IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Appellate Docket No. 04-2550

Citizens for Health, American Psychoanalytic Association, American Association for Health Freedom, New Hampshire Citizens for Health Freedom, American Mental Health Alliance, American Association of Practicing Psychiatrists, Health Administration Responsibility Project, Congress of California Seniors, National Coalition of Mental Health, Professionals and Consumers, California Consumer Health Care Council, Sally Scofield, Eugene B. Meyer, Daniel S. Schrager, Morton Zivan, Michaele Dunlap, Tedd Koren, Jane Doe, Janice Chester, Deborah Peel,

Appellants

v.

Michael O. Leavitt,
Secretary, U.S. Department of Health and Human Services

Appellee

PETITION FOR REHEARING AND REHEARING EN BANC

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December 15, 2005

Statement Required by Local Rule of Appellate Procedure 35.1

I express a belief, based on a reasoned and studied professional judgment, that the panel decision is contrary to decisions of the United States Court of Appeals for the Third Circuit and the Supreme Court of the United States, and that consideration by the full court is necessary to secure and maintain uniformity of decisions in this court , i.e., the panel's decision is contrary to the decisions of this court and the Supreme Court in Leshko v. Servis, 423 F.3d 337 (3rd Cir. 2005); Crissman v. Dover Downs Entertainment Inc., 289 F.3d 231 (3rd Cir. 2001) (en banc); and Brentwood Academy v. Tennessee Secondary School Athletic Association, 531 U.S. 288 (2001).

In addition, this appeal involves a question of exceptional importance, i.e., whether individuals retain a right to privacy under the United States Constitution with respect to their highly personal and sensitive health information. With the decision of the panel on October 31, 2005, this case also now involves the question of whether all governmental infringements of individual liberties are insulated from Constitutional scrutiny merely because similar actions may be taken by private entities.

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PETITION FOR REHEARING AND REHEARING EN BANC

Points of Fact and Law That the Court Overlooked or Misapprended

1. **The Court overlooked Plaintiffs' Constitutional right to privacy for highly sensitive health information that predated the administrative rule at issue in this case.**

2. **The Court misapprehended the nature of the Plaintiffs' Constitutional claims and applied the wrong state action test.**

3. **The Court announced a new state action test which is unprecedented and unsupported in case law.**

4. **The Court misconstrued the holding in cases cited by the Plaintiffs.**

I. The Court Dismissed Plaintiffs' Constitutional Claims on a Basis and Cases Not Addressed by the District Court or By the Parties

The Plaintiffs sought injunctive relief against an Amended Health Information Privacy Rule that substituted federal "regulatory permission" in place of individual permission for the use and disclosure of their most sensitive identifiable health information. Appellants' Br. 2.[1] The undisputed evidence showed that this amendment resulted a radical change in health information privacy practices under which Plaintiffs' health information began to be used and disclosed for virtually any purpose without notice, without their permission and over their objection. Pltfs' Post Hearing Memo. 7. Plaintiffs alleged that the Rule violated their right to informational privacy under the Due Process Clause of the Fifth Amendment and the right to private conversations with their physicians under

[1] The Original Privacy Rule had recognized the individual's right of privacy and consent for the use and disclosure of health information as consistent with constitutional law, medical ethics and long standing practice. Appellants' Br. 4-7. The Amended Rule reversed that decision and, moreover, the preamble explained that "[t]he consent provisions are **replaced** with a new provision that **provides regulatory permission** for covered entities to use and disclose [identifiable] health information for treatment, payment and health care operations." It further stated that henceforth "covered entities, have **regulatory permission** for such uses and disclosures. 67 Fed. Reg. at 53,211, J.A. 1381 (emphasis added).

the First Amendment as well as other Constitutional rights. Amended Complaint, paras. 71-77; 78-79. J.A. 1,486.

This Court found that Plaintiffs were, in fact, being deprived of their medical privacy as a direct result of the "regulatory permission" granted by the Rule. Dec. at 19, n.9, 37. The Court, however, refused to consider the constitutionality of the privacy violations based on a finding that there was no "state action" for which Defendant could be held accountable. Dec. 37-38.

Neither the "state action" issue nor the principal cases cited by this Court were addressed by either of the parties at the District Court or before this Court, nor were they mentioned in the District Court's opinion.[2] This Court did not raise the issue in oral argument on March 9, 2005 nor did it include the issue in the list of issues on which post hearing briefing was requested. Letter to Counsel from the Court (March 23, 2005).

The Court's determination of the issues on which it requested additional briefing should have resulted in a finding of state action. The Court asked whether the claims raised by Plaintiffs were "justiciable" including (a) whether the actors that have actually violated Plaintiffs' privacy rights are before the Court and (b) whether the complaint fails to allege any actual injury caused directly by Defendant's actions. The Court also asked whether the injury has to be caused directly by the agency and whether specific testimony on causation is necessary on remand before the District Court. The Court appears to have decided all of these issues in the Plaintiffs' favor. Dec. at 18.[3] The Court also expressly found that Plaintiffs had met all of the requirements for standing, that is, (a) they had suffered "injury in fact" to their medical privacy, (b) the injury was "casually connected and traceable to an action of the defendant" and (c) enjoining the Rule "is likely to redress [the] alleged injury by restoring the status quo ante". Dec. 18-19, n. 9.

Although Plaintiffs did not address the state action issue directly, their post hearing memorandum cited the Supreme Court's most recent decision prescribing the criteria that courts should use in determining whether state action is present.

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[2] The Court first said that the District Court "touched on" the state action issue when it relied on DeShaney v. Winnebago Co. Soc. Servs. Dept., 489 U.S.189 (1989), but then conceded that DeShaney "did not focus on state action" and finally concluded that the decision "does not reach the specific question before us." Dec. at 26.

[3] In its post hearing brief, Defendant cited a "state action" case, Gibbs v. Titleman, 502 F.2d 1107 (3rd Cir. 1974), but only in response to whether there was a justiciable case or controversy and whether the actor who caused the harm was before the Court. Appellee's Supplemental Memo. 11. The Court did not mention this case in its state action analysis. In any event, the Secretary appeared to have conceded the presence of state action in his brief. Appellants' Reply Br. 5, n.6.

See Memorandum of Appellants in Response to Questions from Court, at 12, citing Brentwood Academy v. Tennessee Secondary School Athletic Assoc., 531 U.S. 288 (2001). The Court did not mention this case in its decision despite the fact that two recent decisions from this circuit rely on it as the authoritative source of criteria for assessing state action. See Leshko v. Servis, 423 F.3d 337, 339 (3rd Cir. September 9, 2005); Crissman v. Dover Downs Ent. Inc., 289 F.3rd 231, 241-42 (en banc) (3rd Cir. 2002). [4] As the following discussion shows, briefing by the parties on the state action issue would have been beneficial.

II. The Court Overlooked Plaintiffs' Constitutional Right to Informational Privacy

The Court began its analysis with the "premise" that "the right to medical privacy asserted by Citizens is legally cognizable under the Due Process Clause of the Fifth Amendment". Dec. at 21. The Court then noted, however, that the "boundaries…[of the right]…have not been exhaustively delineated." The Court then jumped to the conclusion that "Citizens have not shown that federal law prohibited nonconsensual uses or disclosures of health information before the Rule was promulgated." Dec. at 30.

Regardless of the exterior "boundaries" of the constitutional right to medical privacy, the case law cited by the Plaintiffs showed clearly that it encompasses the core principle that individuals have at least some control over the disclosure of their health information in the typical situation. Ferguson v. City of Charleston, 532 U.S. 67, 78 (2001) ("The reasonable expectation of privacy enjoyed by the typical patient undergoing diagnostic tests in a hospital is that the results of those tests will not be shared with non-medical personnel without her consent."; Gruenke v. Seip, 225 F.3d 290, 302 (3rd Cir. 2000) ("…the Third Circuit has clearly recognized that private medical information is 'well within the ambit of materials entitled to privacy protection'".); United States v. Westinghouse, 638 F.2d 570, 577, n.5, 582 (3rd Cir. 1980) ("The right to medical privacy means "control over knowledge about one's self" and the "touchstone" of that right is "reasonable notice" of disclosures and "an opportunity …to raise …objections".); United States v. Scott, 424 F.3d 888, 891 (9th Cir., September 9, 2005) (A constitutional violation occurs "when the government violates a subjective expectation of privacy that society recognizes as reasonable."; Douglas v. Dobbs, 419 F.3d 1097, 1102 (10th Cir. 2005) (" Because privacy regarding matters of health is closely intertwined

[4] In fact, it appears that the decision of the three judge panel in Crissman was reversed en banc because of the issuance of the Brentwood decision. 289 F.3d at 250.

with the activities afforded protection by the Supreme Court, we have held that 'there is a constitutional right to privacy that protects an individual from the disclosure of information concerning a person's health.'") Tucson Woman's Clinic v. Eden, 371 F.3d 1173, 1193 (9th Cir. 2004) ("…we [have] held that the right to informational privacy 'applies both when an individual chooses not to disclose highly sensitive information to the government and when an individual seeks assurance that such information will not be made public'".) See also, Sterling v. Borough of Minersville, 232 F.3d 190, 195, 197-98 (3rd Cir. 2000) ("Our jurisprudence takes an encompassing view of information entitled to a protected right to privacy. '[T]he right to not have intimate facts concerning one's life disclosed without one's consent…is a venerable one whose constitutional significance we have recognized…'", "the essence of the right to privacy is in 'avoiding disclosures of personal matters'", "the right to privacy is well-settled".)[5]

The Rule issued by Defendant extinguished this pre-existing constitutional right of control by individuals over the use and disclosure of their health information and affirmatively transferred it to covered entities. Beginning on the April 14, 2003 implementation date of the Rule and for the first time in the nation's history, covered entities could go into any court and assert their new federal right of "regulatory permission" to use and disclose Plaintiffs' personal health information without their permission and over their objection.

III. The Court Misapprehended the Nature of Plaintiffs' Constitutional Claims and Applied the Wrong State Action Test

In its state action analysis, the Court stated that this case "seems different from…most state action cases" where the allegation is that the plaintiffs' rights have been violated by "private entities who, they claim, are acting on behalf of the state." Dec. at 24. The Court conceded that Plaintiffs contest the promulgation of

[5] Plaintiffs showed that the "reasonable expectation of privacy" that forms the basis for the Constitutional right pre-dates the founding of the country and is reflected in constitutional common law, the law of medical privilege, and the standards of medical ethics of virtually every segment of the medical profession. Appellants' Br. 15-20. Ethics standards have consistently provided: "The physician should not reveal confidential communications or information without the express consent of the patient, unless otherwise required to do so by law." AMA Principles of Medical Ethics, IV. (1998); Amer. Coll. of Phys-Amer. Soc. of Internal Med., Ethics Manual (1998); Assoc. of Amer. Phys, and Surg., Prin. Med. Ethics (9) (Jan. 1991); Amer. Dental Assoc., Code of Prof. Conduct, Sec. 1; Amer. Acad. of Physical Med. and Rehab., Code of Conduct II; Amer. Nursing Assoc., Code of Ethics, 3.1, 3.2; Amer. Psychiatric Assoc., Prin. of Med. Ethics, Sec. 4 (2001); Amer. Psychoanalytic Assoc., Prin. and Standards of Ethics, IV.2; Amer. Psychological Assoc., Ethical Principles, 4.01, 4.05(2003); Nat. Assoc. of Social Workers, Ethical Standards, 1.07 (1999); Clinical Social Work Fed., Code of Ethics III (2003); Amer. Coll. of Emergency Room Phys., Prin. of Ethics, 5 (2001); Amer. Physical Ther. Assoc., Guide for Prof. Conduct, 2.3 (2004); Amer. Soc. of Radiologic Technicians, Code of Ethics, (9) (2003); Amer. Pharm. Assoc., Code of Ethics, Sec. II; Nat. Community Pharm. Assoc., Privacy, Position Statement.

the Amended Rule which is "clearly governmental conduct". However, the Court stated that the "injury" Plaintiffs allege is that their personal health information is being used and disclosed, "without their permission and against their will by third parties". Id. citing Appellants' Br. at 2.

In fact, Plaintiffs' alleged that their personal health information is being disclosed "without their permission and against their will, to numerous other members of the public and government employees for certain 'routine' purposes by covered entities exercising federal authority granted by the Amended Rule". Appellants' Br. at 2. (Emphasis added.) Plaintiffs' constitutional allegations include the Secretary's violation of their constitutionally protected privacy rights by issuing the Rule, conferring unlawful power on all covered entities (including himself) and adopting a rule with the intent, objective and effect of authorizing, supporting and encouraging all covered entities to violate the Plaintiffs' medical privacy. Complaint paras. 71-79. J.A. 1,486.

Accordingly, this is not a case where plaintiffs seek to hold a government official responsible for the acts of private parties. Rather, Plaintiffs seek to hold the Secretary responsible for his own actions. Post Hearing Memo. at 10-11. Plaintiffs showed that the promulgation of a rule expressly intended to allow others to violate constitutional liberties is "clearly 'a choice attributable to the State'" regardless of whether the authority is ever exercised by private parties. Santa Fe Indep. School Dist., 530 F.3rd 290, 311, 316 (2000). See also, Sterling, 232 F.3d at 196 ("threats of unconstitutionally enforcing laws…can lead to a chilling effect" on constitutional rights). So the Court misapprehended Plaintiffs' claims.[6]

The Court then applied a single, incorrect state action analysis. Although the Court noted the "different" nature of this case, it applied only the state action test set forth in National Collegiate Athletic Association v. Tarkanien, 488 U.S. 179 (1988). Dec. at 26 ("Where, as here, plaintiff argues that the State has 'authorized' or 'empowered' a private entity to act in a way that directly brings about the alleged injury, our inquiry focuses on 'whether the State provided a mantle of authority that enhanced the power of the harm-causing individual actor.'

[6] In a footnote, the Court stated that "Citizens here challenge the Secretary's promulgation of the Privacy Rule" as distinct from specific disclosures by Defendant. Dec. at 25, n. 12. The Court never addressed how the Secretary could exercise power that the Constitution did not give to him or to Congress and why this unlawful exercise of power is not "state action". Of course, it is undisputed that the Secretary, as a covered entity, is also the beneficiary of his unlawful action as the administrator of federal health programs such as Medicare and Medicaid. Plaintiff Congress of California Seniors specifically represents the interests of patients and consumers who rely on those programs for health care. Post Hearing Memo at 10, n. 11.

Tarkanien, 488 U.S. at 192'"). The Court then concluded there can be no state action because the Rule does not meet the "Tarkanien test". Dec. at 32.

The Tarkanien case was exactly the type of case that the Court acknowledged that this case is not. It was a suit by a basketball coach against a private association alleging that it was acting on behalf of the State. 488 U.S. at 188. The Supreme Court applied a single state action test that is appropriate for "delegation" cases. 488 U.S. at 192. Plaintiffs in this case have sued the Secretary based on his own actions and do not contend that "third parties are acting on the Secretary's behalf". Dec. at 24. Plaintiffs introduced more than 25 undisputed affidavits and voluminous unrefuted evidence of covered entities violating or threatening to violate their medical privacy by exercising the "regulatory permission" conferred by the Rule in order to illustrate that the Secretary's issuance of the Rule was having its intended effect and to show that the violation of Plaintiffs' medical privacy was not speculative.

This Circuit has not found the type of state action case presented by the Plaintiffs "different" and has found that there are a number of factual categories and tests that the Supreme Court has determined courts should apply in evaluating the existence of state action. Leshko v. Servis, 423 F.3d at 340; Crissman v. Dover Downs, 289 F.3d at 242, 246 relying on Brentwood Acad. v. Tennessee Secondary Sch. Athletic Ass'n, 531 U.S. 288 (2001). The decision here, however, did not cite any of these cases or discuss the state action tests they described.

Applying Brentwood, this Circuit has held that, "[s]tate action cases broadly divide into two factual categories…[t]he first category involves an *activity* that is significantly encouraged by the state or in which the state acts as a joint participant". "[T]he second category of cases involves an *actor* that is controlled by the state, performs a function delegated by the state, or is entwined with government policies or management". 423 F.3d at 340.

State action is present in "action-centered" cases, "where the state provides 'significant encouragement, either overt or covert' for the activity". Id. Further this Circuit noted that determining state action in action-centered cases "requires tracing the activity to its source to see if that source fairly can be said to be the state." "The question", according to the Leshko Court, is "whether the fingerprints of the state are on the activity." Id. By contrast, the analysis in the "actor-centered" cases consists of determining "whether the actor is so integrally related to the state that it is fair to impute to the state responsibility for the action." Id.

This case would seem to fall most comfortably into the "action-centered" category of cases while the Tarkanien case clearly falls into the "actor-centered" category.[7] Thus, this Court has applied exclusively the analysis for actor-centered cases to an action-centered case. This would appear to be a clear conflict with the holdings in Leshko, Crissman, and Brentwood.

This Court has found specifically that the injury to Plaintffs' medical privacy is "casually connected and traceable to an action of the defendant." Dec. at 18, n. 9. So the Court has already "trac[ed] the activity to its source and found the Secretary's fingerprints all over it.

Undisputed evidence shows that the non-consensual disclosure of Plaintiffs' health information under the Rule was far more than "significantly encouraged" by Defendant. The Rule compels all covered entities to provide a "notice of privacy practices" which must include a prescribed list of all of the non-consensual uses and disclosures authorized by the Rule. 45 C.F.R. 164.520(b)(1). The Rule allows covered entities to honor requests by individuals for additional privacy protections only by entering into a special agreement to provide additional restrictions on uses and disclosures. 45 C.F.R. 164.522. However, the Rule provides that covered entities will be subject to severe civil and criminal penalties if they enter into such agreements and fail to abide by them any respect. Appellants' Reply Br. at 7.[8] Thus, covered entities that wish to avoid additional exposure to civil and criminal liability must adopt only the privacy practices set forth in the Rule that eliminate Plaintiffs' medical privacy.

In Lugar v. Edmonson Oil Co, 457 U.S. 922, 937 (1982), one of the "action-centered" cases cited in Leshko, the Supreme Court summarized a two-part approach that had been used to determine whether deprivation of a federal right might be "fairly attributable" to the state. The Court stated that typically "the deprivation must be caused by the exercise of some right or privilege created by the State…and that "…the party charged with the deprivation must be a person who may be fairly said to be a state actor." This may be "because he is a state official." According to the Court, these principles "collapse into each other" when the party charged with the deprivation is, in fact, a state official. The action in this

[7] Given the Secretary's close involvement with covered entities in issuing the Amended Rule and his express approval of the activity, state action also could be present under an "entwinement", "integral involvement" or other state action test not considered by the Court. Brentwood, 531 U.S. at 296; Jackson v. Metro. Edison Co., 419 U.S. 345, 356 (1974).

[8] State action also appears to be present due to the fact that the Rule "discourages" entities from allowing individuals to protect their medical privacy. See Adickes v. S.H. Kress & Co., 398 U.S. 144, 194 (1970) (Brennan, J. concurring in part and dissenting in part).

case is clearly "fairly attributable" to the Secretary because the violation of Plaintiffs' medical privacy was caused by the issuance of a rule that created a new federal right in all covered entities (including the Secretary) to deprive Plaintiffs' of their medical privacy, and the party who has been charged with the deprivation is, appropriately, the Secretary who created that right and encouraged its use.[9]

Lugar reveals another basis for state action that is present in this case. State action is present when there is state enforcement of a policy even though a private entity may have had complete discretion in adopting the policy. 457 U.S. at 938, citing Moose Lodge No. 107 v. Irvis, 407 U.S. 163 (1972). The Court in Moose Lodge, found state action where a state regulation merely required a private club to comply with its own bylaws, but the club's bylaws prohibited the admission of minorities as guests. 407 U.S. at 178. The Rule in this case encourages, and even compels, covered entities to adopt a policy of non-consensual disclosures and also compels covered entities "to abide by the terms" of that policy. 45 C.F.R. 164.520(b)(1)(v)(B).

State action further would appear to be present based on a principle set forth in Blum v. Yaretsky, 457 U.S. 991, 1003 (1982), another "action-centered" case cited in Leshko. A finding of state action is appropriate where the action reflects the "imprimatur" of the state. See also, Jackson v. Metropolitan Edison Co., 419 U.S. at 357 (1974); Shelley v. Kraemer, 334 U.S. 1, 20 (1948). The Court here found that all covered entities had changed their privacy policies to make non-consensual disclosures effective on the Rule's compliance date "using language lifted directly from the Privacy Rule itself." Dec. at 19, n. 9. Further, the Court noted the fact that covered entities are using the Rule as a "new federal seal of approval", or imprimatur, to disclose Plaintiffs' health information. Dec. at 37.

The Court then compounded its error by relying on an excerpt from Adickes, an "actor-centered case" like Tarkanien, for the broad proposition that state action can be present only where "the State, by its law, has compelled the act" or has "commanded" a particular result. Dec. at 27, citing several Supreme Court cases. The Court in Adickes simply held that a victim of discrimination at the hands of a private entity would be able to show state action if she were able to show that the action was compelled or commanded by state law or custom. 398 U.S. at 171.

[9] The evidence shows that all covered entities have acted "with knowledge of and pursuant to" the contested Rule as did the actors in Amer. Manufacturers Ins. Co. v. Sullivan, 526 U.S. 40, 50 (1999). Unlike in that case, however, the Secretary here has participated in, significantly encouraged, dictated and enforced the contested action. Further, the Secretary's action here radically altered, rather than restored, historical rights and relationships between covered entities and individuals.

The Court was careful to state that it was not deciding "whether less substantial involvement by the State might satisfy the state action requirement." Id.

Justice Brennan, concurring and dissenting in part, analyzed the same cases referenced by this Court and noted that they do not require an activity to be compelled or commanded in order for state action to exist, but rather, "leave no doubt" that "the mere existence of efforts by the State…to authorize, encourage, or otherwise support" violations of individual liberties "constitutes illegal state involvement". 398 U.S. at 202.

As Plaintiffs have also shown, the Constitutionality of a law historically has also depended upon its "immediate objective" and "ultimate effect" as analyzed in its "historical context". Appellants' Br. 36-38, Reply Br. 8-112.

IV. The Court Announced a New State Action Test Which Is Unprecedented and Unsupported in Case Law

Erroneously limiting itself to the "Tarkanien test", the Court concluded that state action is entirely dependent upon the law in question having a coercive quality. Dec. at 29. Even this overly restrictive view of the state action doctrine, however, did not allow the Court to dispense with the undisputed evidence that covered entities radically changed their privacy practices on the implementation date of the Rule or the numerous cases cited by Plaintiffs where constitutional violations were found in laws that were not coercive. Appellants' Reply Br. 8-13; Post Hearing Memo. 10-12.

To address these points, the Court adopted the unsupported position that changed behavior does not give a law the coercive quality upon which all state action supposedly depends, "unless the law itself suddenly authorized something that was previously prohibited." Dec. at 29. The Court illustrated its new theory with an example that contends that there would be no state action (and no Constitutional scrutiny) for an act of Congress that authorized cinema operators to conduct random searches of all moviegoers. According to the Court, the federal law is immune to Constitutional challenge if it "codifies a power the cinema owners had already." Dec. at 32. Under the Court's example, the federal law could not be challenged constitutionally even if it were expressly intended to deprive moviegoers of their liberty, it gave cinema operators significant encouragement and support to use the law in this manner, it was having its intended effect, and it contained civil and criminal enforcement measures to ensure that the cinema operators complied with such policies.

The Court's theory ignores the long-standing principle that otherwise private conduct implicates Constitutional protections when the state places its "power, property, and prestige" behind private action. Edmonson v. Leesville Concrete Co. Inc., 500 U.S. 614, 624 (1991); Moose Lodge v. Irvis, supra; Shelley v. Kraemer, 334 U.S. at 13. It further ignores the principle that personal choices become subject to constitutional challenge when the state puts its power and legal authority behind them. Reitman v. Mulkey, 387 U.S. 369, 377 (1967).

V. The Court Misconstrued the Holding in Cases Cited by Plaintiffs

The Court acknowledged that Plaintiffs cited many cases where statutes were found unconstitutional even though they contained no coercive provisions. Dec. at 33, n. 33. The Court asserted, again without support, that state action was found in these cases because the laws at issue had "empowered" private parties to act in ways that would have been prohibited but for the enactment of the challenged law. Id.

The Court illustrates its point by noting that the Supreme Court in Reitman v. Mulkey, supra, invalidated a state constitutional provision that nullified two state laws that prohibited racial discrimination in land sales. Dec. at 34. The rationale of Reitman, in fact, undermines the point the Court was trying to illustrate. There the Supreme Court was careful to explain that the state constitutional provision was invalid under the federal Constitution not because it authorized discrimination that two state laws had prohibited, but because it embued previously permitted private discriminations with state authority. Specifically, the Court held:

> "But the [state constitutional] section struck more deeply and widely [than impliedly repealing the two anti-discrimination statutes]. Private discriminations in housing were now not only free from [the anti-discrimination statutes] but they also enjoyed a far different status than was true before the passage of those statutes. The right to discriminate, including the right to discriminate on racial grounds, was now embodied in the State's basic charter, immune from legislative, executive, or judicial regulation at any level of the state government. Those practicing racial discriminations need no longer rely solely on their personal choice. They could now invoke express [state] constitutional authority, free from censure or interference of any kind from official sources." 387 U.S. at 377. (Emphasis added.)

So the state constitutional provision in Reitman violated the federal Constitution because it expressly authorized as state policy activities that private individuals previously had the power to conduct. Similarly, the Amended Rule creates a new federal right in all covered entities that expressly authorizes and significantly encourages privacy violations that could only have occurred previously without federal authorization. As in Reitman, covered entities need no longer to rely on their personal choice to deprive Plaintiffs of their medical privacy. They may now exercise federal "regulatory permission" granted to them by the Rule.

As this Circuit has noted, the Supreme Court has determined that there is "no simple line between states and persons." Leshko, 423 F.3d at 339. Further, a "host of facts" can bear on the fairness of attributing action the state. 423 F.3d at 340. For this reason, the Supreme Court has "established a number of approaches". Crissman, 289 F.3d at 239. The Court in this case has fastened on a single erroneous approach and failed to consider all of the facts.

This case is unique in that none of the facts alleged in the Verified Amended Complaint or Plaintiffs' affidavits and voluminous evidence have been controverted in any way. The parties have moved for summary judgment so there are no material facts in dispute. The facts show the following:

(a) The Secretary recognized the right of health information privacy and consent in the Original Rule as consistent with Constitutional law, the law of medical privilege, established standards of medical ethics and the long-standing reasonable expectation of patients. Appellants' Br. 14-20, 44-45.

(b) The Secretary decided to eliminate the right to health information privacy under federal law by eliminating the right of consent and affirmatively granting a new right of "regulatory permission" to all covered entities (including himself) to use and disclose any personal health information without notice, without consent and over the individual's objection. Appellants' Br. 6-7, Reply Br. 4.

(c) The admitted intent of the Amended Rule was to remove an "impediment" to efficiency which is the Plaintiffs' right to

privacy. Appellants' Br. 23, Reply Br. 12, Post Hearing Memo. 2.

(d) On the April 23, 2003 implementation date, the Amended Rule had its intended effect by causing covered entities to radically change their health information privacy practices and provide for non-consensual uses and disclosures of Plaintiffs' personal health information precisely as prescribed in the Amended Rule. Appellants' Br. 7, 33-34.

(e) Covered entities have no realistic option to adopt privacy practices that are different from those prescribed by the Rule, and the Rule enforces those practices with civil and criminal penalties. Appellants' Reply Br. 5-7.

(f) By authorizing the disclosure of Plaintiffs' health information without notice, the Rule eliminated the ability of Plaintiffs to assert privacy rights they had under federal and state law. Appellants' Reply Br. 6, 13-15.[10]

(g) Every effort by the Plaintiffs to protect their medical privacy since the Rule's effective date has been rendered ineffective by covered entities applying the "regulatory permission" granted by the Secretary. Appellants' Br. 33-34.

(h) Plaintiffs are now attempting to protect their medical privacy by avoiding seeking necessary health care but even that course of action no longer affords effective privacy protection because the Rule also applies to health information created prior to the April 23, 2003 implementation date. Appellants' Br. 29; Reply Br. 2-3.

As this Circuit noted in Crissman, courts applying the state action doctrine should "look to reality over form". 289 F.3d at 243, citing Brentwood. See also, Leshko, 423 F.3d at 342 and ACLU of N.J. v. Blackhorse Pike Re. Bd. of Ed., 84 F.3d 1471, 1475 (3rd Cir. 1996) (en banc). The plain reality of this case is that Plaintiffs have lost their right to privacy—"the right most valued by civilized

[10] The Court appears to have simply ignored this vital point.

man"[11]—and that loss is a direct and inevitable consequence of affirmative actions taken by the Secretary. To fail to hold the Secretary responsible for his actions would allow this fundamental right to be extinguished with "winks and nods" contrary to the letter and spirit of the state action doctrine. Brentwood, 531 U.S. at 301.

Respectfully submitted,

_____

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[11] Olmstead v. U.S., 277 U.S. 438, 478 (1928) (Brandeis J., dissenting). Appellants Br. 10.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 15TH day of December, 2005, a copy of the foregoing Petition for Rehearing and Rehearing En Banc were served by first class mail upon counsel:

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