No. 19-1243

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

UNITED STATES DEPARTMENT OF JUSTICE,
Petitioner–Appellee,

v.

MICHELLE RICCO JONAS,
Respondent–Appellant.

ON APPEAL FROM A JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW HAMPSHIRE

BRIEF OF *AMICI CURIAE* AMERICAN CIVIL LIBERTIES UNION, AMERICAN CIVIL LIBERTIES UNION OF NEW HAMPSHIRE, AMERICAN CIVIL LIBERTIES UNION OF MAINE, AMERICAN CIVIL LIBERTIES UNION OF MASSACHUSETTS, AMERICAN CIVIL LIBERTIES UNION OF PUERTO RICO, AMERICAN CIVIL LIBERTIES UNION OF RHODE ISLAND[a] • “-Î½’Ž¶ç½ £¦<y

ACLU of New Hampshire Foundation
18 Low Avenue
Concord, NH 03301
T: (603) 224-5591
gilles@aclu-nh.org
henry@aclunh.org

Counsel for Amici Curiae;
Additional counsel listed on next page

Nathan Freed Wessler
First Cir. Bar No. 1188344
Brett Max Kaufman
American Civil Liberties Union Foundation
125 Broad Street, 18th Floor
New York, NY 10004
T: (212) 549-2500
nwessler@aclu.org

Jennifer Stisa Granick
American Civil Liberties Union Foundation
39 Drumm Street
San Francisco, CA 94111
T: (415) 343-0750
jgranick@aclu.org

Zachary L. Heiden
First Cir. Bar No. 99242
Emma E. Bond
First Cir. Bar No. 1181389
American Civil Liberties Union of Maine
121 Middle Street, Suite 200
Portland, Maine 04103
T: (207) 619-6224
zheiden@aclumaine.org
ebond@aclumaine.org

William Ramirez
First Cir. Bar No. 6111
American Civil Liberties Union of Puerto Rico
Union Plaza, Suite 1105
416 Ave. Ponce de Leon
San Juan, PR 00918
T: (787) 753-8493
wramirez@aclu.org

CORPORATE DISCLOSURE STATEMENT

Amici curiae are non-profit entities that do not have parent corporations. No publicly held corporation owns 10 percent or more of any stake or stock in *amici curiae*.

/s/ Nathan Freed Wessler

Nathan Freed Wessler

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes and Regulations

Other Authorities

* Pursuant to Local Rule 32.2, *amici* note that these articles have been accepted for publication but not yet formally published, although they are available online. These articles are relevant to *amici*'s argument and are likely to be of aid to the Court. Both articles address the impact of the Supreme Court's decision in *Carpenter v. United States*, 138 S. Ct. 2206 (2018), on the Fourth Amendment issues in this case. Because *Carpenter* was decided just last summer, there has not been sufficient time for law journal articles about the case to make it all the way to final publication.

INTEREST OF *AMICI CURIAE*[1]

the First Circuit maintains a PDMP, the privacy protections for which will be affected by the outcome of this case.

The New Hampshire Medical Society ("NHMS"), founded in 1791, is dedicated and committed to advocating for patients, physicians, and the medical profession, as well as health-related rights, responsibilities and issues for the betterment of public health in the Granite State. The NHMS was highly involved in the development and implementation of the legislation and regulations for New Hampshire's PDMP, including efforts to protect sensitive medical records from warrantless search by law enforcement.

SUMMARY OF ARGUMENT

The prescription records at issue in this case

to the closely regulated industry exception to the warrant requirement. Rather than inspecting particular pharmacies for regulatory compliance, the Drug Enforcement Administration ("DEA") in this case seeks to conduct a criminal investigative search of a state agency's secure database containing confidential records from every pharmacy in the state. Such a search is untethered from the rationales behind any exception to the warrant requirement.

Finally, Appellant Michelle Ricco Jonas ("Jonas") properly raises Fourth Amendment arguments in this case. As custodian of the PDMP and recipient of the DEA's subpoena, she is entitled to argue in her own right that the subpoena is unreasonable under the Fourth Amendment. She is also entitled to assert the Fourth Amendment rights of individuals with records in the PDMP, because she has a close relationship with them and they are prevented from doing so themselves by lack of notice of the subpoena.

ARGUMENT

I. People Have a Reasonable Expectation of Privacy in Their Sensitive Medical Information Held in Prescription Drug Monitoring Program Databases.

Where an individual has a reasonable expectation of privacy in an item or location to be searched, the search is "'*per se*subprtinabn8.7(th)8.4 -24yseShel

Here, both factors favor the conclusion that there is a reasonable expectation of privacy in the PDMP records sought by the DEA, and thus that the third-party doctrine does not apply. Indeed, even before *Carpenter*, the District of Oregon correctly applied and distinguished *Miller* and *Smith*, concluding that the sensitivity of PDMP records and the lack of voluntariness in their creation and conveyance mean

her consent." *Ferguson v. City of Charleston*, 532 U.S. 67, 78 (2001). That is so notwithstanding that the records are held by a third party—the hospital —rather than by a patient themselves. Other courts have likewise held that there is a reasonable expectation of privacy in medical records in the custody of third parties. *See, e.g.*, *Tucson Woman's Clinic v. Eden*, 379 F.3d 531, 550 (9th Cir. 2004) (requiring warrant for search of medical records in abortion clinic because "all provision of medical services in private physicians' offices carries with it a high expectation of privacy for both physician and patient"); *Doe v. Broderick*, 225 F.3d 440, 450 (4th Cir. 2000) 20i.TJ 0 T,

chosen course of treatment, her diagnosis, and even the stage or severity of her disorder or disease. Thus, this Court's observation that people "have significant

These protections are part of an extensive historical tradition, as "[m]edical records, of which prescription records form a not insignificant part, have long been treated with confidentiality." *Or. PDMP*, 998 F. Supp. 2d at 964. The Oath of Hippocrates, originating in the fourth century B.C.E., required physicians to maintain patient secrets. Bernard Friedland, *Physician-Patient Confidentiality*, 15 J. Legal Med. 249, 256 (1994). In American medical practice, a requirement to preserve the confidentiality of patient health information was included in the earliest codes of ethics of American medical societies in the 1820s and 1830s, the first Code of Medical Ethics of the American Medical Association in 1847, and every subsequent edition of that code, in the ethical codes of other health professionals, including pharmacists, and in the numerous state statutes recognizing the doctor–patient privilege. *See generally* Robert Baker, *Before Bioethics: A History of American Medical Ethics from the Colonial Period to the Bioethics Revolution* (2013); Am. Med. Ass'n, Code of Medical Ethics Opinion 3.2.1: Confidentiality, https://www.ama-assn.org/delivering-care/ethics/confidentiality; Am. Pharmacists Ass'n, Code of Ethics § II, https://www.pharmacist.com/code-ethics; N.H. Rev. Stat. Ann. § 329:26 (physician-patient privilege). Today, virtually all patients (97.2%) believe that

health care providers have a "legal and ethical responsibility to protect patients' medical records."[3]

The strong and enduring guarantees of the confidentiality of patients' medical information are

> essential to the effective functioning of the health and public health systems. Patients are less likely to divulge sensitive information to health professionals if they are not assured that their confidences will be respected. The consequence of incomplete information is that patients may not receive adequate diagnosis and treatment of important health conditions.

Lawrence O. Gostin, *Health Information Privacy*, 80 Cornell L. Rev. 451, 490–91 (1995). The consequences of law enforcement gaining easy access to medical records are especially harmful. As one court has explained, "[p]ermitting the State unlimited access to medical records for the purposes of prosecuting the patient

(citation omitted). Moreover, once a person has sought care, New Hampshire law requires pharmacists to report all prescriptions for schedule II–IV drugs to the PDMP. N.H. Rev. Stat. Ann. § 318-B:33(III). Thus, apart from foregoing care, "there is no way to avoid leaving behind a trail of [medical] data." *Carpenter*, 138 S. Ct. at 2220. "As a result, in no meaningful sense does the [patient] voluntarily '8.5(he1(y)8.212.2(om)(a)3,6(nin)5(a)12.1 .6(t)8.56(e)3.6((s)8.4(i(t,)6.kTw -27.795 -2.204 TTv

(forthcoming 2019), *available at* https://osf.io/preprints/lawarxiv/bsedj (discussing factors). Those factors apply with full force to the records in the PDMP.

1. "Deeply revealing nature," 138 S. Ct. at 2223: Like CSLI, PDMP records "provide[] an intimate window into a person's life." *Id*. at 2217. Knowing what medications a person takes, and thus what medical conditions they have, is tremendously revealing. *See supra* Part I.A. That is why people consider information about the "state of their health and the medicines they take" to be among the most private information about them, deeming it more sensitive even than the "details of [their] physical location over a period of time" at issue in *Carpenter*. Mary Madden, *Americans Consider Certain Kinds of Data to be More Sensitive than Others*, Pew Research Center (2014), https://www.pewinternet.org/2014/11/12/americans-consider-certain-kinds-of-data-to-be-more-sensitive-than-others.

2. "Depth, breadth, and comprehensive reach," 138 S. Ct. at 2223: The Supreme Court observed that CSLI differs from other more limited kinds of location data because it constitutes "an all-encompassing record of the holder's whereabouts," *id*. at 2217, because it is "continually logged for all of the 400 million devices in the United States—not just those belonging to persons who might happen to come under investigation," *id*. at 2218, and because the data is retained—and therefore accessible to police—for years,

contains not just a smattering of recent prescriptions filled by a particular pharmacist, but an "all-encompassing record," *id*. at 2217, of every qualifying controlled substance prescription filled by every pharmacist in New Hampshire for every New Hampshire resident, which is retained in the system for three years. N.H. Rev. Stat. Ann. § 318-B:32(III). "[T]his newfound tracking capacity runs against everyone," *Carpenter* 138 S. Ct. at 2218, and provides a window into people's most closely held "privacies of life," *id*. at 2214 (citation omitted).

3. "Inescapable and automatic nature of its collection,"

government that existed when the Fourth Amendment was adopted," *id.* at 2214 (alteration in original), a warrant is required.

II. The Closely Regulated Industry Exception to the Warrant Requirement Does Not Apply.

Citing this Court's opinion in *United States v. Gonsalves*, 435 F.3d 64 (1st Cir. 2006), the federal government argued below that there is a reduced expectation of privacy in PDMP records because pharmacies are a closely regulated industry. Appellant's App. 137–38. However, neither *Gonsalves* nor the logic of the closely regulated industry exception to the warrant requirement bear the weight the federal government places on them.

Under the closely regulated industry exception, warrantless administrative inspections are permissible only when they are "necessary" to further a substantial government interest. *Gonsalves*, 435 F.3d at 67. That necessity is satisfied by "the need for random and surprise inspections," *id*. at 68, in order to avoid potential disappearance of evidence during the delay required to obtain a warrant. *See New York v. Burger*, 482 U.S. 691, 710 (1987) ("Because stolen cars and parts often pass quickly through an automobile junkyard, 'frequent' and 'unannounced' inspections are necessary in order to detect them."). But there is no such risk of disappearance or alteration of evidence here, as the records sought are held securely in a state database out of reach of any meddling hands. Warrantless access is simply not necessary to further the government's investigative interests.

individual privacy here is significant, and no exception to the warrant requirement applies. *See supra*

database of private medical information from many thousands of people across the state. The cases address searches of discrete commercial enterprises, and so do not govern here.

III. Jonas May Argue that Under the Fourth Amendment the DEA Must Obtain a Warrant before Demanding PDMP Records.

The DEA argued below that Jonas may not assert the Fourth Amendment privacy interests of the individuals whose information the agency seeks from the PDMP in arguing that a warrant is required to access the database. That argument is incorrect on two counts.

A. Jonas may vindicate her own Fourth Amendment interests.

First, as the recipient of the subpoena and custodian of the PDMP records, Jonas is entitled to argue that the subpoena is unreasonable under the Fourth Amendment. *See, e.g.*, *Sturm, Ruger, & Co.*, 84 F.3d at 3 ("the Fourth Amendment is available to the challenger as a defense against enforcement of the subpoena"). It is true that typically the reasonableness of a subpoena is challenged on the ground that it is overly burdensome or seeks information not relevant to the investigation. *Id.* at 4. But in *Carpenter*, the Supreme Court explained that a subpoena is also unreasonable when it seeks a type of records in which people have "a legitimate privacy interest," 138 S. Ct. at 2222. There is no sound reason why Jonas should be permitted to make the former argument but not the latter.

Jonas is fully capable of making that argument and explaining to this Court why "society is prepared to recognize as reasonable," *id.* at 2213, the expectation of privacy in PDMP records. Indeed, every New Hampshire resident with prescription records in the PDMP is similarly situated for purposes of this case, as their records are protected equally by the State's statutory privacy and confidentiality protections.[6] As the recipient of the subpoena and custodian of the PDMP, Jonas is entitled to vindicate her own (and the State's) Fourth Amendment rights by arguing that the DEA's subpoena is a per se unreasonable method of requesting PDMP records, and that a warrant is required instead.

B. Jonas may raise New Hampshire patients' Fourth Amendment interests.

Second, under the doctrine of third-party standing, Jonas may properly raise the privacy interests of individuals whose records reside in the PDMP.[7] The

[6] In *Carpenter*, the Court made no inquiry into Mr. Carpenter's actual or subjective belief about whether the records should be private, instead focusing on the nature of the records in general and all they can reveal. 138 S. Ct. at 2217–19. Moreover, this case is not one where disputed facts about the subjective expectation of privacy of a particular suspect might matter, and thus where the suspect must proffer such facts. *See, e.g.*, *Minnesota v. Carter*, 525 U.S. 83, 90–91 (1998).

[7] *Amici* argue here that, as custodian of the PDMP records, Jonas may challenge the constitutionality of the DEA's subpoena, separate and apart from any entitlement of the State invoke *parens patriae* standing. *See* Appellant's Br. 42–44. Thus, even if the federal government is right that "[t]he action here . . . is not a suit against the State," Appellant's App. 130, and thus that the *parens patriae* doctrine cannot apply, *id.* at 135 n.1, Jonas may still properly challenge the constitutionality of the subpoena under the Fourth Amendment.

association's banks "ha[d] engaged or will engage in a transaction involving more than $10,000 in currency." *Id.*[8]

Second, some courts have erroneously pointed to cases applying the Fourth Amendment's exclusionary rule as establishing a general rule that "a plaintiff may not assert the Fourth Amendment rights of another person." *Microsoft Corp. v. DOJ*, 233 F. Supp. 3d 887, 913 (W.D. Wash. 2017) (citing *Rakas v. Illinois*, 439 U.S. 128 (1978), and *Alderman v. United States*, 394 U.S. 165 (1969)). To be sure, third parties may not invoke the *exclusionary rule* to suppress evidence that was obtained in violation of the privacy interests of others. *See, e.g.*, *Nat'l Cottonseed Prods. Ass'n v. Brock*, 825 F.2d 482, 491 (D.C. Cir. 1987). But that limitation is tied to the particular *remedy* of evidentiary suppression. *See, e.g.*, *United States v. Salvucci*, 448 U.S. 83, 86–89 (1980). The supposed principal authority for that proposition—*Rakas*—explicitly (and solely) concerned the costs and benefits of the exclusionary rule. *See* 439 U.S. at 137–38 ("Since our cases generally have held that one whose Fourth Amendment rights are violated may successfully suppress evidence obtained in the course of an illegal search and seizure,

[8] The Court further explained that "the Fourth Amendment claims of the depositor[s] may not be considered on the record before us," and that the association could not "vicariously assert such Fourth Amendment claims on behalf of bank customers in general." *Id.* at 69. The emphasis in that sentence is on "*in general*," rather than on "vicariously." The Court was merely explaining that it would not address an insufficiently pled Fourth Amendment claim—not that the association could *never* bring such a claim.

himself in order to *protect the rights of that other person*. That is classic third-party standing territory.

Third, and relatedly, there is no reason to have a special rule of third-party standing for Fourth Amendment claims writ large. The decision in *In re Directives* makes clear that there is no blanket rule prohibiting "vicarious" Fourth Amendment arguments. In a case closely analogous to this one, the government issued a national-

Amendment privacy rights of individuals whose private medical information resides in the database, and whose privacy and confidentiality Jonas is statutorily charged with protecting, N.H. Rev. Stat. Ann. § 318-B:34(II), but who have no ability to challenge that impending harm. The Fourth Amendment arguments

Jennifer Stisa Granick
American Civil Liberties Union Foundation
39 Drumm Street
San Francisco, CA 94111
T: (415) 343-0750
jgranick@aclu.org

Gilles R. Bissonnette
First Cir. Bar No. 123868
Henry Klementowicz
First Cir. Bar No. 1179814
ACLU of New Hampshire Foundation
18 Low Avenue
Concord, NH 03301
T: (603) 224-5591
gilles@aclu-nh.org
henry@aclu-nh.org

Zachary L. Heiden
First Cir. Bar No. 99242
Emma E. Bond
First Cir. Bar No. 1181389
American Civil Liberties Union of Maine
121 Middle Street, Suite 200
Portland, Maine 04103
T: (207) 619-6224
zheiden@aclumaine.org
ebond@aclumaine.org

Matthew R. Segal
First Cir. Bar No. 1151872
Jessie J. Rossman
First Cir. Bar No. 1161236
American Civil Liberties Union Foundation of Massachusetts, Inc.
211 Congress Street
Boston, MA 02110

T: (617) 482-3170
msegal@aclum.org
jrossman@aclum.org

William Ramirez
First Cir. Bar No. 6111

ADDENDUM

Table of Medical Conditions Treated by Schedule II–IV Medications[11]

Medical Condition	Schedule II–IV Medications Approved for Treatment of Condition
Hormone replacement therapy for treatment of gender identity disorder/gender dysphoria	Testosterone
Weight loss associated with AIDS	Marinol (dronabinol), Cesamet (nabilone
Nausea & vomiting in cancer patients undergoing chemotherapy	Marinol (dronabinol), Cesamet (nabilone)
Trauma- and stressor-related disorders, including acute stress disorder and post-traumatic stress disorder (PTSD)	Xanax, Valium, Ativan, Lexotan, Librium, Traxene, Sepazon, Serax, Centrax, nordiazepam
Anxiety disorders and other disorders with symptoms of panic	Xanax, Valium, Ativan, Lexotan, Librium, Traxene, Sepazon, Serax, Centrax, nordiazepam
Alcohol addiction withdrawal symptoms	Serax/Serenid-D, Librium (chlordiazepoxide)
Opiate addis disor	

	Vicodin, oxycodone (including Oxycontin and Percocet)
Epilepsy and seizure disorders	Nembutal (pentobarbital), Seconal (secobarbital), clobazam, clonazepam, Versed, Fycompa (perampanel)

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 29(a)(5) because it contains 6,493 words, excluding the parts of the brief exempted by the Rules.
2. This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14-point Times New Roman.

Dated: May 29, 2019

/s/ Nathan Freed Wessler

Nathan Freed Wessler

CERTIFICATE OF SERVICE

I hereby certify that on May 29, 2019, I electronically filed the foregoing *Amici Curiae* Brief for the American Civil Liberties Union, American Civil Liberties Union of New Hampshire, American Civil Liberties Union of Maine, American Civil Liberties Union of Massachusetts, American Civil Liberties Union of Puerto Rico, American Civil Liberties Union of Rhode Island, and New Hampshire Medical Society with the United States Court of Appeals for the First Circuit by using the CM/ECF system. I certify that the following parties or their counsel of record are registered as ECF Filers and that they will be served by the CM/ECF system:

Seth R. Aframe, Counsel for Petitioner–Appellee

Lawrence M. Edelman, Counsel for Respondent–Appellant

Anthony J. Galdieri, Counsel for Respondent–Appellant

Dated: May 29, 2019

/s/ Nathan Freed Wessler

Nathan Freed Wessler