

1 **IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO**

2 Opinion Number: _____

3 Filing Date: August 11, 2015

4 **NO. 33,630**

5 **KATHERINE MORRIS, M.D., AROOP**
6 **MANGALIK, M.D., and AJA RIGGS,**

7 Plaintiffs-Appellees,

8 v.

9 **KARI BRANDENBURG, in her official capacity**
10 **as District Attorney for Bernalillo County, New**
11 **Mexico, and GARY KING, in his official capacity**
12 **as Attorney General of the State of New Mexico,**

13 Defendants-Appellants.

14 **APPEAL FROM THE DISTRICT COURT OF BERNALILLO COUNTY**
15 **Nan G. Nash, District Judge**

16 Kennedy Kennedy & Ives, LLC
17 Laura Schauer Ives
18 Albuquerque, NM

19 ACLU of New Mexico Foundation
20 Alexandra Freedman Smith
21 Albuquerque, NM

1 Kathryn L. Tucker
2 Ojai, CA

3 for Appellees

4 Hector H. Balderas, Attorney General
5 Scott Fuqua, Assistant Attorney General
6 Santa Fe, NM

7 for Appellants

8 Rothstein, Donatelli, Hughes
9 Dahlstrom, Schoenburg & Bienvenu, LLP
10 Kristina Martinez
11 Carolyn M. "Cammie" Nichols
12 Santa Fe, NM

13 for Amicus Curiae The ALS Association New Mexico Chapter

14 Montgomery & Andrews, P.A.
15 Lara Katz
16 Santa Fe, NM

17 for Amicus Curiae Disability Rights Amici: Not Dead Yet, Adapt, American
18 Association of People With Disabilities, Autistic Self Advocacy Network,
19 Disability Rights Education and Defense Fund, National Council on Independent
20 Living, and the United Spinal Association

21 Garcia Ives Nowara, LLC
22 Molly Schmidt Nowara
23 Albuquerque, NM

1 Covington & Burling, LLP
2 Christina G. Kuhn
3 Washington, DC

4 for Amicus Curiae American Medical Women's Association, American Medical
5 Student Association, and New Mexico Public Health Association

6 Robert Schwartz
7 Albuquerque, NM

8 for Amicus Curiae New Mexico Psychological Association

9 Alliance Defending Freedom
10 Catherine Glenn Foster
11 Washington, DC

12 Modrall, Sperling, Roehl, Harris & Sisk, P.A.
13 Emil J. Kiehne
14 Albuquerque, NM

15 for Amicus Curiae State of New Mexico Senators William F. Burt, Mark Moores,
16 Steven P. Neville, William E. Sharer, and Pat Woods; State of New Mexico
17 Representatives Paul C. Bandy, Sharon Clahchischilliage, David M. Gallegos,
18 Jason C. Harper, Yvette Herrell, and James R.J. Strickler; and Christian Medical
19 and Dental Associations

20 Stelzner, Winter, Warburton, Flores, Sanchez & Dawes, P.A.
21 Juan L. Flores
22 Jaime L. Dawes
23 Albuquerque, NM

24 for Amicus Curiae Michael J. Sheehan of the Archdiocese of Santa Fe, Bishop
25 Oscar Cantú of the Diocese of Las Cruces, and Bishop James A. Wall of the
26 Diocese of Gallup

1 **OPINION**

2 **GARCIA, Judge.**

3 {1} A New Mexico statute makes “assisting suicide” a fourth degree felony and
4 defines the proscribed conduct as “deliberately aiding another in the taking of his own
5 life.” NMSA 1978, § 30-2-4 (1963). The question presented is whether this statute
6 may constitutionally be applied to criminalize a willing physician’s act of providing
7 a lethal dose of a prescribed medication at the request of a mentally competent,
8 terminally ill patient who wishes a peaceful end of life (aid in dying) as an alternative
9 to one potentially marked by suffering, pain, and/or the loss of autonomy and dignity.

10 The district court concluded that Section 30-2-4 is invalid under two provisions of the
11 New Mexico Constitution as applied to any physician who provides aid in dying to
12 a patient. In reaching its conclusion, the district court determined that aid in dying is
13 a fundamental liberty interest and that the State did not meet its burden to prove that
14 Section 30-2-4 met a strict scrutiny standard of review. We conclude that aid in dying
15 is not a fundamental liberty interest under the New Mexico Constitution.

16 Accordingly, we reverse the district court’s order permanently enjoining the State
17 from enforcing Section 30-2-4. In addition, we affirm the district court’s
18 determination that, for statutory construction purposes, Section 30-2-4 prohibits aid

1 in dying. Finally, I would also remand to the district court for further proceedings
2 regarding the remaining aid in dying claims raised by Plaintiffs, including the entry
3 of findings and conclusions concerning whether Section 30-2-4 meets the
4 intermediate standard of review required for important individual liberty interests
5 under the New Mexico Constitution and/or whether it passes a rational basis standard
6 of review as applied to aid in dying.

7 **BACKGROUND**

8 {2} Plaintiffs are Dr. Katherine Morris, a surgical oncologist at the University of
9 New Mexico (UNM); Dr. Aroop Mangalik, a UNM physician; and Aja Riggs, a
10 patient who has been diagnosed with uterine cancer.¹ In the course of their practices,
11 Drs. Morris and Mangalik provide medical care to mentally competent, terminally ill
12 adults who have expressed interest in what Plaintiffs call “aid in dying,” which the
13 parties define as the “practice of a physician providing a mentally competent[,]
14 terminally ill patient with a prescription for [a lethal dose of] medication which the
15 patient may choose to ingest to achieve a peaceful death and thereby avoid further
16 suffering.”

17 ¹Although two Plaintiffs are doctors, the right at issue is asserted to belong to
18 their patients, and doctors are typically deemed to have standing to assert the
19 constitutional rights of their patients. *See Singleton v. Wulff*, 428 U.S. 106, 108, 117
20 (1976); *Doe v. Bolton*, 410 U.S. 179, 188 (1973).

1 {3} Aid in dying has been legal in Oregon for nearly two decades. Or. Rev. Stat.
2 Ann. §§ 127.800 to .897 (1997, as amended through 2013). Dr. Morris, who
3 previously practiced in Oregon, administered aid in dying at the request of two
4 patients in that state. The practice is also legal in Vermont, *see* Vt. Stat. Ann. tit. 18,
5 §§ 5281 to 5292 (2013), and Washington, *see* Wash. Rev. Code Ann. §§ 70.245.10
6 to 70.245.904 (2009), and has been judicially recognized as a valid statutory defense
7 to homicide in Montana, *see Baxter v. Montana*, 2009 MT 449, ¶ 1, 354 Mont. 234,
8 224 P.3d 1211. The practice is statutorily stated to be illegal in five other states, *see*
9 Ark. Code Ann. § 5-10-106 (2007) (expressly prohibiting “physician-assisted
10 suicide”); Ga. Code Ann. § 16-5-5(b), (d) (2012) (indicating application to physicians
11 by requiring healthcare providers to notify the licensing board upon conviction);
12 Idaho Code Ann. § 18-4017 (2011) (same); N.D. Cent. Code Ann. § 12.1-16-04
13 (1991) (prohibiting the issuance of prescriptions for the purpose of assisting suicide);
14 R.I. Gen. Laws § 11-60-3 (1996) (prohibiting licensed healthcare practitioners from
15 providing another the physical means to commit suicide), and is potentially prohibited
16 in the majority of remaining jurisdictions by blanket manslaughter statutes similar to
17 Section 30-2-4. *See, e.g.,* Cal. Penal Code § 401 (1905).

1 {4} Uncertain about the legality of aid in dying in New Mexico, Drs. Morris and
2 Mangalik filed suit seeking a declaration that they cannot be prosecuted under
3 Section 30-2-4. They alleged that the statute does not apply to aid in dying, and if it
4 does, such application offends provisions of our state constitution, including Article
5 II, Section 4's guarantee of inherent rights and Article II, Section 18's Due Process
6 Clause. The district court held a trial on the merits at which several witnesses testified
7 for Plaintiffs. That testimony was uncontroverted and formed the basis for the district
8 court's findings. The testimony and findings, which remain undisputed, establish the
9 following facts.

10 {5} Quality of life for terminally ill patients varies depending on the specific
11 illness, its manifestations in the patient, and the patient's physical and psychological
12 reserves. But progressive terminal illness, by definition, interferes with vital
13 functions, such as eating and drinking, breathing, blood flow, and the basic functions
14 of the brain. At any given moment, there are terminally ill patients in New Mexico
15 "who find the suffering from their illness to be unbearable, despite efforts to relieve
16 pain and other distressing symptoms." Some of those patients find the current options
17 in end-of-life care to be inadequate to relieve their suffering and want the option of
18 aid in dying. The dying process is often extremely difficult for patients with terminal

1 illnesses. As a surgical oncologist, Dr. Morris has treated cancer patients with a
2 variety of end-of-life symptoms, such as irremovable “obstruction[s]” that cause the
3 inability to swallow, fluid accumulation that leads to rapid and repeated distention of
4 the abdomen, and swelling of the skin such that it splits open. In some instances, a
5 patient’s suffering is such that doctors induce unconsciousness—the so-called
6 “barbiturate coma”—and then withhold hydration and nutrition until death arrives.
7 As one example, Dr. Morris recalled treating a “really strong” firefighter who was
8 approximately six foot, five inches tall and weighed 280 pounds. His skin cancer led
9 to metastasis of the spine, which left him “sobbing in pain.” All doctors could do to
10 ease his pain “was make him unconscious” by administering “huge doses” of
11 narcotics, muscle relaxants, and sedatives.

12 {6} Dr. Morris testified that sedating people to this level “suppresses their
13 breathing and sometimes ends their li[ves].” The removal of life-sustaining nutrition
14 and hydration also hastens the death of the sedated patient. Experts at trial described
15 the “double-effect” of this practice of terminal (or palliative) sedation, as it is called:
16 Although the physician’s “primary intent”—or more accurately, motive—is to
17 eliminate pain, the physician “inevitably know[s]” that administering such high doses
18 of consciousness-lowering medications—at times, tens or even hundreds of times the

1 normal dosage—will lead, in close proximity, to the patient’s death. Palliative
2 sedation is an accepted medical practice and is allowed in New Mexico. *See generally*
3 NMSA 1978, §§ 24-2D-1 to -6 (1999, as amended through 2012). The same is true
4 for withdrawal of life-sustaining treatment measures. *See generally* NMSA 1978, §§
5 24-7A-1 to -18 (1995, as amended through 2009). But these legal options for ending
6 life arise only after the patient potentially endures a period of degeneration.

7 {7} Apart from pain, there are other reasons why a terminally ill patient may choose
8 aid in dying. In Oregon and Washington, where data on aid in dying are required to
9 be kept by statute, *see* Or. Rev. Stat. Ann. § 127.865; Wash. Rev. Code Ann. §
10 70.245.150, the most commonly cited end-of-life concern among patients who choose
11 to ingest the lethal dose of medication is “loss of autonomy.”² Patients in both states
12 also frequently report that their illnesses cause a loss of dignity and a loss of the
13 ability to engage in the activities that make life enjoyable. Oregon’s Death With
14 Dignity Act Rep., *supra*, at 5; Wash. Death With Dignity Act Rep., *supra*, at 7. Dr.
15 David Pollack, a psychiatrist practicing in Oregon for over forty years, testified at

16 ²Or. Pub. Health Div., Oregon’s Death with Dignity Act Rep. (2014) *available*
17 *at* [https://public.health.oregon.gov/ProviderPartnerResources/EvaluationResearch/](https://public.health.oregon.gov/ProviderPartnerResources/EvaluationResearch/DeathwithDignityAct/Documents/Year17.pdf)
18 [DeathwithDignityAct/Documents/Year17.pdf](https://public.health.oregon.gov/ProviderPartnerResources/EvaluationResearch/DeathwithDignityAct/Documents/Year17.pdf); Wash. State Dep’t of Health, 2013
19 Death With Dignity Act Rep. Exec. Summary (2014) *available at*
20 <http://www.doh.wa.gov/portals/1/Documents/Pubs/422-109-DeathWithDignityAct>
21 [2013.pdf](http://www.doh.wa.gov/portals/1/Documents/Pubs/422-109-DeathWithDignityAct)

1 trial that patients choose to ingest the lethal dose of medication “to alleviate
2 symptoms, to spare others from the burden of watching them dwindle away or be a
3 shell of their former sel[ves] or to feel like they are in control, [to] have some
4 autonomy and some control over the way that they die.”

5 {8} Plaintiff Aja Riggs, who has been diagnosed with life-threatening uterine
6 cancer, testified that she did not know if she “want[ed] to go all the way to the end”
7 and naturally die if the consequences of her cancer reached the terminal stages:

8 I think one of the images that I had that I didn’t and I don’t want to have
9 happen is that I’m lying in bed in pain, or struggling not to be in pain,
10 or mostly unconscious with everybody that cares about me around me
11 and all of us just waiting for me to die.

12 Ms. Riggs further testified that the legal availability of aid in dying would bring her
13 peace of mind and help her feel that she can make controlled personal choices about
14 her experience with cancer. This sentiment was echoed by Dr. Nicholas Gideonse
15 who specializes in end-of-life care in Oregon:

16 I’ve had patients who’ve had breast cancer for [twenty years], been
17 through rounds of fighting and succeeding and remission and then not.
18 They know these illnesses well. And . . . if they get the chance to write
19 that final chapter, to at least describe how the story will end on their own
20 terms, it’s a great relief to patients and their families.

21 {9} The trial testimony identified the existence and substance of a standard of care
22 for determining terminality and eligibility for aid in dying in other states, derived

1 from the experience with the practice in Oregon, where it has been legal since 1997.
2 In addition, it described a standard of care for determining mental competence, that
3 physicians are trained to apply. The testimony further showed similarities among aid
4 in dying, terminal sedation, and the removal or refusal of life-sustaining treatment,
5 as well as the differences between aid in dying and suicide, including the distinct
6 reasons for these acts.

7 {10} The experience in Oregon has been that a number of patients who have been
8 prescribed aid-in-dying medication never ingest it. According to the trial testimony,
9 the availability of the medication nonetheless provides patients the comfort of
10 knowing that there is a peaceful alternative to being forced to endure unbearable
11 suffering. Still more patients do not request the medication after discussing the option
12 with their physicians.

13 **The District Court’s Judgment**

14 {11} After trial, the district court found that physicians have provided and continue
15 to provide aid in dying to qualified patients in Oregon, Washington, and Vermont
16 (pursuant to statutory authorization); Montana (pursuant to an opinion of the Montana
17 Supreme Court); and Hawaii (where there is no criminal prohibition). The court also
18 found that, when aid in dying is available, “end[-]of[-]life care for all terminally ill

1 patients improves through better pain treatment, earlier and increased referrals to
2 hospice[,] and better dialogues between physicians and their terminally ill patients
3 about end[-]of[-]life care and wishes.”

4 {12} Ultimately, the district court concluded that Section 30-2-4 prohibits aid in
5 dying but that its application to aid in dying violates the inherent-rights guarantee and
6 substantive due process protections afforded by Article II, Section 4 and Article II,
7 Section 18 of the New Mexico Constitution. Citing *Washington v. Glucksberg*, 521
8 U.S. 702, 725 (1997), the district court acknowledged that the United States Supreme
9 Court “declined to find the right to aid in dying to be . . . protected by the federal
10 Constitution.” The court nevertheless departed from federal precedent established in
11 *Glucksberg*, noting that New Mexico has inherent power as a separate sovereign in
12 our federalist system to provide more liberty under the New Mexico Constitution than
13 that afforded by the federal Constitution. It then applied the interstitial approach to
14 constitutional analysis mandated by our Supreme Court in such circumstances. *See*
15 *State v. Gomez*, 1997-NMSC-006, ¶ 19, 122 N.M. 777, 932 P.2d 1. The district court
16 concluded that the inherent rights clause of Article II, Section 4 provides “distinct
17 additions” to the fundamental rights afforded under the federal Constitution and a
18 basis to diverge from federal precedent.

1 {13} The district court specifically held that “[a] terminally ill, mentally competent
2 patient has a fundamental right to choose aid in dying pursuant to the New Mexico
3 Constitution’s [Article II, Section 4] guarantee to protect life, liberty, and seeking and
4 obtaining happiness . . . and its substantive due process protections [under Article II,
5 Section 18].” Applying strict scrutiny, the court held that the State had failed to prove
6 that by criminalizing the actions of physicians who provide aid in dying Section 30-2-
7 4 furthers a compelling interest. The district court also ordered that the State be
8 permanently enjoined from prosecuting any physician who provides aid in dying to
9 mentally competent, terminally ill patients who choose to utilize aid in dying. The
10 State timely appealed.

11 **ISSUES AND ARGUMENTS ON APPEAL**

12 {14} On appeal, the parties have stipulated to the factual record developed in the
13 district court. The State argues that (1) there is no fundamental right to the deliberate
14 assistance of a third-party in ending one’s own life through aid in dying, and (2) the
15 district court’s ruling violates the doctrine of separation of powers by legalizing
16 conduct that is designated to be a crime by the Legislature. In addition to disputing
17 the State’s contentions, Plaintiffs argue that Section 30-2-4 does not prohibit aid in
18 dying.

1 **DISCUSSION**

2 **I. Statutory Construction: Section 30-2-4**

3 {15} We begin with the text of the statute, which provides, “[A]ssisting suicide
4 consists of deliberately aiding another in the taking of his own life. Whoever commits
5 assisting suicide is guilty of a fourth degree felony.” Section 30-2-4. “Our principal
6 goal in interpreting statutes is to give effect to the Legislature’s intent.” *Griego v.*
7 *Oliver*, 2014-NMSC-003, ¶ 20, 316 P.3d 865. To do so, we first look to the language
8 used and the plain meaning of that language. *State v. Moya*, 2007-NMSC-027, ¶ 6,
9 141 N.M. 817, 161 P.3d 862. “We refrain from further interpretation where the
10 language is clear and unambiguous.” *State v. Martinez*, 2006-NMCA-068, ¶ 5, 139
11 N.M. 741, 137 P.3d 1195 (internal quotation marks and citation omitted).

12 {16} Plaintiffs contend that the statute does not prohibit aid in dying. Citing Rule
13 12-201(C) NMRA,³ the State protests that this argument is not properly before us
14 because the district court ruled against Plaintiffs on this point and Plaintiffs did not

15 ³Rule 12-201(C) reads:
16

17 An appellee may, without taking a cross-appeal or filing a docketing
18 statement or statement of the issues, raise issues on appeal for the
19 purpose of enabling the appellate court to affirm, or raise issues for
20 determination only if the appellate court should reverse, in whole or in
21 part, the judgment or order appealed from.

1 file a cross appeal. It argues that the doctrine that permits affirmance for any reason
2 supported by the record, *see Meiboom v. Watson*, 2000-NMSC-004, ¶ 20, 128 N.M.
3 536, 994 P.2d 1154, cannot be applied because acceptance of Plaintiffs’ statutory
4 argument would require reversing, not affirming, the district court’s conclusion that
5 Section 30-2-4 prohibits physicians from providing aid in dying. We have held that
6 “an appellee need not cross-appeal to raise an issue that would preserve the judgment
7 below.” *Cochrell v. Mitchell*, 2003-NMCA-094, ¶ 12, 134 N.M. 180, 75 P.3d 396
8 (alteration, internal quotation marks, and citation omitted). In any event, we cannot
9 address the question presented—whether Section 30-2-4 may constitutionally be
10 applied in the circumstances presented here—without first determining what the
11 statute proscribes. We also must interpret statutes in a manner that avoids, to the
12 extent possible, raising constitutional concerns. *Griego*, 2014-NMSC-003, ¶ 19.
13 Accordingly, we determine the meaning of Section 30-2-4.

14 {17} The central point of Plaintiffs’ statutory argument is that the Legislature’s use
15 of the term “suicide” in Section 30-2-4 suggests that the statute “clearly contemplates
16 individuals who are not already dying, and nothing suggests it reaches a competent,
17 dying patient’s decision to achieve a peaceful death.” The factual basis for this
18 argument is the uncontested expert testimony of Dr. Pollack, which establishes that

1 “suicide is a distinctly different act than requesting aid in dying[.]” According to Dr.
2 Pollack, suicide is a “despairing, lonely experience.” He stated that it is an impulsive
3 act—typically in reaction to psychological isolation, shame, guilt, or
4 misunderstanding by others, and its effect on survivors is devastating. Family
5 members tend to experience shock and disbelief or anger. In contrast, Dr. Pollack
6 noted that those who request aid in dying do so to alleviate symptoms and to maintain
7 relationships, connections, and a sense of self, and recognize that the problem
8 confronting them arises from an irreversible physical calamity. They are already
9 dying, and “[they are] focused on maintaining the quality of life that is something that
10 they cherish.” Dr. Pollack also testified that since the 1990s, increasing numbers of
11 mental health and medical professionals have recognized that the two acts are
12 fundamentally different, and treating physicians reject the idea that patients who have
13 chosen aid in dying were committing suicide. He explained that if these patients could
14 have survived their illnesses, they would have chosen to do so. The State concedes
15 that distinctions between suicide and aid in dying identified in the fields of medicine
16 and psychology are “compelling” but contends that they are “irrelevant from a legal
17 standpoint.”

1 {18} As a textual matter, the State is correct. In defining the proscribed
2 conduct—“[a]ssisting suicide”—as “deliberately aiding another in the taking of his
3 own life[,]” the statute necessarily also defines “suicide” as “the taking of [one’s] own
4 life.” Section 30-2-4. This statutory definition of “suicide” binds us. *See Cadena v.*
5 *Bernalillo Cnty. Bd. of Cnty. Comm’rs*, 2006-NMCA-036, ¶ 15, 139 N.M. 300, 131
6 P.3d 687 (“As a rule[,] a statutory definition which declares what a term means is
7 binding on the court.” (alteration, internal quotation marks, and citation omitted)). As
8 noted, the parties define “aid in dying” as “the practice of a physician providing a
9 mentally competent[,] terminally ill patient with a prescription for [a lethal dose of
10 an authorized] medication which the patient may choose to ingest to achieve a
11 peaceful death[.]” While not recognized as “suicide” in a growing body of medical
12 and psychological literature, a patient’s choice to “achieve a peaceful death” is still
13 “the taking of [one’s] own life” under the statute’s plain terms. *See* § 30-2-4.
14 “[A]iding,” in the context of “determining whether one is criminally liable for [his or
15 her] involvement in the suicide of another,” means “providing the means to commit
16 suicide[.]” *State v. Sexson*, 1994-NMCA-004, ¶ 15, 117 N.M. 113, 869 P.2d 301. Dr.
17 Morris testified at trial that a prescription for aid in dying is typically for the
18 barbiturate Seconal, written for a uniform dose calculated to have lethal effect. This

1 conduct, by design, provides a patient the means to take his or her own life and is
2 prohibited by the text of Section 30-2-4.

3 {19} Citing the Uniform Health-Care Decisions Act, §§ 24-7A-1 to -18, as evidence
4 of “New Mexico’s long, proud tradition of public policy promoting autonomy in end-
5 of-life decision making,” Plaintiffs assert that we may consider the “clear policy
6 implications of various constructions” if a statute is ambiguous. They also cite the
7 Supreme Court of Montana’s decision in *Baxter*, 2009 MT 449, ¶¶ 26-28, for the
8 proposition that a state’s public policy valuing autonomy in medical decision making
9 can guide courts in determining whether assisted suicide includes aid in dying. But
10 “[s]tatutory language that is clear and unambiguous must be given effect.” *V.P.*
11 *Clarence Co. v. Colgate*, 1993-NMSC-022, ¶ 8, 115 N.M. 471, 853 P.2d 722. And,
12 where the language is plain, the court’s task of statutory interpretation ends. *Martinez*,
13 2006-NMCA-068, ¶ 5.

14 {20} Plaintiffs’ arguments are unavailing in any event. Since enacting Section 30-2-
15 4 in 1963, the Legislature has twice considered “assisted suicide” in the healthcare
16 context. In both the Uniform Health-Care Decisions Act, §§ 24-7A-1 to -18, and the
17 Mental Health Care Treatment Decisions Act, NMSA 1978, §§ 24-7B-1 to -16 (2006,
18 as amended through 2009), the Legislature expressly refused to “authorize . . .

1 assisted suicide . . . to the extent prohibited by other statutes of this state.” Sections
2 24-7A-13(C); 24-7B-15(C). We note that the “other statute[] of this state” must be
3 a reference to Section 30-2-4. Furthermore, *Baxter’s* exploration of statutes and
4 precedents for evidence of state policy on medical decision making was expressly
5 called for by the language of a statutory affirmative defense that invalidates the
6 consent defense when “it is against public policy to permit the conduct or the
7 resulting harm, even though consented to.” 2009 MT 449, ¶¶ 11-13 (internal
8 quotation marks and citation omitted). Plaintiffs’ statutory argument fails, and we
9 must address the district court’s ruling that aid in dying is a fundamental liberty
10 interest that is entitled to due process protection under the New Mexico Constitution.

11 **II. The New Mexico Constitution**

12 {21} Plaintiffs argue that Section 30-2-4’s criminalization of aid in dying violates
13 two provisions of the New Mexico Constitution: the Due Process Clause of Article
14 II, Section 18, which has an analogous provision in the Fourteenth Amendment of the
15 United States Constitution, and the inherent-rights guarantee of Article II, Section 4,
16 which has no enumerated federal constitutional analogue. Although Plaintiffs do not
17 assert a right to aid in dying under federal law, the State’s argument is that there is no
18 such right, and the inquiry continues to be identical to and controlled by the United

1 States Supreme Court’s analysis in *Glucksberg*, 521 U.S. at 728, where it held that
2 “the asserted ‘right’ to assistance in committing suicide is not a fundamental liberty
3 interest protected by the [federal] Due Process Clause” and that “Washington’s
4 assisted-suicide ban [is] rationally related to legitimate government interests.”
5 Accordingly, we take cognizance of the necessity for an interstitial approach to
6 constitutional analysis adopted by our Supreme Court in *Gomez*, 1997-NMSC-006,
7 ¶ 19. Our review of the district court’s interstitial approach is de novo. *See Bank of*
8 *N.Y. v. Romero*, 2014-NMSC-007, ¶ 52, 320 P.3d 1 (stating that constitutional
9 interpretation issues are reviewed de novo).

10 **A. The Interstitial Approach to Interpreting the New Mexico Constitution**

11 {22} *Gomez* made clear that “states have inherent power as separate sovereigns in
12 our federalist system to provide *more* liberty than is mandated by the United States
13 Constitution” and that “[w]e are not bound to give the same meaning to the New
14 Mexico Constitution as the United States Supreme Court places upon the United
15 States Constitution, even in construing provisions having wording that is identical,
16 or substantially so, unless such interpretations purport to restrict the liberties
17 guaranteed the entire citizenry under the federal charter.” 1997-NMSC-006, ¶ 17
18 (internal quotation marks and citation omitted). While recognizing that “[f]ederal

1 precedent in areas addressed by similar provisions in our state constitutions can be
2 meaningful and instructive[.]” *id.* ¶ 21 (internal quotation marks and citation omitted),
3 our Supreme Court explained that it had abandoned a “lock-step” approach to
4 interpretation of the New Mexico Constitution and applied an “interstitial [approach],
5 providing broader protection where we have found the federal analysis unpersuasive
6 either because we deemed it flawed . . . or because of undeveloped federal analogs[.]”
7 *Id.* ¶ 20 (citations omitted).

8 Under the interstitial approach, the court asks first whether the right
9 being asserted is protected under the federal [C]onstitution. If it is, then
10 the state constitutional claim is not reached. If it is not, then the state
11 constitution is examined. A state court adopting this approach may
12 diverge from federal precedent for three reasons: a flawed federal
13 analysis, structural differences between state and federal government, or
14 distinctive state characteristics.

15 *Id.* ¶ 19 (citation omitted); *see State v. Garcia*, 2009-NMSC-046, ¶ 34, 147 N.M. 134,
16 217 P.3d 1032 (rejecting widely criticized United States Supreme Court decision
17 weakening a right “beyond a point which may be countenanced under our state
18 constitution”); *State v. Rowell*, 2008-NMSC-041, ¶¶ 20-23, 144 N.M. 371, 188 P.3d
19 95 (declining to follow United States Supreme Court decisions criticized in legal
20 literature as “devoid of a reasoned basis in constitutional doctrine”); *N.M. Right to*
21 *Choose/NARAL v. Johnson*, 1999-NMSC-005, ¶¶ 28-43, 126 N.M. 788, 975 P.2d 841

1 (concluding that distinctive characteristics of the New Mexico Constitution mandated
2 rejection of federal constitutional analysis affording less protection); *State v.*
3 *Gutierrez*, 1993-NMSC-062, ¶¶ 32, 50-56, 116 N.M. 431, 863 P.2d 1052 (discussing
4 “a willingness to undertake independent analysis of our state constitutional
5 guarantees when federal law begins to encroach on the sanctity of those guarantees”
6 and rejecting a federal constitutional rule as incompatible with the guarantees of the
7 New Mexico Constitution); *State v. Ochoa*, 2009-NMCA-002, ¶¶ 12-13, 146 N.M.
8 32, 206 P.3d 143 (rejecting a widely criticized United States Supreme Court decision,
9 finding the federal analysis unpersuasive and incompatible with state constitutional
10 standards).

11 {23} Thus, our analysis of rights afforded by the New Mexico Constitution is not
12 “inextricably tied” to federal constitutional analysis. *NARAL*, 1999-NMSC-005, ¶ 37;
13 *see Gutierrez*, 1993-NMSC-062, ¶ 16 (stating that, in interpreting state constitutional
14 guarantees, New Mexico courts may seek guidance from decisions of federal courts
15 without being bound by those decisions). In seeking departure from federal due
16 process precedent, Plaintiffs carried the initial burden to establish that greater due
17 process protections should be recognized under Article II, Section 18 of our New

1 Mexico Constitution.⁴ See *Gomez*, 1997-NMSC-006, ¶ 22-23; Rule 12-216(A)
2 NMRA. The basis for interpreting greater protections under Article II, Section 18 of
3 the New Mexico Constitution must first be addressed and found to exist by the
4 district court. *Gomez*, 1997-NMSC-006, ¶ 23. In its findings of fact and conclusions
5 of law, the district court identified the following reasons for greater protection under
6 Article II, Section 18, which we summarize numerically:

7 1. Our Supreme Court has already recognized greater protections under the
8 New Mexico Constitution in “many instances[,]” citing *Montoya v. Ulibarri*, 2007-
9 NMSC-035, ¶ 22, 142 N.M. 89, 163 P.3d 476 (recognizing that the New Mexico
10 Constitution provides greater rights than those provided in the federal constitution in
11 the areas of double jeopardy, search and seizure, and equal protection).

12 2. Our Supreme Court has recognized that some rights of a “personal nature”
13 are entitled to constitutional protection, such as “the right of parents in the care,
14 custody, and control of their children”; “the freedom of personal choice in matters of
15 family life”; and “the right to family integrity,” citing *In re Pamela A.G.*, 2006-

16 ⁴We note that interstitial review in this instance must be utilized to resolve
17 Plaintiffs’ claim that Article II, Section 18 provides New Mexicans with a due
18 process right to aid in dying that was denied under the federal constitution. Regarding
19 Article II, Section 4, no federal analogue exists and our analysis is initially
20 interpretive and it potentially becomes interstitial only if substantive due process
21 recognition is also required to establish Plaintiffs’ proposed interest under Section 4.

1 NMSC-019, ¶ 11, 139 N.M. 459, 134 P.3d 746 (recognizing the interest of parents
2 in the care, custody, and control of their children as a fundamental liberty interest);
3 *Oldfield v. Benavidez*, 1994-NMSC-006, ¶ 14, 116 N.M. 785, 867 P.2d 1167
4 (recognizing the general right to familial integrity as a clearly established
5 constitutional right but noting its parameters are not absolute, unqualified, or clearly
6 established); and *Jaramillo v. Jaramillo*, 1991-NMSC-101, ¶¶ 15-21, 113 N.M. 57,
7 823 P.2d 299 (addressing the constitutional right to travel in the context of assigning
8 the burden of proof between a relocating custodial parent and the non-custodial
9 parent).

10 3. The protected liberty interest of a terminal patient dealing with imminent
11 death that was identified in *Cruzan ex rel. Cruzan v. Director, Missouri Department*
12 *of Health*, 497 U.S. 261, 278-79 (1990), is more closely aligned with the liberty
13 interest in this case and is entitled to protection under Article II, Section 18, despite
14 not being protected under the Due Process Clause of the Fourteenth Amendment in
15 *Glucksberg*.

16 {24} We note that as part of their interstitial argument, Plaintiffs also asserted that
17 New Mexico has made an enhanced commitment to patient autonomy at the end of
18 life, and Article II, Section 18 should recognize greater protections through the equal

1 protection test articulated in *Breen v. Carlsbad Municipal Schools*, 2005-NMSC-028,
2 ¶ 8, 138 N.M. 331, 120 P.3d 413. This equal protection assertion was not recognized
3 by the district court and was not included in its findings.

4 {25} Prior to any hearings held by the district court, the State moved to dismiss
5 Plaintiffs' complaint based upon substantially the same governmental interests
6 determined to exist by the United States Supreme Court in *Glucksberg*. See 521 U.S.
7 at 703-04. While the State does not fully concede application of the interstitial
8 approach suggested by Plaintiffs, the district court's findings nonetheless identified
9 a basis for establishing greater protections in New Mexico by application of the
10 interstitial approach. First, it held that the distinctive individual interests embodied
11 under Article II, Section 4 are not enumerated as protections within the federal
12 Constitution and these enumerated New Mexico interests have been recognized to
13 support the existence of other inherent rights by our Supreme Court. See *Griego*,
14 2014-NMSC-003, ¶ 1 (relying upon Article II, Section 4 to identify the inherent rights
15 "enjoyed by all New Mexicans" that must then be legally measured because "it is the
16 responsibility of the courts to interpret and apply the protections of the
17 Constitution"). Second, its findings concerning the experiences in other states where
18 aid in dying is legal support the notion that the federal analysis in *Glucksberg* may

1 be flawed and thus may not constitute an authoritative bar to protection under Article
2 II, Section 18 of the New Mexico Constitution. As a result, current due process
3 analysis could result in a different factual and legal outcome than that of *Glucksberg*.
4 Having identified Article II, Section 18 as the basis for application of the interstitial
5 approach under the New Mexico Constitution, the district court rejected *Glucksberg*'s
6 analysis and concluded that greater constitutional protections are provided under the
7 New Mexico Constitution. We review the interstitial analysis employed by the district
8 court as to both constitutional provisions to address whether aid in dying constitutes
9 a liberty interest under either of these two sections of the New Mexico Constitution.

10 **B. Aid in Dying as Defined and Applied by the Parties**

11 {26} Plaintiffs contend that aid in dying is “fundamental or, at the very least,
12 important under the New Mexico Constitution.” On appeal, Plaintiffs identify the
13 fundamental rights implicated in aid in dying as (1) the “right to autonomous medical
14 decision making” and (2) the right to “a dignified, peaceful death.” The district court
15 agreed that aid in dying is a fundamental liberty interest protected by the New Mexico
16 Constitution. Constitutional interpretation is an issue of law we review de novo. *State*
17 *v. Boyse*, 2013-NMSC-024, ¶ 8, 303 P.3d 830. In doing so, we must consider the
18 claimed constitutional interest in the context in which the allegedly protected conduct

1 takes place. Additionally, we emphasize at the outset that the interest asserted here
2 applies only to a narrowly defined class of New Mexico citizens.

3 {27} Plaintiffs do not argue that there is a broad, categorical constitutional right to
4 commit suicide that includes a right to third-party assistance in doing so. Rather,
5 Plaintiffs precisely and narrowly define their claimed liberty interest as one that does
6 not apply to any large classification of citizens. We understand Plaintiffs' assertion
7 to be that this narrowly defined interest is only fundamental where: (1) a mentally
8 competent patient is capable of giving consent, (2) the patient is diagnosed as
9 terminally ill, (3) the patient requests a prescription for medication that may be
10 ingested to bring about an immediate end to his/her life, and (4) a willing physician
11 applying the proper standard of care determines that it would be appropriate to
12 provide and prescribes the terminal dose of medication for the patient to ingest and
13 end the patient's life.

14 {28} The State concedes that citizens have a right to make their own end-of-life
15 decisions and to bring about their own deaths without the aid or assistance of another
16 person. There is also no dispute that a physician may lawfully act pursuant to statute
17 to support a patient's desire to shorten the dying process by removing life-sustaining
18 nutrition, hydration, or mechanical life support, and by administering palliative

1 sedation (high doses of consciousness-lowering medications). *See generally* §§ 24-
2 2D-1 to -6; 24-7A-1 to -18. At oral argument, the State even suggested that patients
3 may bring about the end of their own lives by stockpiling morphine lawfully
4 prescribed by a physician and ultimately ingesting a lethal dosage. According to the
5 State, this act does not involve the statutorily defined aid or assistance of another
6 person under Section 30-2-4, even though it involves a physician’s act of prescribing
7 the medication used by the patient to cause his/her own death. The State also “readily
8 concede[d]” that, except for the acts of aiding or assisting a person in taking his or
9 her own life, it had no interest in causing mentally competent, terminally ill patients
10 to suffer during the final days of their lives.

11 **C. Aid in Dying Is Not a Fundamental Liberty Interest Protected by the Due**
12 **Process Clause of the New Mexico Constitution**

13 {29} The Due Process Clause of the New Mexico Constitution provides that “[n]o
14 person shall be deprived of life, liberty or property without due process of law[.]”
15 N.M. Const. art. II, § 18. The federal Due Process Clause similarly provides that no
16 state “shall . . . deprive any person of life, liberty, or property, without due process
17 of law[.]” U.S. Const. amend. XIV, § 1. Because the State’s due process argument
18 relies primarily on *Glucksberg*, the principal federal case interpreting the liberty
19 interest described here as aid in dying, we shall address its application to our decision

1 even though it does not bind our interpretation under Article II, Section 18, or curtail
2 the potential for broader protections under the New Mexico Constitution. *See Gomez,*
3 1997-NMSC-006, ¶ 19. We also address the narrow scope of Plaintiffs’ proposed
4 liberty interest and its relationship to the interests of life, liberty, and happiness that
5 are enumerated protections within Article II, Section 4.

6 **1. The Federal Analysis of Due Process and *Glucksberg***

7 {30} In *Glucksberg*, the United States Supreme Court confirmed that the substantive
8 component of the Due Process Clause under the Fourteenth Amendment protects
9 certain aspects of personal autonomy as fundamental rights notwithstanding that they
10 are not mentioned in the text of the Bill of Rights. *Glucksberg*, 521 U.S. at 720-21;
11 *see Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 847 (1992) (explaining
12 that the United States Supreme Court has never accepted the view that “liberty
13 encompasses no more than those rights already guaranteed to the individual against
14 [governmental] interference by the express provisions of the first eight [a]mendments
15 to the Constitution”). The Court stated that the government may not interfere with
16 certain liberty interests unless the government meets its burden under a strict scrutiny
17 standard—proving that the infringing statute is narrowly tailored to serve a
18 compelling governmental interest. *Glucksberg*, 521 U.S. at 721. In *Glucksberg*, four

1 physicians, three terminally ill patients, and one nonprofit organization filed suit
2 against the State of Washington, seeking a declaration that the state’s ban on assisting
3 suicide was unconstitutional. 521 U.S. at 707-08. Under the Due Process Clause of
4 the Fourteenth Amendment, the plaintiffs asserted a liberty interest to allow a
5 mentally competent, terminally ill adult the right to choose physician-assisted suicide
6 as a method to end life. *Id.* The United States Supreme Court unanimously determined
7 that “the asserted ‘right’” to physician-assisted suicide is not a liberty interest entitled
8 to any type of protection under the Due Process Clause of the Fourteenth
9 Amendment. *Id.* at 728, 735 (precluding its recognition as a constitutionally protected
10 due process liberty interest because of society’s nearly universal efforts to prevent
11 suicide and assisted suicide and due to the importance of the state’s interest in
12 regulating both the real and potentially adverse consequences of assisted suicide).

13 {31} Fundamental constitutional rights are enumerated and “specific freedoms
14 protected by the Bill of Rights,” *id.* at 720, or those later identified by process of the
15 United States Supreme Court’s enforcement of equality and liberty guaranteed by the
16 Fifth and Fourteenth Amendments. *See Lawrence v. Texas*, 539 U.S. 558, 575 (2003)
17 (“Equality of treatment and the due process right to demand respect for conduct
18 protected by the substantive guarantee of liberty are linked in important respects[.]”).

1 While constitutional interpretation must address “new dimensions of freedom” over
2 time, *see Obergefell v. Hodges*, ___ U.S. ___, 135 S. Ct. 2584, 2596 (2015), the sum of
3 such rights remains principally static because, in the words of the fourth Chief Justice
4 of the United States Supreme Court, John Marshall, “we must never forget, that it is
5 a *constitution* we are expounding.” *M’Culloch v. Maryland*, 17 U.S. 316, 407 (1819).
6 Constitutions, including our New Mexico Constitution, are sacred because they were
7 written to apply in perpetuity. *See Republican Party of N.M. v. N.M. Taxation &*
8 *Revenue Dep’t*, 2012-NMSC-026, ¶ 52, 283 P.3d 853 (“The constitution is the heart,
9 the soul, the genius of our system of government, and its safeguarding is [our New
10 Mexico Supreme] Court’s highest duty and most sacred function.” (internal quotation
11 marks and citation omitted)). “The doctrine of judicial self-restraint requires us to
12 exercise the utmost care whenever we are asked to break new ground in [the] field [of
13 substantive due process.]” *Collins v. Harker Heights*, 503 U.S. 115, 125 (1992); *see*
14 *also Log Cabin Republicans v. United States*, 658 F.3d 1162, 1170 (9th Cir. 2011)
15 (“[W]hen confronted with assertions of new fundamental rights, rather than invite
16 innovation the [c]ourt has counseled caution.”). Plaintiffs’ assertion of a new form of
17 constitutional right, one that protects a terminally ill patient’s interest in death and the

1 process of dying, is the type of new dimension that warrants such a careful exercise
2 of judicial caution.

3 {32} The constitutional question here—whether aid in dying is a constitutional right,
4 fundamental or otherwise—has only been directly answered by one case, *Glucksberg*.
5 Nearly twenty years have passed since *Glucksberg* concluded that a physician’s
6 “assistance in committing suicide is not a fundamental liberty interest protected by
7 the Due Process Clause” of the Fourteenth Amendment. 521 U.S. at 728. Despite its
8 share of criticism over the years, *see* Dissenting Op. ¶¶ 98-99, no court, federal or
9 state, has held that the concept of death, including a method of a more dignified
10 premature death with the assistance of another person, is rooted within the protections
11 of bodily integrity under the constitution.

12 {33} *Glucksberg* both recognized and relied upon “over 700 years [of] Anglo-
13 American common-law tradition [that] has punished or otherwise disapproved of both
14 suicide and assisting suicide.” 521 U.S. at 711. *Glucksberg*’s determination that there
15 exists no precipitate constitutional alleyway to the permanent nationwide legality of
16 physician-assisted suicide also stated its awareness of “serious, thoughtful
17 examinations” regarding aid in dying in various states. *Id.* at 719. It concluded by
18 permitting “earnest and profound debate about the morality, legality, and practicality

1 of [aid in dying] . . . to continue, as it should in a democratic society.” *Id.* at 735; *see*
2 *id.* at 737 (O’Connor, J. concurring) (“There is no reason to think the democratic
3 process will not strike the proper balance between the interests of terminally ill,
4 mentally competent individuals . . . and the [s]tate’s interests in protecting those who
5 might seek to end life mistakenly or under pressure.”); *id.* at 789 (Souter, J.,
6 concurring) (cautioning against “displace[ment of] the legislative ordering of
7 things”). Confirming that it meant what it held in *Glucksberg*, eight years later, the
8 Supreme Court rejected executive action undertaken by the United States Department
9 of Justice to apply the Controlled Substances Act to disallow physicians from
10 prescribing fatal narcotics as authorized by Oregon’s Death With Dignity Act.⁵ *See*
11 *Gonzales v. Oregon*, 546 U.S. 243 (2006). *Obergefell* also recently mentioned the
12 *Glucksberg* decision that has allowed the states to undertake nearly twenty years of

13 ⁵*See* Or. Rev. Stat. Ann. §§ 127.800 to .897. Despite the Supreme Court’s
14 invitation to utilize the democratic process to allow aid in dying in 1997, only three
15 states have presently enacted such enabling legislation. Significantly, at least thirteen
16 other states—Alaska, California, Colorado, Connecticut, Delaware, Maine, Maryland,
17 Massachusetts, Missouri, Nevada, Utah, Wisconsin, and Wyoming—have rejected
18 aid in dying by referendum or have failed to pass aid in dying legislation through
19 each state’s legislative process. *See* Patients Rights Council, *available at*
20 <http://www.patientsrightscouncil.org/site/assisted-suicide-the-continuing-debate/> (last
21 visited July 10, 2015) (tracking ballot initiatives and legislation regarding aid in
22 dying).

1 independent experimentation to properly balance the varying interests of the
2 terminally ill. *Obergefell*, ___ U.S. at ___, 135 S. Ct. at 2596.

3 {34} Before addressing Plaintiffs’ due process claim under Article II, Section 18, we
4 are compelled to address the methodologies applied when litigants pursue due process
5 interests they believe to be implied by the words chosen by the founders of our nation
6 and its states. Prior opinions have expressed the legally analytic, yet structurally
7 ideologic, tug-of-war that exists within courthouses across the nation, including the
8 United States Supreme Court itself. *Compare Glucksberg*, 521 U.S. at 720-21
9 (weighing the constitutional stature of an asserted right by direct review of “this
10 Nation’s history and tradition” (internal quotation marks and citation omitted)), *with*
11 *Lawrence*, 539 U.S. at 572 (“History and tradition are the starting point but not in all
12 cases the ending point of the substantive due process inquiry.” (alteration, internal
13 quotation marks, and citation omitted)), *and Obergefell*, ___ U.S. at ___, 135 S. Ct. at
14 2598 (“History and tradition guide and discipline this inquiry but do not set its outer
15 boundaries. That method respects our history and learns from it without allowing the
16 past alone to rule the present.”(citation omitted)). Yet in this instance, any
17 philosophical attempt to resolve that bigger constitutional picture serves only to
18 distract our focus from the real issues to be considered. The fact that *Glucksberg’s*

1 analytic methodology has been questioned by some legal scholars does not mean the
2 opposite of its holding must be true. More critically for our purposes, *Glucksberg*
3 provided a substantive due process answer to a factually identical scenario that has
4 never been rejected by any state appellate court. The issue before us is not whether
5 *Glucksberg* is one of several available constitutionally interpretive “guideposts for
6 responsible decision[.]making,” *Collins*, 503 U.S. at 125; rather, it remains the only
7 existing precedent regarding the nearly identical constitutional question that is posed
8 in this case. In order to justify a departure from *Glucksberg*, Plaintiffs must have
9 shown precisely why greater fundamental due process protections exist under Article
10 II, Section 4.

11 {35} *Obergefell* suggests that the assisted suicide analysis in *Glucksberg* remains
12 unchanged. *See Obergefell*, __ U.S. at __, 135 S. Ct. at 2602. The *Obergefell* majority
13 briefly addressed aid in dying and distinguished that asserted right of physician
14 assisted suicide from the asserted interest in marriage that was before it. *Id.* In
15 *Obergefell*, every member of the United States Supreme Court, including those
16 justices that the Dissenting Opinion identifies to embrace a more evolving due
17 process concept of constitutional analysis and the developed interests in autonomy
18 of self, passed upon an opportunity to question the majority’s reference to the

1 outcome in *Glucksberg* or cast aspersion upon the analysis of aid in dying that was
2 utilized in *Glucksberg*. *Obergefell*, __ U.S. at __, 135 S. Ct. at 2602. *See* Dissenting
3 Op. at ¶¶ 96 & 100. Specifically, while *Obergefell* recognized the re-ordering of
4 evaluative constitutional criteria in similar due process cases, it provided a specific
5 reference of approval and a brief defense of *Glucksberg* by stating that the “central
6 reference to historical . . . practices . . . may have been appropriate for . . . (physician-
7 assisted suicide), [yet not for] other fundamental rights, including marriage and
8 intimacy.” *Obergefell*, __ U.S. at __, 135 S. Ct. at 2602. Although the United States
9 Supreme Court appears engaged in an effort to integrate its constitutional
10 jurisprudence, including *Glucksberg*, *see Obergefell*, __ U.S. at __, 135 S. Ct. at
11 2602, it is our view that we should continue to be very careful when considering new
12 constitutional interests and remain reluctant to deviate from United States Supreme
13 Court determinations of what are, and what are not, fundamental constitutional rights.

14 {36} Irrespective of the new interpretive dimensions applied by the United States
15 Supreme Court to address differing applications of due process, the substantive
16 fundamental rights that are recognized to exist under the Due Process Clause of the
17 Fourteenth Amendment have always originated from classic personal interactions or
18 embedded principles in our democratic society. These protections include the

1 longstanding interests in marriage, *see Loving v. Virginia*, 388 U.S. 1 (1967); sexual
2 relationships, *see Lawrence*, 539 U.S. 558; family integrity, *see Skinner v. Oklahoma*
3 *ex rel. Williamson*, 316 U.S. 535 (1942); child rearing, *see Pierce v. Soc’y of Sisters*,
4 268 U.S. 510 (1925); education of one’s children, *see Meyers v. Nebraska*, 262 U.S.
5 390 (1923); and bodily integrity, *see Rochin v. California*, 342 U.S. 165 (1952).
6 Plaintiffs have failed to provide any authority to support the position that “death” or
7 “aid in dying” in New Mexico have either been recognized as embedded principles
8 within our democratic society or as a modern interpretation of certain fundamental
9 interests that have been applied to some members of society but historically denied
10 to others. *See In re Adoption of Doe*, 1984-NMSC-024, ¶ 2, 100 N.M. 764, 676 P.2d
11 1329 (“We assume where arguments in briefs are unsupported by cited authority,
12 counsel after diligent search, was unable to find any supporting authority.”); *see also*
13 John B. Mitchell, *My Father, John Locke, & Assisted Suicide: The Real Constitutional*
14 *Right*, 3 Ind. Health L. Rev. 45, 59 (2006) (evaluating the various attempts at
15 articulating the fundamental right at issue in *Glucksberg* and illustrating the difficulty
16 in identifying the right’s contours, while further suggesting that “it would probably
17 be fairer to the proponents of [physician-assisted suicide] in the *Glucksberg* [c]ourt
18 to equate the phrase dying with dignity with a [substitute phrase,] rejection of bad

1 death”). For example, *Cruzan* has been offered by Plaintiffs to identify an equivalent
2 liberty interest to aid in dying. 497 U.S. 261. But the constitutionally protected right
3 assumed to exist in *Cruzan*, 497 U.S. at 279—the right to refuse medical treatment,
4 including lifesaving hydration and nutrition—was clearly distinguished and
5 specifically rejected as an equivalent interest to aid in dying. *Glucksberg*, 521 U.S.
6 at 722-23, 730-31. In addition, the modern concerns associated with aid in
7 dying—regarding issues of pain, suffering, dignity, and autonomy during the final
8 days of a person’s life—are medical circumstances that have only garnered growing
9 consideration in modern society due to the longevity, pain management, and life-
10 sustaining advancements that have been made more recently by the medical
11 profession. *See Cruzan*, 497 U.S. at 270. As discussed in more detail below, we are
12 also troubled that Plaintiffs and their witnesses have narrowed the focus of an
13 autonomous and dignified death to one that favors only a very narrow segment of the
14 population—only those New Mexicans who are competent, terminally ill, and under
15 the care of a physician.

16 {37} Aid in dying, the medical concept of dying with autonomy and dignity, is a
17 relatively recent human phenomena and deserves appropriate public evaluation and
18 consideration. However, as a new legal consideration, it must also be carefully

1 weighed against longstanding societal principles such as preventing a person from
2 taking the life of another; preventing suicide; preventing assisted suicide; promoting
3 the integrity, healing, and life preserving principles of the medical profession;
4 protecting vulnerable groups from unwanted pressure to considering aid in dying as
5 the best alternative to other medical options; and promoting human life where aid in
6 dying is not the appropriate medical option despite a patient’s request for its use. *See*
7 *Glucksberg*, 521 U.S. at 703-04; *see also Cruzan*, 497 U.S. at 270-71. The recent
8 advances in life-prolonging medical care and the public acceptance of aid in dying
9 in some states has not diminished the other longstanding societal principles and
10 concerns regarding intentional killing, the dying process, the preservation of life, and
11 the basic life saving principles embedded in the medical profession. *Cruzan*, 497 U.S.
12 at 280 (“As a general matter, the [s]tates—indeed, all civilized nations—demonstrate
13 their commitment to life by treating homicide as a serious crime. Moreover, the
14 majority of [s]tates in this country have laws imposing criminal penalties on one who
15 assists another to commit suicide.”). Plaintiffs’ witnesses established that certain
16 benefits have been clinically shown to exist and that several of society’s concerns
17 have not materialized when careful regulations and safeguards are imposed upon aid
18 in dying by the medical profession and state legislatures. Yet, even where statutory

1 approval has been achieved, improper application of the statutory protections that
2 allow aid in dying will still expose an offending physician or other responsible parties
3 to criminal liability if they fail to comply with the statutes' narrow parameters. *See*
4 Or. Rev. Stat. Ann. § 127.890; Vt. Stat. Ann. tit. 18, § 5283(b); Wash. Rev. Code
5 Ann. § 70.254.200. As a result, aid in dying is still in the process of being tested by
6 society and the various states where it has been sanctioned. Presently, aid in dying is
7 best described as a legal and societal work in progress. To assert that it has now risen
8 to the level of a fundamental due process right, requiring strict constitutional
9 protection from society's longstanding interest in the protection of life through its
10 final stages, has not been established by this record or by other jurisprudence.

11 {38} Lastly, regarding the constitutional stature of aid in dying, the ultimate arbiter
12 of the meaning of the New Mexico Constitution is our New Mexico Supreme Court.
13 *See State v. ex rel. Serna v. Hodges*, 89 N.M. 351, 356, 552 P.2d 787, 792 (1976),
14 overruled on other grounds by *State v. Rondeau*, 89 N.M. 408, 412, 553 P.2d 688,
15 692 (1976) (recognizing that "as the ultimate arbiters of the law of New Mexico[,]
16 [our Supreme Court is] not bound to give the same meaning to the New Mexico
17 Constitution as the United States Supreme Court places upon the United States
18 Constitution"). We have previously recognized that under circumstances where it

1 appears “that an uncertain state of law should not exist and because avoidance of the
2 same involves an issue of substantial public interest, the matters raised on appeal
3 should be resolved by the Supreme Court.” *Archibeque v. Homrich*, 1975-NMCA-
4 023, ¶ 5, 87 N.M. 265, 531 P.2d 1238 (per curiam). Such a constitutional shift from
5 the United States Supreme Court decision in *Glucksberg*, one that was recently
6 referenced anew in *Obergefell*, should be addressed by our state’s highest court. *See*
7 *Archibeque*, 1975-NMCA-023, ¶ 5; *see also Quill v. Vacco*, 80 F.3d 716, 725 (2d Cir.
8 1996) (“We . . . decline the plaintiffs’ invitation to identify a new fundamental right
9 [to physician-assisted suicide], in the absence of a clear direction from the Court
10 whose precedents we are bound to follow. The limited room for expansion of
11 substantive due process rights and the reasons therefor have been clearly stated[.] . . .
12 Our position in the judicial hierarchy constrains us to be even more reluctant than the
13 [United States Supreme] Court to undertake an expansive approach in this
14 unchartered area.” (internal quotation marks and citation omitted)), *rev’d on other*
15 *grounds, Vacco v. Quill*, 521 U.S. 793 (1997) (internal quotation marks and citation
16 omitted)). Similar to our New Mexico Supreme Court, we are not heedless to changes
17 occurring over time but are careful to expand constitutional interpretations of the law
18 to satisfy our own concepts of right or wrong. *See State v. Pace*, 1969-NMSC-055,

1 ¶ 23, 80 N.M. 364, 456 P.2d 197 (“We are not heedless of the plea that this is a more
2 enlightened day than were those of years gone by, and that views of what is and what
3 is not right have changed with the passage of time. However, we perceive our
4 responsibility as being confined to interpreting the law as we understand it, not to
5 making of new law to satisfy our conceptions of right or wrong.”). From the
6 perspective of constitutional interpretation, *Glucksberg*’s holding still provides this
7 Court with principled authority. Given our analysis, and consistent with *Glucksberg*,
8 we conclude that there is no fundamental right to aid in dying under Article II,
9 Section 18 of the New Mexico Constitution. Therefore, interstitial departure to
10 declare such a right would be inappropriate. *See Gomez*, 1997-NMSC-006, ¶ 19
11 (allowing interstitial identification of a right when existing federal precedent is
12 flawed).

13 **2. Inherent Rights Under Article II, Section 4**

14 {39} Article II, Section 4 specifically identifies three broad categories of individual
15 interests that are entitled to constitutional protection in New Mexico—life, liberty,
16 and happiness. However, Article II, Section 4 has been sparsely interpreted. *See Reed*
17 *v. State ex rel. Ortiz*, 1997-NMSC-055, ¶ 105, 124 N.M. 129, 947 P.2d 86
18 (recognizing that “[o]ur courts have not fully defined the scope of this constitutional

1 provision”), *rev’d sub nom. on other grounds by N.M. ex rel. Ortiz v. Reed*, 524 U.S.
2 151 (1998). The Oxford English Dictionary defines “life” as “[t]he condition or
3 attribute of living or being alive; animate existence. Opposed to *death*.” 8 *Oxford*
4 *English Dictionary* 910 (2d ed. 1989, reprinted with corrections 1991). Plaintiffs ask
5 us to interpret Article II, Section 4’s express protections of liberty and happiness as
6 encompassing an implied inherent right to oppose the protected principle of life by
7 constitutionally allowing third-party physicians to intentionally hasten another
8 person’s death. We decline to recognize Article II, Section 4 as protecting a
9 fundamental interest in hastening another person’s death because such an interest is
10 diametrically “[o]pposed” to the express interest in protecting life. 8 *Oxford English*
11 *Dictionary, supra*, at 910.

12 {40} At its core, aid in dying challenges the longstanding and historic interest in the
13 protection of life until its natural end as well as the equally longstanding prohibition
14 against assisting another in hastening that process. *See Glucksberg*, 521 U.S. at 710-
15 16 (observing that our nation’s historical approach has been to disallow assisting
16 another person in the taking of his/ her own life regardless of the circumstances). This
17 treasured right to life is not only considered sacred under the common law but is also
18 recognized as an inalienable right, even for those condemned to death. *See id.* at 714-

1 15 (citing *Martin v. Commw.*, 37 S.E.2d 43, at 47 (Va.1946) (“The right to life and
2 to personal security is not only sacred in the estimation of the common law, but it is
3 inalienable.”) and *Blackburn v. State*, 23 Ohio St. 146, 163 (1872) (“[E]ven the lives
4 of criminals condemned to death, [are] under the protection of the law[.]”), *overruled*
5 *in part on other grounds by State v. Staten*, 247 N.E.2d 293 (Ohio 1969)). Assisting
6 a condemned criminal in taking his/her own life has also been subjected to
7 punishment. *Commw. v. Bowen*, 13 Mass. 356 (1816). The inalienable right that
8 defends life is also a prioritized constitutional interest in New Mexico. *See Reed*,
9 1997-NMSC-055, ¶ 103 (“When a person’s life is jeopardized by the actions of the
10 state without due process, *no constitutional interest is of greater consequence. . . .*
11 The transgression is not only against a single human being but also the most basic
12 principles upon which our system of government was founded.” (emphasis added)
13 (citation omitted)); *Trujillo v. Prince*, 1938-NMSC-024, ¶ 15, 42 N.M. 337, 78 P.2d
14 145 (1938) (“The [c]onstitution and statute, allowing compensation for life lost
15 through negligence of another, adopt a policy touching the most important subject of
16 all government, in which it is recognized that human life should be protected as well
17 from negligence as from crime. . . . It could scarcely be said that a man has any
18 greater right in his own life now than he had before the adoption of the constitutional

1 provision and statutes of a kindred nature. His right originally was *above all others*,
2 save where it is forfeited for crime.” (emphasis added) (internal quotation marks and
3 citation omitted)). Although the dissent concedes, in general terms, that the
4 government has a compelling and substantial constitutional interest in preserving life,
5 it then concludes that this expressly prioritized constitutional interest in life was not
6 adequately articulated by the State to address the needs of New Mexicans dying from
7 terminal illness and, as a result, effectively disappears upon a medical determination
8 of terminal illness. *See* Dissent ¶¶ 112-114, 117, 121 & 127.

9 {41} We understand Plaintiffs to assert that the process of dying during the final
10 stages of life, defined as a terminally ill patient with six months or less to live, is now
11 an accepted constitutional priority that falls within an intimate zone of privacy and
12 that contemporary generations view aid in dying as a fundamental constitutional
13 interest that deserves strict protection from governmental intrusion. However, death
14 and the process of dying are not rights expressly enumerated within Article II, Section
15 4 and can only qualify as inferences that might exist within the categories of liberty
16 or happiness. Plaintiffs cite no American case law that interprets the interests of
17 constitutional liberty and happiness as extending protection to a third-party that
18 assists another with intentionally taking his or her own life. *See In re Adoption of*

1 *Doe*, 1984-NMSC-024, ¶ 2 (“We assume where arguments in briefs are unsupported
2 by cited authority, counsel after diligent search, was unable to find any supporting
3 authority.”). The leap from a general societal concern about pain, suffering, and/or
4 loss of autonomy and dignity during the final months of a terminally ill person’s life
5 into the creation of an Article II, Section 4 fundamental constitutional right to protect
6 physicians who practice aid in dying is unprecedented. *See Pace*, 1969-NMSC-055,
7 ¶ 23 (recognizing the need for judicial restraint when society may have changed over
8 time and adhering to the preference for deferring to the legislative process for legal
9 changes to keep “our existing laws in step with current thinking”). The Dissenting
10 Opinion’s analysis of how this Court should achieve the creation of this new
11 fundamental interest under the New Mexico Constitution is also vague. *See Dissent*
12 ¶¶ 110-114.

13 {42} The Dissenting Opinion appears to argue that a new constitutionally recognized
14 event now occurs upon the diagnosis of terminal illness. *Id.* First, a patient’s right to
15 privacy automatically creates an inferred end-of-life liberty interest under Article II,
16 Section 4 in the event of terminal illness. *Id.* Next, this new liberty interest ascends
17 to constitutional priority over life itself. *Id.* Ultimately, the Dissenting Opinion
18 harshly criticizes the majority for failing to agree with this new constitutional result.

1 *Id.* at ¶ 114. It then extends this criticism by asserting that the majority is cavalier
2 about the needs of the terminally ill, to the point it asserts that the majority is
3 shockingly disrespectful to both physicians and the terminally ill. *Id.* References of
4 ignorance, disrespect, or miscreance leveled at one’s colleagues by the Dissenting
5 Opinion are improper and unnecessarily harmful to our judicial process. *See id.*

6 {43} We are not persuaded by Plaintiffs’ position that a modern desire to hasten
7 death under the rubric of medical privacy can be inferred to take priority over the
8 express fundamental interest in life set forth in Article II, Section 4. Medical privacy
9 has never been constitutionally extended to such a high constitutional level,
10 especially when “[i]t cannot be disputed that the Due Process Clause protects an
11 interest in life.” *Cruzan*, 497 U.S. at 281. Any development of the importance that
12 society may eventually attribute to dying with autonomy and dignity remains
13 inferential and secondary to life under the enumerated language set forth in Article
14 II, Section 4 as well as our New Mexico precedent. *See Reed*, 1997-NMSC-055,
15 ¶ 103; *Trujillo*, 1938-NMSC-024, ¶ 15. Again, there is no basis under the *Gomez*
16 factors to permit the creation of an interstitial constitutional right under Article II,
17 Section 4 of the New Mexico Constitution. *See Gomez*, 1997-NMSC-006, ¶ 19.

18 **3. The Exclusionary Defects in Plaintiffs’ Proposed Right to Aid in Dying**

1 {44} Article II, Section 4 declares that “*All* persons . . . have certain natural, inherent
2 and inalienable rights” entitled to protection. N.M. Const. art. II, § 4 (Emphasis
3 added). In arguing that the genesis of aid in dying is rooted in Article II, Section 4,
4 Plaintiffs identify two categories of bodily integrity as the basis for fundamental
5 constitutional protection: (1) the “right to autonomous medical decision making” and
6 (2) the right to “a dignified, peaceful death.” But the fundamental constitutional
7 protection being sought by Plaintiffs is not a right of autonomy or dignity shared or
8 uniformly applied to all New Mexico citizens; it is a narrow interest only favoring
9 certain patients who meet very specific criteria during their final days of
10 life—competence, terminal illness, physical ability to take and swallow a pill, and
11 who are under the current care and supervision of a physician who prescribes the
12 lethal dosage of medication. Aid in dying also provides a very narrow benefit from
13 prosecution that exclusively favors physicians. Despite repeatedly referring to aid in
14 dying as the liberty interest of “all New Mexicans,” the Dissenting Opinion ultimately
15 concedes that it is a narrowly defined right and its narrowly tailored application is the
16 “question at the heart of this case.” *See* Dissenting Opinion ¶¶ 73, 133, 135 & 148.
17 {45} Plaintiffs’ experts testified that in Oregon and Washington, patients who have
18 ingested the medication are overwhelmingly white, married, college-educated,

1 insured, receiving hospice services, and dying of cancer or ALS. *See* Or. Pub. Health
2 Div., Oregon’s Death with Dignity Act Rep., at 4; Wash. State Dep’t of Health, 2013
3 Death With Dignity Act Rep., at 1(2014). Plaintiffs do not assert that the same
4 fundamental right exists for the remainder of New Mexicans who cannot meet the
5 narrow definition for aid in dying. In addition, they do not claim that these excluded
6 New Mexicans do not equally suffer from the same symptoms during the final six
7 months of their lives—extreme pain, loss of autonomy, and loss of dignity, despite
8 an absence of terminal illness. Under Plaintiffs’ theory of substantive due process, the
9 remainder of our citizens enduring the similar excruciating and unbearable symptoms
10 are not entitled to equal constitutional protection. This theory would exclude the
11 availability of aid in dying for all terminal patients suffering from a variety of
12 disorders affecting their mental competence such as mental illness, dementia, or
13 Alzheimer’s disease. It would also exclude all patients suffering from non-terminal
14 diseases or other medical conditions that are also causing extreme pain, indignity, and
15 loss of autonomy during the final six months of their lives, such as multiple sclerosis
16 and Parkinson’s disease. *See* Mitchell, *supra*, at 60-61 (recognizing that a
17 fundamental right to aid in dying may not be exercised by “people who are incapable
18 of picking up . . . and/or swallowing the pills [by] themselves[,]” or by those “patients

1 suffering as the result of massive injuries or those inflicted with a wasting disease[.]”
2 and noting that such patients “[may] be in a far worse position than those with
3 terminal illness, e.g. six months or a year to live” because “[t]he suffering of non-
4 terminal patients can go on and on, while, for the terminally ill, the end is in sight”).
5 {46} Furthermore, Plaintiffs’ narrowly defined asserted right to aid in dying would
6 provide constitutional immunity from criminal prosecution to only physicians and no
7 one else. For example, the asserted right would not protect a non-physician from
8 criminal prosecution under Section 30-2-4 under a circumstance in which a patient
9 who qualifies for aid in dying seeks assistance from a loved one in addition to or
10 instead of a physician in achieving a peaceful and dignified death. This exclusionary
11 benefit applying only to physicians further exposes the constitutional inadequacy of
12 Plaintiffs’ asserted right. Just as a fundamental right is one that exists for all citizens,
13 any immunity from prosecution of third parties that springs from such a right, under
14 properly applied principles of equal protection, must exist for *all* citizens who assist
15 in carrying out a patient’s constitutional right to hasten death. *See* N.M. Const. art.
16 II, § 4; *see also Gentry v. Shug*, 2012-NMCA-019, ¶ 8, 270 P.3d 1286 (“An equal
17 protection claim arises when a state actor treats similarly situated groups or persons
18 differently.”). We decline to conclude that a fundamental right exists where it would

1 protect only one class of citizens from criminal prosecution to the exclusion of all
2 others.

3 {47} Under Article II, Section 4, we decline to recognize an inferred fundamental
4 right benefitting only a select few New Mexicans. Fundamental constitutional rights
5 that protect life, liberty, or happiness are “enjoyed by *all* New Mexicans[.]” *Griego*,
6 2014-NMSC-003, ¶ 1 (emphasis added); *see also Obergefell*, __ U.S. at __, 135 S.
7 Ct. at 2599 (recognizing that marriage is a fundamental right “for *all* persons,
8 whatever their sexual orientation” (emphasis added)). The selective discrimination
9 embodied within Plaintiffs’ concept of aid in dying is constitutionally unsound for
10 recognition as a fundamental right embodied within Article II, Section 4 and does not
11 protect all New Mexicans who have equal interests in dying with autonomy and
12 dignity.

13 **D. Whether Aid in Dying Is Protected by the New Mexico Constitution Under**
14 **Plaintiffs’ Other Theories**

15 {48} Plaintiffs challenged Section 30-2-4 in the district court under five independent
16 claims. They claimed that Section 30-2-4 (1) does not prohibit aid in dying, (2) is
17 unconstitutionally vague, (3) violates Article II, Section 18’s equal protection
18 guarantee, (4) violates Article II, Section 18’s due process guarantee, and (5) violates
19 Article II, Section 4’s inherent rights guarantee. In addition to asserting that aid in

1 dying is a fundamental right requiring strict protection under our constitution’s equal
2 protection, due process, and inherent rights clauses, Plaintiffs asserted that Section
3 30-2-4’s prohibition on aid in dying “is not substantially related to an important
4 governmental interest[, or] . . . is not rationally related to firm legal rationale.”
5 Plaintiffs submitted proposed findings of fact and conclusions of law pertaining to all
6 of these theories. In its decision, the district court did not address the second and third
7 theories listed above. Further, the district court did not fully address Plaintiffs’ fourth
8 and fifth theories, whether Section 30-2-4 would pass an intermediate or a rational
9 basis review in the event aid in dying was ultimately determined not to qualify as a
10 fundamental right. It recognized in its final judgment that it did not need to address
11 these other theories because it had concluded that aid in dying was a fundamental
12 right and that Section 30-2-4 was subject to strict scrutiny review.

13 {49} In applying its due process analysis under Article II, Section 18, the district
14 court did not address whether aid in dying qualifies as the type of important
15 individual interest entitled to heightened protection under intermediate scrutiny. *See*
16 *Mieras v. Dyncorp*, 1996-NMCA-095, ¶ 26, 122 N.M. 401, 925 P.2d 518 (noting that
17 important individual interests, although not fundamental, are entitled to a
18 intermediate standard of constitutional review to test the application of the impinging

1 legislation); *Wagner v. AGW Consultants*, 2005-NMSC-016, ¶ 12 n.3, 137 N.M. 734,
2 114 P.3d 1050 (emphasizing that the intermediate scrutiny standard applies to “either
3 an important right or a sensitive class, contrary to what we may have suggested in
4 dicta in [previous cases]”); see also *Richardson v. Carnegie Library Rest., Inc.*, 1988-
5 NMSC-084, ¶¶ 35-37, 107 N.M. 688, 763 P.2d 1153 (noting that heightened
6 intermediate scrutiny allows a method of genuine judicial inquiry of important
7 individual interests rather than the all-or-nothing choice between minimum rationality
8 and strict scrutiny), *overruled on other grounds by Trujillo v. City of Albuquerque*,
9 1998-NMSC-031, 125 N.M. 721, 965 P.2d 305. “This level of evaluation is more
10 sensitive to the risks of injustice than the rational basis standard and yet less blind to
11 the needs of governmental flexibility than strict scrutiny.” *Marrujo v. N.M. State*
12 *Highway Transp. Dep’t*, 1994-NMSC-116, ¶ 11, 118 N.M. 753, 887 P.2d 747
13 (internal quotation marks and citations omitted).

14 {50} Although the initial burden still rests upon a plaintiff to establish that the
15 legislation at issue infringes upon an important individual interest, the state’s burden
16 of proof under an intermediate scrutiny analysis is different from the burden required
17 under a strict scrutiny analysis. Compare *Breen*, 2005-NMSC-028, ¶ 13 (recognizing
18 that the government bears the burden of proof under intermediate scrutiny to “prove

1 that the classification or discrimination caused by the legislation is substantially
2 related to an important government interest” (internal quotation marks and citation
3 omitted)), *with City of Albuquerque v. Pangaea Cinema, LLC*, 2012-NMCA-075,
4 ¶ 29, 284 P.3d 1090 (recognizing that the government bears the burden of proof under
5 strict scrutiny “to show that it has a compelling interest in the challenged scheme and
6 that it has accomplished its goals by employing the least restrictive means”), *rev’d on*
7 *other grounds*, 2013-NMSC-044, 310 P.3d 60; *see also Griego*, 2014-NMSC-003,
8 ¶ 56 (applying intermediate scrutiny in an equal protection context and considering
9 “whether the legislation is over- or under-inclusive in its application” and “whether
10 the legislation is the least restrictive alternative for protecting the important
11 governmental interest”); *Breen*, 2005-NMSC-028, ¶ 32 (“While the least restrictive
12 alternative need not be selected if it poses serious practical difficulties in
13 implementation, the existence of less restrictive alternatives is material to the
14 determination of whether the [restriction] substantially furthers an important
15 governmental interest.” (alteration, internal quotation marks, and citation omitted)).
16 The standard of proof differs even further when the district court applies rational
17 basis testing. *See id.* ¶ 11 (recognizing that the party challenging the legislation bears
18 the burden to prove that the statute is not rationally related to a legitimate

1 governmental purpose). The alternative standards of proof that were included in
2 Plaintiffs' proposed findings and conclusions were not addressed by the district court
3 in its original ruling and the corresponding findings that it entered. *See State ex rel.*
4 *King v. UU Bar Ranch Ltd.*, 2009-NMSC-010, ¶ 44, 145 N.M. 769, 205 P.3d 816
5 (“When a trial court rejects proposed findings of facts or conclusions of law, we
6 assume that said facts were not supported by sufficient evidence.”).

7 {51} We have discretion under certain circumstances to resolve any issue raised on
8 appeal, regardless of whether the district court had an opportunity to resolve that
9 issue. *See* Rule 12-216(A) (limiting appellate scope of review to issues where it
10 “appear[s] that a ruling or decision by the district court was fairly invoked,” but
11 granting appellate courts the discretion to consider unpreserved questions involving
12 jurisdiction, general public interest, fundamental error, or fundamental rights of a
13 party). However, we also have the discretion to remand a case to the district court to
14 address alternative claims or theories raised by the parties that it declined to address
15 at the trial level. *See Pruyne v. Lam*, 2009-NMCA-103, ¶ 17, 147 N.M. 39, 216 P.3d
16 804 (declining to address on appeal an alternative theory raised in the district court
17 because the district court did not address the alternative theory and remanding the
18 case to the district court to address that theory); *State ex rel. Children, Youth &*

1 *Families Dep't v. Frank G.*, 2005-NMCA-026, ¶ 40, 137 N.M. 137, 108 P.3d 543
2 (“The general rule in New Mexico for determining the finality of a judgment is
3 whether all issues of law and fact have been determined and the case disposed of by
4 the [district] court to the fullest extent possible.” (internal quotation marks and
5 citation omitted)).

6 {52} To the extent that aid in dying may be an important interest on par with other
7 important interests recognized by our courts, such as the right to access the courts and
8 the right to an appeal, *see Wagner*, 2005-NMSC-016, ¶ 14, and the right to run for
9 elected office, *see Alvarez v. Chavez*, 1994-NMCA-133, ¶ 21, 118 N.M. 732, 886
10 P.2d 461, *overruled on other grounds by Trujillo v. City of Albuquerque*, 1998-
11 NMSC-031, the district court should have analyzed Section 30-2-4 under
12 intermediate scrutiny and determined whether the State has satisfied its lower burden
13 of persuasion. Furthermore, it should have determined whether Section 30-2-4 passes
14 a rational basis test as applied to aid in dying and have rendered a decision on
15 Plaintiffs’ remaining constitutional claims so as to avoid potential piecemeal appeals
16 in this case.

17 {53} Although these and Plaintiffs’ other alternative claims involve matters of
18 profound public interest, *see Rule 12-216*, it is more appropriate in this case to

1 require the district court to render its decision on these claims and explain the
2 grounds for those decisions prior to our review. The district court, as the sole fact
3 finder in this case, was present for all of the testimony and arguments presented at
4 trial. In considering the claims that it thought unnecessary to consider in the first
5 instance, it will have an opportunity to make any additional factual findings that are
6 more specific to the unaddressed issues and to require further hearings and/or briefing
7 on these issues. Our Court is not in the position to make factual findings relevant to
8 issues left unaddressed by the district court. *See generally Maloof v. San Juan Cnty.*
9 *Valuation Protests Bd.*, 1992-NMCA-127, ¶ 17, 114 N.M. 755, 845 P.2d 849 (“The
10 findings of fact adopted below, if supported by substantial evidence, are controlling
11 on appeal.”). Therefore, I would remand this case to the district court for further
12 proceedings it deems necessary to result in the entry of findings of fact and
13 conclusions of law concerning Plaintiffs’ remaining claims.

14 **CONCLUSION**

15 {54} We reverse the district court’s ruling that aid in dying is a fundamental liberty
16 interest under the New Mexico Constitution. Accordingly, we reverse the district
17 court’s order permanently enjoining the State from enforcing Section 30-2-4. We
18 affirm the district court’s determination that, for statutory construction purposes,

1 Section 30-2-4 prohibits aid in dying. Separate from the Concurring Opinion, I would
2 also remand this case to the district court to make any further findings it deems
3 necessary, to conduct both an intermediate scrutiny and rational basis review of
4 Section 30-2-4, as well as dispose of Plaintiffs' remaining claims.

5 {55} **IT IS SO ORDERED.**

6

7

TIMOTHY L. GARCIA, Judge

8 **J. MILES HANISEE, Judge (concurring in part)**

9 **LINDA M. VANZI, Judge (dissenting)**

1 **HANISEE, Judge (concurring in part).**

2 {56} I view the New Mexico Constitution to incorporate no *right*—fundamental or
3 otherwise—to lethal narcotics medically prescribed for the sole purpose of causing
4 the immediate death of a patient. I therefore concur in reversing the judgment of the
5 district court, and join the majority conclusion that neither Article II, Sections 4 nor
6 18 constitutionalize aid in dying as a fundamental right in New Mexico. *See* Majority
7 Op. ¶¶ 39, 43. I further agree that NMSA 1978, Section 30-2-4 prohibits aid in dying
8 in New Mexico. *See* Majority Op. ¶ 20. I respectfully decline to join the perspectives
9 of either of my colleagues that there is or may be some non-fundamental but
10 otherwise constitutionally “important right” to aid in dying.⁶ Accordingly, remand for
11 further district court proceedings is unwarranted, *see also* Dissenting Op. ¶ 142, and
12 I diverge from the Majority Opinion in this regard also. *See* Majority Op. ¶ 53. As
13 well, I write separately to address my belief that a different branch of the tripartite
14 structure that characterizes our governmental system is vastly better suited to consider
15 and resolve the lawfulness of aid in dying in New Mexico than is the judiciary.

16 ⁶The Dissenting Opinion would hold there to be a “fundamental, or at least
17 important, liberty right to aid in dying.” Dissenting Op. ¶ 104. The Majority author
18 leaves open only the possibility that the lesser of such rights might be guaranteed by
19 the New Mexico Constitution. Majority Op. ¶¶ 52-53.

1 {57} In proposing to affirm the district court, the Dissenting Opinion would
2 adjudicate New Mexico to be just the fourth state to legalize aid in dying, yet the *only*
3 one to do so extra-statutorily and in a manner broadly circumventive of democratic
4 processes.⁷ Such a ruling would stand troublingly alone nationally, and would
5 simultaneously contravene: (1) the United States Supreme Court’s unanimous
6 declaration that there is no such constitutional right; (2) the New Mexico
7 Legislature’s longtime prohibition of suicide assistance and far more recent
8 establishment of end-of-life standards of medical care that expressly disallow aid in
9 dying; and (3) principles of judicial reasoning that rarely compel, and even more
10 rarely permit, the unilateral and permanent imposition of robed will upon coequal
11 branches of government and society at large. The institution tasked with ensuring
12 legal order ought to be measurably cautious before strong-arming into existence
13 instant, precipitous, and profound social change.

14 **Aid in Dying Is Not A Fundamental Right**

15 {58} I agree with the Majority Opinion’s analysis holding there to be no Article II-
16 derived fundamental right to aid in dying in New Mexico. First, Article II, Section 18

17 ⁷While not affirmatively legalizing aid in dying, the Supreme Court of Montana
18 held that “a terminally ill patient’s consent to . . . aid in dying constitutes a statutory
19 defense to a charge of homicide.” *Baxter*, 2009 MT 449, ¶ 50.

1 safeguards our right to due process of law by language meaningfully
2 indistinguishable from the federal Due Process Clause that was held by the United
3 States Supreme Court *not* to provide a right to aid in dying. *See Glucksberg*, 521 U.S.
4 at 728 (“[T]he asserted ‘right’ to assistance in committing suicide is not a
5 fundamental liberty interest protected by the Due Process Clause.”). In order to
6 conclude contrary to *Glucksberg*, we are first required to adhere to the narrow
7 interstitial parameters our New Mexico Supreme Court applies when it is asked to
8 depart from federal constitutional precedent. *See Gomez*, 1997-NMSC-006, ¶ 19
9 (permitting recognition of a right rejected for federal protection by “flawed federal
10 analysis,” or if arising from “structural differences between state and federal
11 government” or New Mexico’s “distinctive state characteristics”). Yet neither our nor
12 some select legal critics’ disagreement with established federal precedent, *see*
13 Dissenting Op. ¶¶ 98-99 (citing scholarly opposition to *Glucksberg*), are the sort of
14 determinants of legal “flaw” that I can embrace under *Gomez*.⁸ The Majority
15 Opinion’s exclusion of aid in dying from those constitutional rights identified by

16 ⁸Regarding the latter two *Gomez*-available bases for interstitial departure,
17 nothing in the record of this case or the arguments of Plaintiffs illustrates structural
18 governmental differences or distinctive state characteristics that lend support to a
19 constitutional right to aid in dying in New Mexico.

20

1 process of interstitial analysis is correct, *see* Majority Op. ¶ 38, particularly given the
2 United States Supreme Court’s concise but timely supportive reference to *Glucksberg*
3 in *Obergefell*. ___ U.S. at ___, 135 S. Ct. at 2602 (noting that *Glucksberg*’s “central
4 reference to specific historic practices . . . may have been appropriate for the asserted
5 right there involved (physician-assisted suicide)[, but] it is inconsistent with the
6 approach [the United States Supreme Court] has used in discussing other fundamental
7 rights, including marriage and intimacy”). It would be a mistake to disregard as dicta
8 the Court’s own recognition that not all interests asserted to be of constitutional
9 dimension require identical analyses. *See Obergefell*, ___ U.S. at ___, 135 S. Ct. at
10 2602 (prohibiting the unequal disallowance of a recognized class of Americans from
11 exercising a 48-year-long established fundamental constitutional right); *see also*
12 *Loving*, 388 U.S. at 12 (declaring marriage to be “one of the vital personal rights
13 essential to the orderly pursuit of happiness”).

14 {59} Secondly, among other inherent rights, Article II, Section 4 guarantees those
15 of “enjoying and defending life and liberty[.]” *See Griego*, 2014-NMSC-003, ¶ 1. But
16 our New Mexico Supreme Court has yet to hold this constitutional provision to be a
17 fountain for as-yet-undiscovered rights, the implied geneses of which more typically
18 spring from federal and/or state due process and equal protection clauses, such as

1 those within Article II, Section 18. *See Obergefell*, ___ U.S. at ___, 135 S. Ct. at
2 2602-03 (“The Due Process Clause and the Equal Protection Clause [interrelate] in
3 a profound way [to] . . . further[] our understanding of what freedom is and must
4 become.”). This distinction is uniquely apropos to aid in dying, an asserted right that
5 is functionally at odds with the enjoyment and defense of life, two of the very few
6 stated interests Article II, Section 4 directly protects. *See* Majority Op. ¶¶ 40-43. In
7 any event, even *Griego* mentions Article II, Section 4 in an introductory way, like our
8 Constitution, then proceeds to conduct its constitutional inquiry pursuant to better
9 established interpretive methodology. *Griego*, 2014-NMSC-003, ¶¶ 1, 25-27, 68.

10 **Aid in Dying Is Not An Important Right To Which Intermediate Scrutiny**
11 **Applies**

12 {60} It seems innately sensible that a constitutional right of any sort, even one that
13 is non-fundamental but “important,” must be meaningfully rooted within some
14 specific protection afforded by the document being interpreted, or elsewhere by law.
15 Yet the theoretical constitutional origin of an important such right does not
16 automatically emerge from an otherwise flawed constitutional assertion. As noted
17 above, the interest that is aid in dying is not merely one unmentioned by the New
18 Mexico Constitution, but one that contradicts its very language and a first principle
19 for which it stands. *See* N.M. Const. art. II, § 4 (declaring the enjoyment and defense

1 of life to be “natural, inherent and inalienable rights[.]”). Moreover, constitutionally
2 “important right[s]” are those “certainly . . . more important and sensitive than rights
3 restricted by primarily social . . . legislation.” *State v. Druktenis*, 2004-NMCA-032,
4 ¶ 98, 135 N.M. 223, 86 P.3d 1050. While it would be a mistake to coldly or cavalierly
5 disregard the wishes of some who suffer from terminal illnesses, and for whom the
6 enjoyment of life has been lost, the aid in dying interest presented by Plaintiffs to be
7 a uniquely New Mexican constitutional right is neither absolute nor unqualified; that
8 is, it is conditionally available to certain citizens but not to others. *See Lucero v.*
9 *Salazar*, 1994-NMCA-066, ¶ 6, 117 N.M. 803, 877 P.2d 1106 (citing *Oldfield*, 1994-
10 NMSC-005, ¶ 15, to advance the proposition that Article II, Section 4 is interpreted
11 in a manner consistent with absolute and unqualified rights derived from the
12 Fourteenth Amendment to the United States Constitution). To establish or leave open
13 the possibility that this narrowest of interests is one of constitutional dimension
14 disregards its predominant unavailability as well as its absence from and irresolvable
15 squabble with our Constitution’s language that instead expresses and emphasizes a
16 diametrically opposite and equally available fundamental right: life’s preservation.
17 {61} Furthermore, even were aid in dying suited for a determination of
18 constitutional importance, it would squarely conflict with the State’s own important

1 and legitimate contrary interests. *See Marrujo*, 1994-NMSC-116, ¶ 11 (holding that
2 an “important—rather than fundamental—individual interest” yields to legislation
3 that “substantially relate[s] to an important governmental interest”)(internal quotation
4 marks and citation omitted). Those include:

5 preventing a person from taking the life of another; preventing suicide;
6 preventing assisted suicide; promoting the integrity, healing, and life
7 preserving principles of the medical profession; protecting vulnerable
8 groups from unwanted pressure to considering aid in dying as the best
9 alternative to other medical options; and promoting human life where
10 aid in dying is not the appropriate medical option despite a patient’s
11 request for its use.

12 Majority Op. ¶ 37. It is difficult to envision legislation designed to foster indisputably
13 legitimate state interests such as these to give way to a limited interest that is, as the
14 Majority Opinion points out, societally undeveloped and within its legal infancy in
15 state courts. *Id.* Of yet greater concern would be the dearth of any regulatory
16 framework enforceable by the State to ensure the safety and efficacy of aid in dying
17 were this judicial body to pronounce its legality. Unlike the three states that have
18 *legislatively* permitted aid in dying, its practice in New Mexico would occur in a void
19 only minimally filled by externally written and questionably enforceable
20 “professional standards of practice” or some alternately nebulous “established
21 standard of care.” Dissenting Op. ¶¶ 126, 127. In fact, the best examples of why the

1 more capably informed legislative process is the superior means by which aid in
2 dying might achieve legality are the three statutory enactments existing nationally.
3 *See* Or. Rev. Stat. Ann. §§ 127.800 to .897; Vt. Stat. Ann. tit. 18, §§ 5281 to 5292;
4 Wash. Rev. Code Ann. §§ 70.245.10 to .904. Each not only provides a framework to
5 actuate aid in dying, but also defines physician responsibilities, reporting
6 requirements, and procedural processes. *Id.* Importantly, each state imposes criminal
7 liability on individuals who engage in varying degrees of malfeasance with regard to
8 aid in dying. *See* Wash. Rev. Code Ann. § 70.245.200; Or. Rev. Stat. Ann. § 127.890
9 § 4.02; Vt. Stat. Ann. tit. 18, § 5283(b). Such a patient-safety-driven framework,
10 codifying a deterrent threat of criminal liability should lives be prematurely, wrongly,
11 or improperly ended in violation of statutorily pre-defined safeguards, is altogether
12 absent in New Mexico. And it is not the judiciary’s place to assume the legislative
13 role necessary to enact some regulatory substitute for that which should accompany
14 and govern any such fundamental transformation in medical caregiving. I consider
15 a New Mexico courthouse to be perhaps the least suitable venue to determine whether
16 the foundational healing tenet of medical care—the Hippocratic Oath—is to be
17 abruptly disregarded, even in the laudable context of attempting to alleviate the
18 suffering of dying patients.

1 {62} Notably also, aid in dying negates not one but *three* contrary expressions of law
2 passed by our citizen legislature, the constitutional branch of government elected by
3 New Mexicans to represent their perspectives as lawmakers. *See* § 30-2-4; §§ 24-7A-
4 1 to -18 (Uniform Health Care Decisions Act); §§ 24-7B-1 to -16 (Mental Health
5 Care Treatment Decisions Act). *See also Glucksberg*, 521 U.S. at 720 (“By extending
6 constitutional protection to an asserted right or liberty interest, we, to a great extent,
7 place the matter outside the arena of public debate and legislative action.”). To
8 substitute our judgment for that underpinning laws written by the New Mexico
9 Legislature and enacted by a governor’s signature would serve to disrupt the
10 considered order by which society is governed. *See Baxter*, 2009 MT 449, ¶ 117
11 (Rice, J., dissenting) (“Controlling their own destiny, Montanans may decide to
12 change the [s]tate’s public policy. . . . This [c]ourt should allow [its citizens] . . . to
13 control their own destiny on [aid in dying].”). Such is particularly true when the
14 newfound right arises from inexact, directly contrary, ethereal, or otherwise indefinite
15 language. Our Constitution was not meant to be molded and stretched to exclusively
16 afford a right of any sort to so few of the many protected by the same enduring and
17 all-encompassing document. *See Griego*, 2014-NMSC-003, ¶¶ 53, 68-69 (declaring

1 unconstitutional statutes that preclude a “discrete group” of New Mexico citizens
2 from engaging in an activity afforded to another group).

3 {63} Regarding intermediate scrutiny, *Griego* is our New Mexico Supreme Court’s
4 most recent topical jurisprudence. Prior to *Obergefell*’s ruling that same-sex marriage
5 is protected by the United States Constitution, *Griego* applied intermediate scrutiny
6 to hold that same-gender couples in New Mexico cannot be denied the “rights,
7 protections and responsibilities of civil marriage solely because of their sexual
8 orientation.” *Griego*, 2014-NMSC-003, ¶ 6. But three circumstances distinguish
9 *Griego* from the issue before us. First, *Griego* made clear that “none of [the] New
10 Mexico[] marriage statutes specifically prohibit same-gender marriages”; however,
11 each “reflect[ed] a legislative intent” to do so. 2014-NMSC-003, ¶¶ 4, 23. Here,
12 Section 30-2-4 expressly criminalizes “deliberately aiding another in the taking of his
13 [or her] own life[,]” a prohibition twice reiterated in ensuing legislation regarding end
14 of life medical care. *See also* §§ 24-7A-13(C); 24-7B-15(C) (each expressly refusing
15 to “authorize . . . assisted suicide . . . to the extent prohibited by other statutes of this
16 state”). Second, unlike the situation before us where the United States Supreme Court
17 has held there to be no fundamental liberty interest in “assistance in committing
18 suicide[,]” *Glucksberg*, 521 U.S. at 728, our New Mexico Supreme Court in *Griego*

1 recognized that the question before it was one that had at the time “not been answered
2 by the United States Supreme Court” and declined to address fundamentality. *Griego*,
3 2014-NMSC-003, ¶ 54. Third and most importantly, the result in *Griego* was based
4 upon application of the New Mexico Human Rights Act (NMHRA), NMSA 1978, §§
5 28-1-1 to -15 (1969, as amended through 2007) (recognizing “sexual orientation as
6 a class of persons protected from discriminatory treatment”) in conjunction with the
7 “equality demanded by the Equal Protection Clause of the New Mexico Constitution.”
8 *Griego*, 2014-NMSC-003, ¶¶ 42, 68 (internal quotation marks and citation omitted).
9 Almost needless to say, the NMHRA is silent on “terminally ill” as a protected class.
10 {64} With no sensitive class or equal protection consideration like was present in
11 *Griego*, application of intermediate scrutiny in this instance can only be premised
12 upon the identification of aid in dying as a freshly minted constitutionally important
13 right. *See Wagner*, 2005-NMSC-016, ¶ 12 n.3 (application of intermediate scrutiny
14 “requires *either* an important right *or* a sensitive class”) (emphasis in original). If
15 found to be such, aid in dying would immediately violate the very equality of
16 application demanded of rights guaranteed by the New Mexico Constitution. One
17 class of citizens—terminally ill, mentally competent adults—would possess a right
18 that would be denied to other similarly but not identically situated New Mexicans at

1 the end of their lives.⁹ New Mexico courts should be particularly wary of
2 constitutionalizing interests that would be unavailable to inexactly situated members
3 of the broader public at the end of their lives. *See Quill*, 521 U.S. at 799 (rejecting
4 equal protection challenge to New York’s statutes banning aid in dying that apply to
5 “all New Yorkers alike [and do not] . . . infringe fundamental rights [or] suspect
6 classifications.” (emphasis added)). Likewise, the constitutional infirmity of
7 protecting some New Mexicans (physicians) but not others (family members of
8 terminally ill patients) from Section 30-2-4’s reach is to me starkly apparent. *See also*
9 Majority Op. ¶ 44.

10 **Section 30-2-4 Is Reasonably Related To A Legitimate Government Purpose**

11 {65} A constitutional challenge to governmental interference with an asserted right
12 bestirs a process of review both federally and in New Mexico whereupon courts
13 “decide what interest is involved or to whom the interest belongs[,]” *Marrujo*, 1994-

14 ⁹A right to aid in dying available only to a minute sector of the population
15 would seem markedly in conflict with bedrock constitutional principles that guarantee
16 equality of rights. Yet to apply principles of equal protection to any future right to aid
17 in dying, as courts will inevitably be asked to do, seems as well fraught with peril. *See*
18 Rachel Aviv, *Letter From Belgium, The Death Treatment: When should people with*
19 *a non-terminal illness be helped to die?*, *The New Yorker*, (June 22, 2015), available
20 at <http://www.newyorker.com/magazine/2015/06/22/the-death-treatment> (questioning
21 the practice of aid in dying generally and specifically its expansion to the contexts of
22 mental illness and dementia in Belgium).

1 NMSC-116, ¶ 9, ascertain state interest in prohibiting or curtailing the asserted right,
2 *Griego*, 2014-NMSC-003, ¶¶ 56-62 (identifying and rejecting the state’s interest in
3 denying same gender couples the right to marry), and apply whichever of three
4 ensuing standards of legal scrutiny is warranted to fairly balance the interests of the
5 proponent with those of the State: strict, intermediate, or “rational basis.” *Marrujo*,
6 1994-NMSC-116, ¶¶ 9-12 (explaining each standard of review and stating that in
7 New Mexico “the same standards of review are used in analyzing both due process
8 and equal protection guarantees”). The rational basis test is “triggered
9 by . . . interests . . . that are not fundamental rights, suspect classifications, important
10 individual interests, [or] sensitive classifications.” *Id.* ¶ 12. “The burden is on the
11 opponent of the legislation to show that the law lacks a reasonable relationship to a
12 legitimate governmental purpose.” *Id.* (internal citation omitted). The test applies in
13 circumstances of “personal activities that are not fundamental rights.” *Id.* Aid in
14 dying is such an activity, and is subject to rational basis review.

15 {66} To justify its ban on aid in dying, the State relies on many of the same
16 “unquestionably important and legitimate” governmental interests identified to be
17 valid by *Glucksberg*: (1) preserving life; (2) “protecting the integrity and ethics of the
18 medical profession”; (3) “ensuring adequate regulation of the practice”; and (4)

1 preventing suicide and treating its causes. 521 U.S. at 703, 729-35. Without
2 “weigh[ing] exactly the relative strengths of these various interests,” *Glucksberg*
3 concluded Washington’s prohibition of “assisting another in the commission of self-
4 murder[,]” to be “at least reasonably related to their promotion and protection.” *Id.*
5 at 707, 735 (internal quotation marks omitted). Therefore, pursuant to rational basis
6 review, the Washington statute did not violate the Fourteenth Amendment. *Id.* at 735;
7 *see also Marrujo*, 1994-NMSC-116, ¶ 12 (“The opponent’s burden is difficult
8 because they must demonstrate that the challenged legislation is clearly arbitrary and
9 unreasonable, not just possibly so. The court will uphold the statute if any state of
10 facts can be discerned that will reasonably sustain the challenged [legislation.]”
11 (internal quotation marks and citation omitted)). Here, Section 30-2-4 prohibits
12 “deliberately aiding another in the taking of his [or her] own life” in a manner nearly
13 identical to the State of Washington, and New Mexico’s own recognized
14 governmental interests align with those determined to be valid by *Glucksberg*.
15 Accordingly, I would conclude that Section 30-2-4 is rationally related to a legitimate
16 government purpose. Both it and the ensuing statutory enactments that define the
17 parameters of medical decision-making reiterate the disallowance of aid in dying in
18 New Mexico, and warrant the “traditional deference accorded by courts to the

1 legislature’s sense of the general good” emphasized by *Marrujo* in its discussion of
2 rational basis review. 1994-NMSC-116, ¶ 12 (internal quotation marks and citation
3 omitted). The determination that Section 30-2-4 withstands rational basis review as
4 a matter of law should be part of our holding today.

5 {67} Lastly, I note that the rational basis test reflects the deference owed by our third
6 branch of government when legislative and executive processes combine to produce
7 laws that govern society. Our uneven decision today amply illustrates why those
8 processes provide better answers to societal questions such as the legality or illegality
9 of aid in dying. Pursuant to them, the New Mexico Legislature may, upon
10 consultation with constituents and citizens, study and propose any bill it deems to be
11 in the best interest of New Mexicans. If such legislation withstands the rigors of
12 bicameral scrutiny, it is next subjected to executive review, after which a governor
13 may sign or veto it. By this exacting process, the people of our state speak to declare
14 their wishes. If an ensuing enactment is legally challenged, courts are then far better
15 positioned to exercise their constitutional role in a properly judicial context.

16 **CONCLUSION**

17 {68} It can be difficult to repress—as judges sometimes must—the innately human
18 inclination to act when invited to provide a decisional option in circumstances where

1 options are sadly few. By declining such an invitation today, I mean not to assail aid
2 in dying or to thwart what Plaintiffs hope to accomplish for gravely ill New
3 Mexicans. The role of the judiciary is not always to determine a victor between
4 competing extremes, particularly when answers to questions of law are attainable on
5 narrower grounds. *See Allen v. LeMaster*, 2012-NMSC-001, ¶ 28, 267 P.3d 806
6 (citing *Baca v. N.M. Dep't of Pub. Safety*, 2002-NMSC-017, ¶ 12, 132 N.M. 282, 47
7 P.3d 441, for the proposition that “courts exercise judicial restraint by deciding cases
8 on the narrowest possible grounds and avoid reaching unnecessary constitutional
9 issues”). Those that may be disappointed or pleased by today’s decision should also
10 know that three judges can no more disavow aid in dying as a movement gathering
11 public momentum than we should today stifle the deeply held beliefs and
12 countervailing efforts of those that exercise their right to oppose it.

13 {69} The question before this panel is not whether aid in dying *should* be legal, nor
14 whether it *can* be legalized in a manner consistent with the New Mexico Constitution;
15 we must simply answer whether the legality of aid in dying is constitutionally
16 *compulsory*. It is not. The correct answer does not spring from our own individual or
17 collective “policy preferences [as m]embers of this Court,” *Glucksberg*, 521 U.S. at
18 720, but from our informed fidelity to constitutional precedent, institutionally

1 advisable notions of restraint, required respect for the roles of co-equal branches of
2 government, and awareness of the often arduous, and yet enduring, people-driven
3 process by which societies evolve within our nation’s immortality-minded experiment
4 in democracy. *See Schuette v. BAMN*, ___ U.S. ___, 134 S. Ct. 1623, 1636-37 (2014)
5 (noting by plurality the “right of citizens to debate so they can learn and decide and
6 then, through the political process, act in concert to try to shape the course of their
7 own times”). Inevitably, the value of rights chosen by citizens will exceed that of
8 rights prematurely directed by judges. To spare aid in dying that which is normally
9 required to effectuate significant change to New Mexico law would deprive it of both
10 the legitimacy of public inclusion and the opportunity for consensus invaluable to the
11 determinative process. *See Obergefell*, ___ U.S. at ___, 135 S. Ct. at 2605 (noting
12 with approval the “referenda, legislative debates, and grassroots campaigns, as well
13 as countless studies, papers, books, and other popular and scholarly writings
14 [alongside] extensive litigation in state and federal courts” regarding same-sex
15 marriage). Such would also wrongly short-change citizens across our state who wish
16 to voice their opinion prior to being told the outcome of matters about which they
17 care. Our preference today simply does not belong alongside historic, hard won, and

1 transcendent rights that warrant constitutional guarantee to the exclusion of
2 countervailing governmental interests.

3 {70} Based on my agreement that the New Mexico Constitution provides no
4 fundamental right to aid in dying, I concur in the Majority Opinion's reversal of the
5 district court's final declaratory judgment and order of permanent injunction. I would
6 extend our ruling to additionally conclude that aid in dying is not a constitutionally
7 protected important right or interest. Lastly, I would uphold Section 30-2-4 pursuant
8 to the rational basis standard of review.

9
10

J. MILES HANISEE, Judge

1 **VANZI, Judge (dissenting).**

2 {71} The question presented is whether NMSA 1978, Section 30-2-4 (1963) may
3 constitutionally be applied to criminalize a willing physician’s act of providing “aid
4 in dying” at the request of a mentally competent, terminally ill patient who wishes a
5 peaceful end of life as an alternative to being forced to endure an unbearable dying
6 process marked by suffering, including extreme pain and/or the loss of autonomy and
7 dignity. I would hold that it may not and would therefore affirm the district court’s
8 order permanently enjoining the State from prosecuting under Section 30-2-4 any
9 physician who provides aid in dying in accordance with the parties’ agreed definition.
10 I present my analysis in full, save for my recitation of the factual record and statutory
11 interpretation, regardless of any repetition with portions of the majority opinion.¹⁰

12 **I. BACKGROUND**

13 {72} Plaintiffs contend that the right to aid in dying is “fundamental or, at the very
14 least, important under the New Mexico Constitution.” I understand the parties’ agreed
15 definition of “aid in dying” to limit the right such that it is implicated only where: (1)
16 a mentally competent adult who is capable of giving consent, and (2) who is
17 terminally ill with a grievous and irremediable medical condition, (3) chooses to

18 ¹⁰A certain amount of redundancy is unavoidable because the majority opinion
19 tracks some of my analysis and presentation of the relevant law.

1 request a prescription for medication that may be ingested to bring about a painless,
2 peaceful, and dignified end of life, and (4) a willing physician applying the
3 established standard of care for aid in dying determines that it would be appropriate
4 to provide such medication so that the requesting patient need not be forced to endure
5 an intolerable dying process marked by suffering, including extreme pain and/or loss
6 of autonomy and dignity. All references to “aid in dying” herein assume and
7 encompass the full scope of the foregoing definition.

8 {73} I pause to address the majority and concurring opinions’ attempt to use these
9 limitations in support of the argument that there is no fundamental right to aid in
10 dying, suggesting that recognizing the right would somehow be an act of “selective
11 discrimination” because only “a select few” would have it and because it “also
12 provides a very narrow benefit from prosecution that exclusively favors physicians.”
13 *See* Majority Op. ¶¶ 44-47 (referring to the limitations as “exclusionary defects”); *see*
14 *also* Concurring Op. ¶¶ 62, 64. The contention is untenable. The right to aid in dying,
15 which I would hold is protected under our Constitution, belongs to *all* New Mexicans.
16 The fact that it may be invoked only by some people who find themselves in certain
17 circumstances is also true of other constitutional rights. The parental autonomy rights
18 recognized by the Constitution (discussed below) apply to all citizens, even though

1 not all citizens will exercise them. So too, the reproductive autonomy rights to use
2 contraception and to terminate a pregnancy belong to every citizen, notwithstanding
3 that every citizen might not be in a situation that would bring about their exercise.
4 The right to terminate a pregnancy, moreover, cannot be exercised beyond a certain
5 point in the pregnancy. Viability marks “the earliest point at which the State’s interest
6 in fetal life is constitutionally adequate to justify a legislative ban on nontherapeutic
7 abortions”; before then, “the State’s interests are not strong enough to support a
8 prohibition of abortion or the imposition of a substantial obstacle to the woman’s
9 effective right to elect the procedure.” *Planned Parenthood of Se. Pa. v. Casey*, 505
10 U.S. 833, 835, 846 (1992). Those who are on life support have the constitutional right
11 to have their lives ended, although not everyone will be on life support. *See Cruzan*
12 *ex rel. Cruzan v. Director, Missouri Dep’t of Health*, 497 U.S. 261, 279, 287, 302,
13 344 (1990) (majority opinion assumed that “a competent person [has] a
14 constitutionally protected right to refuse lifesaving hydration and nutrition”; five
15 Justices concluded that there is a due process right to refuse medical treatment). And
16 there is a fundamental right to marry, even though not everyone will claim it. All
17 asserted rights must be considered in the context in which the allegedly protected
18 conduct takes place. The right to aid in dying is no different in this respect. The fact

1 that the right is exercised in a specific context, during a limited time period, does not
2 defeat its existence. Nor is the recognition of the right precluded because it would
3 protect physicians who provide aid in dying from prosecution but not non-physicians.
4 For one thing, Plaintiffs do not assert a right to the assistance of anyone but a
5 physician in providing aid in dying. For another, the protection of physicians from
6 criminal liability in this context is required for the same reasons it is required in any
7 context in which the assistance of a physician is necessary (under the medical
8 standard of care or otherwise) to effectuate the constitutional right of the patient. As
9 discussed below, the patient's choice and the assistance of the physician to actualize
10 it are both protected. This does not vitiate the right asserted here any more than it
11 does the right to terminate a pregnancy, or to administer terminal sedation, or
12 withdraw life sustaining medication and equipment.

13 {74} Plaintiffs invoke two provisions of the New Mexico Constitution: the due
14 process clause of Article II, Section 18, which has an analogous provision in the
15 United States Constitution, and the inherent rights guarantee of Article II, Section 4,
16 which has no federal constitutional analogue. The State made no attempt below to
17 justify Section 30-2-4 as necessary to serve a compelling governmental interest (as
18 it must if the right is "fundamental") or a substantial governmental interest (which it

1 must if the right is “important”). Instead, relying on a single federal decision,
2 *Washington v. Glucksberg*, 521 U.S. 702 (1997), it argued that the statute is
3 constitutional as applied to aid in dying because it is rationally related to a legitimate
4 governmental interest.

5 {75} The district court concluded that Section 30-2-4, as applied to aid in dying,
6 violates Article II, Section 4 and Article II, Section 18 of the New Mexico
7 Constitution. Citing *Glucksberg*, 521 U.S. at 725, the court acknowledged that the
8 United States Supreme Court had previously “declined to find the right to aid in dying
9 to be . . . protected by the federal Constitution.” The court nevertheless departed from
10 federal precedent. Noting that New Mexico has inherent power as a separate
11 sovereign in our federalist system to provide more liberty than that afforded by the
12 federal Constitution and applying the interstitial approach to constitutional analysis,
13 *see State v. Gomez*, 1997-NMSC-006, ¶ 19, 122 N.M. 777, 932 P.2d 1, the district
14 court concluded that Article II, Section 4 provides “distinct additions” to the rights
15 afforded by the federal Constitution and a basis to diverge from federal precedent.

16 {76} The district court held that “[a] terminally ill, mentally competent patient has
17 a fundamental right to choose aid in dying pursuant to the New Mexico Constitution’s
18 guarantee to protect life, liberty, and seeking and obtaining happiness, N.M. Const.

1 art. II, § 4, and its substantive due process protections, N.M. Const. art. II, § 18.”
2 Applying strict scrutiny, the court held that the State had failed to prove that Section
3 30-2-4 furthers a compelling interest by criminalizing physician aid in dying and
4 ordered that the State is permanently enjoined from prosecuting any physician who
5 provides aid in dying to mentally competent, terminally ill patients.

6 {77} On appeal, the State argues that: (1) there is no fundamental constitutional right
7 to the deliberate assistance of a third party in ending one’s own life; and (2) the
8 district court’s ruling violates the doctrine of separation of powers by legalizing
9 conduct that was designated as a crime by the Legislature. Here, as in the district
10 court, the State makes no attempt to justify Section 30-2-4’s proscription against aid
11 in dying as necessary to serve a compelling or substantial state interest; relying on
12 *Glucksberg*, it asserts it does not have to. Our review is de novo. *Bank of N.Y. v.*
13 *Romero*, 2014-NMSC-007, ¶ 52, 320 P.3d 1.

14 **II. DUE PROCESS**

15 {78} The due process clause of the New Mexico Constitution provides that “[n]o
16 person shall be deprived of life, liberty or property without due process of law[.]”
17 N.M. Const. art. II, § 18. The federal due process clause similarly provides that no
18 state “shall . . . deprive any person of life, liberty, or property, without due process

1 of law[.]” U.S. Const. amend. XIV, § 1. Plaintiffs do not claim a right to aid in dying
2 under federal law, but the State’s argument that there is no such right assumes that the
3 result in this case is dictated by *Glucksberg*, 521 U.S. at 728, which held that “the
4 asserted ‘right’ to assistance in committing suicide is not a fundamental liberty
5 interest protected by the [federal] Due Process Clause” and that “Washington’s
6 assisted-suicide ban [is] rationally related to legitimate government interests.” The
7 majority and concurring opinions also assume that *Glucksberg* is dispositive here. I
8 begin with a review of the key United States Supreme Court decisions interpreting
9 the liberty interest protected by the federal due process clause.

10 **A. Federal Due Process Precedents**

11 {79} Long before it decided *Glucksberg*, the United States Supreme Court
12 interpreted the substantive component of the due process clause to protect aspects of
13 personal autonomy as “fundamental rights,” notwithstanding that they are not
14 mentioned in the text of the Bill of Rights, with which the government may not
15 interfere unless it meets its burden under the strict scrutiny standard to prove that the
16 infringing statute is narrowly tailored to serve a compelling governmental interest.
17 *See Casey*, 505 U.S. at 847 (explaining that the United States Supreme Court has
18 never accepted the view that “liberty encompasses no more than those rights already

1 guaranteed to the individual against [governmental] interference by the express
2 provisions of the first eight Amendments to the Constitution”).

3 {80} These previously recognized fundamental rights include the right to marry, *see*
4 *Loving v. Virginia*, 388 U.S. 1, 2 (1967), and aspects of parental autonomy, *see, e.g.*,
5 *Santosky v. Kramer*, 455 U.S. 745, 753 (1982) (recognizing the rights to the
6 companionship, care, custody, and management of one’s children); *Stanley v. Illinois*,
7 405 U.S. 645, 651-52 (1972) (preserving the right to conceive, raise, and retain
8 custody of one’s children); *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535,
9 541 (1942) (decided on equal protection grounds, emphasizing the “fundamental”
10 nature of individual choice about procreation and the corresponding standard of
11 “strict scrutiny”); *Pierce v. Soc’y of Sisters*, 268 U.S. 510, 534-35 (1925)
12 (recognizing the right to raise one’s children); *Meyer v. Nebraska*, 262 U.S. 390, 400
13 (1923) (discussing the parental right to control children’s education). The Court has
14 also recognized a fundamental due process right to bodily integrity. *See Casey*, 505
15 U.S. at 849 (citing *Washington v. Harper*, 494 U.S. 210, 221-22 (1990); *Winston v.*
16 *Lee*, 470 U.S. 753 (1985); *Rochin v. California*, 342 U.S. 165 (1952)).

17 {81} The Court has held that there is a fundamental due process right to reproductive
18 autonomy, which includes the right to purchase and use contraceptives, *see Griswold*

1 *v. Connecticut*, 381 U.S. 479, 499 (1965) (recognizing a married couple’s privacy
2 right in their intimate relationship); *Eisenstadt v. Baird*, 405 U.S. 438, 443-44 (1972)
3 (extending *Griswold*, under the Equal Protection Clause, to invalidate a state law
4 against distributing contraceptives to unmarried persons), and the right to terminate
5 a pregnancy, *see Roe v. Wade*, 410 U.S. 113, 165-66 (1973); *Casey*, 505 U.S. at 833.
6 In *Roe* and its progeny, the Court recognized and then affirmed the right of a woman
7 to choose whether or not to terminate her pregnancy, reasoning primarily from the
8 personal nature of the decision and its consequences, which are best left to “the
9 woman and her responsible physician.” 410 U.S. at 153; *see Casey*, 505 U.S. at 846
10 (affirming *Roe*’s central holding).

11 {82} Writing separately in *Roe* and its companion case, *Bolton*, Justice Douglas
12 broadly described, among other liberties, a “freedom to care for one’s health and
13 person[.]” *Doe v. Bolton*, 410 U.S. 179, 213 (1973) (Douglas, J., concurring). These
14 cases establish that individuals have an “interest in independence in making certain
15 kinds of important decisions[.]” *Whalen v. Roe*, 429 U.S. 589, 599-600 (1977)
16 (footnote omitted); *see Carey v. Population Servs. Int’l*, 431 U.S. 678, 684-85 (1977),
17 and that “[i]t is a promise of the Constitution that there is a realm of personal liberty
18 which the government may not enter[.]” *Casey*, 505 U.S. at 847. This interest in self-

1 definition, which is “the heart of liberty,” is no less than “the right to define one’s
2 own concept of existence, of meaning, of the universe, and of the mystery of human
3 life.” *Id.* at 851. *Casey* described *Roe* “not only as an exemplar of *Griswold* liberty
4 but as a rule . . . of personal autonomy and bodily integrity, with doctrinal affinity to
5 cases recognizing limits on governmental power to mandate medical treatment or to
6 bar its rejection.” *Casey*, 505 U.S. at 857.

7 {83} Substantive due process decisions pre-dating *Glucksberg* also clearly
8 recognized, as part of the protected liberty interest, the right to the necessary
9 assistance of a physician. In *Carey*, 431 U.S. at 684-90, the Court emphasized, in
10 holding that restrictions on the distribution of contraceptives must satisfy strict
11 scrutiny because they clearly burden the fundamental right to make decisions
12 concerning reproduction, that strict scrutiny also applies to state regulations that
13 burden the fundamental right to make such decisions “by substantially limiting access
14 to the means of effectuating that decision.” And the decisions in *Roe* and *Casey* held
15 that the right encompasses the assistance of a physician necessary to exercise it,
16 “vindicat[ing] the right of the physician to administer medical treatment according to
17 his professional judgment up to the points where important state interests provide
18 compelling justifications for intervention.” *Roe*, 410 U.S. at 165-66. “If an individual

1 practitioner abuses the privilege of exercising proper medical judgment, the usual
2 remedies, judicial and intra-professional, are available.” *Id.* at 166.

3 {84} *Casey* further clarified that, although “[i]t is . . . tempting . . . to suppose that
4 the Due Process Clause protects only those practices, defined at the most specific
5 level, that were protected against government interference by other rules of law when
6 the Fourteenth Amendment was ratified . . . such a view would be inconsistent with
7 our law.” 505 U.S. at 847; *see also Rochin*, 342 U.S. at 171 (“To believe that this
8 judicial exercise of judgment could be avoided by freezing ‘due process of law’ at
9 some fixed stage of time or thought is to suggest that the most important aspect of
10 constitutional adjudication is a function for inanimate machines and not for
11 judges[.]”).

12 {85} In *Cruzan*, 497 U.S. at 278, the Court stated that “[t]he principle that a
13 competent person has a constitutionally protected liberty interest in refusing
14 unwanted medical treatment may be inferred from our prior decisions” and
15 “assume[d] that the United States Constitution would grant a competent person a
16 constitutionally protected right to refuse lifesaving hydration and nutrition.” *Id.* at
17 279; *see id.* at 281 (“[T]he Due Process Clause protects . . . an interest in refusing life-
18 sustaining medical treatment.”). As Justice O’Connor explained in her concurring

1 opinion, “The State’s imposition of medical treatment on an unwilling competent
2 adult necessarily involves some form of restraint and intrusion. A seriously ill or
3 dying patient whose wishes are not honored may feel a captive of the machinery
4 required for life-sustaining measures or other medical interventions. Such forced
5 treatment may burden that individual’s liberty interests as much as any state coercion.
6 The State’s artificial provision of nutrition and hydration implicates identical
7 concerns.” *Id.* at 288 (O’Connor, J., concurring) (citations omitted). “Requiring a
8 competent adult to endure such procedures against her will burdens the patient’s
9 liberty, dignity, and freedom to determine the course of her own treatment.
10 Accordingly, the liberty guaranteed by the Due Process Clause must protect, if it
11 protects anything, an individual’s deeply personal decision to reject medical
12 treatment, including the artificial delivery of food and water.” *Id.* at 289 (O’Connor,
13 J., concurring).

14 {86} In *Bowers v. Hardwick*, 478 U.S. 186, 190-91 (1986), *overruled by Lawrence*
15 *v. Texas*, 539 U.S. 558 (2003), the Court did an about-face, rejecting the substantive
16 due process analysis it had previously applied in addressing fundamental rights.
17 Recasting the respondent’s claim as an asserted “fundamental right to engage in
18 homosexual sodomy,” *id.* at 191, the Court dismissed the right as “at best, facetious,”

1 because homosexual sodomy was not “deeply rooted in this Nation’s history and
2 tradition.” *Id.* at 192, 194 (internal quotation marks and citation omitted). In
3 *Glucksberg*, the Court applied the same tactics, redefining the right asserted and
4 rejecting it for lack of a “deeply rooted” historical antecedent. Before examining
5 *Glucksberg*, I consider the Court’s most recent substantive due process decisions,
6 which make plain that the *Bowers/Glucksberg* analysis does not control substantive
7 due process analysis as a matter of federal constitutional law.

8 {87} In *Lawrence*, the Court overruled *Bowers*, emphatically rejecting its narrow
9 characterization of the right at issue and its rigid adherence to, and exclusive focus
10 on, an historical analysis in deciding substantive due process claims. *Lawrence*, 539
11 U.S. at 567, 577-78. The *Lawrence* Court adopted Justice Stevens’ dissent in *Bowers*,
12 which recognized that “the fact that the governing majority in a [s]tate has
13 traditionally viewed a particular practice as immoral is not a sufficient reason for
14 upholding a law prohibiting the practice[.]” *Lawrence*, 539 U.S. at 577-78 (internal
15 quotation marks and citation omitted). Stating that “[t]he issue is whether the majority
16 may use the power of the [s]tate to enforce these views on the whole society through
17 operation of the criminal law[.]” the *Lawrence* Court embraced *Casey*, quoting its
18 statement that the Court’s “ ‘obligation is to define the liberty of all, not to mandate

1 our own moral code[,]’ ” and its formulation of the due process liberty interest as
2 protecting “the right to define one’s own concept of existence, of meaning, of the
3 universe, and of the mystery of human life.” *Lawrence*, 539 U.S. at 571, 574 (quoting
4 *Casey*, 505 U.S. at 850-51).

5 {88} *Bowers*, the *Lawrence* Court held, “was not correct when it was decided, and
6 it is not correct today.” *Lawrence*, 539 U.S. at 578. Reiterating *Casey*’s
7 pronouncement that “ ‘[i]t is a promise of the Constitution that there is a realm of
8 personal liberty which the government may not enter[,]’ ” *Lawrence*, 539 U.S. at 578
9 (quoting *Casey*, 505 U.S. at 847), *Lawrence* concluded,

10 Had those who drew and ratified the Due Process Clauses . . . known the
11 components of liberty in its manifold possibilities, they might have been
12 more specific. They did not presume to have this insight. They knew
13 times can blind us to certain truths and later generations can see that
14 laws once thought necessary and proper in fact serve only to oppress. As
15 the Constitution endures, persons in every generation can invoke its
16 principles in their own search for greater freedom.

17 *Id.* at 578-79.

18 {89} The Court cemented its rejection of a rigid historical analysis as dispositive of
19 substantive due process rights in *Obergefell v. Hodges*, ___ U.S. ___, 135 S. Ct. 2584
20 (2015), in which the Court held that the federal due process clause protects a liberty
21 interest in marrying a person of the same sex and requires states to license and

1 recognize such marriages. *See id.* at 2604-05, 2608. The Court explained that the
2 liberty interests protected by the federal due process clause “extend to certain
3 personal choices central to individual dignity and autonomy, including intimate
4 choices that define personal identity and beliefs[,]” *id.* at 2597 (citing *Eisenstadt*, 405
5 U.S. at 453; *Griswold*, 381 U.S. at 484-86), and that “[t]he identification and
6 protection of fundamental rights is an enduring part of the judicial duty to interpret
7 the Constitution[,]” *id.* at 2598. The Court emphasized that the task of fulfilling that
8 judicial responsibility “has not been reduced to any formula,” but rather “requires
9 courts to exercise reasoned judgment in identifying interests of the person so
10 fundamental that the State must accord them its respect.” *Id.* (internal quotation marks
11 and citation omitted). “History and tradition guide and discipline this inquiry but do
12 not set its outer boundaries.” *Id.* (citing *Lawrence*, 539 U.S. at 572). The proper
13 method of analysis “respects our history and learns from it without allowing the past
14 alone to rule the present.” *Id.* The Court reasoned:

15 The nature of injustice is that we may not always see it in our own times.
16 The generations that wrote and ratified the Bill of Rights and the
17 Fourteenth Amendment did not presume to know the extent of freedom
18 in all of its dimensions, and so they entrusted to future generations a
19 chapter protecting the right of all persons to enjoy liberty as we learn its
20 meaning. When new insight reveals discord between the Constitution’s
21 central protections and a received legal stricture, a claim to liberty must
22 be addressed.

1 *Id.*

2 **B. *Washington v. Glucksberg***

3 {90} In *Glucksberg*, which was decided after *Bowers* but before *Lawrence* and
4 *Obergefell*, an alliance of physicians and terminally ill patients sought a declaration
5 that a Washington statute criminalizing “promoting a suicide attempt,” defined as
6 “knowingly caus[ing] or aid[ing] another person to attempt suicide,” violated the
7 federal due process clause. *Glucksberg*, 521 U.S. at 707-08 (internal quotation marks
8 and citation omitted). The plaintiffs had asserted “a liberty interest protected by the
9 Fourteenth Amendment which extends to a personal choice by a mentally competent,
10 terminally ill adult to commit physician-assisted suicide.” *Id.* at 708 (internal
11 quotation marks and citation omitted). The Supreme Court recast the issue as
12 “whether the ‘liberty’ specially protected by the Due Process Clause includes a right
13 to commit suicide which itself includes a right to assistance in doing so[,]” *id.* at 723,
14 and restricted its inquiry to whether that right had previously been recognized in the
15 course of “our Nation’s history, legal traditions, and practices,” *id.* at 710, 721. The
16 Court concluded that a “ ‘right’ to assistance in committing suicide is not a
17 fundamental liberty interest protected by the Due Process Clause” because “[t]he
18 history of the law’s treatment of assisted suicide in this country has been and

1 continues to be one of the rejection of nearly all efforts to permit it.” *Id.* at 728.
2 Having declined to recognize a fundamental right, the Court went on to hold the
3 State’s asserted interests to be sufficient to withstand the immediate challenge under
4 rational basis review. *Id.*

5 {91} The Court distinguished *Cruzan* on the ground that the right the Court assumed
6 existed in that case was rooted in “the common-law rule that forced medication was
7 a battery, and the long legal tradition protecting the decision to refuse unwanted
8 medical treatment,” and thus “was entirely consistent with this Nation’s history and
9 constitutional traditions,” while “[t]he decision to commit suicide with the assistance
10 of another . . . has never enjoyed similar legal protection.” *Glucksberg*, 521 U.S. at
11 725. The Court characterized the broad, rights-protective language of *Casey* as a
12 general description of personal activities that had previously been identified as “so
13 deeply rooted in our history and traditions, or so fundamental to our concept of
14 constitutionally ordered liberty, that they are protected by the Fourteenth
15 Amendment[.]” concluding without analysis that the fact that “many of the rights and
16 liberties protected by the Due Process Clause sound in personal autonomy does not
17 warrant the sweeping conclusion that any and all important, intimate, and personal
18 decisions are so protected[.]” *Glucksberg*, 521 U.S. at 727-28.

1 {92} Five Justices wrote separately, reserving the possibility that the Court might
2 recognize a constitutional right to “physician-assisted suicide” in certain
3 circumstances, while relying on different grounds and different reasoning. Justice
4 Stevens concurred in the result, explaining that all of the patient plaintiffs had died
5 during the litigation and that the majority opinion held that “Washington’s statute
6 prohibiting assisted suicide is not invalid ‘on its face[.]’ ” *Id.* at 739 (Stevens, J.,
7 concurring). Justice O’Connor joined the majority opinion “because [she] agree[d]
8 that there is no generalized right to ‘commit suicide[,]’ ” stating that there was no
9 need to reach “the narrower question whether a mentally competent person who is
10 experiencing great suffering has a constitutionally cognizable interest in controlling
11 the circumstances of his or her imminent death” in the context of what she
12 characterized as the facial challenges presented in *Glucksberg* and the related case,
13 *Vacco v. Quill*, 521 U.S. 793 (1997).¹¹ *Glucksberg*, 521 U.S. at 736 (O’Connor, J.,
14 concurring). Justice Ginsburg concurred “substantially for the reasons stated by
15 Justice O’Connor.” *Id.* at 789 (Ginsburg, J., concurring). Justice Breyer also joined
16 Justice O’Connor’s opinion, “except insofar as it joins the majority[.]” writing

17 ¹¹In *Quill*, the Supreme Court held that New York’s similar ban did not deprive
18 a similarly defined class of persons of equal protection, despite the state’s recognition
19 and protection of the right of each patient in the class to refuse lifesaving medical
20 treatment. 521 U.S. at 796-97.

1 separately to say that our legal tradition might protect a “right to die with dignity,”
2 at the core of which “would lie personal control over the manner of death,
3 professional medical assistance, and the avoidance of unnecessary and severe
4 physical suffering—combined[,]” and to emphasize that terminally ill patients
5 experiencing “severe physical pain” might have a constitutionally protected interest.
6 *Id.* at 789-91 (Breyer, J., concurring) (internal quotation marks omitted). Taking a
7 completely different approach, Justice Souter stated that “the importance of the
8 individual interest here, as within that class of ‘certain interests’ demanding careful
9 scrutiny of the State’s contrary claim, cannot be gainsaid[,]” but did not reach the
10 question whether “that interest might in some circumstances, or at some time, be seen
11 as ‘fundamental’ to the degree entitled to prevail” because he was “satisfied that the
12 State’s interests . . . [we]re sufficiently serious to defeat the present claim that its law
13 is arbitrary or purposeless.” *Id.* at 782 (Souter, J., concurring) (citation omitted).

14 {93} Thus, Justices O’Connor and Stevens, and Justices Ginsburg and Breyer (to the
15 extent they joined Justice O’Connor’s concurrence) viewed the majority opinion as
16 having rejected a *facial* challenge. The majority opinion, moreover, agreed that its
17 holding “would not ‘foreclose the possibility that an individual plaintiff seeking to
18 hasten her death, or a doctor whose assistance was sought, could prevail in a more

1 particularized challenge[.]’ ” *Id.* at 735 n.24 (quoting *id.* at 750 (Stevens, J.,
2 concurring)).¹²

3 {94} I need not discuss *Glucksberg* in exegetical detail. Given that *Lawrence* and
4 *Obergefell* emphatically rejected an analysis of unenumerated due process liberty
5 interests upon which *Glucksberg*, like *Bowers*, relied (an analysis focusing solely on
6 the historical roots of the asserted right) and just as emphatically embraced analytical
7 principles that *Glucksberg* rejected (the liberty rights analysis of *Casey* and other
8 decisions addressing due process liberty interests), it is impossible to conclude that
9 the due process analysis applied in *Glucksberg* is dispositive of the issue today, even
10 as a matter of federal law.

11 {95} The assumption that a fundamental right exists only if there is a history and
12 tradition of protecting it, shared by *Bowers* and *Glucksberg*, does not comport with
13 the Supreme Court’s analysis of due process liberty rights in decisions issued before
14 and afterward. As one noted constitutional scholar has pointed out, “laws prohibiting
15 interracial marriage were far more ‘deeply rooted in this Nation’s history and

16 ¹²As Laurence Tribe has observed, “*Quill*, like *Glucksberg*, splintered the Court
17 in a way that required the majority opinion to acknowledge that the Court’s holding
18 left open ‘the possibility that some applications of the state statute may impose an
19 intolerable intrusion on the patient’s freedom.’ ” Laurence H. Tribe, *Lawrence v.*
20 *Texas: The “Fundamental Right” That Dare Not Speak Its Name*, 117 Harv. L. Rev.
21 1893, 1918 n.89 (2004) (quoting *Quill*, 521 U.S. at 809 n.13) (alteration omitted).

1 tradition’ than the right to interracial marriage, but in *Loving v. Virginia*, the Court
2 held that such a right is protected by the Due Process Clause. And there was no
3 deeply rooted tradition of protecting a right to abortion before *Roe v. Wade*. In fact,
4 abortion was illegal in forty-six states when *Roe* was decided.” Erwin Chemerinsky,
5 *Washington v. Glucksberg Was Tragically Wrong*, 106 Mich. L. Rev. 1501, 1505
6 (2008) (footnotes omitted). Furthermore, “the fact that laws have long existed does
7 not answer the question as to whether the interest the laws regulate is so integral to
8 personhood as to be worthy of being deemed a fundamental right.” *Id.*

9 {96} The opinion of the Court in *Obergefell* briefly addressed *Glucksberg*, in
10 rejecting respondents’ argument that petitioners’ assertion of “a new and nonexistent”
11 right was inappropriate in light of *Glucksberg*. See *Obergefell*, ___ U.S. at ___, 135
12 S. Ct. at 2602. The Court said that, although *Glucksberg*’s requirement that liberty
13 “must be defined in a most circumscribed manner, with central reference to specific
14 historical practices . . . may have been appropriate for the asserted right there
15 involved (physician-assisted suicide), it is inconsistent with the approach this Court
16 has used in discussing other fundamental rights[.]” *Id.* The majority and concurring
17 opinions in this case seize on this statement as supporting their contention that
18 *Glucksberg*’s analysis still applies to aid in dying. See Majority Op. ¶ 35; Concurring

1 Op. ¶ 58. Stating that “[i]n *Obergefell*, every member of the United States Supreme
2 Court . . . passed upon an opportunity to question the majority’s reference to the
3 outcome in *Glucksberg* or cast aspersion upon the analysis of aid in dying that was
4 utilized in *Glucksberg*[,]” the majority opinion represents *Obergefell* as providing “a
5 specific reference of approval and a brief defense of *Glucksberg*.” Majority Op. ¶ 35;
6 *see also* Concurring Op. ¶ 58. This characterization of *Obergefell* as an endorsement
7 of *Glucksberg* is specious. It ignores that there was no occasion for the *Obergefell*
8 Justices to question or disparage *Glucksberg*’s analysis of aid in dying, as the issue
9 was not before the Court. And it is exceedingly difficult to imagine how *Obergefell*
10 could be so understood given what the Court said next: “If rights were defined by
11 who exercised them in the past,” the Court explained, “then received practices could
12 serve as their own continued justification and new groups could not invoke rights
13 once denied.” *Obergefell*, ___ U.S. at ___, 135 S. Ct. at 2602. “[R]ights come not
14 from ancient sources alone. They rise, too, from a better informed understanding of
15 how constitutional imperatives define a liberty that remains urgent in our own era.”
16 *Id.* This view of substantive due process rights could not be more contrary to
17 *Glucksberg*, and the application of this principle cannot be understood to be limited
18 to the identity of the right at issue.

1 {97} If the *Obergefell* Court had applied a *Glucksberg* analysis, it could not have
2 identified a history and tradition protecting the right to marry another of the same sex,
3 just as it could not identify a history and tradition protecting the right to engage in
4 same-sex sodomy when it applied that restrictive analysis in *Bowers*. I can think of
5 no principled reason why there should be two tests for substantive due process rights;
6 one for aid in dying, and one for everything else. Although the opinion of the Court
7 in *Obergefell* left *Glucksberg* untouched (again it had no reason to reach out to
8 overrule it), the dissent correctly acknowledged that the majority’s position
9 “require[d] it to effectively overrule *Glucksberg*.” *Obergefell*, ___ U.S. at ___, 135
10 S. Ct. at 2621 (Roberts, J., dissenting). It remains to be seen, of course, what the
11 outcome would be if the Court were to address aid in dying again, but the conclusion
12 is inescapable that the United States Supreme Court itself has disclaimed the
13 substantive due process analysis upon which *Glucksberg*’s holding rests.

14 {98} Reams of critical analysis by numerous commentators, preeminent
15 constitutional scholars among them, also belie the State’s conclusory contention that
16 *Glucksberg* is not “flawed,” and so should be followed under our interstitial approach
17 to analysis of rights afforded by provisions of our Constitution that have federal
18 analogues (more on that later). *See, e.g.*, Chemerinsky, *supra*, at 1506 (“The

1 methodology of *Lawrence* . . . cannot be reconciled with Chief Justice Rehnquist’s
2 restrictive view of rights under the Due Process Clause [in *Glucksberg*.”]; Yale
3 Kamisar, *Foreward: Can Glucksberg Survive Lawrence? Another Look at the End*
4 *of Life & Personal Autonomy*, 106 Mich. L. Rev. 1453, 1455-56 (2008) (noting
5 commentary that, although the *Lawrence* majority did not cite *Glucksberg*, “the
6 aspersions *Lawrence* cast on *Bowers* inevitably fell with equal force on
7 *Glucksberg*—especially the narrow view of substantive due process *Glucksberg*
8 shared with *Bowers*” (footnote, internal quotation marks, and citation omitted));
9 Tribe, *supra*, at 1923 (stating that *Lawrence* demonstrates that “[n]othing in
10 *Glucksberg* can fairly be understood to have cemented the *Bowers* transmutation into
11 our constitutional law”).

12 {99} Commentators have noted, for example, the majority’s recharacterization of the
13 right asserted by the plaintiffs. *See, e.g.*, Ruth C. Stern & J. Herbie Difonzo, *Stopping*
14 *for Death: Re-Framing Our Perspective on the End of Life*, 20 U. Fla. J.L. & Pub.
15 Pol’y 387, 418 (2009) (“In neither the majority nor in the five concurring opinions did
16 the justices correctly or coherently define the questions presented.”). Even scholars
17 who have questioned whether *Lawrence* necessarily means that the United States
18 Supreme Court will recognize a right to aid in dying have described *Glucksberg*’s

1 “fragility” in light of the obvious lack of agreement among the justices, even as to the
2 precise question answered. *See* Kamisar, *supra*, at 1459-60 (noting, *inter alia*, that
3 Justice O’Connor really did not join the majority; that the five concurring opinions
4 “make for frustrating reading and a shaky ruling”; and that *Glucksberg* “may be the
5 most confusing and the most fragile 9-0 decision in Supreme Court history”). As
6 Kamisar has observed, “although Rehnquist’s opinion is called ‘the opinion of the
7 Court,’ it does not seem to deserve that designation.” Kamisar, *supra*, at 1462. For
8 example, “[a]lthough formally Justice O’Connor provided the much-needed fifth vote,
9 it is highly doubtful that she really did[,]” *id.* at 1462, and Justice Stevens’ concurring
10 opinion “is primarily a dissent.” *Id.* at 1464.

11 {100} The State does not address the fractured nature of *Glucksberg*’s concurring
12 opinions. Indeed, counsel for the State said at oral argument that he was not “properly
13 equipped to discuss . . . some of the nuanced views” stated in those opinions. And,
14 although *Obergefell* was not decided until after oral argument, *Lawrence* had been
15 decided, yet the State did not acknowledge that *Lawrence* unequivocally rejected the
16 rigid historical analysis upon which *Bowers* and *Glucksberg* relied exclusively, and
17 instead embraced a concept of liberty that protects “an autonomy of self,” which
18 *Glucksberg* disavowed.

1 {101} The majority and concurring opinions in this case also say nothing about the
2 impact of *Glucksberg*'s fractures and fragility on its authoritative value; like the State,
3 they essentially say that we should give the decision dispositive effect because it
4 exists and has not been overruled. *See* Majority Op. ¶ 34; Concurring Op. ¶ 58. These
5 opinions also do not address the critical commentary, offering only that “[t]he fact
6 that *Glucksberg*'s analytic methodology has been questioned by some legal scholars
7 does not mean the opposite of its holding must be true.” Majority Op. ¶ 34.

8 {102} But even accepting the State's conclusory assertion that *Glucksberg* is not
9 “flawed,” neither the State nor the majority or concurring opinions offer any reason
10 why it should be treated as persuasive, given the United States Supreme Court's
11 current analysis of due process liberty interests and over seventeen years of
12 experience (and evidence) with aid in dying, which the *Glucksberg* Court did not
13 have before it. Whatever the status of *Glucksberg* in the federal courts, the bottom
14 line is that it does not bind us here, and our analysis of rights afforded by the New
15 Mexico Constitution—the only source of rights invoked by Plaintiffs—is not
16 “inextricably tied” to it. *See, e.g., N.M. Right to Choose/NARAL v. Johnson*, 1999-
17 NMSC-005, ¶ 37, 126 N.M. 788, 975 P.2d 841; *State v. Gutierrez*, 1993-NMSC-062,
18 ¶ 16, 50-56, 116 N.M. 431, 863 P.2d 1052.

1 **C. Article II, Section 18 and Our Interstitial Approach**

2 {103} Our Supreme Court has previously interpreted the New Mexico due process
3 clause more expansively than the United States Supreme Court has interpreted the
4 federal due process clause, holding in *Montoya v. Ulibarri*, 2007-NMSC-035, ¶ 23,
5 142 N.M. 89, 163 P.3d 476, that New Mexico’s due process clause requires that
6 habeas petitioners must be permitted to assert freestanding claims of actual
7 innocence. *See also State v. Vallejos*, 1997-NMSC-040, ¶ 32, 123 N.M. 739, 945 P.2d
8 957 (holding that all forms of entrapment violate New Mexico’s due process clause;
9 rejecting widely criticized U.S. Supreme Court precedent to the contrary as to the
10 federal counterpart).¹³ And nothing in our Supreme Court’s most recent interpretation
11 of Article II, Section 18 remotely suggests that analysis of liberty interests under New

12 ¹³Our Supreme Court has rejected federal constitutional precedent and analysis
13 affording less protection than our own Constitution under other provisions as well.
14 *See, e.g., State v. Leyva*, 2011-NMSC-009, ¶ 51, 149 N.M. 435, 250 P.3d 861
15 (departing from Fourth Amendment analysis when construing analogous Article II,
16 Section 10); *State v. Garcia*, 2009-NMSC-046, ¶ 34, 147 N.M. 134, 217 P.3d 1032
17 (rejecting widely criticized United States Supreme Court decision weakening a right
18 “beyond a point which may be countenanced under our state constitution”); *State v.*
19 *Rowell*, 2008-NMSC-041, ¶¶ 20-23, 144 N.M. 371, 188 P.3d 95 (declining to follow
20 United States Supreme Court decisions criticized in legal literature as “devoid of a
21 reasoned basis in constitutional doctrine”); *Gutierrez*, 1993-NMSC-062, ¶¶ 32, 50-56
22 (discussing “a willingness to undertake independent analysis of our state
23 constitutional guarantees when federal law begins to encroach on the sanctity of those
24 guarantees” and rejecting federal constitutional rule as incompatible with the
25 guarantees of the New Mexico Constitution).

1 Mexico’s due process clause requires the rigid adherence to historical analysis that
2 *Glucksberg*, like *Bowers*, elevated to the exclusion of all else. *See Griego*, 2014-
3 NMSC-003, ¶ 2 (“Interracial marriages were once prohibited by laws in many states
4 until the United States Supreme Court declared such laws unconstitutional and
5 ordered an end to the discriminatory treatment.”); *id.* ¶ 58 (“Articulating the
6 governmental interest as maintaining the tradition of excluding same-gender
7 marriages because the historic and cultural understanding of marriage has been
8 between a man and a woman—cannot in itself provide a sufficient basis for the
9 challenged exclusion. To say that the discrimination is traditional is to say only that
10 the discrimination has existed for a long time.” (alteration, internal quotation marks,
11 and citation omitted)). Indeed, *Griego* acknowledged both *Lawrence*, *see Griego*,
12 2014-NMSC-003, ¶ 58, and the privacy right recognized in *Eisenstadt*, 405 U.S. at
13 453, *see Griego*, 2014-NMSC-003, ¶ 60 n.10.

14 {104} Thus, to the extent it is appropriate to be guided by federal law in determining
15 whether New Mexico’s due process clause protects aid in dying, the sound and
16 persuasive analysis is that which embraces the view of liberty, autonomy, and privacy
17 elucidated in the *Casey/Lawrence/Obergefell* line of cases and rejects the analysis of
18 *Bowers* and *Glucksberg*. Even if *Glucksberg* remains good law, as a matter of

1 federal due process analysis, I would reject it as unpersuasive, flawed, and inadequate
2 to protect the rights of New Mexicans. *Garcia*, 2009-NMSC-046, ¶ 57 (Bosson, J.,
3 specially concurring) (“In a government of dual sovereigns, it is imperative that our
4 state Constitution develop to its full potential and protect the rights of our citizens
5 where we deem federal law lacking.”). The State has conceded that citizens have a
6 fundamental right to make their own end-of-life decisions and stated at oral argument
7 before this Court that citizens have a fundamental right to bring about their own
8 deaths, even by stockpiling morphine prescribed by a physician and ingesting a lethal
9 dosage. The State further conceded at oral argument that it had no interest in
10 preventing suffering, mentally competent, terminally ill patients from obtaining aid
11 in dying. *See* Oral Argument, No. 33,360 at 4:19:15-4:19:30 (Jan. 26, 2015) (“The
12 State interest does not lie in prolonging the suffering of people who are in fact
13 terminally ill, and have made an informed, competent decision to request this sort of
14 medication. *I will readily concede that the State has no interest in preventing that*
15 *person from obtaining this sort of assistance.*” (emphasis added)); *supra*, at 4:18:40-
16 4:19:00 (“I don’t think there would be a compelling state interest in preventing a
17 person at the very end of their life who is, in fact, terminally ill and mentally
18 competent from obtaining this sort of assistance. I don’t think the statute would

1 survive strict scrutiny analysis. I don't think the statute would survive an intermediate
2 scrutiny analysis, either, for largely the same reasons.”). According to the State, the
3 only conduct proscribed by Section 30-2-4 in this context is a physician's act of
4 prescribing a lethal dosage of medication. Yet it provides no reason, other than its
5 citation to *Glucksberg*, why that conceded fundamental right does not include the
6 only means available to effectuate the right in a peaceful and dignified manner—a
7 lethal dosage of medication prescribed by a willing physician acting in accordance
8 with the established standard of care for aid in dying.¹⁴ Nor does

9 ¹⁴As Justice Souter reasoned in *Glucksberg*:

10 There is . . . [another] reason for claiming that a physician's assistance
11 here would fall within the accepted tradition of medical care in our
12 society, and the abortion cases are only the most obvious illustration
13 While the Court has held that the performance of abortion
14 procedures can be restricted to physicians, the Court's opinion in *Roe*
15 recognized the doctors' role in yet another way. For, in the course of
16 holding that the decision to perform an abortion called for a physician's
17 assistance, the Court recognized that the good physician is not just a
18 mechanic of the human body whose services have no bearing on a
19 person's moral choices, but one who does more than treat symptoms,
20 one who ministers to the patient. This idea of the physician as serving
21 the whole person is a source of the high value traditionally placed on the
22 medical relationship. Its value is surely as apparent here as in the
23 abortion cases, for just as the decision about abortion is not directed to
24 correcting some pathology, so the decision in which a dying patient
25 seeks help is not so limited. The patients here sought not only an end to
26 pain (which they might have had, although perhaps at the price of
27 stupor) but an end to their short remaining lives with a dignity that they
28 believed would be denied them by powerful pain medication, as well as

1 it explain or even attempt to justify why a physician’s affirmative acts of
2 administering terminal sedation and removing life-sustaining nutrition, hydration, or
3 mechanical life support—undertaken with knowledge that these acts will hasten
4 death—should be legal, while a physician’s affirmative act of writing a prescription
5 that will bring about the same result should be criminalized.¹⁵ I would hold that
6 Article II, Section 18 affords New Mexico citizens a fundamental, or at least
7 important, liberty right to aid in dying from a willing physician.

8 {105} The majority opinion asserts that “[i]n order to justify a departure from
9 *Glucksberg*, Plaintiffs must have shown precisely why greater fundamental due

10 by their consciousness of dependency and helplessness as they
11 approached death. In that period when the end is imminent, they said,
12 the decision to end life is closest to decisions that are generally accepted
13 as proper instances of exercising autonomy over one’s own body,
14 instances recognized under the Constitution and the State’s own law,
15 instances in which the help of physicians is accepted as falling within
16 the traditional norm.

17 *Glucksberg*, 521 U.S. at 779 (citations omitted).

18 ¹⁵See Chemerinsky, *supra*, at 1508 (“Turning off a respirator, removing a
19 feeding tube, stopping medication that keeps a person’s blood pressure at a level to
20 sustain life; all are affirmative acts. Both are intended to end a person’s life—and
21 both will have that effect. The [*Glucksberg*] argument invokes a familiar distinction
22 between omission and commission, but this distinction is inapposite here because
23 ending treatment and administering substances to end life are both acts of commission
24 with the same purpose and effect.”).

1 process protections exist under Article II, Section 4.” Majority Op. ¶ 34. It asserts that
2 “we should continue to be very careful when considering new constitutional interests
3 and remain reluctant to deviate from United States Supreme Court determinations of
4 what are, and what are not, fundamental constitutional rights.” *Id.* ¶ 35. It assigns
5 Plaintiffs the burden to cite authority for the proposition that “ ‘death’ or ‘aid in
6 dying’ in New Mexico have either been recognized as embedded principles within
7 our democratic society or as a modern interpretation of certain fundamental interests
8 that have been applied to some members of society but historically denied to others.”
9 *Id.* ¶ 36. No authority is cited for any of these propositions. I am aware of none. These
10 and other statements in the majority and concurring opinions reflect a profound
11 misunderstanding of our interstitial approach to state constitutional analysis.

12 {106} For example, the majority opinion asserts that “there is no basis under the
13 *Gomez* factors to permit the creation of an interstitial constitutional right under
14 Article II, Section 4 of the New Mexico Constitution.” Majority Op. ¶ 43. But we use
15 interstitial analysis to determine whether we should follow federal precedent in
16 interpreting provisions of our Constitution that have federal analogues. *See, e.g.,*
17 *Gomez*, 1997-NMSC-006, ¶¶ 16, 21-23. Section 18’s due process clause has a federal
18 counterpart; Section 4 does not. I agree with the district court that Section 4 is a

1 distinctive characteristic of our Constitution that provides a basis to depart from
2 federal precedent in determining the due process rights protected by Section 18. *See*
3 *NARAL*, 1999-NMSC-005, ¶¶ 28-43 (concluding that distinctive characteristics of the
4 New Mexico Constitution—the Equal Rights Amendment—required rejection of
5 federal equal protection analysis affording less protection). I reject any suggestion
6 that our interstitial analysis requires that we must give federal due process precedents
7 dispositive effect in determining the inherent rights afforded by Section 4.

8 {107} I also reject the concurring opinion’s characterization of our interstitial
9 approach as “narrow” and as permitting departure from federal precedent based only
10 on a flawed federal analysis, structural differences between state and federal
11 government, or distinctive state characteristics. *See* Concurring Op. ¶ 58. These
12 grounds were stated in *Gomez*, of course, 1997-NMSC-006, ¶ 19, and have been
13 frequently cited since then. But our Supreme Court has subsequently described these
14 grounds as merely examples of reasons warranting departure from federal precedent.
15 *See Leyva*, 2011-NMSC-009, ¶ 40 n.6 (describing these three grounds as “examples
16 of reason for departure”); *id.* ¶ 49.

17 {108} The majority opinion appears to confuse the requirements for preserving a
18 claim predicated on a provision of our Constitution that has a federal counterpart with

1 the parameters that inform our decision whether to follow federal precedent in
2 determining whether the state constitutional provision protects the right asserted. *See*
3 Majority Op. ¶¶ 23, 34. There is no preservation issue here. Plaintiffs have not
4 brought a claim under the federal Constitution. They have identified the provisions
5 of our Constitution that they believe protect the right they assert. They have explained
6 why they believe that each provision protects the right. They have stated reasons why
7 we should not follow *Glucksberg* and why they believe that our Constitution provides
8 broader protection than the federal Constitution. Our interstitial approach requires no
9 more; in fact, it requires less. *See Leyva*, 2011-NMSC-009, ¶ 49 (noting that citation
10 to the state constitutional provision invoked is sufficient).

11 {109} Our interstitial approach does not require (or even permit) us to treat
12 *Glucksberg* as dispositive of this case simply because it exists. *See Gomez*, 1997-
13 NMSC-006, ¶ 17; *see also Arizona v. Evans*, 514 U.S. 1, 8 (1995) (“[S]tate courts are
14 absolutely free to interpret state constitutional provisions to accord greater protection
15 to individual rights than do similar provisions of the United States Constitution.”).
16 It obligates us to consider whether the federal analysis articulated in *Glucksberg* is
17 persuasive because its underlying reasoning “is better calibrated to protect the rights

1 of individuals” in this state from unwarranted government intrusion. *Leyva*, 2011-
2 NMSC-009, ¶ 53. It is not.

3 **D. Article II, Section 4 of the New Mexico Constitution**

4 {110} Plaintiffs also assert a right to aid in dying under the New Mexico
5 Constitution’s inherent rights guarantee, which provides, “All persons are born
6 equally free, and have certain natural, inherent and inalienable rights, among which
7 are the rights of enjoying and defending life and liberty, of acquiring, possessing and
8 protecting property, and of seeking and obtaining safety and happiness.” N.M. Const.
9 art. II, § 4. Section 4 has been sparsely interpreted. *See Reed v. State ex rel. Ortiz*,
10 1997-NMSC-055, ¶ 105, 124 N.M. 129, 947 P.2d 86 (recognizing that “[o]ur courts
11 have not fully defined the scope of this constitutional provision”), *rev’d sub nom. on*
12 *other grounds by New Mexico ex rel. Ortiz v. Reed*, 524 U.S. 151 (1998). But that
13 surely does not mean that its text may simply be read out of the Constitution. *See*
14 *Hannett v. Jones*, 1986-NMSC-047, ¶ 13, 104 N.M. 392, 722 P.2d 643 (noting that
15 the Constitution must be “construed so that no part is rendered surplusage or
16 superfluous”); *cf. Johnson v. Craft*, 87 So. 375, 386 (Ala. 1921) (“The Constitution
17 contains no idle assertions, no meaningless language, [and] no ephemeral
18 purpose[.]”).

1 {111} Nor does it mean that its scope is defined by and limited to the circumstances
2 in which it has previously been invoked, as the State appears to suggest. The State
3 cites *Lucero v. Salazar*, 1994-NMCA-066, ¶ 7, 117 N.M. 803, 877 P.2d 1106, for the
4 proposition that “mere references to the right to enjoy life and to seek and obtain
5 safety and happiness are not sufficient to serve as a basis for a waiver of immunity
6 under [the New Mexico Tort Claims Act].” *Lucero* relied on *Blea v. City of Espanola*,
7 1994-NMCA-008, ¶ 20, 117 N.M. 217, 870 P.2d 755, which stated that “vague
8 references to safety or happiness in [A]rticle II, Section 4 . . . are not sufficient to
9 state a claim under [the New Mexico Tort Claims Act].” *Blea* made clear, however,
10 that the issue in that case was “not what our [C]onstitution protects or does not
11 protect[,]” but “the scope of the acts for which the [L]egislature has waived
12 immunity.” *Id.* These cases have no bearing on the question presented here, which
13 quite obviously requires us to determine what our Constitution protects in this
14 context.

15 {112} Equally clear is that this case involves a great deal more than a vague reference
16 to “safety and happiness.” Far more significant, and relevant here, is that the framers
17 of our Constitution saw fit to include in their enumeration of rights guaranteed as
18 “inherent” the right—and agency to effectuate the right—to “enjoy[] and defend[]”

1 their own “li[ves] and liberty” against unjustified intrusions by the government. N.M.
2 Const. art. II, § 4. Section 4 is no mere “ornament,” as one amicus declares. To the
3 contrary, *Griego* begins by quoting its text in full, emphasizing the primacy of the
4 inherent rights provision in any consideration of the liberty rights of our citizens. *See*
5 2014-NMSC-003, ¶ 1. And *Griego* instructs that “[w]hen government is alleged to
6 have threatened any of these rights, it is the responsibility of the courts to interpret
7 and apply the protections of the Constitution.” *Id.*

8 {113} I think it is plain that Section 4 supplements and expands the liberty rights
9 afforded by Section 18’s due process clause to ensure maximum protection for the
10 lives and liberty of New Mexicans. The express textual rights to “enjoy[] and
11 defend[]” these interests can mean nothing less. I would hold that, whether construed
12 on its own terms as a constitutional provision with no federal analogue, or deemed
13 a “distinctive characteristic” of the New Mexico Constitution mandating rejection of
14 a federal constitutional analysis affording less protection, *see, e.g., NARAL*, 1999-
15 NMSC-005, ¶¶ 28-43, Section 4 affords New Mexico citizens the right and agency
16 to defend their lives and liberty by availing themselves of aid in dying, as that term
17 is defined herein.

1 {114} Relying on a dictionary definition of “life,” the majority opinion recasts the
2 liberty interest asserted by Plaintiffs as “an implied fundamental interest in hastening
3 another person’s death” and then declines to recognize it “because such an interest
4 is diametrically opposed to . . . life.” Majority Op. ¶ 39 (alteration, internal quotation
5 marks, and citation omitted); *see also* Concurring Op. ¶ 59. Despite the contrary
6 stipulated record, the opinion seems to equate the dying and suffering patient who
7 seeks aid in dying with a person who wishes to commit suicide, and her doctor with
8 any miscreant who counsels another to commit suicide against her will. *See* Majority
9 Op. ¶ 40 (citing, *inter alia*, *Commonwealth v. Bowen*, 13 Mass. 356 (1816)). This re-
10 characterization ignores the distinctions between suicide and aid in dying established
11 by the trial testimony and reflects a shocking disrespect for the individuals whose
12 circumstances would bring them to seek aid in dying, individuals who would live if
13 they could, but whose terminal illnesses will not allow them to do so. For these
14 individuals, “death” is imminent, and “life” means being forced to endure unbearable
15 suffering until it ends. The majority’s characterization of aid in dying as contrary to
16 the interest in “life” protected by the inherent rights guarantee, *see also* Concurring
17 Op. ¶ 59, also misapprehends the nature of the liberty interest asserted by Plaintiffs,
18 and ignores that Article II, Section 4 protects the right to “liberty” as well as to life,

1 and the right to defend that liberty against unjustified government intrusion. Having
2 declared what amounts to lock-step adherence to federal due process precedent, the
3 majority and concurring judges ought to consider that under federal law, “a State’s
4 interest in the protection of life falls short of justifying any plenary override of
5 individual liberty claims.” *Casey*, 505 U.S. at 857 (citing, *inter alia*, *Cruzan*, 497 U.S.
6 at 278). They should also consider the record in this case, which establishes that the
7 State has articulated no basis, and concedes none exists, for intruding into the liberty
8 interests of mentally competent, terminally ill New Mexicans to seek aid in dying, as
9 discussed further below.

10 **III. THE ASSERTED STATE INTERESTS**

11 {115} The determination that our Constitution affords New Mexicans a right to aid
12 in dying does not end the matter. The next question is whether the State has carried
13 its burden to prove that Section 30-2-4’s infringement of that right is constitutionally
14 justified. *See Wagner v. AGW Consultants*, 2005-NMSC-016, ¶ 12, 137 N.M. 734,
15 114 P.3d 1050. We apply strict scrutiny when the interest at issue is a “fundamental
16 personal right or civil liberty” guaranteed by the Constitution. *Marrujo v. N.M. State*
17 *Highway Transp. Dep’t*, 1994-NMSC-116, ¶ 10, 118 N.M. 753, 887 P.2d 747. Strict
18 scrutiny requires the government to prove that the infringing statute is narrowly

1 tailored to serve a compelling governmental interest. *Id.* ¶¶ 10-11. Intermediate
2 scrutiny, which applies when legislation infringes on important but not fundamental
3 rights, requires the government to prove that the infringing statute is substantially
4 related to an important governmental interest. *Id.* Relying on *Glucksberg*, the State
5 presumes, as does the concurring opinion, that the less stringent rational basis
6 standard applies here. That standard requires the party asserting the right to show that
7 the statute is not rationally related to a legitimate governmental interest. *See Marrujo*,
8 1994-NMSC-116, ¶¶ 10-12 (describing the three levels of scrutiny applicable to
9 review of equal protection and substantive due process claims). On this record, I
10 would conclude that Section 30-2-4, as applied to aid in dying, does not survive
11 scrutiny under any standard.

12 {116} Throughout this litigation, the State has relied exclusively on the governmental
13 interests asserted by the State of Washington in *Glucksberg*: (1) preserving life; (2)
14 “protecting the integrity and ethics of the medical profession”; (3) “ensuring adequate
15 regulation of the practice”; and, for the first time on appeal, (4) preventing suicide
16 and treating its causes. Beyond simply reciting these interests, the State has made
17 virtually no effort to explain how any of them justify applying Section 30-2-4 to aid

1 in dying in New Mexico.¹⁶ As noted, the State stipulated to the entirety of the
2 evidence presented in the district court. It did not challenge any of the evidence as
3 flawed or unsupported, nor did it call any witnesses or provide any evidence of its
4 own. The State further conceded at oral argument that other than an interest in
5 preventing the “hypothetical potential for abuse,” it had no interest—compelling or
6 substantial or otherwise—in preventing suffering, mentally competent, terminally ill
7 patients from obtaining aid in dying. Nor could it cite a single instance of abuse in
8 any United States jurisdiction where aid in dying is legal—including in Montana,
9 which has no legislatively enacted regulatory framework and is governed entirely by
10 the medical profession’s standard of care. The State merely incants *Glucksberg*, as if
11 it held talismanic significance. But the State may not claim substantial or compelling
12 interests without providing *any* such evidence; on that basis alone, Section 30-2-4’s

13 ¹⁶Like the State, the majority and concurring opinions rely only on the broadly
14 stated governmental interests set forth in *Glucksberg*, and like the State, they provide
15 no analysis explaining how those interests justify denying the right to aid in dying.
16 *See* Majority Op. ¶ 37; Concurring Op. ¶ 61. Nor do the opinions reconcile their
17 position with the State’s stipulation to the entire factual record and the State’s
18 concession that it has no interest in “prolonging the suffering of people who are
19 terminally ill.” To the extent that the majority and concurring opinions discuss aid in
20 dying as “a matter of relatively recent human phenomena,” Majority Op. ¶ 37;
21 Concurring Op. ¶ 62, it is unclear why this itself poses an obstacle. If the concern is
22 lack of information, there is now almost twenty years of data that the *Glucksberg*
23 Court did not have.

1 prohibition on aid in dying fails under heightened scrutiny. *See Griego*, 2014-NMSC-
2 003, ¶ 57 (“[T]he party with the burden of proof in a constitutional challenge must
3 support his or her argument with a ‘firm legal rationale’ or evidence in the record.”).
4 And even under the rational basis standard, the State must do more than cite to
5 interests asserted by another state more than seventeen years ago—at least in this
6 case, in which it has stipulated to a record that demonstrates that the concerns raised
7 in *Glucksberg* have not materialized in states that allow aid in dying. Below, I address
8 the State’s broadly asserted interests, as well as those raised by amici for the State,
9 in light of Plaintiffs’ uncontradicted evidence and the State’s concessions.

10 **A. Interests in Life and Preventing Suicide**

11 {117} No one doubts, as a general abstract matter, that the government has a
12 compelling interest in preserving human life. The specific question presented in this
13 case, however, is whether the State has a compelling—or substantial—interest in
14 prolonging the lives of mentally competent, terminally ill patients, the quality of
15 whose lives can no longer be meaningfully improved by treatment, and whose dying
16 process is so intolerable that they wish to end their lives. The State is unable to
17 articulate an interest in prolonging life in this narrow circumstance and concedes that
18 it has no interest in preventing the terminally ill from hastening their deaths and

1 avoiding painful, undignified, and inhumane endings to their lives. And the State
2 does not dispute that when a patient is close to the end of life and suffering
3 intractable, unrelenting pain, it is legal and ethical for her physician to sedate her and
4 maintain her in a state of deep, continuous unconsciousness to the time of death, with
5 or without providing artificial hydration or nutrition, thereby hastening death.

6 {118} Nor does the law treat the safeguarding of human life as a governmental
7 interest that is absolute, subject to no exceptions. For example, under current New
8 Mexico law and United States Supreme Court precedent, *any* patient may refuse or
9 withdraw life-sustaining treatment, may voluntarily stop eating and drinking, and may
10 obtain from a qualified physician medication that will deeply sedate her—and thereby
11 hasten death—to alleviate suffering. *See generally* §§ 24-7A-1 to -18 (expanding the
12 right to withdraw or withhold life-sustaining treatment to *all* medical decisions and
13 *all* patients); *Glucksberg*, 521 U.S. at 736-37 (O’Connor, J., concurring) (“[A] patient
14 who is suffering from a terminal illness and who is experiencing great pain has no
15 legal barriers to obtaining medication, from qualified physicians, to alleviate that
16 suffering, even to the point of causing unconsciousness and hastening death.”);
17 *Cruzan*, 497 U.S. at 279 (assuming a constitutionally protected right for those who
18 are on life support to have it ended). Thus, some decisions to end one’s life

1 intentionally through termination or refusal of treatment are clearly regarded as
2 worthy of protection, and this is so even where the assistance of a physician is
3 required. These settled constitutional and statutory rights *necessarily* acknowledge
4 a diminished governmental interest in the protection of life under certain
5 circumstances.¹⁷ *See Compassion in Dying v. Washington*, 79 F.3d 790, 820 (9th Cir.
6 1996) (en banc) (“When patients are no longer able to pursue liberty or happiness and
7 do not wish to pursue life, the state’s interest in forcing them to remain alive is clearly
8 less compelling.”), *rev’d on other grounds by Glucksberg*, 521 U.S. at 709. I would
9 hold that the State’s mere assertion of a general interest in the preservation of life
10 cannot outweigh the constitutionally protected liberty interest of a mentally
11 competent, terminally ill patient to aid in dying. *See Casey*, 505 U.S. at 857 (“[A]
12 State’s interest in the protection of life falls short of justifying any plenary override
13 of individual liberty claims.” (citing *inter alia Cruzan*, 497 U.S. at 278)).

14 {119} The State’s asserted interest in “preventing suicide and treating its causes,”
15 raised for the first time on appeal, is unquestionably significant but irrelevant in this

16 ¹⁷The United States Supreme Court has identified similarly shifting state
17 interests at the other end of the spectrum of life. *See Roe*, 410 U.S. at 155; *Casey* 505
18 U.S. at 860, 869-73 (affirming the central holding of *Roe*). Thus, as the government’s
19 interest in life increases during the course of a pregnancy, *see Casey*, 505 U.S. at 869-
20 73, so it diminishes when a suffering patient faces near and imminent death.

1 case. Unrebutted expert testimony at trial established that the practice of aid in dying
2 bears almost no medical or psychological overlap with suicide, as the two phenomena
3 are fundamentally distinct mental and physical processes. Patients who request aid
4 in dying do so because they are suffering from a terminal and incurable physical
5 condition, rather than from a temporary, treatable mental pathology, as is typical of
6 suicide. In addition, the collaboration between a physician and terminally ill patient
7 over time reflects a deliberative, rational process intended to preserve the patient's
8 sense of self and coherent self-image; the antithesis of the impulse-driven, self-
9 destructive behavior of the mentally unstable person who commits suicide. *See, e.g.,*
10 Roy F. Baumeister, *Suicide as Escape from Self*, *Psychological Review*, Vol. 97, No.
11 1 at 90 (1990). Unlike the suicidal person whose psychiatric disorder is amenable to
12 treatment, the terminally ill patient wants to live but cannot because incurable disease
13 makes near-term death inescapable. The State itself admits that individuals seeking
14 aid in dying "are patients who, if the option were available to them, would continue
15 to live a full and rewarding life." Furthermore, the families of terminally ill patients
16 requesting aid in dying tend to be more prepared for, and at peace with, the deaths of
17 their loved ones, and they are often gathered to say farewell; this is in contrast to the

1 feelings of shock, blame, guilt, anger, and/or shame that often accompany death by
2 suicide.

3 {120} This unchallenged expert testimony is supported by amici New Mexico
4 Psychological Association and the American Medical Women’s Association,
5 American Medical Students Association, and New Mexico Public Health Association,
6 who agree that the reasoning on which a mentally competent, terminally ill person
7 bases a decision to end his or her life is distinct from the reasoning a clinically
8 depressed person uses to justify suicide. As Justice James C. Nelson eloquently
9 summarized in *Baxter v. Montana*,

10 “Suicide” is a pejorative term in our society. . . . The term denigrates the
11 complex individual circumstances that drive persons generally—and, in
12 particular, those who are incurably ill and face prolonged illness and
13 agonizing death—to [seek aid in dying]. The term is used to generate
14 antipathy, and it does. [The patients seeking aid in dying] do not seek to
15 commit “suicide.” Rather, they acknowledge that death within a
16 relatively short time is inescapable because of their illness or disease.
17 And with that fact in mind, they seek the ability to self-administer, at a
18 time and place of their choosing, a physician-prescribed medication that
19 will assist them in preserving their own human dignity during the
20 inevitable process of dying. Having come to grips with the inexorability
21 of their death, they simply ask the government not to force them to
22 suffer and die in an agonizing, degrading, humiliating, and undignified
23 manner. They seek nothing more nor less[.]

24 2009 MT 449, ¶ 71, 354 Mont. 234, 224 P.3d 1211 (Nelson, J., specially concurring).

1 {121} I conclude that, although the State’s interests in preserving life and preventing
2 suicide may be compelling or substantial in the abstract, these broadly stated general
3 interests are insufficient to justify infringing the right to aid in dying. Given the
4 State’s stipulations and concessions in this case, there is no basis for a contrary
5 conclusion.

6 **B. The Integrity of the Medical Profession and Adequate Regulation**

7 {122} The State makes three arguments concerning its interest in the integrity of the
8 medical profession and the necessity for regulations: (1) *Glucksberg* recognized the
9 interest; (2) there are no preexisting legislative definitions of “mentally competent”
10 and “terminally ill”; and (3) there is no regulation of the manner in which a patient
11 makes the request. The stipulated factual record undercuts these arguments, and the
12 State’s unsupported conclusions are insufficient to justify Section 30-2-4’s
13 prohibition against aid in dying.

14 {123} The State’s reliance on *Glucksberg*’s stated concerns about protecting the
15 integrity and ethics of the medical profession is unavailing. First, to the extent that
16 the *Glucksberg* Court generally accepted that “the American Medical Association,
17 like many other medical and physicians’ groups, has concluded that physician-
18 assisted suicide is fundamentally incompatible with the physician’s role as healer[,]”

1 521 U.S. at 731 (alteration, internal quotation marks, and citation omitted), that view
2 began to shift significantly within the medical community soon after *Glucksberg* was
3 decided. In fact, by 2005, two national surveys revealed that a majority of polled
4 rank-and-file physicians believed it to be ethical for a doctor to assist a competent,
5 dying patient hasten death.¹⁸ Two months ago, the California Medical Association,
6 representing more than 40,000 physicians in that state, removed its historic opposition
7 to a bill that would allow doctors to prescribe lethal doses of medication to terminally
8 ill patients. California Medical Association Removes Opposition to Physician Aid in
9 Dying Bill (May 20, 2015), *available at* [http://www.cmanet.org/news/](http://www.cmanet.org/news/press-detail/?article=california-medical-association-removes)
10 [press-detail/?article=california-medical-association-removes](http://www.cmanet.org/news/press-detail/?article=california-medical-association-removes). Regardless, a ruling
11 holding that the New Mexico Constitution protects the right to aid in dying would not
12 compel any physician to provide aid in dying.

13 ¹⁸See The Jewish Theological Seminary, *Physician-Assisted Suicide Survey*,
14 *available at* <http://www.jtsa.edu/x5533.xml> (finding that 57% of 1,088 physicians
15 polled believed aid in dying ethical); *News & Innovations*, 20 J. Pain and Palliative
16 Care Pharmacotherapy 83, 92 (2006) (finding that a majority of 677 physicians and
17 1,057 members of the public polled believed that physicians should be permitted to
18 practice aid in dying). Most recently, in a survey of 17,000 American physicians
19 representing 28 medical specialties, a majority stated the belief that patients with an
20 “incurable and terminal” disease “should have the option” to choose aid in dying.
21 Medscape Ethics Report 2014, Part 1: Life, Death, and Pain, at 2 (December 16,
22 2014), *available at* [http://www.medscape.com/features/](http://www.medscape.com/features/slideshow/public/ethics2014-part1#1)
23 [slideshow/public/ethics2014-part1#1](http://www.medscape.com/features/slideshow/public/ethics2014-part1#1).

1 {124} Second, the stipulated record in this case includes evidence of the experience
2 with aid in dying in Oregon, Washington, Montana, and Vermont;¹⁹ uncontroverted
3 opinion evidence of medical ethicists and practitioners informed by the experience
4 in United States jurisdictions with legalized aid in dying; and specific evidence
5 concerning current palliative care and palliative/terminal sedation practices. And this
6 evidence (almost two decades worth) proves that the medical profession has not
7 become corrupted or compromised in any respect in jurisdictions where aid in dying
8 is allowed. *Cf. Casey*, 505 U.S. at 863-64 (explaining that the decisions in *West Coast*
9 *Hotel Co. v. Parrish*, 300 U.S. 379 (1937), and *Brown v. Board of Education*, 347
10 U.S. 483 (1954), “each rested on facts, or an understanding of facts, changed from
11 those which furnished the claimed justifications for the earlier constitutional

12 ¹⁹For example, the Oregon Health Authority recently produced its 2014 annual
13 “Death with Dignity Act - 2014” report, which identifies the number of prescriptions
14 written, number of deaths, patient characteristics, physician characteristics, type of
15 medications, complications, data analysis, and end-of-life concerns, along with
16 historical, legal and statutory challenges, from the time of the law’s enactment in 1998
17 through February 2, 2015, and includes supporting documents. Oregon Public Health
18 Division, Oregon’s Death With Dignity Act - 2014, *available at*
19 [https://public.health.oregon.gov/ProviderPartnerResources/EvaluationResearch/D](https://public.health.oregon.gov/ProviderPartnerResources/EvaluationResearch/DeathwithDignityAct/Pages/index.aspx)
20 [eathwithDignityAct/Pages/index.aspx](https://public.health.oregon.gov/ProviderPartnerResources/EvaluationResearch/DeathwithDignityAct/Pages/index.aspx). The Washington Department of Health
21 similarly issued its fifth annual report containing much of the same
22 information. Washington State Department of Health 2013 Death With
23 Dignity Act Report, Executive Summary, *available at*
24 <http://www.doh.wa.gov/portals/1/Documents/Pubs/422-109-DeathWithDignityAct>
25 [2013.pdf](http://www.doh.wa.gov/portals/1/Documents/Pubs/422-109-DeathWithDignityAct).

1 resolutions[,]” and that “[i]n constitutional adjudication as elsewhere in life, changed
2 circumstances may impose new obligations, and the thoughtful part of the Nation
3 could accept each decision to overrule a prior case as a response to the Court’s
4 constitutional duty”).

5 {125} Third, the State ignores the fact that, for all practical purposes, physicians
6 already participate in helping terminal patients to end their lives. Some doctors do this
7 by ending medical care necessary to sustain life. And, as explained above, when
8 doctors terminally sedate patients, they know that they are “hastening that moment
9 at which that death will occur.”²⁰ The State has not cited any example where the
10 integrity and/or ethics of the medical profession have been called into question in
11 jurisdictions in which aid in dying is practiced; the unspecified concern it adverts to
12 here is speculative and bereft of evidentiary support.

13 {126} The State’s asserted interest in adequate regulation rests on the flawed premise
14 that such legislation is required. As a legal matter, the existence of regulations is
15 surely not a prerequisite to the recognition of a constitutional right. As a factual

16 ²⁰See also Roger S. Magnusson, “*Underground Euthanasia*” & the Harm
17 *Minimization Debate*, 32 J.L. Med. & Ethics 486, 486 (2004) (“A national survey of
18 1092 American physicians found that 3.3 percent had written at least one ‘lethal
19 prescription,’ while 4.7 percent had provided at least one lethal injection. A survey
20 of American oncologists found that 3.7 percent had performed euthanasia, while 10.8
21 percent had [provided aid in dying].” (footnote omitted)).

1 matter, medical care is typically governed by professional standards of practice, not
2 by statutes or court decisions that either prohibit or provide affirmative authorization
3 for specific types of care. *See* 61 Am. Jur. 2d *Physicians, Surgeons, & Other Healers*
4 § 187 (2015); *see also Pharmaseal Labs. Inc. v. Goffe*, 1977-NMSC-071, ¶ 14, 90
5 N.M. 753, 568 P.2d 589 (discussing a physician’s obligation to adhere to recognized
6 standards of medical practice in the community); *Gonzales v. Oregon*, 546 U.S. 243,
7 271 (2006) (noting that the development of best practices in medicine—also referred
8 to as the standard of care—is left to physicians and regulated by the states).

9 {127} Dr. Kress, who practices aid in dying in Montana, which has no regulatory
10 framework, testified at length about how doctors in that state would be liable for
11 malpractice were they to prescribe the medication without “tapping into” the existing
12 standard of care for aid in dying that has developed over seventeen years of clinical
13 experience in Oregon. Today, that established standard of care, which the State does
14 not dispute exists and to which physicians in New Mexico would be held, includes
15 the requirements that an eligible patient for aid in dying must be a terminally ill,
16 mentally competent adult who has made repeated requests over multiple visits, and
17 who is able to self-administer the medication. Mental competence means that the
18 patient does not have any gross cognitive or psychological impairment and that she

1 understands the nature of the illness and the proposed treatments, including any
2 alternatives such as hospice care and pain control, and the potential risks and
3 probable results of taking the medication that will result in her death. Thus, for
4 example, a patient with Alzheimer’s disease or a brain cancer that affects cognition
5 is not eligible for aid in dying. In addition, the standard of care for providing aid in
6 dying directs, in part, that a patient is terminally ill when she has less than six months
7 to live; that to establish terminality, two physicians must agree to the diagnosis; and
8 that the patient must be able to understand the information presented to her and to
9 make a reasoned decision. I also view as significant the trial testimony about a
10 doctor’s relationship with her patient and the often lengthy process of caring for
11 someone who has a terminal illness.

12 {128} In addition to civil liability for failing to comply with the standard of care, as
13 Dr. Kress described, all doctors in New Mexico are subject to regulation by the state
14 medical board, which has been tasked by the Legislature with protecting the public
15 from “the improper, unprofessional, incompetent and unlawful practice of medicine,”
16 and which supervises the profession by licensing competent physicians and by
17 disciplining those whose performance falls below its requirements. NMSA 1978,
18 § 61-6-1 (2003). Discipline for gross negligence includes the revocation or

1 suspension of a license to practice medicine in New Mexico. NMSA 1978, § 61-6-
2 15(A), (D)(12) (2008).

3 {129} The State’s attempt to justify the blanket prohibition of a liberty interest that
4 it concedes is “important and fundamental,” solely on the basis that the Legislature
5 has not enacted legislation to ward off dangers that have not before materialized, is
6 without merit. Such an approach would obliterate constitutional recognition and
7 protection of virtually any liberty interest requiring the intervention of the medical
8 profession, including the right found in *Roe*, 410 U.S. at 155, and affirmed in *Casey*,
9 505 U.S. at 846. Although I conclude that the need for regulation of aid in dying is
10 not necessary given the existing standard-of-care framework, the Legislature is free
11 to enact appropriate guidelines to ensure that only the terminally ill who make a
12 voluntary and informed decision may receive aid in dying. What it may not do is
13 intrude upon the doctor-patient relationship²¹ as it relates to the constitutional right
14 to aid in dying by criminalizing the provision of aid in dying by a willing physician
15 at the request of a mentally competent, terminally ill patient.

16 C. Abuse of Vulnerable Populations and Slippery Slope

17 ²¹Here, as in the context of reproductive autonomy, “[w]hatever constitutional
18 status the doctor-patient relation may have as a general matter, in the present context
19 it is derivative of the [patient]’s position” and “is entitled to the same solicitude it
20 receives in other contexts.” *Casey*, 505 U.S. at 884.

1 {130} At oral argument, the State acknowledged that preservation of life was “a pretty
2 weak interest” when applied to terminally ill patients but said that the interest in life
3 extended to potential areas of abuse. Although the State admitted that this was a
4 “phantom concern” and that “the sky has not fallen,” the State’s amici cite interests
5 in protecting vulnerable individuals, including the elderly and disabled, from
6 exploitation and abuse, and in avoiding a slippery slope to “non-voluntary
7 euthanasia.”²²

8 {131} Abuse of any sort is, of course, a legitimate governmental concern in general,
9 but this “interest” is far too abstract to justify infringement of the constitutional right
10 to aid in dying. First, the detailed protocols and established standard of
11 care—requiring, among other things, the mental competence and informed consent
12 of the patient, ability of the patient to self-administer the medication, a diagnosis of
13 terminal illness by two physicians, and repeated requests with waiting periods in
14 between—undeniably guard against the speculative dangers that amici raise.
15 Moreover, amici fail to explain how the circumscribed right to aid in dying would

16 ²² Non-voluntary euthanasia is defined as causing or hastening the death of “an
17 incompetent, and therefore nonconsenting, person; euthanasia that occurs when the
18 person killed is incapable of either making or refusing to make a request to be killed.”
19 *Black’s Law Dictionary* (10th ed. 2014). Non-voluntary euthanasia has nothing to do
20 with the practice of aid in dying.

1 increase the frequency of elder abuse and disproportionately affect the poor and
2 disabled.

3 {132} And again, as previously noted, the State and amici have not provided a single
4 example of abuse in any United States jurisdiction where aid in dying is legal. The
5 record contains no such evidence, and almost two decades of substantial data from
6 Oregon and elsewhere are to the contrary. *See* Or. Pub. Health Div., Oregon’s Death
7 with Dignity Act Rep. (2014); Wash. State Dept. of Health, 2013 Death with Dignity
8 Act Rep., Exec. Summary (2014). According to the data and evidence described
9 above, issues of coercion, insidious bias, and societal indifference have not occurred
10 and have not threatened the safety of people who are poor, elderly, uninsured, or
11 disabled.²³ *See* Oregon’s Death with Dignity Act Rep., *supra*, at 1-6; Wash. State
12 Dept. of Health 2013 Death with Dignity Act Rep., *supra*, at 1-12; *see also* Margaret
13 P. Battin, et al., *Legal Physician-Assisted Dying in Oregon and the Netherlands:
14 Evidence Concerning the Impact on Patients in “Vulnerable” Groups*, 33 J. Med.
15 Ethics 591, at 591 (2007) (finding no evidence of “heightened risk” to patients with

16 ²³Amici’s related argument concerning the increase in the number of physician-
17 assisted deaths in the Netherlands and Belgium is inapplicable to the issue before us
18 for a host of reasons including, most notably, the fact that those countries practice
19 euthanasia and do so under an entirely different set of laws and standards. For the
20 same reason, the concurring opinion’s citation to a *New Yorker* article concerning
21 euthanasia in Belgium, *see* Concurring Op. ¶ 64 n.9, is also inapt.

1 non-terminal physical disabilities or mental disabilities or other vulnerable groups).
2 Rather, patients who have ingested the medication are overwhelmingly white,
3 married, college-educated, insured, receiving hospice services, and dying of cancer
4 or ALS (commonly referred to as Lou Gehrig's disease). *See Oregon's Death with*
5 *Dignity Act Rep., supra*, at 4-5; Wash. State Dept. of Health 2013 Death with Dignity
6 Act Rep., *supra*, at 1. Nearly all patients pass away at home, and complications are
7 rare, occurring in less than three percent of all cases. *See Oregon's Death with*
8 *Dignity Act Rep., supra*, at 2, 5; Wash. State Dept. of Health 2013 Death with
9 *Dignity Act Rep., supra*, at 1, 9.

10 {133} Trial experts testified that the potential for mistaken diagnoses are low.
11 Physicians have established referral pathways to learn about safe ways to prescribe
12 the medication, including methods for ensuring terminality and competency—medical
13 diagnoses and determinations they are historically and routinely called upon to make
14 outside the context of aid in dying. For instance, physicians frequently assess
15 competency in order to obtain informed consent for surgical and other medical
16 procedures. Doctors are typically capable of differentiating between clinical
17 depression and a sincere, informed decision to seek aid in dying, and they are
18 required by the standard of care to take a patient-centered approach to the issue,

1 ensuring that all options have been meaningfully discussed by first exploring a
2 patient’s needs and fears related to death from terminal illness. Physicians also have
3 experience diagnosing terminality before changing a patient’s model of care from
4 curative to hospice and before terminally sedating any patient. Some amici assert that
5 doctors “often get terminality wrong in determining eligibility for hospice care.” But
6 they offer no supporting evidence, and the statement ignores the fact that we entrust
7 doctors to make these judgments every day in accordance with the relevant standards
8 of care in the medical profession. That some people may defy the odds and that
9 doctors may be wrong from time to time are not reasons to deny to all New Mexicans
10 a constitutional right to aid in dying. No diagnosis is fool proof. But the law does not
11 require 100% certainty. The United States Supreme Court in *Casey* drew a line based
12 on estimated time of fetal viability. Estimates of end-of-life are functionally no
13 different.

14 {134} In my view, the potential for abuse is far more likely in other circumstances not
15 proscribed by law. For example, the State suggested at oral argument that patients
16 could legally stockpile their medication and ingest it to end their lives. And, as
17 discussed, doctors already help patients end their lives by withholding essential
18 medical care and by practicing terminal sedation, neither of which are subject to

1 statutory regulation or to any reporting or recording requirements. Further, experts
2 presented uncontested testimony that patients are sometimes sedated to death
3 according to the instructions of physicians or surrogate decision makers, without the
4 patient's explicit consent and without anyone "knowing what the patient would
5 exactly want because the illness itself or the treatment has rendered them past [the]
6 point of competency." It is hard to imagine that aid in dying makes the potential for
7 abuse any more likely than do these practices; indeed, these practices could well
8 create a greater risk of abuse. As noted constitutional scholar Erwin Chemerinsky put
9 it, bluntly:

10 Indeed, the same concern [about abuse] can be raised about the right to
11 refuse medical care. A person could choose to terminate treatment
12 because of pressure from family members or to reduce their emotional
13 or financial burdens. Notwithstanding this concern, the [United States
14 Supreme] Court recognized a right to refuse medical care in *Cruzan*.
15 There is no reason why the concern is weightier or more powerful in the
16 context of [aid in dying].

17 Besides, if the concern is pressure, the solution should be to lessen the
18 risk of pressure, not to prohibit [aid in] dying. And if the government is
19 concerned that individuals might feel pressure to save their families
20 from large expenses, then the government should ensure that the costs
21 of medical care are adequately covered.

22 Chemerinsky, *supra*, at 1512.

1 {135} The unsupported assertions of the State and its amici about potential abuses are
2 questionable, at best. The speculative possibility that vulnerable individuals might be
3 induced or coerced to hasten their deaths cannot justify denying to all New Mexicans
4 the constitutional right to aid in dying.

5 {136} Finally, amici raise a host of slippery slope arguments, including that aid in
6 dying will assuredly lead to such horrors as euthanasia (voluntary and non-voluntary)
7 of adults and children, that it will be administered by non-physician third parties, and
8 that courts will soon be asked to extend the constitutional right to aid in dying to any
9 competent person, regardless of whether or not the person is terminally ill. These
10 cataclysmic predictions provide no basis to deny a constitutionally protected right to
11 aid in dying. As the United States Supreme Court observed in *Cruzan*, “it is the better
12 part of wisdom not to attempt, by any general statement, to cover every possible
13 phase of the subject.” 497 U.S. at 278 (alteration, internal quotation marks, and
14 citation omitted); *see also Marozsan v. United States*, 852 F.2d 1469, 1498 (7th
15 Cir.1988) (Easterbrook, J., dissenting) (stating that “[t]he terror of extreme
16 hypotheticals produces much bad law”). The State has had “ample opportunity to
17 articulate a constitutionally adequate justification” for prohibiting aid in dying.
18 *Griego*, 2014-NMSC-003, ¶ 68. It has not done so.

1 {137} It is possible that, in another case, presenting different facts, the State might
2 assert interests that a court might view differently. In this case, I end where I began,
3 asking what possible interest the State could have in denying to a mentally competent,
4 terminally ill patient whose medical condition is irreversible and irremediable, who
5 has but a short time to live, and who is experiencing intractable suffering, the right
6 to die peacefully, with dignity, at a time of her own choosing. The State has not
7 advanced a sufficiently persuasive justification for denying aid in dying as that term
8 is defined herein. Indeed, the State has acknowledged the profoundly diminished
9 value of its asserted interests, to the extent it has not conceded that the interests do
10 not exist at all. The factual record in this case, to which the State stipulated in its
11 entirety—including the expert testimony, the comprehensive body of data that has
12 been amassed since *Glucksberg*, and the current state of medical practice and the
13 standard of care—taken together with the State’s significant concessions, compel the
14 conclusion that the State’s asserted interests do not, and cannot, withstand scrutiny
15 under any standard of review; strict, intermediate, or rational basis. I would hold that
16 Section 30-2-4 is unconstitutional as applied to a willing physician’s act of providing
17 aid in dying at the request of a mentally competent, terminally ill patient who wishes
18 a peaceful end of life as an alternative to being forced to endure an unbearable dying

1 process marked by suffering, including extreme pain and/or the loss of autonomy and
2 dignity.

3 **IV. THE REMAND PROPOSAL**

4 {138} The author of the majority opinion, having concluded that the right asserted by
5 Plaintiffs is not a fundamental right, would remand for the district court to (1)
6 determine whether the State has met its burden to justify Section 30-2-4's
7 proscription against aid in dying under intermediate scrutiny; (2) determine whether
8 Section 30-2-4 is constitutional under rational basis review; (3) decide the merits of
9 other constitutional theories that Plaintiffs raised below but did not cross appeal; and
10 (4) make any additional "factual findings relevant to issues left unaddressed by the
11 district court." Majority Op. ¶¶ 48-53. This proposal is completely at odds with the
12 majority opinion's suggestion that it would be inappropriate for this Court to
13 recognize a fundamental right because our Supreme Court is "the ultimate arbiter of
14 the meaning of" our Constitution. Majority Op. ¶ 38. It goes without saying that our
15 Supreme Court will have the final word. But it does not follow that this Court must
16 remain mute until it does. (The cases cited by the majority do not stand for that
17 proposition.) Regardless, it is impossible to reconcile this reasoning with a proposal

1 to remand. And remand cannot be squared with true and settled legal principles as
2 applied to this case.

3 {139} First, the question whether a constitutional right exists is a pure question of
4 law, as is the standard to be applied in determining whether a governmental
5 infringement of that right is constitutionally justified, *i.e.*, the level of scrutiny to be
6 applied to the challenged statute. *State v. Lucero*, 2007-NMSC-041, ¶ 8, 142 N.M.
7 102, 163 P.3d 489 (“[The appellate courts] review issues of statutory and
8 constitutional interpretation de novo.”); *Breen v. Carlsbad Mun. Sch.*, 2005-NMSC-
9 028, ¶ 15, 138 N.M. 331, 120 P.3d 413 (“The determination of which level of scrutiny
10 is applicable under the Constitution is a purely legal question, and is reviewed de
11 novo.”); *Hyden v. N.M. Human Servs. Dep’t*, 2000-NMCA-002, ¶ 12, 128 N.M. 423,
12 993 P.2d 740 (stating that interpretation of the state constitution is reviewed de novo).
13 This means that we consider the legal question whether our Constitution protects the
14 right asserted without any deference to the district court’s conclusions on the issue.
15 *In re Estate of Duran*, 2003-NMSC-008, ¶ 14, 133 N.M. 553, 66 P.3d 326 (explaining
16 that the appellate court is not bound by district court’s legal conclusions and “may
17 independently draw [its] own conclusions of law on appeal” (internal quotation marks
18 and citation omitted)); *Romero Excavation & Trucking, Inc. v. Bradley Constr., Inc.*,

1 1996-NMSC-010, ¶ 5, 121 N.M. 471, 913 P.2d 659 (stating that the appellate court
2 does not defer to district court’s legal conclusions but “determine[s] whether the
3 [district] court correctly applied the law to the facts of the case”). And that means that
4 a remand would be utterly pointless; all the more so here because the district court’s
5 conclusion that the asserted right is protected by our Constitution as a fundamental
6 right necessarily includes the conclusion that the right is at least important, and the
7 State has conceded that it cannot meet its burden under intermediate scrutiny to
8 demonstrate a substantial governmental interest sufficient to justify Section 30-2-4’s
9 intrusion on the right. As Justice Bosson stated in emphasizing that appellate courts
10 should consider state constitutional issues, even if the district court did not, if the
11 party asserting the right cited a state constitutional provision below:

12 [E]ven if the court is not alerted, of what real import is that to the
13 resolution of a pure question of law? The factual record here is not
14 subject to any material dispute. This Court can decide the . . . issue
15 whether or not the trial court addressed it. While in a perfect world the
16 trial court should address each issue first, that aspiration should not be
17 determinative. The statewide interest in development of our state
18 Constitution tips the balance in favor of proceeding, and we should not
19 hesitate to do so.

20 *Garcia*, 2009-NMSC-046, ¶ 63 (Bosson, J., concurring). Although Justice Bosson’s
21 comments were made in the context of discussing the requirements for preserving a

1 state constitutional issue for appeal (an issue not presented here, where Plaintiffs’
2 claims are based solely on the New Mexico Constitution), the point pertains.

3 {140} To the extent the author of the majority opinion believes that the district court
4 should make further “findings,” the factual record is undisputed, and our review is de
5 novo on this aspect of the case as well. *See City of Albuquerque v. One 1984 White*
6 *Chevy Ut.*, 2002-NMSC-014, ¶ 5, 132 N.M. 187, 46 P.3d 94 (explaining that the
7 appellate courts review issues under de novo standard when there are no disputed
8 material facts); *State v. Esparza*, 2003-NMCA-075, ¶ 13, 133 N.M. 772, 70 P.3d 762
9 (“Because the underlying facts . . . are not in dispute, we review the legal issues
10 presented de novo.”). The majority opinion’s concern with factual findings in a case
11 in which the facts are entirely undisputed is baffling in itself. But even assuming a
12 legitimate concern, the author of the majority opinion does not identify a single fact
13 purportedly necessary to resolve the legal issues presented in this case that is not
14 already contained in the stipulated record; the opinion, in fact, does not address the
15 factual record at all. Nor does the State argue that the record is incomplete, or that it
16 lacked the opportunity to present its case in the district court. To the contrary, the
17 State’s counsel said below that “the issues are not fact disputes but legal disputes”

1 and that he thought he “would be willing to stipulate to any facts that Plaintiffs
2 wanted to prove.”

3 {141} The contention that remand is necessary so that the district court can rule on
4 other constitutional theories raised by Plaintiffs that the court saw no need to reach
5 in light of its ruling is contrary to elementary legal principles. Appellate courts
6 routinely affirm district court rulings on purely legal issues where the record allows,
7 even when the district court relied on different reasoning, and when the court did not
8 consider the issue at all. *State v. Vargas*, 2008-NMSC-019, ¶ 8, 143 N.M. 692, 181
9 P.3d 684 (“[W]e may affirm the district court’s order on grounds not relied upon by
10 the district court if those grounds do not require us to look beyond the factual
11 allegations that were raised and considered below.” (internal quotation marks and
12 citation omitted)); *State v. Snyder*, 1998-NMCA-166, ¶ 8, 126 N.M. 168, 967 P.2d
13 843 (considering a state constitutional issue that was not considered or ruled upon in
14 the district court); *State v. Beachum*, 1972-NMCA-023, ¶ 8, 83 N.M. 526, 494 P.2d
15 188 (“A decision of the trial court will be upheld if it is right for any reason.”). No
16 one argues that the district court erred by failing to determine whether the right to aid
17 in dying is “important” even if it is not “fundamental,” as the district court held it
18 was. Nor does anyone claim that the district court erred by failing to rule on

1 Plaintiffs’ other constitutional theories. Appellate courts treat claims made in the
2 district court but not pressed on appeal as abandoned. *English v. English*, 1994-
3 NMCA-090, ¶ 14, 118 N.M. 170, 879 P.2d 802. And the law requires that courts
4 avoid reaching constitutional questions that need not be decided. *Minero v.*
5 *Dominguez*, 1985-NMCA-100, ¶ 5, 103 N.M. 551, 710 P.2d 745 (“As a general
6 principle, courts do not reach constitutional questions unless absolutely required to
7 do so in order to resolve an issue presented.”). The notion that a remand is necessary
8 to decide abandoned constitutional issues so that “potential piecemeal appeals” may
9 be avoided, *see* Majority Op. ¶ 52, makes no sense.

10 {142} The law does not require “the doing of useless things.” *State ex rel. Peters v.*
11 *McIntosh*, 1969-NMSC-103, ¶ 9, 80 N.M. 496, 458 P.2d 222. The facts and principles
12 necessary to a correct holding are known. A remand would be pointless and would
13 needlessly consume the resources of the parties and the courts while delaying final
14 disposition by our Supreme Court.

15 **V. SEPARATION OF POWERS**

16 {143} The State contends that New Mexico courts may not consider whether the
17 Legislature’s criminalization of aid in dying is unconstitutional because doing so

1 violates “separation of powers.”²⁴ First, it argues that decisions about aid in dying are
2 best left to the Legislature because that branch of government is directly accountable
3 to the people, and the fact that Section 30-2-4 has been on the books for forty-two
4 years without amendment demonstrates that the law reflects the values and social
5 mores of New Mexico citizens. Second, the State argues that the “legal landscape
6 surrounding physician[-]assisted suicide is unclear and filled with the kind of
7 uncertainty the resolution of which demands legislative action.” I address the State’s
8 arguments in reverse order.

9 {144} The State’s argument based on the lack of existing regulations specifically
10 governing the conduct of physicians who provide aid in dying has no merit. As a
11 threshold matter, this argument has nothing to do with the separation of powers;
12 rather, it concerns the type and scope of procedural safeguards the State says are
13 necessary to govern the practice of aid in dying. The State’s argument, moreover, is

14 ²⁴The separation of powers clause states:

15 The powers of the government of this state are divided into three
16 distinct departments, the legislative, executive and judicial, and no
17 person or collection of persons charged with the exercise of powers
18 properly belonging to one of these departments, shall exercise any
19 powers properly belonging to either of the others, except [where
20 constitutionally excepted].

21 N.M. Const. art. III, § 1.

1 internally inconsistent, relying on contradictory contentions. The State first contends
2 that the district court erred by failing to implement procedural safeguards for aid in
3 dying such as those set forth in Oregon’s Death With Dignity Act. It then argues that
4 the court “lacks the constitutional power to put these safeguards in place” because
5 these are exclusively legislative determinations. The State is correct that it is not the
6 role of the court to legislate. But a ruling that the New Mexico Constitution protects
7 the right to aid in dying in no way usurps the Legislature’s power to regulate aid in
8 dying in a manner that comports with that ruling. To the extent the Legislature deems
9 regulations appropriate or necessary, nothing would prevent it from enacting
10 constitutionally permissible measures.

11 {145} The State’s argument that the district court impermissibly intruded upon the
12 exclusive province of the Legislature evinces a fundamental misunderstanding of the
13 role of judicial review. Indeed, a decision holding Section 30-2-4 unconstitutional as
14 applied to aid in dying necessarily would vitiate the State’s argument that the district
15 court violated the provisions in our Constitution requiring separation of powers. *See*
16 *NARAL*, 1999-NMSC-005, ¶ 59 (“It is a function of the judiciary when its jurisdiction
17 is properly invoked to measure the acts of the executive and the legislative branch
18 solely by the yardstick of the [C]onstitution.” (internal quotation marks and citation

1 omitted)); *see also Marbury v. Madison*, 5 U.S. 137, 177 (1803) (“It is emphatically
2 the province and duty of the judicial department to say what the law is.”); *Dillon v.*
3 *King*, 1974-NMSC-096, ¶¶ 27-28, 87 N.M. 79, 529 P.2d 745 (holding that the
4 Constitution is the supreme law of the land and that it is the judiciary’s “function and
5 duty to say what the law is and what the Constitution means”). When a
6 constitutionally protected interest is at stake, preference for the legislative process
7 cannot constrain this Court, no matter how long the law at issue has been in effect.
8 *See Walz v. Tax Comm’n of City of New York*, 397 U.S. 664, 678 (1970) (“[N]o one
9 acquires a vested or protected right in violation of the Constitution by long use, even
10 when that span of time covers our entire national existence and indeed predates it.”);
11 *Loving*, 388 U.S. at 6-8 (noting that the state cannot rely on a history of exclusion to
12 narrow the scope of the right); *Brown*, 347 U.S. at 492-93 (same); Oliver Wendell
13 Holmes, Jr., *The Path of the Law*, 10 Harv. L. Rev. 457, 469 (1897) (“It is revolting
14 to have no better reason for a rule of law than that so it was laid down in the time of
15 Henry IV. It is still more revolting if the grounds upon which it was laid down have
16 vanished long since, and the rule simply persists from blind imitation of the past.”).
17 The State urges us to abdicate our constitutional responsibility to decide this matter.
18 This I cannot and will not do.

1 {146} Just over a year ago, our Supreme Court struck down a statutory scheme dating
2 back almost a century that effectively precluded same-sex couples from marrying. At
3 the time, many argued that the policy debate over same-sex marriage, like the current
4 debate over aid in dying, was best left to the legislative process and that judicial
5 review would violate the separation of powers. Our Supreme Court did not retreat
6 from its constitutional responsibility in favor of leaving the matter to civic discourse
7 and legislative action. In *Griego*, 2014-NMSC-003, ¶ 1, Justice Chávez began by
8 underscoring the duty of courts to interpret and apply the protections of the
9 Constitution when the government is alleged to have threatened individual rights. The
10 Court rejected at the outset the premise of the argument the State makes here:

11 The very purpose of a Bill of Rights was to withdraw certain subjects
12 from the vicissitudes of political controversy, to place them beyond the
13 reach of majorities and officials and to establish them as legal principles
14 to be applied by the courts. One's right to life, liberty, and property, to
15 free speech, a free press, freedom of worship and assembly, and other
16 fundamental rights may not be submitted to vote; they depend on the
17 outcome of no elections.

18 *Id.* (quoting *W. Va. Bd. of Educ. v. Barnette*, 319 U.S. 624, 638 (1943)). The Court
19 went on to recognize for the first time a right to same-sex marriage and held that our
20 marriage laws were unconstitutional insofar as they applied only to opposite-sex
21 couples. *Id.* ¶ 69; *see also Obergefell*, ___ U.S. at ___, 135 S. Ct. at 2605 (“The

1 dynamic of our constitutional system is that individuals need not await legislative
2 action before asserting a fundamental right. The Nation’s courts are open to injured
3 individuals who come to them to vindicate their own direct, personal stake in our
4 basic charter. An individual can invoke a right to constitutional protection when he
5 or she is harmed, even if the broader public disagrees and even if the legislature
6 refuses to act.”); *City of Cleburne, Tex. v. Cleburne Living Ctr.*, 473 U.S. 432, 448
7 (1985) (“It is plain that the electorate as a whole, whether by referendum or
8 otherwise, could not order city action violative of the Equal Protection Clause[.]”);
9 *Chambers v. State of Florida*, 309 U.S. 227, 241 (1940) (“Under our constitutional
10 system, courts stand against any winds that blow as havens of refuge for those who
11 might otherwise suffer because they are helpless, weak, outnumbered, or because they
12 are non-conforming victims of prejudice and public excitement.”).

13 {147} While I recognize that Section 30-2-4 was enacted over four decades ago, I
14 disagree with the contention of the State and the concurring opinion, *see* Concurring
15 Op. ¶ 62, that this fact immunizes the statute from judicial review of its
16 constitutionality. The argument is little more than a bald assertion that the Legislature
17 may constitutionally criminalize conduct simply because ‘twas ever thus. The law is
18 to the contrary. A ruling that Section 30-2-4 is unconstitutional as applied to aid in

1 dying reflects neither ignorance nor disregard of a quintessential legislative function.
2 It would not violate the separation of powers. It would simply be an exercise of
3 judicial authority and responsibility that is a founding principle of our system of
4 government. This is what courts do.

5 * * * *

6 {148} The question at the heart of this case is who has the right to decide when and
7 how a mentally competent, terminally ill New Mexican will end her life after the
8 options for meaningful improvement of her terminal condition have been exhausted,
9 such that “life” means being forced to endure unbearable suffering until death
10 arrives.²⁵ I recognize that citizens may disagree about the profound implications of
11 a terminally ill individual’s decision to end her suffering by ending her life, but our
12 judicial obligation is to give effect to the liberty interests of all New Mexicans in
13 accordance with the guarantees of our Constitution. Other choices and decisions
14 central to personal autonomy and dignity have long enjoyed the status of
15 constitutionally protected liberty interests. I would hold that the New Mexico

16 ²⁵ “There are times when even the most accommodating sufferers can endure
17 no more pain, no further losses of function, and no additional insults to their bodily
18 and personal integrity. Despite receiving good palliative care, and regardless of
19 prognosis, these patients arrive at a point where they are ready to end the struggle
20 with their illness.” Stern & Difonzo, *supra*, at 400 (footnote and internal quotation
21 marks omitted).

1 Constitution protects aid in dying as a liberty interest subject to heightened scrutiny.
2 While it is impossible for me to conclude that governmental infringement of the right
3 to aid in dying could be justified by any lesser interest than that required for
4 constitutional rights previously recognized as “fundamental,” the required level of
5 scrutiny need not be determined in this case. For the State concedes that mentally
6 competent, terminally ill citizens have a fundamental right to decide for themselves
7 when and how to end their lives, and it provides no acceptable justification for
8 denying them the only means available to effectuate that right in a peaceful and
9 dignified manner—a lethal dosage of medication prescribed by a willing physician
10 acting in accordance with the established standard of care for aid in dying. It is
11 beyond dispute that the suffering of these citizens “is too intimate and personal for
12 the State to insist, without more, upon its own vision . . . , however dominant that
13 vision has been in the course of our history and our culture.” *Casey*, 505 U.S. at 852.

14
15

LINDA M. VANZI, Judge