IN THE SUPREME COURT OF OHIO

MENORAH PARK CENTER FOR SENIOR LIVING,	:	Case No. 2019-0939
	:	ON APPEAL FROM THE EIGHTH
Appellant,	:	DISTRICT COURT OF APPEALS
vs.	:	
	:	Court of Appeals Case No. CA-18-107615
IRENE ROLSTON,	:	
Appellee.	:	

MERIT BRIEF OF AMICI CURIAE, OHIO HOSPITAL ASSOCIATION, OHIO STATE MEDICAL ASSOCIATION, AND OHIO OSTEOPATHIC ASSOCIATION, IN SUPPORT OF APPELLANT

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INTRODUCTION

This case presents the Court with an opportunity to simplify and clarify the law in Ohio concerning the use and disclosure of private medical information by Ohio healthcare providers. In this regard, Ohio healthcare providers are currently governed by both federal law—the Health Insurance Portability and Accountability Act of 1996 ("HIPAA")—and common law created by the Ohio Supreme Court in *Biddle v. Warren Gen. Hosp.*, 86 Ohio St.3d 395, 715 N.E.2d 518 (1999) before HIPAA regulations were enacted. HIPAA provides a specific and workable framework for the limited use and disclosure of private medical information. *Biddle* does not.

In *Biddle*, the Supreme Court judicially created a new, private cause of action that can be brought by a patient (or the patient's representative) against a healthcare provider in the event of the provider's unauthorized disclosure of the patient's private medical information. Prior to *Biddle*, no such claim existed in Ohio. And regulations implementing HIPAA did not yet exist, which is perhaps why the *Biddle* Court felt compelled to create a new tort to protect patients' privacy.

Biddle does allow for healthcare providers to disclose private medical information, but it does not enumerate situations in which such disclosures are authorized. Rather, *Biddle* allows for disclosure when "necessary to protect or further a countervailing interest that outweighs the patient's interest in confidentiality." *Id.* at paragraph two of the syllabus. The only way to figure out what this vague standard means in a particular context is to litigate it, which is precisely what has happened in this case and many others. Litigation is not an efficient way to define the boundaries of whether a disclosure of patient information is authorized or not.

As noted, *Biddle* preceded the promulgation of privacy and security regulations implementing the requirements of HIPAA and the later enacted Health Information Technology for Economic and Clinical Health ("HITECH") Act (individually the "Privacy Rule" and the

"Security Rule", collectively, the "HIPAA Rules"), which together create a workable national standard for healthcare providers like Amici's membership. The HIPAA Rules established, for the first time, a set of national standards for the protection of certain health information, which are widely recognized by patients, health care providers, payors, and other stakeholders. The HIPAA Rules address the use and disclosure of individuals' health information – called "protected health information" ("PHI") by "covered entities." Health care providers, such as physicians and hospitals, are covered entities under HIPAA.

Prior to HIPAA, no generally accepted set of security standards or general requirements for protecting health information existed in the health care industry on a national scale.

The U.S. Department of Health and Human Services' ("HHS") Office for Civil Rights ("OCR") is primarily responsible for enforcing HIPAA. HIPAA also allows the Department of Justice to bring criminal prosecutions with the possibility of fines and imprisonment for certain HIPAA violations. The HITECH Act later gave State Attorneys General the authority to bring civil actions on behalf of state residents for violations of the HIPAA Rules. The HITECH Act permits State Attorneys General to obtain damages on behalf of state residents or to enjoin further violations of the HIPAA Rules.

Ohio healthcare providers know how to comply with HIPAA, and they are subject to penalties and sanctions for violations. By contrast, providers struggle to interpret *Biddle* in nearly every aspect of their business operations that requires the use or disclosure of PHI. It is unclear whether compliance with HIPAA also satisfies *Biddle* because *Biddle's* standard is so nonspecific. Numerous lawsuits have resulted from this confusion, and Ohio Courts of Appeals interpret *Biddle* inconsistently. So providers are faced with an untenable choice between (1) using and disclosing PHI in a way that is authorized by HIPAA but may not be permissible under

Biddle, thereby subjecting the provider to a possible lawsuit brought by the patient or (2) not using and disclosing the PHI in a way that is permitted under HIPAA but unclear under *Biddle* and thereby disrupting patient care and business operations. The solution is for this Court to overrule *Biddle* because it is antiquated, unworkable, and burdensome to providers, patients, and the court system and instead allow HIPAA (and certain existing Ohio statutes) to govern the use and disclosure of PHI.

STATEMENT OF INTEREST OF AMICI CURIAE

Established in 1915, the Ohio Hospital Association represents 236 hospitals and 14 health systems throughout Ohio that employ 255,000 Ohioans and contribute $31.4 billion to Ohio's economy along with $6.4 billion in net community benefit. OHA is the nation's first state hospital association and is recognized nationally for its patient safety and health care quality initiatives and environmental sustainability programs. Guided by a mission to collaborate with member hospitals and health systems to ensure a healthy Ohio, the work of OHA centers on three strategic initiatives: advocacy; economic sustainability; and patient safety and quality. The association founded the OHA Institute for Health Innovation and is a co-founder of the Ohio Health Information Partnership and the Ohio Patient Safety Institute.

The Ohio State Medical Association ("OSMA") is a nonprofit professional association of approximately 10,000 physicians, medical residents, and medical students in the State of Ohio. The OSMA's membership includes most Ohio physicians engaged in the private practice of medicine in all specialties. The OSMA's purposes are to improve public health through education, encourage interchange of ideas among members, and maintain and advance the standards of practice by requiring members to adhere to the concepts of professional ethics.

The Ohio Osteopathic Association ("OOA") advocates for approximately 6,000 osteopathic physicians, historically osteopathic hospitals, 1,000 osteopathic medical students, and

the Ohio University Heritage College of Osteopathic Medicine. OOA is a state society of the American Osteopathic Association. Its founding purposes include promoting the health of all Ohioans, cooperating with all public health agencies, maintaining high standards at all Ohio osteopathic institutions, encouraging research and investigation – especially pertaining to the principles of the osteopathic school of medicine, and maintaining the highest standards of ethical conduct in all phases of osteopathic medicine and surgery.

STATEMENT OF THE CASE AND FACTS

The parties to this case do not dispute that Appellant Menorah Park Center for Senior Living provided healthcare services that Appellee Irene Rolston has not paid for. Menorah Park sought to collect for those services through the legal system. Complaint (Mun.Ct. Doc. 17). Under Civ.R. 10(D)(1), when, as here, a plaintiff files a claim founded on an unpaid account, the plaintiff must attach a copy of the account. Menorah Park attached copies of its most recent two bills to Ms. Rolston to the complaint, which was filed in Shaker Heights Municipal Court. Complaint (Mun.Ct. Doc. 17).

In response, Ms. Rolston filed a class-action counterclaim on behalf of other patients who received services from Menorah Park and who, like Ms. Rolston, declined to pay for those services and were sued by Menorah Park in an effort to collect payment on those outstanding debts. Answer and Class-Action Counterclaim (Mun.Ct. Doc. 14).

Menorah Park moved to dismiss the counterclaim for the following reasons: (1) health care providers as covered entities can use or disclose protected health information under HIPAA for payment purposes; (2) HIPAA does not provide for a private right of action; and (3) Ohio courts such as the Tenth District Court of Appeals have held that HIPAA preempts any private right of action, citing *OhioHealth Corp. v. Ryan*, 10th Dist. Franklin No. 10AP-937, 2012-Ohio-

60, ¶ 13, 17. Motion to Dismiss (Mun.Ct. Doc. 12). The trial court granted Menorah Park's motion to dismiss. Judgment (Mun.Ct. Doc. 4).

Ms. Rolston appealed, and the Eighth District Court of Appeals reversed. 8th Dist. Cuyahoga No. 107615, 2019-Ohio-2114. The Eighth District concluded that *Biddle* claims complement, rather than conflict, with HIPAA's provisions. *Id.* at ¶ 22, quoting *R.K. v. St. Mary's Med. Ctr., Inc.*, 229 W.Va. 712, 721, 735 S.E.2d 715 (2012). This Court accepted jurisdiction over the case.

LAW AND ARGUMENT

Amici's Proposition of Law: In light of Congress' enactment of the Health Insurance Portability & Accountability Act (HIPAA) and its Privacy and Security Rules, effective April 14, 2003 and expanded in 2013, there is no longer a need for a common law cause of action for the disclosure of private health information in Ohio. *Biddle v. Warren Gen. Hospital*, 86 Ohio St.3d 395, 715 N.E.2d 518 (1999), overruled.

This Court can overrule its own precedent when "(1) the decision was wrongly decided at that time, or changes in circumstances no longer justify continued adherence to the decision, (2) the decision defies practical workability, and (3) abandoning the precedent would not create an undue hardship for those who have relied upon it." *Westfield Ins. Co. v. Galatis*, 100 Ohio St.3d 216, 2003-Ohio-5849, 797 N.E.2d 1256. *Biddle* should be overruled because all three factors are satisfied.

I. Changes in circumstances no longer justify continued adherence to *Biddle*.

In 1999, Justice Resnick announced the Court's expansion of liability for disclosure of confidential patient information to include both doctors and hospitals. *Biddle*, 86 Ohio St.3d at paragraph one of the syllabus. The Court created a cause of action for the disclosure of nonpublic medical information learned within the physician-patient relationship. *Id.* at 401. While vastly expanding liability for physicians and hospitals, *Biddle* did leave some room for "authorized" disclosures but did not define which disclosures may be "authorized." Without authorization, "a

physician or hospital is privileged to disclose otherwise confidential medical information in those special situations where disclosure is made in accordance with a statutory mandate or common law duty, or where disclosure is necessary to protect or further a countervailing interest that outweighs the patient's interest in confidentiality." *Id.* at paragraph two of the syllabus.

Biddle went further. It also said that a third party could be liable for inducing the "unauthorized, unprivileged disclosure of nonpublic medical information medical information that a physician or hospital has learned within a physician-patient relationship." *Id.* at paragraph three of the syllabus. But *Biddle* does not define when a disclosure is "authorized" or "unauthorized." On the other hand, the HIPAA Rules clearly establish which uses and disclosures of a patient's PHI are "authorized" or "unauthorized."

And while *Biddle* set forth the elements necessary to establish third-party liability for inducing the improper disclosure of nonpublic medical information, it gave no indication of what type of "countervailing interest" might outweigh a patient's interest in confidentiality. Physicians and hospitals were – and still are – left instead to guess when they are permitted to use and disclose patient information under *Biddle*. Generally, Ohio healthcare providers attempt to make this determination by analyzing prior litigation concerning whether a certain disclosure in a specific circumstance served a "countervailing interest" that outweighed the patient's interest in confidentiality. Of course, not every type of use or disclosure has been litigated, and so there are gaps in Ohio common law that leave providers with many unanswered questions about how they are permitted to use and disclose private health information under *Biddle*.

A. The Court announced *Biddle* in a far different regulatory atmosphere.

Biddle recognized that courts had long struggled not with whether physicians should be liable for breaches of patient confidentiality in theory but with what to call that cause of action in practice. *Biddle*, 86 Ohio St.3d at 400, 715 N.E.2d 518, citing *Smith v. Driscoll*, 94 Wash. 441,

442, 162 P. 572 (1917). Courts previously attempted to fashion a breach of patient confidentiality into pre-existing torts and other causes of action, such as invasion of privacy, defamation, implied breach of contract, intentional and negligent infliction of emotion distress, implied private statutory cause of action, breach of trust, detrimental reliance, negligence, and medical malpractice. *Biddle* at 400. But it was like trying to fit a square peg into a round hole; none of those pre-existing claims quite fit, and courts found themselves improperly stretching traditional tort theories or ignoring doctrinal limitations in order to "devise a remedy 'for so palpable a wrong.'" *Id.* Citing over two dozen cases, the *Biddle* opinion observed that courts had reached the "inevitable realization" that a claim for breach of confidence "should stand in its own right." *Id.*

The new claim created in *Biddle* was not derived from the Ohio Constitution or the Revised Code. Instead of relying on the General Assembly to fill the then-existing void in Ohio law, the Court took matters into its own hands when it decided *Biddle*. *See State v. Smorgala*, 50 Ohio St.3d 222, 223, 553 N.E.2d 672 (1990) (recognizing the General Assembly as the final arbiter of public policy).

When the Court decided *Biddle* in 1999, the regulatory environment for the disclosure of nonpublic medical information was much different than it is today. No uniform law governed the nation's healthcare data or addressed the protection of healthcare data in an electronic world. Instead, states relied on a patchwork of predominantly common law decisions providing for the protection of private medical information. In some cases, courts drew the basis for liability from the "duty toward the patient implicit in the patient's statutory privilege to exclude the doctor's testimony in litigation." *Humphers v. First Interstate Bank of Oregon*, 298 Or. 706, 718, 696 P.2d 527 (Ore.1985). Courts also relied on state statutes related to licensing provisions for doctors that

identified betrayal of patient secrets as unprofessional conduct. *Simonsen v. Swenson*, 104 Neb. 224177 N.W. 831 (Neb.1920). Other courts looked to contract principles, including breach of fiduciary duties to patients, which allow for tort recovery in an otherwise contractual relationship. *MacDonald v. Clinger*, 84 A.D.2d 482, 486–487, 446 N.Y.S.2d 801 (NY App.1982).

This was the common law repository the *Biddle* Court had available to draw from in creating Ohio's new cause of action. But less than five years later, change would come on a national scale that obviated the need for *Biddle* and established a standard, predictable regulatory regime governing permitted uses and disclosures of patient PHI.

B. In 2003, the HIPAA Privacy Rule went into effect, creating a practical and enduring national standard for the use and disclosure of protected health information.

HIPAA was enacted in 1996, but its presence was not fully felt until 2003, when compliance with the HIPAA Privacy Rule became required. In fact, HHS did not even release the proposed Privacy Rule until almost two months after the Court announced its decision in *Biddle*. That is, the Court created a judicial solution to a problem that federal legislation and administrative rulemaking would almost immediately begin to solve. And that workable national standard was in place just a few years later. HIPAA has evolved over the last decade since the promulgation of the Privacy Rule to address and react to, among other things, the rise in use of electronic health information by both providers and patients alike. *Biddle* has not evolved, making it even more inapposite in today's post-HIPAA age of electronic health information.

As mentioned above, the main function of the Privacy Rule is to clearly define the circumstances under which PHI may and may not be disclosed by covered entities. While the Privacy Rule established national standards for the protection of certain health information, the Security Rule set forth Security Standards for the Protection of Electronic Protected Health Information which established a national set of security standards for protecting certain health

information that is held or transferred in electronic form. The Security Rule operationalizes the protections contained in the Privacy Rule by addressing the technical and non-technical safeguards "covered entities" must put in place to secure individuals' "electronic protected health information" ("e-PHI"). The Security Rule works in conjunction with the Privacy Rule to protect the confidentiality, integrity, and availability of electronic protected health information. Compliance with the Security Rule was required as of April 21, 2005.

Biddle has no such equivalent.

The HIPAA Rules also provide standards for enforcement and provisions relating to compliance and investigations, the imposition of civil money penalties for violations of the HIPAA Rules, and procedures for hearings. An interim final rule was first effective May 19, 2003, and a subsequent interim final rule to conform HIPAA's enforcement regulations to the HITECH Act, was effective on November 30, 2009.[1]

Again, *Biddle* has no such equivalent. Every Common Pleas trial judge and jury in the State of Ohio is a potential arbiter of whether a certain use or disclosure of private patient information is permissible under *Biddle*, and no uniformity exists regarding how *Biddle* is interpreted or how damages are calculated in the event of liability.

HHS issued another rule in 2013 that implements a number of provisions of the HITECH Act to strengthen the privacy and security protections for health information established under HIPAA. This rule included the Breach Notification Rule, 45 CFR §§ 164.400-414, which requires HIPAA covered entities and their business associates to provide notification following a breach of unsecured PHI.

[1] These interim final rules are not temporary; they are final, despite being technically called "interim" final rules.

As discussed in the subsections below, the HIPAA Rules simultaneously protect the privacy and security of PHI while affording covered entities the ability to use and disclose such PHI under a fair and logical system in which they can operate their businesses and provide health care services without fear of litigation and disparate results.

1. The HIPAA Rules provide a myriad of protections for a patient's protected health information.

The HIPAA Rules, although stringent, strike the right balance between protecting the privacy and security of a patient's PHI and affording covered entities a workable framework to operate their businesses. The Rules require appropriate safeguards to protect the privacy of patient PHI and set limits and conditions on the uses and disclosures that may be made of such information without patient authorization.

For example, the HIPAA Privacy Rule provides individuals with a legal, enforceable right to access their health records. These patient access rights – namely the rights of access, amendment, and accounting – are key ways in which HIPAA enables patients to be educated and in control of decisions regarding their health and well-being. The Privacy Rule generally requires covered entities to provide individuals, upon request, with access to the individual's PHI in one or more "designated record sets" maintained by or for the covered entity. 45 CFR 164.524. This includes the right to inspect or obtain a copy, or both, of the PHI, as well as the right to direct the covered entity to transmit a copy to a designated person or entity of the individual's choice. The right of amendment gives individuals the right to have covered entities amend their PHI in a designated record set when that information is inaccurate or incomplete. 45 CFR 164.526. And the right of accounting requires a covered entity to provide an accounting of certain disclosures to the individual upon request. 45 CFR 164.528.

Another example of the protections that HIPAA affords to patients is the right to request confidential communications, which empowers patients to truly partner with their health care providers. A covered health care provider must permit individuals to request and must accommodate reasonable requests by individuals to receive communications of PHI from the covered health care provider by alternative means or at alternative locations to ensure confidentiality. For example, HHS considers a request to receive mailings from the covered entity in a closed envelope rather than by postcard to be a reasonable request that should be accommodated. Similarly, a request to receive mail from the covered entity at a post office box rather than at home, or to receive calls at the office rather than at home, are also considered to be reasonable requests, absent extenuating circumstances. 45 CFR 164.522(b).

A further example of the protective nature of HIPAA is the Security Rule, which establishes national standards to protect individuals' electronic PHI that is created, received, used, or maintained by a covered entity. The Security Rule requires extensive administrative, physical, and technical safeguards to ensure the confidentiality, integrity, and security of electronic PHI. *Biddle* provides no such rigorous and well-defined standards like those provided by HIPAA's Privacy and Security Rules.

2. The HIPAA Privacy and Security Rules also provide practical standards for providers when using and disclosing protected health information.

On top of its protections for PHI, the HIPAA Rules give covered entities a practical standard for using and disclosing such information in the course of their business activities. The default rule under HIPAA is that a patient's PHI cannot be used or disclosed without patient authorization unless expressly permitted under the HIPAA Rules. For example, to avoid interfering with an individual's access to quality health care or the efficient payment for such services, the Privacy Rule permits a covered entity to use and disclose PHI, with certain limits

and protections, for treatment, payment, and certain health care operations activities. By permitting providers to exchange patient information for treatment purposes, the HIPAA Rules ensure a smooth transition for the patient throughout the continuum of care.

Similarly, the efficient payment for health care services requires the use and disclosure of PHI and is also essential to the effective operation of all health care providers. Payment is not the mere exchange of money for services or the traditional billing and collection activities that patients commonly think of. In the healthcare context, it encompasses both healthcare providers charging for medical treatment *and* of health plans (insurers) providing reimbursement for medical treatment. "Payment" specifically encompasses the various activities of health care providers to obtain payment or be reimbursed for their services and of a health plan to obtain premiums, to fulfill their coverage responsibilities and provide benefits under the plan, and to obtain or provide reimbursement for the provision of health care. In short, without the Privacy Rule's flexibility to use and disclosure of PHI, the healthcare system would break down.

Biddle does not specifically provide for any of the aforementioned activities, which is undoubtedly why this lawsuit occurred.

In addition to rule-making pursuant to the HIPAA and the HITECH Act as described above, HHS has continuously issued sub-regulatory guidance to help covered entities (such as healthcare providers) ensure that health information remains secure and private in an ever-changing technological world. For example, HHS has developed guidance and tools to assist HIPAA covered entities to identify and implement the most cost-effective and appropriate safeguards to protect the confidentiality, integrity, and availability of e-PHI and comply with the risk analysis requirements of the Security Rule. *See* https://www.hhs.gov/hipaa/for-professionals/security/guidance/index.html?language=es. (accessed November 11, 2019).

Also, HHS's 2016 guidance on an individual's right to access their medical records addressed such timely issues as responding to, and charging for, electronic medical record requests. *See* https://www.hhs.gov/hipaa/for-professionals/privacy/guidance/access/index.html (accessed November 11, 2019).

Further, in December of 2018, OCR issued a Request for Information ("RFI") seeking input from the public on how the HIPAA Rules, especially the HIPAA Privacy Rule, could be modified to further the HHS Secretary's goal of promoting coordinated, value-based healthcare. In issuing the RFI, OCR noted that:

> HHS developed the HIPAA Rules to protect individuals' health information privacy and security interests, while permitting information sharing needed for important purposes. However, in recent years, OCR has heard calls to revisit aspects of the Rules that may limit or discourage information sharing needed for coordinated care or to facilitate the transformation to value-based health care. The RFI requests information on any provisions of the HIPAA Rules that may present obstacles to these goals without meaningfully contributing to the privacy and security of protected health information (PHI) and/or patients' ability to exercise their rights.

Id.

There is simply no equivalent mechanism (absent continued litigation) for ensuring that *Biddle* evolves with the rapidly changing healthcare environment in the age of the electronic medical record, value-based care, and other dynamics of the industry.

HIPAA's standards provide clarity and uniformity in nationwide practices – both for the protection and, where appropriate, the disclosure of PHI. *Biddle* provides no such clarity or uniformity.

3. The HIPAA Privacy, Security, and Enforcement Rules and statutes provide for civil and criminal penalties enforced by multiple governmental entities.

Unlike *Biddle*, which does not have a uniform enforcement mechanism or uniform standard for calculating damages for a breach of patient confidentiality, HIPAA provides for

significant civil and criminal penalties enforced by HHS's Office for Civil Rights, the Department of Justice, and, more recently, state Attorneys General. The HITECH Act's provisions expanded HIPAA-related enforcement to include actions by state Attorneys General. 42 U.S.C. 1320d-5(d).

The potential civil and criminal penalties are tiered based upon the severity of the unauthorized use of PHI:

Civil Penalties under 45 C.F.R. 160.404

Did not and would not, by reasonable diligence, have known of the violation	$100–$50,000 for each violation No more than $25,000 for identical violations during a calendar year
Violation due to reasonable cause and not to willful neglect	$1,000–$50,000 for each violation No more than $100,000 for identical violations during a calendar year
Willful neglect but corrected within 30 days	$10,000–$50,000 for each violation No more than $250,000 for identical violations during a calendar year
Willful neglect and not corrected within 30 days	No less than $50,000 per violation No more than $1.5 million for identical violations during a calendar year

Criminal Penalties under 42 U.S.C. 1320d-6

Knowing violation	Fine up to $50,000; imprisoned up to 1 year, or both

Committed under false pretenses	Fine up to $100,000; imprisoned up to 5 years, or both
Intent of commercial advantage, personal game, or malicious harm	Fine up to $250,000; imprisoned up to 10 years, or both

In light of the numerous governmental entities with significant enforcement resources and the civil and criminal penalties available to those entities, *Biddle's* private right of action is no longer necessary to protect patient's confidential information. Rather than protect patients, *Biddle* causes only confusion, and patients, providers, and courts bear the financial and emotional costs of litigating what *Biddle's* standard means.

II. *Biddle* is unworkable.

A. *Biddle's* standard for permissible disclosure is so vague and nonspecific that it has resulted in piecemeal litigation (like this case), which is costly to patients, healthcare providers, and the judicial system alike.

As explained above, *Biddle* permits disclosure where "necessary to protect or further a countervailing interest which outweighs the patient's interest in confidentiality." But the Court offered no guidance as to what such a countervailing interest might be outside of the disclosures mandated by statute or common law duty. Instead, it is up to patients to find attorneys and file lawsuits against healthcare providers that have allegedly disclosed the patients' PHI in an unauthorized fashion. In their day-to-day business operations, healthcare providers must weigh the risk of being sued for potentially violating *Biddle* with their need to disclose PHI in ways expressly permitted under HIPAA. The result is a patchwork of case law attempting to interpret an antiquated common law claim that does not make sense in a post-HIPAA era where the majority of PHI is created, used, and disclosed electronically.

B. It's unclear whether compliance with HIPAA equates to compliance with *Biddle* because *Biddle* did not articulate specific circumstances in which disclosures are permissible.

When, as here, *Biddle* and HIPAA collide, healthcare providers and patients are left wondering whether the common law and HIPAA conflict with or complement each other. Worse yet, *Biddle* and HIPAA may sometimes conflict and sometimes complement. This situation cries out for a single, comprehensive, and feasible standard – one that HIPAA provides. The alternative leaves Ohio courts, healthcare providers, and patients to sort out the mess on an *ad hoc* basis.

The confusion that *Biddle* engenders has played out in Ohio's courts, and it will continue for years unless this Court takes action now. Contrary to Congress and HHS's repeated updates and modifications to HIPAA and its rules, *see* discussion above, no single entity interprets and modifies *Biddle*. Instead, its standard is subject to Ohio's twelve District Courts of Appeals. Two recent cases from the Second and Tenth Districts illustrate this rub. *Sheldon v. Kettering Health Network*, 2015-Ohio-3268, 40 N.E.3d 661 (2d Dist.); *OhioHealth v. Ryan*, 10th Dist. Franklin No. 10AP-937, 2012-Ohio-60.

In *OhioHealth*, which predates *Sheldon*, the plaintiff filed a suit to recover on an account for unpaid medical treatment. *OhioHealth* at ¶ 2. The patient filed a counterclaim alleging that the redacted account statement attached to the complaint "created false individually identifiable health information" that the patient was uninsured. *Id.* The Tenth District assumed that *Biddle* would allow a claim for revealing account information rather than actual medical records. *OhioHealth* at ¶ 15. But that Court observed that HIPAA allows disclosure to obtain payment so the disclosure was not "unauthorized" for *Biddle* purposes. That Court also held that state laws contrary to HIPAA requirements are preempted, that no exception to preemption applied, and

that HIPAA provides for no private right of action – so the patient was "without authority" to bring any HIPAA claim to the Court.

Sheldon, on the other hand, came out differently on the preemption issue, albeit in dicta. First, it acknowledged that HIPAA provides no private right of action. *Sheldon* at ¶18. But *Sheldon* went on to determine "whether HIPAA prohibits common-law tort claims based on the wrongful release of confidential medical information unrelated to and independent from HIPAA itself." *Id.* at ¶ 20. Addressing that issue, the Court held that HIPAA does not preempt *Biddle* claims. *Id.* at ¶ 24. Exploring the preemption issue further, it opined that preemption only occurs when a state law and HIPAA conflict and "we fail to see how [a *Biddle*] claim conflicts with HIPAA unless the alleged claim asserts recovery for release of information that HIPAA specifically allows." *Id.* at ¶ 25. Yet that Court touched on an additional problem: "recognition of a *Biddle* claim post-HIPAA presents a seemingly unsolvable conundrum." *Id.* at ¶ 28. That is because

> [i]f authorization under Ohio medical privacy law or rules is more relaxed than HIPAA, then Ohio's less-stringent authorization provisions are not effective because they are preempted by HIPAA. But one could argue that using HIPAA-specific authorization regulations to determine whether release is "unauthorized" allows for the enforcement of HIPAA regulations, which is arguably contrary to the overwhelming conclusion that HIPAA does not provide a private right of action. *Id.*

Amici agree that the continued existence of *Biddle* in a post-HIPAA world presents an unsolvable conundrum. This Court should solve it by overruling *Biddle*. Taken together with Menorah Park's situation, *OhioHealth* and *Sheldon* (and numerous other cases throughout the years) demonstrate the dangers of piecemeal and *ad hoc* litigation over *Biddle's* meaning in Ohio's various trial and appellate courts. Amici's members cannot continue to effectively operate in an atmosphere of conflicting common law rulings that impede their ability to use PHI

for business purposes and their ability to share PHI for coordination-of-care purposes, as permitted by HIPAA.

For all of these reasons, *Biddle* is unworkable.

III. Reliance Interests

A. Because each entity may have its own interpretation of *Biddle's* ill-defined standard, no reliance interests will be harmed by overruling it.

Biddle left open the question of what disclosures it permits. And because it preceded HIPAA's national standard, Ohio's patients and healthcare providers have been left guessing how *Biddle* and HIPAA intersect. Under these circumstances, there can be no reliance interests (on the part of patients or providers) to upend. And to the extent that a provider may have, in an abundance of caution, treated *Biddle* as a more stringent standard, that provider is already complying with HIPAA. Overruling *Biddle* will present little in the way of business disruption or extra expense; it would actually result in cost savings (which also benefit patients) by eliminating the costs Ohio providers currently expend on attempting to figure out what *Biddle* means and how to comply with it.

B. HIPAA's allowance for enforcement by several governmental entities protects the public more reliably than piecemeal private lawsuits, which are typically initiated by patients or patients' representatives when disclosures are made.

Rather than relying on civil litigation and the unique economic pressures that accompany it, HIPAA allows for the enforcement of its provisions by HHS's Office for Civil Rights, the Department of Justice, and state Attorneys General. There are civil and criminal penalties for violating HIPAA, which are proportionate to the violation. No consistency or certainty exists when a patient files a civil lawsuit to enforce *Biddle*. Results are invariably disparate and may or may not reflect the severity of the alleged violation, which negatively impacts both providers and patients.

IV. CONCLUSION

For all of the foregoing reasons, this Court should overrule *Biddle* under its authority in *Galatis* in favor of HIPAA's workable, uniform standard.

Respectfully submitted,

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I certify that I served a copy of this brief via electronic mail on November 18, 2019, on the following:

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