No. 15-10195

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

UNITED STATES OF AMERICA,
***Petitioner-Appellee*,**

vs.

JOSEPH ZADEH, D.O.,
Respondent-Appellant.

Consolidated with No. 15-10202

UNITED STATES OF AMERICA,
***Petitioner-Appellee*,**

vs.

ABBAS T. ZADEH,
Respondent-Appellant.

On appeal from the United States District Court
for the Northern District of Texas, Fort Worth
Case No. 4:14-CV-106-O
Judge Reed Charles O'Connor presiding

AMICUS CURIAE BRIEF OF THE ASSOCIATION OF AMERICAN PHYSICIANS & SURGEONS IN SUPPORT OF RESPONDENT-APPELLANT ABBAS T. ZADEH, IN SUPPORT OF REVERSAL

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CERTIFICATE OF INTERESTED PERSONS

The case number for this *amicus curiae* brief is No. 15-10202, *United States of America v. Abbas T. Zadeh*, which was consolidated under No. 15-10195, *United States of America v. Joseph Zadeh, D.O*.

Amicus Curiae Association of American Physicians & Surgeons, Inc., is a non-profit corporation which has no parent corporation, and no publicly held corporation owns 10% or more of its stock.

Pursuant to the fourth sentence of Circuit Rule 28.2.1, the undersigned counsel of record certifies that the parties' list of persons and entities having an interest in the outcome of this case is complete, to the best of the undersigned counsel's knowledge, with the following additions:

Association of American Physicians & Surgeons, *Amicus Curiae*

Andrew L. Schlafly, counsel for *Amicus Curiae*.

These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

/s/ Andrew L. Schlafly
Andrew L. Schlafly
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Dated: July 13, 2015

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IDENTITY, INTEREST AND AUTHORITY TO FILE[1]

Amicus curiae Association of American Physicians & Surgeons ("AAPS") is a non-profit corporation founded in 1943. AAPS defends the practice of private, ethical medicine, and works to preserve the sanctity of the patient-physician relationship. The Supreme Court has made use of *amicus* briefs submitted by AAPS in high-profile cases. *See, e.g.*, *Stenberg v. Carhart*, 530 U.S. 914, 933 (2000); *id*. at 959, 963 (Kennedy, J., dissenting); *District of Columbia v. Heller*, 554 U.S. 570, 704 (2008) (Breyer, J., dissenting). The Third Circuit also cited an *amicus* brief by AAPS in the first paragraph of one of its decisions. *See Springer v. Henry*, 435 F.3d 268, 271 (3d Cir. 2006).

AAPS has members who practice medicine within the jurisdiction of this Court. How they practice medicine and keep medical records could be affected by the decision in this case. AAPS therefore has direct and vital interests in the issues presented here.

STATEMENT OF THE CASE

Without a warrant and without initially identifying themselves, federal agents searched patient medical records in an office of Dallas-area physicians,

[1] *Amicus* files this brief with the consent of all of the parties. Pursuant to FED. R. APP. P. 29(c)(5), the undersigned counsel certifies that: counsel for the *amicus* authored this brief in whole; no counsel for a party authored this brief in any respect; and no person or entity – other than *amicus*, its members, and its counsel – contributed monetarily to this brief's preparation or submission.

based merely on a state administrative subpoena. A month later the Drug Enforcement Administration ("DEA"), based on representations by one of those federal agents, sought to enforce an administrative subpoena demanding production of records on 35 specific patients for the period between October 1, 2012, and November 25, 2013 (the "Subpoena"). None of the checks and balances against overreaching by one branch of government existed for this warrantless demand for medical records. There is apparently no emergency or any other justification for the federal government to fail to satisfy the conditions inherent in a warrant prior to this search.

SUMMARY OF ARGUMENT

Unconsented access to one's medical records is a trap door to his or her most private information, typically more personal than what is commonly said on a phone call or what may be found in one's home. Moreover, the ability of someone to obtain optimal medical care depends on full confidence in the privacy of the medical record. There would be a pronounced chilling effect from allowing nearly unlimited access by the federal government to examine and copy one's medical records without probable cause, without a search warrant, and with little more than a curiosity of a federal investigator to see what is there.

Dating back nearly 2,500 years to the Oath of Hippocrates, an essential element of the patient-physician relationship is trust, and the Fourth Amendment

stands as a bulwark to protect that trust against erosion by the federal government. A mere federal administrative subpoena should not trump the patient-physician relationship, the Fourth Amendment, and state sovereignty over medical record privacy. Yet that would be the result if the district court decision allowing enforcement of the Subpoena below were affirmed.

The precedent sought by the federal government here would disrupt both the patient-physician relationship and state sovereignty over medical care. Patient confidences would then be vulnerable to exposure and even publicity contrary to the protections of medical ethics and state policy. The fundamental level of trust that is vital to the practice of medicine would be diminished by allowing federal access to patients' medical records with so meager a showing as held below.

The ruling by the district court was specifically in error in denying that there is a clear "presumption against preemption" by federal regulations with respect to state law in the medical field. (Slip op. 7, RE 15-10195.346) Fifth Circuit precedent is clear that there continues to be a presumption against preemption, as explained in Point II below. For centuries the States have held virtually exclusive autonomy over the regulation of medical care, and the expansive encroachment into this field sought by the federal government here should not be allowed. The executive branch of the federal government does not properly regulate the practice

of medicine, and federal administrative subpoenas should not trump Texas policy to protect medical record privacy.

ARGUMENT

I. There Is a Reasonable Expectation of Privacy in Medical Records, as Reflected by the Oath of Hippocrates, and Fourth Amendment Safeguards Should Apply.

There is a reasonable expectation of privacy in medical records that can be traced to the Oath of Hippocrates of Kos, originating in the 5th century B.C.:

> All that may come to my knowledge in the exercise of my profession [as a physician] … which ought not to be spread abroad, I will keep secret and never reveal.[2]

The Oath of Hippocrates thereby established a duty by physicians to protect the confidentiality of medical records, and a reasonable expectation of privacy by patients in their medical records. The U.S. Supreme Court has described the Oath of Hippocrates as "a long-accepted and revered statement of medical ethics." *Roe v. Wade*, 410 U.S. 113, 132 (1973) (embracing the Oath despite disagreeing with its provision relating to abortion). The Oath confirms that the expectation of privacy in medical records is reasonable, and thus the safeguards of the Fourth Amendment should apply to prevent warrantless searches of such records by the federal government. *See* U.S. CONST. amend. IV. Something more than the mere issuance of a subpoena by the federal government is needed before it should be

[2] http://www.aapsonline.org/ethics/oaths.htm (viewed July 9, 2015).

able to go on a fishing expedition through scores of highly personal and private medical records.

"Wherever a man may be, he is entitled to know that he will remain free from unreasonable searches and seizures." *Katz v. United States*, 389 U.S. 347, 359 (1967). A search warrant is not too much to require before authorizing strangers to wade into one's highly personal records filled with private medical information. Relative to the wide variety of circumstances in which the Supreme Court has held there to be a reasonable expectation of privacy deserving of protection under the Fourth Amendment, such as portions of one's automobile, the far more intimate information communicated by a patient to a physician should receive no less protection.

No less than the chief of the federal executive branch, the president, has repeatedly asserted his expectation of privacy in his own medical records. "Concealing one's true medical condition from the voting public is a time-honored tradition of the American presidency." Robert Dallek, "The Medical Ordeals of JFK," *The Atlantic Monthly* (December 2002).[3] The position of the federal government here against meaningful privacy for one's medical records stands in sharp contrast with the position of many of the chief executives in the

[3] http://www.theatlantic.com/magazine/archive/2002/12/the-medical-ordeals-of-jfk/305572/ (viewed July 11, 2015).

White House. "In the twentieth century Woodrow Wilson, Calvin Coolidge, Franklin Delano Roosevelt, and Dwight D. Eisenhower all, to one degree or another, held back the full truth about medical difficulties ...." *Id.* As one columnist explained:

> Perhaps the most famous cover-up occurred with Woodrow Wilson. … Wilson's inner circle, including his wife, doctor, private secretary and even the secretary of state, hid his condition. They told the press and cabinet the president had suffered a nervous breakdown. No one was allowed to see him, not even his vice president. Wilson retired from the White House in 1921 and died three years later.

Cal Thomas, "All candidates should release their medical records," *Anchorage Daily News* (May 19, 2014). More recently, "Bill Clinton refused to release his medical records to the public. Barack Obama released a one-page letter from his doctor testifying to his 'excellent health.'" *Id.* But while the chief executive insists on medical record privacy for himself, federal agents under his supervision take the opposite stance towards everyone else. The Fourth Amendment should prevent this overreach in federal power.

In *Ferguson v. City of Charleston*, 532 U.S. 67 (2001), the U.S. Supreme Court invalidated an analogous invasion of the medical record privacy by a public hospital that conducted suspicionless drug screening of pregnant women's urine, for the legitimate goal of reducing an epidemic of crack babies. *See id.*at 70-71, 77. The goal by the federal government here is certainly no more laudatory than

the goal in *Ferguson*, and thus the Fourth Amendment must apply with at least as much vigor here. *See also Whalen v. Roe*, 429 U.S. 589, 607 (1977) ("[T]he Constitution puts limits not only on the type of information the State may gather, but also on the means it may use to gather it.").

If the sweeping federal Subpoena were enforced here, then implications would be dire for the Second Amendment in addition to Fourth Amendment rights. U.S. CONST. amend. II & IV. For more than a decade, physicians have been urged by pro-gun-control medical societies to ask patients, including children, about gun ownership in their homes. Since 2000, for example, the American Academy of Pediatricians has recommended that "pediatricians incorporate questions about guns into their patient history taking and urge parents who possess guns to remove them, especially handguns, from the home." *See* Brian Falls, "Legislation prohibiting physicians from asking patients about guns," *Journal of Psychiatry & Law* (Fall 2011) [hereinafter, "*Falls*"] (citing American Academy of Pediatrics Committee on Injury and Poison Prevention, 2000, p. 893). Similarly, the American Psychiatric Association issued guidelines in 2003 insisting that physicians ask any patient who might be suicidal whether they have a gun at home or at work. "[S]uch ***discussions should be documented in the medical record***, including any instructions that have been given to the patient and significant others about firearms or other weapons." *See Falls*, section on "Standards of care"

(emphasis added, citing American Psychiatric Association Workgroup on Suicidal Behaviors, 2003, p. 23).

Sweeping demands by the federal government for patients' medical records, if allowed by enforcing the Subpoena at bar, would open the door to a new type of gun control. With respect to many patients who have distant prior convictions and even some who do not, gun ownership is a crime entailing automatic mandatory minimum jail sentences. Allowing sweeping federal administrative subpoenas for medical records, without any of the checks and balances that are inherent in a warrant, would be contrary to the Second and Fourth Amendments with respect to gun ownership.

Physicians are not agents of the police power of government, and should not be forced to choose between protecting their patients against prosecution or protecting them against disease. It is simply not an adequate justification for the federal government to gain unfettered access to one's medical records by citing a hypothetical desire by a federal agent to find "assurance that [the law] is not" being violated, which was all that the court below required in ordering enforcement of the Subpoena. (Slip op. 8, RE 15-10195.347) Something far more, including a meaningful check and balance on executive branch power, is required by the Fourth Amendment. The Subpoena should be quashed and, at a minimum, such a federal attempt to gain access to medical records should not be allowed without a

search warrant.

II. The District Court Erred in Ruling that It Is "Unclear" Whether There Is a Presumption Against Preemption in the Medical Field, Which Is Traditionally Governed by State Law.

The district court erroneously held that "[i]t is unclear whether there is a presumption against preemption." (Slip op. 7, RE 15-10195.346) Its sole support for that sweeping statement of doubt is a citation to a dissenting opinion supported by only three Supreme Court Justices, in a case involving a field of traditional federal regulation by the FDA. It is only in the context of "a history of federal presence" that the presumption against preemption disappears:

> ***Unlike in other contexts***, here we make no presumption against preemption ***because there is a history of federal presence in banking regulation***. *See United States v. Locke*, 529 U.S. 89, 108, 120 S. Ct. 1135, 146 L. Ed. 2d 69 (2000); *Wells Fargo Bank N.A. v. Boutris*, 419 F.3d 949, 956 (9th Cir. 2005).

Barzelis v. Flagstar Bank, F.S.B., 784 F.3d 971, 973 n.2 (5th Cir. 2015) (emphasis added).

Where, as here, there is not a history of federal presence, then controlling Fifth Circuit precedent requires a presumption against preemption:

> States have broad discretion to implement the Medicaid Act: "This [statutory] language confers broad discretion on the States to adopt standards for determining the extent of medical assistance, requiring only that such standards be 'reasonable' and 'consistent with the objectives' of the Act." *Beal v. Doe*, 432 U.S. 438, 444, 97 S. Ct. 2366, 53 L. Ed. 2d 464 (1977). ***In combination with the presumption against preemption*** and its concomitant clear-statement rule, the discretion conferred in *Doe* leaves little doubt that

> we must affirm the summary judgment if the statutory language does not plainly prohibit categorical exclusions.

Detgen v. Janek, 752 F.3d 627, 631 (5th Cir. 2014) (emphasis added).

In fact, this Court has confirmed that this "presumption against preemption" is indeed quite "strong". *See Janvey v. Democratic Senatorial Campaign Comm., Inc.*, 712 F.3d 185, 201 (5th Cir. 2013) (emphasizing "'the strong presumption against preemption'") (quoting *Karl Rove & Co. v. Thornburgh*, 39 F.3d 1273, 1280 (5th Cir. 1994)). It was error for the district court below to deny the continuing vitality and importance of a strong presumption against preemption.

In a case currently pending before the U.S. Supreme Court, the federal district court had held that there is "the presumption against preemption for a state law that operates in the field of health care." *Liberty Mut. Ins. Co. v. Kimbell*, 2012 U.S. Dist. LEXIS 161069, *23 (D. Vt. Nov. 9, 2012), *rev'd sub nom*, *Liberty Mut. Ins. Co. v. Donegan*, 746 F.3d 497 (2d Cir. 2014), *cert. granted sub nom.*, *Gobeille v. Liberty Mut. Ins. Co.*, 2015 U.S. LEXIS 4417 (June 29, 2015). On the petition for *certiorari* before the Supreme Court, the United States sided in its amicus brief with the district court by arguing against preemption, and the United States criticized the holding of the Court of Appeals that allowed preemption. "The court of appeals erred in holding that the Vermont reporting requirements

that respondent challenges are preempted by ERISA."[4] The United States continued to argue there against federal preemption in the field of health care:

> no sound basis exists to conclude that the Vermont reporting requirements affect the administration of ERISA plans in a qualitatively different or more substantial way than "myriad state laws in areas traditionally subject to local regulation," ***such as health*** and safety, "which Congress could not possibly have intended to eliminate."

Brief for the United States as Amicus Curiae on Petition for a Writ of Certiorari in *Gobeille v. Liberty Mut. Ins. Co.*, at 15 (emphasis added, quoting *New York State Conf. of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 668 (1995)).[5]

Thus the United States essentially argued there that States should not be preempted from developing their own approaches in the field of health care, but here the United States insists on enforcing the Subpoena without any deference to Texas law and the strong Texas policy to protect privacy in medical records. *See* Brief of Appellant Abbas T. Zadeh, M.D., at 51-52 (discussing TEX. OCC. CODE §§ 159.002(a), (b)). By its own reasoning in the *Liberty Mut. Ins. Co.* case before the Supreme Court, the United States is overreaching here by intruding into the state domain, and the district court below erred in doubting the existence of the strong presumption against preemption.

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[4] http://sblog.s3.amazonaws.com/wp-content/uploads/2015/05/14-181-US-CVSG-Brief.pdf (viewed July 11, 2015).

[5] *See supra* n.4.

CONCLUSION

The decision below should be reversed.

Respectfully submitted,

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Dated: July 13, 2015

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CERTIFICATE OF COMPLIANCE

1. This brief has been prepared using 14-point, proportionately spaced, serif typeface, in Microsoft Word.

2. This petition complies with F.R.A.P. 29(d) and 32(a)(7)(A) because it is not more than 15 pages in length, excluding material not counted under Rule 32(a)(7)(B)(iii).

s/ Andrew L. Schlafly
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CERTIFICATE OF SERVICE

No. 15-10202, *United States of America v. Abbas T. Zadeh, consolidated under* No. 15-10195, *United States of America v. Joseph Zadeh, D.O.*

I hereby certify that, on July 13, 2015, I electronically filed the foregoing brief with the Clerk of the Court for the U.S. Court of Appeals for the Fifth Circuit by using the Appellate CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the CM/ECF system.

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