In the Supreme Court of the State of California

ALWIN 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.

Case No. S219811

SUPREME COURT
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The Honorable Joanne O'Donnell, Superior Court Judge

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INTRODUCTION

Petitioner Alwin Lewis, M.D. seeks to avoid the professional discipline imposed on him by real party in interest, the Medical Board of California. After an eight-day administrative hearing, the Board placed Lewis's medical certificate on probation for three years. The Board found that Lewis, on a number of specific occasions, prescribed powerful drugs to two patients at excessive levels; failed for almost two years to monitor another patient for liver toxicity, which could have resulted from the interaction between two drugs he prescribed; and failed to document the reasons for prescribing, changing the doses of, and switching prescription medications.

Lewis does not now dispute these findings or the discipline imposed. Rather, he argues that evidence offered to establish his negligence as to all but the original complainant—the medical records of certain patients obtained from his files by consent or subpoena—should have never been admitted in the administrative proceeding. According to Lewis, those records were the fruit of the Board's review of patient prescription records, maintained as required by law by the Department of Justice (Department) in its Controlled Substance Utilization Review and Evaluation System (CURES) database and by the dispensing pharmacy. Lewis claims that the Board's receipt and review of these prescription records, in compliance with statutory requirements but without a warrant or subpoena, violated the Fourth Amendment and his patients' right to privacy under article I, section 1 of the California Constitution. All of his claims fail.

Lewis does not dispute that the Department may lawfully collect and maintain records of all controlled substance prescriptions dispensed to patients. His sole challenge is that the Board violated article I, section 1 of the state Constitution when it received and reviewed CURES records about

his prescribing practices where the original complaint about his patient care did not concern his prescribing practices.

As a threshold matter, Lewis lacks standing to pursue this claim, as his interests do not align with those of his patients. Lewis should not be able to assert his patients' right to privacy to insulate himself from discipline when the central purpose of the Board's request and review of the CURES records was to protect the health and safety of his patients and the public.

Even if Lewis could assert his patients' state right to privacy, there is no violation. Under the test established by *Hill v. National Collegiate Athletic Assn.* (1994) 7 Cal.4th 1, Lewis has not established that his patients have a reasonable expectation of privacy that would prevent lawfully collected CURES data from being provided to the Board or that the Board's receipt of Department-collected CURES data amounts to a serious invasion of his patients' right to privacy. As the United States Supreme Court observed nearly forty years ago in *Whalen v. Roe* (1977) 429 U.S. 589, when it rejected a challenge to the constitutionality of a drug-tracking system much like CURES, disclosures of health information to those who have a reason to know it—including state health regulators—are an expected feature of the modern health care system. Indeed, the collection of prescription drug information in California dates back many decades. As a result, patients reasonably understand that prescriptions for controlled substances are highly regulated and monitored by the government and recognize that these records may be accessed on a confidential basis by administrative agencies, like the Board, in supervising the medical system.

If the minimal invasion effected by the Board's review of CURES data were enough to shift the burden to the State to put forward a countervailing interest under the *Hill* framework, the Board's interests are more than sufficient. When there is a complaint that a physician is

engaging in negligent medical practices of any type, it is important—indeed, it is essential—that the Board be able to quickly ascertain whether that physician's negligence extends to his or her controlled substances prescribing practices, which present a special risk to patients. In this case, the law worked as intended. The Board used CURES data to narrow its investigation, discover, and correct Lewis's unprofessional practices, including those related to prescribing controlled substances, before Lewis's conduct could result in harm. Interposing a subpoena or warrant requirement between the Board and the CURES data held by the Department, as Lewis proposes, lacks legal support and would cause delays that would result in unnecessary risk of harm without meaningful countervailing benefits to patient privacy.

Lewis's remaining claims may be quickly rejected. Lewis waived his Fourth Amendment claim by failing to assert it below and is precluded from asserting the rights of his patients because Fourth Amendment protections are personal. Moreover, the United States Supreme Court rejected a similar Fourth Amendment claim nearly 40 years ago.

Lewis's challenge to the Board's receipt and review of additional prescription records obtained directly from one pharmacy chain, in accordance with statute and without any objection from the pharmacy, has been forfeited by his failure to raise this challenge below, and fails on its merits for reasons substantially similar to the defects in his parallel CURES claims.

Finally, even if Lewis showed any violation of constitutional rights (which he did not), he is not entitled to the sole remedy that he seeks—suppression of the evidence that he claims was the fruit of the Board's review of his patients' prescription records. Not only is the exclusionary rule inapplicable in disciplinary proceedings, but the deterrent value, if any, in excluding these records from the Board's consideration of disciplinary

action is more than outweighed by the costs of suppressing relevant evidence in proceedings to prevent future professional misconduct.

The Court of Appeal's decision should be affirmed.

BACKGROUND

I. California's Recordkeeping and Reporting Requirements for Controlled Substances and Other Prescription Drugs

California has actively regulated the dispensing and use of prescription drugs in the State for nearly 150 years. (See Stats. 1871, ch. 454, p. 681, § 1 [regulating pharmacists in San Francisco]; Stats. 1905, ch. 406, p. 535, § 1 [statewide regulation of prescription drug distribution]; see also *People v. Doss* (1992) 4 Cal.App.4th 1585, 1598 [discussing pervasive regulation of pharmaceutical industry].) Since 1929, the State has required pharmacies to maintain records for certain prescriptions so that the records would be "at all times open to inspection" by law enforcement and by regulatory inspectors. (Stats. 1929, ch. 216, p. 381, § 1; see Stats. 1945, ch. 1193, p. 2248, § 1 [extending requirement to all prescription drugs]; *id.*, ch. 1196, p. 2255, § 1; see Bus. & Prof. Code, § 4081 [substantially similar].)

Although all prescription medications in California are defined as "dangerous drugs" and carefully regulated, a subset of those are classified as "controlled substances" due to their toxicity and potential for abuse leading to psychological or physical dependence. (Bus. & Prof. Code, § 4022; Health & Saf. Code, § 11000 et seq. [California Uniform Controlled Substances Act].)[1] The Uniform Controlled Substance Act classifies controlled substances into five different schedules. (§§ 11007,

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[1] All further statutory references are to the Health and Safety Code unless otherwise noted.

11054-11058.) While Schedule I controlled substances are considered unacceptable for medical use, the drugs on Schedules II through V are prescribed for medical uses despite their high potential for abuse and dependence. (2 Witkin, Cal. Crim. Law (4th ed. 2012) Crimes—Public, § 85, pp. 728-729.)[2] Any physician who prescribes a controlled substance listed on Schedule II must keep a record of the prescription. (§ 11190.) Any physician or pharmacist who dispenses a controlled substance listed on Schedules II, III, or IV must keep a record of the prescription and report that information to the Department, subject to certain exceptions not at issue here. (§§ 11190, 11165, subd. (d).)[3]

The precursor to the modern CURES program dates back to 1939, when the State adopted its "triplicate program" to track the prescription and distribution of certain controlled substances. (Stats. 1939, ch. 60, p. 758 [adding former § 11165].) Under the program, physicians were required to

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[2] For example, Schedule I drugs include cocaine. (§ 11054, subd. (f).) Schedule II includes morphine, Vicodin (acetaminophen and hydrocodone), and Percocet (acetaminophen and oxycodone). (§ 11055, subd. (b).) Schedule III includes stimulants like benzphetamine, certain depressants, and various other narcotics, steroids, and hallucinogenic substances. (§ 11056.) Schedule IV includes all other narcotics, benzodiazepines, and certain other depressants and stimulants. (§ 11057.) Schedule V includes certain narcotic drugs containing nonnarcotic active ingredients. (§ 11058.)

[3] Federal law, too, imposes significant restraints on controlled substance prescriptions, recognizing that practitioners "have the greatest access to controlled substances and therefore the greatest opportunity for diversion." (*United States v. Moore* (1975) 423 U.S. 122, 135.) All physicians must register with the Drug Enforcement Agency and are subject to extensive recordkeeping requirements and oversight. (*Id.* § 1304.04(f)-(h).) For a controlled substance prescription to be effective, the prescription "must be issued for a legitimate medical purpose" (21 C.F.R. § 1306.04(a)), though States retain primary authority to define the applicable standards of practice. (*United States v. Tobin* (11th Cir. 2012) 676 F.3d 1264, 1275.)

write controlled substances prescriptions on specially printed triplicate forms, and one of the three copies was required to be sent from the pharmacy to the state government. (See *People v. Katz* (1962) 207 Cal.App.2d 739, 745.)

CURES was created in 1996 to move the State's longstanding drug-tracking program into an electronic format. (Assem. Com. on Public Safety, Analysis of Assem. Bill. No. 3042 (1995-1996 Reg. Sess.) as amended Mar. 28, 1996, p. 3 <http://www.leginfo.ca.gov/pub/95-96/bill/asm/ab_3001-3050/ab_3042_cfa_960415_103659_asm_comm.html> [as of July 17, 2015].) Section 11165, subdivision (a), requires the Department to maintain CURES to help health care practitioners appropriately prescribe and dispense controlled substances, to facilitate statistical analysis and education, and to help "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[.]" As was true under the triplicate program, CURES requires any pharmacy or other dispenser that fills a prescription for certain controlled substances to report specific, limited information to the state government (now the Department), including the patient's name and contact information; the prescriber's identity and medical license number; the name, quantity, and form of the controlled substance prescribed; the diagnostic code for the prescription; the date the prescription was written; and the date the prescription was filled. (§ 11165, subd. (d).) The Department, in turn, is authorized to provide information in the CURES database to "appropriate state, local, and federal public agencies for disciplinary, civil, or criminal purposes[.]" (§ 11165, subd. (c)(2).) Almost every State in the country has a drug-tracking program similar to CURES. (Congressional Research Service, Prescription Drug Monitoring Programs

(Mar. 24, 2014), at p. 4 <https://www.fas.org/sgp/crs/misc/R42593.pdf> [as of July 13, 2015].)

The CURES database generally allows for the production of three different types of reports related to controlled substances. "Prescriber activity reports," which are at issue here, include all controlled substance prescriptions written by a particular doctor and filled in California during a particular time period. (See AR1090-AR1091.) The system can also generate reports specific to either individual pharmacies or patients for authorized users. (Sen. Health Com., Analysis of Sen. Bill 1071 (2009-2010 Reg. Sess.) as amended Apr. 28, 2010, p. 5 < http://www.leginfo.ca.gov/ pub/ 09-10/bill/sen/sb_1051-1100/sb_1071_cfa_20100505_125046_sen_comm.html> (as of July 17, 2015) (2010 Sen. Report).)

Prior to 2009, the Board and other authorized regulatory agencies obtained CURES reports by mailing or faxing a written request to the Department. (2010 Sen. Report, p. 5.) In 2009, CURES was modified to enable authorized regulatory agencies to obtain real-time, on-line access to the database. (*Ibid.*) Physicians and pharmacists who register with CURES can also directly access information about their patients' individual controlled substances (*ibid.*), which allows the physician or pharmacist to check for drug contraindications and to detect overprescribing and "doctor-shopping" before writing or filling a prescription.

CURES is maintained in a secure database and is required to "comply with all applicable federal and state privacy and security laws and regulations." (§ 11165, subd. (c)(1).) The information reported to CURES is subject to all "existing provisions of law to safeguard the privacy and confidentiality of patients[,]" while any information provided to a regulatory agency pursuant to section 11165 "shall not be disclosed, sold, or transferred to any third party." (*Id.*, subd. (c)(2)). Numerous other privacy protections apply to CURES data provided to the Board. (See, e.g.,

Bus. & Prof. Code, §§ 800, 2225.) Wrongful public disclosure of personal information—including that obtained from CURES—may trigger civil or criminal liability. (See Civ. Code, §§ 1798.45, 1798.48, 1798.57.)

II. THE CALIFORNIA MEDICAL BOARD

The Board is one of the agencies to which the Department is authorized to provide CURES information. (See § 11165.) Established in 1876 as the Board of Medical Examiners (and later the Board of Medical Quality Assurance), the Board's mission is "to protect the public against incompetent, impaired, or negligent physicians[.]" (*Arnett v. Dal Cielo* (1996) 14 Cal.4th 4, 7, citations omitted.) "Protection of the public" is the Board's "highest priority." (Bus. & Prof. Code, § 2001.1.)

The Board is charged with enforcing both the disciplinary and criminal provisions of the Medical Practice Act against licensed physicians. (See Bus. & Prof. Code, § 2004; see generally *Medical Bd. of California v. Chiarottino* (2014) 225 Cal.App.4th 623, 630.) As relevant here, the Medical Practice Act directs the Board to take action against any physician engaged in unprofessional conduct, including the failure to comply with all federal and state laws regulating prescription drugs and controlled substances. (See, e.g., Bus. & Prof. Code, §§ 2238, 2242, 2266.)

To that end, state law broadly vests the Board with the power to investigate complaints that a physician may be engaging in unprofessional conduct. (*Arnett*, *supra*, 14 Cal.4th at pp. 7-8.) In addition to interviewing and taking statements from witnesses, Board investigators are authorized to inspect books and records and to issue subpoenas for testimony and the production of records. (*Ibid.*; see Gov. Code, § 11181, subds. (a), (e).) These tools are designed to permit the Board not only to investigate allegations of misconduct but also to assure itself that its licensees are complying with the law. As this court previously explained, the Board's

investigatory powers, like those of other administrative agencies, are "analogous to the power of the grand jury, which does not depend on a case or controversy to get evidence but can investigate 'merely on suspicion that the law is being violated, or even just because it wants assurance that it is not.'" (*Arnett*, at p. 8.)

By statute, the Board is authorized to investigate physicians for unprofessional conduct in response to complaints from the public or on its own initiative. (Bus. & Prof. Code, § 2220, subd. (a).) Complaints related to quality of care generally are assessed by the Board's medical experts before they are assigned to an investigator. (Bus. & Prof. Code, § 2220.08.) Once an investigation is complete, the Board determines whether sufficient evidence of unprofessional conduct warrants instituting a formal disciplinary action. (*Arnett*, *supra*, 14 Cal.4th at p. 9.) If so, the Board refers the matter to the Attorney General's Office to pursue disciplinary action in an administrative proceeding. (*Ibid.*) If the physician is found guilty of unprofessional conduct, the Board may either suspend or revoke the license, place the physician on probation, or issue a public reprimand. (*Ibid.*) The Board publishes its findings and resulting discipline on its website.

III. PROCEDURAL BACKGROUND

A. The Board Investigates a Patient Complaint Against Lewis and Imposes Discipline for His Negligence In Treating Four Patients

1. Complaint and investigation

The Board opened an investigation into Lewis's patient care after receiving a complaint from patient V.C. (AR0081.) V.C. saw Lewis complaining of a low iron count and fatigue. (AR0082.) According to V.C., Lewis did not attempt to ascertain the reasons for her symptoms, but instead recommended that she lose thirty pounds in three weeks through his

"five-bite diet," which consisted of eating no breakfast and consuming only five bites of food for lunch and dinner. (AR0080-AR0083, AR0946-AR0953.) V.C. reported Lewis to the Board because she believed he was engaging in dangerous medical practices; she simultaneously consented to release her full medical records. (AR0081, AR0953.)

After obtaining V.C.'s medical records, the Board assigned the complaint to an investigator. As part of her usual practice, the investigator obtained a CURES prescriber activity report on Lewis for the preceding three years. (AR0082, AR0099, AR1090-AR1092.) The 205-page report contained the name and date of birth of each patient to whom Lewis had prescribed a Schedule II–IV controlled substance between November 1, 2005, and November 25, 2008; the date of the prescription; the name, form, strength, and quantity of the prescribed drug; the number of prescriptions filled; and other information on the pharmacy and prescriber. (AR0116-AR0320 [redacted].) The investigator then interviewed both V.C. and Lewis. (AR0082-AR0087.) She later obtained a supplemental 49-page CURES prescriber activity report of Lewis's controlled substance prescriptions from December 16, 2008, to December 16, 2009. (AR0088; see AR0321-AR0369 [redacted].)

After the medical consultant's initial review of the case, the Board asked five of Lewis's patients—D.S., D.L., W.G., M.M., and M.U.—to release their full medical records. (AR0088.)[4] Three patients (D.S., D.L., and W.G.) returned signed releases, and Lewis provided copies of their records to the Board. (AR0088-AR0089; AR0099; AR0090.) Because patients M.M. and M.U. did not return signed releases, the Board served a

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[4] The Board initially requested a medical release from a sixth patient, M.C., but did not ultimately pursue that patient's records. (AR0088.)

subpoena duces tecum on Lewis for those patients' records, followed by letters notifying the patients and providing an opportunity to object. (AR0092-AR0093.) Neither M.M. nor M.U. objected, and Lewis provided the requested records two weeks later without objection. (AR0093.)

Following routine practice, the investigator also requested a copy of Lewis's complete prescription history from the corporate headquarters of CVS Pharmacy for the previous three years. (AR1123, AR1126.) CVS responded by providing the Board with a list of all prescriptions written by Lewis and filled at CVS pharmacies during that time period, including both controlled and non-controlled substances. (AR1124-AR1125.) The CVS Pharmacy report included the patients' names and addresses; the name, form, and quantity of the prescriptions filled; the dates the prescriptions were filled; and information identifying the prescriber and the pharmacist for each prescription. (AR0372-AR0893 [redacted].) It included no other information about patients' medical conditions or communications between the patients and Lewis or the pharmacists.

2. Administrative hearing and decision

The Board filed an initial accusation against Lewis regarding patient V.C. (AR0061-AR0066.) The accusation was later amended to include allegations regarding the five additional patients for whom the Board obtained full medical records. (AR0029-AR0043.)

Lewis moved to dismiss these new allegations, arguing that the evidence on which the Board relied concerning patients W.G., M.U., D.L., D.S., and M.M. was the fruit of an unlawful search, namely the Board's review of the CURES prescriber reports. (AR1186.) According to Lewis, the Board infringed his patients' privacy rights by obtaining CURES data from the Department without a warrant, subpoena, or showing of good

cause. (Motion to Dismiss, 1.)[5] Although Lewis's motion made a passing reference to his patients' rights "under the state and federal constitutions," the only legal authority he offered in support concerned article I, section 1 of the California Constitution. (*Id.*, 3-4.) The administrative law judge denied Lewis's motion, finding that the Board's compelling interest in regulating controlled substance prescriptions outweighed any intrusion upon patients' privacy rights in information contained in the CURES prescriber reports. (AR0977.)

After an eight-day administrative hearing, the administrative law judge issued a proposed decision, finding that Lewis's unprofessional conduct warranted discipline. (AR0002, AR0023.) The judge concluded that Lewis committed a number of "repeated negligent acts[,]" "failed to maintain adequate medical records[,]" and, as a result, "engaged in unprofessional conduct" related to four of the six patients (V.C., W.G., M.U., and D.L.). (AR0022 [¶¶ 2-4]; see Bus. & Prof. Code, §§ 2234, 2266.)

With regard to original complainant V.C., the judge concluded that Lewis failed to chart basic information about her visit. (AR0022 [¶¶ 2-4], AR0004 [¶ 6], AR0005-0006 [¶¶ 11-13].) The judge also found that Lewis had negligently treated three other patients, including with respect to his prescribing of controlled substances:

- With regard to patient D.L., the judge found that Lewis prescribed two controlled substances drugs that, when taken together, can cause liver toxicity, yet failed to obtain or recommend liver function tests for almost two years. (AR0016 [¶¶ 63-64]; AR0022 [¶¶ 2, 4], AR0017 [¶ 69].) Lewis also failed to document whether he obtained D.L.'s informed

[5] A copy of the motion to dismiss is attached as Exhibit A to the Board's Request for Judicial Notice, filed concurrently with this brief.

consent to continue a drug that could cause liver toxicity. (AR0022 [¶¶ 2, 4], AR0015 [¶ 61].)

- With respect to W.G., the judge found that Lewis failed to document why the patient required Vicodin, a Schedule II drug (AR0022 [¶¶ 2-3], AR0011 [¶ 38]); why W.G. needed a duplicate prescription for the same medication (AR0022 [¶¶ 2-4], AR0011 [¶ 40]; why Lewis switched W.G. to Percocet, another Schedule II drug, (AR0022 [¶¶ 2-4], AR0012 [¶ 44]); and his "plan to address the apparent change in behavior which may have been related to the Percocet." (AR0013 [¶ 47.) Lewis also prescribed W.G. an excess amount of Vicodin on one occasion, and an excess amount of Percocet on two occasions. (AR0022 [¶¶ 2, 4], AR0013 [¶ 52].)
- With respect to M.U., the judge found that Lewis failed to include in M.U.'s chart any details about whether the Vicodin he prescribed for her was effective, or why M.U. required three prescriptions for this medication in close proximity. (AR0014 [¶ 55b].) Had M.U. had ingested all the tablets prescribed, she would have exceeded a toxic level. (AR0015 [¶ 59c].)

The Board adopted the judge's proposed decision, and placed Lewis's medical license on a three-year probation with specific conditions. (AR0001, AR0023-AR0026.)

B. The Superior Court Rejects Lewis's Request to Overturn the Board's Discipline Based on His Claim that the Board Violated His Patients' State Constitutional Right to Privacy

Lewis sought a writ of mandate in the Los Angeles County Superior Court, arguing that the Board violated his patients' right to privacy under article I, section I of the California Constitution. (AR1186, AR1189; OB 4.) Lewis claimed that the CURES reports that the Board obtained from the Department provided the basis upon which the Board obtained the five patients' medical records and that evidence from those records should be suppressed as the fruit of the Board's unlawful search of CURES. (AR1188, AR1193.) The superior court denied his petition, concluding that the Board's review of the CURES prescriber reports did not violate any

reasonable expectation of privacy Lewis's patients might have in those reports. (AR1246.)

C. The Court of Appeal Affirms

Lewis then filed a petition for writ of mandate in the Court of Appeal, asking the court to set aside the Board's discipline, again based on his claim that the Board's review of CURES records violated his patients' federal and state constitutional rights to privacy. Lewis did not dispute that the Justice Department could properly collect information about controlled substances prescriptions from pharmacies. (Opn. 7.) Lewis argued only that the Board violated the state and federal Constitutions by obtaining CURES data in the course of investigating a complaint that did not allege misconduct related to his controlled substances prescribing practices. (Petn. 15.) As in the superior court, Lewis's opening brief challenged only the Board's receipt of the CURES prescriber activity reports, not the subsequently obtained CVS Pharmacy report, which he raised for the first time in his reply brief. (Mem. in Support 18-19; Reply 9.)[6]

The Court of Appeal denied the petition. The court first concluded that Lewis had no standing to assert the privacy rights of his patients who voluntarily consented to the release of their medical records. (Opn. 4, fn. 3.) The court further observed that, although Lewis's recitation of the issues suggested that he was asserting a Fourth Amendment claim, Lewis made clear that he was pursuing only an informational privacy claim under article 1, section 1 of the state Constitution. (Opn. 6; see also *id.*, fn. 5

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[6] Lewis made a passing reference to the CVS Pharmacy report that assumed it was a CURES report, which it is not. (See Mem. 20.) All of his legal arguments centered on a challenge to the Board's receipt of information from CURES.

[noting additionally that Fourth Amendment rights are personal and cannot be vicariously asserted].)

The court rejected Lewis's claim on the merits. Applying the framework this court set forth in *Hill*, *supra*, 7 Cal.4th 1, the Court of Appeal held that patients have a legally protected interest in records of their prescriptions but that any reasonable expectation of privacy in those records is diminished in light of the known and pervasive regulation of controlled substances. (Opn. 13-16.) The court further held that the Board's access to CURES during the course of its disciplinary investigation did not constitute a serious invasion of Lewis's patients' privacy (Opn. 21), and it rejected Lewis's argument that the Board must have a subpoena or warrant before obtaining CURES data (see Opn. 18-21).

Although the court concluded that Lewis failed to establish *Hill*'s three threshold elements, it held the Board still would prevail even under the applicable balancing test. (Opn. 24.) Even assuming the Board was required to establish a compelling interest, the court held that the State has compelling interests both in controlling the diversion and abuse of controlled substances and in protecting the public against incompetent, impaired, or negligent physicians. (Opn. 22.) These interests, the court held, outweigh the "minor intrusion upon a patient's informational privacy in his or her controlled substances prescription records stored in CURES." (Opn. 24.) Imposing a "good cause" requirement, moreover, would require the Board to litigate privacy issues "in advance," resulting in delay that would defeat the legislative purpose of CURES to provide real-time access to data used to protect public health and safety. (Opn. 23.)

In light of these conclusions, the court held that the superior court correctly denied Lewis's petition to set aside the discipline imposed. (Opn. 24.) The Court of Appeal did not address the CVS Pharmacy report or the applicability of the exclusionary rule.

This court granted Lewis's petition for review.

ARGUMENT

I. THE BOARD'S CONFIDENTIAL RECEIPT OF CURES REPORTS OF LEWIS'S CONTROLLED SUBSTANCES PRESCRIPTIONS IS CONSISTENT WITH THE CALIFORNIA RIGHT TO PRIVACY

Adopted by initiative in 1972, California's right of privacy contained in article I, section 1 of the state Constitution "'protects the individual's *reasonable* expectation of privacy against a *serious* invasion.'" (*Sheehan v. San Francisco 49ers, Ltd.* (2009) 45 Cal.4th 992, 998, italics in the original; *id.* at p. 997.) Lewis lacks standing to assert his patients' rights under this provision to impede an investigation into the care he provided them. In any event, the Board's review of CURES data in investigations into patient care is fully consistent with state privacy protections.

A. Lewis Cannot Assert His Patients' Privacy Rights to Thwart a Disciplinary Proceeding Designed to Protect His Patients

Lewis seeks relief from the Board's discipline against him based on his claim that the Board infringed the privacy rights of his patients when it reviewed two CURES reports. But California constitutional rights are "generally personal" and cannot be asserted on behalf of others except according to certain well-defined exceptions permitting third-party standing. (See *People v. Hazelton* (1996) 14 Cal.4th 101, 109.)[7] While physicians have been permitted to assert their patients' privacy interests in certain defined circumstances, those circumstances are not present here.

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[7] Although the Board has not previously argued that Lewis lacks standing, standing may be raised for the first time on appeal. (*Horn v. County of Ventura* (1979) 24 Cal.3d 605, 619.)

Article I, section I's privacy provision encompasses two classes of rights: an informational privacy interest "in precluding the dissemination or misuse of sensitive and confidential information" and an autonomy interest "in making intimate personal decisions or conducting personal activities without observation, intrusion, or interference[.]" (*Hill*, *supra*, 7 Cal.4th at p. 35.) Both state and federal courts have permitted physicians to assert their patients' autonomy interests in making certain types of personal decisions involving, for example, contraception and reproduction. (See, e.g., *Griswold v. Connecticut* (1965) 381 U.S. 479, 480-481 [contraception]; *American Academy of Pediatrics v. Lungren* (1997) 16 Cal.4th 307, 322, fn. 8, 332 (lead opn. of George, C.J.) [abortion].) In such cases, the physician's and patients' interests are aligned: the physician wishes to provide certain services or advice, the patients wish to receive those services or advice, and the challenged law directly interferes in this medical relationship. (See *Griswold*, at pp. 480-481 [physician faced criminal liability for aiding and abetting contraception]; *People v. Belous* (1969) 71 Cal.2d 954, 959-960 [physician convicted of providing abortion services].) Further, in these particularly sensitive cases, patients may be unwilling or unable to assert their rights directly, and thus without suits brought by physicians, patients' rights may be diluted. (See *Griswold*, at p. 481.)

Such concerns are not present here. Lewis does not suggest that the Board's ability to obtain CURES data interferes with or adversely affects his patients' ability to receive medical services. (Cf. *Whalen*, *supra*, 429 U.S. at p. 603 [observing that requirement to report controlled substances prescriptions to state health officials deprived no individual of the right to decide independently to acquire needed medication].) Nor are patients' and physician's interests necessarily aligned when a physician seeks to vicariously assert his patients' privacy interests in order to avoid Board

review of his medical practices. Here, when five of Lewis's patients were informed that the Board sought their complete medical records in the course of its investigation, three consented and the other two did not object. If those patients had been concerned about the Board accessing the more limited CURES data, they likely would have objected to the Board's review of their full medical records. Allowing Lewis to assert his patients' informational privacy rights in these circumstances is inappropriate.

A second group of cases has permitted physicians to assert their patients' right to informational privacy in medical records that are held by the physician. (See, e.g., *Whitney v. Montegut* (2014) 222 Cal.App.4th 906, 918-921; *Wood v. Superior Court* (1985) 166 Cal.App.3d 1138, 1143-1145.) These cases, too, are inapposite. Where the physician is the custodian of the records being sought, it makes sense to permit the physician to object initially to the disclosure, given the physician/patient relationship and the implicit understanding that the physician will maintain patient confidences. Here, Lewis did not object to the Board's subpoenas of his patients' full medical records in his custody.

The Courts of Appeal have expressed different views as to whether a physician under Board investigation for practices that could endanger his or her patients may assert patients' privacy rights to attempt to prevent the use of records obtained from third-party sources. (Compare, e.g., *Chiarottino*, *supra*, 225 Cal.App.4th at p. 630, fn. 3 [relying on *Wood*, *supra*, 166 Cal.App.3d at 1145 for the proposition that a physician may assert privacy interests of patients who have not consented to disclosure of their medical records] with *Pating v. Board of Medical Quality Assurance* (1982) 130 Cal.App.3d 608, 621 ["reasonabl[e]" to conclude that "having allegedly victimized his patients, [a physician] should not be permitted standing to thus assert their privacy rights for his own protection," citing *People v. Solario* (1977) 19 Cal.3d 760, 764 [burglary suspect could not complain

that police officer violated householder's right to privacy by entering residence to arrest defendant].) The *Pating* court's view is in keeping with patients' interests and common sense, and this court should adopt it.

B. Lewis Has Not Established an Actionable Invasion of the Right to Privacy

Even if Lewis had standing to assert his patients' rights, he would still fail to establish that the Board's access to CURES data infringes any of his patients' constitutionally protected privacy interests. An actionable invasion-of-privacy claim requires three elements: "(1) a legally protected privacy interest; (2) a reasonable expectation of privacy under the circumstances; and (3) conduct by defendant constituting a serious invasion of privacy." (*Hill, supra,* 7 Cal.4th at pp. 39-40; see also *County of Los Angeles v. Los Angeles County Employee Relations Com.* (2013) 56 Cal.4th 905, 926.) These threshold elements are intended to "screen out claims that do not involve a significant intrusion" on a protected privacy interest. (*Loder v. City of Glendale* (1997) 14 Cal.4th 846, 893 (lead opn. of George, C.J.); *County of Los Angeles*, at p. 926 [defendant "entitled to prevail if it negates any of the three required elements"].) If the claimant satisfies each of the three elements, and thereby establishes an actionable invasion of privacy, the court weighs the strength of the asserted privacy interest against the defendant's countervailing interests. (*County of Los Angeles*, at p. 926.)

Lewis's claim fails at the *Hill* threshold because he has not shown that patients reasonably expect that records of controlled substances prescriptions lawfully maintained by the Department will not be provided confidentially to the Board in a physician discipline investigation. Nor did he show that the provision of such records from one state agency to another, as intended by the Legislature and subject to continuing

protections against public disclosure, involves a serious invasion of patient privacy.

1. Patients Have No Reasonable Expectation that CURES Data Will Not Be Provided Confidentially to the Board in the Course of Physician Disciplinary Investigations

Although the CURES statute confirms that patients have a legally recognized privacy interest that CURES records will remain confidential (§ 11165, subd. (c)(2); see Opn. 13), patients have no reasonable expectation that such information will not be provided confidentially to the Board for purposes of investigating possible physician misconduct. The California right to privacy protects only an individual's reasonable expectation of privacy, defined as "an objective entitlement founded on broadly based and widely accepted community norms." (*Hill, supra,* 7 Cal.4th at p. 37.) "A plaintiff's expectation of privacy in a specific context must be objectively reasonable under the circumstances, especially in light of the competing social interests involved[.]" (*Id.* at p. 26.) Custom and practice, including background legal rules, "may create or inhibit reasonable expectations of privacy." (*Id.* at p. 36; *International Federation of Professional & Technical Engineers, Local 21, AFL-CIO v. Superior Court* (2007) 42 Cal.4th 319, 331-332, 338 [looking to widespread practices of federal, state, and local governments and conclusion in Attorney General opinions to find no reasonable expectation of privacy].)

With regard to controlled substances prescriptions, the long history of government regulation and the established and widespread practice of reporting to state regulatory agencies demonstrate that patients have no reasonable expectation that CURES information will be shielded from the Board. In *Whalen, supra,* 429 U.S. 589, the United States Supreme Court rejected a federal constitutional challenge to a drug-monitoring program

similar to CURES, concluding that disclosure of controlled substances prescription information to the government is not "meaningfully distinguishable from a host of other unpleasant invasions of privacy that are associated with many facets of health care." (*Id.* at p. 601.) The Court explained, "[D]isclosures of private medical information to doctors, to hospital personnel, to insurance companies, and to public health agencies are often an essential part of modern medical practice even when the disclosure may reflect unfavorably on the character of the patient." (*Ibid.*) In light of this background norm, New York's drug-tracking program, which required pharmacists to report Schedule II prescriptions to the state Department of Health and mandated that such records be made available to agencies with licensing and regulatory authority over those authorized to deal in controlled substances, violated neither the liberty protections of the Fourteenth Amendment nor the Fourth Amendment. (*Id.* at pp. 592-595, 602, 604, fn. 32.) Requiring disclosure of controlled substance prescriptions to state health agencies, the Court concluded, "does not automatically amount to an impermissible invasion of privacy." (*Id.* at p. 602; see also *id.* at p. 595 [at time of trial, 17 state health department employees had access to the records; records had been used in two investigations involving alleged patient overuse].)

The long-established regulatory scheme governing controlled substances in California likewise gives patients no reasonable expectation that CURES data will be shielded from state medical regulators. As described above, California has required physicians and pharmacists to maintain prescription records for regulatory review for more than a century and to proactively report controlled substance prescriptions to the government for nearly as long. (*Supra*, 4-8.) State law requires pharmacies to furnish records of patients' controlled substance prescriptions to the Department, and, in turn, authorizes the Department to make those records

available to regulatory agencies, including the Board. (See § 11165, subds. (a), (d); Opn. 15.) Federal law requires physicians and pharmacists to inform patients that their records may be provided to government agencies overseeing the health care system, including physician care. (See, e.g., 45 C.F.R. § 164.512(d) (2005).)[8] In light of the specific statutory mandate granting the Board access to CURES data and the "well-known and long-established regulatory history" of controlled substances, patients cannot reasonably expect that the Board would be denied access to CURES information for use in disciplinary investigations. (See Opn. 15.)

Other state high courts have similarly concluded patients have a "significantly diminish[ed]" expectation of privacy in controlled substance prescription records. (See, e.g., *State v. Wiedeman* (Neb. 2013) 835 N.W.2d 698, 711 [discussing "well-known and long-established regulatory history"]; see also *State v. Russo* (Conn. 2002) 790 A.2d 1132, 1150-1153 [similar]). One court explained, "Whatever privacy interest . . . patients and physicians possess in [controlled substance] prescription records is limited to the right not to have the information disclosed to the general public." (*Stone v. Stow* (Ohio 1992) 593 N.E.2d 294, 301; see also *Williams v. Com.* (Ky. 2006) 213 S.W.3d 671, 683 [similar].)

Cases discussing patients' heightened privacy interests in their complete medical records are inapposite. (E.g., *Wood, supra*, 166 Cal.App.3d at pp. 1140-1141; *Bd. of Medical Quality Assurance v. Gherardini* (1979) 93 Cal.App. 3d 669, 673.) A patient's complete medical

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[8] At one pharmacy, for example, patients are informed, "[W]e may disclose information about you (i) if we are required to do so by law or legal process, (ii) to law enforcement authorities or other government officials based on a lawful disclosure request . . . ." (Rite Aid, Privacy Policy <https://www.riteaid.com/legal/privacy-policy> [as of July 15, 2015].)

record—which can include symptom descriptions, patient questions and concerns, family history, diagnoses, test results, and other personal details that the patient communicates in a confidential, one-on-one setting with his or her physician—is much more sensitive and broad-ranging than the limited records contained in the CURES database, and a patient's expectation of privacy is, accordingly, different. (See *Wood*, *supra*, at p. 1147 [information in physician's files is "broadranging" and may include "highly personal details of lifestyle and information concerning sources of stress and anxiety"]; cf. *420 Caregivers, LLC v. City of Los Angeles* (2012) 219 Cal.App.4th 1316, 1350 [medical record "would contain significantly more personal and intimate information" than membership record of medical marijuana collective].) And in fact, the Board treated such records differently here, providing the patients for whom it sought complete medical records an opportunity first to consent and then providing notice and an opportunity to object before the records were obtained by subpoena. Patients have no reasonable expectation of privacy that CURES records will not be provided to the Board during physician disciplinary investigations.

2. The Board's Receipt and Review of CURES Data Is Not a Serious Invasion of Privacy Giving Rise to a Constitutional Claim

Lewis has also failed to satisfy *Hill*'s third threshold element, which asks whether the defendant's conduct rises to the level of a serious invasion of privacy. Because "[n]o community could function if every intrusion into the realm of private action, no matter how slight or trivial, gave rise to a cause of action for invasion of privacy[,] . . . [a]ctionable 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." (*Hill*, *supra*, 7 Cal. 4th at p. 37.) As the

Court of Appeal concluded, the incremental intrusion alleged in this case—a non-public disclosure from the Department to a regulatory agency acting within the scope of its authority to protect the patients to whom the CURES reports pertain—is not the kind of serious invasion against which the state Constitution guards. (Opn. 21.)

As explained above, section 11165 authorizes the Department to disclose CURES data to the Board and other regulatory agencies only "for disciplinary, civil, or criminal purposes" (subd. (c)(2)), and the Board uses the data received only to enforce the disciplinary and criminal provisions of the Medical Practice Act. (Bus. & Prof. Code, § 2004.) When such information is provided to the Board it is subject to extensive privacy protections. (*Supra*, 7-8.) This limited disclosure of CURES records to the Board on a confidential basis for the precise purpose for which CURES data are compiled does not rise to the level of an actionable invasion of privacy. (See Opn. 21; *Chiarottino*, *supra*, 225 Cal.App.4th at p. 636 [Board's receipt of CURES data involves a "relatively minor intrusion upon a patient's reasonable expectation of privacy"]; *ibid.* ["limited incremental intrusion"].)

Nor can such information sharing be viewed as a serious invasion when the practice is well-established in state law. Under the Information Privacy Act, state agencies are permitted to share information—even personal information—with other state agencies when it is necessary for the recipient-agency "to perform its constitutional or statutory duties, and the use is compatible with a purpose for which the information was collected," or if "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).) Under Lewis's theory, a constitutional claim would lie any time a state agency provided personal information about a citizen to

another agency acting within the scope of its jurisdiction unless the agency obtained a warrant or subpoena. This is not (and should not be) the law. (See *Reynaud v. Superior Court* (1982) 138 Cal.App.3d 1, 6 [Department's receipt of Medi-Cal claim information from State's agent for processing claims for use in state investigation cannot "be deemed an *unreasonable* governmental intrusion"]; *Haskins v. San Diego Dept of Public Welfare* (1980) 100 Cal.App.3d 961, 971 [disclosures from one government employee to another under statutory authority to investigate "is not the stuff out of which a cause of action for [a] violation of [the] right of privacy grows"].) Because the information in the CURES database was only shared with the Board any invasion of privacy is slight. Lewis has not met *Hill*'s threshold inquiry, and this court should affirm the decision below on that basis.

C. The Board's Prompt Access to CURES Data Serves Vital Public-Safety Interests that Outweigh Any Intrusion on Patients' Privacy Interests

Even if Lewis could satisfy *Hill*'s three threshold requirements, the Board would still prevail because, as the Court of Appeal concluded, the Board's important—indeed, compelling—interests in accessing CURES data to investigate patient care concerns outweigh the limited intrusion resulting from such access.

1. The "Compelling Interest"/"Least Intrusive Means" Test Does Not Apply

At the outset, Lewis invokes the wrong standard for determining a violation of article I, section 1. Lewis contends the Board must demonstrate that its access to CURES serves a "compelling interest" and was the "least intrusive means" of protecting the public from potentially dangerous medical care. (OB 16-23.) This contention is without merit.

As a general rule, an invasion of privacy does not violate the state Constitution so long as "it substantively furthers one or more countervailing interests." (*Hill*, *supra*, 7 Cal.4th at p. 40; see also *County of Los Angeles*, *supra*, 56 Cal.4th at p. 926 [same].) The invasion may be unjustified, however, if the claimant can point to "'feasible and effective alternatives' with 'a lesser impact on privacy interests.'" (*Ibid.*, quoting *Hill*, at p. 40; see also *Sheehan*, *supra*, 45 Cal.4th at pp. 998-999 [same].)

Lewis urges the Court to disregard the established *Hill* balancing test and hold instead that, in cases involving action by a state agency or information relating to medical care, the State must demonstrate a compelling interest that cannot be met through less intrusive means. (OB 16-23.) Although this court has applied a strict standard of scrutiny to cases involving infringements on bodily autonomy or speech and associational rights (*American Academy of Pediatrics*, *supra*, 16 Cal.4th at pp. 340-341 (lead opn. of George, C.J.) [abortion]; *White v. Davis* (1975) 13 Cal.3d 757, 761 [freedom of speech and association]), the court has made clear that this heightened standard does not apply outside of that context. (*Hernandez v. Hillsides, Inc.* (2009) 47 Cal.4th 272, 288 ["For purposes of this balancing function [under *Hill*]—and except in the rare case in which a 'fundamental' right of personal autonomy is involved—the defendant need not present a ''compelling'' countervailing interest; only 'general balancing tests are employed,'" quoting *Hill*, *supra*, at p. 34].)

Accordingly, this court has repeatedly applied *Hill*'s legitimate-interests balancing test, including in cases where the government is alleged to have infringed an informational privacy interest, including in the context of medical information. In *Loder*, for example, five Justices applied *Hill*'s balancing test to reject a claim that a city's requirement that job applicants submit to urinalysis as part of a preemployment medical assessment, violated applicants' constitutional right to privacy. (14 Cal.4th at pp. 896-

898 (lead opn. of George, C.J.) [city's "substantial interest in conducting suspicionless drug testing of a job applicant" justified "the relatively minor intrusion upon such an applicant's reasonable expectations of privacy"]; *id.* at p. 933 (conc. & dis. opn. of Chin, J. [upholding policy based on "City's important and substantial interests"].) Likewise, the court applied the legitimate-interests balancing test to permit a county to reveal employees' home addresses to the employees' union. (*County of Los Angeles*, *supra*, 56 Cal.4th at pp. 930-932; see also *IFPTE*, *supra*, 42 Cal.4th at pp. 338-339 [applying balancing test in challenge to public disclosure of employee salary information by county]; *420 Caregivers*, *supra*, 219 Cal.App.4th at p. 1347 [applying "legitimate" interest standard in case challenging disclosure of membership records in medical marijuana collective]; *Whitney*, *supra*, 222 Cal.App.4th at p. 919 [same regarding Board subpoena of medical records].) As these cases make clear, the legitimate-interests balancing test applies to informational privacy claims against governmental actors, even in the medical context.

Lewis places heavy reliance on this court's statement in *Hill*, repeated in *Sheehan*, that "the argument that . . . a 'least restrictive alternative' burden must invariably be imposed on defendants in privacy cases derives from decisions that . . . are directed against the invasive conduct of government agencies rather than private, voluntary organizations." (OB 20, quoting *Sheehan*, *supra*, 45 Cal.4th at p. 1002, quoting *Hill*, *supra*, 7 Cal.4th at p. 49.) But in making this observation, the court explained that "at the roots of the 'least restrictive alternative' burden lie cases of infringement of fundamental freedoms of expression and association"—two constitutionally protected rights not at issue in this case. (*Hill*, *supra*, at p. 49, fn. 16.)

There is no basis, moreover, to subject the Board's use of CURES data to the searching standard suggested by Lewis. The "critical factor" in

determining the level of scrutiny is the "particular context" in which an alleged privacy intrusion occurs, "i.e., the specific kind of privacy interest involved and the nature and seriousness of the invasion and any countervailing interests." (*Hill*, *supra*, 7 Cal.4th at p. 34.)

Here, for all the reasons explained above, patients have significantly reduced privacy interests in information about their controlled substance prescriptions when it comes to non-public disclosures to state regulatory agencies. And a limited disclosure of CURES prescriber activity reports from the Department to the Board in a physician discipline investigation does not reflect the kind of serious invasion of patient autonomy or privacy that calls for searching judicial inquiry. (Cf. *Chiarottino*, *supra*, 225 Cal.App.4th at p. 636 [upholding Board review of CURES data without requiring Board to show actions were least intrusive means].) Such probing judicial inquiry, moreover, would lead to unwarranted judicial second-guessing of the Board's physician-oversight function, with the perverse result of protecting patient privacy at the expense of patient safety.[9] Accordingly, to prevail in this case, the Board need only establish that any invasion of patients' constitutional privacy interests is justified by a "legitimate and important competing interest." (*Hill*, *supra*, 7 Cal.4th at p. 38.)

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[9] The two cases on which Lewis relies, *Gherardini*, *supra*, 93 Cal.App.3d 669 and *Johnson v. Superior Court* (2000) 80 Cal.App.4th 1050, are inapposite. (OB 16, 20.) *Gherardini* predates *Hill* and, in any event, involved complete patient medical records. (*Gherardini*, at p. 673.) The court in *Johnson* did not employ the court's analysis in *Hill* to determine whether a compelling or legitimate interest standard should apply and, in any event, was not required to make that determination, concluding that the state-compelled disclosure in a private party lawsuit would satisfy even the heightened compelling interest standard. (*Johnson*, at p. 1071.)

2. The Board's Vital Interest in Protecting the Public Justifies Its Use of CURES to Investigate Physician Care

The Board's review of CURES data already collected by the Department is justified by legitimate—indeed, compelling—state interests. As this court explained in *Hill*, "[l]egitimate interests derive from the legally authorized and socially beneficial activities of government and private entities[.]" (7 Cal.4th at p. 38.) Here, providing the Board with access to CURES data serves the State's vital, dual interests in protecting the public from unlawful use and diversion of a particularly dangerous class of prescription drugs and in protecting patients from negligent or incompetent physicians.

The Supreme Court observed long ago that a State's right to "regulate the administration, sale, prescription, and use of dangerous and habit-forming drugs" 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." (*State of Minnesota ex rel. Whipple v. Martinson* (1921) 256 U.S. 41, 45; see also *Whalen, supra,* 429 U.S. at p. 598 [State has "vital interest in controlling the distribution of dangerous drugs"].)

Abuse and diversion of prescription drugs are significant problems in California, as the Court of Appeal concluded. (Opn. 23.) For example, one governmental study showed that the number of deaths from prescription painkillers has been steadily increasing in California and across the United States since 1999. (See U.S. Dept. of Health & Human Services, Center for Disease Control, *Prescription Painkiller Overdoses in the U.S. Infographic*, p. 2 (Nov. 1, 2011) <http://cdc.gov/vitalsigns/painkilleroverdoses/infographic.html> [as of July 15, 2015]; *id.* at p. 3 [California's drug

overdose death rate was 9.5 to 12.3 deaths per 10,000 people in 2008].) Protecting the public from these dangers is not only a legitimate but a compelling state interest.

In addition, the State has a compelling interest in protecting the public from incompetent, impaired, or negligent physicians. (Opn. 22.) Physicians hold important positions of trust, and violations of the standard of care can have significant—even fatal—consequences. Because patients often lack the knowledge or expertise necessary to detect when their physicians are delivering inappropriate or dangerous medical care, the Board is vested with the responsibility and authority to investigate physicians whose care may pose risks to patients' health and safety. The Board's ability to investigate physicians' prescriptions of highly regulated controlled substances is an integral part of its important oversight responsibilities. (See *Whalen*, *supra*, 429 U.S. at p. 603 fn. 30 ["well settled that the State has broad police powers in regulating the administration of drugs by the health professions"]; Opn. 22.)

These critical state interests easily outweigh any incremental intrusion caused by the Board's receipt of CURES information, on a confidential basis, from the Department. As the Court of Appeal explained in *Chiarottino*, "[S]ociety's substantial interest in reducing the illegitimate use of dangerously addictive prescription drugs" outweighs "the relatively minor intrusion" that occurs when the Board confidentially reviews CURES records to discover and take action against negligent medical practices. (225 Cal.App.4th at p. 636.)

3. Lewis's Argument that the Board Must Obtain a Warrant or Subpoena Before Accessing CURES Data Is Unsupported and Would Fundamentally Undermine the Board's Ability to Protect the Public

Lewis argues that the Board should be required to use a "less intrusive means" of obtaining CURES data, which, in Lewis's view, means the Board must obtain a warrant, subpoena, or otherwise "show good cause" before obtaining prescriber reports from CURES. (OB 27-28.) For all the reasons explained above, the Board need not establish that its method for obtaining CURES data is the least intrusive way of accomplishing its important patient-safety goals. Lewis's proposed alternatives, moreover, lack legal support and would compromise the Board's ability to protect patients from physicians whose unprofessional practices pose risks to patients.

As an initial matter, Lewis cites no authority for the proposition that article I, section 1 of the state Constitution requires one state agency to obtain a warrant, or even resort to a subpoena, before receiving information from another state agency when conducting a regulatory investigation within the scope of its statutory authority.[10] Indeed, as explained above, state law permits inter-agency information sharing without resort to such procedural hurdles in a range of circumstances. (*Supra*, 24-25 [discussing Civil Code, § 1798.24]; see also *Reynaud*, *supra*, 138 Cal.App.3d 1, 7 ["unreasonable" to require State "to make a formal showing or to seek formal adjudication, or even to perceive a genuine privacy issue, before reviewing its own records for the very purposes for which those records were compiled"].)

Lewis's proposed alternatives make little sense in the context of the Board's review of CURES records, and each would compromise the Board's ability to discover and stop dangerous medical practices. Lewis first contends that a warrant (presumably supported by probable cause)

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[10] The State may, of course, require additional procedures as a matter of policy rather than constitutional compulsion.

should be required. (OB 27-28.) But agency investigators need not demonstrate probable cause in order to obtain records relevant to their investigations. As this court explained in discussing the Board's investigative authority, "the power to make administrative inquiry" is analogous to the power of a grand jury, which "can investigate merely on suspicion that the law is being violated, or even just because it wants assurance that it is not." (*Arnett*, *supra*, 14 Cal.4th at p. 8, citing *Brovelli v. Superior Court of Los Angeles County* (1961) 56 Cal.2d 524, 528; see also *Chiarottino*, *supra*, 225 Cal.App.4th at p. 630.)

Unlike a criminal prosecution, Board disciplinary investigations are primarily aimed at preventing future misconduct that might endanger patient health. (See *Griffiths v. Superior Court* (2002) 96 Cal.App.4th 757, 772 [public-protection purpose of licensing statutes "does not require harm to a client before licensing discipline can take place"].) Requiring the Board to marshal probable cause before reviewing CURES data would deprive the Board of the ability to spot-check prescribers for compliance with both the laws and standards of care governing controlled substance prescriptions, potentially preventing the Board from detecting and addressing problems before they result in patient harm. In this case, for instance, it was through review of CURES reports that Lewis's deviation from the standard of care in his prescribing practices was detected.

Lewis's second alternative, an administrative subpoena (OB 27-28), is likewise inappropriate for Board requests for CURES prescriber data. Unlike warrants, subpoenas need not be supported by probable cause, but rather may demand information that is "reasonably relevant" to an agency's investigation. (*Stiger v. Flippin* (2011) 201 Cal.App.4th 646, 656-657; see also *Craib v. Bulmash* (1989) 49 Cal.3d 475, 483.) Subpoenas, however, are not self-executing, and the agency must seek judicial enforcement if the subpoenaed party refuses to comply. (*Stiger*, p. 657; see also *Brovelli*,

supra, 56 Cal.2d at p. 528.) In the context of Board review of CURES data, there is no rationale for requiring this kind of pre-enforcement judicial process, as there would be no occasion for the Department (the presumed recipient of the subpoena Lewis proposes) to object to Board requests for CURES data when the Board is acting within its authority to investigate unprofessional practices and follows any access protocols that the Department, in its discretion, sets. In addition, Board requests for CURES prescriber records in the course of investigating a physician unquestionably satisfy the minimal relevance standard applicable to subpoenas, whether or not the investigation focuses initially on the physician's prescriptions of controlled substances. (See, e.g., Opn. 23-24 ["a physician's prescribing practices are directly related to medical care and treatment afforded to his patients"].) Where review of CURES data reveals questionable practices necessitating investigation of full medical records, the Board does seek consent or issue a subpoena, with notice to patients. Accordingly, requiring the Board to issue a subpoena each time it seeks a CURES prescriber report would add little to the robust privacy protections already covering patients. (*Supra*, 7-8.)

Although his brief is not entirely clear, Lewis suggests that this court should limit the Board's ability to obtain CURES records to cases in which the Board has developed "good cause" to review the records and after notice to patients—requirements that some Courts of Appeal have applied to subpoenas for medical records. (See, e.g., *Bearman v. Superior Court* (2004) 117 Cal.App.4th 463.) Whatever merit such a standard has with respect to subpoenas for complete medical records, that standard is inapplicable to Board requests for CURES data, which, as explained above, do not contain the kind of detailed personal information as may be found in a medical record (*supra*, 22-23), and have long been subject to administrative review without warrant or subpoena (*supra*, 4-8).

Imposing the same kind of notice and good cause requirements to Board requests for CURES data would also compromise the Board's ability to detect and halt dangerous medical practices and thereby put patients' health—and even lives—at risk. "Real-time access to CURES . . . protects patients from incompetent and unprofessional doctors." (Opn. 23.) In creating CURES, the Legislature concluded that "the ability to closely monitor the prescribing and dispensing of Schedule II controlled substances" "is essential to effectively control the abuse and diversion of these controlled substances." (Stats. 1996, ch. 738, p. 3976, § 1.) If the Board were required to provide notice to patients and develop good cause as understood by the Courts of Appeal in the medical records context before obtaining records of controlled substances prescriptions from the Department, it would delay the Board's ability to identify and correct potentially dangerous practices. This is true even if no patient ultimately had any objection to the disclosure. And in cases in which a party objected, the delays could be extensive. (See *Chiarottino*, *supra*, 225.Cal.App. 4th 623 [Board requested patient releases in February 2012; appeal decided April 2014]; *Whitney*, *supra*, 222 Cal.App.4th 906 [petition seeking medical records filed June 2011; appeal decided January 2014].) Requiring the Board to wait for a potentially lengthy judicial-enforcement process to conclude would impede the Board's ability to detect and promptly halt unsafe medical practices, putting public and patient safety at risk, with no meaningful added benefit to patient privacy.

The Board's receipt of CURES prescriber reports is consistent with the privacy guarantee of article I, section 1 of the California Constitution.

II. LEWIS'S FOURTH AMENDMENT CHALLENGE TO THE BOARD'S REVIEW OF CURES DATA IS FORFEITED, RESTS ON THIRD-PARTY RIGHTS THAT CANNOT BE ASSERTED VICARIOUSLY, AND LACKS MERIT

In addition to his claim under article I, section 1 of the state constitution, Lewis now argues that the Board's review of CURES data violated his patients' rights under the Fourth Amendment to the federal constitution. Lewis failed to preserve this claim and, in any event, is precluded from pressing the Fourth Amendment rights of third parties. Furthermore, the claim has no merit.

A. Lewis Forfeited His Fourth Amendment Claim

The Court need not reach Lewis's arguments under the Fourth Amendment because he did not assert the Fourth Amendment as a basis for relief. In administrative proceedings before the Board (and in writ proceedings before the superior court), Lewis generally referred to "violations of fundamental privacy protections guaranteed under state and federal law," but supported his claim solely on the basis of the state constitution. (Motion to Dismiss 1, 3-6; see Verified Petn. 2-3 [AR1141-AR1142]; OB 4.) This kind of passing reference to "federal law," unsubstantiated by legal authority, is not sufficient to advance a Fourth Amendment claim. (See *People v. Stanley* (1995) 10 Cal.4th 764, 793; *Ochoa v. Pacific Gas & Electric Co.* (1998) 61 Cal.App.4th 1480, 1488, fn. 3.) And because he did not assert a Fourth Amendment challenge in the administrative proceedings before the Board, he cannot now seek writ relief on that basis. (*Medical Bd. of California v. Superior Court* (1991) 227 Cal.App.3d 1458, 1462.)

B. Lewis May Not Vicariously Assert a Fourth Amendment Claim on Behalf of His Patients

Lewis's Fourth Amendment claim on behalf of his patients fails at the threshold for the additional reason that he is not entitled to assert any Fourth Amendment interest his patients may have in the Board's review of CURES data. In *Rakas v. Illinois* (1978) 439 U.S. 128, the United States

Supreme Court rejected any notion of third-party standing in this context, holding that "'Fourth Amendment rights are personal rights which, like some other constitutional rights, may not be vicariously asserted.'" (*Id.* at pp. 133-134, quoting *Alderman v. United States* (1969) 394 U.S. 165, 174; see Opn. 6, fn. 5.) Applying *Rakas*, this court has explained that, "[i]n order to challenge a search or seizure, a defendant must allege . . . that the defendant's *personal interests* were violated." (*People v. Bryant* (2014) 60 Cal.4th 335, 365, italics added; see also *People v. Ayala* (2000) 23 Cal.4th 225, 255 [similar].)[11]

Ignoring *Rakas*, Lewis advances two arguments in support of his claim that he can advance his patients' Fourth Amendment interests. First, he argues that a 1979 Court of Appeal decision, *Gherardini*, establishes that he has "standing" to assert his patients' Fourth Amendment rights in an administrative proceeding. (OB 41, citing 93 Cal.App.3d at p. 675 [allowing hospital to challenge subpoena because it "has standing . . . under the 'vicarious exclusionary rule' to object to the admission of evidence obtained in violation of another's constitutional rights"].) To the extent that *Gherardini* suggests there is a "vicarious exclusionary rule," it fails to account for *Rakas*, which specifically held that Fourth Amendment rights are purely personal, and "may be enforced by exclusion of evidence only at the instance of one whose own protection was infringed by the search and seizure." (*Rakas*, *supra*, 439 U.S. at p. 428 [rejecting "target theory" of the

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[11] As discussed above, even if Lewis as a legal matter could assert his patients' rights, two of the three patients whose full medical records Lewis seeks to suppress affirmatively consented, and none objected, to their records' use. Lewis should not be allowed to to override these patients' decisions about their own rights. (See *Pating*, *supra*, 130 Cal.App.3d at p. 621 [once patients consented to introduction of their medical records, physician was "no longer entitled (if ever he had been) to assert their rights"].)

Fourth Amendment]; see also *Minnesota v. Carter* (1998) 525 U.S. 83, 87 [question under the Fourth Amendment is not one of "standing," but whether claimant asserts a personal right].) Contrary to Lewis's view, *In re Lance W.* (1985) 37 Cal.3d 873 did not carve out a different rule for civil proceedings. (OB 41-42.) Rather, *Lance W.* explained that the exclusionary rule generally does *not* apply in civil matters. (*Lance W.*, *supra*, at pp. 892-893; see also *infra*, 44-46.)

Second, Lewis argues that he may vicariously assert his patients' privacy interests because he has a *personal* interest in his own prescription practices. (OB 42-43.) Not only did Lewis fail to argue below that he had any personal Fourth Amendment interest in records kept by third parties about the controlled substance prescriptions he writes, but this argument is a non-sequitur. Even if he has a personal, constitutionally protected privacy interest in his own prescribing practices (which he does not), that is irrelevant to the question whether he may assert the rights of someone else.[12]

C. The Board's Review of CURES Data Without a Warrant Was Consistent with the Fourth Amendment

Even if Lewis were able to assert his patients' Fourth Amendment rights, his argument that the Fourth Amendment required the Board to

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[12] Any suggestion that a doctor would have a reasonable expectation of privacy in prescription records held by CURES would fail. As explained above, there is no reasonable expectation of privacy that would deny the Board access to CURES data collected by the government (*supra*, 20-23), and doctors are on clear notice that their controlled substance prescriptions are reported to the State. (Opn. 7 [relying on § 11190 and concluding that "Lewis has no reasonable expectation of privacy in his prescribing practices of controlled substances"].) "Obviously . . . a 'legitimate' expectation of privacy by definition means more than a subjective expectation of [one's wrongdoing] not being discovered." (See *Rakas*, *supra*, 439 U.S. at p. 143, fn. 12.)

obtain a warrant before reviewing CURES data would fail. (OB 38-41.) As the Supreme Court explained more than 40 years ago, it has "never carried the Fourth Amendment's interest in privacy as far as" to forbid a State to collect and review prescription drug information, and it "decline[d] to do so" in that case. (*Whalen*, *supra*, 429 U.S. at p. 604, fn. 32 [rejecting Fourth Amendment challenge to New York's controlled substance program and noting it was unlike "those cases involv[ing] affirmative, unannounced, narrowly focused intrusions into individual privacy during the course of criminal investigations" in which a Fourth Amendment right might lie]; see also Opn. 19 [discussing *Whalen*].)

As explained above, patients have no reasonable expectation that records of a physician's controlled substance prescriptions will be shielded from the very state agency charged with overseeing the physicians who prescribe those drugs. (*Supra*, 20-23.) Because such regulatory review does not infringe upon any reasonable expectation of privacy, no warrant is necessary under the Fourth Amendment. (See *Williams*, *supra*, 213 S.W.3d at pp. 683-684; see *United States v. Jacobsen* (1984) 466 U.S. 109, 113 [Fourth Amendment "search" occurs only when a reasonable expectation of privacy is infringed].)[13]

Even were a warrant otherwise required, the Board would be entitled to access CURES physician records without a warrant under the administrative search exception set forth in *New York v. Burger* (1987) 482 U.S. 691. *Burger* held that no warrant is necessary to search the records of

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[13] The Louisiana Supreme Court in *State v. Skinner* (La. 2009) 10 So.3d 1212, held that a warrant was required before law enforcement could obtain an individual's prescription drug records from pharmacies. But that case explicitly distinguished the focused police search for criminal prosecution purposes at issue there from the kind of regulatory inquiry at issue in *Whalen* and here. (*Id.* at p. 1218.)

a closely regulated business so long as (1) the State has a substantial interest in regulating the business; (2) the warrantless inspection is necessary to further the regulatory scheme; and (3) the statute authorizing the search provides a constitutionally adequate substitute for a warrant by informing the business operator that inspections are expected and by limiting the discretion of inspection officers. (*Id.* at pp. 702-703; see also *People v. Maikhio* (2011) 51 Cal.4th 1074, 1091-1093 & fn. 8.) While the Supreme Court recently declined to extend this exception to hotel guest registers, observing that "nothing inherent in the operation of hotels poses a clear and significant risk to the public welfare" (*City of Los Angeles v. Patel*, No. 13-1175 (2014) (slip opn.), at p. 14), the opposite is true of prescription drugs in general and controlled substances in particular. Both categories of drugs are defined by law as "dangerous," and both pose inherent risks that require close regulatory scrutiny. (*Supra*, 4-5.) More than a century of detailed regulation in California and across the country confirms that commonsense proposition. (*Supra*, 4-8.)

As the Court of Appeal held, the three *Burger* criteria are satisfied here. First, the State has a substantial interest in controlling access to controlled substances. (*Supra*, 28-30.) Second, the Board requires real-time access to pharmaceutical records to respond quickly and effectively to concerns that physicians may be failing to comply with the limits imposed on controlled substances for patient and public safety. Third, the CURES statute informs patients, physicians, and pharmacists that controlled substance records are made available to the Department and the Board for disciplinary purposes as well as civil and criminal enforcement. (§ 11165, subd. (c); Opn 21 ["the physician and patient know who is authorized to receive CURES data and under what narrow circumstances"].)

The district court's decision in *Oregon Prescription Drug Monitoring Program v. U.S. Drug Enforcement Administration* (D. Or. 2014) 998

F.Supp.2d 957 (*Oregon PDMP*) (see OB 40), does not assist Lewis. That decision, which is pending on appeal (9th Cir. No. 14-35402), invalidated federal law enforcement subpoenas of controlled substance information held by the State based on the incorrect premise that *Whalen* left open whether state collection of information about controlled substance prescriptions violated the Fourth Amendment. (Compare *Oregon PDMP*, *supra*, at p. 964 [*Whalen* not controlling because it "did not reach any claims raised pursuant to the Fourth Amendment"] with *Whalen*, *supra*, 429 U.S. at p. 604 fn. 32 ["[w]e have never carried the Fourth Amendment's interest in privacy as far as [plaintiffs] would have us" and "[w]e decline to do so now"].) Moreover, the court observed, the Oregon statute specifically advised patients that prescription data could be disclosed to law enforcement only with a judicial order based on probable cause, which contributed to the reasonableness of patients' expectation of privacy in their prescription records. (*Oregon PDMP*, at p. 960.) The CURES statute contains no such requirement, and federal law requires patients be informed that their information may be shared with entities such as the Board. (See, e.g., 45 C.F.R. § 164.512(d) (2005).[14]

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[14] The absence of a warrant requirement under the Fourth Amendment also confirms that no such procedural hurdle should be imposed under the state Constitution's privacy provision. As this court has explained,"[i]n the search and seizure context, the article I, section 1 'privacy' clause of the California Constitution has never been held to establish a broader protection than that provided by the Fourth Amendment of the United States Constitution or article I, section 13 of the California Constitution." (*People v. Crowson* (1983) 33 Cal.3d 623, 629; see also *Hill*, *supra*, 7 Cal.4th at p. 30, fn. 9; *Sheehan*, *supra*, 45 Cal.4th at p. 1001; but cf. 86 Ops.Cal.Atty.Gen. 198, *3-4 (2003) [suggesting article I, section 1 would require judicial authorization for law enforcement trap and traces and pen registers even though such authorization not required under the Fourth Amendment].)

III. LEWIS'S CHALLENGE TO THE CVS PHARMACY REPORT IS FORFEITED AND, IN ANY EVENT, WITHOUT MERIT

In his opening brief before this court, Lewis challenges not only the Board's review of CURES data but also the prescriber profile report that the Board obtained from CVS Pharmacy. (OB 28-38.) As explained above, that report lists the prescriptions that Lewis wrote and that his patients filled at CVS pharmacies during a specified time period. Because the Court of Appeal did not address this issue, which was forfeited below, the court should decline to address Lewis's arguments. But if the court chooses to reach Lewis's arguments on the merits, they are easily rejected.

A. Lewis Forfeited His Challenge to the Board's Review of the CVS Pharmacy Report

The court need not address Lewis's challenge to the Board's review of the CVS Pharmacy report, as Lewis did not address that report until his reply brief before the Court of Appeal. Lewis's sole focus below—from his motion to dismiss the administrative accusation through his writ petition to the Court of Appeal—was the Board's review of CURES data. An argument not raised during the challenged administrative proceeding cannot serve as the basis for later writ relief. (*Supra*, 35.) The Court of Appeal, moreover, did not address Lewis's arguments concerning the CVS Pharmacy report.

B. Lewis's Challenge to the CVS Pharmacy Report Fails

In any event, Lewis's belated attempt to assert his patients' interests in the CVS Pharmacy report fails. As an initial matter, for all the reasons explained above, Lewis lacks standing to assert his patients' state privacy interests in records obtained from CVS. (*Supra*, 16-19.)

On the merits of his arguments, Lewis contends that the Board improperly used the tool of a regulatory pharmacy audit as a pretext to investigate his medical practices and therefore cannot rely on the *Burger* exception for warrantless administrative searches. (OB 28-38.) This claim has no merit. First, the record is clear that the Board obtained the report by means of a request with which the pharmacy chose to comply, and not through a compelled search of the pharmacy's records. (AR1124-AR1125.) Second, the Board has statutory authority to obtain pharmacy records for the specific purpose for which they were obtained here: investigating a physician's patient care. (See, e.g., Bus. & Prof. Code, §§ 159.5, 4017, 4081, 4105, 4332; see also *City of Indianapolis v. Edmond* (2000) 531 U.S. 32, 45 [reasonableness under *Burger* of warrantless administrative search grounded in purposes of program, not subjective intentions].)

Beyond his "pretext" claim, Lewis offers little to no argument as to why the Board's review of the CVS Pharmacy report violates the state constitutional right of privacy. To the extent Lewis has preserved such an argument, it fails for the same reasons as his challenge to the Board's review of CURES records.

First, Lewis does not satisfy *Hill*'s three threshold elements, and thus fails to show an actionable invasion of privacy. Patients' reasonable expectations of privacy are diminished in this closely regulated area. (*Supra*, 20-23.) Although patients certainly have a reasonable expectation that such records will not be made available to the general public (see *Stone*, *supra*, 593 N.E.2d at p. 301), the Board's confidential review of such records to investigate Lewis's prescribing practices is not a "serious intrusion" upon patient privacy. (See *Hill*, *supra*, 47 Cal. 4th at p. 37; *State v. Welch* (Vt. 1992) 624 A.2d 1105, 1110-1112 [upholding warrantless search of pharmacy's prescription records under *Burger*].) As above, Lewis's failure to satisfy these threshold elements should end the court's

inquiry. (See *Pioneer Electronics (USA), Inc. v. Superior Court* (2007) 40 Cal.4th 360, 373.)

Second, even were the court to reach the balancing test in *Hill*, the same analysis set forth above applies. The Legislature has authorized the Board to obtain pharmacy records to investigate physicians and ensure compliance with the Medical Practice Act, including its patient health and safety provisions related to prescription drugs. (See *Chiarottino*, *supra*, 225 Cal.App.4th at p. 630; Bus. & Prof. Code, § 4081.) The CVS Pharmacy report helped the Board to narrow its investigation of Lewis to focus on his treatment of five additional patients and ultimately revealed negligence in his treatment of three of them. The alternatives Lewis proposes—a warrant, subpoena, or other showing of "good cause"—lack legal support, would not meaningfully add to patient privacy, and would undermine the Board's ability to detect and stop unsafe medical practices, for all the reasons explained above. (*Supra*, 30-34.)

Third, any Fourth Amendment challenge to the CVS Pharmacy report would fail for all the same reasons set forth above. (*Supra*, 34-40.)

IV. Lewis Is Not Entitled to the Remedy of Suppression, Which Is the Only Remedy He Seeks

For all the reasons explained above, the Board did not violate either article I, section 1 of the state Constitution or the Fourth Amendment when it reviewed CURES records of Lewis's controlled substance prescriptions or the CVS Pharmacy report as part of its investigation into his patient care. Even if it had, Lewis would not be entitled to suppress the full medical records of those patients identified by the Board after review of the more limited prescription records—the only remedy he seeks.

A. The Fourth Amendment Does Not Require Exclusion

Suppression of evidence "is not an 'automatic consequence of a Fourth Amendment violation.'" (*Herring v. United States* (2009) 555 U.S. 135, 137.) Exclusion is not a "'personal constitutional right,'" nor is it aimed at "'redress[ing] the injury occasioned by an unconstitutional search.'" (*Davis v. United States* (2011) 131 S.Ct. 2419, 2426, citation omitted.) Rather, "[t]he rule's 'sole purpose . . . is to deter future Fourth Amendment violations.'" (*Ibid.*) Because "[e]xclusion exacts a heavy toll on both the judicial system and society at large" by suppressing reliable and probative evidence, the rule applies only when "the deterrence benefits of suppression . . . outweigh its heavy costs." (*Id.* at p. 2427; see also *Conservatorship of Susan T.* (1994) 8 Cal.4th 1005, 1017 [similar]; *People v. Willis* (2002) 28 Cal.4th 22, 35.)

In *Illinois v. Krull* (1987) 480 U.S. 340, 349-350, the Supreme Court held that the exclusionary rule does not apply when an officer reasonably relies on statutory authority that is later deemed unconstitutional. For all the reasons explained above, the Board's investigation in this case poses no Fourth Amendment concern. But even if it did, under *Krull*, Lewis would not be entitled to exclude the patients' full medical records as the fruit of an improper search where the statute (§ 11165) specifically authorized Board investigators to examine the CURES data. (See *Krull*, at pp. 356-360.) Although a state statute "cannot support objectively reasonable reliance if . . . the legislature wholly abandoned its responsibility to enact constitutional laws" or the statute's "provisions are such that a reasonable officer should have known that the statute was unconstitutional" (*id.* at

p. 355), Lewis has made no such argument in this case, nor could he do so in light of the authorities presented above. [15]

In any event, the exclusionary rule does not apply to Board disciplinary proceedings. In light of its purposes and its costs, the Supreme Court has "generally held the exclusionary rule to apply only in criminal trials" (*Scott, supra*, 524 U.S. at p. 364, fn. 4), and "[l]ike the United States Supreme Court, [this court] too ha[s] never extended the [exclusionary] rule to exclude evidence from civil proceedings," but only those that are "quasi-criminal" in nature, such as civil forfeiture proceedings. (*Susan T., supra*, 8 Cal.4th 1016.)[16]

Extending the exclusionary rule to Board disciplinary proceedings would be inappropriate because the substantial costs of suppressing evidence of a physician's substandard patient care outstrip any possible deterrent effect. Unlike a criminal trial, which is aimed at punishing past conduct, a disciplinary action seeks to ensure that a professional acting under a state license or permit is acting in the public interest and not

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[15] Lewis suggests that the mere fact that Board employees both obtain the information from CURES and then use that information in disciplinary proceedings is sufficient to establish the application of the exclusionary rule. (OB 43-47.) But this court and the United States Supreme Court have refused to extend the exclusionary rule to noncriminal proceedings even when the same government agency effecting the search seeks to use its fruits. (See *Susan T., supra*, 8 Cal.4th at pp. 1018-1020; *Pennsylvania Bd. of Probation and Parole v. Scott* (1998) 524 U.S. 357, 368-369; *I.N.S. v. Lopez-Mendoza* (1984) 468 U.S. 1032,1042-1043.)

[16] Lewis relies solely on *Dyson v. State Personnel Bd.* (1989) 213 Cal.App.3d 711, 714, which concerned a wholly unauthorized search of a person's home. Nothing resembling such activity occurred in this case. In addition, *Dyson* has been distinguished in other published appellate decisions. (See, e.g., *Finklestein v. State Personnel Bd.* (1990) 218 Cal.App.3d 264, 265 [holding that evidence should not be excluded in disciplinary proceeding before State Personnel Board; distinguishing its "recent decision in *Dyson*"].)

creating risk of harm. For this reason, courts generally decline to apply the exclusionary rule in disciplinary proceedings. (*Pating*, *supra*, 130 Cal.App.3d at p. 624 [rejecting suppression remedy in Board disciplinary action because public is entitled to protection against a physician's negligence or incompetence"]; *Emslie v. State Bar* (1974) 11 Cal.3d 210, 229-230 [rejecting suppression remedy in State Bar disciplinary proceeding]; *Susan T.*, *supra*, 8 Cal.4th at p. 1017, fn. 9 [listing court of appeal decisions that question or decline to apply exclusionary rule in disciplinary proceedings]; cf. *Lopez-Mendoza*, *supra*, 468 U.S. at p. 1046 [applying exclusionary rule in proceedings aimed not at punishment but at prevention of future harm would require "courts to close their eyes to ongoing violations of the law;" high court "has never before accepted" such costs in applying exclusionary rule].) Here, denying the Board information needed to protect the public from potentially substandard medical care risks grave societal harm. And little, if any, deterrence would be achieved by applying the exclusionary rule in cases like this one, where the Board investigator acted properly and pursuant to statutory authority. (See *Krull*, *supra*, 480 U.S. at pp. 349-350.) Exclusion in these circumstances is unwarranted.

B. Article I, Section 1 of the California Constitution Likewise Does Not Require Exclusion

Lewis also would not be entitled to exclusion even if he had established a violation of article I, section 1. As this court has explained, "[t]o identify another source of the right to privacy [other than the Fourth Amendment] does not appear to affect the analysis of . . . whether a violation of that right triggers the exclusionary rule." (*Susan T.*, *supra*, 8 Cal.4th at p. 1014, fn. 8 [rejecting application of exclusionary rule in conservatorship proceeding whether predicated on a Fourth Amendment or California right-to-privacy claim]; see also *supra*, 40, fn. 14 [protections

under article I, section 1 are coextensive with the Fourth Amendment].) And as with the Fourth Amendment analysis, the balance between deterring alleged violations of state constitutional rights through a suppression remedy and the social costs of exclusion likewise tips decisively against application of any exclusionary remedy in this case.

CONCLUSION

The Court of Appeal's judgment should be affirmed.

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Respectfully submitted,

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Attorneys for Real Party in Interest Medical Board of California

CERTIFICATE OF COMPLIANCE

I certify that the attached Answer Brief on the Merits uses a 13 point Times New Roman font and contains 13,712 words, as counted by the Microsoft Word word processing program and excluding all parts that may be excluded under Rule 8.204(c)(3) of the California Rules of Court.

Dated: July 17, 2015

KAMALA D. HARRIS
Attorney General of California

KATHLEEN VERMAZEN RADEZ
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Attorneys for Real Parties in Interest
Medical Board of California

DECLARATION OF SERVICE BY U.S. MAIL

Case Name: **ALWIN CARL LEWIS, M.D. v. MEDICAL BOARD**
No.: **S219811**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service with postage thereon fully prepaid that same day in the ordinary course of business.

On July 17, 2015, I served the attached **ANSWER BRIEF ON THE MERITS** by placing a true copy thereof enclosed in a sealed envelope in the internal mail collection system at the Office of the Attorney General at 455 Golden Gate Avenue, Suite 11000, San Francisco, CA 94102-7004, addressed as follows:

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Attorney for Petitioner Alwin Carl Lewis, M.D.

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

The Honorable Joanne B. O'Donnell
Los Angeles County Superior Court
Stanley Mosk Courthouse
111 North Hill Street
Department 86
Los Angeles, CA 90012-3014

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on July 17, 2015, at San Francisco, California.

Elza C. Moreira
Declarant

Signature

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