S219811

IN THE SUPREME COURT OF THE

STATE OF CALIFORNIA

ALWIN CARL LEWIS
Petitioner,
v.

SUPERIOR COURT OF LOS ANGELES COUNTY
Respondent;

MEDICAL BOARD OF CALIFORNIA
Real Party in Interest.

ON REVIEW FROM THE COURT OF APPEAL
FOR THE SECOND APPELLATE DISTRICT, DIVISION THREE, NO. B252032
AFTER AN APPEAL FROM THE SUPERIOR COURT OF LOS ANGELES COUNTY
HONORABLE JOANNE B. O'DONNELL., NO. BS139289

APPLICATION FOR LEAVE TO FILE *AMICUS* BRIEF AND *AMICUS* BRIEF OF *AMICI CURIAE* THE AMERICAN CIVIL LIBERTIES UNION ("ACLU") OF SOUTHERN CALIFORNIA, ACLU OF NORTHERN CALIFORNIA, AND ACLU OF SAN DIEGO AND IMPERIAL COUNTIES IN SUPPORT OF PETITIONER

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APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF

Pursuant to California Rule of Court 8.520(f), Proposed *Amici*,[1] the American Civil Liberties Union ("ACLU") of Southern California, the ACLU of Northern California, and the ACLU of San Diego & Imperial Counties (collectively "California ACLU affiliates") hereby respectfully apply to this Court for leave to file the accompanying Brief of Amicus Curiae in Support of Petitioner Alwin Carl Lewis in the above-captioned case.

Proposed Amici are the California affiliates of the American Civil Liberties Union ("ACLU"), a national nonprofit, nonpartisan civil liberties organization with more than 500,000 members and supporters dedicated to the principles of liberty and equality embodied in both the United States and California constitutions and our nations' civil rights laws. Since their founding, both the national ACLU and California ACLU affiliates have had an abiding interest in the promotion of those guarantees of liberty and individual rights, including the freedom from unreasonable searches guaranteed by the Fourth Amendment to the United States Constitution and by Article I, section 13 of the California Constitution, as well as the right to privacy safeguarded implicitly by those provisions and explicitly by Article I, section 1 of the California Constitution. The ACLU also has been

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[1] No party or counsel for a party in the pending appeal authored the proposed amicus brief in whole or in part; or made a monetary contribution intended to fund the preparation or submission of the brief. No person made a monetary contribution intended to fund the preparation or submission of the proposed brief, other than the proposed amici curiae, its members, or its counsel. (*See* Cal. R. Court 8.520(f)(4).)

committed to combating abuse of discretion in law enforcement, including through discriminatory exercise of authority.

The California ACLU affiliates have been involved in numerous cases regarding the appropriate scope of law enforcement authority to conduct searches in different circumstances and their collection and use of sensitive information without a warrant.

For example, the California ACLU affiliates have represented parties in litigation challenging law enforcement and government access to medical information in *Haskell v. Harris* (9th Cir. 2014) 745 F.3d 1269 (en banc) (challenge to California statute requiring all felony arrestees to provide DNA samples), and *Patient Zero v. Cal. Div. of Occupational Safety and Health* (*"CalOSHA"*), No. RG09463124 (Alameda Sup. Ct. 2011) (successfully challenging CalOSHA's subpoena for medical records of adult film performer following that performer's positive HIV test), and have filed amicus briefs in several such cases, including *People v. Buza* (2014) 231 Cal. App. 4th 1446 *review granted and opinion superseded,* 342 P.3d 415 (Cal. 2015))regarding constitutionality of requiring arrestees to provide DNA samples); and *United States v. Pool* (9th Circ. 2010) 621 F.3d 1213 (same). The California ACLU affiliates have also litigated cases involving the protection for medical privacy under the California Constitution in other contexts as well. (*See Am. Academy of Pediatrics v. Lungren* (1997) 16 Cal.4th 307 (statute requiring pregnant minors to secure parental consent or judicial authorization before obtaining abortion violated state constitutional right of privacy); *Committee to Defend Reproductive Rights v. Myers* (1981) 29 Cal.3d 252 (exclusion of public funds to pay for elective abortions violated right under Article 1, section 1 to choose whether or not to procreate).)

The ACLU has also challenged the use of government databases in various contexts, including the cataloging of civilian's supposedly suspicious activity in *Gill v. Department of Justice*, No. 3:14-cv-03120-RS (N.D. Cal.), and seeking information on expansion of license plate readers used to accumulate drivers' location data, (*see Am. Civil Liberties Union Found. of S. Cal. v. Super. Ct.* (2015) 236 Cal. App. 4th 673 [addressing whether data from license plate readers is disclosable under the Public Records Act].) The ACLU has also challenged more traditional searches in a wide variety of contexts. (*See, e.g., Gordon v. City of Moreno Valley* (C.D. Cal. 2009) 687 F. Supp. 2d 930 [suit over warrantless raid-style searches of African American-run barbershops ostensibly pursuant to administrative health inspections by state Department of Consumer Affairs]; *Fazaga v. FBI* (C.D. Cal. 2012) 884 F. Supp. 2d 1022 [challenge to the FBI's surveillance of mosques in Orange County]; *K.L. v. City of Glendale*, No. CV-110848 (C.D. Cal.filed Oct. 17, 2011) [challenge to detention and interview of Latino youth on school campus as racial profiling and unreasonable searches]; *Fitzgerald v. City of Los Angeles* (C.D. Cal. 2007) 485 F. Supp. 2d 1137 [suit targeting unlawful searches and detentions in Skid Row area of Los Angeles]; and *United States v. City of Los Angeles* (C.D. Cal. Jan. 4, 2001) 2001 U.S. Dist. LEXIS 26968 [representing community intervenors in consent decree brought by United States Department of Justice, which addressed in part issues around searches].)

The California ACLU affiliates have also sponsored legislative efforts to limit law enforcement access to records, such as California's Electronic Communications Privacy Act, Senate Bill 178 (2015), recently signed into law by Governor Brown, which prevents police from obtaining

information about users from online businesses and service providers without a warrant. (*See* Kim Zetter, *California Now Has the Nation's Best Digital Privacy Law,* WIRED (Oct. 8, 2015) available at *http://www.wired.com/2015/10/california-now-nations-best-digital-privacy-law/* (last visited Oct. 19, 2015).) Amici have also sponsored legislation to protect medical privacy, including the California Health Information Privacy Act, Senate Bill 138 (2013), which protects the medical privacy of individuals who obtain sensitive health services through another person's health insurance plan.

Because this case concerns important questions regarding the scope of law enforcement search authority, individuals' rights to privacy in sensitive medical records and right to be free from unreasonable searches, proper resolution of the matter is of significant concern to Proposed *Amici* and their members.

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Because of the California ACLU affiliates' long-standing commitment to these issues, they have developed experience in the legal issues surrounding both privacy and police authority to conduct searches. The attached proposed amicus brief both addresses legal issues and sets forth the expected impact of the rule endorsed by the Court of Appeal. Proposed *Amici* believe their experience in these issues will make this brief of service to the Court.

DATED: October 22, 2015

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INTRODUCTION

Amici curiae the American Civil Liberties Union ("ACLU") of Southern California, the ACLU of Northern California, and the ACLU of San Diego and Imperial Counties (collectively, "*Amici*") write in support of Petitioner, Dr. Alwin Lewis, to highlight the significant patient privacy concerns implicated by this case. If upheld, the Court of Appeal's decision will strip California patients of critical rights under both the federal and California Constitutions to protect their confidential medical records from warrantless government search, and will turn California into an outlier whose residents are vulnerable to government officials rummaging through

their medical records in a way that has been prohibited by jurisdictions around the country.

Real Party in Interest, the Medical Board of California (the "Medical Board"), seeks unprecedented power to access the private medical information stored on the state's Controlled Substances Utilization Review and Evaluation System ("CURES") database whenever it feels like it—without a warrant, prior judicial review, or oversight of any kind. This type of unchecked surveillance is directly contrary to patients' rights under the Fourth Amendment of the United States Constitution, which forbids access to private prescription records without a warrant, and violates patients' right to privacy under both federal law and Article I, section 1 of the California Constitution. Indeed, it is hard to imagine data that is more sensitive, private, and protected than medical information, including information concerning the types of substances which one is prescribed.

In finding that the Medical Board's warrantless search of patient prescription records was constitutional, the Court of Appeals misconstrued established law and uncritically accepted the false choice presented by the Medical Board between patient privacy and public health. Contrary to the Medical Board's unsupported assertion, compliance with the state and federal Constitutions will not jeopardize public health. As courts and legislatures across the country have found, requiring prior judicial review for searches of prescription data is not only mandated by law, but is good policy. *Amici* respectfully request that the Court of Appeals decision be reversed.

BACKGROUND

A. The CURES Database

California Health and Safety Code § 11165 ("Section 11165") requires that every prescription of a Schedule II, III, or IV controlled substance be logged with the state in the CURES database, along with information about the patient to whom the prescription was provided. Specifically, the statute requires any dispenser of Schedule II–IV drugs to upload the following information to CURES, among other things: (1) the full name, address, and telephone number of the patient; (2) the patient's gender; (3) the patient's date of birth; (4) the National Drug Code ("NDC") number of the medication dispensed; (5) the quantity of the medication dispensed; (6) the number of refills ordered; (7) whether the prescription was dispensed as a refill or first-time request; (8) the date of origin of the prescription; (9) the date of dispensing of the prescription. (Health & Safety Code § 11165(d)(1).) Section 11165 provides access to all information in the CURES database to any "appropriate state, local, and federal public agencies for disciplinary, civil, or criminal purposes and to other agencies or entities, as determined by the Department of Justice, for the purpose of educating practitioners in lieu of disciplinary, civil, or investigative matters." (*Id.* at § 11165(c)(2).)

B. Sensitive Medical Conditions Revealed by the Information in the CURES Database

Schedule II–IV drugs, which are tracked on CURES, include a number of frequently prescribed medications used to treat a wide range of serious medical conditions, including nausea and weight loss in cancer patients undergoing chemotherapy, weight loss associated with AIDS, anxiety disorders, panic disorders, post-traumatic stress disorder, alcohol

addiction withdrawal symptoms, opioid addiction, testosterone deficiency, gender identity disorder/gender dysphoria, chronic and acute pain, seizure disorders, narcolepsy, insomnia, and attention deficit hyperactivity disorder. (*See* Office of Diversion Control, Drug Enforcement Administration, *Controlled Substances by CSA Schedule* (May 28, 2013), available at http://www.deadiversion.usdoj.gov/schedules/orangebook/e_cs_sched.pdf; *see also Physican's Desk Reference*, available at www.pdr.net.)

Table I lists selected schedule II–IV medications used to treat these medical conditions, according to the *Physician's Desk Reference*, *supra.*

TABLE 1 **Medical Condition**	**Schedule II–IV Medications Approved for Treatment of Condition**
Hormone replacement therapy for treatment of gender identity disorder/gender dysphoria	testosterone
Weight loss associated with AIDS	Marinol (dronabinol), Cesamet (nabilone)
Nausea & vomiting in cancer patients undergoing chemotherapy	Marinol (dronabinol), Cesamet (nabilone)
Trauma- and stressor-related disorders, including acute stress disorder and post-traumatic stress disorder (PTSD)	Xanax, Valium, Ativan, Lexotan, Librium, Traxene, Sepazon, Serax, Centrax, nordiazepam
Anxiety disorders and other disorders with symptoms of panic	Xanax, Valium, Ativan, Lexotan, Librium, Traxene, Sepazon, Serax, Centrax, nordiazepam
Alcohol addiction withdrawal symptoms	Serax/Serenid-D, Librium (chlordiazepoxide)
Opioid addiction treatment	Suboxone (buprenorphine), methadone
Attention deficit hyperactivity disorder	Ritalin, Adderol, Vyvanse
Obesity (weight loss drugs)	Didrex, Voranil, Tenuate, mazindol

Chronic or acute pain	narcotic painkillers, such as codeine (including Tylenol with codeine), hydrocodone, Demerol, morphine, Vicodin, oxycodone (including Oxycontin and Percocet)
Epilepsy and seizure disorders	Nembutal (pentobarbital), Seconal (secobarbital), Versed, clobazam, clonazepam
Testosterone deficiency in men	Maxibolin, Orabolin, Durabolin, Duraboral (ethylestrenol)
Delayed puberty in boys	Anadroid-F, Halotestin, Ora-Testryl
Narcolepsy	Xyrem, Provigil
Insomnia	Ambien, Lunesta, Sonata, Restoril, Halcion, Doral, Ativan, ProSom, Versed
Migraines	Stadol (butorphanol)

Because many of these drugs are approved only for treatment of specific medical conditions, a prescription for a schedule II–IV drug will often reveal a patient's underlying diagnosis.

C. The Medical Board's Routine, Warrantless Searches of CURES

The Medical Board is one of several state agencies with access to CURES. (*Id.* at § 11165(c)(2).) The Medical Board acts as the disciplinary and criminal enforcement arm of the state with respect to proceedings against doctors for alleged violations of the Medical Practice Act. (*See* Bus. & Prof. Code § 2004(a); *see also Arnett v. Dal Cielo* (1996) 14 Cal. 4th 4, 8 ["The Board's investigators have the status of peace officers."]. Section 11165 contemplates that the Medical Board will share CURES information with other state agencies, including other criminal and law enforcement entities. (*See* Health & Safety Code § 11165(c)(2).)

Recognizing the inherently private and sensitive nature of the information tracked in CURES, Section 11165 mandates that the use and operation of the database "comply with all applicable federal and state privacy laws and regulations." (Health & Safety Code § 11165(c)(1).) However, the statute provides no penalties for violating patient privacy and offers no details on the mechanisms that must be imposed to ensure compliance with state and federal privacy laws, including the Fourth Amendment of the United States Constitution and Article I, section 1 of the California Constitution. The Medical Board has admitted that it routinely searches years' worth of a physician's prescribing history during an investigation, without a warrant or even a particularized reason to believe the physician is wrongly prescribing medications. (*See Lewis v. Superior Court* (2014) 226 Cal. App. 4th 933, 939 ["*Lewis*"] [citing statement of Medical Board investigator that it "was a common practice during the course of an investigation to 'run' a CURES report on the physician."].)

One such unwarranted search was conducted in this case when the Medical Board—without a warrant or subpoena—searched the prescription records of every patient treated by Dr. Alwin Lewis during a period of more than three years. (*Id.*) The report that the Medical Board received as a result of its warrantless search of Dr. Lewis's patients totaled more than 200 pages. (Appellant's Opening Brief at 8.) The Medical Board searched Dr. Lewis's patients' prescription records despite not having any grounds to believe that Dr. Lewis had committed misconduct with respect to his prescribing practices. The sole reason for the Medical Board's investigation was a complaint from a single patient, VC, that Dr. Lewis had informed her that she needed to lose weight and recommended a diet that she claimed was unhealthy. (*See Lewis*, *supra*, 226 Cal. App. 4th at p.

938.) The Medical Board ultimately determined that VC's claim lacked merit and that Dr. Lewis's medical examination of her met the standard of care. (Appellant's Opening Brief at 7.)

Despite this finding, the Medical Board proceeded to impose discipline on Dr. Lewis for failing to maintain adequate prescription records. The sole factual basis for the discipline imposed was information the Board learned from its warrantless search and review of the over 200 pages of CURES data it gathered. Dr. Lewis was disciplined for failing to maintain adequate prescription records with respect to patient VC as well as five other patients who had not complained about Dr. Lewis and had no idea that their medical records had been searched. (*See id.* at 8; *Lewis*, *supra*, 226 Cal. App. 4th at p. 939.)

SUMMARY OF ARGUMENT

The Medical Board's warrantless search of Dr. Lewis's patients' prescription records violates patients' rights under both the United States and California Constitutions. Because the hundreds of patients whose sensitive medical data was scrutinized by the Medical Board without a warrant received no notice of the search, these patients must rely on Dr. Lewis to assert their rights, which Dr. Lewis has standing to do under the law. The Medical Board's argument to the contrary has no basis in law and is tantamount to a request that unconstitutional searches be immunized from judicial review whenever the searches are conducted behind their subjects' backs. *Amici* urge that it be rejected.

The Court of Appeal's decision is equally flawed on the merits. In rejecting Dr. Lewis's challenge based on his patients' Fourth Amendment rights, the Court of Appeal misapplied old case law and incorrectly concluded that the Fourth Amendment did not preclude the Medical

Board's search. Binding authority, however, including a United States Supreme Court case decided after the Court of Appeals issued its opinion, establishes that the Fourth Amendment applies, and that it was violated by the Medical Board's warrantless search. In addition, the Medical Board violated patients' right to privacy under both the federal Constitution and Article I, section 1 of the California Constitution, as their suspicionless CURES search involved a serious invasion of patients' reasonable expectation that their private medical data will not be scrutinized by government officials without a warrant.

Finally, there is no merit to the Medical Board's alarmist suggestion that enforcing patients' federal and California constitutional rights will jeopardize public health. To the contrary, requiring a warrant or constitutionally adequate substitute for CURES searches will bring California in line with the majority of the jurisdictions to have considered the issue, all of which have upheld constitutional rights while safeguarding patient health.

ARGUMENT

I. THE COURT SHOULD REJECT THE MEDICAL BOARD'S ATTEMPT TO INSULATE ITS UNCONSTITUTIONAL ACTIONS FROM REVIEW BY ARGUING THAT DR. LEWIS LACKS STANDING TO RAISE HIS PATIENTS' RIGHTS

The Medical Board seeks an end-run around the protections of the United States and California Constitutions by arguing that Dr. Lewis lacks standing to raise his patients' rights. *Amici* urge the Court to reject this dangerous proposition, which is not supported by law. Given that the patients whose records were reviewed were not informed of, let alone given an opportunity to object to, the warrantless search of their information—

and, under the Medical Board's view, they never would be—acceptance of the Medical Board's argument would effectively exempt state agencies from compliance with the Constitution whenever searches are conducted in secret. The Court should reject the Medical Board's attempt to immunize its actions from review and hold, consistent with the applicable law, that Dr. Lewis has standing to raise his patients' Fourth Amendment and informational privacy rights.

A. Without Notice of the Search, Dr. Lewis's Patients Necessarily Rely on Dr. Lewis to Assert Their Fourth Amendment Rights

Where, as here, patients are not informed of or are otherwise unable to contest a state agency's actions, courts repeatedly have held that physicians are in the best position to assert the patients' rights, and have granted standing to the physicians to do so. (*See, e.g.*, *In re Search Warrant (Sealed)* (3rd Circ. 1987) 810 F.2d 67, 70 ["*In re Search Warrant*"] [collecting cases and noting that, as the only party with notice of the search, the physician is best suited to raise the issue]; *Sterner v. U.S. Drug Enforcement Agency* (S.D. Cal. 2006) 467 F. Supp. 2d 1017, 1026 ["Sterner"] [granting physician standing]; *In Re Subpoenas Duces Tecum* (W.D. Va. 1999) 51 F. Supp. 2d 726, 738 & fn.6, aff'd 228 F.3d 341 (4th Cir. 2000); *see also Sec'y of State of Md. v. Joseph H. Munson Co.* (1984) 467 U.S. 947, 956 ["Where practical obstacles prevent a party from asserting rights on behalf of itself," a third party who "can reasonably be expected properly to frame the issues and present them with the necessary adversarial zeal" may raise the claim]; *United States v. Westinghouse Elec. Corp.* (3d Cir. 1980) 638 F.2d 570, 574 ["As a practical matter, the absence of any notice . . . of the subpoena means that no person other than

[the petitioner] would be likely to raise the privacy claim. Indeed, this claim may be effectively lost if we do not hear it now."]; *Fair Employment Council of Greater Wash., Inc. v. BMC Marketing Corp.* (D.C. Cir. 1994) 28 F.3d 1268, 1280–81 ["[T]he Court has allowed litigants to assert third parties' rights in challenging restrictions that do not operate directly on the litigants themselves, but that nonetheless allegedly disrupt a special relationship—protected by the rights in question—between the litigants and the third parties."].) In arguing to the contrary, the Medical Board ignores this case law and instead attempts to rely on inapposite cases decided on facts that bear little resemblance to the facts here.

Each of the cases the Board cites—*Rakas v. Illinois* (1978) 439 U.S. 128 ["*Rakas*"], *People v. Bryant* (2014) 60 Cal.4th 335, 365 ["*Bryant*"], and *People v. Ayala* (2000) 23 Cal. 4th 225, 255 ["*Ayala*"]—dealt with physical searches of automobiles or premises, where the owners of the automobiles and premises were aware of the search. (*Rakas*, *supra*, 439 U.S. at p. 128 [search of automobile while owner present], *Bryant*, *supra*, 60 Cal. 4th at p. 365 [search of co-defendant's residence]; *Ayala*, *supra*, 23 Cal. 4th at p. 255 [search of automobile body shop].)[2] By contrast, here, the vast majority of the patients whose prescription records were searched without a warrant remain unaware, even today, of the Board's actions.

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[2] Furthermore, searches of digital information cannot be neatly analogized to searches of physical premises, where it is possible to ascertain a specific "owner" of the property being searched. Here, both Dr. Lewis and his patients have an "ownership" claim in these records, and neither party can vitiate the other's reasonable expectation of privacy. (*Cf. Tucson Woman's Clinic v. Eden* (9th Circ. 2004) 379 F.3d 531, 550 ["*Tucson Woman's Clinic*"] [noting that the "provision of medical services . . . carries with it a high expectation of privacy for *both physician and patient*."] [emphasis added].)

These patients thus cannot assert their rights even if they want to do so, and they are therefore required to rely on Dr. Lewis.[3] (*See Caplin v. Drysdale, Chartered v. United States* (1989) 491 U.S. 617, 623 fn. 3 [when assessing a party's ability to sue on someone else's behalf, courts consider, among other factors, the "ability of the person to advance his own rights"].) This is a critical distinguishing factor from each of the cases on which the Board attempts to rely.

Established law entitles patients to a Court ruling obligating the Medical Board to respect their Fourth Amendment rights, and the Court should reject the Medical Board's attempt to deprive patients of these protections by raising dubious standing arguments.[4] (*Cf. In re Search Warrant, supra*, 810 F.2d at p. 70 [affirming physician's right to raise patients' rights and holding that "if the patients' rights to privacy have been breached, relief must be immediately granted," on interlocutory appeal].)

B. Established Law Supports Dr. Lewis's Right to Raise His Patients' Privacy Rights

Dr. Lewis equally is entitled to assert his patients' right to privacy under the United States and California Constitutions. A long line of cases grant physicians this right, and there is no basis to distinguish this case from these well-established and consistent precedents. (*See, e.g., Griswold*

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[3] The Medical Board incorrectly argues that the fact that five patients whose full medical records subsequently were subpoenaed did not object to the subpoenas establishes that Dr. Lewis's patients do not object to the warrantless CURES search of their medical information. (Medical Board Brief at 36, fn. 11.) These five patients, however, have no authority to waive the Fourth Amendment and state constitutional rights of the hundreds of other patients whose confidential prescription records were searched.

[4] Patients are entitled to such a ruling regardless of whether the Court ultimately decides to suppress the evidence in any proceeding against Lewis.

v. Connecticut (1965) 381 U.S. 479, 480-81 ["*Griswold*"]; *Am. Academy of Pediatrics v. Lungren* (1997) 16 Cal.4th 307, 322, fn. 8, 332 ["*Lungren*"]; *In re Search Warrant, supra*, 810 F.2d at p. 71; *Sterner, supra*, 467 F. Supp. 2d at p. 1026; *In re Subpoenas Duces Tecum* (W.D. Va. 1999) 51 F. Supp. 2d 726, 738 & fn. 6, aff'd 228 F.3d 341 (4th Cir. 2000); *Pagano v. Oroville Hosp.* (E.D. Cal. 1993) 145 F.R.D. 683, 696 ["Physicians, as custodians of their patients' medical records, also have the duty to assert the privacy rights of their patients."].)

The Medical Board argues that an exception should be made to the applicable case law here because (1) Dr. Lewis purportedly "does not suggest that the board's ability to obtain CURES data interferes with or adversely affects his patients' ability to receive medical services," and (2) according to the Medical Board, the interests of Dr. Lewis and his patients' interests are not "necessarily aligned." (Medical Board's Brief at 17.) The Medical Board's arguments fail as a matter of fact and law.

First, with respect to the Medical Board's inaccurate contention that warrantless CURES searches do not affect patient medical care, permitting warrantless rummaging through private prescription data by an unbounded number of government officials undoubtedly risks exerting a chilling effect on patients' willingness to seek treatment for sensitive conditions—*i.e.* those identified in Table I, where prescription data alone reveals the nature of the patient's condition.[5] (*See Urbaniak v. Newton* (1st Dist. 1991) 226

[5] The Medical Board does not even attempt to explain how it could be otherwise, or cite any evidence in support of its position. Rather, the only authority that the Medical Board cites is an inapposite portion of *Whalen v. Roe* (1977) 429 U.S. 589 ["*Whalen*"], a case where the Supreme Court found insufficient evidence to conclude that the mere *collection* of prescription information into a centralized database stored offline would discourage patients from seeking treatment.

Cal. App. 3d 1128, 1139 ["*Urbaniak*"] ["The significance of the patient's reasonable expectations in this context lies in the public interest in encouraging confidential communications within a proper professional framework."].) Confidentiality in prescription records "will both encourage free communication needed for an effective professional relationship and protect the relationship from abuse." (*Id.*)

Moreover, even if the patients do not actually forgo seeking treatment, the experience of receiving medical care necessarily is adversely affected by a regime like the one the Medical Board supports, where submitting to arbitrary searches of private prescription information is deemed a compulsory cost of receiving medical care. (*Cf. In re Application of U.S. for an Order Directing a Provider of Electronic Communication Service to Disclose Records* (3d Cir. 2010) 620 F.3d 304, 317 [no meaningful choice when consumers are forced to share data, particularly where they may not even be aware that their data is collected]; *Commonwealth v. Augustine* (Mass. 2014) 4 N.E.3d 846 [same conclusion in the context of cell site location information]; *United States v. Graham* (4th Cir. 2015) 796 F.3d 332 [same]; *Tracey v. State* (Fla. 2014) 152 So.3d 504 [same].)

Second, contrary to the Medical Board's supposition, Dr. Lewis's interests are aligned with his patients' on the only issue that matters in this

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(Medical Board's Brief at 17 (citing *Whalen, supra*, 429 U.S. at p. 603).) As noted *infra* in Section II(A), however, the pre-Internet-age case of *Whalen* did not address the impact of warrantless government *searches* of this data and, in fact, the Court expressly distinguished the circumstances before it from those involving "affirmative, unannounced, narrowly focused intrusions into individual privacy" of the type that occur during government investigations like the one conducted here. (*Ibid.*, 429 U.S. at pp. 594, 604, fn. 32.)

appeal: Both seek to prevent warrantless searches of patients' private medical information. No authority supports the Medical Board's claim that they, not Dr. Lewis, are the patients' true protectors, and that Dr. Lewis's interests diverge from his patients simply because the claimed purpose of the search was the regulation of public health. Proponents of the abortion and contraception regulations at issue in *Lungren* and *Griswold* similarly argued that their regulations were designed for public protection. On challenges raised by physicians, however, the regulations at issue in those cases were rejected by this Court and the United States Supreme Court on the grounds that they violated patient privacy. (*See Griswold, supra*, 381 U.S. at pp. 480-81; *Lungren, supra*, 16 Cal.4th at pp. 322, fn. 8, 332; *see also Tucson Woman's Clinic, supra*, 379 F.3d at pp. 536-37 [supporters of overturned law claimed that it was enacted to ensure patient safety in response to highly publicized death of patient who received substandard abortion]; *cf. Ferguson v. City of Charleston* (2001) 532 U.S. 67, 85 ["*Ferguson*"] [fact that a search conducted was conducted with a "benign rather than punitive" motive does "justify a departure from Fourth Amendment protections"].)

Further, the Medical Board cites no evidence or authority in support of its blanket assertion that patients are categorically in favor of allowing government agencies to examine their private medical records so that the state may investigate physicians whenever they feel like it. Nor could they: A patient's position on the necessity of a CURES search will vary from person to person, case to case, and will depend on the breadth and rationale for the proposed search. This is exactly why prior review by a judicial officer, in the form of a warrant or other constitutionally adequate substitute, is so important. Without this kind of check on the Medical

Board's power, there is no way to ensure that the search the Medical Board seeks to conduct is actually necessary, supported by probable cause, and sufficiently narrow to protect patient privacy as much as possible.

Dr. Lewis's interests align perfectly with his patients' on this issue. The Medical Board's standing argument is a red herring.

II. THE COURT OF APPEALS' DECISION SHOULD BE REVERSED ON FOURTH AMENDMENT GROUNDS

The Medical Board's position equally fails on the merits. Warrantless searches of CURES violate both the Fourth Amendment to the United States Constitution and patient privacy rights under the federal and California Constitutions. *Amici* begin with a discussion of the Fourth Amendment implications of the Board's search, as a finding that the Medical Board violated the Fourth Amendment obviates the need to conduct the balancing test required to adjudicate violations of patients' right to privacy.

A. The Fourth Amendment Applies

The Court of Appeals sidestepped a major issue in this case by incorrectly determining that it did not need to evaluate whether the Board's conduct violated the Fourth Amendment. In support of its conclusion, the Court of Appeals relied on the 1977 case of *Whalen v. Roe* (1977), 429 U.S. 589. The Court of Appeals characterized *Whalen* as standing for the proposition that the Fourth Amendment does not apply to the Medical Board's warrantless searches in this case: It held that the *Whalen* court "dismissed claims raised pursuant to the Fourth Amendment" and "declined to extend the Fourth Amendment protections to the informational privacy interest at stake in that case." (*Lewis*, *supra*, 226 Cal. App. 4th at p. 952.) The Court of Appeals therefore distinguished cases in which courts in other

states struck down searches of prescription records obtained without a warrant as a violation of the Fourth Amendment. (*Lewis*, *supra*, 226 Cal. App. 4th at p. 951 [finding *State of Louisiana v. Skinner* (La. 2009) 10 So.3d 1212 which held that prescription records could not be searched without a warrant "not persuasive" in light of *Whalen*]; *id.* at 951, fn. 15 ["The Board points out that access to [CURES by the Board] is not a search from the standpoint of the patients.].)

But *Whalen* does not support the Court of Appeals's position or immunize CURES searches from Fourth Amendment scrutiny. *Whalen*, a pre-Internet-age case, considered a New York statute authorizing the *collection* of prescription data into a central computer file stored "off-line" in a secure office building, and held that this collection of data did not implicate the Fourth Amendment. (*Whalen*, *supra*, 429 U.S. at pp. 594, 604, fn. 32.)[6] In reaching this conclusion, the Court expressly distinguished the facts before it from cases—like this one—involving the warrantless, simultaneous *search* of such data. (*Id.* [noting that the Fourth Amendment is triggered by cases involving "affirmative, unannounced, narrowly focused intrusions into individual privacy" of the type that occur during government investigations].) Even if medical data may be collected

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[6] Evincing the markedly different technology of 1977, when the case was decided, the *Whalen* court noted that the "computer tapes" containing the prescription data at issue were kept in a "locked cabinet" and could not be accessed by any "terminal" outside the physical presence of the "computer room." (*Ibid.* at p. 594; *see also ibid.* at pp. 606-07 (Brennan, J., concurring) ["[A]s . . . the Fourth Amendment shows the Constitution puts limits not only on the type of information the State may gather, but also on the means it may use to gather it. The central storage and easy accessibility of computerized data vastly increase the potential for abuse . . . and I am not prepared to say that future developments will not demonstrate the necessity of some curb on such technology."].)

consistent with the Constitution under *Whalen*, once the government attempts to search the data collected on CURES, the Fourth Amendment is triggered and the state must comply with its protections. (*See, e.g.*, *Ferguson, supra*, 532 U.S. at pp. 68-69 [holding that where parties undertake to obtain information with the specific purpose of gathering evidence for investigation, there is "an affirmative reason for enforcing the Fourth Amendment's strictures"]; *State of Louisiana v. Skinner*, (2009) 10 So. 3d 1212, 1216-18 ["*Skinner*"] [imposing a warrant requirement in order to search prescription records and distinguishing *Whalen* on the grounds that it did not deal "with the issue of whether a warrant is required to conduct an investigatory search of prescription records," but rather only with the permissibility of "regulatory disclosures" to maintain a state database].)

To the extent there was any uncertainty regarding whether *Whalen*, in upholding the pre-Internet-age collection of medical data, should be read to authorize digital searches of such data without a warrant, the recently decided United States Supreme Court case of *City of Los Angeles v. Patel* (2015) 135 S.Ct. 2443 ["*Patel*"], eliminates any doubt. *Patel* makes clear that government searches of private information trigger the protections of the Fourth Amendment, regardless of whether such searches purport to be authorized by a statute permissibly requiring collection of that information. (*Patel, supra*, 135 S. Ct at pp. 2451-53.)

In *Patel*, the Court analyzed a statute that—like CURES—both mandated the collection of data and purported to allow such data to be warrantlessly searched. Specifically, the statute at issue in *Patel* was a Los Angeles city ordinance that required hotel operators to maintain "guest registries" documenting multiple pieces of information about their guests

and also to make the registries available for warrantless searches by the Los Angeles Police Department upon request. (*Patel, supra*, 135 S. Ct. at pp. 2447-48.) While upholding the portion of the statute requiring that the registries be maintained, the Court struck down the portion purporting to authorize warrantless searches of the data as a violation of the Fourth Amendment. (*Ibid.* at pp. 2451. 2454).)[7] The Court held that the search provision did not pass constitutional muster because hotel operators—who were deemed to have a reasonable expectation of privacy in their records—received no opportunity to contest the searches in court before they occurred. (*Id.* [finding the ordinance unconstitutional because "it fails to provide . . . an opportunity for pre-compliance review.]")

Likewise, here, the untold number of Dr. Lewis's patients whose medical prescription records are stored in CURES were given no notice of—let alone opportunity to contest—the warrantless search of their information that the Medical Board conducted in this case. Like the hotel operators in *Patel*, who had a reasonable expectation of privacy in their business records, as discussed *infra* in Section II(B), medical patients have an equal—if not greater—reasonable expectation of privacy in their medical information. The Fourth Amendment thus affords these patients the right to demand that, before their private prescription records are searched by the state, a judicial officer review the state's search request to ensure that it is necessary, supported by probable cause, and sufficiently

[7] As explained in section II(C)(2), *infra*, *Patel*'s holding is applicable regardless of whether pharmacies and physicians—unlike hotels—are closely regulated businesses.

narrowly tailored.[8] (*Ibid.*) The Court of Appeal's contrary conclusion that the Fourth Amendment does not apply is incorrect as a matter of law.

B. Patients Have a Reasonable Expectation of Privacy in Their Medical Prescription Records

A long line of cases hold that warrantless searches are prohibited under the Fourth Amendment whenever the subject of the search has a reasonable expectation of privacy in the item or location at issue. (*Arizona v. Gant* (2009) 556 U.S. 332, 338 ["*Gant*"].) As this Court has held, the Constitution "renders inviolable the individual's reasonable expectation of privacy," and "any [warrantless] governmental intrusion into that privacy is an 'unreasonable search' within the meaning of the Fourth Amendment. . . ." (*Lorenzana v. Superior Court* (1973) 9 Cal.3d 626, 639.)

It is well settled that patients have a right to privacy in their medical records. (*See, e.g., John B. v. Superior Court* (2008) 38 Cal.4th 1177, 1198; *Tucson Woman's Clinic, supra*, 379 F.3d 531 at p. 550 ["[A]ll provision of medical services in private physicians' offices carries with it a high expectation of privacy for both physician and patient."].) Patients

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[8] The fact that the business records at issue in *Patel* were housed by the hotel operators, rather than stored on a government server like CURES, makes the search here no less invasive. In applying the Fourth Amendment's protections to preclude warrantless searches of prescription records, no court has found it relevant that the records were accessed from sources outside the patients' physical control. (*See, e.g., Oregon Prescription Drug Monitoring Program v. U.S. Drug Enforcement Admin.* (D. Or. 2014) 998 F. Supp. 2d 957, 964-65 ["*Oregon PDMP*"] [rejecting DEA's attempt to search Oregon's prescription database without a warrant]; *Skinner, supra*, 10 So.3d at pp. 1217-18 [imposing warrant requirement for the search of prescription records held by pharmacy].) *Med. Bd. of California v. Chiarottino* (2014) 225 Cal. App. 4th 623, 636, which the Medical Board cites, was wrongly decided and, in any event, did not address the Fourth Amendment. Nor could *Chiarottino*'s holding be extended to cover the Fourth Amendment in light of *Patel.*

reasonably expect that, absent consent, a warrant, or exigent circumstances, their medical records will not be shared with anyone other than their treating physicians and medical staff. (*See Ferguson, supra*, 532 U.S. 67 at p. 78 [noting that "the typical patient undergoing diagnostic tests in a hospital [reasonably expects] that the results of those tests will not be shared with nonmedical personnel without her consent."]; *Board of Medical Quality Assurance v. Gherardini* (4th Dist. 1979), 93 Cal. App. 669, 679 ["*Gherardini*"] ["The patient should be able to rest assured with the knowledge that the law recognizes the communication [with a physician] as confidential and guards against the possibility of his feelings being shocked or his reputation tarnished by their subsequent disclosure."].) Indeed, studies show that an overwhelming 93% of patients want to decide which government agencies can access their electronic health records,[9] and 88% oppose letting police see their medical records without permission.[10]

1. There Is No Basis to Distinguish between Prescription Records Stored on CURES and Other Medical Information

The Medical Board's attempt to distinguish prescription records from other types of medical information has no basis in law or fact. As

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[9] Patient Privacy Rights and Zogby International, *2000 Adults' Views on Privacy, Access to Health Information, and Health Information Technology* 4 (2010), http://www.forhealthfreedom.org/Gallupsurvey/IHF-Gallup.pdf; *See also* New London Consulting, Fair Warning, at p. 10 (2011), *available at* <www.fairwarning.com/whitepapers/2011-09-WP-US-PATIENT-SURVEY.pdf> (last visited Oct. 1, 2015) (97.2% of patients believe health-care providers have a responsibility to protect patients' medical records and privacy information).

[10] Institute for Health Freedom & Gallup Organization, Public Attitudes Toward Medical Privacy 9-10 (Sept. 26, 2000).

numerous state and federal courts have found, individuals possess a reasonable expectation of privacy in prescription records, just as they do with other types of medical information. (*See, e.g.*, *Loder v. City of Glendale* (1997) 14 Cal. 4th 846, 894 [drug testing implicated student's interest to informational privacy "insofar as the urinalysis provided the NCAA with personal and confidential information regarding the student's medical condition and the student was required to *disclose the medications that he or she currently was taking*."] (citing *Hill*, 7 Cal. 4th at pp. 40-41) (emphasis added); *Skinner*, *supra*, 10 So.3d at pp. 1217-18 [imposing warrant requirement for the search of prescription records and noting that "[a] majority of the federal Circuit Courts of Appeals have concluded that the constitutional right to privacy extends to medical and/or prescription records"] [collecting cases]; *Oregon PDMP*, 998 F. Supp. 2d at pp. 964-65 [rejecting DEA's attempt to search Oregon's prescription database without a warrant and noting that "[m]edical records, of which prescription records form a not insignificant part, have long been treated with confidentiality]; *Douglas v. Dobbs* (10th Cir. 2005) 419 F.3d 1097, 1102 [finding constitutional right to privacy in prescription drug records]; *King v. State* (Ga. 2000) 535 S.E. 2d 492, 495 ["a patient's medical information, as reflected in the records maintained by his or her medical providers, is certainly a matter which a reasonable person would consider to be private"]; *see also Doe v. Southeastern Pa. Transp. Auth.* (3rd Cir. 1995) 72 F.3d 1133, 1138 ["An individual using prescription drugs has a right to expect that such information will customarily remain private."].) None of these cases support the Medical Board's position that patients enjoy a diminished expectation of privacy in prescription records involving controlled substances.

Nor is there any factual basis to distinguish prescription records from any other information contained in a doctor's file. Many drugs, including controlled substances, are approved only for treatment of specific medical conditions or symptoms. Prescriptions for these medications thus necessarily reveal the doctor's diagnosis and the patients' underlying condition. (*See supra*, Table I [providing illustrative list of controlled substances prescribed for specific medical conditions].)

Likewise, there is no merit to the Medical Board's suggestion that the CURES statute, by itself, diminishes patients' reasonable expectation of privacy by requiring that prescription records be uploaded to the state database. This argument was addressed—and rejected—by the court in *Oregon PDMP*, which held that the mandatory collection of prescription information into Oregon's prescription drug database did not affect patients' reasonable expectation of privacy given the "inherently personal" nature of prescription records as well as the fact that "patients and doctors are not voluntarily conveying [prescription] information to" the database, but rather had been forced to provide it under the law. (*Oregon PDMP*, *supra*, 998 F. Supp. 2d at p. 967; *Cf. also In re Application of U.S. for an Order Directing a Provider of Electronic Communication Service to Disclose Records to Government* (3d Cir. 2010) 620 F.3d 304, 317 [holding that cell phone users retain a reasonable expectation of privacy in their location information because users have not voluntarily shared their information with the cellular provider in any meaningful way.].) The Board's argument seeks a rule that no statutory scheme could ever violate the Fourth Amendment—because no person could have a reasonable expectation of privacy in any subject for which a statutory scheme authorized access, no matter how invasive or unjustified. But the Fourth

Amendment's protections are not so easily displaced. "[A] Fourth Amendment search occurs when the government violates a subjective expectation of privacy that society recognizes as reasonable." (*Kyllo v. United States* (2001) 533 U.S. 27, 33.)

2. The Fact That Patients Were Not the Initial Target of the Medical Board's Investigation Does Not Alter the Analysis

The Medical Board effectively concedes that patients have a reasonable expectation of privacy in their CURES records, acknowledging that patients reasonably expect that their "CURES records will remain confidential." (Medical Board Brief at 20.) The Medical Board nevertheless attempts to justify its search in this case by arguing that, even if a reasonable expectation of privacy generally exists, patients do not have a reasonable expectation that their prescription information will not be accessed by the "Board for purposes of investigating possible physician misconduct," as opposed to for the purpose of investigating the patient directly. (Medical Board Brief at 20.) This slices the matter too thinly. The fact that Dr. Lewis's patients were not under direct investigation by the Medical Board does not diminish their reasonable expectation that state agents, including those from the Medical Board, will not access their medical records without a warrant.

(a) One of the Principal Functions of the Fourth Amendment Is to Protect the Privacy of Persons Not Suspected of Wrongdoing

Citizens who are not the subject of a criminal investigation have an equal—if not greater—right to safeguard their private information from

disclosure to government entities. A desire to hide incriminating information in order to escape prosecution has never been the *sine qua non* for protection under the Fourth Amendment. The Constitution equally protects the patients who expect that their prescription records will be kept confidential in order to prevent disclosure of sensitive medical conditions like cancer, AIDS, anxiety disorders, PTSD, opioid addiction, or gender identity disorder, to name a few, to a large number of government employees. (*See, e.g.*, *In re Search Warrant*, *supra*, 810 F.2d at p. 70 [even where patients are not the subject of investigation, "any privacy interests the patients may have are immediately threatened by the government having obtained such highly sensitive personal information as may be contained in their medical files"]; *Tucson Woman's Clinic*, *supra*, 379 F.3d at pp. 551-52 [privacy rights violated when "an unbounded, large number of government employees have access to [patient medical records]."].)

Indeed, the fact that a CURES search captures the private medical information of innocent third parties underscores why the CURES statute violates the Fourth Amendment and why a warrant requirement and judicial supervision are necessary. The Fourth Amendment does not permit the kind of warrantless exploratory rummaging—for any subject, but particularly as to individuals for whom no probable cause exists—that the CURES statute authorizes government agents to conduct. (*See Maryland v. Garrison* (1987) 480 U.S. 79, 84 ["The manifest purpose of [the] requirement [for a warrant to particularly describe the place to be searched] was to prevent general searches."]; *Patel*, *supra*, 135 S.Ct. at pp. 2452-53 [noting the importance of prior judicial review to prevent "an intolerable risk that searches authorized by it will exceed statutory limits, or be used as a pretext to harass hotel operators and their guests."].) By requiring a

warrant and judicial supervision, the Fourth Amendment assigns judicial officers a critical role in ensuring that all aspects of a search are supported by probable cause and are not overly intrusive. (*See United States v. Spilotro* (9th Cir. 1986) 800 F.2d 959, 963.) Judicial supervision is particularly important with evolving technology, where there is a heightened risk of overly intrusive searches capturing the private information of innocent third parties. (*See United States v. Comprehensive Drug Testing, Inc. (CDT)* (9th Cir. 2010) 621 F.3d 1162, 1176 (en banc).)

(b) **It Is Disingenuous to Suggest That Patients Bear No Risk of Prosecution**

The Medical Board's suggestion that patients bear no risk of being investigated as the result of a warrantless CURES search is unsupported and unrealistic. The results of a CURES search could be incriminating for a patient in a variety of circumstances, including, for example, where a patients' prescription records indicate that a patient was stockpiling prescriptions for black-market sale; or a patient is prescribed methadone or another substance that is primarily used to treat addiction and thus indicates the use of illegal drugs. As the Medical Board itself acknowledges, the relevant laws explicitly authorize various governmental and law enforcement agencies with access to CURES to share information with one another for the purpose of investigating criminal activity, without limitation as to who may be prosecuted. (Medical Board Brief at 24, 31; *see also* Health and Safety Code § 11165(c)(2) [directing that "data obtained from CURES . . . [may] be provided to appropriate state, local, and federal public agencies for disciplinary, civil, or criminal purposes."].)

Accordingly, even if the Medical Board claims to have initially searched patient records for the purpose of investigating a doctor, there is

nothing to stop the Board from turning over these records to an entity with the power to prosecute the patient. Examples from around the country indicate that law enforcement agencies regularly attempt to use information obtained from prescription drug databases as evidence against patients. (*See, e.g.*, *Tucker v. City of Florence, Ala.*, (N.D. Ala. 2011) 765 F. Supp. 2d 1320, 1328 [agent with county drug task force requested from the Alabama Prescription Drug Monitoring Program "records of all prescriptions for controlled substances that [a specific patient] had filled between January 1, 2006 and November 30, 2007"]; *United States v. George*, (E.D. Va. Apr. 26, 2010) No. 1:09cr431 (JCC), 2010 WL 1740814, at *2 [federal prosecution of patient for reselling controlled substance pills obtained through "doctor shopping," based partly on records from Virginia Prescription Monitoring Program]; *United States v. Ilayayev*, (E.D.N.Y. 2011) 800 F. Supp. 2d 417, 423–24 [federal prosecution of patient investigated by DEA for obtaining simultaneous oxycodone prescriptions from multiple doctors due to drug addiction]; *State of Utah v. Ryan Douglas Pyle*, Case No. 131910379, State of Utah, Salt Lake County District Court – Third District (2014) [prosecution for prescription fraud resulting from Utah police officer's warrantless search of state prescription drug database].) The risk of such use strikes at the heart of patients' reasonable expectation that their private medical records will not be searched absent a warrant or probable cause.

C. The State Violated the Fourth Amendment by Searching the Medical Prescription Records without a Warrant or Constitutionally Adequate Substitute

As there is no question that the Medical Board did not have a warrant to search Dr. Lewis's patients' private data, the Medical Board's

search is presumptively unconstitutional. (*Gant, supra*, 556 U.S. at p. 338.) Nor does any exception to the warrant requirement justify the Medical Board's actions.

1. The Administrative Search Doctrine Does Not Justify the Warrantless Search

The classic exceptions to the warrant requirement—*e.g.*, exigent circumstances, search incident to arrest—plainly do not apply here. Indeed, the Medical Board does not attempt to rely on those exceptions. Instead, the Medical Board contends that its search may be justified pursuant to the administrative search doctrine. *Patel*, however, as well as the cases cited therein, dispose of the Medical Board's argument.

The administrative search doctrine arises where the "primary purpose" of the search is "distinguishable from the general interest in crime control." (*Patel, supra*, 135 S. Ct. at p. 2452 (quoting *Indianapolis v. Edmond* (2000) 531 U.S. 332, 44).) Even assuming, *arguendo*, that the Board's disciplinary investigation of Dr. Lewis satisfies this threshold requirement, the Medical Board may not rely on the administrative search exception because the Board did not comply with its requirements. As the Supreme Court held in *Patel*, in order to pass constitutional muster, an administrative search must (1) be conducted pursuant to a valid subpoena, and (2) provide the person whose rights are implicated by the search a meaningful opportunity to obtain "pre-compliance review before a neutral decision-maker." (*Id.* at pp. 2452-53.)

The Medical Board did not comply with either of these requirements here. No subpoena was issued prior to the Board's warrantless search of

CURES.[11] Nor were Dr. Lewis's patients provided an opportunity to challenge the search in court before it occurred. Indeed, the patients whose medical records were searched were not even *informed* of the Board's actions. The administrative search doctrine thus does not rescue the Board's actions. (*See id.*; *Skinner*, *supra*, 10 So.3d 1212; *Tucson Woman's Clinic*, *supra*, 379 F.3d 531 at pp. 550-51 ["The scheme's authorization of boundless, warrantless searches of physicians' offices violates the Fourth Amendment."].)

2. The Warrantless Searches at Issue Cannot Be Justified under the Closely Regulated Industry Exception

(a) The Closely Regulated Industry Exception Does Not Apply

Nor is there any merit to the Board's argument that warrantless searches of patient medical data may be justified under the closely regulated industry doctrine. As a threshold matter, the closely regulated industry exception does not seem to apply to this case, which raises the rights of medical patients to be free from unreasonable searches of their confidential prescription records. As *Patel* held, "[o]ver the past 45 years, the Court has identified only four industries that 'have such a history of government oversight that no reasonable expectation of privacy . . . could exist for a proprietor of the stock of such an enterprise[:] . . . liquor

[11] The Medical Board did issue subpoenas to five of Dr. Lewis's patients seeking additional medical records *after* the warrantless CURES search. These later-issued subpoenas, however, cannot justify the CURES search that preceded them. Further, as discussed in Section I(A), *supra*, the five patients who received subpoenas may not waive the privacy rights of the hundreds of other patients whose private prescription records were examined without a warrant.

sales[,] . . . firearms dealing[,] . . . mining[,] . . . and running an automobile junkyard," all industries which, "inherent in the[ir] operation...pose[] a clear and significant risk to the public welfare." (*See Patel, supra*, 135 S. Ct. at p. 2454.) Pharmacies and physicians are not on this list and the provision of medical care furthers, rather than jeopardizes, the public welfare.

Even accepting, *arguendo*, the Medical Board's contention that the list should be expanded to include pharmacies and physcians, the Court's language in *Patel* makes clear that the closely regulated industry exception impacts only the reasonable expectations of privacy held by the "*proprietor of the stock of such an enterprise*"—here, pharmacists and physicians. The closely regulated industry exception does nothing to lessen *patients'* reasonable expectations of privacy in their medical prescription information. Moreover, none of the closely regulated industry cases cited by the Court in *Patel* involved privacy rights of patients in their medical information, which courts have always recognized as enjoying "heightened" protection. (*See also Tucson Woman's Clinic, supra*, 379 F.3d at p. 550 ["[T]he theory behind the closely regulated industry exception is that persons engaging in such industries, and persons present in those workplaces, have a diminished expectation of privacy. . . . That theory clearly does not apply to abortion clinics, where the expectation of privacy is *heightened,* given the fact that the clinic provides a service grounded in a fundamental constitutional liberty, and that all provision of

medical services in private physicians' offices carries with it a high expectation of privacy for both physician and patient."].)[12]

There is, moreover, a qualitative difference between the individual search of one business that is part of a closely regulated industry and the simultaneous search of a database containing *every* holder of prescription medical information in the state. The type of sweeping digital search made possible by CURES evades the practical checks on government surveillance that served as a bulwark against a dragnet-style surveillance state in the past. (*Cf. United States v. Jones* (2012), 132 S. Ct. 945, 963-64 (Alito, J., concurring in the judgment) ["In the pre-computer age, the greatest protections of privacy were neither constitutional nor statutory, but practical. Traditional surveillance for any extended period of time was difficult and costly and therefore rarely undertaken. . . . Only an investigation of unusual importance could have justified such an expenditure of law enforcement resources. Devices like the one used in the present case, however, make long-term monitoring relatively easy and cheap."]; *Cf. also Whalen, supra*, 429 U.S. at p. 595 [older files were kept in a locked vault, and the receiving room for the information was "surrounded by a locked wire fence and protected by an alarm system."].) The limited exception to the warrant requirement for targeted searches of businesses operated in a closely regulated industry was not intended to

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[12] In *Tucson*, the Ninth Circuit did not have reason to consider whether the warrantless searches violated patients' rights, in addition to physicians Fourth Amendment rights, because the finding that the warrantless searches violated physicians rights rendered the issue moot. (*Tucson Woman's Clinic, supra*, 379 F.3d 531 at p. 551 ["Because we have held that the scheme's authorization of warrantless searches violates the Fourth Amendment, we need not reach the third claim of an informational privacy violation."].)

condone the limitless capacity for surveillance that the Medical Board requests here.

(b) Even under the Closely Regulated Industry Exception, the Searches at Issue Would Not Pass Muster under *Patel*'s Least Intrusive Means Test

Even if the closely regulated industry exception did apply, the Medical Board would not be able to rely on it here, because the sweeping CURES search it conducted was not the least intrusive means of gathering information. The Medical Board does not even attempt to argue that CURES searches like the one conducted here are necessary to, or the least intrusive means of, monitoring physician misconduct. Instead, the Medical Board attempts to avoid this issue—and effectively concedes that its search does not pass muster under the relevant test—by arguing that the least-intrusive-means test does not apply. (Medical Board's Brief at 25-26.)

The Medical Board's contention does not survive *Patel*. In a multi-page discussion of the closely regulated industry exception, the Supreme Court made clear that searches conducted pursuant to that exception must be "necessary" and narrowly tailored to obtain the information sought and further the regulatory scheme at issue. (*See Patel*, *supra*, 135 S.Ct. at p. 2456 [rejecting claim that Los Angeles statute requiring hotel operators to share guest registry information with law enforcement was "necessary" to further the regulatory regime at issue so as to escape warrant requirement under closely regulated industry exception]; *see also id.* at p. 2463 (Scalia, J., dissenting) [the Court's decision "import[s] a least-restrictive-means test into [the closely regulated industry line of cases beginning with *Burger*]").)

The Medical Board does not submit any evidence to suggest that warrantless CURES searches like the one conducted here are the "least restrictive means" of accomplishing its goals. That is because they are not. As discussed in Section IV, *infra*, there are myriad ways for the Medical Board to make use of the CURES database to protect public health without routinely violating patients' reasonable expectations of privacy in their prescription records.

III. THE BOARD'S WARRANTLESS SEARCH OF PATIENTS' PERSONAL PRESCRIPTION RECORDS VIOLATED PATIENTS' PRIVACY RIGHTS

In addition to running afoul of the Fourth Amendment, the Medical Board's actions violate the right to privacy recognized by federal law and explicitly afforded to every California citizen in Article I, section 1 of the California Constitution. On this issue, the parties dispute and extensively brief whether strict scrutiny applies. *Amici* agree that persuasive authority exists counseling application of strict scrutiny and the compelling government interest test, (*see Hill v. National Collegiate Assn.* (CA. 1994) 7 Cal.4th 1, 49 ["*Hill*"] [noting that "compelling interest" standard and "least restrictive alternative" test apply to invasions of privacy rights by government].) *Amici* write here, however, to illustrate that this Court need not decide whether higher level of scrutiny applies. In light of the strength of patients' interests in preventing warrantless searches of their medical records for no cause, even under the more deferential "legitimate interest" test, the Medical Board's decision to extract unredacted prescription information without a warrant or good cause constituted an unwarranted invasion of privacy.

A. The Medical Board's Actions Constitute a Serious Invasion of Patients' Reasonable Expectation of Privacy in Protectable Information

A court examining a privacy claim under Article I, section 1 first examines three "threshold" elements: "(1) a legally protected privacy interest; (2) a reasonable expectation of privacy in the circumstances; and (3) conduct by defendant constituting a serious invasion of privacy." (*Hill*, *supra*, 7 Cal.4th at pp. 39-40.)

The Medical Board does not dispute the existence of a legally protected informational privacy interest in the medical information stored on CURES.[13] Further, as set forth more fully above in section II(B), *supra*, patients have a reasonable expectation of privacy against suspicionless, warrantless search of their prescription records.[14]

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[13] Nor could they. California courts have consistently recognized that medical records fall within the purview of California's constitutional right to privacy. (*See Binder v. Superior Court* (Cal. Ct. App. 1987) 196 Cal. App. 3d 893, 900 ["medical records are the type of information which is protected by the right of privacy"]; *Jones v. Superior Court of Alameda County* (Cal. Ct. App. 1981) 119 Cal. App. 3d 534, 548-49 ["There can be little doubt but that petitioner's medical history is entitled to a measure of protection under both federal and state Constitutions"].) "A person's medical profile is an area of privacy infinitely more intimate, more personal in quality and nature than many areas already judicially recognized and protected." (*Gherardini*, *supra*, 93 Cal. App. 3d at p. 678.) Confidential medical records "fall[] squarely within the protected ambit, the expressed objectives of article I, section 1." (*Id.*; *Norman-Bloodsaw v. Lawrence Berkeley Lab.* (9th Cir. 1998) 135 F.3d 1260, 1269 ["The constitutionally protected privacy interest in avoiding disclosure of personal matters clearly encompasses medical information and its confidentiality."].)

[14] *See also Douglas*, *supra*, 419 F.3d at p. 1102 ["[W]e have no difficulty concluding that protection of a right to privacy in a person's prescription drug records, which contain intimate facts of a personal nature, is sufficiently similar to other areas already protected within the ambit of privacy. Information contained in prescription records may reveal other facts about what illnesses a person has..."]; *Doe v. Broderick* (4th Cir. 2000) 225 F.3d 440, 451 ["[M]edical

There similarly can be no reasonable dispute that the government's search of CURES for individually identifying information reflecting all controlled substance prescriptions is a serious invasion of privacy. The unredacted prescription records maintained on CURES reveal deeply personal information: In addition to patient-identifying information, they disclose what drugs a particular patient is taking, and, by extension, significant information about that patient's underlying medical condition and treatment, including confidential medical advice.

The drugs identified as Schedule II–IV all have some accepted medical use. (*See* 21 C.F.R. §§ 1308.12–1308.14; 21 U.S.C. § 801 [Congress has found that "many of the drugs listed [as controlled substances] have a useful and legitimate medical purpose and are necessary to maintain the health and general welfare of the American people."].) These drugs include medications used to treat serious medical conditions. (*See* Table I, *supra.*) Because these medications are used to treat specific conditions, revealing their names will often reveal intimate details about a patient's underlying diagnosis and chosen course of treatment. (*See id.*; *Urbaniak, supra*, 26 Cal. App. 3d at p. 1140 [HIV status "is clearly a 'private fact' of which the disclosure may 'be offensive and objectionable

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treatment records contain intimate and private details that people do not wish to have disclosed, expect will remain private, and, as a result, believe are entitled to some measure of protection from unfettered access by government officials."]; *Southeastern Pa. Transp. Auth.*, *supra*, 72 F3d at p. 1138 ["It is now possible from looking at an individual's prescription records to determine that person's illnesses, or even to ascertain such private facts as whether a woman is attempting to conceive a child through the use of fertility drugs. This information is precisely the sort intended to be protected by penumbras of privacy."].)

to a reasonable [person] of ordinary sensibilities."].) This is deeply personal information.

B. Patients' Substantial Interest in Controlling the Dissemination of Their Records Far Outweighs the Medical Board's Stated Interests

Any interest the Medical Board has in accessing the CURES database without a warrant or any level of suspicion falls far short of outweighing patients' interests in the privacy of their medical records. The Medical Board had no reason to pull each of Dr. Lewis's patients' unredacted prescription records in this case. The Board was not engaged in an investigation of Dr. Lewis's prescription practices; the complaint from VC, which triggered the investigation and ultimately was deemed unfounded, had nothing to do with prescription abuse.

The Constitution provides for a simple process to protect against such unfettered access to private information: If the Medical Board had reason to suspect Dr. Lewis of engaging in the unlawful diversion of prescription drugs, it could simply have gotten a warrant allowing it to access the CURES database. (*See Riley v. California* (2014) 134 S.Ct. 2473, 2493 ["Our cases have historically recognized that the warrant requirement is 'an important working part of our machinery of government,' not merely 'an inconvenience to be somehow 'weighed' against the claims of police efficiency.'"].) Because a court reviews not only whether probable cause exists, but whether it justifies the particular search the government seeks to conduct, a warrant requirement would also ensure that the Medical Board not examine names of patients unless that information were needed for its inquiry. (*People v. Balint* (2006) 138 Cal. App. 4th 200, 211 [warrant requirement "ensures that the search will be

carefully tailored to its justifications, and will not take on the character of the wide-ranging exploratory searches the Framers intended to prohibit."].)

But here, the Medical Board used no standard, sought no prior approval by a judge, and made no showing of probable cause or good cause to any reviewing agency before accessing patients' unredacted prescription records. The Medical Board's reading of the CURES scheme does not require that searches be specific to any investigation of prescription abuses. It does not constrain the government's discretion as to which prescription records to search and under what circumstances. Under the Medical Board's view, the government may scrutinize the prescriptions of everyone, with no indication that the protected information is reasonably relevant to any legitimate government function. The Medical Board cannot claim a strong interest in this type of overbroad, unnecessary search.

By contrast, patients have a strong interest in avoiding a warrantless intrusion into confidential pharmacy records absent any showing of cause. This important interest was explained by the Court of Appeal in *Gherardini*. While recognizing the state's "legitimate interest" in regulating the medical profession, the *Gherardini* court held:

> [A] governmental administrative agency is not in a special or privileged category, exempt from the right of privacy requirements which must be met and honored generally by law enforcement officials. To so hold is to ignore the federal and state constitutional commands as well as the numerous and persuasive judicial decisions in analogous areas. Moreover, such a premise focuses our attention only on the unquestioned right of the Medical Board to investigate the doctor; it ignores the patient's constitutional and statutory rights to be left alone.

(93 Cal. App. 3d at pp. 679-80.)

Moreover, society has a strong interest in respecting confidentiality of prescription medical records to facilitate honest communication between patients and their physicians, without fear of humiliation resulting from the

disclosure of the treatment they receive. (*See Urbaniak, supra*, 226 Cal. App. 3d at p. 1139 ["The significance of the patient's reasonable expectations in this context lies in the public interest in encouraging confidential communications within a proper professional framework."].) Confidentiality in prescription records "will both encourage free communication needed for an effective professional relationship and protect the relationship from abuse." (*Id.*) The balancing test between patient privacy and the Medical Board's demand for unfettered access to CURES weighs decisively in favor of the patients. To adequately protect patient privacy, the Medical Board should be required to obtain a warrant or constitutionally adequate substitute to access CURES.

C. Restricting the Medical Board's Access to CURES Is Consistent with the Purposes of Article 1, Section 1 of the California Constitution

Requiring the Medical Board to submit to judicial review prior to accessing CURES comports with the ballot arguments that led to the passage of California's constitutional right to privacy. "[T]he ballot argument supporting the privacy measure establishes that one principal objective of the privacy clause is to protect individuals from the unnecessary collection, and *improper use*, of personal information about them." (*Lungren, supra*, 16 Cal. 4th at p.334 (emphasis added); *see also Central Valley Ch. 7th Step Found. v. Younger* (Cal. Ct. App. 1989) 214 Cal. App. 3d 145, 161 ["the principal 'mischiefs' at which the amendment is directed are... the improper use of information properly obtained for a specific purpose, for example, the use of it for another purpose or the disclosure of it to some third party."] (overly broad dissemination of arrest data).)

The ballot arguments accompanying the amendment to the California Constitution to recognize that "[i]nformational privacy is the core value furthered by the Privacy Initiative." (*Hill, supra*, 7 Cal.4th at p. 35; *White v. Davis* (1975) 13 Cal.3d 757 ["Fundamental to our privacy is the ability to control circulation of personal information."].) The California constitutional right to privacy "prevents government... from [1] collecting and stockpiling unnecessary information about us and from [2] misusing information gathered for one purpose in order to serve other purposes or to embarrass us." (*Hill, supra*, 7 Cal.4th at pp. 35-36 [citing the Ballot Argument in Support of Amends. to Cal. Const., Gen. Elec. (Nov. 7, 1972)].)[15] The ballot arguments noted that the Privacy Initiative "will not prevent the government from collecting any information it legitimately needs. It will only prevent misuse of this information for unauthorized purposes and preclude the collection of extraneous or frivolous information." (Ballot Argument in Support of Amends. to Cal. Const. with arguments to voters, Gen. Elec. (Nov. 7 1972) p. 27.)[16]

In seeking unfettered access to CURES for any purpose, without any restrictions or judicial oversight, the Medical Board directly contravenes the ballot arguments in support of Article I, Section 1. The type of abusive fishing expedition that the Medical Board conducted here is exactly what

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[15] *See* Right Of Privacy, California Proposition 11 (1972), University of California, Hastings Scholarship Repository, *available at http://repository.uchastings.edu/ca_ballot_props/762* (last visited Oct. 16, 2015).

[16] Because the search unquestionably violated the privacy rights of Dr. Lewis's patients, the Court need not address here whether the mere collection and retention by the government of sensitive prescription drug information runs afoul of the California Constitution's privacy protections.

the ballot initiative establishing the California constitutional right to privacy was intended to prevent.

IV. COMPLIANCE WITH THE UNITED STATES AND CALIFORNIA CONSTITUTIONS WILL NOT COMPROMISE PUBLIC HEALTH

Finally, the Court should reject the Medical Board's argument that patients' right to privacy must yield to the public interest in regulating controlled substances. In upholding CURES, the Court of Appeal reached the conclusion that prohibiting warrantless searches of the CURES database would make it impossible for the board to "spot-check providers for compliance" with the law and medical standards, or "detect and halt" dangerous providing practices.[17] (*See See Lewis*, *supra*, 226 Cal. App. 4th at p. 955; Medical Board Brief at 32, 34.) This is a false choice.

The tension that the Court of Appeal identified between patient privacy and the regulatory goals of the statute is *created* by the fact that there is presently no warrant requirement governing searches of the CURES database, and because searches of the CURES database yield such a broad swath of information. Simply put, the Medical Board's searches are not narrowly tailored, as required by the Fourth Amendment and patients'

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[17] The Court of Appeal also held that "real time benefit" of allowing a physician to "instantly look up a new patient's controlled substance history [on CURES] to determine whether the patient legitimately needs pain medicine or has been 'doctor shopping'" outweighed a patient's right to privacy in his prescription drug information. But a physician already has the ability to ask a patient for access to his or her medical records, and likely does so in the ordinary course of providing care. Such access would provide physicians with the ability to determine whether there is a risk that the patient seeks to abuse controlled substances. Moreover, there is a fundamental difference between a doctor obtaining consent directly from the patient to access medical records, on the one hand, and a state agency accessing medical records in a database without a warrant, on the other.

privacy rights. Requiring a warrant to search the CURES database would eliminate that tension because a judicial officer would be able to limit the search to the subject for which probable cause exists, thereby protecting patient privacy, while still allowing regulators to investigate prescribing practices.[18]

Specifically, a warrant would provide a judicial officer with an opportunity to specify whether the investigator can search doctor, pharmacy, or patient records. A relatively simple technological solution could further protect the privacy of patients or other parties by redacting information not called for by the warrant. For example, in search results for prescriptions issued by physician, patient names could be replaced with a patient number, so that patient names are not disclosed during an initial search. Physician and pharmacy-identifying information would still be accessible to the investigator, thus enabling the Medical Board or other agency to review the information for which probable cause exists—and not review information for which no probable cause exists. (*See United States v. Comprehensive Drug Testing, Inc.* (9th Cir. 2010) 621 F.3d 1162, 1168-69, 1171-72, 1177 [holding that, where data that justifiably may be searched pursuant to a warrant is electronically commingled with data outside the scope of probable cause for the warrant, law enforcement is

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[18] As an initial matter, investigations of pharmacies and physicians do not involve the narrow categories of exigent circumstances in which the Supreme Court has warrantless searches to be justified. (*See, e.g., Mincey v. Arizona* (1978) 437 U.S. 385, 392 [recognizing exception to warrant requirement in life-threatening situations]; *United States v. Santana* (1976) 427 U.S. 38, 42-43 [recognizing exception when law enforcement is in hot pursuit]; *Schmerber v. California* (1996) 384 U.S. 757, 770-71 [recognizing exception to prevent the destruction of evidence].)

obligated to segregate and only review the data for which probable cause exists].) If, upon completing the initial search, it becomes necessary to obtain patient names, someone unrelated to the Medical Board investigator, such as an automated computerized system or other agency official, could send a notice to the patient corresponding to that patient number to request the patient's consent to the disclosure of his name. (*See id.* at pp. 1178-79 (Kosinksi, J., concurring) [approving of a similar protective measure].) Likewise, if probable cause exists to search for the prescription activity of a particular patient, the Medical Board investigator would be able to obtain a subsequent warrant as to that patient only, without also being able to review the records of other patients for whom probable cause does not exist.

The Ninth Circuit proposed a nearly identical technological protection in *Tucson Woman's Clinic*, *supra*, 379 F.3d 531. In *Tucson Woman's Clinic*, the Ninth Circuit held that, for a statute regulating physicians who provided abortions services, "there is little, if any, need to maintain the names and addresses" of patients who sought abortion services. (*Id.* at p. 552.) Dismissing arguments that maintaining patient names was necessary to ensure that doctors complied with record-keeping requirements, the Ninth Circuit held that this statutory objective could be accomplished equally well if the regulating entity "simply ... check[ed] whether the required fields are present in a patient's chart, even if the content of those fields were marked out. Other monitoring goals could easily be satisfied using a coding system to track records without the release of patient identifying information . . . [W]hile the public interest involved—promoting health and safety—is of course a strong one, we fail to see how insisting on unredacted materials promotes this need." (*Id.* at pp. 552-553.) Thus, the inclusion of patient names violated patients' right

to informational privacy. (*Id.* at p. 553.) Similarly, the statutory objectives of CURES can be accomplished by means that are far less intrusive to patient privacy.

In sum, requiring a warrant prior to conducting a search of data would not burden regulatory or law enforcement efforts any more than other investigative situations. While a warrant requirement would prevent exploratory searches through patient records—that can hardly be a reason to permit warrantless searches. (*See Riley*, *supra*, 134 S.Ct. at p. 2498 ["[T]he warrant requirement is 'an important working part of our machinery of government,' not merely 'an inconvenience to be somehow 'weighed' against the claims of police efficiency.'"].) The Fourth Amendment and patient privacy rights prevent precisely this kind of intrusion, namely, warrantless searches of information that individuals reasonably expect to remain private.

V. REQUIRING A WARRANT OR CONSTITUTIONALLY ADEQUATE SUBSTITUTE FOR CURES SEARCHES WOULD BRING CALIFORNIA IN LINE WITH MANY OTHER STATES TO HAVE CONSIDERED THE ISSUE

Enforcing the constitutional safeguards discussed herein would bring California in line with many other jurisdictions to have considered the issue. By statute, ten states prohibit law enforcement from accessing records in those states' prescription monitoring databases without first getting a warrant or otherwise demonstrating probable cause.[19] Vermont

[19] Ala. Code § 20-2-214(6), as amended by 2013 Ala. Laws Act 2013-256 (H.B. 150); Alaska Stat. § 17.30.200(d)(5); Ark. Code Ann. § 20-7-606(b)(2)(A); Ga. Code Ann. § 16-13-60(c)(3); Iowa Code § 124.553(1)(c); Minn. Stat. § 152.126(6)(b)(7); Mont. Code Ann. §§ 37-7-1506(1)(e), 46-4-301(3); N.H. Rev.

does not permit law enforcement requests for controlled substance database records at all. (Vt. Stat. Ann. tit. 18, § 4284.) At least seven additional states require a court order or subpoena, or make no provision for law enforcement access.[20] Pursuant to court opinions, law enforcement agents in Louisiana need a warrant to access prescription records, (*Skinner*, *supra*, 10 So. 3d 1212 at p. 1218), and officers in Kentucky must demonstrate reasonable suspicion for access to that state's controlled substance database, (*Carter v. Commonwealth* (Ky. Ct. App. 2011) 358 S.W.3d 4, 8–9.) Especially in light of the long line of California cases establishing California patients' reasonable expectation of privacy in their medical records, there is no reason for California citizens not to enjoy the protections afforded to patients across the country. The Court of Appeals decision, which unnecessarily eschews these protections, should be reversed.

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Stat. Ann. § 318-B:35(I)(b)(3); Or. Rev. Stat. § 431.966(2)(a)(C); R.I. Gen. Laws § 21-28-3.32(a)(3). The Pennsylvania General Assembly has passed legislation imposing a warrant requirement for law enforcement access to that state's prescription monitoring database. H.B. 1694, Sec. 1, § 2708(G)(1)(I), 2013–14 Leg., Reg. Sess. (Pa. 2013)

[20] Colo. Rev. Stat. § 12-42.5-404(3)(e); Md. Code Ann., Health–Gen. § 21-2A-06(b)(3); Nev. Rev. Stat. § 453.1545(6)(b); N.J. Stat. Ann. § 45:1-46(d)(4); N.Y. Pub. Health Law § 3371(1)(b); N.C. Gen. Stat. § 90-113.74(c)(5); Wis. Stat. § 146.82(2)(4)

VI. CONCLUSION

For the foregoing reasons, *Amici* respectfully submit that the Court of Appeals decision should be overturned.

DATED: October 22, 2015

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