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

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a nuisance action against them. The defendants did not deny they were not in compliance with the local requirements, but argued that these were preempted by state law, or, in the alternative, violated the purpose of the 2003 law requiring the "consistent application" of Proposition 215 among the counties.

The California Court of Appeal, Second Appellate District, disagreed. The first proposition of the defendants, that the local law was totally preempted under California law, was quickly dismissed. The California Constitution provided that a locality "may make and enforce within its limits all local, police, sanitary and other ordinances and regulations not in conflict with its general laws." In this case, while there were two substantive state laws regarding MMD regulation, the state law expressly stated that "[n]othing in this [state law] shall prevent a city or other local governing body from adopting or enforcing laws consistent with this article."

On the next argument, that the local law was incompatible with the state law enacted to "promote uniform and consistent application of [Proposition 215]," and that localities could only enact laws with the same limitations as those set by state law, the court likewise disagreed. The California Legislature included an express statement in the 2003 MMD law that "[n]othing in this section shall prohibit a [county] from adopting ordinances or policies that further restrict the location or establishment of a [MMD]." The defendants also claimed that the permit application fee for a conditional use permit was unreasonable. However, the court found no evidence that the County charged a higher fee to MMDs than it did to other businesses, or that the fee was unreasonable.

Similarly, there was no evidence that the County's zoning restrictions made it impossible for a MMD to exist in the County without being in violation of the distance requirement, or exist only in a remote and unreasonably inconvenient location. The County provided evidence showing commercial zones where MMDs could locate, and these zones contained liquor stores, bars, car washes, pet-grooming businesses, and theaters. This evidence refuted the claim that MMDs were zoned with a purpose of relegating them to remote and commercially infeasible areas.

Finally, the defendants contended that the County's MMD laws violated the equal protection clause of the California Constitution by not allowing MMDs to operate in the same zones as pharmacies. The California Constitution's equal protection clauses contemplated that entities "similarly situated with respect to the legitimate purpose of the laws receive like treatment." In this case, however, the court ruled that MMDs and pharmacies were not similarly situated because marijuana remained illegal under federal law. Accordingly, the court affirmed the lower court's order granting the County's motion for a preliminary injunction. *County of Los Angeles v. Hill*, 192 Cal. App. 4th 861 (Cal. Ct. App. 2011).

First Amendment

Retaliation for Speech: Non-Employee Contractor

Richard Clairmont was employed by Sound Mental Health (SMH), a private company that provided treatment and counseling for domestic violence perpetrators as an independent contractor for the Seattle Municipal Court. It was included as a "certified treatment provider" in a list distributed, by the Seattle Municipal Court, to pretrial and convicted defendants. Clairmont was subpoenaed to testify as an expert witness in a hearing on behalf of a defendant enrolled in a treatment program with a different organization. Shortly after, Clairmont was fired due to his testimony. He was informed by SMH that public employees from the City of Seattle Domestic Violence Probation Officers Unit (Unit) were present when he testified and found that the content of his testimony led to an irrevocable loss of "trust in the integrity of the program." The Unit responded with a stop of all referrals, beginning immediately. SMH said it had no option but to terminate Clairmont.

Clairmont filed suit against SMH and the Unit Manager under Section 1983, alleging that he was terminated by SMH in violation of his First Amendment right to free speech. The district court analyzed the issue as if Clairmont himself was a public employee. It concluded that his testimony was not protected speech because it was not on a matter of public concern, and was of such "minimal value" that it was outweighed by the Unit's interests in addressing victim safety and civil liability. It also granted qualified immunity to the Manager.

The U.S. Court of Appeals for the Ninth Circuit reversed and remanded, first addressing the Manager's contention that she could not have violated Clairmont's First Amendment rights because she did not have any governmental authority over him (she could not hire or fire him). The court disagreed, stating that the "factual record could reasonably support a finding that the [Manager] threatened SMH with the possibility that the Unit would stop referring defendants to SMH unless SMH fired him." The court next addressed whether Clairmont should be considered as a public employee or a private citizen. "An independent contractor who provides services to the government is generally treated like a public employee for purposes of determining whether the contractor has alleged a violation of First Amendment rights." *Bd. of Cnty. Comm'rs.v. Umbehr*, 518 U.S. 668, 673-74 (1996). Despite the fact that Clairmont was not directly the City's independent contractor, given the nature of the relationship between the municipal court and SMH, the nature of the services provided by SMH, and Clairmont's role in the provision of such services, the Ninth Circuit concluded that his relationship with the Municipal Court was analogous to that of an employee and employer.

The court analyzed the speech under the balancing test in *Pickering v. Bd. of Educ.*, 391 U.S. 563 (1968), and found in favor of the plaintiff. Clairmont's testimony revolved around "ways in which treatment programs treat charged and convicted domestic violence offenders, which ultimately implicate[d] the Municipal Court's attempts ...to protect victims of domestic violence — unquestionably a matter of public concern." Lastly, the court affirmed the denial of qualified immunity to the Manager. Although there was no preexisting case law that was "closely analogous" for