No. 10-1425

AUG 1 - 2011

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

REPLY TO BRIEF IN OPPOSITION

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August 1, 2011

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QUESTIONS PRESENTED

1. May a state enact a statute that restricts a patient's federal constitutional right to privacy by compelling a physician to disclose confidential patient records without notice to and authorization by the patient and in conflict with the physician's ethical obligations?

2. May a state agency simultaneously serve as investigator, prosecutor and adjudicator with respect to a licensee under its jurisdiction without amending the state's constitution which explicitly separates legislative, executive and judicial powers?

3. May a physician be sanctioned by a state's medical licensing board for a "failure to cooperate with a lawful investigation" based solely upon the physicians non-release of those patient records to the board if:

a. The "failure to cooperate" statute is unconstitutionally vague;

b. The board never notified the patients it was seeking their confidential records;

c. The statute regarding disclosure of records without patient authorization is itself unconstitutional; and

d. The board's simultaneous roles as investtigator, prosecutor and adjudicator deprived petitioner of his right to due process when the board ignored proposed orders by two independent administrative law judges in favor of the petitioner and again when it decided to appeal the court decisions in favor of the petitioner?

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REPLY TO BRIEF IN OPPOSITION

I. THE COURT OF APPEALS WEIGHED A PATIENT'S FEDERAL CONSTITUTIONAL RIGHT TO PRIVACY AGAINST MARYLAND'S NEED TO ACCESS MEDICAL RECORDS

A. According to the Court of Appeals, the Question Presented Involves a Constitutional Right

The official website of the judiciary of Maryland lists the question presented to the Court of Appeals as "MAY A PHYSICIAN, INVOKING A PATIENT'S CONSTITUTIONAL RIGHT TO PRIVACY, REFUSE TO DISCLOSE TO THE BOARD A PATIENT'S MENTAL HEALTH RECORDS?", Petitions for Writ of Certiorari: Granted December 13, 2007, www.

courts.state.md.us/coappeals/grants/12_07grants.html (retrieved 7-21-11) (capitalization in original) (emphasis added).

B. The Court of Appeals Addressed A Patient's Federal Constitutional Right To Privacy

1. The Court of Appeals cannot eliminate weighing a patient's privacy rights against the state's need to access medical records

The Court of Appeals attempted to insulate its decision from Supreme Court review by not fully articulating its rationale regarding a patient's federal constitutional right to privacy. The Court of Appeals cannot escape one essential fact. It reversed the decision of the Court of Special Appeals ("COSA") which extensively analyzed the federal constitutional right to privacy in medical records. The Court of Appeals said:

> JUDGMENT OF THE COURT OF SPECIAL APPEALS REVERSED AND CASE REMANDED TO THE COURT OF SPECIAL APPEALS WITH DIRECTIONS TO REVERSE THE JUDGMENT OF THE CIRCUIT COURT FOR MONTGOMERY COUNTY AND REMAND THE CASE TO THE CIRCUIT COURT WITH DIRECTIONS TO AFFIRM THE DECISION OF THE MARYLAND STATE BOARD OF PHYSICIANS....

Petitioner's Appendix at 31a ("PetApp")(emphasis added). By its silence on the issue, the Court of Appeals essentially held that the federal constitutional right to privacy is inapplicable to this case. The applicability of such a right is itself a federal question. *See* Eugene Gressman, Kenneth S. Geller,

Stephen M. Shapiro, Timothy S. Bishop, Edward A. Hartnett, *Supreme Court Practice* 188 (9th Edition, 2007) ("*Gressman*").

Taking Respondent's argument to its logical conclusion, a state's highest court would be able to escape Supreme Court review simply by limiting its opinion to a single word, "affirm" or "reverse", even if a federal constitutional right were involved.

2. Contrary to Respondent's position, a patient's right to informational privacy is not well settled law

In its Brief in Opposition ("BIO"), Respondent implies that the federal constitutional right to privacy is well settled law. It is not. Respondent stated: "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." BIO at 11; *Whalen v. Roe*, 429 U.S. 589 (1977); *United States v. Westinghouse Electric Corp.*, 638 F.2d 570 (3d Cir. 1980). *Whalen* itself left open the question of the scope of the federal constitutional right to information privacy. In *Whalen*, the Court assumed but did not decide whether a constitutional right to informational privacy exists.

In *National Aeronautics and Space Administration v. Nelson*, 562 U.S. __ (2011) ("*NASA*"), a majority of this Court again assumed, but did not decide, whether such a federal constitutional right to privacy exists. *NASA*, slip op. at 1. While concurring in the judgment but disagreeing with the majority about the existence of such a right, Justice Scalia urged the Court to finally address the issue of the right's existence. *NASA*, slip op. at 1, 7 (Scalia, J., concurring)

("A federal constitutional right to "informational privacy" does not exist") (joined by Thomas, J.). Justice Scalia explained:

> If ... the Court believes that there *is* a constitutional right to informational privacy, then I fail to see the minimalist virtues in delivering a lengthy opinion analyzing that right while coyly noting that the right is "assumed" rather than "decided". Thirty-three years have passed since the Court first suggested that the right may, or may not, exist...
>
> It harms our image, if not our self-respect, because it makes no sense. The Court decides that the Government did not violate the right to informational privacy without deciding whether there *is* a right to informational privacy, and without even describing what hypothetical standard should be used to assess whether the hypothetical right has been violated....

Id. at 7.

3. Although *Westinghouse* provides a *de facto* standard to analyze a patient's informational privacy rights, the Supreme Court has never given its imprimatur to this analysis.

Respondent correctly states the *Westinghouse* analysis has been applied by the Maryland appellate courts and by various federal and state courts. BIO at 12. However, Petitioner disagrees insofar as the Court of Appeals did not apply the *Westinghouse* analysis to this case. Despite widespread reliance on *Westinghouse*, Petitioner is not aware of any Supreme Court decision citing *Westinghouse*.

C. The Court Of Special Appeals Extensively Analyzed A Patient's Federal Constitutional Right To Privacy

Because COSA's decision was reversed by the Court of Appeals, COSA's opinion is relevant to the determination of whether Petitioner presented a federal question to this Court. COSA's opinion extensively analyzed and is predicated upon a patient's federal constitutional right to privacy. COSA's opinion did not merely list cases in support of its constitutional analysis. Rather, it summarized several relevant Maryland cases that addressed the federal constitutional right to privacy: *Doe* (PetApp at 48-51)[1]; *Dr. K* (PetApp at 44-48)[2]; and the *Barbara Solomon* cases (PetApp at 88-92)[3]. Like those opinions, COSA's opinion relies on *Westinghouse*, probably the leading federal case regarding medical record privacy. A substantial part of COSA's opinion involved application of the *Westinghouse* factors to this case. (PetApp at 75-88).

Having explicitly reversed COSA, COSA's opinion is incorporated into the Court of Appeals opinion – establishing that a federal question was decided below.

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[1] *Dr. K v. State Board of Physician Quality Assurance,* 98 Md. App. 103 (1993), *cert. denied*, 334 Md. 18, *cert. denied,* 513 U.S. 817 (1994).

[2] *Doe v. Maryland Board of Social Work Examiners*, 384 Md. 161 (2004).

[3] *Solomon v. Board of Physician Quality Assurance*, 155 Md. App. 687 (2003) and *Patients of Dr. Solomon v. Board of Physician Quality Assurance*, 85 F. Supp. 2d 545 (D. Md. 1999).

D. Respondent Raised A Federal Constitutional Question Below

In its Petition to the Court of Appeals ("Board's Petition"), the Board recognized a federal constitutional right to privacy exists.

> Review is warranted because the intermediate appellate court's decision establishes a new rule that presumes a physician is free to disregard the Board's lawful subpoena if he merely communicates his intention to invoke **a patient's constitutional right to privacy**. That rule conflicts with applicable statutes and prior decisions of this Court and the Court of Special Appeals upholding the constitutionality of similar subpoenas compelling disclosure of patient records without the patients' consent.

Reply Appendix at 69a-70a ("ReplyApp") (emphasis added)(citations omitted).

The Board further recognized the right's existence by stating: "The Confidentiality of Medical Records Act recognizes only one method by which a physician may assert any **constitutional** or other legal authority in opposition to disclosure, and that is in a motion to quash or a motion for a protective order". ReplyApp at 73a (internal citation and quotation marks omitted)(emphasis added).

In its brief on the merits below, the Board stated the "central question in this appeal, then, is whether the Board's application of the *Doe* and *Dr. K.* analysis in its decision to sanction Dr. Eist ... is supported ...." ReplyApp at 25a. The Board explicitly referenced the Constitution when it stated:

> The parties also agree that this Court's decision in *Doe* and the Court of Special Appeals' decision in *Dr. K.* provide the applicable framework for analyzing whether, **under the Constitution**, the asserted **privacy interests of Patients A, B and C in nondisclosure of their mental health records** outweigh the Board's statutory authority to obtain the records and its responsibility to investigate complaints alleging the improper practice of medicine... In the decision which is now before the Court, the Board expressly followed ***Doe*** and ***Dr. K*** and **applied their analysis** to the facts of this case.

ReplyApp at 25 (emphasis added)(citations omitted).

The Board also stated: "[i]n *Doe* ..., this Court adopted an analytical framework for assessing a claim that a government agency's subpoena for medical records would violate an **individual's constitutional right to privacy** ...." ReplyApp at 27a (citations omitted)(emphasis added). The Board's analysis applied the seven *Westinghouse* factors to the facts of this case and contained numerous references to *Doe*, *Dr. K* and *Westinghouse*. ReplyApp at 27a-38a.

E. The Federation Of State Medical Boards, An *Amicus Curiae* Supporting The Board, Extensively Briefed Federal Constitutional Issues

In connection with the Board's petition to the Maryland Court of Appeals, the Federation of State Medical Boards ("FSMB") submitted an *amicus curiae* brief in support of the Board. The FSMB, an organization that represented 69 state medical boards, argued COSA applied the *Westinghouse*

factors incorrectly. ReplyApp at 51a-67a. In its argument, the FSMB specifically referenced the constitutional right to privacy. *Id.* at 52a ("In this instance, this Court is faced with two compelling but opposing public policies – the government's duty to protect the public and **the constitutional right to privacy**") (emphasis added).

F. Petitioner (As Respondent Below) Addressed Substantial Federal Questions

According to Respondent, Petitioner has failed

> "to meet this Court's standards for proper presentation of a federal claim"... [H]is "brief in the State [high] Court did not properly present his claim as one arising under federal law."... 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... Indeed, his brief candidly acknowledged that "Dr. Eist has never challenged the Board's Constitutional or statutory authority to obtain mental health records...."

BIO at 8-9(citations omitted).

Dr. Eist did not need to present a federal constitutional question to the Court of Appeals for several reasons. First, the Board, as Petitioner below, had presented a constitutional question itself. Second, the Court of Appeals website acknowledged that the question presented involves constitutional rights. Third, the Court of Appeals reviewed COSA's opinion which had analyzed a federal constitutional right at length.

Nevertheless, as Respondent below, Dr. Eist asserted his patients' federal constitutional rights. The "decisions of Maryland courts" mentioned by Respondent are *Doe* and *Dr. K*, both of which explored the federal constitutional right to privacy in medical records and both of which relied on *Westinghouse*. Furthermore, Dr. Eist argued below that the Board ignored the patients' interest in confidentiality. Respondent's Appendix at 26a (RespApp").

Respondent's allegation that Dr. Eist "candidly acknowledged" the Board's Constitutional authority to obtain mental health records is only partially correct. As Dr. Eist's brief below shows, such authority must be tempered – *i.e.* "interests balanced" – when patients object to the release of their mental health records. The brief states:

> As Petitioner concedes (Brief, p. 15), Dr. Eist has never challenged the Board's Constitutional or statutory authority to obtain mental health records, even without a patient's consent. But when a psychiatrist's patients object to release of their mental health records, the competing interests must be balanced, and the Board must demonstrate a "compelling" need, factually specific to the case, before it may demand the records (or punish the psychiatrist for honoring his patients' objections).

RespApp at 19a.

II. PETITIONER COMPLIED WITH RULE 14.1(g)(i)

Respondent alleges that Petitioner "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...." BIO at 9. The Petition states: "Petitioner has raised constitutional challenges to the Subpoena **throughout the proceedings below**...." Petition at 3 (emphasis added). The word "throughout" encompasses: the Court of Appeals[4]; the Court of Special Appeals[5]; the Circuit Court for Montgomery County[6]; the hearings before an Administrative Law Judge[7]; and the Board's ruling.[8]

III. THE COURT OF APPEALS DECISION DOES NOT REST ON A STATE LAW GROUND THAT IS INDEPENDENT OF THE FEDERAL QUESTION AND ADEQUATE TO SUPPORT THE JUDGMENT

Respondent's argument that the state law ground is independent of the federal question and adequate to support the judgment, BIO at 9-10, is wrong for several reasons. First, the Court of Appeals reversed

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[4] PetApp at 23a ("Moreover, the issue of weighing the patients' privacy rights against the Board's need for the records should have been resolved in an action by the patients or Dr. Eist to quash the subpoena or for a protective order").

[5] PetApp at 91a-92a ("Under the circumstances, the Board's interest in obtaining Patient A, B, and C's psychiatric records was not compelling and was outweighed by the **patients' federal constitutional privacy interests** in those records") (emphasis added).

[6] PetApp at 112a ("The Board must weigh the competing interest of the patients versus the need to obtain the records").

[7] PetApp at 227a ("[T]he Board failed to weigh the privacy rights of the Patients against the necessity of disclosure").

[8] PetApp at 169a-179a (applying *Dr. K/Westinghouse* factors).

COSA which engaged in a full-blown analysis of the federal constitutional right to privacy in medical records. Second, a state may not statutorily place a limit on the exercise of a federal constitutional right. *See* U.S. CONST. art. VI; *see also*, *Clinton v. City of New York*, 524 U.S. 417, 449 (1998). Third, a state court may not ignore the rules of grammar and meaning of words to limit the exercise of a federal constitutional right. The Court of Appeals did so when it misinterpreted the words "may not preclude" in Health General §4-307(k)(6) to mean "require" or "must". PetApp at 26a-27a.

IV. WITH RESPECT TO ARGUMENT II, RESPONDENT HAS IGNORED PETITIONER'S REFERENCE TO ARTICLE 8 OF THE DECLARATION OF RIGHTS OF THE MARYLAND CONSTITUTION

Respondent stated that "Dr. Eist cites no authority at all for his Argument II, by which he objects to investigatory, prosecutorial and adjudicatory functions being conducted by a single administrative agency." BIO at 13. The Petition explicitly referenced Maryland's Constitution for support. The Petition explained: "the performance of the multiple functions bestowed on the Board appear to directly contradict the strict Separation of Powers Doctrine set forth in **Article 8 of the Declaration of Rights in the Maryland Constitution** (340a)." Petition at 17 (emphasis added). The Petition quotes Article 8 which provides:

> That the Legislative, Executive and Judicial powers of Government ought to be forever separate and distinct from each other; and **no person exercising the functions of one of**

> **said Departments shall assume or discharge the duties of any other.**

Petition at 17-18(emphasis added).

Respondent argues that "[t]he 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." BIO at 13. *Withrow* is inapposite. It involves a Wisconsin statute enacted under the Wisconsin Constitution. The instant case involves a Maryland statute enacted under the Maryland Constitution which contains the strict Separation of Powers provision quoted above.

In citing *Withrow*, Respondent appears to misunderstand the federal constitutional issue at stake. It is not the *per se* prohibition of the combined investigatory, prosecutorial and adjudicatory functions. Rather, it is Maryland's failure to comply with the procedural requirements needed to amend its own Constitution as set forth in Article XIV. A properly enacted amendment is required to amend Article 8 and empower a single agency to exercise those functions. Analogously, at the Federal level, this Court has repeatedly indicated that changes to the Constitution's framework "must come not by legislation adopted either by Congress or by an individual state, but rather ... through the amendment procedures set forth in Article V." *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 837 (1995). *See also*, *Clinton v. City of New York*, 524 U.S. at 449; *Oregon v. Mitchell*, 400 U.S. 112, 128 (1970)("Congress may not by legislation repeal other provisions of the Constitution"). But for the *ultra vires* act of Maryland's

legislature, the Board would not have been empowered to perform its combined functions.

V. IT IS APPROPRIATE FOR THIS COURT TO REVIEW THE VALIDITY OF A STATUTE

Respondent stated: "[Petitioner'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." BIO at 13. As argued in the Petition, where a statute is vague, due process is offended because an individual cannot distinguish between permitted and prohibited conduct. *Grayned v. City of Rockford*, 408 U.S. 104, 108-109 (1972)(*quoted in* Petition at 18-19). Furthermore, the vagueness of a Maryland statute is appropriate for review not because it conflicts with other court decisions but rather because a vague statute is repugnant to the federal Constitution.

Furthermore, under Supreme Court precedent, "[w]hen an issue or claim is properly before the court, the court is not limited to the particular legal theories advanced by the parties, but rather retains the independent power to identify and apply the proper construction of governing law." *United States National Bank of Oregon v. Independent Insurance Agents of America*, 508 U.S. 439, 446 (1993)("*USNB*") (*quoting Kamen v. Kemper Financial Services, Inc.*, 500 U.S. 90, 99 (1991). Indeed, a court asked to construe a law has the power, if not the duty, to see if that law exists. *See USNB*, 508 U.S. at 446-447.

VI. THE FSMB RECOGNIZED THIS CASE'S NATIONAL IMPORTANCE

In its brief below, the FSMB stated: "The [Court of Special Appeals] decision should be overruled because it misapplies the law, which ... **threatens to extend** to other governmental agencies within Maryland and **into other jurisdictions**." ReplyApp at 49a(emphasis added).

The FSMB concluded its brief by arguing that COSA "goes too far in its holding threatening to affect all of Maryland's governmental agencies and to **seep outside its borders to other State Medical Boards**." ReplyApp at 67a (emphasis added).

CONCLUSION

For the foregoing reasons and the reasons stated in the Petition, the Petition should be granted.

Respectfully submitted,

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August 1, 2011