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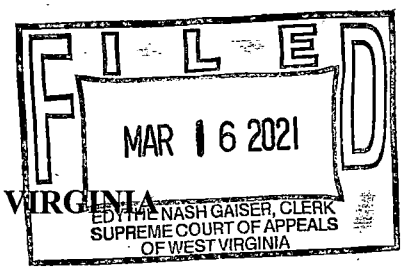

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

STATE OF WEST VIRGINIA EX REL. WEST VIRGINIA UNIVERSITY HOSPITALS – EAST, INC., d/b/a BERKELEY MEDICAL CENTER; CITY HOSPITAL, INC., d/b/a BERKELEY MEDICAL CENTER; THE CHARLES TOWN GENERAL HOSPITAL, d/b/a JEFFERSON MEDICAL CENTER

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Petitioners,

v.

Docket No. 21-0095

THE HONORABLE DAVID M. HAMMER, Judge of the Circuit Court of Jefferson County, West Virginia, Presiding Judge; DEBRA S. WELCH and EUGENE A. ROMAN, individually, and on behalf of all others similarly situated,

Respondents.

RESPONSE IN OPPOSITION TO PETITION FOR WRIT OF PROHIBITION

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I. QUESTIONS PRESENTED

The following questions are taken verbatim from the Petition for Writ of Prohibition presented by West Virginia University Hospitals – East, Inc. d/b/a Berkeley Medical Center; City Hospital, Inc., d/b/a Berkeley Medical Center; The Charles Town General Hospital, d/b/a Jefferson Medical Center ("Petitioners" or collectively as "WVUHE"), and presented here pursuant to West Virginia Rule of Appellate Procedure 16(g):

1. Did the circuit court err when it certified a class of individuals who suffered no injury-in-fact and, therefore, do not have standing to maintain a claim against Petitioners?

Respondents' answer: No. This very issue was resolved in *Tabata v. Charleston Area Med. Ctr., Inc.,* 233 W. Va. 512, 759 S.E.2d 459 (2014). The unlawful access of medically protected information confers standing to the medical data breach victims in this class. Strengthening this proposition, in *Uzuegbunam v. Preczewski*, the US Supreme Court recently recognized "that a plaintiff could always obtain damages even if he 'does not lose a penny by reason of the [violation].'" *Uzuegbunam v. Preczewski*, No. 19-968, 2021 WL 850106, at *4 (U.S. Mar. 8, 2021).

Here, a criminal confessed to improperly accessing the medically protected information of thousands of West Virginians. In *Tabata*, it was unknown if the protected health information of the breach victims was ever accessed. In this case, which is more severe, a federally convicted criminal admitted to accessing protected health information. West Virginians possess the concrete legal right to have their protected health information remain private. The issue of standing has been directly resolved by this Court years ago in *Tabata* and the US Supreme Court similarly resolved it and reinforced that even nominal damages confer standing in *Uzuegbunam v. Preczewski*, No. 19-968, 2021 WL 850106, at *1 (U.S. Mar. 8, 2021).

2. Did the circuit court err when it certified a class action under Rule of Civil Procedure 23 where 98.5% of the proposed class members suffered no breach and sustained no injury?

Respondents' answer: The factual predicate in this question is incorrect, and ignores the standing analysis of *Tabata* and *Uzuegbunam*. The entire class suffered harm by virtue of the improper access of their protected health information as confessed by Ms. Roberts. The Petitioners' internal audit and the deposition of Ms. Roberts confirmed that every member of the certified class suffered improper access of their protected medical information by a confessed criminal. This is why the Petitioners provided form data breach notices to every single victim of the medical breach and even used the word "commonality" in describing the breach.

Like in *Tabata*, all of the class members experience the same "event that gives rise to the claims of the proposed class members which is the disclosure by the respondents of petitioners' personal and medical information." *Tabata v. Charleston Area Med. Ctr., Inc.*, 233 W. Va. 512, 759 S.E.2d 459 (2014). Under the Petitioners' analysis, 0% of the patients in *Tabata* suffered a breach. This is clearly at odds with the WVSCA reasoning that "patients of CAMC, have a legal interest in having their medical information kept confidential. In addition, this legal interest is concrete, particularized, and actual. *Tabata v. Charleston Area Med. Ctr., Inc.*, 233 W. Va. 512, 517, 759 S.E.2d 459, 464 (2014). Again, misapprehending harm and ignoring precedence does not from a legitimate basis for an extraordinary writ.

II. STATEMENT OF THE CASE

The Respondents, Debra S. Welch and Eugene A. Roman, were patients of the Petitioners. From March 1, 2016 through January 17, 2017, a former employee of WVUHE accessed the sensitive and private medical information of approximately seven thousand four hundred and

forty-five (7,445) individuals. (A.R. pp. 1-26, 74-93, 121-208, 362-718, 854-877).[1] WVUHE hired this employee, Angela Roberts, on February 17, 2014 and incorrectly assessed that she was a model employee. (A.R. pp. 1214-1323, 1563-1565). The Petitioners suggest that "this case is about a rogue employee. Angela Roberts, who properly accessed, but occasionally misappropriated, the personal information of WVUE patients." (Writ of Prohibition, pp. 9, line 15-16). Ms. Roberts did not properly access patient files. In fact, Ms. Roberts confessed that each file she accessed was for "Wayne's business," so the suggestion of "proper access" is plainly wrong. (A.R. pp. 1277). WVUHE had no idea, until the discovery by law enforcement, that Ms. Roberts engaged in a criminal conspiracy to steal medical information with Ajarhi "Wayne" Roberts.[2] (A.R. pp. 1-26, 1214-1323). Ms. Roberts and Ajarhi Roberts began dating around March 19, 2016, and shortly thereafter, Ms. Roberts and Ajarhi instituted a criminal plot to steal medical information. (A.R. pp. 1214-1323). For more than eight (8) months, an employee of the Petitioners stole medical data without ever being detected or supervised by her employer, the Petitioners. (A.R. pp. 1214-1323). She confessed to these facts. During Ms. Roberts' deposition on October 7, 2019, she testified that she reviewed **every single medical file** for the purposes of a "real mix of both a business and Wayne's business." (A.R. pp. 1277). She went on to state that all of the records she looked at on a daily basis were looked at for the improper purposes of "Wayne's business." (A.R. pp. 1277). Ms. Roberts, again under sworn testimony, stated she was never supervised by the Petitioners and **could still be accessing files to this day if not for the actions of law enforcement**. (A.R. pp. 1277-1280).

[1] References to the Appendix Record are set forth as "A.R.____."
[2] There is no relation between Ms. Roberts and Mr. Roberts, other than their brief dating relationship.

Respondents also argue that named Plaintiff Roman had a credit card taken out his name by the criminal conspirators confirming that his medical information was improperly accessed. (A.R. pp. 554-718, 854-877, 1412-15632). The notion that there is no evidence supporting that Ms. Roberts wrongfully accessed his information is simply incorrect. Based on her deposition and guilty plea, there is little question that Ms. Roberts was improperly accessing patient information during her criminal conspiracy with Ajarhi Roberts. (A.R. pp. 621-680, 1214-1323) Petitioners clearly do not like the facts of this case, but Petitioner is not entitled to its own facts.

The Petitioners never monitored this employee or figured out that a medical data breach of thousands of patients was undergoing for nearly a year. The Berkeley County Sheriff's Department and the Federal Bureau of Investigations ("FBI") discovered that Ms. Roberts had been stealing patients' sensitive information from the Petitioners. (A.R. pp. 1-26, 121-208, 554-718). During a search of Ajarhi's apartment and investigations into Ajarhi and his schemes, it was discovered that thousands of patients had their information improperly accessed by criminals.

Ultimately, Ms. Roberts was fired. She and Ajarhi were criminally prosecuted and confessed to their crimes. (A.R. pp. 1-26, 621-680, 1214-1323). However, the damage had already been done. Once a person's medical information is improperly accessed, it cannot be unseen. Once a person's medically protected information is accessed for "Wayne's business," privacy rights have been violated. After the Petitioners were advised by law enforcement of the massive medical breach, the DHHS OCR[3] imitated an investigation and thousands of data breach victims were notified that their information was compromised. (A.R. pp. 206-208, 484-486, 711-713)

On or about February 23, 2017, over a month after the Petitioners were made aware of the breach, the Petitioners issued 7,445 data breach notices to patients whose information was accessed

[3] United States Department of Health and Human Services, Office for Civil Rights.

during March 1, 2016 through January 19, 2017 by Ms. Roberts. (A.R. pp. 1-26, 145-164, 362-409, 419-438, 854-877). The Petitioners used the word "commonality" in assessing this data breach incident, and offered the nearly 7,500 victims Kroll credit monitoring services (this was of course regardless of whether or not their information was found in Ajarhi Roberts' possession). (A.R. pp. 118-120, 139-143, 413-417, 444-446, 576-580, 716-718). The fact that Petitioners treated the class members the same, offered the class members the same relief, and used the same form letter to discuss the data breach incident with the victims, each support the circuit court's decision. (A.R. pp. 1-26, 27-48, 74-93, 115-208, 262-718, 854-877).

Ultimately, on August 17, 2020, Respondents filed their Motion and Memorandum for Class Certification. (A.R. pp. 554-713). Extensive briefing was completed on the issue and a hearing was held on September 25, 2020. (A.R. pp. 714-877). Even after the hearing, additional supplemental briefing was completed by both parties. (A.R. pp. 878-1213). The circuit court entered an order maintaining this action as a class on December 23, 2020. (A.R. pp. 1-26).

Later, on January 15, 2021, the parties each filed their motions for summary judgment. (Supp. App. 1577-1637). The motions for summary judgment further reveal that class maintenance is appropriate. For instance, if the Petitioner is correct that it cannot be held vicariously liable for its employees conduct, that would dispose of virtually every claim in this case. The fact that the Petitioners' arguments impact the class members in the same way supports that classwide resolution of the claims is appropriate. On February 9, 2021, Petitioners filed an extraordinary writ challenging already settled law regarding standing. The writ should be denied.

III. SUMMARY ARGUMENT

Ignoring precedence is not a strong basis to award an extraordinary writ. Both *Tabata v. Charleston Area Med. Ctr., Inc.,* 233 W. Va. 512, 759 S.E.2d 459 (2014) and *Uzuegbunam v.*

Preczewski, No. 19-968, 2021 WL 850106, at *1 (U.S. Mar. 8, 2021) dispose of the Petitioners' arguments in this extraordinary writ. Arguing that victims of medical data breaches do not possess standing is contrary to decisions in this Court and recent decisions from the US Supreme Court. Both the *Tabata* Opinion and *Uzuegbunam* recognized that "a request for nominal damages satisfies the redressability element necessary for Article III standing where a plaintiff's claim is based on a completed violation of a legal right." *Uzuegbunam* and *Tabata* provide directly on-point reasoning that reveals the Petitioners' flawed analysis.

Furthermore, this Court thoroughly addressed each of the WVRCP 23 factors in *Tabata* and found that a circuit court's refusal to certify a case involving a less severe medical data breach constituted an abuse of discretion. Petitioners, ignoring precedence, suggest that a circuit court following the law has abused its discretion. Class Certification is not a final judgment from which appeal may be taken, and the facts and circumstances surrounding the Petitioners' challenges of the circuit court ruling on the issue of class certification does not meet the stringent requirements for issuance of the extraordinary remedy of a writ.

More to the point: Following precedence is proper and to rule otherwise is judicial activism. It is the duty of lower courts to follow the law and previous judicial decisions of higher courts. The certification ruling being challenged is consistent with the law of this State as well as very recent US Supreme Court jurisprudence. West Virginians do not have a higher threshold to establish standing than the rest of the Nation and, consistent with *Tabata* and *Uzuegbunam,* there is no basis for the award of an extraordinary writ. As the US Supreme Court very recently recognized:

> The common law did not require a plea for compensatory damages as a prerequisite to an award of nominal damages. **Nominal damages are not purely symbolic. They are instead the damages awarded by default until the plaintiff establishes entitlement to some other form of damages. A single dollar often will not**

> **provide full redress, but the partial remedy satisfies the redressability requirement**. *Church of Scientology of Cal. v. United States*, 506 U.S. 9, 13, 113 S.Ct. 447, 121 L.Ed.2d 313 (1992).

Uzuegbunam v. Preczewski, No. 19-968, 2021 WL 850106, at *2 (U.S. Mar. 8, 2021) (emphasis added). The core principle of *stare decisis* in following legal precedent is fundamental for a unified and predictable system of deciding legal matters. The circuit court simply followed precedent. The extraordinary writ should be denied.

IV. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Pursuant to West Virginia Rule of Appellate Procedure 16(d)(6), the Petition for Writ of Prohibition should be denied without oral argument as this Court and the US Supreme Court have seen the questions presented in this case before and have provided rulings that already address the matters at issue.

The Petitioners assert in their statement regarding oral argument that this writ "involves an increasingly litigated question in class action law and an issue of first impression in West Virginia." (Writ of Prohibition, p. 11, lines 5-6). This is untrue. In fact, the questions at issue in this writ were addressed in 2014 by this Court in *Tabata*. Medical data breaches are not an issue of "first impression" for this Court.

V. ARGUMENT

A. The legal authorities from the WVSCA and the US Supreme Court do not support Petitioners' standing arguments made in context of this extraordinary writ

The Petitioners' arguments are directly at conflict with rulings from the WVSCA and the US Supreme Court, recognizing that "[t]he prevailing rule at common law was that a party whose rights are invaded can always recover nominal damages without furnishing evidence of actual damage." *Uzuegbunam v. Preczewski*, No. 19-968, 2021 WL 850106, at *1 (U.S. Mar. 8, 2021). Indeed, Petitioners' entire discussion on standing, ignores this Court's analysis in *Tabata* where

the WVSCA ruled in the context of a less severe data breach that "**the petitioners and the proposed class members have standing...**" *Tabata v. Charleston Area Med. Ctr., Inc.*, 233 W. Va. 512, 517, 759 S.E.2d 459, 464 (2014)(emphasis added). In sum, the extraordinary writ brings a standing challenge that is already a settled question, by both this Court and the US Supreme Court, and there is no basis to award an extraordinary remedy simply because the circuit court followed precedential case law.

In *Uzuegbunam*, the US Supreme Court reaffirmed the principle that "the common law avoided the oddity of privileging small-dollar economic rights over important, but not easily quantifiable, nonpecuniary rights." *Uzuegbunam v. Preczewski*, No. 19-968, 2021 WL 850106, at *5 (U.S. Mar. 8, 2021). The plaintiff if that case, Mr. Uzuegbunam, is an evangelical Christian that believed an important part of exercising his religion included sharing his faith. After attempting to share his faith on his college campus, Mr. Uzeugbunam was threatened with disciplinary action. He then brought legal action against a number of college officials in charge of enforcing the college's speech policies, arguing that those policies violated his First Amendment rights. The college officials abandoned the challenged policies and then moved to dismiss, arguing that with the policy change Mr. Uzeugbunam no longer possessed standing because he suffered no pecuniary losses. The District Court dismissed the case, holding that the Mr. Uzeugbunam's claim for nominal damages was insufficient to establish standing. The Eleventh Circuit affirmed and stated because the students did not request compensatory damages, their plea for nominal damages could not by itself establish standing. The US Supreme Court recently reversed reasoning as follows:

> Later courts, however, reasoned that every legal injury necessarily causes damage, so they awarded nominal damages absent evidence of other damages (such as compensatory, statutory, or punitive damages), and they did so where there was no apparent continuing or threatened injury for nominal damages to redress. *See, e.g.,*

> *Barker* v. *Green*, 2 Bing. 317, 130 Eng. Rep. 327 (C. P. 1824) (nominal damages awarded for 1-day delay in arrest because "if there was a breach of duty the law would presume some damage"); *Hatch* v. *Lewis*, 2 F. & F. 467, 479, 485–486, 175 Eng. Rep. 1145, 1150, 1153 (N. P. 1861) (ineffective assistance by criminal defense attorney that does not prejudice the client); *Dods* v. *Evans*, 15 C. B. N. S. 621, 624, 627, 143 Eng. Rep. 929, 930–931 (C. P. 1864) (breach of contract); *Marzetti* v. *Williams*, 1 B. & Ad. 415, 417–418, 423–428, 109 Eng. Rep. 842, 843, 845–847 (K. B. 1830) (bank's 1-day delay in paying on a check); *id.*, at 424, 109 Eng. Rep., at 845 (recognizing that breach of contract could create a continuing injury but determining that the fact of breach of contract by itself justified nominal damages).

Uzuegbunam v. Preczewski, No. 19-968, 2021 WL 850106, at *4 (U.S. Mar. 8, 2021). The US Supreme Court ruled that when a legal right is violated, such as freedom of religion, a litigant still possesses standing. Finding otherwise would bar the courthouse doors to victims suffering religious discrimination, trespass, invasions of privacy, and breach of confidentiality. These claims rarely, if ever, involve an out-of-pocket pecuniary loss that the Petitioners argue *must* exists to confer standing. Violations of religious rights, speech rights, privacy rights, and many other common law rights simply do not require actual out of pocket loss (or identify theft) to confer standing, as the Petitioners argue.

This recognized the same principles as the US Supreme Court when it ruled that "[a]pplication of our law to the facts of this case indicates that the **petitioners have standing to bring a cause of action for invasion of privacy. The petitioners and proposed class members have a legal interest in privacy which is concrete, particularized, and actual.** *Tabata v. Charleston Area Med. Ctr.*, Inc., 233 W. Va. 512, 517–18, 759 S.E.2d 459, 464–65 (2014)(emphasis added). The *Tabata* ruling, from years ago, recognized that people possess important legal interest in securing privacy.

The Petitioner's arguments outright ignore that violations of religious rights and privacy rights often times do not involve direct pecuniary losses. These rights, however, are no less important than disputes involving millions of dollars. Victims in cases involving religious and

privacy rights are certainly not barred from the courtrooms of this Nation. *Uzuegbunam v. Preczewski*, No. 19-968, 2021 WL 850106, at *5 (U.S. Mar. 8, 2021)(Finding that "A contrary rule would have meant, in many cases, that there was no remedy at all for those rights, such as due process or voting rights, that were not readily reducible to monetary valuation."). In syllabus point 1 of *Roach v. Harper*, 143 W.Va. 869, 105 S.E.2d 564 (1958), this Court again held that "[t]he right of privacy, including the right of an individual to be let alone and to keep secret his private communications, conversations and affairs, is a right the unwarranted invasion or violation of **which gives rise to a common law right of action for damages.**" *Tabata v. Charleston Area Med. Ctr., Inc.*, 233 W. Va. 512, 517, 759 S.E.2d 459, 464 (2014)(emphasis added). The reasoning in *Roach* mirrors the recent US Supreme Court Opinion that recognizes it is "well established at common law...that a party whose rights are invaded can always recover nominal damages without furnishing any evidence of actual damage." *Uzuegbunam v. Preczewski*, No. 19-968, 2021 WL 850106, at *5 (U.S. Mar. 8, 2021).

This is a case where the circuit court followed well-settled law principles regarding privacy and common law rights of West Virginians. The seminal case law on medical data breaches, along with WVRCP 23, support the circuit court's ruling in this matter. The WVSCA has had occasion to address the issue of class certification multiple times, including specifically in the medical data breach context. *Tabata v. Charleston Area Med. Ctr., Inc.*, 233 W. Va. 512, 759 S.E.2d 459 (2014). In *Tabata*, this Court analyzed each of the WVRCP 23 factors and, in assessing each factor, came to the same conclusion: Medical data breach cases, such as the one at hand, can appropriately be maintained as a class. The *Tabata* ruling is particularly instructive as it addresses each of the WVRCP 23 factors and ruled that class action treatment of medical data breaches, such as this case, is appropriate. The Petitioners do not address *Tabata* until page 17 of their brief. Burying the

most on-point legal authority on medical data breaches does not change the fact that this Court analyzed this issue years ago, and much like the recent authority of *Uzuegbunam*, this Court found that standing existed. In fact, *Tabata* directly addressed the standing arguments of Petitioners and found that "[a]pplication of our law to the facts of this case indicates that the Respondents **have standing** to bring a cause of action for invasion of privacy. The Respondents and proposed class members have a legal interest in privacy which is concrete, particularized, and actual." *Tabata v. Charleston Area Med. Ctr.*, Inc., 233 W. Va. 512, 517–18, 759 S.E.2d 459, 464–65 (2014)(emphasis added).

The Respondents in this case, medical data breach victims, brought this action on behalf of themselves and for the thousands of victims whose sensitive information was breached, accessed, and exposed in a criminal conspiracy lasting from March 1, 2016 through January 17, 2017, which is when the FBI informed Petitioners of the incident. (A.R. pp. 118-120, 139-143, 145-164, 413-438, 444-446, 579-601, 621-680, 682-685, 716-718). The circuit court employed a careful[4] analysis on the issue of class certification. In its class certification order, the circuit court recognized that:

> ... class certification decisions are not "perfunctory." *State ex rel. W. Virginia Univ. Hosps., Inc. v. Gaujot*, 242 W. Va. at 62, 829 S.E.2d at 62 (2019). In ruling on a motion for class certification, "[t]he circuit court must give careful consideration to whether the party has met the burden [and] '[a] class action may only be certified if the trial court is satisfied, after a thorough analysis, that the prerequisites of Rule 23(a) of the West Virginia Rules of Civil Procedure have been satisfied." *Id.*

[4] If this Court determines that a more exacting analysis is required regarding certification, granting the contemporaneously filed motion for remand would be far the more efficient manner of handling that issue as this Court recently developed the law on predominance in *State ex rel. Surnaik Holdings of WV, LLC v. Bedell,* No. 19-1006, 2020 WL 7223178 (W. Va. Nov. 20, 2020).

Class Certification Order, (A.R. pp. 9 at ¶ 33). In addition to following clear precedence of *Tabata*, the circuit court conducted a thorough analysis that weighed each of the WVRCP 23 factors and reasoned as follows:

> The Defendants themselves used the "commonality" language when discussing this data breach among fellow employees shortly after the breach became known.

Class Certification Order, (A.R. pp. 12 at ¶ 49).

> The Defendant's argument further provides evidence that class treatment is proper in this case. The Defendant's analysis in *State ex rel. W. Virginia Univ. Hosps., Inc. v. Gaujot* supports certification because the resolution of legal issues such as standing, breach of contract, and negligent supervision, would resolve more than seven thousand (7,000) claims at a time.

Class Certification Order, (A.R. pp. 14 at ¶ 58).

> In this case, all of the class members' claims arise from the same or similar alleged breach of privacy from the same employee of Defendant.

Class Certification Order, (A.R. pp. 19 at ¶ 86).

> The central question in deciding predominance is "whether adjudication of the common issues in the particular suit has important and desirable advantages of judicial economy compared to all other issues, or when viewed by themselves." *Id.* (quoting 2 *Newberg on Class Actions*, 4th Ed., § 4.25 at 174). Judicial economy would not be supported by nearly seven thousand five hundred different trials, with the same evidence being presented seven thousand five hundred times, the same employee testifying almost seven thousand five hundred separate times, all across the State of West Virginia in different courtrooms with different judges. Clearly, judicial economy is not supported by such a scenario.

Class Certification Order, (A.R. pp. 23 at ¶ 115).

> The questions of fact and law predominate in this matter because this case involves the same employee who received the same training, the same allegations of failed supervision, the breach of all seven thousand four hundred and forty-four (7,445) individual's records using the same computer system, all maintained by the Defendant and, finally, all the individuals present the same legal questions.

Class Certification Order, (A.R. pp. 24 at ¶ 117). The circuit court simply recognized that class maintenance is proper in cases involving the improper medical breach of thousands of individuals.

The Petitioners' own documents and internal communications admit that "the former employee accessed the personal information of 7,445 patients of BMC and Jefferson Medical Center." (A.R. 145-164, 419-438, 582-601). The Petitioners themselves have also admitted to 109 victims of identity theft, of which named Respondent, Mr. Roman is included. (A.R. 682-6085). *See* also, (Supp. App. pp. 1638-1642). It is remarkable that even the Petitioners have used the word "commonality" to describe this breach. (A.R. 118-120, 444-446, 716-718). This is the only class action that undersigned counsel has filed where **even the Defendants have utilized Rule 23 language in discussing the facts**, which bolsters the point that this case easily meets the commonality factor of West Virginia Rule of Civil Procedure 23(a)(2) and the matter should be certified. Also, in this document, Petitioners stated "[w]e are searching for access by the **same individual, same department, and same location.**" (A.R. 118-120, 444-446, 716-718). The Petitioners repeated use of the word "same," as well as the Petitioners use of the exact word at issue in Rule 23(a)(2), "commonality," are each strong indicators that even the Petitioners recognized the common fact predicate resulting in the instant case. As the Petitioners noted, this is a case involving improper access by the "same individual, in the same department, and same location." (A.R. 118-120, 444-446, 716-718).

The medical data breach victims in this case share the undeniable and *common* facts that the same confessed criminal accessed their sensitive information, that each victim was a patient of the Petitioners, that the Petitioners did not discover this breach until the FBI told them, and, finally, that the Petitioners issued the same data breach notices to thousands of victims confessing that a "former employee accessed the information of 7,445 patients of BMC and Jefferson Medical Center." (A.R. 145-164, 419-438, 582-601). The class representatives in the instant case share identical legal claims with the other class members. Ms. Welch and Mr. Roman are victims of the

Petitioners and they were subjected to the same and repeated medical information breaching conduct, by the very same third-party employee as the rest of the putative class members. Ms. Welch and Mr. Roman seek the very same claims and brings forth the same legal theories as the rest of the class so it is easily confirmed that these claims are sufficiently typical to satisfy the typicality component.

Furthermore, the Petitioners' arguments actually demonstrate that class treatment of this case is proper: If Petitioners cannot be held liable for its employee's conduct, as the Petitioners have argued, then the resolution of this question is of "such a nature that it is capable of class wide resolution." *State ex rel. W. Va. Univ. Hosps., Inc. v. Gaujot*, 242 W. Va. 54, 829 S.E.2d 54 (2019). So, even the arguments of Petitioners, misapprehending the harm in this case, supports certification. The analysis in *Gaujot* supports certification because the resolution of legal issues such as standing and negligent supervision would resolve thousands of claims at a time.

B. In opposing certification before the circuit court, Petitioners argued against the wrong class definition

The Petitioners' brief opposing certification argued against the incorrect class definition before the circuit court. (A.R. pp. 719-853). Arguing against a class definition that is not even at issue is clearly important in assessing whether or not to maintain a case pursuant to WVRCP 23. The class proposed for certification was defined as:

> All West Virginia citizens **whose personal information was accessed in the data breach** identified by the Defendant it its February 23, 2017 correspondence to Debra Welch.[5]

Conversely, the Petitioners made its argument challenging certification based upon an entirely differently class definition:

[5] (A.R. pp. 82).

> Plaintiffs' class is defined as "[a]ll West Virginia citizens **whose personal information was stolen in the data breach** identified by the Defendant in its February 23, 2017 correspondence to Debra Welch." However, not every one of the seven thousand four hundred and forty-five individuals whose data was accessed by Ms. Roberts during her time employed by Defendants **had their personal information actually stolen.**[6]

There is a critical difference between **accessed** information and **stolen** information. If the class had been defined as all those individuals that had their information stolen, the extraordinary writ actually makes more sense. However, the class definition includes "West Virginia citizens whose personal information was accessed in the data breach." (A.R. pp. 82). The circuit court, in conducting its analysis, noted that the incorrect definition was argued before it and reasoned:

> The proposed class definition is:
>
> All West Virginia citizens **whose personal information as accessed in the data breach** identified by the Defendant in its February 23, 2017 correspondence to Debra Welch.
>
> In the brief opposing certification, the defendant challenged certification based upon a different class definition:
>
> Plaintiffs' class is defined as "[a]ll West Virginia citizens **whose personal information was stolen in the data breach** identified by the Defendant in its February 23, 2017 correspondence to Debra Welch." However, not every one of the seven thousand four hundred and forty-five individuals whose data was accessed by Ms. Roberts during her time employed by Defendants **had their personal information actually stolen.**

Class Certification Order, (A.R. pp. 7 at ¶ 24). **The fact that Petitioners argued against the wrong class definition before the circuit court is important to consider in this writ.** The WVSCA is not a parachute to rescue litigants from incorrect arguments made at the circuit court. Arguing against the wrong class definition certainly impacted the reasoning of the circuit court as it reasoned:

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[6] (A.R. pp. 736-737)

> **The nuance in the class definition is important in considering defendant's arguments regarding individualized damages and in assessing if certification is appropriate.** A class definition that includes individuals with medical information "accessed" is not the same as a class that is defined as individuals that were victims of identity theft.

Class Certification Order, (A.R. pp. 26 at endnote 3)(emphasis added). In sum, the class which was challenged by the Petitioners was not even the class proposed for certification. This matters not only for obvious reasons, but also because the seminal case on medical breaches, *Tabata*, **does not require that data be stolen**. The defendant opposes an identity theft class, but the Respondents sought certification for those whose information was accessed, which is perfectly consistent with well-settled WVSCA and US Supreme Court case law.

C. The Petitioners clearly misapprehend the harms at issue in this case and continue to improperly focus on identity theft

This Court has already recognized the very harm and risks of harm at issue with the disclosure of confidential health information in *Tabata v. Charleston Area Med. Ctr., Inc.*, 759 S.E.2d 459 (W. Va. 2014); *see also Barber v. Camden Clark Mem'l Hosp. Corp.*, 815 S.E.2d 474 474 (2018)(Finding that "a hospital's compliance with the Medical Records Act, West Virginia Code §§ 55-7-4a through-4j (1981), and the Health Insurance Portability and Accountability Act of 1996...does not preclude an action bason the wrongful disclosure of confidential information..."). In *Tabata*, this Court held that when West Virginians suffer the type of injuries as the Respondents in this case, those victims legally possess actionable claims and suffered harm as a result of an invasion of the legally protected right to have medical information remain confidential and protected.[7]

[7] This is because Article III standing is a low threshold and Respondents need only demonstrate: (1) they have suffered an injury in fact, (2) their injuries are fairly traceable to the conduct challenged, and (3) it is likely the injuries will be redressed by a favorable decision. *Id.* at 1323; *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). Respondents' allegations easily satisfy this standard. In addition to this Court in *Tabata*, the United States Supreme Court has rejected the argument that an injury must be significant. *Com.*

Accordingly, it is well-settled law in West Virginia, and elsewhere for that matter, that any argument suggesting the requirement of economic loss or identify theft constitutes a clear legal fallacy. *Tabata* and *Uzuegbunam* provide thorough reasoning that stands in stark contrast to the several pages of Petitioners' flawed analysis contending the Respondents do not possess standing. This argument of Petitioners relies upon the verifiably wrong legal conclusion that identify theft and economic injury are required to sustain medical data breach claims. Courts across the Nation and this Court in *Tabata* all uniformly recognize that identify theft and economic harm are not required to sustain claims as a result of a breach of confidential information. Indeed, this Court specifically noted "economic injury" was not required when it ruled as follows:

> Simply put, all of the proposed class members are in the same position. Their causes of action are the same and they arise from the same event. **Also, there is no evidence of unauthorized access of their personal and medical information, no evidence of actual identity theft, and no evidence of economic injury arising from the alleged wrongdoing. Rather, all of the proposed class members allege that their interests in confidentiality and privacy have been wrongfully invaded by the respondents.**

Tabata v. Charleston Area Med. Ctr., Inc., 233 W. Va. 512, 520 (2014)(emphasis added).

So, this Court already rejected the precise argument of Petitioners in the above analysis with respect to a medical data breach incident. This Court also explained why an invasion of privacy claim is absolutely proper in the context of a medical data breach:

> In addition, the petitioners allege a cause of action for invasion of privacy. In syllabus point 1 of *Roach v. Harper*, 143 W. Va. 869, 105 S.E.2d 564 (1958), this Court held that "[t]he right of privacy, including the right of an individual to be let alone and to keep secret his private communications, conversations and affairs, is a right that unwarranted invasion or violation of which gives rise to a common law right of action for damages." Significantly, in syllabus point 2 of *Roach*, this Court held that "[a] declaration in an action for damages founded on an invasion of the right of privacy, to be sufficient on demurrer, need not allege that special damages

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Cause/Georgia v. Billups, 554 F.3d 1340, 1351 (11th Cir. 2009) (citing *U.S. v. Students Challenging Regulatory Agency Procedures*, 412 U.S. 669, 689 n. 14 (1973)). In fact, a small injury, even an identifiable trifle, 'is sufficient to confer standing.' *Id.* Put simply, a plaintiff has standing so long as he or she has been aggrieved in such a way that there is a direct state.

> resulted from the invasion." More recently, this Court has held that "[a]n 'invasion of privacy' includes (1) an unreasonable intrusion upon the seclusion of another; (2) an appropriation of another's name or likeness; (3) unreasonable publicity given to another's private life; and (4) publicity that unreasonably places another in a false light before the public." Syl. Pt. 8, *Crump v. Beckley Newspapers, Inc.*, 173 W. Va. 699, 320 S.E.2d 70 (1984). Finally, we indicted in syllabus point 2 of *Cordle v. Gen. Hugh Mercer Corp.*, 174 W. Va. 321, 325 S.E.2d 111 (1984), that "[i]n West Virginia, a legally protected interest in privacy is recognized. *Roach v. Harper*, 143 W. Va. 869, 105 S.E.2d 564 (1958)."

Tabata, 233 W. Va. at 517-18. There is quite clearly no requirement for identity theft[8] or economic injury to sustain claims in a medical data breach case. WVUHE makes the flawed argument that there is no evidence that Plaintiffs' private medical information was ever published. First of all, publication to a third party is not required as *Tabata* reasoned "**there is no evidence of unauthorized access of their personal and medical information**" and this Court still found standing. *Tabata v. Charleston Area Med. Ctr., Inc.*, 233 W. Va. 512, 520 (2014). Secondly, the Petitioners argument is incorrect because in this case publication to a nefarious party unquestionably exists. Again, this breach is far more severe than *Tabata* (where this Court found standing) because there was no evidence of unauthorized access in the *Tabata* case. Here, it is known that improper access already occurred based on the internal audit and available deposition testimony.

Because of Angela Roberts' confession that she accessed the records for "Wayne's business," there is no question that Respondents' information was in fact improperly accessed. (A.R. pp. 1277). Moreover, numerous other courts have found that "Article III does not require Plaintiffs to wait for their identities to be stolen before seeking legal recourse." *Sackin v. TransPerfect Global, Inc.*, No. 17-c-1469, 2017 WL 4444624, at *2 (S.D.N.Y. Oct. 4, 2017), citing

[8] Although not required, the identities of more than 100 of Petitioners' patients was found in the apartment of a confessed criminal conspirator. (Supp. App. 1638-1642).

Attias v. Carefirst, Inc., 865 F.3d 620, at 629–30 (D.C. Cir. 2017); *Remijas v. Neiman Marcus Group*, 794 F.3d 688 at 695 (same); *Galaria v. Nationwide Mut. Ins.*, 663 Fed. Appx. 384, 388 (6th Cir. 2016) (same); *Anderson v. Hannaford Bros. Co.*, 659 F.3d 151, 164 (1st Cir. 2011) (same). The same reasoning applies here, each class member possesses a legal interest in the ongoing protection of their confidential medical information.

Standing is defined as "[a] party's right to make a legal claim or seek judicial enforcement of a duty or right." *Findley v. State Farm Mut. Auto Ins. Co.*, 213 W. Va. 80, 576 S.E.2d 807 (2002). "Standing is comprised of three elements: First, the party attempting to establish standing must have suffered an 'injury-in-fact'—an invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent and not conjectural or hypothetical. Second, there must be a causal connection between the injury and the conduct forming the basis of the lawsuit. Third, it must be likely that the injury will be redressed through a favorable decision of the court." Syl. pt. 5, *Findley v. State Farm Mut. Auto. Ins. Co.*, 213 W.Va. 80, 576 S.E.2d 807 (2002). First, Respondents have a "concrete and particularized" claim for breach of confidentiality. Each of the 7,445 class members had their personal medical information looked at not just for a 'business need,' but for "Wayne's business need." (A.R. pp. 1277). The claims in this case all result from the same incident, the improper access of medically protected information by Ms. Roberts from March 1, 2017 through January 17, 2017 when she was engaged in a confessed criminal conspiracy. (A.R. pp. 1-48, 74-93, 115-208, 362-718, 854-877, 1214-1562). This case is clearly more efficiently and effectively handled pursuant to WVRCP 23. The circuit court's rulings moving forward will avoid inconsistent and varying adjudications that could occur more than seven thousand times if this matter is handled on a one-by-one basis.

Additionally, it is important to note that class actions exist for scenarios that involve smaller damage paradigms. *In re W. Virginia Rezulin Litig.*, 214 W. Va. 52, 67, 585 S.E.2d 52, 67 (2003), further clarified Rule 23(b)(3)'s superiority requirement in *Perrine v. E.I. duPont de Nemours and Co.*, 225 W. Va. 482, 527 (2010) by noting that "[f]actors that have proven relevant in the superiority determination include the size of the class, anticipated recovery, fairness, efficiency, complexity of the issues and social concerns involved in the case." (internal citation omitted). Ultimately, the Court in *Perrine* upheld the trial court's determination that a "[c]lass action is superior to other methods of adjudicating Plaintiffs' claims. Litigation common issues is far superior to thousands of individual claims." *Id.* The same ruling that a class action is a superior method of adjudicating the claims of the class is warranted here because "litigation common issues is far superior to thousands of individual claims." *Id.* Each of the medical data breach victims claims for nominal damages further support that class action maintenance is the preferable method for managing this case.

i. Ms. Roberts confessed to improperly accessing 100% of the protected medical information of the class members

Respondents, Ms. Welch and Mr. Roman, alleged their right to confidentiality was breached, as well as the class members' rights, as a result of Petitioners' conduct. Patients of Petitioners had a legal interest in keeping their information confidential and as such "this legal interest is concrete, particularized, and actual." *Tabata v. Charleston Area Med. Ctr., Inc.*, 233 W. Va. 512, 759 S.E.2d 459 (2014).

Despite the Petitioners arguments, no one is arguing that lawful access supports a class action. What *is* argued is that Petitioners permitted, for nearly a year, unlawful access by a confessed criminal. If a jury believes the Respondents regarding the **fact dispute** of lawful access, that will resolve numerous claims at a time, which supports class maintenance. However, if the

Petitioners believe the evidence as put forth by Respondents, then each class member is entitled to, at a minimum, nominal damages. *Uzuegbunam v. Preczewski*, No. 19-968, 2021 WL 850106, (U.S. Mar. 8, 2021). The guilty pleas of the co-conspirators, list of patient names found in Wayne's apartment, deposition testimony regarding "Wayne's business," all support that Ms. Roberts access was nowhere near "lawful" as the Petitioners have argued. (A.R. pp. 621-680, 1214-1323). WVUHE argues that Ms. Roberts did her job as she was hired to do and only "occasionally" wrote down information of patients to give to Mr. Roberts. However, during her sworn deposition, she testified as follows:

> Q: Okay. Now is it fair for us to think and believe that even though you looked at everybody's records for the legitimate purpose, the business purpose, and that s to do the scheduling or preauthorization, that you were also looking at those records at the same time for an illegitimate business purpose and that is to take names and addresses and Social Security numbers for Wayne?
>
> A: Yes, if there was enough complete information.
>
> ....
>
> Q: Yes. Was there ever an occasion where you wrote down names, a significant amount of names and then just said hey, I'm not going to give these to Wayne?
>
> A: Yes.
>
> Q: And that was not, and that's obviously not for a legitimate medical purpose, right?
>
> ...
>
> Q: So that, it became at some point then a real mix of both a business and a Wayne's business...
>
> A: Yes.
>
> Q: ...need of looking at all that material, is that right?
>
> A: Yes.
>
> ...

Deposition of Angela Roberts, (A.R. pp. 1273-1277).

The data breach victims in this case never should have had their information accessed for "Wayne's business." (A.R. pp. 1277). The damage inflicted by the Petitioners already resulted in harm for the Respondents and the class members because, once this sensitive information is

breached, it cannot be undone, and once this information is seen, it cannot be unseen. This Court has already addressed the legal challenge the Petitioners issued in the instant case and determined that victims in medical data breaches possess standing. Not only do the broad legal principles in *Gaujot* support that this case should be certified, the Opinion in *Tabata* that class action maintenance is appropriate in medical breaches is instructive. Ms. Roberts testified in her sworn deposition that every medical file she reviewed was done as a "real mix of both a business and Wayne's business." (A.R. pp. 1277). The fact that every file was looked at for "Wayne's business" means that every single class member The Petitioners issued virtually identical notices to 7,445 victims. (A.R. pp. 1-26, 145-164, 362-409, 419-438, 854-877, 1277). The Petitioners created a telephone script to handle the calls from the victims of the breach. (A.R. pp. 166-168, 440-442, 603-605). There was not a different script for each member of the class. To the contrary, all class members were treated the same by Petitioners.

Again, all 7,445 individuals' information was accessed by Ms. Roberts for "Wayne's business." (A.R. pp. 1277). This Court has already addressed the issues at play in *Tabata v. Charleston Area Med. Ctr., Inc.*, 233 W. Va. 512, 759 S.E.2d 459 (2014). The only differences are that this case is far more catastrophic and severe as it involves actual and repeated access by a confessed criminal conspirator. There was no proof of access by third parties in *Tabata*, only the chance that information could be accessed.

Petitioners make the flawed argument that there is no evidence that Respondents' private medical information was ever disclosed, divulged, or publicized. However, publication to a nefarious party unquestionably exists in this case because, as WVUHE admitted, Angela Roberts viewed the information outside of her business need for nearly a year. Unlike *Tabata*, this breach

is more severe because there was no evidence of unauthorized access in the *Tabata* case. Here, it is known that unauthorized access continued for nearly a year.

The Petitioners arguments regarding lawful access should not be resolved on an extraordinary writ challenging certificate. Invading the province of a jury and resolving disputes of fact are not designed for interlocutory challenges. Petitioner is certainly free to argue that Ms. Roberts did not violate HIPAA, but her deposition, admitted conduct, the OCR investigation, and guilty pleas in federal court do not sustain this argument. (A.R. pp. 206-208, 484-486, 621-680, 711-713, 1214-1323). In this case, Ms. Roberts confessed that each file during the conspiracy was viewed for "Wayne's business." 100% of the class members have had their privacy rights invaded.[9] (A.R. pp. 1277).

ii. There are many common questions in this case capable of classwide resolution

As noted by the circuit court, there are many common questions and issues in this case. In the Petitioners' own documents provided to Respondents in discovery, non-attorney employees of WVUHE used the words "commonality" to discuss the date breach. (A.R. pp. 118-120, 444-446, 716-718). These documents stated "[t]he commonality that the officer notes is that the names on his victim list seem to have all been treated either within a local physician's office or the hospital." (A.R. pp. 118-120, 444-446, 716-718). The same email chain has a response that states "We are searching for access by same individual, same department, and same location." (A.R. pp. 118-120, 444-446, 716-718). If not for the commonality recognized by law enforcement, this breach may have never been discovered, and Ms. Roberts would still be breaching private medical information and receiving stellar reviews from the Petitioners.

[9] The Petitioners repeatedly argue that only 98.5% of the class members suffered harm. This would only be true if the class was defined as an "identify theft" class where information was stolen. This is the exact mistake made below in the circuit court. The class in this case includes the patients whose information was accessed not "stolen."

The facts of this case are undeniably common: same nefarious employee, same type of information breached, same geographic area, same hospital, same timeframe, same FBI investigation, same offer of credit monitoring to all class members, same Office of Civil Rights findings, same failures to supervise the employee, same telephone script in dealing with the victims, same breach letter sent to all victims of the breach, same actions taken for all victims. (A.R. pp. 118-120, 139-143, 145-164, 166-168, 206-208, 413-417, 419-438, 440-442, 444-446, 484-486, 576-580, 582-601, 603-605, 621-680, 711-713, 716-718).

The fact that the Petitioners treated all of the data breach victims the same is further evidence that the class members experienced the same harm and possess the same claims. This Court, in assessing similar circumstances, reasoned as follows:

> This Court finds that in the instant case the claims of the petitioners and the proposed class members arise from the same set of facts and are governed by the same law. Further, there are common questions such as whether the respondents' conduct breached the duty of confidentiality that a doctor owes a patient and whether the conduct invaded the privacy of the petitioners and the proposed class members. Having found the existence of a common nucleus of operative fact and law and common issues, we believe that the circuit court abused its discretion in determining that the petitioners failed to meet the commonality requirement for class certification.

Tabata v. Charleston Area Med. Ctr., Inc., 233 W. Va. 512, 759 S.E.2d 459 (2014). In the instant case, the class representatives established several questions of law or facts common to the members:

- Did WVUHE fail to supervise Ms. Roberts?
- Is WVUHE vicariously liable for Ms. Roberts' breach of private medical information?
- Can the class members obtain relief for the breach of confidentiality?
- Do class members have breach of contract claims?
- Do the class members have a claim for invasion of privacy?

In assessing whether or not a class action was appropriate, the circuit court took great care and analyzed:

> In this case, each putative class member's data was accessed, at least in part, for the malicious purpose of theft so that the conspirators could illegally profit from class members' identities. This exposed each class member to imminent, impending financial loss from the ongoing criminal conspiracy. Defendants object that only 10 people actually incurred a financial loss, but that is not the Plaintiffs' point. Unlike the circumstance where damage is visibly obvious, such as a car dented in a wreck or a roof crushed-in by a fallen tree limb, intangible property, such as protected health information, does not change in appearance after being breached. Harm occurs when, as here, Ms. Roberts "cased" class members' data because she **improperly deprived that data of its essential character of being private...the law would still find such conduct to be tortious and criminal because, although victims were not physically harmed, they nonetheless lost something of value – a loss of privacy arising from the actor's breach of trust.**

Class Certification Order, (A.R. pp. 13-14). The common questions that will have common answers are the very questions driving the circuit court's certification order in this case. (A.R. pp. 1-26). WVUHE failed to supervise their employee, who undeniably accessed 7,445 individuals' private sensitive information for a "real mix of both a busines and Wayne's business." (A.R. pp. 1277). WVUHE failed to discover the breach, and was only alerted to a data breach when the FBI and Berkeley County Sheriff's Department informed WVUHE (A.R. pp. 118-120, 145-164, 444-446, 419-438, 582-601, 716-718). *State ex rel. W. Va. Univ. Hosps., Inc. v. Gaujot*, 829 S.E.2d 54 (2019), supports the maintenance of a class action because the resolution of legal issues such as vicarious liability or negligent supervision would resolve thousands of claims at a time.

WVUHE does not, has not, and cannot allege that the central liability questions do not have common answers, or that the answer to those questions might depend on facts peculiar to any plaintiff. Whether WVUHE was negligent in its supervision of Ms. Roberts and whether the class members can obtain relief for their claim of breach of confidentiality are common questions that have common answers. The answers are the same for every class member.

iii. The claims of the named plaintiffs are typical of the class

The Respondents' claims are unassailably typical of the class as they are based on the same factual predicate of the entire class and result in typical legal claims. All of the proposed class members possess the same breach of medical information claims arising from the same incident. The same employee of the defendant confessed improperly viewing the medical information of the proposed class members and the Respondents' medical information. A representative party's claim or defense is considered typical under West Virginia law if it arises from the same event or practice or course of conduct that gives rise to the claims of other class members, and if his or her claims are based on the same legal theory. Rule 23(a)(3) only requires that the class representatives' claim be typical of the other class members' claims, not that the claims be identical. Ms. Welch and Mr. Roman seek the same legal theories of relief as the rest of the proposed class. When a claim arises out of the same legal or remedial theory, the presence of factual variations is normally not sufficient to preclude class action treatment." Syl. pt. 12, *In re West Virginia Rezulin*, 585 S.E.2d 52.

The Petitioners cannot legitimately deny that its employee accessed the medical information of thousands of individuals and notified all of these individuals with a form notice. This type of incident is why Rule 23 exists. The undeniable fact that Petitioners treated each class member and the Respondents the same in order to inform them of the facts of this case further indicates that the class brings claims from the same event. The common factual predicate and identical claims to other class members show that typicality is easily established in this case. The circuit court noted that Respondents had met the typicality requirement, and reasoned that "[t]he class representatives in this case share identical claims with the other class members." The circuit court further stated that "Ms. Welch and Mr. Roman are victims of the Defendants and they were

subjected to the same and repeated **medical information breaching conduct**, by the very same third-party employee as the rest of the putative class members." (A.R. pp. 19)(emphasis added).

Ms. Welch and Mr. Roman represent claims very much typical to the class. Ms. Welch represents the 7,445 total individuals whose information was viewed by Ms. Roberts. Mr. Roman represents the same individuals in addition to the 113 individuals who suffered actual identity theft as a result of their information being found at Mr. Roberts' residence. Mr. Roman's information was found in the apartment of "Wayne," a credit card was taken out in his name, and he was named in the indictment of Petitioners' employee. (A.R. pp.1412-1562). The bottom line is that Ms. Welch and Mr. Roman are both medical data breach victims and the internal audit of the Petitioners' confirms that their data was accessed by Ms. Roberts. It was Ms. Roberts that confirmed this access was unlawful. (A.R. pp. 1214-1323).

There are two requirements for typicality. First, the representative's claim must "arise from the same event or practice or course of conduct" as the other class members' claims. That is clearly the satisfied in this case. Second, the representative's claims must be based on the same legal theory. This is also satisfied as Ms. Welch and Mr. Roman bring the same claims for the entire class. This Court's standards for Rule 23(a) typicality are in accord with the standards of other jurisdictions. Typicality is an inquiry into alignment of interest, rather than an investigation into the forms of relief for which the named plaintiff has prayed. *See Gaudin v. Saxon Mortgages Services, Inc.,* 297 F.R.D. 417, 426 (N.D. Cal. 2013). The "main principle behind typicality is that the plaintiff will advance the interests of the class members by advancing his or her own self-interest...The Plaintiff whose claim is typical will ordinarily establish the defendants' liability to the entire class by proving his or her individual claim." *In Re Terazosin Hydrochloride Antitrust Litig.,* 220 F.R.D. 672, 687 (S.D. Fla. 2004) (quoting Newberg on Class Actions sec. 18:8 (4th ed.

2002) at 29). "In determining whether typicality is met, the focus should be on the defendants' conduct and plaintiffs' legal theory, not the injury caused to the plaintiff." *Simpson v. Fireman's Fund Ins. Co.,* 231 F.R.D. 391, 396 (N.D. Cal. 2005).

Ms. Welch and Mr. Roman share identical claims as the other class members. They are each victims of the Petitioners and were subjected to the same and repeated medical information breaching conduct, by the very same employee as the rest of the class members. The typicality requirement is beyond satisfied in this case.

iv. The predominate issues in this case support WVRCP 23 maintenance

It is undeniable that the medical information data breach at issue in this class constitutes a breach of confidentiality and an invasion of privacy for 7,445 individuals comprised in the class. This is the predominant issue in this case. The Office of Civil Rights conclusion that "[t]his breach could reflect violations of 45 C.F.R. §§ 164.502(a), regarding impermissible uses and disclosures of PHI and 164.530(c), regarding safeguards[,]" provides additional support revealing the predominant issues regarding confidentiality and privacy in this action. (A.R. pp. 206-208, 484-486, 711-713).

This Court has clarified the predominance requirement of W. Va. R. Civ. Proc. 23(b)(3) in *Bedell* which stated as follows:

> In addition, circuit courts should assess predominance with its overarching purpose in mind – namely, ensuring that a class action would achieve economies of time, efforts, and expense, and promote uniformity of decision as to person similarly situated, without sacrificing procedural fairness or bringing about other undesirable results. This analysis must be placed in the written record of the case by including it in the circuit court's order regarding class certification.

State ex rel. Surnaik Holdings of WV, LLC v. Bedell, No. 19-1006, 2020 WL 7223178 (W. Va. Nov. 20, 2020). The instant case firmly meets the standard of predominance articulated by this Court. Certification of this medical data breach case, with over seven thousand victims, would

certainly "...promote uniformity of decision as to persons similarly situated." *Id.* Predominance in this case is additionally satisfied as "economies of time, effort, and expense" are better served by certification.

Predominance is met when adjudication of the common questions of law and fact outweigh adjudication of the questions of law and fact specific to individual class members, as is the case in this matter. All of the following are predominate issues in the instant case: the failures of Petitioners to safeguard its patients' records; the intrusion into patients' confidential relationship with a healthcare provider; the invasion of privacy as a result of the breach; and, fact questions surrounding the same employee's breach of thousands of records. The predominate issues in this case involve evaluating the virtually identical harm inflicted by the repeated invasion of protected health information by a confessed criminal. (A.R. pp. 621-680, 1214-1323). At its core, this is a very simple case where the same employee improperly accessed thousands of patients' protected information. The employee confessed to this fact – both in criminal proceedings and in her deposition. (A.R. pp. 621-680, 1214-1323). The attempts to create meaningless fact variants does not change the predominate issues at stake in this case.

D. The Petitioner fails to meet the exceptionally high standard required to be granted a Writ of Prohibition

Extraordinary remedies should not be sought when clear precedential opinions exist that instruct lower courts such as *Tabata* and *Uzuegbunam*. This Court has, on multiple occasions, stated that "[t]o justify this extraordinary remedy, the petitioner[s] ha[ve] the burden of showing that the lower court's jurisdictional usurpation was clear and indisputable and, because there is no adequate relief at law, the extraordinary writ provides the only available and adequate remedy." *State ex rel. Stewart v. Alsop*, 533 S.E.2d 362,364 (W.Va. 2000) (citing *State ex rel. Paul B. v.*

Hill, 201 W.Va. 248,254, 496 S.E.2d 198, 204 (1997) (quoting *State ex rel. Allen v. Bedell*, 193 W.Va. 32, 37,454 S.E.2d 77, 82 (1994) (Cleckley, J., concurring))).

The Petitioner requests this Court to use its power to grant a *Writ of Prohibition* to create new law pursuant to West Virginia Rule of Appellate Procedure 20. However, this Court has held that, "[a] writ of prohibition will not issue to prevent a simple abuse of discretion by a trial court. It will only issue where the trial court has no jurisdiction or having such jurisdiction exceeds its legitimate powers[.]" Syl. pt. 2, *State ex rel. Peacher v. Sencindiver*, 160 W.Va. 314, 233 S.E.2d 425 (1977). Those factors, again, are: "(1) whether the party seeking the writ has no other adequate means, such as direct appeal, to obtain the desired relief; (2) whether the petitioner will be damaged or prejudiced in a way that is not correctable on appeal; (3) whether the lower tribunal's order is clearly erroneous as a matter of law; (4) whether the lower tribunal's order is an oft repeated error or manifests persistent disregard for either procedural or substantive law; and (5) whether the lower tribunal's order raises new and important problems or issues of law of first impression." Syl. Pt. 4, *State ex rel. Hoover v. Berger*, at 14–15. This standard has not been met. Attempting to overturn existing law and battle fact disputes over the behavior of an employee is not designed for resolution by writ.

The Petitioner cannot, of course, argue that it has **no** other adequate means to obtain its desired relief or that it has been prejudiced in such a way that is not correctable on appeal. First, Petitioner could file a motion to decertify. Second, Petitioner could reserve its arguments attempting to create new law for a direct appeal. Instead, the Petitioner desires this Court to issue what amounts to its highest disapproval of a lower court's decision mid-litigation. *See Suriano v. Gaughan*, 198 W.Va. 339, at 345("As an extraordinary remedy, this Court reserves the granting of such relief to 'really extraordinary causes.'"). *See also* Syl. Pt. 1, *Crawford v. Taylor*, 138 W.Va.

207, 75 S.E.2d 370 (1953)("Prohibition lies only to restrain inferior courts from proceeding in causes over which they have no jurisdiction, or, in which, having jurisdiction, they are exceeding their legitimate powers and may not be used as a substitute for [a petition for appeal] or certiorari."). *See also* Syl. Pt. 2, *Woodall v. Laurita*, 156 W.Va. 707 ("Where prohibition is sought to restrain a trial court from the abuse of its legitimate powers, rather than to challenge its jurisdiction, the appellate court will review each case on its own particular facts to determine whether a remedy by appeal is both available and adequate, and only if the appellate court determines that the abuse of powers is so flagrant and violative of petitioner's rights as to make a remedy by appeal inadequate, will a writ of prohibition issue.").

The analysis put forth by this Court in *Woodall* dooms the Petitioners' request. **A circuit court following precedence for which there is no split among the circuits is unquestionably within a circuit court's "legitimate powers."** The "particular facts" which this Court must consider are simply whether the Petitioner may seek remedy by direct appeal, and whether the lower court's decision that the case should proceed on classwide basis was "so flagrant and violative it [its] rights as to make remedy by appeal inadequate." *Id.*

The third factor considered by the *Hoover* Court, and stated to be given the most weight, is whether the lower court's ruling was clearly erroneous. *Hoover*, at 14-15. "Clearly erroneous," is, itself, an exceptionally high standard. Only upon a "definite and firm conviction" that the lower court exceeded its legitimate powers can a writ be granted. *See* Syl. Pt. 1, *In re Faith C.*, 226 W. Va. 188, 189, 699 S.E.2d 730, 731 (2010). The lower court's affirmative decisions, regarding this Petitioner, is that, the Respondents clearly presented to the Court that this case should proceed on a classwide basis on the grounds that WVUHE breached 7,445 individuals' private medical information and essentially allowed 113 individuals to have their identity stolen. (A.R. 1-26, 139-

143, 145-164, 413-417, 419-438, 576-580, 582-601, 682-685). Certainly, this Court cannot have a definite and firm conviction that such a ruling is beyond the legitimate powers of the circuit courts of this State. The lower court's rulings following precedence is not *clearly* erroneous.

Again, writs of prohibition are exceptional in nature. Regarding such extraordinary remedies:

> This Court has explained the standard of review applicable to a writ of prohibition, stating that "[a] writ of prohibition will not issue to prevent a simple abuse of discretion by a trial court. It will only issue where the trial court has no jurisdiction or having such jurisdiction exceeds its legitimate powers. W.Va. Code 53-1-1." Syl. pt. 2, *State ex rel. Peacher v. Sencindiver*, 160 W.Va. 314,233 S.E.2d 425 (1977) ....
>
> We have held that an extraordinary writ ... is not to be used as a substitute for an appeal. "Prohibition lies only to restrain inferior courts from proceeding in causes over which they have no jurisdiction, or, in which, having jurisdiction, they are exceeding their legitimate powers and may not be used as a substitute for writ of error, appeal or certiorari." Syl. pt. 1, *Crawford v. Taylor*, 138 W.Va. 207, 75 S.E.2d 370 (1953). In addition, "[t]his Court is 'restrictive in its use of prohibition as a remedy.' *State ex rel. West Virginia Fire Cas. Co. v. Karl*, 199 W.Va. 678,683,487 S.E.2d 336,341 (1997)." *State ex rel. Allstate Ins. Co. v. Gaughan*, 220 W.Va. 113, 118, 640 S.E.2d 176, 182 (2006). In syllabus point 4 of *State ex rel. Hoover v. Berger*, [199 W.Va. 12,483 S.E.2d 12 (1996)], this Court said:

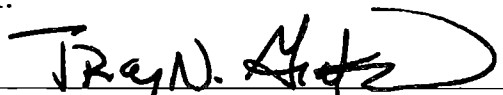
State ex rel. Owners Ins. Co. v. McGraw, 233 W.Va. 776, 779-80, 760 S.E.2d 590, 593-94 (2014) (per curiam) (emphases added).

"A writ of prohibition will not issue to prevent a simple abuse of discretion by a trial court. It will only issue where the trial court has no jurisdiction or having such jurisdiction exceeds its legitimate powers." Syl. Pt. 4, *State ex rel. Jeanette H. v. Pancake*, 529 S.E.2d 865 (W.Va. 2000); *State ex rel. Lambert v. King*, 208 W.Va. 87, 538 S.E.2d 385 (2000). A heavy burden of proof is required to demonstrate that a circuit court's finding is clearly erroneous. As explained by this Court in *State ex rel. Owners Ins. Co. v. McGraw*, 233 W.Va. at 780, 760 S.E.2d at 594: "A finding is 'clearly erroneous' when, although there is evidence to support the finding, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been

committed. However, a reviewing court may not overturn a finding simply because it would have decided the case differently, and it must affirm a finding if the circuit court's account of the evidence is plausible in light of the record viewed in its entirely." (quoting Syl. Pt. 1, in part, *In the interest of Tiffany Marie S.*, 196 W.Va. 223, 470 S.E.2d 177 (1996)). The Petitioner simply does not meet the standard for extraordinary relief it seeks and the circuit court properly followed the precedence of this Court along with the US Supreme Court.

VI. CONCLUSION

For the reasons set above, the Respondents respectfully requests that West Virginia University Hospitals – East, Inc., d/b/a Berkeley Medical Center; City Hospital, Inc., d/b/a Berkeley Medical Center; The Charles Town General Hospital d/b/a Jefferson Medical Center's *Petition for Writ of Prohibition* be denied. The Respondents further requests all such other relief as this Court may deem just and proper.

Signed: 

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Attorneys of Record for Respondents, Debra S. Welch and Eugene A. Roman

CERTIFICATE OF SERVICE

I hereby certify that on this 16th day of March, 2021, true and accurate copies of the foregoing ***"Response in Opposition to Writ of Prohibition"*** was deposited in the U.S. Mail contained in a postage, prepaid, envelope addresses to Respondent, The Honorable David M. Hammer and to counsel for the Petitioners as follows:

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