No. _____

In The Supreme Court of the United States

PROGRAM ADMINISTRATOR OF THE NEW HAMPSHIRE CONTROLLED DRUG PRESCRIPTION HEALTH AND SAFETY PROGRAM,

Petitioner,

v.

UNITED STATES DEPARTMENT OF JUSTICE,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

PETITION FOR A WRIT OF CERTIORARI

JOHN M. FORMELLA
Attorney General

ANTHONY J. GALDIERI*
Solicitor General

LAURA E.B. LOMBARDI
Senior Assistant Attorney General

NEW HAMPSHIRE DEPARTMENT OF JUSTICE
33 Capitol Street
Concord, NH 03301
(603) 271-3658
anthony.j.galdieri@doj.nh.gov
laura.e.lombardi@doj.nh.gov

*Counsel of Record

July 13, 2022

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

QUESTIONS PRESENTED

The United States Drug Enforcement Administration (DEA) issued an administrative investigative subpoena to the Program Manager for New Hampshire's Prescription Drug Monitoring Program under 21 U.S.C. §876. The subpoena commanded her to use her official state position to obtain state-collected prescription drug data about an individual from a state-owned and -controlled healthcare program database and deliver it to the DEA. New Hampshire law permits the program administrator to provide such information to law enforcement only "when presented with a court order based on probable cause," N.H. Rev. Stat. §126-A:93, I(b)(3), a quality the DEA subpoena lacks. Violating this state law is a class B felony. N.H. Rev. Stat. §126-A:94, VII. The Program Manager objected to the subpoena. The United States Department of Justice filed an action to compel compliance under 21 U.S.C. §876(c).

The questions presented are:

1. Whether an administrative investigative subpoena issued under 21 U.S.C. §876 to a state official commanding her to act in her official capacity to obtain state data from a state-owned and -controlled healthcare program and deliver it to the DEA in violation of state criminal law is a subpoena issued to the State.

2. Whether the States, their agencies, and their officials in their official capacities are "persons" under 21 U.S.C. §876(c).

PARTIES TO THE PROCEEDINGS

The Petitioner is the Program Administrator of the New Hampshire Controlled Drug Prescription Health and Safety Program.[1]

The Respondent is the United States Department of Justice.

LIST OF DIRECTLY RELATED PROCEEDINGS

United States Department of Justice v. Michelle Ricco Jonas, No. 19-1243, 24 F.4th 718 (1st Cir. Jan. 27, 2022).

[1] The administrative investigative subpoena in this case is addressed "TO: Michelle Ricco Jonas, Program Manager for the NH PDMP." ECF Docket 1:18-mc-00056, Doc. 1-3 (Filed 08/08/18) (D.N.H.). App. 156. The title of Program Manager was an administrative title given to the person who now occupies the position of "Program Administrator" as reflected in current state law. N.H. Rev. Stat. §§126-A:91, :93; *see also* App. 159.

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INTRODUCTION

In a statute entirely predicated on cooperative federalism, the federal government claims to have found the authority to force state officials to remove confidential, state-collected prescription drug information from a state healthcare program and provide it to the Drug Enforcement Administration (DEA) in violation of state law. These federal directives take the form of administrative investigative subpoenas issued under 21 U.S.C. §876 of the Controlled Substances Act (CSA), a statutory provision that makes no reference to the States as contemplated subpoena targets, 21 U.S.C. §876(b), and that permits enforcement of subpoenas only against "persons," 21 U.S.C. §876(c), a term the CSA does not define.

The text of the CSA contemplates a significantly different relationship with the States and directly addresses how the federal government must interact with them in administering the Act. The Congressional command is unambiguous: "The Attorney General shall cooperate with local, State, tribal, and Federal agencies concerning traffic in controlled substances and in suppressing the abuse of controlled substances." 21 U.S.C. §873(a). The ways in which the Attorney General is empowered to cooperate with the States under 21 U.S.C. §873(a) bear no resemblance to the type of forced compliance an administrative investigative subpoena presents.

Nonetheless, the court of appeals held that an administrative investigative subpoena commanding a

state official to use her official position to obtain protected state data from a state healthcare program database and deliver it to the DEA in violation of state criminal law is not a subpoena really issued to the State. It also alternatively held that, even if such a subpoena were really issued to the State, the States, their agencies, and their officials in their official capacities are "persons" under 21 U.S.C. §876(c). Those holdings are not only incorrect under this Court's precedents, but they also raise serious federalism and constitutional concerns.

The purpose of issuing 21 U.S.C. §876 subpoenas to state prescription drug monitoring programs is to impress a state official into federal service by requiring that state official to query the program's database for state-collected, patient-specific information and provide it to the DEA to assist it in carrying out its federal regulatory functions. The effect of such a subpoena is to convert a state healthcare program into a federal law enforcement tool capable of being queried by the federal government on demand. This outcome conflicts with this Court's anticommandeering precedents, undermines an important state healthcare program, and strips state legislatures of their sovereign authority to place sensible, probable-cause-based privacy protections around state databases that aggregate information about their citizens.

As a co-sovereign regulator and enforcer in the area of controlled drugs, New Hampshire is entitled to control its own state officials and to make its own policy decisions with respect to its own databases.

Nothing in 21 U.S.C. §876 purports to deprive the States of that sovereign authority and, in the absence of unmistakably clear statutory language to that effect, 21 U.S.C. §876 should not be interpreted to deprive the States of that sovereign authority. Accordingly, this Court should grant this petition to hear and address the important federal issues it raises.

OPINIONS BELOW

The court of appeals' order granting the petitioner's motion to stay the mandate and entry of final judgment pending petition for certiorari is unreported. App. 1-2. The court of appeals' order denying the petitioner's petition for rehearing en banc is unreported. App. 71-72. The court of appeals' order affirming the district court is reported at 24 F.4th 718. App. 3-47. The district court's order approving the magistrate's report and recommendation is unpublished, but available at 2019 WL 251246. App. 51. The court of appeals' order staying the district court's judgment pending appeal is unreported. App. 49. The recommendation of the magistrate for the United States District Court for the District of New Hampshire is unpublished, but available at 2018 WL 6718579. App. 52-70.

JURISDICTION

The court of appeals entered judgment on January 27, 2022. App. 48. The petitioner timely petitioned for

rehearing en banc on March 14, 2022. The court of appeals denied that petition on April 15, 2022. App. 71-72. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

The pertinent statutory provisions relied upon herein are reproduced in the appendix to this petition. App. 73-155.

STATEMENT

I. NEW HAMPSHIRE'S CONTROLLED DRUG PRESCRIPTION HEALTH AND SAFETY PROGRAM

New Hampshire's Controlled Drug Prescription Health and Safety Program, also referred to as the New Hampshire Prescription Drug Monitoring Program (PDMP), is a state-created, -maintained, and -controlled database—a healthcare measure designed to "facilitate the confidential sharing of information relating to the prescribing and dispensing of schedule II-IV controlled substances, by prescribers and dispensers within the state." N.H. Rev. Stat. §126-A:90, I. It is operated and controlled by the New Hampshire Department of Health and Human Services. N.H. Rev. Stat. §126-A:89, IV; *id.* §126-A:90, I.[2]

[2] When this litigation began, the PDMP was operated and controlled by the New Hampshire Pharmacy Board and the

Individuals do not voluntarily provide their prescription drug information to the PDMP or otherwise consent to its inclusion in the database. Instead, New Hampshire law requires all of its licensed dispensers to input schedule II-IV prescription drug information into the PDMP database when a prescription is filled. N.H. Rev. Stat. §126-A:91, V-VII. The only way patients can avoid having their prescriptions entered into the PDMP database is to forgo schedule II-IV prescription drugs.

The information contained in the PDMP is "confidential," "is not a public record," is not subject to disclosure under New Hampshire's Access to Governmental Records Law, N.H. Rev. Stat. ch. 91-A, and "is not subject to discovery, subpoena, or other means of legal compulsion for release and shall not be shared with an agency or institution, except as provided in this subdivision." N.H. Rev. Stat. §126-A:92, I. The program administrator, formerly known as the program manager, may provide PDMP information to "[a]uthorized law enforcement officials on a case-by-case basis for the purpose of investigation and prosecution of a criminal offense when presented with a court order based on probable cause." N.H. Rev. Stat. §126-A:93, I(b)(3). Otherwise, "[n]o law enforcement agency or

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statutes regarding the PDMP were found at N.H. Rev. Stat. §§318-B:31-:38. The PDMP was transferred to the Office of Professional Licensure and Certification and subsequently transferred to the New Hampshire Department of Health and Human Services. The statutes regarding the PDMP are now found at N.H. Rev. Stat. §§126-A:89-:97. N.H. Laws 2021, Chapter 91, §§91:45-:46.

official shall have direct access to query the program information." *Id.* Releasing information to law enforcement without a court order based on probable cause is a state-law class B felony. N.H. Rev. Stat. §126-A:94, VII.

II. FACTS AND PROCEDURAL HISTORY

The DEA issued an administrative investigative subpoena to Michelle Ricco Jonas, in her capacity as the then-Program Manager for the PDMP,[3] under 21 U.S.C. §876, a provision of the Controlled Substances Act. The subpoena commanded her to use her official state position to access the state PDMP database, remove information on schedule II-IV controlled drug therapies prescribed to a specific individual, and provide that information to the DEA, App. 156-58, 160-61, without a probable-cause-based court order, N.H. Rev. Stat. §126-A:93, I(b)(3), in violation of state criminal law, N.H. Rev. Stat. §126-A:94, VII. The Program Manager, through the New Hampshire Attorney General's Office, resisted the subpoena on the ground that New Hampshire was the real target of the subpoena and that the Program Manager, a state official commanded to act in her official capacity, was not a "person" under

[3] Ms. Ricco Jonas resigned her position as Program Manager effective April 8, 2021. *See* ECF Docket No. 19-1243, *Notice* (filed 7/28/2022) (1st Cir.). Because the administrative investigative subpoena was issued to Ms. Ricco Jonas in her official capacity as Program Manager of the PDMP, the State considers the subpoena live and operative as to the current Program Administrator of the PDMP.

21 U.S.C. §876(c) against whom such a subpoena could lawfully be enforced as a matter of statutory construction.

The United States Department of Justice (USDOJ) filed an action to enforce the subpoena under 21 U.S.C. §876(c). The Program Manager, through the New Hampshire Attorney General's Office, defended the action, asserting that: (1) New Hampshire was the real target of the subpoena and the States, their agencies, and their officials acting in their official capacities are not "persons" under 21 U.S.C. §876(c) as a matter of statutory construction; and (2) patients have a reasonable expectation of privacy in their PDMP-kept prescription drug data that, under the Fourth Amendment, the DEA cannot obtain absent a warrant.

The Magistrate issued a Report and Recommendation recommending that the district court judge grant the DOJ's petition to compel. App. 52-70. The Magistrate did not address the threshold statutory construction issue of whether the States, their agencies, or their officials in their official capacities were "persons" under 21 U.S.C. §876(c) deeming that question "irrelevant." App. 60, 64 n.5. Instead, the Magistrate found that the DEA's investigation had a legitimate authorized purpose, that the action to enforce the administrative investigative subpoena under 21 U.S.C. §876(c) was not a suit against the State for Eleventh Amendment purposes, that 21 U.S.C. §876 preempted New Hampshire's probable cause requirement, and that the Fourth Amendment did not impede

the Attorney General's ability to obtain patient-specific state PDMP data with an administrative investigative subpoena. App. 52-70.

The district court summarily approved the Report and Recommendation. App. 51. After the Petitioner timely appealed, the court of appeals entered a stay of the district court's judgment. App. 49-50.

The court of appeals affirmed the district court. App. 3-47. The court of appeals held that the administrative investigative subpoena was not issued to the State and that the enforcement proceeding against the Program Manager was not a suit against the State. App. 15-20. Citing cases where the Eleventh Amendment had been raised as a defense to enforcement, the court of appeals reasoned that "courts have validated the service of process to state officers for the production of documents or objects in their possession or control as persons independent of the states, and regardless of whether the states elect to defend on behalf of their officers." App. 17.

Alternatively, the court of appeals held that, even if the subpoena "were really issued to the State," the challenge "would still fail because . . . states, their agencies, and their officials in their official capacities are 'persons' within the meaning of 21 U.S.C. §876(c) against whom subpoenas may be enforced." App. 20. In reaching this conclusion, the court of appeals recognized that the CSA does not define the word "person" and therefore this Court's longstanding interpretive presumption that "person" does not include the

sovereign applies. App. 21-22. The court of appeals found the presumption overcome principally by: (i) 21 U.S.C. §876(a), which describes the types of items an administrative investigative subpoena may reach; (ii) legislative history related to 21 U.S.C. §876's predecessor that makes no mention of including the States, their agencies, and their officials in their official capacities within the scope of the administrative investigative subpoena power contained in 21 U.S.C. §876; and (iii) the goals and purposes of the CSA generally to enhance federal drug enforcement powers and strengthen federal law enforcement tools for that purpose. App. 20-31.

Finally, the court of appeals found that a person cannot claim an objectively reasonable expectation of privacy in his prescription drug records included in the PDMP database because of the closely regulated nature of the pharmaceutical industry and the third-party doctrine. App. 31-47.

REASONS FOR GRANTING THE PETITION

The Court should grant this petition because it involves questions of exceptional importance to the States. The court of appeals' decision not only incorrectly applies this Court's precedents, it permits the federal government to commandeer state PDMP officials, force them to plunder state PDMP databases for patient-specific protected health information, and relinquish that information to the DEA in violation of

state criminal law in order to help the DEA carry out its federal regulatory functions. This conduct seriously impairs New Hampshire's Controlled Drug Prescription Health and Safety Program. It also deprives New Hampshire of its sovereign authority to control its own officials and enact sensible, probable-cause-based policy measures designed to limit law enforcement access to state databases like the PDMP consistent with constitutional norms. This petition therefore presents questions of exceptional importance worthy of this Court's review notwithstanding the lack of any circuit split. Sup. Ct. R. 10(c).

I. Contrary to the court of appeals, the State of New Hampshire is the real target of the administrative investigative subpoena and is the real party in interest with respect to it.

The administrative investigative subpoena in this case seeks state records by commanding a state official to act in her official capacity to extract them from a state PDMP healthcare program and deliver them to the DEA in violation of state criminal law. This Court has long held that state officials acting in their official capacities act as the State. *See*, *e.g.*, *Printz v. United States*, 521 U.S. 898, 930-31 (1997); *Will v. Michigan Dept. of State Police*, 491 U.S. 58, 71 (1989). This Court has similarly held that federal directives issued to state officials commanding them to act in their official capacities constitute directives issued to the State itself. *Printz*, 521 U.S. at 931.

The administrative investigative subpoena issued under 21 U.S.C. §876 is a federal directive commanding a state official, the Program Administrator, to use his or her official position with the State to obtain state aggregated data about a specific patient from a state-owned and -controlled healthcare program and to deliver it to the DEA in violation of state criminal law. It is therefore no different than an administrative investigative subpoena issued to the State itself.

In reaching a contrary conclusion, the court of appeals incorrectly relied upon this Court's plurality decision in *Florida Department of State v. Treasure Salvors, Inc.*, 458 U.S. 670 (1982). In *Treasure Salvors, Inc.*, the question presented was, "Whether the Eleventh Amendment to the United States Constitution bars an in rem admiralty action seeking to recover property owned by a state." 458 U.S. at 683. Critical to the plurality's decision was that the state officials involved were acting beyond the authority conferred upon them by state law and, therefore, not as the State. *See id.* at 696 ("As recognized in *Larson* [*v. Domestic and Foreign Commerce Corp.*, 337 U.S. 682 (1949)], 'action of an officer of the sovereign . . . ' that is beyond the officer's statutory authority is not action of the sovereign."). Consequently, because the state officials "d[id] not have a colorable claim to possession of the artifacts" in that case, they could "not invoke the Eleventh Amendment to block execution of the warrant of arrest." *Id.* at 697.

In this case, the Program Administrator has always acted in accordance with state law and has not

acted beyond any state law authority. The Program Administrator not only has a right to have access to and possession of state PDMP data in his or her official capacity, but also has a colorable statutory construction claim that the Attorney General cannot compel her to provide that state data to him pursuant to an administrative investigative subpoena issued under 21 U.S.C. §876. This case is not an in rem admiralty action like *Treasure Salvors, Inc.*, and the Program Administrator has not asserted that the Eleventh Amendment bars this action. The Program Administrator's argument in this case has always focused on the "logically antecedent" statutory construction question: whether the term "person" as used in 21 U.S.C. §876(c) includes the States, their agencies, and their officials in their official capacities. *Vt. Agency of Nat. Res. v. United States ex rel. Stevens*, 529 U.S. 765, 779 (2000). If Congress did not intend the term "person" as used in 21 U.S.C. §876(c) to include the States, their agencies, and their officials in their official capacities, then the instant DEA subpoena lacks authority and may not be judicially enforced.

The principles that undergird the plurality decision in *Treasure Salvors, Inc.*, derive from *Ex parte Young*, 209 U.S. 123 (1908), and, to the extent they apply at all, support the Program Administrator's position. The *Ex parte Young* doctrine applies in the context of Eleventh Amendment immunity and permits federal courts to vindicate federal rights by commanding "a state official to do nothing more than refrain from violating federal law." *Virginia Office for Protection &*

Advocacy v. Stewart, 563 U.S. 247, 254-55 (2011). "The doctrine is limited to that precise situation, and does not apply 'when the state is the real, substantial party in interest.'" *Id.* at 255 (quoting *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 101 n.11 (1984)). The sovereign is the real, substantial party in interest when the "'relief sought nominally against an officer is in fact against the sovereign if the decree would operate against the latter.'" *Pennhurst*, 465 U.S. at 101 (quoting *Hawaii v. Gordon*, 373 U.S. 57, 58 (1963)). Where the relief requested would require a state official's "affirmative action," "affect the public administration" of a state agency, and cause "the disposition of property" belonging to the State, the State is the real, substantial party in interest. *Cf. Hawaii*, 373 U.S. at 58.

The administrative investigative subpoena will require the Program Administrator to take affirmative action that will adversely affect the public administration of an important state healthcare program and will require a state official to deliver state data to the DEA in violation of state criminal law. The relief sought nominally against the Program Administrator will, in fact, operate against the State forcing it to act contrary to its own governing law. The State is, therefore, the real, substantial party in interest.

The district court cases cited by the court of appeals involving criminal and civil discovery subpoenas are also inapposite. The Petitioner explained below that administrative investigatory subpoenas differ from discovery subpoenas and that their "enforcement is dependent upon the interpretation of statutory

authority." *E.E.O.C. v. Deer Valley Unified Sch. Dist.*, 968 F.2d 904, 906 (9th Cir. 1992); *see* Fed. R. Civ. P. 45, advisory committee notes ("This rule applies to subpoenas ad testificandum and duces tecum issued by the district courts for attendance at a hearing or a trial, or to take depositions. It does not apply to the enforcement of subpoenas issued by administrative officers and commissions pursuant to statutory authority. The enforcement of such subpoenas by the district courts is regulated by appropriate statutes.").

A federal court cannot bypass the threshold statutory construction question of whether Congress has authorized administrative investigative subpoenas against the States, their agencies, and their officials in their official capacities under a specific federal statute simply by likening such subpoenas to discovery subpoenas or other types of compulsory process issued under the Federal Rules of Civil or Criminal Procedure or other authorities. The court of appeals erred in concluding otherwise.

II. Contrary to the court of appeals, the States, their agencies, and their officials in their official capacities are not "persons" under 21 U.S.C. §876(c).

Whether the States, their agencies, and their officials acting in their official capacities are "persons" within the meaning of 21 U.S.C. §876(c) is a question of exceptional importance to the States. The answer controls whether and to what extent a state may adopt

a PDMP and other similar healthcare programs for the benefit of its citizens, while simultaneously protecting its citizens' privacy interests in the state-aggregated information contained within them.

The text and structure of 21 U.S.C. §876 and the CSA generally reveal that the States are not "persons" under 21 U.S.C. §876(c). "Enacted in 1970 with the main objectives of combating drug abuse and controlling the legitimate and illegitimate traffic in controlled substances, the CSA creates a comprehensive, closed regulatory regime criminalizing the unauthorized manufacture, distribution, dispensing, and possession of substances classified in any of the Act's five schedules." *Gonzales v. Oregon*, 546 U.S. 243, 250 (2006). Title II, in which 21 U.S.C. §876 exists, "repealed most of the earlier antidrug laws in favor of a comprehensive regime to combat the international and interstate traffic in illicit drugs." *Gonzales v. Raich*, 545 U.S. 1, 12 (2005). "The main objectives of the CSA were to conquer drug abuse and to control the legitimate and illegitimate traffic in controlled substances." *Id.*

The CSA treats certain sovereign entities (local, State, tribal, and Federal agencies) as collaborative partners with whom the Attorney General "shall cooperate . . . concerning traffic in controlled substances and in suppressing the abuse of controlled substances," 21 U.S.C. §873(a), and "explicitly contemplates a role for the States in regulating controlled substances." *Oregon*, 546 U.S. at 251.

The CSA does not define the term "person." This Court therefore applies a "longstanding interpretive presumption that 'person' does not include the sovereign." *Return Mail, Inc. v. United States Postal Service*, __ U.S. __, 139 S. Ct. 1853, 1861-62 (2019). "This presumption reflects 'common usage.'" *Id.* at 1862 (quoting *United States v. Mine Workers*, 330 U.S. 258, 275 (1947)). "It is also an express directive from Congress: The Dictionary Act has since 1947 provided the definition of 'person' that courts use '[i]n determining the meaning of any Act of Congress, unless context indicates otherwise.'" *Id.* (quoting 1 U.S.C. §1). "The [Dictionary] Act provides that the word 'person . . . include[s] corporations, companies, associations, firms partnerships, societies, and joint stock companies, as well as individuals.'" *Id.* (quoting 1 U.S.C. §1).

While the presumption is not a "hard and fast rule of exclusion," *United States v. Cooper Corp.*, 312 U.S. 600, 604-05 (1941), it "may be disregarded only upon some affirmative showing of statutory intent to the contrary." *Vt. Agency of Nat. Res*, 529 U.S. at 781. This affirmative showing must reveal "'an intent . . . to bring state or nation within the scope of the law.'" *Int'l Primate Protection League v. Administrators of Tulane Educational Fund*, 500 U.S. 72, 83 (1991) (quoting *Cooper Corp.*, 312 U.S. at 605).

This Court "has been especially reluctant to read 'person' to mean sovereign where . . . such a reading is 'decidedly awkward.'" *Int'l Primate Protection League*, 500 U.S. at 83 (quoting *Will*, 491 U.S. at 64). Also, the longstanding interpretive presumption applies equally

to the States and their officials in their official capacities to avoid the circumvention of congressional intent through mere naming conventions. *Will*, 491 U.S. at 71. Finally, the presumption operates to help avoid the "difficult constitutional question[s]" that arise when trying to make federal statutes applicable to the States. *Vt. Agency of Nat. Res.*, 529 U.S. at 787.

The text and structure of 21 U.S.C. §876 reveal no affirmative intent to bring the States, their agencies, and their officials in their official capacities within the administrative investigative subpoena power of the Attorney General. 21 U.S.C. §876(a) addresses the kinds of records and testimony the Attorney General may subpoena. 21 U.S.C. §876(b) identifies the contemplated targets of administrative investigative subpoenas for service of process purposes: "natural person[s]" and "domestic or foreign corporation[s]," "partnership[s]," or "other unincorporated association[s] which [are] subject to suit under a common name." This list of contemplated subpoena targets resembles closely the definition of "person" under 1 U.S.C. §1 and, like 1 U.S.C. §1, makes no mention of sovereign entities.

21 U.S.C. §876(c) authorizes enforcement of administrative investigative subpoenas only against "persons" and refers to a "subpenaed person" as "an inhabitant," "he," one who "carries on business," and one who "may be found." States are not inhabitants, they do not carry on business in the traditional sense, and they are not found within a jurisdiction. Construing the term "person" in this context to include the States

and their agencies is therefore "decidedly awkward." *Int'l Primate Protection League*, 500 U.S. at 83.

The administrative and enforcement provisions contained in 21 U.S.C. §§871-890 reinforce this conclusion. 21 U.S.C. §873 specifically addresses how the Attorney General "shall" engage with other sovereigns in administering the CSA. The relationship contemplated is one of cooperation, not coercion. 21 U.S.C. §873(a) states that "[t]he Attorney General shall cooperate with local, State, tribal, and Federal agencies concerning traffic in controlled substances and in suppressing the abuse of controlled substances." 21 U.S.C. §873(a). "To this end," the Attorney General is empowered to:

> (1) arrange for the exchange of information between governmental officials concerning the use and abuse of controlled substances;
>
> (2) cooperate in the institution and prosecution of cases in the courts of the United States and before the licensing boards and courts of the several States;
>
> (3) conduct training programs on controlled substance law enforcement for local, State, tribal, and Federal personnel;
>
> (4) maintain in the Department of Justice a unit which will accept, catalog, file, and otherwise utilize all information and statistics, including records of controlled substance abusers and other controlled substance law offenders, which may be received from Federal, State, tribal, and local agencies, and

make such information available for Federal, State, tribal, and local law enforcement purposes;

(5) conduct programs of eradication aimed at destroying wild or illicit growth of plant species from which controlled substances may be extracted;

(6) assist State, tribal, and local governments in suppressing the diversion of controlled substances from legitimate medical, scientific, and commercial channels by—

(A) making periodic assessments of the capabilities of State, tribal, and local governments to adequately control the diversion of controlled substances;

(B) providing advice and counsel to State, tribal, and local governments on the methods by which such governments may strengthen their controls against diversion; and

(C) establishing cooperative investigative efforts to control diversion; and

(7) notwithstanding any other provision of law, enter into contractual agreements with State, tribal, and local law enforcement agencies to provide for cooperative enforcement and regulatory activities under this chapter.

21 U.S.C. §873(a)(1-7).

A holistic review of the administrative and enforcement provisions of 21 U.S.C. §§871-890 yields

several important observations. First, Congress has established how the Attorney General must interact with the States in carrying out the CSA in 21 U.S.C. §873. That interaction is one of cooperation. Second, Congress passed administrative and enforcement provisions designed to further and enhance those federal-state cooperative efforts. *See*, *e.g.*, 21 U.S.C. §§878, 882, 885(d). Third, Congress expressly references the States and their officials when it intends to affect them directly. *See*, *e.g.*, 21 U.S.C. §§872(a)(1) (referencing "local, State, tribal, and Federal personnel"), 872a (referencing State, tribal, and local law enforcement and regulatory agencies), 873 (referencing "local, State, tribal, and Federal agencies"), 878 (referencing "State, tribal, or local law enforcement"), 885(d) (referencing "any duly authorized officer of any State").

Provisions beyond 21 U.S.C. §§871-890 similarly show that when Congress intends to affect the States, their agencies, or their officials, it references them expressly and directly. *See*, *e.g.*, 21 U.S.C. §§802(26) (defining the term "State"), 822a(a)(1) (defining the term "covered entity" for purposes of that section only to include "a State, local, or tribal law enforcement agency"), 832(c) (requiring the Attorney General to coordinate with the States). 21 U.S.C. §832 in particular requires the Attorney General to create a centralized database for collecting reports of suspicious orders. 21 U.S.C. §832(b)(1). It requires the Attorney General to share the information it acquires with the States. 21 U.S.C. §832(c). It also requires the Attorney General to "coordinate with States to ensure that the Attorney

General has access to information, *as permitted under State law*, possessed by the States relating to prescriptions for controlled substances that will assist in enforcing Federal law." (emphasis added). This statute specifically contemplates that state law may not permit the Attorney General to access information possessed by the States relating to prescriptions for controlled substances.

Accordingly, the text and structure of the CSA and 21 U.S.C. §876 do not reveal an affirmative intent to bring the States within the meaning of the term "person" in 21 U.S.C. §876(c). They suggest, in fact, the opposite—that Congress had no intent to bring the States, their agencies, and their officials acting in their official capacities within the meaning of the term "person" in 21 U.S.C. §876(c), but instead viewed the States as co-sovereign regulators and enforcers with which the Attorney General must cooperate.

In concluding otherwise, the court of appeals did not analyze the text or structure of the CSA to try to make the affirmative showing of Congressional intent necessary to bring the States, their agencies, and their officials within the meaning of the term "person" in 21 U.S.C. §876. Instead, the court of appeals rested its analysis on the broad, general wording of 21 U.S.C. §876(a), broad, non-specific legislative history related to 21 U.S.C. §876, and the general goals and purposes of the CSA. None of those items is sufficient individually or collectively to overcome the longstanding interpretive presumption and Congress' directive in

1 U.S.C. §1 that the term "person" does not include the sovereign.

While 21 U.S.C. §876(a) speaks broadly and generally about the kinds of items the Attorney General may seek to compel via administrative investigative subpoena, it does not answer the question of who may be targeted and compelled to comply with subpoenas under the statute. *See Vt. Agency of Nat. Res.*, 529 U.S. at 781 n.10 (explaining that the fact that the False Claims Act was "intended to cover the full range of fraudulent acts" does not mean that the Act "was intended to cover all types of fraudsters, including States").

The legislative history the court of appeals cites makes no reference to including the States, their agencies, or their officials in their official capacities within the administrative investigative subpoena power of the Attorney General under 21 U.S.C. §876.

Nor are the goals and purposes of the CSA subverted by reading the statute to require cooperation with other sovereigns; rather, the CSA's text, structure, and legislative history strongly suggest that the Act's goals and purposes are enhanced by cooperation with other sovereigns. *See*, *e.g.*, *Controlled Dangerous Substances, Narcotics and Drug Control Laws, Hearings before the Committee on Ways and Means of the House of Representatives*, 91st Cong. 195 (1970) (President Nixon's message to Congress urging passage of the CSA and explaining that "[e]ffective control of illicit drugs requires the cooperation of many agencies

of the Federal and local and State governments; it is beyond the province of any one of them alone"); *Controlled Dangerous Substances, Narcotics and Drug Control Laws, Hearings before the Committee on Ways and Means of the House of Representatives*, 91st Cong. 206 (1970) (emphasis added) (Statement of John E. Ingersoll, Director, Bureau of Narcotics and Dangerous Drugs, describing the provision that would become 21 U.S.C. §873 as a provision "[o]f key importance" to the successful administrative implementation of the CSA). As a result, all states today have controlled substances acts. New Hampshire's Controlled Drug Act is lengthy and comprehensive, N.H. Rev. Stat. ch. 318-B, and mandates cooperation with the United States to the greatest extent possible. N.H. Rev. Stat. §318-B:23.

For all of these reasons, the court of appeals' decision that the States, their agencies, and their officials acting in their official capacities are "persons" within the meaning of 21 U.S.C. §876(c) who can be conscripted into federal service against their will and forced to act contrary to state law is incorrect and conflicts with this Court's precedents applying the longstanding interpretive presumption.

III. The court of appeals' decision raises serious federalism concerns and places 21 U.S.C. §876 in conflict with this Court's anticommandeering precedents.

The longstanding interpretive presumption that the term "person" does not include the sovereign works

in tandem with two other canons of statutory construction: (1) "the ordinary rule of statutory construction that if Congress intends to alter the usual constitutional balance between States and the Federal Government, it must make its intention to do so unmistakably clear in the statute's language," *Vt. Agency of Natural Res.*, 529 U.S. at 787; and (2) "the doctrine that statutes should be construed so as to avoid difficult constitutional questions." *Id.*

The CSA reflects the usual constitutional balance between the States and the federal government. Its text is intentionally respectful of State sovereignty, contemplates the States actively and regularly exercising their traditional police powers over controlled substances, and requires federal cooperation with the States in an effort to prevent the diversion of controlled substances from a tightly regulated stream of commerce. The court of appeals' interpretation of 21 U.S.C. §876 alters the traditional constitutional balance by permitting the federal government to conscript a state official into federal service via administrative investigative subpoena and command her to act in derogation of state criminal law to assist in a federal regulatory effort. And it does so by implication, contrary to this Court's clear statement jurisprudence. *See*, *e.g.*, *Gregory v. Ashcroft*, 501 U.S. 452, 460-61 (1991); *Will*, 491 U.S. at 65; *United States v. Bass*, 404 U.S. 336, 349 (1971).

As a result, the court of appeals' interpretation places 21 U.S.C. §876 in conflict with this Court's anticommandeering precedents. These precedents

recognize that "the Framers rejected the concept of a central government that would act upon and through the States, and instead designed a system in which the State and Federal Governments would exercise concurrent authority over the people—who were, in Hamilton's words, 'the only proper objects of government.'" *Printz*, 521 U.S. at 919-20 (quoting The Federalist No. 15, at 109). Thus, "'the Framers explicitly chose a Constitution that confers upon Congress the power to regulate individuals, not States.'" *Id.* at 920 (quoting *New York v. United States*, 505 U.S. 144, 166 (1992)). "The great innovation of this design was that 'our citizens would have two political capacities, one state and one federal, each protected from incursion by the other'—'a legal system unprecedented in form and design, establishing two orders of government, each with its own direct relationship, its own privity, its own set of mutual rights and obligations to the people who sustain it and are governed by it.'" *Id.* (quoting *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 838 (1995) (Kennedy, J., concurring)). "The Constitution thus contemplates that a State's government will represent and remain accountable to its own citizens." *Id.*

Applying these principles, this Court held in *New York* that Congress cannot compel the States to "enact or administer a federal regulatory program." 505 U.S. at 188. In *Printz*, this Court held that Congress "cannot circumvent that prohibition by conscripting the State's officers directly." 521 U.S. at 935. It explained that "[t]he Federal Government 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.* "This rule applies, *Printz* held, not only to state officers with policymaking responsibility but also to those assigned more mundane tasks." *Murphy v. Nat. Collegiate Athletic Ass'n*, __ U.S. __, 138 S. Ct. 1461, 1477 (2018).

Construing 21 U.S.C. §876 to permit the Attorney General to issue federal directives in the form of administrative investigative subpoenas to state officials commanding them to obtain state records and deliver them to him in violation of state law to assist in the administration of a federal regulatory scheme violates these core anticommandeering principles. It permits the regulation of States, not individuals. It allows a federal official to transform a state official into a federal agent and to convert a state database into a federal law enforcement tool. The infrastructure the State has put in place to better protect the health and welfare of citizens is thereby hijacked to serve federal interests in a manner inconsistent with the state legislative design.

This result eliminates the division between federal and state authority and treats the federal government as a centralized government with ready access to all state officials and records for federal investigatory and enforcement purposes under the CSA. *See Murphy*, 138 S. Ct. at 1477 (identifying one of the anticommandeering rule's functions as dividing authority between the federal and state governments for the protection of the individual and to decrease the risk of

tyranny and the abuse of governmental power). It also blurs the lines of political accountability by allowing the federal government to avoid political responsibility for the ultimate action of disclosing state-aggregated, patient-specific healthcare information to law enforcement without a probable-cause-based court order. *See id.* (identifying one of the anticommandeering rule's functions as avoiding a blurring of the lines of political accountability). And it shifts compliance costs to the States. *See id.* (identifying one of the anticommandeering rule's functions as preventing Congress from shifting regulatory costs to the States). If access to a national PDMP would better help the DEA carry out its functions, Congress itself must authorize its creation, fund its maintenance, staff it, and take political responsibility for granting law enforcement easy access to it.

The ramifications of the court of appeals' decision in these regards are significant. Under it, the DEA may command any state official (a state governor, department head, etc.) to deliver to it any state records within his or her control that the DEA deems relevant to an investigation. Given that New Hampshire's PDMP contains a comprehensive report of a person's schedule II-IV prescription drug history for the past three years, it is hard to imagine a DEA investigation in New Hampshire (and in other States too) that will not begin by forcing the state PDMP program administrator to query the state PDMP database for that information

and deliver it to the DEA.[4] Under this Court's anticommandeering precedents, Congress could not pass a law requiring state PDMP program administrators to perform this type of patient-specific background check for the DEA's benefit. *Murphy*, __ U.S. __, 138 S. Ct. at 1477; *Printz*, 521 U.S. at 929-31. Similarly, under those same precedents, Congress cannot circumvent this requirement by vesting a federal official with the authority to direct a state PDMP program administrator to perform this type of patient-specific background check for the DEA's benefit via administrative investigative subpoena. *See Printz*, 521 U.S. at 935 ("The Federal Government 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. . . . [S]uch commands are fundamentally incompatible with our constitutional system of dual sovereignty.").

21 U.S.C. §876 should be construed in accordance with the longstanding interpretive presumption "so as to avoid [these types of] difficult constitutional questions," *Vt. Agency of Natural Res.*, 529 U.S. at 787, not to create them.

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[4] All fifty states, the District of Columbia, the Commonwealth of Puerto Rico, Guam, and the Northern Mariana Islands have PDMP programs. *See* PDMP TTAC, State PDMP Profiles & Contacts, https://www.pdmpassist.org/State (last visited June 12, 2022).

IV. Whether state officials in their official capacities are "persons" under 21 U.S.C. §876(c) who can be compelled to assist the Attorney General in carrying out his regulatory and enforcement functions under the CSA is a question of exceptional importance to the States.

The CSA operates in an area traditionally occupied by the States—the regulation of controlled substances to protect the health and safety of their citizens. *See Hillsborough County, Fla. v. Automated Med. Labs., Inc.*, 471 U.S. 707, 719 (1985) ("[T]he regulation of health and safety matters is primarily, and historically, a matter of local concern."). The States therefore have "great latitude under their police powers to legislate" in this area for "the protection of the lives, limbs, health, comfort, and quiet of all persons," *Metropolitan Life Ins. Co. v. Mass.*, 471 U.S. 724, 756 (1985).

If the term "person" in 21 U.S.C. §876 includes the States, their agencies, and their officials in their official capacities, then a "positive conflict" exists between the probable cause requirement contained in N.H. Rev. Stat. §126-A:93, I(b)(3) and 21 U.S.C. §876, and federal law displaces New Hampshire's probable cause requirement. 21 U.S.C. §903. If, however, Congress did not intend the term "person" in 21 U.S.C. §876(c) to include the States, their agencies, and their officials in their official capacities, then no conflict exists between New Hampshire's probable cause requirement and 21 U.S.C. §876. Both can coexist.

One court of appeals and one federal district court have held that a state-law PDMP probable cause requirement similar to New Hampshire's is preempted by 21 U.S.C. §876. *See*, *e.g.*, *Oregon Prescription Drug Monitoring Program v. U.S. Drug Enforcement Admin.*, 860 F.3d 1228, 1236 (9th Cir. 2017); *United States Dept. of Justice, Drug Enforcement Admin. v. Utah Dept. of Commerce*, Case No. 2:16-cv-611-DN-DBP, 2017 WL 3189868, at *6-7 (D. Utah July 27, 2017) (accepting in part and modifying in part magistrate's report and recommendation). One federal district court has held that a different state law restricting law enforcement access to state PDMP records was preempted by 21 U.S.C. §876 if the term "individual" in the state statute were interpreted to mean "patient." *U.S. Dept. of Justice v. Colo. Bd. of Pharmacy*, Civil Action No. 10-cv-01116-WYD-MEH, 2010 WL 3547898, at *4 (D. Colo Aug. 13, 2010), *report and recommendation affirmed and adopted by* 2010 WL 3547896.

In those cases, the parties did not raise the threshold statutory construction issue raised in this case—whether the States, their agencies, and their officials in their official capacities are "persons" within the meaning of 21 U.S.C. §876(c). If the States, their agencies, and their officials in their official capacities are not "persons" within the meaning of 21 U.S.C. §876(c), then the Oregon, Utah, and Colorado laws, like the New Hampshire law, would not be preempted and may stand and be enforced as written.

Administrative investigative subpoenas like the one in this case effectively abrogate state law systems

designed to protect the state-aggregated private health data of state citizens. The States' inability to enforce these state-law systems in the face of such a subpoena inflicts irreparable harm upon them. *See Abbott v. Perez*, __ U.S. __, 138 S. Ct. 2305, 2324 n.17 (2018) ("[T]he inability to enforce its duly enacted plans clearly inflicts irreparable harm on the State"). The New Hampshire legislature did not create the PDMP as a law enforcement tool capable of being queried whenever federal law enforcement officials deem such an inquiry relevant to or useful for their investigation. It created the PDMP as a healthcare measure designed to improve medical treatment and reduce patient morbidity and mortality. N.H. Rev. Stat. §126-A:89, XI; *id.* §126-A:90, I. New Hampshire's sovereign interest in the integrity of its own PDMP program and in affording its citizens' confidential, state-aggregated prescription drug information basic probable-cause-based protection—a critical component of the legislative bargain that resulted in the creation of the New Hampshire PDMP—will be substantially and permanently impaired if the court of appeals' decision stands. Certiorari review is warranted under these circumstances.

CONCLUSION

The Petitioner respectfully requests that this Court grant the petition for a writ of certiorari.

Respectfully submitted,

JOHN M. FORMELLA
Attorney General

ANTHONY J. GALDIERI*
Solicitor General

LAURA E.B. LOMBARDI
Senior Assistant Attorney General

NEW HAMPSHIRE DEPARTMENT
OF JUSTICE
33 Capitol Street
Concord, NH 03301
(603) 271-3658
anthony.j.galdieri@doj.nh.gov
laura.e.lombardi@doj.nh.gov

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**Counsel of Record*