No. 09-538

In the Supreme Court of the United States

CONSUMERS' CHECKBOOK, CENTER FOR THE STUDY OF SERVICES, PETITIONER

v.

DEPARTMENT OF HEALTH & HUMAN SERVICES, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly determined that certain records of Medicare reimbursements to particular physicians were exempt from disclosure under the Freedom of Information Act, 5 U.S.C. 552, as a "clearly unwarranted invasion of personal privacy," 5 U.S.C. 552(b)(6), because those particular records would, as a factual matter, reveal the physicians' personal income but would not be useful in assessing the administration of Medicare.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-35a) is reported at 554 F.3d 1046. The opinion of the district court (Pet. App. 37a-55a) is reported at 502 F. Supp. 2d 79.

JURISDICTION

The judgment of the court of appeals was entered on January 30, 2009 (Pet. App. 57a-58a). A petition for rehearing was denied on June 2, 2009 (Pet. App. 59a-60a). On August 13, 2009, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including October 30, 2009, and the petition was

filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. "Medicare is health insurance for people age 65 or older" or who have certain disabilities or health conditions. Centers for Medicare & Medicaid Services (CMS), *What Is Medicare?*, Apr. 2008, http://www.medicare.gov/Publications/Pubs/pdf/11306.pdf. As the court of appeals recognized, "[w]hile CMS has certain responsibilities to promote quality healthcare for Medicare beneficiaries, it is not authorized to 'exercise any supervision or control over the practice of medicine or the manner in which medical services are provided.'" Pet. App. 8a (quoting 42 U.S.C. 1395).

Rather, CMS is responsible for enrolling health care providers and suppliers in Medicare. Medicare beneficiaries choose to obtain health services from those providers and suppliers (including physicians), and CMS makes payments to those providers and suppliers for those services. See 42 C.F.R. 424.505 (provider and supplier enrollment requirement); 42 C.F.R. 424.510 (provider and supplier enrollment procedures); 42 U.S.C. 1395a(a) ("Any individual entitled to insurance benefits under [Medicare] may obtain health services from any * * * person qualified to participate under this subchapter."); 42 U.S.C. 1395k, 1395*l* (entitlement to and payment of benefits). Based on a variety of factors, CMS determines and publishes fee schedules detailing the amounts it will pay any provider or supplier in a given area to perform various procedures. See generally 42 U.S.C. 1395*l*; 42 C.F.R. Pt. 414.

Incident to enrolling providers and suppliers, and to making payments for health services rendered to benefi-

ciaries, CMS maintains certain information about Medicare providers and suppliers, the diagnoses they have made, and the procedures they have performed for which they have claimed Medicare reimbursement. As relevant here, CMS has "data elements [that] include the diagnosis, the type and place of service and the Unique Physician Identifying Number (UPIN) of the physician who performed the services." Pet. App. 2a.

2. Petitioner is a "nonprofit consumer information and service resource" that offers, *inter alia*, a "guide to top doctors." See Consumers' Checkbook, http://www.checkbook.org (last visited Mar. 10, 2010) (emphasis omitted). Petitioner brought this action under the Freedom of Information Act (FOIA), 5 U.S.C. 552, seeking certain data from Medicare claims records submitted by physicians in Illinois, Washington, the District of Columbia, Maryland, and Virginia during 2004. Pet. App. 2a; see also Consumers' Checkbook, http://www.checkbook.org (last visited Mar. 10, 2010) (listing petitioner's regions of coverage as, *inter alia*, Chicago Area, Puget Sound Area, and Washington D.C. Area). Petitioner's request seeks, as described above, the diagnosis, the type and place of service, and the UPIN of the physician who performed the service. Pet. App. 2a.

Using the information petitioner requested and the fee schedules CMS publishes, a person could determine an individual physician's annual income from Medicare reimbursement. Pet. App. 3a, 43a. Because the requested information—the physician-identifying data in particular—would reveal individual physicians' annual incomes from Medicare, the government objected to the release of the requested data as a "clearly unwarranted invasion of personal privacy," making the information

exempt from disclosure under FOIA Exemption 6. See 5 U.S.C. 552(b)(6).

The government also pointed out it could not release physician-identifying data because it had been permanently enjoined in *Florida Medical Ass'n* v. *Department of Health, Education & Welfare*, 479 F. Supp. 1291, 1311 (M.D. Fla. 1979) (*FMA*), from disclosing "annual Medicare reimbursements amounts, in a way that will identify individual Medicare providers and their amounts of reimbursements." The government explained that because it could not properly release such information under the *FMA* injunction, the data petitioner sought were not agency records "improperly withheld," 5 U.S.C. 552(a)(4)(B), and therefore the district court did not have authority to direct their release in a FOIA suit. See *GTE Sylvania, Inc.* v. *Consumers Union of the United States, Inc.*, 445 U.S. 375, 384 (1980).

The district court rejected both arguments and granted petitioner's motion for summary judgment, see Pet. App. 37a-55a, but stayed its order directing release of the requested records pending the government's appeal.

3. While the government's appeal was pending, the American Medical Association petitioned the court of appeals for, and was granted, leave to intervene to defend its member physicians' privacy interests and their interests as beneficiaries of the *FMA* injunction. The court of appeals reversed. Pet. App. 1a-35a.

a. The court first noted that "[i]f a substantial privacy interest is at stake," then it would need to undertake a case-specific inquiry under which it would "balance the privacy interest in non-disclosure against the public interest" in disclosure. Pet. App. 5a. On the privacy side of the balance, the court recognized that "phy-

sicians have a substantial privacy interest in the total payments they receive from Medicare for covered services." *Id.* at 7a. The court of appeals rejected petitioner's argument that no substantial privacy interest was at stake because disclosure might reveal only a physician's gross income or merely a portion of his income; the court also rejected the distinction petitioner sought to draw between "business activities" and "personal finances." See *id.* at 6a.

On the public interest side of the balancing test, the court of appeals closely examined, and rejected, each of petitioner's various theories. Petitioner first argued that disclosure would serve the public interest by revealing information about CMS's performance in enhancing the quality and efficiency of services provided under Medicare. Petitioner posited that high procedure volumes would indicate a high quality of care, and low volumes the opposite. The court of appeals rejected that view because the petitioners' argument rested on two incorrect premises: The court saw no meaningful consensus in the scientific literature that a physician's frequency of performing a procedure correlated with successful outcomes. And even if there were such a correlation, it would be a correlation with a physician's *total* number of procedures; yet the requested data would speak only to a physician's volume of Medicare-reimbursed procedures. Pet. App. 9a-10a.[1] Petitioner also

[1] Similarly, petitioner suggested that the requested records could "be analyzed in conjunction with other treatment records" to assess quality of care. Pet. App. 11a (quoting Pet. C.A. Br. 24). The court of appeals assumed for the sake of argument that such analysis would be possible, but reemphasized that in such an analysis the particular procedure-frequency data petitioner sought (as distinguished from

posited that identification of physicians would allow public assessment of their quality. But the court of appeals recognized that "determin[ing] if Medicare is paying physicians with insufficient certifications, disciplinary histories or poor evaluations," *id.* at 10a, has nothing to do with procedure volume; a citizen can assess that question simply by knowing whether a suspect physician is enrolled in Medicare, and that information is readily available through other sources. *Id.* at 10a-11a.

Petitioner next argued that disclosure would serve the public interest by bringing Medicare fraud and waste to light. The court of appeals rejected that potential use as a basis for mandatory disclosure of the requested data because petitioner "ha[d] not provided any evidence of alleged fraud the requested data would reveal." Pet. App. 12a. The court of appeals found particularly apropos this Court's recognition that "[i]f a totally unsupported suggestion that the interest in finding out whether Government agents have been telling the truth justified disclosure of private materials, Government agencies would have no defense against requests for production of private information." *Id.* at 12a-13a (quoting *United States Dep't of State* v. *Ray*, 502 U.S. 164, 179 (1991)).

Finally, petitioner argued that disclosure would illuminate HHS's compliance with its own transparency initiatives. The court of appeals disagreed, recognizing that "[t]he public does not need the data itself to evaluate whether CMS's failure to disclose it constitutes a failure to comply with CMS's transparency initiatives." Pet. App. 15a. Rather, the court of appeals explained,

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"other treatment records") would say nothing about whether CMS was performing its quality-promotion obligations. *Id.* at 11a-12a.

petitioner "seeks to use FOIA to compel CMS to *comply* with its transparency initiatives as [petitioner] views them, not to *evaluate* whether CMS is fulfilling its duties." *Ibid.* (emphasis added). In sum, the court concluded that "the requested data does not serve any FOIA-related public interest in disclosure." *Id.* at 16a.

Having found no "FOIA-related public interest," the court of appeals stated that it "need not balance the nonexistent public interest against every physician's substantial privacy interest in the Medicare payments he receives." Pet. App. 16a (citing *National Ass'n of Retired Fed. Employees* v. *Horner*, 879 F.2d 873, 879 (D.C. Cir. 1989) ("[w]e need not linger over the balance; something, even a modest privacy interest, outweighs nothing every time"), cert. denied, 494 U.S. 1078 (1990)). The court further stated that "even were [it] to find a FOIA-related public interest in disclosure, it would be negligible at best and insufficient to outweigh the significant privacy interest in non-disclosure." *Id.* at 17a. Accordingly, the court held that disclosure of the requested data "would constitute a clearly unwarranted invasion of personal privacy," 5 U.S.C. 552(b)(6). Pet. App. 17a. The court of appeals therefore found it unnecessary to reach the question whether disclosure would be barred by the *FMA* injunction. *Id.* at 4a n.3.

b. Judge Rogers concurred in part and dissented in part. Pet. App. 17a-35a. She agreed that physicians had a "more than a *de minimus* [*sic*] privacy interest," but thought that interest was diminished by the fact the income at issue was paid by the government. *Id.* at 20a-22a. On the public interest side, Judge Rogers was persuaded that the requested records could be useful to assess the quality of services provided by physicians for Medicare beneficiaries, or perhaps reveal fraudulent or

wasteful claims. *Id.* at 22a-31a. Accordingly, she would have held Exemption 6 did not apply. *Id.* at 31a. Judge Rogers nonetheless expressed considerable skepticism about petitioner's argument that the *FMA* injunction did not bar release of at least some of the records petitioner sought. See *id.* at 31a-35a. She would have remanded the case to the district court for further proceedings on the scope of the *FMA* injunction, including an evaluation of whether it would be practical to segregate and release "at least * * * records pertaining to physicians who are not members of the recertified class covered by the [*FMA*] injunction." *Id.* at 35a.

c. The court of appeals denied petitioner's petition for rehearing en banc by a 6-to-3 vote. Pet. App. 59a-60a.

ARGUMENT

The court of appeals' decision is correct and rests on its fact-bound conclusion that the particular data petitioner seeks—the identification of the specific physicians who performed, and were reimbursed for, particular medical procedures—would not in fact be useful for any of the public-interest purposes petitioner posits. The court of appeals' decision reflects only the application of settled FOIA law and does not conflict with any decision of this Court or of another court of appeals. Further review is therefore not warranted.

1. The court of appeals' application of FOIA Exemption 6 rests on settled principles of law. In considering that exemption, a court engages in a balancing test to determine whether the privacy interests at stake outweigh the public interest in disclosure. See generally *United States Dep't of Justice* v. *Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 762 (1989) (*Report-*

ers Comm.). As the court of appeals correctly stated, "[t]he only relevant public interest in disclosure 'is the extent to which disclosure would serve the "core purpose of the FOIA," which is "contribut[ing] significantly to public understanding *of the operations or activities of the government*."'" Pet. App. 7a (quoting *United States DoD* v. *FLRA*, 510 U.S. 487, 495 (1994) (*DoD*) (quoting *Reporters Comm.*, 489 U.S. at 775)). The court further cited established law that "the requested information must 'shed[] light on an agency's performance of its statutory duties,'" *ibid.* (quoting *Reporters Comm*, 489 U.S. at 773), and that "[t]he requesting party's intended use for the information is irrelevant to [the] analysis," *ibid.* (quoting *Reporters Comm*, 489 U.S. at 771).

Petitioner asserts that the court of appeals erroneously held that "the information requested must pertain to a specific statutory duty, rather than shed light on the functioning of the agency more generally." Pet. 13. But that is neither what the court of appeals said, nor what it did. Rather, it sought to determine whether the requested information would "contribut[e] significantly to public understanding of the operations or activities of the government." Pet. App. 7a (internal quotation marks, citations, and emphasis omitted). The court considered in detail petitioner's various "arguments regarding how the requested data will shed light on HHS's performance of its mission." *Id.* at 9a. The court of appeals' inquiry touched on both broad generalized goals (such as fighting fraud, see *id.* at 12a), as well as specific statutory mandates (such as promoting quality health care, see *id.* at 8a). And it addressed not only CMS's statutory obligations (see *id.* at 8a, 11a-12a (citing 42 U.S.C. 1395y(g) and 1395cc-3(b))), but also CMS's regulatory compliance (see *id.* at 11a (citing 42 C.F.R.

424.510)) and CMS's own initiatives (see *id.* at 14a-15a (citing CMS, Quality Initiatives - General Information, http://www.cms.hhs.gov/QualityInitiativesGenInfo/01_overview. asp (last visited Mar. 10, 2010))).

Overlooking all these aspects of the court of appeals' inquiry, petitioner focuses on the court's statement that "[t]he requested information must shed[] light on an agency's performance of its statutory duties" and its finding that "we fail to see how the requested information will allow the public to evaluate the performance of any specific quality-promoting programs CMS has a statutory duty to undertake." Pet. 14 (quoting Pet. App. 7a, 11a) (brackets in original). But the court was merely stating the oft-repeated, fundamental principle of FOIA law that to register on the public interest side of the balance, the requested information must "'she[d] light on an agency's performance of its statutory duties' or otherwise let citizens know 'what their government is up to.'" *DoD*, 510 U.S. at 497 (quoting *Reporters Comm.*, 489 U.S. at 773); see also *Bibles* v. *Oregon Natural Desert Ass'n*, 519 U.S. 355 (1997) (same).[2] And the

[2] Presumably petitioner does not suggest the case is certworthy entirely by virtue of the court of appeals' truncated recitation of the canonical formulation from *Reporters Committee* and *DoD*—that is, the court's mentioning "the agency's performance of its statutory duties" but eliding "what the[] government is up to." Nothing about the court of appeals' analysis was truncated, and it is only natural to speak of "statutory duties" because a government agency is "a creature of statute," and has "only those authorities conferred upon it by Congress." *Michigan* v. *EPA*, 268 F.3d 1075, 1081 (D.C. Cir. 2001); see also *Louisiana Pub. Serv. Comm'n* v. *FCC*, 476 U.S. 355, 374 (1986) ("an agency literally has no power to act * * * unless and until Congress confers power upon it"). Speaking of "statutory duties" is even more appropriate in discussing agency action under an intricate statutory scheme like Medicare.

court's conclusions about the usefulness of the particular data petitioner requested are correct (as discussed below), and would not in any event merit this Court's attention.

2. Petitioner also argues that the court of appeals erred in evaluating and balancing the particular public and privacy interests at issue here. Pet. 22-34. The court of appeals' decision is correct, and its fact-bound analysis does not merit further review.

a. On the privacy side of the balancing test, petitioner points out that "the requested records do not themselves reveal how much physicians are paid" and such "information must be derived by combining the requested data with other information." Pet. 33-34. But the fact that some arithmetic (using publicly available fee schedules) might be necessary to compute the precise amount of a physician's income is no privacy protection for the physician at all, and does nothing to vindicate Exemption 6's core purpose of promoting "the individual's control of information concerning his or her person," *Reporters Comm.*, 489 U.S. at 763-764.

The court of appeals rightly rejected the argument—repeated now in the petition (at 34)—that little or no privacy interest was at stake because disclosure would not necessarily reveal a physician's "overall economic situation," but only the "portion" of income attributable to Medicare reimbursement. See Pet. App. 6a ("[T]he requested information need not reveal completely an individual's personal finances to implicate substantial privacy concerns.") (citing *Multi AG Media* v. *Department of Agric.*, 515 F.3d 1224, 1228-1229 (D.C. Cir. 2008)). That reasoning is sound because any physician who receives Medicare reimbursement—like any individual who works more than one job—retains a

strong privacy interest in the level of income he receives, and does not forfeit that interest simply because he has other sources of income.

The court of appeals also rejected—and petitioner also repeats (Pet. 34)—the argument that the privacy interests at stake are minimal per se because the income at issue pertains to "physician's receipt of government funds." See Pet. App. 5a. But the view that personal financial privacy is protected by Exemption 6, irrespective of the source of income, is settled law in the circuits;[3] petitioner does not contend otherwise or offer a cogent reason for rejecting that view.

b. On the public interest side of the balance, the court of appeals correctly rejected each of petitioner's hypothetical uses of the requested records to understand CMS's performance of its duties. Petitioner largely repeats the arguments made to, and rejected by, the court of appeals.

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[3] See *Painting & Drywall Work Preservation Fund, Inc.* v. *HUD*, 936 F.2d 1300, 1302 (D.C. Cir. 1991) (withholding data under Exemption 6 because the records at issue involved accounting of hourly wages and net pay of workers on federally funded construction project); *National Ass'n of Retired Fed. Employees* v. *Horner*, 879 F.2d 873, 874 (D.C. Cir. 1989) (protecting financial information of individuals receiving federal employee retirement benefits), cert. denied, 494 U.S. 1078 (1990); *Painting Indus. of Haw. Mkt. Recovery Fund* v. *United States Dep't of the Air Force*, 26 F.3d 1479, 1484 (9th Cir. 1994) ("[W]e conclude that workers on federally-funded construction projects have a substantial privacy interest in information tying their names and addresses to precise payroll figures."); *Hopkins* v. *United States HUD*, 929 F.2d 81, 87 (2d Cir. 1991) (government contractors' payroll records were exempt from disclosure under Exemption 6 because "individual private employees have a significant privacy interest in avoiding disclosure of their names and addresses * * * particularly where, as here, the names and addresses would be coupled with personal financial information").

i. Petitioner contends that the requested data would allow the public to monitor HHS's "efforts to promote quality in the provision of medical services." Pet. 22-23 (citing studies purporting to show a correlation between the number of times a physician performs certain procedures and the quality of those services). The court of appeals correctly disagreed with this as a factual matter: "[t]he medical community has not reached a consensus on whether the number of procedures performed by a physician correlates to the quality of those procedures." Pet. App. 9a (citing studies contrary to those cited by petitioner). The court also correctly recognized that "[e]ven assuming a strong correlation between volume and quality, the data [petitioner] requests will not indicate total volume because it does not include procedures performed by physicians for non-Medicare patients." *Id.* at 10a. Moreover, the number of procedures performed by a physician plays no part in CMS's determination whether a physician is eligible to be a Medicare provider.[4] Thus, the court of appeals correctly found that "[t]he data will not assist the public in determining whether Medicare is enrolling physicians who do not meet the enrollment requirements." *Id.* at 12a.[5]

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[4] The qualifications for a physician to participate in Medicare are state licensure and entering into a provider agreement. See 42 U.S.C. 1395x(r); 42 C.F.R. 424.510. CMS is itself prohibited from "exercis[ing] any supervision or control over the practice of medicine or the manner in which medical services are provided." 42 U.S.C. 1395.

[5] To the extent petitioner's theory of public interest relies on CMS's authority under 42 U.S.C. 1320a-7(b)(6) to exclude certain enrolled physicians from Medicare, it has waived that contention by not briefing it to the court of appeals. See Pet. App. 24a n.2 (Rogers, J., dissenting) (noting waiver). In any event, for the reasons discussed in the text, procedure volume is as unilluminating for Section 1320a-7(b)(6) exclusion purposes as any other.

ii. Petitioner also maintains that the requested data would allow the public to monitor CMS's efforts to combat fraud in Medicare, and cites reports indicating that "[w]aste, fraud, and abuse in the Medicare program have long been significant problems." Pet. 4, 24. Although those studies show that fraud has been a problem with Medicare payments generally, petitioner failed—as the court of appeals recognized—to "provid[e] any evidence of alleged fraud *the requested data* would reveal." Pet. App. 12a (emphasis added). That deficiency is fatal.

This Court has made clear that a public interest in the general subject matter of the requested records (at bottom, all petitioner asserts) is not a sufficient nexus to permit disclosure under the FOIA. Rather, the Court has emphasized the direct "nexus required between the requested documents and the purported public interest served by disclosure." See *National Archives & Records Admin.* v. *Favish*, 541 U.S. 157, 175 (2004); see also *Senate of the Commonwealth of P.R.* v. *United States Dep't of Justice*, 823 F.2d 574, 588 (D.C. Cir. 1987) (R.B. Ginsburg, J.) (requester must show that there is a public interest in the "specific information being withheld"). The Court has elaborated in particular that to establish a cognizable public interest in exploring misconduct, a FOIA requestor must make a "meaningful evidentiary showing." *Favish,* 541 U.S. at 175.

Petitioner has failed here to connect the number of procedures performed by specifically identified physicians (the "specific information being withheld") with a specific claim of fraud in the Medicare program. At best, plaintiff speculates that the requested data will show whether CMS is reimbursing providers for "un-

necessary procedures." Pet. 24. But the requested data cannot answer that question because whether a procedure is necessary depends entirely on the patient's condition—something the public obviously does not know, because it has no access to Medicare beneficiaries' private medical information.[6]

Petitioner also argues (Pet. 24) that disclosure of the disputed data "may also identify instances in which Medicare is paying claims to providers who are long deceased." But that purpose does not require physician-identifying information tied to number of procedures performed; any member of the public can use the directory of current Medicare physicians to determine whether a dead or retired physician is enrolled with

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[6] Notably, CMS uses much more than procedure volume to implement 42 U.S.C. 1395y(a)(1)(B), which precludes reimbursement for services that "are not reasonable and necessary for the prevention of illness." CMS's computer systems monitor claims data, and when aberrations are noted, a "medical review" is triggered to look at the underlying medical records to determine whether the care meets the "reasonable and necessary" criteria. See generally CMS, Medicare Medical Review Program, http://www.cms. hhs.gov/MedicalReviewProcess/Downloads/mrfactsheet.pdf. In addition, as the court of appeals recognized (see Pet. App. 8 n.4), quality peer review organizations, which do have access to underlying medical records, review whether services are reasonably necessary, the quality of services, and whether certain services can be performed more efficiently and economically. See 42 U.S.C. 1320c-3(a)(1). CMS has also undertaken a pilot program of payment recapture audits performed by private contractors, and the President recently announced an expansion of these efforts. See *President Obama Announces New Effort to Crack Down on Waste and Fraud*, Mar. 10, 2010, http://www.whitehouse.gov/the-press-office/president-obama-announces- new-effort-crack-down-waste-and-fraud. The data petitioner seeks would be at most a small component of those sorts of analyses, and certainly could not be used on their own to meaningfully analyze the quality of services reimbursed by Medicare.

Medicare. See Physician and Other Healthcare Professional Directory, http://www.medicare.gov/physician/search/physicianhome.asp (last visited Mar. 10, 2010). Indeed, the court of appeals recognized that this directory is all that the public needs to determine more generally "whether physicians with insufficient certifications, disciplinary histories or poor evaluations are enrolled in the Medicare program." Pet. App. 10a. CMS also maintains a publicly accessible website containing a list of physicians excluded from the Medicare program for misconduct. See Office of Inspector Gen., United States Dep't of HHS, http://oig.hhs.gov/fraud/exclusions/exclusions_list.asp (last visited Mar. 10, 2010). Such "'alternative sources of information available that could serve the public interest in disclosure' diminish [the] public interest value of disclosure." Pet. App. 10a (quoting *United States DoD Dep't of Military Affairs* v. *FLRA*, 964 F.2d 26, 29-30 (D.C. Cir. 1992)).

iii. Petitioner further contends that "the requested data would allow the public to monitor HHS's own self-proclaimed efforts to ensure greater transparency" in health care. Pet. 25. But the court of appeals' logic rejecting this argument is unassailable: the public knows the data exist but have not been released, and therefore "does not need the data itself to evaluate whether CMS's failure to disclose it constitutes a failure to comply with CMS's transparency initiatives." Pet. App. 15a.

iv. Finally, petitioner argues that "there is always a public interest in monitoring the government's expenditure of public funds." Pet. 25 (capitalization omitted). Even if that were true for FOIA purposes, petitioner does not explain why such an interest extends to the microscopic level of individual reimbursements for individual procedures to specifically identified physicians, or

why aggregate data that do not infringe on physician's financial privacy interests would not serve the same public interests.[7]

Moreover, petitioner's broad proposition is not supported by the cases it cites; each decision rests on much more than a naked, generalized interest in government expenditures. For example, in *News-Press* v. *United States DHS*, 489 F.3d 1173 (11th Cir. 2007), the Court ordered the disclosure of addresses (but not names) of households who received FEMA disaster relief funds—but did so only in the face "ample evidence" that the agency's response to Hurricane Frances may have been plagued with "fraud, waste, or abuse." See *id.* at 1192.[8] In *Multi AG Media*, *supra*, the records at issue did not merely relate to government expenditures—rather, they were the very information the agency had before it when determining whether a particular farm was eligible to

[7] Indeed, there are abundant public data about Medicare expenditures. CMS has for many years compiled an annual Data Compendium giving key statistics about its programs and health care spending. The Data Compendium reports historic, current, and projected data on Medicare enrollment and Medicaid recipients, expenditures, and utilization. Data pertaining to budget, administrative and operating costs, individual income, financing, and health care providers and suppliers are also included. This Data Compendium now is available online as a service to researchers, policymakers, legislators, economists, and statisticians in health care. See CMS, Data Compendium 2009 Edition, http://www.cms.hhs.gov/DataCompendium/15_2009_Data_Compendium.asp.

[8] Petitioner's citation (Pet. 28 n.20) of *Cochran* v. *United States*, 770 F.2d 949 (11th Cir. 1985), is even less helpful, because it involved proven acts of "intentionally diverting government property," *id.* at 956. Similarly, there was established irregularity in *Aronson* v. *HUD*, 822 F.2d 182 (1st Cir. 1987), which concerned the "disclosure and consequent disbursement of funds the government [concededly] owe[d] its citizens," *id.* at 185.

participate in (or was complying with) the government's benefit program. See 515 F.3d at 1230-1232. By contrast here, the number of procedures performed by an individual physician has no bearing upon the physician's eligibility to become a Medicare provider or his entitlement to reimbursement for a procedure. Petitioner's broad proposition is simply mistaken, and the court of appeals correctly resolved this case on its own facts.

3. The petition anticipated the possibility of a circuit split between the decision below and *Alley* v. *United States HHS*, 590 F.3d 1195 (2009), which was pending on the government's appeal to the Court of Appeals for the Eleventh Circuit at the time the petition was filed. See Pet. 15.[9] No split materialized: *Alley* did not address the Exemption 6 issue here, holding instead that the requested records were properly withheld in light of the permanent injunction in *FMA*. *Alley*'s reasoning (which would apply equally to this case) relied on this Court's holding in *GTE Sylvania, Inc.* v. *Consumers Union of the United States, Inc.*, 445 U.S. 375, 384 (1980), that information may not be obtained under FOIA when the agency holding the material has been enjoined from disclosing it. See 590 F.3d at 1203. Thus, not only is there no disagreement in the circuits, but two different courts of appeals have found independently sufficient reasons to deny the relief petitioner seeks. The obstacle that the *FMA* injunction presents to petitioner's ultimate success is an additional reason why further review is unwarranted.

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[9] On the government's application, this Court stayed the district court's order directing release of the requested records in *Alley* pending appeal. See *United States HHS* v. *Alley*, No. 08A794 (Mar. 25, 2009).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MARCH 2010