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SUPREME COURT ROUNDUP

Justices Won't Hear Appeal on Drugs for Terminally Ill

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[WASHINGTON](#) — A legal battle ended at the [Supreme Court](#) on Monday over whether terminally ill patients who have run out of medical options have a constitutional right to try experimental drugs that have not yet received federal approval.

Advocates for patients lost the battle when, without comment, the justices refused to hear an appeal of a ruling by a divided federal appeals court that there is no such right.

The case, which attracted widespread interest and alliances across the usual ideological boundaries, began in 2003 as a lawsuit against the [Food and Drug Administration](#) by a group called the Abigail Alliance for Better Access to Developmental Drugs. The group was started by the father of a 21-year-old woman, Abigail Burroughs, who died while drugs that might potentially have helped her were still in the investigational stage, unavailable to patients. The drugs were later approved.

The [Washington Legal Foundation](#), a conservative public interest law firm here, was also a plaintiff in the lawsuit.

The plaintiffs claimed, as a fundamental aspect of constitutional due process, the right to choose to take medication of unknown benefit and risk that might potentially be lifesaving. A federal district judge here dismissed the case, but a panel of the United States Court of Appeals for the District of Columbia Circuit voted 2 to 1 in the plaintiffs' favor, an unexpected decision that gave the case greatly increased visibility.

The federal government then sought review by the full appeals court, which in August reversed the panel's decision by a vote of 8 to 2.

As it made its way through the courts, the case, *Abigail Alliance v. von Eschenbach*, No. 07-444, was the focus of spirited debates about federal policy, medical ethics and individual freedom. The Food and Drug Administration maintained that so much was still unknown after the

preliminary small-scale Phase 1 trial of a drug — the point at which the patients' group sought a right of access — that the drug could not responsibly be made available to patients. Most experimental drugs ultimately fail their clinical trials on grounds of safety or effectiveness.

But the plaintiffs maintained that the question was one of individual choice. "The right of a terminally ill patient, with no approved treatment options, to take some risks on an investigational treatment in an effort to save her life is implicit in the concept of ordered liberty under any reasonable standard," the plaintiffs' groups said in their Supreme Court appeal.

The Food and Drug Administration told the court that it was considering whether to offer expanded access to investigational drugs for treatment purposes, but was concerned that such access would make it difficult to conduct clinical trials.

These were among other developments at the court on Monday:

Disability Case

The court announced that a case against Wal-Mart Stores Inc. on employers' legal obligations to disabled employees had been settled and was therefore dismissed on Friday. The justices agreed last month to hear the case, *Huber v. Wal-Mart Stores, Inc.*, No. 07-480, but did not schedule it for argument.

The question was what the Americans With Disabilities Act requires when an employee, because of a disability, can no longer perform the duties of a current job. Is the employee entitled to preference for a new position, or simply entitled to compete with others for the new assignment? The issue has divided the lower courts, making it quite likely that the justices will grant another case that presents it.

Federal Death Penalty

Without comment, the court rejected a constitutional challenge to the federal death penalty statute, brought by a man who was convicted and sentenced to death for murdering his girlfriend after bribing his way out of a federal prison.

Lawyers for the defendant, Sherman L. Fields, argued that at the sentencing hearing after his conviction, the jury was permitted to hear evidence about his criminal history that was based on hearsay and that did not meet constitutional standards for admissibility at trial. The government argued in response that those standards did not apply at the sentencing phase once the jury has made the determination that a convicted defendant is eligible for the death penalty.

The case was **Fields v. United States, No. 07-6395**.

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