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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

IN RE GRAND JURY SUBPOENAS, MENDOCINIO COUNTY, CALIFORNIA	Case No. 3:12-xr-90877-RS BRIEF *AMICUS CURIAE* OF THE EMERALD GROWERS ASSOCIATION AND AMERICANS FOR SAFE ACCESS

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EMERALD GROWERS ASSOCIATION

Amicus Emerald Growers Association is a non-profit, member-based association of medical-marijuana cultivators, patients, and community members. The mission of the Emerald Growers Association is to promote the medicinal, environmental, social, and economic benefits of lawfully cultivated medical marijuana from California's Emerald Triangle Region, which includes Mendocino County, by advocating for public policies that foster healthy and sustainable medical-marijuana cultivation. To that end, Emerald Growers Association represents its members by lobbying for and otherwise helping to support standards for sustainable, naturally grown medical marijuana. It regularly communicates with elected officials on behalf of its members to secure laws and regulations that allow medical marijuana to be more available through regulated channels for patients.

The organization has numerous Mendocino-based members who cultivate marijuana within the confines of state law and County regulations. It also includes numerous Mendocino-based members who are patients and who use marijuana within the confines of state law and County regulations. Its members' personal and confidential information would be subject to production if the County is forced to comply with the subpoena. These members, therefore, would refrain from participating in the County's medical-marijuana program if the subpoena is upheld. Moreover, Emerald Growers Association and its members would be chilled from lobbying local officials if the federal government were allowed unfettered access to information concerning the individuals and associations who advocated for medical-marijuana legislative reform.

AMERICANS FOR SAFE ACCESS

Amicus Americans for Safe Access is the nation's largest member-based organization of patients, medical professionals, and scientists promoting safe and legal access to marijuana for therapeutic use and research. Americans for Safe Access represents its members by working to overcome political and legal barriers. It represents its members by lobbying for and otherwise helping to create policies that improve access to medical marijuana for patients.

The organization has numerous Mendocino-based members who cultivate marijuana within the confines of state law and County regulations. It also includes numerous Mendocino-based members who are patients and who use marijuana within the confines of state law and County regulations. Its members' personal and confidential information would be subject to production if the County is forced to comply with the subpoena. These members, therefore, would refrain from participating in the County's medical-marijuana program if the subpoena is upheld. Moreover, Americans for Safe Access and its members would be chilled from lobbying local officials if the federal government were allowed unfettered access to information concerning the individuals and associations who advocated for medical-marijuana legislative reform.

INTRODUCTION

Amici submit this brief in support of the County of Mendocino's ("County's") motion to quash a needlessly broad and bold grand jury subpoena. Compliance with the subpoena would have serious and longstanding repercussions: It would reveal privileged and confidential medical information, bank records, and other financial data. It would chill classically protected speech, including lawful lobbying of local officials. And it would undermine the County's considered and thoughtful attempts to regulate medical marijuana pursuant to state law.[1]

While the subpoena is bold and nearly unprecedented, it was drafted against the backdrop of two other efforts by the federal government to target state and local regulation of medical marijuana. As discussed below, the federal courts have halted those efforts emphatically. Most notably, the Western District of Washington quashed a very similar grand jury subpoena—but one that had an even narrower scope—holding that the production of the responsive documents would inflict far more harm than they were worth. In another matter, the U.S. Court of Appeals for the Ninth Circuit enjoined the federal government from conducting investigations into medical-marijuana matters that chilled First Amendment speech and intruded on the physician-patient relationship.

Undergirding these opinions is that federalism and comity demand respect for the State of California's and County of Mendocino's medical-marijuana regulations. While the Federal government is free to enforce federal laws that criminalize all marijuana, it may not compel state and local officials to carry out federal laws that differ from state and local legislation. That would violate the Tenth Amendment to the U.S. Constitution. Where forced compliance with a

[1] This brief presumes the existence of documents that are responsive to the subpoena. Nothing in this memorandum or other pleadings filed by the *amici* in this matter should be construed as admitting the existence of such documents.

federal grand jury subpoena would eviscerate state and local law—compromising sensitive, confidential information in the process—the price is simply too great to pay. The County's motion to quash should be, and must be, granted.

FACTUAL BACKGROUND

I. THE SUBPOENA

This matter concerns a federal grand jury subpoena issued to Mendocino County on October 23, 2012. County of Mendocino Memo. of Points and Auth. in Supp. of Motion to Quash ("Motion"), Exh. A. The subpoena is remarkably broad, demanding all records, over a nearly three-year period, including but not limited to the following:

- All financial information of individuals and entities who participated in, among other activities, the County's marijuana zip-tie program. This includes, among other things, bank account numbers, routing numbers (which appear on checks), and credit-card information.

- All communications that individuals and entities provided to inspectors who enforced the County's medical-marijuana regulations. This includes the names of patients who may use medical marijuana because they have serious medical conditions for which their doctors have recommended they use marijuana, the patients' medical conditions that prompted the recommendations from their physicians, and the amount of marijuana that they may use pursuant to their doctors' recommendations.

- The names, addresses, and other identifying information of individuals who grow and use marijuana for medicinal purposes pursuant to the County's regulation of medical marijuana.

- All lobbying and other communications regarding the County's medical-marijuana regulations.

Id.

Forced compliance with the subpoena would upset settled expectations among those who complied with the County's medical-marijuana regulations. Mendocino-based individuals and businesses, many of whom are *amici*'s members, complied with the County's regulations in good faith. They reasonably assumed that, while the regulations did not provide immunity from

federal prosecution, compliance with County law would not leave them *worse off* (in terms of potential federal investigation and criminal exposure) than *not complying* with County law. Had the County notified permit applicants in advance that it would deliver their records to federal authorities, the regulations surely would have failed to attract compliance among patients and farmers.

In this way, the subpoena would push all of Mendocino County's small medical-marijuana farmers back to the underground economy, where they no longer would be accountable for the safety of their medical marijuana or the environmental costs of producing it. It also would forever undermine future efforts by the County to regulate marijuana cultivation by irreparably rupturing public trust in County officials and encouraging disregard for the authority of County law.

The subpoena, if upheld, would be devastating to medical-marijuana patients, farmers, lobbying associations, and counties who regulate medical marijuana pursuant to California law: It would require the disclosure of extremely confidential information concerning patients' sensitive medical conditions. It would force the County to provide confidential financial information of farmers and others who have in good faith participated in the County's medical-marijuana regulatory scheme. It would chill the constitutionally protected speech of lobbyists and engaged citizens who wish to speak with the County about improving or otherwise amending the County's regulations. And it would eviscerate the County's attempts to regulate marijuana safely, pursuant to state law, because the proliferation of such subpoenas would result in no medical-marijuana farmers ever cooperating with counties and no patients ever providing their information to the County (or to the farmers who supply their marijuana). In the process, it

would strip the County of the mechanism that this sovereign body has selected to identify medical-marijuana cultivation that it has chosen not to investigate and prosecute.

II. FEDERAL COURTS HAVE QUASHED THE FEDERAL GOVERNMENT'S TWO PRIOR ATTEMPTS TO UNDERMINE STATE AND LOCAL MEDICAL-MARIJUANA REGULATIONS.

A very brief review of the federal government's response to state medical-marijuana programs fills in the background upon which the government drafted its subpoena. This history (1) highlights the patients' privacy interests in the records demanded by the subpoena; (2) illustrates the danger that the subpoena poses to First Amendment speech, to the proper functioning of local medical-marijuana regulations, and to the sovereign interests of the State of California and the County; and (3) demonstrates that federal courts, including this Court, have quickly shot down the federal government's brazen attempts to curtail state and local efforts to safely regulate medical marijuana.

A. The U.S. Court of Appeals for the Ninth Circuit Has Permanently Enjoined The Federal Government From Chilling Protected Speech and Invading the Physician-Patient Relationship Regarding Medical Marijuana.

The citizens of California passed the state's first medical-marijuana legislation, the Compassionate Use Act, in 1996. *Conant v. McCaffrey*, 172 F.R.D. 681, 685-86 (N.D. Cal. 1997). The Compassionate Use Act provides protection from state-law criminal conviction if an individual's physician recommended that the patient use marijuana in the care for a serious illness. *Id.* at 686. Soon after passage of the Compassionate Use Act, the federal government vowed to "prosecute physicians, revoke their prescription licenses, and deny them participation in Medicare and Medicaid for recommending medical marijuana." *Id.* It was clear that the federal government's policy chilled physician-patient speech about the potential benefits and harms of medical marijuana. *Conant v. Walters*, 309 F.3d 629, 638 (9th Cir. 2002) (noting that

"the record is replete with examples of doctors who claim a right to explain the medical benefits of marijuana to patients and whose exercise of that right has been chilled by the threat of federal investigation").

Accordingly, a group of doctors sued in this Court, asking the Court to enjoin the federal government's policy. *Conant*, 172 F.R.D. at 686. Judge Fern Smith found that the government's policy chilled First Amendment speech and issued a preliminary injunction. *Id.* at 701. Judge Alsup subsequently affirmed that ruling and entered a permanent injunction. *Conant*, 309 F.3d at 633. That order permanently enjoined the federal government from implementing its above-referenced policy, including "initiating any investigation" against a physician based on the physician's exercising his or her First Amendment right to recommend marijuana to a patient. *Id.* at 634.

A unanimous panel of the Ninth Circuit upheld the permanent injunction. *Id.* at 639. The court held that physician-patient communication regarding medical marijuana is constitutionally protected speech and that the federal government's policy unlawfully chilled such speech. *Id.* at 637-39.

Judge Kozinski joined the majority opinion, authored by Chief Judge Schroeder. Judge Kozinski also wrote separately to point out that the government's policy violated the Tenth Amendment to the U.S. Constitution by impinging on the State of California's sovereign decision to enact the Compassion Use Act. *Id.* at 645-47. As discussed at further length below, Judge Kozinski reasoned that the federal government's policy unlawfully conscripted the state into effectively enforcing federal law it did not wish to enforce, since it deprived the state of the mechanism used to distinguish medical-marijuana activity that was not criminalized under state law from other marijuana activity that state law did criminalize. *See id.* at 645-46. This

commandeering of state resources, Judge Kozinski concluded, violated the Tenth Amendment. *Id.*

B. A Federal District Court Quashed A Remarkably Similar Subpoena Only Five Years Ago.

Until a subpoena that was issued in 2007 and quashed that same year, *amici* and their counsel are unaware of any post-*Conant* federal activity that directly intruded on physician-patient speech regarding medical marijuana, the confidential records that emanated from that speech, and any other First Amendment rights related to medical-marijuana patients. That 2007 subpoena ventured into this dangerous ground and therefore was quashed by the Eastern District of Washington.

In re Grand Jury Subpoena for THCF Medical Clinic Records ("*THCF*"), 504 F. Supp. 2d 1085, 1087 (E.D. Wash. 2007), considered a motion to quash a targeted grand jury subpoena that sought the records of seventeen medical-marijuana patients that were allegedly possessed by the State of Oregon and the patients' medical clinic. The government explained that it sought the records to help prove that the subjects of the grand jury investigation distributed marijuana, in violation of federal law, to these seventeen individuals. *Id.* at 1089. At the hearing on the motion to quash, the government further limited the scope of the subpoena, asking instead only for the addresses and phone numbers of the seventeen patients, in addition to specific dosages, if any, that their physicians recommended. *Id.*

The Eastern District of Washington weighed the interests of the State and the patients in maintaining the confidentiality of this information against the government's interest in securing it. *Id.* The government had an interest in conducting a criminal investigation of individuals for distributing marijuana in violation of federal law. *Id.* On the other side of the scale, however,

were the interests of the medical-marijuana patients and the State. The patients had a significant interest in protecting their confidential medical information and the physician-patient privilege. *Id.* The State, the court noted, also had a weighty "interest in protecting the integrity of its medical marijuana program and the confidentiality of its citizen's medical records." *Id.* at 1089. With respect to confidentiality, the State had an interest in abiding by state law, which provided that the State would not release medical-marijuana patients' confidential information. *Id.* at 1090-91. With respect to the integrity of its medical-marijuana program, the State had an interest in ensuring the efficacy of its medical-marijuana regulations. *Id.* at 1089-90. And those interests would be trampled, the *THCF* court found, if medical-marijuana patients, concerned that their information could be produced to the government, would be "deterred from participating in the [state's medical-marijuana] program." *Id.* at 1090.

Balancing these interests, the court quashed the subpoena. *Id.* at 1090-91. Commenting upon the government's need for the information, the court noted that the government could conduct its investigation without the records sought by the subpoena. *Id.* at 1090. And while the government's ability to maintain its criminal investigation without the records at issue would not typically result in the quashing of a subpoena, the court granted the motion to quash because the production of the records would divulge confidential medical information, impede the physician-patient relationship, and/or disrupt the implementation of the state's regulatory regime. *Id.* at 1090-91.

Counsel for *amicus* Emerald Growers Association, Adam Wolf, litigated the *THCF* case on behalf of the medical clinic. Counsel, like *amici*, are unaware of any similar subpoena issued prior to the subpoena that the Eastern District of Washington quashed. Nor are they aware of any similar subpoena issued after the court granted that motion to quash—until now.

ARGUMENT

Federal Rule of Criminal Procedure 17(c) provides that a subpoena should be quashed "if compliance would be unreasonable." A district court can quash a federal grand jury subpoena in three general situations: (1) when the subpoena seeks documents that trigger constitutional, statutory, or common-law privileges; (2) when it seeks documents that are irrelevant, vague, or excessively broad; or (3) when it "intrudes gravely on significant interests outside the scope of a recognized privilege, if compliance is likely to entail consequences more serious than even severe inconveniences occasioned by irrelevant or overbroad requests for records." *In re Grand Jury Subpoena for THCF Med. Clinic Records*, 504 F. Supp. 2d at 1088 (citing cases). Here, the subpoena crosses the line in all three respects: it demands documents containing privileged material, it demands documents that are both irrelevant and excessively broad, and it intrudes on serious interests that substantially outweigh the documents' utility to the government.

I. THE SUBPOENA SHOULD BE QUASHED BECAUSE IT DEMANDS PRIVILEGED MATERIAL AND OTHER INFORMATION THAT, IF DISCLOSED, WOULD ENTAIL DEVASTATING CONSEQUENCES.

Forced disclosure of the documents demanded by the subpoena would prove devastating. First, the subpoena seeks information that is clearly privileged and confidential. Responsive documents would include the names of people who have serious medical conditions (which, after all, prompted their physicians to recommend that they use marijuana). In many instances, these documents would specify the patients' serious medical conditions, as well.

Responsive documents also would include confidential financial-account information of the farmers who supply the marijuana to these patients at the recommendation of the patients' physicians. As with health information, this financial data is privileged as a matter of federal,

state, and County law. People and businesses have a settled expectation that this information is confidential.

Not only would the subpoena disclose clearly sensitive, confidential information, but it would eviscerate the County's carefully considered regulations that, in its best judgment, protect public health and allow it to distinguish between conduct that is legal and illegal under state law. If the subpoena is not quashed, the County's regulations will be. No patient or farmer will comply with these regulations if they understand that their compliance could lead to federal investigation. Such federal action that undermines the County's mechanism to enforce its laws violates the Tenth Amendment to the U.S. Constitution and its important underlying principles of federalism.

Similarly, constitutionally protected lobbying with respect to a municipality's medical-marijuana regulations will be greatly chilled if engaged citizens and trade associations know that their communications will put them under a federal spotlight. The subpoena, unfortunately, seeks records of all discussions, including lawful lobbying, concerning the County's medical-marijuana laws. The production of these records would halt such lobbying in the future. The chilling of constitutional speech, much like the production of clearly privileged information and the intrusion on a county's sovereign right to protect the public welfare pursuant to state law, requires that the subpoena be quashed.

A. The Subpoena Should Be Quashed Because It Seeks Medical and Financial Information That Is Privileged and Otherwise Confidential.

The subpoena demands that the County produce medical-marijuana patients' confidential medical information. In fact, after reviewing the universe of responsive documents, the County notes that "the bulk of its disclosure would constitute sensitive medical information concerning

[the County's medical-marijuana patients]." Motion, at p. 15. Likewise, the subpoena explicitly demands financial account numbers—and likely credit-card details, as well—for the participants in the County's zip-tie program. The subpoena must be quashed because this medical and financial information is clearly privileged and otherwise confidential.

In fact, it is hard to imagine information more privileged than an individual's serious medical conditions or private financial information. Indeed, federal and state regulatory schemes, constitutions, and common law are devoted to keeping this information private. *See, e.g.*, Health Insurance Portability and Accountability Act ("HIPAA"), Pub. L. No. 104-191, §§ 261-64, 110 Stat. 1936 (Aug. 21, 1996); 45 C.F.R. § 160.203(b) (preserving, as a matter of federal law, state-law safeguards of medical information); *Norman-Bloodsaw v. Lawrence Berkeley Lab.*, 135 F.3d 1260, 1269 (9th Cir. 1998) (interpreting the U.S. Constitution and stating that "the constitutionally protected privacy interest in avoiding disclosure of personal matters clearly encompasses medical information and its confidentiality"); *Hill v. Nat'l Collegiate Athletic Ass'n*, 7 Cal. 4th 1, 41 (Cal. 1994) (interpreting the California Constitution and reiterating that "[a] person's medical profile is an area of privacy infinitely more intimate, more personal in quality and nature than many areas already judicially recognized and protected"); California Right to Financial Privacy Act, Cal. Gov. Code §§ 7460-93; *Valley Bank of Nevada v. Superior Court*, 15 Cal.3d 652, 656 (Cal. 1975) (holding that the California Constitution's right to privacy extends to one's financial affairs); *Burrows v. Superior Court*, 13 Cal.3d 238, 245 (Cal. 1974) (holding that a bank's disclosure of customer information to law-enforcement officials constituted an unlawful search and seizure under the California Constitution); *see also, e.g.*, *Carey v. Berisford Metals Corp.*, No. 90-Civ-1045, 1991 WL 44843 at *8 (S.D.N.Y. March 28, 1991) (holding a party has a privacy interest in its own bank records

sufficient to confer standing in a civil case to contest discovery of those records); *Schmulovich v. 1161 Rt. 9 LLC*, No. 07-597, 2007 WL 2362598 at *2 (D. N.J. Aug. 15, 2007) (same).

The government has indicated that its main response to this overwhelming authority is to claim that the participants in the State and County's medical-marijuana programs relinquished their privileges and/or interests in this information when they produced it to the County and their medical-marijuana farmers. However, its argument contravenes decades of case law that holds that individuals do not waive privileges or other interests in the confidentiality of their personal information when they disclose such information to an entity, including the government, pursuant to a legal obligation or other operation of law. *See, e.g.*, *Kraima v. Ausman*, 850 N.E.2d 840, 846 (Ill. App. 2006) (defendant did not waive physician-patient privilege over his confidential medical records or consent to their disclosure in a separate court proceeding merely by filing a disability claim that contained the records with a state-run retirement system); *Devenys v. Hartig*, 983 P.2d 63, 66-67 (Colo. App. 1998) (release of medical records to insurance carrier did not waive privilege, as such disclosure was necessary to receive reimbursement for medical expenses); *Henry v. Lewis*, 478 N.Y.S.2d 263, 268 (N.Y. App. Div. 1984) (quashing a subpoena for medical records that had been produced to an insurance company and holding that "[a]n authorization to release medical information to a specific party does not constitute a waiver of the physician-patient privilege as far as other parties are concerned"); *State ex rel. Gonzenbach v. Eberwein*, 655 S.W.2d 794, 796 (Mo. App. 1983) (same); *Grey v. Superior Court*, 133 Cal. Rptr. 318, 320 (Cal. App. 1976) (same); *see also, e.g.*, *Valley Bank of Nevada*, 15 Cal.3d at 656-57 (despite the fact that there is no "bank-customer" privilege, individuals have a constitutional expectation of privacy over their financial information even after disclosing such information to a bank or other entity).

The County possesses the patients' private health information only because the patients gave it to the County and farmers by operation of law. Similarly, the farmers provided their financial account information to the County only because the County required them to do so in order to participate in the zip-tie program. By doing so, neither the patients nor the farmers intended to waive their privileges or interests in this confidential information.

The County's patients and farmers never expected—and would be horrified to find out—that their private and sensitive information could wind up in the peering sights of the federal government. Quashing this subpoena, on the other hand, would respect the patients' and farmers' settled and reasonable expectations of privacy.

B. The Subpoena Should Be Quashed Because Compliance Would Eviscerate The State and County's Medical-Marijuana Programs and Intrude on Vital Principles of Federalism Embodied in the Tenth Amendment.

The broad subpoena should be quashed for the additional reason that it has the effect of stripping the County of the mechanism it has chosen to enforce State law. The Tenth Amendment to the U.S. Constitution, grounded in comity between the federal government and local governments, prohibits federal action that conscripts local officials to enforce federal law against their will or that controls the manner in which local governments regulate private parties. Here, the subpoena, if upheld, would violate the Tenth Amendment by depriving the County of its methods for distinguishing conduct that does, and does not, violate state and local law.

The Tenth Amendment proscribes the federal government from "commandeering" state and local officials. *Printz v. United States*, 521 U.S. 898, 925 (1997). "The Federal Government," the Supreme Court has provided, "may neither issue directives requiring the States to address particular problems, nor command the States' officers, or those of their political

subdivisions, to administer or enforce a federal regulatory program." *Id.* at 930-31; *see also New York v. United States*, 505 U.S. 144, 162 (1991) ("While Congress has substantial powers to govern the Nation directly, including in areas of intimate concern to the States, the Constitution has never been understood to confer upon Congress the ability to require the States to govern according to Congress' instructions.").[2]

On two separate occasions, courts have invoked the Tenth Amendment to enjoin federal action that hindered the ability of state and local officials to distinguish between legal and illegal conduct. In *County of San Diego v. San Diego NORML*, 165 Cal.App. 4th 798, 827 (Cal. Ct. App. 2008), *rvw. denied* (Cal. Oct. 16, 2008), *cert. denied*, 129 S. Ct. 2380 (2009), the California Court of Appeal held that a federal prohibition on state-issued medical-marijuana identification cards would violate the federalist principles of the Tenth Amendment because the cards were the state's "mechanism [for] allowing qualified California citizens, if they so elect, to obtain a form

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[2] In *New York*, the Supreme Court described the purpose of the Tenth Amendment as follows:

> The Constitution does not protect the sovereignty of States for the benefit of the States or state governments as abstract political entities, or even for the benefit of public officials governing the States. To the contrary, the Constitution divides authority between federal and state governments for the protection of individuals. State sovereignty is not just an end in itself: Rather, federalism secures to citizens the liberties that derive from the diffusion of sovereign power.

505 U.S. at 181 (internal quotation marks omitted). *See also Bond v. United States*, -- U.S. --, 131 S. Ct. 2355, 2364 (2011) ("Federalism also protects the liberty of all persons within a State . . . . By denying any one government complete jurisdiction over all the concerns of public life, federalism protects the liberty of the individual from arbitrary power.").

Accordingly, the Supreme Court held in *Bond* that *individuals* may assert Tenth Amendment claims:

> The limitations that federalism entails are not therefore a matter of rights belonging only to the States. States are not the sole intended beneficiaries of federalism. An individual has a direct interest in objecting to laws that upset the constitutional balance between the National Government and the States . . . . Fidelity to principles of federalism is not for the States alone to vindicate.

Id. (internal citation omitted).

of identification that informs state law enforcement officers and others that they are medically exempted from the state's criminal sanctions for marijuana possession and use." The court reasoned that a deprivation of the mechanism selected by the state to distinguish activity it wishes to prosecute from activity it does not wish to prosecute effectively conscripts the state to enforce federal law, in derogation of *New York* and *Printz*. *See id.* at 827-28.

Likewise, in *Conant*, Judge Kozinski explained in a concurring opinion that the federal government's threat of revoking the DEA licenses of California physicians who recommend marijuana to their patients violates the Tenth Amendment. 309 F.3d at 645-47 (Kozinski, J., concurring). Judge Kozinski reasoned that the federal policy targeting doctors who recommend marijuana to patients deprives the state of the mechanism it has chosen to distinguish between decriminalized and criminalized drug use under state law. *Id.* at 645 (highlighting that the federal government's action "undermines the state by incapacitating the mechanism the state has chosen for separating what is legal from what is illegal under state law"). In words that Judge Kozinski borrowed from the Supreme Court, this constitutes an impermissible "attempt to 'control or influence the manner in which States regulate private parties.'" *Id.* at 646 (quoting *Reno v. Condon*, 528 U.S. 141, 150 (2000)).

Here, too, the federal subpoena violates the principles of federalism and comity embodied by the Tenth Amendment. If upheld, the subpoena would disrupt a program designed by the County to distinguish between marijuana cultivation it wishes to investigate and prosecute from that it wishes to leave alone. If the subpoena is not quashed, individual patients and farmers, concerned that the federal government would see their names and other personal information, would refuse to participate in the County's program.

The County has made a decision to conserve its scare law-enforcement resources by declining to arrest and prosecute qualified medical-marijuana patients who cultivate marijuana in accordance with California law. In furtherance of this policy, the County enacted Ordinance No. 9.31.000 *et seq.* to enable state and local law-enforcement officers to distinguish qualified medical-marijuana patient-cultivators from recreational marijuana cultivators, so the former are "not subject to criminal prosecution or sanction." *See* Cal. Health & Saf. Code § 11362.5(b)(1)(B); Cal. SB 420 § 1(b)(1). This Ordinance allows the County to alleviate the cost of marijuana prohibition in accordance with state law.

If the subpoena is upheld—prompting County residents and business to withdraw from the County's regulatory scheme—County officials will be forced to: (1) expend time and energy attempting to verify the legitimacy of marijuana cultivation under California law through other means, such as by interviewing the patient-cultivator; or (2) burden the state's criminal-justice system, contrary to state law, by citing medical-marijuana patients and cultivators, only to have the prosecutor or the court verify their status and formally dismiss the charges.[3] The federal government's compelling the expenditure of state funds and disrupting local law-enforcement regulations are precisely the type of "commandeering" forbidden by the Tenth Amendment. Accordingly, the subpoena must be quashed.

C. The Subpoena Should Be Quashed Because It Would Chill Constitutionally Protected Lobbying Activity For No Valid Purpose.

Not only would patients and farmers refuse to participate in the County's medical-marijuana programs if the County is required to comply with the subpoena, but lobbyists and

[3] Alternatively, in light of these unattractive options, state and local law-enforcement officials may simply throw their hands up in the air and decline to prosecute *any* marijuana offenses. This would hardly advance the federal regulatory scheme.

other concerned citizens would likewise steer clear of discussions with municipalities regarding medical-marijuana ordinances. Although lobbying and other productive discussions with the County concerning their medical-marijuana regulations is constitutionally protected activity, the subpoena unfortunately demands all records regarding discussions about the County's regulations. If the County is forced to comply with the subpoena, those conversations would cease immediately. This consequence is far too serious when such lobbying records are irrelevant to the federal government.

The County's medical-marijuana regulations sprung from a dialog among County officials, medical-marijuana patients, medical-marijuana farmers, and the trade associations that represent patients and farmers. These County residents worked to author and introduce sustainability standards into the County's ordinance, just as they sought to protect themselves from law-enforcement officers who otherwise may confuse their medical marijuana for black-market marijuana. The County actively worked with these individuals and groups to effectively address public health and environmental issues through its medical-marijuana regulations, exercising its broad public interest in promoting the health, safety, and welfare of its citizens. Mendocino County ultimately established a strict regulatory framework in compliance with California's medical-marijuana laws and the California Attorney General's *Guidelines for the Security and Non-Diversion of Marijuana Grown for Medical Use*.

The County successfully began bringing local marijuana cultivation by small farmers above ground by creating incentives for farmers to comply voluntarily with a myriad of laws on nonprofit operation, transparency and record-keeping (aimed at preventing the diversion of medical marijuana for non-medicinal purposes), public nuisance, fire safety, and environmental degradation. The local regulations also provided a clear method for separating state-law

compliant small farmers from their much larger unlawful counterparts and allocating local law-enforcement resources to address the larger, illegal growing of non-medical marijuana. This collaborative effort by the County, medical-marijuana patients, farmers, and trade associations has been a model for a municipality to engage with its residents and businesses to arrive at common-sense regulations that protect public health, the environment, and the County's fiscal interests.

When engaging County employees regarding proposed or codified legislation, these individuals and associations, including *amici*, were simply exercising their time-honored constitutional right to petition the government. *F.T.C. v. Superior Court Trial Lawyers Ass'n*, 493 U.S. 411, 426 (1990) (stating that an "association's efforts to . . . lobby District officials to enact favorable legislation . . . [is] fully protected by the First Amendment."). In fact, "[s]peech advocating a campaign to affect government policy is the essence of protected, political speech." *Hughes v. Region VII Area Agency on Aging*, 542 F.3d 169, 185 (6th Cir. 2008).

As if such lobbying is illegal, the government's subpoena seeks records concerning these discussions with County officials. With remarkable breadth, the subpoena demands all individuals' and entities' correspondence with the County regarding its medical-marijuana regulations. As the County notes, an entire category of responsive documents is correspondence with medical-marijuana patients, farmers, and other members of the public regarding the County's medical-marijuana program. Motion, at p. 14 (item number 5). Such dragnet demands for constitutionally protected conduct cannot be countenanced.

If the public knew that their civic engagement with the County would command the attention of the federal government, most people, including *amici*, would decline to exercise their constitutional right altogether. While this cost of the subpoena is substantial, the gain to the

government is negligible at best. The government has no need to know who has lobbied and otherwise contacted the County regarding its regulations. These documents are completely irrelevant.

Although the federal government can limit constitutionally protected lobbying in very narrow circumstances, it cannot come close to making the requisite showing here. When the cost of compliance with the subpoena is the sacrificing of core constitutional rights and the benefit is non-existent, the subpoena must be quashed.

II. THE COUNTY'S SUBPOENA DOES NOT IMPLICATE FEDERAL PREEMPTION.

Amici agree with almost the entirety of the County's thoughtful and persuasive motion to quash. The only point of disagreement is the relevance of federal preemption. Whereas the County affirmatively argues that the federal Controlled Substances Act ("CSA"), 21 U.S.C. § 801 *et. seq.*, does not preclude the quashing of the subpoena because the CSA does not preempt California's or the County's medical-marijuana laws (Motion, pp. 20-21), *amici* respectfully suggest that the Court not wade into the thicket of preemption jurisprudence because the quashing of the subpoena does not even implicate preemption.

The arguments in support of and opposition to the County's motion to quash simply do not depend on whether the CSA preempts any particular law. The parties' claims that the subpoena should (and should not) be quashed are applicable regardless of whether the CSA were to preempt state or county law. For example, patients' interests in the confidentiality of their sensitive medical information are not dependent on the validity of state or local law. Nor are *amici*'s First Amendment lobbying interests constrained by the legality of California's or the County's laws.

Counsel below have spent many years litigating the potential preemptive effect of the CSA on the State's medical-marijuana laws. *County of San Diego v. San Diego NORML*, 165 Cal.App. 4th 798 (Cal. Ct. App. 2008), *rvw. denied* (Cal. Oct. 16, 2008), *cert. denied*, 129 S. Ct. 2380 (2009); *City of Garden Grove v. Superior Court (Kha)*, 157 Cal. App. 4th 355 (Cal. Ct. App. 2007), *rvw. denied* (Cal. March 19, 2008), *cert. denied*, 555 U.S. 1044 (2008). Courts have devoted considerable resources to ascertaining the meaning of the CSA's anti-preemption provision, 21 U.S.C. § 903, finding that this provision does *not* preempt the state's regulation of medical marijuana. Those cases came as direct challenges to the constitutionality of California's medical-marijuana statutes and demands that local officials take certain actions pursuant to those statutes. Nothing about the matter *sub judice* raises those issues or requires interpretation of the CSA. Accordingly, *amici* suggest that the Court quash the subpoena without unnecessarily delving into this thorny area of constitutional law.[4]

CONCLUSION

Amici respectfully submit that this Court should grant the County's motion to quash. Forced compliance with the subpoena would be disastrous for the County's medical-marijuana patients and farmers (and their trade associations) who have in good faith sought to comply with State and County law.

[4] If the Court were inclined to issue an opinion on the constitutionality of state and local medical-marijuana laws, *amici* certainly agree with the County that the CSA does not preempt these local regulations. *Amici* further note that County Sheriff Allman on at least two occasions briefed the U.S. Attorney's Office for the Northern District of California regarding the County's medical-marijuana ordinances, and the federal government never expressed that federal law preempted the local regulations.

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Respectfully submitted,

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