Nos. 15-1463 & -1487

UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

RYAN PYLE,
Plaintiff - Appellant,

v.

JAMES WOODS, **KELVYN CULLIMORE**, and
COTTONWOOD HEIGHTS,
Defendants - Appellees.

MARLON JONES,
Plaintiff - Appellant,

v.

JAMES WOODS, **KELVYN CULLIMORE**, and
COTTONWOOD HEIGHTS,
Defendants - Appellees.

On appeal from the U.S. District Court for the District of Utah:
No. 2:15-CV-143; Hon. Tena Campbell, U.S. District Judge (*Pyle*)
No. 2:15-CV-278; Hon. Ted Stewart, U.S. District Judge (*Jones*)

APPELLANTS' OPENING BRIEF

ORAL ARGUMENT REQUESTED

Tyler B. Ayres
AYRES LAW FIRM
12339 South 800 East
Suite 101
Draper, UT 84020
(801) 255-5555

Scott C. Borison
LEGG LAW FIRM LLC
1900 South Norfolk Street
Suite 350
San Mateo, CA 94403
(301) 620-1016

Scott Michelman
Scott L. Nelson
PUBLIC CITIZEN
LITIGATION GROUP
1600 20th Street NW
Washington, DC 20009
(202) 588-1000

Counsel for Plaintiff-Appellant Ryan Pyle
and Plaintiff-Appellant Marlon Jones

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STATEMENT OF PRIOR OR RELATED APPEALS

There are no prior or related appeals.

GLOSSARY OF ACRONYMS AND ABBREVIATIONS

A[number]	Appendix of plaintiffs-appellants, page [number]
AMA	American Medical Association
Database	Utah Controlled Substance Database
DOPL	Division of Occupational and Professional Licensing
FCRA	Fair Credit Reporting Act
HIPAA	Health Insurance Portability and Accountability Act

INTRODUCTION

Utah law directs the Utah Division of Occupational and Professional Licensing to maintain a state Controlled Substance Database of all prescriptions for controlled substances filled at pharmacies in the state. Pharmacists are required to report patients' prescription records — including patient's name, date, and drug dosage and quantity — to the Database without patients' consent.

To investigate the theft of medicines from ambulances belonging to a regional fire department serving more than half a million people, the defendants here used the Database to obtain, without a warrant or any individualized suspicion, the prescription drug records of all 480 employees of the fire department, including plaintiffs Ryan Pyle and Marlon Jones. As a result of the search, defendants learned private facts about Pyle's and Jones's prescription history and used these facts to suspend them from their jobs and embark on misguided and ultimately unsuccessful prosecutions. So obvious to the people of Utah was the abusive character of these searches that the legislature promptly amended state law to require that law enforcement officers obtain a warrant before searching individuals' prescription drug records in the Database.

In these consolidated appeals, this Court must decide whether the Fourth Amendment permits law enforcement agencies to search at will, without patient consent or judicial oversight, extremely personal and sensitive information that the

state has collected about its citizens under legal compulsion. Consistent with constitutional doctrine, the long tradition of medical privacy, and the consensus of binding and persuasive authority, this Court should answer with a resounding no.

STATEMENT OF JURISDICTION

This Court has jurisdiction over these consolidated appeals from the final judgments of the district court. 28 U.S.C. § 1291. The district court had jurisdiction over both cases because they raised federal questions regarding the violation of plaintiffs' federal constitutional and statutory rights. 28 U.S.C. § 1331. In No. 15-4163, the district court's judgment, entered October 2, 2015, disposed of all claims in the case, and this appeal was timely noticed on October 29, 2015, within thirty days after entry of judgment. A150; Fed. R. App. P. 4(a)(1)(A). In No. 15-4187, the district court's judgment, entered November 16, 2015, disposed of all claims in the case, and this appeal was timely noticed on December 11, 2015, within thirty days after entry of judgment. A279; Fed. R. App. P. 4(a)(1)(A).

ISSUES PRESENTED

1. Can plaintiffs hold defendants liable under the Fourth Amendment for examining (or causing to be examined) plaintiffs' personal medical prescription records without a warrant, probable cause, or individualized suspicion? (Raised below by defendants' motions to dismiss: A208-20; A51-61. Ruled on below: A272-76; A146-48.)

   This issue incorporates the following subissues:

   a. Was this conduct a violation of plaintiffs' Fourth Amendment rights?

b. Did the district court err in dismissing defendant Cottonwood Heights on grounds not raised by any party and to which plaintiffs had no opportunity to respond?
c. Is defendant Woods entitled to qualified immunity?

2. Did defendants violate the Fair Credit Reporting Act by procuring plaintiffs' prescription drug records for employment purposes without notice to or authorization from plaintiffs? (Raised below by defendants' motions to dismiss: A220-23; A62-64. Ruled on below: A276-78; A148-49.)

STATEMENT OF THE CASE

On these appeals from dismissals for failure to state a claim, the following account reflects the facts as alleged in the complaints and viewed in the light most favorable to plaintiffs. *Barnes v. Harris*, 783 F.3d 1185, 1191-92 (10th Cir. 2015).

A. The Database

In 1995, Utah created the Controlled Substance Database to collect and retain information regarding "every prescription for a controlled substance dispensed in the state to any individual other than an inpatient in a licensed health care facility." Utah Code § 58-37f-201(5). The Database is electronic and maintained by the Utah Division of Occupational and Professional Licensing ("DOPL"). A270.

For each controlled substance a Utah pharmacist dispenses (other than those dispensed to an inpatient at a health care facility), he or she must, within one business day, report to the Database (among other information) the name, quantity,

and dosage of the drug prescribed, the name of the patient, and the date filled. Utah Code § 58-37f-203(1) & (3).

Utah created the Database to enable many uses. Among these were assisting medical professionals (both doctors and pharmacists) in prescribing and dispensing medications, *see id.* § 58-37f-301(2)(f)-(j), enabling the Department of Health to study the use and abuse of controlled substances, *see id.* § 58-37f-301(2)(c)-(d), and conducting investigations related to controlled substance laws, *see id.* § 58-37f-301(2)(a). At the time of the searches at issue, Utah law allowed disclosure of Database records to law enforcement officers without a warrant or judicial review of any kind. *See id.* § 58-37f-301(2)(k) (as of 2013).

In 2015, in response to the events at issue, the Utah legislature amended the law to require that law enforcement agencies and prosecutors obtain a warrant before accessing the Database. *See* 2015 Utah Laws Ch. 326 (S.B. 119), § 2 (effective May 12, 2015); Utah Code § 58-37f-301(2)(k); Utah State Legis., Senate Day 28, Part 1, timestamp 57:39-1:00:53 (Sen. Weiler, sponsor of S.B. 119, describing this case and the testimony of plaintiff Jones to the legislature) (Feb. 23, 2005);[1] *id.* at timestamp 1:14:20-33 (Sen. Madsen, speaking in support of S.B. 119

[1] The Senate floor debate is available at http://utahlegislature.granicus.com/MediaPlayer.php?clip_id=18532&meta_id=542332. All floor debates are available in video only.

and referring to "compelling" testimony regarding the facts of these cases); Utah State Legis., House Day 44, Part 3, timestamp 2:12:00-14:42 (Mar. 11, 2015) (House sponsor Rep. Daw arguing in support of S.B. 119 and describing these cases and one other as "egregious cases of abuse");[2] Dennis Romboy, *Unwarranted drug database search prompts new Utah law, lawsuits*, Deseret News (Apr. 23, 2015).[3]

B. The Warrantless Searches And Their Consequences

In April 2013, the Unified Fire Authority discovered that opioids and other pain medications were missing from several of its ambulances. A269, A169; A17-18. To investigate the crime, the Chief of Police for Cottonwood Heights, Robbie Russo, obtained from Cottonwood Heights Mayor (and board member of the Unified Fire Authority) Kelvyn Cullimore a list of all 480 Unified Fire Authority employees. A269-70; A18; A169. Chief Russo provided that list of names to Detective James Woods to investigate. A169; A18.

To "develop suspect leads of those who have the appearance of Opioid dependencies," Woods searched all 480 employees' prescription drug records in the Database and settled on four suspects, two of whom were Fire Fighter Ryan

[2] *Available at*: http://utahlegislature.granicus.com/MediaPlayer.php?clip_id=18893&meta_id=552210.
[3] *Available at*: http://www.deseretnews.com/article/865627152/Unwarranted-drug-database-search-prompts-new-Utah-law-lawsuits.html?pg=all.

Pyle and Assistant Fire Chief Marlon Jones. A270; A170; A18-A19. Woods did not obtain a warrant for the searches; in fact, at the time of the searches, he did not have any individualized suspicion regarding either Pyle or Jones. A172; A20. Neither Pyle nor Jones was notified of or consented to the search of his prescription records. A172; A20.

Using information from the database, Woods — at the direction of Chief Russo — contacted Pyle's doctors and pharmacists and discussed their courses of treatment, including prescriptions and the conditions that had prompted those prescriptions to be written, A20; he did the same for Jones, A170. One of Jones's health care providers felt "intimidated" by Detective Woods to provide more information than was appropriate. A171. In Pyle's case, the Database records themselves enabled Woods to determine what treatment Pyle was receiving. A19. Woods's investigation of Pyle's and Jones's medical history was not limited to the types of drugs (opioids/pain medication) missing from the Fire Department's ambulances. A171; A19.

Woods shared Pyle's and Jones's private medical records from the Database, and/or the medications each man was taking, with Chief Russo and Mayor Cullimore. A171; A19-20. Cullimore, in turn, discussed Pyle's and Jones's medical records with the governing board of the Unified Fire Authority in connection with plaintiffs' employment status. A171-72; A19-20. Woods referred

Pyle and Jones to state and local prosecutors' offices for prosecution, again (at least as to Pyle) at the direction of Russo and Cullimore. A145; A21; A172. In Pyle's case, the local district attorney refused to prosecute, and so Woods, at the direction of Russo and Cullimore, sought and obtained a prosecution by the state attorney general's office. A20-21.

In May 2013, Jones was charged with doctor-shopping for prescription drugs (but not with the theft that prompted the broad search of the Database). A271; *see* A172 (noting that charges were filed under Utah Code § 58-37-8(3)(a), which prohibits obtaining a controlled substance under false pretenses, not theft). Jones was arrested at his home in front of family and friends. A173.

In November 2013, Pyle was charged under the same statute. A21.[4]

The Unified Fire Authority placed Pyle and Jones on administrative leave. A173; A21. In October 2014, almost a year after Pyle was charged and seventeen months after Jones was charged, the cases against Pyle and Jones were finally dismissed, with prejudice. A177; A21.

[4] Although it is not in the record, Jones was taking pain medication for an on-the-job back injury, double knee replacements, and gout. Each of these medications was legally prescribed by a different specialist. Jones's primary care physician referred him to each of the specialists, and all of Jones's conditions were documented in each doctor's reports. Pyle was taking pain medication for a motorcycle injury and a bone infection following a dental procedure. These medications were legally prescribed and each of Pyle's treating physicians knew about his procedures and corresponding treatments.

C. The Proceedings Below

In February 2015, Pyle sued Woods, Cullimore, and Cottonwood Heights in Utah state court for violations of the federal and Utah constitutions and the federal Fair Credit Reporting Act (FCRA). A7-8. Defendants removed the case to federal court. A3. In April 2015, Jones sued the same defendants in federal court for the same violations of law. A159-60.

In both cases, defendants filed motions to dismiss, arguing that: (1) plaintiffs' rights were not violated; (2) the individual defendants were entitled to qualified immunity; (3) the FCRA did not prohibit a search of the Database; (4) the request for injunctive relief had become moot in light of the 2015 amendment to the Database statute; and (5) after dismissing the federal claims, the court should decline to exercise supplemental jurisdiction over the state-law claims. A41-42; A198-99. In addition, Cullimore argued in the *Jones* case that the claims against him should be dismissed because the complaint did not allege that he personally searched the Database. A199. In opposing the motions to dismiss, both plaintiffs pursued only their Fourth Amendment and FCRA claims. A143; A271.

In October 2015, the district court granted the motion to dismiss Pyle's case. The court first dismissed Pyle's Fourth Amendment claim for injunctive and declaratory relief to the extent that it challenged the statute governing the Database rather than defendants' conduct, because Pyle had failed to satisfy the requirement

that the state attorney general be notified of a claim alleging that a state statute was unconstitutional. A145-46; *see* Fed. R. Civ. Pro. 5.1(a). No party had argued for dismissal on that ground. Next, the court dismissed the Fourth Amendment damages claims against the individual defendants based on qualified immunity. A146-48. The court's immunity analysis did not reach the constitutionality of defendants' conduct; the court held only that the unconstitutionality of that conduct had not been clearly established. A146-48. The court dismissed the FCRA claim because it found, without analysis, that defendants' conduct fell within the statutory exception to the definition of "consumer report" for "investigations" into "suspected misconduct relating to employment" or "investigations" of "compliance with Federal, State, or local laws or regulations." A149 (citing 15 U.S.C. § 1681a(y)).

The court's opinion made no mention of the claim against Cottonwood Heights based on the Database search. The only basis on which Cottonwood Heights sought dismissal of that claim was that the conduct at issue did not violate the Fourth Amendment, *see* A41-42; A50-61; A66, but the district court never reached that issue. Nonetheless, the court's order stated that the case had been dismissed in its entirety and closed the case. A5 (dkt. entry 22).

In November 2015, the district court granted the motion to dismiss Jones's case. As in Pyle's case, the court in *Jones* granted qualified immunity to Woods

without reaching the merits of the Fourth Amendment question because, the court held, the right Woods was alleged to have violated was not clearly established. A273-76. The court concluded that Cullimore had not violated Jones's Fourth Amendment rights at all because Cullimore did no more than provide the list of 480 firefighters. A274. Although Cottonwood Heights argued only that its actions did not violate the Fourth Amendment, *not* that it was entitled to escape liability for the damages claim under 42 U.S.C. § 1983 on any other ground, *see* A198-99; A206-220; A225, the district court dismissed the claim against Cottonwood Heights on the ground that Jones "d[id] not cite any municipal policy or show a link between a policy or custom and the alleged injury." A272. The court did not elaborate on this conclusion or explain why the allegation of a municipal policy in Jones's complaint, A163, was inadequate, nor did it did not reach the merits of the Fourth Amendment question. Finally, the district court dismissed Jones's FCRA claim based on the same exception applied in *Pyle*. A277.

SUMMARY OF ARGUMENT

A search subject to Fourth Amendment requirements occurs when the government invades a person's reasonable expectation of privacy. That reasonable expectation, in turn, is judged by societal understanding. This Court has squarely held that patients have a reasonable expectation of privacy in their prescription records. These records can reveal an array of intimate information about a person,

such as whether he has AIDS, cancer, or any of a range of other illnesses; suffers from depression, anxiety, or other psychiatric conditions; or is taking hormones for a gender transition. Our national tradition of privacy for medical records traces back to the Founding and further to the Hippocratic Oath, and is reflected today in medical codes of ethics for doctors, pharmacists, and pharmacy technicians. State and federal law, too, contribute to patients' reasonable expectation of privacy by requiring that medical records be maintained in confidence. The legislative response to the events of this case also reflects societal understandings concerning prescription records: Shocked that a person's prescription records could be the subject of a warrantless fishing expedition, the Utah legislature acted less than six months after the dismissal of the criminal charges against Pyle and Jones to require a warrant for law enforcement searches of the Database.

Defendants below relied on the third-party doctrine, which vitiates the expectation of privacy in certain information voluntarily disclosed to third parties, but this rule is inapplicable here. First, the disclosure of prescriptions to a pharmacist is not meaningfully voluntary; the alternative would be to forego medical care entirely. Second, unlike the types of information to which the Supreme Court has applied the third party doctrine, prescription records are intensely private, such that individuals' reasonable expectation of privacy survive the disclosure to a pharmacist for the purpose of medical care. Finally, the fact that

the government has possession of the information is not dispositive. Law enforcement could not, for instance, rummage through the files of a public defender without a warrant just because he is a government attorney.

Because Pyle's and Jones's prescription records were protected by the Fourth Amendment, a warrant was presumptively required to search them. The search of Pyle's and Jones's prescription records without a warrant (or an exception to the warrant requirement) and without even individualized suspicion of wrongdoing violated the Fourth Amendment.

The district court's dismissal of Cottonwood Heights from both cases must be reversed, because it rested on grounds that no party argued and of which plaintiffs received no notice: in *Jones*, the failure to allege municipal liability; and in *Pyle*, no grounds at all. This Court will uphold such a dismissal only if it is "patently obvious" plaintiffs cannot prevail and amendment is futile. Here, neither criterion is satisfied. Plaintiffs can state a claim against Cottonwood Heights either based on their allegation of municipal policy or based on the actions of the municipal policymaker, Chief Russo, in directing and/or ratifying the violation of their rights. To the extent the allegations need any supplementation, plaintiffs must be given the opportunity to amend that the district court denied them by dismissing Cottonwood Heights on grounds that no party had raised.

As to Woods, the district court erred in granting qualified immunity. This Court held in 2005 that patients have an expectation of privacy in their prescription records, so a reasonable officer in 2013 would have known he needed a warrant to search individual patients' records. The district court relied on this Court's decisions in *Douglas v. Dobbs* and *Kerns v. Bader* to hold that the right was not clearly established. Those cases, however, involved facts quite different from the straightforward warrantless search performed here: *Douglas* was about the actions of a district attorney in submitting a warrant application, and *Kerns* was about records that a hospital voluntarily released to law enforcement.

Defendants also violated the FCRA by procuring Pyle's and Jones's prescription records for employment purposes without notice to or consent from plaintiffs. Prescription records satisfy the FCRA's broad definition of a "consumer report" because they bear on individuals' "personal characteristics" and "mode of living." The district court erred in rejecting the FCRA claims on the basis of the exception for "investigations." The statutory scheme shows that "investigation" must mean a targeted inquiry based on individualized suspicion, not merely any search no matter how generalized. Under the district court's broad reading of "investigation," that exception would swallow the FCRA's general rule.

STANDARD OF REVIEW

Dismissals for failure to state a claim are reviewed de novo, viewing the facts in the light most favorable to plaintiffs. *Barnes v. Harris*, 783 F.3d 1185, 1191-92 (10th Cir. 2015).

ARGUMENT

I. ACCESSING PLAINTIFFS' PRIVATE MEDICAL INFORMATION WITHOUT A WARRANT VIOLATED THEIR FOURTH AMENDMENT RIGHTS.

The qualified immunity inquiry has two parts — (1) did the defendant violate the Constitution? and (2) was the right he violated "clearly established" at the time of the challenged conduct? — which the Court may address in either order. *Pearson v. Callahan*, 555 U.S. 223, 232, 236 (2009). Plaintiffs will address the two parts in order.[5]

[5] Addressing the merits of the constitutional question first makes sense here for three reasons. First, articulating the contours of the right will be helpful to the Court's determination whether the right has been clearly established. *Id.* at 236. Second, given that databases such as the one at issue here are widespread, *see* A228-30, patients, medical professionals, and law enforcement would benefit from this Court's substantive guidance on the constitutional issue. *See Pearson*, 555 U.S. at 232 (explaining value of addressing constitutional question first "to support the Constitution's elaboration from case to case and to prevent constitutional stagnation" (citation and internal quotation marks omitted)). Finally, because the claim against Cottonwood Heights is not subject to the qualified immunity defense, *Owen v. City of Independence*, 445 U.S. 622, 657 (1980), the constitutional question cannot be avoided here by addressing the second inquiry first.

A. Plaintiffs Have A Reasonable Expectation Of Privacy In Their Medical Records.

At the heart of the Fourth Amendment, Justice Brandeis taught, is "the right to be let alone — the most comprehensive of rights and the right most valued by civilized men." *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting). The reach of that protection — that is, the threshold question whether police are engaging in a "search" governed by the Fourth Amendment — depends on whether a person has a reasonable expectation of privacy in the object of the search. *E.g., California v. Ciraolo*, 476 U.S. 207, 211 (1986); *see generally Katz v. United States*, 389 U.S. 347 (1967). A reasonable expectation of privacy is "one that has a source outside of the Fourth Amendment," such as by reference to "understandings that are recognized and permitted by society." *Minnesota v. Carter*, 525 U.S. 83, 88 (1998) (citation and internal quotation marks omitted). The Court has also considered such factors as laws, *see id.*, and history including the intent of the Framers, *Oliver v. United States*, 466 U.S. 170, 178 (1984). Here, precedent, history, and law all reflect the same societal understanding: Individuals have a reasonable expectation of privacy in their prescription drug records.

The Supreme Court has characterized information about a person's health, including medical conditions generally and specifically prescription drug information, as falling within the sphere of personal information that individuals expect to be private. For instance, in striking down a hospital's practice of

performing drug screens on urine samples of certain maternity patients, the Court explained, "The 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). Of particular relevance here, the Court, in upholding a state's practice of collecting individuals' prescription drug records into a database, made clear that privacy protections should apply because of the sensitive nature of the information: "The right to collect and use such data for public purposes is typically accompanied by a concomitant statutory or regulatory duty to avoid unwarranted disclosures." *Whalen v. Roe*, 429 U.S. 589, 605 (1977). The Court upheld the prescription drug database at issue there because the statutory scheme "evidence[d] a proper concern with, and protection of, the individual's interest in privacy," *id.*, by requiring judicial approval of non-regulatory law enforcement queries, *see id.* at 594 n.12.

Following *Whalen*, this Court has squarely held that "persons have a right to privacy in their prescription drug records" for both Fourth and Fourteenth Amendment purposes. *Douglas v. Dobbs*, 419 F.3d 1097, 1099 (10th Cir. 2005). And the Court has repeatedly recognized the privacy right in medical records. *Kerns v. Bader*, 663 F.3d 1173, 1184 (10th Cir. 2011) ("[A] patient has a privacy interest in medical records held by a third party medical services provider.");

Herring v. Keenan, 218 F.3d 1171, 1175 (10th Cir. 2000) ("This circuit, however, has repeatedly interpreted the Supreme Court's decision in *Whalen v. Roe* . . . as creating a right to privacy in the non-disclosure of personal information."); *F.E.R. v. Valdez*, 58 F.3d 1530, 1535 (10th Cir. 1995) ("There is a constitutional right to privacy in preventing disclosure by the government of personal matters."); *Lankford v. City of Hobart*, 27 F.3d 477, 479 (10th Cir. 1994) ("[T]here is no question that an employee's medical records, which may contain intimate facts of a personal nature, are well within the ambit of materials entitled to privacy protection." (citation and internal quotation marks omitted)); *A.L.A. v. West Valley City*, 26 F.3d 989, 990 (10th Cir. 1994) ("There is no dispute that confidential medical information is entitled to constitutional privacy protection.").

This Court's jurisprudence on the privacy of medical records coincides with the consensus view among the federal courts of appeals. *See United States v. Kravetz*, 706 F.3d 47, 63 (1st Cir. 2013) ("Medical information is . . . universally presumed to be private, not public." (citation and internal quotation marks omitted)); *Tucson Woman's Clinic v. Eden*, 379 F.3d 531, 551 (9th Cir. 2004) ("Individuals have a constitutionally protected interest in avoiding disclosure of personal matters, including medical information." (citation and internal quotation marks omitted)); *Doe v. Broderick*, 225 F.3d 440, 450 (4th Cir. 2000) (recognizing "a patient's expectation of privacy . . . in his treatment records and files maintained

by a substance abuse treatment center"); *Doe v. Se. Pa. Transp. Auth.*, 72 F.3d 1133, 1138 (3rd Cir. 1995) ("An individual using prescription drugs has a right to expect that such information will customarily remain private."); *Doe v. City of New York*, 15 F.3d 264, 267 (2d Cir. 1994) ("[I]nformation about one's body and state of health is matter which the individual is ordinarily entitled to retain within the private enclave where he may lead a private life." (citation and internal quotation marks omitted)).[6]

The personal and private nature of prescription drug records is hard to overstate. Looking at an individual's prescription records can reveal whether that person has any number of medical conditions, including conditions that many people would consider too personal to share with employers, law enforcement agencies, or the general public. As this Court has noted, "Information contained in prescription records not only may reveal other facts about what illnesses a person has, but may reveal information relating to procreation — whether a woman is taking fertility medication for example — as well as information relating to

[6] The Sixth Circuit has taken a narrower view of informational privacy, but its holdings are limited to the context of a substantive due process right to informational privacy; it has not rejected a "reasonable expectation of privacy" in the context of the Fourth Amendment. *See Lambert v. Hartman*, 517 F.3d 433, 442 (6th Cir. 2008) (summarizing the Sixth Circuit's jurisprudence and distinguishing the substantive due process analysis its cases have employed from the reasonable-expectation-of-privacy standard).

contraception." *Douglas*, 419 F.3d at 1102. Prescription records might also reveal a person's drug addiction, *see Doe v. Broderick*, 225 F.3d at 444-45, 451 (finding Fourth Amendment violation where officer investigated theft by searching records of a nearby methadone clinic), or gender identity disorder, *Ore. Prescription Drug Monitoring Prog. v. U.S. Drug Enforcement Admin.*, 998 F. Supp. 2d 957, 966 (D. Or. 2014) (giving examples where prescription records would reveal that individuals "have used testosterone in particular quantities and by extension, that they have gender identity disorder and are treating it through hormone therapy"). Other examples might include whether a person is taking anti-depressants or anti-anxiety medications, anti-seizure medications, or drugs to combat the symptoms associated with AIDS or cancer. So personal is the information that can be gleaned from prescription records that the Supreme Court has expressed concern that failure to respect patients' privacy interest with respect to medical care could deter patients from seeking medical care entirely. *See Ferguson*, 532 U.S. at 78 n.14; *Whalen*, 429 U.S. at 600.

In addition to being highly personal in themselves, many conditions, statuses, or choices revealed through prescription drug information might be the basis for opprobrium or discrimination. *See, e.g.*, *Jaffee v. Redmond*, 518 U.S. 1, 10 (1996) (establishing federal psychotherapist-patient privilege and explaining that "[b]ecause of the sensitive nature of the problems for which individuals

consult psychotherapists, disclosure of confidential communications made during counseling sessions may cause embarrassment or disgrace"); *Sorn v. Barnhart*, 178 F. App'x 680, 681 (9th Cir. 2006) (unpublished) (noting "the lingering social stigma of admitting to mental illness"); *Smith v. City of Salem*, 378 F.3d 566, 568 (6th Cir. 2004) (case of discrimination against a firefighter with gender identity disorder); *Doe v. City of New York*, 15 F.3d at 267 (noting "the unfortunately unfeeling attitude among many in this society toward those coping with" AIDS).

That prescription records reveal some information (the drugs and dosages a person takes) directly and other information (such as a patient's underlying medical conditions) by inference does not diminish the privacy expectation at stake. A search can implicate the Fourth Amendment regardless of whether it reveals information directly or through inference. *See Kyllo v. United States*, 533 U.S. 27, 36 (2001) (rejecting "the novel proposition that inference insulates a search").

In light of the piercing depth of the invasions of privacy inherent in a review of a patient's prescription records, this Court had "no difficulty" finding a right to privacy in prescription drug records because they "contain intimate facts of a personal nature." *Douglas*, 419 F.3d at 1102; *accord Doe v. City of New York*, 15 F.3d at 267 ("Extension of the right to confidentiality to personal medical information recognizes there are few matters that are quite so personal as the status

of one's health, and few matters the dissemination of which one would prefer to maintain greater control over."); *see generally Kravetz*, 706 F.3d at 63 ("Medical records . . . frequently include the details of a person's family history, genetic testing, history of diseases and treatments, history of drug use, sexual orientation and practices, and testing for sexually transmitted diseases." (citation and internal quotation marks omitted)); *cf. Riley v. California*, 134 S. Ct. 2473, 2490 (2014) (explaining an individual's privacy interest in his cell phone by pointing out that internet browsing history from a phone "could reveal an individual's private interests or concerns — perhaps a search for certain symptoms of disease, coupled with frequent visits to WebMD").

Like the case law, our medical tradition reflects a long history of protecting the privacy of patient medical information. "The Hippocratic Oath has contained provisions requiring physicians to maintain patient confidentiality since the Fourth Century B.C.E." *Ore. Prescription Drug Monitoring Prog.*, 998 F. Supp. 2d at 964. Additionally, "a number of signers of the Declaration of Independence and delegates to the Constitutional Convention were physicians trained at the University of Edinburgh, which required its graduates to sign an oath swearing to preserve patient confidentiality." *Id.* In part on the basis of this history, a district court in Oregon held that an administrative subpoena by law enforcement

demanding that a state produce patient prescription drug information that it had collected in a database violated the Fourth Amendment. *Id.* at 967.

The long tradition of medical privacy has continued to the present day. For instance, the requirement of confidentiality appeared in the earliest Code of Medical Ethics of the American Medical Association (AMA). *See* Code of Ethics of the AMA, ch. 1, art. I, § 2 (adopted May 1847; published 1848) ("The obligation of secrecy extends beyond the period of professional services; — none of the privacies of personal and domestic life, no infirmity of disposition or flaw of character observed during professional attendance, should ever be divulged by him except when he is imperatively required to do so.").[7] The requirement is still present in the AMA's current Code, which states, as a "[f]undamental [e]lement[] of the [p]atient-[p]hysician [r]elationship," that: "The patient has the right to confidentiality. The physician should not reveal confidential communications or information without the consent of the patient, unless provided for by law or by the need to protect the welfare of the individual or the public interest." AMA, Opinion 10.01 — Fundamental Elements of the Patient-Physician Relationship.[8]

[7] *Available at*: https://archive.org/stream/63310410R.nlm.nih.gov/63310410R#page/n5/mode/2up.

[8] *Available at*: http://www.ama-assn.org/ama/pub/physician-resources/medical-ethics/code-medical-ethics/opinion1001.page.

Likewise, the AMA policy on patient privacy "affirms . . . [t]hat there exists a basic right of patients to privacy of their medical information and records," and cautions that "[l]aw enforcement agencies requesting private medical information should be given access to such information only through a court order." AMA, Policy, Patient Privacy and Confidentiality, H-315.983(1) & (9). More specifically, regarding prescription databases like the one at issue here, the AMA "advocate[s] for strong confidentiality safeguards and protections of state databases by limiting database access by non-health care individuals to only those instances in which probable cause exists that an unlawful act or breach of the standard of care may have occurred." AMA, Policy, Prescription Drug Monitoring Program Confidentiality, H-95.946.[9]

The American Pharmacists Association and the American Association of Pharmacy Technicians have also adopted ethical codes that affirm patient confidentiality. *See* Am. Ass'n of Pharmacists, Code of Ethics for Pharmacists, item II ("[A] pharmacist focuses on serving the patient in a private and confidential manner.");[10] Am. Ass'n of Pharmacy Techs., Code of Ethics for Pharmacy

[9] The AMA policies cited in this paragraph are available on the AMA's website, which is searchable by policy number at http://www.ama-assn.org/ama/pub/about-ama/our-people/house-delegates/policyfinder.page.

[10] *Available at*: https://www.ashp.org/DocLibrary/BestPractices/EthicsEndCode.aspx.

Technicians, item 5 ("A pharmacy technician respects and supports the patient's individuality, dignity and confidentiality.").[11]

Like these medical institutions, federal and state statutes and regulations also reflect the societal understanding that a person's prescription information is private. Federal regulations implementing the Health Insurance Portability and Accountability Act (HIPAA) define "individually identifiable health information" as "protected health information," 45 C.F.R. § 160.103, which generally may not be disclosed outside of health-care contexts, *id.* § 164.502(a).[12] The Utah Pharmacy Practice Act provides that disclosing confidential patient information in violation of HIPAA is also "unprofessional conduct" for which a pharmacist can be sanctioned. *See* Utah Code § 58-17b-502(10) & -504(5). In the wake of the enactment of these laws, pharmacy customers have become familiar with pharmacy rules that they may not stand in line at pharmacy counters immediately

[11] *Available at*: http://www.pharmacytechnician.com/?page=CodeofEthics.

[12] Although the regulations contain a law-enforcement exception, it is conditioned on meeting specific requirements not present here: the disclosure is about a victim of abuse, neglect, or domestic violence; a court order or other process has issued; reporting is required by a law requiring reporting of physical injuries; the information is provided for the purpose of locating and identifying a suspect, fugitive, material witness, or missing person; or the information involves a crime victim, a decedent, a crime on the premises of the disclosing entity, or an emergency. *Id.* § 164.512(a), (c), (e), (f).

behind a customer being served lest they inadvertently learn what prescriptions the pharmacist is dispensing.

The law that the State of Utah enacted in response to the events in this very case provides additional evidence of the societal expectation that prescription drug records are private. At the time the police searched Pyle's and Jones's prescription records, the state law governing the Database did not specify that a warrant was required to do so. Such was the popular outrage over the searches here that the legislature amended the Database law in 2015 to impose a warrant requirement. Sen. Weiler, the sponsor of the amendment (S.B. 119), explained its rationale:

> This bill will interrupt what has become a standard practice in many police organizations throughout our state. It has become the status quo that when a person becomes under their radar, that they run to the prescription controlled substance database and they look and see what drugs people are taking. I hope that my Senate colleagues shudder at that thought. . . . We have had this database abused.

Utah State Legis., Senate Day 28, Part 1, timestamp 55:25-55:55, 56:52-56 (Feb. 23, 2015).[13]

As one of two examples of such abuse, Sen. Weiler discussed what Cottonwood Heights and its officials did to Pyle and Jones. He recounted that the police "rifled through the private prescription records of almost five hundred

[13] *Available at*: http://utahlegislature.granicus.com/MediaPlayer.php?clip_id=18532&meta_id=542332.

firefighters. Five hundred. Almost five hundred fighters. Looking at their personal prescriptions as part of that investigation. Was it overly broad? Yes. Was it a fishing expedition? Absolutely." *Id.* at timestamp 58:11-58:34; *see also id.* at timestamp 58:55-1:00:38 (describing the investigation, suspension, and arrest of plaintiff Jones as well as his testimony to the legislature). The problem with such searches, Sen. Weiler explained, was that prescriptions are "highly private or sensitive information" that "can reveal details about [people's] medical ailments, their doctor's treatment advice, and more." *Id.* at timestamp 1:03:06-22; *accord* Utah State Legis., House Day 44, Part 3, timestamp 2:18:05-:15 (Mar. 11, 2015) (House sponsor Rep. Daw, arguing in support of S.B. 119: "I believe that if you consider what the data is in the Controlled Substance Database, if that's not your private data, I don't know what is.").[14]

The reaction of the Utah legislature mirrors a measurable trend in societal views on the question of reasonable expectation and medical records: As many national surveys have demonstrated, the public at large strongly believes that medical records should be private.[15]

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[14] *Available at*: http://utahlegislature.granicus.com/MediaPlayer.php?clip_id=18893&meta_id=552210.

[15] *See* 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.

(footnote continues on the next page)

In light of the deeply personal nature of individuals' prescription drug records, the traditions of the medical community, our legal tradition, the Supreme Court's guidance, and on-point Circuit precedent, this Court should hold that individuals have a reasonable expectation of privacy in their prescription records and, accordingly, that querying the Utah prescription drug database constitutes a search.

B. The Third-Party Doctrine Does Not Exempt Prescription Database Queries From Fourth Amendment Protection.

The Supreme Court has held that the voluntary disclosure of certain narrow categories of non-private information to third parties undercuts the discloser's reasonable expectation of privacy in that information. *See Smith v. Maryland*, 442 U.S. 735, 744-46 (1979) (numbers dialed on a telephone were voluntarily exposed

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pdf (finding that "97.2 percent of patients believe care providers have a legal and ethical responsibility to protect patients' medical records and privacy information"); Patient Privacy Rights & Zogby International, 2000 Adults' Views on Privacy, Access to Health Information, and Health Information Technology 4 (2010), http://patientprivacyrights.org/wp-content/uploads/2010/11/Zogby-Result-Illustrations.pdf (finding that 93% of patients want to decide which government agencies can access their electronic health records); Institute for Health Freedom & Gallup Organization, Public Attitudes Toward Medical Privacy 9-10 (Sept. 26, 2000), http://www.forhealthfreedom.org/Gallupsurvey/IHF-Gallup.pdf (finding that 88% oppose letting police see their medical records without permission); *see generally* Pew Research Center, Public Perceptions of Privacy and Security in the Post-Snowden Era 32 (Nov. 12, 2014), http://www.pewinternet.org/files/2014/11/PI_PublicPerceptionsofPrivacy_111214.pdf (finding that 81% of respondents considered "the state of their health and the medicines they take" to be "sensitive" information).

to the telephone company); *United States v. Miller*, 425 U.S. 435, 442-43 (1976) (bank checks and deposit slips were voluntarily conveyed to bank in the course of business). This principle, known as the "third-party doctrine," does not apply to this Database for two reasons: the disclosure is not "voluntary," and the records are more personal than bank records or numbers dialed on a phone. The fact that the government possesses the records does not vitiate the expectation of privacy, either; several important categories of records held by government actors remain private despite the government's possession of them.

First, the voluntariness of the disclosures is an important condition on the application of the third-party doctrine, as the seminal Supreme Court cases reflect. *See Smith*, 442 U.S. at 744 ("[P]etitioner voluntarily conveyed numerical information to the telephone company[.]"); *Miller*, 425 U.S. at 442 ("All of the documents obtained, including financial statements and deposit slips, contain only information voluntarily conveyed to the banks and exposed to their employees in the ordinary course of business."). People can choose not to make a particular phone call or do business with a bank, but they have no meaningful choice not to do business with a pharmacy. As the Supreme Court has recognized, "disclosures of private medical information to doctors, to hospital personnel, to insurance companies, and to public health agencies are often an essential part of modern medical practice." *Whalen*, 429 U.S. at 602. The same is true of pharmacists;

patients cannot legally acquire controlled substances without disclosing their prescription information to pharmacists. *See* Utah Code § 58-37-8(2)(a)(i). A Utah pharmacist's disclosure to the Utah Controlled Substance Database is, in turn, equally involuntary, because it is required by state law. *See id.* § 58-37f-203(1).

Because patients' disclosures of medical information to medical providers, including pharmacists, are not voluntary, the third-party doctrine does not apply. *See Ore. Prescription Drug Monitoring Prog.*, 998 F. Supp. 2d at 967 ("The only way to avoid submission of prescription information to the PDMP is to forgo medical treatment or to leave the state. This is not a meaningful choice."); *see also Thurman v. State*, 861 S.W.2d 96, 98 (Tex. Ct. App. 1993) ("A decision to use a bank may be voluntary. A decision to use a hospital for emergency care is not. We conclude that appellant did not surrender standing to assert his privacy rights when he entered the emergency room.").

The second criterion of the third-party doctrine not satisfied here is the absence of a significant privacy interest in the information conveyed. The privacy interest was an important part of the analysis in both *Smith* and *Miller*. *See Smith*, 442 U.S. at 742 ("[W]e doubt that people in general entertain any actual expectation of privacy in the numbers they dial."); *Miller*, 425 U.S. at 442 ("The checks are not confidential communications but negotiable instruments to be used in commercial transactions."). When the information conveyed to or transmitted

through a third party is of a private, personal nature, courts do not apply the third-party doctrine. *See, e.g.*, *United States v. Warshak*, 631 F.3d 266, 284, 288 (6th Cir. 2010) (distinguishing *Miller* and recognizing that the Fourth Amendment protects contents of emails sent via internet service providers, through which "government agents gain the ability to peer deeply into [a person's] activities"); *DeMassa v. Nunez*, 770 F.2d 1505, 1506-07 (9th Cir. 1985) ("We hold that clients of an attorney maintain a legitimate expectation of privacy in their client files," in part because "neither ownership nor possession is a necessary or sufficient determinant of the legitimacy of one's expectation of privacy."); *cf. United States v. Golden Valley Elec. Ass'n*, 689 F.3d 1108, 1116 (9th Cir. 2012) (applying third-party doctrine to a utility's records on its customers' power consumption because those records "are no more inherently personal or private than the bank records in *Miller*" and were not subject to any agreement on the part of the utility to keep the records confidential). And *Miller* itself reserved judgment as to whether records held by a third party but covered by "evidentiary privileges, such as that protecting communications between an attorney and his client," would receive greater Fourth Amendment protection than bank records. 425 U.S. at 443 n.4. In sum, "the mere *ability* of a third-party intermediary to access the contents of a communication cannot be sufficient to extinguish a reasonable expectation of privacy." *Warshak*, 631 F.3d at 286.

Like the contents of emails and attorney-client material, prescription drug records are far more personal than bank records or numbers dialed on a telephone. *See Doe v. Broderick*, 225 F.3d at 450-51 (distinguishing the bank records in *Miller* from patient records at a methadone clinic because "medical treatment records contain intimate and private details that people do not wish to have disclosed, expect will remain private, and, as a result, believe are entitled to some measure of protection from unfettered access by government officials"). As discussed above, these records often reflect individuals' health conditions or personal choices. Like attorney-client records, prescription records are protected by legal and professional norms of confidentiality. They are a far cry from "negotiable instruments to be used in commercial transactions." *Miller*, 425 U.S. at 442.

Finally, the fact that the prescription records exist in a government database does not diminish patients' expectation of privacy. The government often provides professional services of a confidential nature, such as health services and legal services. But the Fourth Amendment prevents a law enforcement officer from walking into a public hospital and demanding a patient's medical records without a warrant simply because the state owns the hospital and pays the doctors. *See Ferguson*, 532 U.S. at 70, 76-86 (applying Fourth Amendment analysis to patient urine samples, despite the fact that they were in the custody of a public hospital and over the dissent's suggestion that the third party doctrine should apply, *see id.*

at 94-95 (Scalia, J., dissenting)). Likewise, the Fourth Amendment would not permit an officer to access the client files of a public defender, although the files are maintained by a state employee working in a state office. *See DeMassa*, 770 F.2d at 1506-07 (holding that clients maintain a legitimate expectation of privacy in their client files with their attorney).

The patient records at issue are only in the government database to begin with because the government has compelled private parties to submit them. Permitting the government to take advantage of a mandatory disclosure regime to claim a greater prerogative to access the records than it otherwise would have is tantamount to permitting abrogation of the Fourth Amendment by legislative fiat. The court should not open the door to such end-runs around the Fourth Amendment. An invasion of privacy is no less invasive if the government has accomplished it in two steps (mandatory archiving of private information, then a law enforcement search of that information) instead of one (a direct search of privately held information). Indeed, the Supreme Court's decision in *Whalen* approving the collection of medical data presupposed that such collection would not extinguish individual privacy interests and emphasized that "[t]he right to collect and use such data for public purposes is typically accompanied by a concomitant statutory or regulatory duty to avoid unwarranted disclosures." *See Whalen*, 429 U.S. at 605.

Because the disclosure of prescription information to the Database is not voluntary, and because that information is deeply personal and private, the third-party doctrine does not defeat patients' reasonable expectation of privacy in their prescription drug records.

C. Because They Are Searches, Database Queries Without A Warrant Violate The Fourth Amendment.

Where an individual has a reasonable expectation of privacy in an item to be searched, a search conducted without a judicial warrant is "'*per se* unreasonable under the Fourth Amendment.'" *Arizona v. Gant*, 556 U.S. 332, 338 (2009) (quoting *Katz*, 389 U.S. at 357); *accord United States v. Silva-Arzeta*, 602 F.3d 1208, 1213 (10th Cir. 2010).

Here, defendants had no warrant to query the prescription records of 480 individuals including Jones and Pyle. A172; A20. No exception to the warrant requirement (such as exigent circumstances or consent) applies, and defendants have never suggested to the contrary. Therefore, the warrantless searches violated the Fourth Amendment.

II. THE DISTRICT COURT ERRED IN CONCLUDING THAT DEFENDANTS COULD NOT BE HELD LIABLE FOR THE CONSTITUTIONAL VIOLATIONS.

The district court erred both in dismissing the claims against Cottonwood Heights and in granting Woods qualified immunity.[16]

A. The Dismissal Of Cottonwood Heights On A Basis Not Raised By Any Party And Of Which Plaintiffs Had No Notice Must Be Reversed.

"Under Rule 12(b)(6), a plaintiff with an arguable claim is ordinarily accorded notice of a pending motion to dismiss for failure to state a claim and an opportunity to amend the complaint before the motion is ruled upon." *Neitzke v. Williams*, 490 U.S. 319, 329 (1989) (footnote omitted). "These procedures alert him to the legal theory underlying the defendant's challenge, and enable him meaningfully to respond by opposing the motion to dismiss on legal grounds or by clarifying his factual allegations so as to conform with the requirements of a valid legal cause of action." *Id.* at 329-30.

Given these important functions of the ordinary procedures of Rule 12(b)(6), this Court applies a heightened standard in reviewing sua sponte dismissals: "[A] sua sponte dismissal under Rule 12(b)(6) is not reversible error when it is 'patently obvious' that the plaintiff could not prevail on the facts alleged, and allowing him

[16] Plaintiffs do not challenge the dismissal of their constitutional claims against defendant Cullimore.

an opportunity to amend his complaint would be futile." *McKinney v. Okla. Dep't of Human Servs.*, 925 F.2d 363, 365 (10th Cir. 1991) (citations omitted). The reasons underlying this standard — the importance of notice and an opportunity to respond or amend — apply equally where, as here, the district court dismisses a claim based on a ground that no party raised. (Indeed, such a dismissal *is* "sua sponte" in the sense that, although a motion to dismiss was made, the court acted on its own in ruling on a ground of which the plaintiff had no notice or opportunity to respond.) Accordingly, the same standard should apply. The dismissal of plaintiffs' claims against Cottonwood Heights cannot meet that rigorous standard.

In both cases, the district court dismissed the claims against Cottonwood Heights on grounds not argued by any party and to which plaintiffs had no opportunity to respond. The only basis for dismissal Cottonwood Heights raised in the district court was its argument that plaintiffs' Fourth Amendment rights were not violated. The district court did not reach that issue in either *Pyle* or *Jones*. Yet the district court in *Jones* dismissed the claim against Cottonwood Heights because the court concluded, without analysis, that Jones "d[id] not cite any municipal policy or show a link between a policy or custom and the alleged injury." A272. And the district court in *Pyle* dismissed the claim against Cottonwood Heights

without any explanation at all.[17] The dismissal of Cottonwood Heights on grounds that it never raised and of which plaintiffs had no notice can be sustained only if it is *both* "patently obvious" that plaintiffs could not prevail *and* that amendment would be futile. *McKinney*, 925 F.2d at 365. Neither condition applies here.

A municipality is liable for a violation of 42 U.S.C. § 1983 where the violation was caused by a municipal policy. *Monell v. Dep't of Social Servs.*, 436 U.S. 658, 690 (1978). For this purpose, a municipality's "policies" include not only formal written policies but also decisions made by final policymakers who are authorized by state and/or local law to act on behalf of the municipality. *Pembaur v. City of Cincinnati*, 475 U.S. 469, 480-81 (1986); *Dill v. City of Edmond*, 155 F.3d 1193, 1210-11 (10th Cir. 1998). A single decision, if made by a final policymaker, may subject the municipality to liability if the constitutional violation resulted from that decision. *Pembaur*, 475 U.S. at 480. Among the decisions that can subject a municipality to liability is ratifying subordinates' unconstitutional conduct. *David v. City & Cty. of Denver*, 101 F.3d 1344, 1358 (10th Cir. 1996).

[17] The court did explain that it dismissed Pyle's attack on the Database *statute* for failure to notify the Utah attorney general. A145-46. But that disposition did not resolve Pyle's claims against Cottonwood Heights (or any other defendant) for their own unconstitutional *actions*; illustrative of the distinction, the district court went on to grant qualified immunity to Woods and Cullimore even after it had dismissed the claims for equitable relief as to the constitutionality of the statute based on the lack of notice. A146-48.

Here, Pyle and Jones alleged that it was the policy of Cottonwood Heights to query individuals' prescription records without a warrant. A11-12; A17; A163; A168. Although Pyle and Jones have not yet had the opportunity to take discovery regarding municipal policy, their allegation is borne out by the investigation in this case, which was initiated by Robbie Russo, the Cottonwood Heights Chief of Police, and Mayor Kelvyn Cullimore. Russo, in particular, obtained the list of the 480 employees of the Unified Fire Authority, A169; A18; gave it to Woods for his investigation, A169; A18; reviewed the fruits of Woods's Database queries and/or directed further inquiry into plaintiffs' medical treatment based on their prescription records, A171; A20; and directed Woods to seek prosecution based on this information, A21. More generally, the plausibility of Pyle's and Jones's policy allegation is underscored by state Sen. Weiler's observation that prior to the passage of S.B. 119, state law enforcement officers were running between 7,000 and 11,000 Database queries per year. Utah State Legis., Senate Day 28, Part 1, timestamp 56:14-19 (Feb. 23, 2015).[18]

Chief Russo's personal involvement in the investigation of this case — from providing the list of employees to Woods to directing further investigation and prosecution based on plaintiffs' prescription records — is another basis for

[18] *Available at*: http://utahlegislature.granicus.com/MediaPlayer.php?200bclip_id=18532&meta_id=542332.

municipal liability. As the chief of police, Russo is "responsible for the administration of the department," has "command over all of the officers, members and employees of the police department," and has the duty to "make and adopt rules and procedures for the operation and administration of the police department." Cottonwood Heights Code of Ordinances 2.130.010 & 2.130.040.[19]

This Court has held that, as a matter of Utah law, a county sheriff is a final policymaker for Utah municipalities. *J.B. v. Washington Cty.*, 127 F.3d 919, 924 n.5 (10th Cir. 1997) (citing Utah Code § 17-22-2); *accord Barney v. Pulsipher*, 143 F.3d 1299, 1305 (10th Cir. 1998). Utah law further provides that a "chief of police has the same authority as the sheriff within the boundaries of the municipality." Utah Code § 10-3-913(1). Therefore, a police chief is a municipal policymaker under Utah law. *Sivulich-Boddy v. Clearfield City*, 365 F. Supp. 2d 1174, 1185-86 (D. Utah 2005); *Taysom v. Lilly*, 2000 WL 33710847, at *5 (D. Utah Dec. 6, 2000). Accordingly, the actions of Chief Russo in directing and/or ratifying the unconstitutional conduct of Detective Woods are chargeable to Cottonwood Heights for the purpose of determining its liability here. Because the plaintiffs may prove, consistent with the allegations of the complaint, that Cottonwood Heights

[19] *Available at*: http://cottonwoodheights.utah.gov/UserFiles/Servers/Server_109694/File/Government/Elected%20Officials/Ordinances/WST-%20pdf%20Cottonwood%20Heights-Code-Revised%20Title%202-(Current%20thru%20Ordinance%20237--Revised%20March%2010,%20.pdf.

had a policy under which officers queried the Database without a warrant or that Chief Russo directed and/or ratified the actions of Detective Woods in these cases, Pyle and Jones have viable claims against Cottonwood Heights. At the least, it is not "patently obvious" that the plaintiffs could not prevail. *McKinney*, 925 F.2d at 365.

To the extent that any of the allegations regarding municipal policy or Chief Russo's role in the constitutional violation require more development, amendment is permissible on remand. Indeed, the purpose of the Rule 12(b)(6) requirement that a plaintiff have notice of an asserted basis for dismissal is to safeguard a plaintiff's ability "meaningfully to respond by opposing the motion to dismiss on legal grounds or by clarifying his factual allegations so as to conform with the requirements of a valid legal cause of action." *Neitzke*, 490 U.S. at 329-30. Neither plaintiff had that chance here because both complaints were dismissed as to Cottonwood Heights either on grounds as to which the plaintiff had no notice (failure to allege municipal liability in *Jones*) or on no discernible basis at all (in *Pyle*). If plaintiffs' complaints are deficient as to the municipal liability allegations, they should have the same opportunity every other plaintiff is afforded — to investigate further and amend their complaint to allege the necessary facts in more detail.

The possibility that plaintiffs could amend to allege additional facts showing that Chief Russo ordered the search at issue is far from speculative. As state Sen. Weiler recounted at the committee hearing on S.B. 119, according to his investigation of the facts of this very case, Woods "was not one rogue officer"; rather, he was "operating with the police chief's blessing" and "the police chief . . . was directing this officer." Utah State Sen. Judiciary, Law Enforcement & Criminal Justice Committee, committee hearing of Feb. 4, 2015, timestamp 1:04:20-42.[20]

Both because it is not "patently obvious" that plaintiffs cannot prevail against Cottonwood Heights and because amendment would not be futile, the district court's dismissal of Cottonwood Heights must be reversed. *McKinney*, 925 F.2d at 365.

B. Detective Woods Is Not Protected By Qualified Immunity Because He Violated A Clearly Established Right.

The defense of qualified immunity shields officials if their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known. *Pearson*, 555 U.S. at 231. "A plaintiff may satisfy this standard by identifying an on-point Supreme Court or published Tenth Circuit

[20] *Available at* http://utahlegislature.granicus.com/MediaPlayer.php?clip_id=18193.

decision; alternatively, the clearly established weight of authority from other courts must have found the law to be as the plaintiff maintains." *Quinn v. Young*, 780 F.3d 998, 1005 (10th Cir. 2015) (citation and internal quotation marks omitted). The right must not be defined at a high level of generality, such as the proposition that "an unreasonable search or seizure violates the Fourth Amendment." *Id.*; *accord Mullenix v. Luna*, 136 S. Ct. 305, 308 (2015) (per curiam).

"However, the plaintiff need not locate a *perfectly* on-point case." *Quinn*, 780 F.3d at 1005; *accord Mullenix*, 136 S. Ct. at 308. The "clearly established" requirement does not mean that "an official action is protected by qualified immunity unless the very action in question has previously been held unlawful"; rather, qualified immunity is properly denied if "in the light of pre-existing law the unlawfulness [is] apparent." *Anderson v. Creighton*, 483 U.S. 635, 640 (1987); *accord Hope v. Pelzer*, 536 U.S. 730, 739 (2002). "[T]here need not be precise factual correspondence between earlier cases and the case at hand, because 'general statements of the law are not inherently incapable of giving fair and clear warning . . . .'" *Anderson v. Blake*, 469 F.3d 910, 913-14 (10th Cir. 2006) (quoting *Hope*, 536 U.S. at 741).

Here, the district court erred in granting qualified immunity to Detective Woods because it was clearly established in 2013 that searching a patient's prescription records without a warrant or individualized suspicion violates the

patient's Fourth Amendment rights. As explained above, *see supra* Part I.A, in the twenty years prior to the events at issue, this Court repeatedly made clear that individuals have a constitutionally protected privacy interest in their medical records. *See Kerns*, 663 F.3d at 1184; *Douglas*, 419 F.3d at 1101; *Herring*, 218 F.3d at 1175; *F.E.R.*, 58 F.3d at 1535; *Lankford*, 27 F.3d at 479; *A.L.A.*, 26 F.3d at 990. In 2005, this Court specifically held that the privacy interest in medical records under the Fourth Amendment extends to prescription drug records. *Douglas*, 419 F.3d at 1099. Any reasonable officer would know what that means: Under the Fourth Amendment, a warrant is required. *E.g.*, *Gant*, 556 U.S. at 338; *Katz*, 389 U.S. at 357; *Silva-Arzeta*, 602 F.3d at 1213.

Although this Court has never considered these precise circumstances — the warrantless search of a patient's prescription records in a state database — a perfectly on-point precedent is not required so long as the unlawfulness of defendants' conduct was "apparent." *Hope*, 536 U.S. at 739. Here, all an officer needed to know were two propositions: this Court's specific holding in *Douglas* that individuals have a constitutionally protected privacy right in their prescription records, and the well-established principle that an officer cannot invade such a right without a warrant (absent an exception) — a bedrock Fourth Amendment rule that the Supreme Court announced at least as early as *Katz* in 1967 and reiterated as recently as *Gant* in 2009.

Woods cannot invoke the third-party doctrine to argue that the Fourth Amendment right was unclear here. As discussed above, the third-party doctrine is doubly inapplicable, because the records were not voluntarily disclosed and are deeply private. *See supra* Part I.B. The qualified-immunity construct of the "reasonable officer" does not lack common sense. It does not take a constitutional scholar to recognize that records disclosing a person's medications are highly personal. And no "reasonable officer" would imagine that the government's compulsory collection of this private information for inclusion in a government database renders it open to search. Such an assumption would justify warrantless searches of a patient's medical records at a state-run hospital or a defendant's file in the public defender's office, yet no court would sanction such flagrant violations of the Fourth Amendment, and no reasonable officer would attempt them.

The cases on which the district court relied in granting qualified immunity involved application of the clearly established Fourth Amendment right to privacy in medical records in contexts well removed from the facts of this case and the core of the Fourth Amendment's protection against the *search* of prescription drug records by *law enforcement* officers. For instance, *Douglas v. Dobbs* considered a claim that a district attorney violated a patient's Fourth Amendment rights in moving for and obtaining a judicial order authorizing a search of her prescription records from a local pharmacy without (in the plaintiff's view) "sufficient indicia

of probable cause." 419 F.3d at 1103. The question there was not whether the *search itself* violated the Constitution, but whether the *district attorney's application to the magistrate*, based on individualized suspicion but not probable cause, violated the Constitution. *Id.* (noting that the plaintiff "asserts this violation against ADA Dobbs, not for the execution of a warrantless search, but for Dobbs' role in instructing Sergeant Spear with regard to the 'Motion and Order to Produce Prescription Information' which he then used to obtain judicial authorization to execute the search"). The Court recognized that prescription records are protected by the Fourth Amendment but granted qualified immunity to the district attorney. *Id.* at 1099. A reasonable law enforcement officer would not have assumed that otherwise unconstitutional conduct (invading a reasonable expectation of privacy without a warrant) could somehow be permissible because the unconstitutionality of a *different* type of conduct (applying for a warrant on an allegedly insufficient basis) was not clearly established. The constitutional holding in *Douglas* that the Fourth Amendment protects prescription drug records should have alerted any reasonable officer that a warrantless search of such records was unconstitutional.

Kerns v. Bader is even further removed from the facts here. That case involved a sheriff's mere *request* that a hospital provide a suspect's psychiatric records; the hospital complied voluntarily. 663 F.3d at 1178-79. Thus, the specific issue in *Kerns* was whether "the Sheriff violated [the plaintiff's] clearly established

Fourth and Fourteenth Amendment rights by *asking* the . . . hospital to share its records concerning Mr. Kerns's treatment." *Id.* at 1183 (emphasis added). Pyle's and Jones's prescription records, by contrast, were reported to the Database on a compulsory basis, so there was no voluntary disclosure of information by anyone. As consent is an exception to the requirements of the Fourth Amendment, *see, e.g.*, *Georgia v. Randolph*, 547 U.S. 103, 109 (2006), the facts in *Kerns* are in a different doctrinal category from this case. Also unlike this case, the sheriff in *Kerns* sought information about a particular suspect who had already been the subject of a search warrant for his home, 663 F.3d at 1178 — not a scattershot acquisition of the prescription records of an entire workforce in the absence of particularized suspicion regarding any individual.

Although the court in *Kerns* suggested that the third-party doctrine might apply there, the *third party's own voluntary* disclosure to law enforcement implicates a different branch of the third-party doctrine and a different line of reasoning from the cases discussed above concerning whether the third party's mere possession of the information vitiates the reasonable expectation of privacy vis-à-vis *searches by law enforcement*. In *Hoffa v. United States*, 385 U.S. 293, 302-03 (1966), for instance, the Court held that what a person says to a third party is not protected by the Fourth Amendment against the third party's voluntary disclosure. That decision was not based on the "reasonable expectation of privacy"

concept, which would not emerge until the following year in *Katz*. Rather, the Court reasoned that "[t]he risk of being . . . betrayed by an informer . . . is probably inherent in the conditions of human society. It is the kind of risk we necessarily assume whenever we speak." *Id.* at 303 (citation and internal quotation marks omitted). By contrast, the third-party cases about searches by law enforcement concern the reasonable expectation of privacy, and so the Court considered the voluntariness of the disclosure and how private the information was. *See Smith*, 442 U.S. at 742, 744; *Miller*, 425 U.S. at 442. Because *Kerns* concerned both different facts and different law, it should not have muddied the waters of the Fourth Amendment analysis for a reasonable officer.

Finally, one of the opinions below relied in part on the fact that defendants' conduct was authorized by statute. A147. "Reliance on a statute does not, however, make an official's conduct *per se* reasonable," *Roska ex rel. Roska v. Sneddon*, 437 F.3d 964, 971 (10th Cir. 2006) — as the district court itself noted. Regardless of the terms of the statute that created the Database in 1995, after *Douglas v. Dobbs* held in 2005 that prescription records were protected by the Fourth Amendment, no reasonable officer could have believed that warrantless searches of prescription drug records were constitutional. "When a statute authorizes conduct that patently violates the Constitution . . . officials are not entitled to turn a blind eye to its

obvious unconstitutionality and then claim immunity based on the statute." *Id.* at 972.

Because this Court squarely recognized the right to privacy in prescription records in 2005, it was clearly established by 2013 that the search of such records requires a warrant (or an exception to the warrant requirement). The grant of qualified immunity to Woods should be reversed.

III. DEFENDANTS VIOLATED THE FAIR CREDIT REPORTING ACT.

In addition to violating Jones's and Pyle's constitutional rights, defendants also violated plaintiffs' rights under the Fair Credit Reporting Act (FCRA) by procuring "consumer reports" about Jones and Pyle for employment purposes without notice to Jones and Pyle. 15 U.S.C. § 1681b(b)(2)(A). The district court erred in dismissing this claim based on the FCRA exception for "investigations," *id.* § 1681a(y), because an "investigation" under the FCRA does not refer to the type of fishing expedition in which defendants engaged without individualized suspicion of wrongdoing.

A. The Prescription Drug Records Fall Within The FCRA's Definition Of A Consumer Report.

As a threshold matter, Jones's and Pyle's prescription drug records are "consumer reports" under the FCRA. A consumer report is (1) "any written, oral, or other communication of any information by *a consumer reporting agency*" (2) "bearing on a consumer's credit worthiness, credit standing, credit capacity,

character, general reputation, *personal characteristics, or mode of living*" that (3) "is used or expected to be used or collected in whole or in part for the purpose of serving as a factor in establishing the consumer's eligibility for . . . [a] *purpose authorized under section 1681b of this title*." *Id.* § 1681a(d)(1)(C) (emphasis added). The prescription drug records in the Database satisfy each of these elements.

First, the prescription drug records in the database were "communicat[ed] . . . by a consumer reporting agency." *Id.* A "consumer reporting agency" is broadly defined to include "any person which, for monetary fees, dues, or on a cooperative nonprofit basis, regularly engages in whole or in part in the practice of assembling or evaluating . . . information on consumers for the purpose of furnishing consumer reports to third parties, and which uses any means or facility of interstate commerce for the purpose of preparing or furnishing consumer reports." 15 U.S.C. § 1681a(f). The definition of "person" includes government agencies such as the DOPL. *Id.* § 1681a(b). Under Utah law, the Database operates on a cooperative non-profit basis. *See* Utah Code § 58-37f-501; *accord* A166; A15. Utah law also directs DOPL to "regularly engage[]" in "assembling" "information on consumers" — namely, their prescription drug information, *see* Utah Code § 58-37f-203(3) — and then to "furnish[]" these "consumer reports" to "third parties" such as the Department of Health, doctors or pharmacists, or law

enforcement. *See id.* § 58-37f-301(2)(a)-(k). Finally, the Database is accessed online, *see* https://csd.utah.gov, and "the Internet is an instrumentality of interstate commerce." *United States v. Morgan*, 748 F.3d 1024, 1033 (10th Cir. 2014).

Next, the range of subjects that a "consumer report" may "bear[] on" is quite broad. This element is "'not . . . very demanding,' for almost any information about consumers arguably bears on their personal characteristics or mode of living." *Trans Union Corp. v. FTC*, 245 F.3d 809, 813 (D.C. Cir. 2001) (quoting *Trans Union Corp. v. FTC*, 81 F.3d 228, 231 (D.C. Cir. 1996)); *accord Phillips v. Grendahl*, 312 F.3d 357, 365-66 (8th Cir. 2002), *abrogated on other grounds by Safeco Ins. Co. of Am. v. Burr*, 551 U.S. 47 (2007). These subjects reach beyond financial information. Courts applying this definition have held that reports about a person's address, criminal history, or driving record "bear[] on" an individual's "personal characteristics" and/or "mode of living." *See Moreland v. CoreLogic SafeRent LLC*, 2013 WL 5811357, at *4 (C.D. Cal. Oct. 25, 2013); *Ernst v. Dish Network, LLC*, 49 F. Supp. 3d 377, 380 (S.D.N.Y. 2014); *Klonsky v. RLI Ins. Co.*, 2012 WL 1144031, at *3 (D. Vt. Apr. 4, 2012).

As discussed above, a person's prescription drug history can reveal a great deal about the person. *See supra* Part I.A. A patient's use of medication reflects the person's "mode of living," and facts about the underlying medical conditions reveal "personal characteristics." Accordingly, the FTC interprets "consumer

report" to cover a profile of a person's drug history. *In the Matter of Ingenix, Inc.*, 2008 WL 446471, at *1 (F.T.C. Feb. 6, 2008); *In the Matter of Milliman, Inc.*, 2008 WL 446466, at *1 (F.T.C. Feb. 6, 2008). This Court should conclude likewise.

Finally, the prescription drug records are "expected to be used or collected in whole or in part for the purpose of serving as a factor in establishing the consumer's eligibility for . . . [a] purpose authorized under section 1681b of this title." 15 U.S.C. § 1681a(d)(1)(C). The cross-referenced purposes at § 1681b include "a legitimate business need for the information in connection with a business transaction that is initiated by the consumer." *Id.* § 1681b(a)(3)(F)(i). The doctors and pharmacists who query the database plainly have a "legitimate business need" as set forth in Utah law. For the doctors, it is the need to ensure they are providing quality care when "prescribing or considering prescribing any controlled substance"; "diagnosing the . . . patient"; or "providing medical treatment or medical advice." Utah Code § 58-37f-301(2)(f). Pharmacists too have a "legitimate business need": "dispensing or considering dispensing any controlled substance" and determining whether a person "is attempting to fraudulently obtain a controlled substance." *Id.* § 58-37f-301(2)(i). The health-care transactions are "initiated by the consumer" because the patients come to medical providers for care. Although the database was used in this instance for other purposes, the

relevant purpose under the definition is the one for which the collector of the information (the DOPL) expected the prescription information to be used when collecting it. *Heath v. Credit Bureau of Sheridan, Inc.*, 618 F.2d 693, 696 (10th Cir. 1980).

Thus, the prescription records at issue are "consumer reports" subject to the requirements of the FCRA.

B. Defendants Violated The FCRA By Procuring Plaintiffs' Prescription Records For Employment Purposes Without Notice To Or Authorization From Plaintiffs.

Subject to exceptions not relevant here, the FCRA provides that "a person may not procure a consumer report, or cause a consumer report to be procured, for employment purposes with respect to any consumer" unless disclosure has been made to the consumer in writing that a report will be obtained for these purposes and the consumer authorized the procurement of the report. 15 U.S.C. § 1681b(b)(2)(A). "[E]mployment purposes" includes evaluation of a person for "employment, promotion, reassignment or retention as an employee." *Id.* § 1681a(h). Any person who fails to comply with the FCRA's prohibitions can be held liable to the consumer. *Id.* §§ 1681n, 1681o.

Here, when defendants procured plaintiffs' prescription records, they did so in direct connection to a theft at plaintiffs' workplace and with the intent of using the records for employment as well as law-enforcement purposes. A18; A169.

Indeed, Woods shared the records with Mayor Cullimore — who oversees plaintiffs' employer Unified Fire (but who does not have the power to prosecute plaintiffs), A16-17; A171 — and the records were used as a basis to suspend plaintiffs from work. A173; A21.

Neither Pyle nor Jones was notified of or consented to the search of his prescription records. A172; A20. By procuring plaintiffs' prescription records (which are consumer reports under the statute) for employment purposes without providing notice to or receiving authorization from plaintiffs themselves, defendants violated the FCRA.

C. The "Investigation" Exception Is Inapplicable.

The district court erred in dismissing the FCRA claims based on an exception to the definition of consumer reports for communications "made to an employer in connection with an investigation of (i) suspected misconduct relating to employment; or (ii) compliance with Federal, State, or local laws and regulations, the rules of a self-regulatory organization, or any preexisting written policies of the employer." 15 U.S.C. § 1681a(y)(1)(B).[21] The term "investigation"

[21] The FCRA's definition of "consumer report" exempts communications "described in subsection . . . (x)." *Id.* § 1681a(d)(2)(D). The cross-reference to "subsection (x)" is a typo; it should refer to § 1681a(y) but Congress neglected to update the reference when it redesignated former subsection (x) as subsection (y)

(footnote continues on the next page)

in the FCRA is best read to incorporate a requirement of individualized suspicion. *See Freckleton v. Target Corp.*, 81 F. Supp. 3d 473, 481 (D. Md. 2015) (explaining that "Target's background check was not performed *in connection* with an investigation into misconduct" because "Target did not suspect *her* [i.e., the plaintiff] of any misconduct when it requested the background check" (second emphasis added)). Reading the phrases "investigation of suspected misconduct relating to employment" and "investigation of . . . compliance with . . . laws" to allow searches for information related to hundreds of people, unconnected to any individualized suspicion, is incompatible with the statutory scheme. If "investigation" does not require a preexisting suspicion of an individual, then employers could, without complying with the FCRA, engage in pure fishing expeditions on the theory that some employment-related misconduct or violation of law might turn up. "That exception would destroy the rule." *Id.* at 482; *accord Rawlings v. ADS Alliance Data Sys., Inc.*, 2015 WL 3866885, at *3 (W.D. Mo. June 23, 2015) (expressing same concern). Such a result would also clash with other cases holdings that background checks are consumer reports, *see Freckleton*, 81 F. Supp. 3d at 482 n.12 (citing cases), as well as the view of the FTC to that

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in 2010. *See Rivera v. Allstate Ins. Co.*, 2015 WL 5722256, at *9 (N.D. Ill. Sept. 29, 2015).

effect, *see Ramos v. Genesis Healthcare, LLC*, 2015 WL 5822635, at *4 (E.D. Pa. Oct. 1, 2015).

Applying this appropriately narrow understanding of "investigation," the exception does not apply to the queries here, which were general searches of the prescription drug information of 480 individuals, without suspicion of any particular individual. A172; A20. The district court rulings to the contrary here contained no reasoning supporting their application of the § 1681a(y) exception to this case. To ensure that the FCRA exception does not swallow its general rule, this Court should refuse to read "investigation" to include any inquiry no matter how generalized in scope.

CONCLUSION

This Court should reverse the dismissal of the Fourth Amendment claims against Woods and Cottonwood Heights, and the dismissal of the FCRA claims against all defendants.

REQUEST FOR ORAL ARGUMENT

Appellants respectfully request oral argument in light of the importance of the issues presented to the privacy of medical records of all individuals within this Court's jurisdiction and across the country. According to information proffered by defendants (current as of December 2013), nearly every state, including all six under this Court's jurisdiction, have prescription drug databases, and in the

majority of these, including three under this Court's jurisdiction (New Mexico, Oklahoma, and Wyoming), law enforcement agencies can search the databases without judicial approval or oversight, A228-30; A115-16.

Additionally, the FCRA issue is one of first impression before this Court.

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Respectfully submitted,

/s/ Scott Michelman

Tyler B. Ayres
AYRES LAW FIRM
12339 South 800 East
Suite 101
Draper, UT 84020
(801) 255-5555

Scott C. Borison
LEGG LAW FIRM LLC
1900 South Norfolk Street
Suite 350
San Mateo, CA 94403
(301) 620-1016

Scott Michelman
Scott L. Nelson
PUBLIC CITIZEN
LITIGATION GROUP
1600 20th Street NW
Washington, DC 20009
(202) 588-1000

Counsel for Plaintiff-Appellant Ryan Pyle and Plaintiff-Appellant Marlon Jones

CERTIFICATIONS

I certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 12,403 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word, Times New Roman 14-point type.

I certify that all private information that must be redacted pursuant to 10th Cir. R. 25.5 has been redacted.

I certify that the electronic and hard copies of this brief are identical.

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/s/ Scott Michelman

CERTIFICATION OF SERVICE

I certify that on March 23, 2016, I served this brief by ECF on all registered counsel for appellees.

/s/ Scott Michelman