IN THE SUPREME COURT OF THE STATE OF OREGON

STATE OF OREGON, *Plaintiff-Respondent*, v. BRANDON TYLER KERN, *Defendant-Appellant*.	Jefferson County Circuit Court Case No. 21CR08255 Court of Appeals Case No. CA A180774 Supreme Court Case No. S071755

BRIEF OF AMICI CURIAE AMERICAN CIVIL LIBERTIES UNION AND THE AMERICAN CIVIL LIBERTIES UNION OF OREGON IN SUPPORT OF DEFENDANT-APPELLANT

Lindsey Burrows, # 113431
BURROWS APPELLATE LAW
333 SW Taylor Street, Suite 300
Portland, OR 97204
lindsey@burrowsappellatelaw.com
Telephone: 503-882-4575

Kelly Simon, #154213
Eri Andriola, #246500
ACLU OF OREGON, INC.
P.O. Box 4058
Portland, OR 97240
ksimon@aclu-or.org
Eandriola@aclu-or.org
Telephone: 503-227-6928

Julie A. Murray
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
915 15th Street NW
Washington, DC 20005
jmurray@aclu.org
Telephone: 202-675-2326

Attorneys for Amici Curiae

Emily Seltzer, #124513
OREGON PUBLIC DEFENSE COMMISSION
1175 Court St NE
Salem OR 97301
emily.seltzer@opdc.state.or.us
Telephone: 503-378-3032
Attorney for Defendant-Appellant

Colm Moore, #051750
OREGON DEPARTMENT OF JUSTICE
100 SW Market St
Portland, OR 97201
colm.moore@doj.oregon.gov
Telephone: 503-378-4402
Attorney for Plaintiff-Respondent

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INTEREST OF AMICI CURIAE

The American Civil Liberties Union ("ACLU") is a nationwide, nonprofit, nonpartisan organization dedicated to the principles of liberty and equality embodied in the federal and state constitutions and our nation's civil rights laws. The American Civil Liberties Union of Oregon ("ACLU of Oregon") is the Oregon state affiliate of the national ACLU and has more than 39,000 members.

Amici frequently appear before state and federal courts in cases involving the constitutional rights of people accused of crimes and in matters implicating state and federal rights to privacy. Amici also frequently litigate on behalf of individuals who receive or provide reproductive and gender-affirming health care and whose medical records may be targeted by officials who oppose that care.

INTRODUCTION AND SUMMARY OF ARGUMENT

Defendant-appellant Brandon Tyler Kern was convicted of manslaughter based on his involvement in a car accident resulting in another driver's death. The trial court denied Mr. Kern's motion to suppress evidence regarding his post-crash blood alcohol content (BAC), which police obtained without a warrant from the hospital that treated

him after the crash. The trial court held that the hospital's disclosure of Mr. Kern's medical information, which was required by ORS 676.260, was not unlawful under the search-and-seizure guarantees of the Oregon and United States Constitutions because Mr. Kern had no privacy interest in the BAC results and hospital staff did not act as state agents when they drew and analyzed his blood. The Court of Appeals affirmed without opinion.

This court should reverse on state constitutional grounds and need not reach Mr. Kern's federal Fourth Amendment claim. Amici agree with Mr. Kern that government-mandated disclosure of medical records to law enforcement under ORS 676.260 constitutes a search under Article I, section 9, of the Oregon Constitution. *See* Def-Appellant's Merits Br 35–42. And because there is no dispute that the disclosure here happened without a warrant supported by probable cause, this search was unreasonable—and thus violates Article I, section 9—unless the government establishes that an exception to the warrant requirement applies. *Id.* at 39–41. Amici also agree with Mr. Kern that exigency does not constitute a valid exception to the warrant requirement here, where

Mr. Kern's blood was drawn for medical purposes and results could have been sought via a warrant. *Id.* at 29.

Amici submit this brief to make four additional points. First, under Article I, section 9, this court considers whether social and legal norms support an individual's asserted privacy interest. In doing so here, it should consider authorities in addition to those discussed by Mr. Kern, including Article I, section 47, of the Oregon Constitution, which enshrines a "fundamental right" to health care access.

Second, this court should reject the application of the "third-party doctrine" to the Article I, section 9, argument in this case. Some courts have applied that doctrine to reduce or eliminate an individual's privacy interest in records held by a related third-party such as an individual's bank. But that doctrine is inconsistent with this court's precedent. In any event, the doctrine should be categorically rejected as applied to medical records that are compiled or maintained by an individual's health care provider.

Third, to invoke the protections guaranteed under Article I, section 9, Mr. Kern need not demonstrate that hospital officials acted as state agents when they drew and analyzed his blood or when they disclosed his

medical records to police. ORS 676.260—by operation of its statutory mandate—violated Mr. Kern's Article I, section 9, rights. That is sufficient to show state action.

Fourth, a privacy holding in this case is likely to affect medical records that reflect other health care, not just BAC results. In fashioning its decision, the court should consider in particular the impact of its ruling on records that document reproductive and gender-affirming health care. Recent examples show that local law enforcement and out-of-state officials may target these forms of care—and seek records that document them—even in states like Oregon that otherwise protect them.

ARGUMENT

I. Mandatory disclosure of medical records to police under ORS 676.260 violates Article I, section 9.

Article I, section 9, of the Oregon Constitution provides, in relevant part: "No law shall violate the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable search, or seizure." This court's approach to Article I, section 9, claims has two steps: first, the consideration of whether a search has occurred, and second, whether that search was reasonable. *See State v. Thompson*, 370

Or 273, 281, 518 P3d 923 (2022); *State v. Meredith*, 337 Or 299, 303–04, 96 P3d 342 (2004).

The court has emphasized that its Article I, section 9, analysis is "separate and distinct from the [U.S.] Supreme Court's analysis of" Fourth Amendment claims. *State v. Betancourt*, 374 Or 44, 54, n 6, __ P3d ___ (2025). It has also confirmed that Article I, section 9, provides broader protection than its federal analogue. *Id.* (collecting examples).

For example, the definition of a search under Article I, section 9, is "determined by an objective test of whether the government's conduct would significantly impair an individual's interest in freedom from scrutiny." *State v. McCarthy*, 369 Or 129, 153–54, 501 P3d 478 (2021). In turn, an individual's freedom from scrutiny is "determined by social and legal norms of behavior," *State v. Newcomb*, 359 Or 756, 764, 375 P3d 434 (2016), not—as under the Fourth Amendment—a person's "reasonable expectations." *McCarthy*, 369 Or at 154.

Similarly, although federal courts sometimes apply a "third-party doctrine" in Fourth Amendment cases, whereby a person's disclosure of their information to a third party, such as a bank, eliminates or reduces their privacy interest in records containing that information, this court

has never imported that doctrine into state constitutional law. *See State v. Ghim*, 360 Or 425, 436–37, 381 P3d 789 (2016) (reserving the question); *see also, e.g.*, *State v. Lien/Wilverding*, 364 Or 750, 760–61, 441 P3d 185 (2019) (finding that individuals retain a privacy interest under Article I, section 9, in garbage left on the street for pick-up by a private trash collector).

In this case, because Article I, section 9, requires suppression of the medical records to which Mr. Kern objects, *see* Def-Appellant's Br 17–45, the Court "need not address [his] Fourth Amendment arguments." *State v. Campbell*, 306 Or 157, 173, 759 P2d 1040 (1988). Amici make three specific arguments as to why Mr. Kern should prevail under state constitutional law.

A. Additional authorities, including the Oregon Constitution's right to health care, support recognizing a privacy interest in medical records.

A "search" within the meaning of Article I, section 9, occurs when the government invades an individual's privacy interest." *State v. Barnthouse*, 360 Or 403, 413, 380 P3d 952 (2016) (citing *State v. Owens*, 302 Or 196, 206, 729 P2d 254 (1986)). Oregon courts apply "an objective test" to assess the extent of this interest, *McCarthy*, 369 Or at 154, taking

into account "social and legal norms of behavior," *Lien/Wilverding*, 364 Or at 760 (quoting *Newcomb*, 359 Or at 764).

In addition to those sources cited by Mr. Kern, other authorities amply demonstrate that "[s]ocial and legal norms generally protect a person's interest in maintaining the confidentiality of their personal health and medical information." *State v. Villasenor-Sibrian*, 337 Or App 465, 470, 563 P3d 999 (2025); *see also Or Prescription Drug Monitoring Program v. US Drug Enforcement Admin.*, 998 F Supp 2d 957, 964 (D Or 2014) ("Medical records * * * have long been treated with confidentiality."), *rev'd on other grounds*, *Or PDMP v. US Drug Enforcement Admin.*, 860 F3d 1228 (9th Cir 2017).

1. Fundamental state constitutional right to health care

Article I, section 47, of the Oregon Constitution provides key support for a legal norm of protecting an individual's private medical information. Under that provision, individuals have a "fundamental right" to access health care, and the state has an obligation to ensure that such access is "cost-effective, clinically appropriate and affordable." Or Const, Art I, § 47.

The plain text of Article I, section 47, thus contemplates the paramount role that health care plays in people's lives. That role

necessarily includes the relationship between patients and third-party clinicians who make health care access possible in the first place. *See Singleton v. Wulff*, 428 US 106, 117, 96 S Ct 2868, 49 L Ed 2d 826 (1976) (recognizing, for a plurality, the "closeness" of the doctor-patient relationship as a basis for granting third-party standing to doctors who assert patients' constitutional right to medical care); *Whalen v. Roe*, 429 US 589, 602, 97 S Ct 869, 51 L Ed 2d 64 (1977) (recognizing that "disclosures of private medical information to doctors [and] to hospital personnel * * * are often an essential part of modern medical practice").

Clinicians essential to health care access protected by the Oregon Constitution are required by both medical standards of care and various state and federal laws to document and maintain records of the care they provide. *See, e.g.*, *Management of Medical Records*, AMA Code of Med. Ethics, Op. 3.3.1, https://code-medical-ethics.ama-assn.org/ethics-opinions/management-medical-records (stating that "medical records serve important patient interests" and "physicians have an ethical obligation to manage medical records appropriately"); OAR 333-505-0050 ("A medical record shall be maintained for every patient admitted for care

in a hospital."); 42 CFR § 482.24(b) (conditioning participation in Medicare and Medicaid on maintaining medical records for all patients).

This Court should reject any contention that, by accessing one fundamental right—health care—Oregonians have automatically sacrificed a constitutional right to privacy in their medical information. *See Simmons v. United States*, 390 US 377, 394, 88 S Ct 967, 19 L Ed 2d 1247 (1968) (finding it "intolerable that one constitutional right should have to be surrendered in order to assert another" in the context of a forced choice between Fourth and Fifth Amendment rights).

2. Public perspectives

People consider information about the "state of their health and the medicines they take" to be among the most private information about them." Mary Madden, *Americans Consider Certain Kinds of Data to be More Sensitive than Others*, Pew Research Center (Nov 12, 2014).[1] Medical records can reveal intimate, private, and potentially stigmatizing details about a patient's health. In addition to personally identifying information (e.g., name, date of birth, social security number,

[1] Available at https://www.pewresearch.org/internet/2014/11/12/americans-consider-certain-kinds-of-data-to-be-more-sensitive-than-others (last accessed Sept 2, 2025).

contact information), these records may reflect that a patient had an abortion; an individual's mental health history and treatment; sexually transmitted infection status, including HIV status; substance abuse history; a history of domestic violence or sexual assault; and other deeply private information.

These concerns exist in the specific context of blood-test results as well. In addition to reflecting alcohol levels (as in this case), blood-test results may reveal substantial other private information, including the presence of lawful drugs in an individual's system that are associated with one or more stigmatized health conditions.

3. Medical ethics and practice

The Oath of Hippocrates, originating in the fourth century B.C.E., required physicians to maintain patient secrets. Bernard Friedland, *Physician-Patient Confidentiality*, 15 J Legal Med. 249, 256 (1994). And in American medical practice, a requirement to preserve the confidentiality of patient health information was included in the earliest codes of ethics of American medical societies in the 1820s and 1830s, the first Code of Medical Ethics of the American Medical Association in 1847, and every subsequent edition of that code. *See generally* Robert Baker, *Before Bioethics: A History of American Medical Ethics from the Colonial*

Period to the Bioethics Revolution (2013); *Confidentiality*, AMA Code of Med. Ethics, Op. 3.2.1, https://code-medical-ethics.ama-assn.org/ethics-opinions/confidentiality.

Today, the vast majority of patients believe that health care providers have a duty to protect their medical information. *See Patient Perspectives Around Data Privacy*, AMA (2022) (finding that "[m]ore than 92% of people believe privacy is a right" in the context of medical information).[2] Patients are "less likely to divulge sensitive information to health professionals if they are not assured that their confidences will be respected," thus risking inadequate diagnosis and "treatment of important health conditions." Lawrence O. Gostin, *Health Information Privacy*, 80 Cornell L Rev 451, 490–91 (1995).

The consequences of law enforcement gaining easy access to medical records held by health care providers are especially harmful. As one court has explained, "[p]ermitting the State unlimited access to medical records for the purposes of prosecuting the patient would have the highly oppressive effect of chilling the decision of any and all

[2] Available at https://www.ama-assn.org/system/files/ama-patient-data-privacy-survey-results.pdf (last accessed Sept 2, 2025).

[persons] to seek medical treatment." *King v. State*, 535 SE2d 492, 496 (Ga 2000); *see also Ferguson v. City of Charleston*, 532 US 67, 78 n 14. 121 S Ct 1281, 149 L Ed 2d 205 (2001) (recognizing that warrantless law enforcement access to patients' medical information may "deter patients from receiving needed medical care" (citing *Whalen*, 429 US at 599–600)).

4. Other legal protections for medical privacy

Longstanding statutory and regulatory protections for the confidentiality of medical information further confirm the existence of a privacy interest in that information.

Oregon, for example, has an express state "policy" that "an individual has * * * the right to have protected health information of the individual safeguarded from unlawful use or disclosure." ORS 192.553(1)(a). And, as one more specific example, when the Oregon Legislature created a state database for the collection of prescription information, it provided that such information could be made available to law enforcement only with "a valid court order based on probable cause." *Id.* 431A.865(3)(G).[3]

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[3] In *Oregon Prescription Drug Monitoring Program v. U.S. Drug Enforcement Admin.*, 860 F3d 1228 (9th Cir 2017), the federal court of appeals acknowledged, but did not resolve, the question whether

Federal law likewise protects private medical and other health information from disclosure in numerous ways. *E.g.*, 45 CFR 164.502, 164.512 (2024) (HIPAA privacy regulations); Genetic Information Nondiscrimination Act of 2008, Pub L 110-233, 122 Stat 881 (limiting when covered entities can request and rely on genetic information).

Courts, too, recognize a privacy interest in medical information through various privilege doctrines. Oregon—like the vast majority of other states—recognizes a doctor-patient privilege, for example. OEC 504-1; *see also, e.g.*, ORS 40.230 ("psychotherapist-patient" privilege); ORS 40.262 ("counselor-client privilege"); *Jaffee v. Redmond*, 518 US 1, 10 (1996) (establishing federal psychotherapist-patient privilege and explaining that "disclosure of confidential communications made during counseling sessions may cause embarrassment or disgrace").

B. An individual retains a protected privacy interest in medical information contained in a health care professional's records.

1. This court has never adopted the third-party doctrine, and it should not do so now.

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disclosure of information in this database to a federal agency without a warrant violated patients' Fourth Amendment rights.

Some courts—including the Oregon Court of Appeals—have applied what is termed as the third-party doctrine to hold that a person does not "have a protected privacy interest in information that the person voluntarily allows a third party to access and maintain for its own legitimate business purposes." *State v. Hawthorne*, 316 Or App 487, 498–99, 504 P3d 1185 (2021). *E.g.*, *State v. Sparks*, 267 Or App 181, 191–92, 340 P3d 688 (concluding that the defendant did not have a privacy interest in subscriber, usage, and payment records stored by his utility provider where the provider used that information for billing).

Courts that accept the third-party doctrine in principle still rely on context to define the doctrine's outer bounds. The United States Supreme Court has held, for example, that under the Fourth Amendment, individuals do not have a reasonable expectation of privacy in garbage placed in opaque bags outside of their house for collection by a third-party trash collector. *California v. Greenwood*, 486 US 35, 108 S Ct 1625, 100 L Ed 2d 30 (1988). But thirty years later in *Carpenter v. United States*, 585 US 296, 309–10, 138 S Ct 2206, 201 L Ed 2d 507 (2018), when faced with the "unique nature" of cell-site location information in the possession of cellular companies like AT&T, the Court concluded that a

person "maintains a legitimate expectation of privacy in the record of his physical movements as captured through" such location data. *See also, e.g.*, *Hawthorne*, 316 Or at 499 (rejecting application of third-party doctrine where law enforcement asked AT&T to "produce a record of a person's real-time location" using cell-site data).

While this court has on occasion referred to the third-party doctrine or related precedent, it has not endorsed the doctrine's use in resolving Article I, section 9, claims. In *Bray*, for example, the Court acknowledged but did not "decide whether the state permissibly could have obtained [a person's] Google information pursuant to a subpoena" or other order absent probable cause. *State v. Bray*, 363 Or 226, 232 n 3, 422 P3d 250 (2018) (citing *Carpenter*, 585 US at 296).

And in *Ghim*, this court assumed a protected privacy interest in bank records of "customers' transactions with third parties," while acknowledging debate under federal law as to "whether, in light of * * * technological changes, the [U.S. Supreme] Court should revisit its Fourth Amendment cases and recognize a constitutionally protected privacy interest in bank and phone records." 360 Or at 436–37 (citing *United*

States v. Jones, 565 US 400, 417–18, 132 S Ct 945, 181 L Ed 2d 911 (2012) (Sotomayor, J., concurring)).

Moreover, the third-party doctrine is incompatible with the Court's decision in *Lien*, which held that "for purposes of Article I, section 9, defendants * * * had privacy interests in their garbage that had been placed within a closed, opaque container and put out at curbside for collection by [a] sanitation company." 364 Or at 763–64. "[G]iven the realities of living in modern society," this court reasoned that "privacy norms exist notwithstanding some limited public exposure of information, in this case, putting out garbage in a closed bin for pickup by the sanitation company at curbside, an area accessible to members of the public other than the sanitation company." *Id.* at 764. "[M]ost Oregonians would consider their garbage to be private and deem it highly improper for others—curious neighbors, ex-spouses, employers, opponents in a lawsuit, journalists, and government officials, to name a few—to . . . scrutinize [their garbage bin's] contents." *Id.* at 761.

Lien thus demonstrates that, under Article I, section 9, disclosure to one is not equivalent to a disclosure to all, and most especially not to the police. *See id.* at 764 ("Nothing about the relationship among the

actors in this case or the respective obligations of defendants and Republic with respect to the garbage at issue here suggests that defendants had left their garbage for police or other government officials to search."). *Cf. State v. Tanner*, 304 Or 312, 314, 745 P2d 757 (1987) (holding that "one who entrusts an effect to another has a right under Article I, section 9, of the Oregon Constitution against an unlawful search that discovers the effect").

The Court's decision in *State v. Johnson*, 340 Or 319, 131 P3d 173 (2006), does not counsel otherwise. In *Johnson*, the Court affirmed the denial of a defendant's motion to suppress various pieces of evidence obtained from third parties via subpoena, including records of cellular telephone usage. *Id.* at 335–36. But the defendant in that case provided *no* rationale for suppression in the appellate proceedings. *See id.* at 336 (court stating it "cannot identify a source of law" establishing a privacy interest in telephone usage records). The court can hardly be said to have resolved a legal argument never presented to it.

In any event, *Johnson* recognized that the defendant "clearly had a cognizable privacy interest in the *content* of his telephone calls," 340 Or at 336, information most comparable to Mr. Kern's medical records in

this case. And it treated the phone company's disclosure in that case as voluntary, even though it was made in response to a subpoena. *See id.* ("Neither are we aware of any principle that would prevent the cellular telephone provider from responding to a proper subpoena."). Under ORS 676.260, of course, state law mandates that health care professionals disclose BAC results to law enforcement.

2. At minimum, the court should hold that the third-party doctrine is categorically inapplicable to medical records held by a health care provider.

Even if this court were inclined to endorse the third-party doctrine in some contexts, it should categorically hold that the doctrine cannot apply to reduce or eliminate a person's privacy interest in medical information held by their health care provider.

Case law in Oregon and around the country makes clear that an individual "has a privacy interest in [] personal health information contained within" their medical records. *Matter of C.E.S.*, 328 Or App 57, 59, 536 P3d 1089 (2023); *Oregon Prescription Drug Monitoring Program*, 998 F Supp 2d at 964–65. As the United States Supreme Court has explained, for example, "[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." *Ferguson*, 532 US at 78. That is so notwithstanding that the records are held by a third party—such as a hospital—rather than by patients themselves.

Numerous other state courts interpreting their own state constitutions have likewise recognized that individuals retain a privacy interest in their medical records, including those in the custody of third parties. *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."); *King v. State*, 535 SE2d 492, 495 (Ga 2000) ("Even if the medical provider is the technical 'owner' of the actual records, the patient nevertheless has a reasonable expectation of privacy in the information contained therein, since that data reflects the physical state of his or her body."); *Commonwealth v. Shaw*, 770 A2d 295, 299 (Pa 2001) ("The right to privacy extends to medical records of patients."); *Brende v. Hara*, 153 P3d 1109, 1115 (Haw 2007) ("Petitioners' health information is 'highly personal and intimate' information that is protected by the information prong of article I, section 6 [of the Hawai'i Constitution]."); *Weaver v. Myers*, 229 So 3d 1118, 1126 (Fla 2017) ("[W]e have held in no uncertain

terms that '[a] patient's medical records enjoy a confidential status by virtue of the right to privacy contained in the Florida Constitution[.]'" (quoting *State v. Johnson*, 814 So2d 390, 393 (Fla 2002)); *Malcomson v. Northwest*, 339 P3d 1235, 1230 (Mont 2014) ("[T]his Court has long recognized that the privacy interests concerning a person's medical information implicate Article II, Section 10, of the Montana Constitution." (internal quotation marks omitted)); *Kunkel v. Walton*, 689 NE2d 1047, 1055 (Ill 1997) ("The confidentiality of personal medical information is, without question, at the core of what society regards as a fundamental component of individual privacy."); *Thurman v. State*, 861 SW2d 96, 98 (Tex App 1993) (holding that individual "did not surrender standing to assert his privacy rights" in medical records "when he entered the emergency room" (citation omitted)).

Many federal courts applying the Fourth Amendment—which this court recognized as narrower in some respects than Article I, section 9—have come to similar conclusions. *See, e.g.*, *Tucson Woman's Clinic v. Eden*, 379 F3d 531, 550 (9th Cir 2004) (requiring warrant for search of abortion clinic's records because the "provision of medical services * * * carries with it a high expectation of privacy for both physician and

patient"); *Eil v. U.S. Drug Enf't Admin.*, 878 F3d 392, 400 (1st Cir 2017) (recognizing that individuals "have significant privacy interests in their medical records"); *Doe v. Broderick*, 225 F3d 440, 450 (4th Cir 2000) (recognizing "a patient's expectation of privacy * * * in his treatment records and files maintained by a substance abuse treatment center").

C. Mr. Kern need not demonstrate that hospital staff are state agents to invoke Article I, section 9's protection.

"Article I, section 9, prohibits only state action that infringes on a citizen's constitutional rights." *State v. Tucker,* 330 Or 85, 89, 997 P2d 182 (2000). Mr. Kern argues that the "state action" requirement is met here because hospital staff were serving as state agents when they supplied information to law enforcement, as required by ORS 676.260. Def-Appellant's Br 33–35.

In Amici's view, the Court could apply an even more straightforward analysis to find the state action in this case. Regardless whether hospital staff can be considered state agents, it is indisputable that ORS 676.260 is a state statute adopted by the Oregon Legislature and that it imposes mandatory reporting requirements on health care providers. Those reporting requirements therefore constitute state action that, even without more, is sufficient to trigger Article I, section 9,

scrutiny. *State v. Luman*, 347 Or 487, 492, 223 P3d 1041 (2009) (confirming that "government-conducted *or -directed* searches and seizures" are covered (emphasis added)).

II. Any holding as to privacy and the third-party doctrine may have ramifications for records reflecting patients' receipt of reproductive and gender-affirming care.

On its own terms, this case presents an important question about safeguards that should be afforded an individual before the government can access BAC results obtained by a health care provider. But the court's decision may also have spillover effects for other types of health care, which the court should consider in fashioning its decision.

Particularly since the United States Supreme Court's decision in *Dobbs v. Jackson Women's Health Organization*, 597 US 215, 142 S Ct 2228, 213 L Ed 2d 545 (2022), which overturned *Roe v. Wade*, 410 US 113, 93 S Ct 705, 35 L Ed 2d 147 (1973), some government officials opposed to abortion have attempted to target patients and their health care providers for alleged "crimes related to pregnancy, pregnancy loss, or birth." Wendy A. Bach & Madalyn K. Wasilczuk, *Pregnancy as a Crime: A Preliminary Report on the First Year After Dobbs*, Pregnancy Justice 9 (Sept 2024) (documenting "at least 210 [such] cases" in first

year after *Dobbs*, including in numerous states where abortion remains legal).[4]

A similar dynamic is occurring with respect to gender-affirming care for transgender individuals. *See, e.g.*, Priscilla Totiyapungprasert, *"I follow the law:" El Paso doctor responds to Texas AG lawsuit over alleged transgender care*, El Paso Matters (Jan 8, 2025) (attorney general suit against Texas doctor for alleged violation of a state law banning gender-affirming care to minors);[5] *Texas appeals court blocks state from probing transgender kids' parents,* Reuters (Mar 29, 2024) (discussing efforts by Texas attorney general "to carry out child abuse investigations into families whose children were receiving puberty-blocking treatments").[6]

In Oregon, of course, abortion and gender-affirming care remain legal, House Bill (HB) 2002 (OR 2023); ORS 743A.325, and providers in the state continue to care for Oregonians and non-residents alike, *see, e.g.*, Oregon Health Authority, *Month of occurrence and county of*

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[4] Available at https://www.pregnancyjusticeus.org/wpcontent/uploads/2024/09/Pregnancy-as-a-Crime.pdf (last accessed Sept 2, 2025).
[5] Available at https://elpasomatters.org/2025/01/08/texas-ag-paxton-lawsuit-el-paso-doctor-transgender-care/ (last accessed Sept 2, 2025).
[6] Available at https://www.reuters.com/world/us/texas appeals-court-blocks-state-probing-transgender-kids-parents-2024-03-29/ (last accessed Sept 2, 2025).

residence, Oregon occurrence abortions 2025 quarterly year-to-date data, Induced Abortion Data (Aug 2025).[7] In 2023, Oregon also adopted a "shield law" that is designed to protect patients and providers of abortion and gender-affirming care from certain law enforcement threats in and outside of the state. *See* HB 2002 (Or 2023), codified at, e.g., ORS 24.500 (regarding non-enforcement of certain foreign subpoenas); ORS 435.210 (regarding affirmative right to make reproductive health decisions); ORS 435.240 (similar).

Nevertheless, the potential for rogue law enforcement officers or out-of-state politicians to attempt to weaponize Oregon medical records in targeting these forms of care remains a serious concern. A grand jury in West Baton Rouge recently indicted a New York doctor for allegedly prescribing medication that a Louisiana resident used to obtain an abortion. Pam Belluck & Emily Cochrane, *New York Doctor Indicted in Louisiana for Sending Abortion Pills There*, NY Times (Jan 31, 2025).[8] Similarly, the Attorney General of Texas is locked in a battle with a New

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[7] Available at https://www.oregon.gov/oha/PH/BIRTHDEATHCERTIFICATES/VITALSTATISTICS/InducedAbortion/abortion25.pdf.
[8] Available at https://www.nytimes.com/2025/01/31/health/abortion-louisiana-new-york-prosecution-shield-law.html.

York state court clerk to file a default judgment he obtained against that same New York abortion provider. Carter Sherman, *Texas sues New York official for refusing to take action against abortion provider*, The Guardian (July 29, 2025).[9]

And the Texas Attorney General has issued demands to out-of-state medical providers, including the Seattle Children's Hospital in Washington State, *see id.*, for records relating to the "use of hormone blockers and counseling services" for trans patients. Staff of S Comm on Finance, *How State Attorneys General Target Transgender Youth and Adults by Weaponizing the Medicaid Program and their Health Oversight Authority*, S Rep, 118th Cong, 9 (Apr 2024).[10] The Texas Attorney General has reportedly described the investigation as involving "a Medicaid fraud probe [as well as] deceptive trade, antitrust and human trafficking laws." *Id.*

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[9] Available at https://www.theguardian.com/us-news/2025/jul/29/texas-new-york-lawsuit-abortion-provider

[10] Available at https://www.finance.senate.gov/imo/media/doc/senate_finance_committee_majority_staff_report_how_state_attorneys_general_target_transgender_youth_and_adults_by_weaponizing_the_medicaid_program_and_their_health_oversight_authority.pdf

Notably, New York and Washington have adopted shield laws that are similar to Oregon's in some respects. *See State Shield Laws: Protections for Abortion and Gender-Affirming Care Providers*, Kaiser Family Foundation (as of July 2025.[11]

Confirming that individuals retain a state constitutional privacy interest in their medical records, even when those records are held by health care providers, would provide an important additional layer of protection for patients who receive reproductive and gender-affirming care from Oregon providers. Local police departments seeking access to a patient's medical records involving reproductive and gender-affirming care would need to convince a neutral magistrate that there is probable cause to do so. And in declining to enforce out-of-state subpoenas that seek reproductive and gender-affirming care records, Oregon courts can and should rely not only on the state's shield law, but also its constitutional privacy guarantee.

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[11] Available at https://www.kff.org/state-health-policy-data/state-indicator/shield-laws/?currentTimeframe=0&sortModel=%7B%22colId%22:%22Location%22,%22sort%22:%22asc%22%7D

CONCLUSION

For the foregoing reasons and those set forth by Mr. Kern, this court should hold the trial court erred in failing to suppress the use of his BAC results in the criminal proceedings against him.

DATED this 2nd day of September 2025.

Respectfully submitted,

/s/ Lindsey Burrows
Lindsey Burrows, #113431
Burrows Appellate Law
333 SW Taylor Street, Suite 300
Portland, OR 97204
lindsey@burrowsappellatelaw.com
Telephone: 503-882-4575

/s/ Kelly Simon
/s/ Eri Andriola
Kelly Simon, #154213
Eri Andriola, #246500
ACLU of Oregon, Inc.
P.O. Box 4058
Portland, OR 97240
ksimon@aclu-or.org
Eandriola@aclu-or.org
Telephone: 503-227-6928

Julie A. Murray
American Civil Liberties Union Foundation
915 15th Street NW
Washington, DC 20005
jmurray@aclu.org
Telephone: 202-675-2326

CERTIFICATE OF COMPLIANCE WITH BRIEF LENGTH AND TYPE SIZE REQUIREMENTS

In accordance with ORAP 8.15(3), the amicus brief is subject to the same rules as those governing briefs of parties.

Brief length: I certify that this brief contains 5,007 words and thus complies with the word-count limitation in ORAP 5.05.

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CERTIFICATES OF FILING AND SERVICE

Filing and service: I certify that on September 2, 2025, I filed the foregoing with the Appellate Court Administrator by electronic filing, and electronically served upon the following persons by using the court's electronic filing system:

ERNEST G. LANNET #013248
Chief Defender
Criminal Appellate Section
EMILY P. SELTZER #124513
Senior Deputy Public Defender
Oregon Public Defense Comm'n
1175 Court Street NE
Salem, OR 97301
Emily.Seltzer@opdc.state.or.us
Phone: (503) 378-3349
Attorneys for Defendant-Appellant

DANIEL A. RAYFIELD #064790
Attorney General
BENJAMIN GUTMAN #160599
Solicitor General
COLM MOORE #051750
Assistant Attorney General
400 Justice Building
1162 Court Street NE
Salem, OR 97301
colm.moore@doj.oregon.gov
Phone: (503) 378-4402
Attorneys for Plaintiff-Respondent

DATED September 2, 2025

/s/ Lindsey Burrows
Lindsey Burrows, #113431
BURROWS APPELLATE LAW
333 SW Taylor Street, Suite 300
Portland, OR 97204
lindsey@burrowsappellatelaw.com
Telephone: 503-882-4575