No._____

In The

Supreme Court of the United States

DR. GENE N. BARRY

Petitioner,

v.

SCOTT M. FRESHOUR; BELINDA WEST; MARI ROBINSON; ANNE RAUCH; MARY CHAPMAN; DEBBI HENNEKE,

Respondents.

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

PETITION FOR WRIT OF CERTIORARI

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May 10, 2019

QUESTION PRESENTED

Dr. Gene Barry was subjected to a warrantless, non-consensual, and non-exigent administrative search and seizure of his medical records via a Texas Medical Board ["TMB"] subpoena *instanter* addressed to him personally which (1) demanded immediate compliance, (2) was enforced by TMB inspectors, and (3) deprived him of his right to seek pre-compliance review. He sued relevant TMB personnel under 42 U.S.C. § 1983. The United States' District Court for the Southern District of Texas, Houston Division (Rosenthal, C.J.) concluded Dr. Barry suffered an injury and denied Respondents' motion to dismiss. On appeal, the Fifth Circuit reversed after concluding Dr. Barry lacked "Fourth Amendment standing" because he did not own the clinic at which he worked.[1]

Therefore, the question presented is:

> Must doctors have an ownership interest in their medical practices in order to have cognizable privacy or property interests in medical records that (a) they are required by state law to maintain, (b) are subpoenaed from them personally, and (c) are being used against them in administrative proceedings?

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[1] *Barry v. Freshour,* 905 F.3d 912, 915 n. 3 (5th Cir. Oct. 4, 2018). See also *id.,* at 914.

PARTIES TO THE PROCEEDINGS

Petitioner Dr. Gene N. Barry was the plaintiff in the district court and the appellee in the court of appeals.

Respondents Scott M. Freshour, Belinda West, Mari Robinson, Anne Rauch, Mary Chapman, and Debbi Henneke were the defendants in the district court and appellants in the court of appeals.

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On October 18, 2017, the district court entered an order denying Respondents' motion to dismiss Petitioner's § 1983 claims. The Fifth Circuit reversed and rendered on October 26, 2018. The panel treated Petitioner's request for rehearing *en banc* as a request for panel rehearing and denied same on February 13, 2019.

JURISDICTION

The court of appeals entered its published opinion on October 4, 2018. Petitioners' timely request for rehearing *en banc* was denied on February 13, 2019. This Honorable Court's jurisdiction rests on 28 U.S.C. § 1254(1).

RELEVANT STATUTORY AND REGULATORY PROVISIONS

The Fourth Amendment to the U.S. Constitution provides:

> 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.

42 U.S.C. § 1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

INTRODUCTION

This Honorable Court has concluded:

- "[T]he application of the Fourth Amendment depends on whether the person invoking its protection can claim a justifiable, a reasonable, or a legitimate expectation of privacy that has been invaded by government action";[2] and

- "It may be assumed that, for many reasons, physicians have an interest in keeping their prescription decisions confidential."[3]

Respondents nonetheless moved to dismiss each of Dr. Barry's ten separate causes of action under § 1983 based on qualified immunity. The District Court denied same and concluded:

(1) Dr. Barry suffered a cognizable injury sufficient to confer standing;[4]

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[2] *Smith v. Maryland*, 442 U.S. 735, 740 (1979) (internal quotation marks omitted).

[3] *Sorrell v. IMS Health, Inc.,* 564 U.S. 552, 572, 131 S.Ct. 2653, 2668, 180 L.Ed.2d 544 (2011).

[4] *Barry v. Freshour,* 2017 WL 4682176, *4 (S.D. Tex. 2017) (unpub.) ("Though Dr. Barry has no ownership interest in the clinic, one of the subpoenas was addressed to him…and he alleges that the records searched were his…It is undisputed that Dr. Barry is personally named in the proceedings before the State Office of Administrative Hearings…Because Dr. Barry alleges that the medical records were obtained illegally, and because they are being used against him in those proceedings…Dr. Barry has pleaded an injury sufficient for standing.") (citations to the

(2) "The regulatory scheme could not and did not put Dr. Barry on notice that his records would be searched in this unauthorized manner[…]";

(3) "[T]he regulatory scheme does not limit the Texas Medical Board's discretion[…]";[5]

(4) "Because the 'closely regulated' exception does not apply, the search and seizure of the patient medical records under the subpoena is constitutional only if Dr. Barry had 'an opportunity to obtain precompliance review before a neutral decisionmaker[…]";[6]

(5) "Dr. Barry adequately alleges facts that show that no such opportunity was provided[…]";[7]

(6) The statutory scheme did not authorize a warrantless search;[8]

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record omitted). See also *ibid.* ("In *Zadeh [II]*, the doctor owned the medical office that was searched, while Dr. Barry works at the Red Bluff Medical Clinic part-time and has no ownership interest in it…This fact is not critical to the standing issue, because the subpoena was directed to Dr. Barry himself.").

[5] *Id.,* at 8 (citing Tex. Occ. Code § 153.007).

[6] *Id.,* at 7 (citing *City of Los Angeles, Calif. v. Patel,* 576 U.S. ____, 135 S. Ct. 2443, 2452 (2015)).

[7] *Ibid.*

[8] *Id.,* at 8. See also Texas Sunset Advisory Commission – *Executive Summary: Texas Medical Board* [2018], at 2 ("In addition, 10 of the board's more than 40 enforcement actions and lawsuits stemming from its pain management clinic inspections resulted in a judge questioning the board's statutory enforcement authority.

(7) "The defendants do not point to any law to dispute that the law on warrantless searches was clearly established at the time of the alleged search[…]";[9]

(8) "It strains credibility to suggest that doctors and their patients have no reasonable expectation of privacy[…]";[10] and

(9) "Even if the medical profession was a closely regulated industry…Dr. Barry still alleges a constitutional violation that was clearly established when the search occurred."[11]

The TMB Respondents appealed to the Fifth Circuit, which reversed on the purported basis that Dr. Barry lacked Fourth Amendment standing because he did not own the medical clinic at which he worked.[12] Dr. Barry sought *en banc* rehearing, but his petition was treated as a request for panel rehearing and denied.

Without certain tools clarified in statute, such as the ability to enforce its subpoenas and inspect unregistered clinics, the board is limited in its ability to regulate pain management clinics.") (emphasis added), *available at* https://www.sunset.texas.gov/public/uploads/files/reports/Texas%20Medical%20Board%20Executive%20Summary_3-28-18.pdf (last visited April 18, 2019). From www.google.com, search "TMB sunset staff executive summary 2018" and click "Texas Medical Board Sunset Staff Report March 2018".

9 *Barry,* 2017 WL 4682176, at *8 (citations omitted).

10 *Id.*, at *7 (citations omitted).

11 *Id.,* at *8.

12 *Barry,* 905 F.3d, at 915 n. 3. See also *id.,* at 914.

The Fifth Circuit has already found the TMB's continued conduct to be:

(1) unconstitutional;[13]

(2) subject to an insufficient administrative[14] scheme; and

(3) both entitled and not entitled to qualified immunity.[15]

Additionally, Texas state courts have found the TMB's warrantless searches and seizures via subpoenas *instanter* to be:

(1) a "cause of concern";[16]

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[13] *Zadeh v. [Respondent] Robinson*, 902 F.3d 483, 493 (5th Cir., Aug. 31, 2018) {petition for reconsideration en banc filed, response requested, reply filed with leave October 22, 2018} ["*Zadeh II*"]. See also *Cotropia v. [Respondent] Chapman*, 721 Fed. App'x 354, 348 & 361 (5th Cir., March 12, 2018) (unpub.). Cf. *Okorie v. Crawford*, No. 18-60335 (5th Cir. (Miss.), April 12, 2019).

[14] *Barry,* 2017 WL 4682176, at *8. See also *Zadeh II,* 902 F.3d, at 493.

[15] Compare *Zadeh II* with *Cotropia,* 721 Fed. App'x, at 361. See also *Okorie,* No. 18-60335 (slip op., at 2) (granting officers qualified immunity because case law did not clearly establish the unconstitutionality of a government actor "push[ing] the doctor down, dr[awing] his gun multiple times, and limit[ing] the doctor's movement and access to facilities such as the restroom [during an administrative search]."); *id.* (slip op., at 12) (noting threats of lethal force); and *id.* (slip op., at 13) (noting such conduct persisted over the course of more than two hours with nine government agents on-site).

[16] See *Morgan v. [Respondent] Freshour*, 2018 WL 1898412, *4, 2018 U.S. Dist. LEXIS 67315 (S.D. Tex., April

(2) "troubling";[17]

(3) sufficient to "sound alarms";[18] and

(4) designed to both (a) "ensure that there was no judicial oversight of the search by TMB and law enforcement"[19] and (b) "circumvent both the Texas and US Constitutions' requirement for a warrant."[20]

20, 2018) (Hoyt, J.) (unpub.) (denying TMB's employees' motion to dismiss and quoting *Texas v. Morgan,* Cause No. 14-28128-A (24th District Court, Victoria, Texas, Oct. 13, 2015)) ("The fact that a regulatory agency and law enforcement agencies are contacting each other and sharing information to conduct and coordinate a warrantless 'administrative search' is a cause of concern for this Court"). See also *id.*, at *5 ("[T]he TMB acted with bad faith in partnering up with law enforcement to conduct the search of defendant's business.") and *Morgan v. Texas Medical Board,* No. D-1-GN-17-002301 (459th District Court, Travis County, Texas, April 16, 2019) ("[D]uring oral argument, the TMB admitted that they still execute subpoenas in coordination with law enforcement."), App. 41a.

[17] *Morgan,* No. D-1-GN-17-002301, App. 41a ("More troubling is the notion that the TMB's bad behavior may not be limited to this case but instead may be part of a pattern.").

[18] See also *id.,* App. 34a (observing the 24th District Court's findings and conclusions "provide[ ] enough data to sound alarms…").

[19] *Morgan,* Cause No. 14-28128-A, at App. 35a.

[20] *Id.,* at App. 37a. See also *id.,* at 41a.

STATEMENT OF THE CASE

According to Chief Judge Rosenthal;

> The following facts are alleged in Dr. Barry's complaint. On May 7, 2015, a Texas Medical Board employee signed executive director Mari Robinson's name on an administrative subpoena instanter addressed to Dr. Barry, covering patient records located at the Red Bluff Medical Clinic in Pasadena, Texas. (Docket Entry No. 12, at ¶ 13). Dr. Barry worked at the clinic part-time. *Id.* at ¶ 25. That same day, Texas Medical Board investigators, including Rauch, Chapman, West, and Henneke, entered the clinic. They were accompanied by U.S. Drug Enforcement Administration agents, Texas Department of Public Safety officers, and Texas Board of Nursing investigators. *Id.* at ¶¶ 14–15. The Texas Medical Board investigators stated that they were in the clinic to do an investigation and instructed the Texas Department of Public Safety officers to turn off any security cameras, which they did. *Id.* at ¶ 19–21. Clinic staff turned the cameras back on, and the officers turned them off again, throughout the day, until the Texas Medical Board investigators forbade the clinic staff from going into the room where the cameras were located. *Id.* at ¶¶ 22–23.

> Dr. Barry arrived shortly after the Texas Medical Board investigators entered the clinic. They presented him with the subpoena instanter directed to him. *Id.* at ¶ 24. He called his lawyer, Meagan Hassan,[21] who arrived at the clinic an hour later. *Id.* at ¶¶ 26, 30. Hassan told the Texas Medical Board investigators, the Department of Public Safety officers, the Drug Enforcement Administration agents, and the Texas Board of Nursing investigators to leave immediately. *Id.* at ¶¶ 31–32. Most left, but Rauch stayed, insisting that she speak with Freshour, the general counsel of the Texas Medical Board. *Id.* at ¶ 34. Hassan called Freshour and demanded that he order the Board investigators to leave the clinic. *Id.* at ¶ 35. Freshour refused. *Id.* at ¶ 36. Hassan then demanded that the investigators show her what gave them authority to execute the subpoena as a search warrant. *Id.* at ¶ 39. In response, an investigator gave Hassan a copy of Texas Occupational Code § 153.007. *Id.* at ¶ 40. Section 153.007 states: "The board may issue a subpoena or a subpoena duces tecum to compel the attendance of a witness and the production of books, records, and documents. The board may administer oaths and take testimony regarding any matter within its jurisdiction." *Id.* § 153.007(a). The Texas

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21 [Now an Honorable Justice on Texas' Fourteenth Court of Appeals in Houston.]

Medical Board's implementing regulations interpret § 153.007 to require that:

> Upon the request by the board or board representatives, a licensee shall furnish to the board copies of medical records or the original records within a reasonable time period, as prescribed at the time of the request. "Reasonable time," as used in this section, shall mean fourteen calendar days or a shorter time if required by the urgency of the situation or the possibility that the records may be lost, damaged, or destroyed.

22 TEX. ADMIN. CODE § 179.4(a).

Hassan continued to protest that the Board was engaging in an illegal seizure. *Id.* at ¶ 43.[22] The investigators responded that Department of Public Safety officers could detain the clinic administrator if she did not allow them access to the patient records.[23] The investigators also insisted that they could

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22 [The Fifth Circuit characterizes the entirety of this continued interaction as: "Barry and his attorney, whom he had called to the clinic, refused to consent, prompting some of the officials to leave." *Barry,* 905 F.3d, at 913-14.]

23 [But see *Cotropia,* 721 Fed. App'x, at 359 ("The authority that has been cited to us [Tex. Occ. Code § 153.007] does not expressly permit TMB investigators to take the subpoenaed records by force."); c.f. *Morgan,* No. D-1-GN-17-002301, at App. 40a.]

go through all of the clinic's patient files, not only the ones specified in the subpoena instanter, if the clinic staff did not comply. *Id.* at ¶ 44. The clinic administrator subsequently directed the clinic staff to deliver any requested files to the Texas Medical Board investigators. *Id.* at ¶ 45.

The subpoena instanter did not identify the covered records by patient name. *Id.* at ¶ 47. Instead, the subpoena required:

> 2. Patient sign-in sheets or patient log for all patients evaluated from April 1, 2015 to April 30, 2015.
>
> 3. Copies of the corresponding exam and prescription for each patient identified in item #2.
>
> 4. Complete & accurate medical & billing records for a random sample of 15 patient records identified in item # 2.

Id. at ¶ 48.

The Texas Medical Board investigators did not randomly choose 15 patient medical and billing records to review and copy. *Id.* at ¶ 49. Instead, the investigators looked through the records of each patient evaluation and copied all that were incomplete or deficient. *Id.* at ¶ 49–50…

In this suit, Dr. Barry makes the following allegations:

- The Board investigators, Rauch, Chapman, West, and Henneke, violated the Fourth Amendment by searching and seizing his medical records, amounting to an unconstitutional abuse of process. (Docket Entry No. 12, at ¶¶ 97–92, 126–29, 145–53).

- Robinson, the executive director, West, a supervisor of the investigators, and Freshour, the general counsel, are liable because they directed or permitted the search and seizure and failed to supervise and train their employees in a manner reasonably calculated to prevent the unconstitutional abuse of process. *Id.* at ¶¶ 93–114, 130–33, 154–57.

- Freshour failed to protect Dr. Barry from the unconstitutional search, seizure, and abuse of process. *Id.* at ¶¶ 115–25, 134–37, 158–61.

- All the defendants violated or conspired to violate Dr. Barry's rights to procedural due process. *Id.* at ¶¶ 138–44."[24]

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[24] *Barry,* 2017 WL 4682176, at *1-2, App. 8a-11a.

Dr. Barry's Complaint also alleged (1) Respondent Robinson (a licensed attorney) testified to the Texas House of Representatives that the Fourth Amendment to the United States Constitution does not apply to Texas Medical Board searches and seizures[25] and (2) the subpoena was signed in violation of express Texas law (and therefore irrefutably void) because:

(a) "[A] TMB employee other than [Respondent] Robinson signed [her] name to an administrative subpoena *instanter* addressed to Dr. Barry for patient records;"'

(b) The Texas Legislature specifically limited the TMB's subpoena authority to its Executive Director and Treasurer-Secretary; and

(c) The subpoena issued to Dr. Barry was not signed by either person.[26]

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[25] See https://www.youtube.com/watch?v=LmV-utEnSfk (Defendant Robinson's appearance before the Texas House of Representatives Committee on Public Health, at 4:50) {last visited April 19, 2019}). From www.youtube.com, search "Robinson Zedler Short Video".

[26] C.f. *Mosley v. Tex. Health and Human Services Commission,* No. 17-0345 (Tex., May 3, 2019) (Blacklock, J., concurring) (slip op., at 2-3) (quoting, *inter alia, Gutierrez-Brizuela v. Lynch,* 834 F.3d 1142, 1153 (10th Cir. 2016) (GORSUCH, J., concurring); *id.* (slip op., at 3) (acknowledging the Administrative Code is "inferior to statutes."); and *id.* (slip op., at 4) ("The history of this case gives Texans little reason to trust their government agencies[.]").

REASONS FOR GRANTING THE PETITION

This Honorable Court should grant the instant Petition under Supreme Court Rules:

- 10(a) because the Fifth Circuit has:

  (1) entered a decision in conflict with a decision of the Ninth Circuit on the important issue of privacy concerning medical records;

  (2) decided an important constitutional question concerning medical privacy in a way that conflicts with decisions from both of Texas' highest courts; and

  (3) so far departed from the accepted and usual course of judicial proceedings (by actively misinterpreting this Honorable Court's express language) as to call for an exercise of the Court's supervisory power; and

- 10(c) because the Fifth Circuit has:

  (1) decided important questions concerning (*inter alia*) ownership, protectable Fourth Amendment interests, and medical privacy that have not been, but should be, settled by this Honorable Court; and (most directly)

  (2) decided said federal questions in ways that conflict with multiple relevant decisions of this Honorable Court.

A. The Fifth Circuit erred when it concluded Dr. Barry lacked Fourth Amendment standing.

1. Dr. Barry has standing because he had reasonable, justifiable, and legitimate expectations of privacy in his medical records.

This Honorable Court has (1) assumed "physicians have an interest in keeping their prescription decisions confidential,"[27] (2) "emphasized…that the Fourth Amendment analysis must turn on such factors as 'our *societal* understanding that certain areas deserve the most scrupulous protection from government invasion[,]'"[28] and (3) honored the People's Fourth Amendment rights even when they have no ownership interest in any relevant asset.[29] The question of whether doctors have reasonable, justifiable, or legitimate expectations of privacy in medical records they are required by state law to "maintain"[30] should be settled by this Honorable Court, particularly given (a) the

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27 *Sorrell,* 131 S.Ct., at 2668.

28 *California v. Greenwood,* 465 U.S. 35, 43, 108 S.Ct. 1625, 100 L.Ed.2d 30 (1988) (quoting *Oliver v. United States,* 466 U.S. 170, 178, 104 S.Ct. 1735, 80 L.Ed. 2d 214 (1984)) (emphasis added by this Honorable Court).

29 *Carpenter v. U.S.,* 565 U.S. ___, 138 S.Ct. 2206, 2260 (2018). See also § B(2)(b), *infra.*

30 22 Tex. Admin. Code § 165.1(a) ("Each licensed physician of the board shall maintain a medical record for each patient."). See also 22 Tex. Admin. Code § 165.1(b)(1) (mandating said maintenance for seven years).

apparent split herein from both the Ninth and Fifth Circuits[31] and (b) the Texas Court of Criminal Appeals' (Texas' highest criminal court) observation that "society accepts—indeed, positively insists—that [information imparted to a physician], although of necessity partly exposed, should nevertheless retain its essentially private character."[32]

The physician-patient privilege is formally recognized by Texas law[33] (and every other state's law);[34] this privilege is designed "to prevent unnecessary disclosure of highly personal information."[35] Precedent from Texas' two highest

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[31] See *Zadeh II,* 902 F.3d, at 491 (agreeing with the Ninth Circuit that the expectation of privacy in the context of medical records is likely heightened).

[32] *Richardson v. State,* 865 S.W.2d 944, 952 (Tex. Crim. App. 1993). Accord *Tighe v. Ginsberg,* 146 A.D.2d 268, 272, 540 N.Y.S.2d 99 (N.Y. App. Div. 1989) and *Petrillo v. Syntex Laboratories, Inc.,* 499 N.E.2d 952, 957 & 960 (Ill. App. Ct. 1986).

[33] See Tex. Occ. Code § 159.002 (a); see also Tex. R. Evid. 509 and Tex. Att'y Gen. Op. No. JC-0274 (by U.S. Senator John Cornyn), at pp. 2-3 (conceding the "history of respect towards the recognized need for privacy in the doctor-patient relationship."), *available at* https://www2.texasattorneygeneral.gov/opinions/opinions/49cornyn/op/2000/pdf/jc0274.pdf (last visited April 22, 2019).

[34] *R.K. v. Ramirez,* 887 S.W. 2d 836, 839-40 (Tex. 1994) (orig. proceeding).

[35] *Ibid.* (citing *Ex Parte Abell,* 613 S.W.2d 255, 262 (Tex. 1981)). Cf. *Dean-Hayslett v. Methodist Healthcare,* 2015 WL 277114 (Tenn. Ct. App. 2015) (unpub.) (citing *Hammonds v. Aetna Cas. & Sur. Co.,* 245 F. Supp. 793, 801 (N.D. Ohio 1965)).

courts has established Texans have at least *some* expectation of privacy in medical records.[36] Moreover, at least six federal courts of appeals have concluded patients have reasonable expectations of medical privacy[37] and said expectation was well known to the Framers.[38] Therefore, Dr. Barry has standing because

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[36] See *R.K.,* 887 S.W. 2d, at 839-40 and *Richardson,* 865 S.W.2d, at 952-953 ("We would not want to say…that society does not recognize the confidentiality of information imparted to a physician behind the closed doors of an examination room."). See also *id.,* at 953 & n. 7; accord *Tarrant Cnty. Hosp. Dist. v. Hughes*, 734 S.W.2d 675, 679 (Tex. App.—Fort Worth 1987).

[37] See *Doe v. New York,* 15 F.3d 264, 267 (2d Cir. 1994); *Doe v. Southeastern Pennsylvania Trans. Auth.,* 72 F.3d 1133, 1137 (3d Cir. 1995), *cert. denied,* 519 U.S. 808, 117 S.Ct. 51, 136 L.Ed.2d 15 (1996); *Doe v. Broderick,* 225 F.3d 440, 450-51 (4th Cir. 2000); *Doe v. Attorney General of the United States,* 941 F.2d 780, 795-96 (9th Cir. 1991), *vacated on other grounds sub nom., Reno v. Doe ex rel Lavery,* 518 U.S. 1014 (1996); *Douglas v. Dobbs,* 419 F.3d 1097, 1102 (10th Cir. 2005) (same), *cert. denied,* 546 U.S. 1138, 126 S.Ct.1147, 163 L.Ed.2d 1001 (2006); and *Harris v. Thigpen,* 941 F.2d 1495, 1513 (11th Cir.1991). See also *Tucson Woman's Medical Clinic v. Eden,* 379 F.3d 531, 551 (9th Cir. 2004).

[38] See *Oregon Prescription Drug Monitoring Program v. United States Drug Enforcement Agency,* 998 F. Supp. 2d 957, 964 (D. Or. 2014) ["OPDMP"] ("The Hippocratic Oath has contained provisions requiring physicians to maintain patient confidentiality since the Fourth Century B.C.E. The ACLU cites compelling evidence demonstrating that a number of signers of the Declaration of Independence and delegates to the Constitutional Convention were physicians trained at the University of Edinburgh, which required its graduates to sign an oath swearing to preserve patient confidentiality."); *id.,* at *13-14; and *id.,* at *15

(1) he was a Texas doctor, (2) Texas doctors have at least some privacy *or* property interests in the medical records they create and are personally required by state law to maintain,[39] and (3) Respondents unreasonably violated said expectations when they executed a subpoena *instanter* for his medical records as if it was a search warrant.

2. Dr. Barry has standing because he remains injured by the Texas Medical Board's otherwise unreviewable insistence on using illegally seized documents against his medical license.

The District Court concluded:

> It is undisputed that Dr. Barry is personally named in the proceedings before the State Office of Administrative Hearings…Because Dr. Barry alleges that the medical records were obtained illegally, and because they are being used against him in those

("[T]he prescription records here are protected by a heightened privacy interest rendering the use of administrative subpoenas unreasonable.") (citing 45 C.F.R. § 164.512 [Health Insurance Portability and Accountability Act, Privacy Rule] (providing protections for "protected health information")), *rev'd on other grounds* (because intervenors lacked Article III standing), 860 F.3d 1228 (9th Cir. 2017).

[39] 22 Tex. Admin. Code § 165.1(a). See also 22 Tex. Admin. Code § 165.1(b)(1). Cf. *Mosley,* No. 17-0345 (Blacklock, J., concurring) (slip op., at 2) ("Such rules have the force of law, we are told.") (citations omitted).

> proceedings…Dr. Barry has pleaded an injury sufficient for standing.[40]

After the District Court denied Respondents' motions to dismiss, four material developments in Texas law reinforced the propriety thereof. First, the TMB ousted an administrative law judge ["ALJ"] who ruled against it[41] (thereby evidencing the systemic denial of impartial administrative review). Second, a Texas ALJ ruled ALJs lack the power to consider constitutional questions.[42] Third, a Texas ALJ refused "to take judicial notice of the State Trial Court's findings" concerning the Texas Medical Board's unconstitutional conduct with respect to

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[40] *Barry,* 2017 WL 4682176, at *4 (citations to the record omitted).

[41] See Michael King, "*Medical Board Loses a Case...and Attacks the Judge; Burkhalter forced to resign by State Office*", THE AUSTIN CHRONICLE, March 16, 2018, *available at* https://www.austinchronicle.com/news/2018-03-16/medical-board-loses-a-case-and-attacks-the-judge/ (last accessed April 24, 2019).

[42] *Texas Medical Board v. Zadeh,* Texas State Office of Administrative Hearings Docket No. 503-15-2821.DO, App. 47a-48a (ALJs "lack the power of constitutional construction; they cannot determine the validity or constitutionality of the Board's instanter subpoena or otherwise rule the Board's rules and actions unconstitutional…nothing in the statute gives…ALJs the authority to decide the constitutionality or propriety of an agency's investigative actions before a contested case is referred …With these limitations on [the State Office of Administrative Hearing's] jurisdictional authority, the ALJs are powerless to review Staff's conduct in carrying out the Board's investigatory functions before the case was referred to [it].") (internal citations omitted).

another Texas doctor.[43] Fourth, the Texas Supreme Court's unanimous decision and Justice Blacklock's concurrence in *Mosley* (No. 17-0345, published May 3, 2019) evidenced the lengths to which Texas' Office of the Attorney General will go to defend indefensible deprivations of constitutional rights by administrative agents.[44] Therefore, Dr. Barry lacks an adequate remedy at state law for his injuries because the administrative body charged with adjudicating his case cannot (and will not) impartially consider the constitutional questions presented herein.[45]

B. The Fifth Circuit has decided important federal questions in ways that conflict with relevant decisions of this Court.

1. The Fifth Circuit's decision ignores this Honorable Court's jurisprudence guaranteeing the People's clearly established right to seek pre-compliance review.

In *See v. City of Seattle*, this Honorable Court

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43 *Morgan,* D-1-GN-17-002301, App. 33a-34a.

44 See also Respondents' Response to Petition for Rehearing En Banc, App. 50a (contending *See v. Seattle* (see *infra*) "merely prohibits the same individual agent from both issuing and executing a search order.").

45 But see *Zadeh II,* 902 F.3d, at 498 n. 1 (Willett, J., concurring *dubitante*) (observing the ALJ "declined to address the constitutional questions.") (emphasis added) and *Morgan* D-1-GN-17-002301, App. 32a-33a (instructing SOAH to consider whether the documents seized from Dr. Morgan can be used against him in administrative proceedings).

held that state demands for inspections,

> [M]ay not be made and enforced by the inspector in the field, and **the subpoenaed party** may obtain judicial review of the reasonableness of the demand prior to suffering penalties for refusing to comply.[46]

This holding was honored by the Fifth Circuit in both *Cotropia*[47] and *Zadeh I.*[48] Here, however, Dr. Barry ("the subpoenaed party") was deprived of his opportunity to obtain judicial review of a subpoena directed to him personally.[49] Therefore, the Fifth

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[46] *See v. City of Seattle,* 387 U.S. 541, 544-45, 87 S. Ct. 1741, 18 L. Ed. 2d 930 (1967) (emphasis added). See also *Donovan v. Lone Steer, Inc.,* 464 U.S. 408, 414-15, 104 S. Ct. 769, 78 L. Ed. 2d 567 (1984); *Patel,* 135 S. Ct., at 2456; and *U.S. v. Sturm, Ruger & Co., Inc.*, 84 F.3d 1, 3 (1st Cir. 1996).

[47] *Cotropia,* 721 Fed. App'x, at 358 (quoting *See,* 376 U.S., at 544-45).

[48] *United States v. Zadeh*, 820 F.3d 746, 756 (5th Cir. 2016) ["*Zadeh I*"] ("[T]he person served with [an administrative] subpoena may challenge it in court before complying with its demands…") (alteration in the original).

[49] While a second subpoena was issued to the clinic, the Fifth Circuit has held that "only licensees are subject to the [Texas Medical Board's] subpoenas." *Zadeh II,* 902 F.3d, at 492-93; see also *Cotropia,* 721 Fed. App'x, at 359 (citing Tex. Occ. Code § 153.007(e)); and *id.,* at 360 (TMB is the "primary means of licensing…physicians.") (quoting Tex. Occ. Code § 151.003(2)). The clinic where Dr. Barry worked is not (and cannot be) licensed by the TMB and Respondents have not sought reconsideration or appeal on this important point. Therefore, said second subpoena was void *ab initio* (or, at worst, was a secondary abuse of process).

Circuit erred when it held Dr. Barry lacks a cognizable Fourth Amendment interest.[50]

2. The Fifth Circuit's decision ignores this Honorable Court's jurisprudence establishing the People do not require ownership before receiving Fourth Amendment protections.

a. Katz v. U.S. (1967)

The Fifth Circuit held Dr. Barry lacked Fourth Amendment standing because he did not own the clinic at which he worked.[51] However,

> "[T]he Court in *Katz* held that capacity to claim the protection of the Fourth Amendment depends **not** upon a property right in the invaded place but upon whether the person who claims the protection of the Amendment has a legitimate expectation of privacy in the invaded place."[52]

Therefore, the Fifth Circuit erred when it created Fourth Amendment interests that are contingent upon business ownership. When this fundamental

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[50] Compare *Zadeh II,* 902 F.3d, at 493 ("[I]t is the [Texas Medical] Board or its representatives who will be asking for records.") with *See,* 387 U.S., at 544-45 and *Lone Steer,* 464 U.S., at 415.

[51] *Barry,* 905 F.3d, at 915 & n. 3. See also *id.,* at 914.

[52] *Rakas v. Illinois,* 439 U.S. 128, 99 S.Ct. 421, 58 L.Ed.2d 387 (1978) (emphasis added) (citations omitted).

error is acknowledged, the absurdity of the Fifth Circuit's holding that the Fourth Amendment protects the *People's personal places* rather than the People themselves becomes readily apparent.[53] Dr. Barry respectfully requests that this Honorable Court reconsider its holding in *Katz.*[54]

b. Carpenter v. U.S. (2018)

The Fifth Circuit's holding below contravenes this Honorable Court's holding in *Carpenter* that the People can have reasonable expectations of privacy even when (unlike doctors) they do not create, "maintain", control, use, nor keep relevant documents.[55] Even if such interactions with seized documents are deemed necessary before valid Fourth Amendment interests are recognized (per Justices

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[53] See *Katz,* 389 U.S., at 351 ("[T]he Fourth Amendment protects people, not places.").

[54] See *Carpenter,* 138 S.Ct., at 2214 n. 1. See also *id.,* at 2446 (KENNEDY, J., dissenting) (characterizing *Katz* as "a failed experiment").

[55] *Carpenter,* 138 S.Ct., at 2214 (acknowledging the documents in question were "maintained" by a third party).

Thomas,[56] Alito,[57] and Kennedy[58]), Dr. Barry had such interactions because (1) his medical records were seized pursuant to a subpoena with his name on it, (2) he exercised control over said medical records (both personally and through his on-site attorney) at the medical clinic where he worked via legitimate attempts to exclude Respondents therefrom,[59] (3) the

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[56] *Id.,* at 2235 (THOMAS, J., dissenting) (Carpenter "did not create the records, he does not maintain them, he cannot control them, and he cannot destroy them."). Cf. *Barry,* 2017 WL 4682176, at *2 (quoting 22 TEX. ADMIN. CODE § 179.4(a)) ("Upon…request…a licensee shall furnish…medical records…within a reasonable time period…'Reasonable time,' [sic]…shall mean fourteen calendar days or a shorter time if required by the urgency of the situation or the possibility that the records may be lost, damaged, or *destroyed*.") (emphasis added), App. 9a. See also *Cotropia,* 721 Fed. App'x., at 359 ("[Respondent] Chapman did not explain to the district court, and has not explained to us, why the situation was urgent or why the records were unsafe.").

[57] *Id.,* at 2260 (ALITO, J., dissenting) (Carpenter did not (*inter alia*) create, "maintain", or control the documents in question).

[58] *Id.*, at 2234 (KENNEDY, J., dissenting) ("Customers…do not own, possess, control, or use the records, and for that reason have no reasonable expectation that they cannot be disclosed pursuant to *lawful* compulsory process.") (emphasis added). See also *id.,* at 2235 ("[T]he Government did not search anything over which Carpenter could assert ownership and control. Instead, it issued a *court-authorized* subpoena to a third party to disclose information it alone owned and controlled. That should suffice to resolve this case.") (emphasis added).

[59] See *Carpenter,* 138 S.Ct., at 2272 (GORSUCH, J., dissenting) ("Plainly, customers have substantial legal

seized documents were (according to his Complaint) "his medical records", and (4) Texas still seeks to use said documents against him in an administrative proceeding[60] (despite adverse findings and conclusions from two different state courts, two different federal courts, and the Fifth Circuit in both *Zadeh* and *Cotropia*). No reasonable inference can be drawn (at the pleading stage) that Dr. Barry failed to create, control, maintain, use, or keep the documents he was required to maintain and the TMB subpoenaed from him personally.

Dr. Barry's express allegation that he "had a reasonable expectation of privacy in his medical records"[61] is materially distinguished from *Carpenter* (particularly given that the subpoena was issued outside the limits imposed by Texas Occupations Code § 153.007) because it directly invokes concepts of both privacy and property; therefore, Dr. Barry has not "forfeited" said argument,[62] particularly in light of the facts that (1) the Fifth Circuit's ruled (for the first time) Dr. Barry could not state a claim because he did not own the medical clinic at which he worked, (2) this Petition addresses said issue directly, and (3) Dr.

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interests in this information, including at least some right to include, exclude, and control its use. Those interests might even right to the level of a property right."). See also *Granados v. State,* 85 S.W.3d 217, 222-23 (Tex. Crim. App. 2002).

60 *Barry*, 2017 WL 4682176, at *4.

61 *Ibid.*

62 *Carpenter,* 138 S.Ct., at 2272 (GORSUCH, J., dissenting). Cf. *Barry,* 905 F.3d, at 915 n. 3 (holding for the first time that Dr. Barry had no property interest).

Barry's brief on the merits will attempt to address the issue of ownership directly.

c. Rakas v. Illinois (1978)

In *Byrd v. United States,*[63] this Honorable Court made it clear that the Petitioner in *Rakas* "claimed only that they were 'legitimately on [the] premises' and did not claim that they had any legitimate expectation of privacy in the areas of the car which were searched." Here, Dr. Barry specifically alleged he "had a reasonable expectation of privacy in his medical records" and no fact can be read to imply he was at the place of his employment illegitimately. The Fifth Circuit erred when it reached a dispositive conclusion contrary to Dr. Barry's express allegations at the dismissal stage.

3. The Fifth Circuit's decision ignores this Honorable Court's jurisprudence establishing the presumptive unconstitutionality of warrantless searches.

Respondents contend they are authorized to utilize immediately enforced subpoenas *instanter*, "to capture *any* potential regulatory violation[,]"[64] *e.g.,* potential violations concerning advertising,[65]

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[63] *Byrd v. United States,* 584 U.S. ____, 138 S. Ct. 1518, 200 L. Ed. 2d 805 (2018).

[64] Respondents' brief to the Fifth Circuit, 2018 WL 1093689, at *2.

[65] See 22 Tex. Admin. Code § 164.1 *et. seq*.

physician profiles,[66] healthcare liability lawsuits and settlements,[67] and the issuance of contact lens prescriptions.[68] This uncorrected contention runs directly afoul of the well-established fact that:

> [S]earches conducted outside the judicial process, without prior approval by a judge or magistrate, are *per se* unreasonable under the Fourth Amendment – subject only to a few specifically established and well-delineated exceptions.[69]

No exceptions are applicable herein.[70]

4. The Fifth Circuit's impermissible re-interpretation of this Honorable Court's express assumption that physicians have interests in keeping their prescription decisions confidential calls for the exercise of this Court's supervisory power.

The District Court cited *Sorrell* for the proposition that, "for many reasons, physicians have

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66 See 22 Tex. Admin. Code § 173.1, *et. seq*.

67 See 22 Tex. Admin. Code § 176.1, *et seq*.

68 See 22 Tex. Admin. Code § 181.1, *et. seq*.

69 *Arizona v. Gant*, 556 U.S. 332, 338, 129 S.Ct. 1710, 173 L.Ed. 2d 483 (2009) (quoting *Katz v. United States*, 389 U.S. 347, 357 (1967)).

70 See *Barry,* 2017 WL 4682176, at *7 (concluding the medical profession is not "closely regulated"). See also *id.*, at *8 ("Even if the medical profession was a 'closely regulated' industry…Dr. Barry still alleges a constitutional violation that was clearly established when the search occurred.").

an interest in keeping their prescription decisions confidential."[71] The Fifth Circuit, however, held "*Sorrell* merely observes that **states have a** legitimate **interest** in protecting the privacy of medical records on behalf of doctors."[72] The Fifth Circuit's defiance of this Honorable Court's jurisprudence concerning an important question of federal law is erroneous and deserving of review under Supreme Court Rules 10(b) and (c).

C. The Fifth Circuit erred when it reversed Dr. Barry's abuse-of-process claim.

The District Court correctly concluded:

> Dr. Barry alleges claims under the Fourth Amendment. He alleges that the defendants "intended the subpoena *instanter* to act as a 'sneak-and-peek subpoena' in order to gain warrantless access to [his] medical records over contemporaneous objections from [his] legal counsel for the express purpose of identifying which records should be searched and seized." (Docket Entry No. 12, at ¶ 148). Dr. Barry also alleges that the defendants "recklessly violated [his] clearly established constitutional rights to remain free from warrantless searches and seizures." *Id.* at ¶ 153(d). Dr. Barry's abuse-of-process claims are not "freestanding," *Cevallos*, 541 F. App'x at

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71 *Barry,* 2017 WL 4682176, at *7.

72 *Barry,* 905 F.3d, at 915 (emphasis added).

> 394, but are instead founded in the Fourth Amendment."[73]

Based thereon, the District Court denied Respondents' motions to dismiss.[74]

This Honorable Court has guaranteed that the People have the right to challenge a subpoena:

- "on any appropriate ground" (including "for the improper purpose of obtaining evidence for use in a criminal prosecution" and attorney-client privilege);[75] and
- if it has "been issued for an improper purpose, such as to harass the taxpayer or to put pressure on him to settle a collateral dispute, or for any other purpose reflecting on the good faith of the particular investigation."[76]

Dr. Barry maintains the meaning of *instanter* is clearly established under Texas law,[77] that

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[73] *Barry,* 2017 WL 4682176, at *8.

[74] *Ibid.*

[75] *Reisman v. Caplin*, 375 U.S. 440, 449, 84 S. Ct. 508, 513, 11 L. Ed. 2d 459 (1964).

[76] *United States v. Lasalle National Bank,* 437 U.S. 298, 313-14, 98 S. Ct. 2357, 57 L. Ed. 2d 221 (1978).

[77] *Rippey v. State,* 104 S.W.2d 850, 851 (Tex. Crim. App. 1937) (*instanter* "means immediately, forthwith, without delay.") See also *Caudillo v. State,* 541 S.W.2d 617, 618 (Tex. Crim. App. 1976) and *Fentress v. State,* 16 Tex. Ct. App. 79 (1884). But see *Smith v. Little,* 53 Ill. App. 157, 160 (1893) ("Technically, however, it means within the

Respondents' "sneak-and-peak" subpoena *instanter* remains manifestly improper under the facts at this stage,[78] that he had standing to challenge said purpose and process, and that he was unconstitutionally deprived of the right to make said challenge in a manner that was plainly incompetent or a knowing violation of the law.[79] Therefore, the

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judicial day then begun.") (citing 1 Bouv.[ier] Law. Dic. 645).

[78] See *Morgan,* 2018 WL 1898412, *2, 2018 U.S. Dist. LEXIS 67315, *4 ("[T]he seizure of documents expressly reveals the purpose involved, *i.e.*, an intent to use an administrative subpoena as a substitute for a formal search warrant."); see also *id.,* at 3 and *id.,* at 9 ("The evidence shows that defendants entered the plaintiff's offices without a search warrant and conducted a search without the plaintiff's consent and in the absence of exigent circumstances. Clearly, the defendants were searching for contraband or other illegal activity that was presumed by them in advance of the search. This conduct presumably violated clearly established state and federal law.").

[79] Compare (1) *Barry,* 905 F.3d, at 913 (Respondent Robinson was the TMB's Executive Director) and (2) First Amended Complaint, at ¶ 55, App. 51a (Robinson is an attorney) with (1) *id.,* at ¶ 60, App. 52a (alleging the specific and plausible fact that Respondent Robinson could not identify a "constitutionally adequate substitute for a search warrant") and (2) n. 25, *supra* (Robinson testified the Fourth Amendment does not apply to the TMB because it is "civil law enforcement"). See also *Zadeh II,* No. 17-50518, at ROA.774: 2-4 ("Q: Are you familiar with the term [']constitutionally adequate substitute for a search warrant[']? A: [Robinson] Not really.") and *id.,* at ROA.774, 5-25; ROA.775: 1-25; and ROA.776: 1-13 ("Q: Do you believe the phrase [']constitutionally adequate substitution for a search warrant['] is vague?...[Robinson]: I believe that you obviously have a specific intent in mind when you are

Fifth Circuit erred when it rendered judgment against Dr. Barry's unconstitutional abuse-of-process claim.

D. The Fifth Circuit erred when it created a constitutional wrong without a remedy for all parties subjected to illegal searches who are not self-employed.

The maxim *ubi jus, ibi remedium* ("where there is a right, there is a remedy")[80] is arguably the "foundation of all systems of law",[81] was honored by this Honorable Court as early as *Marbury v. Madison,*[82] and was utilized as justification by a unanimous Supreme Court over 100 years later.[83] Dr. Barry's relevant rights arise from (*inter alia*):

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asking me that. *I don't know what it is and I don't understand what you are asking me*.") (emphasis added).

80 BLACK'S LAW DICTIONARY, 1761 (8th ed. 2004).

81 *United States v. Loughrey*, 172 U.S. 206, 232, 19 S. Ct. 153, 43 L. Ed. 420 (1898) (WHITE, J., dissenting).

82 *Marbury v. Madison*, 1 Cranch 137, 163, 2 L.Ed. 60 (1803) ("'[I]t is a general and indisputable rule, that where there is a legal right, there is also a legal remedy by suit, or action at law, whenever that right is invaded.'") (quoting 3 W. BLACKSTONE, COMMENTARIES *23). See also *id.* ("[F]or it is a settled and invariable principle in the laws of England that every right, when withheld, must have a remedy, and every injury its proper redress.") (quoting 3 W. BLACKSTONE, COMMENTARIES *109); and *Middlesex County Sewerage Authority v. Sea Clammers*, 453 U.S. 1, 23-24, 101 S.Ct. 2615, 69 L.Ed.2d 435 (1981) (STEVENS, J., dissenting).

83 *Texas Pacific Railway Company v. Rigsby*, 241 U.S. 33, 39-40, 36 S. Ct. 482, 60 L. Ed. 874 (1916).

(1) the United States Constitution;[84]

(2) understandings concerning the protections afforded doctors' medical and billing records that are recognized and permitted by society;

(3) relevant and binding jurisprudence from this Honorable Court;

(4) state law requiring him to personally maintain his patients' medical records; and

(5) reasonable reliance upon an Opinion from Texas' Office of the Attorney General.[85]

The Fifth Circuit's holding below erroneously recasts the People's clearly established right to pre-compliance review to be within executing officers' discretion while creating an entire class of people who are deprived of access to statutory remedies on the basis of their employment. Beyond further muddying the expectation-of-privacy and property-ownership analyses, this holding ignores yet another controlling line of long-standing precedent from this Honorable

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[84] Dr. Barry further avers it is conceivable his property interests in his medical and billing records pre-date the Constitution.

[85] Tex. Att'y Gen. Op. No. JC-0274, *available at* https://www2.texasattorneygeneral.gov/opinions/opinions/49cornyn/op/2000/pdf/jc0274.pdf (last visited April 22, 2019). Dr. Barry maintains Respondents and their counsel should be estopped from arguing against the Office of the Attorney General's official position.

Court prohibiting governmental officials from exercising discretion during searches.[86]

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[86] *Stanford v. State of Tex.*, 379 U.S. 476, 485, 85 S. Ct. 506, 13 L. Ed. 2d 431 (1965) ("[N]othing is left to the discretion of the officer executing the *warrant*.") (emphasis added); *Johnson v. United States*, 333 U.S. 10, 13–14, 68 S. Ct. 367, 92 L. Ed. 436 (1948) (the Fourth Amendment is reduced to a nullity if the security of the people's homes is left "in the discretion of police officers"); *Gant,* 556 U.S., at 345 (the central concern underlying the Fourth Amendment is "the concern about giving police officers unbridled discretion to rummage at will among a person's private effects."); and *Malley v. Briggs,* 475 U.S. 335, 352, 106. S.Ct. 1092, 89 L.Ed.2d 271 (1986) (POWELL, J., concurring) ("As Lord Mansfield stated two centuries ago: 'It is not fit that the receiving or judging of the information should be left to the discretion of the officer. The magistrate ought to judge; and should give certain directions to the officer.'") (citing *Leach v. Three of the King's Messengers*, 19 How.St.Tr. 1001, 1027 (1765), quoted in *United States v. United States District Court*, 407 U.S. 297, 316, 92 S.Ct. 2125 2136, 32 L.Ed.2d 752 (1972)). Compare *FTC v. Am. Tobacco Co.*, 264 U.S. 298, 303 (1924) (HOLMES, J.) ("Anyone who respects the spirit as well as the letter of the Fourth Amendment would be loath to believe that Congress intended to authorize one of its subordinate agencies to sweep all our traditions into the fire and to direct fishing expeditions into private papers on the possibility that they may disclose evidence of crime.") (citing *ICC v. Brimson*, 154 U.S. 447, 479 (1894)) with *Barry,* 2017 WL 4682176, at *8 ("Second, the regulatory scheme does not limit the Texas Medical Board's discretion. The statute imposes no restrictions on when and to whom subpoenas may be served.") (citing Tex. Occ. Code § 153.007).

A subpoenaed party's "right" to pre-compliance review is no right at all if it can be neither enforced nor remedied. Here, the Fifth Circuit has created a roadmap for impermissible yet irremediable governmental discretion concerning warrantless searches and seizures of the People's medical records. So long as official demands for *instanter* production are directed to someone who even reasonably appears to lack sufficient ownership or privacy interests (despite the absence of any indicia as to what constitutes a sufficient interest or when the People have a constitutionally adequate opportunity to prove same to anyone), the People of Texas lack a remedy. This "monstrous absurdity"[87] extends well beyond the instant case, creates massive constitutional uncertainty, is contrary to unambiguous precedent, and warrants review.

E. The issues herein appear to satisfy Justice Thomas' and Justice Gorsuch's interests in the People's property interests.

On May 14, 2018, this Honorable Court decided *Byrd v. United States*.[88] In a concurring opinion, Justice Thomas identified the relevant issue was

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87 *Franklin v. Gwinnet County Public Schools,* 503 U.S. 60, 67 (1992) ("[T]he power to enforce the performance of the act must rest somewhere, or it will present a case which has often been said to involve a monstrous absurdity in a well organized government, that there should be no remedy, although a clear and undeniable right should be shown to exist.").

88 138 S. Ct. 1518.

"whether Byrd [could] prove that the rental car was his effect." Justice Thomas continued:

> That issue seems to turn on at least three threshold questions. First, what kind of property interest do individuals need before something can be considered "their . . . effec[t]" under the original meaning of the Fourth Amendment? Second, what body of law determines whether that property interest is present—modern state law, the common law of 1791, or something else? Third, is the unauthorized use of a rental car illegal or otherwise wrongful under the relevant law, and, if so, does that illegality or wrongfulness affect the Fourth Amendment analysis?...
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> In an appropriate case, I would welcome briefing and argument on these questions.[89]

Dr. Barry respectfully avers the instant case presents an opportunity to address these "vitally important" questions because it involves the question whether his patients' medical records are his "papers" or "effects".[90]

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89 *Byrd,* 138 S.Ct., at 1531 (THOMAS, J., concurring). See also *Carpenter*, 138 S.Ct., at 2268 (GORSUCH, J. dissenting) ("[W]hat kind of legal interest is sufficient to make something *yours*? And what source of law determines that? Current positive law? The common law at 1791, extended by analogy to modern times? Both? See *Byrd,* [THOMAS J., concurring]; cf. Re, The Positive Law Floor, 129 Harv. L. Rev. Forum 313 (2016). Much work is needed to revitalize this area of the law and answer these questions.").

90 *Byrd,* 138 S.Ct., at 1531 (THOMAS, J., concurring).

Finally, Dr. Barry avers the Fifth Circuit erred because there is no evidence that he was not a bailee with respect to his patients' medical records.[91]

F. The Fifth Circuit erred when it relied upon a definition and remedy that were created after the search and seizure at issue herein.

The Fifth Circuit cited 22 Texas Administrative Code § 195.3(f) for the proposition that:

> The subpoena instanter is defined by the Texas Administrative Code as a subpoena requiring immediate compliance. Specifically, the regulation provides that "[i]f immediate production is not made in compliance with the subpoena, the board, acting through the attorney general, may file suit to enforce the subpoena in a district court in Travis County."

The above-referenced Administrative Code section was added February 18, 2018[92] and did not exist in any known form before the search and seizure herein on May 7, 2015.[93]

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91 See *Carpenter*, 138 S.Ct., at 2268-69 (GORSUCH, J., dissenting).

92 See Tex. Admin. Code § 195.3 (from https://www.sos.texas.gov/tac/index.shtml, click "Search the Texas Administrative Code", search for "*instanter*", and click on the only result (§ 195.3).

93 From the foregoing page, click "Texas Register" then "Issue: 4/23/2010 Final/Adopted".

CONCLUSION

No relevant statute deprives doctors or patients of their privacy or property interests in medical records, no constitutionally adequate substitute for a search warrant exists, and ample precedent establishes doctors have at least ***some*** reasonable, legitimate, *or* justifiable expectation of privacy in medical records.[94] Whether physicians and patients have such expectations and interests is of crucial federal importance, particularly given that (1) virtually everyone sees a doctor at some point in their lives and (2) the Fifth Circuit is at material disagreement with its own precedent and the Ninth Circuit concerning medical privacy.[95] This result leaves the courts, officials, and the People with unreasonable uncertainty concerning their Fourth Amendment rights. Whether physicians in the Fifth Circuit have reasonable expectations of privacy in their medical records (or the right to secure pre-compliance review) should not depend upon (1) the panel that hears their cases or (2) whether they own their medical practices.

This unapologetic administrative assault on the People's constitutional rights improperly deprives non-self-employed subpoena recipients of the sole

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94 See, *e.g., Sorrell,* 131 S. Ct., at 2668.

95 Compare *Barry,* 905 F.3d., at 915 (concluding Dr. Barry had no reasonable expectation of privacy because he did not own the clinic at which he worked) with *Zadeh II,* 902 F.3d., at 491 (agreeing with the Ninth Circuit and concluding the expectation of privacy in medical contexts "likely is heightened").

statutory mechanism designed to rectify deliberate and/or incompetent government deprivations of their clearly established constitutional right to (*inter alia*) pre-compliance review.[96] This result impermissibly and effectively frustrates the legislative purposes behind 42 U.S.C. § 1983. Therefore, the contemplated absence of an adequate remedy under Texas law for deliberate and repeated constitutional violations demands meaningful review in the People's federal courts.

The plainly flawed reasoning employed by both the Texas Medical Board and the Fifth Circuit would immunize (*inter alia*) state boards of bar examiners from § 1983 liability for entering courthouses armed with subpoenas *instanter* directed to judges and demanding the immediate production of professional papers drafted, used, and maintained under their direction because judges (who are not self-employed) have zero privacy or property interests therein. This patently absurd contortion of otherwise clearly established law also appears applicable to doctors at government (perhaps even military) hospitals, to all non-self-employed lawyers, and to countless other vocations that are not even arguably "closely

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[96] See *De Lima v. Bidwell*, 182 U.S. 1, 176-177, 21 S. Ct. 743, 745, 45 L. Ed. 1041 (1901) ("If there be an admitted wrong, the courts will look far to supply an adequate remedy."). See also *California v. Sierra Club*, 451 U.S. 287, 300 n.4, 101 S. Ct. 1775, 68 L. Ed. 2d 101 (1981) (STEVENS, J., concurring) (quoting *Montana-Dakota Utilities Co. v. Northwestern Public Service Co.*, 341 U.S. 246, 261-262, 71 S. Ct. 692, 700, 95 L. Ed. 912 (1951) (FRANKFURTER, J. dissenting)).

regulated" within the meaning of this Honorable Court's controlling jurisprudence.

Finally, the Fifth Circuit's belief that doctors' privacy and property interests in medical records they are required to maintain is coterminous with their ownership interests in the businesses for which they work creates unsustainable uncertainty in the law contrary to this Honorable Court's jurisprudence. The impact of said uncertainty is exponentially exacerbated by the Fifth Circuit's failure to identify how much of a property interest is necessary before doctors can legitimately claim Fourth Amendment standing. As a result, this Honorable Court should grant Dr. Barry's petition for writ of *certiorari.*

PRAYER

The foregoing petition for writ of *certiorari* should be granted.

Respectfully submitted,
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