Case No. 18-40491

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

COURTNEY MORGAN,

Plaintiff - Appellee,

v.

MARY CHAPMAN; JOHN KOPACZ,

Defendants - Appellants.

On appeal from the United States District Court
for the Southern District of Texas, Victoria
Case No. 6:17-CV-0004
Judge Kenneth M. Hoyt presiding

AMICUS CURIAE BRIEF OF THE ASSOCIATION OF AMERICAN PHYSICIANS & SURGEONS IN SUPPORT OF PLAINTIFF-APPELLEE COURTNEY MORGAN, IN SUPPORT OF AFFIRMANCE

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CERTIFICATE OF INTERESTED PERSONS

The case number for this *amicus curiae* brief is No. 18-40491, *COURTNEY MORGAN, Plaintiff-Appellee v. MARY CHAPMAN; JOHN KOPACZ, Defendants-Appellants.*

Amicus Curiae Association of American Physicians & Surgeons, is a non-profit corporation which has no parent corporation, and no publicly held corporation owns 10% or more of its stock.

Pursuant to the fourth sentence of Circuit Rule 28.2.1, the undersigned counsel of record certifies that the parties' list of persons and entities having an interest in the outcome of this case is complete, to the best of the undersigned counsel's knowledge, with the following additions:

Association of American Physicians & Surgeons, *Amicus Curiae*

Andrew L. Schlafly, counsel for *Amicus Curiae*.

These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

/s/ Andrew L. Schlafly
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Dated: September 6, 2018

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Pages**

Constitution and Rule

Other

IDENTITY, INTEREST AND AUTHORITY TO FILE[1]

Amicus curiae Association of American Physicians & Surgeons ("AAPS" or "*Amicus*") is a non-profit corporation founded in 1943. AAPS defends the practice of private, ethical medicine, including preservation of the sanctity of the patient-physician relationship. The U.S. Supreme Court has made use of *amicus* briefs submitted by AAPS in high-profile cases. *See, e.g.*, *Stenberg v. Carhart*, 530 U.S. 914, 933 (2000); *id*. at 959, 963 (Kennedy, J., dissenting); *District of Columbia v. Heller*, 554 U.S. 570, 704 (2008) (Breyer, J., dissenting). The Third Circuit also cited an *amicus* brief by AAPS in the first paragraph of one of its decisions. *See Springer v. Henry*, 435 F.3d 268, 271 (3d Cir. 2006). The Illinois Supreme Court has made use of an *amicus* brief submitted by AAPS. *See Valfer v. Evanston Nw. Healthcare*, 2016 IL 119220, ¶ 33, 402 Ill. Dec. 398, 408, 52 N.E.3d 319, 329 (discussing an amicus brief which was filed by the Association of American Physicians & Surgeons).

AAPS has members who practice medicine within the jurisdiction of this Court, and who rely on confidentiality in the medical records they keep for their patients. The decision in this case will likely affect how AAPS members continue

[1] All parties have stated that they do not oppose the filing of this brief by *Amicus*. Pursuant to FED. R. APP. P. 29(a)(4)(E), undersigned counsel certifies that: counsel for the *Amicus* authored this brief in whole; no counsel for a party authored this brief in any respect; and no person or entity – other than *Amicus*, its members, and its counsel – contributed monetarily to this brief's preparation or submission.

to practice medicine and keep medical records, and thus AAPS has direct and vital interests in the issues presented here.

STATEMENT OF THE CASE

This case consists of yet another warrantless search perpetrated by Texas Medical Board ("TMB") officials in violation of the Fourth Amendment, this time against the family medicine practice of Plaintiff-Appellee Dr. Morgan. Once again, the State seeks immunity for its repeated violations of this essential constitutional right, an immunity that would render as a dead letter the Fourth Amendment rights of patients and physicians. Despite how the U.S. Supreme Court increasingly strengthens protections under the Fourth Amendment, including as recently as its just-completed Term, government officials at the TMB have continued to violate it with impunity.

The Fifth Circuit has seen multiple examples of these Fourth Amendment violations, most notably twice in the last six months. In *Cotropia v. Chapman*, 721 F. App'x 354 (5th Cir. 2018) (*per curiam*), a unanimous panel of this Court reversed a finding of qualified immunity for the same Defendant Chapman on facts indistinguishable from those at bar. But in *Zadeh v. Robinson*, No. 17-50518, 2018 U.S. App. LEXIS 24914 (5th Cir. Aug. 31, 2018), where a different panel of this Court unanimously found a Fourth Amendment violation, two out of the three judges ruled that qualified immunity should shield the wrongdoers. Despite a

strong concurrence objecting to the denial of legal accountability for a constitutional violation that all judges agreed had occurred, the panel majority in *Zadeh* invoked qualified immunity to protect the wrongdoing. But the facts of this case at bar are more egregious than in *Zadeh*, and the *Cotropia* ruling is more consistent with controlling Supreme Court authority and the important values at stake in the Fourth Amendment. There should not be any qualified immunity to protect the wrongdoing here.

The lower court in this case was correct to deny qualified immunity for TMB officials who perpetrated the Fourth Amendment violations against Dr. Morgan. "The evidence shows that defendants entered the plaintiff's offices without a search warrant and conducted a search without the plaintiff's consent and in the absence of exigent circumstances. Clearly, the defendants were searching for contraband or other illegal activity that was presumed by them in advance of the search." (Slip Op. at 9, RE 18-40491.450) Based on that factual finding, the trial court was correct to rule that "[t]his conduct presumably violated clearly established state and federal law." (*Id.*) The decision below should be affirmed.

SUMMARY OF ARGUMENT

The Fourth Amendment is not a mere "second class" right, inferior to other constitutional rights. As a chorus of criticism grows against how courts are marginalizing the Second Amendment as a second class right, let us not forget that

Fourth Amendment safeguards are essential to the Second Amendment right, because patient medical records contain highly personal, sensitive information that includes their gun ownership as well as sexual histories. Allowing intrusions upon Fourth Amendment rights in medical records constitutes an infringement on multiple other constitutional rights.

The U.S. Supreme Court, this Fifth Circuit, and the trial court below have all ruled in favor of strong Fourth Amendment rights, and the recent concurrence by Judge Willett in *Zadeh* criticizes applying qualified immunity to protect constitutional violations. Undeterred, however, Appellants demand qualified immunity for Fourth Amendment violations by the TMB which never seem to stop. Rights of patients and physicians are being repeatedly infringed by TMB officials, and qualified immunity should not be misused to shut down all legal accountability. If for no other reason, qualified immunity for these ongoing violations should be rejected in order to deter future violations of Fourth Amendment rights by the same Texas Medical Board.

Full Fourth Amendment safeguards for medical records are essential to the practice of good medicine, just as a robust attorney-client relationship is essential to the productive practice of law. Violations of the Fourth Amendment by public officials compel legal accountability. When a search of a physician's office is justified, then a valid search warrant can and should be obtained. But in the

absence of that essential procedure of pre-compliance judicial review, physicians can no longer be confident that their medical advice, notes and personalized data inserted into medical charts will be kept private, and patients are deprived of confidentiality in their intimate disclosures to physicians. When six of nine Supreme Court Justices agree that location data stored by cell phone companies is protected by the Fourth Amendment, as they held in *Carpenter v. United States* in June, then medical records are also protected and no qualified immunity should extend to violators. Put another way, physician's offices should enjoy as much protection against administrative searches as occupants in housing projects do, and the Fourth Amendment has long applied fully to both. Violations of those should not be shielded by qualified immunity.

Finally, the request by the attorneys for the TMB officials, in their appellate brief here, for ***absolute*** immunity is particularly unjustified. None of the rationales for absolute immunity should extend to TMB officials. They are not making decisions about which cases to prosecute criminally, and their decisions about searching physicians' offices do not have the inherent safeguards of a judge, jury and right to appeal. Rather, the invasion of privacy by officials who perpetrate a warrantless search is immediate and irreversible, and there is no plausible basis for applying absolute immunity to such conduct.

ARGUMENT

I. The Fourth Amendment Is Not a Vague "Second-Class" Right for which Broad Qualified Immunity Should Shield Wrongdoing.

There is nothing vague, murky, or ill-defined about the application of the Fourth Amendment to protect highly personal information, such as medical records, against searches. As the U.S. Supreme Court made clear long ago, the Fourth Amendment is one of the "civil-rights Amendments having the paramount importance equal to that of the First, Second, Fifth and Sixth Amendments." *Johnson v. Eisentrager*, 339 U.S. 763, 784 (1950). Attempts to reduce the Fourth Amendment to a "second-class" right, by granting sweeping immunity to infringers, should be rejected just as many judges on this Fifth Circuit have properly rejected a dilution of the Second Amendment. *See Mance v. Sessions*, 896 F.3d 390, 398 (5th Cir. 2018) (Ho, Jones, Smith, Elrod, Willett, Duncan, and Engelhardt, JJ., dissenting from the denial of rehearing en banc); *cf. id.* at 391 (Higginson, J., concurring from the denial of rehearing banc) ("I do not read the panel opinion as demoting the Second Amendment to second-class status").

The non-precedential decision of this Court earlier this year in *Cotropia* was correct in denying qualified immunity to the very same Board agent, Defendant Chapman, for having conducted a warrantless search of another physician's office.

Cotropia v. Chapman, 721 F. App'x 354, 358 (5th Cir. 2018). Citing Supreme Court precedent dating back to 1967, this Court held in *Cotropia* that:

> [Supreme Court precedents] make it clear that, prior to compliance, Cotropia was entitled to an opportunity to obtain review of the administrative subpoena before a neutral decisionmaker. Cotropia has pleaded facts that show no such opportunity was provided here. Spaugh, who was on the premises, expressly told Chapman that she was not the custodian of the records. Over Spaugh's objection, Chapman took and copied documents from the front desk of the office. As Chapman immediately executed the subpoena after serving it, Cotropia had no opportunity to obtain precompliance review.

Id. at 358 (citing *See v. City of Seattle*, 387 U.S. 541, 545 (1967), and *Donovan v. Lone Steer, Inc.*, 464 U.S. 408, 415 (1984)). This Court accordingly decided that qualified immunity was not available to Defendant Chapman in that case for conducting an immediate search without a warrant, and without any opportunity to obtain review by a neutral decisionmaker prior to the search.

There are three essential protections that are inherent in the warrant requirement of the Fourth Amendment, as the Supreme Court has explained in interpreting its language:

> Finding these words to be "precise and clear," *Stanford* v. *Texas*, 379 U.S. 476, 481 (1965), this Court has interpreted them to require only three things. First, warrants must be issued by neutral, disinterested magistrates. See, *e. g., Connally* v. *Georgia*, 429 U.S. 245, 250-251 (1977) *(per curiam); Shadwick* v. *Tampa*, 407 U.S. 345, 350 (1972); *Coolidge* v. *New Hampshire*, 403 U.S. 443, 459-460 (1971). Second, those seeking the warrant must demonstrate to the magistrate their probable cause to believe that "the evidence sought will aid in a particular apprehension or conviction" for a particular offense. *Warden* v. *Hayden*, 387 U.S. 294, 307 (1967). Finally,

> "warrants must particularly describe the 'things to be seized,'" as well as the place to be searched.

Dalia v. United States, 441 U.S. 238, 255 (1979).

None of these three requirements are burdensome, as long as there is a valid basis for the search. Issuance of a warrant by a "neutral, disinterested" magistrate is a necessary check against prosecutorial or investigatory abuse. If there is a valid basis to search a physician's office, then this is not a difficult requirement to require obtaining a search warrant first. When there is no such justification for the search, then this should be an insurmountable hurdle.

Similarly, the requirement of a showing of probable cause is undemanding, but essential. Equally important is the Fourth Amendment safeguard that the search be limited to items specifically mentioned in the warrant. When warrants are improperly bypassed, as here, then there is an unlimited invasion of privacy.

In *Cotropia*, there was no "opportunity to obtain review of the administrative subpoena before a neutral decisionmaker." *Cotropia v. Chapman*, 721 F. App'x at 358. Likewise there was no such opportunity here. As ably explained by Dr. Morgan's brief, he was ambushed by the investigators and locked in a room while they seized his records. (Morgan Br. 2) He had no opportunity to obtain review by a neutral decisionmaker. Defendants do not dispute this in their

brief. (Defs. Br. 4) The outcome here should be the same that it was in *Cotropia*: qualified immunity should be denied.

Though non-precedential, *Cotropia* should have guided the result in the *Zadeh* case. Instead, two judges downplayed *Cotropia* and distinguished it on factual differences that are not relevant here. The facts here are foursquare with those in *Cotropia*, and its denial of qualified immunity should be the same result here. The facts in the *Zadeh* case were quite different in that the lead defendant in that case was the Executive Director of the Texas Medical Board, Mari Robinson, who did not participate in the search itself. Moreover, in *Zadeh*, there was "no evidence Defendants Pease and Kirby inspected Plaintiff's office or searched his records." (*Zadeh*, Slip Op. at 4) Here, "CHAPMAN, KOPACZ and the TMB agents searched the premises for over (6) six hours under CHAPMAN's direction, including closed and locked drawers, cabinets and boxes." (Sec. Am. Comp. ¶ 43, RE 18-40491.320) The facts here are thus distinguishable from those in *Zadeh*.

Indeed, for many patients their Fourth Amendment rights are needed to protect their Second Amendment rights, because their medical records contain information about their gun ownership. Medical guidelines and organizations cause physicians to ask their patients about their ownership of guns, and even question children as to whether their parents have guns at home. Physicians are being told, even required, to ask children about gun ownership in their homes,

thereby incriminating a parent if a prior conviction makes it a crime for him to possess a gun. The American Academy of Pediatricians has recommended since 2000 that "pediatricians incorporate questions about guns into their patient history taking[,] and urge parents who possess guns to remove them, especially handguns, from the home." *See* Brian Falls, "Legislation prohibiting physicians from asking patients about guns," *Journal of Psychiatry & Law* (Fall 2011) [hereinafter, "*Falls*"] (citing American Academy of Pediatrics Committee on Injury and Poison Prevention, 2000, p. 893). Both the American Academy of Pediatrics and the American Academy of Family "'recommend that pediatricians ***incorporate questions about firearms into the patient history process*** and ... have policies stating that firearm safety education to patients ***is a necessity***.'" *Wollschlaeger v. Governor,* 848 F.3d 1293, 1302 (11th Cir. 2017) (*en banc*, quoting its Joint Statement of Undisputed Facts, emphasis added). The American Psychiatric Association likewise issued guidelines in 2003 insisting that physicians ask every potentially suicidal patients whether they have a gun at home or at work. "[S]uch ***discussions should be documented in the medical record***, including any instructions that have been given to the patient and significant others about firearms or other weapons." *See Falls*, section on "Standards of care" (emphasis added, citing American Psychiatric Association Workgroup on Suicidal Behaviors, 2003, p. 23).

In Florida, a law was enacted to stop this pernicious practice, such that a physician "may not intentionally enter any disclosed information concerning firearm ownership into the patient's medical record if the practitioner knows that such information is not relevant to the patient's medical care or safety, or the safety of others." Fla. Stat. § 790.338 (Firearms Owners' Privacy Act – FOPA). But an *en banc* decision by the Eleventh Circuit invalidated this protection of gun owners as an unconstitutional infringement on free speech. *Wollschlaeger*, 848 F.3d at 1319 ("The record-keeping, inquiry, and anti-harassment provisions of [the pro-Second Amendment Florida statute] violate the First Amendment ...."). That leaves only the Fourth Amendment as a protection against this persistent back-door attempt at gun control by medical guidelines and societies compelling physicians to place information about gun ownership in medical records for investigators to view without a warrant.

The U.S. Supreme Court has emphasized that warrantless searches, including even constructive searches, are Fourth Amendment violations. Most recently, in *Carpenter v. United States*, the Supreme Court held that "the Government conducts a search under the Fourth Amendment when it accesses historical cell phone records that provide a comprehensive chronicle of the user's past movements." 138 S. Ct. 2206 (2018). The Supreme Court thereby requires a warrant to review location data from someone's cell phone records, which is

obviously less private and sensitive than one's medical records. The possession of the cell phone data by a third party did not override the privacy interests:

> Given the unique nature of cell phone location records, the fact that the information is held by a third party does not by itself overcome the user's claim to Fourth Amendment protection. Whether the Government employs its own surveillance technology as in *Jones* or leverages the technology of a wireless carrier, we hold that an individual maintains a legitimate expectation of privacy in the record of his physical movements as captured through [cell-site location information]. The location information obtained from Carpenter's wireless carriers was the product of a search.

Carpenter v. United States, 138 S. Ct. 2206, 2217 (2018).

The *Carpenter* decision dispelled any doubt about whether third-party doctrine can be properly used to circumvent reasonable expectations of privacy in materials held by entities other than the individual asserting the claim. One can hardly doubt that physicians and patients have a legitimate expectation of privacy in the confidentiality of their medical records, and have a property interest that would also qualify for Fourth Amendment protection under the view espoused by Justices Scalia, Thomas and Gorsuch. *See Carpenter*, 138 S.Ct. at 2235 (Thomas, J., dissenting) ("*whose* property was searched" is the touchstone) (citing *Minnesota* v. *Carter*, 525 U.S. 83, 92 (1998) (Scalia, J., concurring)); *Carpenter*, 138 S. Ct. 2206, 2272 (2018) (Gorsuch, J., dissenting) ("Plainly, customers have substantial legal interests in this information, including at least some right to include, exclude,

and control its use. Those interests might even rise to the level of a property right" entitling it to Fourth Amendment protection.)

Sweeping use of qualified immunity, as sought by the State of Texas here, would obstruct any meaningful accountability for TMB officials as it repeatedly engages in violations of the Fourth Amendment to the detriment of physicians and patients alike. Qualified immunity should be denied.

II. None of the Rationales for Qualified Immunity Exists Here.

None of the rationales for applying qualified immunity exists here. Defendants' insistence on an immediate search of medical records, without any opportunity for pre-compliance review, plainly infringes on the Fourth Amendment as any law student would recognize. There is no legitimate basis for extending qualified immunity to Defendants for their conduct in perpetrating a warrantless search against Dr. Morgan, which was so obviously unconstitutional.

The primary rationale for qualified immunity is to avoid inhibiting officials in the performance of their duties. The "threat of liability can create perverse incentives that operate to inhibit officials in the proper performance of their duties." *Forrester v. White*, 484 U.S. 219, 223 (1988). But no such "perverse incentives" are even remotely plausible here. Officials and staff at the Texas Medical Board knew, or should have known, the importance of pre-compliance judicial review before perpetrating the search of private medical records.

Penalizing officials who deny physicians and patients their constitutional right to timely judicial review is needed to deter wrongdoing. The only "perverse incentives" that would result would be from immunizing infringements.

Another rationale cited for allowing qualified immunity to shield public officials from liability for infringing on constitutional rights is that such liability may cause a "deterrence of able citizens from acceptance of public office." *Harlow v. Fitzgerald*, 457 U.S. 800, 814 (1982). But there is no evidence of any shortage of "able citizens" to work for the Texas Medical Board to exercise immense authority in disciplining physicians. Recognition by this Court that a search warrant or pre-compliance judicial review is required before an official rifles through intimate medical records – and imposing legal accountability for conduct that violates that norm – would not deter candidates from seeking such positions of power. If anything, permissiveness towards the violation of this constitutional right might deter upstanding citizens from joining the TMB. Institutions of integrity attract applicants more easily than lawlessness does.

Other cited rationales for qualified immunity, likewise inapplicable here, for applying qualified immunity are to avoid the "distraction of officials from their governmental duties [and the] inhibition of discretionary action." *Harlow*, 457 U.S. at 816. Imposing liability for unlawful searches in violation of the Fourth Amendment in no way inhibits legitimate discretionary action. Valid search

warrants are not difficult to obtain when justified, and when not justified then the right to pre-compliance judicial review must be respected. Qualified immunity here is not necessary to avoid the inhibition of legitimate discretionary action. Nor is there any risk of rampant litigation over this issue that might distract governmental officials from their daily duties, once liability is imposed. In contrast, qualified immunity creates the risk of litigation over repeat violations.

The TMB has powerful tools for immediately addressing real threats to public safety, such as the much-publicized issue of prescription drug abuse, without violating the Fourth Amendment rights of physicians and their patients. At any time the TMB or the DEA can summarily suspend the ability of a physician to write prescriptions for controlled substances, or simply ask the physician to agree to hold off writing such prescriptions pending an investigation. That may be less exciting than conducting a surprise raid on a patient-filled physician's office without a warrant, but it would be more effective. To the extent patients' medical records need to be reviewed, such review can easily be properly limited to controlled-substances prescriptions, after an opportunity to redact and object, without subjecting patients' medical records to review by strangers without the patients' consent. Qualified immunity is not needed here to avoid disincentives for state officials, who can fully perform their job properly without violating the Fourth Amendment.

The Fifth Circuit has held against qualified immunity in circumstances far less compelling than this case. *See, e.g.*, *Club Retro LLC v. Hilton*, 568 F.3d 181, 195 (5th Cir. 2009) ("[W]e conclude that defendants are not entitled to qualified immunity for their entry and search of Club Retro because the unreasonable scope and manner of Operation Retro-Fit violated Club Retro, L.L.C.'s clearly established constitutional rights to be free from unreasonable searches and seizures."). Not to disparage the Fourth Amendment rights of a night club containing underage patrons and many who had outstanding warrants against them, *Amicus* respectfully submits that medical record privacy is at least as important as in *Club Retro*, and qualified immunity for a plainly unconstitutional search of medical records should be rejected here.

Finally, the TMB is an agency well-funded by the Texas legislature,[2] which would surely indemnify Defendants-Appellants for any personal liability. That process would compel the TMB to fully address and correct the constitutional violations that its agency is perpetrating through misuse of administrative subpoena instanters, for which there is no legitimate need. Qualified immunity here, with its attendant loss in legal accountability, would make it less likely that

[2] http://www.tmb.state.tx.us/idl/55CABFA2-3D66-6185-0EC7-BDDA8EF5B03D (viewed 9/3/2018).

the TMB will respect the Fourth Amendment rights of physicians and patients in the future.

III. This Court Should Reject the Use of the "Subpoena Instanter" Against Medical Offices in Texas, Which Is Contrary to the Fourth Amendment.

A "subpoena instanter" is wholly inappropriate for unexpected, immediate searches of medical offices. Such subpoenas might make sense occasionally to obtain quick response during a trial, but are entirely improper as an administrative means for circumventing the warrant requirement. Subpoenas instanters are almost non-existent outside of the jurisdiction of the Fifth Circuit. Most of the other Circuits lack a single reference to the term, and when it is used it is typically in connection with providing testimony, not searching someone's office without a warrant.

The last reference to a subpoena instanter by the U.S. Supreme Court was apparently as long ago as 1935, and that was in connection with a subpoena requiring an individual to appear before a U.S. Senate committee to explain his allowance of the destruction of documents. *Jurney v. MacCracken*, 294 U.S. 125, 145 (1935). It was an abuse of power for the TMB to use a subpoena instanter to search, without any opportunity for pre-compliance judicial review, entire medical records of non-consenting patients. Most of the other Courts of Appeals do not have a single reported case concerning a subpoena instanter, by which the TMB

infringed upon Fourth Amendment rights here.

Mere administrative subpoenas cannot properly bypass the right to pre-compliance review in court, because administrative subpoenas lack the essential safeguards of search warrants. Administrative searches of housing projects to search for guns and illegal drugs during the Clinton Administration were widely criticized, and struck down:

> Police made random, warrantless and suspicionless searches of entire public apartment buildings. The prime objective of the sweeps was to seize guns. Judge Wayne Anderson of the U.S. District Court for the Northern District of Illinois ruled that these searches were unconstitutional. Emotions and frustrations ran high amidst the outcry that followed, and President Clinton quickly proposed a policy aimed at making the housing projects of America safer. The recommended policy gave police greater power to search without a warrant … [and sought] to require tenants of the housing projects to waive their "privacy" rights and consent to the warrantless searches.

Geoffrey G. Hemphill, "The Administrative Search Doctrine: Isn't This Exactly What the Framers Were Trying To Avoid?" 5 REGENT U. L. REV. 215, 216 (1995) (footnotes omitted).[3] Surely physicians and patients have as much rights.

Where, as here, a state official misuses an administrative subpoena in order to accomplish what requires a search warrant, that is a clear violation of the Fourth Amendment for which legal accountability is essential. When Fourth Amendment rights are so severely violated by the State, on a matter concerning such highly

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3 https://www.regent.edu/acad/schlaw/student_life/studentorgs/lawreview/docs/issues/v5/5RegentULRev215.pdf (viewed 9/3/18).

private information such as gun ownership and sexual histories as contained in medical records, then there needs to be a meaningful remedy for the infringement.

"Wherever a man may be, he is entitled to know that he will remain free from unreasonable searches and seizures." *Katz v. United States*, 389 U.S. 347, 359 (1967). The conduct by the TMB at issue here flies in the face of that fundamental liberty. The patients who had their entire medical records searched by the TMB could have included present or future political candidates, or any individual who becomes understandably upset when his or her most intimate personal details are rifled through by strangers. Compared with the many far-flung instances in which the Supreme Court has held there to be a reasonable expectation of privacy deserving protection under the Fourth Amendment, such as the undercarriage of one's automobile (with respect to a tracking device), medical records possessed by physicians are plainly within full Fourth Amendment protection. *See, e.g., United States v. Jones*, 565 U.S. 400 (2012) (Scalia, J.) (holding that GPS tracking of an automobile's movements constitute a search under the Fourth Amendment).

For many patients who have distant prior convictions and even some who do not, gun ownership is a crime resulting in automatic mandatory minimum jail sentences. With such highly personal information in patient medical records, there must be legal accountability for unlawful searches of those records by government.

Use of a "subpoena instanter" to search medical offices is contrary to well-established precedents dating back decades. Nearly two decades ago, in *Ferguson v. City of Charleston*, the U.S. Supreme Court invalidated an analogous invasion of medical privacy by a public hospital that conducted suspicion-less drug screening of pregnant women's urine, for the legitimate goal of reducing an epidemic of crack babies. 532 U.S. 67, 70-71, 77 (2001). The governmental interest here is weaker than the goal in *Ferguson*.

In a landmark decision 40 years ago, the Supreme Court emphasized the constitutional right in medical record privacy. *See Whalen v. Roe*, 429 U.S. 589, 607 (1977) ("[T]he Constitution puts limits not only on the type of information the State may gather, but also on the means it may use to gather it."). A half-century before that, Justice Holmes explained while writing for the Supreme Court that a seizure of corporate documents analogous to the search here was "an outrage which the Government now regrets." *Silverthorne Lumber Co. v. United States*, 251 U.S. 385, 391 (1920), *overruled on other grounds by United States v. Havens,* 446 U.S. 620 (1980)). Justice Holmes emphasized that regret is not enough, and there must be additional consequences to the wrongdoing: "the rights of a corporation against unlawful search and seizure are to be protected even if the same result might have been achieved in a lawful way." 251 U.S. at 392. The remedy was to quash the subpoenas to prevent an unlawful benefit.

But these precedents of the U.S. Supreme Court, including the exclusion of evidence, have not been enough to deter TMB officials from repeatedly infringing on the Fourth Amendment. A remedy more meaningful than merely excluding evidence is necessary. It is not enough to consider an area of law to be unclear and thereby apply qualified immunity to protect repeated infringement on Fourth Amendment rights concerning medical records. Real violations need deterrence by real remedies.

The U.S. Supreme Court has made it abundantly clear that government agents, such as the Texas Medical Board, cannot properly decide for themselves when to invade privacy. As the Supreme Court explained 70 years ago:

> The point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. ***Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime***. Any assumption that evidence sufficient to support a magistrate's disinterested determination to issue a search warrant will justify the officers in making a search without a warrant would reduce the Amendment to a nullity and leave the people's homes secure only in the discretion of police officers. … When the right of privacy must reasonably yield to the right of search is, as a rule, to be decided by a judicial officer, not by a … government enforcement agent.

Johnson v. United States, 333 U.S. 10, 13-14 (1948) (emphasis added). The *Johnson* Court emphasized that the search without a warrant of a hotel room was a violation of the Fourth Amendment, even though the Court found that the officers

likely had probable cause to obtain a warrant. *See id.* at 15. "If the officers in this case were excused from the constitutional duty of presenting their evidence to a magistrate, it is difficult to think of a case in which it should be required." *Id.*

Long ago the Supreme Court likewise held that mere subpoenas, analogous to the subpoena instanter used below, may not be used to circumvent the Fourth Amendment requirement of a warrant. Nearly 50 years ago, the Supreme Court explained as follows:

> the subpoena involved here could not in any event qualify as a valid search warrant under the Fourth Amendment, for it was issued by the District Attorney himself, and thus omitted the indispensable condition that "the inferences from the facts which lead to the complaint '... be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime.' *Johnson* v. *United States*, 333 U.S. 10, 14." *Giordenello* v. *United States*, 357 U.S. 480, 486. … Thus, ***there can be no doubt*** that under this Court's past decisions the search of [defendant's] office was "unreasonable" within the meaning of the Fourth Amendment.

Mancusi v. DeForte, 392 U.S. 364, 371-72 (1968) (emphasis added). Similarly, "there can be no doubt" that the search at bar violated the Fourth Amendment.

Defendants' appellate brief relies heavily on the *Beck* decision in arguing for uncertainty about the infringement on Fourth Amendment rights. (Defs. Br. 40-41, citing *Beck v. Tex. State Bd. of Dental Exam'rs*, 204 F.3d 629, 639 (5th Cir. 2000) ("[T]he inspection programs provided an adequate substitute for a warrant."), *cert. denied*, 531 U.S. 871 (2000)). But unlike here, both *Beck* and *Villamonte-*

Marquez, upon which *Beck* relied, involved "valid statutory schemes," and neither allowed intrusion on medical record privacy potentially containing gun ownership and sexual history information. *See United States v. Villamonte-Marquez*, 462 U.S. 579, 584-85 (1983) (searching for illegal drugs on a ship).

IV. Absolute Immunity Is Unavailable to Defendant Chapman.

Not content with merely qualified immunity, Defendant Chapman demands absolute immunity, relying primarily on a footnote in a concurring opinion by Justice Ginsburg, which no other Justice joined, in *Albright v. Oliver*, 510 U.S. 266, 279 n.5 (1994) (Ginsburg, J., concurring) ("A right to sue someone who is absolutely immune from suit would hardly be a right worth pursuing."). Justice Ginsburg's conclusion is obvious enough, but militates against a finding of absolute immunity for the alleged Fourth Amendment violations by Defendant Chapman.

Defendant Chapman is not a prosecutor; the scope of absolute immunity does not and should not extend to those who engage in wrongdoing to spark a prosecution against a target. No such absolute immunity existed at common law and no statute provides for it. Prosecutors enjoy common-law immunity only for actions "intimately associated with the judicial phase of the criminal process." *Imbler v. Pachtman*, 424 U.S. 409, 430 (1976).

None of the rationales for conferring absolute immunity on a prosecutor exist here. As explained by the Fifth Circuit in rejecting a claim for absolute immunity for an unreviewable action taken by a prosecutor, no such immunity should apply where, as here, there is no underlying policy interest justifying it. "Immunity is … necessary to prevent [a prosecutor] from shying away from weaker cases out of fear of liability." *Lampton v. Diaz*, 639 F.3d 223, 228 (5th Cir. 2011) No such rationale exists here to immunize Chapman's infringement on Dr. Morgan's Fourth Amendment rights. "There is thus no 'prosecutorial discretion' to protect" where, as here, the activity is not a prosecutor herself deciding which cases to prosecute. *Id.*

Other rationales for absolute immunity likewise do not exist here. "[I]mmunity lessens the burden of litigation on prosecutors. Without immunity, the 'frequency with which criminal defendants bring [retaliatory] suits' would 'impose unique and intolerable burdens upon a prosecutor responsible annually for hundreds of indictments and trials.'" *Id. (*quoting *Van de Kamp v. Goldstein*, 555 U.S. 335, 342 (2009), which quotes *Imbler*, 424 U.S. at 425-26). But Chapman does not handle "hundreds of indictments and trials." She does not handle any prosecutions at all. She is entirely an agent of the Texas Medical Board and has no prosecutorial decision-making authority.

An additional justification is lacking here for absolute immunity, whereby "[a] defendant has the protections of judge, jury, and the appellate process to review any prosecutorial misconduct at trial." Dr. Morgan has no such protections against the infringement on his Fourth Amendment rights. Here, as in *Lampton*, the wrongdoing by an official "is un-reviewable, and the harm is inflicted immediately. Thus, a civil suit is the only way to make the defendant whole. In short, policy does not support the extension of prosecutorial immunity in this context." *Lampton*, 639 F.3d at 229.

Absolute immunity should not extend to Defendant Chapman.

CONCLUSION

There was no error of law or abuse of discretion in the district court's decision in ruling against qualified immunity, and its decision should be affirmed.

Respectfully submitted,

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Dated: September 6, 2018

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CERTIFICATE OF SERVICE

No. 18-40491, *Morgan v. Chapman, et al.*

I hereby certify that, on September 6, 2018, I electronically filed the foregoing brief with the Clerk of the Court for the U.S. Court of Appeals for the Fifth Circuit by using the Appellate CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the CM/ECF system.

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CERTIFICATE OF COMPLIANCE

1. This brief has been prepared using 14-point, proportionately spaced, serif typeface, in Microsoft Word.

2. This brief complies with FED. R. APP. P. 29(a)(5) and 32(a)(7)(B) because it contains a total of 5,804 words, excluding material not counted under Rule 32(f).

Dated: September 6, 2018

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