

UNITED STATES DISTRICT COURT

for the

SOUTHERN DISTRICT OF NEW YORK

BEATRICE M. HEGHMANN, individually:
and on behalf of all others similarly situated,

Plaintiff, : **09 CV 5880 Judge Jones**

vs. :

KATHLEEN SEBELIUS, SECRETARY, : **COMPLAINT**

DEPARTMENT OF HEALTH AND
HUMAN SERVICES, NANCY-ANN :

DEPARLE , DIRECTOR, WHITE : **JURY TRIAL REQUESTED**

HOUSE OFFICE OF HEALTH :

REFORM, AND CHARLENE FRIZZERA :

ADMINISTRATOR, CENTERS FOR :

MEDICARE AND MEDICAID :

SERVICES, : **June 12, 2009**

Defendants. :

BEATRICE M. HEGHMANN, for her Complaint, alleges and says:

1. The Plaintiff is a citizen of the United States and a Federal Tax Payer. She currently resides in Durham, N.H. During the course of her life Plaintiff has had and continues to have occasion to consult with health care providers concerning her health and well being. On several occasions the Plaintiff was required and in the future will be required to reveal intimate aspects of her life to the health care provider during the course of consultation and treatment. Those communications including the intimate aspects of her life are reflected in the personal health information maintained by the health care providers for the Plaintiff's benefit.

2. The Plaintiff has never been covered by either Medicare or Medicaid. The health care providers utilized by the Plaintiff were selected by her and paid either directly by the Plaintiff or in combination with private health insurance maintained by the Plaintiff. Under the Hippocratic Oath, state law and federal law while the medical records are the property of the Plaintiff's health care providers, the information contained in the records remains property of the Plaintiff and the health care providers are required by law to maintain that information in strict confidentiality.

3. The American Recovery and Reinvestment Act of 2009 (hereinafter the Stimulus Act) was signed into law by President Barack Obama on February 17, 2009. Title XIII of that Act attempts to make significant changes with regard to the privacy of health care information of individual patients currently protected by the Hippocratic Oath administered to every physician, laws adopted by Congress and each of the states and under the Health Insurance Portability and Accountability Act (HIPAA), 45 C.F.R. Sec. 164.500 *et. seq.* (2003) (hereinafter HIPAA). For all intent and purposes, HIPAA codified the Hippocratic Oath and provides confidentiality for physician-patient communications under federal statutory law. The Stimulus Act by its terms attempts to render the privacy provided under federal law, state law, the Hippocratic Oath and HIPAA null and void.

4. The Plaintiff brings this action on behalf of herself and all other similarly situated persons who (1) maintain either directly or indirectly private health insurance, including but not limited to persons who will be enrolled in an American Health Benefit Gateway currently proposed by the Senate Committee on Health Education, Labor and Pension or any other similar public plan options established by a State or the Secretary of

HHS; (2) who are not covered by Medicare and/or Medicaid and (3) who have provided and will provide personal health information to a health care provider. The Plaintiff and others similarly situated are now subject the Obama Administration's attempt contained in the Stimulus Act and the American Health Benefit Gateway provisions to eliminate the privacy protection of their personal health information and their fundamental right to personal security both of which are protected under the United States Constitution and Amendments thereto.

5. The Plaintiff is also herself a health care professional who is employed by a health care provider. That health care provider and other health care providers have been adversely effected by the failure of the Defendants and each of them to reimburse health care providers for health care required under the Emergency Medical Treatment and Active Labor Act, 42 U.S.C. Sec. 1395dd, (EMTALA) and Medicare under Section 1866 (a) (1) of the Social Security Act, 42 U.S.C. Sec. 1395ccc(a)(1) The Senate Committee on Health, Education, Labor and Pensions has proposed extending Section 1866 (a) (1) of the Social Security Act, 42 U.S.C. Sec. 1395ccc(a)(1) to the American Health Benefit Gateway currently proposed as the public plan option under Medicare. As a result of the failure on the part of the Defendants to fully pay for items and services mandated under EMTALA and Medicare and as now proposed to be extended under the American Health Benefit Gateway she has been, is and will continue to be adversely effected as a health care professional. The Plaintiff brings this action on behalf of herself as a health care professional and on behalf of all others who are employed by health care providers and who have been and will be adversely impacted by the failure of the Defendants to reimburse health care providers for mandated health care.

6. Kathleen Sebelius is the Secretary of the federal Department of Health and Human Services (hereinafter “HHS”) and is sued in her official capacity as Secretary of HHS. As Secretary she will be in charge of Health Information Technology and Quality. In addition the Secretary will determine the meaning and extent of minimum required medical information and what elements to de-identify under HIPAA. HHS maintains an office at 26 Federal Plaza in New Your City. The main office of HHS is located at 200 Independence Avenue, S.W., Washington, D.C. 20201.

7. Nancy-Ann DeParle is the Director of the White House Office of Health Reform and is sued in her official capacity as Director of the White House Office of Health Reform. Published reports indicate that she and Jeanne Lambrew the Deputy Director of the White House Office of Health Reform are currently operating out of HHS and are assisting in creating the Health Care Technology covered by Title XIII of the Stimulus Act. The Office of Health Reform resides at The White House, 1600 Pennsylvania Ave. S.W., Washington, D.C. 20201.

8. Charlene Frizzera is the Administrator of the Centers for Medicare and Medicaid Services (hereinafter “CMS”) and is sued in her official capacity as Administrator of CMS. CMS in cooperation with HHS and the Office of Health Reform will implement the health care provisions contained in the Stimulus Act. In addition Defendant Frizzera and CMS are instrumental in enforcing EMTALA including levying fines for failure to strictly comply with the requirements of EMTALA. CMS maintains offices at 26 Federal Plaza in New York City. The main office of CMS is located at HHS, 7500 Security Boulevard, Room 314G, Baltimore, MD 21244-1850.

9. This action is filed pursuant to the United States Constitution and the Amendments thereto including, but not limited to, the First, Third, Fourth, Fifth, Ninth, Tenth and Fourteenth Amendments thereto and Federal Common Law. This Court has jurisdiction under 5 U.S.C. Sec. 552a (6), 28 U.S.C. Sec. 1343 (a) (4) and 42 U.S.C. Sec. 1983. Venue is proper under 28 U.S.C. Sec. 1391(e) (1).

10. In conjunction with the Stimulus Act, President Obama has created the White House Office of Health Reform. The White House Office of Health Reform is an agency created at the request of former Senator Tom Daschle to carry out Tom Daschle's vision of health reform. President Obama intended to name Sen. Daschle as the Director of the Office of Health Reform. The Office's current deputy director, Jeanne Lambrew, was co-author of Daschle's book on health care, Critical: What We Can Do About the Health-Care Crisis. Although Sen. Daschle was forced to withdraw his name from nomination for the post of Secretary of HHS and could not be named Director of the Office of Health Reform, his vision of the future of health care is carried on in the Office of Health Reform and Title XIII of the Stimulus Act.

11. Under the Stimulus Act the White House Office of Health Reform is in the process of designing a new system for delivering medical care to every person in the United States and HHS is in the process of implementing the new system. Central to this system is the creation of certified EHR Technology. Under the Stimulus Act the term 'certified EHR technology' means a qualified electronic health record that is certified pursuant to section 3001(c)(5) as meeting standards adopted under section 3004 that are applicable to the type of record involved as determined by the Secretary, such as an

ambulatory electronic health record for office-based physicians or an inpatient hospital electronic health record for hospitals.

12. Every health care provider is being required to acquire and implement Health Information Technology designed by the Office of Health Reform and HHS. As defined under the Stimulus Act the term 'health information technology' means hardware, software, integrated technologies or related licenses, intellectual property, upgrades, or packaged solutions sold as services that are designed for or support the use by health care entities or patients for the electronic creation, maintenance, access, or exchange of health information.

13. A health care provider as defined by the Stimulus Act includes a hospital, skilled nursing facility, nursing facility, home health entity or other long term care facility, health care clinic, community mental health center, renal dialysis facility, blood center, ambulatory surgical center, emergency medical services provider, Federally qualified health center, group practice, a pharmacist, a pharmacy, a laboratory, a physician, a practitioner, a provider operated by, or under contract with, the Indian Health Service or by an Indian tribe, tribal organization, or urban Indian organization, a rural health clinic, a covered entity under section 340B, an ambulatory surgical center, a therapist and any other category of health care facility, entity, practitioner, or clinician determined appropriate by the Secretary.

14. Once the health care providers obtain the Health Information Technology designed by the Office of Health Reform and HHS, the health provider will be required to create a Qualified Electronic Health Record for every person in the United States by 2014. Since Medicare and Medicaid now cover only about 23% of the population, the

Stimulus Act by design effects the privacy of the personal health information for the 65% of the population such as the Plaintiff and all those similarly situated who are covered by private health insurance A Qualified Electronic Health Record is defined in the Stimulus Act as an electronic record of health-related information on an individual that—

`(A) includes patient demographic and clinical health information, such as medical history and problem lists; and

`(B) has the capacity--

`(i) to provide clinical decision support;

`(ii) to support physician order entry;

`(iii) to capture and query information relevant to health care quality; and

`(iv) to exchange electronic health information with, and integrate such information from other sources.

15. After the health care providers create a Qualified Electronic Health Record for every person in the United States those records will then be subject to Enterprise Integration. Under the Stimulus Act the term `enterprise integration' means the electronic linkage of health care providers, health plans, the government, and other interested parties, to enable the electronic exchange and use of health information among all the components in the health care infrastructure in accordance with applicable law, and such term includes related application protocols and other related standards.

16. The health care information of every person in the United States will then be supervised by the National Coordinator who is the head of the Office of the National Coordinator for Health Information Technology established at HHS under the Stimulus Act. The National Coordinator shall perform the duties under the Act in a manner

consistent with the development of a nationwide health information technology infrastructure that allows for the electronic use and exchange of information and that—

`(1) ensures that each patient's health information is secure and protected, in accordance with applicable law;

`(2) improves health care quality, reduces medical errors, reduces health disparities, and advances the delivery of patient-centered medical care;

`(3) reduces health care costs resulting from inefficiency, medical errors, inappropriate care, duplicative care, and incomplete information;

`(4) provides appropriate information to help guide medical decisions at the time and place of care.

17. Currently the greatest protection of Plaintiff's personal health information is provided under HIPAA at Section 264.500 *et. seq.*. However, the Stimulus Act provides that the standards governing the privacy and security of individually identifiable health information under Section 264 of HIPAA shall remain in effect *only to the extent that they are consistent with this subtitle*, (emphasis added) The Secretary shall by rule amend HIPAA *as required* (emphasis added) to make such regulations consistent with this subtitle.

18. HIPAA recognizes that from time to time health care providers will be required to provide information contained in the patient's health record to enable the government to meet national emergencies such as epidemics or to assess medications or procedures used and their success in combating certain illness. In those circumstances HIPAA provides that only the "minimum necessary information" be taken from the patient's health records and provided to a third party. Under HIPAA prior to February 17,

2009 the determination of what constitutes “minimum necessary information” is determined by the health care provider and its physicians.

19. Under the Stimulus Act not later than 18 months after the date of the enactment of the Act, the Secretary of HHS shall issue “guidance” on what constitutes ‘minimum necessary’ for purposes of HIPAA. Thus the authority to determine what constitutes minimum necessary information to be released from the Plaintiff’s personal health record has been shifted from the health care providers and physicians chosen by the Plaintiff to the Secretary of HHS.

20. The privacy protection under HIPAA is further enforced by the limitations placed upon what constitutes “minimum necessary information”. HIPAA lists personal information that may not be included in the minimum information released by the physician. These limitations are denominated “identifications” of protected health information. These identifications include any information in the medical record that can link the information released to a specific individual and includes information such as name, address, social security number, telephone number, automobile VIN number, driver’s license number, etc., etc.

21. Under the Stimulus act not later than 12 months after the date of the enactment of this title, the Secretary shall issue guidance on how best to implement the requirements for the de-identification of protected health information under HIPAA. Thus the Secretary is empowered to totally vitiate the privacy provisions under HIPAA and link medical information contained in the Plaintiff’s personal health record directly to the Plaintiff and all others similarly situated.

22. The Stimulus Act establishes a Federal Coordinating Council for Comparative Effectiveness Research (hereinafter “CER”). This provision lays the groundwork for a permanent government rationing board. Under the Stimulus Act, CER will prescribe what care, procedures or medications the Plaintiff will receive in place of the doctors chosen by the Plaintiff and the Plaintiff herself. The Draft Report language accompanying the House version of the Stimulus Act’s health portion of the bill stated: “By knowing what works best and presenting this information more broadly to patients and healthcare professionals, those items, procedures, and interventions that are most effective to prevent, control, and treat health conditions will be utilized, while those that are found to be less effective *and in some cases, more expensive, will no longer be prescribed.*” (Emphasis added)

23. The Stimulus Act anticipates that there will be breaches in the security system built into Health Information Technology and a patient’s health information will become known to the general public. Stimulus Act Sections 13400, 13401, 13402, 13404, 13405, 13406, 13407, 13408 and 13409 all deal with what should be done when a breach occurs and a patient’s health information is released to the public.

24. Under the Stimulus Act and the provisions regarding breach, the following is excepted from the definition of breach.

(B) EXCEPTIONS- The term ‘breach’ does not include—

(i) any unintentional acquisition, access, or use of protected health information by an employee or individual acting under the authority of a covered entity or business associate if—

(i) such acquisition, access, or use was made in good faith and within the course and scope of the employment or other professional relationship of such employee or individual, respectively, with the covered entity or business associate; and

(II) such information is not further acquired, accessed, used, or disclosed by any person; or

(ii) any inadvertent disclosure from an individual who is otherwise authorized to access protected health information at a facility operated by a covered entity or business associate to another similarly situated individual at same facility; and

(iii) any such information received as a result of such disclosure is not further acquired, accessed, used, or disclosed without authorization by any person.

25. The Stimulus Act also acknowledges that as patients become aware that their personal health information is being released without their consent to the Office of Health Reform, HHS and others they will be reluctant to be fully forthcoming with their health care providers. Under Sec. 3002 of the Stimulus Act one of the duties of the Health Information Policy Committee is to adopt programs with a “goal of minimizing the reluctance of patients to seek care (or disclose information about a condition) because of privacy concerns.”

26. There is established within the Department of Health and Human Services an Office of the National Coordinator for Health Information Technology (referred to in this section as the ‘Office’). The Office shall be headed by a National Coordinator who shall be appointed by the Secretary and shall report directly to the Secretary. The National Coordinator shall perform the duties under subsection (c) in a manner consistent with the development of a nationwide health information technology infrastructure that allows for the electronic use and exchange of information and that among other functions provides appropriate information to help guide medical decisions at the time and place of care.

27. Using this information, the National Coordinator will monitor treatments to make sure the Plaintiff’s doctor is doing what the federal government deems appropriate

and cost effective. The goal is to reduce costs and “guide” Plaintiff’s doctor’s decisions. These provisions in the Stimulus Act are virtually identical to what Daschle prescribed in his 2008 book, Critical: What We Can Do About the Health-Care Crisis”. According to Daschle, doctors have to give up autonomy and “learn to operate less like solo practitioners.”

28. The National Coordinator will be able to enforce his decision as to what is appropriate treatment through sanctions against health care providers. Health care providers that are not “meaningful users” of the new system will face penalties. “Meaningful user” is not defined in the Stimulus Act. That will be left to the HHS secretary, who will be empowered to impose “more stringent measures of meaningful use over time”

29. The penalties administered or threatened by the National Coordinator will deter the Plaintiff’s health care providers from going beyond the electronically delivered protocols should his condition become atypical or he needs an experimental treatment. The vagueness as to penalties is intentional. In his book, Daschle proposed an appointed body with vast powers to make the “tough” decisions elected politicians won’t make. Prior to the Stimulus Act which creates such appointed bodies, these “tough” medical decisions were made by patients such as the Plaintiff after consultation and advice from their health care providers. Thus the Stimulus Act places the Office of Health Reform, HHS and the National Coordinator both between patients, such as the Plaintiff, and their health care providers and, more significantly, standing over the head of the health care providers holding a broadsword of threatened penalties if they depart from the approved protocols.

30. In creating the CER one of the stated goals under the Stimulus Act is to slow the development and use of new medications and technologies because they are driving up health care costs. This despite the fact that these new medications and technologies save the lives of patients such as the Plaintiff. This slowing of development poses a clear and present danger to the personal safety and health of patients such as the Plaintiff and all others similarly situated.

31. The writers of the Stimulus Act have praised Europeans for being more willing to accept “hopeless diagnoses” and “forgo experimental treatments.” and chastises Americans for expecting too much from the health-care system. Others say health-care reform “will not be pain free.” Seniors should be more accepting of the conditions that come with age instead of treating them. The Stimulus Act will apply a cost - effectiveness standard set by the CER This Act permits the bureaucrats at HHS to deny patients, such as the Plaintiff, treatments deemed safe and effective even if those treatments are required to ease the pain and suffering of patients such as the Plaintiff or even prolong their lives. The CER will approve or reject treatment using a formula that divides the cost of the treatment by the number of years the patient is likely to benefit. Treatments for younger patients are more often approved than treatments for diseases that affect the elderly, such as osteoporosis.

32. In 1951 the American College of Physicians (ACP), the American Hospital Association (AHA), Canadian Medical Association, the American Medical Association (AMA) joined with the American College of Surgeons to create the Joint Commission on Accreditation of Hospitals (JCAH), an independent, not-for-profit organization whose primary purpose is to provide voluntary accreditation. Accreditation by the Joint

Commission as JCAH is now known is recognized worldwide as a symbol of quality which reflects an organization's commitment to quality improvement and to meeting state-of-the-art performance standards. Virtually every health care provider in the nation is certified by the Joint Commission. The mission of the Joint Commission is to continuously improve the safety and quality of care provided to the public through the provision of health care accreditation and related services that support performance improvement in health care organizations.

33. The health care provisions of the Stimulus Act will effectively terminate the Joint Commission. The Canadian Medical Association was one of the original members of the Joint Commission in 1951 but had to withdraw in 1959 to form its own accrediting organization in Canada. This was due in large part to the adoption in 1957 of the Canadian Hospital Insurance and Diagnostic Services Act (HIDS Act) which began the introduction of the type of government controlled medical care envisioned by the Obama Administration and the Stimulus Act. As a result of the HIDS Act Canadian health care providers could no longer meet the stringent standards for patient care and safety required by the Joint Commission. With the implementation of the health care provisions contained in the Stimulus Act health care providers in the United States will no longer be able to meet the Joint Commission's high standards for patient care and safety thereby putting the personal security of the Plaintiff and all those similarly situated at risk.

34. In the Stimulus Act the Obama Administration budgeted \$2,000,000,000 federal taxpayer dollars to fund the Office of the National Coordinator for Health Information Technology. The Obama Administration also budgeted \$20,000,000,000 in federal taxpayer dollars for Investment in Health Information Technology. This

technology will be used to deprive the Plaintiff and others of his fundamental right to privacy by requiring that her medical records be released by her health care providers and upon entry into the Health Information Technology maintained under the supervision of the Secretary will be made available without the permission of the Plaintiff to an unknown and potentially unlimited number of persons. Further, this Health Information Technology will be used by the White House Office of Health Reform to monitor, interfere and limit the medical information and medical options provided by the Plaintiff's health care providers in violation of the Plaintiff's fundamental right to personal security.

COUNT I

VIOLATION OF THE PLAINTIFF'S RIGHT TO PRIVACY

35. The Plaintiff re-alleges and re-asserts paragraphs 1 through 34 as if fully set forth herein.

36. The element of confidentiality is an integral aspect of the relationship between a health care provider and a patient, and often, to give the health care provider the necessary information to provide proper treatment, the patient must reveal the most intimate aspects of his or her life to the health care provider during the course of treatment. The confidentiality of Physician-Patient Communications is as old as the medical profession itself. It is widely believed that the Hippocratic Oath, an oath all physicians subscribe to, was written by Hippocrates, the Father of Western Medicine, in the 4th century BC. The Hippocratic Oath provides, "What I may see or hear in the course of the treatment or even outside of the treatment in regard to the life of men, which on no account one must spread abroad, I will keep to myself holding such things

shameful to be spoken about." Ludwig Edelstein, *The Hippocratic Oath: Text, Translation, and Interpretation* (Johns Hopkins Press 1943).

37. Both state and federal law recognizes that a patient has a right of privacy in the communication of intimate personal information between the patient and the physician. Almost every state has statutory provisions providing that no provider may disclose the personal medical record of a patient. The patient's right of privacy in his or her personal health information is also protected under Federal Law and by HIPAA.

38. The protections of the Hippocratic Code were well known to the Founding Fathers, the Framers of the Constitution and the citizens of the United States at the time the Constitution was adopted. Several of the Framers were physicians. The protection of patient – physician communications was part of the ordered pattern of liberty enjoyed by every citizen in the United States in 1789. It is one of the fundamental rights protected by the Constitution. The fundamental nature of this right is reflected not only in the Hippocratic Code known to the Founding Fathers but in the fact that every state and the federal government have passed legislation in support of it.

39. The passage of the Stimulus Act under enormous pressure on a party line vote taken before the Act could even be read by Members of Congress or the public does not constitute a knowing waiver by the American People. Hiding the health legislation in a Stimulus Bill was intentional. Daschle, the author of the health reform along with Defendant Lambrew, wrote that the next president should act quickly before critics mount an opposition. "If that means attaching a health-care plan to the federal budget, so be it," he said. "The issue is too important to be stalled by Senate protocol."

40. The Stimulus Act by its terms requires every health care provider to create an Electronic Health Record for every person within the United States. This process is to be commenced immediately upon the signing of the Stimulus Act and must be completed by 2014. Currently the personal health information provided by the Plaintiff and others similarly situated are contained in hard copy form. In other words the personal health information is on paper forms in hand written notations .made by health care providers. Those paper forms are contained in folders and locked in file cabinets maintained by health care providers for the benefit of the Plaintiff and those similarly situated. To access this information currently a would-be intruder would have to know who the health care providers for the Plaintiff and others similarly situated are. The intruders would then have to break into the health care provider's medical offices, break into the file cabinets, locate the Plaintiff's personal health information and steal the folders.

41. Under the Stimulus Act the Plaintiff's health care providers are required to place the Plaintiff's personal health information on software designed by the White House Office of Health Reform and HHS. Once the Plaintiff's personal health information is stored in an Electronic Health Record the Plaintiff's personal health information is a mouse click away from being accessible to an intruder. This represents an unwarranted and unjustifiable risk to the Plaintiff and others similarly situated.

42. The Plaintiff on behalf of herself and others similarly situated will seek a preliminary and permanent injunction to prevent this unconstitutional exposure of her personal health information.

COUNT II

VIOLATION OF THE PLAINTIFF'S DUE PROCESS RIGHTS

43. The Plaintiff re-alleges and re-asserts paragraphs 1 through 42 as if fully set forth herein.

44. By requiring the Plaintiff's health care providers to place Plaintiff's personal health information in an Electronic Health Record on software designed by the White House Office of Health Reform and HHS, the Stimulus Act attempts to exercise dominion and control over the private property of the Plaintiff, namely her personal health information. This unwarranted interference with the Plaintiff's private property without due process of law violates the Plaintiff's Due Process Rights protected by the United States Constitution.

COUNT III

VIOLATION OF THE PLAINTIFF'S RIGHT TO PRIVACY

45. The Plaintiff re-alleges and re-asserts paragraphs 1 through 44 as if fully set forth herein.

46. Under the terms of the Stimulus Act once the health care providers and HHS are linked via computer, HHS would have real time access to the personal health information being provided by the Plaintiff and all others similarly situated. HHS would have access to the Plaintiffs intimate personal health information even as the Plaintiff discloses it to the physician and health care provider of his choice.

47. In adopting the Constitution the citizens of the United States provided a government of limited powers. The thought that the citizens of the United States in adopting the Constitution would create a government that would have unfettered access

to their personal health information is absurd. No such power has ever been or can ever be given under the Constitution adopted in 1789.

48. The fact that Common Law countries such as Canada and the United Kingdom have adopted forms of National Health Insurance and Managed Care is irrelevant to the United States. At the Federal Convention of 1787 the Framers of the Constitution while complimentary of the British Parliamentary form of government rejected it as unsuitable to the American experience. Our Constitutional form of government is entirely separate and distinct from a Parliamentary form of government.

49. Acts of Congress such as the Stimulus Act cannot *per se* cancel fundamental rights protected by the Constitution. Any curtailment of fundamental rights must be carefully limited to achieve a specific legitimate end. The Stimulus Act is neither carefully limited nor designed to achieve a specific legitimate end. For these reasons, the health care provisions of the Stimulus Act are unconstitutional.

COUNT IV

VIOLATION OF THE PLAINTIFF'S RIGHT TO PERSONAL SECURITY

50. The Plaintiff re-alleges and re-asserts paragraphs 1 through 49 as if fully set forth herein.

51. One of the principle resources relied upon by the Framers of the Constitution was Judge Blackstone's Commentaries on the Laws of England. Contained in Judge Blackstone's Commentaries are descriptions of Fundamental Rights enjoyed by every citizen. Included in those Fundamental Right is the absolute right to personal security. Personal security includes the security of a person's life, limbs, body and health. Included in this Fundamental Right is the right of every citizen to consult when needed with a

medical provider of his choice, to discuss freely intimate aspects of his life without fear of disclosure and the expectation that the medical provider would render the best possible medical advice without regard to cost and without interference by any outside third parties including the government be it in the person of the King, the Congress or the President of the United States.

52. Any suggestion that the Framers of the Constitution and the citizens of the United States who through delegates at Conventions ratified the Constitution would have created a federal government that had the power to stand behind a patient's physician and threaten him or her with sanctions if that physician rather than providing the best possible medical advice instead provided what the Secretary of HHS and the Office of Health Reform consider appropriate and cost effective advice is absurd. No such power was ever given to the federal government and any attempt by the government of the United States or the President to assert such a power now is unconstitutional.

COUNT V

THE PRIVACY ACT

53. The Plaintiff re-alleges and re-asserts paragraphs 1 through 52 as if fully set forth herein.

54. Concerned about the use of private information obtained by one federal agency and then shared with other federal agencies, the People through the Congress adopted provisions to protect the Privacy rights of citizens including, but not limited to, The Privacy Act, 5 U.S.C. Sec. 552a which restricts the dissemination of personal information between agencies of the federal government.

55. The White House Office for Health Reform and HHS are separate federal agencies. The exchange of information between HHS and the White House Office of Health Reform is limited under The Privacy Act. The Stimulus Act does not adopt any of the restrictions on the communication of the personal information of the Plaintiff and others similarly situated acquired by HHS and passed on to the White House Office of Health Reform as required by The Privacy Act or other acts of Congress. In fact representatives of the White House Office for Health Reform are currently working at the offices of HHS with full access to the HHS database.

56. The failure of the Stimulus Act to incorporate provisions required by The Privacy Act on the gathering and sharing of information by HHS and the White House Office of Health Reform violates the privacy rights of the Plaintiff and all others similarly situated.

COUNT VI

VIOLATION OF FEDERAL COMMON LAW

57. The Plaintiff re-alleges and re-asserts paragraphs 1 through 56 as if fully set forth herein.

58. An argument for the health care provisions under the Stimulus Act is that the government needs the data to determine which procedures work and which procedures do not. In truth HHS already has all the information it needs but only as to Medicare and Medicaid patients. This is because of the use by health care providers of the UB-04. The UB-04 (Universal Billing Form adopted in 2004), form number F245-367-000, is an online form used by all health care providers to bill for inpatient and outpatient services. The health care providers fill out the UB-04 for every patient and send the information

electronically to the party paying for the health care services provided. In the case of the Plaintiff and all those similarly situated the UB-04 is sent to their private health insurance carriers. In the case of Medicare or Medicaid the UB-04 is sent to HHS. The UB-04 contains all the information that HHS and the White House Office of Health Reform want to capture in the new Electronic Health Record mandated under the Stimulus Act but only as to the UB-04 forms for Medicare and Medicaid patients. The purpose of the Electronic Health Record is to capture the confidential personal health information for the Plaintiff and all those similarly situated and which is now in the hands of the Plaintiff's health care providers and health care insurers.

59. Another justification for the health care provisions in the Stimulus Act is to improve patient care and safety. In the United States patients including the Plaintiff and all those similarly situated enjoy the protection of the World's Gold Standard when it comes to patient care and safety, the Joint Commission. For over 50 years the Joint Commission which was begun by doctors and health care professionals has been monitoring and regulating health care quality and safety. The certification by the Joint Commission is so valued in the health care community that no health care provider dare attempt to operate without the certification of the Joint Commission. The Joint Commission not only issues rules and guidelines concerning patient care and safety but once every three to five years a team of Joint Commission clinical experts arrives at the door of every health care provider in the country unannounced to do a thorough top to bottom review of the health care provider's operations with a view toward assuring compliance with Joint Commission rules and regulations concerning patient care and safety.

60. The Joint Commission's standards for excellence have been repeatedly recognized by HHS through the Medicare Program. In 1965 Congress passed the Social Security Amendments of 1965 with a provision that hospitals accredited by the Joint Commission are "deemed" to be in compliance with most of the Medicare Conditions of Participation for Hospitals and, thus, able to participate in the Medicare and Medicaid programs. In 1972 The Social Security Act is amended to require that the Secretary of HHS validate Joint Commission's findings. The law also requires the Secretary to include an evaluation of the Joint Commission's accreditation process in the annual HHS report to Congress. In 1993 the federal government announced that home health agencies accredited by the Joint Commission after an unannounced survey will be "deemed" to meet the Medicare Conditions of Participation. In 1995 the federal government recognized Joint Commission laboratory accreditation services as meeting the requirements for Clinical Laboratory Improvement Amendments of 1988 (CLIA) certification. In 2006 the CMS granted the Joint Commission deeming authority to accredit durable medical equipment, prosthetics, orthotics and supplies, as provided by the Medicare Modernization Act of 2003. In 2007 CMS granted the Joint Commission continued deeming authority under the Clinical Laboratory Improvement Amendments of 1988.

61. Nor is the reputation of the Joint Commission limited to the United States. In 2004 The World Health Organization launched its World Alliance for Patient Safety and the Joint Commission was invited to be involved in several of the Alliance's initiatives. In 2005 the World Health Organization designated the Joint Commission and Joint Commission International as the WHO Collaborating Centre for Patient Safety Solutions.

62. By terminating the Joint Commission the Stimulus Act will place the Plaintiff and all others similarly situated in jeopardy. Health care providers will not be able to maintain the high degree of safety and security the Plaintiff and all others similarly situated currently enjoy under the watchful eye of the Joint Commission. Rather than improving the delivery of health care services, the Stimulus Act will precipitate a marked deterioration in patient safety and security as demonstrated by managed care in Canada and the United Kingdom.

63. A final justification for the health care provisions in the Stimulus Act is the claim that action is necessary to avoid a fiscal crisis. The United States spends 15.3% of its Gross Domestic Product (“GDP”) on health care. The supporters of the Stimulus Act claim that this figure is too high and that is why the government must nationalize health care. Our nearest neighbor with national health care is Canada. Canada spends 10.7% of its GDP on health care. Instead of discussing how the United States can reduce its cost of health care from 15.3% to closer to 10.7 %, the Obama Administration instead passes legislation violating the fundamental rights of the Plaintiff and others similarly situated to privacy and personal safety.

64. The difference between the percentage of GDP spent by the United States and Canada is 4.6%. Of the 15.3% spent on health care in the United States 44% is spent by the government on Medicare and Medicaid. The United States can reduce the 4.6% delta in several ways that do not violate the fundamental rights of the Plaintiff and those similarly situated by, among other actions, requiring co-pays for Medicare patients, means testing Medicare, limiting immigration, both legal and illegal, which is driving up the cost of Medicaid, limiting vexatious malpractice lawsuits which forces health care

providers to practice defensive medicine, and requiring young workers not covered by their parents health care insurance to subscribe to private health care insurance as a condition of operating a motor vehicle. Once we see how much has been saved the government can merely raise the level of wages subject to Medicare taxes to cover the remaining difference.

65. The Stimulus Act provides \$22 Billion Dollars to HHS and the Office of Health Reform to create a computerized system which by design will violate the civil rights of every person in the United States. This computerized system will not achieve any of the ends represented by President Obama, the White House Office of Health Reform or HHS. The sole purposes of the Stimulus Act is to obtain confidential personal health care information of the Plaintiff and all those similarly situated that currently resides in the records of health care providers chosen by the Plaintiff and the health insurers contracted by the Plaintiff and the replacement of the Joint Commission by bureaucrats in the White House Office of Health Reform and HHS. This will not only violate the right to privacy enjoyed by the Plaintiff and all those similarly situated but with the demise of the Joint Commission and its replacement by bureaucrats in the White House Office of Health Reform and HHS it will impair the Plaintiff's fundamental right to personal security by creating an unacceptable risk of improper health care.

66. The Plaintiff as a federal tax payer has standing to prevent the expenditure of significant amounts of federal taxpayer dollars to fund an unconstitutional purpose. The Plaintiff asserts that \$22 Billion dollars is a significant expenditure of federal taxpayer dollars and that the creation of the computerized system by HHS and the Office of Health Reform is for an unconstitutional purpose.

COUNT VII

VIOLATION OF THE DUE PROCESS CLAUSE

67. The Plaintiff re-alleges and re-asserts paragraphs 1 through 66 as if fully set forth herein.

68. The Stimulus Act contemplates and legislation currently under consideration in the Congress anticipates an expansion of Medicare to include a public plan option for health insurance coverage for individuals under Medicare to compete with private insurance companies. Under Section 1866 (a) (1) of the Social Security Act, 42 U.S.C. Sec. 1395ccc(a)(1) health care providers who provide health care to Medicare beneficiaries must accept as payment in full whatever CMS pays them for a specific item or service furnished to a qualified individual.

69. 42 U.S.C. Sec. 1395ccc(a)(1) results in CMS underpaying for specific items or services furnished by health care providers to individuals qualified under Medicare. Ronald Williams, chief executive officer of Hartford, Connecticut-based Aetna Inc., testifying before a Senate panel stated that the industry pays an extra \$89 billion a year to providers to make up for “underpayments” from patients covered by existing government programs. These under payments are created when the U.S. Government mandates medical procedures and then refuses to reimburse the health care providers for the full cost of the procedures.

70. The American Health Benefit Gateway currently proposed by the Senate Committee on Health Education, Labor and Pension at Sec. 3105 (c)(1) (c) extends 42 U.S.C. Sec. 1395ccc(a)(1) to the public plan option under Medicare. Thus CMS will now

underpay not only for Medicare but also for the public plan option forcing private insurers including the Plaintiff's health plan and the health plan of all those similarly situated to overpay for items and services required by the Plaintiff and all those similarly situated forcing the Plaintiff and all those similarly situated to pay extra to compensate the insurers for their overpayment.

71. When the U.S. government under compensates health care providers for mandated care, the private insurers then must make up the shortfall in order to keep the health care providers solvent. Insurers then must pass the added cost of making up the shortfall to the Plaintiff and all others similarly situated by raising the cost of the premiums paid for private health insurance. The practice of the U.S. Government under paying for mandated care results in a taking without due process of law of the added costs of private insurance paid by the Plaintiff and all others similarly situated in violation of the Due Process Clause of the U.S. Constitution.

COUNT VIII

VIOLATION OF THE DUE PROCESS CLAUSE

72. The Plaintiff re-alleges and re-asserts paragraphs 1 through 71 as if fully set forth herein.

73. The Emergency Medical Treatment and Active Labor Act, 42 U.S.C. Sec. 1395dd, (EMTALA) is an Act of Congress in 1986 as part of the Consolidated Omnibus Budget Reconciliation Act. It requires hospitals and ambulance services to provide care to anyone needing emergency treatment regardless of citizenship, legal status or ability to pay. There are no reimbursement provisions. As a result of the act, patients needing

emergency treatment can be discharged only under their own informed consent or when their condition requires transfer to a hospital better equipped to administer the treatment.

74. EMTALA applies to "participating hospitals", i.e., those that accept payment from the CMS under the Medicare program. However, in practical terms, EMTALA applies to virtually all hospitals in the U.S. EMTALA's provisions apply to all patients, and not just to Medicare patients.

75. The cost of emergency care required by EMTALA is not directly covered by the federal government. Because of this, the law is an unfunded mandate. Similarly, it has attracted controversy for its impacts on hospitals, and in particular, for its possible contributions to an emergency medical system that is "overburdened, underfunded and highly fragmented". More than half of all emergency room care in the U.S. now goes uncompensated. Hospitals write off such care as charity or bad debt for tax purposes. Increasing financial pressures on hospitals in the period since EMTALA's passage have caused consolidations and closures, so the number of emergency rooms is decreasing despite increasing demand for emergency care.

76. EMTALA has led to cost-shifting and higher rates for insured or paying hospital patients such as the Plaintiff and all others similarly situated, thereby contributing to the high overall rate of medical inflation in the U.S. This cost shifting costs the Plaintiff and all those similarly situated millions of dollars every year.

77. As a result of the financial burden imposed upon health care provider by EMTALA, health care providers including the health care provider at which the Plaintiff is employed have been forced to delay or force employees to forgo salary adjustments and salary increases.

78. EMPTALA constitutes an unconstitutional taking without due process of law in violation of the United States Constitution and the Amendments thereto.

WHEREFORE, The Plaintiff prays that this Court:

1. Enter a Declaratory Judgment stating that the health care provisions of the Stimulus Act are unconstitutional;
2. Enter a Declaratory Judgment stating that Section 1866 (a) (1) of the Social Security Act, 42 U.S.C. Sec. 1395ccc(a)(1) as applied to both Medicare and the American Health Benefit Gateway or any similar public pay option unconstitutional;
3. Enter a Preliminary and Permanent Injunction against the Defendants, and each of them, from accessing the personal health information of any person in the United states not covered by Medicare or Medicaid;
4. Enter a Preliminary and Permanent Injunction against the Defendants, and each of them, from intercepting, reviewing or recording confidential communications exchanged by and between patients and health care providers;
5. Enter a Preliminary and Permanent Injunction against the Defendants, and each of them, from intercepting, reviewing or recording advice from health care providers to patients or from causing health care providers from directly or indirectly limiting their medical advice to patients including, but not limited to, limiting the health care providers advice to protocols or limitations created or designed by the White House Office of Health Care Reform, HHS or any other federal entity;

6. Enter a Preliminary and Permanent Injunction against the Defendants, and each of them, preventing them from disbursing the \$22 Billion dollars budgeted for the HHS Electronic Health Records System;
7. Enter a Preliminary and Permanent Injunction against the Defendants, and each of them, requiring them to reimburse health care providers for the full cost of mandated health procedures and, further, preventing them from expanding Medicare, Medicaid or any other program without providing for and fully funding reimbursement of health care providers at the health care providers cost for mandated health care;
8. Enter a Declaratory Judgment stating that the Emergency Medical Treatment and Active Labor Act, 42 U.S.C. Sec. 1395dd (EMTALA) is unconstitutional.
9. Award costs and expenses of this litigation to the Plaintiff;
10. Any and all such other relief deemed just and proper by this Court.

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