No. 20-7896

IN THE
SUPREME COURT OF THE UNITED STATES

JOHN MATTHEW GAYDEN, JR.,

***Petitioner*,**

v.

UNITED STATES OF AMERICA,

***Respondent*.**

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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REPLY IN SUPPORT OF CERTIORARI

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REPLY IN SUPPORT OF CERTIORARI

The government provides no persuasive reason to deny certiorari on either issue here. As to law enforcement's warrantless search of the PDMP, the government does not dispute that the issue is one of nationwide importance and that the decision below has serious consequences for medical privacy because it permits law enforcement to scrutinize the aggregate of a doctor's prescribing decisions in pursuit of a criminal investigation, which infringes on the doctor's decisionmaking autonomy, hinders the doctor-patient relationship, and chills the provision of necessary medical care.

Instead, the government attempts to reframe the issue—from the search of an aggregate, digital database that analyzes years of private prescription information across all of a doctor's patients to the search of a single prescription or handful prescriptions from an individual patient or pharmacy. In doing so, it ignores this Court's directive that with the advent of new technology like the PDMP, which aggregates and analyzes data at a level previously unobtainable, courts must re-examine traditional Fourth Amendment tests to ensure protection against too permeating a governmental intrusion. Because law enforcement's

continued mining of PDMPs across the country threatens the provision of medical care at a time when millions of Americans rely on prescription medication for their health and safety, the Court should not wait for a deeper split to resolve the question presented.

As regards the pre-indictment delay, the government does not deny that a deeply entrenched split exists. Instead, the government mistakenly suggests the split is of no practical consequence. But the government is wrong to suggest that the split is unimportant, both as to Dr. Gayden and as to the scores of defendants who may seek to assert their due process rights in the face of a prejudicial and untimely criminal prosecution.

I. This case presents an excellent opportunity to apply *Carpenter*'s analysis to a different, but equally sensitive, privacy interest: the comprehensive, digitized, and analyzed collection of a doctor's prescribing decisions.

A. *Carpenter* makes clear that courts should guard against governmental intrusion made possible by new technology like the PDMP, which contravenes traditional privacy expectations.

The government ignores that law enforcement searched the comprehensive record of Dr. Gayden's prescriptions—which had been aggregated and analyzed in the digital PDMP database, giving law

enforcement access to a breadth and depth of information previously unobtainable by traditional investigation, erroneously reducing the search to the collection of a handful of prescriptions from a patient or pharmacy. Building on that faulty premise, the government wrongly contends this case is resolved by a rote application of the third-party doctrine articulated in *Smith v. Maryland*, 442 U.S. 735 (1979), and *United States v. Miller*, 425 U.S. 435 (1976). *See* BIO at 8–11.

But *Carpenter v. United States*, 138 S. Ct. 2206 (2018), has made clear that *Smith* and *Miller* cannot resolve a Fourth Amendment challenge when faced with new technology like the PDMP, which upends society's traditional privacy expectations. Courts must ensure that the degree of protection provided by the Fourth Amendment is the same today as it was at the time of the Founding. *See Carpenter*, 138 S. Ct. at 2214. Thus, as new technology permits law enforcement to obtain information of a breadth and depth previously unobtainable, this Court should evaluate whether the search contravenes traditional privacy expectations. *See id.* at 2217 (explaining that law enforcement's access to cell site records contravenes society's expectation that law enforcement would not secretly monitor and catalog an individual's movements over a

long period of time).

Here, society's expectation of privacy surrounding doctor-patient interactions and a doctor's provision of medical treatment is longstanding, stretching back to before the founding era. *See* Pet. at 28–29. Searching the PDMP—with its aggregated, digitized, and analyzed data—upends that expectation because the search reveals far more than a traditional police investigation could uncover by obtaining prescription information from individual patients or even individual pharmacies.

Indeed, searching all of Dr. Gayden's prescriptions in the PDMP revealed the "privacies of life," making it much more like the search of 127 days of cell site location data than a single day's tracking of an individual. *Carpenter*, 138 S. Ct. at 2217 (quoting *Riley v. California*, 573 U.S. 373, 403 (2014)). Not only does the comprehensive record disclose patients' sensitive medical conditions, *see* Pet. at 24 n.7, but also it permits inferences about a doctor's medical decisionmaking for his patients. Society reasonably expects this information to remain private because permitting law enforcement to access a doctor's aggregate prescribing decisions for criminal investigations can have a serious chilling effect, making doctors "reluctant to prescribe" necessary

medications and patients reluctant to seek out necessary medical care. *Whalen v. Roe*, 429 U.S. 589, 600 (1977); *see* Pet. at 25–26.

The government's assertion that *Carpenter* is limited to location data is also unpersuasive. *See* BIO at 11. *Carpenter*, of course, considered and decided only whether the 128-day collection of cell site location data held by a third-party violated the Fourth Amendment. But its teachings and principles are not so narrow. Instead, *Carpenter* makes clear this Court should "contend with the seismic shifts in digital technology," such as the PDMP, which "made possible the tracking" of all controlled substance prescriptions for all prescribers and patients. 138 S. Ct. at 2219. This case thus presents an excellent opportunity to determine *Carpenter*'s reach in the context of a vital privacy interest that impacts millions of people across the country.

B. The aggregate of a doctor's prescribing decisions is private and is not voluntarily conveyed to the PDMP.

The government's attempt to minimize *Carpenter*'s teaching underscores the need for the Court's intervention here to clarify the Fourth Amendment analysis in advent of new technology. But even putting aside the technological advancements that permitted law enforcement to access Dr. Gayden's comprehensive prescription records

with the ease of a key stroke, the records here are unlike those in *Smith* and *Miller* because (1) they are far more private and revealing, and (2) Dr. Gayden did not voluntarily provide the information. *See Carpenter*, 138 S. Ct. at 2219–20.

The government never addresses the important privacy interest a doctor holds in the aggregate of his prescription records. *See* Pet. at 17–18, 25, 28–29. And as explained *supra*, subjecting these private records to a warrantless search by law enforcement during a criminal investigation threatens medical privacy and chills the provision of medical care. *See Whalen*, 429 at 600; Pet. at 25–26.

Instead, the government attempts to downplay the privacy interest by calling the prescriptions business records maintained in the regular course of the pharmacies' business. BIO at 10. The government's labeling of the records is a red herring. The cell site location records in *Carpenter* were also collected and stored "for . . . business purposes." 138 S. Ct. at 2212. And this Court rejected the argument that a search of those "business" records was constitutionally permissible, especially in light of the new technology at issue. *See id.* at 2219; *supra* at Part I.A.

Nor are the prescription records "voluntarily" conveyed to the

PDMP, as the government erroneously contends. *See* BIO at 10–11. As an initial matter, that the prescriptions were shared with patients and pharmacists for medical treatment purposes does not destroy an expectation of privacy or remove that information from the protection of the Fourth Amendment. *See Ferguson v. City of Charleston*, 532 U.S. 67, 82–86 (2001) (holding that law enforcement access to patient medical information, which had been deliberately shared across medical professionals for treatment purposes, violated Fourth Amendment absent express consent or warrant). This makes sense; there is nothing "voluntary" about the provision of necessary medical treatment, of which prescription medication is no small part. *See* Pet. at 26. So despite the government's suggestion to the contrary, doctors and patients do not "choose" to have prescriptions filled with pharmacists—it is the only way to provide and obtain that necessary treatment.[1]

In any event, the government misses the point by focusing on whether law enforcement would violate the Fourth Amendment by obtaining more limited prescription information from a patient or a

[1] The government also ignores that neither Dr. Gayden nor his patients knew when he prescribed the medication that the prescriptions would be provided to the PDMP. *See* Pet. at 14 n.4.

pharmacy. As explained *supra*, the search of the PDMP differs from the search of an individual prescription from a patient or handful of prescriptions from a pharmacy. The PDMP is a comprehensive, digital, analyzed database that permits law enforcement to search all of a doctor's prescriptions for all of his patients. It enables law enforcement, with the press of a key, to gain unprecedented insight into a doctor's professional and private decisionmaking, which can chill the provision of medical care and has serious consequences for medical privacy. It is the constitutionality of that technology-enabled search—not a traditional investigation of an individual patient's or pharmacy's records—that Dr. Gayden asks this Court to review.

C. The decision below departs from precedent of this Court and other circuits, and waiting for a more pronounced split risks further eroding medical privacy and inhibiting the provision of medical care.

Not only should certiorari be granted based on the merits and importance of the issue, but also the Court's intervention is needed given the conflict. Despite the government's assertion that no direct circuit conflict exists on the question presented,[2] a conflict exists as to an

[2] *But see Oregon Prescription Drug Monitoring Program v. United States Drug Enf't Admin.*, 860 F.3d 1228, 1235 (9th Cir. 2017) (noting, in

underlying premise in the Eleventh Circuit's decision—that a doctor has no expectation of privacy in his provision of medical care, including the prescribing of necessary medication. *See* Pet. at 17–18 (discussing cases that recognize physician's expectation of privacy, including *Tucson v. Women's Clinic v. Eden*, 379 F.3d 531, 550 (9th Cir. 2004), *Whalen*, 429 U.S. at 600, and *Sorrell v. IMS Health*, 564 U.S. 552, 572 (2011)). And the decision also conflicts with this Court's precedent establishing that the Fourth Amendment does not tolerate law enforcement searches of medical information absent consent or a warrant, even though the information had been shared for medical treatment purposes. *See* Pet. at 19–20 (discussing *Ferguson*, 532 U.S. at 78).

The government fails to grapple with how the Eleventh Circuit's opinion conflicts with these decisions. Instead, in a footnote, it attempts to discredit Dr. Gayden's reliance on *Ferguson* and *Whalen* as "misplaced." BIO at 12. The government's dismissal of those decisions does not diminish their significance or relevance, however. Under *Ferguson*, communication of medical information among medical

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context of Fourth Amendment challenge to Oregon PDMP, that physician privacy concerns were not unreasonable but resolving challenge on other grounds).

professionals for treatment purposes does not destroy an expectation that law enforcement will not access that information in pursuit of a criminal investigation absent Fourth Amendment protections, like a warrant. 532 U.S. at 86. Likewise, the sharing of Dr. Gayden's prescriptions with individual patients and pharmacies did not destroy his expectation of privacy in the aggregate of his prescribing decisions. And *Whalen* recognized a doctor's privacy interest in a state's rudimentary controlled substances database, while also suggesting that an intrusion into such a database during a criminal investigation—as in Dr. Gayden's case—could violate the Fourth Amendment. 429 U.S. at 600, 604 n.32. Thus, though neither decision directly addressed the issue here, both conflict with the Eleventh Circuit's reasoning and show why its decision is wrong.

In any event, the viewpoints on this issue are adequately fleshed out, so that waiting for additional percolation is unadvisable. *See* Pet. at 17–22. The longer the Court waits to resolve this issue, the greater the risk that warrantless searches of PDMPs across the country will chill the provision of medical care, of which controlled substance prescriptions—and the conditions they treat—are a significant part. *See* Pet. at 4.

II. Certiorari should also be granted on the pre-indictment delay issue because the split is important, practically significant, and warrants review in this case.

A. A clear and important split exists.

The government does not deny that a clear split of authorities exists on the proper test for when pre-indictment delay violates the Due Process Clause. Rather, it asserts that the split is "narrow" and thus unworthy of review because the majority of jurisdictions have adopted a test much like the one used by the Eleventh Circuit here. *See* BIO at 13–14, 18–19.[3] But the split involves important due process concerns and creates disparate results depending on geography, *see* Part II.B, *infra*, such that the Court should not let the split persist.

The government notes that this Court has denied previous petitions raising the same issue, implying that those denials suggest intervention is unnecessary. *See* BIO at 14. But the recently denied petitions—two of which the Court relisted multiple times—had vehicle problems that Dr. Gayden's does not. For example, in *Harris v. Maryland*, the respondent

[3] The government also defends the Eleventh Circuit's test on the merits. *See* BIO at 14–17. But the Eleventh Circuit's test does not satisfy this Court's directive that due process requires a "delicate judgment based on the circumstances of each case." Pet. at 35 (quoting *United States v. Marion*, 404 U.S. 307, 325 (1971)).

argued that the petitioner's argument was not preserved and that the record was insufficiently developed. *See* Brief of Maryland, *Harris v. Maryland*, No. 20-101, at 12–16 (Dec. 4, 2020). In *Woodard v. United States*, the government argued that plain-error review applied, making the case unsuitable for this Court's discretionary review. *See* Brief of United States, *Woodard v. United States*, No. 20-6387, at 28 (Feb. 22, 2021).[4] And in *Brown v. United States*, the court of appeals made an express finding that the petitioner had not been prejudiced, and the petitioner asked this Court to review what constitutes prejudice in this context—an issue not presented here. *See* Brief of United States, *Brown v. United States*, No. 20-5064, at 8–9 (Dec. 4, 2020); Reply Brief of Petitioner, *Brown v. United States*, No. 20-5064, at 1–5 (Dec. 21, 2020). Thus, the Court's recent denial of certiorari in these cases does not demonstrate that the same result is warranted here.

B. The split is of practical significance.

The government also attempts to downplay the split by mistakenly

[4] Moreover, the charges in *Woodard* were brought "well within the . . . statute of limitations." *Id.* at 24. By contrast, the charges in Dr. Gayden's case were brought just a few days before the statute of limitations expired. *See* Pet. at 7.

asserting that the split is of no practical significance because defendants can rarely prove prejudice (a requirement in both tests) and thus cannot prevail on pre-indictment delay cases anywhere. *See* BIO at 19.

Though prejudice is a high burden, defendants do establish prejudice and succeed on their claims in jurisdictions applying the balancing test used in minority jurisdictions. *See, e.g.*, *Howell v. Barker*, 904 F.2d 889, 895 (4th Cir. 1990) (holding that prejudice to defendant, plus negligence on part of government, sufficed to establish due process violation); *State v. Lee*, 653 S.E.2d 259, 260 (S.C. 2007) (upholding dismissal for preindictment delay where defendant showed prejudice and government failed to offer valid explanation for delay). Thus, this Court's intervention is necessary to resolve the disparate results that occur across jurisdictions for the defendants who show prejudice.

Indeed, what is impossible for defendants to prove is not prejudice but the second part of the Eleventh Circuit's test: an improper motive on the part of the government. *See* Pet. at 36. Unless this Court resolves this issue, defendants who have undisputedly been harmed by unjustified delay in criminal prosecutions will be left with no constitutional recourse.

C. This case presents an ideal vehicle to decide the question presented.

Finally, the government asserts that the question presented makes no difference here because Dr. Gayden cannot show prejudice. BIO at 20–21. But the Eleventh Circuit *presumed* prejudice. *See* Pet. at 11. And Dr. Gayden's ability to satisfy other portions of the minority jurisdiction test is not in dispute: the government does not contend that Dr. Gayden's due process claim would fail under the "balancing" portion of the test, nor does it claim to have a proffered a compelling reason for the long delay in his case. Any remaining questions regarding Dr. Gayden's ability to satisfy the test are best addressed on remand, if necessary. Thus, the Court need only deal with determining the correct test, making this case the perfect vehicle.

Moreover, the government's assertion that Dr. Gayden's prejudice arguments are conclusory is inaccurate. He not only identified multiple deceased witnesses but also explained how their testimony would be exculpatory. *See* Pet. at 10 (discussing the witnesses and their missing testimony). Thus, contrary to the government's assertion, Dr. Gayden can show prejudice. And because the government does not suggest that its reasons for the prolonged delay could satisfy the Due Process Clause

under the balancing test applied by the minority jurisdictions, his case is an excellent vehicle to decide this important issue.

CONCLUSION

Dr. Gayden requests that this Court grant his petition for a writ of certiorari on (1) whether the Fourth Amendment permits a law enforcement officer pursuing a criminal investigation to search the PDMP without a warrant; and/or (2) whether, to establish that pre-indictment delay violated due process, the defendant must prove both actual prejudice and that the delay resulted from the government's improper motive or intentional tactical decision, or whether the defendant must prove actual prejudice and courts must then balance that prejudice against the government's articulated reasons for the delay.

Respectfully submitted,

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