No. 04-623

IN THE
Supreme Court of the United States

ALBERTO R. GONZALES, ATTORNEY GENERAL, ET AL.,

Petitioners,

v.

STATE OF OREGON, ET AL.,

Respondents.

On Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit

AMICUS BRIEF OF AMERICAN CENTER FOR LAW AND JUSTICE IN SUPPORT OF PETITIONERS

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INTEREST OF AMICUS[1]

The American Center for Law and Justice (ACLJ) is a public interest law firm,[2] international in scope, committed to insuring the ongoing viability of constitutional freedoms in accordance with principles of justice. The Chief Counsel for the ACLJ has presented oral argument eleven times before the Supreme Court of the United States. ACLJ attorneys have participated as counsel of record for parties and for amici curiae in numerous cases before state and federal appellate courts, including this Court.

The ACLJ supports the U.S. Department of Justice in its efforts to bar the use of federally controlled substances to perpetrate intentional acts of assisted suicide. The ACLJ likewise opposes the Ninth Circuit's holding that the federal government must surrender the uniform enforcement of drug laws to the misguided, suicide-endorsing laws of a particular state.

SUMMARY OF THE ARGUMENT

1. The respondent state of Oregon lacks standing to challenge the Ashcroft Directive. Under *Massachusetts v. Mellon*, 262 U.S. 447 (1923), it is insufficient under Article III for a state baldly to assert that federal action usurps local powers reserved to the states.

Mellon likewise bars a state from suing the federal

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[1]The parties in this case have consented to the filing of this brief. Copies of the consent letters are being filed herewith. No counsel for any party authored this brief in whole or in part. No person or entity aside from the ACLJ, its members, or its counsel made a monetary contribution to the preparation or submission of this brief.

[2]The ACLJ has no parent corporation, and no publicly held company owns 10% or more of its stock.

government by invoking *parens patriae* standing on behalf of its citizens. Hence, should this Court reverse the Ninth Circuit on the merits, it should also hold that Oregon lacks standing to participate in further proceedings on remand.

2. Oregon claimed below that Congress lacks power under the Commerce Clause to regulate the activities governed by the Ashcroft Directive, and so the federal Controlled Substances Act (CSA) is unconstitutional, to the extent that it authorized Attorney General Ashcroft to issue that directive. Before this Court, Oregon contends that concern over these same Commerce Clause limitations justifies a narrow construction of the CSA, one that would render the Ashcroft Directive statutorily unauthorized. Oregon's Commerce Clause argument, however, is wholly meritless. The CSA lawfully regulates controlled substances *as a class*, and therefore the intrastate nature of particular instances of conduct is irrelevant. *Perez v. United States*, 402 U.S. 146 (1971). Oregon's attempt to raise an "as applied" Commerce Clause challenge must therefore fail. Oregon blurs the distinction between federal regulation of specific acts of conduct with an interstate nexus (as with the Hobbs Act) and federal regulation of a class of acts that Congress has found categorically to be within or to affect interstate commerce (as with the CSA). To the extent Oregon's claim is simply a facial challenge to the CSA, it fails under this Court's precedents.

This Court should reverse the judgment of the Ninth Circuit.

ARGUMENT

I. Oregon Lacks Standing to Bring this Suit.

The state of Oregon, a respondent here, lacks standing in this case. This matter is significant because, should the petitioners prevail in this Court, the case will be remanded for further proceedings.

A. Background

Three distinct sets of parties challenged the Ashcroft directive in district court: Oregon (plaintiff below); medical practitioners (intervenors below); and patients (intervenors below). All are respondents in this Court.

Petitioners early on moved to dismiss Oregon from the case for lack of standing. *See Oregon v. Ashcroft*, 192 F. Supp. 2d 1077, 1087 (D. Ore. 2002). The district court denied this motion. Viewing the Attorney General's directive as an intrusion on Oregon's "sovereign and legitimate interest in the continued enforceability of its own statutes," the district court ruled that Oregon has standing to challenge that directive. *Id.*

The Ninth Circuit did not endorse that holding. Instead, the court held only that the respondent health care practitioners have standing. *Oregon v. Ashcroft*, 368 F.3d 1118, 1121 (9th Cir. 2004). The court of appeals did *not* decide whether the other plaintiffs -- including respondent Oregon -- also have standing. *Id.* at 1121 n.2.[3] Tellingly, while the Ninth Circuit suggested that the respondent *patients* might also have standing, *id.*, the court made no effort to endorse *Oregon*'s claim of standing, *id.*

B. Oregon's Lack of Standing

The Attorney General's directive does not infringe upon any

[3]The Ninth Circuit invalidated the Ashcroft directive. Given this ultimate holding of invalidity -- which, if left intact, would effectively end the litigation -- it was unnecessary for the Ninth Circuit to decide the standing of the other challengers. Should this Court reverse the Ninth Circuit's judgment on the merits, there will be additional proceedings on remand. In such a case, whether Oregon enjoys party status will indeed be a matter of consequence. The remaining respondents would presumably still be able to challenge the Ashcroft Directive as intervenors, assuming that they in fact have Article III standing. *Diamond v. Charles*, 476 U.S. 54, 68 (1985). But Oregon itself could no longer litigate this case.

sovereign interest of Oregon. The Attorney General's actions raise no question concerning either the constitutionality or the enforceability of Oregon's assisted suicide statute, the so-called Death With Dignity Act (DWDA). The DWDA itself is not even at issue; only the availability of certain means, *i.e.*, using federally controlled substances, to accomplish the suicides authorized by the DWDA, is at stake. Indeed, Oregon concedes as much. *See* Brief for Respondent State of Oregon in Opposition ("Ore. Opp.") at 9 n.7 ("petitioner [Attorney General] does not suggest that the DWDA is invalid. He asserts only that his authority over controlled substances allows him to prevent their use for purposes authorized by the Oregon law"); *id.* at 10 ("At most, this case is about the means those physicians can use"); Reply Brief for the Petitioners at 5 (concurring with Oregon's concession).

Under these circumstances, Oregon plainly lacks Article III standing. *Massachusetts v. Mellon*, 262 U.S. 447, 480-86 (1923). As in *Mellon*, Oregon "complains that the act in question invades the local concerns of the State, and is a usurpation of power, viz.: the power of local self government reserved to the States." *Id.* at 480. But as in *Mellon*, "the powers of the State are *not* invaded," *id.* (emphasis added). Oregon's DWDA remains valid, and the Ashcroft Directive imposes no new obligation whatsoever upon the state. All the directive does is to narrow the range of *means* legally available to commit suicide under the DWDA.

> What, then, is the nature of the right the State here asserted and how is it affected by this [directive]? Reduced to its simplest terms, it is alleged that the [directive] constitutes an attempt to [regulate] outside the powers granted [by] Congress and [by] the Constitution and within the field of local powers exclusively [or presumptively] reserved to the States. . . . But what burden is imposed upon the States . . . ? Certainly

> there is none, unless it be the burden [which] falls upon their inhabitants . . . . Nor does the [directive] require the States to do or to yield anything.

Id. at 482.

The only injury, if there is any, occasioned by the Attorney General's directive is to those who desire to use or administer Schedule II substances contrary to federal drug law. Thus, at best, Oregon's interest may be characterized as a *parens patriae* interest on behalf of those persons. On this theory, as well, *Mellon* is dispositive:

> It cannot be conceded that a State, as *parens patriae*, may institute judicial proceedings to protect citizens of the United States from the operation of the statutes thereof. While the State, under some circumstances, may sue in that capacity for the protection of its citizens . . . it is no part of its duty or power to enforce their rights in respect of their relations with the Federal Government. In that field it is the United States, and not the State, which represents them as *parens patriae*, when such representation becomes appropriate; and to the former, and not to the latter, they must look for such protective measures as flow from that status.

Id. at 485-86 (citation omitted). *Accord South Carolina v. Katzenbach*, 383 U.S. 301, 323-24 (1966); *Alfred L. Snapp & Son v. Puerto Rico ex rel. Barez*, 458 U.S. 592, 610 n.16 (1982).[4]

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[4]The district court relied upon two of this Court's cases for its holding that Oregon has standing. *See* 192 F. Supp. 2d at 1087. Neither is applicable here.

The first case, *Maine v. Taylor*, 477 U.S. 131 (1986), involved the constitutionality of a Maine statute; this Court held that Maine had standing to intervene to defend its own law. 477 U.S. at 133, 137. Here, by contrast,

(continued...)

If Oregon were deemed to have standing in this case, then a vast number of federal statutes or agency actions would be subject to challenge *by states*. Countless federal restrictions forbid private parties from exchanging in conduct that would otherwise be permissible under state law. For example, federal laws governing drug labeling, food packaging, the environment, securities transactions, and labor relations all impose requirements beyond what is required under state law. Plainly, private citizens affected by such restrictions can challenge them. But the lesson of *Mellon* is that a state cannot do so, either on its own behalf or on behalf of its citizens, under the theory that the federal government has disrupted its sovereignty. If such federal regulations were deemed interference with "a state's sovereign interest in enforcing its laws" cognizable under Article III, then state attorneys general would be free to bring suit against any and all federal laws, regulations, or executive actions that impose additional requirements beyond those set by state law. If so, then *a fortiori* a state could sue whenever a federal statute preempted any state law.

This is not what Article III permits. Oregon lacks standing.

II. Oregon's Attack on the Constitutional Basis for the CSA Cannot Serve as an Alternate Grounds for Affirming the Judgment.

A. Pertinence of Commerce Clause Issue

In the proceedings below, Oregon claimed that the Commerce Clause does not empower Congress to regulate controlled

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[4](...continued)
the constitutionality of Oregon's DWDA is not at issue. In the second case, *Bowen v. Public Agencies Opposed to Social Security*, 477 U.S. 41 (1986), a federal statute forbade states from withdrawing state employees from the Social Security system, *id.* at 48. Here, there is no federal interference with state employment contracts, or any federal compulsion of states at all.

substances in the case of prescriptions for suicide. *See*, *e.g.*, Appellee's Brief of the State of Oregon at 63-69; Ore. Opp. at 5 n.6. The Ninth Circuit did not reach this argument. *See* 368 F.3d at 1125. Oregon did not renew this argument in its Brief in Opposition. *See* Ore. Opp. at 10 ("only questions" presented are statutory interpretation issues).

Oregon nevertheless continues to argue, in support of a narrow construction of the federal Controlled Substances Act (CSA), that the CSA "pushes the boundaries of Congressional power," Ore. Opp. at 17 (citing *Solid Waste Agency of Northern Cook County v. Army Corps of Engineers*, 531 U.S. 159 (2001), a case that invoked Commerce Clause concerns in support of a narrow statutory construction). Thus, the Commerce Clause issue still lurks in the backdrop of this case. It is therefore worthwhile to demonstrate how truly meritless Oregon's Commerce Clause challenge is.

B. Validity of CSA and Ashcroft Directive Under Commerce Clause

While Oregon may seek to portray this case as raising a modest "as applied" challenge, it is no such thing. To embrace Oregon's argument would be to strike the CSA on its face, throughout the nation.

Federal legislation under the Commerce Clause falls into two broad categories. First, statutes can regulate activities on a case-by-case basis, with proof of a connection to interstate commerce necessary for any particular application. *E.g.*, 18 U.S.C. § 1951 (federal robbery and extortion statute; contains element of "affect[ing] commerce or the movement of any article or commodity in commerce"). *See generally United States v. Lopez*, 514 U.S. 549, 561-62 (1995). Second, statutes can address a class of economic activities, such as pricing milk or producing wheat, without any need to prove a nexus to interstate

commerce in particular cases. *E.g.*, *Perez v. United States*, 402 U.S. 146 (1971) (extortionate credit transactions). *See generally id.* at 150-52.

The CSA falls into the second category. It regulates the dispensing of controlled substances *as a class*, regardless of any nexus to interstate commerce in individual situations. If the CSA is valid generally, then it cannot be struck down on the ground that, "as applied" in the case of prescribed suicides in Oregon, Congress exceeded its constitutional power. As this Court has explained: "Where the *class of activities* is regulated and that *class* is within the reach of federal power, the courts have no power to excise, as trivial, individual instances of the class." *Perez*, 402 U.S. at 154 (emphasis in original; internal quotation marks and citation omitted).

Oregon therefore has it exactly wrong when it claims that the Ashcroft Directive is unconstitutional because "[t]he effect of the conduct regulated under Ashcroft's interpretation of the CSA is nothing if not 'trivial.'" Appellee's Brief of the State of Oregon at 67. This Court's decision in *Perez* directly forecloses that argument.

What is more, Oregon's argument makes little sense as a matter of constitutional policy. Under Oregon's theory, Congress could not regulate any activity *as a category*. Congress (or, perhaps, the Executive in an enforcement action), instead, would be required to prove that each and every good, service, or activity sought to be regulated federally itself satisfied this novel constitutional jurisdictional requirement. Oregon thus would obliterate the longstanding distinction between federal statutes that have specific jurisdictional proof requirements (*e.g.*, a firearm that has moved in interstate commerce) and federal statutes that do not (*e.g.*, extortionate credit transactions), *see*, *e.g.*, *Perez*, 402 U.S. at 152 (quoting *United States v. Darby*, 312 U.S. 100, 120-21 (1941)), because none of the latter would be

constitutional.

The limitation that this theory would impose on federal regulatory power is breathtaking. Consider just the universe of controlled substances: Under Oregon's view, Congress could not regulate a controlled substance -- take methamphetamine as an example -- that was manufactured, distributed, and used entirely intrastate, because there would be no proof of an interstate nexus. It is no understatement to say that this theory would hobble, if not cripple, federal narcotics enforcement efforts in the case of, perhaps, most controlled substances, certainly any controlled substance that could be grown or manufactured in this country. Given the nation's commitment to protect the public against the manifold dangers caused by the use of and trafficking in controlled substances, Oregon's theory has little to commend it -- except as a means of reducing the number of federal inmates.

In short, for Oregon to prevail on its Commerce Clause argument, the CSA would have to be invalid on its face, which would strike the statute down in all its applications, across the nation. This conclusion follows logically from the nature of Oregon's challenge. The power of Congress under the Commerce Clause does not hinge on the lawfulness of the activity in question under state law. Therefore, if it exceeds the power of Congress to regulate the prescription of drugs for suicide in Oregon where that activity is lawful, then it similarly exceeds the power of Congress in all 49 other states where that practice is unlawful.[5] But federal control of narcotics is constitutionally valid under the Commerce Clause, as this Court as long held. *See Minor v. United States*, 396 U.S. 87, 98 n.13

[5]Likewise, if the prescription of drugs for suicide is beyond federal legislative reach because it is supposedly wholly unrelated to drug trafficking, then so is the prescription of drugs for legitimate medical purposes, which is arguably just as unrelated to illegal trafficking.

(1969); *Reina v. United States*, 364 U.S. 507, 511 (1960) (and cases cited). Hence, Oregon's Commerce Clause challenge must be rejected. For the same reason, there is no need here for recourse to the doctrine of constitutional avoidance.

CONCLUSION

This Court should reverse the judgment of the Ninth Circuit.

Respectfully submitted,

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