No. APL-2018-00167

To be argued by:
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15 minutes requested

Albany County Supreme Court No. 776-16 / Third Department No. 525023

State of New York
Court of Appeals

In the Matter of the Application of

THE PLASTIC SURGERY GROUP, P.C.,

Petitioner-Appellant,

v.

THE COMPTROLLER OF THE STATE OF NEW YORK,

Respondent-Respondent.

BRIEF FOR RESPONDENT COMPTROLLER

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PRELIMINARY STATEMENT

This appeal involves the validity of a subpoena issued by the Comptroller in furtherance of his constitutional and statutory obligation to audit all payments made by the State for medical services provided to members of the Empire Plan, the primary health benefit plan for employees of the State and many local governments in New York. This Court has already upheld the Comptroller's authority to obtain a health care provider's billing records in furtherance of such audits, and recognized the Comptroller's broad subpoena power in this context. *See Matter of Handler, M.D., P.C. v. DiNapoli*, 23 N.Y.3d 239 (2014).

Petitioner—like the medical providers in *Handler*, a "nonparticipating" provider in the Empire Plan—commenced this proceeding to quash the Comptroller's subpoena seeking a subset of petitioner's billing records for purposes of the same type of audit that the Comptroller was conducting in *Handler*. While acknowledging the Comptroller's authority to perform such audits, petitioner claims that his subpoena was nonetheless invalid because it sought patient health information and lacked a written

release from each individual patient whose records were sought, a requirement that petitioner claims is imposed by C.P.L.R. 3122(a)(2).

Supreme Court agreed and quashed the subpoena, but the Appellate Division, Third Department, unanimously reversed and granted the Comptroller's cross-motion to compel petitioner's compliance with the subpoena.

While other asserted grounds for quashing the subpoena were litigated below, in this Court the only issue presented is whether C.P.L.R. 3122(a)(2) bars release of the requested records without individualized patient waivers.

The Third Department properly held that it does not. The patient-authorization requirements of C.P.L.R. 3122(a)(2) apply only to discovery subpoenas issued by a party during the course of a particular litigation. They do not govern an investigative subpoena issued by the Comptroller under State Finance Law § 9 in furtherance of his audit functions. The Third Department's reading of the State Finance Law and the C.P.L.R. is supported by the plain language, context, and legislative history of the relevant

provisions. Public policy also favors allowing the Comptroller to obtain the necessary information without having to secure the consent of nearly two thousand of petitioner's patients. Accordingly, this Court should affirm.

QUESTION PRESENTED

Was the Comptroller's investigative subpoena to obtain a subset of petitioner's patient billing records subject to C.P.L.R. 3122(a)(2)'s requirement that discovery subpoenas for medical records be accompanied by written patient consent?

STATEMENT OF THE CASE

A. Relevant Statutes[1]

State Finance Law § 9 gives the Comptroller broad authority to issue investigative subpoenas, requiring persons to be examined "in reference to any matter within the scope of the inquiry or investigation being conducted by the comptroller." Such subpoenas "shall be regulated by the civil practice law and rules." *Id*.

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[1] The relevant statutory provisions are reprinted in full in the attached addendum.

Article 23 of the C.P.L.R. governs the issuance and enforcement of subpoenas generally, and some of these provisions apply to the Comptroller's investigative subpoenas issued under State Finance Law § 9 and others, by their terms, do not. *See infra* Point II(A) (providing examples of each).

Other provisions of the C.P.L.R. govern subpoenas issued specifically in the context of pending litigation, and these requirements do not apply to the Comptroller's investigative subpoenas. Article 31 of the C.P.L.R. governs disclosure in connection with litigation. In particular, C.P.L.R. 3120 allows parties to ongoing litigation, after commencement of an action, to issue pre-trial subpoenas duces tecum, that is, document subpoenas, to non-parties:

> 1. After commencement of an action, any party may serve on any other party a notice or on any other person a subpoena duces tecum:
>
> (i) to produce and permit the party seeking discovery, or someone acting on his or her behalf, to inspect, copy, test or photograph any designated documents or any things which are in the possession, custody or control of the party or person served[.]

C.P.L.R. 3120(1)(i).

Under C.P.L.R. 3122(a), the recipients of such subpoenas—including medical providers from whom patient records are sought—may respond to them by stating objections, *see* 3122(a)(1), and in the case of a medical provider:

> A medical provider served with a subpoena duces tecum, other than a trial subpoena issued by a court, requesting the production of a patient's medical records pursuant to this rule need not respond or object to the subpoena if the subpoena is not accompanied by a written authorization by the patient. Any subpoena served upon a medical provider requesting the medical records of a patient shall state in conspicuous bold-faced type that the records shall not be provided unless the subpoena is accompanied by a written authorization by the patient, or the court has issued the subpoena or otherwise directed the production of the documents.

C.P.L.R. 3122(a)(2).

The issue in this case is whether subdivision 3122(a)(2) applies to the investigative subpoenas issued by the Comptroller in this case, as petitioners contend and Supreme Court held, or whether that statutory provision applies only to subpoenas calling for discovery after the commencement of an action, as the Third Department held.

B. The Comptroller's Authority to Audit Payments for Medical Services Provided Under the New York State Health Insurance Program

The New York State Health Insurance Program (NYSHIP) provides health insurance coverage to active and retired State employees, as well as participating local government and school district employees, and their dependents (R45).[2] The Empire Plan is the primary health benefit plan for NYSHIP (R45). To administer the medical and surgical program of the Empire Plan, the New York State Department of Civil Service contracts with United HealthCare (United) (R45). Under the contract, United processes and pays Empire Plan claims out of monies paid by the State (R45, 66). "In other words, the State funds the Empire Plan as a self-insurer." *Matter of Handler, M.D., P.C. v. DiNapoli*, 23 N.Y.3d 239, 243 (2014) (describing this background). Accordingly, all such payments are subject to audit by the Comptroller (R66). *See also* Civil Service Law § 167(7).

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[2] Numbers in parentheses refer to pages in the Record on Appeal.

United contracts with certain "participating" health care providers who agree to accept payments, at rates established by United, to furnish medical services to Empire Plan members (R45). These rates, plus a nominal co-payment paid by the member to the participating provider, constitutes payment in full for the services rendered (R45). Members may also choose to receive services from "nonparticipating" providers, but the Empire Plan benefit design requires members to pay higher out-of-pocket costs (in the form of deductibles and co-insurance) when they do so, in order to encourage members to use participating providers (R45).

Service fee rates paid by United for services rendered by nonparticipating providers are generally higher than the fee rates that participating providers agree to accept for the same services (R45). In accordance with the benefit design, United pays nonparticipating provider claims at 80% of the "reasonable and customary" charge for the services provided, which is the lowest of (a) the actual amount of the provider's billed charges, (b) the provider's usual charge for the same or similar service, or (c) the usual charge of other providers in the same or similar geographic

area (R45-46). The member is then responsible for the remaining 20% (the co-insurance), as well as any applicable annual deductible and any charges in excess of the reasonable and customary charge (R45-46).

The nonparticipating provider is responsible for collecting these out-of-pocket costs from the member, and when United processes such claims, it expects that the provider will do so (R46). Indeed, the New York State Insurance Department's Office of General Counsel (now the Department of Financial Services) has held in legal opinions dating back well over a decade that the routine waiver of deductibles and/or co-insurance as a common business practice may constitute insurance fraud in violation of article 4 of the New York State Insurance Law (R46; *see also* R53-59). This Court has also recognized that nonparticipating providers have a "legal duty" to collect deductibles and co-insurance, and that

the failure to do so "inflates a claim's cost and adversely impacts the State's fisc." *Handler*, 23 N.Y.3d at 243.[3]

Accordingly, this Court in *Handler* held that, as part of the Comptroller's "fundamental duty" to "superintend the fiscal concerns of the [S]tate," *id.* at 246, the Comptroller was authorized to review the billing records of nonparticipating medical providers that provide health care to Empire Plan beneficiaries. *See id.* at 242, 247-50.

C. The Comptroller Requests Petitioner's Billing Records In Furtherance of His Audit of Payments for Services Provided to Empire Plan Members

Petitioner is a medical practice specializing in plastic surgery, located in Great Neck, New York (R14, 21). It is a nonparticipating provider with respect to the Empire Plan (R45). In 2015, as part of

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[3] The Court provided an illustration of how such claim inflation occurs:

> For example, a provider that charges $100 for a service, and who collects $80 in state money, must collect $20 from the Empire Plan member. In the event that the provider does not collect the co-payment, it has provided a medical service for $80, not $100, and the State should have paid only $64 of that cost.

Handler, 23 N.Y.3d at 243.

broader audits of NYSHIP, the Comptroller selected for review claims paid by United for services rendered by petitioner to members of the Empire Plan between January 2011 and March 2015 to determine if those payments were accurate and appropriate under United's contract with the State (R44-45, 61, 63, 65, 66). The audit sought to determine whether United overpaid these claims because petitioner had routinely waived Empire Plan members' out-of-pocket costs for that period and, if so, to determine the amount of the resulting overpayments by United based on any such inflated invoices (*see* R50, 52). For the time period under review, United's payments for services provided by petitioner totaled over $10 million, among the highest aggregate payments made by United for services rendered by a nonparticipating provider (R47).

After reducing the size of the data set by eliminating certain claims, the Comptroller's auditors selected a random sample of claims for which records would be requested from petitioner for inspection during a site visit (R47-48). For nearly three months, beginning in July 2015, audit staff received no response to their attempts to contact petitioner (including multiple letters, emails,

and phone calls) to explain the purpose of the audit and to schedule a site visit to review the relevant billing records (R48-49, 63-67). Eventually, counsel for petitioner requested a meeting with the Comptroller's staff before any audit took place (R49, 69-71). Although the Comptroller's counsel requested an answer regarding access to the records by the week following the meeting, neither petitioner nor its counsel responded (R49).

D. Petitioner Brings this Proceeding to Quash the Comptroller's Subpoena

In early February 2016, after receiving no further response, the Comptroller served petitioner with a document subpoena requesting the relevant and necessary billing records (R21-26, 49-52). Petitioner refused to comply with the subpoena and instead requested that it be withdrawn (R28-31). The Comptroller declined to do so, issued a letter to petitioner explaining the Comptroller's authority to seek such records as well as responding to petitioner's specific objections, and extended petitioner's deadline for compliance (R33-36, 49).

Petitioner then commenced this proceeding to quash the subpoena, or alternatively, for a protective order if release of the records was required (R11-19). Petitioner asserted that it was not obligated to respond to the subpoena, but rather was prohibited from doing so, because, in its view, both C.P.L.R. 3122(a)(2) and the Health Insurance Portability and Accountability Act of 1996 (HIPAA), 42 U.S.C. §§ 1320d-1320d-9,[4] required the subpoena to be accompanied by written patient authorizations (R15, 18).[5] In the alternative, petitioner argued that certain subpoena requests were irrelevant, overly broad, and unduly burdensome (R16, 18).

The Comptroller cross-moved to compel petitioner's compliance with the subpoena. The Comptroller argued that: (1) this Court has already recognized his constitutional and statutory authority to conduct audits of state payments for services

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[4] Under HIPAA, improper disclosures of protected health information will result in civil and criminal penalties for covered entities. *See* 42 U.S.C. § 1320d-6(a); 45 C.F.R. §§ 164.502(a), 164.508(a)(1).

[5] Petitioner rejected the Comptroller's proposal to redact patient names and replace them with unique identifiers that would still allow auditors to match the various records to be reviewed (R18 n.1, 36).

rendered to Empire Plan members by nonparticipating providers, as well as his broad subpoena power in furtherance of that function; (2) the provisions of C.P.L.R. 3122(a)(2) apply only to discovery subpoenas issued by a party in litigation and not to investigative subpoenas issued by the Comptroller; and (3) the Comptroller is expressly permitted to access otherwise protected confidential health information under HIPAA because that statute authorizes disclosures to "health oversight agencies" for audit and payment purposes (R37-89).

Supreme Court, Albany County (Ryba, J.) adopted petitioner's arguments, summarily granted the petition, and denied the Comptroller's cross-motion to compel (R6-9). The Comptroller appealed (R3-5).

E. The Appellate Division Upholds the Comptroller's Subpoena

In a thorough opinion, the Appellate Division, Third Department, unanimously reversed. The court (1) upheld the validity of the Comptroller's subpoena, and (2) granted the

Comptroller's cross-motion to compel petitioner's compliance with it (R97-102). *See* 155 A.D.3d 1417 (3d Dep't 2017).

Relying on this Court's holding in *Handler*, the Third Department concluded that the subpoena was validly issued in furtherance of the Comptroller's constitutional and statutory obligation to audit the State's Empire Plan payments, including for services rendered to plan members by nonparticipating providers like petitioner (R99). Although no subpoenas were at issue in *Handler* because the providers in that case had voluntarily turned over the requested records, the Third Department noted that *Handler* had recognized the Comptroller's "broad subpoena powers" and found that a review of petitioner's similar records here was equally necessary in order to fulfill the Comptroller's audit mandate (*id.*).

The court next rejected petitioner's argument that C.P.L.R. 3122(a)(2) barred production of the records, because the court found that that provision, by its terms, only applies to subpoenas issued by a party to litigation during discovery, and does not govern the Comptroller's investigative subpoenas under State Finance Law § 9

(R100). Finally, the court concluded that petitioner's production of records was not barred by HIPAA, and that it had failed to demonstrate that the records sought by the Comptroller were irrelevant or otherwise improper (R100-102).

This Court granted petitioner leave to appeal (R94-96).

ARGUMENT

POINT I

THE COMPTROLLER'S INVESTIGATIVE SUBPOENA AUTHORITY SHOULD BE READ BROADLY IN LIGHT OF HIS MANDATE TO AUDIT STATE PAYMENTS

The Comptroller's authority to subpoena a medical provider's billing records should be read broadly, and any purported restrictions on that authority narrowly, in light of his manifest need for such records in order to fulfill his constitutional and statutory obligation to audit Empire Plan payments, including for services rendered to plan members by nonparticipating providers.

In *Handler*, this Court expressly upheld the Comptroller's constitutional authority to conduct audits "to ensure proper billing and payment" by the State for medical services provided under the Empire Plan. 23 N.Y.3d at 247. The Court based its holding on the

Comptroller's fundamental duty under Article V, § 1 of the New York State Constitution "to superintend the fiscal concerns of the [S]tate," *id.* at 246 (internal quotation marks omitted), as well as his specific obligation under Civil Service Law § 167(7) to audit payments made to the State's health insurance vendors under NYSHIP*, Handler,* 23 N.Y.3d at 246-47. *See also* State Finance Law §§ 8(1), (2), (7); § 11. This includes the mandate to audit payments for services to Empire Plan members rendered by nonparticipating providers like petitioner. *Handler*, 23 N.Y.3d at 242, 247-50.

To be sure, as petitioner notes (Br. at 10-11), *Handler* did not involve a specific challenge to the Comptroller's subpoena power because the petitioners there—also nonparticipating providers—had voluntarily turned over their billing records. In upholding the Comptroller's authority to review a nonparticipating provider's billing records in connection with this type of audit, however, this Court recognized the importance of the Comptroller's access to such records as "critical to [his] audit of bills paid with state funds." *Handler*, 23 N.Y.3d at 250. As the Court stated, limiting the Comptroller's access would make his audit task "impossible." *Id.* at

248. And contrary to petitioner's unsupported suggestion that an audit could be completed without the review of petitioner's patient billing records (Br. at 3), this Court emphasized that "[r]eviewing a provider's billing records is the *only* way to ensure that the provider has been collecting the required co-payment" and other out-of-pocket costs in accordance with the Empire Plan's benefit design. *Handler*, 23 N.Y.3d at 248 (emphasis added).

Although a subpoena will not be necessary where a provider voluntarily releases billing records, the *Handler* Court recognized that the Comptroller may sometimes need to rely on the "broad subpoena powers" granted to him by the Legislature "in furtherance of [his] investigatory functions." *Id.* at 247.

For this reason, as the Third Department aptly noted, limiting the Comptroller's subpoena power in the manner urged by petitioner—by conditioning the release of records on the individual consent of a large number of patients (*see infra*, Point II)—"would lead to the untenable result that, unless health care providers voluntarily cooperate with [the Comptroller's] requests for access to patient records for audit purposes, [the Comptroller] would be

unable to fulfill [his] statutory and constitutional obligations" (R100). To ensure the Comptroller's access to the patient billing records necessary for him to audit the State's payments under the Empire Plan, the Comptroller's subpoena authority should be read broadly.

POINT II

THE COMPTROLLER'S INVESTIGATIVE SUBPOENAS ARE NOT SUBJECT TO C.P.L.R. 3122(a)(2)'S PATIENT AUTHORIZATION REQUIREMENTS

Petitioner's primary argument on appeal (Br. at 7-19) is that C.P.L.R. 3122(a)(2) requires that the Comptroller's investigative subpoenas for patient billing records be accompanied by a written release from each patient whose records are sought. This Court should reject this argument. As demonstrated below, State Finance Law § 9 does not subject the Comptroller's investigative subpoenas to the patient-authorization requirements of C.P.L.R. 3122(a)(2), which applies only to subpoenas issued by a party to litigation. This interpretation of the Comptroller's subpoena power is supported by the plain language, context, and legislative history of the relevant provisions.

A. State Finance Law § 9 Incorporates Only Those C.P.L.R. Provisions Generally Applicable to the Issuance and Enforcement of Subpoenas.

The Comptroller's subpoena power is governed by State Finance Law § 9, which permits the Comptroller to subpoena records and documents relating "to any matter within the scope of the inquiry or investigation being conducted" by him. Section 9 generally provides that "[a] subpoena issued under this section shall be regulated by the civil practice law and rules." *Id*.

Contrary to petitioner's assertion (Br. at 9-11, 12-14), this general language cannot sensibly be read to subject the Comptroller's *investigative* subpoenas to provisions in the C.P.L.R. that are plainly directed to subpoenas issued in the course of discovery after a complaint is filed. The language of State Finance Law § 9 incorporates the provisions of the C.P.L.R. insofar as they are applicable, including provisions that generally govern the issuance and enforcement of subpoenas of any kind, such as many of the provisions contained in C.P.L.R. article 23. Indeed, by their terms, not even every provision of article 23 would be applicable to an investigative subpoena issued by the Comptroller.

For example, the Comptroller's investigative subpoenas are governed by the general service rules of C.P.L.R. 2303, which require that "a subpoena duces tecum shall be served in the same manner as a summons." C.P.L.R. 2303(a).[6] But they are not subject to the additional requirement that "[a] copy of any subpoena duces tecum served in a pending civil judicial proceeding shall also be served, in the manner set forth in [Rule 2103], on each party who has appeared in the civil judicial proceeding," C.P.L.R. 2303(a), because an investigative subpoena is not necessarily part of a civil judicial proceeding at all. The Comptroller's investigative subpoenas are likewise not subject to C.P.L.R. 2307, which provides that a subpoena to be issued in the context of an action or other adjudicatory proceeding upon "a library, or a department or bureau of a municipal corporation or of the state, or an officer thereof" must be issued by a court. C.P.L.R. 2307 (referencing notice to "the adverse party," as well as issuance of the subpoena by "a judge of

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[6] And as evidenced by this very proceeding, such a subpoena is also subject to judicial review in a motion "to quash, fix conditions or modify" under C.P.L.R. 2304.

the court in which an action for which it is required is triable" and the judge's authority to impose costs "on any party").[7]

Similarly, as further explained below, the patient-authorization provisions of C.P.L.R. 3122(a)(2) do not apply here because the Comptroller's subpoena did not seek records in connection with discovery in pending litigation. By contrast, if the Comptroller were a party to a lawsuit other than an enforcement proceeding and, as a party, served a subpoena on a third-party medical provider seeking patient records for purposes of pre-trial disclosure, his subpoena would then—and only then—be subject to the requirements of C.P.L.R. 3122(a)(2).

The legislative history of State Finance Law § 9 supports this reading of its reference to the C.P.L.R. As petitioner acknowledges (Br. at 11-12), when the Legislature initially granted the

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[7] This provision may also be inapplicable in view of the fact that the Comptroller's subpoena authority is derived from an independent statutory source. *See Irwin v. Board of Regents of Univ. of State of N.Y.*, 27 N.Y.2d 292, 296 (1970) (holding in context of adjudicatory hearing held by Education Department subcommittee that C.P.L.R. 2307 did not apply to restrict its statutory subpoena power).

Comptroller investigative subpoena power in 1937, it specified that such subpoenas would be subject to only those provisions of the former Civil Practice Act that apply "in relation to enforcing obedience to a subpoena . . . in a matter not arising in an action in a court of record." L. 1937, ch. 733, § 1 (codified at former State Finance Law § 53). This made sense because the bill was intended to give the Comptroller only an *investigative* subpoena power; indeed, it was introduced at the request of the Comptroller following a "gasoline tax refunds scandal" which the Comptroller wanted to investigate but found he lacked the requisite subpoena power to assist him in conducting such an investigation. Mem. of the Director of the Comptroller's Bureau of Municipal Accounts, L. 1937, ch. 773, Bill Jacket, at 4; *see also* Sobel Mem., *id*. at 3.

The Comptroller's authority to issue investigative subpoenas outside of pending litigation, as well as the correspondingly limited application of the Civil Practice Act to such subpoenas, was carried forward when, in 1940, the provision was moved to its current location in State Finance Law § 9. *See* L. 1940, ch. 593 (restructuring and recodifying much of the State Finance Law).

In 1962, the Legislature amended section 9 to reflect the replacement of the Civil Practice Act by the C.P.L.R. *See* L. 1962, ch. 310, § 424. Contrary to petitioner's argument (Br. at 12-13), the conforming amendment did not otherwise alter the nature of the Comptroller's investigative subpoena power nor subject it to civil practice requirements that had previously been inapplicable.

To be sure, the language of section 9 was simplified to state more generally (as in its current form), that "[a] subpoena issued under this section shall be regulated by the [C.P.L.R.]," without further detail. L. 1962, ch. 310, § 424. But this simplification was not intended to have any substantive effect. *See* Mem. of the Judicial Conference of the State of N.Y., L. 1962, ch. 310, Bill Jacket, at 1 (stating in reference to the package of bills including revised section 9 that "these bills are designed to modernize, simplify and clarify procedural law in New York"); Sponsor's Mem., *id*. at 5 ("This is the main transfer and conformity bill under the Civil Practice Law and Rules program."). Contemporaneous revisions to other laws to reflect the adoption of the C.P.L.R. are similarly described as technical, conforming amendments. *See*

Mem. of State of N.Y. Banking Dept., *id.* at 8 (similar changes to Banking Law include no "substantive amendments" and "merely contain technical amendments designed to conform the Banking Law with the proposed [C.P.L.R.], and to make appropriate reference to the proposed new statute").

Thus nothing about the 1962 conforming amendment to section 9 disturbed the prior law that the Comptroller's investigative subpoenas, issued outside the context of any pending action or proceeding, are only to be regulated by the civil practice rules generally governing the issuance and enforcement of subpoenas that are applicable by their terms (primarily those in C.P.L.R. article 23), but not by provisions that relate specifically to subpoenas for discovery in connection with litigation.

Nor is it relevant that, in two more recently enacted statutes giving investigative subpoena authority to other state officers, the Legislature has expressly incorporated article 23 of the C.P.L.R. (Br. at 13). *See* Social Services Law § 111-p, *added by* L. 1997, ch. 398, § 54 (child support enforcement officer); Executive Law § 58(3),

added by L. 2017, ch. 59, Part PPP, § 1 (inspector general for transportation).

Petitioner contends (Br. at 13-14) that the Legislature's inclusion of a specific reference to article 23 limits what provisions of the C.P.L.R. apply to subpoenas issued under the two cited statutes, and that the absence of such limiting language in State Finance Law § 9 reflects a contrary legislative intent to subject the Comptroller's investigative subpoenas to the "the entirety of the C.P.L.R.," including the requirements of article 31. But those more recent statutes simply express in different (but perhaps more precise) words the same understanding that originally informed the Legislature's grant of investigative subpoena authority to the Comptroller under State Finance Law § 9 that we have explained above, and that remained unchanged after the 1962 amendments—namely, that the C.P.L.R. provisions applicable to litigation subpoenas do not apply to investigative subpoenas.

Moreover, the Legislature has continued to refer to the C.P.L.R. in general terms in numerous other statutes giving subpoena power to various state bodies—including in contexts

where the subpoena power may result in the request for and release of patients' medical records. *See, e.g.*, Mental Hygiene Law § 31.13 (Commissioner of Office for People with Developmental Disabilities), *added by* L. 1972, ch. 251 (former § 13.13), *renumbered by* L. 1977, ch. 978, § 34; Mental Hygiene Law § 32.19 (Commissioner of Alcoholism and Substance Abuse Services), *added by* L. 1999, ch. 558, § 18; Workers' Compensation Law § 119 (Workers' Compensation Board), *last amended by* L. 1962, ch. 310, § 496; Executive Law § 63(12) (Attorney General), *last amended by* L. 2014, ch. 55. And the Legislature could not possibly have intended to condition the subpoena power of those agencies on the patient-waiver provisions of C.P.L.R. 3122(a)(2) because to do so would eviscerate the ability of those agencies to investigate systemic wrongdoing—the very purpose for which they were granted their broad subpoena authority.

B. C.P.L.R. 3122(a)(2) Does Not Regulate the Comptroller's Investigative Subpoenas.

As a provision bearing on subpoenas issued in litigation specifically and not one that concerns the issuance and enforcement

of subpoenas generally, C.P.L.R. 3122(a)(2) does not regulate the Comptroller's investigative subpoenas. Petitioner's argument to the contrary disregards this provision's placement in the C.P.L.R., the plain language of the rule in which it is embedded, and the legislative history of that rule, as demonstrated below.

1. Read in Context, C.P.L.R. 3122(a)(2) Does Not Apply to Investigative Subpoenas.

Petitioner contends (Br. at 8-9, 15-19) that C.P.L.R. 3122(a)(2)'s patient-authorization requirements apply "without qualification" whenever any type of subpoena—including an investigative subpoena issued by the Comptroller—seeks patient records, and that the Third Department's conflicting reading ignores this legislative mandate. The language and context of C.P.L.R. 3122(a)(2) defeat this argument. As the Third Department correctly held, the language of C.P.L.R. 3122(a) "makes clear" that the disputed provision's requirements apply only to discovery subpoenas served by parties to litigation (R100).

Under this Court's well-settled canons of statutory construction, "[i]t is fundamental that a court, in interpreting a

statute, should attempt to effectuate the intent of the Legislature." *Matter of Anonymous v. Molik*, 32 N.Y.3d 30, 37 (2018) (internal quotation marks omitted). Courts "look first to the statutory text, which is the clearest indicator of legislative intent," and "[w]here the language of a statute is clear and unambiguous, courts must give effect to its plain meaning." *Id.* (internal quotation marks omitted). Moreover, a court must "consider a statute as a whole, reading and construing all parts of an act together to determine legislative intent." *Friedman v. Connecticut Gen. Life Ins. Co.*, 9 N.Y.3d 105, 115 (2007).

Accordingly, C.P.L.R. 3122(a)(2) must be interpreted in light of its placement in article 31, which concerns disclosure in the "prosecution and defense of an action," C.P.L.R. 3101(a), as well as its position as one of two subdivisions of a single subsection of Rule 3122. Reading subdivision (a)(2) in context confirms that the Legislature intended for the patient-authorization requirements to apply only to discovery subpoenas issued by a party in litigation.

Subdivision (a)(1) sets forth the procedures and grounds for objecting to service by a party "of a notice or subpoena duces tecum

under rule 3120 or section 3121." C.P.L.R. 3122(a)(1). The two referenced provisions govern, respectively, a party's service of a document subpoena on third parties, and a notice of a physical or mental examination in certain cases—both "[a]fter commencement of an action." C.P.L.R. 3120(1), 3121(a). Subdivision (a)(1) references these rules a second time when it describes the remedies available to "the party seeking disclosure under rule 3120 or section 3121" where the recipient of the subpoena has raised an objection to it. C.P.L.R. 3122(a)(1).

The placement of C.P.L.R. 3122(a)(2) in article 31 and its juxtaposition with (a)(1) evince a clear legislative intent to limit subdivision (a)(2) similarly to document subpoenas issued by a party seeking discovery materials "after commencement of an action." Other paragraphs of C.P.L.R. 3122 confirm this intent. *See* C.P.L.R. 3122(d) (where a document subpoena requires copies of the items to be produced, "[t]he reasonable production expenses of a non-party witness shall be defrayed by the party seeking discovery"). And nothing in C.P.L.R. 3122(a)(2) suggests that the

patient-authorization requirements regulate subpoenas outside pending litigation and for purposes other than discovery.

Petitioner's attempt (Br. at 15-16) to read C.P.L.R. 3122(a)(2) in isolation ignores this Court's admonition that statutes must be read as a whole. Petitioner acknowledges (Br. at 16, 17) that subdivision (a)(1) is limited in application to subpoenas issued during discovery under C.P.L.R. 3120. But it then suggests (Br. at 16-17) that this same limitation does not equally apply to subpoenas served on medical providers under subdivision (a)(2), and if the Legislature had intended otherwise, it would have repeated the full cross-reference to both Rule 3120 and Section 3121 in subdivision (a)(2). No such laborious repetition was necessary in view of subdivision (a)(2)'s placement in article 31 and its juxtaposition with subdivision (a)(1).

Moreover, subdivision (a)(2)'s reference to the production of a patient's medical records "pursuant to this rule," in the singular, supports the Comptroller's interpretation of the statute and not petitioner's attempt to sever (a)(2) from its context. Petitioner contends (Br. at 17) that "this rule" refers to subdivision (a)(2) itself,

but that ignores the plain text of the C.P.L.R., which is divided into Articles (e.g. Article 31), Rules (e.g. Rule 3122), and subsections or subdivisions (e.g. Rule 3122(a)(2)). The only reasonable reading of "this rule" is the rule in which those words appear, namely Rule 3122 in its entirety. And subpoenas governed by Rule 3122 can in fact only be issued under the authority of Rule 3120. (While Rule 3122 also cross-references "section" or Rule 3121, that Rule concerns not subpoenas but "notices" to submit to a physical or mental examination.) Thus, any subpoena governed by 3122(a)(2) is also governed by 3120, and is a subpoena issued "after commencement of an action." The phrase "pursuant to this rule" thus does not transform subdivision (a)(2) of Rule 3122 into a free-standing provision generally applicable to all subpoenas.

Finally, if the Court were to find any ambiguity in the statutory text, notwithstanding the argument set forth above, the legislative history of C.P.L.R. 3122(a) would resolve any doubt in favor of the Third Department's reading of the relevant statutes.

2. The Legislative History of C.P.L.R. 3122(a) Confirms That It Does Not Apply to Investigative Subpoenas.

Courts may examine legislative history where the statutory language is "ambiguous or where literal construction would lead to absurd or unreasonable consequences that are contrary to the purpose of the [statute's] enactment," even though the statute is unambiguous. *Anonymous v. Molik*, 32 N.Y.3d at 37; *see also Matter of Shannon v. Westchester County Dept. of Social Servs.*, 25 N.Y.3d 345, 351 (2015) (where statutory language is seemingly "ambiguous," courts have not hesitated to "examine the statute's legislative history").

Petitioner's brief largely ignores (Br. at 17-18) the substantial legislative history confirming that the application of C.P.L.R. 3122(a) is limited to pre-trial discovery conducted in connection with pending litigation.

The Legislature substantially amended C.P.L.R. 3122(a) and other provisions of the C.P.L.R. in 2002, intending "to simplify methods for obtaining discovery of documents, particularly routine business records, from non-party witnesses and procuring their

admission into evidence" in order to "alleviate burdens upon the litigants, non-party witnesses and the courts." Sponsors' Mem. in Support, L. 2002, ch. 575, Bill Jacket, at 3; *see also* 2002 Report of the Advisory Comm. on Civil Practice ("2002 Advisory Comm. Report"), *reprinted in* McKinney's Session Laws, at 2164 (2002) (same).

As part of the 2002 amendments, the requirement for written authorizations before the release of patient records was added to C.P.L.R. 3122(a), in order to protect non-party physicians from inadvertently violating the physician-patient privilege when "served with a subpoena duces tecum requesting a patient's medical records *during the course of discovery*" in a pending lawsuit. 2002 Advisory Comm. Report, *supra*, at 2164 (emphasis added); *see also* Senate Mem. in Support, Senate Bill 3539 (same); Assembly Mem. in Support, Assembly Bill 8384 (same).

In 2011, the Legislature further amended C.P.L.R. 3122(a) to "make clear" that its directive "requiring a patient's authorization" before a medical provider's disclosure of the patient's records "applies only to subpoenas issued during discovery," and would not

prohibit the issuance of a court's "trial subpoena duces tecum seeking the production of medical records" under the authority of C.P.L.R. 2302(b).[8] Assembly Mem. in Support, L. 2011, ch. 307, Bill Jacket, at 6.

Petitioner acknowledges (Br. at 17-18) the above reference to discovery in the legislative history to the 2011 amendment, but erroneously portrays it as an "isolated sentence" at odds with the statute's plain meaning. To the contrary, the legislative history is replete with similar statements. *See, e.g.*, Senate Sponsor's Mem. in Support, Senate Bill S4586-A (same statement); Revised Mem. of N.Y.S. Unified Court Sys., L. 2011, ch. 307, Bill Jacket, at 12 (same); Mem. of N.Y.S. Bar Assn., Comm. on Civil Practice Law and Rules, *id*. at 14 ("the 2002 amendments were intended to primarily streamline pre-trial discovery"); 2011 Report of the Advisory Comm. on Civil Practice ("2011 Advisory Comm. Report"), *reprinted*

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[8] The Legislature enacted this clarification in the wake of a widely followed court decision that broadly applied the patient-authorization requirements to prohibit such a trial court subpoena. *See, e.g.*, Assembly Mem. in Support, L. 2011, ch. 307, Bill Jacket, at 6 (legislatively overruling *Campos v. Payne*, 2 Misc.3d 921 (Civ. Ct. Richmond Co. 2003)).

in McKinney's Session Laws, at 2313 (2011) (reaffirming original purpose of 2002 "inclusion of language [in C.P.L.R. 3122] at the request of the Medical Society [of the State of New York] to protect non-party physicians who were served with disclosure subpoenas seeking medical records").

The fact that the 2011 amendments also split C.P.L.R. 3122(a) into separate subdivisions (1) and (2) does not help petitioner (Br. at 16; Amicus Br. at 6-8). To the contrary, that the two subdivisions were initially codified together as a unified 3122(a) supports the Comptroller's argument that the two subdivisions must continue to be read together. The purpose of recasting C.P.L.R. 3122(a) into two subdivisions was merely to further dispel the ambiguity that had arisen as to whether the patient-authorization requirements also applied to trial court subpoenas. *See* Mem. of N.Y.S. Bar Assn., Comm. on Civil Practice Law and Rules, L. 2011, ch. 307, Bill Jacket, at 15. It did not reflect an intent to detach these requirements from the litigation context and make them generally applicable to all subpoenas for medical records.

C. This Court Has Recognized That Restrictions on Disclosure Contained in C.P.L.R. Article 31 Do Not Apply in the Analogous Context of Grand Jury Subpoenas

For reasons that also apply to the Comptroller's investigative subpoenas, this Court has held that the "conditional bar to discovery of material prepared for litigation" provided for by C.P.L.R. 3101(d) does not apply to a grand jury subpoena issued to investigate possible criminal wrongdoing. *Matter of Application to Quash a Subpoena Duces Tecum in Grand Jury Proceedings* (*Doe*), 56 N.Y.2d 348, 351 (1982).

In *Doe*, the Deputy Attorney General for Medicaid Fraud Control had issued grand jury subpoenas to a hospital and one of its executive officers seeking the production of patient records in connection with an investigation concerning possible crimes committed by hospital staff against hospital patients. *Id.* In addition to the hospital's assertion of the physician-patient privilege of C.P.L.R. 4504 (discussed further below at pp. 40-45), the hospital's challenge also included a claim that its files contained records within the scope of article 31's conditional privilege on materials prepared for litigation and need not be disclosed unless

the Attorney General established that withholding of the records would result in "undue hardship." C.P.L.R. 3101(d)(2).

Although grand jury subpoenas are not specifically governed by the C.P.L.R. when issued by an officer of a criminal court, *see* Criminal Procedure Law § 610.20, this Court has said that they are subject to some evidentiary privileges—such as the attorney-client privilege—codified in the C.P.L.R. *See Doe*, 56 N.Y.2d at 352.[9] This Court nonetheless rejected the hospital's argument in *Doe* that C.P.L.R. 3101(d) applied to the grand jury subpoena there. Observing that the purpose of the conditional privilege was "to prevent attorneys from freely using the preparatory efforts for litigation of their opposing attorneys, except where absolutely necessary," the Court concluded that "[w]hatever the underpinnings of this provision," the Legislature did not intend for such material to be "totally immune" from being released to

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[9] In addition, like the Comptroller's investigative subpoenas, this Court has also recognized that the recipient of a grand jury subpoena may seek relief under C.P.L.R. 2304. *See Brunswick Hosp. Center, Inc. v. Hynes*, 52 N.Y.2d 333, 336 & 339 (1981).

government authorities for legitimate, investigatory purposes. *Doe*, 56 N.Y.2d at 354. The Court explained:

> Nothing in the language or history of the provision suggests that the conditions imposed upon the discovery of this material were meant to apply to a subpoena issued by the Grand Jury or that this section was meant to otherwise impede a legitimate Grand Jury investigation. Since the subpoenaed documents are obviously relevant to the legitimate object of investigation by the Grand Jury, the motion to quash based on the conditional privilege of [C.P.L.R. 3101(d)] was properly rejected.

Id.

This Court's rationale for denying the applicability of C.P.L.R. 3101(d) to grand jury subpoenas applies equally here—namely that nothing in the language or history of the relevant provisions suggests that they were meant to impede a legitimate investigation and prevent the Comptroller from obtaining records "obviously relevant" to that investigation. *Doe*, 56 N.Y.2d at 354.

POINT III

STRONG PUBLIC POLICY CONSIDERATIONS FAVOR UPHOLDING THE COMPTROLLER'S SUBPOENA

The Comptroller's interpretation of his subpoena power under State Finance Law § 9 is further supported by strong public policy

considerations that favor giving him access to the information that he needs to audit state payments for insurance claims under the Empire Plan. To this end, the Comptroller should be allowed to subpoena petitioner's billing records without first having to secure the consent of each of its patients.

In support of its position, petitioner invokes (Br. at 19-20) the physician-patient privilege of C.P.L.R. 4504(a)[10] as well as an individual's right to maintain the confidentiality of his or her medical information.[11] (*See also* Amicus Br. at 4-6 (raising similar arguments).) To be sure, these are significant public interests. But they are outweighed here by other essential interests, namely, the Comptroller's need to obtain the specified information—by use of

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[10] This statute represents "a rule of evidence that protects communications and medical records." *People v. Rivera*, 25 N.Y.3d 256, 261 (2015). It provides that "[u]nless the patient waives the privilege, a person authorized to practice medicine . . . shall not be allowed to disclose any information which he acquired in attending a patient in a professional capacity, and which was necessary to enable him to act in that capacity." C.P.L.R. 4504(a).

[11] As an instance of this right, petitioner cites (Br. at 19) Public Health Law § 2803-c(3)(f). This specific provision is only applicable to patients receiving care in nursing homes and similar facilities, however. *See id*. § 2803-c(2).

his broad subpoena power if necessary—to perform his constitutionally required audit duties. *See supra*, Point I. And as explained further below, requiring individual patient authorizations would eviscerate the Comptroller's ability to perform these audits, as well as to recoup any overpayments of state funds that may be identified.

A. This Court Has Frequently Recognized State Entities' Need for Confidential Medical Records.

In analogous contexts, this Court has recognized an implied exception to the physician-patient privilege of C.P.L.R. 4504(a) and permitted the release of otherwise protected medical information to state entities tasked by the Legislature with carrying out essential duties related to "enforcing certain health care laws" where "the need for disclosure of confidential records was implied from the powers that the legislature conferred on the governmental body." *People v. Rivera*, 25 N.Y.3d at 264 (citing the following cases).

For example, in *Matter of New York City Health & Hosps. Corp. (HHC) v. New York State Commn. of Correction*, 19 N.Y.3d 239, 241-46 (2012), this Court found an implied exception to the

physician-patient privilege and upheld the enforcement of a document subpoena that resulted from the "plenary" authority granted to a state commission to investigate inmate deaths. The *HHC* Court observed that the commission was "constitutionally charged" with the oversight of all state correctional facilities, *see* N.Y. Const., art. XVII, § 5, and that the Legislature had assigned it "broad investigative powers" under the Correction Law. 19 N.Y.3d at 242. That authority included broad "'access . . . to all books, records, and data'" as well as "'any information deemed necessary for the purpose of carrying out the commission's functions, powers and duties,'" even information in the possession of third parties—via the issuance of subpoenas, if necessary. *Id.* at 242-46 & n.3 (quoting Correction Law § 46(1)).

The *HHC* Court reasoned that, despite the important purposes of the physician-patient privilege, there were significant "countervailing legislatively sanctioned policies and practices militating in favor of disclosure." 19 N.Y.3d at 244. Indeed, the Court recognized that the "narrow exemption" claimed by the commission was "reasonably and indeed practically necessar[y] to

be implied" in order to fulfill its broad "responsibilities and powers." *Id*. at 245.

This Court similarly found an implied exception to the physician-patient privilege in a case where the Department of Social Services subpoenaed otherwise protected medical records from a health care provider as part of a Medicaid fraud investigation, given the "important public interest in seeing that Medicaid funds are properly applied." *Matter of Camperlengo v. Blum*, 56 N.Y.2d 251, 255-56 (1982); *see Matter of Burns v. N.Y.S. & Local Police & Fire Retirement Sys.*, 258 A.D.2d 692, 692-93 (3d Dep't 1999) (rejecting argument that C.P.L.R. 4504 protected an individual's medical records from an investigative subpoena issued by the Comptroller under the Retirement and Social Security Law); *see also Doe*, 56 N.Y.2d at 351-354 (rejecting hospital's assertion of the privilege in connection with grand jury subpoena issued by Attorney General).

As in those cases, the privacy interests in medical records here must yield to the significant public interests supporting the Comptroller's subpoena. Like the commission in *HHC*, the

Comptroller is "constitutionally charged" to perform audits of all state payments and has been granted "broad investigative powers" by the Legislature in furtherance of that mandatory function. *HHC*, 19 N.Y.3d at 242. And just like the Comptroller's broad subpoena power under State Finance Law § 9, the commission in *HHC* had broad power "to issue and enforce a subpoena and a subpoena duces tecum . . . in accordance with and pursuant to [the C.P.L.R.]." Correction Law § 46(2); *see also HHC*, 19 N.Y.3d at 242 (recognizing this subpoena power). Although the question was not squarely before the Court in *HHC*, the Correction Law's general reference to the C.P.L.R. as governing the committee's subpoena power did not prevent this Court from permitting the disclosure of otherwise protected medical information. The Court understood the limited release there to be necessary for the commission to perform its investigation. *HHC*, 19 N.Y.2d at 245.

The importance to government oversight of access to confidential medical records is also recognized by the key federal patient privacy law, HIPAA, 42 U.S.C. §§ 1320d-1320d-9, which allows disclosure of medical records for audit purposes without

patient authorizations.[12] *See HHC*, 19 N.Y.3d at 246 (summarily rejecting hospital's alternative argument that HIPAA barred disclosure of the requested records because the governing regulations "specifically allow[ ] for [such] disclosures") (citing 45 C.F.R. § 164.512(a)).

Nor does the Comptroller's position here pose any undue harm to patient privacy interests, because subject to limited statutory exceptions, the Comptroller is bound by the State's Personal Privacy Protection Law not to disclose any records he receives for purposes of conducting his audits without a patient's written consent. *See* Public Officers Law §§ 92(1), 96(1)(a). Accordingly, petitioner's assertion (Br. at 21) that the Comptroller is slighting patient privacy rights for "the convenience of the

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[12] Petitioner has abandoned any challenge to the Comptroller's subpoena based on HIPAA (Br. at 11, n. 1). Although petitioner did not press this challenge below, the Third Department correctly held that HIPAA did not bar the requested disclosures in the absence of written patient consent (R100-101). Under HIPAA, the Comptroller qualifies as a "health oversight agency" performing the "health oversight activit[y]" of auditing the State's payments for services provided to Empire Plan members. *See* 45 C.F.R. §§ 164.501, 164.512(d)(1)(i).

government" is without merit. Petitioner and amici overlook the privacy protections already in place, as well as the countervailing and important public interests served by release of the patient billing records to the Comptroller here, similar to the interests at stake in the above cases.

B. Requiring Patient Authorizations Would Eviscerate the Comptroller's Ability to Perform the Mandated Audits.

The Third Department correctly recognized (R100) that adopting petitioner's construction of the relevant statutes and requiring the Comptroller to obtain written authorization from each patient before being permitted to review billing and payment records would eviscerate the Comptroller's ability to accomplish his core constitutional and statutory mission to prevent the overpayment of state funds and, where appropriate, refer any findings of potential fraud in the State's health care plan to the appropriate authorities.

For the Comptroller to procure the consent of large numbers of patients to the release of their billing records each time he performs an audit is simply not feasible. The audit of payments

made for services provided by even a single provider may involve hundreds, if not thousands, of patient records. For example, the data set which the Comptroller ultimately determined to analyze here included 1,568 of petitioner's claim and billing records, reduced from an initial data set of nearly 12,000 records (R46-48). To condition the Comptroller's access to those records on the individual consent of such a large number of patients would prevent the Comptroller from performing his required review. For instance, a sufficient number of patients withholding their consent (or simply failing to respond to requests for release) would effectively thwart the audit. *See HHC*, 19 N.Y.3d at 245 (recognizing that the limited disclosure requested by the commission was "practically necessar[y]" in order to fulfill its "responsibilities and powers").

Indeed, as the U.S. Department of Health and Human Services explained in connection with HIPAA's exemption for the disclosure of otherwise protected health information for audit purposes, "requiring consent before an oversight official could audit a health plan would make detection of health care fraud all but impossible"; it could take "months or years to locate and obtain the

consent of all current and past enrollees"; and, thus, such "uses of medical information are clearly in the public interest." *Standards for Privacy of Individually Identifiable Health Information; Final Rule*, 65 Fed. Reg. 82462, 82566 (December 28, 2000) (codified at 45 C.F.R. Parts 160 and 164).

Contrary to petitioner's speculation (Br. at 21-22), neither the Comptroller nor the Third Department have "overstated" the impact on the Comptroller's ability to audit. Nor could the Comptroller make do with a lesser number of records here (as he did in the *Handler* case), such that he may more easily be able to secure a lesser number of patient authorizations, as petitioner suggests (Br. at 22-23).

The record establishes why obtaining a more limited subset of records in this case would not be sufficient (R50-51). An audit manager in the Comptroller's office explained that, while auditors conducting an audit like that at issue here "generally select a statistical random sample of the non-participating provider's records to review," in this case access to "all records" in the data set was necessary because petitioner refused a site visit (R50). Thus,

unlike in *Handler* where the providers consented to auditors visiting its offices, auditors here need to "personally select the sampled records" because they "will not have the ability to observe [p]etitioner retrieving the sampled records," nor the "ability to have access to" petitioner's administrative staff to resolve any patient identification or other questions (R50-51).

The auditors' request for all records in the identified data set so that they can personally select the required sample of records out of the total population of records that petitioner would provide is in conformity with Generally Accepted Government Auditing Standards (R50). And it is critical to the Comptroller's audit that auditors are able to verify and match—either by access to provider staff at a site visit or by access to all requested records in the absence of a site visit—the various provider billing and patient account records to be reviewed (R50-51).[13]

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[13] Petitioner raises no challenge in this appeal to the Third Department's grant of the Comptroller's cross-motion to compel compliance with the subpoena after finding that the requested records are all relevant and necessary for the Comptroller to be able to complete his audit. Thus, any claim that the records sought were more extensive than necessary or irrelevant is now abandoned.

Even if a smaller sample set were appropriate here (and it is not), it would be equally problematic to condition the Comptroller's access to records on patient consent. The absence of a sufficient number of patient consents would make achieving even a small sample size difficult, and letting the makeup of the sample be dictated by the vagaries of patient consent could skew it in various ways, impairing the reliability of any audit findings and preventing the Comptroller from performing his constitutionally required review. *See supra*, Point I.

Moreover, in view of the core function the Comptroller serves to superintend the fiscal concerns of the State—including the mandatory audits of all payments made by the State—his ability to fulfill that mandate with respect to health insurance claim payments for services provided to Empire Plan members simply cannot be made to depend upon the type of provider (participating or nonparticipating) rendering those services. The Legislature could not have intended such a discrepancy whereby the Comptroller could audit state health insurance payments for

medical services rendered to Empire Plan members by participating, but not nonparticipating, providers.

This Court in the *HHC* case rejected the adoption of a statutory construction that created a similar incongruity. The Court found that, in granting the state commission in *HHC* its plenary authority, the Legislature "cannot be supposed to have allowed that the thoroughness of the [commission's] inquiry [into the death of an inmate] would vary with the site of an inmate's premortem medical care"—*i.e.*, whether he was treated in prison or in a private hospital. 19 N.Y.3d at 245 (noting that only in the former case would the commission's inquiry have the benefit of a full medical record if waiver of the physician-patient privilege could not be obtained in the latter).

This Court should similarly not "[c]ountenanc[e] such an obviously unintended and unreasonable disparity," *id.*, in the thoroughness, veracity, and reliability of the Comptroller's audits here depending on whether he will or will not have access to all necessary records (*e.g.*, if patient consents cannot be obtained where payments were made for services rendered by

nonparticipating providers). As in *HHC*, in view of the mandatory and broad "extent of the [Comptroller's] authorized review" here, "the effect of the abrogation of [the physician-patient] privilege [is rendered] relatively insignificant with respect to the interests the privilege properly safeguards." *Id.*

Finally, the risk of foregoing audits of state payments for medical services rendered to plan members by nonparticipating providers is clear and has been noted by this Court: a nonparticipating provider's failure to collect patients' required out-of-pocket costs for such services "inflates a claim's cost and adversely impacts the State's fisc." *Handler*, 23 N.Y.3d at 243. And a routine or systematic waiver of such patient costs by a provider renders it impossible for United to administer the Empire Plan as it was designed by the State and can also constitute insurance fraud. *See id.* Without access to such billing records, via subpoena where necessary, the Comptroller's ability to perform reliable, accurate, and timely audits would be thoroughly compromised.

Indeed, adopting petitioner's invitation here to erase the significant and long-standing legislative distinction between

investigative and discovery subpoenas based upon the vastly different purposes they serve, will have wide-ranging ramifications for all kinds of essential state investigations of fraud, waste, and misconduct in various contexts. Subjecting the investigative subpoenas of a state officer or a state administrative body to procedural requirements designed to limit access to records by parties to a particular litigation will place insurmountable burdens on systemic government oversight and review. This would effectively prevent many other state officials in addition to the Comptroller from performing their own constitutional and statutory duties in a manner the Legislature could not possibly have intended.

For these reasons, and because State Finance Law § 9 does not incorporate C.P.L.R. 3122(a)(2)'s patient-authorization requirements as established above, this Court should affirm.

CONCLUSION

The memorandum and order of the Appellate Division, Third Department, should be affirmed.

Dated: Albany, New York
March 13, 2019

Respectfully submitted,

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AFFIRMATION OF COMPLIANCE

Pursuant to the Rules of Practice of the New York Court of Appeals (22 N.Y.C.R.R.) § 500.13(c)(1), Zainab A. Chaudhry, an attorney in the Office of the Attorney General of the State of New York, hereby affirms that according to the word count feature of the word processing program used to prepare this brief, the brief contains 9,191 words, which complies with the limitations stated in § 500.13(c)(1).

Zainab A. Chaudhry

Zainab A. Chaudhry

ADDENDUM
OF
STATUTORY PROVISIONS

STATUTORY PROVISIONS INVOLVED

State Finance Law § 9: Subpoenas; oaths

> The comptroller, deputy comptrollers and assistant deputy comptroller, or either of them, may issue a subpoena or subpoenas requiring a person or persons to attend before the comptroller, a deputy comptroller or assistant deputy comptroller and be examined in reference to any matter within the scope of the inquiry or investigation being conducted by the comptroller, and, in a proper case, to bring with him, a book or paper. A subpoena issued under this section shall be regulated by the civil practice law and rules. The comptroller and deputy comptroller or assistant deputy comptroller or any person designated in writing by them may administer an oath to a witness in any such inquiry or investigation.

* * *

C.P.L.R. 3120: Discovery and production of documents and things for inspection, testing, copying or photographing

> 1. After commencement of an action, any party may serve on any other party a notice or on any other person a subpoena duces tecum:
>
> (i) to produce and permit the party seeking discovery, or someone acting on his or her behalf, to inspect, copy, test or photograph any designated documents or any things which are in the possession, custody or control of the party or person served[.]

C.P.L.R. 3122(a): Objection to disclosure, inspection or examination; compliance.

> (a) 1. Within twenty days of service of a notice or subpoena duces tecum under rule 3120 or section 3121, the party or person to whom the notice or subpoena duces tecum is directed, if that party or person objects to the disclosure, inspection or examination, shall serve a response which shall state with reasonable particularity the reasons for each objection. If objection is made to part of an item or category, the part shall be specified. The party seeking disclosure under rule 3120 or section 3121 may move for an order under rule 3124 or section 2308 with respect to any objection to, or other failure to respond to or permit inspection as requested by, the notice or subpoena duces tecum, respectively, or any part thereof.
>
> 2. A medical provider served with a subpoena duces tecum, other than a trial subpoena issued by a court, requesting the production of a patient's medical records pursuant to this rule need not respond or object to the subpoena if the subpoena is not accompanied by a written authorization by the patient. Any subpoena served upon a medical provider requesting the medical records of a patient shall state in conspicuous bold-faced type that the records shall not be provided unless the subpoena is accompanied by a written authorization by the patient, or the court has issued the subpoena or otherwise directed the production of the documents.