UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
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NATIONAL ABORTION FEDERATION; MARK I. EVANS, M.D.; CAROLYN WESTOFF, M.D., M.Sc; CASSING HAMMOND, M.D.; MARC HELLER, M.D.; TIMOTHY R.B. JOHNSON, M.D.; STEPHEN CHASEN, M.D.; GERSON WEISS, M.D., on behalf of themselves and their patients,

Plaintiffs,

- against -

JOHN ASHCROFT, in his capacity as Attorney General of the United States, along with his officers, agents, servants, employees, and successors in office,

Defendant.

03 Civ. 8695 (RCC)

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***AMICUS CURIAE* THE STATE OF NEW YORK'S MEMORANDUM IN OPPOSITION TO MOTION TO ENFORCE SUBPOENA TO THE NEW YORK PRESBYTERIAN HOSPITAL**

Interest of the Amicus Curiae

For over a century and a half, the State of New York has sought to protect the privacy of its citizen's health information. Recognizing the importance of open communications with medical professionals, in 1828 New York became the first State in the nation to codify the physician-patient privilege. Over the ensuing years, the Legislature has passed other state

laws that strengthen the protection of medical records in the interest of the public health and the privacy of its citizens.

In this action, the Defendant seeks access to patient records from New York Presbyterian Hospital, a major metropolitan hospital serving thousands of New Yorkers each year. The subpoenaed medical records include records of women who have obtained second trimester abortions, women who have required abortion procedures for their health, and women whose physicians have used the intact dilation and extraction abortion procedure.

The State of New York's interest in this dispute is two-fold. First, given the over two-hundred hospitals operating and the tens of thousands of state-licensed physicians who practice medicine in New York, the State has an interest in the application of its laws protecting patient health information within its boundaries. As the Legislature and the State's highest court have recognized, protection of patient medical information serves to further important public health goals. Among these, confidentiality fosters unfettered communication between patients and doctors so that doctors may elicit information necessary for appropriate treatment. Likewise, medical professionals, in the context of confidential care of patients, will be free to record their observations accurately on patient records.

Second, consistent with state-law recognition of the privacy

of health information, the federal Constitution protects the privacy of sensitive medical information. New York has an interest in protecting this constitutional privacy interest, particularly in the context of women seeking to exercise freely their right to reproductive choice. Given the conflict over abortion that has swirled across this country, and the violence and obstruction aimed at reproductive health providers, which has provoked creation of federal and state legislation to address the behavior, see, e.g., Freedom of Access to Clinics Entrances Act, 18 U.S.C. § 248; New York State Clinic Access Act, N.Y. Civ. Rights Law § 79-m, a woman's decision to terminate a pregnancy has been, and continues to be, a particularly private matter. The State of New York has a strong interest in ensuring that women are not deterred from exercising their right to reproductive choice for fear that their medical records will be exposed in litigation to which they are not parties.

ARGUMENT

The Defendant's subpoena of confidential medical records of women who have obtained abortions at New York Presbyterian Hospital presents a challenge to the historical sanctity of patient health information in New York State. Apparently claiming that these protected documents are needed to test the Plaintiff doctors' testimony, the Defendant now seeks to compel

production of these sensitive records.

The law does not support such a release of confidential materials. First, as a matter of comity, federal courts should recognize state privileges, particularly where the state law, as here, is so strongly protective of the privacy of patient's health information. Balancing the Defendant's asserted need for the medical records against the need for protection, the balance falls squarely on the side of protecting medical privacy. Second, the Fourteenth Amendment to the United States Constitution recognizes a privacy interest in maintaining the confidentiality of the health records, a right which would be abridged if the subpoena in this case were enforced. In nearly-identical cases to this one, federal district courts in California and Illinois have recognized the importance of protecting the confidentiality of the health information contained in the patient records and refused to compel their production. See Planned Parenthood Fed'n of America, Inc. v. Ashcroft, No. C-03-4872 (N.D. Cal. Mar. 5, 2004) (attached hereto as Exhibit A); National Abortion Fed'n v. Ashcroft, No. 04-C-55, 2004 U.S. Dist. LEXIS 1701 (N.D. Ill. February 5, 2004). This Court should do the same.

POINT I

NEW YORK LAW PROTECTS THE CONFIDENTIALITY OF PATIENT HEALTH INFORMATION

Protection of the confidentiality of patient health information in New York State is longstanding. In 1828, New York became the first State in the nation to enact a physician-patient privilege statute. See 2 Rev. Stat. of NY, part III, ch. VII, tit. III, § 73 (1st ed. 1829). The degree of protection New York affords the physician-patient relationship both explains the State's interest as amicus curiae and provides the background for understanding why comity requires non-disclosure in this case, discussed at Point II, infra.

In providing a broad privilege for physician-patient communications, New York has recognized the importance of unfettered communication with medical professionals to obtain high quality medical treatment. The codification of the physician-patient privilege was based largely "on the belief that fear of embarrassment or disgrace flowing from disclosure of communications made to a physician would deter people from seeking medical help and securing adequate diagnosis and treatment." Dillenbeck v. Hess, 73 N.Y.2d 278, 285 (1989) (quoting Williams v. Roosevelt Hosp., 66 N.Y.2d 391, 395 (1985)).

The Court of Appeals has identified two additional rationales for the privilege. It "encourages medical professionals to be candid in recording confidential information

in patient medical records, and thereby averts a choice 'between their legal duty to testify and their professional obligation to honor their patients' confidences.'" In re Grand Jury Investigation in New York County, 98 N.Y.2d 525, 529 (2002) (quoting Dillenbeck, 73 N.Y.2d at 285). And it "protects patients' reasonable privacy expectations against disclosure of sensitive personal information." Id.

New York's physician-patient privilege provide 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. The relationship of a physician and patient shall exist between a medical corporation . . . and the patients to whom [it] . . . render[s] professional medical services.

N.Y. CPLR § 4504(a). The privilege applies to information acquired by the medical professional "through the application of professional skill or knowledge," so as to provide medical diagnosis and treatment. Dillenbeck, 73 N.Y.2d at 285 n.4. Pursuant to CPLR § 4504(a), the courts in New York, including the Court of Appeals, have protected hospital patient records. See, e.g., In Re Grand Jury Investigation in New York County, 98 N.Y.2d at 529 (hospital emergency room records protected from disclosure where records sought to identify criminal assailant would reveal confidential communications between physicians and patients); In Re Grand Jury Investigation of Onondaga County, 59

N.Y.2d 130, 134 (1983)(same).

Except where a litigant has affirmatively placed his or her mental or physical condition in issue, Koump v. Smith, 25 N.Y.2d 287, 294 (1969), only the patient (or an authorized representative) may waive the privilege. Dillenbeck, 73 N.Y.2d at 289. While there is a narrow group of statutory and common law exceptions (none of which are applicable here),[1] the privilege has been closely guarded by New York courts.

Other provisions of New York law add to the statutory protections for medical records. For example, New York Public Health Law § 2803-c(3)(f), which applies to health facilities, hospitals and nursing homes, sets forth that "[e]very patient shall have the right to have privacy in treatment and in caring for personal needs, confidentiality in the treatment of personal and medical records, and security in storing personal

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[1] See, e.g., CPLR § 4504 (b) (exempting from the privilege "information indicating that a patient who is under the age of sixteen years has been the victim of a crime"); N.Y. Penal Law § 265.25 (obliging hospitals and medical professionals to report every case of a bullet wound, gunshot wound, powder burn and "every case of a wound which is likely to or may result in death and is actually or apparently inflicted by a knife, icepick or other sharp or pointed instrument"); N.Y. Penal Law § 265.26 (requiring hospitals and medical professionals to report to law enforcement authorities certain cases of serious burns); N.Y. Pub. Health Law § 2101 (1) (obliging physicians to disclose immediately any case of communicable disease); N.Y. Soc. Serv. Law § 413 (1) (requiring all medical professionals to report actual or suspected cases of child abuse); In re Camperlango v. Blum, 56 N.Y.2d 251 (1982)(Medicaid fraud exception to statutory medical confidentiality privilege).

possessions." The statute further requires the facility to publicly post these rights in a conspicuous location to provide notice to patients, who have an expectation of privacy when entering for treatment and other services. Id.[2]

In an action attempting to obtain abortion records pursuant to the Freedom of Information Law, the hospital whose records were at issue asserted that Public Health Law § 2803-c(3)(f) exempted the records from disclosure. Ruling for the hospital, the Court of Appeals denied disclosure of the abortion records and, significantly, rejected redaction as sufficient to permit their release. Short v. Bd. of Managers of Nassau Cty. Medical Ctr., 57 N.Y.2d 399 (1982).

Finally, CPLR § 3122(a), as recently amended, 2002 N.Y. Laws, ch. 575, § 3, requires that any subpoena served on a medical provider requesting 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." CPLR § 3122(a); see Campos v. Payne, 766 N.Y.S.2d 535, 538 (N.Y. Civ. Ct., Richmond Cty., 2003) ("[T]hese [new] requirements "reflect the New York legislature's

[2] New York Public Health Law Section 2805-g(3) adds further protection for a hospital's patient records: "Nothing contained in this section [requiring hospitals to maintain records of financial and inspection reports] shall be construed or deemed to require the public disclosure of confidential medical, social, personal or financial records of any patient."

legitimate response to the urgent need to promote fluidity in the judicial process while maintaining the integrity of patient privacy.").

It is thus clear that New York law would not permit disclosure of the sensitive, third-party patient medical records at issue here.[3]

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[3]The Defendant (Def. Mem. at 9) incorrectly claims that the New York physician-patient privilege does not require the withholding of redacted medical records, citing In re American Tobacco Co., 880 F.2d 1520, 1530-31 (2d Cir. 1989). That case primarily analyzed the State's expert witness and scholar's privileges, not the patient-physician privilege. Id. at 1527-30. This is because the issue in American Tobacco was not patient medical records, but the raw data of several research studies, stored on computer tapes, which happened to include subjects' identities. Id. at 1525.

Consequently, American Tobacco's holding with respect to the adequacy of redaction simply does not apply to this case. First, the redaction of a patient's medical file will be much less effective at protecting the patient's privacy than the redaction of tabulated research data. See Doe v. Roe, 93 Misc. 2d 201, 214 n.9 (Supreme Court N.Y. County 1977) (details of patient histories in psychiatric records make the possibility of recognition very high); see also discussion at pp. 13-14, infra. Second, unlike research data, patient files fall squarely under N.Y. CPLR § 4504(a), which protects not only information identifying a patient, but "any information acquired in attending a patient in a professional capacity." And unlike research data, these files are also protected by Public Health Law § 2803-c(3)(f). Finally, American Tobacco relies on Hyman v. Jewish Chronic Disease Hospital, 15 N.Y.2d 317 (1965). But in that case, the proposed disclosure was to the Director of the Hospital, for whom "the supposed strict secrecy [did] not really exist" since the records had "been seen, read and copied by numerous staff members and employees of the hospital and of the co-operating institution." Id. at 323.

POINT II

THE COURT SHOULD APPLY NEW YORK STATE PRIVILEGE LAW FOR REASONS OF COMITY

New York's policy of protecting the confidentiality of patient health information, discussed at Point I, supra, should be recognized under the principle of comity. Applied to the facts of this case, New York's interest in protecting the physician-patient relationship outweighs the Defendant's proffered reasons for disclosure.

As a matter of comity, federal courts accord deference to state-created privileges. United States v. One Parcel of Property Located at 31-33 York St., 930 F.2d 139, 141 (2d Cir. 1991) (citing Memorial Hosp. v. Shadur, 664 F.2d 1058, 1061 (7th Cir. 1981)). The Seventh Circuit has explained the reasons for such deference as follows:

> A strong policy of comity between state and federal sovereignties impels federal courts to recognize state privileges where this can be accomplished at no substantial cost to federal substantive and procedural policy. And where a state holds out the expectation of protection to its citizens, they should not be disappointed by a mechanical and unnecessary application of the federal rule.

Shadur, 664 F.2d 1058 at 1061 (7th Cir. 1981) (internal citations omitted). In assessing whether to defer to a state privilege under comity principles, federal courts balance the importance of the policy underlying the state privilege against the need for disclosure in a particular case. One Parcel, 930 F.2d at 141;

Shadur, 664 F.2d at 1061.

In performing such a balancing, courts in this and other circuits have been careful not to compel disclosure of medical records unless such records were of major significance to the case. In Olszewski v. Bloomberg L.P., for example, the court deferred to the New York State privilege protecting medical and mental health records, quashing a subpoena of medical records reflecting the medical condition of a party's prior counsel who inexplicably had failed to file opposition papers in response to a summary judgment motion. No. 96-C-3393, 2000 U.S. Dist. LEXIS 17951 (S.D.N.Y. December 13, 2000). While those records may have been relevant to plaintiff's attempt to re-open the resulting default judgment, the court refused to allow disclosure, explaining that discovery of medical records should only be permitted after finding that the "societal interest in disclosure outweighs the individual's privacy interest on the specific facts of the case." Id. at *10 (citing United States v. Westinghouse Elec. Corp., 638 F.2d 570, 578 (3d Cir. 1980)).[4] Similarly, in

[4] See also Manessis v. New York City Dept. of Transp., No. 02-C-359, 2002 U.S. Dist. LEXIS 17884 (S.D.N.Y. Sept. 24, 2002) (granting a motion to limit the scope of production of medical records, the court held that the defendant was only entitled to disclosure of medical records about which the plaintiff had waived his right to privacy by putting his condition at issue in the case); cf. Komlosi v. New York State Office of Mental Retardation and Dev. Disabilities, No. 8-C-1792, 1992 U.S. Dist. LEXIS 4172 (S.D.N.Y. Apr. 3, 1992) (because state privilege illustrated important privacy interests, court deferred to state privilege protecting from disclosure statements of a physician to

Addis v. Holy Cross Health System Corp., applying comity principles, the court declined to order production of medical records when they were protected by Indiana's physician-patient privilege. No. 3:94-CV-118, 1995 U.S. Dist. LEXIS 10122 (N.D. Ind. Feb. 7, 1995). In Addis, the court held that the defendant hospital, which sought patient records from a physician who alleged that the hospital had unlawfully failed to refer patients to him, had not met its burden to show that the records were critical to the case. The court ruled against disclosure, explaining that "[a] strong policy of comity between state and federal sovereignties impels federal courts to recognize state privileges where this can be accomplished at no substantial cost to federal substantive and procedural policy." Addis, 1995 U.S. Dist. LEXIS 10122, at *11 (citations omitted). The court in Addis further noted that, where a State holds out an expectation of protection to its citizens, those expectations should not be defeated by a mechanical and unnecessary application of the federal rule. Id.

This expectation of protection is heightened where the patients whose records are at issue are strangers to the federal lawsuit. Brown v. St. Joseph County, No. S90-221, 1992 U.S. Dist. LEXIS 5083, at *4 (N.D. Ind. 1992) (court deferred to state physician-patient privilege in denying motion to compel discovery

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a quality assurance review committee).

of medical records of non-party patients, who had an expectation of privacy in their records under state law).

In this case, the strong policy of comity between federal and state courts overwhelmingly favor recognition of New York's longstanding policy of protecting the confidentiality of patient health information. Allowing disclosure of medical records of patients who have undergone abortions, especially where the parties are not even parties to the lawsuit, would severely impair the interest protected by New York's medical privacy laws. Indeed, in an analogous case involving this Defendant's attempt to gain access to similar records, an Illinois district court denied disclosure because of interests protected by Illinois state law. National Abortion Fed'n, 2004 U.S. Dist. LEXIS 1701. As the court in National Abortion Fed'n explained, "American history discloses that the abortion decision is one of the most controversial decisions in modern life, with opprobrium ready to be visited by many upon the woman who so decides and the doctor who engages in the medical procedure." Id. at *18. In the context of abortion-related medical records, therefore, the patient's need for privacy is particularly compelling.

The fact that the Defendant in this case is willing to redact certain patient-identifying information from the records does not adequately resolve the privacy interests at stake. Courts have recognized that redacting patient-identifying

information does not protect against the possibility of recognition and therefore does not defeat a non-party patient's reasonable expectation of privacy.

For these reasons, in ruling on the identical issue in a parallel challenge to the constitutionality of the Partial Birth Abortion Ban Act, a California district court refused to compel disclosure of patient records, finding that

> [a]lthough the government has agreed to the redaction of names, addresses, birthdates, and other objectively identifying information, the records nevertheless contain other potentially identifying information of an extremely personal and intimate nature, including, among others, types of contraception, sexual abuse or rape, marital status, and the presence or absence of sexually transmitted diseases.

Planned Parenthood Fed'n, No. C-03-4872, at 3. The court made this finding after reviewing a sample of the disputed medical records under seal. Id. at 2.

Similarly, in Parkson v. Central DuPage Hosp., the court found that it was "questionable at best" whether the redaction of patient's names and identifying numbers from hospital records would protect the patients' identities where the records "arguably contain[ed] histories of the patients' prior and present medical conditions, information that in the cumulative can make the possibility of recognition very high." 435 N.E.2d 140, 144 (Ill. App. Ct. 1982); accord Doe v. Roe, 93 Misc. 2d 201, 214 n.9 (Supreme Court N.Y. County 1977) (details of patient histories in psychiatric records make the possibility of

recognition very high); see also Brown, 1992 U.S. Dist. LEXIS 5083, *4, 10-11 (denying motion to compel discovery of medical records of non-party patients, noting that disclosure of non-party medical records cannot be compelled "'regardless of the measures taken to protect against the disclosure of the nonparty patients' identities'") (quoting Terre Haute Regional Hosp. v. Trueblood, 579 N.E.2d 1342 (Ind. App. 1991)); cf. Short v. Bd. of Managers of Nassau Cty. Medical Ctr., 57 N.Y.2d 399, 405-406 (1982) (redaction of identifying details in abortion patients' medical records did not permit disclosure under New York's Freedom of Information Law).

Regardless of whether the records are redacted, or the non-party patients are actually identified, they would rightly view the release of these records as a significant intrusion on their privacy. Allowing disclosure of the records under these circumstances will likely "have a chilling effect on communications between patients and providers." Planned Parenthood Fed'n, No. C-03-4872, at 3. Indeed, "the potential for injury to the relationship between patient and provider is significant given the providers' pledge of confidentiality." Id. Moreover, "it is unlikely that the individual patients whose records are being produced would have notice or an opportunity to contest disclosure." Id.

The court in Illinois agreed:"[a]n emotionally charged

decision will be rendered more so if the confidential medical records are released to the public, however redacted, for use in public litigation in which the patient is not even a party." National Abortion Fed'n, 2004 U.S. Dist. LEXIS 1701, at *18-19 (emphasis added).

In contrast, the probative value of the records is marginal at best. The Defendant states (Def. Mem. at 18) that it needs the patient records because two of the Plaintiff doctors contend in their declarations that "they perform late-term abortions," and that "the banned procedure has been the appropriate procedure to use in some circumstances." The Defendant claims (Def. Mem. at 18) that it must therefore "have access to the redacted medical records that reflect the circumstances in which they claim to have used the banned procedure." The Defendant adds (Def. Mem. at 18) the bold assertion that "[o]nly by reviewing the medical circumstances of those cases can the Government evaluate plaintiffs' argument that the banned procedure is medically necessary."

However, after reviewing similar declarations and sample medical records in the analogous California case, the district court there found that "the individual medical records are not relevant because they do not contain the information that the government seeks." Planned Parenthood Fed'n, No. C-03-4872, at 2; accord National Abortion Fed'n, 2004 U.S. Dist. LEXIS 1701, at

*19 ("What the government ignores in its argument is how little, if any, probative value lies within these patient records").

Moreover, to the extent that these records shed any light on whether on a banned procedure was performed and was medically necessary, the contents of a group of patient medical records would not prove Defendant's central defense in this case, which is the banned procedure is never medically necessary. Much more apposite to the Defendant's case would be to challenge the doctors' views by citing to the available medical literature and proffering contrary expert opinions. See Planned Parenthood Fed'n, No. C-03-4872, at 2 (finding that even if the patient records did contain relevant information, they would be only "marginally relevant at best because the presence or absence of medical risks and their likelihood and nature are going to be made not on the basis of individual patients' records but on the basis of expert testimony at trial."); National Abortion Fed'n, 2004 U.S. Dist. LEXIS 1701, at *19 (noting the "ready availability of information traditionally used to challenge the veracity of [plaintiffs'] scientific assertions and medical opinions," and that the "presence or absence of medical risks, their likelihood and nature are undoubtably described and discussed in available medical literature").

Under these circumstances, as both the California and the Illinois federal courts have held, "the balance of harms

resulting from disclosure severely outweighs the loss to the government through non-disclosure." National Abortion Fed'n, 2004 U.S. Dist. LEXIS 1701, at *20; Planned Parenthood Fed'n, No. C-03-4872, at 2-3. This Court should thus defer to New York's physician-patient privilege protecting these records.

POINT III

THE CONSTITUTION ALSO PROTECTS THE CONFIDENTIALITY OF THE MEDICAL RECORDS

The privacy interest in the confidentiality of the medical records at issue in this case is also protected by the United States Constitution. The Constitution does not permit compelled disclosure of the medical records here because the United States' marginal need for disclosure does not outweigh the non-party patients' substantial privacy interests.

The Supreme Court has long recognized a constitutionally protected right to privacy. In Whalen v. Roe, 429 U.S. 589 (1977), the Court identified two types of privacy interests protected by the Fourteenth Amendment: "the individual interest in avoiding disclosure of personal matters . . . and the interest in independence in making certain kinds of important decisions. Id. at 599 (citations omitted), 603-604; accord Nixon v. Administrator of General Services et al., 433 U.S. 425, 457 (1977) (recognizing that public officials have "constitutionally protected privacy rights in matters of personal life unrelated to

any acts done by them in their public capacity"). The disclosure of patient information implicates both interests, since it involves the "disclosure of personal matters," and the prospect of disclosure will make some patients reluctant to undergo these medical procedures. Whalen, 429 U.S. at 600. The interest in making important decisions independently is especially strong in "matters relating to marriage, procreation, contraception, family relationships, and child rearing and education." Id. at 600 n.26 (quoting Paul v. Davis, 424 U.S. 693, 713 (1976)).

Whalen itself concerned the disclosure of medical information to representatives of the state. Applying Whalen, the Second Circuit has held that "the right to confidentiality includes the right to protection regarding information about the state of one's health." Doe v. City of New York, 15 F.3d 264, 267 (1994). The court explained that "'[i]nformation about one's body and state of health is matter which the individual is ordinarily entitled to retain within the 'private enclave where he may lead a private life.'" Id. (quoting Westinghouse Elec. Corp., 638 F.2d at 577 (applying Whalen to enforcement of subpoenas seeking medical records)). Indeed, in the court's view, "there are few matters that are quite so personal as the status of one's health, and few matters the dissemination of which one would prefer to maintain greater control over." Doe, 15 F.3d at 267; see also Schachter v. Roe, 581 F.2d 35, 36-37 (2d

Cir. 1978) (applying Whalen to enforcement of subpoenas seeking medical records); Strong v. Board of Educ., 902 F.2d 208 (2d Cir. 1990) (applying Whalen to school board request for teacher medical information following extended medical absence).

The right to privacy is not absolute, however. The Supreme Court has applied a balancing test -- weighing the privacy interest against the public need for disclosure -- to determine whether the right has been abridged. See Whalen, 429 U.S. at 600, 602; Nixon, 433 U.S. at 458, 465. In Doe, the Second Circuit noted more explicitly that "'some form of intermediate scrutiny or balancing approach is appropriate as a standard of review,'" 15 F.3d at 269-70, relying on Barry v. City of New York, 712 F.2d 1554, 1559-60 (2d Cir. 1983). It therefore held that the party seeking disclosure must show a "substantial" interest that outweighs the plaintiff's privacy interest. Doe, 15 F.3d at 269.

The California district court in the analogous Planned Parenthood case relied on the constitutional right to informational privacy to deny the Defendant's motion to compel disclosure of patient medical records because, after "balancing the relevant considerations," it concluded that the defendant's interest in "the marginally relevant patient records" did not justify disclosure. Planned Parenthood Fed'n, No. C-03-4872, at 2-3; see also Olszewski, 2000 U.S. Dist. LEXIS 17951, at *11

(applying Whalen and holding that, taking the patient's "privacy interest into account," medical and mental health records were not discoverable); cf. National Abortion Fed'n, 2004 U.S. Dist. LEXIS 1701, at *20 (quashing the subpoenas for medical records because, "[w]hen contrasted with the potential loss of privacy that would ensue were these medical records used in a case in which the patient was not a party, the balance of harms resulting from disclosure severely outweighs the loss to the government through non-disclosure.").

Balancing the relevant considerations in this case leads to the same result. The recognized privacy interest in health information is particularly strong in the highly-charged context of the constitutionally protected right to reproductive choice. See National Abortion Fed'n, 2004 U.S. Dist. LEXIS 1701 at *18. In addition, as noted in Planned Parenthood Fed'n, the patient records contain other information of an "extremely personal and intimate nature," including types of contraception, sexual abuse, rape, marital status, and the presence or absence of sexually transmitted diseases. No. C-03-4872, at 3. Similarly, the Second Circuit has recognized a constitutionally protected privacy right in plaintiff's HIV status, which "would be true for any serious medical condition, but is especially true with regard to those infected with HIV . . . considering the unfortunately unfeeling attitude among many in this society toward those coping

with the disease." Doe, 15 F.3d at 267. As the court acknowledged, "[a]n individual revealing that she is HIV seropositive potentially exposes herself not to understanding or compassion but to discrimination and intolerance, further necessitating the extension of the right to confidentiality over such information." Id.

Also, the threatened disclosure in this case is particularly invasive because it infringes on the rights of patients who are not parties to the lawsuit, who have not placed their medical condition at issue, and who have no opportunity to be heard on the issue. Moreover, as discussed above, redaction will not adequately protect the privacy interests at stake in these high-profile cases. Cf. Doe, 15 F.3d at 265 (plaintiff stated a claim for violation of right to informational privacy even though alleged disclosure "did not expressly identify [plaintiff] by his given name"). Finally, the Defendant's interest in the information is marginal, at best. See Olszewski, 2000 U.S. Dist. LEXIS 17951, at *10-11 (holding that no societal interest outweighed the individual's privacy interest in his medical records); cf. Whalen, 429 U.S. at 591, 600 (state department of health has sufficient interest in controlling market for illegal drugs to maintain computerized database of prescription holders); Strong, 902 F.2d at 208 (school district has legitimate interest in protecting children under its care to tailor a request for

teacher health information following extended medical absence); Schachter, 581 F.2d at 37 (state department of health has sufficient interest in investigating medical misconduct to review records of target physician's patients). The Constitution therefore prohibits court-ordered disclosure of the subpoenaed patient records in this case.

CONCLUSION

For the foregoing reasons, the Defendant's motion to enforce its subpoena seeking patient medical records from New York Presbyterian Hospital should be denied.

Dated: New York, New York
March 8, 2004

Respectfully submitted,

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