

1 HARDY MYERS
Attorney General
2 STEPHEN K. BUSHONG #85130
Assistant Attorney General
3 Department of Justice
1162 Court Street NE
4 Salem, OR 97301-4096
Telephone: (503) 378-6313
5
6 Attorneys for Plaintiff

7
8
9
10 IN THE UNITED STATES DISTRICT COURT
11 FOR THE DISTRICT OF OREGON

12 STATE OF OREGON,
13 Plaintiff,
14 v.

Case No.
COMPLAINT
(Declaratory and Injunctive Relief)

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.

22
23 **Nature of Action**

24 1.

25 The State of Oregon seeks declaratory and injunctive relief to prevent the United States
26 Drug Enforcement Administration (DEA) and the Attorney General of the United States from

1 exceeding their authority and unconstitutionally negating the Oregon Death with Dignity Act
2 (the Act). The Act, which was duly enacted by Oregon voters through the initiative process and
3 subsequently reaffirmed by Oregon voters, provides a process through which terminally ill adult
4 Oregonians may legally obtain a physician's assistance in hastening death. Defendants now
5 threaten a federal enforcement of the Controlled Substances Act (CSA) that, if given effect,
6 would (1) effectively prevent physician assistance in hastening death as authorized by the Act;
7 (2) eliminate this option for terminally-ill adults in Oregon; and (3) subject Oregon health care
8 providers to administrative and criminal sanctions. This exceeds the authority delegated to the
9 Attorney General and the DEA under the CSA, or alternatively, if permitted under the CSA,
10 exceeds Congress's authority under the Commerce Clause and infringes upon Oregon's
11 sovereignty in violation of the Tenth Amendment.

12 **Jurisdiction and Venue**

13 2.

14 This court has jurisdiction under 28 U.S.C. § 1331 (federal question) and 28 U.S.C.
15 § 1346(a)(2) (civil action against the United States). Declaratory and injunctive relief is proper
16 pursuant to 28 U.S.C. § 2201 (declaratory judgment) and 5 U.S.C. § 702 (Administrative
17 Procedures Act).

18 3.

19 Venue is proper in this court pursuant to 28 U.S.C. § 1391(e), 28 U.S.C. § 1402(a)(1),
20 and Local Rule 3.4.

21 **Parties**

22 4.

23 Plaintiff State of Oregon has a sovereign interest in ensuring that its duly-enacted laws,
24 including the Act, remain in effect. Oregon, by and through its Department of Human Services,
25 its Board of Medical Examiners, and its Board of Pharmacy, also has a regulatory interest in
26 determining whether Oregon physicians and pharmacists may lawfully act pursuant to the Act.

1 Oregon’s regulatory interest includes receiving reports from health care providers as required by
2 the Act. The DEA proposes to utilize these reports in determining whether to take enforcement
3 actions against Oregon physicians.

4 5.

5 The United States of America is a sovereign nation, responsible for enacting and
6 enforcing the CSA and regulations purportedly adopted under the authority of that Act. The
7 United States Department of Justice (USDOJ) and DEA are agencies of the United States that
8 have responsibility for enforcing provisions of the CSA.

9 6.

10 Defendant John Ashcroft (Ashcroft) is the present Attorney General of the United States
11 and is sued in his official capacity. Defendant Asa Hutchinson is the present Administrator of
12 the DEA and is sued in his official capacity. Defendant Kenneth W. Magee is the present
13 Director of the Portland office of the DEA and is sued in his official capacity.

14 **The Oregon Death with Dignity Act**

15 7.

16 On November 8, 1994, the people of Oregon enacted the Act through the initiative; the
17 Act has been codified as ORS 127.800 through 127.995. On November 7, 1997, the people of
18 Oregon rejected (by a margin of about 60 percent to 40 percent) a proposal to repeal the Act.
19 The Act was amended in 1999. *See* 1999 Or. Laws ch. 423. The Act has thus been approved by
20 Oregon voters in two statewide elections and recently amended by the Oregon legislature. It is a
21 duly enacted state law.

22 8.

23 The Act establishes comprehensive procedures by which competent, terminally ill adult
24 residents of Oregon—who meet all requirements established by the Act—may ask a physician to
25 issue a prescription for medication to hasten the death of a dying patient in a humane and
26 dignified manner. The Act imposes various conditions, restrictions and limitations designed to

1 ensure that any decision to request and use such a prescription will be made knowingly and
2 voluntarily, by competent terminally ill adults. The Act provides that no person shall be subject
3 to civil or criminal liability, or professional disciplinary action, for participating in compliance
4 with the Act, or for declining to participate under the Act.

5 **The Controlled Substances Act**

6 9.

7 Title II of the Comprehensive Drug Abuse Prevention and Control Act of 1970, Pub L
8 91-513, codified at 21 U.S.C. § 800, *et seq.*, establishes a registration scheme for manufacturers,
9 distributors, and dispensers (including physicians) of certain enumerated substances. 21 U.S.C.
10 § 822. The Attorney General, or his designee, the DEA, administers the registration scheme.
11 Under certain limited circumstances, the DEA may deny or revoke a physician or pharmacist's
12 DEA registration and, with it, the right to prescribe or dispense controlled substances. 21 U.S.C.
13 §§ 823-24. Any person distributing a controlled substance, except as authorized by the CSA, is
14 also subject to severe criminal penalties. 21 U.S.C. §§ 841 through 846.

15 10.

16 Section 903 of the CSA expresses Congress's intent to permit states to enact laws on
17 subjects that are addressed in the CSA to the greatest extent possible without violating the CSA.
18 21 U.S.C. § 903.

19 11.

20 A regulation adopted by DEA that purports to implement the CSA provides that
21 prescriptions issued for controlled substances must be issued for a "legitimate medical purpose."
22 21 C.F.R. § 1306.04(a). Dispensing controlled substances without a legitimate medical purpose
23 subjects physicians to criminal penalties and/or administrative proceedings to suspend or revoke
24 the physician's registration under the CSA. The CSA, and its implementing regulations, do not
25 define what medical purposes are "legitimate." Traditionally, that determination has been left to
26 the States.

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

12.

The CSA has been incorporated into Oregon law. *See* ORS 677.480(3) and (5); 475.005(5); 689.405. An Oregon physician who prescribes controlled substances in a manner prohibited by the CSA is subject to disciplinary action, including revocation of his or her license to practice medicine, by the State Board of Medical Examiners. ORS 677.480(3) and (5); ORS 475.005(5). Oregon pharmacists who prescribe controlled substances in a manner prohibited by the CSA are subject to disciplinary action by the State Board of Pharmacy. ORS 689.405.

13.

All medications that physicians commonly prescribe to implement the purposes of the Act, and that are best suited for this purpose, are controlled substances subject to the CSA.

Defendants’ Shifting Interpretations of the CSA

14.

Defendants’ interpretation of the CSA, and whether it affects the Act, have changed over time. On November 5, 1997, then DEA Administrator Thomas Constantine (Constantine) opined in a letter that actions taken by physicians and pharmacists in accordance with the Act would violate the CSA.

15.

Constantine’s opinion was reversed by then United States Attorney General Janet Reno, as reflected in a letter dated June 5, 1998. A copy of that letter is attached as Exhibit 1. USDOJ concluded at that time that “the CSA does not authorize DEA to prosecute, or to revoke the DEA registration of, a physician who has assisted in a suicide in compliance with Oregon law.”

16.

On November 6, 2001, Ashcroft announced that USDOJ had reversed its earlier opinion. Under the new interpretation announced by Ashcroft, DEA is now threatening to revoke the registration of, and Ashcroft is threatening to prosecute criminally, any physician who issues a prescription for medication to hasten the death of dying patients as authorized by the Act. In an

1 undated memorandum received by plaintiff on November 6, 2001, Ashcroft directed the DEA
2 “to enforce and apply” the new interpretation notwithstanding anything to the contrary in the
3 June 5, 1998 Attorney General’s letter. Copies of Ashcroft’s memorandum, and the supporting
4 legal opinion, are attached as Exhibits 2 and 3, respectively.

5 17.

6 As a result of the new interpretation of the CSA announced by Ashcroft, Oregon
7 physicians who write a prescription pursuant to the Act may now be subject to administrative
8 enforcement actions by DEA, and possibly to federal criminal penalties. They may also be
9 subject to disciplinary action by the State Board of Medical Examiners. Similarly, Oregon
10 pharmacists who fill a prescription written pursuant to the Act may also be subject to disciplinary
11 action. Defendants have stated their intent to use reports required to be filed with the
12 Department of Human Services as a basis for federal investigation of Oregon health care
13 providers, and possible imposition of criminal and administrative sanctions against those
14 providers under the CSA.

15 **Claim for Relief**

16 **(Declaratory Judgment)**

17 18.

18 Oregon realleges and incorporates by this reference the allegations of paragraphs 1-17.

19 19.

20 Oregon contends that the Act is a state law that is permitted by section 903 of the CSA,
21 and that defendants’ new interpretation and threatened enforcement of the CSA exceeds the
22 authority delegated to defendants under the CSA. Alternatively, if defendants’ new
23 interpretation and threatened enforcement is deemed to be within the scope of authority
24 delegated to defendants under the CSA, then the CSA itself, as so interpreted and applied,
25 exceeds Congress’s enumerated powers under the United States Constitution, in particular,
26 Congress’s power under the Commerce Clause, Article I, section 8 of the United States

1 Constitution. Oregon also contends that such an interpretation and threatened enforcement of the
2 CSA violates the Tenth Amendment of the United States Constitution by usurping powers that
3 the Constitution denies to Congress and reserves to the states or the people.

4 20.

5 Defendants contend that the new interpretation and threatened enforcement of the CSA is
6 valid and permissible.

7 21.

8 Oregon has a present need to know whether the new interpretation and threatened
9 enforcement of the CSA is valid, for several reasons. First, Oregon has a sovereign interest in
10 determining whether its duly-enacted laws remain in effect or have been negated by federal law.
11 Second, Oregon has an interest in determining whether its Board of Medical Examiners, Board
12 of Pharmacy, and Department of Human Services may continue to consider the provisions of the
13 Act in performing their regulatory and administrative functions. Third, Oregon has an interest in
14 determining whether its Department of Human Services may continue to require health care
15 providers to file reports that could be used by DEA in pursuing enforcement actions or criminal
16 penalties against those providers.

17 22.

18 There is a present justiciable controversy between the parties as to whether the new
19 interpretation and threatened enforcement of the CSA is valid. Declaratory relief is appropriate
20 to resolve this controversy.

21 23.

22 Oregon asks this court to declare that the Act is permitted by Section 903 of the CSA and
23 that defendants' new interpretation and enforcement of the CSA exceeds their authority under
24 the CSA, or if the new interpretation and enforcement is authorized by the CSA, that such
25 authorization is unconstitutional. Oregon further asks the court to preliminarily and permanently
26 enjoin defendants from enforcing or otherwise giving effect to that interpretation.

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

24.

Pursuant to 28 U.S.C. §§ 1920 and 2412 (a)(1), Oregon is entitled to recover its costs of suit. Pursuant to 28 U.S.C. § 2412(b) and (d)(1)(A), Oregon is entitled to recover reasonable attorney fees incurred in connection with this litigation.

WHEREFORE, Oregon requests entry of judgment:

- 1. Declaring that the Act is permitted by Section 903 of the CSA and is not preempted in any way by federal law;
- 2. Declaring that the new interpretation and threatened enforcement of the CSA announced by Ashcroft exceeds defendants' authority or is unconstitutional;
- 3. Preliminarily and permanently enjoining defendants from enforcing or otherwise giving effect to that interpretation;
- 4. Awarding Oregon its reasonable attorney fees and costs of suit; and
- 5. Awarding Oregon such other relief as the court deems equitable and just.

DATED this ____ day of November, 2001.

Respectfully submitted,

HARDY MYERS
Attorney General

STEPHEN K. BUSHONG #85130
Attorney-in-Charge
Trial Attorney
Of Attorneys for Plaintiff
1162 Court Street NE
Salem, OR 97301-4096
(503) 378-6313