No. _____

In the
Supreme Court of the United States

GEORGE BEECHER,

Petitioner,

— v. —

STATE OF NEW JERSEY,

Respondent.

On Petition for Writ of Certiorari to the New Jersey Supreme Court

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QUESTION PRESENTED

Did the New Jersey Supreme Court err in adopting a ruling that a defendant prescriber does not have a reasonable expectation of privacy in patient prescription records maintained by the New Jersey Prescription Monitoring Program (NJPMP) and in failing to invalidate N.J.S.A. 45:1-46i(8)?

PARTIES

Petitioner George Beecher and Respondent State of New Jersey are parties to this matter.

LIST OF RELATED PROCEEDINGS

State v. Beecher/State v. Stoveken, Supreme Court of New Jersey, No. C-220 (084636). Certification denied November 13, 2020.

State v. Beecher/State v. Stoveken, Superior Court of New Jersey, Appellate Division, No. A-1753-18T1/A-1985-18T1. Judgment entered June 12, 2020.

State v. Beecher/State v. Stoveken, Superior Court of New Jersey, Law Division, Criminal Part, County of Middlesex, Indictment Nos. 16-08-0129-S/16-08-130-S. Order denying Motion to Suppress entered May 22, 2017.

State v. Beecher, Superior Court of New Jersey, Law Division, Criminal Part, County of Middlesex, Indictment No. 16-08-0129-S. Judgment of Conviction entered December 4, 2018.

TABLE OF CONTENTS

TABLE OF APPENDIX

TABLE OF AUTHORITIES

Cases

OPINIONS BELOW

The Order of the Supreme Court of New Jersey is published at 244 N.J. 372 (2020) and is reprinted at App. 1a. The opinion of the Superior Court of New Jersey, Appellate Division is published at 464 N.J. Super. 86 (App. Div. 2020) and is reprinted at App. 2a. The opinion of the Superior Court of New Jersey, Law Division – Criminal Part, Middlesex County is unpublished and is reprinted at App. 29a.

BASIS FOR JURISDICTION

The Supreme Court of New Jersey denied a Petition for Certification on November 13, 2020. App.1a. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated..." U.S. Const. Amend. IV.

STATUTE INVOLVED

"The division may provide online access to prescription monitoring information, or may provide access to prescription monitoring information through any other means deemed appropriate by the director, to the following persons... a properly

convened grand jury pursuant to a subpoena properly issued for the records." N.J.S.A. 45:1-46i(8).

STATEMENT OF THE CASE

In May of 2015, the State of New Jersey requested, by way of sixteen (16) grand jury subpoenas, access to information relating to Dr. George Beecher that was in the custody of the NJPMP. The NJPMP is a confidential database that maintains detailed practitioner and patient information concerning prescriptions of controlled dangerous substances. Similar databases, generally referred to as Prescription Drug Monitoring Programs (PDMPs), exist in forty-nine (49) states and five (5) territories.[1] The materials returned in response to New Jersey's requests formed the basis for the warrants that resulted in Dr. Beecher's prosecution.

Dr. Beecher and several co-defendants moved before the trial court for the suppression of the seized NJPMP records based on the argument that N.J.S.A. 45:1-46 does not provide adequate privacy protections when law enforcement is seeking sensitive medical information. Specifically, the provision utilized in this case provides: "The division may provide online access to prescription monitoring information, or may provide access to prescription monitoring information through any other means deemed appropriate by the director, to the following persons... a properly convened grand jury pursuant to a subpoena properly

[1] Prescription Drug Monitoring Program Training and Technical Assistance Center, State PDMP Profiles and Contacts (https://www.pdmpassist.org/State)

issued for the records." N.J.S.A. 45:1-46i(8). The trial court ruled on May 22, 2017 that it was "satisfied that the PMP statute provides sufficient constitutional protection of individual's privacy rights in prescription monitoring information held by the Division of Consumer Affairs pursuant to N.J.S.A. 45:1-45 *et seq*." App.27a–App.28a. The trial court also acknowledged that "New Jersey law recognizes that individuals retain a privacy interest in some types of information disclosed to third parties," but found that the relevancy standard was sufficient to protect those interests. App.22a.

The same issue was raised before the New Jersey Superior Court, Appellate Division by way of appeal. On June 12, 2020, that court ruled:

> In applying these constitutional standards to the PMP statute, we hold that the relevancy standard applies when the government is seeking information about a prescriber. Beecher was a prescribing doctor. Stoveken was neither the prescriber nor the patient receiving the medicine. Consequently, neither defendant had a strong privacy interest in the patient information and their reasonable expectations of privacy concerning the information in the PMP was limited.

App.14a. The court further found that: "The Fourth Amendment of the federal Constitution generally does not protect information that has been turned

over to a third party. *See United States v. Miller*, 425 U.S. 435, 442 (1976)." App.13a.

The issue was again raised by way of Certification to the Supreme Court of New Jersey, which was denied on November 13, 2020. App.1a.

REASONS FOR ALLOWANCE OF THE WRIT

I. The New Jersey Supreme Court Erred in Adopting a Ruling that Dr. Beecher Does Not Have a Reasonable Expectation of Privacy in Patient Prescription Records Maintained by the NJPMP and in Failing to Invalidate N.J.S.A. 45:1-46i(8)

The Fourth Amendment protects against "unreasonable searches and seizures." U.S. Const. amend. IV. "[S]earches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment — subject only to a few specifically established and well-delineated exceptions." *Katz v. United States*, 389 U.S. 347, 357 (1967). This Court also recognized in *Katz* that an unconstitutional intrusion does not have to be physical; rather, "the Fourth Amendment protects people – and not simply 'areas.'" *Id.* at 352-353. Still, in order for a person to be afforded Fourth Amendment protection, that person must have a reasonable expectation of privacy in the place being searched. *United States v. Ziegler*, 474 F.3d 1184, 1189 (9th Cir. 2007); *In re Gimbel*, 77 F.3d 593, 599 (2d Cir. 1996) (holding that the Fourth Amendment does not allow the use of an

administrative subpoena where "a subpoena respondent maintains a reasonable expectation of privacy in the materials sought by the subpoena").

A. Contrary to the New Jersey Supreme Court's Adopted Ruling, *Carpenter v. United States* Provides that Dr. Beecher has a Reasonable Expectation of Privacy in Patient Prescription Records Maintained by the NJPMP Pursuant to the Third-Party Doctrine

In this case, the New Jersey Supreme Court adopted the ruling that Dr. Beecher had no expectation of privacy in patient prescription records maintained by a third-party, namely the NJPMP. App.1a; App.13a. Indeed, this Court has long recognized that "[a] person has no legitimate expectation of privacy in information he voluntarily turns over to third parties." *Smith v. Md.*, 442 U.S. 735, 743-744 (1979) (citing *United States v. Miller*, 425 U.S. 435, 442-444 (1976); *Couch v. United States*, 409 U.S. 322, 335-336 (1973); *United States v. White*, 401 U.S. 745, 752 (1971) (plurality opinion); *Hoffa v. United States*, 385 U.S. 293, 302 (1966); *Lopez v. United States*, 373 U.S. 427 (1963)).

However, in *Carpenter v. United States*, 138 S.Ct. 2206 (2018), this Court explored its prior precedent in a manner that recognized that the "third-party doctrine" does not command the elimination of one's expectation of privacy and thus the abdication of one's Fourth Amendment protections. This Court noted that "*Smith* and *Miller*, after all, did not rely solely on the act of sharing," but

looked to particular circumstances to determine whether there was a legitimate expectation of privacy. *Id.* at 2219. In doing so, recognizing that cell-site location information is highly sensitive personal information that is transferred to a third-party, this Court found that a warrant is required for law enforcement to retrieve cell-site location information. *Id.* at 2221.[2]

One district court had channeled the spirit of *Carpenter* just a few years prior. Its ruling, however, did not relate to cell-site location information held by a third-party, but rather medical records held by a third-party. In *United States v. Ciancia*, the United States District Court for the Central District of California found:

> [G]iven the reasonable expectation of privacy that individuals and society attach to medical records containing highly personal material that are maintained by medical providers, this Court is persuaded that a *per se* rule permitting the search and seizure of

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[2] In his dissent in *Carpenter*, Justice Gorsuch provided an alternative analysis that moved beyond "reasonableness" as a barometer for privacy expectations, instead looking to the language of the Fourth Amendment to determine whether its protections for "papers and effects" could serve as a basis to protect a person's interest in information provided to a third-party. *Id.* at 2267-2272 (Gorsuch, J., dissenting). His "positive law" framework lends itself effortlessly to the issue at hand, as prescriptions, pieces of paper handed from doctor to patient to pharmacist, have only recently begun to be supplanted by technology.

> medical records from third parties, entirely free from Fourth Amendment scrutiny, is inappropriate.

No. CR 13-902 PSG, 2015 U.S. Dist. LEXIS 182567, *8 (C.D. Cal. Sep. 3, 2015). After acknowledging that there is a reasonable expectation of privacy in medical records held by third parties, the court declined to find a reasonable expectation of privacy in that case due to the defendant's "unique" circumstances relating to engaging in a public shooting at LAX airport. *Id.* at *9-10.

In this case, the circumstances that a court would consider in performing its analysis relate to the sensitivity of the medical records being provided to PDMPs established by statute throughout the country's states and territories. The Tenth Circuit and the Third Circuit have recognized how deeply personal prescription records are. *See Douglas v. Dobbs*, 419 F.3d 1097, 1102 (10th Cir. 2005), *cert. denied*, 546 U.S. 1138 (2006) ("Information contained in prescription records. . .may reveal other facts about what illnesses a person has[.]"); *Doe v. Southeastern Pennsylvania Trans. Auth.*, 72 F.3d 1133, 1138 (3d Cir. 1995), *cert. denied*, 519 U.S. 808 (1996) ("It is now possible from looking at an individual's prescription records to determine that person's illnesses. . .An individual using prescription drugs has a right to expect that such information will customarily remain private."). Given the breadth of types of drugs being monitored by the PDMPs, there is a long list of medical disorders that one can glean from the review of a person's PDMP records, "including nausea and

weight loss in cancer patients undergoing chemotherapy, weight loss associated with AIDS, anxiety disorders, panic disorders, posttraumatic stress disorder, alcohol addiction withdrawal symptoms, opioid addiction, testosterone deficiency, gender identity/gender dysmorphia, chronic and acute pain, seizure disorder, narcolepsy, insomnia, and attention deficit hyperactivity disorder." *See* Jennifer D. Oliva, Prescription-Drug Policing: The Right to Health-Information Privacy Pre- and Post-Carpenter, Duke Law Journal, Vol. 69, at 783-784 (Jan. 2020) (quoting Brief for Plaintiff-Intervenors-Appellees at 4, *Oregon Prescription Drug Monitoring Program v. U.S. Drug Enforcement Admin.*, 860 F.3d 1228 (9th Cir. 2017)).

In *Carpenter*, this Court was particularly sensitive to the ability of cell-cite location information to track a person's movements. The information that is required to be transmitted to the NJPMP reveals that too. N.J.A.C. 13:45A-35.3. Not only can anyone viewing the records see the details of where you live, but they can see what pharmacy you go to, on what day you visited that pharmacy to pick up your medication, what doctor you go to, and on what day you visited that doctor to be prescribed that medication. N.J.A.C. 13:45A-35.3.[3]

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[3] The depth of personal information required to be transmitted to the NJPMP in staggering:

> i. The surname, first name, and date of birth of the patient for whom the medication is intended; ii. The street address and telephone number of the patient; iii. The date that the medication is dispensed; iv. The number or designation identifying the prescription and the National

In *Carpenter*, this Court also discussed the "voluntariness" of the provision of cell-site location information to a carrier, in that carrying a cell phone is "indispensable to participation in modern society" and collects data "without any affirmative act on the part of the user beyond powering up." *Carpenter*, 138 S.Ct. at 2220. Those facts make it impossible for a person, in any "meaningful sense," to "voluntarily

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> Drug Code of the drug dispensed; v. The pharmacy permit number of the dispensing pharmacy; vi. The prescribing practitioner's name and Drug Enforcement Administration registration number; vii. The name, strength, and quantity of the drug dispensed, the number of refills ordered, and whether the drug was dispensed as a refill or a new prescription; viii. The date that the prescription was issued by the practitioner; ix. The source of payment for the drug dispensed; x. Identifying information for any individual, other than the patient for whom the prescription was written, who picks up the prescription, if the pharmacist has a reasonable belief that the person picking up the prescription may be seeking a controlled dangerous substance, in whole or in part, for any reason other than delivering the substance to the patient for the treatment of an existing medical condition. (1) For purposes of this subparagraph, "identifying information" includes the individual's first and last name, relationship to the patient, and, if available, the type of, and identification number on, a state or Federal government identification; and xi. Such other information, not inconsistent with Federal law, regulation, or funding eligibility requirements, as the Director determines necessary and that is set forth in the Data Collection Manual.

N.J.A.C. 13:45A-35.3.

'assume [ ] the risk'" of providing sensitive information. *Ibid.* (quoting *Smith*, 442 U.S. at 745).

Receiving prescribed medication is likewise "indispensable to participation in modern society." In some cases, it is indispensable to remain in society. The choice for a patient to forgo medication is no choice at all, just as a physician lacks a choice to fail to prescribe a patient medication to alleviate or cure a medical condition.

This Court has considered the concerns of patients about prescription information being released in the past, which "makes some patients reluctant to use, and some doctors reluctant to prescribe, such drugs even when their use is medically indicated." *Whalen v. Roe*, 429 U.S. 589, 600 (1977); *See also Ferguson v. City of Charleston*, 532 U.S. 67, 78 n.14 (2001).

The disclosure of symptoms or the writing of the prescription is the "powering up" in the *Carpenter* scenario. There is no otherwise "affirmative act" permitted by the regulation. In New Jersey "[a] pharmacy filling a prescription for a Schedule II, III, IV, or V controlled dangerous substance, for human growth hormone. . .or for gabapentin, in an outpatient setting, shall collect and electronically transmit to the Division's PMP vendor on a daily basis information for each prescription." N.J.A.C. 13:45A-35.3 (emphasis added). In New Jersey, voluntariness is not a part of the equation in any meaningful way.[4]

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[4] Recently, the Eleventh Circuit ruled that a prescribing doctor does not have a reasonable expectation of privacy in PDMP records, but did so on the basis that "[the doctor's] disclosure of his prescribing records to third parties was voluntary. [He] was

The New Jersey Supreme Court, despite the fact that *Carpenter* had been published two (2) years prior to the decision it adopted in this case, failed to rule in accordance with *Carpenter's* third-party doctrine ruling as it relates to having a reasonable expectation of privacy in highly sensitive personal information that is transferred to a third-party and the necessity of a warrant to obtain it.

In effect, the New Jersey Supreme Court's adopted ruling, by ignoring *Carpenter*, stripped *Carpenter* of its authority in this case on an important federal, constitutional question. In doing so, it also stripped Dr. Beecher of his reasonable expectation of privacy in patient prescription information maintained by the third-party NJPMP.

B. As a Prescriber, Dr. Beecher has a Reasonable Expectation of Privacy in Patient Prescription Records Maintained by the NJPMP

In this case, the New Jersey Supreme Court adopted the ruling that Dr. Beecher had no expectation of privacy in patient prescription records maintained by the NJPMP as a prescriber, and thus a relevancy standard was sufficient for seizure of the records. App.1a; App.9a. The federal courts are not in

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not required to participate in the PDMP system. Instead, [he] volunteered by enrolling as a participant in the automated system." *United States v. Gayden*, 977 F.3d 1146, 1152 (2020). Seeing as the prescription records in New Jersey are compelled rather than "shared," that ruling has no bearing on Dr. Beecher's case.

complete consensus as to how this important question of federal law should be resolved.

A few federal courts have relied upon the Supremacy Clause to permit the federal Drug Enforcement Agency (DEA) to retrieve information from state PDMP databases by administrative subpoena pursuant to the Controlled Substances Act (CSA), 21 U.S.C. § 801. *See Oregon Prescription Drug Monitoring Program v. U.S. Drug Enforcement Admin.*, 860 F.3d 1228 (9th Cir. 2017); *United States Dep't of Justice v. Utah Dep't of Commerce*, No. 2:16-cv-611, 2017 U.S. Dist. LEXIS 118470, 2017 WL 3189868 (D. Utah July 27, 2017); *United States Dep't of Justice v. Colo. Bd. Of Pharm, Civ*. No. 10-cv-0116-WYD-MEH, 2010 U.S. Dist. LEXIS 92778, 2010 WL 3547898 (D. Colo. Aug. 13, 2010), *rep. and rec. aff'd and adopted*, 2010 U.S. Dist. LEXIS 92704, 2010 WL 3547896 (Sept. 3, 2010); *United States v. Motley*, No. 3:19-cr-00026-LRH-WGC, 2020 WL 1076116, *4–7 (D. Nev. March 6, 2020).

The issue raised herein is purely based on a Fourth Amendment violation, rather than any action taken under the CSA, as the search and seizure in this case was performed by a state actor under state law. Thus, the Supremacy Clause is not triggered.

It is essential to note that the decision of the Ninth Circuit in the *Oregon* case addressed the Fourth Amendment issue raised therein purely as it related standing. The Ninth Circuit wrote: "We reverse without reaching the merits of the Fourth Amendment claim because Intervenors lack Article III standing to seek relief different from that sought by Oregon." *Id.* at 1231. In fact, the court was

sympathetic to the Fourth Amendment argument: "We acknowledge the particularly private nature of the medical information at issue here and thus do not question the seriousness of Intervenors' fear of disclosure. Nor do we imply that this concern is unreasonable," *Id.* at 1235. Dr. Beecher did not enter this case by way of motion to intervene. The fruits of the NJPMP search resulted in his prosecution. Thus, this ruling does not serve to preclude Dr. Beecher's claims with respect to the Fourth Amendment issue.

In fact, the lower court's ruling on the Fourth Amendment issue squarely supports the notion that prescribers have an expectation of privacy, specifically as it relates to PDMPs. In *Or. Prescription Drug Monitoring Program v. United States DEA,* 998 F. Supp. 2d 957 (D. Or. 2014), the United States District Court for the District of Oregon, Portland Division found that doctors have a "subjective expectation of privacy in [ ] prescribing information." *Id.* at 964. The court noted that a physician's "duty of confidentiality to his patients" leads to a reluctance to prescribe schedule II-IV drugs because it can be revealed to law enforcement. *Ibid.* "By reviewing doctors' prescribing information, the DEA inserts itself into a decision that should ordinarily be left to the doctor and his or her patient." *Ibid.* Given that society already recognizes the confidential nature of medical information, one should reasonably expect that such information would remain private.

A doctor's privacy interest in patient medical information is inexorably intertwined with a patient's. Both doctors and patients participate in the

generation of medical records, which the doctor then possesses and maintains. Doctors develop medical information collaboratively with the patient, both with the expectation that such information will remain confidential. Doctors are under an obligation to ensure that such information remains private pursuant to the Hippocratic Oath and the Patient and Physician Privilege. These protections exist so that any doctor be able to practice medicine with an open, honest dialogue with patients, which is necessary for the treatment of any single patient and for the furtherance of medicine as a collective scientific endeavor. Doctors practice medicine with the expectation that their interactions with patients will remain private because the practice of medicine is founded upon that expectation. Medicine cannot function without that confidentiality because patients would be less inclined to share accurate information with medical professionals if they knew it would not be kept in confidence. That basic principle goes beyond the fact that privacy is essential for a doctor's ability to run a business; that privacy is a societal necessity. If there were ever a time in modern history that should make that clear, it is now.

This Court has also recognized that patients and doctors have a privacy interest in prescription information and upheld the use of a prescription database after weighing those interests against the interests of the State of New York, basing its ruling on the extensive restrictions in the statute that would prevent the abuse of that system. *Whalen,* 429 U.S. at 598-607. In New Jersey, however, the option for law enforcement to use grand jury subpoenas provides no

adequate judicial oversight to prevent potential abuse.[5]

In *Kurtenbach v. S.D. AG*, 2018 U.S. Dist. LEXIS 53208 (D.S.D. Mar. 29, 2018), the district court did not reach the issue of the constitutionality of a PDMP search and seizure, but noted: "Post-*Whalen*, the Supreme Court has not specifically addressed whether medical records are constitutionally protected. However, a majority of the Circuit Courts of Appeals have concluded the constitutional right to privacy extends to medical and prescription records." *Id*. at 23-24 (citing *Doe v. New York*, 15 F.3d 264, 267 (2d Cir. 1994); *Doe v. Southeastern Pennsylvania Trans. Auth.*, 72 F.3d at 1137; *Anderson v. Romero*, 72 F.3d 518, 522 (7th Cir. 1995); *Doe v. Attorney General of the United States*, 941 F.2d 780, 795-796 (9th Cir. 1991); *Reno v. Doe*, 518 U.S. 1014 (1996); *A.L.A. v. West Valley City*, 26 F.3d 989, 990 (10th Cir. 1994); *Herring v. Keenan*, 218 F.3d 1171, 1175 (10th Cir. 2000), *cert. denied*, 534 U.S. 840 (2001); *Dobbs*, 419 F.3d at 1102; *Harris v. Thigpen*, 941 F.2d 1495, 1513

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[5] In New Jersey, grand jury subpoenas operate essentially as "office subpoenas" for law enforcement. They are issued with no judicial oversight and generally without the knowledge of a grand jury. Where a grand jury subpoena *duces tecum* is challenged a law enforcement officer must simply represent that a grand jury is sitting, the nature and subject matter of the investigation, and be able to "show that the documents subpoenaed bear some possible relationship, however indirect, to the grand jury investigation." *In re Grand Jury Subpoena Issued to Galasso*, 389 N.J. Super. 281, 296-297 (App. Div. 2006) 296-297. In the case of the retrieval of NJPMP records, there is no opportunity to quash the subpoena because they are issued without notice to the defendant. App.7a; App.27a.

(11th Cir. 1991); *Contra Jarvis v. Wellman*, 52 F.3d 125, 126 (6th Cir. 1995) (holding that constitutional right of privacy does not apply to a disclosure of medical records)).

In *Ferguson*, 532 U.S. at 79-85, this Court ruled that drug test results could not be provided by medical professionals to law enforcement absent consent or a warrant, despite having a laudable goal for doing so, because there exists a reasonable expectation of privacy in such medical information. This Court noted: "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." *Id.* at 79. To the Court, having those test results shared with law enforcement was particularly offensive to the Fourth Amendment.

In a different context, this Court has recognized that "[i]t may be assumed that, for many reasons, physicians have an interest in keeping their prescription decisions confidential." *Sorrell v. IMS Health*, 564 U.S. 552, 572 (2011).

The Ninth Circuit has recognized "[a]ll provision of medical services in private physicians' offices carries with it a high expectation of privacy for both physician and patient." *Tucson Women's Clinic v. Eden*, 379 F.3d 531, 550 (9th Cir. 2004). The Fourth Circuit has recognized that "a patient's expectation of privacy . . . in his treatment records and files maintained by a substance abuse treatment center is one that society is willing to recognize as objectively

reasonable." *Doe v. Broderick*, 225 F.3d 440, 450 (4th Cir. 2000).

On the contrary, one district court found that both physicians *and* patients "have a reduced expectation of privacy in the medical records regarding controlled substances as such records are relevant to the issue of whether there has been compliance with the CSA." *United States v. Zadeh*, Civil Action No. 4:14-CV-106-O, 2014 U.S. Dist. LEXIS 181500, *25 (N.D. Tex. Dec. 3, 2014).

Another district court found that a prescriber did not have an expectation of privacy in PDMP records retrieved pursuant to a court order. *United States v. Bereznak,* No. 3:18-CR-39, 2018 WL 1993904, *5 (M.D. Pa. Apr. 27, 2018).

Despite this overall lack of consensus the federal judiciary, there is wealth of case law supporting the notion that Dr. Beecher has a reasonable expectation of privacy in patient prescription information maintained by the NJPMP as a prescriber. That this issue remains unsettled, particularly in light of the ruling in *Carpenter*, provides a compelling reason for this Court to settle this important question of federal, constitutional law.

II. The Current, Incongruous System of PDMP Statutes Poses a Threat to the Fourth Amendment

The lack of judicial consensus as to what level of judicial oversight, if any, should be required for law enforcement to access PDMPs, is exacerbated by the

inconsistency between the PDMP laws in our states and territories; or, perhaps, it is a product of it.

Every state except Missouri has a state-wide PDMP and five (5) territories have them as well.[6] Existing PDMP laws are not consistent with respect to how law enforcement may retrieve PDMP records.

For example, Florida requires only an "active investigation" of "potential criminal activity. . .regarding controlled substances." Fla Stat. § 893.055(5)(e).

Texas limits the release of PDMP information to "the department or other law enforcement or prosecutorial official engaged in the administration, investigation, or enforcement of this chapter or another law governing illicit drugs in this state or another state, if the board is provided a warrant, subpoena, or other court order compelling the disclosure." Tex. Health & Safety Code § 481.076(a)(3).

New Hampshire allows for the provision of PDMP information to "[a]uthorized law enforcement officials on a case-by-case basis for the purpose of investigation and prosecution of a criminal offense when presented with a court order based on probable cause." N.H. Rev. Stat. Ann § 318-B:35(I)(b)(3).[7]

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[6] Prescription Drug Monitoring Program Training and Technical Assistance Center, State PDMP Profiles and Contacts (https://www.pdmpassist.org/State)

[7] In United States DOJ v. Jonas, No. 18-mc-56-LM, 2018 U.S. Dist. LEXIS 219569, *10-13 (D.N.H. Nov. 1, 2018), the United States District Court for the District of New Hampshire, relying upon the Ninth Circuit decision in the *Oregon* case, ruled that pursuant to the Supremacy Clause, the CSA preempted the state statute from requiring a federal agent to obtain a court order

Massachusetts requires that a law enforcement request for PDMP information "is in connection with a bona fide specific controlled substance or additional drug-related investigation and accompanied by a probable cause warrant issued pursuant to chapter 276 [of the Massachusetts Code]." ALM GL ch. 94C, § 24A(e)(4).

Kansas authorizes their board to release prescription monitoring program information to "(4) local, state and federal law enforcement or prosecutorial officials engaged in the administration, investigation or enforcement of the laws governing scheduled substances and drugs of concern subject to the requirements in K.S.A. 22-2502 [Kansas's Search Warrant Statute], and amendments thereto" as well as to "(6) persons authorized by a grand jury subpoena, inquisition subpoena or court order in a criminal action." K.S.A. 65-1685.

As a result, we have one (1) Fourth Amendment, fifty-four (54) databases that perform the same medical information-gathering function, and fifty-four (54) different state statutes governing how the Fourth Amendment applies to them.

To complicate matters further, are (1) the breadth of these databases, and (2) the sharing of information between them. First, "Americans filled 4,063,166,658 prescriptions at retail pharmacies in 2017 alone." *See* Jennifer D. Oliva, Prescription-Drug

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based on probable cause. The district court also addressed the Fourth Amendment argument and ruled that the Respondent did not have a reasonable expectation of privacy in PDMP records. That matter is currently the subject of an appeal with the First Circuit, which was filed on March 12, 2019 and given Docket No. 19-1243.

Policing: The Right to Health-Information Privacy Pre- and Post-Carpenter, Duke Law Journal, Vol. 69, at 784 (Jan. 2020). In New Jersey, as of January 20, 2020:

> The NJ PMP now contains records of more than 102 million prescriptions dispensed in New Jersey. Each record in the database contains over one hundred unique data elements including, but not limited to, the names and addresses of the patient, prescriber, and pharmacy; drug dispensing date; type, days' supply, and quantity of medication; and method of payment.

(AG Grewal Announces Enhancements to NJ PMP that Automatically Analyze Patient CDS History and Identify, Flag Potential Addiction Risks, https://www.nj.gov/oag/newsreleases20/pr20200116a.html).

Second, the New Jersey Attorney General made clear that this information is being shared across borders:

> Seventeen states/territories – Connecticut, Delaware, South Carolina, Rhode Island, Virginia, Minnesota, New York, Massachusetts, West Virginia, New Hampshire, Maine, Pennsylvania, Ohio, Vermont, North Carolina, Washington D.C., and Maryland – share data with the NJPMP.

Ibid. Not only is the volume of information stored in these databases staggering, containing – and sharing – information about a significant percentage of the population, but the states and territories that mandated that PDMPs be created, have different rules with respect to how the Fourth Amendment applies to law enforcement's retrieval of information from them. As it involves such an important question of federal law, the role of the Fourth Amendment in the seizure of sensitive medical information, it is a matter that should be settled by this Court.

CONCLUSION

Petitioner respectfully requests that the Court issue a writ of certiorari.

Respectfully submitted,

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