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Terminally wrong

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The chances are slim that the Supreme Court will hear Abigail Alliance v. von Eschenbach, which is just one of a great many cases vying for consideration. But at some point the nation needs to address the Food and Drug Administration's hold on terminally ill patients who seek one last chance via experimental drug treatments, which this case concerns. It pits a foundation inspired by Abigail Burroughs, a college student who succumbed to cancer in 2001, against the FDA, which considers restrictions on these drugs necessary for both its own approved trials and for public safety. Critical as FDA scrutiny is, ensuring the integrity of its processes does not require depriving a great many suffering people their last chance at survival. We can have both.

At present, the FDA blocks the terminally ill from using drugs which have passed Phase I trials, allowing a select number of trial participants to use them in a process which may land them in a placebo control group. Those placebo-administered patients effectively go untreated. Defenders of this practice argue that opening the drugs to others risks undermining the trial process altogether, since rational patients would simply opt out, fearing the placebo possibility. Defenders also cite the fact that most drugs turn out to do nothing while sometimes costing exorbitant sums of money, which others may bear in higher premiums. In the process, they often scare up old, pre-FDA snake-oil stories as well as some genuine consumer disasters, as if we're moving back to the 1920s by granting the terminal ill their wish.

The problem is that the FDA's processes are inherently flawed when it comes to the terminally ill. For patients whom we know will die without treatment, why insist on a placebo? Terminal lymphoma or leukemia sufferers will succumb; this much is certain. There would seem to be no need for a placebo, except that that's how the FDA insists on running things. Remove the placebo requirement, and the threat to the FDA's process from widely available experimental drugs vanishes.

In the present case, the Abigail Alliance and its petitioner, the Washington Legal Foundation, make a constitutional argument for the right to treatments after the drugs clear the FDA's Phase I trials. They hold that the Fifth Amendment's Due Process Clause, in protecting the right to make one's own fundamental medical-treatment decisions, should require the FDA to face much higher barriers if it wishes to block terminally ill patients from using the means of modern medicine as they evolve. That argument will rise or fall on its merits.

If nothing else, though, this case should raise awareness at the White House and in the 110th Congress that the government, via the powerful FDA, continues to extinguish the hopes of many terminally ill patients. It is simply wrong, not to mention unnecessary.