Traveling Across States for Prohibited Treatments: Medical Aid in Dying and Looming Battles Over Abortion

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This *JGIM Perspective* discusses new and emerging challenges with accessing controversial medical therapies like medical aid in dying and abortion. While some states permit these therapies for only their residents, other states prohibit these therapies for their own residents. We summarize recent developments and growing challenges for clinicians treating "medical tourism" patients from other jurisdictions.

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Medical Aid in Dying (MAiD), sometimes referred to as physician-assisted suicide, remains a contentious practice. Eleven US jurisdictions have authorized MAiD. Twenty other states are considering similar legislation, and the Massachusetts Supreme Judicial Court recently heard arguments on whether Massachusetts may constitutionally prohibit the practice.

But no state has more MAiD experience than Oregon, which has permitted terminally ill patients to obtain a lethal prescription since 1994. Among other eligibility requirements, the statute, like all other US MAiD statutes, mandates that "only requests made by Oregon residents shall be granted."[1] This requirement is designed to prohibit "circumvention tourism," a form of "medical travel" where a patient travels from their home state or country where MAiD (or abortion or another medical practice) is illegal to receive it in a destination state or country where it is legal.[2] For example, many have traveled from around the world to Switzerland for MaiD.

In *Gideonse v. Brown*, an Oregon physician challenged the constitutionality of Oregon's residency requirement in federal court. Rather than defend its law, Oregon settled the case with a promise to eliminate the requirement, thus making MAiD available to patients anywhere in the USA or the world. In this article, we discuss the lawsuit and its settlement. We also assess its implications for abortion, wherein we are likely to see more interstate travel and regulation of such travel in the wake of the recent US Supreme Court decision.[3]

On October 21, 2021, Dr. Nicholas L. Gideonse, a family practice and palliative care physician at the Oregon Health & Science University, sued the state of Oregon alleging that its residency requirement unconstitutionally prevents him from providing MAiD to his terminally ill patients who reside just a few miles away in the state of Washington. Violating the requirement would expose Dr. Gideonse to criminal and civil penalties as well as discipline by the Oregon Medical Board. Dr. Gideonse claimed that the residency requirement "prevents him from providing his non-resident patients with care consistent with his best medical judgment at one of the most important moments in their lives."[1] He also noted that MAiD was "the only medical procedure in [his] day to day practice where a patient's lack of Oregon residency status categorically denies the otherwise appropriate care he can provide them."[1]

Dr. Gideonse contended that the residency requirement contravenes two provisions of the federal Constitution. First, the Privileges and Immunities Clause of Article IV, Section 2, states that "The citizens of each state shall be entitled to all privileges and immunities of citizens in the several states." He further argued that the clause "prevents a state from restricting non-resident visitors access to medical care within its borders absent a substantial state interest and restrictions narrowly tailored to those interests."[1]

Second, Dr. Gideonse argued that the residency requirement violates the so-called Dormant Commerce Clause of Article I, Section 8 of the Constitution which gives Congress the power "To regulate commerce with foreign nations, and among the several states, and with the Indian tribes." The US Supreme Court has, for almost two centuries, read this positive grant of authority to Congress to include a negative restriction on states acting in a way that unduly restricts interstate commerce through protectionist measures that favor state residents over non-residents. Gideonse argued that the MAiD residency requirement unconstitutionally "restricts an out-of-state resident's ability to access Oregon medical services" and "restricts a physician in Oregon from providing out-of-state residents with access to medical services when he attends to them in Oregon," and in the alternative "substantially burdens interstate commerce" in a way that "clearly exceeds the benefits, if any," of the requirement.[1]

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Rather than respond to the merits of these claims, surprisingly on March 28, 2022, the state of Oregon settled for reasons that have not been reported. The state agreed to "not apply or otherwise enforce the residency requirement in the Act" and that at the next regular legislative session, the Oregon Health Authority will submit a "legislative concept that would repeal the residency requirement."[1] With this change, this specific legal challenge has been resolved. Still, the matter is emblematic of a larger set of ethical and legal challenges. Indeed, a nearly identical lawsuit has already been filed in Vermont.[4]

In 1932, Supreme Court Justice Louis Brandeis famously described it as "one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country."[5] In some ways, that has been the vision of MAiD. Eleven jurisdictions have experimented with permitting it. Some view those experiments as successes, others as moral failures. But it has been the prerogative of each state to determine what to do.

In contrast to this Brandeisian "laboratory" approach, in 1997, challengers to New York and Washington criminal prohibitions on MAiD tried to take a "national" approach by asking the US Supreme Court to recognize a Constitutional right to MAiD.[6,7] Just as *Roe v. Wade* did with abortion, that would have produced a single USA-wide solution rendering unlawful all state prohibitions of the practice. But the Supreme Court ruled that criminal prohibitions of MAiD do not violate the federal Constitution.

The result of the *Gideonse v. Brown* settlement occupies a middle ground between a single federal rule on MAiD (available for all US citizens) and each individual state adopting its own rule for its own citizens (available for only our citizens). In other words, the settlement resets to a background norm tolerating interstate travel. Under this rule, states may decide what transpires in their own physical territory. But they may not decide whether other states' citizens can access their MAiD or whether their citizens can access MAiD elsewhere.

But like many middle positions, this approach is problematic. For those who seek to liberalize access to MAiD, it may end up deflating pushes for referenda, legislation, or legal challenges. States that currently prohibit MAiD might deflect some of the force of those challenges by pointing out that patients seeking such assistance might travel to Oregon — a state that will now take all comers — and thus there is a less pressing need for reform in their home state.

Furthermore, for those states that justify prohibiting MAiD to protect vulnerable patients who reside in that state, it is unclear that those interests are satisfied when a patient travels to Oregon. Just because Oregon has put out a welcome mat does not require them to lower their drawbridge. These states might respond either by using existing criminal prohibitions on assisted suicide to prosecute or by otherwise prohibiting in-state activities related to MAiD such as helping the patient travel to Oregon or helping prepare the medications for ingestion upon return from Oregon. States might also prohibit referrals for MAiD or even providing of information about this option. While no US state has taken this step for MAiD, other countries have taken this step. For example, the UK took this approach to travel to Switzerland for MAiD, and Ireland barred even providing information about traveling to other countries to obtain an abortion.[2]

Such approaches may seem draconian, but in the international arena, we have seen a similar strategy adopted (and lauded) for female genital cutting.[2] In the interstate US context, one could imagine a legislator arguing for this approach as to that state's prohibition on conversion therapy for LGBTQ youth: "we owe a duty to our youth, and have prohibited this harmful practice *here*, so why would we let parents transport our citizen children to another state to achieve the same thing?"

The most prominent and already emerging arena for this fight is travel for abortion. In the wake of Texas's S.B.8 and other abortion restrictions, we see increasing numbers of pregnant persons travelling out-of-state for abortion.[8] But may a state restrict abortion not only inside but also outside its territory? Several yet unenacted Missouri bills would extend the state's restrictive abortion laws to cases where Missouri citizens sought abortions in other states.[9,10] Now that the Supreme Court has overruled *Roe v. Wade*, this problem has become even more acute.[3]

While Justice Kavanagh suggested that the right to interstate travel makes this not "especially difficult as a constitutional matter," that is only the non-precedential opinion of a single justice.[3] Ultimately, whether for abortion or MAiD (or another contentious medical practice), the Supreme Court may need to resolve questions about interstate travel for services unavailable in a patient's home state. These cases are likely to raise the deepest questions regarding the nature of our federal system and the role of interstate travel.

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