No. 24-752

In the Supreme Court of the United States

PAUL THOMAS,
Petitioner,

v.

KATHLEEN HARDER, ET AL.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF *AMICUS CURIAE* INFORMED CONSENT ACTION NETWORK IN SUPPORT OF PETITIONER

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February 14, 2025

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Amicus Curiae[1] respectfully submits this brief in support of Petitioner and asks that Petitioner's Petition for Writ of Certiorari be granted.

INTEREST OF *AMICUS CURIAE*

Amicus Curiae, Informed Consent Action Network (ICAN), is a Texas-based 501(c)(3) which was founded by Del Bigtree in 2016. ICAN's mission is to "put the power of scientifically researched health information" into the public's hands "and to be bold and transparent in doing so," allowing citizens to give informed consent regarding health interventions.[2] To carry out this mission, ICAN investigates and disseminates information regarding the safety of medical procedures, pharmaceutical drugs, and vaccines, through its website,[3] social media posts, press events, and press releases. Importantly, one of the vehicles for ICAN's activities is its rapidly growing internet-based talk show, "The HighWire with Del Bigtree" ("The HighWire").[4] The HighWire is hosted by Del Bigtree and is live streamed via The HighWire's website and social media accounts on multiple platforms.

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[1] Rule 37.2 and 37.6 Disclosures: No counsel for any party authored this brief in whole or in part. No person or entity other than *amici* and their counsel made a monetary contribution intended to fund the preparation or submission of this brief. Further, *amicus* provided notice to all counsel of this filing ten days before the deadline.

[2] Informed Consent Action Network, www.icandecide.org.

[3] *Id.*

[4] The HighWire, https://thehighwire.com.

ICAN has been instrumental in demanding accountability for government narratives regarding vaccines and drugs through various successful lawsuits against government agencies such as the Food and Drug Administration, the Department of Health and Human Services, the Centers for Disease Control and Prevention, and the National Institutes of Health. Furthermore, ICAN has filed hundreds of Freedom of Information Act requests to obtain additional insight into the decision-making processes of these agencies. Through The HighWire, ICAN is able to shed light on governmental oversight in the area of vaccine and drug development, produce reports from leading experts in the scientific community, disseminate information obtained through legal action, and solicit donations to fund its charitable activities—all with the goal of creating a more knowledgeable populace able to make informed and autonomous medical decisions.

INTRODUCTION

This case represents the intersection of two vitally important rights within the context of medicine: the right to free speech and the right to informed consent. In this case, the Ninth Circuit affirmed the dismissal, with prejudice, of Petitioner's meritorious suit against the Oregon Medical Board ("OMB") stemming from its procedurally unlawful, irregular, and unjustifiable suspension of his medical license for the simple act of exercising his free speech rights and ensuring his patients had fully informed consent prior to undergoing a medical procedure. If the Ninth Circuit's decision is permitted to stand

unexamined by this Court, it will function as a blanket pardon for any wrongdoing by any medical board employee or staff member. They will avoid punishment no matter how egregious the conduct or how radical the departure from procedures which are intended to protect physicians—procedures whose existence justified the very immunity that is claimed to apply here. This decision is in direct conflict with federal law and it well merits this Court's intervention and correction. Perhaps more significant, however, is the issue of the erosion of the rights to free speech and informed consent that will result if the Ninth Circuit's holding is left unexamined, which is the issue that *Amicus Curiae* is most concerned about.

At its heart, the underlying issue in this case is the use of free speech for the purpose of facilitating informed consent and, more particularly, the OMB's apparent disdain for both. Here, the OMB meted out punishment on the Petitioner in the harshest and most extreme of ways. The board did this even though Petitioner was merely ensuring, through the presentation of accurate and complete medical and scientific information, that his patients had true and fully informed consent when it comes to an increasingly controversial medical procedure—vaccination.

For all of the reasons skillfully identified by the Petitioner, *Amicus Curiae* urges this Court to take up the issues presented by this matter. Additionally, *Amicus Curiae* asserts that the Court should take up Petitioner's appeal because, if allowed to stand, the Ninth Circuit's decision authorizes the delicensing of physicians for doing nothing more than deviating

from CDC guidelines. Giving patients the unvarnished truth about a medical procedure that the OMB insists individuals undergo, regardless of the cost to the individual, should never be grounds for delicensure. *See Stuart v. Camnitz*, 774 F.3d 238, 253 (4th Cir. 2014) ("Transforming the physician into the mouthpiece of the state undermines the trust that is necessary for facilitating healthy doctor-patient relationships and, through them, successful treatment outcomes."). With public trust in medicine at an all-time low, this Court's intervention is necessary to ensure that physicians retain their free speech rights and the ability to practice with autonomy and with an eye toward the best interests of the individual patient.

Amicus Curiae respectfully submits that the facts herein further support the conclusion that the Court should grant Petitioner's Petition for Writ of Certiorari.

SUMMARY OF ARGUMENT

The Ninth Circuit's decision calls out for this Court's review for a myriad of reasons, including its lack of clarity, its improper sweeping grant of quasi-judicial immunity to individuals never contemplated or intended to receive such immunity, and its wholly improper denial of Petitioner's ability to amend his complaint. More crucial, however, is the need for this Court to correct what will inevitably flow from this decision, which is the stifling of physicians' speech and, with it, patients' inability to give truly informed consent. At a time when Americans' trust in institutions—and especially medical bodies—is at its

nadir, there is no case more worthy of this Court's attention than the instant one which, left unreviewed, will put an enduring stamp of approval on the destruction of the doctor-patient relationship.

ARGUMENT

This Court has previously recognized the irrefutable necessity of informed consent in the context of medical procedures: "Indeed, the requirement that a doctor obtain informed consent to perform an operation is 'firmly entrenched in American tort law.'" *National Inst. of Family & Life Advocates v. Becerra*, 585 U.S. 755, 770 (2018) (quoting *Cruzan v. Director, Mo. Dept. of Health*, 497 U.S. 261, 269 (1990)); *see also Schloendorff v. Society of N.Y. Hospital*, 211 N. Y. 125, 129-30 (1914) (Cardozo, J.) ("Every human being of adult years and sound mind has a right to determine what shall be done with his own body; and a surgeon who performs an operation without his patient's consent, commits an assault, for which he is liable in damages."). As the Fourth Circuit has eloquently acknowledged, informed consent is a fundamental component of the doctor-patient relationship:

> Traditional informed consent requirements derive from the principle of patient autonomy in medical treatment. Grounded in self-determination, obtaining informed consent prior to medical treatment is meant to ensure that each patient has the information she needs to meaningfully consent to medical procedures. As the term suggests, informed

> consent consists of two essential elements: comprehension and free consent. Comprehension requires that the physician convey adequate information about the diagnosis, the prognosis, alternative treatment options *(including no treatment)*, and the risks and likely results of each option. *Physicians determine the 'adequate' information for each patient based on what a reasonable physician would convey, what a reasonable patient would want to know, and what the individual patient would subjectively wish to know given the patient's individualized needs and treatment circumstances.* Free consent, as it suggests, requires that the patient be able to exercise her autonomy free from coercion. It may even include at times the choice not to receive certain pertinent information and to rely instead on the judgment of the doctor. *The physician's role in this process is to inform and assist the patient without imposing his or her own personal will and values on the patient.* The informed consent process typically involves a conversation between the patient, fully clothed, and the physician in an office or similar room before the procedure begins. Once the patient has received the information she needs, she signs a consent form, and treatment may proceed. *Stuart*, 774 F.3d at 251-52 (emphasis added) (cleaned up).

Petitioner, here, did nothing more than ensure that his patients understood a medical procedure and

its benefits and risks such that they were able to give fully informed consent before submitting to it. The fact that a number of these patients, after being honestly informed of the risks and benefits, opted to decline it, or opted to decline it on behalf of their minor children, is not a basis on which a medical board can justifiably revoke a physician's medical license in any sane country. "[T]he state cannot commandeer the doctor-patient relationship to compel a physician to express its preference to the patient." *Id.* at 253. As this Court has acknowledged, balance is needed in the context of informed consent: "[A] a Constitution that allows States to insist that medical providers tell [individuals] about the possibility of [forgoing a medical procedure] should also allow States similarly to insist that medical providers tell [individuals] about the possibility of [undergoing the medical procedure]." *National Inst.*, 585 U.S. at 796 (Breyer, J., dissenting). So, too, here: A Constitution that allows States to insist that medical providers tell patients about the benefits of vaccination should also allow States similarly to insist, but at the very least allow, that medical providers tell patients about the possibility of harms from vaccination. S*ee also Planned Parenthood v. Casey*, 505 U.S. 833, 968 (1992) (Rehnquist, C.J., concurring and dissenting) (concluding the "presentation of balanced information" was "rationally related to the State's legitimate interest in ensuring" an individual's "consent is truly informed"), *overruled on other grounds by Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215 (2022).

The intrusion into the doctor-patient relationship that the Ninth Circuit, in affirming

dismissal of Petitioner's case, has signed off on here is no different than the type of intrusion into the doctor-patient relationship that this Court and the circuit courts have historically condemned pursuant, inter alia, to the First Amendment. *See, e.g.*, *City of Akron v. Akron Ctr. for Reprod. Health*, 462 U.S. 416, 445 (1983), *overruled on other grounds by Casey*, 505 U.S. at 843 (noting the Court had previously "warned against" placing physicians in "an undesired and uncomfortable straitjacket" by "insisting upon recitation of a lengthy and inflexible list of information" (internal quotation marks omitted)); *Carey v. Population Servs. Int'l*, 431 U.S. 678, 700 (1977) (stating, in the context of medical care, the "State may not completely suppress the dissemination of concededly truthful information about entirely lawful activity" (internal quotation marks omitted)); *Stuart*, 774 F.3d at 253 (striking down various North Carolina mandatory counseling requirements and noting, "The coercive effects of the [mandated] speech are magnified when the physician is compelled to deliver the state's preferred message in his or her own voice."); *Poe v. Menghini*, 339 F. Supp. 986, 995-96 (D. Kan. 1972) ("Undoubtedly, physicians should be free to practice their profession and to exercise their professional discretion subject only to such regulations as are necessary for the protection of legitimate public interests.").

In *National Institute of Family & Life Advocates v. Becerra*, for example, this Court specifically recognized that a physicians' right to professional speech "do[es] not permit governments to impose content-based restrictions … without persuasive evidence of a long (if heretofore

unrecognized) tradition to that effect." 585 U.S. 755, 767 (2018) (cleaned up); s*ee id*. at 769 ("[A] State may not, under the guise of prohibiting professional misconduct, ignore constitutional rights." (internal quotation marks omitted)).

The lower court's opinion, which the Ninth Circuit affirmed with minimal explanation, in one fell swoop, has essentially outlawed a physician's right to free speech and ability to obtain true informed consent by authorizing delicensure for providing information to patients in a manner that deviates, apparently even slightly, from government-endorsed speech such that it fails to produce the results the board demands, which is more vaccination:

> A person of ordinary intelligence—much more, a licensed physician—could understand that the failure to, among other things, provide vaccine guidance consistent with the CDC's recommendations to protect children from communicable diseases would constitute 'a serious danger to the public health' ....' Appendix at 51a (quoting ORS §§ 183.430(2), 677.205(3)).

As Petitioner succinctly puts it, "the OMB's *de facto* rule requires Dr. Thomas to vaccinate children" by restricting his speech. (Brief for Petitioner at 16.) Under the Ninth Circuit's affirmance of that *de facto* rule, both physicians' and patients' fundamental right to speech will be violated with the blessing of this Court because nothing, including Petitioner's constitutionally protected efforts to allow his patients informed consent, will be permitted to interfere with

the government's goal of vaccination. Unless the information he provides is sanctioned by the CDC or another governmental entity, a physician will not be able to say it and a patient not able to receive it—or, alternatively, he can say it and then go through Petitioner's experience of having a medical board take whatever action it desires as retribution for having done so. The right is effectively vitiated without even so much as a pre-deprivation hearing.

Ultimately, allowing the Ninth Circuit's decision to stand unreviewed would be an egregious disservice to physicians and patients alike because, even despite its lack of clarity, it is a clear green light for unelected, unaccountable, and apparently immune medical boards, as well as their staff and employees, to run roughshod over patients' and physicians' rights. *See Stuart*, 774 F.3d at 253 ("We can perceive no benefit to state interests from walling off patients and physicians in a manner antithetical to the very communication that lies at the heart of the informed consent process."). Put simply, the Ninth Circuit's far-reaching decision simply does not give this deeply impactful issue, which intersects both informed consent and free speech, the appropriate level of attention or analysis that it requires.

CONCLUSION

"True consent to what happens to one's self is the informed exercise of a choice, and that entails an opportunity to evaluate knowledgeably the options available and the risks attendant upon each." *Canterbury v. Spence*, 464 F.2d 772, 780 (1972). Physicians' "reasonable divulgence" to patients has

long been recognized as obligatory for a patient to make "an intelligent decision" *Id.* To that end, a physician has a duty to "seek and secure his patient's consent before commencing an operation or other course of treatment" and in order "to be efficacious, [consent] must be free from imposition upon the patient." *Id.* at 782-83. "[I]t is evident that it is normally impossible to obtain a consent worthy of the name"—that is, informed consent—"unless the physician first elucidates for the patient's edification." *Id.* at 783.

Elucidating the options and perils of a medical procedure is precisely what Petitioner did here. Nevertheless, it is evident that it was precisely this carrying out of his duty-bound obligation that provoked the OMB's targeted, unlawful, and procedurally irregular attacks on Petitioner's license. Be assured that, without this Court's intervention, the Ninth Circuit's sign off on this unfortunate yet correctable injustice to Petitioner will only serve to invite, if not demand, the further erosion of Americans' judicially recognized right to truly informed consent to medical procedures. For these reasons, *Amicus Curiae* respectfully asks the Court to grant Petitioners' Petition for Certiorari.

Respectfully submitted, this 14th day of February 2025.

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