

21-1308

No.

In The Supreme Court of the United States

**J. MARTIN ROBERTSON,
Petitioner,**

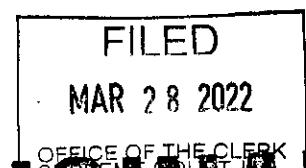
v.

**TEACHERS INSURANCE AND ANNUITY
ASSOCIATION OF AMERICA;
RIVERSTONE RESIDENTIAL GROUP, LLC
nka GREYSTAR RS GROUP, LLC;
RIVERSTONE RESIDENTIAL CA, INC.
nka GREYSTAR RS CA, INC.; AND
GREYSTAR REAL ESTATE PARTNERS, LLC,
Respondents.**

*On Petition For Writ Of Certiorari to the
California Court of Appeal, First Appellate District*

PETITION FOR WRIT OF CERTIORARI

**J. MARTIN ROBERTSON
1001 Bridgeway, No.515
Sausalito, California 94965
415-464-9447
jmr@mrobertsonlaw.com**



ORIGINAL

QUESTIONS PRESENTED FOR REVIEW

1. Whether Section 111 of the Medicare, Medicaid, and SCHIP Extension Act of 2007 as amended by Section 204 of the Medicare IVIG Access and Strengthening Medicare and Repaying Taxpayers Act of 2012, 42 U.S.C. § 1395y(b)(8), or guidance that the Centers for Medicare & Medicaid Services has issued to implement the statute since January 3, 2017 has required settlement or judgment debtors or their insurers to report the Social Security number or date of birth of a settlement or judgment creditor to CMS before or after they pay him a money settlement or judgment?
2. Whether a settlement or judgment creditor's rights to liberty and privacy under the Fourteenth Amendment to the U.S. Constitution protect his Social Security number and date of birth from disclosure to settlement and judgment debtors before or after they pay him a money settlement or judgment?
3. Whether, in denying a judgment creditor's requests that it take judicial notice of the CMS guidance on which judgment debtors' insurers relied to claim they needed his Social Security number and date of birth to report payment of a money settlement and judgment to CMS, subsequent CMS guidance and a Social Security Administration report on the history of the Social Security number, the California Court of Appeal denied him due process and equal protection of the law which the Fourteenth Amendment to the U.S. Constitution guarantees him?

PARTIES

The petitioner in this Court is J. Martin Robertson. He, who is admitted to practice law in California, other states and the District of Columbia but who is not admitted to practice in this Court, is representing himself in this matter.

The parties named as respondents in the court whose decision is sought to be reviewed, the California Court of Appeal for the First Appellate District, include (1) Larkspur Courts; (2) Larkspur Courts Apartments; (3) Teachers Insurance and Annuity Association of America; (4) Riverstone Residential Group, LLC; (5) Riverstone Residential CA, Inc.; (6) Riverstone Residential SF, Inc.; (7) Riverstone Residential Group, Inc.; and (8) Greystar Real Estate Partners, LLC.

Robertson's real opponents in this Court are (1) Teachers Insurance and Annuity Association of America; (2) Riverstone Residential Group, LLC nka Greystar RS Group, LLC; (3) Riverstone Residential CA, Inc. nka Greystar RS CA, Inc.; and (4) Greystar Real Estate Partners, LLC, all of which are private organizations.

PROCEEDINGS RELATED TO CASE

This case arises from the following proceedings:

Robertson v. Larkspur Courts, et al., No. CIV 1504551, Marin County (California) Superior Court. Order after judgment entered Aug. 25, 2020.

Robertson v. Larkspur Courts, et al., No. A160942, California Court of Appeal, First Appellate District. Opinion entered Oct. 5, 2021; order entered Oct. 21, 2021; orders entered Jan. 20, 2021 and May 28, 2021.

Robertson v. Larkspur Courts, et al., No. S271724, California Supreme Court. Order entered Dec. 29, 2021.

The following proceedings are also directly related to this case:

Robertson v. Larkspur Courts, et al., No. CIV 1504551, Marin County Superior Court. Order entered May 4, 2017; judgment entered May 4, 2017; orders after judgment entered Jul. 13, 2017, Feb. 23, 2018, Apr. 18, 2018 and Feb. 13, 2020.

Robertson v. Larkspur Courts, et al., No. A152226, California Court of Appeal, First Appellate District. Opinion entered May 22, 2018; order entered Jun. 8, 2018.

Robertson v. Larkspur Courts, et al., No. S249645, California Supreme Court. Order entered Aug. 8, 2018.

Robertson v. Larkspur Courts, et al., No. A154206, California Court of Appeal, First Appellate District. Opinion entered Jun. 19, 2019; order entered Jul. 11, 2019.

Robertson v. Larkspur Courts, et al., No. S257127, California Supreme Court. Order entered Sep. 18, 2019.

TABLE OF CONTENTS

QUESTIONS PRESENTED FOR REVIEW.....	i
PARTIES.....	ii
PROCEEDINGS RELATED TO CASE.....	ii
TABLE OF CONTENTS.....	iv
TABLE OF AUTHORITIES.....	vii
PETITION FOR WRIT OF CERTIORARI.....	1
BASIS FOR JURISDICTION.....	1
CONSTITUTIONAL PROVISIONS, STATUTES, REGULATIONS AND GUIDANCE INVOLVED IN THE CASE.....	2
STATEMENT OF THE CASE.....	3
A. Apartment Lease.....	3
B. Refusal to Respond to Mold Properly.....	4
C. Suit.....	4
D. Stipulation for Settlement.....	5
E. Judgment Modifying Stipulation.....	7
F. Appearing Defendants' First Post-Judgment Motion.....	8
G. Robertson's Post-Judgment Motions for Costs and Attorney's Fees and Appearing Defendants' Second and Third Post-Judgment Motions.....	14
REASONS FOR ALLOWANCE OF THE WRIT....	22
A. The Ways the Court of Appeal Decided the Questions Presented in the Petition Are Wrong.....	22
1. Question 1.....	23

a. Section 111 of the MMSEA.....	24
b. Section 204 of the SMART Act.....	26
c. CMS Guidance.....	27
2. Question 2.....	29
a. Liberty.....	29
b. Privacy.....	32
3. Question 3.....	34
B. The Questions Presented in the Petition Are Important Questions of Law That Have Not Been, but Should Be Settled by, this Court.....	35
C. The Way the Court of Appeal Decided the First Question Presented in the Petition Conflicts with Relevant Decisions of This Court.....	36
D. This Case Provides an Excellent Vehicle to Address the Questions Presented in the Petition.....	38
CONCLUSION.....	38
APPENDIX, VOLUME 1.....	1a
Rule 14.1(i)(i) Documents (opinions and orders entered in conjunction with the judgment sought to be reviewed)— documents listed in a table of contents prefacing Volume 1 of Appendix.....	1a

APPENDIX, VOLUME 1 (CONTINUED)

Rule 14.1(i)(ii) Documents (any other relevant opinions and orders entered in the case by courts)— documents listed in a table of contents prefacing Volume 1 of Appendix.....	37a
--	-----

APPENDIX, VOLUME 2.....	117a
--------------------------------	------

Rule 14.1(i)(v) Documents (material required by Rule 14.1(f))— documents listed in a table of contents prefacing Volume 2 of Appendix.....	117a
---	------

APPENDIX, VOLUME 3.....	357a
--------------------------------	------

Rule 14.1(i)(v) Documents (material required by Rule 14.1(g)(i))— documents listed in a table of contents prefacing Volume 3 of Appendix.....	357a
--	------

TABLE OF AUTHORITIES	
UNITED STATES SUPREME COURT CASES	
<i>Chevron, U.S.A. v. Natural Resources Defense Council, Inc. et al.</i> , 467 U.S. 837 (1984).....	36, 37
<i>FDA v. Brown & Williamson Tobacco Corp.</i> , 529 U.S. 120 (2000).....	36, 37
<i>Ferm v. United States Trustee</i> , 528 U.S. 1189 (2000).....	33
<i>NASA v. Nelson</i> , 562 U.S. 134 (2011).....	33
<i>Nixon v. Administrator of General Services</i> , 433 U.S. 425 (1977).....	32
<i>Washington v. Glucksberg</i> , 521 U.S. 702 (1997).....	29, 30
<i>Whalen v. Roe</i> , 429 U.S. 589 (1977).....	32, 33
UNITED STATES COURTS OF APPEALS CASES	
<i>In re Crawford</i> , 194 F.3d 954 (1999 9th Cir.).....	33
FEDERAL ACTS	
Medicare, Medicaid, and SCHIP Extension Act of 2007, Pub. L. No. 110-173, 121 Stat. 2492 (Dec. 29, 2007).....	23, 24, 25

FEDERAL ACTS (CONTINUED)

Medicare IVIG Access and Strengthening Medicare and Repaying Taxpayers Act of 2012, Pub. L. No. 112-242, 126 Stat. 2374 (Jan. 10, 2013).....	23, 26
--	--------

FEDERAL STATUTES

5 U.S.C. § 552a.....	2
28 U.S.C. § 1257.....	1
42 U.S.C. § 426.....	2, 23
42 U.S.C. § 426-1.....	2, 23
42 U.S.C. § 1395c.....	2, 23
42 U.S.C. § 1395j.....	2, 23, 24
42 U.S.C. § 1395k.....	2, 23, 24
42 U.S.C. § 1395o.....	2, 23, 24
42 U.S.C. § 1395y(b)(8).....	2, 9, 23, 24, 25
42 U.S.C. § 1395y(b)(8)(A)(i).....	25
42 U.S.C. § 1395y(b)(8)(A)(ii).....	25
42 U.S.C. § 1395y(b)(8)(B)	26
42 U.S.C. § 1395y(b)(8)(B)(i).....	25
42 U.S.C. § 1395y(b)(8)(B)(ii).....	25
42 U.S.C. § 1395y(b)(8)(C).....	11, 20, 25
42 U.S.C. § 1395y(b)(8)(H).....	25

CONGRESSIONAL REPORTS

Congressional Research Service, “S. 2499 – Medicare, Medicaid, and SCHIP Extension Act of 2007,” 110 th Cong., 1st Sess. (Dec. 29, 2007).....	24, 25
--	--------

H.R. REP. NO. 112-750 (Jan. 3, 2012).....	26
---	----

Senate Proceedings and Debates on S. 2499, 153 CONG. REC. S15834 (Dec. 18, 2007).....	24
---	----

FEDERAL REGULATIONS

42 C.F. R. § 400.202.....	2, 24
---------------------------	-------

FEDERAL GUIDANCE

<i>MMSEA Section 111 Medicare Secondary Payer Mandatory Reporting Liability Insurance (Including Self-Insurance), No-Fault Insurance, and Workers’ Compensation User Guide, Version 5.2, Chapters III and IV (Rev. 2017/3 January COBR-Q1-2017-v5.2 (Centers for Medicare & Medicaid Services Jan. 3, 2017).....</i>	2, 9, 27, 28, 29
--	------------------

<i>MMSEA Section 111 Medicare Secondary Payer Mandatory Reporting Liability Insurance (Including Self-Insurance), No-Fault Insurance, and Workers’ Compensation User Guide, Version 5.3, Chapters III and IV (Rev. 2017/15 December COBR-Q4-2017-v5.3 (Centers for Medicare & Medicaid Services Dec. 15, 2017).....</i>	2, 27, 28, 29
---	---------------

FEDERAL GUIDANCE (CONTINUED)

*MMSEA Section 111 Medicare Secondary Payer
Mandatory Reporting Liability Insurance
(Including Self-Insurance), No-Fault
Insurance, and Workers' Compensation User
Guide, Version 5.9, Chapters I, III and IV
(Rev. 2020/29 June COBR-Q2-2020-v5.9
(Centers for Medicare & Medicaid Services
Jun. 29, 2020).....2, 27, 28, 29*

*MMSEA Section 111 Medicare Secondary Payer
Mandatory Reporting Liability Insurance
(Including Self-Insurance), No-Fault
Insurance, and Workers' Compensation User
Guide, Version 6.7, Chapters I, III and IV
(Rev. 2022/10 January COBR-Q1-2022-v6.7
(Centers for Medicare & Medicaid Services
Jan. 10, 2022).....2, 27, 28, 29*

UNITED STATES CONSTITUTION

U.S. CONST. amend. XIV, § 1.....2, 29, 30, 34, 35

FEDERAL AGENCY REPORTS

Social Security Administration,
“The Story of the Social Security number,”
Social Security Bulletin, Volume 69, No. 2
(2009).....30, 31

CALIFORNIA STATUTES

California Civil Code § 1717.....2, 14, 17, 19

California Civil Code § 1798.1.....2

California Code of Civil Procedure § 170.6...2, 14, 15

California Code of Civil Procedure § 663.....2, 8

California Code of Civil Procedure § 664.6.....2, 7

CALIFORNIA STATUTES (CONTINUED)

California Code of Civil Procedure § 685.010.....	2, 10
California Code of Civil Procedure § 685.020.....	2, 10
California Code of Civil Procedure § 685.040.....	2
California Code of Civil Procedure § 916.....	2
California Code of Civil Procedure § 917.1.....	2
California Code of Civil Procedure § 918.....	2
California Code of Civil Procedure § 918.5.....	2
California Code of Civil Procedure § 1008.....	2, 12
California Code of Civil Procedure § 1021.5.....	
.....	2, 14, 17, 18, 19
California Code of Civil Procedure § 1032.....	
.....	2, 14, 17, 18
California Evidence Code § 350.....	2
California Evidence Code § 451.....	2
California Evidence Code § 452.....	2
California Evidence Code § 453.....	2
California Evidence Code § 459.....	2
California Evidence Code § 720.....	2
California Evidence Code § 1200.....	2

CALIFORNIA RULES

California Rules of Court,	
Rule 8.252.....	2

California Court of Appeal	
First Appellate District Local Rules,	
Rule 6.....	2

CALIFORNIA CONSTITUTION

CAL. CONST. art. I, § 1.....	2
------------------------------	---

PETITION FOR WRIT OF CERTIORARI

J. Martin Robertson respectfully petitions for a writ of certiorari to review a decision of the California Court of Appeal for the First Appellate District in this case.

BASIS FOR JURISDICTION

On October 5, 2021, the California Court of Appeal for the First Appellate District entered a decision affirming the Marin County Superior Court's August 25, 2020 order after judgment. App.A; App.E. On October 21, 2021, the Court of Appeal entered an order denying Robertson's petition for rehearing. App.D.

On December 29, 2021, the California Supreme Court entered an order denying Robertson's petition for review of the Court of Appeal's decision. App.F.

This Court has jurisdiction to review the California Court of Appeal's decision and the three questions of federal law that Robertson presents in this petition pursuant to 28 U.S.C. § 1257.

Robertson specifies the stages of the state court proceedings, in the trial and appellate courts, when the federal questions he asks the Court to review were raised, the method or manner of raising them and the ways the courts passed on them to show that the federal questions were timely and properly raised and that the Court has jurisdiction to review the decision in the Statement of the Case set forth below.

CONSTITUTIONAL PROVISIONS, STATUTES, REGULATIONS AND GUIDANCE INVOLVED IN THE CASE

Constitutional provisions (the Due Process and Equal Protection Clauses of the U.S. Constitution, Amendment XIV, § 1), federal statutes (42 U.S.C. §§ 426, 426-1, 1395c, 1395j, 1395k, 1395o, 1395y(b)(8) and 5 U.S.C. § 552a) and federal regulations (42 C.F.R. § 400.202) are involved in this case. App.X-HH, 2:117a-163a.

In addition, Centers for Medicare & Medicaid Services guidance (the *MMSEA Section 111 Medicare Secondary Payer Mandatory Reporting Liability Insurance (including Self-Insurance), No-Fault Insurance, and Workers Compensation User Guide*, Versions 5.2, 5.3, 5.9 and 6.7, commonly called the “NGHP [Non-Group Health Plan] User Guides” or “NGHP User Guides”), is involved in this case. App.II-LL, 2:164a-316a.

Finally, a California Constitutional provision (the Privacy Clause of the California Constitution, Article I, § 1), California statutes (California Civil Code §§ 1717 and 1798.1, Code of Civil Procedure §§ 170.6, 663, 664.6, 685.010, 685.020, 685.040, 916, 917.1, 918, 918.5, 1008, 1021.5 and 1032 and Evidence Code §§ 350, 451, 452, 453, 459, 720 and 1200) and California rules (California Rules of Court, Rule 8.252, and California Court of Appeal First Appellate District Local Rules, Rule 6) have been involved in this case. App.MM-KKK, 2:317a-355a.

The key provisions involved in this case are contained in 42 U.S.C. § 1395y(b)(8), the NGHP User Guides and the Fourteenth Amendment, § 1.

App.GG, 2:157a-162a; App.II-LL, 2:164a-316a; App.X, 2:117a.

California authorities are identified to provide the Court with the context in which the federal questions presented for review were raised and passed on in the California courts.

STATEMENT OF THE CASE

A. Apartment Lease.

On January 25, 1999 and October 1, 2003, Robertson entered into leases of an apartment in Larkspur, California, with Larkspur Courts. From approximately January 25, 1999 to February 28, 2014, he lived in the apartment, paying Larkspur Courts approximately \$471,415.00 in rent for it. AA288, 24:003730:19-003731:13; AA289, 25:003803-003808.¹

Since August 17, 1999, when it acquired the apartment complex where Robertson leased the apartment, Teachers Insurance and Annuity Association of America (“TIAA”) has owned the complex. AA288, 24:003731:14-003732:7; AA289, 25:003809-003816.

From at least 2013 to 2014, Riverstone Residential Group entities were involved in the management of the apartment for TIAA. AA288, 24:003732:24-003733:4 and 003742:15-003743:1.

¹ “AA” refers to the appendix (Appellant’s Appendix) filed in the Court of Appeal.

B. Refusal to Respond to Mold Properly.

On December 20, 2013, Robertson observed what he thought was extensive mold in the apartment. Subsequent investigation confirmed the presence of that. On February 28, 2014, after trying to get the owners and managers of the apartment to respond to the mold properly for 70 days but failing to get them to do that, he vacated the apartment. When he moved, he left many of his things (which were exposed to and contaminated by the mold) in the apartment. AA288, 24:003744:1-003750:21.

Because of the conduct of the owners and managers of the apartment, Robertson incurred losses and expenses of \$30,873.91. AA288, 24:003751:14-003752:10.

C. Suit.

On December 18, 2015, Robertson, out more than \$30,000, sued the entities that owned and managed the apartment for damages, naming eight entities as defendants. On January 19, 2016, before serving the complaint, he filed an amended complaint. On June 1, 2016, he filed a second amended complaint. AA288, 24:003752:12-20; AA54, 3:000170-000460 (second amended complaint).

In his second amended complaint, he sought compensatory damages for losses and expenses and emotional distress he suffered as a result of the mold and the risk the mold presented. He sought punitive damages for the defendants' intentional misrepresentation and concealment of information about the mold and how they planned to remove it after he asked them to respond to the conditions properly. He did not seek damages for physical

injuries or medical expenses. AA288, 24:003753:10-18.

Four of the named defendants—TIAA; Riverstone Residential Group, LLC nka Greystar RS Group, LLC; Riverstone Residential CA, Inc. nka Greystar RS CA, Inc.; and Greystar Real Estate Partners, LLC—appeared. The other four named defendants—Larkspur Courts; Larkspur Courts Apartments; Riverstone Residential SF, Inc.; and Riverstone Residential Group, Inc.—did not appear. AA288, 24:003753:19-26.

D. Stipulation for Settlement.

On January 17, 2017, the appearing defendants and Robertson mediated the case before Martin Quinn at JAMS in San Francisco, California. AA288, 24:003756:10-27. At the mediation, the appearing defendants agreed to reimburse Robertson for \$28,000.00 of the \$30,873.91 in losses and expenses he incurred because of the defendants' acts and omissions. They did not agree to pay him damages for anything else. Robertson has not submitted any claim for physical injuries or medical expenses to the defendants or to any federal or state health services agency. AA288, 24:003756:9-27.

From January 17-24, 2017, the appearing defendants and Robertson signed a Stipulation for Settlement which the mediator, Quinn, prepared and, at Robertson's request, edited. AA288, 24:003757:1-24.

The text of the Stipulation, as transcribed in the appendix, is less than three pages long. App.FFFF, 3:448a-452a (AA289, 25:003851-003856).

The Stipulation, in essence, requires that (1) the appearing defendants and Robertson sign, acknowledge and deliver to each other a mutual release—which includes as parties *all named defendants and their affiliated entities*—of all claims, known and unknown, in the action or arising out of or related to his occupancy of the apartment and (2) the appearing defendants pay Robertson a settlement amount of \$28,000.00 *before* he signs and delivers a dismissal with prejudice of the action to the appearing defendants. The Stipulation requires each party to bear its own attorney's fees and court costs for matters covered in the Stipulation but **not** for matters **not** covered in the Stipulation. AA288, 24:003757:19-24.

The terms in the Stipulation do **not** require Robertson to disclose his Social Security number or date of birth to the appearing defendants, their insurers or anyone else before or after they pay him the settlement amount.

No one (no officer, director, employee, attorney or agent of the appearing defendants or anyone else) asked him to include terms requiring him to disclose his Social Security number or date of birth to them in the Stipulation before the appearing defendants and he signed it. AA377, 32:005294:1-4.

Robertson was **not** eligible for Medicare benefits and was **not** a Medicare beneficiary when the appearing defendants and he signed the Stipulation. To wit, he (1) was not 65 years of age or older, (2) was not receiving disability benefits from Social Security or the Railroad Retirement Board and (3) did not have End Stage Renal Disease on January 17-24, 2017. AA288, 24:003772:16-25.

Robertson would *not* have signed the Stipulation if those defendants had asked that terms requiring him to disclose the information to them, their insurers or anyone else be included in it. AA288, 24:003770:24-27.

E. Judgment Modifying Stipulation.

On January 24, 2017, the trial court reassigned the case from Judge Geoffrey M. Howard to Judge Stephen P. Freccero. App.H, 1:37a-39a (AA165, 27:004203-004204).

On May 4, 2017, after denying the appearing defendants' motion to enforce settlement and granting Robertson's motion to enter judgment on the Stipulation, the trial court entered judgment, modifying material terms in the Stipulation almost exactly as the appearing defendants proposed (in a proposed judgment they lodged) over Robertson's objections, pursuant to California Code of Civil Procedure § 664.4. App.I, 1:40a-43a (AA149, 9:001706-001709) (order); App.J, 1:44a-47a (AA150, 9:001710-001713) (judgment).

In the judgment, the trial court (1) required the appearing defendants and Robertson to accept a mutual release that includes as parties *only* the four appearing defendants and their affiliated entities *rather than* a mutual release that includes as parties *all* eight named defendants and their affiliated entities, (2) allowed the appearing defendants to remit payment of the settlement amount to Robertson *rather than* pay him *themselves* and (3) required Robertson to dismiss his claims against *all* eight named defendants *without* getting releases of the four non-appearing defendants' claims against him before he dismisses

his claims against those defendants. The judgment requires each to bear its own attorney's fees and court costs for matters covered in the judgment but *not* for matters *not* covered in the judgment.

AA288, 24:003759:7-19.

The terms in the judgment do *not* require Robertson to disclose his Social Security number or date of birth to the appearing defendants, their insurers or anyone else before or after they pay him the settlement amount.

On July 13, 2017, the trial court entered an order denying Robertson's May 22, 2017 motion to vacate the judgment and enter an amended judgment correctly reflecting terms in the Stipulation pursuant to California Code of Civil Procedure § 663. The trial court sanctioned him for asking it to replace some of the words it included in the judgment at the request of the appearing defendants with words those defendants and he included in the Stipulation. App.K, 1:48a-55a (AA173, 10:001989-001995).

On August 11, 2017, Robertson appealed from the trial court's May 4, 2017 judgment and July 13, 2017 order after judgment in Case No. A152226.

F. Appearing Defendants' First Post-Judgment Motion.

On January 5, 2018, the appearing defendants filed a post-judgment motion seeking an order to "compel Plaintiff to disclose his Date of Birth and Social Security Number and to stay the enforcement of the Court's Judgment until Plaintiff complies with such disclosure." App.LLL, 3:357a (AA224, AA17:002523:27-002524:7). In a memorandum in support, they said they "must

obtain Plaintiff's Social Security Number and Date of Birth in order to comply with Medicare's federal reporting requirements." App.MMM, 3:359a (AA225, 17:002536:1-4).

In support of their motion, they filed a Declaration of AIG, which Darryl H. Cabbagstalk, a Complex Claims Director for AIG Claims, Inc., the claims handling representative for the appearing defendants' insurer, AIG Specialty Insurance Company, signed. App.NNN, 3:360a-362a (AA227, AA17:002592-002595).

In his declaration, Cabbagstalk claimed that AIG required Robertson's Social Security number and date of birth to remit payment to Robertson to comply with Medicare reporting requirements.

Cabbagstalk asserted:

4. As the carrier representative for Defendants, AIG intends on remitting this payment on behalf of Defendants. However, pursuant to the Medicare and Medicaid SCHIP Extension Act of 2007 (MMSEA), Section 111 of the MMSEA amended the Medicare Secondary Payer (MSP) statute to require "an applicable plan" such as liability insurance to report claim and settlement information involving Medicare beneficiaries to the Centers for Medicare & Medicaid Services (CMS). 42 U.S.C. § 1395y(b)(8). To this end, Medicare requires either the HICN or Social Security number [either the last 5 digits or the full 9 digit SSN], the beneficiary's first and last name, the date of birth, and the gender to coordinate benefits. NGHP User Guide v. 5.2. As a result, the

Plaintiff's Social Security Number [either the last 5 digits or the full 9 digit SSN] and Date of Birth is required in order for AIG to remit payment to Plaintiff, in order to comply with Medicare reporting requirements.

Id., 3:361a.

Cabbagestalk did not provide a full citation for, or a copy of, what he called "NGHP User Guide v. 5.2" in or with his declaration.

On January 24, 2018, Robertson opposed the appearing defendants' motion. AA229-233, 18:002599-19:003068. In his opposition, he raised the first and second questions of federal law that he raises in this petition. He reproduces the pages where he raised **Questions 1 and 2** in his appendix. App.000, 3:363a-366a (AA229, 18:0002611:1-002615:2).

On February 23, 2018, while Robertson's appeal from the judgment and order after judgment in Case No. A152226 was pending, the trial court entered another order after judgment **requiring** Robertson to disclose his Social Security number and date of birth to the appearing defendants and **conditioning** their obligations to pay him the settlement amount and post-judgment interest on the settlement amount (to which California Code of Civil Procedure §§ 685.010-685.020 entitle him) on his disclosure of the information to them, **modifying** material terms in the judgment and the Stipulation underlying it. App.L, 1:56a-75a (AA245,19:003114-003127). The specific directives of the order, as transcribed in the appendix, contain two pages of text. App.L, 1:63a-65a ("Conclusions and Order" section in order).

In its order, the trial court overruled Robertson's objections to Cabbagstalk's declaration. App.L, 1:59a-60a (AA245, 19:003116:21-003117:4). Robertson objected, essentially, on grounds that the appearing defendants denied him the opportunity to confront Cabbagstalk concerning what the user guide on which he relied (NGHP User Guide Version 5.2) said, denying him due process and equal protection of the law. App.PPP, 3:367a-371a (AA232, 19:003061-003065) (written objections); App.QQQ, 3:373a and 3:375a-377a (oral objections).

In ruling on **Question 1**, the trial court concluded that the appearing defendants "have established that access to Plaintiff's date of birth and social security number is necessary to satisfy their federal Medicare reporting requirements." App.L, 1:60a (order). It based its order on this:

Defendants are ready to make the settlement payment to Plaintiff. To do so, their insurer (AIG) contends it must have Plaintiff's date of birth and social security number in order to report claim and settlement information to the Centers for Medicare & Medicaid Services (CMS).

App.L, 1:69a (Exhibit 1 to order). It said it found "no basis for concluding that the reporting requirements are no longer valid." App.L, 1:60a (order). It did not cite any section of any statute other than 42 U.S.C. § 1395y(b)(8)(C) or any section or page of any NGHP User Guide in support of its conclusion. App.L, 1:56a-75a. It did not find that Robertson was a Medicare beneficiary when the appearing defendants and he signed the Stipulation. App.L, 1:56a-75a.

In ruling on **Question 2**, the trial court concluded that, “[o]n balance, the court finds that Defendants’ need to comply with federal law outweighs the speculative possibility of future harm” to Robertson. App.L, 1:62a (order).

On March 13, 2018, Robertson filed a motion for reconsideration of the appearing defendants’ January 5, 2018 motion pursuant to California Code of Civil Procedure § 1008. AA247-251, 20:003144-003259). On April 10, 2018, he filed a reply to the appearing defendants’ opposition to his motion. AA261-263, 21:003310-003454. In his motion and reply, he raised the first and second questions of federal law that he raises in this petition. He reproduces the pages where he raised **Questions 1 and 2** in his appendix. App.RRR, 3:378a-380a (AA248, 20:003158:1-003163:3) (memorandum in support of motion); App.SSS, 3:381a-383a (AA261, 21:003318:5-003321:9) (reply).

On April 18, 2018, the trial court, in another order after judgment, denied Robertson’s motion for reconsideration of the appearing defendants’ January 5, 2018 motion. App.M, 1:76a-83a (AA265, 21:003459-003465).

On April 24, 2018, Robertson appealed from the trial court’s February 23, 2018 and April 18, 2018 orders after judgment in Case No. A154206.

On May 22, 2018, in Case No. A152226, the Court of Appeal affirmed the trial court’s May 4, 2017 judgment and July 13, 2017 order. It upheld the trial court’s conclusion that its modification of terms in the Stipulation did not prejudice Robertson and its sanction of him for asking it to amend some of the terms it modified. App.N, 1:84a-94a.

On August 8, 2018, the California Supreme Court denied review of the Court of Appeal's May 22, 2018 decision. App.P, 1:96a.

On August 27, 2018 and October 24, 2018, in his corrected opening brief and reply brief in his appeal from the trial court's February 23, 2018 and April 18, 2018 orders in Case No. A154206, Robertson raised the first and second questions of federal law that he raises in this petition. He reproduces the pages where he raised **Questions 1 and 2** in his appendix. App.TTT, 3:384a-387a (corrected opening brief); App.UUU, 3:388a-394a (reply brief).

On June 19, 2019, in Case No. A154206, the Court of Appeal vacated the trial court's February 23, 2018 order on grounds that the trial court lacked jurisdiction to enter the order while Robertson's appeal from the trial court's judgment and order after judgment was pending. App.R, 1:99a-107a. It concluded that:

The trial court ordered that Robertson provide his date of birth and Social Security number to respondents within 10 days of the order, conditioned respondents' obligation to pay on his compliance with this directive, and stayed the accrual of post-judgment interest until he provided the relevant information.

App.R, 1:102a. Based on that, it concluded that "the order 'effectively modif[ied] the [j]udgment.'" App.R, 1:104a.

When it vacated the order, it restored Robertson's rights to collect the settlement amount and post-judgment interest on the settlement amount without disclosing his Social Security

number and date of birth to the appearing defendants (rights which the trial court took away from him when it entered its February 23, 2018 order).

On September 18, 2019, the California Supreme Court denied review of the Court of Appeal's June 19, 2019 decision. App.T, 1:109a.

G. Robertson's Post-Judgment Motions for Costs and Attorney's Fees and Appearng Defendants' Second and Third Post-Judgment Motions.

On October 21, 2019, his rights to collect the settlement amount and post-judgment interest on it without disclosing his Social Security number and date of birth to the appearing defendants restored, Robertson filed motions for costs he incurred opposing their post-judgment applications and motion to require him to disclose the information to them before they pay him the settlement amount and moving for costs he incurred doing that from the appearing defendants pursuant to California Code of Civil Procedure § 1032 and from TIAA (which, as indicated above, owns Larkspur Courts) under the second lease that Larkspur Courts and he signed pursuant to California Civil Code § 1717. He filed a motion for attorney's fees for time he spent opposing their applications and motion and moving for time he spent doing that from the appearing defendants pursuant to California Code of Civil Procedure § 1021.5. AA282-295, 24:003652-27:004381.

On December 2, 2019, Robertson filed a motion for peremptory disqualification of Judge Freccero on grounds that he was prejudiced against him and his interest and he could not have a fair

and impartial hearing before him on remand pursuant to California Code of Civil Procedure § 170.6. AA305-309, 28:004559-004608.

On January 15, 2020, Robertson filed amended motions for costs and attorney's fees. AA313-322, 30:004629-004737.

Robertson itemized \$20,904.09 in costs he incurred and recorded 1,584.6 hours of time he spent in his capacity as an attorney opposing the appearing defendants' post-judgment actions to require him to disclose his Social security number and date of birth to them before they pay him the settlement amount and moving for costs and attorney's fees doing that in the trial and appellate courts. AA371, 32:005195 (costs summary); AA379, 33:005443 (hours-rate summary).

On January 15, 2020, in his amended memorandum in support of his amended motion for costs, Robertson raised the first question of federal law that he raises in this petition. He reproduces the pages where he raised **Question 1** in his appendix. App.VVV, 3:395a-399a.

On January 15, 2020, the appearing defendants filed another (a second) motion seeking an order to require Robertson to disclose his Social Security number and date of birth to them before they pay him the settlement amount. In their motion, they asked the trial court (1) to require him to sign a release of his claims (including his claims for the costs and the attorney's fees he sought in his motions for costs and attorney's fees) against them, their insurers and their attorneys and (2) to relieve them of their obligations to pay him post-judgment interest on the settlement amount. They did not file

a declaration of Cabbagestalk or any other AIG officer, director or employee in support of their motion. AA324-328, 30:004742-004860.

On February 13, 2020, the trial court granted Robertson's motion for peremptory disqualification of Judge Freccero. App.V, 1:112a.

On February 14, 2020, the trial court reassigned the case to Judge James T. Chou. App.W, 1:113a-115a.

On February 24, 2020, the appearing defendants filed another motion asking the trial court (1) to require Robertson to sign a release of his claims (including his claims for the costs and the attorney's fees he sought in his amended motions for costs and attorney's fees) against them, their insurers and their attorneys and (2) to relieve them of their obligations to pay him post-judgment interest on the settlement amount. AA357-360, 31:005030-005113.

On February 25, 2020, the appearing defendants withdrew their January 15, 2020 motion, dropping their demand that Robertson disclose his Social Security number and date of birth to them before they pay him the settlement amount. AA362, 31:005116.

On June 4, 2020, the appearing defendants sent Robertson a check for the settlement amount. They did not send him a check for the \$8,446.03 in post-judgment interest they owed him for their 1,102-day delay in paying him. AA377, 32:005260:22-005261:4 and 005262:15-20; AA378, 32:005350-005354. Post-judgment interest accrued because his prior appeals did not stay their obligations to pay him the settlement amount.

On July 30, 2020, Robertson filed an opposition to the appearing defendants' February 24, 2020 motion. AA389-396, 36:005916-006198. In his opposition, he raised the first and second questions of federal law that he raises in this petition. He reproduces the pages where he raised **Questions 1 and 2** in his appendix. App.WWW, 3:400a-401a.

On August 12, 2020, at the hearing on his amended motions for costs and attorney's fees and the appearing defendants' motion to require him to sign a release and relieve them of their obligations to pay him post-judgment interest on the settlement amount, Robertson raised the first question of federal law that he raises in this petition. He reproduces the pages where he raised **Question 1** in his appendix. App.XXX, 3:402a-407a.

On August 25, 2020, in another order after judgment, the trial court denied Robertson's amended motion for costs under Section 1032. It denied his amended motion for attorney's fees under Section 1021.5. It granted the appearing defendants' motion to deny him post-judgment interest on the settlement amount but denied their motion to require him to sign a release as they proposed.² It did not rule on his amended motion for costs under the second lease pursuant to Section 1717. App.E, 1:24a-33a (AA409, 37:006301-006312).

² Robertson negotiated with them about entry into a mutual release excepting his claims for costs and attorney's fees and his claims for post-judgment interest to no avail. AA390, 36:005958:17-005968:13.

The trial court ruled on **Questions 1 and 2** when it said that:

Plaintiff is not a prevailing party. The Court of Appeal's ruling vacating Judge Freccero's February 23, 2018 order compelling plaintiff to provide his Social Security Number and Date of Birth (SSN/DOB) as a condition of payment, did not result in a net monetary recovery for plaintiff within the meaning of section 1032(a)(4). The Court of Appeal's decision was not on the merits of the order. In fact, the Court of Appeal acknowledged that the trial court could enter the same order once jurisdiction was restored.

App.E, 1:30a (Exhibit 1 to order).

On September 4, 2020, Robertson appealed from the trial court's August 25, 2020 order after judgment in Case No. A160942. That stayed trial court review of proposed mutual releases that the appearing defendants and he lodged to comply with that order.

On January 15, 2021 and May 26, 2021, in his opening brief and reply brief in his appeal from the trial court's August 25, 2020 order, Robertson raised the first and second questions of federal law that he raises in this petition. He reproduces the pages where he raised **Questions 1 and 2** in his appendix. App.YYY, 3:408a-412a (opening brief); App.AAAA, 3:426a-433a (reply brief).

On October 5, 2021, in Case No. A160942, the Court of Appeal affirmed the trial court's August 25, 2020 order after judgment denying his amended motion for costs under California Code of Civil Procedure § 1032. App.A, 1:9a-11a. It affirmed the

trial court's order denying his amended motion for attorney's fees under California Code of Civil Procedure § 1021.5. App.A, 1:7a-9a. It affirmed the trial court's order granting their motion to deny him post-judgment interest on the settlement amount. App.A, 1:11a-17a. It did not rule on his amended motion for costs under the second lease pursuant to California Civil Code § 1717. App.A, 1:1a-18a.

In ruling on **Questions 1 and 2** in Case No. A160942, the Court of Appeal changed its conclusions in its June 19, 2019 opinion in Case No. A154206. It said:

In its February 2018 ruling on respondents' first motion to enforce the judgment, the trial court addressed the parties' dispute about whether respondents needed the social security information to pay Robertson. Although we vacated the ruling on jurisdictional grounds in *Robertson II*, we appreciate the court's sensible reasoning and measured approach in addressing the issue. The court found that respondents "established that access to [Robertson's social security information was] necessary for them to satisfy their federal Medicare reporting requirements. (See 42 U.S.C. § 1395y(b)(8)(C).)" It agreed with Robertson that he has privacy interests in the information, but it found that those interests were outweighed by AIG's "legitimate and necessary" need for the information, especially since AIG was "potentially subject to significant financial penalties if [it failed] to report the settlement." In an effort to protect Robertson's interests, the court

“proposed strict terms for a protective order” that would have imposed limits on the information’s use, and respondents agreed to be bound by such an order. The court concluded that the “disclosure of [the] additional information” would not materially alter the terms of the settlement, but instead would be “simply a ministerial act, one reasonably necessary so that material terms of the settlement [could] be executed while complying with federal law.”

We find no fault with the trial court’s ruling, although we need not decide whether AIG in fact had a legal obligation to report the settlement. In our view, it was enough that AIG had a reasonable and good-faith basis to believe it had such an obligation. Thus, AIG’s request for the social security information is not fairly characterized as a condition of payment, but is more accurately characterized as a good-faith attempt to obtain information AIG reasonably believed was necessary to transmit the payment. In turn, we view Robertson’s non-responsiveness to be akin to a judgment creditor’s refusal to give a judgment debtor wiring instructions needed to transmit funds to the creditor’s account.

App.A, 1:15a-16a. It did not cite any section of any statute other than 42 U.S.C. § 1395y(b)(8)(C) or any provision of any CMS user guide in support of its opinion. App.A, 1:1a-18a. It did not say that Robertson was a Medicare beneficiary when the appearing defendants and he signed the Stipulation. App.A, 1:1a-18a.

The Court of Appeal denied Robertson's requests to take judicial notice of, *inter alia*, NGHP User Guide Versions 5.2 to 6.3 and the Social Security Administration's report entitled "The Story of the Social Security Number." App.A, 1:2a, n. 1 (opinion); App.B, 1:19a-20a (first pre-opinion order); App.C, 1:21a-22a (second pre-opinion order); App.ZZZ, 3:413a-425a (relevant portions of first request to take judicial notice); App.BBBB, 3:434a-439a (relevant portions of second request). The Court of Appeal did not rule on Robertson's requests to take judicial notice of NGHP User Guide Version 6.4. App.A, 1:1a-18a. Robertson made those requests in a motion he filed on June 29, 2021. App.CCCC, 3:440a-443a (relevant portions of third request).

On October 20, 2021, Robertson filed a petition for rehearing in the Court of Appeal. In his petition, he raised the first and second questions of federal law that he raises in this petition. He reproduces the pages where he raised **Questions 1 and 2** in his appendix. App.DDDD, 3:444a-445a.

On October 21, 2021, the Court of Appeal denied Robertson's petition for rehearing. App.D, 1:23a.

On November 10, 2021, Robertson filed a petition for review in the California Supreme Court. In his petition, he raised the first, second and third questions of federal law that he raises in this petition. He reproduces the pages where he raised **Questions 1, 2 and 3** in his appendix. App.EEEE, 3:446a-447a.

On December 29, 2021, the California Supreme Court denied Robertson's petition for review. App.F, 1:34a.

REASONS FOR ALLOWANCE OF THE WRIT

A. The Ways the Court of Appeal Decided the Questions Presented in the Petition Are Wrong.

The Court of Appeal affirmed the trial court's order denying Robertson's amended motions for costs and attorney's fees and granting the appearing defendants' motion to deny him post-judgment interest on two sets of grounds.³

First, it did that on grounds that

- (1) Cabbagstalk "had a reasonable and good-faith basis to believe" AIG entities had "a legal obligation" to report payment of the settlement amount to CMS and AIG entities needed Robertson's Social Security number and date of birth to do that and
- (2) Robertson was "vexatious and obstructionist" in opposing their applications and motions to require him to disclose the information to them.

Second, it did that on grounds that (1) "AIG's request for social security information is not fairly characterized as a condition of payment, but is more accurately characterized as a good-faith attempt to obtain information AIG reasonably believed was necessary to transmit the payment" and (2) "Robertson's non-responsiveness" was "akin to a judgment creditor's refusal to give a judgment

³ The Court of Appeal also denied him attorney's fees on other grounds, under California law.

debtor wiring instructions needed to transmit funds to the creditor's account."

Essentially, the Court of Appeal concluded that federal law required the appearing defendants' insurers to report Robertson's Social Security number and date of birth to CMS and that Robertson obstructed them from paying him by refusing to disclose the information to them.

The Court of Appeal's conclusions are wrong.

1. Question 1.

Neither Section 111 of the Medicare, Medicaid, and SCHIP Extension Act of 2007 (the "MMSEA") as amended by Section 204 of the Medicare IVIG Access and Strengthening Medicare and Repaying Taxpayers Act of 2012 (the "SMART Act"), 42 U.S.C. § 1395y(b)(8), *nor* guidance that CMS has issued to implement the statute since January 3, 2017 has required the appearing defendants or their insurers to report Robertson's Social Security number or date of birth to CMS before or after they pay him the settlement amount.

In Sections 226-226A of the Social Security Act, as amended, 42 U.S.C. §§ 426-426-1, Congress said that, to be entitled to benefits under Part A of the Medicare program (which it established in Section 1811 of the Act, as amended, 42 U.S.C. § 1395c), an individual must (1) be 65 years of age or older, (2) be receiving disability benefits from Social Security or the Railroad Retirement Board or (3) have End Stage Renal Disease. In Section 1836 of the Act, as amended, 42 U.S.C. § 1395o, Congress said that, to be entitled to benefits under Part B of the Medicare program (which it established in Sections 1831-1832 of the Act, as amended, 42

U.S.C. §§ 1395j-1395k), an individual must (1) be entitled to benefits under Part A or (2) be 65 years of age or older and a resident of the United States and either a citizen or an alien lawfully admitted for permanent residence who has resided in the United States for five years.

In regulations promulgated under the Social Security Act, in 42 C.F.R. § 400.202, the Department of Health & Human Services and CMS said “[a]s used in connection with the Medicare program, unless the context indicates otherwise— *** (3) *Entitled* means that an individual meets all requirements for Medicare benefits.”

a. Section 111 of the MMSEA.

In 2007, Congress enacted the MMSEA, Pub. L. No. 110-173, 121 Stat. 2492 (Dec. 29, 2007).

Congress enacted Section 111 of the MMSEA to “improve the Secretary [of HHS]’s ability to identify beneficiaries for whom Medicare is the secondary payer” of health care claims. Senate Proceedings and Debates on S. 2499, 110th CONG. REC. S15834, S15835, col. 2, ¶ 1 (daily ed. Dec. 18, 2007) (statement of Sen. Grassley).

In Section 111 of the MMSEA, which is codified in 42 U.S.C. § 1395y(b)(8), Congress established a two-step process that an “applicable plan” (such as a liability insurer) must follow when it or its insured settles a case with a “claimant” or a court enters judgment in the case. Congress said that Section 111 “[r]equires an applicable plan to determine: (1) whether a claimant is entitled to Medicare benefits on any basis; and (2) submit specified information about any entitled claimant to the Secretary [of HHS].” Congressional Research

Service, “S.2499 – Medicare, Medicaid, and SCHIP Extension Act of 2007,” 110th Cong., 1st Sess., at 1-2 (Dec. 29, 2007).

In the first step of the two-step process it established, which is set forth in 42 U.S.C. § 1395y(b)(8)(A)(i), Congress required an applicable plan to determine whether a claimant is entitled to benefits under the Medicare program on any basis.

In the second step, which is set forth in 42 U.S.C. § 1395y(b)(8)(A)(ii), Congress required an applicable plan to report payment of a money settlement or judgment to a claimant that it determines is entitled to benefits under the Medicare program, submitting information described in 42 U.S.C. § 1395y(b)(8)(B) for any claimant that it determines is entitled to benefits under the Medicare program.

In 42 U.S.C. § 1395y(b)(8)(B)(i)-(ii), Congress described information that an applicable plan must submit for any claimant that it determines is entitled to benefits under the Medicare program.

In 42 U.S.C. § 1395y(b)(8)(C), Congress specified when an applicable plan must submit information for any claimant that it determines is entitled to benefits under the Medicare program under 42 U.S.C. § 1395y(b)(8)(A)(ii).

In 42 U.S.C. § 1395y(b)(8)(H), Congress said that HHS may implement the requirements in 42 U.S.C. § 1395y(b)(8) by program instruction or otherwise.

Congress did not expressly authorize HHS (or CMS) to include social security account number or health identification claim number reporting

requirements in regulations or guidance in Section 111 of the MMSEA.

b. Section 204 of the SMART Act.

In 2013, Congress enacted the SMART Act, Pub. L. No. 112-242, 126 Stat. 2374 (Jan. 10, 2013), amending the MMSEA.

Congress made it absolutely clear that, when it amended Section 111 of the MMSEA in Section 204 of the SMART Act, it **required HHS to eliminate** social security account number and health identification claim number reporting requirements. The House of Representatives said that the SMART Act (which the House passed as H.R. 1845, as amended, by a recorded vote of 401-3 and the Senate passed without amendment by unanimous consent) “directs CMS to develop an alternative to requiring the use of Social Security numbers as the identifier defendants must file with CMS.” H.R. REP. NO. 112-750, at 50-51 (Jan. 3, 2012).

In Section 204 of the SMART Act, which is codified in an undesignated flush paragraph in 42 U.S.C. § 1395(b)(8)(B), Congress **required HHS to eliminate** social security account number and health identification claim number reporting requirements throughout the two-step process within eighteen months of January 10, 2013 (by July 10, 2014) **unless** HHS notified committees of jurisdiction in the House of Representatives and Senate that the deadline for eliminating those requirements, without extension, threatened patient privacy or the integrity of the secondary payer system by that date.

The appearing defendants failed to offer

evidence that HHS sent House and Senate committees any deadline extension notice by July 10, 2014. So, HHS had to eliminate the reporting requirements throughout the two-step process *to comply with Congress' mandate* in section 204 of the SMART Act by July 10, 2014.

c. CMS Guidance.

Since January 3, 2017, CMS has issued guidance to implement 42 U.S.C. § 1395y(b)(8) in the form of NGHP User Guides sixteen times, in Versions 5.2 to 6.7, under 42 U.S.C. § 1395y(b)(8)(H).

The NGHP User Guide Version 5.2 was applicable when the appearing defendants and Robertson signed the Stipulation from January 17-24, 2017. App.II, 2:164a-200a. Version 5.3 was applicable when the appearing defendants filed their motion to require Robertson to disclose his Social Security number and date of birth to them on January 5, 2018 and when the trial court entered its order requiring him to disclose the information to them on February 23, 2018. App.JJ, 2:201a-237a. Version 5.9 was applicable when the trial court entered its order denying Robertson post-judgment costs and attorney's fees and post-judgment interest on the settlement amount on August 25, 2020. App.KK, 2:238a-276a. Version 6.7 was issued on January 10, 2022. App.LL, 2:277a-316a.

In the user guides it has issued since January 3, 2017, CMS *has not required* applicable plans (which CMS calls "responsible reporting entities" or "RREs") to report a settlement with no responsibility for ongoing medicals where the claimant was *not* a Medicare beneficiary on the date the payment

obligation was established (the date of the settlement). It has said, in Chapter III, that:

Where there is a settlement, judgment, award, or other payment with no establishment/acceptance of responsibility for ongoing medicals, if the individual is not a Medicare beneficiary the RRE is not required to report for purposes of 42 U.S.C. 1395y(b)(8) (Section 111 reporting for liability insurance [including self-insurance], no-fault insurance, or workers' compensation).

App.II, 2:183a (Version 5.2); App.JJ, 2:220a (Version 5.3); App.KK, 2:259a (Version 5.9) ; App.LL, 2 :299a (Version 6.7).

In the user guides it has issued since January 3, 2017, CMS **has not required** responsible reporting entities to report a Medicare beneficiary's Social Security number or date of birth to it before or after they pay him a settlement amount *or* any claimant to disclose the information to them.

In Chapter IV, CMS has **not** said that it requires RREs to submit a query with a claimant's full or partial Social Security number or health identification claim number (which contained a claimant's Social Security number) and date of birth to it to determine the Medicare status of an injured party. Instead, it has said, in Chapter IV, that:

CMS allows RREs that are file submitters to submit a query to the BCRC [Benefits Coordination and Recovery Center] to determine the Medicare status of the injured party prior to submitting claim information for Section 111 reporting.

App.II, 2:193a (Version 5.2 [“query” in Version 5.2]); App.JJ, 2:230a (Version 5.3); App.KK, 2:269a (Version 5.9); App.LL, 2:309a (Version 6.7).

It has said, with regard to its “Query Input File,” that:

This is an *optional* query file that can be used by an RRE to determine whether an injured party/claimant is a Medicare beneficiary.

App.II, 2:196a (Version 5.2); App.JJ, 2:233a (Version 5.3); App.KK, 2:272a (Version 5.9); App.LL, 2:312a (Version 6.7).

CMS **has not required** the appearing defendants or their insurers to report Robertson’s Social Security number and date of birth to it *or* Robertson to disclose the information to them because he was not a Medicare beneficiary when the Stipulation for Settlement was signed. Even if he were, CMS **has not required** the appearing defendants or their insurers to report the information to it *or* Robertson to disclose the information to them.

2. Question 2.

Robertson’s Social Security number as well as his date of birth have been protected from disclosure to the appearing defendants by his rights to liberty and privacy under the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution.

a. Liberty.

In *Washington v. Glucksberg*, 521 U.S. 702, 719-720 (1997), the Court said that the Due Process Clause of the Fourteenth Amendment “guarantees more than fair process, and the ‘liberty’ it protects

includes more than the absence of physical restraint.” It recognized that the Due Process Clause “provides heightened protection against government interference with certain fundamental rights and liberty interests.”

The Court confirmed, at 720-721, that its established method of substantive-due-process analysis has two primary features. First, it said “the Due Process Clause specially protects those fundamental rights and liberties which are, objectively, ‘deeply rooted in this Nation’s history and tradition.’” Second, it said that it has “required in substantive-due-process cases a ‘careful description’ of the asserted fundamental liberty interest.” It said that “the Fourteenth Amendment ‘forbids the government to infringe *** “fundamental” liberty interests *at all*, no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling interest.’”

The liberty which the Due Process Clause guarantees protects individuals’ privacy interests in avoiding disclosure of personal matters, including some kinds of personal information.

Protection and avoidance of disclosure of one’s Social Security number as well as one’s date of birth, to protect the security of the information and minimize risk of misuse of the information, has been a right and liberty deeply rooted in our Nation’s history and tradition.

As the SSA has explained in “The Story of the Social Security number,” *Social Security Bulletin*, Volume 69, No. 2, at 9-12, Exhibits 1-2 (2009), Congress and the President have allowed federal government departments and agencies and states

and political subdivisions of states to use and require disclosure of Social Security numbers **only** for strictly limited purposes. Congress and the President have authorized (1) the SSA and the Internal Revenue Service to use Social Security numbers to maintain records of earnings of individuals who work in jobs covered by the Social Security Act, (2) the IRS to use Social Security numbers as taxpayer identification numbers for individuals for purposes other than administering the Social Security System; (3) federal agencies (such as the Department of Defense and the Office of Personnel Management) to use Social Security numbers as identification numbers for military servicepersons and civilian employees for purposes other than administering the Social Security System; and (4) states and political subdivisions of states to use Social Security numbers as identification numbers for individuals in administration of tax, general public assistance, driver's license and motor vehicle registration laws within their jurisdictions. App.GGGG, 3:486a-490a (Exhibit 1) and 492a-496a (Exhibit 2).

As the SSA has also explained in its bulletin, at 10-12, Exhibit 2, Congress and the President have allowed private organizations to require disclosure of Social Security numbers **only** for strictly limited other purposes. Congress and the President have required financial institutions to require individuals who open and maintain financial accounts to provide their Social Security numbers to the financial institutions. App.GGGG, 3:492a-496a (Exhibit 2 [changes in 1970 and 1983]).

Private organizations other than financial institutions (such as residential landlords and their property managers and insurers) may ask individuals to provide their Social Security numbers voluntarily. But, such organizations may *not* require individuals to provide the information mandatorily.

Clearly, disclosing one's Social Security number and date of birth is *not* akin to providing wiring instructions needed to transfer funds to a creditor's account as the Court of Appeal concluded. The *only* information that is needed to wire money to an individual creditor's account is the name of the financial institution where he maintains the account, the name in which he maintains the account, the number of his account and the routing number of the financial institution. Financial institutions do *not* require that debtors provide a creditor's Social Security number or date of birth to wire money *to* his account.

b. Privacy.

In *Whalen v. Roe*, 429 U.S. 589, 599-600 (1977), the Court recognized that “[t]he cases sometimes characterized as protecting ‘privacy’ have in fact involved at least two different kinds of interests.” It said that “[o]ne is the individual interest in avoiding disclosure of personal matters, and another is the interest in independence in making certain kinds of important decisions.”

In *Nixon v. Administrator of General Services*, 433 U.S. 425, 457 (1977), the Court said that “[o]ne element of privacy has been characterized as ‘the individual interest in avoiding disclosure of personal matters.’”

In *NASA v. Nelson*, 562 U.S. 134, 147 (2011), the Court, as it did in *Whalen*, said that it “assume[d] for present purposes that the Government’s challenged inquiries implicate[d] a privacy interest of constitutional significance.”

In *In re Crawford*, 194 F.3d 954, 958 (1999 9th Cir.), *cert. denied sub nom. Ferm v. United States Trustee*, 528 U.S. 1189 (2000), the U.S. Court of Appeals for the Ninth Circuit said that “[w]hile the Supreme Court has expressed uncertainty regarding the precise bounds of the constitutional ‘zone of privacy,’ its existence is firmly established,” *citing Whalen, supra*, 429 U.S. at 599-600. It said that “the indiscriminate public disclosure of SSNs, especially when accompanied by names and addresses, may implicate the constitutional right to informational privacy.” At 959, it said that “[t]he right to informational privacy, however, ‘is not absolute; rather, it is a conditional right which may be infringed upon a showing of proper governmental interest.’” It made clear that “[i]n each case, however, the government has the burden of showing that ‘its use of the information would advance a legitimate state interest and that its actions are narrowly tailored to meet the legitimate interest.’”

In this matter, unlike in *Crawford*, no federal statute, regulation or guidance has required that the appearing defendants or their insurers report Robertson’s Social Security number or date of birth to CMS or that Robertson disclose the information to the appearing defendants. The government has had **no** legitimate interest in the information being reported. So, the appearing defendants have had **no** legitimate interest in the information.

Since Congress required HHS (and CMS within it) to eliminate Social Security number reporting requirements by July 10, 2014, Robertson has had a right to maintain the privacy of his Social Security number and date of birth without being required to disclose the information to the appearing defendants and their insurers.

3. Question 3.

The trial court denied Robertson opportunity to confront Cabbagstalk concerning what the CMS guidance on which he relied, NGHP User Guide Version 5.2, required.

After the trial court did that, the Court of Appeal denied Robertson opportunity to show (1) what NGHP User Guide Version 5.2, on which Cabbagstalk relied, *actually required*; (2) what NGHP User Guide Version 5.3, which replaced the user guide on which Cabbagstalk relied *before* the appearing defendants filed their January 5, 2018 motion to require Robertson to disclose his Social Security number or date of birth to them and *before* the trial court entered its February 23, 2018 order requiring him to disclose the information to them, *actually required*; and (3) what NGHP User Guide Versions 5.4 to 6.4, which replaced earlier user guides, *actually required* by denying his requests to take judicial notice of the user guides. That denied Robertson opportunity to show that, in those user guides, CMS *has not required* the appearing defendants, their insurers or anyone else to report the information to it since January 3, 2017, denying him due process and equal protection of the law which the Fourteenth Amendment guarantees him.

The Court of Appeal also denied Robertson opportunity to show what the SSA report on the history of the Social Security number says by denying his request to take judicial notice of the report. That denied Robertson any chance to show that, in that report, SSA explained that the federal government has allowed use and required disclosure of Social Security numbers **only** for strictly limited purposes, denying him due process and equal protection of the law which the Fourteenth Amendment guarantees him.

B. The Questions Presented in the Petition Are Important Questions of Law That Have Not Been, but Should Be Settled by, this Court.

The questions of federal law presented in the petition are important questions of federal law that have not been settled by this Court. The questions should be settled by the Court because they affect the rights of all individuals who become creditors through settlement or judgment on claims in the United States.

Substantively, if state and lower federal courts decide these questions of federal law as the Court of Appeal has in this matter, settlement and judgment creditors will be forced to disclose their Social Security numbers and dates of birth to settlement and judgment debtors and their insurers to collect money settlements and judgments on claims even though Congress enacted legislation to prevent them from having to do that in 2013.

Procedurally, debtors will be allowed to force creditors to disclose the information by simply telling courts that CMS guidance requires them to report the information to CMS, without quoting or citing any CMS guidance requiring that and without giving creditors opportunity to show that CMS guidance does not require them to report the information to CMS, as the debtors did in this case.

That will put creditors who disclose their Social Security numbers and dates of birth to debtors at significant risk of irreparable harm from disclosure of the information unnecessarily. If their Social Security numbers and dates of birth are disclosed, they will not be able to use and rely on their Social Security numbers and dates of birth—as security codes—to control and limit access to personal records, report information to government agencies and maintain financial accounts safely and securely and protect themselves from being defrauded or otherwise victimized. If disclosed, they will not be able to restore the privacy and confidentiality of the records.

**C. The Way the Court of Appeal
Decided the First Question
Presented in the Petition
Conflicts with Relevant
Decisions of This Court.**

The way the Court of Appeal decided the first question presented in the petition conflicts with this Court's decisions in *Chevron, U.S.A. v. Natural Resources Defense Council, Inc. et al.*, 467 U.S. 837, 842-844 (1984), and *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 125 (2000). In *Chevron*, at 842-843, the Court said: "If the intent of

Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.”

In *Brown & Williamson*, at 125, the Court said: “Regardless of how serious the problem an administrative agency seeks to address, however, it may not address its authority ‘in a manner that is inconsistent with the administrative structure that Congress enacted into law.’⁴

Under *Chevron* and *Brown & Williamson*, the courts must give effect to Congress’ intent that HHS (and CMS within it) eliminate social security account number and health identification claim number reporting requirements by July 10, 2014 and read the NGHP User Guides that CMS has issued since January 3, 2017 to eliminate any such requirements. CMS did not have authority to impose such requirements after July 10, 2014.

At the behest of the appearing defendants and their insurers, the trial court ignored that Congress required HHS (and CMS) to eliminate the reporting requirements, saying it found “no basis for concluding that the reporting requirements are no longer valid.” App.L, 1:60a (order). The Court of Appeal ignored that Congress required that, too, saying “we appreciate the court’s sensible reasoning and measured approach in addressing the issue.” App.A, 1:15a.

⁴ Robertson cited those decisions for those points in his corrected opening brief, at 26-27, in his appeal in Case No. A154206 and in his opening brief, at 24-25, in his appeal in Case No. A160942.

The Court of Appeal's decision renders Congress' requirement that HHS (and CMS) eliminate Social Security number reporting requirements and CMS' elimination of Social Security number and date of birth reporting requirements superfluous.

D. This Case Provides an Excellent Vehicle to Address the Questions Presented in the Petition.

The questions presented in the petition are clear; Robertson briefed the questions below; and, the ways the Court of Appeal's decided the questions prevent him from recovering costs he incurred opposing the appearing defendants' applications and motions to require him to disclose his Social Security number and date of birth to them before they pay him the settlement amount and moving for costs doing that *and* post-judgment interest on the settlement amount for their delay in paying him the settlement amount.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted by,



March 22, 2022
J. Martin Robertson