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IN THE UNITED STATES DISTRICT COURT
DISTRICT OF UTAH, CENTRAL DIVISION

UNITED STATES DEPARTMENT OF
JUSTICE, DRUG ENFORCEMENT
ADMINISTRATION,

Petitioner,

v.

UTAH DEPARTMENT OF COMMERCE and
UTAH DIVISION OF OCCUPATIONAL &
PROFESSIONAL LICENSING,

Respondents.

**RESPONDENTS' SUPPLEMENTAL
MEMORANDUM REGARDING
STANDING**

Case No. 2:16-cv-611-DN-DBP

Judge David Nuffer
Magistrate Judge Dustin B. Pead

Respondents Utah Department of Commerce and Utah Division of Occupational and Professional Licensing (“Respondents”), based on the Court’s Order dated October 21, 2016 ([doc. 41](#)) submits this Supplemental Memorandum Regarding Standing. Petitioner raised the issue of Respondents’ standing in their Memorandum opposing the ACLU’s Motion to

Intervene.¹ Respondents have not had an opportunity to respond to Petitioner’s argument that Respondents lack standing, and the Parties agreed to allow a supplemental brief by Respondents, which the Court memorialized in its Scheduling Order.²

In this case, standing turns on whether Respondents have suffered an injury in fact. Respondents have suffered an injury in fact because Petitioner’s use of an administrative subpoena to access Respondents’ prescription drug database (the “Database”) undermines Respondents’ exercise of their sovereign power to create and enforce its legal code.

ARGUMENT

Respondents’ stake in this litigation is sufficiently adverse to establish standing because “[t]he States have a legally protected sovereign interest in ‘the exercise of sovereign power over individuals and entities within the relevant jurisdiction [, which] involves the power to create and enforce a legal code.’”³

An inquiry into standing seeks to determine whether a party has a personal stake in a controversy’s outcome to assure concrete adverseness, which sharpens the presentation of issues upon which a court depends for illumination.⁴ In this case, standing turns on whether Respondents have suffered the necessary injury in fact. To have standing, a party must demonstrate (1) an injury in fact that is concrete and particularized, as well as actual or

¹ Doc. 31 p. 16.

² Doc. 41.

³ *Wyoming ex rel. Crank v. United States*, 539 F.3d 1236, 1242 (10th Cir. 2008) (quoting *Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez*, 458 U.S. 592, 601 (1982)).

⁴ *Id.* at 1241 (quoting *Massachusetts v. EPA*, 549 U.S. 497 (2007)).

imminent; (2) an injury that is traceable to the conduct complained of; and (3) an injury that is redressable by a decision of the court.⁵

1. The Injury to Respondents is Concrete, Particularized, and Actual.

The conflict between Petitioner's subpoena power⁶ and the warrant requirement of Section 58-37f-301(m) is particular to Respondents and creates a personal stake in the outcome, because using a subpoena would interfere with Respondents' power to create and enforce a legal code.⁷ Section 58-37f-301(m) requires federal, state, and local law enforcement agencies and state and local prosecutors to obtain a warrant before obtaining Database information related to the investigation of a controlled substance and a specific person who is the subject of an investigation.⁸ DOPL employees or other individuals who knowingly releases Database information without having first received a warrant are guilty of a third degree felony.⁹ If Petitioner is allowed to bypass the warrant requirement, it would interfere with Respondents' power to create and enforce the statute. Aside from the obvious circumvention of the warrant requirement, the effectiveness of the statute would be further jeopardized here because Petitioner's access might bleed over into de facto access for cooperating law enforcement

⁵ *Id.* (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992)).

⁶ 21 U.S.C.A. § 876.

⁷ *Wyoming*, 539 F.3d at 1242.

⁸ Utah Code Ann. § 58-37f-301(m).

⁹ *Id.* § 58-37f-601(1)(a)(i).

agencies or prosecutors (who might otherwise be required to obtain a warrant) if they are working with Petitioner or sharing information with Petitioner.¹⁰

The case of *Wyoming ex rel. Crank v. U.S.*, 539 F.3d 1236 (10th Cir. 2008) is instructive. In *Wyoming ex rel. Crank*, the Tenth Circuit concluded that Wyoming had the requisite Article III standing to bring a suit against the Federal Bureau of Alcohol, Tobacco, Firearms, and Explosives (“ATF”).¹¹ Wyoming enacted a new law to expunge misdemeanor convictions for the purpose of restoring lost firearm rights.¹² ATF informed the Wyoming Attorney General that ATF would not restore federal firearm rights, because of what ATF argued was a conflicting federal law.¹³ The Wyoming Attorney General sought review of ATF’s interpretation of the conflicting statutes in federal district court.¹⁴ The district court determined that ATF’s interpretation was not arbitrary or capricious, and dismissed the challenge.¹⁵ Wyoming appealed, and ultimately the Tenth Circuit found that ATF’s statutory interpretation was properly upheld by the district court. The court further reviewed de novo whether Wyoming had standing to challenge ATF’s interpretation, and determined that standing existed because of Wyoming and other states’ “legally protected sovereign interest in the exercise of sovereign power over

¹⁰ 21 U.S.C.A. § 873 (Cooperative arrangements with local, State, tribal, and Federal agencies); 28 C.F.R. § 0.103 (authorizing the DEA to release information obtained by the DEA to Federal, State, and local law enforcement).

¹¹ 539 F.3d at 1241–42.

¹² *Id.*

¹³ *Id.* at 1238–39.

¹⁴ *Id.*

¹⁵ *Id.* at 1239.

individuals and entities within the relevant jurisdiction, which involves the power to create and enforce a legal code.”¹⁶

The facts in *Wyoming ex rel. Crank* and the facts in the present case are similar: a state is challenging a federal agency’s interpretation of a conflict between state and federal law that impacts citizens’ constitutional rights. Like Wyoming, Respondents here are challenging federal action that negatively impacts Respondents’ power to create and enforce a legal code.

In addition to the Tenth Circuit, other circuits have analyzed the relevant standing issues and upheld the State’s right to raise Fourth Amendment issues in the context of preemption arguments.¹⁷ In *Virginia ex rel. Cuccinelli v. Sebellius*, 656 F.3d 253 (4th Cir. 2011), the Fourth Circuit analyzed whether Virginia had standing to challenge a federal law.¹⁸ The conflict was between the individual mandate provision of the Affordable Care Act and a Virginia statute that declared that no Virginia resident was required to obtain insurance coverage.¹⁹ The Fourth Circuit determined that Virginia lacked standing to challenge the individual mandate because the conflict between the statutes did not interfere with Virginia’s power to create and enforce a legal code.²⁰ The conflict between the statutes did not interfere with Virginia’s power to create and

¹⁶ *Id.* at 1241–42.

¹⁷ *Virginia ex rel. Cuccinelli v. Sebellius*, 656 F.3d 253 (4th Cir. 2011); *see Oregon Prescription Drug Monitoring Program v. U.S. Drug Enf’t Admin.*, 998 F. Supp. 2d 957 (D. Or. 2014) (reaching of the merits of the arguments without analyzing standing).

¹⁸ 656 F.3d at 266–67.

¹⁹ *Id.*

²⁰ *Id.* at 269.

enforce a legal code because the Virginia statute “regulate[d] nothing and provide[d] for the administration of no state program.”²¹

The Fourth Circuit referred to the list of cases²² cited by Virginia in support of standing (including *Wyoming*), but distinguished them because the state statutes at issue in those cases regulated behavior or provided for the administration of a state program.²³ The cases cited “reflect[ed] the ‘exercise of [a state’s] sovereign power over individuals and entities within the relevant jurisdiction.’”²⁴ The Virginia statute reflected no exercise of sovereign power, because its sole intention was to immunize Virginia citizens from federal law, which Virginia lacks sovereign authority to do.²⁵

Unlike the law at issue in *Sebellius*, Utah’s warrant requirement was not passed by the State merely as a vehicle to challenge Petitioner’s administrative subpoena power. Rather, it is part of a complex statutory text that governs the administration of the Database, regulates access to the Database by federal, state, and local law enforcement and prosecutors, and criminalizes

²¹ *Id.* at 270.

²² See *Maine v. Taylor*, 477 U.S. 131, 132–33 (1986) (regulating importation of baitfish); *Diamond v. Charles*, 476 U.S. 54, 59–60 (1986) (regulating abortion); *Wyoming*, 539 F.3d at 1239–40 (establishing “procedure to expunge convictions of domestic violence misdemeanors” for purposes of “restoring any firearm rights”); *Texas Office of Pub. Util. Counsel v. FCC*, 183 F.3d 393, 409 (5th Cir.1999) (establishing telecommunications aid programs for schools and libraries); *Alaska v. U.S. Dep’t of Transp.*, 868 F.2d 441, 442–43 (D.C. Cir. 1989) (regulating airline price advertising); *Ohio v. U.S. Dep’t of Transp.*, 766 F.2d 228, 230 (6th Cir. 1985) (regulating shipment of hazardous nuclear materials).

²³ *Id.* at 269–270

²⁴ *Id.* (quoting *Alfred L. Snapp & Son, Inc. v. Puerto Rico, ex rel., Barez*, 458 U.S. 592, 601 (1982))

²⁵ *Id.* at 270.

accessing the Database without a warrant.²⁶ Respondents have standing to challenge Petitioner’s administrative subpoena power because Petitioner’s use of an administrative subpoena, instead of a warrant, infringes on Respondents’ right to create and enforce a legal code related to the administration of a state program and the regulation of access to information held by Respondents. That conflict, as described more fully in Respondents’ Memorandum in Opposition to Enforcement, is that the use of an administrative subpoena to access the confidential, protected, and personal information in the Database violates the Fourth Amendment’s protections against unlawful searches.²⁷

2. Respondents’ Injury Satisfies the Traceability and Redressability Requirements.

As the Tenth Circuit said in *Wyoming*, and as is true here, “there is little doubt that [the] alleged injury satisfies the traceability and redressability requirements of standing.”²⁸ “Article III requires proof of a substantial likelihood that the defendant’s conduct caused plaintiff’s injury in fact.”²⁹ And “that it is likely that a favorable court decision will redress the injury to the plaintiff.”³⁰ The injury that would result from enforcement of the administrative subpoena satisfies both requirements because use of an administrative subpoena instead of a warrant would directly cause the Fourth Amendment injury, and a decision by the Court to not enforce the administrative subpoena would prevent the injury. Accordingly, Respondents satisfy all three Article III standing requirements.

²⁶ [Utah Code Ann. § 58-37f-301](#).

²⁷ Resp.’s Mot. Opp. doc. 24.

²⁸ [539 F.3d 1236, 1242](#).

²⁹ *Id.* (quotation and citations omitted).

³⁰ *Id.* (quotation and citations omitted).

CONCLUSION

Respondents have standing to oppose the enforcement of Petitioner's administrative subpoena on Fourth Amendment grounds because the injury that would result interferes directly with Petitioners' ability to create and enforce a legal code. Respondents ask that the Court find that Respondents have standing, and proceed to the Fourth Amendment question presented in the remainder of the briefing.

DATED: November 9, 2016.

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