2011 WL 2581849 (U.S.) (Appellate Petition, Motion and Filing)
Supreme Court of the United States.

Harold I. EIST, M.D., Petitioner,
v.
MARYLAND STATE BOARD OF PHYSICIANS.

No. 10-1425.
June 20, 2011.

On a Petition for a Writ of Certiorari to the Court of Appeals of Maryland

Brief for American Association of Practicing Psychiatrists et al as Amici Curiae Supporting Petitioner

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*i QUESTIONS PRESENTED

1. May a state restrict a patient's federal constitutional right to privacy by compelling a physician to disclose confidential patient records without notice and authorization by the patient and in conflict with the physician's ethical obligations?

2. May a state agency simultaneously serve as investigator, prosecutor and adjudicator with respect to a licensee under its jurisdiction without amending the state's constitution which explicitly separates legislative, executive and judicial powers?

3. May a physician be disciplined by a state's medical licensing board if:

a. The relevant statutory language - “fails to cooperate with a lawful investigation” - is unconstitutionally vague;

b. The board never notified the patients it was seeking their confidential medical records; or

c. The board's simultaneous roles as investigator, prosecutor and adjudicator deprive Petitioner of his right to due process?

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*1 INTEREST OF AMICI CURIAE [1]

Amici Curiae represented here are national and state practitioner and consumer organizations that have an interest in protecting the patient's right to health information privacy and the ethical practice of psychotherapy. These organizations represent thousands of individuals across the United States.

The American Association of Practicing Psychiatrists ("AAPP") is the primary author of this brief. AAPP is a nationwide 1,000 member organization of psychiatric physicians who have dedicated themselves to preserving the accessibility and

availability of quality psychiatric care for patients and reasonable reimbursement for the psychiatric physicians who provide that care.

Additional *amici* are included in the Appendix to this brief.

*2 SUMMARY OF ARGUMENT

The petition for certiorari should be granted for the following reasons:
1. Over the past thirty years this Court has repeatedly recognized the right to health information privacy under the Constitution, and that right has been recognized by virtually every circuit. However, the scope of that right and the method for balancing competing governmental interests have not been defined by this Court.

2. At issue in this case is the privacy of mental health records of patients in ongoing treatment which this Court has found essential for access to effective psychotherapy.

3. The facts are undisputed. The underlying third party complaint on which a subpoena for records was based has been dismissed, and neither the patients nor the psychiatrist violated any law related to their treatment.

4. Law-abiding patients, ethical psychotherapists, and medical boards need to know what constitutional privacy rights mental health patients have and when the state must honor those rights.

***3** This case arises out of a scheme by a lawyer ("Mr. S") to deprive his wife ("Patient A") of custody of their 10 and 14 year-old children ("Patients B and C") in the context of a contentious divorce proceeding. Mr. S enlisted the Board's assistance in seeking a litigation advantage over his wife by compelling disclosure of her psychiatric treatment records and those of her children and damaging the credibility and reputation of their psychiatrist (Dr. Eist) in retaliation for his having provided an affidavit attesting to the wife's fitness as a parent in the custody proceeding.

The Board enabled Mr. S' scheme through the application of its "absolutist" investigatory policy under which, as a preliminary step in *any* investigation, the Board compelled the immediate disclosure of *all* medical records of *any* patients who were the subject of *any* complaint *without notice* to the patients or an opportunity to object, and in *complete disregard* of the facts and circumstances giving rise to the complaint. This policy was based on the Board's assumption that patients have no privacy rights with respect to the Board and that the Board is free to compel practitioners to violate their standards of ethics.

Such a policy by a mental health professional licensing board "invite[s] a potential witch hunt into the emotional lives of people who have not been notified nor been given the opportunity to be heard about the disclosure of their mental health records …." *Jane Doe v. Md. Bd. of Soc. Work Exam'rs,* 384 Md. 161, 193, 862 A.2d 996, 1014 (Md. 2004) (Judges Battaglia and Raker, dissenting). That witch hunt occurred in this case.

***4** At stake in this case is continued access to effective psychotherapy, the ethical practice of psychotherapy, and the preservation of the right to health information privacy under the U.S. Constitution.

STATEMENT OF FACTS

The facts in this case are undisputed. *Maryland State Bd. of Physicians v. Eist,* 417 Md. 545, 556, 11 A.3d 786, 792 (Md. 2011); *Maryland State Bd. of Physicians v. Eist,* 176 Md. App. 82, 117, 932 A.2d 783, 804 (Md. Ct. Spec. App. 2007).

Patient A began receiving psychotherapy from Dr. Eist in 1996, and two of her children began receiving treatment in 1999 while the family was embroiled in contentious divorce and custody litigation with Mr. S, a "litigation adversary." *Eist,* 176 Md. App. at 82, 128. At Patient A's request, Dr. Eist executed an affidavit for use in the custody litigation attesting that Patient A was a competent caretaker of her children. *Id.* at 103. On March 13, 2001, Mr. S filed a complaint with the Board making an unsupported and unsworn allegation that "for the past two years" Dr. Eist, in Mr. S' opinion, "over-medicated my wife and my sons" and acted unprofessionally by asking for payment for a family counseling session. *Id.* at 101-02. At about the same time, Mr. S also sought to gain access to the children's psychotherapy records through the custody proceeding, but counsel for the children blocked that attempt by asserting their psychotherapist-patient privilege. *Id.* at 104-05.

***5** Two days after receiving the complaint from Mr. S, the Board, following its absolutist policy, sent a *subpoena duces tecum* to Dr. Eist commanding him to produce, within ten days, "a copy of all medical records of" Patients A, B, and C. *Id.* at 103. The demand was not limited to "the past two years" or to medications as referenced in the complaint. The sole legal remedy stated in the subpoena for resolving any objection was "on petition of the Board a court of competent jurisdiction may punish the person as for contempt, pursuant to the provisions of the Health Occupations Article of the Annotated Code of Maryland Section 14-206(b)." *Eist,* 417 Md. at 550. The Board did not send the subpoena to the patients or otherwise notify them that their psychiatric records had been requested based on a complaint by Mr. S. *Eist,* 176 Md. App. at 102.

Immediately upon receiving the subpoena on April 19, 2001, Dr. Eist informed the Board that the complaint was false and had been filed by a third party who was an adversary to his patients in a divorce proceeding in which custody was an issue. *Id.* at 103. Dr. Eist also told the Board that under Maryland law and his standards of ethics he could not release his patients' mental health information without their permission. The Board told him he was wrong and that he had to produce the records. *Id.* at 107. [2] Dr. Eist then consulted counsel who confirmed that, under applicable law, he must obtain the patients' permission in order to disclose their records.

***6** On April 20, Dr. Eist sent the Board a letter again informing it of the divorce and custody litigation and that he believed the Board was required to notify his patients that he was being asked to divulge their confidential psychiatric information. He also offered to "cooperate fully" with the the investigation if his patients consented to the disclosure of their mental health information or with "any appropriate decision" that overruled their objections. *Id.* at 104.

Patients A, B, and C informed Dr. Eist that they strongly objected to him disclosing their psychiatric records to the Board. Dr. Eist informed the Board of those objections and reiterated his willingness to cooperate. *Id.* at 105. On May 14, 2001, Patient A informed the Board through her lawyer that she did not want Dr. Eist to release her records, that she had no complaints about Dr. Eist, and that he had always conducted himself in a professional manner. *Id.* at 105-06.

Within thirty days of the issuance of the subpoena, the Board was made aware that (a) the patients had asserted their constitutionally protected right to privacy and had rebutted the unsupported allegations against Dr. Eist, (b) Dr. Eist believed he could not ethically disclose their information over their objections, and (c) the complaint had been filed by a litigation adversary of the patients seeking to harm them and Dr. Eist for personal gain. Yet, the Board never interviewed the patients or conducted any investigation into the facts provided by Dr. Eist and the patients.

***7** The ten-day return deadline in the subpoena expired on April 29, but the Board did not seek a court order compelling disclosure of the information over the patients' objections. Had the Board sought to enforce the subpoena by going to court, it would not have been able to sustain its burden of showing that the subpoena was lawful. The Court of Special Appeals noted that had the Board sought to enforce the subpoena using the process described in it, "the proper ruling by the court would have been that the Board was not entitled to the records in question because disclosing them would violate the patients' constitutional rights." *Eist,* 176 Md. App. at 135. Instead, it sent another letter dated June 27 to Dr. Eist requesting a response to the allegations and demanding that the patients' records be disclosed "within forty-eight

hours" and stating that failure to disclose the records "may be grounds for disciplinary action." *Id.* at 106. The forty-eight hours passed, and still the Board did not seek a court order, *Id.*

On July 11, Dr. Eist's counsel provided the Board greater detail on the adversarial nature of the divorce and custody case. He again stated that Dr. Eist did not have his patients' permission to reveal their records and that "no court has weighed the necessity for violating their confidences based upon the unsupported allegations of someone with a clear conflict of interest, and a desire to violate those confidences." *Eist,* 417 Md. at 552. He provided correspondence from lawyers for all of the patients asserting their right to privacy for the requested information and stated, "We believe that the communications of persons who are uninvolved in the complaint, who have legitimate ***8** privacy and confidentiality issues, and who are engaged in litigation with the complainant, should be examined and thoughtfully dealt with." *Eist,* 176 Md. App. at 107.

On July 16, Dr. Eist wrote the Board a detailed letter explaining the family history that resulted in the divorce and custody litigation and rebutting the allegation that he had acted unprofessionally. *Id.* The Board never responded to the letters from Dr. Eist or his counsel. *Id.* at 108.

On February 4, 2002, the Board formally charged Dr. Eist with failing to cooperate with an investigation. *Id.* Under compulsion of the Board's charge, Dr. Eist's counsel notified counsel for the mother and her children on March 1, 2002 that Dr. Eist would have to disclose their records to the Board within one week unless they convinced the Board to drop the request or obtained a court order enjoining Dr. Eist from disclosing their records. *Id.* Having heard no response, Dr. Eist disclosed the records to the Board on March 21, 2002. *Id.*

On August 14, 2002, an administrative law judge ("ALJ") ruled the Board was wrong in believing that it had an absolute right to the mental health records of the patients and that when patients assert their constitutional right to privacy, an independent fact finder must assess whether the Board has shown a compelling interest in the records that overrides the patient's constitutional privacy interest, using criteria specified in federal constitutional case law. *Id.* at 109-10. The ALJ concluded that Dr. Eist had not been uncooperative but, rather merely had tried "to ***9** safeguard the rights of his Patients." *Id.* at 110. On January 28, 2003, the Board reversed the ALJ decision based on its erroneous belief that Maryland case law supported its policy that the Board's interest in patient records would always outweigh the patients' constitutional privacy interest. *Id.* at 110-11.

Dr. Eist appealed to the Circuit Court for Montgomery County which, on August 19, 2003, reversed the Board on the grounds that it had committed an "error of law" in determining that it had an absolute right to the mental health records regardless of the patients' constitutional right to privacy. *Id.* at 111. The court remanded the case for an ALJ evidentiary hearing on whether the Board could show an overriding compelling interest. *Id.*

In April 2004, Dr. Eist learned through discovery that a peer review committee had exonerated him *four months earlier* and that the complaint had been dismissed on February 5, 2004. *Id.* at 111. The Board thereby suppressed the fact that the complaint was baseless so it would not interfere with their efforts to punish Dr. Eist for defending the interests of his patients.

On November 16, 2004, an ALJ again ruled against the Board finding that, under criteria in federal case law, the Board had not shown a compelling interest sufficient to override the privacy interests of the patients. *Id.* at 112. On June 22, 2005, the Board conducted its evaluation under the federal criteria and concluded that its interests outweighed those of the ***10** patients, thereby rationalizing its absolutist disclosure policy. *Id.* at 112-13.

Dr. Eist appealed, and on April 5, 2006, the Circuit Court again reversed the Board concluding: "… the Board, as a matter of law, has exceeded its authority in rendering its decision based on factual findings to the contrary.… [T]he Board's

decision is one that is not adequately supported by the facts and the law.…" Brief for Petitioner at 157a, app. A. In reaching its decision, the court noted that the Board elected not "to enforce the subpoena through legal duress." *Id.* at 71.

The Board appealed the Circuit Court's decision to the Maryland Court of Special Appeals and, on September 13, 2007, it issued a detailed unanimous decision in Dr. Eist's favor holding that:
1) Maryland case law has adopted this Court's recognition that patients have a right to privacy for health information protected by the U.S. Constitution.

2) The Board's absolutist disclosure policy is in conflict with constitutional law applied by this Court and the State of Maryland.

3) Once patients assert their constitutional right to health information privacy, competing interests must be weighed by an independent tribunal using criteria established in federal case law.

***11** 4) The individual's constitutional right to privacy may be overridden only by a showing of a compelling state interest. *Eist,* 176 Md. App. at 135.

The Board appealed, and on January 21, 2011, the Maryland Court of Appeals, in a split 4-3 decision, reversed the five prior decisions in Dr. Eist's favor. The Court of Appeals did not dispute the constitutional analysis in the prior holdings. It avoided addressing the constitutional and ethical issues by holding that (a) the Maryland legislature had expressly mandated by statute that physicians in Dr. Eist's position "must" file a motion for a protective order as the sole means of raising an objection to a subpoena, and (b) the five prior decisions were not supported by Maryland case law because all rulings cited in support had arisen in the context of adjudicating a motion to quash a subpoena. *Eist,* 417 Md. at 564-68.

The Court of Appeals ruling suffered from two fatal defects: first, the statutory "form of notice" of the subpoena on which the court relied as evidence of legislative intent was not enacted until 2005 and was *not* the form of notice that the Board sent to Dr. Eist in 2001, and second, the Maryland constitutional rulings were *not* contingent upon the physician or the patient raising the constitutional issue in a motion to quash the subpoena.

On February 17, 2011, the court denied Dr. Eist's Motion for Reconsideration but materially revised its final decision by deleting all references to the statutory "must" language added in 2005. The ***12** decision now rests on section 4-307(k)(6) which states that the provisions for issuing subpoenas "may not preclude a health care provider, a recipient, or a person in interest" from asserting a constitutional right in a motion to quash a subpoena. *Eist,* 417 Md. at 564.

There is no evidence that the legislature intended this to be the *exclusive* route for raising constitutional concerns. The subpoena sent to Dr. Eist did not even mention this provision. *Id.* at 550.

So this case involves an effort by a state licensing board to prevent law-abiding patients from exercising their constitutional right to privacy and psychotherapists from adhering to their standards of ethics.

ARGUMENT

I. The Court of Appeals Decision Threatens Access to Effective Psychotherapy

The "reason and experience" of the nation, as recognized by this Court, shows that "[e]ffective psychotherapy, by contrast [with treatment of physical ailments], depends upon an atmosphere of confidence and trust in which the patient is willing to make a frank and complete disclosure of facts, emotions, memories, and fears." *Jaffee v. Redmond,* 518 U.S. 1, 10, 116 S. Ct. 1923, 1928 (1996). Further, this Court has found, "the mere possibility of disclosure may impede development

of the confidential relationship necessary for successful ***13** treatment [footnote omitted]." *Id.*; *see also McCormack v. Bd. of Educ,* 158 Md. App. 292, 305-06, 857 A.2d 159, 166-67 (Md. App. 2004).

The unique therapist-patient relationship has been described as follows:
Psychotherapy probes the core of the patient's personality. The patient's most intimate thoughts and emotions are exposed during the course of treatment. " 'The psychiatric patient confides (in his therapist) more utterly than anyone else in the world. … (H)e lays bare his entire self, his dreams, his fantasies, his sins, and his shame.' " (*Taylor v. United States* (1955) 95 U.S. App. D.C. 373, 222 F.2d 398, 401, quoting Guttmacher and Weinhofen, Psychiatry and the Law 272 (1952)). The patient's innermost thoughts may be so frightening, embarrassing, shameful or morbid that the patient in therapy will struggle to remain sick, rather than reveal those thoughts even to himself. The possibility that the psychotherapist could be compelled to reveal those communications to anyone … can deter persons from seeking needed treatment and destroy treatment in progress. (Citing J. Katz, J. Goldstein, & A. Dershowitz, Psychotherapy, Psychoanalysis and the Law 726-27 (1967).)

Hawaii Psychiatric Soc'y v. Ariyoshi, 481 F. Supp. 1028, 1038 (D. Haw. 1979) (quoting *Caesar v. Mountanos,* 542 F.2d 1064, 1071-72 (9th Cir. 1976) (Hufstedler, J., dissenting)). *See also* ***14** *McMaster v. Iowa Bd. of Psychology Exam'rs,* 509 N.W.2d 754, 758 (Iowa 1993).

This Court has further noted that the confidential conversations essential for effective psychotherapy would surely be chilled by the absence of privacy protections "particularly when it is obvious that the circumstances that give rise to the need for the treatment will probably result in litigation." *Jaffee,* 518 U.S. at 12. The already imperative need for private communications in psychotherapy becomes even more critical where there is a chance the communications could be used in child custody cases. *Lazenovsky v. Lazenovsky,* 357 Md. 586, 619-20, 745 A.2d 1054, 1072 (Md. 2000); *In re Berg,* 152 N.H. 658, 665, 886 A.2d 980, 986-87 (N.H. 2005). All of these circumstances were present in this case.

The ethical psychotherapist must, at the outset of the relationship, "disclose to the patient 'the relevant limits on confidentiality.' " *Jaffee,* 518 U.S. at 13 n.12. In light of the Court of Appeals decision psychotherapists may well have to give their patients the following Miranda-style warning before commencing psychotherapy:

> Mrs. A, you may tell me your most intimate thoughts and emotions so that I can treat you effectively. I will not disclose what you tell me, unless your estranged husband or anyone else files even an unsupported false complaint with the Maryland State Board of Physicians in an effort to deprive you of custody of your children, or damage you in some other way, in which case, ***15** I will have to disclose your entire psychiatric record, and that of your children, immediately without notice to you and without providing you with an opportunity to object unless, within ten days or before I disclose the records, you somehow find out about the Board's request and can locate a knowledgeable lawyer to file a motion to quash the request. Now, tell me what is troubling you.

There could hardly be a more grave threat to effective psychotherapy.

The risk of disclosure of sensitive psychiatric information was not merely hypothetical. As the Court of Special Appeals found, the Board did not disclose the psychiatric records of the mother and her children to Mr. S only because "Dr. Eist was vigilant in making it known to the Board that in no event were the records in question to be turned over to Mr. S." *Eist,* 176 Md. App. at 123. Even so, the identities of Patients A, B, and C were revealed in unsealed portions of the agency and circuit court records available to the public. *Id.* at 125 n.18.

It cannot be argued rationally that the policy of absolute automatic compelled disclosure of psychiatric records serves the public interest. As this Court found in *Jaffe*, access to effective psychotherapy is in the best interest of *both* the individual

and the public, so protecting the privacy of confidential communications between psychotherapists and their patients serves ***16** *both* the individual and the public interest. *Jaffee,* 518 U.S. at 11-12. [3]

II. The Court of Appeals Decision Threatens the Ethical Practice of Psychotherapy

The right of patients to not have communications with their psychotherapists disclosed without their consent and against their will is reflected in the established standards for the ethical practice of psychotherapy. The principles of ethics of the American Psychiatric Association provide as follows:

A physician shall respect the rights of patients, colleagues, and other health professionals, and shall safeguard patient confidences and privacy within the constraints of the law.

Psychiatric records, including even the identification of a person as a patient, must be protected with extreme care. Confidentiality is essential to psychiatric treatment. This is based in part on the special nature of psychiatric therapy as well as on the traditional ethical relationship between physician and patient.… When the psychiatrist is ordered by the court to reveal the confidences entrusted to him/her by ***17** patients, he or she may comply or he/she may ethically hold the right to dissent within the framework of the law. When the psychiatrist is in doubt, the right of the patient to confidentiality … should be given priority. The psychiatrist should reserve the right to raise the question of adequate need for disclosure. In the event that the necessity for legal disclosure is demonstrated by the court, the psychiatrist may request the right to disclosure of only that information which is relevant to the legal question at hand. [4]

Similarly, the ethics standards of the American Psychoanalytic Association provide that:

> Confidentiality of the patient's communications is a basic patient's right and an essential condition for effective psychoanalytic treatment and research. A psychoanalyst must take all measures necessary to not reveal present or ***18** former patient confidences without permission, nor discuss the particularities observed or inferred about patients outside consultative, educational or scientific contexts. [5]

The National Association of Social Workers' standards state that the social worker should be guided by the principle that "[c]lients' informed and authorized consent will be a prerequisite to transmitting information to or requesting information from third parties." [6]

The American Medical Association's Code of Ethics provides that "conflicts between a patient's right to privacy and a third party's need to know should be resolved in favor of the patient, except where that would result in a serious health hazard or harm to the patient or others." [7]

Dr. Eist, as a medical doctor, a psychiatrist, a past president of the American Psychiatric Association, and the Washington Psychiatric Society, and a psychoanalyst, clearly was bound by these ethical principles. The Board has a duty to prevent the "immoral or unprofessional conduct in the practice of medicine" which includes the failure of a psychiatrist to protect the confidentiality of communications with patients. ***19** *Salerian v. Maryland State Bd. of Physicians,* 176 Md. App. 231, 236-37, 932 A.2d 1225, 1228 (Md. App. 2007). The Board, took the position in this case, however, that patients "had no say in the matter" and that Dr. Eist's ethical obligation to his patients "doesn't matter." Brief for Petitioner at 227a, app. A.

The Board's absolutist policy of automatic compelled disclosure and the Court of Appeals decision upholding it violate established standards for the ethical practice of psychotherapy. Dr. Eist upheld his ethical and legal duty while the

Board failed to discharge its duty to the public. Patient A and her two children had every reason to believe that their communications with their psychotherapist would remain confidential unless the state demonstrated a compelling interest in overriding that expectation.

III. The Court of Appeals Decision Deprives Mental Health Patients of Their Constitutional Right to Privacy

This Court has long recognized that individuals have a right to privacy in their health information protected by the Constitution. *NASA v. Nelson,* _____ U.S. _____, 131 S. Ct. 746, 757 (2011) (drug treatment or counseling information of government employees); *Ferguson v. City of Charleston,* 532 U.S. 67, 78, 121 S. Ct. 1281, 1288 (2001) (results of diagnostic tests); *Whalen v. Roe,* 429 U.S. 589, 599, 97 S. Ct. 869, 876 (1977) (prescription drug information); *Nixon v. Adm'r of Gen. Servs.,* 433 U.S. 425, 457-58, 97 S. Ct. 2797, 2797-98 (1977) (*inter alia*, communications with one's physician). Nearly all federal circuits have now relied ***20** on those rulings to recognize a constitutionally protected right to privacy of personal information. *See* Russell T. Gorkin, *The Constitutional Right to Informational Privacy: NASA v. Nelson,* 6 Duke J. Const. L. & Pub. Pol'y Sidebar 1, 8 n.56 (2010); Joel Glover, *The Right to Privacy of Medical Records*, 79 Denv. U. L. Rev. 540, 541 (2002). While the scope of the right to privacy for health information has yet to be defined, it must encompass therapist-patient communications if it is to have any meaning.

The constitutional right to privacy is not absolute, and courts typically look to see whether the individuals have a "reasonable expectation" of privacy under the facts of a particular case. *Ferguson,* 532 U.S. at 78. *See also, NASA,* 131 S. Ct. at 761; *Whalen,* 429 U.S. at 602; *Nixon,* 433 U.S. at 458. The Maryland Court of Special Appeals correctly applied this Court's constitutional rulings relying on Maryland case law involving mental health records. Based on the "reason and experience" of the nation and prevailing standards of ethics, Dr. Eist's patients had a strong expectation that their psychotherapy records would not be disclosed to the Board over their objection based on an unsupported complaint from a third party.

Whether the reasonable expectation of privacy in a particular case prevails over the state's perceived need for the information requires, at the very least, a careful balancing of the individual's constitutional right to privacy against the state's interests by an independent decision maker. *Ferguson,* 532 U.S. at 78; ***21** *Nixon,* 433 U.S. at 458.[8] Most circuits have adopted a balancing test. *See, e.g., Anderson v. Blake,* 469 F.3d 910, 915-16 (10th Cir. 2006); *Tucson Woman's Clinic v. Eden,* 379 F.3d 531, 551 (9th Cir. 2004); *Denius v. Dunlap,* 209 F.3d 944, 956-57 (7th Cir. 2000); *Block v. Ribar,* 156 F.3d 673, 686 (6th Cir. 1998); *Doe v. City of New York,* 15 F.3d 264, 269-70 (2d Cir. 1994); *Nat'l Treasury Emps. Union v. U.S. Dep't of Treasury,* 25 F.3d 237, 244 (5th Cir. 1994); *Alexander v. Peffer,* 993 F.2d 1348, 1350 (8th Cir. 1993); *Walls v. City of Pittsburgh,* 895 F.2d 188, 192 (4th Cir. 1990); *Hester v. City of Milledgeville,* 777 F.2d 1492, 1497 (11th Cir. 1985); *United States v. Westinghouse Elec. Corp.,* 638 F.2d 570, 578 (3d Cir. 1980). The more intimate and personal the information, the more justified is the expectation that the information will not be shared. *Sterling v. Borough of Minersville,* 232 F.3d 190, 195 (3d Cir. 2000). Many federal and state courts have adopted the seven criteria for balancing competing interests set forth in *United States v. Westinghouse,* 638 F.2d at 578. *See e.g., Eden,* 379 F.3d at 551; *Ex parte St. Vincent's Hosp.,* 991 So. 2d 200, 209 (Ala. 2008); *McNiel v. Cooper,* 241 S.W.3d 886, 896 (Tenn. App. 2007); *Planned Parenthood of Ind. v. Carter,* 854 N.E.2d 853, 879 (Ind. Ct. App. 2006); *Eist,* 176 Md. App. at 791; *Stenger v. Lehigh Valley Hosp. Ctr.,* 530 Pa. 426, 436, 609 A.2d 796,801 (1992).

***22** The need for a balancing of interests necessarily imposes a duty on the Board, once patients assert their constitutional right to privacy, to demonstrate why its interest should override that right. *Carey v. Population Servs. Int'l,* 431 U.S. 678, 686, 97 S. Ct. 2010, 2016 (1977); *McNiel,* 241 SW3d at 900; *see also Eist,* 176 Md. App. at 793-94. Moreover, a state may not infringe fundamental liberty interests " '*at all*, no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling [governmental] interest.' " *Washington v. Glucksberg,* 521 U.S. 702, 721, 117 S. Ct. 2258, 2268 (1997) (emphasis in original) (quoting *Reno v. Flores,* 507 U.S. 292, 302, 113 S. Ct. 1439, 1447 (1993)); *see also Troxel v. Granville,* 530 U.S. 57, 65, 120 S. Ct. 2054, 2060 (2000). Fundamental rights are those "deeply rooted

in this Nation's history and tradition." *Glucksberg,* 521 U.S. at 721 (citations omitted). The right to privacy for highly sensitive mental health information is deeply rooted in the nation's history and tradition. *See Jaffee,* 518 U.S. at 12-15.

Further the state has the burden of demonstrating that there are no "less intrusive alternatives" that would accomplish the state's interest. *Sell v. United States,* 539 U.S. 166, 179, 123 S. Ct. 2174, 2184 (2003). *See also Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1,* 551 U.S. 701, 783, 127 S. Ct. 2738, 2789 (2007); *Grutter v. Bollinger,* 539 U.S. 306, 339-40, 123 S. Ct. 2325, 2345 (2003). These constitutional principals have been recognized repeatedly in cases involving demands for information by medical boards. ***23** *Bearman v. Superior Court,* 117 Cal. App. 4th 463, 472, 11 Cal. Rptr. 3d 644, 650-51 (Cal. Ct. App. 2004); *Wood v. Superior Court of Sacramento Cnty.,* 166 Cal. App. 3d 1138, 1148, 212 Cal. Rptr. 811, 820 (Cal. Ct. App. 1985); *Div. of Med. Quality, Bd. of Med. Quality Assurance v. Gherardini,* 93 Cal. App. 3d 669, 680, 156 Cal. Rptr. 55, 61-62 (Cal. Ct. App. 1979); *McMaster,* 509 N.W. 2d at 759.

Dr. Eist's patients had a reasonable expectation that their mental health records would not be disclosed without their knowledge and permission. It is undisputed that the Board's absolutist policy of disclosure did not permit any balancing of competing interests, because the Board assumed its interests in disclosure would always prevail regardless of the facts. *Eist,* 176 Md. App. at 127-28. The Board made no effort to use less intrusive alternatives to automatic compelled disclosure.

IV. The Court of Appeals Decision Deprives Mental health Patients and Practitioners of Due Process.

The Court of Appeals decision is untenable under established principles of due process. The court essentially held that Dr. Eist and his patients may not contest a state policy that eliminates the patients' right to privacy, because the patients failed to seek a court order quashing a subpoena that was not sent to them, and Dr. Eist and his patients did not follow a process that was not mentioned in the subpoena that the Board convinced them was "futile."

An "elementary and fundamental requirement of due process" under the Fifth and Fourteenth ***24** Amendments to the Constitution is "notice reasonably calculated, under all of the circumstances, to apprise interested parties of the pendency of the action" and "an opportunity to present their objections." The process must include a "reasonable time" for interested parties to make an appearance. *Mullane v. Central Hanover Bank & Trust Co.,* 339 U.S. 306, 314, 70 S. Ct. 652, 657 (1950). *See also Armstrong v. Manzo,* 380 U.S. 545, 551-52, 85 S. Ct. 1187, 1191 (1965).

The Board's notice and subpoena were not sent to the patients, the Board did not provide Dr. Eist or the patients with notice of the process the Court of Appeals found was "exclusive," the subpoena set forth a single process for resolving the objections which the Board declined to follow, and the Board actively discouraged Dr. Eist and the patients from seeking a protective order. The Board also withheld evidence that Dr. Eist had been exonerated while it continued to prosecute him for failing to comply with the investigation into a baseless complaint. The ten days which the Board's subpoena afforded Dr. Eist to disclose the patients' records was not a "reasonable time" for them to find out about the demand, locate competent counsel, and raise an objection in court.

Further, the fact that the Board did not avail itself of the only route to judicial review mentioned in the subpoena and, instead, imposed an administrative penalty conveys the impression the Board intentionally evaded judicial review because it knew its actions were unlawful. As the facts of this case show, medical board investigative procedures that do not comply with the ***25** Constitution and professional ethics are susceptible to abuse by third parties.

CONCLUSION

"[I]t is a promise of the Constitution that there is a realm of personal liberty which the government may not enter." *Lawrence v. Texas,* 539 U.S. 558, 578, 123 S.Ct. 2472, 2484 (2003) (quoting *Planned Parenthood of Southeastern Pa. v.*

Casey, 505 U.S. 833, 847, 112 S.Ct. 2791, 2805 (1992)). The confidential communications between law abiding mental health patients and their ethical psychiatrists surely must be encompassed within that realm. The petition for certiorari filed by Dr. Eist should be granted.

Footnotes

1 Pursuant to Supreme Court Rule 37.6, letters indicating the intent to file this *amicus curiae* brief were received by counsel of record for all parties at least 10 days prior to the due date of this brief. Counsel for Petitioner has consented to the filing of this brief. Counsel for *amicus curiae* represents that no counsel for a party authored this brief in whole or in part and that none of the parties or their counsel, nor any other person or entity other than *amicus*, its members, or their counsel, made a monetary contribution intended to fund the preparation or submission of this brief.

2 According to the Board's findings, Board staff convinced counsel for Patient A that contesting the subpoena "would be a lot of effort to no avail." Brief for Petitioner at 167a, app. A, *Eist,* 417 Md. 545 (Md. 2011).

3 The U.S. Department of Health and Human Services has found that more than two million Americans each year do not seek treatment for mental illness due to privacy fears. Standards for Privacy of Individually Identifiable Health Information, 65 Fed. Reg. 82,462, 82,779 (Dec. 28, 2000).

4 Am. Psychiatric Ass'n, *Principles of Medical Ethics with Annotations Especially Applicable to Psychiatry*, 6-7 (2009), *available at* http:// www.psych.org/MainMenu/PsychiatricPractice/Ethics/ResourcesStandards/Principlesof MedicalEthics.aspx. The American Psychiatric Association has adopted a policy with respect to how medical boards should appropriately handle complaints from non-patient third parties under which boards should first determine whether there is sufficient evidence to warrant further investigation and, if so, obtain the patients' consent and provide for an independent review if the patients object. Am. Psychiatric Ass'n, *Position Statement on Release of Patients' Records to State Medical Boards* (Dec. 2007), *available at* http:// www.psych.Org/MainMenu/EducationCareerDevelopment/Library/PosifionStatements.aspx.

5 Am. Psychoanalytic Ass'n, *Principles and Standards of Ethics for Psychoanalysts, available at* http://www.apsa.org/ About_APsaA/Ethics_ Code.aspx.

6 Nat'l Ass'n of Social Workers, Policy Statements, *Social Work Speaks, 2006-2009*, 61 (2006).

7 *See* 65 Fed. Reg. at 82,472 (citing AMA Policy No. 140.989).

8 This Court in *Jaffee* expressly rejected a balancing test to determine whether psychotherapist-patient communications were privileged because of the importance of patients being able to predict with some reliability whether the privacy of their communications would be protected. *Jaffee,* 518 U.S. at 17-18.