No. 96-110

IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

STATE OF WASHINGTON, and CHRISTINE GREGOIRE,
Attorney General of the State of Washington,
Petitioners,
v.
HAROLD GLUCKSBERG, M.D., ABIGAIL HALPERIN, M.D.,
THOMAS A. PRESTON, M.D., and
PETER SHALIT, M.D., Ph.D.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF *AMICI CURIAE* OF THE UNITED STATES CATHOLIC CONFERENCE; NEW YORK CATHOLIC CONFERENCE; WASHINGTON STATE CATHOLIC CONFERENCE; OREGON CATHOLIC CONFERENCE; CALIFORNIA CATHOLIC CONFERENCE; MICHIGAN CATHOLIC CONFERENCE; CHRISTIAN LIFE COMMISSION OF THE SOUTHERN BAPTIST CONVENTION; NATIONAL ASSOCIATION OF EVANGELICALS; THE LUTHERAN CHURCH-MISSOURI SYNOD; WISCONSIN EVANGELICAL LUTHERAN SYNOD-LUTHERANS FOR LIFE; THE EVANGELICAL COVENANT CHURCH; AND THE AMERICAN MUSLIM COUNCIL IN SUPPORT OF PETITIONERS STATE OF WASHINGTON, ET AL.

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November 8, 1996

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES: Page

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

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INTEREST OF *AMICI*

This Court has agreed to review a decision that draws a startling and unprecedented conclusion—that the Due Process Clause confers a right to obtain from one's physician the means of committing suicide. This remarkable and erroneous conclusion obliterates a most basic tenet of American law—that the State may prohibit conduct that facilitates the killing of another person. For this reason, representatives of diverse religious communities unite here across denominational lines as *amici curiae* to demonstrate to this Court why the lower court was wrong. Our Constitution does not create a right to have one's life taken, much less a right to dispense lethal drugs to facilitate the killing of others. Individual statements of interest follow.

The United States Catholic Conference is a nonprofit corporation organized under the laws of the District of Columbia. Its members are the active Roman Catholic Bishops in the United States. The Catholic Bishops of New York, Washington, Oregon, California, and Michigan are, in addition, members of the State Catholic Conferences of those respective states. The Conferences are vehicles through which the Bishops speak cooperatively and collegially on matters affecting the Catholic Church and its people. Roman Catholicism is the largest religious denomination in the United States, with over 60 million members in this country. The Conferences advocate and promote the pastoral teaching of the Church on diverse issues, including the protection of human rights and the sanctity and dignity of human life. Each Conference has been active in supporting state laws that protect persons from assisted suicide.

The Christian Life Commission is the moral concerns and public policy agency for the Southern Baptist Convention, the nation's largest Protestant denomination, with over 15.2 million members in over 38,000 autonomous

local churches. The Commission is charged with addressing public policies affecting the sanctity of human life.

The National Association of Evangelicals ("NAE") is a nonprofit association of evangelical Christian denominations, churches, organizations, institutions and individuals. It includes some 42,500 churches from 75 denominations, and 300 parachurch ministries. NAE has joined in this and many other *amicus* briefs in the defense of human rights, including the right to life.

The Lutheran Church-Missouri Synod is the second-largest Lutheran denomination in the United States. It has about 6,000 member congregations and about 2.6 million individual members. In 1995, as a result of their deeply held religious beliefs on the sanctity of life, the congregations of the Synod passed a resolution expressing the Synod's objection "to medical personnel having any part in actively inducing death, even at the patient's request." The Synod resolved "to speak against any attempt to legalize physician-assisted suicide."

The Wisconsin Evangelical Lutheran Synod-Lutherans for Life is a para-synod organization in fellowship with the 400,000-member Wisconsin Evangelical Lutheran Synod ("WELS") and the 10,000-member Evangelical Lutheran Synod. WELS-Lutherans for Life is a specialized ministry seeking to make known God's will on life and to provide assistance to others on life issues. God's will concerning euthanasia and suicide is clear, recognizing that God acknowledges the absolute value of human life despite its varying or diminished quality. WELS-Lutherans for Life stands by the conviction that it is contrary to the will of God to take one's own life or to assist in doing so.

The Evangelical Covenant Church ("ECC") is a Protestant denomination with 92,000 members in 600 churches throughout the United States It operates a university, two hospitals, twelve continuing care and retirement com-

munities, and twelve nursing homes as a Christian ministry. ECC has adopted an ethical guideline on death and euthanasia. The guideline affirms the ECC's commitment to provide "the best palliative measures we can to relieve the pain, discomfort and suffering of our patients. . . . We do not act in any way intentionally to cause, assist, or accelerate the death of patients."

The American Muslim Council ("AMC") is a nationally recognized organization representing the interests of the American Muslim community. AMC is a committed advocate of human rights. It participates in interfaith and multiethnic dialogue with the hope of promoting an environment in which tolerance and justice will thrive. AMC's opposition to assisted suicide is rooted in Islamic belief, which strongly affirms the sanctity of human life.

Through their counsel, the parties have consented to the appearance of these *amici*.

SUMMARY OF ARGUMENT

Americans are a people who esteem personal freedom. But personal freedom is lived and experienced in a human community. To live together in a community requires accommodation, compromise, and even limitations on one's choices in order to protect the common good. We are not a nation in which each person is a law unto himself or herself, but a nation of ordered liberty.

In preserving those freedoms essential to ordered liberty, this Court has insisted that the judiciary give special attention to the constitutional text, to history and tradition, and to the specificity of a claim in evaluating whether a personal demand also finds expression in the Due Process Clause. The claims advanced in the court below fail these basic tests.

In this case, the Ninth Circuit read the Due Process Clause to hold that persons who are terminally ill have

a liberty interest in having someone else provide the means of taking their own lives. While the courts have often struggled with the scope and meaning of the word "liberty," it is plain that life is necessary to the exercise of any other right or liberty. A demand for assistance in killing oneself has never received protection under the constitutional guarantee of liberty. Indeed, the text of the Due Process Clause would be emptied of meaning were it read as protecting a right to be *deprived* of life and liberty.

Moreover, the court below disregarded a basic tenet of the common law, that one person may not facilitate the killing of another person. The Washington statute at issue here is such a law. It is quite distinct from the law regulating the acceptance or rejection of medical treatment. One is not required to accept every conceivable medical treatment that might preserve life. This case, however, is not about letting people die by terminating treatment, but deliberately and intentionally making people die through affirmative means. Our history and traditions have never permitted the latter.

Absent action by this Court, the decision below would set in motion profound and ominous changes in how our society will care for persons who are old, poor, disabled, and vulnerable. Lifting prohibitions against assisted suicide will have a disproportionate and adverse impact upon the poor, the elderly, minorities, women, and those without access to medical care. These are precisely the people whom our Constitution should protect. This Court is being asked by respondents to alter the fundamental nature of our relationships at the end of our lives, and to do so with no reliable guide as to the consequences. The radical departure from our legal traditions sought below could adversely affect the life and death of every American. This Court should reverse.

ARGUMENT

An ardent champion of personal freedom, Justice William O. Douglas, understood that living together in a community requires accommodation, compromise, and limitations on one's choices in order to protect the common good. In his concurring opinion in *Roe v. Wade,* 410 U.S. 113 (1973), he wrote that liberty included "autonomous control over the development of one's intellect, interests, tastes and personality." *Id.* at 211. Yet such freedom of thought and belief, which Justice Douglas said was "absolute, permitting of no exceptions," is internal to the person. Personal choices exhibited in *conduct* are subject to restraint for the sake of the common good and civic peace and order. Some conduct, which might at first glance appear exclusively personal, is subject even to outright prohibition for these reasons. *Jacobson v. Massachusetts,* 197 U.S. 11 (1905). We are a nation not of unbridled and autonomous liberties, but of ordered liberty.

While accommodation and compromise are first and foremost the task of our democratic and legislative process, this Court has a role in preserving those personal freedoms that are essential to ordered liberty. Yet the Court's reliance upon principles or values that cannot fairly be read into the Constitution "usurp the people's authority, for such decisions represent choices that the people have never made and that they cannot disavow through corrective legislation." *Thornburgh v. American College of Obstetricians and Gynecologists,* 476 U.S. 747, 787 (1986) (White, J., dissenting). The need for restraint is particularly essential in interpreting a concept as potentially open-ended as "liberty":

> The Judiciary, including this Court, is the most vulnerable and comes nearest to illegitimacy when it deals with judge-made constitutional law having little or no cognizable roots in the language or even the design of the Constitution. Realizing that the present construction of the Due Process Clause represents

> a major judicial gloss on its terms, as well as on the anticipation of the Framers . . ., the Court should be extremely reluctant to breathe still further substantive content into the Due Process Clause so as to strike down legislation adopted by a State or city to promote its welfare.

Moore v. East Cleveland, 431 U.S. 494, 544 (1977) (White, J., dissenting).

The claimed right in the case at bar is a demand for the affirmative assistance of another to end one's life. Although this demand has been called by various names, what respondents have asked this Court to create is a "right" to assistance in committing suicide. In holding that there is such a right implicit in the Due Process Clause, the lower court disregarded this Court's decisions on substantive due process and acted in derogation of the common good.

I. THE CONSTITUTION DOES NOT CREATE OR PROTECT A RIGHT TO ASSISTED SUICIDE.

A. Assisted Suicide Does Not Satisfy Any of the Criteria This Court Has Established For Identifying Interests Subject to the Protection of Substantive Due Process.

1. *This Court Has Insisted Upon a Rigorous Test for Substantive Due Process Claims.*

Three methodological principles for identifying interests entitled to substantive due process protection have emerged from this Court's decisions, ensuring judicial restraint and preventing this Court's substantive due process jurisprudence from becoming simply a product of "the predilections of those who happen at the time to be Members of [the] Court." *Moore v. East Cleveland*, 431 U.S. at 502. First, no interest can be protected under the substantive component of the Due Process Clause if recognition of that interest conflicts with the text of the Con-

stitution. If it were otherwise, the Due Process Clause would simply be a judicial vehicle for amending the Constitution, in contravention of the exclusive mechanism that the constitutional text itself establishes for amendment.

Second, this Court has identified those interests entitled to substantive due process protection by reference to an objective standard, to wit, those interests which are "deeply rooted in this Nation's history and tradition," *id.* at 503, or which are so "fundamental" as to lie at the very "base of our civil and political institutions" such that "ordered liberty" could scarcely be imagined were they eliminated. *Palko v. Connecticut*, 302 U.S. 319, 325, 328 (1937); *see also Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934) (due process protects those liberties "so rooted in the traditions and conscience of our people as to be ranked as fundamental"); *Griswold v. Connecticut*, 381 U.S. 479, 501 (1965) (the Court has "continual[ly] insist[ed] upon respect for the teachings of history [and] solid recognition of the basic values that underlie our society") (Harlan, J., concurring in judgment). Thus, history plays more than a merely "useful role," *Compassion in Dying v. Washington*, 79 F.3d 790, 805 (9th Cir. 1996), in deciding questions of substantive due process. Opinion polls (*id.* at 810) and "changing values" (*id.* at 802-3) may influence legislators, but judges are bound by a more enduring standard in matters of constitutional law.[1]

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[1] The Ninth Circuit's assessment of public opinion was not only misplaced but wrong. Since 1994, at least seventeen states have rejected legislative proposals to legalize assisted suicide. Alaska, HB 371 (died in House State Affairs Committee, 1996); Arizona, S.B. 1007 (negative vote in Senate Health Committee, Jan. 1996); California, A. 1080 (withdrawn by sponsor in 1995) and A. 1310 (died without a hearing, Jan. 1996); Colorado, H.B. 1308 (tabled by House Committee on Health, Environment, Welfare and Institutions, Feb. 1995) and H.B. 1185 (defeated 7-to-4 in the same committee, Feb. 1996); Connecticut, S.B. 361 (died in committee, April

That history is the linchpin for deciding what is protected under substantive due process is evident from this Court's decisions. Early in this century, relying upon our nation's historic recognition of the right and duty of parents to direct the upbringing of their children, this Court struck down laws that forbade parents to have their children taught a foreign language, *Meyer v. Nebraska,* 262 U.S. 390 (1923), or to send their children to private schools. *Pierce v. Society of Sisters,* 268 U.S.

1995); Maine, L.D. 748 (rejected by House Judiciary Committee 10-to-3 and by full House 105-to-35, June 1996); Maryland, H.B. 933 (rejected by House Environmental Affairs Committee 15-to-4 in 1995) and H.B. 474 (rejected by same committee 16-to-5 in 1996); Massachusetts, H.B. 3173 (died in House Judiciary Committee, May 1995); Michigan, H.B. 4134 (died in committee, 1995); Mississippi, H.B. 1023 (died in House Judiciary Committee, 1996); Nebraska, L.B. 1259 (died in Judiciary Committee, 1996); New Hampshire, H.B. 339 (rejected by House of Representatives 256-to-90, Jan. 1996); New Mexico, S.B. 446 (tabled 6-to-1 by Senate Judiciary Committee, Feb. 1995); New York, S. 1683, S. 5024-A, A. 6333 (died without a hearing in 1995); Vermont, H.B. 335 (died in House Committee on Health and Welfare, 1995); Washington, S.B. 5596 (died in committee, March 1995); Wisconsin, S.B. 90 and A.B. 174 (died in committee).

The voters of Washington have specifically rejected an effort to weaken their State's law against assisted suicide by referendum, as has the State of California. Dennis L. Breo, *MD-Aided Suicide Voted Down; Both Sides Say Debate to Continue,* 266 JAMA 2895 (Nov. 27, 1991). In 1996, Iowa and Rhode Island joined the majority of states that impose criminal penalties on assisted suicide. Iowa S.F. 2066, to be codified at Iowa Code § 707A.2 (Supp. 1996); R.I. Pub. Act 96-133, to be codified at R.I. Gen. Stat. tit. 11, ch. 60.

Opinion polls indicate a divided and ambivalent electorate on this question, *see Legislating Assisted Suicide,* The Washington Post, Apr. 4, 1996, at A18, with opposition to assisted suicide being strongest among the frail, elderly, and terminally ill—precisely those most directly affected by the issue. Harold G. Koenig, *Attitudes of Elderly Patients and Their Families Toward Physician-Assisted Suicide,* 156 Arch. Intern. Med. 2240 (Oct. 28, 1996); Ezekiel J. Emanuel, *et al., Euthanasia and Physician-Assisted Suicide: Attitudes and Experiences of Oncology Patients, Oncologists, and the Public,* 347 The Lancet 1805 (June 29, 1996).

510 (1925). In *Griswold v. Connecticut,* this Court relied upon the historic sanctity of the marital relationship to overturn the conviction of a physician for giving a married couple information and advice about contraceptives. 381 U.S. at 486. This Court said that the Connecticut law "operat[ed] directly on an intimate relation of husband and wife," having a "maximum destructive impact" upon that relationship. *Id.* at 482, 485.[2] Justice Goldberg, in concurring, left no doubt that in his view it was the marital or family relationship that the Connecticut law threatened. That law, he wrote, "disrupt[ed] the traditional relation of the family—a relation as old and as fundamental as our entire civilization. . . ." *Id.* at 495-96 (Goldberg, J., concurring).[3]

History was also identified as the operative principle when the Court defined abortion to be a constitutional right. Half of the majority opinion in *Roe v. Wade* is devoted to historical attitudes toward abortion. Based on this review, a majority of the Court concluded that statutes banning abortion were "of relatively recent vintage," deriving from "statutory changes effected, for the most part, in the latter half of the 19th century." 410 U.S. at 129, 140-41. While the Court's historical account in

[2] This Court's concern with the text of the Constitution is also apparent in *Griswold.* The Court relied upon "the zone of privacy created by several constitutional guarantees." 381 U.S. at 485. Among the various guarantees identified by the Court were the fourteenth amendment freedom to educate one's children, *id.* at 482, the first amendment right of association, *id.* at 483, and the third and fourth amendment right to be free of governmental intrusion into the home. *Id.* at 484.

[3] Reliance upon history and tradition has been equally dispositive in identifying rights triggering heightened judical scrutiny under the Equal Protection Clause. In *Loving v. Virginia,* 388 U.S. 1 (1967), for example, in striking down on equal protection and due process grounds a Virginia law that forbade interracial marriages, the Court observed that "[t]he freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men." 388 U.S. at 12.

Roe is seriously flawed,[4] this Court's extended historical discussion in *Roe* nonetheless underscores its continued reliance upon our Nation's history and traditions to identify interests entitled to substantive due process protection.

Nothing in *Planned Parenthood v. Casey*, 505 U.S. 833 (1992), repudiates the historical standard to which *Roe* and earlier cases adhered over the course of nearly a century. Indeed, *Casey* reaffirmed that in its substantive due process decisions this Court looks to "what history teaches are the traditions from which [the Nation] developed as well as the traditions from which it broke." *Casey*, 505 U.S. at 850, *quoting Poe v. Ullman*, 367 U.S. 497, 542 (1961) (Harlan, J., dissenting from dismissal on jurisdictional grounds).[5] Legislators can look where they will, but it is our history and traditions that this Court for a century has embraced as the objective criterion that will prevent its substantive due process jurisprudence from lapsing into an expression of the justices' own "personal and private notions." *Griswold v. Connecticut*, 381 U.S. at 493 (Goldberg, J., concurring).[6]

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[4] D. Horan & B. Balch, *Roe v. Wade: No Justification in History, Law or Logic*, J. Connery, *The Ancients and the Medievals on Abortion: The Consensus the Court Ignored*, and M. Arbagi, *Roe and the Hippocratic Oath*, in Abortion and the Constitution (eds. D. Horan, E. Grant & P. Cunningham) (Georgetown University Press 1987). As this Court is aware, Christian groups appearing here as amici believe that *Roe* was wrongly decided.

[5] This is not to dispute that constitutional adjudication requires "reasoned judgment." *Casey*, 505 U.S. at 849. Reason, however, does not operate without criteria to guide it. Otherwise, judges would indeed be "free to roam where unguided speculation might take them." *Id.* at 850, *quoting Poe v. Ullman*, 367 U.S. 497, 542 (Harlan, J., dissenting).

[6] The plurality opinion in *Casey* does concern itself with the protection of certain choices it called "intimate" and "personal." 505 U.S. at 851. We do not view this language as setting forth a new test for due process purposes or even signaling a willingness to depart from settled constitutional law. Rather this language is

A third guiding principle of the Court's substantive due process jurisprudence is its recognition that interests for which heightened constitutional protection is sought must be identified with specificity and with an eye toward the factual context in which that interest is asserted. *Reno v. Flores,* 507 U.S. 292, 302 (1993) (substantive due process claims must begin with a "careful description of the asserted right"); *Collins v. City of Harker Heights,* 503 U.S. 115, 126 (1992). Whether a state can constitutionally forbid or authorize certain conduct cannot be answered by describing the conduct in its most abstract or generic terms. States, for example, may not forbid individuals of different races to marry, *Loving v. Virginia,* 388 U.S. 1 (1967), but they can prohibit polygamous unions, *Reynolds v. United States,* 98 U.S. 145 (1878), or marriages between members of the same immediate family or persons of the same gender. 52 Am.Jur.2d *Marriage* §§ 62-63 (2d ed. 1970) (marriages between closely related persons are universally proscribed). Likewise, a state may not prevent parents from sending their children to private schools, *Pierce v. Society of Sisters, supra,* or from providing them instruction in a foreign language, *Meyer v. Nebraska, supra,* but can require that they attend school and receive instruction in English.[7]

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descriptive, not prescriptive. *See, e.g., Olmstead v. United States,* 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting) (discussing the "right to be let alone").

[7] *Meyer,* 262 U.S. at 402 (dicta) ("The power of the state to compel attendance at some school and to make reasonable regulations for all schools, including a requirement that they shall give instructions in English, is not questioned"); *Pierce v. Society of Sisters,* 268 U.S. at 534 (dicta) ("No question is raised concerning the power of the state reasonably to regulate all schools, to inspect, supervise and examine them, their teachers and pupils; to require that all children of proper age attend some school, that teachers shall be of good moral character and patriotic disposition, that certain studies plainly essential to good citizenship must be taught,

Thus, whether interracial, polygamous, or incestuous unions may constitutionally be prohibited cannot be answered merely by framing the conduct at issue as an exercise of the "right to marry," just as the constitutionality of a law touching education cannot be determined merely by invoking a generic parental right to control the upbringing of one's child. Individual justices have disagreed about the precise level of specificity with which a particular interest must be characterized,[8] but the impossibility of reconciling the Court's various due process decisions based on mere recitation of such abstract rights as the "right to marry" or "right to control the upbringing of one's child" demonstrates that considerable specificity in articulating the precise interest at issue is necessary.

2. *Assisted Suicide Fails This Court's Due Process Test.*

Application of these three criteria—consistency with constitutional text, grounding in history, and factual specificity in the description of the underlying interest—to the conduct at issue here at once demonstrates that, contrary to the Ninth Circuit's decision, *Compassion in Dying*, 79 F.3d at 793, 802, "terminally ill, competent adults" have no due process "right to die." First, it is impossible to reconcile recognition of a "right to die" with the actual text of the Constitution. On the contrary, the Due Process Clause protects "life." U.S. Const.,

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and that nothing be taught which is manifestly inimical to the public welfare").

[8] *Compare Michael H. v. Gerald D.*, 491 U.S. 110, 118-30 (1989) (Scalia, J.) (considering a father's interest in asserting parental rights over a child whose mother was at all times married to another man), *with id.*, 491 U.S. at 132 (O'Connor, J., concurring in part) (stating that "[o]n occasion the Court has characterized relevant traditions protecting asserted rights at levels of generality that might not be 'the most specific level' available"), *and with id.*, 491 U.S. at 136 (Brennan, J., dissenting) (stating that fathers have a constitutionally protected interest in their relationship with their children).

amend. 14. Accordingly, there can be no constitutional guarantee to choose to be *dead*. Indeed, life is more fundamental than any other right, for it is the "right to have rights." *Furman v. Georgia*, 408 U.S. 238, 290 (1972) (Brennan, J., concurring). Even outside a constitutional context, American courts generally have rejected *any* claim that there is a legal interest in not being alive.[9]

The Due Process Clause also guarantees "liberty." But choosing to be dead does not enhance one's liberty. Instead it brings all human freedom to an end. It is difficult to see how one can speak coherently of a freedom to give up all one's freedom. Self-destruction is clearly a far more radical renunciation of freedom than, for example, selling oneself to another person, for it is irreversible and eliminates the potential for exercising all other liberties. In short, the Due Process Clause, which is framed as a guarantee against the *deprivation* of life and liberty, would be turned on its head were it construed as requiring the state to permit individuals to assist others in *abandoning* their life and liberty.

Our Constitution has never been understood as requiring states to permit individuals to relinquish their liberty

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[9] *See, e.g., Lininger v. Eisenbaum*, 764 P.2d 1202, 1212 (Colo. 1988) ("life, however impaired and regardless of any attendant expenses, cannot rationally be said to be a detriment . . . when measured against the alternative of . . . not having existed at all"); *Azzolino v. Dingfelder*, 315 N.C. 103, 111, 337 S.E.2d 528, 533 (1985) ("[W]e are unwilling to say that life, even life with severe defects, may ever amount to a legal injury"), *cert. denied*, 479 U.S. 835 (1986); *Elliott v. Brown*, 361 So.2d 546, 548 (Ala. 1978) ("[T]here is no legal right not to be born. . . . Upon what legal foundation is the court to determine that it is better not to have been born than to be born with deformities? . . . We decline to pronounce judgment in the imponderable area of non-existence"); *Becker v. Schwartz*, 46 N.Y.2d 401, 411, 386 N.E.2d 807, 812 (N.Y. 1978) (rejecting a claim of wrongful life "in view of the very nearly uniform high value which the law and mankind has placed on human life").

even when that is what they claim to want. American law, for example, does not recognize under any circumstances a transaction to sell oneself into permanent servitude. *Memphis v. Greene,* 451 U.S. 100, 120 (1981). A host of far less serious interests, and even statutory interests like the right to be paid a minimum wage, may not be waived. *Brooklyn Savings Bank v. O'Neil,* 324 U.S. 697, 706-07 (1945). Similarly, the law will not enforce an unconscionable bargain or a contract that violates public policy, even if the parties freely agreed to it. *E.g., Stamford Bd. of Educ. v. Stamford Educ. Ass'n,* 697 F.2d 70, 73 (2d Cir. 1982). If the law can prevent waiver of these lesser interests, it would be inexplicable if the state were constitutionally required to stand idle while an individual, alone or with assistance, renounced the one interest upon which all these others depend. It is life itself, as well as liberty, that the founding fathers declared to be "inalienable."

Recognition of a "right to die" on the part of terminally ill, competent adults also creates serious questions of consistency with other constitutional provisions. One court, for example, has concluded that the failure to protect a class of citizens from self-inflicted deadly harm violates the Equal Protection Clause, *Lee v. Oregon,* 891 F. Supp. 1429 (D. Or. 1995) (permanent injunction), *appeal pending,* No. 95-35804 (9th Cir.); *but see Quill v. Vacco,* 80 F.3d 716 (2d Cir. 1996), *cert. granted,* No. 95-1858 (U.S.). It may violate federal statutes, such as the Americans with Disabilities Act, which protects the disabled. *Lee v. Oregon,* 869 F. Supp. 1491, 1499 (D. Or. 1994) (preliminary injunction).

The equal protection concerns implicated here are obvious. Singling out the terminally ill as a class of persons who "deserve" to have their suicidal impulses implemented—even as the law continues to forbid assistance in suicide for everyone else—presupposes that, in some objective sense, their lives in particular are no longer

worth living. This at bottom would reflect a judgment by the state that some people are better off dead than alive. A civilized society, and certainly a society that guarantees equal justice under the law, makes no such judgment with respect to any person. A judicial declaration that some citizens have a "right to die" would also be in direct conflict with the decision by almost every State legislature in the Union to preserve a uniform prohibition against assisted suicide, raising profound questions of federalism and separation of powers. Some have even suggested that the federal judiciary's sudden discovery of a "right to die" raises questions about the continued capacity of Americans to debate and devise democratic solutions to the important modern questions facing them. *Compassion in Dying v. Washington,* 85 F.3d 1440, 1446-51 (9th Cir. 1996) (Trott, J., dissenting from the denial of rehearing *en banc* by the full court).

This Court, however, need not resolve these complex questions to decide this case because assisted suicide, even were it not in actual *conflict* with the text of the Constitution, clearly does not satisfy the historical criterion that this Court, over the course of nearly a century, has established as the pre-eminent test for identifying substantive interests whose protection is *mandated* under the Due Process Clause. After reviewing societal attitudes about suicide in the last two millennia, what is probably the most exhaustive modern historical-legal analysis of suicide in this country concludes:

> [T]here is no significant support for the claim that a right to suicide is so rooted in our tradition that it may be deemed "fundamental" or "implicit in the concept of ordered liberty." Indeed, the weight of authority in the United States, from colonial days through at least the 1970s has demonstrated that the predominant attitude of society and the law has been one of opposition to suicide. It follows that courts

> should not hold suicide or its assistance to be a protected right under the United States Constitution.

Thomas Marzen, *et al., Suicide: A Constitutional Right?*, 24 Duq. L. Rev. 1, 4 (Fall 1985). Relying in part on the Marzen study, Justice Scalia has observed that there is no historical support for a right to assisted suicide:

> At common law in England, a suicide . . . was criminally liable. Although the States abolished the penalties imposed by the common law (*i.e.*, forfeiture and ignominious burial), they did so to spare the innocent family and not to legitimize the act. Case law at the time of the adoption of the Fourteenth Amendment generally held that assisting suicide was a criminal offense. The System of Penal Law presented to the House of Representatives by Representative Livingston in 1828 would have criminalized assisted suicide. The Field Penal Code, adopted by the Dakota Territory in 1877, proscribed attempted suicide and assisted suicide. And most States that did not explicitly prohibit assisted suicide in 1868 recognized, when the issue arose in the 50 years following the Fourteenth Amendment's ratification, that assisted and (in some cases) attempted suicide were unlawful. Thus, there is no significant support for the claim that a right to suicide is so rooted in our tradition that it may be deemed "fundamental" or "implicit in the concept of ordered liberty."

Cruzan v. Director, Missouri Dep't of Health, 497 U.S. 261, 294-95 (1990) (Scalia, J., concurring) (citations and internal punctuation omitted). Except for the Ninth Circuit, lower courts are in agreement with this view. *Quill v. Vacco*, 80 F.3d 716, 724 (2d Cir. 1996), *citing* Mark E. Chopko & Michael F. Moses, *Assisted Suicide: Still a Wonderful Life?*, 70 Notre Dame L. Rev. 519, 561 (1995); *see also People v. Kevorkian*, 527 N.W.2d 714, 733 (Mich. 1994) (stating that it "would be an impermissibly radical departure from existing tradition and from the principles that underlie that tradition to declare that there is . . . a fundamental right [to assistance in com-

mitting suicide] protected by the Due Process Clause"), *cert. denied,* 115 S.Ct. 1795 (1995); *Compassion in Dying v. Washington*, 49 F.3d 586, 591 (9th Cir. 1995) (panel) (no constitutional right to aid in killing oneself has been recognized in "the two hundred and five years of our existence"), *rev'd*, 79 F.3d 790 (9th Cir. 1996) (*en banc*). The Ninth Circuit's historical account is flawed both in method and in its findings. The fact that mankind's view of suicide is "checkered," *Compassion in Dying*, 79 F.3d at 806, or that suicide met with mixed attitudes in ancient times, *id.* at 806-07, does not show that it is "deeply rooted in *this* Nation's history and traditions." *Moore v. East Cleveland*, 431 U.S. at 504 (emphasis added).[10] The Ninth Circuit's assessment of the Christian tradition on suicide is certainly mistaken.[11]

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[10] Parents in ancient Greece could slaughter or abandon their children if weak or deformed, *see* Will Durant, The Life of Greece 50 (1939), but this is no proof that the practice is deeply rooted in American history and traditions. This Court has never hesitated to reject ancient attitudes, especially when based on ideas that are inconsistent with those ideas upon which our American institutions rest. *E.g., Meyer v. Nebraska*, 262 U.S. 390, 401-02 (1923) (ancient Greek notions concerning child rearing were based on ideas about the relation between the individual and the state which are "wholly different from those upon which our institutions rest," and no legislature could impose similar restrictions on our people "without doing violence to both letter and spirit of the Constitution").

[11] "The Church's tradition has always rejected [suicide] as a gravely evil choice." Pope John Paul II, Encyclical Letter *Evangelium Vitae*, ¶ 66 (March 25, 1995). The single clear instance of "assisted suicide" in the Old Testament, involving the death of Saul, is treated as a capital crime (2 Samuel 1:6-16). The Christian tradition views Judas's suicide not as an act of repentance (*cf.* 79 F.3d at 808 n.25), but as an act of despair. Justin, Cyprian, Tertullian, Clement of Alexandria, Lactantius, Augustine, and other early Christian thinkers all rejected suicide. Darrel W. Amundsen, Medicine, Society, and Faith in the Ancient and Medieval Worlds 89-102 (Johns Hopkins Univ. 1996). Suicide was seen as murder of oneself, and sometimes as worse than murder; according to John Chrysostom, "if it is base to destroy others, much more is it [base] to destroy one's self." *Id.* at 98. Christian leaders praised martyrs

With respect to the Ninth Circuit's treatment of suicide in more modern times, the lessening and eventual removal of criminal penalties for persons who unsuccessfully attempted suicide does not suggest approval of the practice. "Although the States abolished the penalties . . . of forfeiture and ignominious burial, they did so to spare the innocent family and not to legitimize the act." *Cruzan*, 497 U.S. at 294-95 (Scalia, J., concurring) (internal punctuation altered). That stakes are no longer driven through the bodies of persons who commit suicide, *see Compassion in Dying*, 79 F.3d at 809, is no modern-day endorsement of suicide. Our current understanding of assisted suicide is informed by undisputed evidence that virtually all who commit suicide (95% in almost every study) have "a major psychiatric illness at the time of death." New York State Task Force on Life and the Law, When Death is Sought: Assisted Suicide and Euthanasia in the Medical Context 126 (May 1994); P. Marzuk, *et al., Increase in Suicide by Asphyxiation in New York City After the Publication of Final Exit*, 329 New Eng. J. Med. 1508, 1510 (Nov. 11, 1993) ("95 percent of all persons who commit suicide have a serious mental illness").[12] It is for such reasons, and not because of societal

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who adhered to their faith even under threat of death, but criticized those who rushed to a martyr's death too readily. The point of martyrdom was to remain faithful, not to intend one's death. The Ninth Circuit was wholly mistaken in suggesting that St. Augustine's chief concern about suicide was the toll it was taking on faithful Christians (79 F.3d at 808), since Augustine strongly condemned suicides by heretics whose teaching and activities he vigorously opposed. Amundsen at 109-111. Equally mistaken is the Ninth Circuit's claim (79 F.3d at 808) that St. Thomas More favored euthanasia because it is mentioned in his fictional work on the imaginary *pagan* society of Utopia. *See* Thomas More, Utopia 102 (Penguin Books 1965). More's Utopia also allowed divorce (*id.* at 104), but the real-life Thomas More was beheaded for refusing to accept King Henry VIII's divorce.

[12] In fact, terminally ill patients expressing suicidal thoughts usually abandon the wish to commit suicide after their depression has been treated or they have received other appropriate medical

approval, that suicide itself is not now punished under the criminal law.

The criminal proscription of assisted suicide, of course, is a longstanding tradition that continues to the present day. The consistency of that proscription has an immediate bearing on the inquiry regarding its constitutional status. Whatever else can be said of substantive due process, this much is true: it surely cannot protect conduct *expressly* prohibited throughout our nation's history. *Michael H. v. Gerald D.*, 491 U.S. 110, 122 n.2 (1989); *see also Bowers v. Hardwick*, 478 U.S. 186, 194 (1986) (longstanding proscriptions against homosexual sodomy render any claim to substantive due process protection "at best, facetious"). Protection of a particular interest "need not take the form of an explicit constitutional provision or statutory guarantee" to warrant protection under the Due Process Clause, "but it must at least exclude . . . a societal tradition of enacting laws *denying* the interest." *Michael H. v. Gerald D.*, 492 U.S. at 122 n.2 (original emphasis).

The Ninth Circuit facilely asserts that sometimes history is not a guarantor of fairness, as illustrated by our nation's tragic history of racial discrimination. But now-obsolete and rejected laws condoning racial discrimination are easily distinguishable. Formerly a disgraceful part of our nation's laws and traditions, racial discrimination was specifically targeted in the thirteenth and fourteenth amendments. Clearly the fact that some laws which furthered racial discrimination were once on the books does not prevent one from finding such laws unconstitutional now. *Loving v. Virginia*, *supra*. The practices of slavery and racial discrimination are precisely examples of those "traditions from which [our nation] broke," *Planned Parenthood v. Casey*, 505 U.S. at 850, for it was precisely

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treatment. New York State Task Force on Life and the Law, When Death Is Sought: Assisted Suicide and Euthanasia in the Medical Context, x, 120-21.

for that purpose that the fourteenth amendment was enacted. In *Loving*, the Court further grounded its decision in history when it observed that the freedom to marry "has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men." *Loving*, 388 U.S. at 12.

Finally, the "right to die" or to "control the time and manner of one's death," *Compassion in Dying*, 79 F.3d at 802, lacks the requisite specificity used in describing substantive due process interests. First, the Ninth Circuit used these very same terms to describe radically different types of conduct, *i.e.*, refusing medical treatment and obtaining a deadly poison, even though these have been treated quite differently under the law.[13] Moreover, a "right to control the time and manner of one's death" expresses *no* limitation in terms of conduct or the actor. Such a claimed right would seem to encompass, for instance, a right to die by gunfire in full view of paying spectators, or by any other means one chose. Nor does the claimed right express any limitation with respect to who may "assist." *See Compassion in Dying v. Washington*, 79 F.3d at 838 n.140 (noting that family members and others may also be involved in facilitating an assisted suicide). For these reasons, one must reject the claimed "right to die" or to "control the time and manner of one's death." Stripped of euphemism, what is at stake here is a claimed "right" to enlist the aid of others in committing suicide. There is no such right.

B. *Planned Parenthood v. Casey* Does Not Alter the Due Process Methodology or Establish A Right To Assisted Suicide.

In *Planned Parenthood v. Casey*, a plurality opinion for this Court characterized abortion as an "intimate and per-

[13] These amici discuss the difference between assisting suicide and rejecting medical treatment in their brief *amici curiae* in *Vacco v. Quill*, No. 95-1858.

sonal" choice, one "central to personal dignity and autonomy." *Planned Parenthood v. Casey*, 505 U.S. at 851. "At the heart of liberty," the plurality wrote, "is the right to define one's own concept of existence. . . ." *Id.* The court below believed assisted suicide to be constitutionally protected because it too is "intimate," "personal," and part of the "right to define one's own concept of existence."

The claim leads to absurd results. If a decision need only be "personal" and "intimate" to qualify for constitutional protection, then the number of interests entitled to constitutional protection and beyond the scope of state regulation will be large indeed. A decision to use hallucinogenic drugs for recreation, engage in a consensual duel, sell one's body into prostitution, or any number of other equally personal and intimate activities currently subject to state prohibition would be constitutionally protected. Furthermore, if the fact that a choice is "intimate and personal" is enough to guarantee its protection under the fourteenth amendment, then the asserted right to commit suicide could not plausibly be confined to the terminally ill. A decision to commit suicide because of a failing business or family tragedy would seem just as "intimate" and "personal" as a decision to commit suicide based on other reasons or no reason. *Compassion in Dying v. Washington*, 49 F.3d at 591 (if terminally ill persons have a right to commit suicide, "every man and woman in the United States must enjoy" the right—"a *reductio ad absurdum*"), *rev'd*, 79 F.3d 790 (9th Cir. 1996). The same could be said of attempts to defend such a right in terms of the "suffering" of the terminally ill. Other kinds of human suffering are as "personal" and some are more long-lasting. In recognition of this fact, the only nation in the world to experiment for a number of years with legally permitted euthanasia has quickly moved from cases of terminal illness to those involving chronic conditions

and even purely mental suffering.[14] The "personal" nature of suicide proves nothing because it proves too much.

Indeed, there is an especially strong reason to believe in this litigious society that such a claimed right to assisted suicide would not stop with the terminally ill.[15] As Justice Cardozo observed, any principle tends "to expand itself to the limit of its logic." Benjamin N. Cardozo, Nature of the Judicial Process 51 (Yale University Press 1949). Once *any* right to assisted suicide is conceded for any class of persons, it will be impossible to confine the right to that class. Indeed, if such a right were recognized, it could be argued in the criminal law context that killing those who cannot be proven to have objected to the act constitutes no crime at all. This would represent a 180-degree change in the direction of the criminal law to date. *Blackburn v. State,* 23 Ohio St. 146, 163 (1873) ("The lives of all are equally under the protection of the law, and under that protection to their last moment"); *Martin v. Commonwealth,* 184 Va. 1009, 1018, 37 S.E.2d 43, 47 (Va. 1946) (right to life is inalienable; consent of victim is no defense). Since all medical conditions can be placed on a continuum, any distinction based on the health status of the victim would be subject to challenge as arbitrary. Other classes of sick or suffering people would demand a right to assisted suicide on equal

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[14] House Judiciary Subcommittee on the Constitution, 104th Cong., 2d Sess., *Physician-Assisted Suicide and Euthanasia in the Netherlands* 6-12, 15-16 (September 1996) (Report of Chairman Charles T. Canady).

[15] Defining the term "terminally ill" itself has proven to be problematic. "[S]eventeen years of experience with State Living Will statutes that have used 'terminal condition' as a prerequisite to patient directives have demonstrated that 'terminal' lacks any truly objective, operational definition. The terminal requirement is an . . . unworkable requirement." American Bar Association Commission on Legal Problems of the Elderly, Memorandum of January 17, 1992, *reprinted in* 8 Issues in Law & Medicine 117 (Summer 1992).

protection grounds. There is no principled basis for distinguishing among the "depressed twenty-one year old, the romantically-devastated twenty-eight year old, the alcoholic forty-year old. . . ." *Compassion in Dying v. Washington*, 49 F.3d at 591, *rev'd* 79 F.3d 791 (9th Cir. 1996).

Casey is in any event readily distinguishable from cases involving an asserted right to suicide or assisted suicide. The *stare decisis* considerations which led a plurality of this Court in *Casey* to reaffirm the "central holding" of *Roe* are entirely absent—and indeed, tilt in the opposite direction—when one turns to assisted suicide. Assisted suicide not only has no precedent to support it, but is universally proscribed.

Furthermore, this Court has always permitted abortion regulation it deemed necessary to protect a woman's life and health. *E.g., Roe v. Wade*, 410 U.S. at 164. It has even conceded that bans on abortion were more legally defensible in ages when it was "an inherently hazardous procedure" for the woman. *Id.* at 149-50. By contrast, support of a right to suicide is plainly incompatible with protection of health because it destroys the subject's very life. Suicide is always "an inherently hazardous procedure." Finally, except in the abortion context this Court has never ruled that states are constitutionally required to permit the destruction of innocent human life. The Court permitted the destruction of unborn children only because, in its view, they were not persons. *Roe*, 410 U.S. at 158 ("the word 'person,' as used in the Fourteenth Amendment, does not include the unborn"). No party in this case contests the fact that the terminally ill are "persons" and so are entitled to the Constitution's protection.

II. THIS CASE RAISES FUNDAMENTAL QUESTIONS ABOUT THE ROLE AND RULE OF LAW IN THIS SOCIETY.

Ours is a Nation founded not simply upon boundless or unprincipled liberty, but on *ordered* liberty. *Palko v. Connecticut,* 302 U.S. at 325. It follows that one does not have an absolute right to do with one's own body, or anyone else's, as he or she pleases. *Roe v. Wade,* 410 U.S. at 154. The "statute books are replete with constitutionally unchallenged laws against prostitution, suicide, voluntary self-mutilation, brutalizing 'bare fist' prize fights, and duels, although these crimes may only directly involve 'consenting adults.'" *Paris Adult Theatre I v. Slaton,* 413 U.S. 49, 68 n.15 (1973). The choice of a spouse is perhaps the most intimate of choices, but that choice too is qualified by concerns for the common good that are expressed in limitations based on affinity, consanguinity, and gender. In each of these instances, the claims of an individual are balanced against, and sometimes subordinated to, the common good.

For many reasons, the common good counsels strongly against physician-assisted suicide. Public policy is not made at the extremes or for the extremes. Medical evidence shows clearly that most of those who express desires to end their lives have a treatable depression or other psychopathology.[16] Some, though not the majority, of persons who request suicide are in pain.[17] Once these conditions are treated, however, the demand to end life ceases.[18] If we embrace a "right to die" as designed by the

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[16] *See* discussion, *supra,* at 19.

[17] *See* P.J. van der Maas, *et al.,* Euthanasia and Other Medical Decisions Concerning the End of Life 44 (Elsevier Science Publishing 1992).

[18] "Adequate pain relief, control of symptoms, and treatment of psychological distress clearly alter patients' requests to terminate life." Kathleen M. Foley, *The Relationship of Pain and Symptom Management to Patient Requests for Physician-Assisted Suicide,* 6 J. of Pain and Symptom Management 289, 296 (1991).

court below, those who would die prematurely by exercising that "right" are those most in need of care and comfort, those most vulnerable to disparities in economic and health care resources.[19]

A New York State Task Force that studied this issue predicted that the poor, the elderly, minorities, and those without access to medical care are more likely to be encouraged to request "aid" in dying (or have it requested "for" them by surrogates) than any other class if assisted suicide is legalized. New York State Task Force on Life and the Law, When Death is Sought: Assisted Suicide and Euthanasia in the Medical Context, xii (May 1994). Others have noted the disproportionate impact that legalization of assisted suicide would have on women. American Association of Suicidology, *Report of the Committee on Physician-Assisted Suicide and Euthanasia,* 26 Suicide & Life-Threatening Behavior 9 (1996 Supp.). It was for this reason, among others, that the diverse members of the New York State Task Force on Life and the Law unanimously rejected the view that the State's prohibition against assisted suicide should be altered in any way:

> No matter how carefully any guidelines are framed, assisted suicide and euthanasia will be practiced through the prism of social inequality and bias that characterizes the delivery of services in all segments of our society, including health care. The practices will pose the greatest risks to those who are poor, elderly, members of a minority group, or without access to good medical care.

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[19] Individuals treated at centers serving predominantly minority patients have been found to be three times more likely than others to receive inadequate pain treatment, with women and the elderly also more likely to receive poor treatment. C.S. Cleeland, *et al., Pain and its Treatment in Outpatients with Metastatic Cancer*, 330 New Eng. J. Medicine 592-6 (1994). "Pain is . . . more likely to be undertreated if the patient is minority, female, elderly, or a child." State of California, Summit on Effective Pain Management: Removing Impediments to Appropriate Prescribing 3 (Summit Report 1994).

New York State Task Force on Life and the Law, *supra* at xiii. We need to consider—and this Court needs to confront—the larger consequences for education, economic reform, the eradication of poverty, discrimination, and other ills of society if we foster the attitude that, in the face of seemingly intractable difficulties, it is an individual's right not only to surrender but to enlist others to provide the means to end his or her life. The prohibition against intentional killing "is the cornerstone of law and of social relationships." House of Lords, 1 Report of the Select Committee on Medical Ethics 48 (Jan. 31, 1994). It is surely constitutional.

This case asks plainly how constitutional law and constitutional principle can and should develop over the foreseeable future. It asks whether the rule of law, which traditionally has prevented people from enlisting others to carry out self-destructive impulses, may crumble in the face of a newly-minted claim of unbridled autonomy. It asks whether traditional and valued distinctions in the law and in medical practice must give way to these new claims of autonomy—claims which are self-contradictory, for they destroy the very person whose freedom they claim to maximize. At bottom, this case asks whether the kind of society we are to become will reflect our deepest values or none at all. No person or class of persons should be labeled by our legal system as having a life not worth living. Our society is made richer through the lives and well-being of all.

CONCLUSION

For the foregoing reasons, the judgment of the Ninth Circuit should be reversed.

Respectfully submitted,

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