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

REPLY BRIEF OF PETITIONER

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App.	Petitioner's Appendix
Apl't App.	Appendix Upon Direct Appeal to the West Virginia Supreme Court of Appeals, *W. Va. DHHR v. E.H.*, No. 14-0965
BIO	Respondents' Brief in Opposition
DHHR	West Virginia Department of Health and Human Resources
HIPAA	The Health Insurance Portability and Accountability Act of 1996, Pub. L. No. 104-191, 110 Stat. 1936 (codified as amended in scattered sections of 18, 26, 29 & 42 U.S.C.)
Pet.	Petition for Certiorari
Privacy Rule	Standards for Privacy of Individually Identifiable Health Information, 45 C.F.R. Pts. 160 & 164

REPLY BRIEF

Nothing in Respondents' brief in opposition rebuts the need for this Court to rein in a state high court that has both disregarded its duty under the Supremacy Clause and undermined the patient privacy that Congress sought to protect with the Health Insurance Portability and Accountability Act of 1996 (HIPAA).

Respondents offer little in direct response to the Petition's arguments. Though their brief fills thirty-two pages, not a word defends, or even addresses, the West Virginia high court's unprecedented abdication to a state agency of its responsibility under the Supremacy Clause to determine whether state law has been preempted. And Respondents' answer to the second question presented—whether HIPAA's Privacy Rule preempts state law—reduces to a single incredible assertion in two pages buried in the back of the brief. BIO 27-29. According to Respondents, a state law that requires nearly unlimited disclosure of state psychiatric patients' private medical information to legal strangers is somehow "more stringent" than HIPAA—a federal law that, as anyone who has ever been to the doctor knows, requires affirmative patient consent even for one spouse to obtain the medical information of the other.

Respondents primarily seek—at great length—to show that the judgment below is good policy and that this case presents a poor vehicle for review. Neither contention is persuasive. Policy preferences do not excuse a state supreme court from carrying

out its obligations under the Supremacy Clause to federal law. While the state court might think it good policy to grant an outside organization nearly unrestricted access to the private medical information of some of society's most vulnerable—a debatable proposition, to be sure—it may not ignore federal law to pursue that end.

Nor are Respondents correct that this case is a poor vehicle. They assert that there are other grounds on which to affirm the judgment. But these arguments were rejected unanimously by the court below, and this Court need not consider them because Respondents have not filed a cross-petition and the arguments are in any event fact-bound issues that do not merit certiorari. Respondents also contend that this case is inappropriate for review because it involves a state agency urging preemption of state law. But as this Court well knows, it is the duty of state officials, who must uphold both the federal and state constitutions, to independently assess the constitutionality of the state laws they are charged to apply.

The undeniable facts are these: A state supreme court has refused to perform its duty under the Supremacy Clause to give effect to federal law over a plainly contrary state law. This defiance of federal law and the constitutional order cries out for certiorari. Indeed, this Court should consider summarily reversing or vacating the judgment below, as it has done in other cases involving similarly egregious behavior by state high courts. See, *e.g.*, *James v. City of Boise*, 136 S. Ct. 685, 685 (2016); *Marmet Health Care Ctr., Inc. v. Brown*, 132 S. Ct. 1201, 1202 (2012).

I. Respondents do not contest that the state high court abdicated its duty under the Supremacy Clause.

The preemption decision below is not merely incorrect, see Pet. 39-42, it is an unprecedented dereliction of duty on a constitutional scale, see *id.* at 31-39. Unlike any preemption decision of this Court or any other court of which any party is aware, the West Virginia Supreme Court of Appeals abdicated to a state agency the determination whether state law is preempted by federal law. The state court simply adopted a conclusory statement in a non-binding preemption "guide" produced by outside counsel to a state agency that is not a party to this litigation. *Id.* at 21, 27-28. That abdication of duty must be swiftly corrected by this Court.

Respondents offer no defense on this point at all. BIO 1 (defending judgment "for reasons different from those given" below). They do not dispute that the state high court had a "responsibility to enforce the supreme law of the land." Pet. 36. They concede that preemption "demands a comparison between the . . . context-specific, relevant provisions of federal and state law." BIO 28. They do not contest that the state court failed to undertake such an analysis or even to discuss the specific standards in the Privacy Rule for evaluating preemption. 45 C.F.R. § 160.202. And they do not argue that a court may entirely defer a preemption decision to a state agency or offer any example of a court having done so before.

Most significant, Respondents do not question that the state court's abdication on preemption is a fundamental constitutional error of the kind that

this Court has summarily reversed. They do not quarrel with the dissenting justice's warning that the majority opinion's "mind-boggling" approach eviscerates the Supremacy Clause. App. 41; see also Pet. 37. And they do not challenge that just this Term, this Court summarily reversed a state supreme court for similarly disregarding its "duty" to respect the constitutional order. *City of Boise,* 136 S. Ct. at 685; see also Pet. 38.

II. The West Virginia Supreme Court of Appeals effectively nullified the preemption clause of a major federal privacy law.

A second, independent reason for this Court's intervention is that the decision below renders the Privacy Rule's preemption clause effectively a nullity. The Privacy Rule creates a "federal floor" of privacy protection by forbidding healthcare providers from disclosing patient information without authorization, 65 Fed. Reg. 82,462, 82,471, 82,580 (Dec. 28, 2000); 45 C.F.R. § 164.508(a)(1), and by preempting inconsistent state law unless the law provide patients "more stringent" protection. 45 C.F.R. § 160.203(b). As Respondents admit, "every [] court to consider HIPAA preemption has held that 'more stringent' means 'laws that afford patients more control over their medical records." BIO 28 (quoting Pet. 40). But here, the state law at issue requires the opposite: it mandates the disclosure of patient records without patient authorization, while the Privacy Rule forbids the same. App. 27-29, 31. By exempting such a state law from preemption, the decision below runs right through the federal floor of privacy protection created by the Privacy Rule.

Respondents, nonetheless, assert that the decision below is correct. They confess that "[o]ften, 'more stringent' state laws are those that prohibit a disclosure that HIPAA allows." BIO 27. But "given the circumstances here," they claim, the state law's requirement of more disclosure to patient advocates actually "provides more stringent protection." *Ibid.* That is to say, Respondents contend that the mandated disclosure of nearly all patient information to individuals who are, in the eyes of the law, strangers to the patients is somehow more protective of patient privacy.

To justify this astonishing claim, Respondents explain that the required disclosures "better enable[] patients to protect their rights." *Id.* at 27-28. According to Respondents, the "severely mentally ill patients at [the hospitals] . . . can achieve 'more control' over their health information only with the assistance of advocates, who effectively act as their agents." *Id.* at 29. Put another way, the unfettered disclosure to the advocates protects privacy because patients "require advocates' support in interpreting and making decisions regarding their health information." *Ibid.*

Nonsense. Respondents' logic is built wholly on false premises and self-serving assumptions. To begin, the patients do not "require" these particular advocates, who have no legal relationship or duty to the patients, to make informed decisions about medical information. As Respondents admit, the advocates are at best acting "effectively" as agents. Instead, patients can be and are assisted by *actual* agents, who are legally recognized through measures like guardianship or power-of-attorney. See*, e.g.*,

W. Va. Code §§ 27-3-2, 27-5-3(e). Respondents' argument also assumes that every advocate who unilaterally declares him or herself to act "effectively" as a patient's agent will do so in the patient's interest. But there is no way to be sure that such advocates, who do not owe patients a duty of loyalty as a legal guardian or attorney-in-fact does, will not be influenced by or act in accordance with agendas that may or may not benefit individual patients. See Pet. 22 ("advocates had a practice of 'fishing' in patient files").

The fact is that the state law at issue gives psychiatric patients—some of society's most vulnerable individuals—less control over the privacy of their medical information than the ordinary American. Anyone who has been to the doctor is familiar with the many forms and signatures that must be completed before that doctor will release medical information to an insurance company or anyone else. Even a patient's spouse cannot access the patient's information without that patient's prior consent. But as interpreted by the West Virginia Supreme Court of Appeals, the state law here mandates that state psychiatric hospitals "provid[e] unlimited record access to patient advocates," and to do so *without any prior patient authorization or even patient knowledge*. App. 30. That is the fundamental issue. DHHR is not objecting to the presence of advocates, but simply to the notion that notice and consent are not required, which contrasts sharply with the experience most other Americans have under HIPAA. Contrary to Respondents' assertion, there is no question that the state law is much *less* stringent than federal law and, therefore, should have been preempted.

III. There are no obstacles to this Court's review.

Conceding that the Petition presents a "clean" preemption question," BIO 31, Respondents devote the bulk of their brief to arguing that this case is nevertheless a poor vehicle for this Court's review. But like the state high court's clumsy attempt to insulate its opinion from review, Respondents' arguments also fail. The majority opinion below asserted that its decision "is grounded solely on state law," App. 3, but there is clearly no merit to that contention, see Pet. 43, and even Respondents do not defend it. Similarly, Respondents' alleged obstacles to review do not withstand scrutiny.

A. This Court neither may nor should concern itself with the HIPAA exceptions rejected below.

Respondents erroneously contend that if this Court grants certiorari, it must first pass on four "fact-intensive" exceptions to HIPAA that were discussed extensively and rejected unanimously by the West Virginia high court. BIO 12-27, 31. They assert that if this Court were to reverse the state court on any of those grounds and find that HIPAA permits the disclosures required by state law, this Court could affirm the judgment below without reaching the question of preemption. *Id.* at 12 ("[T]his ends the inquiry because there is no preemption when state law 'do[es] not conflict with federal law.'").

This argument fails for at least two reasons.

1. The HIPAA exceptions are not properly before this Court.

The grounds that Respondents offer as alternate bases for affirmance are not properly before this Court because there is no cross-petition. A cross-petition is required for *any* "argument that would modify the judgment." Eugene Gressman, et al., Supreme Court Practice 489, 492 (9th ed. 2007). In *Northwest Airlines, Inc. v. County of Kent, Michigan*, for example, this Court refused to consider a supposedly alternate ground to affirm that was not presented in a cross-petition because agreeing with the argument would "alter the judgment below." 510 U.S. 355, 364 (1994). It did not matter that the allegedly alternate ground was antecedent to the questions presented. See ibid.; see also, e.g., Genes*is Healthcare Corp. v. Symczyk*, 133 S. Ct. 1523, 1529 (2013).

If this Court were to agree with Respondents on one of their proposed alternate grounds, it could not simply affirm the judgment. The judgment below is that Petitioner must provide full access to records, subject to no documentation or accounting requirements. App. 32, 85-86. But if this Court were to reverse the West Virginia high court as to one of the four HIPAA exceptions and permit disclosures on that ground, that judgment would have to change.

At the very least, this Court would have to modify the judgment to limit the disclosures from full access to only that minimally necessary. See BIO 7. The Privacy Rule generally requires that disclosures made pursuant to HIPAA exceptions must be limited to the "minimum necessary to

accomplish the intended purpose." 45 C.F.R. § 164.502(b). This is a demanding requirement that includes, among other specifications, express restrictions on the disclosure of "an entire medical record." *Id.* § 164.514(d)(5). Though there are limited carve-outs to the requirement, see *id.* § 164.502(b)(2), Respondents concede that it applies to all four HIPAA exceptions they advance. BIO 7, 27.

In addition, this Court would likely have to modify the judgment to impose documentation and accounting requirements. The Privacy Rule specifies that "[a]n individual has a right to receive an accounting of disclosures of protected health information." 45 C.F.R. § 164.528(a)(1). This requirement does not apply to the exception for disclosures to carry out health care operations, *id.* § 164.528(a)(1)(i), but it clearly limits Respondents' remaining three exceptions.

2. This Court can and should decline to review the applicability of the HIPAA exceptions.

Even if this Court could review the applicability of the HIPAA exceptions, it should exercise its discretion to decline to do so and review only the preemption questions presented in the Petition. Contrary to Respondents' assertion, this Court does not "have to" take up any non-jurisdictional issues that it does not believe warrant review. BIO 31. This Court has refused to consider alternate non-jurisdictional grounds for affirmance when those grounds would not themselves "justify the grant of certiorari." *United States v. Nobles*, 422 U.S. 225, 241-42 n.16 (1975); *cf. Samsung Elecs. Co. v. Apple*

Inc., 136 S. Ct. 1453 (2016) (granting certiorari on only one of several questions presented in a petition).

As evidenced by Respondents' failure to cross-petition, the state supreme court's decisions on the four HIPAA exceptions do not warrant this Court's review. Though the justices were divided on the question of preemption, they unanimously rejected as "wholly inapplicable" all of the HIPAA exceptions urged by Respondents. App. 3, 16-27. And Respondents themselves describe the exceptions as "fact-bound questions unique to the patient advocacy program at West Virginia's two state psychiatric hospitals" that would require this Court "to confront a range of complicated factual issues." BIO 2, 31.

In contrast, the preemption questions presented in the Petition are not only "clean," *id.* at 31, but have far-reaching consequences. If permitted to stand, the preemption decision below risks encouraging the West Virginia high court and other courts throughout the country to similarly abdicate their duty under the Supremacy Clause in other cases, or to apply the same nonsensical conception of "more stringent" to further undermine HIPAA and other federal laws with identical preemption language. Pet. 42.

In sum, this Court's intervention is needed only to reverse the lower court's fundamentally problematic judgment on preemption, and this Court can and should limit its review accordingly.

B. It is not inappropriate for a state agency to argue for preemption of state law.

Respondents also assert that review is "hardly appropriate" because a state agency is "asserting that its own state law . . . is federally preempted." BIO 30-31. They suggest the proper resolution is an amendment by the state legislature. *Id.* at 31.

But it is well-understood that state agencies and officers may, where circumstances demand it, urge a court to strike down a state law as inconsistent with the United States Constitution. Those agencies and officers "are under oath to uphold the federal and state constitutions," and therefore have a duty to assess whether "a statute which [they are] required to administer or implement is unconstitutional." *Manchin v. Browning*, 296 S.E.2d 909, 922-23 (W. Va. 1982).[1] Indeed, the Ohio Attorney General recently advised this Court of his "serious concerns about the constitutionality of" a particular Ohio law and advocated for "judicial review [of the law] in an appropriate case." Br. of Amicus Curiae Ohio Attorney General Michael Dewine in Support of Neither Party at 2, 134 S. Ct. 2334 (2014) (No. 13-193), *Susan B. Anthony List v. Driehaus*, 2014 WL 880938, at *2.

That is the case here. Petitioner DHHR "first argued that state law, properly understood, did not require the hospitals to disclose patient records without patient consent." Pet. 23. But because the West Virginia high court chose to construe state law

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[1] *Manchin* was overruled in part on grounds not relevant here by *State ex rel. Discover Fin. Servs., Inc. v. Nibert*, 744 S.E.2d 625, 645 (W. Va. 2013).

to mandate nearly unlimited disclosures, and because that ruling on the meaning of state law cannot be challenged in this Court, DHHR urges preemption consistent with its constitutional duty to uphold the supremacy of federal law.[2]

C. Respondents' policy preferences do not make this case a poor vehicle.

All that is left is Respondents' policy argument that state psychiatric patients benefit from the nearly unrestricted disclosure of information to patient advocates. BIO 29-30. Respondents' policy views are of debatable merit: one could certainly argue that state psychiatric patients deserve the same privacy protections as any other patient. And they are also vastly overstated: DHHR does not seek to "entirely cut[] off the advocacy services," BIO 29, but only to require affirmative patient consent before disclosures to advocates. But more to the point, these policy preferences cannot excuse a court from its obligations under the Supremacy Clause or supersede the clear terms of HIPAA's Privacy Rule.

CONCLUSION

The petition should be granted.

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[2] Respondents' passing suggestion that DHHR might lack standing, BIO 30, is absurd. As Respondents acknowledge elsewhere, DHHR and its hospitals are the entities that must comply with HIPAA. *Id.* at 6, 8 n.2. Thus, after DHHR identified its violations, it filed an incident report with the State Privacy Office in the Health Care Authority, which is the state body charged with transmitting breach notices to the federal government. That report was withdrawn after the state trial court determined there had been no violations. Apl't App. 207-09, 248-49, 288, 541-42, 776.

Respectfully submitted,

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