FILED
SAN DIEGO SUPERIOR COURT
JUL 24 2015
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SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF SAN DIEGO

CHRISTY LYNNE DONOROVICH-ODONNELL; ELIZABETH ANTOINETTE MELANIE GOBERTINA WALLNER; WOLF ALEXANDER BREIMAN; AND LYNETTE CAROL CEDERQUIST, M.D.,

Plaintiffs,

v.

KAMALA D. HARRIS, IN HER OFFICIAL CAPACITY AS THE ATTORNEY GENERAL OF THE STATE OF CALIFORNIA; JACKIE LACEY, IN HER OFFICIAL CAPACITY AS THE DISTRICT ATTORNEY FOR THE COUNTY OF LOS ANGELES; ANN MARIE SCHUBERT, IN HER OFFICIAL CAPACITY AS THE DISTRICT ATTORNEY FOR THE COUNTY OF SACRAMENTO; AND BONNIE DUMANIS, IN HER OFFICIAL CAPACITY AS THE DISTRICT ATTORNEY FOR THE COUNTY OF SAN DIEGO,

Defendants.

Case No. 37-2015-00016404-CU-CR-CTL

RULING ON DEMURRER

Department: 71
Judge: Hon. Gregory W. Pollack
Date: July 24, 2015
Time: 10:00 a.m.

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1 I.

2 **DECISION**

3 This is an action brought by a physician and three seriously ill, advanced stage cancer
4 patients seeking a declaration from this court that Penal Code §401 is unconstitutional
5 pursuant to the California Constitution, Article 1, §1 (privacy and liberty), §2 (free speech)
6 and §7 (equal protection). For the reasons discussed below, the court finds that Penal Code
7 §401 is constitutional and, therefore, sustains defendants' demurrers.

8 Ordinarily, leave to amend is allowed when a court sustains a demurrer (*Goodman v.*
9 *Kennedy* (1976) 18 Cal.3d 335, 349), thereby providing plaintiff with an opportunity to
10 amend the complaint to address its defects. However, "[l]eave to amend should be denied
11 when the facts are not in dispute and the nature of the claim is clear, but no liability exists
12 under substantive law." *Lawrence v. Bank of America* (1985) 163 Cal.App.3d 431, 436.
13 This court, having found that Penal Code §401 is constitutional, does not believe that
14 plaintiffs can reasonably allege any new facts which would miraculously make
15 unconstitutional that which this court has just found to be constitutional. Therefore, the
16 court sustains defendants' demurrers as to all causes of action without leave to amend on the
17 ground that each fails to state facts constituting a cause of action. Code Civ. Proc.
18 §430.10(e).

19 The unfortunate scenario alleged in the complaint cries out for a legislative fix, not a
20 judicial nix, of Penal Code §401.

21 II.

22 **ANALYSIS**

23 a. **Penal Code §401**

24 Courts presume a statute is constitutional unless its unconstitutionality clearly,
25 positively and unmistakably appears; all presumptions and intendments favor its validity.
26 *People v. Falsetta* (1999) 21 Cal.4th 903, 912-913. The burden of establishing the
27 unconstitutionality of a statute rests with the party who is contending that it is
28 unconstitutional. *In re York* (1995) 9 Cal.4th 1133, 1152.

Penal Code §401 states:

Every person who deliberately aids, or advises, or encourages another to commit suicide, is guilty of a felony.

Prohibition against assisted suicide has long been the law in California, with California first codifying its prohibition against assisted suicide in 1874. *Washington v. Glucksberg* (1997) 521 U.S. 702, 715. Most states make it a crime to assist suicide. These "assisted suicide bans are not innovations. Rather, they are long standing expressions of the States' commitment to the protection and preservation of all human life." (*Glucksberg,* at p. 710.) In 1993, California voters rejected an assisted suicide initiative. (*Glucksberg,* at p. 717.) In 1997, President Clinton signed the Federal Assisted Suicide Funding Restriction Act of 1997, which prohibits the use of federal funds in support of physician-assisted suicide. (*Glucksberg,* at p. 718; 42 USC §14401 et seq.)

b. <u>Donaldson v. Lungren</u>

In *Donaldson v. Lungren* (1992) 2 Cal.App.4th 1614, the court upheld the constitutionality of Penal Code §401. There, Donaldson, suffering from an incurable malignant astrocytoma of the brain, wanted to take his own life, with the assistance of another, so that his body could thereafter be cryogenically preserved. He hoped that sometime in the future, when a cure for his disease was found, he could be brought back to life. The plan was to terminate his life by a lethal dose of drugs with the assistance of a third party.

The *Donaldson* court began its analysis by recognizing that one has a constitutionally protected interest in refusing unwanted medical treatment or procedures (see, e.g., *Cruzan v. Director, Missouri Health Dept.* (1990) 497 U.S. 261, 278 - 279), that this constitutionally secured right derives from a liberty interest found in the Fourteenth Amendment to the U.S. Constitution (*Cruzan,* at p. 279, fn. 7), and, in California, from the right of privacy in Article 1, §1 of the California Constitution (*People v. Adams* (1990) 216 Cal.App.3d 1431, 1438; *Bouvia v. Superior Court* (1986) 179 Cal.App.3d 1127, 1137). (*Donaldson,* at p.1620.) The *Donaldson* court further noted that the right to refuse medical treatment exists even if such

refusal or withdrawal of treatment is life-threatening and the patient is not actually terminally ill. *See,* e.g., *Bouvia v. Superior Court, supra,* at p.1138. However, the *Donaldson* court, as well as the U.S. Supreme Court in two subsequent assisted suicide cases, discussed *infra,* noted the crucial distinction between, on the one hand, one's admittedly constitutional right to discontinue treatment even if such discontinuance results in death, and, on the other hand, the active causing of that death. As Justice Rehnquist wrote in *Vacco v. Quill* (1997) 521 U.S. 793, 807, it is **"the distinction between letting a patient die and making that patient die."**

The *Donaldson* court noted that while a person may take his own life, it does not follow that such person has the constitutional right to obtain assistance from a third party in doing so:

> *Donaldson is asking that we sanction something quite different. Here there are no life-prolonging measures to be discontinued. Instead, a third person will simply kill Donaldson and hasten the encounter with death. No statute or judicial opinion countenances Donaldson's decision to consent to be murdered or to commit suicide with the assistance of others. (Von Holden v. Chapman (1982) 87 A.D.2d 66, 450 N.Y.S.2d 623, 627 – "essential dissimilarity" between right to decline medical treatment and any right to end one's life.)*
>
> *Donaldson, however, may take his own life. He makes a persuasive argument that his specific interest in ending his life is more compelling than the state's abstract interest in preserving life in general. No state interest is compromised by allowing Donaldson to experience a dignified death rather than an excruciatingly painful life.*
>
> *Nevertheless, even if we were to characterize Donaldson's taking his own life as the exercise of a fundamental right, it does*

not follow that he may implement the right in the manner he wishes here. It is one thing to take one's own life, but quite another to allow a third person assisting in that suicide to be immune from investigation by the coroner or law enforcement agencies.

In such a case, the state has a legitimate competing interest in protecting society against abuses. This interest is more significant than merely the abstract interest in preserving life no matter what the quality of that life is. Instead, it is the interest of the state to maintain social order through enforcement of the criminal law and to protect the lives of those who wish to live no matter what their circumstances. This interest overrides any interest Donaldson possesses in ending his life through the assistance of a third person in violation of the state's penal law. We cannot extend the nature of Donaldson's right of privacy to provide a protective shield for third persons who end his life. (*Donaldson,* at p. 1622.)

The *Donaldson* court held that Penal Code §401 did not violate *Donaldson's* constitutional right to privacy, nor did Penal Code §401 violate the assisting third party's constitutional right to exercise free speech pursuant to the First Amendment of the United States Constitution or Article 1, §2 --- the free speech provision within the of California Constitution.

c. <u>Equal Protection</u>

The unsuccessful constitutional challenge to Penal Code §401 by the *Donaldson* plaintiff was brought based upon Article 1, §1, which includes privacy and liberty interests, and Article 1, §2, which includes freedom of speech. The fifth cause of action pleaded by our plaintiffs, however, is based upon a purported violation of California's equal protection clause (Article 1, §7). While there is no published opinion in California specifically dealing

with Article 1, §7 in the context of Penal Code §401, it should be noted that California follows the same two-tier approach in reviewing legislative classifications under its equal protection law as does the U.S. Supreme Court in interpreting the equal protection clause under the U.S. Constitution. *Graham v. Kirkwood Meadow Public Utility District* (1994) 21 Cal.App.4th 1631, 1642. In *D'Amico v. Board of Medical Examiners* (1974) 11 Cal.3d 1, 21-22, the California Supreme Court summarized the two tests applied in equal protection clause cases, applicable to both the California Constitution and the United States Constitution:

> *There are two such tests which are applied by the courts of this state and the United States Supreme Court. The first is the basic and conventional standard for reviewing economic and social welfare legislation in which there is a "discrimination" or differentiation of treatment between classes or individuals. It manifests restraint by the judiciary in relation to the discretionary act of a co-equal branch of government; in doing so it invests legislation involving such differentiated treatment with a presumption of constitutionality and requires merely that* ***distinctions drawn by a challenged statute bear some rational relationship to a conceivable legitimate state purpose.*** *[Citation.] So long as such classification does not permit one to exercise the privilege while refusing it to another of like qualifications, under like circumstances and situations, it is unobjectionable upon this ground. [Citations.] Moreover, the burden of demonstrating the invalidity of a classification under this standard rests squarely upon the party who assails it. [Citations.]*
>
> *A more stringent test is applied, however, in cases involving "suspect classifications" or touching on "fundamental*

interests." Here the courts adopt "an attitude of active and critical analysis, subjecting the classification to strict scrutiny. [Citations.] Under the strict standard applied in such cases, the state bears the burden of establishing not only that it has a compelling interest which justifies the law, but that the distinctions drawn by the law are necessary to further its purpose. [Emphasis added.]

As noted previously, the *Donaldson* court has held that, in California, one does not have a constitutional right to assisted suicide. (*Donaldson, supra,* at p. 1623.) Accordingly, any attack upon a law prohibiting such assistance based upon equal protection fails if the law passes the simple test that it "bears some rational relationship to a conceivable legitimate state purpose." The *Donaldson* court specifically noted that Penal Code §401 serves pertinent state interests in "preserving human life, preventing suicide, protecting innocent third parties such as children, and maintaining the ethical integrity of the medical profession" (*Donaldson,* at p. 1620), as well as operating to discourage those who might encourage suicide to advance personal motives. (*Donaldson,* at p. 1624.)

Plaintiffs argue that there is no meaningful distinction between, on the one hand, hastening death by giving a patient palliative sedation and thereafter allowing death to follow from starvation or the natural disease process --- "terminal sediation" --- a practice which is constitutionally permitted, and, on the other hand, plaintiffs' proposed "Aid in Dying," which hastens death through the self-administering of lethal medication prescribed by a physician.

In so maintaining, plaintiffs fail to appreciate a very key distinction: In terminal sedation, it is not the sedative, which provides only comfort and perhaps even unconsciousness, that ultimately kills the patient --- it is the progression of the disease (or the patient's prior decision to stop taking nourishment) that ultimately causes the death. In "Aid to Dying," the mechanism of death is clearly the lethal medication. It is, as Justice

Rehnquist noted, the "distinction between letting a patient die and making that patient die." *Vacco v. Quill* (1997) 521 U.S. 793, 807.

Since "Aid in Dying" is quicker and less expensive, there is a much greater potential for its abuse, e.g., greedy heirs-in-waiting, cost containment strategies, impulse decision-making, etc. Moreover, since it can be employed earlier in the dying process, there is a substantial risk that in many cases it may bring about a patently premature death. For example, consider that a terminally ill patient, not in pain but facing death within the next six months, may opt for "Aid in Dying" instead of working through what might have been just a transitory period of depression. Further, "Aid in Dying" creates the possible scenario of someone taking his life based upon an erroneous diagnosis of a terminal illness, which was, in fact, a misdiagnosis that could have been brought to light by the passage of time. After all, doctors are not infallible.

Furthermore, "Aid in Dying" increases the number and general acceptability of suicide, which could have the unintended consequence of causing people who are not terminally ill (and not, therefore, even eligible for "Aid in Dying") to view suicide as an option in their unhappy life. For example, imagine the scenario of a bullied transgender child, or a heartsick teenaged girl whose first boyfriend just broke up with her, questioning whether life is really worth living. These children may be more apt to commit suicide in a society where the terminally ill are routinely opting for it. The message society needs to send to children must be that suicide is not an option for them; widespread "Aid in Dying," i.e., assisted suicide, may blur that message to immature minds. ("When grandma was in pain and dying, she just committed suicide. Why shouldn't I? My life is s-o-o-o painful.") Even though suicide (as opposed to assisted suicide) is legal in California, "the State has an important interest to ensure that people are not influenced to kill themselves." (*Donaldson,* at p. 1623.)

According to the Centers for Disease Control and Prevention (CDC), for youth between the ages of 10 and 24, suicide is the third leading cause of death, claiming almost 4,600 lives each year. A nationwide survey of youth in grades 9-12 in public and private

schools in the United States found that 16% of the students had reported having seriously considered suicide. (CDC website, March 10, 2015).

d. <u>Freedom of Speech</u>

Plaintiffs' claim that Penal Code §401 unconstitutionally infringes upon the assisting third party's freedom of speech was flatly rejected by the *Donaldson* court:

> *We disagree that Penal Code §401 impairs Mondragon's [the third party assisting in the contemplated suicide] exercise of free speech . . . Mondragon enjoys no constitutional protection from his planned participation in Donaldson's suicide.*

That the proposed assisting party [Mondragon] may not have been a physician[1] while plaintiff Lynette Carol Cederquist, M.D., is a physician is a distinction without a legal difference. None of the stated rationales for the *Donaldson* holding was premised on the third party not being a physician, e.g., that the third party's participation was wrongful because it constituted the unlawful practice of medicine without a medical license. (*See* Bus. & Prof. Code §2052.) In fact, to the extent that the *Donaldson* court was concerned a third party might unduly influence a reluctant person to commit suicide but for the prohibition of Penal Code §401, there may exist an even more compelling reason to have the statute include physicians, given the potentially coercive "white-coat influence" a physician may have over decision- making by a vulnerable, despondent, terminally ill patient.

This court fully recognizes that communication prohibitions and requirements between a doctor and a patient trigger constitutional scrutiny. After all, the right of free expression applies to every person, physicians and non-physicians alike. Cal. Const., Art. 1, §2(a) ("*Every person* may freely speak, write and publish his or her statements on all subjects, being responsible for the abuse of this right. A law may not restrain or abridge liberty of speech or press."). However, some courts have recognized that the constitutionality of speech within the confines of a specific doctor-patient relationship is

[1] Actually, it is unclear whether Mondragon was a physician. Whereas the complaint describes Donaldson as "a mathematician and computer software scientist," no information is provided as to Mondragon's occupation.

actually diminished, that certain limitations can be placed on such speech that, outside the professional relationship, would be constitutionally impermissible. In *Planned Parenthood of Southeastern Pennsylvania v. Casey* (1992) 505 U.S. 833, 884, the U.S. Supreme Court, upholding a requirement that doctors affirmatively disclose certain information to abortion patients regarding the risks of abortion, stated:

> *All that is left of petitioners' argument is an asserted First Amendment right of a physician not to provide information about the risks of abortion, and childbirth, in a manner mandated by the State. To be sure, the physician's First Amendment rights not to speak are implicated [citation], but only as part of the practice of medicine, subject to reasonable licensing and regulation by the State. [Citation.] We see no constitutional infirmity in the requirement that the physician provide the information mandated by the State here.*

In referring to the above quoted U.S. Supreme Court excerpt, the court in *Pickup v. Brown* (2013) 740 F3d 1208, 1228, observed:

> *Outside the professional relationship, such a requirement would almost certainly be considered impermissible speech.*

The *Pickup* court, at p. 1228, went on to note:

> *Thus, the First Amendment tolerates a substantial amount of speech regulation within the professional-client relationship that it would not tolerate outside of it. And that toleration makes sense: When professionals, by means of their state-issued licenses, form relationships with clients, the purpose of those relationships is to advance the welfare of clients, rather than to contribute to public debate.*

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The *Pickup* court, at p. 1228, also noted:

> *Moreover, doctors are routinely held liable for giving negligent medical advice to their patients, without serious suggestion that the First Amendment protects their right to give advice that is not consistent with the accepted standard of care. A doctor may not counsel a patient to rely on quack medicine. The First Amendment would not prohibit the doctor's loss of license for doing so.*

In *National Association for Advancement of Psychoanalysis v. California Board of Psychology* (9th Cir. 2000) 228 F.3d 1043, 1054, the court noted that "[t]he communication that occurs during psychoanalysis is entitled to constitutional protection, but it is not immune from regulation."

Doctor-patient communication is subject to state regulation. For example, Health & Safety Code §1690 requires that a physician provide the patient with specific information before performing a hysterectomy. Health & Safety Code §109275 requires the physician to provide specific information to the patient upon making a diagnosis of breast cancer. Health & Safety Code §109278 requires that a physician provide information about gynecological cancers as part of any annual gynecological examination. Bus. & Prof. Code §865.1 prohibits licensed mental health providers from engaging in sexual orientation change efforts, i.e., treatment designed to convert homosexuals into heterosexuals, with patients under 18 years of age. Clearly, it is not the case that a law which regulates in any fashion the communication between a doctor and a patient is necessarily violative of the First Amendment or California's free speech constitutional provision.

Furthermore, in evaluating the freedom of speech issue as to Penal Code §401, it is important to note whereas the plain language of that statute suggests that merely advising ("Every person who deliberately aids, *or advises*, or encourages another to commit suicide, is guilty of a felony") may violate Penal Code §401, California case law has defined otherwise. The *Donaldson* case, relying on California Supreme Court and other authority

(see, e.g., *In re Joseph G.* (1983) 34 Cal.3d 429, 435-436; *Bouvia v. Superior Court,* 179 Cal.App. 3d 1127, 1145), interpreted such language as requiring "affirmative and direct conduct such as furnishing a weapon or other means by which another could physically and immediately inflict a death-producing injury upon himself," that to satisfy the burden of Penal Code §401, the assisting party would have to (1) "have specifically intended the suicide" and (2) "have had a direct participation in bringing it about." (*Donaldson,* at p. 1625.) The *Donaldson* court specifically noted that the constitutional guarantees of free speech protect the freedom of individuals "to speak, write, print or otherwise communicate information or opinion." (*Donaldson,* at p. 1625.)

In re Ryan N. (2001) 92 Cal.App.4th 1359, 1374-1375, the court similarly noted that there has to be something more than mere verbal solicitation to constitute a violation of Penal Code §401:

> *Although on its face the statute may appear to criminalize simply giving advice or encouragement to a potential suicide, the courts have – again by analogy to the law of aiding and abetting – required something more than mere verbal solicitation of another person to commit a hypothetical act of suicide. Instead, the courts have interpreted the statute as proscribing "the direct aiding and abetting of a specific suicidal act ... Some active and intentional participation in the events leading to the suicide are required in order to establish a violation. [McCollum v. CBS, Inc. (1988) 202 Cal.App. 3d 989, 1007 [249 Cal.Rptr. 187]. Thus, in order to prove a violation of section 401, it is necessary to establish all of the essential elements: (1) the defendant specifically intended the victim's suicide; (2) the defendant undertook some active and direct participation in bringing about the suicide, such as by furnishing the victim with the means of suicide, and, finally, (3) the victim actually committed a specific*

overt act of suicide. (Ibid.; People v. Matlock (1959) 51 Cal. 2d 682, 694 [336 P.2d 505, 71 A.L.R. 2d 605]; Donaldson v. Lungren, supra, 2 Cal.App.4th at p.1625.)

The California legislature has known of this case law interpretation of Penal Code §401for some time, and, to date, has not modified it. "Where a statute has been construed by judicial decision, and that construction is not altered by subsequent legislation, it must be presumed that the Legislature is aware of the judicial construction and approves it." *People v. Hallner* (1954) 43 Cal.2d 715, 719.

Further, in analyzing the potential constitutionality of a statute, the court must keep in mind both the Constitutional-Doubt Canon and the Rule of Lenity. Constitutional-Doubt Canon: "[I]f the terms of a statute are by fair and reasonable interpretation capable of a meaning consistent with the requirements of the Constitution, the statute will be given that meaning, rather than another in conflict with the Constitution. *In re Waters of Long Valley Creek Stream System* (1979) 25 Cal.3d 339, 349. The Rule of Lenity: "When language which is reasonably susceptible of two constructions is used in a penal law ordinarily that construction which is more favorable to the offender will be adopted." *People v. Ralph* (1944) 24 Cal.2d 575, 581.

Accordingly, this court concludes that Penal Code §401 does not make illegal the physician's preliminary verbal or written "counseling" aspect of "Aid in Dying", i.e., providing information, recommendations and referrals to a patient, but to the extent that the physician engages in such affirmative and direct conduct as prescribing, administering, or otherwise providing the lethal medication, such assistance would be violative of Penal Code §401. This interpretation of Penal Code §401 appears consistent with that reached by each of the defendants in this action --- the California Attorney General (Demurrer, at p. 11; Reply, at p. 9), the Los Angeles District Attorney (Demurrer, at pp. 8-9), the Sacramento District Attorney (by Joinder) and the San Diego District Attorney (by Joinder).

That Penal Code §401, as interpreted by California case law, does not criminalize mere patient-physician counseling avoids any potential freedom of speech issues. See, e.g.,

Conant v. Walters (9th. Cir. 2002) 309 F.3d 629 (government policy threatening to punish physicians for communicating with their patients about the medical use of marijuana fails to survive First Amendment scrutiny); *Pickup v. Brown* (9th Cir. 2013) 740 F.3d 1208 (California Business & Professions Code §§865.1, 865.2, subjecting licensed mental health providers to professional discipline for engaging in sexual orientation change efforts (SOCE) i.e., therapy designed to convert homosexuals to heterosexuals, with minors, was found to be constitutional because it prohibited deleterious "treatment" which protected the well-being of minors, a legitimate state interest, while at the same time did not prohibit mental health providers from discussing, referring and even recommending SOCE to minors).

e. <u>Stare Decisis</u>

This trial court is not at liberty to ignore the holdings in *Donaldson v. Lungren,* a Court of Appeal opinion, to create what, in effect, would be a new constitutional right, i.e., the constitutional right to have assistance in taking one's life with concomitant immunity to the suicide-assisting third party. "The doctrine of stare decisis expresses a fundamental policy of common law jurisdictions, that a rule once declared in an appellate decision [e.g., *Donaldson v. Lungren]* constitutes a precedent that should normally be followed by certain other courts [e.g., this court] in cases involving the same problem [e.g., constitutionality of Penal Code §401]. It is based on the assumption that certainty, predictability, and stability in the law are the major objectives of the legal system; i.e., that parties should be able to regulate their conduct and enter into relationships with reasonable assurance of the governing rules of law. Another justification for the doctrine is convenience; lawyers and the courts are relieved of the necessity of continually reexamining matters settled by prior decisions." 9 Witkin, <u>California Procedure (5th Ed. 2008)</u>, Appeals, §481 pp. 540-541.

In *Auto Equity Sales, Inc. v. Superior Court of Santa Clara County* (1962) 57 Cal.2d 450, 455, the California Supreme Court noted that "[d]ecisions of every division of the District Courts of Appeal [which include *Donaldson v. Lungren*] are binding upon ... all the superior courts of this state, and that "[c]ourts exercising inferior jurisdiction must accept the law declared by courts of superior jurisdiction. It is not their function to attempt to overrule

decisions of a higher court." Accordingly, this court is required to follow the holdings in *Donaldson,* even if it were to believe that *Donaldson* was wrongly decided.

f. <u>Supreme Court Authority</u>

It perhaps needs no citation that "state courts are bound by the decision of the Supreme Court of the United States on questions depending upon the construction of the United States Constitution." *Moon v. Martin* (1921) 185 Cal. 361, 368. However, this court recognizes that plaintiffs have not based their challenge to Penal Code §401 as being violative of the U.S. Constitution, but rather the California Constitution, and that rights secured under the California Constitution are not necessarily co-extensive with those under the U.S. Constitution. For example, California's constitutional right of privacy is broader and more protective than the federal constitutional right of privacy. *American Academy of Pediatrics v. Lungren* (1997) 16 Cal.4th 307, 326. However, this court finds that the reasoning and analysis of the two major assisted suicide cases decided by our United States Supreme Court, consistent with California's *Donaldson* opinion, are both instructive and persuasive.

In *Washington v. Glucksberg* (1997) 521 U.S. 702, the U.S. Supreme Court upheld the constitutionality of Washington's ban on assisted suicide, which made it a felony to knowingly cause or aid another person to attempt suicide. There, four physicians, whose medical practices included treatment of terminally ill patients whom they would assist in ending their lives but for Washington's ban on assisted suicide, three terminally ill patients and a non-profit organization that counsels persons considering physician assisted suicide had challenged Washington's law, claiming that it was unconstitutional and violative of a liberty interest protected by the U.S. Constitution's Fourteenth Amendment's Due Process Clause. The U.S. Supreme Court found that Washington's assisted suicide ban was rationally related to multiple legitimate government interests, such as prohibiting intentional killing and preserving human life; preventing the serious public health problem of suicide, especially among the young, the elderly and those suffering from untreated pain or from depression or other mental disorders; protecting the medical profession's integrity and ethics

and maintaining physicians' role as their patients' healers; protecting the poor, the elderly, the disabled, the terminally ill, and persons in other vulnerable groups from indifference, prejudice, and psychological and financial pressure to end their lives; and avoiding a possible slide towards voluntary, and perhaps even involuntary, euthanasia. (*Glucksberg,* at pp. 703, 729-736.) The U.S. Supreme Court held that Washington's ban "does not violate the Fourteenth Amendment, either on its face or as applied to competent, terminally ill adults who wish to hasten their deaths by obtaining medication prescribed by their doctors." (*Glucksberg,* at p. 735.)

In *Vacco v. Quill* (1997) 521 U.S. 793, three gravely ill patients, along with two physicians who maintained they were being deterred from prescribing lethal medication consistent with treatment standards of their medical practice for mentally competent, terminally ill patients who were suffering great pain and desirous of a physician's help in taking their own lives, brought suit to challenge the constitutionality of New York's ban on assisted suicide. The U.S. Supreme Court held that New York's prohibition on assisted suicide did not violate the Equal Protection Clause of the Fourteenth Amendment of the United Statutes Constitution, holding the right to die with assistance is not a fundamental right. *Vacco v. Quill's* analysis began by noting the obvious, that New York's ban on assisted suicide, while at the same time permitting patients to refuse medical treatment that could lead to their death, did not treat anyone differently from anyone else or draw distinctions between persons:

> ***Everyone****, regardless of physical condition, is entitled, if competent, to refuse unwanted lifesaving medical treatment;* ***no one*** *is permitted to assist suicide. Generally speaking, laws that apply even-handedly to all 'unquestionably comply' with the Equal Protection Clause. [Emphasis in original.]*
> (*Vacco v. Quill,* at p. 800.)

Further, the U.S. Supreme Court concluded that the withdrawal of lifesaving medical treatment, which is constitutionally protected, was distinguishable from physician assisted

suicide, and that New York's reasons for recognizing and acting on this distinction, which included prohibiting intentional killing, preserving life, preventing suicide, maintaining the physician's role as his or her patient's healer, protecting vulnerable people from indifference, prejudice and psychological and financial pressure to end their lives, and avoiding a possible slide toward euthanasia, were "valid and important public interests [which] easily satisfy the constitutional requirement that a legislative classification bear a rational relation to some legitimate end." *Id.,* at p. 808-809.

g. **Standing and Ripeness**

In addition to their defense of the constitutionality of Penal Code §401, the demurring defendants maintain that the complaint is subject to demurrer based on: (1) plaintiffs lack standing, and (2) the controversy is not ripe.

Because this court finds that Penal Code §401 is constitutional, a finding faithful to California precedent and U.S. Supreme Court authority, the issues of standing and ripeness are moot. Similarly, since Penal Code §401 is constitutional, plaintiffs' request for an order enjoining future prosecution under that statute must fail as well. *See* Civil Code §3423(d); Code Civ. Proc. §526(b)(4); *Donaldson v. Lungren,* 2 Cal.App.4th 1614, 1623.

To satisfy the standing requirement, plaintiffs "must demonstrate a realistic danger of sustaining a direct injury as a result of the statute's operation or enforcement. [Citation.] It is sufficient for standing purposes that the plaintiff intends to engage in a course of conduct arguably affected with a constitutional interest and that there is a credible threat that the challenged provision will be invoked against the plaintiff." *Prigmore v. City of Redding* (2012) 211 Cal.App.4th 1322, 1349. A case is ripe if the following two-pronged test is satisfied: (1) "the dispute is sufficiently concrete so that declaratory relief is appropriate," and (2) "plaintiffs will suffer hardship if judicial consideration is withheld." *City of Santa Monica v. Stewart* (2005) 126 Cal.App.4th 43, 64. "[T]he requirement [of ripeness] should not prevent courts from resolving concrete disputes if the consequences of a deferred decision will be lingering uncertainty in the law, especially where there is widespread public

interest in the answer to a particular legal question." *Sherwyn v. Department of Social Services* (1985) 173 Cal.App.3d 52, 58.

Penal Code §401 prevents the plaintiff patients from receiving "Aid in Dying," i.e., assisted suicide[2], which, according to the complaint, causes them to instead face a painful and protracted death. The plaintiff physician, whose practice involves care for terminally ill patients, some of whom would choose the option of "Aid in Dying" but for Penal Code §401, faces potential criminal felony exposure should she provide the assistance prohibited by Penal Code §401. Both the plaintiff patients and the plaintiff physician face actual injury from the operation of Penal Code §401. Of course, for purposes of ruling on a demurrer, the court must take all material facts pleaded as true. *Sheehan v. S.F. 49ers, Ltd.* (2009) 45 Cal.4th 992, 998.

Based on the allegations of the complaint, the court finds that plaintiffs do have standing to bring this action and that the controversy to be decided in this action is ripe. Plaintiffs have easily cleared the hurdles of standing and ripeness. It is the last hurdle, the constitutionality of Penal Code §401, which they cannot clear.

III.

CONCLUSION

In upholding the constitutionality of Penal Code §401, this court is not unsympathetic to the plight of terminally-ill patients who wish to lessen their end of life suffering and endeavor to die with greater dignity, or to dedicated physicians who fear exposure to felony prosecution for simply providing requested relief to terminally ill patients. Several states have already enacted statutes expressly permitting physician assisted suicide under certain conditions, and in California that may ultimately be a legal reality if Senate Bill 128 is enacted. Indeed, this issue of physician-assisted suicide is one that is best left to the legislature, and not the courts, an observation made by the *Donaldson* court, itself, more than two decades ago:

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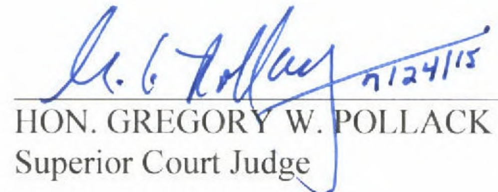
[2] The complaint, at ¶2, defines "Aid in Dying" as "the recognized medical practice of offering mentally competent, terminally ill persons medication that they may choose to take to bring about a quick and peaceful death."

> *It is unfortunate for Donaldson that the courts cannot always accommodate the special needs of an individual. We realize that this is critical to Donaldson, but the legal and philosophical problems posed by this predicament are a legislative matter rather than a judicial one.*

(*Donaldson,* at p. 1623.)

It is not the proper role of a superior court judge to declare as unconstitutional a statute, which a higher court has already declared to be constitutional, simply because that judge may have a personal belief that it is a law that ought to be modified. To the extent that Penal Code §401 unfairly blocks the wishes of certain persons affected by it, rather than this court nixing the law as unconstitutional, the legislature ought to be fixing the law so that the legitimate needs of terminally-ill patients and their physicians are recognized, respected and protected.



HON. GREGORY W. POLLACK
Superior Court Judge