Appeal No. 14-35402

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

OREGON PRESCRIPTION DRUG MONTIROING PROGRAM, an agency of the State of Oregon,

Plaintiff-Appellee,

ACLU FOUNDATION OF OREGON, INC.; JOHN DOE 1; JOHN DOE 2; JOHN DOE 3; JOHN DOE 4; JAMES ROE, M.D.,

Intervenor-plaintiffs – Appellees,

v.

U.S. DRUG ENFORCEMENT ADMINISTRATION, Defendant in Intervention,

Defendant-Appellant.

BRIEF of YALE LAW SCHOOL INFORMATION SOCIETY PROJECT IN SUPPORT OF INTERVENOR-PLAINTIFFS-APPELLEES

On Appeal from the United States District Court
For the District of Oregon

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INTEREST OF AMICI CURIAE[1]

Amicus is the Information Society Project (ISP) at The Yale Law School,[2] an intellectual center addressing the implications of new information technologies for law and society, with a special interest in data privacy and medical privacy issues. Many of the scholars affiliated with the ISP write and teach in the area of privacy and technology law and are concerned with the development of Fourth Amendment jurisprudence in general and the third party doctrine's impact on law enforcement access to personal information maintained in large computerized databases, like the one at issue in this case, in particular.

STATEMENT OF THE CASE

In 2009 the State of Oregon established its Prescription Drug Monitoring Program ("the PDMP" or "the prescription database") to collect information about prescription of certain drugs in Oregon. *Oregon Prescription Drug Monitoring Program v. U.S. Drug Enforcement Admin.*, 998 F. Supp. 2d 957, 959–60 (D. Or. 2014) ("*Oregon PDMP*"). The database collects identifying information about health care practitioners and patients who prescribe or receive prescriptions of

[1] This brief is filed with the consent of the parties as required under F.R.A.P. 29. No counsel for a party authored the brief in whole or in part; no party or party's counsel contributed money to fund preparing or submitting the brief; and no person other than the amici curiae or their counsel contributed money intended to fund preparing or submitting the brief.

[2] This brief has been filed on behalf of a Center affiliated with Yale Law School but does not purport to present the school's institutional views, if any.

drugs that can be used to treat a variety of conditions. *Id*. While all medical information is considered "private,"[3] many of the conditions treated—including psychiatric disorders, such as depression, anxiety, and Attention Deficit Hyperactivity Disorder (ADHD), and other conditions, such as drug or alcohol addiction, HIV, and "gender identity disorder," *id.* at 960—raise heightened privacy concerns.[4]

According to the State of Oregon, "[t]he 'primary purpose of the PDMP is to provide practitioners and pharmacists a tool to improve health care,' by providing health care providers with a means to identify and address problems related to the side effects of drugs, risks associated with the combined effects of prescription drugs with alcohol or other prescribed drugs, and overdose." *Id.* (quoting PDMP

[3] *Whalen v. Roe*, 429 U.S. 589, 602 (1977); *Ferguson v. City of Charleston*, 532 U.S. 67, 78 (2001).

[4] *See, e.g., United States v. Jones,* 132 S. Ct. 945, 955 (Sotomayor, J., concurring) (2012) (citing *People v. Weaver*, 12 N.Y.3d 433, 441–442, 882 N.Y.S.2d 357, 909 N.E.2d 1195, 1199 (N.Y. 2009)) (highlighting the "indisputably private nature" of information that can be discovered on individual trips to a "psychiatrist, the plastic surgeon, the abortion clinic, the AIDS treatment center, the strip club, the criminal defense attorney, the by-the-hour motel, the union meeting [hall], the [houses of worship], the gay bar . . . ."); Jones, 132 S. Ct. at 964 (Alito, J., concurring) (joined by Justices Ginsburg, Breyer, Kagan) (arguing "the use of longer term GPS monitoring in investigations of most offenses impinges on expectations of privacy" because "society's expectation has been that law enforcement agents and others would not—and indeed, in the main, simply could not—secretly monitor and catalogue every single movement of an individual's car for a very long period.").

Fact Sheet). In compliance with *Whalen v. Roe*, 429 U.S. 589 (1977), and undoubtedly to reassure physicians and patients alike, the statute creating the PDMP classifies the reported information as "protected health information," and limits disclosures to a few select circumstances. Or. Rev. Stat. § 431.966. For example, disclosures may be made to medical practitioners or pharmacists for the purpose of evaluating the need for treatment "for a patient to whom the practitioner or pharmacist anticipates providing . . . care." *Id.* § 431.966(2)(a)(A). Disclosures of patient information to a "federal, state or local law enforcement agency engaged in an authorized drug-related investigation involving a person to whom the requested information pertains" are restricted to disclosures made "[p]ursuant to a valid court order based on probable cause." *Id.* § 431.966(2)(a)(D). Indeed, as the district court emphasized, PDMP's public website "repeatedly references the privacy protections afforded prescription information and informs visitors that law enforcement officials may not obtain information 'without a valid court order based on probable cause.'" *Oregon PDMP*, 998 F. Supp. 2d at 960 (citation omitted).

Despite the requirements of the Oregon statute that information from the prescription database may only be produced to law enforcement officials with a valid court order based on probable cause, the DEA has repeatedly served the PDMP with administrative subpoenas seeking information from the database. The

DEA contends that PDMP must respond to subpoenas for information issued pursuant to its power under 21 U.S.C. § 876 to issue subpoenas to "require the production of any records (including books, papers, documents, and other tangible things which constitute or contain evidence) which the Attorney General finds relevant or material to" an investigation regarding controlled substances. The State objects to these subpoenas because disclosure of the information without a court order based on probable cause would violate Oregon law and seeks declaratory relief in this case to determine its rights and responsibilities.

A group of patients and medical providers whose information has been disclosed to the PDMP pursuant to the Oregon state law ("the patients and providers") intervened in this case arguing that release of medical information without warrants based on probable cause would violate their Fourth Amendment rights. The DEA argues first that 21 U.S.C. § 876 preempts Oregon state law. Second, as relevant to this amicus brief, the DEA argues that administrative subpoenas are sufficient for Fourth Amendment purposes because, *inter alia*, the patients and providers have no reasonable expectation of privacy because they disclosed the medical information to a third party, albeit for medical purposes.

SUMMARY OF ARGUMENT

Relying on an overbroad interpretation of the "third party doctrine" doctrine cases, the DEA argues that the Plaintiffs-Intervenors have no Fourth Amendment

rights in their confidential medical information contained in the State of Oregon's Prescription Drug Monitoring Program database, and therefore the Oregon PDMP must respond to its administrative subpoenas for the information sought to aid in criminal investigations. Under this interpretation of the third party doctrine cases—such as *United States v. Miller,* 425 U.S. 435 (1976), *Smith v. Maryland*, 442 U.S. 735 (1979), and *United States v. Hoffa*, 385 U.S. 293 (1966)—a party always loses its reasonable expectation of privacy in confidential information whenever that information is disclosed to any other party, the "third" party. This radical interpretation of the doctrine is unsupported by the cases cited and directly contradicted by others ignored by the DEA; applying the doctrine in this broad sweeping manner would create an exception to the warrant requirement out of whole cloth, making confidential medical information and legal files subject to administrative subpoenas by law enforcement agencies nationwide. The DEA tries to sweep with a broad brush when the third party doctrine carves with a scalpel.

Jurisprudence from this Court and the Supreme Court establishes that while disclosure of confidential information to a third party is relevant to the consideration of a party's reasonable expectation of privacy, it is *never* dispositive of that determination. Instead, as with all such determinations, it is considered along with the totality of the circumstances. Courts pay special attention to the voluntariness of the disclosure, the relationship between the parties, any special

circumstances that lead the party to believe that the information will or will not be maintained in the strictest of confidences. These special circumstances include, on the one hand, legal assurances of confidentiality in statute, common law doctrine, or professional ethics or, on the other hand, any incentives the party might have to disclose the information leading one to "assume the risk" of a breach of confidentiality to law enforcement. With respect to the disclosures at issue here, limited disclosures of medical information for purposes of obtaining or determining appropriate treatments, the Supreme Court and this Court have already taken these considerations into account holding that patients maintain a reasonable expectation of privacy in their confidential medical information disclosed to their physicians and warrants are required when the information is sought for law enforcement purposes. *Ferguson v. City of Charleston,* 532 U.S. 67, 78 (2001); *see also Tucson Woman's Clinic v. Eden*, 379 F.3d 531, 550 (9th Cir. 2004).

ARGUMENT

I. The Supreme Court and this Court have held that the Fourth Amendment Requires Law Enforcement Officials to Obtain a Warrant for Confidential Medical Information Disclosed for Medical Rather Than Law Enforcement Purposes.

The Fourth Amendment guarantees "[t]he right of the people to be secure in their persons . . . against unreasonable searches and seizures." U.S. Const. amend. IV. As the court below noted, the Fourth Amendment "guards against searches and seizures of items or places in which a person has a reasonable expectation of

privacy." *Oregon PDMP*, 998 F. Supp. 2d at 963 (citing *United States v. Ziegler,* 474 F.3d 1184, 1189 (9th Cir. 2007)). A person has a reasonable expectation of privacy if he or she can show that he or she "ha[s] 'an actual (subjective) expectation of privacy and, second, that the expectation [is] one that society is prepared to recognize as reasonable.'" *Id.* at 964 (quoting *Katz v. United States,* 389 U.S. 347, 361 (1967) (Harlan, J., concurring)).

"Over and again," the Supreme Court has emphasized that "searches conducted outside the judicial process, without prior approval by judge or magistrate," like the administrative subpoenas at issue in this case, "are *per se* unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions." *Katz v. United States*, 389 U.S. 347, 357 (1967). Because this case does not involve any of these closely guarded exceptions in which the Court finds a reduced expectation of privacy,[5] the DEA must look elsewhere to justify its failure to obtain warrants based on probable cause. It claims that it may dispense with the warrant requirement when seeking

[5] *See, e.g.*, *Chandler v. Miller*, 520 U.S. 305, 313 (1997) (exceptions to the main rule are sometimes warranted based on "special needs, beyond the normal need for law enforcement.") (quoting *Skinner v. Ry. Labor Executives' Ass'n*, 489 U.S. 602, 619 (1989)); *Schneckloth v. Bustamonte*, 412 U.S. 218, 219 (1973) (warrant unnecessary for search that is conducted pursuant to consent.); *Warden, Md. Penitentiary v. Hayden*, 387 U.S. 294, 298–299 (1967) (hot pursuit exception allows officers to investigate without warrant if delay "would gravely endanger their lives or the lives of others"); *Agnello v. United States*, 269 U.S. 20, 30 (1925) (warrantless search allowed incident to arrest).

records from the PDMP, claiming that the patient and physician intervenors have no reasonable expectation of privacy in their medical records once they have been disclosed to the PDMP, relying on what has been called the "third party doctrine." Br. for Appellant at 31–34. This overbroad interpretation of the third party doctrine—a claim that disclosure to *any* other third party vitiates the reasonable expectation of privacy—is not only contradicted by jurisprudence from the Supreme Court and this Court that is directly relevant to medical records disclosures, it would essentially create out of whole cloth another exception to the warrant requirement. It would dispense with the required inquiry into reasonable expectation of privacy in any case where a disclosure is made and would allow the government to subpoena medical records and legal files at a whim. None of the case law the Government cites supports this radical interpretation of the doctrine.

A. Disclosure of Private Information to a Third Party is Relevant to, But Never Dispositive Of, the Inquiry into Reasonable Expectation of Privacy.

As jurisprudence from the Supreme Court and this Court show, a warrant is excused for "third party" information only where the information is disclosed to others in a manner that vitiates the reasonable expectation of privacy in the information. The third party doctrine helps us to determine *whether* the person has retained a reasonable expectation of privacy in the information he or she has handed over. As Justice Breyer has emphasized, "th[e] Court has continuously

emphasized that '[r]easonableness is measured by examining the totality of the circumstances.'" *Georgia v. Randolph*, 547 U.S. 103, 125 (2006) (Breyer, J., concurring) (internal ellipses omitted). *See* Stephen E. Henderson, *After United States v. Jones, After the Fourth Amendment Third Party Doctrine*, 14 N.C. J. L. & Tech. 431, 458–59 n.138 (2013) ("Henderson, *After Jones*"). Thus, the disclosure is relevant to, but never dispositive of, the determination of reasonable expectation of privacy.

As the Supreme Court has often stressed, the warrant requirement is not a mere formality:

> The presence of a search warrant serves a high function. . . . The right of privacy was deemed too precious to entrust to the discretion of those whose job is the detection of crime and the arrest of criminals. Power is a heady thing; and history shows that the police acting on their own cannot be trusted. And so the Constitution requires a magistrate to pass on the desires of the police before they violate [a person's] privacy . . ."

McDonald v. United States, 335 U.S. 451, 455–56 (1948).

B. The Supreme Court Has Never Applied the "Third Party Doctrine" in the Overbroad Manner Advocated by the DEA and Has Expressed Support for Further Limiting the Doctrine.

While there has not been a "core" third party case in the Supreme Court for many years, we can learn a great deal about the doctrine from decisions in which the Court has *rejected* dissenters' claims that the doctrine vitiated the reasonable

expectation of privacy in a given case.[6] In five decisions, the Supreme Court has shied away from applying a broad third party doctrine, finding no vitiation of privacy expectations even where information was turned over to third parties or made public in some other way. Further confirming the doctrine's use as providing a framework within which to evaluate the expectation of privacy, Supreme Court case law establishes that whether one loses one's reasonable expectation of privacy in information disclosed to a third party depends on the specifics of the relationship between discloser and disclosee.

For example, it is well-established in the paradigmatic third party doctrine case, that if one discloses personal information to a friend or co-conspirator, even if one has a subjective belief that the friend can be trusted to keep this information secret, this subjective belief is not one that society is prepared to recognize as reasonable. *See Hoffa v. United States*, 385 U.S. 293, 302 (1966); *Oregon PDMP*, 998 F. Supp. 2d at 964 (quoting *Katz v. United States,* 389 U.S. at 361 (Harlan, J., concurring)). As the DEA seems to acknowledge by its failure to cite them, these paradigmatic third party doctrine cases—those discussing disclosure of private information to informants—are inapposite here. The fact that disclosure could benefit the third party is another reason that the discloser's expectation of privacy was not reasonable in those cases. You might believe your friend or acquaintance

[6] Henderson, *After Jones,* 14 N.C. J. L. & Tech. at 438-42

won't turn you in, but you have no special reason to think they won't, and there is no indication that society is prepared to honor your mistaken belief that your friend will not betray you. Indeed, any person takes the risk that a co-conspirator will turn against them, if only to save their own hide and receive more lenient treatment. *See Couch v. United States* 409 U.S. 322, 335 (1973) (noting that when the IRS investigates an accountant's client, that accountant's "own need for self protection would often require the right to disclose the information given him."). As the Court explained in *Hoffa v. United States*, 385 U.S. 293 (1966):

> What the Fourth Amendment protects is the security a man relies upon when he places himself or his property within a constitutionally protected area, be it his home or his office, his hotel room or his automobile. . . . In the present case, however, it is evident that *no interest legitimately protected by the Fourth Amendment is involved*. It is obvious that the petitioner was not relying on the security of his hotel suite when he made the incriminating statements to [the informant] or in [the informant's] presence.

Hoffa, 385 U.S. at 301–02 (emphasis added); *see also Lewis v. United States*, 385 U.S. 206, 211 (1966) ("when, as here, the home is converted into a commercial center to which outsiders are invited for purposes of transacting unlawful business, *that business is entitled to no greater sanctity than if it were carried on in a store*, a garage, a car, or on the street.") (emphasis added).[7]

[7] Moreover, none of those cases involved third parties being *forced* to turn over information, as the Oregon PDMP is in this case. Those were cases where the third parties voluntarily disclosed information for their own benefit.

C. The Supreme Court Has Specifically Held that Parties Retain a Reasonable Expectation of Privacy in Confidential Medical Information Disclosed For Purposes of Obtaining Medical Treatment.

On the other end of the spectrum, the Supreme Court and this Court have specifically addressed disclosure of medical information to a physician for purposes of diagnosis and treatment, holding such disclosure does not vitiate one's reasonable expectation of privacy. The risk that our physician's motivation in treating us is to incriminate us is not the "kind of risk we necessarily assume" when we seek medical treatment. *Cf. Hoffa*, 385 U.S. at 303 (stating that accused assumed risk that person he was talking to would talk to police). For example, in *Ferguson v. City of Charleston*, 532 U.S. 67 (2001), the Court held that the voluntary conveyance of information to third party medical providers did not vitiate patients' reasonable expectation of privacy, because the patients had a reasonable expectation that the information was taken and testing was done for medical purposes, and that the test results would remain confidential. *Id.* at 78 ("[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."). In so holding, the Court specifically rejected Justice Scalia's claim, relying on the confidential informant cases, that by handing over the urine to their physicians for drug tests performed for medical purposes the patients lost their reasonable expectation of privacy. *See Ferguson,*

532 U.S. at 92 (Scalia, J., dissenting) ("There is only one act that could conceivably be regarded as a search of petitioners in the present case: the *taking* of the urine sample.").[8]

That same year, the Supreme Court also held that a person had a reasonable expectation of privacy in information—heat emanating from private residence—even though that information was "available" to the public with the use of thermal imaging devices that could "see" it coming from the house. *Kyllo v. U.S.*, 533 U.S. 27, 29 (2001). In *Kyllo*, the fact that the information could only be seen from the outside of the house with the use of technology not in general use was central to the Court's decision that the party had not lost a reasonable expectation of privacy. *Id*. at 40

Also, highly applicable to this case are the co-tenancy and hotel room cases. The Court has explained that a hotel guest who provides "implied or express permission" to "maids, janitors or repairmen to enter his room in the performance of their duties," thus disclosing otherwise personal information to these "third parties," does not also permit such individuals to bring the police with them. *Stoner v. California*, 376 U.S. 483, 489 (1964) (citing *U.S. v. Jeffers*, 342 U.S. 48, 51 (1951)) (internal quotation marks omitted). As the Court held in *Stoner*, 376

[8] Note in this case, the question is not whether the state of Oregon *may* violate its own state law and release the information voluntarily to the DEA. The question is whether the DEA must obtain a warrant to *require* the State of Oregon to release the private medical information in the database.

U.S. at 490, holding that the search—without a warrant—of a hotel guest's room was reasonable would leave Fourth Amendment rights of hotel guests "to depend upon the unfettered discretion" of hotel employees. *See also Chapman v. United States*, 365 U.S. 610, 616–17 (1961).

Similarly, the Court held that where employees hand over their urine to an employer for drug testing, thus disclosing that information to a third party, employees retained a reasonable expectation of privacy in those tests results. The Court held that those "[t]est results may not be used in a criminal prosecution of the employee without the employee's consent." *Nat'l Treasury Employees Union v. Von Raab*, 489 U.S. 656, 666 (1989).

In *Georgia v. Randolph*, 547 U.S. 103, 106 (2006), the Court held that one cotenants' consent to the police to enter was not effective as against a present, objecting cotenant. The dissenters argued that the third party doctrine meant that the cotenant's consent should be enough to establish consent to the search. *See id.* at 128, 132–33 (Roberts, J., dissenting). The majority rejected this contention, holding that we must look to the societal expectation, and the expectation is that a party rejected by one cotenant will not enter. *See id.* at 111, 113–14 (majority opinion). The *Randolph* Court also discussed that one retains a reasonable expectation of privacy in hotel rooms despite the entrance of others, and the same rule applies to apartments. *See Randolph*, 547 U.S. at 112.

Similarly, in *City of Ontario v. Quon*, eight members of the Court expressed support for reexamining the third party doctrine in a way that might bring the *Smith* holding into question, noting that "[c]ell phone and text message communications are so pervasive that some persons may consider them to be essential means or necessary instruments for self-expression, even self-identification," and that this fact "might strengthen the case for an expectation of privacy" in a case in the future.[9] Similarly, in *United States v. Jones*, five members of the Court rejected the idea that individuals lose any expectation of privacy in information about their location simply because they travel in "public" thus disclosing the information to third parties on the roadways.[10]

As Professor Stephen Henderson has summarized, even before *United States v. Jones*:

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[9] *Quon*, 560 U.S. 746, 760 (2010) (assuming, without deciding, that employee "had a reasonable expectation of privacy in the text messages sent on the pager provided to him by the City," but holding that government employer's review of text messages was reasonable on other grounds).

[10] *Jones,* 132 S. Ct. 945, 955 (Sotomayor, J., concurring) ("I agree with Justice ALITO that, at the very least, 'longer term GPS monitoring in investigations of most offenses impinges on expectations of privacy.'"); *Jones*, 132 S. Ct. at 964 (Alito, J., concurring) "Under this approach, relatively short-term monitoring of a person's movements on public streets accords with expectations of privacy that our society has recognized as reasonable. . . . But the use of longer term GPS monitoring in investigations of most offenses impinges on expectations of privacy"; and "conclud[ing] that the lengthy monitoring that occurred in this case constituted a search under the Fourth Amendment.").

> we had a potentially 'limited' third party doctrine that might constitutionally protect information provided to a conduit or bailee, that might constitutionally protect information exposed to the public but not regularly obtained by that public, that might constitutionally protect information that enjoys other constitutional or statutory protection, and that might be ripe for change given developments in technology and social norms and trends in state constitutional law.

Henderson, at 447; *id* at 438–39 n.37 (citing *U.S. v. Warshak*, 631 F.3d 266 (6th Cir. 2010)). Henderson also notes that the notion of disclosure to the "public" is dependent on "social norms," stating that the defendant's expectation of privacy in information may be retained where the information enjoys "other constitutional or statutory protection[.]" *Id*. at 447.[11]

Confirming that the third party doctrine is not absolute, this Court and the Fourth Circuit similarly held that patients and providers have a reasonable expectation of privacy in medical records. In *Tucson Woman's Clinic v. Eden*, 379 F.3d 531, 550 (9th Cir. 2004), this Court held that "all provision of medical services in private physicians' offices carries with it a high expectation of privacy for both physician and patient." *See, also, e.g.*, *Doe v. Broderick*, 225 F.3d 440, 450–52 (4th Cir. 2000) (requiring a warrant, or at the very least probable cause, to access medical records). A significant number of state courts have similarly

[11] *See also* James X. Dempsey, *The Path to ECPA Reform and the Implications of* United States v. Jones, 47 U.S.F. L. Rev. 225, 242–43 (2012) (noting that Court rejected the third party doctrine in interpreting a Freedom of Information Act exception in *U.S. Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 763 (1989)).

applied a limited third party doctrine that examines whether a reasonable expectation of privacy is vitiated in light of the particular disclosure that occurred. *See* Stephen E. Henderson, *Learning from All Fifty States: How To Apply the Fourth Amendment and Its State Analogs To Protect Third Party Information from Unreasonable Search*, 55 Cath. U. L. Rev. 373, 395 (2006).

II. Neither *United States v. Miller* Nor *Smith v. Maryland* Apply to this Case.

The DEA argues that when a person discloses otherwise private information to a third party, that person loses any reasonable expectation of privacy in the information, and thus forfeits all Fourth Amendment protections related to it. The DEA's argument is primarily based on a pair of Supreme Court decisions: *United States v. Miller,* 425 U.S. 435 (1976) and *Smith v. Maryland*, 442 U.S. 735 (1979), both of which are clearly distinct from the case at hand.

A. The Information at Issue in the Current Case is Extremely Confidential in Nature and Was Not Voluntarily Conveyed to the PDMP.

In *Miller*, the Court held that a bank depositor had no reasonable expectation of privacy in the information he had voluntarily handed over to his bank in the course of transactions. In *Smith*, the Court held that a criminal defendant had no reasonable expectation of privacy in phone numbers conveyed to his telephone company when dialed from his home phone. In both cases, the Court "examine[d] the nature of the particular documents sought to be protected in order to determine

whether there is a legitimate expectation of privacy concerning their contents." *Miller*, 425 U.S. at 442 (citation and internal quotation marks omitted). In both cases, the Court's determination that there was no such expectation turned on two findings: that the documents in question were not particularly confidential in nature, and that the information contained in those documents had been "voluntarily conveyed" to the third parties in question. *See Miller*, 425 U.S. at 442 (the documents were "not confidential communications but negotiable instruments to be used in commercial transactions," and the documents contained "only information voluntarily conveyed to the banks."); *Smith*, 442 U.S. at 741, 744 (noting that pen registers monitor "only" numbers dialed, not contents of communication, and that "when he used his phone, petitioner voluntarily conveyed numerical information to the telephone company").

These two findings, key to the decisions of the *Miller* and *Smith* courts, do not apply to the facts of this case. First, communications with health care professionals, including those involved in receiving and filling prescriptions, are among the most confidential in a person's life. *See* Intervenors' Br. at 28-29 (Plaintiffs-Intervenors in particular have an actual expectation of privacy in their prescription records, and people generally consider health information to be "among the most private pieces of information about them"). Second, the decision to seek medical treatment and fill prescriptions cannot reasonably be considered

"voluntary." When the consequences of choosing one option over another may well include physical and mental health harms, as is the case with medical treatment, the choice is not meaningful. But even if one assumes that patients voluntarily give information to their doctors and pharmacists, they do not voluntarily give information to the Oregon PDMP. Doctors and pharmacists give information to the PDMP, and do so not voluntarily, but because they are required to do so by law. Or. Rev. Stat. § 431.964(1).

B. The PDMP is not a Party to the Transactions it Monitors.

Moreover, the Court's decision in *Miller* also rested on the grounds that the records in question were not those of the bank depositor, but rather "the business records of the banks," 425 U.S. at 440. In reaching this point, the Court leaned heavily on the idea that "[b]anks are not neutrals in transactions involving [the records], but parties . . . with a substantial stake in [the records'] continued availability and acceptance." *Id.* (quoting *California Bankers Ass'n v. Shultz*, 416 U.S. 21, 48–49 (1974)) (internal ellipses and quotation marks omitted). The transactions at issue here plainly differ from those in *Miller* in this regard. The entity from which the DEA seeks to obtain prescription records, the Oregon Prescription Drug Monitoring Program, is a neutral party retaining information about a transaction where the patient, the doctor, and the pharmacist are the interested parties.

C. Relevant Statutes Reinforce Oregon Residents' Expectation of Privacy in their Medical Records.

The *Miller* Court further supported its reasoning by pointing out that "[t]he lack of any legitimate expectation of privacy concerning the information kept in bank records was assumed by Congress in enacting the Bank Secrecy Act, the expressed purpose of which is to require records to be maintained because they 'have a high degree of usefulness in criminal tax, and regulatory investigations and proceedings.'" 425 U.S. at 442–43 (citation omitted). In the case at hand, the very opposite can be said to be true. By enacting a probable cause requirement for law enforcement access to the prescription database, Or. Rev. Stat. § 431.966(2)(a)(D), the Oregon state legislature reinforced an already existing expectation of privacy in Oregonians' prescription records.

D. Plaintiffs-Intervenors Have Made No Concession Regarding Non-Digital Collection of the Information in Question.

In addition to the reasons of non-sensitivity and voluntary conveyance discussed above, the *Smith* Court based its conclusion on a determination that the phone company's electronic switching equipment, which received information about numbers dialed, was "merely the modern counterpart of the operator." 442 U.S. at 744. The defendant had conceded that use of a human operator would have eliminated his expectation of privacy in the numbers he had dialed, 442 U.S at 744, meaning that finding a lack of substantial difference between an operator and electronic equipment amounted to finding no expectation of privacy. Plaintiffs-

Intervenors have made no such concession here, a fact that further weakens the analogy between *Smith* and this case.

III. Even If the Third Party Doctrine Was Understood as a Consent Doctrine, the Medical Information Shared for Medical Purposes at Issue in this Case Does Not Fall Within the Scope of the Doctrine.

One commentator has argued the third party doctrine should be "understood as a consent doctrine," "as a subset of consent law."[12] Under that theory, the searches in this case would not come within the scope of the doctrine. None of the searches in the informant cases, or in *Miller* or *Smith* went beyond the explicit limitations placed on the scope of consent, *see Lewis*, 385 U.S. at 209–10 (in discussing *Gouled v. United States*, 255 U.S. 298 (1921), highlighting the importance of remaining within the scope of consent); *Hoffa*, 385 U.S. at 303; *On Lee v. United States*, 343 U.S. 747, 751-52 (1952); *see also United States v. Miller*, 425 U.S. 435 (1976); *Securities & Exchange Comm'n v. O'Brien*, 467 U.S. 735 (1984). In this case, however, the searches of the Oregon PDMP went beyond the consent given by the patients or their physicians, which was to use the medical information for treatment and diagnostic purposes only. *See, e.g., Ferguson v. City of Charleston II*, 308 F.3d 380, 396–98 (4th Cir. 2002) (on remand) (patients did not give consent to searches for Fourth Amendment purposes where they only gave consent to testing for medical purposes and were assured of confidentiality).

[12] *See* Orin S. Kerr, *The Case for the Third-Party Doctrine*, 107 Mich. L. Rev. 561, 565 (2009).

Where consent is obtained "by stealth, or through social acquaintance, or in the guise of a business call," the search must be limited to the scope of the consent; otherwise, it is no longer consensual but is "against [the] will" of the person searched and therefore violates the Fourth Amendment. *Gouled v. United States*, 255 U.S. 298, 305–06 (1921) (search went beyond scope of consent when man obtained entry into a suspect's home by falsely representing that he intended only to pay a social visit, then proceeded to ransack the suspect's private papers and seize some of them); *id.* at 304–05.[13]

IV. The Additional Third-Party Doctrine Cases on Which the DEA Relies are Even Less Relevant to the Case at Hand.

The DEA seeks to justify its reliance on *Smith* and *Miller* by situating them among several similar cases about the disclosure of sensitive information to third parties. Br. for Appellant at 33 & n.14. The additional cases the DEA cites for this purpose are even less applicable than *Smith* and *Miller* are here.

[13] *See also United States v. Bosse*, 898 F.2d 113, 115 (9th Cir. 1990) ("access gained by a government agent . . . violates the fourth amendment's bar against unreasonable searches and seizures if such entry was acquired by affirmative or deliberate misrepresentation of the nature of the government's investigation" or when the government agent "misrepresent[s] the scope, nature or purpose" of his or her investigation) (internal quotations omitted); *see also United States v. Attson*, 900 F.2d 1427, 1429 (9th Cir. 1990) (noting district court's finding that defendant "did *not* consent to the taking of blood *for police use*" when he signed the general hospital consent form, but only consented to its use for "medical purposes") (emphasis in original).

A. Oregon Residents Have No Reason to Anticipate That Their Medical Information Will Be Disclosed to the Government, and are in Fact Entitled to the Opposite Expectation.

Several of the additional cases cited by the DEA rely on the proposition that individuals should anticipate the disclosure of the information in question, either because it was shared for purposes of disclosure or because of the nature of the relationship between the individual and the relevant third party. This proposition is clearly inapplicable to medical information and the doctor-patient relationship.

The DEA cites *Couch v. United States*, 409 U.S. 322 (1973), where the Court ruled that a restaurant owner had no expectation of privacy in financial records she had turned over to her accountant. That decision turned largely on the fact that the restaurant owner had given the records to her accountant "for the purpose of preparing her income tax returns," 409 U.S. at 324, or in other words, for "mandatory disclosure of much of the information" the records contained to the IRS, the very same entity which now sought the records for criminal investigatory purposes. 409 U.S. at 335. Unlike taxpayers who seek out accountants, Oregon patients do not seek out doctors or pharmacists for the purpose of revealing information to the government. Even if one could argue that this was the case because reporting to the PDMP is mandatory, patients certainly do not intend for their prescription records to be revealed to law enforcement entities that may criminally investigate them, and which are entirely distinct from the PDMP.

Along the same lines, the *Couch* Court also emphasized that the defendant sought "extensions of constitutional protections [of privacy] . . . under a system largely dependent upon honest self-reporting even to survive." 409 U.S. at 335. Unlike the tax system, which depends upon information being revealed, the health care system largely depends on promises that information will remain confidential. Without these promises, patients may fear to see doctors or be fully honest with them about medically relevant information. *See* Intervenors' Br. at 39–40.

The Court used substantially similar reasoning in another case cited by the DEA, *United States v. White*, 401 U.S. 745 (1971). There, the Court ruled that the warrantless monitoring of conversations between a criminal defendant and a police informant did not infringe upon the Fourth Amendment, even when the informant wore a radio transmitter that relayed conversations to police in real-time. The Court based its decision partially on the idea that "[i]nescapably, one contemplating illegal activities must realize and risk that his companions may be reporting to the police." 401 U.S. at 752. The opposite is true in the case at hand. Centuries of medical teaching have emphasized the importance of keeping medical information confidential, and doctors are professionally obligated to honor patient confidentiality under almost all circumstances. *See* Intervenors' Br. at 36–42. A patient should almost "inescapably" believe that information he reveals to his doctor will not be shared without his permission.

The differences between these cases, where the nature of the relationship or the information in question would lead an individual to expect disclosure, and the case at hand is further emphasized by an exception built into this Court's decision in *United States v. Golden Valley Electric Association*, 689 F.3d 1108 (9th Cir. 2012). In *Golden Valley*, the only recent case on which the DEA relies, this Court determined that members of an electric power cooperative did not have a reasonable expectation of privacy in their power consumption records. Although this Court explained that people "ordinarily" lack a reasonable expectation of privacy in the information they reveal to third parties, it also emphasized that "[d]epending on the circumstances or the type of information, a company's guarantee to its customers that it will safeguard the privacy of their records might suffice to justify resisting an administrative subpoena." 689 F.3d at 1116. The case at hand fits squarely within this exception.

Unlike the Golden Valley Electric Association, which could not show an explicit confidentiality agreement with its customers, *id*., Oregon did publicly guarantee, through state statute, that patients' prescription records would not be revealed to law enforcement at a standard lower than probable cause. Or. Rev. Stat. § 431.966(2)(a)(D). Furthermore, the Court in *Golden Valley* found that the "type of information" at stake there, namely information about power consumption, was "no more inherently personal or private than the bank records in *Miller*." 689 F.3d

at 1116. However, there is strong reason to believe that prescription records are more personal than bank records, and certainly far more personal than power consumption records, both because of the inherently private nature of medical information and the strong tradition of confidentiality in the doctor-patient relationship.

B. No Previous Line of Cases Eliminates Oregon Patients' Expectation of Privacy in Their Prescription Records When Collected Using a Different Method.

While *United States v. White* is distinguishable from the case at hand for the reasons discussed above, it also true that the thrust of the Court's reasoning in *White* did not involve the third-party doctrine, but rather the distinction, or lack thereof, between electronic and traditional surveillance techniques. The Court pointed out that, "[s]o far, the law permits the frustration of actual expectations of privacy by . . . authorizing the use of informants," and found that "there is no persuasive evidence that the difference . . . between the electronically equipped and unequipped agent is substantial enough to require discrete constitutional recognition." 401 U.S. at 752. The Court was only able to use this reasoning because of a line of cases upholding warrantless use of informants with no (or less) electronic monitoring capability than the informant in *White*. The DEA has cited no analogous line of cases that would allow law enforcement to obtain prescription records for purposes of criminal investigation without a warrant using a collection

method slightly different from the one proposed here, because no such line of cases exists.

C. The Information Sought by the DEA is Directly Related to Plaintiffs-Intervenors.

The DEA also cites *United States v. Payner*, 447 U.S. 727 (1980), a case that involved the IRS's "unconstitutional and possibly criminal" seizure of a bank executive's briefcase and the financial records it contained. 447 U.S. at 733. Although the *Payner* Court did rule that the defendant in the case had no expectation of privacy in the records seized, the situation was quite distinct from most third-party doctrine cases because nothing indicated that the seized records were even *about* the defendant, and there was no evidence that the defendant had ever had any connection with the records. *See* 447 U.S. at 732 n.4 ("At the outset, it is not clear that secret information regarding this respondent's account played any role in the investigation that led to the discovery of the critical loan guarantee agreement.") Rather, the seized documents revealed a "close working relationship" between the bank of the executive whose briefcase was seized and a second bank. 447 U.S. at 730. The discovery of this relationship led the IRS to issue subpoenas to that second bank, and those subpoenas eventually revealed evidence implicating the defendant in tax evasion. *Id*. This attenuated chain of connections between the defendant and the information at issue is entirely dissimilar from the connection between a patient and his own prescription records.

CONCLUSION

For the foregoing reasons, the district court's decision should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), I hereby certify that this brief contains 6,939 words, excluding the portions of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii), and has been prepared in a proportionally spaced typeface using Times New Roman 14-point font.

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CERTIFICATE OF SERVICE

I hereby certify that on December 12, 2014, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. All Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

I further certify that on this day I shall mail seven copies of the foregoing to the Court, pursuant to Circuit Rule 31-1.

DATED: December 12, 2014 /s/ Priscilla Joyce Smith
PRISCILLA JOYCE SMITH