DOCKET NO. CV-09-5033392	:	SUPERIOR COURT
GARY BLICK, M.D. and RONALD M. LEVINE, M.D.	:	JUDICIAL DISTRICT OF
V.	:	HARTFORD at HARTFORD
OFFICE OF THE DIVISION OF CRIMINAL JUSTICE, et al.	:	JUNE 1, 2010

MEMORANDUM OF DECISION ON MOTION TO DISMISS

This is an action for declaratory and injunctive relief by two Connecticut physicians who ask this court to allow them to engage in physician-assisted suicide. Specifically, the physicians ask this court to order the defendant State's Attorneys not to prosecute them, or any other physician, for manslaughter under Connecticut General Statutes § 53a-56 if they provide "aid in dying" by prescribing lethal medication to competent, terminally ill patients to enable those patients to kill themselves.

Connecticut General Statutes § 53a-56(a) provides that "[a] person is guilty of manslaughter in the second degree when . . . (2) he intentionally causes or aids another person, other than by force, duress or deception, to commit suicide."

The defendants have moved to dismiss the action on the grounds that: (1) the plaintiffs'

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claims are not ripe; (2) the plaintiffs lack standing; and (3) the plaintiffs' claims are barred by the doctrine of sovereign immunity.

Facts

The complaint, affidavits in opposition to the motion to dismiss, relevant statutes and legislative history provided by the parties set forth the following relevant facts.

The plaintiffs, Dr. Gary Blick and Dr. Ronald M. Levine, are physicians licensed to practice medicine in Connecticut. Dr. Blick is currently the Medical and Research Director of CIRCLE Medical, LLC, in Norwalk, and he specializes in infectious disease and the treatment of HIV/AIDS. Prior to forming CIRCLE Medical in 2002, Dr. Blick spent fifteen years practicing internal medicine and treating HIV/AIDS patients in Stamford, and was an attending physician at several area hospitals. Dr. Levine is currently a primary care internist with a practice devoted to providing medical care to the residents of Fairfield County, and is an attending physician at Greenwich Hospital.

In the course of their current medical practices, both Dr. Blick and Dr. Levine regularly treat patients approaching death due to terminal illness. Such patients have no chance of recovery and can expect, at best, only a small degree of symptomatic relief from medication. In some cases, even symptomatic relief is impossible to achieve without the use of terminal sedation, a pharmacological technique that renders the patient unconscious during the days or weeks prior to his or her death. The only choice available to such patients, therefore, is prolonged and unrelieved anguish on the one hand, or unconsciousness and total loss of control and personal dignity on the other. In those circumstances, the professional judgment of each of the plaintiffs is that aid in dying would be a medically and ethically appropriate option for those patients who request it

Each of the plaintiffs has treated, and currently is treating, terminally-ill, mentally-competent patients who have requested, or discussed the possibility of, aid in dying:

For example, Dr. Levine formerly treated a patient, R.J.S. , for advanced cancer of the tongue. R.J.S., a highly-successful New York attorney, suffered numerous debilitating and painful symptoms from the cancer and the attempts at curative treatment: Surgery to remove the tumor cost R.J.S. most of his tongue and salivary glands and prevented him from consuming food orally. He could barely swallow or speak, choked frequently on secretions, and experienced chronic, severe pain.

R.J.S. found his situation, including the likelihood that he would die from massive internal hemorrhaging when the tumor breached his carotid artery, and the dying process unbearable. As such, R.J.S. told Dr. Levine of his desire for aid in dying - for medication that he could take to bring about a peaceful death at home, surrounded by loved ones, at a time of his choosing. R.J.S. had no mental health issues and made these choices with his decision-making ability fully intact; and, given his circumstances, Dr. Levine determined aid in dying to be a medically and ethically proper treatment. However, the fear of criminal prosecution deterred Dr. Levine from providing aid in dying to R.J.S.

Dr. Levine treated a patient with similar needs, T.F., a bank president and marathon runner who was diagnosed with amyotrophic lateral sclerosis ("ALS," a/k/a Lou Gehrig's Disease). As with R.J.S., T.F.'s disease caused him horrific suffering - including rapid progressive loss of motor function, and difficulty breathing, swallowing and moving his extremities. After pursuing other treatment options, and with his mental faculties fully intact, T.F. repeatedly asked Dr. Levine to prescribe medications that he could take to achieve a peaceful death and avoid dying due to

starvation, suffocation, or choking to death. However, the fear of criminal prosecution deterred Dr. Levine from providing aid in dying to T.F.

Dr. Levine currently has three patients who are facing, or soon will face, the same hard choices as R.J.S. and T.F., and who have told Dr. Levine of their desire for aid in dying: a patient dying of brain cancer; a patient dying of metastatic melanoma; and a patient in an advanced stage of ALS. While Dr. Levine is pursuing every possible option to prolong these patients' lives and ease their suffering, the two cancer patients have a life expectancy of only several months and the ALS patient is rapidly losing her ability to breathe and eat on her own. As with R.J.S. and T.F., Dr. Levine believes aid in dying to be a medically and ethically proper treatment that should be available to his patients. However, the fear of criminal prosecution deters Dr. Levine from providing aid in dying to these three individuals.

Dr. Blick has had similar experiences. One of his former patients, J.P., was a 48 year old Broadway costume designer dying of AIDS. J.P. suffered from a complex array of problems which progressed despite extensive interventions with multiple medications over several years. J.P. experienced pneumocystis carinii pneumonia, anemia, debilitating chronic diarrhea, severe wasting and weight loss, burning pain in both feet and all of his toes so severe that he could not tolerate the feel of bed sheets on his feet, and a loss of the ability to walk without severe pain. As J.P.'s illness progressed, he developed additional symptoms, including progressive loss of use of his lower extremities, impaired speech, loss of use of his right arm and kidney failure. These symptoms prevented J.P. from continuing his career, which he loved; and in spite of weekly counseling, diminished J.P.'s desire to live with those debilitating burdens. Medications to treat J.P.'s multitude of symptoms and conditions caused distressing side effects including lightheadedness, dizziness and

nightmares.

J.P. repeatedly told Dr. Blick of his desire to "die with dignity" and to have control over when and how he died. Dr. Blick was certain that J.P. expressed his desire for aid in dying at a point when he was terminally ill with no hope of a cure (only palliative options that were not effective in relieving his suffering) and with his decision-making ability fully intact. As with Dr. Levine, Dr. Blick determined aid in dying to be a medically and ethically proper treatment. However, the fear of criminal prosecution deterred Dr. Blick from providing aid in dying to J.P.

Dr. Blick also currently is treating terminally-ill patients who have expressed a desire for aid in dying: B.B., who is suffering from hepatic cirrhosis and hepatocellular carcinoma associated with AIDS; J.Z., who has a rare HIV/AIDS-associated, Burkitt's-like non-Hodgkin's lymphoma; J.L., who is suffering from HIV/AIDS wasting syndrome and HIV/AIDS-associated, gastric non-Hodgkin's lymphoma; G.S., who has HIV/AIDS-associated, mycobacterium avium complex (MAC) and HIV/AIDS encephalopathy; and H.C., who is suffering from a rare form of large cell anaplastic non-Hodgkin's lymphoma. As with J.P., Dr. Blick believes aid in dying to be a medically and ethically proper treatment option. However, the fear of criminal prosecution deters Dr. Blick from providing aid in dying to these individuals.

The criminal statute at issue in this case, Connecticut General Statutes § 53a-56, states that:

> (a) A person is guilty of manslaughter in the second degree when: (1) He recklessly causes the death of another person; or (2) he intentionally causes or aids another person, other than by force, duress or deception, to commit suicide.
>
> (b) Manslaughter in the second degree is a class C felony.

Section 53a-56 was enacted in 1969 as part of a comprehensive Penal Code that took effect in 1971. See 1969 Conn. Pub. Acts No. 828, § 57. The Code also prohibits "murder," which is

defined in Connecticut General Statutes § 53a-54a (formerly 53a-54) to include intentionally "caus[ing] a suicide by force, duress or deception." Taken together, Connecticut General Statutes §§ 53a-56 and 53a-54a prohibit all intentionally assisted suicides in Connecticut.

The Commission to Revise the Criminal Statutes that drafted the Penal Code (the "Commission"), including §§ 53a-56 and 53a-54a, provided official comments "to indicate the rationale, background and source of the various portions of the Code, as an aid to interpretation thereof." Commentary on Title 53a, the Penal Code by the Commission to Revise the Criminal Statutes, Conn. Gen. Stat. Ann., Title 53a, p. 289, (West 2007). The Comment to § 53a-54a explains that whereas the prohibition in § 53a-54a against causing suicide by force, duress or deception was aimed at "cases where the actor causes or aids a suicide by aggressive or devious means and for purely selfish motives," § 53a-56 was directed at "the more sympathetic cases, such as . . . assistance rendered to one tortured by a painful disease." Commission to Revise the Criminal Statutes, Commission Comment, Conn. Gen. Stat. Ann. § 53a-54a, p. 11 (West 2007). The Comment to § 53a-56, echoes this intent, stating that:

> [This section] causing or aiding a suicide, is aimed at such situations as aiding, out of the feelings of sympathy, the suicide of one inflicted with a painful and incurable disease. While such conduct is blameworthy, the possible mitigating circumstances justify its treatment as manslaughter, rather than murder.

Commission to Revise the Criminal Statutes, Commission Comment, Conn. Gen. Stat. Ann. § 53a-56, p. 164. (West 2007).

The General Assembly has never amended §53a-56, although several bills have been introduced that would have changed the law to permit physicians to prescribe medication to enable competent, terminally ill patients to kill themselves, which is what the plaintiffs seek here. See, e.g.,

Senate Bill 361, "An Act Concerning Physician-Assisted Suicide," (1994); House Bill 6928, "An Act Concerning Death With Dignity," (1995); Senate Bill 334, "An Act Concerning Physician Assisted Suicide," (1995); Senate Bill 1138, "An Act Concerning Death With Dignity," (2009).

For example, in 1994, Senate Bill 361, "An Act Concerning Physician-Assisted Suicide," sought to amend § 53a-56 to add the following exception (in upper case):

> (a) A person is guilty of manslaughter in the second degree when: (1) He recklessly causes the death of another person; or (2) he intentionally causes or aids another person, other than by force, duress or deception, to commit suicide, EXCEPT THAT IT SHALL BE AN AFFIRMATIVE DEFENSE TO A PROSECUTION UNDER THIS SUBDIVISION THAT (A) THE DEFENDANT IS A PHYSICIAN LICENSED UNDER THE PROVISIONS OF CHAPTER 370, (B) THE VICTIM MADE A WRITTEN REQUEST TO SUCH PHYSICIAN TO PRESCRIBE MEDICATION WHICH WAS SELF-ADMINISTERED AND ALLOWED SUCH VICTIM TO CONTROL THE TIME, PLACE AND MANNER OF DEATH, (C) THE VICTIM WAS EIGHTEEN YEARS OF AGE OR OLDER, OF SOUND MIND AND ABLE TO UNDERSTAND THE NATURE AND CONSEQUENCES OF THE ADMINISTRATION OF SUCH MEDICATION AND (D) THE VICTIM WAS DEEMED TO BE IN A TERMINAL CONDITION, AS DEFINED IN SUBDIVISION (3) OF SECTION 19a-570, AS AMENDED BY SECTION 3 OF PUBLIC ACT 93-407, BY THE ATTENDING PHYSICIAN AND ANOTHER PHYSICIAN WITH EXPERTISE IN THE DISEASE CATEGORY OF THE PATIENT.
>
> (b) Manslaughter in the second degree is a class C felony.

Senate Bill 361 (1994). The Judiciary Committee held a public hearing on the bill, heard extensive testimony, but did not take further action on the bill. See Joint Standing Committee Hearings, Judiciary, March 17, 1994.

In 1995, the same amendment to § 53a-56 was reintroduced as House Bill 6928, "An Act Concerning Death With Dignity." Once again, the Judiciary Committee held a public hearing, heard extensive testimony, and took no further action. See Joint Standing Committee Hearings, Judiciary, March 24, 1995.

More recently, in January, 2009, another, more detailed bill, Senate Bill 1138, "An Act Concerning Death With Dignity," was referred to the Judiciary Committee. The bill would have permitted competent, terminally-ill individuals to request medication to self administer to end their lives and authorize physicians to prescribe medication for that purpose. The bill further provided that any action taken in accordance with the bill's provisions would "not constitute causing another person to commit suicide in violation of section 53a-54a or 53a-56 of the general statutes." Senate Bill 1138, § 18(b) (2009). The Judiciary Committee decided to "box" the bill and not advance it.

Discussion of the Law and Ruling

The plaintiffs claim that no court has construed the word "suicide" as used in § 53a-56 and there is substantial uncertainty as to the legal rights and responsibilities of the parties as they relate to a physician providing "aid in dying" to a mentally competent, terminally ill individual. (Complaint 41). The plaintiffs ask this court to issue a judgment "declaring that Conn. Gen. Stat. § 53a-56 does not provide a valid statutory basis to prosecute any licensed physician for providing aid in dying because the choice of a mentally competent terminally ill individual for a peaceful death, as an alternative to enduring a dying process the patient finds unbearable, does not constitute 'suicide' within the meaning of § 53a-56(a)(2), and further declaring that any such prosecution is void as a matter of law." (Complaint, Prayer for Relief, 1). The plaintiffs also want this court to permanently enjoin the defendants from prosecuting any licensed physician for providing "aid in dying" to a mentally competent, terminally ill individual.

The defendants have moved to dismiss this action on the grounds that (1) the plaintiffs' claims are not ripe or otherwise justiciable; (2) the plaintiffs lack standing; and (3) the claims are

barred by the doctrine of sovereign immunity.

"A motion to dismiss . . . properly attacks the jurisdiction of the court, essentially asserting that the plaintiff cannot as a matter of law and fact state a cause of action that should be heard by the court." *Columbia Air Services, Inc. v. Dept. of Transportation*, 293 Conn. 342, 346, 977 A.2d 636 (2009). A motion to dismiss may be brought to assert, inter alia, "lack of jurisdiction over the subject matter." Practice Book § 10-31(a). "[T]he plaintiff bears the burden of proving subject matter jurisdiction, whenever and however raised." *Fort Trumbull Conservancy, LLC v. Alves*, 265 Conn. 423, 430 n. 12, 829 A.2d 801 (2003).

The defendants argue that the plaintiffs' claims should be dismissed because they are not ripe and are nonjusticiable. They are not ripe, the defendants argue, because, they rest upon future events that may not occur as anticipated, or may not occur at all. When a claim is not ripe, the court lacks subject matter jurisdiction to adjudicate it. *Milford Power Co. LLC v. Alstom Power, Inc.*, 263 Conn. 616, 822 A.2d 196 (2003). The defendants argue that the plaintiffs' claims are nonjusticiable because they involve making and not interpreting the law, a task for the legislature, and not the courts.

Although a declaratory judgment action "provides a valuable tool by which litigants may resolve uncertainty of legal obligations," *Milford Power*, 263 Conn. at 625, it "may not be utilized merely to secure advice on the law, or to establish abstract principles of law, or to secure the construction of a statute if the effect of that construction will not affect a plaintiff's personal rights." Id. at 625-626 (internal citations omitted). Instead, a "declaratory judgment must rest on some cause of action that would be cognizable in a nondeclaratory suit" and "is limited to solving justiciable controversies." *Id.* at 625.

"A declaratory judgment action is not, however, 'a procedural panacea for use on all occasions,' but, rather, is limited to solving justiciable controversies. *Liebeskind v. Waterbury*, 142 Conn. 155, 158-59, 112 A.2d 208 (1955). Invoking § 52-29 does not create jurisdiction where it would not otherwise exist. *Wilson v. Kelley*, 224 Conn. 110, 116, 617 A.2d 433 (1992)." *Id.*

"[J]usticiability comprises several related doctrines, namely, standing, ripeness, mootness and the political question doctrine, that implicate a court's subject matter jurisdiction and its competency to adjudicate a particular matter." *Office of the Governor v. Select Comm. of Inquiry*, 271 Conn. 540, 569, 858 A.2d 709 (2004). "Justiciability requires (1) that there be an actual controversy between or among the parties to the dispute . . . (2) that the interests of the parties be adverse . . . (3) that the matter in controversy be capable of being adjudicated by judicial power . . . and (4) that the determination of the controversy will result in practical relief to the complainant." *Office of the Governor v. Select Comm. of Inquiry*, *supra*, at 568-569 (2004).

Connecticut courts have repeatedly dismissed declaratory judgment actions that are based on future, contingent, or uncertain events. *See e.g., Milford Power Company, LLC v. Alstom Power, Inc.*, 263 Conn. 616, 822 A.2d 196(2003)(dispute over insurance coverage properly dismissed as unripe because no demand for payment had been made and thus the issue was "hypothetical" and "too speculative for resolution"); *Hamilton v. U.S. Services Automobile Association*, 115 Conn. App. 774, 974 A.2d 774(2009)(declaration of defendant insurer's obligation to indemnify insured was hypothetical and unripe in advance of judicial determination whether insured was liable); *Swiss Cleaners, Inc. v. Danaher*, 129 Conn. 338, 27 A.2d 806 (1942)(court improperly issued declaratory judgment that corporation was subject to criminal law limiting hours that women could work because there was nothing in the record to show that the corporation had violated, or intended to

violate, the law); *Lovell v. Town of Stratford,* 7 Conn. Supp. 255 (1939)(declaratory judgment action dismissed because plaintiff contractor had no existing contract with the defendant town and his grievances involving contractual issues were "based upon contingencies that may never happen").

In *Cooley v. Granholm*, 291 F.3d 880 (6th Cir. 2002), the Sixth Circuit vacated a declaratory judgment construing an assisted suicide law because the suit was unripe and nonjusticiable. The plaintiffs were two physicians who, like the present plaintiffs, claimed a right to provide physician-assisted suicide to mentally competent, terminally ill patients who were suffering unbearable and irremediable pain. The physicians sought a declaration invalidating a Michigan law that prohibited such assistance, but allowed the termination of life support and the use of life-shortening pain medication to alleviate severe pain. The district court granted the State's motion for summary judgment on the grounds that there was no constitutional right to provide physician-assisted suicide. The Sixth Circuit vacated the district court's decision, concluding that the plaintiffs' claims were not ripe because neither doctor claimed to have a competent terminally ill patient suffering irremediable pain whose needs could not be met by termination of life support or the use of pain medication.

"Without the focus that a particular patient's situation provides, [the court could] not be sure whether the justification of euthanasia . . . is present." *Id.* at 883. Neither could it be sure "whether outside pressures have been brought to bear or some other abuse is present." *Id.* at 883. Because "a claim is not ripe for adjudication if it rests upon contingent future events that may not occur as anticipated, or indeed may not occur at all," the court lacked subject matter jurisdiction over the plaintiffs' claims. *Id.* at 883-884, *quoting Texas v. U.S.*, 523 U.S. 296, 300 (1998).

The defendants argue that the plaintiffs' claims are not ripe for adjudication because the

plaintiffs do not claim to be currently treating any patients who want "aid in dying," and whether future patients will request aid in dying, and whether the plaintiffs will be in a position to offer aid depend on unknown future events. The plaintiffs might be concerned about civil liability or the revocation of their medical licenses. All of these factors, the defendants argue, make it entirely uncertain whether the plaintiffs would in fact provide "aid in dying" if presented with the opportunity to do so.

The defendants further argue that even if the plaintiffs had a patient requesting "aid in dying" and were committed to providing such aid despite the risks of incurring civil liability and losing their licenses, it is unknown whether the defendants would become aware of and necessarily prosecute them for such conduct under Connecticut General Statutes § 53a-56.

The plaintiffs respond to the ripeness argument by citing *Herald Publishing Co. v. Bill*, 142 Conn. 53, 111 A.2d 4 (1955), which, they argue, "makes it clear that the plaintiffs do not have to prove that they are presently treating a terminally-ill, mentally competent patient who has requested aid in dying for their claims to be ripe." (Plfs' Brief p. 13). According to the plaintiffs, under *Herald Publishing*, all that is necessary for their declaratory judgment action to be ripe is a fear of prosecution if they pursued certain proposed courses of action.

In *Herald Publishing*, a newspaper publisher sought a declaratory judgment as to whether Connecticut's criminal lottery and conspiracy statutes would prohibit it from running an advertisement listing free prizes to be given away in a drawing at two area supermarkets. 142 Conn. at 54-55. The plaintiff had not actually run the ad; rather, it was "ready and willing to accept and publish the advertising copy but ha[d] refrained from doing so because it ha[d] been advised that publication might involve the risk of criminal prosecution." *Id.* at 55. The State, however, claimed

that the declaratory judgment statute "confers no jurisdiction upon [the trial court] to render such a judgment with respect to liability under the criminal statutes." *Id.* at 56.

The Supreme Court rejected the State's argument and held that a declaratory judgment action is a jurisdictionally proper method by which to determine "whether the specific statutes would be interpreted in such a manner as to impose penalties, criminal and otherwise, upon the plaintiffs if they pursued certain proposed courses of action." *Id.* at 57. The Court noted that while criminal statutes that are malum in se - e.g., robbery, murder, rape and other traditional, common-law crimes - leave "no serious doubt as to what course of conduct is proscribed[,]"criminal statutes that are malum prohibitum "arouse genuine doubt as to what the statute permits and what it prohibits." *Id.* Under such circumstances, a plaintiff "should not be forced to endure a criminal prosecution in order to enable the courts to resolve the question." *Id.* at 58.

The Court in *Herald Publishing* considered a criminal statute that was "malum prohibitum," that is, there was a genuine issue as to whether the conduct in question did violate the statute. It distinguished such a statute from one which was "malum in se," crimes like robbery and murder, which leave no doubt as to what conduct is proscribed.

The statute in question, Connecticut General Statutes § 53a-56, and the commentary to and legislative history of the statute make it quite clear that assisting a suicide, even for humanitarian reasons, is a crime. As the Court in *Washington* v. *Glucksberg*, 521 U.S. 702, 705-706, 117 S. Ct. 2258, 138 L. Ed. 2d 772 (1997), noted "[i]n almost every State — indeed, in almost every western democracy — it is a crime to assist a suicide." *Id.*, 710.

The legislative history of § 53a-56 further supports the conclusion that the legislature intended the statute to apply to physicians who assist a suicide, and intended the term "suicide" to

include self-killing by those who are suffering from unbearable terminal illness. This intent is apparent both in the Commission Comments to § 53a-56 and in the subsequent attempts to amend § 53a-56.

As discussed previously, the Commission that drafted the Penal Code, including § 53a-56, provided official Comments "to indicate the rationale, background and source of the various portions of the Code, as an aid to interpretation thereof." Commentary on Title 53a, the Penal Code by the Commission to Revise the Criminal Statutes, Conn. Gen. Stat. Ann., Title 53a, p. 289 (West 2007). The Connecticut Supreme Court looks to the Commission Comments to "furnish guidance" in interpreting legislative intent. *State v. Hardy*, 278 Conn. 113, 121 n. 8, 896 A.2d 755 (2006).

The Commission Comment on § 53a-56 explains that subsection (a)(2), "causing or aiding a suicide, is aimed at such situations as aiding, out of the feelings of sympathy, the suicide of one inflicted with a painful and incurable disease." Commission to Revise the Criminal Statutes, Penal Code Comment, Conn. Gen. Stat. Ann. § 53a-56, p. 164 (West 2007). In other words, § 53a-56 is aimed at precisely the situation presented by the plaintiffs - aiding a terminally ill patient, in unbearable pain, to end his or her own life - and precisely the situation in which physicians are most likely to participate.

The conclusion that the legislature intended the prohibition against assisted suicide in § 53a-56 to include assistance rendered by physicians to terminally ill patients who seek to end their lives is further supported by the multiple, unsuccessful attempts to amend the statute to expressly permit such assistance. If such assistance were already permitted, there would be no need to amend the statute.

One such amendment, sponsored by Senator Jepsen, would have added the following

language to § 53a-56:

> (a) A person is guilty of manslaughter in the second degree when: (1) He recklessly causes the death of another person; or (2) he intentionally causes or aids another person, other than by force, duress or deception, to commit suicide, EXCEPT THAT IT SHALL BE AN AFFIRMATIVE DEFENSE TO A PROSECUTION UNDER THIS SUBDIVISION THAT (A) THE DEFENDANT IS A PHYSICIAN LICENSED UNDER THE PROVISIONS OF CHAPTER 370, (B) THE VICTIM MADE A WRITTEN REQUEST TO SUCH PHYSICIAN TO PRESCRIBE MEDICATION WHICH WAS SELF-ADMINISTERED AND ALLOWED SUCH VICTIM TO CONTROL THE TIME, PLACE AND MANNER OF DEATH, (C) THE VICTIM WAS EIGHTEEN YEARS OF AGE OR OLDER, OF SOUND MIND AND ABLE TO UNDERSTAND THE NATURE AND CONSEQUENCES OF THE ADMINISTRATION OF SUCH MEDICATION AND (D) THE VICTIM WAS DEEMED TO BE IN A TERMINAL CONDITION, AS DEFINED IN SUBDIVISION (3) OF SECTION 19a-570, AS AMENDED BY SECTION 3 OF PUBLIC ACT 93-407, BY THE ATTENDING PHYSICIAN AND ANOTHER PHYSICIAN WITH EXPERTISE IN THE DISEASE CATEGORY OF THE PATIENT.
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> (b) Manslaughter in the second degree is a class C felony.

Senate Bill 361, "An Act Concerning Physician-Assisted Suicide" (1994). This amendment included all the elements of what the plaintiffs call "aid in dying" and, if adopted, would have protected physicians who provided "aid in dying" from prosecution under § 53a-56. Although the Judiciary Committee held a public hearing and heard extensive testimony for and against the proposed amendment, no one suggested that the amendment was unnecessary because § 53a-56 already permitted physician-assisted suicide. Ultimately, the Committee did not advance the bill. See Joint Standing Committee Hearings, Judiciary, March 17, 1994.

In 1995, the same amendment to Conn. Gen. Stat. § 53a-56 was introduced again as House Bill 6928, "An Act Concerning Death With Dignity." Once again, the Judiciary Committee held a public hearing, heard extensive testimony, but took no further action. See Joint Standing Committee Hearings, Judiciary, March 24, 1995.

In January, 2009, another, more detailed bill, Senate Bill 1138, "An Act Concerning Death With Dignity," was considered by the Judiciary Committee. The bill would have permitted competent, terminally-ill individuals to request medication to self administer to end their lives and authorized physicians to prescribe medication for that purpose. The bill further provided that any action taken in accordance with the bill's provisions would "not constitute causing another person to commit suicide in violation of section 53a-54a or 53a-56 of the general statutes." Senate Bill 1138, § 18(b) (2009). The Judiciary Committee decided not to advance the bill.

As stated above, "Justiciability requires (1) that there be an actual controversy between or among the parties to the dispute . . . (2) that the interests of the parties be adverse . . . (3) that the matter in controversy be capable of being adjudicated by judicial power . . . and (4) that the determination of the controversy will result in practical relief to the complainant." *Office of the Governor v. Select Comm. of Inquiry*, 271 Conn. 540, 568-569, 858 A.2d 709 (2004). In light of the commentary, legislative history, and history of failed attempts to amend § 53a-56, it is clear that that statute applies to the plaintiffs, and, therefore, there is no controversy. In addition, amending the statute so that it does not apply to the plaintiffs is not a "controversy capable of being adjudicated by judicial power." Such a change is a task of the legislature. "[I]t is the legislature which must determine the requirements of public policy for the state." *Tileston v. Ullman*, 129 Conn. 84, 94, 20 A.2d 582 (1942).

Legislative determination is particularly important given the significant medical, legal, and ethical concerns about legalized physician-assisted suicide that have been raised across the country. Among other difficult and important public policy concerns that the legislature would have to evaluate - and is uniquely positioned in our system of government to evaluate - are the following:

- Whether physician-assisted suicide threatens the most vulnerable in society, including the poor, the elderly, and the disabled, who are at risk of being threatened, coerced, or influenced to end their lives to spare their families the financial costs and emotional strain of caring for them; and, if so, who best to protect vulnerable individuals from undue influence, pressure or coercion;

- Whether physician-assisted suicide shifts the focus of physicians and insurers away from vitally important measures such as identifying and treating depression and providing end-of-life pain control and palliative care; and, if so, how best to ensure that all appropriate treatment and care options are considered and made available to patients who may be considering suicide;

- Whether physician-assisted suicide undermines the physician-patient relationship and the integrity of the medical profession by eroding patient trust in the doctor's role as healer; and, if so, how best to avoid or limit such harms; and

- Whether physician-assisted suicide opens the door to the possibility of involuntary euthanasia, as has occurred in the Netherlands, because "what is couched as a limited right to 'physician-assisted suicide' is likely, in effect, a much broader license, which could prove extremely difficult to police and contain," *Washington v. Glucksberg,* 521 U.S. 702, 733 (1997); and, if so, how best to design effective legal and regulatory controls to avoid involuntary euthanasia.

See Kathleen Foley, M.D. and Herbert Hendin, M.D., *The Case Against Assisted Suicide* (Johns Hopkins Univ. Press 2002); *Washington v. Glucksberg*, 521 U.S. 702, 728-735 (1997); *Krischer v. McIver*, 697 So.2d 97 (Fla. 1997).

Connecticut citizens have raised a myriad of concerns at public hearings on unsuccessful bills that would have amended § 53a-56 to permit physicians to assist their patients in ending their lives. As one individual testified at a public hearing on Conn. House Bill 6928, "An Act Concerning Death With Dignity" (1994):

> Is assisted suicide the kind of choice, assuming it can be made in a fixed and rational manner, that we wish to offer a gravely ill person? Will we not sweep up in the process some who are not really tired of life, but think others are tired of them? Some who do not really want to die, but who feel that they should not live on because to do so when there exists the legal alternative is a selfish and a cowardly act. Will not some feel an obligation to have themselves eliminated in order that the funds allocated for their illness might be better used by their families? Or financial worries aside, in order to relieve the families of the emotional strain involved.

Conn. Joint Standing Committee Hearings, Judiciary Committee, 1995 Sess., p. 2713 (March 24, 1995)(remarks of Jane Anne Sfranski). The legislature is the most appropriate body to evaluate these important questions as well as a host of other complex issues, such as how competency should be determined, how "terminally ill" should be defined, whether the patient must be competent when he takes the lethal medication or only when he requests it, whether disinterested witnesses are required, and how the decision to end life will be limited to the competent patient when existing laws allow conservators, next of kin, and others to make decisions for the patient. Such questions are best addressed in the legislature through the legislative process and should not be addressed by the court.

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.

As the Connecticut Supreme Court has warned, "[i]t is the legislature which must determine

the requirements of public policy for the state and, if the legislature is of the opinion that the broad provisions of the[ ] statute[ ] should stand unchanged, for [the Court] to read an exception into [it] is to pre-empt the legislative function." *Tileston v. Ullman*, 129 Conn. 84, 94, 20 A.2d 582 (1942). The plaintiffs' claims in this case are not justiciable because they must be decided through the legislative process, not by the Court.

The defendants also argue that this court lacks subject matter jurisdiction over the plaintiffs' claims because those claims are barred by sovereign immunity. The Connecticut Supreme Court has long recognized that the common law doctrine of sovereign immunity bars suit against the State, except where the State, by appropriate legislation, consents to be sued. *Miller v. Egan*, 265 Conn. 301, 313, 828 A.2d 549 (2003); *Canning v. Lensink*, 221 Conn. 346, 349, 603 A.2d 1155 (1992); *Horton v. Meskill*, 172 Conn. 615, 623, 376 A.2d 359 (1977); *State v. Kilburn*, 81 Conn. 9, 11, 69 A. 1028 (1908). "[S]overeign immunity . . . has deep roots in this state and our legal system in general, finding its origin in ancient common law." *DaimlerChrysler Corp. v. Law*, 284 Conn. 701, 711, 937 A.2d 675 (2007).

"A sovereign is exempt from suit, not because of any formal conception or obsolete theory, but on the logical and practical ground that there can be no legal right as against the authority that makes the law on which the right depends." *Lyon v. Jones*, 291 Conn. 384, 396, 968 A.2d 416 (2009). "The practical and logical basis of the doctrine is today recognized to rest on this principle and on the hazard that the subjection of the state and federal governments to private litigation might constitute a serious interference with the performance of their functions and with their control over their respective instrumentalities, funds and property." *Lyon*, 291 Conn. at 396-397; *Miller*, 265 Conn. at 314. Accordingly, the doctrine of sovereign immunity "protects the state, not only from

ultimate liability for alleged wrongs, but also from being required to litigate whether it is so liable." *Shay v. Rossi,* 253 Conn. 134, 165, 749 A.2d 1147 (2000), overruled on other grounds, *Miller v. Egan*, 265 Conn. 301, 828 A.2d 549 (2003).

The Connecticut Supreme Court has recognized that the doctrine of sovereign immunity applies both to the State as an entity and to its officers and agents. *Schub v. Dept. of Social Services*, 86 Conn. App. 748, 862 A.2d 382, *cert. denied*, 273 Conn. 920 (2005); *Columbia Air Services, Inc. v. Department of Transportation,* 293 Conn. 342, 977 A.2d 636 (2009). This is "because the state can act only through its officers and agents, [and therefore] a suit against a state officer concerning a matter in which the officer represents the state is, in effect, against the state." *Columbia Air Services*, 293 Conn. at 349.

Exceptions to the doctrine of sovereign immunity "are few and narrowly construed." *Columbia Air Services*, 293 Conn. at 349. "There are three exceptions: (1) when the legislature, either expressly or by force of a necessary implication, statutorily waives the state's sovereign immunity; (2) when an action seeks declaratory or injunctive relief on the basis of a substantial claim that the state or one of its officers has violated the plaintiff's constitutional rights; and (3) when an action seeks declaratory or injunctive relief on the basis of a substantial allegation of wrongful conduct to promote an illegal purpose in excess of the officer's statutory authority." *Columbia Air Services*, 293 Conn. at 349, *quoting DaimlerChrysler Corp*, 284 Conn. at 720-72.

The second and third exceptions apply solely to claims for declaratory and injunctive relief. "For a claim made pursuant to the second exception, complaining of unconstitutional acts, [the Court] require[s] that the allegations of such a complaint and the factual underpinnings if placed in issue, must clearly demonstrate an incursion upon constitutionally protected interests." *Columbia*

Air Services, 293 Conn. at 350 (internal quotation marks and brackets omitted). "For a claim under the third exception, the plaintiffs must do more than allege that the defendants' conduct was in excess of their statutory authority; they also must allege or otherwise establish facts that reasonably support those allegations." *Columbia Air Services*, 293 Conn. at 350.

In this case, the plaintiffs have sued the Division of Criminal Justice, the Chief State's Attorney in his official capacity, and thirteen State's Attorneys in their official capacities. All of these defendants, as officers or agents of the State, are protected from suit by sovereign immunity unless one of the three exceptions to sovereign immunity applies. *See Columbia Air Services, Inc. v. Department of Transportation, supra.*

The plaintiffs have not alleged any statutory waiver of sovereign immunity, nor have they alleged that any of the defendants has violated their constitutional rights or acted pursuant to an unconstitutional statute. Neither of the first two exceptions to sovereign immunity applies.

The plaintiffs argue that if the defendants prosecute the plaintiffs for assisting terminally ill, mentally competent patients to commit suicide, they will be acting in excess of their statutory authority and, therefore, the third exception to sovereign immunity does apply here.

The Connecticut Supreme Court has phrased the third exception to sovereign *immunity in two different ways. Most recently, in Columbia* Air Services, Inc. v. Department of Transportation, 293 Conn. 342, 977 A.2d 636 (2009), the Court phrased the exception as it had in *DaimlerChrysler Corp. v. Law*, 284 Conn. 701, 720-721, 937 A.2d 675 (2007), and *Antinerella v. Rioux*, 229 Conn. 479, 497, 642 A.2d 699 (1994), overruled in part by *Miller v. Egan*, 265 Conn. 301, 325, 828 A.2d 549 (2003), stating that sovereign immunity does not apply "when an action seeks declaratory or injunctive relief on the basis of a substantial allegation of wrongful conduct to promote an illegal

purpose in excess of the officer's statutory authority." *Columbia Air Services*, 293 Conn. at 349. The plaintiffs do not argue that the defendants would "promote an illegal purpose" in excess of their statutory authority if they prosecuted the plaintiffs for violating Conn. Gen. Stat. § 53a-56.

The second way in which the Connecticut Supreme Court has phrased the "excess of statutory authority" exception to sovereign immunity is less stringent. In *Miller v. Egan*, *supra* at 327, and *C.R. Klewin Northeast, LLC v. Fleming*, *supra* at 260, the Court stated that "when a process of statutory interpretation establishes that the state officials acted beyond their authority, sovereign immunity does not bar a claim seeking declaratory or injunctive relief." Under this standard, the plaintiffs need not allege that the defendants sought to promote an illegal purpose. They must, however, allege that the defendants acted in excess of their statutory authority and "allege or otherwise establish facts that reasonably support those allegations." *Columbia Air Services, 293 Conn.* at 350. When a process of statutory interpretation establishes that the defendants did not act in excess of their statutory authority, sovereign immunity bars the plaintiffs' claims. *C.R. Klewin Northeast, LLC v. Fleming*, 284 Conn. 250, 260, 932 A.2d 1053 (2007).

The plaintiffs have made no allegation, and have pled no facts to support an allegation, that the defendants would be acting in excess of their statutory authority if they prosecuted the plaintiffs for violating Conn. Gen. Stat. § 53a-56. In particular, although they allege that a terminally ill patient who takes his or her own life by taking lethal medication does not commit "suicide" within the meaning of § 53a-56 and, therefore, a physician cannot be prosecuted for aiding that process, they allege no facts to support that conclusory allegation. Nor do they allege any facts that would support the conclusion that the defendant State's Attorneys lack the statutory authority to prosecute a physician whom they believe has violated § 53a-56. The Complaint alleges the opposite - that each

of the defendant State's Attorneys is "vested by Article 4, Section 27 of the Connecticut Constitution with '[t]he prosecutorial power'" for a given judicial district and "has the statutory responsibility, pursuant to Conn. Gen. Stat. § 51-286a, to 'diligently inquire after and make appropriate presentment and complaint to the Superior Court of all crimes and other criminal matters within the jurisdiction of the court or in which the court may proceed.'" (Complaint 15-27).

Moreover, the process of statutory construction of Connecticut General Statutes § 53a-56 clearly supports the conclusion that the defendants **would not act in excess** of their statutory authority if they prosecuted plaintiffs for violating § 53a-56.

In construing a statute, the "fundamental objective is to ascertain and give effect to the apparent intent of the legislature." *American Promotional Events, Inc. v. Blumenthal*, 285 Conn. 192, 201, 937 A.2d 1184 (2008). In searching for the legislative intent, a court looks "first to the text of the statute itself and its relationship to other statutes." *Id.* at 202, citing Connecticut General Statutes § 1-2z. If the text of the statute is not plain and unambiguous, it is appropriate to look to the statute's "legislative history and circumstances surrounding its enactment, to the legislative policy it was designed to implement, and to its relationship to existing legislation and common law principles governing the same general subject matter." *Klewin,* 284 Conn. at 261.

In the present case, § 53a-56 states that "[a] person is guilty of manslaughter in the second degree when . . . he intentionally causes or aids another person, other than by force, duress or deception, to commit suicide." The term "suicide" is not defined in § 53a-56 or any other section of the General Statutes. "In the absence of a statutory definition, [the Court] turn[s] to General Statutes § 1-1 (a), which provides [that] . . . 'in the construction of the statutes, words and phrases shall be construed according to the commonly approved usage of the language.'" *Stone-Krete Constr., Inc.*

construed according to the commonly approved usage of the language.'" *Stone-Krete Constr., Inc. v. Eder,* 280 Conn. 672, 677-678, 911 A.2d 300 (2006). "To ascertain the commonly approved usage of a word, [the Court] look[s] to the dictionary definition of the term." *Id.* at 678.

Merriam Webster's Collegiate Dictionary defines "suicide" as "the act or an instance of taking one's own life voluntarily and intentionally, esp. by a person of years of discretion and of sound mind." Merriam Webster's Collegiate Dictionary, p. 1177 (10th ed. 1993). Black's Law Dictionary defines "suicide" as "the act of taking one's own life." Black's Law Dictionary, p. 1475 (8th ed. 2004). Nothing in the text of § 53a-56 and the common usage of the word "suicide" supports the plaintiffs' claim that "the choice of a mentally competent terminally ill individual for a peaceful death [by taking a prescription medication] as an alternative to enduring a dying process the patient finds unbearable does not constitute 'suicide' within the meaning of §53a-56(a)(2)." (Complaint 40). On the contrary, such conduct is "the act of taking one's own life," which constitutes "suicide." Black's Law Dictionary, p. 1475 (8th ed. 2004). In short, taking one's life even for a sympathetic reason is suicide.

Not only is the text of § 53a-56 devoid of any support for the plaintiffs' interpretation of the term "suicide," but it also does not include any exception from prosecution for physicians who assist another individual to commit suicide. Instead, § 53a-56 applies to every "person . . . [who] intentionally causes or aids another person, other than by force, duress or deception, to commit suicide." Connecticut General Statutes § 53a-56. It is a basic rule of statutory construction that the "court is bound by [a statute's] terms and cannot read into its plain language exceptions that the legislature has not created." *Santopietro v. City of New Haven*, 239 Conn. 207, 215, 682 A.2d 106 (1996). Accordingly, § 53a-56 cannot be read to exclude physicians from its scope.

The legislative history of § 53a-56 set forth on pages 6-8 and 14-16 above further supports the conclusion that the legislature intended the statute to apply to physicians who assist a suicide, and intended the term "suicide" to include self-killing by those who are suffering from unbearable terminal illness.

The language and legislative history of § 53a-56 compel the conclusion that the defendants would not be acting in excess of their authority if they prosecuted the plaintiffs under § 53a-56 for providing "aid in dying." If the defendants prosecuted the plaintiffs for providing "aid in dying" in violation of § 53a-56, they would be acting within the scope of their authority. The third exception to sovereign immunity for conduct in excess of statutory authority, therefore, does not apply and sovereign immunity bars the plaintiffs' claims.

The plaintiffs argue that the motion to dismiss is not the "proper time" to construe Connecticut General Statutes § 53a-56. However, the Connecticut Supreme Court precedent suggests otherwise. *C.R. Klewin Northeast, LLC v. Fleming*, 284 Conn. 250, 932 A.2d 1053 (2007). At issue in *Klewin* was whether Connecticut General Statutes § 3-7(c) imposed a mandatory duty on the State Comptroller and the Commissioner of the Department of Transportation to pay a settlement after the Governor had authorized payment. Section 3-7(c) permitted the Governor to authorize the settlement of any disputed claim against the State and to certify the amount to be paid. The plaintiff had entered into a settlement with the State for $1.2 million that had been authorized by the Governor pursuant to § 3-7(c), but had not been paid. Seeking payment, the plaintiff filed a writ of mandamus against the Governor, the Comptroller and the Commissioner, arguing that the Governor's authorization and certification pursuant to § 3-7(c) created a mandatory duty on the part of the defendant officials to pay the settlement. When the State moved to dismiss on the grounds of

sovereign immunity, the trial court denied the motion, relying on the plaintiff's allegations that the defendants had acted in excess of their statutory authority by failing to pay as required by § 3-7(c).

On appeal, the Connecticut Supreme Court reversed, based on a thorough statutory construction of § 3-7(c), and concluded that the defendants had not acted in excess of their authority and thus sovereign immunity barred the plaintiff's claim. The Court reversed the decision of the trial court and remanded with the instruction that the case be dismissed for lack of subject matter jurisdiction.

In this case, as in *Klewin*, the court need not accept the plaintiffs' conclusions as to whether the defendants will exceed their statutory authority. It is much clearer in this case than it was in *Klewin* that the conduct about which the plaintiffs complain does not involve the exceeding of statutory authority by the defendants. There is, therefore, no exception to sovereign immunity that applies. The case is hereby dismissed because it is barred by the doctrine of sovereign immunity and, as stated above, it presents a nonjusticiable claim, one which must be decided by the Connecticut legislature, and not by the court.

By the court,

Aurigemma, J.