COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT

NO. SJC-13194

DR. ROGER M. KLIGLER and DR. ALAN STEINBACH,

Plaintiffs-Appellants,

v.

MAURA T. HEALEY, in her official capacity as the Attorney General of the Commonwealth of Massachusetts, and MICHAEL O'KEEFE, in his official capacity as District Attorney of Cape & Islands District,

Defendants-Appellees.

On Appeal from the Suffolk County Superior Court
Civil Action No. 16-3254F

SUPPLEMENTAL BRIEF OF EUTHANASIA PREVENTION COALITION USA AS AMICUS CURIAE IN SUPPORT OF MAURA T. HEALEY AND MICHAEL O'KEEFE AND FOR AFFIRMANCE

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CORPORATE DISCLOSURE STATEMENT

Euthanasia Prevention Coalition USA is a nonprofit corporation based in Hartford, Connecticut, with no parent corporation and no stockholders.

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IDENTITY AND INTEREST OF *AMICUS CURIAE*[1]

Euthanasia Prevention Coalition USA is a national network that opposes euthanasia and assisted suicide, promoting helpful measures to improve the quality of life of people and their families. The Coalition's interest in this case has not changed since filing its prior brief. Because this Court has requested additional briefing to address how *Dobbs v. Jackson Women's Health Organization*, 142 S. Ct. 2228 (2022), affects the Court's substantive due process analysis, the Coalition files this supplemental brief to explain that *Dobbs* substantially bolsters the conclusion that physician-assisted suicide is not a fundamental right under the Massachusetts Constitution.

[1] No counsel for a party authored this brief in whole or in part. No one other than *amicus curiae* and their counsel made any monetary contribution to fund the preparation or submission of this brief. And neither *amicus curiae* nor its counsel represents or has represented one of the parties in this or any other proceeding involving similar issues.

SUMMARY OF ARGUMENT

There is no fundamental right to physician-assisted suicide in the Massachusetts Constitution. The U.S. Supreme Court's decision in *Dobbs* bolsters that conclusion by reaffirming what this Court has repeatedly held: only those rights that are deeply rooted in history and tradition and implicit in the concept of ordered liberty can qualify as fundamental rights. *Dobbs*, 142 S. Ct. at 2242; *accord Commonwealth v. Roman*, 179 N.E.3d 1091, 1098 (Mass. 2022) (same under state equal-protection analysis); *Commonwealth v. Wilbur W.*, 95 N.E.3d 259, 267 (Mass. 2018) (same under state due-process analysis); *Gillespie v. City of Northampton*, 950 N.E.2d 377, 382–83 (Mass. 2011) (same).

Applying the same test applied in *Dobbs* here, the conclusion is irrefutable: physician-assisted suicide cannot be a fundamental right under the Massachusetts Constitution because no such right is deeply rooted in the Commonwealth's—or the Nation's—history and tradition. Appellants argue this does not matter. But *Dobbs* shows that fact is dispositive. Appellants also note that the Massachusetts Constitution protects some rights to promote individual autonomy. Yet *Dobbs* holds that history still controls. And even if courts may sometimes look beyond history to ask whether new groups may enjoy old rights, even the *Dobbs* dissent suggests that would be improper for assisted suicide. In all respects, then, *Dobbs* confirms that the Court should affirm the judgment below.

ARGUMENT

I. *Dobbs* reaffirms that only those rights that are deeply rooted in history and tradition qualify as fundamental.

The Coalition argued in its earlier brief that only rights that are "deeply rooted in . . . history and tradition, and implicit in the concept of ordered liberty," can qualify as fundamental. Coalition Br. 11 (citing *Gillespie*, 950 N.E.2d at 382–83 (quoting *Washington v. Glucksberg*, 521 U.S. 702, 720–21 (1997)) (cleaned up). *Dobbs* confirms this is correct. 142 S. Ct. at 2242. *Dobbs* also says *Glucksberg*'s history-and-tradition test is uniquely appropriate when human life is at risk. *Id.* at 2258, 2260. And even the *Dobbs* dissent doesn't dispute that *Glucksberg*'s test is the right test for "considering physician-assisted suicide." *Id.* at 2326 n.4 (Breyer, Sotomayor, and Kagan, JJ., dissenting). Especially for cases like this one, *Glucksberg*'s test controls.

A. *Dobbs* reaffirms that courts should apply *Glucksberg*'s test to identify fundamental rights.

Consistent with precedent of this Court and the U.S. Supreme Court, *Dobbs* reaffirmed the test courts apply to identify rights that are "not mentioned in the Constitution" but are still protected by the Fourteenth Amendment's Due Process Clause. 142 S. Ct. at 2242. In short, courts look to history and tradition—not to modern social views. A fundamental right "must be 'deeply rooted in this Nation's history and tradition' and 'implicit in the concept of ordered liberty.'" *Id.* (quoting *Glucksberg*, 521 U.S. at 721).

Glucksberg shows the way. *Id.* at 2247. There, the Court "surveyed more than 700 years of 'Anglo-American common law tradition,'" and held that, because no right to assisted suicide is "deeply rooted in [our] Nation's history and tradition," it does not qualify as fundamental. *Id.* (quoting *Glucksberg*, 521 U.S. at 720-21). While public "[a]ttitudes toward" suicide have "changed," overall "our laws" have not. *Id.* at 2254.

Dobbs shows that history is dispositive—and for good reason. "Historical inquiries of this nature are essential whenever [courts] are asked to recognize a new component of the 'liberty' protected by the Due Process Clause because the term 'liberty' alone provides little guidance." *Id.* at 2247. Thus, historical surveys both illumine deeply rooted but previously unrecognized rights while also promoting judicial restraint. Consider the risk. The term "liberty" is a "capacious term." *Id.* As President Lincoln recognized, "We all declare for Liberty; but in using the same word we do not all mean the same thing." *Id.* Accordingly, courts "must guard against the natural human tendency to confuse what [the Fourteenth] Amendment protects with [their] own ardent views about the liberty that Americans should enjoy." *Id.*

So the Fourteenth Amendment protects only "ordered" liberty. *Id.* at 2257. "While individuals are certainly free *to think* and *to say* what they wish about" matters of self-determination, "they are not always free *to act* [on] those thoughts." *Id.* Otherwise "liberty" could license anything—even "illicit drug use, prostitution, and the like." *Id.* at 2258.

But "[n]one of [those] rights has any claim to being deeply rooted in history." *Id.* And after surveying the relevant history, *Dobbs* held the same is true of abortion. 142 S. Ct. at 2249–54. The "most important" part of that history, *Dobbs* said, was how the "States regulated abortion when the Fourteenth Amendment was adopted." *Id.* at 2267. Three quarters of the States had criminalized abortion by then. *Id.* at 2252–53. And by the end of the 1950s, "statutes in all but four States and the District of Columbia prohibited abortion" in all cases except to save or preserve the life of the mother. *Id.* at 2253.[2] On this record, *Dobbs* "inescapabl[y] conclu[ded] . . . that a right to abortion is not deeply rooted in [our] Nation's history and traditions." *Id.*

"The Court in *Roe* could have said of abortion exactly what *Glucksberg* said of assisted suicide: 'Attitudes toward [abortion] have changed since Bracton, but our laws have consistently condemned, and continue to prohibit, [that practice].'" *Id.* at 2254 (quoting *Glucksberg*, 521 U.S. at 719). And that should have been just as dispositive in *Roe* as it was in *Glucksberg*—and as it is here.

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[2] Massachusetts was one of three states that only "prohibited abortions performed 'unlawfully' or 'without lawful justification.'" *Dobbs*, 142 S. Ct. at 2253 n.35. And this Court had "assume[d]" that a "physician may lawfully procure the abortion of a patient if in good faith he believes it to be necessary to save her life or to prevent serious impairment of her health, mental or physical, and if his judgment corresponds with the general opinion of competent practitioners in the community in which he practises." *Commonwealth v. Wheeler*, 53 N.E.2d 4, 5 (Mass. 1944).

B. *Dobbs* shows that courts should especially apply *Glucksberg*'s test when human life is at risk.

While *Dobbs* held that *Glucksberg*'s test applies to all substantive due process claims, it added that the test applies *especially* when human life is at stake. *Dobbs*, 142 S. Ct. at 2277, 2280. "'Abortion is a unique act' because it terminates 'life or potential life.'" *Id.* at 2277 (quoting *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 852 (1992)) (cleaned up). Abortion is thus "inherently different from marital intimacy," "marriage," or "procreation." *Id.* (quoting *Roe v. Wade*, 410 U.S. 113, 159 (1973)). And for the same reason, abortion is different from rejecting medical treatment, which does not end life but "simply permits life to run its course, unencumbered by contrived intervention." *People v. Kevorkian*, 527 N.W.2d 714, 728 (Mich. 1994).

Assisted suicide, though, *is* a "unique act" like abortion. It too "involves an affirmative act to end a life." *Id.* And that explains why assisted suicide is not equivalent to "withdrawing or refusing life-sustaining medical treatment." *Guardianship of Doe*, 583 N.E.2d 1263, 1270 (Mass. 1992). Unlike when a patient merely rejects treatment, if a "patient ingests lethal medication prescribed by a physician, he is killed by that medication." *Vacco v. Quill*, 521 U.S. 793, 801 (1997). Here too, then, an alleged right to destroy life "cannot be justified by a purported analogy to the rights recognized in [any] other cases or by 'appeals to a broader right to autonomy.'" *Dobbs*, 142 S. Ct. at 2280.

C. Even the dissent in *Dobbs* does not dispute that courts should apply *Glucksberg*'s test to assisted suicide.

The *Dobbs* dissent, while disagreeing with the case's outcome, conceded that *Glucksberg*'s history-and-tradition test "may have been appropriate" for physician-assisted suicide, even if the test was inadequate for "other fundamental rights." 142 S. Ct. at 2326 n.4 (dissent) (quoting *Obergefell v. Hodges*, 576 U.S. 644, 671 (2015)). For support, the dissent quoted *Obergefell*'s statement that, if "'rights were defined by *who exercised them in the past*, then received practices could serve as their own continued justification'—even when they conflict with 'liberty' *and 'equality'* as later and more broadly understood." *Id.* (emphasis added) (quoting *Obergefell*, 576 U.S. at 671).

The *Dobbs* dissent got it half right. It would be dangerous for the Court to unmoor the definition of "liberty" from *Glucksberg*'s history-and-tradition test; authorizing courts to make up fundamental rights undermines democracy. But the dissent is correct that the Constitution allows for our understanding of "equality" to evolve. *See, e.g.*, *Loving v. Virginia*, 388 U.S. 1 (1967). For example, as the Coalition explained in its earlier brief, the Supreme Court has "long held the right to marry is protected by the Constitution." Coalition Br. at 12 (quoting *Obergefell*, 576 U.S. at 664). "That's true 'as a matter of history and tradition.'" *Id.* (quoting *Obergefell*, 576 U.S. at 671). So that's not the question the Supreme Court answered in *Loving* or *Obergefell*. *Id.* at 12–13.

Instead, *Obergefell* "framed the question as whether there was a 'sufficient justification for excluding the relevant class from the right.'" Coalition Br. at 12 (quoting *Obergefell*, 576 U.S. at 671). Or as this Court framed it in *Goodridge*, for "depriv[ing] individuals of access" to a previously established fundamental right "because of a single trait." *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941, 958 (Mass. 2003).

So while *Obergefell* and *Goodridge* might justify looking beyond "history and tradition" to decide whether "new groups" should be allowed to "invoke [old] rights once denied," *Obergefell*, 576 U.S. at 671, that analysis only "applies *after* a fundamental right—deeply rooted in history and tradition—has been established," Coalition Br. at 13. Those cases do not justify "looking beyond history and tradition to decide whether a fundamental right exists in the first place." *Id.*

Nor does physician-assisted suicide warrant any such broader analysis. *Dobbs*, 142 S. Ct. at 2326 n.4 (dissent). Physician-assisted suicide is *not* a right that has been "exercised . . . in the past." *Id.* at 2326. An alleged right to die is a modern invention. Coalition Br. 16–20. No one—regardless of race, sex, or wealth—has ever exercised a constitutional right to die. So there is no worry that some have been afforded a right that others have been denied. If anything, Appellants' "very narrow" definition of who would be eligible to exercise their alleged right would invite similar constitutional challenges as those addressed by *Obergefell*, *Loving*, and *Goodridge*. Coalition Br. at 37–39.

II. Applying *Glucksberg*'s test yields the same conclusion under Massachusetts law as it does under federal law: no fundamental right to physician-assisted suicide exists.

Appellants argue Massachusetts' ban on assisted suicide violates "the fundamental right of self-determination and individual autonomy in the context of end-of-life medical care." Opening Br. 32. So they appear to make a substantive due process claim. But they do not argue this right is rooted in history and tradition. And that argument would fail. Coalition Br. 16–20. Instead, they argue "history and tradition" cannot "govern[] what constitutes a fundamental right," otherwise "interracial and same-sex marriages would still be illegal." Opening Br. 30–31 (citing *Goodridge*, *Obergefell*, and *Loving*). But *Dobbs* shows that Appellants reject the right test and reach the wrong result.

To begin, *Glucksberg* controls. This Court decides due process claims by applying "the same standards followed in Federal due process analysis." *Gillespie*, 950 N.E.2d at 382 n.12 (cleaned up). So to qualify as fundamental under the Massachusetts Constitution, a right must be "'deeply rooted in this Nation's history and tradition,' and 'implicit in the concept of ordered liberty.'" *Id.* at 382–83 (quoting *Moore v. East Cleveland*, 431 U.S. 494, 503 (1997) (plurality); *Glucksberg*, 521 U.S. at 720–21). *Accord Dobbs*, 142 S. Ct. at 2246–47, 2253–54 (applying the same test). And as this Court's recent decision in *Roman* shows, the same test applies even under an equal-protection analysis. 179 N.E.3d at 1098.

When it comes to identifying whether a fundamental right exists in the first place, there are no exceptions to *Glucksberg*'s history-and-tradition rule. And the history "of assisted suicide in this country has been and continues to be one of the rejection of nearly all efforts to permit it." *Glucksberg*, 521 U.S. at 728. That remains true 25 years after *Glucksberg*. "Nine states and the District of Columbia have [enacted laws] to allow" physician-assisted suicide. Attorney General's Br. 39. But the "vast majority of states" still forbid it. Cody Bauer, *Dignity in Choice: A Terminally Ill Patient's Right to Choose*, 44 MITCHELL HAMLINE L. REV. 1024, 1040 & n.111 (2018).

Like similar laws in other states, Massachusetts' common-law prohibition on assisted suicide is no innovation. *Glucksberg*, 521 U.S. at 710. Instead, it is a "longstanding expression[]" of the Commonwealth's "commitment to the protection and preservation of all human life." *Id.*

Indeed, the "earliest reported case addressing the subject was the 1816 Massachusetts jury charge in *Commonwealth v. Bowen*." Thomas J. Marzen et al., *Suicide: A Constitutional Right?* 24 DUQUESNE L. REV. 1, 72 (1985). Bowen had "persuaded a man . . . who was about to be executed" to hang himself. *Id.* at 74. And Chief Justice Parker instructed the jury that "if the murder of one's self is [a] felony," as it was at the time, "the accessory is equally guilty as if he had aided and abetted in the murder" of one man by another. *Id.* (quoting *Bowen's Trial* at 51–52, *reprinted in, Commonwealth v. Mink*, 123 Mass. 422, 428 (1877)).

Even after later changes in the law, suicide and attempted suicide have remained "unlawful and criminal as *malum in se*." Marzen, *supra*, at 184 (quoting *Mink*, 123 Mass. at 429). *Accord* Coalition Br. at 19–20 (discussing the relevant history). No "subsequent cases or statutes . . . cast doubt upon [that] conclusion" in Massachusetts. Marzen, *supra*, at 184. Quite the opposite, describing *Bowen* as "centuries-old Massachusetts common law," this Court recently reaffirmed "that a defendant might be charged and convicted of a homicide offense merely for 'repeatedly and frequently advising and urging a victim to destroy himself,' with no physical assistance." *Commonwealth v. Carter*, 115 N.E.3d 559, 569 (Mass. 2019) (quoting *Bowen*, 13 Mass. at 356) (cleaned up).

As *Dobbs* confirms, that history is dispositive. 142 S. Ct. at 2246–47, 2253–54. No fundamental right to assisted suicide *of any sort* exists under Massachusetts law. Coalition Br. at 16–25. Nor does the right to *reject* medical treatment implicate a new right to *demand* medical aid in committing suicide. Coalition Br. at 25–33. This Court should decline Appellants' invitation to "invent a constitutional right unknown to the past and antithetical to the defense of human life that has been a chief responsibility of our constitutional government." *Compassion in Dying v. Washington*, 49 F.3d 586, 591 (9th Cir. 1995). Especially in cases like this one where an alleged right that is unknown to history and tradition would threaten human lives, courts should be willing to defer to "the people's elected representatives." *Dobbs*, 142 S. Ct. at 2243, 2247, 2257.

CONCLUSION

This Court requested additional briefing to address how *Dobbs* affects the Court's substantive due process analysis. As explained above, *Dobbs* substantially bolsters the conclusion that physician-assisted suicide is not a fundamental right under the Massachusetts Constitution. Such rights must be deeply rooted in history and tradition and implicit in the concept of ordered liberty, and an alleged right to a physician's help to commit suicide does not satisfy that stringent test.

Dobbs's analysis confirms the constitutionality of the common-law prohibition on assisted suicide. Accordingly, the Court should affirm the judgment below.

Respectfully submitted,

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By: */s/ Christopher P. Schandevel*

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RULE 16(K) CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that this brief complies with all of the rules of court that pertain to the filing of amicus briefs, including, but not limited to, the requirements of Rules 16 and 20 of the Massachusetts Rules of Appellate Procedure. This brief complies with Mass. R. App. P. 20(a)(4)(B) because it has been produced in proportionally spaced typeface using Century Schoolbook 14-point font, and it complies with this Court's July 7, 2022 order because, excluding the parts of the brief exempt by Mass. R. App. P. 20(a)(2)(D), it contains 12 pages.

/s/ Christopher P. Schandevel
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CERTIFICATE OF SERVICE

I hereby certify that on August 29, 2022, the foregoing amicus brief was electronically filed with the Clerk of Court for the Massachusetts Supreme Judicial Court, which will accomplish service on counsel for all parties through the Court's electronic filing system. I further certify that I have served copies of the brief by email on the following counsel of record for the parties:

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