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

12 STATE OF OREGON,

13 Plaintiff,

14 and

15 RICHARD HOLMES; KARL STANSELL;
16 JAMES ROMNEY; JANE DOE #1;
17 PETER A. RASMUSSEN, M.D.; and
DAVID MALCOM HOCHHALTER, Rph,

18 Plaintiffs-Intervenors,

19 v.

20 JOHN ASHCROFT, in his official capacity as
United States Attorney General; ASA
21 HUTCHINSON, in his official capacity as
Administrator of the Drug Enforcement
22 Administration; KENNETH W. MAGEE, in his
official capacity as Director of the Drug
23 Enforcement Administration, Portland Office;
UNITED STATES OF AMERICA; UNITED
24 STATES DEPARTMENT OF JUSTICE; and
UNITED STATES DRUG ENFORCEMENT
25 ADMINISTRATION,

26 Defendants.

Case No. CV01-1647-JO

OREGON'S REPLY MEMORANDUM

TABLE OF CONTENTS

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

- INTRODUCTION 1
- ARGUMENT 2
 - I. This action is not subject to dismissal for lack of subject matter jurisdiction 2
 - A. This court has federal question jurisdiction 2
 - B. If section 507 precludes this court from exercising federal question jurisdiction, the case should be transferred to the Court of Appeals 7
 - II. The CSA does not authorize Ashcroft to override the Oregon Death with Dignity Act..... 7
 - A. The operative provisions of the CSA cited by defendants do not reflect a congressional intent to displace state laws on end-of-life care..... 7
 - B. The CSA’s preemption provision does not evidence a congressional intent to override state laws addressing end-of-life care for dying patients 11
 - C. The “clear statement” principle applies 14
 - III. Defendants are not entitled to summary judgment on the “legitimacy” of using controlled substances to hasten death under the Oregon Act..... 15
 - IV. The Ashcroft directive violates the APA’s notice-and-comment requirements ... 16
 - V. The court may review the Ashcroft directive for compliance with Executive Order 13132 18
 - VI. Defendants’ constitutional arguments miss the point 20
- CONCLUSION..... 21

1 **TABLE OF AUTHORITIES**

2 **Cases**

3 *Abbott Labs v. Gardner*, 387 U.S. 136 (1966)..... 5

4 *Action for Children’s Television v. F.C.C.*, 59 F.3d 1249 (D.C. Cir. 1995)..... 5

5 *Air Transp. Assoc. of America v. FAA*, 169 F.3d 1 (D.C. Cir. 1999) 19

6 *Alden v. Maine*, 527 U.S. 706, 119 S.Ct. 2240, 144 L.Ed.2d 636 (1999)..... 21

7 *American Fed. of Gov. Emp. v. Federal Labor Relat.*, 204 F.3d 1272 (9th Cir. 2000)..... 19

8 *Anderson v. Celebrezze*, 460 U.S. 780 (1983) 1

9 *Burke v. Kansas State Osteopathic Ass’n*, 111 F.2d 250 (10th Cir. 1940) 11

10 *Califano v. Sanders*, 430 U.S. 99, 97 S.Ct. 980, 51 L.Ed.2d 192 (1977) 2

11 *California ex rel. Van de Kamp v. Reilly*, 750 F. Supp. 433 (E.D. Cal. 1990)..... 5

12 *Carmel-By-The-Sea v. U.S. Dept. of Transp.*, 123 F.3d 1142 (9th Cir. 1997)..... 18, 19

13 *Chen v. I.N.S.*, 95 F.3d 801 (9th Cir. 1996) 18

14 *Chen Zhou Chai v. Carroll*, 48 F.3d 1331 (4th Cir. 1995) 19

15 *Conant v. McCaffrey*, 172 F.R.D. 681 (N.D. Cal. 1997) 6

16 *Conant v. McCaffrey*, 2000 U.S. Dist. LEXIS 13024 (N.D. Cal. 2000)..... 6

17 *Crist v. Leippe*, 138 F.3d 801 (9th Cir. 1998)..... 5

18 *Cruz-Aguilera v. INS*, 245 F.3d 1070 (9th Cir. 2001)..... 7

19 *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658 (1993) 13

20 *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 120 S.Ct. 1291, 146 L.Ed.2d
 21 121 (2000)..... 8, 9

22 *Fort Ord Toxics Project, Inc. v. California E.P.A.*, 189 F.3d 828 (9th Cir. 1999)..... 8

23 *Geier v. American Honda Motor Co., Inc.*, 529 U.S. 861, 120 S.Ct. 1913 (2000)..... 13

24 *General Finance Corp. v. FTC*, 700 F.2d 366 (7th Cir. 1983)..... 6

25 *Georgia Ass’n of Osteopathic Physicians and Surgeons v. Allen*, 112 F.2d 52 (5th Cir.
 1940)..... 11

26 *Great Plains Co-op v. Commodity Future Trading Comm’n*, 205 F.3d 353 (8th Cir. 2000) 6

1 *Gunderson v. Hood*, 268 F.3d 1149 (9th Cir. 2001) 16

2 *Gustafson v. Alloyd Co.*, 513 U.S. 561 (1995)..... 8

3 *Hoctor v. U.S. Dep’t. of Agric.*, 82 F.3d 165 (7th Cir. 1996) 17

4 *International Science and Technology Inst., Inc. v. Inacom Communications, Inc.*, 106 F.3d
1146 (4th Cir. 1997)..... 3

5 *John Hancock Mutual Life Ins. Co. v. Harris Trust & Sav. Bank*, 510 U.S. 86, 114 S.Ct.
517, 126 L.Ed.2d 524 (1993)..... 8

6 *LaVoz Radio de la Comunidad v. F.C.C.*, 223 F.3d 313 (6th Cir. 2000)..... 6

7 *Legal Aid Soc. of Alameda Cty. v. Brennan*, 608 F.2d 1319 (9th Cir. 1979)..... 19

8 *Lexecon, Inc. v. Milberg Weiss Bershal Hynes and Lerach*, 523 U.S. 26 (1998)..... 8

9 *McNary v. Haitian Refugee Center, Inc.*, 498 U.S. 479, 111 S.Ct. 888, 112 L.Ed.2d 1005
10 (1991)..... 3, 4, 5

11 *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 116 S.Ct. 2240, 135 L.Ed.2d 700 (1996)..... 12, 13

12 *Murphey v. Lanier*, 204 F.3d 911 (9th Cir. 2000)..... 3

13 *New York v. United States*, 505 U.S. 144, 112 S.Ct. 2408, 120 L.Ed.2d 120 (1992)..... 20

14 *Parola v. Weinberger*, 848 F.2d 956 (9th Cir. 1988)..... 2

15 *PDK Labs, Inc. v. Reno*, 134 F. Supp.2d 24 (D.D.C. 2001)..... 6

16 *Printz v. United States*, 521 U.S. 898, 117 S.Ct. 2365, 138 L.Ed.2d 914 (1997)..... 20, 21

17 *Proyecto San Pablo v. I.N.S.*, 189 F.3d 1130 (9th Cir. 1999)..... 2

18 *Pub. Util. Comm’n of Or. v. BPA*, 767 F.2d 622 (9th Cir. 1985) 6

19 *Raygor v. Regents of Univ. of Minn.*, 2002 WL 269234, No. 00-1514 (U.S., Feb. 27,
20 2002)..... 13, 14, 15, 21

21 *Reno v. Catholic Social Services, Inc.*, 509 U.S. 38, 113 S.Ct. 2485, 125 L.Ed.2d 38 (1993)..... 2

22 *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218 (1947)..... 13

23 *Sierra Club v. Peterson*, 705 F.2d 1475 (9th Cir. 1983)..... 18, 19

24 *Solid Waste Agency v. Army Corps of Eng’rs.*, 531 U.S. 159, 121 S.Ct. 675 (2001)..... 14

25 *Sur Contra La Contaminacion v. E.P.A.*, 202 F.3d 443 (1st Cir. 2000)..... 19

26 *Taffin v. Leavitt*, 493 U.S. 455, 110 S.Ct. 792, 104 L.Ed.2d 887 (1990) 3

Thunder Basin Coal Company v. Reich, 510 U.S. 200 (1994)..... 6

1	<i>United States Nat. Bank of Or. v. Independent Ins. Agents of America, Inc.</i> , 508 U.S. 439 (1993).....	8
2	<i>United States v. Lopez</i> , 514 U.S. 549, 115 S.Ct. 1624, 131 L.Ed.2d 626 (1995).....	20
3	<i>United States v. Moore</i> , 423 U.S. 122 (1975).....	10, 11, 20
4	<i>United States v. Rosenberg</i> , 515 F.2d 190 (9 th Cir. 1975).....	10, 20
5	<i>Utley v. Varian</i> , 811 F.2d 1279 (9 th Cir. 1987).....	18
6	Statutes	
7	ORS 127.800 to 127.897.....	15
8	ORS 127.880.....	15
9	Other Authorities	
10	21 C.F.R. § 1306.04.....	15, 16
11	5 U.S.C. § 7106(b)(1).....	19
12	8 U.S.C. § 1160(e).....	4
13	21 U.S.C. § 371(f)(1).....	5
14	21 U.S.C. § 801(6).....	7, 10
15	21 U.S.C. § 802(21).....	10
16	21 U.S.C. § 811.....	3, 17
17	21 U.S.C. § 821.....	7, 9
18	21 U.S.C. § 824.....	3
19	21 U.S.C. § 829(c).....	8, 10
20	21 U.S.C. § 841.....	8, 10
21	21 U.S.C. § 871.....	7, 9
22	21 U.S.C. § 877.....	2, 3, 4
23	21 U.S.C. § 903.....	11, 12
24	28 U.S.C. § 1331.....	2, 4
25	28 U.S.C. § 1631.....	7
26	42 U.S.C.A. § 4321 (Supp. 1982).....	18

1 **INTRODUCTION**

2 Defendants challenge, for the first time, this court’s jurisdiction, contending that the
3 Court of Appeals has exclusive jurisdiction under section 507 of the Controlled Substances Act
4 (CSA). Defendants’ jurisdictional argument is contrary to the plain language of the statute, the
5 accepted framework for analyzing this type of statutory provision, and controlling authorities.
6 District courts have federal question jurisdiction to address challenges to an agency’s statutory
7 and constitutional authority even where a statute confers jurisdiction to review agency decisions
8 on the Court of Appeals.

9 On the merits, defendants contend that it is “abundantly clear” that Congress authorized
10 the Attorney General to decide, as a matter of federal law, whether a practice authorized by state
11 law is nonetheless illegal. Defendants conclude that “assisting suicide” is not legitimate, and that
12 Attorney General John Ashcroft’s (Ashcroft) directive to that effect merely states what the CSA
13 has always meant. The directive, they assert, is a valid interpretive rule that Oregon cannot
14 nullify. And the directive does not, in their view, invoke the outer limits of Congress’s
15 constitutional authority because the federal authority to decide this issue is so clear from the text
16 and history of the CSA.

17 “But merely *saying* it is so does not *make* it so.”¹ Defendants’ assertions wither when
18 scrutinized under accepted legal standards. Their conclusion that Congress authorized the
19 Attorney General to decide this issue as a matter of federal law is based on a flawed and
20 piecemeal reading of the CSA, and on authorities that interpret and apply the CSA in different
21 contexts. Unlike the cases that defendants cite, *this* case challenges (1) the federal government’s
22 power to declare “illegitimate” a practice that is clearly authorized by state law; and (2) the
23 process through which the federal government has attempted to override state law. Merely
24 asserting that defendants “clearly” had this power, and that they were “plainly” entitled to
25 exercise it without first notifying the State of Oregon or the general public, does not make it so.

26 _____
¹ *Anderson v. Celebrezze*, 460 U.S. 780, 816 (1983) (Rehnquist, J., dissenting) (emphasis added).

1 **ARGUMENT**

2 **I. This action is not subject to dismissal for lack of subject matter jurisdiction.**

3 **A. This court has federal question jurisdiction.**

4 Defendants contend that section 507 of the CSA, 21 U.S.C. § 877, vests exclusive
5 jurisdiction in the Court of Appeals, and that Oregon “cannot escape” this jurisdictional
6 requirement by invoking the Administrative Procedures Act (APA) or the Declaratory Judgment
7 Act.² But Oregon is not relying solely on the APA or the Declaratory Judgment Act to establish
8 subject matter jurisdiction. It is clear that the court has federal question jurisdiction under
9 28 U.S.C. § 1331 to decide Oregon’s claims.

10 In *Califano v. Sanders*, the Supreme Court held that the “obvious effect” of the 1976
11 amendment to section 1331 “is to confer jurisdiction on federal courts to review agency action,
12 regardless of whether the APA of its own force may serve as a jurisdictional predicate.”³ The
13 Supreme Court reaffirmed that holding in *Reno v. Catholic Social Services, Inc.*, stating that
14 section 1331 “confer[s] jurisdiction on federal courts to review agency action.”⁴ That authority
15 is “subject only to preclusion-of-review statutes created or retained by Congress[.]”⁵ As the
16 Ninth Circuit recently put it, “in the absence of a specific statutory provision to the contrary,
17 district courts have jurisdiction to review agency action as part of their general federal question
18 jurisdiction[.]”⁶ That jurisdiction applies “unless a statute expressly precludes review[.]”⁷

19 Thus, the only question is whether section 507 of the CSA “expressly precludes review”
20 of Oregon’s challenge to the Ashcroft directive. Section 507 does not “expressly preclude
21 review” for several reasons. First, review in the Court of Appeals is permissive, not mandatory,
22

23 ² See Defendants’ Memorandum at 10.

24 ³ *Califano v. Sanders*, 430 U.S. 99, 105, 97 S.Ct. 980, 51 L.Ed.2d 192 (1977).

25 ⁴ *Reno v. Catholic Social Services, Inc.*, 509 U.S. 38, 56, 113 S.Ct. 2485, 125 L.Ed.2d 38 (1993).

26 ⁵ *Califano*, 430 U.S. at 105.

⁶ *Proyecto San Pablo v. I.N.S.*, 189 F.3d 1130, 1136, n. 5 (9th Cir. 1999).

⁷ *Parola v. Weinberger*, 848 F.2d 956, 958 (9th Cir. 1988).

1 under the plain language of the statute. The statute provides that an aggrieved party “may obtain
2 review” of a final decision in the Court of Appeals.⁸ The Ninth Circuit recently explained that a
3 jurisdictional statute’s “use of the term ‘may’ does not itself confer exclusive jurisdiction on the
4 court mentioned.”⁹

5 Second, Oregon’s challenge is not to a decision made by the Attorney General “under”
6 subchapter II of the CSA as required to confer jurisdiction in the Court of Appeals. Decisions
7 made by the Attorney General “under” subchapter II include the decision to list a substance on a
8 CSA schedule under 21 U.S.C. § 811; the decision to register a doctor or pharmacist under 21
9 U.S.C. § 823; and the decision to revoke a registration under 21 U.S.C. § 824. *Those*
10 decisions—which can involve formal adjudications, with factual findings—are reviewable
11 directly in the Court of Appeals under section 507 of the CSA. Oregon’s challenge is different.

12 Oregon challenges the Attorney General’s statutory and constitutional authority to issue
13 his directive, and the process he followed in deciding to override Oregon law. There was no
14 “final decision” or “determination” made by the Attorney General on the issues raised by
15 Oregon’s challenge, so there would be nothing for the Court of Appeals to “review.” The
16 Supreme Court and the Ninth Circuit have concluded that similar statutes—and even statutes
17 expressly providing for *exclusive* review in the Court of Appeals—do not preclude district courts
18 from exercising federal question jurisdiction to decide issues of statutory and constitutional
19 authority or process.

20 In *McNary v. Haitian Refugee Center, Inc.*,¹⁰ plaintiffs challenged the manner in which
21 the Immigration and Naturalization Service (INS) administered the “Special Agricultural

22 ⁸ See 21 U.S.C. § 877.

23 ⁹ *Murphey v. Lanier*, 204 F.3d 911, 913 (9th Cir. 2000), quoting *International Science and*
24 *Technology Inst., Inc. v. Inacom Communications, Inc.*, 106 F.3d 1146, 1151 (4th Cir. 1997). See
25 also, *Taffin v. Leavitt*, 493 U.S. 455, 460-61, 110 S.Ct. 792, 104 L.Ed.2d 887 (1990)
(jurisdictional statute “is plainly permissive, not mandatory, for the statute does not state nor
even suggest that such jurisdiction shall be exclusive. It provides that suits of the kind described
‘may’ be brought in the federal district courts, not that they must be”).

26 ¹⁰ *McNary v. Haitian Refugee Center, Inc.*, 498 U.S. 479, 111 S.Ct. 888, 112 L.Ed.2d 1005
(1991).

1 Workers” (SAW) provisions of the Immigration Reform Act. One provision of that Act gave the
2 Court of Appeals exclusive jurisdiction to review INS determinations under the Act. The
3 Supreme Court held that the Act’s jurisdictional provision “does not address the kind of
4 procedural and constitutional claims respondents bring in this action[.]”¹¹ Therefore, the Court
5 concluded that “the District Court’s general federal-question jurisdiction under 28 U.S.C. § 1331
6 to hear this action remains unimpaired” by the statute providing for exclusive review in the Court
7 of Appeals.¹²

8 The language interpreted in *McNary* is similar to the language in 21 U.S.C. § 877; in
9 addition to providing for review in the Court of Appeals, both provisions state that the agency’s
10 determinations “shall be conclusive” if supported by substantial evidence in the record.¹³
11 Judicial review under such a provision is for abuse of discretion and lack of substantial evidence
12 in the record. But the *McNary* Court concluded that it “would make no sense” if this provision is
13 read “as requiring constitutional and statutory challenges to INS procedures to be subject to [the
14 Act’s] specialized review provision.”¹⁴ That is because the abuse-of-discretion standard “is
15 appropriate for judicial review of an administrative adjudication of the facts[.]” but it “does not
16 apply to constitutional or statutory claims, which are reviewed *de novo* by the courts.”¹⁵ The
17 Supreme Court found that inclusion of such a provision in the statute “lends substantial credence
18 to the conclusion that the Reform Act’s review provision does not apply to challenges to INS’
19 practices and procedures in administering the SAW program.”¹⁶

20
21 ¹¹ *McNary*, 498 U.S. at 493.

22 ¹² *Id.* at 494.

23 ¹³ 21 U.S.C. § 877 provides: “Findings of fact by the Attorney General, if supported by
24 substantial evidence, shall be conclusive.” The statute at issue in *McNary*, 8 U.S.C. § 1160(e),
25 provided that “the findings of fact and determinations contained in the record shall be conclusive
26 unless the applicant can establish abuse of discretion or that the findings are directly contrary to
clear and convincing facts contained in the record considered as a whole.”

25 ¹⁴ *Id.* at 493.

26 ¹⁵ *Id.*

¹⁶ *Id.* at 493-94.

1 The same is true here. *McNary* is thus controlling. *McNary* is also consistent with the
2 Court’s earlier decision in *Abbott Labs v. Gardner*.¹⁷ There, the Court rejected the United States’
3 assertion that pre-enforcement district court review of an agency rule was precluded by a
4 provision of the Federal Food, Drug and Cosmetics Act that provided for review of agency
5 regulations in the Court of Appeals.¹⁸ The Court explained that the “generous review
6 provisions” of the APA should be given a “hospitable” reading, so that statutes precluding
7 review would be applied only where there is “clear and convincing evidence” of a legislative
8 intent to preclude review.¹⁹

9 The Ninth Circuit has found that similar statutes providing for review of agency decisions
10 in the Court of Appeals do not preclude district court review of claims challenging an agency’s
11 constitutional and statutory authority. In *Crist v. Leippe*, the plaintiff asserted “broad challenges
12 to the constitutionality of agency practices and procedures.”²⁰ The Ninth Circuit held that a
13 provision in the Federal Aviation Act providing for review in the Court of Appeals “does not
14 preclude jurisdiction in the district court” to resolve the claim on the merits.²¹ Other courts have
15 reached similar conclusions.²² Indeed, a federal court construing the CSA found that the
16 jurisdictional provision cited by defendants does *not* preclude district courts from exercising
17 federal question jurisdiction to review the Drug Enforcement Administration’s (DEA) “final
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19 ¹⁷ *Abbott Labs v. Gardner*, 387 U.S. 136 (1966).

20 ¹⁸ *See Abbott Labs*, 387 U.S. at 141, n. 3 (*citing* 21 U.S.C. § 371(f)(1)).

21 ¹⁹ *Id.* at 141.

22 ²⁰ *Crist v. Leippe*, 138 F.3d 801, 804 (9th Cir. 1998).

23 ²¹ *Id.* at 804-05.

24 ²² *See, e.g., Action for Children’s Television v. F.C.C.*, 59 F.3d 1249, 1256 (D.C. Cir. 1995)
25 (holding that district court had jurisdiction to review constitutionality of FCC action despite
26 statute committing review to the Court of Appeals); *California ex rel. Van de Kamp v. Reilly*,
750 F. Supp. 433, 436 (E.D. Cal. 1990) (rejecting United States’ argument that statute providing
for Court of Appeals review of agency action precluded district court review: “There is no
indication that Congress intended the limited review provision [in the statute] to deprive federal
district courts of subject matter jurisdiction under 28 U.S.C. § 1331 to hear statutory or
constitutional challenges to the agency’s action”).

1 interpretation” of the CSA.²³ Similarly, a California district court reviewed constitutional and
2 statutory challenges to DEA’s construction of the CSA on the merits; the United States did not
3 contend in that case that the district court lacked jurisdiction because the CSA provided for
4 exclusive review in the Court of Appeals.²⁴

5 Thus, this court has jurisdiction to decide Oregon’s claims on the merits. The cases cited
6 by defendants are not to the contrary. The Ninth Circuit case cited by defendants—*Pub. Util.*
7 *Comm’n of Or. v. BPA*²⁵—involved a statute that expressly provided for exclusive review in the
8 Court of Appeals. The statute applied in *Pub. Util. Comm’n* provided that a petition for review
9 “shall be filed” in the Court of Appeals; the statute here uses permissive language (“may obtain
10 review”). The other cases cited by defendants either involve statutes expressly providing for
11 exclusive review in the Court of Appeals,²⁶ or involve attempts to invoke federal question
12 jurisdiction to enjoin ongoing administrative proceedings.²⁷ None of those cases involved
13 challenges to the agency’s statutory and constitutional authority that are comparable to Oregon’s
14 challenges in this case. Those cases do not apply here.

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20 ²³ *PK Labs, Inc. v. Reno*, 134 F. Supp.2d 24, 29 (D.D.C. 2001).

21 ²⁴ *See Conant v. McCaffrey*, 2000 U.S. Dist. LEXIS 13024 (N.D. Cal. 2000). *See also, Conant v.*
22 *McCaffrey*, 172 F.R.D. 681 (N.D. Cal. 1997).

23 ²⁵ *Pub. Util. Comm’n of Or. v. BPA*, 767 F.2d 622 (9th Cir. 1985).

24 ²⁶ *See, e.g., LaVoz Radio de la Comunidad v. F.C.C.*, 223 F.3d 313 (6th Cir. 2000) (statute
25 provides that petition for review “shall” be filed in the Court of Appeals, which has “exclusive”
26 jurisdiction).

27 *See, e.g., Great Plains Co-op v. Commodity Future Trading Comm’n*, 205 F.3d 353, 355 (8th
Cir. 2000) (affirming district court’s conclusion that “it had no jurisdiction to enjoin or otherwise
interfere with the administrative proceedings of the CFTC”); *Thunder Basin Coal Company v.*
Reich, 510 U.S. 200, 202 (1994) (same); *General Finance Corp. v. FTC*, 700 F.2d 366, 368 (7th
Cir. 1983) (holding that target of an FTC investigation “may not maintain a suit to enjoin the
investigation but must wait until the government sues”).

1 **B. If section 507 precludes this court from exercising federal question**
2 **jurisdiction, the case should be transferred to the Court of Appeals.**

3 If defendants are correct, then transfer—not dismissal—is the appropriate remedy under
4 28 U.S.C. § 1631.²⁸ The Ninth Circuit recently indicated that “[n]ormally transfer will be in the
5 interest of justice.”²⁹ Thus, if this court concludes that section 507 of the CSA precludes it from
6 considering Oregon’s challenges to the Ashcroft directive on the merits, the proper remedy
7 would be to transfer the case to the Court of Appeals for the Ninth Circuit. Because the case will
8 likely be appealed to that court anyway, Oregon suggests that the most appropriate course of
9 action would be for this court to enter judgment on the merits, indicating that the court would in
10 the alternative transfer the case to the Court of Appeals if section 507 precludes the district court
11 from exercising federal question jurisdiction to decide the case in the first instance.

12 **II. The CSA does not authorize Ashcroft to override the Oregon Death with Dignity**
13 **Act.**

14 **A. The operative provisions of the CSA cited by defendants do not reflect a**
15 **congressional intent to displace state laws on end-of-life care.**

16 Defendants argue that the Ashcroft directive is authorized by the CSA because provisions
17 of the statute “plainly contemplate the existence of federal standards.”³⁰ They glean this statutory
18 authority from the rulemaking authority set forth in 21 U.S.C. §§ 821 and 871; the reference to
19 “federal” control of drug trafficking in section 801(6); the “course of professional practice”
20

21 _____
22 ²⁸ That statute provides in pertinent part: “Whenever a civil action is filed in a court * * *,
23 including a petition for review of administrative action, * * * and that court finds that there is a
24 want of jurisdiction, the court shall, if it is in the interest of justice, transfer such action to
25 another such court in which the action or appeal could have been brought at the time it was filed
26 or noticed, and the action or appeal shall proceed as if it had been filed in or noticed for the court
from which it is transferred.”

²⁹ *Cruz-Aguilera v. INS*, 245 F.3d 1070, 1074 (9th Cir. 2001), citing *Miller v. Hambrick*, 905 F.2d
259, 262 (9th Cir. 1990).

³⁰ Defendants’ Memorandum at 20.

1 language in section 802(21); the “other than for a medical purpose” language in section 829(c);
2 and the reference to “this subchapter” in section 841.³¹

3 There are two main problems with defendants’ approach. First, their analysis is contrary
4 to accepted principles of statutory construction. The Supreme Court has made it clear that
5 statutory construction “is a holistic endeavor.”³² The “central tenet” of interpreting a statute is to
6 discern Congress’s intent; in so doing, “a statute is to be considered in all its parts when
7 construing any one of them.”³³ The court is “guided not by a single sentence or member of a
8 sentence, but must look to the provisions of the whole law, and to its object and policy.”³⁴ It
9 would be erroneous to rely on “isolated words or sentences” to define Congress’s intent.³⁵ In
10 addition, courts “must be guided * * * by common sense as to the manner in which Congress is
11 likely to delegate a policy decision of such * * * political magnitude to an administrative
12 agency.”³⁶

13 Defendants’ approach suggests that a congressional intent to delegate authority to the
14 Attorney General to displace state law in deciding a policy decision of this magnitude can be
15 discerned from the “isolated words and sentences” they cite. But courts do not attempt to glean a
16 congressional intent by piecing together words and sentences from various places in the statute.
17 Instead, courts discern Congress’s intent by examining the statute as a whole, giving due
18 consideration to the “object and policy” of the overall statutory scheme. For example, in *FDA v.*
19 *Brown & Williamson Tobacco Corp.*, the Supreme Court held that Congress did not intend to

20 ³¹ Defendants’ Memorandum at 20-21.

21 ³² *United States Nat. Bank of Or. v. Independent Ins. Agents of America, Inc.*, 508 U.S. 439, 455
22 (1993).

23 ³³ *Lexecon, Inc. v. Milberg Weiss Bershal Hynes and Lerach*, 523 U.S. 26, 36 (1998).

24 ³⁴ *Fort Ord Toxics Project, Inc. v. California E.P.A.*, 189 F.3d 828, 832 (9th Cir. 1999), quoting
25 *John Hancock Mutual Life Ins. Co. v. Harris Trust & Sav. Bank*, 510 U.S. 86, 94-95, 114 S.Ct.
26 517, 126 L.Ed.2d 524 (1993).

27 ³⁵ *United States Nat. Bank*, 508 U.S. at 455. See also, *Gustafson v. Alloyd Co.*, 513 U.S. 561,
570 (1995) (statute “should not be read as a series of unrelated and isolated provisions”).

28 ³⁶ *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 130, 120 S.Ct. 1291, 146 L.Ed.2d
121 (2000).

1 delegate authority to the Food and Drug Administration (FDA) to regulate tobacco products
2 because such regulation would be “inconsistent with the [Act’s] core objective[.]”³⁷ The “core
3 objective” of the CSA was to halt illegal trafficking in drugs—a point conceded by
4 defendants—not to address the profound moral, ethical and medical issues raised by the practice
5 of physician assistance in hastening death. There is no evidence that Congress intended to
6 delegate a policy decision of this magnitude to the Attorney General.

7 The second problem with defendants’ analysis is that the specific statutes they cite
8 actually serve different purposes—ones that are consistent with Congress’s overall
9 scheme—than those suggested by defendants. According to defendants, the CSA provisions they
10 cite make it clear that determining “the extent of authorized activities was always a question of
11 *federal law*.”³⁸ A closer look at those provisions refutes that argument.

12 The rulemaking authority granted to the Attorney General under 21 U.S.C. §§ 821 and
13 871 does not expressly delegate any authority to the Attorney General to override a state’s
14 determination that a particular activity is authorized. The authority delegated to the Attorney
15 General under section 821 is limited to regulating “the registration and control of the
16 manufacture, distribution and dispensing” of controlled substances.³⁹ And the authority
17 delegated under section 871 is limited to actions necessary “for the efficient execution of [the
18 Attorney General’s] functions.”⁴⁰ As explained at page 28 of Oregon’s opening memorandum,
19 those provisions do not give the Attorney General unlimited authority to override state law in
20 this context. The rulemaking authority delegated under sections 821 and 871 makes sense when
21 it is used to maintain and enforce the “closed system” of controlled substances that the CSA
22 created to combat the problem of illegal trafficking in drugs. Neither provision authorizes the
23 Attorney General to decide as a matter of federal law a question that is far removed from the

24 ³⁷ *FDA v. Brown & Williamson*, 529 U.S. at 142.

25 ³⁸ Defendants’ Memorandum at 24.

26 ³⁹ 21 U.S.C. § 821.

⁴⁰ 21 U.S.C. § 871.

1 problem that Congress was intending to address. One state’s answer to the difficult moral,
2 ethical and medical questions raised by the practice of physician assistance in hastening death
3 has nothing to do with the national problem of drug trafficking.

4 The fact that 21 U.S.C. § 801(6) refers to “Federal control of the intrastate incidence of
5 the trafficking controlled substances” again reflects Congress’s attempt to address the same
6 problem. The Oregon Death with Dignity Act (Oregon Act) addresses end-of-life decisions by
7 dying persons, not “trafficking” in controlled substances. Similarly, the fact that the definition of
8 “practitioner” in 21 U.S.C. § 802(21) includes the words “in the course of professional practice”
9 says nothing about whether Congress intended federal agents to override a state’s determination
10 regarding which professional practices are authorized by that state’s laws. The same is true of
11 the reference to “this subchapter” in 21 U.S.C. § 841. That language may reflect a congressional
12 intent to “federalize” the “war on drugs” but there is no reason to infer from that reference an
13 intent to override state law on the legitimacy of assisting in dying patients’ end-of-life decisions.

14 Finally, defendants’ reference to 21 U.S.C. § 829(c) completely misses the mark. That
15 statute on its face only applies to Schedule V substances; Schedule II substances are ordinarily
16 used under the Oregon Act. Moreover, section 829(c) provides only that no Schedule V drug
17 “may be distributed or dispensed other than for a medical purpose.” There is no indication
18 anywhere in that provision—or elsewhere in the CSA—that Congress intended to delegate
19 authority to the Attorney General to determine as a matter of federal law that a medical practice
20 authorized by state law nonetheless constitutes a prohibited use of controlled substances.

21 Defendants argue that these provisions “make clear that the extent of authorized activities
22 was always a question of *federal* law, as confirmed by decisions such as *Moore* and
23 *Rosenberg*.”⁴¹ But as explained above, the statutory provisions only “make clear” that
24 controlling illicit trafficking in drugs was always a question of federal law, not that Congress

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26 ⁴¹ Defendants’ Memorandum at 24, referring to *United States v. Moore*, 423 U.S. 122 (1975) and
United States v. Rosenberg, 515 F.2d 190 (9th Cir. 1975).

1 intended to displace state laws addressing complex end-of-life decisions by dying patients.
2 *Moore, Rosenberg* and the other CSA cases cited by defendants do not address the question of
3 federal displacement of state laws. None of the practices found to be in violation of federal law
4 in those cases were authorized by state law. And none of those cases addressed the issue of end-
5 of-life care for the terminally ill, a question that has nothing to do with illegal trafficking in
6 drugs.

7 Under the predecessor to the CSA—the Harrison Narcotics Act—it was well-established
8 that the “legitimacy” of medical practices was determined under *state* law.⁴² Defendants cannot
9 dispute that registration under the CSA as enacted in 1970 was *automatic* for any practitioner
10 authorized to practice medicine under state law.⁴³ There was never any federal inquiry into the
11 “legitimacy” of a doctor’s practices as part of that registration scheme. Although the 1984
12 amendment gave additional authority to deny or revoke a registration in the “public interest,”
13 that authority was intended to address a different problem—resource and enforcement problems
14 at the state level—not to authorize the Attorney General to override a state’s determination that a
15 particular medical practice is lawful. Thus, defendants’ suggestion that this has “always” been
16 the law is just wrong.

17 **B. The CSA’s preemption provision does not evidence a congressional intent to**
18 **override state laws addressing end-of-life care for dying patients.**

19 Defendants point out that the CSA’s preemption provision, 21 U.S.C. § 903, does two
20 things. The first clause precludes operation of “field” preemption, which applies when the
21 federal interest in the area is so dominant that it has “occupied the field,” leaving no room for

22 ⁴² See *Burke v. Kansas State Osteopathic Ass’n*, 111 F.2d 250, 251 (10th Cir. 1940) (holding that
23 the issue of whether osteopathic physicians have the right to administer narcotic drugs under the
24 Harrison Act “must be determined by the statutory law of Kansas, as interpreted by its Supreme
25 Court”); *Georgia Ass’n of Osteopathic Physicians and Surgeons v. Allen*, 112 F.2d 52 (5th Cir.
1940) (holding that registration and administration of narcotics under the Harrison Act “is
controlled by applicable Georgia statutes”).

26 ⁴³ See *United States v. Moore*, 423 U.S. at 140 (under the CSA as enacted in 1970, registration
“is mandatory if the applicant is authorized to dispense drugs or conduct research under the law
of the State in which he practices”).

1 state regulation. The second clause confirms that federal law controls where there is a “positive”
2 conflict between state and federal law.⁴⁴ Oregon does not dispute those points. The
3 disagreement between the parties lies in the conclusion that should be drawn from them.

4 In Oregon’s view, the fact that Congress expressly chose to leave states free to address
5 issues that might otherwise fall within the subject area of the CSA absent a “positive conflict”
6 between state and federal law means that Congress intended to allow states the freedom to enact
7 and enforce their own laws without federal interference to the greatest extent possible. It follows
8 that Congress did *not* intend to confer broad authority on the Attorney General to interpret the
9 CSA in such a way as to *create* a positive conflict, thus negating state law, particularly on issues
10 of social policy that are unrelated to the illegal drug trade. That is consistent with the rule of
11 *Medtronic, Inc. v. Lohr* cited in Oregon’s opening memorandum.⁴⁵

12 Defendants disagree with that conclusion. According to defendants, 21 U.S.C. § 903
13 means not only that federal law controls where there is a conflict, but that Congress intended to
14 give the Attorney General the authority to create such a conflict, thus preempting state law by
15 “interpreting” the statute. In other words, according to defendants, federal law governs
16 whenever the Attorney General decides that a use of controlled substances that he opposes runs
17 afoul of the CSA, even if that use is authorized by state law. That proposition goes too far. If
18 defendants are correct, then an Attorney General who is opposed to the death penalty, for
19 example, would have the authority to decide that the use of controlled substances in carrying out
20 the death penalty by lethal injection is not a “legitimate” use of controlled substances. Congress
21 did not give the Attorney General that power. The question is *not* the supremacy of federal law,
22 but whether Congress intended to delegate authority to the Attorney General to decide questions
23 of social policy that are traditionally decided by the states, questions such as the efficacy of the

24 ⁴⁴ Defendants’ Memorandum at 24-25.

25 ⁴⁵ In *Medtronic*, the Supreme Court explained that, when construing a statutory preemption
26 provision, courts must presume that matters traditionally left to the states are not to be
superseded by federal law “unless that was the clear and manifest purpose of Congress.”
Medtronic, Inc. v. Lohr, 518 U.S. 470, 485, 116 S.Ct. 2240, 135 L.Ed.2d 700 (1996).

1 death penalty, or the legitimacy of physician assistance in hastening death. Those issues have
2 absolutely nothing to do with the national problem presented by the “war on drugs” that led to
3 the enactment of the CSA.

4 Defendants’ only response is to insist that Congress “plainly” intended to confer that
5 authority on the Attorney General even though Congress did not say so expressly, and to suggest
6 that the *Medtronic* presumption was “foreclosed” by *Geier v. American Honda Motor Co., Inc.*⁴⁶
7 The first contention is a misinterpretation of the CSA, as explained above. The second
8 contention is also wrong. The issue in *Geier* was whether the National Traffic and Motor
9 Vehicle Safety Act of 1966 preempted common law tort claims brought against an automobile
10 manufacturer for failing to install airbags in an automobile manufactured in 1987. The Court
11 held that the tort claims were preempted by federal law, but it did not overrule the *Medtronic*
12 presumption. That presumption was applied in *Medtronic* and other Supreme Court cases dating
13 back many decades.⁴⁷ Indeed, the Supreme Court reaffirmed that principle in *Raygor v. Regents*
14 *of Univ. of Minn.*, which was decided just a few days ago. The Court explained:

15 When Congress intends to alter the usual constitutional balance
16 between the states and the federal government, it must make its
17 intention to do so unmistakably clear in the language of the statute.
18 This principle applies when Congress intends to preempt the
19 historic powers of the states or when it legislates in traditionally
20 sensitive areas that affect the federal balance. In such cases, the
21 clear statement principle reflects an acknowledgment that the states
22 retain substantial sovereign powers under our constitutional
23 scheme, powers with which Congress does not readily interfere.⁴⁸

24 ⁴⁶ See Defendants’ Memorandum at 27, citing *Geier v. American Honda Motor Co., Inc.*, 529
25 U.S. 861, 120 S.Ct. 1913 (2000).

26 ⁴⁷ See *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 663-64 (1993) (“In the interest of
27 avoiding unintended encroachment on the authority of the states, however, a court interpreting a
28 federal statute pertaining to a subject traditionally governed by state law will be reluctant to find
29 preemption. Thus, preemption will not lie unless it is the clear and manifest purpose of
30 Congress.”); *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947) (“Congress legislated
31 here in a field in which the states have traditionally occupied. So we start with the assumption
32 that the historic police powers of the states were not to be superceded by the federal Act unless
33 that was the clear and manifest purpose of Congress”).

⁴⁸ *Raygor v. Regents of Univ. of Minn.*, 2002 WL 269234, No. 00-1514 (U.S., Feb. 27, 2002)
(slip op. at 9) (internal quotes and citations omitted).

1 That principle applies with equal force here. Congress does not “readily interfere” with
2 the states’ sovereign power to decide whether a physician’s assistance in hastening the death of a
3 dying patient is sound social policy. Courts should not infer that Congress intended to delegate
4 that authority to the Attorney General to decide that question when it enacted the CSA to address
5 the problem of illegal drug trafficking.

6 **C. The “clear statement” principle applies.**

7 Oregon argued in its opening memorandum that the Ashcroft directive violates the “clear
8 statement” rule as articulated and applied in *Solid Waste Agency v. Army Corps of Eng’rs.*⁴⁹
9 Defendants’ respond by characterizing the principle as the “doctrine of constitutional
10 avoidance.” According to defendants, that doctrine “is not even remotely applicable” because
11 (1) it is “abundantly clear” from the CSA that Congress intended to authorize the Attorney
12 General to take this action; and (2) the CSA, as interpreted in the Ashcroft directive, does not
13 invoke the outer limits of Congress’s power. Defendants overstate their case.

14 When application of a federal statute “at least raises a serious constitutional doubt[,]”
15 courts “have good reason to rely on a clear statement principle of statutory construction.”⁵⁰ This
16 “clear statement” principle was applied in *Solid Waste Agency* to invalidate an agency’s
17 interpretive rule in the absence of a clear statement that Congress intended to authorize the
18 agency to encroach upon an area traditionally left to the states. Oregon contends that the
19 Ashcroft directive is invalid under the same principle.

20 Defendants’ suggestion that it was “abundantly clear” that Congress intended to authorize
21 the Attorney General to take this unprecedented action is refuted by the text and history of the
22 CSA, as discussed in Oregon’s opening memorandum and above. Moreover, what defendants
23 describe as “abundantly clear” was certainly not so clear to Attorney General Reno, who reached
24 a contrary conclusion. And in applying the “clear statement” principle, the court need not decide

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26 ⁴⁹ *Solid Waste Agency v. Army Corps of Eng’rs.*, 531 U.S. 159, 172-73, 121 S.Ct. 675 (2001).

⁵⁰ *Raygor*, slip op. at 9.

1 whether the Ashcroft directive’s interpretation of the CSA violates the Commerce Clause or the
2 Tenth Amendment, or both. Rather, the court need only acknowledge—as the Supreme Court
3 acknowledged in *Raygor*—that “the notion at least raises a serious constitutional doubt.”⁵¹ That
4 possibility is certainly presented where, as here, a federal agency effectively overrides a state law
5 addressing a public policy issue that has been traditionally a matter of *state* concern.

6 **III. Defendants are not entitled to summary judgment on the “legitimacy” of using**
7 **controlled substances to hasten death under the Oregon Act.**

8 Defendants argue that dispensing controlled substances to assist in hastening death upon
9 request of a competent, terminally ill patient is not a “legitimate medical purpose” within the
10 meaning of the CSA and 21 C.F.R. § 1306.04.⁵² Defendants have submitted affidavits and cited
11 articles and studies in support of that conclusion. The patient-intervenors have submitted
12 affidavits and cited articles and studies on the other side of the debate. But the question is one of
13 social policy, based on medical, moral and ethical considerations. In Oregon’s view, neither side
14 can “win” this debate in court. Rather, the issue was resolved for Oregon by the voters.

15 Thus, the conflicting affidavits are irrelevant to the legal issues that are presented here.
16 Indeed, the question as framed by defendants—whether “assisting suicide” is a “legitimate
17 medical purpose”—is irrelevant because hastening the death of a terminally ill patient under the
18 Oregon Act is *not* “assisted suicide” under the express terms of ORS 127.880.⁵³ If the court
19 finds that it is appropriate to decide whether using controlled substances to hasten a dying
20 patient’s death pursuant to the Oregon Act is a legitimate medical purpose, then clearly a genuine
21 issue of material fact precludes resolving that issue on summary judgment.

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24 ⁵¹ *Raygor*, slip op. at 9.

25 ⁵² See Defendants’ Memorandum at 27-30.

26 ⁵³ ORS 127.880 provides in pertinent part: “Actions taken in accordance with ORS 127.800 to
127.897 shall not, for any purpose, constitute suicide, assisted suicide, mercy killing or
homicide, under the law.”

1 **IV. The Ashcroft directive violates the APA’s notice-and-comment requirements.**

2 Defendants conclude that compliance with the APA’s notice-and-comment requirements
3 was not required here because the Ashcroft directive was “plainly interpretive.”⁵⁴ It is well
4 established, however, that an agency’s characterization of its own action as “interpretive” is not
5 determinative.⁵⁵ Oregon acknowledged in its opening brief that distinguishing between
6 “legislative rules” (which require public notice and comment) and “interpretive rules” (which do
7 not) is a difficult task. The Ninth Circuit readily concedes that courts “have struggled with” this
8 question in many cases.⁵⁶

9 Defendants, however, have no difficulty concluding that the Ashcroft directive is “plainly
10 interpretive.” They (1) rely on language in the directive itself (acting in compliance with the
11 Oregon Act “may” lead to “possible” revocation of a physician’s registration); (2) argue that the
12 directive would not have the binding force of law in a formal adjudication proceeding to revoke a
13 physician’s registration; and (3) cite cases that attempt to distinguish between interpretive and
14 legislative rules in other contexts.

15 The first two points tend to support a conclusion that the Ashcroft directive is just an
16 interpretation of the CSA and 21 C.F.R. § 1306.04 that is not binding on anyone. But other
17 factors support a contrary conclusion. For example, while some portions of the directive are
18 conditional, other aspects of the directive appear to leave *no* discretion to the DEA agents who
19 are expressly “directed” to apply it. The directive states:

20 I hereby determine that assisting suicide is not a ‘legitimate
21 medical purpose’ within the meaning of 21 C.F.R. § 1306.04
22 (2001), and that prescribing, dispensing, or administering federally
23 controlled substances to assist suicide violates the CSA. * * * This
24 conclusion applies regardless of whether state law authorizes or
25 permits such conduct by practitioners or others and regardless of
26 the condition of the person whose suicide is assisted. I hereby

24 _____
25 ⁵⁴ Defendants’ Memorandum at 39.

26 ⁵⁵ See *Gunderson v. Hood*, 268 F.3d 1149, 1154 n. 27 (9th Cir. 2001) (“The label an agency
attaches to its pronouncement is clearly not dispositive”).

⁵⁶ *Id.* at 1154 (9th Cir. 2001).

1 direct the DEA, effective upon publication of this memorandum in
the *Federal Register*, to enforce and apply this determination[.]

2 The fact that Attorney General Ashcroft’s “conclusion” effectively negates Oregon law
3 further supports a finding that the directive is not merely an “interpretive” rule. Defendants cite
4 no authority for the proposition that a federal agency can effectively override a state law through
5 an interpretive rule. Moreover, Oregon noted at page 20 of its opening memorandum the
6 “chilling effect” the directive would have on the practice of physician assistance in hastening
7 death in Oregon. As a practical matter, no Oregon doctor is likely to risk losing his DEA
8 registration in order to “test” whether the directive will be binding in a revocation adjudication.
9 Thus, the directive is “binding” in the sense that it would effectively halt the practices authorized
10 by the Oregon Act.

11 As for the cases cited by defendants, Oregon acknowledged in its opening brief that there
12 were many cases addressing the distinction between legislative and interpretive rules. It is
13 difficult to formulate a single definitive test from any case or series of cases. Oregon argued that
14 the “better analysis” looked at *all* the pertinent factors identified in the case law in light of the
15 underlying purpose of the notice-and-comment requirement. This was the approach utilized by
16 Judge Posner in the *Hocrot* case.⁵⁷ Defendants offer no response to the Posner approach.
17 Applying that approach here leads to the conclusion that the public notice-and-comment
18 procedures of the APA apply. Moreover, it would be unusual for Congress to require the
19 Attorney General to comply with formal rulemaking procedures when listing a substance on a
20 CSA schedule—as required by 21 U.S.C. § 811—but allow the Attorney General to preempt
21 state law on an important public policy issue through an informal “interpretive” rule. Defendants
22 offer no explanation for this difference.

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26 ⁵⁷ See Oregon’s opening memorandum at 19, citing *Hocrot v. U.S. Dep’t. of Agric.*, 82 F.3d 165,
170-72 (7th Cir. 1996).

1 **V. The court may review the Ashcroft directive for compliance with Executive**
2 **Order 13132.**

3 Defendants do not contend that they *complied* with the President’s Executive Order on
4 Federalism (EO 13132). Instead, they contend that EO 13132 does not confer any judicially
5 enforceable rights. It is correct that an executive order like EO 13132 ordinarily does not create
6 a private right of action.⁵⁸ But that does not mean that defendants can simply ignore EO 13132.

7 Rather, an executive order can establish legal standards against which an agency action is
8 reviewed under the APA, even if the order does not give rise to a private right of action. The
9 Ninth Circuit indicated in *Carmel-By-The-Sea v. U.S. Dept. of Transp.* that an executive order
10 creates “law to apply” under the APA as long as it establishes objective standards for reviewing
11 the agency’s action.⁵⁹ In *Sierra Club v. Peterson*,⁶⁰ the Ninth Circuit reviewed actions taken by
12 the United States Forest Service for compliance with a president’s executive order. The court
13 held that “[t]he fact that there is no express or implied private right of action under EO 12088
14 does not prevent review of agency action under the APA.”⁶¹

15 Defendants responded by suggesting that EO 13132 cannot be enforceable because its
16 very terms reveal that it was not intended to create enforceable rights; that is because EO 13132
17 states that it was only designed to improve the internal management of the executive branch. But
18 that was also true of the executive order in *Sierra Club*, yet the Ninth Circuit still reviewed the
19 Forest Service’s actions for compliance with the executive order.⁶² Moreover, the Ninth Circuit
20 finds it “questionable whether an executive order could of its own force preclude judicial review

21 _____
22 ⁵⁸ See *Chen v. I.N.S.*, 95 F.3d 801, 805 (9th Cir. 1996); *Utley v. Varian*, 811 F.2d 1279, 1285 n. 5
(9th Cir. 1987).

23 ⁵⁹ *Carmel-By-The-Sea v. U.S. Dept. of Transp.*, 123 F.3d 1142, 1166 (9th Cir. 1997).

24 ⁶⁰ *Sierra Club v. Peterson*, 705 F.2d 1475 (9th Cir. 1983).

25 ⁶¹ *Id.* at 1478, n. 5.

26 ⁶² The executive order at issue in *Sierra Club* states: “Nothing in this Order shall create any right
or benefit, substantive or procedural, enforceable at law by a party against the United States, its
agencies, its officers or any person.” EO 12088, reprinted at 42 U.S.C.A. § 4321 (Supp. 1982),
§ 1-802.

1 of action taken pursuant to it.”⁶³ The cases cited by defendants are not to the contrary. The only
2 Ninth Circuit case cited by defendants, *American Fed. of Gov. Emp. v. Federal Labor Relat.*,⁶⁴
3 did not involve review of agency action for compliance with an executive order. The issue in
4 *American Fed.* was “whether a district office of the Social Security Administration * * *
5 committed an unfair labor practice when it refused to bargain over staffing levels[.]”⁶⁵ Under the
6 governing statute, bargaining was required only “at the election of the agency.”⁶⁶ The union
7 argued that “the President made this election for the agency through Executive Order 12871[.]”⁶⁷
8 The Ninth Circuit disagreed: “We cannot conclude * * * that the language of the order
9 constitutes an election to bargain.”⁶⁸

10 Thus, *American Fed.* does not stand for the proposition that agency actions are not
11 subject to APA review for compliance with an executive order. The cases from other
12 circuits—string-cited at page 46 of defendants’ memorandum—held that the particular executive
13 order at issue does not give rise to a private cause of action. Most of those cases did not decide
14 whether agency action was reviewable for compliance with an executive order under the APA.⁶⁹
15 The rule in this circuit—applied in *Carmel-By-The-Sea* and *Sierra Club*—allows such review.
16 Accordingly, the Ashcroft directive is reviewable for compliance with EO 13132. And as
17 explained in Oregon’s opening memorandum, the directive violates EO 13132 in many respects.
18 Defendants offer nothing to dispute that point.

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21 ⁶³ *Legal Aid Soc. of Alameda Cty. v. Brennan*, 608 F.2d 1319, 1330 n. 15 (9th Cir. 1979).

22 ⁶⁴ *American Fed. of Gov. Emp. v. Federal Labor Relat.*, 204 F.3d 1272 (9th Cir. 2000).

23 ⁶⁵ *Id.* at 1273.

24 ⁶⁶ *Id.*, citing 5 U.S.C. § 7106(b)(1).

25 ⁶⁷ *Id.* at 1273.

26 ⁶⁸ *Id.* at 1275.

⁶⁹ See, e.g., *Sur Contra La Contaminacion v. E.P.A.*, 202 F.3d 443 (1st Cir. 2000); *Chen Zhou Chai v. Carroll*, 48 F.3d 1331 (4th Cir. 1995). *Air Transp. Assoc. of America v. FAA*, 169 F.3d 1, 8 (D.C. Cir. 1999) does hold that the review under the APA is not available; that conclusion appears to be contrary to the rule in the Ninth Circuit applied in *Sierra Club v. Peterson*.

1 **VI. Defendants’ constitutional arguments miss the point.**

2 Defendants’ constitutional arguments boil down to three points. First, defendants cite
3 cases holding that the CSA does not violate the Commerce Clause or the Tenth Amendment.
4 Second, defendants argue that exercising Commerce Clause power to displace a state’s exercise
5 of its traditional police powers is not enough to establish a violation of the Tenth Amendment.
6 Third, defendants argue that the Supreme Court’s recent “federalism” decisions do not apply
7 here because the CSA does not compel states to adopt or implement federal policies or programs.

8 On the first point, the “wealth of precedent” rejecting constitutional challenges to the
9 CSA does not apply here; the cases cited by defendants are all distinguishable. None of those
10 cases—*Moore*, *Rosenberg*, and others—involved practices expressly authorized by state law.
11 Those cases did not involve the exercise of federal power under the Commerce Clause to negate
12 a state’s considered policy choice on an issue that is traditionally reserved to the states. And as
13 explained in Oregon’s opening memorandum, the fact that Congress attempted to exercise its
14 Commerce Clause power in areas traditionally left to the states was cited by the Supreme Court
15 in *Lopez* as evidence that Congress had exceeded its Commerce Clause powers.⁷⁰

16 Defendants’ second point assumes that the CSA, as interpreted in the Ashcroft directive,
17 is within Congress’s Commerce Clause power. To be sure, Congress *can* displace state law in
18 many areas when exercising its Commerce Clause power. But Congress can also run afoul of a
19 state’s sovereign interests—protected expressly by the Tenth Amendment and implicitly by the
20 system of “dual sovereignty” reflected in the constitutional structure—when exercising its
21 Commerce Clause powers. *New York v. United States*⁷¹ and *Printz v. United States*⁷² are
22 examples of that principle.

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25 ⁷⁰ See *United States v. Lopez*, 514 U.S. 549, 583, 115 S.Ct. 1624, 131 L.Ed.2d 626 (1995)
(Kennedy, J., concurring).

26 ⁷¹ *New York v. United States*, 505 U.S. 144, 112 S.Ct. 2408, 120 L.Ed.2d 120 (1992).

⁷² *Printz v. United States*, 521 U.S. 898, 117 S.Ct. 2365, 138 L.Ed.2d 914 (1997).

1 Defendants’ third argument assumes that the principles of federalism reflected in the *New*
2 *York* and *Printz* decisions limit federal authority only in the situations presented in those
3 cases—federal compulsion to enact policies (*New York*) or to administer federal programs
4 (*Printz*). But as explained in Oregon’s opening memorandum, the Supreme Court has never
5 limited the federalism principles applied in those cases to the precise situations presented there.
6 Indeed, other recent federalism cases—*Alden v. Maine*⁷³ and *Raygor v. Regents of Univ. of*
7 *Minn.*, for example—indicate that the Court is more likely to *expand* the sovereign rights of
8 states to legislate free of federal interference. Ashcroft’s “interpretation” of the CSA to negate
9 the policy choice made by Oregon voters, if held to be authorized by the CSA, violates Oregon’s
10 sovereign right to make that choice.

11 CONCLUSION

12 This court has federal question jurisdiction to decide Oregon’s statutory and
13 constitutional challenges to defendants’ attempt to override Oregon law through the Ashcroft
14 directive. Defendants’ contention that the Court of Appeals has exclusive jurisdiction to
15 “review” Ashcroft’s decision should be rejected.

16 On the merits, Oregon should prevail because the Ashcroft directive is premised on two
17 fundamentally flawed notions. First, the directive presumes that Congress intended to give the
18 Attorney General the authority to decide—as a matter of federal law—sensitive public policy
19 issues like the “legitimacy” of physician assistance in hastening death when it authorized the
20 Attorney General to take actions to address the problem of illegal trafficking in drugs. Second,
21 the directive presumes that Congress authorized the Attorney General to negate state laws in
22 deciding that issue through informal procedures, even though every other substantive
23 decision—listing a substance on a CSA schedule, or revoking a federal registration, for
24 example—requires the Attorney General to utilize formal adjudication or rulemaking procedures.

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⁷³ *Alden v. Maine*, 527 U.S. 706, 119 S.Ct. 2240, 144 L.Ed.2d 636 (1999).

