SUPREME COURT
STATE OF ARIZONA

STATE OF ARIZONA, Respondent, v. CHALICE RENEE ZEITNER, Petitioner.	)	Arizona Supreme Court Case No. CR-18-0076-PR Arizona Court of Appeals Case No. 1 CA-CR 16-0679 Maricopa County Superior Court Case No. CR 2015-000299-001 DT

BRIEF OF AMICUS CURIAE ARIZONA ATTORNEYS FOR CRIMINAL JUSTICE IN SUPPORT OF CHALICE RENEE ZEITNER'S PETITION FOR REVIEW

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Neither the Common Law nor the Federal Rules of Evidence provide a testimonial privilege on the basis of the physician-patient relationship. Arizona, however, has specifically enacted a statute that prohibits a physician from testifying or providing evidence concerning a patient's care without the patient's consent. This legislatively-enacted privilege is not subject to the typical limitations of a common-law privilege. The legislature has not explicitly abrogated the privilege.

Nonetheless, the Court of Appeals, in *State v. Zeitner*, No 1 CA-CR 16-0679, 782 Ariz. Adv. Rep. 4 (January 16, 2018), has determined that the legislature has impliedly abrogated the privilege by permitting AHCCCS to demand that medical records be "disclosed" when fraud or abuse is *suspected*. Reasoning that this disclosure obviates the need for the privilege, the Court of Appeals has determined that the privilege cannot survive when medical records have been disclosed to AHCCCS in the course of such an investigation.

That the Arizona Legislature statutorily created a privilege despite the lack of a common-law or federal analog speaks to privilege's importance in this state. The Opinion is inconsistent with the clear text of the statute, which does not explicitly abrogate the privilege. Moreover, if allowed to stand, the Opinion would abrogate the privilege in virtually every case in which AHCCCS alleged that it

"suspected" or was "investigating" fraud or abuse. The result would be the significant diminishment of the privilege, despite the fact that the legislature has not explicitly spoken on the subject of the privilege's abrogation under these circumstances. Furthermore, it would create a two-tier system that disadvantages the indigent, who disproportionally rely on care provided by AHCCCS.

INTEREST OF AMICUS CURIAE

AACJ, the Arizona state affiliate of the National Association of Criminal Defense Lawyers, was founded in 1986 in order to give a voice to the rights of the criminally accused and to those attorneys who defend the accused. AACJ is a statewide not-for-profit membership organization of criminal defense lawyers, law students, and associated professionals dedicated to protecting the rights of the accused in the courts and in the legislature, promoting excellence in the practice of criminal law through education, training and mutual assistance, and fostering public awareness of citizens' rights, the criminal justice system, and the role of the defense lawyer.

BACKGROUND

The facts are largely set out by the Petition for Review. Chalice Renee Zeitner was indicted on 11 charges, including defrauding the Arizona Health Care Cost Containment System ("AHCCCS") by obtaining coverage for an abortion by lying to her physician about a cancer diagnosis. Opinion ("Op.") at ¶ 11. Zeitner

pled not guilty to the charges, and moved to exclude any information relating to her communications with her treating physicians in the course of her care on the basis of the physician-patient privilege. *Id.* at ¶12. The trial court denied the motion, and permitted evidence obtained from her physicians, including their testimony and medical records related to her care, to be used against her at trial. *Id.* at ¶¶ 12-13. She was found guilty on all charges. *Id.* at ¶ 13.

The Court of Appeals upheld the convictions. It reasoned that, while the physician-patient privilege is not subject to the same limitations as common-law privileges, Op. at ¶¶ 18-21, the legislature had impliedly abrogated the privilege by permitting AHCCCS to require the "disclosure" of medical records in the course of an investigation into fraud or abuse, Op. at ¶¶ 22-27. The instant Petition for Review followed.

THIS COURT SHOULD GRANT REVIEW

I. The Physician-Patient Privilege Serves Important and Longstanding Interests and Should Be Protected

The doctrine of evidentiary privilege is a recognition by our legal system that, in some cases, personal privacy is more important than being able to present the most probative evidence at trial. Where a privilege exists, it puts the individual's interest in the privacy of certain communications above the state's interest in compelling the probative evidence. "[T]hese exceptions to the demand for every man's evidence are not lightly created nor expansively construed, for

they are in derogation of the search for truth." *United States v. Nixon*, 418 U.S. 683, 710 (1974).

The Federal Rules of Evidence are silent as to the physician-patient privilege, and the federal courts have rejected it. *B)enally v. United States*, 216 F.R.D. 478, 479 (D. Ariz. 2003. But at least forty-three states, including Arizona, have legislatively recognized some version of the privilege. *See* Appendix. This Court must "assume our legislature considered and accounted for the various policy concerns . . . when it codified the privilege." *State v. Wilson*, 200 Ariz. 390, 396 ¶ 13 (App. 2001), *as corrected* (June 18, 2001).

Most case law justifies the privilege with the so-called utilitarian or "instrumental" rationale, which views privileges as "obstructions to the truthfinding process that must be justified by their benefit to an important relationship." Daniel W. Shuman, *The Origins of the Physician-Patient Privilege and Professional Secret*, 39 Sw. L.J. 661, 663 (1985). Wigmore imposed four requirements for recognition of such a privilege:

> (1) The communications must originate in a confidence that they will not be disclosed.
>
> (2) This element of confidentiality must be essential to the full and satisfactory maintenance of the relation between the parties.
>
> (3) The relation must be one which in the opinion of the community ought to be sedulously fostered.

> (4) The injury that would inure to the relation by the disclosure of the communications must be greater than the benefit thereby gained for the correct disposal of litigation.

8 Wigmore on Evidence § 2285 (1961). According to the instrumental rationale, the purpose of the physician-patient privilege is to "encourage full and frank disclosure of medical history and symptoms by a patient to his doctor." *Phoenix Children's Hosp., Inc. v. Grant*, 228 Ariz. 235, 237 ¶ 8 (App. 2011) (citing *Lewin v. Jackson*, 108 Ariz. 27, 31 (1972)). It thus serves a utilitarian purpose – the fostering of open and forthright communications between doctors and patients that might otherwise be chilled by the prospect that the doctor may one day be called upon to give evidence against her patient in court.

But there is a second, non-instrumental argument—that the privilege is necessary to protect the humanistic values of personal autonomy and privacy that we ascribe to the medical profession. The Hippocratic Oath recognizes the value of confidence in the physician-patient relationship by requiring that a physician swear to "respect the privacy of my patients, for their problems are not disclosed to me that the world may know." *See* Peter Tyson, *The Hippocratic Oath Today,* Nova (March 27, 2001), available at https://www.pbs.org/wgbh/nova/body/hippocratic-oath-today.html. It is generally accepted "that forcing the physician to betray the patient would shock our sense of decency and propriety." 25 Wright & Miller, Fed. Prac. & Proc. Evid. § 5522 (1st ed.). Federal law protects certain medical

information from disclosure, s*ee, e.g.* Pub. L. No. 104-191 (HIPAA), and many states have developed tort doctrines that punish the disclosure of private medical information. *See, e.g., Bagent v. Blessing Care Corp.*, 862 N.E.2d 985 (Ill. 2007); *Berger v. Sonneland*, 26 P.3d 257 (Wash. 2001); *Humphers v. First Interstate Bank of Oregon*, 696 P.2d 527 (Or. 1985).

Thus, the physician-patient privilege exists not only to foster communication between a doctor and her patient, but also because our society has come to deeply value medical privacy and autonomy and prize the confidence that exists between a doctor and her patient. The Arizona Legislature values that personal relationship so highly that it statutorily enacted a privilege that prohibits a doctor from testifying or providing evidence in court against her patient, despite the fact that no corresponding federal or common-law privilege exists. That clear policy determination may not be taken lightly, and the privilege should not be cast aside frivolously, unless the legislature specifically dictates. That so many states have enacted the privilege in the face of the federal refusal to do so speaks to the importance of keeping medical information private. *See* Appendix.

When the legislature has clearly spoken on a matter by enacting statutes, those enactments constitute the public policy of the State. *Ray v. Tucson Med. Center*, 72 Ariz. 22, 35 (1951) ("The declaration of public policy is primarily a legislative function."). That public policy is rooted not only in the utilitarian desire

to foster communications between doctor and patient, but also to respect the personal autonomy and life or death decisions that must be made in the course of that relationship. This Court should consider these policy ramifications very carefully before judicially abrogating a legislatively-enacted privilege that constitutes a clear statement of public policy.

II. The Plain Language of the Statute Is Inconsistent with the Court of Appeals Opinion

Paragraphs 22-28 of the Opinion hold that certain AHCCCS implementation statutes impliedly abrogate the statutory physician-patient privilege. That interpretation, however, simply cannot be reconciled with the plain language of the statutes implicated. This Court should overturn this portion of the Court of Appeals Opinion and hold that the privilege statute and the AHCCCS statutes at issue can both be given effect without abrogating the physician-patient privilege.

A. The Privilege is Testimonial

Arizona has statutorily enacted a rule of evidence that prevents physicians from testifying against their patients in court:

> A person shall not be examined as a witness in the following cases:
>
> . . .
>
> A physician or surgeon, without consent of the physician's or surgeon's patient, as to any information acquired in attending the patient which was necessary to enable the physician or surgeon to prescribe or act for the patient.

A.R.S. § 13-4062 (4). This privilege is *testimonial* in that it only commands that persons subject to it "shall not be examined" in certain "cases." As the Court of Appeals pointed out, however, the testimonial privilege has been extended to medical records. *Tucson Med. Ctr., Inc. v. Rowles*, 21 Ariz. App. 424 (1974) (permitting hospital to refuse to turn over records). *Rowles*, however, applies only to persons who are "parties to a proceeding," *id.* at 429, and specifically considers only "the effect of [the privilege statute] upon the admissibility or discovery of hospital records," *id.* at 427. Thus, the testimonial privilege should be viewed as an exception to the usual compulsory process to which a party is constitutionally granted in a proceeding before a court. *See* 8 Wigmore on Evidence § 2191 (1961).

But while the privilege statute protects a physician from providing documentary or testimonial evidence at trial, it does not otherwise prevent the disclosure of private medical information in other contexts. Indeed, several Arizona statutes *compel* the disclosure of private medical information without abrogating the physician-patient privilege. For instance, A.R.S. § 36-135 requires physicians to report certain information about vaccinations to the Department of Health Services. Does this statute abrogate the physician-patient privilege as it concerns these vaccinations? Common sense would say no—the disclosure of the information to a state agency tasked with maintaining public health should not prevent a patient from prohibiting his doctor from testifying or providing

documentary evidence for use *at trial*. But the Court of Appeals Opinion would cause the opposite result, because by requiring the disclosure of the protected health information, the legislature has abrogated the testimonial privilege. This cannot be the result intended by the legislature.

B. The AHCCCS Statute Distinguishes between "Use" and "Disclosure."

In holding that the legislature had abrogated the testimonial privilege as to AHCCCS fraud, the Court of Appeals relied on a particular portion of the AHCCCS enabling act:

> Subject to existing law relating to privilege and protection, the director shall prescribe by rule the types of information that are confidential and circumstances under which such information may be *used or released*, including requirements for physician-patient confidentiality. . . . Notwithstanding any law to the contrary, a member's medical record shall be *released* without the member's consent in situations or suspected cases of fraud or abuse relating to the system to an officer of the state's certified Arizona health care cost containment system fraud control unit who has submitted a written request for the medical record.

A.R.S. § 36-2903(I) (emphasis added). The Court of Appeals held that, because the statute permits the *release* of certain information "without the member's consent," that the *use* of that information (*i.e.*, in a court proceeding) was also permitted. Op. at ¶ 24. However, this simply cannot be reconciled with the plain meaning of the statute.

This Court interprets a statute "according to its plain meaning, unless doing so would lead to impossible or absurd results." *City of Tucson v. Clear Channel*

Outdoor, Inc., 209 Ariz. 544, 559 ¶ 71 (2005). The statute here is clear on its face. The first sentence of section 2903(I) requires the AHCCCS administrator to set rules regarding when certain medical information may be "*used or released*" and specifically makes that use or release "*subject to existing law relating to privilege*." The last sentence permits the "*release*" of certain information, "*notwithstanding any law to the contrary*." The clear conclusion is that the legislature intended that this information may be *released* to AHCCCS, but may be *used* only "subject to existing law relating to privilege." Existing law relating to privilege prevents a physician from testifying or offering evidence against her patient in a criminal trial. *See* A.R.S. § 13-4062(4). And it prevents medical records from being compelled as evidence. *See Rowles*, 21 Ariz. App. at 427.

The Court of Appeals rejects the use/release distinction by noting that providers are required to notify AHCCCS of fraud and AHCCCS is required to refer those cases to the Attorney General. A.R.S. § 36-2918.01(A). The Court appears to reason that, because such a referral must be for the purpose of prosecution, it must follow that the information should be *used* in that prosecution. But investigators frequently utilize leads in their investigations that they will be unable to use at trial. *See, e.g.*, Ariz. R. Evid. 403 (excluding relevant evidence from trial under certain circumstances). There is no rule that permits the State to use evidence at trial merely because they are in possession of it.

Finally, the Court of Appeals' reliance on Arizona Administrative Code R9-22-512(A)(2) is misplaced. Although it purports to allow AHCCCS to release protected information without the patient's consent for the purpose of conducting an investigation and prosecution, it cannot do so if such a release would contravene the statutory imperative that any rules permitting release of protected information be "[s]ubject to existing law relating to privilege." A.R.S. § 36-2903(I). Administrative agencies are limited in their power by their enabling legislation. *Ariz. State Bd. of Regents v. Ariz. State Pers. Bd.*, 195 Ariz. 173, 175 ¶ 9 (1999). Where the enabling legislation, which permits an agency to engage in rulemaking, has set clear limitations to the rules that the agency may pass, an agency may not surpass its authority. *Id.* "[I]f an agency rule conflicts with a statute, the rule must yield." *Id.* Thus, even if the administrative rule permitted the use of privileged material in a prosecution, it must yield to the statute, which clearly does not.

III. The Court of Appeals Opinion Would Create a Two-Tiered System in Which Those Who Can Afford Healthcare Have the Privilege and Those Who Rely on AHCCCS Do Not

The Equal Protection and Due Process clauses of the federal constitution "emphasize the central aim of our entire judicial system – all people charged with crime must, so far as the law is concerned, stand on an equality before the bar of justice in every American court." *Griffin v. Illinois*, 351 U.S. 12, 17 (1956). These

provisions protect the indigent from "invidious discriminations" in criminal proceedings. *Id.* at 18.

Medicaid provides medical services to qualified low-income individuals. *Southwest Fiduciary, Inc. v. Ariz. Health Care Cost Containment Sys. Admin.*, 226 Ariz. 404, 406 ¶ 8 (App. 2011). AHCCCS administers Medicaid services for the State of Arizona. *Id.* Individuals who qualify for AHCCCS based on their incomes make no more than 133% of the federal poverty level. A.R.S. §§ 36-2901.01(A) & 36-2901.07(A). In Arizona, for the year 2018, the federal poverty level for a single individual is $12,140. 83 Fed. Reg. 2643 (Jan. 18, 2018). Thus, a single person making more than $16,147 may not qualify for AHCCCS based on his income.

The Opinion, if allowed to stand, will effectively eliminate the physician-patient privilege for low-income individuals who rely on AHCCCS for healthcare. The Opinion reasons that the State can compel the release of the patient's medical records in any investigation for fraud, and so "the confidences the privilege is designed to protect already will have been disclosed." Op. at ¶ 26. The records of AHCCCS members are thus subject to release without the member's consent "in situations or *suspected cases* of fraud *or abuse* relating to the system." A.R.S. § 36-2903(I) (emphasis added); *see also* A.R.S. § 36-2918(G) (permitting AHCCCS to subpoena "any record in any form necessary to support an investigation or audit" when it is "[p]ursuant to an investigation of prohibited acts or fraud and

abuse involving the system."). By the reasoning of the Opinion, all that is necessary to strip away the protections of the physician-patient privilege is for AHCCCS to "suspect" a member of "fraud or abuse" or other "prohibited acts."

The subpoena power AHCCCS wields is astonishingly broad. If AHCCCS could strip away the physician-patient privilege by merely investigating a member for fraud, abuse, or other prohibited acts, then the privilege would be effectively non-existent. But the privilege for non-members, who receive private healthcare, would be unaffected. The result would be a two-tiered system, in which the indigent do not have the benefit of the privilege but everyone else does. The command of *Griffin*, that all must stand equally before the bar of justice, cannot countenance such a result. Abrogating the physician-patient privilege in the case of AHCCCS members, but permitting it to remain intact for non-AHCCCS members, constitutes "invidious discrimination" against indigent defendants.

CONCLUSION

The Court of Appeals may believe that "[i]t would serve little purpose, and would make little sense, for a patient to retain the power to prevent her physician from testifying when the physician can be legally compelled to release the patient's medical records" because "the confidences privilege is designed to protect will have been disclosed." Op. at ¶ 26. But whether the privilege "makes sense" to the Court of Appeals is irrelevant. The privilege is a creature of statute, and the Court

of Appeals is bound to enforce it—whether it "makes sense" or not—absent some legislative enactment to the contrary.

The Court of Appeals erred by holding that the physician-patient privilege was impliedly abrogated by the AHCCCS enabling legislation. This Court should vacate that portion of the Court of Appeals Opinion and hold that abrogation of the physician-patient privilege must be explicitly authorized by statute.

RESPECTFULLY SUBMITTED this 17th day of May, 2018.

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APPENDIX

STATES WITH PHYSICIAN-PATIENT PRIVILEGES AND THEIR STATUTORY SOURCES

Alaska	Alaska R. Evid. 504
Arizona	Ariz. Rev. Stat. §§ 12-2235 & 13-4062
Arkansas	Ark. R. Evid. 503
California	Cal Evid. Code §§ 990-994
Colorado	Colo. Rev. Stat. § 13-90-107(1)(d)
Connecticut	Conn. Gen. Stat. § 52-146o
Delaware	Del. R. Evid. 503
Florida	Fla. Stat. § 456.057
Georgia	Ga. Code. § 24-9-40
Hawaii	Haw. R. Evid. 504
Idaho	Idaho R. Evid. 503
Illinois	735 Ill. Comp. Stat. 5/8-802
Indiana	Ind. Code § 34-46-3-1(2)
Iowa	Iowa Code § 622.10
Kansas	Kan. Stat. § 60-427
Kentucky	Ky. R. Evid. 506
Louisiana	La. R. Evid. 510
Maine	Me. R. Evid. 503

Michigan	Mich. Stat. §§ 27A.2157 & 28.945(2)
Minnesota	Minn. Stat. § 595.02(d)
Mississippi	Miss. R. Evid. 503
Missouri	Mo. Ann. Stat. § 537.035
Montana	Mont. Code § 26-1-805
Nebraska	Neb. Rev. Stat. § 27-504
Nevada	Nev. Rev. Stat. §§ 49.215-49.245
New Hampshire	N.H. Rev. Stat. § 329:26
New Jersey	N.J. R. Evid. 506
New Mexico	N.M. R. Evid. 11-504
New York	N.Y. C.P.L.R. 4504
North Carolina	N.C. Gen. Stat. § 8-53
North Dakota	N.D. R. Evid. 503
Ohio	Ohio Rev. Code §§ 2317.02(B) & 2921.22(G)(3)
Oklahoma	Okla. Stat. tit. 12, § 2503
Oregon	Or. Rev. Stat. § 40.235
Pennsylvania	Pa. Cons. Stat. § 5929
Rhode Island	R.I. Gen. Laws § 9-17-24
South Dakota	S.D. Codified Laws §§ 19-13-6 to 19-13-11

Texas	Tex. R. Evid. 509
Utah	Utah R. Evid. 506
Vermont	Vt. R. Evid. 503
Virginia	Va. Code. §8.0-399
Washington	Wash. Rev. Code § 5.60.060(5)
Wisconsin	Wis. Stat. §905.04
Wyoming	Wyo. Stat. §§ 1-12-101(a)(i) & 27-14-610