No. 24-5107

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

Reply Brief for Petitioner

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Introduction

Myron Motley was arrested after police officers searched without a warrant through years of his prescription medical records. The district court denied Motley's motion to suppress, and the Ninth Circuit affirmed, holding for the first time that prescription records are not entitled to privacy protections. Because this decision misinterpreted this Court's caselaw and created a circuit split, Motley petitioned for a writ of certiorari.

In response, the government argues this case is a poor vehicle for this Court's review because it believes alternative grounds support the judgment, and the Ninth Circuit's reasoning is consistent with other jurisdictions and this Court.

The government is wrong, and this Court should grant Motley's petition for writ of certiorari.

Argument

I. This Court's further review of the merits of Motley's Fourth Amendment argument is justified.

In response to Motley's petition, the government disputes the Ninth Circuit's decision created a jurisdictional split and argues the Ninth Circuit reached the correct conclusion on the merits. But the government misreads the cases Motley relies on and miscomprehends the split. Read properly, the Ninth Circuit's decision disregards this Court's precedent and splits with several other jurisdictions in incorrectly concluding that prescription medical records are not entitled to Fourth Amendment protection.

A. The Ninth Circuit's decision conflicts with decisions from this Court and other circuits.

In his petition, Motley argued the Ninth Circuit's decision conflicts with precedent from this Court in two ways: (1) it conflicts with cases concerning privacy interests inherent in medical records in general and prescription records specifically; and (2) it conflicts with precedent concerning the Fourth Amendment exception for closely regulated industries. Pet-10–12; *see* Sup. Ct. R. 10(c). The government fails to adequately address these arguments.

1. Privacy interests in prescription records

The government contends the Ninth Circuit correctly treated prescription medical records differently from other types of medical records. BIO-14. Nothing in this Court's precedent or cases from other jurisdictions justifies this disparate treatment.

The government fails to adequately address cases holding that the same information revealed by prescription records is entitled to privacy protections, instead, stating in a conclusory manner that prescription records are different. BIO-17; *see Jaffee v. Redmond*, 518 U.S. 1, 10 (1996) (mental illness); *Doe v. Att'y Gen. of U.S.*, 941 F.2d 780, 795–96 (9th Cir. 1991) (HIV status and AIDS diagnosis), *disapproved of on other grounds by Lane v. Pena*, 518 U.S. 187 (1996); *Smith v. City of Salem*, 378 F.3d 566, 568–69, 575 (6th Cir. 2004) (gender dysmorphia); *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").

The government does discuss three cases involving prescription medical records. BIO-15–17. But the government's attempts to distinguish these cases fail. In *Douglas v. Dobbs*, 419 F.3d 1097, 1102 (10th Cir. 2005), the Tenth Circuit had "no difficulty concluding" prescription drug information was private and protected. The Tenth Circuit's statement that "the right to privacy is not absolute" does nothing to detract from this conclusion. Similarly, in *Doe v. Se. Pa. Transp. Auth.* (*SEPTA*), 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." True enough, the Third Circuit was not considering a regulatory scheme like Nevada's and, like the Tenth Circuit in *Dobbs*, noted privacy interests are not absolute. *See* BIO-16. But Motley did not argue the Ninth Circuit's decision splits from the Tenth Circuit on those issues; instead, he argued the Ninth Circuit's decision splits from the Tenth Circuit on whether prescription records are private. Finally, 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 addressed state privacy interests, along with "federal jurisprudence." *Id.* at 1218. And, again, Motley does not argue *Skinner* is directly controlling; instead, he argues the Ninth Circuit's decision splits with *Skinner*'s conclusion that prescription records are objectively private. On that issue, because the Ninth Circuit deepened a jurisdictional split, this Court's review is appropriate. *See* Sup. Ct. R. 10(a).

2. Closely-regulated-industry exception

With respect to the exception for closely regulated industries, the government simply repeats the arguments from its answering brief in the Ninth Circuit. BIO-10–14. Motley does not dispute that prescription medication is subject to government regulations. *See* BIO-11–13 (citing regulations). But this Court has not recognized pharmacies as "pervasively regulated" for purposes of the exception. And even were this Court to conclude pharmacies are pervasively regulated, Motley provided several reasons why that conclusion on its own is not enough for the exception to apply. *See* Pet.-10–11 (emphasizing search here involved law enforcement specifically looking for evidence of a crime); Pet.-11 (arguing statute provides no "constitutionally adequate substitute for a warrant" that "limit[s] the discretion of the inspecting officers" (quoting *New York v. Burger*, 482 U.S. 691, 703 (1987))); Pet.-11–12 (distinguishing between privacy rights of business owners versus customers).

The government responds to this argument in two ways. First, the government insists "it would be unreasonable for anyone in the opioid prescription chain"—including the patient— "to expect opioid prescription records to remain private." BIO-13–14. But *all* medical records, not just prescription records, are seen by individuals outside the doctor-patient relationship, including hospital billing departments, insurance companies, and pharmacies. Accepting the government's argument would decimate protections for records this Court has previously explained are private. *See Ferguson v. City of Charleston*, 532 U.S. 67, 69–70 (2001) ("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.").

Second, the government insists *Ferguson* is distinguishable but lists only immaterial factual differences. The government asserts, in *Ferguson*, "it was not disputed by the parties that the state hospital's test of a patient's urine for drugs was a search." BIO-14 (citing *Ferguson*, 532 U.S. at 76 & n.9). But the Court did not simply accept that fact for purposes of the case; the Court held "the urine tests conducted by those staff members were indisputably searches within the meaning of the Fourth Amendment." *Ferguson*, 532 U.S. at 76. And the government notes that *Ferguson* involved urine screens, not prescription records. BIO-14 (quoting *Ferguson*, 532 U.S. at 69–70, 83–84 & n.21). But that fact from *Ferguson* is unnecessary to its ultimate conclusion (which the government does not address)—a state's general interest in law enforcement is not a "special need" justifying warrantless searches for evidence of a crime. 532 U.S. at 77–86.

B. This Court should reject the government's merits-based argument in its brief in opposition.

The government insists the Ninth Circuit "correctly recognized [Motley]'s suppression claim lacks merit. BIO-9. As an initial note, the merits of the Ninth Circuit's decision are not at issue at the certiorari stage. *See* Sup. Ct. R. 10. But to the extent the government argues the merits are a reason not to grant Motley's petition, the government is wrong. For the reasons set forth in the petition, the Ninth Circuit was wrong in concluding that a patient does not have a privacy interest in prescription records, as they contain confidential medical information

which should not be disclosed to law enforcement without a warrant supported by probable cause.

II. This case presents an ideal vehicle.

Motley's case presents an opportunity for this Court to prevent erosion of medical privacy and Fourth Amendment protections. The case squarely presents a Nevada law that allows state law enforcement unfettered warrantless access to the state's Prescription Monitoring Program (PMP) database, expressly to "investigate a crime related to prescription drugs." Nev. Rev. Stat. § 453.165. The statute allowing this unrestricted, warrantless access is the broadest in the nation. Contrary to the government's opposition, this case directly challenges medical privacy violations and does not have alternative grounds for affirmance.

A. The government's purported alternative grounds for affirmance are not a reason to decline review.

1. The third-party disclosure doctrine is not at issue.

While the parties argued to the Ninth Circuit whether the third-party disclosure doctrine affected the suppression claim, the Ninth Circuit did not address this argument in its majority opinion. *United States v. Motley*, 89 F.4th 777, 783–86 (9th Cir. 2023); Pet. Appx. A, pp. 5–7. Thus, the intersection of the third-party doctrine with prescription privacy rights is not ripe for certiorari.

Furthermore, the government's third-party doctrine argument conflicts with precedent. BIO-17–19. Although patients must share private information with third parties, "[t]he 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 [their] consent." *Ferguson*, 532 U.S. at 78. Adopting the government's position would undermine decades of this Court's precedent holding patients have a protected privacy interest in medical records, despite turning that same information over to third-party medical providers. *See, e.g., id. a*t 76–86.

In two cases in the 1970s, this Court held that documents provided to third parties may not be entitled to Fourth Amendment protections. *Smith v. Maryland*, 442 U.S. 735, 743–45 (1979); *United States v. Miller*, 425 U.S. 435, 442–44 (1976). But in *Carpenter v. United States*, 585 U.S. 296 (2018), this Court clarified the narrow contours of the doctrine. Not every record revealed to a third party undermines the expectation of privacy in that record. *Id.* at 315. Instead, courts must consider "the nature of the particular documents sought" and whether they were "voluntary[ily] expos[ed]." *Id.* at 314.

The government, however, fails to address the relevant portions of *Carpenter* and instead claims this case is more like *Smith* and *Miller*. BIO-18–19. The government's argument implies that Motley could abstain from medical care, but the same could be said in *Carpenter*—abstaining from medical care is akin to "disconnecting the phone from the network." *Carpenter*, 585 U.S. at 315.

Prescription medication information is protected by the Fourth Amendment because of the strong expectation of privacy in medical records notwithstanding providers' access. Prescription records from Nevada's PMP share much in common with the cell-site records in *Carpenter*. *Carpenter* focused on the "deeply revealing" nature of the search, "its depth, breadth, and comprehensive reach, and the

inescapable and automatic nature of its collection." 585 U.S. at 320. Prescription records are "deeply revealing," *id.* at 320, "provid[ing] an intimate window into a person's life," *id.* at 311; *see Or. Prescription Drug Monitoring Program (PDMP) v. U.S. DEA*, 998 F. Supp. 2d 957, 967 (D. Or. 2014). The records are comprehensive, showing any of hundreds of different prescriptions, prescribed by any doctor, anywhere in the state, going back several years. *See Carpenter*, 585 U.S. at 310–11, 320.

Motley, by providing medical information to doctors and pharmacists, was not taking the risk that information would be revealed to others—medical providers are forbidden by law and ethical obligations from doing so. *See DeMassa v. Nunez*, 770 F.2d 1505, 1506–07 (9th Cir. 1985). The data collection is also automatic and "inescapable" for anyone who wants to participate in modern healthcare. *See Carpenter*, 585 U.S. at 315–36, 320. Prescription information, therefore, is like cell-site information, because it "is not truly 'shared' [voluntarily] as one normally understands the term"—instead, transmission is an automatic aspect of receiving healthcare. *Id.* at 315. Unless foregoing needed prescription treatments, patients cannot avoid sharing their information. "As a result, in no meaningful sense does the user voluntarily 'assume[ ] the risk' of turning over" prescription information. *Id.* at 315 (quoting *Smith*, 442 U.S. at 745) (alteration in original); *see also Oregon PDMP*, 998 F. Supp. 2d at 967. For the same reasons this Court relied on in *Carpenter*, the third-party doctrine does not apply here.

2. Good faith does not apply.

The government argues the exclusionary rule should not apply because law enforcement relied in good faith on search warrants and the statute. BIO-20–21. Reliance on a warrant is irrelevant here, as all three warrants post-dated—and relied on—the warrantless PMP search. And officers' purported good-faith reliance on the statute is not a reason to deny Motley's petition.

This Court created the exclusionary rule to "compel respect" for the Fourth Amendment's constitutional guaranty against unreasonable searches and seizures. *Davis v. United States*, 564 U.S. 229, 236 (2011). The rule applies when the benefits of suppression outweigh the societal costs, with its applicability resting on the culpability of the police conduct. *Id.* at 237–38. When deliberate police conduct is at issue, "the deterrent value of exclusion is strong and tends to outweigh the resulting costs." *Id.* at 238. Similarly, the government cannot justify a search under a statute if the statute's "provisions are such that a reasonable officer should have known that the statute was unconstitutional." *Illinois v. Krull*, 480 U.S. 340, 355 (1987); *see Michigan v. DeFillippo*, 443 U.S. 31, 37–39 (1979).

A reasonable officer should know a statute allowing indiscriminate searches through private medical records is unconstitutional. "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); *see Carpenter*, 585 U.S. at 303. Specifically concerning medical records, this Court has held they are entitled to Fourth Amendment protections. *See, e.g., Ferguson*, 532 U.S. at 81–

86; *see also Norman-Bloodsaw v. Lawrence Berkeley Lab.*, 135 F.3d 1260, 1269–70 (9th Cir. 1998); *Douglas*, 419 F.3d at 1102. And although courts have begun considering the related question of administrative subpoenas for PMP records, no court has approved a statute like Nevada's, allowing warrantless searches, by law enforcement, with no judicial oversight, expressly to find evidence of a crime. *Contra United States v. Korte*, 918 F.3d 750, 759 (9th Cir. 2019). The good faith doctrine therefore does not apply.

Because the majority decision did not rule on whether the good-faith exception applies, this case remains a good vehicle for the Court's review, leaving to the lower courts consideration of any exceptions. This follows the procedural posture in *Carpenter*, where the government made a nearly identical argument in its brief in opposition. *Compare* BIO-20–21, *with* Br. of the U.S. in Opp., *Carpenter v. United States*, 2017 WL 411305, at *29–31 (U.S. Jan. 27, 2017); *cf., e.g.,* K*orte,* 918 F.3d at 757–59 (denying relief on good-faith grounds after this Court's grant of certiorari and merits decision in *Carpenter*). Ruling otherwise here would effectively insulate the Nevada statute—and others like it—from this Court's review, giving the government "carte blanche to violate constitutionally protected privacy rights, provided, of course, that a statute supposedly permits them to do so." *United States v. Warshak*, 631 F.3d 266, 282 n.13 (6th Cir. 2010).

3. The searches were not harmless.

Investigation of Motley began when an officer with the Reno Police Department (RPD) used the Nevada statute to review years of 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. There were ultimately three warrants challenged in this case: (1) a state warrant to track Motley's car for 90 days based on information from the PMP database, hearsay statements from an informant (CS-1), and Motley's stale, overturned criminal history, 3-ER-573–88;[1] (2) a federal tracking warrant to track Motley's car for 45 additional days based on the first state tracking warrant, a new PMP report for Motley, and PMP reports for people Motley met while under RPD surveillance, 3-ER-596–603; and (3) a federal wiretap warrant authorizing 30 days of electronic surveillance of Motley's phone calls and text messages, along with further location tracking, based on the previous two tracking warrant applications and evidence, information from three confidential informants (including CS-1), phone records, and PMP information for Motley and his alleged coconspirators. 3-ER-606–717; 4-ER-719–24. Without an evidentiary hearing, the district court denied Motley's motion to suppress the fruits of the searches. Pet. Appx. D.

The government argues that any Fourth Amendment violations regarding the PMP database searches were harmless "because the affidavits rested on sufficient probable cause even without the information from the prescription database." BIO-22. But prescription information made up a significant portion of all three warrant applications. 3-ER-573–88, 581–717; 4-ER-719–24; *contra United States v. Reed*, 15

[1] Motley cites to the Excerpts of Records submitted to the Ninth Circuit as: "volume-ER-pages." The excerpts of record are available on the ECF docket for *United States v. Motley*, No. 21-10296 (9th Cir.).

F.3d 928, 933–34 (9th Cir. 1994). And the remaining information in the warrant applications did not establish probable cause. *See United States v. Nora*, 765 F.3d 1049, 1058–60 (9th Cir. 2014); *United States v. Vasey*, 834 F.2d 782, 788 (9th Cir. 1987).

The government disagrees, relying on a tip from a confidential source and Motley's criminal history. BIO-22–23. The government fails to address, however, why the tip was unreliable: (1) the tip was based on hearsay; (2) the police did not know a declarant's identity; (3) the informant's reliability was undermined by his incentive to cooperate; and (4) the informant's "predictive information" concerned only innocent activities.

Because the warrants lacked probable cause when excised of the PMP database information, the PMP search and the resulting searches were not harmless. Thus, this Court should grant certiorari to review whether the statute permitting law enforcement warrantless access to Nevada's PMP database information violates the Fourth Amendment.

B. The government does not dispute the importance of the privacy issues at stake.

The government does not dispute that medical records, including prescription medication information, reveal intensely personal details about a patient's life. Pet.-12–13. The Ninth Circuit's published 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. To prevent erosion of medical privacy and Fourth

Amendment protections, both within and outside the criminal context, this Court's review is warranted

Conclusion

This Court should grant certiorari.

Dated this 25th day of October, 2024.

Respectfully submitted,

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