No. 15-1142

IN THE

Supreme Court of the United States

WEST VIRGINIA DEPARTMENT OF HEALTH AND HUMAN RESOURCES,

Petitioner,

v.

E. H., ET AL.,

Respondents.

On Petition for Writ of Certiorari to the Supreme Court of Appeals of West Virginia

BRIEF OF *AMICUS CURIAE* ASSOCIATION OF AMERICAN PHYSICIANS AND SURGEONS, IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

Enacted under the federal Health Insurance Portability and Accountability Act of 1996 (HIPAA), the federal Privacy Rule sets a federal floor for the privacy of medical records. The Rule generally prohibits healthcare providers from disclosing patient records without patient authorization. It expressly preempts any "contrary" state law unless that law provides "more stringent" privacy protection or one of certain narrow exceptions applies.

The West Virginia Supreme Court of Appeals held below that the Privacy Rule does not preempt West Virginia state law that requires broad disclosures. The court interpreted state law to mandate that state-run psychiatric hospitals disclose nearly all patient records to an independent organization without patient authorization. But relying solely on the summary assertion of one state executive agency that this state law is more protective of patient privacy than the Privacy Rule, the court found the state law not preempted.

The questions presented are:

1. Whether a court may abdicate to a state executive agency its duty under the Supremacy Clause to determine whether state law has been preempted.

2. Whether the Privacy Rule, which forbids the disclosure of a patient's records without patient authorization, preempts West Virginia state law, which requires the disclosure of patient records without patient authorization.

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INTERESTS OF *AMICUS CURIAE*[1]

Since 1943, *Amicus* Association of American Physicians and Surgeons ("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 *Amicus*, its members, or its counsel made a monetary contribution to the preparation or submission of this brief. *Amicus* files this brief with the required ten-day prior written notice, and with the written consent by all parties as filed concurrently with this brief.

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

AAPS has a direct and vital interest in this case by virtue of the goals of its members to protect the medical record privacy of patients and physicians.

SUMMARY OF ARGUMENT

The Supreme Court of Appeals of West Virginia has given "access without limitation" to so-called patient advocates to rifle through confidential psychiatric records of identified patients, without their consent. (Pet. at 32a) This is contrary to The Health Insurance Portability and Accountability Act of 1996 ("HIPAA"), 42 U.S.C.S. §§ 1320d-1320d-8, and the Privacy Rule promulgated thereunder, 42 C.F.R. pts. 160 & 164 (2013), which establish safeguards against this intrusion into medical record privacy.

In so doing, the court below created a conflict with virtually every other court, state and federal, by granting *carte blanche* to strangers to gain access to highly personal psychiatric records without the consent of patients. Where those privileged documents may end up is anyone's guess, and this invasion of privacy is just the sort of intrusion that the Privacy Rule prohibits.

Moreover, the Privacy Rule protects *individual* rights, which cannot be sacrificed for a vague overall goal such a purported "improvement of the quality of health care." (Pet. at 31a) The court below erred in responding to an alleged public health problem of inadequate psychiatric care, by authorizing infringement on individual rights of privacy. It is not necessary – or permissible under the Privacy Rule –

to intrude on the privacy rights of patients in the name of promoting public health.

Finally, medical privacy is an issue of national significance. The degree of confidentiality that a patient retains in his mental health records as guaranteed by federal law – but improperly overruled by the state court below – is a matter that warrants granting the petition for *certiorari*.

ARGUMENT

I. THE WEST VIRGINIA SUPREME COURT CREATED A CONFLICT WITH OTHER STATE AND FEDERAL COURTS ON THE MEANING OF "MORE STRINGENT" IN ASSESSING PREEMPTION.

HIPAA generally preempts "contrary" state laws. 45 C.F.R. § 160.203. A "state law" is defined broadly to "mean a constitution, statute, regulation, rule, common law, or other State action having the force and effect of law." 45 C.F.R. § 160.202. The ruling below fits within this definition, and thus should be preempted by HIPAA because the court decision gives "access without limitation" to highly personal medical records by non-medical strangers. (Pet. at 32a). "Contrary, when used to compare a provision of State law to a standard, requirement, or implementation specification adopted under this subchapter, means: (1) A covered entity or business associate would find it impossible to comply with both the State and Federal requirements …." 45 CFR 160.202 & (1). That "impossible to comply with both" federal and state law is the box that the decision below has put

West Virginians in, and this contravenes the Supremacy Clause. U.S. CONST. Art. VI, Cl. 2.

Federal preemption ensures that HIPAA and the Privacy Rule override state medical privacy laws unless the state laws are "more stringent" than the federal standard. *Nw. Mem'l Hosp. v. Ashcroft*, 362 F.3d 923, 926 (7th Cir. 2004) (citing 45 C.F.R. § 160.203(b)); *see generally* 42 U.S.C. § 1320d-7(a)(2)(B). Until now, courts had been virtually unanimous in construing the "more stringent" test to refer to "laws that afford patients more control over their medical records." *Law v. Zuckerman*, 307 F. Supp. 2d 705, 709 (D. Md. 2004). *See also Wade v. Vabnick-Wener*, 922 F. Supp. 2d 679, 686 (W.D. Tenn. 2010); *Congress v. Tillman,* 2009 U.S. Dist. LEXIS 50501, at *3 (E.D. Mich. June 16, 2009); *Stewart v. La. Clinic*, 2002 U.S. Dist. LEXIS 24062, at *9 (E.D. La. Dec. 12, 2002).

Federal regulations are clear that the "more stringent" exemption from HIPAA preemption applies only when the state law "provide[s] greater protection for the individual who is the subject of the individually identifiable health information" than the standard set forth by HIPAA and its regulations. 45 C.F.R. § 160.202(6). Under federal regulations, therefore, courts generally should not consider the state law to be more stringent than the Privacy Rule unless the state law "prohibits or restricts a use or disclosure in circumstances" where HIPAA would permit it. *Id.* § 160.202.

The decision below in West Virginia conflicts with the foregoing decisions and with the Supreme Court of Georgia, which held that state laws less protective of patient privacy do not qualify for the "more

stringent" exception to preemption under HIPAA. The Georgia high court ruled that a state statute was preempted by federal law with respect to medical record privacy because the Georgia law did not impose any express requirement of notification of patients, while the federal law did. *Allen v. Wright*, 282 Ga. 9, 12, 644 S.E.2d 814, 816-17 (2007). The Georgia court explained that:

> Because [Ga. Code] § 9-11-9.2 fails to impose any express requirement of notification of the right to revoke, it is possible to comply with its provisions while failing to satisfy the more stringent requirements of HIPAA. Therefore, the state statute has been preempted by the federal law.

Id. Under the Supremacy Clause, therefore, HIPAA preempted the less stringent Georgia law.

Granting unconsented access by strangers to psychiatric records, as the court below did, is plainly preempted by HIPAA because the ruling does not confer on patients greater control over their own medical records. Rather, the decision by the Supreme Court of Appeals of West Virginia has created a conflict with multiple decisions by other state and federal courts, which this Court should resolve by granting *certiorari.*

II. THE WEAKENING BELOW OF CONFIDENTIALITY FOR THE PATIENT-PSYCHIATRIST RELATIONSHIP IS OF NATIONAL IMPORTANCE AND WARRANTS REVIEW HERE.

This Court has granted *certiorari* to review and reverse decisions that weakened the attorney-client privilege. For example, an appellate ruling that the attorney-client privilege does not survive the death of the client was considered and reversed by this Court. *Swidler & Berlin v. United States*, 524 U.S. 399 (1998). Speaking about the attorney-client privilege, this Court held that "[t]he privilege is intended to encourage 'full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and the administration of justice.'" *Id.* at 403.

Likewise, robust privacy for the patient-psychiatric relationship is fundamental to the duty of the psychiatrist to protect the patient against embarrassment or other harm, and the only exception is when disclosure is necessary to protect harm to others. "The psychiatrist's duty to preserve the privacy of his patient requires that he not disclose a confidence of his patient 'unless such disclosure is *necessary* to avert danger to others.'" *Mavroudis v. Superior Court*, 102 Cal. App. 3d 594, 600, 162 Cal. Rptr. 724, 730 (1980) (quoting *Tarasoff v. Regents of Univ. of Cal.*, 17 Cal. 3d 425, 441 (1976), emphasis added). This very limited exemption from the general rule of confidentiality for patient-psychiatric records is analogous to the limited crime-fraud exception to the strict confidentiality of attorney-client communications. *See, e.g.*, *United States v. Zolin*, 491

U.S. 554, 563 (1989). If a court were to authorize wholesale access to otherwise confidential attorney-client communications, that would be considered an issue of national importance. So should the ruling below that enables third-party access on an unconsented basis to psychiatric records of patients.

Just as expediency is no justification for a sweeping violation of the attorney-client privilege, broad objectives of public health do not justify intruding on the confidential patient-psychiatrist relationship. This Court has not hesitated to grant *certiorari* to examine and protect the confidential relationship between attorneys and clients, and should likewise grant the petition here to review the infringement below on the rights of patients in the confidentiality of their treatment by psychiatrists.

CONCLUSION

For the foregoing reasons, the petition for *certiorari* should be granted.

Respectfully submitted,

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