No. _____

In the
Supreme Court of the United States

Myron Motley,

Petitioner,

v.

United States of America,

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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Question Presented for Review

"It is familiar history that indiscriminate searches and seizures conducted under the authority of 'general warrants' were the immediate evils that motivated the framing and adoption of the Fourth Amendment." *Payton v. New York*, 445 U.S. 573, 583 (1980). Nevada allows such indiscriminate searches, providing law enforcement access to patients' prescription histories. In a published opinion, a panel majority approved this statute, deepening a jurisdictional split and departing from this Court's precedent, to hold that prescription drug information is not private. *United States v. Motley*, 89 F.4th 777, 783–86 (9th Cir. 2023); Appx. A, pp. 1–13.

The question presented is:

Whether patients hold a reasonable expectation of privacy under the Fourth Amendment in prescription medication records, which can reveal a wealth of private medical information.

Related Proceedings

The prior proceedings for this case are found at:

United States v. Motley, 89 F.4th 777, 783–86 (9th Cir. 2023),

United States v. Motley, No. 21-10296, 2023 WL 9014457 (9th Cir. Dec. 29, 2023),

United States v. Motley, 443 F. Supp. 3d 1203 (D. Nev. 2020).

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Petition for Writ of Certiorari

Myron Motley petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

Opinions Below

The Ninth Circuit's decision is published in the Federal Reporter at *United States v. Motley*, 89 F.4th 777, 783–86 (9th Cir. 2023). Appx. A, pp. 1–13.

The order of the district court is published in the Federal Supplement at *United States v. Motley*, 443 F. Supp. 3d 1203 (D. Nev. 2020). Appx. D, pp. 19–31.

Jurisdiction

The Ninth Circuit entered its final order denying panel or en banc rehearing on April 18, 2024. Appx. C, p. 18. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(a). This petition is timely per Sup. Ct. R. 13.1.

Constitutional and Statutory Provisions

U.S. Const. amend IV:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Nev. Rev. Stat. § 453.165 (2018):

> Access to database for certain employees of law enforcement agencies; certification; requirements for access; access for unauthorized purpose prohibited; monitoring; authority of Board or Division to terminate access.
>
> 1. Except as otherwise provided in this section, the Board shall allow an employee of a law enforcement agency to have Internet

access to the database of the computerized program developed pursuant to NRS 453.162 if:

(a) The employee has been approved by his or her employer to have such access;
(b) The employee has completed the course of training developed pursuant to subsection 5 of NRS 453.164; and
(c) The law enforcement agency has submitted the certification required pursuant to subsection 2 to the Board.

2. Before an employee of a law enforcement agency may be given access to the database pursuant to subsection 1, the law enforcement agency must certify to the Board that the employee has been approved to be given such access and meets the requirements of subsection 1. Such certification must be made on a form provided by the Board and renewed annually.

3. When an employee of a law enforcement agency accesses the database of the computerized program pursuant to this section, the employee must enter a unique user name assigned to the employee and, if applicable, the case number corresponding to the investigation pursuant to which the employee is accessing the database.

4. An employee of a law enforcement agency who is given access to the database of the computerized program pursuant to subsection 1 may access the database for no other purpose than to:

(a) Investigate a crime related to prescription drugs; or
(b) Upload information to the database pursuant to NRS 453.1635.

5. A law enforcement agency whose employees are provided access to the database of the computerized program pursuant to this section shall monitor the use of the database by the employees of the law enforcement agency and establish appropriate disciplinary action to take against an employee who violates the provisions of this section.

6. The Board or the Division may suspend or terminate access to the database of the computerized program pursuant to this section if a law enforcement agency or employee thereof violates any provision of this section.

Introduction

Nevada law allows state law enforcement unfettered access to the state's prescription monitoring database, expressly to "investigate a crime related to prescription drugs." Nev. Rev. Stat. § 453.165. Police are not limited by probable cause. And police are not limited to accessing information about drugs of abuse. Instead, police can access prescriptions for any medication on Nevada's four prescription drug schedules, for anyone in the state, including minors and public officials. Such broad indiscriminate access will undoubtedly reveal information this Court has held is private. For example, this private information may include whether a patient is: (1) receiving hormone treatment; (2) experiencing symptoms from AIDS; (3) having difficulty conceiving; or (4) suffering from mental illness.

The statute allowing this unrestricted, warrantless access is the broadest in the nation. And the Ninth Circuit's majority decision provides a constitutional rubber stamp to similar statutes in other states. To prevent erosion of medical privacy and Fourth Amendment protections, both within and outside the criminal context, this Court's review is required.

Statement of the Case

In 2015, the Nevada Legislature passed Nevada Revised Statute § 453.165, which allows "an employee of a law enforcement agency" access to Nevada's Prescription Monitoring Program (PMP) database to "investigate a crime related to prescription drugs." The statute requires only that the law enforcement employee complete a training on the database, obtain approval from his or her employer, and submit a certificate. *Id.* at § 453.165(1). After gaining access, the employee—

without a warrant or administrative subpoena—can review the controlled prescription history for anyone in the state. Although the statute limits the purposes for which a law enforcement employee can access the database, *id.* at § 453.165(4), it provides no external oversight or enforcement mechanism.

In September 2018, law enforcement officers in Reno, Nevada, used this statute to review years of Myron Motley's prescription drug purchases, then used the warrants obtained with this information to track Motley's movements and wiretap his phone. Following the government's surveillance, Motley was prosecuted for seven federal drug offenses. After an unsuccessful motion to suppress, Motley was convicted on six of those counts and sentenced to 179 months' imprisonment.

The Ninth Circuit affirmed the district court's denial of the motion to suppress, but the judges disagreed in their reasoning. Relying heavily on a case out of the First Circuit, *U.S. Dep't of Just. v. Ricco Jonas*, 24 F.4th 718 (1st Cir. 2022), the majority held Motley lacked a reasonable expectation of privacy in his prescription records. *Motley*, 89 F.4th at 783–86; Appx. A, pp. 5–7. Although *Ricco Jonas* concerned administrative subpoenas, the majority adopted its reasoning that the "closely regulated nature of prescription drugs" provided an exception to the warrant requirement for government searches. *Motley*, 89 F.4th at 784–85; Appx. A, p. 6. The majority also agreed with the First Circuit that prescription records differ from "all other medical records." *Id.* at 786; Appx. A, p. 7. The majority did so largely because "[p]rescription *opioid* records are unlike general medical records," *id.* (emphasis added)—despite the dozens of non-opioid medications subject to

warrantless disclosure under the Nevada statute. *See* Nev. Admin. Code §§ 453.510–453.540.

In her concurrence, Judge Graber expressed concerns with the majority's reasoning.[1] *Id.* at 788–91 (Graber, J., concurring); Appx. A, pp. 8–11. The concurrence noted the general principle, under both Ninth Circuit and Supreme Court precedent, that "people reasonably expect privacy in their personal medical records." *Id.* at 790 (Graber, J., concurring); Appx. A, p. 10. Because "[p]rescription records are a subset of medical records," they "are entitled to some measure of privacy." *Id.* (Graber, J., concurring). And, just like other medical records, "prescription records can be extremely revealing." *Id.* (Graber, J., concurring). Thus, "[t]he Supreme Court's observation about medical records generally applies with equal force to prescriptions specifically: 'an intrusion on [an expectation of privacy in prescription records] may have adverse consequences because it may deter patients from receiving needed medica[tions].'" *Id.* (Graber, J., concurring) (alteration in original) (quoting *Ferguson v. City of Charleston*, 532 U.S. 67, 78 (2001)).

Reasons for Granting the Petition

I. The Ninth Circuit's decision deepens a jurisdictional split on privacy rights for prescription medical records.

The panel majority held that patients lack a reasonable expectation of privacy in prescription medical records. *Motley*, 89 F.4th at 783–86; Appx. A, pp. 5–

[1] Judge Graber would have affirmed on other grounds. *Motley*, 89 F.4th at 788–90 (Graber, J., concurring); Appx. A, pp. 8–11.

7. This holding deepens a jurisdictional split, with at least three courts disagreeing with the Ninth Circuit's reasoning, and none going as far as the majority decision here.

A. Most jurisdictions to consider the question hold the Fourth Amendment protects prescription drug information.

Two of the three circuits to consider the question, the Tenth Circuit and the Third Circuit, hold the Fourth Amendment protects an individual's prescription drug records. In *Douglas v. Dobbs*, 419 F.3d 1097, 1102 (10th Cir. 2005), the Tenth Circuit had "no difficulty concluding" that prescription drug information was private and protected.[2] The court explained, "protection of a right to privacy in a person's prescription drug records, which contain intimate facts of a personal nature, is sufficiently similar to other areas already protected within the ambit of privacy." *Id.* Similarly, in *Doe v. Southeastern Pennsylvania Transp. Auth.*, 72 F.3d 1133, 1137–38 (3d Cir. 1995), the Third Circuit concluded "a person's medical prescription record is within the ambit of information protected by the Constitution." Both cases emphasized the personal nature of prescription drug records, which can reveal "illnesses, or even . . . such private facts as whether a woman is attempting to conceive a child through the use of fertility drugs." *Id.* at 1138; *see Douglas*, 419 F.3d at 1102.

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[2] Despite concluding the plaintiff had a privacy right to her prescription records, the court rejected her Fourth Amendment claim on qualified immunity grounds not relevant here. *Douglas*, 419 F.3d at 1102–03.

At least one state supreme court is in accord. In *State v. Skinner*, 10 So. 3d 1212, 1215–18 (La. 2009), the Supreme Court of Louisiana concluded "the right to privacy in one's medical and prescription records is an expectation of privacy that society is prepared to recognize as reasonable." The court cited the majority of the federal courts of appeal, which "have concluded the constitutional right to privacy extends to medical and/or prescription records." *Id.* at 1217. And the court concluded that, "absent the narrowly drawn exceptions permitting warrantless searches, . . . a warrant is required to conduct an investigatory search of medical *and/or* prescription records." *Id.* at 1218 (emphasis added).

Even more jurisdictions, including this Court, agree that the *type* of information revealed by Nevada's PMP database is private. Patients are entitled to privacy for various diagnoses and medical conditions, including: mental illness, *Jaffee v. Redmond*, 518 U.S. 1, 10 (1996); HIV and AIDS, *Doe v. Att'y Gen. of U.S.*, 941 F.2d 780, 795–96 (9th Cir. 1991), *disapproved of on other grounds by Lane v. Pena*, 518 U.S. 187 (1996); sexually transmitted diseases and pregnancy, *Norman-Bloodsaw v. Lawrence Berkeley Laboratory*, 135 F.3d 1260, 1269 (9th Cir. 1998); and gender dysmorphia, *Smith v. City of Salem, Ohio*, 378 F.3d 566, 568–69, 575 (6th Cir. 2004). *See also Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 658 (1995) (distinguishing urinalysis for drugs from urinalysis to determine "whether the student is, for example, epileptic, pregnant, or diabetic"); *Tucson Woman's Clinic v. Eden*, 379 F.3d 531, 550–51 (9th Cir. 2004) (striking down regulation allowing warrantless searches of an abortion clinic and explaining patients have a "*heightened*" expectation of privacy in medical offices (emphasis in original)); *King v.*

State, 535 S.E.2d 492, 495 (Ga. 2000) ("[A] patient's medical information . . . is certainly a matter which a reasonable person would consider to be private" and, in fact, is "entitled to more privacy than bank records or phone records."). And the Georgia Supreme Court recently suppressed use of a defendant's medical records obtained without probable cause by the state due to "a constitutional right to privacy in his medical records." *Gates v. State*, 896 S.E.2d 536, 539–41 (Ga. 2023).

B. The Ninth Circuit joined the First Circuit with the minority view that prescription medical records are not private.

The Ninth Circuit relied heavily on a First Circuit decision, which held for the first time that prescription records are distinguishable from other private medical records.[3] Appx. A, pp. 6–7. In *Ricco Jonas*, 24 F.4th at 721–24, the First Circuit considered the Federal Controlled Substances Act (CSA) at 21 U.S.C. § 876, which provides for administrative subpoenas to investigate "illicit drug activity." The DEA, under this authority, issued an administrative subpoena for information stored in New Hampshire's Prescription Drug Monitoring Program. *Id.* at 724.

The First Circuit affirmed issuance of the administrative subpoena, concluding patients lacked a reasonable expectation of privacy in their prescription records. *Id.* at 733–40. The court explained "that there is a diminished expectation

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[3] This Court's decision in *Whalen v. Roe*, 429 U.S. 589, 597–604 (1977), is distinguishable. In Whalen, this Court concluded that New York's prescription monitoring program did not impermissibly invade the privacy interests of New York residents. But this Court explicitly distinguished cases, like this one, involving "affirmative, unannounced, narrowly focused intrusions into individual privacy during the course of criminal investigations." *Id.* at 603–04 n.32; *see Ferguson*, 532 U.S. at 76–86.

of privacy for materials that are maintained by a business that is subject to pervasive regulation and inspection." *Id.* at 734. Because prescription medication is subject to "pervasive regulation and inspection," the court concluded patients lacked a reasonable expectation of privacy in prescription records. *Id.* at 734–35. And the court "reject[ed] Ricco Jonas's invitation to equate prescription drug records to all other medical records," reasoning that "prescription drug records do not generally or necessarily contain the more personal and intimate information that other medical records do." *Id.* at 735–36.

Despite the breadth of the First Circuit's conclusion in *Ricco Jonas*, it is limited in two ways that the Ninth Circuit's decision is not. First, the CSA's requirement that law enforcement obtain an administrative subpoena before accessing records ensures oversight and approval by a detached magistrate. *See* 21 U.S.C. § 876(a). Nevada's statute, in contrast, grants law enforcement personal access to the PMP database, with no external approval required and without external oversight. Second, the CSA provides an opportunity for pre-compliance review in federal court. 21 U.S.C. § 876(c). In Nevada, patients will learn that law enforcement accessed their personal medical records only when those records are used against them in court.

Thus, the CSA has some safeguards this Court requires to exempt closely regulated industries from the Fourth Amendment's warrant requirement. *See New York v. Burger*, 482 U.S. 691, 703 (1987). Because the Nevada statute lacks those safeguards, the Ninth Circuit's decision to adopt the First Circuit's reasoning will

even more greatly erode medical privacy. To prevent this erosion and realign the Ninth Circuit with the majority view, this Court should grant the petition.

II. The Ninth Circuit's decision conflicts with this Court's precedent and other circuits' decisions on the closely-regulated-industry exception.

The majority decision relied on an exception to the Fourth Amendment's warrant requirement for closely regulated industries. *Motley*, 89 F.4th at 784–86; Appx. A, pp. 6–7; *see Burger*, 482 U.S. at 693 (describing exception to warrant requirement "for administrative inspections of pervasively regulated industries"). But the majority decision unreasonably extends the narrow contours of this exception, creating a conflict with this Court's precedent. This Court's review is thus appropriate. *See* Sup. Ct. R. 10(c).

Crucially, other courts limit the exception to administrative searches. But the Nevada statute allows law enforcement full access to the PMP database specifically to look for evidence of a crime. *See* Nev. Rev. Stat. § 453.165(4) (allowing PMP access for express purpose of "investigat[ing] a crime related to prescription drugs"). As this Court explains, warrantless search regimes are unconstitutional when the "primary purpose is ultimately indistinguishable from the general interest in crime control." *City of Indianapolis v. Edmond*, 531 U.S. 32, 41–44 (2000); *see City of Los Angeles v. Patel*, 576 U.S. 409, 420 (2015) (distinguishing administrative searches from criminal investigations); *Vernonia Sch. Dist. 47J*, 515 U.S. at 658 (similar).

This Court's decision in *Ferguson*, 532 U.S. at 69–70, is instructive, which addressed the constitutionality of a state hospital's warrantless drug screens of pregnant patients. This Court noted it had approved random drug tests in other

circumstances. *Id.* at 77 (citing *Skinner v. Railway Labor Execs.' Ass'n*, 489 U.S. 602 (1989), *Treasury Employees v. Von Raab*, 489 U.S. 656 (1989), and *Vernonia School Dist. 47J*, 515 U.S. at 646). But this Court reached a different conclusion in *Ferguson* because the records at issue were not turned over to any third party—they were turned over to law enforcement. *Ferguson*, 532 U.S. at 80–81. Because the purpose of the warrantless search was "ultimately indistinguishable from the general interest in crime control," this Court concluded the search could not withstand Fourth Amendment scrutiny. *Id.* at 81–86 (citation omitted).

The Ninth Circuit's majority decision's use of the closely-regulated-industry exception conflicts with this Court's precedent in two additional ways. First, this Court limits the exception to administrative regimes that provide a "constitutionally adequate substitute for a warrant" that "limit[s] the discretion of the inspecting officers." *Burger*, 482 U.S. at 703 (quoting *Donovan v. Dewey*, 452 U.S. 594, 603 (1981)). The majority decision does not consider these requirements, and the Nevada statute has no such safeguards. There is no limitation on time, place, or scope. *Burger*, 482 U.S. at 703. There is no limitation on the subject of the search. *See Patel*, 576 U.S. at 427–28. And there is no opportunity for the subject of the search "to obtain precompliance review before a neutral decisionmaker." *Id.* at 420–23; *contra Ricco Jonas*, 24 F.4th at 721–25, 733–40 (reviewing constitutionality of administrative scheme before affirming issuance of subpoena).

Second, cases applying this exception do so when analyzing the privacy rights of the business owner, not the customer. When a business owner "chooses to engage in [a] pervasively regulated business," the owner does so "with the knowledge" that

the business "will be subject to effective inspection." *United States v. Biswell*, 406 U.S. 311, 316 (1972). The *owner* therefore has a reduced expectation of privacy. *Id.*; *Burger*, 482 U.S. at 701–02. The same cannot be said for *customers* of that business (or, in this case, patients). *See United States v. Seslar*, 996 F.2d 1058, 1063 (10th Cir. 1993) ("[T]he closely regulated industry line of cases does not justify the warrantless search of unregulated persons."); *see also United States v. Herrera*, 444 F.3d 1238, 1245–47 (10th Cir. 2006); *Anobile v. Pelligrino*, 303 F.3d 107, 121 (2d Cir. 2001).

Because the majority decision represents an unwarranted expansion of a limited exception to the Fourth Amendment's warrant requirement—conflicting with Supreme Court precedent—this Court should grant the petition.

III. This case presents a good vehicle to decide an issue of exceptional importance.

The Ninth Circuit in its published opinion deepened a jurisdictional split on an issue of exceptional importance—privacy in prescription medical records. The concept of medical privacy goes back centuries, at least to the time of the original Hippocratic Oath. Clinton DeWitt & Charles Thomas, *Privileged Communications Between Physician and Patient,* 37 Tex. L. Rev. 806, 806–07 & n.1 (1959). Congress recognized the importance of medical privacy when it passed the Health Insurance Portability and Accountability Act (HIPAA) in 1996. *See Webb v. Smart Doc. Sols., L.L.C.,* 499 F.3d 1078, 1084 (9th Cir. 2007); *see also* 5 U.S.C. § 552(b)(6) (exempting "medical files" from Freedom of Information Act). And Nevada, like most states and

the District of Columbia, codified the doctor-patient privilege at Nev. Rev. Stat. § 49.225, which the Ninth Circuit's opinion and Nev. Rev. Stat. § 453.165 eliminate.

The protective rules and statutes exist for a reason—medical records can reveal intensely personal details about a patient's life. *See Douglas*, 419 F.3d at 1102. Records in Nevada's PMP database can disclose information about patients' gender identity, sexuality, sexually transmitted infections, mental health, and pregnancy status. The majority decision allows the government to access this private information—not for medical or public health purposes—but to search for evidence of a crime. And no external controls prevent abuses of this privilege by law enforcement.

As the concurrence notes, alternatives to this broad statute exist. *Motley*, 89 F.4th at 790 (Graber, J., concurring); Appx. A, p. 10. For example, Nevada could limit access to "only the most dangerous prescription drugs, coupled with a requirement that persons filling those specific prescriptions be warned that their prescription data could be subject to search." *Id.* Or Nevada could allow for administrative subpoenas on suspicion less than probable cause, but allowing some external review. *See Ricco Jonas*, 24 F.4th at 721–24. Whether these statutes would pass constitutional muster would be a closer question. But instead "Nevada's law indiscriminately allows warrantless searches of any and all prescriptions, even those drugs with no history of abuse or resale, and even those drugs that reveal specific medical histories." *Motley*, 89 F.4th at 790–91 (Graber, J., concurring); Appx. A, p. 10. To prevent Nevada's law from eroding medical privacy and

constitutional protections for everyone in the state, this Court should grant Motley's petition.

Conclusion

Because the panel decision deepens a jurisdictional split and conflicts with this Court's precedent in an area of exceptional importance—privacy of prescription medication records—this Court should grant the petition for writ of certiorari.

Dated this 16th day of July, 2024.

Respectfully submitted,

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