To Be Argued By:
Sue J. Nam
Time Requested: 30 Minutes

CTQ-2020-00004

Court of Appeals

STATE OF NEW YORK

HECTOR ORTIZ, in his capacity as Temporary Administrator of the Estate of Vicky Ortiz, individually and on behalf of all others similarly situated,

Plaintiff-Appellant,

against

CIOX HEALTH LLC, as successor in interest to IOD Inc., and THE NEW YORK AND PRESBYTERIAN HOSPITAL,

Defendants-Appellees,

and

IOD INC. and COLUMBIA PRESBYTERIAN MEDICAL CENTER,

Defendants.

On Question Certified by the United States Court of Appeals for the Second Circuit (USCOA Docket No. 19-1649-cv)

REPLY BRIEF FOR PLAINTIFF-APPELLANT HECTOR ORTIZ, IN HIS CAPACITY AS TEMPORARY ADMINISTRATOR OF THE ESTATE OF VICKY ORTIZ, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED

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PRELIMINARY STATEMENT

The New York Legislature capped at $0.75 per page what a provider can charge a "qualified person" for medical records. That statutory cap applies whether the qualified person is the patient herself, the patient's attorney, or the distressed parent of the patient. The statutory cap applies whether or not the qualified person is diligent in reviewing her bills, knows there is a per-page limit on charges for medical records, is proficient enough in English to dispute the charges, or has the resources to bring a special proceeding in court. By zeroing in on selective portions of Section 18 of the New York Public Health Law, Respondents hope this Court will lose sight of the forest for the trees.

Nothing in the text of Section 18 remotely suggests that it was intended to shield for-profit corporations from liability for overcharging New Yorkers for their medical records. To the contrary, both the plain language of the statute and the clear legislative history demonstrate the unambiguous legislative intent behind Section 18 and its numerous amendments. Section 18, and specifically the statutory limit on charges of PHL § 18(2)(e), were enacted for the benefit of the people of this State to ensure their affordable access to medical records. Consistent with Section 18's legislative purpose, courts and litigants have long accepted that private claimants can bring plenary actions under PHL § 18(2)(e) in state and federal court until the district court's decision in this case in 2019.

The overcharging of Ortiz was not a one-off mistake. In just a four-year

period, Respondents billed in excess of the statutory cap on approximately 86,500 invoices, resulting in millions of dollars of overcharges. Should this Court find there is no private right of action for damages, the tens of thousands of New Yorkers who were overcharged will have no remedy and the enforcement landscape for the providers of medical records, which included a private right of action for decades, will bring unknown future implications regarding compliance with PHL § 18(2)(e).

Thus, even if this Court declines to follow the reasoning of the *Feder* Decision[1] – litigated by the major hospitals and record providers in New York on behalf of themselves and all other similarly situated, which squarely addressed this issue and was affirmed on appeal – the statutory language, legislative history, policy considerations, and relevant case law all support the finding that PHL § 18(2)(e) provides a private right of action for damages when a medical provider violates the $0.75 per-page cap on charges for paper copies of medical records. Ortiz is one of the class for whose particular benefit the statute was enacted; the recognition of a private right of action promotes the legislative purpose of ensuring affordable access to medical records; and the creation of such a right is consistent with the legislative scheme of Section 18 of the Public Health Law.

New Yorkers should be permitted to continue to have an avenue to seek

[1] The defined terms in Appellant's opening brief apply here.

redress when the law specifically enacted to protect them against price gouging is violated. To rule otherwise would not only be contrary to the statute and legislative history but would jeopardize the ability of New Yorkers and their representatives to obtain affordable copies of their medical records.

BACKGROUND

I. The Language and Legislative History of Section 18 of the Public Health Law

Respondents contend that "no one group can claim the special status necessary to justify an implied private right of action on its behalf" (NYPH Br. at 14) and that the enactment of Section 18 and its subsequent amendments were intended to "avoid burdening health care providers" (CIOX Br. at 14). This is truly a journey through the looking glass.

The Legislature could not be clearer that the purpose of enacting the original 1986 statute, Section 18 of the Public Health Law, was to establish patients' right of access to their health records. The statute was and is entitled "Access to patient information." C.A. 3-8 (L. 1986, ch 497) ("the 1986 law"); PHL § 18.[2] The heart of Section 18 of the Public Health Law then and now ensures that health care providers "shall" provide an opportunity to inspect patient information or "shall" furnish copies of patient information. *Compare* C.A. 5, Section 18(2)(a), (d) of 1986 law, *with* PHL § 18(2)(a), (d). Moreover, a

[2] References to "C.A." are to the Compendium of Authorities filed by CIOX.

provider is permitted to deny access only in very limited circumstances, such as when "the requested review of the information can reasonably be expected to cause substantial and identifiable harm to the subject or others that would outweigh the qualified person's right of access to the information." *Compare* C.A. 3-4, Section 18(3)(a) of 1986 law, *with* PHL § 18(3)(a). In the event of a denial of access, the qualified person was and is given a right to notice and review of the decision. *Compare* C.A. 6-7, Section 18(3)(e)-(f) of 1986 law, *with* PHL § 18(3)(e)-(f).

Although a practitioner "may" impose a reasonable charge for copies and "may" place reasonable limitations on the time, place, and frequency of any inspection, PHL § 18(2)(e)-(f), these provisions can hardly be characterized as "removing the burdens that right would impose on health care providers, including litigation burdens" (CIOX Br. at 19) or a "balancing of competing interests among various groups" (NYPH Br. at 13).

Passage of the 1986 law overcame the strong opposition of health industry lobbyists and prioritized the rights of patients and their representatives. It was a major victory for individuals over business interests. *See*, *e.g.*, C.A. 46-47 (NYCLU 1986 Legislative Memorandum) ("This bill would, at long last, extend to New Yorkers . . . the right to see, examine, correct and make copies of one's medical records. The creation of this right of access is a vital step towards guaranteeing individuals the ability to fully assert and protect their rights to

privacy and individual autonomy.").

The Legislature amended Section 18 multiple times. Tellingly, each and every amendment furthered the legislative purpose of ensuring that patients and their representatives have access to medical records.

In 1987, the Legislature added a provision that "[n]o health care provider shall be subjected to civil liability arising solely from granting or providing access to any patient information in accordance with this section." C.A. 89 (L 1987, ch 770); PHL § 18(11). This amendment was not a "liability shield" for providers (CIOX Br. at 15). Rather the amendment's "purpose is to ensure compliance with section 18 of the Public Health Law, which provides citizens with an opportunity to seek access to their medical records." C.A. 97 (New York State Assembly 1987 Committee Bill Memorandum) (emphasis added). In urging the Governor's approval of the amendment, the Legislature specifically explained that Section 18 of the Public Health Law was enacted to "enable patients, parents and guardians to have access to patient information in the possession of health care providers, whenever such disclosure will not reasonably result in harm to the patient, client or others." C.A. 92 (Letter of the Chairman of the New York Senate's Committee on Health to Counsel to the Governor). The amendment specifically addressed the concern that the potential for provider liability may have a "'chilling effect' upon the release of any patient information under section 18." *Id.*

In 1991, the Legislature added a cap of seventy-five cents per page to the charge that providers impose for copying medical records. C.A. 131 (L 1991, ch 165 § 48) ("the 1991 amendment"). This one sentence amendment had nothing to do with the bulk of the bill that principally revised New York's Medicaid program. Thus, the Legislature's statements regarding the purpose of the bill – to contain Medicaid costs for the state and to make various changes regarding medical malpractice – was irrelevant to the 1991 amendment. Rather, as CIOX concedes, "the 1991 amendment was enacted in response to complaints about [providers] overcharging." CIOX Br. at 16.

In an attempt to find support where none exists, Respondents cite *Casillo v. St. John's Episcopal Hosp.*, 151 Misc.2d 420 (Sup Ct. Suffolk Cty. 1992) to buttress their suggestion that the amendment imposing the $0.75 cap was enacted to benefit providers. *See* CIOX Br. at 17 ("The Legislature's imposition of a cap that reduced the then-prevailing rate of $1.50 to $0.75 preserved incentives for hospitals to retain the infrastructure necessary to produce records efficiently…."); NYPH Br. at 16-17 ("The cap can be seen as another balanced approach to the controversy, providing patients with relief from higher charges and providers with a yardstick by which they could claim that they provided the records at a reasonable cost."). The actual text of the *Casillo* decision forecloses Respondents' self-serving interpretation.

The court in *Casillo* dispelled any notion that the cap was for the benefit

of providers, bluntly stating that the $0.75 per-page cap was enacted "because the Legislature has decided to recognize hospital and physician cupidity in providing a patient with his or her medical records." 151 Misc.2d at 425. In that case, as in this case, the provider charged the patient's attorney $1.50 per page for patient records in addition to certain flat fees. The court found, "Nothing more clearly indicates the lucrative source of income copying has provided to a hospital than the case at bar." *Id.* The court also noted the "obvious dismay over the legislative capping" by the defendant hospital and other New York hospitals. *Id.* at 426. The court then expressed concern with "the role [the Medical Record Association of New York State, Inc.] apparently plays regarding the setting of fees for medical record reproduction on a State-wide basis." *Id.* at 428.

The court recognized that, although the 1991 amendment "was not intended to create a plethora of litigation," it also was not "intended to overrule, dampen or otherwise limit . . . patient accessibility to medical records."

> Rather, [the 1991 amendment] was enacted to create a unifying definition for the "reasonable charge" standard and to stem the burgeoning costs being imposed on patients seeking to obtain their own medical records for whatever purpose.
>
> While a person can conceivably seek a judicial hearing to determine whether charges imposed are "reasonable" . . ., the reality is that the costs of litigation are so high as to far outweigh the economic benefit to be gained. In effect, patients and their designated third parties are at the mercy of medical providers who can basically charge whatever they want with almost absolute impunity.

Casillo, 151 Misc.2d at 429.

Rather than lending support for Respondents' position that the 1991 amendment was an effort by the Legislature to "minimize provider burden" (CIOX Br. at 16) and "primarily to introduce predictability and efficiency to subpoena practice" (*id.* at 17), the plain language of *Casillo* refutes these arguments. The 1991 amendment, first and foremost, was enacted to protect patients and their representatives from price gouging. The Legislature's creation of a "unifying definition for the 'reasonable charge' standard" was to benefit "patients and their designated third parties," *Casillo*, 151 Misc.2d at 429, not to benefit providers. The 1991 amendment was an effort by the Legislature to tilt the inequities of power in the favor of "qualified persons" because those persons otherwise "are at the mercy of medical providers who can basically charge whatever they want with almost absolute impunity." *Id.*

In 1992, the Legislature amended Section 18 to expressly add attorney representatives to the list of "qualified persons" in PHL§ 18(1)(g). C.A.382 (L 1992, ch 227 § 8). Again, the bill jacket identifies the legislative purpose of this amendment and legislative purpose of the earlier 1991 amendment:

> Section 48 and 49 of Chapter 165 of the laws of 1991 which amended section 17 and 18 of the public health law to provide that the reasonable charge for paper copies of health care records shall not exceed seventy-five cents per page. Notwithstanding the fact that the amendment dealt only with the cost of limitation, a controversy arose as to whether the charge limitation applied when paper copies of health care records were supplied to [sic] attorney. The present amendment is intended to remove any ambiguity and to reinforce the intent of Chapter 165 of the laws of 1991 that the

> maximum charge limitation applies when records are being furnished to legal representatives for all qualified persons delineated under Section 18(g) of the Public Health Law.

C.A. 386 (New York State Senate Introducer's Memorandum in Support) (emphasis added).

In other words, the simple purpose of the 1991 amendment imposing a cap on what providers can charge is reflected in the simple language of the amendment: "the reasonable charge for paper copies shall not exceed seventy-five cents per page." PHL § 18(2)(e).

In 1998, Section 18 was amended to conform state law to new federal requirements that a provider must furnish original mammograms to patients. C.A. 421-23 (L 1998, ch 576 § 2-5). With respect to the costs associated with compliance, however, "the bill goes beyond the federal mandates in that it prohibits the facility from charging the patient a fee when the facility chooses to make a copy of the original mammogram for its files as it releases the original mammogram to the patient, their medical institution, or their health care provider…." C.A. 410 (Letter of the Chairman of the New York Senate's Committee on Health to Counsel to the Counsel to the Governor). *See* PHL § 18(2)(e). The amendment thus imposed further burdens on providers for the benefit of patients than what was federally mandated.

And finally, in 2017, the Legislature prohibited any charging for medical records when they were required for the purpose of supporting an application,

claim, or appeal for any government benefit or program. C.A. 510 (L 2017, Ch. 322 § 2); PHL § 18(2)(e). Again, the focus of this amendment was on patients, rather than the health providers, as the Chair for the New York Assembly Committee on Health explained:

> This bill, which is before the Governor, would ease consumers' access to their health and medical records when applying for or accessing government benefits.
>
> Individuals applying for an array of public benefits need medical records to document their eligibility or claims. This may include Social Security disability benefits, 9/11 survivor health benefits, etc. These claimants generally cannot afford to pay the statutory rate of seventy-five cents per page for these records, which can number in the hundreds of pages. And while current law provides that access to such records shall not be denied solely because of inability to pay, patients are often unaware of this right, or may experience humiliation when pursuing it.
>
> Patients, who are often already suffering from illness, injury or natural catastrophe, should not be burdened with the cost of delivering such information when it is legally required for obtaining the public benefits to which they are entitled. The law recognizes the patient's right to his or her records, and health care providers often provide them at no charge. Especially in these circumstances, that ought to be a patient's right and part of a provider's responsibility.

C.A. 436 (emphasis added).

Accordingly, the purpose of Section 18 and the 1991 amendment is not to shield providers; it certainly is not to shield them when they overcharge qualified persons. The overriding legislative purpose for Section 18 as a whole, and with respect to each and every amendment, is to ensure access for patients and their

representatives to medical records, including by alleviating the burdens of excessive costs.

II. The *Feder* Decision

The district court did not have the benefit of the *Feder* Decision, the only case decided by a New York Supreme Court and New York appellate court to squarely address the issue and one that would have been persuasive authority. Just as Respondents are quick to blame the "qualified persons," who fail to catch and correct Respondents' overcharges, Respondents fault Ortiz for failing to discover the *Feder* decision until the case reached the Second Circuit. Never mind that Respondent NYPH not only was a party in *Feder*, but it made the same arguments as it did in *Feder* to the district court. Yet, NYPH failed to inform the district court that these very arguments had been squarely rejected at the trial level and on appeal in state court. NYPH even opposed Ortiz's motion in the Second Circuit for judicial notice of the *Feder* decision, arguing that Ortiz was engaging in "sandbagging" Respondents and the court. Second Circuit, Dkt No. 81. If any party was engaging in sandbagging, it was NYPH.

And even if only the parties to *Feder* and the panel of the First Department were aware of the trial court opinion in *Feder*, as Respondent CIOX suggests (CIOX Br. at 59), the defendants in *Feder* were the major hospitals and health record providers of New York, who represented not only themselves, but others similarly situated. *See* A0101. In addition to NYPH, the parties included Staten

Island Hospital, Brunswick Hospital Center, Memorial Sloan-Kettering Cancer Center, Correspondence Management, Inc., HCC Health Information Management Services, and Copy Right, Inc. *Id.* And these entities in turn belonged to organizations such as the Medical Society of the State of New York, the Hospital Association of New York State, and the Medical Record Association of New York State, Inc. ("MRANYS"), which kept its members well informed of legal developments. *See*, *e.g.*, C.A. 41 (Medical Society of the State of New York's Memorandum regarding 1986 law); C.A. 50 (Hospital Association of New York State's letter regarding 1986 law); *Casillo*, 151 Misc.2d at 426-28 (detailing the communications from MRANYS to its members about the 1991 amendment).

The notion that the *Feder* Decision was not widely known and relied upon in the health industry and factored in providers' legal positions in plenary actions for damages strains credulity. Conceding that NYPH, as a party, must have been aware of the decision, CIOX wanly states only that "CIOX itself had never been party to a final judgment in which the existence of the private right of action in PHL §18 was either actually or necessarily decided." CIOX Br. at 59. Respondents would have this Court believe that sophisticated defendants, including these very Respondents, simply overlooked this threshold avenue of defense for almost two decades after the *Feder* Decision until NYPH raised it before the district court, recycling the same arguments it previously made in *Feder*.

It is against this background that this Court must consider the *Sheehy* factors.

ARGUMENT

I. PHL § 18(2)(e) Affords A Private Right of Action

A. Appellant Is One of the Class for Whose Particular Benefit PHL § 18 Was Enacted

Respondent CIOX concedes that Appellant is within the class of persons that the New York Legislature intended to benefit with the enactment of PHL § 18(2)(e). CIOX Br. at 9. However, Respondent NYPH argues that "no one group can claim the special status necessary to justify an implied private right of action on its behalf." NYPH Br. at 14. NYPH asks this Court to disregard the plain language of PHL § 18(2)(e), which confers particular benefits on "qualified persons," like Ortiz, who request copies of medical records. NYPH instead argues that the entirety of Section 18 reflects a "balanced approach" because the statute takes into account other interests like those of health care facilities and health care practitioners.

Under NYPH's proposed analysis, no well-considered statute can ever be seen as intending to benefit a class of persons because that statute necessarily considers the reasonable needs of various stakeholders. Yet, in addition to the statutory language itself, the legislative history of Section 18 discussed above provides unequivocal confirmation that the purpose of Section 18 and its amendments is to establish and strengthen the rights of patients and their

representatives to access their health information. Because the statute itself and the legislative history make readily apparent the Legislature's consistent prioritization of patients and their representatives over providers, Appellant, as a "qualified person" under Section 18 is clearly "one of the class for whose particular benefit the statute was enacted," thereby satisfying the first of the *Sheehy* factors.

B. Recognizing an Implied Private Right of Action Will Promote the Legislative Purpose To Ensure That Qualified Persons Have Affordable Access to Medical Records

Despite the "fierce opposition" of the health care industry (CIOX Br. at 13), the Legislature not only enacted Section 18, but it subsequently amended it to strengthen the rights of patients and their representatives. Thus, permitting plaintiffs to sue to enforce PHL § 18(2)(e) would promote the legislative purpose of Section 18 generally (to provide qualified persons access to their medical information) and of the 1991 amendment specifically (to limit the costs imposed by providers to no more than $0.75 per page).

In the face of undisputed evidence that tens of thousands of New Yorkers were overcharged, Respondents' insinuations that this action is lawyer and fee driven is groundless. Particularly outrageous is Respondent NYPH's suggestion that patients could avoid being overcharged if they were just more diligent and knowledgeable about their rights. *See* NYPH Br. at 23 ("In any event, the Article 78 remedy effectively protects *diligent* qualified persons who request their own

medical records.") (emphasis in original); *id.* at 24 ("the likelihood of the type of error made here in responding to the request for Vicky Ortiz's records by her attorney would be highly unlikely to occur if the patient herself requested the records"); *id.* at 24, n. 13 ("While an invoice may not state the per-page charge as such, it should show the total charge and the total page. The rest simply is math."). What may be "statistically insignificant vender errors" to hospitals (*id.* at 17) is a significant financial hardship and an impediment to access for those who need medical records to make an informed medical decision or to investigate potential neglect or malpractice.

Respondents' dismissiveness and callousness highlight why a private right of action for damages is necessary to combat providers that charge "qualified persons" more than the $0.75 per-page statutory cap for their medical records. No one is suggesting that medical records "spring, fully formed, from the clamshell of the hospital chart" or that the only "sensible response" is that providers should "charge nothing for copies of medical records." CIOX Br. at 20-21. However, providers' right to make unlimited profits is tempered by the Legislature's clear directive that "the reasonable charge for paper copies shall not exceed seventy-five cents per page." PHL § 18(2)(e).

The notion that a private right of action would be "an invitation to never-ending class action litigation" (CIOX Br. at 19) that would "create an enticing class action pot of gold every few years" (NYPH Br. at 17) ignores the

compliance mechanisms that companies across industries regularly institute to reduce its exposure to litigation and liability.[3] Private actions, especially class actions, not only remedies past harms, but incentivizes providers to change its practices to avoid liability in the future so that there can be no "self-sustaining litigation machine." *Id.* at 18. And there is an obvious solution to the fantastical claims of "never-ending" litigation. Providers can comply with the per-page cap that is mandated by law.

Respondents suggest that the 86,500 invoices that contained overcharges were the result of requests coming from a patient's attorney. If the ability to charge far greater amounts to persons who are not expressly protected by statute were the source of the error, as Respondents contend, it seems that a systematic solution (such as staff training to better discern who is requesting the records and/or instructing staff to err on the side of charging $0.75 per page rather than more) can be implemented, thereby greatly reducing if not eliminating the so-called "evergreen" source of potential liability. Of course, such a solution also would eliminate the evergreen source of additional revenue that Respondents currently enjoy from these "errors." Without sufficient pressure to institute

[3] Respondents also raise the specter of endless litigation regarding what constitutes "reasonable fees," but that is beyond the question certified here. The only certified question before this Court is whether Section 18(2)(e) of the New York Public Health Law provides a private right of action for damages when a medical provider violates the provision limiting the reasonable charge for paper copies of medical records to $0.75 per page.

procedures to minimize those incidents, providers always will err on the side of overcharging and continually will place the burden on the patients and their representatives to catch and correct the overcharges. *See*, *e.g.*, NYPH Br. at 17, n. 9 ("One wonders why a private right of action would be needed if the [release of information company] would readily refund the overcharge if that fact is simply brought to its attention.").

The issue is not whether perfection can be achieved in billing, but who is in the best position to prevent and address the overcharges. If that burden is laid on individuals, it will certainly be New York State's most vulnerable citizens who will pay the price. The Legislature protected all "qualified persons" from being charged more than $0.75 per page for medical records, but under Respondents' view, it is the responsibility of the overcharged individual to redress an overcharge by disputing the bill and/or bringing an Article 78 proceeding within four months of the overcharge. Under Respondents' approach, anyone who does not have the time, health, or energy to fight (particularly in light of their recent sickness or injury that required medical care); or who cannot read and speak English proficiently; or who cannot decipher hospital bills; or who cannot follow hospital math; or who do not know their legal rights; or who do not have money to hire lawyers, will overpay with no recourse.

Should this Court rule that there is no private right of action, Respondents not only will escape liability for the tens of thousands of New Yorkers they

overcharged in the past, but Respondents and all other providers of medical records will have license going forward to overcharge "qualified persons" with impunity, knowing full well that the costs of bringing a special proceeding are so high as to far outweigh any economic benefit to be gained. In contrast, continuing to permit plaintiffs to sue for damages for violations of PHL § 18(2)(e) will promote the legislative purpose of Section 18 as a whole (to provide qualified persons access to their medical information) and the 1991 amendment in particular (to limit the costs imposed by providers on qualified persons to no more than $0.75 per page), thereby satisfying the second *Sheehy* factor.

C. Creation of an Implied Private Right of Action Is Consistent with the Legislative Scheme

1. Express Remedies Are Not Exclusive

As CIOX rightly points out (CIOX Br. at 14), "the clearest indicator of legislative intent is the statutory text." *Majewski v. Broadalbin-Perth Cent. School Dist.*, 91 N.Y.2d 577, 583 (1998). Here, the text indicates the Legislature did not intend a civil fine imposed by the Commissioner of Health under PHL § 12 or an action pursuant to Article 78 under PHL § 13 to be the exclusive remedies for a violation of PHL § 18(2)(e). PHL § 13 states that the Public Health Law "may" – not "shall" – be enforced by an Article 78 proceeding, and PHL § 12(6) states that Section 12 is intended to provide "additional and cumulative remedies" and nothing therein "shall abridge or alter rights of action or remedies now or hereafter existing."

Unable to counter this statutory language, Respondents fall back to the argument that the "Legislature created the enforcement mechanisms that it wanted." NYPH Br. at 20. However, this amounts to the circular argument that because the Legislature did not include a private right of action, there can be no implied private right of action. CIOX even takes the route of asking this Court to change the third prong of *Sheehy* standard altogether – from whether the creation of such a right would be consistent with the legislative scheme to one where there must be "positive indicia of the Legislature's intent that one be afforded." CIOX Br. at 52. Respondents essentially ask this Court to apply the third *Sheehy* factors in such a restrictive manner that no court could ever find an implied right of action.

This Court has held that a "private right of action may at times further a legislative goal and coalesce smoothly with the existing statutory scheme." *Uhr v. East Greenbush Cent. School Dist.,* 94 N.Y.2d 32, 40 (1999) (citing *Doe v. Roe,* 190 A.D.2d 463, 471 (4th Dept 1993)). This is just that situation.

2. Article 78 Proceeding Does Not Provide Ortiz Relief

PHL § 13 allows for an Article 78 special proceeding. However, contrary to CIOX's contention that an "Article 78 proceeding would provide Ortiz complete relief," CIOX Br. at 27, it would not. CPLR § 7806 provides that restitution or damages can be granted only when two requirements are met:

Any restitution or damages granted to the petitioner [1] must be

> incidental to the primary relief sought by the petitioner, and [2] must be such as he might otherwise recover on the same set of facts in a separate action or proceeding suable in the supreme court against the same body or officer in its or his official capacity.

CPLR § 7806 (underline and bracketed numbers added).

Again, faced with clear statutory language, CIOX argues that Ortiz could meet the requirements of CPLR § 7806 if she were to couch the relief just so to circumvent the statute. CIOX contends that Ortiz could avail herself of the special proceeding if she claims that she is seeking "equitable restitution incidental to the judgment requirement compliance with the statute." CIOX Br. at 27. This is pure speculation and contradicted by the statute that explicitly requires the ability to "otherwise recover on the same set of facts in a separate action," *i.e.*, a plenary action. Here, Respondents argue that there is no plenary private right of action, which necessarily would foreclose recovery of incidental restitution or damages under CPLR § 7806.

In *Metropolitan Taxicab Bd of Trade v. New York City Taxi & Limousine Comm.*, 115 A.D.3d 521, 523-34 (1st Dept 2014), the First Department concluded that the petitioner's claim for damages against a city agency was not permitted under CPLR § 7806 because the petitioner had no right to damages against the city agency in the first place. The court explained: "The City had no statutory duty to reimburse the damages that petitioners sought.… Thus, the losses that petitioners incurred as a result of the arbitrary reduction in the taxi lease cap in

this case do not qualify as incidental damages." 115 A.D.3d 523-34. The court held: "That article 78 permits the court, in certain circumstances, to award damages in an action that also reviews the validity of a government determination does not create a right to damages that does not otherwise exist." *Id.* at 524 (emphasis added).

CIOX does not address its inherently conflicting position that Ortiz could have sought incidental damages pursuant to an Article 78 proceeding Ortiz but cannot seek damages on the "on the same set of facts in a separate action or proceeding suable in the supreme court." CPLR § 7806. Instead, it focuses only on the first requirement of CPLR § 7806 that the "damages granted to the petitioner must be incidental to the primary relief sought by the petitioner." Even here CIOX tries to fit a square peg into a round hole by citing a line of authority that is limited to cases brought against State agencies or officers.

CIOX chides Ortiz for failing to cite *Matter of Gross v. Perales*, 72 N.Y.2d 231 (1988). *See* CIOX Br. at 33 ("Ortiz does not cite *Gross*, or indeed any case law, in her arguments concerning CPLR 7806."). However, *Gross* and all of the other cases cited by CIOX (CIOX Br. at 30-33) present the classic Article 78 proceeding, where the petitioner sought a review of a determination by a State body or officer. *See*, *e.g.*, *Matter of Shore Winds, LLC v. Zucker*, 179 A.D.3d 1208, 1210 (3d Dept 2020) ("Regardless of how the claim was styled, Shore Winds is essentially challenging a determination by a state agency – i.e.,

[the Office of the Medicaid Inspector General] – and an award of monetary relief, if any, would be incidental to such a claim."); *Metropolitan Taxicab*, 115 A.D.3d at 523-34 (petitioner's claim for damages against city agency not permitted as incidental to Article 78 review of agency's tax rule); *Morgan v. State of New York*, 13 A.D.3d 497, 498 (2d Dept 2004) ("The claimant's request, in effect, to annul [the Long Island State Veterans Home]'s determination to raise the daily rate charged to residents of its nursing home, was in essence a claim for equitable relief that should have been brought by way of a CPLR article 78 proceeding."); *Matter of Adams v. Welch,* 272 A.D.2d 642 (3d Dept 2000) ("Here, the central issue of the proceeding was the constitutionality of the reevaluation and the methodology used to calculate the assessments [by the Commissioner of Assessment and Taxation of the City of Albany].").

CIOX breezily claims in a footnote, CIOX Br. at 27, n. 9, that Article 78 proceedings can be brought against corporations, but provides no explanation as to why the *Gross* line of cases would apply in a suit for money damages against non-State defendants. Where a claim for damages is made against the State or its agencies or officers, whether damages are available at all or whether the Supreme Court is the proper court for hearing such a claim hinges on the question of whether the monetary relief is "incidental" to the review of an adverse State agency determination. *See Gross*, 72 N.Y.2d at 233-34 ("The primary issue presented on this appeal is whether a municipality may challenge a determination

by a State administrative agency, and at the same time recover wrongfully withheld money from the State, within the context of an article 78 proceeding in Supreme Court, or whether such a lawsuit must be commenced in whole or in part in the Court of Claims.") With no qualified immunity and no special venue applicable to corporations, these cases have no bearing on the case at hand. Again, *Metropolitan Taxicab* is instructive. In that case, the First Department, citing *Gross*, explained that "incidental damages are generally confined to monies that an agency either collected from or withheld from a petitioner and then was obligated to reimburse after a court annulled a particular agency determination." 115 A.D.3d at 522.

Given CPLR § 7806's language limiting the "restitution or damages granted to the petitioner," Ortiz cannot avail herself of an Article 78 special proceeding to recover damages against corporate defendants on behalf of herself and all persons like her, who already received copies of her medical records but were charged and paid more than $0.75 per page in contravention of the per-page cap. At a minimum, her ability to do so is uncharted territory.[4]

[4] Respondent NYPH takes no position on the novel issue of "whether an Article 78 proceed would permit a refund of an overpayment [in violation of PHL § 18(2)(e)]," NYPH Br. at 23, n. 12, but rather takes the slash and burn approach. It argues that its (baseless) interpretation of the facts of this case should bar each and every overcharged person from seeking a refund no matter the circumstances because creating an implied right of action would "assist attorneys who lack diligence in pursuing copies of their clients' medical records." NYPH Br. at 24.

3. The Legislature Allowed for "Proceedings and Penalties" Under Section 18

There also is nothing in the comprehensive bill jackets submitted by CIOX demonstrating that the Legislature ever considered a private right of action under Section 18, let alone rejected it. *Cf.*, *Sheehy v. Big Flats Community Day*, 73 N.Y.2d 629, 636 (1989) (no private right of action could be implied for the defendant's violation of General Obligations Law § 11–101 because the court found that the Legislature had specifically considered but declined to provide such a right). However, there is indication that the Legislature did allow for penalties to be assessed against a health care provider under Section 18.

Section 18(11) provides: "No proceeding shall be brought or penalty assessed, except as provided for in this section, against a health care provider, who in good faith, denied access to patient information." Section 18 (11) can be read as an indication that the Legislature allowed for proceedings and penalties, such as damages, to be assessed against a health care provider under "this section" for violations and immunized only those providers who denied access to patient information "in good faith."

Respondents argue that the language in PHL § 18(3)(f), which provides in relevant part that "relief available pursuant to this section shall be limited to a judgment requiring the provider to make available to the qualified person the requested information for inspection or copying," applies to the entirety of

Section 18, rather than to the special judicial review of denials of access provided for in PHL § 18(3)(f). But interpreting the limitation of relief in § 18(3)(f) as applying to all of Section 18 would conflict with and obviate Section 18(11).

In *DeLaurenzo v. Nadler*, 8 A.D.3d 609 (2nd Dept 2004), the Second Department concluded that Section 18(3)(f), read in conjunction with Section 18(11), does not categorically limit relief even in instances where a request for information is denied. *Id.* at 610 (limitation of remedy in §18(3)(f) not applicable for health care providers who deny access to patient information willfully or in bad faith). Accordingly, courts have interpreted the limitation on relief in §18(3)(f) as applying narrowly and not to the entirety of Section 18. Indeed, in *Smalls v. St. John's Episcopal Hosp.*, 152 A.D.3d 629, 630 (2d Dept 2017), the Second Department edited its quotation of the statute to make the narrow application even clearer. The court presented the relevant statutory language as follows: "The relief available [pursuant to Public Health Law § 18(3)(f)] shall be limited to judgment requiring the [health care] provider to make available to the [patient] the requested information for inspection or copying." *Id.* (edits in original).

The overarching goal of the Legislature to expand and ensure access by patients and their representatives to patient records again is reflected by how it chose to limit liability for providers. The Legislature provided immunity for providers in PHL § 18(12) for "civil liability arising solely from granting or

providing access to any patient information," thereby encouraging the granting of access. But with respect to any hinderances to access, the Legislature only carved out specific, limited immunity for "good faith" denials of access. PHL § 18 on its face has no enforcement mechanism for the situation at hand, where access to medical records has been provided and the medical records are accurate. Instead, the Legislature left the mechanism of enforcement in those circumstances, including the assessment of penalties, to the courts.

Indeed, enforcement of § 18(2)(e), enacted to provide broader, more affordable access to health records, has been in the courts for decades. This is the crucial difference between this case and those in which this Court has concluded there is no private right of action.

4. A Decision in the Negative on the Certified Question Will Upset the Long Standing Enforcement Landscape

This case is unusual and distinguishable from this Court's other decisions in that a private right of action here will not open up a new source of litigation. *Cf.*, *Cruz v. TD Bank, N.A.*, 22 N.Y.3d 61, 76 (2013) ("recognition of new liability for banks of the type proposed by plaintiffs would be incompatible with the legislative scheme"); *Hall v. United Parcel Serv. of Am.*, 76 N.Y.2d 27, 34 (1990) ("The conclusion that some governmental oversight and regulation may be desirable … does not necessarily lead to the further conclusion that a new tort cause of action should be established to address the problem."). Confirmation that

a private right of action exists here will preserve the status quo. In contrast, an answer by this Court on the certified question in the negative will change the legal landscape and upset the current balance by removing a check on providers.

Even taking Respondents at their word that they make efforts to comply with the cap, at least when patients themselves request the records, there is no guarantee that they will continue to do so when a previously existing deterrent against violation is removed altogether. Respondents argue that the existing governmental oversight provided by Section 12 is "robust," but they cannot point to any action ever taken by the Commissioner of Health or the Attorney General to enforce PHL § 18(2)(e).

The implications of a decision that there is no private right of action is unknown. This uncertainty regarding if or how compliance will change and if, when, and how the Commissioner of Health or Attorney General will enforce PHL § 18(2)(e) when private litigants can no longer do so runs counter to any reservation about upsetting the balance of interests in a regulatory scheme.

In contrast, this Court concluding that a private right of action for damages for a violation of PHL § 18(2)(e) exists will harmonize with the prior recognition by courts and litigants that such plenary actions are consistent with the Legislative scheme. Moreover, the threat of recoupment of any overcharge for copies of medical records will continue to incentivize providers to comply with PHL § 18(2)(e) and to stop profiteering on the most vulnerable – people who

require medical records and are not in a position to object to the pricing.

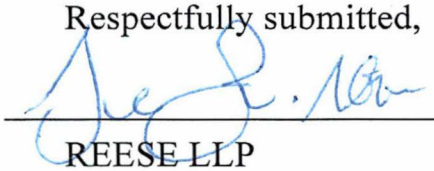
In sum, every prong of the *Sheehy* test is met.

CONCLUSION

For the reasons set forth above, the Court should answer the certified question in the affirmative.

Date: November 27, 2020

Respectfully submitted,



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CERTIFICATE OF COMPLIANCE

I hereby certify pursuant to 22 NYCRR § 500.13(c) that the foregoing brief was prepared on a computer.

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