NO. HHD-CV-09-5033392-S

GARY BLICK, M.D. and RONALD M. LEVINE, M.D.	:	SUPERIOR COURT
	:	JUDICIAL DISTRICT OF HARTFORD
v.	:	AT HARTFORD
OFFICE OF THE DIVISION OF CRIMINAL JUSTICE, et al.	:	
	:	NOVEMBER 19, 2009

MEMORANDUM IN SUPPORT OF DEFENDANTS' 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, despite a criminal statute clearly banning such conduct. Specifically, the physicians ask this Court to order the defendant State's Attorneys not to prosecute them, or any other physician, for manslaughter under Conn. Gen. Stat. § 53a-56 if they provide "aid in dying" by prescribing lethal medication to competent, terminally ill patients to enable those patients to kill themselves.[1]

Conn. Gen. Stat. § 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." Notwithstanding the plain language of the statute and the legislature's repeated rejection of proposed legislation that would have permitted physician-assisted suicide, the plaintiffs ask this Court to end run the legislative process by declaring that

[1] The plaintiffs define "aid in dying" as "providing a mentally-competent, terminally-ill patient with a prescription for medication that the patient may choose to take in order to bring about a peaceful death if the patient finds his dying process unbearable." (Complaint ¶ 30).

physicians cannot be prosecuted under § 53a-56 for providing "aid in dying," because patients who accept such aid and take their own lives are not committing "suicide" within the meaning of Conn. Gen. Stat. § 53a-56. The plaintiffs seek such relief despite the fact that (1) their claims are not ripe; (2) they lack standing; and (3) their claims are barred by the doctrine of sovereign immunity. Because these fundamental deficiencies deprive this Court of subject matter jurisdiction, the plaintiffs' Complaint should be dismissed.

STATEMENT OF FACTS

A. The Plaintiff Physicians

The plaintiffs are two Connecticut physicians, Gary Blick, M.D. and Ronald Levine, M.D. Dr. Blick states that he specializes in infectious disease and the treatment of HIV/AIDS and is currently the Medical and Research Director of CIRCLE Medical, LLC in Norwalk, Connecticut. (Complaint ¶ 3). Dr. Levine states that he is a primary care internist with a practice that provides care to Fairfield County residents. (Complaint ¶ 8).

Each plaintiff claims to regularly treat patients approaching death due to terminal illness. (Complaint ¶¶ 7, 12). Each plaintiff further claims to have treated mentally competent, terminally ill adults who have requested "aid in dying." (Complaint ¶ 36). "Aid in dying," according to the plaintiffs, means providing "a mentally-competent, terminally-ill patient with a prescription for medication that the patient may choose to take in order to bring about a peaceful death if the patient finds his dying process unbearable." (Complaint ¶ 30). Neither plaintiff claims to be currently treating any patient who has requested aid in dying. Both plaintiffs claim

that they were deterred from providing aid in dying to past patients due to fear of potential prosecution under Conn. Gen. Stat. § 53a-56. (Complaint ¶ 36).

B. Conn. Gen. Stat. §§ 53a-56 and 53a-54a Prohibit Intentional Physician-Assisted Suicide.

The criminal statute at issue in this case, Conn. Gen. Stat. § 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.

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

C. The Penal Code Commission Comments Explain That § 53a-56 Was Directed At Potentially Sympathetic Cases, Such As Aiding The Suicide Of One Inflicted With A Painful And Incurable Disease.

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). Thus, § 53a-56 reflects a legislative policy choice to make assisting suicide in circumstances that are sympathetic a lesser offense than assisting suicide by force or duress, but nonetheless a criminal offense.

D. Attempts To Amend § 53a-56 Have Been Unsuccessful.

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)(available at www.cga.ct.gov/ps94/tob/s/SB-0361.HTM). 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." (Available at www.cga.ct.gov/ps95/tob/h/HB-6928.HTM). 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.

In January, 2009, another, more detailed bill, Senate Bill 1138, "An Act Concerning Death With Dignity, was referred to the Judiciary Committee. (Available at www.cga.ct.gov/2009/TOB/S/2009SB-01138-R00-SB.htm). 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.

E. The Plaintiffs' Claims

Apparently dissatisfied with the legislature's failure to amend Conn. Gen. Stat. § 53a-56 to permit physicians to prescribe medication to terminally ill patients to enable them to end their lives, the plaintiffs want this Court to construe § 53a-56 not to prohibit such conduct. Specifically, 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). Accordingly, 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.

MOTION TO DISMISS STANDARD

"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 (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 (2003).

"Whenever the absence of jurisdiction is brought to the notice of the court or the tribunal, cognizance of it must be taken and the matter passed upon before it can move one step further in the cause, as any movement is necessarily the exercise of jurisdiction." FDIC v. Peabody N.E., Inc., 239 Conn. 93, 99 (1996); see also Practice Book § 10-33 (lack of subject matter jurisdiction cannot be waived). Because "[t]he doctrine of sovereign immunity implicates subject matter jurisdiction . . . [it] is . . . a basis for granting a motion to dismiss." Columbia Air Services, 293 Conn. at 347; Cox. v. Aiken, 278 Conn. 204, 211 (2006). The same is true of justiciability, ripeness, and standing, each of which, if lacking, deprives the court of subject matter jurisdiction and is a basis for granting a motion to dismiss. Milford Power Co. LLC v.

Alstom Power, Inc., 263 Conn. 616 (2003)(lack of ripeness, justiciability); St. George v. Gordon, 264 Conn. 538, 545 (2003)(lack of standing).

ARGUMENT

I. THIS COURT LACKS SUBJECT MATTER JURISDICTION OVER THE PLAINTIFFS' CLAIMS BECAUSE THEY ARE NOT RIPE AND ARE NONJUSTICIABLE.

The plaintiffs' claims should be dismissed because they are not ripe and are nonjusticiable. In particular, they rest upon future events that may not occur as anticipated, or may not occur at all. When a claim is not ripe, this Court lacks subject matter jurisdiction to adjudicate it. Milford Power Co. LLC v. Alstom Power, Inc., 263 Conn. 616 (2003).

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 (emphasis added).

"[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 (2004)(footnote omitted). "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 (2004).

"[R]ipeness is a sine qua non of justiciability." Milford Power, 263 Conn. at 624. "[T]he rationale of the ripeness requirement [is] to prevent courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements." Milford Power, 263 Conn. at 626 (internal quotation marks omitted). The court "must be satisfied that the case before [it] does not present a hypothetical injury or a claim contingent upon some event that has not and indeed may never transpire." Id. If a declaratory judgment is sought not to settle a present controversy, but rather to avoid one in the future, it is unripe and nonjusticiable. Id. at 629.

Applying these principles, the 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 (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 (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 (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").

Similarly, 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. Although the district court granted the State's motion for summary judgment, finding no constitutional right to provide physician-assisted suicide under the circumstances advanced by the plaintiffs, 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 same lack of ripeness dooms the present Complaint. The plaintiffs are two physicians who do not claim to be currently treating any patients who want "aid in dying." Although the plaintiffs claim that past patients have requested aid in dying, and the plaintiffs expect to encounter such patients in the future, it is unknown whether they in fact will or what the circumstances will be. It is entirely possible that no patient will request aid in dying or that the plaintiffs might change practices, retire, or otherwise cease to be in a position to offer aid in dying. It simply is not known what the future circumstances of the plaintiffs and their patients will be.

Nor is it known whether the plaintiffs would provide "aid in dying" to a future patient who requested it. The plaintiffs state that they have been deterred from providing aid in dying due to fear of potential prosecution, but they do not state that, absent such fear, they would definitely have provided such assistance. There may have been other factors that would have given them pause, and might give them pause in the future, such as the specific circumstances of the patient or fear of civil liability for damages. See Edwards v. Tardif, 240 Conn. 610 (1997)(upholding a $504,750 jury verdict against a physician who prescribed excessive barbiturates to a suicidal patient who used them to kill herself). They might also be concerned that their medical licenses might be revoked by the Connecticut Medical Examining Board. See

Conn. Gen. Stat. § 20-13c; American Medical Association Code of Medical Ethics § 2.211.[2] All of these factors make it entirely uncertain whether the plaintiffs would in fact provide "aid in dying" if presented with the opportunity to do so.

Finally, 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 Conn. Gen. Stat. § 53a-56. The Complaint does not allege that any physicians have been prosecuted under § 53a-56 or that the plaintiffs have personally been threatened with prosecution. Furthermore, although the plaintiffs allege that the State's Attorneys have a statutory responsibility 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), the plaintiffs ignore the fact that the State's Attorneys "have a wide latitude and broad discretion in determining when, who, why and whether to prosecute for violations of the criminal law." State v. Kinchen, 243 Conn.

[2] The American Medical Association Code of Medical Ethics (the "AMA Code") takes the position that "[p]hysician-assisted suicide is fundamentally incompatible with the physician's role as healer, would be difficult or impossible to control, and would pose serious societal risks." AMA Code of Medical Ethics Opinion 2.211 (available at www.ama-assn.org/ama/pub/physican-resources/medical-ethics/code-medical-ethics/opinion2211.shtml). According to the AMA Code, "[p]hysician-assisted suicide occurs when a physician facilitates a patient's death by providing the necessary means and/or information to enable the patient to perform the life-ending act (eg, the physician provides sleeping pills and information about the lethal dose, while aware that the patient may commit suicide)." Id. The AMA Code requires that "[i]nstead of participating in assisted suicide, physicians must aggressively respond to the needs of patients at the end of life. . . . Multidisciplinary interventions should be sought including specialty consultation, hospice care, pastoral support, family counseling, and other modalities." Id.

690, 699 (1998). Different State's Attorneys, when faced with the same circumstances, may reach differing decisions on whether to prosecute and for what crime, and thus it is unknown whether the plaintiffs would necessarily be prosecuted under § 53a-56.

In short, this case "rests upon contingent future events that may not occur as anticipated, or indeed may not occur at all." Texas v. U.S., 523 U.S. 296, 300 (1998). In the absence of any particular patient or any certainty that there will be a patient in the future who will request "aid in dying," that the plaintiffs will provide that patient with aid in dying despite the possibility that they could lose their medical licenses and be held civilly liable, and that the defendants will decide to prosecute them for manslaughter under § 53a-56, this claim is purely hypothetical and not ripe. Accordingly, dismissal is warranted for lack of subject matter jurisdiction.

II. THIS COURT LACKS SUBJECT MATTER JURISDICTION OVER THE PLAINTIFFS' CLAIMS BECAUSE THE PLAINTIFFS LACK STANDING

Dismissal is further warranted because the plaintiffs lack standing. In particular, they have failed to demonstrate a "specific, personal and legal interest" in the challenged action, an injury to that interest that is not speculative and hypothetical, and a likelihood that this Court's decision would result in practical relief. "If a party is found to lack standing, the court is without subject matter jurisdiction to determine the cause." Cambodian Buddhist Society of Connecticut, Inc. v. Planning and Zoning Commission, 285 Conn. 381, 395 (2008).

Standing "is a practical concept designed to ensure that courts and parties are not vexed by suits brought to vindicate nonjusticiable interests and that judicial decisions which may affect the rights of others are forged in hot controversy, with each view fairly and vigorously

represented. . . . These two objectives are ordinarily held to have been met when a complainant makes a colorable claim of direct injury he has suffered or is likely to suffer, in an individual or representative capacity. Such a personal stake in the outcome of the controversy . . . provides the requisite assurance of concrete adverseness and diligent advocacy." Andross v. Town of W. Hartford, 285 Conn. 309, 322 (2008).

"Standing is established by showing that the party claiming it is authorized by statute to bring suit or is classically aggrieved." Crone v. Gill, 250 Conn. 476, 479-480 (1999). The present plaintiffs do not claim statutory aggrievement and therefore must satisfy the test for classical aggrievement. "The fundamental test for determining classical aggrievement encompasses a well-settled twofold determination: First, the party claiming aggrievement must successfully demonstrate a ***specific, personal and legal interest*** in the challenged action, as distinguished from a general interest, such as is the concern of all members of the community as a whole." In re Melody L., 290 Conn. 131, 156 (2009)(brackets omitted; emphasis added). "Second, the party claiming aggrievement must successfully establish that this specific personal and legal interest has been specially and injuriously affected by the challenged action." Id. (brackets omitted).

"Aggrievement is established if there is a possibility, as distinguished from a certainty, that some legally protected interest . . . has been adversely affected." In re Melody L., 290 Conn. at 156. "In order to have a legal interest which would give the plaintiff standing, the interest must be clearly protected by law." Housing Authority of the City of Danbury v. State of Connecticut, CV 930313914S, 1994 Conn. Super. Lexis 738 at *11 (Conn. Superior Court,

March 17, 1994). "The fact that the plaintiffs . . . seek only declaratory relief does not relieve them of the obligation to establish standing." St. George v. Gordon, 264 Conn. 538, 546 (2003).

In the present case, the plaintiffs state that the "potential application of Conn. Gen. Stat. § 53a-56 deters [them] from providing aid in dying and thereby prevents [them] from offering medical care which, in their professional judgment, would otherwise be appropriate under the circumstances." (Complaint ¶ 39). Totally absent from the plaintiffs' Complaint, however, is any claim to a legally protected interest in providing "aid in dying." In particular, the plaintiffs do not claim any constitutional right to provide "aid in dying," nor do they claim to be asserting the legal right of any particular patient to receive such aid. Indeed, the U.S. Supreme Court in Washington v. Glucksberg, 521 U.S. 702 (1997), and Vacco v. Quill, 521 U.S. 793 (1997), rejected claims that there is a 14th Amendment right to assisted suicide.[3] Nor do the plaintiffs claim to be asserting a legal right to provide aid in dying based on a statute, regulation, or even a medical code of ethics. As noted above, the AMA Code of Medical Ethics expressly *rejects* physician-assisted suicide as fundamentally incompatible with the physician's role as a healer. See footnote 2, supra. Apparently, all that the plaintiffs are asserting is a personal desire to be allowed to provide lethal prescription medications to certain patients. This desire falls far short of the "specific, personal and ***legal*** interest" necessary to confer standing.

Standing is lacking in this case for the further reason that the plaintiffs' alleged injury is purely speculative. An injury that is speculative or hypothetical is insufficient to satisfy the

[3] State high courts have similarly found no such right under their state constitutions. See, e.g., Krischer v. McIver, 697 So. 2d 97 (Fla. 1997); Sampson v. State, 31 P.3d 88 (Alaska 2001).

requirements of standing. Fort Trumbull Conservancy v. City of New London, 265 Conn. 423, 436 (2003)(allegation of a mere fear of damages was "too vague and speculative a claim of injury for the purpose of establishing classical aggrievement"); Poe v. Ullman, 367 U.S. 497 (1961)(lack of any real threat of prosecution rendered declaratory judgment action nonjusticiable).

As discussed above with regard to ripeness, the plaintiffs' alleged injury – the "existence and potential application of § 53a-56" that will deter the plaintiffs from providing aid in dying to future patients (Complaint ¶ 39) -- is purely speculative. It is unknown whether the plaintiffs will encounter a future patient seeking aid in dying, whether the plaintiffs will actually provide aid to dying to that patient, and whether a defendant State's Attorney will prosecute the plaintiffs. The plaintiffs do not allege that the defendants have actually threatened them with prosecution or that the defendants have prosecuted physicians under § 53a-56. All they allege is that the defendants have a responsibility to "inquire after and make appropriate presentment and complaint to the Superior Court of all crimes" and that the plaintiffs are deterred from providing aid in dying by "the existence and potential application of Conn. Gen. Stat. § 53a-56." (Complaint ¶¶15-27, 39). Under the circumstances, the alleged "existence and potential application of Conn. Gen. Stat. § 53a-56" is too speculative an injury to satisfy the requirements of standing.

Furthermore, a ruling by this Court would not necessarily provide the plaintiffs with practical relief. "Justiciability requires . . . that the determination of the controversy will result in practical relief to the complainant." Nielsen v. State, 236 Conn. 1, 6-7 (1996); see also AFSCME Connecticut Council 4 v. Town of Andover, 49 Conn. Supp. 603, 610-611 (2006). The doctrine

of standing imposes the same requirement. Gay & Lesbian Law Students Assn. v. Board of Trustees, 236 Conn. 453, 465 (1996). In the plaintiffs' case, however, even if this Court were to order the defendants not to prosecute the plaintiffs, it is unlikely that the plaintiffs would obtain practical relief because they would probably be stripped of their medical licenses and could face civil liability. See Edwards v. Tardif, 240 Conn. 610 (1997); Conn. Gen. Stat. § 20-13c; American Medical Association Code of Medical Ethics § 2.211. In essence, plaintiffs seek a declaration that could result in the end of their medical careers – hardly practical relief. Senate Bill 1138, which died in the Judiciary Committee in January, 2009, recognized this reality and included a provision that would have protected physicians from civil and criminal liability, as well as disciplinary action by the Connecticut Medical Examining Board, if they provided medication to a terminally ill patient to enable the patient to end his or her life. See Senate Bill 1138, § 19 (2009). Because a ruling by this Court would not provide such protection, and thus would not provide the plaintiffs with practical relief, the plaintiffs' claims are nonjusticiable and do not satisfy the requirements of standing.

III. SOVEREIGN IMMUNITY BARS THE PLAINTIFFS' CLAIMS.

This Court lacks subject matter jurisdiction over the plaintiffs' claims for the further reason that the plaintiffs' claims are barred by sovereign immunity.

A. The Doctrine Of 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 (2003); Canning v. Lensink, 221 Conn.

346, 349 (1992); Horton v. Meskill, 172 Conn. 615, 623 (1977); State v. Kilburn, 81 Conn. 9, 11 (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 (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 (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 (2000), overruled on other grounds, Miller v. Egan, 265 Conn. 301 (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, cert. denied, 273 Conn. 920 (2005)(sovereign immunity barred claims against Department of Social Services); Columbia Air Services, Inc. v. Department of Transportation, 293 Conn. 342 (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 720-721 (internal citations omitted).[4]

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'

[4] In C.R. Klewin Northeast, LLC v. Fleming, 284 Conn. 250, 260 (2007), and Miller v. Egan, 265 Conn. 301, 327 (2003), the Connecticut Supreme Court phrased the third exception to sovereign immunity slightly differently, stating that sovereign immunity does not apply "when a process of statutory interpretation establishes that the state officials acted beyond their authority."

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.

B. None Of The Three Exceptions To Sovereign Immunity Applies To The Present Case.

In the present 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, 293 Conn. 342 (2009)(sovereign immunity barred claims for declaratory and injunctive relief against state agency and its commissioner).

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. Accordingly, neither of the first two exceptions to sovereign immunity applies.

The plaintiffs have also not alleged that the defendants acted in excess of their statutory authority so as to come within the scope of the third exception to sovereign immunity. As noted above in footnote 4, 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 (2009), the Court phrased the exception as it had in DaimlerChrysler Corp. v. Law, 284 Conn. 701, 720-721 (2007), and Antinerella v. Rioux, 229 Conn. 479, 497 (1994), overruled in part by Miller v. Egan, 265 Conn. 301, 325 (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. Applying this standard in Antinerella v. Rioux, the Court held that the defendant sheriff acted in excess of his statutory authority when he wrongfully terminated the plaintiff deputy sheriff's employment for the alleged illegal purpose of misappropriating the plaintiff's business and furthering the defendant's own illegal fee splitting enterprise. Clearly, the plaintiffs in the present case have not met this standard because their Complaint in no way alleges or provides facts to support an allegation 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, 265 Conn. 301, 327 (2003), and C.R. Klewin Northeast, LLC v. Fleming, 284 Conn. 250, 260 (2007), 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 (2007).

Applying this test to the present case compels the conclusion that the plaintiffs' claims are barred. First, 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. Indeed, the Complaint alleges precisely 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, quoting Conn. Gen. Stat. § 51-286a(a). Conn. Gen. Stat. §53a-56 states the elements of the crime of manslaughter. Given the defendants' statutory authority to "make appropriate presentment and complaint to the Superior Court of all crimes," and the fact that violation of § 53a-56 is a crime, the defendants would be acting within the scope of their statutory authority if they prosecuted the plaintiffs for

violating § 53a-56, even if the plaintiffs were ultimately not found guilty. In the absence of any allegation that defendants' conduct falls outside the scope of their statutory authority, or any factual support for such an allegation, sovereign immunity bars the plaintiffs' claims. Tuchman v. State, 89 Conn. App. 745, 760-761, cert. denied, 275 Conn. 920 (2005).

Although the complete absence of any allegation, or factual support for an allegation, that the defendants' conduct is in excess of their statutory authority is, in itself, sufficient basis on which to conclude that the "excess of statutory authority" exception to sovereign immunity does not apply to the present case, Tuchman, 89 Conn. App. at 760-761, a process of statutory construction compels the same conclusion. In particular, statutory construction establishes 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 (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 Conn. Gen. Stat. § 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. v. Eder, 280 Conn. 672, 677-678 (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). Notably absent from these definitions is any exception for an individual who is terminally ill, uses prescription medications as opposed to some other method to end his or her life, or seeks a physician's assistance to facilitate the process. 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." Conn. Gen. Stat. § 53a-56 (emphasis added). 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 (1996). Accordingly, § 53a-56 cannot be read to exclude physicians from its scope.

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 (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). The Comment to the statute that prohibits murder, § 53a-54a, reiterates this point, stating that § 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).[5] 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.

[5] The Commission Comment to Conn. Gen. Stat. § 53a-54a explains that "[murder] . . . includes causing the suicide of another by force, duress or deception, with the requisite homicidal intent. This limitation, taken together with the corresponding manslaughter provisions, is designed to differentiate between the more sympathetic cases, such as suicide pacts, assistance rendered to one tortured by a painful disease, and the like, and cases where the actor causes or aids a suicide by aggressive or devious means and for purely selfish motives." Commission to Revise the Criminal Statutes, Commission Comment, Conn. Gen. Stat. Ann. § 53a-54a, p. 11 (West 2007).

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.
>
> (b) Manslaughter in the second degree is a class C felony.

Senate Bill 361, "An Act Concerning Physician-Assisted Suicide" (1994)(emphasis added) (available at www.cga.ct.gov/ps94/tob/s/SB-0361.HTM). 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." (Available at www.cga.ct.gov/ps95/tob/h/HB-6928.HTM). 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. (Available at www.cga.ct.gov/2009/TOB/S/2009SB-01138-R00-SB.htm). 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.

These unsuccessful bills are significant because the Connecticut Supreme Court has long held that "rejection by the Legislature of a specific provision contained in an act is most persuasive . . . that the act should not be construed to include the omitted provision." Tappin v. Homecomings Financial Network, Inc., 265 Conn. 741, 761 n. 20 (2003)(emphasis added; ellipsis omitted); State v. Nelson, 126 Conn. 412, 418 (1940). Relying on this principle, the Court in State v. Nelson, 126 Conn. 412 (1940), refused to read an exception into state laws that

prohibited anyone from assisting, abetting or counseling another to use contraceptives. The defendants in Nelson were two physicians who argued that the laws should be construed not to apply to physicians who assisted or counseled a married woman to use contraceptives when the general health and well being of the woman necessitated such use. The Court noted that the text of the statutes included no such exception and the legislature had repeatedly rejected bills that included such an exception. Stating that "[r]ejection by the Legislature of a specific provision is most persuasive that the act should not be construed to include it," the Court refused to read the alleged exception into the statutes. Id. at 418.

Similarly, in Tileston v. Ullman, 129 Conn. 84 (1942), the Court refused to read an exception from prosecution into the contraception statutes for physicians who aided women for whom pregnancy might cause serious injury or death. Once again, the Court concluded that "[t]he legislature has, by its refusal to amend the statutes, indicated beyond doubt its intention that they should apply as they are written, without the exception claimed by the plaintiff." Id. at 94. In so holding, the Court admonished the plaintiff, in language that is equally applicable to the present case, that:

> [A]lthough our legislature has repeatedly refused to amend the law, we have been asked, by construction, to accomplish the purpose which it declined to sanction. It 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 these statutes should stand unchanged, for us to read an exception into them is to pre-empt the legislative function.

Id. at 93-94.

The same judicial restraint is warranted here. The legislature has made a policy choice that aiding suicide in circumstances that are sympathetic is a lesser offense than aiding suicide by force or duress, but that all forms of assisted suicide are criminal. Although the plaintiffs would have this Court preempt that choice through statutory construction, "[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 (1942).

In sum, 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." Common usage of the term "suicide" includes the situation presented by the plaintiffs, namely "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," and nothing in the statutory language provides any exception from prosecution for physicians who assist such a suicide. Furthermore, the Commission Comments and multiple unsuccessful efforts to amend § 53a-56 make clear that it does not currently permit physicians to assist a suicide under any circumstances. Accordingly, 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.

CONCLUSION

For all of the foregoing reasons, this Court lacks subject matter jurisdiction over the plaintiffs' claims and the defendants' motion to dismiss should be granted.

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CERTIFICATION

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