

QUESTION PRESENTED

1. Whether a federal appeals court lacks subject-matter jurisdiction to review a remand order after a state defendant asserts a civil rights exemption claiming that a remand order is reviewable.

PARTIES TO THE PROCEEDING

Pursuant to Rule 14.1(b), the following list identifies all of the parties appearing here and before the United States Court of Appeals for the Ninth Circuit.

The petitioner here and appellant below is Barbara Clark, registered nurse and nurse practitioner.

The appellee below and respondent here is the Adventist Health System – West.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6, Petitioner states as follows:

Barbara Clark, R.N., N.P. is not associated with any corporate entity.

The Adventist Health System – West of Roseville; California is affiliated with the Seventh Day Adventist Church, General Conference, Silver Spring, Maryland.

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The opinion of the Court of Appeals is unpublished and is reprinted in the Appendix to the Petition (“Pet. App.”) at 1a. The District Court’s opinion is an unpublished minute order and is reprinted at Pet. App. at 2a. The District Court’s previous order is unpublished and is reprinted at 3a-4a. The Findings and Recommendations of the District Court’s magistrate are reprinted at Pet. App. at 5a-6a.

JURISDICTION

The Court of Appeals entered its judgment on October 10, 2007 and is reprinted at Pet. App. at 8a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

This case involves the provisions of 28 U.S.C. § 1443(2), *et. seq.* The pertinent provisions are reproduced in the Appendix at Pet. App. 7a.

STATEMENT OF CASE

This case concerns a matter of intense federal concern and should be heard by this Supreme Court as Americans have a great interest in (1) those individuals, like the petitioner, that are engaged in the risky business of acting as a HIPAA whistleblower and (2) allowing such courageous individuals to protect their bodily integrity with defensive lethal force, as expressed by Amendment II of the U.S. Constitution, when confronted with life threatening situations designed to intimidate such citizens or threaten their lives.

Here the petitioner was a labor and delivery nurse injured on the job at a small town (Bakersfield, California) hospital in 1994. She became a claimant in California’s workers compensation system and was targeted for an alleged intimidation campaign by apparent undercover

agents in the employ of Clark's self-insured ex-employer when she filed a HIPAA-related federal lawsuit in November, 2005.

Ostensibly these agents were assigned the tasks of collecting video evidence for use in a workers compensation tribunal in California where Clark has appeared as a workers compensation claimant since 1997. The petitioner was also an active pro se (and later represented) plaintiff in an acrimonious federal HIPAA-based lawsuit against the respondents.

The petitioner complained to several federal and state agencies in 2005 and 2006 via dozens of letters that these agents used aggressive surveillance tactics, up to and including, interfering with the safe operation of Clark's vehicle on treacherous mountain roads under the pretext of "surveillance activities" that are supposedly designed to detect workers' compensation fraud.

On several occasions petitioner met with special agents of the Federal Bureau of Investigation in Bakersfield to discuss these incidents. The F.B.I. encouraged the petitioner to continue with the aggressive pursuit of her HIPAA lawsuit against the respondents.

The intimidation tactics attributed to the respondents included alleged tailgating of petitioner's vehicle by agents of the respondent and became known as "cat and mouse" chase games as described to judicial officers in both the related state workers compensation proceedings and a federal civil rights lawsuit filed, in part, pursuant to the Health Insurance Portability and Accountability Act of 1996 (HIPAA) (see companion Petition for Writ of Certiorari, No. 07-8419, U.S. Supreme Court, *Barbara Clark v. Carol Pope*).

When Clark was about to appear before the California Fraud Assessment Commission to discuss these cat and mouse tailgating games with that state commission

Clark was served with eight (8) temporary restraining orders for “workplace violence” issued by a state court in Placer County, California at the urging of Clark’s former employer, the Adventist Health System – West. The TROs ordered Clark to “stay away” from eight (8) employees of the hospital system (including Carol Pope, the claims adjustor of Clark’s workers’ compensation claim) and surrender any firearms she may have in her possession. Clark was forbidden to communicate with Ms. Pope (defendant in the related HIPAA litigation) and the other seven (7) employees of the Adventist hospital system in any way; electronic mail, letters, telephone calls, telefax transmissions, etc.

Clark removed these TRO petitions to the federal court hearing her HIPAA case, as Carol Pope was a defendant in that case (presently on appeal in the U.S. Supreme Court (docket no. 07-8419)). The district court remanded the TROs back to the California state court that issued them and the TROs became permanent on September 11, 2006.

A year later the Adventist Health System – West motioned (in another related lawsuit (CIV-S-07-1086-FCD-KLM-PS, U.S. District Court for the Eastern District of California) suggested that the petitioner be declared a “*vexatious litigant*”, under California’s Vexatious Litigant statute. Their [Adventist] motion relied heavily upon the eight (8) TRO removals as eight separate and individual commenced federal actions in their calculations to satisfy the California vexatious litigant standard that the petitioner had filed at least five (5) lawsuits *in propria persona*, and lost, in the proceeding seven (7) years. (see California Vexatious Litigant statute).

Petitioner filed a motion in this instant litigation, pursuant to Fed. R. Civ. Proc. Rule 60(b), that the surprising vexatious litigant calculation of the TROs (8)

required the federal court to re-examine its early remand order and re-acquire jurisdiction of the TROs for the purpose of classifying said proceedings as one overall action.

The federal district court disagreed and denied the Rule 60(b) motion by minute order. Petitioner appealed the minute order on the grounds that a remand order was reviewable under the doctrine of 28 U.S.C. § 1447(d).

The federal appeals court disagreed and refused to hear the appeal based upon lack of subject matter jurisdiction as defined by § 1447(d).

A. Factual Background

1. On November 29, 2005 Clark filed a federal lawsuit against her workers compensation claims adjuster (Carol Pope), an employee of the respondent's self-insured workers compensation plan. By a strange twist of fate, that underlying federal case is presently docketed in this very court (docket no. 07-8419). Among other things, the petitioner alleged that Carol Pope had engaged in a criminal conspiracy to violate the criminal sanctions of the Health Insurance Portability and Accountability Act of 1996 (HIPAA).

In the intervening months following November 2005, the petitioner became the target of increasing intimidation in the form of "cat and mouse" tailgating activities. The petitioner wrote dozens of letters to various federal law enforcement agencies tasked with investigating civil rights abuses about these matters (to include the F.B.I.).

In court proceedings (May 17, 2006) before a Sacramento, California federal district court magistrate (see No. 07-8419) the petitioner informed the district court and attorneys representing the Adventist Health System – West of the foregoing "cat and mouse" tailgating activities. Further, she informed these parties that she intended to acquire a permissible defensive weapon to protect herself

from further “cat and mouse” tailgating chase games, attributed to workers compensation surveillance agents of the Adventist Health System - West. Clark openly accused the attorneys for the respondents at that hearing of authorizing the tailgating tactics of their workers compensation fraud surveillance agents. The petitioner advised the magistrate that she “deemed the use of deadly force appropriate” if she felt her life was in jeopardy. Clark also repeated this phrase in a pleading filed on May 10, 2006 in her state workers compensation case.

Simultaneous with the May 17, 2006 hearing the respondents filed petitions in the California Superior Court for Placer County, on behalf of Carol Pope and Jonathan Reuben (employees), under the California Workplace Violence Safety Act to seek injunctive relief against the petitioner to forbid Clark from carrying a firearm and having any contact with said employees.

Shortly after petitioner’s appearance before the federal magistrate (May 17, 2006) petitioner Clark made it known on Clark’s public interest web-site that she intended to address the California Fraud Assessment Commission on June 20, 2006 to give testimony about her experiences in this matter.

On June 16, 2006 the Adventist Health System – West filed additional petitions seeking injunctive relief against Clark to forbid her from carrying a firearm in the California Superior Court for Placer County. Six additional employees were named as co-petitioners with the Adventist health System – West, including the Chief Executive Officer, Donald R. Ammon, the Chief Operating Office, Robert C. Carmen, the Director of HIPAA (Health Insurance Portability and Accountability Act of 1996) Programs, Larry D. Mitchell, Corporate Counsel, Peggy Nakamura, esq., and others.

On June 19, 2006 Placer County Commissioner Margaret Wells issued a set of eight (8) temporary restraining orders (TROs) that amounted to “stay away” orders from the above mentioned employees. The 6/19/2006 TROs ordered petitioner to surrender any firearms she may have in her possession and to report to a hearing in Placer County on July 10, 2006.

The next morning, at 9:00 am (6/20/2006) as Clark entered a state government building to provide testimony before the California Fraud Assessment Commission she was approached by a process server who served the eight (8) TROs previously described upon Clark, which was filmed by a television (TV) crew for a San Francisco based public interest cable TV show.

On June 30, 2006 Clark removed all eight (8) state actions to the U.S. District Court for the Eastern District in Sacramento by filing a proper “Notice of Removal” in both federal and state courts. In the “Notice” the petitioner cited the following:

“The Defendant’s (CLARK) right to remove a case to federal court is not subject to the review of a state court. When defendant seeks removal of a state case to a federal court a state court has a “duty to proceed no further in the cause.” *Steamship Co. v. Tugman*, 106 U.S. 118, 112(1882); *Hyde Park Partners, L.P. v. Connolly*, 839 F.2d 837, 842 (1st Cir. 1988).”

On July 10, 2006 Placer County commenced a hearing, without Clark in attendance, and extended the practical effects of the TROs to September 11, 2006 and scheduled a hearing on that date to adjudicate whether or not said TROs should be made permanent (3 years) pursuant to California’s Workplace Violence Act.

On July 12, 2006 the federal magistrate issued her Findings and Recommendations suggesting that the TRO

cases be remanded back to Placer County pursuant to 28 U.S.C. § 1447(c).

Petitioner Clark objected to the magistrate's Findings and Recommendations (7/21/2006) stating:

"One of the defendant[']s, Carol Pope, has already been accused in related litigation of conspiring with corrupt and unethical judges and [a] "vile, conniving and despicable" "judge shopping" attorney[s], like Dennis Hershewe."

"The (1) "bad faith" Placer County Superior Court and District Attorney's office, and (2) the suspected influence of the Adventist Health System have created a prejudiced and biased local state court, have combined to (3) cause the issuance of these sham "workplace violence" restraining orders; the defendant [petitioner Clark] requires extraordinary protection – by this court – from the Adventist hospital chain and their influence upon the Placer County Superior Court."

"As a matter of simple public policy the pro se defendant [petitioner Clark] must be allowed to act as her own "private attorney general" and defend her constitutionally protected rights in this federal venue pursuant to the Supremacy Clause, Amendment I and II."

Nevertheless, by order, dated 9/1/2006, the district judge remanded all eight (8) TROs back to the Placer County court where they were made permanent for three years on 9/11/2006.

In other related litigation (CIV-S-07-1086-FCD-KLM-PS, U.S. District Court for the Eastern District of California) the Adventist Health System – West moved to have the petitioner labeled a "vexatious litigant" under the California Vexatious Litigant statute. Clark's removal of the eight (8) workplace violence petitions in 2006 was cited as justification, in part, to have Clark enjoined from having

further access to the federal courts in the State of California.

Simultaneous with the motion for the vexatious litigant order (VLO) by the Adventist Health System – West, petitioner moved the federal court for reconsideration of the remand order of 9/1/2006 (which remanded the TRO cases back to Placer County) via Clark’s motion pursuant to Fed. R. Civ. Proc. Rule 60(b).

On 8/28/2007 the district judge issued a minute order denying the petitioner’s Rule 60(b) motion. Petitioner appealed to the U.S. Court of Appeals for the Ninth Circuit. Relying on 28 U.S.C. § 1447(d) the Ninth Circuit denied the appeal.

B. Proceedings Below

A motion hearing was held in the district court on May 17th, 2006 in related litigation (No. 07-8419, U.S. Supreme Court, Clark v. Pope). Simultaneously, on May 17th, 2006 and May 18th, 2006 two Adventists employees sought protection pursuant to California’s Workplace Violence Safety Act via petitions for injunctive relief filed in the Superior Court for Placer County; they were (1) Carol Pope and (2) Jonathan Ruben, respectively. Pope and Ruben have both been “*claims adjustors*” in Clark’s open workers’ compensation claim. Placer County case numbers were assigned as S-CV-19352 (5/17/2006) for Pope and S-CV-19359 (5/18/2006) for Ruben. These two petitions (“*the May petitions*”) were rolled into six (6) other petitions filed on or about June 15th, 2006 in Placer County (“*the June petitions*”). Eight (8) TROs were issued altogether by the California Superior Court for Placer County on 6/19/2006. All eight (8) TROs were served upon Clark the following day in front of the California Fraud Assessment Commission and a TV public interest camera crew.

Clark subsequently removed these TROs to the federal district court hearing related litigation on June 30th, 2006 by Clark. The May petitions were assigned federal case numbers 2:06-CV-1465-FCD-KJM for Pope (S-CV-19352) and 2:06-CV-1466-FCD-KJM for Ruben (S-CV-19359).

In the “Notice of Removal”, filed in both federal and state courts, Clark clearly indicated that all state proceedings should cease pursuant to *Steamship Co. v. Tugman*, 106 U.S. 118, 112(1882); *Hyde Park Partners, L.P. v. Connolly*, 839 F.2d 837, 842 (1st Cir. 1988)

The state court ignored Clark’s admonition in the “Notice of Removal” that state proceedings should be suspended, and subsequently held a hearing on July 10, 2006, extending the conditions of the eight (8) TROs until September 11, 2006. The practical effects of these TROs were to enjoin Clark from contacting – in any form – Carol Pope (claims adjustor) and the other seven (7) employees and to surrender any firearms in her possession.

Cal. Code Civ. Proc. § 527.8(a) states: “[a]ny employer, whose employee has suffered unlawful violence or a credible threat of violence from any individual, which can be construed to be carried out at the workplace, may seek a temporary restraining order and an injunction on behalf of the employee prohibiting further unlawful violence or threats of violence by that individual.”

As stated in the petitions and subsequent TROs: “..a May 10, 2006 Declaration of Defendant ... states in pertinent part that Defendant has decided to carry a firearm and deems it appropriate to fire upon any individual with deadly force whom she perceives is threatening her life or safety.”

On 10/13/2006 the district court asserted that:

“Remand orders based on 28 U.S.C. § 1447(c) are unreviewable on “appeal or otherwise.” 28 U.S.C. § 1447(d). This statutory language has “universally [been] construed to preclude not only appellate review but also reconsideration by the district court.” Seedman v. U.S. District Court, 837 F.2d 413, 414 (9th Cir. 1988). Once a district court certifies a remand order to state court it is “divested of jurisdiction and can take no further action on the case.” ”

REASONS FOR GRANTING THE PETITION

The unprecedented intimidation directed at the petitioner by the respondent Adventist Health System – West has taken many forms and illustrates the present gaps of Constitutional protections relied upon by HIPAA whistleblowers.

These are the same gaps exploited on a daily basis by other corporate citizens of the United States to achieve greater intimidation and control over those whistleblowers that risk their very lives when they seek enforcement of such laws as HIPAA.

This Supreme Court has now been presented an opportunity to examine one woman’s life that has been subjected to a comprehensive campaign of what appears to the layman as legal intimidation; but, is more clearly understood by the Constitutional scholar as a demonstration of contempt for the U.S. Constitution and federal laws protecting HIPAA whistleblowers.

For instance, the open defiance by a state court (Placer County, California) to ignore petitioner’s admonishments to halt its proceedings when provided a “Notice of Removal” that cites *Steamship Co. v. Tugman*, 106 U.S. 118, 112(1882) and *Hyde Park Partners, L.P. v. Connolly*, 839 F.2d 837, 842 (1st Cir. 1988)” is particularly disturbing. It appears there is significant indifference in some state courts as to operative federal pre-emption. This

Supreme Court should use this case as an opportunity to clarify – once and for all – the importance of cessation of state proceedings when a state case is removed to the federal venue.

Secondly, the improper application of the California Workplace Violence statute seems particularly troubling in the context of Amendment II of the U.S. Constitution.

Thirdly, the Supreme Court has been presented a case that offers an opportunity to clear up any lingering confusion concerning the Civil Rights exception to remand orders based upon 28 U.S.C. § 1447(d) as defined by 28 U.S.C. § 1443(2). Clark claims that she was advancing the public good by participating in the detection of fraudulent and criminal activity by advancing her federal HIPAA-based lawsuit, in essence acting as a “private attorney general”. This Supreme Court must make it clear that acts of intimidation against such courageous individuals like HIPAA whistleblowers will not be tolerated and allow the petitioner to be clothed with the federal pre-emption defense articulated at 28 U.S.C. § 1443(2).

This case presents an exceptionally important question of federal law that has not been but should be settled by this Court, and on which the circuits are in conflict: How do the principles of 28 U.S.C. § 1443(2) apply to a private actor that is standing in the shoes of federal law enforcement to investigate and enforce the civil rights attributes of the HIPAA medical privacy law to thwart criminal acquisition of an individual’s medical records that may be used by a wrong doer to gain an unfair advantage in acrimonious civil litigation. The answer to that question is of paramount importance to the continued enforcement of the criminal sanctions of the HIPAA medical privacy law.

I. The 28 U.S.C. § 1443(2) pre-emption defense should be made available to private actors

advancing federal law enforcement and public interests with encouragement from federal agents when faced with state proceedings designed to thwart those law enforcement activities.

There is a pressing need for this Court to clarify the principles of federal pre-emption of state laws, when such laws can be misused to chill or squelch those individuals that are advancing public policy with fraud detection activities, encouraged by federal law enforcement officers.

A. Does a private actor HIPAA whistleblower operating under encouragement and direction of the Federal Bureau of Investigation secure a pre-emption defense to state court proceedings designed to retaliate against that private actor?

As a threshold matter, this Court has recognized a patients' constitutional right to privacy in their medical information as defined by *Whalen v. Roe*, 429 U.S. 589, 598-600 (1977) (stating cases involving "privacy" include interest in nondisclosure of private information and interest in making important decisions independently). See also, *Ferguson v. City of Charleston*, 532 U.S. 67 (2001) (holding hospital's unauthorized reporting of positive cocaine test was unreasonable search absent patient's consent).

This Court has recognized some form of a right to privacy for 115 years. In 1891 it concluded that "no right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others ... " *Union Pacific Railway Co. v. Botsford*, 141 U.S. 250, 251 (1891). In Justice Brandeis' Olmstead dissent, he declared that every unjustifiable intrusion by the

government upon the privacy of the individual, whatever the means employed, must be deemed a violation of the Fourth Amendment." *Olmstead v. U.S.*, 277 U.S. 438, 477 (1928) (Brandeis, J., dissenting).

More recently, this Court concluded in *Griswold v. Connecticut* that the right to privacy was to be found in the penumbras of the First, Fourth and Fifth Amendments. *Griswold v. Connecticut*, 381 U.S. 479, 484-85 (1965).

Along with promulgating standards and regulations protecting the privacy of individually identifiable information, HIPAA explicitly provides for enforcement of its criminal sanctions by the criminal division of the U.S. Department of Justice, Federal Bureau of Investigation. HIPAA criminalized the unauthorized distribution of a patient's medical records for "*commercial advantage, gain, or malicious harm*"; such misconduct is a federal crime against the United States. 42 U.S.C. § 1320d-6. The HIPAA criminal sanctions for violations of HIPAA speak to the fundamental right to privacy of all Americans.

However, the F.B.I.'s resources are obviously stretched to the limit fighting the "War on Terror"; explaining only two criminal convictions of perpetrators under the HIPAA law to date by the U.S. Department of Justice.

It will be America's health care providers (physicians, nurses, medical workers) that will be the *de facto* front line enforcement of HIPAA privacy regulations. In many respects, petitioners like Clark (a registered nurse and nurse practitioner) will stand in the shoes of the F.B.I. to monitor, enforce and provide overall deterrence against HIPAA privacy breaches.

In the petitioner's case the F.B.I., with knowledge of Clark's activities, provided approval and

encouragement of her HIPAA *de facto* enforcement activities in the form of her federal lawsuit against alleged perpetrators that breached the privacy shield created by HIPAA (see Carol Pope).

If this Court allows a would be perpetrator (allegedly Carol Pope) to initiate retaliatory actions in state court against a federal HIPAA whistleblower like Clark, there will be a reluctance for health care professions to enforce HIPAA privacy. The specter of retaliatory and career destroying “*workplace violence restraining orders*” will virtually chill *de facto* enforcement of HIPAA privacy by the medical community at large.

If patient medical privacy should be considered a fundamental civil right, and if a HIPAA whistleblower is protecting that right, then a HIPAA whistleblower should be able to claim a federal pre-emptive defense in a state court under the protections of 28 U.S.C. § 1443(2) and remove a retaliatory state action to federal court for consideration of the federal HIPAA issues at stake by a federal judge. Especially if there is an ongoing federal court action addressing HIPAA privacy violations when the alleged retaliatory state action is filed (as was the case with Clark, see Placer County, California workplace violence TROs).

III. IMMEDIATE REVIEW IS URGENTLY NEEDED

On April 27, 2004 President George W. Bush signed an Executive Order entitled: Incentives for the Use of Health Information Technology and Establishing the Position of the National Health Information Technology Coordinator. A stated objective of this Order is to, “(f) Ensure[s] that patients' individually identifiable health information is secure and protected.”

The integrity of a patient's medical records will become increasingly important to provide a stable, safe and secure national electronic medical record infrastructure.

The first line of deterrence will be weak and ineffective if medical professionals fear retaliation for reporting security and privacy breaches. In California, an employer can file parasitic retaliatory "*workplace violence restraining orders*" against an employee with little provocation. If a HIPAA whistleblower cannot remove such a parasitic retaliatory state lawsuit to a federal court under the protections of 28 U.S.C. § 1443(2), then the United States Government must be prepared to do without the cooperation of front-line medical personnel that will place job security above the privacy of an individual's medical records.

CONCLUSION

For the foregoing reasons this writ of certiorari should be granted.

Respectfully submitted,

January 8, 2008

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APPENDIX A

