COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT

No. SJC-13194

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

Appellants (Plaintiffs Below),

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,

Appellees (Defendants Below),

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

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I. PRELIMINARY STATEMENT

The Plaintiffs-Appellants, Dr. Roger Kligler and Dr. Alan Steinbach ("Plaintiffs" or "Appellants"), hereby submit this Reply Brief in further support of their appeal from the Superior Court's judgment, issued on December 31, 2019, granting Defendants' motion for summary judgment on Counts I-IV and VI of the complaint, and more specifically, in response to Defendants Maura Healey and Michael O'Keefe's ("Defendants" or "Appellees") Opposition Brief, dated August 20, 2021 ("Opp'n Br."). Without waiving any arguments raised in their Opening Brief, dated May 10, 2021 ("Opening Br."), Plaintiffs reply herein only to those arguments raised by the Defendants that require further response.

II. ARGUMENT

A. "Physician-assisted Suicide" ("PAS") Is Not The Same As "Medical Aid In Dying" ("MAID")

Defendants argue that "physician-assisted suicide" or PAS is a more proper term for describing "the practice" at issue. Opp'n Br. at 10 at FN 1. Not so. "Physician-assisted suicide" is fundamentally different from MAID. By using the term "physician-assisted suicide," Defendants attempt to recast the narrow remedy Plaintiffs seek as a request for broad judicial approval of any form of suicide in which a physician participates. Plaintiffs do not seek such a broad remedy.

As Plaintiffs made clear, MAID is defined narrowly as a practice where a doctor, who determines, according to accepted medical standards, that her adult, terminally ill patient who is mentally competent, may, at her patient's request, prescribe medication that her patient can self-ingest to hasten the time of their death. Terminally ill patients have few choices—they face certain death within a short period of time from an existing, incurable illness. The only choice at issue is

the choice of medical treatment during this irreversible dying process. "Assisted suicide," on the other hand, is a much broader term, defined as "suicide committed by someone with assistance from another person."[1]

The term "physician-assisted suicide" has not been adopted by any of the ten jurisdictions where the practice is authorized. On the other hand, the term "aid in dying" was adopted by at least two state legislatures. For example, "medical aid in dying" is defined as "the medical practice of a physician prescribing medical aid-in-dying medication to a qualified individual that the individual may choose to self-administer to bring about a peaceful death" under Colorado's End of Life Options Act. Colo. Rev. Stat. Ann. § 25-48-102. And under California's End of Life Option Act, the prescribed life-ending medication is called "aid-in-dying drug." Cal. Health & Safety Code § 443.1.

Moreover, state legislatures and courts in states where the practice is authorized recognize medical aid in dying as differing from suicide or assisted suicide, and have expressly rejected the latter terminology. For example, Oregon's Death with Dignity Act specifically notes that "[a]ctions taken in accordance with ORS 127.800 to 127.897 shall not, for any purpose, constitute suicide, assisted suicide, mercy killing or homicide, under the law." Or. Rev. Stat. Ann. § 127.880. And in Montana, where "assisted suicide" is illegal, the Montana Supreme Court ruled in *Baxter v. State* that medical aid in dying provided to terminally ill, mentally competent adult patients in no way violates established state law

[1] *See, e.g.*, https://www.merriam-webster.com/dictionary/assisted%20suicide.

[including Montana's assisted suicide statute] or the principles of public policy. *Baxter v. State*, 354 Mont. 234, 247 (2009).

Similarly, health organizations have refused to use the term "suicide" to describe a terminally ill patient's choice to reduce the suffering of an inevitable death. For example, the Massachusetts Medical Society, American Academy of Hospice and Palliative Medicine, and American Academy of Family Physicians have all adopted policies opposing the use of the terms "suicide" and "assisted suicide" to describe the medical practice of aid in dying.[2] And the American Association of Suicidology, a nationally recognized organization that promotes prevention of suicide through research, public awareness programs, education, and training comprised of respected researchers and mental health professionals, states that medical aid in dying is fundamentally different from suicide and that the term "physician-assisted suicide" should not be used.[3]

Accordingly, Plaintiffs maintain that "physician-assisted suicide" is improper terminology in this case because it does not accurately describe the procedure for which Plaintiffs seek this Court's authorization.

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[2] *See, e.g.*, https://www.massmed.org/News/Medical-Aid-In-Dying-(MAID)/.
[3] Statement of the American Association of Suicidology, "Suicide" Is Not the Same as "Physician Aid in Dying." Approved October 30, 2017. Available at https://ohiooptions.org/wp-content/uploads/2016/02/AAS-PAD-Statement-Approved-10.30.17-ed-10-30-17.pdf.

B. Common Law Involuntary Manslaughter Does Not Apply To MAID

1. Plaintiffs' request for declaratory relief does not seek an advisory opinion

Defendants argue that Plaintiffs are not entitled to declaratory relief because Plaintiffs are seeking an advisory opinion on the application of criminal law to MAID based on hypothetical circumstances. Opp'n Br. at 17.

This argument was properly rejected by the Superior Court and should be rejected here.[4] The Supreme Judicial Court of Massachusetts has stated that "[t]he choice of openly challenging the criminal law was unnecessary if the purpose was merely to test the statute and not for some other purpose, such as compelling public attention." *Commonwealth v. Baird*, 355 Mass. 746, 755 (1969). The U.S. Supreme Court has likewise held "it is not necessary that [plaintiff] first expose himself to actual arrest or prosecution to be entitled to challenge a statute that he claims deters the exercise of his constitutional rights." *Steffel v. Thompson*, 415 U.S. 452, 459 (1974). By logical extension, here a declaratory judgment action is the appropriate mechanism to challenge the constitutionality of the application of common law involuntary manslaughter to a medical practice, such as MAID. No

[4] In the Superior Court, Defendants moved to dismiss based on this same argument—that this case should not be resolved in a declaratory judgment proceeding because Plaintiffs seek an advisory opinion. The Attorney General's Motion to Dismiss, dated December 28, 2016 (Addendum 43-68). After full briefing and oral argument, the Superior Court denied Defendants' motion. Superior Court's Memorandum of Decision and Order on Defendants' Motions to Dismiss, May 25, 2017 (Addendum 27-42). Defendants did not appeal this ruling. Thus, Defendants have waived any further arguments on appeal that Plaintiffs' seek an advisory opinion and that Plaintiffs' claim should not be resolved on the merits. Mass. R. App. P. 16.

physician should have to risk criminal prosecution and the loss of their medical license in order to be able to ascertain whether or not providing the treatment their patient requests, within a medical standard of care, violates the law.

Further, a rule that forces Dr. Kligler to find a physician who is willing to risk imprisonment and loss of his medical license—his vocation and livelihood—before determining the legality of providing such a prescription will likely mean that this issue is never adjudicated. The severity of potential sanctions will discourage physicians—as it discourages Dr. Steinbach—from providing MAID altogether.[5] *See Ex parte Young*, 209 U.S. 123, 130, 146 (1908) (where the potential penalties resulting from committing the acts are substantial, requiring plaintiffs to carry out acts that potentially violate the criminal statute in order to challenge it would amount to a "denial of any hearing" to the plaintiffs).

Moreover, in this case there is a threat of prosecution by Michael O'Keefe, District Attorney of the Cape and Islands District. Mr. O'Keefe has opined that state law prohibits medically-assisted dying and the resulting charge would be murder and he has expressed his belief that physician assisted suicide is illegal under the common law until the Legislature passes a law telling him otherwise. *See* Addendum 32. And as acknowledged by the Superior Court, Mr. O'Keefe's

[5] Dr. Kligler's situation is sufficiently crystallized that there is a clear case or controversy. Dr. Kligler was diagnosed with Stage 4 Metastatic Castrate-Resistant Prostate Cancer. His condition is incurable. Dr. Kligler testified that he seeks a prescription for MAID so that when his pain and suffering become unbearable in the final weeks of life, he can elect to die in a manner that is peaceful and painless. He requests some measure of autonomy and control over the timing and circumstances of his death.

comments "demonstrate a threat of prosecution to physicians in the Cape and Islands District that is more than imaginary or speculative." *Id.* at 7.

Defendants further argue that because there are factual permutations surrounding the practice of MAID, the controversy should be resolved in a criminal proceeding when and if the Commonwealth decides to prosecute. Opp'n Br. at 17-18. This argument should also be rejected. As noted by the Superior Court, Massachusetts law "articulates a well-established general medical standard of care: the degree of care and skill of the average qualified practitioner, taking into account advances in the profession and the available resources." Motions to Dismiss Order at 12. This medical standard of care leaves little room for factual permutations. And "the existence of some imprecision in these concepts is not an insurmountable barrier to declaratory relief." *Id.* at 13.

2. The doctor's prescription of MAID medication does not cause the patient's death

As acknowledged by the Superior Court, in contrast to the majority of states, "Massachusetts has not expressed a public policy against assisted suicide by enacting a statute imposing criminal liability on one who assists another in committing that act." Addendum 36.

Moreover, as noted by the Defendants, there are only two cases—the *Carter* case and *Persampieri*—where a defendant was charged with or convicted of manslaughter for playing a role in a victim's suicide, and the facts of these cases are "substantially different from and more egregious than the scenario posited by Doctors Kligler and Steinbach." *Id.* at 38; *Commonwealth v. Carter*, 474 Mass. 624

(2016), (*Carter I*); *Commonwealth v. Carter*, 481 Mass. 352, 363 (2019) ("*Carter II*"); *Persampieri v. Commonwealth*, 343 Mass. 19 (1961).

The current case is different from *Carter* and *Persampieri* because the prescription of MAID medication does not cause the patient's death. A patient who fills the MAID prescription, and self-ingests the medication causes their own death and the "chain of self-causation" is not broken such that the doctor could then become the cause of a resulting death. *Carter II*, 481 Mass. at 362-363. Moreover, the standard of care requires the physician to inform the patient they can change their mind and that they do not have to self-ingest even if they obtain a prescription.

Defendants argue that "Plaintiffs' analogy between the doctor who provides a prescription for a lethal medication and those who sold the carbon monoxide generator and water pump to the victim in *Carter* is entirely misplaced" because while "there was no indication in *Carter* that the seller knew or should have known of the victim's intention to kill himself using the generator and/or pump," "the doctor writes the prescription for the very purpose of giving the patient the means to commit suicide." Opp'n Br. at 22 at FN 8. This argument should fail because for many doctors, prescribing MAID medication is a way to help a terminally ill patient obtain peace of mind, rather than cause harm to or death of the patient. Opening Br. at 23. In requesting and prescribing MAID medication, the immediate goal of both patient and physician may be nothing more than to give the patient a greater sense of control over the process of dying, and both may hope that the patient is never forced to take this final step in order to relieve their suffering. *Id.* at

24. Thus, Defendants' proposition that "the doctor writes the prescription for the very purpose of giving the patient the means to commit suicide" is misplaced.

Therefore, because the doctor's prescription of MAID medication does not cause the patient's death—indeed the intent is to ease suffering—the Court should find that common law involuntary manslaughter is not applicable to MAID.

C. Common Law Involuntary Manslaughter Is Unconstitutionally Vague As Applied To MAID

Defendants argue that common law involuntary manslaughter is not vague as applied to MAID because the criminal offense is defined with sufficient definiteness that ordinary people can understand what conduct is prohibited and the application of involuntary manslaughter law to MAID does not encourage arbitrary and discriminatory enforcement. This argument is unfounded at least because ordinary people cannot understand whether MAID is prohibited under the law.

In *Carter I*, the SJC found it "important" to specifically state that MAID is "easily distinguishable" from *Carter*, where there was an allegation of "a systematic campaign of coercion on which the virtually present defendant embarked—captured and preserved through her text messages—that targeted the equivocating young victim's insecurities and acted to subvert his willpower in favor of her own." 474 Mass. at 636. Finding the defendant in *Carter* was guilty of involuntary manslaughter, the SJC noted that it was "important to articulate what this case is not about. It is not about . . . a person offering support, comfort, and even ***assistance*** to a mature adult who, confronted with such circumstances [imminent death], has decided to end his or her life." *Id.* (emphasis added).

Defendants argue that because the SJC in *Carter II* did not use the word "assistance," the SJC intended to "alter[] the dictum to refer only to constitutionally protected communications." Opp'n Br. at 29. However, as noted by Defendants, because this issue was not presented in *Carter* and has never been decided by the SJC (and Massachusetts has not enacted a statute imposing criminal liability on one who assists another in committing that act), the SJC has simply not spoken on whether it considers MAID to violate the common law of involuntary manslaughter. Therefore, ordinary people cannot readily discern whether MAID is prohibited under common law involuntary manslaughter based on the different dicta in the *Carter* cases.

D. MAID Implicates A Fundamental Constitutional Right And Therefore Heightened Judicial Review Applies

Defendants contend that "nowhere in their opening brief do Plaintiffs state that heightened judicial review, such as strict scrutiny, applies," and therefore the argument is waived. Opp'n Br. at 32 at FN 12. Not so. Plaintiffs argued repeatedly that MAID implicates a fundamental constitutional right. Therefore strict judicial review applies. As acknowledged by Defendants, "strict scrutiny is limited to circumstances where either 'a suspect classification' or 'a fundamental right' is implicated." *Id.* Thus, because Plaintiffs contend that MAID implicates a fundamental constitutional right, it follows that strict scrutiny must apply. *See, e.g.*, *Goodridge v. Dep't of Pub. Health*, 440 Mass. 309, 330 (2003) ("Where a statute implicates a fundamental right or uses a suspect classification, we employ 'strict judicial scrutiny.'. . . For all other statutes, we employ the 'rational basis test.'").

Defendants further argue that while it is a fundamental constitutional right to reject medical treatment, a patient does not have a fundamental right to receive MAID. Opp'n Br. at 33-39. This argument runs afoul of the SJC's holding in *Brophy v. New England Sinai Hosp., Inc.*, where the SJC held that a person has the right "to make [his] own decision to ***accept or reject*** treatment, whether that decision is wise or unwise." 398 Mass. 417, 430 (1986) (citations omitted, emphasis added). By logical extension, the Court should find a person has a fundamental right to the option to receive MAID from a willing physician.

Defendants also contend that the privacy right of bodily integrity does not establish a fundamental right to receive MAID "because the right encompasses only rejecting medical treatment" under the federal constitution. Opp'n Br. at 35-36. This argument, however, fails to take into account that the privacy right of bodily integrity is "an area in which [Massachusetts's] constitutional guarantee of due process ha[d] sometimes impelled [the court] to go further than the United States Supreme Court." *Moe v. Sec'y of Admin. & Fin.*, 382 Mass. 629, 649 (1981).

For example, in *Moe*, the SJC applied a heightened scrutiny standard in holding that statutory provisions restricting Medicaid abortion funding impermissibly burdened the fundamental right to receive medical care to terminate a pregnancy. 382 Mass. at 658–59. The challenged statutory provisions "would [have] prohibit[ed] the payment of State Medicaid funds for abortions except as necessary to avert the death of the mother." *Id.* at 632. Each plaintiff's doctor could not certify that abortion was necessary to prevent death and the women could not afford the procedure without Medicaid. *Id.* The plaintiffs argued that the statutory

provisions burdened the fundamental right to *receive* an abortion secured by the due process guarantee in the Massachusetts Declaration of Rights. *Id.* at 645.

In defining the right at stake in the case, the SJC first recognized that "a woman's decision whether or not to terminate a pregnancy by abortion falls within a constitutionally protected zone of privacy," as established by *Roe v. Wade*, 410 U.S. 113 (1973). *Id.* at 646. This right was not absolute and could be curtailed by state regulations that advanced a "compelling state interest," such as the health of the pregnant woman or potential human life, and were "narrowly drawn to express only the legitimate state interests at stake." *Id.*

Expanding the scope of its analysis, the SJC reflected that the "cases dealing specifically with a woman's right to make the abortion decision privately express but one aspect of a far broader constitutional guarantee of privacy"—namely, the privacy of family life. *Id.* The SJC stated: "[t]he constitutional right to privacy . . . is an expression of the sanctity of individual free choice and self-determination as fundamental constituents of life. The value of life as so perceived is lessened not by a decision to refuse treatment, but by the failure to allow a competent human being the right of choice." *Id.* at 648–49.

Reflecting on this development in its jurisprudence, the SJC noted "'something approaching consensus' in support of the principle that '[a] person has a strong interest in being free from nonconsensual invasion of his bodily integrity, and a constitutional right of privacy that may be asserted to prevent unwanted infringements of bodily integrity.'" *Id.* at 649. The SJC stated that the *Moe* case—which involved the right to *receive* medical treatment rather than *refuse* treatment—invoked these principles in the same area of law—an area in which the

Massachusetts's "constitutional guarantee of due process ha[d] sometimes impelled [the court] to go further than the United States Supreme Court." *Id.*

In considering whether this right was burdened by the funding provisions, the SJC first highlighted that the Supreme Court of the United States had previously upheld "substantially identical" provisions by reasoning that the provisions did not substantially interfere with a fundamental right and that the provisions were rationally related to the government interest of protecting potential life. *Id.* at 650. The Supreme Court of the United States pointed out that "it simply does not follow that a woman's freedom of choice carries with it a constitutional entitlement to the financial resources to avail herself of the full range of protected choices." *Id.* The SJC rejected this reasoning, stating that it believed Massachusetts's Declaration of Rights provided greater protection than did the Federal Constitution in those cases. *Id.* at 651. In the SJC's view, characterizing the purpose of these provisions as encouraging childbirth did not conceal the state's purpose of discouraging abortion. *Id.* at 654. The SJC voiced its agreement with Justice Brennan's dissent in *Harris*, in which he stated: "[b]y thus injecting coercive financial incentives favoring childbirth into a decision that is constitutionally guaranteed to be free from governmental intrusion, (this restriction) deprives the indigent woman of her freedom to choose abortion over maternity, thereby impinging on the due process liberty right recognized in *Roe v. Wade*." *Id.* at 655. The SJC concluded that the funding provisions burdened the plaintiffs' fundamental right to choose whether to terminate a pregnancy. *Id.*

In view of *Saikewicz*, the SJC in *Moe* was willing to go further than the United States Supreme Court to extend the privacy right to a woman's freedom to

choose whether to terminate a pregnancy. Here, as in *Moe*, Plaintiffs see no reason why the court should limit the *Saikewicz* holding to cases involving refusal of a medical treatment. As the SJC made clear in *Moe*, a competent human being has a fundamental privacy right to "individual free choice and self-determination." *Moe*, 382 Mass. at 648.

MAID implicates a fundamental constitutional right and therefore strict scrutiny should apply in this case.

E. The Commonwealth's Purported Prohibition on MAID Does Not Meet The Rational Basis Test For Either Due Process Or Equal Protection

Plaintiffs maintain that the Commonwealth's prohibition on MAID does not meet the rational basis test for either due process or equal protection because Defendants fail to prove the prohibition bears "a real and substantial relation to the public health, safety, morals, or some other phase of the general welfare." *Goodridge*, 440 Mass. at 330. And because the Commonwealth's prohibition on MAID fails the rational basis test, it would certainly fail the strict scrutiny test because Defendants cannot offer any compelling governmental interest that justifies the prohibition on MAID. *Finch v. Commonwealth Health Ins. Connector Auth.*, 461 Mass. 232, 236 (2012).

Defendants list seven alleged reasons why the prohibition on MAID may rationally be maintained, but none should stand.

First, Defendants argue that the system might be ineffectual in determining the competence of patients, both at the time they request a MAID prescription and later, when they administer it. Opp'n Br. at 45-47. Physicians routinely evaluate

patients for depression under the current standard of care when handling existing end-of-life care, including patient requests to discontinue life support. Opening Br. at 34. Moreover, because no other self-ingested prescriptions in the Commonwealth bear this requirement, it is irrational to create a new, additional requirement for self-ingested MAID prescriptions in the Commonwealth. *Id.* at 34-35.

Second, Defendants argue that it is virtually impossible to determine when a condition is terminal. Opp'n Br. at 47-48. This argument, however, does not provide a rational basis for distinguishing between MAID and other permissible end-of-life options, such as VSED, palliative sedation, and hospice. Each jurisdiction, including Massachusetts, has an established medical standard of care for diagnosing terminal illness. Opening Br. at 35-36. Important medical decisions, including life and death decisions, are made based on these diagnoses. *Id*. Physicians are accustomed to making these determinations and those physicians who deal most frequently with terminally ill patients are especially adept at making these determinations. *Id.*

Third, Defendants argue there is widespread availability of effective alternatives to relieve end-of-life suffering. Opp'n Br. at 48-49. Defendants, however, admit that in a small number of cases, these alternatives do not provide effective pain management. *Id.* at 49. Essentially Defendants argue that because there are not many patients whose pain is left untreated, it is rational to infer from the absence of Legislative action that the Legislature intended to just let those patients suffer. Setting aside the insensitivity of this argument, it also completely fails to address the equal protection violation raised by Plaintiffs. The concept of

equal protection does not have an exception for unconstitutional laws that discriminate against only a small number of citizens. If even one citizen's rights are infringed without equal protection, the law should be found unconstitutional.

Furthermore, Defendants' argument misses the point regarding end-of-life care. Some patients who are interested in MAID seek to avoid intolerable pain or unbearable suffering, and seek the peace of mind that MAID offers. RAIII/170 at ¶ 46. For others, MAID emboldens the patient to attempt "longshot" therapies that may leave them in even greater suffering if the therapy fails. RAIII/211 at ¶ 8.

Fourth, Defendants argue that the unwillingness of many doctors to participate in MAID may lead to doctor-shopping, which in turn may increase the risks associated with MAID. Opp'n Br. at 49-50. The fact that doctors who are opposed to MAID can refuse to participate should logically dispel any qualms they have about the process.[6] As with the purported harm to the profession, the Defendants have again failed to provide any evidence of improper doctor shopping or development of a cottage industry of physicians providing MAID to unqualified patients in places that have legalized MAID. In Oregon there is no such evidence. Moreover, there is no evidence from Oregon or the other states where MAID is permitted that the medical profession has suffered. Opening Br. at 37.

Fifth, Defendants argue that there is no applicable medical standard of care for MAID in Massachusetts. Opp'n Br. at 51-52. This argument is unfounded because the general standard of care would continue to govern in the absence of

[6] Doctors are traditionally reluctant to adopt new medical practices for which they lack formal training. However, history has shown that this initial reluctance is quickly overcome and leads to acceptance that ultimately contributes to advancement of medical practice for the improvement of patient care.

specific regulation from the Legislature prohibiting or explicitly authorizing MAID. The medical profession's existing framework would allay any concerns in the minds of neutral, unbiased legislators about regulation of the medical profession. Physicians may also choose to follow procedures recognized in the states where MAID procedures are created by statute.

Sixth, Defendants argue that a patient's choice of MAID may be subject to external influences or arbitrary or unjustified factors. Opp'n Br. at 52-53. There are multiple problems with this argument. To start, there is no evidence that patient decisions in states that have adopted MAID are being motivated by "arbitrary or otherwise unjustified factors" or that terminally ill patients are being unduly influenced into taking MAID medications. "Not every asserted rational relationship is a conceivable one." *Goodridge*, 440 Mass. at 330 n.20 (quotation marks omitted). And the bare assertion of a parade of horribles without any evidence cannot form the rational relationship needed to save the law. *Id.* at 334. If MAID is explicitly authorized, those who fail to follow its requirements may still be prosecuted. Recognition of MAID will not frustrate the Commonwealth's ability to police undue influence and improper actions in this sphere and it would not bar the Legislature from enacting further guidance on the practice.

Lastly, Defendants argue that were MAID to be authorized, it could be difficult over time to limit it to the specific class of patients posited by Plaintiffs. Opp'n Br. at 53-54. Defendants raise three specific concerns—that the competence requirement may be removed, that the self-ingestion requirement may be eliminated, and that MAID may not be limited to the terminally ill. *Id.* at 53. None of these concerns is supported by any evidence. We now have 21 years of

experience and data from Oregon and many additional years of experience and data from the other states that have adopted MAID. There has been no removal of the competence requirement in any jurisdiction, no successful lawsuits brought by disabled individuals to eliminate the self-ingestion requirement, and no attempts to make MAID available to individuals who are not terminally ill.

Therefore, the Commonwealth's prohibition on MAID does not meet the rational basis test for either due process or equal protection.

III. Conclusion

For the foregoing reasons, Plaintiffs maintain that this Court should reverse the judgment of the Superior Court.

Dr. Roger M. Kligler and
Dr. Alan Steinbach

By their attorneys,

/s/ Nathaniel P. Bruhn

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Dated: October 12, 2021

RULE 16(K) CERTIFICATION

The undersigned hereby certifies that this brief complies with the rules of court that pertain to the filing of briefs, including but not limited to Mass. R. App. P. 16(a)(6)(pertinent findings or memorandum of decision); Mass. R. App. P. 16(e) (references in briefs to the record); Mass. R. App. P. 16(f) (reproduction of statutes, rules and regulations), Mass. R. App. P. 16(h) (length of briefs); Mass. R. App. P. 18 (appendix to the briefs); and Mass. R. App. P. 20 (forms of briefs, appendices, and other papers).

This brief complies with Mass. R. App. P. 20(a)(2)(B) because it has been produced in proportionally spaced typeface using Times New Roman 14-point font and, excluding the parts of the document exempt by Mass. R. App. P. 20(a)(2)(B), contains less than 4500 words.

/s/ Nathaniel P. Bruhn

COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

No. 2021-P-0156

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

Appellants (Plaintiffs Below),

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,

Appellees (Defendants Below),

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

CERTIFICATE OF SERVICE

I hereby certify that on October 12, 2021 a true and correct copy of the above document was served upon counsel for each party registered for electronic service through the electronic filing system and will serve all other parties by first class mail.

/s/ Nathaniel P. Bruhn

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ADDENDUM

notice sent 5/31/17 (BM)
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5/31

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPERIOR COURT
SUCV2016-03254-F

DR. ROGER M. KLIGLER & another[1]

vs.

MAURA T. HEALY[2] & another[3]

MEMORANDUM OF DECISION AND ORDER ON DEFENDANTS' MOTIONS TO DISMISS

The plaintiffs filed this suit claiming that the Massachusetts Constitution protects the rights of mentally competent terminally ill patients and their doctors to engage in physician assisted suicide. This matter is before the court on the Defendant (DA)'s Motion to Dismiss and the Attorney General's Motion to Dismiss pursuant to Mass. R. Civ. P. 12(b)(6). For the reasons discussed below, the motions are **DENIED**.

BACKGROUND

The following facts are taken from the Complaint and, at this stage, and as the law requires, are assumed to be true for purposes of this motion. Plaintiff Roger Kligler, M.D. is a competent adult who has been diagnosed with Stage 4 Metastatic Castrate-Resistant Prostate Cancer, for which he began treatment in July of 2016. Based on this diagnosis and treatment, his prognosis is a median of twenty-five months to live, with a range of seven to fifty-seven months. Dr. Kligler seeks physician

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[1]Dr. Alan Steinbach

[2]in her official capacity as Attorney General of the Commonwealth of Massachusetts

[3]Michael O'Keefe, in his official capacity as District Attorney of Cape & Islands District

assistance to obtain lethal medication so that he may have the option to end his life peacefully. Plaintiff Alan Steinbach, M.D. is a licensed physician who treats competent terminally ill patients, including Dr. Kligler, with no chance of recovery. Some of these patients have expressed a desire not to live in a state of palliative sedation and are not receiving medical interventions that can be withdrawn. If requested, Dr. Steinbach would provide information and advice to and would write prescriptions for lethal medication to be self-administered by competent terminally ill adults, giving them the option to bring about a quick and peaceful death. However, Dr. Steinbach is deterred from doing so by the fear of criminal prosecution.[4]

Doctors Kligler and Steinbach filed this action against Attorney General Maura Healey ("the AG") and Cape and Islands District Attorney Michael O'Keefe ("the DA") on October 24, 2016. Count I of the complaint seeks a declaratory judgment that "manslaughter charges are not applicable to physicians who follow a medical standard of care and write a prescription to terminally ill, competent adults who request such aid and may choose to self-administer the medication consistent with the practice of 'Medical Aid in Dying.'"[5]

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[4]This Court takes judicial notice of the fact that writing such a prescription is an explicitly authorized practice in several states. See California End of Life Option Act, Health and Safety Code Division 1, § 443 (passed by legislature effective June 9, 2016); Colorado End of Life Option Act, Colo. Rev. Stat. Article 48 (adopted by ballot initiative December 16, 2016); Oregon Death With Dignity Act, Revised Statutes Chapter 127.800 (adopted by ballot initiative October 27, 1997); Vermont Patient Choice and Control at the End of Life Act, Title 18, chapter 113 (passed by legislature May 2013); Washington Death With Dignity Act, Wash. Rev. Code § 70.245 (adopted by ballot initiative November 4, 2008); District of Columbia Death With Dignity Act, B21-0038 (passed by D.C. Council effective February 20, 2017). See Mass. G. Evid. § 202(b) (2016) (court may take judicial notice of laws of other jurisdictions).

[5]The plaintiffs define the term "Medical Aid in Dying" in their complaint to mean "the recognized medical practice of allowing mentally competent, terminally ill adults to obtain medication that they may choose to take to bring about a quick and peaceful death."

Count II alleges that application of the common law of manslaughter to a physician who engages in the conduct described above violates the Massachusetts Constitution because the law is impermissibly vague. Count III alleges that application of the manslaughter law to such a physician impermissibly restricts the constitutional right to privacy, autonomy and bodily integrity, and Count IV alleges that it impermissibly restricts the plaintiffs' fundamental liberty interests. Counts II, III, and IV each request a declaration "that physicians who follow a medical standard of care and write a prescription pursuant to the practice of Medical Aid in Dying to terminally ill, competent adults who request such aid do not violate criminal law, including the common law crime of manslaughter." Each count also seeks an injunction prohibiting the AG and the DA from prosecuting physicians who engage in that conduct.

Count V alleges that application of the law of manslaughter to a physician who provides information and advice about Medical Aid in Dying to competent terminally ill patients who voluntarily ingest lethal prescribed medication constitutes an unlawful restraint on the constitutional right to freedom of speech by hindering physicians' ability to discuss medically appropriate end of life treatment options. Count V seeks a declaration that giving such advice is not manslaughter and an injunction prohibiting the AG and the DA from prosecuting physicians who inform, advise, or counsel patients about Medical Aid in Dying.

Finally, Count VI alleges that application of the manslaughter law to physicians who follow a medical standard of care and provide Medical Aid in Dying violates the constitutional right to the equal protection of law by treating differently terminally ill adults who wish to receive Medical Aid in Dying and terminally ill adults who wish to hasten death by withdrawing life-sustaining treatment. Count VI seeks a declaration that physician assisted suicide is not manslaughter as well as an

injunction against prosecution.

DISCUSSION

The AG and the DA move to dismiss the complaint on the ground that it fails to state a claim for declaratory relief. When evaluating the legal sufficiency of a complaint pursuant to Rule 12(b)(6), the court must accept as true all of the factual allegations of the complaint and draws all reasonable inferences from the complaint in favor of the plaintiff. Coghlin Elec. Contractors, Inc. v. Gilbane Building Co., 472 Mass. 549, 553 (2015); Iannacchino v. Ford Motor Co., 451 Mass. 623, 636 (2008). However, the court need not accept as true legal conclusions cast in the form of factual allegations. Schaer v. Brandeis Univ., 432 Mass. 474, 477 (2000). To survive a motion to dismiss, a complaint must contain factual allegations which, if true, raise a right to relief above the speculative level. Golchin v. Liberty Mut. Ins. Co., 460 Mass. 222, 223 (2011); Iannacchino v. Ford Motor Co., 451 Mass. at 636. The plaintiff's allegations must be more than mere labels and conclusions and must plausibly suggest, not merely be consistent with, an entitlement to relief. Coghlin Elec. Contractors, Inc. v. Gilbane Building Co., 472 Mass. at 553.

I. LACK OF ACTUAL CONTROVERSY

The AG and the DA first contend that dismissal of the complaint is required because this Court cannot grant declaratory relief in the absence of an actual controversy. Thus, this Court must decide whether it has jurisdiction to allow the complaint to proceed to a determination on the merits. The Declaratory Judgment Act provides in relevant part:

> the superior court . . . may on appropriate proceedings make binding declarations of right, duty, status and other legal relations sought thereby, either before or after a breach or violation thereof has occurred in any case in which an actual controversy has arisen and is

specifically set forth in the pleadings . . . .

G.L. c. 231A, § 1.[6] Although the purpose of this statute is remedial and it is to be liberally construed, declaratory relief is not available if there is no actual controversy. Gay & Lesbian Advocates & Defenders v. Attorney Gen., 436 Mass. 132, 134 (2002). An actual controversy means a real dispute caused by one party's assertion of a legal right in which he has a definite interest and the denial of such assertion by another party with a definite interest in the subject matter, where the attendant circumstances plainly indicate that unless the matter is adjusted, the parties' antagonistic claims will almost immediately and inevitably lead to litigation. Id.; Bunker Hill Distrib., Inc. v. District Atty. for Suffolk Dist., 376 Mass. 142, 144 (1978). The defendants contend that there is no actual controversy here because no one has threatened to prosecute Dr. Steinbach for manslaughter.

The application of criminal statutes lies with the prosecutor in the first instance and he cannot be compelled to render advisory opinions at the behest of private citizens. Bunker Hill Distrib., Inc. v. District Atty. for Suffolk Dist., 376 Mass. at 147. Accordingly, where the prosecutor has neither threatened the plaintiff with prosecution nor indicated to the plaintiff that he views particular conduct to be in violation of a criminal statute, there is no actual controversy. Gay & Lesbian Advocates & Defenders v. Attorney Gen., 436 Mass. at 134; Bunker Hill Distrib., Inc. v. District Atty. for Suffolk Dist., 376 Mass. at 144-145. Cf. Benefit v. Cambridge, 424 Mass. 918, 921-922 (1997); Steffel v.

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[6]This Court is not persuaded by the AG's argument that the complaint implicates section 2 of the statute, which permits declaratory judgment to be used "to obtain a determination of the legality of the administrative practices and procedures of any municipal, county or state agency or official which practices and procedures are alleged to be in violation of the Constitution of the United States or of the constitution or laws of the commonwealth . . . which violation has been *consistently repeated* . . . ." G.L. c. 231A, § 2 (emphasis added).

Thompson, 415 U.S. 452, 459 (1974).

The complaint in this case does not allege that either the AG or the DA has threatened to prosecute Dr. Steinbach or asserted an interpretation of the manslaughter law that encompasses the conduct in which he wants to engage. Nonetheless, in deciding a Rule 12(b)(6) motion, the court may consider matters of public record and matters of which it may take judicial notice. Schaer v. Brandeis Univ., 432 Mass. 474, 477 (2000). The court may take judicial notice of a fact that is not subject to reasonable dispute because it can be readily determined from sources whose accuracy cannot reasonably be questioned. Mass. G. Evid. § 201(b)(2) (2016). According to the *Cape Cod Times*, Cape & Island District Attorney Michael O'Keefe has opined that state law prohibits medically-assisted dying and the resulting charge would be murder.[7] In addition, the *New Boston Post* reports that O'Keefe has expressed his belief that physician assisted suicide is illegal until the Legislature passes a law telling him otherwise.[8] The court may take judicial notice of the existence and content of a published newspaper article, particularly when the content is not being considered for the truth of the matters reported. Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 569 n.13 (2007); Kosilek v. Spencer, 889 F.Supp.2d 190, 215 n.6 (D. Mass. 2012), rev'd on merits of claim, 774 F.3d 63 (1st Cir. 2014), cert. den., 125 S.Ct. 2059 (2015). Cf. Bogertman v. Attorney Gen., 474 Mass. 607, 616 (2016).

Here, O'Keefe's statements are offered not for their truth but rather, to show his state of mind and the effect of his words on a reasonable physician. Notably, the defendants do not claim that the

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[7]Haven Orecchio-Egresitz, 2 Cape Doctors Sue for the Right to Participate in Assisted Suicide, *Cape Cod Times*, October 26, 2016.

[8]Evan Lips, Lawsuit Seeks to Prove Legality of Massachusetts Physician-assisted Suicide, *New Boston Post*, October 27, 2016.

statements attributed to O'Keefe in the newspaper are inaccurate, nor do they contend that it is improper for the court to consider those statements in ruling on the motion to dismiss. Rather, they argue that the plaintiffs have taken O'Keefe's statements out of context because when he made them, he had not yet been served with the complaint in this matter and was not commenting on the specific facts of this case. The defendants emphasize that O'Keefe subsequently clarified his position that all manslaughter charges must be considered on a case by case basis and his office does not answer hypotheticals about whether it will commence a prosecution.[9]

This Court does not now decide whether physician assisted suicide is protected by the Massachusetts Constitution.

Rather, the court's task is only to address whether there is jurisdiction to hear the declaratory judgment action brought by Doctors Kligler and Steinbach. In the view of this Court, O'Keefe's statements to the media satisfy the threshold pleading requirement of a credible threat of prosecution for manslaughter. O'Keefe's public comments demonstrate a threat of prosecution to physicians in the Cape and Islands District that is more than imaginary or speculative. Accordingly, the complaint raises an actual controversy appropriate for resolution by declaratory judgment and should not be dismissed at this stage of the proceedings.

In addition, an actual controversy concerning a criminal statute may exist in the case of a constitutional challenge to the validity of legislation on its face or as applied to a class of persons

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[9]The *Boston Globe* reports that when asked specifically whether he would prosecute Dr. Kligler's physician for prescribing lethal drugs, O'Keefe responded, "We don't answer 'ifs'." Patricia Wen, Falmouth Doctor Files Lawsuit Seeking Right to Die: "It's an Option that I Want to Have," *Boston Globe*, October 26, 2016. As noted *supra*, the District Attorney is never required to render advisory opinions. See Bunker Hill Distrib., Inc. v. District Atty. for Suffolk Dist., 376 Mass. at 147.

similarly situated. Moe v. Secretary of Administration & Fin., 382 Mass. 629, 643 (1981); Bunker Hill Distrib., Inc. v. District Atty. For the Suffolk Dist., 376 Mass. at 145; Mobil Oil Corp. v. Attorney Gen., 361 Mass. 401, 405 (1972); Sturgis v. Attorney Gen., 358 Mass. 37, 42 (1970); Commonwealth v. Baird, 355 Mass. 746, 755 (1969), cert. den., 396 U.S. 1028 (1970). See, e.g., Massachusetts Chiropractic Layman's Ass'n, Inc. v. Attorney Gen., 333 Mass. 179, 180 (1955) (actual controversy existed as to constitutionality of application to chiropractors of statute prohibiting practice of medicine without license, where plaintiff held degree of chiropractic and wished to practice in this State). The fact that this case involves the well-established elements of a common law crime rather than the text of a criminal statute is of no consequence for the purposes of declaratory relief.

This Court does not now decide the merits of Doctors Kligler and Steinbach's claim that the Massachusetts Constitution prohibits the prosecution for manslaughter of physicians who prescribe lethal medication to be self-administered by competent terminally ill patients. Rather, it concludes that the complaint survives a motion to dismiss because the plaintiffs have satisfied their threshold burden to allege an actual controversy with respect to the validity of the law of manslaughter as applied to a class of citizens.[10]

Moreover, the United States Supreme Court has stated that in order to contest the constitutionality of a criminal statute, the plaintiff need not first expose himself to actual arrest or

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[10]The Supreme Judicial Court has opined that where the question of the scope of a criminal statute is of continuing concern to the parties, and no criminal prosecution is actually pending, it is responsible for prosecuting authorities to utilize declaratory relief to obtain judicial clarification before subjecting a class of individuals to the hazard and discomfort of criminal litigation. See Attorney Gen. v. Kenco Optics, Inc., 369 Mass. 412, 415 (1976); Knox v. Massachusetts Soc'y for the Prevention of Cruelty to Animals, 12 Mass. App. Ct. 407, 408-409 (1981).

prosecution. See Babbitt v. Farm Workers, 442 U.S. 289, 298 (1979). It is sufficient that the plaintiff has alleged an intention to engage in a course of conduct arguably affected with a constitutional interest but proscribed by statute, and there exists a credible threat of prosecution under the statute. Id. See, e.g., Doe v. Bolton, 410 U.S. 179, 188 (1973) (licensed physicians presented justiciable controversy as to constitutionality of abortion statute although none had ever been prosecuted or threatened with prosecution). In addition, there is an actual controversy where a plaintiff is chilled from exercising his right to free expression or foregoes such expression in order to avoid enforcement consequences. Blum v. Holder, 744 F.3d 790, 796 (1st Cir.), cert. den., 135 S.Ct. 477 (2014). The complaint in this case alleges that Dr. Steinbach wishes to counsel patients and prescribe lethal medication but is deterred from doing so by his fear of prosecution for manslaughter. Given that Dr. Steinbach asserts a First Amendment right to counsel patients, the complaint presents an actual controversy if he has alleged an objectively credible fear of prosecution.

The common law crime of manslaughter may be proved by intentional conduct which involves a high degree of likelihood that substantial harm will result to another: i.e., wanton or reckless conduct resulting in a death. Commonwealth v. Carter, 474 Mass. 624, 631 (2016); Commonwealth v. Catalina, 407 Mass. 779, 789 (1990). There are two reported cases in Massachusetts in which a defendant was charged with or convicted of manslaughter for playing a role in a victim's suicide. As emphasized by the AG and the DA here, the facts of those cases are substantially different from and more egregious than the scenario posited by Doctors Kligler and Steinbach. See Carter, 474 Mass. at 635 (probable cause existed for manslaughter charge where defendant badgered mentally fragile boyfriend, who was predisposed to suicide and in the process of suicide attempt, to get back into truck filled with carbon monoxide); Persampieri v.

Commonwealth, 343 Mass. 19, 22 (1961) (manslaughter conviction proper where husband loaded gun, removed safety, handed it to wife and encouraged her to kill herself, knowing that she was intoxicated, emotionally distraught, and suicidal).

Certain aspects of Massachusetts law suggest that a manslaughter charge for physician assisted suicide is unlikely. In contrast to the majority of states, Massachusetts has not expressed a public policy against assisted suicide by enacting a statute imposing criminal liability on one who assists another in committing that act.[11] Moreover, the Supreme Judicial Court has suggested in dicta that assisting a terminally ill patient in ending his or her life may not be manslaughter. See Carter, 474 Mass. at 636 (noting that manslaughter charge against defendant who coerced depressed boyfriend to commit suicide "is not about a person seeking to ameliorate the anguish of someone coping with a terminal illness and questioning the value of life. Nor is it about a person offering support, comfort, and even assistance to a mature adult who, confronted with such circumstances, has decided to end his or her life.").

However, other aspects of the legal landscape suggest official disapproval of physician assisted suicide. See, e.g., G.L. c. 111, § 227(c) (nothing in palliative care statute "shall be construed to permit a healthcare professional to offer to provide information about assisted suicide or the prescribing of medication to end life."); G.L. c. 201D, § 13 (nothing in statute authorizing health care proxies "shall be construed to constitute, condone, authorize, or approve suicide or mercy killing, or to permit any affirmative or deliberate act to end one's own life other than to permit the natural process of dying."). See also Norwood Hosp. v. Munoz, 409 Mass. 116, 124-127 (1991) (recognizing

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[11]As of 2015, forty states had enacted statutes making assisting or aiding suicide a crime. See Alan Meisel & Kathy L. Cerminara, The Right To Die: the Law of End-of-Life Decisionmaking § 12.09 (3d ed. 2015 Supp.).

state's interests in preserving life, preventing suicide, and maintaining integrity of medical profession).

Ultimately, physician assisted suicide appears to meet the traditional elements of manslaughter, and there is substantial uncertainty as to whether it will be prosecuted as such. Given the state of the law in Massachusetts, it is plausible that a physician who writes a lethal prescription for self-administration by a competent terminally ill patient could be charged with manslaughter upon the death of that patient. This Court therefore concludes that Dr. Steinbach has alleged an objectively credible fear of prosecution, permitting him to challenge application of the manslaughter law to similarly situated physicians.

Finally, although the issue of an actual controversy is a close one on the facts of this case, a judge enjoys some discretion in deciding whether a case is appropriate for declaratory relief. See Pazolt v. Director of the Div. of Marine Fisheries, 417 Mass. 565, 569 (1994); Boston v. Keene Corp., 406 Mass. 301, 305 (1989). This case involves difficult questions of considerable importance to the public as well as a matter of grave personal urgency to Dr. Kligler.

This Court makes no judgment as to the legality of physician assisted suicide in Massachusetts. However, after serious consideration of the AG and the DA's forceful arguments, the court concludes that the plaintiffs have met their burden to plead an actual controversy and therefore, the complaint survives a Rule 12(b)(6) motion to dismiss.

II. EFFICACY OF DECLARATION TO END DISPUTE

The AG and the DA next contend that dismissal is warranted because this Court is incapable of rendering a judgment that will immediately and completely resolve the case. The Declaratory Judgment Act provides in relevant part:

> The court may refuse to render or enter a declaratory judgment or decree where such judgment or decree, if rendered or entered, would not terminate the uncertainty or controversy giving rise to the proceedings or for other sufficient reasons. The reasons for the refusal shall be stated in the record.

G.L. c. 231A, § 3. See also Board of Selectmen of Truro v. Outdoor Advertising Bd., 346 Mass. 754, 759-760 (1964). The defendants argue that there are too many uncertainties in the declarations sought by the plaintiffs. For example, Massachusetts law does not establish a "medical standard of care" for physician assisted suicide, and the appropriate standard remains a matter of debate among professional medical societies. Nor, the defendants argue, are there universally accepted standards for identifying terminal illness and determining the competency of terminally ill patients. The defendants urge this Court to recognize that it cannot resolve these issues in a manner that definitively applies in all cases of physician assisted suicide.

Although Massachusetts law does not include a standard of care specific to this context, case law articulates a well-established general medical standard of care: the degree of care and skill of the average qualified practitioner, taking into account advances in the profession and the available resources. See Palandjian v. Foster, 446 Mass. 100, 105 (2006); Brune v. Belinkoff, 354 Mass. 102, 109 (1968). Moreover, the Legislature already has defined the concept of "terminal illness" in various contexts. See G.L. c. 111, § 228(a) (palliative care); G.L. c. 175, § 212 (life insurance settlements); G.L. c. 167O, § 1 (health insurance consumer protection). In the view of this Court, the existence of some imprecision in these concepts is not an insurmountable barrier to declaratory relief.[12]

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[12]In Baxter v. State, 2008 Mont. Dist. LEXIS 482 (Dist. Ct. Mont. Dec. 5, 2008), vacated on other grounds, Baxter v. State, 224 P.3d 1211 (Mont. 2010), the trial court noted: "Competency is easily determined by the patient's doctor. Treating physicians are frequently

The AG and the DA further argue that the plaintiffs are not entitled to the broad relief sought in the complaint: a declaratory judgment that physician assisted suicide involving a competent terminally ill patient is not manslaughter. Such a sweeping declaration arguably disregards the evaluation of individual facts and circumstances required by the common law of manslaughter and infringes on the prosecutor's exclusive discretion in deciding whether to prosecute a case, particularly ones suggesting fraud or coercion. See Commonwealth v. Cheney, 440 Mass. 568, 574 (2003); Commonwealth v. Clint C., 430 Mass. 219, 224 n.7 (1999). However, even if the plaintiffs are not entitled to the specific relief sought, they are entitled to a declaration of their rights, whether they win or lose this case. Bettencourt v. Bettencourt, 362 Mass. 1, 10 (1972). Doctors Kligler and Steinbach can ask the court at the next stage of the proceedings to declare whether or not the Massachusetts Constitution protects a competent terminally ill patient's right to end his life with the assistance of a physician, and that declaration will immediately impact the parties' rights. See Boston Safe Deposit & Trust Co. v. Dean, 361 Mass. 244, 248 (1972) (recognizing that there may be benefit to parties from a partial or contingent answer to questions raised by complaint for declaratory relief).[13]

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called upon to determine competency of their patients for purposes of guardianship or other legal proceedings. Whether a patient is terminally ill can also be determined by the physician as an integral component of the physician-patient relationship." Baxter, 2008 Mont. Dist. LEXIS 482 at *34. This Court agrees with the Montana trial court's reasoning with respect to the availability of declaratory relief.

[13]A court declared constitutional right, if one indeed exists, may not in all cases prevent the commencement of a prosecution for manslaughter but would furnish the basis for a defense to such a charge. See Norcisa v. Board of Selectmen of Provicetown, 368 Mass. 161, 170 (1975) (noting that unconstitutionality of criminal statute as applied to defendant's conduct is complete defense to charge).

Ultimately, the refusal to enter declaratory relief under G.L. c. 231A, § 3 is a matter of discretion for the court. Board of Selecmen of Truro v. Outdoor Advertising Bd., 346 Mass. at 760. This Court does not now address the merits of the plaintiffs' claim concerning physician assisted suicide. Rather, the court simply must rule on a motion to dismiss. This Court declines the defendants' invitation to exercise its discretion to dismiss Doctor Kligler and Doctor Steinbach's complaint at this stage of the proceedings.

III. LEGISLATIVE FORUM

Finally, the AG and the DA urge this Court to dismiss the complaint because physician assisted suicide implicates complex policy questions involving social, moral, economic, and religious considerations that are best resolved through the legislative process. This Court takes judicial notice of the fact that the Legislature has repeatedly considered but declined to enact proposed legislation that would create limited immunity for physician assisted suicide. Cf. Pereira v. New England LNG Co., Inc., 364 Mass. 109, 122 (1973) ; Bray v. Lee, 337 F.Supp. 934, 937 (D. Mass. 1972).[14] In addition, in November of 2012, Massachusetts voters narrowly rejected Ballot Question 2, an initiative entitled, "Massachusetts Death With Dignity Act."[15]

Several courts rejecting a constitutional right to physician assisted suicide have opined that the questions of morality, medical ethics, and contemporary social norms raised are more appropriately considered and resolved by the legislative branch. See Sampson v. State, 31 P.3d 88,

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[14]Notably, on January 23, 2017, twelve Democrats introduced Bill No. 1225, "An Act relative to end of life options," in the Massachusetts Senate.

[15]Voters were 51.9% opposed and 48.1% in favor of Question 2. Section 18 of that proposed law provided that physician conduct that complied with the law's detailed provisions "shall not constitute suicide, assisted suicide, mercy killing or homicide under any criminal law of the commonwealth."

98 (Alaska 2001); Donorovich-Odonnell v. Harris, 241 Cal. App. 4th 1118, 1140 (Cal. Ct. App. 2015); Blick v. Office of Div. of Criminal Justice, 2010 WL 2817256 at *10 (Conn. Super. Ct.); Morris v. Brandenburg, 376 P.3d 836; 838 (N.M. 2016). Notably, however, none of those courts declined to consider the merits of a constitutional claim on that basis.

This Court does not disagree that the Legislature is a superior forum for grappling with the issue of physician assisted suicide. However, allowing this case to proceed to a hearing on the merits will not foreclose legislative action on that subject. Even if the constitutional right claimed by the plaintiffs exists, the Legislature would be entitled to enact rational guidelines to protect the State's interests in preserving life, protecting the vulnerable from fraud and coercion, and maintaining the integrity of the medical profession.[16]

While the court owes great deference to the Legislature to decide social and policy issues, it is the traditional and settled role of courts to decide constitutional issues. Goodridge v. Department of Pub. Health, 440 Mass. 309, 339 (2003); Bates v. Director of the Office of Campaign & Political Fin., 436 Mass. 144, 168 (2002); Moe v. Secretary of Administration & Fin., 382 Mass. at 642 . The complexity of establishing the parameters of a right to physician assisted suicide ultimately may militate against recognition of such a right, but it does not absolve this Court of the obligation to protect its citizens by adjudicating a properly presented constitutional claim. As noted *supra*, this

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[16]For example, after finding that the Montana Constitution protects the right of a competent terminally ill patient to employ the assistance of a physician to end his life, the trial court stated: "The implementation of this Court's decision, including provisions to protect the compelling state interests, remains a function of the legislature." Baxter v. State, 2008 Mont. Dist. LEXIS 482 at *36. The court noted that the legislature could address such issues as providing an opt out for physicians who did not wish to participate, creating guidelines for participating physicians, establishing standards for terminal illness and competency, and protecting patients from abuses. See id. at *33-36.

Court is not ruling on the merits of Doctors Kligler and Steinbach's constitutional claim at this time. The court concludes only that the plaintiffs have satisfied their minimal burden to allege jurisdiction over their complaint for declaratory relief.

ORDER

For the foregoing reasons, it is hereby **ORDERED** that the Defendant (DA)'s Motion to Dismiss and the Attorney General's Motion to Dismiss be **DENIED**.

Mary K. Ames
Justice of the Superior Court

DATED: May 25, 2017

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPERIOR COURT
DEPARTMENT OF THE
TRIAL COURT

Dr. Roger M. Kligler and Dr. Alan Steinbach,

Plaintiffs,

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.

CIVIL ACTION NO. 16-03254-F

CERTIFICATE OF SERVICE

I hereby certify that on this 28th day of December 2016, I have served copies of the foregoing documents: The Attorney General's Motion to Dismiss, Memorandum of Law in Support of the Attorney General's Motion to Dismiss, and the Notice of Service of Motion to Dismiss by first class mail, postage prepaid, upon:

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Signed under the pains and penalties of perjury.

Robert L. Quinan, Jr. /WEC
Robert L. Quinan, Jr.

December 28, 2016

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPERIOR COURT
DEPARTMENT OF THE
TRIAL COURT

Dr. Roger M. Kligler and Dr. Alan Steinbach,

Plaintiffs,

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.

CIVIL ACTION NO. 16-03254-F

NOTICE OF SERVICE OF MOTION TO DISMISS

In accordance with Superior Court Rule 9E, defendant Maura Healey, Attorney General of the Commonwealth of Massachusetts, hereby gives notice of service this day upon the plaintiffs of her Motion to Dismiss Complaint, which will be filed with the Court in accordance with the requirements of Superior Court Rule 9A(b)(2) within the time limits prescribed by that rule.

MAURA HEALEY
ATTORNEY GENERAL

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Dated: December 28, 2016

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.	SUPERIOR COURT DEPARTMENT OF THE TRIAL COURT
Dr. Roger M. Kligler and Dr. Alan Steinbach, Plaintiffs, 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.	CIVIL ACTION NO. 16-03254-F

THE ATTORNEY GENERAL'S MOTION TO DISMISS

The defendant Maura Healey, in her official capacity as Attorney General of Massachusetts, hereby moves that the plaintiffs' complaint for declaratory judgment and injunctive relief be dismissed on the ground that the complaint does not allege facts that make declaratory and related relief appropriate, and therefore fails to state a claim on which relief can be granted. See Mass. R. Civ. P. 12(b)(6); Iannacchino v. Ford Motor Co., 451 Mass. 623, 635-636 (2008). In short, plaintiffs cannot point to any actual controversy between the parties. Moreover, the complaint fails to state a case for declaratory relief because a present declaration regarding the legality of what plaintiffs style "medical aid in dying" cannot end whatever dispute might arise on the subject in the future. And, at bottom, this important public policy issue belongs in the Legislature. The enormously complicated and weighty policy considerations surrounding the practice of self-administered, medically-induced extinguishment of terminally-ill patients' lives, and the working out of regulatory details if any such policy were to be adopted,

are the business of the Legislative and Executive Branches. In further elaboration of these arguments, the Attorney General respectfully refers this Court to her memorandum of law in support of motion to dismiss filed herewith.

WHEREFORE, the Attorney General requests:

1. That this motion to dismiss be allowed with prejudice.
2. That the court grant whatever alternative relief is appropriate in the circumstances.

MAURA HEALEY
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Dated: December 28, 2016

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPERIOR COURT
DEPARTMENT OF THE
TRIAL COURT

Dr. Roger M. Kligler and Dr. Alan Steinbach,

Plaintiffs,

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.

CIVIL ACTION NO. 16-03254-F

MEMORANDUM OF LAW IN SUPPORT OF THE ATTORNEY GENERAL'S MOTION TO DISMISS

Defendant Maura Healey, Attorney General of the Commonwealth, submits the attached memorandum of law in support of her motion to dismiss the plaintiffs' complaint for declaratory judgment and injunctive relief.

Respectfully submitted,

MAURA HEALEY
ATTORNEY GENERAL

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TABLE OF CONTENTS

INTRODUCTION

Plaintiffs' complaint alleges that the lead plaintiff, Dr. Roger M. Kligler, is terminally ill, anticipates that he will experience considerable discomfort and loss of bodily functions and integrity before death overtakes him naturally, and so desires that a physician make available to him medication that will hasten the onset of death, to be self-administered (if at all) at a time of his choosing. His co-plaintiff, Dr. Alan Steinbach, is prepared to accommodate Dr. Kligler's request, but will not do so because he fears prosecution under the manslaughter statute or other state criminal law. The plaintiffs seek declaratory relief that will assure them either that what they contemplate is not criminal in Massachusetts or, if it is, that criminalizing such conduct violates the Massachusetts Constitution. They also seek accompanying injunctive relief against prosecution. The prayers for relief request a declaratory judgment and injunctive relief on behalf of physicians in general, not merely Dr. Steinbach.

The Attorney General has considerable sympathy for Dr. Kligler, and acknowledges the very difficult circumstances that exist when any grievously ill individual contemplates medically-induced death, as well as the weighty social, moral, cultural, medical, and economic issues that arise at the end of life. Nevertheless, this complaint is not the proper vehicle to establish or change public policy on these issues. The Massachusetts Legislature has repeatedly considered, but declined to enact, proposed legislation that would create limited immunity for active medical intervention to advance the time of death. In November 2012, the public rejected a similar measure presented in the form of an initiative petition. Plaintiffs now seek to transfer the public policy question to the judiciary, but the role of the courts typically is to resolve concrete individual disputes based on policy decisions made and implemented by other branches of government—not to make far-reaching judgments that are fundamentally legislative in nature.

Application of several judicially-honed criteria concerning whether and when declaratory

judgment procedure is available establishes that neither declaratory nor injunctive relief is appropriate here. Accordingly, dismissal of the complaint without rendering a declaration is required. See Gay & Lesbian Advocates & Defenders v. Attorney General, 436 Mass. 132, 134-136 (2002) ("GLAD"). Most important of all, currently there is no actual controversy that can be adjudicated definitively. No prosecution is presently threatened or pending. A "medical standard of care" on which the requested declaration is predicated does not exist in Massachusetts with respect to patient-directed, medically-induced death. The case set forth in the complaint does not, and nor could it, reflect the large variety of factual permutations surrounding medical determinations as to patient capacity to exert free will, or prosecutorial determinations regarding the possible application of homicide law to medical interventions that hasten the onset of death. The declaratory judgment statute itself does not contemplate relief against government officers where violations have not been repeated. Finally, declaratory relief should be denied as a matter of discretion because the complex policy questions that this complaint poses must in the first instance be addressed by the Legislative Branch.

STATEMENT OF FACTS

Because this is a motion to dismiss, the facts alleged in the complaint are presumed true at this stage of the proceeding. Dr. Kligler, a retired physician, is a cancer patient. Based on his diagnosis and treatments that began in July, 2016, it is anticipated that he will live between seven and fifty-seven months from that treatment commencement date. He may not lawfully write a prescription for himself, but wishes to obtain from another physician a prescription for lethal medication that he may self-administer at a time of his choosing "if and when his suffering at the end of his life becomes unbearable." Complaint, pars. 3, 7.

Dr. Kligler is unable to locate a physician in Massachusetts to provide such a prescription because doctors fear criminal prosecution for so doing. Id. Dr. Steinbach, a physician licensed to practice in Massachusetts, would do so not only for Dr. Kligler but also for other terminally ill,

competent adults "who, at their own discretion, could exercise the option to self-administer the drug." Complaint, par. 8. Dr. Steinbach would as well "provide information and advise patients about all of their end-of-life options, including Medical Aid in Dying."[1] He "does not provide Medical Aid in Dying because he fears criminal prosecution under the laws of the Commonwealth of Massachusetts." Complaint, pars. 4, 8.

PRAYERS FOR RELIEF

The plaintiffs request a declaration that "physicians do not violate the criminal laws of the Commonwealth of Massachusetts when they follow a medical standard of care and prescribe Medical Aid in Dying medications for self-administration by the patient, or when they provide information or advice about such medications." Complaint, para. 70, prayer A. In the alternative, the plaintiffs pray for a declaration that "application of criminal laws of the Commonwealth of Massachusetts to physicians providing such care is unconstitutional under the Massachusetts Constitution." Id. In support of this proposition, the plaintiffs rely on constitutional provisions regarding due process (Complaint, pars. 44-57); free speech (pars. 58-63); and equal protection (pars. 64-69). In addition, they seek an injunction permanently enjoining the defendants (the Attorney General and the Cape & Islands District Attorney) "from prosecuting physicians for providing information and advice to terminally ill, competent adult patients on Medical Aid in Dying or for prescribing medication for Medical Aid in Dying to such patients upon request." Complaint, par. 70, prayer B.

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[1] This brief does not adopt plaintiffs' "Medical Aid in Dying" locution for two reasons. First, that phrase runs the risk of confusing passively hastening death—*i.e.*, withholding or withdrawing life-sustaining medical treatment, which often is lawful in Massachusetts—with actively hastening death through a lethal agent. Second, it fails to distinguish between providing aid to a patient who actively ends his own life—what many term physician-assisted suicide—and a doctor actively ending a patient's life (active euthanasia). When this brief uses the phrase "Medical Aid in Dying" herein, it is by way of reference to language in the complaint.

ARGUMENT

I. THIS COURT SHOULD NOT ENTERTAIN THE REQUEST FOR DECLARATORY RELIEF BECAUSE AN ACTUAL CONTROVERSY IS NOT PRESENT NOW AND AN ACTUAL CONTROVERSY WOULD NOT BE CREATED BY ANY REFUSAL ON THE PART OF THE DEFENDANTS TO OFFER ANY COMMITMENT REGARDING PROSECUTION.

Ordinarily, "when an action for declaratory relief is properly brought, even if relief is denied on the merits, there must be a declaration of the rights of the parties." City of Boston v. Mass. Bay Transp. Auth'y, 373 Mass. 819, 829 (1977). However, this proposition does not apply where plaintiffs seek declaratory relief without alleging facts that make the rendering of a declaration proper. In such instances, dismissal of the complaint is the appropriate remedy. See GLAD, 436 Mass. at 134-136 (finding that declaratory judgment action should be dismissed where no actual controversy existed and disputed issue in case required fact finding). Here, the plaintiffs have not alleged facts that entitle them to declaratory relief. Thus the complaint fails to state a claim on which relief can be granted, see Iannacchino v. Ford Motor Co., 451 Mass. 623, 635-636 (2008), and the complaint should be dismissed.

A. The Complaint Fails to Allege the Existence of an Actual Controversy.

Certain specified courts "may on appropriate proceedings make binding declarations of right, duty, status and other legal relations sought thereby . . . in any case in which an actual controversy has arisen and is specifically set forth in the pleadings." G.L. c. 231A, § 1 (emphasis supplied). An actual controversy exists where there is:

> a real dispute caused by the assertion by one party of a legal relation, status or right in which he has a definite interest, and the denial of such assertion by another party also having a definite interest in the subject matter, where the circumstances attending the dispute plainly indicate that unless the matter is adjusted such antagonistic claims will almost immediately and inevitably lead to litigation.

Bunker Hill Distributing, Inc. v. District Attorney for the Suffolk District, 376 Mass. 142, 144 (1978), quoting School Comm. of Cambridge v. Superintendent of Schools of Cambridge, 320 Mass. 516, 518 (1946). Controversy in the abstract is not sufficient to invoke the declaratory

judgment remedy. See Mass. Ass'n of Indep't Ins. Agents and Brokers v. Comm'r of Insurance, 373 Mass. 290, 293 (1977). "Such proceedings are concerned with the resolution of real, not hypothetical, controversies; the declaration issued is intended to have an immediate impact on the rights of the parties." Id. at 292-293.

Here, while the plaintiffs certainly have a strong enunciated interest in the subject matter, their complaint does not set forth that an actual dispute presently exists. No prosecution has commenced, nor has either defendant threatened to prosecute. The defendant District Attorney, whose office would presumably take the lead were such a prosecution contemplated, has quite properly stated that he does not act in advance on hypotheticals with undetermined facts.[2] Consequently, the plaintiffs have not set forth in their complaint either of the two factual allegations that are essential to a claim for declaratory relief.

First, they have not alleged, nor could they, that the defendants have taken a position adverse to their assertion of rights. See Bunker Hill Distributing, 376 Mass. at 144 (actual controversy requires "the denial of [plaintiffs'] assertion by another party also having a definite interest in the subject matter"). There has been no denial of plaintiffs' assertions by either defendant.

Second, the complaint must allege circumstances that, absent a prior resolution, make it inevitable that the antagonistic claims "will almost immediately and inevitably lead to litigation." Id. There being no present controversy, the plaintiffs could hardly allege, and they have not alleged, that immediate litigation is inevitable. Where there is no present controversy, a request for declaratory relief constitutes nothing more than a request for an advisory opinion and should be dismissed. See GLAD, 436 Mass. at 135.

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[2] Patricia Wen, Falmouth doctor files lawsuit seeking right to die, Boston Globe, Oct. 26, 2016 ("Asked if he would prosecute Kligler's physician if he knew that Kligler had died and the doctor had provided drugs for the death, [District Attorney] O'Keefe replied, 'We don't answer "if"s.'")

The plaintiffs do not allege, but may soon suggest, that their concern with the possibility of prosecution is sufficient to create the requisite actual controversy for declaratory judgment purposes. Their concern that their challenge to existing law might provoke an official response in the future does not establish that there is an actual dispute now. See Bunker Hill Distributing, 376 Mass. at 144 (declaratory relief complaint dismissed where district attorney neither threatened prosecution nor indicated he considered that motion picture violated obscenity statute).

Furthermore, the plaintiffs' concern that they could be prosecuted for manslaughter or another crime finds little support in the history of official responses to physician advice and action with respect to terminally ill patients. "In recent times, although there are news accounts of physicians (and non-physicians) who have been investigated by criminal and/or regulatory authorities for administering lethal doses of medications to terminally ill patients, there have been few prosecutions[.]" Alan Meisel, et al., The Right to Die: The Law of End-of-Life Decisionmaking, § 12.04[D] (3rd ed., Wolters Kluwer, 2016 supp.); id. at § 12.04[F] n.162 (citing only one prosecution in the United States in the 21st century).[3] The Attorney General is aware of no prosecution in Massachusetts for "Medical Aid in Dying" or assisted suicide by any other name that have not involved some form of recklessness or duress. None of the actual prosecutions charged physician assistance or advice.

To be sure, involuntary manslaughter convictions have been upheld in cases of "wanton or reckless" conduct "involv[ing] a high degree of likelihood that substantial harm will result to another." Commonwealth v. Welansky, 316 Mass. 383, 399 (1944). The following specifically

[3] In 1996, the Ninth Circuit noted that "[t]here is no reported American case of criminal punishment being meted out to a doctor for helping a patient hasten his own death." Compassion in Dying v. Washington, 79 F.3d 790, 811 (9th Cir. 1996), quoted in Kenneth Klothen, Tinkering with the Legal Status Quo on Physician-Assisted Suicide: A Minimalist Approach, 14 Rutgers J. L. & Religion 361, 372 & n.46 (2013) (author Klothen noting that he has found only one such case reported since then, apart from the prosecutions of Dr. Jack Kevorkian for active euthanasia).

entailed direct participation in a completed suicide: In Persampieri v. Commonwealth, 343 Mass. 19, 22-23 (1961), the defendant goaded his emotionally disturbed wife, loaded the weapon, and coached her how to fire the fatal shot. In Commonwealth v. Atencio, 345 Mass. 627, 629-631 (1963), the defendant engaged in a game of Russian roulette with the victim. And in the recent case of Commonwealth v. Carter, 474 Mass. 624, 626-628 (2016), the defendant encouraged the victim to kill himself and chastised him when he delayed doing so. Each case turned on the precise and unusual circumstances presented—circumstances that differ significantly from what plaintiffs propose.

That is not to say that, having commenced this action and having encouraged public awareness of it through the media, the plaintiffs may not find that they have invited official attention. If so, the result is self-induced. At the present time, there is no prosecution, no threat of prosecution, and no actual controversy sufficient to satisfy the requirements of the declaratory judgment statute. The plaintiffs' concern that they could be prosecuted on discrete facts that may or may not constitute criminal violations does not create any actual controversy.

B. The Refusal of Prosecutors to Commit to Prosecute or Not to Prosecute in Advance of a Determination of the Unique Facts Does Not Create an Actual Controversy that Entitles the Plaintiffs to a Declaratory Judgment.

Citing Persampieri and Carter—cases which, as noted above, dealt with circumstances quite different from what is contemplated by the present complaint—the plaintiffs state that there is "uncertainty as to whether informing or advising patients regarding Medical Aid in Dying or providing a prescription for Medical Aid in Dying is also a prosecutable offense." Complaint, pars. 19-20. That the plaintiffs are "uncertain" regarding their rights and possible exposure in the circumstances does not by itself create the kind of actual present controversy that the declaratory judgment statute contemplates. For there to be an actual controversy, there must be both a plaintiff with "a definite interest" to assert, and "the denial of such assertion by another party also

having a definite interest in the subject matter." It must be shown also that "such antagonistic claims will almost immediately and inevitably lead to litigation." GLAD, 436 Mass. at 134-135.

As indicated, neither defendant has threatened prosecution. A law enforcement officer is entitled to remain silent on the subject as long as the alleged facts remain hypothetical, see Bunker Hill Distributing, 376 Mass. at 144-145, and the defendants' refusal to commit unless and until an investigation of actual facts takes place is within their lawful prerogatives. That the plaintiffs are left uncertain how to proceed does not constitute an actual controversy within the scope of the declaratory judgment statute.

An actual controversy can emerge only if a court *assumes* there will be a prosecution on the facts alleged, or if the court orders the defendants to state in advance whether they will prosecute. Neither position is tenable. The defendants, and prosecutors in general, are Executive Branch officials with the responsibility to determine who and under what circumstances to prosecute. Such prosecutorial decisions are not the function of the Judicial Branch. See Massachusetts Declaration of Rights, Pt. 1, Art. 30 ("the judicial shall never exercise the legislative and executive powers, or either of them"). Judicial deference to the authority of the prosecutor is demanded particularly when a decision to prosecute turns on facts that require both investigation and judgment whether to proceed criminally. See GLAD, 436 Mass. at 135-136.[4] This is especially so when it is the complexities of a possible involuntary manslaughter charge that are involved.

In Massachusetts, the elements of manslaughter are not expressly stated in any statute, but have been described in judicial decisions. General Laws c. 265, § 13, the only applicable statute,

[4] In the GLAD case, the issue was whether the plaintiffs' sexual conduct occurred in public or private. The Supreme Judicial Court ruled that "[t]he plaintiffs' stipulation that they commit these acts in their residence, vehicles parked in a parking lot, wooded outdoor areas, and secluded areas of public beaches is too general to permit us to conclude that there is an actual controversy over whether the location of their conduct is public or private." 436 Mass. at 135-136.

sets forth the punishment, but does not otherwise define the offense. See Commonwealth v. Carter, 474 Mass. 624, 632 (2016). "Involuntary manslaughter is a proper result only in quite particular factual scenarios." Ariel A. v. Commonwealth, 420 Mass. 281, 287 n.7 (1995). In Massachusetts, active intervention to hasten the onset of death is not explicitly condoned by statute or viewed as lawful under the common law, and participating in another's life-ending act can in certain circumstances be a criminal offense. Whether a particular form of medical assistance or advice that advances when a patient would otherwise die would constitute involuntary manslaughter under Massachusetts law can be assessed only by means of a close examination of the factual circumstances in a given case. It follows that application of the elements of manslaughter is too case-specific a process to be reduced to a general declaration that physician involvement in a patient-chosen, medically-induced death either always is or always is not criminal in this state.

The only instances in which Massachusetts courts have interfered with the criminal process either in advance or while criminal proceedings were pending have featured "very special circumstances." See Norcisa v. Board of Selectmen of Provincetown, 368 Mass. 161, 171. The Supreme Judicial Court has noted that "however the concept is phrased, the necessity of defending a single criminal prosecution rarely, if ever, justifies issuance of the injunction." Id. Rather, the court should take into account whether "the available defenses to the . . . criminal complaint amount to an adequate remedy at law." Id. at 168. Should the plaintiffs believe that active intervention to hasten death is not criminal, or that criminalizing it is unconstitutional, their propositions "may be determined as readily in the criminal case as in a suit for injunction." Id., quoting Douglas v. Jeannette, 319 U.S. 157, 163-164 (1943). Declining to grant declaratory relief at a time when an actual controversy does not exist does not deprive the plaintiffs of an effective forum in which to advance their defenses should an actual controversy arise. "Permitting

declaratory or injunctive relief in the absence of a threat of enforcement removes control of litigation from the prosecutor and subjects limited prosecutorial resources to allocation, not through the judgment of the appropriately elected official, the district attorney, but at the instigation of insular interests." Bunker Hill Distributing, 376 Mass. at 147.

"The cases in which an actual controversy concerning criminal statutes has been found generally involved constitutional challenges to the facial validity of legislation or to its validity as applied to a class of persons similarly situated." Id. at 145. Neither condition is present in this case. Massachusetts has no statute that addresses medical aid to advance death, and thus prior adjudication of such a statute's validity either facially or as applied is impossible. Furthermore, the complaint alleges distinctive facts that have not been shown to apply to a "similarly situated" class,[5] and that are not exempt from the detailed consideration of individual circumstances that is required in manslaughter prosecutions. Cf. District Attorney for the Suffolk District v. Watson, 381 Mass. 648, 659-660 (1980) (court considered facial constitutionality of death penalty statute where no facts had to be adjudged, there existed uncertainty regarding administration of first degree murder cases, and there were "clearly exceptional [circumstances] justifying declaratory relief to prevent disruption of the orderly administration of criminal justice"). The present plaintiffs have not stated such a case.

II. THE COMPLAINT FAILS TO STATE A CASE FOR DECLARATORY RELIEF BECAUSE A PRESENT DECLARATION CANNOT END WHATEVER DISPUTE MAY ARISE.

Even were it determined that the present complaint sets forth the existence of an actual controversy, declaratory relief is unavailable because the court cannot render a judgment that will now resolve the case. Where a declaratory judgment will not terminate the controversy, a judge

[5] Dr. Kligler's status as a terminally ill *physician* requesting a lethal prescription renders him peculiarly atypical of patients who have sought to control the timing of their own deaths.

has "a substantial range of discretion to deny or postpone declaratory relief." Boston Safe Deposit and Trust Company v. Dean, 361 Mass. 244, 248 (1972). "One of the principal purposes of the declaratory judgment law, G.L. c. 231A, is to settle completely the controversy submitted for decision." Spillane v. Adams, 76 Mass. App. Ct. 378, 386 (2010), quoting Kilroy v. O'Connor, 324 Mass. 238, 242 (1949).

Assuming that the factual allegations of the complaint are true, there are nevertheless multiple uncertainties, any one of which will prevent the court from rendering a declaration that will finally resolve whatever dispute is shown to exist. First, the plaintiffs seek a declaration that provides in part that "physicians do not violate the criminal laws of the Commonwealth of Massachusetts when they follow a medical standard of care" in prescribing lethal medication for future self-administration. See Complaint, par. 70, prayer A. But this requested articulation of Massachusetts law turns on a standard that is not recognized in the Commonwealth, thereby making it impossible for the court ultimately to decide whether "Medical Aid in Dying" has been properly delivered.

The requested declaration does not define "medical standard of care," nor does it refer to any external definition thereof. This is because Massachusetts has no specific criteria that would constitute a standard of care applicable to physician participation regarding a patient's choice to advance the time of death. No statute or administrative regulation governs the subject. Professional societies of Massachusetts doctors have not generated applicable codes or rules.

Indeed, professional medical societies have generally opposed physician intervention to hasten the onset of death. The Massachusetts Medical Society, for example, vigorously opposed Question 2 on the 2012 state ballot (a proposed law allowing a licensed physician to prescribe

medicine at the request of a terminally ill patient to end that patient's life).[6] Likewise, "maintenance of the ethical integrity of the medical profession" is cited frequently as a state interest that may override individual choice on the subject. See Brophy v. New England Sinai Hospital, Inc., 398 Mass. 417, 432 (1986), citing Superintendent of Belchertown State School v. Saikewicz, 373 Mass. 728, 741 (1977). Thus, a critical component of the proposed declaration—a medical standard of care—cannot be applied to resolve conclusively this or similar disputes.

Second, the complaint alleges that the procedure that would be the subject of a declaration would be restricted to "mentally competent, terminally ill adults" who may be given lethal medication that they choose to self-administer at some point in the future that they themselves select. Complaint, pars. 2, 5, 14. Passing the question how present competency is to be determined given the grievous circumstances affecting the state of mind of a patient who knows she is terminally ill,[7] confidence that a given patient is presently competent, and that her decision is not the product of coercion or undue influence, does not translate into certainty that a copacetic mental state will exist in the future. The time at which Dr. Kligler or any patient may choose to avail himself of the prescribed medication is by definition a future time, with his mental condition

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[6] We append a copy of the Overview of Massachusetts Ballot Question 2 published by the Massachusetts Medical Society in 2012 as Exhibit A. This overview quotes the American Medical Association's Code of Ethics, which states that "allowing physicians to participate in assisted suicide would cause more harm than good. Physician assisted suicide is fundamentally incompatible with the physician's role as healer." Id. at § 5.7 (2016 ed.). In evaluating the Attorney General's motion to dismiss, this Court may consider "matters of public record" and other items susceptible of judicial notice, such as professional codes. Schaer v. Brandeis University, 432 Mass. 474, 477 (2000), quoting 5A C.A. Wright & A.R. Miller, Federal Practice and Procedure § 1357, at 299 (1990).

[7] The observations of the Alaska Supreme Court on this very question nonetheless bear noting. That court, in a case similar to this one, concluded that "the mental competency of terminally ill patients is uniquely difficult to determine." "[B]y proposing to restrict physician-assisted suicide to mentally competent adults, [plaintiffs] would hinge the exercise of that right on a vague, unverifiable, and subjective standard." Sampson v. State, 31 P.3d 88, 97 (Alaska 2001).

and the surrounding circumstances impossible to predict now.[8] That the decision could result from "substituted judgment," Saikewicz, 373 Mass. at 745-755,[9] makes the potential for misguided judgment even more alarming and is an additional reason why the Legislature, not the judiciary, is the appropriate forum for this debate. See Argument IV below.

Third, what constitutes a "terminal" illness is the subject of vigorous debate and some conjecture.[10] As the Alaska Supreme Court has noted, "[t]o define an eligible class of terminally ill persons would be a daunting enterprise – especially for a court of law." Sampson v. State, 31 P.3d 88, 97 (Alaska 2001) (affirming denial of an order declaring physicians exempt from manslaughter charges if they assisted dying patients to end their lives unnaturally). Doctors are "notoriously poor" at predicting the remaining life span of terminally ill patients. John Schumann, M.D., *The Worst Fortune Tellers*, SLATE (Aug. 18, 2010), available at http://tinyurl.com/o2mhb8q. In every U.S. jurisdiction in which patient-chosen medically-induced death is expressly permitted,

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[8] Plaintiffs' complaint alleges that "people [with Dr. Kligler's form of cancer] live a median of 25 months, with a range of 7 to 57 months after starting treatment." Complaint, par. 7. Dr. Kligler commenced treatment in July, 2016. Id. On information and belief (see footnote 10, infra), the medical community treats as "terminal" those patients whose deaths are anticipated within six months. The longer Dr. Kligler lives and the longer the choice to self-administer death-inducing medication is postponed, the greater the uncertainty regarding what his future mental state and the surrounding circumstances would be, and the less likely it is that this complaint sets forth a present actual controversy capable of a reliable, final resolution now. Furthermore, the Attorney General recognizes that, as a physician, Dr. Kligler is a unique patient and that concerns regarding the competency of some terminally ill patients may prove much more acute in other cases.

[9] But see G.L. c. 201D, § 12 ("Nothing in this chapter [dealing with health care proxies] shall be construed to constitute, condone, authorize, or approve suicide or mercy killing, or to permit any affirmative or deliberate act to end one's own life other than to permit the natural process of dying.").

[10] "In a systematic review, [researchers] identified six definitions related to terminally ill from various palliative oncology publications. Four of these definitions involved a life expectancy of six months or less." Hui, David et al. "Concepts and Definitions for 'Actively Dying,' 'End of Life,' 'Terminally Ill,' 'Terminal Care,' and 'Transition of Care': A Systematic Review." Journal of Pain and Symptom Management 47.1 (2014): 77–89.

the governing statutes limit eligibility to those patients whose deaths are anticipated within six months. Whether or not Dr. Kligler is presently terminally ill under other states' statutory standards, no standard of lawful intervention on which a declaration or court order can be based has been established in the Commonwealth. Likewise, no court is equipped to declare that palliative sedation has failed,[11] leaving "Medical Aid in Dying" as the only viable option short of natural death. Plaintiffs seek a declaration that physicians may lawfully prescribe lethal medication for self-administration by patients "if and when their suffering becomes unbearable." Complaint, par. 5. But plaintiffs' claim for relief "would inevitably involve the judiciary in deciding questions that are simply beyond its capacity. There is no court that can answer the question of how *much* pain, or perception of pain by a third party, is necessary before the suffering becomes intolerable and irremediable." People v. Kevorkian, 639 N.W.2d 291, 307 (Mich. App. 2001) (emphasis in original).

When a declaratory judgment "would not terminate the uncertainty or controversy giving rise to the proceedings, or for other sufficient reasons, the court may refuse to render or enter a declaratory judgment or decree." Spillane, 76 Mass. App. Ct. at 386. Here, the main components of the broad legal principle that plaintiffs advocate—terminally ill patient, competency, unbearable pain, medical standard of care—cannot be determined for all cases on the allegations of this complaint. There is no answer a court could provide that would address sufficiently all conceivable circumstances surrounding patient-directed, medically-induced death, and thereby

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[11] The Hospice and Palliative Care Federation of Massachusetts defines "palliative sedation" as "the monitored use of medications to relieve refractory and unendurable physical, spiritual and psycho-social distress for patients with a terminal diagnosis, by inducing varied degrees of unconsciousness. The purpose of the medication is to provide comfort and relieve suffering and not to hasten death." See http://www.hospicefed.org/?page=bestpractices (last visited on December 23, 2016). That last phrase dovetails with the Massachusetts statute dealing with palliative care and end-of-life options, G.L. c. 111, § 227, which provides: "Nothing in this section shall be construed to permit a healthcare professional to offer to provide information about assisted suicide or the prescribing of medication to end life."

afford plaintiffs the certainty they desire (effectively, immunity for helping to end a biologically viable life). Consequently, the subject matter of plaintiffs' complaint does not lend itself to a declaratory judgment.

III. DESPITE THE REQUIREMENT OF G.L. c. 231A, § 2, THE COMPLAINT FAILS TO ALLEGE THAT THE DEFENDANTS HAVE VIOLATED THE LAW AND THAT SUCH VIOLATIONS HAVE BEEN CONSISTENTLY REPEATED.

As set forth above, declaratory judgment is not available because there is no actual controversy, or whatever dispute there is cannot finally be resolved. Given that the defendants are public officers, the statute restricts use of the declaratory judgment in an additional way.

General Laws c. 231A, § 2, provides in relevant part: "[The] procedure under section one may be used in the superior court to enjoin and to obtain a determination of the legality of the administrative practices and procedures of any municipal, county or state agency or official which practices or procedures are alleged to be in violation of the Constitution of the United States or of the constitution or the laws of the commonwealth . . . , which violation has been consistently repeated." (Emphasis supplied.) The present defendants are public officers charged with, among other things, the adoption of practices and procedures governing the choice of cases to prosecute.

The above-quoted provision reflects that many significant governmental functions are the business of the Executive Branch. While the judiciary renders judgment on executive decisions on a case-by-case basis (criminal prosecutions, judicial review of agency decisions, etc.), it is not expected that the Judicial Branch will exercise judgment with respect to the functioning of the executive officers or agencies in the first instance. An exception is captured in G.L. c. 231A, § 2, wherein the Legislature contemplated the possibility that executive officers might engage in a pattern of unlawful conduct that the judiciary should be empowered to remedy through the declaratory judgment procedure.

The complaint alleges no facts that would justify the invocation of this provision. It accuses neither defendant of violating the United States Constitution or the Constitution or laws of the Commonwealth on any occasion, much less that they have done so repeatedly. As indicated, neither defendant has commenced criminal proceedings, nor has either threatened a prosecution. Indeed, the complaint expresses uncertainty regarding the defendants' intentions, see Complaint, par. 26, another indication that those officers have done nothing to invoke the reach of G.L. c. 231A, § 2.

Should a prosecution materialize in the future—despite the fact that none involving a physician appears to have occurred in Massachusetts in living memory—that by itself would not constitute a violation of law on the part of the prosecutor, and certainly not a repeated violation. Prosecutors do not violate the law by seeking indictments, even if defendants are subsequently acquitted. The complaint does not allege that the defendants have engaged in bad-faith prosecution, nor could it, on this or any related subject, and so declaratory judgment procedure is not available.

IV. THIS IMPORTANT PUBLIC POLICY ISSUE BELONGS IN THE LEGISLATURE.

Apart from the above considerations, any one of which requires rejection of the plaintiffs' request for a declaration, the court should decline to render a declaratory judgment as a matter of discretion because, barring another public referendum, the subject matter ultimately belongs in the Legislative Branch. The many weighty policy questions that are implicated range across a spectrum of social, moral, economic, religious, and cultural considerations. There is no dispute that Dr. Kligler and those who suffer similarly are deserving of the utmost compassion, and their arguments that the law should adjust to take their extreme circumstances into account deserve close and serious consideration in various public fora, including the Legislature.

At the same time, there are countervailing public interests: "We have recognized at least four countervailing State interests: (1) the preservation of life; (2) the protection of interests of third parties; (3) the prevention of suicide; and (4) the maintenance of the ethical integrity of the medical profession." Brophy, 398 Mass. at 432. Accord Com. v. Pugh, 462 Mass. 482, 504 (2012). See also Meisel, et al., The Right to Die, supra, at § 12.05[A][1][a][ii]. The Commonwealth also has a legitimate interest in providing positive protections to ensure that a terminally ill patient's end-of-life decision is informed, independent, and procedurally safe.[12] The balancing of conflicts between such interests and those of the plaintiffs and other patients and physicians is for the policy-making arm of the government. If the Legislature decides that it is time to accommodate the needs of the terminally ill in the way advanced by the plaintiffs, then the Legislature will also be the forum in which necessary and appropriate standards, procedures, and safeguards will be adopted.

There is a broad national consensus that these questions are not for the courts. The concerns "require robust debate in the legislative and executive branches of government." Morris v. Brandenburg, 372 P.3d 836, 838 (N.M. 2016). "We defer to the political branches of

[12] As noted by the New Mexico Supreme Court last summer, "end-of-life decisions are inherently fraught with the potential for abuse and undue influence." Morris v. Brandenburg, 372 P.3d 836, 849 (N.M. 2016). "Regulation in this area is essential, given that if a patient carries out his or her end-of-life decision it cannot be reversed, even if it turns out that the patient did not make the decision of his or her own free will." Id. at 857. If plaintiffs were to obtain the declaration they seek, would any Massachusetts court determine in future cases whether decisions by other patients to avail themselves of lethal drugs were principally motivated by finances, the patient's sense of being a burden on others, fear resulting from impending death or ongoing debility, or depression from inadequate medical care or improper pain management? Additionally, it surely will not fall to any court, for example, to police how a lethal drug, once prescribed, is to be safeguarded and kept from potentially unscrupulous, or underage, hands—an imperative that could remain of vital concern for months in view of the fact that, of the more than 1,500 patients in Oregon who have requested a lethal prescription, about 35 percent never use the drug. Haider J. Warraich, Going Beyond 'Do No Harm', New York Times, Nov. 5, 2016, at A-19. See Jackson v. Longcope, 394 Mass. 577, 580 n.2 (1985) ("reasonable to take judicial notice of facts when considering a motion to dismiss").

government on the question of whether aid-in-dying should be considered a prosecutable offense." Myers v. Schneiderman, 31 N.Y.S.3d 45, 55 (N.Y. App. Div. 2016). "Because the controversy surrounding physician-assisted suicide is so firmly rooted in questions of social policy, rather than constitutional tradition, it is a quintessentially legislative matter." Sampson v. State, 31 P.3d 88, 98 (Alaska 2001). "[T]he controversial issue of physician aid-in-dying is for the Legislature." Donorovich–Odonnell v. Harris, 241 Cal. App. 4th 1118, 1140 (2015), review denied (Feb. 3, 2016) (noting that the law of "physician aid-in-dying" should not be changed by judicial opinion because the safeguards accompanying any such law should be designed by the Legislature). The case for assisted suicide "should not be decided on the basis of the Court's own assessment of the weight of the competing moral arguments." Krischer v. McIver, 697 So. 2d 97, 104 (Fla. 1997). "[It] seems particularly critical for the policy branches of government to establish such a right, if one is to be established." Kevorkian v. Thompson, 947 F. Supp. 1152, 1171 (E.D. Mich. 1997).[13]

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[13] The federal judge who decided the Kevorkian v. Thompson case further explained that

> courts are simply not equipped to conduct the type of comprehensive, broad-based hearings at which witnesses and experts on all sides of the question would testify about the broader policy ramifications of creating and regulating a right to assisted suicide. It is the Legislative and Executive branches which, in our system, are uniquely well-equipped to pursue these issues. Courts have before them only the legal arguments of lawyers and, while questions of law are certainly part of the equation, the core issues presented are fundamentally grounded in questions of policy and how we view ourselves as a society. In a democracy, these questions are best answered by those who must answer to the people for their policy product, not by those who have no accountability to the people.

947 F. Supp. at 1171. Similarly, a Superior Court judge in Connecticut, faced with a case nearly identical to this one (but for a state statute curtailing assistance in committing suicide), dismissed it, concluding: "A declaration by this court that physician-assisted suicide is legal would deprive the legislature of its rightful opportunity and obligation to weigh the competing public policy concerns, and would leave physician-assisted suicide to the discretion of individual physicians without any legislatively-imposed standards or controls." Blick v. Office of the Div. of Crim. Justice, 2010 WL 2817256 at *29 (Conn. Super. Ct., June 2, 2010).

"No appellate court has held that there is a constitutional right to physician aid in dying." Morris v. Brandenburg, 376 P.3d at 839 (N.M. June 30, 2016).[14] States may permit the practice if they choose, and so far five have done so by legislation or ballot initiative. The policy considerations, and the working out of regulatory details if a policy is adopted, are uniquely the business of the Legislative Branch. They should not be fashioned or influenced by extrapolation from a single advisory decision rendered by the Judicial Branch—which is not well-suited to generate complex and intensely fact-specific policy determinations, but rather is charged with deciding non-hypothetical, concrete individual disputes in accordance with law.

[14] By the same token, no appellate court has ever determined that the State is without constitutional authority to restrict active facilitation of medically-induced death. Indeed, the United States Supreme Court expressly rejected claims that two state statutes criminalizing aiding of suicide were unconstitutional, under both federal equal protection and due process theories, nearly twenty years ago. Vacco v. Quill, 521 U.S. 793, 800-802 (1997); Washington v. Glucksberg, 521 U.S. 702, 734 (1997). The majority opinion in Glucksberg, however, ended with these words: "Throughout the Nation, Americans are engaged in an earnest and profound debate about the morality, legality, and practicality of physician-assisted suicide. Our holding permits this debate to continue, as it should in a democratic society." 521 U.S. at 735. In just the past three years, the number of States immunizing from prosecution in specified circumstances patient-chosen, medically-induced deaths has doubled. See Colo. Rev. Stat. § 25-48 (eff. 12/16/2016); Cal. Health & Safety Code Part 443 (eff. 6/9/2016); Vt. Stat. Ann. Tit. 18 c. 113 (eff. 5/20/2013). Six months ago, one of the organizations representing Drs. Kligler and Steinbach in this suit—Compassion & Choices—praised the American Medical Association for initiating a study of "aid in dying" as an option for terminally ill adults. See https://www.compassionandchoices.org/ama-praised-for-action-leading-to-study-of-aid-in-dying/ (last visited December 23, 2016). This Court should permit these developments to unfold organically rather than impose a solution via judicial declaration.

CONCLUSION

For the foregoing reasons, the defendants request that the complaint be dismissed with prejudice.

Respectfully submitted,

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