

SUPREME COURT, STATE OF COLORADO
Colorado State Judicial Building
2 East 14th Avenue, Denver, CO 80203

DATE FILED: January 25, 2023 2:25 PM
FILING ID: 4D2E2EBF8CEE4
CASE NUMBER: 2023SA12

IN RE:

THE PEOPLE OF THE STATE OF
COLORADO

v.

GAVIN SEYMOUR,
Juvenile Defendant.

COURT USE ONLY

**Attorneys for Amicus Curiae Electronic
Privacy Information Center**
Calli Schroeder
Atty. Reg. # 50621
Electronic Privacy Information Center
1519 New Hampshire Ave. NW
Washington, D.C. 20036
Phone: 202-483-1140

Case No.: 2023SA12
Related Case Below: 21-CR-
20001 (*People v. Gavin
Seymour*) Denver District Court,
Div.: 5A

**BRIEF OF AMICUS CURIAE ELECTRONIC PRIVACY INFORMATION
CENTER IN SUPPORT OF PETITIONER GAVIN SEYMOUR AND
REVERSAL**

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with C.A.R. 29 and C.A.R. 32, including all formatting requirements set forth in these rules. Specifically, the undersigned certifies that

The amicus brief complies with the applicable word limit set forth in C.A.R. 29(d).

It contains 3,157 words (does not exceed 4,750 words).

The amicus brief complies with the content and form requirements set forth in C.A.R. 29(c).

I acknowledge that my brief may be stricken if it fails to comply with any of the requirements of C.A.R. 29 and C.A.R. 32.

s/ Calli Schroeder

Calli Schroeder, Atty. Reg. # 50621

TABLE OF CONTENTS

	Page
Interests of the <i>Amicus</i>	1
Introduction.....	1
Argument	2
I. This Court's Opinion Will Have a Nationwide Impact.....	2
II. Reverse Keyword Warrants Threaten Access to Abortion and Information About Reproductive Privacy	5
A. Reverse Keyword Warrants Can Collect Information on Vast Numbers of People Who Search for Information About Their Reproductive Health.....	5
B. Reverse Keyword Warrants Could Expose Colorado Residents to Surveillance by Law Enforcement in Other States	9
C. Reverse Keyword Warrants Will Have a Chilling Effect on a Person's Right to Access Health Information Online	10
D. Reverse Keyword Warrants Would Increase the Risk of Meritless Prosecution.....	12
Conclusion	13

TABLE OF AUTHORITIES

Cases

<i>City of Seattle v. Long</i> , 493 P.3d 94 (Wash. 2021).....	3
<i>J.C. v. D.C.</i> , 199 A.3d 192 (D.C. 2018)	3
<i>Stanley v. Georgia</i> , 394 U.S. 557 (1969).....	12
<i>State v. Sanchez</i> , 570, 448 P.3d 991 (Idaho 2019)	3
<i>United States v. Chatrie</i> , 590 F. Supp. 3d 901 (E.D. Va. 2022).....	3, 4

Other Authorities

Alex Guarino, <i>Study Finds 89% of US Citizens Turn to Google Before Their Doctor</i> , WECT (June 24, 2019).....	7
Alice Miranda Ollstein and Megan Messerly, <i>Missouri Wants To Stop Out-of-State Abortions. Other States Could Follow</i> , Politico (Mar. 19, 2022).....	10
Amit Rawal, <i>Google’s New Health-Search Engine</i> , Medium (Jan. 21, 2020).....	7
Def’s Mot. to Suppress Evidence from a Keyword Warrant & Request for a Veracity Hearing.....	4, 9
Emily Olsen, <i>An Analysis Published in JAMA Internal Medicine Found About 350,000 Searches for Abortion Pill-Related Terms the First Week in May.</i> , Mobi Health News (June 29, 2022).....	8

Jennifer Gerson, <i>Abortion Rights Supporters Are Trying to Reduce Barriers to Access Through Search Keywords</i> , 19 th News (July 27, 2022)	7
Neil Richards, <i>Intellectual Privacy: Rethinking Civil Liberties in the Digital Age</i> (2015).....	12
Nick Coltrain, <i>Colorado Democrats Stop GOP’s Anti-Abortion Measures and Brace for Threat to Roe v. Wade</i> , Denver Post (Feb. 25, 2022)	5
Robert Baldwin, <i>Losing a Pregnancy Could Land You In Jail In Post-Roe America</i> , NPR (July 3, 2022).....	12
See Thomas Brewster, <i>Cops Demand Google Data on Anyone Who Searched a Person’s Name... Across a Whole City</i> , Forbes (Mar. 17, 2017).....	3
Seymour C.A.R. 21 Petition, Exh. 4, Decl. of Nikki Adeli.....	4
<i>The Most Googled Medical Symptoms by State</i> , Eligibility (Mar. 19, 2019).....	6

INTERESTS OF THE *AMICUS*

EPIC is a non-profit research center in Washington, DC, whose mission is to focus public attention on emerging privacy and civil liberties issues and to protect privacy, freedom of expression, and democratic values in the information age. EPIC believes privacy is a fundamental right. While advances in technology have potential to enhance our lives, the government and courts must guard against abuses, including invasive surveillance. EPIC regularly participates as amicus in cases involving surveillance and Fourth Amendment issues before the U.S. Supreme Court, state supreme courts, and other federal and state appeals courts. *See* Electronic Privacy Information Center, *Fourth Amendment Amicus Briefs* (2023), available at https://epic.org/?s=&_topics=fourth-amendment-privacy-laws&_content-type=amicus-brief.

INTRODUCTION

As the first and highest court to issue a public ruling on reverse keyword warrants, this Court will play an important role in the future of reverse keyword warrants nationwide. The Court's decision will influence how courts around the country grapple with the constitutionality of reverse keyword warrants. It will also

impact whether and how technology companies—namely, Google—execute the warrants in Colorado and elsewhere. The Court should thus carefully consider the potential impacts of its decision and how these reverse warrants can be used as a tool of oppression. This *amicus curiae* brief focuses on one such application of reverse keyword warrants: to target those who search for information related to abortion. Following the U.S. Supreme Court’s decision in *Dobbs v. Jackson Women’s Health Organization*, 142 S. Ct. 2228 (2022), several states have moved to criminalize abortion. Some are even considering making it illegal to travel for an abortion in a state in which it is legal. If reverse keyword warrants are found to be constitutional, people seeking information about abortions or other reproductive health issues will be at risk of investigation and prosecution. This could lead people to refrain from searching for such information at all, chilling speech and—much worse—preventing people from receiving life-saving medical treatment.

ARGUMENT

I. This Court's Opinion Will Have a Nationwide Impact.

The constitutionality of reverse keyword warrants is a novel issue. The existence of these reverse warrants only became public in 2017. *See* Thomas Brewster, *Cops Demand Google Data on Anyone Who Searched a Person’s*

Name... Across a Whole City, Forbes (Mar. 17, 2017).¹ This Court will be the first to publicly rule on the constitutional question they raise. The Court’s decision will influence courts across the nation as they consider the constitutionality of reverse keyword warrants used in their jurisdictions. It will also impact how search engines like Google execute these warrants in the future.

As the first public ruling to address the constitutionality of reverse keyword warrants, this Court’s opinion will have an impact wider than the borders of Colorado. Courts considering novel Fourth Amendment questions often rely on the reasoning from courts in other jurisdictions. *See, e.g., United States v. Chatrue*, 590 F. Supp. 3d 901, 931 (E.D. Va. 2022) (evaluating a geofence warrant based on reasoning from *In re Search of Information Stored at Premises Controlled by Google*, 481 F. Supp. 3d 730 (N.D. Ill. 2020) and *Matter of Search of Info. that is Stored at Premises Controlled by Google LLC*, 579 F. Supp. 3d 62 (D.D.C. 2021)). Courts nationwide cite this Court’s opinions as persuasive authority across a range of subjects. *See, e.g., City of Seattle v. Long*, 493 P.3d 94, 113 (Wash. 2021); *State v. Sanchez*, 570, 448 P.3d 991, 998 (Idaho 2019); *J.C. v. D.C.*, 199 A.3d 192, 203 (D.C. 2018).

¹ <https://www.forbes.com/sites/thomasbrewster/2017/03/17/google-government-data-grab-in-edina-fraud-investigation/?sh=5fe5045d7ade>.

This Court’s decision will also impact whether and to what extent technology companies like Google execute reverse keyword warrants. After a magistrate approves a warrant, “Google reviews each piece of legal process to ensure that it satisfies applicable law, works to narrow legal process when it is overbroad, and also objects to producing user information when appropriate.” *See* Seymour C.A.R. 21 Petition, Exh. 4, Decl. of Nikki Adeli ¶ 2. In this case, Google employees refused to execute the first two reverse keyword search warrants Google was served. *See* Def’s Mot. to Suppress Evidence from a Keyword Warrant & Request for a Veracity Hearing ¶¶ 21–24. Google then helped the government craft the third reverse keyword warrant subject to the motion to suppress. *Id.* ¶ 25. Google employees also occasionally reject other types of overbroad reverse warrants such as geofence warrants. *See, e.g., Chatrie*, 590 F. Supp. At 914, 921. While we do not know why Google rejects a warrant in a given case, the company apparently takes steps to ensure that the privacy of its users is protected against unreasonable intrusion by law enforcement—the same concern that underlies the Fourth Amendment’s requirement for particularized probable cause. As this Court’s opinion will be the only published opinion on the constitutionality of reverse keyword warrants, it will likely have a significant impact on Google’s decisions moving forward to reject or to execute such a reverse warrant.

When evaluating and announcing its decision about the legality of the reverse keyword warrant in this case, this Court should remain cognizant of that the impacts of its decision will be felt outside the state of Colorado.

II. Reverse Keyword Warrants Threaten Access to Abortion and Information About Reproductive Privacy

A. Reverse Keyword Warrants Can Collect Information on Vast Numbers of People Who Search for Information About Their Reproductive Health

Reverse keyword warrants undermine the statutorily protected right to an abortion in Colorado. Colorado has rejected attempts to restrict abortion access in the state four times since 2008. Nick Coltrain, *Colorado Democrats Stop GOP's Anti-Abortion Measures and Brace for Threat to Roe v. Wade*, Denver Post (Feb. 25, 2022).² Colorado residents and others who visit Colorado for reproductive health have a right to procure, support, and learn about abortions. Reverse keyword warrants, whether issued in this state or others, threaten that right by exposing significant amounts of sensitive personal data to law enforcement scrutiny without a valid basis. By their nature, reverse keyword searches allow law enforcement to

² <https://www.denverpost.com/2022/02/25/colorado-democrats-stop-3-gop-abortion-bills/>.

obtain information about every single person searching for specific terms related to reproductive health care, regardless of the reason for the search.

The United States Supreme Court’s decision in *Dobbs v. Jackson Women’s Health Organization*, 142 S. Ct. 2228 (2022), should inform this Court’s analysis of the Fourth Amendment and Article II, Section 7 of the Colorado Constitution. While abortions are legal in Colorado, they may not be legal in other states whose residents legally travel to Colorado for abortions. Following *Dobbs*, people may no longer be able to access relevant and necessary medical information about pregnancy or abortion from a doctor—and must therefore turn to the internet. Reverse keyword warrants will allow law enforcement in states that have criminalized abortion to identify and obtain sensitive information on a very large subset of people who have conducted online searches about reproductive health. People have the right to access information about their bodies, health, and medical choices without fear that those searches will subject them to law enforcement scrutiny. This Court’s decision will impact that right for people across the country. *See supra* Section I.

Google has become a go-to source for medical information: a 2019 study found that 89% of patients Google their symptoms before going to their doctor. *The Most Googled Medical Symptoms by State, Eligibility* (Mar. 19, 2019); Alex

Guarino, *Study Finds 89% of US Citizens Turn to Google Before Their Doctor*, WECT (June 24, 2019).³ These queries constitute 7% of Google’s daily searches, amounting to 70,000 search queries per minute or over 1 billion each day. Amit Rawal, *Google’s New Health-Search Engine*, Medium (Jan. 21, 2020).⁴

This trend extends to the realm of reproductive health, especially after *Dobbs*. In the weeks after the *Dobbs* decision was issued, Google searches for “‘medication abortion pills’ [went] up by 70 percent; ‘do abortion pills expire’ [went] up 350 percent; ‘abortion pills Amazon’ [went] up 80 percent. People Googling for ‘states where abortion is illegal map’ [went] up over 1,050 percent in [a] month.” Jennifer Gerson, *Abortion Rights Supporters Are Trying to Reduce Barriers to Access Through Search Keywords*, 19th News (July 27, 2022).⁵

Researchers found that Google searches originating in the United States mentioning terms such as “abortion pill,” “mifepristone/mifeprex,” or “misoprotol/cytotec” (abortion medications) reached record highs in the weeks after the *Dobbs* decision leaked. Emily Olsen, *An Analysis Published in JAMA*

³ <https://eligibility.com/medicare/states-most-googled-medical-symptom;https://www.wect.com/2019/06/24/study-finds-us-citizens-turn-google-before-their-doctor/>.

⁴ <https://medium.com/swlh/googles-new-healthcare-data-search-engine-9e6d824b3ccd>.

⁵ <https://19thnews.org/2022/07/abortion-access-activists-google-keywords-seo/>.

Internal Medicine Found About 350,000 Searches for Abortion Pill-Related Terms the First Week in May., Mobi Health News (June 29, 2022).⁶ There were 350,000 abortion pill-related searches in the week following the leak, 162% higher than expected. *Id.* Reverse keyword searches could subject any of the people conducting these searches to law enforcement investigation.

As a medical decision that often requires significant research and planning, abortion is especially vulnerable to discovery through reverse keyword warrants. Many search terms related to abortion are hard to obscure: people must search specific locations (“Planned Parenthood” or “abortion clinic”), specific treatments (“Plan C pills” or “mifepristone”), or other specific terms. In a state where abortion is not legal, a person may take all of the necessary steps to protect themselves from prosecution while obtaining an abortion but will still need to search the internet for information about their decision and health.

Colorado has determined that abortions should be legal; reverse keyword warrants are especially damaging to people’s ability to obtain abortions both inside and outside of Colorado; and this Court’s ruling will affect—even if indirectly—

⁶ <https://www.mobihealthnews.com/news/study-internet-searches-abortion-medications-surged-after-roe-draft-leak>.

the execution of reverse keyword warrants nationwide. The Court should find that these warrants violate the U.S. and Colorado constitutions.

B. Reverse Keyword Warrants Could Expose Colorado Residents to Surveillance by Law Enforcement in Other States

Reverse keyword warrants threaten patients and providers in Colorado because they may expose patients' private internet searches to out-of-state law enforcement. Reverse keyword warrants may reveal Colorado residents' searches to investigators because officials—such as the ones in this case—do not always place geographic limitations on reverse keyword warrants. *See, e.g.*, Def.'s Motion to Suppress Evidence from a Keyword Warrant & Request for a Veracity Hearing ¶¶ 22, 26 (detailing keywords used and a date range restriction but no geographic restrictions). This could have multiple deleterious effects: chilling residents from exercising their right to obtain information, subjecting residents to legal process from other states, and leaving residents open to prosecution under laws that prohibit aiding and abetting another person in obtaining an abortion.

Permitting reverse keyword warrants could increase the risk of prosecution for people seeking to provide, support, or obtain legal abortions in Colorado. While no state has yet criminalized out-of-state travel to obtain abortion services, several states have contemplated such a law. Alice Miranda Ollstein and Megan Messerly,

Missouri Wants To Stop Out-of-State Abortions. Other States Could Follow, Politico (Mar. 19, 2022).⁷ In the future, reverse keyword warrants could be used to prosecute people who have obtained or provided legal abortions if states succeed in criminalizing interstate travel to obtain an abortion.

This also presents a safety concern for abortion providers. Abortion providers in Colorado should not have to fear abortion-related investigations in other states or worry whether their patients searched terms that may implicate them in a reverse keyword warrant. Reverse keyword warrants will rightfully cause distress for patients and providers if their Google search history can be obtained by law enforcement and used to prosecute them.

C. Reverse Keyword Warrants Will Have a Chilling Effect on a Person’s Right to Access Health Information Online

This Court should decide that reverse keyword searches are unconstitutional because the alternative will chill the First Amendment right to gather reproductive-health-related information online. A person in a state that prohibits abortion may still want to search for information about abortion and related reproductive healthcare topics for many reasons, such as informing their political choices or

⁷ <https://www.politico.com/news/2022/03/19/travel-abortion-law-missouri-00018539>.

deciding whether their physical safety depends on obtaining an abortion. If this court finds that reverse keyword warrants are constitutional and influences courts in other states to find the same, those people may be unwilling to conduct such searches for fear of law enforcement scrutiny or prosecution. Alternatively, not everybody knows how and whether police from other states can enforce their anti-abortion laws in Colorado. If people incorrectly, but reasonably, fear abortion-related prosecution outside of Colorado because the state permits reverse keyword warrants, they would also be chilled from exercising their rights. Disincentivizing these types of searches could result in a less informed populace and could have dire effects if people with severe reproductive health issues are too frightened to turn to the internet for guidance. This is especially worrisome in the area of reproductive health, where searches for unambiguously legal activity may be similar to searches for criminalized activity such as abortions.

Privacy scholar Neil Richards has explained, “Internet searches implicate our intellectual privacy. We use tools like Google Search to make sense of the world, and intellectual privacy is needed when we are making sense of the world. Our curiosity is essential, and it should be unfettered . . . search queries implicate a special kind of intellectual privacy, which is the freedom of thought.” Neil Richards, *Intellectual Privacy: Rethinking Civil Liberties in the Digital Age* 111–

12 (2015). Indeed, it is well established that “the Constitution protects the right to receive information and ideas.” *Stanley v. Georgia*, 394 U.S. 557, 564 (1969). This Court should find that reverse keyword warrants are unconstitutional consistent with the well-established right to intellectual privacy.

D. Reverse Keyword Warrants Would Increase the Risk of Meritless Prosecution

In a state that has criminalized abortion broadly, people seeking information about reproductive health may be prosecuted merely if they conduct abortion-related searches before having a miscarriage. Prosecutors in states that prohibit abortion have already begun bringing charges against more women who have experienced miscarriages, labeling them as intentional abortions. *See* Robert Baldwin, *Losing a Pregnancy Could Land You In Jail In Post-Roe America*, NPR (July 3, 2022).⁸ A pregnant person who searches for information about miscarriages or other reproductive topics and later loses their pregnancy unwillingly could become an automatic suspect anytime a reverse keyword warrant issues, risking scores of meritless prosecutions. For example: a pregnant person has experienced several miscarriages in the past and worries that it might happen again

⁸ <https://www.npr.org/2022/07/03/1109015302/abortion-prosecuting-pregnancy-loss>.

during their current pregnancy. They live in a state that has broadly criminalized abortion and have heard news stories of women struggling to manage miscarriages safely. So they search for information such as “what causes miscarriages” in order to avoid them, which another person might search in order to *induce* a miscarriage. A reverse keyword warrant targeting these types of searches could be unable to distinguish between people who miscarried and people who induced illegal abortions, exposing many people to a risk of prosecution simply for attempting to protect their health. This demonstrates the danger of reverse warrants that make suspects out of anybody based on their questions, thoughts, and fears.

CONCLUSION

The Court should rule that reverse keyword warrants are unconstitutional, thereby safeguarding the reproductive and intellectual freedoms of individuals in Colorado and beyond, setting the stage for analogous rulings across the country, and providing companies subject to these overbroad warrants a clear basis to reject them.

Respectfully submitted,

s/ Calli Schroeder

Attorney: Calli Schroeder, Atty. Reg. # 50621

Electronic Privacy Information Center
1519 New Hampshire Ave. NW
Washington, D.C. 20036
Phone: 202-483-1140

Dated: January 24, 2023

I certify that true copies of the Proposed Brief of *Amicus Curiae*
Electronic Privacy Information Center were served by Electronic Service this
date upon all counsel of record.

/s/ Calli Schroeder
Calli Schroeder, Atty. Reg. # 50621

Dated: January 24, 2023