

**STATE CONSTITUTIONAL LAW—DUE PROCESS—NEW
MEXICO SUPREME COURT UPHOLDS CRIMINAL ASSISTED
SUICIDE STATUTE, DECLINES TO FIND FUNDAMENTAL
RIGHT TO PHYSICIAN AID IN DYING.
MORRIS V. BRANDENBURG, 2016-NMSC-027, 376 P.3D 836.**

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I. INTRODUCTION

In *Morris v. Brandenburg*,¹ the New Mexico Supreme Court considered whether section 30-2-4,² a statute criminalizing assisted suicide, violated New Mexico's constitution.³ Specifically, Petitioners—Aja Riggs, Dr. Katherine Morris, and Dr. Aroop Mangalik⁴—challenged section 30-2-4 on its face and as applied as violating the due process clause⁵ or, alternatively, the inherent rights clause⁶ of New Mexico's constitution because there exists a fundamental right to physician aid in dying (“PAD”).⁷ This Comment will first provide the factual and procedural history leading up to the New Mexico Supreme Court's decision in *Morris* as well as the relevant statutory, constitutional, and case law underlying the issue. Next, this Comment will discuss the court's analysis. Finally, this Comment will argue that, although there was room to diverge from federal precedent, the court correctly decided *Morris* because the legislature is better suited to make

1. 2016-NMSC-027, 376 P.3d 836.

2. N.M. STAT. ANN. § 30-2-4 (West 2018). In full, the statute provides: “Assisting suicide consists of deliberately aiding another in the taking of his own life. Whoever commits assisting suicide is guilty of a fourth degree felony.” *Id.*

3. *Morris*, 2016-NMSC-027, ¶ 13, 376 P.3d at 842.

4. *Id.* ¶ 3–6, 376 P.3d at 839–40.

5. N.M. CONST. art. II, § 18 (“No person shall be deprived of life, liberty or property without due process of law . . .”).

6. *Id.* at § 4 (“All persons are born equally free, and have certain natural, inherent and inalienable rights, among which are the rights of enjoying and defending life and liberty . . . and of seeking and obtaining safety and happiness.”). Plaintiffs commonly “tack[] references to the natural rights clause onto their due process or equal protection arguments.” Marshall J. Ray, *What Does the Natural Rights Clause Mean to New Mexico?*, 39 N.M. L. REV. 375, 381 (2009). The unspoken theory is that the natural rights clause provides guidance to the due process clause and can trigger a heightened level of scrutiny if the regulation deprives an individual of a right enumerated in the clause. *Id.* Nevertheless, “courts have been reluctant to view the natural rights clause as a basis for raising the level of scrutiny with which they examine laws that supposedly violate due process or equal protection.” *Id.* at 382. Throughout this Comment, the phrases “inherent rights clause” and “natural rights clause” are used interchangeably to refer to article II, section 4 of the New Mexico Constitution.

7. As a preliminary note, it is important to distinguish PAD and euthanasia because only PAD was at issue in *Morris*. Generally, PAD refers to when a “physician assists a patient in dying by writing a prescription for a lethal dose of a drug that the patient self-administers.” Christina White, Comment, *Physician Aid-in-Dying*, 53 HOUS. L. REV. 595, 599 n.22 (2015) (emphasis omitted) (quoting SUSAN M. BEHUNIAK & ARTHUR G. SVENSON, *PHYSICIAN-ASSISTED SUICIDE: THE ANATOMY OF A CONSTITUTIONAL LAW ISSUE* 11 (2003)). Alternatively, euthanasia refers to “when a third party, either physician or layperson, administers the lethal act.” *Id.* (citing ELIZABETH PRICE FOLEY, *THE LAW OF LIFE AND DEATH* 153 (2011)). For more on the distinction, see Katherine Ann Wingfield & Carl S. Hacker, *Physician-Assisted Suicide: An Assessment and Comparison of Statutory Approaches Among the States*, 32 SETON HALL LEGIS. J. 13, 15–17 (2007).

such a determination. In that vein, this Comment will briefly examine *Morris*'s impact on the End of Life Options Act.⁸ Although the bill failed to pass in the New Mexico Senate, it would have decriminalized PAD and provided mentally competent, terminally ill patients with the option of self-administering doctor-prescribed medication to bring about his or her own death.⁹

II. STATEMENT OF THE CASE

Aja Riggs was diagnosed with uterine cancer in August 2011.¹⁰ Over the next few months, her doctors realized that her cancer was extremely aggressive and started her on chemotherapy, but then found a separate cancerous tumor.¹¹ Chemotherapy was difficult for Aja; it caused numerous side effects and nearly took her life.¹² Aja feared what it would be like when she inevitably succumbed to her cancer and contemplated “the possibility of a ‘more peaceful death.’”¹³ Accordingly, Petitioners claimed that PAD—“the medical practice of providing a mentally-competent, terminally-ill patient with a prescription for medication that the patient may choose to take in order to bring about a peaceful death if the patient finds his [or her] dying process unbearable”—could provide Aja with the death she seeks.¹⁴ In essence, Petitioners asserted that prosecuting a physician pursuant to section 30-2-4 was unconstitutional because a fundamental right to PAD exists under New Mexico's state constitution.¹⁵

Petitioners subsequently filed suit and sought a declaratory judgment that section 30-2-4¹⁶ was unconstitutional either as applied or on its face, and an injunction prohibiting the prosecution of doctors under

8. S. 252, 53d Leg., 1st Sess. (N.M. 2017); H.R. 171, 53d Leg. 1st Sess. (N.M. 2017).

9. *New Mexico Senate Rejects 'Right to Die' Bill*, U.S. NEWS & WORLD REP. (Mar. 15, 2017, 10:39 PM), <https://www.usnews.com/news/best-states/new-mexico/articles/2017-03-15/new-mexico-senate-rejects-right-to-die-bill>.

10. *Morris v. Brandenburg*, 2016-NMSC-027, ¶ 3, 376 P.3d 836, 839.

11. *Id.*

12. *Id.* Specifically, she had an anaphylactic reaction to the treatment, had excruciating pain in her veins, and experienced burning, nausea, and fatigue. *Id.* These are common side effects for traditional chemotherapy. *Side Effects of Chemotherapy*, CANCER.NET, <http://www.cancer.net/navigating-cancer-care/how-cancer-treated/chemotherapy/side-effects-chemotherapy> (last visited Apr. 14, 2018).

13. *Morris*, 2016-NMSC-027, ¶ 4, 376 P.3d at 839.

14. *Id.* ¶ 5, 376 P.3d at 839 (alteration in original).

15. *See id.* ¶¶ 17, 37, 376 P.3d at 844, 850.

16. *See supra* note 2 (providing the full text of section 30-2-4).

the statute.¹⁷ On the issue of whether PAD was a fundamental right, the district court specifically found the following:

This Court cannot envision a right more fundamental, more private or more integral to the liberty, safety and happiness of a New Mexican than the right of a competent, terminally ill patient to choose aid in dying. If decisions made in the shadow of one's imminent death regarding how they and their loved ones will face that death are not fundamental and at the core of these constitutional guarantees, than what decisions are? As recognized by the United States Supreme Court in *Cruzan* "[t]he choice between life and death is a deeply personal decision of obvious and overwhelming finality."¹⁸

After finding the right fundamental, the district court applied strict scrutiny and determined that the State did not put forth a compelling government interest.¹⁹ Ultimately, the district court held that although PAD fell within the scope of the statute, prosecuting a doctor for it would violate a patient's fundamental right to choose aid in dying under New Mexico's due process clause or its inherent rights clause.²⁰

The New Mexico Court of Appeals affirmed the judgment that PAD fell within the language of the statute but reversed the finding that PAD is a fundamental right.²¹ The court, however, did not provide a majority view as to what level of scrutiny should apply.²² Instead, Judge Garcia's majority opinion suggested that PAD could be an important right to which intermediate scrutiny would apply; however, he would have remanded to the district court to determine whether section 30-2-4 would have passed either intermediate scrutiny or the rational basis test.²³

On the other hand, Judge Hanisee, in his concurrence, noted that he would have held that section 30-2-4 was subject only to a rational basis test as PAD is not an important nor fundamental right.²⁴ Finally, Judge Vanzi, in dissent, would have held that New Mexico's due process clause

17. *Morris*, 2016-NMSC-027, ¶ 12, 376 P.3d at 841.

18. *Morris v. Brandenburg*, No. D-202-CV 2012-02909, 2014 WL 10672986, at *7 (N.M. Dist. Ct. Jan. 13, 2014) (quoting *Cruzan v. Dir., Mo. Dep't of Health*, 497 U.S. 261, 281 (1990)).

19. *Id.* The district court found that the inherent rights clause allowed it to diverge from the federal due process precedent under the interstitial approach. *Id.* at *6.

20. *Id.* at *5-7.

21. *Morris v. Brandenburg*, 2015-NMCA-100, ¶ 1, 356 P.3d 564, 567, *aff'd*, 2016-NMSC-027, 376 P.3d 836.

22. *Morris*, 2016-NMSC-027, ¶ 13, 376 P.3d at 842.

23. *Morris*, 2015-NMCA-100, ¶ 52, 356 P.3d at 585.

24. *Id.* ¶¶ 56, 70, 356 P.3d at 585, 591 (Hanisee, J., concurring in part).

provided Petitioners with “a fundamental, or at least important, liberty right to aid in dying from a willing physician.”²⁵ In finding such a right, Judge Vanzi rejected the U.S. Supreme Court’s substantive due process analysis outlined in *Washington v. Glucksberg*²⁶ “as unpersuasive, flawed, and inadequate to protect the rights of New Mexicans.”²⁷ In sum, despite disagreeing about what level of scrutiny applied, a majority of the court concluded that PAD is not a fundamental right and the conduct—as defined by Petitioners—fell within the meaning of the statute.²⁸

Although Petitioners also raised claims that section 30-2-4 is unconstitutionally vague and violates the equal protection clause of New Mexico’s constitution, the district court issued its decision based only on due process grounds.²⁹ Consequently, the New Mexico Supreme Court did not address the aforementioned claims because they were not properly before the court.³⁰

III. BACKGROUND

Because Petitioners challenged the constitutionality of section 30-2-4, two similar statutes—the United Health Care Decisions Act (“UHCDA”)³¹ and the Pain Relief Act (“PRA”)³²—are particularly relevant. Moreover, the two provisions from New Mexico’s state constitution—the due process clause³³ and the inherent rights clause³⁴—under which Petitioners asserted that a fundamental right exists will be discussed. Finally, the Federal Due Process Clause³⁵ and two cases brought asserting a federal due process violation of similar rights are significant because New Mexico follows the interstitial approach.³⁶

25. *Id.* ¶ 104, 356 P.3d at 602 (Vanzi, J., dissenting).

26. 521 U.S. 702 (1997); *see infra* Sections III.C, IV.C.

27. *Morris*, 2015-NMCA-100, ¶ 104, 356 P.3d at 601 (Vanzi, J., dissenting).

28. *Id.* ¶ 1, 356 P.3d at 567 (majority opinion).

29. *Id.* ¶ 48, 356 P.3d at 583.

30. *Morris v. Brandenburg*, 2016-NMSC-027, ¶ 17 n.3, 376 P.3d 836, 844 n.3.

31. N.M. STAT. ANN. §§ 24-7A-1 to -18 (West 2018).

32. N.M. STAT. ANN. §§ 24-2D-1 to -6 (West 2018).

33. N.M. CONST. art. II, § 18.

34. *Id.* § 4.

35. U.S. CONST. amend. XIV, § 1.

36. New Mexico’s constitution provides similar due process guarantees to the Due Process Clause of the Fourteenth Amendment. *Morris v. Brandenburg*, 2016-NMSC-027, ¶ 18, 376 P.3d 836, 844. Because there is a federal analogue, the New Mexico Supreme Court uses the interstitial approach. *Id.* ¶ 19, 376 P.3d at 844. Under this approach, the court first determines whether the U.S. Constitution protects the claimed right. *Id.* If the U.S. Constitution does not protect the asserted right, the question becomes whether “flawed

A. State Statutory Provisions

The statute at issue—section 30-2-4—provides: “[a]ssisting suicide consists of deliberately aiding another in the taking of his own life. Whoever commits assisting suicide is guilty of a fourth degree felony.”³⁷

Petitioners relied on the New Mexico PRA and the UHCDA to bolster their claim that New Mexico’s constitution should provide more protection than the U.S. Constitution.³⁸ In relevant part, the New Mexico PRA provides:

A health care provider who prescribes, dispenses or administers medical treatment for the purpose of relieving pain and who can demonstrate by reference to an accepted guideline that the provider’s practice substantially complies with that guideline and with the standards of practice identified in [section 24-2D-4 of the New Mexico Statutes] shall not be disciplined pursuant to board action or criminal prosecution, unless the showing of substantial compliance with an accepted guideline by the health care provider is rebutted by clinical expert testimony.³⁹

Petitioners also cited to the UHCDA, which has two significant provisions. Section 24-7A-13(B)(1) provides, in pertinent part, that “[d]eath resulting from the withholding or withdrawal of health care in accordance with the Uniform Health-Care Decisions Act does not for any purpose . . . constitute a suicide, a homicide or other crime.”⁴⁰ Moreover, the statute explicitly “does not authorize mercy killing, *assisted suicide*,

federal analysis, structural differences between state and federal government, or distinctive state characteristics” allow the state to diverge from federal precedent. *Id.* (quoting *State v. Gomez*, 1997-NMSC-006, ¶ 19, 122 N.M. 777, 783, 932 P.2d 1, 7). Under *Gomez*, New Mexico’s state constitution can “provide *more* liberty than is mandated by the United States Constitution.” 1997-NMSC-006, ¶ 17, 122 N.M. at 782, 932 P.2d at 6. However, “[t]he burden is on the party seeking relief under the state constitution to provide reasons for interpreting the state provisions differently from the federal provisions when there is no established precedent.” *ACLU of N.M. v. City of Albuquerque*, 2006-NMCA-078, ¶ 18, 139 N.M. 761, 770, 137 P.3d 1215, 1224. *See generally* Kevin John Licciardi, Comment, *Criminal Procedure: Search and Seizure*, 29 RUTGERS L.J. 1105, 1319 (1998) (summarizing *State v. Gomez*). For more on New Mexico’s adoption of the interstitial approach, see Robert F. Williams, *New Mexico State Constitutional Law Comes of Age*, 28 N.M. L. REV. 379 (1998).

37. N.M. STAT. ANN. § 30-2-4 (West 2018).

38. *See infra* Section IV.C and note 93 (outlining Petitioners’ argument that New Mexico has distinctive characteristics to justify a departure from federal precedent).

39. N.M. STAT. ANN. § 24-2D-3(A) (West 2018) (citing N.M. STAT. ANN. § 24-2D-4 (West 2018)).

40. N.M. STAT. ANN. § 24-7A-13(B)(1) (West 2018).

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euthanasia or the provision, withholding or withdrawal of health care, to the extent prohibited by other statutes of this state.”⁴¹

B. State Constitutional Provisions

Petitioners asserted that there exists a fundamental right under two provisions of the New Mexico Constitution: the due process clause⁴² and the inherent rights clause.⁴³ The due process clause of New Mexico’s constitution provides: “[n]o person shall be deprived of life, liberty or property without due process of law.”⁴⁴ The inherent rights clause provides: “[a]ll persons are born equally free, and have certain natural, inherent and inalienable rights, among which are the rights of enjoying and defending life and liberty, of acquiring, possessing and protecting property, and of seeking and obtaining safety and happiness.”⁴⁵ Petitioners claimed there exists a fundamental right to PAD under either of these provisions.⁴⁶

C. Federal Precedent

The Due Process Clause of the Fourteenth Amendment to the U.S. Constitution provides that no State shall “deprive any person of life, liberty, or property, without due process of law.”⁴⁷ Because New Mexico courts apply the interstitial approach, and because New Mexico’s due process provision closely follows the Federal Due Process provision,⁴⁸ *Washington v. Glucksberg*⁴⁹ and *Cruzan v. Director, Missouri Department of Health*⁵⁰—cases that determined whether similar rights exist under the U.S. Constitution—are instructive.⁵¹

In *Glucksberg*, the Supreme Court answered the question of “whether the ‘liberty’ specially protected by the Due Process Clause includes a right to commit suicide which itself includes a right to assistance in doing so.”⁵² The Court answered the question using its “established method of

41. § 24-7A-13(C) (emphasis added).

42. N.M. CONST. art. II, § 18.

43. *Id.* § 4.

44. *Id.* § 18.

45. *Id.* § 4.

46. *Morris v. Brandenburg*, 2016-NMSC-027, ¶ 17, 376 P.3d 836, 844. See *supra* notes 5–6 and *infra* Section IV.D for the difference between New Mexico’s state due process clause and its inherent rights clause and how advocates use them.

47. U.S. CONST. amend. XIV, § 1.

48. See *supra* notes 44, 47 and accompanying text.

49. 521 U.S. 702 (1997).

50. 497 U.S. 261 (1990).

51. See *supra* note 36 (discussing interstitial approach).

52. *Glucksberg*, 521 U.S. at 723.

substantive-due-process analysis.”⁵³ According to the Court, “the Due Process Clause specially protects those fundamental rights and liberties which are, objectively, ‘deeply rooted in this Nation’s history and tradition’ . . . and ‘implicit in the concept of ordered liberty,’ such that ‘neither liberty nor justice would exist if they were sacrificed.’”⁵⁴ Moreover, the asserted right requires a “careful description.”⁵⁵

There, the Court found that the right to assisted suicide is not deeply rooted in our Nation’s history; instead, “for over 700 years, the Anglo-American common-law tradition has punished or otherwise disapproved of both suicide and assisting suicide.”⁵⁶ The Court contrasted this with the asserted right in *Cruzan*—the right to refuse unwanted medical treatment—which has historical roots in battery and informed consent.⁵⁷ Consequently, the Court found that the right to assisted suicide was not fundamental, and that Washington’s assisted suicide ban passed the rational basis test.⁵⁸ Although the Court agreed the right was not fundamental, there was no majority opinion, and several Justices filed concurring opinions.⁵⁹

The Supreme Court’s decision in *Cruzan* also provides useful context to *Morris*. In *Cruzan*, the Supreme Court assumed that an individual has a due process right in refusing life-saving medical treatment.⁶⁰ Together, *Cruzan* and *Glucksberg* highlight the distinction between refusing medical treatment, knowing it could result in death, and actively seeking out treatment to end one’s life.⁶¹

IV. THE COURT’S ANALYSIS

The New Mexico Supreme Court affirmed the district court’s holding that section 30-2-4⁶² covered the conduct at issue but reversed the finding

53. *Id.* at 720.

54. *Id.* at 720–21 (citations omitted) (first quoting *Moore v. East Cleveland*, 431 U.S. 494, 503 (1977); then quoting *Palko v. Connecticut*, 302 U.S. 319, 325, 326 (1937)).

55. *Id.* at 721 (quoting *Flores v. Reno*, 507 U.S. 292, 302 (1993)).

56. *Id.* at 710–11.

57. *Id.* at 724–25.

58. *Id.* at 728–36.

59. *See infra* notes 81, 116–17, 128–29, 136 and accompanying text.

60. *Cruzan v. Dir., Mo. Dep’t of Health*, 497 U.S. 261, 279 (1990).

61. *See Glucksberg*, 521 U.S. at 725 (“The decision to commit suicide with the assistance of another may be just as personal and profound as the decision to refuse unwanted medical treatment, but it has never enjoyed similar legal protection.”); *see also Morris v. Brandenburg*, 2016-NMSC-027, ¶ 33, 376 P.3d 836, 848 (“There is a marked difference between refusing medical treatment, even if doing so will hasten death, and seeking treatment which has for its exclusive purpose the taking of one’s life.”).

62. N.M. STAT. ANN. § 30-2-4 (West 2018).

that the statute was facially unconstitutional or unconstitutional as applied.⁶³ The court remanded the case for proceedings consistent with its opinion.⁶⁴

Writing for the court, Justice Chávez analyzed four major issues. First, the court considered whether section 30-2-4 applied to Petitioners' definition of PAD.⁶⁵ Second, applying the interstitial approach,⁶⁶ the court evaluated whether section 30-2-4 violated the Due Process Clause of the U.S. Constitution.⁶⁷ Under the second prong of the interstitial approach, the court then determined if the federal analysis is flawed or if New Mexico's constitution has unique state characteristics to warrant a different analysis.⁶⁸ Third, the court analyzed whether article II, section 4 of the New Mexico Constitution guarantees a constitutional right to PAD.⁶⁹ Finally, the court examined whether section 30-2-4 passed rational basis review.⁷⁰

A. *Section 30-2-4 Encompasses and Prohibits Physician Aid in Dying*

The court first found that Petitioners' definition of PAD fell within the plain language of the statute.⁷¹ Under section 30-2-4, assisting suicide is "deliberately aiding another in the taking of his own life."⁷² As defined by Petitioners, PAD is "the medical practice of providing a mentally-competent, terminally-ill patient with a prescription for medication that the patient may choose to take in order to bring about a peaceful death if the patient finds his [or her] dying process unbearable."⁷³ The court determined that the wrongful act under the statute was "aiding;" thus, a doctor who provides a patient with a lethal dose of a drug intended to be used by the patient to take his or her life could be prosecuted under the statute.⁷⁴ Moreover, the court did not

63. *Morris*, 2016-NMSC-027, ¶ 58, 376 P.3d at 857.

64. *Id.*

65. *Id.* ¶ 14, 376 P.3d at 842.

66. *Id.* ¶ 19, 376 P.3d at 844; *supra* note 36 (explaining interstitial approach).

67. *Morris*, 2016-NMSC-027, ¶¶ 17–31, 376 P.3d at 844–47. Although Petitioners also had an equal protection claim, the district court did not address it in its decision. *Id.* ¶ 17 n.3, 376 P.3d at 844 n.3. Accordingly, the issue was not ripe for review. *Id.*

68. *Id.* ¶¶ 32–34, 376 P.3d at 847–49.

69. *Id.* ¶ 39, 376 P.3d at 850.

70. *Id.* ¶ 52, 376 P.3d at 855.

71. *Id.* ¶ 14, 376 P.3d at 842. The court addressed this issue first because if the statute did not cover the conduct, it could have disposed of the case. *Id.* The New Mexico Supreme Court addresses issues of statutory interpretation de novo and uses the Legislature's intent as a principal guidepost. *Id.*

72. *Id.* ¶ 15, 376 P.3d at 842 (citing N.M. STAT. ANN. § 30-2-4 (West 2018)).

73. *Id.* (alteration in original).

74. *Id.*

accept any of Petitioners' arguments to go beyond the plain meaning of the statute to conclude that PAD fell outside the scope of the statute.⁷⁵

B. Physician Aid in Dying Is Not a Protected Right Under the Due Process Clause of the U.S. Constitution

The court next analyzed whether the right to PAD was protected under the U.S. Constitution because New Mexico follows the interstitial approach.⁷⁶ Relying on *Glucksberg*, the court concluded that Petitioners did not have a constitutional right to PAD.⁷⁷ In *Glucksberg*, the U.S. Supreme Court held that a Washington statute criminalizing the giving of aid to someone attempting suicide did not violate the Fourteenth Amendment "either on its face or 'as applied to competent, terminally ill adults who wish to hasten their deaths by obtaining medication prescribed by their doctors.'"⁷⁸ Because the Supreme Court found that there is no fundamental liberty interest in "the right to commit suicide," it applied the rational basis test.⁷⁹ The Court concluded that there was a rational basis between the five interests the government set forth and the Washington statute.⁸⁰ The New Mexico Supreme Court took

75. *Id.* ¶ 16, 376 P.3d at 842–43. Petitioners argued that (1) the medical and psychological community consider PAD to be different than suicide; (2) the practice of aid in dying did not exist when the Legislature drafted the statute, and applying it to the conduct at issue would go against New Mexico's historical bend toward patient autonomy; and (3) the court should rely on New Mexico's public policy favoring patient autonomy to conclude that aid in dying does not fall within the prohibition on assisted suicide just as the Montana Supreme Court did in a recent decision. *Id.* (discussing *Baxter v. State*, 2009 MT 449, 354 Mont. 234, 224 P.3d 1211). The court responded that (1) the conduct still fell within the statute, and that the statute does not track the nuances recognized by the medical and psychological professions; (2) the UHCDA—adopted after the practice of aid in dying became known—explicitly prohibits "assisted suicide"; and (3) the issue in the Montana case was whether aid in dying could be a statutory consent defense to a homicide charge, which assumes the physician could be prosecuted in the first place. *Id.*

76. *See supra* note 36 (discussing interstitial approach).

77. *Morris*, 2016-NMSC-027, ¶ 31, 376 P.3d at 847. The court noted, however, that "an opening remains for a more particularized protection." *Id.* The *Glucksberg* majority conceded that its opinion did not foreclose a more particularized challenge, however it noted that "such a claim would have to be quite different from the ones advanced by respondents here." *Washington v. Glucksberg*, 521 U.S. 702, 735 n.24 (1997).

78. *Morris*, 2016-NMSC-027, ¶ 20, 376 P.3d at 844 (quoting *Glucksberg*, 521 U.S. at 735).

79. *Id.* ¶ 26, 376 P.3d at 846.

80. *Id.* ¶ 27, 376 P.3d at 846 (citing *Glucksberg*, 521 U.S. at 729–35). The five interests put forth were: (1) the "unqualified interest in the preservation of human life"; (2) the "interest in preventing suicide, and in studying, identifying, and treating its causes"; (3) the "interest in protecting the integrity and ethics of the medical profession"; (4) the "interest in protecting vulnerable groups . . . [from] subtle coercion and undue influence in

note of—but did not follow—Justice Stevens’s concurrence which discussed the possibility that an individual might have a constitutionally protected interest if there was a more particularized challenge.⁸¹

C. The Glucksberg Substantive Due Process Analysis Is Not Flawed nor Are There Distinctive State Characteristics to Justify Departure from Federal Precedent

Having determined that the U.S. Constitution did not protect the asserted right, the court evaluated whether the *Glucksberg* analysis is flawed or if New Mexico’s constitution or its laws have any unique characteristics to justify a departure from federal precedent.⁸² The New Mexico Supreme Court found no flaws in the *Glucksberg* analysis.⁸³

Petitioners raised two arguments with respect to the federal analysis. They argued that: (1) the Supreme Court has changed its approach to substantive due process since *Glucksberg* and (2) *Glucksberg* was a facial challenge determined without evidence on the safety of aid in dying—such evidence, Petitioners claimed, is now before the New Mexico Supreme Court.⁸⁴ The court responded to Petitioners’ first argument by highlighting that although the *Obergefell v. Hodges*⁸⁵ majority criticized how the *Glucksberg* Court defined the right at issue, PAD still does not have “such a tradition to fall back on.”⁸⁶ Furthermore, the court distinguished *Cruzan* and *Glucksberg*, indicating that “[t]here is a marked difference between refusing medical treatment, even if doing so will hasten death, and seeking treatment which has for its exclusive purpose the taking of one’s life.”⁸⁷ Having agreed with how the Supreme Court defined the right, the court also found that the governmental

end-of-life situations”; and (5) a fear that granting the right could result in “broader” interpretations allowing voluntary or involuntary euthanasia.” *Id.*

81. *Id.* ¶ 30, 376 P.3d at 847. According to Justice Stevens, a more particularized challenge might be made by a “terminally ill patient faced not with the choice of whether to live, only of how to die . . . who is not victimized by abuse, who is not suffering from depression, and who makes a rational and voluntary decision to seek assistance in dying.” *Glucksberg*, 521 U.S. at 746–47 (Stevens, J., concurring).

82. *Morris*, 2016-NMSC-027, ¶ 31, 376 P.3d at 847.

83. *Id.* ¶ 34, 376 P.3d at 848.

84. *Id.* ¶ 32, 376 P.3d at 847.

85. 135 S. Ct. 2584 (2015).

86. *Morris*, 2016-NMSC-027, ¶ 33, 376 P.3d at 848; *see also Obergefell*, 135 S. Ct. at 2602 (“[W]hile [the *Glucksberg*] approach may have been appropriate for the asserted right there involved (physician-assisted suicide), it is inconsistent with the approach this Court has used in discussing other fundamental rights, including marriage and intimacy.”).

87. *Morris*, 2016-NMSC-027, ¶ 33, 376 P.3d at 848.

interests advanced in *Glucksberg* were legitimate.⁸⁸ Accordingly, the court found no flaw in the federal analysis.⁸⁹

Next, the court analyzed whether New Mexico's constitution has any distinctive characteristics to warrant a departure from federal precedent. Petitioners cited to "New Mexico's 'long, proud, extraordinary history of respecting patient autonomy and dignity at the end of life'" to bolster their claim that the New Mexico Constitution should provide additional protection to the conduct at issue.⁹⁰ Specifically, Petitioners maintained that (1) "New Mexico was the first state to adopt the UHCDA," a statute that allows patients to give advance directives to health care professionals;⁹¹ (2) "New Mexico was one of the first three states to recognize advance directives" via the 1977 Right to Die Act;⁹² and (3) a patient has the right to receive pain relief even if administering it could result in death under the PRA.⁹³

In response, the court found that the UHCDA expressly prohibits assisted suicide, undermining Petitioners' argument that the UHCDA would protect PAD.⁹⁴ Moreover, the court referred to the numerous safeguards in place under the UHCDA, which—according to the court—emphasize the concern that "end-of-life decisions are inherently fraught with the potential for abuse and undue influence."⁹⁵ As such, the UHCDA does not signify a distinct characteristic of New Mexico law; rather, it simply codified *Cruzan*.⁹⁶ Thus, the court found that there were no unique characteristics of the state's constitution or law to depart from the *Glucksberg* analysis.⁹⁷

88. *Id.* ¶ 34, 376 P.3d at 848. Particularly, the court agreed with interests three through five. *See supra* note 80 (delineating the five interests advanced in *Glucksberg*).

89. *Morris*, 2016-NMSC-027, ¶ 34, 376 P.3d at 848.

90. *Id.* ¶ 35, 376 P.3d at 849.

91. *Id.*

92. N.M. STAT. ANN. §§ 24-7-1 to -11 (repealed 1984 & 1997). The Right to Die Act was later replaced by the UHCDA, N.M. STAT. ANN. §§ 24-7A-1 to -18 (West 2018).

93. *Morris*, 2016-NMSC-027, ¶ 35, 376 P.3d at 849. Petitioners separately argued that New Mexico case law supporting the state's distinctive respect for autonomy during end-of-life decisions implied a fundamental right to PAD. *Id.* ¶ 37, 376 P.3d at 849–50. The court dismissed Petitioners' argument and noted that the cases Petitioners cited either discussed the policy behind the UHCDA—a statute expressly not authorizing assisted suicide—or delineated fundamental liberty interests already recognized by federal law. *Id.* ¶ 38, 376 P.3d at 850.

94. *Id.* ¶ 36, 376 P.3d at 849; § 24-7A-13(C) ("The Uniform Health-Care Decisions Act does not authorize mercy killing, assisted suicide, euthanasia or the provision, withholding or withdrawal of health care, to the extent prohibited by other statutes of this state.").

95. *Morris*, 2016-NMSC-027, ¶ 36, 376 P.3d at 849 (citing §§ 24-7A-2(A)–(E), -7A-6.1, -7A-7, -7A-11, -7A-14).

96. *Id.*

97. *Id.* ¶ 38, 376 P.3d at 850.

D. New Mexico's Inherent Rights Clause Does Not Provide Petitioners with a Fundamental or Important Right to Physician Aid in Dying

Petitioners also argued a separate and independent basis on which there exists a fundamental right to the conduct at issue.⁹⁸ Specifically, Petitioners contend that the New Mexico natural rights clause protects “the right for a terminal patient to choose a peaceful, dignified death through aid in dying.”⁹⁹ The court noted that the natural rights clause of the New Mexico Constitution has rarely been construed, and that natural rights clauses generally have an “ambiguous history.”¹⁰⁰ According to the court, there are two different approaches to determine whether natural rights clauses create enforceable rights.¹⁰¹ Some states follow the federal approach, which treats natural rights as “a statement of ideals, not law.”¹⁰² Others view the clause as creating enforceable rights, constrained by a state’s reasonable regulation.¹⁰³

New Mexico courts use the state’s inherent rights clause “as a prism through which [to] view due process and equal protection guarantees.”¹⁰⁴ Accordingly, the court concluded that the clause “has never been interpreted to be the exclusive source for a fundamental

98. *Id.* ¶ 39, 376 P.3d at 850.

99. *Id.*

100. *Id.* ¶¶ 39–42, 376 P.3d at 850–51. Further, the court discussed two themes that helped guide the jurisprudence on natural rights clauses: (1) “a balancing test to weigh the exercise of the natural right against the State’s inherent power to regulate” or (2) construing the natural rights clause as a means to “invalidate legislation adversely affecting personal liberty and happiness unless [its] exercise . . . in some way harms or presents an actual and substantial risk of harm to another person.” *Id.* ¶ 41, 376 P.3d at 851 (quoting Ray, *supra* note 6, at 391–94).

101. *Id.* ¶ 43, 376 P.3d at 852.

102. *Id.* (quoting Swepi, LP v. Mora County, 81 F. Supp. 3d 1075, 1172 (D.N.M. 2015)).

103. *Id.* ¶ 44, 376 P.3d at 852.

104. *Id.* ¶ 46, 376 P.3d at 853.

or important constitutional right.”¹⁰⁵ Thus, the court held that there was no fundamental right to PAD under article II, section 4.¹⁰⁶

E. Section 30-2-4 Survives Rational Basis Review

The court next determined whether section 30-2-4 passed the rational basis test in order for it to be constitutional on its face and as applied to the conduct at issue.¹⁰⁷ Unlike the federal rational basis test, New Mexico courts put the burden on the “challenger to demonstrate that the legislation is not supported by a firm legal rationale or evidence in the record.”¹⁰⁸ Citing to the protections outlined in the UHCDA and the PRA¹⁰⁹ for support that end-of-life decisions carry with them the potential for abuse and undue influence, the court held that the government interests were grounded in firm legal rationale.¹¹⁰

105. *Id.* ¶ 51, 376 P.3d at 855. However, in some instances, the natural rights clause supplements the due process analysis. For example, in interpreting article II, section 4, the New Mexico Supreme Court noted the following:

[W]e are mindful of the more intimate relationship existing between a state government and its people, as well as the more expansive role states traditionally have played in keeping and maintaining the peace within their borders However, on the state level, our Constitution can offer not only to protect life, but also the ‘more expansive’ guarantee of obtaining safety. One of the more important functions of the individual states is to secure the rights of the individuals within their borders.

Reed v. State ex rel. Ortiz, 1997-NMSC-055, ¶ 105, 124 N.M. 129, 150–51, 947 P.2d 86, 107–08 (quoting *Cal. First Bank v. State*, 1990-NMSC-106, ¶ 44, 111 N.M. 64, 76, 801 P.2d 646, 658), *rev’d per curiam*, 524 U.S. 151 (1998).

106. *Morris*, 2016-NMSC-027, ¶ 51, 376 P.3d at 855.

107. *Id.* ¶ 52, 376 P.3d at 855.

108. *Id.* ¶ 57, 376 P.3d at 856–57 (citing *Wagner v. AGW Consultants*, 2005-NMSC-016, ¶ 24, 137 N.M. 734, 743, 114 P.3d 1050, 1059).

109. *Id.* ¶ 56, 376 P.3d at 856. *See supra* note 95 and accompanying text.

110. *Morris*, 2016-NMSC-027, ¶ 57, 376 P.3d at 857. Specifically, the governmental interests the court articulated in its analysis were:

(1) the interest in protecting the integrity and ethics of the medical profession; (2) the interest in protecting vulnerable groups—including the poor, the elderly, and disabled persons—from abuse, neglect, and mistakes due to the real risk of subtle coercion and undue influence in end-of-life situations or the desire of some to resort to physician aid in dying to spare their families the substantial financial burden of end-of-life health care costs; and (3) the legitimate concern that recognizing a right to physician aid in dying will lead to voluntary or involuntary euthanasia because if it is a right, it must be made available to everyone, even when a duly appointed surrogate makes the decision, and even when the patient is unable to self-administer the life-ending medication.

Id. For a response to these asserted governmental interests, see Norman L. Cantor, *Two Opinions in Search of a Justice: The Constitution and Physician-Assisted Suicide*, 28 RUTGERS L.J. 435, 439–43 (1997).

Petitioners, however, argued that the rationales recognized in *Glucksberg* are no longer valid.¹¹¹ The court responded that the legislature addressed these concerns in 2015 when the UHCDA was most recently amended, and these amendments reflect exceptions to section 30-2-4's application.¹¹² The court expressed concern about recognizing a fundamental right to PAD, particularly with respect to whether there was proper legislation to protect patients in making a well-informed decision.¹¹³

Ultimately, the court held that the statute was not unconstitutional as applied to Petitioners or on its face despite PAD falling within the language of the statute.¹¹⁴

V. ANALYSIS AND IMPLICATIONS

The New Mexico Supreme Court arrived at the right conclusion in *Morris* because access to PAD is a determination better suited for the legislative branch. However, in arriving at its conclusion, the court passed on an opportunity to diverge from *Glucksberg*—the federal precedent—under its interstitial approach. This Part will first evaluate how the *Morris* court could have determined the federal analysis to be flawed, then discuss why the court was correct to leave the question to the legislature. Finally, this Part will examine *Morris*'s impact on the End of Life Options Act, a bill rejected by the New Mexico legislature.¹¹⁵ Although New Mexico's attempt at passing PAD legislation proved to be unsuccessful, the legislature still remains—and has been—a viable avenue to evoke change.

First, the *Morris* court could have found the federal analysis to be flawed given its inconsistency with the Supreme Court's due process

111. *Morris*, 2016-NMSC-027, ¶ 57, 376 P.3d at 857.

112. *Id.*

113. *Id.*

114. *Id.* ¶ 58, 376 P.3d at 857.

115. The court's holdings on the statutory interpretation and inherent rights clause issues will not be discussed in detail. The court's statutory interpretation analysis was proper because Petitioners' definition fell within the plain meaning of the statute and the court's consideration of statutes on the same subject bolstered its conclusion. *See State v. Sexson*, 1994-NMCA-004, ¶¶ 14, 16, 117 N.M. 113, 116, 869 P.2d 301, 304; *see also Oldham v. Oldham*, 2011-NMSC-007, ¶ 11, 149 N.M. 215, 218, 247 P.3d 736, 739 (“[A] statutory subsection may not be considered in a vacuum, but must be considered in reference to the statute as a whole and in reference to statutes dealing with the same general subjection matter.” (alteration in original) (quoting *State v. Smith*, 2004-NMSC-032, ¶ 10, 136 N.M. 372, 376, 98 P.3d 1022, 1027)). Moreover, the court was wise not to find a fundamental right to PAD under the inherent rights clause given that the clause “has never been interpreted to be the exclusive source for a fundamental or important constitutional right.” *Morris*, 2016-NMSC-027, ¶ 51, 376 P.3d at 855.

analysis as outlined in *Obergefell*. Moreover, to the extent that the *Glucksberg* analysis hinges upon a “careful description” of the asserted right, many of the Justices who joined Chief Justice Roberts’s majority opinion—an opinion that “spoke for the Court only by virtue of Justice O’Connor’s fifth vote”¹¹⁶—approached the issue differently.¹¹⁷ Nevertheless, the *Morris* court found that *Glucksberg* controlled as it answered a similar question that Petitioners posed.¹¹⁸ But, how narrowly the right is defined has implications on the outcome of the case.¹¹⁹ This potential flaw has been somewhat remedied by the Court’s revamped due process analysis in *Obergefell*.¹²⁰ As a result, some question what is left of the *Glucksberg* analysis.¹²¹

Likewise, although *Glucksberg* held that the Washington statute was constitutional on its face and as applied,¹²² the concurring opinions shed doubt on the precedential value of the majority opinion.¹²³ In fact, Justice Gorsuch—a staunch opponent of PAD¹²⁴—concedes that “[n]o majority ruling has decided whether a right to euthanasia and

116. Neil M. Gorsuch, *The Right to Assisted Suicide and Euthanasia*, 23 HARV. J.L. & PUB. POL’Y 599, 616 (2000). Yale Kamisar has referred to *Glucksberg* as “the most confusing and the most fragile 9-0 decision in Supreme Court history.” Yale Kamisar, Foreword, *Can Glucksberg Survive Lawrence? Another Look at the End of Life and Personal Autonomy*, 106 MICH. L. REV. 1453, 1460 (2008). “[A]lthough Rehnquist’s opinion is called ‘the opinion of the Court,’ it does not seem to deserve that designation.” *Id.* at 1462. While “Justice O’Connor provided the much-needed fifth vote, it is highly doubtful that she really did.” *Id.* Furthermore, Justice Stevens’s concurring opinion “is primarily a dissent.” *Id.* at 1464.

117. See, e.g., Ruth C. Stern & J. Herbie DiFonzo, *Stopping for Death: Re-Framing Our Perspective on the End of Life*, 20 U. FLA. J.L. & PUB. POL’Y 387, 418 (2009) (“In neither the majority nor in the five concurring opinions did the justices correctly or coherently define the questions presented.”).

118. *Morris*, 2016-NMSC-027, ¶¶ 20–31, 376 P.3d at 844–47. *Glucksberg*’s precedential value divided the Court of Appeals. Compare *Morris v. Brandenburg*, 2015-NMCA-100, ¶ 30, 356 P.3d 564, 576–80, with *id.* ¶¶ 108–09, 356 P.3d at 603 (Vanzi, J., dissenting).

119. Carol A. Pratt, *Efforts to Legalize Physician-Assisted Suicide in New York, Washington and Oregon: A Contrast Between Judicial and Initiative Approaches—Who Should Decide?*, 77 OR. L. REV. 1027, 1050–51 (1998).

120. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2598 (2015); see also Peter Nicolas, *Fundamental Rights in a Post-Obergefell World*, 27 YALE J.L. & FEMINISM 331, 336–41 (2016).

121. See, e.g., *Obergefell*, 135 S. Ct. at 2621 (Roberts, C.J., dissenting); *Morris*, 2015-NMCA-100, ¶¶ 101–02, 356 P.3d at 600 (Vanzi, J., dissenting).

122. *Washington v. Glucksberg*, 521 U.S. 702, 735 (1997).

123. Gorsuch, *supra* note 116, at 616.

124. Paula Span, *Gorsuch Staunchly Opposes ‘Aid in Dying.’ Does It Matter?*, N.Y. TIMES (Feb. 24, 2017), <https://www.nytimes.com/2017/02/24/health/neil-gorsuch-aid-in-dying-supreme-court.html>. See generally Joan Biskupic, *Gorsuch’s Writings Could Prompt End of Life Questions at Confirmation Hearing*, CNN (Mar. 16, 2017), <http://www.cnn.com/2017/03/17/politics/neil-gorsuch-confirmation-hearing/index.html>.

assistance in suicide exists *as applied*.¹²⁵ The *Morris* court even cited to the language that a “more particularized challenge” might prevail, however it elected to pass on the opportunity to find such a right.¹²⁶ Notably, the challenge in *Morris* was different. Unlike in *Glucksberg* where the petitioners had passed away since the district court ruling,¹²⁷ Aja Riggs—one of the Petitioners in *Morris*—was still alive and “faced not with the choice of whether to live, only of how to die” as Justice Stevens suggested in his concurring opinion in *Glucksberg*.¹²⁸ In this instance, it is possible that the New Mexico Supreme Court could have rejected the *Glucksberg* analysis as flawed because of its questionable precedential value to an *as applied* challenge.¹²⁹ As such, the New Mexico Supreme Court could have granted broader protections under New Mexico’s state constitution.¹³⁰

Despite the potential flaws of *Glucksberg*, the New Mexico Supreme Court properly found that it nevertheless controlled and precluded the state due process claim from being reached.¹³¹ In so finding, the court expressed concerns about defining a terminal illness and providing adequate safeguards to ensure that a patient’s decision was

125. Gorsuch, *supra* note 116, at 642; *see also* Kamisar, *supra* note 116, at 1464, 1466–67.

126. *Morris v. Brandenburg*, 2016-NMSC-027, ¶¶ 29–31, 376 P.3d 836, 846–47 (quoting *Washington v. Glucksberg*, 521 U.S. 702, 735 n.24 (1997)).

127. *Glucksberg*, 521 U.S. at 707–08.

128. *Id.* at 746 (Stevens, J., concurring). According to Justice Stevens, this would “give[] proper recognition to the individual’s interest in choosing a final chapter that accords with her life story, rather than one that demeans her values and poisons memories of her.” *Id.* at 746–47. Another difference not mentioned by the New Mexico Supreme Court was that the State put forth no evidence in *Morris*, and instead, relied solely on the arguments put forth in *Glucksberg*. *See* *Morris v. Brandenburg*, 2015-NMCA-100, ¶ 116, 356 P.3d 564, 605 (Vanzi, J., dissenting).

129. *See* Gorsuch, *supra* note 116, at 616; *see also* *Glucksberg*, 521 U.S. at 790 (Breyer, J., concurring) (noting the possibility of a liberty interest in “a ‘right to die with dignity’ . . . [which] at its core would lie personal control over the manner of death, professional medical assistance, and the avoidance of unnecessary and severe physical suffering-combined”); *id.* at 736 (O’Connor, J., concurring) (refusing to reach “the narrower question whether a mentally competent person who is experiencing great suffering has a constitutionally cognizable interest in controlling the circumstances of his or her imminent death”).

130. Under the interstitial approach, New Mexico’s state constitution can provide broader protection than the Federal Constitution. *See supra* note 36 for a discussion of the interstitial approach. Where the federal analysis is flawed, New Mexico courts can extend protection beyond that of the U.S. Constitution. *See, e.g.*, *State v. Granville*, 2006-NMCA-098, ¶¶ 10, 13–14, 140 N.M. 345, 350, 142 P.3d 933, 937–38 (listing examples of New Mexico courts finding greater protections than federal law).

131. In fact, “[n]ot a single state supreme court has relied on any of its own state constitutional provisions or on any U.S. Supreme Court decision to declare [PAD] a protected right.” Kamisar, *supra* note 116, at 1470 (footnote omitted).

well-informed and made without undue influence.¹³² The court was not alone in these concerns. The slippery slope argument—that recognizing a right to die “will take civilized society down a slippery slope, leading to extensive abuses against [at risk groups]”—remains a prime concern across many different forums.¹³³ Thus, the court was correct to defer to the legislature as “[r]egulation in this area is essential,” especially because of the irreversibility of such a decision.¹³⁴

Morris’s deferral to the legislature finds support among the *Glucksberg* Court, scholars, and other state courts. Accordingly, it is for this reason that the *Morris* court properly determined that there was no fundamental right to PAD. Specifically, the Supreme Court in *Glucksberg* indicated that “[t]hroughout the Nation, Americans are engaged in an earnest and profound debate about the morality, legality, and practicality of physician-assisted suicide. Our holding permits this debate to continue, as it should in a democratic society.”¹³⁵ The various concurring opinions in *Glucksberg* support this determination as well.¹³⁶ Scholars also believe the *Glucksberg* Court was “inviting the states to explore and decide [the] issue for themselves.”¹³⁷ Finally, other state

132. *Morris v. Brandenburg*, 2016-NMSC-027, ¶ 57, 376 P.3d 836, 857.

133. HOWARD BALL, AT LIBERTY TO DIE: THE BATTLE FOR DEATH WITH DIGNITY IN AMERICA 106 (2012); see, e.g., *id.* at 76–77; Kamisar, *supra* note 116, at 1471–75. But see Lindsay N. McAneeley, Comment, *Physician Assisted Suicide: Expanding the Laboratory to the State of Hawai‘i*, 29 U. HAW. L. REV. 269, 274–75 (2006) (indicating the success associated with Oregon’s Death with Dignity Act).

134. *Morris*, 2016-NMSC-027, ¶ 57, 376 P.3d at 857.

It is not easy to define who would qualify to be a terminally ill patient, or what would be the criteria for assuring a patient is competent to make an end-of-life decision, or what medical practices are acceptable to aid a patient in dying, or what constitutes a safe medication. These concerns require robust debate in the legislative and the executive branches of government.

Id. ¶ 2, 376 P.3d at 838.

135. *Washington v. Glucksberg*, 521 U.S. 702, 735 (1997).

136. See *id.* at 788 (Souter, J., concurring) (“Legislatures . . . have superior opportunities to obtain the facts necessary for a judgment about the present controversy [T]heir mechanisms include the power to experiment, moving forward and pulling back as facts emerge within their own jurisdictions.”); *id.* at 736–38 (O’Connor, J., concurring); *id.* at 752 (Stevens, J., concurring).

137. McAneeley, *supra* note 133, at 274–75. Indeed “[t]he opinions, both majority and concurring, invited legislative reform.” Kathryn L. Tucker, *In the Laboratory of the States: The Progress of Glucksberg’s Invitation to States to Address End-of-Life Choice*, 106 MICH. L. REV. 1593, 1597 (2008). Some suggest that this reform should take place on the federal level. See David Bryant, Note, *The Need for Legalization and Regulation of Aid-in-Dying and End-of-Life Procedures in the United States*, 18 QUINNIPIAC HEALTH L.J. 287, 311–12 (2015) (“The most effective and safest way to legalize and regulate end-of-life procedures is for the federal government to establish laws and create uniform standards to ensure the safe practice of these procedures.”).

courts have also concluded that access to PAD should be at the legislature's discretion.¹³⁸

Recently, New Mexico attempted to become another state to legalize PAD.¹³⁹ On January 20, 2016, Senator Stefanics and Representatives Armstrong and McCamley introduced the End of Life Options Act (the "Act") in the New Mexico House of Representatives.¹⁴⁰ On March 13, 2017, the Senate Judiciary Committee rejected the Act.¹⁴¹ The Act would have amended section 30-2-4 to grant immunity to a health care provider who provides medical aid in dying.¹⁴² Although inevitably rejected, *Morris's* impact is clear—the Act addressed many of the concerns expressed by the court. For example, the Act would have, among other things, established safeguards to ensure that a patient was well informed, defined terminal illness, and created a protocol for a doctor to make an independent determination before assisting the patient.¹⁴³

It would have been wise for the New Mexico legislature to pass the Act, particularly given the benefits associated with providing

138. See, e.g., *Krischer v. McIver*, 697 So. 2d 97, 104 (Fla. 1997) ("By broadly construing the privacy amendment to include the right to assisted suicide, we would run the risk of arrogating to ourselves those powers to make social policy that as a constitutional matter belong only to the legislature."); *Myers v. Schneiderman*, 140 A.D.3d 51, 65 (N.Y. App. Div. 2016). *But see* *Krischer*, 697 So. 2d at 111 (Kogan, J., dissenting).

139. PAD is legal in the District of Columbia and the following five states: California, Colorado, Oregon, Vermont, and Washington. *Physician-Assisted Suicide Fast Facts*, CNN (June 10, 2017), <http://www.cnn.com/2014/11/26/us/physician-assisted-suicide-fast-facts/index.html>. In Montana, a terminally ill, mentally competent adult patient's consent can provide a doctor with a defense to a homicide charge. *Baxter v. State*, 2009 MT 449, ¶ 50, 354 Mont. 234, 251 224 P.3d 1211, 1222. Oregon became the first state to legalize PAD in 1994. OR. REV. STAT. §§ 127.800–.897 (2018); McAneeley, *supra* note 133, at 275. Following the adoption of the Oregon Death with Dignity Act, the Oregon Department of Human Services Office of Disease Prevention and Epidemiology compiled data to evaluate the benefits and risks that accompany PAD. *Id.* at 280. The results demonstrated that PAD had not been "forced upon vulnerable patients," "account[ed] for less than one-eighth of one percent of Oregonian deaths," and "create[ed] opportunities for discussions between patients and physicians regarding end-of-life care." *Id.* at 280–82. The success of the Oregon Death with Dignity Act shows that "aid-in-dying laws can, and do, work well." Tucker, *supra* note 137, at 1602. For more on the Oregon Death with Dignity Act, see *id.* at 1600–06.

140. H.R. 171, 53d Leg., 1st Sess. (N.M. 2017), <https://www.nmlegis.gov/Sessions/17%20Regular/bills/house/HB0171.pdf>. Rep. Armstrong and Sen. Stefanics introduced the Senate version of the bill on January 30, 2017. S. 252, 53d Leg., 1st Sess. (N.M. 2017), <https://www.nmlegis.gov/Sessions/17%20Regular/bills/senate/SB0252.pdf>.

141. N.M. S. 252.

142. N.M. H.R. 171; N.M. S. 252.

143. Compare N.M. H.R. 171, and N.M. S. 252, with *Morris v. Brandenburg*, 2016-NMSC-027, ¶¶ 34–36, 57, 376 P.3d 836, 848–49, 857.

the option of aid in dying,¹⁴⁴ the impact it has on life expectancy,¹⁴⁵ and the Supreme Court's invitation to continue the debate in the laboratory of the states.¹⁴⁶ Nevertheless, other states remain actively engaged in efforts to pass PAD legislation.¹⁴⁷

VI. CONCLUSION

The New Mexico Supreme Court, in *Morris v. Brandenburg*, upheld a statute criminalizing assisted suicide as constitutional both on its face and as applied to the Petitioners. In so holding, the court declined to find a fundamental right to PAD such that the statute violated Petitioners' rights under either the New Mexico's due process clause or the inherent rights clause. The court arrived at the correct conclusion, but passed on an opportunity to diverge from federal precedent under its interstitial approach. Although *Morris* was a setback for Petitioners—and those who advocate for PAD—it can still serve as a useful guide for other states seeking to legalize or decriminalize PAD in a legislative forum.

144. See, e.g., Linda Ganzini et al., *Mental Health Outcomes of Family Members of Oregonians Who Request Physician Aid in Dying*, 38 J. PAIN & SYMPTOM MGMT. 807, 813 (2009); Kathryn A. Smith et al., *Quality of Death and Dying in Patients Who Request Physician-Assisted Death*, 14 J. PALLIATIVE MED. 445, 445, 449 (2011).

145. See *Krischer v. McIver*, 697 So. 2d 97, 109 (Fla. 1997) (Kogan, J., dissenting) (“Medicine now has pulled the aperture separating life and death far enough apart to expose a limbo unthinkable fifty years ago”); K.K. DuVivier, *Fast-Food Government and Physician-Assisted Death: The Role of Direct Democracy in Federalism*, 86 OR. L. REV. 895, 925–26 (2007) (“[T]he same medical advances that have helped extend life sometimes also extend death, creating a ‘twilight zone of suspended animation’ that draws out the hardship for families and the pain for the soon-to-be deceased.” (footnote omitted) (quoting *Cruzan v. Dir., Mo. Dep’t of Health*, 497 U.S. 261, 270 (1990) (Brennan, J., dissenting))); see also Cantor, *supra* note 110, at 438.

146. See *supra* notes 135–36 and accompanying text; see also *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) (“It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.”).

147. *Take Action in Your State: Death with Dignity Around the U.S.*, DEATH WITH DIGNITY, <https://www.deathwithdignity.org/take-action> (last visited Apr. 18, 2018); cf. Jessica Nutik Zitter, *Should I Help My Patients Die?*, N.Y. TIMES (Aug. 5, 2017), <https://www.nytimes.com/2017/08/05/opinion/sunday/dying-doctors-palliative-medicine.html> (discussing the impact and personal experience of a palliative care physician working in a state that recently passed PAD legislation).