

1 In this case, the federal government has commandeered the Kansas State Board of
2 Healing Arts (the “KSBHA”), ripped matters that are within its authority from its hands, and
3 improperly asserted federal authority over the regulation of medical practice within the State.
4 Realizing the full extent of the impropriety that had occurred, the federal government chose
5 to deny its actions, and to call those involved on the part of the KSBHA liars. (Exhibit 1,
6 Letter from United States Attorney Eric Melgren to Lawrence Buening, Jan. 28, 2008.) But,
7 denial of the government’s actions does not make them disappear, and we therefore ask the
8 Court to consider what has actually happened, and to mitigate the damage.

9 The KSBHA is an agency of the government of the State of Kansas and is charged
10 with regulating medical practitioners within the State, including licensing and disciplinary
11 matters. On May 30, 2006, Kelli Stevens, litigation counsel at the KSBHA filed a complaint
12 on behalf of the KSBHA against Dr. Schneider’s license. (Exhibit 2, Stevens Aff. ¶ 2.) The
13 KSBHA has previously considered several cases involving Dr. Schneider, and in *all* cases
14 had reached a finding that he was practicing medicine in accordance with the standard of care
15 within the State.

16 On January 17, 2007, Ms. Stevens was contacted by Assistant United States Attorney
17 (“AUSA”) Tanya Treadway, who informed Ms. Stevens that she was seeking to indict Dr.
18 Schneider, and asking the KSBHA not to take any action. (*Id.* at ¶ 4.) Ms. Treadway also
19 requested a meeting with the KSBHA. On January 22, 2007, Ms. Treadway met with three
20 employees of the KSBHA, including Ms. Stevens, Ms. Diane Bellquist, and Hester Jay. (*Id.*
21 at ¶ 5.) At the meeting, Ms. Treadway again asked the KSBHA to take no action with respect
22 Dr. Schneider’s license, until she was able to obtain an indictment. (*See Id.* at ¶ 7; Exhibit 3,
23 Jay Aff. ¶ 7, Jan. 25, 2008; Exhibit 4, Bellquist Aff. ¶¶ 13-16 , Jan. 25, 2008.)
24 Subsequently, Ms. Treadway contacted Ms. Stevens on at least two occasions, asking the
25 KSBHA to continue to forbear from any action against Dr. Schneider, and ultimately
26 assuring her that an indictment was imminent. Finally, in late December of 2007, the Grand

1 Jury returned an indictment, and Ms. Treadway informed Ms. Stevens of this fact. (Exhibit 2,
2 Stevens Aff., ¶ 11.)

3 Thus, according to the sworn affidavits of three employees of the KSBHA who met
4 with her personally, Ms. Treadway did in fact urge the KSBHA not to act. It is clear that Ms.
5 Treadway's actions, as well as her statements to the KSBHA, reveal that she viewed its
6 regulatory process as an "impediment" to the prosecution. (Exhibit 4, Bellquist Aff. ¶ 13.)
7 It is not readily apparent why this would be so, until one considers the effect that further
8 findings in favor of Dr. Schneider would have on the prosecution. This fear was particularly
9 well-founded, given the decisions of the KSBHA in favor of Dr. Schneider in every single
10 instance.

11 Aside from "impeding" the prosecution, it is also obvious that Ms. Treadway
12 considered the KSBHA a valuable source of information, at her disposal and subject to her
13 control. The KSBHA was subject to extensive demands for documents by the government,
14 which were expected to be rigidly adhered to and given priority over other pending matters.
15 (See Exhibit 5, Letter from Mark Stafford to AUSA Tanya Treadway, Jan. 22, 2008; Exhibit
16 6, Letter from AUSA Tanya Treadway to Mark Stafford, Jan. 24, 2008.) On January 18,
17 2008, Ms. Treadway castigated the KSBHA for not providing Dr. Schneider's responses in
18 disciplinary cases. (Exhibit 7, Letter from AUSA Tanya Treadway to Mark Stafford, Jan.
19 18, 2008.) Ms. Treadway further rebuked the KSBHA for "implicitly request[ing] an
20 extension of time" to respond to a subpoena in order to deal with other state matters, and
21 threatened to send a special agent to collect the materials at the KSBHA offices at 9:00 a.m.
22 on the original subpoena deadline. (Exhibit 6, Letter from AUSA Tanya Treadway; Exhibit
23 8, Letter from Buening to Melgren, Jan. 25, 2008.)

24 The federal government also apparently viewed its relationship with the KSBHA as
25 one requiring the subservience and deference of the latter to the former. This is evident in its
26 correspondence with the KSBHA countless times. On January 25, 2008, for example, the
government chastises the KSBHA for filing a pleading as civil "in a criminal case," and

1 orders the KSBHA to withdraw the pleading. (Exhibit 9, Letter from AUSA Tanya Treadway
2 to Mark Stafford, Jan. 24, 2008.) What is troubling here is not only the authoritative tone and
3 posture of the federal government toward the KSBHA, but also its tacit assertion that it could
4 unilaterally and conclusively characterize the nature of the KSBHA's cases and hold the
5 KSBHA to its view. So extensive was the government's view of its authority over the
6 KSBHA, that it rebuked the KSBHA even for the decisions its attorneys made in their
7 discretion. (Exhibit 7, Letter from Treadway to Stafford, Jan. 18, 2008; Exhibit 9, Letter from
8 Treadway to Stafford, Jan. 24, 2008.)

9 In the end, the blame fell on the KSBHA, which was painted as having fallen down
10 on the job, and drew strident criticism from members of the legislature. (Exhibit 8, Letter
11 from Buening to Melgren, Jan. 25, 2008.) Unfortunately, two attorneys with the KSBHA
12 resigned as a result of these events. The United States has done nothing to correct the public
13 record, evidently adhering to its "if it happened, it would be wrong, therefore it did not
14 happen" position. Thus, the United States has thus far successfully usurped the authority of
15 the KSBHA, all the while escaping accountability for improperly hijacking the State's
16 regulatory process.

17 ARGUMENT

18 19 **The Government Improperly Interfered with Kansas's Regulatory Process and** 20 **Abstention is Required**

21
22 Under our system of federalism, the regulation of the practice of medicine is left to
23 the states. *Conant v. Walters*, 309 F.3d 629, 639 (9th Cir. 2002) (quoting *Linder v. United*
24 *States*, 268 U.S. 5, 18 (1925) ("direct control of medical practice in the states is beyond the
25 power of the federal government")). On the other hand, the federal government generally is
26 not empowered to regulate the practice of medicine or to decide substantive medical issues,
and is particularly not empowered to do so under the Controlled Substances Act. *Gonzales v.*

1 *Oregon*, 546 U.S. 243, 261 (2006). A corollary of these principles is that the federal
2 government may not intentionally thwart a state’s regulatory process in order to pursue its
3 own agenda, particularly in an area where it lacks the authority to act. Yet, that is precisely
4 what has occurred in the instant case.

5 Above, we have noted the troubling motivations for such a course of action. Here, we
6 also note that the government’s actions violate long-established principles of federalism and
7 comity, and present a particularly egregious case of federal overreaching. While the federal
8 government is not empowered to regulate medicine within the states, the government did so
9 in two ways in the instant case. First, the federal government shut down or indefinitely
10 suspended the process that was taking place within the state. At the time the federal
11 investigation was proceeding, the Kansas State Board of Healing Arts had filed a complaint
12 and was prepared to move forward on a number of cases involving Dr. Schneider. (Exhibit 2,
13 *Stevens Aff.* ¶ 2.)

14 Second, the federal government commenced its own process and obtained a criminal
15 indictment, rendering moot the need to resume the State’s regulatory process. In our
16 contemporaneously-filed motions to dismiss, we have addressed the nature of the
17 Indictment’s allegations at some length, but we must emphasize here that the Indictment
18 actually deals with issues of medical science, professional judgment and evolving standards
19 of care, rather than drug dealing or criminal fraud, and therefore represents a clear abuse of
20 the federal criminal process, and a usurpation of the State’s regulatory power. These
21 unlawful actions of the federal government violated Dr. Schneider’s right to the due process
22 of law.

23 Courts have invoked abstention in situations involving ongoing proceedings in state
24 agencies, and particularly medical boards. *See, e.g., Gibson v. Berryhill*, 411 U.S. 564, 576-
25 77 (1973) (recognizing that medical board proceedings generally warrant deference but not
26 abstaining because composition of the medical board itself was unconstitutional); *Amanatullah v. Colorado Med. Exam’r*, 187 F.3d 1160 (10th Cir. 1999); *Weitzel v. Div.*

1 *Occup. & Prof'l Licensing*, 240 F.3d 871 (10th Cir., 2001); *Simopoulos v. Virginia State*
2 *Board of Medicine*, 644 F.2d 321 (4th Cir. 1981).

3 For the above reasons, if any part of the Indictment is not dismissed as
4 unconstitutional or due to other defects, this Court should abstain from hearing this matter
5 until it is fully and finally resolved by the State. The principles of federalism and comity
6 require such a course of action, and such a course of action is supported by the decisions of
7 this and other circuits applying the doctrines of abstention, particularly the *Younger* and
8 *Burford* doctrines.

9 The Tenth Circuit has previously invoked the *Younger* abstention doctrine in a similar
10 context. That doctrine provides that “[a] federal court must abstain from exercising
11 jurisdiction when: (1) there is an ongoing state criminal, civil, or administrative proceeding,
12 (2) the state court provides an adequate forum to hear the claims raised in the federal
13 complaint, and (3) the state proceedings "involve important state interests, matters which
14 traditionally look to state law for their resolution or implicate separately articulated state
15 policies." *Amanatullah*, 187 F.3d at 1163. “Younger abstention is *non-discretionary*; it *must*
16 be invoked once the three conditions are met, absent extraordinary circumstances.” *Id.*
17 (emphasis supplied) .

18 With respect to *Burford* abstention, the Tenth Circuit has recognized that

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20 “*Burford* abstention [is] appropriate where: ‘there have been presented difficult
21 questions of state law bearing on policy problems of substantial public import whose
22 importance transcends the result in the case then at bar.... In some cases, however, the
23 state question itself need not be determinative of state policy. It is enough that
24 exercise of federal review of the question in a case and in similar cases would be
25 disruptive of state efforts to establish a coherent policy with respect to a matter of
26 substantial public concern.’”

1 *Grimes v. Crown Life Ins. Co.*, 857 F.2d 699 (10th Cir. 1988) (quoting *Colorado River Water*
2 *Conservation Dist. v. United States*, 424 U.S. 800, 814 (1976)).

3 We note that there is a substantial overlap between the standards articulated in
4 *Burford* and those in *Younger*. This is not surprising, given that both doctrines are
5 formulated towards the same end: preserving principles of federalism and comity. The
6 Supreme Court has urged a flexible application of these doctrines where they are warranted.
7 The Court has explained that the abstention doctrines are not rigid: “[t]he various types of
8 abstention are not rigid pigeonholes into which federal courts must try to fit cases...” *New*
9 *Orleans Pub. Serv., Inc. v. Council of the City of New Orleans*, 491 U.S. 350, 359 (1989).
10 The facts of this case make it a matter of first impression, but the principles of federalism and
11 comity as discussed in the decided case law clearly require abstention.

12 Because there is a substantial overlap between the two doctrines, we address the
13 application of both cases to the instant case in one discussion. First, with respect to the issue
14 of ongoing state proceedings, we note that the State undertook the task of dealing with these
15 issues, before its processes were brought to an end by the overbearing actions of the
16 government. Furthermore, these issues bear directly on the issues that the government has
17 now taken up in the instant case.

18 Let us imagine, for example, if the KSBHA’s process were allowed to run its course,
19 and the KSBHA concluded that Dr. Schneider was practicing in accordance with the standard
20 of care (as it had numerous times in the past) with respect to the patients that are the subjects
21 of the Indictment’s counts. Could the government nevertheless override the KSBHA’s
22 conclusions, and prosecute as a crime conduct that the State has found to be medical practice
23 according to the standard of care? We doubt any court would answer yes, especially in light
24 of *Gonzales v. Oregon*. In this case, the government consciously and intentionally thwarted
25 such a determination by a state agency empowered and uniquely qualified to make it, and
26 substituted in its place its own unqualified judgment. This is precisely what the abstention
doctrines serve to protect against.

1 As noted above, this case also involves matters traditionally regulated by the State.
2 The state has articulated policies on this issue. The Kansas State Board of Healing Arts,
3 along with the Kansas Board of Nursing and the Kansas Board of Pharmacy, has adopted the
4 State Medical Board Guidelines on Pain Treatment. In relevant part, these guidelines
5 provide that

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7 “The appropriate application of current knowledge and treatment modalities
8 improves the quality of life for those patients who suffer from pain, and
9 reduces the morbidity and costs associated with pain that is inappropriately
10 treated. All health care providers who treat patients in pain, whether acute or
11 chronic, and whether as a result of terminal illness or non-life-threatening
12 injury or disease, should become knowledgeable about effective methods of
13 pain treatment. The management of pain should include the use of both
14 pharmacologic and non-pharmacologic modalities.”

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16 “Inappropriate treatment of pain is a serious problem in the United States.
17 Inappropriate treatment of pain includes non-treatment, undertreatment,
18 overtreatment, and ineffective treatment. All persons who are experiencing
19 pain should expect the appropriate assessment and management of pain while
20 retaining the right to refuse treatment. A person's report of pain is the optimal
21 standard upon which all pain management interventions are based. The goal of
22 pain management is to reduce the individual's pain to the lowest level
23 possible, while simultaneously increasing the individual's level of functioning
24 to the greatest extent possible. The exact nature of these goals is determined
25 jointly by the patient and the health care provider.”
26

1 (Exhibit 9, KSBHA Joint Policy Statement, § I, ¶¶ 2-3.) The above excerpts raise several
2 issues relevant to the abstention analysis. First, it is clear that the state regulatory bodies
3 view this issue as a very important one, because they expressly say so. Second, it shows
4 that the State recognizes that achieving “appropriate” pain treatment is not an easy matter,
5 and necessitates both education in the field of pain treatment, as well as patient involvement
6 in treatment decisions. It is clear that the State recognizes a need for physician discretion and
7 the need to carve out sufficient breathing room within the physician-patient relationship. The
8 government’s actions in this case demonstrate the antithesis of this view, applying the blunt
9 force of federal criminalization to matters that have been explicitly recognized by the State as
10 difficult and delicate policy matters..

11 The exercise of federal jurisdiction in this case would not only be disruptive of state
12 efforts to regulate the practice of medicine, and in particular to resolve the issues involving
13 Dr. Schneider, but also would condone the government’s impermissible efforts to override
14 the State’s regulatory process. Allowing the government to proceed in this case would
15 embolden the federal authorities to continue to act in a similar manner, ensuring that the
16 State’s regulatory process will forever be at its whim and mercy. Such a situation would
17 stifle the autonomous and meaningful development of policy by the State guaranteed by the
18 Constitution. Rather, this Court should allow the State’s process to run its course, and take
19 up this case again once it is resolved in the state, if necessary.

20
21 **CONCLUSION**

22 For the above reasons, the Court should abstain from hearing this case.
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26 Respectfully Submitted,

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