

IN THE SUPREME COURT OF OHIO

MEDICAL MUTUAL OF OHIO :
: Case No. 2008-0598
Appellants, :
:
v. :
:
WILLIAM SCHLOTTERER, D.O. : On Appeal from Cuyahoga County
: Court of Appeals, Eighth Appellate
: District
Appellee. :
:
: Appeals Case No. CA-07-089388
:

BRIEF OF AMICUS CURIAE AMERICAN CIVIL LIBERTIES UNION OF OHIO
FOUNDATION, INC. IN OPPOSITION TO APPELLANT MEDICAL MUTUAL

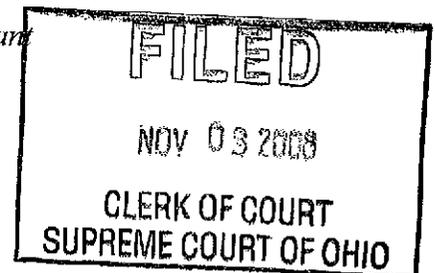
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Interests of Amicus Curiae

Amicus curiae the American Civil Liberties Union of Ohio Foundation, Inc. submits this brief in opposition to Appellant Medical Mutual. *Amicus* files this brief to protect the privacy rights of the patients whose medical records Medical Mutual seeks in this case and to protect the public health, which would be jeopardized by disclosure. The patients whose records are at issue are not parties and have not been given the opportunity to be heard, and *amicus* addresses their interests in this litigation.

The American Civil Liberties Union of Ohio Foundation, Inc. (ACLU) is the state affiliate of the national American Civil Liberties Union, a nationwide, non-profit, nonpartisan organization with nearly 550,000 members. The ACLU of Ohio has nearly 30,000 members and supporters statewide. The ACLU's mission is to defend the principles of liberty and equality embodied in the Constitution and this nation's civil rights laws. As part of that commitment, the ACLU of Ohio has been active in defending privacy rights, including statutory and common law privileges. In addition, the ACLU has sought to protect access to safe, confidential HIV testing and treatment, free from discrimination, throughout the country, including Ohio. As part of its ongoing commitment to those purposes, the ACLU submits the following *amicus curiae* brief in opposition to Medical Mutual's overbroad request for non-party patient medical records.

Statement of Facts

Amici curiae adopt Appellee Dr. Schlotterer's Statement of Facts.

Argument

Appellant Medical Mutual and its *amici* have portrayed this discovery dispute as being an essential protection to the health care industry against billing fraud. Appellee Doctor Schlotterer

has portrayed it as a fishing expedition that violates state law and ignores the proper channels for conducting a billing investigation. Noticeably absent from the discussion are the hundreds of non-party patients whose private medical records are at issue. As this Court acknowledged in its July 9, 2008 decision in *Hageman v. Southwest General Health Center*, 119 Ohio St.3d 185, 2008-Ohio-3343,¹ and during the October 7, 2008 oral argument in *Roe v. Planned Parenthood of Southwest Ohio*, Case No. 2007-1832, the courts must use these patients' rights as the lens through which to view any request for or use of their records.

Amici do not contend that Medical Mutual should be without protection against billing fraud. But invasion of patient privacy and the doctor-patient privilege should be a last resort. This is not a last resort situation, and Medical Mutual has not availed itself of less invasive methods to investigate fraud.

In the instant discovery dispute, Medical Mutual is pursuing a hunch. They requested a sample of Dr. Schlotterer's treatment records for a designated number of Medical Mutual members, and Dr. Schlotterer provided that information without objection and in compliance with the Provider Agreement. Apparently not finding what they were looking for, Medical Mutual then took the bold step of asking for all medical records – not more, all. Medical Mutual filed suit and asked the trial court for an order requiring Dr. Schlotterer to waive privilege on behalf of ALL of his patients, without patient consent, with respect to all patient records from January 1, 2000 through February 26, 2006, covering over 600 active patients. Such a request to investigate a mere suspicion is grossly overbroad and, more, it ignores appropriate procedure for investigating such suspicions. As Dr. Schlotterer points out in his brief, if Medical Mutual were

¹ “[I]t is for the patient – not some medical practitioner, lawyer, or court – to determine what the patient's interests are with regard to personal confidential medical information.” *Hageman* at ¶13, citing *Biddle v. Warren Gen. Hosp.* (1999), 86 Ohio St.3d 395, 408, 715 N.E.2d 518.

genuinely concerned about up-coding or other fraudulent billing procedure, the proper step would have been to report it to the Ohio Department of Insurance (ODI) for them to investigate. While the parties dispute whether such report to ODI was ever made,² and even if state law allows insurers a private right to sue, nothing in Ohio law allows Medical Mutual to paw through six years worth of private patient records on a billing frolic.

While this is important for all patients, it is even more critical for those who are managing medical conditions like HIV that require continuous monitoring. If patients fear that what they tell their doctor will not remain private, the patients may refrain from telling their doctor about symptoms or risky behavior that are critical to their treatment plan. Simply redacting medical records is not enough to cure this chill, as it still will leave patients fearful of reprisal. It is essential to maintain access to confidential medical care for people living with HIV, and this court should affirm their rights in rejecting Medical Mutual's discovery frolic into HIV patients' confidential medical records.

This Court should reject Plaintiffs' request to review the medical records of non-party patients. The disclosures Plaintiffs seek would violate the confidentiality of physician-patient communications, undermining the provision of medical care to all Ohio residents and chill access to critical medical treatment. Plaintiffs fail to demonstrate any actual need for the full medical

² The Eighth District Court of Appeals noted that "although Med Mutual's complaint makes a claim of fraud against the doctor, nothing in the record indicates that Med Mutual has complied with R.C. 3999.42, which imposes a statutory duty upon an insurer to report that belief to the state board of insurance." *Medical Mutual of Ohio v. William Schlotterer*, 8th Dist. Ct. of App. Case No. 89388, at p.10 (2008). Additionally, "claims of insurance fraud primarily are covered by R.C. 2913.47, and, should the doctor be found guilty of the crime, the court may order restitution" thus providing Medical Mutual with a remedy. *Id.* "The legislature thus has indicated a preference for such matters to be handled by the state, rather than by a private party." *Id.*

records, much less a need that can overcome the significant threat to public health and the invasion of privacy inherent in the disclosure.

Thus, this Court should affirm, first, because absent the assurance of confidentiality, patients avoid or delay treatment or fail to disclose pertinent medical information, disabling physicians from providing the proper treatment. What is perhaps the most disturbing aspect of this case is that Dr. Schlotterer's practice primarily treats people living with HIV. Confidentiality exists to ensure that patients are honest and forthcoming with their doctors, so that the doctor is better able to treat that specific patient. The need for confidentiality is heightened when people living with HIV, in particular, seek health care, which often requires divulging the most intimate of details. Allowing Plaintiffs access to the records they seek would show patients that personal details they tell their doctor will not remain confidential, leading them to avoid critical care. And the redaction Plaintiffs tout is no answer: given the wealth of detail a medical record contains, redaction cannot reliably conceal patient privacy; the process of redaction itself entails disclosure at least to lawyers and their assistants; and people living with HIV – who already face fear of stigma and discrimination – will be deterred from seeking essential medical care out of fear of disclosure.

This Court should affirm, second, because, reflecting the importance of confidentiality in health care, the United States Constitution prohibits disclosure of the medical records Plaintiffs seek. Both of the privacy interests identified by the United States Supreme Court are at stake here: the interest in avoiding disclosure of personal matters and the interest in making certain decisions independently. Based on that constitutional right, numerous courts have prohibited disclosure of non-party medical records. This Court should do the same.

Proposition of Law No. I: Disclosure of Non-Party Medical Records Damages the Physician-Patient Relationship and Deters Patients From Seeking Timely and Safe Medical Care.

Medical Mutual's request to read six years of Dr. Schlotterer's medical records of non-party patients should be rejected. To permit this broad discovery, even with redaction, would violate the privacy of communications inherent in the physician-patient relationship and chill patients living with HIV from accessing essential health care.

A. Privacy is at the Heart of the Physician-Patient Relationship and Critical to the Provision of Health Care to Patients Living with HIV.

The privacy of communication between patients and their physicians is at the heart of the physician-patient relationship and at the core of the medical profession. Without a guarantee of confidentiality, those in need of health care often delay treatment or avoid it altogether, and those who do seek care withhold information about their symptoms and medical history that may be critical to diagnosis and treatment. As one scholar explained, absent the assurance of confidentiality, "patients will be reluctant to accurately and honestly disclose personal information, or they may avoid seeking care altogether for fear of suffering negative consequences, such as embarrassment, stigma, and discrimination." Janlori Goldman, *Protecting Privacy To Improve Health Care*, Health Affairs, Nov./Dec. 1998 at 47, 48; see also *United States v. Chase* (C.A. 9, 2003), 340 F.3d 978, 990 (en banc) (explaining that candor is essential to the psychotherapist-patient relationship "because patients will be more reluctant to divulge" relevant information if they know that it may be disclosed without their consent). The promise that one's health care provider will not betray confidentiality is so fundamental that patients have come to take it for granted, and can hardly imagine seeking medical care without it. See Robert M. Veatch, *Medical Ethics* (1997), 89.

This need for privacy is particularly acute when a patient seeks medical care to manage and treat HIV. Here the patient is especially vulnerable as he reveals some of the most intimate details of his life. And when a patient seeks HIV and AIDS care, the stakes are even higher than for other health concerns, given the intense politicization, stigma and discrimination often faced by people living with HIV.

Courts have especially struggled with discovery of non-party medical records when the patients were seeking care for a condition that may subject them to social stigma and thus have a heightened interest in preserving the privacy of their medical care. As the District Court for the Northern District of Illinois explained when rejecting a request for the medical records of non-party patients who sought abortions,

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. An 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. Patients would rightly view such disclosure as a significant intrusion on their privacy.

Nat'l Abortion Fed'n v. Ashcroft (N.D. Ill. Feb. 6, 2004), Slip Op. No. 04 C 55, 2004 WL 292079 at *6, *aff'd sub nom. Nw. Mem'l Hosp. v. Ashcroft* (C.A.7, 2004), 362 F.3d 923. The court further noted that “the ability to communicate freely without fear of public disclosure is the key to successful treatment.” *Id.*

Disclosing the health care records of patients seeking sensitive health care undermines patients' trust in their doctors, disrupts the physician-patient relationship, and thereby undermines patients' medical care.

B. People Wishing to be Tested for HIV or Manage Treatment May Not Seek Safe and Timely Medical Care if Their Confidentiality is Not Protected.

The need for privacy in the physician-patient relationship is all the more important to patients seeking medical testing or treatment for HIV. It is therefore all the more urgent to protect the records sought here, as Dr. Schlotterer primarily treats patients living with HIV.

Sadly, HIV diagnosis still carries significant risk of stigma and social repercussions.³ As noted by a recent joint report from the ACLU AIDS Project and Lambda Legal:

Since the onset of the U.S. HIV epidemic in 1981, stigma and discrimination have detrimentally affected people living with HIV (PLWH) in every aspect of their lives – including employment, education, housing, insurance, health care, and relationships with family, friends and sexual partners. This has resulted in harms including the erosion of social support networks, eviction from homes, loss of work, denial of healthcare, social isolation, depression and violence. Confidentiality laws, the Americans with Disabilities Act and state antidiscrimination laws have provided some legal protection and relief against HIV-related discrimination. Further, the introduction of highly active antiretroviral therapy (HAART) in 1996 dramatically increased the life expectancy of

³ Vanable, P.A. *et al.*, “Impact of HIV-Related Stigma on Health Behaviors and Psychological Adjustment among HIV-Positive Men and Women,” *AIDS and Behavior*, 10(5), 473-482 (2006); Schuster, M.A. *et al.*, “Perceived Discrimination in Clinical Care in a Nationally Representative Sample of HIV-Infected Adults Receiving Health Care,” *Journal of General Internal Medicine*, 20, 807-813 (2005); American Civil Liberties Union, “HIV and Civil Rights: A Report from the Frontlines of the HIV/AIDS Epidemic,” 2003, available at http://www.aclu.org/pdfs/hivaids/hiv_civilrights.pdf; Herek, G. *et al.*, “HIV-Related Stigma and Knowledge in the United States: Prevalence and Trends, 1991-1999,” *American Journal of Public Health*, 92(3), 371-377 (2002); Studdert, D., “Charges of Human Immunodeficiency Virus Discrimination in the Workplace: The Americans with Disabilities Act in Action,” *American Journal of Epidemiology*, 156(3), 219-229 (2002); Zierler, S. *et al.*, “Violence Victimization After HIV Infection in a US Probability Sample of Adult Patients in Primary Care,” *American Journal of Public Health*, 90(2), 208-215 (2000); Chesney, M. & Smith, A.W., “Critical Delays in HIV Testing and Care: The Potential Role of Stigma,” *American Behavioral Scientist*, 42(7), 1158-1170 (1999); Herek, G., “AIDS and Stigma,” *American Behavioral Scientist*, 42(7), 1102-1112 (1999); Herek, G. & Capitanio, J., “AIDS Stigma and Sexual Prejudice,” *American Behavioral Scientist*, 42(7), 1126-1143 (1999).

those PLWH with access to care. However, too many PLWH in the United States continue to be harmed by stigma and discrimination.

ACLU AIDS Project and Lambda Legal, "Increasing Access to Voluntary HIV Testing: The Continuing Relevance of Stigma and Discrimination," available online at http://www.aclu.org/images/asset_upload_file532_30250.pdf (last visited on Nov. 2, 2003), at p.3.

Concern about stigma and discrimination must be considered when treating people living with HIV, as noted by the U.S. Centers for Disease Control and Prevention (CDC). Individuals may decline HIV testing due to concerns about "partner violence or potential stigma or discrimination." Centers for Disease Control and Prevention, "Revised Recommendations for HIV Testing of Adults, Adolescents, and Pregnant Women in Health-Care Settings," *MMWR* 55 (RR14), 1-17 (2006) available at <http://www.cdc.gov/mmwr/preview/mmwrhtml/rr5514a1.htm> (hereinafter "CDC, Revised Recommendations"), at 9. Similarly, the CDC cautions against using family or friends as translators when discussing HIV diagnosis due to the risk of stigma or discrimination. *Id.* at 10. In fact, the CDC once went so far as to recommend that HIV positive patients be referred to legal counseling about how to maintain the confidentiality of their diagnosis so as to guard against discrimination. *Id.* at 37.

Much of the stigma attached to HIV stems from prejudices that some associate with groups disproportionately affected, such as gay men or drug users. In order to effectively treat patients living with HIV, doctors must be able to discuss sexual activity and other highly personal matters with their patients as part of their treatment plan. If patients fear that these intimate details will not be kept confidential, patients will neglect to share such information. In

the instant case, whatever the motives of Medical Mutual in asking to view Dr. Schlotterer's full patient records, under no circumstance is Medical Mutual entitled to such intimate personal details as may be contained the full patient files.

Discrimination against people with HIV is a major concern if confidentiality is not strictly respected. Concerns about confidentiality have been identified as a significant reason people avoid HIV testing or treatment in the first place. Kaiser Public Opinion Spotlight, "Attitudes about Stigma and Discrimination Related to HIV/AIDS," 2006, *available at* <http://www.kff.org/spotlight/hivUS/index.cfm>.

"Because HIV stigma and discrimination tragically remain prevalent in today's society, and have a profound psychological impact on people with HIV from the moment of diagnosis, an HIV diagnosis is in no way routine. Health care providers should not treat an HIV test or diagnosis like they would treat other medical conditions such as hypertension, high cholesterol, and cancer. [Doing so].. could cause psychological harm to the patient, damage the patient-provider relationship, and undermine patient trust in the health care system."

ACLU AIDS Project and Lambda Legal, "Increasing Access to Voluntary HIV Testing: The Continuing Relevance of Stigma and Discrimination," available online at http://www.aclu.org/images/asset_upload_file532_30250.pdf (last visited on Nov. 2, 2003), at p.7 (internal citations omitted).

Driving patients away from the health care system by failing to protect their confidentiality has serious repercussions. "[A]t least one recent study has confirmed that a relationship between stigma and treatment nonadherence still exists – with lapses in treatment adherence being associated with more frequent stigmatization and people who missed clinic

appointments more likely to report stigma-related experiences.” Id., citing Vanable *et al.* (2006). The psychological effects of stigma have been found to correlate with “increased treatment nonadherence, suicidal ideation, disease progression and mortality.” Id., Heckman, T.G. *et al.*, “Emotional Distress in Nonmetropolitan Persons Living with HIV Disease Enrolled in a Telephone-Delivered, Coping Improvement Group Intervention,” *Health Psychology*, 23(1), 94-100 (2004) (discussing studies with these findings). These concerns may be especially true for younger patients struggling with HIV. As the Centers for Disease Control and Prevention recently reported, one in four young women ages fourteen to nineteen has at least one sexually transmitted infection (STI). Sara E. Forhan *et al.*, *Prevalence of Sexually Transmitted Infections and Bacterial Vaginosis among Female Adolescents in the United States: Data from the National Health and Nutritional Examination Survey (NHANES) 2003-2004*, in 2008 National STD Prevention Conference, Chicago, Ill. (Mar. 10-13, 2008). Sexually transmitted infections can have long-term, devastating consequences, which can often be avoided or mitigated through timely treatment. *See, e.g.*, Kimberly A. Workowski, *et al.*, *U.S. Centers for Disease Control and Prevention Guidelines for the Treatment of Sexually Transmitted Diseases: An Opportunity to Unify Clinical and Public Health Practice*, 137 *Ann. Intern. Med.* (2002), 255; *see also Aid for Women v. Foulston* (D. Kansas, 2006), 427 F. Supp. 2d 1093, 1108 (finding that mandatory reporting of voluntary sexual activity between minors would result in a “significant decrease in minors seeking care and treatment related to sexual activity” and that “in the long term, forgoing or delaying medical care leads to risks to minors including the worsening of existing medical conditions and the spreading of undiagnosed diseases”), *vacated as moot following amendment of relevant statute* (C.A. 10, Sept. 18, 2007), Order at 3-4; *Protecting Adolescents: Ensuring Access to Care and Reporting Sexual Activity and Abuse*, 35 *J. of Adolescent Health* (2004), 420,

422 (“The long-term consequences of limiting access to health care for sexually active adolescents may include an increase in the prevalence of STIs, a rise in unintended teen pregnancy, and escalation in the number of mental and behavioral health issues, including the potential of partner violence”). Thus, connecting patients to early screening, diagnosis and treatment is crucial, which necessarily means assuring these patients that their health care records will remain confidential.

For reasons such as these, major medical organizations have adopted policies recognizing that confidentiality in care is essential. For instance, in 2004, the American College of Obstetricians and Gynecologists, and American Academy of Pediatrics, American Academy of Family Physicians, and the Society for Adolescent Medicine issued a joint position paper concluding that “[t]he issue of confidentiality of care is a significant access barrier to health care” and how critical it is that patients “who are sexually active receive appropriate confidential health care and counseling.” *Protecting Adolescents: Ensuring Access to Care and Reporting Sexual Activity and Abuse*, 35 J. of Adolescent Health (2004), 420, 422 (Joint Position Paper). The medical groups therefore recommend that “[f]ederal and state laws should support physicians and other health care professionals and their role in providing confidential health care to their ... patients.” *Id.* at 420. The American Medical Association has similarly adopted a policy statement that “confidential care for [patients] is critical to improving their health.” American Medical Association, *Confidential Health Services for Adolescents*, Policy No. H-60.965 (1998), at 1.

The Ohio General Assembly has likewise recognized the need to ensure patients’ privacy in order to promote their access to critical health care. *See, e.g.*, R.C. § 2317.02(B). This is not to say that confidentiality is absolute. In certain cases, limited disclosure to the *government* is

appropriate and required by statute. See R.C. §§ 2317.02(B)(1)(c) and 2317.02(B)(1)(d) (in certain criminal cases), 3701.24 (positive HIV or AIDS test must be reported to the Department of Health). Limited disclosure to private litigants may also be proper on occasion, but the broad and indiscriminate disclosure Plaintiffs seek here, however, would only discourage patients from accessing needed HIV treatment and being entirely forthright with the doctors.

While Plaintiffs seek medical records from one doctor who treats patients living with HIV, the chill of their discovery demand is much broader and may impress upon other patients that their doctor-patient relationship may not be as private as they thought. Such a conclusion could have a detrimental impact on access to honest, accurate medical care much broader than the non-party patients whose records are at issue in this case.

C. Redaction of the Records Will Not Protect Patients' Privacy.

Redaction of the medical records cannot – contrary to Plaintiffs' assertions – protect non-party patients from an invasion of their privacy. “[H]owever redacted” the records of their medical care might be, “[p]atients would rightly view such disclosure as a significant intrusion on their privacy.” *Nat'l Abortion Fed'n*, 2004 WL 292079 at *6.

First, medical records contain a wealth of highly detailed and patient-specific information. Revealing that a patient has, for example, colitis and a history of depression, or Lupus and early onset of menses can reveal her identity to certain parties, even when other information that would obviously identify the patient is redacted. See *Planned Parenthood Fed'n of Am., Inc. v. Ashcroft* (N.D. Cal, Mar. 5, 2004), Slip Op. No. C03-4872 PJH, 2004 WL 432222, at *2 (rejecting argument that “the redaction of names, addresses, birthdates, and other objectively identifying information,” from patients' medical records would adequately protect their privacy because “the records nevertheless contain other potentially identifying information

of an extremely personal and intimate nature”); *Parkson v. Central DuPage Hosp.* (Ill.App. 1982), 435 N.E.2d 140, 144 (finding it “questionable at best” whether the redaction of patients’ names and identifying numbers from hospital records would protect non-party 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”).

As Judge Posner explained when quashing a subpoena for medical records of non-party patients:

Even if all the [patients] whose records the government seeks know what “redacted” means, they are bound to be skeptical that redaction will conceal their identity from the world. . . . Some of these [patients] will be afraid that when their redacted records are made a part of the trial record . . . persons of their acquaintance, or skillful “Googlers,” sifting the information contained in the medical records concerning each patient’s medical and sex history, will put two and two together, “out” the . . . [patients], and thereby expose them to threats, humiliation, and obloquy.

Nw. Mem’l Hosp. v. Ashcroft (C.A. 7, 2004), 362 F.3d 923, 929.

Second, as a practical matter, the process of deciding what material might be personal and should be redacted is subjective. Information that the redactor believes would not permit identification may in fact be identifying to another reader of the same document. Moreover, the very process of redaction, which will require lawyers and their assistants to review entire medical records to determine what information is properly protected, itself results in an invasion of privacy.

Third, courts have recognized that privacy is invaded even if information is revealed that does not cause discovery of a person’s identity. Some information is so private that to disclose it is invasive:

Even if there were no possibility that a patient’s identity might be learned from a redacted medical record, there would be an invasion of privacy. Imagine if nude pictures of a

woman, uploaded to the Internet without her consent though without identifying her by name, were downloaded in a foreign country by people who will never meet her. She would still feel that her privacy had been invaded.

Id. at 929.

Finally, even if redaction could protect the non-party patients from invasion of privacy, disclosing medical records will nonetheless chill patients from seeking health care to manage HIV. It is safe to assume that if the records are disclosed, many patients will understand that all of Dr. Schlotterer's medical records were given to Medical Mutual; they will not understand what it means that those records were "redacted" or will fear (justifiably) that the redacting process itself compromised their privacy, and was insufficient. As one major medical association, the American Academy of Pediatrics, explained, patients are deterred from seeking health care services upon "even a perceived lack of confidentiality in health care regarding sexual issues." American Academy of Pediatrics, *The Adolescent Right to Confidential Care When Considering Abortion*, 97 *Pediatrics* (1996), 746, 749.

Permitting civil discovery of the medical records here would teach patients in Ohio and throughout the country that the confidentiality of their doctor-patient communications – even in areas in which society encourages them to trust in that confidentiality – cannot be guaranteed. HIV patients especially would be put on notice that if they obtain medical care to manage their HIV, their complete medical records may be sought at some future time in civil lawsuits to which they are not even parties. See *Planned Parenthood Fed'n of Am.*, 2004 WL 432222, at *2 (denying motion to compel discovery of medical records of non-party patients because, among other reasons, "allowing disclosure of records will have a chilling effect on communications between patients and providers" and "the potential for injury to the relationship between patient and provider is significant given the providers' pledge of confidentiality").

Because patients living with HIV value the privacy of their health care so highly, if records were disclosed here, some patients might refrain entirely from seeking critical health care, while others would fail to disclose to their health care practitioners full information and details about their medical histories, conditions, and concerns – information without which these practitioners cannot provide care to protect HIV patients, as well as the public health.

Proposition of Law No. II: Patients Have a Constitutional Right to Privacy in Their Medical Records that Is Not Overcome By the Plaintiffs' Interest in Those Records.

Because of the fundamental nature of privacy of communications between health care provider and patient, the United States Constitution protects the medical records from discovery in this case.

The United States Supreme Court long ago recognized two types of privacy interests protected by the Constitution, “the individual interest in avoiding disclosure of personal matters . . . and . . . the interest in independence in making certain kinds of important decisions.” *Whalen v. Roe* (1977), 429 U.S. 589, 599-600; accord *Nixon v. Adm’r of Gen. Servs.* (1977), 433 U.S. 425, 457 (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”); see also *State ex rel. Fisher v. Cleveland*, 109 Ohio St.3d 33, 2006-Ohio-1827, ¶ 24 (applying *Whalen*); *State ex rel. Beacon Journal Publishing Co. v. Akron* (1994), 70 Ohio St.3d 605, 607 (applying *Nixon* and citing *Whalen*); *Lambert v. Hartman* (C.A. 6, 2008) 517 F.3d 433, 440-41 (recognizing a privacy interest under *Whalen* in information regarding sexual matters). Of course, decisions about HIV treatment enjoy protection under both the informational and decisional strands of the right.

The discovery of non-party medical records Medical Mutual seeks here would undermine both the informational and decisional privacy interests identified by *Whalen*. As discussed

above, disclosing the records would deter patients from seeking timely and safe HIV care, interfering with their ability to make decisions about how to manage their treatment and live their lives. See discussion *supra* Part I. Permitting discovery of non-party medical records would also reveal highly “personal matters,” and would thus invade the right to informational privacy.

When considering disclosure of private matters, the right to privacy is balanced against the need for the information. *Whalen*, 429 U.S. at 600, 602. This entails a two-step process: “First must be determined whether a legitimate expectation of privacy exists in the information sought to be disclosed. Second, if the expectation of privacy exists, the benefits to the individual of withholding the information must be weighed against the benefits . . . of disclosure.” *State ex rel. Fisher*, 2006-Ohio-1827 at ¶ 25.⁴

As to step one of the test set out in *Fisher*, there can be no doubt that the non-party patients have a legitimate (and significant) expectation in the privacy of their medical records. Such privacy is at the core of the physician-patient relationship. See *supra* Part I.

Similarly, the United States Court of Appeals for the Sixth Circuit has found a right to privacy in personal information where the individual privacy interest is of a “constitutional dimension,” *Kallstrom v. City of Columbus* (C.A.6, 1998), 136 F.3d 1055, 1061, including where the information is about “sexuality and choices about sex,” because these “are interests of an intimate nature which define significant portions of our personhood.” *Bloch v. Ribar* (C.A. 6,

⁴ The scope of discovery permitted by Civ. R. 26(B)(1) instructs that “[p]arties may obtain discovery regarding any matter, *not privileged*, which is relevant to the subject matter involved in the pending action.” (Emphasis added.) Medical records are admittedly privileged. Disclosure of privileged records is proper only when the information contained therein is necessary to further or protect a countervailing interest that outweighs the privilege. *Richards v. Kerlakian*, 162 Ohio App.3d 823, 2005-Ohio-4414, citing *Biddle v. Warren Gen. Hosp.*(1999), 86 Ohio St.3d 395.

1998), 156 F.3d 673, 685. “The disclosure of private sexual information implicate[s] a ‘fundamental right or one implicit in the concept of ordered liberty’ – namely the fundamental right of privacy in one’s sexual life.” *Lambert*, 517 F.3d at 441, quoting *Bloch*, 156 F.3d at 684, 686. As the Sixth Circuit explained earlier this year, there is a “right to be free from governmental intrusion into matters touching on sexuality and family life,” and to permit disclosure of such personal information “would be to strip away the very essence of . . . personhood.” *Id.* at 441, citing *Bloch*, 156 F.3d at 685.

As to step two of the test set out in *State ex rel. Fisher*, Medical Mutual fails to demonstrate any compelling need for the disclosure that outweighs the non-party patients’ substantial privacy interest in the medical records. As the Eighth District Court of Appeals observed, judicially recognized exceptions to *Biddle* (and, by the same reasoning, *Fisher*) were in cases where “the ‘countervailing interest’ that permitted disclosure concerned the welfare of the patients themselves.” *Medical Mutual v. Schlotterer*, 2008-Ohio-49, ¶ 29. In the instant case, it’s the patients whose rights are in jeopardy from the disclosure. As the Eighth District further observed, “[t]he facts demonstrate that Med Mutual has no concern for the interests of any of the doctor’s patients. Instead, Med Mutual has only its own pecuniary interest, seeking disclosure of privileged matters as a ‘fishing expedition’ in order to conduct an audit of the doctor’s billing practices.” *Id.* at ¶ 32.

For these reasons, other courts have rejected efforts to obtain non-party medical records, and this Court should do the same. *See, e.g., Planned Parenthood of Indiana*, 854 N.E.2d at 879-80 (granting preliminary injunction prohibiting state from accessing medical records, noting “the chilling effect that disclosure of the records would have upon [the] patients, who might be reluctant to continue their relationship with [the provider] if they believed that their unredacted

medical records were subject to disclosure”); *see also King v. State* (Ga., 2000), 535 S.E.2d 492 (holding that patient had right to privacy in her own medical record under the Georgia Constitution and quashing ex parte subpoena seeking medical record for criminal prosecution); *In re Xeller* (Tex. App., 1999), 6 S.W.3d 618 (prohibiting discovery of non-party medical records, among other reasons, on ground that disclosure would violate constitutional privacy right).

Finally, it is important to note the scope of the records requested by Medical Mutual. Unlike the initial request for records for only a handful of Medical Mutual insured patients, the discovery request is far more broad. The request was for ALL patient records, regardless of what billing code was used, over the course of six years. It was not limited, as required under *Richard v. Kerlakian* 162 Ohio App.3d 823, 2005-Ohio-4414, at ¶4.

Given the non-party patients’ profound privacy interest in their medical records and the limited value, at best, of the records to Plaintiffs, the balance tips strongly against disclosure of the records. This Court should not permit discovery that will result in an invasion of privacy and chill HIV patients from seeking timely, high quality health care.

Conclusion

For the reasons set forth above, *Amici* respectfully request that this Court deny Plaintiffs’ request for discovery of non-party medical records.

Respectfully submitted,



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A handwritten signature in black ink, appearing to read 'CLD', written over a horizontal line.

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