an interest in "ensuring that the determination whether a pregnant minor is sufficiently competent and mature to consent to an abortion is made in a fair and unbiased manner." (*Lungren, supra,* 16 Cal.4th at p. 357.) The California Supreme Court rejected the "assumption that licensed health care providers cannot be trusted to make an unbiased determination as to whether a minor is capable of giving informed consent to an abortion . . . . It is clear that a statute that impinges upon a fundamental constitutional right cannot be upheld on the basis of unsupported speculation that the Legislature believed that health care professionals would not perform their duties in an honest and ethical manner." (*Id.* at pp. 357-358 (plur. opn. of George, C. J.), fn. omitted; see also *id.* at p. 377 (conc. opn. of Kennard, J.) ["Determining whether a patient has given informed consent to a proposed medical procedure is an integral part of the practice of medicine with respect to patients . . . and the physician's license provides sufficient assurance that the physician will do so competently, fairly, and objectively."].)

Of course, recognition of the right of mentally competent, terminally ill adults to the assistance of a physician in the circumstances presented here does not mean doctors can be *compelled* to provide such assistance. "Each doctor can and would decide for himself or herself whether to assist a person in dying. Recognizing a constitutional right to assisted dying would not keep doctors from deciding whether and when to participate. There is a

constitutional right to abortion, but no doctor is ever required to perform an abortion. . . . [T]he doctor's role is to be a 'healer.' But that does not help in dealing with situations where there is a terminally ill patient and no healing to be done." (Chemerinsky, *supra,* 106 Mich. L.Rev. at p. 1511; cf. *Conservatorship of Morrison* (1988) 206 Cal.App.3d 304, 307 [conservator may authorize removal of feeding tube from conservatee in persistent vegetative state, "but cannot require physicians to remove the tube against their personal moral objections if the patient can be transferred to the care of another physician who will follow the conservator's direction"].)

***Protection of innocent third parties*:** *Thor* found the interest in protecting innocent third parties to be inapplicable in that case. "Generally, this concern arises when the refusal of medical treatment endangers public health or implicates the emotional or financial welfare of the patient's minor children." (*Thor, supra,* 5 Cal.4th at p. 744.) As in *Thor*, the present case "involves neither circumstance." (*Ibid.*)

To be sure, the state has an interest in protecting vulnerable persons from abuse or neglect. For example, there could be circumstances in which family members are motivated to encourage a terminally ill relative to elect to hasten death in order to avoid crushing medical expenses or for other personal reasons having nothing to do with the best interests of the terminally ill person. (See *Glucksberg*, *supra*, 521 U.S. at pp. 731-732.) But that is not this case. Further, Penal Code section 401 can fully protect against such misconduct without infringing the right to aid-in-dying. (See *ante*, at p. 45.) An overly broad assertion of a compelling state

interest in protecting the innocent has never been accepted as a justification for prohibiting Californians from voluntarily refusing medical treatment, including artificial nutrition and hydration, even though the result will be death.

3. No legal authority supports infringing the California Constitutional autonomy privacy right to aid-in-dying.

Although a mentally competent, terminally ill adult who wishes to end the pain and suffering resulting from her illness has the right to bring her life to a peaceful and dignified close, that is often easier said than done. The choice of violent means—for example, the use of a gun, or a leap from a bridge or a building—will subject others to the horror of finding and dealing with a brutally damaged corpse, and hardly qualifies as peaceful and dignified. Most persons would prefer death by ingesting pills, but most laypersons do not know which medicine would be appropriate, and it is unlikely that the person's medicine cabinet will contain the appropriate pills. There is also a significant risk that consumption of self-selected medication for purposes of ending one's life will fail to achieve the objective and instead result in further medical complications, such as brain injury. For all of those reasons, the right of personal autonomy in this context would in most circumstances be a hollow right if the terminally ill patient seeking to exercise it were precluded by law from obtaining the assistance of

her physician in obtaining the correct medication in the correct dose.

Numerous cases have rejected such an anomaly. For example, in circumstances where the United States Constitution secures a woman's right to terminate an unwanted pregnancy, legislation is unconstitutional if it imposes an "undue burden" on that right—one that has the "purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus." (*Planned Parenthood of Southeastern Pennsylvania v. Casey* (1992) 505 U.S. 833, 877 [112 S.Ct. 2791, 120 L.Ed.2d 674].)

Applying this principle, courts have struck down laws unduly restricting—although not altogether precluding—access to medical services for abortions. (See, e.g., *Doe v. Bolton* (1973) 410 U.S. 179, 192-195 [93 S.Ct. 739, 35 L.Ed.2d 201] [law requiring that abortions be performed in hospital accredited by the Joint Commission on Accreditation of Hospitals]; *Planned Parenthood Arizona, Inc. v. Humble* (9th Cir. 2014) 753 F.3d 905 [law restricting types of medication that may be used to cause an abortion, where law was not supported by medical grounds, resulted in a significant increase in the cost of medication, and would delay or deter many women from seeking an abortion]; *Planned Parenthood of Wisconsin, Inc. v. Van Hollen* (7th Cir. 2013) 738 F.3d 786 [law requiring doctors at abortion clinic to have admitting privileges at hospital within 30 miles of provider's clinic].) A legislative prohibition against aid-in-dying does not merely "burden" a terminally ill patient who wishes

to obtain a prescription to end her life in a dignified and humane way; it prohibits such medical assistance altogether.

More fundamentally, the supposed distinction between aid-in-dying and withdrawing unwanted lifesaving medical treatment is "anything but clear" (Chemerinsky, *supra*, 106 Mich. L.Rev. at p. 1508)—if not altogether illusory. "Both involve affirmative acts by physicians. Turning off a respirator, removing a feeding tube, stopping medication that keeps a person's blood pressure at a level to sustain life; all are affirmative acts. Both are intended to end a person's life—and both will have that effect." (*Ibid.*)

As previously noted, the precise issue presented here is one of first impression in California. The decision in *Donaldson* is inapposite, and the superior court here was wrong to perceive *Donaldson* as having stare decisis effect in the present context. (Exh. 15, p. 217.) In *Donaldson*, a terminally ill person claimed that his right to end his life included the right to have the assistance of a layperson, Mondragon, for the purpose of "cryogenically preserv[ing]" his body (*Donaldson*, *supra*, 2 Cal.App.4th at p. 1617)—and thereby bringing about his death. "This procedure would freeze Donaldson's body to be later reanimated when curative treatment exists for his brain cancer." (*Id.* at p. 1618.) Donaldson and Mondragon sought a court order protecting Mondragon from criminal prosecution and preventing the county coroner from examining Donaldson's remains. (*Id.* at pp. 1618-1619.)

The Court of Appeal agreed that "Donaldson . . . may take his own life. He makes a persuasive argument that his specific interest in ending his life is more compelling than the state's abstract

interest in preserving life in general. *No state interest is compromised by allowing Donaldson to experience a dignified death rather than an excruciatingly painful life.*" (*Donaldson*, *supra*, 2 Cal.App.4th at p. 1622, emphasis added.) But, the court concluded, "[i]t is one thing to take one's own life, but quite another to allow a third person assisting in that suicide to be immune from investigation by the coroner or law enforcement agencies." (*Ibid.*) The "state has an important interest to ensure that people are not influenced to kill themselves. The state's interest must prevail over the individual because of the difficulty, if not the impossibility, of evaluating the motives of the assister or determining the presence of undue influence." (*Ibid.*)

That rationale makes sense when applied to an unregulated, unlicensed layperson—especially one engaged in the commercial business of selling "cryogenic preservation" services. But it cannot logically be applied to a licensed physician who has no personal self-interest at stake, who owes ethical and fiduciary duties to the patient, and who is subject to significant regulatory oversight. In *Thor* and *Lungren*, the California Supreme Court observed that speculation that a physician might fail to protect the interests of the patient by acting on something less than fully informed, voluntary and competent consent could not justify an infringement of the patient's right of personal autonomy in connection with a decision to die by cessation of treatment. The same reasoning applies to aid-in-dying. Donaldson, who alternatively alleged he would "end his life by a lethal dose of drugs" if he could not be frozen (*Donaldson, supra,* 2 Cal.App.4th at p. 1618), did not claim a right to the

assistance of a physician in that respect, and the court in that case did not address that right. Christy's interest in avoiding excruciating pain and suffering in her final moments is a far cry from Donaldson's science fiction hopes of future "reanimation."

For all of these reasons, no compelling state interest supports a penal law infringing Christy's personal autonomy privacy right to end her life in a dignified manner, at a time of her choosing, by ingesting medication prescribed by her physician.

CONCLUSION

For the foregoing reasons, petitioners respectfully request this court to issue a peremptory writ in the first instance, directing the superior court to vacate its judgment and render a new and different judgment granting declaratory and injunctive relief as prayed in petitioners' complaint.[18]

[18] Real parties in interest argued below that the court could not enjoin public officials from performing duties they are required by law to perform. (Exh. 7, pp. 62-63; exh. 8, pp. 84-85; exh. 9, pp. 91-92; exh. 10, p. 96.) That rule does not apply here, however, because real parties in interest are not required by law to prosecute an act that does not violate California law.

August 27, 2015

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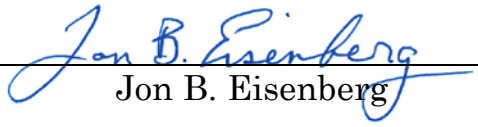
By: 
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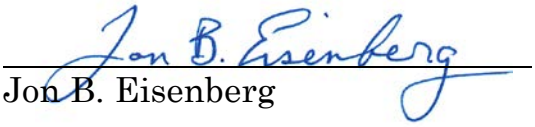
CERTIFICATE OF WORD COUNT

(Cal. Rules of Court, rule 8.204(c)(1).)

The text of this brief consists of 13,070 words as counted by the Microsoft Word version 2010 word processing program used to generate the brief.

Dated: August 27, 2015



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PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

At the time of service, I was over 18 years of age and not a party to this action. I am employed in the County of Los Angeles, State of California. My business address is 15760 Ventura Boulevard, 18th Floor, Encino, California 91436-3000.

On August 27, 2015, I served true copies of the following document(s) described as

(1) PETITION FOR WRIT OF MANDATE AND/OR PROHIBITION OR OTHER APPROPRIATE RELIEF; MEMORANDUM OF POINTS AND AUTHORITIES

(2) SUPPORTING EXHIBITS (VOLUME 1 – PAGES 1 - 303)

on the interested parties in this action as follows:

SEE ATTACHED SERVICE LIST

BY E-MAIL: I caused a copy of the document(s) to be sent from e-mail address mcowley@horvitzlevy.com to the persons at the e-mail addresses listed in the Service List. I did not receive, within a reasonable time after the transmission, any electronic message or other indication that the transmission was unsuccessful.

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on August 27, 2015 at Encino, California.

/s/ Millie Cowley
Millie Cowley

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