No. 07-444

In The
Supreme Court of the United States

ABIGAIL ALLIANCE FOR BETTER ACCESS TO DEVELOPMENTAL DRUGS, *et al.*,

Petitioners,

v.

ANDREW C. VON ESCHENBACH, *et al.*,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

BRIEF OF *AMICUS CURIAE* INSTITUTE FOR JUSTICE IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

INSTITUTE FOR JUSTICE
WILLIAM H. MELLOR
SCOTT G. BULLOCK*
DANA BERLINER
901 North Glebe Road
Suite 900
Arlington, VA 22203
(703) 682-9320

**Counsel of Record*

Attorneys for Amicus Curiae

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

Whether the Due Process Clause protects the right of a terminally ill patient with no remaining approved treatment options to attempt to save her own life by deciding, in consultation with her own doctor, whether to seek access to investigational medications that the Food and Drug Administration concedes are safe and promising enough for substantial human testing.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES – Continued

Page

OTHER PUBLICATIONS

TABLE OF AUTHORITIES – Continued

IDENTITY AND INTEREST OF *AMICUS CURIAE*[1]

Pursuant to Supreme Court Rule 37.2(a), the Institute for Justice respectfully submits this brief *amicus curiae* in support of the petition for a writ of certiorari. Written consent was granted by counsel for all parties and filed with the Clerk of the Court.

The Institute for Justice is a nonprofit, public interest law center committed to defending the essential foundations of a free society through securing greater protection for individual liberty and restoring constitutional limits on the power of government.

SUMMARY OF ARGUMENT

Petitioner Abigail Alliance is named for Abigail Burroughs, a 21-year-old college student who died of head and neck cancer in 2001. She fought her cancer for two years and then ran out of government-approved treatment options. Her highly-renowned Johns Hopkins University oncologist wanted to put Abigail on an experimental cancer drug whose early trial results proved very promising. Unfortunately for Abigail, she could not get into the clinical trials for the drug and died three years before the Food and Drug Administration (FDA) finally approved the drug.

[1] Pursuant to Supreme Court Rule 37.6, counsel for a party did not author this brief in whole or in part. No person or entity, other than *amicus curiae*, their members, or their counsel made a monetary contribution specifically for the preparation or submission of this brief.

Petitioner Abigail Alliance was founded by Abigail, her father, and other patients and their families who seek greater access to drugs approved for clinical trials. Petitioner filed an action in the U.S. District Court for the District of Columbia arguing, *inter alia*, that the Due Process rights of terminally ill patients with no approved treatment options are violated when the government denies access to safe experimental drugs that companies are willing to make available. In August of this year, the U.S. Court of Appeals for the D.C. Circuit sitting *en banc* ruled 8-2 that terminally ill patients do not have a constitutional right to access potentially life-saving drugs that the FDA has already found to be safe for clinical trials but has not yet decided that they are effective. *Abigail Alliance for Better Access to Developmental Drugs v. von Eschenbach*, 495 F.3d 695 (2007) (*en banc*). Of course, the dying patients hope the drugs will be effective, but they do not have time to wait for studies to prove that; experimental drugs may be their only hope to save their lives. The powerful dissent in the case, written by Judge Judith Rogers, and joined by Chief Judge Douglas Ginsburg, concluded: "Denying a terminally ill patient her only chance to survive without even a strict showing of governmental necessity [for denying access to the drugs] presupposes a dangerous brand of paternalism." *Id.* at 728.

This case, like many cases in the lower courts exploring important constitutional issues, came down to an issue of semantics. The majority opinion characterized the right at issue as an extremely narrow one – "the right to access experimental and unproven drugs in an attempt to save one's life." *Id.* at 701, n. 5. The dissent characterized the right in more general terms – the right "to try to save one's

life." *Id.* at 715. Not surprisingly, the majority found no fundamental right to "access experimental and unproven drugs," while the dissent did find a fundamental interest in the right to life. *Id.* at 712 and 715.

The dissent described the majority's characterization of the right as "tragic wordplay." *Id.* at 728. And there is no doubt that the dispute between the majority and dissent did come down to the exact wording chosen to describe the right at issue. This kind of "wordplay" has become the defining feature of fundamental rights analysis. When a court wants to uphold a right, it gives a more general characterization. When it wants to belittle a right, it describes it in the narrowest and most absurd way possible.

Lower courts lack a clear, consistent method for ascertaining whether constitutional rights should be deemed fundamental or non-fundamental. Now is the time for this Court to not only protect the ability of individuals to try to save their own lives when confronted with life-threatening illnesses, but also to set forth more clearly how essential constitutional liberties should be characterized – and thus protected – under the Fifth and Fourteenth Amendments.

As further set forth below, there is an ample and growing body of scholarly support recognizing a constitutional right to control personal medical decisions. The research comes from an ideologically diverse group of scholars. The scholarship is bound by a recognition that it is curious and wholly unjustified that courts have recognized constitutional protection for the right to an abortion and to engage in certain sexual practices but not for the right of individuals to make decisions concerning the

treatment of life-threatening illnesses, especially considering that these decisions are perhaps the most momentous and private decisions one can make. The scholarship sets forth a powerful case that the Constitution and this Court's previous decisions in this area support, even demand, recognition for the right of medical self-determination.

ARGUMENT

I. CONFUSION EXISTS AS TO HOW COURTS SHOULD PROTECT VITAL LIBERTIES AND THIS CASE PRESENTS AN EXCELLENT OPPORTUNITY TO PROVIDE NEEDED GUIDANCE ON FUNDAMENTAL CONSTITUTIONAL ISSUES.

This case involves important constitutional issues concerning due process guarantees of the Fifth and Fourteenth Amendments, the Ninth Amendment guarantee that rights not enumerated in the Bill of Rights are nevertheless protected, and this Court's modern doctrine of "fundamental rights" jurisprudence. The majority in the D.C. Circuit claimed that the right at issue in the case was "the right to access experimental and unproven drugs in an attempt to save one's life." *Abigail Alliance*, 495 F.3d at 701, n. 5. Cast in this way, the majority, not surprisingly, found that such a right was non-fundamental and thus subject merely to rational basis review, which, of course, the prohibition survived. *Id.* at 712-14.

In contrast, the dissent characterized the right at issue as the right to life, explicitly protected by the Fifth and Fourteenth Amendments, and the right to self-preservation,

a right, while not set forth directly in the Constitution, is unquestionably implicit in the concept of ordered liberty and deeply rooted in our nation's history and traditions. Thus, according to the dissent, the right should be recognized as a "fundamental" due process right and the FDA's prohibition should be subject to strict scrutiny. As the dissent notes, it is "startling" that non-enumerated rights "to marry, to fornicate, to have children, to control the education and upbringing of children, to perform varied sexual acts in private, and to control one's own body . . . have all been deemed fundamental, . . . but the right to try to save one's life is left out in the cold despite its textual anchor in the right to life." *Id.* at 715.

In our view, the Privileges or Immunities Clause of the Fourteenth Amendment and the Ninth Amendment, rather than the Due Process Clause, should be the primary sources for the recognition of substantive, albeit non-textual, individual rights. *See, e.g.*, Clarence Thomas, *The Higher Law Background of the Privileges or Immunities Clause of the Fourteenth Amendment*, 12 Harv. J.L. & Pub. Pol'y 63 (1989); Randy Barnett, *The Rights Retained by the People: The History and Meaning of the Ninth Amendment* (1989); Kimberly C. Shankman & Roger Pilon, *Reviving the Privileges or Immunities Clause to Redress the Balance Among States, Individuals, and the Federal Government*, Cato Policy Analysis No. 326 (November 23, 1998).[2] Of

[2] We believe that the Ninth and Fourteenth Amendments reflect the natural rights orientation of the amendments' drafters and the common law traditions present at the time of their passage. *See* Edward S. Corwin, *The "Higher Law" Background of American Constitutional Law* (1955); Randy Barnett, *Getting Normative: The Role of Natural Rights in Constitutional Adjudication*, 12 Const. Commentary

(Continued on following page)

course, the Privileges or Immunities Clause was largely read out of the Constitution in the *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1873), thus encouraging the creation of "substantive due process" rights. Whether it is too late in the day to reconsider *Slaughter-House* is a matter of great debate among legal scholars and even some members of this Court. *See* Philip Kurland, *The Privileges or Immunities Clause "Its Hour Come Round at Last"?*, 1972 Wash. U. L. Q. 405; Clint Bolick, *Unfinished Business: A Civil Rights Strategy for America's Third Century* (1990); *Saenz v. Roe*, 526 U.S. 489 (1999).

We believe that this Court should reconsider *Slaughter-House* and that the Privileges or Immunities Clause should be restored to its rightful place as the protector of basic individual rights. Nevertheless, as the petition in the instant case and next section of this brief make clear, the right of self-preservation and the ability of individuals to make medical decisions regarding their lives are deeply embedded in our nation's history and traditions and should be recognized as fundamental under either the Due Process or the Privileges or Immunities Clauses of the Fifth and Fourteenth Amendments.

As pointed out in the petition in this case, there is confusion among the lower courts about the current doctrine used by this Court to protect unenumerated rights. The infamous footnote 4 of this Court's decision in *United States v. Carolene Products*, 304 U.S. 144, 152 n. 4 (1938), requires courts to distinguish fundamental rights from other supposedly "lesser" liberties that legislatures have

---

93 (1995). These amendments were intended not to create new rights, but rather to protect pre-existing rights from state interference.

broad discretion to regulate, control, or even eliminate. As noted by many, footnote 4 worked a revolution in both the political branches of government and the role of courts:

> While it is generally realized that footnote 4 of *Carolene Products* signaled a substantive redirection of the Court's role in the political system, it is not often recognized that this shift also required the Court to do something unprecedented; that is, to enumerate the specific freedoms and privileges that should be considered inviolate even in a regime of expanded powers. In the nineteenth century it was assumed that government should leave individuals alone unless the state could convince a court that the exercise of power advanced a valid public purpose. By contrast, under the contemporary model, it has been assumed that the government's power should be left undisturbed unless an individual can convince a court that the law infringed on a discrete fundamental right.[3]

The confusion among the lower courts is generated in part because, under footnote 4, so much of constitutional law now turns on how a particular individual right is characterized.

As noted above, a liberty is considered fundamental when it involves a right that is "implicit in the concept of ordered liberty" or "deeply rooted in this nation's tradition and history." *See Washington v. Glucksberg*, 521 U.S. 702, 721 (1997) (citations omitted). The burden is currently on the claimant litigating a due process challenge to prove that the unenumerated liberty at issue is somehow "fundamental."

---

[3] Howard Gilman, *The Constitution Besieged: The Rise and Demise of Lochner Era Police Powers Jurisprudence* 104 (1993).

Moreover, this Court in *Glucksberg* also held that parties must provide a "careful description" of the asserted right, thereby encouraging parties to perhaps too narrowly define fundamental liberty interests. *Id.* The constitutional inquiry, then, turns very much on how the liberty is defined.

The instant case provides a perfect example of this semantic struggle. The majority opinion in this case defined the right at issue as the right of terminally ill patients to access experimental drugs that have passed limited safety trials but have not yet been proven safe and effective. *Abigail Alliance*, 495 F.3d at 701, n. 5. Not surprisingly, given the short history of drug regulation in this country, the majority concluded that such a right was not deeply rooted in our nation's history and traditions nor implicit in the concept of ordered liberty. *Id.* at 712-14. The dissent described the right at stake as the right "to try to save one's life." *Id.* at 715. One would be hard pressed to think of a more clearly-established and long-standing legal tradition than the right to self-preservation.

The outcome of a case, including this one, can depend almost entirely on which of two descriptively accurate characterizations a court decides to use. For instance, this Court has long recognized the fundamental right of parents to direct and control the upbringing and education of their children, even though the rights of parents or families are nowhere mentioned in the Constitution. But imagine how cases would have turned out if this vital right would have been characterized instead as the "right of parents to have their kids learn German" (*see Meyer v. Nebraska*, 262 U.S. 390 (1923)) or "the right of parents to stop grandparents from seeing their grandchildren." *See Troxel v. Granville*, 530 U.S. 57 (2000). Neither of those "rights" could fairly be described as deeply rooted in our nation's history and traditions. Such manipulation of

language makes it easy for a hostile court to dismiss serious constitutional claims. The U.S. Court of Appeals for the Seventh Circuit, for instance, was able to quickly dispose of a challenge to a city-wide ban on the sale of spray-paint by asking whether there was anything in the Constitution about a right to buy spray-paint and whether the right to buy spray-paint even appeared on "wild-eyed radical's list" of fundamental rights. *National Paint and Coating Association v. City of Chicago*, 45 F.3d 1124, 1129 (7th Cir. 1995).

Because of the current state of this doctrine, lower courts can effectively decide how they want to rule and then choose how to describe the right in question to fit that ruling. The defining of the right decides the case. The time is ripe for this Court to not only resolve the vital constitutional issue implicated by this case, but to also provide greater guidance for lower courts to ensure that the protection of essential constitutional rights do not become a matter of word games and semantics.[4]

---

[4] Instead of the current problematic fundamental/non-fundamental rights doctrine, noted constitutional expert Professor Randy Barnett of Georgetown University Law Center, proposes that all liberties should be treated equally. Under his proposal, "the government would have the burden to justify its restrictions on liberty, whether exercising its police power at the state level, or its enumerated power at the federal level. Whatever power is being exercised, the government may justly (1) regulate the rightful exercise of liberty or (2) prohibit wrongful acts, but they may not (3) prohibit rightful exercise of liberty. In short, while all liberty may be reasonably regulated, the burden is on the government to show why the regulation of any particular liberty is truly necessary and proper. We should not just take the government's word for it. If a regulation of liberty is necessary to protect the rights of others in the community that regulation can stand. Only if the activity itself is wrongful, however, can they prohibit the activity altogether." Randy Barnett, *The Presumption of Liberty and the Public Interest: Medical*

(Continued on following page)

II. A DIVERSE BODY OF LEGAL SCHOLARSHIP HAS CALLED FOR THE RECOGNITION OF A CONSTITUTIONAL RIGHT OF INDIVIDUALS TO MAKE DECISIONS REGARDING ESSENTIAL MEDICAL TREATMENTS.

There is a growing consensus in the academic community that the Constitution protects the right of terminally ill patients to access experimental medical treatments. This support comes from scholars across the ideological spectrum. For instance, Professor Eugene Volokh of UCLA Law School argues that the right of the terminally ill to use experimental medical treatments is a subset of the more general right to medical self-defense, and that this right should be respected in the same manner as the right to lethal self-defense. Eugene Volokh, *Medical Self-Defense, Prohibited Experimental Therapies, and Payment for Organs*, 120 Harv. L. Rev. 1813 (2007). Professor Jessie Hill of Case Western Reserve University School of Law argues that this Court's jurisprudence touching on the right to make autonomous medical treatment decisions has been arbitrarily split between two opposing lines of cases with conflicting views on the proper amount of deference due to legislatures' medical determinations. B. Jessie Hill, *The Constitutional Right to Make Medical Treatment Decisions: A Tale of Two Doctrines*, 86 Tex. L. Rev. (forthcoming 2007). Furthermore, she concludes that the legislature is not necessarily in the best institutional position to make scientific and medical determinations. Finally, Professor Elizabeth Patterson of Georgetown University Law Center asserts that the right to make

---

Marijuana and Fundamental Rights, 22 Wash. U. J.L. & Pol'y 29, 43 (2006).

health care decisions falls within the well-established right of privacy and is therefore due heightened protection. Elizabeth G. Patterson, *Health Care Choice and the Constitution: Reconciling Privacy and Public Health*, 42 Rutgers L. Rev. 1 (1989). These noted scholars' work is discussed in more detail below.

A. Medical Self-Determination Is An Aspect Of The Right To Self-Defense.

Professor Volokh argues in a recent article that the right to medical self-defense is analogous to the long-recognized right to lethal self-defense and should be similarly protected by this Court. 120 Harv. L. Rev. 1813 (2007). Volokh describes a number of situations in which the lives of women are placed in danger. The first situation involves a woman who is seven months pregnant and the pregnancy threatens her life. Even though the fetus is already viable, because her life is in danger, she has a constitutional right to terminate her pregnancy in order to protect her own life. The second situation involves a woman who faces an intruder in her home and fears that the intruder intends to kill or seriously injure her. Just as the first woman may protect her life by ending her pregnancy, this woman may kill her attacker in order to protect her own life. The third situation set forth by Volokh describes the issue in the instant case – a terminally ill woman will die if she is not permitted access to a drug that has not yet passed Phase II testing by the FDA. According to Volokh, all of these situations involve a right to self-defense, and just as a woman is entitled to protect her life by killing her attacker or terminating her viable fetus, she should also be allowed to protect her own life by

hiring a doctor to administer medication that has not yet been fully approved by the FDA.

The right to lethal self-defense, broadly defined as the right to protect oneself against an attacker even if it entails the use of deadly force, has long been accepted as an exception to all criminal laws. According to Volokh, "[t]he lethal self-defense right has constitutional foundations in substantive due process, in state constitutional rights to defend life and to bear arms, and perhaps in the Second Amendment. But even setting aside those constitutional roots, the right has long been recognized by statute and common law." *Id.* at 1815. Just as the right to lethal self-defense is limited to circumstances in which deadly force is necessary to defend one's life, the right to medical self-defense would be limited to present, life-threatening medical conditions.

Volokh makes clear that his is not a general autonomy argument in which people would be allowed to put anything into their bodies. Rather, he focuses on the narrow right to medical self-defense, which is supported by both this Court's privacy jurisprudence and its longstanding acceptance of the right to lethal self-defense. Thus, Volokh argues, the D.C. Circuit erred in pointing to the longstanding regulation of pharmaceuticals as evidence that the right to medical self-defense cannot be constitutionally recognized under the *Glucksberg* test. The use of lethal force and the right to abortion are also regulated, yet the right to self-defense has always coexisted with such regulation precisely because it is a narrow exception. *Id.* at n. 76. Similarly, the right to medical self-defense can coexist with a tradition of regulation in the pharmaceutical industry.

In addition, according to Volokh, courts should not distinguish experimental therapies from the right to lethal self-defense or the right to a therapeutic abortion on the basis of the chances of success. *Id.* at 1831. The appellate court's decision in the instant case specifically points out that there is no proven therapeutic effect for the forbidden medical treatment. However, the use of lethal self-defense is permitted even if there is a significant chance that the attacker will still overcome the person. *Id.* Similarly, the right to a therapeutic abortion still exists even if the mother may die with the abortion. *Id.* The fact that the abortion increases the mother's chances of survival by even a small uncertain amount is sufficient to make the procedure permissible. Thus, arguing that the medical treatments have not been proven effective should be ineffectual.

Lethal self-defense and abortion-as-self-defense share the core principle that people should have a right to defend themselves against a threat to their lives. *Id.* at 1825-26. This Court has already recognized medical self-defense in the context of abortions that are necessary to protect the woman's life or health, and, virtually alone within the larger abortion debate, this narrow right has remained largely uncontroversial. According to Volokh, the right to medical self-defense " . . . can't logically be limited to situations in which the defensive procedure is abortion and rejected when a woman needs to defend herself using experimental drugs or an organ transplant. Nothing about therapeutic postviability abortion makes it deserve protection more than any other medical self-defense procedure." *Id.* at 1826. Because the right to postviability abortions logically flows from the right to medical self-defense and not the right to reproductive choice, which no longer exists

postviability, such a right is indistinguishable from other rights to medical self-defense. Thus, in order to impose a substantial burden on a patient's right to protect her life through medical procedures, the government should be required to show that it has a substantial reason for imposing such a burden, and that its goals cannot be accomplished in any less burdensome manner. *Id.* at 1827.

B. Legislatures Should Not Automatically Be Deferred To When Highly Personal Medical Decisions Are At Stake.

In a forthcoming article in the Texas Law Review, Professor Hill argues that the constitutional cases touching on medical treatment decisions should be viewed as one body of doctrine. 86 Tex. L. Rev. (forthcoming 2007). According to Hill, two distinct lines of constitutional doctrines dealing with medical treatment choices have developed over time. The "public health" line of cases, beginning with *Jacobson v. Massachusetts*, 197 U.S. 11 (1905), emphasizes the police power of the state over individual rights. The "autonomy" line of cases, beginning with *Griswold v. Connecticut*, 381 U.S. 479 (1965), emphasizes individual dignity and autonomy interests. These two lines of cases have taken conflicting views of the existence of the right to make autonomous medical treatment decisions and the degree to which determinations of medical facts made by legislatures are due judicial deference. Hill contends that these two approaches are not doctrinally justified, as they both deal with essentially the same problem – the constitutional right to make medical treatment choices. In addition, the differing outcomes in these lines of cases largely stems from the inconsistent application of deference. According to Hill, legislatures are

ill-suited to decide whether a medical treatment has therapeutic value, with judges being in a better position to weigh the scientific evidence. She argues for the consistent recognition of a constitutional right to protect one's life that is not limited by deference to legislative findings of medical fact, and the balancing of this right against the state's interest in regulating the practice of medicine to protect the public.

The "public health cases" emphasize the state's power and duty to protect citizens from threats to their health. Under this approach, judges focus on the legislatures' role in protecting the citizenry at large and grant legislatures great deference in fulfilling their task. These cases include the state's power to enforce a mandatory vaccination law and to forbid the distribution of marijuana for medicinal purposes. *Jacobson, supra*; *United States v. Oakland Cannabis Buyers' Cooperative*, 532 U.S. 483 (2001) ("*OCBC*"). Hill discusses a recent example of this Court's application of the public health doctrine in *OCBC*. In this case, this Court dismissed the claims of seriously ill patients to access cannabis for medicinal purposes when no other treatment was working. Despite the fact that the patients presented unrefuted evidence that marijuana may have legitimate medicinal purposes, this Court deferred to a congressional finding that marijuana has no accepted medicinal use. In the public health cases, this Court has granted the states broad police power to act in the interest of public health and safety, and has allowed the legislatures to remain the primary judge of the common good.

The "autonomy cases," epitomized by the Court's reproductive rights jurisprudence, began with the right to make autonomous medical decisions and have since

developed into a broader right to bodily integrity and decisional independence. These cases focus on a suffering individual, and often do not defer to legislative findings of medical fact. "All of the autonomy cases grant some form of heightened scrutiny to claims of infringement on the right to choose appropriate medical treatment, whether it be in the form of a virtual per se rule that government may not interfere with a woman's right to protect her health by choosing abortion, as in *Roe*, or in the form of some sort of careful balancing of interests, which the Court in *Glucksberg* suggested would be required for any law interfering with a seriously ill patient's access to palliative care." Unlike *OCBC*, this Court in *Stenberg v. Carhart*, 530 U.S. 914 (2000), recognized a strong substantive due process right to make medical treatment decisions. In *Carhart*, the Court recognized a broad right to choose one abortion procedure over another for safety reasons, and, unlike in *OCBC*, even allowed the plaintiff to challenge the state's view of the medical evidence.

According to Hill, a more logical approach would be to recognize that a constitutional right is implicated whenever the government interferes with medical choices, and to then inquire whether there is sufficient reason to override that right. Such an inquiry would include the consideration of the strengths of the claimant's evidence. In contrast, in the public health and the autonomy cases, "the Court has basically decided whether individuals have a constitutional right to make autonomous medical treatment choices based on their largely superficial categorization of a given case as an autonomy case or a public health case, and . . . there are no satisfying doctrinal ways to explain the conflict between these two types of cases."

Courts typically defer to legislative determinations because legislatures are thought to possess more legitimacy than courts when finding facts, and they are thought to be more competent at finding facts. This Court has considered scientific questions to be "matters not within specialized judicial competence." *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 33-34 (1976) (quoting *United States v. Gainey*, 380 U.S. at 67 (internal quotation marks omitted)). However, for a number of reasons, Hill argues that the traditional reasons for judicial deference to legislative fact-finding do not apply in the context of medical fact, and that courts are in a better institutional position than legislatures to conduct scientific fact-finding. First, scientific determinations, unlike social policy determinations, should not be driven by politics, value judgments, or the desires of the majority. Second, the fact that legislatures are democratic, representative bodies has no applicability where issues of pure medical fact are concerned. Finally, there is no reason to believe that legislatures possess superior institutional competency with respect to medical and scientific fact. Hill therefore argues for a jurisprudence that avoids using superficial doctrinal categories and granting automatic deference to legislatures, and instead balances government interests against the individual claim of a right of access to a given medical treatment using all available scientific information.

C. This Court's Previous Decisions Support Recognition Of A Right To Medical Self-Determination.

Finally, Professor Patterson has argued that the right of privacy should afford constitutional protection to health

care choices. 42 Rutgers L. Rev. 1 (1989). This Court has recognized a constitutionally protected "right of privacy" as an aspect of liberty that is entitled to heightened substantive protection under the Due Process clauses of the Fifth and Fourteenth amendments. In determining whether a right to privacy exists, this Court looks to the extent to which the decision at issue is highly personal, the degree of importance that is attached to it, whether there is a tradition of social and legal attitudes toward the role of the state in regard to the decision, and whether that right is associated with other enumerated rights. According to Patterson, the personalness and importance of health care choice is clearly established. Courts have recognized that decisions concerning health care are "to an extraordinary degree, intrinsically personal." *Andrews v. Ballard*, 498 F. Supp. 1038, 1047 (S.D. Tex. 1980).

Health is also clearly of predominant importance to an individual. Patterson writes: "Most of the detriments cited by the Supreme Court to support its holding that abortion choice is fundamental are equally implicated by all health care decisions, notably, the potential for physical and psychological harm, and for a 'distressful' change in lifestyle for both the individual and his family." 42 Rutgers L. Rev. at 35. In addition, history and tradition support the inclusion of health care decisions within the right to privacy. Health care decisions were not regulated when the Bill of Rights and the Fourteenth Amendment were adopted, and there is a brief history of their regulation. Moreover, health care decisions are related to areas of liberty given express constitutional protection, are associated with the right to life protected by the Fifth and Fourteenth amendments, and are linked to the right to property in one's own person. The tradition of non-regulation, the association

with other enumerated rights, and the personalness and importance of health care choices combine to provide strong evidence that such choices should be included with the right to privacy that has been recognized by this Court. *Id.* at 45.

Patterson therefore argues that health care choices should be regulated only when such regulation is required to achieve an important public goal. *Id.* at 89. While the state's interest in protection of public health is entitled to considerable weight, it must be balanced against an individual's fundamental right in making his own health care decisions. The state's interest "has less validity when the asserted threat to public health arises from the voluntary choices of the affected members of the public. This is particularly true where opinions may differ as to what course of action is in the best interest of the affected persons, as is often the case in regard to health care." *Id.* at 89-90. Regulation should be finely tuned to respond to the informational and evaluative problems associated with individuals making their own health care decisions, with the government's intrusion minimized to the level necessary to accomplish its objective. Thus, Patterson concludes, "A more balanced approach to regulation is called for, with restrictions being carefully formulated to leave as much room as possible for individual choice while still protecting the public in areas where protection is genuinely needed." *Id.* at 91.

As the foregoing discussion demonstrates, there is a strong trend within the legal academic community in favor of providing access to experimental medical treatment. Arguments in favor of such a presumption include a right to medical self-defense, an argument against deference to legislatures in the context of medical decisions, and a

constitutional right to privacy. It is clear from the literature that regardless of which method of analysis is utilized there is broad support for a constitutional right to protect one's health. The time is ripe for this Court to address the vital constitutional issue presented by the instant petition.

CONCLUSION

For the forgoing reasons, *amicus curiae* Institute for Justice respectfully requests that the petition for certiorari be granted.

Respectfully submitted,

INSTITUTE FOR JUSTICE
WILLIAM H. MELLOR
SCOTT G. BULLOCK*
DANA BERLINER
901 North Glebe Road
Suite 900
Arlington, VA 22203
Telephone: (703) 682-9320
Facsimile: (703) 682-9321

**Counsel of Record*