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IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF OREGON

STATE OF OREGON, )  
 )  
Plaintiff, ) CV 01-1647  
 )  
vs. ) November 8, 2001  
 )  
JOHN ASHCROFT, et al., ) Portland, Oregon  
 )  
 )  
 )  
 )  
Defendants. )

TRANSCRIPT OF TEMPORARY RESTRAINING ORDER  
BEFORE THE HONORABLE ROBERT E. JONES  
UNITED STATES DISTRICT COURT JUDGE

APPEARANCES

FOR THE STATE OF OREGON: Stephen Bushong  
Assistant Attorney General

FOR THE UNITED STATES: Michael W. Mosman  
U.S. Attorney

Herbert Sundby  
Assistant U.S. Attorney

William Howard  
Department of Justice

Daniel Dormant  
Cynthia Ryan  
Drug Enforcement Administration

Howard Neilson  
Office of the Attorney General

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FOR THE INTERVENORS:           Eli Stutsman  
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  Proceedings recorded stenographically,  
  computer-aided transcription.

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P R O C E E D I N G S

4

5

THE COURT: We will be addressing the State of Oregon versus John Ashcroft, et al.

7

Would the parties on the telephone please introduce yourself for the record.

9

name

MR. HOWARD: Good afternoon, Your Honor. My name is Bill Howard. I am with the U.S. Department of Justice. With me here is Dan Dormont, D-O-R-M-O-N-T, who is senior counsel at the Drug Enforcement Administration, and Cynthia Ryan, who is chief counsel of the DEA. Also with us is Howard Neilson, who is counselor to the Attorney General of the United States.

16

THE COURT: All right.

17

And present in the courtroom, would you please introduce yourselves, gentlemen.

19

of

MR. BUSHONG: Steve Bushong appearing on behalf of the State of Oregon.

21

MR. SUNDBY: Herb Sundby for the United States.

22

THE COURT: Okay. Mr. Sundby, Mr. Bushong, the first issue I wish to address is the issue of standing. I had a telephone conference very briefly, just scheduling with Mr. Howard and Mr. Bushong this morning as to how we

4

1

are going to handle the arguments and what we are going to

2 address today, but that definitive discussion may be  
altered 3 substantially by the issue which was raised in a brief,  
4 which I did not have at the time.

5 The record should reflect that at 12:08 today I  
and 6 received -- noon -- I received the brief from Mr. Howard  
7 the Government. One of the contentions which we should  
8 always take up first is: Does the State of Oregon have  
9 standing?

10 The United States relies on an old 1923 case of  
11 Massachusetts v. Mellon. It essentially states that you  
12 must have an injured party as a plaintiff and that the  
state 13 is not the injured party.

14 I would like to have Mr. Bushong, if you would  
15 please respond to that section of the Government's brief.

16 MR. BUSHONG: Thank you, Your Honor. Do you  
want 17 me to stand or address it into the microphone?

18 THE COURT: Just be seated. That's fine. Just  
19 speak into the mike so everybody can hear you.

20 MR. BUSHONG: Thank you. Your Honor, first of  
21 all, we did not brief standing in our brief so if the  
Court 22 is concerned --

23 THE COURT: No, you didn't. That's why I asked  
24 you to.

25 MR. BUSHONG: I am prepared to address it, but  
we

1 would like the opportunity to file a brief on the standing  
2 issue, if the Court would allow that.

3 THE COURT: I want to get your initial reaction.  
4 If you recall, in the case that Judge Hogan had involving  
5 this issue originally, I believe the Ninth Circuit was  
very  
6 concerned with the issue of standing. That's about as far  
7 as it got.

8 MR. BUSHONG: Your Honor, I am prepared to  
address  
9 the standing issue. This case is very much different from  
10 the case that was filed several years ago in front of  
Judge  
11 Hogan.

12 THE COURT: Just a second. We have a space  
13 problem. Could we have the press people sit in the jury  
14 box. Don't feel locked in. You can come and go when the  
15 demands meet you. That opens it up even more.

16 Okay. Let's talk about standing, Counsel.

17 MR. BUSHONG: Your Honor, this case is much  
18 different than the case several years ago in front of  
Judge  
19 Hogan. We agree that the agreement in the Lujan case and  
20 others that there be an injury in fact alleged is a  
21 requirement that must be met.

22 It certainly is met here for a number of  
reasons.  
23 Oregon has alleged injury to its sovereign interests in  
24 ensuring that laws that are duly enacted in accordance  
with  
25 Oregon law remain in effect.

be

1 Oregon has also alleged injury to its regulatory  
2 interests in connection with the actions of the Board of  
3 Medical Examiners, the Board of Pharmacy and what used to  
4 known as the Health Division and now is known as the  
5 Department of Human Services, which are dependent in large  
6 part upon the actions that have been taken here by the  
7 defendant.

8 There is case law that addresses these types of  
9 injury that we are relying on. I can give you a couple  
10 cites today.

11 THE COURT: If you would, I would appreciate it.  
12 Also alert opposing counsel.

cite

13 MR. BUSHONG: I would. The first case I would  
14 cite is New York v. United States. You can tell by the  
15 caption that is a state versus the United States. The  
16 is 505 U.S. 144, a 1992 case.

New

17 Again, that was a case under which New York law,  
18 the State of New York was entitled to dispose of its  
19 hazardous waste in a certain way, in accordance with the  
20 York law.

21 The United States took the position in a federal  
22 statute that disposal in a different way was required by  
23 federal law. New York filed a declaratory judgment action  
24 asking the Court to determine whether the federal law  
25 overturned the -- controlled over the state law, which is

1 the same issue that is presented here.

2 The standing issue in that case was addressed by  
3 the lower courts. When the case went up to the Supreme  
4 Court, the United States didn't even challenge the fact  
that  
5 New York had standing.

6 There are a number of other cases. I will just  
7 give you the cites and won't discuss it now. Bowen v.  
8 Public Agencies to Social Security Entrapment, 477 U.S.  
41.

9 THE COURT: Who was the plaintiff?

10 MR. BUSHONG: Bowen. B-O-W-E-N.

11 THE COURT: That doesn't sound like a state.

12 MR. BUSHONG: That's not a state. But the Court  
13 states at Page 51, in Note 17 that a state does have  
14 standing when it alleges interference with its interest in  
15 the preservation of its own sovereignty. There are a  
number  
16 of lower courts that have followed that reasoning.

17 Alaska v. United States Department of  
18 Transportation, 868 F.2d 441. That's out of the D.C.  
19 circuit, 1989, at Page 44 is the main discussion in that  
20 case.

21 Ohio v. Department of Transportation, 766 F.2d  
22 228, a Sixth Circuit case. The Court concluded that  
because  
23 Ohio was litigating the validity of its own statute, it  
had  
24 a sufficient stake in the outcome in the litigation to  
give  
25 it standing.

1                   The Ninth Circuit has addressed this.  
Washington

2                   Utilities & Transportation v. Federal Communications  
3                   Commission, 513 F.2d 1142, Ninth Circuit, 1975.

4                   And one final one: Illinois Department of  
5                   Transportation v. Hinson, 122 F.3d 370, Seventh circuit,  
6                   1977.

7                   THE COURT: Do any of these cases distinguish  
the  
8                   Mellon case?

9                   MR. BUSHONG: Yes, they do. The Mellon case  
10                  discusses a state's standing under the *parens patriae*  
11                  doctrine, which is not the basis by which the State of  
12                  Oregon is bringing this action. That's the distinction.

13                  THE COURT: All right. Let me address, Mr.  
Howard  
14                  and your associates, the issue of standing is if you claim  
15                  that there is insufficient evidence of a state injury,  
then  
16                  wouldn't that naturally open the door for the intervention  
17                  of those who petition the Court to intervene who claim  
real  
18                  injury?

19                  MR. HOWARD: Your Honor, our position here is  
that  
20                  they had to plead sufficient facts to establish standing  
in  
21                  their complaint. So what we do is we look at that  
22                  complaint. In that complaint they basically -- they  
23                  basically say they have two interests in the litigation.  
24                  One is sovereign interest and the other is a regulatory

25 interest.

9

it 1 Insofar as the sovereign interest is concerned,  
2 is simply not sufficient, given the facts in this case and  
3 the facts that are pleaded, it is not sufficient for the  
4 state to say, well, we don't like what the DEA has done  
5 here; we don't like this statute. There has to be some  
6 particularized injury, and there simply isn't.

7 Mr. Bushong alluded to, I believe, one or two  
8 cases that I haven't seen yet, but one or two cases in the  
9 description where the federal government was placing at  
10 issue a state statute, and we have not done that here.

the 11 What we're doing, we are construing our own  
12 federal statute. We are not challenging the validity of  
13 Oregon statute. That would still stand.

14 So as far as a regulatory interest is concerned,  
15 our position on that is that absent factual allegations in  
16 the complaint that would distinguish this from *parens*  
17 *patriae*, the doctrine of *parens patriae* clearly applies in  
18 this case. The Mellon case does apply.

standing, 19 One other point I would make, Your Honor, if the  
20 Court is going to allow Oregon to file a brief on  
21 we would ask for the opportunity to file a reply.

22 THE COURT: As I said to you over the telephone  
23 this morning, obviously everybody needs to get as much  
24 briefing done as soon as possible. We are certainly not  
25 going to shoot from the hip on this matter, but we will

1 require complete briefing. But I do have to make some  
2 decision as far as temporary relief in the form of  
temporary  
3 injunction, which I will be making either today or  
tomorrow.

4 The other thing I would like to know, is counsel  
5 present here for any of those who are asking permission to  
6 intervene as opposed to file amici brief?

7 MR. VAN AELSTYN: Yes, Your Honor, counsel are  
8 here.

9 THE COURT: Please come up and take seats at  
10 counsel table and introduce yourselves.

11 Please introduce yourself, sir, and who you  
12 represent.

13 MR. VAN AELSTYN: Nicholas Van Aelstyn with the  
14 law firm of Heller Ehrman White & McAuliffe. We represent  
15 intervenor Richard Holmes, Karl Stansell, Jane Doe No. 1,  
16 James Romney and Compassion In Dying of Oregon.

17 With me is my colleague, Natalie Hocken.

18 MS. HOCKEN: Natalie Hocken with Heller Ehrman  
in  
19 Portland.

20 THE COURT: Sir.

21 MR. STUTSMAN: Thank you, Your Honor. Eli  
22 Stutsman. I represent the proposed intervenors, Peter  
23 Rasmussen, M.D., a Salem physician, and David Hochhalter,  
a  
24 Salem pharmacist.

25 THE COURT: Where are you from?

1 MR. STUTSMAN: My office is based right in  
2 downtown Portland.

3 THE COURT: There is somebody from California  
4 that said they were here, Carol?

5 THE CLERK: Yes, they are here.

6 MR. VAN AELSTYN: Your Honor, I am the only  
7 attorney from California. I am with the San Francisco  
8 office. Natalie Hocken is with me from our Portland  
9 office.

9 I did file a pro hac vice petition this morning.

10 THE COURT: Mr. Howard, this is awkward dealing  
11 through telephonic presentations. Did you receive the  
12 briefs from the intervenor, proposed intervenors?

13 MR. HOWARD: Your Honor, I only know that I  
14 an received an e-mail from, I believe, Natalie Hocken about  
15 a hour ago. I have not looked at that e-mail. That may be  
16 motion to intervene. I simply don't know. Beyond that, I  
17 received no other motions to intervene, if any at all. I  
18 received nothing by way of fax or by service.

19 MR. SUNDBY: Your Honor, the U.S. Attorney's  
20 not Office received a brief from one of the parties, and I'm  
21 sure who that was. We will be sending that on to  
22 Mr. Howard.

23 MR. STUTSMAN: Your Honor, Eli Stutsman, for the  
24 all record. I faxed to Mr. Howard in his East Coast office

25 of the material that you received today. That fax went

12

1 through at about eleven o'clock. And then I also had  
2 personally delivered to the U.S. Attorney's Office the  
same  
3 documents. That would have been perhaps noon today.

4 THE COURT: What I told Mr. Howard on the phone,  
I  
5 wouldn't expect him to argue the case blind as far as the  
6 intervenors are concerned. But as long as you are here,  
7 after we have completed the main arguments between the  
state  
8 and the federal government, I will permit the petitioners  
9 for intervention to give their presentations so you won't  
10 have a dry run from coming up from California. So at  
least  
11 the Government would be on alert as to what your position  
12 is.

13 Greg Lynch had filed a request, and it was not  
14 opposed to file an amici brief. Is that correct?

15 MR. BUSHONG: That's correct. I received that  
by  
16 e-mail about an hour or so ago.

17 THE COURT: Did you get that back there,  
18 Mr. Howard?

19 MR. HOWARD: I did, Your Honor. I do not oppose  
20 that request.

21 THE COURT: Because it is on your side,  
obviously.

22 All right.

23 MR. BUSHONG: No objection from the State.

24 THE COURT: All right. Well, then this is your  
25 time, your request and your burden to convince the Court

13

1 that you are entitled to temporary relief.

2 MR. BUSHONG: Yes. Thank you, Your Honor.

3 I have learned a long time ago that when you  
come  
4 into court on a day's notice asking for a temporary  
5 restraining order, you better have a darn good reason.

6 THE COURT: Not quite a day. I think we first  
got  
7 word of this at four o'clock yesterday.

8 MR. BUSHONG: Yes, that's right. And it has to  
be  
9 a better reason than the fact that you think you are going  
10 to win your case. We think we are going to win our case.  
11 But that's not why we are here today. We do have a good  
12 reason.

13 I am going to focus my discussion on that  
reason,  
14 because I think that's the reason that is before the  
Court.  
15 I am going to start, of course, with the standards that  
16 govern a preliminary injunction and a TRO. I will briefly  
17 touch on those.

18 It is well established in the Ninth Circuit that  
19 the Court looks at kind of two factors: The probability  
of  
20 success, whether there are serious questions on the  
merits,  
21 on the one hand. And on the other hand, the irreparable

22 harm, the balance of hardships. It is a sliding scale.  
23 This is known to the Court, and I am not going to belabor  
24 that point.

25 I think I'm not going to try to convince

14

I  
have  
success

1 Your Honor today that we win on the merits. I don't think  
2 have to. I think all I need to do is show you that we  
3 raised some substantial questions that are significant and  
4 important questions, and we do have a probability of  
5 on those issues.

is  
that

6 The best I can do without belaboring this point  
7 to tell you why I think we have raised substantial  
8 questions, and we have a chance of winning in this case.  
9 The best place I can find to say that is the words of the  
10 Attorney General three years ago because we presented the  
11 same arguments to the Attorney General three years ago  
12 we are presenting to the Court today.

13 The Attorney General at that time --

14 THE COURT: Well, on that score, Professor David  
15 Schuman, constitutional scholar and professor at the  
16 University of Oregon, now serving on the state Court of  
17 Appeals, filed at least a letter, if not a brief, with the  
18 Attorney General that seemed to be persuasive to her  
19 decision. I would ask that be made available to the  
Court.

20 Do you have it?

21 MR. BUSHONG: I do have copies, Your Honor. I  
22 apologize. I meant to cover that first.

23 THE COURT: You do have that, Mr. Howard?

24 MR. HOWARD: I believe so, Your Honor. I will  
25 have to check.

15

1 THE COURT: All right.

2 MR. HOWARD: Your Honor, I do not have in what  
was  
3 faxed to me last night at 8:00 p.m., 5:00 p.m. your time.  
4 Perhaps the U.S. Assistant Attorney Mr. Sundby has it  
there.

5 MR. BUSHONG: Your Honor, I would point out it  
is  
6 also attached to the United States' filing today.

7 THE COURT: Mr. Sundby has it here now, at  
least.  
8 You haven't had a chance to read it, Mr. Sundby?

9 MR. SUNDBY: I have not.

10 THE COURT: It is dated December 3, 1997. It is  
11 written to Jonathan Schwartz, Assistant Attorney General,  
12 Washington, D.C. Go ahead with your argument that the  
13 Government had a 180-degree change in position from the  
time  
14 of administration of Attorney General Janet Reno as  
opposed  
15 to Attorney General Ashcroft.

16 So let's hear what you have to say.

17 MR. BUSHONG: Thank you, Your Honor. For the  
18 record, the letter from David Schuman is attached as  
Exhibit  
19 4 to the United States' filing of today. So they do have

20 that.

from

21 The reference that I was going to read to you  
22 the Attorney General's conclusion in 1998 is on Page 3 of  
23 our Exhibit 1 to our complaint. We basically have two  
24 arguments here. That is, the actions of the Attorney  
25 General and the Drug Enforcement Administration exceed the

16

1 authority delegated to them by Congress. That's argument  
2 one.

goes

don't

three

3 Argument two is, of course, the constitutional  
4 argument that if it is within that authority, then that  
5 beyond the commerce clause power that Congress has. I  
6 think you need to get to argument two because here is what  
7 the Attorney General said with respect to argument one  
8 years ago.

as

law

9 "There is no evidence that Congress in the  
10 Controlled Substances Act intended to displace the states  
11 the primary regulators of the medical profession or to  
12 override a state's determination as to what constitutes  
13 legitimate medical practice in the absence of a federal  
14 prohibiting that practice.

15 "Even more fundamentally, there is no evidence  
16 that Congress in the Controlled Substances Act intended to  
17 assign DEA the novel role of resolving the earnest and  
18 profound debate about the morality, legality and

19 practicality of legal assisted suicide" -- citing the  
20 Washington v. Glucksberg case -- "simply because that  
21 procedure involves the use of controlled substances.

22 "These questions are not susceptible of  
scientific  
23 or factual resolution but rather are fundamental questions  
24 of morality and public policy. Such a mission falls well  
25 beyond the purpose of the Controlled Substances Act."

17

1 That was the Attorney General's conclusion three  
2 years ago. Two days ago they announced that they were  
3 taking the exact opposite conclusion.

4 I submit to the Court that you don't have to be  
5 convinced either way. All you have to be convinced here  
6 today is that these are serious questions and that  
7 reasonable minds can differ, and we would like the  
8 opportunity to brief these issues in more detail.

9 THE COURT: Well, indeed, there is a prelude to  
10 Attorney General Reno's decision was from DEA,  
11 Constantine --

12 MR. BUSHONG: Yes.

13 THE COURT: -- that took an opposite position  
that  
14 she reached.

15 MR. BUSHONG: Exactly.

16 THE COURT: So we have the Government saying  
that  
17 there is interference and then there isn't. And there is.

18 MR. BUSHONG: That's exactly correct, Your  
Honor.

19                   The main purpose of a temporary restraining  
order  
20                   is to preserve the status quo until these serious  
questions  
21                   can be resolved. Now, I know there is some dispute here  
22                   over what is the status quo. Our position, of course, is  
23                   that the status quo is the sequence of events, the state  
24                   that existed before the controversy arose. And before the  
25                   controversy arose two days ago, the Oregon Death with

18

1                   Dignity Act was in effect. So the status quo would be to  
2                   continue that law into effect.

3                   Now, I'm going to move to the reason why do we  
4                   need a decision today? Why is it important that the Court  
5                   act today?

6                   We do assert the sovereign and regulatory  
7                   interests of the state, both as a basis for standing and  
8                   because those interests are important to the ultimate  
9                   resolution of this case. I will confess that those  
10                   interests probably aren't enough, standing alone, to  
justify  
11                   immediate relief here today.

12                   But we have more than that. What we have, and  
we  
13                   have relied on this in our motion for temporary  
restraining  
14                   order, are the interests of people like Carl Stansell,  
15                   Richard Holmes and James Romney and the other intervenors,  
16                   and you have those affidavits before you. I am going to  
17                   summarize what they say. These are individuals who are

18 suffering through the final stages of terminal illness.

19 THE COURT: How do you leap from the State of  
20 Oregon to individual intervenors --

21 MR. BUSHONG: I leap there --

22 THE COURT: -- for standing?

23 MR. BUSHONG: I'm not relying on them for  
24 standing. The State has standing in its own right.

25 THE COURT: You are saying you are not taking  
this

19

1 parental role argument and yet that seems to be what you  
are  
2 arguing to me. You say you don't think that you have  
enough  
3 as a general proposition. Now, you are going to  
individual  
4 cases.

5 How do you get from the State to individual  
cases  
6 as far as the State standing?

7 MR. BUSHONG: Well, once we have standing,  
8 Your Honor, we have standing to raise the challenge.

9 THE COURT: You just told me you didn't have  
10 enough standing on its face. And then you said, "but we  
11 have more," and then you go to the individual cases.

Where  
12 is that leap of faith?

13 MR. BUSHONG: First of all, because we rely in  
our  
14 motion on the affidavits of these individuals. Whenever  
you  
15 seek a temporary restraining order, you have to show that

16 you have standing to bring the lawsuit, which we have  
shown.  
17 But you have to show the harm that justifies immediate  
18 relief. These affidavits show the harm that justifies the  
19 immediate relief here.

20 THE COURT: To the individuals. Where is the  
harm  
21 to the State?

22 MR. BUSHONG: The harm to the State is to the  
23 sovereign interest of the State. The State has a strong  
24 interest in having its laws remain in effect.

25 THE COURT: Maybe I misheard you. I thought you

20

1 said that that's one of the arguments for standing but you  
2 thought it was insufficient. Didn't you just say that?

3 MR. BUSHONG: I said if that's all we had, I  
4 wouldn't even be here. I wouldn't be asking you to grant  
a  
5 TRO.

6 THE COURT: The next thing, what more do you  
have  
7 as far as State injury as opposed to individual injury?

8 MR. BUSHONG: I don't have anything more as far  
as  
9 specific State injury other than the fact that the State  
is  
10 relying on the individual injury as a basis for this  
motion.

11 THE COURT: The question is: How do you get  
12 there? How do you get to the individual injury as being a  
13 State injury?

there. 14 MR. BUSHONG: I don't think we have to get  
don't 15 I think once we have standing to bring the lawsuit, we  
to 16 have to show that the specific injury that we are seeking  
that 17 prevent through immediate relief is the type of injury  
18 supports our claim to standing.

19 THE COURT: I don't want to sound unkind, but it  
20 seems like your argument is circular. You say, "Our  
our 21 regulatory interest is insufficient. We have more. And  
22 more is the injured individuals, but we are not in a  
I'm 23 parental role as far as those people are concerned." So  
24 still asking you, what is the State interest and you come  
25 back and say, "Well, the injured individuals."

21

1 Perhaps this case should be entitled to allow  
2 intervention and have the title of the case be the injured  
posit 3 individuals as having the real injury, unless you can  
4 something that the State would have injury in the sense of  
5 additional care, expenses or something of that nature.  
But 6 we have no affidavits to justify anything of that nature.

7 MR. BUSHONG: I'm not making that claim,  
8 Your Honor. In fact, if that satisfies the Court, I would  
9 be happy to have the interventions allowed and allow the  
for 10 intervenors to argue the individual interest as a basis

if

11 this immediate relief. I am prepared to argue it today,  
12 you want to hear from me.

13 THE COURT: I want to give you every opportunity  
14 to make your best arguments to the Court here and now  
15 without restriction.

go

16 MR. BUSHONG: Thank you. In that case, I will  
17 on to tell you what types of injury are before the Court  
18 today that we believe justifies immediate relief.

19 First, we have the affidavit of Richard Holmes.  
20 He is 72 years old. He has terminal colon cancer. In his  
21 affidavit, he is in substantial pain. He has already made  
22 under the Oregon law the first oral request for the  
23 medication to hasten his death.

the

24 Under the Oregon law, there is a 15-day waiting  
25 period before he can make his second request. These are

22

that,

1 steps that the patient has to go through. He has made his  
2 second request. He hasn't signed his written request.  
3 That's the third step. Because he was prepared to do  
4 and then the directive from Attorney General Ashcroft came  
5 down on November 6th. His two doctors confirm that he has  
6 terminal cancer; that he is capable; that he is acting  
7 voluntarily and is making an informed decision.

when

8 Second, we have an affidavit from Carl Stansell.  
9 He is 67 years old. He is suffering from terminal throat  
10 cancer, which he says in his affidavit causes him agony

11 he eats. His first oral request for the medication has  
been  
12 made. The 15-day waiting period expires November 17. So  
he  
13 is in that interim period.

14 James Romney, you have his affidavit. He is  
15 suffering from Lou Gehrig's disease, ALS. He has not yet  
16 made the request. He says in his affidavit that he wants  
to  
17 do so at the appropriate time.

18 Fourth, we have the affidavit of Jane Doe No. 1  
19 who wants to preserve her anonymity. She is 83 years old  
20 and is suffering from pancreatic cancer. She is in severe  
21 pain, partially controlled by medication. She made the  
22 first request for the medication on November 2nd and is  
now  
23 placed on hold because of the actions of Attorney General  
24 Ashcroft.

25 We also have affidavits from Dr. Peter  
Rasmussen.

23

1 He is an oncologist. He treats hundreds of terminal  
2 patients. He has two patients that currently qualify  
under  
3 Oregon law. One of them made the first request on  
4 November 7. Two others are engaged in the process.  
5 Dr. Rasmussen says he cannot meet the community's standard  
6 of care that has been defined by Oregon law and Oregon  
7 practice since the Oregon Death with Dignity Act took  
effect  
8 and is being prevented to do so by Attorney General

9 Ashcroft's directive.

10 Finally, there is an affidavit from David  
11 Hochhalter. He is a licensed pharmacist. He is  
registered  
12 with the DEA. He is willing to fill prescriptions. He  
has  
13 done so in the past, but he cannot do so because of the  
14 directive issued by Attorney General Ashcroft.

15 These people have interests. They have rights  
16 under existing Oregon law that have been snatched away by  
a  
17 federal agency in Washington D.C., and those rights are  
18 irreparable in our view.

19 I want to talk just briefly about the  
20 countervailing interests because the United States  
mentions  
21 that in their brief. They talk about the interest in  
22 protecting life, which clearly is a strong interest.

23 THE COURT: Excuse me for a second. Mr. Mosman,  
24 there is a chair waiting up here for you. Go ahead.

25 MR. MOSMAN: Thank you.

24

1 MR. BUSHONG: One point I want to make on that  
is  
2 that we could, if the United States would agree to put the  
3 directive on hold for a month, or even two weeks, give us  
4 enough time to come in with more substantive briefs, make  
a  
5 presentation in Court so Your Honor can decide the matters  
6 on the merits. If they would make that agreement,  
stipulate  
7 to a --

discuss

8 THE COURT: Have you had an opportunity to

9 that with them?

the

10 MR. BUSHONG: I have not. The only discussion I  
11 had with Mr. Howard was by telephone this morning, and we  
12 just talked about the procedure. I had discussions with  
13 Mr. Mosman yesterday but only about the procedure that we  
14 would be handling. I would point out that if the United  
15 States' interest in protecting life were so strong, then  
16 they would have their legal opinion which is attached to  
17 brief in June of this year.

18 THE COURT: Since June 29.

19 MR. BUSHONG: They waited five months, and it  
20 wouldn't hurt to wait another.

we

21 THE COURT: My question, Mr. Howard, I know, as

the

22 have said, all of us, both sides and the Court have been  
23 working feverishly on these issues. Rather than to have  
24 Court take official action one way or the other, would the  
25 Government consider a hiatus until the 20th of this month,

25

1 until this matter has been fully briefed and can be fully  
2 argued?

to

3 MR. HOWARD: Your Honor, we are just not ready

and

4 make a decision about that right now. Opposing counsel

it

5 I can talk after the hearing. I can seek instruction on

6 from my higher-ups.

7 THE COURT: The point is, it is not unheard of.

8 In fact, we do it quite often in these matters. Instead  
of

9 everybody getting last minute filed papers and so forth,  
to

10 give very thoughtful matters, rather than to have the  
Court

11 make an official declaration one way or the other, it does

12 appear on the surface that your office has had this

13 communication from two lawyers who I have no knowledge who

14 they are or what their status is since June 29th; and that

15 this has been no interaction between the federal  
government

16 or the State or even any discussion since that date until

17 suddenly this comes up the day before yesterday late in  
the

18 day.

19 It seems to me to be a very rational approach  
for

20 the Government and the State to have an opportunity to  
fully

21 brief the critical issues of standing and so forth. There

22 doesn't appear on the surface that there is going to be  
any

23 irreparable harm to the Government considering the amount  
of

24 time it has taken so far to reach this point.

25 MR. HOWARD: I can pass that up to my  
supervisors,

26

1 Your Honor. But I will have to tell you that my

2 recommendation would be to not stay enforcement of the

in

3 decision. I say that based on the arguments that we make  
4 our papers, Your Honor.

to

5 It seems to me what we have to do, we have to  
6 understand what the nature of the harm here is. It seems  
7 me that what we are asking the Court to do, or what the  
8 other side is asking the Court to do, is to stay the  
9 decision so that persons can receive federally controlled  
10 substances to cause their suicide. In other words, people  
11 would die under the State of Oregon's position. Clearly  
12 that is irreparable harm to those individuals, and we  
13 to protect those individuals.

desire

14 THE COURT: And they have been doing so since  
15 June 29th since you have had this information. So that  
16 makes a fairly soft argument that suddenly it is an  
17 emergency now, but it wasn't the last several months.

18 Let's head on with your argument, Mr. Bushong.

to

19 MR. BUSHONG: Thank you, Your Honor. I do want  
20 briefly address some of the points that the United States  
21 raised in their brief. I did just get that this morning  
22 actually at about noon. So I apologize if my arguments  
23 not that polished, but I will do my best.

are

24 They raise a number of issues. We have already  
25 discussed standing.

27

merits,

1 The other argument that they raise on the

2 and most of their arguments do go to the merits, which I  
3 will address. What we are talking about here is an agency  
4 regulation that they contend is controlling unless it is  
5 plainly erroneous or inconsistent with the regulation, the  
6 agency interpretation of their own regulation.

7 But, of course, that's not our argument. We are  
8 not arguing that the agency is erroneously interpreting  
9 their own regulation. We are arguing that the agency  
10 interpretation is inconsistent with the statute and  
exceeds  
11 the authority granted to the agency by the statute.  
That's  
12 our argument, No. 1.

13 So the second point they raise, they cite the  
14 Washington v. Glucksberg case, the U.S. Supreme Court  
case.  
15 We believe that case actually supports our position that  
we  
16 cited at Page 15 in our brief. That's the case where the  
17 Supreme Court held that there is no constitutional right  
to  
18 a physician's assistance in dying which, of course, is not  
19 at issue here. The Court did state in its opinion that  
this  
20 is a matter that is best left to the policy decisions of  
21 individual states.

22 Third, they cite the recent decision by the  
23 Supreme Court in the Oakland Cannabis Buyers' Coop case.  
24 That's a very narrow holding in that case. The holding of  
25 the Supreme Court was that there was no medical necessity

a 1 defense because Congress has specifically determined that  
2 Schedule I substance, and under the Controlled Substances  
3 Act there are various schedules. But a Schedule I  
4 substance, which marijuana is, has no legitimate medical  
5 purposes.

6 THE COURT: In your brief you make the  
distinction 7 we are talking about a No. II category.

8 MR. BUSHONG: Yes.

9 THE COURT: Why should that make any difference  
in 10 the analysis?

11 MR. BUSHONG: It makes a lot of difference  
because 12 a Schedule II substance has legitimate medical purposes in  
a 13 number of instances, pain relief and others.

14 There has been no determination by Congress that  
a 15 Schedule II substance does not have a legitimate medical  
16 purpose. Unlike the Cannabis Growers case where Congress  
17 has made a determination that a Schedule I substance has  
no 18 legitimate medical purpose.

19 And, of course, the Court didn't address really  
what 20 the two issues that we are raising here. Leaving aside  
are 21 Congress has done, this is an agency that is acting. We  
hasn't 22 challenging that agency's authority to act. Congress  
23 defined anywhere in the Controlled Substances Act what  
24 medical practices and what medical purposes are legitimate

25 or not. They have left that to the states. That's our

29

1 position.

2 And then, second, the Supreme Court in the  
3 Cannabis case also expressly declined to address the  
4 constitutional issues that we are raising here.

5 The next point that the United States makes in  
6 their brief is the commerce clause. I am getting to the  
7 merits of our constitutional issue. I am just going to  
8 briefly point out that they say in their brief that there  
is  
9 no basis in the current Supreme Court jurisprudence for  
our  
10 argument that this would exceed the commerce clause  
11 authority.

12 But they relegate the most important case, the  
13 Morrison case, the most recent case decided by the Supreme  
14 Court on the extent of Congress's commerce clause  
authority  
15 to a footnote. They cite it in passing. Well, our case  
is  
16 built on Morrison and Lopez, as you can see from our  
brief.  
17 So I don't think you can relegate it to a footnote and  
then  
18 just dismiss it.

19 Finally, the argument on who is really  
preserving  
20 the status quo gets into the policy of it. People differ  
on  
21 the policy of the Oregon law. There is no question about  
22 that. The majority of Oregon voters adopted one policy

23 decision. They adopted it twice. A strong minority  
24 disagreed. I can't dispute that. There certainly is a  
25 strong interest in preserving life.

30

that  
in  
recently  
70  
That  
policy

1 But the status quo here, the state of affairs  
2 existed before November 6th, allowed the Oregon law to be  
3 effect. There was reference in the newspaper just  
4 that since that law has gone into effect there have been  
5 people who have taken advantage of that law. Reasonable  
6 people can differ on whether that's a good thing or a bad  
7 thing for society. Those people were dying of cancer.  
8 was their choice. For the most part they were dying of  
9 cancer. I'm not going to try to convince you of the  
10 points. I don't think I have to.

11 THE COURT: It is interesting to note that both  
12 president Clinton, as well as our present president, are  
13 opposed to assisted suicide.

14 MR. BUSHONG: Yes.

15 THE COURT: Yet it was President Clinton's  
16 Attorney General that took the opposing view.

address  
17 MR. BUSHONG: With that, Your Honor, I can  
18 the merits of our arguments more if you want to hear that.  
19 But I think I will rely on our brief. I would say that we  
20 believe we have made the necessary showing here that the

quo, 21 balance strongly tips in favor of preserving the status  
22 allowing Oregon law to remain in effect.

23 We would ask the Court to grant the TRO and give  
24 us an opportunity to brief these important issues more  
25 fully.

31

1 Thank you.

2 THE COURT: Mr. Howard, you have been very  
3 patient. The floor is yours, so go ahead.

4 MR. HOWARD: Thank you, Your Honor.

5 I will also start with the sliding scale which  
the  
6 Court must apply in the context of a motion for temporary  
7 restraining order. What that means is that the State of  
8 Oregon has to demonstrate that -- well, let me put it this  
9 way -- the greater the hardship for the State of Oregon,  
the  
10 less it would have to demonstrate a probability of  
success.

11 The point I was trying to make earlier about  
12 hardship, I think is a very important one. This is an  
13 extremely unusual case. The harm in this context, and we  
do  
14 have a standing problem here, there really is no harm to  
the  
15 State of Oregon.

16 But putting that aside, if we are looking at the  
17 affidavits that Mr. Bushong has alluded to, the harm that  
we  
18 are talking about has to do with whether these persons are

19 going to be able to obtain a physician-assisted suicide,  
the  
20 use of a federally controlled substance.

21 Exhibit 6 to our brief consists of a number of  
22 letters which the Attorney General sent out on November  
6th.

23 One is the American Medical Association. Another is to  
the  
24 National Hospice and Palliative Care Association. Another  
25 is the to the American Pain Society. Another is to the

32

1 Catholic Medical Association. He also wrote to the  
American  
2 Society of Anesthesiologists. The American Headache  
3 Society. Physicians for Compassionate Care. The  
Christian  
4 Medical and Dental Association. The American Academy of  
5 Pain Medicine. And the Catholic Health Association.

6 In those letters he stressed that his ruling in  
no  
7 way affects the ability of physicians to prescribe  
federally  
8 controlled substances for pain relief. Now that being so,  
9 it seems to me, Your Honor, that pain is not at issue in  
the  
10 Court's evaluation of the question of harm.

11 What it comes down to is whether Oregon's  
12 desire -- or what it comes down to is whether these  
patients  
13 will continue living while the Court considers the  
question  
14 that has been put before it.

15 It is the Government's view, the view of the

16 United States, that it would be great harm to the United  
17 States and to these individuals to grant the injunction.  
18 These individuals should be permitted to continue living.  
19 Life is good. The Court would have to find that living,  
to  
20 continue living, is actually harmful.

21 Now given that --

22 THE COURT: Just in respect to your statement  
that  
23 "life is good" and the Court would have to find "living is  
24 actually harmful," upon what basis does the Court make  
such  
25 decision when you are dealing with the terminally-ill that

33

1 life is good, it would be better for them to be pulled  
from  
2 life support and starve to death or have no care, et  
cetera,  
3 whatever takes place?

4 On what basis do we make that the United States  
is  
5 injured, first? That's one of your statements.

6 And secondly, upon what basis do we say that  
life  
7 is good or that there could be something actually harmful.

8 Am I supposed to take judicial notice of these  
9 things or make some sort of morality decision? Or what  
are  
10 you asking the Court to do?

11 MR. HOWARD: I think the principal point we want  
12 to make here, Your Honor. The question before the Court  
is

13 one of irreparable harm and irreversible harm. Now, if  
the  
14 Court grants the injunction, those individuals may well  
15 commit assisted suicide and that harm, should the Court  
16 later decide the United States is correct in its  
17 interpretation, that harm would be irreversible. That's  
18 what we are asking the Court to do.

19 Now, beyond that, if the Court wants to look at  
20 the sources to consider the larger question the Court has  
21 raised, one of the documents that we cite in our brief is  
22 the Joint Task Force of the State of New York where they  
23 considered these questions, the question of assisted  
suicide  
24 in tremendous depth, and we would be glad to file copies  
of  
25 that Joint Task Force report with the Court.

34

1 Of course, the Court may also look at the public  
2 positions of the AMA and these other organizations to see  
3 what their reasoning is when they make the decision that  
4 physician-assisted suicide is not the practice of  
medicine.

5 To return to the sliding scale --

6 THE COURT: My question is, on what sort of  
7 evidence does the Court make these decisions that you are  
8 suggesting? I take it that your answer is that we would  
9 look at anecdotal evidence from various professional  
10 organizations. Is that right?

11 MR. HOWARD: That would be my answer, that's  
12 correct, Your Honor. But, again, the question for the  
Court

13 is one of irreparable harm. It is a question of  
14 irreversible damage. That's what the Court has to look at  
15 here. Given the fact that these patients may well die if  
16 the Court grants the injunction, then that is certainly  
17 irreparable harm.

18 THE COURT: How is it to the United States in  
19 blunt terms?

20 MR. HOWARD: I'm sorry? Your Honor, could you  
21 repeat the question.

22 THE COURT: How is there irreparable harm to the  
23 United States in blunt terms?

24 MR. HOWARD: In blunt terms, Your Honor, I think  
25 the answer lies in the doctrine of *parens patriae*. The

35

1 United States stands in relation to its citizens in this  
2 context as *parens patriae*. The United States has an  
3 interest in promoting and protecting the lives of its  
4 citizenry.

5 THE COURT: Does that also apply to the states  
6 their individual capacity under federalism concepts?

7 MR. HOWARD: Not when there is a conflict,  
8 Your Honor.

9 THE COURT: Is there some authority that says  
10 that?

11 MR. HOWARD: I would cite the Court to  
12 *Massachusetts v. Mellon* which discusses *parens patriae*.

13 THE COURT: That it applies to the federal

in

14 government but not to the states?

15 MR. HOWARD: Correct, Your Honor.

16 THE COURT: All right. Go ahead.

17 MR. HOWARD: Given what we have said about harm  
18 then, the sliding scale and the fact that Oregon had the  
19 burden of showing the greater its hardship, that it would  
20 need to make less of a showing in terms of probability of  
21 success. Well, given what we have said about the issue of  
22 harm in this case and the harm to the United States, it  
23 seems to me that the State of Oregon has a tremendous  
burden  
24 of establishing probability of success in this case, and  
25 they simply can't do that, Your Honor.

36

1 Because the bottom line in this case is simply  
the  
2 question of whether the DEA's interpretation of its  
3 regulation, which is 21 C.F.R. 1306.04 is clearly  
erroneous  
4 or inconsistent with the statute.

5 Oregon hasn't made that showing, nor can they.  
We  
6 have briefed that issue, Your Honor. I don't think that I  
7 need to go into it in great detail. The bottom line is  
that  
8 standard is an extremely differential one and Oregon  
simply  
9 cannot meet it.

10 THE COURT: As I understand it, as far as the  
11 hierarchy is concerned, the Attorney General has an  
12 interpretive role, as we have seen exercised before  
Attorney

13 General Reno and Attorney General Ashcroft, but there is  
14 also a role that is delegated to the DEA.

15 MR. HOWARD: That is correct, Your Honor. We  
cite  
16 the statutes to that effect by which the Attorney General  
17 has delegated his authority to the DEA.

18 THE COURT: How do we get a situation where the  
19 DEA says one thing and the Attorney General says the  
other?

20 MR. HOWARD: Well, the final analysis, it is the  
21 Attorney General's decision. If he disagrees with the DEA  
22 and the interpretation of the statute, the Attorney  
General  
23 can overrule that interpretation.

24 THE COURT: But absent overruling it, the DEA  
25 controls?

37

1 MR. HOWARD: That's correct, Your Honor.

2 THE COURT: Okay. Go ahead.

3 MR. HOWARD: The Controlled Substances Act is  
the  
4 statute that the DEA administers. Under Chevron, the DEA  
is  
5 entitled to deference in construing that statute.

6 In terms of the regulation, the Supreme Court  
case  
7 that applies, the Auer case, which we cite in our brief.  
8 Again, that standard is an extremely differential one.

The  
9 state of Oregon has to demonstrate that the DEA's  
10 interpretation of its regulation is clearly erroneous, and

11 they can't do that.

not  
We  
the  
position

12           Because the interpretation in this instance is  
13 only not clearly erroneous, it is extremely reasonable.  
14 buttress that position by reference to the Supreme Court's  
15 decision in Moore, to the observation, lengthy observation  
16 in the Supreme Court case in Glucksberg where it traced  
17 tradition in this country over 700 years that abhors  
18 assisted suicide and suicide. And we support that  
19 by reference to the generally accepted standard of medical  
20 care that is recognized by the AMA and the other ten or so  
21 organizations who were identified in Exhibit 6 and to whom  
22 Attorney General Ashcroft recently wrote.

have

23           THE COURT: How do you square that with the  
24 concurring comments of Justice O'Connor to the extent that  
25 it is a matter of individual state's rights, the states

38

and

1 the right and capacity to make experimentation in fields  
2 involving these extremely delicate decisions of morality  
3 the like? It seems to cite with some approval the Oregon  
4 experiment.

5           MR. HOWARD: Well, I would have to go back and  
6 read Justice O'Connor's concurrence, Your Honor. But it  
7 seems to me, just in thinking about it here, that her  
8 observations wouldn't apply where you are dealing with a  
9 conflict between the federal statute, the Controlled

there  
10 Substances Act in this case and a state practice. If  
11 is no conflict, then there is not an issue.  
12 Again, I go back to the fact that the Attorney  
13 General's decision doesn't say that an individual can't  
take  
14 his or her life, as unfortunate as that would be. What it  
15 says is that the DEA's interpretation of the regulation  
16 under which the DEA can initiate administrative revocation  
17 proceedings against a physician who uses a federally  
18 controlled substance to assist a patient in committing  
19 suicide is not allowable under that regulation and under  
its  
20 statute. We are dealing here with a conflict, Your Honor.

21 THE COURT: We are dealing with interpretation  
by  
22 administrative agency, which is buttressed by the Attorney  
23 General who has delegated that to the agency as opposed to  
24 interpreting acts of Congress, correct?

25 MR. HOWARD: Most immediately, yes. We are

39

DEA  
1 dealing with the Attorney General's reinstatement of the  
2 interpretation of its own regulation.

3 THE COURT: All of these matters are hotly  
debated  
4 in Congress, as we speak, correct?

5 MR. HOWARD: Well, I don't think that's right,  
6 Your Honor. I think as recently, I believe, as last year,  
7 the Congress enacted the statute. I believe we addressed  
it

is  
much  
8 in our brief. I will have to look at that. But Congress  
9 on record as opposing physician-assisted suicide. That  
10 is completely in the case.

11 THE COURT: Well, there is no Congressional act  
12 that you are asserting or interpreting to the Court?

13 MR. HOWARD: The OLC opinion fairly does cite to  
14 the federal statute that Congress recently passed in which  
15 it said, yeah, federal funds cannot be used for  
16 physician-assisted suicide.

17 THE COURT: That's not what we are dealing with,  
18 is it?

19 MR. HOWARD: No, we are not, not in this  
instance.  
20 We are dealing with the ability of the DEA to initiate  
21 registration/revocation proceedings against divisions.

22 THE COURT: I guess what I point out is, the  
23 position of the DEA is precisely what has been proposed to  
24 the Congress but not yet enacted. Is that correct?

25 MR. HOWARD: I'm sorry, Your Honor. Could you

40

1 please say that again.

2 THE COURT: By using the administrative  
approach,  
3 the administrative approach through DEA interpretation, as  
4 approved, and approved by the Attorney General is as  
exactly  
5 the same goal as what has been proposed to Congress but  
has  
6 not yet been enacted. Is that not correct?

the

7 MR. DORMONT: Your Honor, Dan Dormont from the  
8 Drug Enforcement Administration. I don't believe it is  
9 case there is a federal statute, a bill being considered  
10 Congress which would make it a federal crime per se to  
11 engage in physician-assisted suicide.

in

the

12 As to the narrow question that's addressed in  
13 DEA regulation, or explicitly addressed in DEA regulation  
14 letter, the use of controlled substances in  
15 physician-assisted suicide is a legitimate medical  
purpose.

16 To my knowledge, that has never been addressed by Congress  
17 specifically, nor is there a bill pending to do that.

18 THE COURT: Okay. Mr. Howard, go back to your  
19 argument then.

of

burden

20 MR. HOWARD: Well, Your Honor, in terms of the  
21 probability of success argument, again, we think in view  
22 the harm component, the State of Oregon had a massive  
23 of proof to meet here, and they simply can't, in view of  
24 highly differential standard.

the

25 Beyond that, of course, there is the standing

41

the

1 issue. If the Court does find standing, there is the  
2 commerce clause issue. We cited Lopez. It does seem to  
3 Government that given the stated case law on the commerce  
4 clause and the ability of Congress to aggregate interstate

5 commerce, the economic activity, that clearly Congress can  
6 aggregate the actions of physicians across the country and  
7 that would certainly be interstate commerce.

8 THE COURT: Well, Lopez was a case where the  
9 Supreme Court took the position about not expanding  
federal  
10 law into interstate commerce. It stands for the opposite  
of  
11 what you are asserting to the Court, doesn't it?

12 MR. HOWARD: Well, there is a great deal of  
dicta  
13 in that case.

14 THE COURT: As you say, it is a dicta.

15 MR. HOWARD: Yes, Your Honor.

16 THE COURT: There is nothing in Lopez that gives  
17 the idea that the present court is going to expand the  
18 concept of interstate commerce. In fact, they are going  
in  
19 the other direction, are they not?

20 MR. HOWARD: Well, I'm not sure they are going  
in  
21 the other direction, Your Honor. But Lopez is helpful  
22 because the Court there examined what is interstate  
23 commercial activity as opposed to non-interstate activity.  
24 We do have the case law recognizing that economic activity  
25 can be aggregated, and we certainly have legislative  
history

1 on the Controlled Substances Act where Congress has  
2 acknowledged that the distribution of drugs is a closed  
3 system within the United States moving across borders.

4 THE COURT: Okay. Go ahead, sir.

5 MR. HOWARD: Well, beyond the commerce clause  
6 issue, Oregon did allude to the Fifth Amendment in their  
7 complaint, but I did not see that briefed, Your Honor. We  
8 do not think there is a Fifth Amendment problem in this  
case  
9 in as much as the statute, the regulations that are at  
issue  
10 in this case do not regulate the states. They regulate  
the  
11 physicians. That is to say, the regulation regulates the  
12 ability of physicians and requires that they dispense  
13 prescriptions only for legitimate medical purposes. So,  
14 frankly, we see no Tenth Amendment issue in this case.

15 That is all that I have, Your Honor.

16 THE COURT: All right. Well, you have done a  
fine  
17 job considering the pressures you have been under and the  
18 time limits that we have had here and with the lack of  
19 documents, kind of like arguing the case with one hand  
tied  
20 behind your back. That goes for both sides.

21 I would like to hear from the proposed  
intervenor  
22 at this point.

23 Do you want brief rebuttal?

24 MR. BUSHONG: I do.

25 THE COURT: Go ahead.

43

1 MR. BUSHONG: Just a couple of points on that.

2 Mr. Howard referred Your Honor to the New York

3 Joint Task Force report and the various positions taken by  
4 the AMA and other organizations. We don't dispute those  
5 points, but when we brief this case on the merits, we will  
6 bring to your attention the fact that there is significant  
7 difference of opinion out there on this issue. I don't  
8 think that's any surprise to anybody. It is not all on  
one  
9 side.

10 THE COURT: I hope to avoid that sort of --  
that's  
11 why I asked the question. I really don't want to get into  
12 that basis for decision. This should be on a broad-based  
13 decision. You can find as many people on one side as the  
14 other in the different locales. I don't think that's  
going  
15 to lead us any place. We want to decide this case upon  
the  
16 important constitutional, administrative law, case law and  
17 statutes that we have.

18 So let's go ahead.

19 MR. BUSHONG: My only other two points in  
response  
20 to what Mr. Howard was saying.

21 Your Honor asked the question about this issue  
22 being debated in Congress. There was what was known as  
the  
23 Pain Relief Promotion Act. That was introduced in  
Congress.  
24 It was certainly big news in Oregon when Senator Wyden  
25 threatened to filibuster that bill if it came to a vote.

the  
1 That bill never passed. It would have done exactly what  
2 Attorney General's directive is doing here.

was  
3 THE COURT: You assumed that is what the Court  
4 alluding to?

5 MR. BUSHONG: Yes. I assumed that's what the  
6 Court was alluding to. There was that bill pending.

the  
7 Finally, the last point. Mr. Howard says that  
8 Attorney General is not saying that Oregon's physicians  
9 can't take a life. He says, "However sad that may be."  
10 They are only saying they can't use controlled substances  
to  
11 do so.

12 Frankly, that's rather baffling. Nobody is  
13 suggesting that Oregon attorneys (sic.) would be taking  
14 lives in any way. Oregon physicians do, under current  
15 Oregon law, have the authority to issue prescriptions that  
16 will hasten death. That's all we are talking about here.

I  
17 think it is disingenuous to say we are talking about other  
18 issues.

19 THE COURT: Well, is the Attorney General's  
you  
20 position -- I could address that to both sides. Suppose  
you  
21 are a physician and you have a terminally-ill person and  
could  
22 are prescribing Schedule II controlled substances that  
condition  
23 well take life, depending upon the dosage and the  
24 of the patient. Is this going to put the physician in a  
25 position where if he guesses wrong, or she guesses wrong,

1 that they have committed a felony offense?

2 MR. BUSHONG: From Oregon's perspective we think  
3 that is a real danger, and that's a real concern that we  
4 have with respect to the directive.

5 Now, I know that Attorney General Ashcroft has  
6 issued a letter that counsel referred to that attempts to  
7 minimize that danger. But I think that danger is there  
8 nonetheless. I think we have the affidavit from  
9 Dr. Rasmussen in the record that speaks to that issue.

10 THE COURT: All right. Any further rebuttal?

11 MR. BUSHONG: No, Your Honor. That's all, Your  
12 Honor. Thank you.

13 THE COURT: Any surrebuttal comments, Mr.  
Howard?

14 MR. HOWARD: Your Honor, I would refer the Court  
15 to Exhibit 6, the collection of letters that the Attorney  
16 General sent down.

17 THE COURT: Yes. I have them here. Let's go to  
18 intervenors. I will start with you, sir.

19 MR. VAN AELSTYN: Thank you, Your Honor. Again,  
20 my name is Nicholas Van Aelstyn. I represent five  
proposed

21 intervenor plaintiffs: Carl Stansell, Richard Holmes, Jim  
22 Romney, Jane Doe No. 1 and Compassion In Dying of Oregon.

23 Your Honor, I will try not to repeat many of the  
24 arguments that Mr. Bushong has made, but I would like to  
25 amplify on many of them.

1 THE COURT: Can you hear, Mr. Howard?

2 MR. HOWARD: Yes, Your Honor. Thank you.

3 MR. VAN AELSTYN: First and foremost, I would  
like  
4 to address our motion to intervene itself. It is a  
5 four-part test. Very quickly: The timeliness of the  
6 motion. We filed it this morning. The action was filed  
7 yesterday.

8 We have a significantly protectable interest in  
9 that these individuals and the organizations have an  
10 immediate interest in the continued administration of the  
11 Death with Dignity Act.

12 And to skip to the most important, the  
intervenors  
13 will not be adequately represented by the parties to this  
14 action because they have an interest, as has been  
discussed  
15 in great length this morning -- this afternoon -- that is  
16 wholly apart from that of the State.

17 These individuals, the four individuals, are  
18 currently -- three of the four are availing themselves of  
19 their opportunities under Oregon law with the Death with  
20 Dignity Act. They are current. They have made the  
21 requests. They are in the waiting period before they can  
22 make a second request for the prescription, in accordance  
23 with the Death with Dignity Act.

24 That interest is direct, immediate, and I might  
25 submit, as well, urgent. These individuals are suffering

1 great pain, decreasing bodily function and integrity. The  
2 status quo that we must address when considering the harms  
3 here, let us consider what the status quo is for Carl  
4 Stansell who was suffering from throat cancer. He is  
5 experiencing extreme pain. Similarly, Jane Doe No. 1 is  
6 suffering from pancreatic cancer.

and  
7           These individuals are suffering immediate pain  
8 decrease of bodily function. What is critical to them is  
9 that they have an opportunity to choose the manner and  
10 timing of their death so they can do so in a humane and  
11 dignified manner. That is what is of critical importance  
to  
12 them.

13           The proposed Ashcroft directive effectively  
14 deprives them of their rights under Oregon law to do that  
15 and condemns them to their current condition and the  
16 inability to avail themselves of their rights under Oregon  
17 law. Those interests are, as I say, immediate and urgent  
18 and distinct from those of the State that Mr. Bushong has  
19 very well expressed already this morning.

20           THE COURT: It is this afternoon.

21           MR. VAN AELSTYN: Thank you, Your Honor. I am  
22 sorry, Your Honor. It has been a long couple of days for  
23 all of us.

24           This leads as well to the issue of irreparable  
25 harm. I won't address the standard. Mr. Howard and

1 Mr. Bushong have addressed that well already this  
afternoon.

2 But, again, the harm that these individuals will face is  
3 certainly irreparable and also quite severe.

4 And, again, maintaining the status quo for them  
5 will have an immediate quality of life issue for them in  
6 terms of being able to control their end days and how they  
7 live out the remainder of their lives, having been given  
8 terminal prognosis.

9 On the other side of the coin, we have the harm  
10 suggested by Mr. Howard. I would like to just address  
11 those.

12 First of all, he submits, and I believe Your  
Honor  
13 asked him for what authority there exists for the question  
14 that life is good as a simple proclamation. And I would  
15 direct the Court --

16 THE COURT: For the terminally ill.

17 MR. VAN AELSTYN: For the terminally ill. Thank  
18 you for pointing that out. That is the issue here.

19 What is the quality of life and the nature of  
life  
20 for the terminally ill? I direct the Court to Pages 17  
and  
21 18 of our brief where we discuss decisions by the U.S.  
22 Supreme Court that have addressed this very issue. We  
need  
23 not rely simply upon our anecdotal experience.

24 In *Cruzan v. Missouri*, the U.S. Supreme Court  
25 recognized that a competent person has a constitutionally

1 protected right to refuse life-saving treatment, hydration  
2 and nutrition. The Court has recognized that.

3           Similarly, in the Glucksberg case that has  
already  
4 been discussed this morning, the Court discussed the AMA  
5 recognized practice of terminal sedation and the  
recognized  
6 medical practice of the double effect when treating severe  
7 pain amongst the terminally ill. The Court did not  
overrule  
8 that. In fact, it expressly recognized that as a  
legitimate  
9 medical practice. Thus, the Court has, in fact,  
recognized  
10 that for the terminally ill that are suffering extreme  
pain,  
11 that are facing the final days, the question becomes a  
12 different one. It is not resolvable by a resort to a  
simple  
13 proclamation that life is good.

14           That is the issue that our clients that seek to  
be  
15 before the Court in this hearing currently face. These  
16 individuals have terminal illnesses, and they are  
suffering  
17 greatly. They seek to, as the Court has recognized their  
18 rights in Cruzan and Glucksberg, to address their end days  
19 in an appropriate and dignified manner. That is what  
Oregon  
20 law allows them to do. Absent a temporary restraining  
21 order, they will be deprived of their availability to do  
so.

22           On a related issue, and this is a little bit of  
a  
23 tangent, but I would like to express it because it is on

not

24 this subject of pain. Mr. Howard suggested that pain is  
25 the issue and makes reference to the letters in Exhibit 6,

50

1 which unfortunately I have not seen.

a

2 But I submit, as Mr. Bushong has also addressed,  
3 that, in fact, there will be a profound chilling effect as  
4 result of Attorney General Ashcroft's memo upon the  
5 prescription of pain medication to the terminally ill.

it

6 There is already reams of evidence, and we won't go into

are

7 now, we are prepared to present that to the Court, if we

in

8 given time to do so, that suggests that there is already

9 existence a certain hesitation on the part of many health  
10 care providers to treat pain in the final days out of a  
11 concern of falling afoul of the Controlled Substances Act  
12 and being subjected to prosecution for felonies.

order

13 The reason I want to address that point here is  
14 that that concern exists, not only in Oregon, and I direct  
15 the Court to the State's proposed order and agree and join  
16 the State in requesting that the temporary restraining

is

17 and injunction issue against all defendants because this

18 a concern that extends beyond Oregon.

points

19 The interpretation of the Controlled Substances  
20 Act that is set forth in Attorney General Ashcroft's memo  
21 applies nationally. In fact, that is one of the very

22 of the memo in its reliance, we believe wrongly, of the  
23 Oakland Cannabis Club. Therefore, it has an effect, and  
we  
24 believe a chilling effect on the treatment of pain  
25 medication across the country.

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1 That brings me from the balance from the harm to  
2 the likelihood of success on the merits. I join in the  
3 arguments that Mr. Bushong has already made this morning -  
-

4 THE COURT: Again, it is this afternoon.

5 MR. VAN AELSTYN: Thank you.

6 With regard to the likelihood of success on the  
7 merits, the first issue is the statutory one. I submit  
that  
8 Mr. Howard's reliance upon the deference traditionally  
9 accorded to an agency's interpretation of its own  
10 regulations is simply a red herring. The issue here is  
the  
11 Controlled Substances Act and not the DEA's regulation  
that  
12 implement and yet interpret the Controlled Substances Act.

13 THE COURT: Did you get ever a chance to study  
his  
14 brief on that hierarchy?

15 MR. VAN AELSTYN: I'm sorry, Your Honor. I did  
16 not. I was on a plane here this morning.

17 THE COURT: It is very interesting the way it  
was  
18 laid out. I was trying to figure out who is the real  
actor  
19 here. Is it the DEA? Or is it the Attorney General? Are

20 they the same? And how do you get from one to the other?

rules  
21                   Apparently, according to the administrative

DEA  
22 that the DEA -- the Attorney General can delegate to the  
23 the interpretation. Isn't that your position for the  
24 Government, Mr. Howard?

25                   MR. HOWARD: That's correct, Your Honor.

52

1                   MR. DORMONT: Dan Dormont for the DEA. Just to  
2 fill out the picture. The full authority to promulgate  
3 rules and regulations and to interpret both, not only the  
4 DEA regulations, but also the laws that the DEA  
administers,  
5 which is the Controlled Substances Act, that authority has  
6 been delegated to the discretion of the administrator and,  
7 of course, with all delegations within an agency, the head  
8 of the agency, in this case the Attorney General, always  
9 retains the authority as he exercised in this case.

10                   THE COURT: Yeah. I don't think it is a red  
11 herring at all. I think it is a serious issue for you.

12                   Goahead, sir.

point  
13                   MR. VAN AELSTYN: Again, I will stand by my  
14 to one degree. I will take away the red herring. I do  
wish  
15 to make one fundamental point. I think we all agree that  
16 the authority for the regulations flow from the statute  
17 itself. It is the statute that is the underlying  
authority,

whom 18 and if the interpretation of the statute, regardless of  
discussion 19 it is by, is incorrect, then that should end the  
here. 20 because it is the statute that ultimately must govern

Controlled 21 In addition to that legal point, I would like to  
implement 22 draw attention to Attorney General Ashcroft's November 6th  
23 memo itself in which he expressly interprets the  
24 Substances Act and not merely the regulations that  
25 it.

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the 1 This is Attorney General Ashcroft speaking in  
of 2 memo: "I have concluded that the DEA's original reading  
to 3 the CSA, that controlled substances may not be dispensed  
4 assist in suicide was correct."

citing 5 Later in the memo he similarly adds, after  
prescribing, 6 the regulation, but he goes on to write: "That  
substances 7 dispensing or administering federally controlled  
own 8 to assist suicide violates the CSA." So, again, by his  
9 language and by our understanding of our constitutional  
10 framework, it is the statute that is at issue here.

just 11 To address the Oakland Cannabis Club, I would  
12 like to add a little further discussion on the issue of

13 Schedule II versus Schedule I drugs. Mr. Bushong  
addressed

14 that quite a bit.

15 As an additional detail here, Schedule I drugs  
are

16 those for which there is no safe harbor under the  
Controlled

17 Substances Act for a physician to prescribe them. A

18 physician cannot under the Controlled Substances Act

19 prescribe a Schedule I drug and be subject to the safe

20 harbor.

21 Schedule II drugs have a safe harbor for the  
22 administration of those controlled substances for  
legitimate

23 medical purposes. All of the controlled substances that  
are

24 utilized by those acting in accordance with the Death with

25 Dignity Act are Schedule II substances. Therefore, to go

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1 there and to suggest that the administration of these  
drugs

2 is a violation of the CSA, it is inherently getting into

3 what is deemed to be a legitimate medical practice or not.

4 That is an area that Congress has expressly and

5 traditionally accorded to the states. It is an area for  
the

6 states.

7 That brings us to the commerce clause. There  
has

8 already been a great deal of discussion on Morrison and

9 Lopez. I won't add much to it except to add, finally, to

10 join, as well, as Mr. Bushong was noting, that the

not 11 Glucksberg case did expressly leave this to the states,  
but 12 only I would suggest in Justice O'Connor's concurrence,  
inference 13 I think as well in the majority opinion the strong  
14 is that the matter would be left to the states. That goes  
15 to the Tenth Amendment issues, the fundamental issues of  
16 federalism that are here and now before the Court.

17 Just to conclude, again, those that are seeking  
to 18 be before the Court and to be heard on this, the  
individuals 19 and Compassion In Dying of Oregon, which is an  
organization 20 that provides critical services to those facing terminal  
21 illnesses and advises them to their rights and all of  
their 22 options, including the Death with Dignity Act.

23 As stated in George Eighmey's declaration, fully  
24 70 percent of those -- of the 70 individuals that have  
25 exercised the rights, clients under the Oregon Death with

55

Therefore, 1 Dignity Act were clients of Compassion In Dying.  
2 it itself, apart from the individual, has an interest in  
3 this lawsuit and in seeing that the Oregon Death with  
4 Dignity Act be allowed to continue.

5 THE COURT: Wasn't that issue addressed in Judge  
6 Hogan's case about organizations representing people as to  
7 whether they had standing? I haven't had a chance to go  
8 back and review that. I had a recollection that there was

a

but 9 problem in that case on standing with the organizations  
10 not the individuals.

I'm 11 MR. VAN AELSTYN: That is a case, Your Honor,  
12 not familiar with.

13 THE COURT: Do you recall?

that 14 MR. BUSHONG: Your Honor, my recollection is  
15 the individuals were found to have standing but not the  
16 organizations.

17 THE COURT: Yeah. I don't think you have got  
18 something to argue as far as your organization. I think  
19 physicians were arguing some convoluted theory that they  
20 would lose the ability to bill their patients if their  
21 patients took their own lives, they didn't have a chance  
to  
22 spend more money trying to keep them alive for a period  
for  
23 a normal transition. So I think you have a problem with  
24 standing as far as your organization is concerned.

25 MR. VAN AELSTYN: I would ask the Court to look  
at

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1 our brief at Pages 9 through 11 where we discuss the  
is 2 Sagebrush Rebellion case and some other case law. There  
3 a great body of law, in addition to Judge Hogan's  
decision,  
4 that address the standing of organizations on behalf, not  
5 only of their interest, but that of their members. We  
would

6 like, as well, an opportunity to brief that in greater  
7 detail. For the moment, I will leave it at that.

8 THE COURT: One way or the other, whether I  
grant  
9 the TRO or not, there will be extensive briefing obviously  
10 before we reach the merits of this case.

11 So thank you very much, sir.

12 Did your associate want to add anything?

13 MS. HOCKEN: No thank you, Your Honor.

14 THE COURT: Mr. Howard, would you like any  
15 rebuttal to these comments at this point?

16 MR. HOWARD: The one point we want to emphasize,  
17 Your Honor, is the question of harm and whether temporary  
18 injunctive relief should issue. The bottom line here is  
19 that the Court is being asked to consider this case. But  
if  
20 the Court were to stay enforcement of the Attorney  
General's  
21 decision, those individuals may pass away. They may die.  
22 The Court cannot bring them back.

23 On the other hand, if the Court does not grant  
the  
24 injunctive relief and it later concludes that the Attorney  
25 General's decision is incorrect, then those individuals

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1 would be free at a later time to do what they want to do.

2 THE COURT: All right. Thank you.

3 Sir, did you wish to make a statement on behalf  
of  
4 your intervention?

5 MR. STUTSMAN: Thank you, Your Honor. For the  
6 attorneys on the speaker phone, this is Eli Stutsman on  
7 behalf of the proposed intervenors, Peter Rasmussen and  
8 David Hochhalter.

9 I filed a motion to intervene, together with a  
10 memorandum in support of that motion and also a complaint  
11 and intervention, together with two affidavits that  
support  
12 both the motion and the complaint.

13 I have argued briefly in the memorandum the same  
14 four-point test that you just heard. Because my clients  
are  
15 differently situated, I would like to briefly address  
that.

16 With respect to timeliness, obviously we are all  
17 here with little sleep, very quickly. I doubt that's an  
18 issue for anyone.

19 With respect to the second prong of the four-  
part  
20 test, the protectable interest, both of my clients are  
21 registered with DEA. They have prescribing and/or  
extensive  
22 privileges with controlled substances, and they are the  
23 direct target of Attorney General Ashcroft's new directive  
24 to apply and enforce the CSA against DEA registrants.

25 So their protectable interest is quite high.  
They

1 are not represented by the State of Oregon, which gets  
2 actually to the fourth prong, the adequacy of the  
3 representation. They are unrepresented otherwise in this

4 litigation.

5 And then the third prong, taking them out of  
6 order, clearly disposition of this action is likely to  
7 resolve their claims as well.

8 So I believe that on all four points they have  
9 stated a basis for joinder as a right and that,  
10 additionally, I believe, with the Court's discretion,  
leave  
11 for joinder as well.

12 THE COURT: All right.

13 MR. STUTSMAN: I would like to say something,  
14 first, about the claim that if this Court stays  
enforcement  
15 of Attorney General Ashcroft's memorandum that people in  
16 Oregon will die, and this Court won't be able to bring  
them  
17 back.

18 The people we are talking about that will die  
will  
19 die anyway. They are terminally-ill. If the Death with  
20 Dignity Act is allowed to remain in effect, they will have  
a  
21 choice. We know statistically that very few patients  
22 exercise that choice.

23 Perhaps 10 patients out of 30,000 deaths a year  
in  
24 Oregon, some number like that. It is quite low. Despite  
25 the power of this Court, there is nothing this Court can  
do

1 to bring back those patients when they die, whether the  
law

2 is in effect or whether they die of their underlying  
3 disease.

4 By definition, in Oregon, when we say  
"terminally  
5 ill," that means they have less than six months to live.  
6 They are not chronically ill. They don't have an  
7 opportunity to go do anything else. If they have pursued  
a  
8 course of treatment, they find themselves in the  
9 circumstances where they have complied with a lengthy  
Death  
10 with Dignity statute. In order for them to say they are  
11 terminally ill, as they have, their life is short. They  
12 will die. And they should have the choice under the  
Oregon  
13 law.

14 That gets us to the harm inflicted upon my  
15 clients. My clients practice medicine in the state of  
16 Oregon. As a physician and a pharmacist, there is a  
17 standard of care here. The standard of care is reflected  
in  
18 the Oregon Death with Dignity Act which codified the  
19 standard of care after much public debate and three years  
of  
20 federal court litigation.

21 If Attorney General Ashcroft's memorandum is not  
22 stayed, my clients cannot meet the Oregon standard of  
care.  
23 That's a tremendous harm to my clients. And clearly, we  
24 have already talked about the patients, a tremendous harm  
to  
25 them as well.

evidence, 1 I would like to talk about the anecdotal  
it 2 much of which is reflected in Exhibit 6. I haven't read  
3 recently, but I'm sure I have seen it over the decade.  
live 4 That's a quagmire. We don't need to weigh into it. We  
5 in a nation of states. In this particular state we have a  
6 very strong policy/pronouncement. It is codified in the  
7 statute. We made a decision. It doesn't really matter  
what 8 the New York Task Force said six, seven years ago. We  
9 have  
10 come to a different conclusion. We didn't do it with a  
task 11 force. We did it with a democratic process. We have had  
12 two elections. The law is in effect.

law 12 I think we need to look squarely at this state  
13 and the tension between this state law and what the  
federal 14 government is now trying to do. A simple and quick  
reading 15 of Attorney General Ashcroft's memorandum reveals that  
this 16 isn't just a mere interpretation of a federal statute.  
This 17 is an interpretation of federal statute designed to target  
18 the Oregon law.

19 I don't believe anybody can dispute that. Even  
20 the manner in gathering evidence suggests how drug  
21 enforcement officers might obtain the evidence. They will  
22 simply rely upon the reports that physicians are required  
to

23 file under the Oregon Death with Dignity Act. So  
physicians  
24 are in a huge quandary. If they don't file the reports,  
25 they are not in compliance with state law. If they do  
file

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1 the reports, Attorney General Ashcroft will obtain those  
2 reports as evidence against them.

3 THE COURT: Is that about it?

4 MR. STUTSMAN: No, your Honor. If you would  
give  
5 me just a moment.

6 Mr. Bushong spoke about my client for a moment.  
I

7 would like to speak about his for a moment. As I  
understood  
8 Mr. Bushong's argument about standing, he articulated the  
9 standing claim that he has alleged. He further provided  
10 this Court with authorities. I believe that those  
11 authorities support the standing claim as it is alleged in  
12 Mr. Bushong's complaint.

13 When Mr. Bushong started talking about the  
14 proposed intervenors and the additional and individual  
15 claims they brought, I understood that to be a transition  
in  
16 the discussion to what's the urgency presented today. I  
17 didn't understand that to be my standing claim is weak; I  
18 need to supplement it.

19 I think that if we return to the authorities  
that  
20 Mr. Bushong has already provided to this Court, which I  
21 haven't read, but I clearly recognize, that we will find

the 22 standing based on the State's complaint. If we look at  
the 23 State's allegations and if we look at the allegations of  
genuine 24 proposed intervenors, we find a very, very real and  
25 injury immediately. It is happening today.

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in 1 Dr. Rasmussen cannot meet the standard of care  
with 2 Oregon. He cannot write a prescription under the Death  
3 Dignity Act. Pharmacist Hochhalter cannot fill those  
4 prescriptions. Patients cannot request and expect to  
obtain 5 them. That's today. This impact is real, and it is right  
6 now.

7 THE COURT: Thank you.

8 MR. STUTSMAN: If I could say one more thing  
about 9 the Cannabis decision.

10 THE COURT: We have read that opinion. It is  
11 clearly distinguishable.

12 MR. STUTSMAN: Thank you.

13 THE COURT: It deals with a different substance  
14 and a different type of matter.

15 Thank you.

16 Mr. Howard, did you want to make any rebuttal to  
17 this last comment?

18 MR. HOWARD: I would make just two quick points,  
19 Your Honor. One is, the question before the Court here is

the  
is  
simply

20 one of reasonableness. Under the differential standard,  
21 Court simply has to ask whether the DEA's interpretation  
22 reasonable. The courts may not agree with that  
23 interpretation. Persons in Oregon may not agree with that  
24 interpretation. But that's not the question. It is  
25 a question of reasonableness.

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attention  
Care,  
occur  
for

1 Secondly, I would commend to the Court's  
2 the amicus brief filed by Physicians for Compassionate  
3 I think there are a great number of points made in that  
4 brief which the Court should consider, having heard some  
5 anecdotal evidence from the other side just a moment ago.  
6 Thank you, Your Honor.  
7 THE COURT: Thank you. I have read that brief.  
8 Well, this is a matter for a temporary relief.  
9 The issue is one that must be resolved by substantial and  
10 intense briefing on a matter of such great public concern.  
11 I'm looking at balancing the injury that may  
12 one way or the other, and we are talking about a period of  
13 time between now, and I think that your original request  
14 the State was for what? Ten days?  
15 MR. BUSHONG: Ten days.  
16 THE COURT: Here is the way I look at it: This  
17 matter came up before for the United States under the  
18 Clinton Administration and Attorney General Reno. At that

19 time a determination was made that clearly there was no  
20 violation of the federal law with the Oregon Assisted  
21 Suicide Law. That was the law as promulgated and followed  
22 by the United States up until this week.

23 There has been investigation made by two lawyers  
24 of unknown abilities who prepared a memoranda dated June  
25 to the Attorney General of the United States. That

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1 memoranda was very carefully written and very commendably  
2 written and very thorough. It is obvious that a lot of  
3 went into it. It explained in great detail the arguments.

work

4 However, July passed, August passed, September  
5 passed, October passed. We are here now in the second

week

6 of November and suddenly the Attorney General issues this  
7 edict for instant enforcement. There is no showing under  
8 these circumstances that the United States in any way

would

9 be irreparably impaired, nor anyone that the United States  
10 represents, in one form or another, would be irreparably  
11 impaired by a temporary stay of the Attorney General's  
12 action.

13 This matter, as we have said before, deserves  
14 serious contemplation, serious research. On the other end  
15 of the scale, we do have people that have been relying on  
16 the Government's own determination of the validity of this  
17 Act, the physicians who have been prescribing and

following

18 the law which has very strict restrictions on who is  
19 eligible and how it is to be applied and the mental state  
of  
20 the individuals facing death, the emotional trauma, as  
well  
21 as the physical trauma that they have been made in  
22 contemplation in following the law and deciding their own  
23 fate at the time that they wished to do so and that is  
24 irreparable damage to them to deprive them from proceeding  
25 as planned until this law is validly and carefully  
evaluated

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1 by the Court.

2 Therefore, I am granting the stay until the  
3 20th of November with this statement: I am not in a  
4 position at this juncture to make any prediction as to the  
5 ultimate outcome of the case. I feel that either side  
could  
6 prevail after the Court has had an opportunity to fully  
7 evaluate all of the discrete issues that are involved in  
8 this matter. This is no signal to anyone as to what the  
9 Court's ultimate decision would be on the merits.

10 However, since we are in this mode, this matter  
11 should be acted on without any delay whatsoever. I will  
12 request that all briefing be completed by the 16th of  
13 November and that because of the nature of the way it has  
14 been presented, I will ask for simultaneous submission.

We  
15 don't need the usual submission of the State go first, the  
16 United States files a responsive brief. We all know what  
17 the issues are.

18 I will grant the intervention of the individuals  
19 and the physicians but not the organizations.

20 That is the order of the Court. This is a  
21 temporary order that will expire on the 20th day of  
November  
22 unless it is extended for good cause as shown by the  
Court.

23 This matter involving the State of Oregon, the  
24 State is not required to post a bond or other security nor  
25 are the individual intervenors, unless the Government

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1 insists so as a matter of law.

2 That will be the ruling of the Court.

3 The Court is in recess.

4 (Recess.)

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is

I certify, by signing below, that the foregoing  
a correct transcript of the record of proceedings in the  
above-entitled cause. A transcript without an original  
signature is not certified.

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DENNIS W. APODACA, RPR  
Official Court Reporter

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DATE

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