**Nos. 15-1463 & -1487**

**UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT**

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**RYAN PYLE**,
*Plaintiff - Appellant*,

v.

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

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**MARLON JONES**,
*Plaintiff - Appellant*,

v.

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

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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*)

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# APPELLANTS' REPLY BRIEF

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## GLOSSARY OF ACRONYMS AND ABBREVIATIONS

| | |
|---|---|
| A[number] | Appendix of plaintiffs-appellants, page [number] |
| ACLU | American Civil Liberties Union |
| Database | Utah Controlled Substance Database |
| DOPL | Division of Occupational and Professional Licensing |
| FCRA | Fair Credit Reporting Act |

## INTRODUCTION AND SUMMARY OF ARGUMENT

The strength of the Fourth Amendment privacy interest Ryan Pyle and Marlon Jones possess in their private prescription drug records — an expectation grounded in social tradition, medical tradition, history, and law, and confirmed by the judgment of the Utah legislature — is hard to refute. Defendants do not come close. They cite a few questionably reasoned out-of-circuit cases that provide no reason to ignore the established law of this Court. Defendants' contention that the third-party doctrine undermines plaintiffs' expectation of privacy ignores the Supreme Court's controlling authorities in *Smith*, *Miller*, and *Ferguson* and relies on cases from the distinguishable context of drunk-driving blood tests. The exception to the warrant requirement for "closely-regulated industries" is inapplicable here because this doctrine does not permit law-enforcement searches for general crime-control purposes and because warrantless searches of the Utah Controlled Substance Database were neither necessary to serve the state's regulatory interest nor subject to any limits on officer discretion.

Defendants' other arguments fare no better. Federal Rule of Civil Procedure 5.1 does not apply because plaintiffs challenge defendants' *conduct*, not the (now-amended) statute governing the database; because the Utah Attorney General had notice of the *Jones* case below; and because he has notice of this consolidated appeal now. On qualified immunity, defendants argue that only a case with

practically identical facts can clearly establish the unconstitutionally of defendants' conduct, but the Supreme Court has squarely rejected that position. Finally, defendants' interpretation of the "investigation" exception to the Fair Credit Reporting Act is so broad that it would swallow the rule.

Defendants do not defend the erroneous dismissal of Cottonwood Heights in the decisions below on the basis of *Monell v. Department of Social Services*, 436 U.S. 658 (1978), a ground not raised by any party and of which plaintiffs had no notice. The plaintiffs' showing in their opening brief that the *Monell* dismissal was erroneous stands unrebutted.

## ARGUMENT

### I. RULE 5.1 DOES NOT BAR PLAINTIFFS' DAMAGES CLAIMS.

Rule 5.1 is inapplicable here for three reasons.

*First*, plaintiffs appeal only the dismissal of their claims for damages to compensate for harms caused by defendants' unconstitutional conduct, not any claims for injunctive relief against the (now-amended) statute governing the database. A ruling in plaintiffs' favor, therefore, would not invalidate any statute. Contrary to the defendants' contention, the unconstitutionality of the former statute does not necessarily follow from ruling for plaintiffs on their damages claims. Many applications of the former statute would have been constitutional — for instance, if an officer obtained prescription records based on a warrant (a step that

the statute did not require but certainly permitted) instead of just entering a case number. Unconstitutional conduct often occurs based on authority conferred by a constitutional statute. For instance, if a Utah law enforcement officer arrested someone without a warrant or probable cause, his action would violate the Fourth Amendment, but no one would think that Utah's statute authorizing officers to make arrests, Utah Code § 53-13-103(2), was constitutionally invalid, even though that statute does not itself require a warrant.[1]

Indeed, the district court in Pyle's case appears to have recognized the difference between the injunctive and damages claims here. Although the district court did not specify that the Rule 5.1 dismissal applied to the injunctive claims only, the court went on to consider qualified immunity as to the individual defendants, A146-48 — a step that would not have been necessary had Rule 5.1 resolved the damages claims as well as the injunctive claims. *Cf. Wood v. Strickland*, 420 U.S. 308, 314 n.6 (1975) (explaining that qualified immunity applies to damages, not equitable relief).

*Second*, as to Jones, Rule 5.1 notice was provided, as defendants concede. Defs.' Br. 14. Defendants' claim that the timing of Jones's notice provides an alternate basis for affirmance is untenable, both because defendants did not raise

[1] Plaintiff's trial counsel explained this point to the district court in *Pyle*, as defendants acknowledge. A129; Defs.' Br. 13.

this objection below and because the district court did not, in fact, exercise its discretion to dismiss because of the timing. Defendants acknowledge that any such dismissal would have been discretionary, not mandatory. *See* Defs.' Br. 15. "Though an appellate court may judge whether a district court exercised its discretion (and whether it abused that discretion), it cannot exercise the district court's discretion" in its stead. *United States v. Labastida-Segura*, 396 F.3d 1140, 1143 (10th Cir. 2005). The district court surely did not abuse its discretion (and defendants do not claim it did) in failing to dismiss the case sua sponte based on an objection the defendants never raised.

*Third*, regardless of what occurred at the district court, "the appellate court has discretion to respond in different ways" to the absence of Rule 5.1 notice. *Oklahoma ex rel. Edmondson v. Pope*, 516 F.3d 1214, 1216 (10th Cir. 2008). The only constraint is that failure to file the notice "does not forfeit a constitutional claim or defense that is otherwise timely asserted." Fed. R. Civ. P. 5.1(d). As this Court has explained, "[i]t often may suffice to notify the Attorney General and allow him to intervene on appeal." *Pope*, 516 F.3d at 1216. Here, Attorney General Reyes had timely notice of this appeal, *see Jones v. Woods*, No. 15-4187, Order (10th Cir. filed Dec. 30, 2015), and is also on the ECF notice list for this case, so he could have intervened had he wished to be heard. It is unsurprising that he did not do so, because the database statute has been amended to prohibit the conduct

that plaintiffs challenge. For the same reason, there is no risk here that this Court will strike down a Utah law without the Attorney General's participation.

## II. DEFENDANTS VIOLATED PLAINTIFFS' FOURTH AMENDMENT RIGHTS.

Defendants argue that their actions did not violate the Fourth Amendment for three reasons. First, they observe that a few state courts disagree with this Court's precedent regarding the reasonable expectation of privacy in prescription drug records. Second, they invoke the third-party doctrine. Third, they rely on the "closely-regulated industry" exception to the warrant requirement. Each argument fails.

### A. Plaintiffs Have A Reasonable Expectation Of Privacy, Recognized By This Court, In Their Prescription Drug Records.

As plaintiffs demonstrated in their opening brief, individuals have a reasonable expectation of privacy in their medical records, including prescription drug records. This Court specifically recognized as reasonable this expectation of privacy in *Douglas v. Dobbs*, 419 F.3d 1097, 1099 (10th Cir. 2005). The expectation is further supported by the overwhelming weight of persuasive authority, medical tradition and practice, history, and the public consensus that medical and drug records are private. Opening Br. 15-27. Amici have underscored the privacy interests inherent in prescription drug information and the depth of the

historical tradition regarding the confidentiality of this information. Br. of ACLU et al. 11-22.

Defendants' efforts to distinguish *Douglas* and *Ferguson v. City of Charleston*, 532 U.S. 67 (2001), are unavailing. Defendants quote a footnote from *Douglas* stating that the right of privacy is "not absolute" and noting that the privacy expectation in that case "must be tempered by the fact that New Mexico apparently requires pharmacies to make these records available to law enforcement." 419 F.3d at 1102 n.3, *quoted in* Defs.' Br. 23. However, defendants misleadingly omit the very next words: "presumably in response to a duly authorized court order." 419 F.3d at 1102 n.3. With that key qualification, then, the footnote says only that the right to privacy is not an absolute bar against disclosure but rather is tempered by the obligation of pharmacists "to make these records available to law enforcement, *presumably in response to a duly authorized court order*," *id.* (emphasis added) — that is, to disclose the records in accordance with the Fourth Amendment.

Of course, no expectation of privacy is "absolute" in the sense that it cannot be overcome by a warrant satisfying Fourth Amendment requirements. If the ability to access evidence pursuant to a warrant sufficed to demonstrate the absence of a Fourth Amendment privacy interest, the Fourth Amendment would become self-defeating: The permissibility of a search authorized by a warrant

would mean that a warrantless search had to be permitted as well. *Douglas* does not suggest such an absurd result. That this Court presumed the necessity of a court order before prescription drug records could be disclosed only underscores the Court's holding in *Douglas* that "persons have a right to privacy in their prescription drug records." *Id.* at 1099.

As for *Ferguson*, defendants' observation that the case did not conclusively resolve the issue presented here does not undermine its persuasive value in supporting plaintiffs' position by highlighting the private nature of personal medical information. *See Ferguson*, 532 U.S. at 78 ("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."). And as plaintiffs have observed, the Supreme Court's view is widely shared. *See* Opening Br. 16-18 (citing cases from this Court and from the First, Second, Third, Fourth, and Ninth Circuits).

Beyond these brief jabs at *Douglas* and *Ferguson*, defendants offer nothing to rebut plaintiffs' or amici's authorities. Defendants do not deny the traditional and modern protections of patient privacy in medical practice. Defendants do not dispute that the public overwhelmingly views medical records as private. Defendants offer no explanation for why the Utah legislature would have swiftly responded to the facts of this very case by imposing a warrant requirement if not

for the reason stated by the legislators who enacted the law: Prescription drug information is deeply private. *See* Opening Br. 25-26.

Defendants instead offer a handful of state-court cases that reason, in circular fashion, that because state laws authorize access to prescription drug records, individuals do not possess an expectation of privacy in these records. *See, e.g.*, *State v. Tamulonis*, 39 So. 3d 524, 528 (Fla. Dist. Ct. App. 2010); *Murphy v. State*, 62 P.3d 533, 538 (Wash. Ct. App. 2003); *State v. Russo*, 790 A.2d 1132, 1151-52 (Conn. 2002). Of course, if that argument were valid, the Fourth Amendment would be subordinate to legislation and not the other way around. *See Smith v. Maryland*, 442 U.S. 735, 740 n.5 (1979) (rejecting the notion that Fourth Amendment protection for the home would evaporate "if the Government were suddenly to announce on nationwide television that all homes henceforth would be subject to warrantless entry").

Defendants' claim that "the courts have almost universally held that *warrantless* searches by law enforcement of prescription drug databases do not violate either [sic] the Fourth Amendment," Defs.' Br. 21, is misleading. In fact, only one of the cases defendants cite for that proposition, Defs.' Br. 21-27, addresses a state prescription drug monitoring program database: *Williams v. Commonwealth*, 213 S.W.3d 671 (Ky. 2006). That case has subsequently been criticized in and narrowed by the Kentucky Court of Appeals in *Carter v.*

*Commonwealth*, 358 S.W.3d 4, 8-9 (Ky. Ct. App. 2011), *review denied* (Feb. 15, 2012), which held that, notwithstanding *Williams*, reasonable suspicion is required for law enforcement to access the Kentucky prescription monitoring program database in light of the serious privacy implications.[2]

State courts are thus far from unanimous on the subject of privacy in prescription records. Some state courts — including the Utah Supreme Court — agree with the view of the federal courts of appeals that individuals have a reasonable expectation of privacy in their prescription drug records. *See, e.g., State v. Skinner*, 10 So. 3d 1212, 1218 (La. 2009); *State v. Yount*, 182 P.3d 405, 411 (Utah 2008).

In any event, the state cases are not the law in this Circuit. *Douglas* is.

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

Defendants' invocation of the third-party doctrine ignores the critical distinctions between this case and the Supreme Court's decisions in *Smith v.*

[2] Except *Williams*, none of the additional cases defendants cite in their qualified immunity argument, Defs.' Br. 36, addresses an unreasonable-search claim involving a state prescription drug monitoring program database. *Tucker v. City of Florence*, 765 F. Supp. 2d 1320 (N.D. Ala. 2011), involved a law enforcement search of prescription database records, but the plaintiff there sued for malicious prosecution and false arrest, not unreasonable search. *Id.* at 1323. The court's discussion of the database search therefore focused on whether probable cause existed to arrest and prosecute the plaintiff, and the court concluded that probable cause existed regardless of the information from the database. *Id.* at 1336-37.

*Maryland*, 442 U.S. 735 (1979), and *United States v. Miller*, 425 U.S. 435 (1976). As plaintiffs have explained, both those cases relied on the voluntariness of the disclosure to third parties and the nature of the information. Opening Br. 27-31. Unlike bank records and numbers dialed on a telephone, prescription information is deeply private, "contain[ing] intimate facts of a personal nature." *Douglas*, 419 F.3d at 1102. And the disclosure of prescription information to pharmacies is not in any meaningful sense voluntary because patients cannot legally acquire controlled substances without disclosing their prescription information to pharmacists. *See* Utah Code § 58-37-8(2)(a)(i); *see generally Whalen v. Roe*, 429 U.S. 589, 602 (1977) ("[D]isclosures 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."). Therefore, the third-party doctrine is inapplicable.

Defendants do not dispute the relevance of voluntariness and the nature of the information under *Smith* and *Miller*. Defendants even concede that private information that individuals are in every practical sense required to provide to a third party are not subject to the third-party doctrine. *See* Defs.' Br. 30 (conceding that emails stored in servers are not subject to the third-party doctrine).

Nevertheless, defendants urge the application of the third-party doctrine based on cases concerning the acquisition of records of post-collision blood tests of

drivers suspected of drunkenness. These cases are doubly inapplicable. First, all but one predate the Supreme Court's 2001 decision in *Ferguson*. There, the Supreme Court applied the Fourth Amendment to urine tests of hospital patients, despite the fact that the tests were in the custody of the hospital, 532 U.S. at 76-86, and over the dissent's suggestion that the third-party doctrine should apply, *see id.* at 94-95 (Scalia, J., dissenting).

Second, the narrow context of a post-accident blood-alcohol test is quite different from the wide range of prescription information that a patient provides to a pharmacist in order to obtain needed medications. The blood-alcohol tests occurred in the specific and individualized circumstance in which a person was likely to have been involved in a drunk-driving crime and for the limited purpose of determining a single fact about the person. *See People v. Perlos*, 462 N.W.2d 310, 320 (Mich. 1990) ("[T]here first must be an accident, a person must be taken to a medical facility, the person must have been the driver of a vehicle involved in the accident, and medical personnel must order a chemical analysis, on their own initiative, for medical treatment. … Prosecutors can only gain access to chemical test results. They cannot obtain all of a person's medical records, nor can they obtain a blood sample for their own discretionary testing."). Accordingly, the holdings of the blood-test cases on which defendants rely are narrow and specific to the circumstance of a particular person's treatment following an alcohol-related

crash. *See State v. Davis*, 12 A.3d 1271, 1276 (N.H. 2010) ("[S]ociety does not recognize a reasonable expectation of privacy in blood alcohol test results obtained and recorded by a hospital as part of its consensual treatment of a patient, where those results are requested by law enforcement for law enforcement purposes in connection with an incident giving rise to an investigation for driving while under the influence of intoxicating liquors or controlled drugs.").

By contrast, applying the third-party doctrine to the Database of Utahns' controlled-substance prescription records would expose to law enforcement a trove of information unconnected to a particular circumstance in which involvement in a crime might diminish a reasonable expectation of privacy. *See* Br. of ACLU et al. 14-15 (cataloguing conditions that might be revealed about individual patients, including "anxiety disorders, panic disorders, post-traumatic stress disorder, weight loss associated with AIDS, nausea and weight loss in cancer patients undergoing chemotherapy, alcohol addiction withdrawal symptoms, opiate addiction, testosterone deficiency, gender identity disorder/gender dysphoria, chronic and acute pain, seizure disorders, narcolepsy, insomnia, and attention deficit hyperactivity disorder"). Thus, information about an obviously intoxicated driver's blood-alcohol level is inherently less private than a person's prescription records. *Cf. Miller*, 425 U.S. at 442 (considering the nature of the information at issue in applying the third-party doctrine).

Defendants also cite a non-blood-test case, *Young v. Murphy*, 90 F.3d 1225 (7th Cir. 1996), which is wholly inapposite. There, an executor of an estate "alleged violations of a number of amorphous and ill-defined state and constitutional rights" by state officials, *id.* at 1229; one claim was that examination of the decedent's nursing home records violated the Fourth Amendment, *id.* at 1236. The only theory apparently presented to the court was that the decedent had a direct possessory right to his records; the court rejected that theory and hence the Fourth Amendment claim, "[b]ecause [the executor] has alerted us to no other basis for regarding as unconstitutional the state's examination of [the decedent's] records." *Id. Young* thus never considered, much less ruled on, any reasonable expectation of privacy in medical records not in a patient's possession.

Defendants' passing suggestion that the third-party doctrine applies to any information "not … belonging to any individual," Defs.' Br. 15, cannot be squared with *Ferguson*, which (as noted) applied the Fourth Amendment to urine test results that belonged to a hospital. 532 U.S. at 76-86. More generally, the Supreme Court ruled almost half a century ago that Fourth Amendment protection is not limited to property interests, but rather is tied to an individual's reasonable expectation of privacy. *See Katz v. United States*, 389 U.S. 347, 353 (1967); *id.* at 361 (Harlan, J., concurring).

Finally, defendants point out that *Kerns v. Bader*, 663 F.3d 1173 (10th Cir. 2011), invoked the third-party doctrine, but defendants disregard the crucial distinction that plaintiffs have noted between that case and this one: Whereas this case concerns a law enforcement *search* of prescription drug information, *Kerns* involved the *voluntary* disclosure of information by a Veterans Affairs hospital. *Id.* at 1179. Whether or not the hospital's disclosure was improper for reasons aside from the Fourth Amendment (for instance, because of its confidentiality obligation to its patient), the Fourth Amendment does not protect a person from the possibility that a third-party entrusted with information might itself voluntarily disclose it. *Hoffa v. United States*, 385 U.S. 293, 302-03 (1966). But that principle rests on a different theory from the idea that information disclosed to third parties is inherently subject to a warrantless search by law enforcement; the fact that a *third party can choose* to disclose a person's confidence does not mean that *the police can compel* such a disclosure without a warrant. *See* Opening Br. 45-46. Defendants provide no answer to that distinction.

This Court should adhere to the limits of the third-party doctrine articulated in *Smith* and *Miller* and hold that the doctrine does not apply to prescription drug records.

### C. The "Closely-Regulated Industry" Exception To The Warrant Requirement Is Inapplicable.

As the Supreme Court recently summarized in *City of Los Angeles v. Patel*, 135 S. Ct. 2443 (2015), "[s]earch regimes where no warrant is ever required may be reasonable where special needs make the warrant and probable-cause requirement impracticable, and where the primary purpose of the searches is distinguishable from the general interest in crime control." *Id.* at 2452 (citation, internal quotation marks, and source's alteration marks omitted). One such "special need" that the Court has recognized is administrative inspections of a "closely-regulated" industry. *Id.* at 2454; *accord Roska ex rel. Roska v. Peterson*, 328 F.3d 1230, 1241 (10th Cir. 2003).

A "closely-regulated" industry is one that "ha[s] such a history of government oversight that no reasonable expectation of privacy could exist for a proprietor over the stock of such an enterprise." *New York v. Burger*, 482 U.S. 691, 700 (1987) (citation and internal quotation marks omitted). Such an industry may be subject to warrantless administrative searches only if (1) the government has a "substantial" interest "that informs the regulatory scheme pursuant to which the inspection is made"; (2) "warrantless inspections" are "necessary to further [the] regulatory scheme"; and (3) "the statute's inspection program, in terms of the certainty and regularity of its application … provid[es] a constitutionally adequate

substitute for a warrant." *Id.* at 702-03 (citation and internal quotation marks omitted); *accord Patel*, 135 S. Ct. at 2456.

The searches at issue do not remotely fall within the "closely-regulated industry" exception. They were not administrative inspections, but rather undertaken to pursue general crime control — an impermissible characteristic for a "special needs" search of any kind. The searches also fail two of the three prongs of the *Burger* test, because the warrantless searches were not necessary to serve a government interest and because no "constitutionally adequate substitute for a warrant" existed. And state regulation of pharmacies does not justify the diminution of a patient's — as opposed to a pharmacist's — expectation of privacy. Any of these failings alone would be enough to refute the applicability of the "closely-regulated industry" doctrine here; cumulatively, they reveal a wide gap between that doctrine and this case.[3]

[3] Defendants focus on the history of pharmacy regulation, Defs.' Br. 17-19, but that history goes only to the threshold question whether the industry is closely regulated, not to the other requirements for a valid administrative search regime. *See United States v. Seslar*, 996 F.2d 1058, 1061 (10th Cir. 1993) (the "closely regulated" question is an "initial determination" to be made before applying the *Burger* test). Defendants cite *United States v. Gonsalves*, 435 F.3d 64 (1st Cir. 2006), but that case upheld a warrantless inspection of misbranded or adulterated drugs, *id.* at 66; the court specifically noted that the appeal did *not* concern patient records, *id.* at 67. Defendants also rely on *Thacker v. Commonwealth*, 80 S.W.3d 451 (Ky. Ct. App. 2002), but that case was overruled regarding the "closely-

*(footnote continues on the next page)*

*First*, the reason for the search at issue here, and for use of the Database by law enforcement officers under the pre-2015 statute, was general crime control: Woods queried the Database not to inspect a business for compliance with regulatory standards, but to follow a hunch about who stole medication from Unified Fire Authority ambulances — as defendants concede. *See* Defs.' Br. 2 ("Woods accessed the Database to develop suspect leads…."). It is well-settled that general crime control is an impermissible purpose for any special-needs search. *See City of Indianapolis v. Edmond*, 531 U.S. 32, 41-42 (2000) (striking down vehicle-checkpoint program because its aim was "to uncover evidence of ordinary criminal wrongdoing"); *accord Patel*, 135 S. Ct. at 2452 (noting that "the primary purpose of the searches [must be] distinguishable from the general interest in crime control"); *Ferguson*, 532 U.S. at 83 n.21 (finding "closely-regulated industry" doctrine inapplicable to searches "specifically designed to gather evidence of violations of penal laws").

Accordingly, this Court has looked with disfavor on invocations of the "closely-regulated industry" doctrine where searches "were conducted not as part of a pre-planned and dispassionate administrative procedure but instead pursuant to direct criminal suspicion." *S & S Pawn Shop Inc. v. City of Del City*, 947 F.2d 432,

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regulated industry" exception — by one of defendants' own authorities. *See Williams v. Com.*, 213 S.W.3d 671, 682 (Ky. 2006).

441 (10th Cir. 1991); *see also United States v. Johnson*, 994 F.2d 740, 742 (10th Cir. 1993) ("[A]n administrative inspection may not be used as a pretext solely to gather evidence of criminal activity."); *cf. V-1 Oil Co. v. Means*, 94 F.3d 1420, 1427 (10th Cir. 1996) (approving warrantless searches of commercial trucks under the "closely-regulated industry" doctrine, in part because the regulations at issue "do not authorize a general search by any law enforcement officer").

That the Database was, prior to 2015, accessible to law enforcement for general crime control purposes was the primary reason that the legislature amended the law to require law enforcement to obtain a warrant. As Senator Weiler, the sponsor of the 2015 bill to amend the Database, explained, the "standard practice" of law enforcement was to "run to the prescription controlled substance database and [to] look and see what drugs people are taking" when "a person becomes under their radar." Utah State Legis., Senate Day 28, Part 1, timestamp 55:25-48 (Feb. 23, 2015).[4] The use of the Database for general crime control removes the warrantless searches at issue from the ambit of legitimate special needs, including the inspection of closely-regulated businesses.

*Second*, warrantless access to the Database fails the *Burger* test for administrative searches of closely-regulated industries because "warrantless

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

inspections" are not "necessary to further [the] regulatory scheme." *Burger*, 482 U.S. at 702. The Database aims to help the state Division of Occupational and Professional Licensing (DOPL) identify practices of prescribing and dispensing controlled substances, practitioners prescribing controlled substances unprofessionally or unlawfully, individuals obtaining controlled substances in suspicious quantities, individuals presenting fraudulent prescriptions, individuals hospitalized for controlled-substance overdose or poisoning, and individuals convicted for certain drug-related crimes. Utah Code § 58-37f-201(6). Even leaving aside that Woods's search had nothing to do with the DOPL's regulation of pharmacies, warrantless queries by law enforcement are entirely unnecessary to achieve the goals for which the Database was created. The Database is already monitored in myriad respects. For instance, DOPL personnel may "engage[] in analysis of controlled substance prescription information." *Id.* § 58-37f-301(2)(b). Employees of the state Department of Health may "conduct scientific studies regarding the use or abuse of controlled substances" or seek the information "in relation to a person or provider whom the Department of Health suspects may be improperly obtaining or providing a controlled substance." *Id.* § 58-37f-301(2)(c). Practitioners and pharmacists may use the Database in making treatment decisions or in determining whether a patient is engaging in abuse. *Id.* § 58-37f-301(2)(f)&(*i*).

None of these activities requires warrantless access by the police. Indeed, the legislature itself does not believe that warrantless police queries are necessary to carry out the purposes of the Database, as demonstrated by the fact that the Utah legislature amended the statute last year to require a warrant for law enforcement access.

Additionally, unlike inherently dangerous industries like firearms dealing, mining, and junkyards, *see Patel*, 135 S. Ct. at 2454, in which time-sensitive physical hazards could develop on business premises in the absence of regular inspections, the pharmacy industry presents no comparable danger with regard to patient records. And because the information is stored in a database maintained by the state, defendants' suggestion that "random and surprise inspections" are needed, Defs.' Br. 19, is implausible. The state has all the time it needs to obtain a warrant, and doing so will not allow anyone to destroy evidence that a "surprise" search of the Database would otherwise reveal. *See Patel*, 135 S. Ct. at 2456 (rejecting application of the "closely-regulated industry" doctrine to hotel guest registries because of the availability of warrants, among other reasons).

A comparison with defendants' own authority on this point, *United States v. Maldonado*, 356 F.3d 130 (1st Cir. 2004), is instructive. There, the court upheld warrantless inspections of commercial trucks, finding the "necessity" criterion satisfied "because of the speed with which commercial vehicles move from place

to place." *Id.* at 136; *accord id.* at 135 ("Because the industry is so mobile, surprise is an important component of an efficacious inspection regime."). This Court has upheld truck safety inspections under the "closely-regulated industry" doctrine for the same reason. *V-1 Oil Co.*, 94 F.3d at 1427. Unlike commercial trucks, pharmacy records in the state's Database are not going anywhere, so warrantless law enforcement searches are unnecessary.

*Third*, warrantless Database searches fail another *Burger* criterion, the existence of a "constitutionally adequate substitute for a warrant," which "must perform the two basic functions of a warrant: it must advise the owner of the commercial premises that the search is being made pursuant to the law and has a properly defined scope, and it must limit the discretion of the inspecting officers." *Burger*, 482 U.S. at 703. No feature of the search at issue here performed either of the required functions. Neither patients nor pharmacists were notified of queries. And there were no limits on officer discretion to search.

In the latter regard, defendants highlight the regulatory requirement that an officer querying the Database provide a "valid case number of the investigation or prosecution." Defs.' Br. 19. The case number requirement is a far cry from the type of safeguards the Supreme Court demands; as the Court has explained, a "constitutionally adequate substitute for a warrant" must "constrain police officers' discretion as to which [businesses] to search and under what circumstances." *Patel*,

135 S. Ct. at 2457; *see also V-1 Oil Co. v. Wyo. Dep't of Envtl. Quality*, 902 F.2d 1482, 1487 (10th Cir. 1990) (holding that "closely-regulated industry" doctrine did not apply to Wyoming environmental statute that "leaves inspectors free to inspect any business as often or seldom as he or she pleases"). The requirement that Woods assign a number to his own dragnet investigation before accessing the Database imposed no constraint on his actions.

Under the pre-2015 Utah statute, "federal, state, and local law enforcement authorities" could access the Database if "engaged as a specified duty of their employment in enforcing laws regulating controlled substances." Utah Code § 58-37f-301(2)(k)(i) (as of 2013). The statute did not regulate how closely an individual's prescription information needed to relate to an investigation, how much suspicion an officer needed to have, or how necessary the prescription information needed to be in order for the officer to query the Database. Thus, officers' discretion was virtually unconstrained — as this case illustrates. As long as the search was somehow linked to an open investigation, any officer whose job description included investigating violations of controlled substances laws could have, consistent with the statute, downloaded the prescription histories of every Utahn and searched through those records in hopes of finding something suspicious. In fact, that scenario is not too far from what was actually happening prior to the 2015 amendments: The fact that, until 2015, law enforcement officers

"[we]re running between 7 and 11 thousand searches a year, and all they ha[d] to do [wa]s put in a case number,"[5] shows just how little constraint the case number requirement imposed. An officer's entry of a case number is the antithesis of a "constitutionally adequate substitute for a warrant" that "limit[s] the discretion of the inspecting officers." *Burger*, 482 U.S. at 703.

*Fourth*, the Supreme Court has repeatedly explained that the effect of the "closely-regulated industry" exception is to vitiate the expectation of privacy for "a *proprietor* over the stock of such [a closely-regulated] enterprise," *Burger*, 482 U.S. at 700 (emphasis added), *quoted at* Defs.' Br. 16; *accord Patel*, 135 S. Ct. at 2454; *Marshall v. Barlow's, Inc.*, 436 U.S. 307, 313 (1978) — not the privacy of a business's customers. Close regulation of a business is a condition that a business owner accepts when "choos[ing] to engage in this pervasively regulated business." *United States v. Biswell*, 406 U.S. 311, 316 (1972). Pharmacy patients, by contrast, do not knowingly or voluntarily accept such a trade-off; rather, they are required under state law to deal with pharmacies in order to obtain the medicines they need. *See* Utah Code § 58-37-8(2)(a)(i).

[5] Utah State Legis., Senate Day 28, Part 1, timestamp 56:14-23 (Feb. 23, 2015) (statement of Sen. Weiler) *available at*: http://utahlegislature.granicus.com/MediaPlayer.php?clip_id=18532&meta_id=542332.

Additionally, although patients' personal information might legitimately be viewed incidentally to a regime of industry regulation, *see Burger*, 482 U.S. at 716, the warrantless searches here were not aimed at regulating the industry but instead at determining whether any of 480 individuals might have been involved in a particular crime. Whether or not the pharmacy proprietor's expectation of privacy is lower than the average shopkeeper's because of the nature of the industry, the *patients'* expectation of privacy is higher than the average patron of a closely-regulated business because of their constitutionally-protected interest in the privacy of their prescription records. *Cf. Tucson Woman's Clinic v. Eden*, 379 F.3d 531, 550 (9th Cir. 2004) (holding that the closely-regulated industry exception did not save a state statutory and regulatory regime authorizing warrantless searches of abortion providers' offices and medical records, in part because patients' "expectation of privacy is *heightened*"). The rights of pharmacy patients, therefore, cannot be equated with those of, say, the customers of a junkyard. Accordingly, in addition to failing the *Burger* test, the pre-2015 warrantless search regime falls outside the "closely-regulated industry" doctrine because it invades privacy interests other than those of the business proprietor, for reasons unrelated to the regulation of the industry.

In sum, the "closely-regulated industry" doctrine is defeated by the use of the Database for general crime control purpose, by two of the three *Burger* criteria, and by the invasion of privacy interests other than the business owner's.

## III. COTTONWOOD HEIGHTS IS NOT ENTITLED TO AFFIRMANCE BASED ON *MONELL*.

Defendants do not defend the district court's dismissal of Cottonwood Heights based on the asserted absence of a policy sufficient for municipal liability under *Monell v. Department of Social Services*, 436 U.S. 658 (1978). As plaintiffs have explained, that dismissal was improper because it was based on grounds not raised by any party and of which plaintiffs had no notice, and because plaintiffs adequately alleged municipal liability. Opening Br. 34-40.

Defendants did not rely on *Monell* below and do not defend the district court's *Monell* ruling in this Court. Such a default ordinarily suffices to "waiv[e] any *Monell* defense with respect to this appeal." *RBIII, L.P. v. City of San Antonio*, 713 F.3d 840, 844 n.2 (5th Cir. 2013). Although an appellee's waiver does not bind an appellate court if it would be "fair" to affirm the district court on the waived basis, *United States v. Iverson*, 2016 WL 1039697, at *5 (10th Cir. Mar. 16, 2016), it would be manifestly unfair to affirm on *Monell* grounds here, given the district court's sua sponte ruling on the subject, plaintiffs' lack of notice and of an opportunity to amend if necessary in the district court, and the failure of either the district court or the defendants to identify at any time deficiencies in plaintiffs'

municipal liability allegations. *See Flanagan v. Munger*, 890 F.2d 1557, 1572 n.20 (10th Cir. 1989) ("We do not address … the City's liability under *Monell* with respect to these claims because neither defendant raised these defenses below or on appeal, and thus we lack the necessary facts."). Accordingly, this Court should reverse the dismissal of the claim against Cottonwood Heights if it finds that plaintiffs have stated a Fourth Amendment claim, regardless of the result of the qualified immunity inquiry as to Woods. *See Owen v. City of Independence*, 445 U.S. 622, 657 (1980) (holding that municipalities cannot claim qualified immunity).

## IV. WOODS IS NOT ENTITLED TO QUALIFIED IMMUNITY.

As plaintiffs have explained, the unlawfulness of Woods's actions flows from two propositions of law: first, this Court's specific holding that individuals have a constitutionally protected privacy right in their prescription records, *Douglas*, 419 F.3d at 1099; and second, the well-established principle that an officer cannot invade such a right without a warrant (absent an exception), *e.g.*, *Arizona v. Gant*, 556 U.S. 332, 338 (2009); *United States v. Silva-Arzeta*, 602 F.3d 1208, 1213 (10th Cir. 2010).

Defendants' argument for qualified immunity is not that these propositions were not clearly established by 2013. Instead, defendants complain that these principles have not previously been applied specifically to "hold[] that warrantless

access to a prescription drug database by law enforcement personnel is a violation of an individual's constitutional rights." Defs.' Br. 35. But the Supreme Court has rejected the proposition that qualified immunity must be granted absent previous cases whose facts were "materially similar" to the facts at issue; "[t]his rigid gloss on the qualified immunity standard … is not consistent with our cases." *Hope v. Pelzer*, 536 U.S. 730, 739 (2002). As the Court recently reiterated, "[w]e do not require a case directly on point[.]" *Mullenix v. Luna*, 136 S. Ct. 305, 308 (2015) (per curiam). Rather, qualified immunity should be denied if "in the light of pre-existing law the unlawfulness [is] apparent." *Anderson v. Creighton*, 483 U.S. 635, 640 (1987); *accord Hope*, 536 U.S. at 739. Thus, "there need not be precise factual correspondence between earlier cases and the case at hand." *Anderson v. Blake*, 469 F.3d 910, 913 (10th Cir. 2006).

Refusing to hold officers responsible for making a basic inferential step would turn the "reasonable officer" of the qualified immunity analysis into an uncommonly foolish officer. If an officer knows that entering a private home is a search and that a search requires a warrant, it defies belief that he would not know — and would not be expected to know — that entering a private home requires a warrant. The same principle applies here. The Supreme Court and this Court have rejected the view that courts must spoonfeed officers every application of the law in order for them to know what the Constitution prohibits.

Accordingly, *Douglas*'s characterization of the issue "[w]hether a warrant is required to conduct an investigatory search of prescription records" as "an issue that has not been settled," 419 F.3d at 1103, was true when written, but not afterward, because the Court in *Douglas* itself clarified that prescription drug records fall within an individual's reasonable expectation of privacy. *Id.* at 1099. A reasonable officer is charged with being able to apply the warrant requirement to any invasion of a reasonable expectation of privacy, so *Douglas* effectively settled the law.

Defendants also suggest that Utah law's authorization of Woods's conduct demonstrated that Woods was not acting clearly unlawfully. But as this Court has explained, "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." *Roska ex rel. Roska v. Sneddon*, 437 F.3d 964, 972 (10th Cir. 2006). In light of the two clearly established principles of law identified above, Woods's conduct did "patently violate[] the Constitution."

## V. DEFENDANTS VIOLATED THE FAIR CREDIT REPORTING ACT.

Defendants begin their FCRA argument by pointing out that plaintiffs have not cited "a *single* case holding that law enforcement accessing a state prescription drug database and the [sic] using that information in a criminal investigation

constitutes a violation of the Fair Credit Reporting Act." Defs.' Br. 37. Defendants appear to be extrapolating qualified immunity principles to the FCRA, but defendants have neither claimed immunity for their FCRA violation nor shown that such immunity is available under that statute.

The question is simply whether defendants violated the statute. Defendants do not dispute that the records at issue were consumer reports. *See* Opening Br. 47-51. Rather, defendants rely entirely on the statutory exception for an "investigation" into either (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). The implication of defendants' position is that such an "investigation" can be of anyone without regard to any individualized suspicion directed at a particular employee.

As plaintiffs have explained, that view is unreasonably broad. Opening Br. 52-54. In the first clause, § 1681a(y)(1)(B)(i), the text uses the term "suspected" to modify "misconduct." The exception does not cover roving inquisitions seeking to uncover "misconduct" but rather targeted inquiry where "misconduct" is "suspected." Here, neither Pyle nor Jones was "suspected" of any "misconduct" when the search of their prescription drug records was undertaken. A20; A172.

As to the second clause, § 1681a(y)(1)(B)(ii), if individualized suspicion were not required, any background check of any employee would be allowed because it is directed at ensuring generalized "compliance" with law or employer policy. Courts have rightly rejected this approach. *E.g.*, *Freckleton v. Target Corp.*, 81 F. Supp. 3d 473, 481-82 (D. Md. 2015). Additionally, in the absence of an individualized suspicion requirement, employers would have the unilateral power to broaden the circumstances and the types of records that they could seek, by adopting a "preexisting written polic[y]" that implicates more types of information.

Defendants end with two brief points premised on misreadings of the FCRA. Defendants argue that the reason for plaintiffs' suspensions was the criminal charges filed against them, not their prescription drug records. Defs.' Br. 40-41. But the violation at issue does not depend on why or even whether the plaintiffs were suspended, because what the statute prohibits is "procur[ing] a consumer report … for employment purposes." 15 U.S.C. § 1681b(b)(2)(A). As plaintiffs alleged, their prescription drug records were *procured* in connection with a theft at plaintiffs' workplace and with the intent of using the records for employment as well as law-enforcement purposes. A18 (¶ 61); A169 (¶ 62). The precise role the records subsequently played in plaintiffs' suspension does not diminish the violation, which was complete when the records were "procure[d]."

Defendants also appear to argue that the relevant duty created by the FCRA concerns only an employer. Defs.' Br. 41. However, the statutory prohibition is directed at any "person" who "procures" the consumer report for employment purposes, not just an employer who subsequently uses it. *See* 15 U.S.C. § 1681b(b)(2)(A) ("a *person may not procure* a consumer report, or cause a consumer report to be procured, for employment purposes," absent exceptions (emphasis added)).

## 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.

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Respectfully submitted,

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## 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 6,976 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 May 11, 2016, I served this brief by ECF on all registered counsel for appellees.

/s/ Scott Michelman