No. 24-1163

In The

Supreme Court of the United States

LaWanda A. Johnson, Ph.D.

v. *Petitioner,*

United States

Respondent.

On Petition for Writ of Certiorari
To The United States Court of
Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. The United States Court of Appeals for the Ninth Circuit has decided an important question of federal law that has not been, but should be, settled by this Court; and, has decided that important federal question in a way that conflicts with relevant decisions of this Court. May procedures set forth by section 3221 of the Coronavirus Aid, Relief, and Economic Security Act of 2020 (P.L. 116-136), and its regulations be, *technically jurisdictional*?

II. Defendant claims she is a beneficiary of the Confidentiality of records statute (42 U.S.C. § 290dd-2), and its implementing regulations (42 C.F.R. Part 2). Is it fundamentally wrong to bar fact-finding; where, new and undisputed evidence shows the plaintiff's allegations of Article III standing do not pass muster?

III. The United States Court of Appeals for the Ninth Circuit has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power. **1)** Must, questions of Article III standing be answered first; **2)** must, jurisdictional facts appear affirmatively in the materials of record; and **3)** is it ever too late to challenge a plaintiff's Article III standing?

PARTIES TO THE PROCEEDINGS

The parties to the proceeding in the United States Court of Appeals for the Ninth Circuit were Petitioner, LaWanda A. Johnson, Ph.D.; and, her Co-Defendant, Antoine D. Johnson, MD. Respondent is the United States.

There are no corporate parties involved in this case.

DIRECTLY RELATED PROCEEDINGS

1. Petition for Writ of Error Coram Nobis (evidentiary hearing requested), in the United States District Court for the Western District of Washington at Tacoma. *United States v. LaWanda A. Johnson, Ph.D.* No. 3:09-cr-05703-DGE (Jan. 26th, 2024)

2. Appeal of order denying evidentiary hearing and, Petition for Writ of Error Coram Nobis, to the Ninth Circuit Court of Appeals. *LaWanda A. Johnson v. United States,* No. 24-3916 (June 26th, 2024)

3. Pending Motion for Panel Rehearing and Rehearing En Banc: Ninth Circuit Court of Appeals, Feb. 4th, 2025.

4. Pending Motion for Stay of Mandate: Ninth Circuit Court of Appeals, Feb. 4, 2025.

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CITATION OF OPINIONS AND ORDERS

1. *United States v. Johnson*, 3:09-cr-05703-DGE (W.D. Wash. May 20, 2024).

2. *United States v. Johnson*, Case No. 24-3916 (9th Cir.: 01/27/2025).

3. *United States v. Johnson*, Case No. 23-3676 (9th Cir.: 01/28/2025).

4. *United States v. Johnson,* Case No. 24-4436 (9th Cir.: 12/20/2024).

5. *United States v. Johnson*, Case No. 24-4435 (9th Cir.: 12/20/2024).

6. *United States v. Johnson*, Case No. 22-35715 (9th Cir.: 01/04/2024).

7. *United States v. Johnson*, Case No. 3:14-cv-06000-RBL (9th Cir.: 06/11/2015).

8. *United States v. Johnson*, Case No. 12-30129 (9th Cir.: 09/10/2013).

BASIS FOR JURISDICTION IN THIS COURT

a) This case arises under Article III, Section 2, clause 1 of the United States Constitution; because, the Appellant-petitioner claims "an actual or threatened invasion of [her] constitutional rights by the enforcement of some act of public authority ... and asks for judicial relief." (U.S. Const., Art. III, S.2, c1).

b) The judgment of the Ninth Circuit Court of Appeals was entered on January 27, 2025. Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

AUTHORITY

A. "Congress shall make no law ... abridging the freedom of speech, or ... the right of the people ... to petition the government for a redress of grievances." (U.S. Const., Amend. 1- in pertinent part).

"[T]here may be a First Amendment question whether ... disclosure can be compelled." (*Hynes v. Mayor of Oradell*, 425 U.S. 610, 626 n.1 (1976)).

B. The Fourth Amendment protects the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures...." (U.S. Const., Amend. 4- in pertinent part).

AUTHORITY- Continued

Under the Fourth Amendment, an individual is entitled to be free from unreasonable governmental intrusion wherever an individual may harbor an "expectation of privacy that society is prepared to consider reasonable." (*United States v. Jacobsen*, 466 U.S. 109, 113 (1984))."

C. The Fifth Amendment guarantees: No person shall be "deprived of life, liberty or property without due process of law." (U.S. Const., Amend. 5- in pertinent part).

"We have recognized that the special relationship between patient and physician will often be encompassed within the domain of private life protected by the Due Process Clause." (*Cruzan ex rel. Cruzan v. Director, Missouri Department of Health*, 497 U.S. 261, 342 n.12 (1990)).

D. "It may be stated as a general principle, that public policy forbids the maintenance of any suit in a court of justice, the trial of which would inevitably lead to the disclosure of matters which the law itself regards as confidential, and respecting which it will not allow the confidence to be violated. On this principle, suits cannot be maintained which would require a disclosure of the confidences of the confessional, or those between husband and wife, or of communications

AUTHORITY- Continued

by a client to his counsel for professional advice, or of a patient to [her] physician for a similar purpose."

(*Totten, Administrator, v. United States*, 92 U.S. 105, 107 (1875)).

E. Section 3221 of the Coronavirus Aid, Relief, and Economic Security Act (Pub. L. 116-136: codified at 42 U.S.C. § 290dd-2 (March 27, 2020)).

F. 42 C.F.R. PART 2 - Confidentiality of Substance Use Disorder Patient Records (42 C.F.R. §§ 2.1 – 2.68 (February 16, 2024)).

G. 42 C.F.R. §2.65 –

(a)Application. An order authorizing the use or disclosure of patient records, or testimony relaying the information contained in those records, to investigate or prosecute a patient in connection with a criminal proceeding may be applied for by the person holding the records or by any law enforcement or prosecutorial official who is responsible for conducting investigative or prosecutorial activities with respect to the enforcement of criminal laws, including administrative and legislative criminal proceedings. The application may be filed separately, as part of an application for a subpoena or other

AUTHORITY- Continued

compulsory process, or in a pending criminal action. An application must use a fictitious name such as John Doe, to refer to any patient and may not contain or otherwise use or disclose patient identifying information unless the court has ordered the record of the proceeding sealed from public scrutiny.

(b)Notice and hearing. Unless an order under § 2.66 is sought in addition to an order under this section, an order under this section is valid only when the person holding the records has received:

(1) Adequate notice (in a manner which will not disclose patient identifying information to other persons) of an application by a law enforcement agency or official;

(2) An opportunity to appear and be heard for the limited purpose of providing evidence on the statutory and regulatory criteria for the issuance of the court order as described in §2.65(d); and

(3) An opportunity to be represented by counsel independent of counsel for an applicant who is a law enforcement agency or official.

(c)Review of evidence: Conduct of hearings. Any oral argument, review of evidence, or hearing on the application shall be held in the judge's chambers or in some other manner which ensures that patient identifying information is not disclosed to anyone other than a party to the proceedings, the patient,

AUTHORITY- Continued

or the person holding the records. The proceeding may include an examination by the judge of the patient records referred to in the application.

(d)Criteria. A court may authorize the use and disclosure of patient records, or testimony relaying the information contained in those records, for the purpose of conducting a criminal investigation or prosecution of a patient only if the court finds that all of the following criteria are met:

(1) The crime involved is extremely serious, such as one which causes or directly threatens loss of life or serious bodily injury including homicide, rape, kidnapping, armed robbery, assault with a deadly weapon, and child abuse and neglect.

(2) There is a reasonable likelihood that the records or testimony will disclose information of substantial value in the investigation or prosecution.

(3) Other ways of obtaining the information are not available or would not be effective.

(4) The potential injury to the patient, to the physician-patient relationship and to the ability of the part 2 program to provide services to other patients is outweighed by the public interest and the need for the disclosure.

(5) If the applicant is a law enforcement agency or official, that:

AUTHORITY- Continued

(i) The person holding the records has been afforded the opportunity to be represented by independent counsel; and
(ii) Any person holding the records which is an entity within federal, state, or local government has in fact been represented by counsel independent of the applicant.
(e)Content of order. Any order authorizing a use or disclosure of patient records subject to this part, or testimony relaying the information contained in those records, under this section must:
(1) Limit use and disclosure to those parts of the patient's record, or testimony relaying the information contained in those records, which are essential to fulfill the objective of the order;
(2) Limit disclosure to those law enforcement and prosecutorial officials who are responsible for, or are conducting, the investigation or prosecution, and limit their use of the records or testimony to investigation and prosecution of the extremely serious crime or suspected crime specified in the application; and
(3) Include such other measures as are necessary to limit use and disclosure to the fulfillment of only that public interest and need found by the court.

STATEMENT OF THE CASE

Factual Background

"The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury." (U.S. Const., Article III, section 2, clause 3- in pertinent part). To prove, *interalia*, "the crime of health care fraud was committed by someone" (App. 31), to the petit jury in this case, the United States, as plaintiff, had to use or disclose confidential medical records. (App. 23).

Condition precedent for using or disclosing the confidential medical records of a substance use disorder **patient** (42 U.S.C. § 290dd-2(g), 42 C.F.R. § 2.11), is ascertaining a "unique" (42 C.F.R. § 2.61(a)), use or disclosure order pursuant to procedures set forth by the Confidentiality of records statute. (42 U.S.C. § 290dd-2).

At all times relevant to this case, the defendant, LaWanda A. Johnson, Ph.D., claims she is a beneficiary of the Confidentiality of records statute; and, its rules under 42 C.F.R. Part 2. (App. 29).

Procedural Background

In the coram nobis court, Ms. Johnson introduced new, undisputed evidence not available at the time of trial, direct appeal, nor § 2255 Motion, *viz.*- Federal Bureau of Prisons evidence of her 18-month sentence reduction under 18 U.S.C. § 3621(e). Hence, ***i)*** she completed the Bureau's Residential

Drug Abuse Program (App. 29); and, ***ii)*** she has been a patient pursuant to 42 U.S.C. § 290dd-2(d).

In general, resolution of a coram nobis case "ultimately calls as much for the exercise of judgment as for the application of logic." (*Andrus v. Allard*, 444 U.S. 51, 65 (1979)). Here, deductive reasoning from the new, undisputed evidence introduced by Ms. Johnson in the coram nobis court; reveals, she was "identified as an individual with a substance use disorder in order to determine that individual's eligibility to participate in a part 2 program." (42 C.F.R. § 2.11- **patient**).

Applying 18 U.S.C. § 3621(e), 28 C.F.R. §§ 522.20, 522.21, 551.100 and 550.53(b)(1) & (d), to that new, undisputed evidence shows: The Federal Bureau of Prisons verified Ms. Johnson was a **patient**, within 24 hours of her detention. Ms. Johnson's order of detention is recorded at entry #10 of the district court docket; and, proves such verification occurred about seven months *before* the United States filed its Superseding Indictment, May 4, 2010. Restated, Ms. Johnson was a **patient**, *before* commencement of suit.

Statutory and Regulatory Background

Under the Confidentiality of records statute (42 U.S.C. § 290dd-2), the United States is required to ascertain a "unique" use or disclosure order under 42 C.F.R. § 2.65 "by an appropriate order of a court of competent jurisdiction granted after application showing good cause" (42 U.S.C. § 290dd-2(b)(2)(C)),

before investigating or prosecuting any **patient**, including Ms. Johnson. (42 C.F.R. § 2.65).

Failure to ascertain a "unique" use or disclosure order under 42 C.F.R. § 2.65 prior to investigating or prosecuting any **patient**, including Ms. Johnson, effects the adjudicatory function of any court of justice, *viz.*- With no court order, nor patient consent, patient records "may not be disclosed or used in any civil, criminal, administrative, or legislative proceedings conducted by any Federal, State, or local authority, against a patient." (42 U.S.C. § 290dd-2(c)- in pertinent part).

Except as otherwise provided by law, the United States Attorney shall prosecute all offenses against the United States (28 U.S.C. § 547(1)); and, "a private citizen lacks a judicially cognizable interest in the prosecution or nonprosecution of another." (*Linda R. S. v. Richard D*, 410 U.S. 614 (1973)).

Patient confidentiality of records overlooked

The materials of record show the United States failed to ascertain an order under 42 C.F.R. § 2.65; ergo, the United States Attorney is debarred from prosecuting any **patient**, including Ms. Johnson, within the authority of 28 U.S.C. § 547(1), as provided by the Confidentiality of records statute. (42 U.S.C. § 290dd-2(c)).

A court generally cannot exercise jurisdiction if a prosecutor cannot prosecute a case, as the prosecutor initiates criminal proceedings. Where the prosecutor is precluded by federal law from

hauling a defendant into court on a charge, "federal law requires that a conviction on that charge be set aside" (*U.S. v. Broce*, 488 U.S. 563, 575 (1989)). If the United States cannot lawfully bring its case because Ms. Johnson is a **patient**, the court cannot exercise jurisdiction over it; and, there is no actual case or controversy.

Notwithstanding, the coram nobis court and the United States Court of Appeals for the Ninth Circuit did not dismiss this case. Instead, they appear to have: ***i)*** determined section 3221 of the Coronavirus Aid, Relief, and Economic Security Act of 2020 (P.L. 116-136), is a "non-jurisdictional statute" (App. 15); and, ***ii)*** applied the repudiated doctrine of hypothetical jurisdiction through pretermission of the Article III standing question. (*Steel Co. v. Citz.s for Better Env't,* 523 U.S. 83, 98 (1998)). This appeal follows.

REASONS FOR GRANTING THE WRIT

I. Procedures set forth by section 3221 of the CARES Act, and its regulations, appear *technically jurisdictional.*

In March 2020, Congress passed the Coronavirus Aid, Relief, and Economic Security Act ("CARES Act"), to alleviate burdens caused by the burgeoning COVID–19 pandemic. (Pub. L. 116–136, 134 Stat. 281).

Section 3221 of the CARES Act amended the Confidentiality of records statute (42 U.S.C. § 290dd-2), in part, to tighten the requirements in the event confidentiality is breached; and, by adding

other protections for patients. (See 42 U.S.C. § 290dd-2(c) & 42 C.F.R. § 2.12(d)).

"As a general rule, if an action is barred by the terms of a statute, it must be dismissed." (*Hallstrom v. Tillamook County*, 493 U.S. 20, 31 (1989)). "An unmet jurisdictional precondition deprives courts of power to hear the case, thus requiring immediate dismissal. And jurisdictional rules are impervious to excuses like waiver or forfeiture. Courts must also raise and enforce them sua sponte." (*MOAC Mall Holdings LLC v. Transform Holdco LLC*, 143 S. Ct. 927, 936 (2023)).

"Prosecution" is barred by the terms of the Confidentiality of records statute and its regulations where Ms. Johnson is a patient. (42 U.S.C. § 290dd-2(c), 42 C.F.R. § 2.65). "Absent a proper representative of the Government as a petitioner in this criminal prosecution, jurisdiction is lacking." (*U.S. v. Providence Journal Co.*, 485 U.S. 693, 708 (1988); see also, 28 U.S.C. § 547(1)).

The procedures set forth by section 3221 of the CARES Act, and accompanying regulations, appear *technically jurisdictional*; because, the Confidentiality of records statute "sets the bounds of the court's adjudicatory authority." (*Santos-Zacaria v. Garland*, 143 S. Ct. 1103, 1111-12 (2023).

Whether or not the attorney for the United States is prevented from prosecuting Ms. Johnson due to those statutory jurisdictional requirements, remains an open question; because, the coram nobis court ***did not*** resolve the material issue of Ms. Johnson's patient status, when she introduced new,

undisputed Federal Bureau of Prisons evidence proving she is a patient (42 C.F.R. § 2.11- 'patient').

Because the question of Article III standing depends on the resolution of Ms. Johnson's patient status, the coram nobis court's decision to ***not*** resolve the issue of Ms. Johnson's patient status, appears consistent with "diverting the poor from justice at the gate." (Amos 5:12 NKJV: *Cf.*, 28 U.S.C. § 453).

"Jurisdiction cannot be effectively acquired by concealing for a time the facts which conclusively establish that it does not exist." (*Lambert Co. v. Balt. Ohio R.R. Co.,* 258 U.S. 377, 382 (1922)).

II. It is fundamentally wrong to bar fact-finding; where new, undisputed evidence shows the plaintiff's allegations of Article III standing do not pass muster.

There is statutory direction concerning when Ms. Johnson is entitled under the 5th Amendment's Due Process Clause, to have her new, undisputed evidence weighed by a trier of fact. As coram nobis actions are of the same "general character" as habeas and § 2255 Motions (*U.S. v. Morgan*, 346 U.S. 502, 506 n.4 (1954)), procedures under 28 U.S.C. §§ 2254(e)(2)(B) and 2255(b) inform the mode of hearing determination.

Ms. Johnson's new, undisputed Federal Bureau of Prisons evidence proving her patient status, governs (see 18 U.S.C. § 3625); ergo, "the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional

error, no reasonable factfinder would have found the applicant guilty of the underlying offense." (28 U.S.C. § 2254(e)(2)(B)).

Similarly, "the motion and the files and records of the case [***do not***] conclusively show [Ms. Johnson] is entitled to no relief" (28 U.S.C. § 2255(b)); hence, failure to grant an evidentiary hearing impugns the fairness of the coram nobis proceedings, *viz.*- "the very integrity of the fact-finding process." (*Brown v. Louisiana*, 447 U.S. 323, 334 (1980)).

Also, the Confidentiality of records statute imposes "safeguards against unauthorized disclosure." (42 U.S.C. § 290dd-2(b)(2)(C)). Specifically, that statute authorizes "an opportunity to seek revocation or amendment of" a use or disclosure order through "presentation of evidence on the statutory and regulatory criteria for the issuance of [a use or disclosure] order in accordance with paragraph (c)" of 42 C.F.R. § 2.66. (42 U.S.C. § 290dd-2(g), 42 C.F.R. § 2.66(b)).

At least two federal courts have held that a hearing provides an adequate opportunity to seek "revocation or amendment." (See *U.S. v. Norris*, 2:22-cr-00132-NT, at *25 (D. Me. Apr. 26, 2024); and, *U.S. v. Bryant*, No. 19-4179, at *12 (6th Cir. Mar. 17, 2021)). Unlike the coram nobis court in this matter, those federal courts appear to interpret the "presentation of evidence" clause under 42 C.F.R. § 2.66(b), as implicating an adjudicatory proceeding; where, fact finding procedures must be observed.

Thus, guidance from this Supreme Court is necessary to secure uniformity in the treatment of

42 C.F.R. § 2.66(b), procedures. "Undoubtedly, federal programs that by their nature are and must be uniform in character throughout the Nation necessitate formulation of controlling federal rules." (*Empire Healthchoice v. McVeigh*, 547 U.S. 677, 712 (2006)).

III. Questions of Article III standing must be answered first; jurisdictional facts must appear affirmatively in the materials of record; and, it is never too late to challenge a plaintiff's Article III standing.

In this case, the ORDER upon the Petition for Writ of Error Coram Nobis, does not settle the contest over Article III standing. Plaintiff's Article III standing was challenged below; but, an identified jurisdictional bar – want of a 42 C.F.R. § 2.65 Order and patient consent – went unaddressed.

Whether a plaintiff has standing to sue under Article III of the Constitution is a "threshold question." (*FDA v. All. for Hippocratic Med.*, 144 S. Ct. 1540, 1554 (2024)). One reason for addressing standing to sue under Article III first, is that the standing inquiry "tends to assure that the legal questions presented to the court will be resolved ... in a concrete factual context." (*Id.*). That is yet to happen, in this case.

For over 140 years, this Supreme Court has treated courts as having limited jurisdiction; and, "the presumption in every stage of the cause is, that it is without their jurisdiction, unless the contrary appears from the record." (*M.C.L.M. Railway Co. v.*

Swan, 111 U.S. 379, 383 (1884)). "If the record does not affirmatively show jurisdiction ... we must, upon our own motion, so declare and make such order as will prevent [a] court from exercising an authority not conferred upon it by statute." (*Thomas v. Board of Trustees*, 195 U.S. 207, 211 (1904)).

Ms. Johnson sought coram nobis relief on the ground that she is a **patient** under 42 U.S.C. § 290dd-2 and 42 C.F.R. Part 2; and, plaintiff's prosecution of her is barred for want of a statutory jurisdictional prerequisite. (See 42 U.S.C. § 290dd-2(c), 42 C.F.R. § 2.65). "Jurisdictional bars ... may be raised by any party at any time during the proceedings and ... are required to be raised by a court sua sponte" (*Wilkins v. U.S.*, 143 S. Ct. 870, 872-73 (2023)).

CONCLUSION

Throughout this litigation, the plaintiff carries the burden of showing that it is properly in the court. But, the plaintiff failed to support its allegations of jurisdictional facts with lawful evidence when challenged by Ms. Johnson in the inferior courts with new, undisputed Federal Bureau of Prisons evidence.

In adjudicating Ms. Johnson's factual challenge to the plaintiff's Article III standing, the practice of the lower courts appears to depart from the practice of this Supreme Court; nor, can it be harmonized with the intent of the Confidentiality of records statute, *viz.*- "to prevent circumvention or evasion thereof, or to facilitate compliance therewith." (42 U.S.C. § 290dd-2(g)).

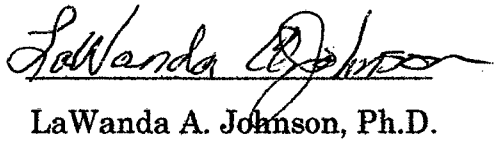
"The strictest adherence to the provisions of [42 U.S.C. § 290dd-2] is absolutely essential to the success of all drug abuse prevention programs. Every patient and former patient must be assured that [her] right to privacy will be protected. Without that assurance, fear of public disclosure of drug abuse or of records that will attach for life will discourage thousands from seeking the treatment they must have if this tragic national problem is to be overcome. (H. Conf. Rep. No. 92-920, 92d Cong., 2d Sess. — (1972), reprinted in U.S. Code Cong. and Admin. News, pp. 2062, 2072.).

Hence, the command of the Confidentiality of records statute is designed to further the fair and just administration of criminal justice respecting substance use disorder patients; and, the welfare of the public, in addition to the ends of justice, are served by GRANTING certiorari.

Please decide whether the procedures set forth by section 3221 of the CARES Act, and its regulations, may be *technically jurisdictional.* Also, please direct the lower courts to resolve the issue of Ms. Johnson's CARES Act patient status, in the first instance.

March 29th, 2025

Respectfully submitted by,



LaWanda A. Johnson, Ph.D.
(In propria persona)