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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.	CASE NO. 2:16-cv-611-DN-DBP **REPLY IN SUPPORT OF PETITION TO ENFORCE DEA ADMINISTRATIVE SUBPOENAS** Chief Judge David Nuffer Magistrate Judge Dustin B. Pead
UNITED STATES DEPARTMENT OF JUSTICE, DRUG ENFORCEMENT ADMINISTRATION, Petitioner, v. AMERICAN CIVIL LIBERTIES UNION et al., Respondent-Intervenors.	

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INTRODUCTION

Petitioner the United States Department of Justice, Drug Enforcement Administration ("DEA") hereby submits this reply in support of its Petition to Enforce an administrative subpoena served upon the Utah Department of Commerce and the Utah Division of Occupational and Professional Licensing ("DOPL") (collectively, "State Respondents") pursuant to 21 U.S.C. § 876(c). [Doc. 2.] Neither the State Respondents nor the Respondent-Intervenors (collectively, "Respondents") have identified a valid basis to hold unenforceable DEA's administrative subpoena, which seeks prescription records in Utah's Controlled Substance Database ("CSD"). Respondents concede that DEA's subpoena satisfies the reasonable relevance test that applies to administrative subpoenas. In other words, the subpoena falls within DEA's statutory authority, is not too indefinite, and seeks information that is reasonably relevant to DEA's investigation of a medical provider, DEA Registrant #1, based on the suspicion that the provider is issuing prescriptions in violation of the Controlled Substances Act ("CSA"), 21 U.S.C. §§ 801 *et seq.*, to individuals who appear to be members of a criminal organization with overseas ties. The only defense that Respondents raise to enforcement of DEA's subpoena is the assertion that under the Fourth Amendment, the subpoena is unreasonable as applied to the CSD. But that as-applied Fourth Amendment defense necessarily fails and therefore cannot justify denial of DEA's Petition to Enforce.

As an initial matter, Respondents lack Article III standing to press their Fourth Amendment defense. First, State Respondents are not persons who can assert Fourth Amendment rights, nor may they assert Fourth Amendment rights of Utah citizens against the federal government. Because State Respondents assert no other defense to DEA's Petition, there is no genuine controversy between State Respondents and DEA warranting further delay in enforcing

the subpoena. Second, Respondent-Intervenors also lack Article III standing. To the extent Respondent-Intervenors sought to piggyback on State Respondents' standing, they may not do so once the Court determines that State Respondents themselves lack Article III standing. Nor may Respondent-Intervenors establish their own standing because they claim no interest in the subpoenaed records at issue in the case. Respondent-Intervenors' asserted concern that DEA someday may subpoena CSD records relating to them or their members is too speculative to qualify as a certainly impending injury that could support standing. Respondents' Fourth Amendment arguments therefore should be rejected at the outset for lack of standing.

Although the Court need not reach the issue, Respondents' Fourth Amendment defense also fails on the merits. Respondents do not have a reasonable expectation of privacy in the subpoenaed records because State Respondents are not persons with Fourth Amendment rights, and Respondent-Intervenors concede they have no such expectation with respect to the subpoenaed CSD prescription records at issue in this case.

Moreover, under the circumstances here, DEA's subpoena does not violate the Fourth Amendment rights of the individuals to whom the subpoena pertains. In support of its subpoena, DEA has explained that the subpoenaed records are believed to pertain to individuals suspected of receiving prescriptions issued in violation of the CSA and of engaging in further illegal sales of the prescribed controlled substances. Such individuals could not claim a reasonable expectation of privacy in information relating to such prescriptions.

In addition, any reasonable expectation of privacy that such individuals might have is further diminished because DEA seeks prescription records from State Respondents, a third party, and because the legal distribution of controlled substances through prescriptions is a

closely regulated industry. Under the regulatory scheme that applies to this industry in Utah, those who distribute controlled substances through prescriptions have long been subject to monitoring through recordkeeping and inspection requirements. Law enforcement access to prescription records is part and parcel of a scheme designed to ensure that controlled substances are not diverted from their intended use.

Furthermore, Respondents err in proposing a warrant as a feasible—much less required—alternative in this circumstance. The Supreme Court has recognized that when a federal agency has a legitimate investigatory role in furtherance of its statutory mission, Congress may authorize the agency to use administrative subpoenas as an investigative tool before probable cause has been developed. This authority is not dependent on the content of the subpoenaed records. Indeed, courts often uphold administrative subpoenas issued in the course of a legitimate investigation, despite a third party's asserted expectation of privacy in the subpoenaed records. Such subpoenas are lawful as long as they comply with the reasonable relevance test, which the subpoena here clearly does.

Finally, even if the Court were to engage in further reasonableness analysis, DEA's subpoena would survive such scrutiny. The government has an important interest in enforcing the CSA, which outweighs any limited expectation of privacy that individuals might retain in their prescription information once that information is stored in the CSD. Also significant is the fact that, even after DEA obtains the subpoenaed information, the information is protected from further disclosure by the Privacy Act and other laws. Indeed, the reasonable relevance requirements, along with statutory protection of the subpoenaed prescription records as confidential, suffice to establish that DEA's subpoena is reasonable even though the individuals

identified in the subpoenaed records have not been notified, particularly given the risk that notification would pose to DEA's investigation. Accordingly, the subpoena should be enforced.

EVIDENTIARY OBJECTIONS

Pursuant to DUCivR 7-1(b)(1)(B), DEA objects to Exhibit B to the Declaration of Marvin H. Sims, attached to State Respondents' Memorandum in Opposition to DEA's Petition to Enforce ("State Opp.") [Doc. 24], together with Mr. Sims' description of Exhibit B, under Rules 401 and 402. Exhibit B consists of a redacted copy of a DEA administrative subpoena addressed to Marvin H. Sims. [Doc. 24-3.] However, that document is not the administrative subpoena that DEA seeks to enforce through this action. *See* Pet'n ¶ 9 [Doc. 2] (identifying the administrative subpoena at issue in this action as served on November 12, 2015 on Francine A. Giani, Executive Director of Utah Department of Commerce, and Mark Steinagel, Director of Occupational and Professional Licensing). Exhibit B therefore is not relevant to DEA's Petition to Enforce, Fed. R. Evid. 401, and thus is inadmissible, Fed. R. Evid. 402. Thus, Exhibit B, and Paragraphs 3 and 4 of the Mr. Sims' declaration, should be stricken from the record.

DEA also objects to the admission of evidence submitted by Respondent-Intervenors in opposition to DEA's Petition. *See* attachments to Respondent-Intervenors' [Proposed] Memorandum in Opposition to Petition to Enforce Administrative Subpoenas Issued by [DEA] ("Intervenors Opp.") [Doc. 25]. Specifically, DEA objects to the Declaration of Deborah C. Peel [Doc. 25-1], the Declaration of Mark A. Rothstein [Doc. 25-2], the Declaration of Robert Baker [Doc. 25-3], and Exhibits C, G-J, L, M (exhibit A), N-P [Docs. 25-6; 25-10 to -12; 25-15; 25-16, at 7; 25-17 to -19]. DEA's evidentiary objections to Respondent-Intervenors' submitted evidence

are set forth in full in a contemporaneously-filed separate document.[1]

[1] DUCivR 7-1(b)(1)(B) indicates the Court's preference that objections be included in the same document as the reply but also indicates that, "in exceptional cases, a party may file evidentiary objections as a separate document," provided that the separate document is filed at the same time as the reply. Given the length of DEA's evidentiary objections to evidence submitted by Respondent-Intervenors, to whose intervention in this case DEA maintains an objection pursuant to Rule 72(a), *see* Doc. 50, DEA submits that filing the objections as a separate document is appropriate in this case. DEA hereby incorporates the substance of those objections herein.

ARGUMENT

I. THERE IS NO DISPUTE THAT DEA'S ADMINISTRATIVE SUBPOENA IS ENFORCEABLE UNDER THE WELL-ESTABLISHED "REASONABLE RELEVANCE" TEST

As explained in DEA's memorandum in support of its Petition to Enforce Administrative Subpoenas [Doc. 7], and not disputed by Respondents, a court's role in determining whether an administrative subpoena issued by an Executive Branch agency is reasonable, and thus enforceable, is a "strictly limited" one. *FTC v. Texaco, Inc.*, 555 F.2d 862, 872 (D.C. Cir. 1977). That inquiry, as the Supreme Court has explained, is so limited because the investigative authority of an administrative agency derives from Congress and does not require "leave of court." *United States v. Morton Salt Co.*, 338 U.S. 632, 643 (1950). An agency may "investigate merely on suspicion that the law is being violated, or even just because it wants assurance that it is not." *Id.* at 642-43. Thus, no "specific charge or complaint of violation of law" need be identified. *Okla. Press Publ'g Co. v. Walling*, 327 U.S. 186, 215-16 (1946). In this context, the Fourth Amendment requires only that a subpoena be "sufficiently limited in scope, relevant in purpose, and specific in directive so that compliance will not be unreasonably burdensome." *Becker v. Kroll*, 494 F.3d 904, 916 (10th Cir. 2007).

DEA demonstrated in its opening memorandum that the administrative subpoena at issue here satisfies these requirements. *See* Pet. Mem. at 4-7. Congress has expressly granted DEA the authority to investigate potential violations of the CSA. *See* 21 U.S.C. §§ 871-890. DEA's subpoena seeks information clearly relevant to an ongoing DEA investigation into a particular medical provider's potential issuance of prescriptions in violation of the CSA. *See* Declaration of Diversion Investigator Robert Churchwell ("Churchwell Decl.") ¶¶ 3-5 [Doc. 7-1]. The

information sought relates to this individual and covers a discrete time period. *See id.* ¶ 7. The subpoena therefore is not too indefinite, nor is it overly burdensome. Respondents do not suggest otherwise. Thus, there is no dispute here that all elements of the "reasonable relevance" test for administrative subpoena enforcement are satisfied. Respondents' asserted challenges fall well outside the limited scope of an administrative subpoena proceeding and accordingly should be recognized as fruitless, and DEA's subpoena should be enforced.

II. STATE RESPONDENTS LACK STANDING TO RAISE A DEFENSE BASED ON THE ASSERTED FOURTH AMENDMENT RIGHTS OF ITS CITIZENS

The sole defense that State Respondents have advanced in opposition to DEA's Petition to Enforce its subpoena is the argument that "DEA's administrative subpoenas violate the Fourth Amendment as applied to the [CSD] because of the private nature of the records in the [CSD]." State Opp. at 1. However, State Respondents lack Article III standing to raise this defense because they can identify no cognizable injury in fact for purposes of such a defense. *See DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 335 (2006) (standing must be established "for each claim [a party] seeks to press"). An "injury in fact," for purposes of Article III standing, is "an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) (internal quotation and citation omitted). For purposes of a Fourth Amendment defense to an alleged "search," the relevant "invasion of a legally protected interest" is the invasion of a person's reasonable expectation of privacy. *Rakas v. Illinois*, 439 U.S. 128, 140 (1978) (identifying question generally as "whether the disputed search and seizure has infringed an interest of [the challenger] which the Fourth Amendment was designed to protect"). In addition, "Fourth Amendment rights are personal rights which . . . may not be vicariously asserted." *Brown v. United*

States, 411 U.S. 223, 230 (1973). Thus, only a person whose reasonable expectation of privacy has been invaded has standing to challenge that invasion on Fourth Amendment grounds. *See United States v. Jones*, 132 S. Ct. 945, 950 (2012).

Here, State Respondents have no "legally protected interest" under the Fourth Amendment for a threshold reason manifest in the language of the Amendment. The Fourth Amendment protects the "rights of the people," U.S. Const. amend. IV, but State Respondents, as components of a State, are not "people" within the meaning of the Constitution. *Cf. South Dakota v. U.S. Dep't of Interior*, 665 F.3d 986, 990–91 (8th Cir. 2012) ("The State is not a 'person' within the meaning of the Fifth Amendment's Due Process Clause." (citing *South Carolina v. Katzenbach*, 383 U.S. 301, 323–24 (1966))). State Respondents therefore cannot identify an injury in fact for purposes of a Fourth Amendment defense.[2]

The existence of a state law that conflicts with the plain terms of § 876 does not confer standing for State Respondents to raise an "as-applied" Fourth Amendment defense.[3] *Virginia ex*

[2] State Respondents have not sought to invoke *parens patriae* standing to assert the Fourth Amendment rights of Utah citizens, nor is standing in a *parens patriae* capacity available against the federal government. *Massachusetts v. Mellon*, 262 U.S. 447, 485-86 (1923); *Massachusetts v. EPA*, 549 U.S. 497, 520 n.17 (2007).

[3] State Respondents do not deny that the warrant requirement in Utah Code Ann. § 58-37f-301(2)(m) conflicts with DEA's authority under § 876 to seek records through an administrative subpoena. State Respondents thus have conceded this issue. *See SCO Grp., Inc. v. Novell, Inc.*, 692 F. Supp. 2d 1287, 1295 (D. Utah 2010) (deeming issue conceded when plaintiff failed to respond); *see also Eddy's Toyota of Wichita, Inc. v. Kmart Corp.*, 945 F. Supp. 220, 224 (D. Kan. 1996) (plaintiff "concedes the validity of this argument by failing to respond to it"). In light of that conflict, there is no genuine dispute that the state law is preempted. *See Cerveny v. Aventis, Inc.*, 155 F. Supp. 3d 1203, 1211 (D. Utah 2016); *see also Chamber of Commerce v. Edmondson*, 594 F.3d 742, 769 (10th Cir. 2010) (state law that "interferes with the methods by which the federal statute was designed to reach [its] goal" is preempted (quoting *Int'l Paper Co. v. Ouellette*, 479 U.S. 481, 494 (1987))); *Dep't of Justice v. Colo. Bd. of Pharmacy*, No. 10-1116, 2010 WL 3547898, at *4 (D. Colo. Aug. 13, 2010), *aff'd* 2010 WL 3547896 (D. Colo. Sept. 3,

rel. Cuccinelli v. Sebelius, 656 F.3d 253, 269 (4th Cir. 2011) ("[T]he mere existence of a state law . . . does not license a state to mount a judicial challenge to any federal statute with which the state law assertedly conflicts."). In *Cuccinelli*, the court thus held that the state lacked standing to challenge the Affordable Care Act's individual mandate provision based on a Virginia law that "purport[ed] to immunize Virginia citizens from" the federal provision because the federal provision did not "affect Virginia's ability to enforce" state law with respect to its citizens. *Id.* at 270. Rather, "the Constitution itself withholds from Virginia the power to enforce the [state law] against the federal government." *Id.*

State Respondents attempt to distinguish *Cuccinelli* on the theory that DEA's use of an administrative subpoena "interfere[s]" with State Respondents' "power to create and enforce a legal code," citing *Wyoming ex rel. Crank v. United States*, 539 F.3d 1236 (10th Cir. 2008). State Supp. Br. at 3 [Doc. 48]. The circumstances in *Crank*, however, differed from both *Cuccinelli* and the circumstances here. There, Wyoming sought to stop ATF, a federal agency, from notifying firearm dealers within the state that Wyoming concealed carry permits were ineffective, based on ATF's interpretation of a state law purporting to establish an "expungement" procedure, vis-à-vis a federal statute, for individuals with domestic violence convictions. *Id.* at 1238-39. Wyoming did not seek to raise a Fourth Amendment or other constitutional claim; rather, it claimed that ATF's actions were based on erroneous statutory interpretations. The Tenth Circuit held that Wyoming had a sovereign interest in creating and enforcing a legal code with respect to individuals within its

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2010) (holding § 876 preempted a similar Colorado law). State Respondents seek to distinguish *Colo. Bd. of Pharmacy* by noting that the state agency did not seek to raise a Fourth Amendment claim in that case. However, the state respondent in that case would have lacked standing to raise such a claim for the same reasons explained herein.

jurisdiction, and that ATF's actions in interpreting Wyoming's law "interfere[d] with Wyoming's ability to enforce its legal code." *Id.* at 1242.

Here, DEA has not interpreted Utah law in a manner contrary to Utah's interpretation, nor has it sought to interfere with Utah's enforcement of its legal code with respect to Utah citizens. Rather, DEA seeks to enforce *its own* administrative subpoena pursuant to *its own* authority under a federal law, 21 U.S.C. § 876. DEA's assertion of the authority granted by Congress to serve an administrative subpoena, rather than abide by a warrant requirement in state law, does not affect Utah's ability to enforce its own laws because "'federal officers who are discharging their duties in a state . . . are not subject to the jurisdiction of the state'" to begin with. *Virginia ex rel. Cuccinelli*, 656 F.3d at 270 (quoting *Ohio v. Thomas*, 173 U.S. 276, 283 (1899)). Indeed, the conflicting portion of the Utah law (the portion purporting to apply the state law to federal officers), like the Virginia law at issue in *Cuccinelli*, merely "purports to immunize [Utah] citizens from federal law"—namely, the authority that Congress granted DEA to seek records using administrative subpoenas. *See id.* While the statutory conflict might give State Respondents standing to challenge DEA's statutory interpretations (though they raise no such challenge here), it does not create an injury in fact with respect to State Respondents' proposed as-applied Fourth Amendment challenge.[4] Rather, such a challenge, if it were even available, would be an entirely separate

[4] None of the cases that the Fourth Circuit distinguished in *Cuccinelli*, listed by State Respondents in a footnote, State Supp. Br. at 6 n.22, support State Respondents' standing in this case. In none of those cases did a court hold a state had standing to assert the Fourth Amendment or other personal constitutional rights of its citizens in an as-applied challenge to a federal statute based on a state law's attempt to impose conflicting requirements on federal officers. Rather, in *Maine v. Taylor*, 477 U.S. 131, 136-37 (1986), the Supreme Court held that the state was party to a genuine controversy on appeal because its statute, imposing an import ban on live baitfish, had been held facially invalid under the dormant Commerce Clause. The other cited cases involved state challenges to federal agency action under the Administrative Procedure Act ("APA"), in which the

potential defense to enforcement of DEA's administrative subpoena, unrelated to the statutory conflict.[5] State Respondents therefore cannot use the existence of a conflicting state law as a back-door means of raising a Fourth Amendment defense that they otherwise lack standing to raise. To the contrary, upon this Court's determination that State Respondents lack standing to raise the only defense that they have advanced, there is no longer any actual case or controversy between DEA and State Respondents.

III. RESPONDENT-INTERVENORS SHOULD BE DISMISSED FROM THIS ACTION FOR LACK OF STANDING

Because State Respondents lack standing to raise their proposed as-applied Fourth Amendment defense, Respondent-Intervenors may not invoke piggyback standing to pursue their own Fourth Amendment defense. *City of Colo. Springs v. Climax Molybdenum Co.*, 587 F.3d

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states sought to invalidate an action or rule in its entirety based on different statutory interpretations or alleged rulemaking defects. *See Tex. Off. of Pub. Util. Counsel v. FCC*, 183 F.3d 393, 418 (5th Cir. 1999) (states asserted APA claims against FCC's implementation of federal statute based on different statutory interpretations); *State of Alaska v. U.S. Dep't of Transp.*, 868 F.2d 441, 443 (D.C. Cir. 1989) (states asserted rulemaking defects in federal rule seeking to regulate airline pricing, and the court held they had standing because the federal rule would preempt state consumer protection laws); *State of Ohio ex rel. Celebrezze v. U.S. Dep't of Transp.*, 766 F.2d 228, 232–33 (6th Cir. 1985) (state brought similar rulemaking challenge to federal rule that would preempt a state law requiring prenotification of shipments of radioactive materials).

[5] To the extent State Respondents seek to suggest that resolution of their proposed as-applied Fourth Amendment challenge is a necessary antecedent to resolution of the preemption issue, they are incorrect. However, there can be no Fourth Amendment challenge to § 876 "as applied to the CSD" because "the Fourth Amendment protects people, not places." *Jones*, 132 S. Ct. at 950. As discussed in greater detail below, any as-applied Fourth Amendment challenge to a statute authorizing searches must focus on the statute's application to a *person*, not to a state database, and must be asserted *by* that person, based on *that person's* "reasonable expectation of privacy." *Id.* The individualized nature of the analysis necessarily precludes categorical holdings based solely on the location or items searched. *See Rakas*, 439 U.S. at 134. Thus, even if a person's as-applied Fourth Amendment challenge to a particular administrative subpoena succeeded, it could not render § 876 void *ab initio*, either in whole or in part. Such a challenge therefore would have no bearing on a preemption analysis involving § 876.

1071, 1079 (10th Cir. 2009) (explaining that intervenor may rely on "piggyback" standing if an existing party on the same side of the case already has standing to raise the same claim). Rather, the holding that State Respondents lack standing triggers an obligation on the part of Respondent-Intervenors to establish standing in their own right. *Cf. Diamond v. Charles*, 476 U.S. 54, 63-64 (1986) (dismissing intervenor's appeal for lack of standing because no other party with standing remained in the appeal). Because Respondent-Intervenors lack standing, they should be dismissed from this case.

Respondent-Intervenors assert no interest in the subpoenaed CSD records at issue here. Rather, their only interest relates to hypothetical future DEA subpoenas that, they speculate, might someday seek their prescription records in Utah's CSD in some future DEA investigation. Such "allegations of *possible* future injury are not sufficient" to establish standing; rather, as the Supreme Court has "repeatedly reiterated," "threatened injury must be *certainly impending* to constitute injury in fact." *Clapper v. Amnesty Int'l USA*, 133 S. Ct. 1138, 1147 (2013) (internal quotation omitted); *see also COPE v. Kansas State Bd. of Educ.*, 821 F.3d 1215, 1222–23 (10th Cir. 2016) (plaintiff lacked standing because asserted potential future injury was speculative and not "certainly impending").

While Respondent-Intervenors claim they or some of their members have filled prescriptions in Utah and that their records are therefore in the CSD, they neither assert that they or their medical providers are, or are likely to be, targets of a DEA investigation, nor establish that DEA will ever seek their prescription records from the CSD. Such assertions in any event would not suffice to establish standing. In *Clapper*, the Court rejected the plaintiffs' assertion that their communications would be intercepted by a government surveillance program "at some point in the

future" as insufficient to demonstrate a "certainly impending" injury because the notion that the government would target them, in particular, was "highly speculative." *Clapper*, 133 S. Ct. at 1147-48. Here as well, the notion that DEA might ever seek CSD records containing Respondent-Intervenors' prescription information is pure speculation. The Court therefore should hold that Respondent-Intervenors lack standing and dismiss them from this case.

IV. EVEN IF RESPONDENTS HAD ARTICLE III STANDING, THEIR ASSERTION THAT THE FOURTH AMENDMENT PRECLUDES ENFORCEMENT OF DEA'S ADMINISTRATIVE SUBPOENA IS WITHOUT MERIT

Even apart from the jurisdictional deficiencies with Respondents' proffered defense, their as-applied Fourth Amendment defense fails on the merits. The Supreme Court has long recognized that when an agency's administrative subpoena satisfies the reasonable relevance test, it is "per se reasonable and Fourth Amendment concerns are deemed satisfied." *Morton Salt Co.*, 338 U.S. at 652. While conceding that the reasonable relevance test is satisfied, Respondents argue that the Fourth Amendment analysis here is somehow different from other administrative subpoena contexts because of "the sensitive and protected information in the [Utah Controlled Substance] Database." State Opp. at 12. According to Respondents, the "citizens of Utah" have a reasonable expectation of privacy in the information about their controlled substance prescriptions in the Utah CSD, *id.* at 1, and DEA thus may not access that information without a search warrant. Respondents' position is flawed for several reasons.

A. Respondents Have No Expectation of Privacy in the Subpoenaed Records

1. Respondents Do Not Claim that Their Prescription Information Appears in the Subpoenaed Records, Nor May They Vicariously Assert the Fourth Amendment Rights of Others Not Before the Court

As an initial matter, Respondents cannot establish an expectation of privacy in the

subpoenaed records because none of the Respondents claim that *their* prescription information is contained in those records, and Respondents may not vicariously assert the Fourth Amendment interests of either DEA Registrant #1—the medical provider whose CSD prescription records are the subject of the administrative subpoena at issue—or of individuals who received prescriptions from DEA Registrant #1. It is a touchstone of Fourth Amendment jurisprudence that "Fourth Amendment rights are personal rights which . . . may not be vicariously asserted." *Brown*, 411 U.S. at 230. Under the Fourth Amendment, a person may allege that a government "search" implicates the Fourth Amendment only where the search violates *that person's* "reasonable expectation of privacy." *Jones*, 132 S. Ct. at 950. Whether a search might implicate *someone else's* privacy interests is not relevant. *See Rakas*, 439 U.S. at 134 ("A person who is aggrieved by an illegal search and seizure only through the introduction of damaging evidence secured by a search of a third person[] . . . has not had any of his Fourth Amendment rights infringed"); *United States v. Valdez Hocker*, 333 F.3d 1206, 1208 (10th Cir. 2003) (defendant could not raise a Fourth Amendment challenge to the search of a car unless he had a possessory interest in the car).

The Tenth Circuit has expressly applied this principle to the administrative subpoena context, recognizing that an individual may not challenge a DEA administrative subpoena on Fourth Amendment grounds unless the individual has established his own reasonable expectation of privacy in the subpoenaed evidence. *United States v. Moffett*, 84 F.3d 1291, 1293 (10th Cir. 1996) (denying motion to suppress Amtrak train manifest obtained through DEA administrative subpoena because defendant lacked reasonable expectation of privacy in manifest); *cf. United States v. Miller*, 425 U.S. 435, 444-46 (1976) (bank depositor could not challenge subpoenas issued to bank because he had no expectation of privacy in subpoenaed records).

Under this well-established precedent, Respondents' Fourth Amendment defense is foreclosed. State Respondents clearly cannot claim that their own prescription information is at issue, as they are state agencies, not individuals who might fill prescriptions. Indeed, as explained above, State Respondents have no Fourth Amendment interest at stake in this action because they are not "people" with Fourth Amendment rights, *see* U.S. Const. amend. IV. In addition, Respondent-Intervenors concede the subpoenaed records do not contain any prescription information relating to them or their members. That fact alone prevents Respondents from asserting an expectation of privacy in this action that could support a Fourth Amendment defense beyond the requirements of the reasonable relevance test.

Respondents try to circumvent the prohibition on vicarious assertion of Fourth Amendment rights by suggesting that consideration of their Fourth Amendment argument is a necessary antecedent to the Court's holding that the warrant requirement in Utah law is preempted—a holding that, as explained above, Respondents otherwise do not contest. Specifically, Respondents argue that if the federal statute authorizing DEA administrative subpoenas, 21 U.S.C. § 876, is unconstitutional *as applied to the CSD*, then Utah Code Ann. § 58-37f-301(2)(m)—the Utah law that purports to require DEA to obtain a warrant in order to access CSD prescription records—cannot be preempted. *See* State Opp. at 1; Intervenor Opp. at 2.

However, Respondents have it backwards. Respondents' theory might be plausible if, for example, Respondents asserted that § 876 was void *ab initio* because Congress lacked the power to grant DEA the authority to use administrative subpoenas as a tool in its investigations into possible CSA violations. However, Respondents do not challenge the facial validity of § 876, nor could they. As explained above, the Supreme Court has recognized that Congress may grant Executive

Branch agencies the authority to investigate, and it may authorize the use of administrative subpoenas as a tool in such investigations. *Morton Salt Co.*, 338 U.S. at 642-43. The facial validity of Congress's grant of such authority to DEA in § 876 thus is not subject to dispute.

This case therefore differs from *City of Los Angeles v. Patel*, 135 S. Ct. 2443 (2015), where the Supreme Court considered a facial challenge to a statute authorizing warrantless searches of hotel guest records. *See id.* at 2450. In contrast to that case, DEA's use of an administrative subpoena issued pursuant to § 876, as a general matter, already falls within the scope of what the Supreme Court has held valid. Generally, such a subpoena is indisputably consistent with the Fourth Amendment as long as the subpoena comports with the limited "reasonable relevance" test described above. *See Becker*, 494 F.3d at 916. Indeed, in *Patel*, the Supreme Court recognized that administrative subpoenas do not require probable cause and allow for only "limited grounds on which a motion to quash can be granted." *Patel*, 135 S. Ct. at 2453.

In contrast to the facial challenge at issue in *Patel*, Respondents' attempt to assert an as-applied Fourth Amendment defense on the theory that DEA administrative subpoenas "violate the Fourth Amendment as applied to the Database," State Opp. at 1; *cf.* Intervenor Opp. at 13 n.36, cannot be squared with the principles of Fourth Amendment jurisprudence set forth above. An as-applied Fourth Amendment claim cannot result in the conclusion that § 876 is void *ab initio*, in whole or in part, because such a claim depends not on the nature of the object to be searched, in the abstract, but on the claimant's reasonable expectation of privacy in that object. *Cf. United States v. Mich. Dep't of Cmty. Health*, No. 1:10-MC-109, 2011 WL 2412602, at *7 (W.D. Mich. June 9, 2011) ("The essence of the right to privacy is one's expectation of it." (citing *Katz v. United States*, 389 U.S. 347 (1967))). This framework necessarily contemplates that the same search that violates

the Fourth Amendment as applied to one individual, who has a legitimate expectation of privacy at stake, would not violate the Fourth Amendment as applied to someone else. Respondents simply cannot raise an "as-applied" Fourth Amendment challenge to DEA's administrative subpoena based solely on the general type of records sought, while ignoring the fact that they have no reasonable expectation of privacy in the content of those records.[6]

Indeed, the administrative subpoena at issue in this case illustrates the problems inherent in Respondents' approach. DEA has explained that it has "identified and corroborated further information that DEA Registrant #1"—the medical provider whose prescription records are sought through the subpoena—"was/is providing controlled substance prescriptions to individuals who were in turn selling the controlled substances illicitly." Churchwell Decl. ¶ 5. Furthermore, "[t]he individuals obtaining these controlled substances appear to be members of a criminal organization operating within the State of Utah who are acting in concert in furtherance of their criminal motives." *Id.* Based on this description, it is possible that the CSD records sought through DEA's subpoena do not reflect valid prescriptions for genuine medical conditions. Indeed, if the individuals identified in the records are obtaining prescription drugs in violation of the CSA, that fact alone likely precludes them from establishing a reasonable expectation of privacy in the subpoenaed records. *E.g.*, *Minnesota v. Carter*, 525 U.S. 83, 88–95 (1998) (holding defendants had no legitimate expectation of privacy in premises used to conduct illegal commercial transaction involving drugs). Respondents' arguments regarding a legitimate expectation of

[6] Respondents cite the decision in *Or. PDMP v. DEA*, 998 F. Supp. 2d 957, 963 (D. Or. 2014), *appeal pending*, No. 14-35402 (9th Cir.), as supporting the notion that their as-applied Fourth Amendment defense is a necessary antecedent to the preemption issue. However, that notion in *Or. PDMP* was without support and should not be adopted here. Moreover, in *Or. PDMP*, the state agency sought a declaratory judgment that would govern all future attempts by DEA to access PDMP records. This action, in contrast, seeks to enforce a single DEA administrative subpoena.

privacy in prescription records assume that the records reflect accurate medical information. But neither Respondents nor the Court are in a position to rely on that assumption, given that the subpoenaed records do not relate to any individual participating in this action.

Furthermore, while Respondent-Intervenors assert that CSD prescription records "can indicate facts about patients' sex, sexuality, and sexually transmitted infections, mental health, and substance abuse," which they contend is particularly sensitive, Int. Opp. at 18, nothing in the record here suggests that the subpoenaed prescription records of DEA Registrant #1 contain such information. Respondent-Intervenors also suggest that certain medications "are approved only for treatment of specific medical conditions," so a prescription "will often reveal a patient's underlying diagnosis." *Id.* at 4. Again, however, Respondent-Intervenors have not established that any of the prescription records of DEA Registrant #1 that are at issue in this action fall within this category. Rather, Respondent-Intervenors' arguments merely highlight the speculative nature of their Fourth Amendment claim with respect to this case and illustrate the importance of limiting the availability of a Fourth Amendment defense to those who actually have an expectation of privacy at stake. Here, because Respondents have no reasonable expectation of privacy in the subpoenaed records, their as-applied Fourth Amendment defense should be rejected at the outset.

2. Individuals Retain No Reasonable Expectation of Privacy with Respect to Disclosure of Prescription Records, Held in a State Database as Part of a Comprehensive Regulatory Scheme, to Law Enforcement Personnel Engaged in Lawful Investigations

Respondents' challenge also fails because they cannot demonstrate that individuals retain an expectation of privacy in CSD records, particularly in regard to the State's sharing such records with federal law enforcement for investigative purposes. The Tenth Circuit has recognized that, under the "third party doctrine," "'the Fourth Amendment does not prohibit the obtaining of

information revealed to a third party and conveyed by [the third party] to Government authorities, even if the information is revealed [to the third party] on the assumption that it will be used only for a limited purpose and the confidence placed in the third party will not be betrayed.'" *Kerns v. Bader*, 663 F.3d 1173, 1184 (10th Cir. 2011) (quoting *Miller*, 425 U.S. at 443). The court noted that this doctrine precludes an individual's assertion of an expectation of privacy in his financial information where that information is held by and obtained from a third party. *Id.* The application of the doctrine to personal medical records remains unsettled in this Circuit. *Id.*; *cf. Tapia v. City of Albuquerque*, 10 F. Supp. 3d 1323, 1408 (D.N.M. 2014) (recognizing that the law on this issue remained unsettled as of 2014).[7] However, the court in *Kerns* further noted that, under the Supreme Court's decision in *Whalen v. Roe*, 429 U.S. 589 (1977), "access by the government [to third party-held medical records] without a concomitant public disclosure 'does not automatically amount to an impermissible invasion of privacy.'" *Kerns*, 663 F.3d at 1186 (quoting *Whalen*, 429 U.S. at 600, 602). A holding that no expectation of privacy is implicated by disclosure of prescription records held by a third party to authorized government personnel, where there is no intention to further disclose those records to the public, is not foreclosed under Tenth Circuit precedent and, moreover, would be consistent with the third party doctrine discussed in *Miller*.

While it may be unsettled whether the third-party doctrine applies to medical records in general, in the case of prescription records in the Utah CSD, an additional factor requires the

[7] Respondents have cited the Tenth Circuit's decision in *Douglas v. Dobbs*, 419 F.3d 1097 (10th Cir. 2005), as recognizing that individuals retain a privacy interest in prescription records obtained from a pharmacy. The court in *Dobbs* did state that the plaintiff in that case had a privacy interest in her prescription records, but the court ultimately rejected her claim, finding no violation of a clearly established right. *Id.* at 1103. The court also did not address the applicability of the third party doctrine. *See id.* The Tenth Circuit's later decision in *Kerns* recognized the statement in *Dobbs* as dicta, leaving the applicability of the third party doctrine to medical records unsettled. *Kerns*, 663 F.3d at 1184.

conclusion that individuals retain no expectation of privacy. Specifically, the distribution of controlled substances by prescription qualifies as a closely regulated industry. *See Marshall v. Barlow's, Inc.*, 436 U.S. 307, 313 (1978) (industries are "closely regulated" when they have a "long tradition of close government supervision"). Utah's collection of prescription information from pharmacists, and its maintenance of such information in the CSD, is part of a broader federal and state scheme to regulate and monitor the legal distribution of controlled substances, with a significant focus on recordkeeping as a means of preventing the illegal diversion of such drugs. Such regulation has existed for over a century. Indeed, Utah first created a State Board of Pharmacy in 1907, requiring all pharmacists within the State to be registered with Board, and to keep records regarding the sale of certain drugs, including cocaine, morphine, and opium. Compiled Statutes of Utah 1907 §§ 1711-1727. The law required such records "to be always open for inspection by the proper authorities, and to be preserved for at least five years after the last entry." *Id.* § 1727. Similar requirements have remained in effect ever since. *See* Compiled Laws of the State of Utah 1917 §§ 4420, 4425, 4432; Revised Statutes of Utah 1933 § 79-12-24; Utah Code Ann. §§ 79-10a-1, -8, -11, -21 to -25, -34 (1943).[8] As described in Petitioner's opening memorandum, the CSA, together with DEA's implementing regulations, similarly contains numerous provisions regulating the activities of providers authorized to dispense controlled substances, and subjecting the premises and records of such providers to administrative

[8] For the Court's convenience, copies of these historical provisions are attached hereto. *See also* Utah Code Ann. § 58-38-6(4)(vii) (conditioning license on making controlled substance records available to those authorized to inspect them), (5) (requiring records), (7)(m)-(n) (requiring licensees to make records available and allow entry into any premises for inspection); -10(3)(d) (allowing for inspection of controlled substance records pursuant to administrative subpoena), -12(1) (requiring state law enforcement to cooperate and exchange information with federal agencies charged with enforcing controlled substance laws); *id.* § 58-37f-203(3) (requiring pharmacists to submit information to CSD).

inspections and subpoena. Pet'n Mem. at 1-3 (citing, *e.g.*, 21 U.S.C. §§ 822, 876, 880, 882(f); 21 C.F.R. §§ 1301.01 *et seq.*).[9]

Individuals' expectation of privacy in records required to be kept as part of a closely regulated industry are significantly diminished. *Cf. United States v. Seslar*, 996 F.2d 1058, 1061 (10th Cir. 1993) ("[P]ersons doing business in closely regulated industries have a significantly reduced expectation of privacy."). Here, the combination of these two factors—that the prescription records at issue here have been subpoenaed from a third party, the State, and that such records are required to be maintained as part of the close regulation of the legal distribution of controlled substances—together weigh against recognition of a reasonable expectation of privacy in CSD prescription records.

Other courts facing similar issues therefore have held that allowing law enforcement access to prescription records held either by a pharmacy or in a state database did not implicate individual patients' expectation of privacy. *State v. Wiedeman*, 835 N.W.2d 698, 710–13 (Neb. 2013) ("We agree that an investigatory inquiry [through an administrative subpoena] into prescription records in the possession of a pharmacy is not a search pertaining to the pharmacy patient. A patient who has given his or her prescription to a pharmacy in order to fill it has no legitimate expectation that governmental inquiries will not occur."); *Williams v. Com.*, 213 S.W.3d 671, 682 (Ky. 2006) (holding that, in light of the "limited data" contained in a state prescription database (similar to the data contained in Utah's CSD), "citizens have no reasonable

[9] In addition to the CSA, federal law includes provisions authorizing government access to personally identifiable health information, including for law enforcement purposes. *E.g.*, 45 C.F.R. § 164.512(f)(1)(ii)(C). Federal law also authorizes federal law enforcement to suspend disclosure requirements that otherwise apply to covered entities under HIPAA when identifying health information has been sought for investigative purposes. *Id.* § 164.528(a)(2).

expectation of privacy in this limited examination of and access to their prescription records" by law enforcement personnel); *Stone v. Stow*, 593 N.E.2d 294, 301 (Ohio 1992) ("Whatever privacy interest the patients and physicians possess in these prescription records is limited to the right not to have the information disclosed to the general public. Disclosures to police officers, or to officials of the State Pharmacy Board, do not violate that right."). This Court similarly should hold that any expectation of privacy that individuals retain in their prescription information once transmitted, first to a pharmacy and then to the CSD, does not extend to the disclosure of that information to law enforcement officers authorized by statute to seek such information in the course of an investigation.[10]

B. The Fourth Amendment Does Not Require DEA to Obtain a Warrant, Rather than an Administrative Subpoena, in Order to Access CSD Records in the Course of an Investigation

Even aside from the lack of a reasonable expectation of privacy at stake here, the Fourth Amendment does not compel DEA to obtain a warrant in order to access CSD records when

[10] Even where courts have held that individuals retain some expectation of privacy in prescription information that appears in third party records, they have recognized that the expectation of privacy is limited due to the closely regulated nature of pharmacies, and have upheld warrantless inspections of such records on that basis. *United States v. Nechy*, 827 F.2d 1161, 1166 (7th Cir. 1987) (recognizing that the government has "subjected pharmacists to an elaborate regulatory system that includes a requirement of keeping records"); *United States v. Acklen*, 690 F.2d 70, 75 (6th Cir. 1982) (pharmacists "have a reduced expectation of privacy in the records kept in compliance with the [CSA]"); *U. S. ex rel. Terraciano v. Montanye*, 493 F.2d 682, 685 (2d Cir. 1974) (upholding "non-forcible inspection and seizure, during business hours, by a narcotics agent, of records of a licensed pharmacist, maintained on the premises as required, relating to narcotics and stimulant or depressant drugs"); *Murphy v. State*, 62 P.3d 533, 538 (Wash. 2003) (concluding that "patients who purchase prescription narcotics from pharmacists have a limited expectation of privacy in the information compiled by pharmacists regarding their prescriptions" but that "patients know or should know that their purchase of such drugs will be subject to government regulation and scrutiny" and "dispensers of prescription drugs have kept similar records open to government scrutiny throughout this state's history"; discussing similar decisions in *State v. Russo*, 790 A.2d 1132 (Conn. 2002); *State v. Welch*, 624 A.2d 1105 (Vt. 1992)).

Congress has expressly authorized DEA to seek such records through an administrative subpoena. In arguing to the contrary, Respondents ignore the nature and purpose of an administrative subpoena, as repeatedly set forth by the Supreme Court. The purpose of an administrative subpoena is investigative. The import of this fact, as the Supreme Court has explained, is that, unlike in the context of a warrant, no "specific charge or complaint of violation of law" need be identified. *Okla. Press Publ'g Co.*, 327 U.S. at 215-16. Rather, an agency can exercise its "power of inquisition" "merely on suspicion that the law is being violated, or even just because it wants assurance that it is not." *Morton Salt Co.*, 338 U.S. at 642-43. "[B]ecause no specific crime need be alleged [in order to issue an administrative subpoena], probable cause to suspect the commission of a crime is unnecessary." *Resolution Trust Corp. v. Greif*, 906 F. Supp. 1446, 1450–51 (D. Kan. 1995).[11]

Accordingly, it is well established that neither probable cause nor a warrant is required for an administrative subpoena. *See Patel*, 135 S. Ct. at 2453 (confirming that administrative subpoenas do not require probable cause and allow for only "limited grounds on which a motion to quash can be granted"); *Donovan v. Lone Steer, Inc.*, 464 U.S. 408, 415 (1984) ("our cases make it clear that the Secretary of Labor may issue an administrative subpoena without a warrant" (citing *Okla. Press Publ'g Co.*, 327 U.S. at 215-16); *United States v. Powell*, 379 U.S. 48, 57 (1964) (holding IRS administrative summons does not require probable cause because the IRS summons is analogous to the administrative subpoenas considered in *Okla. Press* and *Morton Salt*); *see also Doe v. United States*, 253 F.3d 256, 264 (6th Cir. 2001) (holding "DOJ need not make a showing

[11] Courts also recognize that "[a]n administrative subpoena is not self-executing and is therefore technically not a 'search.'" *United States v. Sturm, Ruger & Co.*, 84 F.3d 1, 3 (1st Cir. 1996). Rather, as provided in § 876, subpoenas are "subject to judicial review and enforcement." *Id.*

of probable cause to issue an administrative subpoena under 18 U.S.C. § 3486"); *In re Subpoena Duces Tecum*, 228 F.3d 341, 348 (4th Cir. 2000) (same).

Indeed, imposing a probable cause or warrant requirement in this context would result in "the virtual end to any investigatory efforts by governmental agencies" because it would create the "unacceptable paradox" of requiring the investigating agency to show probable cause before it can undertake an investigation to determine if probable cause exists. *Id.* Courts have squarely rejected such a prospect. *In re Subpoena Duces Tecum*, 228 F.3d at 348; *see Doe*, 253 F.3d at 263 (citing *Powell* Court's concern "that requiring the IRS to show probable cause . . . would seriously hinder the agency's ability to conduct" tax fraud investigations).

The Tenth Circuit previously has recognized that an administrative subpoena need not be supported by probable cause; rather, an administrative subpoena does not violate the Fourth Amendment as long as it is "sufficiently limited in scope, relevant in purpose, and specific in directive so that compliance will not be unreasonably burdensome." *See Becker*, 494 F.3d at 916; *see also In re Subpoena Duces Tecum*, 228 F.3d at 349 (recognizing that the reasonable relevance test provides the proper balance in this context between "constraining governmental power" and "preserv[ing] the governmental power of investigation"). As explained above, Respondents concede that these "reasonable relevance" factors are satisfied here. The analysis does not change when the requested records contain private medical information. Indeed, *Becker* involved an administrative subpoena that an investigator in Utah's Medicaid Fraud Control Unit had served on the physician plaintiff, seeking medical records for forty-seven patients in connection with an investigation into potential "upcoding" of the plaintiff's Medicaid claims. *Becker*, 494 F.3d at 909, 916. The court did not conclude that an administrative subpoena was inappropriate in that context;

rather, it held that the Fourth Amendment does not require an administrative subpoena to be supported by probable cause, regardless of the nature of the information sought through the subpoena. *See id.* at 916-17.[12]

Most recently, in *United States v. Zadeh*, 820 F.3d 746, 756–57 (5th Cir. 2016), the Fifth Circuit rejected the argument that a different reasonableness standard applied to a DEA administrative subpoena seeking medical records based on a doctor's argument that "his patients have a reasonable expectation of privacy in medical records." *Id.* at 755. Although the court did not question the patients' reasonable expectation of privacy, it held that the "reasonable relevance" test remained "the appropriate standard for administrative subpoenas seeking documents." *Id.* at 757. Respondents identify no case, other than the *Or. PDMP* decision that is currently on appeal in the Ninth Circuit, where a court held that administrative subpoenas simply were unavailable as an investigative tool due to the nature of information in the subpoenaed records. Such a holding would ignore the Supreme Court's recognition that administrative subpoenas serve a purpose different from a search that is subject to the warrant requirement.[13] In light of controlling

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[12] *See also Resolution Trust Corp.*, 906 F. Supp. at 1450-53 (explaining that the reasonable relevance test satisfies Fourth Amendment requirements even where the information sought consists of allegedly private financial and tax information). Other Circuits have similarly applied the reasonable relevance test to medical information. *E.g.*, *United States v. Whispering Oaks Residential Care Facility, LLC*, 673 F.3d 813, 816-19 (8th Cir. 2012) (subpoenas issued by a U.S. Attorney's Office to residential health care facilities during a health care fraud investigation, seeking records of goods and services provided by the facilities); *In re Subpoena Duces Tecum*, 228 F.3d at 349-51 (subpoenas issued by U.S. Attorney's Office to physician and healthcare corporations, seeking patient records in connection with a healthcare fraud investigation); *Sturm, Ruger & Co.*, 84 F.3d at 3-4 (subpoena sought records relating to employees' on-the-job injuries).

[13] In arguing that a warrant is required, Respondents rely on cases considering whether the search at issue qualified for the "special needs" or "administrative search" exceptions to the warrant requirement. *See, e.g.*, State Opp. at 3, 6 (citing *Ferguson v. City of Charleston*, 532 U.S. 67 (2001); *Tucson Women's Clinic v. Eden*, 379 F.3d 531 (9th Cir. 2004)). Those cases are inapposite because they did not involve administrative subpoenas. Unlike the special needs and

precedent, the Court should reject as untenable Respondents' position that DEA must obtain a warrant before accessing CSD prescription records.

C. DEA's Use of an Administrative Subpoena to Access CSD Prescription Records Is Eminently Reasonable

Even in the rare instances where other courts have gone beyond the reasonable relevance test in analyzing the reasonableness of an administrative subpoena, they have not suggested that either probable cause or a warrant was required. Instead, these courts have engaged in a more general reasonableness analysis, weighing the government's interest against the asserted privacy interests. *See, e.g., Big Ridge, Inc. v. Fed. Mine Safety & Health Review Comm'n*, 715 F.3d 631, 648-49 (7th Cir. 2013). In *Big Ridge*, the court concluded that administrative subpoenas requiring mine operators to produce their employees' medical records did not violate the Fourth Amendment "despite the personal nature of the medical records demanded . . . because the government's need for the records outweighs the miners' privacy interest in the records, the records are no longer in the miners' custody, and the Privacy Act and [agency]'s training and protocols adequately protect against unwarranted disclosure by [the agency's] agents." *Id.* at 652.

A similar analysis here compels the same conclusion. There is no question that DEA's investigative efforts serve the important government interest "in identifying illegal activity and in deterring future misconduct." *In re Subpoena Duces Tecum*, 228 F.3d at 351. As DEA's declarant has explained, DEA needs CSD records to further these interests because of the burden of issuing subpoenas to each and every pharmacy in the state, and the further imposition of a warrant requirement for CSD access would severely limit DEA's ability to conduct timely, effective

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administrative search exceptions to the warrant requirement, administrative subpoenas are governed by an entirely different standard based on their function as an investigative tool used in agency investigations, when Congress has so authorized, even where no probable cause exists.

investigations. *See* Churchwell Decl. ¶¶ 10-12.

On the other hand, to the extent Respondents can assert a reasonable expectation of privacy in the subpoenaed CSD prescription records, that expectation is diminished for the reasons explained above. Given the nature of DEA's investigation, the subpoenaed records may not even relate to valid prescriptions for genuine medical conditions. Moreover, the subpoenaed records here are held by a third party, the State of Utah. *Big Ridge, Inc.*, 715 F.3d at 649 ("Any possible Fourth Amendment right to the privacy of the miners' medical records here is limited by the fact that when MSHA sought to inspect and copy the records, they were in the custody of the mines."). Finally, the CSD itself is part of the heavy regulation surrounding the legal distribution of controlled substances.

At the same time, like the federal mine inspectors in *Big Ridge*, DEA investigators are "bound by the Privacy Act," 5 U.S.C. § 552a, "not to disclose any personal information and to take certain precautions to keep personal information confidential." *Big Ridge, Inc.*, 715 F.3d at 650; *see* Churchwell Decl. ¶ 14. Accordingly, even if this additional balancing test is applied, DEA's administrative subpoena clearly is reasonable under the Fourth Amendment.

D. Respondent-Intervenors Fail to Establish that the Lack of Notice to Individuals Identified in the Subpoenaed Records Renders DEA's Administrative Subpoena Unreasonable

Respondent-Intervenors devote a single paragraph of their brief to the argument that DEA is constitutionally required to provide notice to the individuals whose information is contained in the CSD records that DEA seeks through its administrative subpoena. However, they cite no relevant support for that supposed requirement. The cases that Respondent-Intervenors cite addressed notice in the context of searches pursuant to probable cause or a warrant, and in

particular, searches that involved entry into a person's home or covert surveillance.[14] Respondent-Intervenors cite no precedent requiring notice to individuals identified in records sought through an administrative subpoena, either before or after compliance with the subpoena.

Moreover, Respondents-Intervenors ignore the Supreme Court's holding, in a similar context, that the Fourth Amendment does not require notice to targets of an SEC investigation when the SEC served an administrative subpoena on a third party, even though a lack of notice would preclude the target from challenging the subpoena. *SEC v. Jerry T. O'Brien, Inc.*, 467 U.S. 735, 748-49 (1984). The Court reasoned that imposing a notice requirement would place significant burdens on the investigating agency while also allowing targets significant opportunity "to impede legitimate investigations." *Id.* at 750. The Court further emphasized that Congress had granted the SEC authority to issue administrative subpoenas without providing notice and that the decision to provide notice therefore fell within the federal agency's discretion. *Id.* at 751. The Court therefore was unwilling to impose a notice requirement that "'would unwarrantedly cast doubt upon and stultify the [agency's] every investigatory move.'" *Id.* (quoting *Donaldson v. United States*, 400 U.S. 527, 531 (1971)).

Here, similar considerations warrant rejection of any notice requirement for DEA administrative subpoenas seeking CSD records. As with the SEC, Congress granted DEA authority to issue administrative subpoenas as an investigative tool without imposing a specific notice requirement. In this context, where drug prescriptions are part of a closely regulated

[14] *E.g.*, *Wilson v. Arkansas*, 514 U.S. 927, 934 (1995) (addressing "officer's unannounced entry into a home"); *Dalia v. United States*, 441 U.S. 238, 248 (1979) (addressing covert entry into a person's home to install bugging equipment); *Katz*, 389 U.S. at 355 n.16 (1967) (advance notice not required for electronic surveillance); *United States v. Freitas*, 800 F.2d 1451, 1456 (9th Cir. 1986) (addressing warrant allowing surreptitious entry into defendant's home).

industry, *see supra*, individuals who fill prescriptions for controlled substances in Utah are already on notice that their prescription information will be transmitted to the CSD, and that this information is subject to inspection by law enforcement and others for various purposes.[15] Indeed, the laws that authorize such access are part of the close regulation of the legal distribution of controlled substances. Yet, like the SEC investigations considered in *O'Brien*, DEA investigations clearly would be impaired if DEA were required to tip off the targets of its investigations, by letting them know specifically that an investigation was underway, before it could obtain subpoenaed CSD records. Once notified, such targets could destroy evidence, move to a different address or jurisdiction, or otherwise impede DEA's investigation. In this case, where the individuals receiving prescriptions are also under suspicion, the same concerns apply to them.

In addition, it would be impossible for DEA to notify the individuals who are identified as having received prescriptions from DEA Registrant #1 in advance, given that DEA has not received the subpoenaed records that identify those individuals.[16] Moreover, to the extent Respondent-Intervenors seek to suggest that DEA should notify individuals, *after* completing an

[15] Notably, the Utah law governing the CSD, which sets forth many different circumstances where CSD records may be accessed for various purposes, contains no mechanism for specific pre- or post-access notice in any of those circumstances. *See* Utah Code Ann. § 58-37f-301.

[16] Respondent-Intervenors mischaracterize DEA's request to State Respondents not to give advance notice of its administrative subpoena to the targeted provider. While DEA included such a request in its administrative subpoena, due to the possibility that such notice would impede its investigation, federal law does not prohibit State Respondents from providing notice. As in *Zadeh*, State Respondents are not "covered entities" under HIPAA and thus are not subject to HIPAA's disclosure requirement and its exceptions. *Zadeh*, 820 F.3d at 755. DEA's administrative subpoena thus allowed State Respondents to exercise their own judgment regarding whether to provide advance notice to individuals identified in the subpoenaed CSD records. Indeed, State Respondents are the only parties that could provide such notice because only they have access to the subpoenaed records before compliance with the subpoena. However, Respondent-Intervenors are precluded by the limitations on their intervention from seeking notice from State Respondents.

investigation, that prescription records relating to them were obtained through a subpoena, that suggestion has no bearing on whether DEA's administrative subpoena should be enforced now, while its investigation is still underway. Indeed, it is unclear what purpose such post-investigation notice would serve. In any event, the reasonableness factors already assessed above suggest that the question of notice is not dispositive here. The possibility that DEA may receive CSD records containing an individual's prescription information in the course of an investigation into possible violations of the CSA does not raise the same concern that would be implicated if public disclosure of such information were involved. The information collected through such subpoenas continues to be protected from disclosure by the Privacy Act and other laws. Moreover, the fact that administrative subpoenas must comply with the reasonable relevance test ensures that the information sought not be overly broad in scope and that it be relevant to a DEA investigation. These features mitigate any concern that a lack of notice otherwise might raise. Accordingly, the Court should reject Respondent-Intervenors' arguments regarding notice.

CONCLUSION

For the foregoing reasons as well as those set forth in DEA's opening memorandum, the Court should enforce DEA's administrative subpoena against Respondents.

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Respectfully submitted,

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