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## Supreme Court Affirms Oregon Physician Assisted Suicide Statute

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## NEWS

## Supreme Court Affirms Oregon Physician Assisted Suicide Statute

By Adam Braun

In a landmark 6-3 decision spurring tremendous controversy, the Supreme Court affirmed the legality of Oregon's Death With Dignity Act in *Gonzales v. Oregon*.<sup>1</sup> The decision sparked action by advocates on both sides of the physician assisted suicide debate.

The Court held that the Oregon Death With Dignity Act ("ODWDA") did not violate the Controlled Substances Act ("CSA"), despite the dissent of Justice Scalia, who was joined by Chief Justice Roberts and Justice Thomas.<sup>2</sup> Writing for the Court, Justice Kennedy announced that the CSA did not authorize the Attorney General to prohibit doctors from prescribing drugs regulated by the CSA for use in physician assisted suicide, as the Bush Administration had argued.<sup>3</sup> In reaching the decision, Justice Kennedy relied not on principles of constitutional law, as past decisions on physician assisted suicide had, but instead on technical aspects of administrative law.<sup>4</sup>

The challenge to the ODWDA was brought by the Attorney General and not by a private party, unlike previous cases on this issue. In this case, former Attorney General John Ashcroft issued an Interpretive Rule ("the Rule") in November 2001, which determined that the performance of procedures which assisted a patient in terminating his life was not a legitimate medical practice.<sup>5</sup> As such, any dispensation or prescription of substances covered by the CSA for use in terminating a patient's life was considered unlawful by the Department of Justice.<sup>6</sup>

The Rule called the legality of ODWDA into question. Passed in 1994 by a statewide ballot measure, the ODWDA exempted state-licensed physicians who dispensed or prescribed lethal doses of drugs upon the request of a terminally ill patient from civil or criminal liability.<sup>7</sup> ODWDA, which survived a 1997 referendum seeking its repeal, went unchallenged during the Clinton Administration.<sup>8</sup> When the measure was finally challenged by the Interpretive Rule, the state of Oregon, joined by a physician, a pharmacist and terminally ill citizens of Oregon, challenged the Rule in District Court.<sup>9</sup> The District

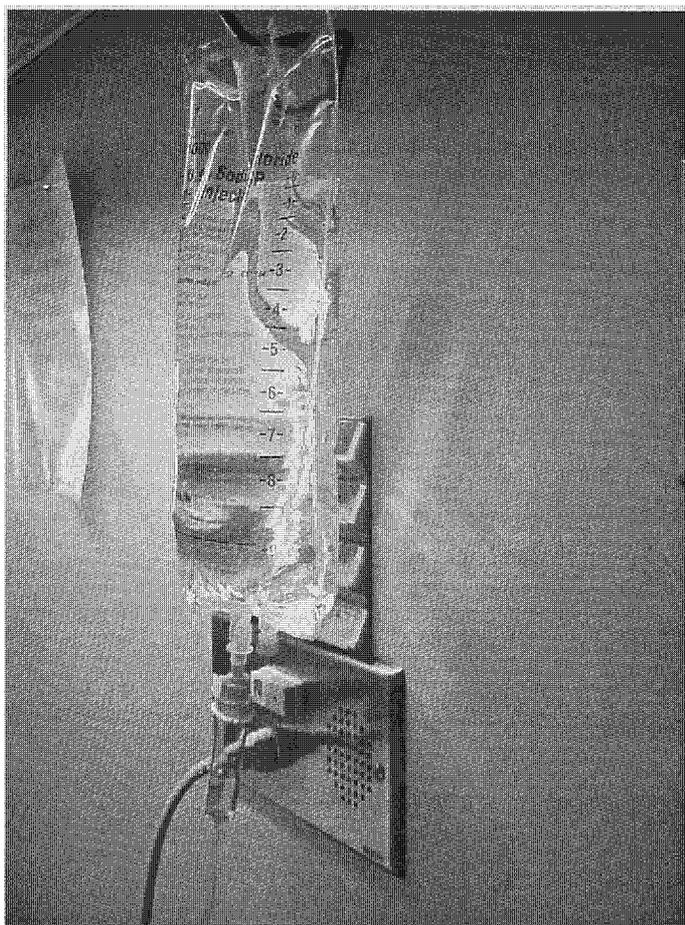
Court entered a permanent injunction against enforcement of the Interpretive Rule and, on appeal, the Court of Appeals for the Ninth Circuit held the Rule to be invalid on grounds that it "alter[ed] the constitutional balance between the states and the federal government."<sup>10</sup>

The Supreme Court affirmed the ruling of the Court of Appeals, agreeing that the extensive power vested in the Attorney General by the Interpretive Rule invalidated the Rule.<sup>11</sup> As the Court declined to address the constitutionality of ODWDA, advocates on both sides claimed victory.

"The opinion was result oriented," said Roger Pilon, Vice President for Legal Affairs at the CATO Institute.<sup>12</sup> "There's enough case law [there] that the two sides can get any result they want."<sup>13</sup>

Wesley Smith, senior fellow at the Discovery Institute and author of eleven books including *Forced Exit: the Slippery Slope from Assisted Suicide to Legalized Murder*, agreed. He noted that the decision is "so narrowly drawn and steeped in the arcania of regulatory and statutory interpretation that it would normally spark little interest outside of administrative

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law journals.”<sup>14</sup> Smith, along with many other opponents of physician assisted suicide, claim that the Interpretive Rule would have been valid had the Attorney General worked with the Department of Health and Human Services (“HHS”) to enforce the Rule. Had HHS been consulted, they argue, the decision as to what medical acts constitute “legitimate medical practices” would be made by the Government agency responsible for regulating medical practice and the Rule would be valid.<sup>15</sup>

Proponents of ODWDA point out that the matter is now settled. They argue that ODWDA was twice approved by the voters of Oregon and that the Rule has now been decisively defeated at the District Court, in the Ninth Circuit and at the United States Supreme Court.<sup>16</sup>

<sup>1</sup> *Gonzales v. Oregon*, 126 S.Ct. 904 (2006).

<sup>2</sup> *Id.*

<sup>3</sup> *Id.* at 922-23.

<sup>4</sup> Wesley J. Smith, *Nothing to Die Over*, National Review Online (Jan. 12, 2006), <http://www.nationalreview.com/smithw/smith200601181012.asp>.

<sup>5</sup> *Gonzales*, 126 S.Ct. at 911.

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> *Id.* at 913-14.

<sup>9</sup> *Id.* at 914.

<sup>10</sup> *Oregon v. Ashcroft*, 368 F.3d 1118, 1124 (9th Cir. 2004).

<sup>11</sup> *Gonzales*, 126 S.Ct. at 925-26.

<sup>12</sup> E-Mail Interview with Roger Pilon, Vice President for Legal Affairs, CATO Institute (Jan. 30, 2006).

<sup>13</sup> *Id.*

<sup>14</sup> *Nothing to Die Over*, *supra* note 4.

<sup>15</sup> Molly McDonough, *More Tests for Assisted Suicide Likely*, ABA Journal E-Report, <http://www.abanet.org/journal/ereport/j20suicide.html> (last visited Apr. 26, 2006); *Nothing to Die Over*, *supra* note 4.

<sup>16</sup> Press Release, Governor Ted Kulongoski, Statement by Governor Ted Kulongoski on *Gonzales v. Oregon* (Jan. 17, 2006), [http://governor.oregon.gov/Gov/p2006/press\\_011706c.shtml](http://governor.oregon.gov/Gov/p2006/press_011706c.shtml) (last visited Mar. 13, 2006).

## House Passage of Cheeseburger Bill Cheered on by Food Industry

By Andrea Binion

In response to a 2002 suit against McDonald's Corporation, 21 states have enacted laws designed to shield the fast food industry from liability against obesity-related lawsuits.<sup>1</sup> Multiple versions of the “cheeseburger bill,” a term coined by the Congressional Research Service, have also been proposed in Congress.<sup>2</sup> These “cheeseburger bills” block civil lawsuits against food manufacturers by individuals claiming that their health condition was caused by the manufacturers' food.<sup>3</sup>

On October 21, 2005 the House of Representatives passed The Personal Responsibility in Food Consumption Act (“the Act”), by a vote of 276-139.<sup>4</sup> The goal of the act is “to prevent legislative and regulatory functions from being usurped by civil liability actions brought or continued against food manufacturers, marketers, distributors, advertisers, sellers and trade associations for claims of injury relating to a person's weight gain, obesity or any health condition associated with weight gain or obesity.”<sup>5</sup> The Act associates weigh gain, obesity and other related health conditions with “a multitude of factors, including genetic factors and the lifestyle and physical fitness decisions of individuals.”<sup>6</sup> Accordingly, such weight gain, obesity or related health conditions will not be attributed to the consumption of a particular food or beverage.<sup>7</sup> Additionally, the Act attempts to foster personal responsibility over frivolous lawsuits that have the potential to be economically damaging.<sup>8</sup> A similar bill was introduced in the Senate in April 2005, and is presently being considered by the Senate Committee on the Judiciary.<sup>9</sup>

Industry trade groups such as the Food Products Association, the National Restaurant Association and the National Council of Chain Restaurants praise the bill's passage, claiming that “cheeseburger bills” prevent the costs of frivolous lawsuits from being passed along to consumers.<sup>10</sup> The bill's sponsor, Ric Keller (R-Fl.), said the legislation was all about “common sense and personal responsibility.”<sup>11</sup> The Speaker of the House, Dennis

(Cheeseburger Bill, continued on page 3)