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IN THE THIRD DISTRICT COURT – SALT LAKE
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

STATE OF UTAH, Plaintiff, v. RYAN DOUGLAS PYLE, Defendant.	**MOTION TO SUPPRESS** Case No. 131910379 Judge Vernice Trease

Defendant Ryan Douglas Pyle, by and through his counsel of record, Gregory G. Skordas, pursuant to Utah R. Crim. P. 12(b), moves this Court for an order suppressing all evidence flowing from the warrantless search of Mr. Pyle's prescription drug records maintained in the Utah Controlled Substance Database during an investigation unrelated to the instant case.

Defendant bases this Motion on the points and authorities contained in Memorandum in Support of Motion to Suppress.

DATED this __14th day of March, 2014.

SKORDAS, CASTON & HYDE, LLC

__/s/ Rebecca H. Skordas ____
Rebecca H. Skordas

CERTIFICATE OF SERVICE

I hereby certify that on the 14th day of March, 2014, I served by electronic filing a true and correct copy of the foregoing MOTION TO SUPPRESS, to the following:

Wayne D. Jones
Assistant Utah Attorney General
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__/s/ Ryan Wilson ________
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IN THE THIRD DISTRICT COURT – SALT LAKE
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

STATE OF UTAH, Plaintiff, v. RYAN DOUGLAS PYLE, Defendant.	**MEMORANDUM IN SUPPORT OF MOTION TO SUPPRESS** Case No. 131910379 Judge Vernice Trease

Defendant Ryan Douglas Pyle, by and through his counsel of record, Rebecca H. Skordas, pursuant to Utah R. Crim. P. 12(b), submits the following Memorandum in Support of Motion to Suppress:

STATEMENT OF FACTS

Ryan Douglas Pyle is a paramedic employed by Unified Fire Authority, where he has worked since January, 2007. During his tenure, he has been assigned to two stations: Station 101 from January, 2007 through February 2013, and Station 107 from February 2013 through the present.

On April 23, 2013, Detective James Woods was contacted by Chief Robby Russo regarding a suspected theft of morphine from a Unified Fire Authority ambulance. Further

investigation revealed tampering with several vials of medication; fluid was removed from the vials via syringe, and replaced with saline. Upon this discovery, Unified Fire Authority and Unified Police conducted an audit of several fire stations. They discovered that tampering had occurred at Stations 113, 114, and 116. Mr. Pyle never worked at those fire stations. The audit did not reveal any suspects.

Later that day, Detective Woods searched, without a warrant or any suspect, prescription records belonging to each Unified Fire Authority employee – four hundred eighty people – by accessing the Utah Controlled Substance Database (hereinafter "UCSD"), to identify people with opioid dependencies. The UCSD keeps record of each controlled substance dispensed by a pharmacist other than those dispensed for an inpatient at a health care facility; pharmacists are required to submit the information. Utah Code § 58-37f-203(2). The records contain, *inter alia*, the patient's name, the prescribing practitioner's name, the date of the prescription and when it was filled, and the name, strength, and quantity of the controlled substance. § 58-37f-203(2)(a)-(m). After searching each of four hundred eighty employees' prescription records, Detective Woods concluded that four employees had "the appearance of Opioid dependence," including Mr. Pyle.

After concluding Mr. Pyle had an opioid dependence issue based on a warrantless search of his prescription records, Detective Woods shifted his investigation away from the theft of medication and to Mr. Pyle's prescription records and other medical history. In June, 2013, Detective Woods sought to file prescription fraud charges against Mr. Pyle based on the information gleaned from the warrantless search of Mr. Pyle's prescription records, but the District Attorney's office declined to file charges. On November 1, 2013, the State charged Mr.

Pyle with Prescription Fraud, a third degree felony, in violation of Utah Code § 58-37-8(3)(a)(ii). Mr. Pyle is not a suspect in the theft of medication from Stations 113, 114, and 116. In fact, the theft case has been closed with no charges being brought.

ARGUMENT

I. MR. PYLE HAS STANDING TO CHALLENGE THE WARRANTLESS SEARCH OF HIS PRESCRIPTION RECORDS.

A person may raise the protections offered by the Fourth Amendment and Utah Const. Art. I, § 14 where he has "a legitimate expectation of privacy in the invaded place." *Rakas v. Illinois*, 439 U.S. 128, 143 (1978); *State v. Sepulveda*, 842 P.2d 913, 915 (Utah Ct. App. 1992); *see also State v. Thompson*, 810 P.2d 415, 416-18 (Utah 1991) (finding that bank customers had standing to challenge a search of their records held by the bank). Mr. Pyle had a legitimate expectation of privacy in his prescription records maintained in the Utah Controlled Substance Database. *See infra* Part II.A. Thus, Mr. Pyle has standing to challenge Detective Woods's warrantless search of those records.

II. DETECTIVE WOODS VIOLATED MR. PYLE'S RIGHTS PROTECTED BY THE FOURTH AMENDMENT AND ARTICLE I, SECTION 14 OF THE UTAH CONSTITUTION WHEN HE UNREASONABLY SEARCHED MR. PYLE'S PRESCRIPTION RECORDS WITHOUT A WARRANT.

Mr. Pyle's rights were violated when Detective Woods searched his prescription records without obtaining a warrant. All evidence flowing from or obtained as a result of Detective Woods's unreasonable search must be suppressed. The Fourth Amendment to the United States Constitution guarantees "the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated." U.S. CONST. amend. IV. It further guarantees that "no Warrants shall issue, but upon probable cause, supported by

Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." *Id*. The Utah Constitution mirrors these provisions, but may be interpreted to provide greater protection than the Fourth Amendment. *See* UTAH CONST. art. I, § 14; *Thompson*, 810 P.2d at 418 (holding that the state constitution recognized a reasonable expectation of privacy in documents and information submitted to a bank, despite a contrary result under a Fourth Amendment analysis in *United States v. Miller*, 425 U.S. 435, 442 (1976)).

A "cardinal principle" of search and seizure law is that "searches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment - - subject only to a few specifically established and well-delineated exceptions." *Horton v. Cal.*, 496 U.S. 128, 133 n.4 (1990); *accord State v. Trane*, 2002 UT 97, ¶¶22 (adopting the same per se rule with respect to warrantless searches and UTAH CONST. art. I, § 14). Further, a warrantless search "must still be based on probable cause." *State v. Moreno*, 2009 UT 15, ¶¶21. Although it is not an "irreducible requirement," a constitutional search or seizure usually requires "some quantum of individualized suspicion. . . ." *Id*. at ¶¶22; *see Ferguson v. City of Charleston*, 532 U.S. 67, 79 n.15 (2001) (noting the "general rule that a search must be based on individualized suspicion of wrongdoing.").

To "compel respect for the constitutional guaranty" provided by the Fourth Amendment, the federal courts require evidence acquired by an unreasonable search to be excluded. *Davis v. United States*, 131 S.Ct. 2419, 2426 (2011) (citing *Weeks v. United States*, 232 U.S. 383, 232 U.S. 383 (1914); *Mapp v. Ohio*, 367 U.S. 643 (1961)). Similarly, "exclusion of illegally obtained evidence is a necessary consequence of police violations of article I, section 14" of the Utah

Constitution.[1] *State v. Larocco*, 794 P.2d 460, 472 (Utah 1990) (plurality opinion); *Thompson*, 810 P.2d 415, 419 (Utah 1991) (adopting the *Larocco* plurality's conclusions with respect to Utah's exclusionary rule); *see also State v. Abell*, 2003 UT 20, ¶¶41 (excluding evidence obtained as a result of an unreasonable search and seizure). Thus, unless supported by one of a few, narrow exceptions, a warrantless search is unreasonable, and evidence obtained through the unreasonable search must be excluded.

A. Detective Woods's sweeping search of 480 people's prescription records, including Mr. Pyle's, constituted an unreasonable search under the Fourth Amendment and article I, section 14 because Mr. Pyle had a legitimate expectation of privacy in the records held by the State.

Detective Woods's dragnet-style investigation of 480 people's prescription records, including Mr. Pyle's, constitutes a search under the Fourth Amendment and article I, section 14 of the Utah Constitution. A search implicating the Fourth Amendment or article I, section 14 occurs when a person can claim a "legitimate expectation of privacy that has been invaded by government action." *Smith v. Maryland*, 442 U.S. 735, 740 (1979); *see Thompson*, 810 P.2d at 418. A legitimate expectation of privacy exists where a person subjectively expects privacy, and whether that subjective expectation is "one that society is prepared to recognize as reasonable." *Smith*, 442 U.S. at 740 (citing *Katz v. United States*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring)). A reasonable expectation of privacy is "one that has a source outside of the Fourth Amendment, either by reference to concepts of real or personal property law or to

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[1] Although some disagreement exists with respect to whether UTAH CONST. art. I, § 14 contemplates exclusion of illegally obtained evidence, *Thompson*, and its approval of the exclusionary rule, remains controlling precedent. *See State v. Walker*, 2011 UT 53, ¶¶28 (Lee, J., concurring) (advocating an alternative ground for the court's decision that would overrule *Larocco* and *Thompson,* and eliminate the state exclusionary rule); *but see id*. at ¶¶21 (Nerhring, J., concurring) (joined by Justices Durham and Parrish; disapproving of Justice Lee's concurrence); *see also State v. Hoffman*, 2013 UT App 290, ¶¶56 (recognizing, in dicta, the conflicting concurrences in *Walker* with respect to the exclusionary rule and article I, section 14).

understandings that are recognized and permitted by society." *Minnesota v. Carter*, 525 U.S. 83, 88 (1998). Thus, where the government invades an area that a person expects be private, and that society recognizes as private, a search has occurred.

i. <u>Mr. Pyle subjectively expected that his prescription records were and would remain private.</u>

Mr. Pyle subjectively expected that his prescription records were private. While he has sought medical treatment for various illnesses, surgery, and injuries, he expected at all times that his medical information was and would remain private. (Pyle Aff., ll. 3, 5). He expected privacy in the records because those records reveal extremely private information documenting his medical condition and history. (Id. at l. 8). He was aware that pharmacies must disclose certain information to the State, but he did not consent to that disclosure, and still expected that his prescription records were private. (Id. at ll. 10-13). Mr. Pyle expected his prescription records were private even though the information was maintained in the UCSD. (Id. at l. 14). (See Exhibit A)

ii. <u>Society overwhelmingly recognizes an important, reasonable privacy interest in prescription records.</u>

Prescription records reveal intimate, private, and potentially stigmatizing details about a person's health, including the person's underlying medical condition, the severity of the condition, and the course of treatment prescribed by the treating physician. Thus, prescription records are widely and reasonably considered private.

Under the Fourth Amendment, there is "no talisman that determines in all cases those privacy expectations that society is prepared to accept as reasonable." *O'Connor v. Ortega*, 480 U.S. 709, 715 (1987) (plurality opinion). Instead, the court gives weight to "such factors as the

intention of the Framers of the Fourth Amendment, the uses to which the individual has put a location, and our societal understanding that certain areas deserve the most scrupulous protection from government invasion." *Id.* (quoting *Oliver v. United States*, 466 U.S. 170, 178 (1984)). [2] Warrantless access to confidential medical records trenches on privacy expectations recognized by case law, states' practices, and longstanding principles of medical ethics known to the Fourth Amendment's framers and relied on by the public today.

1. Case law recognizes an expectation of privacy in medical information.

Courts widely recognize an expectation of privacy in medical information. In *Ferguson v. City of Charleston*, 532 U.S. 67 (2001), the Supreme Court held that patients have a reasonable expectation of privacy in their medical records. The case addressed whether the "special needs" exception provided a state hospital "authority to conduct drug tests and to turn the results over to law enforcement agents without the knowledge or consent of the patients." *Id.* at 77. The Court held that the special needs exception did not apply, and that "the reasonable expectation of privacy enjoyed by the typical patient undergoing diagnostic tests in a hospital is that the results of those tests will not be shared with nonmedical personnel without her consent." *Id.* at 78. The decision was an easy one, as the Court noted that "in none of our prior cases was there any intrusion upon that kind of expectation," and that "we have previously recognized that an intrusion on that expectation may have adverse consequences because it may deter patients from receiving needed medical care. *Id.* at 78, n.14. Although the Court has not addressed the privacy interest in prescription records in particular, the reasoning in *Ferguson* applies equally to medical

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[2] The Fourth Amendment principles analyzed throughout Part II.A apply to Article I, Section 14 of the Utah Constitution as well. *See Thompson*, 810 P.2d at 416 ("Article I, section 14 of the Utah Constitution reads nearly verbatim with the fourth amendment, and thus this Court has never drawn any distinctions between the protections offered by the respective constitutional provisions.").

records beyond test results, including confidential prescription information that can reveal as much about an underlying diagnosis as can test results themselves.

Several courts have recognized that patients have a reasonable expectation of privacy in medical records. In *Tucson Women's Clinic v. Eden*, 379 F.3d 531, 550 (9th Cir. 2004), the court held that a warrant is required for law enforcement to search medical records held by an abortion clinic, in part because "all provision of medical services in private physicians' offices carries with it a high expectation of privacy for both physician and patient.". *See also Doe v. Broderick*, 255 F.3d 440, 450-51 (4th Cir. 2000) ("[A] patient's expectation of privacy . . . in his treatment records and files maintained by a substance abuse treatment center is one that society is willing to recognize as objectively reasonable."); *F.E.R. v. Valdez*, 58 F.3d 1530, 1535 (10th Cir. 1995) (noting that the patient-plaintiffs "had an expectation of privacy in their medical records" and upholding search pursuant to a facially valid warrant); *Nat'l Assoc. of Letter Carriers, AFL-CIO v. U.S. Postal Serv.*, 604 F. Supp. 2d 665, 674-75 (S.D.N.Y. 2009) (postal employees whose medical information was obtained from health providers by the Postal Service without consent "have – at minimum – standing to bring suit based on a reasonable expectation of privacy in their medical records."); *State v. Skinner*, 10 So. 3d 1212, 1218 (La. 2009) ("[W]e find that the right to privacy in one's medical and prescription records is an expectation of privacy that society is prepared to recognize as reasonable. Therefore, absent the narrowly drawn exceptions permitting warrantless searches, we hold a warrant is required to conduct an investigatory search of medical and/or prescription records.").[3] Indeed, "prescription information . . . is intensely private as it

[3] Some courts have held that there is no reasonable expectation of privacy in prescription records under the Fourth Amendment, relying on the "third party doctrine." *See Williams v. Commonwealth*, 213 S.W. 3d 671, 682-84 (Ky. 2006). That reasoning has come under significant criticism, and is inapt here. *See, e.g.*, *Carter v. Commonwealth*,

connects a person's identifying information with the prescription drugs they use," and "it is difficult to conceive of information that is more private or more deserving of Fourth Amendment protection." *Or. Prescription Drug Monitoring Program v. United States DEA*, 2014 U.S. Dist. LEXIS 17047, 21-22 (D. Or. 2014). (See Exhibit B),

One source of the expectation of privacy in medical information and prescription records can be found in cases addressing the right to informational privacy under the Due Process clauses of the Fifth and Fourteenth Amendments. Those cases speak to the widespread acceptance, and thus the reasonableness, of privacy protections for medical records. In the foundational case *Whalen v. Roe*, 429 U.S. 589 (1977), the Supreme Court considered whether New York's collection of prescription records in an early computerized database violated patients' and doctors' right to informational privacy. Although the Court held that the security and privacy protections of New York's system made it constitutionally permissible, it recognized a right to informational privacy and explained that the right "involved at least two different kinds of interests. One is the individual interest in avoiding disclosure of personal matters, and another is the interest in independence in making certain kinds of important decisions." *Id*. at 599-600.

The circuit courts have expanded on the Supreme Court's decision in *Whalen*, firmly and repeatedly recognizing the "privacy protection afforded medical information." *Doe v. Attorney Gen. of the U.S.*, 941 F.2d 780, 795-96 (9th Cir. 1991), *vacated on other grounds sub nom. Reno*

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358 S.W. 3d 4, 8-9 (Ky. Ct. App. 2011) (explaining strong disagreement with reasoning of Williams and imposing reasonable suspicion standard for requests for prescription records; see also infra Part II.B (explaining why third party doctrine does not apply to this case). Courts have also applied the "pervasively regulated industry administrative search" exception to the Fourth Amendment in permitting inspections of pharmacy records. *See, e.g., State v. Russo*, 790 A.2d 1132, 1151-52 (Conn. 2002); *Stone v. Stow*, 593 N.E. 2d 294, 300-01 (Ohio 1992). Those cases are inapposite because they authorize inspections of individual pharmacies, not searches of all of a patient's or physician's prescription records in a comprehensive statewide electronic database maintained by a state agency.

v. Doe ex rel. Lavery, 518 U.S. 1014 (1996). The Ninth Circuit has explained that "[o]ne can think of few subject areas more personal and more likely to implicate privacy interests than that of one's health," and has stated that collection of medical information "implicate[s] rights protected under both the Fourth Amendment and the Due Process Clause[s]." *Norman-Bloodsaw v. Lawrence Berkely Lab.*, 135 F.3d 1260, 1269 (9th Cir. 1998); *see also Seaton v. Mayberg*, 610 F.3d 530,541 (9th Cir. 2010) ("One who goes to a physician in order to obtain medical benefit to himself or his family has substantial privacy interests . . . ."); *Tucson Woman's Clinic*, 379 F.3d at 551 ("Individuals have a constitutionally protected interest in avoiding 'disclosure of personal matters,' including medical information."); *Yin v. California*, 95 F.3d 864, 870 (9th Cir. 1996) ([I]ndividuals have a right protected under the Due Process Clause of the Fifth or Fourteenth Amendments in the privacy of personal medical information and records."). Other circuits to address the issue agree. *Herring v. Keenan*, 218 F.3d 1171, 1175 (10th Cir. 2000); *Doe v. Se. Pa. Transp. Auth.*, 72 F.3d 1133, 1137 (3d Cir. 1995); *Anderson v. Romero*, 72 F.3d 518, 522 (7th Cir. 1995); *Doe v. New York*, 15 F.3d 264, 267 (2d Cir. 1994); *see also Harris v. Thigpin*, 941 F.2d 1495, 1513 (11th Cir. 1991) (assuming such right exists). *Cf. Lee v. City of Columbus, Ohio*, 636 F.3d 245, 260-61 (6th Cir. 2011) (recognizing privacy interest in medical records but stating that "a person possesses no reasonable expectation that his medical history will remain *completely* confidential.").

Two circuits have specifically held that the right to privacy in medical information encompasses prescription records. As the Third Circuit explained:

> 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. An individual using

> prescription drugs has a right to expect that such information will customarily remain private.

Se. Pa. Transp. Auth., 72 F.3d at 1138 (citation omitted). The Tenth Circuit reached a similar conclusion in *Douglas v. Dobbs*, 419 F.3d 1097, 1102 (10th Cir. 2005), where it stated that "there is a constitutional right to privacy that protects an individual from the disclosure of information concerning a person's health." The court continued by stating, "[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 . . . ." *Id.*

These cases protecting the privacy of medical information under the Fifth and Fourteenth Amendments provide a source for the societal expectation of privacy in prescription records and the medical information they reveal, and thus, a basis for triggering the Fourth Amendment's protections. *See id.* at 1101-03 (relying on *Whalen* and related cases to inform analysis of Fourth Amendment interest in privacy of prescription records). Because "few subject areas [are] more personal and more likely to implicate privacy interests than that of one's health," *Norman-Bloodsaw*, 135 F.3d at 1266, patients have a reasonable expectation in their medical information.[4] The Supreme Court and Tenth Circuit have recognized as much. *Ferguson*, 532 U.S. at 78; *Douglas*, 419 F.3d at 1102.

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[4] Prescription records reveal some medical information (the drugs and dosages a person takes) directly and other information (a patient's underlying medical conditions) by inference. A search can implicate the Fourth Amendment regardless of whether it reveals information directly or through inference. *See Kyllo v. United States*, 533 U.S. 27, 36 (2001) (rejecting "the novel proposition that inference insulates a search," noting that it was "blatantly contrary" to the Court's holding in *United States v. Karo*, 468 U.S. 705 (1984), "where the police 'inferred' from the activation of a beeper that a certain can of ether was in the home").

2. State laws protect the privacy of patient medical information.

To evaluate whether police procedures are reasonable, the Supreme Court has often "looked to prevailing rules in individual jurisdictions." *Tennessee v. Garner*, 471 U.S. 1, 15-16 (1985) (citing *United States v. Watson*, 423 U.S. 411, 421-22 (1976)).[5] Thus, for example, as support for its holding that the Fourth Amendment prohibits the use of lethal force to apprehend a fleeing felon absent a significant threat of death or serious bodily injury to the officer or others, the Court noted in *Garner* that the trend in state laws was away from the common law rule allowing deadly force against any fleeing felon. *Id*. at 19 & n.21; *see also Elkins v. United States*, 364 U.S. 206, 219 (1960) (looking to states' practices in determining scope of Fourth Amendment's exclusionary rule). Here, the majority of states protect the confidentiality of medical information, and a significant number of states specifically require a warrant or probable cause to access records in a state prescription monitoring program.

Nine states have enacted legislation prohibiting law enforcement from accessing records in those states' prescription monitoring programs unless the government obtains a warrant or otherwise demonstrates probable cause. Ala. Code § 20-2-214(6), as amended by 2013 Ala. Laws Act 2013-256 (H.B. 150) ("declaration that probable cause exists"); Alaska Stat. § 17.30.200(d)(5) ("search warrant, subpoena, or order issued by a court establishing probable cause"); Ark. Code Ann. § 20-7-606(b)(2)(A) ("search warrant signed by a judge that demonstrates probable cause"); Ga. Code Ann. § 16-13-60(c)(3) ("search warrant"); Iowa Code § 124.553(1)(c) ("order, subpoena, or other means of legal compulsion . . . that is issued based upon a determination of probable cause"); Minn. Stat. § 152.126(6)(b)(7) ("valid search

[5] Fourth Amendment rules are not determined by state law, *Virginia v. Moore*, 553 U.S. 164 (2008), but *Garner* illustrates how the Court's assessment of Fourth Amendment standards can be informed by relevant state policies.

warrant”); Mont. Code Ann. §§ 37-7-1506(1)(e), 46-4-301(3) (subpoena issued upon affidavit stating probable cause); N.H. Rev. Stat. Ann. § 318-B:35(I)(b)(3) (“court order based on probable cause”); Or. Rev. Stat. § 431.966(2)(a)(C) (“valid court order based on probable cause”). In addition, Vermont bars access to prescription records in its prescription monitoring program by law enforcement directly or on request. Vt. Stat. Ann. Tit. 18, § 4284. Maine and Nebraska’s laws establishing those states’ prescription drug monitoring programs are silent on law enforcement access. Me. Rev. Stat. tit. 22, § 7250(4); Neb. Rev. Stat. § 71-2455.

The trend over time has been toward inclusion of a probable cause requirement. Long-term trends in state practices, even when not unanimous, can inform the Fourth Amendment analysis. *See Garner*, 471 U.S. at 18 (“It cannot be said that there is a constant or overwhelming trend away from the common-law rule . . . Nonetheless, the long-term movement has been away from the rule that deadly force may be used against any fleeing felon, and that remains the rule in less than half the States.”). The nine states that require probable cause have all adopted or reasserted this standard within the last decade. Of the seven states to enact or update prescription drug monitoring statutes in the last two years, four require probable cause for law enforcement access, and one makes no provision for law enforcement access at all. *Compare* 2012 N.H. Adv. Legis. Serv. 196 (LexisNexis), 2011 Ga. Laws 659, § 2, 2011 Mont. Laws ch. 241, § 7 (relevant terms defined in Mont. Code Ann. § 46-4-301(3)), 2011 Neb. Laws 237, *and* 2011 Ark. Acts 304, *with* 2011 Md. Laws 166 and 2011 Tenn. Pub Acts 310, § 3. Thus, the trend in the states is toward adoption of greater protections against unjustified law enforcement access.

Additionally, a number of state courts have held that individuals have a reasonable expectation of privacy in medical records under state constitutional provisions or the Fourth

Amendment. *See State v. Skinner*, 10 So. 3d 1212, 1218 (La. 2009) ("[A]bsent the narrowly drawn exceptions permitting warrantless searches, we hold a warrant is required to conduct an investigatory search of medical and/or prescription records."); *King v. State*, 535 S.E.2d 492, 495 (Ga. 2000) ("[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."); *State v. Nelson*, 941 P.2d 441, 449 (Mont. 1997) ("We hold that in order to establish that there is a compelling state interest for the issuance of an investigative subpoena for the discovery of medical records, the State must show probable cause . . . ."); *Commonwealth v. Riedel*, 651 A.2d 135, 139-40 (Pa. 1994) (holding that probable cause is required for access to medical records because "appellant does have a reasonable expectation of privacy in his medical records"); *State v. Copeland*, 680 S.W.2d 327, 330-31 (Mo. Ct. App. 1984) (requiring probable cause for the results of blood tests because, "[f]ollowing the law and common practice, it is normally expected that a patient's disclosures to a hospital will be kept confidential.").

Further, a majority of states recognize a physician-patient privilege as a matter of state law. No physician-patient privilege existed at common law, but 42 states and the District of Columbia have created one through legislation.[6] Utah Rule of Evidence 506 recognizes a

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[6] Alaska R. Evid. 504; Ariz. Rev. Stat. Ann. § 12-2235 (2013); Ark. R. Evid. 503; Cal. Evid. Code §§ 990–1007 (West 2013); Colo. Rev. Stat. § 13-90-107(d) (2013); Conn. Gen. Stat. Ann. § 52-146o (West 2013); Del. Unif. R. Evid. 503; D.C. Code Ann. § 14-307 (2013); Fla. Stat. Ann. § 456.057 (West 2013); Haw. Rev. Stat. § 616-1 (West 2013); Idaho Code Ann. § 9-203.4 (West 2013); 735 Ill. Comp. Stat. Ann. 5/8-802 (West 2013); Ind. Code Ann. § 34-46-3-1 (West 2013); Iowa Code Ann. § 622.10 (West 2013); Kan. Stat. Ann. § 60-427 (West 2012); La. Code Evid. Ann. art. 510 (2012); Me. R. Evid. 503; Mich. Comp. Laws Ann. § 600.2157 (West 2013); Minn. Stat. Ann. § 595.02 (West 2013); Miss. Code Ann. § 13-1-21 (West 2013); Mo. Ann. Stat. § 491.060 (West 2013); Mont. Code Ann. § 26-1-805 (West 2013); Neb. Rev. Stat. Ann. § 27-504 (West 2012); Nev. Rev. Stat. Ann. § 49.215 (West 2011); N.H. Rev. Stat. Ann. § 329:26 (2013); N.J. Stat. Ann. § 2A:84A-22.2 (West 2013); N.M. R. Evid. 11-504; N.Y. C.P.L.R. 4504 (McKinney 2013); N.C. Gen. Stat. Ann. § 8-53 (West 2013); N.D. R. Evid. 503; Ohio Rev. Code Ann. § 2317.02(B) (West 2013); Okla. Stat. Ann. tit. 12, § 2503 (West 2013); Or. Rev. Stat. Ann. § 40.235 (West 2013); 42 Pa. Cons. Stat. Ann. § 5929 (West 2013); R.I. Gen. Laws Ann. § 5-37.3-4 (West 2012); S.D.

physician-patient privilege. These privileges, like the other state privacy protections discussed above, function to assure patients of the confidentiality of their medical information and form part of the basis upon which patients' expectations of privacy are formed. *Cf. DeMassa v. Nunez*, 770 F.2d 1505, 1506 (9th Cir. 1985) (per curiam) (discussing attorney-client privilege as a source of clients' reasonable expectation of privacy in their client files held by an attorney).[7]

In the State of Utah, the Government Records Access and Management Act, ("GRAMA") designates "records containing data on individuals describing medical history, diagnosis, condition, treatment, evaluation or similar medical data as "private records." Utah Code Ann. § 63G-2-302(1)(b). Prescription records clearly fall within that description and access to such records are strictly limited. See § 63G-2-202.

3. The confidentiality of patient health information is protected by longstanding ethical rules that were known to the framers of the Fourth Amendment and continue in force today.

Confidentiality of patient medical information has been a cornerstone of medical practice throughout much of the world for millennia and is protected today by codes of ethics of medical professional societies. This constitutes an important source of patients' reasonable expectation of privacy in their medical information. *See DeMassa v. Nunez*, 770 F.2d 1505, 1506-07 (9th Cir. 1985) (per curiam) (identifying rules of professional conduct and other sources of professional

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Codified Laws § 19-13-6 (2012); Tex. R. Evid. 509; Utah Code Ann. § 78B-1-137 (West 2012); Vt. Stat. Ann. tit. 12, § 1612 (West 2013); Va. Code Ann. § 8.01-399 (West 2013); Wash. Rev. Code Ann. § 5.60.060 (West 2013); Wis. Stat. Ann. § 905.04 (West 2013); Wyo. Stat. Ann. § 1-12-101 (West 2013).

[7] Federal law also recognizes the heightened privacy interest in medical records. See Privacy Protection Act, 42 U.S.C. §§ 2000aa-11(a)(3) (the Attorney General must recognize "special concern for privacy interests in cases in which a search or seizure for such documents could intrude upon a known confidential relationship such as that which may exist between . . . doctor and patient"); HIPAA Privacy Rule, 45 C.F.R. § 164.512 (setting rules to protect confidentiality of protected health information).

ethics as a source of clients' reasonable expectation of privacy in client files possessed by attorneys).

The Oath of Hippocrates, originating in the fourth century B.C.E., required physicians to maintain patient secrets. Mark A Rothstein, *Chapter 6: Confidentiality*, *in* Medical Ethics: Analysis of the Issues Raised by the Codes, Opinions, and Statements 161, 170 (Baruch A. Brody et al. eds., 2001). These concepts long predate America's founding, and would have been known to the framers of the Fourth Amendment. American medical practice reflected the concern for privacy in the earliest codes of ethics by including provisions that preserved the confidentiality of patient health information. The concerns were codified by the American medical societies in the 1820s and 1830s, the first Code of Medical Ethics of the American Medical Association in 1847, every subsequent edition of that code, and in the ethical codes of other health professionals, including the American Nurses Association and American Pharmaceutical Association. *See* Rothstein, *Confidentiality*, at 172-73; AMERICAN MED. ASS'N., CODE OF MEDICAL ETHICS ART. I, § 2 (1847), *available at* http://www.ama-assn.org/resources/doc/ethics/1847code.pdf.

Today, virtually all patients (97.2%) believe that health care providers have a "legal and ethical responsibility to protect patients' medical records." New London Consulting & FairWarning, How Privacy Considerations Drive Patient Decisions and Impact Patient Care Outcomes 10 (Sept. 13, 2011).[8] 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

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[8] *Available at* http://www.fairwarning.com/whitepapers/2011-09-WP-US-PATIENT-SURVEY.pdf.
[9] Patient Privacy Rights & Zogby International, *2000 Adults' Views on Privacy, Access to Health Information, and Health Information Technology* 4 (2010), http://patientprivacyrights.org/wp-content/uploads/2010/11/Zogby-Result-

without permission.[10]

Failing to recognize an individual's longstanding privacy interest in his medical information, and allowing law enforcement to easily access that information, is particularly harmful. Without privacy protections, patients may delay medical care or avoid it altogether, which implicates both personal harms and potential public health consequences. *See* Lawrence O. Gostin, *Health Information Privacy*, 80 Cornell L. Rev. 451, 490-91 (1995) (explaining why protecting the confidentiality of patients' medical information "is valued not only to protect patients' social and economic interests, but also their health and the health of the wider community"). As one court explained, "[p]ermitting the State unlimited access to medical records for the purposes of prosecuting the patient would have the highly oppressive effect of chilling the decision of any and all [persons] to seek medical treatment." *King v. State*, 535 S.E.2d 492, 496 (Ga. 2000). The Supreme Court has echoed this concern, recognizing that violating a patient's expectation in the confidentiality of medical information "may have adverse consequences because it may deter patients from receiving needed medical care." *Ferguson*, 532 U.S. at 78, n.14 (citing *Whalen*, 429 U.S. at 599-600); *accord Whalen*, 429 U.S. at 602 ("Unquestionably, some individuals' concern for their own privacy may lead them to avoid or to postpone needed medical attention.").

4. Prescription records can reveal types of information that are particularly sensitive and receive heightened protections.

Illustrations.pdf.
[10] Institute for Health Freedom & Gallup Organization, *Public Attitudes Toward Medical Privacy* 9-10 (Sept. 26, 2000), http://www.forhealthfreedom.org/Gallupsurvey/IHF-Gallup.pdf.

Records in the UCSD can indicate facts about patients' sex, sexuality, and sexually transmitted infections, mental health, and substance abuse. These areas "are highly sensitive, even relative to other medical information." *Norman-Bloodsaw*, 135 F.3d at 1269.

For example, a prescription for Marinol can reveal that a patient is being treated for AIDS.[11] The Ninth Circuit has held that "[i]ndividuals who are infected with the HIV virus clearly possess a constitutional right to privacy regarding their condition." *Doe*, 15 F.3d at 267; *accord Doe*, 941 F.2d at 795-96.

> This would be true for any serious medical condition, but is especially true with regard to those infected with HIV or living with AIDS, considering the unfortunately unfeeling attitude among many in this society toward those coping with the disease. An individual revealing that she is HIV seropositive potentially exposes herself not to understanding or compassion but to discrimination and intolerance, further necessitating the extension of the right to confidentiality over such information.

Doe, 15 F.3d at 267.

A prescription for testosterone can reveal both that a person is transgender or transsexual and the stage of his transition from the female to male sex. This is highly private information that can expose a person to discrimination and opprobrium. *See Smith v. City of Salem, Ohio*, 378 F.3d 566, 568-69, 575 (6th Cir. 2004) (discussing discrimination against person diagnosed with gender identity disorder and holding that such discrimination violates Title VII); *Doe v. Blue Cross & Blue Shield*, 794 F.Supp. 72, 74 (D.R.I. 1992) (permitting use of pseudonym to bring suit because "[a]s a transsexual, plaintiff's privacy interest is both precious and fragile, and this Court will not cavalierly permit its invasion"); *see also* Jaime M. Grant et al., Injustice at Every

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[11] Marinol is used for loss of appetite associated with weight loss in patients with AIDS. *See* http://www.marinol.com/about-marinol.cfm.

Turn: A Report of the National Transgender Discrimination Survey 2 (2011),[12] ("Transgender . . . people face injustice at every turn: in childhood homes, in school systems that promise to shelter and educate, in harsh and exclusionary workplaces, at the grocery store, the hotel front desk, in doctors' offices and emergency rooms, before judges and at the hands of landlords, police officers, health care workers, and other service providers.").

The UCSD also tracks several medications that are used to treat mental illness, including panic disorders, anxiety disorders, and post-traumatic stress disorder. Information about mental health and mental illness is similarly sensitive and is afforded particularly strong privacy protections. *See Jaffee v. Redmond*, 518 U.S. 1, 10 (1996) (establishing federal psychotherapist-patient privilege and explaining that "[b]ecause of the sensitive nature of the problems for which individuals consult psychotherapists, disclosure of confidential communications made during counseling sessions may cause embarrassment or disgrace"); *see also* Utah R. Evid. 506 (establishing physician and mental health therapist-patient privilege).

In short, "medical 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." *Doe v. Broderick*, 225 F.3d 440, 451 (4th Cir. 2000). The expectation of privacy in prescription records and the medical information they reveal is recognized by society as reasonable.

B. The evidence obtained through Detective Woods's search of Mr. Pyle's prescription records must be suppressed because it was conducted without a warrant, and it was not conducted pursuant to an exception to the warrant requirement or exclusionary rule.

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[12] *Available at* http://www.thetaskforce.org/downloads/reports/reports/ntds_full.pdf.

i. <u>Mr. Pyle's legitimate expectation of privacy in his prescription records is not vitiated by the State of Utah's limited ability to access the records in the Utah Controlled Substance Database; the "third-party doctrine" does not apply.</u>

A person has a reasonable expectation of privacy in prescription records regardless of whether they are maintained by a third party. Although some cases state that there is no reasonable expectation of privacy in some records in the possession of a third party business, *United States v. Miller*, 425 U.S. 435 (1976), *Smith v. Maryland*, 442 U.S. 735 (1979), those decisions do not reach the search at issue in this case. Unlike in *Miller* and *Smith*, where the Court held that there is no reasonable expectation of privacy in certain records turned over to a bank or in the telephone numbers a person dial, Mr. Pyle retained a reasonable expectation of privacy in his prescription records contained in the UCSD.

In *Miller*, the Court held that a bank depositor had no expectation of privacy in records about his transactions that were held by the bank. Although the Court explained that the records were the bank's business records, 425 U.S. at 440, it proceeded to inquire whether Miller could nonetheless maintain a reasonable expectation of privacy in the records: "We must examine the nature of the particular documents sought to be protected in order to determine whether there is a legitimate 'expectation of privacy' concerning their contents." *Id*. at 442. The Court's ultimate conclusion—that Miller had no such expectation—turned not on the fact that the records were owned or possessed by the bank, but on the fact that Miller "voluntarily conveyed" the information contained in them to the bank and its employees. *Id*.

In *Smith*, the Court held that the use of a pen register to capture the telephone numbers a person dials was not a search under the Fourth Amendment. 442 U.S. at 739, 742. The Court relied heavily on the fact that when dialing a phone number the caller "voluntarily convey[s]

numerical information to the telephone company." *Id*. at 744. As in *Miller*, in addition to establishing voluntary conveyance the *Smith* Court also assessed the degree of invasiveness of the surveillance at issue to determine whether the user had a reasonable expectation of privacy. The Court noted the "pen register's limited capabilities," *id*. at 742, explaining that "'a law enforcement official could not even determine from the use of a pen register whether a communication existed.'" *Id*. at 741 (quoting *United States v. New York Tel. Co.*, 434 U.S. 159, 167 (1977)).

Assessing an individual's expectation of privacy in prescription records in the UCSD thus turns on whether the contents of the records were voluntarily conveyed to the UCSD, and what privacy interest a person retains in those records. Unlike the cancelled checks at issue in *Miller* and the dialed telephone numbers in *Smith*, the prescription records were not voluntarily conveyed to the State of Utah. Utah law requires pharmacists to report all prescriptions for any controlled substance to the Division of Occupational and Professional Licensing. Utah Code § 58-37f-203(1)-(2). Even if disclosure of one's medical condition to the doctor and the prescription to treat that condition can be deemed "voluntary," the pharmacist's conveyance of the prescription to the UCSD involves no volition by or even knowledge of the patient. The Third Circuit reached the same conclusion with respect to cell phone location records, holding that cell phone users retain a reasonable expectation of privacy in their location information – even though wireless providers keep records of the cell towers a phone was connected to at the start and end of each call – because "[a] cell phone customer has not 'voluntarily' shared his location information with a cellular provider in any meaningful way." *In re Application of the U.S. for an Order Directing a Provider of Elec. Commc'ns Serv. to Disclose Records to the*

Gov't, 620 F.3d 304, 318-19 (3d Cir. 2010).

Moreover, the decision to visit a physician and a pharmacist to obtain medical treatment is not in any meaningful sense voluntary. Obtaining medical care for a serious emergent or chronic condition such as AIDS, acute pain, seizure disorders, panic or anxiety disorders, or heroin addiction is a course of action dictated by one's physical and psychological ailments. Opting to forego care can leave a person debilitated or dead, and could pose a public health risk. As one court has explained, "the rule in *Miller* pertains to objects or information voluntarily turned over to third parties. A decision to use a bank may be voluntary. A decision to use a hospital for emergency care is not." *Thurman v. State*, 861 S.W.2d 96, 98 (Tex. App. 1993).

Prescription records also qualify for protection on the second dimension identified by *Miller* and *Smith*: the privacy interest a person retains in them. Bank records and dialed phone numbers reveal some private details of a person's life, but they are not nearly as revealing of private information as are prescription records and the sensitive medical information they disclose. *See Thurman*, 861 S.W.2d at 98 ("We believe that medical records are entitled to more privacy than bank records and phone records."). Indeed, courts have specifically held that patients retain a reasonable expectation of privacy in their prescription or medical records notwithstanding the fact that a third party has access to them. *King v. State*, 535 S.E.2d 492, 495 (Ga. 2000) ("Even if the medical provider is the technical 'owner' of the actual records, the patient nevertheless has a reasonable expectation of privacy in the information contained therein, since that data reflects the physical state of his or her body."); *Doe v. Broderick*, 225 F.3d 440, 450 (4th Cir. 2000) (holding that there is a reasonable expectation of privacy in substance abuse treatment records held by a methadone clinic and distinguishing *Miller*). Because medical

records are inherently and deeply private, *supra* Part II.A, they require the highest protection the Fourth Amendment offers. *See United States v. Golden Valley Elec. Ass'n*, 689 F.3d 1108, 1116 (9th Cir. 2012) (suggesting that search terms entered into Google are more inherently private than electricity usage records and thus would receive greater Fourth Amendment protection).

Recognizing a reasonable expectation of privacy in prescription records is consistent with cases in which courts have found a reasonable expectation of privacy in other types of records that have been handled by a third party. For example, in *DeMassa v. Nunez*, 770 F.2d 1505, 1506 (9th Cir. 1985) (per curiam), the Ninth Circuit held that "clients of an attorney maintain a legitimate expectation of privacy in their client files." The court identified the source of this reasonable expectation of privacy "in federal and state statutes, in codes of professional responsibility, under common law, and in the United States Constitution." *Id*. at 1506–07. The fact that the files were in the possession of the attorney, not the client, did not undermine the protections of the Fourth Amendment. *Id*. at 1507; *accord United States v. Knoll*, 16 F.3d 1313, 1321 (2d Cir. 1994) ("[T]he protection of the Fourth Amendment extends to those papers that a person leaves with his or her lawyer."); *see also United States v. Warshak*, 631 F.3d 266, 285 (6th Cir. 2010) (holding that there is a reasonable expectation of privacy in the contents of emails even though email is sent through an internet service provider's servers). Likewise, that Mr. Pyle's prescription records are in the UCSD does not vitiate his otherwise-reasonable expectation of privacy in them.

Even if the third party doctrine rendered the search of Mr. Pyle's prescription records reasonable under the Fourth Amendment, it would not survive scrutiny under the Utah Constitution. Utah's constitution provides greater protection than the Fourth Amendment where

records are held by a third party. In *State v. Thompson*, 810 P.2d 415, 418 (Utah 1991), the Supreme Court of Utah held that under article I, section 14 of the Utah Constitution, the defendant had a reasonable expectation of privacy in his bank records – a result contrary to that reached in *Miller* under the Fourth Amendment. Where bank records are arguably less private than prescription records, it follows that a person retains a reasonable expectation of privacy in his prescription records held by the state. Thus, the third-party doctrine does not eliminate Mr. Pyle's reasonable expectation of privacy in his prescription records under article I, section 14 of the Utah Constitution.

ii. <u>The evidence obtained by Detective Woods must be excluded because he did not act in good faith when he searched Mr. Pyle's prescription records without a warrant.</u>

The evidence obtained from the unreasonable search of Mr. Pyle's records should be suppressed because Detective Woods did not act in good-faith reliance on Utah Code § 58-37f-301. The exclusionary rule's purpose is to deter police misconduct. *See Herring v. United States*, 555 U.S. 135, 141 (2009). Evidence should be excluded when "it can be said that the law enforcement officer had knowledge, or may be properly charged with knowledge, that the search was unconstitutional under the Fourth Amendment." *State v. Baker*, 2010 UT 18, ¶¶35. Although illegally-obtained evidence may avoid exclusion when it is the product of an officer's "reasonable reliance on a statute later declared unconstitutional," *Id.* at ¶¶36 (citing *Illinois v. Krull*, 480 U.S. 340, 349 (1986)), that exception is limited, and Detective Woods's conduct does not satisfy its requirements.

The good-faith exception to the exclusionary rule announced in *Krull* is narrow. In *Krull*, an officer conducted a warrantless administrative search of a vehicle wrecking yard pursuant to a

statute that was later declared unconstitutional by the Supreme Court of Illinois. *Krull*, 480 U.S. at 344-45. The Court held that where the officer had reasonably relied upon the statute that was later declared unconstitutional, the evidence would not be excluded. *Id*. at 349-50. This exception has since been characterized as applying to cases involving "warrantless administrative searches performed in good faith reliance on a statute later declared unconstitutional." *Herring*, 555 U.S. at 142; *accord United States v. McCane*, 573 F.3d 1037, 1043 (10th Cir. 2009); *Thompson*, 810 P.2d at 419; *see also Williams*, 213 S.W.3d at 678-79 & n.7 (good-faith exception inapplicable where the search was not administrative because of "excessive and unauthorized entanglement with law enforcement"). Where these conditions are not met, the *Krull* good-faith exception does not apply.

1. Detective Woods's search was not an administrative search because it was conducted pursuant to a criminal investigation.

Mr. Pyle's records were searched pursuant to a criminal investigation, not the type of administrative search contemplated in *Krull*. "An administrative search is a search conducted or required by a government actor but which does not have criminal investigation as its goal." *State v. Moreno*, 2009 UT 15, ¶¶25. Warrantless administrative searches are only allowed where there are "special needs" that consist of "limited circumstances, *where the privacy interests implicated by the search are minimal*, and where an important government interest furthered by the intrusion would be placed in jeopardy by a requirement of individualized suspicion . . . ." *Id*. (emphasis original) (quoting *Chandler v. Miller*, 520 U.S. 305, 314 (1997)). Where no "special need" is present, the general rule that "a search or seizure is ordinarily unreasonable in the absence of individualized suspicion of wrongdoing" applies. *City of Indianapolis v. Edmond*, 531 U.S. 32, 37 (2000). Thus, where a criminal investigation is the impetus of the search, and where

the privacy interests implicated by the search are great, the search is not administrative, and not protected by the *Krull* good-faith exception.

Detective Woods's search was not conducted in objectively reasonable reliance on Utah Code § 58-37f-301(2)(i). The good faith exception is inapplicable where it can be found that state actors "had knowledge, or may properly be charged with knowledge, that the search was unconstitutional under the Fourth Amendment." *United States v. Peltier*, 422 U.S. 531, 542, 95 S.Ct. 2313, 2320, 45 L.Ed.2d 374 (1975). In this case, Detective Woods searched prescription records belonging to all of Unified Fire Authority's 480 employees, including Mr. Pyle, demonstrating a complete lack of individualized suspicion or probable cause. He conducted this sweeping search pursuant to a criminal investigation, not pursuant to a regulatory scheme that would be compromised by requiring individualized suspicion. Further, the privacy interests involved in this case are so significant that "it is difficult to conceive of information that is more private or more deserving of Fourth Amendment protection." *Or. Prescription Drug Monitoring Program*, 2014 U.S. Dist. LEXIS 17047 at 21-22. Thus, there was no "special need" in this case that would justify accessing and reviewing the medical information of 480 people simply because they worked for Unified Fire Authority. Detective Woods's search was not an administrative search; the *Krull* good-faith exception is inapplicable. Instead, it was an objectively unreasonable and unjustifiable warrantless search in a criminal investigation, breathtaking in its sweep, conducted without any regard to the privacy interests of the people whose records were invaded and with no reason to believe any single person had engaged in any criminal conduct.

2. Detective Woods's search falls outside the scope of the *Krull* good-faith exception because Utah Code § 58-37f-301(2)(i) has not been declared unconstitutional.

The good-faith exception announced in *Krull* applies only where a statute has been declared unconstitutional subsequent to the search. *See supra* Part II.B.ii. In this case, Utah Code § 58-37f-301(2)(i) has not been declared unconstitutional.[13] Thus, Detective Woods's conduct falls outside the scope of the exception announced in *Krull*.

3. The *Krull* good faith exception to the Fourth Amendment does not apply to article I, section 14 of the Utah Constitution.

Even if the good-faith exception to the Fourth Amendment exclusionary rule applied to Detective Woods's search, no such exception exists with respect to the exclusionary rule applied by the courts when police violate article I, section 14 of the Utah Constitution. *See Baker*, 2010 UT 18, ¶¶35 n.2 ("We have not had the opportunity to determine whether [the good-faith] exception exists under the Utah Constitution, and we do not do so today."); *see also Sims v. Collection Div. of Utah State Tax Comm'n*, 841 P.2d 6, 11 n.10 (Utah 1992); *Thompson*, 810 P.2d at 419-20. Thus, where Detective Woods's warrantless search violated Mr. Pyle's legitimate expectation of privacy protected by article I, section 14 of the Utah Constitution, the evidence obtained from the search must be excluded.

CONCLUSION

Prescription and other medical records communicate information about individuals that society in general accepts as deeply private. Ryan Pyle legitimately expected, in line with

[13] Mr. Pyle does not challenge the constitutionality of Utah Code § 58-37f-301(2) in this motion. He challenges the constitutionality of Detective Woods's search. However, he reserves the right to challenge the statute's constitutionality in a later motion.

societal expectations, that his prescription records would remain private. Although his records were maintained in the UCSD, he did not voluntarily convey those records in any meaningful sense. Thus, Mr. Pyle's rights under the Fourth Amendment and article I, section 14 of the Utah Constitution guaranteed that his prescription records would not be subject to unreasonable search. Detective Woods violated Mr. Pyle's rights, and the rights of 479 other Unified Fire Employees, when he searched their prescription records without a warrant and without even a modicum of individualized suspicion. Exclusion of the evidence obtained from Detective Woods's search of Mr. Pyle's records is necessary to deter future unchecked intrusions by police into people's most private information.

For the foregoing reasons, Mr. Pyle respectfully requests that this Court issue an order suppressing all evidence obtained as a result of and flowing from Detective Woods's warrantless search of his prescription records.

DATED this __14th day of March, 2014.

SKORDAS, CASTON & HYDE, LLC

__/s/ Rebecca H. Skordas ____
Rebecca H. Skordas

CERTIFICATE OF SERVICE

I hereby certify that on the 14th day of March, 2014, I served by electronic filing a true and correct copy of the foregoing MEMORANDUM IN SUPPORT OF MOTION TO SUPPRESS, to the following:

Wayne D. Jones
Assistant Utah Attorney General
348 E. S. Temple
Salt Lake City, UT 84111
Telephone: (801) 524-3083

__/s/ Ryan Wilson ________
Skordas, Caston & Hyde, LLC

Exhibit A

Gregory G. Skordas (#3865)
Rebecca H. Skordas (#6409)
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341 So. Main Street, Suite 303
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Telephone: (801) 531-7444
Facsimile: (801) 531-8885
Attorney for Defendant

IN THE THIRD DISTRICT COURT – SALT LAKE
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

STATE OF UTAH, Plaintiff, v. RYAN DOUGLAS PYLE, Defendant.	**AFFIDAVIT OF RYAN D. PYLE** Case No. 131910379 Judge Vernice Trease

STATE OF UTAH)
)ss.
COUNTY OF SALT LAKE)

AFFIANT BEING FIRST DULY SWORN DEPOSES AND STATES AS FOLLOWS:

1. I am a resident of the State of Utah.
2. I have been employed by Unified Fire Authority since January, 1, 2007.
3. During my tenure, I have been assigned to two stations: Station 101 from January, 2007 through February 2013, and Station 107 from February 2013 through the present.

4. I have sought medical care for various illnesses, surgery, and injuries while a resident of the State of Utah and while employed by the Unified Fire Authority.
5. My wife is a health care professional.
6. I have an expectation that my medical information is private.
7. I have an expectation that the types of medications my health care providers prescribe for me are private.
8. I have an expectation that the identity of the health care providers who have treated me is private.
9. The doctor's identity, area of practice, and the prescriptions I receive reveal information about my medical history.
10. I am aware that the State of Utah keeps records on prescribed controlled substances in a centralized database.
11. I have never consented to have my medical information included in the database.
12. I have never consented to have record of the doctors I have seen, the dates of my treatments, and the medications they prescribed kept in a database.
13. I have never given any of my health care providers permission to disclose my private medical records or the medications I receive to anyone other than the limited disclosure to insurance companies and others I authorize in writing pursuant to HIPAA.

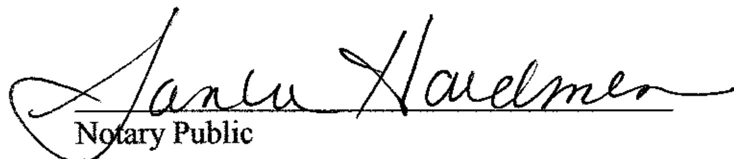
14. Though I understand that the pharmacy that fills my prescriptions must disclose certain information to the State of Utah, I still expect that the pharmacy will protect my right to privacy in every other meaningful way.

15. I believe that I have a right to privacy in my medical information even though information about prescriptions for controlled substances I have been prescribed is gathered and maintained in a database compelled and created by the State of Utah.

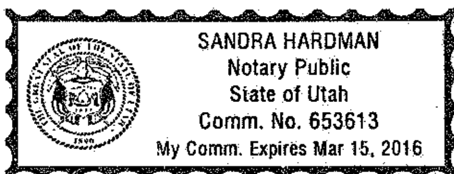
DATED this 14 day of March, 2014.

Ryan Douglas Pyle

Personally appeared before me, Ryan Douglas Pyle and signed the original foregoing document, this 14 day of March, 2014



Notary Public



County of Salt Lake
State of Utah

Exhibit B

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

PORTLAND DIVISION

OREGON PRESCRIPTION DRUG MONITORING PROGRAM, an agency of the STATE OF OREGON,

Plaintiff,

v.

UNITED STATES DRUG ENFORCEMENT ADMINISTRATION, an agency of the UNITED STATES DEPARTMENT OF JUSTICE,

Defendant.

Case No. 3:12-cv-02023-HA

OPINION AND ORDER

JOHN DOE 1, et al.,

Plaintiffs-Intervenors,

v.

UNITED STATES DRUG ENFORCEMENT ADMINISTRATION, an agency of the UNITED STATES DEPARTMENT OF JUSTICE.

Defendant in Intervention.

HAGGERTY, District Judge:

Plaintiff, the Oregon Prescription Drug Monitoring Program (PDMP) brought this action for declaratory relief against the United States Drug Enforcement Administration (DEA)

pursuant to 28 U.S.C. § 2201 to determine its rights and obligations in complying with administrative subpoenas issued by the DEA. The American Civil Liberties Union of Oregon, Inc., John Does 1-4, and Dr. James Roe, M.D. (collectively "ACLU" or "intervenors"), intervened in this matter pursuant to Federal Rule of Civil Procedure 24(a) over the objections of the DEA in order to raise arguments regarding intervenors' protected health information and Fourth Amendment rights. All parties have moved for summary judgment. For the following reasons, the ACLU's Motion for Summary Judgment [27] is granted, the PDMP's Motion for Summary Judgment [24] is denied as moot, and the DEA's Cross Motions for Summary Judgment [40 and 42] are denied.

BACKGROUND

In 2009, the Oregon legislature created the PDMP, an electronic database maintained by the Oregon Health Authority to record information about prescriptions of drugs classified in Schedules II-IV under the federal Controlled Substances Act (CSA).[1] Or. Rev. Stat. (ORS) 431.962. The PDMP became fully operational in 2011. A pharmacy that dispenses a Schedule II-IV prescription drug in Oregon must electronically report certain information regarding that prescription to the PDMP including: the quantity and type of drug dispensed, identifying information about the patient, and identifying information about the practitioner who prescribed the drug. ORS 431.964. The "primary purpose of the PDMP is to provide practitioners and pharmacists a tool to improve health care," by providing health care providers with a means to identify and address problems related to the side effects of drugs, risks associated with the

[1] The CSA, 21 U.S.C. § 801 *et seq.*, classifies drugs into five schedules. Schedule I consists of substances for which there is a high potential for abuse and no currently accepted medical use. Schedules II-V include drugs with an accepted medical use and with progressively lower potentials for abuse.

combined effects of prescription drugs with alcohol or other prescribed drugs, and overdose. PDMP Fact Sheet, Wessler Decl. Ex. B. "Approximately 7,000,000 prescription records are uploaded to the system annually." *Id.*

Depending on the drug prescribed, the information reported to PDMP can reveal a great deal of information regarding a particular patient including the condition treated by the prescribed drug. Schedule II-IV drugs can be used to treat a multitude of medical conditions including AIDS, psychiatric disorders, chronic pain, drug or alcohol addiction, and gender identity disorder.

Pursuant to Oregon statute, prescription monitoring information uploaded to the PDMP constitutes "protected health information" and is not subject to disclosure except in limited circumstances. ORS 431.966. A physician or pharmacist may access patient records in the PDMP only if they "certif[y] that the requested information is for the purpose of evaluating the need for or providing medical or pharmaceutical treatment for a patient to whom the practitioner or pharmacist anticipates providing, is providing or has provided care." ORS 431.966(2)(a)(A). Relevant to this case, the PDMP may also disclose patient information "[p]ursuant to a valid court order based on probable cause and issued at the request of a federal, state or local law enforcement agency engaged in an authorized drug-related investigation involving a person to whom the requested information pertains." *Id.* at 431.966(2)(a)(C). The PDMP's public website repeatedly references the privacy protections afforded prescription information and informs visitors that law enforcement officials may not obtain information "without a valid court order based on probable cause for an authorized drug-related investigation of an individual." *See, e.g.*, Oregon PDMP, *Frequently Asked Questions*, (January 31, 2014, 10:12 AM), http://www.orpdmp.com/faq.html.

The CSA empowers the Attorney General, and executive agencies acting pursuant to his authority, with broad authority to issue administrative subpoenas to investigate drug crimes. 21 U.S.C. § 876. Pursuant to § 876(a) "the Attorney General may subpoena witnesses, compel the attendance and testimony of witnesses, and require the production of any records (including books, papers, documents, and other tangible things which constitute or contain evidence) which the Attorney General finds relevant or material to" an investigation regarding controlled substances. These administrative subpoenas are not self enforcing, and "[i]n the case of contumacy by or refusal to obey a subpoena issued to any person, the Attorney General may invoke the aid of any court of the United States within the jurisdiction of which the investigation is carried on . . . to compel compliance with the subpoena." *Id.* at § 876(c). While there is no penalty for failing to comply with a § 876 subpoena, failure to obey a court order enforcing the subpoena "may be punished by the court as contempt thereof." *Id.*

The DEA has sought to utilize § 876 subpoenas to obtain prescription records from the PDMP. However, the PDMP has refused to comply with the administrative subpoenas on the basis that to do so would violate Oregon law. In at least one instance, the DEA obtained judicial enforcement of a § 876 subpoena against the PDMP for the production of all Schedule II-IV controlled substance prescriptions issued by a particular physician during the course of approximately seven months. *United States v. Oregon Prescription Drug Monitoring Program*, 3:12-mc-00298 (D. Or. Aug. 27, 2012). In that matter, the magistrate judge found ORS 431.966's court order requirement to be preempted by § 876. However, the PDMP was not provided with an opportunity to contest the validity of the subject administrative subpoena. The State of Oregon complied with the court enforced subpoena in that matter, however, additional subpoenas have since been issued to the PDMP and the State of Oregon continues to maintain its

position that it cannot comply with such subpoenas absent a court order.

On September 11, 2012, the DEA issued an administrative subpoena to the PDMP demanding the prescription records for an individual patient and on September 17, 2012, the DEA issued another administrative subpoena to the PDMP demanding a summary of all prescription drugs prescribed by two physicians. The PDMP objected to each subpoena on the basis that disclosure of the requested information would violate Oregon law. Shortly thereafter, the PDMP initiated this action for declaratory relief asking this court to determine whether the Supremacy Clause of the United States Constitution and § 876 preempt ORS 431.966.

The ACLU intervened in this matter pursuant to Federal Rule of Civil Procedure 24(a) in order to raise arguments regarding intervenors' protected health information and Fourth Amendment Rights. The four John Does each utilize prescribed Schedule II-IV substances for the treatment of various medical conditions. John Doe 1 is a retired CEO and currently takes two Schedule II drugs to treat extreme pain caused by recurring kidney stones. John Doe 2, an attorney, and John Doe 4, a medical student, have both been diagnosed with gender identity disorder and utilize prescription testosterone, a Schedule III drug, for hormone replacement therapy. John Doe 3 is a small business owner and takes alprazolam, a Schedule IV drug, to treat anxiety and post-traumatic stress disorders as well as Vicodin, a Schedule III drug, as a pain reliever. Each of the John Does considers his health information to be private and is distressed that the DEA might obtain his prescription information, and by extension information about his medical conditions, without a warrant.

Doctor James Roe, M.D., is an internist who primarily treats geriatric and hospice patients and as a consequence, prescribes more Schedule II-IV drugs than a typical physician. He has been interviewed and investigated by the DEA in the past, and is concerned that his patients'

prescription records have been accessed or may be accessed without a warrant. He asserts that pressure from the DEA has resulted in changes to his prescribing practices.

STANDARDS

Summary judgment is appropriate "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). In this case, the parties agree on all material facts and the dispute is purely legal.

DISCUSSION

Each of the parties has moved for summary judgment. The DEA contends that § 876 preempts ORS 431.966's court order requirement pursuant to the Supremacy Clause of the United States Constitution and that the PDMP should be ordered to comply with the DEA's administrative subpoenas. Additionally, the DEA contends that intervenors do not have standing to present their arguments concerning the Fourth Amendment, that their claims are not ripe, and that they do not have a protected privacy interest in their prescription records. The PDMP contends that, at most, only ORS 431.966's probable cause requirement is preempted as § 876 subpoenas are not self-enforcing. Intervenors contend that the administrative subpoenas are unlawful as they violate the Fourth Amendment.

A. Standing and Ripeness

The DEA contends that intervenors do not have standing to present their arguments related to the Fourth Amendment. Intervenors contend that they do not need Article III standing in accordance with Ninth Circuit precedent, and in any case, do have such standing.

This court previously permitted the ACLU to intervene in this matter pursuant to Federal Rule of Civil Procedure 24(a). There is no basis to reconsider that ruling here. Rather, the question is whether Article III erects any barriers to the justiciability of intervenors' arguments

concerning the Fourth Amendment.

In the Ninth Circuit, courts "resolv[e] intervention questions without making reference to standing doctrine." *Portland Audubon Soc. v. Hodel*, 866 F.2d 302, 308 n.1 (9th Cir. 1989), *abrogated on other grounds by Wilderness Soc'y v. U.S. Forest Serv.*, 630 F.3d 1173 (9th Cir. 2011); *Sagebrush Rebellion, Inc. v. Watt*, 713 F.2d 525, 527–29 (9th Cir.1983). The Ninth Circuit has "declined to incorporate an independent standing inquiry into our circuit's intervention test," though the intervention test implicitly includes some standing analysis. *Id.* Although not all circuits have reached agreement on this issue, the Ninth Circuit is not alone and the question has not been resolved by the Supreme Court. *Diamond v. Charles*, 476 U.S. 54, 68-69 (1986) (noting that the Courts of Appeals have reached different conclusions in determining "whether a party seeking to intervene before a District Court must satisfy not only the requirements of Rule 24(a)(2), but also the requirements of Art. III").

Were intervenors pursuing claims wholly distinct from those of the PDMP, this court might find cause to conduct a standing analysis. *See e.g. San Juan County, Utah v. United States*, 503 F.3d 1163, 1171 (5th Cir. 2007) ("so long as there [is] Article III standing for the original party on the same side of the litigation as the intervenor, the intervenor need not itself establish standing"). However, intervenors pursue claims related to PDMP's claims. The PDMP has sought declaratory relief to determine its rights and obligations in complying with the DEA's administrative subpoenas. Before this court can determine how to resolve any conflict between the PDMP's obligations under ORS 431.966 and administrative subpoenas issued pursuant § 876, the court must first determine that the DEA's issuance of the administrative subpoenas is a constitutional exercise of its authority and that a conflict actually exists. *Oregon v. Ashcroft*, 368 F.3d 1118, 1126 (9th Cir. 2004) (noting that the "CSA shall not be construed to

preempt state law unless there is a 'positive conflict' between" federal and state law and that "'federal courts must, whenever possible, . . . avoid or minimize conflict between federal and state law'") (quoting 21 U.S.C. § 903; *United States v. Oakland Cannabis Buyers' Coop.*, 532 U.S. 483, 502 (2001) (Stevens, J. concurring)); *see also, Alden v. Maine*, 527 U.S. 706, 731 (1999) ("the Supremacy Clause enshrines as 'the supreme Law of the Land' only those Federal Acts that accord with the constitutional design") (citing *Printz v. United States*, 521 U.S. 898, 924 (1996)). If the DEA's administrative subpoenas violate the Fourth Amendment as applied to the PDMP, as intervenors contend, there is no conflict between ORS 431.966 and federal law. This court "has a Case or Controversy before it regardless of the standing of the intervenors." *Id.* at 1172. The ACLU's arguments are merely an extension of those advanced by the PDMP requiring this court to begin at the beginning and consideration of those arguments in no way destroys the controversy already in existence. Accordingly, the court concludes that intervenors do not need standing to raise arguments concerning the Fourth Amendment.

The court also concludes that intervenors' claims are ripe for adjudication. "Whether framed as an issue of standing or ripeness, the inquiry is largely the same: whether the issues presented are 'definite and concrete, not hypothetical or abstract.'" *Wolfson v. Brammer*, 616 F.3d 1045, 1058 (9th Cir. 2010) (quoting *Thomas v. Anchorage Equal Rights Comm'n*, 220 F.3d 1134, 1139 (9th Cir. 2000) (en banc)). Regardless of whether intervenors themselves are currently subject to investigation by the DEA[2], it is clear that PDMP's rights and obligations must be determined at this time. The DEA has sought, and continues to seek, the use of administrative

[2] It is unclear when, if ever, the DEA believes a challenge brought pursuant to the Fourth Amendment would be ripe. The DEA does not notify its targets of its investigations, and even if an individual were prosecuted, it is uncertain whether the DEA would notify that individual regarding the DEA's use of administrative subpoenas to gather evidence.

subpoenas to obtain individuals' prescription records. As discussed above, in order to determine whether PDMP must comply with the DEA's administrative subpoenas, and whether a positive conflict exists between § 876 and ORS 431.966, the court will first determine whether the issuance of the subpoenas is a constitutional exercise of the DEA's authority. Accordingly, the court must evaluate intervenors' claims at this time. The questions presented by this case are "purely legal, and will not be clarified by further factual development." *Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 581 (1985). Accordingly, those questions are now ripe for adjudication.

B. Fourth Amendment

The Fourth Amendment provides protection against "unreasonable searches and seizures." U.S. CONST. amend. IV. "[S]earches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment – subject only to a few specifically established and well-delineated exceptions." *Katz v. United States*, 389 U.S. 347, 357 (1967). The Fourth Amendment does not protect against all searches or seizures, rather it guards against searches and seizures of items or places in which a person has a reasonable expectation of privacy. *United States v. Ziegler*, 474 F.3d 1184, 1189 (9th Cir. 2007); *In re Gimbel*, 77 F.3d 593, 599 (2d Cir. 1996) (holding that the Fourth Amendment does not allow the use of an administrative subpoena where "a subpoena respondent maintains a reasonable expectation of privacy in the materials sought by the subpoena").

The Fourth Amendment protects people, not places, and to invoke the protections of the Fourth Amendment, a person must first show that they have "an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as 'reasonable.'" *Katz*, 389 U.S. at 361 (Harlan, J., concurring).

It is clear from the record that each of the patient intervenors has a subjective expectation of privacy in his prescription information, as would nearly any person who has used prescription drugs. Each has a medical condition treated by a Schedule II-IV drug and each considers that information private. Doctor James Roe also has a subjective expectation of privacy in his prescribing information. *See* Decl. Dr. James Roe (describing his duty of confidentiality to his patients and how law enforcement has made doctors, including himself, reluctant to prescribe schedule II-IV drugs where medically indicated). By reviewing doctors' prescribing information, the DEA inserts itself into a decision that should ordinarily be left to the doctor and his or her patient. Because each of the individual intervenors has a subjective expectation of privacy, the question becomes whether intervenors' subjective expectations of privacy are expectations that society is prepared to recognize as reasonable.

There is "no talisman that determines in all cases those privacy expectations that society is prepared to accept as reasonable." *O'Connor v. Ortega*, 480 U.S. 709, 715 (1987). Rather, courts must weigh "such factors as the intention of the Framers of the Fourth Amendment, the uses to which the individual has put a location, and our societal understanding that certain areas deserve the most scrupulous protection from government invasion." *Id.* (quoting *Oliver v. United States*, 466 U.S. 170, 178 (1984)).

Medical records, of which prescription records form a not insignificant part, have long been treated with confidentiality. The Hippocratic Oath has contained provisions requiring physicians to maintain patient confidentiality since the Fourth Century B.C.E. The ACLU cites compelling evidence demonstrating that a number of signers of the Declaration of Independence and delegates to the Constitutional Convention were physicians trained at the University of Edinburgh, which required its graduates to sign an oath swearing to preserve patient

confidentiality. Baker Decl. ¶¶ 4-10. It is not surprising that privacy protections for medical records have not only been placed in Oregon law, but are also enshrined in certain aspects of federal law. *See, e.g.*, Health Insurance Portability and Accountability Act, Privacy Rule, 45 C.F.R. § 164.512 (providing protections for "protected health information").

In *Whalen v. Roe*, the Supreme Court had occasion to consider the right to informational privacy in prescription records under the Due Process Clause of the Fourteenth Amendment. 429 U.S. 589 (1977). While *Whalen* is not controlling in this case because the Court did not reach any claims raised pursuant to the Fourth Amendment, it is nevertheless instructive. In *Whalen*, the Court considered whether New York's collection of prescription information in a computerized database violated doctors' and patients' constitutionally protected privacy rights. 429 U.S. at 591. The Court noted that there are two types of privacy interests implicated by prescription records: "One is the individual interest in avoiding disclosure of personal matters and another is the interest in independence in making certain kinds of important decisions." *Id.* at 699-600. New York's program could make "some patients reluctant to use, and some doctors reluctant to prescribe, such drugs even when their use is medically indicated [such that] the statute threatens to impair both [plaintiffs'] interest in the nondisclosure of private information and also their interest in making important decisions independently." *Id.* at 600. Despite the fact that the Court acknowledged that privacy rights were implicated, it ultimately concluded that New York's prescription information program adequately safeguarded patients' and doctors' informational privacy rights under the Fourteenth Amendment. *Id.* The court declined to address the plaintiffs' Fourth Amendment arguments because the case did not "involve affirmative, unannounced, narrowly focused intrusions into individual privacy during the course of criminal investigations." *Id.* at 604 n.32.

In *Ferguson v. City of Charleston,* the Supreme Court analyzed medical records under the Fourth Amendment. 532 U.S. 67 (2001). In that case, a state hospital was conducting drug tests of pregnant women and then providing the results of those tests to law enforcement. *Id.* at 72-75. The Supreme Court noted that the "reasonable expectation of privacy enjoyed by the typical patient undergoing diagnostic tests in a hospital is that the results of those tests will not be shared with nonmedical personnel without her consent." *Id.* at 78. The Court found that "an intrusion on that expectation of privacy may have adverse consequences because it may deter patients from receiving needed medical care." *Id.* at 78 n.14 (citing *Whalen*, 429 U.S. at 599-600). The Court concluded that the "special need" exception to the warrant requirement was inapplicable to the search because the "central and indispensable feature of the policy from its inception was the use of law enforcement to coerce patients into substance abuse treatment." *Id.* at 80.

The Ninth Circuit has also had occasion to evaluate whether patients and doctors have a reasonable expectation of privacy in medical records protected by the Fourth Amendment. In *Tucson Women's Clinic v. Eden*, the Ninth Circuit evaluated an Arizona regulation that required abortion clinics to submit to warrantless inspections by the Arizona Department of Human Services. 379 F.3d 531, 537 (9th Cir. 2004). The Ninth Circuit determined that the administrative search exception to the Fourth Amendment which, in some circumstances, allows warrantless searches of closely regulated businesses, was inapplicable to the searches authorized by the Arizona regulations. *Id.* at 550. The court determined that abortion services were not sufficiently regulated to fall within the exception. *Id.* More importantly, the court noted that "the 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." *Id.* That theory was inapplicable 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." *Id.* Accordingly, the Ninth Circuit held that the statute and regulations were violative of the Fourth Amendment.[3]

In this matter, the court easily concludes that intervenors' subjective expectation of privacy in their prescription information is objectively reasonable. Although there is not an absolute right to privacy in prescription information, as patients must expect that physicians, pharmacists, and other medical personnel can and must access their records, it is more than reasonable for patients to believe that law enforcement agencies will not have unfettered access to their records.[4] The prescription information maintained by PDMP is intensely private as it connects a person's identifying information with the prescription drugs they use. The DEA attempts to draw a distinction between medical records and prescription information in order to distinguish the present case from *Tucson Women's Clinic*'s conclusion that "all provision of medical services in private physicians' offices carries with it a high expectation of privacy." 379 F.3d at 550. This distinction is very nearly meaningless. By obtaining the prescription records for individuals like John Does 2 and 4, a person would know that they have used testosterone in

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

[4] The DEA argues that because there are privacy protocols within the DEA, and risk of public disclosure of prescription information is low, there is no violation of patients' privacy interests. The Fourth Amendment was not designed to protect public disclosure of individuals' private information, but to protect people from government intrusion. The DEA also contends that there is no reasonable expectation of privacy because the DEA can request records from individual pharmacies. Whether or not such requests would conform with the Fourth Amendment is not before the court and the DEA's ability to obtain limited prescription information in a more cumbersome manner is irrelevant to this court's analysis of the administrative subpoenas at issue.

particular quantities and by extension, that they have gender identity disorder and are treating it through hormone therapy. It is difficult to conceive of information that is more private or more deserving of Fourth Amendment protection. That this expectation of privacy in prescription information is protected in ORS 431.966 and advertised on PDMP's public website, makes that expectation all the more reasonable.

The DEA contends that even if intervenors have a reasonable expectation of privacy in their prescription records, the DEA may still utilize administrative subpoenas to obtain the records and that the "third-party doctrine" undermines any expectation of privacy. The DEA relies on *United States v. Golden Valley Elec. Ass'n*, 689 F.3d 1108, 1115 (9th Cir. 2012) and contends that because the Fourth Amendment's strictures are relaxed in the context of administrative subpoenas, that the DEA should be able to obtain the prescription information without a warrant. In *Golden Valley Elec. Ass'n*, the Ninth Circuit discussed the Fourth Amendment's limited protections as applied to administrative subpoenas. The court noted that:

> It is sufficient for Fourth Amendment purposes if the inquiry is within the authority of the agency, the demand is not too indefinite and the information sought is reasonably relevant. The gist of the protection is in the requirement, expressed in terms, that the disclosure sought shall not be unreasonable.

Id. (quoting *Reich v. Montana Sulphur & Chemical Co.*, 32 F.3d 440, 448 (9th Cir. 1994)).

In *Golden Valley*, the Ninth Circuit upheld the DEA's use of administrative subpoenas to obtain electric company records pertaining to electricity consumption at three addresses. In so holding, the court noted that a "customer ordinarily lacks a reasonable expectation of privacy in an item, like a business record, in which he has no possessory or ownership interest." *Id.* at 1116 (quoting *United States v. Cormier*, 220 F.3d 1103, 1108 (9th Cir.2000)). The court specifically noted that "depending on the circumstances or the type of information, a company's guarantee to its customers that it will safeguard the privacy of their records might suffice to justify resisting an

administrative subpoena." *Id.* Here, it is clear that the information sought by the DEA is relevant to its investigations, but the question is whether the use of an administrative subpoena to obtain the information sought is reasonable. The prescription records at issue here are entirely unlike electric company records in which an individual lacks a reasonable expectation of privacy. Much like the information safeguarded in *Tucscon Women's Clinic*, the prescription records here are protected by a heightened privacy interest rendering the use of administrative subpoenas unreasonable.

Lastly, the DEA contends that intervenor-plaintiffs expectation of privacy is unreasonable pursuant to the "third party doctrine." Under that theory, an individual does not have a reasonable expectation of privacy in information held by a third party. *See e.g., United States v. Miller*, 425 U.S. 435 (1976) (no expectation of privacy in bank records); *Smith v. Maryland*, 442 U.S. 735 (1979) (same for telephone numbers a person dials). In *Miller*, the Supreme Court's analysis turned largely on the fact that Miller "voluntarily conveyed" the information contained in the bank records to the bank and in *Smith*, the court made the same determination for a person dialing telephone numbers.

However, this case is markedly different from *Miller* and *Smith* for two reasons. The first is that the PDMP's records are "more inherently personal or private than bank records," and are entitled to and treated with a heightened expectation of privacy. *Golden Valley Elec. Ass'n*, 689 F.3d 1116. *See, DeMassa v. Nunez*, 770 F.2d 1505 (9th Cir. 1985) (attorney's clients have reasonable expectation of privacy in their legal files even though kept and maintained by attorney). Secondly, patients and doctors are not voluntarily conveying information to the PDMP. The submission of prescription information to the PDMP is required by law. The only way to avoid submission of prescription information to the PDMP is to forgo medical treatment

or to leave the state. This is not a meaningful choice. *See, In re Application of U.S. for an Order Directing a Provider of Electronic Communication Service to Disclose Records to Government*, 620 F.3d 304, 317 (3rd Cir. 2010) (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).

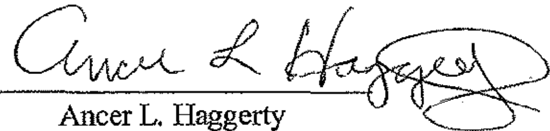
Because the court concludes that the DEA's use of administrative subpoenas to obtain prescription records from the PDMP violates the Fourth Amendment, the court does not reach the issues raised pursuant to the Supremacy Clause.

CONCLUSION

For the foregoing reasons, the ACLU's Motion for Summary Judgment [27] is GRANTED, the PDMP's Motion for Summary Judgment [24] is DENIED AS MOOT, and the DEA's Cross Motions for Summary Judgment [40 and 42] are DENIED.

IT IS SO ORDERED.

DATED this 11 day of February, 2014.



Ancer L. Haggerty
United States Judge