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10 IN THE UNITED STATES DISTRICT COURT
11 FOR THE DISTRICT OF OREGON

12 STATE OF OREGON,
13 Plaintiff,
14 v.

15 JOHN ASHCROFT, in his official capacity as
United States Attorney General; ASA
16 HUTCHINSON, in his official capacity as
Administrator of the Drug Enforcement
17 Administration, KENNETH W. MAGEE, in
his official capacity as Director of the Drug
18 Enforcement Administration, Portland Office,
UNITED STATES OF AMERICA; THE
19 UNITED STATES DEPARTMENT OF
JUSTICE; and THE UNITED STATES DRUG
20 ENFORCEMENT ADMINISTRATION,
21 Defendants.

Case No.

PLAINTIFF'S MEMORANDUM IN SUPPORT
OF MOTIONS FOR A TEMPORARY
RESTRAINING ORDER AND A
PRELIMINARY INJUNCTION

22
23 **INTRODUCTION**

24 In a dramatic reversal of publicly-announced legal policy, the United States Attorney
25 General has instructed the Administrator of the Drug Enforcement Administration (DEA) to
26 begin taking “appropriate administrative action” against Oregon health care providers who take

1 actions that are expressly authorized by the Oregon Death with Dignity Act. Oregon contends
2 that defendants have exceeded the limits of their authority in taking this new, unprecedented
3 action. Because of the serious consequences these actions will have on Oregon health care
4 providers and terminally ill Oregonians, and the serious affront to Oregon’s sovereign and
5 regulatory interests, Oregon seeks immediate injunctive relief to preserve the status quo pending
6 resolution of the important legal questions presented in this case.

7 **BACKGROUND**

8 **I. The Controlled Substances Act.**

9 The federal Controlled Substances Act, 21 U.S.C. § 801 et seq. (CSA) represents a
10 carefully designed attempt by Congress to regulate the abuse of drugs trafficked in interstate
11 commerce. *See* 21 U.S.C. § 801(3) (setting out findings of impact on interstate commerce of
12 drug abuse). Among other provisions, the CSA requires the Attorney General to maintain
13 schedules of controlled substances based on their potential for abuse, 21 U.S.C. § 812, and to
14 establish registries for persons licensed to manufacture and to dispense controlled substances. 21
15 U.S.C § 822. Physicians and pharmacists are required to register in order to prescribe or
16 dispense controlled substances. 21 U.S.C. § 822(a)(2). Physicians who dispense such drugs
17 without a registration or inconsistently with the terms of a registration are subject to criminal
18 penalties. 21 U.S.C. §§ 841 and 842.

19 As originally written (and as applied, until now), the CSA respected traditional State
20 sovereignty in matters of medical licensing and practice. Some indication of congressional intent
21 is clear from the declarations in the CSA itself which refer explicitly to the need to control “illicit
22 trafficking,” 21 U.S.C. § 801a(1), and to address “traffic in controlled substances,” 21 U.S.C.
23 § 801(3). Reference to legislative history confirms those explicit declarations. The legislative
24 history of the CSA includes a statement that the principal purpose of the law was “to deal in a
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1 comprehensive fashion with the growing menace of drug abuse in the United States[.]”¹
2 Congress recognized that registration to prescribe controlled substances “would be as a matter of
3 right where the individual or firm is engaged in activities involving these drugs *which are*
4 *authorized or permitted under State law.*”² Moreover, Congress was “concerned about the
5 appropriateness of having federal officials determine the appropriate method of the practice of
6 medicine[.]”³ The House Committee Report on the bill that became the CSA explains: “The bill
7 provides for control...of problems related to drug abuse through registration of manufacturers,
8 wholesalers, retailers, and all others in the legitimate distribution chain, and makes transactions
9 outside the legitimate distribution chain illegal.”⁴ In short, the CSA was intended to address
10 drug abuse and trafficking, not practices that are engaged in by physicians in accordance with
11 state law.⁵

12 That conclusion is confirmed by other provisions of the CSA and its implementing
13 regulations. The CSA expressly provides that state law is *not* preempted “unless there is a
14 positive conflict” between a provision of the CSA and state law.⁶ A federal regulation provides
15 that prescription of controlled substances must be “for a legitimate medical purpose,” but the
16 regulation does not attempt to define what medical purposes are “legitimate” and what are not.⁷

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18 ¹ H.R. Rep. No. 91-1444, 91st Cong., 2d Sess. (1970), *reprinted in* 1970 U.S.C.C.A.N. at 4566,
4567.

19 ² 1970 U.S.C.C.A.N. at 4590 (emphasis added).

20 ³ 1970 U.S.C.C.A.N. at 4581.

21 ⁴ H.R. Rep. No. 91-1444, p. 3, quoted in *United States v. Moore*, 423 U.S. 122, 135, 96 S.Ct.
335, 46 L.Ed.2d 333 (1975). As the *Moore* Court also pointed out, “Congress was particularly
concerned with the diversion of drugs from legitimate channels to illegitimate channels.” *Ibid.*

22 ⁵ See *United States v. Rosenberg*, 515 F.2d 190, 193 (9th Cir.), *cert. denied*, 423 U.S. 1031
23 (1975), *citing* 1970 U.S.C.C.A.N. at 4590 (explaining that Congress was concerned with the
diversion of drugs out of legitimate channels of distribution. The registration system, which
24 requires written records to be maintained of drug transfers from manufacturer to doctor to user
was intended to serve as a means of monitoring the flow of drugs in an effort to stop diversion to
illegal uses).

25 ⁶ 21 U.S.C. § 903.

26 ⁷ See 21 C.F.R. § 1306.04(a).

1 Indeed, the CSA itself does not even attempt to address that issue. That is consistent with the
2 legislative history, which left such determinations to the States.

3 **II. Oregon’s Death with Dignity Act.**

4 Oregon’s Death with Dignity Act (ORS 127.800 through 127.995) (the Act), was enacted
5 in 1994 through the initiative power reserved to the people of Oregon. In 1997, Oregon voters
6 overwhelmingly rejected a proposal to repeal the Act. The Act establishes comprehensive
7 procedures by which competent, terminally-ill adults may obtain a prescription from an Oregon
8 physician to hasten their death. Physicians, pharmacists, and others who participate in
9 compliance with the Act are not subject to civil or criminal sanctions, or professional
10 disciplinary actions. Health care providers are required by the Act to file reports with the
11 Department of Human Services documenting the actions that were taken under the Act.⁸

12 According to recent news reports summarizing those records, Oregon physicians have
13 prescribed lethal medication to 70 terminally-ill Oregonians—most of them suffering in the final
14 stages of terminal cancer—since the Act took effect.⁹

15 **III. Defendants’ reversal.**

16 Defendants’ dramatic change of position on this issue is evidenced by Exhibits 1, 2, and 3
17 to Oregon’s complaint. In June 1998, then United States Attorney General Janet
18 Reno—reversing a preliminary opinion issued by former DEA Administrator Thomas
19 Constantine—concluded that the CSA “does not authorize DEA to prosecute, or to revoke the
20 DEA registration of, a physician who has assisted in a suicide in compliance with Oregon law.”¹⁰
21 Oregon physicians have taken action in reliance on that opinion.

22 Yesterday, Attorney General Ashcroft announced that his office has now reached the
23 exact opposite conclusion. Attorney General Ashcroft stated that, in his opinion, physicians who

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⁸ See ORS 127.865(1)(b).

25 ⁹ See *The Oregonian*, Nov. 7, 2001.

26 ¹⁰ Complaint, Exhibit 1, p.3.

1 act in accordance with Oregon’s Death with Dignity Act may have their registrations to write
2 prescriptions suspended or revoked, regardless of whether their conduct is authorized by Oregon
3 law.¹¹ The Attorney General further authorized the DEA to obtain records filed with the Oregon
4 Department of Human Resources evidencing actions taken by Oregon physicians in accordance
5 with the Act, and to then take “appropriate administrative actions” against those physicians based
6 on that evidence.¹²

7 **IV. Standards for a TRO and Preliminary Injunction.**

8 The standard for issuing a temporary restraining order is the same as the standard for
9 issuing a preliminary injunction.¹³ The purpose of both is to preserve the *status quo* pending a
10 final determination of the merits of the action.¹⁴ The “*status quo*” refers to the last uncontested
11 status that preceded the pending controversy. Thus, a TRO and preliminary injunction preserve
12 the district court’s power to render a meaningful decision on the merits.

13 The Ninth Circuit employs a test under which a TRO and preliminary injunction may be
14 granted if the movant demonstrates either: (1) a probability of success on the merits and
15 irreparable injury; *or* (2) serious questions going to the merits and that the balance of hardships
16 tips sharply in its favor.¹⁵ “These two formulations represent two points on a sliding scale in
17 which the required degree of irreparable harm increases as the probability of success
18 decreases.”¹⁶ These are not two separate tests but merely extremes of a single continuum.¹⁷ “If

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20 ¹¹ See Complaint, Exhibit 2.

21 ¹² *Id.*

22 ¹³ See *Dumas v. Gommerman*, 865 F.2d 1093, 1095 (9th Cir.1989).

23 ¹⁴ See *Lopez v. Heckler*, 725 F.2d 1489, 1509 (9th Cir.), *vacated on other grounds*, 469 U.S. 1082
(1984) (*citing* J. Moore & J. Lucas, *Moore’s Federal Practice* ¶65.04[1] at 65-36 (2d ed. 1983),
24 purpose is to preserve status quo pending final determination of action after full hearing).

25 ¹⁵ *Idaho Sporting Congress v. Alexander*, 222 F.3d 562, 565 (9th Cir. 2000); *Topanga Press, Inc.*
26 *v. City of Los Angeles*, 989 F.2d 1524, 128 (9th Cir. 1993).

¹⁶ *Idaho Sporting Congress v. Alexander*, 222 F.3d 562, 565 (9th Cir. 2000) (quoting *Roe v.*
Anderson, 134 F.3d 1400, 1402 (9th Cir. 1998)).

¹⁷ *Fund for Animals, Inc. v. Lujan*, 962 F.2d 1391, 1401 (9th Cir. 1992).

1 the balance of harm tips decidedly toward the plaintiff, then the plaintiff need not show as robust
2 a likelihood of success on the merits as when the balance tips less decidedly.”¹⁸ When the public
3 interest is involved, a district court must examine whether that public interest favors the
4 plaintiff.¹⁹

5 **ARGUMENT**

6 **I. The status quo should be preserved to prevent irreparable harm and to protect the**
7 **public interest.**

8 The status quo in this case allows Oregon’s Death with Dignity Act to remain in effect,
9 preventing defendants’ new interpretation of the CSA from interfering with Oregon’s law
10 pending final resolution of this action. That conclusion avoids irreparable harm to Oregon health
11 care providers and terminally-ill patients who have relied—and seek to continue relying—on
12 Oregon’s law. It also preserves Oregon’s sovereign interests—expressed by a majority of
13 Oregon voters on two separate occasions—and the regulatory interests of the State.

14 Absent injunctive relief, Oregon physicians face the prospect of losing their prescription-
15 writing privileges, federal investigations, and potential criminal and administrative sanctions, all
16 of which could be based on compelled self-incrimination if they comply with Oregon law and
17 file the required reports with the Department of Human Services. Dying patients will lose rights
18 guaranteed to them under Oregon law. And the sovereign will of Oregonians will be thwarted.
19 The public interest strongly supports granting injunctive relief to preserve the status quo.

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¹⁸ *Alaska v. Native Village of Venitie*, 856 F.2d 1384, 1389 (9th Cir.1988) (quoting *Aguirre v. Chula Vista Sanitary Serv.*, 542 F.2d 779 (9th Cir.1976)).

¹⁹ *Fund for Animals, Inc. v. Lujan*, 962 F.2d 1391, 1400 (9th Cir.1992).

1 **II. Oregon has a substantial likelihood of success on the merits.**

2 **A. Defendants’ new interpretation of the CSA exceeds the authority delegated**
3 **by Congress.**

4 It is axiomatic that a federal agency has only that authority explicitly granted to it by
5 statute or that is necessary to carry out the purpose of the statute.²⁰ Admittedly, the Attorney
6 General and DEA have broad authority to take such actions as are necessary to the execution of
7 their functions under the CSA. However, those actions must be consistent with the intent of
8 Congress, as evidenced by a proper interpretation of the CSA. As explained above, Congress did
9 not intend to regulate—or to allow the DEA to regulate—medical practices that are
10 (1) authorized under state law, (2) performed by licensed physicians, and (3) unrelated to drug
11 abuse or trafficking. It follows that any attempt to revoke or deny a controlled substances
12 registration because a physician prescribes a lethal dose of a controlled substance under the Act
13 would be beyond DEA’s authority.

14 To conclude otherwise would lead to anomalous results. It would suggest, for example,
15 that the DEA could revoke the controlled substances registration of a physician who dispensed,
16 or a manufacturer who supplied, a controlled substance used in an execution in conformance
17 with state law. Similarly, such an interpretation would allow the DEA to revoke the license of a
18 physician who prescribed pain medication during an abortion that is legal under state law, if the
19 DEA concluded that such practice was not a “legitimate medical purpose” and therefore was
20 “inconsistent with the public interest.” Yet, none of those activities—like the prescription of a
21 lethal dose of a controlled substance in accordance with the Death with Dignity Act—is remotely
22 related to the purpose of the CSA, and an attempt to regulate them is not within DEA’s authority.

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24 ²⁰ See, e.g., *Lyng v. Payne*, 476 U.S. 926, 937, 106 S.Ct. 2333, 90 L.Ed.2d 921 (1986) (“an
25 agency’s power is no greater than that delegated to it by Congress”); *Japan Whaling Assn. v.*
26 *Amer. Cetacean Soc.*, 478 U.S. 221, 233, 106 S.Ct. 2860, 92 L.Ed.2d 166 (1986) (“The
Secretary, of course, may not act contrary to the will of Congress when exercised within the
Bounds of the Constitution. If Congress has directly spoken to the precise issue in question, if
the intent of Congress is clear, that is the end of the matter.”).

1 In short, the DEA has no authority to interpret its rule (21 C.F.R. § 1306.04) to allow it to revoke
2 a practitioner’s registration for acting in accordance with the provisions of the Act.

3 Examination of other aspects of the CSA also confirms that compliance with the Death
4 with Dignity Act is not a ground for revocation of a controlled substances registration under the
5 CSA. If the DEA interpretation of the CSA were correct, it would effectively result in the
6 preemption of portions of the Act. Yet, the CSA expressly provides that state law is not
7 preempted “unless there is a positive conflict” between a provision of the CSA and a state law.²¹

8 The scope of an explicit preemption provision is determined by reference to “two
9 presumptions about the nature of” preemption. *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 116 S.Ct.
10 2240, 135 L.Ed.2d 700, 715 (1996). The first presumption is “that the historic police powers of
11 the States were not to be superseded by the Federal Act unless that was the clear and manifest
12 purpose of Congress.” *Ibid.* (internal quotations marks omitted). The Court noted that the first
13 presumption is “consistent with both federalism concerns and the historic primacy of state
14 regulation of matters of health and safety.” *Ibid.* Second, “any understanding of the scope of a
15 pre-emption statute must rest primarily on ‘a fair understanding of congressional purpose.’”
16 *Medtronic, Inc.*, 135 L.Ed.2d at 716, quoting *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 530
17 n. 37, 112 S.Ct. 2608, 120 L.Ed.2d 407 (1992) (emphasis in original). The structure and purpose
18 of the act as a whole is relevant to the latter inquiry. *Ibid.*

19 Examination of the preemption provision leads to the same conclusion as does analysis of
20 the CSA generally: “Congress did not intend to allow the Attorney General or the DEA to
21 interfere with a state’s determination of what constitutes a legitimate medical practice. The

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23 ²¹ 21 U.S.C. § 903 provides:

24 “No provision of this title shall be construed as indicating an intent on the part of
25 the Congress to occupy the field in which that provision operates, including
26 criminal penalties, to the exclusion of any State law on the same subject matter
which would otherwise be within the authority of the State, unless there is a
positive conflict between that provision of this title and that State law so that the
two cannot consistently stand together.”

1 “positive conflict” that would lead to the conclusion that Congress intended to preempt state law
2 on physician-assisted suicide arises only if the CSA is interpreted in a manner completely
3 inconsistent with congressional intent, as discussed above. Only if the CSA is interpreted in the
4 manner suggested by defendants does the conflict arise; the clear intent to avoid preemption
5 expressed in 21 U.S.C. § 903 would be ignored under that interpretation.

6 Moreover, the Supreme Court has been loathe to interpret a federal statute as preempting
7 a state statute, especially when the federal law would intrude into an area traditionally reserved
8 to the states. So, for example, in *Gregory v. Ashcroft*, 501 U.S. 452, 111 S.Ct. 2395, 115
9 L.Ed.2d 410 (1991), the Court considered the application of the Age Discrimination in
10 Employment Act (ADEA) to Missouri’s requirement that state judges retire at age 70.
11 Emphasizing the system of dual sovereignty between state and federal governments, the Court
12 stated that it would “not read the ADEA to cover state judges unless Congress has made it clear
13 that judges are *included*.” 501 U.S. at 467 (emphasis in original). To avoid the difficult
14 federalism issues, the Court concluded that the ADEA simply does not apply to state judges.

15 Similarly, unless Congress clearly intended to allow the DEA to revoke a controlled
16 substances registration when that agency determined that a medical procedure authorized by state
17 law is not a “legitimate medical purpose,” the CSA should not be so interpreted. In the case of
18 the CSA, all indications are that Congress not only did not intend the DEA to interfere in matters
19 of state law, but that it intended to address a completely different problem, the so-called “war on
20 drugs.” The Supreme Court long has recognized that “direct control of medical practice in the
21 States is beyond the power of the federal government.”²² Given that control of medical practice
22 historically is reserved to the states, and that several aspects of the CSA indicate congressional
23 intent to address drug trafficking but not interfere with medical practice, any interpretation of the
24 CSA that would allow the DEA the authority to sanction the prescribing of lethal dosages of
25 controlled substances in accordance with the Death with Dignity Act is wrong as a matter of law.

26 ²² *Linder v. United States*, 268 U.S. 5, 18, 45 S.Ct. 446, 69 L.Ed. 819 (1925).

1 Finally, defendants' new interpretation of the CSA raises serious constitutional questions.
2 The Tenth Amendment provides: "The powers not delegated to the United States by the
3 Constitution, nor prohibited by it to the states, are reserved to the States respectively, or to the
4 people." The states "retain substantial sovereign authority under our constitutional system."²³ In
5 light of the sovereign powers reserved by the states and the fact that, historically, direct control
6 of medical practice has been a matter of local concern, it is unlikely that a federal agency has the
7 constitutional authority to override a state's choice to define a medical practice as legitimate.²⁴

8 **B. If defendants' new interpretation of the CSA is authorized, then the CSA**
9 **violates the Commerce Clause and the Tenth Amendment.**

10 In *United States v. Lopez*, 514 U.S. 549, the Supreme Court reaffirmed that "[t]he
11 Constitution creates Federal government of enumerated powers" and that "[t]his constitutionally
12 mandated division of authority 'was adopted by the Framers to ensure protection of our
13 fundamental liberties.'" *Lopez*, 514 U.S. at 552, quoting *Gregory v. Ashcroft*, 501 U.S. 452, 458
14 (1991). The Court explained that the Congressional power to regulate interstate commerce thus
15 gave Congress power to (1) "regulate the use of the channels of interstate commerce." *Lopez*,
16 514 U.S. at 558; (2) "regulate and protect the instrumentalities of interstate commerce, or
17 persons or things in interstate commerce, even though the threat may come only from intrastate
18 activities," *id.*; and (3) "regulate . . . those activities that substantially affect interstate
19 commerce." *Id.* at 558-59. Careful consideration of *Lopez* and the recent decision in *United*

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22 ²³ *Gregory*, 501 U.S. at 457.

23 ²⁴ Although some courts have rejected Tenth Amendment challenges to the CSA, those
24 challenges have involved criminal prosecutions for violations of the CSA. *See, e.g., United States v. Lerebours*, 87 F.3d 582 (1st Cir. 1996), *cert. denied*, 117 S.Ct. 694 (1997); *United States v. Rosenberg*, 515 F.2d 190 (9th Cir.), *cert. denied*, 423 U.S. 1031 (1975); *United States v. Green*, 511 F.2d 1062 (7th Cir.), *cert. denied*, 423 U.S. 1031 (1975). Although there is "no doubt that Congress has the power to regulate drugs under the Interstate Commerce Clause," *Rosenberg*, 515 F.2d at 198, whether Congress may go farther and determine what aspects of medical practice are "legitimate" is subject to significant doubt.

1 *States v. Morrison*, 120 S.Ct. 1740 (2000), make clear that the CSA, as now interpreted by
2 defendants, uses none of these three valid channels of the commerce power.

3 *Lopez* invalidated the Federal Gun-Free School Zones Act of 1990, which purported to
4 make it a federal crime to carry a gun within 1000 yards of any school. The Court held that
5 neither guns nor schools were “channels” of interstate commerce, *id.* at 559, and further declined
6 to hold that its regulation of guns was a proper regulation of “a thing in interstate commerce.”
7 *Id.* at 559. The Act failed, however, as regulation of an activity that “substantially affect[ed]
8 commerce” even though the Court conceded the existence of a close relationship between
9 schools and economic development. *Id.* at 564. The argument failed, the Court stated, because it
10 proved too much: “if we were to accept the Government’s arguments, we are hard pressed to
11 posit any activity by an individual that Congress is without power to regulate.” *Id.* at 564. The
12 Court further noted the lack of a “jurisdictional element” requiring the government to prove that
13 the weapon in question affected commerce, *id.* at 561, and the omission of meaningful factual
14 findings of an impact on commerce that might serve as an interpretive guide, *id.* at 562. Finally,
15 the Act was invalid, in part, because the States have plenary authority in matters of criminal law,
16 and one of the flaws of the Act was that it “displace[d] state policy choices in . . . that its
17 prohibitions appl[ied] even in States that have chosen not to outlaw the conduct in question.” *Id.*
18 *at 561 n.3, quoting* Brief for United States 29, n18.

19 The Court expanded on its analysis of “substantial effect” in *United States v. Morrison*,
20 120 S.Ct. 1740 (2000). In that case, the Court invalidated the provisions of the Violence Against
21 Women Act that provided victims of gender-based violence with a civil remedy against their
22 abusers in federal court. *Id.* at 1754. The Court held that the Act was not supported by the
23 Commerce Power because gender based violence was not “economic in nature.” *Id.* at 1751.
24 The “noneconomic, criminal nature of the conduct at issue” was dispositive despite extensive
25 Congressional findings that gender-based violence has a significant economic effect. *Id.* at 1750,
26 1752. The findings were irrelevant because they relied on attenuated analysis, a form of analysis

1 “we have already rejected as unworkable if we are to maintain the Constitution’s enumeration of
2 powers.” *Id.* at 1752. The flaw with attenuated analysis is that it could be “applied equally as
3 well to family law and other areas of traditional state regulation since the aggregate effect of
4 marriage, divorce, and childbearing is undoubtedly significant.” *Id.* at 1753.

5 Like the Gun-Free School Zones Act, defendants’ interpretation of the CSA cannot
6 seriously be defended as a regulation of the channels of interstate commerce. The clinics,
7 homes, and physicians’ offices in which end-of-life care takes place bear no resemblance to rail
8 yards, airports, or interstate highways, or other activities found to be instrumentalities of
9 interstate commerce. Similarly, although terminal patients choosing to end their lives make use
10 of controlled substances to do so, the CSA, as interpreted by defendants—to the extent it applies
11 to assisted suicide—does not regulate “things” in interstate commerce. Guns, no less than
12 controlled substances, are “things” which are the subject of an interstate market, but that was
13 found to be insufficient in *Lopez*. See *Lopez*, 514 U.S. at 602-03. If the CSA is read to authorize
14 defendants’ action, then Congress would be authorizing the federal government to reach into the
15 private and personal decisions of terminal patients during the last six months of their lives.
16 Congress in adopting the CSA did not intend to extend the Act’s reach so far. The Act’s original
17 findings dealt with the impact of the interstate market in controlled substances and the effects of
18 drug abuse, not medical practices and personal end-of-life decisions authorized by state law.

19 Moreover, whatever impact the voluntary decisions of some dozen patients per year may
20 have on interstate commerce, it is clearly *less* than the impact the Court conceded of gender-
21 based violence. But that impact was found to be insufficient in *Morrison*; the same is true here.

22 Delivery of medical advice and prescription drugs to a terminally ill patient may be a
23 “commercial transaction,” but that is not enough. Certainly the use of controlled substances in
24 end-of-life care involves private use of items that have been purchased prior to that use. If,
25 however, the simple prior participation in a market rendered all subsequent activity involving the
26 use of the goods purchased were enough, *Lopez* could not have been decided as it was.

1 Defendant in that case had obtained from some source a firearm, the manufacture and sale of
2 which was admittedly part of an overall interstate market. However, the Court rejected this fact
3 as sufficient to establish a basis for regulation. It distinguished the case from *Wickard v.*
4 *Filburn*, 317 U.S. 111 (1942), in which the government had been allowed to regulate the growth
5 of wheat for personal consumption. Because such wheat could “have a substantial influence on
6 price and market conditions,” *Wickard* “involved economic activity in a way that the possession
7 of a gun in a school zone does not.” *Lopez*, 514 U.S. 549, 560-61, quoting *Wickard*, 317 U.S. at
8 128. To be sure, the drugs used in a patient’s end-of-life decision will have been purchased at
9 some point. But as Justice Kennedy cautioned in *Lopez*, “[i]n a sense any conduct in this
10 interdependent world of ours has an ultimate commercial origin or consequence, but we have not
11 yet said the commerce power may reach so far.” *Lopez*, 514 U.S. at 580 (Kennedy, J.,
12 concurring).

13 Defendants cannot show that the decisions of Oregon patients about end-of-life care can
14 influence the market. For that reason, the CSA, to the extent it is read to preempt Oregon’s
15 Death with Dignity Act, “is not an essential part of a larger regulation of economic activity, in
16 which the regulatory scheme could be undercut unless the intrastate activity were regulated.”
17 *Lopez*, 514 U.S. at 561. End-of-life decisions, however objectionable they may be to defendants,
18 are—like gun possession in school zones—“in no sense an economic activity that might, through
19 repetition elsewhere, substantially affect any sort of interstate commerce.” *Id.* at 567.

20 One important principle in assessing the validity of an extension of the commerce power
21 is that courts should “inquire whether the exercise of national power seeks to intrude upon an
22 area of state concern.” *Lopez*, 514 U.S. at 580 (Kennedy, J., concurring). In this case,
23 defendants’ interpretation of the CSA, even more strongly than the Gun-Free School Zones Act,
24 “forecloses the States from experimenting and exercising their own judgment in an area to which
25 States lay claim by right of history and expertise, and it does so by regulating an activity beyond
26 the realm of commerce in the ordinary and usual sense of that term.” *Id.* at 583 (Kennedy, J.,

1 concurring). The offense against federalism is grievous, for by seeking to squash Oregon's
2 experiment in end-of-life care, defendants violate “the theory and utility of our federalism,”
3 under which “the States may perform their role as laboratories for experimentation to devise
4 various solutions where the best solution is far from clear.” *Id.* at 581 (Kennedy, J., concurring).

5 In addition, courts are required “to review the Congressional assessment [of a basis for
6 use of an enumerated power], not for soundness but simply for the rationality of concluding that
7 a jurisdictional basis exists in fact.” *Morrison*, 120 S.Ct. 1760 (Souter, J., dissenting); *accord*
8 *see id.* at 1778 (Breyer, J., dissenting); *see also Lopez*, 514 U.S. at 603 (Souter, J., dissenting); *id.*
9 at 617 (Breyer, J., dissenting). Defendants’ interpretation of the CSA fails rational basis scrutiny
10 on two grounds. First, it asserts federal regulatory authority to burden and discourage an
11 intrastate activity that is entirely unrelated to the underlying purpose of the CSA. Second, it
12 makes the purported impact of a physician’s action on interstate commerce wholly dependent on
13 a post hoc assessment of the intent with which it was done. The controlled substances authorized
14 for use in pain relief are precisely the same as those forbidden for use in hastening death of a
15 terminally-ill patient. There is simply no rational basis to believe that prescription and
16 distribution of controlled substances has a different impact on interstate commerce when it is
17 done with the intent of permitting a terminal patient to end his or her life than it would have
18 when done with the intent of allowing the same patient to use the same medication for relief of
19 pain.

20 In *Morrison*, the Supreme Court explicitly warned against any interpretation of the
21 enumerated powers of Congress that would create for Congress what the Founders denied to
22 it—a general police power superseding that of the States. *Morrison*, 120 S.Ct. at 1754. In order
23 to give effect to this principle of federalism, courts must insist on more than formalism or the
24 invocation of magic words to justify an extension of the Commerce Power into local matters.
25 “The Constitution requires a distinction between what is truly national and what is truly local. In
26 recognizing this fact, we preserve one of the few principles that has been consistent since the

1 [Commerce] Clause was adopted.” *Id.* It is difficult to think of any activity that by tradition,
2 experience, and logic, more clearly falls on the “truly local” side of this line than regulation of
3 medical practice in general and of the intimate, moment-by-moment care for the dying in
4 particular.

5 Defendants’ attempt to assert federal authority over local medical care is particularly
6 egregious because it comes on the heels of an explicit recognition by the Supreme Court that
7 State experimentation is an essential part of the expected long-term resolution of the question of
8 proper care for the dying. As the Court noted in *Washington v. Glucksberg*, 521 U.S. 702
9 (1997), “the States are currently engaged in serious, thoughtful examinations of physician-
10 assisted suicide and other similar issues.” *Id.* at 719. The Court declined to impose a judicial
11 rule upon the States, in part specifically because the experimentation of States is designed to
12 produce better answers. “Throughout the nation, Americans are engaged in an earnest and
13 profound debate about the morality, legality, and practicality of physician-assisted suicide. Our
14 holding permits this debate to continue, as it should in a democratic society.” *Id.* at 735.

15 **CONCLUSION**

16 Defendants’ new and unwarranted intrusion into the medical practices of Oregon
17 physicians and the end-of-life decisions made by terminally-ill Oregonians should be enjoined
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1 pending resolution of the important legal issues presented in this case. Accordingly, Oregon's
2 motions for a temporary restraining order and preliminary injunction should be granted.

3 DATED this ____ day of November, 2001.

4 Respectfully submitted,

5 HARDY MYERS
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