No. 14-35402

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

OREGON PRESCRIPTION DRUG MONITORING PROGRAM,
Plaintiff-Appellee,

ACLU FOUNDATION OF OREGON, INC., et al.,
Plaintiffs-Intervenors–Appellees,

v.

UNITED STATES DRUG ENFORCEMENT ADMINISTRATION,
Defendant-Appellant.

On Appeal from the United States District Court for the District of Oregon,
No. 12-cv-02023

BRIEF FOR PLAINTIFFS-INTERVENORS–APPELLEES

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Corporate Disclosure Statement

Plaintiff-Intervenor–Appellee American Civil Liberties Union Foundation of Oregon, Inc., is a non-profit entity that does not have parent corporations. No publicly held corporation owns 10 percent or more of any stake or stock in the ACLU Foundation of Oregon. Other Plaintiffs-Intervenors–Appellees are private individuals.

/s/ Nathan Freed Wessler

Nathan Freed Wessler

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STATEMENT OF JURISDICTION

Plaintiffs-Intervenors–Appellees ("Intervenors") adopt Appellant Drug Enforcement Administration's ("DEA") statement of jurisdiction except for its citation to 28 U.S.C. § 1292(a)(1) as the basis of this Court's jurisdiction. This Court has jurisdiction pursuant to 28 U.S.C. § 1291, because the district court's opinion and order granting summary judgment to Intervenors, *see* Appellant's Excerpts of Record ("A-ER") 3–18, and its entry of judgment based on that opinion, *see id.* at 19–20, constitute a "final decision of the district court[]." 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

Under Oregon law, law enforcement may obtain confidential prescription records from the Oregon Prescription Drug Monitoring Program ("PDMP") only with a "valid court order based on probable cause." Or. Rev. Stat. § 431.966(2)(a)(D). Notwithstanding this requirement, prior to the filing of this suit, the DEA requested records from the PDMP three times using administrative subpoenas issued pursuant to 21 U.S.C. § 876, and stated that it would continue to issue approximately two administrative subpoenas to the PDMP per month for the foreseeable future. The PDMP filed suit to defend its ability to enforce the court-order requirement under Oregon law. John Does 1–4, Dr. James Roe, and the

ACLU of Oregon ("Intervenors") intervened as plaintiffs to argue that the DEA's use of administrative subpoenas under § 876 violates the Fourth Amendment's warrant requirement. In this appeal, the DEA challenges the district court's jurisdiction under Article III to decide the case, and the district court's conclusion that the DEA's warrantless requests for PDMP records violate the Fourth Amendment.

STATEMENT OF THE CASE

I. The Oregon Prescription Drug Monitoring Program.

In 2009, the Oregon legislature created the Oregon Prescription Drug Monitoring Program, an electronic database maintained by the Oregon Health Authority ("OHA") that records information about all "prescription drugs dispensed by pharmacies in Oregon that are classified in schedules II through IV under the federal Controlled Substances Act." Or. Rev. Stat. § 431.962(1)(a). The PDMP became operational in 2011.[1]

The Oregon Legislature established the PDMP as a public health tool to allow physicians "to identify and inhibit the diversion of prescription drugs, while promoting appropriate utilization of prescription drugs for legitimate medical

[1] OHA, *Oregon Prescription Drug Monitoring Program* ("PDMP Fact Sheet") (2012), http://www.orpdmp.com/orpdmpfiles/PDF_Files/PDMP-fact-sheet_2012_v1.0.pdf (Plaintiffs-Appellees–Intervenors' Excerpts of Record ("I-ER") 11).

purposes." S.B. 355, A-Engrossed, 75th Leg. Assemb. (Or. 2009)[2] (I-ER 13); *see also, e.g.*, PDMP Fact Sheet (I-ER 11) ("The primary purpose of the PDMP is to provide practitioners and pharmacists a tool to improve health care."). Thus, physicians and pharmacists may access patient records in the PDMP only if they "certify 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." Or. Rev. Stat. § 431.966(2)(a)(A).

After dispensing a schedule II–IV prescription drug to a patient in Oregon, pharmacies are required to electronically report to the PDMP the name, address, date of birth, and sex of the patient; identification of the pharmacy dispensing the drug and the practitioner who prescribed the drug; and identification of the drug prescribed, date of origin of the prescription and date dispensed, quantity and number of days for which the drug was dispensed, and number of refills authorized. *Id.* § 431.964 (1).[3] Approximately seven million prescriptions are uploaded to the PDMP system annually, PDMP Fact Sheet (I-ER 11), and protected health information about identifiable patients is retained for up to three

[2] *Available at* https://olis.leg.state.or.us/liz/2009R1/Downloads/MeasureDocument/SB355/A-Engrossed.

[3] Several of these categories were added in 2013. 2013 Or. Laws, ch. 550, § 3.

years, Or. Rev. Stat. § 431.966(4). As of September 2014, records of more than 22 million prescriptions had been stored in the PDMP.[4]

The federal Controlled Substances Act, 21 U.S.C. § 812, designates five categories of drugs, divided into schedules I–V. Drugs are assigned a schedule based on "their relative abuse potential, and likelihood of causing dependence when abused."[5] Schedule II–IV drugs, which are tracked by the PDMP, include a number of frequently prescribed medications used to treat a wide range of serious medical conditions, including nausea and weight loss in cancer patients undergoing chemotherapy, weight loss associated with AIDS, anxiety disorders, panic disorders, post-traumatic stress disorder, alcohol addiction withdrawal symptoms, opioid addiction, testosterone deficiency, gender identity disorder/gender dysphoria, chronic and acute pain, seizure disorders, narcolepsy, insomnia, and attention deficit hyperactivity disorder. *See* Office of Diversion Control, DEA, *Controlled Substances by CSA Schedule* (May 28, 2013)[6] (I-ER 21–32); Decl. of Dr. Deborah C. Peel ¶¶ 6–7 (I-ER 235); I-ER 34–116 (drug information summaries for selected schedule II–IV medications showing medical conditions

[4] OHA, Prescription Drug Monitoring To-Date Report (Sept. 2014), http://www.orpdmp.com/orpdmpfiles/PDF_Files/Reports/Sept_2014_PDMP_ToDate.pdf.
[5] Office of Diversion Control, DEA, Controlled Substance Schedules, http://www.deadiversion.usdoj.gov/schedules/#define; *see also* 21 U.S.C. § 812(b).
[6] http://www.deadiversion.usdoj.gov/schedules/orangebook/e_cs_sched.pdf.

the drugs are approved to treat). "These conditions . . . are among some of the most frequently diagnosed in Americans." Peel Decl. ¶¶ 8–9 (I-ER 238–40). Table 1 lists selected schedule II–IV medications used to treat these medical conditions.

TABLE 1 **Medical Condition**	**Schedule II–IV Medications Approved for Treatment of Condition**
Hormone replacement therapy for treatment of gender identity disorder/gender dysphoria	testosterone
Weight loss associated with AIDS	Marinol (dronabinol), Cesamet (nabilone)
Nausea & vomiting in cancer patients undergoing chemotherapy	Marinol (dronabinol), Cesamet (nabilone)
Trauma- and stressor-related disorders, including acute stress disorder and post-traumatic stress disorder (PTSD)	Xanax, Valium, Ativan, Lexotan, Librium, Traxene, Sepazon, Serax, Centrax, nordiazepam
Anxiety disorders and other disorders with symptoms of panic	Xanax, Valium, Ativan, Lexotan, Librium, Traxene, Sepazon, Serax, Centrax, nordiazepam
Alcohol addiction withdrawal symptoms	Serax/Serenid-D, Librium (chlordiazepoxide)
Opioid addiction treatment	Suboxone (buprenorphine), methadone
Attention deficit hyperactivity disorder	Ritalin, Adderol, Vyvanse
Obesity (weight loss drugs)	Didrex, Voranil, Tenuate, mazindol
Chronic or acute pain	narcotic painkillers, such as codeine (including Tylenol with codeine), hydrocodone, Demerol, morphine, Vicodin, oxycodone (including Oxycontin and Percocet)
Epilepsy and seizure disorders	Nembutal (pentobarbital), Seconal (secobarbital), Versed, clobazam, clonazepam
Testosterone deficiency in men	Maxibolin, Orabolin, Durabolin, Duraboral (ethylestrenol)
Delayed puberty in boys	Anadroid-F, Halotestin, Ora-Testryl
Narcolepsy	Xyrem, Provigil

Insomnia	Ambien, Lunesta, Sonata, Restoril, Halcion, Doral, Ativan, ProSom, Versed
Migraines	Stadol (butorphanol)

Because many of these drugs are approved only for treatment of specific medical conditions, a prescription for a schedule II–IV drug will often reveal a patient's underlying diagnosis. Peel Decl. ¶ 3 (I-ER 234); Decl. of Professor Mark A. Rothstein ¶ 10 (I-ER 216); I-ER 34–116. Thus, information about an individual's prescriptions in the PDMP can reveal a great deal of sensitive medical information. In recognition of Oregon residents' privacy interest in their prescription records, the legislation creating the PDMP included privacy protections that sharply limit access to personally identifiable prescription information in the database. *See* Or. Rev. Stat. § 431.966(2)(a). Relevant here, the PDMP is prohibited from disclosing prescription records to law enforcement agencies unless presented with 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.* § 431.966(2)(a)(D);[7] *see also* Or. Admin. R. 410-121-4020(35) ("The [law enforcement] request shall be pursuant to a valid court order

[7] This provision originally appeared at § 431.966(2)(a)(C), but was later moved to subsection (D). 2013 Or. Laws, ch. 550, § 4.

based on probable cause."). The Oregon Health Authority prominently and repeatedly explains this protection in public materials about the PDMP. *See, e.g.*, OHA, Data Requests[8] (I-ER 118) ("[Law enforcement may] gather information for an active drug-related investigation of an individual when permitted by a valid court order based on probable cause."); OHA, Law Enforcement[9] (I-ER 120) ("A subpoena is not sufficient for the PDMP to release information. A law enforcement agency must provide a search warrant signed by a judge or a court order signed by a judge that indicates there is probable cause for the judge to issue the order."); OHA, Frequently Asked Questions[10] (I-ER 8) ("Law enforcement agencies will not have direct access to the system, but law enforcement officials may request information from the Oregon Health Authority if they have a valid court order based on probable cause."); OHA, Oregon PDMP Patient Rights 2[11] ("Law enforcement can only obtain a copy of a patient's PDMP record with a valid court order.").

II. DEA Warrantless Requests to the PDMP.

Notwithstanding the requirement of a court order based on probable cause under Oregon law, the DEA has been requesting protected health information from

[8] http://www.orpdmp.com/data-requests/.
[9] http://www.orpdmp.com/law-enforcement/.
[10] http://www.orpdmp.com/faq.html.
[11] http://www.orpdmp.com/orpdmpfiles/Patient%20Rights%20Handout.pdf.

the PDMP using administrative subpoenas pursuant to a provision of the Controlled Substances Act, 21 U.S.C. § 876. *E.g.*, Pet. to Enforce DEA Administrative Subpoena, *United States v. State of Oregon Prescription Drug Monitoring Program* (hereinafter "*U.S. v. Oregon PDMP*"), No. 12-MC-298 (D. Or. Aug. 24, 2012) (I-ER 122–24); *see also* Decl. of Nina Englander ¶¶ 2–7 (I-ER 285). Section 876 permits certain federal law enforcement officials to issue and serve subpoenas seeking records "relevant or material" to a controlled substances investigation. 21 U.S.C. § 876(a). The subpoenas are issued without first being presented to a court, but are judicially enforceable if the recipient declines to honor them. *Id.* § 876(c). The DEA has issued multiple § 876 subpoenas to the PDMP, and has stated that it will issue approximately two subpoenas to the PDMP per month for the foreseeable future. Decl. of Lori A. Cassity in Supp. of Pet. to Enforce DEA Administrative Subpoena ¶ 6, *U.S. v. Oregon PDMP* (I-ER 128); Englander Decl. ¶¶ 2, 4–5 (I-ER 285).

Oregon has refused to comply with the DEA subpoenas on the basis that complying with them would violate Oregon law. *See* Englander Decl. ¶¶ 6–7 & Exs. E–F (I-ER 285–90). The DEA takes the position that the Oregon requirement of a court order based on probable cause is preempted by § 876. Def. DEA's Combined Mem. in Supp. of Cross-Mot. for Summ. J. Against Pl. ("DEA SJ Preemption Br.") 12, Docket 41. The DEA has obtained judicial enforcement of

one subpoena, which sought production of "a Physician Profile for all Schedule II-V controlled substance prescriptions written by [a specific doctor, whose name is redacted from public filings] from 6/01/2011 through 1/06/2012." Mem. in Supp. of Pet. to Enforce DEA Administrative Subpoena, *U.S. v. Oregon PDMP* (I-ER 131). In support of its petition to enforce the subpoena, the DEA specifically stated that redacted protected health information could not reasonably be used in the investigation, and therefore that it was seeking the names and other identifying information of individual patients who filled prescriptions written by the doctor under investigation. Decl. of Tyler D. Warner ¶ 6, *U.S. v. Oregon PDMP* (I-ER 145). On August 27, 2012, a magistrate judge in the District of Oregon granted the DEA's petition to enforce the subpoena and found the state requirement of a court order based on probable cause to be preempted.[12] Order to Enforce DEA Admin. Subpoena, *U.S. v. Oregon PDMP* (I-ER 147). The PDMP complied with the magistrate judge's order and disclosed the requested protected prescription information to the DEA. Englander Decl. ¶ 3 (I-ER 285).

After the August 2012 magistrate judge's order, Oregon maintained its position that state law precluded it from complying with DEA subpoenas for protected health information in the PDMP. *Id.* ¶¶ 6–7. After receiving two more §

[12] The PDMP did not have time to respond to the DEA's petition before the magistrate judge ruled. Docket 25, at 5.

876 subpoenas, Oregon filed suit seeking a declaration that Oregon's restrictions on law enforcement access are not preempted and that the state "cannot be compelled to disclose an individual's protected health information to the DEA pursuant to an administrative subpoena unless so ordered by a federal court." Compl. 4 (A-ER 24). Intervenors John Does 1–4, Dr. James Roe, and the ACLU of Oregon sought, and the district court granted, intervention in order to protect their interests and present Fourth Amendment arguments. Order of Mar. 31, 2013 (A-ER 63–68).

III. Intervenors' Expectation of Privacy in their Prescription Records in the PDMP.

The information contained in the PDMP and sought by the DEA implicates the privacy rights of Oregon residents and physicians practicing in Oregon, including Intervenors. If the DEA were to obtain further prescription records from the PDMP without obtaining a warrant based on probable cause, it would be able to learn easily what schedule II–IV medications individuals are taking and, by extension, the nature of their underlying medical conditions. Peel Decl. ¶ 3 (I-ER 234). This would violate the reasonable expectation of privacy that doctors and patients have in their protected health information. *See generally* Rothstein Decl. (I-ER 212–17).

Intervenors all receive or issue prescriptions for schedule II, III, or IV drugs that are filled in Oregon pharmacies and therefore recorded in the PDMP.[13] Decl. of John Doe 1 ¶¶ 4–6; Decl. of John Doe 2 ¶¶ 4–5; Decl. of John Doe 3 ¶¶ 4–5; Decl. of John Doe 4 ¶¶ 4–5; Decl. of Dr. James Roe ¶¶ 8–16 (I-ER 252–77). John Doe 4 is a medical student who identifies as transgender and, has been undergoing hormone replacement therapy since being diagnosed with gender identity disorder more than four years ago. This involves self-administering injections of prescription testosterone, a schedule III drug, once every two weeks. Doe 4 Decl. ¶¶ 3, 6–9, 11 (I-ER 269–70). John Doe 2, an attorney, has also been diagnosed with gender identity disorder and is undergoing hormone replacement therapy consisting of injections of prescription testosterone. Doe 2 Decl. ¶¶ 3–11 (I-ER 258–59).

John Doe 3, a small business owner, takes alprazolam (Xanax), a schedule IV drug, to treat anxiety and post-traumatic stress disorders. He also suffers from a genetic blood disorder that prevents him from taking over-the-counter pain medications. As a result, he takes Vicodin, a schedule III drug, to relieve the types of pain that most people are able to treat with over-the-counter medications. Doe 3 Decl. ¶¶ 3, 6–17 (I-ER 263–65).

[13] Intervenor ACLU of Oregon sued on behalf of its members who have prescription records in the PDMP.

John Doe 1, a retired CEO, takes two medications classified in schedule II under the federal Controlled Substances Act to treat the extreme pain caused by recurring kidney stones. Doe 1 Decl. ¶¶ 3, 7–13 (I-ER 252–54). These individuals consider information about their prescriptions and the health conditions they treat to be private, and they are distressed by the prospect of the DEA's gaining access to them without a warrant. Doe 1 Decl. ¶¶ 24–28; Doe 2 Decl. ¶¶ 18–21; Doe 3 Decl. ¶¶ 18–27; Doe 4 Decl. ¶¶ 12–19 (I-ER 255–72).

James Roe, M.D., is an internist who primarily treats geriatric and hospice patients. Because of the nature of his practice, he prescribes more schedule II–IV drugs, particularly opiate and narcotic pain medications, than physicians in other specialties. Dr. Roe has been interviewed and investigated by the DEA, and believes that the DEA has sought his prescription records from the PDMP without a warrant. Roe Decl. ¶¶ 3, 7, 13–15, 25–35, 38–39, 43 (I-ER 274–83).

IV. District Court's Opinion.

On cross-motions for summary judgment, the district court held that the Oregon PDMP's suit against the DEA constituted an Article III case or controversy creating standing, and that because the Fourth Amendment arguments raised by Intervenors "are merely an extension of those advanced by the PDMP . . . [,] consider[ing] . . . 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." Op. & Order 6–8 ("SJ Op.") (A-ER 8–10). The court further held that "the DEA's use of administrative subpoenas to obtain prescription records from the PDMP violates the Fourth Amendment." A-ER 18. On that basis, it granted summary judgment to Intervenors, denied summary judgment to the DEA, and declined to address the PDMP's motion for summary judgment on the basis that it was moot. *Id.* The court permanently enjoined the DEA from obtaining prescription records from the PDMP "without first securing a warrant based upon probable cause." A-ER 20.

SUMMARY OF ARGUMENT

This case raises the question whether government agents may obtain confidential and sensitive medical records in criminal investigations without satisfying the Fourth Amendment's warrant requirement. Prescription records can divulge information not only about the medications a person takes, but also about her underlying medical conditions, the details of her treatment, and her physicians' confidential medical advice—all matters that society recognizes as deeply personal and private. The expectation of privacy in that information is not waived by the mere fact that records are maintained in a secure state database established for public health purposes. Accordingly, law enforcement may obtain the records in question only pursuant to a probable cause warrant. Moreover, there is no jurisdictional bar to reaching the merits of this case. Because Intervenors' Fourth

Amendment arguments are antecedent to, and dispositive of, the original Plaintiff's claim, they are properly before the Court.

ARGUMENT

I. The District Court Properly Exercised Jurisdiction Over This Case.

A. The Constitutionality of 21 U.S.C. § 876 As Applied to the DEA's Requests for Confidential Prescription Records Is a Question Antecedent to and Dispositive of Oregon's Claims.

The district court properly reached the merits of Oregon's and Intervenors' arguments. Although Intervenors have demonstrated ample injury to establish Article III standing in their own right, *see infra* Part I.B; Pls.-Intervenors' Response & Reply 14–32, Docket 48; I-ER 251–83 (Intervenors' declarations), Oregon's undisputed standing supplies the case or controversy providing jurisdiction. The argument advanced by Intervenors—that the DEA's use of administrative subpoenas under 21 U.S.C. § 876 violates the Fourth Amendment—is antecedent to, and indeed dispositive of, Oregon's claim. As the district court held, there is no way to adjudicate Oregon's preemption claim without first deciding whether "the DEA's administrative subpoenas violate the Fourth Amendment as applied to the PDMP" because, if they do, "there is no conflict between [Oregon] and federal law." SJ Op. 7–8 (A-ER 9–10).

This Court has repeatedly explained that "[a] party seeking to intervene pursuant to Rule 24, Federal Rules of Civil Procedure, need not possess the

standing necessary to initiate the lawsuit." *United States v. Imperial Irrigation Dist.*, 559 F.2d 509, 521 (9th Cir. 1977), *rev'd in part, vacated in part on other grounds sub nom. Bryant v. Yellen*, 447 U.S. 352 (1980). Otherwise stated, "[i]n order for an individual to intervene in ongoing litigation between other parties, he need only meet the [Rule 24(a) intervention] criteria."[14] *Yniguez v. Arizona*, 939 F.2d 727, 731 (9th Cir. 1991) (citing *Sagebrush Rebellion, Inc. v. Watt*, 713 F.2d 525 (9th Cir. 1983)). *Accord Perry v. Schwarzenegger*, 630 F.3d 898, 906 (9th Cir. 2011) (per curiam); *Cal. Dep't of Soc. Servs. v. Thompson*, 321 F.3d 835, 846 n.9 (9th Cir. 2003).

This is because "[o]nce a valid Article III case-or-controversy is present, the court's jurisdiction vests. The presence of additional parties, although they alone could independently not satisfy Article III's requirements, does not of itself destroy jurisdiction already established." *Ruiz v. Estelle*, 161 F.3d 814, 832 (5th Cir. 1998). Thus, "parties seeking to intervene under Rule 24(a) or (b) need not establish Article III standing so long as another party with constitutional standing on the same side as the intervenor remains in the case. In that circumstance the federal

[14] The four criteria required for intervention under Fed. R. Civ. P. 24(a) are: "(1) timeliness; (2) an interest in the subject matter of the litigation; (3) absent intervention the party's interest may be practically impaired; (4) other parties inadequately represent the intervenor." *Yniguez v. Arizona*, 939 F.2d 727, 731 (9th Cir. 1991). The DEA does not challenge the district court's determination that Intervenors satisfy Rule 24's requirements for intervention. *See* Order (A-ER 63–68).

court has a Case or Controversy before it regardless of the standing of the intervenor." *San Juan Cnty., Utah v. United States*, 503 F.3d 1163, 1172 (10th Cir. 2007) (en banc) (citation and internal quotation marks omitted).

As the district court held, there is no need to contemplate whether a different rule would be required when an intervenor raises claims that are wholly distinct from those of an original party. SJ Op. 7 (A-ER 9). Unlike the cases cited by the DEA, where a single plaintiff raises multiple distinct legal claims, *see* Appellant's Br. 20 (citing, *inter alia*, *Davis v. Fed. Election Comm'n*, 554 U.S. 724, 734 (2008)), here Intervenors raise arguments that are a subset of, and determinative of, the dispute between Oregon and the DEA. The district court therefore had jurisdiction to address them without regard to whether Intervenors would have had independent standing to bring suit on their own. Indeed, the district court would have had jurisdiction to decide the merits of this case even had Intervenors never joined the suit.

The State of Oregon argued below that the state-law prohibition on releasing PDMP records to law enforcement without a "valid court order," Or. Rev. Stat. § 431.966(2)(a)(D), is enforceable, even against a federal request pursuant to an administrative subpoena under § 876. Mem. in Supp. of Pl.'s Mot. For Summ. J. 8, Docket 25. The DEA disagreed, arguing that Oregon's statute is preempted by § 876. DEA SJ Preemption Br. 10–12, Docket 41. It is undisputed that Oregon has

standing, and that this preemption claim creates a justiciable case or controversy within the meaning of Article III.

The arguments briefed by Intervenors are part and parcel of that claim. Resolving whether § 876 actually preempts Oregon's obligations under Or. Rev. Stat. § 431.966 necessarily involves deciding whether § 876 is a constitutional exercise of congressional power as applied to requests for PDMP records. As this Court has explained, "the CSA [Controlled Substances Act] shall be not be [sic] construed to preempt state law unless there is a 'positive conflict' between the text of the statute and state law." *Oregon v. Ashcroft*, 368 F.3d 1118, 1126 (9th Cir. 2004) (citing 21 U.S.C. § 903; *United States v. Oakland Cannabis Buyers' Coop.*, 532 U.S. 483, 502 (2001) (Stevens, J., concurring)). There can be no such conflict if the purportedly preemptive federal statute is unconstitutional on its face or as applied. An unconstitutional federal statute has no effect, *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 180 (1803), and therefore has no preemptive force. Before addressing whether the CSA—or any federal statute, for that matter—overrides a duly enacted state statute, the first step of analysis is to ask whether the federal statute is a constitutional exercise of federal power, and thus whether it has any effect at all.

Preemption doctrine is rooted in the Supremacy Clause of the U.S. Constitution, which provides: "This Constitution, and the Laws of the United

States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land." U.S. Const. art. VI, cl. 2. As the Supreme Court has explained, "the Supremacy Clause enshrines as 'the supreme Law of the Land' only those Federal Acts that accord with the constitutional design. Appeal to the Supremacy Clause alone merely raises the question whether a law is a valid exercise of the national power." *Alden v. Maine*, 527 U.S. 706, 731 (1999) (citing *Printz v. United States*, 521 U.S. 898, 924 (1997)); *see also Printz*, 521 U.S. at 924 ("The Supremacy Clause . . . makes 'Law of the Land' only 'Laws of the United States which shall be made in Pursuance [of the Constitution].'"); *Marbury*, 5 U.S. (1 Cranch) at 180 ("[I]n declaring what shall be the *supreme* law of the land, . . . only those [laws] which shall be made in *pursuance* of the constitution, have that rank.").

The Supreme Court has refused to enforce federal statutes over states' objections when those statutes violate the Constitution as applied. In *Alden*, for example, the Court held that the Fair Labor Standards Act violated the Constitution insofar as it waived states' sovereign immunity against suit in state courts without state consent. Because the statute was unconstitutional as applied to that context, it could not be enforced against the states—the Supremacy Clause had no effect as to an unconstitutional statute. 527 U.S. at 731–32. Likewise, in *Printz* the Court concluded that the portion of the Brady Act that directed state law enforcement officers to administer a federal firearm background check program violated

principles of federalism enshrined in the Constitution, and therefore was not binding on states notwithstanding the Supremacy Clause. 521 U.S. at 924, 935. The lesson of these and other cases is that "only measures that are constitutional may preempt state law." *S.J. Groves & Sons Co. v. Fulton Cnty.*, 920 F.2d 752, 763 (11th Cir. 1991); *see also Pacific Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n*, 461 U.S. 190, 203 (1983) ("It is well-established that *within Constitutional limits* Congress may preempt state authority." (emphasis added)). "To hold that Congress could preempt state laws by enacting unconstitutional acts would be directly contrary to deeply rooted principles of Federalism." *S.J. Groves & Sons*, 920 F.2d at 763.

In light of the strong presumption against federal preemption of state statutes by the CSA, *see* 21 U.S.C. § 903, the district court was right to assess the constitutionality of the DEA's use of administrative subpoenas under § 876 as part of its consideration whether § 876 preempts Oregon law. Intervenors supplied reasons to the district court why the DEA's use of administrative subpoenas under § 876 to request confidential prescription records held in the PDMP violates the Fourth Amendment. *See* Mem. in Supp. Of Pls.-Intervenors' Mot. For Summ. J. 10–33 , Docket 28; *infra* Parts II–III. This argument is necessarily "antecedent to . . . and ultimately dispositive of the . . . dispute" between Oregon and the DEA, *Arcadia v. Ohio Power Co.*, 498 U.S. 73, 77 (1990), because if § 876 is

unconstitutional in this context, it drops out of the equation and cannot preempt Oregon law. *S.J. Groves & Sons*, 920 F.3d at 763–64. The district court properly addressed and decided the questions presented in this case because Intervenors' arguments are nested within the original Plaintiff's claims. Those arguments, presented after a proper grant of intervention, were rightly decided by the district court and are appropriately before this Court now.

B. If a Determination of Intervenors' Standing is Required, It Should Be Made By the District Court.

Even if Intervenors were required to demonstrate standing, they have adduced sufficient facts to do so. *See* Doe 1–4 and Roe Decls. (I-ER 251–83); Pls.-Intervenors' Response & Reply 11–32, Docket 48. Because the district court concluded that the Fourth Amendment arguments were properly before it regardless of Intervenors' standing, however, it declined to address the record evidence supporting standing or to make factual findings. SJ Op. 8 (A-ER 10). Should this Court decide that Intervenors must establish standing in their own right, the case should be remanded to the district court for the purpose of addressing standing in the first instance. *See, e.g.*, *Friery v. Los Angeles Unified Sch. Dist.*, 448 F.3d 1146, 1150 (9th Cir. 2006).

However, remanding the case for a decision on Intervenors' standing would be a senseless exercise. Even if Intervenors were dismissed from this case, the constitutionality of the DEA's use of administrative subpoenas under the Fourth

Amendment would still be squarely presented, and would be dispositive of Oregon's claim. That question would be answered the same way by the district court on remand, and would be again presented to this Court on appeal. In the interest of judicial economy, this Court should settle the Fourth Amendment question now.

C. This Case is Ripe for Review.

Ripeness is a "question of timing" intended to avoid "premature adjudication." *Thomas v. Anchorage Equal Rights Comm'n*, 220 F.3d 1134, 1138 (9th Cir. 1999) (en banc) (internal quotation marks omitted). Because the DEA has already used administrative subpoenas to seek and obtain confidential prescription records from the PDMP and has stated under oath its intent to continue doing so, the district court correctly held that the claims in this case are ripe. SJ Op. 8 (A-ER 10).

The DEA has served three § 876 subpoenas on the PDMP and has obtained judicial enforcement of one. That subpoena sought "all Schedule II-V controlled substance prescriptions" written by a doctor over a six-month period, thus sweeping in a large amount of confidential information about the doctor-patient relationship and private facts about patients' health. Warner Decl. ¶ 3 (I-ER 144). The subsequent, unenforced subpoenas seek even greater quantities of data. *See* Englander Decl. Exs. C & D (I-ER, Vol. II, 291–92). The DEA has refused to alter

its policy of seeking records from the PDMP using administrative subpoenas, rejecting Oregon's requests that it obtain court orders as required by Oregon law (and the Fourth Amendment). The agency has stated under oath that it intends to continue sending multiple administrative subpoenas to the PDMP each month for the foreseeable future. Cassity Decl. ¶ 6 (I-ER 128). The result is that the DEA has violated, and will continue to violate, the rights of Intervenors and other Oregon residents.

These facts show that the case is fit for judicial decision because "[t]he issue presented in this case is purely legal, and will not be clarified by further factual development." *Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 581 (1985); *see also Freedom to Travel Campaign v. Newcomb*, 82 F.3d 1431, 1434–35 (9th Cir. 1996). The conduct by the DEA that Intervenors challenge has already occurred and continues, and the controversy before this Court is concrete: the DEA takes the position that there is nothing improper with its administrative subpoenas to the PDMP, or with its policy and practice of issuing such subpoenas, and Oregon and Intervenors contend that the subpoenas are not permissible under the Fourth Amendment and Oregon law. Intervenors and the State of Oregon have already suffered injury and face a substantial risk of further injury from the DEA's

practices.[15] *See Truth v. Kent Sch. Dist.*, 542 F.3d 634, 643 (9th Cir. 2008) (a challenge is ripe where plaintiff "complains of discrete events that have already occurred"), *overruled on other grounds by L.A. Cnty., Cal. v. Humphries*, 562 U.S. 29 (2010). Moreover, the law is clear that "one does not have to await the consummation of threatened injury to obtain preventive relief." *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298 (1979) (internal quotation marks omitted).

The district court correctly held that the case is ripe for review, and there is no bar to the justiciability of the asserted claims.

II. The DEA's Warrantless Access to Confidential Medical Records in the PDMP Violates the Fourth Amendment.

A. The Fourth Amendment Prohibits Use of Administrative Subpoenas Where a Person Has a Reasonable Expectation of Privacy in the Records Law Enforcement Seeks.

Where an individual has a reasonable expectation of privacy in an item or location to be searched, the search is "'*per se* unreasonable under the Fourth Amendment"' unless conducted pursuant to a judicial warrant. *Arizona v. Gant*, 556 U.S. 332, 338 (2009) (quoting *Katz v. United States*, 389 U.S. 347, 357 (1967)). Only if there is no reasonable expectation of privacy, or if one of the "few specifically established and well-delineated exceptions" to the warrant requirement

[15] These considerations also support standing.

applies, may government officials conduct a warrantless search. *Id.* (internal quotation marks omitted). Accordingly, the government may use an administrative subpoena to conduct a search only if the target of the search lacks a reasonable expectation of privacy in the requested records. *United States v. Plunk*, 153 F.3d 1011, 1020 (9th Cir. 1998) ("Plunk does not have the requisite standing to challenge [the subpoena's] issuance under the Fourth Amendment 'unless he [can] demonstrate that he had a legitimate expectation of privacy attaching to the records obtained.'" (second alteration in original)), *amended by* 161 F.3d 1195 (9th Cir. 1998), *abrogated on other grounds by United States v. Hankey*, 203 F.3d 1160, 1169 & n.7 (9th Cir. 2000); *see also, e.g.*, *In re Gimbel*, 77 F.3d 593, 599 (2d Cir. 1996). This Court has therefore permitted use of administrative subpoenas only after determining that the target of the investigation lacked a reasonable expectation of privacy in the items or records law enforcement seeks. *E.g.*, *United States v. Golden Valley Elec. Ass'n*, 689 F.3d 1108, 1116 (9th Cir. 2012); *Plunk*, 153 F.3d at 1020.

The DEA misapprehends Intervenors' argument and the district court's holding when it attributes to both the view that "subpoenas must be subject to the same probable cause determination as search warrants." Appellant's Br. 39. This is not what Intervenors argue, nor what the district court held. Rather, Intervenors have consistently maintained that because people have a reasonable expectation of

privacy in confidential medical records under the Fourth Amendment, a warrant is required *instead* of a subpoena. Pls.-Intervenors' Response & Reply 7, Docket 48; *accord* SJ Op. 15 (A-ER 17).

When an administrative subpoena is proper, it is indeed issued upon a relevance standard and governed by the reasonableness test set forth in *See v. City of Seattle*, 387 U.S. 541, 544–45 (1967), and elsewhere. Appellant's Br. 37–38. But the question here is not whether the DEA's subpoenas are overbroad or overly burdensome, *see id.*, or whether a probable cause requirement should be engrafted onto issuance of subpoenas. Rather, it is whether an administrative subpoena is the proper mechanism for obtaining records and information in which people have a reasonable expectation of privacy under the Fourth Amendment. It is not.[16]

For this reason, *Becker v. Kroll*, 494 F.3d 904 (10th Cir. 2007), is inapposite. In *Becker*, the Tenth Circuit held only that an "administrative subpoena is not subject to the same probable cause requirements as a search warrant." *Id.* at 916.

[16] The five-factor balancing test used in cases evaluating the right to informational privacy under the Fifth and Fourteenth Amendment due process clauses is also not applicable. Contrary to the DEA's assertion, Appellant's Br. 43, *Seaton v. Mayburg*, 610 F.3d 530 (9th Cir. 2010), does not stand for the proposition that Fourth Amendment claims should be resolved by resort to the more malleable Fourteenth Amendment standard. The discussion in *Seaton* is focused only on the right to informational privacy under the Due Process Clause. Likewise, *Tucson Woman's Clinic v. Eden*, 379 F.3d 531, 549–54 (9th Cir. 2004), analyzed the plaintiffs' Fourth and Fourteenth Amendment claims separately, applying the reasonable-expectation-of-privacy test to the former and the five-factor balancing test to the latter.

The plaintiff did not argue that there was a reasonable expectation of privacy in the records at issue, nor that a subpoena was the wrong kind of legal process to use under the Fourth Amendment. *See* Corrected Br. of the Pl./Appellant, *Becker*, 2005 WL 6137783, at *31–34; Third Br. on Cross Appeal by the Appellant Taj Becker, M.D., *Becker*, 2005 WL 6311342. The Tenth Circuit's conclusion neither addresses nor contradicts the district court's holding here.

Likewise, in *In re Subpoena Duces Tecum*, 228 F.3d 341 (4th Cir. 2000), the Fourth Circuit concluded that "a subpoena need not be supported by probable cause." *Id.* at 349. The appellant argued only that administrative subpoenas should include a probable cause requirement, that the subpoena at issue was unreasonably overbroad, and that the subpoena violated patients' right to informational privacy under the Fourteenth Amendment. Opening Br. of Appellant, *In re Subpoena Duces Tecum*, 2000 WL 33981507, at *9–17, 20. The appellant did not raise, and the court did not address, the question whether there is a reasonable expectation of privacy in certain medical records that requires the government to proceed via a warrant instead of a subpoena. *See also In re Admin. Subpoena John Doe*, 253 F.3d 256, 263 (6th Cir. 2001) (explaining that "the DOJ need not make a showing of probable cause to issue an administrative subpoena under 18 U.S.C. § 3486, nor does petitioner argue for such a standard on appeal.").

Because of the sensitivity of the records involved, the protections of the Fourth Amendment's warrant clause fully apply. *See infra*. The DEA strays afield when it asks the Court to consider that issuance of administrative subpoenas to the PDMP is the most "efficient" means of conducting an investigation. Appellant's Br. 43 n.18. A claim of expediency does not make a warrantless search reasonable; were it so, the warrant requirement would have withered away long ago. As the Supreme Court has repeatedly emphasized, "the warrant requirement is 'an important working part of our machinery of government,' not merely 'an inconvenience to be somehow "weighed" against the claims of police efficiency.'" *Riley v. California*, 134 S. Ct. 2473, 2493 (2014) (quoting *Coolidge v. New Hampshire*, 403 U.S. 443, 481 (1971)). The implication, "of course, is not that the information [in the PDMP] is immune from search; it is instead that a warrant is generally required before such a search." *Id.*

B. Intervenors Have a Reasonable Expectation of Privacy in their Prescription Records Held by the PDMP.

To establish a reasonable expectation of privacy under the Fourth Amendment, a person must demonstrate an actual expectation of privacy in the item or location searched, and that the expectation of privacy is "one that society is prepared to recognize as reasonable." *Smith v. Maryland*, 442 U.S. 735, 740 (1979) (internal quotation marks omitted). 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 understandings that are recognized and permitted by society.'" *Minnesota v. Carter*, 525 U.S. 83, 88 (1998) (citation omitted).

1. Intervenors, Like Other People, Have an Actual Expectation of Privacy in their Prescription Records.

The DEA does not contest that Intervenors have an actual, personal expectation of privacy in their prescription records held by the PDMP and the medical information those records reveal. Indeed, John Does 1–4's prescription records reveal sensitive and private information about the medical conditions their prescriptions treat, which include gender identity disorder or gender dysphoria, anxiety and post-traumatic stress disorders, frequent kidney stones, persistent insomnia, and recurring pain. Doe 1 Decl. ¶¶ 7–8, 14; Doe 2 Decl. ¶¶ 6–9; Doe 3 Decl. ¶¶ 8–9, 14–15; Doe 4 Decl. ¶¶ 6–8 (I-ER 252–70). Their prescription records also reveal details about their medical treatment itself and the treatment decisions made in conjunction with their physicians, including potentially embarrassing or stigmatizing details of their diagnoses, drug dosages, and the nature and stage of their treatment. Dr. James Roe's prescription records are also private, as they reveal confidential information about his treatment of patients and the doctor-patient relationship. Roe Decl. ¶¶ 14–15, 28, 43 (I-ER 276–83). As the district court held, each Plaintiff-Intervenor has an actual expectation of privacy in these records, "as would nearly any person who has used prescription drugs." SJ Op. 10

(A-ER 12); *see also* Doe 1 Decl. ¶¶ 24–28; Doe 2 Decl. ¶¶ 18–21; Doe 3 Decl. ¶¶ 18–27; Doe 4 Decl. ¶¶ 12–19; Roe Decl. ¶ 43; Peel Decl. ¶ 16 ("[I]nformation about Plaintiffs-Intervenors' prescriptions reveals sensitive details of their diagnoses.") (I-ER 242, 255–83).

2. Society Recognizes the Expectation of Privacy in Prescription Records as Reasonable.

Prescription records reveal intimate, private, and potentially stigmatizing details about a patient's health, including the patient's underlying medical condition, the severity of the condition, and the course of treatment prescribed by the treating physician. Peel Decl. ¶¶ 3, 17 (I-ER 234, 242). For that reason, as with other medical records, they are widely considered private—and reasonably so.

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 has given 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)). 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. These sources provide redundant support for the same basic proposition, that society has reached near consensus about the need to maintain the privacy of medical and prescription records. As the Pew Research Center recently found, people consider information about the "state of their health and *the medicines they take*" to be among the most private pieces of information about them, deeming it more sensitive than the contents of their emails or text messages, their relationship history, or their religious views.[17]

i. Case law recognizes 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 to the Fourth Amendment's warrant requirement provides a state hospital with "authority to conduct drug tests [of patients] and to turn the results over to law enforcement agents without the knowledge or consent of the patients." *Id.* at 77. Before concluding that the special needs exception did not apply—and thus that the hospital had violated the Fourth Amendment—the Court held that "[t]he

[17] Pew Research Center, *Public Perceptions of Privacy and Security in the Post-Snowden Era* 32 (Nov. 12, 2014), http://www.pewinternet.org/files/2014/11/PI_PublicPerceptionsofPrivacy_111214.pdf (emphasis added). Eighty-one percent of respondents considered information about health and medications to be "sensitive." *Id.*

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 apparently found that principle an easy one, remarking 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 under the Fourth Amendment in prescription records in particular, its reasoning in *Ferguson* applies with equal force to medical records beyond diagnostic test results, including confidential prescription information that can reveal just as much about an underlying diagnosis as can the test results themselves.

This Court, too, has recognized that patients and doctors have a reasonable expectation of privacy in medical records under the Fourth Amendment. In *Tucson Woman'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." (Emphasis added). Other courts have echoed this conclusion. *See, e.g., 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."); *Doe v. Broderick*, 225 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."); *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) (holding that postal employees whose medical information was obtained from health care providers by the Postal Service without consent "have—at a minimum—standing to bring suit based on a reasonable expectation of privacy in their medical records"); *see also 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).

Whalen v. Roe, 429 U.S. 589 (1977), is not to the contrary. There 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 under the Due Process Clause of the Fourteenth Amendment. Although the Court held that the security and privacy protections of New York's system made it permissible under the Due Process Clause, the Court discussed a right to informational privacy and explained that cases protecting the right to privacy have "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 Court explained the plaintiffs' argument that collection of prescription records implicates both factors:

> The mere existence in readily available form of the information about patients' use of Schedule II drugs creates a genuine concern that the information will become publicly known and that it will adversely affect their reputations. This concern makes some patients reluctant to use, and some doctors reluctant to prescribe, such drugs even when their use is medically indicated. It follows, [plaintiffs] argue, that the making of decisions about matters vital to the care of their health is inevitably affected by the statute. Thus, the statute threatens to impair both their interest in the nondisclosure of private information and also their interest in making important decisions independently.

Id. at 600. The Court concluded that "the New York program does not, on its face, pose a sufficiently grievous threat to either interest to establish a constitutional violation" under the Fourteenth Amendment. *Id.*

That analysis, while not dispositive of the ultimate Fourth Amendment question in this case, does speak to the widespread acceptance, and thus the reasonableness, of privacy protections for medical records. Moreover, although the Court in *Whalen* disclaimed application of the Fourth Amendment to the facts at issue there, it distinguished "cases involv[ing] affirmative, unannounced, narrowly focused intrusions into individual privacy during the course of criminal investigations," where the Fourth Amendment *would* apply. *Id.* at 604 n.32. This case squarely presents such a situation, and requires assessing whether people have

a reasonable expectation of privacy in their confidential medical records held in the PDMP. The privacy interests in prescription records identified in *Whalen* help inform an assessment of the reasonableness of the expectation of privacy for Fourth Amendment purposes.

In the years since *Whalen*, this Court has firmly and repeatedly recognized 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 v. Doe ex rel. Lavery*, 518 U.S. 1014 (1996). The Court 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 Berkeley Lab.*, 135 F.3d 1260, 1269 (9th Cir. 1998); *see also, e.g.*, *Seaton*, 610 F.3d at 541; *Tucson Woman's Clinic*, 379 F.3d at 551; *Caesar v. Mountanos*, 542 F.2d 1064, 1067 n.9 (9th Cir. 1976).

Other circuits have specifically held that the expectation of 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.

Doe v. Se. Pa. Transp. Auth., 72 F.3d 1133, 1138 (3d Cir. 1995) (citation omitted); *accord Douglas v. Dobbs*, 419 F.3d 1097, 1102 (10th Cir. 2005) ("[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.") (citation omitted).

Courts have also recognized that physicians have an interest in the privacy of their prescription and other medical records. The Supreme Court recently noted: "It may be assumed that, for many reasons, physicians have an interest in keeping their prescription decisions confidential." *Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653, 2668 (2011); *see also Whalen*, 429 U.S. at 600 (explaining concern that risk of privacy violations make "some doctors reluctant to prescribe . . . drugs even when their use is medically indicated").

The cases protecting the privacy of medical information under the Fifth and Fourteenth Amendments provide one 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 Douglas*, 419 F.3d at

1101–03 (relying on *Whalen* and related cases to inform analysis of Fourth Amendment privacy interest in 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 1269, patients have a reasonable expectation of privacy in their medical information.[18] The Supreme Court and this Court have recognized as much. *Ferguson*, 532 U.S. at 78; *Tucson Woman's Clinic*, 379 F.3d at 550.

ii. 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.

It is no surprise that the Supreme Court in *Ferguson* so easily concluded that people have a reasonable expectation of privacy in their medical records. The 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. Rothstein Decl. ¶ 3 (I-ER 214). This constitutes an important source of patients' reasonable expectation of privacy

[18] Prescription records reveal some 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").

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 ethics as 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. Rothstein Decl. ¶ 3 (I-ER 214). In American medical practice, a requirement to preserve the confidentiality of patient health information was included in the earliest codes of ethics of 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. Decl. of Professor Robert Baker ¶¶ 12–15 (I-ER 224–27); Rothstein Decl. ¶ 3 (I-ER 214). Today, virtually all patients (97.2%) believe that health care providers have a "legal and ethical responsibility to protect patients' medical records."[19]

Medical confidentiality was an established norm in colonial and founding-era America, and the framers of the Fourth Amendment were well aware of the

[19] New London Consulting & FairWarning, *How Privacy Considerations Drive Patient Decisions and Impact Patient Care Outcomes* 10 (Sept. 13, 2011), http://www.fairwarning.com/whitepapers/2011-09-WP-US-PATIENT-SURVEY.pdf (I-ER 158).

need for maintaining the confidentiality of patients' medical information. In the eighteenth century, almost every American "regular physician" studied at the University of Edinburgh Medical School in Scotland or under someone who had trained there. Baker Decl. ¶¶ 4–5 (I-ER 219–30). Beginning in the 1730s, every physician who received a medical degree from the University of Edinburgh was required to sign an oath swearing "never, without great cause, to divulge anything that ought to be concealed, which may be heard or seen during professional attendance." *Id.* ¶ 6 & n.1. Physicians who had been educated at the University of Edinburgh or under one of its graduates, and thus who had sworn to keep patients' medical information confidential, were among the signers of the Declaration of Independence and delegates to the Constitutional Convention. *Id.* ¶ 7. Most notably, Benjamin Rush, one of the signers of the Declaration of Independence, was a physician and an alumnus of the University of Edinburgh, the author of a published lecture on medical confidentiality, and perhaps the most influential medical educator in founding-era America. *Id.* ¶¶ 8–9. Three other physicians were among the signers of the Declaration of Independence, and at least three physicians were delegates to the Constitutional Convention. *Id.* ¶¶ 7, 10. Of the latter, one (James McClurg) received his medical degree from the University of Edinburgh and another (James McHenry) received his medical education studying under Dr.

Rush. *Id.* ¶ 10. "These men would have been well acquainted with the traditional ethical precept of keeping patients' medical information confidential." *Id.*

Further, patients treated by "regular physicians" trained in the Edinburgh tradition would also have understood the guarantee of confidentiality of the medical information they shared with their physicians, including the prescribing orders written to obtain medicine from an apothecary or compounding pharmacist. *Id.* ¶ 18. Like George Washington, who was treated by Edinburgh-educated physician Samuel Bard, most of the delegates to the Constitutional Convention and members of the First Congress would have had access to the services of such physicians, who practiced in significant numbers in the population centers of the late-18th century United States. *Id.* ¶ 5. The delegates and lawmakers thus would have expected their own medical information to have been protected against release to third parties without their consent. *Id.* ¶¶ 5, 18. Ethical protections of the confidentiality of medical information were firmly in place at the time of the Fourth Amendment's ratification in 1791 and were known to the Constitution's framers.

The strong and enduring guarantees of the confidentiality of patients' medical information are "essential in encouraging patients to provide their physicians with accurate and complete health information, without which medical care would be severely compromised." Rothstein Decl. ¶ 4 (I-ER 214–15). Without

confidentiality protections, patients would "delay medical care or avoid treatment altogether" and suffer embarrassment, stigma, and economic harms. *Id.* ¶¶ 5–6. A lack of confidentiality protections can also lead to public health consequences and "can lessen societal support for the health care system." *Id.* ¶¶ 7–8; *see also* Lawrence O. Gostin, *Health Information Privacy*, 80 Cornell L. Rev. 451, 490–91 (1995).

The consequences of law enforcement gaining easy access to medical records are particularly harmful. As one court has 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."). This principle is longstanding: the first American medical society to formalize its code of medical ethics, the Medical Society of the State of New York, instructed

physicians as early as 1823 that they were not to break patient confidences even when haled into court. Baker Decl. ¶¶ 12–13 (I-ER 224–25).

Unjustified law enforcement access to confidential medical information can deter physicians from prescribing and patients from receiving medications, including pain control drugs that are medically necessary, "resulting in more under-treatment of chronic pain." Rothstein Decl. ¶ 9–11; *see also* Peel Decl. ¶¶ 18–19, 23–24 (I-ER 215–16, 243–49). Accordingly, 93% of patients want to decide which government agencies can access their electronic health records,[20] and 88% oppose letting police see their medical records without permission.[21] The Oregon Legislature's inclusion of the court-order and probable-cause requirements reflects its considered understanding that unjustified law enforcement access to prescription records violates patients' expectations of privacy and would cause harm. *See, e.g.*, Work Session on SB 355 Before the S. Comm. on Human Servs. & Rural Health Policy, 75th Leg. Assembly, at 0:7:23–0:7:35 (Or. Apr. 13, 2009)

[20] 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-Illustrations.pdf (I-ER 168).

[21] Institute for Health Freedom & Gallup Organization, *Public Attitudes Toward Medical Privacy* 9–10 (Sept. 26, 2000), http://www.forhealthfreedom.org/Gallupsurvey/IHF-Gallup.pdf (I-ER 183–84).

(statement of Sen. Bates)[22] ("If you look at the bill carefully you'll see we did everything to protect people. Law enforcement cannot get into this database without a court order that's based on probable cause."); Senate floor debate on SB 355, 75th Leg. Assembly, at 0:45:05–0:45:26 (Or. June 25, 2009) (statement of Sen. Kruse)[23] ("We do not even have law enforcement involved. For law enforcement to get this information it would have to be in relation to an ongoing case, and they would need probable cause, which is an incredibly high bar."); House floor debate on SB 355, 75th Leg. Assembly, at 0:39:42–0:39:51 (Or. June 25 2009) (statement of Rep. Shields)[24] ("This bill is not going to get in the way of the Fourth Amendment. If law enforcement wants these records, they're going to have to get a warrant in order to do so.").

iii. State laws protect the privacy of patient medical information, including by requiring probable cause for law enforcement access to prescription records.

"In evaluating the reasonableness of police procedures under the Fourth Amendment," the Supreme Court has often "looked to prevailing rules in

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[22] Audio recording available at http://www.leg.state.or.us/listn/archive/archive.2009s/SHSRHP-200904130806.ram.

[23] Audio recording available at http://www.leg.state.or.us/listn/archive/archive.2009s/SENATE-200906251614.ram.

[24] Audio recording available at http://www.leg.state.or.us/listn/archive/archive.2009s/HOUSE-200906291645.ram.

individual jurisdictions" and the trend in relevant state laws. *Tennessee v. Garner*, 471 U.S. 1, 15–16, 18 & n.21 (1985) (citing *United States v. Watson*, 423 U.S. 411, 421–22 (1976)); *see also Elkins v. United States*, 364 U.S. 206, 219 (1960).[25] 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.

Including Oregon, ten states have enacted legislation prohibiting law enforcement from accessing records in those states' prescription monitoring programs unless the government gets a warrant or otherwise demonstrates probable cause. Ala. Code § 20-2-214(7); Alaska Stat. § 17.30.200(d)(5); Ark. Code Ann. § 20-7-606(b)(2)(A); Ga. Code Ann. § 16-13-60(c)(3); Iowa Code § 124.553(1)(c); Minn. Stat. § 152.126(6)(b)(7); Mont. Code Ann. §§ 37-7-1506(1)(e), 46-4-301(3); N.H. Rev. Stat. Ann. § 318-B:35(I)(b)(3); Or. Rev. Stat. § 431.966(2)(a)(C); R.I. Gen. Laws § 21-28-3.32(a)(3). 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 prescription drug monitoring program statutes make no provision for law enforcement access. Me. Rev. Stat. tit. 22, § 7250(4); Neb. Rev. Stat. § 71-2455.

[25] 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 practices.

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. The ten states that require probable cause all have adopted or reasserted this standard within the last decade, with a number of states instituting a probable cause requirement in just the last three years. *See* 2013 R.I. Pub. Laws Ch. 132, § 2; 2012 N.H. Adv. Legis. Serv. 196 (LexisNexis); 2011 Ark. Laws Act 304, § 1; 2011 Ga. Laws 659, § 2; 2011 Mont. Laws ch. 241, § 7 (relevant terms defined in Mont. Code Ann. § 46-4-301(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 Skinner*, 10 So. 3d 1212 at1218 ("[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*, 535 S.E.2d at 495 ("[A] patient's medical information, as reflected in the records maintained by his or her medical providers, is certainly a matter which a reasonable person would consider to be private."); *State v. Nelson*, 941 P.2d 441, 449 (Mont. 1997) (imposing probable cause requirement); *Commonwealth v. Riedel*, 651 A.2d 135, 139–40 (Pa. 1994)

("[A]ppellant 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) ("Following 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 43 states and the District of Columbia have created one through legislation.[26] 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*,

[26] Alaska R. Evid. 504; Ariz. Rev. Stat. Ann. § 12-2235; Ark. R. Evid. 503; Cal. Evid. Code §§ 990–1007; Colo. Rev. Stat. § 13-90-107(d); Conn. Gen. Stat. Ann. § 52-146o; Del. Unif. R. Evid. 503; D.C. Code Ann. § 14-307; Fla. Stat. Ann. § 456.057; Ga. Code Ann. § 24-12-1; Haw. Rev. Stat. § 616-1; Idaho Code Ann. § 9-203.4; 735 Ill. Comp. Stat. Ann. 5/8-802; Ind. Code Ann. § 34-46-3-1; Iowa Code Ann. § 622.10; Kan. Stat. Ann. § 60-427; La. Code Evid. Ann. art. 510; Me. R. Evid. 503; Mich. Comp. Laws Ann. § 600.2157; Minn. Stat. Ann. § 595.02; Miss. Code Ann. § 13-1-21; Mo. Ann. Stat. § 491.060; Mont. Code Ann. § 26-1-805; Neb. Rev. Stat. Ann. § 27-504; Nev. Rev. Stat. Ann. § 49.215; N.H. Rev. Stat. Ann. § 329:26; N.J. Stat. Ann. § 2A:84A-22.2; N.M. R. Evid. 11-504; N.Y. C.P.L.R. 4504; N.C. Gen. Stat. Ann. § 8-53; N.D. R. Evid. 503; Ohio Rev. Code Ann. § 2317.02 (B); Okla. Stat. Ann. tit. 12, § 2503; Or. Rev. Stat. Ann. § 40.235; 42 Pa. Cons. Stat. Ann. § 5929; R.I. Gen. Laws Ann. § 5-37.3-4; S.D. Codified Laws § 19-13-6; Tex. R. Evid. 509; Utah Code Ann. § 78B-1-137; Vt. Stat. Ann. tit. 12, § 1612; Va. Code Ann. § 8.01-399; Wash. Rev. Code Ann. § 5.60.060; Wis. Stat. Ann. § 905.04; Wyo. Stat. Ann. § 1-12-101.

770 F.2d at 1506 (discussing attorney-client privilege as a source of clients' reasonable expectation of privacy in their client files held by an attorney).[27]

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

Records in the PDMP 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; *see also* Peel Decl. ¶ 15 (I-ER 241–42).

A prescription for Marinol can reveal that a patient is being treated for AIDS. Peel Decl. ¶ 7.b (I-ER 235); PDR.net, Marinol (I-ER 67). As this Court has recognized,

> [i]ndividuals who are infected with the HIV virus clearly possess a constitutional right to privacy regarding their condition. . . . An individual revealing that she is HIV seropositive potentially exposes herself not to understanding or compassion but to discrimination and

[27] 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); *see also* Peel Decl. ¶¶ 10, 15 (I-ER 240–42). Although the HIPAA Privacy Rule contemplates law enforcement requests for covered records using an administrative subpoena, disclosure is merely permissive, 45 C.F.R. § 164.512(f)(1)(ii)(C), and the Privacy Rule includes a recognition that more protective state standards should not be overridden by the provisions of the federal Rule. *Id.* §§ 160.202, 160.203(b).

> 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 female to male sex. Peel Decl. ¶ 7.a; Doe 2 Decl. ¶¶ 6–14, 20 (I-ER 235, 258–61). 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); *see also* Jaime M. Grant et al., *Injustice at Every Turn: A Report of the National Transgender Discrimination Survey* 2 (2011)[28] (I-ER 204) ("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.").

A number of medications tracked in the PDMP are used to treat mental illness, including panic disorders, anxiety disorders, and post-traumatic stress disorder. Peel Decl. ¶ 7.d–7.e; Doe 3 Decl. ¶¶ 14–17; PDR.net profiles of Adderall,

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

Lorazepam, Clonazepam, Onfi, Ritalin, Valium, Vyvanse, & Xanax (I-ER 34, 43, 49, 82, 94, 103, 109, 112, 236, 264–65). 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"); *Sorn v. Barnhart*, 178 F. App'x 680, 681 (9th Cir. 2006) (noting "the lingering social stigma of admitting to mental illness").

Finally, drugs tracked by the PDMP reveal information about substance abuse addiction and treatment: prescriptions for buprenorphine or methadone can reveal that patients are in treatment for opiate addiction, and prescriptions for chlordiazepoxide (Librium) and oxazepam (Serax) can reveal treatment for alcohol addiction withdrawal. Peel Decl. ¶ 7.f–7.g (I-ER 236); PDR.net, Librium (I-ER 61). These records, too, are deeply private and can expose a patient to stigma. Indeed, Congress has specifically imposed heightened confidentiality protections for substance abuse treatment records and has limited access to them by law enforcement and in criminal proceedings. 42 U.S.C. § 290dd-2; *see also Broderick*, 225 F.3d at 450–51; Rothstein Decl. ¶ 11 (I-ER 216).

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." *Broderick*, 225 F.3d at 451. The expectation of privacy in prescription records and the medical information they reveal is recognized by society as reasonable.

III. The State of Oregon's Limited Ability to Access Records in the PDMP Does Not Eliminate Patients' Reasonable Expectation of Privacy in those Records.

A person can retain a reasonable expectation of privacy in prescription records even though the records are in the hands of a third party. Although in some instances a person may lack a reasonable expectation of privacy in records held by a third party, neither the Supreme Court nor this Circuit has recognized a categorical rule to that effect, and courts have held that people retain a reasonable expectation of privacy in medical records stored in a third party's files. *See, e.g.*, *Ferguson*, 532 U.S. at 78; *Tucson Woman's Clinic*, 379 F.3d at 550; *Broderick*, 225 F.3d at 450–51; *Skinner*, 10 So. 3d at 1218. The Supreme Court's decisions in *United States v. Miller*, 425 U.S. 435 (1976), and *Smith v. Maryland*, 442 U.S. 735 (1979), are not to the contrary.

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 them: "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, and that the canceled checks and deposit slips at issue were not "confidential." *Id.* The Court explicitly reserved judgment on whether records held by a third party but covered by "evidentiary privileges, such as that protecting communications between an attorney and his client," would receive greater Fourth Amendment protection. *Id.* at 443 n.4.

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 PDMP thus turns on whether the contents of the records were voluntarily conveyed to the PDMP, and what privacy interest a person retains in those records. This Court has recognized that the so-called third-party doctrine is not an on-off switch, explaining in *Golden Valley* that records that are "more inherently personal or private than the bank records in *Miller*" may receive Fourth Amendment protection. 689 F.3d at 1116; *accord United States v. Cormier*, 220 F.3d 1103, 1108 (9th Cir. 2000) ("[T]he guest registration records did not contain highly personal information about Cormier. Instead, the registration records merely stated his name and room number. The *Miller* rationale is even more compelling in the context of guest registration records because no highly personal information is disclosed to the police."). By way of example, the Court pointed to the "personal nature of Google search queries" stored by the company.[29] *Golden Valley*, 689

[29] The Supreme Court recently affirmed the relevance to the Fourth Amendment analysis of the degree of sensitivity of the records to be searched. *Riley*, 134 S. Ct. at 2490 ("[C]ertain types of data are also qualitatively different. An Internet search and browsing history, for example, can be found on an Internet-enabled phone and

F.3d at 1116 (citing *Gonzales v. Google, Inc.*, 234 F.R.D. 674, 683–84 (N.D. Cal. 2006)).

Unlike the cancelled checks at issue in *Miller* and the dialed telephone numbers in *Smith*, the prescription records contained in the PDMP were not voluntarily conveyed to the State of Oregon. Oregon law requires pharmacists to report all prescriptions for schedule II–IV drugs to the PDMP. Or. Rev. Stat. § 431.964(1). Even if disclosure of one's medical condition to the doctor and the prescription to treat that condition to the pharmacist can be deemed "voluntary," the pharmacist's conveyance of the prescription to the PDMP involves no volition by or even knowledge of the patient. The Third Circuit reached the same conclusion with regard 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 during 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); *accord Tracey v. State*, 2014 WL 5285929, at *16 (Fla. Oct. 16, 2014).

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could reveal an individual's private interests or concerns—perhaps a search for certain symptoms of disease, coupled with frequent visits to WebMD.").

Moreover, the decision to visit a physician and pharmacist to obtain urgent medical treatment is not in any meaningful sense voluntary. Obtaining medical care for a serious emergent or chronic condition such as acute pain, seizure disorders, panic or anxiety disorders, AIDS, or opioid addiction is a course of action dictated by one's physical and psychological ailments. Opting to forgo care can leave a person debilitated or dead. 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. We conclude that appellant did not surrender standing to assert his privacy rights when he entered the emergency room." *Thurman v. State*, 861 S.W.2d 96, 98 (Tex. App. 1993) (citation omitted).

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 id.* ("We believe that medical records are entitled to more privacy than bank records and phone records."); *supra* Part II.B.2.iv. Indeed, courts have 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. *Ferguson*, 532 U.S.

at 78; *King*, 535 S.E.2d at 495 ("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."); *Broderick*, 225 F.3d at 450 (distinguishing *Miller*). Because medical records are inherently and deeply private, *supra* Part II, they require the highest protection the Fourth Amendment offers.

Additionally, the medical information contained in and revealed by prescription records is covered by the doctor-patient privilege in numerous states. *See supra* note 26 (listing state statutes establishing doctor-patient evidentiary privilege); *see also, e.g.*, Cal. Evid. Code § 992 (privilege applies to information disclosed to third parties "to whom disclosure is reasonably necessary for . . . the accomplishment of the purpose for which the physician is consulted."); Or. Rev. Stat. Ann. § 40.235(1)(a)(C) (similar); Ga. Code Ann. § 24-12-1(b) (explicitly extending privilege to pharmacists). It therefore does not fall within even the most expansive reading of *Miller*, where the Court explained that it was not addressing whether the expectation of privacy in information covered by privilege is diminished by the mere fact that the records are held in confidence by a third party. 425 U.S. at 443 n.4.

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*, 770 F.2d at 1506, this Court 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 [protections of attorney-client privilege], and in the United States Constitution." *Id.* at 1506–07. The fact that the confidential files were in the possession of the attorney, not the client, did not undermine the Fourth Amendment's protections. *Id.* at 1507; *accord United States v. Knoll*, 16 F.3d 1313, 1321 (2d Cir. 1994). Likewise, that Intervenors' prescription records are in the PDMP's database does not vitiate the otherwise-reasonable expectation of privacy in them.

Prescription records stored in the PDMP are much like emails stored in an email provider's servers, in which people retain an expectation of privacy. *United States v. Warshak*, 631 F.3d 266, 285 (6th Cir. 2010). For one, the entity maintaining the digital files may access them only for limited enumerated purposes. *Compare id.* at 287 (noting that the email provider's terms of service permitted it to "'access and use individual Subscriber information in the operation of the Service and as necessary to protect the Service'"), *with* Or. Rev. Stat. § 431.966(2)(a)(B) ("[T]he Oregon Health Authority shall disclose the information [in the PDMP] . . . [t]o designated representatives of the authority . . . to establish

or maintain the electronic system of the prescription monitoring program."). More importantly, both sets of records are deeply private. *Compare Warshak*, 631 F.3d at 284 ("[T]he conglomeration of stored messages that comprises an email account . . . provides an account of its owner's life. By obtaining access to someone's email, government agents gain the ability to peer deeply into his activities."), *with Se. Pa. Transp. Auth.*, 72 F.3d at 1138 ("It is now possible from looking at an individual's prescription records to determine that person's illnesses, or even to ascertain such private facts as whether a woman is attempting to conceive a child through the use of fertility drugs."). In a variety of contexts under the Fourth Amendment, access to a protected area for one limited purpose does not render that area suddenly unprotected from government searches. *See, e.g.*, *Stoner v. California*, 376 U.S. 483, 487–90 (1964) (implicit consent to janitorial personnel to enter motel room does not amount to consent for police to search room); *Chapman v. United States*, 365 U.S. 610, 616–17 (1961) (search of a house invaded tenant's Fourth Amendment rights even though landlord had authority to enter house for some purposes). Confidential prescription records fall squarely in this camp.

The ability of state or federal authorities to conduct administrative inspections of individual pharmacies to check for regulatory compliance does not reduce the expectation of privacy in sensitive prescription records in the PDMP, particularly as against a criminal investigative search of a particular patient's or

physician's records. The DEA cites administrative inspection statutes as diminishing Oregon patients' and physicians' expectation of privacy in PDMP records. Appellant's Br. 35 (citing Or. Rev. Stat. § 689.155(8) (permitting regulatory inspection by state Board of Pharmacy of the "premises or records" of a "drug outlet"); 21 U.S.C. § 880 (providing for issuance by courts of administrative inspection warrants for "controlled premises" "to inspect and copy records, reports, and other documents required to be kept or made under this subchapter")). But these statutes permit administrative inspection of a pharmacy's records upon a regulatory justification particular to that pharmacy. *See United States v. Goldfine*, 538 F.2d 815, 818–19 & n.2 (9th Cir. 1976). Although the government is not prevented from using evidence collected in an administrative or regulatory inspection of a pharmacy in a later criminal proceeding, *id.* at 818–19, the administrative search exception was never intended to allow a categorical end-run around the warrant requirement outside of the exception's limited ambit. *See New York v. Burger*, 482 U.S. 691, 702 (1987) (permitting warrantless inspections of pervasively regulated businesses only if "'necessary to further [a] regulatory scheme'").[30]

[30] The ability to conduct an administrative inspection of a junkyard's records, as in *Burger*, does not imply a further power to effect a warrantless seizure of the title to a car bought from the junkyard and kept in a person's safety deposit box. So, too,

Further, the existence of an exception to the warrant requirement as to one class of regulated businesses does not justify warrantless searches of any and all entities that may have received information from those businesses. Although a person may expect that a particular pharmacy's records could be inspected without a probable cause warrant, there is no expectation that the records of *every* pharmacy in the state will be simultaneously searched, much less for criminal investigative purposes. The power to search one pharmacy does not include the power to search an electronic database containing the sum total of all Oregon pharmacies' records of controlled substances prescriptions. *Cf. Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001) ("Congress . . . does not, one might say, hide elephants in mouseholes."). As this Court has explained,

> It's no answer to suggest . . . that people can avoid these hazards by not storing their data electronically. To begin with, the choice about how information is stored is often made by someone other than the individuals whose privacy would be invaded by the search. Most people have no idea whether their doctor, lawyer or accountant maintains records in paper or electronic format, whether they are stored on the premises or on a server farm in Rancho Cucamonga, whether they are commingled with those of many other professionals or kept entirely separate.

United States v. Comprehensive Drug Testing, Inc., 621 F.3d 1162, 1176–77 (9th Cir. 2010). The power the DEA seeks, to conduct wide-ranging, warrantless

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the power to inspect a pharmacy's records does not imply a power to warrantlessly seize records from a secure state medical records database.

searches of Oregon's secure electronic database consolidating sensitive medical records for public health purposes, does not flow from any recognized exception to the warrant requirement.

In light of the high expectation of privacy in prescription records and the medical information they reveal, *supra* Part II, *Miller* and *Smith* do not apply to the medical records at issue here, and a warrant is required.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be affirmed.

Respectfully Submitted,

Dated: December 5, 2014

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STATEMENT OF RELATED CASES

Plaintiffs-Intervenors–Appellees are not aware of any related cases.

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 13,999 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in Times New Roman, 14-point font.

/s/ Nathan Freed Wessler

Nathan Freed Wessler

December 5, 2014

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 5th day of December, 2014, the foregoing BRIEF FOR PLAINTIFFS-INTERVENORS–APPELLEES was filed electronically through the Court's CM/ECF system. Notice of this filing will be sent by e-mail to all parties by operation of the Court's electronic filing system.

/s/ Nathan Freed Wessler

Nathan Freed Wessler