No. 19-676

IN THE

Supreme Court of the United States

JOSEPH A. ZADEH, ET AL.,

Petitioners,

v.

MARI ROBINSON, ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF *AMICUS CURIAE* ASSOCIATION OF AMERICAN PHYSICIANS AND SURGEONS, IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether the Court should recalibrate or reverse the doctrine of qualified immunity.

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INTERESTS OF *AMICUS CURIAE*[1]

Amicus Association of American Physicians and Surgeons ("AAPS"), is a national association of physicians. Founded in 1943, AAPS is dedicated to the highest ethical standards of the Oath of Hippocrates and to preserving the sanctity of the patient-physician relationship. AAPS has been a litigant in this Court and in other appellate courts. *See, e.g.*, *Ass'n of Am. Physicians & Surgs. v. Mathews*, 423 U.S. 975 (1975);

[1] *Amicus* files this brief after providing the requisite ten days' prior written notice and receiving written consent by all the parties. Pursuant to Rule 37.6, counsel for *amicus curiae* authored this brief in whole, no counsel for a party authored this brief in whole or in part, and no such counsel or a party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity – other than *amicus*, its members, and its counsel – contributed monetarily to the preparation or submission of this brief.

Ass'n of Am. Physicians & Surgs. v. Tex. Med. Bd., 627 F.3d 547 (5th Cir. 2010); *Ass'n of Am. Physicians & Surgs. v. Clinton*, 997 F.2d 898 (D.C. Cir. 1993).

This Court has expressly made use of amicus briefs submitted by AAPS. *See, e.g., Stenberg v. Carhart*, 530 U.S. 914, 933 (2000); *id.* at 959, 963 (Kennedy, J., dissenting); *District of Columbia v. Heller*, 554 U.S. 570, 704 (2008) (Breyer, J., dissenting). The Third and Seventh Circuits have also made use of amicus briefs by AAPS. *See United States v. Natale*, 719 F.3d 719, 739 (7th Cir. 2013); *Springer v. Henry*, 435 F.3d 268, 271 (3d Cir. 2006).

AAPS filed an amicus brief with the Fifth Circuit in this case below, and has a strong interest in this petition for a writ of *certiorari*.

SUMMARY OF ARGUMENT

"To summarize, we have concluded there was a violation of Dr. Zadeh's constitutional rights," the Fifth Circuit held below. (Pet. App. 14a) With that clear ruling, this case is an excellent vehicle for reconsidering qualified immunity, which the Fifth Circuit applied despite the stark violation of constitutional rights. This infringement was not done in the heat of a moment by a police officer understandably making a snap decision involving life or death, but instead was a pervasive practice by officials at the Texas Medical Board (TMB) in violation of rights familiar to most first-year law students.

The judge-made doctrine of qualified immunity is overdue for review particularly where, as here, there is a violation without any justification of urgency. Government can cause real harm to individuals, and it confounds justice to automatically deny relief from

constitutional violations; there should be a real deterrent for conduct by government which is unconstitutional. The exclusionary rule, as used in the criminal context, is one approach. Its better analog in the civil context would be real liability for damages caused by violations of constitutional rights, not a presumptive denial of legal accountability.

Sovereign immunity is an outdated vestige of a monarchy which is unsupportable in our constitutional republic today. It is unfair to require a victim of a violation of constitutional rights to bear the full brunt of the damages, rather than spreading that loss among the public which can do something about it through the democratic process. Just as charitable immunity doctrine has been cast aside by courts as unjustified today, qualified immunity for government violations of constitutional rights is an anachronism.

This case illustrates the incoherence of qualified immunity doctrine in its current form. The panel below essentially held that evidence of a tradition of constitutional violations by a government agency is justification for applying qualified immunity. The opposite should be true: the more pervasive the violations, the less the justification for any immunity.

"The King can do no wrong" is a legal doctrine appropriate for a monarchy which has subjects, not for our constitutional republic comprised of citizens. Until 1948, there was no citizenship in Great Britain, and it made sense in that monarchy for subjects of the Crown not to be able to sue the Crown. It was not until the British Nationality Act of 1948 that citizenship was

even established in Great Britain.[2] American courts should not continue to import, without statutory justification, an artifact of a monarchy which Great Britain itself has abandoned in other fundamental ways.

The Petition should be granted to clarify or overturn the judge-made doctrine of qualified immunity.

ARGUMENT

When Fourth Amendment privacy rights are flagrantly violated by the State, qualified immunity should not excuse the wrongdoing. Warrants can be obtained easily in compliance with the Fourth Amendment, if a search is justified. But in the absence of the safeguard of a warrant, physicians cannot be confident that what they write in medical charts will be kept private, and patients are deprived of assurance that their intimate disclosures to physicians will remain confidential. Attorneys are protected against unlawful searches and seizures, thereby preserving the attorney-client privilege and the confidence of clients that their communications with attorneys will remain private. Well-established Fourth Amendment protections must extend to physicians and their patients as well, and legal accountability is necessary to attain that goal.

But by holding in favor of qualified immunity for the lawless search below, the lower court gave *carte blanche* to the administrative state to disregard the Fourth Amendment. The lack of accountability for such an unconstitutional act by the State is an

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[2] http://www.legislation.gov.uk/ukpga/Geo6/11-12/56/enacted (viewed 12/8/19).

unacceptable precedent in connection with medical record privacy. Qualified immunity should not extend to eliminate remedies for this violation of the Fourth Amendment, and the petition for *certiorari* should be granted to address this important issue. The TMB enforced a surprise administrative subpoena against a physician's office without any independent oversight by a magistrate, without any meaningful protections of patient privacy, and without complying with fundamental Fourth Amendment requirements.

The decision below recognized the violation of the constitutional right, but then erred in denying full accountability for it. By misapplying qualified immunity, the Fifth Circuit deprived physicians and patients of any remedy when a governmental agency, in this case the TMB, egregiously infringes on their Fourth Amendment rights. Review is needed here.

I. Qualified Immunity Should Not Extend to Where, as Here, the Violations of the Fourth Amendment Were Egregious.

Qualified immunity should not apply where, as here, there is an enormous "need to hold public officials accountable when they exercise power irresponsibly." *Pearson v. Callahan*, 555 U.S. 223, 231 (2009). A non-emergency search of many persons' entire medical records, which may contain sexual histories, gun ownership, and private domestic issues, was perpetrated by Respondents in egregious violation of the Fourth Amendment.

There is no "need to shield officials from harassment, distraction, and liability when they perform their duties reasonably," in the face of this severe infringement on Fourth Amendment rights. *Id.*

Respondents "'violate[d] clearly established statutory or constitutional rights of which a reasonable person would have known,'" and such conduct should not be immunized from liability. *Mullenix v. Luna*, 136 S. Ct. 305, 308 (2015) (*per curiam*) (quoting *Pearson*, 555 U.S. at 231).

"Wherever a man may be, he is entitled to know that he will remain free from unreasonable searches and seizures." *Katz v. United States*, 389 U.S. 347, 359 (1967). The patients who have had their entire medical records unreasonably searched by the TMB could have included political candidates or anyone who becomes understandably upset when his or her most intimate personal details are rifled through by strangers. Given that the undercarriage of one's automobile (with respect to a tracking device) is protected by the Fourth Amendment, personal medical records are too. *See, e.g., United States v. Jones*, 565 U.S. 400 (2012) (holding that GPS tracking of an automobile's movements constitute a search under the Fourth Amendment).

Guidelines compel physicians today to insert all sorts of highly private information in a medical record, such asking children about gun ownership in their homes. The pro-gun control American Academy of Pediatricians has recommended since 2000 that "pediatricians incorporate questions about guns into their patient history taking[,] and urge parents who possess guns to remove them, especially handguns, from the home." *See* Brian Falls, "Legislation prohibiting physicians from asking patients about guns," *Journal of Psychiatry & Law* (Fall 2011) [hereinafter, "*Falls*"] (citing American Academy of Pediatrics Committee on Injury and Poison Prevention

893 (2000)). The American Psychiatric Association likewise issued guidelines in 2003 insisting that physicians ask any patient who might be suicidal whether he or she has a gun at home or at work. "[S]uch ***discussions should be documented in the medical record***, including any instructions that have been given to the patient and significant others about firearms or other weapons." *See Falls*, section on "Standards of care" (emphasis added, citing American Psychiatric Association Workgroup on Suicidal Behaviors 23 (2003)).

The Fourth Amendment plainly applies to administrators making a surprise visit to a medical office and demanding private medical records without a warrant. Nearly two decades ago this Court applied the Fourth Amendment against an invasion of medical privacy by a public hospital that conducted, without any suspicion, drug screening of pregnant women's urine, which had the legitimate goal of reducing an epidemic of babies exposed to harmful illegal drugs in utero. *Ferguson v. City of Charleston*, 532 U.S. 67, 70-71, 77 (2001). *See also Whalen v. Roe*, 429 U.S. 589, 607 (1977) ("[T]he Constitution puts limits not only on the type of information the State may gather, but also on the means it may use to gather it.").

A century ago Justice Holmes wrote for the Supreme Court that a seizure of corporate documents analogous to the search here was "***an outrage*** which the Government now regrets." *Silverthorne Lumber Co. v. United States*, 251 U.S. 385, 391 (1920) (emphasis added). Justice Holmes emphasized that regret is not enough, and there must be additional consequences to the wrongdoing, and that "the rights of a corporation against unlawful search and seizure

are to be protected even if the same result might have been achieved in a lawful way." *Id.* at 392. The remedy in that case was to quash the subpoenas so that the government could not benefit from its unlawful seizure, but that does not right the wrong with respect to an infringement on patients' rights.

This Court has been abundantly clear that government agents cannot properly decide for themselves when to invade privacy. As this Court explained 70 years ago:

> The point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. ***Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime***. Any assumption that evidence sufficient to support a magistrate's disinterested determination to issue a search warrant will justify the officers in making a search without a warrant would reduce the Amendment to a nullity and leave the people's homes secure only in the discretion of police officers. … When the right of privacy must reasonably yield to the right of search is, as a rule, to be decided by a judicial officer, not by a … government enforcement agent.

Johnson v. United States, 333 U.S. 10, 13-14 (1948) (emphasis added). This Court emphasized in *Johnson* that the search without a warrant of a hotel room was a violation of the Fourth Amendment, even though the Court found that the officers likely had probable cause

to obtain a warrant. *See id.* at 15. "If the officers in this case were excused from the constitutional duty of presenting their evidence to a magistrate, it is difficult to think of a case in which it should be required." *Id.*

Long ago the Supreme Court likewise held that mere subpoenas, like those used below, may not be used to circumvent the Fourth Amendment requirement of a warrant. Nearly 50 years ago, the Supreme Court explained as follows:

> the subpoena involved here could not in any event qualify as a valid search warrant under the Fourth Amendment, for it was issued by the District Attorney himself, and thus omitted the indispensable condition that "the inferences from the facts which lead to the complaint '... be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime.' *Johnson* v. *United States*, 333 U.S. 10, 14." *Giordenello* v. *United States*, 357 U.S. 480, 486. … Thus, ***there can be no doubt*** that under this Court's past decisions the search of [defendant's] office was "unreasonable" within the meaning of the Fourth Amendment.

Mancusi v. DeForte, 392 U.S. 364, 371-72 (1968) (emphasis added). Similarly, "there can be no doubt" that the search below violated the Fourth Amendment.

Accordingly, the Fifth Circuit was unanimous that the surprise search of Dr. Zadeh's medical office and his patients' records was in violation of the Fourth Amendment. (Pet. App. 14a) So far, so good. But then the appellate court applied qualified immunity anyway to the clear violation, rendering the legal

challenge essentially for naught. (*Id.* 14a-20a) This deprived the public, particularly patients, of essential deterrence against infringements on the Fourth Amendment.

II. An Entrenched Pattern of Violating Constitutional Rights Is Less Deserving of Qualified Immunity, Not More So.

As an illustration of the broken doctrine of qualified immunity doctrine, the degree to which a constitutional violation is entrenched at a government agency is deemed to be a reason to apply immunity rather than reject it. The Fifth Circuit panel majority expressly held that:

> Even assuming that the plaintiffs could show that Robinson failed to train her subordinates and that failure resulted in a constitutional violation, Robinson was not deliberately indifferent in delegating her subpoena authority ***in light of the fact she was acting pursuant to the regulations in the same way as her predecessors and the numerous subpoenas issued each year***.

(Pet. App. 25a, emphasis added).

Under this reasoning, a pervasive violation of constitutional rights by a governmental agency is more likely to receive qualified immunity than an aberrational violation is. What is the logic in that? The doctrine of qualified immunity has so many such contortions that a review by this Court is overdue for it.

This case of a non-emergency, egregious violation of Fourth Amendment rights fits the call by Justice

Thomas to reconsider the doctrine of qualified immunity:

> Until we shift the focus of our inquiry to whether immunity existed at common law, we will continue to substitute our own policy preferences for the mandates of Congress. In an appropriate case, we should reconsider our qualified immunity jurisprudence.

Ziglar v. Abbasi, 137 S. Ct. 1843, 1872 (2017) (Thomas, J., concurring in part and concurring in the judgment).

The application of qualified immunity below weakens any incentive for the Texas legislature and executive branch to be proactive in preventing recurrence of Fourth Amendment violations. Entrenched government officials can abuse their power with impunity under the expansive application of qualified immunity to their conduct. While such sweeping immunity may make sense if governance were by a monarch protected by the concept "the King does no wrong," virtually blanket immunity does not make sense in our constitutional republic.

III. None of the Rationales for Qualified Immunity Exists Here.

None of the rationales for applying qualified immunity exists here, and no purpose is served by immunizing from accountability the wrongdoing by State officials in this case. Their insistence on an immediate search of the entire medical records of numerous patients, without any opportunity for pre-compliance review, obviously implicates the Fourth Amendment as any first-year law student would know.

Perhaps the most often stated rationale for qualified immunity is to avoid inhibiting officials in the performance of their duties. The "threat of liability can create perverse incentives that operate to inhibit officials in the proper performance of their duties." *Forrester v. White*, 484 U.S. 219, 223 (1988).

But no such "perverse incentives" are remotely plausible in this case, or cases like it. Administrators at the TMB knew, or should have known, the importance of pre-compliance judicial review before rifling through private medical records. Legal accountability for TMB officials who deny physicians and patients their constitutional right to timely judicial review is the sort of disincentive that should be established. The only "perverse incentives" are those created by immunizing such wrongdoing against legal accountability, as the Fifth Circuit decision does.

Although not invoked by the Fifth Circuit in this case, another rationale sometimes cited for allowing qualified immunity to shield public officials from liability for infringing on constitutional rights is that such liability may cause a "deterrence of able citizens from acceptance of public office." *Harlow v. Fitzgerald*, 457 U.S. 800, 814 (1982). But the position of Executive Director of the TMB is a powerful office in Texas and there is no shortage of "able citizens" who would like to have that job, with or without qualified immunity. Recognizing that a search warrant or pre-compliance judicial review is required before reading through intimate medical records – and punishing conduct that violates that norm – would not deter any qualified candidates from taking a position at the TMB. If anything, permissiveness towards the violation of this constitutional right might deter upstanding citizens

from joining the agency expected to violate constitutional rights. People want to work at institutions of integrity, and want meaningful accountability if and when positions of power are misused to infringe on constitutional rights.

Other stated rationales, likewise inapplicable here, for applying qualified immunity are to avoid the "distraction of officials from their governmental duties [and the] inhibition of discretionary action." *Harlow*, 457 U.S. at 816. Imposing liability for unlawful searches in violation of the Fourth Amendment would not inhibit legitimate discretionary action. Valid search warrants are not difficult to obtain when justified. There is no risk of rampant litigation over this issue, which might distract governmental officials from their daily duties. The TMB could adopt and adhere to policies that prevent Fourth Amendment violations by their staff in the future. If anything, qualified immunity in this situation creates the risk of more litigation by failing to deter repeat violations.

The TMB has an abundance of legitimate tools for addressing genuine risks to public safety without violating the Fourth Amendment rights of physicians and their patients. For example, the TMB and the DEA can immediately suspend the ability of physicians to write prescriptions for controlled substances, or ask the physician to agree to hold off writing such prescriptions pending an investigation. If patients' medical records need to be reviewed, such review could be properly limited to controlled-substance prescriptions without subjecting all of patients' medical records to review by strangers without the patients' consent. Qualified immunity is unnecessary to avoid disincentives for state officials,

who can do their job while complying with the Fourth Amendment.

Like many governmental agencies, the TMB is well-funded by the state legislature,[3] which would surely protect Respondents against personal liability. Narrowing qualified immunity would have the salutary effect of encouraging the governor or legislature to exercise much-needed oversight and stop costly constitutional violations which an agency perpetrates. The sweeping qualified immunity adopted below renders it less likely that the TMB and other administrative agencies will respect the Fourth Amendment.

CONCLUSION

For the foregoing reasons and those stated in the Petition, this Court should grant the Petition for a Writ of Certiorari.

Respectfully submitted,

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[3] http://www.tmb.state.tx.us/idl/55CABFA2-3D66-6185-0EC7-BDDA8EF5B03D (viewed 12/8/19).