S219811

In the

Supreme Court

of the

State of California

ALWIN CARL LEWIS,

Petitioner,

v.

THE SUPERIOR COURT OF LOS ANGELES COUNTY,

Respondent;

MEDICAL BOARD OF CALIFORNIA,

Real Party in Interest.

AFTER A DECISION BY THE CALIFORNIA COURT OF APPEAL
SECOND APPELLATE DISTRICT, DIVISION THREE · NO. B252032
SUPERIOR COURT OF LOS ANGELES · HON. JOANNE B. O'DONNELL · NO. BS139289

OPENING BRIEF ON THE MERITS

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ALWIN CARL LEWIS, M.D.

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OPENING BRIEF ON THE MERITS

ISSUES PRESENTED

Pursuant to California Rules of Court ("CRC") Rule 8.520(b)(2)(B), Petitioner Alwin Carl Lewis, M.D. ("Petitioner" or "Dr. Lewis") restates the "Issues Presented" in his Petition for Review:

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.

STATEMENT OF THE CASE

Pursuant to CRC Rules 8.204(a)(2) and 8.520(b)(1), Petitioner sets forth this Statement of the Case. The appellate record in this case consists of five separate bound volumes of Supporting Exhibits, paginated consecutively, and references in this brief are to the appropriate Exhibit and page number of the Supporting Exhibits ("S.E.").

A. BRIEF SUMMARY

The essential facts of the case are not in dispute.[1] The Medical Board of California ("the Board") initiated an investigation against the medical license of a physician, Petitioner Alwin Carl Lewis, M.D. ("Petitioner" or "Dr. Lewis"), based on a single patient complaint by patient V.C. The patient alleged that Dr. Lewis had recommended that she lose weight and start a diet she considered unhealthful. No issue whatsoever was raised with respect to prescriptions for this patient or with her actual care, other than the alleged dietary recommendation.

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 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. The

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[1] This section serves as a brief general overview. More detailed discussion of the facts, with citations to the record, occurs in section C., "Factual and Procedural History", *infra*, at pp. 5-14.

Board amended its Accusation to add numerous medication-related allegations against Dr. Lewis with respect to patients other than V.C. Dr. Lewis filed a motion to dismiss the allegations relating to these other patients which was denied. The Board largely, but not entirely, ruled in favor of Dr. Lewis with respect to these other patients, primarily finding only minor recordkeeping violations. In its final Decision, the Board placed Dr. Lewis's medical license on probation for three years under various terms and conditions.

Dr. Lewis subsequently filed a petition for writ of administrative mandamus in the trial court, challenging the Decision in its entirety. He argued, *inter alia*, that the CURES searches and general pharmacy audits were improper and in violation of his patients' right to privacy under the State Constitution (Art. I, section 1) and contended that the disciplinary action based on patients other than V.C. was entirely improper. The trial court rejected Dr. Lewis' arguments and affirmed the Board's Decision.

Dr. Lewis then filed a writ petition in the Court of Appeal, which, unlike the trial court action, only challenged the CURES searches and pharmacy audits and not the discipline imposed with respect to patient V.C. That Petition was denied in a published opinion, *Lewis v. Superior Court* (2014) 172 Cal.Rptr.3d 491 ("*Lewis I*"). Dr. Lewis' Petition for Review to

this Court was subsequently granted. The present Petition only challenges the discipline based on patients other than V.C.

B. STATEMENT OF APPEALABILITY

Dr. Lewis' petition for writ of administrative mandamus in the trial court was filed pursuant to California Code of Civil Procedure section 1094.5. California Business and Professions Code section 2337, enacted in 1993, eliminated the right of direct appeal for physicians or other licentiates challenging a professional disciplinary action, leaving only appellate writ review as a means of challenging a trial court decision. *Leone v. Medical Board of California* (2000) 22 Cal.4th 660, 670. Accordingly, Dr. Lewis filed a writ petition in the Court of Appeal, which ultimately led to the aforementioned published opinion in *Lewis I.* An appellate court decision on a writ petition is subject to review by this Court in the same manner applicable to appeals. *Superior Court v. County of Mendocino* (1996) 13 Cal.4th 45, 52, fn.5.

C. FACTUAL AND PROCEDURAL HISTORY

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).

1. 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. related to 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).

2. 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, respectively. 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 to Dr. Lewis, conducted a broad and intrusive search of all of Petitioner's patients' medical prescription records for controlled medications, 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*, 172 Cal.Rptr.3d at 495. 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.

With the information obtained from the CURES reports and the subsequent pharmacy audits, the Board 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.

3. 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--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).

4. 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*, 172 Cal.Rptr.3d at 496.

After written and oral argument, the Court of Appeal issued its decision, denying the petition for writ of mandate, in *Lewis I.* In its decision, the court assumed, without deciding, that the compelling state interest standard applied to patient medical records, after *Hill v. National Collegiate Athletic Assn.* (1994) 7 Cal.4th 1. *Lewis I, supra*, 173 Cal.Rptr.3d at 507. 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 the CURES database or to conduct a general pharmacy audit in conducting a physician disciplinary investigation.

The Court of Appeal's decision was filed on May 29, 2014. This Petition for Review followed and was granted by the Court.

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*, *Hill*, and related cases

The Court of Appeal in *Lewis I* found 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*, 172 Cal.Rptr.3d at 502 ("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"). The same conclusion was reached by the First Appellate District in *Medical Board of California v. Chiarottino*

(2014) 225 Cal.App.4th 623, 631 ("*Chiarottino*") ("It is established that patients do have a right to privacy in their medical information under our state Constitution").[2]

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. In reaching this conclusion, the Court of Appeal noted that "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." *Id.* at 678.

This Court has also recognized that the state constitutional right to

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[2] In addition, in *Whalen v. Roe* (1977) 429 U.S. 589, 599, 97 S.Ct. 869, 876, the U.S. Supreme Court recognized a federal constitutional right to privacy in patient prescription records due to "the individual interest in avoiding disclosure of personal matters." See also *Oregon Prescription Drug Monitoring Program v. U.S. Drug Enforcement Admin.* (D.Ore. 2014) 998 F.Supp.2d 957, 964-965. It should be noted, however, that the California constitutional right to privacy is, "in many contexts... broader and more protective of privacy than the federal constitutional right of privacy as interpreted by the federal courts." *American Academy of Pediatrics v. Lungren* (1997) 16 Cal.4th 307, 326.

privacy applies to patient medical records. *Hill v. National Collegiate Athletic Assn.* (1994) 7 Cal.4th 1, 41 ("*Hill*") (citing *Gherardini* for the proposition that "information about the internal medical state of an [individual's] body... is regarded as personal and confidential"). Indeed, this Court noted in *Ruiz v. Podolsky* (2010) 50 Cal.4th 838, 851, that "[t]he disclosure of ... sensitive medical information is at the core of the protected informational privacy interest," citing *Hill*, 7 Cal.4th at 41.

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

The court in *Gherardini* applied 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 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*. *Lewis I*, *supra*, 172 Cal.Rptr.3d at 507. 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. The Court noted:

> 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).

Subsequently, in *American Academy of Pediatrics v. Lungren* (1997) 16 Cal.4th 307, this Court noted that *Hill* was not intended to be read broadly to diminish the state constitutional right to privacy: "[*Hill*] should not be interpreted as establishing significant *new* requirements or hurdles that a plaintiff must meet in order to demonstrate a violation of the right to privacy under the state Constitution-- hurdles that would modify substantially the traditional application of the state constitutional privacy provision (and diminish the protection provided by that provision)." *Id.* at 330-331, italics in original. The Court also noted that, "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." *Id.* at 326.

The principles set forth in *Hill* were affirmed in the more recent case of *Sheehan v. San Francisco 49ers, Ltd.* (2009) 45 Cal.4th 992, where the Court quoted *Hill*:

> In *Hill*, we explained that "the trial court erred in imposing on the NCAA the burden of establishing that there were no less intrusive means of accomplishing its legitimate objectives.... [T]he argument that such a 'least restrictive alternative' burden must invariably be imposed on defendants in privacy cases derives from decisions that: (1) involve clear invasions of central, autonomy-based privacy rights, particularly in the areas of free expression and association, procreation, or government-provided benefits in areas of basic human need; or (2) are directed against the invasive conduct of government agencies rather than private, voluntary organizations.' (*Id.* at p. 49, 26 Cal.Rptr.2d 834, 865 P.2d 633.)

Id. at 1002 (emphasis added). *See also Johnson v. Superior Court (California Cryobank)* (2000) 80 Cal.App.4th 1050, 1071 (applying the "compelling state interest" test to court-ordered discovery of medical information in a civil case, which involves "state-compelled disclosure... [which] is treated as a product of state action.")

Thus, in situations involving invasions of informational privacy by governmental agencies with respect to protected categories such as medical information, the "least intrusive alternatives" standard still applies. That is precisely what is involved here.

C.

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

As discussed in the previous section, in both *Hill* and the more recent case of *Sheehan*, this Court has acknowledged that the "compelling state interest" standard *does* apply to invasions of informational privacy by public entities. That, and other facts, distinguishes the present case from *Hill* and *Sheehan*, which involved invasions of privacy by private entities.

Sheehan involved patdown searches of patrons to football games before entering a privately-owned football stadium. The Court noted:

> "We have been directed to 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 alternative' possible under the circumstances. Nothing in the language [or] history of the Privacy Initiative justifies the imposition of such a burden; we decline to impose it." [quotation from *Hill*, *supra*, 7 Cal.4th at 50]. ...
>
> The state constitutional right of privacy does not grant courts a roving commission to second-guess security decisions at private entertainment events or to micromanage interactions between private parties.

Sheehan, *supra*, 45 Cal.4th at 1002, emphasis added.

Unlike a private entity, the State Medical Board has broad and expansive authority to explore the prescription records of any patient in 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*, 172 Cal.Rptr.3d at 495. In other words, the Board routinely runs these CURES searches virtually every time it investigates a physician for any reason at all. Such CURES searches are then often used to justify even more intrusive general pharmacy audits of all prescriptions, both controlled and non-controlled. (S.E., Ex. 1, p. 1125).

Further, 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. Similarly, *Sheehan* merely involved "a private entertainment venue's security arrangements" and the voluntary attendance by sports fans of events at that venue. *Sheehan, supra*, 45 Cal.4th at 1002.

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 Admin.* (D.Ore. 2014) 998 F.Supp.2d 957, where the court noted:

> [P]atients 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 967, emphasis added.

In addition, there are no countervailing "freedom of association" considerations applicable here, as there were to the NCAA, which is a private entity. See *Hill*, *supra*, 7 Cal.4th at 39. The 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

In *Hill*, the Court 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, the state had adequately demonstrated such an interest and that warrantless searches of CURES and prescription records were freely available to the State. *Lewis I, supra*, 172 Cal.Rptr.3d at 507: "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*, 172 Cal.Rptr.3d at 508. 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 508-509 (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.[3]

A requirement that the Board obtain a warrant, subpoena, or other showing of good cause would constitute a "less intrusive alternative," one which fairly balances the rights of the public to be protected with the rights

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[3] 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.

of the individual. If warrant or good cause is obtained in the first instance to search the CURES records, presumably that showing would also suffice to justify a general pharmacy audit of that physician as well. However, should the Court decide that warrantless searches of CURES are permissible, Petitioner contends that any subsequent general pharmacy audits arising out of such a CURES search must then be accompanied by warrant, subpoena, or other showing of good cause.

B.

The same warrant or "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

1.

Closely regulated businesses

A subpoena or warrant requirement with respect to the pharmacy audits conducted herein would be consistent with federal cases construing the Fourth Amendment with respect to administrative searches of "closely regulated businesses." As noted, the state constitutional privacy right is, in fact, broader and more protective than the federal constitutional right. *American Academy of Pediatrics v. Lungren* (1997) 16 Cal.4th 307, 326. Therefore, to the extent that federal authorities support a warrant requirement, Petitioner contends that such a requirement should also be

applicable pursuant to the state constitutional right.

Dr. Lewis acknowledges that there is authority holding that the "closely regulated business" exception permits audits of pharmacists to be conducted without warrant under some circumstances. 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 expressly quoted and relied on the decision of the United States Supreme Court in *New York v. Burger* (1987) 482 U.S. 691, 107 S.Ct. 2636 ("*Burger*") in reaching this conclusion. *Doss*, *supra*, 4 Cal.App.4th at 1597 ("It is well settled that warrantless searches of pervasively regulated and licensed businesses are permissible under the Fourth Amendment, if conducted pursuant to statutory authorization," citing *Burger*). In *Burger*, the U.S. Supreme Court explained the rationale for the exception from the warrant requirement in searches of closely-regulated businesses. The Court noted that the owner of a closely-regulated business "has a reduced

expectation of privacy" and that "the warrant and probable-cause requirements, which fulfill the traditional Fourth Amendment standard of reasonableness for a government search [citation omitted] have lessened application in this context." *Burger*, *supra*, 482 U.S. at 702, 107 S.Ct. at 2643. Even then, however, the Court noted that warrantless searches were only permissible if certain criteria were met. These criteria were discussed by the Court of Appeal in *De La Cruz v. Quackenbush* (2000) 80 Cal.App.4th 775:

> As the Supreme Court pointed out in *Burger*, "even in the context of a pervasively regulated business, [a warrantless search] will be deemed reasonable only so long as three criteria are met." (482 U.S. at p. 702.) Those criteria require that a "substantial governmental interest" exists in the regulatory scheme under which the inspection is made, a warrantless inspection is necessary to further the regulatory scheme and the inspection program provides a constitutionally adequate substitute for a warrant. (*Id.* at pp. 702-703.)

80 Cal.App.4th at 785, bracketed material in original.

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 *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.

As will be discussed in the following subsection, federal cases dealing with the Fourth Amendment expressly prohibit the pretextual use of warrantless "administrative" searches for criminal investigations. The same reasoning should prohibit the use of warrantless "administrative" searches of pharmacies for the purpose of disciplinary actions against professional medical licenses, which, while not strictly criminal in nature, nevertheless involve the deprivation of a significant vested property right. *Hughes v. Board of Architectural Examiners* (1998) 17 Cal.4th 763, 788-789.

2.

Prohibition on the use of a warrantless administrative search as a pretext for a criminal investigation

The U.S. Supreme Court has expressly cautioned that the exception to the normal warrant requirement does not apply to a purported administrative search of a closely regulated business that is a mere pretext

for what is, in reality, a criminal investigation. *Burger*, *supra*, 482 U.S. at 716-717, 107 S.Ct. at 2651, fn.27. The purpose of the investigation is directly relevant to such an inquiry. Where the warrantless administrative investigation is, in fact, conducted in good faith as, for example, a routine pharmacy audit, and happens to find incriminating evidence of criminal or other wrongdoing, such evidence would not be automatically prohibited.[4] However, where the warrantless investigation is conducted as a mere ruse for what is, in reality, a broader criminal search, the fruits of that search are prohibited by the Fourth Amendment.

Many subsequent cases have confirmed that a so-called "inventory" or administrative search, which is not ordinarily subject to warrant requirements, may not be used for the purpose of conducting a criminal investigation. Thus, in *Whren v. United States* (1996) 517 U.S. 806, 116 S.Ct.1769 , the Court, citing *Burger*, noted that a warrantless administrative inspection does not violate the Fourth Amendment when that search "did not appear to be 'a 'pretext' for obtaining evidence of ... violation of ... penal laws.' " *Whren*, *supra*, 517 U.S. at 811, 116 S.Ct. at 1773. The Court went on to note that "the exemption from the need for probable cause (and

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[4] 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).

warrant), which is accorded to searches made for the purpose of inventory or administrative regulation, is not accorded to searches that are *not* made for those purposes." *Id.*, 517 U.S. at 811-812, 116 S.Ct. at 1773 (underling added; italics in original). The Court made clear that, in the context of administrative inspections like pharmacy audits, which are conducted pursuant to a pervasive regulatory scheme, "an officer's motive invalidates objectively justifiable behavior under the Fourth Amendment." *Id.*, 517 U.S. at 812, 116 S.Ct. at 1774 (emphasis added)

This result was affirmed in *City of Indianapolis v. Edmond* (2000) 531 U.S. 32, 45, 121 S.Ct. 447, 456, where the Court cited *Burger* for the proposition that an administrative inspection conducted with neither warrant nor probably cause is valid if it is not "a pretext for gathering evidence of violation of the penal laws." The Court noted that, even beyond administrative searches, "programmatic purposes may be relevant to the validity of Fourth Amendment intrusions undertaken pursuant to a generalized scheme without individualized suspicion." *Id.*, 531 U.S. at 45-46, 121 S.Ct. at 456.

Numerous other cases have affirmed the principle that a warrantless administrative search conducted for the purpose of a criminal investigation violates the Fourth Amendment. See e.g. *People v. Won Kyu Lee* (Ill. 2014)

7 N.E.2d 851, 857 (pretext; citing *Burger* and related cases); *People v. Valenzuela* (1999) 74 Cal.App.4th 1202, 1209 (noting that a warrantless administrative search, which is a mere pretext for a criminal investigation, expressly citing to *Burger, supra*, 482 U.S. at 716-717, 107 S.Ct. at 2651, fn.27); *People v. Walker* (2012) 210 Cal.App.4th 1372, 1384 (noting "administrative search cases prohibiting pretextual police intrusions"); *United States v. Johnson* (10th Cir. 1993) 994 F.2d 740, 742 ("an administrative inspection may not be used as a pretext solely to gather evidence of criminal activity"); *United States v. Belcher* (8th Cir. 2002) 288 F.3d 1068, 1071 ("administrative stops must not be allowed to become pretexts for 'general crime control' or occasions 'for the ordinary enterprise of investigating crime' "); *Anobile v. Pelligrino* (2nd Cir. 2001) 303 F.3d 107, 122 ("The Supreme Court has acknowledged, however, that a search may be invalid if the administrative inspection was a 'pretext' for obtaining evidence of general criminal activity.")

In the present case, the Board's investigator was quite frank in admitting that the pharmacy audits were not conducted for the purpose of an ordinary administrative inspection of the pharmacies, but, in fact, were for the specific purpose of investigating all patients treated by Dr. Lewis to attempt to uncover any potentially disciplinable conduct on his part. See

e.g. S.E., Ex. 1, p. 1125.

Petitioner respectfully submits that this Court should not permit warrantless administrative searches of pharmacies to be used as a "pretext" to conduct a physician license disciplinary action, and that the use of warrantless pharmacy (or other administrative) audits for the purpose of a professional disciplinary action should be barred, for the same reason that such searches cannot be used as a 'ruse' for a criminal investigation. By analogy to the federal cases, Petitioner submits that the state constitutional right to privacy, which is more protective than the federal right, should prohibit searches conducted for these purposes.

III.

IN ADDITION, THE FOURTH AMENDMENT RIGHTS OF DR. LEWIS AND OF HIS PATIENTS IN THE MEDICAL RECORDS HAS BEEN VIOLATED

A.

A warrantless search is, with very few exceptions, *per se* unreasonable under the Fourth Amendment

Petitioner also asserts that he must be 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 Fourth Amendment rights did apply, no balancing test of any sort is required based on the U.S. Supreme Court's

ruling in *Whalen v. Roe* (1977) 429 U.S. 589, 604, fn.32 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. *Lewis I, supra*, 172 Cal.Rptr.3d at 506, including fn.16 (expressly distinguishing *State v. Skinner* (La. 2009) 10 So.3d 1212 and *Oregon Prescription Drug Monitoring Program v. United States Drug Enforcement Admin.* (D.Ore. 2014) 998 F.Supp.2d 957 on this ground).

This conclusion in *Lewis I*-- that, if the Fourth Amendment applied, the warrantless searches would be *per se* unreasonable-- was correct. In *Whalen v. Roe* (1977) 429 U.S. 589, 97 S.Ct. 869, for example, the Court held that Fourth Amendment rights were not offended by the mere fact that a state maintained a computerized databank of controlled substance prescriptions. However, the Court declined to reach the applicability of the Fourth Amendment to "affirmative, unannounced, narrowly focused intrusions into individual privacy during the course of criminal investigations." *Whalen, supra*, 429 U.S. at 604, 97 S.Ct. at 878, fn.32. In fact, the Ninth Circuit has noted that "In most circumstances, searches and seizures conducted without a warrant are 'per se unreasonable under the Fourth Amendment-- subject only to a few specifically established and

well-delineated exceptions.' " *Al-Haramain Islamic Foundation, Inc. v. U.S. Dept. of Treasury*, 686 F.3d 965, 990 (9th Cir. 2012) (quoting *Katz v. United States* (1967) 389 U.S. 347, 357, 88 S.Ct. 507).[5]

Similarly, in *Oregon Prescription Drug Monitoring Program v. United States Drug Enforcement Admin.*, *supra*, the federal district court noted that a balancing test does not apply in Fourth Amendment cases, and rejected the application of such a test, in invalidating a state system of prescription records very similar to the one involved here:

> Citing *Whalen*, the Ninth Circuit [in *Tucson Woman's Clinic v. Eden*, 379 F.3d 531 (9th Cir. 2004)] balanced five factors in weighing the governmental interest in obtaining information against the individual's privacy interest and found that the searches also violated plaintiffs' informational privacy rights under the Fourteenth Amendment. 379 F.3d at 551-53. That balancing test is inapplicable in the context of the Fourth Amendment.

Oregon Prescription Drug Monitoring Program v. United States Drug Enforcement Admin., *supra*, 998 F.Supp.2d at 965, fn.3 (emphasis added).

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[5] The court in *El-Hamrain* noted there might be a very few other narrow exceptions to the warrant requirement, but none of them apply here. See 683 F.3d at 993-995, citing *Samson v. California* (2006) 547 U.S. 843, 126 S.Ct. 2193 and *United States v. Knights* (2004) 534 U.S. 112, 124 S.Ct. 587 (both of which specifically involved probationers, who have a diminished privacy interest); and *United States v. Flores-Montano* (2004) 541 U.S. 149, 152, 124 S.Ct. 1582, 1585 (involving a search at the border, where the search and seizure power is "at its zenith.")

To the extent that the Fourth Amendment applies in this case, Petitioner submits that no balancing test at all is applicable and that the fruit of the warrantless CURES searches and pharmacy audits must be barred.

B.

Physicians have standing to raise their patient's Fourth Amendment privacy rights in their medical records

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* (1967) 389 U.S. 347 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) (later renumbered 28(f)(2), the "Right to Truth-in-Evidence" provision) to the California Constitution.

The Court of Appeal's citation to *In re Lance W.* is simply inapposite. There, the California Supreme Court noted that Proposition 8

eliminated vicarious liability rule only with respect to criminal proceedings, and made the exclusionary rule in California criminal proceedings coextensive with, and not in excess of, the Fourth Amendment. *In re Lance W.*, *supra*, 37 Cal.3d at 890. However, the Court in *In re Lance W.*, in rejecting an equal protection argument made by a criminal defendant, expressly noted that "there may be civil proceedings in which the circumstances under which evidence was obtained suggest that the purposes of the exclusionary rule warrant its application." *Id.* at 893.

The courts have recognized that the Fourth Amendment indeed applies to administrative proceedings. See *Brovelli v. Superior Court* (1961) 56 Cal.2d 524, 529 ("[o]f course, department heads [of administrative agencies] cannot compel the production of evidence in disregard of the privilege against self-incrimination or the constitutional provisions prohibiting unreasonable searches and seizures"). Because the result in *In re Lance W.* was expressly limited to the applicability of the exclusionary rule in criminal cases, it does not affect existing case law applying the vicarious exclusionary rule in administrative cases.

There is also authority 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." See also *Bearman v. Superior Court* (2004) 117 Cal.App.4th 463, 468-469.

Thus, Dr. Lewis had standing, either vicariously or directly, to assert his patients' privacy rights on their behalf.

C.

The exclusionary rule applies under the circumstances of this particular case

Dr. Lewis also notes that, while the exclusionary rule is not necessarily applicable to all administrative disciplinary actions (see e.g. *Emslie v. State Bar* (1974) 11 Cal.3d 210, 229-230, holding that the application of the exclusionary rule in administrative cases depends on the facts of the case), it is applicable here. This case is analogous to that of *Dyson v. California State Personnel Bd.* (1989) 213 Cal.App.3d 711, where the exclusionary rule was applied to an administrative proceeding. In that case, Dyson, a school youth counselor, was dismissed from employment based upon a search of Dyson's home and the seizure of stolen property therein. *Id.* at 714. Thomas Gold, a security officer at the school who was technically a peace officer, initiated the investigation and contacted several

sheriff's officers, who accompanied him to Dyson's home. *Id.* at 715-716. There, they conducted a warrantless search of Dyson's house.

The Court of Appeal distinguished *Emslie*, a case that involved evidence lawfully seized by Nevada police that was later used in a California State Bar Association disciplinary proceeding. *Dyson*, *supra*, 213 Cal.App.3d at 717. In *Emslie*, an attorney, William G. Emslie, was observed picking up a key from the swimming pool area at Caesar's Palace Hotel, where he was not a registered guest; he was apprehended by hotel security officers who found eight hotel room keys in his pockets; they called the sheriff's office. *Emslie*, *supra*, 11 Cal.3d at 217. Deputy sheriff John Davis made the arrest, giving Emslie his *Miranda* rights. Emslie consented to a search of his room at the Rodeway Inn, where numerous stolen items were found. *Id.* This Court concluded that the search and seizure were legal and proper. *Id.* at 226 ("we have concluded from our independent review of the record that there was no unlawful search or seizure").

The Court of Appeal in *Dyson* noted that the reason that the exclusionary rule was not applied in *Emslie* was that the evidence therein had been lawfully seized by the police pursuant to their own independent investigation, and that there would be no deterrent purpose served by excluding the evidence at an administrative proceeding since it had already

been lawfully seized. *Id.* at 718.

The *Dyson* court went on to hold:

> These reasons for admitting illegally seized evidence in an administrative proceeding have no application to this case. The evidence seized in this case was in no way the independent product of police work. The search was initiated on the basis of allegations of criminal misconduct made to the agency. It was directed by and the evidence was seized and held by the agency. The agency turned the evidence over to prosecutorial authorities for use in a criminal prosecution, retrieved it following its suppression by the court in the criminal proceeding, and introduced it in evidence in the administrative disciplinary hearing. The sole function of the sheriff's officers present at the scene of the search of Dyson's home was to assist Gold, who was unsure of the extent of his own peace officer powers. They left after the search, consistent with the view they were assisting Gold, leaving the evidence seized in Gold's possession. The evidence was then placed in the trunk of Gold's car and taken to Preston where Gold, pursuant to his superior's direction, turned it over to a different police entity, the Ione Police Department, for use in the criminal prosecution of Dyson. The evidence was subsequently suppressed in that proceeding and the criminal charges dismissed on grounds that the search of Dyson's home violated his constitutional rights of privacy.

Id. at 718-719 (emphasis added).

On these grounds, the court in *Dyson* applied the exclusionary rule and barred the admission of the seized evidence from the administrative

proceedings, to deter such illegal conduct by the agency. Precisely the same situation is presented here: the Medical Board investigators, who are technically peace officers, have conducted warrantless administrative searches expressly for the purpose of supporting an ongoing disciplinary action against Dr. Lewis. They should not be permitted to profit from such activity, and the exclusionary rule is necessary to act as a deterrent against such wrongful activity.

In *Department of Transp. v. State Personnel Bd.* (2009) 178 Cal.App.4th 568, 577, the court noted that, in *Dyson*, "[t]he crucial point was that 'The evidence seized in this case was in no way the independent product of police work'; rather, the search 'was directed by and the evidence was seized and held by the agency' that employed Dyson. (*Id.* at pp. 718-719.) Under the circumstances, the court applied the exclusionary rule because 'The unconstitutional search could not have a tighter nexus with the agency that seeks to profit from it.' (*Id.* at p. 721.)" Similarly, in *Finkelstein v. State Personnel Bd.* (1990) 218 Cal.App.3d 264, 271, the Court of Appeal noted that *Dyson* does indeed stand for the proposition that an illegal search conducted by an administrative agency specifically for disciplinary purposes would be subject to the exclusionary rule.

The same circumstances are involved here: the very agency

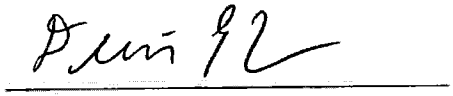
conducting the illegal search was the Medical Board, which seeks to directly profit therefrom. No independent and lawful search by the police or other investigators uncovered the information; rather, it was the product of a targeted search against Dr. Lewis and his patients. Accordingly, *Dyson* is directly on point, and the exclusionary rule should apply under the circumstances of this case.

CONCLUSION

Based on the foregoing, Petitioner respectfully requests that the decision of the Court of Appeal be reversed and the matter remanded to the Medical Board with instructions to exclude all allegations obtained as a result of the CURES searches and the pharmacy audits, and that penalty be reconsidered based solely on the treatment of patient V.C.

Dated: February 17, 2015

FENTON LAW GROUP, LLP

By: 

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