No. 19-1243

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

UNITED STATES DEPARTMENT OF JUSTICE,
Petitioner–Appellee,

v.

MICHELLE RICCO JONAS,
Respondent–Appellant.

ON APPEAL FROM A JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW HAMPSHIRE

BRIEF OF *AMICI CURIAE* AMERICAN CIVIL LIBERTIES UNION, AMERICAN CIVIL LIBERTIES UNION OF NEW HAMPSHIRE, AMERICAN CIVIL LIBERTIES UNION OF MAINE, AMERICAN CIVIL LIBERTIES UNION OF MASSACHUSETTS, AMERICAN CIVIL LIBERTIES UNION OF PUERTO RICO, AMERICAN CIVIL LIBERTIES UNION OF RHODE ISLAND, AND NEW HAMPSHIRE MEDICAL SOCIETY IN SUPPORT OF RESPONDENT–APPELLANT SEEKING REVERSAL

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* Pursuant to Local Rule 32.2, *amici* note that these articles have been accepted for publication but not yet formally published, although they are available online. These articles are relevant to *amici*'s argument and are likely to be of aid to the Court. Both articles address the impact of the Supreme Court's decision in *Carpenter v. United States*, 138 S. Ct. 2206 (2018), on the Fourth Amendment issues in this case. Because *Carpenter* was decided just last summer, there has not been sufficient time for law journal articles about the case to make it all the way to final publication.

INTEREST OF *AMICI CURIAE*[1]

The American Civil Liberties Union ("ACLU") is a nationwide, non-profit, non-partisan public interest organization dedicated to defending civil rights and civil liberties. The ACLUs of New Hampshire, Maine, Massachusetts, Puerto Rico, and Rhode Island are the affiliates of the national ACLU within the jurisdiction of the First Circuit. The protection of privacy as guaranteed by the Fourth Amendment is of special concern to each organization. The ACLU has been at the forefront of numerous state and federal cases addressing the right of privacy, including as counsel for petitioner in *Carpenter v. United States*, 138 S. Ct. 2206 (2018), and counsel for intervenors in *Oregon Prescription Drug Monitoring Program v. United States Drug Enforcement Administration* (*Or. PDMP*), 998 F. Supp. 2d 957 (D. Or. 2014), *rev'd on standing grounds*, 860 F.3d 1228 (9th Cir. 2017), and *United States Department of Justice v. Utah Department of Commerce*, No. 16-cv-611, 2017 WL 3189868 (D. Utah July 27, 2017). The ACLU and its affiliates have also been at the forefront of legislative efforts to protect sensitive medical records in state prescription drug monitoring program ("PDMP") databases against warrantless search by law enforcement. Each jurisdiction within

[1] Pursuant to Rule 29(a)(2), counsel for *amici curiae* certifies that all parties have consented to the filing of this brief. Pursuant to Rule 29(a)(4)(E), counsel for *amici curiae* states that no counsel for a party authored this brief in whole or in part, and no person other than *amici curiae*, their members, or their counsel made a monetary contribution to its preparation or submission.

the First Circuit maintains a PDMP, the privacy protections for which will be affected by the outcome of this case.

The New Hampshire Medical Society ("NHMS"), founded in 1791, is dedicated and committed to advocating for patients, physicians, and the medical profession, as well as health-related rights, responsibilities and issues for the betterment of public health in the Granite State. The NHMS was highly involved in the development and implementation of the legislation and regulations for New Hampshire's PDMP, including efforts to protect sensitive medical records from warrantless search by law enforcement.

SUMMARY OF ARGUMENT

The prescription records at issue in this case reveal intimate, private, and potentially stigmatizing details about patients' health, including details of those patients' underlying medical conditions. For that reason, as with other medical records, people have a reasonable expectation of privacy in them. As the Supreme Court explained in *Carpenter v. United States*, when law enforcement seeks records from a third party in which the subject of the investigation has a reasonable expectation of privacy, use of an administrative subpoena is unreasonable under the Fourth Amendment, and a warrant is required instead. Such is the case here.

That expectation of privacy is not diminished because authorities are permitted to conduct administrative inspections of individual pharmacies pursuant

to the closely regulated industry exception to the warrant requirement. Rather than inspecting particular pharmacies for regulatory compliance, the Drug Enforcement Administration ("DEA") in this case seeks to conduct a criminal investigative search of a state agency's secure database containing confidential records from every pharmacy in the state. Such a search is untethered from the rationales behind any exception to the warrant requirement.

Finally, Appellant Michelle Ricco Jonas ("Jonas") properly raises Fourth Amendment arguments in this case. As custodian of the PDMP and recipient of the DEA's subpoena, she is entitled to argue in her own right that the subpoena is unreasonable under the Fourth Amendment. She is also entitled to assert the Fourth Amendment rights of individuals with records in the PDMP, because she has a close relationship with them and they are prevented from doing so themselves by lack of notice of the subpoena.

ARGUMENT

I. People Have a Reasonable Expectation of Privacy in Their Sensitive Medical Information Held in Prescription Drug Monitoring Program Databases.

Where an individual has a reasonable expectation of privacy in an item or location to be searched, the search is "'*per se* unreasonable under the Fourth Amendment'" unless conducted pursuant to a judicial warrant. *Arizona v. Gant*, 556 U.S. 332, 338 (2009) (quoting *Katz v. United States*, 389 U.S. 347, 357

(1967)). Only if there is no reasonable expectation of privacy, or if one of the "few specifically established and well-delineated exceptions" to the warrant requirement applies, may government officials conduct a warrantless search. *Id*. (quotation marks omitted). As the Supreme Court recently made clear, the warrant requirement applies even when the government seeks to compel a third party to produce records in which an individual has a reasonable expectation of privacy. *Carpenter*, 138 S. Ct. at 2221–22. In that circumstance, the use of an administrative subpoena is unreasonable under the Fourth Amendment, and a warrant is required instead. *Id.* Indeed, long before *Carpenter*, this Court recognized that a subpoena seeking personal records rather than corporate documents, as is the case here, raises special concerns. *United States v. Sturm, Ruger, & Co.*, 84 F.3d 1, 4 n.1 (1st Cir. 1996) (citing *In re Gimbel*, 77 F.3d 593, 596–600 (2d Cir. 1996)).

In *Carpenter*, the Supreme Court made clear that the mere fact that records are held by a third party does not vitiate an individual's reasonable expectation of privacy under the Fourth Amendment. 138 S. Ct. at 2220. Instead, the Court explained, the cases on which the third-party doctrine is based—*United States v. Miller*, 425 U.S. 435 (1976), and *Smith v. Maryland*, 442 U.S. 735 (1979)—require a dual inquiry into "the nature of the particular documents sought" and whether they were "voluntar[ily] expos[ed]." 138 S. Ct. at 2219–20.

Here, both factors favor the conclusion that there is a reasonable expectation of privacy in the PDMP records sought by the DEA, and thus that the third-party doctrine does not apply. Indeed, even before *Carpenter*, the District of Oregon correctly applied and distinguished *Miller* and *Smith*, concluding that the sensitivity of PDMP records and the lack of voluntariness in their creation and conveyance mean that they are protected by the Fourth Amendment. *Or. PDMP*, 998 F. Supp. 2d at 963–67. After *Carpenter*, it is all the more clear that that outcome is correct. *See* Jennifer D. Oliva, *Prescription Drug Policing: The Right to Protected Health Information Privacy Pre- and Post-*Carpenter, 69 Duke L.J. __ (forthcoming 2020), *available at* https://ssrn.com/abstract=3225000.

A. The sensitive nature of the private medical information contained in the New Hampshire PDMP creates a reasonable expectation of privacy.

The DEA's warrantless request in this case impinges on reasonable expectations of privacy because of "the particularly private nature of the medical information at issue," *Or. PDMP*, 860 F. 3d at 1235 (9th Cir. 2017), in state PDMP databases.

1. Prescription records reveal private and sensitive information.

As the Supreme Court has explained, "[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

her consent." *Ferguson v. City of Charleston*, 532 U.S. 67, 78 (2001). That is so notwithstanding that the records are held by a third party—the hospital —rather than by a patient themselves. Other courts have likewise held that there is a reasonable expectation of privacy in medical records in the custody of third parties. *See, e.g.*, *Tucson Woman's Clinic v. Eden*, 379 F.3d 531, 550 (9th Cir. 2004) (requiring warrant for search of medical records in abortion clinic because "all provision of medical services in private physicians' offices carries with it a high expectation of privacy for both physician and patient"); *Doe v. Broderick*, 225 F.3d 440, 450 (4th Cir. 2000) ("[A] patient's expectation of privacy . . . in his treatment records and files maintained by a substance abuse treatment center is one that society is willing to recognize as objectively reasonable."); *State v. Skinner*, 10 So. 3d 1212, 1218 (La. 2009) ("[W]e find that 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 prescription records in this case entail the same privacy concerns.[2]

[2] The federal government is wrong in suggesting that the Supreme Court settled the Fourth Amendment question here in *Whalen v. Roe,* 429 U.S. 589 (1977). *See* Appellant's App. 136. In *Whalen*, the Court held that New York's collection of prescription records in an early computerized database did not violate patients' and doctors' right to informational privacy under the Due Process Clause of the *Fourteenth* Amendment. 429 U.S. at 600. The Court distinguished situations—not presented by that case—"involv[ing] affirmative, unannounced, narrowly focused intrusions into individual privacy during the course of criminal investigations," where the *Fourth* Amendment would apply. *Id.* at 604 n.32. The DEA's

Drugs listed as controlled substances and tracked by the PDMP include a number of frequently prescribed medications used to treat a wide range of serious medical conditions, including anxiety disorders, panic disorders, post-traumatic stress disorder, weight loss associated with AIDS, nausea and weight loss in cancer patients undergoing chemotherapy, alcohol addiction withdrawal symptoms, opiate addiction, testosterone deficiency, gender identity disorder/gender dysphoria, chronic and acute pain, seizure disorders, narcolepsy, insomnia, and attention deficit hyperactivity disorder. (An addendum to this brief lists selected medications tracked by the PDMP that are used to treat these medical conditions.)

An individual's prescription records in the PDMP can reveal a great deal of private medical information beyond just the medication prescribed. Because many of these drugs are approved only for treatment of specific diseases or disorders, "[i]nformation contained in prescription records . . . may reveal other facts about what illnesses a person has." *Douglas v. Dobbs*, 419 F.3d 1097, 1102 (10th Cir. 2005); *accord Doe v. Se. Pa. Transp. Auth.*, 72 F.3d 1133, 1138 (3d Cir. 1995) ("It is now possible from looking at an individual's prescription records to determine that person's illnesses, or even to ascertain such private facts as whether a woman is attempting to conceive a child through the use of fertility drugs."). A patient's prescription history can reveal her physician's confidential medical advice, her

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investigative request to the PDMP presents precisely the Fourth Amendment question left open by *Whalen*.

chosen course of treatment, her diagnosis, and even the stage or severity of her disorder or disease. Thus, this Court's observation that people "have significant privacy interests in their medical records, which we have described as 'highly personal' and 'intimate in nature,'" *Eil v. U.S. Drug Enf't Admin*., 878 F.3d 392, 400 (1st Cir. 2017), applies with full force to the prescription records at issue here.

2. Society recognizes the expectation of privacy in prescription records as reasonable.

In recognition of the sensitivity of this information, the New Hampshire legislature erected strong protections for the confidentiality and security of the prescription records reported by health care providers and stored in the PDMP. Physicians and pharmacists are permitted to access the database only for the limited purposes of "providing medical or pharmaceutical care to a specific patient," "reviewing information regarding prescriptions issued or dispensed by the requester," or "investigating the death of an individual." N.H. Rev. Stat. Ann. § 318-B:35(I). Unauthorized use of or access to the database subjects a person to felony prosecution or discipline by a regulatory board. *Id.* § 318-B:36(IV–VII). The records are also exempted from disclosure under the state public records law, and are "not subject to discovery, subpoena, or other means of legal compulsion for release." *Id.* § 318-B:34(I). Central to this case, law enforcement agents can access data in the PDMP only with a search warrant or other court order based on probable cause. *Id.* § 318-B:35(I)(b)(3); N.H. Code Admin. R. Ph 1505.03.

These protections are part of an extensive historical tradition, as "[m]edical records, of which prescription records form a not insignificant part, have long been treated with confidentiality." *Or. PDMP*, 998 F. Supp. 2d at 964. The Oath of Hippocrates, originating in the fourth century B.C.E., required physicians to maintain patient secrets. Bernard Friedland, *Physician-Patient Confidentiality*, 15 J. Legal Med. 249, 256 (1994). In American medical practice, a requirement to preserve the confidentiality of patient health information was included in the earliest codes of ethics of American medical societies in the 1820s and 1830s, the first Code of Medical Ethics of the American Medical Association in 1847, and every subsequent edition of that code, in the ethical codes of other health professionals, including pharmacists, and in the numerous state statutes recognizing the doctor–patient privilege. *See generally* Robert Baker, *Before Bioethics: A History of American Medical Ethics from the Colonial Period to the Bioethics Revolution* (2013); Am. Med. Ass'n, Code of Medical Ethics Opinion 3.2.1: Confidentiality, https://www.ama-assn.org/delivering-care/ethics/confidentiality; Am. Pharmacists Ass'n, Code of Ethics § II, https://www.pharmacist.com/code-ethics; N.H. Rev. Stat. Ann. § 329:26 (physician-patient privilege). Today, virtually all patients (97.2%) believe that

health care providers have a "legal and ethical responsibility to protect patients' medical records."[3]

The strong and enduring guarantees of the confidentiality of patients' medical information are

> essential to the effective functioning of the health and public health systems. Patients are less likely to divulge sensitive information to health professionals if they are not assured that their confidences will be respected. The consequence of incomplete information is that patients may not receive adequate diagnosis and treatment of important health conditions.

Lawrence O. Gostin, *Health Information Privacy*, 80 Cornell L. Rev. 451, 490–91 (1995). The consequences of law enforcement gaining easy access to medical records are especially harmful. As one court has explained, "[p]ermitting the State unlimited access to medical records for the purposes of prosecuting the patient would have the highly oppressive effect of chilling the decision of any and all [persons] to seek medical treatment." *King v. State*, 535 S.E.2d 492, 496 (Ga. 2000). The Supreme Court has similarly recognized that facilitating warrantless law enforcement access to patients' medical information "may have adverse consequences because it may deter patients from receiving needed medical care." *Ferguson*, 532 U.S. at 78 n.14 (citing *Whalen*, 429 U.S. at 599–600). What is true

[3] New London Consulting & FairWarning, *How Privacy Considerations Drive Patient Decisions and Impact Patient Care Outcomes* 10 (Sept. 13, 2011), http://www.fairwarning.com/whitepapers/2011-09-WP-US-PATIENT-SURVEY.pdf.

of medical privacy more broadly is also true of PDMPs: prescription monitoring "efforts that fail to adequately safeguard patient data do much more than harm individual rights; by undermining patient trust and creating a system of perverse incentives, they can push patients away from seeking appropriate, timely help." Leo Beletsky, *Deploying Prescription Drug Monitoring to Address the Overdose Crisis: Ideology Meets Reality*, 15 Ind. Health L. Rev. 139, 142 (2018).

B. Records held in the PDMP are not voluntarily conveyed by patients.

"Neither does the second rationale underlying the third-party doctrine—voluntary exposure—hold up when it comes to" records in the PDMP. *Carpenter*, 138 S. Ct. at 2220. Unlike the cancelled checks at issue in *Miller* and the dialed telephone numbers in *Smith*, the prescription records contained in the PDMP are not voluntarily conveyed. The decision to visit a physician and pharmacist to obtain urgent medical treatment is not in any meaningful sense voluntary. Obtaining medical care for a serious condition such as acute pain, seizure disorders, panic or anxiety disorders, AIDS, or opioid addiction is a course of action dictated by one's physical and psychological ailments. Opting to forgo care can leave a person debilitated or even dead. As one court has explained, "the rule in *Miller* pertains to objects or information *voluntarily* turned over to third parties. A decision to use a bank may be voluntary. A decision to use a hospital for emergency care is not." *Thurman v. State*, 861 S.W.2d 96, 98 (Tex. App. 1993)

(citation omitted). Moreover, once a person has sought care, New Hampshire law requires pharmacists to report all prescriptions for schedule II–IV drugs to the PDMP. N.H. Rev. Stat. Ann. § 318-B:33(III). Thus, apart from foregoing care, "there is no way to avoid leaving behind a trail of [medical] data." *Carpenter*, 138 S. Ct. at 2220. "As a result, in no meaningful sense does the [patient] voluntarily 'assume[ ] the risk' of turning over" this information. *Id.* (second alteration in original).

C. PDMP records share important traits with the location data in *Carpenter*, and thus deserve protection.

In *Carpenter*, the Supreme Court held that the government conducts a Fourth Amendment search when it acquires a person's cell site location information ("CSLI") from their cellular service provider.[4] 138 S. Ct. at 2220. While recognizing that *Miller* and *Smith* will continue to permit warrantless requests for certain kinds of data, like the bank records and dialed phone numbers at issue in those cases, the Court "decline[d] to extend" the third-party doctrine to the digital agglomerations of sensitive location data held by wireless carriers today. *Id*. In reaching this conclusion, the Court provided several factors that distinguish CSLI from more rudimentary forms of third-party-held data. *Id*. at 2217–20, 2223; *see also* Paul Ohm, *The Many Revolutions of Carpenter*, 32 Harv. J.L. & Tech. __

[4] The Court only addressed searches of seven days or more of data, and reserved decision on lesser durations of CSLI. 138 S. Ct. at 2217 n.3. Here, the DEA seeks more than *two years'* worth of PDMP records. Appellant's App. 24.

(forthcoming 2019), *available at* https://osf.io/preprints/lawarxiv/bsedj (discussing factors). Those factors apply with full force to the records in the PDMP.

1. "Deeply revealing nature," 138 S. Ct. at 2223: Like CSLI, PDMP records "provide[] an intimate window into a person's life." *Id*. at 2217. Knowing what medications a person takes, and thus what medical conditions they have, is tremendously revealing. *See supra* Part I.A. That is why people consider information about the "state of their health and the medicines they take" to be among the most private information about them, deeming it more sensitive even than the "details of [their] physical location over a period of time" at issue in *Carpenter*. Mary Madden, *Americans Consider Certain Kinds of Data to be More Sensitive than Others*, Pew Research Center (2014), https://www.pewinternet.org/2014/11/12/americans-consider-certain-kinds-of-data-to-be-more-sensitive-than-others.

2. "Depth, breadth, and comprehensive reach," 138 S. Ct. at 2223: The Supreme Court observed that CSLI differs from other more limited kinds of location data because it constitutes "an all-encompassing record of the holder's whereabouts," *id*. at 2217, because it is "continually logged for all of the 400 million devices in the United States—not just those belonging to persons who might happen to come under investigation," *id*. at 2218, and because the data is retained—and therefore accessible to police—for years, *id*. Likewise, the PDMP

contains not just a smattering of recent prescriptions filled by a particular pharmacist, but an "all-encompassing record," *id*. at 2217, of every qualifying controlled substance prescription filled by every pharmacist in New Hampshire for every New Hampshire resident, which is retained in the system for three years. N.H. Rev. Stat. Ann. § 318-B:32(III). "[T]his newfound tracking capacity runs against everyone," *Carpenter* 138 S. Ct. at 2218, and provides a window into people's most closely held "privacies of life," *id*. at 2214 (citation omitted).

3. "Inescapable and automatic nature of its collection," *id.* at 2223: The Supreme Court explained that cell phone location information is not "truly 'shared' as one normally understands the term," both because carrying a cell phone is "indispensable to participation in modern society," and because once a person has an operational cell phone, it automatically and inescapably generates location data. *Id*. at 2220. Likewise, the decision to visit a physician and pharmacist to obtain necessary medical care is not in any meaningful sense voluntary, and once a patient has obtained a prescription from their doctor and filled it with their pharmacist, the pharmacist conveys the prescription to the PDMP "by dint of its operation," *id*., with no volition or even knowledge of the patient. *See supra* Part I.B. Unlike the more quotidian internet protocol address information at issue in this Court's recent decision in *United States v. Hood*, which even the defendant did "not dispute that he voluntarily disclosed," 920 F.3d 87, 91 (1st Cir. 2019), the

collection of prescription records in the PDMP is not in any meaningful sense "voluntary[ily] expos[ed]," *Carpenter*, 138 S. Ct. at 2220.

4. "Remarkably easy, cheap, and efficient compared to traditional investigative tools," *id.* at 2218: The central lesson of *Carpenter* is that courts cannot "mechanically apply[]" the third-party doctrine to newer forms of digital-age records that provide the government with powers of investigation that would have been unimaginable in past eras. *Id*. at 2214, 2219. Thus, CSLI requires Fourth Amendment protection because, "[p]rior to the digital age, law enforcement might have pursued a suspect for a brief stretch, but doing so 'for any extended period of time was difficult and costly and therefore rarely undertaken.'" *Id*. at 2217 (citation omitted). Today, by contrast, "[w]ith just the click of a button, the Government can access each carrier's deep repository of historical location information at practically no expense." *Id*. at 2218.

Similarly, prior to computerized PDMPs, investigators could have sought prescription records from individual pharmacies. Only in the rarest of investigations, however, could police have canvassed every pharmacy in the state and collected a comprehensive set of its prescription records. Never could investigators have done so instantaneously, "with just the click of a button." *Id.* Thus, in order to "assure [ ] preservation of that degree of privacy against

government that existed when the Fourth Amendment was adopted," *id.* at 2214 (alteration in original), a warrant is required.

II. The Closely Regulated Industry Exception to the Warrant Requirement Does Not Apply.

Citing this Court's opinion in *United States v. Gonsalves*, 435 F.3d 64 (1st Cir. 2006), the federal government argued below that there is a reduced expectation of privacy in PDMP records because pharmacies are a closely regulated industry. Appellant's App. 137–38. However, neither *Gonsalves* nor the logic of the closely regulated industry exception to the warrant requirement bear the weight the federal government places on them.

Under the closely regulated industry exception, warrantless administrative inspections are permissible only when they are "necessary" to further a substantial government interest. *Gonsalves*, 435 F.3d at 67. That necessity is satisfied by "the need for random and surprise inspections," *id.* at 68, in order to avoid potential disappearance of evidence during the delay required to obtain a warrant. *See New York v. Burger*, 482 U.S. 691, 710 (1987) ("Because stolen cars and parts often pass quickly through an automobile junkyard, 'frequent' and 'unannounced' inspections are necessary in order to detect them."). But there is no such risk of disappearance or alteration of evidence here, as the records sought are held securely in a state database out of reach of any meddling hands. Warrantless access is simply not necessary to further the government's investigative interests.

Nor does the ability of authorities to conduct administrative inspections of individual pharmacies or other drug dispensaries to check for regulatory compliance reduce the expectation of privacy in sensitive prescription records in the PDMP, particularly as against a criminal investigative search of an individual patient's records. In *Gonsalves*, this Court upheld a Rhode Island law permitting warrantless "administrative searches of 'establishments' where drugs are manufactured and stored." 435 F.3d at 67. It did so on the basis that "drugs are heavily regulated in storage and dispensation and have been for many years." *Id*. This Court took pains, however, to emphasize the narrowness of its holding: "Whether the practice of medicine in general meets this test is a different question that we need not decide. Nor are we concerned on this appeal with patient records; [the] search and seizure was solely directed to misbranded and adulterated drugs held at large in [the physician's] office."[5] *Id*. (citation omitted). Thus, "[g]iven the variations in fact patterns and the sensitivity of the subject area," the Court found "good reason to keep [its] focus narrow." *Id*. As the Supreme Court has explained, the reasonableness of an administrative search is determined "by balancing the need to search against the invasion which the search entails." *Camara v. Mun. Court*, 387 U.S. 523, 537 (1967). As predicted by this Court, the invasion into

[5] Investigators were concerned with reports of a physician dispensing diluted vaccines, and so conducted an inspection of the physician's office to look for "misbranded or adulterated drugs." *Id.* at 66.

individual privacy here is significant, and no exception to the warrant requirement applies. *See supra* Part I.A.

The federal government cites the state statute governing administrative inspections of pharmacies as diminishing New Hampshire patients' expectations of privacy in PDMP records. Appellant's App. 137 (citing N.H. Rev. Stat. Ann. § 318-B:12). But similar to the law at issue in *Gonsalves*, that statute permits administrative inspections of a pharmacy's records to determine whether "licensed pharmacies and pharmacists-in-charge comply 'with all local, state, and federal pharmacy and drug laws.'" *In re Morgan*, 742 A.2d 101, 105 (N.H. 1999) (quoting N.H. Rev. Stat. Ann. § 318:1). The existence of an exception to the warrant requirement as to certain records held by one class of regulated businesses does not justify warrantless searches of any and all similar records, no matter where they are obtained. As the Supreme Court has put it, "[t]he fact that equivalent information could sometimes be obtained by other means does not make lawful the use of means that violate the Fourth Amendment." *Kyllo v. United States*, 533 U.S. 27, 35 n.2 (2001). Whatever the closely regulated industry doctrine might say about administrative inspections of pharmacies' books, the DEA does not seek to inspect pharmacies' books in this case. Rather, it seeks to search the records of a state agency. *Amici* are aware of no cases applying the closely regulated industry exception to a warrantless search of a state agency's records, much less an agency

database of private medical information from many thousands of people across the state. The cases address searches of discrete commercial enterprises, and so do not govern here.

III. Jonas May Argue that Under the Fourth Amendment the DEA Must Obtain a Warrant before Demanding PDMP Records.

The DEA argued below that Jonas may not assert the Fourth Amendment privacy interests of the individuals whose information the agency seeks from the PDMP in arguing that a warrant is required to access the database. That argument is incorrect on two counts.

A. Jonas may vindicate her own Fourth Amendment interests.

First, as the recipient of the subpoena and custodian of the PDMP records, Jonas is entitled to argue that the subpoena is unreasonable under the Fourth Amendment. *See, e.g.*, *Sturm, Ruger, & Co.*, 84 F.3d at 3 ("the Fourth Amendment is available to the challenger as a defense against enforcement of the subpoena"). It is true that typically the reasonableness of a subpoena is challenged on the ground that it is overly burdensome or seeks information not relevant to the investigation. *Id.* at 4. But in *Carpenter*, the Supreme Court explained that a subpoena is also unreasonable when it seeks a type of records in which people have "a legitimate privacy interest," 138 S. Ct. at 2222. There is no sound reason why Jonas should be permitted to make the former argument but not the latter.

Jonas is fully capable of making that argument and explaining to this Court why "society is prepared to recognize as reasonable," *id.* at 2213, the expectation of privacy in PDMP records. Indeed, every New Hampshire resident with prescription records in the PDMP is similarly situated for purposes of this case, as their records are protected equally by the State's statutory privacy and confidentiality protections.[6] As the recipient of the subpoena and custodian of the PDMP, Jonas is entitled to vindicate her own (and the State's) Fourth Amendment rights by arguing that the DEA's subpoena is a per se unreasonable method of requesting PDMP records, and that a warrant is required instead.

B. Jonas may raise New Hampshire patients' Fourth Amendment interests.

Second, under the doctrine of third-party standing, Jonas may properly raise the privacy interests of individuals whose records reside in the PDMP.[7] The

[6] In *Carpenter*, the Court made no inquiry into Mr. Carpenter's actual or subjective belief about whether the records should be private, instead focusing on the nature of the records in general and all they can reveal. 138 S. Ct. at 2217–19. Moreover, this case is not one where disputed facts about the subjective expectation of privacy of a particular suspect might matter, and thus where the suspect must proffer such facts. *See, e.g.*, *Minnesota v. Carter*, 525 U.S. 83, 90–91 (1998).

[7] *Amici* argue here that, as custodian of the PDMP records, Jonas may challenge the constitutionality of the DEA's subpoena, separate and apart from any entitlement of the State invoke *parens patriae* standing. *See* Appellant's Br. 42–44. Thus, even if the federal government is right that "[t]he action here . . . is not a suit against the State," Appellant's App. 130, and thus that the *parens patriae* doctrine cannot apply, *id.* at 135 n.1, Jonas may still properly challenge the constitutionality of the subpoena under the Fourth Amendment.

general rule against third-party standing is a prudential one, which "should not be applied where its underlying justifications are absent." *Singleton v. Wulff*, 428 U.S. 106, 114 (1976). In cases like this one, the policies underlying that "rule of practice" are "outweighed by the need to protect . . . fundamental rights" when "it would be difficult if not impossible for the persons whose rights are asserted to present their grievance before any court." *Barrows v. Jackson*, 346 U.S. 249, 257 (1953).

As the PDMP's custodian, Jonas plainly overcomes the prudential limits on third-party standing because (1) she has a close relationship with the individuals whose records the PDMP holds in trust, and (2) those individuals are unable to protect their own interests independently. *See Mills v. United States*, 742 F.3d 400, 407 (9th Cir. 2014) (citing *Kowalski v. Tesmer*, 543 U.S. 125, 130 (2004)); *see also Powers v. Ohio*, 499 U.S. 400, 411 (1991) (articulating test for third-party standing).

As to the first factor, like other custodians of medical records bound by duties of confidentiality, Jonas has a close relationship with the people whose records are collected and safeguarded in the PDMP. *See, e.g.*, *In re Search Warrant*, 810 F.2d 67, 70–71 (3d Cir. 1987) (third-party standing for physician to protect medical records on behalf of patients); *United States v. Westinghouse Elec. Corp.*, 638 F.2d 570, 574 (3d Cir. 1980) (employer to protect medical records on

behalf of employees); *see also* N.H. Rev. Stat. Ann. § 318-B:34(II) ("The board [of pharmacy] shall establish and maintain procedures to ensure the privacy and confidentiality of patients and patient information."); N.H. Code Admin. R. Ph 1505.01–05 (privacy and confidentiality regulations). That is plainly the kind of relationship that suffices to overcome the general rule against third-party standing. *See, e.g.*, *Powers*, 499 U.S. at 413–14 (criminal defendant on behalf of jurors); *Barrows*, 346 U.S. at 255–60 (white land-seller on behalf of prospective Black buyers); *In re Directives Pursuant to Sec. 105B of Foreign Intelligence Surveillance Act*, 551 F.3d 1004, 1008–09 (F.I.S.A. Ct. Rev. 2008) (internet service provider on behalf of customers); *Rothner v. City of Chicago*, 929 F.2d 297, 300–01 (7th Cir. 1991) (video game distributer on behalf of minor customers).

And as to the second—and "more important," *Eisenstadt v. Baird*, 405 U.S. 438, 445 (1972)—third-party standing factor, the individuals whose records are the subject of the subpoena are hindered from advancing their own rights by the lack of notice of the subpoena. *Westinghouse Elec. Corp.*, 638 F.2d at 574 ("As a practical matter, the absence of any notice to the employees of the subpoena means that no person other than Westinghouse would be likely to raise the privacy claim. Indeed, this claim may be effectively lost if we do not hear it now."); *see also* Appellant's App. 24 (DEA subpoena requesting recipient to "not disclose the existence of this request or investigation for an indefinite time period").

The DEA cannot seriously dispute this analysis. Instead, it appears to argue that third-party standing doctrine simply does not apply when it comes to Fourth Amendment rights at all because "Fourth Amendment rights are personal to each person and may not be asserted vicariously." Appellant's App. 134 (quotation marks and alterations omitted). But there is no such Fourth Amendment exception, and the DEA's argument both selectively misreads Supreme Court precedent and is illogical.

First, the DEA's main support below, *see id.*, for its supposed special Fourth Amendment exception to the third-party standing doctrine was *California Bankers Association v. Shultz*, 416 U.S. 21, 69 (1974), but that case establishes no such rule. In *Shultz*, a banking association sought to challenge a bank-secrecy regulation that affected account holders who engaged in transactions larger than $10,000. *Id.* at 58. The association challenged the regulation by arguing that it violated the Fourth Amendment rights of depositors to the association's banks. *Id.* at 67. Far from holding that the association could never raise such Fourth Amendment claim, the Court simply stated that the association lacked standing because it did "not show that [the depositors'] transactions [were] required to be reported" pursuant to the regulation. *Id.* at 68. In other words, the association had not pled (and the Court "simply [could not] assume") that any individual depositor to any of the

association's banks "ha[d] engaged or will engage in a transaction involving more than $10,000 in currency." *Id.*[8]

Second, some courts have erroneously pointed to cases applying the Fourth Amendment's exclusionary rule as establishing a general rule that "a plaintiff may not assert the Fourth Amendment rights of another person." *Microsoft Corp. v. DOJ*, 233 F. Supp. 3d 887, 913 (W.D. Wash. 2017) (citing *Rakas v. Illinois*, 439 U.S. 128 (1978), and *Alderman v. United States*, 394 U.S. 165 (1969)). To be sure, third parties may not invoke the *exclusionary rule* to suppress evidence that was obtained in violation of the privacy interests of others. *See, e.g.*, *Nat'l Cottonseed Prods. Ass'n v. Brock*, 825 F.2d 482, 491 (D.C. Cir. 1987). But that limitation is tied to the particular *remedy* of evidentiary suppression. *See, e.g.*, *United States v. Salvucci*, 448 U.S. 83, 86–89 (1980). The supposed principal authority for that proposition—*Rakas*—explicitly (and solely) concerned the costs and benefits of the exclusionary rule. *See* 439 U.S. at 137–38 ("Since our cases generally have held that one whose Fourth Amendment rights are violated may successfully suppress evidence obtained in the course of an illegal search and seizure,

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[8] The Court further explained that "the Fourth Amendment claims of the depositor[s] may not be considered on the record before us," and that the association could not "vicariously assert such Fourth Amendment claims on behalf of bank customers in general." *Id.* at 69. The emphasis in that sentence is on "*in general*," rather than on "vicariously." The Court was merely explaining that it would not address an insufficiently pled Fourth Amendment claim—not that the association could *never* bring such a claim.

misgivings as to the benefit of enlarging the class of persons who may invoke that rule are properly considered when deciding whether to expand standing to assert Fourth Amendment violations.”). The same is true of *Alderman*. *See* 394 U.S. at 174 (“There is no necessity to exclude evidence against one defendant in order to protect the rights of another. No rights of the victim of an illegal search are at stake when the evidence is offered against some other party.”). It is little surprise, then, that when this Court has remarked on the failure of “vicarious” claims of Fourth Amendment rights, it has done so with reliance on exclusionary-rule cases. *See, e.g.*, *United States v. Torres*, 162 F.3d 6, 10 (1st Cir. 1998) (stating that “Fourth Amendment rights are personal *to each defendant* and may not be asserted vicariously” and citing only exclusionary-rule cases (emphasis added)). Moreover, the fact that exclusionary-rule cases fall outside the general rule for third-party standing makes good sense. In those cases, a litigant is invoking the rights of another in order to *protect the rights of himself and only himself*—and it is not difficult to understand why courts would be reluctant to allow such claims.[9] But in cases like this one (as well as the litany of other third-party standing cases reviewed above), a litigant is invoking the rights of another *who cannot do so*

[9] For example, in *Rakas*, two defendants sought to exclude evidence found in the locked glove compartment of another person’s car. 439 U.S. at 130–31. And in *Alderman*, two defendants sought to suppress evidence obtained through eavesdropping in another person’s place of business. 394 U.S. at 167.

himself in order to *protect the rights of that other person*. That is classic third-party standing territory.

Third, and relatedly, there is no reason to have a special rule of third-party standing for Fourth Amendment claims writ large. The decision in *In re Directives* makes clear that there is no blanket rule prohibiting "vicarious" Fourth Amendment arguments. In a case closely analogous to this one, the government issued a national-security surveillance demand on Yahoo!. *See* 551 F.3d at 1007–08. Yahoo! challenged the demand, explicitly basing its claims "on the Fourth Amendment rights of third-party customers." *Id.* at 1008. The Foreign Intelligence Surveillance Court of Review permitted the challenge to proceed, finding no bar against "bring[ing] suit to enforce the rights of others," notwithstanding that those rights arose under the Fourth Amendment.[10] *Id.* at 1009; *see also, e.g.*, *In re McVane*, 44 F.3d 1127, 1137 (2d Cir. 1995) (analyzing Fourth Amendment challenge to grand-jury subpoena without questioning standing of respondents to invoke privacy rights of their family members).

The DEA has sought to enforce a subpoena that both injures Jonas (as the State's PDMP custodian forced to comply) and threatens to invade the Fourth

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[10] As here, *In re Directives* involved a federal statute permitting the recipient of a government demand to contest its legality in court. *Compare id.* at 1009 (citing 50 U.S.C. § 1805b(h)(1)(A)), *with* 21 U.S.C. § 876(c). Neither statute does anything "to circumscribe the types of claims of illegality that can be brought." 551 F. 3d at 1009.

Amendment privacy rights of individuals whose private medical information resides in the database, and whose privacy and confidentiality Jonas is statutorily charged with protecting, N.H. Rev. Stat. Ann. § 318-B:34(II), but who have no ability to challenge that impending harm. The Fourth Amendment arguments advanced by Jonas are properly before the Court.

CONCLUSION

Amici respectfully urge this Court to hold that the Fourth Amendment's warrant requirement applies to the DEA's requests for PDMP records in this case. In so holding, the Court need not disturb the general rule that "[t]he Government will be able to use subpoenas to acquire records in the overwhelming majority of investigations." *Carpenter*, 138 S. Ct. at 2222. Because this is "the rare case where the suspect has a legitimate privacy interest in records held by a third party," "a warrant is required." *Id.*

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Respectfully Submitted,

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ADDENDUM

Table of Medical Conditions Treated by Schedule II–IV Medications[11]

Medical Condition	Schedule II–IV Medications Approved for Treatment of Condition
Hormone replacement therapy for treatment of gender identity disorder/gender dysphoria	Testosterone
Weight loss associated with AIDS	Marinol (dronabinol), Cesamet (nabilone
Nausea & vomiting in cancer patients undergoing chemotherapy	Marinol (dronabinol), Cesamet (nabilone)
Trauma- and stressor-related disorders, including acute stress disorder and post-traumatic stress disorder (PTSD)	Xanax, Valium, Ativan, Lexotan, Librium, Traxene, Sepazon, Serax, Centrax, nordiazepam
Anxiety disorders and other disorders with symptoms of panic	Xanax, Valium, Ativan, Lexotan, Librium, Traxene, Sepazon, Serax, Centrax, nordiazepam
Alcohol addiction withdrawal symptoms	Serax/Serenid-D, Librium (chlordiazepoxide)
Opiate addiction treatment	Buprenorphine (Suboxone), methadone
Attention deficit hyperactivity disorder	Ritalin, Adderol, Vyvanse
Obesity (weight loss drugs)	Didrex, Voranil, Tenuate, mazindol
Chronic or acute pain	Narcotic painkillers, such as codeine (including Tylenol with codeine), hydrocodone, Demerol, morphine,

[11] Descriptions of listed medications, including their approved uses, are available through the Physicians' Desk Reference website, www.pdr.net. A list of schedule I–V drugs is available at https://www.deadiversion.usdoj.gov/schedules/orangebook/e_cs_sched.pdf. *See also* Appellant's App. 77 n.1 (providing examples). While the New Hampshire PDMP tracks Schedule II–IV medications, N.H. Rev. Stat. Ann. § 318-B:33(III), some other PDMPs within the First Circuit also track Schedule V medications, thus expanding the amount of sensitive patient information retained. *See* Mass. Gen. Laws ch. 94C, § 24A; 216 R.I. Code R. § 20-20-3.4(A).

	Vicodin, oxycodone (including Oxycontin and Percocet)
Epilepsy and seizure disorders	Nembutal (pentobarbital), Seconal (secobarbital), clobazam, clonazepam, Versed, Fycompa (perampanel)
Testosterone deficiency in men	Maxibolin, Orabolin, Durabolin, Duraboral (ethylestrenol)
Delayed puberty in boys	Anadroid-F, Halotestin, Ora-Testryl
Narcolepsy	Xyrem, Provigil
Insomnia	Ambien, Lunesta, Sonata, Restoril, Halcion, Doral, Ativan, ProSom, Versed, Belsomra
Migraines	Butorphanol (Stadol)

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 29(a)(5) because it contains 6,493 words, excluding the parts of the brief exempted by the Rules.
2. This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14-point Times New Roman.

Dated: May 29, 2019

/s/ Nathan Freed Wessler

Nathan Freed Wessler

CERTIFICATE OF SERVICE

I hereby certify that on May 29, 2019, I electronically filed the foregoing *Amici Curiae* Brief for the American Civil Liberties Union, American Civil Liberties Union of New Hampshire, American Civil Liberties Union of Maine, American Civil Liberties Union of Massachusetts, American Civil Liberties Union of Puerto Rico, American Civil Liberties Union of Rhode Island, and New Hampshire Medical Society with the United States Court of Appeals for the First Circuit by using the CM/ECF system. I certify that the following parties or their counsel of record are registered as ECF Filers and that they will be served by the CM/ECF system:

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