No. 14-181

IN THE

Supreme Court of the United States

ALFRED GOBEILLE, IN HIS OFFICIAL CAPACITY AS CHAIR OF THE VERMONT GREEN MOUNTAIN CARE BOARD,

Petitioner,

v.

LIBERTY MUTUAL INSURANCE COMPANY,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF *AMICI CURIAE* ASSOCIATION OF AMERICAN PHYSICIANS AND SURGEONS, INC., AND THE VERMONTERS FOR HEALTH CARE FREEDOM, IN SUPPORT OF NEITHER PARTY

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QUESTION PRESENTED

Vermont requires health care providers and health care payers to produce claims data and related information to the State's health care database. The law applies to all public and private entities that pay for health care services, including insurers, government programs, and third-party administrators. The State purportedly uses the database to inform health care policy.

Amici curiae will address the following question:

Did the Second Circuit err in holding in favor of patient medical record privacy, by deciding that ERISA preempts Vermont's health care database law as applied to the third-party administrator for a self-funded ERISA plan?

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INTERESTS OF *AMICI CURIAE*[1]

Since 1943, *Amicus* Association of American Physicians and Surgeons, Inc. ("AAPS") has been a membership organization dedicated to preserving the ethical standards of the Oath of Hippocrates and the sanctity of the patient-physician relationship. AAPS has filed numerous *amicus curiae* briefs in noteworthy cases like this one. *See, e.g., Stenberg v.*

[1] No counsel for a party authored this brief in whole or in part. No person or entity other than *Amici*, its members, or its counsel made a monetary contribution to the preparation or submission of this brief. *Amici* file this brief with the blanket written consent by all parties, which they have filed with the Court.

Carhart, 530 U.S. 914, 933 (2000) (citing an AAPS *amicus* brief).

Amicus Vermonters for Health Care Freedom ("VHCF") is a non-profit organization founded in 2011 in order to educate the public and legislators on issues relating to health care policy in Vermont. Specifically, VHCF opposes a government monopoly over health care and the adverse impact it will have in Vermont on patients and the economy. VHCF sponsors forums, makes presentations to community and professional groups, appears on public policy television and radio programs, and serves as an expert resource.

Amici have a direct and vital interest in this case by virtue of their goals to protect medical record privacy for patients.

SUMMARY OF ARGUMENT

The appellate decision below protects medical record privacy against intrusion by a Vermont regulatory scheme that requires production to the State of massive amounts of data related to individual care of patients. The Second Circuit properly found that there was a "significant" risk to the privacy of patients associated with the demand by Vermont for the wholesale transfer of medical records about unsuspecting patients. *Petition for a Writ of Certiorari Appendix* ("Pet. App.") 29 n.13. By construing the Employee Retirement Income Security Act of 1974 ("ERISA") in a manner consistent with patient privacy, the ruling below comports with teachings of this Court in favor of a full privilege of confidentiality in some medical records and a right of

privacy in others. ERISA should be interpreted in a manner that safeguards patient privacy, and the decision below was correct in doing that.

Short of affirming the decision below, the optimal result would be for this Court to dismiss the writ of *certiorari* as having been improvidently granted. This would leave intact the analysis below that protects privacy, while epitomizing judicial restraint on an issue that has not yet been fully vetted by the various Circuits. Indeed, there is no Circuit split, and no disagreement with a ruling by this Court arising from the Second Circuit decision, and it should remain in effect based on a dismissal of the writ.

ARGUMENT

Under threat of a $10,000 fine per violation, Vermont broadly requires "that any entity … possessing … [any] information relating to health care provided to Vermont residents or by Vermont health care providers and facilities" comply with the following:

> regularly submit medical claims data, pharmacy claims data, member eligibility data, provider data, and other information relating to health care provided to Vermont residents and health care provided by Vermont health care providers and facilities to both Vermont residents and non-residents in specified electronic format to the Department for each health line of business ….

Pet. App. 5-6 (citing Vt. Stat. Ann. tit. 18, § 9410(g) for the fine; quoting Vt. State Regulation H-2008-01, §§ 3(X), 4(D), for the reporting requirement).

The decision below was right in holding, after considering the privacy issue, that the Vermont regulatory scheme is preempted by ERISA, and this Court should dismiss the writ of *certiorari* as having been improvidently granted.

I. THE DECISION BELOW WAS CORRECT BASED ON MEDICAL RECORD PRIVACY GROUNDS.

The court below made a factual finding that the Vermont statute creates a significant risk to the privacy of patients' medical records. The Second Circuit expressly held:

> The overview of requirements (set out above) makes clear that Vermont requires ERISA plans to record, in specified format, massive amounts of claims information and to report that information to third parties, ***creating significant (and obvious) privacy risks*** and financial burdens that will be passed from the TPA to the Plan and from the Plan to the beneficiaries. That is not a proper allocation of plan assets.

Pet. App. 29 n. 13 (emphasis added).

This Court should reject the proposition, urged upon it by Petitioner in its brief, that "[t]he statute and rule protect personal privacy." Pet. Br. at 11. Breaches of the privacy of databases are so widespread and commonplace now that it can hardly be doubted that when medical record data is assembled and transferred in such large quantities, as the Vermont statute requires, then it is foreseeable that a privacy breach will inevitably occur. *See, e.g.*, "When identity theft isn't news,"

Deseret Morning News (Salt Lake City) (August 26, 2015) ("Thieves took the personal information of at least 22 million federal employees from the Office of Personnel Management.").

Yet Petitioner insists that patient privacy will be protected because "[t]he statute … mandates that confidential information be 'filed in a manner that does not disclose the identity of the protected person,'" Pet. Br. 11, quoting Vt. Stat. Ann. tit.18 § 9410(e), by "prohibit[ing] submission of 'direct personal identifiers,' … including names, addresses, and Social Security numbers." Pet. Br. 11, quoting Vt. State Regulation H-2008-01 § 7(A)(5) and Vt. Stat. Ann. tit.18 § 9410(h)(3)(D). But scholars have disproven the myth that privacy in medical records is attained by removing "direct personal identifiers" as Petitioner pretends. A team at Harvard was able to identify 84-97% of the individuals in a DNA database despite its lack of several personal identifiers. The researchers cross-referenced public voter registrations lists and used dates of birth. *See* Latanya Sweeney, Akua Abu, Julia Winn, "Identifying Participants in the Personal Genome Project by Name," supported by a National Institutes of Health Grant.[2] Professor Sweeney even showed how private medical information about then-Governor William Weld of Massachusetts could be publicly disclosed through the process of "re-identification". *See id.* at 2; *see also* Latanya Sweeney, "k-anonymity: a model for protecting privacy," *International Journal on Uncertainty,*

[2] http://dataprivacylab.org/projects/pgp/1021-1.pdf (viewed Aug. 28, 2015).

Fuzziness and Knowledge-based Systems 557-70 (2002).[3]

Petitioner repeatedly quotes the dissent below for its statement that there was "no evidence" of a risk to privacy under the Vermont statute. Pet. Br. 22, 52. But in fact the dissent did not specifically and adequately address the privacy issue, and instead merely asserted that it is speculation to recognize the Vermont regulatory scheme as being "time-consuming and risky." Pet. App. 46 (Straub, J., dissenting, quoting panel decision at Pet. App. 25). Yet the risk is real, and the privacy rights of patients are plainly implicated by Vermont's demand for massive amounts of medical record data so broad in scope that this could easily harm individual patients in a relatively small State such as Vermont. A hacker, an intentional leak of this information, or perhaps simply a freedom of information-type request could yield private medical information that might ruin the career of a political candidate or employee.

In *Whalen v. Roe*, this Court recognized that medical record privacy interests are substantial, and that state laws implicating them are to be analyzed with something more than a mere rational-basis standard of review. "The right to collect and use such [medical] data for public purposes is typically accompanied by a concomitant statutory or regulatory duty to avoid unwarranted disclosures" and "in some circumstances that duty arguably has its roots in the Constitution …." *Whalen v. Roe*, 429 U.S. 589, 605 (1977). "Unquestionably, some

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[3] https://epic.org/privacy/reidentification/Sweeney_Article.pdf (viewed Aug. 28, 2015).

individuals' concern for their own privacy may lead them to avoid or to postpone needed medical attention," the Court observed. *Id.* at 602.

While this Court ultimately upheld the reporting requirement imposed by the State of New York in *Whalen*, the Court did so before the pervasive hacking and leaking of personal information that exists today. The *Whalen* Court cautioned that the outcome could be different in "a system that did not contain comparable security provisions." *Id.* at 606. *See also* Roger S. Magnusson, "Symposium Article: Part 4: Privacy: The Changing Legal and Conceptual Shape of Health Care Privacy," 32 J.L. Med. & Ethics 680, 681 (Winter, 2004) (explaining that in *Whalen* this Court "appeared to recognize an intermediate level of protection for information privacy claims falling somewhere between the compelling state interest approach (that applies where state legislation would interfere with fundamental liberty interests), and the more easily-satisfied rational relation test, where it would not") (inner quotations omitted).

In *Jaffee v. Redmond*, the Court went further and held that "confidential communications between a licensed psychotherapist and her patients in the course of diagnosis or treatment are protected from compelled disclosure under Rule 501 of the Federal Rules of Evidence." 518 U.S. 1, 15 (1996). The Court added that this:

> psychotherapist privilege covers confidential communications made to licensed psychiatrists and psychologists. We have no hesitation in concluding in this case that the federal privilege should also extend to confidential communications

> made to licensed social workers in the course of psychotherapy.

Id. at 15.

As with other privileges, the purpose of the psychotherapist-patient is to protect the relationship and avoid the chilling effect that disclosure would have on that relationship. The Vermont statute, while pretending to protect privacy, breaks down the "trust" in confidentiality that the Court has determined to be of paramount concern. "Like the spousal and attorney-client privileges, the psychotherapist-patient privilege is 'rooted in the imperative need for confidence and trust.'" *Id.* at 10 (quoting *Trammel v. United States*, 445 U.S. 40, 51 (1980)). It matters not whether a government thinks its safeguards against hacking and data breaches are adequate, but whether patients lose their "confidence and trust" by virtue of the mandated disclosures.

In another context, the Court has cited favorably the Oath of Hippocrates, which contains a strong protection of privacy dating back nearly 2500 years:

> All that may come to my knowledge in the exercise of my profession [as a physician] … which ought not to be spread abroad, ***I will keep secret and never reveal***.

Oath of Hippocrates of Kos, 5th century B.C. (emphasis added).[4] This Court has described the Oath of Hippocrates as "a long-accepted and revered statement of medical ethics." *Roe v. Wade*, 410 U.S. 113, 132 (1973) (embracing the Oath of Hippocrates despite disagreeing with its provision relating to

[4] http://www.aapsonline.org/ethics/oaths.htm (viewed August 25, 2015).

abortion).

Dissenting from the Court decision that approved warrantless wiretaps in *Olmstead v. United States,* Justice Brandeis characterized patient-physician communications as being privileged on the same level as the attorney-client relationship:

> communications that are private and privileged – those between physician and patient, lawyer and client ….

Olmstead v. United States, 277 U.S. 438, 487 (1928) (Brandeis, J., dissenting), *overruled by Katz v. United States*, 389 U.S. 347, 353 (1967). Justice Brandeis's view, of course, eventually commanded a majority with respect to protection by the Fourth Amendment of telephone conversations against government wiretaps.

It is a factual issue whether the Vermont statute comports with basic privacy for patients in their medical records, and this factual question was essentially resolved against the Vermont statute by the Second Circuit. This Court should not grapple anew with this same factual question. *See, e.g.*, *Thompson v. Louisiana*, 469 U.S. 17, 23 (1984) ("a factual issue" is "unsuitable for our consideration in the first instance," this Court observed). Whatever security protections that Vermont insists are in place to safeguard the privacy of the data were obviously not persuasive to the Second Circuit. This Court should not make a different factual finding based on such a meager record here on the privacy issue.

In addition to *Whalen*, other decisions by this Court have recognized that there are "constitutionally protected privacy rights in matters of personal life." *Nixon v. Adm'r of General Servs.*,

433 U.S. 425, 457 (1977). *See also McVane v. FDIC (In re McVane)*, 44 F.3d 1127, 1138 (2d Cir. 1995) (holding that there is an "'intermediate' level of scrutiny to laws requiring individuals to disclose personal financial information"). ERISA preemption should be construed as consistent with these privacy concerns, as the Second Circuit correctly held below.

II. THE WRIT OF *CERTIORARI* SHOULD BE DISMISSED AS HAVING BEEN IMPROVIDENTLY GRANTED.

The privacy of medical records is central to this case but it has not been fully litigated and is not even addressed by the Question Presented as formulated by Petitioner. Yet a decision by this Court would have a significant impact on the fundamental issue of medical record privacy with respect to governmental databases. Rather than decide this matter without adequate vetting by the lower courts first, the appropriate resolution is to dismiss the writ of *certiorari* as having been improvidently granted.

There was no substantive dissent below from the finding by the panel majority that the Vermont regulatory scheme posed "significant" and "obvious" risks to privacy. The current posture of this case does not permit the Court to fully address and resolve the underlying privacy issue. A decision upholding the enforceability of the Vermont regulatory scheme against ERISA plans would have the effect of eroding, *sub silentio*, patient medical record privacy and the teaching of *Whalen v. Roe*.

The dilemma here falls within the rich history of this Court in dismissing a case, without resolving the

Question Presented, in order to preserve the issue for another day. As this Court explained *per curiam* more than 50 years ago:

> While this Court decides questions of public importance, it decides them in the context of meaningful litigation. Its function in resolving conflicts among the Courts of Appeals is judicial, not simply administrative or managerial. Resolution here of the extent to which [this issue] may be given effect by our courts can await a day when the issue is posed less abstractly.

The Monrosa v. Carbon Black Export, 359 U.S. 180, 184 (1959).

Supreme Court procedure facilitates this result by allowing a writ of *certiorari* to be granted based on merely four votes, such that upon further consideration five votes may later dismiss the same writ:

> The vote of four Justices is sufficient to grant a petition for certiorari, but that action does not preclude a majority of the Court from dismissing the writ as improvidently granted after the case has been argued. *See, e. g., NAACP v. Overstreet*, 384 U.S. 118, 16 L. Ed. 2d 409, 86 S. Ct. 1306 (1966) (dismissing, after oral argument, writ as improvidently granted over the dissent of four Justices). We have frequently dismissed the writ as improvidently granted after the case has been briefed and argued; in fact, we have already done so twice this Term. *See Gibson v. Florida Bar*, 502 U.S. 104, 116 L. Ed. 2d 432, 112 S. Ct. 633 (1991); *PFZ Properties, Inc. v. Rodriguez*, 503 U.S. 257, 117 L. Ed. 2d 400, 112 S. Ct. 1151 (1992).

United States v. Williams, 504 U.S. 36, 60 n.7 (1992) (Stevens, J., dissenting). Such dismissal is appropriate here to avoid premature resolution of a thorny constitutional issue of medical record privacy. In words apt here, Justice Stevens explained in his concurrence with a high-profile dismissal of a writ as improvidently granted:

> this Court has appropriately decided to dismiss the writ as improvidently granted centers around the importance of the difficult First Amendment questions raised in this case. As Justice Brandeis famously observed, the Court has developed, "for its own governance in the cases confessedly within its jurisdiction, a series of rules under which it has avoided passing upon a large part of all the constitutional questions pressed upon it for decision." *Ashwander v. TVA*, 297 U.S. 288, 346, 80 L. Ed. 688, 56 S. Ct. 466 (1936) (concurring opinion). The second of those rules is that the Court will not anticipate a question of constitutional law in advance of the necessity of deciding it. *Id.*, at 346-347, 80 L Ed 688, 56 S Ct 466. The novelty and importance of the constitutional questions presented in this case provide good reason for adhering to that rule.

Nike, Inc. v. Kasky, 539 U.S. 654, 663 (2003) (Stevens, J., concurring, joined by Ginsburg and Souter). Likewise, the "novelty and importance" of the constitutional issue of privacy here weigh against ruling on the issue before there is a Circuit split below.

The writ for *certiorari* was granted here after six States submitted an amicus brief insisting that review by this Court was necessary, but upon closer

look their arguments do not withstand scrutiny. *See Brief for the States of New York, Maryland, Massachusetts, New Hampshire, Oregon, and Utah as Amici Curiae in Support of Petitioner*. Their brief argues that at least sixteen States have a data collection program "of this type" (*id.* at 1), yet barely a third of those States joined their amicus brief and its lead State, New York, estimates that it is still a year away from its program becoming operational. (*Id.* at 2-3) The States' amicus brief then asserts that a prominent achievement of this data collection was to discover in 2011 that one in six hysterectomies may be unnecessary (*id.* at 6), but the same point about unnecessary hysterectomies was fully reported by CNN as having "long been a concern" years earlier, in 2007. Curt Pesmen, "5 operations you don't want to get – and what to do instead," *CNN* (July 27, 2007) ("There's long been a concern, at least among many women, about the high rates of hysterectomy … in the United States. American women undergo twice as many hysterectomies per capita as British women and four times as many as Swedish women.").[5]

The medical profession can do a far better job of reducing health care costs, without invading patient privacy, than States can do in violation of it. ERISA does not exist to permit some States to run roughshod over patient privacy. A more complete record on the privacy issue is warranted before the floodgates are opened for a third of the States to become Big Brother.

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[5] http://www.cnn.com/2007/HEALTH/07/27/healthmag.surgery/index.html?iref=newssearch (viewed Aug. 26, 2015).

The Department of Justice urged this Court not to grant *certiorari* in this case, and pointed out that there is neither a Circuit split nor any disagreement by the decision below with a ruling by this Court. *See Brief for the United States as Amicus Curiae* (On Petition), dated May 2015, at 21 ("no square conflict exists over the question presented at this time"); *id.* at 18 (explaining that there is no conflict with any decisions by this Court, which "in fact, has not considered a state law similar to the Vermont scheme"). Lacking a proper basis for a writ of *certiorari*, and in light of how the arguments by Petitioner in seeking a writ of *certiorari* were disproven by the United States, the writ should be dismissed.

CONCLUSION

For the foregoing reasons, the writ of *certiorari* should be dismissed as improvidently granted.

Respectfully submitted,

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