No. 19-_____

IN THE

Supreme Court of the United States

VINCENT MASTANDUNO
Petitioner,

vs.

NATIONAL FREIGHT INDUSTRIES, AMERICAN ZURICH INSURANCE CO.,
Respondents.

On Petition for a Writ of Certiorari to the North Carolina Court of Appeals

PETITION FOR A WRIT OF CERTIORARI

William E. Anderson
McDANIEL & ANDERSON, L.L.P.
P.O. Box 58186
Raleigh, NC 27658
Phone: (919) 872-3000
Fax: (919) 790-9273
E-Mail: w.anderson@mcdas.com
Counsel for Petitioner
July 25, 2019

I. Question Presented

Does a person have a constitutional right to privacy over his personal health information; and where the State publishes a person's private health information online, what is the proper test for determining the constitutionality of the publication?

II. Table of Contents

TABLE OF AUTHORITIES

CASES

CONSTITUTIONAL PROVISIONS

STATUTES

REGULATIONS

PETITION FOR A WRIT OF CERTIORARI

Petitioner Vincent Mastanduno respectfully petitions for a writ of certiorari to review the judgment of the North Carolina Court of Appeals which denied the Petitioner's request to prevent the State from publishing his private health information on the Internet.

OPINIONS BELOW

The opinion of the North Carolina Court of Appeals will appear in the Southeast Reporter and the North Carolina Reporter, but does not yet have an official citation. The opinion is found at Pet App 1a-20a. The order of the North Carolina Supreme Court denying discretionary review does not yet have an official citation. *See* Id. 21a-22a.

JURISDICTION

This Court has jurisdiction pursuant to 28 U.S.C. § 1257. The North Carolina Court of Appeals issued its opinion and judgment on October 16, 2018. Id at 1a-20a. On January 30, 2019 the North Carolina Supreme Court denied the Petitioner's Petition for Discretionary Review.[1] Id at 21a-22a.

---

[1] Because the North Carolina Supreme Court denied review of the decision of the North Carolina Court of Appeals, the decision of the Court of Appeals is a judgment of "rendered by the highest court of a State in which a decision could be had" under 28 U.S.C. § 1257(a). *E.g.* Brown v. Texas, 443 U.S. 47, 99 S.Ct.

CONSTITUTIONAL PROVIONS INVOLVED

United States Constitution, Amendment XIV, § 1 (in relevant part):

> No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

More than forty years ago this Court, in Whalen v. Roe, 429 U.S. 589, 97 S. Ct. 869, 51 L. Ed. 2d 64 (1977), addressed whether a person has a constitutional right to privacy over his or her personal information, such as prescription information. Since that time, federal and state courts have struggled with (a) whether this right exists at all, (b) if the right exists, then determining the types of information that are subject to the privacy right, and (c) the circumstances in which the State's interests justify a disclosure of constitutionally protected personal information. In permitting the North Carolina Industrial Commission to publish the Petitioner's personal health information on the Internet, the court violated

---

2637, 61 L.Ed.2d 357 (1979).

the Petitioner's rights, and created dangerous precedent for the publication of personal health information by other State and federal agencies. This case presents for review the issues described above that courts across this country have been struggling with for four decades. These issues are especially vital in the modern era where information can be instantaneously disseminated to anyone in the world with a computer (or cell phone) and an internet connection.

I. PETITIONER'S WORKERS COMPENSATION CLAIM AND REQUEST FOR PRIVACY

The Petitioner worked as a truck driver. He was injured on May 29, 2012 as a result of slipping on a wet floor on a trailer. (Pet App 3a) The Plaintiff filed a workers compensation claim, and the employer admitted liability. (Id.)

On 6 June 2016, the Petitioner filed a request "to have all information regarding my hearing sealed so that it is not a matter of public record." (Id. 23a) This request was made because workers compensation claims in North Carolina result in an Opinion and Award that contains findings of fact, including findings as to the worker's health conditions, and these findings are then published on the Internet. *E.g.* Id. 28a - 30a, 34a. Even a settlement of a workers compensation claim results in findings of fact that are made public. *See* N.C. Gen. Stat. § 97-17 ("settlement agreement shall be filed by the employer with and approved by the Commission").

On June 9, 2016, the Deputy Commissioner denied the Petitioner's request. (Id. 24a - 25a) The Petitioner expressed concerns that sensitive medical records would become public. (Id. 27a-28a) The employee therefore sought reconsideration of the denial of his motion.

On 27 June 2016, the Deputy again denied the employee's motion. This order specifically found that "information, including medical information, . . . may be reflected in findings of fact in a final Opinion and Award [and] will unavoidably become a part of a public record." (Id. 28a - 30a) The Deputy further found that sealing the employee's file "for the purpose of preventing lenders and others from finding otherwise publicly available information during routine background investigations and due diligence would be improper." (Id. 29a) The order further stated, "The protection of Plaintiff's sensitive medical records presents a more substantial basis for concern, however. Nevertheless, it remains the case that all injured workers involved in litigation before the Industrial Commission operate under the same privacy rules. Thus, the undersigned finds insufficient basis for the extraordinary relief Plaintiff seeks." (Id.)

The Petitioner appealed from this ruling, and on November 17, 2016, the Chairman filed an order again denying the employee's request. (Id. 33a - 35a) This decision acknowledged that, "Opinions and Awards may be accessed by the public via the Livelink database Plaintiff refers to in his appeal." (Id. 34a)

The Petitioner again appealed within the Industrial Commission, asserting that the publication of this information violated his Constitutional rights. At the hearing, the Plaintiff argued, in part, "You are disclosing personal, sensitive, medical information via the Internet for the world to review." (Id. 44a) The Commission again rejected the Petitioner's request, by decision issued May 22, 2017. (Id. 38a - 41a) The opinion acknowledged that Opinions and Awards are available through the Livelink database. (Id. 40a) The Commission refused to address the Constitutional issues, as "the Commission does not have jurisdiction to rule on constitutional issues." (Id. 41a)

The Petitioner then appealed to the North Carolina Court of Appeals.

II. NORTH CAROLINA COURT OF APPEALS

The Petitioner appealed to the North Carolina Court of Appeals. On October 16, 2018 the Court of Appeals issued an opinion determining that the Petitioner does not have a Constitutional right that prohibits the Award and Opinion, which will contain findings regarding the Petitioner's medical conditions, from being published online. Regarding a right to privacy, the Court of Appeals wrote, "As the U.S. Supreme Court did in Whalen [v. Roe, 429 U.S. 589, 97 S. Ct. 869, 51 L. Ed. 2d 64 (1977)] and National Aeronautics & Space Administration [v. Nelson, 562 U.S. 134, 147, 131 S. Ct. 746, 756 (2011)] we will assume for present purposes that the Industrial Commission's refusal to seal Plaintiff's

case file implicates a privacy interest of constitutional significance." (Pet App 13a)

The Court of Appeals then wrote: "Our assessment of the constitutionality of the challenged publicizing of medical information in an Award must take into account the crucial role the Industrial Commission plays for workers and the State's economy, as well as the sheer magnitude of claims that must be adjudicated in a timely manner." (Id. 14a) The court then utilized a balancing test, stating, "Next, we must weigh Plaintiff's privacy interests implicated by the public dissemination of an Award against the public interest." (Id.) The court then wrote:

> Furthermore, N.C.G.S. § 97-84 expresses other important public interests at stake: "The case shall be decided and findings of fact issued based upon the preponderance of the evidence in view of the entire record. The award, together with a statement of the findings of fact, rulings of law, and other matters pertinent to the questions at issue shall be filed with the record of the proceedings."

(Id. 15a)

The court recognized the competing interests as follows:

> We recognize that the findings of fact of an award will often include potentially sensitive information that might

> otherwise be considered private, such as a claimant's identity, a claimant's employment history, a description of the injury suffered at work, and the effects of the injury on the claimant's physical and mental capabilities. However, the inclusion of pertinent and relevant information such as this is necessary because it ensures that workers' compensation claims are resolved impartially with well-reasoned decisions. Not only does this serve the public's interest in government transparency, but, without this information, our ability to conduct effective appellate review would be significantly impaired. (Id. 15a)

The court then recognized that many workers compensation cases will involve sensitive medical information, but stated, "Sensitive as these topics may be, Plaintiff wholly overlooks the crucial role this personal medical information had in the Commission's resolution of the claim." (Id. 16a) "Because Plaintiff seeks compensation based on his injury, his privacy interest in avoiding the disclosure of medical information relevant to this claim is lessened, if not waived, due to his status as a party in the present action. (Id. 16a)

The court concluded:

> In light of the critical role that the Opinion and Award plays in our State's workers' compensation system and our General Assembly's determination that

> these documents are public records, we conclude that Plaintiff's asserted privacy interests do not outweigh the public interests at stake here. Accordingly, we conclude that the Industrial Commission is not obligated to seal Plaintiff's workers' compensation file, including any Award, due to any constitutional privacy interest. (Id. 19a)

IV. NORTH CAROLINA SUPREME COURT

The Petitioner field a Petition for Discretionary Review with the North Carolina Supreme Court on November 20, 2018. On January 30, 2019, the North Carolina Supreme Court denied this Petition, which terminated the Petitioner's avenues of appeal within North Carolina. (Pet App 21a)

REASONS FOR GRANTING THE WRIT

State and federal courts across the country have struggled with determining, defining, and delineating individuals' Constitutional right to "informational privacy." These issues are especially heightened in the current technological environment where a document can be posted on the Internet, and it is immediately visible to anyone in the world with an internet connection. From there it can be downloaded, and the information forever remains in the public realm.

In this case, the moment that the North Carolina Industrial publishes an award in the

Petitioner's workers compensation case, which will contain findings of facts regarding the Petitioner's health conditions, the award will be posted online, and anyone in the world can download and access that information.

The private health information of thousands of workers in North Carolina has in fact been disseminated to everyone in the world. If one conducts a search today on the North Carolina Industrial Commission's Livelink database[2] for the word "depression," it will yield 3141 published documents. The vast majority of these documents reflect that the injured worker suffered from depression. A search for the following words yields the following results: "PTSD" -- 300 documents; "abortion" -- 12 documents; "miscarriage" --19 documents; "erectile dysfunction" -- 89 documents; "HIV" -- 58 documents. Searches for numerous other personal and private terms yield similar results (e.g. "rape," "suicide") as does a search for legal and illegal medications (e.g. "Zoloft," "Prozac," "cocaine," "marijuana"). As such, workers in North Carolina asserting a claim for workers compensation who have violated no law face the prospect that their personal and sensitive health information will published online and visible to anyone, including their family, neighbors, co-workers, and pharmaceutical companies.

---

[2] This database can be accessed through http://www.ic.nc.gov/database.html.

Under the reasoning of the North Carolina Court of Appeals, there are virtually no limitations on the government's ability to disseminate a person's private health information, so long as the state can cite to a "public interest in government transparency" or promotion of the economy.[3] Pursuant to this rationale, could the health information of a veteran, maintained by the Veteran's Administration, be posted on the Internet, along with that veteran's name, under the guise of a public interest in transparency? And could the health information of a person applying for SSDI be posted online, on the basis that the public has an interest in knowing the workings of the SSDI program? And do persons who obtain health insurance through the Affordable Care Act forfeit a right to privacy over their health information simply because their medical conditions and treatment are intertwined with a Governmental program?

Due to the Constitutional right to informational privacy, the State should not be

---

[3] The decision at issue is persuasive authority across the country, but is binding only in North Carolina. In the landscape of cases addressing a right to informational privacy, however, this case is of significance. This case is noteworthy in that it involves a public dissemination of health information, rather than a disclosure to a finite number of persons with safeguards. As such, this case is significant persuasive authority on the Government's ability to publish private information to the general public.

allowed to publish private health information, that can be linked to specific person, simply because the public has some interest in the program at issue. To hold otherwise is contrary to fundamental rights afforded by the Fourteenth Amendment.

I. CASES FROM THIS COURT ADDRESSING A RIGHT TO INFORMATIONAL PRIVACY

There are only a few cases from this Court addressing a right to informational privacy.

The leading case addressing a right to informational privacy is Whalen v. Roe, 429 U.S. 589, 97 S. Ct. 869, 51 L. Ed. 2d 64 (1977). In Whalen, the issue was whether a state could require health care providers to submit information to a central filing system regarding patients' use of Schedule II drugs. The Court wrote, "The cases sometimes characterized as protecting 'privacy' have in fact involved at least two different kinds of interests. One is the individual interest in avoiding disclosure of personal matters, and another is the interest in independence in making certain kinds of important decisions." Id at 599-600, 97 S.Ct. at 876, 51 L.Ed.2d at 73 (1977) (for the latter interest citing, e.g., Griswold v. Connecticut, 381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965)).

The Court upheld the legislation, primarily based on the extreme security measures taken to maintain the privacy of the patients' information. Those measures included that the records were kept in a vault, the receiving room was surrounded by a locked wire fence and protected by an alarm system, computer tapes were kept in a locked cabinet, and

public disclosure of the identity of patients was expressly prohibited by statute. Only seventeen persons had access to the files. Whalen, 429 U.S. at 593-595, 97 S. Ct. at 873-874, 51 L. Ed. 2d at 70-71.

The Court thus held that the legislation was not unconstitutional, stating that the limited disclosure of health information with these safeguards in place "is sufficient to constitute an invasion of any right or liberty protected by the Fourteenth Amendment." Id. at 603-04, 97 S.Ct. at 878, 51 L.Ed.2d at 76.

Justice Brennan concurred, and noted that if the health information were disclosed to the general public, then the disclosure would presumptively violate the individuals' right to privacy. Id. at 606, 97 S.Ct. at 880, 51 L.Ed.2d at 78 (Brennan, J., concurring).

Thirty-four years later this Court again addressed privacy right in Nat'l Aeronautics & Space Admin. v. Nelson, 562 U.S. 134, 131 S.Ct. 746, 178 L.Ed.2d 667 (2011). In this case, the Government required employees to disclose drug use and drug treatment. "[W]e will assume for present purposes that the Government's challenged inquiries implicate a privacy interest of constitutional significance." Id at 313, 131 S.Ct. at 756, 178 L.Ed.2d at 678 (2011). This Court wrote, "The Government has good reason to ask employees about their recent illegal-drug use. Like any employer, the Government is entitled to have its projects staffed by reliable, law-abiding persons who will 'efficiently and effectively' "discharge their duties. Questions about illegal-drug use are a useful way of figuring out which persons

have these characteristics." As for the question about drug treatment, "The Government, recognizing that illegal-drug use is both a criminal and a medical issue, seeks to separate out those illegal-drug users who are taking steps to address and overcome their problems." Id. at 152, 131 S.Ct. at 760, 178 L.Ed.2d at 682.

One year prior to Whalen, this Court addressed a claim to privacy in Paul v. Davis, 424 U.S. 693, 96 S.Ct. 1155, 47 L.Ed.2d 405 (1976). In this case, the State actor published a flyer with the plaintiff's name and photograph and identified him as a shoplifter. The plaintiff sued for violations of his privacy. "While there is no 'right of privacy' found in any specific guarantee of the Constitution, the Court has recognized that 'zones of privacy' may be created by more specific constitutional guarantees and thereby impose limits upon government power." Id. at 712-713, 96 S.Ct. at 1165-66. This Court held that these zones of privacy did not include the plaintiff's arrest on a shoplifting charge.

The same year that Whalen was decided, this Court also addressed a privacy claim in Nixon v. Administrator of General Services, 433 U.S. 425, 97 S.Ct. 2777, 53 L.Ed.2d 867 (1977). In this case, former President Nixon challenged a law that allowed the Government to review his papers, including some of which were his diary entries and his wife's personal files, and communications with his family, friends and clergy. This court wrote, "appellant has a legitimate expectation of privacy in his personal communications." Id. at 465, 97 S.Ct. at 2801, 53 L.Ed.2d at 905. "One element of privacy has been characterized as 'the individual interest in

avoiding disclosure of personal matters." Id. at 457, 97 S.Ct. at 2797, 53 L.Ed.2d at 900 (quoting Whalen). For various reasons, including that the protected documents were relatively few and that the private records would not be publicly disseminated, the Court held that the screening of President Nixon's personal papers did not violate the plaintiff's privacy rights.

II. LOWER COURTS HAVE STRUGGLED WITH THE RIGHT TO PRIVACY

Whether this Court declared a right to privacy in Whalen is open to debate. Although this Court has faced multiple cases asserting a Constitutional right to privacy, it has never rejected the existence of such a right. For example, in NASA v. Nelson, *supra*, this Court could have ruled that there is no right to privacy, but it refused to do so. Some justices have, however, opined in concurring opinions that such a right does not exist. *See* Nat'l Aeronautics & Space Admin. v. Nelson, 562 U.S. 134, 160, 131 S.Ct. 746, 764, 178 L.Ed.2d 667, 687 (2011) (Scalia, J., joined by Thomas, J., concurring; indicating a preference to rule against the plaintiff on the basis that "A federal constitutional right to 'informational privacy' does not exist," rather than a balancing of interests).

Following Whalen, the federal circuits have struggled in their analysis of a right to privacy. Some courts have noted that Whalen is ambiguous on whether a right to privacy exists. *See*, *e.g.*, Borucki v. Ryan, 827 F.2d 836 (1st Cir., 1987) ("Whalen provides little guidance regarding the nature of the confidentiality branch of the right of

privacy."; noting also the "split in the circuits"); Seaton v. Mayberg, 610 F.3d 530 (9th Cir., 2010) ("Some of our sister circuits recognize a constitutional right to privacy in medical records, though the Supreme Court has never so held."). Nevertheless, a majority of the Circuits have ruled that the Fourteenth Amendment to the Constitution provides a right to informational privacy. Although some decisions have questioned whether such a right exists, no Circuit has held that the right does not exist. Even where the right exists, all of the decisions recognize that an individual's right to privacy can be overridden by state interests.

The decisions cited below demonstrate how the Circuits have addressed the issue of a Constitutional right to privacy over medical information:

Second Circuit: This Circuit has held that Whalen creates a right of privacy that extends to health information. Doe v. City of New York, 15 F.3d 264 (2nd Cir., 1994) ("the right to confidentiality includes the right to protection regarding information about the state of one's health"; public disclosure that plaintiff had HIV violated right to privacy); Matson v. Bd. of Educ. of The City Sch. Dist. of N.Y., 631 F.3d 57 (2nd Cir., 2011) ("As a general matter, 'there exists in the United States Constitution a right to privacy protecting 'the individual interest in avoiding disclosure of personal matters.'"; citing Doe, which quoted Whalen).

This Circuit has somewhat conflicting decisions as to whether the right to privacy extends only to serious medical conditions. *Compare* Matson v. Bd. of Educ. of The City Sch. Dist. of N.Y., 631

F.3d 57 (2nd Cir. 2011) ("Confidential medical conditions are those that are 'excruciatingly private and intimate [in] nature' such as those 'likely to provoke ... an intense desire to preserve one's medical confidentiality.'"; citation omitted; plaintiff's fibromyalgia is not stigmatizing and therefore is not protected; dissent arguing that condition is sufficiently stigmatizing) *with* Hancock v. Cnty. of Rensselaer, 882 F.3d 58 (2nd Cir. 2018) ("Along with many of our sister circuits, we have explicitly recognized the right to privacy in one's personal information, including information about one's body."; rejecting argument that privacy applies only to serious medical conditions; "identifying the strength of the individual interest in privacy never ends the analysis"; state actor accessing employee's medical records without justification violates Fourteenth Amendment).

Third Circuit: This Circuit recognizes a right to privacy. "An individual has a constitutional right to privacy which protects 'the individual interest in avoiding disclosure of personal matters.' We have long recognized the right to privacy in one's medical information." Doe v. Delie, 257 F.3d 309, 315 (3d Cir. 2001) (citing Whalen; inmate has privacy interest in maintaining privacy that he has AIDS).

In this Circuit, prescription records are *per se* protected under the Constitution. Doe v. Southeastern Pa. Transp. Auth., 72 F.3d 1133, 1137 (3rd Cir. 1995) (right to privacy in medical records; test for privacy is whether right asserted is 'fundamental' or 'implicit in the concept of ordered liberty'"; "Medical records fall within this scope."; citing Whalen). U.S. v. Westinghouse Elec. Corp.,

638 F.2d 570 (3rd Cir., 1980) ("There can be no question that an employee's medical records, which may contain intimate facts of a personal nature, are well within the ambit of materials entitled to privacy protection. Information about one's body and state of health is matter which the individual is ordinarily entitled to retain within the "private enclave where he may lead a private life.").

Sixth Circuit: The Sixth Circuit recognizes a right to privacy, but this right might not extend to medical records. Gutierrez v. Lynch, 826 F.2d 1534 (6th Cir., 1987) ("It is firmly established that individuals have a constitutionally protected right to privacy. The right to privacy involves two kinds of interests. One is the right to avoid disclosing matters of a personal nature; . . . ."; "legitimate requests for medical information do not constitute an invasion of the right to privacy"; plaintiff's rights not violated by ordinance requiring persons on sick leave for more than 30 days to providing the City with medical information); Jarvis v. Wellman, 52 F.3d 125, 126 (6th Cir. 1995) (disclosure of medical records did not rise to level of fundamental right; prison officials sued when inmate accessed plaintiff's medical records). *See also* P.P. v. DeSanti, 653 F.2d 1080 (6th Cir. 1981) ("we conclude that the Constitution does not encompass a general right to nondisclosure of private information"; pertaining to juvenile court records).

Seventh Circuit: This Circuit recognizes a right to informational privacy, based on Whalen, and it covers medical communications. Denius v. Dunlap & Sadler, 209 F.3d 944 (7th Cir. 2000) ("In this Circuit, the right clearly covers medical records and

communications."; instructor renewing employment may not be required to disclose medical information, as he has a Constitutional right to privacy over such information and State actors did not show sufficient countervailing interests)

Eighth Circuit: This Circuit has held that the medical condition must be degrading or humiliating to invoke a Constitutional right to privacy. Cooksey v. Boyer, 289 F.3d 513 (8th Cir., 2002) (information disclosed must be either a shocking degradation or an egregious humiliation; statements that plaintiff had stress are not sufficiently humiliating).

Ninth Circuit: This Circuit recognizes a right to informational privacy over medical conditions. Norman-Bloodsaw v. Lawrence Berkeley Laboratory, 135 F.3d 1260 (9th Cir., 1998) ("The constitutionally protected privacy interest in avoiding disclosure of personal matters clearly encompasses medical information and its confidentiality."; testing of employees' blood for disease and pregnancy, without employees' knowledge, violates right to privacy). Coons v. Lew, 762 F.3d 891, 900 (9th Cir. 2014) ("The Supreme Court has recognized a fundamental privacy right in non-disclosure of personal medical information."; citing Whalen).

Tenth Circuit: This Circuit recognizes a right to privacy, which includes medical information. Herring v. Keenan, 218 F.3d 1171 (10th Cir., 2000) ("This circuit, however, has repeatedly interpreted the Supreme Court's decision in Whalen v. Roe, 429 U.S. 589 (1977), as creating a right to privacy in the non-disclosure of personal information."; plaintiff had constitutional right to privacy that he had HIV).

Douglas v. Dobbs, 419 F.3d 1097 (10th Cir., 2005) ("privacy regarding matters of health is closely intertwined with the activities afforded protection by the Supreme Court," and thus there is constitutional right to privacy that "protects an individual from the disclosure of information concerning a person's health."; "privacy in prescription records falls within a protected 'zone of privacy' and is thus protected as a personal right either 'fundamental' to or 'implicit in the concept of ordered liberty'"; District Attorney violated plaintiff's rights by obtaining plaintiff's pharmacy records)

D.C. Circuit: This Circuit is doubtful that a right to information privacy exists. American Federation of Government Employees, AFL-CIO v. Department of Housing & Urban Development, 118 F.3d 786 (D.C. Cir., 1997) ("We begin our analysis by expressing our grave doubts as to the existence of a constitutional right of privacy in the nondisclosure of personal information."; assuming that right exists, government is justified in requiring DOD employees to disclose mental health information)

Outside the context of medical information, the courts have addressed whether other types of information are private. Courts fairly consistently conclude that records of a person's criminal activity are not private. Nilson v. Layton City, 45 F.3d 369 (10th Cir. 1995) (plaintiff does not have privacy interest in his guilty plea to sexual assault, even if it was later expunged); Scheetz v. The Morning Call, Inc., 946 F.2d 202 (3rd Cir. 1991) (evidence of domestic violence in police report is not protected); Bailey v. City of Port Huron, 50 F.3d 364 (6th Cir. 2007) (police department issued press release and

mugshot of person charged with resisting officer); Eagle v. Morgan, 88 F.3d 620 (8th Cir., 1996) (details of guilty plea "are by their very nature matters within the public domain," and thus there is "no legitimate expectation of privacy in this material.").

Some courts have held that financial information is not protected. Overstreet v. Lexington-Fayette Urban County Gov't, 305 F.3d 566 (6th Cir. 2002) (plaintiff's ownership in real estate is not private; employer may require disclosure of same); St. Michael's Convalescent Hosp v. California, 643 F.2d 1369 (9th Cir. 1981) (hospital does not have privacy interest in cost information); *but see* Walls v. Cit of Petersburg, 895 F.2d 188 (4th Cir. 1990) ("Financial information [pertaining to debts and judgments] is protected by a right to privacy."; employer nevertheless has compelling interests to require disclosure of such information).

A person may have a privacy interest in her home address. Paul v. Verniero, 170 F.3d 396 (3rd Cir. 1999) ("accepting" plaintiff's claim for a nontrivial interest in home address; nevertheless state interest in notifying others of sex offenders outweighs privacy interest). On the other hand, it has been held that one's social security number is not private. Lambert v. Hartman, 517 F.3d 433 (6th Cir. 2008) (court clerk's publication of social security number of person receiving speeding ticket did not implicate fundamental liberty interest).

It has been held that a confidential informant does not have a Constitutional right to the non-disclosure of her identity. Malleus v. George, 641 F.3d 560 (3rd Cir. 2011) (denying claim where

information does not pertain not pertain to sexuality, health, or finances). A person does not have a right to privacy that he is not qualified for a job. Alexander v. Peffer, 993 F.2d 1348 (8th Cir. 1993). A person has an expectation of privacy over the details of her rape. Bloch v. Ribar, 156 F.3d 673 (6thCir. 1998). A person has an expectation of privacy over a video depicting her rape. Anderson v. Blake, 469 F.3d 910 (10th Cir. 2006). A person has a right of privacy over transsexualism. Powell v. Schriver, 175 F.3d 107 (2nd Cir., 1999).

State courts have also addressed the Constitutional right to privacy. "Many state courts also have recognized the federal constitutional right to informational privacy." People v. Gonzales, 120 Cal. Rptr. 3d 911, 929 fn. 9 (App. 2011), rev'd other grounds, 56 Cal.4th 353, 296 P.3d 945 (2013).

These courts have struggled with several issues surrounding a right to privacy, including whether such a right even exists. They have also struggled with the balancing of such a right against State interests.

Thus, this Court can provide great clarification on the Constitutional right to informational privacy, especially in the context of health information, including: (1) whether a Constitutional right to informational privacy exists, (2) if so, the factors used in determining whether a right exists, (3) whether medical information is *per se* private, or if only humiliating medical information is private, and (4) whether the State must show compelling justification to warrant public disclosure of an individual's health information.

III. THE NORTH CAROLINA COURT OF APPEALS' RELIANCE ON A PUBLIC INTEREST IN TRANSPARANCY AND PROMOTION OF THE ECONOMY TO JUSTIFY PUBLIC DISCLOSURE OF PRIVATE HEALTH INFORMATION EVISCERATES THE RIGHT TO PRIVACY

Against this backdrop, the North Carolina Court of Appeals assumed that a Constitutional right to informational privacy existed, and then proceeded to "weigh Plaintiff's privacy interests implicated by the public dissemination of an Award against the public interest." (Pet App 14a)[4] After reviewing several perceived public interests, the court concluded that the "Plaintiff's asserted privacy interests do not outweigh the public interests at stake here." (Id. 19a) When each of these purported public interests is analyzed, however, none of them has any merit, and certainly not enough merit to justify publishing a worker's private health information. Further, these justifications for releasing private health information to the general public would apply to virtually any situation in

---

[4] The Court of Appeals determined that the Constitutional issue was properly before the court. Further, even though the appeal was interlocutory, as the Commission had not yet made a decision, the appeal was ripe, because once the Commission posts the Award online, the damage is done and cannot be remedied.

which a State or the Federal government obtains a person's health information.

1. Role of Industrial Commission / Magnitude of Claims

The Court of Appeals opinion states, "Our assessment of the constitutionality of the challenged publicizing of medical information in an Award must take into account the crucial role the Industrial Commission plays for workers and the State's economy, as well as the sheer magnitude of claims that must be adjudicated in a timely manner." (Pet App 14a)

There is no doubt that the workers compensation system plays a crucial role for workers and for North Carolina's economy. This does not, however, in any way justify publishing a worker's personal health information to the world. The Industrial Commission can function and the State's economy will not suffer if workers' health information is kept private.

The vast majority of the records of the Industrial Commission are not public records, pursuant to statute. N.C. Gen. Stat. § 97-92 (all records except for "awards" are not public records).[5]

---

[5] There is no statute directly addressing whether the "Award" is a public record or not. As the award and the findings of fact are published online, the Industrial Commission must deem these to be public records.

The Industrial Commission certainly has functioned with the vast majority of its records (e.g. forms, medical records, deposition transcripts, motions, briefs) being private. Thus, the agency can fully function and simultaneously maintain privacy over workers' private information.

As for the State's economy, there is no link between the disclosure of a worker's health information and the strength of the economy. North Carolina has many laws that protect the privacy of health and other records, and there is no suggestion that any of these have impaired the State's economy. See, e.g., N.C. Gen. Stat. § 8-53 (regarding physician-patient privilege); N.C. Gen. Stat. § 122C-52(a) (pertaining to confidential information obtained in treating people with mental illnesses). Further, most states have similar provisions, and there are federal laws that protect privacy. *See*, *e.g.*, 164 C.F.R. § 512 (HIPAA). North Carolina's economy has thrived even though workers clearly have various state and federal statutory rights to privacy.

As for the "magnitude of claims" that the Commission handles, this is not a justification for publishing the award (with findings of fact) to the world. The Plaintiff is not asking the Commission to do anything; ironically, he is asking the Commission to *not* do something. The Commission has chosen to publish the workers' private health information online, and its burden would only be lessened by not publishing these findings online. There was no evidence whatsoever that the Industrial Commission's burden would be increased by not publishing sensitive findings of fact online.

Reference to the State's economy to warrant invasion of the worker's privacy effectively nullifies the worker's privacy rights. Such an erosion of rights under the guise of promoting industry is impermissible. *See*, *e.g.*, Metropolitan Life Insurance Company v. Ward, 470 U.S. 869, 882, 105 S.Ct. 1676, 1683, 84 L.Ed.2d 751, 762 (1985) ("acceptance of [State's] contention that promotion of domestic industry is always a legitimate state purpose under equal protection analysis would eviscerate the Equal Protection Clause").

These reasons should therefore be given no weight against a worker's privacy right to protect his or her private health information, such as reproductive issues or psychological conditions, from being published online.

2. N.C. Gen. Stat. § 97-84

The Court of Appeals found a "public interest" in N.C. Gen. Stat. § 97-84, which states, "The case shall be decided and findings of fact issued based upon the preponderance of the evidence in view of the entire record. The award, together with a statement of the findings of fact, rulings of law, and other matters pertinent to the questions at issue shall be filed with the record of the proceedings." (Pet App 15a)

This statute simply states that the award, with findings of fact, must be filed in the Industrial Commission. The award can be fully prepared and filed with the agency without making the health information public. The Court of Appeals thus drew no logical connection between the need for an award,

together with findings of fact, and the publication of a worker's private health information to the general public. The award, together with findings of fact, and the workers' privacy are not mutually exclusive. The Court of Appeals is conflating the issue of having an award with findings of fact and the issue of publicly disclosing this award.

Further, and perhaps more fundamentally, if a worker has a constitutional right to privacy, then a state legislature cannot create a public interest by statute, and thereby essentially trump the Constitution. If the disclosure violates a Constitutional right, then a state statue cannot negate the violation.

3. Ensuring impartiality / well-reasoned decisions

The court wrote, "the inclusion of pertinent and relevant information such as this [i.e. personal health information] is necessary because it ensures that workers' compensation claims are resolved impartially with well-reasoned decisions." (Pet App 15a)

This reasoning is likewise ill-founded. The impartiality of the Commission and the reasonableness of its decisions are kept in check by the injured workers and the employers, who have a right of appeal within in the Industrial Commission, and then to the judiciary; these appellate tribunals can fully review a workers compensation award. The worker and the employer do not need to have findings of fact as to the worker's medical conditions

disseminated to the world in order to challenge the decision.

An interest in ensuring impartiality is therefore no justification for releasing the workers' information to the public.

4. Transparency

The North Carolina Court of Appeals also found an interest in "transparency" that justified releasing an injured workers' health conditions to the world. (Pet App 15a)

The need for transparency of a worker's private health information has not, however, been shown. The raw data for awards (e.g. the amounts awarded) can be published, and the data can be used for statistical or other purposes. There is no public interest, however, in the transparency of an individual worker's injuries, medical history, and medication use.

The recognition of an interest in "transparency," sufficient to justify publishing the Petitioner's health information to the world, effectively eviscerates a person's right to privacy over health information that goes far beyond a workers compensation claim. As argued more fully in the next section, if the public has an interest in access to these agency decisions, sufficient to override the worker's right to privacy, then the same could be said of everyone's health information that is provided to any governmental entity for any purpose, such as Medicare, Medicaid, the Affordable Care Act, and Veterans Administration benefits. There is no

showing that the public has a significant interest in access to the details of these claims, linked to a specific person, consisting of the workers' health conditions, such as AIDS, mental health issues, birth control, erectile dysfunction *etc*.

It also bears noting that a workers compensation claim is a dispute between two private persons, *i.e.* the worker and the employer. The State merely administers that State program; State funds are not used to pay the claims of private employers, such as the Petitioner's employer. As such, the public interest in this private claim is much lower than that for a claim made for a benefit paid by the government.

5. Appellate Review

The Court of Appeals also found a public interest in the disclosure of a worker's private health information because "without this information, our ability to conduct effective appellate review would be significantly impaired." (Pet App 15a)

The Court of Appeals is again making a "false choice." The judiciary can fully review decisions from the Industrial Commission without making public the private health information of every injured worker.

For those cases that do reach the judiciary, the judiciary could protect a worker's privacy by sealing the record on appeal, or at least redacting personal health information from the record on appeal. Thus the courts can fully review the Commission's awards and opinions without jeopardizing workers' privacy.

Even if the court system were not to seal the record on appeal, this would not justify releasing the health information for all of those workers who do not appeal their case to the court system; this would be a classic case of throwing out the baby with the bathwater. Only a small portion of workers compensation claims will reach the judiciary.[6]

The ramifications of the rationale of the Court of Appeals show that it creates a dangerous precedent. Every dispute in a state or federal agency has the potential to reach the court system. Pursuant to the court's reasoning, the personal health information of any person, who has disclosed that information to an agency as a part of a claim for benefits, can be disclosed to the entire world in order to allow for appellate review. The courts need to be able to review, for example, claims for Veterans Administration benefits, claims for SSDI benefits, and tax deductions for medical expenses. Each of these types of cases can reach the court system,[7] and

---

[6] Only a small fraction of workers appeal their cases to the judiciary. In 2017, the Commission had more than 64,000 workers compensation files. (Pet App 14a) There were, however, only 400 cases on appeal to the Full Commission. Id. The number of these appealed to the Court of Appeals would only be a fraction of the 400 that went to the Full Commission.

[7] Shinseki v. Woodrow F. Sanders. Eric K. Shinseki, 556 U.S. 396, 129 S.Ct. 1696, 173 L.Ed.2d 532 (2009) (claim for VA benefits); Traynor v. Turnage Kelvey v. Turnage, 485 U.S. 535, 108 S.Ct. 1372, 99 L.Ed.2d 618 (1988) (same); Bowen v. Yuckert, 482 U.S. 137,

the courts will need findings of fact from the agency. Due to the need for such agency findings, then pursuant to the North Carolina Court of Appeals' reasoning, a Government agency could publish the health information of a veteran, of a disabled person seeking benefits, and of a taxpayer seeking a tax deduction for a medical expense, under the rationale that such findings are needed to enable appellate review, and that somehow this justifies publication of such findings before judicial review is invoked.

When a dispute reaches the judiciary, there may be a First Amendment right of the public to view the court records, subject to some limitations. This Court has recognized this right for criminal cases,[8] but not for civil cases. And some states, such as North Carolina,[9] have an "open courts" provision that renders judicial proceedings open to public inspection. These doctrines, however, do not apply to a decision issued by the North Carolina Industrial Commission, which is a state agency, and not a judicial body.[10] Reference to the potential for

---

107 S.Ct. 2287, 96 L.Ed.2d 119 (1987) (claim for SSDI benefits); Carasso v. CIR, 292 F.2d 367 (2nd Cir. 1961) (addressing tax deduction for medical expenses).

[8] Richmond Newspapers, Inc v. Virginia, 448 U.S. 555, 100 S.Ct. 2814, 65 L.Ed.2d 973 (1980) ("We hold that the right to attend criminal trials 17 is implicit in the guarantees of the First Amendment.").

[9] North Carolina Constitution, Article I, Sec. 18 .

[10] See, e.g., Pearson v. C.P. Buckner Steel Erection Co., 348 N.C. 239, 241, 498 S.E.2d 818, 820 (1998)

judicial proceedings to justify an agency's disclosing private information is therefore misplaced.

6. Relevance of Health Information / Waiver

The Court of Appeals also justified disclosing workers' health information by stating, "Sensitive as these topics [i.e. personal health information] may be, Plaintiff wholly overlooks the crucial role this personal medical information had in the Commission's resolution of the claim." (Pet App 16a) "Because Plaintiff seeks compensation based on his injury, his privacy interest in avoiding the disclosure of medical information relevant to this claim is lessened, if not waived, due to his status as a party in the present action." (Id. 18a)

This reasoning is flawed. The court is again confusing the issue of the need for this information to adjudicate the claim with the issue of whether that information should be publicly disseminated. The worker's health information is certainly relevant to his or her workers compensation claim. This does not, however, mean that this information should be made public. Without question, the worker's medical records are also relevant, and yet those are clearly rendered private by N.C. Gen. Stat. § 97-92 (stating that all records other than awards are not public records). Similarly, the worker's health information, when rendered in an Award and Opinion, can remain

---

("[I]t is well established that the Commission is not a court with general implied jurisdiction.").

private. Relevance and privacy are not mutually exclusive.

As for the argument that a worker waives his privacy rights by asserting a workers compensation claim, this rationale would put the injured worker in an intractable dilemma. She would be forced to either forego her right to compensation for injuries incurred on the job, or to have her personal health information released to the world. This Court has held that a worker cannot be forced to choose between his job and his constitutional rights. Pickering v. Board of Education of Township High School District 205, Will County, Illinois, 391 U.S. 563, 88 S.Ct. 1731, 20 L.Ed.2d 811 (1968). And similarly, a worker cannot be forced to choose between his workers compensation claim and his right to privacy.

The Plaintiff does not dispute that the Respondents and the Commission may have his health information, but the Plaintiff's privacy is waived only to this extent. To the extent that the doctrine of waiver applies, it should be narrowly construed and should apply to release health information only to the employer and the Commission; the worker's private information divulged to these persons remains private as to third parties.[11]

---

[11] See, e.g., Multimedia Wmaz v. Kubach, 212 Ga. App. 707, 720, 443 S.E.2d 491, 501 (1994) ("it is possible for a person to only partially waive his right to privacy by, for example, . . . limiting disclosure of a

This basis for publishing a worker's health information again shows that it goes too far. If a worker is said to have waived his right to privacy by filing a workers compensation claim, then has a Veteran waived his right to privacy over his medical condition by seeking medical treatment at a VA Hospital, such that private health information can be published online?

When each of the reasons asserted by the Court of Appeals to justify releasing the worker's private health information to the public is analyzed, they do not justify releasing the injured worker's personal health information to an online database accessible by anybody in the world with a computer and an Internet connection. When these perceived public interests are weighed against the worker's right to privacy, it is clear that the worker's rights should prevail.

IV. A PUBLIC DISCLOSURE OF HEALTH INFORMATION BY A STATE AGENCY SHOULD BE ALLOWED ONLY WHERE THE PRIVACY RIGHTS ARE OUTWEIGHED BY COMPELLING STATE INTERESTS

---

private fact to a certain class of persons and retaining a privacy right in the same fact as to all others"); Times-Mirror Co. v. Superior Court, 198 Cal. App. 3d 1420, 1427, 244 Cal. Rptr. 556, 561 (1988) ("talking to selected individuals does not render private information public").

The salient points in this case are that the Petitioner is not a criminal; the Petitioner is simply asserting his right to workers compensation benefits; upon resolution of the claim (by settlement or adjudication), the agency will issue an award with findings of fact as to the Petitioner's medical conditions; and these findings will be posted on the Internet for the whole world to see.

The Petitioner maintains that, as a clear majority of the Circuits have found, and as this Court at least implied in Whalen, the Constitution does grant a right of privacy over a person's private information. The parameters of what is included in this right to privacy are not clear, but at a minimum they include a person's health information. Further, public dissemination of personal health information should be done only where the state can show compelling state interests. This is no more than what Justice Brennan wrote more than forty years ago, stating: "Broad dissemination by state officials of such information (e.g. prescription information), however, would clearly implicate constitutionally protected privacy rights, and would presumably be justified only by compelling state interests." Whalen, 429 U.S. at 606, 97 S.Ct. at 880, 51 L.Ed.2d at 78 (Brennan, J., concurring).

The issue in this case is not whether the agency and the employer may have this information; the Petitioner has always agreed that these persons may have this information, as it pertains to the claim for workers compensation benefits. At issue, however, whether this personal health information should be published to the world. Privacy over one's

medical information is implicit in the concept of ordered liberty. *See* Roe v. Wade, 410 U.S. 113, 152, 93 S.Ct. 705, 726, 35 L.Ed.2d 147, 176 (1973) ("[O]nly personal rights that can be deemed 'fundamental' or 'implicit in the concept of ordered liberty are included in this guarantee of personal privacy.").

Where the release of information is limited to a finite set of persons, and precautions are taken against further release of the information, a different issue is presented. In Whalen, this Court, in affirming legislation that required that persons' health information would be sent to a central repository, noted the extreme measures taken to protect the information, including the use of a vault, a locked wire fence, an alarm system, a locked cabinet, and statutory prohibitions against the public disclosure of the information. By contrast, in the instant case, the State agency is simply posting online the workers' health information, such as AIDS, depression, erectile dysfunction, and abortions.

The vast majority of cases addressing whether a disclosure of health information violates a right to privacy are in the context of a disclosure to a very small group of people.[12] To disclose an individual's

---

[12] *See*, *e.g.*, Whalen (disclosure of prescription information to a small number of state actors); U.S. v. Westinghouse Elec. Corp., 638 F.2d 570 (3rd Cir., 1980) (disclosure of health information to small set of employees at National Institute for Occupational Safety and Health); Gutierrez v. Lynch, 826 F.2d

health information to the general public, without justification, is a blatant affront to an individual's privacy.

This public disclosure is even more serious in view of modern technology. One court addressing a privacy claim noted that the protection afforded by the courts must be commensurate with technological advances. This court wrote:

> We believe these precautions [taken by the employer to safeguard financial

---

1534 (6th Cir., 1987) (plaintiff's rights not violated by ordinance requiring persons on sick leave for more than 30 days to providing the City with medical information); American Federation of Government Employees, AFL-CIO v. Department of Housing & Urban Development, 118 F.3d 786 (D.C. Cir., 1997) (employees to disclose mental health information to employer). Further, courts evaluating any sort of private information focus on the protection afforded to that information, and whether it is publicly disseminated. Walls v. City of Petersburg, 895 F.2d 188, 194-195 (4th Cir. 1990) (noting that information was kept in a private filing cabinet locked at night, and only four persons had access to the information); Flaskamp v. Dearborn Public Schools, 385 F.3d 935 (6th Cir. 2004) ("the extent of dissemination [is] an important factor in assessing the informational-privacy claim"). *See also* See Nixon v. Administrator of General Services, 433 U.S. at 458, 97 S.Ct. at 2797 (noting precautions to prevent unwarranted disclosure of private information).

> information] are reasonable and sufficient; however, if this type of information had been more widely distributed, our conclusions might have been different. In the past few decades, technological advances have provided society with the ability to collect, store, organize, and recall vast amounts of information about individuals in sophisticated computer files. This database capability is already being extensively used by the government, financial institutions, and marketing research firms to track our travels, interests, preferences, habits, and associates. Although some of this information can be useful and even necessary to maintain order and provide communication and convenience in a complex society, we need to be ever diligent to guard against misuse. Some information still needs to be private, disclosed to the public only if the person voluntarily chooses to disclose it.

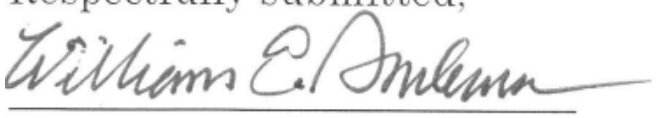
This was written nearly thirty years ago, in Walls v. City of Petersburg, 895 F.2d 188 (4th Cir. 1990). Justice Brennan foresaw technological changes more than forty years ago in Whalen, when he wrote, "The central storage and easy accessibility of computerized data vastly increase the potential for abuse of that information, and I am not prepared to say that future developments will not demonstrate the necessity of some curb on such technology." Whalen, 429 U.S. at 607, 97 S.Ct. at 880, 51 L.Ed.2d at 78 (Brennan, J., concurring).

The North Carolina Court of Appeals had several options at its disposal to protect the Petitioner's right to privacy. These options included but were not limited to (1) holding that the North Carolina Industrial Commission may not publish online any worker's health information; (2) holding that that the North Carolina Industrial Commission may not publish online any worker's health information upon that worker's motion to seal his record; (3) holding that the North Carolina Industrial Commission must provide the worker with a thirty day window following issuance of the Award in which to request that the award be sealed. Rather than use these or any other options to protect the worker's privacy, the North Carolina Court of Appeals held that the State's interest in transparency and in the economy justify publishing the worker's health information, as contained in the findings of fact in the award, to the world.

CONCLUSION

This Court should grant Petitioner Vincent Mastanduno's Petition for a Writ of Certiorari to Review the Opinion of the North Carolina Court of Appeals, which effectively eviscerated an injured worker's right to privacy. Pursuant to the rationale of the Court of Appeals, the private health information of any person submitting a claim to any state or federal agency can be posted online for the world to see under the rubric of transparency and economics.

Respectfully submitted,



William E. Anderson
McDANIEL & ANDERSON, L.L.P.
P.O. Box 58186
Raleigh, NC 27658
Phone: (919) 872-3000
Counsel for Petitioner, Vincent Mastanduno