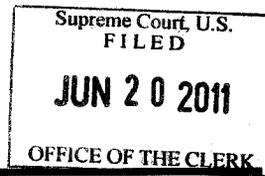


No. 10-1425



---

IN THE  
**Supreme Court of the United States**

---

HAROLD I. EIST, M.D.,  
*Petitioner,*

v.

MARYLAND STATE BOARD OF PHYSICIANS,  
*Respondent.*

---

On Petition For A Writ Of Certiorari  
To The Court Of Appeals Of Maryland

---

**BRIEF IN OPPOSITION TO  
PETITION FOR WRIT OF CERTIORARI**

---

DOUGLAS F. GANSLER  
Attorney General of Maryland

STEVEN M. SULLIVAN\*  
Assistant Attorney General  
200 St. Paul Place, 20th Floor  
Baltimore, Maryland 21202  
ssullivan@oag.state.md.us  
(410) 576-6324

Attorneys for Respondent

\* *Counsel of Record*

---

---

**Blank Page**

## QUESTION PRESENTED

Addressing only issues of State law in the exercise of its exclusive power to declare the authoritative interpretation of Maryland statutes, did the Maryland Court of Appeals properly hold (1) that the physician licensing and discipline provisions of the Maryland Medical Practice Act and the provisions of the Maryland Confidentiality of Medical Records Act require that a physician must produce a patient's medical records in response to an investigatory subpoena from the Maryland State Board of Physicians unless the physician or the patient's representative files in court a motion to quash or for protective order and obtains a court order relieving the physician of the statutory obligation to produce the records, and (2) that a physician who had refused to comply with a subpoena for nearly eleven months without seeking to quash it or obtain a protective order could not later challenge the subpoena as a defense to an administrative disciplinary charge for failing to cooperate with the Board's investigation?

## TABLE OF CONTENTS

	Page
QUESTION PRESENTED .....	i
TABLE OF AUTHORITIES .....	iv
STATEMENT OF THE CASE .....	1
A. Administrative and Judicial Proceedings Below .....	1
B. Regulation of Physicians and the Confidentiality of Medical Records under Maryland Law .....	3
C. Dr. Eist's Noncompliance with the Board of Physicians' Subpoena .....	5
REASONS FOR DENYING THE WRIT .....	7
THE PETITION DOES NOT PRESENT A SUBSTANTIAL FEDERAL QUESTION. ...	7
A. The Petition Seeks Review of Questions that Were Not Presented to or Decided by the Maryland Court of Appeals. ....	7
B. The Court Lacks Jurisdiction to Review the Court of Appeals' Decision Addressing Only Independent and Adequate State Law Grounds. ....	9

C. The Petition Identifies No Conflict  
Between the Maryland Court of Appeals'  
Decision and the Decisions of this Court,  
Federal Courts of Appeals, or Other State  
High Courts. .... 11

CONCLUSION ..... 13

RESPONDENT'S APPENDIX

## TABLE OF AUTHORITIES

Cases	Page
<i>Adams v. Robertson</i> , 520 U.S. 83 (1997) .....	9
<i>Board of Physician Quality Assurance v. Levitsky</i> , 353 Md. 188 (1999) .....	4
<i>Coleman v. Thompson</i> , 501 U.S. 722 (1991) .	10, 11
<i>Doe v. Maryland Board of Social Worker Examiners</i> , 384 Md. 161, 862 A.2d 996 (2004) .....	12
<i>Doe v. Poritz</i> , 662 A.2d 367 (N.J. 1995) .....	12
<i>Dr. K. v. State Board of Physician Quality Assurance</i> , 98 Md. App. 103, 632 A.2d 453 (1993), <i>cert. denied</i> , 334 Md. 18, 637 A.2d 1191, <i>cert. denied</i> , 513 U.S. 817 (1994) .....	12
<i>Ferm v. United States Trustee (In re Crawford)</i> , 194 F.3d 954 (9th Cir. 1999) .....	12
<i>Howell v. Mississippi</i> , 543 U.S. 440 (2005) .....	8, 9
<i>McMaster v. Iowa Bd. of Psych. Examiners</i> , 509 N.W.2d 754 (Iowa 1993) .....	12
<i>McNiel v. Cooper</i> , 241 S.W.3d 886 (Tenn. Ct. App. 2007) .....	12

<i>Middlebrooks v. State Bd. of Health</i> , 710 So.2d 891 (Ala. 1998) .....	12
<i>Nat'l Treasury Emps. Union v.</i> <i>United States Dep't of the Treasury</i> , 25 F.3d 237 (5th Cir. 1994) .....	12
<i>Patients of Barbara Solomon v.</i> <i>Board of Physician Quality Assur.</i> , 85 F. Supp.2d 545 (D. Md. 1999) .....	12
<i>People v. Hepner</i> , 21 Cal. App. 4th 761 (Cal. App. 2d Dist. 1993) .....	12
<i>Planned Parenthood v. Carter</i> , 854 N.E.2d 853 (Ind. Ct. App. 2006) .....	12
<i>Street v. New York</i> , 394 U.S. 576 (1969) .....	8
<i>United States v. Westinghouse</i> , 638 F.2d 570 (3d Cir. 1980) .....	11, 12
<i>Whalen v. Roe</i> , 429 U.S. 589 (1977) .....	11, 12
<i>Withrow v. Larkin</i> , 421 U.S. 35 (1975) .....	13

## Statutes

### Federal Statutes

28 U.S.C. § 1257 .....	8, 9
------------------------	------

Maryland Statutes

Annotated Code of Maryland

Courts and Judicial Proceedings Article

§ 9-109(b) ..... 6

Health-General Article

§ 4-306(b)(2) ..... 4

§ 4-307(k)(1)(v) ..... 4

§ 4-307(k)(6) ..... 2, 5, 6

Health Occupations Article

§ 14-205(a)(2) ..... 4

§ 14-206(a) ..... 4

§ 14-401(a) ..... 4

§ 14-401(i) ..... 4

§ 14-404(a)(33) ..... 7

Rules

Federal Rules

Rules of the Supreme Court

Rule 10(b) ..... 11

Rule 10(c) ..... 11

Rule 14.1(g)(i) ..... 9

Maryland Rules

Rule 8-131(b) ..... 3

## STATEMENT OF THE CASE

The petitioner, Harold I. Eist, M.D., a psychiatrist licensed by the Maryland State Board of Physicians (the "Board of Physicians" or "Board"), seeks review of a decision of the Court of Appeals of Maryland that addresses only questions of Maryland statutory law and does not purport to base any of its conclusions on federal law.

### A. Administrative and Judicial Proceedings Below

The appeal arose from a petition for judicial review of a Board of Physicians decision reprimanding and fining Dr. Eist \$5,000 for violating the Maryland Medical Practice Act, Title 14, Subtitle 4 of the Health Occupations Article, by failing to cooperate with the Board's investigation of a complaint alleging that Dr. Eist over-medicated three members of the complainant's immediate family and conducted himself in an unprofessional manner. Pet. App. 6a-7a, 164a. Specifically, Dr. Eist was sanctioned for failing to comply with the Board's subpoena duces tecum for medical records during the nearly 11-month period that elapsed from April 19, 2001, when Dr. Eist received the subpoena, until he ultimately provided the medical records to the Board on March 20, 2002. Pet. App. 8a, 12a.

It is undisputed that Dr. Eist failed to comply with the subpoena during that nearly 11-month period and that neither he nor the patients who were the subjects of the medical records ever availed themselves of the procedure for challenging the subpoena through a motion to quash or a motion for a protective order, as

expressly authorized by the Maryland Confidentiality of Medical Records Act. *See* Md. Code Ann., Health-Gen. § 4-307(k)(6). Pet. App. 11a, 14a, 160a, 168a.

After the case worked its way through an unusually protracted history of proceedings before administrative tribunals and State trial and appellate courts, the Maryland Court of Appeals issued its January 21, 2011 decision affirming the Board of Physicians' June 22, 2005 order finding that Dr. Eist had violated the Maryland Medical Practice Act by failing to cooperate with the Board's investigation. Pet. App. 5a-31a, 189a.

The Court of Appeals held that, under the Maryland Medical Practice Act and the Maryland Confidentiality of Medical Records Act, a health care provider who receives a subpoena for medical records as part of an investigation by the Maryland State Board of Physicians "is required to provide the medical records to the Board regardless of the patient's authorization"; that "the Board is not required to bring a judicial action to enforce the subpoena"; and that the health care provider or any other person opposing disclosure of the records bears the burden of seeking adjudication of any objection to the subpoena "by filing in court a motion to quash or a motion for a protective order," which "is the route chosen by the General Assembly for the resolution of constitutional or other objections to the subpoena." Pet. App. 26a, 27a & n.11. The Court of Appeals further concluded that, in light of this statutory scheme, Dr. Eist "was not entitled to refuse timely compliance with the subpoena, refrain from filing a motion to quash or a motion for protective order, and later, in this collateral

contested case administrative proceeding, challenge the subpoena.” Pet. App. 31a.

Though three judges dissented from the Court of Appeals’ decision, the dissenting opinion did not express any disagreement with the majority’s interpretation of the Maryland Medical Practice Act and the Maryland Confidentiality of Medical Records Act. Instead, the dissent relied on Dr. Eist’s assertion that his refusal to comply with the Board of Physicians’ subpoena should be excused because he acted on the advice of counsel, an issue that was neither addressed by the intermediate Court of Special Appeals nor raised before the Court of Appeals in any petition for a writ of certiorari or cross-petition. *See* Pet. App. 33a n.1 (noting that “the Court of Special Appeals decided the case on other grounds” and “the court did not consider whether Dr. Eist acted in good faith and/or upon the advice of counsel in refusing to furnish the records in response to the subpoena”); Md. Rule 8-131(b) (“Unless otherwise provided by the order granting the writ of certiorari, in reviewing a decision rendered by the Court of Special Appeals. . . , the Court of Appeals ordinarily will consider only an issue that has been raised in the petition for certiorari or any cross-petition and that has been preserved for review by the Court of Appeals.”).

**B. Regulation of Physicians and the Confidentiality of Medical Records under Maryland Law**

The Maryland State Board of Physicians is the State regulatory agency charged with licensing and disciplining Maryland physicians under the Maryland

Medical Practice Act, Title 14, Subtitle 4 of the Health Occupations Article (“Health Occ.”) of the Maryland Code. By law, the Board of Physicians is authorized to investigate any alleged violation of the Medical Practice Act, *see* Md. Code Ann., Health Occ. § 14-205(a)(2), and the Board is *required* to conduct at least a preliminary investigation of each complaint lodged against a licensed physician, *see* Health Occ. § 14-401(a); *Board of Physician Quality Assurance v. Levitsky*, 353 Md. 188, 190 (1999) (construing as mandatory the Board’s statutory duty to conduct a preliminary investigation). *See* Pet. App. 23a-24a.

The Maryland Medical Practice Act expressly grants the Board of Physicians discretion to issue subpoenas “in connection with any investigation” conducted pursuant to its statutory authority. Health Occ. § 14-206(a); *see also* Health Occ. § 14-401(i). Pet. App. 24a. Typically, upon receiving a complaint alleging a failure to meet the standard of quality medical care, the Board of Physicians will subpoena the medical records of the patient as part of its preliminary investigation. Pet. App. 165a ¶ 7.

Under the Maryland Confidentiality of Medical Records Act, Title 4, Subtitle 3 of the Health- General Article (“Health-Gen.”), a physician who receives from the Board a subpoena for mental health services records is required to disclose the records to the Board even “without the authorization of” a patient or other “person in interest.” Md. Code Ann., Health-Gen. § 4-307(k)(1)(v); *see also* Health-Gen. § 4-306(b)(2) (same requirement applies to any “medical record”). The Confidentiality of Medical Records Act recognizes only one method by which a physician or a person in

interest may assert “any constitutional right or other legal authority in opposition to disclosure,” and that is “in a motion to quash or a motion for a protective order. . . .” Health Gen. § 4-307(k)(6). Pet. App. 25a-26a.

**C. Dr. Eist’s Noncompliance with the Board of Physicians’ Subpoena**

On April 19, 2001, Dr. Eist received from the Board of Physicians a letter requesting his response to a complaint that he had “over-medicated” members of the complainant’s family and conducted himself in a less than “professional manner.” Pet. App. 7a. Included with the letter was a subpoena duces tecum informing Dr. Eist that he was “SUMMONED and COMMANDED by the BOARD . . . to deliver IMMEDIATELY UPON SERVICE OF PROCESS a copy of all medical records of [the three patients] treated at your facility. . . ,” with “such information . . . made returnable within 10 (ten) days. . . .” Pet. App. 7a.

On April 20, 2001, Dr. Eist telephoned the Board of Physicians’ staff to state that the complaint was false and that, without prior consent from his patients, he would be unable to provide information or records in response to the allegations regarding the treatment of his patients. Pet. App. 308a, ¶ 4. During that telephone call, Dr. Eist was advised that compliance with the subpoena was nonetheless required. Pet. App. 165a, ¶6.

On May 4, 2001, Dr. Eist forwarded a copy of the subpoena to one of the patients, the wife of the complainant, and asked to be informed whether she was “taking any action to oppose [Dr. Eist’s] compliance with this subpoena.” Pet. App. 9a. Ten days later, an attorney representing the complainant’s wife in then-pending divorce proceedings notified the Board of Physicians that the complainant’s wife would “not waive her privilege with Dr. Eist and . . . asked that he not release her records in response to the request.” Pet. App. 10a; 309a, ¶ 8. As the petition indicates, the “privilege” asserted was Maryland’s statutory psychiatrist-patient privilege. *See* Pet. 16 (citing Md. Code Ann., Courts & Judicial Proceedings § 9-109(b)); Pet. App. 356a-57a.

Dr. Eist continued his refusal to produce the requested records despite receiving a further letter from the Board of Physicians, which repeated the request for the subpoenaed records, advised that “receipt of those medical records is not contingent on the consent of the patient/s,” and cautioned Dr. Eist that failure to produce the requested records “may be grounds for disciplinary action . . . for fail[ure] to cooperate with a lawful investigation. . . .” Pet. App. 10a.

Though both Dr. Eist and his patients were represented by counsel, neither Dr. Eist nor his patients ever filed a motion to quash the subpoena or motion for protective order, as contemplated by the Maryland Confidentiality of Medical Records Act. Health-Gen. § 4-307(k)(6). Pet. App. 11a, 168a ¶¶ 19-20.

After Dr. Eist's refusal to honor the subpoena had persisted for 8 months, the Board of Physicians voted on December 19, 2001, to charge Dr. Eist with a violation of § 14-404(a)(33) of the Health Occupations Article, which authorizes the Board to reprimand, place on probation, or suspend or revoke the license of any licensee who "[f]ails to cooperate with a lawful investigation conducted by the Board. . . ." Pet. App. 11a. The charge was officially issued on February 4, 2002. Pet. App. 12a.

On March 1, 2002, an attorney acting on Dr. Eist's behalf wrote his patients' attorneys to inform them that he would release the subpoenaed records to the Board of Physicians if the patients did not seek the intervention of a court. Pet. App. 168a ¶ 23.

Finally, on March 20, 2002, nearly 11 months after receiving the subpoena, Dr. Eist produced the requested patient records to the Board of Physicians. Pet. App. 12a, 168a ¶ 24.

### **REASONS FOR DENYING THE WRIT**

#### **THE PETITION DOES NOT PRESENT A SUBSTANTIAL FEDERAL QUESTION.**

##### **A. The Petition Seeks Review of Questions That Were Not Presented to or Decided by the Maryland Court of Appeals.**

Certiorari should be denied because, to the extent the petition purports to present questions of federal law, no such federal claim was presented to the

Maryland Court of Appeals or addressed in its decision. When faced with a request to invoke its jurisdiction under 28 U.S.C. § 1257, “this Court has almost unfailingly refused to consider any federal-law challenge to a state-court decision unless the federal claim ‘was either addressed by or properly presented to the state court that rendered the decision [this Court has] been asked to review.’” *Howell v. Mississippi*, 543 U.S. 440, 443 (2005) (citations omitted).

In this case, no federal claim of any kind is addressed in the court of appeals’ decision, which rests entirely on the construction and application of Maryland statutes. *See* Pet. App. 5a-34a. When “the highest state court has failed to pass upon a federal question, it will be assumed that the omission was due to want of proper presentation in the state courts, unless the aggrieved party in this Court can affirmatively show the contrary.” *Street v. New York*, 394 U.S. 576, 582 (1969).

Dr. Eist has failed “to meet this Court’s standards for proper presentation of a federal claim,” *Howell*, 543 U.S. at 443, in two respects. First, his “brief in the State [high] Court did not properly present his claim as one arising under federal law.” *Howell*, 543 U.S. at 443. A copy of the brief filed by Dr. Eist in the court of appeals is reproduced in the appendix (abbreviated “Resp. App.”) to this brief. As Dr. Eist’s brief confirms, his argument in the court of appeals pressed only issues of Maryland law and, for support, his brief relied almost entirely on decisions of Maryland courts. *See* Resp. App. 17a-40a. Indeed, his brief candidly acknowledged that “Dr. Eist has never

challenged the Board's Constitutional or statutory authority to obtain mental health records, even without a patient's consent." Resp. App. 19a.

Second, the petition filed in this Court fails to make an affirmative showing that a federal question was properly presented in the court of appeals. Dr. Eist has not satisfied this Court's Rule 14.1(g)(i), which requires that his petition must contain "specification of the stage in the proceedings . . . , when the federal questions sought to be reviewed were raised," and "the method and manner of raising them . . . with specific reference to the places in the record where the matter appears. . . ." A petitioner cannot satisfy the requirement of proper presentation of a federal claim with mere "passing invocations of 'due process'" or other vague references to federal law; instead, "it must be clear that a *federal* claim was presented." *Howell*, 543 U.S. at 444 n.2 (quoting *Adams v. Robertson*, 520 U.S. 83, 89 (1997)) (emphasis in original).

The petition here does not satisfy this essential requirement, and it should therefore be denied.

**B. This Court Lacks Jurisdiction to Review the Court of Appeals' Decision Addressing Only Independent and Adequate State Law Grounds.**

In the context of direct review of a state court judgment under 28 U.S.C. § 1257, this Court has deemed "jurisdictional" the well-established rule that "[t]his Court will not review a question of federal law decided by a state court if the decision of that court

rests on a state law ground that is independent of the federal question and adequate to support the judgment.” *Coleman v. Thompson*, 501 U.S. 722, 729 (1991) (citation omitted). “This rule applies whether the state law ground is substantive or procedural.” *Id.*

In this case, the rule precludes jurisdiction because the court of appeals’ decision rests entirely on independent and adequate state law grounds. That is, the court of appeals decided the appeal by interpreting the Maryland Medical Practice Act and the Maryland Confidentiality of Medical Records Act to mandate compliance with a Board of Physicians’ subpoena for medical records unless a constitutional or other objection to disclosure is asserted in a motion to quash or a motion for a protective order filed in court. Pet. App. 26a-27a. Because Dr. Eist did not avail himself of this exclusive means for challenging a subpoena under applicable Maryland law, the Court of Appeals concluded that Maryland law prevented him from later raising a challenge to the subpoena as part of his defense to the Board’s disciplinary charge. *Id.* at 27a.

These State law grounds are manifestly independent from the substance of any objections to the subpoena that Dr. Eist might have asserted under federal constitutional or statutory law, if he had chosen to pursue a motion to quash or a motion for a protective order. The Court of Appeals’ decision expresses no view on the merits of any such objection that might have been raised in the requisite motion to quash or motion for a protective order, which Dr. Eist chose not to file. Moreover, the Court of Appeals’ reliance on its authoritative interpretation of Maryland statutes is more than adequate to support

its judgment. "Because this Court has no power to review a state law determination that is sufficient to support the judgment," the petition presents "nothing for the Court to do." *Coleman*, 501 U.S. at 729, 730.

**C. The Petition Identifies No Conflict Between the Maryland Court of Appeals' Decision and the Decisions of this Court, Federal Courts of Appeals, or Other State High Courts.**

Entirely absent from the petition is any showing that the court of appeals' decision "has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals," S. Ct. Rule 10(b), or that "conflicts with relevant decisions of this Court," Rule 10(c).

First, as explained above, the court of appeals decided *no* federal question, important or otherwise. Second, the petition does not purport to identify any meaningful disagreements among courts that have addressed the questions that the petitioner is asking this Court to consider. For example, in urging the Court to take up the issue of constitutional rights to privacy and due process with regard to medical records, the petition cites as principal authorities this Court's decision in *Whalen v. Roe*, 429 U.S. 589, 599 (1977), and the Third Circuit's application of *Whalen* in *United States v. Westinghouse*, 638 F.2d 570, 577 (3d Cir. 1980). Nowhere does the petition cite any court decision that conflicts with *Whalen* or *Westinghouse*, or that casts doubt on the continued validity and sufficiency of their guidance.

Far from suggesting that Maryland is out of step in this regard, the petition acknowledges at page 10 n.11 that Maryland appellate courts have applied *Westinghouse* in *Doe v. Maryland Board of Social Worker Examiners*, 384 Md. 161, 184-85, 862 A.2d 996, 1009-10 (2004), and *Dr. K. v. State Board of Physician Quality Assurance*, 98 Md. App. 103, 112, 114-15, 632 A.2d 453, 457, 459 (1993), *cert. denied*, 334 Md. 18, 637 A.2d 1191, *cert. denied*, 513 U.S. 817 (1994).<sup>1</sup> Both *Doe* and *Dr. K.* also expressly followed this Court's guidance in *Whalen*. *See Doe*, 384 Md. at 183, 862 A.2d at 1008; *Dr. K.*, 98 Md. App. at 112, 632 A.2d at 457.

---

<sup>1</sup> *Westinghouse* has been applied in whole or in part by at least two other federal courts of appeals and several other State appellate courts; no court has directly criticized its analysis. *See Ferm v. United States Trustee (In re Crawford)*, 194 F.3d 954, 959 (9th Cir. 1999); *Nat'l Treasury Emps. Union v. United States Dep't of the Treasury*, 25 F.3d 237, 244 (5th Cir. 1994); *Patients of Barbara Solomon v. Board of Physician Quality Assur.*, 85 F. Supp.2d 545, 548 (D. Md. 1999) (anticipating that the Fourth Circuit would apply *Westinghouse* if the opportunity arose); *Middlebrooks v. State Bd. of Health*, 710 So.2d 891, 892 (Ala. 1998); *McMaster v. Iowa Bd. of Psych. Examiners*, 509 N.W.2d 754, 760 (Iowa 1993); *Doe v. Poritz*, 662 A.2d 367, 411 (N.J. 1995); *People v. Hepner*, 21 Cal. App. 4th 761, 785 (Cal. App. 2d Dist. 1993); *Planned Parenthood v. Carter*, 854 N.E.2d 853, 879 (Ind. Ct. App. 2006); *McNiel v. Cooper*, 241 S.W.3d 886, 896 (Tenn. Ct. App. 2007).

As to other arguments raised in the petition, none of which are preserved, Dr. Eist cites no authority at all for his Argument II, in which he objects to investigatory, prosecutorial and adjudicatory functions being conducted by a single administrative agency. The petition does not acknowledge this Court's decision in *Withrow v. Larkin*, 421 U.S. 35 (1975), which rejected a constitutional challenge to an administrative agency's ability to serve as investigator, prosecutor and administrative decision maker. Similarly, Dr. Eist's vagueness argument, asserted for the first time as Argument III in the petition, fails to identify any conflict between court decisions that might warrant this Court's review.

### CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

DOUGLAS F. GANSLER  
Attorney General of Maryland

STEVEN M. SULLIVAN  
Assistant Attorney General  
200 St. Paul Place, 20th Floor  
Baltimore, Maryland 21202  
ssullivan@oag.state.md.us  
(410) 576-6324

Attorneys for Respondent

July 20, 2011

**Blank Page**