

No.

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*In the Supreme Court of the United States*

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CITIZENS FOR HEALTH; AMERICAN ASSOCIATION FOR  
HEALTH FREEDOM; AMERICAN ASSOCIATION OF  
PRACTICING PSYCHIATRISTS; AMERICAN MENTAL  
HEALTH ALLIANCE-USA; AMERICAN PSYCHOANALYTIC  
ASSOCIATION; NATIONAL COALITION OF MENTAL  
HEALTH PROFESSIONALS AND CONSUMERS; NEW  
HAMPSHIRE CITIZENS FOR HEALTH FREEDOM; SALLY  
SCOFIELD; TED KOREN, DC; MICHAEL DUNLAP, PSY.D.;  
MORTON ZIVAN, PH.D.; CALIFORNIA CONSUMER  
HEALTHCARE COUNCIL; CONGRESS OF CALIFORNIA  
SENIORS; HEALTH ADMINISTRATION RESPONSIBILITY  
PROJECT; DANIEL S. SHRAGER; EUGENE B. MEYER;  
JANE DOE; JANIS CHESTER; DEBORAH PEEL,  
PETITIONERS

*v.*

\* MICHAEL O. LEAVITT, SECRETARY U.S. DEPARTMENT  
OF HEALTH AND HUMAN SERVICES

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*PETITION FOR A WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE THIRD CIRCUIT*

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**PETITION FOR WRIT OF CERTIORARI**

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**QUESTIONS PRESENTED**

- I. Whether the Court of Appeals decision conflicts with relevant decisions of this Court by holding that state action for a constitutional challenge to the deprivation of a right to liberty cannot exist unless the law in question “suddenly authorized something that was previously prohibited”.
  
- II. Whether the Court of Appeals decision conflicts with relevant decisions of this Court by holding that state action may exist only where the State has “compelled” a particular act or “commanded” a particular result.
  
- III. Whether the Court of Appeals decision conflicts with relevant decisions of this Court and decisions of other United States Courts of Appeals by failing to consider other relevant state action criteria.

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**OPINIONS BELOW**

The opinion of the Court of Appeals, *Citizens for Health, et al. v. Leavitt*, 428 F.3d 167 (3<sup>rd</sup> Cir. 2005), the order denying rehearing and rehearing en banc, and the opinion of the District Court, *Citizens for Health, et al. v. Thompson*, 2004 WL 765356 (E.D. Pa. 2004) are attached at App. 1a-83a.

**JURISDICTION**

The judgment for which Plaintiffs seek review was entered on October 31, 2005. Plaintiffs' Petition for Rehearing and Rehearing En Banc was denied on January 13, 2006. This Court has jurisdiction to review this matter on a writ of certiorari under 28 U.S.C. 1254.

**RELEVANT PROVISIONS INVOLVED**

First, Fourth, Fifth and Ninth Amendments to the U.S. Constitution

Health Insurance Portability and Accountability Act of 1996 (HIPAA)  
Pub. L. 104-191, 110 Stat. 1936, Title II, Subtitle F, §264(c)

Standards for Privacy of Individually Identifiable Health Information

45 C.F.R. §164.506(a), 65 Fed. Reg. 82,810 (Dec. 28, 2000)  
(Original Rule)

45 C.F.R. §164.506(a), 67 Fed. Reg. at 53,268 (Aug. 14, 2002)  
(Amended Rule)

(See Appendix)

**STATEMENT**

Plaintiffs in this case ("Citizens") are nine individuals and ten national and state associations representing approximately 750,000 consumers, medical practitioners and their patients whose health information privacy began to be violated prospectively and retroactively on April 14, 2003 by "covered entities", which include the Secretary and private organizations, using an Amended Health Information Privacy Rule ("Amended Rule") issued by the Secretary of Health and Human Services ("HHS"), 67 Fed. Reg. 53,182 (Aug. 14, 2002). The Amended Rule, for the first time in the nation's history, conferred federal authority on federal officials and private entities to routinely use and disclose virtually all identifiable health information about any individual without consent and over the individual's objection. The Rule thereby transferred the locus of decision-making regarding disclosures from Citizens to covered entities and their business associates.

Because the Secretary did not submit any evidence contesting Citizens' allegations, the facts are not in dispute. Citizens' comprehensive complaint was verified in detail by 25 affidavits and hundreds of notices of privacy practices issued on or after April 14, 2003 showing that Citizens' identifiable health information was being, or was about to be, disclosed by covered entities without notice, without their consent, and over their objections relying on the "regulatory permission", authority, encouragement and support provided by the Amended Rule.

The Secretary in a predecessor Administration, issued the Original Privacy Rule on December 28, 2000 to implement section 264 of HIPAA which required the issuance of regulations setting forth the health information privacy rights individuals "should have" as part of new standards to facilitate the electronic transmission and storage

of health information. 65 Fed. Reg. 82,462. Upon assuming office, the current Administration delayed the Original Rule's effective date and reopened the comment period from February 28 through March 30, 2001. 66 Fed. Reg. 12,434, 12,738. After an expedited review of additional comments, the Secretary put the Original Rule into effect on April 14, 2001 with a two year delayed implementation date (April 14, 2003), as required by the statute. *Id.*

The Original Rule recognized a right to health information privacy and consent with respect to the use and disclosure of identifiable health information by "covered entities" and their "business associates" for "routine" uses defined as "treatment, payment and health care operations".<sup>1</sup> HHS found that Congress had recognized strong privacy protections "are a *sine qua non* of the increased efficiency...brought about by the electronic revolution." 65 Fed. Reg. at 82,474. Strong privacy measures were deemed essential because (a) there is growing public concern about the loss of personal privacy in electronic information systems, (b) the increasing use of "interconnected" electronic information systems renders health privacy more vulnerable, (c) highly sensitive health information, such as genetic information, is becoming more available, and (d) increased numbers of people have access to others' health information. 65 Fed. Reg. at 82,465-66.

<sup>1</sup> Covered entities are defined as health plans, health care clearinghouses or health care providers; business associates means anyone who handles health information on behalf of covered entities including bill collectors, consultants, accountants, lawyers, and data aggregators. 45 C.F.R. §160.102. According to HHS, there are over 600,000 covered entities and millions of business associates. 66 Fed. Reg. at 12,739. Health plans include federally administered health programs such as Medicare, Medicaid, and the Indian Health Service. 45 C.F.R. §160.103. Treatment, payment and health care operations are approximately 80 broad uses and disclosures including premium rating, business planning and development, management services and due diligence in the potential sale of a business. 45 C.F.R. §164.501

The preamble to the Original Rule recognized that the right to privacy is essentially "the claim of individuals, groups, or institutions to determine for themselves when, how, and to what extent information about them is communicated". 65 Fed. Reg. at 82,465. It also concluded that "[p]rivacy is a fundamental right" traditionally protected by state statutory and common law, federal constitutional law, and the law of psychotherapist-patient privilege. 65 Fed. Reg. at 82,464. HHS also found that privacy is essential for effective, high quality health care. 65 Fed. Reg. at 82,467.

Finally, HHS determined that the right of consent, as the means of exercising the right to privacy, was part of traditional standards of medical practice as evidenced by standards of medical ethics, most state laws, and the prevailing practice in the country. 65 Fed. Reg. at 82,472-74, 82,771. The right of consent was deemed essential to the right to privacy as evidenced by comments from consumers and most health care practitioners. 65 Fed. Reg. at 82,473. Thus, the Original Rule recognized the right of consent for routine disclosures. 45 C.F.R. §164.506(a), 65 Fed. Reg. at 82,810.

On March 27, 2002, the Secretary proposed reversing his prior decision and eliminating the individual's right of consent for the use and disclosure of identifiable health information for routine purposes. 67 Fed. Reg. 14,776. Despite receiving comments from individuals and organizations representing over 100 million consumers and practitioners objecting to elimination of the right of consent, the Secretary issued the Amended Rule on August 14, 2002 that not only eliminated the individual's right of consent, but also granted "regulatory permission" to all covered entities to use and disclose Citizens' health information for the eighty "routine" uses without notice, without consent and even over their objection. 67 Fed. Reg. at 53,211, 45 C.F.R. §164.506(a), 67 Fed. Reg. at 53,268. The Secretary did not

address HHS' prior findings with respect to health privacy being a fundamental constitutional right. This reversal of policy effectively converted the Original "Privacy" Rule into a "disclosure" rule, because the broad definitions of "routine" uses now worked to broadly eliminate rather than preserve the right to privacy. That authority was conferred on all covered entities including the Secretary as administrator of the Medicare, Medicaid and Indian Health Services programs.

Citizens filed this action in District Court for the Eastern District of Pennsylvania on April 10, 2003, four days before the April 14, 2003 implementation date of the Amended Rule, seeking an injunction of the Amended Rule's elimination of the right of consent and the authorized nonconsensual disclosures of Citizens' identifiable health information. A First Amended Complaint was filed on May 5, 2003. Citizens challenged the Amended Rule on the grounds that (a) it violated Citizens' right to informational privacy protected by the Fourth, Fifth and Ninth Amendments to the Constitution and the right to private communications with medical practitioners protected by the First Amendment, (b) it violated the psychotherapist-patient privilege recognized by this Court<sup>2</sup>, (c) it was not authorized by section 264 of HIPAA and (d) the Secretary's reversal of position was "arbitrary and capricious" action prohibited by the Administrative Procedure Act. First Amended Complaint at paras. 65-83.

The parties cross-moved for summary judgment, and the District Court issued a decision on April 2, 2004 ruling in Citizens favor on standing but granting the Secretary's motion based on the following findings:

<sup>2</sup> Jaffee v. Redmond, 518 U.S. 1, 116 S. Ct. 1923 (1996).

(1) Citizens had standing to raise the claims because they showed that: (a) their identifiable health information already had been or would be disclosed without their consent on and after April 14, 2003 by covered entities relying expressly on the "regulatory permission" granted them by the Amended Rule, (b) the Amended Rule "changed the landscape" with respect to whether consent is required for disclosure of identifiable health information, (c) Citizens could not protect their right to privacy and consent even by withholding health information because information already in their records could be disclosed without their consent under the authority of the Rule, (d) Citizens are limiting the health information they disclose and are even avoiding seeking health care altogether for themselves and their families because of the privacy violations authorized by the Rule, (e) the right under the Amended Rule for Citizens to request a consent process is rendered meaningless by the fact that the Rule permits all such requests to be summarily denied and such requests, in fact, have been uniformly denied and (f) it is likely, as opposed to speculative, that enjoining the Amended Rule will redress the injuries caused to Citizens' privacy by the Rule. App. 59a-65a.<sup>3</sup>

(2) The Court refused to consider Citizens' constitutional claims and even refused to acknowledge that there is a constitutionally protected right to information privacy because the Court erroneously believed Citizens were asserting that the Secretary had a constitutional duty to protect them from health privacy intrusions by affording a consent process. See decision at App. 75a, relying on DeShaney v. Winnebago Co. Soc. Servs. Dep't, 489 U.S. 189, 195, 109 S. Ct. 998 (1989).<sup>4</sup>

<sup>3</sup> The District Court had jurisdiction under 28 U.S.C. Sec. 1331.

<sup>4</sup> The court did not dispute that constitutional protection for the right to health information privacy has been recognized in Ferguson v. City of

(3) The Court concluded that the Amended Rule was reasonably related to the legislative purposes of the statute and that it was not retroactive because it did not impair stricter privacy rights created by state law, ethics codes or standards of practice. App. 71a-74a.

(4) The Court also rejected Citizens' Administrative Procedure Act challenge concluding that the Secretary provided a reasoned analysis for reversing the decision to recognize a right to privacy and consent despite the fact that he ignored the findings on which that decision was based and relied on the same evidence for the policy reversal. App. 65a-71a.

Citizens sought de novo review by the Court of Appeals on the same issues. After oral argument on March 9, 2005, the Court of Appeals requested the parties to address additional written questions with respect to whether there was a justiciable case or controversy, whether the correct defendant was before the court and, if so, whether additional testimony before the district court might be necessary and the appropriate remedy if the Amended Rule were invalidated. The state action issue was not raised by the Court or either party nor did the Court request the issue be addressed in post-hearing briefing.<sup>5</sup>

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Charleston, 532 U.S. 67, 121 S. Ct. 1281 (2001); and Whalen v. Roe, 429 U.S. 589, 97 S. Ct. 869 (1977).

<sup>5</sup> Six amicus curiae briefs were filed in support of Citizens' constitutional challenge by the Program for Psychiatry and the Law at Harvard Medical School, the Association of American Physicians and Surgeons, past presidents of the Massachusetts Medical Society and past chair of the American Medical Association Council on Ethics and Judicial Affairs, the National Association of Social Workers, NARAL Pro-Choice America Federation, Consumer Attorneys of California and the Texas Civil Rights Project. Only the Texas Civil Rights Project addressed the state action issue.

On October 31, 2005, the Court of Appeals issued a decision affirming the District Court's decision, although on different grounds with the following holdings:

- (1) All of the issues with respect to standing, justiciability, proper defendant, need for additional testimony, and appropriate remedy were decided in Citizens' favor. App. 11a.
- (2) Citizens had standing to bring this suit because (a) they demonstrated through affidavits and other evidence that their identifiable health information had been, or imminently would be, disclosed without consent by covered entities and that they and their families were avoiding seeking health care to prevent further non-consensual disclosures, (b) prior to April 14, 2003, Citizens had the ability to prevent non-consensual disclosures of their identifiable health information, (c) notices of privacy practices from covered entities beginning April 14, 2003 showed an intent to use and disclose Citizens' health information without consent using language taken directly from the Amended Rule, and (d) Citizens showed that they, in fact, had lost the ability to prevent such disclosures on the Amended Rule's implementation date. App. 34a.
- (3) The Court agreed with Citizens that the DeShaney decision was not dispositive of the constitutional claims because they were not seeking protection by the Secretary of their right to privacy but, rather, were seeking protection from the Court for their constitutional right to privacy with respect to actual or threatened violations by covered entities, including the Secretary, exercising federal authority. App. 12a.

- (4) The Court of Appeals, however, refused to address Citizens' constitutional claims, this time based on the holding that there was no state action since the Amended Rule allegedly did not "compel" or "command" the privacy violations and on the unprecedented proposition that state action could not be present unless the Amended Rule suddenly authorized something that was previously prohibited. App. 17a-18a, 25a.
- (5) The Court of Appeals summarily affirmed the District Court with respect to Citizens' statutory and Administrative Procedure Act claims. App. 25a-29a.

Citizens filed a timely petition for rehearing and rehearing en banc on the grounds that the Court of Appeals had failed to obtain briefing on the state action issue and had ignored controlling Third Circuit and Supreme Court precedent interpreting the state action doctrine. That petition was denied, without opinion, on January 13, 2006.

#### REASONS FOR GRANTING THE PETITION

**I. The Court of Appeals' holding that state action cannot exist unless the state "suddenly authorized something that was previously prohibited" conflicts with relevant decisions of this Court.**

According to the Court of Appeals, state action can not exist, "unless the law itself suddenly authorized something that was previously prohibited." App. 18a. The Court further stated that state action is not present where the government "only codifies" a power that private parties had already. App. 19a. To illustrate its point, the Court stated that legislation passed by Congress

would be insulated from constitutional challenge if it were to permit private cinema operators, at their discretion, to search all movie goers for any reason. Id. Under this formulation of the state action doctrine, Congress (or a federal agency or a state) could insulate any action or policy from Constitutional challenge if it could point to an example of a similar action or policy in the private sector. By holding that the state may immunize its actions from constitutional scrutiny based on private violations of individual liberties, the Court has turned the state action doctrine into a legal nullity.

The Court cited no case law to support its novel proposition, and Citizens is aware of none. Citizens believe this is because the proposition is contrary to the basic principles of the state action doctrine recognized in numerous decisions of this Court. As the Court of Appeals acknowledged, the "state action" doctrine developed in the civil rights cases decided over more than 100 years following the Civil War. App. 16a-17a. "The Civil Rights Cases", 109 U.S. 3, 3 S. Ct. 18 (1883); Shelley v. Kraemer, 334 U.S. 1, 68 S. Ct. 836 (1948); Garner v. State of Louisiana, 368 U.S. 157, 82 S. Ct. 248 (1961); Peterson v. City of Greenville, 373 U.S. 244, 83 S. Ct. 1119 (1963); Lombard v. State of Louisiana, 373 U.S. 267, 83 S. Ct. 1122 (1963); Robinson v. Florida, 378 U.S. 153, 84 S. Ct. 1693 (1964); Reitman v. Mulkey, 387 U.S. 369, 87 S. Ct. 1627 (1967); Adickes v. S. H. Kress, 398 U.S. 144, 90 S. Ct. 1598 (1970); Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 92 S. Ct. 1965 (1972); Norwood v. Harrison, 413 U.S. 455, 466, 93 S. Ct. 2804, 2811 (1973); Gilmore v. City of Montgomery, 417 U.S. 556, 94 S. Ct. 2416 (1974).

These decisions establish that state action exists where the State requires, adopts, approves, encourages, enforces or in some way supports racial discrimination

which has long been conducted by private entities. State action was found in these cases where the law in question authorized or enforced an action or a policy that was previously permitted, rather than prohibited, among private individuals and entities.

In announcing the state action doctrine in “The Civil Rights Cases”, this Court stated that the Constitution “nullifies and makes void ...state action **of every kind** which impairs the privileges and immunities of citizens of the United States, or which injures them in life, liberty, or property without due process of law...”. 109 U.S. at 11, 3 S. Ct. at 21 (emphasis added). Included within the scope of state action are “the wrongful acts of individuals, [ ]supported by state authority in the shape of laws, customs, or judicial or executive proceedings.” 109 U.S. at 17, 3 S. Ct. at 25. Accordingly, protection under the state action doctrine extends to the deprivation of any Constitutionally guaranteed right, like medical privacy, where that deprivation is supported by state action.

In fact, this Court noted that the private actions that were the subject of the complaint (“denying to individuals the privileges and accommodations of a theater” and other types of discrimination) would be prohibited if they were supported by state action, even though those deprivations had been common practice in the private sector throughout the history of the United States. 109 U.S. at 22-23, 3 S. Ct. at 29. Subsequent cases applied these principles.

For example, state action supporting the prior private practice of racial discrimination was found in (a) the action of state courts upholding restrictive covenants in land sales contracts, Shelley v. Kraemer, 334 U.S. 5-6, 68 S. Ct. 838-9; (b) a trespass statute used to enforce a city ordinance supporting a “local custom” of restaurant

owners to discriminate against minorities, Peterson v. City of Greenville, 373 U.S. 246, 83 S. Ct. 1120; (c) statements of city officials supporting the common practice of restaurants refusing to permit segregated dining, Lombard v. Louisiana, 373 U.S. 272, 83 S. Ct. 1125; (d) state regulations discouraging restaurants from departing from past practices of refusing to serve minorities, Robinson v. Florida, 378 U.S. 156, 84 S. Ct. 1695; (e) state application of a “disturbance of the peace” statute to enforce a private restaurant’s segregation policy, Garner v. Louisiana, 368 U.S. 160, 173, 82 S. Ct. 249, 256; (f) a State constitutional amendment that authorized existing racial discrimination in the housing market, Reitman v. Mulkey, 387 U.S. 373, 381, 87 S. Ct. 1630, 1634; (g) a trespass law which was applied to enforce “a long-standing and still prevailing” custom of operating racially segregated restaurants, Adickes v. S.H. Kress, 398 U.S. 173, 90 S. Ct. 1616; (h) a state regulation requiring a private club to adhere to its bylaws supporting its practice of discriminating against minorities in the provision of services, Moose Lodge No. 107 v. Irvis, 407 U.S. 178, 92 S. Ct. 1974; (i) a statute that provided books to private schools operating on a segregated basis, Norwood v. Harrison, 413 U.S. 466, 93 S. Ct. 2811; and (j) a city policy of allocating facilities for use by private segregated schools in order to perpetuate existing private discrimination, Gilmore v. City of Montgomery, 417 U.S. 566-67, 94 S. Ct. 2423.

Under the Court of Appeals’ interpretation of the state action doctrine, racial discrimination invalidated in these cases could still be the norm. Using the Court’s example, a law passed by Congress authorizing cinema operators to deny access to minorities would be immune to constitutional challenge. Clearly such a law would constitute state action under the holdings in the above cases. State action typically is found where the state puts

its weight on the side of the proposed practice so that private individuals “need no longer rely on their personal choice” but can invoke express state authority to support their previously private conduct. Jackson v. Metro. Edison Co., 419 U.S. 345, 357, 95 S. Ct. 449, 456 (1974); Reitman v. Mulkey, 387 U.S. 377, 87 S. Ct. 1632.

That has clearly occurred here where, after the implementation of the Amended Rule, covered entities, including the Secretary, no longer needed to rely on their personal choice but could, and did, disclose Citizens’ identifiable health information relying on “regulatory permission” granted by the Rule. The evidence shows that nearly all providers obtained consent to disclose Citizens’ health information prior to implementation of the Amended Rule. App. 35a and 23a, 65 Fed. Reg. at 82,472, 82,771. Even if covered entities theoretically could have disclosed Citizens’ health information without federal authority, that possibility alone does not preclude a finding of state action where the Secretary has created a regulatory scheme that encourages and enforces private policies of nonconsensual disclosures. Reitman v. Mulkey, 387 U.S. 379-80, 87 S. Ct. 1633.

**II. The Court of Appeals’ holding that state action may exist only where the state has “compelled” a particular act or “commanded” a particular result conflicts with relevant decisions of this Court.**

The Court of Appeals concluded that state action may exist only where the state, by its law “has compelled the act” or when the state has “commanded” a particular result.” See App. 17a., relying on Adickes v. S.H. Kress & Co., Peterson v. City of Greenville, Robinson v. Florida, Lombard v. Louisiana, and Shuttlesworth v. Birmingham, 373 U.S. 262,

83 S. Ct. 1130 (1963). That conclusion is in conflict with the holdings in these and other decisions of this Court.

The Court in Adickes did not specify the state action that actually existed because the case was remanded without such a ruling due to the lower court’s premature award of summary judgment. 398 U.S. at 160-61, 171, 90 S. Ct. at 1609-10, 1615-17. The Court, however, described a broad range of evidence that could support a state action finding.

The case involved a Caucasian school teacher who was refused service when she sought to dine with several African-American students at a restaurant and was arrested for vagrancy after she left. 398 U.S. at 146, 90 S. Ct. at 1602. The statute under which she was arrested did not compel or otherwise command segregation, she was not asked to leave the restaurant, and she was not arrested for being on the premises. 398 U.S. at 161, n. 23, 90 S. Ct. at 1610.

The plaintiff could show abridgement of her constitutional rights, according to the Court, if she could prove that the restaurant refused her service because of “a state-enforced custom of segregating the races in public restaurants” having the force of law. 398 U.S. at 171, 90 S. Ct. at 1615. This concept of state action recognizes that “settled practices of state officials may, by imposing sanctions or withholding benefits, transform private predilections into compulsory rules of behavior.” 398 U.S. at 168, 90 S. Ct. at 1614. In other words, state action can be found in the influence on private decisions by state enforcement or discouragement of those decisions.

The Court of Appeals noted that the Adickes Court used “two polar propositions” to analyze the state action issue— one where the state itself is discriminating because of race and the other where a private party is acting on his own personal predilections and “not...against a backdrop of state

compulsion or involvement.” 398 U.S. at 169, 90 S. Ct. at 1614-15 (emphasis added.) App. 16a. The Court of Appeals, however, focused exclusively on the “compulsion” branch of the Adickes analysis and ignored the broader “involvement” branch.<sup>6</sup> The Adickes Court also stated that it was not deciding “whether less substantial involvement of a State might satisfy the state action requirement.” 398 U.S. at 171, 90 S. Ct. at 1615. Such less substantial involvement was identified in the following other decisions.

The Court in Peterson v. City of Greenville, 373 U.S. 244, 248, 83 S. Ct. 1119, 1121 (1963) found state action in the application of a non-discriminatory trespass statute because it was used to enforce a city ordinance expressly

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<sup>6</sup> The Court also misstated Citizens’ allegations, effectively avoiding the fact that the other “pole proposition”—direct state involvement—is also present in this case. The Court conceded that Citizens and Amici had referred to the Secretary’s grant of “regulatory permission” to himself to violate Citizens’ privacy rights in his role as a “covered entity” charged with administration of the Medicare, Medicaid and Indian Health Services programs. App. 14a, n.12, 38a. The Court concluded it did not have to decide whether this grant of direct authority constituted state action because Citizens challenged the promulgation of the rule, “not specific disclosures by HHS.” Id. The Court supported this conclusion by stating that Citizens had alleged only that their privacy was being violated by “third parties”. App. 14a, citing Citizens’ Br. at 2. In fact, the allegation to which the Court referred stated that Citizens’ health information privacy was being violated by “covered entities exercising federal authority granted by the Amended Rule.” Citizens’ Br. at 2. Further, Citizens expressly alleged in their complaint that the Secretary had violated their rights to privacy by eliminating their right of consent and expressly authorizing “all covered entities and their business associates” to disclose Citizens’ health information without their permission and against their will. First Amended Complaint, para. 71. The Secretary is indisputably a covered entity. Also, one of the Plaintiffs is the Congress of California Seniors comprised of individuals insured principally under the Medicare and Medicaid programs administered by the Secretary. First Am. Comp., para. 20. Thus, the Court should have considered whether the Secretary’s direct violation of Citizens’ health privacy resulted in state action but failed to do so.

requiring discrimination in restaurants. Id. The principle on which the decision rests is that state action is present when “to some significant extent the State in any of its manifestations has been found to have become involved” in abridging individual rights. 373 U.S. at 247.

The Court in Lombard v. State of Louisiana, 373 U.S. 267, 269, n. 1, 83 S. Ct. 1122, 1123 (1963) expanded this principle. Several Caucasian and African-American individuals who staged a “sit-in” demonstration at a refreshment counter were arrested under a state trespass statute. State action was found in the form of non-binding public statements by the Superintendent of Police and the Mayor that “sit-ins” would not be tolerated. 373 U.S. at 273, 83 S. Ct. at 1125. Neither the state statute nor the officials’ statements compelled or commanded proprietors to discriminate. They were entirely free to integrate their facilities without violating any state law. 373 U.S. at 270-271, 83 S. Ct. at 1123-24. The decision in Lombard stands for the proposition that “an authoritative expression of state policy that is nondiscriminatory on its face may be found to be discriminatory when considered against the factual background of its promulgation (citations omitted).” Adickes v. Kress, 398 U.S. at 193, 90 S. Ct. at 1621, Brennan, J., concurring in part and dissenting in part (emphasis added).

The state action doctrine was developed further in Robinson v. Florida, 378 U.S. 153, 154, n. 1, 84 S. Ct. 1693, 1694 (1964). That case involved prosecution of a mixed race group of individuals under a state trespass statute when they refused to leave a restaurant that had a “policy” of refusing to serve African-Americans. The statute gave the restaurant complete discretion to deny services to anyone who would be “detrimental” to serve. The State had a regulation and an administrative policy requiring restaurants that elected to serve African-Americans to have separate “facilities”, such as toilet facilities. Neither the statute nor the regulation and

administrative policy “compelled” or “commanded” the policy adopted by the restaurant. The Court found state action to support a constitutional challenge with the following rationale:

While these Florida regulations do not directly and expressly forbid restaurants to serve white and colored people together, they certainly embody a state policy putting burdens upon any restaurant which serves both races, burdens bound to discourage the serving of the races together.

378 U.S. at 156, 84 S. Ct. at 1695. Thus, the state was found to be involved to a “significant extent” due to a state policy that simply imposed burdens discouraging integration.

The Peterson, Lombard, and Robinson “sit-in” cases do not stand for the proposition that state action can be present only where private action is “compelled” or “commanded”, but rather that state action is present where there is significant state involvement in the form of supporting, encouraging, discouraging or enforcing private decisions.<sup>7</sup>

That conclusion was noted three years after Robinson in Reitman v. Mulkey, 387 U.S. 369, 376, 87 S. Ct. 1627, 1631 (1967), where the Court stated that “prohibited state involvement could be found ‘even where the state can be charged with only encouraging’ rather than commanding discrimination” citing, Robinson; Anderson v. Martin, 375 U.S. 399, 84 S. Ct. 454 (1964); Barrows v. Jackson, 346 U.S. 249, 73 S. Ct. 1031 (1953); McCabe v. Atchison, Topeka &

<sup>7</sup> In Shuttlesworth, convictions for aiding and abetting violation of a city trespass ordinance were dismissed for lack of evidence, but the ordinance did not compel or command discrimination. 373 U.S. at 263, n. 2, 83 S. Ct. at 1131.

Santa Fe R. Co., 235 U.S. 151, 35 S. Ct. 69 (1914).<sup>8</sup> In Reitman, an amendment to the state constitution guaranteed the right to sell or lease real property to anyone that an individual, “in his absolute discretion, chooses.” 387 U.S. at 372, n. 2, 87 S. Ct. at 1629. Accordingly, the action by private property owners refusing to rent to minorities was not compelled or commanded by the amendment. State action nonetheless was found to hold the state provision unconstitutional because it was “intended to authorize, and does authorize, racial discrimination in the housing market.” 387 U.S. at 381, 87 S. Ct. at 1634. So, Reitman stands for the proposition that private conduct need not be “compelled” or “commanded” in order for state action to be found but may be only encouraged, authorized or supported as evidenced by the intent, effect, and historical context of the contested action. 387 U.S. at 373, 87 S. Ct. at 1630.<sup>9</sup>

This Court applied these principles again in Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 176, 92 S. Ct. 1965, 1973 (1972), where it found a private club’s policy of refusing to serve African-Americans was constitutionally

<sup>8</sup> The Reitman Court also noted that that state action had been found in Burton v. Wilmington Parking Authority, 365 U.S. 715, 81 S. Ct. 856 (1961) even though the State “neither commanded nor expressly authorized or encouraged the discrimination” but only “elected to place its power, property and prestige behind the admitted discrimination”. 387 U.S. at 380, 87 S. Ct. at 1633.

<sup>9</sup> Indeed, this Court’s landmark decision in Brown v. Board of Education, 374 U.S. 483, 486 n. 1, 74 S. Ct. 686, 687 (1954) which spawned many of the cases that refined the state action doctrine, involved a Kansas statute “which permits, but does not require” cities of a certain size to maintain separate school facilities for Caucasian and African-American students. That statute was struck down as unconstitutional along with others that required separate facilities. This Court has often found laws that permit but do not require certain private acts to be in violation of constitutional rights. Santa Fe Indep. School Dist. v. Doe, 530 U.S. 290, 309, 120 S. Ct. 2266, 2282 (2000); Wallace v. Jaffree, 472 U.S. 38, 40, 105 S. Ct. 2479, 2481, 2491 (1985).

defective based on state action in the form of a state regulation that simply required private clubs to comply with their own bylaws. There was “no suggestion” that the state regulation required private clubs to discriminate or that it had been applied to that effect. The state action resulted solely from the potential “application” of the rule. 407 U.S. at 178, 92 S. Ct. at 1974.

State action was also found in Norwood v. Harrison, 413 U.S. 455, 93 S. Ct. 2804 (1973) in a state statute that provided books for both public and private schools without regard to whether the private schools had racially discriminatory policies. According to that decision, state action can be any tangible aid that “has a significant tendency to facilitate, reinforce, and support private discrimination”. 413 U.S. at 466, 93 S. Ct. at 2811. The constitutionally defective statute did not compel or command private segregation, and the private schools were not coerced in any way to adopt discriminatory policies. The Court further held that the state is prohibited by the Constitution from engaging directly in discriminatory conduct, and “[i]t is axiomatic that a state may not induce, encourage or promote private persons to accomplish what it is constitutionally forbidden to accomplish.” 413 U.S. at 465, 93 S. Ct. at 2810.

A similar holding was reached in Gilmore v. City of Montgomery, 417 U.S. 556, 94 S. Ct. 2416 (1974). There this Court found state action in a city policy that allocated facilities to private schools that were racially segregated. The city’s policy did not compel or command segregation, and the schools had complete discretion to operate on a segregated or desegregated basis. State action was found because the city’s policy “enhanced the attractiveness of segregated private schools” enabling them to offer complete athletic programs. According to the Court, this resulted in “significant state involvement” in private discrimination. 417 U.S. at 573, 94 S. Ct. at 2426.

In both Edmonson v. Leesville Concrete Co., 500 U.S. 614, 111 S. Ct. 2077 (1991) and Georgia v. McCollum, 505 U.S. 42, 112 S. Ct. 2348 (1992), this Court struck down the racially motivated exercise of peremptory challenges by private individuals in civil (Edmonson) and criminal (McCollum) court proceedings even though the actions were authorized by facially neutral statutes. The individuals in these cases were not compelled, or even encouraged, to exercise their statutory rights in a racially discriminatory manner. The Court in both cases found that the trial court’s enforcement of the racially motivated private decisions involved the government “in a significant way” in otherwise private discrimination. 500 U.S. 624, 111 S. Ct. 2085; 505 U.S. 55, 112 S. Ct. 2356-57.

Finally, this Court has applied the state action principles developed in the civil rights area in other contexts. In Skinner v. Railway Labor Executives, 489 U.S. 602, 109 S. Ct. 1402 (1989), the Court struck down on constitutional grounds a federal regulation that was entirely permissive in that it merely authorized railroads to require employees to submit to breath and urine tests in certain circumstances. Nothing in the regulation compelled any such testing by the railroads. 489 U.S. at 602, 611, 614, 109 S. Ct. at 1407, 1410, 1411. Addressing the state action issue, the Court stated, “[t]he fact that the Government has not compelled a private party to perform a search does not, by itself, establish that the search is a private one.” 489 U.S. at 615, 109 S. Ct. at 1412. According to the Court, state action is present where the government “has done more than adopt a passive position” toward the particular private decision, but rather, has shown a “strong preference” for the conduct and there are “clear indices of the Government’s encouragement, endorsement and participation.” Id.

The facts in Skinner, involving government permission and encouragement of private entities to conduct random searches, are analogous to the random searches example used by the Court of Appeals to illustrate its novel state action concept. App. 19a. The rationale of Skinner, grounded in more than 100 years of Supreme Court case law, shows that state action is present where the federal government merely authorizes, encourages or endorses but does not compel or command, searches of private citizens by private entities. Thus, the Court's own example plainly shows that its holding is in conflict with decisions of this Court.

**III. The Court of Appeals' decision conflicts with relevant decisions of this Court and decisions of other Courts of Appeal by failing to address relevant state action criteria.**

This Court recently set forth the analysis that courts must apply in determining whether state action is present in a case with a constitutional claim. According to the Court, "the judicial obligation is not only to 'preserv[e] an area of individual freedom by limiting the reach of federal law' and avoi[d] the imposition of responsibility on a State for conduct it could not control,' [citations omitted] but also to assure that constitutional standards are invoked 'when it can be said that the State is *responsible* for the specific conduct of which the plaintiff complains'". Brentwood Academy v. Tennessee Secondary School Ass'n, 531 U.S. 288, 295, 121 S. Ct. 924, 930, (2001) (emphasis added). According to the Court, "if the [Constitution] is not to be displaced, therefore, its ambit cannot be a simple line between States and people operating outside formally governmental organizations, and the deed of an ostensibly private organization or individual is to be treated sometimes as if the State had caused it to be performed." (emphasis added) Id. The question is whether there is such a "close nexus" between the state and the

challenged action that "seemingly private behavior 'may be fairly treated as that of the State itself'". Id., citing Jackson v. Metro. Edison Co. 419 U.S. 345, 351, 95 S. Ct. 449 (1974).

Action that is fairly attributable to the state under Brentwood, "is a matter of normative judgment, and the criteria lack rigid specificity ...no one fact can function as a necessary condition across the board for finding state action; nor is any set of circumstances absolutely sufficient...". The Court noted that "[o]ur cases have identified a host of facts that can bear on the fairness of such an attribution." 531 U.S. at 296, 121 S. Ct. at 930. Criteria cited by the Court for determining the presence of state action include where the action results from the state's exercise of "coercive power", "when the State provides 'significant encouragement, either overt or covert'", "when a private actor operates as a 'willful participant in a joint activity with the State or its agents'", "when it is 'entwined with the government policies' or when government is 'entwined in [its] management or control'"(citations omitted). Id. The Court must perform a "necessarily fact-bound inquiry". Id. at 298. The mere fact that state action may not be present under one set of criteria does not mean that it should not be found under others. Id. at 302.

The Court of Appeals completely ignored Brentwood despite the fact that Citizens cited the decision and the state action criteria it mandates in its post-hearing memorandum. Appellants' Memorandum in Response to Questions from the Court, pp. 10-11 (April 8, 2005). Instead, the Court of Appeals addressed only a single state action criterion—whether the private action was "compelled" or "commanded" by the Secretary's regulation. App. 17a. Thus, the Court of Appeals failed to discharge its "judicial obligation" to assure that "constitutional standards are invoked" where, as here, Citizens' fundamental liberty rights have been, or imminently will be, violated by both the Secretary and by private entities

as expressly authorized, encouraged and enforced by the Amended Rule.

Brentwood reversed a finding of no state action by a Court of Appeals which had considered only three of the state action criteria established by this Court. 531 U.S. at 294. Review and reversal of the Court of Appeals' decision in this case is even more appropriate because that Court limited itself to the rigid application of only a single state action criterion to the exclusion of all others, and the Court affirmed the granting of summary judgment in favor of the government even though it had not disputed any of the facts alleged in the Verified Amended Complaint, affidavits and exhibits submitted by Citizens. At such a stage in a judicial proceeding, all such alleged facts must be taken as true and the inferences to be drawn from them must be viewed in the light most favorable to the party opposing such a motion. Adickes, supra at 158-161. See also, App. 34a, n. 9.

It is undisputed in this case that (a) the right to information privacy is the right to decide whether one's health information may be disclosed<sup>10</sup>; (b) the right to privacy is a fundamental right protected by the Constitution<sup>11</sup>, (c) the Original Privacy Rule effective April 14, 2001 recognized this right to privacy and consent for identifiable health information further noting that a consent process is consistent with traditional practice and the public's expectation of privacy<sup>12</sup>; (c) the Amended Rule "replaced" the right of privacy and consent with "regulatory permission" for hundreds of thousands of covered entities (including the Secretary) to routinely use and disclose Citizens' identifiable health information without notice, without their consent and

<sup>10</sup> 65 Fed. Reg. at 82,465

<sup>11</sup> 65 Fed. Reg. at 82,464.

<sup>12</sup> 45 CFR §164.506(a), 65 Fed. Reg. at 82,474, 82,771, 82,810

over their objection<sup>13</sup>; (d) the Secretary's express intent in issuing this rule was to extinguish Citizens' right to privacy and consent in routine situations which the Secretary believed was an impediment to the efficient delivery of health care<sup>14</sup>; (e) the Amended Rule compels every covered entity to provide a notice of privacy practices which includes a description of the routine uses and disclosures that the entity is authorized by the Rule to make regardless of whether that is consistent with the entity's past, or current privacy practices<sup>15</sup>; and (f) beginning on the April 14, 2003 implementation date of the Amended Rule, virtually all covered entities switched from their past practice of obtaining consent for routine uses and disclosures to the nonconsensual use and disclosure of Citizens' health information as a result of the authority, encouragement, support and enforcement provided by the Amended Rule.<sup>16</sup>

Furthermore, the Court of Appeals determined, in ruling in Citizens' favor on standing, that covered entities are, or imminently will be, violating Citizens' health information privacy causing them "injury in fact" and that the injury is "causally connected and traceable" to the action of the Secretary. App. 34a, n. 9.

There is far more evidence of state authorization and encouragement in this case than was present in the non-binding oral statements in Lombard v. Louisiana, supra; the neutral state constitutional provision in Reitman v. Mulkey, supra; the "custom" of segregating races in Adickes v. S. H. Kress, supra; the state book supply statute in Norwood v. Harrison, supra; the city policy in Gilmore v. City of

<sup>13</sup> 67 Fed. Reg. at 53,211, 45 CFR §164.506(a), 67 Fed. Reg. at 53,268

<sup>14</sup> 67 Fed. Reg. at 53,210-211.

<sup>15</sup> 45 CFR §164.520(b)(1)(ii)

<sup>16</sup> See, e.g., affidavits of Deborah Peel, M.D. as well as numerous other similar affidavits. J.A. 238-240, 312-314, 1476-1485 and generally, J.A. 46-332.

Montgomery, *supra*; the peremptory challenge statutes in Edmonson v. Leesville Concrete Co. *supra* and Georgia v. McCollum, *supra*; or the permissive federal drug testing regulation in Skinner v. Railway Labor Executives, *supra*. Yet the Court of Appeals in this case failed even to consider the overwhelming undisputed evidence under these criteria.

In addition to the significant encouragement to violate the Plaintiffs' health information privacy, the Amended Rule also provides significant discouragement to private entities that may wish to continue providing a consent process as they have in the past. The Amended Rule allows covered entities to provide a consent process only by means of a cumbersome process of granting an individual's request to depart from the privacy practices mandated by the Rule and entering into an agreement to restrict uses and disclosures.<sup>17</sup> Further discouragement is provided by the fact that failure of a covered entity to adhere to the agreement is a violation of the Rule subjecting the covered entity to potential civil sanctions.<sup>18</sup> The discouragement for covered entities to honor Citizens' right to privacy is clearly stronger than the discouragement reflected in the state regulations in Robinson v. Florida, *supra* for restaurants to serve races together. Yet the Court of Appeals did not consider this state action criterion.

As the Court of Appeals acknowledged, covered entities have adopted the disclosure practices mandated by the Amended Rule as their privacy practices as of the April 14, 2003 implementation date. App. 35a, n. 9, 23a. The Amended Rule compels these covered entities "to abide by the terms" of their stated privacy practices and enforces this requirement with civil penalties. 42 U.S.C. §1320d-5; 45

<sup>17</sup> 67 Fed. Reg. at 53,213, 45 CFR §164.522.

<sup>18</sup> Id.

C.F.R. §160.402.<sup>19</sup> Thus, state action is present under the "enforcement" criterion of the state action doctrine. Moose Lodge No. 107 v. Irvis, *supra*, at 163. See also, Edmonson v. Leesville Concrete Co., *supra* at 624 and Georgia v. McCollum, *supra*, at 55. The Court of Appeals failed to consider this criterion as well.

This Court has also determined that state action may be found where the state has put its "imprimatur" or approval on the action. Blum v. Yaretsky, 457 U.S. 991, 1003, 102 S. Ct. 2777, 2785 (1982); Jackson v. Metro. Edison Co., *supra* at 357; Shelley v. Kraemer, *supra* at 20. That "imprimatur" is deemed to be present where the state has conducted a review of the proposed action and specifically approved it. Jackson, *supra* citing Public Utilities Comm'n v. Pollack, 343 U.S. 451, 72 S. Ct. 813 (1952). See also, Moose Lodge No. 107, *supra* at 176, n. 3 (state action exists where the government has "approved" or "endorsed" the violation). The undisputed evidence here is that the Secretary expressly approved and endorsed in the Amended Rule the unauthorized disclosures sought and proposed by certain covered entities. Further, the Court of Appeals found that covered entities are violating the health information privacy of Citizens "using language lifted directly from the Privacy Rule itself". App. 35a, n.9. The Court of Appeals found "regrettable and disquieting" the fact that covered entities are construing the authorization granted by the Amended Rule "as constituting a new federal seal of approval" to violate Citizens' health privacy. App. 23a. The Court, however, failed to consider whether this fact also amounts to state action.

State action also exists where the government has provided the "procedural scheme" and committed to enforce the deprivation of a constitutionally protected right. Lugar v.

<sup>19</sup> 45 CFR §164.520(b)(1)(v)(B).

Edmonson Oil, 457 U.S. 922, 940, 102 S. Ct. 2744, 2756 (1982). The Court did not consider this criterion either.

Finally, this Court has repeatedly found that unconstitutional state action can be found in the intent and effect of a facially neutral law. Reitman v. Mulkey, *supra* at 381; Norwood v. Harrison, *supra* at 463-66; Gilmore v. City of Montgomery, *supra* at 568; Edmonson v. Leesville Concrete Co. *supra* at 624; Georgia v. McCollum, *supra* at 53. The stated intent and effect of the Amended Privacy Rule is to eliminate the ability of Citizens to exercise their rights to health information privacy in routine situations. The Court of Appeals did not consider whether this intent and effect could constitute state action.

The Court of Appeals decision also appears to be in conflict with the case law from at least two circuits holding that a variety of criteria must be considered in determining whether state action is present, and such state action can be evidenced by “encouragement and support” from the federal government even if it does not compel the private choice. For example, such encouragement and support sufficient for state action was present in a memorandum of understanding and the “structure of the program” where a spouse was deprived of access to his children under a federal witness protection program. Franz v. United States, 707 F.2d 582, 592-93 (D. C. Cir. 1983). See also, Breault v. Heckler, 763 F.2d 62, 64 (D.C. Cir. 1985) (“significant governmental promotion” sufficient for state action); Jeffries v. Georgia Residential Finance Authority, 678 F.2d 919, 923 (D. C. Cir. 1982), cert. denied 45 U.S. 971, 103 S. Ct. 302 (1982) (private citizen’s conduct attributable to the state “where the government affirmatively facilitates, encourages, or authorizes the objectionable practice”). The law of the Fourth Circuit appears to be similar. Doe v. Charleston Area Medical Center, 529 F.2d 638, 643 (4<sup>th</sup> Cir. 1975 ) (“government

sanction need not reach the level of compulsion to clothe what is otherwise private discrimination with ‘state action’”).

### CONCLUSION

The Court of Appeals’ decision in this case is based on a radical new formulation of the state action doctrine. The Court cited no precedent for its new state action theory, and the holding is in direct conflict with the holdings of this Court in the civil rights area which the Court of Appeals concedes formed the basis for the state action doctrine. The Court of Appeals’ holding undermines virtually all constitutionally protected rights, and particularly civil rights, by insulating state action from constitutional scrutiny if the state can contend that it is merely codifying private violations of liberty.

The Court of Appeals’ state action analysis is in direct conflict with the very cases on which it relies. Those cases, and their progeny, clearly show that private action need not be compelled or commanded in order for state action to be found. Under the Court of Appeals’ example, Congress could enact a law, immune to constitutional challenge, authorizing cinema owners (or other private entities) to conduct random searches of individuals even if the law was expressly intended to encourage, promote, support and enforce such searches as a federal policy and the law was having its intended effect. In any event, the Court of Appeals erroneously ignored the fact that the actions determined to be actually or imminently causing Citizens’ “injuries in fact” are being taken both by private entities as well as the Secretary expressly under the authority of the Amended Rule.

Finally, the Court of Appeals ignored the controlling precedent from this Court in Brentwood which defines the “judicial obligation” of courts evaluating the presence of state action to consider a “host of facts” and criterion that bear on

the fairness of attributing actions to the government. The Court of Appeals' holding that it may rigidly apply a single criteria and ignore all others directly conflicts with this Court's holding in Brentwood and will prevent constitutional standards from being invoked in many situations where the right to liberty is denied.

This case involves not only the question of whether individuals may raise any constitutional issue but also whether they may preserve their constitutional right to informational privacy. HHS found that the health information privacy rule "affects over 600,000 covered entities and virtually every American." 66 Fed. Reg. at 12,739. Citizens' identifiable health information which is being disclosed under the authority of the Amended Rule without their consent and over their objections includes their mental health and genetic information. If Citizens do not have a constitutionally protected right to privacy for their inner-most thoughts and genetic make-up, it is difficult to imagine how they could have any right to privacy. If there is no right to privacy, there can be no liberty. As often stated, "[t]he framers of the Constitution...conferred, as against the government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men." Olmstead v. United States, 277 U.S. 438, 478, 48 S. Ct. 564, 572 (1928) (Brandeis J., dissenting).

Accordingly, this case involves fundamental constitutional rights rooted in the nation's history and tradition and whether individuals will be able to exercise those rights. For these reasons, this petition should be granted.

Respectfully submitted,

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