19-267(L)

19-275(con)

In the United States Court of Appeals

for the Second Circuit

STATE OF NEW YORK, STATE OF CONNECTICUT, STATE OF NEW JERSEY, STATE OF WASHINGTON, COMMONWEALTH OF MASSACHUSETTS, COMMONWEALTH OF VIRGINIA, STATE OF RHODE ISLAND, CITY OF NEW YORK,
Plaintiffs-Appellees,

v.

UNITED STATES DEPARTMENT OF JUSTICE, WILLIAM P. BARR, in his official capacity as Attorney General of the United States,
Defendants-Appellants.

On Appeal from the
United States District Court for the Southern District of New York
Case No. 18-cv-6471, Hon. Edgardo Ramos

BRIEF OF PUBLIC HEALTH SCHOLARS AS *AMICI CURIAE* SUPPORTING PETITIONS FOR REHEARING *EN BANC*

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INTEREST OF *AMICI CURIAE*

Amici are leading public health scholars. They have strong interests in promoting public health. *Amici* submit this brief because, in approving DOJ's requirement that Byrne grant recipients allow local officials to share individuals' immigration-status information with federal authorities, the panel decision in this case will endanger public health by deterring community members from seeking health care. This issue is important enough in its own right to warrant *en banc* review, and the need for rehearing is heightened in the context of a global viral pandemic. A full list of *amici* is provided in the appendix to this brief.[1]

INTRODUCTION AND SUMMARY OF ARGUMENT

The issues raised by the rehearing petitions are exceptionally important and warrant review by this Court sitting *en banc*. Experience has shown that assuring the confidentiality of patients' immigration information is critically important to protecting public health, particularly in the context of a widespread viral pandemic like the one

[1] No party's counsel authored this brief in whole or in part. No entity or person, other than *amici* and their counsel, made a monetary contribution to the preparation or submission of this brief. A motion under Fed. R. App. P. 29(b)(2) for leave to file this brief is submitted herewith.

now confronting the plaintiff jurisdictions. Detecting, containing, and treating communicable diseases requires broad access to health-care services: Individuals who are unable or unwilling to obtain that care endanger not only their own health, but also the health of others in the community. And because many people are unable to afford private health care, any strategy for combatting such diseases depends substantially on publicly provided services. For those services to be effective, however, community members must be willing to obtain them—a goal that will be frustrated by DOJ's new requirement that recipients of Byrne grants allow officials to share information relating to individuals' immigration status with federal authorities.

Immigrant communities are especially reliant on public health services. At the same time, many immigrants are unwilling to take steps that may attract the attention of federal immigration authorities. This includes availing themselves of public health-care services. Immigrants and their families reasonably fear that if public-health officials may share their status with federal authorities, the result of seeking health care will be deportation or other adverse action. This fear has a chilling effect, deterring many immigrants from seeking needed health care.

Cities and States across the country have for decades adopted policies preventing disclosure of patients' immigration information for precisely this reason. *See, e.g.*, N.Y. Exec. Order No. 170 (Sept. 15, 2017); Chicago Mun. Code § 2-173-030; S.F. Admin. Code §§ 12H-I; Seattle Ordinance No. 121063. By requiring city and state governments (like the plaintiffs in this case) to entangle themselves in the federal immigration apparatus, the approach advanced by the federal government and endorsed by the panel decision will imperil public health by dissuading vulnerable people from seeking care—an outcome that inevitably would endanger the broader community. That would be a terrible consequence at any time; it is particularly distressing in the midst of a global viral pandemic.

Accordingly, *amici* respectfully urge this Court to grant the petitions for rehearing *en banc*, not only to resolve the important legal questions presented (and to dispel a circuit split in which this Court is now the lone outlier), but also to ensure that the dire public-health consequences threatened by the panel decision do not come to pass.

ARGUMENT

I. PUBLIC HEALTH, PARTICULARLY IN AN EMERGENCY, DEPENDS ON BROAD COMMUNITY ACCESS TO HEALTH-RELATED PUBLIC SERVICES.

Broad availability and usage of healthcare services improve public health outcomes. As courts in related cases have found, "[p]ublic health is served when individuals freely seek preventive care and do not stave off care until they need emergency room treatment in the midst of a health crisis." *Philadelphia v. Sessions*, 280 F. Supp. 3d 579, 609 (E.D. Pa. 2017), *subsequent judgment aff'd*, 916 F.3d 276 (3d Cir. 2019).

The importance of promoting the broadest access to healthcare is particularly pronounced regarding diagnostic testing and vaccination—both of which are critical components of effective policies for combating infectious disease.[2] The current COVID-19 pandemic provides a timely and compelling example. Because at present there is no COVID-19 vaccine, "[c]ontrolling the spread of the pandemic" in the short- to medium-term "demands finding the infected and isolating them until

[2] *See, e.g.*, Cassandra D. Kelly-Cirino et al., *Importance of Diagnostics in Epidemic and Pandemic Preparedness*, 4 BMJ GLOBAL HEALTH 1, 1 (2018), https://perma.cc/D9WF-RBK6; Mark Perkins et al., *Diagnostic Preparedness for Infectious Disease Outbreaks*, 390 THE LANCET 2211, 2211 (2017), https://perma.cc/B32E-7GNC.

they can no longer spread the disease"—and because many carriers of the virus are asymptomatic, the only way to do that "is to test." Umair Irfan, *The Case for Ending the Covid-19 Pandemic with Mass Testing*, VOX (Apr. 13, 2020) (summarizing literature), https://perma.cc/BX3N-ZNQW. In the long-term, "[a]lleviation of the enormous burden of mortality and morbidity associated with the COVID-19 pandemic will probably depend on the development of effective vaccines that could be rolled out widely." Nir Eyal et al., *Human Challenge Studies to Accelerate Coronavirus Vaccine Licensure*, 2020 J. INFECT. DIS. 1, 1, https://perma.cc/YUM6-FMKK.

Such testing and vaccination programs require broad public participation to be effective. Asymptomatic carriers who refuse testing may contribute to perpetuation of the pandemic. And as the federal government itself has explained, the goal of a vaccination regime is to protect "the entire community" by vaccinating as many people as possible so as to develop "herd immunity." *See* U.S. Dep't of Health & Human Servs., *Vaccines Protect Your Community* (updated Feb. 2020), https://

perma.cc/3TJK-RVYZ.[3] For this reason, governments cannot rely on private actors to address these public-health concerns; "national and sub-national public health capacities" are "necessary for countries to detect and respond to public health events wherever they occur." Rebecca Katz & Julie Fischer, *The Revised International Health Regulations: A Framework for Global Pandemic Response*, 3 GLOBAL HEALTH GOVERNANCE 1, 9 (2010), https://perma.cc/JKR5-VBBJ. Indeed, because diseases like COVID-19 may pose "threat[s] to national and international peace and security," government must play a "central role" in providing "interventions and protection" from pandemics. Adam Kamradt-Scott, *Changing Perceptions: Of Pandemic Influenza and Public Health Responses*, 102 AM. J. PUB. HEALTH 90, 90, 94-95 (Dec. 2011), https://perma.cc/D39H-WN6N.

Pandemic response is of course only one area where broad access to health care is essential if the public is to be protected. Similar

[3] *See also* Tae Hyong Kim et al., *Vaccine Herd Effect*, 43 SCAND. J. INFECT. DIS. 683, 683 (2011) ("A high uptake of vaccines is generally needed for success"), https://perma.cc/W2GF-MNBK; Annelies Wilder-Smith et al., *The Public Health Value of Vaccines beyond Efficacy: Methods, Measures and Outcomes*, 15 BMC MEDICINE 1, 1, 4 (2017) (describing "broad public health benefits" of a vaccination regime), https://perma.cc/N7YS-AW9H.

considerations apply to (for instance) tuberculosis and HIV, which (thanks in part to public-health efforts) have not resulted in pandemics. Of particular relevance here, "[m]igrants suffering from contagious diseases such as TB and AIDS do not go home or otherwise disappear. They just keep living in the community, further imperiling the health of all, native and migrant alike." Alejandro Portes et al., *The U.S. Health System and Immigration: An Institutional Interpretation*, 24 SOCIOL. FORUM 487 (2009) (Portes) (manuscript 10), https://perma.cc/N8U9-HZBH. As one doctor put it: "If you don't treat the foreign-born population, you're increasing the risk of disease among all members of the community, not just those without papers. Preventable diseases don't care what your tax bracket is; they don't care about your political ideology. All that matters, as far as they are concerned, is that no one was there to prevent their spread." *Id.* at 14. At the same time, encouraging individuals to seek prompt or preventive care limits the extent to which delayed treatment leads to medical emergencies—ultimately reducing treatment costs and preserving vital hospital resources. *See, e.g.*, *Philadelphia*, 280 F. Supp. 3d at 609.

II. ENSURING CONFIDENTIALITY OF PATIENTS' IMMIGRATION STATUS IS VITAL TO PUBLIC HEALTH.

Broad access to and utilization of health care are thus critical to protecting public health. And policies protecting the confidentiality of patients' immigration status are critical tools for encouraging immigrant communities to make use of the health-care system. As one district court found in a similar lawsuit, such policies "make the community safer by fostering trust between residents and local law enforcement," thereby "encourag[ing] undocumented residents … to obtain preventative medical care and immunizations, which has major implications for public health." *Cty. of Santa Clara v. Trump*, 250 F. Supp. 3d 497, 525 (N.D. Cal. 2017) (citing *amicus* briefs). Conversely, as another court found, failure to ensure confidentiality is "counterproductive to public health" because it leads immigrants "not [to] accept any kind of care where they would have to disclose their non-citizenship status," resulting in "spread of an infectious disease much to the detriment of the entire [community]." *Philadelphia*, 280 F. Supp. 3d at 611.

Confidentiality policies are important because "[i]mmigrants, in particular the poor and unauthorized, are also mostly uninsured,"

Portes 2, [4] which means that "immigrants often rely on safety-net options" such as public health programs. Lila Flavin et al., *Medical Expenditures on and by Immigrant Populations in the United States: A Systematic Review*, 2018 INT. J. HEALTH SERV. 1, 17 (Flavin), https://perma.cc/2XD3-2A3E. In New York City, for example, the "public hospital system … and community health centers … are the primary safety-net providers that care for uninsured New Yorkers, including the undocumented." Task Force Report 9.

Fear of deportation—a fear that would be greatly accentuated by a perception that local officials might share patients' immigration status with federal authorities—poses a major barrier to public provision of health care to immigrant communities. Immigrants, both documented and undocumented, often "refrain from seeking vital services, including medical services, from any local government or private agency—even agencies unrelated to law enforcement—for fear of exposing themselves or their family members to legal sanctions or harassment." Omar

[4] *See, e.g.*, Mayor's Task Force on Immigrant Health Care Access, *Improving Immigrant Access to Health Care in New York City* 8 (2015) (Task Force Report) (35.1% of New York City noncitizen residents and 63.9% of undocumented residents are uninsured), https://perma.cc/YM3M-4E3Z.

Martinez et al., *Evaluating the Impact of Immigration Policies on Health Status Among Undocumented Immigrants: A Systematic Review*, 17 J. IMMIGR. MINOR. HEALTH 947 (2015) (manuscript 10), https://perma.cc/63FX-PW86. In one especially vivid example, a child in Oklahoma died "when his parents delayed seeking medical treatment because they feared that hospital officials would report them to ICE." Elizabeth M. McCormick, *Federal Anti-Sanctuary Law: A Failed Approach to Immigration Enforcement and A Poor Substitute for Real Reform*, 20 LEWIS & CLARK L. REV. 165, 199 (2016).

This is not an isolated anecdote. Studies consistently find that "lack of documentation—and the fear associated with it—is a powerful deterrent to people obtaining care they believe they need," Marc L. Berk & Claudia L. Schur, *The Effect of Fear on Access to Care Among Undocumented Latino Immigrants*, 3 J. IMMIGR. HEALTH 151, 155 (2001), because it "makes [unauthorized immigrants] reluctant to approach any official-looking institution for fear of detention and deportation." Portes 8.[5] This is true even when care is offered free of charge. *Id.* at

[5] *See, e.g.*, Scott D. Rhodes et al., *The Impact of Local Immigration Enforcement Policies on the Health of Immigrant Hispanics/Latinos in the United States*, 105 AM. J. PUB. HEALTH 329, 332 (2015) (immigrants

17-18. The phenomenon is so well documented that health-care providers must take significant steps to combat it—as where one Florida clinic "placed itself right next to a Baptist church in order to prevent raids by [ICE] agents that would scare away its mostly undocumented users." *Id.* at 14.

There is little doubt that allowing local health authorities to assist federal immigration-enforcement efforts would exacerbate this chilling effect on health-care use. And these adverse health consequences would not be limited to the immigrants who are frightened away from seeking care. Most immediately, and as illustrated by the Oklahoma case discussed above, "[t]he children of immigrants"—who may themselves be natural-born U.S. citizens—"are disproportionately underserved by the health care system because of barriers their parents face." Flavin 18. And

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"reported that they … did not access or utilize health services for which they were eligible, including preventive services," because "[t]hey worried that … their lack of documentation … would put them at risk for detention and deportation"), https://perma.cc/GF79-LFJR; Karen Hacker et al., *The Impact of Immigration and Customs Enforcement on Immigrant Health: Perceptions of Immigrants in Everett, Massachusetts, USA*, 73 SOC. SCI. MED. 586 (2011) (manuscript 7) ("Both documented and undocumented immigrants discussed fears that giving out personal information to acquire health insurance or health care would be reported to ICE," which "[i]n some cases … led to avoidance of care"), https://perma.cc/66GF-FHCH.

because public health often depends on broad access to care (such as diagnostic testing and vaccines), dissuading immigrants from pursuing care undermines the broader public welfare. "[I]f nurses at public hospitals report people who come in for medical services to immigration authorities, other migrants will quickly see the hospital as an extension of the immigration enforcement regime"—creating a "community-wide problem" as the government is impaired in its "ability to know the true extent of people staying at home sick, where they are, or what their true needs are." Peter Mancina, *Sanctuary Cities and Sanctuary Power*, *in* OPEN BORDERS: IN DEFENSE OF FREE MOVEMENT 250, 252 (Reece Jones ed. 2019), https://perma.cc/J528-TC5Y.[6] Indeed, in part because they can deter immigrants from accessing health-care services, "[i]mmigration policies and migration interception practices implemented by receiving nations are a major global determinant of health." Martinez 9.

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[6] *See, e.g.*, Huyen Pham, *The Constitutional Right Not to Cooperate? Local Sovereignty and the Federal Immigration Power*, 74 UNIV. CIN. L. REV. 1373, 1400 (2006) ("Immigrants … may refuse to seek medical care if they believe that hospital workers will report them or their family members to federal immigration authorities. Not only are the immigrants themselves at risk, but their family members, neighbors, co-workers, and others in the community are also at risk if the health problem is contagious.")

The record in this case confirms that (as the district court recognized) a failure to assure confidentiality "would harm local populations, undermine relationships between local communities and law enforcement, and 'interfere[] with local policies that promote public health and safety.'" J.A. 35-36 (quoting *Philadelphia*, 280 F. Supp. 3d at 625). For example, New York City's Health Commissioner attested that "protection of confidential information[] including … immigration status[] is very important" because residents will "refuse services, including services like immunizations," and will "refuse to cooperate with public health investigations," "if they believe that [public] employees may disclose their information to [ICE]." Bassett Decl. (Dist. Ct. Dkt. 75) ¶ 4. Such refusals harm public health by "compromis[ing]" the City's "ability to investigate outbreaks and to trace the possible contacts of disease cases." *Id.* ¶ 6. The Commissioner's concerns, expressed in August 2018, have proved prescient in the context of COVID-19.

For all these reasons, as well as those expressed in the rehearing petitions, *amici* respectfully submit that the Court should rehear this case *en banc*. The issues presented are tremendously important, and not only as a matter of law. Allowing the panel decision to stand would

imperil the health of people in cities and states across the country, in the middle of a deadly viral pandemic. It is for good reason that, aside from the panel decision in this case, no court has countenanced such a result.

CONCLUSION

The petitions for rehearing *en banc* should be granted.

/s/ Charles A. Rothfeld

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 29(b)(4) because it contains 2,597 words, excluding the exempted portions.

This brief complies with the typeface and type-style requirements of Fed. R. App. P. 32(a)(5) and 32(a)(6) because it has been prepared in a proportionally spaced, 14-point Century Schoolbook typeface.

/s/ Charles A. Rothfeld

APPENDIX

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