No. 14-35402

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

OREGON PRESCRIPTION DRUG MONITORING PROGRAM, an agency of the State of Oregon,

Plaintiff - Appellee,

ACLU FOUNDATION OF OREGON, INC.; JOHN DOE 1; JOHN DOE 2; JOHN DOE 3; JOHN DOE 4; JAMES ROE, M.D.,

Intervenor-Plaintiffs - Appellees,

v.

U.S. DRUG ENFORCEMENT ADMINISTRATION, Defendant in Intervention,

Defendant - Appellant.

APPELLEE'S BRIEF

Appeal from the United States District Court
for the District of Oregon

ELLEN F. ROSENBLUM
Attorney General
ANNA M. JOYCE
Solicitor General
STEPHANIE L. STRIFFLER
Senior Assistant Attorney General
1162 Court St. NE
Salem, Oregon 97301-4096
Telephone: (503) 378-4402
stephanie.striffler@doj.state.or.us
Attorneys for Appellee

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ANSWERING BRIEF OF APPELLEE OREGON PRESCRIPTINON DRUG MONITORING PROGRAM

INTRODUCTION

The Oregon Prescription Drug Monitoring Plan (PDMP or Oregon PDMP) brought this declaratory judgment proceeding seeking a declaration that it is not required to comply with DEA's administrative subpoenas seeking prescription records from the Oregon PDMP – without a court order. ER 21-24. The district court did not reach the state's request for relief. It did not do so because it agreed with Plaintiff-Intervenor-Appellees American Civil Liberties Union Foundation et al (ACLU) that the use of administrative subpoenas pursuant to the federal Control Substances Act to obtain those prescription records violates the Fourth Amendment to the United States Constitution. ER 18. The district court judgment permanently enjoined the DEA "from obtaining prescription records from Oregon Prescription Drug Monitoring Program without first securing a warrant based upon probable cause." ER 19-20. The DEA appeals, seeking to reverse that judgment. Oregon PDMP has not relied on the Fourth Amendment in asserting its position. However, in the event that the DEA is successful in convincing this court to reverse the district court's judgment, this court should reach the issue that was raised by Oregon PDMP below: that pursuant to Oregon statute, Or. Rev. Stat. § 431.966, DEA must obtain a court order to enforce such administrative subpoenas. The judgment

appealed from grants part of the relief requested by Oregon PDMP in that, under the judgment, the DEA's administrative subpoenas are not self-executing. For the reasons explained below, this court should affirm that part of the district court's judgment that in essence enjoins DEA from obtaining prescription records from PDMP based solely on an administrative subpoena, and remand for amendment of the judgment in accordance with the relief requested by Oregon PDMP.

STATEMENT OF JURISDICTION

Pursuant to Circuit Rule 28-2.2, plaintiff-appellee accepts petitioner's statement of jurisdiction.

ISSUES PRESENTED FOR REVIEW

1) Must Oregon PDMP refuse to produce records in response to a DEA subpoena in the absence of a court order enforcing the subpoena because federal law and state law are consistent in their requirement of a court order to compel the production of these protected records, and state law is therefore not preempted; or

(2) Even if the state law were preempted, could PMDP lawfully decline to produce records, until a court reviews the DEA's administrative subpoena and reaches a judicial determination that the subpoena in question is valid and complies with federal requirements?

STATEMENT OF THE CASE

This case arises out of a series of administrative subpoenas from the U.S. Drug Enforcement Administration to the Oregon Prescription Drug Monitoring Program, seeking the disclosure of prescription drug records. Because those subpoenaed records contain "protected health information," Oregon statute requires the PDMP to protect the records unless it is ordered by a court to disclose them. Oregon PDMP brought this declaratory judgment action pursuant to 28 U.S.C. § 2201 seeking a declaration that PMDP cannot be compelled to disclose an individual's protected health information to the DEA pursuant to an administrative subpoena unless ordered to do so by a federal court. ER 1-4.[1]

The American Civil Liberties Union (ACLU) and individual plaintiffs intervened, contending that the subpoenas violated the Fourth Amendment to the U.S. Constitution. They sought a declaration to that effect, along with an injunction prohibiting the DEA from obtaining prescription records from the PDMP without securing a warrant based on probable cause. ER 25 -62.

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[1] Contrary to DEA's statement, Oregon PDMP did not assert that the subpoenas were "contrary to state law." (Appellants Br 1). Rather Oregon PDMP asserted that DEA was required to obtain a court order before PDMP could comply with the subpoenas, consistent with both state and federal law.

The parties filed cross motions for summary judgment, agreeing that there were no disputed questions of fact and that the dispute could be resolved as a matter of law. The district court ruled in favor of the ACLU plaintiffs, concluding that the use of administrative subpoenas to obtain prescription records from the PDMP violates the Fourth Amendment. ER 18. The district court accordingly granted the ACLU plaintiffs' motion for summary judgment and denied DEA's motion for summary judgment. *Id.* The court did not reach Oregon PDMP's argument that state law required a court order, and denied Oregon PDMP's summary judgment motion as moot. ER 18. The DEA has appealed.

STATEMENT OF FACTS

A. Relevant Statutes.

At issue with respect to Oregon PDMP's claim in this case is the interaction of state and federal statutes.

1. Or. Rev. Stat. § 431.966.

The Oregon Health Authority maintains the Oregon Prescription Drug Monitoring Program, for monitoring and reporting information relating to certain prescription drugs dispensed by pharmacies in Oregon. Or. Rev. Stat. § 431.962(1)(a). The covered prescription drugs are those drugs that are classified in schedules II through IV under the federal Controlled Substances Act. *Id.* When retail pharmacies in Oregon dispense a covered prescription

drug, they are required to report certain information to the Oregon Health Authority. That information includes the name, address, and date of birth of the patient; the identity of the dispensing pharmacy, and the identity of the practitioner who prescribed the drug. *Id.* The Oregon Health Authority maintains the information in the Oregon PDMP electronic data system. Or. Rev. Stat. § 431.962(2). The Program allows practitioners and pharmacists to identify their patients at risk for overdose and side effects of those drugs. Subject to the Health Insurance Portability and Accountability Act (HIPAA) and other confidentiality laws, the Oregon Health Authority discloses the information to such practitioners or pharmacists who are using the information for the patient's treatment. Or. Rev. Stat. § 431.966(2)(a)(A).

The prescription monitoring information is "protected health information," which is not subject to disclosure except under limited circumstances:

> Prescription monitoring information submitted to PDMP constitutes protected health information:
>
> > (1)(a) Except as provided under subsection (2) of this section, prescription monitoring information submitted under Or. Rev. Stat. 431.964 to the prescription monitoring program established in Or. Rev. Stat. 431.962:
> >
> > (A) Is protected health information under Or. Rev. Stat. 192.553 to 192.581.

> (B) Is not subject to disclosure pursuant to Or. Rev. Stat. 192.410

Or. Rev. Stat. § 431.966(1).

Because the information is "protected health information," Oregon law prohibits the disclosure of information collected by PDMP except in limited circumstances. Under the provision relevant here, PDMP may disclose such information only "[p]ursuant to a valid court order based on probable cause and issued at the request of a federal, state or local law enforcement agency engaged in an authorized drug-related investigation involving a person to whom the requested information pertains." Or. Rev. Stat. § 431.966(2)(a)(C).

2. The Controlled Substances Act (CSA).

The Controlled Substances Act gives the United States Attorney General authority to issue administrative subpoenas to investigate drug crimes. "In any investigation relating to his functions * * * with respect to controlled substances* * *the Attorney General may subpoena witnesses, compel the attendance and testimony of witnesses, and require the production of any records * * * which the Attorney General finds relevant or material to the investigation." 21 U.S.C. § 876(a). The authority to issue administrative subpoenas was delegated to the DEA. *See* 28 C.F.R. § 0.100.

The CSA does not give the Attorney General authority to enforce his own administrative subpoenas. Instead, when a respondent does not comply with an

administrative subpoena issued by the DEA under § 876(a), the CSA expressly directs the DEA to seek a court order to compel compliance:

> In the case of contumacy by or refusal to obey a subpoena [sic] issued to any person, the Attorney General [via the DEA] may invoke the aid of any court of the United States * * *. to compel compliance with the subpoena [sic]* * *. Any failure to obey *the order of the court* may be punished by the court as a contempt thereof.

21 U.S.C. § 876(c) (emphasis added).

B. The DEA subpoenas.

The relevant facts are not in dispute. The subpoenas at issue in this case are two subpoenas DEA served on Oregon PDMP in September 2012. In the first subpoena, the DEA demanded records containing protected health information of an individual. ER 7. The DEA's second administrative subpoena demanded a summary of all prescription drugs prescribed by two physicians. *Id.* Oregon PDMP, through its counsel, objected to each subpoena, on the basis that Oregon law prohibits disclosure of the requested information except pursuant to valid court order. ER 7, 23. The DEA had previously served a subpoena on PDMP in January 2012.[2]

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[2] The January 2012 subpoena was enforced by an order from the district court, without PDMP having had an opportunity to brief the issues for the court. ER 6.Oregon PDMP produced responsive records in compliance with the order. *Id.*

DEA contended that the federal Controlled Substances Law preempts state law and that DEA was therefore not required to obtain a court order. In the district court, DEA indicated that its goal was to obtain a general court order requiring PDMP to comply with similar subpoenas without individual court orders. *Defendant's Combined Memorandum and Response Brief* at 14 (Docket No. 41).

When the Oregon Department of Justice and U.S. Department of Justice were unable to reach agreement on whether the DEA could compel the production of the records without a court order, Oregon PDMP filed its declaratory judgment action, seeking a declaration that it cannot be compelled to disclose an individual's protected health information to the DEA under an administrative subpoena unless so ordered by a federal court. ER 21-24.

SUMMARY OF ARGUMENT

Oregon PDMP Is not required to provide information that is "protected health information" under state law without a court order, as provided by state law. The federal Controlled Substances Act does not preempt state law in that regard. The CSA contains no clear and manifest intent to preempt Oregon law, but rather contains a non-preemption clause stating that state law is preempted only if there is a "positive conflict" with state law. There is no such conflict. CSA subpoenas are not self-enforcing; the CSA requires a court order for

enforcement of subpoenas. Nor does the court order requirement stand as an obstacle to the purpose of the CSA. Court enforcement of an administrative subpoena does not impose a burden beyond what is required by federal law. Accordingly, federal and state law can be read consistently to allow for the DEA to issue an administrative subpoena under the CSA, *and* to allow for PDMP to request judicial review of that subpoena and to wait for a court order before producing those records that are protected under Oregon law.

STANDARD OF REVIEW

This court reviews *de novo* a grant of summary judgment. *Blanford v. Sacramento County*, 406 F.3d 1110, 1114 (9th Cir. 2005). "Viewing the evidence in the light most favorable to the non-moving party, [this court] must determine whether there are any genuine issues of material fact, and whether the district court correctly applied the relevant substantive law." *Jackson v. City of Bremerton*, 268 F.3d 646, 650 (9th Cir 2001). There were no disputed facts below. Accordingly, the appeal presents questions of law. Whether state law is preempted by federal law is an issue of law reviewed de novo. *Laws v. Sony Music Entertainment, Inc.*, 448 F.3d 1134, 1137 (9th Cir. 2006). The court may affirm the grant of summary judgment on any ground presented by the record, even if not relied upon by the district court. *See Forest Guardians v. U.S. Forest Serv.*, 329 F.3d 1089, 1097 (9th Cir. 2003).

ARGUMENT

A. Introduction

Under state law, Or. Rev. Stat. § 431.966(2)(a)(C), Oregon PDMP is required to protect the records in question unless and until the administrative subpoena is enforced through a court order. The DEA contends that the federal Controlled Substances Act preempts the state law requirement of a court order. But the federal law does not have that effect, because federal law and state law are consistent in their requirement of a court order to compel the production of these protected records.

In the alternative, even if the state law were preempted, Oregon PDMP could lawfully decline to produce records, consistent with Oregon and federal law, until a court reviews the DEA's administrative subpoena and reaches a judicial determination that the subpoena in question is valid and complies with federal requirements.

B. The Controlled Substances Act does not preempt Oregon law with respect to the protections afforded to private health information.

The court "start[s] with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." *Wyeth v. Levine*, 555 U.S. 555, 565 (2009) (citation and internal quotation marks omitted). Congress can preempt state law expressly; or it can preempt state law under "conflict preemption principles,"

where compliance with both federal and state regulation is impossible, or when state law "stands as an obstacle to the accomplishment of the purposes and objectives of Congress." *Hillman v. Maretta*, ___ U.S. ___, 133 S. Ct.. 1943, 1949-50, 186 L.Ed. 2d 43 (2013) (citations omitted). Here there is neither an express statement of Congressional intent to preempt state law nor a positive conflict between the federal and state laws.

1. Federal law calls for courts to harmonize state and federal law where possible, especially where there is no clear Congressional intent to preempt state law.

The CSA contains no clear and manifest intent to preempt Oregon law. To the contrary, "[t]he CSA explicitly contemplates a role for the States in regulating controlled substances, as evidenced by its pre-emption provision." *Gonzalez v. Oregon*, 546 U.S. 243, 251 (2006). That provision states:

> No provision of [the CSA] shall be construed as indicating an intent on the part of the Congress to occupy the field in which that provision operates, including criminal penalties, to the exclusion of any State law on the same subject matter which would otherwise be within the authority of the State, *unless there is a positive conflict between that provision of [the CSA] and that State law so that the two cannot consistently stand together.*

21 U.S.C. § 903 (emphasis added).

In considering whether federal law and state law conflict, this court should consider that the state law at issue bears on traditional state police powers. Courts will not infer congressional intent to displace the state's

historical police power from congressional silence or ambiguity. *See ,e.g.*, *Solid Waste Agency of N. Cook Cty. v. Army Corps of Eng'rs*, 531 U.S. 159, 172-74 (2001) (requiring a clear indication of congressional intent to encroach on traditional state powers). Where historic state powers like the power to regulate and protect health information are implicated, only a clear statement of congressional intent to displace those historic powers is sufficient. *Id*. If the Court has "any doubt about congressional intent, [it is] to err on the side of caution, finding no preemption." *Malabed v. N. Slope Borough*, 335 F.3d 864, 869 (9th Cir. 2003). Further, in determining the construction of the federal and state statutes at issue, the court should take a "respectful approach" to "harmoniz[e] state and federal statutes where possible so as to avoid finding preemption." *Unocal Corp. v. Kaabipour*, 177 F.3d 755, 769 (9th Cir. 1999).

Here, the Oregon law at issue—Or. Rev. Stat. § 431.966—concerns state and local administration and enforcement of health laws and the state's protection of privacy interests of its citizens. As the Supreme Court has stated, "the regulation of health and safety matters is primarily, and historically, a matter of local concern." *Hillsborough Cnty., Fla. v. Automated Med. Labs., Inc*., 471 U.S. 707, 719 (1985). The Oregon statute falls squarely within that realm, and it can and should be harmonized with the CSA to accomplish Congress's intent and the state's interest in protecting its citizens' privacy

interests. While there is one area in which the federal and state laws conflict, the statutes can otherwise be harmonized to require a court order.

The one limited conflict between the state and federal statutes at issue here concerns the probable-cause requirement. Because Or. Rev. Stat. § 431.966(2)(a)(C) requires a showing of probable cause for issuance of a court order, and the CSA does not, Oregon PDMP agrees that the probable-cause requirement is preempted. But the remainder of the Oregon statute is consistent with the DEA's administrative subpoena powers and can easily be harmonized with it. As the following discussion shows, there is no conflict between the plain language of the laws as to the court order; and Oregon law poses no obstacle to the DEA's ability to carry out the objectives of the CSA. The CSA and Oregon law neatly mesh in their court order requirement.

2. There is no conflict between the court order requirements in the text of the Oregon law and the text of the CSA.

Both the CSA and Oregon statute require a court order before an agency may be legally compelled to produce protected health information. As for the Controlled Substances Act, administrative subpoenas issued by the DEA pursuant to § 876(a) are not "self-enforcing." *United States v. Golden Valley Elec. Ass'n*, 689 F.3d 1108, 1116 (9th Cir. 2012). Rather, the CSA specifies that DEA must "invoke the aid of any court of the United States * * *. to compel compliance with the [administrative] subpoena." 21 U.S.C. § 876(c).

When the subject of the subpoena fails to comply, this court has recognized that the federal issuing agency "must seek a court order compelling compliance. The court will review * * * administrative subpoenas for compliance with the appropriate standard before issuing an enforcement order." *Golden Valley Elec.*, 689 F.3d at 1116. Failure to obey the court order enforcing the administrative subpoena "may be punished by the court as a contempt thereof." 21 U.S.C. § 876(c). There is no penalty for failing to immediately comply with an administrative subpoena.

Similarly, Or. Rev. Stat. § 431.966 requires a "valid court order" before PDMP is permitted to comply with law enforcement's demands for the information:

> the Oregon Health Authority shall disclose the information:
>
> * * *
>
> (C) Pursuant to a valid court order based on probable cause and issued at the request of a federal, state or local law enforcement agency engaged in an authorized drug-related investigation involving a person to whom the requested information pertains.

Or. Rev. Stat. § 431.966(2)(a). Therefore, with the exception of the probable-cause requirement, the plain language of the CSA and Or. Rev. Stat. § 431.966(2)(a)(C) contemplate precisely the same enforcement mechanism—a court order compelling compliance—and are therefore entirely consistent.

Even the details of the judicial review contemplated by the CSA are consistent with Or. Rev. Stat. § 431.966(2)(a)(C). In determining whether to issue a court order, a federal court may not simply rubber-stamp administrative subpoenas. Instead, the court must engage in a fact-specific analysis to determine whether the subpoena complies with federal law:

> An administrative subpoena may not be too indefinite or broad. The critical questions are: (1) whether Congress has granted the authority to investigate; (2) whether procedural requirements have been followed; and (3) whether the evidence is relevant and material to the investigation. Even if other criteria are satisfied, a Fourth Amendment reasonableness inquiry must also be satisfied.

Golden Valley Elec., 689 F.3d at 1113 (citations and internal quotation marks omitted).

This is, in essence, precisely what the Oregon statute calls for, in its requirement of a court order issued at the request of a law enforcement agency "engaged in an authorized drug-related investigation involving a person to whom the requested information pertains." The federal-court review of an administrative subpoena would exactly satisfy Or. Rev. Stat. § 431.966(2)(a)(C). The court order requirements under Oregon and federal law are consistent. The CSA does not preempt this Oregon law requirement.

3. The court order requirement is not an obstacle to enforcement of the CSA.

Just as there is no conflict between the plain language of the two laws, there is also no conflict between the Oregon law and the *purpose* of the federal law. A state law can also be preempted on the basis that it "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Fidelity Fed. Sav. & Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 153 (1982) (citations omitted). But the court order requirement of Or. Rev. Stat. § 431.966(2)(a)(C) is not an obstacle to the accomplishment and execution of the CSA.

As explained above, Congress conferred upon the DEA the authority to issue administrative subpoenas that are not self-executing and that therefore require court enforcement. In so doing, Congress provided protections against oppressive or otherwise abusive use of the DEA's subpoena authority. Oregon law cannot be an obstacle to Congress's objectives when it simply results in the DEA following its own congressionally mandated enforcement mechanisms. Court enforcement of an administrative subpoena does not impose an additional burden on the DEA above and beyond what is required by federal law. Instead, requiring court enforcement of an administrative subpoena is consistent with the objectives of Congress in enacting the CSA and with the plain language of the CSA.

And the Supreme Court has characterized judicial review of administrative subpoenas as "rather minimal limitations on administrative action." *See v. City of Seattle*, 387 U.S. 541, 544 (1967); *see also United States v. Sturm, Ruger & Co.*, 84 F.3d 1, 3-4 (1st Cir. 1996) ("The requirements for enforcement of an administrative subpoena are not onerous.")

As a result, state law is not an obstacle to the accomplishment of the CSA's purposes, and Or. Rev. Stat. § 431.966(2)(a)(C) is not preempted on that basis either. The issue in this case is not whether PDMP may withhold the records altogether, as some other states have tried to do. Rather, it is whether PDMP must refrain from producing the records *until the DEA obtains a court order* enforcing its administrative subpoena. And there is no conflict on that point between the two laws. Or. Rev. Stat. § 431.966(2)(a)(C) allows PDMP to produce protected records to the DEA only in response to a court order—and federal law likewise provides that the DEA must obtain a court order before it can enforce its administrative subpoenas.

4. Cases from other states do not support DEA's position.

Below, DEA cited two district court decisions from other states, neither of which is on point. The DEA did not identify any cases – and Oregon is aware of none – in which a court has examined the issue raised by Oregon here. In the cases DEA cited, state agencies took the position that it was flatly illegal

for them to produce their protected records to the DEA *at all*; in fact the restrictions were quite different and so the cases are not on point.

Michigan law precluded the disclosure of confidential information to anyone, which directly conflicted with the plain language and the intent of the CSA. *See United States v. Michigan Dep't of Comty. Health*, No. 1:10-mc-109, 2011 WL 2412602, at *13 (W.D. Mich. June 9, 2011) (Michigan's confidentiality statute nullified to the extent that it prevented the DEA "from using a proper federal subpoena to obtain records which involve a controlled substance"). And Colorado took the position that it would only give the DEA information "specific to a *patient*," due to the requirements of Colorado law. The court found that the "overly burdensome and time-consuming" means interfered with the intent and purpose of the CSA, because the DEA would be required to contact and search the records of more than 800 pharmacies located in Colorado for information on the three registrants. *See United States Dep't of Justice v. Colorado Bd. of Pharm.*, No. 1-cv-1116, 2010 WL 3547898, at *4 (D. Colo. Aug. 13, 2010). In both of those cases, state law flatly forbade the production of records, and the state agencies argued that they were bound by state law.

In contrast, Oregon does not take the position that the DEA may not have the records, or that PDMP must protect the records in all cases, or that the state

has an obligation to comply with state law that is inconsistent with the CSA. Rather, Oregon's view is that the requirement of a court order is not preempted and therefore Oregon PDMP is required to wait for judicial review and a court order before it could turn over the records—which is precisely the enforcement mechanism contemplated for any administrative subpoena.

5. The "probable cause" portion of the Oregon statute is severable from the court order provision.

Below, DEA proposed a theory under which the probable cause requirement, which Oregon PDMP agrees is preempted, is not severable from the remainder of Or. Rev. Stat. § 431.966(2)(a)(C), such that the entire provision is preempted by the CSA. But that provisioin is severable. Oregon's court-oversight provision is completely capable of being executed without the probable cause requirement, and that makes the probable-cause provision severable.

As the DEA agreed below, severability is a matter of state law. *Defendant DEA's Combined Memorandum and Response Brief* at 13 (Docket No. 41). Whether an invalid legislative provision should be severed is a matter of the legislative intent of the enacting body—in this case, the Oregon Legislature. *Clear Channel Outdoor, Inc. v. City of Portland*, 243 Or. App. 133, 147, 262 P.3d 782, 791-92 (2011). Oregon law mandates a presumption that what can be saved of a statute by responsible judicial construction must be

saved. Or. Rev. Stat. § 174.040. Once a provision is found invalid, the court must take a careful look at the specific language that must be deleted to ensure the legislative intent remains intact, if possible. *See Clear Channel*, 243 Or. App. at 148, 262 P3d at 792. Under Oregon law, if any part of a statute is stricken, the remaining parts must still be enforced unless they are "so essentially and inseparably connected with and dependent upon the unconstitutional part that it is apparent that the remaining part would not have been enacted without the unconstitutional part[,]" or "[t]he remaining parts, standing alone, are incomplete and incapable of being executed in accordance with the legislative intent." Or. Rev. Stat. § 174.040 (2), (3). Neither of those circumstances is presented here.

Because Oregon PDMP collects such sensitive and detailed information, the Oregon legislature built a number of safeguards to ensure that the information would be released only in particular circumstances. Three of those safeguards appear in the statutory provision at issue here: PDMP may disclose such information only (1) "[p]ursuant to a valid court order" that is (2) "based on probable cause" and (3) "issued at the request of a federal, state or local law enforcement agency engaged in an authorized drug-related investigation involving a person to whom the requested information pertains." Or. Rev. Stat. § 431.966(2)(a)(C).

Without the probable-cause requirement, then, the statute provides that Oregon PDMP will provide protected health information only "[p]ursuant to a valid court order* * * issued at the request of a federal, state or local law enforcement agency engaged in an authorized drug-related investigation involving a person to whom the requested information pertains." What remains is still a complete and coherent legal requirement, completely capable of execution—and completely consistent with the legislature's intent to protect the information.

The DEA argued below that the probable-cause requirement is not severable because "[a]bsent the probable cause requirement, it is not clear what a court order is to be 'based on.'" *Defendant DEA's Combined Memorandum and Response Brief* at 13 (Docket No. 41). But it is clear. The remaining portion still limits disclosure and still provides direction for the court's analysis: whether the request is coming from an authorized agency engaged in a specific type of investigation relating to the precise person whose information is sought. That is not only a clear direction, consistent with the Oregon legislature's intent, but it is precisely consistent with the Court's inquiry under the CSA. As this court has explained, the court may enforce a subpoena only after determining "(1) whether the agency has the authority to investigate; (2) whether the required procedures were followed; and (3) whether the evidence is

relevant and material to the investigation." *See United States v. Golden Valley Elec. Ass'n*, 689 F.3d at 1113.

In short, there is no Congressional intent to preempt Oregon's regulation of its pharmaceutical information, no positive conflict between Oregon law and the CSA as to the court order that PDMP has asked for, and no obstacle to the execution of Congress's intent. The CSA does not preempt Oregon's statutory mandate that PDMP protect its health records except in response to a court order. Only the probable-cause provision is preempted by federal law. PDMP may not, as a result, turn over the records that the DEA is seeking unless the DEA shows a court that its subpoena complies with federal law and thereby obtains a court order enforcing the subpoena.

C. Alternatively, PDMP may decline to produce protected health records to the DEA until the DEA obtains a court order enforcing its administrative subpoena.

Even if the Oregon law were preempted, PDMP still has the legal right to decline to produce its protected records in the absence of a court order enforcing an administrative subpoena. That is because any subject of an administrative subpoena may seek a judicial determination that the subpoena is reasonable:

> [A]lthough our cases make it clear that [a federal agency] may issue an administrative subpoena without a warrant, they nonetheless provide protection for a subpoenaed [person] by allowing him to question the reasonableness of the subpoena,

> before suffering any penalties for refusing to comply with it, by raising objections in an action in district court.

Donovan v. Lone Steer, Inc., 464 U.S. 408, 414 (1984) (citations and internal quotation marks omitted) (discussing the Secretary of Labor's authority to issue administrative subpoenas under the Fair Labor Standards Act), *cited in Sturm, Ruger & Co.*, 84 F.3d at 3-4 ("unlike the subject of an actual search, the subject of an administrative subpoena has an opportunity to challenge the subpoena before yielding the information"); *see also See v. City of Seattle*, 387 U.S. at 544 (while an agency may issue demands in the form of administrative subpoenas, the demand "may not be made and enforced by the inspector in the field, and the subpoenaed party may obtain judicial review of the reasonableness of the demand prior to suffering penalties for refusing to comply").

The text of the CSA is entirely consistent with the principle that the recipient of an administrative subpoena maintains the right to challenge the administrative subpoena in federal court before suffering any penalties for refusing to comply. The CSA directs the DEA to "invoke the aid of any court of the United States * * *. to compel compliance with the [administrative] subpoena" and provides that failure to obey the court order enforcing the administrative subpoena—not failure to obey the administrative subpoena

itself—"may be punished by the court as a contempt thereof." 21 U.S.C. § 876(c).

In determining whether to enforce an administrative subpoena under the CSA, the court considers, among other things, "whether procedural requirements have been followed" and "whether the evidence is relevant and material to the investigation." *United States v. Golden Valley Elec. Ass'n*, 689 F.3d at 1113. While Oregon PDMP may not flatly refuse to provide the information at all, it can wait until a court has reviewed the subpoena and determined whether enforcement is warranted. Waiting for an order is consistent with federal law. And because Oregon law has given PDMP the authority and a clear directive to protect the private and confidential health information that it collects, it is not only lawful but reasonable for PDMP to ask for judicial review of the administrative subpoenas that it receives.

In sum, because the Controlled Substances Act and the Oregon privacy law governing PDMP records can be readily harmonized, PDMP asks this court to find that the Controlled Substances Act does *not* preempt Or. Rev. Stat. § 431.966(2)(a)(C), except as to probable cause. Accordingly, PDMP asks the court to find that PDMP may not produce its protected records in response to a DEA administrative subpoena until the subpoena has been enforced by a court order finding that the subpoena meets all relevant federal requirements.

In the alternative, PDMP asks this court to rule that it may lawfully decline to produce protected records under Or. Rev. Stat. § 431.966 in response to a DEA administrative subpoena until the subpoena has been enforced by a court order finding that it meets all relevant federal requirements.

CONCLUSION

If this court agrees with the DEA that the administrative subpoenas do not violate the Fourth Amendment, this court should reach the issue raised by Oregon PDMP below: that pursuant to Or. Rev. Stat. § 431.966, DEA must obtain a court order to enforce such administrative subpoenas. This court should rule that Oregon PDMP is not required to respond to such subpoenas without a court order. This court should therefore affirm that part of the judgment under which DEA administrative subpoenas are not self-executing and should remand to the district court to amend its judgment in accordance with its ruling.

Alternatively, in the event this court agrees with the DEA that the administrative subpoenas do not violate the Fourth Amendment, but the court concludes that Oregon PDMP's request for relief is not before this court based on the district court judgment, this court should remand for the district court to address the issue raised by Oregon PDMP.

Respectfully submitted,

ELLEN F. ROSENBLUM
Attorney General
ANNA M. JOYCE
Solicitor General

/s/ Stephanie L. Striffler

STEPHANIE L. STRIFFLER #824053
Senior Assistant Attorney General
stephanie.striffler@doj.state.or.us

Attorneys for Plaintiff-Appellee
Oregon Prescription Drug Monitoring Program

SLS:bmg/6060325

SUPPLEMENTAL APPENDIX

Or Rev Stat 174.040

It shall be considered that it is the legislative intent, in the enactment of any statute, that if any part of the statute is held unconstitutional, the remaining parts shall remain in force unless:

(1) The statute provides otherwise;

(2) The remaining parts are so essentially and inseparably connected with and dependent upon the unconstitutional part that it is apparent that the remaining parts would not have been enacted without the unconstitutional part; or

(3) The remaining parts, standing alone, are incomplete and incapable of being executed in accordance with the legislative intent.

ELLEN F. ROSENBLUM
Attorney General of Oregon
ANNA M. JOYCE
Solicitor General
STEPHANIE L. STRIFFLER
Assistant Attorney General
1162 Court St.
Salem, Oregon 97301
Telephone: (503) 378-4402

Counsel for Plaintiff-Appellee

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

OREGON PRESCRIPTION DRUG MONITORING PROGRAM, an agency of the State of Oregon, Plaintiff - Appellee, ACLU FOUNDATION OF OREGON, INC.; JOHN DOE 1; JOHN DOE 2; JOHN DOE 3; JOHN DOE 4; JAMES ROE, M.D., Intervenor-Plaintiffs - Appellees, v. U.S. DRUG ENFORCEMENT ADMINISTRATION, Defendant in Intervention, Defendant - Appellant.	U.S.C.A. No. 14-35402 STATEMENT OF RELATED CASES

Department of Justice
1515 SW 5th Ave, Ste 410
Portland, OR 97201
(971) 673-1880

Pursuant to Rule 28-2.6, Circuit Rules of the United States Court of Appeals for the Ninth Circuit, the undersigned, counsel of record for appellee, certifies that she has no knowledge of any related cases pending in this court.

Respectfully submitted,

ELLEN F. ROSENBLUM
Attorney General
ANNA M. JOYCE
Solicitor General

/s/ Stephanie L. Striffler

STEPHANIE L. STRIFFLER
Senior Assistant Attorney General
stephanie.striffler@doj.state.or.us
Attorneys for Appellee
Oregon Prescription Drug Monitoring

Department of Justice
1515 SW 5th Ave, Ste 410
Portland, OR 97201
(971) 673-1880

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(a)(7), Federal Rules of Appellate Procedure, I certify that the Appellee's Brief is proportionately spaced, has a typeface of 14 points or more and contains 5,584 words.

DATED: December 5, 2014

/s/ Stephanie L. Striffler

STEPHANIE L. STRIFFLER
Senior Assistant Attorney General
stephanie.striffler@doj.state.or.us
Attorney for Plaintiff-Appellee

SLS:bmg/6060325

CERTIFICATE OF SERVICE

I hereby certify that on December 5, 2014, I directed the Appellee's Brief to be electronically filed with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/ Stephanie L. Striffler

STEPHANIE L. STRIFFLER
Senior Assistant Attorney General
stephanie.striffler@doj.state.or.us
Attorney for Plaintiff-Appellee

SLS:bmg/6060325