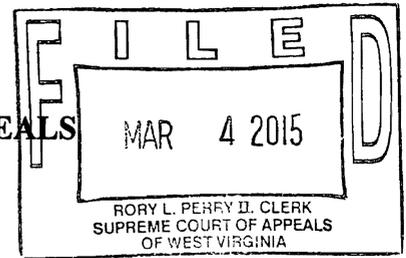


IN THE WEST VIRGINIA SUPREME COURT OF APPEALS
NO. 14-0965



**West Virginia Department of Health and Human Resources,
West Virginia Bureau for Behavioral Health and Health Facilities,
Defendants Below,**

Petitioners

v.

**E.H., et al.,
Plaintiffs Below,**

Respondents.

PETITIONER'S REPLY BRIEF

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INTRODUCTION

At bottom, this case is about Legal Aid advocates' correct role. No one disputes that the Fourteenth Amendment and HIPAA forbid state hospitals from disclosing patients' confidential psychiatric records to unrelated third parties without patients' consent. Rather, the disagreement is about on which side of these privacy protections the advocates fall.

Here, the lower court is attempting to convert a private patient advocate program into a public health oversight board. The lower court held that under HIPAA, Legal Aid can access all patient records because Legal Aid is part of state hospitals or state government as a general auditor for all patients. But Legal Aid is merely an independent private advocate. It represents individual consenting patients and conducts on their behalf limited audits through de-identified files or sample records from consenting patients.

That is why the Fourteenth Amendment and HIPAA prevent the state psychiatric hospitals from turning over *all* patients' files to Legal Aid. The federal constitutional right to privacy precludes sharing a patient's confidential records with an outside entity like Legal Aid that does not need every record. HIPAA likewise forbids state hospitals from disclosing confidential health information to an external advocate like Legal Aid who does not work on behalf of or for the hospitals or as part of state government, and who does not need every record.

ARGUMENT

I. The hospitals cannot turn over all patient records to Legal Aid because Legal Aid is an independent entity with limited advocacy and auditing duties—not part of state hospitals or state government.

Under state law, Legal Aid may access records “pertinent” to its independent advocacy for a consenting patient. Pet. Br. at 3, 27. By state rule, Legal Aid and all “client (or patient or resident) advocates” must be “*independent* of the facility management in every behavioral health facility.” W. Va. Code St. R. § 64-59-20.1 (emphasis added). Independent advocates cannot

access all patient files because they are not part of the hospitals themselves, but may access records “pertinent” to their advocacy. W. Va. Code St. R. § 64-59-20.2.9; Pet. Br. at 27-28. Any information *not* for advocacy for a specific and consenting patient is *not* “pertinent” or releasable under this rule. Pet. Br. at 3, 27, 39.

A. Plaintiffs assert that all advocates can nevertheless access all patient files because the state rules elsewhere provide that “[n]o written consent is necessary for . . . advocates” to access a patient’s records. W. Va. Code St. R. § 64-59-11.5.1.d (emphasis added); Resp. Br. at 5, 37-38. But before obtaining any patient’s records, state rules require an advocate to be assisting the patient and require the patient to consent to advocacy. Pet. Br. at 3, 27-28. The rules contemplate disclosure of records on an individual basis: “[r]ecords shall only be disclosed. . . [t]o providers of health, social, or welfare services involved in caring for or rehabilitating the client. The information shall be kept confidential and used solely for the benefit of the client.” W. Va. Code St. R. § 64-59-11.5.1.d. And the rules state that “[p]rocedures and investigations conducted under this rule shall be conducted with due regard for the confidentiality, rights and dignity of all parties.” *Id.* §64-59-20.2.15. The state rule dispensing with written consent merely allows an individual patient to agree to advocacy orally. Pet. Br. at 3, 28. It does not provide that a patient need never consent before Legal Aid views his or her psychiatric records, nor does it repeal the more specific rule that advocates may only access “pertinent” records to individual advocacy.

B. Plaintiffs alternatively assert that Legal Aid can skirt the rules limiting access to patient records because they have separate authority to perform auditing work for the state. Resp. Br. at 6-8, 10-12, 15, 19, 23, 33-35, 38-43. This auditing, they claim, includes “monitoring and ensuring overall compliance with patient civil rights” at each hospital, making

all records “pertinent” to their work. *Id.* at 4, 39 n.10. But Plaintiffs cite no state law authorizing Legal Aid to be a hospital-wide auditor or monitor. Resp. Br. at 4-5, 7. Nor could they. Legal Aid’s only statutory role is to provide individual representation to consenting patients—the rules provide that “patient advocates *shall assist clients.*” W. Va. Code S. R. § 64-59-20.16.b (emphasis added). Nowhere do the rules charge Legal Aid with oversight or auditing all hospital operations without patient consent.

Plaintiffs contend that advocacy and auditing by Legal Aid are nevertheless part of the hospitals’ “own mission” and “a central part of DHHR’s Behavioral Health Services Plan and legislative rule . . . because the advocacy system furthers the DHHR’s role of providing adequate, appropriate, and meaningful care.” Resp. Br. at 29, 30-31, 33-34. But if the state rules provide that advocacy for individual, consenting patients is Legal Aid’s “independent” mission, any benefit the hospitals receive through the presence of advocates is not enough to make Legal Aid part of state hospitals or government, or empower Legal Aid to monitor all patients.

More importantly, Legal Aid cannot be both independent of and part of the State. Either Legal Aid is private and independent, or it is public and governmental. And Legal Aid is not part of state government. No state law vests Legal Aid with governmental authority. Legal Aid is not subject to direction or control from state hospitals and Legal Aid’s advocacy is not for the hospitals. Nor are Legal Aid’s employees state employees; prior practice was changed to make Legal Aid an independent advocate for patients. State law does not charge Legal Aid with any governmental oversight to audit anything, let alone audit all patients’ files.

C. Plaintiffs next claim that even in the absence of any statutory authority, Legal Aid’s grant agreement makes it an independent advocate for patients and a part of internal governmental auditing operations. Resp. Br. at 1, 4, 7-8, 30, 33-35 & n.8, 37, 40-41. But this

presumes that the hospitals can override state law, rules which provide Legal Aid's mission is independent patient advocacy. The hospitals lack that power.

In any case, the grant agreement's auditing provision is too slim a reed to bear the weight that Plaintiffs put on it. Without elaboration, the agreement states that Legal Aid shall conduct two "audits" of hospitals' legal compliance and report to Plaintiffs, the court, the court monitor, and the hospitals. App. 24, 27. Consistent with Legal Aid's statutory role to assist consenting patients, the grant agreement *also* states that its purpose is to "provide *external* advocacy services to *West Virginians*." App. 7 (emphasis added). The agreement further confirms that Legal Aid is an "independent grantee" without any "principal-agent relationship or employer-employee relationship" with the hospitals or state government. App. 18; Pet. Br. at 3-4, 22, 33.

The grant agreement's terse auditing provision does not make Legal Aid the state hospitals' general auditor or a governmental inspector. Pet. Br. at 13, 18, 22-24, 32-33, 35-37, 41. The agreement does not define what it means by audits. It does not indicate that audits are separate from advocacy. It does not state Legal Aid will audit all patient files and investigate all violations of patient rights. It does not say that Legal Aid's audits (or any other services) are on behalf of *state hospitals* instead of *patients*. It does not specify that auditing requires exercising governmental powers or acting as an arm of state government. And it does not instruct Legal Aid to audit all patient files or disregard the absence of patient consent.

Moreover, if the grant agreement did make Legal Aid a general auditor for state hospitals, either internally or by granting state regulatory power, Legal Aid would no longer be independent of the state. That cannot be reconciled with the language in the grant agreement making Legal Aid an independent grantee. App. 18. Nor can it be reconciled with state law, which only permits Legal Aid to perform advocacy work if it is independent of the state. W. Va.

Code St. R. 64-59-20.1.

Under the state rules, this would disqualify Legal Aid from any advocacy work. Because the purpose of the grant agreement is to fund independent patient advocates, the auditing provision thus could not make Legal Aid an at-large auditor for the state.

The only plausible reading of the grant agreement is instead that Legal Aid can, in the course of advocacy for individual patients, “audit” hospitals on patients’ behalf through a sample of patients agreeing to share their records or through pertinent public or de-identified data. *Cf.* Resp. Br. at 28 (agreeing that the hospitals may “create de-identified information”). And that is how Legal Aid actually conducts audits: through general information and a small sample of consenting patients, not by examining *all* patient files. App. 729, 734. Legal Aid’s 2010 audit, for example, involved “two patients from each unit (for a total of eight to ten).” *Id.*

D. Plaintiffs also assert that the grant agreement’s business associate addendum separately gives Legal Aid governmental oversight authority and access to all patient files. Resp. Br. at 8-9, 33-35. But the addendum does nothing of the kind. Pet. Br. at 6, 13, 19-26. The addendum merely permits access to patient records if HIPAA allows. *Id.* at 6, 24.

Under HIPAA, business associates are entities that provide services on behalf of, to, or for the hospitals, like a hospitals’ lawyer or accountant. The business associate addendum calls Legal Aid a business associate. But the addendum does not identify any services that Legal Aid—which must advocate independently on behalf of patients—provides on behalf of, to or for the hospitals. And so under HIPAA, Legal Aid is not a business associate and cannot access all patient records. The hospitals have no power to make someone a business associate just by labeling them as such when the so-called associate’s defined responsibilities do not otherwise comport with the exception HIPAA provides for bona fide business associates.

And this principle is particularly important in today's regulatory climate, where entities covered under HIPAA frequently use boilerplate designations even where they do not apply. HIPAA requires all covered entities and business associates to enter an agreement, so many organizations enter business associate agreements with every contact just to avoid any chance of "federal enforcement efforts." Paul J. Routh, *Welfare Benefits Guide: Health Plans and Other Employer Sponsored Benefits* § 3:17 (2014). But the fact that parties enter into a business associate agreement does not, in itself, turn either entity into a business associate." *Id.*

E. Plaintiffs next attempt to root a mandate to audit all patient files in the lower court's earlier orders. Resp. Br. at 1, 3-4, 7-9, 11, 34-36, 38-41. But no order includes any mandate so broad for Legal Aid. Pet. Br. at 2-3, 23, 29-30, 32-33, 35, 38-39. The lower court's initial order established an "*external* advocate system" and "contract with an entity *outside* State government" to provide patient advocates; it said nothing about auditing or accessing all patient files. App. 357, 400; Pet. Br. at 2-3, 29-30. And the other orders Plaintiffs cite do not even mention advocates. The August 7, 2009 order deals only with case management services. App. 716-18. The 2009 Agreed Order provides only for periodic review of hospitals' legal compliance without any mention of *who* reviews them. App. 405. The February 2010 order merely finds that the court monitor may access certain patient files without violating HIPAA. App. 428-30.

Nor *could* the lower court empower Legal Aid to audit all patient files, for the same reason that the hospitals could not do so. Pet. Br. at 33. Giving Legal Aid the power to inspect and access all patient records would transcend the limits on auditors provided by state rule, which provide that advocates are to be independent of the state and advocate only for consenting individual patients. Pet. Br. at 3. And for the court in particular to do so would raise a

constitutional problem. Handing Legal Aid this public oversight role would also violate the separation of powers, because the legislature did not approve this authority and no one may delegate executive powers from the Executive Branch to an outside entity unaccountable to the people through elections. Pet. Br. at 33.

Even less could or did the *court monitor*, as Plaintiffs contend, empower Legal Aid to assume governmental oversight powers and access all patient files. Resp. Br. at 3-4, 7, 9, 35, 38; App. 424, 739-48. The court monitor has no powers that the court lacks. And the record shows that the court monitor never attempted to vest Legal Aid with public oversight authority to audit all patient files and care. Pet. Br. at 23, 30. Rather, the court monitor observed problems with “the quality of advocacy services” and documented how Legal Aid conducted *limited* audits. *Id.*; App. 424, 411 (noting that hospitals could object to an overbroad audit).

F. Finally, Plaintiffs claim that the hospitals’ past privacy policies make Legal Aid an auditor for all patients as agents for the hospitals in the hospitals’ internal “health care operations.” Resp. Br. at 31-32, 35. But the hospitals’ prior privacy policy provides that the hospitals may only share *limited files* with advocates. Pet. Br. at 26, 28-29; App. 778-79 (providing that hospitals “may” share patient information “for activities that are necessary to operate this organization. . . . to others who we contract with to provide administrative services. [including] our lawyers, auditors, accreditation services, consultants, and patient advocates”). This policy does not *require* disclosure or equate advocates with auditors. And in any event, even if the hospitals had mistakenly believed that the advocates were agents of the hospitals, they were wrong under state law, and full access violates federal law. Pet. Br. at 7-9; Resp. Br. at 31.

II. The Fourteenth Amendment's right to informational privacy forbids the indiscriminate disclosure of state psychiatric records to a private entity like Legal Aid.

A. No party disputes that the Fourteenth Amendment generally limits state disclosure of private information to an independent entity.

The Fourteenth Amendment's right to informational privacy protects an "individual interest in avoiding disclosure of personal matters," including "information about the state of one's health." Pet. Br. at 14-16. Under this right, a state may only use or share personal psychiatric records if it meets a balancing test that weighs the privacy intrusion against the reasonableness of governmental use and safeguards against disclosure outside the government. Pet. Br. at 16. The key factor under this test is the individual's right to consent before the state discloses private information to entities outside state government. *Id.*

Plaintiffs concede these general constitutional standards. They accept that the Fourteenth Amendment requires state hospitals to protect patient privacy. Resp. Br. at 19 ("agree[ing] that privacy is an important and fundamental right."); *id.* at 22 ("Respondents do not, and have not ever, disputed that a constitutional right to privacy exists for the patients."); *id.* at 23 (not "disputing that the patients committed to the Hospitals have a right to privacy that DHHR must respect and enforce."); *id.* ("The dispute in this case is not whether a right to privacy exists."). Plaintiffs "agree with DHHR's proposition that 'the Fourteenth Amendment's right to informational privacy forbids the indiscriminate disclosure of state psychiatric records.'" *Id.* at 22-23. As Plaintiffs put it, the Fourteenth Amendment requires that "medical records, and psychiatric treatment records in particular, must be maintained with the upmost care and protected from unauthorized public disclosure." *Id.* at 25. Plaintiffs' attempt to distinguish federal cases cited for these general principles is thus misplaced. *Id.* at 23-24.

B. The Fourteenth Amendment governs state disclosure of all psychiatric records to Legal Aid.

Plaintiffs suggest instead that the Fourteenth Amendment is “irrelevant” to state disclosures of psychiatric records to Legal Aid. Resp. Br. at 23 (“This is a question governed by the state and federal laws that have been enacted to ensure that patient privacy is protected, and does not in any way challenge the underlying constitutional right to privacy. Accordingly, this Court must merely decide whether the disclosure of records in this context is permitted under federal and state statutes.”); *id.* at 25 (“[The Fourteenth Amendment] is simply not the issue presented in the instant appeal. Rather, the relevant question here is whether federal and state laws permit the disclosure of patient records to the patient advocates . . . the answer to that question does not involve a constitutional challenge.”).

Plaintiffs’ bald attempt to evade constitutional restrictions cannot withstand scrutiny. There is no “Legal Aid exception” to the Fourteenth Amendment. Pet. Br. at 14-18. The Fourteenth Amendment always governs any disclosure of private information from a government entity to a private entity, even if statutes provide additional safeguards.

Plaintiffs further contend that the Fourteenth Amendment does not apply here because disclosing all patient psychiatric records to Legal Aid is not “the *indiscriminate* disclosure of psychiatric records.” Resp. Br. at 23. But if giving an independent entity access to all state psychiatric records in perpetuity does not constitute indiscriminate disclosure triggering the Fourteenth Amendment, nothing can. Pet. Br. at 16-18.

Plaintiffs next claim that giving Legal Aid all patient records is not *public* disclosure. Resp. Br. at 24-25 (Legal Aid’s “review is conducted in confidence without public disclosure of any protected health information.”). But Plaintiffs mistake the constitutional line between *state possession* of records within state hospitals, which balances one set of interests, and the

disclosure of records *outside state government to an independent entity like Legal Aid*, which involves other interests and is subject to much greater constitutional restrictions. Pet. Br. at 16-18. The Fourteenth Amendment's protections are highest when a private entity outside of state government views confidential psychiatric records. Plaintiffs cite no case to the contrary.

But even if Plaintiffs were right and Legal Aid were an internal part of state government empowered to conduct oversight of all patient files, the Fourteenth Amendment's balancing test would still govern giving patient records to Legal Aid. Pet. Br. at 16. After all, constitutional privacy protections apply not only to disclosures by state hospitals to non-state entities: they also govern the reasonableness of a state's internal collection and use of private information. That is why, for example, the right to privacy would require this Court to scrutinize an attempt to share psychiatric records with the Department of Commerce or the Division of Tourism. So, too, giving all patient records to Legal Aid is subject to the Fourteenth Amendment's balancing test.

C. Under the Fourteenth Amendment's balancing test, patients' rights to privacy outweigh Legal Aid's interest in accessing all patient files.

Here, nothing in the Fourteenth Amendment's balancing test weighs in favor of disclosing all patients' psychiatric records to a non-governmental entity without patient consent. Little can be more private than psychiatric records. Pet. Br. at 16-18. And it is difficult to conceive of a more intrusive invasion of psychiatric patients' privacy than releasing all patient records en masse and in perpetuity. *Id.* at 17-18. What is more, no legitimate interest justifies indiscriminate turnover of patient records to an outside entity—not when Legal Aid can do its advocacy work without accessing every patient's psychiatric records. Legal Aid can speak to patients, observe hospital conditions in person, access records upon patient consent, and use de-identified records. *Id.* at 18. On balance, then, the right to privacy requires respecting a patient's freedom to keep psychiatric files private until he or she chooses to share them with Legal Aid.

In response, Plaintiffs assert that giving Legal Aid all patient records without patient consent satisfies the Fourteenth Amendment’s balancing test because giving files to Legal Aid can “benefit” patients. Resp. Br. at 24. Plaintiffs claim that “the patient advocates’ review of health information is being done for the benefit of the patients whose information is reviewed, either in the context of investigating alleged abuse and neglect, or in assisting a patient with a grievance that the patient has brought to the advocate’s attention.” *Id.*

But the patient should decide if disclosing his or her records would benefit him or her, as the Fourteenth Amendment right to privacy requires. Pet. Br. at 17-18. If disclosure serves a patient’s interest, the patient can allow Legal Aid to examine as many records as he or she wishes. But if the patient disagrees (or the patient’s guardian objects, in the case of an incompetent patient), he or she should be able to prevent disclosure.¹

D. Plaintiffs’ attempts to evade constitutional review are unavailing.

1. Perhaps recognizing that no argument exists under the Fourteenth Amendment in favor of unrestricted access for Legal Aid to all state psychiatric records, Plaintiffs claim that the hospitals abandoned this assignment of error by not raising it at the lower court’s evidentiary hearing. Resp. Br. at 21-22 (“DHHR barely raised the issue before the circuit court, and thereafter abandoned it.”). But this contention lacks merit. Pet. Br. at 16, 54-55.

The hospitals raised patients’ constitutional rights below in writing. Pet. Br. at 54-55; App. 77 (“It is a Violation of Constitutional Law for Advocates to Have Unlimited Access to Patient Records.”); *id.* (“Patients hold this right and the Department cannot, without another law that preempts this Constitutional right, violate it by providing a patient’s private records to third

¹ Plaintiffs further claim that no harm will result from giving Legal Aid every file—by which Plaintiffs mean that disclosure will not “chill” “confidential conversations between patients and their psychotherapists.” Resp. Br. at 24. But no one can know this with any confidence. The hospitals think automatic disclosure to Legal Aid will discourage an open patient-psychiatrist relationship. Pet. Br. at 16-17. And common sense suggests they are right.

parties without the patient's consent.”). Plaintiffs and the lower court in contrast ignored the Fourteenth Amendment. Pet. Br. at 16, 54-55.

What is more, the evidentiary hearing was not an opportunity for legal argument because the hearing was limited to factual testimony. *Id.* at 54-55. The hospitals did not have any opportunity to touch on constitutional issues at the hearing, let alone knowingly abandon their patients' constitutional rights. And both during and after the hearing, the hospitals opposed giving Legal Aid unrestricted access to all patient files. *Id.*

In any event, the state hospitals *cannot* waive patient privacy rights under the Fourteenth Amendment even if they should have repeated their constitutional arguments at the hearing. Pet. Br. at 53-54; App. 77. The Fourteenth Amendment exists to operate as an independent check on state action. And because the state hospitals do not hold patients' privacy rights against state hospital disclosures, it does not permit the state to waive constraints on its own behavior.

2. Plaintiffs also maintain that “consideration of this constitutional issue is not required to resolve this appeal.” Resp. Br. at 19, 22-25. But Plaintiffs mistake the nature of constitutional review. Plaintiffs are right that this Court can forbid disclosure and avoid examining the Fourteenth Amendment *if* disclosing all patient psychiatric records *violates* state law or HIPAA. Resp. Br. at 23 (“If it concludes that such disclosures are not authorized, there is no need to address the alleged constitutional violation.”). Plaintiffs are wrong though to assert that if HIPAA and state law *permit* indiscriminate disclosure of all state psychiatric patients' records, this Court can avoid considering the Fourteenth Amendment. What Plaintiffs really mean is that this Court must hold HIPAA unconstitutional if the Fourteenth Amendment forbids granting Legal Aid access to all patients' psychiatric files. Resp. Br. at 23 (“[T]he only way the constitutional issues would become relevant would be if this Court finds that HIPAA provides

one or more exemptions authorizing the disclosure of protected health information in the narrow context presented in this case, but ruled *sue sponte* that *HIPAA*, or some portion thereof, *violates the Fourteenth Amendment* to the United States Constitution.”) (emphasis added). But Plaintiffs mistake how HIPAA works. HIPAA does not require or authorize disclosure itself: HIPAA merely places an additional federal bar to disclosure by hospitals. Pet. Br. at 18-20. That HIPAA may protect less than the Fourteenth Amendment does not render HIPAA unconstitutional, but rather the underlying state laws or state actions requiring disclosure in violation of the Fourteenth Amendment—such as the lower court’s order here.

III. HIPAA prohibits hospitals from giving all patient records to Legal Aid because nothing exempts Legal Aid from HIPAA’s requirement to obtain patient consent and share only the minimum information necessary.

Like the Fourteenth Amendment, HIPAA requires hospitals to obtain patient consent before disclosing any personal health information to Legal Aid. Pet. Br. at 18-20, 26-27, 30. Legal Aid falls under no exemption to this requirement. *Id.* at 18-39. Legal Aid performs independent, private advocacy and auditing on behalf of and for *patients* against the hospitals—not on behalf of hospitals or state government. *Supra* Pt. I. That is why Legal Aid is *not* a business associate acting on behalf of the hospitals, a public health authority, a governmental health oversight entity, an entity conducting the hospitals own health care operations, or a state entity conducting abuse and neglect investigations. Pet. Br. at 18-39. And even if Legal Aid were to fall under an exemption to HIPAA’s consent requirement, HIPAA still would permit Legal Aid to access only the minimum files necessary.

A. Legal Aid does not fall under HIPAA’s business associate exemption because Legal Aid advocates on behalf of and for patients—not on behalf of state hospitals.

Under HIPAA, a “business associate” acts “[o]n *behalf of*” state hospitals or “[p]rovides . . . services *to or for*” the hospitals. 45 C.F.R. § 160.103 (emphasis added). Plaintiffs assert that

HIPAA's general consent requirement does not apply to Legal Aid because Legal Aid is "engaging in activities related to *furthering* treatment." Resp. Br. at 27, 34-35 (emphasis added). But this misstates HIPAA's standard: a business associate acts *on behalf of the hospitals*, or provide services to or for *the hospitals*, nothing more.

Legal Aid does not fall under this exception because its advocates do not provide services *on behalf of*, to, or *for* the hospitals' own operations. Pet. Br. at 20-26. Legal Aid instead *independently* advocates on behalf of *patients*. *Supra* Pt. I. Its auditing functions do not make it a business associate, because, as Plaintiffs put it, any "systemic auditing and grievances" are "largely irrelevant to the question of whether [Legal Aid] is a business associate of DHHR." Resp. Br. at 35 n. 8. The grant agreement's mislabeling of Legal Aid as a business associate is of no moment because "contracting parties certainly cannot . . . subvert HIPAA through language in their agreements." Resp. Br. at 35 n. 8; *see* Pet. Br. at 24-26. Moreover, while it is true that "DHHR chose [Legal Aid] as the contractee to provide advocacy services" on behalf of patients, Resp. Br. at 27, 34-35, those advocacy services are provided, by state rule, *independently* on behalf of *patients* via independent grant funding.

B. HIPAA preempts all state laws unless an exception applies, but no exception applies to Legal Aid that would allow it to access all patient records.

HIPAA preempts state laws that let entities access patient files without patient consent, unless HIPAA itself excepts the state law from federal preemption. Here, HIPAA and state law are in harmony, because state law does not require state hospitals to give Legal Aid all records. Pet. Br. at 26-30; *supra* Pt. I. Were state law to allow Legal Aid to access all patient records without patient consent, however, HIPAA's consent requirement would preempt the state law, unless Legal Aid falls under a HIPAA exception. Pet. Br. at 30. But Legal Aid falls under no HIPAA exception.

1. Legal Aid is not a HIPAA-exempt public health authority because Legal Aid has no state governmental power over public health.

HIPAA's exception for "*public* health surveillance, investigation, or intervention" does not apply to Legal Aid, a private entity not conducting government activities. 45 C.F.R. § 160.203(c) (emphasis added). Plaintiffs rightly do not defend the lower court's holding otherwise. Pet. Br. at 30-33.

2. Legal Aid does not perform HIPAA-exempt health oversight activities because no state law vests Legal Aid with governmental oversight authority.

For much the same reason as why Legal Aid is not a public health authority, Legal Aid is also not a health oversight agency, that is, a public-empowered entity exercising a grant of governmental authority for the state. Pet. Br. at 33-35; 45 C.F.R. §§ 164.501, 164.512(d). Plaintiffs contend Legal Aid is a health oversight agency because it acts "under contract with DHHR to conduct oversight activities authorized by law—that is, the auditing and complaint resolution activities required by court order and legislative rule." Resp. Br. at 19, 41. But Legal Aid is a private entity, not a public agency, and no state law gives Legal Aid a *public* health oversight role with governmental authority to audit. *Supra* Pt. I.

3. Legal Aid does not fall under HIPAA's exemption for hospitals' internal operations because Legal Aid works independently for patients.

Nor does Legal Aid merit access to all patient files under HIPAA's exemption for disclosure *undertaken by a state hospital* for "*its own* treatment, payment, or health care operations." 45 C.F.R. § 164.506(c)(1) (emphasis added); Pet. Br. at 35-37. Legal Aid is not part of state hospitals and does not deliver the hospitals' own treatment or care. *Supra* Pt. I. Rather, Legal Aid is independent from the hospitals and advocates on behalf of individual, consenting patients by bringing grievances or auditing their files. *Id.*

Plaintiffs again assert that Legal Aid acts on behalf of the hospitals because Legal Aid

acts *in furtherance of* the hospitals' health care operations. Resp. Br. at 27, 34-35. But services by another "in furtherance of" a hospital's operations do not fall under HIPAA's healthcare operations standard. Rather, services *undertaken by a state hospital* for "its own treatment, payment, or health care operations" do. Pet. Br. at 35-37.

Plaintiffs next contend that any accrediting or auditing work qualifies as part of a hospitals' internal operations, but that ignores that HIPAA's exception depends upon the purpose of contracted-for auditing or accrediting. Resp. Br. at 33. *Internal* hospital auditing or accrediting by a contractor for hospitals' internal use falls under HIPAA's exception *for hospitals' own internal purposes*; Legal Aid's *external* auditing *for patients and the court* does not. If Legal Aid's auditing were by hospitals for internal hospital purposes, Legal Aid would no longer be independent and eligible for advocacy. *Supra* Pt. I.A-B.

Plaintiffs also assert that Legal Aid's advocacy counts as hospitals' own "resolution of internal grievances." Resp. Br. at 30-32. But this conflates the hospitals' *resolution* of patient grievances for its own operations with Legal Aid's independent *initiation* of grievances for individual patients. A hospital may share patient files with its own internal employees if the hospital deems it necessary to resolve an internal grievance because its employees are already part of the hospitals' own operations; Legal Aid is independent of these operations, which is why it may not take patient information to conduct external patient advocacy or auditing against the hospitals. Pet. Br. at 35-37. That is why HHS permits employee representatives' incidental access on a need-to-know basis, but not patient representatives' access on any basis under this exception. 65 Fed. Reg. 82,462-01, 82,491 (Dec. 28, 2000).

4. Legal Aid cannot gain access to all patient files under HIPAA's exception for abuse and neglect investigations because state law does not mandate disclosure to Legal Aid, Legal Aid is not a governmental authority, and the exception only permits sharing records of suspected abuse.

Plaintiffs rightly decline to defend the lower court's holding that Legal Aid may access files under HIPAA's exception for reporting abuse or neglect to government. Pet. Br. at 37-38.

5. Legal Aid cannot claim a HIPAA exemption by virtue of this lawsuit because no state law mandates disclosure to Legal Aid and the lower court cannot create its own HIPAA exceptions.

Finally, the lower court cannot override HIPAA on its own say-so. Pet. Br. at 39-40. HIPAA permits disclosure "required by law" "*in the course of* any judicial . . . proceeding" and "[i]n response to an order of a court or administrative tribunal." 45 C.F.R. § 164.512(e)(1) (emphasis added). This disclosure must also rest on separate legal authority, such as a state statute, rule, or prior order "*enforceable in a court of law.*" 65 Fed. Reg. at 82,497 (emphasis added).² Otherwise, this exception could apply whenever a state judge feels like creating its own HIPAA exception. Pet. Br. at 39-40.

Here, the lower court lacks independent authority under state law or prior court order to require disclosure, and so Legal Aid cannot gain day-to-day access to all patient files through this exception. Pet. Br. at 39-40. Plaintiffs contend that state rules and prior court orders provide a legal mandate for disclosure. Resp. Br. at 19, 36-39. But that is not so. *Supra* Pt. I. And even if they did, this exception only applies to disclosures *in the course of* any judicial or administrative proceeding, *not* disclosures to non-litigant advocates on a daily out-of-court basis.

Nor is "auditing" state hospitals through Legal Aid how a court or parties should collect information for litigation. The rules of civil procedure provide ample legal methods of

² HHS's interpretation of these rules in the Federal Register is entitled to deference. *Nat'l Abortion Fed'n v. Ashcroft*, No. 03 CIV. 8695 (RCC), 2004 WL 555701, at *5 (S.D.N.Y. Mar. 19, 2004) ("The Court must defer to HHS's reasonable interpretation of HIPAA.") (citing *Chevron USA, Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 843-44 (1984)).

discovery, with the additional benefit of allowing objecting third-party patients to seek protective orders for overbroad requests. Ultimately, any necessary information should come through discovery or a court monitor's investigation, not by converting a private patient advocate program into a public health oversight board.

C. Even if Legal Aid does not need patient consent to access patient files, HIPAA requires Legal Aid to access only the minimum files necessary, not *all* files.

Under HIPAA, even if the hospitals could give advocates patient files without patient consent, the hospitals still must make reasonable efforts to ensure that Legal Aid only accesses the minimum files necessary. Pet. Br. at 40-41; Resp. Br. at 27-28, 41-42.

Plaintiffs contend that “given the patient advocates’ responsibilities to file grievances and conduct systemic audits, full disclosure of patient records complies with the minimum necessary standard.” Resp. Br. at 19, 41-42. But this mistakes Legal Aid’s role. *Supra* Pt. I. Legal Aid’s advocates do not need to access all patient records to bring a grievance requested by an individual patient or to conduct limited audits on behalf of consenting patients. And hospitals can only verify the advocates’ observance of their limited role through an individual form that indicates the necessary patient documents and certifies that disclosure is necessary because the individual patient has requested an investigation or audit into these matters. Pet. Br. at 40-41.

Plus, even if state law permitted Legal Aid to be a free-range auditor for all patient files, an individual patient may still affirmatively decline to share his or her files with Legal Aid, in which case the advocates cannot access the patient’s information under any HIPAA exemption. Pet. Br. at 41; Resp. Br. at 28.

Plaintiffs also object that HIPAA’s consent and documentation requirements makes Legal Aid tell the hospitals about their investigations. Resp. Br. at 15-17, 44. But that is not true. If the advocates want to investigate hospitals secretly on behalf of a patient, the patient may request

a copy of every file him or herself and then give it to the advocate. *Id.* at 28 (agreeing that an individual may disclose all records).

Plaintiffs also complain of the burdens and delays attributable to obtaining patient consent and documenting each access. Resp. Br. at 2, 14-17, 38, 43-44. But if Plaintiffs dislike HIPAA's privacy protections, they should object to Congress not this Court.

IV. The lower court clearly erred when it found as a factual matter that the hospitals closed off all access for advocates and refused to allow patients to consent to advocacy.

The lower court erred when it found *first*, that the hospitals had forbidden any access to patients in person or to their records, and *second*, that the hospitals would only allow guardians and surrogates, not patients to consent to disclosure. Pet. Br. at 41-45 (citing App. 338-41 (Aug. 27, 2014 Order at ¶¶ 11-12, 13, 18, 20, 22, 24).) The hospitals allow advocates to talk to patients and staff and the hospitals disclose records upon patient consent. *Id.* at 42-44. The hospitals also allow patients, as well as guardians and surrogates, to consent to disclosure. *Id.* at 44-45. Because the lower court's contrary factual findings are clearly incorrect and go to the heart of the on-the-ground situation at the hospitals, they require reversal even aside from the lower court's incorrect conclusions about the federal constitution and HIPAA.

Plaintiffs claim there was no factual error, the hospitals misread the order, and in any event, error would be harmless. Resp. Br. at 45. But the order and record speak for themselves.

V. The lower court appears to have lacked jurisdiction to proceed in this action.

In the past, the hospitals have raised before this court the possibility that the absence of proper parties in the lower court meant that the lower court lacked jurisdiction to proceed. In its opening brief in this appeal, the hospitals noted that Legal Aid is did not appear in this case or present argument about the access it wishes to have to hospital patients' files. Pet. Br. at 9. And in its two later briefs filed in related appeals, Nos. 14-0664, No. 14-0845, the hospitals noted that

on further review, it appeared that Plaintiffs' appellate briefs were written by counsel of record without any actual party client, because all named plaintiffs are deceased and this matter was never certified as a class action.

Plaintiffs' counsel did not respond in any way, and in particular did not show that counsel represents anyone with a live injury in this case. The present adjudication contradicts the general rule that courts do not exercise jurisdiction to resolve the rights of absent third parties. *See State ex rel. Leung v. Sanders*, 213 W. Va. 569, 578, 584 S.E.2d 203, 212 (2003).

In light of the absence of any patient or advocate with a cognizable injury, the lower court may not have had jurisdiction to proceed in this action since the final Plaintiff's death. It therefore would have no power in the first place to enter the orders on appeal or any other orders. This Court thus should vacate all lower court orders since the final Plaintiff's death and remand this case to the lower court with instructions to dismiss the case. *State ex rel. TermNet Merch. Servs., Inc. v. Jordan*, 217 W. Va. 696, 702, 619 S.E.2d 209, 215 (2005).

VI. This Court has jurisdiction.

Jurisdiction exists over this appeal. The lower court's dispositive ruling is appealable because it "approximates a final order in its nature and effect." Pet. Br. at 45-50. The lower court's failure to certify finality, however, provides an additional basis for jurisdiction under Rule 54(b). *Id.* at 50-52. And if the order were non-final, the collateral order doctrine and the importance of these issues would nevertheless each permit review. *Id.* at 52-54.

Plaintiffs fail to offer any arguments to the contrary. Resp. Br. at 19 n. 5.

CONCLUSION

This Court should vacate all lower court orders since the final Plaintiff's death and remand this case to the lower court with instructions to dismiss the case. In the alternative, the lower court should be reversed.

Respectfully submitted,

**WEST VIRGINIA DEPARTMENT OF
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Dated: March 4, 2015

CERTIFICATE OF SERVICE

I, Julie Marie Blake, Assistant Attorney General and counsel for Defendant-Petitioner, verify that on March 4, 2015, I served a copy of *Petitioner's Reply Brief* upon all parties by depositing the same in the United States mail, first class postage prepaid, addressed as follows:

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