No. _____

In The
Supreme Court of the United States

HOWARD CENTER,

Petitioner,

v.

AFSCME LOCAL 1674 and DANIEL PEYSER,

Respondents.

On Petition For Writ Of Certiorari To The Vermont Supreme Court

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Pursuant to federal regulations collectively known as "the HIPAA Privacy Rule," must a covered entity like the Howard Center ensure compliance therewith by its workforce, adopt a sanction policy, and apply appropriate sanctions against all members of its workforce who fail to comply?

II. Did the Arbitrator manifestly disregard the law by prohibiting the Howard Center from imposing even minimal discipline on an employee, who indisputably violated patient privacy in violation of federal law, when "appropriate sanctions" are mandatory under the HIPAA Privacy Rule?

PARTIES TO THE PROCEEDING

Petitioner is the Howard Center (hereinafter also called "employer"), a non-profit organization that employs about 1,600 support workers, clinicians, nurses, teachers, case managers, and others at more than 60 locations throughout Vermont. The Howard Center provides various types of mental-health services to more than 19,000 clients. The Howard Center is recognized by the State of Vermont as the "Preferred Provider" for substance-use services in Chittenden County as well as an "Opioid Treatment Hub."[1]

Respondent is AFSCME Local 1674 (hereinafter also called "the union"), a labor union that represents a subset of Howard Center employees for collective-bargaining purposes.

Co-Respondent Daniel Peyser (hereinafter also called "grievant" or "claimant") is a licensed clinician and social worker who has been employed by the Howard Center since 2016. Peyser is responsible for counseling and providing medication-assisted treatment to patients at the Howard Center's Chittenden Clinic who struggle with substance abuse. Federal and state laws, as well as Howard Center policies, require him to protect patient privacy. Nevertheless, to benefit

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[1] *See* (1) https://howardcenter.org/about-us/about-howard-center/#:~:text=In%20Vermont%2C%20Howard%20Center%20is,use%20services%20in%20Chittenden%20County; (2) https://www.healthvermont.gov/sites/default/files/documents/pdf/ADAP_Treatment_Directory.pdf; (3) https://www.healthvermont.gov/sites/default/files/documents/pdf/ADAP_Treatment%20Resource%20Guide%20Directory%20Chittenden.pdf.

PARTIES TO THE PROCEEDING—Continued

himself, he made an unauthorized disclosure to an outside party of the identities of two patients, for which he was disciplined with a written reprimand until the Arbitrator ordered that the reprimand be removed from his personnel file.

CORPORATE DISCLOSURE STATEMENT

The Howard Center has no parent corporation or publicly held company that owns 10% or more of its stock.

RELATED CASES

- *In the Matter of Arbitration Between AFSCME Local 1674 & Howard Center,* Arbitration Award made October 26, 2020.
- *Howard Center v. AFSCME Local 1674,* Case No. 20-CV-00823, Vermont Superior Court, Chittenden Unit. Judgment entered September 9, 2021.
- *Howard Center v. AFSCME Local 1674,* Case No. 20-CV-00823, Vermont Superior Court, Chittenden Unit. Judgment entered September 9, 2021.
- *Howard Center v. AFSCME Local 1674 & Daniel Peyser,* Case No. 21-AP-257, Vermont Supreme Court. Judgment entered January 20, 2023.
- *Howard Center v. AFSCME Local 1674 & Daniel Peyser,* Case No. 21-AP-257, Vermont Supreme Court. Judgment entered February 7, 2023.

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The Entry Order, Majority Opinion, and Dissenting Opinion, in *Howard Center v. AFSCME Local 1674 & Daniel Peyser*, Case No. 21-AP-257, by the Vermont Supreme Court, dated January 20, 2023, reported at 2023 VT 6, available at 2023 WL 1461639, affirming the decision below, is set forth at App. 1-30.

The Decision on Motion, in *Howard Center v. AFSCME Local 1674*, Case No. 20-CV-00823, by the Vermont Superior Court, Chittenden Unit, dated September 9, 2021, affirming the Arbitration Award, is set forth at App. 31-42.

The Judgment, in *Howard Center v. AFSCME Local 1674*, Case No. 20-CV-00823, by the Vermont Superior Court, Chittenden Unit, dated September 9, 2021, is set forth at App. 43.

The Award of the Arbitrator, in *In the Matter of Arbitration Between AFSCME Local 1674 & Howard Center*, dated October 26, 2020, is set forth at App. 44-63.

The Entry Order, in *Howard Center v. AFSCME Local 1674 & Daniel Peyser*, Case No. 21-AP-257, by the Vermont Supreme Court, dated February 7, 2023, denying re-argument, is set forth at App. 64-65.

JURISDICTIONAL STATEMENT

The Vermont Superior Court, Chittenden Unit, had original jurisdiction pursuant to 12 V.S.A. § 5671 over proceedings to confirm, modify, or vacate an arbitration award and to enter judgment on same.

The Vermont Supreme Court had appellate jurisdiction pursuant to VT. CONST. ch. II, § 30, and 4 V.S.A. § 2(a), over appeals from judgments, rulings, and orders of the Vermont Superior Court.

This Court has appellate jurisdiction pursuant to 28 U.S.C. § 1257(a) over appeals of final judgments rendered by Vermont's highest court, where the construction of federal regulations enacted pursuant to a United States statute is drawn into question, and where this Petition for a writ of *certiorari* has been filed within 90 days of the Vermont Supreme Court's final judgment affirming the Arbitration Award and/or the Court's subsequent denial of Petitioner's motion for re-argument. *See* Rule 13.3 of the Rules of the Supreme Court of the United States.

FEDERAL STATUTORY AND REGULATORY PROVISIONS INVOLVED

Section 1302(a) of Title 42 of the United States Code

> The Secretary of the Treasury, the Secretary of Labor, and the Secretary of Health and Human Services, respectively, shall make and publish such rules and regulations, not

inconsistent with this chapter, as may be necessary to the efficient administration of the functions with which each is charged under this chapter.

Section 1320d of Title 42 of the United States Code

(6) **Individually identifiable health information**

The term "individually identifiable health information" means any information, including demographic information collected from an individual, that—

(A) is created or received by a health care provider, health plan, employer, or health care clearinghouse; and

(B) relates to the past, present, or future physical or mental health or condition of an individual, the provision of health care to an individual, or the past, present, or future payment for the provision of health care to an individual, and—

(i) identifies the individual; or

(ii) with respect to which there is a reasonable basis to believe that the information can be used to identify the individual.

Section 1320d-6 of Title 42 of the United States Code

(a) Offense

A person who knowingly and in violation of this part—

* * *

> **(3)** discloses individually identifiable health information to another person,

shall be punished as provided in subsection (b). . . .

(b) Penalties

A person described in subsection (a) shall—

> **(1)** be fined not more than $50,000, imprisoned not more than 1 year, or both;
>
> **(2)** if the offense is committed under false pretenses, be fined not more than $100,000, imprisoned not more than 5 years, or both; and
>
> **(3)** if the offense is committed with intent to sell, transfer, or use individually identifiable health information for commercial advantage, personal gain, or malicious harm, be fined not more than $250,000, imprisoned not more than 10 years, or both.

Section 164.306(a) of Title 45 of the Code of Federal Regulations

General Requirements. Covered entities and business associates must do the following:

> (1) Ensure the confidentiality . . . of all electronic protected health information the covered entity or business associate creates, receives, maintains, or transmits.
>
> * * *
>
> (4) Ensure compliance with this subpart by its workforce.

Section 164.308(a)(1)(ii)(C) of of Title 45 the Code of Federal Regulations

A covered entity or business associate must, in accordance with § 164.306:

* * *

Sanction policy (Required). Apply appropriate sanctions against workforce members who fail to comply with the security policies and procedures of the covered entity or business associate.

Section 164.530(e)(1) of Title 45 of the Code of Federal Regulations

Sanctions. A covered entity must have and apply appropriate sanctions against members of its workforce who fail to comply with the

> privacy policies and procedures of the covered entity or the requirements of this subpart. . . .

STATEMENT OF THE CASE

Petitioner Howard Center and Respondent AFSCME Local 1674 are parties to a collective-bargaining agreement ("the CBA") pursuant to which any grievances that are not resolved may be submitted to arbitration. The union filed a grievance on behalf of Co-Respondent Daniel Peyser and the parties agreed to proceed immediately to arbitration.

During arbitration, the Howard Center insisted there was just cause to discipline Peyser with a written reprimand (at the very least) because his unauthorized disclosure of two patient names to an outside party, to benefit himself, indisputably violated various federal and state laws and Howard Center policies and also constituted a criminal act.[1]

Among those federal laws are regulations promulgated by the Department of Health and Human Services ("HHS") pursuant to the Health Insurance Portability and Accountability Act of 1996 ("HIPAA"), commonly known as the HIPAA Privacy Rule. Pursuant to this Rule, a covered entity like the Howard

[1] *See*, *e.g.*, 42 U.S.C. § 1320d-6(a)(3) & (b)(1) ("A person who knowingly and in violation of this part . . . discloses individually identifiable health information to another person, . . . shall . . . be fined not more than $50,000, imprisoned not more than 1 year, or both.").

Center ***must*** ensure compliance therewith by its workforce, ***must*** adopt a sanction policy, and ***must*** apply appropriate sanctions against workforce members, like Peyser, who fail to comply.[2]

The Arbitrator found that Peyser had indeed violated patient privacy when he revealed the names of two patients to his union representative, David Van Duesen, a third party who is neither employed by the Howard Center nor under its control, for personal reasons unconnected with treatment. "Mr. Peyser admitted that he shared this information with Mr. Van Deusen at the meeting" on June 28, 2019, held to discuss questions that had arisen about Peyser's billing practices. App. 47-48. "There is no dispute that Mr. Peyser did not obtain permission from the clients, or authorization from the [Howard] Center to share this information with anyone." App. 48. "There is [also] no dispute that Mr. Van Deusen, is not an employee of the [Howard] Center, and that he saw patient's names on certain records." App. 59. "[I]t must be concluded that there was no need for Mr. Peyser to have shown Mr. Van Deusen the records with the names of the clients identifiable on the records. The clients' names could have been redacted." App. 61. "[O]therwise unacceptable

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[2] "We do not suggest that the other laws and regulations that employer presented to the arbitrator were inapplicable or could not provide grounds to support a finding of just cause. . . ." App. 10. Rather, during later stages of this case, the Howard Center focused its argument on the HIPAA Privacy Rule because it is unusual—if not unique—in what it requires of covered entities, framed in mandatory terms, when dealing with employees who violate patient privacy.

conduct cannot be rendered acceptable simply because the matter involves union activities." *Id.*

Nevertheless, despite the "plethora of laws [and] regulations . . . ensuring patient privacy" that were presented to him, the Arbitrator "sustained the grievance and ordered Howard Center to remove the reprimand from Mr. Peyser's personnel file." App. 60 & 31. In doing so, the Arbitrator relied on various mitigating circumstances—none of which are valid exceptions to the HIPAA Privacy Rule's disciplinary mandate—that he believed should excuse Peyser's misconduct and relieve him of all consequences.[3]

The Howard Center moved to vacate the Arbitration Award, again asserting the HIPAA Privacy Rule (among other federal and state laws) as justification for the minimal discipline imposed on Peyser. Unfortunately, the Vermont Superior Court denied the motion, rejecting the Howard Center's argument that the Arbitrator's prohibition against enforcing the HIPAA

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[3] The Howard Center had already taken these so-called mitigating circumstances into account in deciding to reprimand Peyser rather than terminating his employment, which it had every right to do under the CBA and its personnel policies. Indeed, employers routinely impose much harsher sanctions for HIPAA violations of this type, *i.e.*, those apparently unmotivated by malicious intent or desire for financial gain. *See*, *e.g.*, *Texas Hospital Fires 16 for Privacy Violations*, 8 GUIDE TO MED. PRIVACY & HIPAA NEWSLETTER 5 (Jan. 2010) ("A Texas hospital fired 16 employees who improperly accessed the records of a medical resident on staff who had been brought to the hospital with a gunshot wound. . . . The employees apparently accessed the files to check on the condition of their colleague, a violation of the [HIPAA] Privacy Rule.").

Privacy Rule's disciplinary mandate constituted manifest disregard of the law.

The Howard Center appealed that decision. Unfortunately, the Vermont Supreme Court affirmed. In doing so, the Majority did not need to decide "whether to adopt the manifest-disregard standard" of review of arbitration decisions "because, assuming *arguendo* it applies, employer fails to show that its requirements are satisfied." App. 3.

The Majority based its decision on its observation that "[n]either the HIPAA statute or regulation referenced above define the term 'appropriate sanction' and there is no case law interpreting the term." App. 13. As a *post hoc* rationalization for the Arbitration Award, the Majority reasoned that because an employer has discretion in deciding the severity of the sanction to be imposed on employees who violate patient privacy, the HIPAA Privacy Rule's disciplinary mandate is not really mandatory at all; thus, the Arbitrator could prohibit the Howard Center from imposing any sanction no matter how minimal. *See* App. 13-15. In so ruling, the Majority failed to credit the mandatory nature of the word "must," used throughout HIPAA regulations to denote those actions that an employer "must" take.[4]

Justice Harold E. Eaton Jr. wrote a lengthy dissent. "Because *employer's decision to sanction grievant*

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[4] For example, 45 C.F.R. §§ 164.306 and 164.530 combined use the word "must" a total of 29 times and the word "may" nine times, showing that HHS knows how to distinguish mandatory duties from permissive options by using these words.

was supported and required by law and the arbitrator disregarded the law in overturning it, I would reverse and remand for the trial court to vacate the arbitration order." App. 17-18 (emphasis added). Justice Eaton elaborated:

> The majority [concludes] that neither HIPAA nor its implementing regulations define what the appropriate sanction is for disclosing private health information and emphasiz[es] that the law provides some discretion in how an employer responds. *The majority basically holds that HIPAA did not require employer to formally sanction claimant and therefore the arbitrator did not disregard the law when he reversed employer's sanction of claimant.*

App. 20-21 (emphasis added). Explaining that the word "must" is "mandatory language" that is "inconsistent with the concept of discretion," Justice Eaton reasoned, "The plain language of the [HIPAA] Privacy Rule refutes the conclusion that a covered entity may choose not to sanction an employee who violates patient confidentiality." App. 27 (internal quotation marks omitted).

Applying the two-part manifest-disregard standard adopted by the Second Circuit and other federal courts, Justice Eaton determined, "Here, both elements of manifest disregard are met because *the arbitrator chose to ignore the law that required employer to sanction grievant for his misconduct and the applicable legal principle was clearly defined*." App. 24 (emphasis added). Justice Eaton rejected the Arbitrator's stated

belief that Peyser's misconduct was merely an "error in judgment" for which no discipline at all would be appropriate, noting that the HIPAA Privacy Rule "makes no exception based on the intent of the disclosure or the scope of the misconduct." App. 29.

Justice Eaton explained that a covered entity's limited discretion—over the severity of discipline alone—does not relieve the Howard Center of the HIPAA Privacy Rule's requirement that "appropriate sanctions" must be imposed for violations:

> There was, however, no lesser sanction because employer imposed the lowest level of discipline available under the employment contract. If this was the sole error made by the arbitrator, it may not be grounds for reversal since it would amount to an error of law and not total disregard for the law. *The reason this case rises to the level of egregious conduct warranting reversal is that employer's action of sanctioning claimant was not just proper under its employment contract but required by federal law.*

App. 28-29 (emphasis added). This fundamental disagreement between the Majority and Dissent, over the mandatory nature of appropriate sanctions under the HIPAA Privacy Rule, is why the Howard Center humbly petitions for a writ of *certiorari*.

REASONS FOR GRANTING THE PETITION

I. Pursuant to the HIPAA Privacy Rule, a covered entity like the Howard Center "must" ensure compliance therewith by its workforce, "must" adopt a sanction policy, and "must" apply "appropriate sanctions" against all members of its workforce who fail to comply.

At first glance, the stakes in this case might appear to be low, even *de minimis*. After all, this is a dispute over whether or not a negative notation can remain in a lone employee's file. But the implications of this case are potentially far-reaching and thus it should be viewed in that broader context.

"The United States remains mired in an opioid epidemic that has spanned more than two decades, killed hundreds of thousands of Americans, and affected the lives of millions more." *Lebanon County Employees' Retirement Fund v. Collis*, 2022 WL 17841215, *5 (Del. Ct. Chan. 2022). "[D]espite ongoing efforts, the scope of the opioid crisis continues to grow. Opioids are claiming lives at a staggering rate, and overdoses from prescription opioids are reducing life expectancy in the United States." *Lisa T. v. Saul*, 2021 WL 2875759, *18 (D.S.C.) (cleaned up), *report & recommendation adopted*, 2021 WL 2875697 (D.S.C. 2021).

"*The opioid crisis is a matter of national significance*." *Lebanon County Employees' Retirement Fund v. AmerisourceBergen Corp.*, 2020 WL 132752, *11 (Del. Ct. Chan.) (emphasis added), *aff'd*, 243 A.3d 417 (Del.

2020). "On October 26, 2017, President [Donald] Trump directed the Secretary of Health and Human Services to declare the opioid crisis a Public Health Emergency." *City of Huntington v. AmerisourceBergen Drug Corp.*, 2020 WL 4511490, *1 n.1 (S.D. W. Va. 2020). To wit: "It shall be the policy of the United States to use *all lawful means* to combat the drug demand and opioid crisis currently afflicting our country." *Combatting the National Drug Demand & Opioid Crisis*, 82 Fed. Reg. 50305 (Oct. 26, 2017) (emphasis added).[5]

One such lawful means—indeed, the means most likely to have the greatest success—is substance-use treatment. Sadly, this treatment is woefully underutilized. According to the National Institute on Drug Abuse, while 20.4 million people in the United States were diagnosed with substance-use disorders in 2019,

[5] Though it may be a small state without any major population centers, Vermont is far from immune to the opioid crisis devastating our nation. *See* Vt. Dep't of Health, *Opioid-Related Fatal Overdose Brief, 2021 Preliminary Data* (April 2022) (https://www.healthvermont.gov/sites/default/files/documents/pdf/ADAP-OpioidFatalOverdoseDataBrief-202l.pdf) ("At this time, the data shows a 33% increase from 158 deaths in 2020 to 210 in 2021). Indeed, opioids have had a disproportionate negative impact on rural areas, particularly in Vermont. *See* U.S. Dep't of Agriculture, *Opioid Misuse in Rural America* (https://www.usda.gov/topics/opioids) ("In five states, California, Connecticut, North Carolina, Vermont, and Virginia, the rate of drug-overdose deaths in rural counties were higher than those in urban counties.").

only 10.3 percent received treatment. *See* NIDA IC Fact Sheet 2022.[6]

Decades ago, the U.S. Congress recognized one factor that tends to cause this underutilization of substance-use treatment:

> "Every patient and former patient must be assured that his right to privacy will be protected. Without that assurance, fear of public disclosure of [substance] abuse or of records that will attach for life will discourage thousands from seeking the treatment they must have if this tragic national problem is to be overcome."

In re Arbitration Between Local 738, International Brotherhood of Teamsters & Certified Grocers Midwest, Inc., 737 F. Supp. 1030, 1033 (N.D. Ill. 1990) (quoting legislative history of Public Health Service Act); *see United States ex rel. Chandler v. Hektoen Institute for Medical Research*, 2003 WL 22284199, *3 (N.D. Ill. 2003) (same).

"*The confidentiality of medical records* maintained in conjunction with [substance-use] treatment programs [is] *essential to that endeavor.* Congress felt that '*the strictest adherence*' *to the confidentiality provision was needed*, lest individuals in need of [substance] abuse treatment be dissuaded from seeking help." *Ellison v. Cocke County, Tennessee*, 63 F.3d 467, 471 (6th

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[6] https://nida.nih.gov/about-nida/legislative-activities/budget-information/fiscal-year-2022-budget-information-congressional-justification-national-institute-drug-abuse/ic-fact-sheet-2022.

Cir. 1995) (quoting legislative history of Public Health Service Act) (emphasis added); *see Mosier v. American Home Patient, Inc.*, 170 F. Supp. 2d 1211, 1213 (N.D. Fla. 2001) (same). "In sum, the sweep of the [federal] statute, the broad discretion delegated to the Secretary of Health and Human Services, and the provision of penalties make *unmistakable Congress's intent to vigorously protect the range of records about substance abuse*." *Carr v. Allegheny Health, Education, & Research Foundation*, 933 F. Supp. 485, 487 (W.D. Pa. 1996) (emphasis added).

"Recognizing the importance of protecting the privacy of health information in the midst of the rapid evolution of health information systems, Congress passed HIPAA in August 1996." *South Carolina Medical Ass'n v. Thompson*, 327 F.3d 346, 348 (4th Cir.), *cert. denied*, 540 U.S. 981 (2003). In 2001, HHS enacted the HIPAA Privacy Rule. *See id.* at 349. These administrative regulations "have the full force and effect of statutory law." *DePaolo v. Triad Healthcare*, 2013 WL 6671551, *4 (Conn. Super. Ct. 2013) (cleaned up).

Though other federal statutes protecting patient privacy were enacted earlier, HIPAA has since become "the principal federal law addressed to the protection and permissible sharing of patient health information. *It establishes uniform national standards* . . . both to facilitate and *to regulate the sharing of patient health information*." *Barzilay v. City of New York*, 610 F. Supp. 3d 544, 564 (S.D.N.Y. 2022) (emphasis added). In sum, with a few narrow exceptions that are not implicated here, "HIPAA prohibits the disclosure of medical

records without a patient's consent." *Meadows v. United States*, 963 F.3d 240, 244 (2d Cir. 2020).

To enforce HIPAA's uniform national standards, HHS relies on providers like the Howard Center. "[T]his is but one of many instances where *government relies on self-policing by private organizations to effectuate the purposes underlying federal regulating statutes*." *United States v. Solomon*, 509 F.2d 863, 869 (2d Cir. 1975) (Friendly, J.) (emphasis added). "[T]here would be *a complete breakdown* in the regulation of many areas of business *if employers did not carry most of the load of keeping their employees in line*. . . ." *Id.* at 870 (emphasis added). Though the venerable Judge Henry Friendly was speaking about a different federal regulatory scheme, his words still ring true, particularly regarding the HIPAA Privacy Rule.

Under the HIPAA Privacy Rule, covered entities "*must* protect against disclosure of their patients' protected health information." *Planned Parenthood Great Northwest, Hawaii, Alaska, Indiana, & Kentucky, Inc. v. Cameron*, 2022 WL 3973263, *12 (W.D. Ky. 2022) (emphasis added). "The HIPAA Privacy Rule *requires* covered entities to implement reasonable safeguards to limit incidental uses or disclosures of protected health information." *Barzilay*, 610 F. Supp. 3d at 565 (emphasis added). "And HIPAA *requires* [covered entities] . . . *to '[e]nsure compliance . . . by its work force*.'" *Aldrich v. Rural Health Services Consortium, Inc.*, 579 Fed. Appx. 335, 338 (6th Cir. 2014) (quoting 45 C.F.R. § 164.306(a)) (emphasis added).

"HIPAA provides for penalties to be imposed by the Secretary of the Department of Health and Human Services." *Meadows*, 963 F.3d at 244. "HIPAA breaches can result in criminal and civil penalties for covered entities." *Barzilay*, 610 F. Supp. 3d at 565. Employees of covered entities also face legal jeopardy for their HIPAA violations. *See*, *e.g.*, 42 U.S.C. § 1320d-6(a)(3) & (b)(1).[7]

To comply with HIPAA, all that a covered entity's employee need do is redact or "de-identify documents by removing information" such as a patient's name. *Planned Parenthood*, 2022 WL 3973263 at *12 (internal quotation marks omitted); *see* 45 C.F.R. § 164.514(a); *Briggs v. Adel*, 2020 WL 4003123, *16 (D. Ariz. 2020) (PHI may be disclosed after "making appropriate redactions" so that "all patient-identifying information [i]s redacted from the records"). Simply put, Peyser could have avoided a written reprimand and all the associated grief by the selective and effective use of a Sharpie.

And yet, contrary to the extensive HIPAA training required by his licensure and employment, Peyser failed to take this simple precaution before sharing both patient records with Van Deusen. As the Arbitrator noted, "'The clients' names could have been

[7] As required, the Howard Center reported this incident to the regulatory authorities. *See* 45 C.F.R. § 164.408(a). That neither the Howard Center nor Peyser have been subjected to legal jeopardy thus far, as a result of Peyser's illegal conduct, is likely due more to prosecutorial discretion and restraint than any legal prohibition against taking legal action.

redacted' without compromising the union representative's ability to defend grievant." App. 25. As the Dissent put it:

> [T]he fact that the disclosure happened in a closed-door meeting does not excuse grievant's actions or alter employer's obligation under HIPAA. *The disclosure of private health records in this setting was just as harmful, and undoubtedly just as unwelcome, to the patients involved as a disclosure in some other setting, especially having in mind the disclosure had nothing to do with the patients' treatment but rather with grievant's billing practices.*

App. 25-26 (emphasis added). Thus, Peyser's unauthorized disclosure of patient records, solely for his own purposes, "was patently unreasonable." *Aldrich*, 579 Fed. Appx. at 338.

By disciplining Peyser for breaking the law regulating an essential area of his field of employment—one that is central to the Howard Center's mission—the Howard Center "did what any other company would do, and (arguably) what any company should do." *Gilman v. Marsh & McLennan Cos.*, 826 F.3d 69, 75 (2d Cir. 2016). More importantly, the Howard Center did what it was ***legally required*** to do. As the Dissent noted, the Majority's decision effectively "punishes employer for carrying out its obligations under federal law and ignores the harm to patients whose information was improperly disclosed." App. 17.

The Majority apparently failed to fully grasp that each of the pertinent duties that the HIPAA Privacy

Rule imposes on covered entities like the Howard Center is phrased in mandatory, not permissive, terms. *See* 45 C.F.R. §§ 164.306(a)(1), 164.306(a)(4), 164.530(e)(1). Each regulatory provision at issue here employs the word "must." *See id.* "The words of a governing text are of paramount concern, and what they convey, in their context, is what the text means." ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 56 (2012) (bold omitted).

"[T]he plain meaning of 'must' is a command, synonymous with 'shall.'" *State of Georgia v. Henderson*, 436 S.E.2d 209, 211 (Ga. 1993); *see State of Vermont v. Rafuse*, 726 A.2d 18, 19 (Vt. 1998); *In Interest of D.S.*, 263 N.W.2d 114, 119 (N.D. 1978). "The word 'must' generally imposes a mandatory requirement." *Washoe County v. Otto*, 282 P.3d 719, 725 (Nev. 2012). "'The word "must" means that the requirement is mandatory and not discretionary.'" *Automated Transactions, LLC v. First Niagara Financial Group, Inc.*, 2011 WL 13213256, *1 (W.D.N.Y. 2011) (quoting *In re Settlement Facility Dow Corning Trust*, 2010 WL 1247839, *3 (E.D. Mich. 2010)); *see In re Dow Corning Corp.*, 2009 WL 891692, *1 (E.D. Mich. 2009) (citing *Perotta v. Gregory*, 158 N.Y.S.2d 221, 223 (N.Y. Sup. Ct. 1957)).

Whether used in a statute, regulation, rule, or some other legal text, "must" denotes a "mandatory duty." *Ohio Security Insurance Co. v. Axis Insurance Co.*, 413 P.3d 1028, 1029 (Wash. 2018) (statute); *see Borowski v. Ayers*, 524 S.W.3d 292, 298 (Tex. Ct. App. 2016) (same); *Vanguard Piping Systems, Inc. v. Eighth Judicial District Court*, 309 P.3d 1017, 1020 (Nev.

2013) (rule). " 'Must,' in this context, means '*is required by law*.' " *Khmelnitskaya v. Wang*, 2022 WL 2229494, *2 (Wash. Ct. App. 2022) (statute) (emphasis added); *see Funderbunk v. South Carolina Electric & Gas Co.*, 2019 WL 3406814, *7 (D.S.C. 2019) (rule). Use of this word "*provides no room for discretion*." *Insurance Safety Consultants, LLC v. Nugent*, 2018 WL 4732430, *7 (N.D. Tex.) (rule) (emphasis added), *report & recommendation adopted*, 2018 WL 4725244 (N.D. Tex. 2018).

It is true that, when enforcing the HIPAA Privacy Rule, covered entities have some discretion over the severity of discipline. But discretion over one thing does not translate into unbridled discretion over everything. *See Perotta*, 158 N.Y.S.2d at 224 (statute "merely gives the Commission discretion to disqualify applicants for certain stated reasons. It does not give the Commission discretion to qualify any applicant who does not meet the mandatory statutory requirements.").

So, while determining "appropriate sanctions" for violating patient privacy involves discretion over severity, covered entities still "must" do something to fulfill their HIPAA obligations. Here, the Arbitrator effectively prohibited the Howard Center from doing anything at all, forcing Peyser's HIPAA violation to go unpunished, in direct conflict with the plain meaning of the words used in the HIPAA Privacy Rule. *See* App. 24-25 ("[T]he arbitrator acknowledged the governing privacy law but nonetheless disregarded the HIPAA

Privacy Rule's *command requiring* employer to sanction grievant.") (Eaton, J., dissenting) (emphasis added).

It is obvious why HHS, in fashioning the HIPAA Privacy Rule, made appropriate sanctions mandatory for employees who violate patient privacy. According to the treatise that the Majority cited, HIPAA "requires covered entities to install . . . sanction programs partially to enforce the regulations, but *mainly to reinforce health care workers' ongoing sensitivity and commitment to HIPAA principles*." GUIDE TO MEDICAL PRIVACY & HIPAA § 732 (J. Flynn ed. 2016) (emphasis added). "*Enforcement is essential in delivering the message to the workforce that privacy . . . under HIPAA is imperative to the organization. It should be well understood that privacy violations . . . are subject to disciplinary action*." *Id.* § 733 (emphasis added).

Citing a May 2009 practice brief of the American Health Information Management Association, the Majority's cited treatise reiterated:

> [A] *consistent enforcement . . . approach is key to gaining public confidence in the . . . privacy of their PHI.* Additionally, *failure to implement a strong and consistent enforcement approach leaves providers vulnerable to law suits and further government intervention through state and federal government laws and regulations*. . . .

Id. (emphasis added).

Admittedly, HIPAA violations are rare at the Howard Center. But despite the Howard Center's best

efforts to prevent them, they still sometimes occur—even under unexpected and unusual circumstances, as this case demonstrates. The Howard Center's ability to consistently enforce the HIPAA Privacy Rule among its workforce—to ensure ongoing sensitivity and commitment to HIPAA principles—will be undermined once Peyser's fellow employees learn that he has escaped any and all consequences for his indisputably illegal conduct. Human nature being what it is, that knowledge will surely breed a cavalier attitude among the Howard Center workforce concerning the HIPAA Privacy Rule, thereby increasing the frequency of violations. Forcing removal of a written reprimand from Peyser's file sends exactly the wrong message.

Moreover, when the Howard Center tries to discipline its employees for future HIPAA violations, they and their union representatives will surely hold up this case as "law of the shop" that they will argue must be followed in arbitration to excuse more employee misconduct of a similar type. *Burlington Area Public Employees Union, Local 1343, AFSCME, AFL-CIO v. Champlain Water District*, 594 A.2d 421, 424 (Vt. 1991). Deprived of its only means of enforcement—discipline consistent with the CBA—the Howard Center's efforts to maintain patient privacy will be reduced to a paper tiger.

And if any more of the Howard Center's current and/or potential patients get wind of this,[8] their confidence in the Howard Center's ability to keep their PHI private will erode, possibly leading them to forgo treatment. As the Dissent recognized, "It is already difficult for individuals to seek substance-abuse counseling and treatment and ignoring the harm caused by disclosing private health information, as I believe the majority's decision does, could result in a chilling effect in the future on those needing treatment." App. 26.

This "chilling effect" would be a tragic result, one that can be avoided by allowing the Howard Center to do what the HIPAA Privacy Rule commands and impose "appropriate sanctions" on Peyser for his indisputably illegal misconduct. It is primarily for this reason that the Howard Center respectfully urges this Court to adopt the "manifest disregard of the law" standard and apply it to the Arbitration Award at issue, as explained below.

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[8] The patients who were directly affected by Peyser's misconduct have long since been notified, as required by the HIPAA Privacy Rule. *See* 45 C.F.R. § 164.404.

II. The Arbitrator manifestly disregarded the law by prohibiting the Howard Center from imposing even minimal discipline on an employee, who indisputably violated patient privacy in violation of federal law, because "appropriate sanctions" are mandatory under the HIPAA Privacy Rule.

To have any hope of obtaining *vacatur* of the Arbitration Award, the Howard Center understands that it "must clear a high hurdle." *Stolt-Nielsen S.A. v. AnimalFeeds International Corp.*, 559 U.S. 662, 671 (2010). "It is not enough . . . to show that the [arbitrator] committed an error—or even a serious error." *Id.* "It is only when [an] arbitrator strays from interpretation and application of the agreement and effectively 'dispense[s] his own brand of industrial justice' that his decision may be unenforceable." *Major League Baseball Players Ass'n v. Garvey*, 532 U.S. 504, 509 (2001) (quoting *United Steelworkers of America v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 597 (1960)).

"Courts play only a limited role when asked to review the decision of an arbitrator and only a very narrow set of circumstances delineated by statute and case law permit *vacatur*." *Porzig v. Dresdner, Kleinwort, Benson, North America, LLC*, 497 F.3d 133, 138 (2d Cir. 2007) (cleaned up). "A decision of an arbitrator, however, is not totally impervious to judicial review." *Id.* at 139. "In addition to the grounds for vacatur explicitly provided for by the Federal Arbitration Act ('FAA'), 9 U.S.C. § 10(a), an arbitral decision may be

vacated when an arbitrator has exhibited a 'manifest disregard of law.'" *Westerbeke Corp. v. Daihatsu Motor Co., Ltd.*, 304 F.3d 200, 209 (2d Cir. 2002) (Sotomayor, J.).[9]

"'Manifest disregard of the law' by arbitrators is a judicially-created ground for vacating their arbitration award, which was introduced by the Supreme Court" in 1953. *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Bobker*, 808 F.2d 930, 933 (2d Cir. 1986) (citing *Wilko v. Swan*, 346 U.S. 427, 436-37 (1953)). While it may be this Court's creation, the manifest-disregard standard has been subject to some ambivalence. *See Stolt-Nielsen*, 559 U.S. at 671 n.3 ("We do not decide whether manifest disregard survives . . . as an independent ground for review or as a judicial gloss on the enumerated grounds for *vacatur* set forth in [the FAA].").

Nevertheless, many lower federal courts—including the Second Circuit—still employ this standard to arbitration decisions. *See*, *e.g.*, *Weiss v. Sallie Mae, Inc.*, 939 F.3d 105, 109 (2d Cir. 2019). "Our circuit has long held that an arbitration award may be vacated if it exhibits a manifest disregard of the law." *Wallace v.*

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[9] "Other Circuits have recognized additional, nonstatutory bases upon which a reviewing court may vacate an arbitrator's award, including where the awards are 'completely irrational,' 'arbitrary and capricious,' and contrary to an explicit public policy." *Porzig*, 497 F.3d at 139 (citations omitted). Though the Howard Center confines its argument herein to manifest disregard as embodied in Second Circuit jurisprudence, it should be noted that these additional non-statutory bases could all be said to each call for vacating the Arbitration Award.

Buttar, 378 F.3d 182, 189 (2d Cir. 2004) (cleaned up). Though not adopting it outright, the Vermont courts purported to apply this standard below. The Howard Center respectfully submits that now is the time to embrace "manifest disregard of the law" as a non-statutory ground for vacating arbitration awards. *See* App. 23 ("I can think of no clearer opportunity to [adopt manifest disregard] than is presented here, where the arbitrator purposely ignored applicable law to excuse an unnecessary breach of patient confidentiality by grievant.") (Eaton, J., dissenting).[10]

"The manifest disregard standard is, admittedly, a controversial one, but we think the controversy is unwarranted." *Schiferle v. Capital Fence Co., Inc.*, 61 N.Y.S.3d 767, 771 (N.Y. App. Div. 2017). New York's appellate court explained:

> Under both the Federal Arbitration Act and [New York] State law, an arbitration award is subject to *vacatur* when the arbitrator

[10] To be clear, the Vermont courts reviewed the Arbitration Award at issue here under the Vermont Arbitration Act, 12 V.S.A. §§ 5677-5678 ("VAA"), rather than the FAA. However, "[d]ecisions under statutes based on the Uniform Arbitration Act and under the Federal Arbitration Act are helpful to us in construing the Vermont act." *Vermont Built, Inc. v. Krolick*, 969 A.2d 80, 87 (Vt. 2008). Since Vermont arbitration law generally follows federal arbitration law, a decision by this Court unreservedly adopting the manifest-disregard standard would inform both. *See Masseau v. Luck*, 252 A.3d 788, 799 (Vt.) (citing *Stolt-Nielsen*, 559 U.S. at 671 n.3) ("Accordingly, whether courts are empowered to apply the manifest disregard doctrine under either the VAA or FAA is again an open question."), *cert. denied*, 142 S. Ct. 89 (2021).

> exceeds his or her power, and as the Second Circuit has explained, *arbitrators who act in manifest disregard of the law have thereby exceeded their powers* within the meaning of [the FAA]. After all, as Judge Sack astutely observed . . . , *parties do not agree in advance to submit to arbitration that is carried out in manifest disregard of the law*. . . . Given our high Court's unanimous adoption of the manifest disregard standard under the Federal Arbitration Act . . . , *we see no reason to reject the manifest disregard standard under the identically-worded provision of [the New York statute]—particularly given the utility of harmonizing state and federal practice regarding judicial oversight of arbitration proceedings.*

Id. at 771-72 (emphasis added; citations and internal quotation marks omitted).[11] The *Schiferle* Court's reasoning applies equally here.[12]

"Our review under the doctrine of manifest disregard is severely limited. It is highly deferential to the arbitral award and obtaining judicial relief from

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[11] Judge Sack's observation that "parties do not agree in advance to submit to arbitration that is carried out in manifest disregard of the law," *Stolt-Nielsen S.A. v. AnimalFeeds International Corp.*, 548 F.3d 85, 95 (2d Cir. 2008), *rev'd on other grounds*, 559 U.S. 662 (2010), takes on added significance in light of this Court's more recent jurisprudence emphasizing the importance of consent. *See Viking River Cruises, Inc. v. Moriana*, 142 S. Ct. 1906, 1918 (2022) (citing *Stolt-Nielsen*).

[12] Like both the FAA and the equivalent New York statute, the VAA also authorizes *vacatur* when "the arbitrators exceeded their powers." 12 V.S.A. § 5677(a)(3).

arbitrators' manifest disregard of the law is rare." *Duferco International Steel Trading v. T. Klaveness Shipping A/S*, 333 F.3d 383, 389 (2d Cir. 2003). The Second Circuit noted that "since 1960 we have vacated some part or all of an arbitral award for manifest disregard in [only] four out of at least 48 cases where we applied the standard." *Id.* As a result, there is little danger of opening the floodgates to litigation if this standard is adopted.[13]

"The two-prong test for ascertaining whether an arbitrator has manifestly disregarded the law has both an objective and a subjective component." *Westerbeke*, 304 F.3d at 209. That test is as follows:

> An arbitral award may be vacated for manifest disregard only where a petitioner can demonstrate "both that (1) the arbitrators knew of a governing legal principle yet refused to apply it or ignored it altogether, and (2) the law ignored by the arbitrators was well-defined, explicit, and clearly applicable to the case."

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[13] Three out of those four cases "involved an arbitral decision that exceeded the legal powers of the arbitrators. In those cases, it is arguable that manifest disregard need not have been the basis for vacating the award, since *vacatur* would have been warranted under the FAA." *Duferco*, 333 F.3d at 389. In other words, just as the *Schiferle* Court ruled, manifest disregard as a standard for *vacatur* finds support in the statute and is really just a gloss on the statutory *vacatur* ground of the arbitrators "exceed[ing] their powers." 9 U.S.C. § 10(a)(4). Thus, whether a court cites a statutory or non-statutory ground when vacating an arbitral decision is largely a matter of semantics.

Porzig, 497 F.3d at 139 (quoting *Wallace*, 378 F.3d at 189). This two-prong test "has for decades guaranteed that review for manifest disregard [does] not grow into the kind of probing merits review that would undermine the efficiency of arbitration." *Wachovia Securities, LLC v. Brand*, 671 F.3d 472, 483 (4th Cir. 2012).[14]

According to the Second Circuit, the objective prong of this test actually involves two separate inquiries. *Duferco*, 333 F.3d at 389. "First, we must consider whether the law that was allegedly ignored was clear, and in fact explicitly applicable to the matter before the arbitrator[ ]." *Id.* at 389-90. "An arbitrator obviously cannot be said to disregard a law that is unclear or not clearly applicable. Thus, misapplication of an ambiguous law does not constitute manifest disregard." *Id.* at 390. Furthermore, "[a] legal principle clearly governs the resolution of an issue before the arbitrator if its applicability is 'obvious and capable of being readily and instantly perceived by the average person qualified to serve as an arbitrator.' " *Westerbeke*, 304 F.3d at 209 (quoting *Merrill Lynch*, 808 F.2d at 933).

As demonstrated above, the plain meaning of the word "must," used in connection with a covered entity's duty to impose "appropriate sanctions" on workforce members who violate patient privacy, makes the

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[14] *See Kashner Devidson Securities Corp. v. Mscisz*, 531 F.3d 68, 75 (1st Cir. 2008) (quoting treatise that says, "Although subject to slight variations in wording, courts [in other circuits] generally apply [this] two part test in determining if the award should be vacated for manifest disregard of the law.").

HIPAA Privacy Rule both clear and explicitly applicable here. There is nothing ambiguous about HHS's command. Anyone serving in the role of arbitrator could and should have readily and instantly perceived that the meaning of "must" is mandatory. *See Porzig*, 497 F.3d at 143-44 (finding manifest disregard when arbitration panel failed to award attorney's fees "[d]espite the settled jurisprudence with respect to the mandatory requirement both that attorney's fees be awarded for successful claims brought under [federal statute] and that attorney's fees be awarded for litigation enforcing the right to those fees").[15]

"Second, once it is determined that the law is clear and plainly applicable, we must find that the law was in fact improperly applied, leading to an erroneous outcome." *Duferco*, 333 F.3d at 390. "Among the manifest errors identified by federal courts are circumstances in which the panel's judgment was found to be incompatible with a controlling statute." *Travelers Insurance Co. v. Nationwide Mutual Insurance Co.*, 886 A.2d 46, 49 (Del. Ct. Chan. 2005). Thus, if the law requires a party to do something, and through the improper application of that law an arbitrator orders that party not to do the very thing required by law, that would obviously be an erroneous outcome. As the Dissent noted: "Had the arbitrator applied the HIPAA Privacy Rule, *he*

[15] Apparently, the Majority was swayed by the Respondents' argument that no one can know what HIPAA regulations really mean until a court has interpreted them. Surely, HHS would be surprised to learn that its regulations are unenforceable until after they are thoroughly litigated. Nevertheless, this only makes this Court's intervention all the more necessary.

necessarily would have concluded that employer had just cause to reprimand grievant." App. 28 (emphasis added).

For example, in *Matter of Arbitration of Western Union Telegraph Co. & American Communications Ass'n, CIO*, 86 N.E.2d 162 (N.Y. 1949), New York's highest court addressed a case in which the employer was "required by the Federal Communications Act to accept all outbound international communications offered to it by the public and to transmit the same in accord with a formula and regulations prescribed by the Federal Communications Commission." *Id.* at 164. Nevertheless, in sympathy with a strike then occurring elsewhere, "a substantial number" of its unionized employees refused to handle certain messages. *Id.* at 165. As the court described it:

> The refusal to handle "hot traffic" concededly practiced by such employees interrupted and delayed the forwarding of messages *which Western Union was required by law to transmit*, disarranged a system of work designed by Western Union to assure the quick dispatch of those messages, and made idle those employees who, although trained in the technique of such work, refused to transmit messages which were within their prescribed duties in the performance of an ordinary day's work.

Id. Accordingly, the court ruled that the arbitrator had exceeded his powers when ordering the employer to take such measures as reinstating suspended employees with back pay, reasoning:

> It is difficult to understand how [the employer] can discharge those duties required of it by both Federal and State statutes if it is also required to *retain* in its service employees whose duty it is to transmit telegraph messages but who refuse to handle messages offered by the public which happen to be routed over facilities of a telegraph company where a strike prevails. To approve such a practice would to that extent oust the employer company from control of its own business and to that extent would prevent it from performing duties to the public required by law.

Id. at 168 (emphasis in original). In much the same way, the Arbitration Award ousts the Howard Center from control of its own business and prevents it from maintaining HIPAA compliance.[16]

In a more recent case, *New York Telephone Co. v. Communications Workers of America Local 1100, AFL-CIO District One*, 256 F.3d 89 (2d Cir. 2001), the employer sought *vacatur* of an arbitration award requiring it to pay the union a monthly sum equal to the

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[16] The Majority distinguished *Western Union* from this case because, in the former, the court ruled that the arbitrator had exceeded his powers rather than manifestly disregarded the law. *See* App. 15. But this is a distinction without a difference. It should come as no surprise that the New York court did not employ the manifest-disregard standard in 1949 because this Court did not invent that standard until 1953, four years later. *See Wilko*, 346 U.S. at 436-37. In any event, under New York law as it later evolved, "arbitrators who act in manifest disregard of the law have thereby exceeded their powers within the meaning of" the governing statute. *Schiferle*, 61 N.Y.S.3d at 772 (internal quotation marks omitted).

dues that the union would have collected if the employer had not used non-union workers. The employer argued that such payments were illegal under 29 U.S.C. § 186. *See id.* at 91. The arbitrator had disagreed, finding that the payments fell under a statutory exception, and expressly disregarded Second Circuit precedent to the contrary. *See id.*

"The district court held that the dues payments were illegal because they did not come within an applicable exception to § 186 and therefore vacated the arbitration award. . . ." *Id.* The Second Circuit agreed and chastised the arbitrator for rejecting binding precedent in favor of contrary out-of-circuit precedent. "These opinions are not the law of this Circuit; it was therefore 'manifest disregard of the law' for the arbitrator to reject [binding precedent] and apply another rule." *Id.* at 93 (quoting *Halligan v. Piper Jaffray, Inc.*, 148 F.3d 197, 202 (2d Cir. 1998), *cert. denied*, 526 U.S. 1034 (1999)). Here, it was manifest disregard of the law for the Arbitrator to come up with his own balancing test *vis-à-vis* the HIPAA Privacy Rule's disciplinary mandate, weighing its duties against Peyser's interest in union representation and finding the latter to prevail. *See* App. 60 ("[T]here must be a balance between the two interests.").

Even more recently, a federal district court in California vacated part of an arbitration award that conflicted with the HIPAA Privacy Rule. *See Long Beach Memorial Medical Center v. United Steel, Paper & Forestry, Rubber, Manufacturing, Energy, Allied*

Industrial & Service Workers International Union, 2021 WL 3109920 (C.D. Cal. 2021).

In that case, a phlebotomist made sexualized comments while drawing blood that made a female patient—designated "Patient Z"—feel uncomfortable. *See id.* at *1. The hospital reprimanded the employee in writing "and also verbally instructed [him] to avoid all contact" with Patient Z. *Id.* About two weeks later, while drawing a female patient's blood, the employee "began to wonder whether she was the patient he was not to contact." *Id.* After he brought this to his supervisor's attention, he was terminated for insubordination. *See id.* The hospital found "not credible" his claims that he had not realized until it was too late that she was Patient Z. *Id.*

The employee and his union grieved the termination, which went to binding arbitration. *See id.* While determining that the employee's actions during the second blood draw warranted "serious disciplinary action," the arbitrator also concluded that termination was too severe and that the employee should instead be suspended for about 18 months and required to undergo additional training. *See id.* In addition, the arbitrator stated:

> "[The employee] should also be given Patient Z's name again so that he can take the necessary steps to commit it to memory, write it down and keep it in a safe place, such as his wallet to refer to, if needed, (while keeping the name confidential) to ensure he knows patient

> Z's identity and does not draw her blood or have any contact with her in the future."

Id. at *3 (quoting arbitration award).

"The Hospital contends that this provision [of the arbitration award] violates public policy by putting the Hospital in the untenable position of violating [HIPAA]. The court agrees." *Id.* Citing the applicable regulatory provisions, the court ruled:

> An award requiring the Hospital to allow one of its employees to maintain the name of a patient on a piece of paper in his wallet at all times runs contrary to the public policy, enshrined in HIPAA, of protecting patient privacy, including an individual's status as a patient. Accordingly, the portion of the arbitration award requiring the Hospital to "take the necessary steps" to help [the employee] keep Patient Z's name written down "in a safe place" is vacated.

Id. So, too, should the Arbitration Award at issue here be vacated because it puts the Howard Center in an equally untenable position of unwilling complicity in Peyser's HIPAA violation.

These three cases stand for the indubitable proposition that arbitrators cannot order a party to break the law. Whether denoted as exceeding his or her powers, violating public policy, or manifesting disregard for the law, an arbitrator who effectively orders a party to break the law has acted so egregiously and erroneously

that his or her arbitration decision cannot be allowed to stand.

Finally, there is the subjective prong of the Second Circuit's test. "Third, once the first two inquiries are satisfied, we look to a subjective element, that is, the knowledge actually possessed by the arbitrators." *Duferco*, 333 F.3d at 390. "The arbitrator must appreciate the existence of a clearly governing legal principle but decide to ignore or pay no attention to it." *Westerbeke*, 304 F.3d at 209 (cleaned up). "We review only for a clear demonstration that the [arbitrator] intentionally defied the law." *Duferco*, 333 F.3d at 393.

"[T]his is not a case . . . where we refused to find 'manifest disregard' because [a party] had not sufficiently brought the governing law to the attention of the arbitrators. There is no such problem here." *Halligan*, 148 F.3d at 203-204. Indeed, the Arbitrator himself noted in passing the "plethora of laws [and] regulations . . . ensuring patient privacy" that were presented to him but nevertheless chose to go his own way without analyzing or applying a single one of them. App. 60.

Just as the Dissent concluded, "[T]his is not merely a situation where the arbitrator misapplied the law. Here, the arbitrator had full knowledge of employer's obligations under federal law, acknowledged them, and chose to ignore those requirements." App. 21. Thus, like the objective prong, the subjective prong is satisfied here.

CONCLUSION

If there was ever a case in which an arbitrator's manifest disregard for the law has been demonstrated, this is it. The Arbitration Award does not reflect mere legal error but rather profound error that risks undermining the central tenets of the HIPAA Privacy Rule. Accordingly, the Howard Center respectfully requests that this Court grant this Petition for a writ of *certiorari* and reverse the Vermont Supreme Court's decision below.

Respectfully submitted,

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