

No. 02-479

IN THE SUPREME COURT OF THE UNITED STATES

MEDICAL BOARD OF CALIFORNIA,
Petitioner

v.

MICHAEL J. HASON,
Respondent

Objection to Motion to Dismiss Pursuant to Supreme Court Rule 46.2

Pursuant to Supreme Court Rule 46.2(a), Respondent Dr. Michael Hason files this objection, limited to the amount of damages and costs in this Court, to Petitioner's motion to dismiss.

On March 3, 2003, after Petitioner and Respondent and many *amici curiae* had filed their briefs, and just three weeks before oral argument was scheduled, Petitioner moved this Court to dismiss its petition for a writ of certiorari. The Medical Board's motion to dismiss is considered under Supreme Court Rule 46.2 because Respondent, Dr. Michael Hason, does not stipulate to this dismissal and would prefer that the case go forward in this Court.

Rule 46.2 permits Dr. Hason to request an award of damages and costs

incurred in this Court. The Medical Board's actions – petitioning this Court for a writ of certiorari and then withdrawing the petition after certiorari was granted and briefing was complete – have imposed significant damages and costs on this Court, the attorneys for Dr. Hason, and many who filed *amicus* briefs.

Additionally, the Medical Board's conduct poses a serious threat to the integrity of this Court. For these reasons, as explained below, Dr. Hason seeks damages and costs from the Petitioner, Medical Board of California.

1. With no changes in the law, facts, or circumstances, the Medical Board simply changed its mind and decided to withdraw its petition for a writ of certiorari despite having asserted sovereign immunity at every stage of this litigation.

Dr. Hason sued the Medical Board, and its officers, in the United States District Court for the Central District of California for impermissibly discriminating against him in denying him a medical license because of his history of depression. Dr. Hason claimed that the Medical Board's action violated his rights under the United States Constitution and Title II of the Americans with Disabilities Act. App. to Cert. Pet. at 37. The Medical Board, and its officers, moved to dismiss the suit based on the Eleventh Amendment. The District Court granted the motion to dismiss and concluded that neither state officers nor the

state government could be sued for injunctive or damage relief because of the Eleventh Amendment. App. to Cert. Pet. at 15, 17, 19-23

Dr. Hason appealed to the United States Court of Appeals for the Ninth Circuit. The Court of Appeals reversed the District Court, holding that state officers may be sued for injunctive relief; that Title II of the Americans with Disabilities Act is a constitutional exercise of Congress's power under section five of the Fourteenth Amendment and maybe used to sue state governments; and that discrimination against individuals with disabilities in medical licensing is actionable under Title II in that it is "services, programs, or activities" of the state. App. to Cert. Pet. at 1.

The State then sought *en banc* review, again asserting that the Eleventh Amendment precludes the suit against the Medical Board of California. The Court of Appeals denied the Medical Board's petition for *en banc* review. App. to Cert. Pet. at 26.

The State then petitioned this Court for certiorari, which Dr. Hason opposed. On November 16, 2002, this Court granted certiorari.

On January 10, the Medical Board filed its brief on the merits. On February 18, Respondent filed its brief on the merits, as did a number of *amici curiae*. Oral argument is scheduled for March 25, 2003.

2. On March 3, 2003, the Medical Board of California filed a motion to dismiss its petition for certiorari. Its one sentence motion offered no reasons; evidently the members of the Medical Board and their lawyers changed their mind about review in this Court. Nothing new has occurred since the petition for certiorari was filed that would explain why the Medical Board having invoked this Court's jurisdiction now wants the case dismissed. If it wanted to withdraw its petition, it is inexplicable why it did not do so before the briefs were written.

3. The Medical Board's actions seem unprecedented and pose a serious threat to the integrity of this Court. Although, of course, cases often settle prior to oral argument, the Medical Board rejected many offers that Dr. Hason made for a settlement. Respondent cannot identify any prior incident where a petitioner simply changed its mind and unilaterally withdrew its petition just three weeks before oral argument was scheduled.

Following the Medical Board's example, petitioners may choose in the future to withdraw their petitions, even shortly before oral argument, if they see another case posing the same issue about to come to the Court which is better from their perspective. Or after reading the briefs by respondent and its *amici*, a petitioner may decide that the approach taken in its brief did not work and to withdraw the case and take a different tact in the next case posing the issue. Or

following the Medical Board's example, a petitioner might even wait until after oral argument, and if it perceives the argument as not having gone well, withdraw the case and have the issue decided in another case in the future. There are a myriad of ways in which petitioners might use withdrawal for strategic reasons.

The tradition in this Court has been that such practices are unacceptable. The tradition has been that once certiorari has been granted a case will be briefed and argued unless the case becomes moot, by virtue of a change in circumstances or settlement. Damages and costs are appropriate here against the Medical Board to deter such conduct in the future.

4. Damages and costs also should be awarded against the Medical Board because it imposed significant expense in time and money on the attorneys for Dr. Hason and this Court. There is no excuse for why the Medical Board, if it did not want this Court to reach the issue posed in this case, sought certiorari or did not withdraw its petition before the briefing was completed.

At a minimum, the Medical Board should be ordered to pay the attorneys for Dr. Hason for their time in preparing the response to the petition for a writ of certiorari and their brief on the merits. Also, the Medical Board should be required to pay this Court for its costs in having respondent's brief printed in that *in forma pauperis* status was granted.

When Petitioner makes a motion to dismiss the case, Supreme Court Rule 46.2(a) permits the Respondent to object to dismissal, limited to a request for payment of “the amount of damages and costs in this Court.” Rule 46.2(a) does not define what constitutes “damages.” Because this appears to be an unprecedented situation, there is no case law interpreting “damages.” But clearly the damages suffered include the time and expense expended because of the Medical Board’s seeking certiorari and waiting until virtually the last minute before withdrawing its petition. Additionally, this Court could award attorneys’ fees and costs against the Medical Board pursuant to 28 U.S.C. §1927. *See* Robert L. Stern, Eugene Gressman, Stephen M. Shapiro & Kenneth S. Geller, Supreme Court Practice 741 (8th ed. 2002) (“Although the Court has not yet done so, it possesses the power to award attorneys’ fees incurred as a result of unreasonable and vexatious delay or multiplication of proceedings before it. 28 U.S.C. §1927.”) Also, of course, this Court, like all federal courts, has inherent powers to impose fees and costs as sanctions. *See Chambers v. NASCO, Inc.*, 501 U.S. 32 (1991).

5. The Medical Board’s withdrawal of its petition for certiorari should not be regarded as providing any benefit to Dr. Hason that would negate his claim for damages and costs. This is not a settlement, though Dr. Hason repeatedly offered to settle the case. A settlement resolves the dispute and thus is favored in this and

every court. But here, Dr. Hason's claims against the Medical Board remain unresolved and the Medical Board's action shifts the litigation back to the district court. Unlike a settlement, Dr. Hason has received no benefits from the proceedings in this Court.

Nor is this the same as Dr. Hason prevailing in this Court. It is certain that this Court will in the near future grant certiorari in another case posing the same issue as to whether state governments may be sued for violating Title II of the Americans with Disabilities Act. If this Court holds that Title II is not within the scope of section five of the Fourteenth Amendment, then the Medical Board can move to dismiss Dr. Hason's suit on that basis even though he will have spent many months litigating in the lower courts. In fact, if the issue has not been resolved by the completion of the litigation in Dr. Hason's case, there is nothing to preclude the Medical Board from again coming to this Court with the same issue. It obviously is unclear whether withdrawal of a petition for certiorari by the Medical Board constitutes a waiver of its sovereign immunity because this situation never has arisen. Nor is it clear whether a waiver could be effective, especially if this Court holds that Title II is outside the scope of congressional

powers.¹

5. As damages, respondent seeks payment of its attorneys' fees and an order that the Medical Board pay this Court for the costs it incurred. Counsel of record, Erwin Chemerinsky, spent 146 hours in preparing the opposition to the petition for a certiorari, Respondent's brief on the merits, and this motion. His customary fee is \$400 per hour. His fees are thus \$58,400. His co-counsel, Mark Rosenbaum, spent 48.4 hours on this matter. His customary fee is \$550 per hour. His fees are thus \$26,620. This does not reflect all of the costs incurred by Respondent's attorneys; it does not include the time spent by research assistants or by other attorneys who spent time on the matter. But it does reflect the most significant damages and costs imposed by the Medical Board's actions.

¹For these reasons, Dr. Hason prefers that this case go forward in this Court and thus does not stipulate to the dismissal pursuant to Rule 46.1. Hence, this matter is before the Court pursuant to Rule 46.2, which governs dismissals without a stipulation of all parties. Under Rule 46.2, Respondent cannot oppose a motion to dismiss a certiorari petition in these circumstances. Respondent, though, respectfully observes that Rule 46.2 does not require that this Court grant Petitioner's motion to dismiss. Since there remains a "case and controversy," as the Medical Board refused to settle this case and it will now be litigated in the district court; since there is an issue of significance about which there is a split among the circuits; and since the case has been fully briefed, this Court could choose to exercise its discretion to not dismiss the case. If the Medical Board did not wish to pursue it, the Court could appoint an *amicus* to represent the Medical Board's position. *Cf., United States v. Dickerson*, 530 U.S. 428 (2000).

Respectfully submitted,

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March 6, 2003

Certificate of Service

A copy of this Objection to Motion to Dismiss Pursuant to Supreme Court Rule 46.2 was served by e-mail, fax, and express mail to:

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March 6, 2003