DAILY INDEPENDENT

Sandefur: The DEA must accommodate the Right to Try

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Passed by 41 states before a federal version was signed into law in 2018, Right to Try gives dying patients the right to use investigational medicines that have been approved for safety, but not yet approved for final sale, by the federal government.

The basic principle of Right to Try is that individuals have the right to make their own decisions about their health care — especially when their lives hang in the balance, without having to first get permission from the U.S. Food and Drug Administration — permission that often takes a long time to get, and which the FDA often refuses for arbitrary reasons.

In the years since they were adopted, Right to Try laws have improved and saved the lives of hundreds of terminally ill patients who otherwise would have been out of options.

But when oncologists at the Advanced Integrative Medical Science Institute wanted to treat cancer patients with the investigational drug psilocybin, another government agency got in the way. Psilocybin meets the criteria for Right to Try and has been shown to be safe and effective in clinical trials for relieving anxiety and depression in patients with advanced cancer.

But psilocybin is a Schedule I substance, meaning its access is also restricted by the federal Drug Enforcement Agency, which rejected AIMS doctors' access to the drug for therapeutic treatment. A few weeks ago, the AIMS Institute, oncologists and cancer patients filed a Petition for Review in the U.S. Court of Appeals for the Ninth Circuit to stop the DEA from interfering with Right to Try.

Joined by our friends at the Cato Institute, we filed a brief in support of these desperate patients, arguing that the DEA's refusal to accommodate Right to Try undermines the important goal of getting dying patients the treatments they need when they need them — and allowing patients and their doctors to make these important decisions free from needless bureaucracy.

Right to Try laws were adopted out of concern that the federal government has increasingly and improperly interfered with the practice of medicine. Over the past century, federal law gradually shifted from a focus on providing information to patients and their doctors to a more paternalistic approach — one that in practice actually blocks patients from accessing medicines they need.

State and federal Right to Try laws restore states' role in regulating and protecting the practice of medicine and, more importantly, safeguard patients' right to make their own medical decisions, especially patients diagnosed with a life-threatening illness.

In addition to restoring patient autonomy, Right to Try was meant to eliminate the arbitrary and unjustifiable outcomes that resulted from a system that forced patients to undergo a lengthy and complicated process to get government permission to try to save their lives.

Under Right to Try, if a patient with a life-threatening illness wants to try an investigational treatment that has passed initial FDA safety trials and is currently being used in a clinical trial, the patient is legally entitled to use that medicine even though it may bring serious risks. And state Right to Try laws shield the treatment of terminally ill patients with investigational drugs independent of federal law.

When states adopted Right to Try, they provided greater protections for a fundamental right than were provided by the federal system. The state laws provide that terminal patients and their doctors should be free to decide — without government interference — whether treatment should include experimental medications.

And the federal Right to Try statute makes clear that Congress did not intend for federal agencies to effectively override or make unenforceable the states' Right to Try laws.

That's why we argue that the DEA's refusal to accommodate Right to Try not only undermines congressional goals, but also exceeds its authority and intrudes on a state-protected right: the right to protect one's own life.