Court of Appeals

of the

State of New York

HECTOR ORTIZ, in his capacity as Temporary Administrator of the Estate of Vicky Ortiz, individually and on behalf of all others similarly situated,

Plaintiff-Appellant,

– against –

CIOX HEALTH, LLC, as successor in interest to IOD INC. and THE NEW YORK AND PRESBYTERIAN HOSPITAL,

Defendants-Respondents,

– and –

IOD INC. and COLUMBIA PRESBYTERIAN MEDICAL CENTER,

Defendants.

MOTION FOR LEAVE TO FILE BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES AS *AMICUS CURIAE* IN SUPPORT OF DEFENDANTS-RESPONDENTS

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COURT OF APPEALS
STATE OF NEW YORK

CTQ-2020-00004

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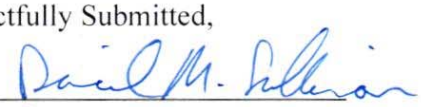
NOTICE OF MOTION

PLEASE TAKE NOTICE that on March 22, 2021 at the Court of Appeals Courthouse, located at 20 Eagle Street, Albany, New York, 12207, the Chamber of Commerce of the United States of America will move this Court for an order granting Amicus Curiae relief and accepting the proposed amicus brief.

Dated: March 12, 2021
New York, New York

Respectfully Submitted,

By: 

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COURT OF APPEALS
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IOD INC. and COLUMBIA PRESBYTERIAN MEDICAL CENTER

Defendants.

AFFIRMATION IN SUPPORT OF MOTION FOR AMICUS CURIAE RELIEF

NEW YORK, NEW YORK:

DANIEL M. SULLIVAN, an attorney at law, admitted to practice in New York, affirms, under penalty of perjury, that the following statements are true or, if stated on information and belief, that he believes them to be true:

1. I am an attorney with Holwell Shuster & Goldberg LLC, counsel to the Chamber of Commerce for the United States of America (the "Chamber").

2. Under Court of Appeals Rule 500.23, I submit this affirmation in support of the Chamber's motion to submit the proposed amicus curiae brief in support of Defendants-Respondents in the above-entitled matter.

3. The proposed amicus curiae brief is attached as Exhibit A.

4. The Chamber has a unique perspective that would be helpful to the Court in its consideration of this appeal. Moreover, the Chamber is capable of identifying law and arguments that might otherwise escape the Court's consideration. Rule 500.23(a)(4)(i).

5. The Chamber is a non-profit, tax-exempt organization incorporated in the District of Columbia. The Chamber is the world's largest business federation. It represents approximately 300,000 direct members and indirectly represents the interests of more than 3 million companies and professional organizations of every size, in every industry sector, and from every region of the country. Rule 500.23(a)(4)(ii). This case implicates the Chamber's interests because it raises the important question of when courts can and should imply a private right of action for alleged violations of statutes that do not expressly provide such a remedy. This question matters greatly to the broader business community, which is often regulated by federal and state statutes that do not explicitly provide for private rights of action. *Id.*

6. No party's counsel contributed content to the proposed amicus curiae brief or participated in the preparation of the brief. The Chamber's counsel has discussed the timing for amicus briefs and the positions taken in the attached amicus brief with counsel for Defendants-Respondents. Rule 500.23(a)(4)(iii)(a).

7. No party, party's counsel, person, or entity, other than the Chamber, its members, and its counsel, has contributed money that was intended to fund preparation or submission of the brief. Rule 500.23(a)(4)(iii)(b)-(c).

WHEREFORE, it is respectfully requested that this Court grant this motion to appear as amicus curiae and that the enclosed amicus brief be accepted.

DATED: March 12, 2021
New York, New York

Daniel M. Sullivan

Attorney for Proposed Amicus

STATEMENT UNDER RULE 500.1(f)

The Chamber of Commerce of the United States of America ("Chamber") states that it is a non-profit, tax-exempt organization incorporated in the District of Columbia. The Chamber has no parent corporation, and no publicly held company has 10% or greater ownership in the Chamber. The Chamber's sole affiliate is the U.S. Chamber of Commerce Foundation. The Chamber's subsidiaries are CC1, LLC, CC2, LLC, and the Madison County Record, Inc.

Exhibit A - Proposed Brief

Court of Appeals

of the

State of New York

HECTOR ORTIZ, in his capacity as Temporary Administrator of the Estate of Vicky Ortiz, individually and on behalf of all others similarly situated,

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

STATEMENT OF INTEREST

The Chamber of Commerce of the United States of America (the "Chamber") is the world's largest business federation. The Chamber represents approximately 300,000 direct members and indirectly represents the interests of more than 3 million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files amicus curiae briefs in cases, including before this Court, that raise issues of concern to the nation's business community. *See, e.g.*, Brief of the Chamber of Commerce of the United States of America and Coalition for Litigation Justice, Inc., as Amici Curiae in Support of Defendant-Appellant, *Nemeth v. Brenntag N. Am.*, APL-2020-00122 (N.Y. Oct. 29, 2020); Brief of the Chamber of Commerce of the United States as Amicus Curiae in Support of Appellant, *Chavez v. Occidental Chem. Corp.*, CTQ-2019-00003 (N.Y. Mar. 13, 2020).

This case implicates the Chamber's interests because it raises the important question of when courts can and should imply a private right of action for alleged violations of statutes that do not expressly provide such a remedy. This question matters greatly to the broader business community, which is often regulated by federal and state statutes that do not explicitly provide for private rights of action. Implying private rights of action in such statutes would inevitably increase the costs and uncertainty businesses face to comply with an already complex regulatory landscape.

INTRODUCTION

The United States Court of Appeals for the Second Circuit has certified the following question to this Court: Does Section 18(2)(e) of the New York Public Health Law provide a private right of action for damages when a medical provider violates the provision limiting the reasonable charge for paper copies of medical records to $0.75 per page? Respondents Ciox Health LLC and the New York and Presbyterian Hospital persuasively argue why, as a matter of New York law governing implied rights of action, the answer to this question must be "no." The Chamber writes to explain that this answer fits comfortably within broader federal and state jurisprudence regarding implied rights of action.

Since the U.S. Supreme Court's decision in *Cort v. Ash,* 422 U.S. 66 (1975), both federal and state courts have repeatedly affirmed that implied rights of action should be the exception, not the rule, and that courts should approach any request to create a private right of action with skepticism. Faced with circumstances similar to those presented here, such courts have repeatedly refused to imply a private right of action. In particular, courts have made clear that when a statute, like

the Public Health Law, sets forth specific and tailored remedies that do not include a private right of action for damages, a court should not write one into the statute. This Court should reach the same conclusion here.

ARGUMENT

New York law lays out a three-part test for implying a private right of action for a statutory violation. *Sheehy v. Big Flats Cmty. Day, Inc.*, 73 N.Y.2d 629, 633–34 (1989). For the reasons articulated by Respondents, Appellant Ortiz cannot meet at least two of the New York requirements: that the "recognition of a private right of action would promote the legislative purpose" and that "creation of such a right would be consistent with the legislative scheme." *Id.* For these reasons alone, the Court should find that Public Health Law § 18(2)(e) does not contain an implied private right of action for damages.

This result is not only consistent with New York precedent on implied rights of action; it also coheres with the jurisprudence of courts around the country. As explained below, the U.S. Supreme Court has increasingly limited the scope of judicial power to imply a private right of action where Congress has not provided one. In doing so, it has

emphasized that the fundamental criterion in this area must be the intent of the legislature as revealed by the statute. Other states' highest courts have followed suit, adapting tests from the federal case law that are similar to the doctrine that applies in New York.

These federal and state authorities point in the same direction: In the face of legislative silence, implying private rights of action is usually not appropriate. This is especially so where the statute itself sets forth specific remedies—other than a private right of action for damages—for a statutory violation. Judicial caution in this area not only respects the powers of the legislature, it avoids imposing on regulated entities undesirable economic costs that will ultimately injure society at large.

I. THE U.S. SUPREME COURT HAS INCREASINGLY DECLINED TO IMPLY PRIVATE RIGHTS OF ACTION

Over forty years ago, the U.S. Supreme Court's decision in *Cort v. Ash*, 422 U.S. 66 (1975), marked the beginning of the modern era of federal jurisprudence on implied private rights of action. In *Cort*, the Supreme Court was asked to determine whether a criminal statute that prohibited corporations from making contributions or expenditures in connection with presidential elections provided a private cause of action to a corporate stockholder against company directors who violated the

statute. *Id.* at 68. In finding that there was no implied right of action under the statute, the Court articulated four factors to guide the analysis:

> First, is the plaintiff one of the class for whose especial benefit the statute was enacted . . .—that is, does the statute create a federal right in favor of the plaintiff? Second, is there any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one? . . . Third, is it consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff? . . . And finally, is the cause of action one traditionally relegated to state law, in an area basically the concern of the States, so that it would be inappropriate to infer a cause of action based solely on federal law?

Id. at 78 (citations omitted).

Cort departed from earlier cases that had liberally implied private remedies for statutory violations.[1] *Cort* re-centered the implied rights inquiry squarely on the question of legislative intent. 422 U.S. at 78. Its approach proved influential on state courts—a number of states, New York included, used the *Cort* factors as a model when crafting their own tests for implying private rights of action. *See Burns Jackson*

[1] *See Alexander v. Sandoval*, 532 U.S. 275, 287 (2001) ("Respondents would have us revert in this case to the understanding of private causes of action that held sway 40 years ago . . . . That understanding is captured by the Court's statement in *J.I. Case Co. v. Borak*, 377 U.S. 426, 433 (1964), that 'it is the duty of the courts to be alert to provide such remedies as are necessary to make effective the congressional purpose' expressed by a statute. We abandoned that understanding in *Cort v. Ash* . . . and have not returned to it since.").

Miller Summit & Spitzer v. Lindner, 59 N.Y.2d 314, 325 (1983) (adopting the first three *Cort* factors).[2]

In the years following its decision in *Cort*, the Supreme Court further emphasized that the touchstone of the implied-right-of-action analysis—and the main thrust of the *Cort* inquiry—is whether the legislature intended to create a private right of action. *See, e.g.*, *Touche Ross & Co. v. Redington*, 442 U.S. 560, 575 (1979) ("The central inquiry remains whether Congress intended to create, either expressly or by implication, a private cause of action."). Thus, the Supreme Court has become increasingly reluctant to imply private rights of action absent a clear indication of intent from Congress. In *Transamerica Mortgage Advisors, Inc. v. Lewis*, for example, the Court held that the Investment Advisors Act's extensive remedial scheme—which provided for criminal

[2] *See also, e.g.*, *Fangman v. Genuine Title, LLC*, 136 A.3d 772, 779 (Md. 2016); *Shumate v. Drake Univ.*, 846 N.W.2d 503, 505 (Iowa 2014); *Kealoha v. Machado*, 315 P.3d 213, 232–33 (Haw. 2013); *Baldonado v. Wynn Las Vegas, LLC*, 194 P.3d 96, 100–01 (Nev. 2008); *T & M Jewelry, Inc. v. Hicks*, 189 S.W.3d 526, 529 (Ky. 2006); *Trade 'N Post, L.L.C. v. World Duty Free Americas, Inc.*, 628 N.W.2d 707, 710–12 (N.D. 2001); *Coates v. Elzie*, 768 A.2d 997, 999 (D.C. 2001); *Est. of Witthoeft v. Kiskaddon*, 733 A.2d 623, 626 (Pa. 1999); *Matter of State Comm'n of Investigation*, 527 A.2d 851, 854 (N.J. 1987). Not surprisingly, many states dropped the fourth *Cort* factor as inapplicable to their analysis. *See, e.g.*, *Coates*, 768 A.2d at 1001 ("[O]nly [the first] three of the four factors listed in *Cort v. Ash* are relevant to the question whether a state law creates an implied cause of action.").

penalties, enforcement by the SEC, and administrative sanctions—combined with the fact that Congress had expressly provided for private actions in other securities statutes, was strong evidence that Congress did not intend to provide such a remedy in the Investment Advisors Act. 444 U.S. 11, 19–20 (1979). And again, in *Middlesex County Sewerage Authority v. National Sea Clammers Association*, the Court rejected an implied private right of action under the Federal Water Pollution Control Act and the Marine Protection, Research, and Sanctuaries Act of 1972, because those statutes already contained enforcement mechanisms. 453 U.S. 1, 13 (1981).

Tellingly, since *Cort*, the U.S. Supreme Court has rarely recognized private rights of action. In 19 of 22 cases addressing the issue after *Cort*, the Supreme Court has refused to imply a private right of action where the statute did not expressly provide one.[3]

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[3] *See Armstrong v. Exceptional Child Ctr., Inc.*, 575 U.S. 320 (2015); *Alexander v. Sandoval*, 532 U.S. 275 (2001); *Suter v. Artist M.*, 503 U.S. 347 (1992); *Karahalios v. Nat'l Fed'n of Fed. Emps., Loc. 1263*, 489 U.S. 527 (1989); *Thompson v. Thompson*, 484 U.S. 174 (1988); *Massachusetts Mut. Life Ins. Co. v. Russell*, 473 U.S. 134 (1985); *Daily Income Fund, Inc. v. Fox*, 464 U.S. 523, 536 (1984); *Jackson Transit Auth. v. Loc. Div. 1285, Amalgamated Transit Union, AFL-CIO-CLC*, 457 U.S. 15 (1982); *Middlesex Cty. Sewerage Auth. v. Nat'l Sea Clammers Ass'n*, 453 U.S. 1 (1981); *Texas Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630 (1981); *California v. Sierra Club*, 451 U.S. 287 (1981); *Nw. Airlines, Inc. v. Transp. Workers Union of Am., AFL-CIO*, 451 U.S. 77 (1981); *Universities Rsch. Ass'n, Inc. v. Coutu*, 450 U.S. 754 (1981); *Kissinger v. Reps. Comm. for Freedom of the Press*, 445 U.S. 136 (1980);

Moreover, the U.S. Supreme Court has made clear that any implied-right-of-action analysis should be strongly rooted in respect for separation-of-powers principles. This grounding properly recognizes the province of the legislature to create statutory remedies. *See Touche Ross & Co.*, 442 U.S. at 579 ("If there is to be a federal damages remedy under these circumstances, Congress must provide it. It is not for us to fill any hiatus Congress has left in this area." (quotation omitted)); *see also Wilder v. Virginia Hosp. Ass'n*, 496 U.S. 498, 509 n.9 (1990) ("The [*Cort*] test reflects a concern, grounded in separation of powers, that Congress rather than the courts controls the availability of remedies for violations of statutes.").

Even in those limited instances in which the U.S. Supreme Court has recognized an implied right of action, it has done so in language that carefully circumscribed its own power. *See Cannon v. Univ. of*

Transamerica Mortg. Advisors, Inc. (TAMA) v. Lewis, 444 U.S. 11 (1979); *Touche Ross & Co. v. Redington*, 442 U.S. 560 (1979); *Chrysler Corp. v. Brown*, 441 U.S. 281 (1979); *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978); *Piper v. Chris-Craft Indus., Inc.*, 430 U.S. 1 (1977). *But see Herman & MacLean v. Huddleston*, 459 U.S. 375 (1983); *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran*, 456 U.S. 353 (1982); *Cannon v. Univ. of Chicago*, 441 U.S. 677 (1979). In *Transamerica*, the Court recognized a "limited private remedy under the Investment Advisers Act of 1940 to void an investment advisers contract," but otherwise held that the statute did not contain an implied private right of action. 444 U.S. at 24.

Chicago, 441 U.S. 677, 717 (1979) (stating that, in the absence of an explicit statutory directive, rights of action could be implied "under certain limited circumstances"); *id.* at 718 (Rehnquist, J., concurring) ("Not only is it far better for Congress to so specify when it intends private litigants to have a cause of action, but for this very reason this Court in the future should be extremely reluctant to imply a cause of action absent such specificity on the part of the Legislative Branch." (quotation omitted)). The Court's respect for the judiciary's proper role vis-à-vis the legislature indicates that implying a private cause of action should be the exception, not the norm.

The U.S. Supreme Court cemented its modern reluctance to create private rights of action when a statute is silent in *Alexander v. Sandoval*, 532 U.S. 275 (2001). In *Sandoval*, the Court found that there was no private right of action to enforce disparate-impact regulations promulgated under Title VI of the Civil Rights Act of 1964. In explaining the Court's reasoning, Justice Scalia synthesized the law on implied rights of action since *Cort*. Justice Scalia summarized:

> [P]rivate rights of action to enforce federal law must be created by Congress. The judicial task is to interpret the statute Congress has passed to determine whether it displays an intent to create not just a private right but also a private remedy. Statutory

> intent on this latter point is determinative. Without it, a cause of action does not exist and courts may not create one, no matter how desirable that might be as a policy matter, or how compatible with the statute."

Id. at 286–87.[4]

The caution *Sandoval* sounded has continued to reverberate in Supreme Court opinions regarding implied rights of action. *See, e.g.*, *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1856 (2017) ("If the statute does not itself so provide, a private cause of action will not be created through judicial mandate."); *Stoneridge Inv. Partners, LLC v. Sci.-Atlanta*, 552 U.S. 148, 164–65 (2008) ("In the absence of congressional intent the Judiciary's recognition of an implied private right of action necessarily extends its authority to embrace a dispute Congress has not assigned it to resolve." (quotation omitted)); *Sosa v. Alvarez-Machain*, 542 U.S. 692, 727 (2004) ("[T]his Court has recently and repeatedly said that a

[4] The analysis the Supreme Court adopted in *Sandoval* thus focused on "congressional intent" as "the salient question" and "applied a more textual method to answer that question," limiting the importance of the extra-textual factors included in the original *Cort* test. Anthony J. Bellia Jr., *Justice Scalia, Implied Rights of Action, and Historical Practice*, 92 NOTRE DAME L. REV. 2077, 2086–87 (2017). Thus, while there remains some debate over whether *Sandoval* narrowed the *Cort* factors as a matter of federal doctrine on implied rights of action, *id.* at 2088 & n.61, what is critical here is that the federal courts have, over the last forty years, become increasingly skeptical of implying causes of action that Congress did not create.

decision to create a private right of action is one better left to legislative judgment in the great majority of cases."). In short, the Supreme Court has afforded due respect to the role of Congress in fashioning legislative remedies by declining to imply private rights of action absent a clear indication of congressional intent.

II. RECENT DECISIONS FROM STATE HIGH COURTS SIMILARLY CAUTION AGAINST IMPLYING PRIVATE RIGHTS OF ACTION

In recent years, a number of state high courts have applied their own versions of the *Cort* test to reject implied rights of action under circumstances similar to those presented here.

For example, in *Baldonado v. Wynn Las Vegas*, the Nevada Supreme Court determined that a Nevada statute prohibiting employers from taking employee tips did not imply a private cause of action. 194 P.3d 96, 98 (Nev. 2008). Applying the *Cort* factors, the Court concluded that "in light of the statutory scheme requiring the Labor Commissioner to enforce the labor statutes and the availability of an adequate administrative remedy for those statutes' violations, the Legislature did not intend to create a parallel private remedy for [violations of the statute]." *Id.* at 102. It reasoned that "when an

administrative official is expressly charged with enforcing a section of laws, a private cause of action generally cannot be implied." *Id.*

In *Scull v. Groover, Christie & Merritt, P.C.*, the Maryland Court of Appeals reached a similar outcome. *Scull* concerned the Maryland HMO Act, which prohibits health care providers from charging an HMO member a fee for covered services in excess of the fee allowed by the HMO plan. 76 A.3d 1186, 1190–91 (Md. 2013). The question before the Court was whether a patient has a private right of action against a health care provider who overcharged him in violation of the Act. *Id.* at 1191. Applying the *Cort* factors, the Court concluded that a private right of action would not be consistent with the statutory scheme. In particular, the Court noted that the Act expressly provided for different private causes of action—implying that the legislature intended to create those causes of action and not others. *Id.* at 1192. Moreover, the Court reasoned that the fee cap is enforced by a separate provision of the Act requiring health care providers to include certain "hold harmless" provisions in their contracts with the HMOs. *Id.*

The Tennessee Supreme Court's decision in *Hardy v. Tournament Players Club*, 513 S.W.3d 427, 430 (Tenn. 2017), is in accord. In *Hardy*,

the Court declined to create a private right of action under Tennessee's Tip Statute, which requires employers to pay tips from a customer to the employees who served the customer; the statute makes violation of that provision a misdemeanor. The Court found that the plaintiff—a tipped employee—was an intended beneficiary of the statute, and thus satisfied the first *Cort* factor. But the Court ultimately concluded that the Tip Statute does not create a private right of action because it provides for governmental enforcement through criminal sanctions. *Id.* at 440–41. The Court cited *Alexander v. Sandoval*, noting that "the scales [have] tipped against recognizing a private right of action under a statute in the absence of 'manifest' legislative intent to permit it, particularly where a statute includes express governmental mechanisms for enforcement." *Id.* at 442.

Baldonado, *Scull*, and *Hardy* are not outliers. They illustrate a trend in state courts, going back at least twenty years, to resist creating implied private rights of action, particularly when the statute itself demonstrates that the legislature considered how the statute should be

enforced and established specific mechanisms for doing so.[5] As Respondents explain, Public Health Law §18(2)(e) and its related provisions fit comfortably within that category. Brief of Respondent Ciox Health, LLC at 25–44 (describing the private and public remedies available for a violation of Public Health Law § 18(2)(e)). Rejecting an

[5] *See also Keodalah v. Allstate Ins. Co.*, 449 P.3d 1040, 1046 (Wash. 2019) (no implied private right of action under state insurance statute for adjuster's bad faith evaluation of claim because statute "contains several specific enforcement mechanisms," including administrative enforcement by insurance commissioner and criminal liability); *Shumate v. Drake Univ.*, 846 N.W.2d 503, 512 (Iowa 2014) (service dog trainer denied access to facility in violation of statute did not have implied private right of action because other provisions of the statute contained express private rights of action, suggesting that the legislature did not intend to provide a private right of action for the at-issue provision); *Gen. Pipeline Const., Inc. v. Hairston*, 765 S.E.2d 163, 172 (W. Va. 2014) (statute protecting historically significant gravesites does not create a private cause of action because the Director of the Historic Preservation Section is empowered to enforce the statute); *Dema v. Tenet Physician Servs.-Hilton Head, Inc.*, 678 S.E.2d 430, 434 (S.C. 2009) (no private right of action against health care provider for unauthorized medical procedures performed in violation of state statute because "the enforcement mechanism of the [statute] is [the Department of Health and Environmental Control's] authority to impose sanctions and not civil liability"); *Asylum Hill Problem Solving Revitalization Ass'n v. King*, 890 A.2d 522, 532 (Conn. 2006) (state fair housing law does not create an implied private right of action because it was effectuated through data collection and reporting requirements imposed on the executive and legislative branches, which "counsel[ed] strongly against finding a legislative intent to provide for judicial enforcement of the directive through a private cause of action"); *Metzger v. DaRosa*, 805 N.E.2d 1165, 1170–72 (Ill. 2004) (no private right of action under whistleblower provision of state personnel code in part because code provides for administrative process to address violations); *Trade 'N Post, L.L.C. v. World Duty Free Americas, Inc.*, 628 N.W.2d 707, 712–13 (N.D. 2001) (no private right of action for damages under either the North Dakota Unfair Discrimination Law or Unfair Trade Practices Law because the statutes provide for criminal penalties and enforcement by the Attorney General).

implied private right of action for damages here, therefore, would put this Court in the good company of sister states that—like New York—apply versions of the *Cort* test.[6]

III. THIS COURT SHOULD CONSIDER THE GROWING CONSENSUS AGAINST IMPLYING PRIVATE RIGHTS OF ACTION WHERE A STATUTE SETS FORTH CLEAR ALTERNATIVE REMEDIES

Of course, this Court is not obligated to consider the broader jurisprudence of federal and state courts when deciding whether to imply a private right of action under New York statutes. And this

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[6] State high courts that do not apply versions of the *Cort* test, but instead look to other factors to determine legislative intent, have similarly declined to find implied private rights of action where the statute sets forth other specific remedies to enforce the statute. *See Somers v. Cherry Creek Dev., Inc.*, 439 P.3d 1281, 1283–85 (Mont. 2019) (no implied private right of action under Montana Retail Installment Sales Act because statute creates a process through which buyers can complain to Department of Administration regarding violations and Department can enforce statute through administrative remedies); *Cherrie v. Virginia Health Servs., Inc.*, 787 S.E.2d 855, 858–59 (Va. 2016) (no implied private right of action for production of documents under regulation requiring nursing facilities to make written policies and procedures available for review because regulation provides for enforcement by Virginia Board of Health and creates administrative process for interested parties to file complaints); *Graphic Commc'ns Loc. 1B Health & Welfare Fund A v. CVS Caremark Corp.*, 850 N.W.2d 682, 692 (Minn. 2014) (no implied private right of action for failing to pass on the difference between the acquisition cost of brand name drugs and substituted generic prescription drugs in violation of state statute because the statute provides the State Board of Pharmacy with enforcement authority); *Liberty Nat. Life Ins. Co. v. Univ. of Alabama Health Servs. Found., P.C.*, 881 So. 2d 1013, 1026 (Ala. 2003) (statute requiring hospital to provide itemized statement does not contain implied private right of action because "[t]he Legislature expressly reserved to the attorney general a cause of action for such violations").

Court's precedents alone provide a sufficient basis to reject an implied private right of action under Public Health Law § 18(2)(e). But for several reasons, the Court should consider the growing judicial consensus as it determines whether to recognize implied causes of action—both as a general matter and under the circumstances presented in this case.

First, as noted earlier, the New York standard for implying rights of action is modeled on the Supreme Court's test as articulated in *Cort*. *Burns Jackson*, 59 N.Y.2d at 325 (adopting the first three *Cort* factors); *see also Haar v. Nationwide Mut. Fire Ins. Co.*, 34 N.Y.3d 224, 228–29 (2019); *Cruz v. TD Bank, N.A.*, 22 N.Y.3d 61, 70–71 (2013). That later cases applying and refining *Cort*—both on a federal and state court level—consistently circumscribe the judiciary's role in implying private rights of action should be instructive for this Court as it considers the same issue under New York law.

Second, sound principles reinforce the shift away from creating private rights of action. As discussed above, both federal and state courts have recognized the importance of respecting the separation of powers and the judiciary's limited role in crafting remedies for statutory

violations. These principles counsel against implying private rights of action—particularly where, as here, the statute contains other remedies and enforcement mechanisms.

As Respondents explain, the Public Health Law at issue in this case clearly indicates that the legislature considered the remedial scheme it wished to create and chose *not* to include a private right of action. Brief of Respondent Ciox Health, LLC at 25–44. For example, the legislature authorized an Article 78 proceeding to compel compliance with the statute and empowered the Attorney General and Commissioner of Health to enforce it. *Id.* And "it is an elemental canon of statutory construction that where a statute expressly provides a particular remedy or remedies, a court must be chary of reading others into it." *Transamerica*, 444 U.S. at 19. In these circumstances, it is clear that the legislature "considered the issue of remedies," and "a court's creation of additional remedies is more likely to invade the legislative function by replacing its judgment for that of the legislature." Susan J. Stabile, *The Role of Congressional Intent in Determining the Existence of Implied Private Rights of Action*, 71 NOTRE DAME L. REV. 861, 883–84 (1996).

The potential for intrusion into the legislative function is particularly strong when—as is the case for Public Health Law § 18(2)(e)—the statute provides for enforcement by a public official. In this situation, implying a cause of action risks undermining the legislature's choice about the appropriate resources that should be dedicated to pursuing and deterring violations of the statute.

As scholars in this area have noted, implication of a private right of action creates social costs which the legislature may well have wished to avoid. Those costs come not only in the form of expensive litigation and its accompanying burdens on the court system, but also in the form of overdeterrence. After all, regulated entities may spend more than is socially optimal to avoid statutory violations because they fear incurring outsized liability. *See, e.g.*, Amanda M. Rose, *Reforming Securities Litigation Reform: Restructuring the Relationship Between Public and Private Enforcement of Rule 10b-5*, 108 COLUM. L. REV. 1301, 1326–27 (2008) (detailing how "profit-driven private enforcement" can lead to overenforcement and overdeterrence); Steven Shavell, *The Fundamental Divergence Between the Private and the Social Motive to Use the Legal System*, 26 J. LEGAL STUD. 575, 581–82 (1997) (describing

how private parties fail to consider the social costs of litigation when deciding to bring suit).

Public Health Law § 18(2)(e) appears to reflect legislative consideration of this risk. The statute contains a simple prohibition on charging more for copies of patient information than either (1) the provider's costs incurred or (2) $0.75 a page, whichever is lower. And the statute authorizes the Attorney General and the Commissioner of Health to pursue remedies for violations of the statute. The legislature could have reasonably determined that not every innocent or technical violation of Public Health Law § 18(2)(e) merits the costs of civil litigation.

Indeed, "when faced with complex policy problems, [legislatures tend] to enact regulations that are deliberately overbroad and then to rely on the discretion of government enforcers to administer these regulations in a way that advances their underlying social goals." Matthew C. Stephenson, *Public Regulation of Private Enforcement: The Case for Expanding the Role of Administrative Agencies*, 91 VA. L. REV. 93, 116 (2005). The delegation of enforcement discretion to the Attorney General and Commissioner of Health allows for public officials

to determine which enforcement actions are worth pursuing, taking into account the potential costs to the public. *See Sosa*, 542 U.S. at 727 ("The creation of a private right of action raises issues beyond the mere consideration whether underlying primary conduct should be allowed or not, entailing, for example, a decision to permit enforcement without the check imposed by prosecutorial discretion."). It also allows public officials to apply their subject matter expertise to craft enforcement strategies that "encourag[e] compliance and innovation while preventing and remediating harms." *See, e.g.*, U.S. CHAMBER INST. FOR LEGAL REFORM, ILL-SUITED: PRIVATE RIGHTS OF ACTION AND PRIVACY CLAIMS 14 (July 2019) (hereinafter "Ill-Suited").

The creation of an implied private right of action would obliterate this careful balance by taking discretion out of the enforcement equation. While public enforcers can use a variety of tools to achieve a socially optimal outcome, private rights of action "nullif[y] the public enforcer's ability to effectively utilize these tools by ensuring that the law will be enforced to its outermost limits, regardless of the public enforcer's desires, so long as such enforcement is profitable." Rose, *supra*, at 1304. In particular, private enforcement interferes with

public officials' ability to reach collaborative solutions with regulated entities. *See* Stephenson, *supra*, at 118 ("Private enforcement suits, however, may often engender an overemphasis on coercion and deterrence at the expense of negotiation and cooperation, regardless of the wishes of the government enforcement agency."). In short, implying a private right of action significantly undermines the effectiveness of the legislatively chosen public enforcement scheme.

Of course, a court could attempt to mitigate this harm by reading in additional elements into the private right of action—for instance, a requirement that the overcharge have been negligently or willfully made—as legislatures often do when they explicitly authorize such actions. But such an attempt would compound the error—seeking to fix the initial, and practically inadvisable, judicial overreach with a second one, even less theoretically defensible than the first. *Cf. Halliburton Co. v. Erica P. John Fund, Inc.*, 573 U.S. 258, 284–85 (2014) (Thomas, J., concurring) (describing the dangers of crafting statutory causes of action in the absence of explicit text authorizing such an action). The better approach is that taken by the courts cited above: If a statute contains public enforcement mechanisms, the court should not create

private remedies in addition to those explicitly contemplated. *See, e.g.*, *Trade 'N Post, L.L.C.*, 628 N.W.2d at 712–13 (noting that the implication of a private right of action "where the legislature has provided a comprehensive regulatory scheme" would be "an intrusion on the [enforcing agency's] regulatory authority" (quotation omitted)).

Finally, this Court should be wary of staking a position at odds with the growing consensus against creating implied causes of action because doing so would put businesses that operate in New York at a disadvantage. Implying private rights of action injects uncertainty into the law. If courts are willing to stray from the statutory text and imply causes of action, regulated entities and individuals can no longer rely on the scope of potential liability set forth in the statute. Instead, they must assume that every statutory violation—no matter how minor or inadvertent—could result in costly private litigation, brought by plaintiffs who lack incentives to consider the social costs of their enforcement decisions. *See* Shavell, *supra*, at 579.

This problem is exacerbated by the fact that private enforcement—unlike enforcement by a public official—can lead to a proliferation of suits, sometimes resulting in "inconsistent and

dramatically varied" rulings. *See, e.g.*, Ill-Suited, *supra*, at 14. Further, private parties have incentives to bring claims even when defendants have not violated the statute. Stephenson, *supra*, at 116 (discussing how private enforcement can lead to "strike suits" where plaintiffs seek to extort settlement offers for non-meritorious claims). That outcome risks imposing costs on both regulated entities and society at large that the legislature sought to avoid.

Thus, adopting an approach at odds with that of other jurisdictions risks imposing these costs disproportionately on New York businesses. There is no sound reason—either in law or policy—to subject New York businesses to such disproportionate burdens. This Court has previously declined to chart such a course, and it should exercise the same caution here.

CONCLUSION

For the foregoing reasons, the Court should find that Public Health Law § 18(2)(e) does not contain an implied private right of action for damages.

Dated: March 12, 2021
New York, New York

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CERTIFICATE OF COMPLIANCE

1. The following statement is made in accordance with Court of Appeals Rule 500.13(c).

2. The Chamber's brief was prepared in the processing system Microsoft Word 2016, with Century Schoolbook typeface, 14-point font.

3. The text of the body brief, omitting the cover page and tables, has a word count of 5,401, as calculated by the processing system.

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I, Tyrone Heath, 2179 Washington Avenue, Apt. 19, Bronx, New York 10457, being duly sworn, depose and say that deponent is not a party to the action, is over 18 years of age and resides at the address shown above or at

On March 12, 2021

deponent served the within: **BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES AS AMICUS CURIAE IN SUPPORT OF DEFENDANTS-RESPONDENTS**

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