ters." *Whalen v. Roe*, 429 U.S. 589 (1977). However, the interest of privacy of medical information varied with the condition and had been constitutionalized only "within narrow parameters." Historically, the courts had considered, on a case-by-case basis, whether a disease was contagious or attributed in any way to "socially repugnant conduct." The Second Circuit declined to add fibromyalgia to the list of protected conditions, as it was not a disease that was fatal or resulted in "profound psychiatric disorder." The court also focused its analysis on whether revealing one's condition would expose a person "not to understanding or compassion but to discrimination and intolerance." For fibromyalgia, there was no evidence of social discrimination or intolerance against people with the disease. Matson also claimed that the defendants disclosed her private medical information for the purpose of embarrassing and humiliating her, and it prevented her being employed in the teaching sector again. The court disagreed. The SCI had been given specific authority to issue reports of investigations that would be in the interest of the school district. In the year Matson's report was issued, the SCI publicly released ten other reports. Moreover, there was no evidence that Matson was precluded from finding employment (the Scandia Symphony website had rave reviews about her work). Because Matson's complaint offered no allegations of societal or actual discrimination, hostility, or intolerance based upon her diagnosis, the court affirmed the dismissal of the action. *Matson v. Board of Educ. of City School Dist. of New York*, 631 F.3d 57 (2d Cir. 2011).

Ordinance Banning Recruiting Invalid

Two California cities, Arcata and Eureka, passed basically identical "Youth Protection Acts," being ordinances that prohibited agents or employees of the federal government from engaging in military recruitment activities targeting minors. The ordinances were proposed in response to alleged violations of laws governing military recruitment — specifically, that recruiters targeted "teens through ad campaigns, mailings, telephone calls, email, and direct personal contact. They promote[d] enlistment by glorifying military service and exaggerating the educational and career benefits, while ignoring the dangers." The ordinances purported to bar the federal government from "recruit[ing], initiat[ing] contact with for the purpose of recruiting, or promot[ing] the future enlistment of any person under the age of eighteen into any branch of the United States Armed Forces" and subjected military recruiters to civil penalties for infractions. However, the ordinances exempted "individuals who are not employed by or agents of the U.S. government" from these restrictions. Both cities expressed an intent to enforce their ordinances against the federal government. In response, the federal government sued to bar enforcement on the basis that the ordinances were invalid under the Supremacy Clause of the U.S. Constitution. It asserted that the laws were preempted by federal law, and violated the doctrine of intergovernmental immunity because they directly regulated and discriminated against the federal government.

The district court agreed and granted the federal government's motion, finding the ordinances sought "to subject the conduct of the federal government directly to local government control," thereby violating the doctrine of intergovernmental immunity. It declared the ordinances invalid and permanently enjoined the two cities from enforcing them. The cities appealed, raising, for the first time, the district court's subject matter jurisdiction, arguing that the government failed to satisfy the "injury in fact" requirement for Article III standing; second, that because the government's complaint presented only a federal defense and not a federal claim, the government misused the Declaratory Judgment Act to try to establish federal question jurisdiction where it did not exist.

The U.S. Court of Appeals for the Ninth Circuit affirmed, finding the ordinances were unconstitutional. The government had established Article III standing, as it faced an "imminent adverse impact." It was "the sole target of the challenged [municipal] action," as enforced by civil penalties, and it was undisputed that the cities intended to and would enforce the ordinances if they were upheld. The federal government was not misusing the Declaratory Judgment Act to manufacture a federal claim, as Congress had, by statute, provided the district courts with original jurisdiction over "all civil actions, suits or proceedings commenced by the United States," and the government's complaint posed a federal question in its own right.

On the merits, the district court correctly held that the ordinances violated intergovernmental immunity — by constraining the conduct of federal agents and employees, the ordinances sought to regulate the government directly; further, they discriminated against the United States by specifically targeting and restricting its recruiters. The cities' Tenth Amendment defense (that the ordinances represented a valid exercise of their general police powers) was rejected because regulating the federal government's military recruitment efforts was not a power reserved to the states. The Ninth Circuit found it unnecessary in the circumstances to address the preemption argument. *U.S. v. City of Arcata*, 629 F.3d 986 (9th Cir. 2010).

Code Enforcement

Preemption and Medical Marijuana Dispensaries

California voters enacted Proposition 215, which legalized the right to obtain and use marijuana for medical purposes. In 2003, California added another law, this time for the purpose of promoting the "uniform and consistent application of [Proposition 215] among the counties." In 2006, Los Angeles County adopted a number of ordinances regulating the operation of medical marijuana dispensaries (MMDs). The laws required a MMD to obtain a conditional use permit, to locate outside a 1,000-foot radius of schools, playgrounds, parks, libraries, places of worship, child-care facilities and youth facilities. Any MMD not in compliance would be deemed a public nuisance.

Martin Hill and others allegedly operated a MMD without having obtained a business license, a conditional use permit, and a zoning variance to allow its operation within 1,000 feet of a public library. The County brought

continued on page 34