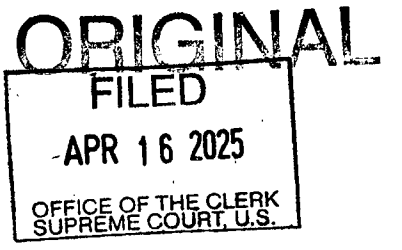
No. 25-23

In The Supreme Court of the United States



Antoine D. Johnson, MD,

v. *Petitioner,*

United States

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. Did the inferior courts err: *1)* by failing to apply, or *2)* by misapplying, settled Article III standing rules to factual jurisdictional objections allowing expansion of the record?

II. Is a use or disclosure "order of a court of competent jurisdiction granted after application showing good cause" (42 U.S.C. § 290dd-2(b)(2)(C)), a prerequisite to suit; and, does its absence debar prosecution under 28 U.S.C. § 547(1)?

III. The Defendant is a beneficiary of the Confidentiality of records statute (42 U.S.C. § 290dd-2); and, its rules (42 C.F.R. Part 2). Does compelled disclosure or use of sensitive, substance use disorder records, withstand *exacting scrutiny* in this case?

PARTIES TO THE PROCEEDING

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

There are no corporate parties involved in this case.

DIRECTLY RELATED PROCEEDINGS

1. Petition for Writ of Error Coram Nobis in the United States District Court for the Western District of Washington at Tacoma. *United States v. Johnson,* 3:09-cr-05703-DGE (W.D. Wash. June 26, 2023).

2. Appeal of order denying Petition for Writ of Error Coram Nobis, to the Ninth Circuit Court of Appeals. *U.S. v. Johnson,* 23-3676: Nov. 6th, 2023.

3. Motion for Panel Rehearing and Rehearing En Banc. *U.S. v. Johnson,* 23-3676: Feb. 11th, 2025.

4. Motion for Stay of Mandate. *U.S. v. Johnson,* 23-3676: Feb. 11th, 2025.

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CITATION OF OPINIONS AND ORDERS

1. *United States v. Johnson,* 3:09-cr-05703-DGE (W.D. Wash. Jan. 26, 2024).

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

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

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

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

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

7. *United States v. Johnson,* Case No. 3:14-cv-06018-RBL (9th Cir.: 06/11/2015).

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

BASIS FOR JURISDICTION

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

b) The judgment of the court of appeals was entered Jan. 28, 2025. Petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1254(1).

AUTHORITY

A. The First Amendment to the US Constitution provides:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

U.S. Const. Amend. I

AUTHORITY- Continued

"[W]e have long understood as implicit in the right to engage in activities protected by the First Amendment a corresponding right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends." (*Roberts v. United States Jaycees*, 468 U.S. 609, 622 (1984)).

"We have repeatedly found that compelled disclosure, in itself, can seriously infringe on privacy of association ... guaranteed by the First Amendment." (*Davis v. Fed. Election Comm'n*, 554 U.S. 724, 744 (2008)).

"Regardless of the type of association, compelled disclosure requirements are reviewed under exacting scrutiny." (*Ams. for Prosperity Found. v. Bonta*, 141 S. Ct. 2373, 2383 (2021)).

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

AUTHORITY- Continued

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

"[T]he doctor-patient relationship is one of the zones of privacy accorded constitutional protection" (*Whalen v. Roe*, 429 U.S. 589, 596 (1977)).

"[C]ases ... characterized as protecting 'privacy' have in fact involved at least two different kinds of interests. One is the individual interest in avoiding disclosure of personal matters, and another is the interest in independence in making certain kinds of important decisions." (*Roe* @ 598-600).

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

AUTHORITY- Continued

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

D. "It may be stated as a general principle, that public policy forbids the maintenance of any suit in a court of justice, the trial of which would inevitably lead to the disclosure of matters which the law itself regards as confidential, and respecting which it will not allow the confidence to be violated. On this principle, suits cannot be maintained which would require a disclosure of the confidences of the confessional, or those between husband and wife, or of communications by a client to his counsel for professional advice, or of a patient to [her] physician for a similar purpose." (*Totten v. U.S.* 105, 107 (1875).

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

F. 42 C.F.R. PART 2 - Confidentiality of Substance Use Disorder Patient Records (42 C.F.R. §§ 2.1 – 2.68 (02/16/2024)).

STATEMENT OF THE CASE

Statutory Background

On March 27th, 2020, President Trump signed into law the Coronavirus Aid, Relief, and Economic Security Act ("CARES Act"), passed by the 116th United States Congress.

Among other things, the CARES Act amended the Confidentiality of records statute (42 U.S.C. § 290dd-2); which, expressly safeguards the identity of any patient connected with a substance use disorder treatment program. (42 U.S.C. § 290dd-2(a)). Non-compliance with the Act or its regulations (42 C.F.R. Part 2), prohibits the use or disclosure of a patient's identity "for a law enforcement purpose or to conduct any law enforcement investigation." (42 U.S.C. § 290dd-2(c)(3)).

Factual Background

The United States implemented a use or disclosure order under 42 C.F.R. § 2.66, prior to commencement of suit. (App. 23). Appellant-petitioner is regarded as a *program* and/or *person holding the records* in that order; and, he claims that order publishes the identity of a patient - ***LaWanda A. Johnson, Ph.D.*** – in violation of 42 C.F.R. § 2.66(d)(2). Appellant-petitioner supports his position with new, undisputed evidence from the Federal Bureau of Prisons ("BOP").

Sometime after Appellant-petitioner's trial, direct appeal, and § 2255 Motion, the BOP gave LaWanda Johnson, her *Sentence Monitoring Computation DATA*. (App. 28). That DATA shows Ms. Johnson received a sentence reduction under 18 U.S.C. § 3621(e). (App. 29).

"If an inmate meets the two statutory prerequisites for sentence reduction — conviction of a nonviolent offense and successful completion of drug treatment — then § 3621(e)(2)(B) instructs that the BOP may, ... grant early release." (*Lopez v. Davis*, 531 U.S. 230, 231 (2001)).

Appellant-petitioner could not ascertain that DATA while in custody; because, it is contraband under BOP policy. (28 C.F.R. § 543.11(d)(2)). Notably, the underlying Petition for Writ of Error Coram Nobis was filed *three days* after Appellant-Petitioner was released from custody; and, DATA was introduced at that time.

Applying DATA to 18 U.S.C. § 3621(e)(1) and 28 C.F.R. §§ 522.20 & 522.21(a)(2); reveals, Ms. Johnson was "identified as an individual with a substance use disorder in order to determine that individual's eligibility to participate in a part 2 program" (42 C.F.R. § 2.11), within 24 hours of her detention (**10/07/2009**- see entry #10 of district court docket); and, before commencement of suit (**05/04/2010**- entry #80 of district court docket).

The definition of patient "includes both current and former patients." (*Id.*; see also, 42 U.S.C. § 290dd-2(d)- "The prohibitions of this section continue to apply to records concerning any individual who has been a patient, irrespective of whether or when such individual ceases to be a patient.").

Procedural History

Per the implemented § 2.66 order, "no information obtained under this section may be used or disclosed to conduct any investigation or prosecution of a patient in connection with a criminal matter." (42 C.F.R. § 2.66(d)(2)). Unless an order under § 2.66 is sought *in addition to* an order under § 2.65:

> The restriction on use or disclosure of information to initiate or substantiate any criminal charges against a patient or to conduct any criminal investigation of a patient (42 U.S.C. 290dd-2(c)), applies to any information, whether or not recorded, which is substance use disorder information obtained by a federally assisted substance use disorder program after March 20, 1972 (part 2 program), or is alcohol use disorder information obtained by a federally assisted alcohol use disorder or substance use disorder program after May 13, 1974 (part 2 program).
>
> ***42 C.F.R. § 2.12(b)(2)- in pertinent part.***

Succinctly, the 42 C.F.R. § 2.66 order is presumptively defective; because, it apparently was used to criminally investigate and prosecute a patient. Appellant-Petitioner attacked the factual allegations supporting Plaintiff's Article III standing, based on that theory. Shockingly, the coram nobis court failed to analyze all Article III standing criteria (App. 7); which, are required to establish a justiciable case or controversy within the jurisdiction of the federal courts. (Art. III, sect. 2, cl. 1).

Also, the lower courts appear to have applied, *wrongly*, the "categorically repudiated ... doctrine of hypothetical jurisdiction, by which several Courts of Appeals found it proper to proceed immediately to a merits question, despite jurisdictional objections, at least where (1) the merits question is more readily resolved, and (2) the prevailing party on the merits would be the same as the prevailing party were jurisdiction denied." (*Waleski v. Montgomery, McCracken, Walker & Rhoads, LLP*, 143 S. Ct. 2027 (2023)).

Use of hypothetical jurisdiction.

"The continued use of hypothetical jurisdiction raises serious concerns." (*Waleski v. Montgomery, McCracken, Walker & Rhoads, LLP*, 143 S. Ct. 2027 (2023)). "A court acts ultra vires when it assumes hypothetical jurisdiction in order to rule on the merits." (*Mendoza v. Strickler*, 51 F.4th 346, 352 (9th Cir. 2022)).

Here, the prevailing party on the merits is **not** the same as the prevailing party were jurisdiction denied; because, Ms. Johnson would be found to be a patient if her patient status was resolved by a trier of fact, *viz.*- BOP DATA governs. (18 U.S.C. § 3625). "Jurisdiction cannot be effectively acquired by concealing for a time the facts which conclusively establish that it does not exist." (*Lambert Co. v. Balt. Ohio R.R. Co.*, 258 U.S. 377, 382 (1922)).

Also, "the right to be let alone — the most comprehensive of rights and the right most valued by civilized men" (*California v. Hodari D*, 499 U.S. 621, 646 n.18 (1991)), guarantees "the right of an individual to be free in action, thought, experience, and belief from governmental compulsion." (*Whalen v. Roe*, 429 U.S. 589, 600 n.24 (1977)).

Appellant-petitioner claims he was denied that right; where, his "interest in independence in making certain kinds of important decisions" about use or disclosure of records under 42 U.S.C. § 290dd-2 & 42 C.F.R. Part 2, appears to be infringed by unlawful government intrusion. (*Roe* @ 599-600).

This appeal follows.

REASONS FOR GRANTING THE WRIT

I. The inferior courts erred: *i)* by failing to apply; or, *ii)* by misapplying, settled Article III standing rules to factual jurisdictional objections allowing expansion of the record.

The United States Court of Appeals for the Ninth Circuit *erred* in affirming the coram nobis court's decision; because, neither the appellate court, nor the coram nobis court resolved Appellant-petitioner's factual challenge to Plaintiff's Article III standing.

Steel Co. v. Citizens for a Better Environment, 523 U.S. 83, 94-95 (1998), "normally bars a court from addressing a substantive merits claim before addressing all jurisdictional vulnerabilities." The 9th Circuit, however, interpreted *Steel Co.*—and this Court's decisions in *Norton v. Mathews*, 427 U.S. 524, 530-531 (1976), and *Secretary of Navy v. Avrech*, 418 U.S. 676, 678 (1974) (per curiam), which *Steel Co.* discussed—to permit a court to proceed to the merits despite the existence of unresolved jurisdictional questions:

> "The Court appears to allow an exception to the rule against hypothetical jurisdiction in those peculiar circumstances where the outcome on the merits has been 'foreordained' by another case such that the jurisdictional question could have no effect on the outcome."

Bakalian v. Cent. Bank of Republic of Turkey, 932 F.3d 1229, 1236 (9th Cir. 2019).

But, the 9th Circuit appears to deviate from that Circuit Law; because, the decision in this case varies depending on whether the jurisdictional question is addressed. Recall, in a small set of cases: "A litigant's failure to follow the rule deprives a court of all authority to hear a case." (*Harrow v. Dep't. of Defense*, 144 S. Ct. 1178, 1183 (2024)). This is such a case.

"As a general rule, if an action is barred by the terms of a statute, it must be dismissed." (*Hallstrom v. Tillamook County*, 493 U.S. 20, 31 (1989)). Thus, even if Confidentiality of records statutory rules (42 U.S.C. § 290dd-2), and regulations (42 C.F.R. Part 2), are not jurisdictional, they create mandatory procedural rules that must be enforced when properly invoked.

Still, Appellant posits the Confidentiality of records statute and its rules are jurisdictional; because, in prohibiting criminal prosecution, they "mark the bounds of a court's adjudicatory authority." (*Boechler, P.C. v. Comm'r of Internal Revenue*, 142 S. Ct. 1493, 1497 (2022)).

Here, "facts are alleged that entitle the applicant to relief" (*U.S. v. Morgan*, 346 U.S. 502, 506 n.3 (1954)), *viz.*- new, undisputed Federal Bureau of Prisons evidence not available at the time of trial, direct appeal, nor § 2255 Motion. (App 29). Accordingly, this is not a case in which the jurisdictional label is necessary to provide "sound reasons ... for failure to seek appropriate earlier relief" (*Morgan* @ 512; see also, 28 U.S.C. § 2254(e)(2)(A)(ii) & (B)).

"One aspect of fundamental fairness, guaranteed by the Due Process Clause of the Fifth Amendment, is that individuals similarly situated must receive the same treatment by the Government." (*U.S.D.A. v. Murry*, 413 U.S. 508, 517 (1973)). Thus, failing to apply or misapplying the statutory and regulatory rules under 42 U.S.C. § 290dd-2 and 42 CFR Part 2, is error "of fundamental character" (*Morgan* @ 504).

Whether the rules under 42 U.S.C. § 290dd-2 or 42 C.F.R. Part 2 are construed as jurisdictional or mandatory and inflexible, the outcome is the same: Bureau evidence proves Ms. Johnson has been a ***patient*** since before commencement of suit. (18 U.S.C. § 3625, 42 C.F.R. § 2.11).

Per 18 U.S.C. § 3621(e) and 28 C.F.R. § 522.21(a)(2), within 24-hours of her detention (*supra.*), Ms. Johnson was identified as an individual with a substance use disorder in order to determine that individual's eligibility to participate in a part 2 program. Hence, the plaintiff appears to lack Article III standing due to noncompliance with 42 U.S.C. § 290dd-2(c) and 42 C.F.R. §§ 2.65 & 2.66.

In this case, "the court might lack subject-matter jurisdiction for non-merits reasons" (*Brownback v. King*, 141 S. Ct. 740, 750 n.8 (2021)); because, it "is a fundamental principle of our constitutional scheme that government, like the individual, is bound by the law. We do not subscribe to the totalitarian principle that the Government is the law, or that it may disregard the law even in pursuit of the lawbreaker." (*Alderman v. U.S.*, 394 U.S. 165, 202 (1968).

Though pleading a claim and pleading Article III standing do not appear to "entirely overlap" (*Brownback* @ 750), they may be "intertwined" under *Bowen v. Energizer Holdings, Inc.*, 118 F.4th 1134, 1143 (9th Cir. 2024). This is because "allegations relating to standing [**are not**] separable from the merits of the case." (*Id.*).

To prove "the crime of health care fraud was committed by someone" (App. 31), the Plaintiff implemented a use or disclosure order under 42 U.S.C. § 290dd-2 and 42 C.F.R. § 2.66. (App. 23). Under *Bowen*, "jurisdictional issues and substantive issues are deemed intertwined when the question of jurisdiction is dependent on the resolution of factual issues going to the merits." (*Bowen* @ 1143).

As a ***patient***, use or disclosure of Ms. Johnson's identity, disproves factual allegations supporting Article III standing; because, the 42 U.S.C. § 2.66 order would be defective. "[W]hen a court is faced with a factual attack on standing ... the court must leave the resolution of material factual disputes to the trier of fact when the issue of standing is intertwined with an element of the merits of the plaintiff's claim." (*Bowen* @ 1144).

That standard was clearly not followed by the inferior courts; because, ***i)*** no evidentiary hearing was granted, and ***ii)*** Ms. Johnson's ***patient*** status remains unresolved.

II. A use or disclosure "order of a court of competent jurisdiction granted after application showing good cause" (42 U.S.C. § 290dd-2(b)(2)(C)), is a prerequisite to suit; and, its absence debars prosecution under 28 U.S.C. § 547(1).

A. *"... a prerequisite to suit;"*

"It is well established that the interpretation of a doubtful statute may be influenced by language of other statutes which are not specifically related, but which apply to similar persons, things, or relationships." (*Federal Employees v. Department of Interior*, 526 U.S. 86, 105 (1999)).

Employing this principle, please compare the Confidentiality of records statute (42 U.S.C. § 290dd-2), to the Revocation of naturalization statute (8 U.S.C. § 1451). Though nonanalogous, the statutes apply to similar persons, things, or relationships, *viz.*- United States attorneys. (42 U.S.C. § 290dd-2(c)(1)- "criminal prosecution"; *cf.*, 8 U.S.C. § 1451(a)- "duty of the United States attorneys").

8 U.S.C. § 1451(a) requires United States attorneys to file an affidavit showing good cause to institute denaturalization proceedings. 42 U.S.C. § 290dd-2(c) provides: "[e]xcept as otherwise authorized by a court order . . ., a record . . . may not be disclosed or used in any civil, criminal, administrative, or legislative proceedings conducted by any Federal, State, or local authority, against a patient." Notably, in this case, the materials of record do not contain evidence of patient consent from LaWanda Johnson.

On two occasions this Court has held: "An affidavit showing good cause is a prerequisite to the initiation of denaturalization proceedings." (*Matles v. U.S.*, 356 U.S. 256, 257 (1958)- cit. *U.S. v. Zucca*, 351 U.S. 91, 99-100 (1956)). But, whether the order referenced in 42 U.S.C. § 290dd-2(c), is a prerequisite to suit, appears to be an issue of first impression.

Greater reason exists for treating a use or disclosure order issued under 42 U.S.C. § 290dd-2(b)(2)(C), "after application showing good cause" as a prerequisite to suit; than, merely an "affidavit showing good cause" issued under 8 U.S.C. § 1451 (a).

The order is a written decision made by a judge, "in a court of competent jurisdiction" (*supra.*), whereas the affidavit is simply a written declaration made under oath; and, failure to ascertain the order, **not** the affidavit, may implicate criminal penalties (42 U.S.C. § 290dd-2(f)).

Congress recognized: "The mere filing of a proceeding for denaturalization results in serious consequences to a defendant." (*Zucca* @ 99). A "person, once admitted to American citizenship, should not be subject to legal proceedings to defend his citizenship without a preliminary showing of good cause. Such a safeguard must not be lightly regarded." (*Id.*).

Similarly, Congress stressed: "Every patient and former patient must be assured that his right to privacy will be protected. Without that assurance, fear of public disclosure of drug abuse or of records that will attach for life will discourage thousands from seeking the treatment they must have if this tragic national problem is to be overcome." (*Ellison v. Cocke County*, 63 F.3d 467 (6th Cir. 1995); *U.S. v. Graham*, 548 F.2d 1302, 1314 (8th Cir. 1977); *U.S. v. Eide*, 875 F.2d 1429 (9th Cir. 1989); *Doe v. County of Fairfax*, 225 F.3d 440 (4th Cir. 2000)).

The issue in denaturalization cases is "important to the liberty of the citizen" (*Chaunt v. U.S.*, 364 U.S. 350, 353 (1960); but, "§ 290dd-2 creates rights in favor of society, not just particular members of society." (*Doe* @ 448). Ergo, if an affidavit "safeguard" is required to maintain suit in a denaturalization case, it is hard to imagine why an order to "safeguard" records of substance abuse, should not be required to maintain suit in cases that use or disclose such records.

B. "... its absence debars prosecution ..."

Under the Attorney General's supervision, the United States Attorney, an appointee of the President, has the duty, "except as otherwise provided by law," to prosecute all offenses against the United States within his or her district. (28 U.S.C. § 547(1)).

The prevailing rule in the federal system is that those who prosecute crime are "public officials" who "must serve the public interest." (*Marshall v. Jerrico, Inc.*, 446 U.S. 238, 248 (1980)- cit. *Berger v. U.S.*, 295 U.S. 78, 88 (1935)). Ergo, a scheme injecting a non-public interest into the enforcement process, may bring impermissible factors into the prosecutorial decision; and, in some contexts, raise serious constitutional questions. (*Jerrico* @ 249-250).

In this case, United States attorneys used or disclosed records under 42 U.S.C. § 290dd-2, and testimony relaying such records; but, ascertained a **defective** order under 42 U.S.C. § 290dd-2(c) and 42 C.F.R. § 2.66, according to clear evidence introduced below. "Such record or testimony shall not be used by any Federal, State, or local agency for a law enforcement purpose or to conduct any law enforcement investigation." (42 U.S.C. § 290dd-2(c)(3); &, 42 C.F.R. § 2.66).

Recall, prosecutorial decision-making is taken away from United States attorneys; where, there is a law directing such action. (28 U.S.C. § 547(1)). The Confidentiality of records statute (42 U.S.C. § 290dd-2(c)(3)), does precisely that; when, United States attorneys fail to bestow "unconditional compliance" upon its regulations. (42 C.F.R. § 2.13(b)).

Judicial notice will be taken of public officers and their official positions and authority within the jurisdiction of the court. (See 31 C.J.S., Evidence, 37, p. 594). Thus, the authority of United States attorneys in this case is subject to judicial review as an aspect of the recognized power of federal courts to regulate the conduct of attorneys as officers of the Court. (See 28 U.S.C. § 1654; *cf.*, S. Ct. Rule 5- "I will conduct myself ... according to law").

Public officials are presumed to "act properly and according to law" (*FCC v. Schreiber*, 381 U.S. 279, 296 (1965), "in the absence of clear evidence to the contrary." (*National Archives and Records Admin. v. Favish*, 541 U.S. 157, 174 (2004)). The new, undisputed Federal Bureau of Prisons evidence showing LaWanda Johnson is a ***patient*** (42 C.F.R. § 2.11), is clear evidence rebutting the presumption of legitimacy given United States attorneys in this case. (App. 29).

Thus, reviewing United States Attorney authorization under 28 U.S.C. § 547(1) in this case, "safeguards against statutory or constitutional excesses" (*American Power Co. v. S.E.C*, 329 U.S. 90, 106 (1946)); where, use or disclosure of confidential records in violation of 42 C.F.R. § 2.66, bars criminal investigation or prosecution of a *program* or *person holding the records*. (42 U.S.C. § 290dd-2(c); &, 42 C.F.R. §§ 2.12(d)(1), and 2.66).

III. Compelled disclosure or use of sensitive, substance use disorder records, does not withstand exacting scrutiny in this case.

Congress and the Department of Health and Human Services have made it clear that rules are necessary to protect "the patient, the physician patient relationship, and the treatment programs." (See 42 U.S.C. § 290dd-2(b)(2)(C); and, 42 C.F.R. § 2.64(d)). Thus, it is not only the privacy rights of individual patients that are at stake here, but also the continued effectiveness and viability of important substance abuse treatment programs. (See 42 C.F.R. § 2.66).

"[C]ompelled disclosure requirements are reviewed under exacting scrutiny." (*Ams. for Prosperity Found. v. Bonta*, 141 S. Ct. 2373, 2383 (2021)). Here, a "unique kind of court order" is required "to authorize a disclosure or use of patient information which would otherwise be prohibited by 42 U.S.C. 290dd–2 and the regulations" in 42 C.F.R. Part 2. (42 C.F.R. § 2.61(a)).

A subpoena or other similar legal mandate compelling disclosure, must be accompanied by a valid court order under 42 C.F.R. § 2.65, before a **patient** name may lawfully be used or disclosed to criminally investigate or prosecute a **patient**; or, a **program/person holding the records**. The rule at 42 C.F.R. § 2.65, establishes explicit criteria for a court of competent jurisdiction to consider before authorizing use or disclosure of **patient** identifying information, under the Confidentiality of records statute. (42 U.S.C. § 290dd-2(g)).

Where the United States does not follow Confidentiality of records rules, it subjects **patients, programs and persons holding the records** to "other manifestations of public hostility." (*NAACP v. Alabama*, 357 U.S. 449, 462 (1958)). Ergo, compelled disclosure does not survive "exacting scrutiny" in this case; because, no substantial relationship between any disclosure requirement and any legitimate governmental interest exists without a 42 C.F.R. § 2.65 order, nor consent from the presumptive patient-LaWanda Johnson.

No such order nor consent appears in the materials of record. Thus, LaWanda A. Johnson's identity and testimony relaying her identity cannot be used for any law enforcement purpose (42 U.S.C. § 290dd-2(c)(3)); including, criminal investigation or prosecution of Appellant-petitioner, *viz.*- a *program* or *person holding the records*. (42 C.F.R. § 2.66).

Conclusion

To ensure Article III standing exists, the subordinate tribunal must resolve the issue of Ms. Johnson's patient status; "for this court cannot determine the weight or effect of evidence, nor decide mixed questions of law and fact." (*York & Cumberland R.R. Co. v. Myers*, 59 U.S. 246, 251-52 (1855)).

The petition for a writ of certiorari should be granted, and this case should be remanded with instructions to: ***i)*** resolve the issue of LaWanda Johnson's patient status; then, ***ii)*** follow the Confidentiality of records rules and 28 U.S.C. § 547(1).

Respectfully submitted

03/30/2025

Antoine D. Johnson, MD (*In pro per*)

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