S219811

IN THE SUPREME COURT OF CALIFORNIA

ALWIN CARL LEWIS,

Petitioner,

vs.

THE SUPERIOR COURT OF LOS ANGELES COUNTY,

Respondent,

MEDICAL BOARD OF CALIFORNIA,

Real Party in Interest

AFTER A DECISION BY THE CALIFORNIA COURT OF APPEAL,
SECOND APPELLATE DISTRICT, DIVISION THREE, CASE NO. B252032

APPLICATION TO FILE *AMICUS CURIAE BRIEF* AND BRIEF OF *AMICUS CURIAE* CENTER FOR PUBLIC INTEREST LAW IN SUPPORT OF MEDICAL BOARD OF CALIFORNIA

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CENTER FOR PUBLIC INTEREST LAW
IN SUPPORT OF
MEDICAL BOARD OF CALIFORNIA

The Center for Public Interest Law (CPIL), a nonprofit academic center of research and advocacy in regulatory and public interest law at the University of San Diego School of Law, respectfully applies for leave to file the accompanying *amicus curiae* brief in support of the Medical Board of California pursuant to rule 8.520(f) of the California Rules of Court. CPIL is familiar with the content of the parties' briefs. CPIL wishes to provide this Honorable Court with background information on this matter from the perspective of those without an institutional or proprietary interest in the policies at issue.

For 35 years, CPIL has represented the interests of the unorganized and

underrepresented in state regulatory proceedings. The Center serves as a public monitor of over 25 state regulatory agencies, including the Medical Board of California (MBC), in order to promote their efficiency, visibility, and responsiveness to democratic values. In addition to monitoring the activities of state agencies, CPIL monitors the activity of the state Legislature and the courts as to the professions and trades regulated by the agencies; and publishes the *California Regulatory Law Reporter*, which exposes the activities of all three branches of government as to the regulation of trades and professions.

Since 1986, CPIL has taken a special interest in the Medical Board and its enforcement program, which — because it is intended to protect patients from physicians who are incompetent, negligent, reckless, impaired, and/or otherwise dangerous — is one of the most important regulatory functions in the state.

In 1986, CPIL secured a three-year grant to study MBC's physician discipline system. In 1989, CPIL published *Physician Discipline in California: A Code Blue Emergency*, a 100-page critique of the Board's enforcement program; the report — dubbed "*Code Blue*" — described the fragmented structure, minimal output, and misguided priorities of the Board's physician discipline system as it then existed, and outlined substantial structural and administrative reforms that would cure those flaws.

CPIL's critique quickly led to comprehensive reform legislation. In 1990, CPIL sponsored Senate Bill 2375 (Presley) (Chapter 1597, Statutes of 1990), which implemented many of the recommendations in *Code Blue*. Among many other things, SB 2375 amended Business and Professions Code section 2229 to elevate public protection above physician rehabilitation as the "paramount" priority of MBC's enforcement program. SB 2375 created the

Health Quality Enforcement (HQE) Section in the Attorney General's Office[1] — the very deputies attorney general who specialize in prosecuting health care disciplinary matters and who are representing the Medical Board in this matter. SB 2375 also created a special Medical Quality Hearing Panel (MQHP) of administrative law judges (ALJs) within the Office of Administrative Hearings (OAH)[2] — which produced the proposed decision adopted by the Medical Board in this matter. Before any other California occupational licensing board had the authority to "interim suspend" the license of an egregiously dangerous licensee pending conclusion of the lengthy disciplinary process, SB 2375 authorized MBC and HQE to seek interim suspension of a physician's license from an OAH ALJ. The bill also enhanced required reporting to MBC on physician negligence and misconduct; increased the maximum penalty against hospitals for failure to report adverse peer review actions to MBC as required by Business and Professions Code section 805; and required MBC to annually report certain specific information to the Legislature and the public.

In 1993, CPIL co-sponsored SB 916 (Presley) (Chapter 967, Statutes of 1993), which further implemented its *Code Blue* recommendations by enhancing the authority of MBC investigators to request and receive medical records from physicians under investigation; adding a "public letter of reprimand" to the Board's spectrum of disciplinary remedies; enhancing the resources for MBC's enforcement program by increasing its biennial license renewal fees; and amending Business and Professions Code section 2337 to streamline judicial review of MBC disciplinary decisions. As against a constitutional challenge, the amendments to section 2337 were upheld by this

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[1] Cal. Gov't Code § 12529 *et seq.*

[2] *Id.* at §§ 11371 *et seq.*

Honorable Court in *Leone v. Medical Board of California,* 22 Cal. 4th 660 (2000). SB 916 also codified the Board's changes to its public disclosure policy, which MBC adopted at the behest of CPIL, and which survived a litigation challenge mounted by the California Medical Association; today, that public disclosure policy is reflected in Business and Professions Code sections 803.1 and 2027.[3]

In addition to representing the interests of patients before the Board and in the Legislature, CPIL has also fought for patients in court. In 1995, CPIL filed *amicus curiae* briefs in support of the Medical Board in *California Medical Association v. Medical Board of California*, Case No. 376275, a Sacramento County Superior Court challenge to the Board's progressive public disclosure policy; MBC and CPIL prevailed. Also in 1995, CPIL contributed an *amicus curiae* brief in support of the Medical Board's position in this Honorable Court's unanimous decision in *Arnett v. Dal Cielo*, 14 Cal. 4th 4 (1996), which rejected the medical profession's attempt to secrete internal hospital "peer review" records from the Board. In that matter, a hospital and the medical profession sought to characterize formal Medical Board investigations as "civil discovery," minimize the Board's role as the government regulator of the profession, and elevate their own perceived "public protection" role over that of the Board. This Honorable Court unanimously rejected all of those arguments and established the Medical Board's preeminent governmental role in protecting public health and safety.

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[3] Since 1993, CPIL has sponsored, drafted, and/or supported at least two dozen other pieces of successful legislation to strengthen the Medical Board's physician discipline system; additionally, it has helped to block or amend numerous pieces of legislation sponsored by the medical profession that would have served to protect the medical profession rather than patients. CPIL has also participated actively in the Legislature's periodic "sunset reviews" of the Medical Board's performance in 1997, 2002, 2005, and 2013.

We respectfully submit that the *Dal Cielo* decision should serve as a starting point for this Honorable Court in evaluating the broad investigative authority that the Medical Board has – and must continue to have – in order to properly investigate complaints and reports of physician misconduct, and to protect patients from dangerous doctors.[4]

Finally, one of CPIL's undersigned attorneys, Julianne D'Angelo Fellmeth, has personally attended quarterly Medical Board meetings for over 29 years and has personally investigated and audited the Medical Board's enforcement program while serving as the Medical Board Enforcement Program Monitor from 2003 - 2005. It is fair to say that CPIL knows as much or more about MBC than anyone in the State of California, and we would like to share this knowledge with this Honorable Court on behalf of patients who need the protection of the Medical Board.

This matter concerns the Controlled Substance Utilization Review and Evaluation System (CURES), which is intended to enable the Medical Board and other law enforcement agencies to detect ***prescribers*** (including physicians) and ***dispensers*** (including pharmacists) who are prescribing and dispensing dangerously addictive ***controlled substances*** to patients who may be "doctor - shopping" and/or "pharmacy - shopping" in order to acquire excessive amounts of controlled substances for their own misuse, abuse,

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[4] CPIL does not always agree with the Medical Board, and has — along with its sister organization, the Children's Advocacy Institute — represented doctors in actions against the Medical Board. *See, e.g., Sinaiko v. Superior Court (Medical Board of California, Real Party in Interest)*, 122 Cal. App. 4th 1133 (2004) (Board unfairly disregarded all of allergist's expert witnesses in action alleging unprofessional conduct); *see also Le Bup Thi Dao, et al. v. Board of Medical Quality Assurance*, Case No. 876321 (San Francisco Superior Court, 1991) (Board unfairly denied licenses to 32 Vietnamese physicians).

unlawful sale or other distribution. CPIL wishes to apprise this Court about the intractable problem that CURES is intended to address, and the importance of that detection mechanism to the Medical Board of California, and to the experienced peace officer investigators who investigate complaints and reports against its physician licensees, in their efforts to protect patients from dangerous doctors.

Neither CPIL, nor any person associated with it, has received any remuneration from any party to this proceeding for this contribution, or for any other purpose; and its research and authorship of this brief is entirely from its own offices. CPIL wishes to provide this Honorable Court with background information on this matter of significant public importance from the perspective of those without an institutional or proprietary interest in the policies at issue, and who require protection by the Medical Board of California from unsafe doctors.

DATED: July 17, 2015 Respectfully submitted,

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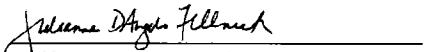
By: 
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BRIEF OF *AMICUS CURIAE*
CENTER FOR PUBLIC INTEREST LAW
IN SUPPORT OF MEDICAL BOARD OF CALIFORNIA

I. INTRODUCTION

This matter presents a conflict between two co-equal "inalienable" rights guaranteed by Article I, Section 1 of the California Constitution — the right to safety and the right to privacy — in the context of an alarming prescription drug overdose and abuse epidemic in the United States. The public protection implications of this conflict far outweigh the patients' privacy issues here; indeed the very purpose of the CURES database would be completely undermined if MBC is stripped of its expedited ability to use this critical tool.

As the state's regulator of physicians, the Medical Board of California (MBC) is charged with "public protection" as its "paramount" priority.[1] Deaths and injuries caused by physician-prescribed narcotics are undeniably a matter of significant concern to the public, and MBC plays a critical role in ensuring that its licensees do not further contribute to this epidemic by overprescribing opioids and other highly addictive medications to California patients.[2]

The Controlled Substance Utilization and Review System (CURES), California's prescription drug monitoring program (PDMP), is instrumental in MBC's "efforts to control the diversion and resultant abuse of Schedule II,

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[1] Cal. Bus. & Prof. Code §§ 2229(a) and (c); 2001.1.

[2] See Lisa Girion and Scott Glover, *Doctors Are Top Source of Prescription Drugs for Chronic Abusers*, L.A. TIMES, Mar. 3, 2014, citing a Centers for Disease Control report published in the Journal of the American Medical Association; *see infra* text at notes 9-13.

Schedule III, and Schedule IV controlled substances."[3] MBC investigators often conduct CURES searches in the course of their official investigations of complaints against physicians, and they are statutorily permitted to do so without a warrant or subpoena for good reason. As set forth below, a CURES search assists investigators, and Department of Justice (DOJ) prosecutors who direct MBC investigations,[4] in determining whether to pursue a more thorough investigation via the subpoena process. To require prior court approval for each CURES search, as Dr. Lewis suggests, would not only impede MBC's ability to detect overprescribing practices, but would add considerable delay to an already excessively lengthy disciplinary process. Such an unnecessary obstacle would be devastating to public safety, inevitably leading to further patient harm and even death.

Petitioner Lewis's contention that the Medical Board's "warrantless and unfettered" search of the CURES database during official investigations violates his patients' constitutional "privacy" rights in controlled substances prescription data completely ignores the coextensive and inalienable right to "safety" guaranteed by the very same constitutional provision.[5] Nor does he acknowledge that MBC is charged with "public protection" as its highest priority.

As the court below recognized, controlled substance prescription data housed in the CURES database are very different from the information contained in patients' comprehensive "medical records," which are privileged,

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[3] Cal. Health and Safety Code § 11165(a).

[4] Cal. Gov't Code § 12529.6(b).

[5] Cal. Const., art. I, § 1.

and afforded a higher level of privacy protection.[6] Indeed, California pharmacies notify their patients that they may disclose prescription information without patient consent as required by law. Dr. Lewis's attempt to equate these records is thus properly resisted. On balance, the privacy interests at issue here do not outweigh California's vital interests in protecting the public by (1) preventing dangerous physicians from continuing to practice with an unrestricted license; and (2) controlling the distribution of dangerous drugs. Inhibiting the Medical Board's ability to detect and investigate physicians who are overprescribing controlled substances to patients as proposed, and risking lives in the process, would be directly contrary to MBC's express purpose, the considerable investigative authority delegated to the Medical Board by the Legislature and recognized by this Court,[7] and the California Constitution's guarantee of safety as an inalienable right.

Finally, MBC receives information regarding physician misconduct from a wide variety of sources — not just patient complaints — and it is authorized to initiate its own complaints and investigations.[8] Thus the Court should reject Petitioner Lewis's argument that a CURES search should be permissible only if a patient complaint specifically relates to a physician's prescribing practices. Common sense dictates that a drug-seeking patient addicted to pain medication is not going to complain to the Medical Board that her doctor has been excessively prescribing that very medication to her.

Dr. Lewis is asking this Court to severely limit MBC's ability to protect the public by essentially requiring it to: (1) wait for a specific complaint that

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[6] *Lewis v. Superior Court*, 226 Cal. App. 4th 933, 948 (2014).

[7] *Arnett v. Dal Cielo*, 14 Cal. 4th 4 (1996).

[8] Cal. Bus. & Prof. Code § 2220(a).

a physician has been overprescribing; and (2) before taking any action to even investigate that allegation, seek court approval to run a CURES search. During this delay, the doctor will continue to prescribe deadly medications, increasing the likelihood that patients will die. This is unacceptable.

In order to preserve the Medical Board's ability to fulfill its public protection mission, and enable it to properly discipline its licensees who endanger the public by overprescribing highly addictive controlled substances, *amicus curiae* CPIL respectfully requests that this Court affirm the decision below.

II. PRESCRIPTION DRUG ABUSE — NATIONALLY AND IN CALIFORNIA — HAS REACHED EPIDEMIC PROPORTIONS, AND CURES IS ESSENTIAL TO CURBING THIS TREND IN CALIFORNIA

A. The Prescription Drug Abuse Epidemic

According to the Centers for Disease Control and Prevention (CDC), drug overdoses are the leading cause of accidental death in the United States. In 2013, nearly 44,000 people died from drug overdoses. Over half of these (22,767) were related to prescription drugs: 70% of these deaths involved opioid prescription painkillers, and 30% involved benzodiapines.[9] The rate of fatal prescription drug overdoses in the United States involving opioids nearly quadrupled from 1999 to 2011.[10] In a 2014 report, the CDC stated that

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[9] Centers for Disease Control, *Prescription Drug Overdose Data* (2015) at http://www.cdc.gov/drugoverdose/data/overdose.html (last visited July 15, 2015).

[10] Li-Hui Chen, M.S., Ph.D., Holly Hedegaard, M.D., M.S.P.H., and Margaret Warner, Ph.D., *Drug-poisoning Deaths Involving Opioid Analgesics: United States 1999-2011*, National Center for Health Statistics (NCHS) Data Brief 166 (2014) at 1, at http://www.cdc.gov/nchs/data/databriefs/db166.htm (hereinafter "*Drug-poisoning Deaths*"). See also Rebecca L. Haffajee, J.D.,

"[m]isuse or abuse of prescription drugs, including opioid-analgesic pain relievers, is responsible for much of the recent increase in drug-poisoning deaths."[11] A 2014 CDC analysis found that drug overdose deaths increased for the eleventh consecutive year in 2010.[12] Additionally, "[d]rug misuse and abuse caused about 2.5 million emergency department (ED) visits in 2011. Of these, more than 1.4 million ED visits were related to prescription drugs."[13]

California is not immune from this alarming trend. In fact, according to a June 2015 report, drug overdoses are the leading cause of injury-related

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M.P.H., Anupam B. Jena, M.D., Ph.D., Scott G. Weiner, M.D., M.P.H., *Mandatory Use of Prescription Drug Monitoring Programs*, J. AMER. MED. ASS'N, Vol. 313, No. 9 (Mar. 3, 2015) at 891 ("[t]he United States is in the midst of a prescription opioid overdose and abuse epidemic. The rate of fatal prescription drug overdoses involving opioids almost quadrupled from 1.4 deaths/100,000 people in 1999 to 5.4 deaths/100,000 people in 2011") (hereinafter "*JAMA*").

[11] *Drug-poisoning deaths*, *supra* note 10, at 1, citing Leonard J. Paulozzi, *Prescription Drug Overdoses: A Review*, 43 J. SAFETY RESEARCH 283 (2012) ("most drug overdoses have become associated with licit pharmaceuticals such as opioid analgesics

and psychotherapeutic drugs").

[12] Margaret Warner, Ph,.D., Holly Hedegaard, M.D., M.S.P.H., Li-Hui Chen, M.S., Ph.D., *Trends in Drug -poisoning Deaths Involving Opioid Analgesics and Heroin: United States, 1999-2012* at 5 (Dec. 2014) at http://www.cdc.gov/nchs/data/hestat/drug_poisoning/drug_poisoning_deaths_1999-2012.pdf (last visited July 15, 2015).

[13] Centers for Disease Control, *Prescription Drug Overdose Data* (2015) at http://www.cdc.gov/drugoverdose/data/overdose.html (last visited July 15, 2015) *See also* CDC data cited in Massimo Calabresi, *The Price of Relief: Why American Can't Kick Its Painkiller Problem,* TIME (June 15, 2015) (accompanied by the magazine cover's headline: "They're the most powerful painkillers ever invented. And they're creating the worst addiction crisis America has ever seen").

deaths in California.[14] In late 2012, a four-part *Los Angeles Times* investigative report documented the extent of the problem in Southern California and exposed California physicians' role in this prescription drug overdose epidemic.[15] The report analyzed coroners' records in four Southern California counties (Los Angeles, Orange, Ventura, and San Diego) over a six-year period, and found that in nearly half of the 3,733 prescription drug-related fatalities examined, the deceased had a doctor's prescription for at least one drug that caused or contributed to the death.[16] Even more troublesome, the analysis revealed that 71 California-licensed doctors (0.1% of all practicing doctors in the four counties) had prescribed drugs to a disproportionate number of patients who overdosed and died.[17] Each of those 71 doctors prescribed drugs to three or more patients who later fatally overdosed; and four of those doctors lost ten or more patients to fatal drug overdoses.[18] Most of these doctors had never been investigated or disciplined by the Medical Board at the time of the series' publication.[19]

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[14] Robert Wood Johnson Foundation, *The Facts Hurt: A State-By-State Injury Prevention Policy Report 2015* (June 2015) at 14, at http://healthyamericans.org/assets/files/TFAH-2015-InjuryRpt-final6.18.pdf (last visited July 15, 2015) ("[d]rug overdoses have become the leading cause of injury in 36 states, including California, surpassing motor vehicle-related deaths").

[15] *See* Scott Glover and Lisa Girion, *Dying for Relief*, L.A. TIMES, Nov. 11, 2012, Dec. 9, 2012, Dec. 20, 2012, Dec. 30, 2012.

[16] *Id.* at Part One ("*Legal Drugs, Deadly Outcomes*"), Nov. 11, 2012, at A26.

[17] *Id.*

[18] *Id.*

[19] *Id.*

According to CDC Director Thomas R. Frieden, M.D., M.P.H., prescription drug monitoring programs (PDMPs) — statewide computerized databases that track prescriptions for painkillers and other commonly abused narcotics from doctor to pharmacy to patient (such as CURES) — are the most promising tools to combat this problem.[20] California is not unique in its efforts to collect data on dispensed controlled substance prescriptions and make it available to authorized users via a secure electronic database. As of July 2014, 49 states had passed legislation authorizing a PDMP, 48 states had an operating PDMP,[21] and 22 states "now legally mandate prescribers to query the system before writing for controlled substances with recognized potential for abuse or dependence."[22]

According to a recent study conducted by Brandeis University's PDMP Center of Excellence: "Research and accumulated experience strongly suggest that PDMPs serve essential functions in combating the prescription drug abuse epidemic.... They can help identify major sources of prescription drug diversion such as prescription fraud, forgeries, doctor shopping ... and improper prescribing and dispensing. PDMPs are also important resources for

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[20] *See* Scott Glover and Lisa Girion, *Prescription Drug-Related Deaths Continue to Rise in U.S.*, L.A. TIMES, Mar. 29, 2013, at http://articles.latimes.com/2013/mar/29/local/la-me-ln-prescription-drugrelated-deaths-continue-to-rise-20130329.

[21] PDMP Center of Excellence, Brandeis University, *Briefing on PDMP Effectiveness* (2014) at 2.

[22] *JAMA*, *supra* note 10, at 891. Senate Bill 482 (Lara), currently pending in the California Legislature, would require California prescribers to check CURES before writing a prescription for a Schedule II or III controlled substance for a patient for the first time, and annually thereafter if such a drug continues to be part of a patient's treatment.

practitioners and third party payers, giving them information on patients' use of controlled substances that is crucial for providing good medical care and ensuring patient safety."[23]

Regrettably, CURES — which lacked a stable source of funding — became a victim of the budget crisis that enveloped California government during the first decade of the 2000s. "Recent budget cuts to the Attorney General's Division of Law Enforcement have resulted in insufficient funding to support the CURES PDMP.... the PDMP is necessary to ensure health care professionals have the necessary data to make informed treatment decisions and to allow law enforcement to investigate prescription drug diversion. Without a dedicated funding source, the CURES PDMP is not sustainable...."[24]

B. The California Legislature Rescues CURES and Recognizes Its Value

In 2013, in the wake of the *Times' Dying for Relief* series, the California Legislature acknowledged the effectiveness of PDMPs in curbing the prescription drug abuse epidemic and enacted legislation, Senate Bill 809 (DeSaulnier), which made the following findings: "The Controlled Substance Utilization Review and Evaluation System (CURES) is a valuable preventive, investigative, and educational tool for health care providers, regulatory agencies, educational researchers, and law enforcement.... Schedule II, Schedule III, and Schedule IV controlled substances have had deleterious

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[23] *Briefing on PDMP Effectiveness, supra* note 21, at 3 (citations omitted).

[24] Senate Floor Analysis of SB 809 (DeSaulnier) (Sept. 10, 2013); *see also* Scott Glover and Lisa Girion, *Dying for Relief*, L.A. TIMES, Part Four (Dec. 30, 2012) at A22 ("[Governor Brown] eliminated the Bureau of Narcotics Enforcement, the unit that operated CURES, as part of his response to the state's financial crisis. CURES is now run by a single full-time employee in the attorney general's office").

effects on private and public interests, including the misuse, abuse, and trafficking in dangerous prescription medications resulting in injury and death. It is the intent of the Legislature to work with stakeholders to fully fund the operation of CURES which seeks to mitigate those deleterious effects and serve as a tool for ensuring safe patient care, and which has proven to be a cost-effective tool to help reduce the misuse, abuse, and trafficking of those drugs."[25]

Among other things, SB 809 surcharged the license fees of most California prescribers and dispensers of controlled substances in order to create a stable source of funding for the CURES database; required the Department of Justice to use that money to rebuild and upgrade CURES; and requires all prescribers and dispensers of controlled substances to register with CURES by January 1, 2016, so they may check a patient's prescription drug history prior to prescribing or dispensing controlled substances.[26]

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[25] Cal.Stats.2013, c. 400.

[26]The California Legislature has more recently demonstrated its concern over the prescription drug abuse epidemic by passing Assembly Bill 1535 (Bloom) in 2014 (Chapter 326), which added section 4052.01 to the California Business and Professions Code. Section 4052.01 authorizes pharmacists to furnish – without a physician's prescription – naloxone hydrochloride (NH), an antidote to opioids that blocks the central nervous system effects of several types of opiate medications, to a person at risk of opioid-related overdose, pursuant to standardized procedures developed by the Medical Board and the Board of Pharmacy. The Assembly Floor analysis cited a March 2014 research letter published in the *Journal of the American Medical Association*, stating "***the highest-risk and highest-use group of opioid users is more likely to obtain opioids from a physician's prescription than from a drug dealer. And those prescriptions are filled at pharmacies.***" (emphasis added).

California legislators are not the only public officials who are concerned about the prescription drug overdose epidemic. On May 21, 2014, the District Attorneys of Orange and Santa Clara counties filed *People of the*

III. CALIFORNIA PATIENTS HAVE A CONSTITUTIONAL RIGHT TO SAFETY, AND THE MEDICAL BOARD IS CHARGED WITH PROTECTING THEM FROM UNSAFE DOCTORS AS ITS "PARAMOUNT" PRIORITY

In emphasizing the constitutional right to privacy in California, petitioner completely overlooks the fact that before "privacy" was ever added to the California Constitution, Article I, section 1 already guaranteed all Californians a right to "***safety***" that is properly recognized as an explicit, enumerated, and co-equal part of the provision: "All people are by nature free and independent and have inalienable rights. Among these are enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining ***safety***, happiness, and privacy."[27] As this Honorable Court recognized in *Arnett*, the Medical Board of California plays a key role in furthering that constitutional right. "The purpose of the Board is to protect the health and safety of the public."[28] Further, the Board is statutorily charged with protecting Californians from unsafe doctors as its "paramount" priority, and that duty is mandatory.[29] It is difficult to overstate the irreparable harm

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State of California v. Purdue Pharma LP, et al., Case No. 30-2014-00725287-CU-BT-CXC, a civil action alleging false and misleading advertising by Purdue and other pharmaceutical companies about their opioid painkillers, including oxycontin.

[27] Cal. Const., art. I, § 1 (emphasis added).

[28] *Arnett*, 14 Cal. 4th at 9.

[29] Cal. Bus. & Prof. Code § 2229(a) and (c) ("protection of the public ***shall*** be the highest priority...; where rehabilitation and protection are inconsistent, protection ***shall*** be paramount") (emphasis added); *see also id.* at § 2001.1.

that an unsafe physician can cause to patients, and the Medical Board is the sole entity authorized to protect patients from those doctors.

IV. CURES SEARCHES ARE PROPERLY CONDUCTED PURSUANT TO MBC'S BROAD INVESTIGATIVE AUTHORITY TO CARRY OUT ITS PARAMOUNT PUBLIC PROTECTION AND SAFETY MANDATE

As found by this Court in *Arnett v. Dal Cielo*,[30] and more recently by the First District Court of Appeal in *Medical Board of California v. Chiarottino*,[31] MBC is the entity through which the State of California licenses and regulates physicians "as an exercise of police power."[32] As noted above, in exercising that police power, MBC is required to elevate patient protection above other competing interests. Consistent with the constitutionally-protected guarantee of safety, MBC's paramount priority is protecting patients from unsafe doctors.

This Honorable Court has recognized that, in order to carry out its public protection role, the sworn peace officer investigators who are charged with investigating complaints and reports about physicians have been delegated wide latitude. "A primary power exercised by the Board in carrying out its enforcement responsibilities is the power to ***investigate***: the statute broadly vests the Board with the power of 'Investigating complaints from the public, from other licensees, from health care facilities, or from a division of the board that a physician and surgeon may be guilty of unprofessional

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[30] 14 Cal. 4th 4 (1996).

[31] 225 Cal. App. 4th 623 (2014).

[32] *Arnett*, 14 Cal. 4th at 7; *Chiarottino*, 225 Cal. App. 4th at 629.

conduct.'"[33] Thus MBC is not limited to investigating consumer complaints and mandated reports about physicians' adverse events,[34] but may initiate complaints and generate investigations on its own accord. Indeed, Business and Professions Code section 2220(a) specifically authorizes the Medical Board to investigate complaints "***from the board***" (emphasis added). MBC's investigatory powers have been liberally construed.[35]

The Board's power to generate its own complaints is instrumental in identifying dangerous doctors and pursuing appropriate disciplinary action. The Medical Board Enforcement Monitor found that the Medical Board itself "was the second most productive source of complaints leading to all disciplinary actions" during an 18-month period examined by the Monitor, and identified at least seven situations in which MBC is listed as the "source" of

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[33] *Chiarottino*, 225 Cal. App. 4th at 629, quoting *Arnett*, 14 Cal. 4th at 7-8, citing Bus. & Prof. Code § 2220(a) (emphasis original).

[34] *See, e.g.*, Cal. Bus. & Prof. Code §§ 801.01 (insurers required to file reports with MBC regarding malpractice payouts), 801.1 (self-insured government entities required to report malpractice payouts to MBC), 802 (uninsured physicians must self-report malpractice payouts to MBC), 802.1 (physicians must self-report felony charges and criminal convictions to MBC), 802.5 (coroners required to report findings that a death may be the result of physician gross negligence or incompetence to MBC), 803 (court clerks required to report convictions and judgments against physicians to MBC), 805 (hospitals and HMOs required to report specified internal disciplinary actions against physician admitting privileges to MBC).

[35] *See Stiger v. Flippin, et al.*, 201 Cal. App. 4th 646, 652 (2011), *quoting Arnett,* 14 Cal. 4th at 7-8; *Shively v. Stewart*, 65 Cal. 2d 475, 479 (1966) ("[t]o enable the Board to carry out its enforcement responsibilities, the Medical Practice Act 'broadly vests' the Board with investigative powers...such investigatory powers have been liberally construed").

a complaint.[36] This is important for two reasons. Most importantly, it signifies the Legislature's intent to provide MBC investigators with a wide range of tools enabling them to detect MBC licensees who are potentially injuring patients. Second, it highlights the severe restrictions Dr. Lewis's proposal would impose upon MBC in utilizing the CURES database. Since patient complaints are only one of many events triggering MBC investigations, permitting CURES searches to be run only after a patient complains about a physician's prescribing practices would drastically reduce the scenarios under which this important tool could be utilized at all.56

"'The Board's investigators[37] have the status of peace officers,... and possess a wide range of investigative powers. In addition to interviewing and taking statements from witnesses, the Board's investigators are authorized to exercise delegated powers ... to 'Inspect books and records' and to 'Issue subpoenas for the attendance of witnesses and the production of papers, books,

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[36] Julianne D'Angelo Fellmeth and Thomas A. Papageorge, *Initial Report of the Medical Board Enforcement Program Monitor* (Nov. 1, 2004), at 93. Available at http://www.sandiego.edu/law/centers/cpil/research-advocacy/mbc-initial.php and at http://www.mbc.ca.gov/Publications/Enforcement_Report.aspx (hereinafter "*Initial Report*"). *See infra* text at notes 59-80 for information on the Medical Board Enforcement Monitor.

[37] At the time of the events in *Arnett*, *Chiarottino*, and the instant matter, the Medical Board employed its own peace officer investigators. Effective July 1, 2014, the Medical Board's investigators were transferred to the Department of Consumer Affairs' Division of Investigation, and specifically to the Division's new Health Quality Investigation Unit, where they continue to function as peace officer investigators and continue to specialize in investigating complaints and reports against physicians; *see* Bus. & Prof. Code §§ 159.5, 160.5(b). As such, the investigators are no longer "the Board's" investigators, but the Board contracts for their services and their authorities and responsibilities are unchanged.

accounts, documents and testimony in any inquiry [or] investigation ... in any part of the state."[38] "Further, because the Board is authorized 'to issue a subpoena in any inquiry [or] investigation,' ... the Board may do so for purely investigative purposes; it is not necessary that a formal accusation be on file or a formal adjudicative hearing be pending."[39]

MBC investigators conduct CURES searches pursuant to the Board's authority to make "administrative inquiry." As this Honorable Court has recognized, this power "is not derived from a judicial function but is more analogous to the power of a 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.***"[40]

Moreover, the "independent, professional investigators" who investigate Medical Board matters[41] do not act alone in investigating physicians; they work in conjunction with, and in fact "under the direction" of, deputies attorney general from the Health Quality Enforcement Section of the Attorney General's Office.[42] These experienced professionals specialize in

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[38] *Chiarottino*, 225 Cal. App. 4th at 629, quoting *Arnett*, 14 Cal. 4th at 8 (citations omitted).

[39] *Chiarottino*, 225 Cal. App. 4th at 630, quoting *Arnett*, 14 Cal. 4th at 8 (citation omitted).

[40] *Arnett*, 14 Cal. 4th at 8, quoting *United States v. Morton Salt Co.*, 338 U.S. 632, 642–43 (1950) (emphasis added).

[41] *Arnett*, 14 Cal. 4th at 12.

[42] Cal. Gov't Code § 12529.6(b).

investigating and prosecuting physician discipline matters[43] in a "vertical enforcement and prosecution model," and the function they perform has been singled out by the Legislature as "one of the most critical functions of state government."[44] Surely some deference to the experience and expertise of these individuals in investigating and prosecuting these complex matters is warranted. Critically, the deputies attorney general provide an additional "check" upon the investigators, ensuring that MBC is complying with the Administrative Procedure Act,[45] and that doctors' due process rights are protected throughout the adjudicative process.

Finally, the underlying matter involves an administrative disciplinary inquiry in a licensed and highly regulated profession,[46] and the precise practice at issue — the prescription of controlled substances which is tracked by CURES — is even more highly regulated by both the state and federal

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[43] *Id.* at § 12529 ("[t]here is in the Department of Justice the Health Quality Enforcement Section. The primary responsibility of the section is to investigate and prosecute proceedings against licensees and applicants within the jurisdiction of the Medical Board of California ....").

[44] *Id.* at § 12529.6(a) ("The Legislature finds and declares that the Medical Board of California, ***by ensuring the quality and safety of medical care***, performs one of the most critical functions of state government. Because of the ***critical importance of the board's public health and safety function***, the complexity of cases involving alleged misconduct by physicians and surgeons, and the evidentiary burden in the board's disciplinary cases, the Legislature finds and declares that using a vertical enforcement and prosecution model for those investigations is in the best interests of the people of California.") (emphasis added).

[45] *Id.* at §§ 11370, *et seq.*

[46] The Medical Practice Act, Cal. Bus. & Prof. Code §§ 2000 *et seq.*, sets forth extensive and detailed licensing, regulatory, and enforcement standards governing the practice of medicine in California.

governments.[47] Dr. Lewis's attempt to inhibit the Medical Board's ability to detect and investigate physicians who are overprescribing controlled substances to patients is inconsistent with the wide latitude MBC is granted to conduct investigations, MBC's express purpose of public safety, and the California Constitution's guarantee of safety as an inalienable right.[48]

V. PATIENTS' PRIVACY INTERESTS IN CURES CONTROLLED SUBSTANCE DATA ARE DIMINISHED AND DO NOT OUTWEIGH MBC'S PUBLIC PROTECTION MANDATE

As the Medical Board argued below (and will presumably reiterate here), patient privacy interests in the CURES data at issue — even should they be asserted by patients[49] — are not absolute. *Hill v. National Collegiate Athletic Ass'n*, 7 Cal. 4th 1, 37 (1994). Even if Petitioner can establish (1) a legally protected privacy interest, (2) a reasonable expectation of privacy under the circumstances, and (3) a serious invasion of the privacy interest, as required by *Hill,* the privacy interest still must yield to a showing of "one or more legitimate competing interests."[50] Here, the State has persuasively

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[47] *See Chiarottino*, 225 Cal. App. 4th at 634–36 (citing numerous authorities recognizing "society's substantial interest in reducing the illegitimate use of dangerously addictive prescription drugs").

[48] *Arnett*, 14 Cal. 4th at 7-8; Cal. Gov't Code § 12529.6; Cal. Const., art. I, § 1.

[49] In this matter, Petitioner Lewis is asserting his patients' privacy rights under Article I, section 1 of the California Constitution, as authorized by *Wood v. Superior Court*, 166 Cal. App. 3d 1138 (1985). However, we are not aware that any patient in this matter has complained that his/her privacy rights are being trampled by the Medical Board's access to CURES controlled substance data. *See Lewis*, 226 Cal. App. 4th at 939.

[50] *Hill*, 7 Cal. 4th at 39-40; *County of Los Angeles v. Los Angeles County Employee Relations Comm'n*, 56 Cal. 4th 905, 926 (2013), citing *Hill*,

articulated at least two compelling and competing state interests: (1) the state's overarching interest in preventing dangerous physicians from continuing to practice with an unrestricted license,[51] with public protection as its "paramount" priority[52]; and (2) the state's "vital interest in controlling the distribution of dangerous drugs."[53]

In its decision below, the Second District Court of Appeal analyzed the asserted patient privacy rights under *Hill*'s three-pronged test and found that patients have a "diminished" right to privacy in the controlled substance data housed in CURES and accessed by the Medical Board in this matter.[54] CPIL agrees with that holding for multiple reasons. First, CURES data are not "medical records" which are created by physicians. All California-licensed prescribers and dispensers of controlled substances are aware that any prescription of a Schedule II, III, or IV controlled substance will be reported by the dispenser to CURES, and that DOJ and appropriate California law

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7 Cal. 4th at 40; *see also Whitney v. Montegut*, 222 Cal. App. 4th 906, 919 (2014) ("invasion of a privacy interest is not a violation of the state constitutional right to privacy if the invasion is justified by a competing interest").

[51] *Arnett*, 14 Cal. 4th at 7.

[52] Cal. Bus. & Prof. Code §§ 2229(c) and 2001.1.

[53] *See Whalen v. Roe*, 429 U.S. 589 (1977), and numerous other authorities cited for this noncontroversial proposition in *Chiarottino*, 225 Cal. App. 4th at 634, and *Lewis,* 226 Cal. App. 4th at 954 ("there is no dispute that the state has a compelling interest in controlling the diversion and abuse of controlled substances").

[54] *Lewis*, 226 Cal. App. 4th at 946–51.

enforcement agencies may access those records for investigatory purposes.[55]

Likewise, *patients* are informed that pharmacies will disclose prescription data without patient consent if required to do so by law.[56] And as the court below noted, the CURES statute itself places patients on notice that data regarding controlled substance prescriptions will be monitored by the state.[57] Surely if citizens are deemed to have knowledge of the law for the

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[55] Cal. Health and Safety Code § 11165 (the primary purpose of the CURES statute is to "assist ... law enforcement and regulatory agencies in their efforts to control the diversion and resultant abuse of ... controlled substances"); *see also* Cal. Bus. & Prof. Code § 4081(a).

[56] *Lewis*, 226 Cal. App. 4th at 948 ("A reasonable patient filling a prescription for a controlled substance knows or should know that the state, which prohibits the distribution and use of such drugs without a prescription, will monitor the flow of these drugs from pharmacies to patients."); *see also, e.g.*, CVS privacy policy ("In matters involving claims of personal or public safety or in litigation where the data is pertinent, ***we may use or disclose personal information without your consent*** or court process.") (emphasis added; available at https://www.cvs.com/help/privacy_policy.jsp); Rite Aid privacy policy ("... there are certain limited circumstances where the law may require us to disclose your health care information [including]...to ***health oversight agencies (medical licensing boards, e.g.)*** for activities authorized by law such as audits, investigations...and for the government to monitor the health care system...") (emphasis added; available at https://www.riteaid.com/legal/patient-privacy-policy); Walgreens privacy policy (informing patients that it may use and disclose personal health information without prior authorization for "health oversight activities" as authorized by law, including "audits [and] investigations") (available at http://www.walgreens.com/topic/help/general/noticeprivacypractices.jsp?foot=privacy).

[57] *Lewis*, 226 Cal. App. 4th at 953 ("...the CURES statute informs patients and physicians that controlled substances prescription records are subject to disclosure to the state for electronic monitoring by the Department of justice.").

purposes of criminal charges, they must equally be deemed to know about the statutorily required data that are maintained in the CURES database.[58]

Finally, patients' privacy rights in CURES data are further diminished because — as noted above — (1) the practice of medicine is a highly regulated profession, and (2) the prescription of controlled substances is even more highly regulated under both state and federal law. The diminished privacy interests patients have in the data contained in the CURES database cannot outweigh the risk to public safety that is sure to result if MBC were hampered in its ability to detect dangerous doctors who are overprescribing these deadly substances.

VI. PATIENTS WOULD BE ENDANGERED IF MBC INVESTIGATORS WERE REQUIRED TO SEEK PERMISSION PRIOR TO SEARCHING THE CURES DATABASE

As noted in CPIL's application, one of CPIL's undersigned attorneys has regularly attended Medical Board meetings for 29 years and served as the Medical Board Enforcement Program Monitor from 2003–2005, pursuant to now-repealed Business and Professions Code section 2220.1. Created by the California Legislature in a 2002 bill,[59] the Enforcement Monitor was statutorily charged with investigating and evaluating the enforcement and diversion programs of the Medical Board, making "the reform and reengineering of the board's enforcement program and operations and the improvement of the overall efficiency of the Board's disciplinary system" her "highest priority."[60]

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[58] *See Hale v. Morgan*, 22 Cal. 3d 388, 396 (1978) ("It is an emphatic postulate of both civil and penal law that ignorance of a law is no excuse for a violation thereof."); Cal. Health & Safety Code § 11165.

[59] Cal.Stats.2002, c. 1985 (Senate Bill 1950 (Figueroa)).

[60] Cal. Bus. & Prof. Code § 2220.1 (repealed).

In this capacity, the undersigned attorney published a 300-page report entitled *Initial Report of the Medical Board Enforcement Program Monitor* on November 1, 2004.[61] This report included extensive data and hundreds of findings on all stages of MBC's enforcement program, including the intake of complaints and mandated reports about questionable physician conduct, formal investigations, MBC's partnership with the Health Quality Enforcement Section (HQE) in the Attorney General's Office, prosecutions, and its review of proposed ALJ decisions and stipulated settlements in reaching final agency disciplinary decisions. This report, and the Enforcement Monitor's Final Report, contained significant findings about substantial delays that occur throughout the enforcement process.[62]

A. The Physician Discipline System Is Already Excessively Lengthy

The court below noted that imposing a good cause, warrant, or subpoena requirement on MBC before it may access CURES in the course of a disciplinary investigation "would necessarily involve litigating the privacy issue in advance .... this delay defeats the legislative purpose of CURES."[63] The Second District also noted that "if the privacy issue were litigated before accessing CURES, the prescribing physician under investigation could stall

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[61] *Initial Report, supra* note 36.

[62] *Id.; see also* Julianne D'Angelo Fellmeth and Thomas A. Papageorge, *Final Report of the Medical Board Enforcement Program Monitor* (Nov. 1, 2005), available at http://www.sandiego.edu/law/centers/cpil/research-advocacy/mbc-final.php and at http://www.mbc.ca.gov/Publications/Enforcement_Report.aspx (hereinafter "Final Report").

[63] *Lewis*, 226 Cal. App. 4th at 955.

release of these records, which would prevent the state from exercising its police power to protect the public health."[64]

The court below is correct, and the Enforcement Monitor documented that such a delay would add even more time to an already-lengthy process. At the time of the Monitor's inquiry, it took the Medical Board an average of 960 days — or 2.63 years — from the receipt of a complaint to a final disciplinary action by the Board.[65] That was an average; many cases take much longer, and that does not include judicial review of a Medical Board decision (during which time the decision is usually stayed). According to the Medical Board's most recent annual report, the Board's case cycle time has slightly improved to an average of 865 days — or 2.37 years — from receipt of a complaint to final disciplinary action.[66] From a public protection point of view, this timeframe is unacceptable, because an incompetent, unqualified, or impaired physician can cause irreparable harm to patients, and the Board rarely uses its "interim suspension" power to suspend or restrict the practice of a physician pending the conclusion of the disciplinary process[67] — so accused doctors are usually entitled to continue practicing without restriction.

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[64] *Id.*

[65] *Initial Report, supra* note 36, at 63.

[66] Medical Board of California, *2013–14 Annual Report* (2015) at vi. http://www.mbc.ca.gov/Publications/Annual_Reports/annual_report_2013-2014.pdf

[67] In 2013–14, MBC secured only 21 interim suspension orders. *Id.* at vii.

Further, MBC investigators and HQE prosecutors must work under a statute of limitations,[68] which incentivizes physicians who are under investigation to delay, stall, and/or refuse to produce lawfully requested or even subpoenaed medical records of their patients — usually in an effort to run out the statute of limitations. Although Business and Professions Code section 2225(d) requires physicians to produce medical records in response to a lawful MBC request within 15 days of the request (accompanied by a patient release), the Monitor found that "on average, medical records procurement time during 2003-04 ... [took 66 days at the screening stage, or] over four times the statutory 15-day waiting period."[69] Because of physician stalling and MBC practice at the time, the Monitor found that, for cases referred for formal investigation, MBC spent an average of 140 days simply procuring needed medical records from physicians they sought to investigate. The Monitor repeatedly noted that MBC should no longer tolerate lengthy delays by physicians and health care institutions in responding to lawful MBC requests for medical records.[70]

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[68] Business and Professions Code section 2230.5 requires MBC to complete its investigation and the Attorney General's Office to file a formal accusation against a physician "within three years after the board ... discovers the act or omission alleged as the ground for disciplinary action, or within seven years after the act or omission alleged as the ground for disciplinary action occurs, whichever occurs first."

[69] *Initial Report, supra* note 36, at 101.

[70] "The lengthy waiting time for the procurement of essential medical records is among the greatest problems facing the MBC district offices and among the principal sources of overall case processing delays. Monitor interviews consistently found this problem of paramount concern among MBC investigators, who described it as the 'biggest problem for MBC investigations,' 'a major issue for all the district offices,' and the 'single

Stalling by physicians and/or their counsel[71] in producing requested medical records is only one of many delays that are inherent within MBC's physician discipline system. Delays occur throughout the process due to MBC investigative staff attrition,[72] refusal and/or stalling by physicians and their counsel to appear for an interview with MBC investigators and medical consultants,[73] the Board's difficulty in procuring expert medical witnesses (physicians) who are able and willing to review medical records and

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greatest source of delay' in the disciplinary process." *Initial Report, supra* note 36, at 140. "MBC investigators and HQE attorneys report that certain defense counsel routinely refuse to allow their clients to produce certified [medical] records, and then refuse to stipulate to their admission at hearing because the records are not certified." *Id.* at 172. To be fair, the Monitor also criticized MBC investigators for tolerating long delays by physicians and their counsel, and HQE prosecutors for failing to make use of their subpoena enforcement authority and section 2225.5 sanctions for failure to produce medical records. *Id.* at 140–41, 171–72.

[71] "There is evidence of a substantial trend toward doctors retaining and using defense counsel earlier and more frequently in the investigation process. Although a physician's right to retain counsel is unquestioned, the practical effect is often greater procedural delay as counsel interpose objections, complicate the records procurement process, and insist on scheduling and processing accommodations." *Id.* at 127.

[72] "Supervisors and field investigators uniformly report that valuable, experienced investigators are lost and well-qualified applicants go elsewhere because of salary disparities between the pay of MBC and other agencies hiring peace officers .... [S]ubstantial pay differentials ... place MBC at a hiring and retention disadvantage, especially at the top steps of the senior investigator positions." *Id.* at 147.

[73] In 2004, an average of 60 days elapsed between MBC's initial request for an interview and the actual interview. *Id.* at 129.

testify against a colleague,[74] and difficulty in setting evidentiary hearings within the Office of Administrative Hearings due to conflicting calendars of OAH judges, the prosecutor, the defense attorney, and the subject physician.[75] Requiring the Medical Board to litigate privacy issues in quality of care cases before being able to access CURES would add months and in some cases years to an already excessively lengthy process and prevent MBC from fulfilling its public protection mission.[76]

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[74] In most quality of care cases, MBC must submit the completed investigation to an "expert witness" (a physician in the same or similar specialty as the subject physician) who must review all the medical records and draft a written opinion. The Monitor did not separately calculate how long it took MBC investigators to locate a suitable expert; however, in 2004, it took the experts an average of 69 days to return a completed expert opinion — more than double MBC's expectation of 30 days' turnaround time. *Id.* at 129, 160.

[75] In 2004, there was "an estimated average 443-day period between filing of the accusation and conclusion of the evidentiary hearing — over 14 months. Some of these hearings are one- or two-day matters; others should last weeks but — due to the schedules of the attorneys, respondent, and judge — must be conducted in many non-contiguous blocks over the course of many months." *Id.* at 183.

[76] In *Chiarottino*, the court noted that MBC obtained information about respondent's overprescribing habits in August 2011, yet the appellate opinion was not dated until April 15, 2014; ***it took nearly three years to litigate whether MBC had properly run a CURES search in that case.*** 225 Cal. App. 4th at 626. *See also Whitney v. Montegut*, 222 Cal. App. 4th at 909 (also demonstrating a three-year litigation period between respondent's refusal to comply with MBC's subpoena in January 2011, and the appellate opinion dated January 2014).

B. Courts Should Refrain from Micromanaging Executive Branch Agency Investigations

In this matter, the Second District also found that "the Board's access to CURES should not be limited based on the nature of the complaint lodged against the licensee-physician. From the patients' perspective, the privacy interest in their controlled substances prescription records is no different if the Board were investigating unprofessional conduct in their care and treatment or in improper prescription practices."[77] This is an important point. Most patients are unsophisticated when it comes to selecting and communicating with their physicians, and they are equally unable to judge whether a particular physician practice violates the law or the standard of care. Very few patients file complaints about physicians with the Medical Board. In 2013–14, patients filed a total of 5,336 complaints against over 106,000 California-licensed physicians who live and practice California (MBC's total licensee population exceeds 130,000).[78] In fact, it is unclear how many patients even know the Medical Board exists, and that it has the authority to investigate complaints and take disciplinary action against physicians. In particular, patients who are being prescribed controlled substances rarely complain about their prescribing physicians — because they want to continue receiving controlled substances.

However, some patients take the initiative to research the Medical Board and file a complaint. Those patients have no idea what the law is, whether their physician has violated it, and/or whether their complaint against that physician is the first or the fiftieth that the Medical Board has received against that physician. They simply want to express concern about a

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[77] *Lewis*, 226 Cal. App. 4th at 955.

[78] Medical Board of California, *2013–14 Annual Report* (2015) at i, vi.

physician's practice to the people who do know the law: the Medical Board of California.

Once a physician has come to the attention of the Medical Board, it is inappropriate to curb or excessively hamper a full investigation of that physician. MBC has a statutory duty to fully screen and, as appropriate, investigate physician licensees who are the subject of complaints and reports. The Legislature has delegated ample and broad investigative authority to the Medical Board, including the authority to initiate its own complaints and generate its own investigations — which it does in numerous scenarios.[79]

The Enforcement Monitor found that MBC investigators generate new complaints based on their own investigation in at least seven scenarios, including the following: "(1) [the Central Complaint Unit] or a district office investigator in investigating a case against Dr. X, obtains medical records and — based on the records — realizes that Dr. Y is equally or more culpable, and initiates a complaint against Dr. Y; [and] (2) when an investigator is looking into a case, she will often run a "Civil Index" check (a check on all civil malpractice actions filed against the subject physician) and may find additional victims of the subject physician who have not filed a complaint with MBC, whereupon the investigator will initiate a new complaint against the physician."[80] These are longstanding MBC investigative techniques that have proven effective in detecting physicians who have injured patients — which

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[79] *See* Section IV, *supra*; Cal. Bus. & Prof. Code § 2220(a) ("the board shall have ***all*** the powers granted in this chapter ... including but not limited to ... [i]nvestigating complaints from the public, from other licensees, from health care facilities, or ***from the board*** that a physician and surgeon may be guilty of unprofessional conduct") (emphasis added).

[80] *Initial Report, supra* note 36, at 93 (five additional examples omitted).

is the Board's job, and this Court should not unnecessarily infringe on that authority. *Amicus* thus respectfully contends that it is not appropriate to impose requirements that may impede such regulatory investigations, or to interpose the substitute judgment of judicial officials who may not be fully informed and expert in the dangers extant.

As this Court recognized in *Arnett*, "[in] recent years the Legislature has provided the Board with tools of increasing power and sophistication to assist it" in its "duty to protect the public against incompetent, impaired, or negligent physicians."[81] The CURES system is just such a tool. It has been established to "assist ... law enforcement and regulatory agencies in their efforts to control the diversion and resultant abuse of Schedule II, Schedule III, and Schedule IV controlled substances...."[82] The CURES statute does not require MBC to secure a warrant or subpoena, or to present a showing of "good cause" or "no less restrictive alternative." The Legislature knows how to structure a warrant requirement when it wants to, and its decision not to warrants some deference. Equally, the decision of an executive branch agency on how best to investigate complex complaints against its licensees warrants some respect. These are the kinds of decisions that — barring a bright-line transgression emanating from improper motive — are properly left to the regulatory agency charged with the momentous task of public protection.

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[81] *Arnett*, 14 Cal. 4th at 7.

[82] Cal. Health and Safety Code § 11165(a).

VII. THE APPELLATE COURT PROPERLY REJECTED PETITIONER'S FOURTH AMENDMENT CLAIM

Finally, the Fourth Amendment to the U.S. Constitution does not preclude MBC from conducting CURES searches when investigating its licensees. Even assuming Dr. Lewis's attempt to vicariously assert his patients' Fourth Amendment rights is legally sound,[83] as an agency overseeing the highly regulated medical profession, MBC may properly conduct warrantless administrative searches.[84] Here, as set forth in detail above, CURES searches of MBC licensees (1) further a substantial government interest in preventing the abuse and diversion of controlled substances and protecting the public from dangerous physicians who are overprescribing such substances; (2) are necessary to further the MBC's regulatory scheme and public protection mandate; and (3) and are conducted pursuant to a statutorily defined scope sufficient to limit excessive discretion by state inspectors and clear notice that inspections may occur.[85] Dr. Lewis' contention that the Court should disregard MBC's administrative search powers, and find MBC's searches *per se* unconstitutional must be soundly rejected.

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[83]*See Rakas v. Illinois*, 439 U.S. 128, 133-34 (1978) ("Fourth Amendment rights are personal rights which, like some other constitutional rights, may not be vicariously asserted.") (citations omitted); *In re Lance W.*, 37 Cal.3d 873, 890 (1985) (holding Cal. Const., art. I, § 28, subd. (d), abrogated the judicially-created "vicarious exclusionary rule," under which a defendant had standing to object to the introduction of evidence seized in violation of the rights of a third person).

[84]*New York v. Burger*, 482 U.S. 691 (1987). *See also* Thomas A. Papageorge and Robert C. Fellmeth, CALIFORNIA WHITE COLLAR CRIME AND BUSINESS LITIGATION (4th edition, Tower Publishing, 2013) at § 15.3, p. 892-94.

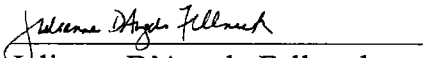
[85] *Id.*

VIII. CONCLUSION

In order to preserve the Medical Board of California's public protection mandate, and maintain its ability to detect and discipline its licensees who are contributing to the prescription drug abuse epidemic, *amicus* the Center for Public Interest Law respectfully urges this Honorable Court to affirm the decision below of the Second District Court of Appeal.

DATED: July 17, 2015 Respectfully submitted,

CENTER FOR PUBLIC INTEREST LAW
ROBERT C. FELLMETH
JULIANNE D'ANGELO FELLMETH
BRIDGET FOGARTY GRAMME

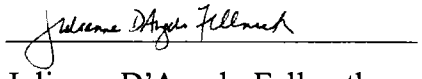
By: 
Julianne D'Angelo Fellmeth
Attorneys for *Amicus Curiae*
CENTER FOR PUBLIC INTEREST LAW

CERTIFICATE OF WORD COUNT PURSUANT TO RULE 8.520

The text of *Amicus Curiae*'s Brief consists of 7,925 words as counted by the Corel WordPerfect program used to generate this brief.

Dated: July 17, 2015

Respectfully submitted,

By: 

Julianne D'Angelo Fellmeth
Attorney for *Amicus Curiae*
CENTER FOR PUBLIC INTEREST LAW

PROOF OF SERVICE BY MAIL

I, Bridget Fogarty Gramme, declare under penalty of perjury under the laws of the State of California that the following is true and correct:

I am employed in the County of San Diego, State of California. I am over the age of 18 years and not a party to the within action. My business address is 5998 Alcalá Park, San Diego, CA 92110. On July 17, 2015, I served the following document:

BRIEF OF AMICUS CURIAE CENTER FOR PUBLIC INTEREST LAW IN SUPPORT OF RESPONDENT MEDICAL BOARD OF CALIFORNIA

on the parties in this action by placing a true copy thereof, enclosed in a sealed envelope, in the United States Mail at San Diego, CA, addressed as follows:

Henry R. Fenton Dennis E. Lee Benjamin J. Fenton FENTON LAW GROUP LLP 1990 South Bundy Drive, Suite 777 Los Angeles, California 90025 *Attorneys for Petitioner, Alwin Carl Lewis*	Edward Kyo Soo Kim OFFICE OF THE ATTORNEY GENERAL 300 South Spring Street, Suite 1702 Los Angeles, California 90013 *Counsel for Real Party in Interest, Medical Board of California*
Office of the Clerk CALIFORNIA COURT OF APPEAL Second Appellate District, Division Three Ronald Reagan State Building 300 South Spring Street, Second Floor Los Angeles, California 90013	Clerk for Hon. Joanne B. O'Donnell SUPERIOR COURT OF CALIFORNIA County of Los Angeles Stanley Mosk Courthouse 111 North Hill Street Los Angeles, California 90012 *Trial Court Judge*

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on July 17, 2105 at San Diego, California.

Bridget Fogarty Gramme

S219811

PROOF OF SERVICE BY MAIL

I, Bridget Fogarty Gramme, declare under penalty of perjury under the laws of the State of California that the following is true and correct:

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Bridget Fogarty Gramme

Bridget Fogarty Gramme

RECEIVED

JUL 21 2015

CLERK SUPREME COURT