S219811

9

CRC 8.25(b) COPY

Case No.

SUPREME COURT
FILED

JUL 09 2014

Frank A. McGuire Clerk

Deputy

IN THE
SUPREME COURT OF CALIFORNIA

ALWIN CARL LEWIS, M.D.

Petitioner,

v.

SUPERIOR COURT OF THE STATE OF CALIFORNIA,
COUNTY OF LOS ANGELES,

Respondent,

MEDICAL BOARD OF CALIFORNIA,

Real Party in Interest.

After a Decision by the Court of Appeal
Second Appellate District, Division Three
Case No. B252032

PETITION FOR REVIEW

FENTON LAW GROUP, LLP
Henry R. Fenton, State Bar No. 45130
Dennis E. Lee, State Bar No. 164360
Benjamin J. Fenton, State Bar No. 243214
bfenton@fentonlawgroup.com
1990 South Bundy Drive, Suite 777
Los Angeles, CA 90025
(310) 444-5244 - FAX: (310) 444-5280
Attorneys for Petitioner
ALWIN CARL LEWIS, M.D.

Case No.

IN THE
SUPREME COURT OF CALIFORNIA

ALWIN CARL LEWIS, M.D.

Petitioner,

v.

SUPERIOR COURT OF THE STATE OF CALIFORNIA,
COUNTY OF LOS ANGELES,

Respondent,

MEDICAL BOARD OF CALIFORNIA,

Real Party in Interest.

After a Decision by the Court of Appeal
Second Appellate District, Division Three
Case No. B252032

PETITION FOR REVIEW

FENTON LAW GROUP, LLP
Henry R. Fenton, State Bar No. 45130
Dennis E. Lee, State Bar No. 164360
Benjamin J. Fenton, State Bar No. 243214
bfenton@fentonlawgroup.com
1990 South Bundy Drive, Suite 777
Los Angeles, CA 90025
(310) 444-5244 - FAX: (310) 444-5280
Attorneys for Petitioner
ALWIN CARL LEWIS, M.D.

TABLE OF CONTENTS

TABLE OF CONTENTS (cont'd)

TABLE OF AUTHORITIES

CALIFORNIA CASES

TABLE OF AUTHORITIES (cont'd)

CALIFORNIA CASES (cont'd)

FEDERAL CASES

OUT-OF-STATE CASES

TABLE OF AUTHORITIES (cont'd)

CONSTITUTIONS

STATUTES

IN THE
SUPREME COURT OF CALIFORNIA

ALWIN CARL LEWIS, M.D.

Petitioner,

v.

SUPERIOR COURT OF THE STATE OF CALIFORNIA,
COUNTY OF LOS ANGELES,

Respondent,

MEDICAL BOARD OF CALIFORNIA,

Real Party in Interest.

After a Decision by the Court of Appeal
Second Appellate District, Division Three
Case No. B252032

PETITION FOR REVIEW

ISSUES PRESENTED

1. Whether the Medical Board of California ("Medical Board" or "Board") is permitted, pursuant to the State constitutional right to privacy, to conduct a warrantless and unfettered search of records of prescriptions for both controlled and non-controlled substances for hundreds of patients, initiated by the state's computerized Controlled Substance Utilization

Review and Evaluation System (CURES) and followed up by general pharmacy audits, regardless of the nature of the patient complaint(s) involved? Petitioner Alwin Carl Lewis, M.D., contends that the applicable legal standard is that the State must show a "compelling state interest" to justify such an intrusion into the constitutional privacy right, and that, under this standard, the blanket, warrantless searches conducted herein were not sufficiently narrowly tailored.

2. Whether Fourth Amendment privacy rights under the federal constitution, which do not require balancing of interests, may be asserted by a physician with respect to patient prescription records.

INTRODUCTION: WHY REVIEW SHOULD BE GRANTED

A.

The important constitutional privacy rights involved

Review in this case should be granted because the decision of the Court of Appeal squarely conflicts with the privacy guarantees set forth in the California Constitution.

The facts of the case are not in dispute.[1] The Board's investigation arose out of a single patient complaint that a physician, Petitioner Alwin

---

[1] More detailed discussion of the facts, with citations to the record, occurs in subsequent sections.

Carl Lewis, M.D. ("Petitioner" or "Dr. Lewis"), recommended that the patient (V.C.) lose weight and start a diet that the patient considered to be unhealthful. There was no issue whatsoever with respect to prescriptions pertaining to this patient or with the actual care of the patient.

The Board ultimately found that Dr. Lewis did not recommend any sort of "unhealthful diet", as the patient claimed, nor did the Board find any violations of the standard of care in her treatment (a one-time event on May 8, 2008). The only adverse finding by the Board with respect to V.C. was that some of Petitioner's documentation could have been more thorough.

Nevertheless, based solely on V.C.'s complaint, the Medical Board obtained, via CURES and general pharmacy audits, prescription medication records for all of Dr. Lewis' patients over a four-year period, including records for non-controlled prescription medications for many of these patients. Dr. Lewis had hundreds of patients, and the records obtained revealed the medications taken by these patients over an extended period of time. By reviewing these records, the Medical Board could easily discern the most sensitive private information that patients are entitled to maintain as confidential, such as which persons are being treated for cancer, AIDS, mental illness, or any number of other conditions that are not the Board's concern, absent a compelling interest. These records contain the names and

addresses of the patients such that, without privacy protection, there is nothing to prevent investigators from snooping into the health conditions of celebrities, sports figures, judges or anyone else.

In 1972, the California Constitution was amended to provide express protection to the right of privacy. (Article I, section 1). The state constitutional privacy right is broader than that under the federal constitution. *American Academy of Pediatrics v. Lungren* (1997) 16 Cal.4th 307, 326-327. This Court has indicated that the state constitutional amendment was aimed at several "principal mischiefs":

> (1) government snooping and the secret gathering of personal information, (2) the overbroad collection and retention of unnecessary personal information ..., (3) the improper use of information properly obtained for a specific purpose, for example, the use of it for another purpose or the disclosure of it to some third party, and (4) the lack of a reasonable check on the accuracy of existing records. ... any such intervention must be justified by a compelling interest.

White v. Davis (1975) 13 Cal.3d 757, 775 (emphasis added).

This Court noted that the amendment reflected voter concerns regarding "proliferation of government snooping and data collecting... Government agencies seem to be competing to compile the most extensive sets of dossiers of American citizens. Computerization of records makes it

possible to create 'cradle-to-grave' profiles of every American." *People v. Privitera* (1979) 23 Cal.3d 697, 709.

As held in *Medical Quality Assurance v. Gherardini* (1979) 93 Cal.App.3d 669 ("*Gherardini*"), and confirmed by numerous subsequent cases, "A person's medical profile is an area of privacy infinitely more intimate, more personal in quality and nature than many areas already judicially recognized and protected." *Gherardini*, *supra*, 93 Cal.App.3d at 678; see also *Hill v. National Collegiate Athletic Assn.* (1994) 7 Cal.4th 1, 41 (quoting the same language from *Gherardini*).

In *Gherardini*, the Court of Appeal concluded that the Medical Board must make a showing of "good cause" before obtaining patient medical records. The court reached this conclusion based on the "compelling interest" standard set forth in such cases as *White* and *Privitera*, which requires that the State use the "least intrusive means" available when dealing with the constitutional privacy right. *Gherardini*, *supra*, 93 Cal.App.3d at 677-682.

The Court of Appeal, in the present case, purported to apply *Gherardini* and the compelling interest standard, yet concluded that warrantless, subpoenaless searches of patient prescription records are freely available to state law enforcement agencies. The Court of Appeal's

decision is plainly erroneous for the reasons set forth in detail herein.

B.

Specific legal questions raised herein

Review should be granted to clarify at least three distinct legal issues of great statewide significance. First, does the "compelling state interest" standard still apply to the state constitutional right to privacy that patients have with respect to their medical records? In this case (*Lewis v. Superior Court* (2014) 226 Cal.App.4th 933, 2nd App. Dist., "*Lewis I*"), the court called into question the holding in *Gherardini* that the "compelling state interest" standard applies to the state constitutional privacy right in medical records, due to this Court's later decision in *Hill v. National Collegiate Athletic Assn.* (1994) 7 Cal.4th 1, 34-35 ("*Hill*"), in which this Court determined that the "compelling state interest" test does not always apply and that a lesser degree of scrutiny may apply, depending on the context.

Lewis I assumed, without deciding, that the compelling state interest standard does indeed still apply with respect to patient prescription records, after *Hill*. *Lewis I, supra*, 226 Cal.App.4th at 953-954.[2] There remains an

---

[2] In *Medical Board of California v. Chiarottino* (2014) 225 Cal.App.4th 623, 631-632 ("*Chiarottino*"), the First Appellate District also assumed, without deciding, that the compelling interest standard applied to prescription records.

open question about the applicable standard of review in this context.

Perhaps more importantly, the appellate court erred in its application of that test, in that it failed to consider whether less intrusive alternatives were available to meet the asserted state interest at issue; specifically, whether a warrant or "good cause" requirement would be sufficient. Thus, the second critical legal issue raised by this case is: assuming that the compelling state interest test still applies in this context, did *Lewis I* err in applying that test? Because *Lewis I* failed to consider "less intrusive alternatives" to protect the privacy right at stake,[3] Petitioner contends that it did so err, and that a warrant, subpoena, or good cause requirement should have been found to be applicable.[4]

The third issue is whether a physician is entitled to assert privacy rights under the Fourth Amendment of the federal constitution with respect to prescription records of the physician's patients. The court in *Lewis I* suggested that physicians cannot, and thereby distinguished two cases from other jurisdictions, *State v. Skinner*, 10 So.3d 1212 (La.2009) ("*Skinner*")

---

[3] *Chiarottino* also failed to discuss "less intrusive alternatives" such as a good cause requirement.

[4] Dr. Lewis acknowledges that CURES serves a valid public purpose in protecting patient health and safety with respect to controlled substances, but contends that the "least intrusive means" of impinging on patient privacy rights requires a warrant or good cause requirement of some sort.

and *Oregon Prescription Drug Monitoring Program v. United States Drug Enforcement Administration*, --- F.Supp.2d ---, 2014 WL 562938 (D.Ore.2014) ("*OPDMP*"). See *Lewis I*, 226 Cal.App.4th at 941, fn.5; and at 952, including fn.16. As far as Petitioner is aware, there is no clearcut authority in California whether a physician has a "personal" privacy right (as opposed to a "vicarious" right) in patient medical records. If so, the Court of Appeal's attempts in *Lewis I* to distinguish *Skinner* and *OPDMP* fail utterly, and, as acknowledged by the Court of Appeal, no balancing test would apply in this case at all due to the U.S. Supreme Court's ruling in *Whalen v. Roe*, 429 U.S. 589, 604, fn.32 (1977) (*Lewis I, supra*, 226 Cal.App.4th at 952), such that there has been an unequivocal violation of Fourth Amendment rights inasmuch as the searches here were conducted without warrant, subpoena, or any showing of good cause whatsoever.

BACKGROUND

Petitioner Alwin Carl Lewis, M.D. ("Petitioner" or "Dr. Lewis") practices medicine in southern California. See Supporting Exhibits filed with Court of Appeal, "S.E.", Ex. 1, p. 2 (Decision, Finding 4). He received his medical degree and a masters degree in Public Health from Tulane University in New Orleans, Louisiana, in 1997. *Id.* (Finding 3). In 2001, he completed an internal medicine residency at UC Irvine. *Id.* His practice

is primarily devoted to adults and weight loss issues. *Id.* (Finding 4).

A. The initial complaint

The Board initiated its investigation against Dr. Lewis after a written complaint by patient V.C. on August 11, 2008. S.E., Ex. 1, p. 81 (Investigation Narrative). V.C. was interviewed by a Board investigator on April 7, 2009. S.E., Ex. 1, pp. 82-84. V.C.'s complaint arose out of a single visit with Dr. Lewis on May 8, 2008. S.E., Ex. 1, pp. 81-84. In both her written statement and her interview, V.C. raised no issues whatsoever about medications or prescriptions. Rather, she appeared to be angry that Dr. Lewis had recommended weight loss and her principal complaint was that Dr. Lewis had purportedly recommended a diet plan, called the "Five Bite Diet", that the patient believed is "not healthy." S.E., Ex. 1, p. 81-84.

Upon receipt of patient V.C.'s authorization, Dr. Lewis forwarded V.C.'s medical records to the Board for review; Dr. Lewis had only seen V.C. once, briefly, and she had declined to return for any follow-ups. S.E., Ex. 1, pp. 81-82. The Board sent the results of their investigation of V.C. to two experts for review. S.E., Ex. 1, p. 7 (Decision, Finding 23) and p. 88.

The Board's original Accusation was dated May 10, 2011. S.E., Ex. 1, p. 3 (Decision, Finding 1) and pp. 61-66. The Accusation pertained solely to Dr. Lewis' care and treatment of V.C. on May 8, 2008. S.E., Ex. 1,

pp. 4-7 (Decision, Findings 6-22); and pp. 61-66. The original Accusation (as well as all amended Accusations) merely alleged, with respect to patient V.C., that Dr. Lewis had not performed a full medical exam on V.C. on May 8, 2008, but had instead focused on her weight, and that he had tried to put her on the "Five Bite Diet." S.E., Ex. 1, pp. 34-35 (¶ 10); and p. 64 (¶ 9). No issues regarding medications or prescriptions-- or even of care provided, other than the purported dietary recommendation-- were ever raised by the Board at the administrative hearing with respect to V.C.

After fully considering the evidence at hearing, the Board concluded that Dr. Lewis' medical exam of V.C. was indeed within the standard of care and that he had not, in fact, put the patient on the "Five Bite Diet" or any other diet, but instead had merely suggested a healthy lifestyle. S.E, Ex. 1, p. 10 (Decision, Finding 32). The only "misconduct" ultimately found by the Board with respect to V.C. was a few minor issues with documentation-- specifically, he had not documented some of the routine questions he had asked the patient in the course of his exam; he had not quantified the extent to which the patient's weight was excessive except for a reference to "central obesity"; and he did not document that the patient was being treated by another physician for her headaches. S.E., Ex. 1, pp. 5-6 (Decision, Findings 11-13) and p. 9 (*Id.*, Finding 28-d).

B. The intrusive CURES searches and subsequent pharmacy audits, conducted without warrant, subpoena, or showing of good cause

The Board subsequently amended its Accusation twice, on June 21, 2011 and February 1, 2012. S.E., Ex. 1, p. 3 (Decision, Finding 1) and pp. 29-46. The amended Accusations were substantially identical to the original in their allegations regarding V.C. but also added entirely new allegations and charges related to five additional patients, W.G., M.U., D.L., D.S., and M.M. *Id.*

None of these five patients had filed any sort of complaint about Dr. Lewis. Rather, the Board had, without any prior notice or warning to the patients or Dr. Lewis, conducted a broad and intrusive search of all of Petitioner's patients' medical prescription records, via the state's Controlled Substance Utilization Review and Evaluation System (CURES). S.E., Ex. 1, p. 82. On November 25, 2008, the Board obtained a 205-page CURES report which set forth the records for prescriptions for controlled medications for all of Dr. Lewis' patients, from November 2005 to November 25, 2008. *Id* at 82, 116-320.

CURES records are maintained in a statewide databank and contain confidential patient information such as a patient's first and last name, home address, the particular medication prescribed, the quantity of medication prescribed, and the location of the pharmacy.

Pursuant to California Health and Safety ("Cal. H&S") Code section 11165(a), CURES includes all prescriptions of controlled substances in California. Pharmacies are required to file regular reports of new controlled substance prescriptions on a weekly basis with CURES, and this information is quite extensive and includes the full name, address, phone number, gender, and date of birth of the patient, as well as information about the prescriber, the medications prescribed, the pharmacy from which they were obtained, and the quantity. See e.g. Cal. H&S Code section 11165(d), as amended by S.B. 809 and effective September 27, 2013.

At the time the Board conducted its initial search of CURES, no patients other than V.C. had authorized the release of medical records to the Board or had made any complaints against Dr. Lewis. S.E., Ex. 1, pp. 1092-1093. Moreover, the Board had not obtained any warrants nor issued any subpoenas for patient records prior to the Board's receipt of the CURES records. *Id.* On December 16, 2009 the Board obtained an additional 49 pages of CURES reports pertaining to Dr. Lewis' patients. S.E., Ex. 1, pp. 88, 321-369, 1093-1095. This additional report was also obtained despite the absence of any patient complaints, or the issuance of any subpoenas. *Id.*

The Board's own investigator testified that it was "a common practice during the course of an investigation to 'run' a CURES report on the

physician." *Lewis I, supra*, 226 Cal.App.4th at 939. In other words, the Board routinely runs these CURES searches virtually every time it investigates a physician for any reason at all.

Based on the results of the CURES searches, the Board then sought and obtained the complete prescription records of all of Petitioner's patients from several pharmacies, purportedly pursuant to its general authority to audit pharmacies under Cal. Bus. and Prof. Code section 4081. These records occur as Exhibit "II" at the administrative hearing (S.E., Ex. 1, pp. 370-893), comprising over 500 pages. These records came from Board audits of March 3, 2011 of the CVS Pharmacy in Burbank, and of April 7, 2011 of the CVS pharmacy in Studio City. (S.E., Ex. 1, pp. 104-106, 1125). Exhibit "II" contains hundreds of pages of prescription records for patients other than the five patients at issue, as well as complete records for prescriptions for both controlled and non-controlled drugs, which are obtainable via standard pharmacy audit, but not via CURES.

The pharmacy audits were just as improper as the CURES search (and were arguably even more intrusive, in that they included all prescription records, including non-controlled substances), in that they were conducted for the express purpose of investigating physician prescription practices-- and not as an administrative audit of a pharmacy-- and were

obtained without warrant, subpoena, or showing of good cause.[5]

With the information obtained from the CURES reports and the subsequent pharmacy audits, the Board improperly reviewed patient records for hundreds of Dr. Lewis' patients treated from 2005 to at least 2010. Based on a review of these CURES reports, the Board either issued subpoenas or requested authorizations for medical records with respect to the aforementioned five patients. S.E, Ex. 1, p. 88. As noted, the Board amended its Accusation twice with new allegations and charges related to these patients, alleging excessive prescription of controlled substances, inadequate record keeping, and other violations of the standard of care. S.E., Ex. 1, pp. 29-58, esp. pp. 35-38.

C. The administrative hearing

The administrative hearing was held in February, 2013. S.E., Ex. 1, p. 2. At the outset of the hearing, Dr. Lewis filed a motion to dismiss with respect to the allegations pertaining to patients W.G., M.U., D.L., D.S., and M.M., which was denied. *Id.*, pp. 975-977.

As previously noted, the Board concluded that the only "misconduct" with respect to V.C. involved a few minor issues with documentation--

---

[5] The distinction between administrative pharmacy searches and investigative searches of physician-patient practice is discussed in detail at ____, *infra*.

specifically, Dr. Lewis had not documented some of the routine questions he had asked the patient in the course of his exam; he had not quantified the extent to which the patient's weight was excessive except for a reference to "central obesity"; and he did not document that the patient was being treated by another physician for her headaches. S.E., Ex. 1, pp. 5-6 (Decision, Findings 11-13) and p. 9 (*Id.*, Finding 28-d).

With respect to the other patients, the Board ultimately found that Dr. Lewis was not guilty of excessive prescribing of any medications; had committed primarily very minor record-keeping violations; and that no patients had been actually harmed by any of these very minor violations. S.E., Ex. 1, pp. 22-23 (Decision, Legal Conclusions # 6-9). The Board expressly found that "[t]he few instances in which more than the minimum dosages of medications were prescribed involved patients with documented need for the medications." S.E., Ex. 1, p. 23 (Id., Legal Conclusion # 9). Accordingly, the Board concluded that "discipline in the lower range of the spectrum is appropriate." *Id.*

The Medical Board adopted the Decision as final, effective August 17, 2012. S.E., Ex. 1, p. 1. The Decision revoked Petitioner's medical license but stayed the revocation and placed him on probation for three years under various terms and conditions. S.E., Ex. 1, pp. 23-26 (Order).

D. Subsequent court proceedings

Dr. Lewis filed a Petition for Writ of Administrative Mandamus in the Superior Court of Los Angeles, on September 12, 2012. S.E., Ex. 3, pp. 1140-1174. The Petition alleged, *inter alia*, that the Board's Decision should be set aside with respect to the five patients added in the Amended Accusations-- W.G., M.U., D.L., D.S., and M.M.-- based on the overbroad, intrusive, and warrantless search of their prescription records, going as far back as 2005. S.E., Ex. 3, pp. 1141-1442.

In a written decision dated July 17, 2013, the trial court, the Honorable Joanne O'Donnell, denied the Petition. The court rejected the argument that the warrantless search of the CURES reports had violated the privacy rights of the patients or the physician. S.E., Ex. 9, pp. 1242-1246.

Dr. Lewis subsequently filed a Petition for Writ of Mandate in the Court of Appeal, which is the only authorized mode of appellate review. Cal. Bus. & Prof. Code § 2337; *Leone v. Medical Board* (2000) 22 Cal.4th 660, 663-664, 670. The Court of Appeal granted an alternative writ and an order to show cause. *Lewis I, supra*, 226 Cal.App.4th at 940.

After written and oral argument, the Court of Appeal issued its decision, denying the petition for writ of mandate. *Lewis I.* In its decision, the court assumed, without deciding, that the compelling state interest

standard still applied to patient medical records, after *Hill*. Id. at 953-954. The court did not, however, consider whether "less intrusive alternatives" were available, as required under that test. The court concluded that the State does not need any subpoena, warrant, or prior showing of good cause to search either the CURES database or to conduct a general pharmacy audit, with respect to a physician disciplinary investigation.

The Court of Appeal's decision was filed on May 29, 2014. This Petition for Review followed and is appropriate and timely pursuant to *Superior Court v. County of Mendocino* (1996) 13 Cal.4th 45, 52, fn.5, and California Rules of Court ("CRC") Rules 8.500(e)(1), 8.25(b)(3).

LEGAL DISCUSSION

I.

THE 'COMPELLING INTEREST' STANDARD APPLIES TO THE STATE CONSTITUTIONAL PRIVACY RIGHT IN PATIENT MEDICAL RECORDS, INCLUDING PRESCRIPTION RECORDS

A.

The state constitutional privacy right applies to medical records, pursuant to *Gherardini* and related cases

The Court of Appeal in *Lewis I* acknowledged that the right to privacy set forth in article I, section 1 of the California Constitution applies to patient medical records, including prescription records. *Lewis I, supra,*

226 Cal.App.4th at 946-947 ("Like medical records, prescription records contain identifying information and sensitive information related to drugs used to treat a person's medical condition and also reveal medical decisions concerning the course of treatment.... entitled to privacy from unauthorized public and bureaucratic snooping").[6]

In reaching this conclusion, *Lewis I* cited the seminal case of *Board of Medical Quality Assurance v. Gherardini* (1979) 93 Cal.App.3d 669 ("*Gherardini*"). In *Gherardini*, the Court of Appeal applied cases such as *White v. Davis* (1975) 13 Cal.3d 757 and *People v. Privitera* (1979) 23 Cal.3d 697 in holding that the state constitutional right to privacy applied to patient medical records. *Gherardini, supra*, 93 Cal.App.3d at 677-678.

B.

The "compelling state interest" test with "the least intrusive manner" standard continues to apply to medical records after *Hill v. NCAA* (1994) 7 Cal.4th 1

Gherardini went on to apply the then-applicable standard of review, which was that a violation of the state constitutional right to privacy must be "justified by a compelling state interest", and that, "if state scrutiny is to be allowed, it must be by the least intrusive manner." *Gherardini, supra*, 93

---

[6] The same conclusion was reached by *Chiarottino, supra*, 225 Cal.App.4th at 631 ("It is established that patients do have a right to privacy in their medical information under our state Constitution")

Cal.App.3d at 680. The court concluded that there was a "compelling state interest" involved-- the protection of the public from incompetent or unprofessional physicians-- but also concluded that this right should only be infringed after a showing of good cause by the agency involved, with "an order drawn with narrow specificity." *Id.* at 681.

In *Lewis I*, the court noted that *Gherardini* pre-dated this Court's decision in *Hill v. National Collegiate Athletic Assn.* (1994) 7 Cal.4th 1 ("*Hill*"). *Lewis I, supra*, 226 Cal.App.4th at 953-954. In *Hill*, this Court held that the "compelling state interest" standard applies to some, but not all, cases involving the state constitutional right to privacy, and that, in some contexts, a lesser degree of scrutiny is justified. *Hill, supra*, 7 Cal.4th at 32-35. *Hill*, however, declined to set a "bright-line" rule for determining which standard applies. The Court instead indicated that, in situations involving heightened scrutiny (e.g. a "compelling state interest"), there must be a showing that the "least intrusive means" were employed, whereas in cases involving lesser scrutiny, such a showing might not be necessary:

> Confronted with a defense based on countervailing interests, plaintiff [asserting violation of the state constitutional privacy right] may undertake the burden of demonstrating the availability and use of protective measures, safeguards, and alternatives to defendant's conduct that would minimize the intrusion on privacy interests.

> [citations omitted]. For example, if intrusion is limited and confidential information is carefully shielded from disclosure except to those who have a legitimate need to know, privacy concerns are assuaged. On the other hand, if sensitive information is gathered and feasible safeguards are slipshod or nonexistent, or if defendant's legitimate objectives can be readily accomplished by alternative means having little or no impact on privacy interests, the prospect of actionable invasion of privacy is enhanced.

Id. at 38, emphasis added.

Hill involved a lawsuit by student-athletes from Stanford University against the National Collegiate Athletic Association (NCAA), a private entity, alleging a violation of the students' state constitutional right to privacy from the NCAA's requirement that student-athletes be subjected to urine-based drug-testing involving direct observation. *Hill, supra*, 7 Cal.4th at 9. The Court concluded that, in such a context involving the voluntary participation of athletes in the privileged realm of collegiate competition, a private entity was not required to establish a "compelling interest" in its drug testing requirements. *Id.* at 46-47. The Court also concluded that the plaintiffs, and not the defendants, had the burden of proving that "there are no less intrusive means available", such as "drug education and testing based on reasonable suspicion [as] feasible alternatives to random drug testing." *Id.* at 49.

In reaching these conclusions, *Hill* acknowledged various significant factors, including the fact that

> The NCAA is a private organization, not a government agency. Judicial assessment of the relative strength and importance of privacy norms and countervailing interests may differ in cases of private, as opposed to government, action.
>
> First, the pervasive presence of coercive government power in basic areas of human life typically poses greater dangers to the freedoms of the citizenry than actions by private persons. ...
>
> Second, "an individual generally has greater choice and alternatives in dealing with private actors than when dealing with the government." ...
>
> Third, private conduct, particularly the activities of voluntary associations of persons, carries its own mantle of constitutional protection in the form of freedom of association. ...

Id. at 38-39 (emphasis added).

C.

The present case is distinguishable from *Hill* in that it involves involuntary intrusions into privacy rights by a powerful and unaccountable public entity

All of the factors cited in the previous quote militate the other way in the present case, which involves government action, not private action.

First, the State Medical Board, as a public entity, has broad and

expansive authority to explore the prescription records of any patient in the State, to a far more intrusive extent than any private entity like the NCAA, and with respect to the entire population of the State. Indeed, the Board's own investigator testified that it was "a common practice during the course of an investigation to 'run' a CURES report on the physician." *Lewis I*, *supra*, 226 Cal.App.4th at 939. In other words, the Board routinely runs these CURES searches virtually every time it investigates a physician for any reason at all.

Second, this situation is markedly different from that in *Hill*, which involved voluntary participation by student-athletes in the privileged world of collegiate competition, a realm that only a select few individuals are eligible for, which "carries with it social norms that effectively diminish the athlete's reasonable expectation of personal privacy in his or her bodily condition, both internal and external". *Hill*, *supra*, 7 Cal.4th at 42. In contrast, individual patients have no realistic "choice" regarding the submission of their prescription records to the State CURES database. This lack of a meaningful choice was accurately described by the U.S. District Court in *Oregon Prescription Drug Monitoring Program v. United States Drug Enforcement Administration*, --- F.Supp.2d ---, 2014 WL 562938 (D.Ore.2014) ("*OPDMP*"), where the court noted that "patients and doctors

are not voluntarily conveying information to the PDMP [an Oregon state prescription drug monitoring program similar to the California CURES program]. The submission of prescription information to the PDMP is required by law. The only way to avoid submission of prescription information to the PDMP is to forgo medical treatment or to leave the state. This is not a meaningful choice." *Id.* at *8, emphasis added.

Third, there are no countervailing "freedom of association" considerations applicable here, as there were to the NCAA, which is a private entity. The Medical Board is a public entity that has no such First Amendment "freedom of association" rights.

Accordingly, Petitioner contends that, in the present context-- searches of patient prescription records by a state enforcement agency-- a "compelling public interest" must be established which involves the "least intrusive means" available.

II.

THE COURT OF APPEAL FAILED TO ADDRESS THE AVAILABILITY OF 'LESS INTRUSIVE MEANS' AND SO MISAPPLIED THE COMPELLING INTEREST STANDARD IN THIS CASE

A.

Because the "compelling interest" standard applies in this case, a subpoena, warrant, or good cause standard is applicable

Hill rejected the argument made by the student-athletes that the NCAA should employ "less intrusive means" such as "drug education and testing based on reasonable suspicion [as] feasible alternatives to random drug testing." *Hill, supra*, 7 Cal.4th at 49. This is precisely the argument being made in the present case: that the Medical Board should employ "less intrusive means" of monitoring controlled substance abuse, by limiting searches of the CURES databases (and subsequent searches conducted pursuant to the general pharmacy audit authority) to those involving "good cause", as established by warrant, subpoena, or similar legal mechanism. However, *Hill* declined to apply the "less intrusive means" standard precisely because the case did not involve either a "clear invasion[] of central, autonomy-based privacy rights" or "the invasive conduct of government agencies rather than private, involuntary associations." *Id.* at 49. The Court in *Hill* expressly noted that there was "no case imposing on a

private organization, acting in a situation involving decreased expectations of privacy, the burden of justifying its conduct as the 'least offensive' possible under the circumstances. ... we decline to impose it." *Id.* at 50 (emphasis added).

As noted, the Courts of Appeal in both *Lewis I* and in *Chiarottino*, while failing to resolve whether the "compelling interest" standard applies, purported to find that, even if that test applied, it had not been met and that warrantless searches of CURES and prescription records were freely available to the State. *Lewis I*, *supra*, 226 Cal.App.4th at 954: "we assume without deciding that the state must establish a compelling interest"; *Chiarottino*, *supra*, 225 Cal.App.4th at 631: "Even assuming defendant has satisfied the three-prong prima facie elements under *Hill*, we concluded any invasion of his patients' privacy rights... is justified by a compelling competing interest."

However, despite the assertion by the court in *Lewis I* that it was applying the "compelling interest" test, the court therein completely failed to discuss or consider whether "less intrusive alternatives" were feasible. Instead, the court merely stated, "To impose a good cause requirement before accessing CURES data would necessarily involve litigating the privacy issue in advance. ... This delay defeats the legislative purpose of

CURES... If the privacy issue were litigated before accessing CURES, the prescribing physician under investigation could stall release of these records, which would prevent the state from exercising its police power to protect the public health." *Lewis I*, *supra*, 226 Cal.App.4th at 955. In other words, the Court of Appeal's rationale for finding that a "good cause" requirement was too restrictive was that it could "stall release" of records. This rationale is ludicrous. Mere expediency in obtaining the records can hardly justify the broad and intrusive authority that the Board seeks here.

The *Lewis I* court went on to assert as follows:

> The Board's access to CURES also should not be limited based upon the nature of the complaint lodged against the licensee-physician. From the patients' perspective, the privacy interest in their controlled substances prescription records is no different if the Board were investigating unprofessional conduct in their care and treatment or in improper prescription practices. Even if the Board is investigating the former, as was the case here, a physician's prescribing practices are directly related to medical care and treatment afforded to his patients. A complaint regarding the quality of care and treatment by a diet doctor, for example, might often reveal improper prescribing practices that could be deadly. Likewise, a complaint regarding the quality of care or treatment may be related to a physician's substance abuse problem that poses a threat to public health. Limits such as Lewis proposes would compromise the Board's paramount concern to protect public health.

Id. at 955 (emphasis added).

This rationale also makes no sense. Whether or not "good cause" exists to search the CURES database can be litigated on a case-by-case basis. In those situations where a credible suspicion exists of improper prescribing practices, such good cause would be readily shown. But the court is basically saying that mere fact that a patient complaint has been made, as in the present case, is sufficient to raise a "generalized" concern about potential "substance abuse problems" of a physician, thereby justifying unfettered access to prescription information. Allowing such unfettered searches whenever the State feels like it does not limit the State to the "least intrusive means"; to the contrary, it enables the State to be as intrusive as it pleases without any concern for possible legal ramifications.[7]

---

[7] The Court of Appeal in *Chiarottino* also failed to address the issue of "less intrusive alternatives." Instead, the court therein merely noted that the Board did not "investigate the records of individuals who were not [the physician's] patients, or that the Board improperly disclosed any CURES information to third parties." *Chiarottino*, *supra*, 225 Cal.App.4th at 636. This discussion fails to address the argument that the search of the patients' pharmacy records is inherently intrusive, regardless of whether the Board improperly discloses that information to third parties or not.

B.

The same "good cause" standard should apply to general pharmacy audits that are conducted for the express purpose of investigating physician practices rather than as administrative audits of pharmacists

Dr. Lewis acknowledges that there is some authority holding that the "closely regulated business" exception permits audits of pharmacists to be conducted without warrant. In *People v. Doss* (1992) 4 Cal.App.4th 1585, the court permitted a warrantless search of a pharmacy in a criminal action, over the objection of the pharmacist. *Id.* at 1588-1589. However, the application of the "closely regulated business" exception in the context of pharmacy audits in the administrative investigation of pharmacists does not and should not extend to Medical Board investigations of physician prescription practices in the context of the physician-patient relationship.

Doss held that pharmacies are closely regulated businesses in California. *Doss*, *supra*, 4 Cal.App.4th at 1598. However, that, alone, is insufficient to establish that warrantless searches of pharmacies are necessarily valid in all contexts. Even for closely regulated businesses, the requirements of *New York v. Burger*, 482 U.S. 691 (1987) ("*Burger*") must still be met for a warrantless search to be valid.

In *Doss*, the Court held that the warrantless search therein was justified because "state statutes authorize administrative inspections of

pharmacies." *Id.* at 1598 (emphasis added). Accordingly, a pharmacist has no reasonable expectation of privacy with respect to such administrative searches that are conducted for purposes of verifying whether the pharmacist is complying with applicable law. *Doss* did not hold that warrantless pharmacy audits could be freely conducted in investigating physician-patient prescribing practice. That issue was not raised in *Doss* and so was never reached; no physician or patient therein objected on privacy grounds.

Unlike a physician or patient, a pharmacist does not have a reasonable expectation of privacy in prescription records with respect to administrative pharmacy inspections. There are several reasons. One is that pharmacists are on notice that their business records are subject to inspection at any time. Cal. Bus. and Prof. Code section 4081 (formerly section 4232) provides, in pertinent part:

> All records of manufacture and of sale, acquisition, or disposition of dangerous drugs or dangerous devices shall be at all times during business hours open to inspection by authorized officers of the law, and shall be preserved for at least three years from the date of making. A current inventory shall be kept by every [entity] who maintains a stock of dangerous drugs or dangerous devices.

Id. at subdiv. (a).

In contrast, the medical records of a physician are not ordinarily subject to such broad searches; rather, they may only be searched in the office of the physician, and only if a patient complaint is involved. Cal. Bus. & Prof. Code section 2225(a).

But perhaps more importantly, the purpose of administrative pharmacy inspections, which is to examine the extent to which pharmacists have complied with applicable law, does not implicate important informational privacy rights of the pharmacist. To the pharmacist, these records only pertain to products that he or she has distributed. This is in sharp contrast to the informational privacy rights of the patient, regarding the intimate details of his or her medical condition. The court concluded, "Under both the statutory scheme and the circumstances of this case, defendant [pharmacist] had no reasonable expectation of privacy in the pharmacy records." *Doss*, *supra*, 4 Cal.App.4th at 1598 (emphasis added).

Indeed, the only concern raised in *Doss* was the pharmacist's right to sell drugs as he saw fit. The evidence indicated that the pharmacist was basically selling controlled drugs without a valid prescription, to non-patients, and for his own personal profit:

> [O]ver a 15-month period, defendant, the owner of Medical Memorial Pharmacy, ordered and took possession of large quantities of certain controlled substances in high dosages. The

> drugs were of a type rarely prescribed by physicians but in high demand among the illegal street trade. At the end of the 15-month period, an audit of defendant's pharmacy revealed that none of the ordered drugs were in stock; that there were no prescription forms to account for the legal distribution of any of the drugs as required by law; that defendant had no inventory of drugs in stock as required by the Drug Enforcement Administration; and that there had been no reported burglaries of defendant's pharmacy to account for the disappearance of the drugs.

Id. at 1589 (emphasis added).

The circumstances of *Doss* were simply different from the circumstances of the present case. The present case did not arise out of information that was actually obtained as part of a routine pharmacy audit. As discussed, Investigator Hollis did apparently order pharmacy records pursuant to B&P Code section 4081, but not for the purposes of an administrative investigation of a pharmacist, but rather for the purpose of investigating the propriety of Dr. Lewis' prescribing practices. Ms. Hollis even admitted that the "more typical" situation in which she would order such an audit would be in an investigation of pharmacies, not physicians. (S.E., Ex. 1, p. 1125).

Unlike CURES searches, a generalized pharmacy audit pursuant to Cal. Bus. & Prof. Code section 4081 enables access to all prescription

records, including prescriptions for non-controlled substances. A simple perusal of Exhibit "II" at the administrative hearing, which occurs at S.E., Ex. 1, pp. 370-893, reveals records of numerous prescriptions of non-controlled substances that were obtained pursuant to the generalized pharmacy audit.

This case is analogous to that of *People v. Coffman* (1969) 2 Cal.App.3d 681, in which the court held that a search pursuant to one statutory scheme could not be used as a "ruse" to justify a search for entirely different purposes.

In *Coffman*, a police officer attempted to justify an ordinary police search of a parolee, by the mere fact that a parole officer was present at the time of the search. The California courts have held that a parole officer may conduct searches of parolees, without regard to Fourth Amendment protections, for the "purpose of maintaining the restraints and social safeguards accompanying the parolee's status." *Coffman*, *supra*, 2 Cal.App.3d at 688. The Court emphatically rejected the notion that the parole officer's presence validated a search by a police officer, where the purpose of the search had no relation to the individual's parolee status:

> The Attorney General cites five later appellate decisions ... to support the contention that the parole officer's physical presence or his delegation of authority to the police validates

the search without regard to its instigating source.

The contention is inacceptable. ... Parole status alone does not justify a search by peace officers other than parole agents. [citations] When a parole agent is justified in making a search, he may enlist the aid of the police. [citation] The parole agent's physical presence, even his nominal conduct of the physical acts of search, does not signalize validity. The purpose of the search, not the physical presence of a parole agent, is the vital element. ...

The parole agent was not engaged in administering his supervisorial function. He had not instigated the search nor evinced any official interest in it except in his role as a 'front' for the police. His presence was a ruse, calculated to supply color of legality to a warrantless entry of a private dwelling. The Fourth Amendment hardly lends itself to such totemism. The search was primarily aimed at ordinary law enforcement, not parole administration. Law enforcement searches are heartily to be encouraged, but by means sanctioned by the Constitution. Defendant was in jail and the Chico police had ample time and opportunity to secure the search warrant mandated by the Fourth Amendment. They chose the parole agent rather than a search warrant as their ticket of entry to the apartment. The search was illegal and its evidentiary products inadmissible. Evidence which awaited the police, which had been practically and legally obtainable through a search warrant, was now tainted by the pursuit of unconstitutional means. Such a taint is not temporary. An unconstitutional seizure places the articles permanently beyond the pale of admissibility.

Coffman, supra, 2 Cal.App.3d at 688-689 (emphasis added).

The court specifically noted the following caveat:

> This holding places no impediment upon cooperation between police and parole agencies. It does mean that when the search is instigated by the police for law enforcement purposes, Fourth Amendment principles must govern judicial use of the resulting evidence. [citations]

Coffman, supra, 2 Cal.App.3d at 689, fn.3 (emphasis added).

That caveat was affirmed in *People v. Burgener* (1986) 41 Cal.3d 505, 536, fn.14, where this Court held that *Coffman* was inapplicable to the extent that it could be read as always barring the admissibility of evidence, obtained as part of a parolee search, in an ordinary law enforcement case. Rather, the courts have made clear that the fruit of a parolee search that is initially conducted for the proper purposes-- i.e. parole administration-- could still be used by police officers in ordinary law enforcement cases:

> *Coffman* stands for the proposition that, absent a proper parole purpose, the parole agent's mere presence or authorization for the search is ineffective to validate the search. On the other hand, as we explained in *People v. Burgener* (1986) 41 Cal.3d 505, 536, neither police participation in the search nor the parolee's custodial status invalidates an otherwise proper parole supervision purpose.

People v. Johnson (1988) 47 Cal.3d 576, 594 (emphasis added).

Similarly, in a case involving what actually originates a legitimate,

good faith administrative audit of a pharmacy, pursuant to either B&P Code section 4081, the mere fact that the fruit of such a search are used in a subsequent investigation of a physician's prescribing practices would not necessarily render the warrantless administrative search invalid.[8] Rather, it is the pretextual use of the statutes authorizing warrantless administrative audits of pharmacies, for the express purpose of investigating physician-patient prescribing practices, that is invalid. Such use is precisely what happened here, and reflects a deliberate attempt to circumvent the informational privacy rights of patients and physicians.

As noted in *Coffman*, the ruling was not intended to prevent investigators from acting on such information, obtained for valid purposes; thus, if the Board had, in fact, discovered information raising issues about a physician's prescription practices during the course of what began as a good faith administrative pharmacy audit, such information could presumably be used against the physician in a disciplinary action. But the opposite happened here: the pharmacy audit procedures were used for the express purpose of justifying an intrusive search, violative of patient informational privacy rights.

---

[8] That is precisely what appeared to have happened, for example, in *Wood v. Superior Court* (1985) 166 Cal.App.3d 1138, 1141 (routine pharmacy audit uncovered potential problems with physician prescribing activities).

III.

WHETHER FOURTH AMENDMENT RIGHTS APPLY TO A PHYSICIAN IN HIS OR HER MEDICAL RECORDS IS AN UNRESOLVED QUESTION

One additional important issue is whether Petitioner is permitted to assert Fourth Amendment rights under the federal constitution, against unlawful searches and seizures, with respect to the medical records of his patients. The court in *Lewis I* strongly implied that, if such rights did apply, no balancing test of any sort is required based on the U.S. Supreme Court's ruling in *Whalen v. Roe*, 429 U.S. 589, 604, fn.32 (1977) and that the warrantless, subpoenaless searches would then be *per se* unconstitutional, without any need to delve into the nature of the public interest involved, or the existence of less intrusive alternatives.

In *Gherardini*, the Court of Appeal applied the Fourth Amendment rights of the federal constitution to a physician on behalf of his patients, pursuant to the "vicarious exclusionary rule" which then applied in California. *Gherardini, supra*, 93 Cal.App.3d at 675-676, 681 (1979 case citing the vicarious exclusionary rule and using it to apply *Katz v. United States*, 389 U.S. 347, 1967, and the Fourth Amendment of the federal constitution). The court in *Lewis I*, however, noted that the "vicarious exclusionary rule", which used to be the rule in California, had been

abrogated in 1982 by state constitutional amendment. *Lewis I, supra*, 226 Cal.App.4th at 941, fn.5, citing *In re Lance W.* (1985) 37 Cal.3d 873, 890, which discussed the 1982 amendment via Proposition 8, adding article I, section 28(d) to the California Constitution.

The court in *Lewis I* went on to expressly distinguish two cases cited by Petitioner, on the ground that those cases involved Fourth Amendment rights under the federal constitution: (1) *State v. Skinner*, 10 So.3d 1212 (La. 2009): "Absent from Lewis' discussion of *Skinner* is a distinction critical here, that is, a balancing test was inapplicable to the court's Fourth Amendment analysis of the intrusion into individual privacy during the course of a criminal investigation" (*Lewis I, supra*, 226 Cal.App.4th at 952, citing *Skinner*, 10 So.3d at 1218, and *Whalen v. Roe*, 429 U.S. 589, 604, fn.32 (1977); and (2) *Oregon Prescription Drug Monitoring Program v. United States Drug Enforcement Administration*, --- F.Supp.2d ---, 2014 WL 562938 (D.Ore.2014) ("*OPDMP*"), as involving a "Fourth Amendment issue" (*Lewis I, supra*, 226 Cal.App.4th at 952, fn.16; see also *OPDMP* at *6, fn.3: A balancing test pursuant to *Whalen* "is inapplicable in the context of the Fourth Amendment."

Lewis I, therefore, acknowledged that, if Fourth Amendment rights applied, no "balancing" would be required pursuant to *Whalen v. Roe*, and

good cause would be required to be shown via warrant or subpoena. However, the court rather conclusorily stated that "Lewis has no reasonable expectation of privacy in his prescribing practices of controlled substances." *Lewis I, supra*, 226 Cal.App.4th at 942, fn.6, noting only that controlled substances are "highly regulated" by the state.

However, there is authority to the contrary that holds that a physician does, indeed, have a personal privacy interest, and not just a vicarious one, in his or her prescribing practices. In *Wood v. Superior Court* (1985) 166 Cal.App.3d 1138, 1145, the court held that a physician whose patient prescription records are at issue has "*first* party standing" [emphasis in original] and not merely "third party standing" because the physician's interests are "coincident with", and are "also implicated." Further, *De La Cruz v. Quackenbush* (2000) 80 Cal.App.4th 775 held that, even for closely regulated businesses, Fourth Amendment rights still apply.

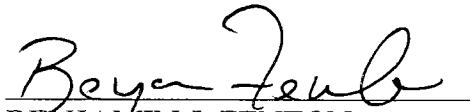
Petitioner contends that there is an open question whether a physician has direct, personal Fourth Amendment privacy interests in his or her prescription records, such that *Lewis I* itself suggests that no "balancing" is required and that a warrant or subpoena showing good cause would indeed be required.

CONCLUSION

Based on the foregoing, Petitioner respectfully requests that this Petition for Review be granted.

Dated: July 8, 2014

FENTON LAW GROUP, LLP

By: 

BENJAMIN J. FENTON
Attorneys for Petitioner,
Alwin Carl Lewis, M.D.

CERTIFICATION OF WORD COUNT

I certify that this document contains 8,178 words, as counted by the word processing program used to generate this document, excluding the title page and the tables.

Dated: July 8, 2014

Respectfully submitted:

By: _____

Benjamin J. Fenton
Attorneys for Petitioner

226 Cal.App.4th 933
Court of Appeal,
Second District, Division 3, California.

Alwin Carl LEWIS, Petitioner,
v.
The SUPERIOR COURT of Los Angeles County, Respondent;
Medical Board of California, Real Party in Interest.

B252032 | Filed May 29, 2014

Synopsis

Background: Physician petitioned for writ of administrative mandamus seeking to set aside Medical Board's disciplinary decision subjecting physician's license to a stayed revocation subject to probation conditions. The Superior Court, No. BS139289, Los Angeles County, Joanne B. O'Donnell, J., denied petition. Physician filed a petition for writ of mandate in the Court of Appeal to set aside the judgment.

[Holding:] The Court of Appeal, Aldrich, J., held that Board's access to patients' controlled substance prescription records from Controlled Substance Utilization Review and Evaluation System (CURES) database did not violate patients' constitutional rights to privacy.

Petition denied.

West Headnotes (25)

[1] **Constitutional Law**
Right to privacy
92 Constitutional Law
92VI Enforcement of Constitutional Provisions
92VI(A) Persons Entitled to Raise Constitutional Questions; Standing
92VI(A)4 Particular Constitutional Provisions in General
92k727 Right to privacy
Physician lacked standing to assert the state constitutional privacy rights of three patients who voluntarily consented to the release of their medical records, on physician's petition for writ of administrative mandamus seeking to set aside Medical Board's disciplinary decision against physician. Cal. Const. art. 1, § 1.

Cases that cite this headnote

[2] **Constitutional Law**
Right to privacy
92 Constitutional Law
92VI Enforcement of Constitutional Provisions
92VI(A) Persons Entitled to Raise Constitutional Questions; Standing
92VI(A)4 Particular Constitutional Provisions in General
92k727 Right to privacy
(Formerly 198Hk223(1))
Physician had standing to assert the state constitutional privacy rights of patients who did not consent to the release of their medical records from Controlled Substance Utilization Review and Evaluation System (CURES) database as part of investigation of physician, on physician's petition for writ of administrative mandamus seeking to set aside Medical Board's disciplinary decision against physician. Cal. Const. art. 1, § 1.

Cases that cite this headnote

[3] **Constitutional Law**
Facial invalidity
92 Constitutional Law
92V Construction and Operation of Constitutional Provisions
92V(F) Constitutionality of Statutory Provisions
92k656 Facial invalidity
A "facial challenge" to the constitutional validity of a statute or ordinance considers only the text of the measure itself, not its application to the particular circumstances of an individual.

Cases that cite this headnote

[4] **Constitutional Law**
Invalidity as applied
92 Constitutional Law
92V Construction and Operation of Constitutional Provisions
92V(F) Constitutionality of Statutory Provisions
92k657 Invalidity as applied

Next

An "as applied challenge" to a statute or ordinance involves an otherwise facially valid measure that has been applied in a constitutionally impermissible manner, and this type of challenge contemplates analysis of the facts of a particular case or cases to determine the circumstances in which the statute or ordinance has been applied and to consider whether in those particular circumstances the application deprived the individual to whom it was applied of a protected right.

Cases that cite this headnote

[5] **Searches and Seizures**
Standing to Object
349 Searches and Seizures
349IV Standing to Object
349k161 In general
Fourth Amendment rights are personal rights which, like some other constitutional rights, may not be vicariously asserted. U.S. Const. Amend. 4.

Cases that cite this headnote

[6] **Constitutional Law**
Medical records or information
Health
Discovery, investigation, subpoena
92 Constitutional Law
92XI Right to Privacy
92XI(B) Particular Issues and Applications
92k1227 Records or Information
92k1231 Medical records or information
198H Health
198HI Regulation in General
198HI(B) Professionals
198Hk214 Disciplinary Proceedings
198Hk217 Discovery, investigation, subpoena
Medical Board's access to patients' controlled substance prescription records from Controlled Substance Utilization Review and Evaluation System (CURES) database, as part of investigation into physician's quality of care, did not violate the patients' constitutional rights to privacy, even though the allegations under investigation did not include improper prescription practices, and even if CURES failed to provide patients with notice and access to their data, since the regular scrutiny of prescriptions of controlled substances by law enforcement and regulatory agencies diminished the expectation of privacy in those records, there were sufficient safeguards to prevent unwarranted public disclosure and unauthorized access to CURES data, and compelling state interests outweighed any right to informational privacy on behalf of patients. Cal. Const. art. 1, § 1; Cal. Health & Safety Code § 11165; Cal. Bus. & Prof. Code §§ 4081(a), 4333(a).

Cases that cite this headnote

[7] **Constitutional Law**
Controlled substances
92 Constitutional Law
92XI Right to Privacy
92XI(B) Particular Issues and Applications
92k1273 Controlled substances
Under state constitutional right to privacy, physician had no reasonable expectation of privacy in his prescribing practices of controlled substances. Cal. Const. art. 1, § 1; Cal. Health & Safety Code § 11190.

Cases that cite this headnote

[8] **Appeal and Error**
Cases Triable in Appellate Court
30 Appeal and Error
30XVI Review
30XVI(F) Trial De Novo
30k892 Trial De Novo
30k893 Cases Triable in Appellate Court
30k893(1) In general
Whether a statute is challenged facially or as applied, when the facts are not disputed, the determination of its constitutionality is a question of law reviewed de novo.

Cases that cite this headnote

[9] **Evidence**
Legislative proceedings and journals
157 Evidence
157I Judicial Notice
157k27 Laws of the State

157k33 Legislative proceedings and journals

On physician's petition for writ of administrative mandamus seeking to set aside Medical Board's disciplinary decision, Court of Appeal would take judicial notice of legislative history materials relating to the statute governing the Department of Justice's provision of Controlled Substance Utilization Review and Evaluation System (CURES) reports to other agencies without use of a subpoena. Cal. Health & Safety Code § 11165.

Cases that cite this headnote

[10] **Health**

Discovery, investigation, subpoena

198H Health
198HI Regulation in General
198HI(B) Professionals
198Hk214 Disciplinary Proceedings
198Hk217 Discovery, investigation, subpoena

Under the Information Practices Act, the Medical Board qualifies for authorization under the Controlled Substance Utilization Review and Evaluation System (CURES) to access and review controlled substances prescription records. Cal. Civ. Code § 1798.24.

Cases that cite this headnote

[11] **Searches and Seizures**

Constitutional and statutory provisions

349 Searches and Seizures
349I In General
349k12 Constitutional and statutory provisions

The privacy protected by the California Constitution is no broader in the area of search and seizure than the "privacy" protected by the Fourth Amendment or by the search and seizure provision of the California Constitution. U.S. Const. Amend. 4; Cal. Const. art. 1, §§ 1, 13.

Cases that cite this headnote

[12] **Constitutional Law**

Relation between state and federal rights

92 Constitutional Law
92XI Right to Privacy
92XI(A) In General
92k1211 Relation between state and federal rights

In many contexts, the scope and application of the state constitutional right of privacy is broader and more protective of privacy than the federal constitutional right of privacy as interpreted by the federal courts. Cal. Const. art. 1, § 1.

Cases that cite this headnote

[13] **Constitutional Law**

Absolute, inviolable, or unlimited nature

92 Constitutional Law
92XI Right to Privacy
92XI(A) In General
92k1214 Absolute, inviolable, or unlimited nature

The state constitutional right of privacy and the privacy right protected by the federal Constitution are not absolute; rather, the right to privacy is a conditional right that may be infringed upon by balancing the intrusion with a showing of the proper governmental interest. Cal. Const. art. 1, § 1.

Cases that cite this headnote

[14] **Constitutional Law**

Right to Privacy

Constitutional Law

Reasonable, justifiable, or legitimate expectation

92 Constitutional Law
92XI Right to Privacy
92XI(A) In General
92k1210 In general
92 Constitutional Law
92XI Right to Privacy
92XI(A) In General
92k1215 Reasonable, justifiable, or legitimate expectation

The party claiming a violation of the right of privacy established in the state constitution must establish (1) a legally protected privacy interest, (2) a reasonable expectation of privacy under the circumstances, and (3) a serious invasion of the privacy interest; and once these elements are established, the court must then weigh and balance the justification for the conduct in question against the severity of the intrusion on privacy. Cal. Const. art. 1, § 1.

Cases that cite this headnote

[15] **Constitutional Law**
Compelling interest
Constitutional Law
Sex and Procreation
Constitutional Law
Birth control
92 Constitutional Law
92XI Right to Privacy
92XI(A) In General
92k1217 Compelling interest
92 Constitutional Law
92XI Right to Privacy
92XI(B) Particular Issues and Applications
92k1237 Sex and Procreation
92k1238 In general
92 Constitutional Law
92XI Right to Privacy
92XI(B) Particular Issues and Applications
92k1237 Sex and Procreation
92k1239 Birth control
Where a case under the state constitutional right to privacy involves an obvious invasion of an interest fundamental to personal autonomy, e.g., freedom from involuntary sterilization or the freedom to pursue consensual familial relationships, a compelling interest must be present to overcome the vital privacy interest, but if the privacy interest is less central, or in bona fide dispute, general balancing tests are employed. Cal. Const. art. 1, § 1.

Cases that cite this headnote

[16] **Constitutional Law**
Questions of law or fact
92 Constitutional Law
92VI Enforcement of Constitutional Provisions
92VI(C) Determination of Constitutional Questions
92VI(C)1 In General
92k963 Questions of law or fact
Under state constitution, whether a legally recognized privacy interest is present in a given case is a question of law to be decided by the court. Cal. Const. art. 1, § 1.

Cases that cite this headnote

[17] **Constitutional Law**
Questions of law or fact
92 Constitutional Law
92VI Enforcement of Constitutional Provisions
92VI(C) Determination of Constitutional Questions
92VI(C)1 In General
92k963 Questions of law or fact
Under state constitution, whether plaintiff has a reasonable expectation of privacy in the circumstances and whether a defendant's conduct constitutes a serious invasion of privacy are mixed questions of law and fact. Cal. Const. art. 1, § 1.

Cases that cite this headnote

[18] **Constitutional Law**
Medical records or information
92 Constitutional Law
92XI Right to Privacy
92XI(B) Particular Issues and Applications
92k1227 Records or Information
92k1231 Medical records or information
The state constitutional right to privacy extends to medical records and prescription records. Cal. Const. art. 1, § 1.

Cases that cite this headnote

[19] **Health**
Records and duty to report; confidentiality in general
198H Health
198HI Regulation in General
198HI(B) Professionals
198Hk191 Regulation of Professional Conduct; Boards and Officers
198Hk196 Records and duty to report; confidentiality in general
Under Controlled Substance Utilization Review and Evaluation System (CURES) and Confidentiality of Medical Information Act, a patient who has obtained a prescription for a controlled substance has a legally protected privacy interest in unwarranted

public disclosure and unauthorized access to information contained in those records. Cal. Health & Safety Code §§ 11165, 11165.1(d); Cal. Civ. Code §§ 56.05(j), 1798.24(e).

Cases that cite this headnote

[20] **Constitutional Law**
Medical records or information

92 Constitutional Law
92XI Right to Privacy
92XI(B) Particular Issues and Applications
92k1227 Records or Information
92k1231 Medical records or information

Under state constitutional right to privacy, a patient has a reasonable expectation that sufficient statutory safeguards in the Controlled Substance Utilization Review and Evaluation System (CURES) prevent unwarranted public disclosure and unauthorized access to their controlled substances prescription records. Cal. Const. art. 1, § 1; Cal. Health & Safety Code §§ 11165, 11165.1.

Cases that cite this headnote

[21] **Constitutional Law**
Right to Privacy

92 Constitutional Law
92XI Right to Privacy
92XI(A) In General
92k1210 In general

Under state constitution, actionable invasions of privacy must be sufficiently serious in their nature, scope, and actual or potential impact to constitute an egregious breach of the social norms underlying the privacy right. Cal. Const. art. 1, § 1.

Cases that cite this headnote

[22] **Searches and Seizures**
Administrative inspections and searches; regulated businesses

349 Searches and Seizures
349I In General
349k79 Administrative inspections and searches; regulated businesses

For a warrantless search of a closely regulated business to be deemed reasonable under Fourth Amendment, the inspection program must provide a constitutionally adequate substitute for a warrant, and the regulatory statute must advise the owner of the commercial premises that the search is being made pursuant to the law, have a properly defined scope, and limit the discretion of the inspecting officers. U.S. Const. Amend. 4.

Cases that cite this headnote

[23] **Searches and Seizures**
Administrative inspections and searches; regulated businesses

349 Searches and Seizures
349I In General
349k79 Administrative inspections and searches; regulated businesses

Access to the Controlled Substance Utilization Review and Evaluation System (CURES) in compliance with the statutory procedures satisfies the requirement for a constitutionally adequate substitute for a warrant to search a "closely regulated" business, and is a reasonable search under the Fourth Amendment. U.S. Const. Amend. 4; Cal. Health & Safety Code § 11165.

Cases that cite this headnote

[24] **Constitutional Law**
Right to Privacy

92 Constitutional Law
92XI Right to Privacy
92XI(A) In General
92k1210 In general

An invasion of privacy is justified under the state constitution if it substantively furthers one or more countervailing interests. Cal. Const. art. 1, § 1.

Cases that cite this headnote

[25] **Controlled Substances**
Nature and Power to Regulate

96H Controlled Substances
96HI In General
96Hk1 Nature and Power to Regulate
96Hk2 In general

Pursuant to its police power to protect the public health and welfare, a state has the power to regulate and control the sale, use, and traffic of habit-forming drugs.

See 7 Witkin, Summary of Cal. Law (10th ed. 2005) Constitutional Law, § 581.

Cases that cite this headnote

**494 ORIGINAL PROCEEDINGS in mandate. Joanne B. O'Donnell, Judge. Petition denied. (No. BS139289)

Attorneys and Law Firms

Fenton Nelson, Henry R. Fenton, Dennis E. Lee, Los Angeles, and Benjamin J. Fenton for Petitioner.

Francisco J. Silva, Long X. Do and Lisa Matsubara, Sacramento, for California Medical Association as Amicus Curiae on behalf of Petitioner.

No appearance for Respondent.

Kamala D. Harris, Attorney General, Gloria L. Castro, Assistant Attorney General, E.A. Jones III and Edward K. Kim, Deputy Attorneys General, for Real Party in Interest.

Opinion

ALDRICH, J.

*937 In this case, we determine whether the Medical Board of California (hereafter, the Board) violated patients' informational privacy rights in their controlled substances prescription records when the Board obtained that data from the Controlled Substance Utilization Review and Evaluation System (CURES) (Health & Saf.Code, § 11165) during a disciplinary investigation of their physician. Alwin Carl Lewis, M.D., contends the CURES statute violates his patients' informational privacy rights, as the statute permits the Board to access data before obtaining a warrant or administrative subpoena demonstrating good cause.

California's Constitution grants an express right to privacy (art. I, § 1), thus our focus is on California case law rather than federal law or the federal Constitution. The Board's statutory authority to access CURES during the *938 course of an investigation into Lewis's alleged unprofessional conduct requires balancing his patients' right to privacy in their controlled substances prescription records against the state's interest in protecting the public health by regulating the abuse and diversion of controlled substances, and in protecting the public against incompetent, impaired, or negligent physicians. We conclude on balance, the CURES statute does not amount to an impermissible invasion of Lewis's patients' state constitutional right to privacy, as there are sufficient safeguards to prevent unwarranted public disclosure and unauthorized access **495 to CURES data. Thus, we deny the petition. [1]

1 The privacy issue presented here also was addressed in *Medical Board of California v. Chiarottino* (2014) 225 Cal.App.4th 623, 170 Cal.Rptr.3d 540. The First District concluded the Board did not violate a physician's patients' constitutional right to privacy by accessing CURES before issuing administrative subpoenas for medical records.

FACTUAL AND PROCEDURAL BACKGROUND

The Board, through its Division of Medical Quality, has statutory authority to investigate, and to take and commence disciplinary action against a physician guilty of unprofessional conduct. (Bus. & Prof.Code, §§ 2220, subd. (a), 2227, 2234, 2241.5, subd. (c)(7); *Arnett v. Dal Cielo* (1996) 14 Cal.4th 4, 7, 56 Cal.Rptr.2d 706, 923 P.2d 1; see also *Stiger v. Flippin* (2011) 201 Cal.App.4th 646, 651–652, 135 Cal.Rptr.3d 168.) The Board enforces the Medical Practice Act (Bus. & Prof.Code, § 2000 et seq.), and several statutory provisions address prescribing controlled substances by licensee-physicians. (Bus. & Prof.Code, §§ 2238 [violation of state or federal statute regulating dangerous drugs or controlled substances], 2241 [furnishing drugs to addicts], 2241.5 [prescribing, dispensing, or administering to a person under his or her treatment for medical condition, dangerous drugs or prescription controlled substances for treatment of pain], 2242 [furnishing dangerous drugs without examination].) To assist regulatory agencies, such as the Board, in their efforts to control the diversion and resultant abuse of controlled substances, CURES electronically monitors the prescribing and dispensing of these prescription drugs. (Health & Saf.Code, § 11165, former subd. (c).) [2]

2 At the time of these administrative proceedings, Health and Safety Code section 11165, subdivision (c) applied. The Legislature has since amended the statute.

Subdivision (c) of Health and Safety Code section 11165 was renumbered (c)(2). (See *post.*)

1. *Access To CURES During Investigation and Disciplinary Proceedings*

The Board began its investigation after one of Lewis's patients complained about the quality of care and treatment that she received during her initial consultation in May 2008. The patient's complaint focused on Lewis's recommendation that she lose weight and start a diet that the patient considered to be unhealthful.

***939** During the course of the investigation, the Board investigator obtained CURES reports for Lewis's prescribing practices from November 1, 2005 through November 25, 2008, and from December 16, 2008 through December 16, 2009. The investigator testified that it was a common practice during the course of an investigation to "run" a CURES report on the physician.

[1] Based upon a review of these CURES reports, the Board sent releases to six of Lewis's patients to obtain their medical records. The Board received signed releases from three patients, and the Board obtained the other two patients' records after an administrative subpoena was issued and notice was sent to the patients that their medical records were being subpoenaed. [3]

3 Three of Lewis's patients voluntarily consented to the release of their medical records. Lewis has no standing to assert their privacy rights. (See *Pating v. Board of Medical Quality Assurance* (1982) 130 Cal.App.3d 608, 621, 182 Cal.Rptr. 20.)

The operative second amended accusation (accusation) filed by the Board against Lewis alleged, as to the initial patient, ****496** gross negligence in her care and treatment by failing to focus on her chief complaints, repeated negligent acts in her care and treatment, failure to maintain adequate/accurate medical records, and general unprofessional conduct. With respect to the additional patients, the accusation alleged prescribing without an appropriate prior examination, excessive prescribing, failure to maintain adequate/accurate medical records, general unprofessional conduct, and violation of drug statutes.

At the conclusion of the eight-day administrative hearing, the administrative law judge (ALJ) submitted a proposed decision. As to the initial patient, the ALJ concluded that Lewis engaged in unprofessional conduct by failing to maintain adequate records. With respect to the additional patients, the ALJ found that two of Lewis's patients had been over-prescribed controlled substances during a short period of time. The ALJ, however, concluded it had not been established that Lewis engaged in repeated acts of excessive prescribing of dangerous drugs or furnished dangerous drugs without appropriate prior examinations. Lewis was disciplined for failing to maintain accurate prescription records. The ALJ recommended revoking Lewis's license, but the revocation was stayed. Lewis was placed on probation for three years with certain conditions. The Board adopted the ALJ's proposed decision.

2. *Mandamus Proceeding in Superior Court, Petition for Writ of Mandate*

Lewis filed a petition for writ of administrative mandamus in the trial court seeking to set aside the Board's decision. Lewis did not challenge the Board's ***940** factual findings and legal conclusions as to the initial patient, but challenged the factual findings and legal conclusions with respect to the additional patients. Lewis argued the Board violated his patients' informational privacy rights under article I, section 1 of the California Constitution by accessing CURES during the course of an investigation unrelated to improper prescription practices, and also violated their rights not to be subjected to unwarranted searches and seizures.

The trial court denied the petition, concluding CURES permitted the Board to access the data without an administrative subpoena or other showing of good cause. In the extensive written order, the court further stated that Lewis "provide[d] no authority suggesting that an authorized government body's review of the CURES system's data violate[d] a right to privacy." The trial court noted that even if the constitutional right to privacy were implicated, the right to privacy is not absolute and "must be weighed against the compelling public interest in controlling potentially dangerous pharmaceuticals to prevent their abuse." In weighing these competing interests, "[t]he public health and safety concern[s] served by the monitoring and regulation of the prescription of controlled substances serves a compelling public interest that justifie[d] disclosure of prescription records without notification or consent." Judgment was entered denying the petition for writ of administrative mandamus.

Lewis filed a petition for writ of mandate in this court to set aside the judgment. A writ petition is the only authorized

mode of appellate review. (Bus. & Prof.Code, § 2337; *Leone v. Medical Board* (2000) 22 Cal.4th 660, 663–664, 670, 94 Cal.Rptr.2d 61, 995 P.2d 191.) We issued an order to show cause. For the reasons stated, we discharge the order to show cause and deny Lewis's petition.

CONSTITUTIONAL ISSUE

[2] [3] [4] [5] Lewis presents the following issue for review: "[W]hether the Medical ****497** Board of California is permitted to conduct searches, without any showing of any kind—whether good cause, reasonable suspicion, or some other similar standard—and without warrant or subpoena—of the controlled substances prescription records of patients throughout the State, via the State's computerized Controlled Substance Utilization Review and Evaluation System."[4] As stated, the challenge to CURES appears to be based upon the ***941** protections of the Fourth Amendment,[5] but Lewis makes clear that he is asserting his patients' right to informational privacy in their controlled substances prescription records. Lewis has standing to assert his patients' right to privacy under article I, section 1 of the California Constitution. (*Wood v. Superior Court* (1985) 166 Cal.App.3d 1138, 1145, 212 Cal.Rptr. 811.) As presented, the issue also appears to be a facial attack to the constitutional validity of CURES. "A facial challenge to the constitutional validity of a statute or ordinance considers only the text of the measure itself, not its application to the particular circumstances of an individual." (*Tobe v. City of Santa Ana* (1995) 9 Cal.4th 1069, 1084, 40 Cal.Rptr.2d 402, 892 P.2d 1145.) The relief typically sought is total invalidation of the law. Therefore, cases hold that the challenger must demonstrate "a present total and fatal conflict with applicable constitutional prohibitions." (*Ibid.* citations and internal quotation marks omitted.) In contrast, an as applied challenge to a statute or ordinance involves an otherwise facially valid measure that has been applied in a constitutionally impermissible manner. (*Ibid.*) This type of challenge "contemplates analysis of the facts of a particular case or cases to determine the circumstances in which the statute or ordinance has been applied and to consider whether in those particular circumstances the application deprived the individual to whom it was applied of a protected right." (*Ibid.*)

4 Because Lewis uses the words "subpoena" and "warrant," we assume his use of "warrant" is in the traditional Fourth Amendment sense to refer to criminal proceedings. The United States Supreme Court, however, uses the term "warrant" also to refer to administrative subpoenas that are the usual method by which an administrative agency obtains records from private parties. (See *De La Cruz v. Quackenbush* (2000) 80 Cal.App.4th 775, 779, fn. 1, 96 Cal.Rptr.2d 92.) "The right at stake is the right to a front-end or back-end judicial review of the reasonableness of the search." (*Ibid.*)

5 The Fourth Amendment of the United States Constitution, which is enforceable against the states as a component of the Fourteenth Amendment's guarantee of due process of law provides in relevant part: "The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures, shall not be violated...." (U.S. Const., 4th Amend.; *Mapp v. Ohio* (1961) 367 U.S. 643, 655, 81 S.Ct. 1684, 6 L.Ed.2d 1081.) " 'Fourth Amendment rights are personal rights which, like some other constitutional rights, may not be vicariously asserted.' " (*Rakas v. Illinois* (1978) 439 U.S. 128, 133–134, 99 S.Ct. 421, 58 L.Ed.2d 387; *In re Lance W.* (1985) 37 Cal.3d 873, 890, 210 Cal.Rptr. 631, 694 P.2d 744.)

[6] [7] Lewis clarifies that his constitutional challenge does not seek to invalidate the CURES statute. He does not challenge the CURES statute insofar as the state requires the collection of his patients' controlled substances prescription records in a centralized database. Nor does he "contend here that a warrant or showing of good cause is required in *all* CURES searches. Rather, he contends that such a requirement applies when the *purpose* of the CURES search is the investigation of *physicians* rather than *pharmacies*." (Emphasis in original.) This distinction is based on the physician-patient relationship. As it applies to him, Lewis's constitutional ****498** attack is narrowly focused on the Board's access to his patients' CURES data during an investigation unrelated ***942** to improper prescription practices without patient consent or prior judicial approval upon a showing of good cause.[6]

6 We focus solely on Lewis's patient's right to informational privacy because Lewis has no reasonable expectation of privacy in his prescribing practices of controlled substances. (Health & Saf.Code, § 11190.) As discussed, *post*, controlled substances are highly regulated by the state.

[8] Accordingly, Lewis presents an as applied challenge to the CURES statute, in which we analyze the facts of his case to determine the circumstances in which CURES has been applied and consider whether the application deprived

Lewis's patients of a protected privacy right. (See *Tobe v. City of Santa Ana, supra,* 9 Cal.4th at p. 1084, 40 Cal.Rptr.2d 402, 892 P.2d 1145.) Whether a statute is challenged facially or as applied, when the facts are not disputed, the determination of its constitutionality is a question of law that we review de novo. (*Alviso v. Sonoma County Sheriff's Dept.* (2010) 186 Cal.App.4th 198, 204, 111 Cal.Rptr.3d 775.)

DISCUSSION

The constitutional issue presented here implicates the informational privacy rights of patients in the highly regulated area of controlled substances. We present a brief overview of these statutes before addressing the privacy issues.

1. *Regulation of Controlled Substances*

The prescribing and dispensing of controlled substances in California is regulated by the California Uniform Controlled Substances Act (the Act). (Health & Saf.Code, § 11000 et seq.) The Act classifies controlled substances into five schedules. (Health & Saf.Code, §§ 11053–11058.) For example, codeine, hydrocodone, morphine, and methadone are examples of Schedule II drugs. (Health & Saf.Code, § 11055, subds. (b)(1)(G), (I), (L) & (c)(14).) With the exception of a 72–hour supply for a patient, or an order for use by a hospital patient, no controlled substance classified in Schedule II "shall be dispensed without a prescription." (Health & Saf.Code, §§ 11158, subds. (a), (b), 11159.) Except when ordered for use by a hospital patient, "or when dispensed directly to an ultimate user by a practitioner, other than a pharmacist or pharmacy, no controlled substance classified in Schedule III, IV, or V may be dispensed without a prescription." (Health & Saf.Code, §§ 11158, subd. (a), 11159.)

Prescriptions for Schedule II through V drugs must be made on an official form, but Schedule III through V drugs may be dispensed upon an oral or electronically transmitted prescription. (***943** Health & Saf.Code, § 11164, subds. (a), (b).) If orally or electronically transmitted, a hard copy must be produced and "signed and dated by the pharmacist filling the prescription" or other authorized person. (Health & Saf.Code, § 11164, subd. (b)(1).) These prescription forms must contain the address for whom the controlled substance is prescribed. (Health & Saf.Code, § 11164, subd. (a)(2).) If the prescription is orally or electronically transmitted, the hard copy need not include the address if that information is readily retrievable in the pharmacy. (Health & Saf.Code, § 11164, subd. (b)(2).)

Every practitioner, other than a pharmacist, who prescribes a controlled substance classified in Schedule II through IV has a duty to keep records of controlled substances dispensed. (Health & Saf.Code, § 11190, subds. (a)-(c).) "Each ****499** prescriber that dispenses controlled substances shall provide the Department of Justice the information required by this subdivision on a weekly basis in a format set by the Department of Justice pursuant to regulation." (Health & Saf.Code, § 11190, subd. (c)(2)(A).) Certain exceptions to the reporting requirements apply to Schedule II, III, and IV controlled substances but are not at issue here. (Health & Saf.Code, § 11190, subds. (e), (f).)

2. *Health and Safety Code section 11165 (CURES)*

The Department of Justice maintains CURES to electronically monitor the prescribing and dispensing of Schedule II through IV controlled substances by all practitioners authorized to prescribe or dispense these controlled substances. (Health & Saf.Code, § 11165, subd. (a).) Although the Legislature has since amended subdivision (a) of Health and Safety Code section 11165, at the time of these administrative proceedings, the statute stated in pertinent part: "To assist law enforcement and regulatory agencies in their efforts to control the diversion and resultant abuse of Schedule II, Schedule III, and Schedule IV controlled substances, and for statistical analysis, education, and research, the Department of Justice shall ... maintain the Controlled Substance Utilization Review and Evaluation System (CURES) for the electronic monitoring of, and Internet access to information regarding, the prescribing and dispensing of Schedule II, Schedule III, and Schedule IV controlled substances by all practitioners authorized to prescribe or dispense these controlled substances." [7]

7 Health and Safety Code section 11165, subdivision (a) now reads: "To assist health care practitioners in their efforts to ensure appropriate prescribing, ordering, administering, furnishing, and dispensing of controlled substances, law enforcement and regulatory agencies in their efforts to control the diversion and resultant abuse of Schedule II, Schedule III, and Schedule IV controlled substances, and for statistical analysis, education, and research, the Department of Justice shall ... maintain the Controlled Substance Utilization Review and Evaluation System (CURES) for the electronic monitoring of, and Internet access to information regarding, the prescribing

and dispensing of Schedule II, Schedule III, and Schedule IV controlled substances by all practitioners authorized to prescribe, order, administer, furnish, or dispense these controlled substances."

***944** The Department of Justice receives weekly reports from dispensing pharmacies for Schedule II through IV controlled substances prescriptions. (Health & Saf.Code, § 11165, subd. (d).) These reports include the name, address, and telephone number of the "ultimate user," the prescriber's license number, the pharmacy prescription number, the National Drug Code (NDC) of the controlled substance dispensed, the quantity of the controlled substance dispensed, and the number of refills ordered. (Health & Saf.Code, § 11165, subd. (d).)

[9] The Department of Justice provides CURES reports to the Board without use of a subpoena. (Health & Saf.Code, § 11165, former subd. (c).) "Data obtained from CURES shall only be provided to appropriate state, local, and federal persons or public agencies for disciplinary, civil, or criminal purposes and to other agencies or entities, as determined by the Department of Justice, for the purpose of educating practitioners and others in lieu of disciplinary, civil, or criminal actions."[8] (Health & Saf.Code, § 11165, former subd. ****500** (c).) Former subdivision (c) of Health and Safety Code section 11165 was renumbered as subdivision (c)(2) without substantive changes to the quoted provision.[9] The CURES statute prohibits the disclosure, sale, or transfer of data to any third party. (Health & Saf.Code, § 11165, former subd. (c).)

8 We deferred ruling on the Board's request for judicial notice. We grant judicial notice of Exhibits E and F and deny the request as to the remaining exhibits. It appears from these exhibits that the legislative intent was to establish CURES to provide instantaneous access for authorized entities.

9 The following sentence was added to Health and Safety Code section 11165, subdivision (c)(2): "The Department of Justice shall establish policies, procedures, and regulations regarding the use, access, evaluation, management, implementation, operation, storage, disclosure, and security of the information within CURES, consistent with this subdivision."

At the time of these proceedings, the statute provided that "CURES shall operate under existing provisions of law to safeguard the privacy and confidentiality of patients." (Health & Saf.Code, § 11165, former subd. (c).) Subdivision (c)(1) of Health and Safety Code section 11165 now states: "The operation of CURES shall comply with all applicable federal and state privacy and security laws and regulations."

[10] The Information Practices Act of 1977 (Civ.Code, § 1798 et seq.) places strict limits on the dissemination of personal information to protect an individual's right to privacy. (Civ.Code, § 1798.1.) Subdivision (e) of Civil Code section 1798.24, permits disclosure "[t]o a person, or to another agency ***945** where the transfer is necessary for the transferee agency to perform its constitutional or statutory duties, and the use is compatible with a purpose for which the information was collected and the use or transfer is accounted for in accordance with Section 1798.25." "[A] use is compatible if the use of the information requested is needed in an investigation of unlawful activity under the jurisdiction of the requesting agency or for licensing, certification, or regulatory purposes by that agency." (Civ.Code, § 1798.24, subd. (e).) The Board qualifies for authorization under CURES to access and review controlled substances prescription records.

3. *The State Constitutional Right to Privacy*

[11] The California Constitution contains an explicit guarantee of the right of privacy. (art. I, § 1; *American Academy of Pediatrics v. Lungren* (1997) 16 Cal.4th 307, 326, 66 Cal.Rptr.2d 210, 940 P.2d 797 (plur. opn. of George, C.J.).) The constitutional provision states: "All people are by nature free and independent and have inalienable rights. Among these are enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety, happiness, and privacy." (Cal. Const., art. I, § 1.) The privacy protected by the California Constitution "is no broader in the area of search and seizure than the 'privacy' protected by the Fourth Amendment or by article I, section 13 of the California Constitution." (*Hill v. National Collegiate Athletic Assn.* (1994) 7 Cal.4th 1, 30, fn. 9, 26 Cal.Rptr.2d 834, 865 P.2d 633 (*Hill*).) The privacy right at issue here is Lewis's patients' interest in preventing the disclosure or misuse of their controlled substances prescription records, which falls into the category of "informational privacy."

[12] [13] The U.S. Supreme Court in *Whalen v. Roe* (1977) 429 U.S. 589, 599–600, 97 S.Ct. 869, 51 L.Ed.2d 64, assumed a right to informational privacy existed under the federal Constitution in controlled substances prescription records. (See *National Aero. and Space Admin. v. Nelson* (2011) —— U.S. ——, 131 S.Ct. 746, 756–757 & fn. 10, 178 L.Ed.2d

667; **501 *People v. Gonzales* (2013) 56 Cal.4th 353, 384, 154 Cal.Rptr.3d 38, 296 P.3d 945.) "[I]n many contexts, the scope and application of the state constitutional right of privacy is broader and more protective of privacy than the federal constitutional right of privacy as interpreted by the federal courts. [Citations.]" (*American Academy of Pediatrics v. Lungren, supra*, 16 Cal.4th at pp. 326–327, 66 Cal.Rptr.2d 210, 940 P.2d 797.) The state constitutional right of privacy, and the privacy right protected by the federal Constitution are not absolute. Rather, the right to privacy is a conditional right that may be infringed upon by balancing the intrusion with a showing of the proper governmental interest. (*Whalen v. Roe, supra*, at p. 598, 97 S.Ct. 869; *Tucson Woman's Clinic v. Eden* (9th Cir.2004) 379 F.3d 531, 551; *Hill, supra*, 7 Cal.4th at pp. 34–35, 26 Cal.Rptr.2d 834, 865 P.2d 633.) As previously stated, our analysis focuses on the express guarantee of the right to privacy under the California Constitution.

*946 4. *The Board Did Not Violate Lewis's Patients' Right to Informational Privacy*

[14] Article I, section 1 of the California Constitution creates a " 'legal and enforceable right of privacy for every Californian.' " (*White v. Davis* (1975) 13 Cal.3d 757, 775, 120 Cal.Rptr. 94, 533 P.2d 222.) "The party claiming a violation of the constitutional right of privacy established in article I, section 1 of the California Constitution must establish (1) a legally protected privacy interest, (2) a reasonable expectation of privacy under the circumstances, and (3) a serious invasion of the privacy interest." (*International Federation of Professional & Technical Engineers, Local 21, AFL–CIO v. Superior Court* (2007) 42 Cal.4th 319, 338, 64 Cal.Rptr.3d 693, 165 P.3d 488, citing *Hill, supra*, 7 Cal.4th at pp. 39–40, 26 Cal.Rptr.2d 834, 865 P.2d 633.) These "threshold elements" screen out claims that otherwise do not implicate significant intrusions on a privacy interest protected by the state constitutional privacy provision. (*American Academy of Pediatrics v. Lungren, supra*, 16 Cal.4th at pp. 330–331, 66 Cal.Rptr.2d 210, 940 P.2d 797.) Once these elements are established, the court must then weigh and balance the justification for the conduct in question against the severity of the intrusion on privacy. (*Id.* at p. 331, 66 Cal.Rptr.2d 210, 940 P.2d 797.)

[15] If these threshold elements are proved, the *Hill* decision sets the standard in which a proffered justification for alleged interferences with the right to privacy will be measured. "Where the case involves an obvious invasion of an interest fundamental to personal autonomy, e.g., freedom from involuntary sterilization or the freedom to pursue consensual familial relationships, a 'compelling interest' must be present to overcome the vital privacy interest. If, in contrast, the privacy interest is less central, or in bona fide dispute, general balancing tests are employed." (*Hill, supra*, 7 Cal.4th at p. 34, 26 Cal.Rptr.2d 834, 865 P.2d 633.)

[16] **[17]** "Whether a legally recognized privacy interest is present in a given case is a question of law to be decided by the court. [Citations.] Whether plaintiff has a reasonable expectation of privacy in the circumstances and whether defendant's conduct constitutes a serious invasion of privacy are mixed questions of law and fact." (*Hill, supra*, 7 Cal.4th at p. 40, 26 Cal.Rptr.2d 834, 865 P.2d 633.)

a. *Legally Protected Privacy Right*

[18] The right to privacy extends to medical records. (*John B. v. Superior Court* (2006) 38 Cal.4th 1177, 1198, 45 Cal.Rptr.3d 316, 137 P.3d 153; **502 *Board of Medical Quality Assurance v. Gherardini* (1979) 93 Cal.App.3d 669, 678–679, 156 Cal.Rptr. 55.) "The state of a person's gastro-intestinal tract is as much entitled to privacy from unauthorized public or bureaucratic snooping as is that person's bank account, the contents of his library or his membership in the NAACP." (*Board of Medical Quality Assurance v. Gherardini, supra*, at p. 679, 156 Cal.Rptr. 55.)

*947 Like medical records, prescription records contain identifying information and sensitive information related to drugs used to treat a person's medical condition and also reveal medical decisions concerning the course of treatment. What medication a person takes to treat a gastro-intestinal condition also is entitled to privacy from unauthorized public and bureaucratic snooping.

[19] By statute, there also is a legally protected privacy interest in controlled substances prescription records stored in CURES. Health and Safety Code section 11165.1, which permits a treating physician or pharmacist to access CURES data, specifically states that this information is considered medical information subject to the provisions of the Confidentiality of Medical Information Act (Civ.Code, § 56 et seq.).[10] (Health & Saf.Code, § 11165.1, subd. (d).) Moreover, the CURES statute prohibits unauthorized public disclosure and operates under existing law to safeguard privacy and confidentiality. (Health & Saf.Code, § 11165, former subd. (c); Civ.Code, § 1798.24, subd.

(c).) Thus, a patient who has obtained a prescription for a controlled substance has a legally protected privacy interest in unwarranted public disclosure and unauthorized access to information contained in those records.

10 Civil Code section 56.05, subdivision (j) provides in pertinent part: " 'Medical information' means any individually identifiable information, in electronic or physical form, in possession of or derived from a provider of health care, health care service plan, pharmaceutical company, or contractor regarding a patient's medical history, mental or physical condition, or treatment."

b. *Reasonable Expectation of Privacy*

"Even when a legally cognizable privacy interest is present, other factors may affect a person's reasonable expectation of privacy." (*Hill, supra,* 7 Cal.4th at pp. 36–37, 26 Cal.Rptr.2d 834, 865 P.2d 633.) Citing *Whalen v. Roe, supra,* 429 U.S. at page 602, 97 S.Ct. 869, the *Hill* court noted that "customs, practices, and physical settings ... may create or inhibit reasonable expectations of privacy." (*Hill, supra,* at p. 36, 26 Cal.Rptr.2d 834, 865 P.2d 633.)

In *Whalen v. Roe, supra,* 429 U.S. 589, 97 S.Ct. 869, the U.S. Supreme Court upheld a New York statute that required reporting Schedule II prescription records to the state department of health. The information included the name of the prescribing physician, the dispensing pharmacy, the drug and dosage, and the name, address, and age of the patient. (*Id.* at p. 593, 97 S.Ct. 869.) This data was recorded into a centralized computer system. (*Ibid.*) The collection of this data, as part of the state's oversight of controlled substances, was not an unwarranted disclosure of private information in violation of federal constitutionally protected privacy rights. (*Id.* at pp. 591, 592–593, 97 S.Ct. 869.) The *Whalen* court concluded collecting this centralized data was supported by established law and not "meaningfully distinguishable from a host of other unpleasant ***948** invasions of privacy that are associated with many facets of health care." (*Id.* at p. 602, 97 S.Ct. 869.) Thus, the New York statute did not violate "any right or liberty protected by the Fourteenth Amendment." (*Id.* at pp. 603–604, 606, 97 S.Ct. 869.)

****503** Addressing the threat of public disclosure, the *Whalen* court noted there was a possibility that the data may be offered in a judicial proceeding if a doctor or patient is accused of a violation of the law. (*Whalen v. Roe, supra,* 429 U.S. at p. 600, 97 S.Ct. 869.) The court reasoned, however, that the remote possibility judicial supervision of the evidentiary use of this data would provide inadequate privacy protection was insufficient to hold the New York statute facially unconstitutional. (*Id.* at pp. 601–602, 97 S.Ct. 869.)

We recognize the privacy issue in *Whalen v. Roe*was limited to collecting centralized data by the state, and thus the court did not address the issue presented here, that is, a patient's right to informational privacy when these centralized controlled substances prescription records are accessed by a state, local, or federal agency for disciplinary, civil, or criminal purposes. [11] Nevertheless, we find *Whalen v. Roe* to be persuasive, as did the California Supreme Court in *Hill,* to illustrate what constitutes a reasonable expectation of privacy.

11 The centralized data, however, was available for use by state department of health investigators, and had been used in at least two investigations. (*Whalen v. Roe,supra,* 429 U.S. at p. 595, 97 S.Ct. 869.)

There is a diminished expectation of privacy in controlled substances prescription records maintained in CURES. Contrary to Lewis's contention, it does not follow that a patient's expectation of privacy in his or her controlled substances prescription records is the same as the expectation of privacy in medical records. Unlike medical records, prescriptions of controlled substances are subject to regular scrutiny by law enforcement and regulatory agencies as part of the pervasive regulation of controlled substances. A reasonable patient filling a prescription for a controlled substance knows or should know that the state, which prohibits the distribution and use of such drugs without a prescription, will monitor the flow of these drugs from pharmacies to patients. Pharmacies are required to maintain records of prescriptions filled for controlled substances and present them to "authorized officers of the law" without a warrant. (*People v. Doss* (1992) 4 Cal.App.4th 1585, 1597–1598, 6 Cal.Rptr.2d 590; see also Bus. & Prof.Code, §§ 4081, subd. (a), 4333, subd. (a).) A pharmacist also has a statutory obligation to provide data of controlled substances prescriptions to the Department of Justice on a weekly basis for electronic monitoring in CURES. (Health & Saf.Code, § 11165, subd. (d).) This well-known and long-established regulatory history significantly diminishes any reasonable expectation of privacy against the release of controlled substances prescription ***949** records to state, local, or

federal agencies for purposes of criminal, civil, or disciplinary investigations. [12]

12 The California Medical Association (CMA) has filed an amicus curiae letter brief on behalf of Lewis. CMA argues the Board's position is absurd that a patient's controlled substances prescription records may be subject to different privacy protections depending on whether the information is contained in CURES or in medical records. This argument mischaracterizes the Board's position. Prescriptions for controlled substances are highly regulated and whether the information is housed in CURES or at the local pharmacy, there is a statutory obligation to provide controlled substances prescription records to the state without a warrant or administrative subpoena, reducing any reasonable expectation of privacy.

[20] Both federal and state courts also have recognized that "closely regulated" businesses have a reduced expectation of privacy whether analyzed as creating an unreasonable expectation of privacy or a ****504** reasonable expectation of privacy justified by a competing state interest. (E.g., *New York v. Burger* (1987) 482 U.S. 691, 702, 107 S.Ct. 2636, 96 L.Ed.2d 601; *People v. Doss, supra,* 4 Cal.App.4th at p. 1598, 6 Cal.Rptr.2d 590.) While the reasonable expectation of privacy is diminished here, it is not de minimus. A patient has a reasonable expectation that sufficient statutory safeguards in CURES prevent unwarranted public disclosure and unauthorized access to their controlled substances prescription records.

c. *Seriousness of Invasion*

[21] Not every intrusion of privacy gives rise to a cause of action for invasion of privacy. (*Hill, supra,* 7 Cal.4th at p. 37, 26 Cal.Rptr.2d 834, 865 P.2d 633.) "Actionable invasions of privacy must be sufficiently serious in their nature, scope, and actual or potential impact to constitute an egregious breach of the social norms underlying the privacy right." (*Ibid.*) Lewis contends that when the Board accessed CURES, a serious invasion of his patients' privacy rights occurred because (1) there are no criminal or civil sanctions in the CURES statute to safeguard against unwarranted public disclosure, and (2) there is no statutory requirement of a showing of good cause or other judicial determination before the Board accessed his patients' CURES data. [13]

13 CMA offers a third reason, that is, patients are not the subject of the investigation. CMA focuses on the deficiencies of CURES to provide notice to patients, or to permit patients to have access to their CURES data. These deficiencies are not pertinent to our resolution of the issue presented here, and these concerns are better directed to the Legislature.

(1). *Unwarranted Public Disclosure*

The fear, not present here, that the Board will publicly disclose CURES data obtained during the course of a licensee-physician investigation does not constitute a serious invasion of privacy. The Board has statutory and regulatory duties to protect against the public release of a patient's CURES data. As ***950** noted, the Board may lawfully obtain CURES data as authorized by statute for disciplinary purposes. (Health & Saf.Code, § 11165, former subd. (c).) Data disclosed to any individual agency cannot be sold or transferred to a third party. (*Ibid.*) The Board also must secure CURES data against unauthorized disclosure and has an independent statutory duty to protect the privacy and confidentiality of any information it obtains in the discharge of its duties. (*Ibid.*; Bus. & Prof.Code, § 2225.) Civil Code section 1798.24, subdivision (e) further requires the Board to protect CURES data from unwarranted public disclosure. Here, there is no contention that the Board publicly disclosed Lewis's patients' information to third parties or failed to protect the confidentiality of the CURES data it received during the course of its investigation.

Lewis relies on *Tucson Woman's Clinic v. Eden, supra,* 379 F.3d 531, in which the Ninth Circuit concluded that the informational privacy rights of patients were violated by Arizona regulations that required disclosure of (1) unredacted medical records to the Arizona Department of Health Services (DHS), and (2) ultrasound pictures with patient identifying information to a private contractor for review. (*Id.* at pp. 551–554.) The Ninth Circuit employed a balancing test to weigh the privacy interest against the state intrusion, noting the safeguards to prevent unauthorized disclosure of unredacted medical records and ultrasound pictures to members of the public were inadequate. (*Id.* at pp. 552–553.) Citing ****505** *Whalen v. Roe, supra,* 429 U.S. at pages 594 through 595, 97 S.Ct. 869, the Ninth Circuit reasoned that, unlike the Arizona regulations, the New York statute imposed criminal penalties for such unauthorized disclosures. (*Tucson Woman's Clinic v. Eden, supra,* at p. 552.) Additionally, there were no safeguards in the Arizona regulations to limit access to these

records, which on balance constituted a violation of the patients' informational privacy rights. (*Id.* at pp. 552–553.)

The Ninth Circuit's analysis, however, was decidedly different concerning the regulation that required licensee-physicians to release information, including the name of a patient, to a professional licensing board if an incident arose with the patient. (*Tucson Woman's Clinic v. Eden, supra*, 379 F.3d at pp. 553–554.) The court recognized that although a professional licensing board was not covered by the statutory scheme's prohibitions on information disclosure, other established safeguards prohibited release of patient information to the public when any incident was reported to the Arizona Medical Board or the Board of Osteopathic Examiners in Medicine and Surgery. (*Id.* at p. 554.) The requested information was limited, and the state had a strong ***951** interest in the licensing board investigating serious patient incidents. Employing the balancing test, the Ninth Circuit concluded there was no violation of patients' informational privacy rights.[14] (*Ibid.*)

14 In *Tucson Woman's Clinic v. Eden,supra*, 379 F.3d 531, the Ninth Circuit also considered the constitutionality of the regulatory scheme permitting warrantless inspections of abortion clinics. (*Id.* at p. 549.) The Ninth Circuit held the regulatory scheme violated physicians' Fourth Amendment rights, and the administrative exception applicable to closely regulated businesses was inapplicable to the searches authorized by the Arizona regulations. (*Id.* at pp. 550–551.) The balancing test the Ninth Circuit used to address informational privacy rights under the Fourteenth Amendment was not applicable to its Fourth Amendment analysis.

Here, although there are no penalties in CURES for unwarranted public disclosure, other safeguards prohibit release of patient information to the public. Thus, we conclude the release of CURES data to the Board during an investigation of a licensee-physician is not a serious invasion of privacy because sufficient safeguards are in place.

(2). *Access to CURES Data Without a Warrant or Subpoena*

Lewis next contends the Board's access to CURES during an investigation of a licensee-physician is a serious invasion of his patients' privacy rights because there is a reasonable societal expectation that to conduct such a search there must be a showing of good cause (or other reasonableness standard) to obtain an administrative subpoena or warrant. Lewis argues the Board must make this showing *before* accessing CURES.

Lewis's argument is a challenge to the Board's authority to access CURES to compile the facts necessary to obtain administrative subpoenas for his patients' medical records. To support his argument, Lewis principally relies on *State v. Skinner* (La.2009) 10 So.3d 1212, which held that a warrantless search of a criminal defendant's pharmacy records during a criminal investigation violated the defendant's Fourth Amendment privacy interests and the state constitutional right to privacy.[15] (*Id.* at p. 1218.) The court addressed whether Louisiana's citizens have a reasonable expectation of privacy ****506** in their pharmaceutical prescriptions and medical records such that a warrant is required for a search of those records in a criminal investigation. (*Id.* at p. 1215.) Analyzing federal jurisprudence under the Fourth Amendment privacy interest and the state's heightened privacy interest, the *Skinner* court concluded "the right to privacy in one's medical and prescription records is an expectation of privacy that society is prepared to recognize as reasonable." (*Id.* at p. 1218.) Thus, a warrant was required.

15 *Skinner* did not involve access to a centralized database maintained by the state. The Board points out that access to state records by another state agency is not a search from the standpoint of the patient.

***952** Absent from Lewis's discussion of *Skinner* is a distinction critical here, that is, a balancing test was inapplicable to the court's Fourth Amendment analysis of the intrusion into individual privacy during the course of a criminal investigation. (*State v. Skinner, supra*, 10 So.3d at p. 1218.) In *Whalen v. Roe, supra*, 429 U.S. 589, 97 S.Ct. 869, the United States Supreme Court dismissed the claims raised pursuant to the Fourth Amendment, noting that the cases cited in support of that argument involved "affirmative, unannounced, narrowly focused intrusions into individual privacy during the course of criminal investigations." (*Id.* at p. 604, 97 S.Ct. 869, fn. 32.) The *Whalen* court declined to extend the Fourth Amendment protections to the informational privacy interest at stake in that case. (*Ibid.*)

Like the informational privacy rights under the federal Constitution at issue in *Whalen v. Roe* and *Tucson Woman's Clinic v. Eden*, under this state's constitutional right to privacy (art. I, sec. 1), we must balance the justification against the intrusion when a case involves a genuine, nontrivial invasion

of a privacy interest.[16] Thus, *Skinner*, which is non-binding authority, is not persuasive.

16 In *Medical Board of California v. Chiarottino, supra*, 225 Cal.App.4th 623, 170 Cal.Rptr.3d 540, [2014 WL 1427466], the court cited out-of-state cases relying on *Whalen v. Roe* to conclude the Board did not violate patients' privacy interests in accessing CURES and using that information to obtain administrative subpoenas. (*Id.* at pp. 634–37, 170 Cal.Rptr.3d 540.)

We granted Lewis's request to bring to our attention another out-of-state case recently filed in the United States District Court in *Oregon, Oregon Prescription Drug Monitoring Program v. United States Drug Enforcement Administration* (D. Or. 2014) ——— F.Supp.2d ———, 2014 WL 562938. That case is inapposite. The statutory scheme at issue is not similar to the CURES statute, and the Fourth Amendment issue presented was the right of a federal agency to obtain centralized records from a state prescription drug monitoring program by issuing administrative subpoenas rather than obtaining warrants.

Focusing on the Fourth Amendment privacy interest, Lewis further argues that access to CURES without an administrative subpoena (or warrant) is a serious invasion of privacy that cannot be justified under the "closely regulated" business exception to the warrant requirement. The rationale for this exception is the owner or operator of a closely regulated business has a reduced expectation of privacy.

[22] A warrantless search of a "closely regulated" business is deemed reasonable if certain criteria are met. (*New York v. Burger, supra*, 482 U.S. at p. 702, 107 S.Ct. 2636; *De La Cruz v. Quackenbush, supra*, 80 Cal.App.4th at pp. 781–782, 96 Cal.Rptr.2d 92.) To pass constitutional muster, one criterion is that the inspection program must provide a constitutionally adequate substitute for a warrant. (*New York v. Burger, supra*, at pp. 702–703, 107 S.Ct. 2636.) The regulatory statute must advise the owner of the commercial premises that the search is being made pursuant to the law, have a properly defined scope, and limit the discretion of the inspecting officers. (*Id.* at p. 703, 107 S.Ct. 2636.)

[23] ****507** ***953** Lewis contends that the CURES statute imposes no limits on the discretion of the inspecting officer, which we presume in this context is the Board investigator. We disagree. Access to CURES in compliance with the statutory procedures satisfies this requirement and is a reasonable search.

As a preliminary matter, there is a diminished expectation of privacy in the highly regulated area of prescription drugs, as a warrantless search of a patient's pharmacy records is statutorily authorized. (Bus. & Prof.Code, § 4081, subd. (a).) There is no greater right to privacy in controlled substances prescription records stored in CURES than the privacy rights in the same prescription records housed at CVS or Rite–Aid.

Unlike *De La Cruz v. Quackenbush, supra*, 80 Cal.App.4th 775, 96 Cal.Rptr.2d 92, where the regulatory scheme did not define a routine inspection program, the CURES statute informs patients and physicians that controlled substances prescription records are subject to disclosure to the state for electronic monitoring by the Department of Justice. (Health & Saf.Code, § 11165, former subd. (c).) Access to CURES data is limited to state and federal agencies for civil, criminal, and disciplinary purposes. Thus, under the statutory scheme, the physician and patient know who is authorized to receive CURES data and under what narrow circumstances.

In sum, we conclude that the Board's access to CURES during the course of a disciplinary investigation did not constitute a serious invasion of Lewis's patients' right to informational privacy.

d. *Balancing the Justification Against the Intrusion*

[24] Even if we were to conclude that Lewis had established the threshold elements to establish a right to informational privacy on behalf of his patients, we must balance the justification for permitting the Board to access CURES during an investigation of a licensee-physician against the intrusion. (See *Hill, supra*, 7 Cal.4th at p. 40, 26 Cal.Rptr.2d 834, 865 P.2d 633.) An invasion of privacy is justified if it substantively furthers one or more countervailing interests. (*Ibid.*)

Lewis and the Board do not agree on the level of scrutiny required to balance these interests. In *Whalen v. Roe, supra*, 429 U.S. 589, 97 S.Ct. 869, the court invoked a rational basis test, concluding the New York statute was a reasonable exercise of the state's broad police powers. (*Id.* at p. 598, 97 S.Ct. 869.) In *Hill*, the Supreme Court declined to hold that every assertion of a privacy interest under article I, section 1 must be overcome by a " 'compelling interest.' " (*Hill, supra*, 7 Cal.4th at pp. 32–35, 26 Cal.Rptr.2d 834, 865 P.2d 633.) *Board of Medical Quality Assurance v. Gherardini, supra*, 93 Cal.App.3d 669, 156 Cal.Rptr. 55, decided before

Hill, held that when balancing the intrusion into the patients' informational privacy rights in their ***954** medical records, the state must establish a compelling state interest. (*Id.* at p. 679, 156 Cal.Rptr. 55.) Although the privacy issue here relates to informational privacy, which is similar to the constitutional question addressed by the *Whalen* court, we assume without deciding that the state must establish a compelling interest.

The Board advances two compelling state interests to access CURES during an investigation of a licensee-physician.

[25] First, there is no dispute that the state has a compelling interest in controlling the diversion and abuse of controlled substances. Pursuant to its police power to protect the public health and welfare, a ****508** state has the power to regulate and control the sale, use, and traffic of habit-forming drugs. (*Whipple v. Martinson* (1921) 256 U.S. 41, 45, 41 S.Ct. 425, 65 L.Ed. 819; *People v. Privitera* (1979) 23 Cal.3d 697, 704–705, 153 Cal.Rptr. 431, 591 P.2d 919, cert. den. *sub nom. Privitera v. California* (1979) 444 U.S. 949, 100 S.Ct. 419, 62 L.Ed.2d 318.) As the U.S. Supreme Court stated when examining a California statute that regulated morphine: "There can be no question of the authority of the State in the exercise of its police power to regulate the administration, sale, prescription and use of dangerous and habit-forming drugs, such as are named in the statute. The right to exercise this power is so manifest in the interest of the public health and welfare, that it is unnecessary to enter upon a discussion of it beyond saying that it is too firmly established to be successfully called in question." (*Whipple v. Martinson, supra,* at p. 45, 41 S.Ct. 425; see also *People v. Privitera, supra,* at p. 731, 153 Cal.Rptr. 431, 591 P.2d 919 (dis. opn. of Bird, C.J.).)

Second, the state has a compelling interest in exercising its regulatory power to protect the public against incompetent, impaired, or negligent physicians. (*Arnett v. Dal Cielo, supra,* 14 Cal.4th at p. 7, 56 Cal.Rptr.2d 706, 923 P.2d 1.) "Protection of the public shall be the highest priority for the Medical Board of California in exercising its licensing, regulatory, and disciplinary functions. Whenever the protection of the public is inconsistent with other interests sought to be promoted, the protection of the public shall be paramount." (Bus. & Prof.Code, § 2001.1.) Vesting the Board with the authority to investigate complaints against licensee-physicians is an integral part of the oversight of professional practice.

Lewis contends that his patients' informational privacy rights in their controlled substances prescription records outweighs these compelling state interests because the CURES statute permits the Board to access data before demonstrating good cause. We disagree.

The Legislature has determined that CURES may be accessed as a tool to monitor abuse and diversion of controlled substances. To impose a good ***955** cause requirement before accessing CURES data would necessarily involve litigating the privacy issue in advance. As the court stated in *Reynaud v. Superior Court* (1982) 138 Cal.App.3d 1, 187 Cal.Rptr. 660, when addressing a similar argument, the scope of the privacy clause is "potentially enormous" and the "variety of circumstances in which it might be invoked is essentially infinite." (*Id.* at p. 8, 187 Cal.Rptr. 660.) This delay defeats the legislative purpose of CURES. One of the real-time benefits of access to CURES is to permit a physician, who is authorized to prescribe or dispense a controlled substance, to instantly look up a new patient's controlled substances history to determine whether the patient legitimately needs pain medicine or is "doctor shopping."

Real-time access to CURES also protects patients from incompetent and unprofessional doctors. If the privacy issue were litigated before accessing CURES, the prescribing physician under investigation could stall release of these records, which would prevent the state from exercising its police power to protect the public health.

The Board's access to CURES also should not be limited based upon the nature of the complaint lodged against the licensee-physician. From the patients' perspective, the privacy interest in their controlled substances prescription records is no different if the Board were investigating unprofessional conduct in their care and treatment or in improper prescription ****509** practices. Even if the Board is investigating the former, as was the case here, a physician's prescribing practices are directly related to medical care and treatment afforded to his patients. A complaint regarding the quality of care and treatment by a diet doctor, for example, might often reveal improper prescribing practices that could be deadly. Likewise, a complaint regarding the quality of care or treatment may be related to a physician's substance abuse problem that poses a threat to public health. Limits such as Lewis proposes would compromise the Board's paramount concern to protect public health.

Balancing the state's substantial interest in preventing the abuse and diversion of controlled substances and protecting the public health against the minor intrusion upon a patient's informational privacy in his or her controlled substances prescription records stored in CURES, we conclude the Board's actions here in accessing and compiling data from CURES did not violate article I, section 1 of the California Constitution. There are sufficient safeguards in the CURES statute and other regulatory duties to protect patients' informational privacy and confidentiality from unwarranted public disclosure and unfettered access to CURES data. Thus, we conclude the Board's access to CURES while investigating a consumer complaint against Lewis that was unrelated to his prescription practices did not violate his patients' state ***956** constitutional right to privacy in their controlled substances prescription records. Accordingly, the trial court did not err in denying Lewis's petition to set aside the Board's disciplinary action against him.

DISPOSITION

The order to show cause is discharged. The petition for writ of mandate is denied. The parties are to bear their own costs.

We concur:

KLEIN, P.J.

CROSKEY, J.

Parallel Citations

226 Cal.App.4th 933, 14 Cal. Daily Op. Serv. 5967, 2014 Daily Journal D.A.R. 6823

End of Document

PROOF OF SERVICE
STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am a citizen of the United States and employed in Los Angeles County, California. I am over the age of 18 and not a party to the within action. My business address is 1990 South Bundy Drive, Suite 777, Los Angeles, CA 90025.

On July 8, 2014, I served on the interested parties in this action the document(s) described as **PETITION FOR REVIEW** by transmitting the original or a true and correct copy thereof to the addressee(s) as follows:

Edward K. Kim, Deputy Attorney General
DEPARTMENT OF JUSTICE
300 S. Spring Street, Ste. 1702
Los Angeles, CA 90013

Court Clerk to the Honorable Joanne B. O'Donnell
LOS ANGELES SUPERIOR COURT
Central District, Stanley Mosk Courthouse
Department 86
111 N. Hill Street
Los Angeles, CA 90012

Joseph A Lane, Clerk
Second District Court of Appeal, Division Three
Ronald Reagan State Building
300 S. Spring Street
2nd Floor, North Tower
Los Angeles, CA 90013

☑ **VIA OVERNIGHT MAIL (FEDERAL EXPRESS OR EXPRESS MAIL):**
The document(s) were delivered to the overnight mail service in a sealed envelope(s) or package(s) addressed to the person(s) listed above.

☑ (State) I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

☐ (Federal) I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.

ALEX FRIEDMAN