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Stephen D. Lapatin

J.D. Candidate, 2019, Roger Williams University School of Law

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Rhode Island's Prescription Drug Database: Warrantless Searches by Law Enforcement Pass Constitutional Muster

Stephen D. Lapatin*

INTRODUCTION

The opioid epidemic in Rhode Island is the most urgent public health crisis of our generation.¹ The opioid crisis originated in the late 1990s when pharmaceutical companies assured doctors that their patients would not become addicted to prescription opioids.²

* Candidate for Juris Doctor, Roger Williams University School of Law, 2019. Thank you to Professor Colleen P. Murphy, Nicole Rohr, Tyler Bischoff and the *Roger Williams University Law Review* Editorial Board for their invaluable guidance throughout the writing process.

1. *Overdose Prevention and Intervention Task Force*, R.I. OFF. GOVERNOR, <http://www.governor.ri.gov/initiatives/odtaskforce/> (last visited Mar. 22, 2018).

2. *Opioid Overdose Crisis*, NAT'L INST. ON DRUG ABUSE, <https://www.drugabuse.gov/drugs-abuse/opioids/opioid-overdose-crisis> (last updated Mar. 2018); *Opioid Overdose: Prescribing Data*, CTRS. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/drugoverdose/data/prescribing.html> (last updated Aug. 30, 2017); *Rhode Island's Strategic Plan on Addiction and Overdose: Four Strategies to Alter the Course of an Epidemic*, R.I. GOVERNOR'S OVERDOSE PREVENTION & INTERVENTION TASK FORCE 3 (2015), health.ri.gov/news/temp/RhodeIslandsStrategicPlanOnAddictionAndOverdose.pdf. ("The two main driving forces behind this increase were regulatory pressures encouraging more opioid prescribing, and unscrupulous practices by some in the pharmaceutical industry."). Nationwide, a total of 214,881,622 opioid prescriptions were dispensed by retail pharmacies in 2016. CDC, *Annual Surveillance Report of Drug-Related Risks and Outcomes*, CTRS. FOR DISEASE CONTROL & PREVENTIONS 9 (2017), <https://www.cdc.gov/drugoverdose/pdf/pubs/2017-cdc-drug-surveillance->

Consequently, opioid prescribing rates increased dramatically, resulting in widespread diversion and misuse.³

Despite state-wide efforts to combat the opioid epidemic, opioid addiction continues to tighten its grip on Rhode Islanders.⁴ In 2014, Rhode Island established a prescription drug monitoring database (PDMP), which contains prescription information for every Schedule II–V drug that is prescribed.⁵ Rhode Island’s PDMP has proven to be an important mechanism in the fight against the opioid crisis, as it “helps to prevent over-prescribing and promotes better coordination among healthcare providers throughout the state.”⁶ Additionally, the PDMP is a tool for law enforcement to detect overprescribing, diversion, or fraud related to prescription opioids.⁷ Under the 2014 PDMP law, law enforcement officials were required to obtain a warrant pursuant to probable cause in order to access PDMP information.⁸ However, the warrant requirement was repealed in 2017, making it easier for law enforcement to access PDMP information.⁹

report.pdf.

3. *Opioid Overdose Crisis*, *supra* note 2. A study conducted by the Centers for Disease Control and Prevention found that in about a quarter of all United States counties, enough opioids were prescribed in 2016 for every person to have one. *U.S. Prescribing Rate Maps*, CTRS. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/drugoverdose/maps/rxrate-maps.html> (last updated July 31, 2017).

4. *Overdose Death Data*, PREVENT OVERDOSE RI, <http://preventoverdoseri.org/overdose-deaths/> (last visited Mar. 22, 2018) [hereinafter *Overdose Death Data*]. From 2011 to 2016, overdose deaths increased by more than ninety percent in Rhode Island. *Id.*

5. See 21 R.I. GEN. LAWS § 21-28-3.32 (Supp. 2017). Most states have implemented various forms of PDMPs, which monitor the prescribing and dispensing of Schedule II–V controlled substances to prevent improper or illegal use of controlled substances. *What States Need to Know about PDMPs*, CTRS. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/drugoverdose/pdmp/states.html> (last updated Oct. 3, 2017).

6. Press Release, R.I. Dep’t of Health, RI Achieves 100% Enrollment in Prescription Drug Monitoring Program (Sept. 29, 2016), <http://www.ri.gov/press/view/28654> (quoting current Rhode Island State Governor Gina M. Raimondo). The PDMP serves to “identify unusual or aberrant patterns of prescribing controlled substances, by relevant prescribing attributes.” 21 § 21-28-3.32(n)(3)(ii).

7. *Prescription Drug Monitoring Program, Mission*, R.I. DEP’T HEALTH, http://health.ri.gov/programs/detail.php?pgm_id=156/ (last visited Mar. 22, 2018) [hereinafter *Prescription Drug Monitoring Program*].

8. § 21-28-3.32(a)(4). See H.B. 7574, 2014 Leg., Jan Sess. (R.I. 2014).

9. § 21-28-3.32(a)(5). Compare H.B. 7574, 2014 Leg., Jan Sess. (R.I.

Effective January 1, 2018, the 2017 Rhode Island law authorizes law enforcement officials within the Medicaid Fraud and Patient Abuse Unit (MFPAU) in the Office of the Rhode Island Attorney General (RIAG) to access PDMP information without a warrant.¹⁰ While this is the current law, there will likely be constitutional challenges, as previewed during the legislative process in 2017 when the Rhode Island General Assembly considered the elimination of the warrant requirement.¹¹ At that time, the American Civil Liberties Union (ACLU) and over twenty medical associations strongly opposed the bill.¹² During the Senate Judiciary Committee hearing on the then-proposed law, a representative testifying on behalf of various medical associations in Rhode Island argued that a warrantless search of the PDMP is unconstitutional and a gross invasion of privacy rights.¹³ Moreover, the ACLU stated, “[i]f police wanted to search the medicine cabinet in your home, they would need a warrant,” and “[t]he fact that the medicine cabinet is stored electronically shouldn’t change that equation.”¹⁴ On the other hand, the RIAG strongly advocated in favor of the proposed law, arguing that the law is not only constitutional, but also necessary because the warrant requirement under the 2014 law significantly hampered investigations into “pill-mills” and over-prescribing

2014) (requiring a warrant for all law enforcement) *with* H.B. 5469, 2017 Leg., Jan. Sess. (R.I. 2017) (requiring no warrant for “a department employee to a certified law enforcement prescription drug diversion investigator of a qualified law enforcement agency for use in an investigation”).

10. § 21-28-3.32(a)(5).

11. *Organizations Ask Governor to Veto Bill Allowing Law Enforcement Access to PDMP Without Warrant*, ACLU (July 17, 2017), <http://www.riaclu.org/news/post/organizations-ask-governor-to-veto-bill-allowing-law-enforcement-access-to>.

12. *Id.* Medical associations that were opposed to warrantless searches of the PDMP included, among others, the Rhode Island Medical Society, the Hospital Association of Rhode Island, the Mental Health Association of Rhode Island, the Rhode Island Academy of Physician Assistants, and the Rhode Island Health Center Association. *Opposed to Warrantless Search of Prescription Drug Monitoring Program*, R.I. MED. SOC’Y, http://riaclu.org/images/uploads/PDMP_Supporting_Groups.pdf (last visited Mar. 22, 2018).

13. *An Act Relating to Food and Drugs — Uniform Controlled Substances Act: Hearing on S. 656 Before the S. Comm. on Jud.*, 2017 Leg., Jan. Sess. (R.I. 2017).

14. *Organizations Ask Governor to Veto Bill Allowing Law Enforcement Access to PDMP Without Warrant*, *supra* note 11.

physicians.¹⁵ Likewise, Governor Gina Raimondo described the law as one more “tool in the toolbox against the criminal networks that prey on Rhode Islanders who have become addicted to prescription drugs.”¹⁶ Ultimately, the Rhode Island General Assembly agreed with Governor Raimondo and the RIAG, repealing the warrant requirement before law enforcement can access PDMP information.¹⁷

It is well-settled that under the Fourth Amendment, “a warrant is required—subject to well-delineated exceptions—for any government intrusion into an area in which an individual retains a reasonable expectation of privacy.”¹⁸ In light of this privacy concern, the 2017 Rhode Island law was one of the most highly contested pieces of legislation in the 2017 legislative session. Beyond Rhode Island, Fourth Amendment challenges to laws authorizing warrantless searches of state-PDMPs have begun to emerge throughout the country.¹⁹ The ACLU challenged laws similar to that of Rhode Island in Utah and Oregon; it has taken cases as high as the United States Court of Appeals for the Ninth Circuit.²⁰ However, the constitutionality of laws permitting warrantless searches of PDMPs remains largely unsettled across all jurisdictions.

This Comment will examine the constitutionality of the 2017 Rhode Island law from the perspective of patients and medical personnel in the context of the warrant requirement under the

15. *An Act Relating to Food and Drugs — Uniform Controlled Substances Act: Hearing on S. 656 Before the S. Comm. on Jud.*, 2017 Leg., Jan. Sess. (R.I. 2017) (statement of Matthew Lenz, R.I. Att’y Gen.).

16. See Katherine Gregg, *Raimondo Signs Bill Allowing Warrantless Searches of R.I. Drug Database*, PROVIDENCE J. (July 19, 2017, 7:12 PM), <http://www.providencejournal.com/news/20170719/raimondo-signs-bill-allowing-warrantless-searches-of-ri-drug-database>.

17. See 21 R.I. GEN. LAWS § 21-28-3.32(a)(5) (Supp. 2017).

18. See *Arizona v. Gant*, 556 U.S. 332, 338 (2009).

19. See *Or. Prescription Drug Monitoring Program v. ACLU*, 860 F.3d 1228 (9th Cir. 2017); *United States D.O.J. v. Utah Dep’t of Com.*, No. 2:16-CV-611-DN-DBP, 2017 WL 3189868, at *1 (D. Utah Jul. 27, 2017).

20. See *Or. Prescription Drug Monitoring Program*, 860 F.3d at 1228, 1231 (“The ACLU . . . argu[ed] that the DEA’s use of subpoenas violate[d] their Fourth Amendment rights. They sought declaratory and injunctive relief prohibiting the DEA from obtaining prescription records from the PDMP without a warrant supported by probable cause.”); *Utah Dep’t of Com.*, WL 3189868, at *1.

Fourth Amendment. This Comment will argue that the law does not violate the Fourth Amendment of the United States Constitution. Part I will begin by discussing Rhode Island's PDMP law prior to 2017 and proceed to examine the legislature's fight against the opioid epidemic that led to the 2017 law authorizing law enforcement to access the PDMP without a warrant. Part II will address constitutional issues pertaining to the 2017 law, beginning by analyzing the constitutionality of the law from the perspective of patients and will examine whether they retain a reasonable expectation of privacy in their prescription information contained in the PDMP. In addition, this Part will examine the constitutionality of the law from the perspective of medical personnel and its applicability to the warrant requirement under the Fourth Amendment. Finally, this Part will conclude that the 2017 law is constitutional because patients do not retain a reasonable expectation of privacy in their prescription information and searching a prescribing medical professional's prescription records is an administrative search, which is an exception to the warrant requirement.

I. RHODE ISLAND'S LEGISLATIVE RESPONSE TO ITS OPIOID CRISIS

The 2017 Rhode Island law discarded the warrant requirement contained in the PDMP law for certain law enforcement officials.²¹ Since creating the PDMP in 2014, the Rhode Island General Assembly has passed numerous laws aimed at combatting the opioid crisis.²² Despite those efforts, it is evident the legislature remains concerned about the state of the opioid crisis in Rhode Island, as illustrated by the enactment of the 2017 Rhode Island law. This part will examine the PDMP law prior to 2017 and the changes implemented through the enactment of the 2017 Rhode Island law.

A. Rhode Island Prescription Drug Monitoring Program Prior to 2017

In 2014, Rhode Island created a statewide PDMP maintained

21. § 21-28-3.32(a)(5).

22. See, e.g., H.B. 7574, 2014 Leg., Jan. Sess. (R.I. 2014); S.B. 2523, 2014 Leg., Jan. Sess. (R.I. 2014); S.B. 2823 (R.I. 2016); S.B. 2946, 2016 Leg., Jan. Sess. (R.I. 2016); H.R. 5469, 2017 Leg., Jan. Sess. (R.I. 2017).

by the Rhode Island Department of Health (RIDOH).²³ The PDMP collects, monitors, and analyzes electronically transmitted prescribing and dispensing data submitted by medical practitioners and pharmacies.²⁴ All licensed physicians and pharmacists are required to register with the PDMP and report to the database every Schedule II–V prescription that they issue within one business day.²⁵

Since 2016, Rhode Island has required prescribing physicians and pharmacists to review the PDMP prior to prescribing or dispensing opioids to protect against patients seeking prescriptions for illegitimate medical reasons.²⁶ Studies have shown that this requirement has been effective in combatting the opioid crisis.²⁷ For example, a 2010 study found that when the PDMP was reviewed prior to issuing a prescription, emergency room physicians altered their patient's opioid prescriptions in forty-one percent of cases.²⁸ Moreover, sixty-one percent of patients received fewer opioid pain medications than had been previously planned by the physicians prior to reviewing the PDMP, with the physician sometimes choosing not to prescribe an opioid at all.²⁹

Information reported to the PDMP includes basic information, such as the patient's name and prescription details, along with the prescribing physician and pharmacist information.³⁰ Prior to

23. § 21-28-3.32(a). The summary of the bill that created the PDMP stated: "This act would require the director of the department of health, after appropriate notice and hearing, to promulgate rules and regulations for the purpose of adopting a system for electronic data transmission of prescriptions for controlled substances." H.B. 5756, 2013 Leg., Jan. Sess. (R.I. 2013).

24. See Miles D. Schreiner, *A Deadly Combination: The Legal Response to America's Prescription Drug Epidemic*, 33 J. LEGAL MED. 529, 535 (2012).

25. §§ 21-28-3.18(n), -3.32(l).

26. *Id.* § 21-28-3.20(b). "The prescription-monitoring program shall be reviewed prior to starting any opioid." *Id.*

27. See David F. Baehren et al., *A Statewide Prescription Monitoring Program Affects Emergency Department Prescribing Behaviors*, 56 ANNALS OF EMERGENCY MED. 19, 21–22 (2010).

28. *Id.* at 21.

29. *Id.*

30. § 21-28-3.32(b); see also R.I. DEP'T HEALTH, DATA SUBMISSION DISPENSE GUIDE RHODE ISLAND PRESCRIPTION DRUG MONITORING PROGRAM (RI PDMP) 24–25, 31 (2016), <http://go.appriss.com/rs/768-UPQ-075/images/RI%20PDMP%20AWARxE%20Dispenser%20Guide.pdf> [hereinafter RIDOH DATA SUBMISSION DISPENSE GUIDE] (specifying the information required by

2017, access to this information was limited to certain medical professionals, medical boards, and pharmacists to assist in the treatment of their patients, in addition to law enforcement officials “[p]ursuant to a valid search warrant based on probable cause to believe a violation of federal or state criminal law ha[d] occurred and that specified information contained in the database would assist in the investigation of the crime.”³¹

All fifty states have some version of a PDMP to monitor the prescribing and dispensing of opioids. According to the United States Supreme Court, the collection of prescription information in prescription databases is a reasonable exercise of a state’s broad police powers and does not violate the United States Constitution; however, the Court has not yet spoken to whether a valid search warrant is required for state law enforcement officials to search the database.³²

B. The 2017 Rhode Island Law Allowing Law Enforcement Access to Prescription Drug Monitoring Program Information Without a Warrant

In 2017, Rhode Island passed a law allowing law enforcement to access the state’s PDMP without a warrant.³³ Specifically, the 2017 Rhode Island law allows for disclosure of PDMP information “[b]y a [RIDOH] employee to a certified law enforcement prescription drug diversion investigator of a qualified law enforcement agency for use in an investigation.”³⁴ More

Rhode Island when submitting records to the RI PDMP).

31. § 21-28-3.32(a).

32. *See Whalen v. Roe*, 429 U.S. 589, 598, 602 (1977) (“Requiring such disclosures to representatives of the State having responsibility for the health of the community, does not automatically amount to an impermissible invasion of privacy.”).

33. *See* S.B. 0656aaa, 2017 Leg., Jan. Sess. (R.I. 2017).

34. § 21-28-3.32; *see also id.* § 21-28-1.02(5) (“Certified law enforcement prescription drug diversion investigator’ means a certified law enforcement officer assigned by his or her qualified law enforcement agency to investigate prescription drug diversion.”); § 21-28-1.02(41) (“Qualified law enforcement agency’ means the U.S. Food and Drug Administration, Drug Enforcement Administration, Federal Bureau of Investigation, Office of Inspector General of the U.S. Department of Health & Human Services, or the Medicaid Fraud and Patient Abuse Unit in the Office of the Attorney General.”); Katherine Gregg, *Advocates urge veto of bill to open prescription drug database for law enforcement*, PROVIDENCE J. (July 17, 2017), <http://www.providence>

specifically, warrantless access is limited to certified law enforcement officials, including those “within the Medicaid Fraud and Patient Abuse Unit [MFPAU] in the Office of the [Rhode Island] Attorney General.”³⁵ The RIAG argued that the warrant requirement under the 2014 law significantly handicapped its investigative abilities regarding illicit opioid use, and therefore, the 2017 Rhode Island law was necessary to further the state’s fight against the opioid epidemic.³⁶

Notably, the 2017 Rhode Island law does not provide unfettered access to Rhode Islanders’ prescription information.³⁷ As a prerequisite, the law enforcement officials within MFPAU must first complete a certification course approved by the state.³⁸ Then, when PDMP information is sought, certified law enforcement officials are required to submit a written verification to the RIDOH, averring that the PDMP information sought is in furtherance of an active investigation.³⁹ Additionally, the RIAG is required to submit “quarterly reports of the data received by all certified law enforcement prescription drug diversion investigators in the qualified law enforcement agency,” containing

journal.com/news/20170717/advocates-urge-veto-of-bill-to-open-prescription-drug-database-for-law-enforcement (“The access would apply to the . . . Medicaid Fraud and Patient Abuse Unit in the state attorney general’s office.”).

35. § 21-28-1.02(41).

The Medicaid Fraud and Patient Abuse Unit enforces the laws pertaining to fraud in the state Medicaid program and prosecutes cases of abuse, neglect or mistreatment of patients in all state healthcare facilities. The Unit prosecutes criminal activity, pursues civil remedies where appropriate and participates with federal and state authorities in a variety of inter-agency investigations and administrative proceedings. Unit prosecutors, auditors, investigators and health care professionals employ a multi-disciplinary approach to combat health care fraud and patient abuse.

Medicaid Fraud and Patient Abuse Unit, R.I. OFF. ATT’Y GEN., <http://www.riag.ri.gov/CriminalUnit/MedicaidFraudPatientAbuseUnit.php> (last visited Mar. 28, 2018).

36. See *An Act Relating to Food and Drugs — Uniform Controlled Substances Act: Hearing on S. 656 Before the S. Comm. on Jud.*, 2017 Leg. Jan. Sess. (R.I. 2017).

37. “No person shall access information in the prescription-monitoring-database except to the extent and for the purposes authorized.” § 21-28-3.32(i).

38. See *id.* § 21-28-1.02(5).

39. *Id.* § 21-28-3.32(a)(5)(ii)(A).

written verification that the requests were part of lawful investigations, and a brief description of each case closed during that quarter that used PDMP information.⁴⁰ If the requirements set forth in the law are not satisfied, the RIDOH can strip access to PDMP records from state law enforcement officials.⁴¹

C. The 2017 Rhode Island Law Does Not Violate the Health Insurance Portability and Accountability Act or the Rhode Island Constitution

The 2017 Rhode Island law is consistent with the Federal Health Insurance Portability and Accountability Act (HIPAA) and the Rhode Island Constitution. Opponents of laws permitting warrantless searches of prescription records argue that the laws violate HIPAA privacy protections.⁴² This concern was raised before the Senate Judiciary Committee regarding the 2017 Rhode Island law, where one opponent argued that prescription records are “some of the most highly protected information that a person can have.”⁴³ While this argument may seem compelling at first glance, warrantless searches of the PDMP do not fall within the scope of HIPAA protections, which will be discussed in the

40. *Id.* § 21-28-3.32(a)(5)(ii).

41. *Id.* § 21-28-3.32(a)(5)(v). This section reads as follows:

Failure to submit a verification form under subsection (5)(iv) of this section shall result in the immediate suspension of disclosure of information from the database by the department to the qualified law enforcement agency and its certified law enforcement prescription drug diversion investigators until determination is made by the department to allow continued disclosure.

Id.

42. Nathan Freed Wessler, *The DEA Thinks You Have “No Constitutionally Protected Privacy Interest” in Your Confidential Prescription Records*, AM. C.L. UNION (Sept. 24, 2013), <https://www.aclu.org/blog/national-security/dea-thinks-you-have-no-constitutionally-protected-privacy-interest-your> (“The Drug Enforcement Administration thinks people have ‘no constitutionally protected privacy interest’ in their confidential prescription records, according to a brief filed last month in federal court. That disconcerting statement comes in response to an ACLU lawsuit challenging the DEA’s practice of obtaining private medical information without a warrant. The ACLU has just filed its response brief, explaining to the court why the DEA’s position is both startling and wrong.”).

43. *See An Act Relating to Food and Drugs — Uniform Controlled Substances Act: Hearing on S. 656 Before the S. Comm. on Jud.*, 2017 Leg. Jan. Sess. (R.I. 2017) (statement of Patrick Quinlan).

following section.

Moreover, it is well established that states can afford greater protections under state constitutions than those provided by the United States Constitution.⁴⁴ However, the Rhode Island Supreme Court has declined to extend protection against unreasonable searches and seizures beyond Fourth Amendment precedent established by the United States Supreme Court.⁴⁵

1. *Health Insurance Portability and Accountability Act*

HIPAA contains a Privacy Rule that establishes national standards to protect individuals' medical records and other protected health information.⁴⁶ The Privacy Rule applies to the use and disclosure of private health information by "covered entities" and "business associates."⁴⁷ Although prescription information may emanate from covered entities, a PDMP is neither a "covered entity" nor a "business associate" within the meaning of HIPAA, and, thus, warrantless access to the PDMP does not fall within the scope of HIPAA protections.⁴⁸ Regardless, the Privacy Rule permits covered entities to disclose protected health information, such as prescription records, to law enforcement without the individual's written authorization upon submission of a written request by law enforcement.⁴⁹ As a result, the 2017 Rhode Island law is not inconsistent with HIPAA

44. *See, e.g.*, *State v. Bjerke*, 697 A.2d 1069, 1073 (R.I. 1997).

45. *See id.*

46. *The HIPAA Privacy Rule*, U.S. DEP'T HEALTH & HUM. SERVS., <https://www.hhs.gov/hipaa/for-professionals/privacy/index.html> (last visited Mar. 28, 2018).

47. 45 C.F.R. § 160.103 (2017). HIPAA defines covered entities as health care providers, health plans (health insurers and HMOs), and health care clearinghouses. *Id.* Health care providers include hospitals, physicians, and other caregivers, as well as researchers who provide health care and receive, access, or generate individually identifiable health care information. *Id.* Pharmacists and pharmacies are also HIPAA covered entities. *Id.* A business associate is any person or organization that creates, receives, maintains or transmits protected health information on behalf of a covered entity. *Id.*

48. NAT'L ALL. FOR MODEL STATE DRUG LAWS & SARA L. GREEN & ASSOCIATES, LLC, PRESCRIPTION DRUG MONITORING PROGRAMS (PMPs) AND THE HEALTH INSURANCE PORTABILITY AND ACCOUNTABILITY ACT (HIPAA), 1–3 (Mar. 31, 2017), <http://www.namsdl.org/library/ED56718E-A683-22AA-FDEE3CD77BE925DE/>.

49. 45 C.F.R. § 164.512(f)(1)(ii)(C) (2017).

because it does not fall within the scope of the Act.

2. *Rhode Island Constitution*

The Rhode Island Supreme Court has recognized its power to afford greater protections to its citizens under the Rhode Island Constitution.⁵⁰ It held in *State v. Bjerke*, however, that “[t]he decision to depart from minimum standards and to increase the level of protection should be made guardedly and should be supported by a principled rationale.”⁵¹ The Rhode Island Constitution does not provide additional protections against unreasonable searches and seizures than those guaranteed under the Fourth Amendment of the United States Constitution.⁵² Ultimately, the Rhode Island Supreme Court has concluded that “the Fourth Amendment provides ample protection against unreasonable searches and seizures, and state courts should respect the manner in which it is interpreted by the United States Supreme Court.”⁵³ As such, the proceeding section will focus on issues arising under the Fourth Amendment to the United States Constitution pertaining to the 2017 Rhode Island law.

II. THE 2017 RHODE ISLAND LAW AND THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION

The 2017 Rhode Island law raises constitutional issues. For example, when law enforcement officials access PDMP information pursuant to the 2017 Rhode Island law for the purpose of investigating a prescriber or pharmacist for illicit activity, patients who received treatment from that prescriber or pharmacist inevitably will have their prescription information turned over to law enforcement as well.⁵⁴ Therefore, physicians’ constitutional privacy right in the records they keep and patients’

50. *State v. Bjerke*, 697 A.2d 1069, 1073 (R.I. 1997) (quoting *State v. Benoit*, 417 A.2d 895, 899 (R.I. 1980)) (internal quotations omitted).

51. *Id.*

52. *See id.* The Rhode Island Constitution guarantees “[t]he right of the people to be secure in their persons, papers and possessions, against unreasonable searches and seizures.” R.I. CONST. art. I, §6.

53. *State v. Werner*, 615 A.2d 1010, 1014 (R.I. 1992); *see also Bjerke*, 697 A.2d at 1073 (stating that the court recognizes its power to afford greater protections under the R.I. Constitution, but declined to do so).

54. 21 R.I. GEN. LAWS § 21-28-3.32 (Supp. 2017).

constitutional privacy right in their prescription information are potentially violated by the 2017 Rhode Island law. This part argues that the 2017 Rhode Island law does not violate the Fourth Amendment to the United States Constitution. First, patients do not retain a reasonable expectation of privacy in their prescription information contained in the PDMP; and second, as to prescribing physicians and pharmacists, warrantless searches by law enforcement of prescription records reported to the PDMP fall into the administrative search exception to the warrant requirement.

Constitutional implications that may arise differ for patients and prescribing physicians. Although patients do not own the records reported to the PDMP, they could have a right to privacy under the Fourth Amendment if those patients retain a reasonable expectation of privacy in their prescription information.⁵⁵ If the patients do not have a reasonable expectation of privacy in their prescription information contained in the PDMP, then Fourth Amendment protections do not apply, and law enforcement officials do not have to obtain a warrant to access the database.⁵⁶ On the other hand, in Rhode Island, all medical records are the property of the physician who created the medical records.⁵⁷ As such, medical records reported to the PDMP are commercial property of the reporting physicians, which is covered by the Fourth Amendment unless an exception to the warrant requirement applies—such as the administrative search exception that arguably applies here.⁵⁸

A. Patients Do Not Retain a Reasonable Expectation of Privacy in Prescription Information Reported to the PDMP

Assume that a patient in Rhode Island has been charged with

55. *Katz v. United States*, 389 U.S. 347, 353 (1967) (“[T]he Fourth Amendment protects people—and not simply ‘areas’—against unreasonable searches and seizures . . .”).

56. *Id.*

57. § 5-37-22(g) (“Unless otherwise expressly stated in writing by the medical practice group, all medical records shall be the property of the medical practice group with which a physician is associated when that physician created all such medical records.”).

58. *See Katz*, 389 U.S. at 354; *see also* *New York v. Burger*, 482 U.S. 691, 699 (1987) (stating that the protection against unreasonable searches or seizures extends to commercial property).

a criminal offense stemming from evidence obtained through a warrantless search of his or her prescription information contained in the PDMP. Subsequently, the patient challenges the constitutionality of the 2017 Rhode Island law that authorized law enforcement officials to obtain that information without a warrant—a scenario that may be a reality in the not-so-distant future. In order to prevail, the patient would have to prove that he or she had a reasonable expectation of privacy in his or her prescription information contained in the PDMP.⁵⁹ To make that determination, the United States Supreme Court employs a two-prong test: first, whether the individual has exhibited a subjective expectation of privacy in the object of the search; and secondly, whether that subjective expectation of privacy is one that society is prepared to recognize as reasonable.⁶⁰ If a reasonable expectation of privacy does not exist, then the Fourth Amendment protections do not apply and warrantless searches are allowed.⁶¹

The last time the United States Supreme Court interpreted the right to privacy in prescription information was in *Whalen v. Roe*, in which the Court upheld the constitutionality of a New York law that required patients' prescription information to be reported to a centralized database.⁶² The Court admitted that, as a starting point, a reasonable expectation of privacy in prescription information exists.⁶³ Specifically, two different kinds

59. See *Katz*, 389 U.S. at 361 (Harlan, J., concurring).

60. *California v. Ciraolo*, 476 U.S. 207, 211 (1986); *Smith v. Maryland*, 442 U.S. 735, 740 (1979); *Katz*, 389 U.S. at 361 (Harlan, J., concurring). In *Smith*, regarding the first prong, the Court stated that the inquiry rests on, "whether . . . the individual has shown that 'he seeks to preserve [something] as private.'" 442 U.S. at 740 (quoting *Katz*, 389 U.S. at 361) (alteration in original). In addition, regarding the second prong, the *Smith* Court stated that the determination turns on whether the individual's expectation, viewed objectively, is justifiable under the circumstances. *Id.*

61. *Smith*, 442 U.S. at 740 ("[T]his Court uniformly has held that application of the Fourth Amendment depends on whether the person invoking its protection can claim a 'justifiable,' a 'reasonable,' or a 'legitimate expectation of privacy' that has been invaded by government action."); see also *Arizona v. Gant*, 556 U.S. 332, 338 (2009) (quoting *Katz*, 389 U.S. at 357) ("[S]earches conducted outside the judicial process, without prior approval by a judge or magistrate, are *per se* unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions.") (internal quotations omitted).

62. 429 U.S. 589, 602 (1977).

63. *Id.* at 599–600.

of privacy interests are implicated by a state-run prescription database: “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.”⁶⁴ In upholding the constitutionality of the law, the Court stated:

[N]either the immediate nor the threatened impact of the patient-identification requirements in the New York State Controlled Substances Act of 1972 on either the reputation or the independence of patients for whom Schedule II drugs are medically indicated is sufficient to constitute an invasion of any right or liberty protected by the Fourteenth Amendment.⁶⁵

The Court reasoned that requiring prescription information to be provided to government officials who are responsible for public health and safety, “does not automatically amount to an impermissible invasion of privacy.”⁶⁶

Courts have differed as to the extent of patients’ limited privacy interest recognized in *Whalen*.⁶⁷ Although *Whalen* upheld the constitutionality of state-run PDMPs, the Court did not address patients’ reasonable expectation of privacy pertaining warrantless searches by law enforcement officials.⁶⁸ Nonetheless, since patients do not retain a reasonable expectation of privacy in prescription information that is reported to the PDMP, one may argue that the warrant requirement is never triggered and, therefore, a warrantless search would not result in a Fourth Amendment violation. In contrast, the United States Court of Appeals for the Tenth Circuit, in *Douglas v. Dobbs*, found that

64. *Id.*

65. *Id.* at 603–04.

66. *Id.* at 602.

67. See Kathleen A. Ward, *A Dose of Reality: The Prescription for a Limited Constitutional Right to Privacy in Pharmaceutical Records is Examined in Douglas v. Dobbs*, 12 MICH. ST. U. J. MED. & L. 73, 76 (2008) (“Although courts have acknowledged a privacy right exists in pharmaceutical records, the magnitude of this right has not been completely defined.”).

68. “The constitutional question presented is whether the State of New York may record, in a centralized computer file, the names and addresses of all persons who have obtained, pursuant to a doctor’s prescription, certain drugs for which there is both a lawful and unlawful market.” *Whalen*, 429 U.S. at 591.

patients do retain a reasonable expectation of privacy in their prescription records.⁶⁹ The court, relying on the privacy interests recognized in *Whalen*, concluded that a patient's interest in avoiding disclosure included law enforcement officials and not merely disclosure to the general public because prescription records may contain information regarding other medical conditions.⁷⁰

State courts that have interpreted *Whalen* have found that a patient's reasonable expectation of privacy extends to protection against public disclosure, but it does not extend to prescription information obtained by law enforcement officials.⁷¹ For example, the Connecticut Supreme Court has held that patients do not have a reasonable expectation of privacy in prescription information obtained by law enforcement.⁷² In *State v. Russo*, law enforcement officers, obtained a patient's prescription records without a warrant pursuant to state law.⁷³ The court reasoned that the privacy protection recognized in *Whalen* was only an expectation that a patient's prescription records will not be disseminated to the general public.⁷⁴ Moreover, it stated that "the [*Whalen*] court drew no distinction between the patients' rights vis-à-vis the investigators, on the one hand, and the patients' rights vis-a-vis the regulatory personnel of the New York department of health, on the other hand."⁷⁵ Thus, the *Russo* court extended *Whalen* from mere reporting of a patient's information to a database to warrantless searches by law enforcement officers.⁷⁶

69. 419 F.3d 1097, 1102 (10th Cir. 2005).

70. *Id.*

71. *See, e.g.*, *State v. Wiedeman*, 835 N.W.2d 698 (Neb. 2013); *State v. Russo*, 790 A.2d 1132 (Conn. 2002); *State v. Stow*, 593 N.E.2d 294 (Ohio 1992).

72. *Russo*, 790 A.2d at 1152–53.

73. *Id.* at 1141–42 ("General Statutes § 21a-265 broadly provides that prescription records shall be 'open for inspection . . . to federal, state, county and municipal officers, whose duty it is to enforce the [federal and state drug laws].'" (alterations in original).

74. *See id.* at 1143.

75. *Id.* at 1153.

76. In response to the patient's argument that although an individual does not have a reasonable expectation of privacy with regard to his or her prescription records in the context of searches by regulatory personnel, an individual does have such an expectation of privacy in the context of inspections by law enforcement personnel, the court stated: "Both the dictates of *Whalen* and common sense compel this court to reject the defendant's claim

Similarly, in *State v. Stow*, the Ohio Supreme Court found that a patient's right to privacy in prescription records extends only to disclosure of information to the general public.⁷⁷ The court held that the mere threat of unauthorized disclosure to the general public was not enough to render a law permitting warrantless searches unconstitutional.⁷⁸ Moreover, the Nebraska Supreme Court upheld the constitutionality of a warrantless search by law enforcement because the request was safeguarded by any further dissemination of those records.⁷⁹

Turning now to the 2017 Rhode Island law, the weight of the case law suggests that patients do not have a reasonable expectation of privacy in their prescription information contained in Rhode Island's PDMP. The 2017 Rhode Island law does not follow the *Douglas* line of reasoning, which states that patients have a reasonable expectation of privacy in prescription records because they are inherently private and might contain facts about other medical conditions.⁸⁰ The *Douglas* court expressly stated that a patient has a right to privacy in preventing disclosure of prescription records by government officials but failed to acknowledge the fact that police officers are also government officials.⁸¹ Befittingly, the court failed to address whether the prescription records at issue in the case actually contained such information, only finding that "prescription records . . . may reveal other facts about what illnesses a person has" ⁸² Regardless, prescription information reported to the Rhode Island PDMP does not include facts pertaining to a patient's medical conditions: it contains only the patient's basic information and prescription

that any such distinction is constitutionally significant." *Id.* at 1153.

77. 593 N.E.2d 294, 299 (Ohio 1992) ("After finding that no significant threat is presented to [the patient's] right of privacy, we follow the lead of the *Whalen* court.").

78. *Id.*

79. *State v. Wiedeman*, 835 N.W.2d 698, 709 (Neb. 2013). "Weighing the State's significant interest in the regulation of potentially dangerous and addictive narcotic drugs against the minimal interference with one's ability to make medical decisions and the protections from broader dissemination to the general public, we find the State did not violate [the patient's] . . . privacy rights through its warrantless, investigatory access to [the patient's] prescription records." *Id.* at 206.

80. *Douglas v. Dobbs*, 419 F.3d 1097, 1102 (10th Cir. 2005).

81. *See id.*

82. *Id.* (emphasis added).

information.⁸³

The 2017 Rhode Island law is similarly consistent with the interpretation of a patient's right to privacy delineated in *Whalen*.⁸⁴ As previously stated, the 2017 Rhode Island law adequately safeguards against disclosure of prescription information to the general public by allowing only the MFPAU—responsible for public health and safety—to obtain PDMP records upon submission of written verification to the RIDOH.⁸⁵ The 2017 Rhode Island law expressly prohibits disclosure of PDMP information to unauthorized personnel and vests the RIDOH with the ability to strip access to PDMP information upon non-compliance with the law, adequately safeguarding against the possibility of disclosure.⁸⁶

Thus, because patients do not have a reasonable expectation of privacy in their prescription information contained in the PDMP, a warrantless search of the PDMP by law enforcement pursuant to the 2017 Rhode Island law would not trigger the warrant requirement under the Fourth Amendment.

B. Fourth Amendment Issues Pertaining to Prescribing Physicians and Pharmacists: The Administrative Search Exception to the Warrant Requirement

Assume that a Rhode Island law enforcement official searched PDMP records without a warrant pursuant to an investigation of a doctor, who is now charged with a criminal offense stemming from illegal prescribing practices. The doctor challenges the constitutionality of the 2017 Rhode Island law authorizing the officer to conduct the warrantless search, arguing that the search was unconstitutional because the prescription records that were reported to the PDMP are the commercial property of his or her medical practice, and therefore protected by the Fourth Amendment.

Under the Fourth Amendment, “searches conducted outside the judicial process . . . are *per se* unreasonable—subject to only a

83. See RIDOH DATA SUBMISSION DISPENSE GUIDE, *supra* note 30, at 25.

84. See *Whalen v. Roe*, 429 U.S. 589, 605 (1977).

85. 21 R.I. GEN. LAWS § 21-28-3.32(a)(5)(iv) (Supp. 2017).

86. *Id.* § 21-28-3.32(a)(5)(v).

few specifically established and well-delineated exceptions.”⁸⁷ One of those exceptions is the administrative search exception, which involves those situations where the government conducts a search of commercial property pursuant to a regulatory scheme.⁸⁸ The Fourth Amendment extends to commercial property, but greater latitude is afforded to warrantless searches of commercial property because the privacy rights that individuals enjoy in those contexts differs from the privacy right to one’s home or person. Specifically, “that this privacy interest [in commercial property] may, in certain circumstances, be adequately protected by regulatory schemes authorizing warrantless inspections.”⁸⁹

The United States Supreme Court has not decided whether a search of a PDMP by law enforcement officials is an administrative search. Nonetheless, a search must meet three requirements to fall within the administrative search exception to the warrant requirement.⁹⁰ First, the warrantless search must be one that is designed to enforce a regulatory scheme and not merely for the purpose of collecting criminal evidence.⁹¹ Second, the warrantless search must be in the context of a “pervasively regulated industry.”⁹² Finally, the warrantless search must be reasonable.⁹³ Reasonableness is determined using a three-part test: (1) the regulatory scheme must further a “substantial” government interest; (2) warrantless inspections must be necessary to further the regulatory scheme; and (3) the regulatory scheme must be a constitutionally adequate substitute for a warrant.⁹⁴

87. *Arizona v. Gant*, 556 U.S. 332, 338 (2009) (quoting *Katz v. United States*, 389 U.S. 347, 357 (1967)).

88. See *New York v. Burger*, 482 U.S. 691, 702 (1987); Ann K. Wooster, Annotation, *Validity of Warrantless Administrative Inspection of Business that is Allegedly Closely or Pervasively Regulated*, 182 A.L.R. Fed. § 2[a] (2002); see also Eve Brensike Primus, *Disentangling Administrative Searches*, 111 COLUM. L. REV. 254, 259 (2011) (“[T]he government has increasingly relied on administrative search doctrine to justify its actions.”).

89. Wooster, *supra* note 88, at § 2[a]; see *Marshall v. Barlow’s Inc.*, 436 U.S. 307, 312–13 (1978).

90. See *Burger*, 482 U.S. at 702–05.

91. *Los Angeles v. Patel*, 135 S. Ct. 2443, 2452 (2015) (quoting *Indianapolis v. Edmond*, 531 U.S. 32, 44 (2000)).

92. *Burger*, 482 U.S. at 702.

93. *Id.*

94. *Id.*

1. *A Warrantless Search Authorized Under the 2017 Rhode Island Law is Designed to Enforce an Administrative Scheme*

To determine if a warrantless search falls into the administrative search exception to the warrant requirement, the first step is to conclude whether the warrantless search is designed to enforce a regulatory scheme and not solely for the purpose of collecting criminal evidence.⁹⁵ The United States Supreme Court in *Los Angeles v. Patel* considered whether warrantless searches of hotel records by law enforcement officers was an administrative search.⁹⁶ The contested code provision compelled hotel operators to keep a record containing specific information concerning guests, and to make the record available to police for inspection on demand.⁹⁷ The Court found that, although the exception to the warrant requirement did not ultimately apply, the authorized warrantless search was an administrative search because it served a “special need” other than conducting criminal investigations.⁹⁸ The special need was to ensure compliance with the recordkeeping requirement, “which in turn deters criminals from operating on the hotels’ premises.”⁹⁹ Furthermore, in *New York v. Burger*, the United States Supreme Court held that a warrantless search of a junkyard by a police officer was constitutional.¹⁰⁰ The Court concluded that an administrative search pursuant to a regulatory scheme is not unconstitutional “simply because, in the course of enforcing it, an inspecting officer may discover evidence of crimes”¹⁰¹ Thus, it is clear that a warrantless search may be conducted by law enforcement personnel for both administrative and penal purposes and still fall within the meaning of an administrative search.¹⁰²

The Vermont Supreme Court relied on *Burger* in finding that

95. *Id.*

96. 135 S. Ct. at 2448.

97. *Id.*

98. *Id.* at 2452.

99. *Id.* The code provision was struck down on other grounds because it failed to provide hotel operators with an opportunity for pre-compliance review. *Id.* at 2451.

100. 482 U.S. 691, 717 (1987).

101. *Id.* at 716.

102. *See id.* at 717 (“[W]e fail to see any constitutional significance in the fact that police officers, rather than ‘administrative’ agents, are permitted to conduct the . . . inspection.”).

a warrantless search of pharmacy records by a police officer was an administrative search.¹⁰³ In that case, *State v. Welch*, the police officer acted pursuant to a Vermont law that required pertinent records to be open to state law enforcement officials who were responsible for enforcing narcotics laws.¹⁰⁴ The court held that the police officer's inspection was within his enforcement powers, which allowed him to search the pharmacy records in furtherance of a criminal investigation.¹⁰⁵

Under the 2017 Rhode Island law, warrantless searches of the PDMP serve as an additional piece to the well-established and long-standing regulatory scheme of prescription drug regulation and reporting in the state.¹⁰⁶ The PDMP fosters communication among health professionals in order to better treat their patients and provides prescribers with information that is conducive to making informed prescribing decisions.¹⁰⁷ Beyond that, the PDMP is a tool used by law enforcement to detect illegal activities by physicians, pharmacists, and patients.¹⁰⁸ Therefore, the 2017 Rhode Island law is consistent with the *Burger* line of reasoning because it serves administrative and penal purposes.¹⁰⁹

2. *The Prescription Drug Industry in Rhode Island is Pervasively Regulated*

Regarding the administrative search exception, the United States Supreme Court employs a two-part test to determine if an industry has a reasonable expectation of privacy: (1) the industry must be comprehensively regulated; and (2) the industry must pose an inherently clear and significant risk to public welfare.¹¹⁰

103. *State v. Welch*, 624 A.2d 1105, 1110 (Vt. 1992).

104. *Id.* at 1111.

105. *Id.* at 1113.

106. See 21 R.I. GEN. LAWS § 21-28-3.32(Supp. 2017).

107. See *id.* § 21-28-3.32(m). The prescribing practitioner shall review the prescription-monitoring program prior to refilling or initiating an opioid. See *id.* § 21-28-3.32(m); *Prescription Drug Monitoring Program*, *supra* note 7.

108. See Press Release, Governor Gina Raimondo, RI Achieves 100% Enrollment in Prescription Drug Monitoring Program (Sept. 29, 2016), <http://www.ri.gov/press/view/28654>.

109. See § 21-28-3.32(a)(1)–(2), (5).

110. *Los Angeles v. Patel*, 135 S. Ct. 2443, 2454 (2005). However, the United States Supreme Court has made it abundantly clear that the administrative search exception is inapplicable to a warrantless search that

Based on the nature of pervasively regulated industries, an individual's reasonable expectation of privacy in the context of those industries is lessened.¹¹¹ Because of that, the United States Supreme Court has stated that "no reasonable expectation of privacy . . . could exist for a proprietor over the stock of such an enterprise."¹¹²

Despite numerous lower court decisions, the United States Supreme Court has yet to decide whether the prescription drug industry is pervasively regulated for purposes of the administrative search exception to the warrant requirement.¹¹³ Regarding industries other than the prescription drug industry, the Court characterized pervasively regulated industries as those with such a history of comprehensive government regulation that a reasonable expectation of privacy could not exist for a proprietor over information produced and maintained within the context of that industry.¹¹⁴

Lower courts have held that the pharmaceutical industry is comprehensively regulated for purposes of the administrative search exception.¹¹⁵ Notably, in *United States v. Gonsalves*, the United States Court of Appeals for the First Circuit analyzed whether the prescription drug industry in Rhode Island is

is not within the context of a pervasively regulated industry. *Id.*

111. *Id.*

112. *Id.*

113. *United States v. Jamieson-McKames Pharmaceuticals, Inc.*, 651 F.2d 532, 542 (8th Cir. 1981) (holding that the drug-manufacturing industry, which had a long history of supervision and inspection, was within the class of closely regulated businesses that could be searched without a warrant without violating the Fourth Amendment); *U.S. ex. Rel. Terraciano v. Montanye*, 493 F.2d 682, 685 (2nd Cir. 1974) (holding that searching a licensed pharmacist's records related to narcotics and stimulant or depressant drugs that were maintained on the premises did not violate the Fourth Amendment); *see also Costantini v. Medical Bd. of Cal.*, No. 93-16926, 1994 WL 419924, at *2 (9th Cir. Aug. 11, 1994) (unpublished table decision) (holding that a search of pharmaceutical and patient records of a principal officer of a weight-loss clinic fell within the administrative search exception to the Fourth Amendment).

114. *Patel*, 135 S. Ct. at 2454 (quoting *Marshall v. Barlow's, Inc.*, 436 U.S. 307, 313 (1978)).

115. *United States v. Gonsalves*, 435 F.3d 64, 67 (1st Cir. 2006); *United States v. Acklen*, 690 F.2d 70, 75 (6th Cir. 1982); *United States D.O.J. v. Utah Dep't of Com.*, No. 2:16-cv-611-DN-DBP, 2017 WL 3189868, at *1, *9 (D. Utah Jul. 27, 2017).

pervasively regulated.¹¹⁶ In *Gonsalves*, pursuant to a search warrant, law enforcement officers conducted a search of patient prescription records located in a doctor's office.¹¹⁷ The court held that:

In Rhode Island, as under federal law and in other states, drugs are heavily regulated in storage and dispensation and have been for many years. . . . Rhode Island's Food, Drugs, and Cosmetics Act has been in effect for a half-century . . . and the pertinent provisions are numerous, longstanding and pervasive. The scheme readily passes the "closely regulated" test of *Burger*.¹¹⁸

Since *Gonsalves*, Rhode Island has continued to regulate the prescription drug industry, passing numerous laws pertaining to the PDMP since it was established in 2014.¹¹⁹ For example, since 2016, prescribers have been required to inform patients of the existence of the PDMP, and are required to report prescription information to the PDMP within one business day.¹²⁰

In addition to being comprehensively regulated, the prescription drug industry in Rhode Island must pose a significant risk to the public welfare in order to qualify for the administrative exception.¹²¹ In *Patel*, the United States Supreme Court held that the hotel industry was not pervasively regulated because "nothing inherent in the operation of hotels poses a clear and significant risk to the public welfare."¹²² Such a statement, however, cannot be made in regard to prescription opioids. The prescription drug industry, unlike hotels, is consistent with the Supreme Court's interpretation of pervasively regulated industries because it poses a clear and significant risk to public welfare, illustrated by the numerous laws passed by Rhode Island in response to the opioid crisis.¹²³

116. *Gonsalves*, 435 F.3d at 67.

117. *Id.* at 66.

118. *Id.* at 67 (internal citations omitted).

119. See H.R. 7574, 2014 Leg., Jan. Sess. (R.I. 2014); S.B. 2523, 2014 Leg., Jan. Sess. (R.I. 2014); S.B. 2823, 2016 Leg., Jan. Sess. (R.I. 2016); S.B. 2946, 2016 Sess. (R.I. 2016); H.R. 5469, 2017 Leg., Jan. Sess. (R.I. 2017).

120. S.B. 2823, 2016 Leg., Jan. Sess. (R.I. 2016).

121. See *Los Angeles v. Patel*, 135 S. Ct. 2443, 2454 (2015).

122. *Id.*

123. According to the Centers for Disease Control and Prevention,

Therefore, the 2017 Rhode Island law satisfies the two-part test for pervasively regulated industries because the prescription drug industry in Rhode Island is comprehensively regulated and poses a clear and significant risk to public welfare.

3. *Warrantless Searches by Law Enforcement of the PDMP Under the 2017 Rhode Island Law are Reasonable*

An administrative search within a pervasively regulated industry must be reasonable under the three *Burger* requirements.¹²⁴ The test for reasonableness differs from the *Katz* two-prong test because an individual's reasonable expectation of privacy is significantly lessened in the context of a pervasively regulated industry.¹²⁵ In the context of administrative searches: (1) the regulatory scheme must further a "substantial" government interest; (2) warrantless inspections must be "necessary to further the regulatory scheme"; and (3) the "inspection program, in terms of certainty and regularity of its application," is a "constitutionally adequate substitute for a warrant."¹²⁶ Although the United States Supreme Court has not analyzed the constitutionality of warrantless searches of PDMPs, numerous state courts have applied the three-part *Burger* analysis to laws similar to that of the 2017 Rhode Island law.¹²⁷

a. *The PDMP is a Regulatory Scheme that Furthers a Substantial Government Interest*

Courts have recognized that the government has a substantial interest in regulating areas that pose a threat to public welfare.¹²⁸

prescription opioid abuse is a health epidemic. Joanna Shepherd, *Combating the Prescription Painkiller Epidemic: A National Prescription Drug Reporting Program*, 40 AM. J. L. & MED. 85, 86 (2014); see also *Overdose Death Data*, *supra* note 4.

124. *New York v. Burger*, 482 U.S. 691, 702 (1987); see also *State v. Welch*, 624 A.2d 1105, 1111 (R.I. 1992).

125. See *Welch*, 624 A.2d at 1111.

126. *Burger*, 482 U.S. at 702 (quoting *Donovan v. Dewey*, 452 U.S. 594, 600, 602 (1981)).

127. See, e.g., *State v. Russo*, 790 A.2d 1132 (Conn. 2002); *State v. Stow*, 593 N.E.2d 294 (Ohio 1992); *State v. Welch*, 624 A.2d 1105 (Vt. 1992).

128. States such as Vermont, Connecticut, and Ohio have all recognized a strong government interest in the regulation of prescription drugs. See *Russo*, 790 A.2d at 1155; *Stow*, 593, N.E.2d at 300; *Welch*, 624 A.2d at 1111.

For example, in *Burger*, the United States Supreme Court found that New York had a substantial government interest in regulating the junkyard industry because the high rate of motor vehicle thefts were causing a significant economic burden on citizens.¹²⁹ Additionally, regarding warrantless searches of mining facilities, the Court stated: “[I]t is undisputed that there is a substantial [government] interest in improving the health and safety conditions in the Nation’s underground and surface mines . . . the mining industry is among the most hazardous in the country”¹³⁰

The PDMP furthers a substantial government interest in regulating opioids because the over-prescribing of opioids, which often leads to overdose deaths, can be addressed by regulating and controlling the prescription drug industry through the PDMP. Beyond crime, Rhode Island’s opioid problem negatively affects its citizens at an increasing rate, and the medical and prescription drug industries are directly associated with this problem.¹³¹ The 2017 Rhode Island law ensures that all prescribing physicians and dispensing pharmacists make informed decisions while treating their patients because, under its requirements, physicians and pharmacists must consult the PDMP prior to prescribing an opioid.¹³² Absent the PDMP, it would be significantly more difficult to prosecute over-prescribing doctors, “pill-mill” pharmacies, and opioid-abusing patients. The PDMP allows government officials to monitor state-wide opioid use and track down bad actors. Therefore, it is difficult to deny that Rhode Island’s PDMP law furthers an important governmental interest in combatting the opioid crisis in the state.

b. Warrantless Searches of Rhode Island’s PDMP Are Necessary to Further the Regulatory Scheme

Turning to the second *Burger* requirement, warrantless

129. *Burger*, 482 U.S. at 708.

130. *Donovan*, 452 U.S. at 602; *see also* *United States v. Biswell*, 406 U.S. 311, 315 (1972) (concluding regulation of firearms to prevent crime furthered a substantial government interest).

131. *C.f. Burger*, 482 U.S. at 708 (concluding that the high rate of vehicle theft in New York was a major societal problem that placed enormous economic and personal burdens on its citizens).

132. 21 R.I. GEN. LAWS § 21-28-3.32(m) (Supp.2017).

searches must be necessary to further the regulatory scheme.¹³³ In this context, the United States Supreme Court has often deferred to determinations made by the legislature. For example, in *Donovan*, the Court deferred to the legislature's decision to authorize warrantless searches of mining facilities, stating: "[I]f an inspection is to be effective and serve as a credible deterrent, unannounced, even frequent inspections are essential. In this context, the prerequisite of a warrant could easily frustrate inspection."¹³⁴ Likewise, the Vermont Supreme Court deferred to the legislature's determination that warrantless searches are necessary to effectuate the deterrent effect of prescription drug regulations.¹³⁵

Looking to the 2017 Rhode Island law, the Rhode Island General Assembly determined that it was necessary to discard the warrant requirement for PDMP searches. The RIAG expressly stated that warrantless searches are necessary to further the effectiveness of the PDMP.¹³⁶ The RIAG further stated a warrant requirement significantly hampers its ability to investigate "pill-mills" and doctor-shopping patients.¹³⁷ On the other side, representatives from the ACLU and various medical associates testified in strong opposition to the then-proposed law before the Senate Judiciary Committee.¹³⁸ The Rhode Island General Assembly had ample evidence to make an informed decision regarding warrantless access by law enforcement to PDMP information. Thus, a court deferring to the legislature would find that a law authorizing warrantless searches of Rhode Island's PDMP is necessary to ensure the effectiveness of prescription drug regulations.

133. *Burger*, 419 U.S. at 702.

134. *Donovan*, 452 U.S. at 603 (quoting *Biswell*, 406 U.S. at 316) (alteration in original) (internal quotations omitted).

135. *State v. Welch*, 624 A.2d 1105, 1112 (Vt. 1992) (quoting *Burger*, 482 U.S. at 710).

136. See *An Act Relating to Food and Drugs — Uniform Controlled Substances Act: Hearing on S. 656 Before the S. Comm. on Jud.*, 2017 Leg. Sess. (R.I. 2017).

137. *Id.*

138. *Id.*

c. The PDMP Regulatory Scheme is a Constitutionally Adequate Substitute for a Warrant

Under the third *Burger* requirement, in order to be considered a constitutionally adequate substitute for a warrant, the law must perform the two basic functions of a warrant: (1) it must advise the owner that the search is being made pursuant to the law and has a properly defined scope; and (2) it must limit the discretion of the inspecting officers and have a properly defined scope.¹³⁹

Regarding the first prong, the Vermont Supreme Court in *Stow* stated, “the inspection scheme provides an adequate substitute for a warrant, because these provisions are ‘sufficiently comprehensive and defined that the owner of commercial property cannot help but be aware that his property will be subject to periodic inspections undertaken for specific purposes.’”¹⁴⁰ Under the 2017 Rhode Island law, prescribers are sufficiently notified that a search is being made in accordance with the law because all prescribers in Rhode Island are required to register with the PDMP in order to obtain a prescribing license.¹⁴¹ Moreover, the bottom of the PDMP registration form has a separate section pertaining to the PDMP’s functions and requirements.¹⁴² Thus, prescribing physicians and pharmacists have knowledge of their record-keeping obligations and are aware that inspections of prescription records in the PDMP may occur.

In addition, the scope of the Rhode Island law is narrowly tailored—only authorizing the MFPAU to conduct warrantless searches of the PDMP upon submission of a written request to the RIDOH.¹⁴³ The United States Supreme Court in *Patel* determined that a municipal ordinance allowing warrantless searches of hotel records was too broad because it failed “sufficiently to constrain police officers’ discretion as to which

139. *Burger*, 482 U.S. at 711.

140. *Stow*, 593 N.E.2d at 300–01.

141. *Prescription Drug Monitoring Program*, *supra* note 7. In response to the crisis, Rhode Island Governor Raimondo stated: “Achieving 100% enrollment in our [PDMP] is an important milestone, and we will continue to set the bar high to ensure that providers on the frontlines of Rhode Island’s overdose crisis are actively using the system to keep their patients safe.” Gov. Gina Raimondo, *supra* note 108.

142. *Prescription Drug Monitoring Program*, *supra* note 7.

143. 21 R.I. GEN. LAWS § 21-28-3.32(m) (Supp. 2017).

hotels to search and under what circumstances.”¹⁴⁴ On the other hand, the court in *Welch* found that a regulatory scheme authorizing warrantless searches was narrowly tailored because it limited warrantless inspections to certain law enforcement officers.¹⁴⁵ Therefore, the 2017 Rhode Island law is consistent with the Vermont Supreme Court’s line of reasoning. Furthermore, the 2017 Rhode Island law requires that the request for PDMP information be pursuant to an active investigation and does not allow unfettered access to prescription records.¹⁴⁶ The time, place, and scope of the Rhode Island law is sufficiently limited to serve as a constitutionally adequate substitute for a warrant.

In conclusion, the 2017 Rhode Island law satisfies the requirements of the administrative search exception delineated by the United States Supreme Court. As a result, warrantless searches of the PDMP by law enforcement do not violate the constitutional rights of the prescribers whose records are obtained pursuant to the 2017 Rhode Island law.

CONCLUSION

Rhode Island lawmakers are faced with an epidemic that continues to pose a serious risk to the welfare of the state. The 2017 Rhode Island law strikes a balance between protecting the privacy of prescription information and providing law enforcement officials with effective tools to combat the opioid epidemic in Rhode Island. This Comment has shown that the privacy protections afforded by the Fourth Amendment are not triggered by warrantless searches of Rhode Island’s PDMP. The 2017 Rhode Island law will help solve the opioid crisis and will withstand constitutional challenges brought under the Fourth Amendment.

144. *Los Angeles v. Patel*, 135 S. Ct. 2443, 2456 (2015).

145. *State v. Welch*, 624 A.2d 1105, 1112 (Vt. 1992). Regarding the third prong, the court also stated: “Pharmacists may not dispense drugs without obtaining a license and this necessarily implies knowledge of their record-keeping obligations.” *Id.*

146. § 21-28-3.32(a)(5).