J. Adam Moore (WSBA No. 4458)
The Adam Moore Law Firm
217 N. 2nd St.
Yakima, WA 98901
Tel: 509-575-0372
Fax: 509-452-6771

Graham Boyd (CA Bar No. 167727)
Adam B. Wolf (CA Bar No. 215914)
ACLU Foundation
1101 Pacific Avenue, Ste. 333
Santa Cruz, CA 95060
Tel: 831-471-9000
Fax: 831-471-9676

Attorneys for THCF Medical Clinic

Received
JUN 11 2007
ACLU of Washington

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

IN THE MATTER OF GRAND JURY SUBPOENA FOR THCF MEDICAL CLINIC RECORDS	Case No. _______ **MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO QUASH GRAND JURY SUBPOENA**

INTRODUCTION

Pursuant to Fed. R. of Crim. P. 17(c)(2), THCF Medical Clinic ("the Medical Clinic") moves to quash a subpoena seeking confidential medical records regarding patients' medical histories and medicinal regimens.[1] Specifically, the subpoena seeks confidential physician-patient communications regarding medical marijuana and the medical histories of patients who have been recommended to

[1] The Federal government presumes that such documents exist. Nothing in this memorandum should be construed as admitting the existence of such documents.

use marijuana for medicinal purposes. Patients have a heightened expectation of privacy in such records, as they concern especially sensitive medical consultations; physicians have a recognized constitutional right to create such records without fear of federal punishment or investigation. Allowing the subpoena to stand would not only invade such intimate and private communications, but also would chill protected physician-patient speech about medical marijuana. Recent precedent dictates that this Court should quash the federal government's investigation of physician-patient communications about medical marijuana. *See Conant v. Walters*, 309 F.3d 639 (9th Cir. 2002) ("*Conant III*").

The subpoena in this case must be considered in the context of the *Conant* litigation, which enjoined attempts by the federal government to invade patient privacy and chill protected physician-patient speech regarding medical marijuana. *See id.* Responding to state medical-marijuana statutes, the federal government investigated doctors and threatened to punish any doctor who recommended marijuana to a patient. *See id.* at 634. This attack on medical speech and privacy was stopped only when the government was permanently enjoined from investigating or punishing doctors for recommending medical marijuana, based on a holding that physicians and patients enjoy a First Amendment right to communicate about the medical risks and benefits of marijuana. *See id.* at 639.

This history establishes the special sensitivity of medical records relating to medical marijuana and the importance of court supervision of any attempt to invade patient privacy or chill physician speech in this area. In this case, the subpoena is specifically directed at confidential documents concerning confidential and constitutionally protected physician-patient speech regarding medical marijuana. Furthermore, such documents are of no relevance to the goals of the

current federal investigation, where the Government has already accumulated significant direct evidence of marijuana cultivation; yet, even with courts having firmly declared that medical use is irrelevant to federal criminal law, the Government seeks medical records for the putative purpose of being "able to consider the reasons persons are utilizing [state] medical marijuana exemption[s]." Gov. Resp. to Mot. to Quash at 7, No: MJ-07-4071-0 (May 29, 2007). In sum, the Government has scant need for these records, yet faces considerable obstacles to obtain these sensitive records. The subpoena should be quashed as an unnecessary infringement on both privacy and First Amendment rights.

Finally, the Court should quash the subpoena because it seeks potentially incriminating information. The Medical Clinic invokes its Fifth Amendment right to refuse to disclose the requested documents. Given prior government attempts to punish physicians and patients for discussing medical marijuana, the Medical Clinic has a valid concern that—at least in the federal government's eyes—the production of the documents covered by the subpoena would amount to incriminatory testimony. Accordingly, the Medical Clinic cannot be compelled to produce the documents covered by the subpoena.

STATEMENT OF FACTS

I. Factual Background

On Tuesday, April 10, 2007, the Medical Clinic and its director, D. Paul Stanford, received a federal grand jury subpoena—then-returnable on May 15, 2007—seeking production from the Medical Clinic of any and all records pertaining to 17 individuals. *See* Declaration of Graham A. Boyd ("Boyd Dec."), Exh. 1. By agreement, the subpoena was made returnable June 12, 2007. *Id.*, ¶ 8.

The subpoena demands all documents that the Medical Clinic possesses as to these individuals, including but not limited to the following categories:

- Documentation of Medical Authorization to Possess Marijuana for Medical Purposes in the State of Washington
- Medical Statements and or Reports
- Correspondence

Id. Thus, the subpoena casts a wide net for every medical record, yet signals a particular interest in the medical records of consultations regarding medical marijuana and any physician recommendations of medical marijuana to patients.

II. Federal Government Attacks on Confidential Physician-Patient Speech Led to the Issuance of a Permanent Federal Injunction.

To provide the proper context to evaluate this subpoena, it is necessary to briefly review the history of the federal government's response to state medical-marijuana programs. This history—most notably, the federal government's prior attacks on physician-patient speech—(1) is relevant to the patients' privacy interest in the records requested by the subpoena, (2) illustrates the danger that the subpoena poses to physician-patient speech protected by the First Amendment, and (3) bolsters the Medical Clinic's claim of Fifth Amendment privilege.

Soon after the citizens of California passed the Compassionate Use Act in 1996, the federal government "confirmed that it would prosecute physicians, revoke their prescription licenses, and deny them participation in Medicare and Medicaid for recommending medical marijuana." *Conant v. McCaffrey*, 172 F.R.D. 681, 686 (N.D. Cal. 1997) ("*Conant I*"). On December 30, 1996, the federal government issued a memorandum entitled "The Administration's Response to the Passage of California Proposition 215 and Arizona Proposition

200." *Id.* at 688. This memorandum "described specific sanctions that the federal government would impose on physicians who recommend or prescribe Schedule I controlled substances, including: (1) revocation of medical licenses, (2) exclusion from Medicare and Medicaid programs, and (3) criminal prosecution." *Id.* (internal quotation marks omitted). Moreover, the federal government adopted the position that a physician would violate federal criminal law if he or she recommended medical marijuana to a patient anticipating that the patient would, in turn, use his or her recommendation to obtain marijuana. *Conant III*, 309 F.3d at 635. It is clear that the federal government adopted a policy that not only was *intended* to chill candid physician-patient speech about the potential harms and benefits of medical marijuana; it *did* chill protected speech. *See id.* at 638 (noting that "the record is replete with examples of doctors who claim a right to explain the medical benefits of marijuana to patients and whose exercise of that right has been chilled by the threat of federal investigation").

Accordingly, a group of doctors sued in the Northern District of California, asking the court to enjoin the federal government's policy. *See Conant I*, 172 F.R.D. at 690-91. In the trial court, Judge Fern Smith found that the government's policy chilled protected physician-patient speech and issued a preliminary injunction on April 30, 1997. *See Conant I.* Holding that the act of recommending medical marijuana is not a criminal offense, Judge Smith enjoined the federal government "from threatening or prosecuting physicians, revoking their licenses, or excluding them from Medicare/Medicaid participation based upon conduct relating to medical marijuana that does not rise to the level of a criminal offense." *Id.* at 701. On September 7, 2000, Judge William Alsup entered a permanent injunction. The permanent injunction provides that:

> [T]he government is permanently enjoined from (i) revoking any physician class member's DEA registration merely because the doctor makes a recommendation for the use of medical marijuana based on a sincere medical judgment and (ii) *from initiating any investigation solely on that ground*. The injunction should apply whether or not the doctor anticipates that the patient will, in turn, use his or her recommendation to obtain marijuana in violation of federal law.

Conant III, 309 F.3d at 634 (emphasis added).

A unanimous panel of the Ninth Circuit upheld the permanent injunction, expressly rejecting the government's contention that a physician might violate federal controlled substances laws by recommending medical marijuana to a patient. *Id.* at 635-36. The court held that physician-patient communication regarding medical marijuana was constitutionally protected speech and that the federal government's policy chilled such speech. *Id.* at 637-39.

Aside from the current grand jury subpoena, counsel (who litigated the *Conant* case) are unaware of any other attempt by federal agents or prosecutors to include physicians or physician records in an investigation of the physician's patients. The subpoena ventures into this dangerous ground for the first time.

ARGUMENT

I. The Subpoena Should be Quashed as an Unwarranted Invasion of Physician-Patient Confidentiality.

The subpoena directed at the Medical Clinic requests documents of the most intimate nature: Medical records of sick and dying patients. This subpoena should be quashed because it demands documents that violate applicable state and federal privileges regarding sensitive physician-patient communications.

A. Washington State's Physician-Patient Privilege, Which is Applicable As a Matter of Federal Law, Shields the Disclosure of The Medical Clinic's Confidential Physician-Patient Communications.

Like most states, Washington, recognizing the importance of physician-patient confidentiality, has created a privilege for confidential doctor-patient communications. This privilege operates to prohibit the exact type of information that the Government seeks through the subpoena it issued to the Medical Clinic.

Under Washington law, "a physician . . . shall not, without the consent of his or her patient, be examined in a civil action as to any information acquired in attending such patient." Wash. Rev. Code § 5.60.060(4). This privilege protects medical records, *see Toole v. Franklin Inv. Co.*, 158 Wn. 696, 698 (1930) (holding that medical records are "protected by the rule of privileged communications, as much so as if the physicians were being examined as witnesses in person"), and extends to criminal proceedings, *see, e.g.*, *State v. McCoy*, 70 Wn.2d 964, 965 (1967). Washington has protected physician-patient privacy in this manner for many years. *See State v. Miller*, 105 Wn. 475 (1919). The purpose of this privilege "is to surround communications between patient and physician with the cloak of confidence, and thus allow complete freedom in the exchange of information between them to the end that the patient's ailments may be properly treated." *State v. Boehme*, 71 Wn.2d 621, 635 (1967).

The Government will undoubtedly argue that Washington's physician-patient privilege does not apply here because the only applicable privileges are those created by federal common law, not by state law. That contention is generally true, as Federal Rule of Evidence 501 dictates that, "Except as otherwise required by the Constitution of the United States or provided by Act of Congress . . . the privilege of a witness . . . shall be governed by the principles of the

common law as they may be interpreted by the courts of the United States . . . ." *See also Jaffee v. Redmond*, 518 U.S. 1, 8 (1996).[2] However, FRE 501's presumption that a common-law rule applies is overcome in this case because an "Act of Congress" provides that state-law privileges shall apply to compelled testimony regarding medical records.

Recognizing the importance of the privacy of medical records, Congress recently enacted the federal Health Insurance Portability and Accountability Act ("HIPAA"), Pub. L. No. 104-191, §§ 261-64, 110 Stat. 1936 (Aug. 21, 1996). HIPAA creates a variety of protections for medical records, including the preservation of state protections of medical records that are not reflected in federal law. 45 C.F.R. § 160.203(b). In other words, Congress set a floor of minimum privacy standards in HIPAA, but recognized the continuing validity of state laws that are more protective of the medical privacy of patients. By enacting HIPAA, Congress expressed a federal policy of respecting the judgments made by States that choose to provide more stringent protections to medical records. Ralph Ruebner & Leslie Ann Reis, *Hippocrates to HIPAA: A Foundation for a Federal Physician-Patient Privilege*, 77 Temple L. Rev. 505, 533 (2004) ("HIPAA itself gives effect to state privacy laws for use in both federal and state court proceedings if the state law . . . provides more stringent protections of privacy.").

Accordingly, Washington State's protection of patient privacy is, as a matter of federal law, applicable in this case. *See id.* at 532-40 (analyzing HIPAA and

---

[2] Federal Rule of Evidence 1101(d)(2) provides that all rules of evidence shall be inapplicable in grand jury proceedings, except for those dealing with privileges. As a result, Rule 501 is applicable to grand jury proceedings. *See, e.g.*, *In re Grand Jury Investigation*, 918 F.2d 374, 379 (3d Cir. 1990).

concluding that it is an "'Act of Congress' that establishes a [state] evidentiary privilege under Federal Rule of Evidence 501"); *see also* FRE 501 (noting that federal common-law privileges apply, "[e]xcept as . . . provided by Act of Congress"). Applying Washington law, this court must quash the subpoena.

B. The Court Should Recognize in This Case a Privilege, As a Matter of Federal Law, for the Most Confidential Physician-Patient Records.

"The privileges between priest and penitent, attorney and client, and physician and patient . . . are rooted in the imperative need for confidence and trust." *In re Grand Jury Proceedings, Unemancipated Minor Child*, 949 F. Supp. 1487, 1494 (E.D. Wash. 1996). In this case, the Government's subpoena is especially likely to interfere with the confidence and trust necessary for good relations between doctors and patients. Because of the sensitive nature of the particular physician-patient communications sought by the subpoena in this case, as well as the limited relevance of this information to the Government, this Court should recognize an evidentiary privilege as a matter of federal common law.

In *Jaffee*, the Supreme Court held, for the first time, that federal common law recognizes a privilege protecting confidential communications between a psychotherapist and her patient. 518 U.S. 1. This opinion, which significantly altered the analysis for assessing purported common-law privileges, provided a roadmap for courts to analyze new claims of such privileges. The methodological framework adopted by the *Jaffee* Court dictates that this Court should find a federal common-law privilege for confidential communications between a physician and her patient that relate to extremely sensitive medical issues.

The *Jaffee* Court began by noting that "the common law is not immutable but flexible, and by its own principles adapts itself to varying conditions." 518

U.S. at 8-9 (stating further that the federal common-law with respect to privileges "did not freeze the law . . ., but rather directed federal courts to continue the evolutionary development of testimonial privileges") (internal quotation marks omitted). It then considered a variety of factors in finding the existence of a federal psychotherapist-patient privilege: (1) the "need for confidence and trust" between the psychotherapist and her patient, (2) the service of public ends, including "the provision of appropriate treatment for individuals," (3) the existence in the laws of the 50 States and the District of Columbia of "some form" of the purported privilege, and (4) the "evidentiary benefit that would result from the denial of the privilege." *Id.* at 10-15.

These factors compel a finding by this Court that there should be a federal common-law privilege for communications between physicians and their patients regarding medical marijuana and the debilitating medical conditions of medical-marijuana patients. *See generally* Ruebner & Reis, 77 Temple L. Rev. at 547-48 ("Thus, . . . the rationale of *Jaffee* . . . mandate[s] the recognition of a federal physician-patient privilege."). First, like psychotherapeutic treatment, medical advice regarding marijuana requires the utmost trust and confidence between physician and patient. Thirteen states have legalized the use of medical marijuana, and yet, with very few exceptions,[3] medical marijuana is illegal under federal law, which prescribes severe penalties for its use. As a result, patients and doctors could easily be chilled from even *discussing* medical marijuana if they believed

[3] Although it criminalizes medical-marijuana use in the vast majority of cases, the federal government directly supplies a small number of patients with medical marijuana under its own Compassionate Care program. *See Conant III*, 309 F.3d at 648-49 (Kozinski J., concurring) (discussing this program).

that such discussions might be disclosed. *Conant III*, 309 F.3d at 683 (recognizing this chilling effect).

Like the policy enjoined in the *Conant* litigation, forced disclosure of confidential physician-patient communications regarding medical marijuana would shatter the trust and confidence necessary for good medical care. A patient understandably would be less likely to ask a physician about the possible benefits or harms of medical marijuana if he or she believed that the discussion might be disclosed to federal investigatory authorities. Similarly, doctors who would otherwise recommend medical marijuana to patients might avoid doing so for fear that this could expose themselves or their patients to a federal criminal investigation. Ultimately, forced disclosure of physician-patient communication regarding medical marijuana would have the same chilling effect as the government's illegal policy of punishing physicians directly. In an atmosphere where every physician-patient communication about marijuana could invite federal prosecutors into the medical examination room, trust and open communication are a literal impossibility. Accordingly, this factor weighs very strongly in favor of finding the records in this case privileged.

Second, for the reason discussed above, the finding of the limited privilege at issue in this case is necessary for the "provision of appropriate treatment." As the *Jaffee* Court stated in finding a psychotherapist-patient privilege: "The mental health of our citizenry, *no less than its physical health*, is a public good of transcendent importance." 518 U.S. at 11 (emphasis added). Where physicians risk becoming once again chilled from providing advice, patients are left to their own devices, depending on internet sites, word-of-mouth from friends, or other less reliable sources of information about the risks and benefits of medical use of

marijuana. A privilege is thus necessary to maintain the ability of physicians to give candid, accurate advice to patients in this vulnerable area of medical practice.

Like the evidence discussed in *Jaffee*, medical records pertaining to medical marijuana are particularly sensitive. Medical marijuana is used to treat chronic pain, and is frequently used to treat AIDS-related wasting disease and to restore appetite for cancer patients. *See Inst. of Med., Marijuana and Medicine: Assessing the Science Base* at 179 (Janet E. Joy et al. eds., 1999), *available at* http://books.nap.edu/catalog.php?record_id=6376 (concluding that "[s]cientific data indicate the potential therapeutic value of cannabinoid drugs, primarily THC, for pain relief, control of nausea and vomiting, and appetite stimulation"). Clearly, personal information regarding such conditions is especially sensitive. *See*, *e.g.*, *Roe v. Sherry*, 91 F.3d 1270, 1274 (9th Cir. 1996) (recognizing that "Roe has a strong interest in protecting the confidentiality of his HIV status.") Moreover, medical marijuana records are more sensitive than other medical records because marijuana is illegal under federal law. As the Seventh Circuit noted with respect to records of late-term abortion procedures: "The natural sensitivity that people feel about the disclosure of their medical records—the sensitivity that lies behind HIPAA—is amplified when the records are of a procedure that Congress has now declared to be a crime." *Northwestern Memorial Hosp. v. Ashcroft*, 362 F.3d 923, 929-30 (7th Cir. 2004) (quashing a subpoena seeking abortion records). Accordingly, this factor also weighs very strongly in favor of finding a privilege.[4]

---

[4] Because of the federal government's history of improper attacks on physician-patient speech regarding medical marijuana, the danger of chilled speech is not simply hypothetical. This attack on physician-patient speech, and the litigation needed to stop it, is outlined in the Statement of Facts above.

Third, the vast majority of states, including Washington and Oregon, recognize "some form" of the physician-patient privilege. *See* Wash. Rev. Code § 5.60.060(4); Or. R. Rev. Rule 504-1. In fact, 42 states and the District of Columbia recognize some form of this privilege. Ruebner & Reis, 77 Temple L. Rev. at 563-64 & n.439.[5] Unless this privilege were also recognized here, "any State's promise of confidentiality would have little value if the patient were aware that the privilege would not be honored in a federal court." *Jaffee*, 518 U.S. at 13.

The final factor considered in *Jaffee*—evidentiary value—also weighs in favor of finding a privilege. In *Conant III*, the Ninth Circuit held that physicians do not violate any law by discussing medical marijuana with patients, or even by recommending marijuana to patients. 309 F.3d at 636. Accordingly, records of medical marijuana consultations do not provide evidence of a crime and are of no value to a grand jury; such records merely reveal the privately given, sincere medical judgments of physicians. These judgments are protected by the First Amendment and should be of no interest to federal prosecutors. *See id.* at 637.

The Government may argue that it needs to scrutinize medical records to rebut any defense based on medicinal use of marijuana. However, such evidence is not relevant in a federal prosecution for marijuana crimes and would not be admissible at trial. *See, e.g.*, *United States v. Rosenthal*, 266 F. Supp. 2d 1068 (N.D. Cal. 2003). Accordingly, "the likely evidentiary benefit that would result from the denial of the privilege is modest." *Jaffee*, 518 U.S. at 11.

---

[5] The cited article reports that forty states and the District of Columbia have enacted some form of the physician-patient privilege. 77 Temple L. Rev. at 563-64. Further research has turned up two more states that presently recognize some form of this privilege. *See* Conn. Gen. Stat. § 52-146o; New Mexico Rev. Rule § 11-504.

Because of the heightened need for trust and confidence between physician and patient in this context and the highly sensitive nature of medical-marijuana documents, a privilege is necessary to "facilitat[e] the provision of appropriate treatment" to patients who need advice regarding the harms and benefits of marijuana. *Jaffee*, 518 U.S. at 11. If the Medical Clinic "cannot shield the medical records of its . . . patients from disclosure in judicial proceedings . . . the [organization] will lose the confidence of its patients, and persons with sensitive medical conditions may be inclined to turn elsewhere." *Northwestern Memorial Hosp.*, 362 F.3d at 929. Moreover, without a privilege, *no* physician will be able to offer candid counsel to patients regarding medical marijuana.

Overall, each of the factors considered in *Jaffeee* strongly supports finding a privilege for medical-marijuana records. *See generally* Ruebner & Reis, 77 Temple L. Rev. at 546-74 (analyzing the *Jaffee* factors and concluding that there now should be a recognized federal common-law physician-patient privilege). In fact, the factors weigh more strongly in favor of a privilege here than they did in *Jaffee*. The medical records at issue in this case are very sensitive because of the federal prohibition on marijuana use. Moreover, the federal government has a documented history of improperly seeking to chill candid physician-patient communication regarding medical marijuana. Thus, a privilege is necessary to preserve trust and confidence between physician and patient in consultations discussing medical marijuana. Given the negligible evidentiary value such medical records would have for any federal investigation, this Court should recognize a privilege for such records.

C. Even if a Privilege Were Deemed Not to Apply, the Subpoena Must Be Quashed as an Unreasonable Invasion of Patient Privacy.

Even if the medical records are not deemed privileged, this Court should quash the subpoena as an unwarranted invasion of patient privacy. Because the records demanded in the subpoena are extremely sensitive, but have little, if any, evidentiary value for the Government, the Court should follow the lead of a federal court of appeal in quashing the subpoena due to the unreasonable invasion of patient privacy.

This Court has authority to quash a subpoena if compliance would be unreasonable or oppressive. Fed. R. Crim. P. 17(c). In light of the private, confidential nature of the communications sought and the negligible value such communications would provide for the Government, compliance with the subpoena would be unreasonable and oppressive.

Medical patients have a right to privacy in their medical records. *Norman-Bloodsaw v. Lawrence Berkeley Lab.*, 135 F.3d 1260, 1269 (9th Cir. 1998) ("The constitutionally protected privacy interest in avoiding disclosure of personal matters clearly encompasses medical information and its confidentiality."); *Doe v. Southeastern Penn. Transp. Auth.*, 72 F.3d 1133, 1137 (3d Cir. 1995) (recognizing a privacy interest in prescription records). This right should not be infringed lightly. All of the considerations outlined above in favor of finding a more general privilege also support quashing this subpoena as an unreasonable intrusion on physician-patient confidentiality.

The Seventh Circuit's decision in *Northwestern Memorial Hospital* provides significant support for this conclusion. Although the Seventh Circuit held that abortion records were not protected by a general evidentiary privilege, it quashed a subpoena seeking such records on the ground that compliance with the subpoena

would have resulted in an unwarranted invasion of patient privacy. *See* 362 F.3d at 927-33. In quashing the subpoena, the court relied primarily on the sensitivity of the records and their limited evidentiary value. *See id.*

The subpoena served on the Medical Clinic should be quashed for the same reasons. Discussions between physicians and their patients about medical marijuana, like abortion consultations, will involve private details, such as HIV status. Also, medical records concerning marijuana are especially sensitive because of the federal prohibition of marijuana. As with records concerning late-term abortion procedures, privacy concerns are "amplified" because they concern a treatment "that Congress has now declared to be a crime." *Northwestern Memorial Hosp.*, 362 F.3d at 929.

Furthermore, the government simply has no need for the material requested. The government claims that it has seized significant quantities of marijuana from the targets of its investigation. Attempting to argue that, in such circumstances, the grand jury *also* needs to review medical marijuana records, the government states that "[t]he grand jury should be able to consider the reasons persons are utilizing Oregon's medical marijuana exemption, and how those individuals interact with individuals known to be in violation of federal and state law with respect to the manufacture and distribution of marijuana." Gov. Resp. to Mot. to Quash at 7, No: MJ-07-4071-0 (May 29, 2007) (responding to the State of Oregon's motion to quash a subpoena relating to the same investigation). However, this information is *completely irrelevant* to a federal investigation, given that federal courts *must* exclude from jury consideration any evidence related to medical use of marijuana. *See Rosenthal*, 266 F. Supp. 2d 1068. Whether or not the targets of this investigation are growing marijuana for medical purposes in compliance with state

law has no possible bearing on a federal prosecution. The government provides no other basis for relevance of medical marijuana records. Thus, applying the reasoning of *Northwestern Memorial Hospital*, this Court should quash the subpoena as an unnecessary intrusion into medical privacy.

In addition to the factors considered in *Northwestern Memorial Hospital*, this case raises significant First Amendment issues. The medical-privacy concerns are heightened by the documented history of improper government attempts to chill protected physician-patient speech regarding medical marijuana. *See Conant III*, 309 F.3d at 638. In *Bursey v. United States*, 466 F.2d 1059, 1083-88 (9th Cir. 1972), *superseded by statute on other grounds*, as stated in *In re Grand Jury Proceedings*, 863 F.2d 667 (9th Cir. 1988), the Ninth Circuit held that a grand jury investigation infringed the associational privacy of Black Panther members. There, the government's investigation arose out of an alleged threat to the President's life from the Black Panther Party's Chief of Staff. *See* 466 F.2d at 1065. Two employees of the party's newspaper were held in contempt after they asserted the First Amendment when refusing to answer questions propounded by a federal grand jury regarding the employee's political associations. *Id.* at 1081-88. The government responded that its interest in investigating a serious crime outweighed the witnesses' First Amendment-based associational privacy rights. *Id.* at 1086. Rejecting the government's argument, the Ninth held that "[t]he fact alone that the Government has a compelling interest in the subject matter of a grand jury investigation does not establish that it has any compelling need for the answers to any specific questions." *Id.*; *see also id.* at 1086-88 (holding that many of the grand jury's questions improperly intruded on the witnesses' associational privacy and disallowing such questions).

Bursey provides important guidance for this case. As in *Bursey,* the specific material covered by the subpoena is of limited or no value to any federal investigation. Also, like the improper questions in *Bursey*, the subpoena in this case has a significant and serious potential to chill protected speech by invading privacy. Furthermore, the secrecy of grand jury proceedings does not mitigate this problem. As the Ninth Circuit noted:

> In the context of this case, the secrecy of the grand jury proceedings did little to soften the blow to the First Amendment rights. The public did not know what the grand jury learned, but the proceedings were no secret to the Government. A Government lawyer initiated the investigation. A Government lawyer presented the evidence to the grand jury. Political dissidents who criticize the Government may well have more fear about disclosure to the Government than to anyone else, and the Government heard every word.

Id. at 1086. These considerations apply equally here. Patients and doctors discussing medical marijuana will be most concerned about maintaining privacy from federal government intrusion. "When First Amendment interests are at stake, the Government must use a scalpel, not an ax." *Id.* at 1088. Here, the Government seeks to intrude upon First Amendment rights without any significant justification.

The fact that quashing the subpoena comports with Washington State's physician-patient privilege is also a significant consideration in favor of the Medical Clinic's motion. Comity "impels federal courts to recognize state privileges where this can be accomplished at no substantial cost to federal substantive and procedural policy." *Northwestern Memorial Hosp. v. Ashcroft*, 362 F.3d at 932.

In sum, many factors support quashing the subpoena served on the Medical Clinic. Disclosure would damage physician-patient trust and confidence, while

revealing sensitive and private information. Moreover, disclosure would chill protected physician-patient speech regarding medical marijuana. Also, quashing the subpoena would serve important comity interests and respect Washington's strong protection of patient privacy. Finally, the potential benefits of the subpoena are negligible. Accordingly, this Court should grant the Medical Clinic's motion.

II. COMPELLING THE PRODUCTION OF DOCUMENTS UNDER THE SUBPOENA WOULD VIOLATE THE FIFTH AMENDMENT.

The subpoena's demand for medical records regarding medical marijuana, especially where such records may include recommendations for medical-marijuana use, infringes the Fifth Amendment rights against self-incrimination. The federal government has proved willing to prosecute medical-marijuana patients and their doctors, *see Conant III*, 309 F.3d at 635, and, with no assurance that the Government will not prosecute these individuals, they cannot be compelled to produce the documents at issue.

A. Production of Medical-Marijuana Records Would Be Testimonial Communication.

The act of producing documents in response to a grand jury subpoena is testimonial if it can be used by the government to show the existence, possession, or authenticity of the documents requested. *Fisher v. United States*, 425 U.S. 391, 410 (1976). Because the existence and authenticity of these subpoenaed documents is unknown to the government, the compelled production of those documents "tacitly concedes the existence of the papers demanded." *United States v. Doe*, 465 U.S. 605, 613 (1984); *In re Grand Jury Subpoena, Dated April 18, 2003*, 383 F.3d 905, 911 (9th Cir. 2004).

In effect, the government demands that the clinic inform it of the following facts: 1) whether or not the Clinic's physicians have treated each named individual, 2) whether or not the named individuals have requested that the Clinic's doctors recommend medical marijuana, and 3) whether or not the Clinic's physicians have authorized any of the listed individuals to use and/or possess medical marijuana. Thus, the production of documents pursuant to the subpoena would be testimonial. *See Doe*, 465 U.S. at 613.

B. The Documents Demanded by the Subpoena are Incriminating Within the Meaning of the Fifth Amendment.

Producing documents is protected by the Fifth Amendment if the act of production has a tendency to incriminate. *Fisher*, 425 U.S. at 410. This is a relatively low bar, which is satisfied by the mere possibility of prosecution. *See, e.g.*, *In re Master Key Litigation*, 507 F.2d 292 (9th Cir. 1974). The act of producing the requested documents—if, indeed, the documents exist, *see supra* n.1—would state at least the following potentially incriminating matters: (1) that the named individuals sought medical advice regarding marijuana; and (2) that, pursuant to state law, the Medical Clinic authorized these specific federal targets to possess marijuana. In an environment where the federal government has proven willing to prosecute medical-marijuana patients, providers and physicians, the requested documents could tend to incriminate. *See Conant III*, 309 F.3d at 635.

Because the government has not granted immunity to the Medical Clinic's patients and because the subpoena requests information that could potentially lead to future prosecution, the Court should quash the subpoena.

CONCLUSION

For the foregoing reasons, this Court should quash the subpoena served on the Medical Clinic.

Dated: ________, 2007

Respectfully submitted,

____

J. Adam Moore (WSBA No. 4458)
The Adam Moore Law Firm
217 N. Second Street
Yakima, WA 98901
Tel: 509-575-0372

Graham Boyd (CA Bar No. 167727)
Adam B. Wolf (CA Bar No. 215914)
ACLU Foundation
1101 Pacific Avenue, Ste. 333
Santa Cruz, CA 95060
Tel: 831-471-9000

Attorneys for THCF Medical Clinic