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

STATE OF UTAH, Plaintiff, v. RYAN DOUGLAS PYLE, Defendant.	**[PROPOSED] BRIEF OF AMICI CURIAE AMERICAN CIVIL LIBERTIES UNION FOUNDATION AND ACLU OF UTAH IN SUPPORT OF DEFENDANT'S MOTION TO SUPPRESS** Case No. 131910379 Judge Vernice Trease

STATEMENT OF AMICI'S INTEREST

The American Civil Liberties Union ("ACLU") is a nationwide, nonprofit, nonpartisan organization with over 500,000 members dedicated to defending the principles embodied in the federal and state constitutions and our nation's civil rights laws. The ACLU of Utah is one of its statewide affiliates. The ACLU and ACLU of Utah regularly advocate for the protection of privacy rights under the Fourth Amendment to the U.S. Constitution and article I, section 14 of the Utah Constitution, including the right to be free from unreasonable searches of confidential medical records.

ARGUMENT

This case concerns the right to privacy under the Fourth Amendment to the U.S. Constitution and article I, section 14 of the Utah Constitution in some of the most personal and

sensitive information people have: prescription records and the confidential medical information they reveal. 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. Because society recognizes this information as deeply personal and private, the U.S. and Utah constitutions require law enforcement to secure a warrant before conducting a search of prescription records held in a secure state database. The warrantless, dragnet search of the Defendant's prescription records in this case violated the Fourth Amendment and article I, section 14, and therefore the fruits of that search must be suppressed.

I. Warrantless Searches of the Utah Controlled Substance Database Impinge on the Privacy of People's Medical Records

A. The Utah Controlled Substance Database Contains Sensitive and Private Medical Information About Hundreds of Thousands of Utah Residents

The Utah Controlled Substance Database ("UCSD") is an electronic database maintained by the Utah Division of Occupational and Professional Licensing that records information about "every prescription for a controlled substance dispensed in the state to any individual other than an inpatient in a licensed health care facility." Utah Code Ann. § 58-37f-201(5). The Utah Legislature created the UCSD in 1995[1] and enacted amendments expanding its scope in 2010. *See* 2010 Utah Laws Ch. 287, §§ 4–17.

After dispensing a controlled substance to a patient in Utah, pharmacists are required to electronically report to the UCSD the name, address, date of birth, gender, and ID number of the patient; identification of the pharmacy and pharmacist dispensing the drug and the practitioner who prescribed the drug; and the name and Rx number of the drug prescribed, date the

[1] *Utah Controlled Substance Database*, Utah Division of Occupational & Professional Licensing, http://dopl.utah.gov/programs/csdb/index.html ("The Utah Controlled Substance Database Program was legislatively created and put into effect on July 1, 1995.").

prescription was issued and filled, quantity, strength, and dosage of the drug, and information about the number of days' supply dispensed and the number of refills authorized. Utah Code Ann. § 58-37f-203(2); Utah Admin. Code r. 156-37f-203(1)(a). Reporting of additional information, including customer identification number and customer location, is "strongly suggested" but not mandatory. Utah Admin. Code r. 156-37f-203(1)(b). As of September 2012, there were more than 47 million prescription records held in the UCSD. Marvin H. Sims, C.S. DataBase Administrator, *Utah's Controlled Substance Database Program* 4 (Sept. 18–19, 2012).[2]

For purposes of the UCSD, "controlled substances" consist of all drugs listed in the federal Controlled Substances Act,[3] 21 U.S.C. § 812, and all drugs listed in the parallel section of the Utah Controlled Substances Act, Utah Code Ann. §§ 58-37-4, 58-37-4.2. *See id.* § 58-37-3. Drugs listed as controlled substances and tracked by the UCSD include a number of frequently prescribed medications used to treat a wide range of serious medical conditions, including anxiety disorders, panic disorders, post-traumatic stress disorder, weight loss associated with AIDS, nausea and weight loss in cancer patients undergoing chemotherapy, alcohol addiction withdrawal symptoms, opiate addiction, testosterone deficiency, gender identity disorder/gender dysphoria, chronic and acute pain, seizure disorders, narcolepsy, insomnia, and attention deficit hyperactivity disorder. These conditions are among the most frequently diagnosed in Americans—for example, approximately 100 million U.S. adults suffer from chronic pain,[4] "an

[2] http://www.pdmpassist.org/pdf/PPTs/West2012/3_Sims_NewInitiatives.pdf.
[3] A list of federally scheduled drugs is available on the Drug Enforcement Administration website. Office of Diversion Control, Drug Enforcement Administration, Controlled Substances by CSA Schedule (Mar. 12, 2014), http://www.deadiversion.usdoj.gov/schedules/orangebook/e_cs_sched.pdf.
[4] Institute of Medicine of the National Academies, Committee on Advancing Pain Research, Care, and Education, *Relieving Pain in America: A Blueprint for Transforming Prevention, Care, Education, and Research* 2 (2011), *available at* http://books.nap.edu/openbook.php?record_id=13172.

estimated 50-70 million US adults have sleep or wakefulness disorder,"[5] approximately 40 million American adults suffer from anxiety disorders each year,[6] and more than one million people in the United States have an HIV infection.[7] This means that the UCSD and similar databases in other states will soon contain sensitive information about the majority of Americans. Table 1 lists selected medications tracked by the UCSD that are used to treat the medical conditions listed above.

TABLE 1[8] **Medical Condition**	**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	Cesamet (nabilone), Marinol (dronabinol)
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)
Opiate addiction treatment	buprenorphine (Suboxone), 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

[5] *Insufficient Sleep is a Public Health Epidemic*, Centers for Disease Control & Prevention (Jan. 13, 2014), http://www.cdc.gov/features/dssleep/.
[6] Nat'l Institute of Mental Health, Nat'l Institutes of Health, *Anxiety Disorders* 1 (2009), http://www.nimh.nih.gov/health/publications/anxiety-disorders/nimhanxiety.pdf.
[7] *HIV in the United States: At A Glance*, Centers for Disease Control & Prevention (Dec. 3, 2013), http://www.cdc.gov/hiv/statistics/basics/ataglance.html.
[8] Descriptions of listed medications, including their approved uses, are available through the Physicians' Desk Reference website, www.pdr.net.

	(secobarbital), clobazam, clonazepam, Versed
Testosterone deficiency in men	ethylestrenol (Maxibolin, Orabolin, Durabolin, Duraboral)
Delayed puberty in boys	Anadroid-F, Halotestin, Ora-Testryl
Narcolepsy	Xyrem, Provigil
Insomnia	Ambien, Lunesta, Sonata, Restoril, Halcion, Doral, Ativan, ProSom, Versed
Migraines	butorphanol (Stadol)

Because many of these drugs are approved only for treatment of specific diseases or disorders, a prescription for a controlled substance will often reveal a patient's underlying medical condition. Thus, information about an individual's prescriptions in the UCSD can reveal a great deal of private medical information beyond just the medication prescribed. A patient's prescription history can reveal her physician's confidential medical advice, her chosen course of treatment, her diagnosis, and even the stage or severity of her disorder or disease.

In recognition of the sensitivity of these records, the Utah Legislature made it a felony to obtain or release information from the database without authorization. Utah Code Ann. § 58-37f-601. Physicians and pharmacists are permitted to access records in the database only for enumerated purposes, including providing diagnosis and treatment to a current or prospective patient or assessing whether that patient may have inappropriately obtained prescriptions in the past, and checking on prescriptions issued under the physician's own DEA number. *Id.* § 58-37f-301(2)(e). Mental health therapists are permitted access in even more limited circumstances. *Id.* § 58-37f-301(2)(k).

B. The Near-Complete Lack of Limitations on Law Enforcement Access to Records in the UCSD Invites Violations of Patients' Privacy

Notwithstanding the extremely sensitive and private nature of the information contained in the UCSD, law enforcement agents and prosecutors are given direct access to records in the database if they are "engaged as a specified duty of their employment in enforcing laws: (i)

regulating controlled substances; (ii) investigating insurance fraud , Medicaid fraud, or Medicare fraud; or (iii) providing information about a criminal defendant to defense counsel, upon request during the discovery process." *Id.* § 58-37f-301(2)(i). Within the context of a controlled substances or insurance fraud investigation, this provides nearly unfettered discretion to officers to search the prescription histories of dozens or hundreds of patients, and thereby learn private facts about their treatment decisions and medical conditions.

Utah is an extreme case in this regard. By statute, ten states prohibit law enforcement from accessing records in those states' prescription monitoring databases without first getting a warrant or otherwise demonstrating probable cause.[9] Vermont does not permit law enforcement requests for controlled substance database records at all.[10] Additional states require a court order or subpoena,[11] or make no provision for law enforcement access.[12] Pursuant to court opinions, law enforcement agents in Louisiana need a warrant to access prescription records, *State v. Skinner*, 10 So. 3d 1212, 1218 (La. 2009), and officers in Kentucky must demonstrate reasonable suspicion for access to that state's controlled substance database, *Carter v. Commonwealth*, 358 S.W.3d 4, 8–9 (Ky. Ct. App. 2011). Even states not requiring judicial enforcement of requests for prescription database records require law enforcement to provide written certifications to the agency that administers the database in each particular investigation,[13] or limit requests to

[9] Ala. Code § 20-2-214(6), as amended by 2013 Ala. Laws Act 2013-256 (H.B. 150); Alaska Stat. § 17.30.200(d)(5); Ark. Code Ann. § 20-7-606(b)(2)(A); Ga. Code Ann. § 16-13-60(c)(3); Iowa Code § 124.553(1)(c); Minn. Stat. § 152.126(6)(b)(7); Mont. Code Ann. §§ 37-7-1506(1)(e), 46-4-301(3); N.H. Rev. Stat. Ann. § 318-B:35(I)(b)(3); Or. Rev. Stat. § 431.966(2)(a)(C); R.I. Gen. Laws § 21-28-3.32(a)(3). The Pennsylvania General Assembly has passed legislation imposing a warrant requirement for law enforcement access to that state's prescription monitoring database. H.B. 1694, Sec. 1, § 2708(G)(1)(I), 2013–14 Leg., Reg. Sess. (Pa. 2013).

[10] Vt. Stat. Ann. tit. 18, § 4284.

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

[12] Me. Rev. Stat. tit. 22, § 7250(4); Neb. Rev. Stat. § 71-2455.

[13] *See, e.g.*, Ariz. Rev. Stat. Ann. § 36-2604(C)(4); 720 Ill. Comp. Stat. 570/318(e). Similarly, Florida law requires the agency that administers the database to verify that law enforcement requests are "authentic and authorized." Fla. Stat. § 893.055(7)(c).

records of "a specific patient . . . under investigation,"[14] or at least impose a relevance and materiality standard.[15] These restrictions serve to provide at least a modicum of protection to the highly sensitive information contained in controlled substance databases.

Utah, by contrast, permits law enforcement agents to log in to the UCSD directly whenever they are "engaged as a specified duty of their employment in enforcing laws . . . regulating controlled substances." Utah Code Ann. § 58-37f-301(2)(i). The records sought need not be those of a suspect under investigation, and need not be relevant or material to the investigation. The statute does not even require there to be a nexus to an active investigation at all, although the implementing regulations require law enforcement to "provide a valid case number of the investigation or prosecution" when requesting information. Utah Admin Code r. 156-37f-301(4). As long as there is an open investigation to which the search is somehow linked, any officer whose job description includes investigating violations of controlled substances laws could, consistent with the statute, download the prescription histories of every person who lives, works, or uses a pharmacy within their jurisdiction, and search through those records in hopes of finding something suspicious. The Division of Occupational and Professional Licensing does not individually review law enforcement requests for access, and no judge provides ex ante oversight. With 744 officers from 185 law enforcement agencies registered to access the UCSD as of 2012, Sims, *supra*, at 8,[16] the opportunities for abuse are rife.

Exactly this type of abuse occurred in this case. A detective with the Cottonwoods Heights Police Department conducted a search of the prescription records of all 480 Unified Fire Authority ("UFA") employees without any particularized suspicion, let alone a warrant or probable cause. The search was not limited to the records of a single suspect or even a small

[14] W. Va. Code § 60A-9-5(a)(1).
[15] Del. Code Ann. Tit. 16, § 4798(*l*)(2)(d).
[16] http://www.pdmpassist.org/pdf/PPTs/West2012/3_Sims_NewInitiatives.pdf.

group of possible suspects. It was not limited even to UFA employees known to have had access to the ambulances from which medications went missing during the relevant time period. Finding no evidence of the crime under investigation, the detective proceeded to rifle through the electronic prescription records of hundreds of firefighters, paramedics, and clerical staff of the UFA in the apparent hope that he would identify something suspicious. This prosecution is a fruit of that warrantless and suspicionless search.

II. People Have a Reasonable Expectation of Privacy in their Prescription Records and the Confidential Medical Information Those Records Reveal

"[T]he right to be free from unreasonable searches and seizures embodied in the Utah and United States Constitutions is one of the most fundamental and cherished rights we possess." *State v. Thomas*, 961 P.2d 299, 303 (Utah 1998). Under both constitutions, a warrant is required when people have a reasonable expectation of privacy in the item or location searched. *Arizona v. Gant*, 556 U.S. 332, 338 (2009); *Sims v. Collection Div. of Utah State Tax Comm'n*, 841 P.2d 6, 8 (Utah 1992). Because Utah residents have a reasonable expectation of privacy in their prescription records contained in the UCSD and the confidential medical information those records reveal, the Fourth Amendment to the U.S. Constitution and article I, section 14 of the Utah Constitution require law enforcement to obtain a warrant from a neutral magistrate upon a showing of probable cause before conducting a search of those records. *See* Motion to Suppress 3–19. The warrantless search of Mr. Pyle's prescription records violates his fundamental constitutional rights.

A recent opinion from the U.S District Court for the District of Oregon explains why the Fourth Amendment's warrant requirement applies to prescription records held in a state's controlled substance database. *Oregon Prescription Drug Monitoring Program v. U.S. Drug Enforcement Admin.* ("*Oregon PDMP*"), 3:12-CV-02023-HA, --- F. Supp. 2d ----, 2014 WL

562938 (D. Or. Feb. 11, 2014). That case involved the Drug Enforcement Administration's practice of using administrative subpoenas, instead of warrants, to request prescription records from the Oregon Prescription Drug Monitoring Program ("PDMP") database:

> The court easily concludes that [patients'] subjective expectation of privacy in their prescription information is objectively reasonable. Although there is not an absolute right to privacy in prescription information, as patients must expect that physicians, pharmacists, and other medical personnel can and must access their records, it is more than reasonable for patients to believe that law enforcement agencies will not have unfettered access to their records. The prescription information maintained by PDMP is intensely private as it connects a person's identifying information with the prescription drugs they use.

Id. at *7.

The court's explanation of why society recognizes a reasonable expectation of privacy in prescription records tracks the arguments made by the Defendant here. The Defendant has identified a number of sources for society's understanding that the expectation of privacy in prescription records and the medical information they reveal is reasonable: case law decided under both the Fourth and Fourteenth Amendments; longstanding rules of medical ethics; state laws protecting the privacy of medical information and prescription records; and judicial and societal recognition that certain information about patients revealed by their prescription records—such as information about sexuality, mental health, and substance abuse—is particularly sensitive and deserving of heightened protection. *See* Motion to Suppress 3–19. The district court in Oregon recognized each of these as relevant sources of the reasonable expectation of privacy in prescription records. For example, it discussed *Ferguson v. City of Charleston*, 532 U.S. 67 (2001), and related cases, which conclude that "the 'reasonable expectation of privacy enjoyed by the typical patient undergoing diagnostic tests in a hospital is that the results of those tests will not be shared with nonmedical personnel without her consent.'" *Oregon PDMP*, 2014 WL 562938 at *6 (quoting *Ferguson*, 532 U.S. at 78). The court further

explained that "there are two types of privacy interests implicated by prescription records; 'One is the individual interest in avoiding disclosure of personal matters and another is the interest in independence in making certain kinds of important decisions.'" *Id.* at *6 (quoting *Whalen v. Roe*, 429 U.S. 589, 599–600 (1977)).[17] This is exactly the kind of privacy interest that the Fourth Amendment is intended to protect.

The court explained that another basis for society's recognition of an expectation of privacy in prescription records is found in the nature of the sensitive and private information that can be revealed by a transcript of a person's medications. For example, "[b]y obtaining the prescription records for individuals like [two of the Oregon plaintiffs], a person would know that they have used testosterone in particular quantities and by extension, that they have gender identity disorder and are treating it through hormone therapy. It is difficult to conceive of information that is more private or more deserving of Fourth Amendment protection." *Id.* at *7.

Finally, the court observed that "[m]edical records, of which prescription records form a not insignificant part, have long been treated with confidentiality":

> The Hippocratic Oath has contained provisions requiring physicians to maintain patient confidentiality since the Fourth Century B.C.E. The ACLU cites compelling evidence demonstrating that a number of signers of the Declaration of Independence and delegates to the Constitutional Convention were physicians trained at the University of Edinburgh, which required its graduates to sign an oath swearing to preserve patient confidentiality.

[17] In its opposition to the Defendant's motion to suppress, the State focuses almost entirely on the holdings of *Whalen* and its progeny, which were decided under the due process clauses of the Fifth and Fourteenth Amendments. *See* Memorandum in Opposition to Defendant's Motion to Suppress 3–6. While those cases' discussions of the privacy interest in medical records are relevant to the Fourth Amendment question, their ultimate holdings are not. The Defendant here does not allege a Due Process Clause violation, and does not challenge the state's power to establish the UCSD in the first place. Further, in *Whalen* the Court disposed of the plaintiffs' Fourth Amendment claim by simply observing that the state's actions did not involve the "affirmative, unannounced, narrowly focused intrusions into individual privacy during the course of criminal investigations" that would trigger the protections of the Fourth Amendment. *Whalen*, 429 U.S. at 604 n.32. Here, by contrast, the issue is precisely the constitutionality of law enforcement's "affirmative, unannounced, narrowly focused intrusions into individual privacy during the course of [a] criminal investigation[]." Thus, it is Fourth Amendment doctrine, and not the holding of *Whalen*, that controls.

Id. at *5. The court relied for this conclusion on an expert declaration showing that medical confidentiality was an established norm in colonial and founding-era America, and that the framers of the Fourth Amendment were well aware of the need for maintaining the confidentiality of patients' medical information. *See* Declaration of Professor Robert Baker in Support of Plaintiffs-Intervenors' Motion for Summary Judgment, *Oregon PDMP*, No. 3:12-cv-02023-HA (July 1, 2013), attached as Exhibit A. As Professor Baker explained, the drafters of the Constitution and the Fourth Amendment "would have been well acquainted with the traditional ethical precept of keeping patients' medical information confidential," *id.* ¶ 10, and even those framers who were not physicians themselves would 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.

This Court should reach the same conclusion as the Oregon district court. Indeed, state courts elsewhere in the country have decided that there is a reasonable expectation of privacy in prescription records generally, *Skinner*, 10 So. 3d at 1218, and in records held in a controlled substance database in particular, *Carter*, 358 S.W.3d at 8.[18] The Defendant here had a reasonable expectation of privacy in the information obtained by law enforcement, and the warrantless search violated his Fourth Amendment rights.

The search at issue also violated article I, section 14 of the Utah Constitution. The Utah Supreme Court has explained that, while its "interpretation of article I, section 14 has often paralleled the United States Supreme Court's interpretation of the Fourth Amendment, [it] ha[s] stated that [it] will not hesitate to give the Utah Constitution a different construction where doing so will more appropriately protect the rights of this state's citizens." *State v. DeBooy*, 2000 UT

[18] *But see Williams v. Commonwealth*, 213 S.W. 3d 671, 682–84 (Ky. 2006).

32, ¶ 12, 996 P.2d 546. Indeed, the court has "held on more than one occasion that article I, section 14 provides a greater expectation of privacy than the Fourth Amendment as interpreted by the United States Supreme Court." *Id.* (citing *State v. Thompson*, 810 P.2d 415, 416–18 (Utah 1991) (depositor's bank records) and *State v. Larocco*, 794 P.2d 460, 465–71 (Utah 1990) (vehicle identification number in motor vehicles)). Although the same sources and authorities that govern the Fourth Amendment analysis may be used to determine the meaning of article I, section 14, assessing the state constitution's protections requires "independent consideration." *Id.* ¶ 19. "Independent analysis must begin with the constitutional text and rely on whatever assistance legitimate sources may provide in the interpretive process. There is no presumption that federal construction of similar language is correct." *State v. Tiedemann*, 2007 UT 49, ¶ 37, 162 P.3d 1106. Thus, even if the Fourth Amendment did not protect records in the UCSD, article I, section 14 would apply.

Article I, section 14 is implicated when a person has a reasonable expectation of privacy in an item or location searched. *Sims*, 841 P.2d at 8. As under the Fourth Amendment, under article I, section 14 "'[w]arrantless searches are per se unreasonable unless undertaken pursuant to a recognized exception to the warrant requirement.'" *State v. Trane*, 2002 UT 97, ¶ 22, 57 P.3d 1052 (quoting *State v. Brown*, 853 P.2d 851, 855 (Utah 1992)) (alteration in original). Here, the same factors that create a reasonable expectation of privacy under the Fourth Amendment create such an expectation under article I, section 14. *See supra*.

The history giving rise to article I, section 14 also results in the conclusion that a warrant is required. *See State v. Little*, 2012 UT App 168, ¶ 9, 280 P.3d 1072 ("[A] historical argument for increased protection against searches and seizures [under article I, section 14] must show a 'logical link between the unique experience of [early Utah settlers] and contemporary society's

notions' about the particular context of the search or seizure at issue."). Early Utahns were no strangers to the practice of medicine by physicians, and therefore would have been familiar with the principles of medical confidentiality to which physicians have long adhered. *See* Ex. A. In 1880, the concentration of doctors in the Utah Territory was 131 doctors per 100,000 people.[19] That number is not markedly out of step with the concentration of doctors in Utah today: 169 per 100,000 people.[20] Thus, Utah residents at in the late 1800s, including attendees at the 1895 constitutional convention, would have had direct experience with the expectation of confidentiality attending interactions with treating physicians. The expectation of privacy in medical records forms part of the backdrop against which article I, section 14 was enacted.

Moreover, "[t]his state's early settlers were themselves no strangers to the abuses of general warrants. Underlying the abuse of the general warrant was the perversion of the prosecutorial function from investigating known crimes to investigating individuals for the purpose of finding criminal behavior. A free society cannot tolerate such a practice." *DeBooy*, 2000 UT 32, ¶ 26. The detective in this case conducted a "generalized . . . search" of all 480 UFA employees' prescription records "without any individualized suspicion of a crime having been committed [by any particular one of them], much less probable cause." *Id.* ¶ 22. The UCSD statute, Utah Code Ann. § 58-37f-301(2)(i), provides officers "no guidelines as to how their inquiry [is] to be conducted; it [is] left entirely to the discretion of the officers in the field." *Id.* ¶ 23. "Such unbridled discretion for the officers is inherently unreasonable under the Fourth Amendment and article I, section 14." *Id.* The Cottonwood Heights detective abused that

[19] Census Office, Dep't of the Interior, *Statistics of the Population of the United States at the Tenth Census (June 1, 1880)* 81, 738 (1881), *available at* http://www.census.gov/prod/www/decennial.html. According to the 1880 census, there were 189 physicians and surgeons serving a territory-wide population of 143,963.
[20] Samuel Weigley, Alexander E.M. Hess, & Michael B. Sauter, *Doctor Shortage Could Take Turn for the Worse*, USA Today, Oct. 20, 2012, http://www.usatoday.com/story/money/business/2012/10/20/doctors-shortage-least-most/1644837/.

discretion in conducting a warrantless search of an area in which Mr. Pyle had a reasonable expectation of privacy.

III. The State's Creation of and Limited Access to of the UCSD Does Not Eliminate Patients' Reasonable Expectation of Privacy in Prescription Records Contained in the UCSD

The Defendant's brief explains in detail why the so-called "third party doctrine" does not eliminate Mr. Pyle's reasonable expectation of privacy in his prescription records held in the UCSD. *See* Motion to Suppress 20–24. Amici offer additional reasons why that is the case, under both the Fourth Amendment and the Utah Constitution.

The judge in *Oregon PDMP* succinctly explained why the Supreme Court's decisions in *United States v. Miller*, 425 U.S. 435 (1976), and *Smith v. Maryland*, 442 U.S. 735 (1979), do not apply to records held in a state controlled substance database:

> this case is markedly different from *Miller* and *Smith* for two reasons. The first is that the PDMP's records are "more inherently personal or private than bank records," and are entitled to and treated with a heightened expectation of privacy. [*United States v.*]*Golden Valley Elec. Ass'n*, 689 F.3d [1108,]1116 [(9th Cir. 2012)]. *See, DeMassa v. Nunez*, 770 F.2d 1505 (9th Cir.1985) (attorney's clients have reasonable expectation of privacy in their legal files even though kept and maintained by attorney). Secondly, patients and doctors are not voluntarily conveying information to the PDMP. The submission of prescription information to the PDMP is required by law. The only way to avoid submission of prescription information to the PDMP is to forgo medical treatment or to leave the state, This is not a meaningful choice.

2014 WL 562938, at *8.

Moreover, *Miller* expressly excludes records of the type at issue here from the reach of the third-party doctrine. The Supreme Court explained that its opinion in *Miller* did not encompass information subject to "evidentiary privileges, such as that protecting communications between an attorney and his client." 425 U.S. at 443 n.4. Prescription records and the medical information they reveal are at least as private as client files held by an attorney,

and are thus deserving of the highest protection the Fourth Amendment can offer. *Compare* Utah R. Evid. 504 (lawyer–client privilege), *with* Utah R. Evid. 506 (physician–patient privilege).

Courts have found in a number of contexts that people can retain a reasonable expectation of privacy in information or locations despite third parties having limited access to them. The Sixth Circuit's opinion in *United States v. Warshak*, 631 F.3d 266 (2010), is instructive. There, the court held that there is a reasonable expectation of privacy in the contents of emails held in an email provider's servers. The court explained that the fact that email is sent through an internet service provider's servers does not vitiate the legitimate interest in email privacy: both letters and phone calls are sent via third parties (the postal service and phone companies), but people retain a reasonable expectation of privacy in those forms of communication. *Id.* at 285–86 (citing *Katz v. United States*, 389 U.S. 347, 353 (1967); *United States v. Jacobsen*, 466 U.S. 109, 114 (1984)). *Warshak* further held that even if a company has a right to access information in certain circumstances under the terms of service (such as to scan emails for viruses or spam), that does not necessarily eliminate the customer's reasonable expectation of privacy vis-à-vis the government. *Id.* at 286–88. 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.*, *Minnesota v. Olson*, 495 U.S. 91, 98–99 (1990) (holding that "an overnight guest has a legitimate expectation of privacy in his host's home" even though "he and his possessions will not be disturbed by anyone *but his host and those his host allows inside*" (emphasis added)); *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);

State v. Kent, 432 P.2d 64, 66 (Utah 1967) ("[T]he consent of a landlord or hotel or motel manager would not be sufficient to justify an officer to make a search of tenant's premises without a warrant.").

Prescription records stored in the UCSD are much like emails stored in an email provider's servers. For one, the entity maintaining the digital files may access them only for limited enumerated purposes. *Compare Warshak*, 631 F.3d 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* Utah Code Ann. § 58-37f-301(2) (explaining circumstances under which Division of Occupational and Professional Licensing employees may access UCSD) *and id.* § 58-37f-601 (imposing criminal penalties for unauthorized access to and use of UCSD records). 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 Doe v. Se. Pa. Transp. Auth.*, 72 F.3d 1133, 1138 (3d Cir. 1995) ("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.").

Searching massive computerized files raises particular concerns. *See United States v. Comprehensive Drug Testing, Inc.*, 621 F.3d 1162, 1175–77 (9th Cir. 2010); *United States v. Carey*, 172 F.3d 1268, 1275 (10th Cir. 1999). Prior to creation of the PDMP, individuals could rely on the practical realities of law enforcement's limited resources to protect them from sweeping, dragnet searches: to obtain records of all of a person's prescriptions, in many cases

law enforcement would have had to canvass numerous pharmacies or physicians seeking relevant records, a resource-intensive exercise that would have been justified only in important or well-founded cases. Now, however, the government can obtain an entire transcript of a person's—or 480 persons'—out-patient prescription history for controlled substances with a single query of the UCSD. This raises especially serious questions under the Fourth Amendment. *Cf. United States v. Jones*, 132 S. Ct. 945, 963–64 (2012) (Alito, J., concurring in judgment) ("In the pre-computer age, the greatest protections of privacy were neither constitutional nor statutory, but practical. . . . Only an investigation of unusual importance could have justified such an expenditure of law enforcement resources. Devices like the one used in the present case, however, make long-term monitoring relatively easy and cheap."). Thus, for these reasons and as explained in the Defendant's brief, the so-called "third party doctrine" does not preclude relief under the Fourth Amendment here.

The third party doctrine also does not vitiate the reasonable expectation of privacy under the state constitution. The Utah Supreme Court has held that under article I, section 14, people have a reasonable expectation of privacy in their "bank statements, 'checks, savings, bonds, loan applications, loan guarantees, and all papers which [they] supplied to the bank to facilitate the conduct of [their] financial affairs upon the reasonable assumption that the information would remain confidential.'" *State v. Thompson*, 810 P.2d 415, 418 (Utah 1991). This is so, notwithstanding the fact that these records are held by a third party—the bank—rather than in the private home or office files of the person to which they pertain. Prescription records and the medical information they disclose are at least as private as bank records, and are entitled to article I, section 14's full protection.

Utah is not alone in recognizing a reasonable expectation of privacy in certain information or records held by a third party. State courts have interpreted state constitutional provisions analogous to article I, section 14 as protecting bank records,[21] tax documents,[22] phone dialing records[23] and cell site location information[24] held by the phone company, employment records,[25] and even trash left out for collection.[26] *See* Stephen E. Henderson, *Learning from All Fifty States: How to Apply the Fourth Amendment and Its State Analogs to Protect Third Party Information from Unreasonable Search*, 55 Cath. U. L. Rev. 373 (2006). State courts have also recognized the privacy interest in medical records held by a third party. *See Skinner*, 10 So. 3d at 1218; *State v. Nelson*, 941 P.2d 441, 448 (Mont. 1997). Utah courts have likewise recognized that defendants have "a privacy interest in the potentially privileged medical records sought by the State." *State v. Yount*, 2008 UT App 102, ¶ 24, 182 P.3d 405 (citing *State v. Gonzales*, 2005 UT 72, ¶ 41, 125 P.3d 878 (quashing subpoenas because an attorney improperly subpoenaed a victim's "private mental health records in violation of her right to privacy"); *State v. Cramer*, 2002 UT 9, ¶ 22, 44 P.3d 690 (acknowledging a "privacy interest[ ] in privileged mental health records"); *State v. Anderson*, 972 P.2d 86, 89 (Utah Ct. App. 1998) (stating that the purpose of the physician-patient privilege is to encourage a patient's full disclosure to a physician "in order to receive effective medical treatment, free from the embarrassment and *invasion of privacy* that

[21] *State v. McAllister*, 875 A.2d 866, 875 (N.J. 2005); *People v. Lamb*, 732 P.2d 1216, 1220–21 (Colo. 1987) (en banc); *Commonwealth v. DeJohn*, 403 A.2d 1283, 1291 (Pa. 1979); *Burrows v. Superior Court*, 529 P.2d 590, 593 (Cal. 1974); *People v. Jackson*, 452 N.E.2d 85, 88-89 (Ill. App. Ct. 1983).
[22] *People v. Gutierrez*, 222 P.3d 925 (Colo. 2009) (en banc).
[23] *State v. Rothman*, 779 P.2d 1, 7–8 (Haw. 1989); *Commonwealth v. Melilli*, 555 A.2d 1254, 1258–59 (Pa. 1989); *State v. Thompson*, 760 P.2d 1162, 1163-65 (Idaho 1988); *State v. Gunwall*, 720 P.2d 808, 813 (Wash. 1986) (en banc); *People v. Timmons*, 690 P.2d 213, 215 (Colo. 1984) (en banc); *State v. Hunt*, 450 A.2d 952, 955–56 (N.J. 1982); *People v. Blair*, 602 P.2d 738, 746 (Cal. 1979) (en banc); *People v. DeLaire*, 610 N.E.2d 1277, 1282 (Ill. App. Ct. 1993).
[24] *Commonwealth v. Augustine*, 4 N.E. 3d 846, 467 Mass. 230, 251 (2014); *State v. Earls*, 214 N.J. 564, 588 (N.J. 2013).
[25] *Missoulian v. Bd. of Regents of Higher Educ.*, 675 P.2d 962, 970 (Mont. 1984).
[26] *State v. Hempele*, 576 A.2d 793, 810 (N.J. 1990); *State v. Boland*, 800 P.2d 1112, 1116-17 (Wash. 1990) (en banc); *People v. Edwards*, 458 P.2d 713, 718 (Cal. 1969) (en banc).

might result from the physician's disclosure of the information" (emphasis added)) (parentheticals quoted from *Yount*)).

Thus, even if the third party doctrine barred relief under the Fourth Amendment, the Defendant would still have recourse under article I, section 14. "The workability of a federal rule on the subject and whether it has a tendency to give rise to 'confusion' and 'inconsistent interpretations' among courts has been the primary concern of the Utah Supreme Court in determining whether a different interpretation under our state constitution is warranted." *State v. Little*, 2012 UT App 168, ¶ 9, 280 P.3d 1072. The Utah Supreme Court has already explained in detail why the third party doctrine announced by the U.S. Supreme Court in *Miller* has been "roundly criticized," and has departed from it in an analogous context. *Thompson*, 810 P.2d at 417–18. Accordingly, Mr. Pyle has a reasonable expectation of privacy in the prescription records contained in the UCSD and obtained without a warrant by law enforcement. He is entitled to relief for violation of his constitutional rights.

IV. The Evidence Derived from the Unconstitutional Search of the UCSD Should Be Suppressed

A. The Good Faith Exception to the Fourth Amendment's Exclusionary Rule Does Not Apply

When police invade a person's reasonable expectation of privacy in violation of the Fourth Amendment, evidence derived from the illegal search may not generally be introduced at trial against the target of the search. *Mapp v. Ohio*, 367 U.S. 643 (1961). The exclusionary rule does not apply, however, to "evidence obtained by an officer acting in objectively reasonable reliance on a statute." *Illinois v. Krull*, 480 U.S. 340, 349 (1987). Even so, a "law enforcement officer [cannot] be said to have acted in good-faith reliance upon a statute if its provisions are

such that a reasonable officer should have known that the statute was unconstitutional." *Id.* at 355.

As explained above and in the Defendant's brief, law enforcement's warrantless search of Mr. Pyle's prescription records in the UCSD violated his Fourth Amendment rights. That a state statute, Utah Code Ann. § 58-37f-301(2)(i), purported to authorize that warrantless search does not prevent suppression of the illegally obtained evidence.

For one, *Krull* does not strictly apply to this case because, "unlike in *Krull*, the officers in this case were not acting pursuant to a statute that was later declared unconstitutional." *State v. Deherrera*, 965 P.2d 501, 504 (Utah Ct. App. 1998). No court has yet passed on the constitutionality of Utah Code Ann. § 58-37f-301(2)(i). This is not like the situation contemplated in *State v. Chapman*, 921 P.2d 446, 451–52 (Utah 1996), or *Michigan v. DeFillippo*, 443 U.S. 31, 38 (1979), where police were enforcing a substantive criminal statute that has not yet been invalidated, and that officers were therefore bound to enforce. *See DeFillippo*, 443 U.S. at 38 ("The enactment of a law forecloses speculation by enforcement officers concerning its constitutionality—with the possible exception of a law so grossly and flagrantly unconstitutional that any person of reasonable prudence would be bound to see its flaws."). Rather, the statute at issue here is procedural, governing the circumstances under which police can engage in a search.

Following the logic of *Krull*, the good faith exception does not apply here because the procedural statute is so clearly unconstitutional that reliance on it cannot have been in objective good faith. Section 58-37f-301(2)(i) provides officers a completely unbridled grant of discretion to engage in warrantless searches of extremely private medical records, without individualized suspicion, in the course of criminal investigations. Grants of broad power to search without a

warrant or individualized suspicion have been upheld only where those searches were administrative in nature, or where special needs beyond the normal conduct of law enforcement make the warrant requirement impractical. Thus, law enforcement may conduct administrative inspections of closely regulated businesses to check for compliance with applicable regulations without adhering to the Warrant Clause. *See, e.g.*, *New York v. Burger*, 482 U.S. 691, 702–04 (1987). And they may, for example, conduct short suspicionless stops of vehicles at a checkpoint to question drivers for tips about a recent crime, *Illinois v. Lidster*, 540 U.S. 419 (2004), or subject students participating in extracurricular activities to random, suspicionless drug testing, *Bd. of Educ. v. Earls*, 536 U.S. 822 (2002). But the Fourth Amendment forbids warrantless searches without individualized suspicion for "general 'crime control' purposes, *i.e.*, 'to detect evidence of ordinary criminal wrongdoing.'" *Lidster*, 540 U.S. at 423 (quoting *City of Indianapolis v. Edmond*, 531 U.S. 32, 41 (2000)). Thus, warrantless stops and searches lacking individualized suspicion for the purpose of seeking illegal drugs violate the Fourth Amendment. *Edmond*, 531 U.S. at 44. Likewise, testing pregnant women's blood for evidence of drug use in order to refer those with positive results to the police is unconstitutional. *Ferguson*, 532 U.S. 67. A reasonable officer should know that a statute granting warrantless access to a database containing hundreds of thousands of Utahns' prescription records violates the Fourth Amendment too. *See id.* at 78 ("The reasonable expectation of privacy enjoyed by the typical patient undergoing diagnostic tests in a hospital is that the results of those tests will not be shared with nonmedical personnel without her consent.").

The search of Mr. Pyle's prescription records violated the Fourth Amendment, *see supra* Part II, and was carried out on the authority of a statute that clearly violates the Fourth Amendment as well. Section 58-37f-301(2)(i) applies to criminal investigations, not to

administrative inspections. Searches of the UCSD to enforce controlled substances laws do not implicate any special need beyond the normal enforcement of criminal laws, and do not involve any population or place in which people have a reduced expectation of privacy. In fact, the prescription records contained in the UCSD are so deeply private that they reside at the apex of the Fourth Amendment's protections. A reasonable officer contemplating the statute's provisions would know as much.

B. There is No Good Faith Exception to the Exclusionary Rule Under Article I, Section 14

The exclusionary rule applies to searches carried out in violation of article I, section 14. *See State v. Abell*, 2003 UT 20, ¶ 41, 70 P.3d 98, 110. But the good faith exception does not. The Utah Supreme Court has never applied the good faith exception to searches conducted in violation of article I, section 14. *State v. Baker*, 2010 UT 18, ¶ 35 n.2, 229 P.3d 650, 663 n.2 ("We have not had the opportunity to determine whether [the good faith] exception exists under the Utah Constitution, and we do not do so today."). Therefore, the fruits of the warrantless search of Mr. Pyle's UCSD records should be suppressed.

There is no reason to now begin applying the good faith exception to searches carried out in violation of article I, section 14. The Utah Supreme Court has expressed skepticism at the exception's wisdom, at least twice remarking that "a number of state courts have declined to adopt the [good faith] exception under their state constitutions." *Sims*, 841 P.2d at 11 n.10 (citing cases from Michigan, Minnesota, New Jersey, New York, North Carolina, and Washington); *see also Thompson*, 810 P.2d at 420 n.4 (citing *State v. Marsala*, 579 A.2d 58 (Conn. 1990), and cases cited therein). The Utah Court of Appeals has also questioned "whether the exclusionary rule existing by virtue of Article I, Section 14, of the Utah Constitution is subject to a *Leon*-type 'good faith' exception," concluding that "a healthy skepticism should permeate the courts'

consideration [of that question] in view of the troublesome analysis in *Leon*." *State v. Rowe*, 806 P.2d 730, 743 (Utah Ct. App. 1991), *rev'd on other grounds*, 850 P.2d 427 (Utah 1992).

Moreover, binding precedent should have put Detective Woods on notice that, at the very least, a subpoena was needed to access private and sensitive medical records held by a third party. Article I, section 14 requires *at least* that much for bank records. *See Thompson*, 810 P.2d at 418. And medical records subject to doctor-patient privilege require at least a subpoena, with notice to the patient, as well. *Yount*, 2008 UT App. 102, ¶¶ 11–16. Detective Wood acted in disregard of clear precedent in obtaining Mr. Pyle's records with no legal process or showing of individualized suspicion whatsoever. Therefore, even if a good faith exception existed under the Utah Constitution, it would not be applicable here.

CONCLUSION

For the foregoing reasons, and as argued in the Defendant's brief, this Court should grant the Defendant's motion to suppress evidence gathered through a warrantless search of the Utah Controlled Substance Database.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 14th day of April, 2014, I served by electronic filing a true and correct copy of the foregoing BRIEF OF AMICI CURIAE AMERICAN CIVIL LIBERTIES UNION FOUNDATION AND ACLU OF UTAH IN SUPPORT OF DEFENDANT'S MOTION TO SUPPRESS, to the following:

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