

No. 20-3075

---

---

IN THE UNITED STATES COURT OF APPEALS  
FOR THE SIXTH CIRCUIT

---

**IN RE CVS PHARMACY, INC.; OHIO CVS STORES L.L.C.;  
DISCOUNT DRUG MART, INC.; GIANT EAGLE, INC.;  
HBC SERVICE COMPANY; RITE AID OF MARYLAND, INC. D/B/A MID-  
ATLANTIC CUSTOMER SUPPORT CENTER; RITE AID OF OHIO, INC.;  
RITE AID HDQTRS. CORP.; WALGREEN CO.;  
WALGREEN EASTERN CO.; AND WALMART INC.,**

*Petitioners–Defendants.*

---

On Mandamus from the United States District Court  
for the Northern District of Ohio, Eastern Division, No. 1:17-md-2804

---

**BRIEF OF *AMICI CURIAE* AMERICAN CIVIL LIBERTIES UNION AND  
AMERICAN CIVIL LIBERTIES UNION OF OHIO  
IN SUPPORT OF NEITHER PARTY**

Freda J. Levenson  
(0045916)  
American Civil Liberties  
Union of Ohio  
Foundation  
4506 Chester Avenue  
Cleveland, OH 44103  
Tel: (614) 586-1972  
Fax: (614) 586-1974  
flevenson@acluohio.org

David J. Carey  
(0088787)  
American Civil Liberties  
Union of Ohio  
Foundation  
1108 City Park Avenue,  
Suite 203  
Columbus, OH 43206  
Tel: (614) 586-1972  
Fax: (614) 586-1974  
dcarey@acluohio.org

Nathan Freed Wessler  
Brett Max Kaufman  
American Civil Liberties  
Union Foundation  
125 Broad Street, 18th Fl.  
New York, NY 10004  
Tel: (212) 549-2500  
Fax: (212) 549-2654  
nwessler@aclu.org  
bkaufman@aclu.org

## **CORPORATE DISCLOSURE STATEMENT**

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

/s/ Nathan Freed Wessler  
Nathan Freed Wessler

## TABLE OF CONTENTS

INTEREST OF AMICI CURIAE.....	vi
SUMMARY OF ARGUMENT .....	1
ARGUMENT .....	2
I. Disclosure of Highly Sensitive Prescription Information Implicates Constitutional Privacy Concerns.....	2
A. The discovery order involves a huge quantity of highly sensitive information.....	3
B. Patients have constitutionally protected privacy interests in the sensitive prescription records held by the Pharmacy Defendants.....	5
1. Prescription records are protected by the Due Process Clause.....	6
2. Prescription records are protected by the Fourth Amendment.....	7
a. Prescription records merit protection because they are highly sensitive.....	8
b. Prescription records merit protection because they are not voluntarily shared.....	10
C. The Pharmacy Defendants may properly raise the constitutional privacy interests of their patients.....	11
II. This Court Should Order Additional Protective Measures to Mitigate the Risk of Harm.....	12
A. De-identification.....	13
B. Limitations on production .....	15
C. Prohibition on law enforcement access .....	16
D. Special Master .....	16
CONCLUSION .....	17
CERTIFICATE OF COMPLIANCE.....	19
CERTIFICATE OF SERVICE .....	20
DESIGNATION OF RELEVANT DISTRICT COURT DOCUMENTS .....	21

**TABLE OF AUTHORITIES**

**Cases**

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

*Doe v. Broderick*,  
 225 F.3d 440 (4th Cir. 2000).....4, 7

*Doe v. Se. Pa. Transp. Auth.*,  
 72 F.3d 1133 (3d Cir. 1995) .....6

*Douglas v. Dobbs*,  
 419 F.3d 1097 (10th Cir. 2005) .....6

*Ferguson v. City of Charleston*,  
 532 U.S. 67 (2001) .....8

*Heartland Acad. Cmty. Church v. Waddle*,  
 427 F.3d 525 (8th Cir. 2005) .....12

*Humphreys v. Drug Enf't Admin.*,  
 96 F.3d 658 (3d Cir. 1996) .....13

*In re Grand Jury Subpoenas*,  
 454 F.3d 511 (6th Cir. 2006) .....17

*In re Lott*,  
 424 F.3d 446 (6th Cir. 2005) .....2

*Jaffee v. Redmond*,  
 518 U.S. 1 (1996) .....5

*John B. v. Goetz*,  
 531 F.3d 448 (6th Cir. 2008) ..... 11, 12

*Kallstrom v. City of Columbus*,  
 136 F.3d 1055 (6th Cir. 1998) .....6

*Or. Prescription Drug Monitoring Program v. U.S. Drug Enf't Admin.*,  
 998 F. Supp. 2d 957 (D. Or. 2014).....7, 9

*Powers v. Ohio*,  
499 U.S. 400 (1991) .....12

*Smith v. Maryland*,  
442 U.S. 735 (1979) .....8

*State v. Skinner*,  
10 So. 3d 1212 (La. 2009) .....7

*Thurman v. State*,  
861 S.W.2d 96 (Tex. Ct. App. 1993) .....10

*Tucson Woman’s Clinic v. Eden*,  
379 F.3d 531 (9th Cir. 2004) .....7

*U.S. ex rel. Chandler v. Cook Cty., Ill.*,  
277 F.3d 969 (7th Cir. 2002) .....11

*United States v. Miller*,  
425 U.S. 435 (1976) .....8

*Whalen v. Roe*,  
429 U.S. 589 (1977) ..... 6, 8, 13

**Statutes**

42 U.S.C. § 290dd-2.....4

Ohio Rev. Code Ann. § 2317.02.....9

**Other Authorities**

*ADHD Medications and Side Effects*, WebMD .....5

Am. Med. Ass’n, Code of Medical Ethics Opinion 3.2.1: Confidentiality .....9

Am. Pharmacists Ass’n, Code of Ethics .....9

Arvind Narayanan & Vitaly Shmatikov, *Robust De-anonymization of Large Sparse Datasets*, IEEE Symposium on Security and Privacy (2008) .....14

*Benzodiazepines*, Drugs.com .....5

*Buprenorphine*, Prescribers’ Digital Reference.....4

Digital Recognition Network.....14

*Facts and Statistics*, Anxiety and Depression Association of America .....5

James Dahlhamer, et al., *Prevalence of Chronic Pain and High-Impact Chronic Pain Among Adults — United States, 2016*,  
Morbidity and Mortality Weekly Report, Sept. 14, 2018 .....4

Jessica Su, et al, *De-anonymizing Web Browsing Data with Social Networks*,  
World Wide Web Conference 2017 .....14

Mary Madden, *Americans Consider Certain Kinds of Data to be More Sensitive than Others*, Pew Research Center, Nov. 12, 2014.....9

*Methadone hydrochloride*, Prescribers’ Digital Reference .....4

Stuart A. Thompson & Charlie Warzel, *Twelve Million Phones, One Dataset, Zero Privacy*, N.Y. Times (Dec. 19, 2019).....14

## INTEREST OF AMICI CURIAE<sup>1</sup>

The American Civil Liberties Union (“ACLU”) is a nationwide, non-profit, non-partisan public interest organization dedicated to defending civil rights and civil liberties. The ACLU of Ohio is an affiliate of the national ACLU. The protection of privacy under the Constitution and laws of the United States is of special concern to each organization. The ACLU has been at the forefront of numerous state and federal cases addressing the right to privacy, including privacy protections for prescription records.

---

<sup>1</sup> *Amici*’s motion for leave to file is being filed contemporaneously with this brief. Pursuant to Rule 29(c)(5), counsel for *amici curiae* states that no counsel for a party authored this brief in whole or in part, and no person other than *amici curiae*, their members, or their counsel made a monetary contribution to its preparation or submission.

## SUMMARY OF ARGUMENT

*Amici* write to address one discrete and important issue in this multi-district litigation (“MDL”): the serious privacy concerns raised by the district court’s discovery order requiring production of the prescription records of many millions of Americans from across the nation. (Order, R. 3055, Page ID 477516–20). Petitioners (“Pharmacy Defendants”) include the largest retail pharmacy chains in the country. Pursuant to the district court’s order, they are required to produce 13 years’ worth of detailed nationwide prescription information not only to Plaintiffs Cuyahoga and Summit Counties (“Plaintiffs”), but also presumably to the hundreds (or more) of other plaintiffs whose opiate dispensing claims against the pharmacies may be litigated in later phases of this MDL. Because the prescription records at issue—which appear to include both opioids and a host of other commonly prescribed medications, such as Xanax, Adderall, and buprenorphine—can reveal highly sensitive information about patients’ underlying medical conditions, their disclosure implicates patients’ rights under the Due Process Clause and the Fourth Amendment. In light of the serious harm that could flow from misuse or inadvertent disclosure of this protected information, any discovery order must be narrowly tailored to account for these interests.

In bringing suit, the Plaintiffs now before this Court—and the thousands of other MDL plaintiffs with pending claims—doubtless seek to protect their



residents against the harms that can flow from opiate dependency, including addiction-related deaths. Yet it would be worse than ironic if, in the course of trying to redress such harms, this case ended up victimizing the many millions of American patients whose sensitive medical information is now at issue. In order to minimize the risk of harmful breaches of medical privacy, this Court should order protective measures, including robust de-identification of records, limitations on the geographic scope of records that are disclosed to any party, and involvement of a special master to maintain security and control over the prescription records.

## **ARGUMENT**

### **I. Disclosure of Highly Sensitive Prescription Information Implicates Constitutional Privacy Concerns.**

As this Court has observed, mandamus “review is rather frequently provided . . . because of the desire to protect against discovery of information that is claimed to be protected by the Constitution, privilege, or more general interests in privacy.” *In re Lott*, 424 F.3d 446, 450 (6th Cir. 2005) (alteration in original; citation and emphasis omitted). Here, the district court has ordered production of a huge quantity of constitutionally and statutorily protected medical information. The sensitivity of those records should weigh heavily on this Court’s consideration of the propriety of the discovery order and the safeguards necessary to avoid damaging breaches of patient confidentiality.

**A. The discovery order involves a huge quantity of highly sensitive information.**

In its December 27, 2019 discovery order, the district court directed the Pharmacy Defendants to produce “nationwide transactional dispensing data” covering the period “from 2006 forward.” (R. 3055, Page ID 477519). As made clear in Plaintiffs’ relevant discovery request, this dispensing data includes a great deal of information; for each qualifying prescription, Plaintiffs seek

the drug name, prescription number, NDC number, date filled, quantity dispensed, dosage form, days’ supply, MME, prescriber’s name, prescriber’s DEA number, dispensing pharmacist, patient’s full name and address, patient’s identification number, quantity prescribed, number of refills authorized (if any), diagnostic code, method of payment, patient paid amount, and whether the prescription was covered by third party payers.

(Plaintiffs’ (First) Combined Discovery Requests to Dispensers, R. 2925-3, Page ID 429924).

Plaintiffs seek this information not only for every opioid prescription filled by the Defendants’ pharmacies nationwide during a 13-year period, but also for prescriptions for so-called “cocktail drugs” that have potential for adverse interaction with opioids, which Plaintiffs define as “a muscle relaxant, stimulant or benzodiazepines with an opioid.” (*Id.* at Page ID 429924 n.1). The medications at issue are commonly prescribed, and knowing that a person takes them can reveal highly sensitive information about stigmatized and private medical diagnoses.

Opioids are prescribed to treat acute and chronic pain, including pain related to cancer. An estimated 20 percent of U.S. adults report having chronic pain, and an estimated eight percent report high-impact chronic pain (i.e., “chronic pain that frequently limits life or work activities”).<sup>2</sup> Although opioids are far from the only strategy for dealing with such pain, they are an important and medically accepted option for many patients. Buprenorphine and methadone, which are prescribed to treat opioid dependence (sometimes known as opioid use disorder), are also classed as opioids.<sup>3</sup> There is a strong privacy interest in “substance abuse treatment records” because they contain “intimate and private details that people do not wish to have disclosed.” *Doe v. Broderick*, 225 F.3d 440, 451 (4th Cir. 2000). Indeed, in recognition of their sensitivity, Congress has imposed strict confidentiality protections for such records. 42 U.S.C. § 290dd-2.

Benzodiazepines, which include such commonly prescribed medications as Xanax (alprazolam) and Klonopin (clonazepam), are a class of medications used to

---

<sup>2</sup> James Dahlhamer, et al., *Prevalence of Chronic Pain and High-Impact Chronic Pain Among Adults — United States, 2016*, Morbidity and Mortality Weekly Report, Sept. 14, 2018, <https://www.cdc.gov/mmwr/volumes/67/wr/mm6736a2.htm>.

<sup>3</sup> See *Buprenorphine*, Prescribers’ Digital Reference, <https://www.pdr.net/drug-summary/Butrans-buprenorphine-488>; *Methadone hydrochloride*, Prescribers’ Digital Reference, <https://www.pdr.net/drug-summary/Methadone-Hydrochloride-Oral-Solution-methadone-hydrochloride-3322.3647>.

treat anxiety and panic disorders,<sup>4</sup> PTSD, seizure disorders, insomnia, and alcohol withdrawal.<sup>5</sup> Stimulants include Adderall and Ritalin, which are frequently prescribed to both children and adults to treat attention-deficit hyperactivity disorder.<sup>6</sup> Because of the stigma that can accompany mental health diagnoses, information about treatment of mental health and mental illness is highly sensitive and is afforded strong privacy protections. *See, e.g., Jaffee v. Redmond*, 518 U.S. 1, 10 (1996) (establishing 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”).

**B. Patients have constitutionally protected privacy interests in the sensitive prescription records held by the Pharmacy Defendants.**

In light of the sensitivity of information revealed by prescription records, they are protected against unjustified disclosure by at least two provisions of the Constitution: the right to informational privacy found in the Due Process Clauses

---

<sup>4</sup> “Anxiety disorders are the most common mental illness in the U.S., affecting 40 million adults . . . every year.” *Facts and Statistics*, Anxiety and Depression Association of America, <https://adaa.org/about-adaa/press-room/facts-statistics>.

<sup>5</sup> *See Benzodiazepines*, Drugs.com, <https://www.drugs.com/drug-class/benzodiazepines.html>.

<sup>6</sup> *See ADHD Medications and Side Effects*, WebMD, <https://www.webmd.com/add-adhd/adhd-medication-chart#1>.

of the Fifth and Fourteenth Amendments, and Fourth Amendment's prohibition on unreasonable searches and seizures.

**1. Prescription records are protected by the Due Process Clause.**

The Due Process Clause protects an “individual’s interest in avoiding disclosure of highly personal matters.” *Kallstrom v. City of Columbus*, 136 F.3d 1055, 1060 (6th Cir. 1998) (citing *Whalen v. Roe*, 429 U.S. 589, 598–600 (1977)). Courts have had “no difficulty concluding that protection of a right to privacy in a person’s prescription drug records, which contain intimate facts of a personal nature, is sufficiently similar to other areas already protected within the ambit of privacy.” *Douglas v. Dobbs*, 419 F.3d 1097, 1102 (10th Cir. 2005) (citations omitted). In other words, because “[i]t is now possible from looking at an individual’s prescription records to determine that person’s illnesses, . . . [a]n individual using prescription drugs has a right to expect that such information will customarily remain private.” *Doe v. Se. Pa. Transp. Auth.*, 72 F.3d 1133, 1138 (3d Cir. 1995); accord *Douglas*, 419 F.3d at 1102 (“Information contained in prescription records . . . may reveal other facts about what illnesses a person has.”). Where, as here, there is a “constitutional interest in preventing the release of personal information,” release or dissemination is justified “only where the governmental action furthers a compelling state interest, and is narrowly drawn to further that state interest.” *Kallstrom*, 136 F.3d at 1064.

## 2. Prescription records are protected by the Fourth Amendment.

Similarly, people’s privacy interests in their prescription records are protected by the Fourth Amendment. Because of their sensitivity, courts have recognized that there is a reasonable expectation of privacy in all manner of medical records. *See, e.g., Tucson Woman’s Clinic v. Eden*, 379 F.3d 531, 550 (9th Cir. 2004) (requiring warrant for search of medical records in abortion clinic because “all provision of medical services in private physicians’ offices carries with it a high expectation of privacy for both physician and patient”); *Broderick*, 225 F.3d at 450 (“[A] patient’s expectation of privacy . . . in his treatment records and files maintained by a substance abuse treatment center is one that society is willing to recognize as objectively reasonable.”). There is likewise a reasonable expectation of privacy in prescription records. *See, e.g., State v. Skinner*, 10 So. 3d 1212, 1218 (La. 2009) (“[W]e find that the right to privacy in one’s medical and prescription records is an expectation of privacy that society is prepared to recognize as reasonable.”); *Or. Prescription Drug Monitoring Program v. U.S. Drug Enf’t Admin. (Or. PDMP)*, 998 F. Supp. 2d 957, 963–67 (D. Or. 2014), *rev’d on standing grounds*, 860 F.3d 1228 (9th Cir. 2017).

The Fourth Amendment applies notwithstanding that the records are held by a third party—the pharmacy—rather than by patients themselves. As the Supreme Court has explained, “[t]he reasonable expectation of privacy enjoyed by the

typical patient undergoing diagnostic tests in a hospital is that the results of those tests will not be shared with nonmedical personnel without her consent,” irrespective that the hospital holds the records. *Ferguson v. City of Charleston*, 532 U.S. 67, 78 (2001). Indeed, in *Carpenter v. United States*, 138 S. Ct. 2206 (2018), the Supreme Court made clear that the mere fact that records are held by a third party does not vitiate an individual’s reasonable expectation of privacy under the Fourth Amendment. *Id.* at 2220. Instead, the Court explained, the 1970s cases on which the third-party doctrine is based—*United States v. Miller*, 425 U.S. 435 (1976), and *Smith v. Maryland*, 442 U.S. 735 (1979)—require a dual inquiry into “the nature of the particular documents sought” and whether they were “voluntar[ily] expos[ed].” 138 S. Ct. at 2219–20. Here, both factors favor the conclusion that there is a reasonable expectation of privacy in prescription records, even when they are held by and obtained from a pharmacy.

**a. Prescription records merit protection because they are highly sensitive.**

As the Supreme Court has recognized, due to the sensitivity of the information revealed by medical records, unfettered access to them “may have adverse consequences because it may deter patients from receiving needed medical care.” *Ferguson*, 532 U.S. at 78 n.14 (citing *Whalen*, 429 U.S. at 599–600). Accordingly, “[m]edical records, of which prescription records form a not insignificant part, have long been treated with confidentiality.” *Or. PDMP*, 998 F.

Supp. 2d at 964; *see, e.g.*, Am. Med. Ass’n, Code of Medical Ethics Opinion 3.2.1: Confidentiality, <https://www.ama-assn.org/delivering-care/ethics/confidentiality>; Am. Pharmacists Ass’n, Code of Ethics § II, <https://www.pharmacist.com/code-ethics>; Ohio Rev. Code Ann. § 2317.02(B) (physician–patient privilege).

Like the cell phone location data at issue in *Carpenter*, prescription records deserve protection because of their “deeply revealing nature,” “provid[ing] an intimate window into a person’s life.” 138 S. Ct. at 2217, 2223. *See also supra* Part I.A. Indeed, people consider information about the “state of their health and the medicines they take” to be among their most private and sensitive, even more so than the “details of [their] physical location over a period of time” at issue in *Carpenter*.<sup>7</sup>

Also like the cell phone location data in *Carpenter*, the prescription records at issue here have incredible “depth, breadth, and comprehensive reach.” 138 S. Ct. at 2223. They contain not just a smattering of recent prescriptions filled by a particular pharmacist, but an “all-encompassing record,” *id.* at 2217, of every qualifying controlled substance prescription filled by every one of Defendants’ thousands of pharmacies across the country over 13 years. This “tracking capacity

---

<sup>7</sup> Mary Madden, *Americans Consider Certain Kinds of Data to be More Sensitive than Others*, Pew Research Center, Nov. 12, 2014, <https://www.pewinternet.org/2014/11/12/americans-consider-certain-kinds-of-data-to-be-more-sensitive-than-others>.



runs against everyone,” *id.* at 2218, and provides a window into millions of people’s most closely held “privacies of life,” *id.* at 2214.

**b. Prescription records merit protection because they are not voluntarily shared.**

“[T]he second rationale underlying the third-party doctrine—voluntary exposure—[also does not] hold up when it comes to” prescription records because of the “inescapable and automatic nature of [their] collection.” *Carpenter*, 138 S. Ct. at 2220, 2223. Unlike the cancelled checks at issue in *Miller* and the dialed telephone numbers in *Smith*, the prescription records contained in the PDMP are not voluntarily conveyed. The decision to visit a physician and pharmacist to obtain necessary medical treatment is not voluntary in any meaningful sense. Obtaining medical care for a serious condition such as acute pain, seizure disorders, panic or anxiety disorders, or opioid addiction is a course of action dictated by one’s physical and psychological ailments. Opting to forgo care can leave a person debilitated. As one court put it, “the rule in *Miller* pertains to objects or information *voluntarily* turned over to third parties. A decision to use a bank may be voluntary. A decision to use a hospital for emergency care is not.” *Thurman v. State*, 861 S.W.2d 96, 98 (Tex. Ct. App. 1993) (citation omitted). Apart from forgoing care, “there is no way to avoid leaving behind a trail of [medical] data.” *Carpenter*, 138 S. Ct. at 2220. “As a result, in no meaningful

sense does the [patient] voluntarily ‘assume[ ] the risk’ of turning over” this information. *Id.* (second alteration in original).

**C. The Pharmacy Defendants may properly raise the constitutional privacy interests of their patients.**

In their briefing to the district court, Plaintiffs argued that the Defendant Pharmacies lack standing to raise the Fourth Amendment privacy interests of patients whose prescription records are subject to disclosure under the discovery order. (Opp. to Pharmacy Defs.’ Mot. for Recons., R. 3050, Page ID 477025–26). To the contrary, custodians of medical records may raise patients’ privacy interests in order to protect those records from disclosure.

To begin, courts frequently place limits on discovery on the basis of arguments, advanced by a party, that the discovery would harm the privacy interests of third parties not before the court. *See, e.g., John B. v. Goetz*, 531 F.3d 448 (6th Cir. 2008) (setting aside discovery order requiring forensic imaging of privately owned computers, in part due to concern with privacy interests of private computer owners, based on arguments advanced by defendant state governments); *U.S. ex rel. Chandler v. Cook Cty., Ill.*, 277 F.3d 969 (7th Cir. 2002) (ordering protection of third parties’ medical records on the basis of arguments advanced by defendant county), *aff’d*, 538 U.S. 119 (2003).

Moreover, there is no special rule against third-party standing to raise Fourth Amendment arguments in civil litigation. (*Contra* R. 3050, Page ID 477025–26).

As the Eighth Circuit has explained, “[t]he Supreme Court has never held (and neither have we) that associational standing is not available to [civil litigants] alleging Fourth Amendment violations.” *Heartland Acad. Cmty. Church v. Waddle*, 427 F.3d 525, 532 (8th Cir. 2005).<sup>8</sup> Where a civil litigant seeks to advance the Fourth Amendment interests of another person, courts are to apply the familiar prudential test for third-party standing. *See id.* at 532–33. *See also Powers v. Ohio*, 499 U.S. 400, 410–11 (1991) (test for third-party standing).

## **II. This Court Should Order Additional Protective Measures to Mitigate the Risk of Harm.**

In light of the extreme sensitivity of patient prescription information and the wide scope of the district court’s discovery order, this Court should act to minimize the risks of public disclosure and misuse of the records. Although the district court’s protective order provides some important safeguards, (*see* Case Management Order No. 2: Protective Order, R. 441, Page ID 5799–5836), “[d]uplication, by its very nature, increases the risk of improper exposure, whether purposeful or inadvertent.” *John B.*, 531 F.3d at 457. Here, where “[d]ispensing-related claims are at issue in many of the nearly 2500 cases in this MDL,” (Track

---

<sup>8</sup> The Supreme Court has held that individuals may not invoke the *exclusionary rule* to suppress evidence that was obtained in violation of the Fourth Amendment rights of others. However, that stricture applies only in “the context of a case considering the applicability of the exclusionary rule, a remedy used for Fourth Amendment violations in criminal cases but not in civil cases.” *Id.*

One-B Case Management Order, R. 2940, Page ID 430083), there are serious risks inherent to disclosing copies of the Pharmacy Defendants' *nationwide* prescription records to hundreds or thousands of city, county, and state governments.

Disclosure without adequate protections may “make[] some patients reluctant to use, and some doctors reluctant to prescribe, such drugs even when their use is medically indicated,” *Whalen*, 429 U.S. at 599, and may incentivize physicians to take drastic steps to observe their ethical duty to protect patient confidences. *See, e.g., Humphreys v. Drug Enf't Admin.*, 96 F.3d 658, 660, 662 (3d Cir. 1996) (recognizing that in order to avoid public disclosure of information about a state supreme court justice's prescriptions for psychiatric medications, including benzodiazepines, it may be reasonable for the physician to write prescriptions in the names of the justice's secretaries and law clerk).

In light of these concerns, *amici* urge this Court to consider the following options to mitigate risks to patient privacy. Although none can completely eliminate the risk of privacy violations, in combination they can reduce the likelihood of harm.

#### **A. De-identification**

Plaintiffs appear to have conceded that patient names and addresses should be replaced with a unique and anonymized identifier before being produced in

discovery.<sup>9</sup> (Plaintiffs’ (First) Combined Discovery Requests to Dispensers, R. 2925-3, Page ID 429924 n.2). Although this sort of de-identification can make abuse of the information more difficult, the academic and popular literature is replete with examples of large sets of de-identified records being re-identified by cross-referencing them with other, publicly available data sets.<sup>10</sup> Here, for example, de-identified prescription data that includes the dates and locations where each prescription was issued by a physician and filled by a pharmacist could be re-identified by cross-referencing them with large nationwide databases of individuals’ location histories, which can place people at doctors’ offices and pharmacies at particular times. Databases derived from commercial automated license plate readers or app-based collection of cell phone location data, for example, may have such capabilities.<sup>11</sup> Certainly this Court should order de-

---

<sup>9</sup> To the extent that Plaintiffs seek production of “patient’s identification number,” (R. 2925-3, Page ID 429924), that too should be masked.

<sup>10</sup> See, e.g., Mandamus Pet. 27; Jessica Su, et al, *De-anonymizing Web Browsing Data with Social Networks*, World Wide Web Conference 2017, <http://randomwalker.info/publications/browsing-history-deanonymization.pdf>; Arvind Narayanan & Vitaly Shmatikov, *Robust De-anonymization of Large Sparse Datasets*, IEEE Symposium on Security and Privacy (2008), [https://www.cs.utexas.edu/~shmat/shmat\\_oak08netflix.pdf](https://www.cs.utexas.edu/~shmat/shmat_oak08netflix.pdf).

<sup>11</sup> See Digital Recognition Network, <https://drndata.com> (automated license plate reader database containing more than 6.5 billion location records); Stuart A. Thompson & Charlie Warzel, *Twelve Million Phones, One Dataset, Zero Privacy*, N.Y. Times (Dec. 19, 2019),

identification of any transactional prescribing data released to the plaintiffs and clarify that, as was ordered at an earlier stage of the MDL proceedings, the parties are precluded from trying to “ascertain the identities of de-identified patients.” (Order Governing Production of Medical and Pharmacy Claims Data in Track One Cases, R. 1421, Page ID 39390). Still, de-identification of patient information is unlikely to be sufficient protection if the records are stolen, leaked, or mishandled—more is required.

### **B. Limitations on production**

As it stands, the district court’s discovery order entitles Plaintiffs to receive full responsive information not just about prescriptions filled in or near their jurisdictions, but nationwide. The district court has acknowledged, however, that for Plaintiffs—two Ohio counties—“transactional data outside of Ohio . . . is less relevant than Ohio data.” (R. 3055, Page ID 477520 n.5). Accordingly, even if efficiency demands that Pharmacy Defendants begin processing nationwide prescription data immediately in contemplation of future phases of this MDL, they should be required to produce to any particular plaintiff only data deemed geographically relevant to that plaintiff’s claims. By partitioning production in this

---

<https://www.nytimes.com/interactive/2019/12/19/opinion/location-tracking-cell-phone.html>.

way, the Court can limit the damage from any potential breach of a particular plaintiff's files.

### **C. Prohibition on law enforcement access**

It is not clear to *amici* whether the district court's protective order contemplates situations where prescription records produced in discovery may be provided to law enforcement agencies. (*Compare* R. 441 at ¶¶ 33(j), 34(h), Page ID 5810, 5813 (disclosure of confidential information to law enforcement), *with id.* ¶ 75, Page ID 5832 (“The Parties shall not use or disclose Protected Health Information for any purpose other than the Litigation”)). Because Fourth Amendment concerns are at their zenith when law enforcement is involved, *see Carpenter*, 138 S. Ct. at 2214 (“[A] central aim of the Framers was ‘to place obstacles in the way of a too permeating police surveillance.’” (citation omitted)), there should be an absolute prohibition on law enforcement agencies accessing the copies of prescription records produced in discovery.

### **D. Special Master**

In lieu of permitting disclosure of prescription data directly to MDL plaintiffs, this Court should consider ordering the district court to appoint a special master for data privacy, who can maintain custody of the nationwide prescription data and can run queries on the database upon request of plaintiffs in this or future phases of the litigation. The queries could initially produce aggregated reports (for

example, to identify patients or pharmacy outlets with particularly high prescribing numbers), and then produce granular prescribing information only for those patients or pharmacy locations that meet some threshold of suspicion. This arrangement would be roughly analogous to the court-run review of potentially privileged materials in criminal investigations, *see, e.g., In re Grand Jury Subpoenas*, 454 F.3d 511, 524 (6th Cir. 2006), and would allow plaintiffs to search for significant patterns in the prescription data without unnecessarily exposing the underlying patient information to dissemination.

### **CONCLUSION**

For the foregoing reasons, *amici* respectfully urge this Court to ensure that the sensitive prescription records at issue are adequately protected.



Respectfully Submitted,

Dated: January 24, 2020

By: /s/ Nathan Freed Wessler

Nathan Freed Wessler  
Brett Max Kaufman  
American Civil Liberties Union  
Foundation  
125 Broad Street, 18th Floor  
New York, NY 10004  
(212) 549-2500  
nwessler@aclu.org  
bkaufman@aclu.org

Freda J. Levenson (0045916)  
American Civil Liberties Union of  
Ohio Foundation  
4506 Chester Avenue  
Cleveland, OH 44103  
Tel: (614) 586-1972 x125  
Fax: (614) 586-1974  
flevenson@acluohio.org

David J. Carey (0088787)  
American Civil Liberties Union of  
Ohio Foundation  
1108 City Park Avenue, Suite 203  
Columbus, OH 43206  
Tel: (614) 586-1972  
Fax: (614) 586-1974  
dcarey@acluohio.org

## CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 29(a)(5) because it contains 3,805 words, excluding the parts of the brief exempted by the Rules, which is less than half the length permitted for a mandamus petition under Federal Rule of Appellate Procedure 21(d).
2. This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14-point Times New Roman.

Dated: January 24, 2020

/s/ Nathan Freed Wessler  
Nathan Freed Wessler

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on this 24th day of January, 2020, the foregoing Amici Curiae Brief for the American Civil Liberties Union and American Civil Liberties Union of Ohio was filed electronically through the Court's CM/ECF system. Notice of this filing will be sent by e-mail to all parties by operation of the Court's electronic filing system.

/s/ Nathan Freed Wessler  
Nathan Freed Wessler

**DESIGNATION OF RELEVANT DISTRICT COURT DOCUMENTS**

<b>Description of Entry</b>	<b>Record Entry Number</b>	<b>Page ID Range</b>
Case Management Order No. 2: Protective Order	441	5799–5836
Order Governing Production of Medical and Pharmacy Claims Data in Track One Cases	1421	39390
Plaintiffs' (First) Combined Discovery Requests to Dispensers	2925-3	429924
Track One-B Case Management Order	2940	430083
Opposition to the Pharmacy Defendants' Motion for Reconsideration of the Court's December 10, 2019 Order	3050	477025–477026
Order on Reconsideration Regarding Scope of Discovery in Track One-B	3055	477516–477520