To be Argued by:
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(Time Requested: 15 Minutes)

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Court of Appeals

of the

State of New York

In the Matter of the Application of

THE PLASTIC SURGERY GROUP, P.C.,

Petitioner-Appellant,

– against –

THE COMPTROLLER OF THE STATE OF NEW YORK,

Respondent-Respondent.

REPLY BRIEF FOR PETITIONER-APPELLANT

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PRELIMINARY STATEMENT

In our opening brief, we showed that the plain language of State Finance Law § 9 and CPLR 3122(a)(2) requires that a Comptroller's subpoena duces tecum served on a medical provider, such as The Plastic Surgery Group, seeking patient medical records be accompanied by authorizations from the patients whose records are the subject of the subpoena. We further showed that requiring the Comptroller to obtain patient authorizations promotes New York's public policy, recognized in numerous statutes, of the State protecting the confidentiality of patient medical records and protecting providers from having to choose between complying with the subpoena at the risk of breaching patient confidentiality or contempt of court for not complying.

Despite conceding that "State Finance Law § 9 incorporates the provisions of the C.P.L.R. insofar as they are applicable" (Brief for Respondent Comptroller, p. 19), the Comptroller argues that the one section of the CPLR governing subpoenas duces tecum to medical providers for patient records does not apply to its subpoena duces tecum to a medical provider seeking patient records. To support this conclusion, under the guise of interpreting the statutes, the Comptroller

creates new sub-classes of subpoenas duces tecum not present in any statute and essentially re-writes State Finance Law § 9 and CPLR 3122(a)(2) to impose conditions and limitations that do not appear anywhere in the statutory text. The Comptroller asks the Court to disregard the plain text of CPLR 3122(a)(2) and instead focus on its physical location within the overall CPLR to limit its express terms, all in the alleged interests of policy.

Each of these arguments must be rejected as violative of this Court's well-settled jurisprudence. This Court has long applied "the well-respected plain meaning doctrine in fulfillment of its judicial role in deciding" statutory construction appeals. *See In re Raritan Dev. Corp. v. Silva*, 91 NY2d 98, 106 (1997). Where the statutory text is clear and unambiguous, the Court construes that text to give effect to the plain meaning of the words used. *Patrolmen's Benevolent Assn. of City of New York v. City of New York*, 41 NY2d 205, 208 (1976). Absent an ambiguity, the Court will not resort to rules of construction to broaden or limit the scope and application of a statute, because "'no rule of construction gives the court discretion to declare the intent of the law *when the words are unequivocal*.'" *See Raritan Dev. Corp.*, 91 NY2d at

107 (quoting *Bender v. Jamaica Hosp.*, 40 NY2d 560, 562 (1976) (emphasis in original)). This Court has repeatedly recognized that it is "not free to legislate" and if any "unsought consequences" result from the application of the plain meaning doctrine, it is for the Legislature to evaluate and resolve them. *Raritan Dev. Corp.*, 91 NY2d at 107 (quoting *Bender*, 40 NY2d at 562).

These principles require that the Court reverse the Third Department's memorandum and order, quash the Comptroller's subpoena to The Plastic Surgery Group, and deny the Comptroller's cross-motion to compel. CPLR 3122(a)(2), on its face, applies to all subpoenas duces tecum seeking patient records from a medical provider without any condition or limitation as to who served it or the purpose for which it was served. If requiring the Comptroller's compliance prevents it from discharging its constitutional and statutory obligation to audit the State's payments under the Empire Plan, then it is the Legislature's role to correct, not this Court's.

ARGUMENT

I. Neither State Finance Law § 9 nor the CPLR Distinguishes Between Investigative Subpoenas and Discovery Subpoenas

Throughout its brief, the Comptroller distinguishes between two types of subpoenas: a subpoena in the context of discovery in a pending action and an investigative subpoena outside of litigation. This distinction serves as the foundation for the balance of the Comptroller's statutory text argument. According to the Comptroller, only discovery subpoenas are subject to CPLR 3122(a)(2), not investigative subpoenas. (Brief for Respondent Comptroller, p. 21) The Comptroller does not explain why the policy considerations of CPLR 3122(a)(2) requiring compliance with a so-called discovery subpoena – to protect physicians from inadvertently violating the physician-patient privilege when requested to produce patient records (Brief for Respondent Comptroller, p. 33) – would not also apply equally (if not with greater force given the absence of a judge overseeing the proceedings) to an investigative subpoena.

In any event, the Comptroller's argument is premised upon a distinction that does not exist in the statutory text. CPLR 2301

identifies the various types of subpoenas: a "subpoena" requiring the attendance of a person to give testimony; a "subpoena duces tecum" requiring the production of books, papers and other things; and a "child support subpoena" issued pursuant to section one hundred eleven-p of the social services law. *See* CPLR 2301.

The two statutes at the center of this appeal follow the nomenclature created in CPLR 2301. State Finance Law § 9 permits the Comptroller to issue a "subpoena or subpoenas requiring a person or persons to attend . . . and be examined . . . and, in a proper case, to bring with him, a book or paper." State Finance Law § 9. Similarly, CPLR 3122(a)(2) refers to a subset of "subpoena duces tecum" where the books, papers or things requested constitute "a patient's medical records." CPLR 3122(a)(2). Neither statute differentiates between an "investigative subpoena" and "a discovery subpoena."

Once the fictional distinction between types of subpoenas is dispensed with, it is apparent that CPLR 3122(a)(2) does apply to the Comptroller's subpoena to The Plastic Surgery Group. All of the components of the statute are present: The Plastic Surgery Group is a medical provider. It was served with a subpoena duces tecum (not a

trial subpoena issued by a court). That subpoena requested the production of patients' medical records but was not accompanied by patient authorizations. Therefore, The Plastic Surgery Group was under no obligation to respond to the subpoena, and the Third Department should have quashed it.

II. The Location of CPLR 3122(a)(2) Both Within Article 31 and Adjacent to CPLR 3122(a)(1) Does Not Alter Its Plain Meaning

Faced with the plain meaning of CPLR 3122(a)(2) as applying to all subpoenas duces tecum to medical providers for patient records, the Comptroller argues that the location of 3122(a)(2) within Article 31 – titled "Disclosure" – and next to 3122(a)(1) – governing the process for objecting to a discovery notice or subpoena duces tecum issued under Rule 3120 or 3121 – reflects an intention to limit 3122(a)(2) only to subpoenas issued in the course of discovery in a pending action. In our opening brief, we clearly showed that there is no basis to limit 3122(a)(2) based on its proximity to 3122(a)(1) and will not repeat those arguments here. (*See* Appellant's Brief, pp. 15-19) Rather, we address only the Comptroller's new argument premised on the location of CPLR

3122(a)(2) within Article 31 of the CPLR. This argument too must be rejected.

Historically, the title of an act was not considered when determining meaning because the title was not adopted by the Legislature. Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts*, 221 (2012). Modern practice, however, changed that as legislatures now typically adopt the title. *Id.* According to Justice Scalia and Mr. Garner, the "classic statement" on the use of statutory titles and headings in American law was announced by the United States Supreme Court in *Brotherhood of R. R. Trainmen v. Baltimore & Ohio R.R.*, 331 US 519 (1947). There, the Court stated:

> "[The] heading is but a short-hand reference to the general subject matter involved. . . . But headings and titles are not meant to take the place of the detailed provisions of the text. Nor are they necessarily designed to be a reference guide or a synopsis. Where the text is complicated and prolific, headings and titles can do no more than indicate the provisions in a most general manner; to attempt to refer to each specific provision would often be ungainly as well as useless. As a result, matters in the text which deviate from those falling within the general pattern are frequently unreflected in the headings and titles. Factors of this type have led to the wise rule that the title of a statute and the heading of a section cannot limit the plain meaning of the text. For interpretative purposes, they are of use only when they shed light on some ambiguous word or phrase. They are

> but tools available for the resolution of a doubt. But they cannot undo or limit that which the text makes plain."

Id. at 528-29 (citations omitted).

New York has adopted this approach. The title of an act defines the scope of the enactment and gives notice of the purpose which its sponsors had in mind and may be resorted to as an aid in the ascertainment of the legislative intent only in the case of ambiguity in meaning. *See* Statutes §§ 13, 123; *see also National Enerdrill Corp. v. Crown Drilling, Inc.*, 119 Misc. 2d 162, 164-65 (Sup Ct, NY County 1983) ("While it is true that a bill's title may be resorted to for the purpose of clarifying doubtful wording in the bill's body, where the body of the bill is unambiguous[,] a contrary expression of intention may not be taken as a limitation of the bill."). It may not, however, alter or limit the effect of unambiguous language in the body of the statute itself. *See* Statutes § 123.

On the other hand, the heading of a portion of a statute such as a chapter or section is not part of the act and does not extend or restrict the language contained in the body of the statute; although, it may be resorted to as an aid in ascertainment of legislative intent where a provision is ambiguous in meaning. *Id.* In *Squadrito v. Griebsch*, 1

NY2d 471 (1956), this Court refused to limit the plain words of a statute based upon its more narrowly worded heading. There, this Court stated that "there can be no doubt that the text of the statute must take precedence over its title. While a title or heading may help clarify or point the meaning of an imprecise or dubious provision, it may not alter or limit the effect of unambiguous language in the body of the statute itself." *Id.* at 475.

This Court cited *Squadrito* with approval in *Ministers & Missionaries Benefit Bd. v. Snow*, 26 NY3d 466 (2015), when it recognized the limited usefulness of section and article headings on overall meaning. Specifically, the Court stated that "[d]ue to the practicality of attempting to organize all of the statutory rules, by putting provisions that relate to one another together or in close proximity, portions of statutes may be placed in an article or section whose title – while correctly applying to that article or section in general – does not accurately reflect every individual provision therein." *Id.* at 477 n 4.

Here, the Comptroller has not argued, because it cannot in good faith argue, that there is any ambiguity in either State Finance Law § 9

or CPLR 3122(a)(2). The latter provision applies, by its plain terms, to all subpoenas duces tecum to medical providers seeking patient medical records. The title of Article 31 is therefore irrelevant. The Comptroller's effort to limit CPLR 3122(a)(2) based upon the heading of the article in which it appears runs afoul of this Court's well-established interpretive canons and must be rejected.

III. The Comptroller's Speculative Policy Argument Does Not Alter the Express Statutory Framework Set Forth in State Finance Law § 9 and CPLR 3122(a)(2)

The Comptroller also argues that public policy dictates that it be free of the statutory requirement of obtaining patient consents in CPLR 3122(a)(2). Specifically, the Comptroller claims that requiring it to obtain patient consents would effectively preclude it from discharging its statutory and constitutional duties, recognized in *Handler*, to ensure proper billing and payment by the State for medical services provided to Empire Plan insureds. (*See* Brief for Respondent Comptroller, Point I) While the Comptroller recognizes that there are "significant public interests" that weigh against allowing the Comptroller to subpoena medical records without patient authorizations, in the Comptroller's view, those public interests are secondary to and outweighed by the

Comptroller's need to obtain the information. (Brief for Respondent Comptroller, pp. 39-40) This argument too must be rejected for multiple reasons.

First, the fundamental premise on which the Comptroller bases this argument is entirely speculative and unsupported by any evidence in the Record. There is nothing in the Record to suggest that the Comptroller actually sent requests for medical authorizations to The Plastic Surgery Group's patients before serving the practice with a subpoena, and the Comptroller never claims that it sent such requests. Indeed, nowhere in the Record does the Comptroller ever claim to have previously sent requests for patient authorizations in the context of any other Empire Plan audits. In short, there is no basis to conclude that the Comptroller has any experience at all with requesting authorizations from Empire Plan beneficiaries for the release of their medical records.

In the absence of such evidence, there is no ground for this Court to accept as fact, and base its decision on, the Comptroller's argument that conditioning the release of Empire Plan beneficiaries' medical records on patient consent would prevent the Comptroller from fulfilling

its statutory and constitutional obligations. (*See* Brief for Respondent Comptroller, pp. 17-18) Perhaps the Comptroller would obtain a sufficient and varied number of authorizations to allow it to conduct the audit. But we have no way of knowing because the Comptroller never attempted to obtain the authorizations. The Comptroller is asking this Court to establish a rule of state-wide significance concerning the release of protected health information based on speculation alone. The Court should decline that invitation, as this Court has repeatedly dismissed speculative claims and arguments. *See, e.g.*, *Connaughton v. Chipotle Mexican Grill, Inc.*, 29 NY3d 137, 143 (2017) (affirming the dismissal of a fraud in the inducement claim where the alleged damages consisted of speculative lost opportunity costs); *People v. Hatton*, 26 NY3d 364, 371 n 2 (2015) (courts should not assess the sufficiency of an accusatory instrument based on speculation); *Diaz v. New York Downtown Hosp.*, 99 NY2d 542, 544 (2002) (holding that a speculative expert opinion should be given no probative value); *U.S. Fidelity & Guar.Co. v. Copfer*, 48 NY2d 871, 873 (1979) (finding the insured's speculation that a satisfactory settlement with injured plaintiff would have resulted if the insurer sought out the injured party and attempted

to negotiate a settlement was too speculative to support a claim of bad faith against the insurer).

Second, there are multiple other ways for the Comptroller to obtain the information it needs to conduct the audits, the focus of which is to determine whether Empire Plan members paid the portion of The Plastic Surgery Group's charge that was not covered by the Plan. (*See* Brief for Respondent Comptroller, p. 10) For example, the State could insert into the terms of the Empire Plan a provision stating that Plan participants expressly consent to the release of their medical information to the Comptroller. While that may not be effective retroactively to allow for an audit of The Plastic Surgery Group for the period covered by the Comptroller's subpoena, it would likely pave the way for future audits and the review of out-of-network providers' patient records. Alternatively, the Comptroller could serve subpoenas on individual Empire Plan patients for proof that they paid their out-of-pocket costs, and thereby circumvent the requirements of CPLR 3122(a)(2) altogether. The advantage that these two alternatives have over the Comptroller's current subpoena-without-consent course of action is that they incorporate the Empire Plan beneficiaries whose

records are the subject of inquiry into the equation; whereas, the Comptroller's current approach excludes them entirely and seeks to secure their private medical records without their knowledge or consent.

Third, the Comptroller is attempting to use policy as an end-run around the plain words of State Finance Law § 9 and CPLR 3122(a)(2) in violation of the plain-meaning doctrine. The Comptroller cites *In re New York City Health & Hosps. Corp. v. New York State Commn. of Correction*, 19 NY3d 239 (2012), and *In re Camperlengo v. Blum*, 56 NY2d 251 (1982), in support of its contention that this Court should recognize an implied exception to CPLR 3122(a)(2). (*See* Brief for Respondent Comptroller, pp. 40-43) Those cases, however, are inapplicable to the current case.

The issue in *Camperlengo* was whether a physician could rely on the physician-patient privilege as a basis to quash a subpoena issued by the State Department of Social Services requesting records relating to 35 Medicaid patients treated by the physician. *Camperlengo*, 56 NY2d at 253-54. This Court refused to quash the subpoena finding that the dual federal and state statutory framework of the Medicaid system,

which required physicians to maintain patient records for a minimum of six years and to provide those records to the state agency or Secretary of Health and Human Services upon request, constituted an implied legislative exception to the physician-patient privilege. *Id.* at 255 ("[T]he Federal and State record-keeping and reporting requirements evidence a clear intention to abrogate the physician-patient privilege to the extent necessary to satisfy the important public interest in seeing that Medicaid funds are properly applied.")

In *New York City Health & Hosps. Corp.*, this Court held that the physician-patient privilege did not prevent a City-run hospital from producing records relating to its treatment of a single individual who at the time of his hospitalization was a correctional inmate in the custody of the City in response to a subpoena served by the New York State Commission of Correction. *New York City Health & Hosps. Corp.*, 19 NY3d at 241-42. This Court found that the Legislature's specific direction in the Correction Law to the Commission's Medical Review Board to investigate and review the cause and circumstances of the death of any inmate of a correctional facility and the appurtenant broad

grant of investigative powers constituted implied exceptions to the physician-patient privilege. *Id.* at 245-46.

In both *Camperlengo* and *New York City Health & Hosps. Corp.*, the Court considered the interplay between the statutorily created physician-patient privilege embodied in CPLR 4504 and some other express statutory scheme: in *Camperlengo*, it was the complex statutory framework of the Medicaid program authorizing the State and Secretary's receipt of patient medical records; whereas, in *New York City Health & Hosps. Corp.* it was the Legislature's directive that the Medical Review Board investigate inmate deaths. The Court's decisions in both cases recognize that the Legislature, by empowering and compelling a governmental body to enforce certain health care laws, necessarily also intended to create an exception to the statutory privilege. *See People v. Rivera*, 25 NY3d 256, 264 (2015) (explaining the rationale for the holdings of *Camperlengo* and *New York City Health & Hospitals Corp.*).

Here, in contrast, we do not have two competing acts of the Legislature. The Legislature's declaration in CPLR 3122(a)(2) that a medical provider need not respond to a subpoena duces tecum for

patient medical records if that subpoena is not accompanied by patient authorizations stands alone. There is no specific directive to the Comptroller to review patient medical records, similar to those in *Camperlengo* and *New York City Health & Hospitals Corp.*, from which it can be inferred that the Legislature meant to carve out an exception to CPLR 3122(a)(2). Civil Service Law § 167(7), authorizing the Comptroller to audit payments from the state health insurance fund, cannot provide any basis for the Court to infer that the Legislature intended to create an exception to the authorization requirement because that statute was adopted nearly 50 years before CPLR 3122(a)(2). *See* 1956 N.Y. Laws 1169. Furthermore, Section 167(7) does not expressly contemplate the Comptroller reviewing providers' medical records, unlike the Medicaid laws and Correction Law.

Nor is there any merit to the Comptroller's argument that the anti-disclosure provisions of the Public Officer's Law warrant creating an exception to CPLR 3122(a)(2). Essentially, the Comptroller argues that patient privacy interests are protected because the Comptroller's office is prohibited from disclosing information gathered during the audit. (Brief for Respondent Comptroller, pp. 44-45) It is far from

certain that patients would freely disclose their symptoms and medical condition to physicians selected by them if the patients knew that the information would also be reviewed by unknown financial auditors from the Comptroller's office, as the Comptroller suggests.

Also, the Comptroller understates the significance of its request. The sanctity of patient confidentiality is an important factor presented on this appeal, but so too are the separation of powers and proper division of authority between the Legislature and courts which have led this Court to apply the plain-meaning doctrine in statutory construction cases. *See Raritan*, 91 NY2d at 107. These "respectable principles and precedents" preclude this Court from crafting an exception to a statute where the Legislature has not evidenced any intention to create one. *Id.* If the other means of obtaining the information necessary to perform the audit are ineffective (*see supra*, pp. 13-14) and requiring the Comptroller to comply with CPLR 3122(a)(2) proves too restrictive on the Comptroller's ability to conduct the audits, then it is incumbent

on the Legislature – if it chooses – to adopt corrective legislation that facilitates the audits, rather than this Court legislating.

CONCLUSION

The Court should hold that the Comptroller was obligated to comply with CPLR 3122(a)(2) when issuing its subpoena duces tecum to The Plastic Surgery Group for patients' medical records, reverse the Third Department's memorandum and order, quash the Comptroller's subpoena, and deny the cross-motion to compel.

Dated: April 24, 2019

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NEW YORK STATE COURT OF APPEALS
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