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 AND AMERICAN CIVIL LIBERTIES UNION OF NEW HAMPSHIRE IN SUPPORT OF RESPONDENT–APPELLANT'S MOTION TO STAY DISTRICT COURT JUDGMENT PENDING APPEAL

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CORPORATE DISCLOSURE STATEMENT

Amici Curiae American Civil Liberties Union and American Civil Liberties Union of New Hampshire are non-profit entities that do not have parent corporations. No publicly held corporation owns 10 percent or more of any stake or stock in *amici curiae*.

/s/ Nathan Freed Wessler

Nathan Freed Wessler

RULE 29 STATEMENTS

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.

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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 AND SUMMARY OF ARGUMENT

The American Civil Liberties Union ("ACLU") is a nationwide, non-profit, non-partisan public interest organization dedicated to defending the civil rights and civil liberties guaranteed by the Constitution. The ACLU of New Hampshire is a state affiliate of the national ACLU. The protection of privacy as guaranteed by the Fourth Amendment is of special concern to both organizations. 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* [hereinafter "*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*, 2017 WL 3189868 (D. Utah July 27, 2017).

Amici write to highlight several reasons why this Court should grant Appellant's motion for a stay pending appeal. *See Nken v. Holder*, 556 U.S. 418, 434 (2009) (setting out factors for issuance of stay pending appeal). First, the district court's Fourth Amendment analysis failed to adequately account for the Supreme Court's reasoning in *Carpenter*; correct application of that decision would give Appellant a high likelihood of success on the merits. Second, because there is no adequate remedy for warrantless disclosure of Prescription Drug

Monitoring Program ("PDMP") records to the Drug Enforcement Administration ("DEA"), only issuance of a stay can prevent irreparable harm. And third, issuance of a stay would support New Hampshire's strong public interest in operating the PDMP as a public health tool, rather than an adjunct of warrantless law enforcement inquiry.

ARGUMENT

1. Appellant's Likelihood of Success on the Merits is Strong in Light of *Carpenter v. United States*.

The district court failed to correctly account for the impact of the Supreme Court's landmark decision in *Carpenter v. United States* on the Fourth Amendment analysis in this case. It also underappreciated the magnitude of the privacy interest in the sensitive medical information at issue. Correcting for these errors, Appellant has "a strong likelihood of success" on appeal. *Respect Maine PAC v. McKee*, 622 F.3d 13, 15 (1st Cir. 2010).

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, as in *Carpenter*, both factors favor the conclusion that there is a reasonable expectation of privacy in the PDMP records sought by the DEA. 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 means 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 2019), *available at* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3225000, at 60 ("DEA warrantless searches of PDMP protected health information violate the Fourth Amendment under pertinent pre-*Carpenter* precedent and *Carpenter*.").

In *Carpenter*, the 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.[1] 138 S. Ct. at 2220. While *Miller* and *Smith* will continue to permit warrantless requests for older 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. __ (forthcoming 2019), *available at* https://osf.io/preprints/lawarxiv/bsedj (discussing factors). Those factors apply with full force to the records in the PDMP.

a. "Deeply revealing nature," 138 S. Ct. at 2223: Like CSLI, PDMP records "provide[] an intimate window into a person's life." *Id*. at 2217. Schedule II through IV drugs are prescribed to treat a range of medical conditions, including panic or anxiety disorders, acute pain, AIDS and cancer symptoms, seizure disorders, gender dysphoria, and opioid and alcohol addiction. In many cases, revealing these prescriptions will necessarily reveal a person's underlying medical diagnosis. *Or. PDMP*, 998 F. Supp. 2d at 960, 966. As the Pew Research Center

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[1] The Court only addressed searches of seven days or more of data, and reserved decision on whether there is some shorter duration of CSLI that can be acquired without triggering the Fourth Amendment. 138 S. Ct. at 2217 n.3. Here, the DEA seeks *two years'* worth of PDMP records. ECF No. 1-2.

explains, 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 [your] 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 (emphasis added).

b. "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 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). Without statutory and Fourth Amendment protections, "this newfound tracking capacity runs against everyone," 138 S. Ct. at 2218, and

provides a window into people's most closely held "privacies of life," *id.* at 2214 (citation omitted).

c. "Inescapable and automatic nature of its collection," 138 S. Ct. 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. Obtaining medical care is a course of action dictated by one's physical and psychological ailments. Forgoing care can leave a person debilitated or dead. Further, 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. *Cf. United States v. Hood*, __ F.3d __, 2019 WL 1466943, at *4 (1st Cir. 2019) (discussing voluntariness element of *Carpenter*).

d. "Remarkably easy, cheap, and efficient compared to traditional investigative tools," 138 S. Ct. 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 the digital age, investigators could have visited individual pharmacies armed with administrative inspection warrants to obtain prescription records. *See, e.g.*, *United States v. Acklen*, 690 F.2d 70, 71 (6th Cir. 1982) (discussing how a DEA "inspector obtained an administrative inspection warrant and searched the premises of the defendant's pharmacy"). 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," 138 S. Ct. at 2218.

2. A Stay Is Necessary to Avoid Irreparable Harm.

In addition to causing irreparable injury to Appellant and the State of New Hampshire, *see* Mot. to Stay D. Ct. Judgment Pending Appeal 33–34, failure to grant a stay would irreparably harm the individual whose medical records the DEA

seeks.[2] If the PDMP is compelled to comply with the DEA's subpoena before full adjudication of this appeal, this Court will not be able to "'unring the bell' once the information has been released." *Maness v. Meyers*, 419 U.S. 449, 460 (1975). In this situation, "[s]ubsequent appellate vindication [will not] have its ordinary consequence of totally repairing the error." *Id.*

Because the subpoena directs the PDMP to "not disclose the existence of this request or investigation for an indefinite time period," ECF No. 1-3, the subject of the subpoena will not learn of its existence in time to seek precompliance review. Only if that individual is eventually indicted will they receive notice of the subpoena pursuant to pretrial discovery. At that stage, the

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[2] Contrary to the DEA's assertions, *see* ECF No. 25, at 4–5, the Fourth Amendment interests of the individual who is the subject of the DEA subpoena are properly before the Court. Whether this action is construed as a suit against Appellant in her individual or official capacity, Appellant and/or the State of New Hampshire may properly place before the Court the full scope of Fourth Amendment harms that would result from compliance with the subpoena.

Like other custodians of medical records bound by duties of confidentiality who have been permitted to raise the privacy interests of others, Appellant and the State have a close relationship with the people whose records they collect and safeguard in the PDMP, and those people are hindered from raising their own interests by the DEA's instruction not to disclose the existence of the subpoena. *See, e.g.*, *In re Search Warrant*, 810 F.2d 67, 70–71 (3d Cir. 1987) (physician); *United States v. Westinghouse Elec. Corp.*, 638 F.2d 570, 574 (3d Cir. 1980) (employer); *see also, e.g.*, *Powers v. Ohio*, 499 U.S. 400, 411 (1991) (explaining requirements for third-party standing); *Alfred L. Snapp & Son, Inc. v. Puerto Rico, ex rel., Barez*, 458 U.S. 592, 602 (1982) (explaining circumstances in which states have standing "to pursue the interests of a private party").

person could move for suppression of unconstitutionally procured evidence, but any suppression motion would likely run up against the federal government's invocation of the good-faith exception to the exclusionary rule. *See United States v. Phillips*, 458 F. App'x 757, 759 (10th Cir. 2012) (applying good-faith exception to deny suppression of records obtained from the Oklahoma Prescription Monitoring Program without a warrant). Likewise, any later suit for damages would potentially be subject to a qualified immunity defense. *See Pyle v. Woods*, 874 F.3d 1257, 1264 (10th Cir. 2017) (invoking qualified immunity to reject suit challenging warrantless disclosure of records from Utah's PDMP). Accordingly, only precompliance review by this Court in this appeal can adequately protect against the harm of unconstitutional disclosure of the records without a warrant.

3. The Public Interest Favors Granting a Stay.

The public interest favors granting a stay, because a stay would vindicate New Hampshire's strong public policy to protect these records from warrantless search and to treat the PDMP primarily as a public health tool, rather than as an adjunct of law enforcement.

In establishing the PDMP, the New Hampshire legislature erected strong protections for the confidentiality and security of the sensitive prescription records reported by health care providers and stored in the database. *See* N.H. Rev. Stat. Ann. § 318-B:34 (confidentiality provisions); *id.* § 318-B:36 (penalizing

unauthorized uses and disclosures of PDMP records). Among this package of protections, the legislature chose to permit law enforcement access only with a court order based on probable cause. *Id.* § 318-B:35(I)(b)(3). New Hampshire is not alone in this Circuit in this regard. *See* Mass. Gen. Laws ch. 94C, § 24A(f)(4) (requiring "a probable cause warrant" for law enforcement requests to the Massachusetts database); *see also* Me. Rev. Stat. Ann. tit. 22, § 7250 (setting out confidentiality protections for the Maine database, and making no provision for disclosure of records to law enforcement).

The warrant requirement is an important part of the statute, as it helps enforce the legislature's primary purpose in establishing the PDMP "as a tool to improve medical treatment" and to "reduce patient morbidity and mortality associated with controlled drugs by providing a secure program through *which the prescriber and the dispenser* may access information on a patient's controlled drug prescription history." SB 286, 2012 Session § 196:1(IV–V) (N.H.) (emphasis added). The public policy of requiring a warrant for law enforcement access to the PDMP stands as a recognition that effectively addressing the opioid addiction crisis primarily requires public health approaches, not prosecutorial ones. *See* Brendan Saloner, et al., *A Public Health Strategy for the Opioid Crisis*, 133 Pub. Health Rep. 24S (2018). Indeed, 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 Indiana Health L. Rev. 139, 142 (2018). Thus, while law enforcement searches of PDMP records may sometimes be justified, there is a strong public interest in allowing those searches to take place only after judicial approval based on a showing of probable cause.

Moreover, the DEA will not be injured by issuance of a stay pending appeal. The subpoena at issue here was originally issued more than a year ago, in February 2018. ECF No. 7, at 1–2 (describing issuance of identical subpoenas on February 28 and June 11, 2018); ECF No. 7-2 (2/28/18 subpoena). If the DEA truly sought "to further its interest in timely investigations," ECF No. 25 at 6, agency investigators could easily have obtained a search warrant by now. Instead, the agency appears to be pursuing this case to obtain judicial endorsement of its interpretation of the relevant statutes and the Fourth Amendment. It is of course the DEA's prerogative to do so, but there is no sound reason to grant the agency an irreversible windfall prior to this Court's determination whether the subpoena is permissible under the Fourth Amendment.

CONCLUSION

Amici respectfully urge the Court to grant Appellant's motion for a stay pending appeal.

Dated: April 17, 2019

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 29(a)(5) because it contains 2,597 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.

/s/ Nathan Freed Wessler
Nathan Freed Wessler

April 17, 2019

CERTIFICATE OF SERVICE

I hereby certify that on April 17, 2019, I electronically filed the foregoing *Amici Curiae* Brief for the American Civil Liberties Union and the American Civil Liberties Union of New Hampshire 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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