UNITED STATES DISTRICT COURT
DISTRICT OF NEW HAMPSHIRE

UNITED STATES DEPARTMENT OF JUSTICE,	)	
	)	
Petitioner,	)	
	)	
v.	)	Misc. No.
	)	
MICHELLE RICCO JONAS,	)	
	)	
Respondent.	)	
	)	

UNITED STATES DEPARTMENT OF JUSTICE'S
PETITION TO COMPEL COMPLIANCE WITH ADMINISTRATIVE SUBPOENA

Pursuant to 21 U.S.C. § 876(c), the United States Department of Justice petitions this Court to compel compliance with a June 13, 2018 United States Drug Enforcement Administration Subpoena to Michelle Ricco Jonas. Because, in accordance with the Controlled Substances Act, 21 U.S.C. § 876(a) (CSA), Ms. Ricco Jonas is "any person" who may be subpoenaed to produce records relating to the Attorney General's functions under the CSA, this Court has jurisdiction to compel her compliance.

In support of this Petition, the United States Department of Justice refers the Court to the attached exhibits as well as the supporting memorandum of law.

Therefore, this Court should order Respondent Ricco Jonas to comply with the underlying June 13, 2018 Drug Enforcement Agency administrative subpoena.

Respectfully submitted,

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Dated: August 8, 2018

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UNITED STATES DEPARTMENT OF JUSTICE'S
MEMORANDUM OF LAW IN SUPPORT OF
ITS PETITION TO COMPEL COMPLIANCE WITH ADMINISTRATIVE SUBPOENA

I. INTRODUCTION.

Under the Federal Controlled Substances Act (CSA), Congress has authorized the Attorney General, who in turn has delegated to the United States Drug Enforcement Administration (DEA), the authority to issue administrative subpoenas to, among other things, require the production of records relating to any of the Attorney General's functions under the CSA. 21 U.S.C. § 876(a). This Court has jurisdiction to compel compliance with a DEA administrative subpoena. 21 U.S.C. § 876(c).

The New Hampshire Prescription Drug Monitoring Program gathers information from New Hampshire dispensaries each time there is a dispensing of a Schedule II, III or IV controlled substance. The New Hampshire Board of Pharmacy uses this information to maintain a database about the prescribing, dispensing and use of controlled substances, which is referred to as the PDMP. Michelle Ricco Jonas is the program manager of the New Hampshire PDMP.

On June 13, 2018, the DEA served a subpoena on Ricco Jonas seeking records from the PDMP. Ricco Jonas, by way of a letter from the New Hampshire Attorney General, has refused

to comply with the subpoena. See July 12, 2018 Letter from Assistant Attorney General Anthony Galdieri, attached as Exhibit A (Galdieri Ltr.). Ricco Jonas contends that this Court does not have jurisdiction to enforce a subpoena issued to her requesting that she turn over PDMP documents because she is a state official and therefore the subpoena was provided to her in her official capacity. According to her, Congress did not provide federal courts with the power to compel subpoena compliance by a state or a state official served with a subpoena in her official capacity.

Ricco Jonas is wrong for at least two reasons. First, the DEA subpoena was served on Ricco Jonas individually and does not seek any remedy from the State of New Hampshire (the State). The CSA gives this Court the power "to compel compliance with [a] subpoena . . . issued to any person." 21 U.S.C. § 876(c). Ricco Jonas is "any person" from whom documents have been subpoenaed and therefore this Court has jurisdiction to compel her compliance. Moreover, even if the subpoena to Ricco Jonas was deemed to have been served on the State directly, this Court would retain jurisdiction. Courts have held, under other statutes and rules authorizing subpoenas, that the word "person" includes States. Thus, this Court should order Ricco Jonas to comply with the DEA subpoena.

II. LEGAL BACKGROUND.

A. The Controlled Substances Act.

Congress enacted the CSA in 1970. The Act's purpose is to "conquer drug abuse and to control the legitimate and illegitimate traffic in controlled substances." Gonzales v. Raich, 545 U.S. 1, 12 (2005). To achieve these goals, Congress established a "comprehensive regime" that makes it illegal to manufacture, distribute, dispense, or possess any controlled substance except as authorized by the CSA. Id. at 12-13. Controlled substances are categorized into five

schedules based on the drugs' potential for abuse, accepted medical uses and likelihood of causing psychological or physical dependency. 21 U.S.C. § 812.

Under the CSA, the Attorney General is authorized to issue administrative subpoenas to investigate drug crimes and other misconduct related to controlled substances:

> In any investigation relating to his functions under [the CSA] with respect to controlled substances . . . the Attorney General may . . . require the production of any records (including books, papers, documents and other tangible things which constitute or contain evidence) which the Attorney General finds relevant or material to the investigation.

21 U.S.C. § 876(a). The Attorney General has delegated this subpoena authority to the DEA. 28 C.F.R. § 0.100.

The CSA provides that a subpoena may be served upon a natural person by personal delivery. 21 U.S.C. § 876(b). It further provides that "in the case of contumacy or refusal to obey a subpena [sic] issued to any person, the Attorney General may invoke the aid of any court of the United States within the jurisdiction which the investigation is carried on or of which the subpenaed [sic] person is an inhabitant, or in which he carries on business or may be found, to compel compliance with the subpena [sic]." 21 U.S.C. § 876(c).

B. The New Hampshire PDMP.

The New Hampshire PDMP is operated by the New Hampshire Board of Pharmacy, a state agency. The Board collects data and maintains a database about the prescribing, dispensing, and use of Schedule II, III, and IV controlled substances. New Hampshire law requires that each dispenser of covered controlled substances submit information regarding each prescription dispensed within seven days of the dispensing. N.H. Rev. Stat. Ann. § 318-B:33. New Hampshire law also provides that PDMP information may not be disclosed to law enforcement absent "a court order based on probable cause." N.H. Rev. Stat. Ann. § 318-B:35.

Michelle Ricco Jonas is the PDMP program manager, which is located in Concord, New Hampshire. www.newhampshirepdmp.com/contact-us.html.

III. RICCO JONAS' ARGUMENT.

On June 13, 2018, the DEA served a subpoena on Ricco Jonas which requested all records pertaining to a certain person from February 28, 2016 to the present day that were being maintained by the New Hampshire PDMP.[1] June 13, 2018 Administrative Subpoena, attached as Exhibit B. The subpoena requested that the documents be provided to the DEA by July 13, 2018.[2] Id.

Ricco Jonas has refused to comply with the subpoena on the ground that the CSA does not permit this Court to enforce a DEA subpoena served on a state. Galdieri Ltr. at 2-4. In this regard, Ricco Jonas focuses her argument on 21 U.S.C. § 876(c), the provision that gives this Court jurisdiction to enforce the DEA subpoena. That provision provides this Court jurisdiction in "the case of contumacy by or refusal to obey a subpena [sic] issued to any person." 21 U.S.C. § 876(c). Ricco Jonas says that this Court's jurisdiction therefore is limited only to subpoenas issued to "any person." Galdieri Ltr. at 3-4. She then adds that she is not "any person" because she is a State of New Hampshire employee. She says that the subpoena issued to her by the DEA was issued to her in her official capacity, and therefore it is as if the DEA issued the subpoena

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[1] The DEA originally served the subpoena on the PDMP directly. The PDMP, through the New Hampshire Attorney General, objected on the ground that the Court could not enforce a subpoena served on the State. Without conceding that the Attorney General's position was correct, see infra at Section IV-B, the DEA then served a subpoena on Ricco Jonas for the same information.

[2] Record from the PDMP contain important information for identifying persons that may be violating the CSA. Such records often provide information on prescribers and individuals whose controlled substance acquisition or prescribing practices are outside the norm, which can provide early evidence to further an investigation into possible illegal drug distribution.

directly to the state. Because, according to Ricco Jonas, Congress' use of "any person" does not include states, the subpoena issued to her was not issued to "any person." Thus, she concludes that this Court lacks authority to enforce the subpoena. Id.

IV. THIS COURT HAS JURISDICTION TO COMPEL RICCO JONAS TO COMPLY WITH THE DEA SUBPOENA.

A. The DEA Subpoenaed "Any Person," Not The State, By Serving Ricco Jonas.

Even assuming (incorrectly, see infra at Section IV-B), that Ricco Jonas' argument that this Court would lack jurisdiction over a petition to compel compliance with a DEA subpoena issued directly to a state had merit, the subpoena at issue here was not directed to a state. The DEA issued the subpoena individually to Ricco Jonas, requiring her to provide certain documents that are in her custody or control. Thus, the DEA served "any person" with the subpoena. Therefore, this Court has jurisdiction to compel compliance.

Section 876(b), the subpoena service provision, refers to a "natural person" and § 876(c), the subpoena enforcement provision, refers to "any person." Ricco Jonas obviously fits both descriptions. Nevertheless, Ricco Jonas contests her personhood by claiming that the DEA served her in her official capacity as PDMP program manager, which she says means that a petition to compel her compliance is akin to a petition seeking compliance by the State of New Hampshire. Galdieri Ltr. at 3 (citing Will v. Mich. Dep't of State Police, 491 U.S. 58, 70 (1989)).

Ricco Jonas is wrong when she says that a petition to compel her to comply with the subpoena would be an official capacity action.[3] Contrary to Ricco Jonas' suggestion, an action is not an official capacity action merely because the action is directed at a person who works for

[3] A federal court petition to compel compliance with an administrative subpoena is an "action." EEOC v. Illinois State Tollway Auth., 800 F.2d 656, 659 (7th Cir. 1986).

the government and relates to an aspect of the person's public employment. Rather, the distinction between official and personal capacity actions rests on the nature of the relief sought. Lewis v. Clarke, ___ U.S. ___, 137 S. Ct. 1285, 1291 (2017). "In an official-capacity claim, the relief sought is only nominally against the official and in fact is against the official's office and thus the sovereign itself." Id. In contrast, in a personal-capacity action, the relief comes from the employee individually for actions taken under the color of state law. Id.

Whether an action to enforce a subpoena issued to a state employee is an official or personal capacity action has arisen in the Eleventh Amendment context. The Eleventh Amendment bars federal court actions against states, which includes official capacity actions, but allows personal capacity actions.[4] Hafer v. Melo, 502 U.S. 21, 30 (1991); Rosie D. v. Swift, 310 F.3d 230, 235 (1st Cir. 2002). There have been circumstances in federal civil cases when non-party, state officials have faced motions to compel for failing to comply with subpoena requests for documents. These officials have argued that the federal court lacked jurisdiction to compel their compliance under the Eleventh Amendment because the motion to compel was actually against the state since the subpoena was issued to them in an official capacity.

Not so. The Seventh Circuit observed that serving a subpoena on an employee of a state agency for records raises no sovereign immunity concerns because no "ultimate relief is being sought" from the state and thus serving a state agency official is an appropriate way to obtain state documents. Ott v. City of Milwaukee, 682 F.3d 552, 556 (7th Cir. 2012); see also Barnes v. Black, 544 F.3d 807, 812 (7th Cir. 2008). That is certainly correct. Contempt of court is the remedy for a state employee's failure to comply with an order to compel. 21 U.S.C. § 876(c).

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[4] The Supreme Court has recognized that Eleventh Amendment principles are useful when determining whether Congress intended the term “person” to encompass States. Will, 491 U.S. at 66.

That remedy would run against the person served with subpoena, here Ricco Jonas, until she decided to comply. In re Kave, 760 F.2d 343, 352 (1st Cir. 1985) (stating that civil contempt is imposed to coerce present or future compliance with an order of the court); Newman v. Graddick, 740 F.2d 1513, 1524 (11th Cir. 1984) (describing a civil contempt citation against a government official as "a sanction designed to compel a person to do what a court has ordered him to do"). The remedy would not run against the State.

Other federal courts have also reached this conclusion, noting that a request that the state custodian of records produce documents "does not . . . subject [the state] to a claim for relief." Allen v. Woodford, 543 F. Supp. 2d 1138, 1142-43 (E.D. Cal. 2008), rep. and rec. adopted, 544 F. Supp. 2d 1074 (2008); see United States v. University of Massachusetts, 167 F. Supp. 3d 221, 225 (D. Mass. 2006) (observing that motion to compel non-party discovery "will not result in a judgment of any kind requiring financial payment from the state"). Thus, a motion to compel seeking compliance from a state employee is not, contrary to Ricco Jonas' suggestion, an official capacity action seeking relief from the sovereign. Id.; Thomas v. Hickman, CV F 06-0215, 2008 WL 782476, at *3-4 (E.D. Cal. Mar. 20, 2008) (stating that process of issuing subpoena to state employee did not amount to an assertion of liability by the state or a claim for relief from the state); Jackson v. AFSCME Local 196, 3:07cv0471, 2008 WL 1848900, at *2 (D. Conn. Apr. 25, 2008) (similar); Wilson v. Venture Financial Group, Inc., C09-5768BHS, 2010 WL 4512803, at *1-2 (W.D. Wash. Nov. 2, 2010) (similar); Laxalt v. McClatchy, 109 F.R.D. 632, 634-35 (D. Nev. 1986) (similar);.

Rather than seeking relief from the state (the key component in an official capacity action), the subpoena served here was a request that Ricco Jonas individually provide the named documents. Thomas, 2008 WL 782476, at *3 (stating that it was an "important distinction" that

subpoenas were served "on individuals" [various state agency employees] and not the state agency directly).[5] Therefore, Ricco Jonas is "any person" on whom a DEA subpoena was served since she was served individually. Accordingly, this Court has jurisdiction to compel her to comply with the subpoena.[6]

B. The CSA's Use Of "Any Person" Includes The State.

In any event, even if the DEA served the subpoena directly on the State (which it did not do here), the result would be the same. This is so because the phrase "any person," as used in 21 U.S.C. § 876(c), should be construed to include the State and its agencies.

The issue raised here -- whether, under 21 U.S.C. § 876(c), "any person" includes the State, is a question of first impression. However, the Seventh Circuit has held that "person" includes a state agency under Fed. R. Civ. P. 45, the rule that authorizes the issuing of non-party subpoenas in federal civil litigation.[7] Ott, 682 F.3d at 556.

In claiming that "any person," as used in 21 U.S.C. § 876(c), should be read to exclude the State, Ricco Jonas relies on the presumption that when Congress uses the word "person," it does mean to include the sovereign. That same presumption was relied on unsuccessfully in Ott to argue that "person," as used in Fed. R. Civ. P. 45, did not include a state agency.

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[5] The notion that a government official could be subpoenaed under a rule authorizing subpoenas on a "person" arose in one of the most famous cases ever decided by the Supreme Court, United States v. Nixon, 418 U.S. 683 (1974). There, President Nixon was subpoenaed, under Fed. R. Crim. P. 17(c) which, at that time, provided that the subpoena may "command the person to whom it is directed to produce" documents. The Supreme Court enforced that subpoena without questioning it's authority to do so.

[6] A contrary ruling would affect more than the PDMP. It would preclude DEA from subpoenaing other state agencies that often have useful information pertaining to drug investigations such as the New Hampshire State Police or the New Hampshire Crime Laboratory.

[7] The D.C. Circuit has concluded that "person" as used in Rule 45 includes a federal agency. Yousuf v. Samantar, 451 F.3d 248 (D.C. Cir. 2006).

The presumption relied on by Ricco Jonas applies when (1) the statute, if not limited to exclude a state, would deprive the sovereign of a recognized or established prerogative or interest such as a statute of limitations and (2) where deeming a State to be a person would cause an absurdity such as, for example, the application of a speeding law to a police officer pursuing a criminal. Ott, 682 F.3d at 556. Neither circumstance exists in the subpoena context.

There is no established prerogative for the State to be immune from discovery obligations. Ott, 682 F.3d at 556. Indeed, the rule is just the opposite: "Governmental units are subject to the same discovery rules as other persons and entities having contact with the federal courts." In re Missouri Dep't of Natural Resources, 105 F.3d 434, 436 (8th Cir. 1997). As the Supreme Court explained, the presumption relied on by Ricco Jonas is most appropriately applied when "it is claimed that Congress has subjected the States to liability to which they had not been subject before." Vermont Agency of Natural Resources v. Stevens, 529 U.S. 765, 781 (2000). That is not the case here. "Federal subpoenas routinely issue to state . . . employees to produce official records or appear and testify in court and are fully enforceable . . . ." United States v. Juvenile Male 1, 431 F. Supp. 2d 1012, 1016 (D. Ariz. 2006); Thus, that the CSA allows for the subpoenaing of state records is nothing new.

There is also no absurdity in subjecting the State to a subpoena. For the reasons described above, it is entirely appropriate to subpoena a state employee for records. See Ott, 682 F.3d at 556. Thus, since a party can obtain state documents merely by making "a minor change in the addressee of the subpoena" through sending the subpoena to the state employee instead of the State directly, there is no sound reason for preventing the State from being subpoenaed directly. Id. This rationale applies with equal force to the CSA subpoena provision at issue

here.[8] Because the reasons for the presumption do not apply here, Ricco Jonas reliance on the presumption to argue that "person" excludes the State is misplaced.

Ricco Jonas also relies on certain other provisions of the CSA to contend that Congress did not intend to subject a state to an administrative subpoena. She contends that the CSA shows generally that Congress contemplated that states, localities, tribes and the federal government would work cooperatively in sharing information to combat drug abuse. Thus, according to Ricco Jonas, construing the CSA to permit the DEA to command a state to produce documents is inconsistent with the cooperative thrust of the CSA. Galdieri Ltr. at 4-5.

There is, of course, nothing in the CSA which indicates that Congress intended to exclude subpoenas against states. That Congress generally wanted cooperation among governmental entities does mean that Congress wanted to preclude the DEA from using the subpoena power when appropriate. But, more importantly, Ricco Jonas' argument about the other CSA provisions fails to account for the origin of the administrative subpoena enforcement language that Congress employed in the CSA. The phrase most squarely at issue, "In the case of contumacy by or refusal to obey a subpena [sic] issued to any person," appears in numerous enactments authorizing the enforcement of administrative subpoenas by myriad agencies, dating back at least to the National Labor Relations Act in 1935. E.g., 16 U.S.C. § 4017(c); 7 U.S.C. § 4317; 15 U.S.C. § 77v; 7 U.S.C. § 4511; 7 U.S.C. § 6412; 7 U.S.C. § 4816(c)(1); 7 U.S.C. § 6308; 42 U.S.C. § 1320a-4; 7 U.S.C. § 7488; 20 U.S.C § 1097a; 12 U.S.C. § 3108(4)(A); 7 U.S.C § 7449(c); 7 U.S.C. § 6208(c); 7 U.S.C. § 4610a(c); 7 U.S.C. § 3412; 7 U.S.C. § 7469; 29

[8] Excluding the State from the subpoena power is absurd for other reasons. For example, states employ and contract with prescribers of controlled substances in multiple ways, including in state hospitals, departments of correction and departments of public health. Under Ricco Jonas' argument, DEA could not conduct investigations of these prescribers (whom they have licensed) when records from their employer are required. That makes no sense.

U.S.C. § 161; 7 U.S.C. § 6809; 42 U.S. § 1997a-1; 16 U.S.C. § 1174; 7 U.S.C. § 7108; 7 U.S.C. § 2717; 15 U.S.C. § 330c; 21 U.S.C. § 969; 7 U.S.C. § 6010; 42 U.S.C. § 405; 42 U.S.C. § 6299; 16 U.S.C. § 470ff(c); 16 U.S.C. § 2407; 16 U.S.C. § 2437; 12 U.S.C. § 2404; 42 U.S.C. § 7621; 22 U.S.C. § 286(f); 42 U.S.C. § 4915; 5 U.S.C. § 1507; 12 U.S.C. § 1784; 16 U.S.C. § 825f; 15 U.S.C. § 1714; 21 U.S.C. § 876(c); 15 U.S.C. § 687(b); 18 U.S.C. § 3486; 50 U.S.C. § 4555; 30 U.S.C. § 823; 29 U.S.C. § 161.

This history suggests that Congress did not choose the phrase "any person" with the intent to exclude states. Rather, Congress's use of this language in § 876(c) readily suggests that Congress simply codified language that it often chooses when authorizing the judicial enforcement of administrative subpoenas. The law has treated states as being subject to the same subpoena obligations as other persons and entities. Ott, 682 F.3d at 557; Illinois State Tollway Auth., 800 F.2d at 659 (stating that a court may enforce an EEOC administrative subpoena issued to a state agency under the EEOC enforcement provision which uses the same "any person" language as CSA). There is no reason to think that Congress wanted to follow a different approach here when it adopted the standard subpoena enforcement language that it has used throughout the United States Code. Accordingly, even if this Court were to accept Ricco Jonas incorrect claim that the subpoena directed to her should be treated as a subpoena served on the State of New Hampshire, this Court still has the authority to order compliance.

C. Ricco Jonas' Claim that DEA Must Follow the New Hampshire Court Order Requirement Fails.

Aside from claiming a lack of jurisdiction to enforce the subpoena, Ricco Jonas has suggested that the DEA cannot obtain PDMP information without following the New Hampshire law provision that requires law enforcement to have a court order based on probable cause to obtain such information. Galdieri Ltr. at 5. That argument is wrong.

Any claim that the DEA must follow the New Hampshire state law requirement to obtain PDMP data would run headlong into the Supremacy Clause because the DEA subpoena provision does not contemplate a court order based on probable cause. In this regard, the Ninth Circuit has ruled, in a case regarding the Oregon PDMP that has the same court order requirement as New Hampshire, that Supremacy Clause preemption principles allow DEA to proceed with a subpoena instead of a court order based on probable cause. Oregon Prescription Drug Monitoring Program v. DEA, 860 F.3d 1228 (9th Cir. 2017).

The Ninth Circuit reasoned that Congress expressly preempted state law when it passed the CSA. 21 U.S.C. § 903. Oregon PDMP, 860 F.3d at 1236. Thus, the state-law court order requirement cannot exist if that requirement stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress. Id. The purpose of the CSA subpoena requirement was to allow the Attorney General to obtain needed information without court order, unless the recipient of the subpoena failed to comply. Id. Adding the additional court order requirement therefore imposed a layer of process and proof that Congress did not think warranted. Id. For that reason, the requirement interferes with the method by which "the federal statute was designed to meet its goal," and therefore the court order requirement is preempted. Id. Two district courts have also found that the DEA subpoena power preempts inconsistent state restrictions on access to PDMP information. See DOJ v. Utah Dep't of Commerce, 2:16-cv-611, 2017 WL 3189868, at *1 (Utah July 27, 2017); DOJ v. Colorado Board of Pharmacy, 10-cv-01116, 2010 WL 3547898, at *4 (D. Col. Aug. 13, 2010), rep. and rec. adopted, 2010 WL 3547896 (Sept. 3, 2010).

Finally, and most importantly for present purposes, in these cases, where courts have enforced DEA subpoenas issued to state PDMPs, no court suggested that it lacked the power to

enforce the subpoena on the ground that a state agency is not "any person." This is so despite a court's sua sponte obligation to make such an inquiry. McCulloch v. Velez, 364 F.3d 1, 5 (1st Cir. 2004) ("It is black-letter law that a federal court has an obligation to inquire sua sponte into its own subject matter jurisdiction.").

V. CONCLUSION.

For the reasons stated, this Court should enforce this petition and order Ricco Jonas to comply with the June 13, 2018 subpoena within 30 days of this Court's order.

Respectfully submitted,

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Dated: August 8, 2018

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July 12, 2018

Diversion Investigator Gabrielle Stern
Drug Enforcement Administration
Manchester District Office
324 South River Road
Bedford, NH 03110

Dear Investigator Stern,

The New Hampshire Attorney General's Office represents Michelle Ricco-Jonas, Program Manager for the New Hampshire Prescription Drug Monitoring Program ("PDMP"). The purpose of this letter is to provide you with a response to the June 13, 2018 subpoena you issued to Ms. Ricco-Jonas.

On March 5, 2018, you served an administrative subpoena, pursuant to 21 U.S.C. § 876(a) of the Controlled Substances Act ("CSA"), on the PDMP. The subpoena requested that the PDMP "provide any and all records regarding [redacted], being maintained by the New Hampshire Prescription Drug Monitoring Program from February 28, 2016 through February 28, 2018."

On or about April 9, 2018, we objected to the subpoena in writing. In our objection, we noted that the CSA does not authorize the DEA to subpoena States or their sovereign agencies. We stated that 21 U.S.C. § 876(b) of the CSA authorizes service of subpoenas only upon natural persons or upon "domestic or foreign corporation[s] or upon a partnership or other unincorporated association[s]." We further explained that Section 876(b) does not mention the State or its sovereign agencies, that the general rule of statutory construction is that the term "person" does not include the State or its sovereign agencies or actors, and that the CSA, as a whole, does not indicate a Congressional intent to include the State or its sovereign agencies within the meaning of the term "person" as used in the statute. Thus, we determined that, under Section 876, the DEA had no authority to issue or enforce a subpoena against a State or its sovereign agencies. We further noted that, if the DEA desires the information sought in the subpoena, it would have to comply with the requirements in RSA 318-B:34 or RSA 318-B:35 to obtain it, consistent with the CSA's emphasis on cooperation with the States and their agencies

On June 13, 2018, you served a second administrative subpoena pursuant to 21 U.S.C. § 876(a) of the CSA on Michelle Ricco-Jonas, in her official capacity as Program Manager for the

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New Hampshire PDMP. This second subpoena requests Ms. Ricco-Jonas to "provide any and all records regarding [redacted], being maintained by the New Hampshire Prescription Drug Monitoring Program from February 28, 2016 through present day." The subpoena requests the documents be delivered to the DEA's Manchester District Office by July 13, 2018.

Upon review of the June 13, 2018 subpoena and the applicable law, Ms. Ricco-Jonas, through counsel, objects to providing the DEA with the information requested in the subpoena for at least the following reasons.

I. The CSA Does Not Authorize The DEA To Subpoena States, Their Sovereign Agencies, or State Officials Working in their Official Capacity for those Agencies.

The New Hampshire Pharmacy Board is a sovereign agency of the State of New Hampshire. RSA 318-B:2; *see* RSA 541-A:1, II ("'Agency' means each state board, commission, department, institution, officer, or any other state official or group, other than the legislature or the courts, authorized by law to make rules or to determine contested cases."); RSA 541-B:1, I ("'Agency' means all departments, boards, offices, commissions, institutions, other instrumentalities of state government, including but not limited to the Pease development authority, division of ports and harbors, the New Hampshire housing finance authority, the New Hampshire energy authority, the community college system of New Hampshire, . . . and the general court, including any official or employee of same when acting in the scope of his or her elected or appointed capacity, but excluding political subdivisions of the state.").

The New Hampshire Pharmacy Board operates, maintains, and oversees the PDMP. The PDMP is not a separate legal entity; it is a program established by RSA 318-B:31-41. *See* RSA 318-B:31, I ("'Board' means the pharmacy board, established in RSA 318:2."); RSA 318-B:32, I ("The board shall design, establish, and contract with a third party for the implementation and operation of an electronic system 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.").

Ms. Ricco-Jonas is a State official employed by the Office of Professional Licensure and Certification, the state agency that is an umbrella organization for most of the state's licensing boards. RSA 310-A:1-c, II ("Every classified or unclassified state employee position authorized in the boards, councils, and commissions under RSA 310-A:1-a shall be transferred to the office of professional licensure and certification and subject to the supervisory authority of the executive director."); RSA 310-A:1-a(w) (listing the New Hampshire Pharmacy Board). In her official capacity with the State, Ms. Ricco-Jonas serves as the Program Manager of the PDMP. The June 13, 2018 subpoena has been directed to Ms. Ricco-Jonas in her official capacity as Program Manager of the PDMP and seeks to compel her to provide to the DEA certain information out of the PDMP that is expressly protected by State statute and that would require Ms. Ricco-Jonas to commit a crime under State law. *See* RSA 318-B:36. The CSA does not empower the DEA to do this.

21 U.S.C. § 876 of the CSA does not provide the DEA with the authority to subpoena a State, its sovereign agencies, or its officials serving in their official capacities like Ms. Ricco-Jonas as a matter of law.

To begin with, Section 876(b) authorizes service of subpoenas only upon natural persons or upon "domestic or foreign corporation[s] or upon a partnership or other unincorporated association." The State, its sovereign agencies, and its officials are not mentioned in Section 876(b).

Section 876(c) authorizes enforcement of subpoenas only against "any person." The CSA does not define the term "person." However, the general rule of statutory construction is that the term "person" is not ordinarily construed to include the State, its sovereign agencies, or its officers acting in their official capacities. *See, e.g., Vt. Agency of Natural Res. v. United States ex rel. Stevens*, 529 U.S. 765, 780 (2000) ("We must apply to this [statutory] text [of 31 U.S.C. § 3729(a)] our longstanding interpretive presumption that 'person' does not include the sovereign."); *United States v. United Mine Workers of Am.*, 330 U.S. 258, 275 (1947) ("In common usage that term ['person'] does not include the sovereign, and statutes employing it will ordinarily not be construed to do so."); *AG of Can. v. RJ Reynolds Tobacco Holdings*, 103 F. Supp. 2d 134, 147 (N.D.N.Y. 2000) ("As a general rule, the term 'person' does not include the sovereign."); *see also* 1 U.S.C. § 1 (defining the term "person" to include corporate entities, but not to include the State or its sovereign agencies or officers).

The United States Supreme Court confronted a similar statutory construction issue in *Will v. Mich. Dept. of State Police*, wherein it held as follows:

> Obviously, state officials literally are persons. But a suit against a state official in his or her official capacity is not a suit against the official but rather is a suit against the official's office. As such, it is no different from a suit against the State itself. . . . We hold that neither a State nor its officials acting in their official capacities are 'persons' under §1983.

491 U.S. 58, 70 (1989) (citations omitted). *See also Negron-Almeda v. Santiago*, 528 F.3d 15, 27 n.2 (1st Cir. 2008) ("Claims against a state official in his official capacity are treated as claims against the state.") (citations omitted); *Baldi v. MacKenzie*, No. 04-158-SM, 2004 U.S. Dist LEXIS 14212, at 85 (D.N.H. July 26, 2004) ("Where, as here, all of the claims are made against a government official acting purely in a representative role, the suit must be regarded as one against the sovereign.") (quotations omitted).

The text and context of the CSA support interpreting the term "person" in 21 U.S.C. § 876 to exclude the State, its sovereign agencies, and its officials acting in their official capacities for at least several reasons.

First, while the CSA does not define the term "person," it expressly defines the term "State" to mean "a State of the United States, the District of Columbia, and any commonwealth, territory, or possession of the United States." 21 U.S.C. § 802(26). The CSA then uses the terms "person" and "State" throughout its statutory text differently, including within statutory sections,

and without any indication that the definitions overlap. *See, e.g.*, 21 U.S.C. § 882(c) (authorizing a "State" to bring certain actions against "a person, entity, or Internet site" that violates specific statutory provisions). The term "State" or "State of the United States" is typically construed to include State agencies and State officials. *See Will*, 491 U.S. at 71 ("But a suit against a state official in his or her official capacity is not a suit against the official but rather is a suit against the official's office. As such, it is no different from a suit against the State itself."); *see also Poirier v. Mass. Dep't of Corr.*, 558 F.3d 92, 97 (1st Cir. 2009) ("States and their agencies are entitled to sovereign immunity regardless of the relief sought.") (internal quotations omitted).

Second, the CSA recognizes "State boards of pharmacy" as entities that should receive certain notifications that the United States Attorney General receives under 21 U.S.C. § 831 and makes no mention of that term being synonymous with the term "person" as used in 21 U.S.C. § 876 or in the CSA generally.

Third, 21 U.S.C. § 873, which appears within the same subsection as 21 U.S.C. § 876, contemplates "cooperative arrangements" with the States, not relationships where information can be demanded by subpoena. Indeed, the statute expressly directs the United States Attorney General to "cooperate with . . . State . . . agencies concerning traffic in controlled substances and in suppressing the abuse of controlled substances." 21 U.S.C. § 873(a). In furtherance of this cooperation, the statute authorizes the Attorney General to do certain things like: (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"; and (3) "enter into contractual agreements with State . . . and local law enforcement agencies to provide for *cooperative enforcement and regulatory activities* under this chapter." (emphasis added). These provisions would, in significant part, be rendered meaningless if the United States Attorney General could simply coerce a State, its sovereign agencies, or its officials into action via subpoena.

Fourth, in addition to 21 U.S.C. § 873, other CSA provisions acknowledge cooperative federalism principles and seek to preserve State sovereignty and autonomy, free of coercion or preemption by the federal government. For example, 21 U.S.C. § 882(c)(3) specifies that, in authorizing States to bring certain civil actions under its provisions, "nothing in this chapter shall prevent an attorney general of a State from exercising the powers conferred on the attorney general of a State by the laws of such State to conduct investigations or to administer oaths or affirmations or to compel the attendance of witnesses of or the production of documentary or other evidence."

21 U.S.C. § 903 also takes care to specify a very narrow standard for when the CSA preempts State law: "No provision of this subchapter shall be construed as indicating an intent on the part of the Congress to occupy the field in which that provision operates, including criminal penalties, to the exclusion of any State law on the same subject matter which would otherwise be within the authority of the State, unless there is a positive conflict between that provision of this subchapter and that State law so that the two cannot consistently stand together." This preemption standard is expressly and purposefully respectful of State sovereignty and autonomy, much like the cooperation provisions of 21 U.S.C. § 873.

Thus, the text and context of the CSA itself reveal that the term "person" as used in 21 U.S.C. § 876 does not, and was never meant to, extend to the States, their sovereign agencies, or their officials acting in their official capacities. Rather, the unambiguous text of the CSA reveals a statutory scheme that is highly protective of individual State sovereignty and autonomy and authorizes the United States Attorney General, through the DEA or otherwise, only to cooperate with the States, not to coerce them into action via subpoenas issued to State officials.

Accordingly, for at least all of the above reasons, the June 13, 2018 subpoena is *ultra vires*, is not for a proper purpose authorized by Congress, and seeks information that is not within the DEA's authority to obtain via subpoena under 21 U.S.C. § 876. *See, e.g.*, *United States v. Comley*, 890 F.2d 539, 541 (1st Cir. 1989) ("In general, an agency subpoena is enforceable if it is for a proper purpose authorized by Congress, the information sought is relevant to that purpose and adequately described, and statutory procedures are followed in the subpoena's issuance."); *Reich v. Sturm, Ruger & Co.*, 903 F. Supp. 239, 244 (D.N.H. 1995) (observing, among other things, that one of the limitations on administrative subpoenas is that the subpoena must be within the agency's authority). Moreover, under the plain language of 21 U.S.C. § 876(c), the DEA lacks the authority to enforce the June 13, 2018 subpoena against Ms. Ricco-Jonas. Ms. Ricco-Jonas will therefore not be providing records pursuant to it.

II. If The DEA Desires The Information Sought In Its June 13, 2018 Subpoena, It Will Have To Comply With RSA 318-B:34 Or RSA 318-B:35 To Obtain It.

The CSA contemplates voluntary, cooperative relationships with the States and their sovereign entities. Consequently, State law provisions that either wholly forbid the DEA from obtaining information collected by a State or one of its sovereign agencies or attach cooperative efforts and other procedures to that process are not, as a matter of law, preempted by 21 U.S.C. § 876. While we understand that at least two other courts have held that similar state statutes are preempted by 21 U.S.C. § 876, the question of the DEA's authority to issue and enforce a subpoena against a State, its sovereign agencies, or its officials acting in their official capacities under 21 U.S.C. § 876 was never addressed in those cases. *Or. Prescription Drug Monitoring Program v. United States DEA*, 860 F.3d 1228 (9th Cir. 2017); *DEA v. Utah Department of Commerce*, No. 16-CV-611, 2017 U.S. Dist. LEXIS 118470 (D. Utah July 27, 2017). Thus, we do not view those cases as controlling or dispositive and would suggest that those cases were wrongly decided.

Instead, for the reasons given in Section I above, subpoenas issued against the States, their sovereign agencies, and their officials acting in their official capacities under 21 U.S.C. § 876 are *ultra vires*, are not for a proper purpose authorized by Congress, are not within the DEA's authority, and are not enforceable under the plain language of 21 U.S.C. § 876(c). The CSA is grounded in principles of federalism and calls for cooperative arrangements with the States, not relationships where information can be demanded by subpoena. Accordingly, the CSA does not preempt any of the provisions of RSA 318-B:34 or RSA 318-B:35 and, if the DEA desires information contained in the PDMP, it must work cooperatively through those State statutes to obtain it.

In sum, Ms. Ricco-Jonas will not be supplying the information requested in its June 13, 2018 subpoena. That subpoena is legally invalid, is not authorized by the CSA, and cannot be enforced against New Hampshire, its sovereign agencies like the New Hampshire Pharmacy Board, or its officials acting in their official capacities.

If you have any questions or concerns, please feel free to contact either myself or Assistant Attorney General Tom Broderick.

Sincerely,

Anthony Galdieri
Assistant Attorney General
Civil Bureau

Cc: Tom Broderick, Assistant Attorney General, New Hampshire Department of Justice
Michael Bullek BSP, R.Ph, Administrator/Chief of Compliance, New Hampshire Board of Pharmacy
Claire M. Brennan, Diversion Program Manager, U.S. Department of Justice

U.S. DEPARTMENT OF JUSTICE/DRUG ENFORCEMENT ADMINISTRATION
SUBPOENA

In the matter of the investigation of
Case No: CG-18-2001
Subpoena No. CG-18-701292

TO: Michelle Ricco Jonas, Program Manager for the NH PDMP
AT: 121 South Fruit Street Concord, NH 03301

PHONE: 6032716980
FAX: 6032712856

GREETING: By the service of this subpoena upon you by DI Gabrielle Stern who is authorized to serve it, you are hereby commanded and required to appear before DI Gabrielle Stern, an officer of the Drug Enforcement Administration to give testimony and to bring with you and produce for examination the following books, records, and papers at the time and place hereinafter set forth:

Pursuant to an investigation of violations of 21 U.S.C. 801 et seq., you are to provide any and all records regarding [redacted], being maintained by the New Hampshire Prescription Drug Monitoring Program from February 28, 2016 through present day. This is an administrative subpoena issued by the Drug Enforcement Administration (DEA), a federal law enforcement agency, for records that may include protected health information. DEA is authorized by 21 U.S.C. § 876 to issue an administrative subpoena and is permitted by 45 C.F.R. § 164.512(f) to request protected health information. The information sought is relevant and material to a legitimate law enforcement inquiry; the subpoena is specific and limited in scope to the extent reasonably practicable in light of the purpose for which the information is sought; and de-identified information cannot reasonably be used. NONDISCLOSURE: Disclosure of any information concerning this subpoena would impede a federal law enforcement investigation. Pursuant to 45 C.F.R. § 164.528(a)(2), you must suspend notice to any individual whose protected health information is disclosed in response to this subpoena for a period of two (2) years.

Please do not disclose the existence of this request or investigation for an indefinite time period. Any such disclosure could impede the criminal investigation being conducted and interfere with the enforcement of the Controlled Substances Act.

Please direct questions concerning this subpoena and/or responses to Diversion Investigator Gabrielle Stern, 603-628-7411ext169.

Place and time for appearance: At Manchester District Office 324 South River Road, Bedford, NH 03110 on the ~~29th day of June~~ 13th of July 18, 2018 at 09:00 AM. In lieu of personal appearance, please email records to Gabrielle.N.Stern@usdoj.gov or fax to 603-628-7488.

Failure to comply with this subpoena will render you liable to proceedings in the district court of the United States to enforce obedience to the requirements of this subpoena, and to punish default or disobedience.

Issued under authority of Sec. 506 of the Comprehensive Drug Abuse Prevention and Control Act of 1970, Public Law No. 91-513 (21 U.S.C. 876)

ORIGINAL

Signature: Claire M Brennan
Claire M. Brennan
Diversion Program Manager

Issued this 11th day of Jun 2018

FORM DEA-79

UNITED STATES DISTRICT COURT
DISTRICT OF NEW HAMPSHIRE

UNITED STATES DEPARTMENT OF JUSTICE,	)	
	)	
Petitioner,	)	
	)	
v.	)	Misc. No.
	)	
MICHELLE RICCO JONAS,	)	
	)	
Respondent.	)	
	)	

ORDER TO SHOW CAUSE

In accordance with 28 U.S.C. § 636(b)(1)(B), Magistrate Judge Andrea K. Johnstone is designated to review and, if necessary, conduct a hearing on the government's Petition to Compel Compliance With Administrative Subpoena pursuant to the provisions of 21 U.S.C. § 876(a).

In accordance with subparagraph (C), the Magistrate Judge shall file her proposed findings and recommendations under subparagraph (B) with the Court, and a copy shall forthwith be provided to all parties in an appropriate manner.

Upon the Petition, the exhibits attached to the Petition, and upon the motion of Scott W. Murray, United States Attorney for the District of New Hampshire, it is

ORDERED that Michelle Ricco Jonas appear before the Honorable Andrea K. Johnstone, United States Magistrate Judge for the District of New Hampshire, in the Warren Rudman Courthouse, located at 55 Pleasant Street, Concord, New Hampshire, on the _____ day of _____ 2018, at _____ __.m., to show cause why she should not be compelled to obey the Drug Enforcement Administration Subpoena served upon her on June 13, 2018. It is further

ORDERED that a copy of this Order, together with the Petition and exhibits attached to that Petition, be served in accordance with Federal Rule of Civil Procedure 4 upon Michelle Ricco Jonas on or before _____, 2018. It is further

ORDERED that within ten (10) days of service of a copy of this Order and the Petition with exhibits upon her, the respondent, Michelle Ricco Jonas shall file and serve a written response to the Petition supported by an appropriate affidavit, as well as any motion the respondent desires to make. All motions and issues raised by the respondent will be considered upon the return date of this Order. Only those issues raised by motion or brought into controversy by the responsive pleadings and supported affidavit will be considered at the return of this Order and any uncontested allegations in the Petition will be considered as admitted.

DONE and ORDERED at Concord, New Hampshire, this _____ day of _____ 2018.

_____
U.S. District Court Judge