

No. 07-10877

IN THE
SUPREME COURT OF THE UNITED STATES

John C. Auster,
Petitioner,

v.

United States of America,
Respondent.

*On Petition For Writ of Certiorari to the
United States Court of Appeals for the Fifth Circuit*

**BRIEF FOR THE NATIONAL ASSOCIATION
OF SOCIAL WORKERS AND THE LOUISIANA
CHAPTER OF THE NATIONAL ASSOCIATION
OF SOCIAL WORKERS AS AMICI CURIAE IN
SUPPORT OF PETITIONER**

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INTEREST OF *AMICI CURIAE*¹

Established in 1955, the National Association of Social Workers (NASW) is the largest association of professional social workers in the world with 145,000 members and chapters throughout the United States, in Puerto Rico, Guam, the Virgin Islands, and an International Chapter in Europe. The Louisiana Chapter of NASW has 2,540 member social workers. With the purpose of developing and disseminating standards of social work practice while strengthening and unifying the social work profession as a whole, NASW provides continuing education, enforces the *NASW Code of Ethics*, conducts research, publishes books and studies, promulgates professional criteria, and develops policy statements on issues of importance to the social work profession.

In furtherance of these purposes, NASW has promulgated *Standards for Clinical Social Work in Social Work Practice*. NASW also offers a credentialing program to enhance the professional

¹*Amici curiae* state, pursuant to Supreme Court Rule 37.6, that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae*, its members or its counsel made a monetary contribution to its preparation or submission. *Amici curiae* further state, pursuant to Supreme Court Rule 37, that the parties have consented to the filing of this brief and that counsel of record for all parties received notice at least 10 days prior to the due date of the *amici curiae*'s intention to file this brief.

standing of social workers. The credentials offered include the NASW Diplomate in Clinical Social Work and the Qualified Clinical Social Worker credential. NASW's members are highly trained and experienced professionals who counsel individuals, families, and communities in a variety of settings, including schools, hospitals, mental health clinics, senior centers, and private practices.

NASW's policy statement, *Confidentiality and Information Utilization*, indicates that social workers are expected to fully inform clients "about the implications of sharing personal information, including the ethical and legal obligations of the social workers to respect privacy and protect the confidentiality and legal constraints and limitations that impinge on both the client and the social worker." NASW, SOCIAL WORK SPEAKS 61, 65 (2006).

NASW's participation in this case supports its mission of promoting high standards of professional practice in the area of clinical social work. NASW supports review of the decision below, as requested by the Petitioner, so that this Court may resolve a split that has developed among the federal circuit courts regarding an exception to the psychotherapist-patient privilege.

This case presents an issue of recurring and substantial importance to amici's members and to other mental health professionals throughout the country: whether the psychotherapist-patient privilege, recognized in *Jaffee v. Redmond*, 518 U.S. 1 (1996), protects threatening statements uttered by patients during private therapy sessions. In the

Fifth Circuit's view, the psychotherapist-patient privilege does not even apply. If allowed to stand, the Fifth Circuit's decision will have serious adverse consequences on amici's members and other mental health professionals as well as on the patients they treat.

CONSENT OF PARTIES

This brief as *amici curiae* in support of Petitioner is filed with the consent of all parties.

SUMMARY OF ARGUMENT

In the instant case, *United States v. Auster*, the Fifth Circuit improperly sidestepped application of the psychotherapist-patient privilege by redefining the meaning of confidentiality within a private therapy session. This novel ruling subverts the Court's intent in creating a psychotherapist-patient privilege in *Jaffe v Redmond*. By avoiding a review of the applicability of privilege, the Fifth Circuit weakens the privilege and permits other courts to disregard the application of the privilege. This reasoning rewrites the federal psychotherapist-patient privilege to such an extent that review by the Court is necessary to clarify the correct standard for federal courts – a standard that serves both the public policy and the authority that underlie the psychotherapist-patient privilege. In addition, this ruling by the Fifth Circuit further fractures the split in the federal circuit courts over a “dangerous patient” exception to the privilege. By granting review, the Court can return uniformity and certainty to the privilege, as required by *Jaffee*.

ARGUMENT

I. **AUSTER IS THE APPROPRIATE VEHICLE TO RESOLVE THE SPLIT IN THE FEDERAL CIRCUIT COURTS OVER AN EXCEPTION TO THE PSYCHOTHERAPIST-PATIENT PRIVILEGE FOR THREATS MADE BY PATIENTS**

Jaffee v. Redmond, 518 U.S. 1 (1996), stands for the proposition that it is sound public policy to protect the private communications between mental health patients and their psychotherapists. In *Jaffee*, the Court recognized that a psychotherapist-patient privilege serves a public good by facilitating the provision of treatment for individuals suffering from mental or emotional problems. *Id.* at 11. According to the Court, “[t]he mental health of our citizenry, no less than its physical health, is a public good of transcendent importance.” *Id.* In the last footnote of the majority opinion, footnote 19, the Court raised the question of how to handle a dangerous patient who may be a threat to others.²

²Footnote 19 states: “Although it would be premature to speculate about most future developments in the federal psychotherapist privilege, we do not doubt that there are situations in which the privilege must give way, for example, if a serious threat of harm to the patient or to others can be averted only by means of a disclosure by the therapist.” *Jaffee v. Redmond*, 518 U.S. 1, 18 (1996).

In the years since *Jaffee* was decided, the federal circuit courts have developed an inconsistent approach for applying the psychotherapist-patient privilege to threats made by psychotherapy patients. Two circuits have held that there is no exception to the testimonial privilege for threats made by patients. *United States v. Hayes*, 227 F.3d 578, 583-84 (6th Cir. 2000); *United States v. Chase*, 340 F.3d 978, 985-87 (9th Cir. 2003). Such threats are subject to limited disclosure stemming from the therapist’s “duty to warn.” This duty is discharged by communications other than by disclosing confidences in court proceedings (e.g., to police officers or intended victims). Thus, these courts have held that the duty operates only as an exception to psychotherapist-patient *confidentiality*, not psychotherapist-patient *privilege*. *Id.* In contrast, the Tenth Circuit has held that there is an exception to the privilege for patients’ threats and that a close factual review and analysis is required to determine its applicability in specific cases. *United States v. Glass*, 133 F.3d 1356, 1360 (10th Cir. 1998).

Although these three circuit courts focused on the correct interpretation of *Jaffee*’s footnote 19, the Fifth Circuit has attempted to avoid the Court’s *Jaffee* jurisprudence altogether. The Fifth Circuit reversed a trial court’s decision by improperly sidestepping an application of the psychotherapist-patient privilege. That is, the court improperly sidestepped the “dangerous patient” analysis by redefining the meaning of confidentiality within the context of therapy. The court defined patient threats made during a private therapy session as “non-

confidential” when the patient knows that the therapist is under a duty to disclose such threats. *United States v. Auster*, 517 F.3d. 312, 315-16 (5th Cir. 2008). The court held that in this situation, even though the patient is speaking during a private therapy session, the patient has no reasonable expectation of confidentiality. Therefore, the privilege does not apply. *Id.*

This novel ruling subverts this Court’s intent in creating a psychotherapist-patient privilege. By avoiding an application of *Jaffee*, the Fifth Circuit weakens *Jaffe* and permits other courts to disregard the application of the *Jaffe* psychotherapist-patient privilege. The Fifth Circuit’s reasoning rewrites the federal psychotherapist-patient privilege to such an extent that review by the Court is necessary to clarify the correct standard for federal courts – a standard that will serve both the public policy and the authority behind the psychotherapist-patient privilege.

In recognizing the privilege, the Court was concerned with preserving the psychotherapist-patient relationship by protecting a patient’s confidences. The Court made clear in *Jaffee* that the psychotherapist-patient privilege is entrenched in the notion that “effective psychotherapy . . . depends upon an atmosphere of trust in which the patient is willing to make frank and complete disclosure of facts, emotions, memories, and fears.” *Jaffe*, 518 U.S. at 10. This privilege serves the public interest of enabling the treatment of mental health patients by allowing them to disclose their innermost

thoughts without fear of disclosure. *Id.* at 11. The Court further reasoned that the practical effect of recognizing the privilege is not prejudicial to parties seeking the protected information because it is not likely that such information would even exist without the privilege. That is, patients would not be forthcoming to therapists if they knew the information would not be protected in the course of litigation. *Id.* at 12. Therefore, the interest in recognizing the privilege outweighed the interest in denying it. The Fifth Circuit's decision in *Auster* clearly does not serve this public policy interest.

The Fifth Circuit's decision in *Auster*, and the split in the federal circuit courts, also disturbs the goal of uniformity inhered in the Federal Rules of Evidence. Federal Rule of Evidence 501, the authority from which the Court recognized the psychotherapist-patient privilege, requires that testimonial privileges be applied consistently. Privileges are "governed by the principles of the common law as they may be interpreted . . . in the light of reason and experience." Fed. R. Evid. 501. The Report of the House Committee on the Judiciary for Federal Rule of Evidence 501 states, "privileges shall continue to be developed by the courts of the United States under a *uniform standard* applicable in both civil and criminal cases." 1974 U.S. Code Cong. & Ad. News 7075, 7082 (emphasis added). Indeed, the stated purpose for enacting the Federal Rules of Evidence is to "provide a uniform code of evidence for use in the Federal Courts . . ." 1974 U.S. Code Cong. & Ad. News 7075, 7075.

As the petition explains, the decision below conflicts with the decisions of other circuits. Pet. at 6. The present case is an appropriate vehicle by which to resolve the split, and there is no benefit to permitting the federal circuit courts to fracture further.

II. THE PSYCHOTHERAPIST-PATIENT PRIVILEGE IS NOT AUTOMATICALLY WAIVED WHEN A PSYCHOTHERAPIST MAKES A MANDATED REPORT

Mandated reports made by psychotherapists as in this case should not automatically be viewed as waiving testimonial privilege. *U.S. v. Auster*, 2007 WL 148670, *3 (E.D. La. 2007). The public policy served by the mandated reports required of many therapists, as in this case for the continuation of health benefits or as required in many states to report a dangerous patient, does not diminish the public policy served by the recognition of confidentiality in the therapist-patient relationship.

A. Background of Duty to Warn

Therapists hold confidentiality as a “bedrock operating principle” for effective psychotherapy. Morgan, S. & Polowy, C., *NASW Legal Defense Fund Legal Issue of the Month: Social Workers and the Duty to Warn*, 1 (NASW 2005). Confidentiality facilitates the development of a therapeutic relationship where the patient is willing to disclose relevant personal information. At times this information may be embarrassing or painful or may subject the patient “to reprisals in personal,

professional, or legal relationships” if disclosed outside of the therapeutic relationship. *Id.*

In general, social workers’ primary responsibility is to promote the well-being of their patients (clients). This responsibility is sometimes superseded by the responsibility to protect third parties from harm done by their clients. Code of Ethics of the National Association of Social Workers, § 1.01 (rev. 1999). This latter responsibility is the “duty to warn” or the “duty to protect.”

This duty was first recognized by the Supreme Court of California in *Tarasoff v. Regents of the University of California*, 551 P.2d 334 (Cal. 1976). In this case, the court held that a therapist has an affirmative duty to protect foreseeable victims of the client. *Id.* at 340. The court stated: “When a therapist determines, or pursuant to the standards of his profession should determine, that his patient presents a serious danger of violence to another, he incurs an obligation to use reasonable care to protect the intended victim against such danger.” *Id.* The therapist can discharge this duty to protect by warning the intended victim or others likely to inform the victim of the threat, notifying the police, or taking “whatever other steps are reasonably necessary under the circumstances.” *Id.* The policy behind this duty is the “public interest in safety from violent assault.” *Id.* at 346.

The Tarasoff duty represents a direct conflict with a therapist's ethical duty to maintain client

confidentiality.³ The Supreme Court of California reconciled this conflict by stating that a disclosure under these types of circumstances is not a breach of trust or of the therapist's professional ethics. *Id.* at 347. Earlier in its opinion, the court had stressed that a therapist's duties to his patient require that "he not disclose a confidence unless such disclosure is necessary to avert danger to others, and even then that he do so discreetly, and in a fashion that would preserve the privacy of his patient to the fullest extent compatible with the prevention of the threatened danger." *Id.* Based on the court's attempt at reconciling the duty to warn with a therapist's ethical duty of confidentiality, the court evidently was more focused on the safety of the victim rather than the prosecution of the patient. Anthony Parsio, *Note: The Psychotherapist-Patient Privilege: The Perils of Recognizing a "Dangerous Patient" Exception in Criminal Trials*, 41 NEW ENG. L. REV. 623, 640-43 (2007); George C. Harris, *The Dangerous Patient Exception to the Psychotherapist-Patient Privilege: The Tarasoff Duty and the Jaffee Footnote*, 74 WASH. L. REV. 33, 62-63 (1999).

B. There is No Compelling Reason to Link Exceptions to Confidentiality and Privilege

Although the duty to warn affects confidentiality, it does not necessarily affect the

³Code of Ethics of the National Association of Social Workers, § 1.07 Privacy & Confidentiality (rev. 1999).

psychotherapist-patient testimonial privilege. Several states that have explicitly rejected an exception to the testimonial privilege based on a duty to warn distinguish between confidentiality and privilege. *Chase*, 340 F.3d at 986. The supreme court of one such state explained the distinction by focusing on the different interests that underlie the privilege and the duty to warn — the policy interest of the privilege is to give the patient the ability to prevent the disclosure of confidential information at trial; the public interest of the duty to warn is to protect third party victims. *State v. Miller*, 300 Or. 203, 709 P.2d 225, 236 (1985). This latter public interest can be served by “divulging only that information needed to show why a clear and immediate danger is believed to exist. It would rarely justify the full disclosure of the patient’s confidences to the police and never justify a full disclosure in open court, long after any possible danger has passed.” *Id.*

III. *AUSTER* AND THE SPLIT IN THE FEDERAL CIRCUIT COURTS REINSTATES UNCERTAINTY THAT WAS REJECTED BY *JAFFEE*

In *Jaffee*, the Court emphasized the need for certainty in federal privileges.

[For] the purpose of the privilege [] to be served, the participants in the confidential conversation “must be able to predict with some degree of certainty whether particular discussions will be protected. An uncertain privilege, or

one which purports to be certain but results in widely varying applications by the courts, is little better than no privilege at all.”

Jaffee v. Redmond, 518 U.S. 1, 18 (1996) (quoting *Upjohn Co. v. United States*, 449 U.S. 383, 393 (1981)). In *Jaffee*, the Court was referring to the balancing component of the privilege previously applied by some federal courts. *Jaffee* rejected this balancing component and the uncertainty that it created.

The *Auster* decision, and the overall split in the federal circuit courts, reinstates uncertainty in the privilege by leaving several questions left unanswered for therapists. For example, under the reasoning of the Fifth Circuit in *Auster*, the privilege does not protect “non-confidential” threats uttered during therapy. However, the Fifth Circuit did not define just how much information from the therapy session is left unprotected if a court deems a threat “non-confidential.” Under the NASW Code of Ethics, a social worker must disclose “the least amount of confidential information necessary” to discharge a duty to warn.⁴ This means that a social worker, in

⁴The general expectation that social workers will keep information confidential does not apply when disclosure is necessary to prevent serious, foreseeable, and imminent harm to a client or other identifiable person. In all instances, social workers should disclose the least amount of confidential information necessary to achieve the desired purpose; only information that is directly relevant to the purpose for which the disclosure is made should be revealed. Code of Ethics of the

discharging a duty to warn, may disclose far less than the full statements uttered by the client during therapy. The Fifth Circuit failed to define what information is not protected: only that information disclosed by the therapist in satisfying the duty to warn, or the full statements of the patient, or the therapist's own notes.

The duty to warn also instills a level of uncertainty in the privilege. The duty to warn is the basis of the Fifth Circuit's sidestep and the Tenth Circuit's exception to the privilege. However, this duty varies considerably by state. For example, some states have a mandatory duty;⁵ some states have a permissible "duty",⁶ and some states are

National Association of Social Workers, § 1.07(c) Privacy & Confidentiality (rev. 1999).

⁵Ariz. Rev. Stat. Ann. § 36-517.02(A); Cal. Civ. Code § 43.92(a); Colo. Rev. Stat. § 13-21-117; Del. Code Ann. tit. 16 § 5402(a); Idaho Code Ann. § 6-1902; 405 Ill. Comp. Stat. 5/6-103(b); Ind. Code Ann. § 34-30-16-1; Ky. Rev. Stat. Ann. § 202A.400(1); La. Rev. Stat. Ann. § 9:2800.2(A); Md. Code Ann., Cts. & Jud. Proc., § 5-609(b); Mass. Gen. Laws Ann. ch. 123, § 36B(1); Mich. Comp. Laws Ann. § 330.1946(1); Minn. Stat. Ann. § 148.975(2); Mont. Code Ann. § 27-1-1102; Neb. Rev. Stat. § 38-2137(1); N.H. Rev. Stat. Ann. § 330-A:35(I); N.J. Stat. Ann. § 2A:62A-16(b); Ohio Rev. Code Ann. § 2305.51; Tenn. Code Ann. § 33-3-206; Utah Code Ann. § 78-14a-102; Va. Code Ann. § 54.1-2400.1(B); Wash. Rev. Code Ann. § 71.05.120(2).

⁶Alaska Stat. § 08.95.900(a)(6); Ark. Code Ann. § 17-103-107(2); D.C. Code § 7-1203.03; Fla. Stat. Ann. § 491.0147; Haw. Rev. Stat. § 467E-15; Iowa Code Ann. § 154C.5; Miss. Code Ann. § 41-21-97; Mo. Ann. Stat. § 337.636; N.M. Stat. Ann. § 61-31-24; N.Y. C.P.L.R. Law § 4508; Okla. Stat. Ann. tit. 59, § 1261.6; Or. Rev. State. Ann. § 40.250; R.I. Gen. Laws § 5-

silent on the issue.⁷ Some states require or permit a disclosure of confidential information to prevent a general threat to the public at large⁸ while other states require or permit disclosure only to prevent harm to a specific individual or group.⁹ To discharge the duty, some states designate the appropriate intervention required¹⁰ while others do not. A federal testimonial privilege should not suffer “widely varying applications,” at the hands of state courts and legislatures. *See Jaffee*, 518 U.S. at 18.

37.3-4; S.C. Code Ann. § 19-11-95; S.D. Codified Laws § 27A-12-29; Tex. Health & Safety Code Ann. § 611.004; W.Va. Code Ann. § 27-3-1; Wyo. Stat. Ann. § 33-38-113.

⁷States that are silent as to the social worker’s duty include Georgia, Kansas, Maine, Nevada, and North Dakota. Morgan, S. & Moore, M., *NASW Legal Defense Fund Legal Issue of the Month: Social Workers and the “Duty to Warn” State Laws*, 2 (NASW 2008).

⁸For example, Wisconsin, Delaware, Washington, and Nebraska speak to a threat to the public at large. *Id.* (citing Morgan, S. & Polowy, C., *NASW Legal Defense Fund Legal Issue of the Month: Social Workers and the Duty to Warn*, 1 (NASW 2005)).

⁹For example, Arizona, Colorado, Louisiana, Michigan, Missouri, Vermont, and New Jersey speak to a threat to specific individuals or groups. *Id.*

¹⁰For example, a therapist in California can discharge the duty by making reasonable efforts to communicate the threat to the victim and to law enforcement while a therapist in Delaware can discharge the duty by notifying law enforcement and the victim *or* arranging for the hospitalization of the patient. *Id.*

IV. CERTAINTY AND UNIFORMITY IN THE FEDERAL PRIVILEGE IS REQUIRED BECAUSE THIS LAW ALSO INFORMS STATE COURTS

The states all recognize some form of psychotherapist-patient privilege. *Jaffee* at 12. More specifically for social workers, over half of the states have statutes that explicitly grant a privilege to social workers as a profession.¹¹ Nearly half of the states and the District of Columbia grant a privilege to communications between clients and mental health professionals, which generally includes social workers.¹² In two states, the courts

¹¹ Ark. Code Ann. §§ 17-103-107; Conn. Gen. Stat. Ann. §52-146q; Del. Code tit. 24, § 3913; Haw. Rev. Stat. § 467E-15; Idaho Code § 54-3213; 225 Ill. Comp. Stat. 20/16; Ind. Code Ann. § 25-23.6-6-1; Kan. Stat. Ann. § 65-6315; Me. Rev. Stat. Ann. tit.32 § 7005; Md. Code, Cts. & Jud. Proc. § 9-121; Mass. Gen. Law C112- § 135B; Mich. Comp. Laws Ann. § 333.18513; Miss. Code. Ann. § 73-53-29; Mont. Code Ann. §37-22-401; N.J. Stat. Ann. § 45:15BB-13; N.M. Stat. Ann. § 61-31-24; N.Y. Civ. Prac. L&R. § 4508; N.C. Gen. Stat. § 8-53.7; Okl. St. Ann. tit. 59, § 1261.6; Or. Rev. Stat. § 40.250 Rule; R.I. Gen. Laws § 5-39.1-4; S.D. Codified Laws § 36-26-30; Tenn. Code. Ann. §63-23-107; Wash. Rev. Code. Ann. § 18.19.180; W.Va. Code Ann. § 30-30-12; Wyo. Stat. Ann. § 33-38-113.

¹² Ariz. Rev. Stat. § 32-3283; Cal. Evid. Code § 1014; Colo. Rev. Stat. § 12-43-218; D.C. Code § 14-307; Fla. Stat. Ann. § 90-503; Ga. Code Ann. § 24-9-21; Iowa Code Ann. § 622.10; Ky. R. Evid., Rule 507; La. Code Evid. Ann. art. 510; Minn. Stat. Ann. § 595.02 (g); Mo. Rev. Stats. § 337.636; Neb. Rev. Stat. § 71-1, 335; Nev. Rev. Stat. §§ 49.251-49.252; N.H. Rev. Stat. Ann. § 330-A:19, Rules of Evid., Rule 503; Ohio Rev. Code Ann. § 2317.02(G) ; S.C. Code § 19-11-95; Tex. R. Civ. Evid.,

or legislatures have explicitly denied any privilege to communications with social workers, and in another two, it is unclear whether such communications are privileged. ENCYCLOPEDIA OF SOCIAL WORK 412-14 (Terry Mizrahi & Larry E. Davis eds., Oxford University Press 2008).

While the *Jaffee* ruling is not automatically applicable to cases brought in state courts, the holding can have great influence on state courts deciding privilege issues. For example, in *Commonwealth v. Fuller*, an accused rapist sought production of a victim's counseling records from the rape crisis center at which she had been counseled. 423 Mass. 216, 667 N.E. 2d 847 (1996). The rape crisis center refused to provide the records on the ground that the records were absolutely privileged under a Massachusetts statute which protects from disclosure a victim's sexual assault counseling records. The Supreme Court of Massachusetts cited *Jaffee* to support the existence of a "psychotherapist privilege" under the federal common law, which buttressed the court's conclusion that it was not necessary for a privilege to be constitutionally based. Polowy, C. & Gorenberg, C., *NASW General Counsel Law Note: Client Confidentiality and Privileged Communications*, 15 (NASW 1997).

By granting review and resolving the split in the federal circuits, this Court can return uniformity

Rule 510; Utah Code Ann. § 58-60-114; Vt. R. Evid., Rule 503; Va. Code Ann. § 8.01-400.2; Wis. Stat. Ann. § 905.04.

and consistency to this privilege for amici's members and other mental health professionals throughout the country, as well as for the patients that they treat.

CONCLUSION

The Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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