20-6834

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

C. Holmes, MD,
Petitioner,
v.

Alex M. Azar, II,
Secretary
Of the Department of Health and Human Services (HHS),
Respondent,

ON PETITION FOR A WRIT OF CERTIORARI TO THE U.S. COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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ORIGINAL

QUESTION PRESENTED

As applied by respondents in this case and in its ongoing pattern and practice, HIPAA's Privacy Rule cannot pass constitutional muster; respondents' wrongdoing violates the HIPAA Privacy Rule, deprives patients of more stringent privacy rights under applicable state law, and places physicians, including the petitioner, in the untenable position of violating applicable local privacy law in order to be paid for medically necessary services rendered in good faith without prior notice and without just cause.

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The unpublished Order on appeal in this matter is dated January 27, 2020. Petition for Rehearing was denied on May 26, 2020. The March 19, 2020, order of this Court provides for extension to file 150 days after the Petition for Rehearing was denied.

JURISDICTION

The United States Court of Appeals Petition for Rehearing was denied by order filed May 26, 2020. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AT ISSUE

Amendment I

Religion and Expression

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances. No Soldier shall, in time of peace be quartered in any house, without the consent of the Owner, nor in time of war, but in a manner to be prescribed by law

Amendment III

Quartering Soldiers

No Soldier shall, in time of peace be quartered in any house, without the consent of

the Owner, nor in time of war, but in a manner to be prescribed by law.

Amendment IV

Search and Seizure

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Amendment IX

Unenumerated Rights

The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

STATE STATUTORY PROVISIONS AT ISSUE

S.C. Code § 44-115-40

Except as otherwise provided by law (*with limited exceptions not applicable here)*, a physician shall not honor a request for release of copies of medical records without receiving express written consent of the patient or person authorized by law to act on behalf of the patient. S.C. Code 44-115-40 (emphasis supplied).

FACTS

There is conflict between Circuits regarding disparate rulings under the same or similar fact patterns and this Court is requested to grant review regarding consistency. Specifically, the D.C. Circuit addressed unlawful acts by respondents in the intervening case of *Ciox Health, LLC v. Azar* (D. D.C. January 23, 2020). It is respectfully submitted small practitioners are disproportionately affected by respondent's unlawful acts as was the copy center in *Ciox. Id.* In the instant case, the petitioner physician strives to provide high quality, cost effective, individualized, compassionate care to each and every patient and has practiced in the same location since completion of medical school, internship, and residency. The physician's practice is a non-covered entity under HIPAA, and is recognized by Medicare/CMS as a small practice qualified for paper claim waiver as documented in the record. At all times pertinent to the issues herein, the revisions to HIPAA after 2011 were not in effect and at no time did Respondent's Business Associate provide a valid HIPAA Business Associate Agreement or any Business Associate Agreement at all and none is found in the record.

Because the physician's practice is a non-covered entity under HIPAA, release of privileged healthcare information (PHI) is governed by state law. While the physician's practice is a non-covered entity under HIPAA, it is important to note that the express provisions of HIPPA's Privacy Rule itself incorporate state law where state protections of privileged health information are more stringent as is the case in South Carolina. See attached Arnold & Porter (A&P) opinion letters.

With HIPAA, Congress intended to protect small practices by providing that small

practices are non-covered entities under HIPAA. As a non-covered entity under HIPAA, the physician's practice is subject to the same law in effect before the HIPAA Privacy Rule was enacted, which has always required express written consent and authorization for release of medical records. Local law in South Carolina provides:

Except as otherwise provided by law (*with limited exceptions none of which apply here)*, a physician shall not honor a request for release of copies of medical records without the receipt of express written consent of the patient or person authorized by law to act on behalf of the patient. S.C. Code 44-115-40 (emphasis supplied).

The plain language of the statute requires Respondent to provide express written consent of the patient for release of copies of medical records. Respondents failed to comply with applicable state law by failing to provide express written consent. PHI is the patient's information, not the physician's, and the petitioner physician is not allowed by law to release copies of medical records unless Respondent provides express written consent. The record reflects the physician timely notified Respondent and the contractors/sub-contractors of the applicable local law; Respondent unreasonably failed and refused to respond. Respondent and/or its contractors/subcontractors had a duty to timely respond to petitioner's timely notice and violated Federal law, state law, and its own regulations. Respondents made false, deceptive, and/or misleading statements to petitioner's established and new patients. The letter and spirit of the law should be construed in the patients' favor as patients are the intended beneficiaries. The physician is happy to comply with requests in accordance with applicable local law. To the extent respondents' wrongdoing without notice and without just cause disproportionately threatens the petitioner's and small practitioners' ability to earn a living and practice one's profession,

and the record reflects it does, these issues of great public importance are capable of repetition, capable of evading judicial review, and incapable of adequate remedy on appeal.

INTRODUCTION

In February 2019, the Great Statesman, Rep. Elijah Cummings, may he rest in peace, observed, "When we're dancing with the angels, the question will be asked, in 2019, what did we do to make sure we kept our democracy intact?" Along with Rep. John Lewis, may God rest his soul, it is fitting to remember these lifetimes of steadfast bravery and unremitting courage. It is fitting, as well, to remember the beginnings of that democracy. The framers of our state and Federal Constitutions risked life, limb, and liberty to escape abuses by the British government.

Both state and Federal constitutions were deliberately crafted to foreclose those abuses here. The framers did not need computers, tablets, or cell phones to discern the basic tenets of fundamental fairness and due process. An impartial decision-maker was seen as a non-negotiable requirement for preventing such abuses. The letter and spirit of our cherished Constitution categorically prohibit deprivation of life, liberty, or property without due process of law, nor shall any person be denied equal protection of the laws. The right of trial by jury shall be preserved inviolate. As a corollary, another requirement, deemed mandatory and prohibitory, is that no single individual, whether British monarch, government official, or HHS Secretary shall have absolute authority over a citizen's life, liberty, or property without being subject to the right of appeal with meaningful judicial review.

In the instant case, plaintiff timely requested the substantial right of *de novo* determination by an Article III Judicial Officer without Report & Recommendation (R&R) in the district court. There are examples of pro se hard copy filings subjected to a magistrate dispensing separate second class so-called justice, without consent, with impermissible delegation, without statutory authority, and/or without meaningful judicial review, gleefully and cavalierly used as a trap for the unwary pro se litigant. Significantly and materially, there is an abundant body of law decisively declaring separate is never equal. The acknowledged systemic institutional biases against minorities and/or pro se litigants threaten our democracy and feed the appearance of the proverbial "rigged" system. In the pro se setting, this issue is of exceptional importance as it is capable of repetition, capable of evading judicial review, and incapable of adequate remedy on appeal. As set forth more fully below, it is respectfully submitted our democracy depends on the basic tenets of fundamental fairness and due process just as much, if not more so, in this age of cell phones, tablets, computers, and uncertain times. Judge J. Waties Waring, the renowned crafter of divine dissents lying in repose in Charleston, is turning over in his grave at the historically persistent lawlessness of the Four Corners of Law in the courthouse bearing his name.

REASONS FOR GRANTING THE *WRIT OF CERTIORARI*

I. Threshold Matter

Without being disagreeable, it is respectfully submitted there is disagreement, and

as set forth more fully herein, there is no jurisdiction for the Report & Recommendation (R&R) or its adoption because there is no consent to a magistrate and there is timely express request for appeal to and disposition by an Article III Constitutional Officer without R&R on dispositive motion. Because there is no jurisdiction for the Report and Recommendation (R&R), it cannot and, in good faith, should not be adopted, including but not limited to, impermissible delegation adversely affects and/or prejudices lower court decisions. Petitioner is prejudiced thereby. The plaintiff timely appealed in the district court for the substantial right to the Constitutional protection of *de novo* disposition by an Article III Judicial Officer without R&R on a dispositive motion and respectfully submits there can be no jurisdiction without consent. *Wimmer v. Cook*, 774 F.2d 68 (4th Cir., 1985); *Roell v. Withrow*, 538 U.S. 580 (2003). Magistrate Report & Recommendation (R&R) without consent jeopardizes/impairs litigants' substantial rights including but not limited to, full and fair meaningful appellate review. To the extent a substantial right, including meaningful appellate review, is or could be diminished for pro se litigants by magistrate R&R on dispositive motions, and the record reflects that it is diminished in this and other cases, magistrate R&R without consent on dispositive motion cannot pass constitutional muster. Petitioner is prejudiced thereby. But for illegitimate R&R, the outcome should have and would have resulted in a decision in petitioner's favor.

Petitioner seeks de novo review and/or remand regarding intervening events including but not limited to, change of position by the DOJ supporting petitioner's position that Respondent's pattern and practice in its interpretation/application of the

Affordable Care Act (ACA), HIPAA, and/or pertinent parts is outside the scope of authority and/or unconstitutional. Moreover, the R&R should be reversed due to clear error. Specifically, clear error is based on, including but not limited to, statutory construction and the failure to address applicable local law. Accordingly, the lower court order should be reversed.

II. Petitioner seeks de novo review and/or remand regarding intervening events including but not limited to, change of position by the Department of Justice (DOJ) supporting petitioner's position that respondent's pattern and practice in its interpretation/application of the Affordable Care Act (ACA), HIPAA, and/or pertinent parts is outside the scope of authority and/or unconstitutional.

Petitioner seeks de novo review and/or remand regarding intervening events including but not limited to, change of position by the Department of Justice (DOJ) supporting petitioner's position that Respondent's pattern and practice in its interpretation/application of the Affordable Care Act (ACA), HIPAA, and/or pertinent parts is outside the scope of authority and/or unconstitutional. The DOJ has now taken the position it supports the following ruling:

> For the reasons stated above, the Court ... declares the individual mandate, 26 U.S.C. § 5000A(a), UNCONSTITUTIONAL. Further, the Court declares the remaining provisions of the ACA, Pub. L. 111-148, are INSEVERABLE and therefore INVALID. *Texas v. U.S.*, 4:18-CV-00167 (filed December 14, 2018).

As was widely reported on March 26, 2019, a letter from the Department of Justice announced the shift in support of a district court judge's ruling that the law is unconstitutional (www.npr.org > 03/26/2019). Accordingly, petitioner seeks de novo

review and/or remand regarding intervening events including but not limited to, change of position by the Department of Justice (DOJ) supporting petitioner's position. The lower court order is unsustainable.

III. Ambiguous, conflicting, and/or unclear rules regarding Report & Recommendation(R&R)

As a threshold matter, ambiguous, conflicting, and/or unclear rules regarding R&R over a busy time during the Holidays is inconsistent with case law favoring determination on the merits. By analogy, "the quality of justice must not be subordinated to arbitrary insistence upon compliance with procedural rules" in this case with no legal prejudice to the other side where the record reflects the objections were timely served by mail and timely filed in good faith by fax on November 16, 2018. *Dublin Sportswear v. Charlett*, 485 Pa. 633, 639, 403 A.2d 568, 571 (1979). In the case of *Newman Development Group of Pottstown, LLC v. Genuardi's Family Market, Inc.*, 52 A.3d 1233 (Pa. 2012), the Pennsylvania Supreme Court ruled that the Superior Court was wrong to throw out the appeal on what it said was an unclear rule suggesting conscious or subconscious reduction of caseload as a driving force. Petitioner respectfully submits the lower court overlooks and/or misconstrues the directions for mailing in the Report & Recommendation (R&R) which support petitioner's timely filing and good faith efforts on a non-jurisdictional purported deadline by approximately one day for objections to R&R. Moreover, petitioner respectfully asserts clear error of material fact and law support reversal of the R&R. Petitioner requests denial of respondents' motions and requests compliance with Rule 45, Fed. R. Civ. P., and issuance of subpoenas for relevant

discovery requests, including but not limited to, material EOB's (explanation of benefits) for claims. Accordingly, the lower court decision should be reversed.

IV. There is no jurisdiction for the Report & Recommendation (R&R).

Jurisdiction cannot be waived. In the March 26, 2019, Order, the referral to a magistrate is based on clear error of material fact and law: Local Civil Rule 73.02(B)(2)(g) (D. S.C.) is inapplicable and constitutes prejudicial error. To the extent a Local Rule is interpreted or applied to provide for referral without consent for magistrate's R&R on a dispositive motion, that referral is inconsistent with constitutional, statutory, and/or case law. Further, there is no consent for referral to a magistrate. Without consent, there is no jurisdiction for the R&R or its adoption. Moreover, the petitioner's opposition to respondents' motions expressly requested disposition by the Presiding District Court Judge, an Article III Constitutional Judicial Officer (not a magistrate) without R&R on dispositional motion. W*immer v. Cook*, 774 F.2d 68 (4th Cir., 1985); *Roell v. Withrow*, 538 U.S. 580 (2003). The magistrate's R&R impermissibly adversely affected and/or prejudiced the matter. But for the prejudicial error the outcome should have and would have resulted in a decision favorable to the petitioner. The issues are capable of repetition and capable of evading judicial review. Accordingly, reversal is respectfully requested.

V. Petitioner respectfully requests *nunc pro tunc* filing.

By analogy, the case of *Bureau Veritas N. Am., Inc. v. Dep't of Transp.,* 127 A.3d 871 (Pa. Commw. Ct., 2015) provides the following guidance:

The party seeking *nunc pro tunc* filing must show

1) that extraordinary circumstances, involving fraud or breakdown in the administrative process or non-negligent circumstances related to the party, its counsel or a third party, caused the untimeliness;

2) that it filed the document within a short time period after the deadline or date that it learned of the untimeliness; and

3) that the respondent will not suffer prejudice due to the delay. *Cook,* 671 A.2d at 1131; *C.E. v. Department of Public Welfare,* 97 A.3d 828, 832 (Pa.Cmwlth.2014); *H.D.,* 751 A.2d at 1219. BV has satisfied all of these requirements.

Bureau Veritas N. Am., Inc. v. Dep't of Transp., 127 A.3d 871 (Pa. Commw. Ct., 2015).

In the instant case, extraordinary circumstances warrant *nunc pro tunc* relief. Specifically, there was a misunderstanding or miscommunication from a staff member of the Clerk's office regarding the statement that after the deadline, three days are allowed on dispositive motions for pro se litigants. Parties are advised to consult the Clerk's office with such questions. Moreover, what the staff member said is consistent with the Report and Recommendation (R&R) itself, which authorizes mailing the objections and provides the mailing address of PO Box 835, Charleston, SC 29402. It does not say the R&R must be mailed before the deadline in order to be timely. Petitioner respectfully submits, under these circumstances, the information is unclear, ambiguous, and/or conflicting. The document was timely served and there is no legal prejudice to the other side. Per the successful fax transmission receipt, the petitioner timely filed by fax on

November 16, 2019, which establishes good faith, non-negligent circumstances, and if deemed late, the hard copy was filed as soon as possible within a short time. Accordingly, petitioner respectfully requests *nunc pro tunc* relief.

VI. It appears the lower court was aware the objections were filed by fax on November 16, 2019, but did not address it.

It appears the lower court was aware the objections were timely served by mail and filed in good faith by fax on November 16, 2019. This material fact supports petitioner's good faith efforts and establishes no legal prejudice. Petitioner respectfully submits the filing of objections on November 16, 2019, by fax was emergent. Petitioner is informed and believes that the short window of time during Thanksgiving week for a dispositional filing involving meritorious claims with no negligence constitutes emergency for the petitioner. Further, there is precedent because the petitioner has filed by fax before at 843.579.1402. Accordingly, petitioner respectfully submits the objections are timely.

Moreover, a staff member of the Clerk's office stated that three days are allowed after the deadline on dispositive motions for pro se litigants. The Report and Recommendation (R&R) itself anticipates mailing the objections and provides the mailing address of PO Box 835, Charleston, SC 29402; as such, filing by mail plus three days would have been during the week of Thanksgiving. Rule 6, Fed. R. Civ. P. (FRCP). The Court was closed for Thanksgiving after November 20, 2018, to November 26, 2018. Rule 6, Fed. R. Civ. P. (FRCP). There is no suggestion there would or could be disposition during the week of Thanksgiving. The next date when the Court was open was

November 26, 2018. The United States Post Office advises that delivery of mail around the Holidays may be delayed, therefore, out of an abundance of caution, petitioner timely filed amended objections to ensure compliance within the three days. Delivery of the mail to that address, in fact, has taken more than three days in petitioner's experience. The opinion suggests an absurd result wherein receipt through the mail is timely, however, receipt before delivery of the mail, as in this case, is not. By analogy, the case of *Trowell v. South Carolina Department of Public Safety* is instructive. *Trowell v. South Carolina Department of Public Safety,* 384 S.C. 232, 681 S.E.2d 893 (Ct.App.2009). The South Carolina Court of Appeals observed that the decision "arbitrarily created a trap for the unwary." *Id.* at 237, 681 S.E.2d at 896. The court held that the litigant's substantial rights were prejudiced due to the arbitrary and capricious nature of the interpretation. *Id.* at 237, 681 S.E.2d at 896. Accordingly, petitioner respectfully requests reversal of the lower court order.

VII. In the alternative and for good cause shown, petitioner respectfully requests consideration of enlargement of time for objections filed in good faith and without legal prejudice.

In the alternative and for good cause shown, petitioner respectfully requests consideration of enlargement of time for objections. Petitioner respectfully asserts the objections are timely submitted in good faith and if deemed late, then substantially compliant. By analogy, the Court has broad discretion under Rule 6(b)(1), Fed. R. Civ. P. *See Lonestar Steakhouse & Saloon v. Alpha of Va., Inc.*, 43 F.3rd 922, 929

(4thCir.1995).'"[A]n application under Rule 6(b)(1) normally will be granted in the absence of bad faith or prejudice to the adverse party.'" *Mickalis Pawn Shop, LLC, v. Bloomberg*, 465 F.Supp.2d 543, 545 (D.S.C. 2006) (citations omitted). The petitioner respectfully submits there is no legal prejudice to the other side, none has been claimed by anyone, and the request is hereby entered in good faith. In addition, there is precedent because the petitioner has filed by fax before at 843.579.1402. Petitioner is not aware, and there has been no notice, of a change in the interim. Accordingly, if deemed late, petitioner requests minimal enlargement of time on a dispositional order with no legal prejudice.

VIII. Summary judgment should be denied as premature

The petitioner made timely requests for the EOB's (explanation of benefits) which the ALJ unreasonably denied. Petitioner is prejudiced because request for relevant evidence supporting petitioner's claims was denied. This issue is capable of repetition and capable of evading judicial review. The case of *Baughman v. AT&T Co.*, 410 S.E.2d 537, 306 S.C. 101 (1991) states the following:

Since it is a drastic remedy, summary judgment "should be cautiously invoked so that no person will be improperly deprived of a trial of the disputed factual issues." Watson v. Southern Ry. Co., 420 F. Supp. 483, 486 (D.S.C. 1975); see also Holloman v. McAllister, 289 S.C. 183, 186, 345 S.E. (2d) 728, 729 (1986) ("an extreme remedy to be cautiously invoked"). **This means, among other things, that summary judgment must not be granted until the opposing party has had a full and fair opportunity to complete discovery.** 10A Wright & Miller, Federal Practice and Procedure § 2741, p. 543 (1983); 6 Moore's Federal Practice ¶ 56.02[6], p. 56-39 (2d) ed. 1990); see, e.g., First Chicago Int'l v. United

Exchange Co., 836 F. (2d) 1375 (D.C. Cir.1988); Gary Plastic Packaging Corp. v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 756 F. (2d) 230 (2d Cir.1985). (Emphasis supplied.)

Baughman v. AT&T Co., 410 S.E.2d 537, 306 S.C. 101 (1991).

For good cause and for full and fair disposition on the merits, petitioner respectfully submits respondents' motions should be denied as premature and requests subpoenas for relevant discovery requests along with an opportunity for discovery.

The record reflects the petitioner made timely requests for discovery of records and explanation of benefits (EOBs) for all challenged claims regarding, including but not limited to, false, deceptive, misleading information to petitioner's established and new patients adversely affecting the physician-patient relationship. Petitioner requested copies of the EOBs and other information to document material irregularities, including the failure to timely process and pay claims and/or disinformation to established and new patients, by respondents' contracting/subcontracting agents. In addition, the petitioner needed clarification of the reasons for denying claims as some, if not all, resulted in multiple EOBs with different explanations for the same claim. The documents requested are material to establishing that all claims, both Attachment A and B claims, were timely appealed. [1] Accordingly, the Respondents' motions to dismiss and for summary judgment should be held in abeyance pending discovery.

1

The record reflects the Respondents' contractual/subcontractual agents contacted the Petitioner with notification that no appeals were necessary because the claims were all being processed for payment. Reliance on that representation thwarted and/or prevented some, if not all, appeals in Attachment A. See copy of record memorializing Respondent's notice that appeal was unnecessary, which is contained in the record on appeal. That memorialization, generated in the ordinary course of business, and the authenticating affidavit are admissible as written documentation of the representations made by the (sub)contractors and constitute additional evidence in the record supporting discovery.

IX. The Medicare Appeals Council (MAC) found the ALJ abused his discretion, and the ALJ wrongfully denied petitioner's timely request for in-person hearing.

The ALJ wrongfully denied petitioner's timely request for in-person hearing with travel to the hearing arranged by petitioner at petitioner's expense. The ALJ represented that physicians are entitled to an in-person hearing, but unreasonably refused to comply with the physician's request for in-person hearing. Petitioner was not provided with meaningful opportunity to be heard on respondent's wrongdoing and wrongful taking of patients' and physicians' property, individual, and/or privacy rights, including but not limited to, rights to covered services and wrongful taking of fees for medically necessary physician services rendered in good faith. Respondent's motions should be denied.

The Medicare Appeals Council (MAC) found that the administrative law judge (ALJ) abused his discretion. We respectfully submit that the ALJ also abused his discretion by, including but not limited to, denial of the timely request for in-person (not telephone) hearing, denial of timely request for discovery for material documents, thereby denying full and fair hearing and meaningful review, and failure to even address governing local law. Similarly, due to the express and implied deference given to the ALJ and the importance of these issues, the right to an in-person hearing, timely requested, should be respected. This Court should find and the substantial evidence in the record reflects that the ALJ's abuse of discretion resulted in prejudice to the physician's and to patients' rights. But for that prejudice, the result should have and would have been a different outcome in the physician's favor. Respectfully, the physician's right to request an in-person (not telephone) hearing should be upheld. *See Hicks v. Feiock*, 108 S.Ct.

1423, 485 U.S. 624, 99 L.Ed. 721, 56 U.S.L.W. 4347 (1988). "The touchstone of due process is protection of the individual against arbitrary action of government," *Wolff v. McDonnell*, 418 U.S. 539, 558 (1974), or denial of fundamental procedural fairness, see, e.g., *Fuentes v. Shevin*, 407 U.S. 67, 82 (1972) (the procedural due process guarantee protects against "arbitrary takings"). *County of Sacramento v. Lewis*, 523 U.S. 833, 118 S.Ct. 1708, 140 L.Ed.2d 1043 (1998). See *Moore v. Moore*, 376 S.C. 467, 657 S.E.2d 743 (2008) (procedural due process requires (1) adequate notice; (2) adequate opportunity for a hearing; (3) the right to introduce evidence; and (4) the right to confront and cross-examine witnesses). See U.S. Const., Article I, sec. 9 and 10; U.S. Const. amend. I, IV, V, VII, and XIV; S.C. Const. art. I, sec. 2, 3, 4, 10, and 14; S.C. Const. art. V, sec. 4; S.C. Const. art. V, sec. 5.

X. As applied by respondents in this case, HIPAA's Privacy Rule cannot pass constitutional muster; respondents' wrongdoing violates the HIPAA Privacy Rule, deprives patients of more stringent privacy rights under applicable state law, and places physicians, including the petitioner in the untenable position of violating applicable local law in order to be paid for medically necessary services rendered in good faith without prior notice and without just cause.

"(T)he Secretary [of Health and Human Services ("HHS")] has repeatedly emphasized that...[HIPAA] defers to states that impose stringent consent requirements", that "individual authorization [is] generally...more protective of privacy interests than the lack of such authorization", and that HIPAA "leaves pre-existing state law privacy rights in place" and does not "authorize or permit disclosures that state laws would otherwise prohibit." *Citizens for Health v. Leavitt*, 428 F.3d 167, 181-82, n.16 (3d Cir.

2005). HIPAA "give[s] preemptive effect to State laws that would otherwise be in effect...to the extent they conflict with and are more stringent than the requirements promulgated under...HIPAA", it is not "the intent of...[HIPAA] to give an effect to State law that it would not otherwise have in the absence of...[HIPAA's antipreemption provision]", "HHS [has] interpreted the antipreemption provision to merely maintain the status quo in states in which more stringent privacy regulations existed prior to HIPAA", and *S.C. Code § 44-115-40* remains the law in areas in which *South Carolina* has the authority to regulate. *National Abortion Federation v. Ashcroft*, 2004 WL 555701, at *1-5 (S.D.N.Y. 2004) (emphasis supplied). South Carolina has the authority to regulate non-covered entities under HIPAA as in this case.

As applied by respondent in this case, HIPAA cannot pass constitutional muster; respondent's wrongdoing violates the HIPAA Privacy Rule, which incorporates the more stringent privacy rights under state law in South Carolina, deprives patients of individual, privacy, and property rights, and places physicians, including the petitioner-physician, in the untenable position of violating applicable state law in order to be paid for medically necessary services rendered in good faith without prior notice. No prior notice of change or "complex review" was given by respondent, and there has been no change in applicable state law. Respondent's wrongdoing consists of wrongful taking of patients' property, wrongful deprivation of privacy rights in protecting medical records, wrongful interference with established physician-patient relationships, and/or wrongful interference with patients' access to their physician of choice. Constitutionality of HIPAA is challenged as applied in this case to the claims in both Attachment A and B. *See*: 45 C.F.R. § 160.203.

XI. The dispute herein is a matter of statutory construction.

Section 264(c)(2) of the HIPAA statute provides that the privacy regulations promulgated by HHS "shall not supersede a contrary provision of State law, if the provision of State law imposes requirements, standards, or implementation specifications that are more stringent than the requirements, standards, or implementation specifications imposed under the regulation." HIPAA § 264(c)(2), 110 Stat.2033-34. The HHS regulations provide that a state law is "more stringent" than HIPAA if it "provides greater privacy protection for the individual who is the subject of the individually identifiable health information." 45 C.F.R. § 160.202. The regulation specifies that a state law is "more stringent" if it meets one or more of the following criteria:

a. the state law prohibits or restricts a use or a disclosure of information where HIPAA would allow it,

b. the state law provides an individual with "greater rights of access or amendment" to his medical information than provided under HIPAA,

c. the state law provides an individual with a "greater amount of information" about "a use, a disclosure, rights, and remedies,"

d. the state law provides for the retention or reporting of more detailed information or for a longer duration, or

e. the state law "provides greater privacy protection for the individual who is the subject of the individually identifiable health information."

45 C.F.R. § 160.202.

In this case, the state law, S.C. Code § 44-115-40, "provides greater privacy protection for the individual who is the subject of the individually identifiable health information." 45

C.F.R. § 160.202.

"Individually identifiable health information" refers to information that relates to the past, present, or future physical or mental health or condition of an individual, the provision of health care to an individual, or the past, present, or future payment for the provision of health care to an individual, and either (i) identifies the individual; or (ii) with respect to which there is a reasonable basis to believe that the information can be used to identify the individual. 42 U.S.C.A. § 1320d(6)(B). A patient's medical record contains "individually identifiable health information." 45 C.F.R. § 160.202. Comparisons between state law and HIPAA's Privacy Rule show that the state law is more stringent therefore, HIPAA's Privacy Rule preserves South Carolina's more rigorous protections. 45 C.F.R. § 160.203. Specifically, receipt of express, not general, written consent signed by the patient is required before honoring a request from third parties, including the respondents or respondents' sub-contractors/contractors, for release of copies of the patient's medical records under these circumstances. S.C. Code § 44-115-40. *See: SCMA v. Thompson*, 327 F.3d 346, 349 (4th Cir. 2003), cert. denied 540 U.S. 981, 124 S. Ct. 464 (2003); *Citizens for Health v. Leavitt*, 428 F.3d 167, 181-82, n.16 (3d Cir. 2005); *National Abortion Federation v. Ashcroft*, 2004 WL 555701, at *1-5 (S.D.N.Y. 2004).

XII. Attachment A and B claims should not be dismissed because the dispute herein is a matter of statutory construction, one of several exceptions to the requirement that parties exhaust administrative remedies.

The dispute herein is a matter of statutory construction involving state law, HIPAA, and HIPAA's Privacy Rule. Statutory construction is one of several exceptions to

the requirement that parties exhaust administrative remedies. *McDonald v. Centra, Inc.*, 946 F.2d 1059, 1063 (4th Cir. 1991). "A party is not required to exhaust administrative remedies if: (1) the dispute concerns statutory construction; (2) using administrative procedures would cause irreparable injury; (3) resorting to administrative procedures would be futile; (4) administrative remedies would be inadequate; or (5) the administrative decision would go unreviewed. See generally *Darby v. Kemp*, 957 F.2d 145, 147 (4th Cir.1992), rev'd on other grounds, 61 U.S.L.W. 4679 (U.S.1993); *McDonald v. Centra, Inc.*, 946 F.2d 1059, 1063 (4th Cir.1991), cert. denied, 60 U.S.L.W. 3815 (U.S.1992)." *Fares v. U.S. I.N.S.*, 50 F.3d 6 (4th Cir., 1995). Specifically, statutory construction of HIPAA and the following state law is at issue:

Except as otherwise provided by law (*with limited exceptions none of which apply here)*, a physician shall not honor a request for release of copies of medical records without receiving express written consent of the patient or person authorized by law to act on behalf of the patient. S.C. Code 44-115-40 (emphasis supplied).

HIPAA expressly preserves more stringent state laws, and the above statute provides more stringent protections for medical records. The plain language of the above statute requires the respondent/contractor/subcontractor(s) to provide express written consent signed by the patient for release of copies of medical records in South Carolina from a non-covered entity under HIPAA. Respondents violated applicable state law by failing to provide express written consent signed by the patient as timely requested by the petitioner-physician. PHI is the patient's information, not the physician's, and the petitioner-physician herein is not allowed by law to release copies of medical records without express written consent signed by the patient. The letter and spirit of the law

should be construed in the patients' favor, the intended beneficiaries. As such, statutory construction provides subject matter jurisdiction for both Attachment A and Attachment B claims. Accordingly, respondents' motions should be denied.

XIII. A valid HIPAA Business Associate Agreement (BAA) was not provided.

At all times related to the claims herein, the revisions to HIPAA after 2011 were not in effect. The request for release of medical records was not from the covered entity, but from a Business Associate. The Business Associate failed to provide a valid HIPAA Business Associate Agreement (BAA) and none is found in the record. Moreover, the subcontractor's and/or subcontractor of a subcontractor's role or intended role in unspecified "complex review" with alleged unauthorized access to the patients' medical records is material and supports request for discovery. The respondent, contractor, and/or subcontractor(s) did not provide a valid HIPAA Business Associate Agreement (BAA) or any Business Associate Agreement at all. The patient, along with the physician on patients' behalf, is entitled to proof of a valid BAA ensuring certain security measures and other features, which respondents failed to provide. Where respondent's BAA fails to require the BA to comply with HIPAA's Privacy Rule, the BA, i.e., contractor, subcontractor, and/or subcontractor(s) of a subcontractor, is not authorized to access PHI. The Business Associate, contractor, and/or subcontractor(s) failed to provide a valid HIPAA Business Associate Agreement under HIPAA's Privacy Rule, then in effect. Accordingly, respondents' motions should be denied or held in abeyance pending

discovery.

XIV. Based on years of claim submission and no notice of change, the "minimum necessary" protected health information (PHI) for billing purposes is established and was provided as evidenced by the fact the claims were paid.

Moreover, respondents violated HIPAA's own "minimum necessary" requirements regarding PHI by requesting more than the "minimum necessary," i.e., the entire medical record, rather than the usual and customary minimum required in this setting as established through the ordinary course over many years as well as those established for respondent, a covered entity, by HIPAA's own "minimum necessary" requirements. *See*: 45 CFR 164.502, 164.514. If the "minimum necessary" had not been provided, the claims would not have been paid, which corroborates petitioner's claims. The entire medical record is not the usual and customary "minimum necessary" in this setting. Medical associations advise physicians to follow applicable law, which requires a valid authorization signed by the patient for release of copies of medical records. Medical associations counsel physicians that the determining principle is that PHI belongs to the patient. If there is any doubt, the physician is legally and ethically bound to err in favor of the intended beneficiary, the patient. "A physician acts ethically when she provides confidential information to others ... as authorized by the patient." *SCBME v. Hedgepath*, 480 S.E.2d 724 (S.C. 1997).

The "minimum necessary" PHI for billing purposes for the non-covered entity is established over decades by the usual and customary PHI for claims processing by the physician. But for submission of the "minimum necessary" information establishing

medical necessity, the claims would not have been paid. There was no prior notice of any change requiring the entire medical record for billing purposes as compared to the usual and customary information. As a non-covered entity under HIPAA, there has been no change. To the extent respondent is arguing that notice on some website is reasonable, it is not reasonable to provide notice on a website to small practices and non-covered entities under HIPAA, and there is no such notice in the record. The record reflects respondents did provide other notices to the physician at the designated contact information, which is at the same location and in the usual and customary manner provided by respondent for many years. By routinely expanding the "minimum necessary" to include the patients' entire medical record of PHI, respondent engages in wrongdoing wholly inconsistent with and effectively negating the "minimum necessary" requirement and/or the letter and spirit of HIPAA's Privacy Rule, then in effect. Respondents' motions should be denied.

XV. Equitable estoppel.

Evidence in the record documents the physician requested redetermination, reconsideration, review, and/or appeal of the claims in Attachment A, which discovery should confirm. Contained in the record on appeal, the copy of the memorialization of respondent's notice that the appeal was unnecessary documents petitioner's request for appeal of claims, both A and B. That memorialization, generated in the ordinary course of business, and the authenticating affidavit are admissible as written documentation of the representations made by the (sub)contractor and constitute written evidence in the

record documenting petitioner's appeal of claims in Attachment A and B. Moreover, statutory construction is one of several exceptions to the requirement that parties exhaust administrative remedies. *McDonald v. Centra, Inc.*, 946 F.2d 1059, 1063 (4th Cir. 1991). Affirmative misconduct by the respondent and/or agents is established by the record, including but not limited to: attempt to thwart/prevent petitioner's appeal, violations of requirements for timely processing and handling of claims, violations of the "minimum necessary" requirement for billing purposes by requiring the entire medical record, violations of HIPAA's Privacy Rule which incorporates state law because South Carolina law is more stringent than HIPAA's Privacy Rule, violations of South Carolina privacy law for non-covered entities under HIPAA, and others. *See: SCMA v. Thompson*, 327 F.3d 346, 349 (4th Cir. 2003), cert. denied 540 U.S. 981, 124 S. Ct. 464 (2003). The respondent/contractor knew or should have known it was wrong to thwart/prevent appeal and to violate more stringent state privacy laws. The respondent/contractor intended to wrongfully thwart/prevent appeal and to violate more stringent state privacy laws. Petitioner relied on the respondent/contractor's representations that appeal was not necessary as the respondent/agent intended. The physician had no knowledge that the respondent/contractor's representations were untrue. The respondent/contractor's misconduct was relied upon to the detriment of the patients' and the physician's individual, privacy, and/or property rights. The physician should not be punished for complying with applicable law. "A physician acts ethically when she provides confidential information to others ... as authorized by the patient." *SCBME v. Hedgepath*, 480 S.E.2d 724 (S.C. 1997). Conversely, the respondent/contractor/subcontractor should not be unjustly enriched for wrongdoing.

XVI. The physician's good faith efforts.

The petitioner-physician "**did not know and could not reasonably have been expected to know**" that respondent would deny claims for medically necessary services rendered in good faith without prior notice. Respondent failed to provide notice and failed to provide a valid HIPAA Business Associate Agreement. As such, respondent, contractor, and/or subcontractor(s) were not authorized to access PHI. Petitioner timely notified the respondent/contractor/subcontractor of the applicable law without any response, suggesting respondent/contractor/subcontractor knew or should have known of the wrongdoing. *See: SCMA v. Thompson*, 327 F.3d 346, 349 (4th Cir. 2003), cert. denied 540 U.S. 981, 124 S. Ct. 464 (2003). Through no fault of the provider, who relied in good faith on the plain language of the applicable statute, on the usual and customary practice over years, on the advice of multiple attorneys, and on the attached Arnold & Porter opinion letters, the physician did not know and could not reasonably have been expected to know that respondent would not cover the services rendered in good faith to established and long-time patients as well as new patients; therefore, waiver is requested. Waiver is also requested pursuant to the above-referenced change of position by the DOJ because the DOJ now asserts the ACA is unconstitutional which supports the petitioner-physician's good faith assertion that respondents' wrongdoing herein is unconstitutional. Waiver is also requested pursuant to Executive Order No. 1, dated January 20, 2017, for the ACA (Affordable Care Act) penalty herein and for respondent's

wrongful taking of petitioner's fees for medically necessary services rendered in good faith without prior notice. The physician should not be punished for complying with applicable law. Accordingly, respondents' motions should be denied.

XVII. The tort of breach of confidentiality/privacy.

The HIPPA Privacy Rule incorporates State law if it provides greater privacy protection for the individual who is the subject of the individually identifiable health information. 45 C.F.R. § 160.203. "State law means a constitution, statute, regulation, rule, common law, or other State action having the force and effect of law." 45 C.F.R. § 160.202. As such, the HIPPA Privacy Rule anticipates and incorporates South Carolina law including, but not limited to, the tort of breach of confidentiality/privacy. The tort of breach of confidentiality/privacy in South Carolina confirms the need for "express written consent of the patient" under local law. *See: Meetze v. Associated Press*, 230 S.C. 330, 95 S.E.2d 606 (1957). Further, established case law provides that "(a) physician acts ethically when she provides confidential information to others ... as authorized by the patient." *SCBME v. Hedgepath*, 480 S.E.2d 724 (S.C. 1997). The physician should not be punished for complying with applicable law. Accordingly, respondents' motions should be denied.

XVIII. The State Constitution provides the right of privacy.

The HIPPA Privacy Rule incorporates State law if it provides greater privacy

protection for the individual who is the subject of the individually identifiable health information. 45 C.F.R. § 160.203. "State law means a constitution, statute, regulation, rule, common law, or other State action having the force and effect of law." 45 C.F.R. § 160.202. As such, HIPPA's Privacy Rule anticipates and incorporates South Carolina law including, but not limited to, the right of privacy contained in the South Carolina Constitution. The South Carolina Constitution is one of approximately ten state constitutions which expressly provides the right of privacy. S.C. Const. art. I § 10. If HIPAA's Privacy Rule had not incorporated the more stringent protections under state law, it could be found unconstitutional on its face; failure of respondent to incorporate the more stringent protections under state law is a systematic policy and procedure of unconstitutional application of HIPPA's Privacy Rule in South Carolina. Respondent ignores the plain language of the more stringent state laws in South Carolina. Respondents' systematic wrongdoing and unconstitutional policies and procedures of interpretation and application of HIPAA's Privacy Rule defeat and/or thwart Congressional intent to preserve more stringent state privacy laws and to grant express legislative rights to patients under HIPAA's Privacy Rule then in effect. Specifically, the R&R is reversible based on clear error regarding statutory construction and the failure to consider the plain language of applicable more stringent state privacy law as acknowledged, represented, and embraced by the Secretary, HHS, and then Respondent's Counsel Azar in the case of *SCMA v. Thompson*, 327 F.3d 346 (4th Cir., 2003), cert. denied 540 U.S. 981, 124 S. Ct. 464 (2003) with Terry Richardson on the other side for SCMA. Accordingly, the petitioner respectfully requests reversal.

XIX. The ALJ erred in dismissing claims in Attachment A.

Further, it is respectfully submitted that the ALJ erred in dismissing claims in Attachment A due to no redetermination. In fact, redetermination was requested, and the record reflects that Respondent thwarted review and wrongfully prevented redetermination by representing that the request for review was not necessary. See Footnote 1, *supra*. Similarly, review of multiple claims with the same issue is allowed and review of the claims herein involves the same issue. The physician's timely request for the Respondent to produce copies of relevant documents and/or EOB's to which the physician would not otherwise have access was denied. The claims in Attachment A represent covered services. Statutory construction is one of several exceptions to the requirement that parties exhaust administrative remedies. *McDonald v. Centra, Inc.*, 946 F.2d 1059, 1063 (4th Cir. 1991). Statutory construction provides subject matter jurisdiction for the Attachment A claims, which should not be dismissed.

XX. Specifically, the R&R is reversible based on clear error regarding statutory construction and the failure to consider the plain language of applicable state law.

As a non-covered entity under HIPAA, the physician's practice is subject to the same law in effect before the HIPAA Privacy Rule was enacted. Local law in South Carolina provides:

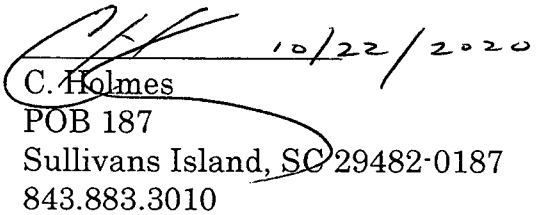
Except as otherwise provided by law (*with limited exceptions none of which apply here)*, a physician shall not honor a request for release of copies of medical records without the receipt of express written consent of the patient or person authorized by law to act on behalf of the patient. S.C. Code 44-115-40 (emphasis supplied).

The plain language of the statute requires Respondent to provide express written consent of the patient for release of copies of medical records. Respondents failed to comply with applicable state law by failing to provide express written consent. PHI is the patient's information, not the physician's, and the petitioner physician is not allowed by law to release copies of medical records unless Respondent provides express written consent. The letter and spirit of the law should be construed in the patients' favor as patients are the intended beneficiaries. The physician is happy to comply with authorization pursuant to applicable local law. Specifically, the R&R is reversible based on clear error regarding statutory construction and the failure to consider the plain language of applicable state law as acknowledged, represented, and embraced by the Secretary, HHS, and then Respondent's Counsel Azar in the case of *SCMA v. Thompson*, 327 F.3d 346 (4th Cir., 2003), cert. denied 540 U.S. 981, 124 S. Ct. 464 (2003). Accordingly, reversal of the lower court orders is respectfully requested.

CONCLUSION

WHEREFORE petitioner respectfully requests that this Court grant the petition for *writ of certiorari.*

Respectfully submitted,



10/22/2020

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