No. 19-1384

In The
Supreme Court of The United States

JAMES E. PIETRANGELO, II
Petitioner,

v.

CORRINNE HUDSON,
Respondent,

On Petition for a Writ of Certiorari to The Supreme Court of Ohio

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The Health Insurance Portability and Accountability Act (HIPAA) of 1996, 42 U.S.C. § 1320d-2; 45 C.F.R. pts. 160 & 164, requires any medical authorization, even one in litigation, to "be voluntary for individuals." 65 Fed. Reg. 82657. HIPAA prescribes other requirements for valid medical authorizations as well. See, e.g., 45 C.F.R. § 164.508(c)(1) & (c)(2)(i). However, while some federal courts heed these HIPAA mandates, other federal courts, as well as state courts—especially in the absence of precedent from this Court and most Circuit Courts—routinely violate the mandates, compelling plaintiffs in litigation to execute involuntary and otherwise HIPAA-non-compliant medical authorizations for defendants upon penalty of dismissal of the plaintiffs' claims or exclusion of their medical evidence at trial.

In the instant case, a trial court in Ohio issued an order requiring Petitioner to sign involuntary and otherwise HIPAA-non-compliant medical authorizations upon penalty of dismissal of his personal injury claim, and the Eighth District Court of Appeals of Ohio affirmed that order. The question presented is whether the court in doing so violated federal law, HIPAA.

LIST OF PARTIES

Petitioner James E. Pietrangelo, II is the plaintiff-appellant below.

Respondent Corrinne Hudson is the defendant-appellee below.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner James E. Pietrangelo, II respectfully petitions for a writ of certiorari to review the judgment of the Eighth District Court of Appeals of Ohio in this case.

OPINIONS BELOW

The order of the Cuyahoga County Court of Common Pleas of Ohio (App. 22) on defendant's motion to compel medical authorizations is unreported. The opinion of the Eighth District Court of Appeals of Ohio (App. 9) affirming the trial court's order is reported at 2019 Ohio 1988. The orders of the Eighth District (App. 3,7) denying panel reconsideration and en banc consideration are not reported. The order of the Supreme Court of Ohio (App. 2) declining jurisdiction of the appeal is not itself reported, but the case announcement of the declination (App. 1) is reported at 2020 Ohio 647.

JURISDICTION

On March 3, 2020, The Supreme Court of Ohio entered its order declining jurisdiction of the appeal of the judgment appealed herein which was itself entered on May 23, 2019. This Court's jurisdiction is based on 28 U.S.C. § 1257(a), Petitioner having timely filed this Petition within the time provided, including under COVID-19 Order, 589 U.S. __ (Mar. 19, 2020).

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

A. The Supremacy Clause, U.S. Const., art. VI, cl. 2, which states:

"This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

B. The Health Insurance Portability and Accountability Act (HIPAA) of 1996, Pub. L. 104-191, 110 Stat. 1936, codified at 42 U.S.C. § 1320d-2, which states in relevant part:

"**(d) Security standards for health information**

(1) Security standards The Secretary shall adopt security standards.

(2) Safeguards Each person described in section 1320d-1(a) of this title who maintains or transmits health information shall maintain reasonable and appropriate administrative, technical, and physical safeguards—(A) to ensure the integrity and confidentiality of the information; (B) to protect against any reasonably anticipated—(i) threats or hazards to the security or integrity of the information; and (ii) unauthorized uses or disclosures of the information; and (C) otherwise to ensure compliance with this part by the officers and employees of such person."

C. 45 C.F.R. § 164.508(a), (b), & (c), which state in relevant part:

"**(a) Standard: Authorizations for uses and disclosures—(1) Authorization required: General rule.** Except as otherwise permitted or required by this subchapter, a covered entity may not use or disclose protected health information without an authorization that is valid under this section. **(2) Authorization required: Psychotherapy notes.** Notwithstanding any provision of this subpart, other than the transition provisions in § 164.532, a covered entity must obtain an authorization for any use or disclosure of psychotherapy notes ***.

(b) Implementation specifications: General requirements - (1) Valid authorizations. (i) A valid authorization is a document that meets the requirements in paragraphs (a)(3)(ii), (a)(4)(ii), (c)(1), and (c)(2) of this section, as applicable. (ii) A valid authorization may contain elements or information in addition to the elements required by this section, provided that such additional elements or information are not inconsistent with the elements required by this section.

(c) Implementation specifications: Core elements and requirements - (1) Core elements. A valid authorization under this section must contain at least the following elements: (i) A description of the information to be used or disclosed that identifies the information in a specific and meaningful fashion.(ii) The name or other specific identification of the person(s), or class of persons, authorized to

make the requested use or disclosure. (iii) The name or other specific identification of the person(s), or class of persons, to whom the covered entity may make the requested use or disclosure. (iv) A description of each purpose of the requested use or disclosure. The statement 'at the request of the individual' is a sufficient description of the purpose when an individual initiates the authorization and does not, or elects not to, provide a statement of the purpose. (v) An expiration date or an expiration event that relates to the individual or the purpose of the use or disclosure. *** (vi) Signature of the individual and date. ***(2) Required statements.*** In addition to the core elements, the authorization must contain statements adequate to place the individual on notice of all of the following: (i) The individual's right to revoke the authorization in writing. (ii) The ability or inability to condition treatment, payment, enrollment or eligibility for benefits on the authorization. (iii) The potential for information disclosed pursuant to the authorization to be subject to redisclosure by the recipient and no longer be protected by this subpart."

D. Dept. of Health & Human Servs., 45 C.F.R. pts. 160 and 164, Standards for Privacy of Individually Identifiable Health Information; Final Rule, 65 Fed. Reg. 82657-59, 82662 (Dec. 28, 2000), which state in relevant part:

"We intend the authorizations required under this rule to be voluntary for individuals"; "[T]he right for individuals to revoke an authorization at any time

is essential to ensuring that the authorization is voluntary"; "[The] authorization requirements are intended to ensure than an individual's authorization is truly voluntary"; "We have attempted to ensure that authorizations are entered into voluntarily[.]"

STATEMENT OF THE CASE

This Petition arises from a trial court order, in a personal injury suit, compelling Petitioner James E. Pietrangelo, II to sign involuntary and otherwise HIPAA-non-compliant medical authorizations upon penalty of dismissal of his personal injury claim—in contravention of HIPAA. On August 17, 2015, Pietrangelo was lawfully stopped at a red light in Cleveland, Ohio when a car traveling behind him and being driven by Respondent Corrinne Hudson slammed into the back of his car at speed and without breaking. See 8th Dist. App. No. CA-18-107344, 7/13/18 App.R. 9(A) Record ("R"), No. 1 (8/9/17 Compl.) at ¶ 5. Hudson had been distracted while driving by playing with her dog which was in the car with her at the time. See id. at ¶ 6.

Although wearing a seatbelt, Pietrangelo was injured by the sheer force of the collision. See id. at ¶ 7. Among other things, Pietrangelo suffered injury to his back, resulting in immediate shock, pain, and weakness/loss of range of motion. See ibid. Pietrangelo received medical attention at the scene, and subsequently repeatedly received treatment from doctors for his accident injuries, and in doing so incurred significant medical bills and expenses. See

id. at ¶ 11. Pietrangelo's aforesaid back symptoms persisted for months after the accident, leaving him barely able to walk during that time. See id. at ¶¶ 7, 9. Eventually, Pietrangelo's back injury reduced to a baseline permanent pain and weakness/loss of range of motion. See id. at ¶ 11.

At the time of the accident, both Pietrangelo and Hudson were insured by the same insurance company, State Farm. See id. at ¶ 12. Pietrangelo made a claim for his personal injuries and medical bills from the accident against both his own policy and Hudson's policy with the insurance company. See ibid. The insurance company rolled Pietrangelo's claim against his own policy into his claim against Hudson's policy. See ibid. Thereafter, the insurance company, while it promptly paid Pietrangelo's property damage claim, refused to pay any of Pietrangelo's medical bills unless he settled his personal injury claim in full for the amount of his then outstanding medical bills plus a nominal amount for pain and suffering. See id. at ¶ 13. When Pietrangelo demanded a fair injury settlement, the State Farm claims adjuster laughed at him. Pietrangelo refused to be "low-balled," and declined the insurance company's settlement offer. See ibid. Consequently, to date, Pietrangelo has never been compensated with a single cent for his personal injuries and medical bills from the car accident.

On August 9, 2017, Pietrangelo timely filed suit in the Cuyahoga County Court of Common Pleas in Cleveland, Ohio against Hudson for the personal

injuries he suffered and the medical bills he incurred as a result of her negligence in rear-ending his car. See id. passim. In his complaint, Pietrangelo specifically alleged the injury to his back—as well as injuries to his head and neck—from the car accident. See id. at ¶¶ 7, 9, 10, 19; App.R. 9(A) Record, No. 21 (5/18/18 Mot. to Compel) at Ex. A (Pl.'s Resp. to Def.'s Interrog. No. 11). Hudson filed an answer denying liability and damages, see App.R. 9(A) Record, No. 3 (9/14/17 Ans.), but later purportedly admitted liability. The trial court eventually issued a case management order in the case, among other things, opening discovery and setting a discovery deadline of April 20, 2018. See App.R. 9(A) Record, No. 13 (1/18/18 J.E.). Thereafter, Hudson's insurer-provided counsel deposed Pietrangelo on February 27, 2018.

At the end of that deposition, Hudson's insurance counsel asked Pietrangelo to sign several medical authorizations—to/for his various medical providers whom he had previously identified in an interrogatory answer—for copies of all of his medical records since January 1, 2005, without limitation as to scope, i.e., regardless of the body part(s) affected or the medical condition(s) at issue in the records. See App.R. 9(A) Record, No. 21 at 3; App.R. 9(A) Record, No. 22 (5/20/18 Opp. to Mot. to Compel) at 2-4. The authorizations, besides being unlimited in scope, also omitted any *in camera* review by the trial court; contemplated a third-party vendor obtaining the records directly from the medical providers and then providing them directly to Hudson's counsel herself;

and permanently stripped Pietrangelo's medical records of their confidentiality as to the world. See R-22 at 3. The authorizations were also unaccompanied by any qualified protective order (QPO). Immediately upon Hudson's counsel's request, Pietrangelo, who had previously already provided Hudson with copies of all of his medical records of treatment of his injuries from the accident, tentatively refused to sign the authorizations, for several stated reasons; and later, in a March 5, 2018 letter to Hudson's counsel, Pietrangelo confirmed his refusal. See App.R. 9(A) Record, No. 21 at 3 & at Ex. B; App.R. 9(A) Record, No. 22 at 2-4.

Ultimately, at no point in discovery did Hudson ever propound a request for production upon Pietrangelo himself for the records which she sought by her proposed medical authorizations, nor did she ever serve subpoenas upon Pietrangelo's identified medical providers for those same records. See R-22 at 7-8. Instead, on May 18, 2018, almost a month *after* the discovery deadline had passed without any extension, Hudson, *without* first having filed for or been granted leave, filed an untimely Civ.R.37 motion to compel, asking the trial court to compel Pietrangelo to sign medical authorizations allowing Hudson to broadly obtain all of his medical records since January 1, 2005, again without any limitation as to the scope of those records. See R-21 passim & at caption, 1, 2, 4-5. Hudson's motion on its face indicated that it sought to compel medical authorizations unlimited in scope and with a time-frame of 10 years

before the accident and 3 years after. However, remarkably, Hudson did not attach to her motion any actual proposed medical authorizations themselves or copies thereof (not even the ones from the deposition), nor did she in her motion reproduce or quote the terms themselves of any such authorizations, nor did she otherwise place any proposed authorizations/their terms into the record. See R-21; App.R. 9(A) Record, passim. Also, Hudson's motion neither included nor sought a qualified protective order (QPO). See ibid.

Pietrangelo timely filed an opposition to Hudson's motion, raising multiple objections to it, including but not limited to that Hudson's proposed medical authorizations violated or would violate HIPAA various ways, including by not being voluntary; that Hudson had not attached any actual proposed authorizations/terms themselves to her motion for the trial court to review; that Hudson's proposed authorizations had unconscionable terms, including one stripping Pietrangelo's medical records, once obtained, of confidentiality forever as to the world, and another forcing Pietrangelo to undertake financial obligations to third parties for Hudson's own discovery costs in obtaining the records; that the authorizations violated or would violate Pietrangelo's physician-patient privilege under state law, including because the authorizations were unlimited in scope and overbroad in time and did not provide for *in camera* review; and that medical authorizations are

not provided for in the Ohio Rules of Civil Procedure. See App.R. 9(A) Record, No. 22.

In his opposition to Hudson's motion, Pietrangelo specifically argued the following with respect to HIPAA and thereby preserved the issue for appeal:

> "More importantly, Defendant failed to attach to her instant motion a copy of the very medical authorizations themselves which she wants the Court to order Plaintiff to execute. Plaintiff submits that—as a matter of due process—the Court may not blindly order Plaintiff to sign whatever forms Defendant's counsel puts before him as purported medical authorizations. Among other things, federal law (HIPAA) has certain requirements for medical-authorization forms in order to protect individuals' rights. See 45 C.F.R. 164.508(c)(1) ('Core elements. A valid authorization under this section must contain at least the following elements:'). the authorizations are **directly** prohibited by state statute and caselaw . . . not to mention federal law (HIPAA, the Fourth Amendment). It is undisputed—indeed Defendant readily admits in her motion—that Defendant's proposed medical authorizations are solely time- based, providing access to all of Plaintiff's medical records—regardless of the condition or specific body part documented in any given record Thus, merely by way of illustration, if Plaintiff sought medical treatment for some condition

> which is loathsome or socially stigmatizing or embarrassing, such as STD, lice, HIV, incontinence, or impotence Defendant's medical authorizations would also allow her/her counsel/her third-party agent to obtain and review the medical records of that condition. HIPAA also seems to restrict third-party access to a person's medical records of certain conditions such as HIV, unless a person *voluntarily* signs a medical authorization for the records. Signing an authorization under court order is not voluntary.
>
> Thus, Defendant in her motion simply asks the Court to order something which is conspicuously prohibited by law." See R-22 at 8, 9-10, 12-13 (emphases original).

On May 21, 2018, the trial court entered an order stating that Hudson's motion to compel was to be held in abeyance, and that "at the [already scheduled June 12, 2018] settlement conference of this case this Court shall consider [it]." App.R. 9(A) Record, No. 23 (5/21/18 J.E.). In that same order, the trial court ordered *Hudson* "to present to the Court for its review the actual authorizations which are the subject matter of her motion to compel." R-23. Hudson ultimately *never* complied with that order; she *never* filed any actual proposed authorizations, nor even submitted any proposed authorizations into the physical possession of the trial court itself at any point. See App.R. 9(A) Record, passim; App.R. 9(C) & (E) Record at 2.

On June 12, 2018, the trial court held the scheduled settlement conference—in chambers and *off the record*—with Pietrangelo, Hudson's insurance counsel, and someone whom Pietrangelo at the time thought was second counsel for Hudson but afterwards learned was actually the State Farm adjuster. See App.R. 9(C) & (E) Record at 1. No settlement was reached. Thereupon, and remarkably *while still in* the settlement conference, the trial court took up the matter of Hudson's motion to compel. See App.R. 9(C) & (E) Record at 1-2. At that very moment, Hudson's insurance counsel took several medical authorizations out of her briefcase and handed them directly to Pietrangelo; she did not hand or show them or a copy of them to the trial court. See id. at 2. The authorizations apparently were the same ones Hudson's insurance counsel had sprung on Pietrangelo at his deposition. Pietrangelo refused to sign the authorizations on the spot—orally reiterating his May 20, 2018 opposition objections to them—including his objections based on HIPAA. See ibid.

Thereupon, the trial court, without ever having reviewed any actual medical authorizations from Hudson or otherwise, and without issuing any qualified protective order (QPO), simply filled out and issued to Pietrangelo a postcard order (App. 22), entered later that same day on the docket, ordering Pietrangelo "to sign standard medical authorizations by June 22, 2018, otherwise the case will be dismissed." App.R. 9(A) Record, No. 25 (6/18/18 J.E.);

App.R. 9(C) & (E) Record at 2. The order did not attach or reference any specific actual authorizations, and did not otherwise explain what "standard medical authorizations" were or meant. See App.R. 9(A) Record, No. 25; App.R. 9(C) & (E) Record at 2. The order simply ignored the HIPAA issues raised by Pietrangelo.

On June 20, 2018, Pietrangelo timely appealed the trial court's post-card order to the state court of appeals for Cuyahoga County, the Eighth District Court of Appeals of Ohio. See App.R. 9(A) Record, Nos. 26, 27, 28 (6/20/18 Not. of App. et seq.). Such an order was immediately appealable under state law because it implicated Pietrangelo's state-law physician-patient privilege, see *Wooten v. Westfield Ins. Co.*, 181 Ohio App. 3d 59, 907 N.E.2d 1219, 2009 Ohio 494, ¶¶ 11-12 (8th Dist.), and under federal law because it immediately violated HIPAA. To perfect his appeal, Pietrangelo timely served and then filed an App.R. 9(C) proposed statement of the proceedings for the settlement conference, for approval by the trial court as part of the record on appeal. See App.R. 9(A) Record, No. 29 (7/4/18 Prop. App.R. 9(C) Stat.). That statement incorporated and attached copies of the medical authorizations which Hudson's insurance counsel had handed to Pietrangelo during the settlement conference and which Pietrangelo had kept. See id. at Exs. 1-5. However, as the Eighth District panel that ultimately heard Pietrangelo's appeal would later note in its decision of that appeal, *Hudson* herself objected to inclusion of copies of those

authorizations in the App.R. 9(C) statement, and the trial court thus omitted the copies from it. See 8th Dist. App. No. CA-18-107344, 5/23/19 J.E. & Op.; *Pietrangelo v. Hudson*, 2019 Ohio 1988, ¶ 21 (8th Dist.).

In his principal brief on appeal, Pietrangelo specifically argued the following with respect to HIPAA and thereby preserved the issue for appeal:

> "The trial court erred and abused its discretion to the prejudice of Pietrangelo in implicitly granting Hudson's motion to compel medical authorizations and then in ordering, and/or in issuing its June 12, 2018 journal entry/order ordering, 'Plaintiff to sign standard medical authorizations by June 22, 2018, otherwise the case will be dismissed,' for multiple reasons. Hudson's authorizations were otherwise improper and unconscionable, including because they were HIPAA-non-compliant .
>
> The trial court's lack of consideration of any actual authorizations was particularly egregious because HIPAA, the Health Insurance Portability and Accountability Act, which overrides state law in any event, has certain requirements for medical authorizations, for the protection of individuals' rights. See 45 C.F.R. 164.508(c)(1) ('Core elements. A valid authorization under this section must contain at least the following elements:'). The

trial court could not legally order Pietrangelo to sign a HIPAA-non-compliant authorization.

Statutory law otherwise also prohibits compelled medical authorizations which are unlimited in scope, because they might reveal stigmatizing medical issues such as tuberculosis, STDs, HIV, AIDS, and alcohol and drug abuse, which may only be disclosed voluntarily under federal and state law. See 45 C.F.R.§ 164.502(a) (the HIPAA privacy rule);

In fact, the medical authorizations which Hudson's counsel handed Pietrangelo during the settlement conference were so blatantly un-limited that they authorized Hudson to obtain any medical records pertaining to HIV and AIDS—in direct violation of HIPAA." 8th Dist. App. No. CA-18-107344, 9/18/18 Br. at Assign. Error I, Argument, 9, 16, 24-25.

Remarkably, the Eighth District panel ultimately entered a judgment (App. 9) affirming the trial court's order requiring Pietrangelo to sign medical authorizations. See 8th Dist. App. No. CA-18-107344, 5/23/19 J.E. & Op.; 2019 Ohio 1988. In its decision, the Eighth District (panel) completely ignored the HIPAA violations raised and argued by Pietrangelo in his appeal—including that the trial court's order *on its face* compelled involuntary and otherwise HIPAA-non-compliant authorizations—and instead the Eight District simply blamed *Pietrangelo* for allegedly failing to "make the[] authorizations] part of the record," id. at ¶ 21 (8th Dist.), even though

they had been sought by *Hudson*. Indeed, the Eighth District never *once* mentioned HIPAA in its decision—even though the trial court's order itself was part of the record on appeal and (along with existing docket entries) clearly demonstrated both that the medical authorizations were involuntary and that the trial court had not reviewed any authorizations for HIPAA compliance. See id. passim.

On May 27, 2019, Pietrangelo timely filed an application for both panel reconsideration and en banc consideration with the Eighth District. See 8th Dist. App. No. CA-18-107344, 5/27/19 Appl. for Panel Recons. & En Banc Cons. On November 7, 2019, the Eighth District issued orders (App. 3,7) denying the application. See id., 11/7/19 J.E.s.

On December 6, 2019, Pietrangelo timely appealed the Eighth District judgment to The Supreme Court of Ohio. In his jurisdictional memorandum asking the Supreme Court to accept his appeal, Pietrangelo specifically argued the following with respect to HIPAA and thereby preserved the issue for appeal:

> "This case involves a substantial constitutional question and separately a question of public or great general interest regarding individuals' medical records. First, lower courts in Ohio are routinely violating federal law regarding medical records. The Health Insurance Portability and Accountability Act, or HIPAA, which was enacted by Congress in part precisely to prevent individuals' medical records from being

accessed without their consent, requires that any authorization for medical records have certain elements and formalities—including being totally voluntary. As federal law, HIPAA is supreme to state-court decisions inconsistent with it. Yet, like other courts have done, the trial court below ordered Appellant Pietrangelo, over his objections, and upon penalty of dismissal of his claims, to involuntarily sign medical authorizations and to sign medical authorizations that were not HIPAA-compliant; and, on appeal, the Eighth District Court of Appeals panel, while not even finding that the authorizations were voluntary or HIPAA-compliant, affirmed that order. Review by this Court is thus necessary to immediately remedy the mistaken or misguided view among Ohio judges today that the provisions and requirements of HIPAA can be overridden simply because the patient involved is a party in litigation. HIPAA controls over Ohio law, including decisional law, that is inconsistent with it.

The Eighth District panel thus completely ignored Pietrangelo's other appeal arguments which did not require review of the authorizations themselves, such as that Hudson's motion to compel was untimely and procedurally defective, and that the compelled authorizations were per se

involuntary and thus violated HIPAA. See id. passim.

A court may not order a plaintiff to sign a medical authorization, even in litigation. Under HIPAA, a plaintiff may truly voluntarily choose to provide a defendant with a medical authorization or authorizations for his or her medical records, but a plaintiff may not be compelled to do so by a defendant or even by a court, including under a waiver theory. See 45 C.F.R. §164.502(a) (the general HIPAA privacy rule, which prohibits a medical provider from disclosing a person's medical records/-protected health information, even in litigation, unless pursuant to a voluntary medical authorization from the plaintiff, a subpoena from the defendant, or an order from the court to the medical provider); 45 C.F.R. §164.508(a)(1) & (b)(1) (what constitutes a valid medical authorization under HIPAA); 45 C.F.R. §164.508(c)(1) & (c)(2)(i) ('Core elements. A valid authorization under this section must contain at least the following elements: The individual's right to revoke the authorization') [fn. 1 By definition, a plaintiff has no right to revoke an authorization which is court-ordered; ergo, since a valid authorization must include a right to revoke under HIPAA, an authorization cannot be court-ordered under

HIPAA.]; 45 C.F.R. §164.512 ('A covered entity may use or disclose protected health information without the written authorization of the individual, as described in §164.508, or the opportunity for the individual to agree or object as described in §164.510, in the situations covered by this section, subject to the applicable requirements of this section.'), 45 C.F.R. §164.512(e) & (e)(1)(i)-(ii)

('Standard: Disclosures for judicial and administrative proceedings. Permitted disclosures. A covered entity may disclose protected health information in the course of any judicial or administrative proceeding: In response to an order of a court or administrative tribunal, provided that the covered entity discloses only the protected health information expressly authorized by such order; or In response to a subpoena, discovery request, or other lawful process, that is not accompanied by an order of a court or administrative tribunal'); 65 Fed. Reg. 82, 657 ('We intend the authorizations required under this rule to be *voluntary* for individuals . . . .') (emphasis added), 82, 658 (stating that the right to revoke an authorization at any time 'is essential to ensuring that the authorization is *voluntary*') (emphasis added), 82, 659 ('We have attempted to create authorization

> requirements that make the individual's decisions as clear and *voluntary* as possible') (emphasis added)." Ohio Sup. Ct. No. 2019-1719, 12/16/19 Memo. in Supp. of Juris. at 1, 9-10.

On March 3, 2020, the Supreme Court entered an order (App.1) declining jurisdiction of Pietrangelo's appeal. Pietrangelo now timely files the instant Petition.

REASONS FOR GRANTING THE WRIT

I. The Eighth District's Decision Clearly Violated Federal Law, HIPAA as Enacted and Promulgated, and Also Violated the Supremacy Clause

The Eighth District's decision clearly violated federal law, HIPAA as enacted and promulgated, and also violated the Supremacy Clause which requires state judges to follow federal law. Under HIPAA, a judge has no authority to order a plaintiff to sign a medical authorization which is involuntary and otherwise HIPAA-non-compliant.

The Health Insurance Portability and Accountability Act (HIPAA) of 1996, 42 U.S.C. § 1320d-2; 45 C.F.R. pts. 160 & 164, was enacted by Congress, and further promulgated by the Secretary of Health and Human Services, "in part, to address concerns about the confidentiality of health information." *Johnson v. Quander*, 370 F.Supp.2d 79, 100 (D.D.C. 2005).

"[M]any patients [were] concerned that their information is not protected." Dept. of Health & Human Servs., 45 C.F.R. pts. 160 and 164, Standards for Privacy of Individually Identifiable Health Information; Final Rule, 65 Fed. Reg. 82465 (Dec. 28, 2000). "In the absence of a national legal framework of health privacy protections, consumers [were] increasingly vulnerable to the exposure of their personal health information." Id. at 82467. "Congress intended through this legislation [of HIPAA] to 'recogniz[e] the importance of protecting the privacy of health information," *Webb v. Smart Documents Solutions, LLC*, 499 F.3d 1078, 1084 (9th Cir. 2007) (citation omitted), because "[p]rivacy is a fundamental right" and "[a]mong different sorts of personal information, health information is the most sensitive," 65 Fed. Reg. 82464. HIPAA established "a set of basic national privacy standards and fair information practices that provides all Americans with a basic level of protection and peace of mind that is essential to their full participation in their care." Ibid. HIPAA's goal is to "ensure the integrity and confidentiality of [patients'] information" and protect against "unauthorized uses or disclosures of the information." Id. at 82470. Because it is intended to be national in effect, HIPAA, including its promulgated standards, expressly preempts "any contrary provision of State law." 42 U.S.C. § 1320d-7(a)(1). See, also, 45 C.F.R. § 160.203 (same).

"The statute itself, however, does not specify [] how to protect privacy[.]" *Webb*, 499 F.3d at 1084.

"Instead, it authorizes the Secretary of Health and Human Services to 'adopt standards' that will . . . ensure the integrity and confidentiality of [individuals' health] information [and protect against] . . . unauthorized uses or disclosures of the information.' *See* 42 U.S.C. 1320d-2." *Ibid.* (citing and quoting 42 U.S.C. § 1320d-2(d)(1) & 2(A)/(B)(ii)) (brackets original).

Pursuant to his statutory authority under 42 U.S.C. § 1320d-2, the Secretary of Health and Human Services promulgated regulations to protect the integrity and confidentiality of individuals' health information. See 45 C.F.R. § 164.102. These regulations are clear and unambiguously set out an overarching "Privacy Rule" with regard to the disclosure of health information: except in limited situations (which do not apply to the instant case), no entity possessing an individual's health information may disclose that information to a third party except "in response" to one of the following: (1) a valid authorization from the individual himself or herself; (2) a subpoena or discovery request or other lawful process from a party that is accompanied by satisfactory evidence that the party attempted (a) to give notice of the subpoena, etc. to the individual whose information is sought from the entity or (b) to seek from the court/tribunal a qualified protective order (QPO) protecting the information sought once disclosed; or (3) an order from a court/tribunal expressly specifying the health information that is to

be disclosed to the third party. See 45 C.F.R. § 164.508(a)(1) & §164.512(e)(1).

An authorization from an individual, to be valid under HIPAA, must (1) be voluntary; (2) contain certain elements, including basic things like an expiration date, and advanced things like a statement that the individual has the right to revoke the authorization; and (3) meet certain requirements, including having no material falsehoods. See 45 C.F.R. § 164.508(a), (b), & (c); 45 C.F.R. § 164.508(c)(2) ("In addition to the core elements, the authorization must contain statements adequate to place the individual on notice of all of the following: (i) The individual's right to revoke the authorization in writing[.]"); Dept. of Health & Human Servs., 45 C.F.R. pts. 160 and 164, Standards for Privacy of Individually Identifiable Health Information; Final Rule, 65 Fed. Reg. 82657 (Dec. 28, 2000) ("We intend the authorizations required under this rule to be voluntary for individuals"), 82658 ("the right for individuals to revoke an authorization at any time is essential to ensuring that the authorization is voluntary"), 82659 (the "authorization requirements are intended to ensure than an individual's authorization is truly voluntary"), 82662 ("We have attempted to ensure that authorizations are entered into voluntarily"); 45 C.F.R. § 164.508(b) & (c).

Thus, because HIPAA is preemptive, no variation on its enumerated methods for disclosure of an individual's health information is lawful. See *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 113 S.Ct.

1732 (1993). Specifically, a trial court may not order a plaintiff in litigation to sign a medical authorization which is involuntary and/or does not contain the required elements or meet the specified requirements—especially if the court has not even reviewed the authorization for HIPAA compliance in the first place. Nor may an appeals court affirm such an order on the basis that the plaintiff himself or herself allegedly did not place the authorization in the record, because under HIPAA such an order is per se unlawful (and immediately appealable under HIPAA) regardless of whether the authorization is in the record or not. Indeed, such an order defeats the very purpose of HIPAA, which is to *ensure* the integrity and confidentiality of individuals' health information and to provide all Americans with a basic level of protection and *peace of mind* that is essential to their full participation in their care. A compelled medical authorization is involuntary and placed in the hands of an individual's opponent in litigation (and in the hands of that opponent's third-party agents) and carries with it no penalty for misuse of the authorization or health information, such as contempt of court (unlike an actual court order directly to the entity having the health information), and thus is a recipe for disaster for a patient's medical privacy and peace of mind. Moreover, as a matter of the statutory-interpretation canon of *expressio unius est exclusio alterius*, a compelled authorization is prohibited by HIPAA, since Congress in HIPAA provided respectively for a

voluntary authorization from an individual or a court order directly to the entity—not a court order directly to an individual compelling an involuntary authorization to an entity. See *Chevron U.S.A. Inc. v. Echazabal*, 536 U.S. 73, 80, 122 S.Ct. 2045 (2002).

Thus, the trial court violated federal law and the Supremacy Clause when it, without having first even reviewed any medical authorizations, ordered Pietrangelo to sign medical authorizations which were involuntary and otherwise HIPAA-non-compliant, and the Eighth District likewise violated federal law and the Supremacy Clause by affirming the trial court's order.

II. The Eighth District Is Not Alone Among Courts Nationwide in So Violating HIPAA; Indeed, both Federal and State Courts Routinely So Violate HIPAA, and There Is a Clear Split Among Federal Courts Between Those Which Have Ruled They Have Authority to Compel Medical Authorizations and Those Which Have Ruled They Do Not

The Cuyahoga County Court of Common Pleas and the Eighth District Court of Appeals are not alone among courts nationwide in so violating HIPAA. Indeed, both federal and state courts routinely violate HIPAA by ordering plaintiffs to sign medical authorizations which are involuntary and otherwise HIPAA-non-compliant. See infra; Mark A. Rothstein & Meghan K. Talbott, "Compelled Disclosures of Health Records: Updated Estimates," J. Law Med.

Ethics, Issue 45, p. 153 (Apr. 20, 2017) (estimating 185,000 compelled disclosures of health records in litigation per year in America).

There is even an almost perfect split within federal and state courts alike between those which, HIPAA notwithstanding, rule that they have authority under Civil Rules 26 and 37 to compel medical authorizations, and those which rule, in accordance with HIPAA, that they do not have such authority under any provision. See *Sherlock v. Fountainebleu*, 229 F.Supp.3d 1277, 1279, 1281 (S.D.Fla. 2017) ("As all parties recognize, there is no binding legal authority. Neither the United States Supreme Court nor the Eleventh Circuit Court of Appeals has decided the issue. In addition, there is a split of authority across the country."); *Clewis v. Medco Health Solutions, Inc.*, Civ. Action No. 3:12-CV-5208-L, Memo. Op. & Order (N.D.Tex. Sep. 25, 2013) ("there appears to be a split among district courts as to this issue"); *Cupp v. United States*, No. CV512-005, 2015 WL 510134, at 3 (S.D.Ga. Feb. 6, 2015) ("There appears to be a split in authority as to whether a party, or a court, may compel another party to sign an authorization for the release of records, on the basis of a discovery request."); *Cameron v. Supermedia, LLC*, No. 4:15cv315-MW/CAS, 2016 WL 1572952, at *3 (N.D.Fla. Apr. 19, 2016) ("the law governing discovery of a plaintiff's medical records . . . is, frankly, all over the map").

See, also, e.g., *Mean v. Massie*, No. CV-17-00368-TUC-DCB, Ord. (D. Ariz. May 17, 2018) (pro

compelled medical authorizations ("pro")); *Johnson v. Richard*, No. 1:15CV00056-JM-JTK, Prop. Findings & Recomms. (E.D.Ark. Apr. 27, 2016) (pro; dismissing plaintiff's case for, among other things, refusing to sign medical authorization); *Pinder v. McDowell*, Case No. 5:14-CV-359-JM-BD, Recomm. Disp. (E.D. Ark. 2017) (same); *Miller v. Kastelic*, No. 12-cv-02677, 2013 WL 4431102, at *3 (D.Colo. Aug. 16, 2013) (contra compelled medical authorizations ("contra")); *Klugel v. Clough*, 252 F.R.D. 53, 54-55 (D.D.C. 2008) (contra); *Chase v. Nova SE Univ., Inc.*, No. 11-61290-CIV, 2012 WL 1936082, at 1 (S.D.Fla. May 29, 2012) (contra); *Cupp*, 2015 WL 510134, at *3 (pro); *Northlake Medical Ctr., LLC v. Queen*, 634 S.E.2d 486, 490 (Ga. Ct. App. 2006) (contra); *Doye v. Martin,* No. CV408-174, 2010 WL3463614, at 2 n.2 (S.D. Ga. Aug. 31, 2010) (pro); *Becker v. Securitas Security Servs., USA, Inc.*, No. 06-2226, 2007 WL 677711, at 3 (D.Kan. Mar. 2, 2007) (contra); *Butler v. Louisiana Dept. Public Safety & Corrections*, 3:12-cv-00420, 2013 WL 2407567, at 9 (M.D.La. May 29, 2013) (contra); *Williams v. NPC Intern., Inc.*, 224 F.R.D. 612, 613 (N.D. Miss. 2004) (pro); *Clark v. Vega Wholesale, Inc.*, 181 F.R.D. 470 (D.Nev. 1998) (contra); *Lopez v. Cardenas Mrkts., Inc.*, Case No. 2:11-cv-00323-ECR-CWH, Ord. (D.Nev. Oct. 5, 2011) (contra); *Singh v. Friedson*, 36 A.D.3d 605, 607 (N.Y. App.Div., 2d Dept. 2007) (pro); *Steele v. Clifton Springs*, 6 Misc.3d 953, 957 (N.Y. Super. Ct. Monroe Cty. 2005) (pro); *Jimoh v. Charlotte-Mecklenberg Housing Partnership, Inc.*, Civ. Case No. 3:08-CV-

495-RJC-DCK, Ord. (W.D.N.C Dec. 4, 2009) (pro); *Wetzel v. Brown*, No. 1:09-cv-053, 2014 WL 684693, at *4 (D.N.D. Feb. 21, 2014 (pro); *Moody v. Honda of Am. Mfg.*, 2006 WL 1785464 (S.D. Ohio 2006) (contra); *Langenfeld v. Armstrong World Industs., Inc.*, 299 F.R.D. 547, 555-556 (S.D.Ohio 2014) (pro); *Jones-McNamara v. Holzer Health Systems, Inc.*, No. 2:13-cv-616, 2015 WL 196415, at 2 (S.D.Ohio Jan. 15, 2015) (contra); *Croston v. Massillon Chiropractic Clinic*, Case No. 2014-CV-00154 (Comm. Pls. Ct. Stark Cty.) (pro); *Croston v. Massillon Chiropractic Clinic,* 2015 Ohio 25, ¶ 31 (5th Dist. Ct. App.) (pro); *Sarko v. Penn-Del Directory Co.*, 170 F.R.D. 127, 131 (E.D. Pa. 1997) (pro); *In re Guzman*, 19 S.W.3d 522 (Tex. App. Corpus Christi 2000) (contra); *Sastrawidjaya v. Mughal*, 196 Wn.App. 415 (Div. II 2016) (contra); *Putterman v. Supreme Chain Logistics, Ltd.*, Case No. C18-376RSM (E.D.Wash. Nov. 27, 2018) (pro); *Fields v. W.Va. State Police*, No. 2:09-CV-0754, Memo. Op. & Ord. at 9 (S.D.W.Va. Jan. 26, 2010) (contra); *Adams v. Ardcor*, 196 F.R.D. 339, 344 (E.D. Wis. 2000) (pro). See, also, J. Grenig & J. Kinsler, *Handbook Fed. Civ. Discovery & Disclosure*, § 912 and n. 10 (4th ed. July 2018 update) ("Rule 34 may not be used to compel a party to sign a release or authorization so that the requesting party may obtain a document directly from a non-party.").

Guidance is needed from this Court to settle this matter. Where one lives in America should not decide whether one is afforded medical privacy and peace of mind or not.

III. This Case Is An Appropriate Vehicle For the Court to Review the Question Presented

This case is an appropriate vehicle for the Court to review the question presented. First, Petitioner timely raised the federal question in the courts below. Second, while none of the courts below directly addressed HIPAA, that very refusal to address HIPAA commends this case to the Court for review, since it demonstrates how badly courts in America are ignoring the will of Congress, that they do not feel obliged to even obliquely touch upon the statute. Third, Petitioner will likely be highly prejudiced—by dismissal of his claim—due to the trial court's violation of HIPAA—and through no fault of his own. The Eighth District blamed Petitioner for the authorizations not having been placed in the record, but obviously only Respondent should have answered below for that. In Ohio, as in every other jurisdiction in America, the burden of initial production on a motion is on the movant to demonstrate the exact relief sought—as a matter of due process for the non-movant. See, e.g., Ohio Civ.R.7(B)(1) ("A motion, whether written or oral, shall state with particularity the grounds therefor, and shall set forth the relief or order sought."); *Mitseff v. Wheeler*, 38 Ohio St.3d 112, 114 (1988) ("Civ.R. 7 is substantially similar to the Fed.R.Civ.P. 7, which treats the particularity requirement not as a matter of form, but as 'real and substantial.'") (citation omitted); *AAA Am. Constr., Inc. v. Alpha Graphic,* 2005 Ohio 2822, ¶10 (8th Dist.) (Civ.R.7(B)(1) "assures that the [trial] court

can comprehend the basis of the motion and deal with it fairly."); *Miller v. JMC Steel Grp.*, 2013 Ohio 3979, ¶ 6 (11th Dist. Trumbull) ("The particularity requirement of Civ.R. 7(B)(1) [i]s a central component to the notice requirement mandated by due process.") (internal quotation marks and citations omitted).

CONCLUSION

For the foregoing reasons, Petitioner James E. Pietrangelo, II respectfully requests that this Court issue a writ of certiorari to review the judgment of the Eighth District Court of Appeals.

Respectfully submitted,

Dated: June 12, 2020

s/

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