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IN THE SUPREME COURT OF THE UNITED STATES

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ALBERTO R. GONZALES, :

ATTORNEY GENERAL, ET AL., :

Petitioners, :

v. : No. 04-623

OREGON, ET AL. :

- - - - - x

Washington, D.C.

Wednesday, October 5, 2005

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:02 a.m.

APPEARANCES:

PAUL D. CLEMENT, ESQ., Solicitor General, Department of Justice, Washington, D.C.; on behalf of the Petitioners.

ROBERT M. ATKINSON, ESQ., Senior Assistant Attorney General, Salem, Oregon; on behalf of the Respondents.

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P R O C E E D I N G S

[10:02 a.m.]

CHIEF JUSTICE ROBERTS: The Court will now hear argument in Gonzales v. Oregon.

General Clement.

ORAL ARGUMENT OF PAUL D. CLEMENT

ON BEHALF OF PETITIONERS

GENERAL CLEMENT: Thank you, Mr. Chief Justice, and may it please the Court:

Before Oregon became the first State to authorize assisted suicide, the prescription of federally controlled substances to facilitate suicide generally violated State law and also violated Federal law. Respondents contend that Oregon's decision to remove the State-law consequences from that conduct also operated to remove the Federal-law consequences.

JUSTICE STEVENS: May I ask, what Federal law does it violate?

GENERAL CLEMENT: It violated the Controlled Substances Act. And the D.A. had taken the position, before Oregon acted, for example, that the fact that a doctor prescribed controlled substances for purposes of a suicide was a basis for revoking his license.

JUSTICE O'CONNOR: Well, now, would that be true also for any doctor who provided the substances to furnish

1 an execution of a convicted death penalty convict?

2 GENERAL CLEMENT: No, Justice O'Connor, the
3 death penalty situation, lethal injection, is different,
4 for a number of reasons. Of course, the D.A. has long
5 taken a position of non-enforcement in that context, which
6 would be protected by this Court's decision in Heckler
7 against Cheney.

8 JUSTICE O'CONNOR: But, otherwise, it would be
9 the same reasoning --

10 GENERAL CLEMENT: I don't think it would,
11 Justice O'Connor, at least not since 1994, because in 1994
12 Congress passed a statute that I think is best read as
13 ratifying the practice of lethal injection. This is 18
14 U.S.C. 3596. And that statute authorizes the Federal
15 Government to use the method of execution in the State of
16 the sentencing court. And at the time that was passed, in
17 1994, the overwhelming majority -- something like 25 of
18 the 38 States -- had already used lethal injection. So, I
19 would read that as --

20 JUSTICE O'CONNOR: But would it be open --

21 GENERAL CLEMENT: -- a ratification --

22 JUSTICE O'CONNOR: -- to the Attorney General to
23 pass a regulation like this one, and all of a sudden apply
24 it -- some new Attorney General, who had a very different
25 view of the death penalty?

1 GENERAL CLEMENT: No, I don't think so, Justice
2 O'Connor, and I think the reason is, at a minimum, 18
3 U.S.C. 3596, because I think that would now stand as an
4 obstacle to that type of regulatory impression --

5 JUSTICE SOUTER: Does the --

6 JUSTICE O'CONNOR: Well, not if it just refers
7 back to the States, would it?

8 GENERAL CLEMENT: No, but this is a provision
9 that dictates how the Federal Government shall do its
10 executions. And I think, at that time, in 1994, it
11 effectively ratified the practice of using lethal
12 injection. I --

13 JUSTICE SOUTER: Does the statute -- does the
14 Federal statute specifically authorize doctors to do this?
15 Or does it simply say that convicts may be executed by
16 lethal injection?

17 GENERAL CLEMENT: Well, the statute itself says
18 that the Federal Government shall use the method in the
19 State in which the sentencing court sits, the Federal
20 sentencing court.

21 JUSTICE SOUTER: No, but the method may simply
22 be lethal injection. And, going back to Justice
23 O'Connor's question, it might still be the case that, on
24 the theory the Government is advancing this morning, it
25 would be unlawful for a doctor to engage in that, because

1 that was, in fact, not within the limits of the practice
2 of medicine, the doctor was using a controlled substance
3 for something outside the practice of medicine, and hence,
4 it would be illegal.

5 GENERAL CLEMENT: And again, Justice Souter, I
6 think the best reading is, that is now foreclosed -- that
7 interpretation would be foreclosed by Congress's action in
8 1994. There are also some technical differences --

9 JUSTICE SOUTER: But I take it Congress did not
10 refer specifically to -- or did not include a specific
11 authorization of doctors, so that we'd have to do a little
12 construction to get to your point.

13 GENERAL CLEMENT: I think we would have to do a
14 little construction, in fairness, but I do think -- I
15 mean, and there also are some differences, because, for
16 example, as I understand the practice in most States,
17 doctors actually aren't exactly involved in the specific
18 process of administering the lethal injection. There's
19 also a technical difference, which is, with respect to
20 lethal injection, it's not the federally controlled
21 substance which is the lethal agent. It's just that
22 there's a federally controlled substance that's used to
23 administer -- to relieve pain in conjunction with a
24 different injection that's not -- that does not involve a
25 federally controlled substance. And that's actually the

1 lethal agent. Here, of course, it's --

2 JUSTICE BREYER: In your view, were it not for
3 the statute, the Federal statute, your view of the
4 Attorney General's authority is -- leaving that statute
5 aside, if it weren't there -- the Attorney General, should
6 we have an Attorney General who is opposed to the death
7 penalty, could, in fact, regulate or stop Federal -- State
8 death penalties, through this same mechanism, by saying
9 that no physician can be registered insofar as he engages
10 in that.

11 GENERAL CLEMENT: Justice Breyer, I haven't
12 thoroughly considered the issue, precisely because I do
13 think the '94 statute stands as an obstacle. It may be
14 that some of the differences in the way that the death
15 penalty is administered, the fact that doctors aren't
16 directly involved --

17 JUSTICE SCALIA: At most, it --

18 GENERAL CLEMENT: -- would allow for --

19 JUSTICE SCALIA: -- at most, it would allow him
20 to prosecute, or to move for the dis-certification of
21 doctors who engage in that practice. And if the State
22 chooses to do it without doctors, it would be okay.

23 GENERAL CLEMENT: I think that's right. As I
24 say, I think some of the technical ways in which the
25 penalty is administered could make a difference.

1 JUSTICE BREYER: Well, what we're getting -- at
2 least what I'm getting at was this is, I would probably
3 have read the statute to say that the drug statute, which
4 is trying to stop drug addiction and heroin and -- has
5 nothing to do with the death penalty. And I would think
6 that the argument on the other side is that the statute
7 has nothing to do with assisted suicide. Congress didn't
8 think about the death penalty, and it didn't think about
9 assisted suicide. It's rather like the tobacco case,
10 except a fortiori. Now, what's your response to that?

11 GENERAL CLEMENT: Well, several points, Justice
12 Breyer. I think that, first of all, I would say that
13 Congress did focus on suicide, if not physician-assisted
14 suicide, and I think that's an important distinction that
15 I'd like to come back to. But I actually think the
16 comparison to the tobacco case is quite instructive,
17 because there what you had is a statute in which something
18 seemed like it might come within the plain terms of the
19 FDCA, and yet if you took that literally, it would run
20 smack into another statutory scheme.

21 And here, there is no other statutory scheme.
22 To the contrary, the most natural reading of the
23 Controlled Substances Act, I would say -- and I'll address
24 it in a minute -- is that this falls within the authority
25 of the Attorney General. And if you look to any

1 alternative congressional indication of intent on this
2 topic, the only thing you would find is the Assisted
3 Suicide Funding Restriction Act of 1997, which continues a
4 Federal policy against assisted suicide.

5 JUSTICE GINSBURG: May I comment --

6 GENERAL CLEMENT: So, in that sense, I think
7 it's very different than the Brown and Williamson case.

8 Now, taking, though --

9 JUSTICE GINSBURG: May I --

10 GENERAL CLEMENT: -- as to what Congress --

11 JUSTICE GINSBURG: -- may I ask you about the
12 position this Court took in Glucksberg? That is, everyone
13 on the Court in that case seemed to assume that physician-
14 assisted suicide was a matter for the State, and the
15 Government, at that time, said, "State legislatures
16 undoubtedly have the authority to create the kind of
17 exception to assisted suicide fashioned by the court of
18 appeals. There is every reason to believe that State
19 legislatures will address the urgent issues involved in
20 this case in a fair and impartial way." And then the
21 Government added that, "There is no indication that the
22 political processes are malfunctioning in this area."
23 That was a position presented to this Court in the
24 Glucksberg case by the Government.

25 Now, you are rejecting that position.

1 GENERAL CLEMENT: With respect, Justice
2 Ginsburg, I don't think so. I -- we stand by the brief in
3 Glucksberg. Now, obviously in the Glucksberg case, the
4 Federal law that everybody was focused on -- and, in
5 fairness, the United States was focused on -- was the
6 Federal Constitution. And so, that's one important
7 difference.

8 Another important difference -- and I think this
9 is an important point -- is that the Federal regulation
10 here, the interpretation of the Attorney General, does not
11 purport to foreclose the issue of assisted suicide --

12 JUSTICE SOUTER: Well, they say --

13 GENERAL CLEMENT: -- which is --

14 JUSTICE SOUTER: -- that, in practical terms,
15 that is exactly what it does, because the only way they
16 can administer their law sensibly is by using these kinds
17 of drugs, scheduled drugs.

18 GENERAL CLEMENT: Well, Justice Souter, we don't
19 have a factual record on that question. I think it's not
20 clear that that's the case, because, I mean, proponents of
21 physician-assisted suicide have identified alternative
22 methods. Perhaps the most notorious proponent of
23 physician-assisted suicide, Dr. Kevorkian, operated
24 without a federal controlled-substance license for the
25 last six years before his conviction --

1 JUSTICE SOUTER: Well, did he use --

2 GENERAL CLEMENT: -- at the time --

3 JUSTICE SOUTER: -- did he use a controlled
4 substance?

5 GENERAL CLEMENT: He did not. He did not, which
6 is why he could do that. So, it just goes to prove that
7 physician-assisted suicide and the use of federally
8 controlled substances for physician-assisted suicide are
9 not coextensive.

10 JUSTICE GINSBURG: But we're told that the --
11 those methods are less gentle to the patient, the methods
12 that the State of Oregon has authorized its physicians to
13 prescribe. We are told, at least in some of the briefs,
14 that, from the patient's point of view, it's much less
15 upsetting.

16 GENERAL CLEMENT: Justice Ginsburg, we operate
17 without a factual record on that point. In doing some
18 outside reading, it seems that some of the other methods
19 are actually disapproved, not because they're less -- more
20 painful, but because it's more obvious that it's a
21 suicide, in certain cases, and the administration of
22 scheduled drugs sort of blurs that line.

23 JUSTICE STEVENS: General Clement --

24 GENERAL CLEMENT: But I guess my point would be,
25 even if we take it as true that controlled substances are

1 the most efficient way to do this, I take it as a given
2 that if Oregon doctors decided that a schedule 1 substance
3 was the most effective way to administer a lethal overdose
4 --

5 JUSTICE GINSBURG: But Congress --

6 GENERAL CLEMENT: -- after this Court's --

7 JUSTICE GINSBURG: -- Congress spoke --

8 GENERAL CLEMENT: -- decision in Raich --

9 JUSTICE GINSBURG: -- Congress spoke about
10 section -- schedule 1 drugs, and that's what's lacking
11 here. Congress says schedule 1 drugs, those are: no,
12 never; schedule 2: okay on a doctor's prescription.

13 GENERAL CLEMENT: I agree there is that
14 difference between schedule 1 and schedule 2 substances.
15 Now, I think that brings us to the Attorney General's
16 regulation, which is a longstanding regulation.

17 JUSTICE STEVENS: General Clement, before you go
18 there, I want to question you about your distinction
19 between Dr. Kevorkian and a doctor who uses controlled
20 substances. Why could not the Attorney General treat Dr.
21 Kevorkian's conduct as conduct that may threaten the
22 public health and safety, and seek his -- cancellation of
23 his license?

24 GENERAL CLEMENT: Justice Stevens, I don't think
25 he could. First of all, I think it's clear that that

1 isn't the authority that's invoked here. And the Attorney
2 General in the --

3 JUSTICE STEVENS: Well, he --

4 GENERAL CLEMENT: -- OLC opinion are patently --

5 JUSTICE STEVENS: -- he can rely --

6 GENERAL CLEMENT: -- clear on that.

7 JUSTICE STEVENS: -- on things like prior
8 convictions, other things unrelated to a specific
9 transaction. And if he thinks that assisted suicide is
10 contrary conduct that threatens the public interest,
11 health and safety, I don't know why that wouldn't apply to
12 Dr. Kevorkian, as well as somebody using controlled
13 substances.

14 GENERAL CLEMENT: Well, Justice Stevens, the
15 reason I would say that it wouldn't is, I think you have
16 to read this regulation against a backdrop that for 90
17 years the Federal Government has been involved in the
18 regulation of controlled substance. Now, there have been
19 a lot of statements and a lot of court opinions during
20 that 90 years --

21 JUSTICE STEVENS: But the Attorney General's
22 directive, if I remember it, does not identify any
23 particular controlled substance. It just identified a
24 particular kind of conduct by the doctor.

25 GENERAL CLEMENT: The -- I'm not sure if you're

1 referring to the statute or the regulation. I would say
2 it this way, which is to say --

3 JUSTICE STEVENS: Neither one. Neither one is
4 identifying which schedule 2 or schedule 3 substance may
5 not be used.

6 GENERAL CLEMENT: I think that's fair, Justice
7 Stevens. I don't take issue with that. And I think
8 you're right to say that the statutory grant of authority
9 to the Attorney General is quite broad. He's supposed to
10 make judgments in the public interest about public health
11 and safety.

12 The point I was trying to make is, I would read
13 all of that against the backdrop that for 90 years the
14 Federal Government has been involved in the regulation of
15 controlled substance. And we all know that that is going
16 to have an incidental effect on State regulation --

17 JUSTICE KENNEDY: Well, for me --

18 GENERAL CLEMENT: -- of medicine.

19 JUSTICE KENNEDY: -- for me, the case turns on
20 the statute. And it's a hard case. And it seems to me
21 that your answer to Justice Stevens would be to say that
22 the Justice Department has found this practice to be an
23 abuse of the drug. But then, my question -- and if -- if
24 you had, in fact, given that answer, my question --

25 [Laughter.]

1 JUSTICE KENNEDY: -- my question would then be,
2 Isn't that an odd statutory scheme, where the Attorney
3 General can find it to be an abuse of the use of the drug
4 if the State of Oregon has specifically told its doctors,
5 under special procedures in defined circumstances, that
6 they can administer it?

7 GENERAL CLEMENT: Well, I don't think that would
8 be an odd regime. I think if, for example, Oregon made a
9 radically different judgment and said that in Oregon it
10 was going to be permissible to have treatment or
11 detoxification programs that involve the administration of
12 radically larger quantities of controlled substances than
13 had been recognized in any other State, I think, under the
14 authority of cases like Moore, the Attorney General can
15 make a judgment -- now, that's not a legitimate medical
16 purpose, that's --

17 JUSTICE KENNEDY: Well, that's --

18 GENERAL CLEMENT: -- an abuse.

19 JUSTICE KENNEDY: -- that's -- that's a -- the
20 slipper-slope argument that I wanted to explore a bit. If
21 we do rule against you, and for the State of Oregon, on
22 the statute, you do think that there will be some other
23 serious consequence which will hinder the Department of
24 Justice in an orderly implementation of this statute,
25 particularly under the abuse formulation?

1 community, as determined by the Secretary." And it seems
2 to me that that cuts against you in this case.

3 GENERAL CLEMENT: Well, Justice Kennedy, it is
4 perfectly true that there are places in the statute where
5 medical or scientific decisions are expressly given to the
6 Secretary of Health and Human Services and not the
7 Attorney General, but it is equally true that there are
8 places in the Controlled Substances Act where medical
9 determinations or public-health determinations are given
10 expressly to the Attorney General and not the Secretary of
11 Health and Human Services. And one of the places, of
12 course, that's true is Sections 823 and 824 of Title 1 --
13 Title 21 -- which, of course, are the provisions about the
14 registration and revocation of registrants. And Congress
15 --

16 JUSTICE O'CONNOR: Well, certainly the practice
17 of medicine by physicians is an area traditionally
18 regulated by the States, is it not?

19 GENERAL CLEMENT: It absolutely is, Justice
20 O'Connor, but --

21 JUSTICE O'CONNOR: And there is nothing express
22 in the statute suggesting that it's designed to put in the
23 hands of the Federal Government or the Attorney General
24 the regulation of the practice of medicine, is there?

25 GENERAL CLEMENT: Justice O'Connor, there's

1 nothing that says we want to take over the regulation of
2 medicine, but it's crystal clear --

3 JUSTICE O'CONNOR: Well, and there were two
4 attempts, were there not, to get legislation passed to do
5 this expressly in Congress, and they failed?

6 GENERAL CLEMENT: Well, yes, but I think this
7 Court is always hesitant to draw inferences from --

8 JUSTICE O'CONNOR: Yes.

9 GENERAL CLEMENT: -- failed legislative efforts.
10 And if --

11 JUSTICE O'CONNOR: Yes.

12 GENERAL CLEMENT: -- the Attorney General had
13 not adopted this interpretation, it may be that this
14 Congress would have passed those initiatives --

15 JUSTICE O'CONNOR: And a prior Attorney General
16 had a different interpretation.

17 GENERAL CLEMENT: And the prior administer of
18 the DEA before that had our position. So, this is an area
19 where I think, you know, there are different approaches to
20 this.

21 What I wanted to make clear, though, is, you're
22 absolutely right that the regulation of medicine is --
23 this Court has observed -- is traditionally left to the
24 States. But that has to be reconciled with the fact that
25 for 90 years the Federal Government has had a prominent

1 role in the regulation of controlled substances. And it's
2 been clear --

3 JUSTICE O'CONNOR: Yeah, but --

4 GENERAL CLEMENT: -- since the very --

5 JUSTICE O'CONNOR: -- are these -- are these
6 drugs classified as illegal, for all purposes?

7 GENERAL CLEMENT: Not for all --

8 JUSTICE O'CONNOR: No.

9 GENERAL CLEMENT: -- purposes, but they are
10 highly classified, highly controlled substances. They are
11 the -- the substances that are at issue here are the most
12 highly controlled lawful substances. And I think if you
13 go back to the history of the Harrison Act, it's been
14 clear since the very first prosecutions under the Harrison
15 Narcotics Act of 1914 that the Federal Government's
16 ability to regulate medicine was going to have an
17 incidental effect on the State's ability to regulate
18 medicine. I mean, States had much more of a laissez
19 attitude towards -- laissez-faire attitude towards the
20 opium trade, but that was really displaced by the --

21 JUSTICE O'CONNOR: Yeah, but it's a --

22 GENERAL CLEMENT: -- Harrison Act.

23 JUSTICE O'CONNOR: -- it's a different thing to
24 regulate by saying, "No one can prescribe this substance.
25 It's so lethal, we won't let anyone prescribe it at all."

1 And it's quite different to say, "This -- if a -- if a
2 physician follows the Oregon law, it's a -- it's not a
3 legitimate practice of medicine." That's a very different
4 approach.

5 GENERAL CLEMENT: Justice O'Connor, I can't tell
6 you there isn't a difference between the treatment of
7 schedule 1 substances --

8 JUSTICE O'CONNOR: Yeah.

9 GENERAL CLEMENT: -- that are just verboten for
10 all purposes and schedule 2 substances, but the regulation
11 of Federal controlled substances in the Harrison Act has
12 always focused on drugs that have some lawful medical uses
13 but are --

14 CHIEF JUSTICE ROBERTS: What --

15 GENERAL CLEMENT: -- also susceptible to abuse.

16 CHIEF JUSTICE ROBERTS: -- what is the closest
17 analog you have, outside of the present case, where the
18 Attorney General's enforcement activity has impinged upon
19 what the State has recognized as medical practice?

20 GENERAL CLEMENT: Well, I think I would -- I
21 mean, I -- I guess I would do two answers to that, Mr.
22 Chief Justice. One, I would point to the fact that, at
23 the genesis of the Harrison Act, it really was displacing
24 State medical judgments about the opium trade. I would
25 point to two other examples, one under this statute and

1 one other the -- under the FDCA.

2 The idea under the FDCA -- the example that
3 comes to mind is the FDA's treatment of Laetrile, that
4 this Court addressed in the Rutherford decision. In that
5 case, 17 States had made a judgment that Laetrile was --
6 could be available, for prescription use, to treat cancer.
7 And the FDA, by refusing to approve Laetrile --

8 CHIEF JUSTICE ROBERTS: Well, that's the FDA.
9 I'm talking about the Attorney General, under this
10 statute.

11 GENERAL CLEMENT: Well, then I think I would --
12 I mean, I -- I'm not sure I can point to a decision by the
13 Attorney General, but I think it's -- in the structure of
14 this Act -- obviously the schedule 1 treatment of
15 marijuana that this Court had before it in the Raich case,
16 involved a situation where the Act clearly displaced the
17 medical judgments of California and nine other States --

18 JUSTICE SOUTER: No, but --

19 GENERAL CLEMENT: -- who recognized --

20 JUSTICE SOUTER: -- that was a clear act of
21 Congress. I mean, Congress had made that decision, and it
22 was unmistakable. It seems to me that the problem that
23 you have, with your reference back to the Harrison Act and
24 the 90 years of regulation, is that the 90 years of
25 regulation was regulation for the purpose of stopping drug

1 pushing and drug abuse, in the conventional sense. And to
2 say that a statute -- or a statutory history taken into
3 consideration in determining the scope of this statute,
4 with that kind of a history, can support a view that
5 suddenly the Attorney General of the United States is
6 given, in effect, the sole authority to determine whether
7 any State may or may not authorize assisted suicide, and
8 may do so in a way that any other Attorney General can
9 flip back and forth -- as has happened in this case, if
10 Attorney General Reno was wrong -- seems to me a kind of
11 argument from history that simply cuts against you,
12 because it leads to a sort of a bizarre result. I mean,
13 what is your response to that?

14 GENERAL CLEMENT: Well, Justice Souter, I think
15 you have to look at the regulation of drug abuse and ask,
16 To what end was Congress regulating these substances?

17 JUSTICE SOUTER: Well, and I -- as I said, it
18 seems to me that your 91 years of history say that the end
19 that Congress had in mind was to stop drug pushing and
20 stop conventional drug abuse. It didn't have any more --
21 there's no indication that I know of that Congress had
22 assisted suicide in mind, any more than it had the
23 administration of the death penalty in mind.

24 GENERAL CLEMENT: Well, Justice Souter, what I
25 would say is, what Congress had in mind in enacting these

1 substances is, they were concerned about drug abuse, not
2 for its own sake, but for the debilitating effect it has
3 on people's lives, for its tendency to destroy lives. And
4 I will grant you that Congress, in 1970, did not have
5 before it in its contemplation a State that would make
6 physician-assisted suicide lawful. But that's because it
7 would have been unthinkable at that time. And what
8 Congress did have clearly in its contemplation is the fact
9 that a clear manifestation of a drug's potential for abuse
10 was the fact that it could lead to suicide and overdoses.
11 And that's page 35 of the House report, for those that
12 look at legislative history. And I actually think that's
13 --

14 JUSTICE SOUTER: Suicide is a result of the kind
15 of dementia that comes from drug abuse. That is not
16 suicide under the circumstances that we're talking about
17 within the limits of the Oregon law.

18 GENERAL CLEMENT: Well, Congress didn't specify,
19 one way or another. And what I would -- I would point you
20 to the House report, because I think it actually is
21 indicative, because when Congress is framing the issue,
22 they first look at the extent of the problem. And one of
23 the ways they identify the problem as serious is, they
24 point to overdoses that are taking place among teenagers.
25 And then, in the next section of the report, they look at

1 the question of the consequences of drug abuse. And what
2 do they point to as --

3 JUSTICE STEVENS: General, then may I just ask
4 this question? We're focusing on whether congress really
5 authorized this action by the Attorney General. And in
6 the Raich case, which, of course, was a close case --
7 there were three dissents in the case -- the -- there was
8 great attention on the fact Congress had considered the
9 interstate market for the product involved, an impact on
10 the market if it was allowed to be sold in -- or grown and
11 so forth in California. But is there any evidence at all
12 that Congress thought that any of these -- schedule 2 or 3
13 substances that are used in assisted-suicide situations --
14 that Congress focused on the impact of that use on the
15 interstate market for those drugs?

16 GENERAL CLEMENT: Well, Justice Stevens, I mean,
17 I -- first of all, I would say, as it compared to Raich, I
18 would almost think this is an a fortiori case, as it
19 affects commerce, because, unlike Raich, which, of course,
20 were untraditional noncommercial transactions, the
21 transactions at issue here are standard commercial
22 transactions that are --

23 JUSTICE STEVENS: But are they --

24 GENERAL CLEMENT: -- well within --

25 JUSTICE STEVENS: -- are they transactions that

1 have any impact on any market, any commercial market, that
2 Congress ever mentioned?

3 GENERAL CLEMENT: I think they do. And I sure
4 hope they do, because this is a situation where Congress
5 and the Federal Government pervasively regulates the drug
6 transactions at issue here in a way that even respondents
7 don't object to. The details of the form that you fill
8 out for the prescription, the fact that it has to be in
9 writing, the regulations specify whether it has to be in
10 pen or pencil -- I mean, there's such a pervasive
11 involvement of the Federal Government in the regulation of
12 these controlled substances that I don't think there's any
13 additional commerce clause extension by regulating the
14 purpose for which the prescription is being made. That's
15 what the DEA did in the context of Marinol, when it was
16 first moved from schedule 1 to schedule 2, that -- we
17 discuss that in detail on page 30 of our brief. And I
18 think that kind of regulation, although it's not a common
19 feature of the DEA in its administration of the Controlled
20 Substances Act, is an important one, is a legitimate one.

21 And I guess what I would say, with respect to
22 Congress's intent, is, it seems to me odd to think that a
23 Congress that was concerned about overdoses, concerned
24 about suicides, would be indifferent or agnostic on the
25 question of using federally controlled substances for the

1 express purpose of inducing a lethal overdose.

2 JUSTICE BREYER: Why were -- you were going to
3 say, at one point -- why was Congress concerned about
4 overdoses of narcotics and so forth? Why?

5 GENERAL CLEMENT: I think they were concerned
6 with it part and parcel of -- because, I mean, I think of
7 the things that Congress does when it regulates is, it
8 regulates to protect life, to protect health and safety --

9 JUSTICE BREYER: But, I mean, there was a
10 reason, wasn't there, that they're worried about people
11 taking narcotics?

12 GENERAL CLEMENT: I mean, sure --

13 JUSTICE BREYER: Right.

14 GENERAL CLEMENT: -- there are. Sure they are.

15 JUSTICE BREYER: Right. What was the main --

16 GENERAL CLEMENT: And they're worried about the
17 impact --

18 JUSTICE BREYER: I would have thought it was
19 narcotics addiction.

20 GENERAL CLEMENT: Well, I think it is, but,
21 again, I think --

22 JUSTICE BREYER: All right. Well, if it is
23 narcotics addiction --

24 GENERAL CLEMENT: But not solely.

25 JUSTICE BREYER: -- and I would have thought

1 that was it --

2 GENERAL CLEMENT: No, not solely.

3 JUSTICE BREYER: All right. All right. Again,
4 because you know I'm going to say, What has this got to do
5 with that? So, why not solely?

6 [Laughter.]

7 JUSTICE BREYER: Not solely. You go ahead.
8 What else?

9 GENERAL CLEMENT: Not solely. And, again, I
10 mean, I think, you know, addiction qua addiction was not
11 the concern so much as addiction because of its tendency
12 to debilitate lives --

13 JUSTICE BREYER: Right.

14 GENERAL CLEMENT: -- to destroy lives --

15 JUSTICE BREYER: Yes. Yes, but it's true
16 addiction. And this seems to --

17 GENERAL CLEMENT: Well, no, I don't think that's
18 right, Justice Breyer.

19 JUSTICE BREYER: No?

20 GENERAL CLEMENT: I think there are a number of
21 instances where the abuse that is being -- that Congress
22 is concerned with is not solely the addictive abuse. I
23 mean, to take one example, Congress has recently, as part
24 of the controlled substances regime, regulated GHB, one of
25 these so-called "date-rape drugs." And the concern for

1 abuse there is not its addictive quality, but the fact
2 that it can be used in a way that's not medical, that can
3 be very pernicious, and the like. And so, I think that's
4 just another example of this concept of abuse being much
5 broader than a narrow focus on diversion or a narrow focus
6 on addiction.

7 JUSTICE SOUTER: Yeah, but even in your example,
8 the concern of Congress is with the use of the drug to
9 hurt people who do not understand that they're going to be
10 hurt, and don't want to be hurt, and perhaps, in your
11 example, the use of the drug to facilitate the violation
12 of the law, that seems to me worlds away from what we're
13 talking about here.

14 GENERAL CLEMENT: Well, Justice Souter, I would
15 simply say that the Controlled Substances Act, if you look
16 at it, is a very paternalistic piece of legislation. It's
17 not designed to let people make their own judgments about
18 the health risk.

19 And if I could reserve the remainder of my time?

20 CHIEF JUSTICE ROBERTS: Thank you, General
21 Clement.

22 Mr. Atkinson.

23 ON BEHALF OF RESPONDENTS

24 MR. ATKINSON: Mr. Chief Justice, and may it
25 please the Court:

1 Since Gibbons versus Ogden, at the very latest,
2 this Court has recognized that, in the system of dual
3 sovereignty created by American federalism --

4 JUSTICE O'CONNOR: Would you speak up just a
5 little, please?

6 MR. ATKINSON: I'm sorry, Your Honor, I will.

7 JUSTICE SCALIA: Maybe elevate your -- the
8 microphone.

9 JUSTICE O'CONNOR: Maybe you could raise the
10 podium.

11 JUSTICE SCALIA: You're too tall.

12 [Laughter.]

13 MR. ATKINSON: I'll work on that, Your Honor.

14 JUSTICE GINSBURG: Raise it up.

15 JUSTICE O'CONNOR: No, that -- the crank will
16 raise it, if you -- no, the other way around.

17 Thank you.

18 MR. ATKINSON: Yes, Your Honor.

19 What the Court said in Gibbons versus Ogden was
20 that health laws of every description were for the States
21 to regulate. In Glucksberg, this Court --

22 CHIEF JUSTICE ROBERTS: Well, the relationship
23 between the States and the Federal Government has changed
24 a little since Gibbons versus Ogden.

25 [Laughter.]

1 MR. ATKINSON: That's certainly true, Your
2 Honor. And yet I think if you look both at your opinion
3 in Glucksberg and in the opinion -- excuse me -- and in
4 the text of the Controlled Substances Act, you will find
5 that this Court has recognized that this specific subject,
6 physician-assisted dying, is one that is for the States to
7 regulate.

8 CHIEF JUSTICE ROBERTS: Well, that begs the
9 question -- if you had said "this specific subject," the
10 regulation of controlled substances, your answer would
11 have come out the other way, which is kind of what the
12 case is about.

13 MR. ATKINSON: I agree. And let me talk, then,
14 about the -- why we believe the text of the statute
15 demonstrates that Congress intended to leave the decision
16 about what is, and is not, a legitimate medical practice
17 to the States, as it has always been. And that's the key
18 question in this case, because the U.S. Attorney General
19 --

20 JUSTICE BREYER: Yes, because, I mean, wouldn't
21 -- suppose that some State said that, "We think doctors
22 can prescribe, for people who want to take it, morphine
23 for recreational use."

24 MR. ATKINSON: Your Honor, there are a number of
25 limits clear in the Controlled Substances Act. But taking

1 the hypothetical you've offered, specifically, we think
2 that the answer would have to be that Congress intended to
3 leave the definition of what is a legitimate medical
4 practice to the States.

5 JUSTICE BREYER: No matter what? I mean, they
6 have cases and so forth that say, "Of course a State could
7 go too far. A State might decided it's" -- just what I
8 said. And you're going to say your case turns or falls --
9 you win or lose, depending on whether I accept that a
10 State could not stop a doctor from becoming, in effect, a
11 conduit to a group of drug dealers by saying, "I think
12 recreational use is part of my medical practice"? That
13 would be up to the State?

14 MR. ATKINSON: Certainly, the State could stop
15 it, yes. The question --

16 JUSTICE BREYER: No.

17 JUSTICE SCALIA: No, it didn't "stop it" --

18 MR. ATKINSON: But that --

19 JUSTICE SCALIA: -- but could the State allow
20 it?

21 MR. ATKINSON: Yes.

22 JUSTICE SCALIA: And if the State allowed it,
23 the Federal Government would have to allow the drugs to be
24 used for that purpose --

25 MR. ATKINSON: Well --

1 JUSTICE SCALIA: -- you're saying.

2 MR. ATKINSON: -- there are a number of limits
3 in the text of the Act itself. There are limits in other
4 Federal statutes not contained in the CSA. There is also
5 the political limits on irresponsible lawmaking at both
6 the State and the Federal level that have served us well
7 for almost 200 years.

8 JUSTICE SCALIA: I would have thought that at
9 the time this legislation was enacted, it would have been
10 as unthinkable for a State to allow drugs to be used -- to
11 be prescribed by a doctor to kill a patient as it would be
12 for drugs to be subscribed by a doctor to make the patient
13 feel better.

14 MR. ATKINSON: Your Honor, many drugs --

15 JUSTICE SCALIA: I mean, I think that assisted
16 suicide would have been as unthinkable at the time this
17 was enacted as prescribing cocaine just for recreational
18 use.

19 MR. ATKINSON: We don't suggest that Congress
20 had physician-assisted dying specifically in mind at the
21 time that it enacted the Controlled Substances Act. What
22 we do think that Congress had in mind was the 200-year
23 history of State regulation of medicine, of the practice
24 of medicine, and what were, and were not, legitimate
25 medical purposes.

1 JUSTICE GINSBURG: But you agree -- you -- in
2 answer to Justice Breyer's question, he mentioned a drug
3 that was a schedule 1 drug, morphine. Or maybe --

4 MR. ATKINSON: I'm sorry --

5 JUSTICE GINSBURG: -- perhaps it isn't --

6 MR. ATKINSON: -- I think it is a schedule 2
7 drug, Your Honor.

8 JUSTICE GINSBURG: It's schedule 2 drug.

9 MR. ATKINSON: Yes. We certainly don't suggest
10 that a State could authorize the use of a schedule 1 drug
11 for any purpose at all.

12 JUSTICE GINSBURG: But are you saying that if
13 the doctor is using it, saying, "In my medical judgment,
14 this makes people happy; and, therefore, I'm going to
15 prescribe it," that a State could permit that? Wouldn't
16 the Moore case rule that out?

17 MR. ATKINSON: I don't think so, Your Honor.
18 There aren't -- there is no history of the U.S. Attorney
19 General prosecuting any doctor at any time in the -- in
20 the -- since before Moore --

21 JUSTICE GINSBURG: But I thought the idea of
22 Moore was, if you're using this, the doctor is prescribing
23 the drug as a pusher.

24 MR. ATKINSON: That's correct. And we have no
25 -- we have --

1 CHIEF JUSTICE ROBERTS: Well, but let's -- but
2 the supposition is that the State legal judgment is that
3 that's the wrong characterization, that it's legitimate
4 medical practice to make patients feel better, and
5 morphine does that; and so, the State can allow them to
6 prescribe morphine to make people feel better. And I
7 understand your position to be that that would be
8 permissible?

9 MR. ATKINSON: Yes.

10 CHIEF JUSTICE ROBERTS: That could not -- that's
11 not prohibited under the Controlled --

12 MR. ATKINSON: That is --

13 CHIEF JUSTICE ROBERTS: -- Substances Act.

14 MR. ATKINSON: -- that is not prohibited under
15 the Controlled Substances Act if the doctor was acting
16 consistent with the specific terms of the Act and the
17 specific terms of the State statutes.

18 JUSTICE O'CONNOR: And you say the Attorney
19 General of the United States could not deem it to be drug
20 abuse under the Act if a State allowed that for
21 recreational use or to cure depression or -- How about
22 steroids for bodybuilders? -- and decided that's perfectly
23 okay. Now, can the Attorney General find that that's drug
24 abuse?

25 MR. ATKINSON: As the term "drug abuse" is used

1 in the statute, Justice O'Connor, it is used expressly in
2 terms of the scheduling decisions that the U.S. Attorney
3 General is authorized to make, and required to make. It
4 is not otherwise generally used. What the Controlled
5 Substance --

6 JUSTICE O'CONNOR: Well, I don't know that I
7 understand your answer. Could the Attorney General deem
8 the authorization -- purported authorization by a
9 physician to use morphine to help with depression, or
10 steroids for bodybuilding -- can that Attorney General
11 say, under the Act, that's drug abuse?

12 MR. ATKINSON: Not if it is permitted by -- and
13 regulated by State law.

14 JUSTICE BREYER: Suppose I disagreed with you
15 about that, then would you lose the case?

16 MR. ATKINSON: I would certainly lose ground,
17 Your Honor.

18 [Laughter.]

19 JUSTICE BREYER: I'm asking, if I disagreed with
20 you that I thought -- we take the facts of Moore, where
21 he's a drug pusher, the doctor, and, for some unknown
22 reason, the State says, "That's fine, it doesn't violate
23 State law," but the Attorney General says, "Do what you
24 want about State law. I think it violates the Federal
25 law." Suppose I think the Attorney General does have the

1 right to do that for -- assuming it -- assuming it -- then
2 what do you say about this case?

3 MR. ATKINSON: Well, first of all, we don't
4 think, Justice Breyer, that what the U.S. Attorney General
5 is attempting to do here is reasonable within the scope of
6 whatever authority he has. Moreover, he has not followed
7 the processes and procedures that are specified in the
8 Controlled Substances Act. But our first position in this
9 case is, he simply lacks the authority to do that.

10 The Controlled Substances Act reflects, first,
11 in Section 903, the anti-preemption provision, which is
12 found in the State's brief, at page 36, that Congress
13 intended not to intrude on State laws that would otherwise
14 be within the authority of the State.

15 CHIEF JUSTICE ROBERTS: What does that do to the
16 effectiveness of regulation under the Controlled
17 Substances Act? If one State can say it's legal for
18 doctors to prescribe morphine to make people feel better,
19 or to prescribe steroids for bodybuilding, doesn't that
20 undermine the uniformity of the Federal law and make
21 enforcement impossible?

22 MR. ATKINSON: I don't believe it does, Mr.
23 Chief Justice. In the first instance, we think the U.S.
24 Attorney General's claim of uniformity is overstated. We
25 think it's clear from the text of the statute that

1 Congress intended to leave the definition of what is, or
2 is not, a legitimate medical practice in the hands --

3 CHIEF JUSTICE ROBERTS: Well, that may or --

4 MR. ATKINSON: -- of the States.

5 CHIEF JUSTICE ROBERTS: -- may not be true. But
6 focus on the particular question. If you have one State
7 that allows the use of a drug that the Federal Government
8 has determined is illegal, and is illegal everywhere else
9 because other States haven't done it, how is the Federal
10 Government supposed to enforce that prohibition?

11 MR. ATKINSON: Well, I don't think the Federal
12 Government is supposed to enforce that prohibition if the
13 prohibition -- if we're dealing with a schedule 2, 3, or 4
14 or 5 substance. Congress has clearly spoken to schedule 1
15 substances. Once we move into the other substances,
16 traditionally and has -- as has -- as been the -- as is
17 the case today in every State, physicians, under the
18 regulation of State medical boards, prescribe those
19 medications for purposes other than those for which
20 they're normally prescribed.

21 CHIEF JUSTICE ROBERTS: I'm trying to get at the
22 specific enforcement point. If you have one State that
23 allows morphine to be used legally for --

24 MR. ATKINSON: Yes.

25 CHIEF JUSTICE ROBERTS: -- recreational

1 purposes, how is the Federal Government supposed to
2 enforce the prohibition on that elsewhere?

3 MR. ATKINSON: Well, there is no -- well, the
4 Congress can prescribe -- can enforce it in any State in
5 which it is not authorized by State law. If the U.S.
6 Attorney General wants to regulate it in a State where it
7 is authorized by State law, he must go to Congress and get
8 a clear statement of authority to do that.

9 JUSTICE SOUTER: But are you saying, in response
10 to the Chief Justice's question, that, in fact, Congress,
11 itself, could not explicitly pass a statute that says, "No
12 State, through its doctors or otherwise, may authorize the
13 use of morphine" --

14 MR. ATKINSON: Not at all, Justice Souter.

15 JUSTICE SOUTER: All right. So, you're not
16 making a --

17 MR. ATKINSON: No, not --

18 JUSTICE SOUTER: -- constitutional --

19 MR. ATKINSON: -- at all.

20 JUSTICE SOUTER: -- argument. You're sticking
21 to your statutory argument.

22 MR. ATKINSON: We're sticking to the statutory
23 argument.

24 JUSTICE SOUTER: Okay.

25 JUSTICE SCALIA: Which comes down to an argument

1 that "accepted medical practice" means accepted medical
2 practice State by State --

3 MR. ATKINSON: That's correct.

4 JUSTICE SCALIA: -- rather than on some uniform
5 basis. Do you have any other area, regarding the
6 enforcement of this Act, where the drug is allowed, or not
7 allowed, to be used on the basis of divergent views of
8 medical practice by divergent States?

9 MR. ATKINSON: There are any number of areas in
10 which --

11 JUSTICE SCALIA: Such as?

12 MR. ATKINSON: -- States diverge. Such as --
13 palliative care, I think, is the most obvious example.
14 These days, there is a great deal of divergence among the
15 States as to how --

16 JUSTICE SCALIA: In palliative care? And you
17 think in some States you can -- you can prescribe these
18 drugs without violating the Act; whereas, in other States,
19 the same prescription would violate the Act.

20 MR. ATKINSON: In some States, a prescription
21 would violate State law; and in other cases, in other
22 States, that same prescription would not.

23 JUSTICE SCALIA: Would it violate the Federal
24 law in those other States?

25 MR. ATKINSON: It would if the -- if the

1 prescription violated the State law, the U.S. Attorney
2 General could take action against the physician.

3 JUSTICE SCALIA: Oh. So you say that in -- with
4 respect to many aspects of this legislation, what's lawful
5 -- and what's lawful depends upon the accepted medical
6 practice within the State.

7 MR. ATKINSON: That's exactly correct, Justice
8 --

9 JUSTICE SCALIA: Does this have to be reflected
10 in the State medical board determinations, or just in what
11 the -- what the doctors in that region tend to think is a
12 good idea?

13 MR. ATKINSON: Your Honor, what we believe is
14 that what Congress did in enacting the Controlled
15 Substances Act was leave those decisions to the States to
16 enforce according to their traditional methods. Now, in
17 some cases, that may be by statute; in some cases, the
18 States may discipline doctors for -- through a State
19 medical board.

20 JUSTICE SCALIA: Any cases that you can think of
21 where the same prescription has been held okay in one
22 State and not okay in another State?

23 MR. ATKINSON: Your Honor, we're not aware of
24 any cases in which the U.S. Attorney General has ever
25 attempted to de-register or to prosecute a doctor who was

1 acting in accordance with State law. We have a history
2 that we're -- to -- at least since the Controlled
3 Substances Act, in 1970, where the U.S. Attorney General
4 has never attempted to suggest, as he does here, that
5 something that is permissible under State law is, in any
6 sense, a violation --

7 JUSTICE STEVENS: Yes, but the --

8 MR. ATKINSON: -- of the Controlled Substances
9 Act.

10 JUSTICE STEVENS: -- statute goes beyond the
11 State law, the five factors, you know, on the -- justify
12 the --

13 MR. ATKINSON: Yes.

14 JUSTICE STEVENS: -- revocation. And some are
15 in compliance with State law, but the fifth factor is,
16 "such other conduct which may threaten the public health
17 and safety." It seems to me that's a clear grant of
18 authority to go beyond State law.

19 MR. ATKINSON: Justice Stevens, we think that
20 the best reading of the five factors is that they continue
21 to respect State laws. Certainly, that's what the
22 legislative history, for those of you who would be willing
23 to look at it, of the 1984 amendments reflects. Congress
24 was not concerned about how States were defining
25 legitimate medical practices. Congress was concerned

1 about the failure to enforce existing State law. And
2 that's clearly reflected in the legislative history, some
3 of which is set out in the State's brief, on page 36, in
4 note 16. But if you look at those five factors, what they
5 are addressed to is individual applicants -- that is,
6 individual doctors -- not to broad medical purposes.

7 And what you're seeing here in the Attorney
8 General's claim of authority, for the first time, is rules
9 that are not addressed to controlled substances, per se,
10 but to medical practices, and that is something that the
11 Congress simply never contemplated giving you.

12 CHIEF JUSTICE ROBERTS: Well, what do you do
13 with regulation 1306, which -- the one that, of course,
14 talks about "legitimate medical purpose"? That was
15 promulgated in 1971. It wasn't directed to the Oregon
16 statute. And yet it suggests that the Attorney General
17 has the authority to interpret that phrase.

18 MR. ATKINSON: Well, we think there's -- there
19 are two answers to that, Chief -- Mr. Chief Justice. The
20 first is that, in Harris versus Christensen, this Court
21 said that a Federal agent cannot promulgate a new
22 regulation in the guise of interpreting an old one. Now,
23 in 1971, when that regulation to which you refer was
24 enacted, it was absolutely clear that the U.S. Attorney
25 General could not have de-registered an Oregon doctor who

1 was acting in accordance with State law, because, as this
2 Court pointed out in United States versus Moore, the
3 registration was a matter -- was as a matter of right if
4 the -- if the physician was in good standing with State
5 medical authorities.

6 So, what he's attempting to do today, in the
7 guise of interpreting that rule, is to make it mean
8 something entirely different than what it meant when he
9 enacted it. And I think Christensen versus Harris County
10 says that he simply cannot do that.

11 CHIEF JUSTICE ROBERTS: You had a --

12 JUSTICE SCALIA: The --

13 CHIEF JUSTICE ROBERTS: -- second answer?

14 MR. ATKINSON: Excuse me?

15 CHIEF JUSTICE ROBERTS: I'm sorry. You had a
16 second answer?

17 MR. ATKINSON: That's all right. I'm -- I --
18 I'm happy with the first one, at this point.

19 [Laughter.]

20 JUSTICE SCALIA: Mr. Atkinson, you've spent most
21 of your time talking about the statute and the
22 regulations. Do you also make the argument that ,even if
23 the Government wanted to do this thing, it would be
24 unconstitutional?

25 MR. ATKINSON: We do, Your Honor. One of the

1 questions presented in Raich was whether Congress "could"
2 do what it had done. The question here is -- first of
3 all, is whether Congress "did" what it had done. And our
4 point is not necessarily that it would be
5 unconstitutional, but that it would raise a significant
6 constitutional question, which implicates the clear-
7 statement rule and the constitutional avoidance rule.

8 JUSTICE SCALIA: But why would it raise a
9 significant constitutional question? I take it that it's
10 none of the Government's business whether people gamble or
11 not. I take it, it's none of the -- the Federal
12 Government -- I take it, it's none of the Federal
13 Government's business whether people are allowed to drink
14 at 21 or at 18, innumerable other things, which really are
15 matters that belong to the police power of the States.
16 But the Federal Government has chosen to regulate those
17 things through the use of its commerce power. Is the
18 drinking age any more a matter of -- or any less a matter
19 of State privilege than suicide?

20 MR. ATKINSON: No, I wouldn't say that --

21 JUSTICE SCALIA: So, are those -- are those
22 entries of the Federal Government into the regulation of
23 drinking age, are they unconstitutional --

24 MR. ATKINSON: No, Justice Scalia.

25 JUSTICE SCALIA: -- or do they raise serious

1 constitutional questions?

2 MR. ATKINSON: No, they don't, Justice Scalia.

3 JUSTICE SCALIA: Well, why does this one? I
4 don't --

5 MR. ATKINSON: The difference here is simply
6 that there -- the amounts, as was suggested earlier, are
7 so minute that there cannot be any significant effect on
8 interstate commerce. There is not even any evidence in
9 this record that there is a market for the drugs that are
10 used under the Death with Dignity Act, much less if there
11 is an illicit trade. There's no question here of -- as
12 the Court described it in Raich, where you had a \$10
13 billion market of --

14 JUSTICE SCALIA: Well, if ten States adopted
15 assisted suicide, it might be a different -- a different
16 --

17 MR. ATKINSON: Once again --

18 JUSTICE SCALIA: -- constitutional --

19 MR. ATKINSON: -- Your Honor, in --

20 JUSTICE SCALIA: -- question.

21 MR. ATKINSON: -- in Oregon's experience, we
22 have a small number of people, most of whom consume the
23 drug. The amounts that are left over, even if this law
24 spread nationwide, would not be significant.

25 JUSTICE BREYER: Would you spend a minute --

1 JUSTICE KENNEDY: The statute gives the Attorney
2 General authority to promulgate regulations for the
3 dispensing of drug -- 821 -- and that seems to me to
4 describe precisely what the Attorney General has done
5 here.

6 MR. ATKINSON: I can't disagree with that,
7 Justice Kennedy. The question is, Does he have authority
8 to tell a doctor in a particular State, not by reference
9 to a particular drug that he may not dispense this drug,
10 but that he may not dispense a drug for a specific medical
11 purpose? And, as I've suggested, this is the first time
12 we've ever seen that happen. And we think that's because
13 it's inconsistent with the congressional design, which was
14 to leave the subject of what are, and are not, legitimate
15 medical purposes to the States and to -- and to have the
16 U.S. Attorney General promulgate rules that deal with
17 things like the -- like prescriptions, scheduling of those
18 drugs so that they are on schedule 2 or schedule 3 or
19 perhaps --

20 JUSTICE KENNEDY: Well, it seems to me --

21 MR. ATKINSON: -- schedule 1.

22 JUSTICE KENNEDY: -- very odd to have a
23 regulation on dispensing that takes no account of the
24 purpose for which the drug is being used.

25 MR. ATKINSON: Well, we think it's somewhat

1 odder, frankly, Justice Kennedy, to suggest that Congress
2 intended to authorize a single unelected Federal official
3 to decide, in his sole and apparently un-reviewable
4 discretion, that this medical practice, of which he
5 disapproves, may not be --

6 JUSTICE KENNEDY: Well, but I give --

7 MR. ATKINSON: -- followed.

8 JUSTICE KENNEDY: -- you a statutory reference,
9 and then you tell me about something else.

10 MR. ATKINSON: Well, no, I -- we agree that he
11 gets to authorize regulations on dispensation -- to
12 require, for example, that there be prescriptions before
13 it be dispensed, that physicians shall follow certain
14 rules and regulations before they dispense, and those are
15 the kinds of things on which we agree he has the authority
16 to engage in rulemaking and to -- and to promulgate
17 uniform --

18 JUSTICE BREYER: I'm sorry, on that, I didn't
19 think that the reg was defining the word "dispense." I
20 thought the statute defines the word "dispense." And it's
21 -- persons registered by the AG to dispense controlled
22 substances are exempt. And then you look at who is such a
23 person. A person who does that is a practitioner. And
24 who is a practitioner? A registered practitioner is one
25 who prescribes, a physician registered by the United

1 States to distribute or dispense a controlled substance in
2 the course of professional practice. And I thought this
3 reg is defining "in the course of professional practice."
4 Am I wrong about that? I thought it was a reg that says,
5 "In the course of professional practice, the prescription,
6 to be effective, must be a legitimate medical purpose by
7 an individual practitioner." Now, I might be wrong. How
8 does it work?

9 MR. ATKINSON: No, I think that's absolutely
10 right. But the question -- that is a very different
11 question from the question of, Who gets to define, as a
12 matter of policy, what is a "legitimate medical practice"?

13 JUSTICE BREYER: On the matter of policy, I
14 would -- since -- if you -- if you've said basically what
15 you want to say in your argument, I would appreciate your
16 devoting a minute to an assumption which you don't want to
17 agree with. But suppose I were to assume that a State is
18 not free, through the device of defining what's good
19 medical practice, to gut the Act -- that is, to really
20 make marijuana or something else, like morphine, legal --
21 because they disagree with Congress's basic judgment that
22 it should be illegal. That could happen.

23 MR. ATKINSON: It could.

24 JUSTICE BREYER: Now, suppose I think that the
25 AG does have the power to stop Congress from gutting the

1 Act. All right? Now, on that, do I have -- if I believe
2 that, on that assumption, do I have to decide this case
3 against you?

4 MR. ATKINSON: No.

5 JUSTICE BREYER: And if not, why not?

6 MR. ATKINSON: There are at least two reasons
7 for that, Justice Breyer. The first is the commerce-
8 clause question, which we believe to be --

9 JUSTICE BREYER: Suppose, on the commerce-clause
10 question, I -- on assumption, I don't agree with you,
11 either -- then do I have to decide?

12 [Laughter.]

13 MR. ATKINSON: I'm starting to be backed into a
14 corner.

15 [Laughter.]

16 MR. ATKINSON: I think -- I think the third
17 answer then becomes the procedural answer, Justice Breyer,
18 and that is that what the U.S. Attorney General is doing
19 here violates the rule this Court stated in Christensen
20 versus Harris County, and he is attempting to do, by an
21 administrative rule, what he can only do by notice in
22 comment rulemaking.

23 JUSTICE SCALIA: I would --

24 JUSTICE BREYER: Far be it from me to suggest an
25 argument that you don't want to make, but, I mean, I've

1 found it different, in life and law, when you pass a rule
2 in a State that guts an Act, from when you pass the rule
3 in a State that doesn't seem to have much to do with the
4 purpose of the Act.

5 MR. ATKINSON: Well, I certainly would not
6 disagree with that in --

7 JUSTICE SCALIA: Yes, you would. I think --

8 [Laughter.]

9 JUSTICE SCALIA: It seems to me -- it seems to
10 me that you -- that you cannot accept the premise that it
11 guts the Act, if you come in here with the proposition,
12 which you do, that what the Act says is: whatever is
13 accepted medical practice within the State is okay.
14 That's your principal point.

15 MR. ATKINSON: That is correct.

16 JUSTICE SCALIA: But the Act does not refer to
17 any overall Federal accepted medical practice. It refers
18 to accepted medical practice, State by State. And,
19 therefore, it in no way guts the Act if a State wants to
20 let these drugs be used for, you know, make-people-happy
21 purposes. I don't see how you can accept the premise.

22 MR. ATKINSON: I wasn't anxious to accept it,
23 Justice Scalia, but I --

24 [Laughter.]

25 MR. ATKINSON: -- I was -- I thought I was being

1 told to. Let me --

2 [Laughter.]

3 MR. ATKINSON: -- but let me -- let me offer, if
4 I can -- we --

5 JUSTICE GINSBURG: May I ask you, in -- Mr.
6 Atkinson, in response to the question you were just asked,
7 you said there were procedural problems, no notice in
8 comment. So, that's a "how" it's done.

9 MR. ATKINSON: That's --

10 JUSTICE GINSBURG: How about the "who"? Is this
11 something -- how does it work under the Controlled
12 Substance Act? What authority does the Department of HHS
13 have? What is the division of authority between those two
14 under the Act? The Attorney General, on the one hand, and
15 the Department of Health and Human Services, and including
16 the FDA, on the other.

17 MR. ATKINSON: Justice Ginsburg, I can't answer
18 that question in specific respect to this case, because
19 there is no authority in the Controlled Substances Act for
20 anyone to do what has been done here -- that is, to focus
21 on the specific medical practice and say, "No controlled
22 substance" --

23 JUSTICE GINSBURG: But you made --

24 MR. ATKINSON: -- "can be used for" --

25 JUSTICE GINSBURG: -- you made a point earlier

1 that the Attorney General has never done this before, has
2 never said, "You can't prescribe particular drugs for" --
3 has -- that has not been done. You've been giving
4 examples of where the FDA ruled that you can't --

5 MR. ATKINSON: That's correct.

6 JUSTICE GINSBURG: -- use a drug. And that
7 control is nationwide, no matter what the State medical
8 board thinks, right?

9 MR. ATKINSON: Yes. There is -- there are --
10 for example, in scheduling of drugs -- and the U.S.
11 Attorney General suggests, for example, that he could
12 simply schedule these drugs in a way to -- as a way of
13 avoiding the Oregon Act -- or voiding the Oregon Act, as
14 it were. And, to do that, he has to get his medical and
15 scientific advice from the Secretary of Health and
16 Services, and must accept that advice and be bound by it.
17 And certainly, that wasn't done in this case. So, I hope
18 that answers your question.

19 JUSTICE GINSBURG: Who -- the consultation, you
20 said, was not with HHS, and it wasn't with Oregon? Who
21 did the Attorney General consult?

22 MR. ATKINSON: To the best of our knowledge, it
23 was solely done within the Department of Justice.

24 JUSTICE STEVENS: May ask this question
25 concerning the -- Justice Scalia's suggestion that you're

1 insisting the States would have the authority to act
2 independently of a congressional prohibition against the
3 use of a substance to make people happy and so forth.
4 Isn't your point in this case that Congress hasn't really
5 spoken to the issue to which the Attorney General has
6 spoken?

7 MR. ATKINSON: That's exactly right, Justice
8 Stevens.

9 JUSTICE STEVENS: Which is the opposite of the
10 case that Justice Scalia point, where the Congress has
11 spoken to the issue.

12 MR. ATKINSON: And there are circumstances in
13 which it has, and those in which it has not. And to try
14 to respond to Justice Scalia's point, again I would invoke
15 the 200 years of responsible regulation of the practice of
16 medicine, which is the backdrop against which Congress
17 legislated in this case. Congress does not lightly
18 assume, nor should it, that States are going to -- are
19 going to simply legalize drugs to make people happy. It
20 hasn't happened. Congress doesn't assume it's going to
21 happen. States act responsibly. Congress assumes --

22 CHIEF JUSTICE ROBERTS: Well, but in 1971
23 Congress didn't assume the States were going to pass
24 legislation for use of drugs to assist with suicide,
25 either.

1 MR. ATKINSON: No, that's certainly true, Mr.
2 Chief Justice. But Congress knew, as we all know, that
3 the practice of medicine evolves, that things change, that
4 today's -- acupuncture, the use of Botox, things that were
5 unheard of 30 years ago, are all accepted medical
6 practices today, and they are all regulated by the States,
7 not by the U.S. Attorney General. And the question here
8 is whether Congress intended to enact a uniform medical
9 practices --

10 JUSTICE SCALIA: These are all different manners
11 of assisting people to stay alive or assisting people to
12 feel better. Assisting people to die is something of a
13 totally different category.

14 MR. ATKINSON: Justice Scalia, I have to
15 disagree. There's a great deal of medical practice now,
16 and attention, focused on end-of-life issues. This Court
17 has seen them. For example, in Cruzan, the Court said it
18 is a matter for the States to decide those things. The
19 Court has seen cases that involve do-not-resuscitate
20 orders. The Court is familiar with living wills. There
21 are any number of --

22 JUSTICE SCALIA: I don't deny that. I -- I'm
23 not taking a position on whether, you know, a State wants
24 to allow it, or not. I'm just taking a position on
25 whether it was envisioned by Congress, in 1971, that

1 accepted medical practice would include prescribing drugs
2 to help somebody end his life. And I don't think it -- I
3 don't think it would have occurred to Congress.

4 MR. ATKINSON: I don't think that it would have
5 occurred to them either, Justice Scalia, but I do think
6 what occurred to them was that that was a matter that,
7 like any other matter dealing with the regulation of
8 medical practice, the States could be trusted to act
9 responsibly. That's what Oregon has done here. That's
10 what this Court invited the States to do in Glucksberg.

11 JUSTICE SOUTER: But I take it you would agree
12 that, in effect, all you need to win on the statutory
13 argument is for us to accept the premise that Congress may
14 very well have intended to interfere with the practice of
15 medicine and to authorize the Attorney General to do it,
16 insofar as the practice of medicine would have gutted the
17 statute -- e.g., doctors who prescribe recreational drugs,
18 doctors who, in effect, cater to pushers -- but that
19 Congress did not intend to go any further than that in
20 authorizing interference with the practice of medicine. I
21 take it you agree that if we accepted that premise, that
22 would be sufficient for you in this case.

23 MR. ATKINSON: That's absolutely true.

24 JUSTICE SOUTER: Okay.

25 MR. ATKINSON: That's absolutely true, Justice

1 Souter. But -- this case is obviously about statutory
2 construction, but it's about statutory construction in a
3 very special area, and that is the area of federalism, of
4 the relationship between the sovereign States and the
5 Federal Government. We think it's clear, from examining
6 the statute, that Congress intended to retain and respect
7 the historic powers of the States to define legitimate
8 medical practices.

9 CHIEF JUSTICE ROBERTS: Thank you, Counsel.

10 General Clement, you have four minutes
11 remaining.

12 REBUTTAL ARGUMENT OF PAUL D. CLEMENT

13 ON BEHALF OF PETITIONERS

14 GENERAL CLEMENT: Mr. Chief Justice, and may it
15 please the Court:

16 I think Respondents have embraced the logical
17 consequences of their position. And what it results in is
18 turning the Controlled Substances Act, the federal
19 Controlled Substances Act, into an odd patchwork. It also
20 is profoundly a-historical, because, at the time of the
21 Harrison Act of 1914 -- which the Controlled Substances
22 Act was intended to strengthen, not weaken, as this Court
23 pointed out in Moore -- at that time, the States had a
24 variety of different approaches to opium and heroin and
25 other -- and cocaine and other substances -- opium and

1 cocaine now of which land on schedule 2. Some of them
2 tightly regulated them, some of them allowed them in over-
3 the-counter tonics in large quantities. And the point of
4 the Harrison Act was to clean that up and impose a uniform
5 Federal regime. And they knew it would have an impact on
6 State regulation of medicine. And even the Court, in the
7 Linder days, recognize that that was not, per se, a
8 constitutional problem.

9 JUSTICE SCALIA: But what about gutting? Never
10 mind Mr. Atkinson's argument. What about gutting?

11 GENERAL CLEMENT: Well, it's an odd statutory --
12 I mean, I'm not familiar with the -- with the principle
13 that the Federal authority only extends to prevent that
14 which would gut the statute, and no further. That seems
15 like an odd principle. And I think that, here, it is a
16 perfectly legitimate interpretation of this statute to say
17 that a Congress that was profoundly concerned with
18 overdoses, with suicide, with drug abuse, precisely
19 because of its debilitating effect on people's lives,
20 would not have been agnostic at the prospect of --

21 CHIEF JUSTICE ROBERTS: At the time --

22 GENERAL CLEMENT: -- controlled substances.

23 CHIEF JUSTICE ROBERTS: -- at the time this
24 statute was passed to deal with lax State treatment of
25 opium, was opium regulated as part of medical practice in

1 any of the States?

2 GENERAL CLEMENT: It was, Mr. Chief Justice.
3 They were all over the map, but there was clearly a
4 recognition that doctors were part and parcel of the
5 problem, that there were needs in States to more closely
6 regulate both the doctors and the pharmacies. That was,
7 kind of, the two problems that gave rise to this. And
8 there's no question that the impact of the Federal program
9 was profound on the State's practice of medicine.
10 Nonetheless, that program was upheld, and that has been
11 the tradition in this area.

12 JUSTICE KENNEDY: Was the impact profound
13 because they were in what's now schedule 1, that they were
14 just prohibited? In other words, were doctors allowed to
15 prescribe opium for some purposes?

16 GENERAL CLEMENT: They were. And opium's now on
17 schedule 2. The Harrison Act did not have the schedules
18 we're familiar with from the Controlled Substance. But
19 most of what was at issue -- I mean, opium, in its various
20 forms, morphine, all of that of that is now on schedule 2,
21 and that's really what prompted the Harrison Act in the
22 first instance.

23 JUSTICE STEVENS: May I ask you this question?
24 If the Attorney General determined that acupuncture was
25 conduct that threatened the public health and safety,

1 could he de-license, or revoke, the license of doctors who
2 engaged in acupuncture?

3 GENERAL CLEMENT: I don't think so, Justice
4 Stevens. It's the same reason as my answer earlier, which
5 is, I think you have to look at this regime, and read it
6 in light of the 90 years of Federal involvement in the
7 regulation of controlled substances and the lack of a
8 traditional Federal role in regulating medicine qua
9 medicine. And I think this is on the -- on the side of
10 the line of regulating controlled substances.

11 With respect to the commerce-clause issue, I
12 would -- thought that one thing that came clear out of the
13 Raich decision is that the relevant factor to consider is
14 not the class of activities that a State decides to
15 decriminalize, but, rather, the class of activities that
16 Congress decides to regulate.

17 And with respect to schedule 2 substances, I
18 would think this case is a fortiori. We're not talking
19 about substances that are homegrown and are never part of
20 a commercial transaction. And even those who were in the
21 dissent in Raich, I think, would think that this was an
22 appropriate commerce-clause application. This case is to
23 Raich as the regulation of commercial farming would be to
24 Wickard against Filburn. It is a much different
25 situation. Congress's commerce-clause power is more

1 robust here.

2 I wanted to remark and focus for a minute on
3 what an odd statute Oregon has passed. The practitioner
4 respondents point out it is a prescribing law only. And
5 Oregon itself points out that what's allowed here is the
6 prescription, but not the administration, of these
7 substances.

8 Even what Oregon does, does not purport to be
9 medicine, as one traditionally understands it. I can
10 think of no other medical substance where a doctor can
11 prescribe it, but not administer it. And I think if you
12 look at that aspect of the statute, what becomes clear is
13 that Oregon is not regulating medicine, it's purporting to
14 basically take a Federal regulatory regime that allows
15 doctors the ability to get at schedule 2 substances.

16 Thank you, Mr. Chief Justice.

17 CHIEF JUSTICE ROBERTS: Thank you, General
18 Clement.

19 The case is submitted.

20 [Whereupon, at 11:02 a.m., the case in the
21 above-entitled matter was submitted.]

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