**No. S244148**

# IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

**ARAM BONNI,**

*Plaintiff and Appellant,*

vs.

**ST. JOSEPH HEALTH SYSTEM et al.,**

*Defendants and Respondents*

## APPLICATION BY DIGNITY HEALTH, SUTTER HEALTH, ADVENTIST HEALTH, MEMORIALCARE, AND SHARP HEALTHCARE TO FILE BRIEF OF AMICI CURIAE IN SUPPORT OF DEFENDANTS AND RESPONDENTS; PROPOSED BRIEF

After a Decision by the Court of Appeal
Fourth Appellate District, Division Three, No. G052367

Orange County Superior Court No. 30-2014-00758655
Hon. Andrew P. Banks

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## APPLICATION TO FILE BRIEF OF AMICI CURIAE

Pursuant to California Rules of Court, rule 8.520(f), Dignity Health, Sutter Health, Adventist Health, MemorialCare, and Sharp Healthcare hereby apply for permission to file a brief in this case as amici curiae in support of Defendants and Respondents St. Joseph Health System et al. A copy of the proposed brief is attached to this application.

Dignity Health is California's largest not-for-profit operator of general acute-care hospitals. Dignity Health operates more than 30 hospitals across California. These hospitals provide 24-7 emergency care, hospital inpatient and outpatient care, and health clinic services to tens of thousands of Californians annually. Through teamwork and innovation, faith and compassion, advocacy and action, Dignity Health endeavors to keep its patients happy, healthy, and whole. Dignity Health has appeared as amicus curiae in, among other cases, *Dhillon v. John Muir Health* (2017) 2 Cal.5th 1109; *Shaw v. Superior Court* (2017) 2 Cal.5th 983; *Fahlen v. Sutter Central Valley Hospitals* (2014) 58 Cal.4th 655; *El-Attar v. Hollywood Presbyterian Medical Center* (2013) 56 Cal.4th 976; *Economy v. Sutter East Bay Hospitals* (2019) 31 Cal.App.5th 1147; and, under its former name Catholic Healthcare West, *Mileikowsky v. West Hills Hospital & Medical Center* (2009) 45 Cal.4th 1259 and *Kibler v. Northern Inyo County Local Hosp. Dist.* (2006) 39 Cal.4th 192.

Sutter Health's 24 California hospitals partner with more than 12,000 physicians to deliver top-rated, affordable healthcare to more

than three million Californians. Sutter hospitals compassionately care for more low-income Medi-Cal patients in Northern California than any other health system, and some Sutter facilities have been providing care in their communities for more than 100 years. Sutter Health supports community programs to help ensure those in need have access to care and social services. Sutter Health also strives to be an industry innovator, including by integrating physical and mental health to provide care for the whole person. Sutter Health appeared as amicus in *Natarajan v. Dignity Health* (2019) 42 Cal.App.5th 383, review pending, No. S259364.

Adventist Health is a faith-based, nonprofit integrated health system serving more than 80 communities on the West Coast and in Hawaii. Founded on Seventh-day Adventist heritage and values, Adventist Health provides care in 19 California hospitals, as well as clinics, home care agencies, hospice agencies, and joint-venture retirement centers in both rural and urban communities. Adventist Health's compassionate and talented team of 37,000 includes associates, medical staff physicians, allied health professionals and volunteers driven in pursuit of one mission: living God's love by inspiring health, wholeness, and hope. Adventist Health has appeared as amicus in *Fahlen v. Sutter Central Valley Hospitals* (2014) 58 Cal.4th 655 and *El-Attar v. Hollywood Presbyterian Medical Center* (2013) 56 Cal.4th 976.

MemorialCare is a nonprofit health system that includes four hospitals, two medical groups, outpatient health centers, urgent care centers, imaging centers, breast centers, surgical centers, and dialysis

centers throughout Orange County and Los Angeles County. MemorialCare's mission is to improve the health and well-being of individuals, families, and the system's communities. MemorialCare appeared as amicus in *Flores v. Presbyterian Intercommunity Hospital* (2016) 63 Cal.4th 75; *Natarajan v. Dignity Health* (2019) 42 Cal.App.5th 383, review pending, No. S259364; and *Economy v. Sutter East Bay Hospitals* (2019) 31 Cal.App.5th 1147.

Sharp HealthCare is a not-for-profit integrated regional healthcare-delivery system based in San Diego. It includes four acute-care hospitals, three specialty hospitals, three affiliated medical groups, outpatient and urgent care centers, and a full spectrum of other facilities and services. Sharp has approximately 2,700 affiliated physicians. Sharp's purpose is to provide exceptional care with excellence, commitment, and compassion. Sharp appeared as amicus curiae in *Dhillon v. John Muir Health* (2017) 2 Cal.5th 1109; *Flores v. Presbyterian Intercommun. Hosp.* (2016) 63 Cal.4th 75; *Fahlen v. Sutter Central Valley Hospitals* (2014) 58 Cal.4th 655; and *Natarajan v. Dignity Health* (2019) 42 Cal.App.5th 383, review pending, No. S259364.

Resolution of the issue presented in this case regarding the applicability of the anti-SLAPP statute in the context of physician peer review will significantly impact these hospital systems and other California hospitals statewide. All California hospitals must conduct peer review to protect patients and to maintain hospital accreditation and certification in the Medicare and Medi-Cal programs to treat the majority of their patients. However, participation by physician peer

reviewers is voluntary, making it essential that the law protects and encourages medical staff members to participate and that their participation is not chilled by the threat of meritless lawsuits alleging retaliatory peer review and similar claims. (*Kibler v. Northern Inyo County Local Hosp. Dist.* (2006) 39 Cal.4th 192, 201.)

The proposed brief of amici curiae will assist the Court in deciding the matter. The brief will present additional arguments and authorities demonstrating that prong one of the anti-SLAPP statute broadly applies to all facets of physician peer review that commonly are the bases for retaliation claims by physicians arising from peer review communications and related actions.

No party, counsel for a party, or any other person or entity other than amici curiae and their counsel has made a monetary contribution intended to fund the preparation or submission of the brief, and no party or counsel for a party has authored this brief in whole or in part.

Dated: August 7, 2020 MANATT, PHELPS & PHILLIPS, LLP

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## PROPOSED BRIEF OF AMICI CURIAE

## I. INTRODUCTION AND INTEREST OF AMICI

Amici curiae Dignity Health, Sutter Health, Adventist Health, MemorialCare, and Sharp Healthcare are California hospital systems that regularly conduct physician peer review and that have a direct interest in the resolution of the applicability of the anti-SLAPP law to physician peer review.

Amici support the defendant hospital's arguments and will not repeat them. Rather, amici submit this brief in order to elaborate on the need for a broad application of anti-SLAPP protections for hospitals, medical staffs, physician members of medical staffs, and others who engage in statutorily required peer review of physicians practicing at the hospitals. As this case and many others show, claims of retaliatory physician peer review by the affected physicians have become commonplace and threaten to stifle physician peer review at California hospitals. As discussed below:

- The purpose of the anti-SLAPP law is to promote participation in matters of public interest. Peer review is inherently for the protection of the public, as it ensures that incompetent and harmful physicians are detected and disciplined, as well as ensures a robust reporting and circulation of information that will restrict problem physicians from practicing on members of the public. "[T]he public issue implicated [by

physician peer review] is the qualifications, competence, and professional ethics of a licensed physician."[1]

- The anti-SLAPP statute prevents lawsuits that chill protected participation in matters of public interest. Physician peer review is dependent on the frank and candid participation of physicians and others. "[M]embership on a hospital's peer review committee is voluntary and unpaid, and many physicians are reluctant to join peer review committees so as to avoid sitting in judgment of their peers."[2] Failure to extend anti-SLAPP protections "would further discourage participation in peer review by allowing disciplined physicians to file harassing lawsuits against hospitals and their peer review committee members . . . ."[3]

- The policy of promoting candid exchange of information regarding problematic physicians by protecting the peer review process is reflected in numerous statutory and judicially created privileges, immunities, and other protections for peer reviewers. Broad application of the anti-SLAPP statute to physician peer review furthers these policies.

- The anti-SLAPP law should be interpreted broadly to apply to all aspects of the peer review process, which are largely

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[1] *Yang v. Tenet Healthcare, Inc.* (2020) 48 Cal.App.5th 939, 947.

[2] *Kibler v. Northern Inyo County Local Hosp. Dist.* (2006) 39 Cal.4th 192, 201.

[3] *Ibid.*

intertwined into a seamless and ongoing process, comprised of steps that are not discrete. A final termination or disciplinary action is seldom the only alleged basis for liability. Lawsuits brought by physicians alleging such claims as retaliation, interference with economic advantage, or defamation, among others, arise from a variety of phases and aspects of the peer review process that often cannot neatly be separated from an ultimate disciplinary decision.

- Peer review is inherently communicative in nature and occurs in connection with an official proceeding authorized by law, and it therefore is protected under the anti-SLAPP law, Code of Civil Procedure section 425.16, subdivision (e)(2).

- Peer review conduct furthers speech or petitioning in connection with a public issue and therefore is protected under the anti-SLAPP law, Code of Civil Procedure section 425.16, subdivision (e)(4).

## II. THE ANTI-SLAPP LAW FOCUSES ON MATTERS OF PUBLIC INTEREST; PHYSICIAN PEER REVIEW SERVES A CRITICAL PUBLIC INTEREST

The fundamental purpose of the anti-SLAPP statute is to protect those engaged in speech or petitioning activity with respect to matters of public interest. The "Legislature f[ound] and declare[d] that it is in the public interest to encourage continued participation in matters of public significance . . . ." (Code Civ. Proc., § 425.16, subd. (a).) The same law commands

that "this section shall be construed broadly."

Virtually all aspects of the physician peer review process conducted at hospitals are matters of great public interest. California's peer review statutes declare that peer review and the disciplinary actions that can result are for the purpose of protecting hospital patients and the public:

> (3) Peer review, fairly conducted, is essential to preserving the highest standards of medical practice.
>
> (4) Peer review that is not conducted fairly results in harm to both patients and healing arts practitioners by limiting access to care.
>
> (5) Peer review, fairly conducted, will aid the appropriate state licensing boards in their responsibility to regulate and discipline errant healing arts practitioners.
>
> (6) To protect the health and welfare of the people of California, it is the policy of the State of California to exclude, through the peer review mechanism as provided for by California law, those healing arts practitioners who provide substandard care or who engage in professional misconduct, regardless of the effect of that exclusion on competition.

(Bus. & Prof. Code, § 809, subd. (a)(3)-(6); see also Bus. & Prof. Code, § 809.05, subd. (d) ["A governing body and the medical staff shall act exclusively in the interest of maintaining and enhancing quality patient care."].)

Federal law similarly recognizes the important public interest in conducting effective physician peer review to ensure that unqualified or otherwise unfit doctors do not practice on

patients. In the Health Care Quality Improvement Act (HCQIA), 42 U.S.C. § 11101 et seq., Congress found:

> (1) The increasing occurrence of medical malpractice and the need to improve the quality of medical care have become nationwide problems that warrant greater efforts than those that can be undertaken by any individual State.
>
> (2) There is a national need to restrict the ability of incompetent physicians to move from State to State without disclosure or discovery of the physician's previous damaging or incompetent performance.
>
> (3) This nationwide problem can be remedied through effective professional peer review. . . .
>
> (5) There is an overriding national need to provide incentive and protection for physicians engaging in effective professional peer review.

(42 U.S.C. § 11101.)

This Court has repeatedly recognized and reaffirmed the public-oriented nature of physician peer review, explaining that "peer review of physicians . . . serves an important public interest. Hospital peer review, in the words of the Legislature, 'is essential to preserving the highest standards of medical practice' throughout California." (*Kibler*, 39 Cal.4th at 199 [quoting Bus. & Prof. Code, § 809, subd. (a)(3)]; see also *Kibler*, 39 Cal.4th at 200 ["peer review procedure plays a significant role in protecting the public against incompetent, impaired, or negligent physicians"]; *id.* at 201 ["the Legislature has granted to individual hospitals, acting on the recommendations of their peer

review committees, the primary responsibility for monitoring the professional conduct of physicians licensed in California. In that respect, these peer review committees oversee 'matters of public significance,' as described in the anti-SLAPP statute"]; *El-Attar v. Hollywood Presbyterian Med. Ctr.* (2013) 56 Cal.4th 976, 988 ["the primary purpose of the peer review process . . . is to protect the health and welfare of the people of California by excluding through the peer review mechanism those healing arts practitioners who provide substandard care or who engage in professional misconduct"] [internal citations and quotation marks omitted].)

More specifically, "the public issue implicated [by physician peer review] is the qualifications, competence, and professional ethics of a licensed physician. . . . Whether or not a licensed physician is deficient in such characteristics is, we hold, a public issue." (*Yang*, 48 Cal.App.5th at 947; see also *Healthsmart Pacific, Inc. v. Kabateck* (2017) 7 Cal.App.5th 416, 429 ["members of the public, as consumers of medical services, have an interest in being informed of issues concerning particular doctors and health care facilities"]; *Decambre v. Rady Children's Hospital-San Diego* (2015) 235 Cal.App.4th 1, 20, fn. 11 ["We take no issue with defendants' assertion that physician competence and behavior are matters of public interest and may be entitled to anti-SLAPP protection under subdivision (e)(4)"], disapproved on

other grounds in *Park v. Board of Trustees of Cal. State Univ.* (2017) 2 Cal.5th 1057; *Webman v. Little Co. of Mary Hosp.* (1995) 39 Cal.App.4th 592, 600-601 ["'[a] hospital which closes its eyes to questionable competence and resolves all doubts in favor of the doctor does so at the peril of the public[,]' thereby undercutting the goal of the state's peer review mechanism"] [citation omitted].)

In addition, the purpose of the physician disciplinary reporting requirements imposed by state and federal law is to ensure a robust flow of information among hospitals, the government, and the public so that all are well-informed about problem physicians and so that government regulators have the information necessary to monitor physician licensing and behavior. California hospitals and medical staffs are required to make a report to the Medical Board of California when taking a range of disciplinary actions against a physician or when a physician voluntarily leaves to avoid the consequences of his or her conduct.[4] (Bus. & Prof. Code, § 805, subds. (b), (c).) These

[4] A report is required when, for any "medical disciplinary cause or reason," a physician's application for privileges or membership is denied, a physician's membership or privileges are terminated or revoked, or restrictions on privileges or membership for certain time periods are imposed or voluntarily accepted. (Bus. & Prof. Code, § 805, subd. (b).) A report also is required if a physician, having been notified of an investigation or that an application for privileges or membership has been or will be denied, resigns, takes a leave of absence, or withdraws or abandons an application or request for renewal of staff privileges or

reports serve a critical informational purpose: "Prior to granting or renewing staff privileges for any physician and surgeon," hospitals must request a report on that physician from the Medical Board of California "to determine if any report has been made pursuant to Section 805 indicating that the applying physician and surgeon . . . has been denied staff privileges, been removed from a medical staff, or had his or her staff privileges restricted as provided in Section 805." (Bus. & Prof. Code, § 805.5, subd. (a).)

Federal law similarly requires that peer review bodies report disciplinary action to the National Practitioner Data Bank (NPDB) and requires hospitals considering credentialing physicians to request such information from the NPDB. (See 42 U.S.C. §§ 11133, 11135, 11137.)

These required reports ensure that information regarding peer review actions flows among hospitals for the benefit of the public. The Medical Board and NPDB cannot police every physician in every hospital in California, so the reporting obligations imposed on hospitals are essential for the agencies to fulfill their duties. In *Kibler*, this Court noted that requiring reports of physician discipline to the Medical Board and requiring hospitals to request Medical Board reports as part of their consideration of physicians' applications for privileges are specific

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membership. (*Id.*, § 805, subd. (c).)

examples of ways in which California's statutory peer review scheme serves the "end" of "'preserving the highest standards of medical practice' throughout California." (*Kibler*, 39 Cal.4th at 199-200 [citation omitted].)

The public interest is also served by "the sharing of information between peer review bodies," which the Legislature found and declared "is essential to protect the public health." (Bus. & Prof. Code, § 809.08, subd. (a).) To that end, the peer review statute requires that, "[u]pon receipt of reasonable processing costs, a peer review body shall respond to the request of another peer review body and produce relevant peer review information about a licentiate that was subject to peer review by the responding peer review body for a medical disciplinary cause or reason." (Bus. & Prof. Code, § 809.08, subd. (b).)

Finally, "the integrity of the health care system . . . is a matter of widespread public concern." (*Healthsmart Pacific*, 7 Cal.App.5th at 429; see also *Integrated Healthcare Holdings, Inc. v. Fitzgibbons* (2006) 140 Cal.App.4th 515, 523 [physician's email complaining about acquisition of hospitals concerned a public issue of the acquirer's "financial ability to successfully operate the hospitals, and the potential harm to the public should [it] fail"].)

In all of these respects, physician peer review is a public issue for purposes of the anti-SLAPP law.

## III. THE ANTI-SLAPP LAW PROTECTS AGAINST CHILLING PARTICIPATION IN MATTERS OF PUBLIC INTEREST; EFFECTIVE PHYSICIAN PEER REVIEW REQUIRES ROBUST PARTICIPATION WITHOUT FEAR OF REPRISAL

The protections of the anti-SLAPP law are achieved by preventing "'lawsuits brought primarily to chill' the exercise of speech and petition rights." (*FilmOn.com Inc. v. DoubleVerify Inc.* (2019) 7 Cal.5th 133, 143 [quoting Bus. & Prof. Code, § 425.16, subd. (a)]; see also *Kibler*, 39 Cal.4th at 197 ["meritless [SLAPP] lawsuits seek to deplete 'the defendant's energy' and drain 'his or her resources'"] [citation omitted].)

This Court has recognized that the physician peer review process depends on the voluntary participation of members of a hospital's medical staff, such that there is a particular need to encourage, and to not discourage, such participation. The anti-SLAPP statute is an essential tool to achieve this by protecting peer reviewer defendants from meritless "harassing lawsuits against hospitals and their peer review committee members" (*Kibler*, 39 Cal.4th at 201) and the attendant litigation burden and costs. As this Court has explained, "membership on a hospital's peer review committee is voluntary and unpaid, and many physicians are reluctant to join peer review committees so as to avoid sitting in judgment of their peers. To hold . . . that hospital peer review proceedings are *not* 'official proceeding[s] authorized by law' within the meaning of

subdivision (e)(2), would further discourage participation in peer review by allowing disciplined physicians to file harassing lawsuits against hospitals and their peer review committee members rather than seeking judicial review of the committee's decision by the available means of a petition for administrative mandate." (*Kibler*, 39 Cal.4th at 201 [emphasis in original]; see also *Westlake Commun. Hosp. v. Superior Court* (1976) 17 Cal.3d 465, 486 [noting "that nonmedical hospital board members and doctors who undertake the hard task of selecting those who are to be accorded the use of the hospital must labor under a heavy burden. . . . Such board members and doctors frequently donate their time and talents on a volunteer basis."].)

In *Park*, the Court held that an employer's tenure decision was not protected activity, but it reaffirmed the need to avoid chilling participation in peer review and other public-focused hearing procedures. (*Park*, 2 Cal.5th at 1070-1071.) The Court discussed *Vergos v. McNeal* (2007) 146 Cal.App.4th 1387, 1398-1399, where the court held that the anti-SLAPP law protected the acts of a hearing officer in adjudicating an aggrieved employee's complaint. The *Vergos* court "agree[d] . . . that a narrow reading of the [anti-SLAPP] statute in plaintiff's favor could result in public employees' reluctance to assume the role of hearing officer in such cases, and thus thwart the petitioning activities of employees with grievances." (*Vergos*, 146

Cal.App.4th at 1398.) In *Park*, this Court said: "As the *Vergos* court observed, denying protection to the hearing officer's participation in the process might chill employees' willingness to serve and hamper the ability to afford harassed employees review of their complaints. Likewise, to deny protection to individuals weighing in on a public entity's decision might chill participation from a range of voices desirous of offering input on a matter of public importance." (*Park*, 2 Cal.5th at 1070-1071 [citation omitted].)[5] The same is true in the physician peer review context.

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[5] *Park* rejected the university's argument that *Vergos* demonstrated that an adverse decision arose from protected speech. *Park* explained *Vergos* dealt only with an individual hearing officer and did not address whether *the entity's decision* arose from protected speech or petitioning activity. (*Park*, 2 Cal.5th at 1070-1071.) The Court held that concerns for chilling of individuals' participation in the hearing process did not apply to "the ultimate decision itself, and none of the core purposes the Legislature sought to promote when enacting the anti-SLAPP statute are furthered by ignoring the distinction between a government entity's decisions and the individual speech or petitioning that may contribute to them." (*Ibid*. [footnote omitted].) But in the physician peer review context, there is no such "distinction." As discussed *infra* Part IV, the ultimate decision is the culmination of a process that is wholly dependent on the speech and participation of individual members of the medical staff and committees that can only speak and act through individuals. (See *Mileikowsky v. West Hills Hospital & Medical Center* (2009) 45 Cal.4th 1259, 1267 ["The medical staff acts chiefly through peer review committees, which, among other things, investigate complaints about physicians and recommend whether staff privileges should be granted or renewed."].) A failure to extend protections to a hospital's ultimate decision necessarily will chill the speech and participation in peer review by individuals. Peer review, including the final hospital decision, furthers the purposes of the anti-SLAPP statute.

(*California Eye Institute v. Superior Court* (1989) 215 Cal.App.3d 1477, 1483 ["[t]here is a strong public interest in supporting, encouraging and protecting effective medical peer review programs and activities"] [citation omitted].)

Further, robust peer review—including the protections to ensure that it takes place—is necessary to ensure that hospitals and medical staffs have the ability to vigorously police the quality of the physicians practicing at the hospital and to ferret out incompetent physicians who might harm patients. Unlike the educational setting in *Park*—where a student likely has no claim against the university for providing a poor education[6]—a hospital may face legal liability to a patient who is harmed by an incompetent physician. (See *Elam v. College Park Hospital* (1982) 132 Cal.App.3d 332, 340-341 [holding that a hospital may be liable to a patient if its "failure to insure the competence of its medical staff through careful selection and review creates an unreasonable risk of harm to its patients"]; *Hongsathavij v. Queen of Angels/Hollywood Presbyterian Med. Ctr.* (1998) 62

[6] See, e.g., *Wells v. One2One Learning Foundation* (2006) 39 Cal.4th 1164, 1211-1212 (recognizing that a cause of action for "educational misfeasance" is barred: "Subjecting [public schools] to an academic duty of care . . . 'would expose them to the tort claims—real or imagined—of disaffected students and parents in countless numbers. . . . The ultimate consequences, in terms of public time and money, would burden them—and society—beyond calculation.'") (quoting *Peter W. v. San Francisco Unified Sch. Dist.* (1976) 60 Cal.App.3d 814, 825).

Cal.App.4th 1123, 1143 ["A hospital itself may be responsible for negligently failing to ensure the competency of its medical staff and the adequacy of medical care rendered to patients at its facility. A hospital has a duty to ensure the competence of the medical staff by appropriately overseeing the peer review process."] [citations omitted].)

## IV. THE POLICY OF PROTECTING PEER REVIEWERS TO ENSURE VIGOROUS PEER REVIEW IS MANIFEST IN CALIFORNIA AND FEDERAL LAWS

California and federal law give expression to the policy encouraging participation in physician peer review by affording to peer reviewers protections from tort liability. These are summarized below. Broad application of the anti-SLAPP law in the physician peer review context is necessary to further these state and federal policies.

### A. State and federal laws provide extensive privileges and immunities for peer review.

The policy of protecting peer reviewers in order to ensure frank discussion is reflected in numerous absolute and qualified statutory privileges that are specifically applicable to aspects of the physician peer review process. Some of these are in the physician peer review statutes in the Business & Professions Code. (See, e.g., Bus. & Prof. Code, § 805, subd. (j) ["No person shall incur any civil or criminal liability as the result of making any report required by this section."]; *id.*, § 809.08, subd. (c) [a

peer review body that responds to the request of another peer review body for "relevant peer review information about a licentiate that was subject to peer review by the responding peer review body for a medical disciplinary cause or reason" (Bus. & Prof. Code, § 809.08, subd. (b)) is "not subject to civil or criminal liability for providing [the] information" if it acted in good faith]; see also *Joel v. Valley Surgical Center* (1998) 68 Cal.App.4th 360, 371-372 [holding report to Medical Board was absolutely privileged under section 805, subdivision (j) (then subdivision (f))].)

Other protections appear in the Civil Code. (See Civ. Code, § 43.7, subd. (b) [precluding monetary liability for actions of peer reviewers or hospital board members for acts undertaken or performed in reviewing physicians]; Civ. Code, § 43.8, subd. (a) [precluding monetary liability for communications to hospitals, medical staffs, or peer review committees "when the communication is intended to aid in the evaluation of the qualifications, fitness, character, or insurability of a practitioner of the healing . . . arts"].)

In addition, this Court has recognized that the statutory privilege of Civil Code, section 47, subdivision (b)(4) applies in the peer review context. (See *Kibler*, 39 Cal.4th at 202-203 [discussing amendment of Civil Code, section 47, subdivision (b)(4) privilege to apply to proceedings reviewable by

administrative mandamus, including physician peer review].)

And other privileges also apply in the peer review context. (See Civ. Code, § 47, subd. (b)(3) [protecting any "publication" made "in any . . . official proceeding authorized by law"]; Civ. Code, § 47, subd. (c) [privilege for communications between interested persons]; see also *Joel*, 68 Cal.App.4th at 371-372 [holding reports to Medical Board and NPDB were privileged under Civil Code, section 47, subd. (b)(3) (then section 47)].)[7]

Federal law provides additional protections for peer reviewers. In HCQIA, Congress recognized that "[t]he threat of private money damage liability under Federal laws, including treble damage liability under Federal antitrust law, unreasonably discourages physicians from participating in effective professional peer review." (42 U.S.C. § 11101, subd. (4).) Thus, HCQIA provides that where physician peer review meets certain minimum procedural requirements that make it presumptively fair, peer reviewers will be immune from damages liability. With the exception of civil rights violations, where a

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[7] Even the state laws devoted to prohibiting retaliation against physicians ensure that courts protect ongoing physician peer review. (See, e.g., Health & Saf. Code, § 1278.5, subd. (*l*) ["This section does not limit the ability of the medical staff to carry out its legitimate peer review activities in accordance with Sections 809 to 809.5, inclusive, of the Business and Professions Code."]; Bus. & Prof. Code, § 2056, subd. (f) ["Nothing in this section shall be construed to prohibit the governing body of a hospital from taking disciplinary actions against a physician and surgeon as authorized by Sections 809.05, 809.4, and 809.5."].)

peer review action meets the statutory procedural standards, persons involved in a peer review action "shall not be liable in damages under any law of the United States or of any State (or political subdivision thereof) with respect to the action." (42 U.S.C. § 11111, subd. (1).) In addition, "[n]otwithstanding any other provision of law, no person (whether as a witness or otherwise) providing information to a professional review body regarding the competence or professional conduct of a physician shall be held, by reason of having provided such information, to be liable in damages under any law of the United States or of any State (or political subdivision thereof) unless such information is false and the person providing it knew that such information was false." (*Id.* subd. (2).)[8]

### B. State law protects discovery of peer-review related information.

The policy to protect peer reviewers also is reflected in the absolute statutory protections for proceedings and records of "organized committees . . . having the responsibility of evaluation and improvement of the quality of care," decreeing that such information is, with very limited exceptions, not subject to discovery and that participants in peer review committee

[8] In *Fahlen v. Sutter Central Valley Hospitals* (2014) 58 Cal.4th 655, 685-686, this Court extensively discussed HCQIA's immunities but left further treatment for development in future cases.

meetings are not required to testify as to those proceedings. (Evid. Code, § 1157, subds. (a), (b).)

The legislative purpose behind the absolute discovery immunity—to encourage participants in medical staff peer review to be frank, open, and honest in order to assure effective peer review—has been repeatedly acknowledged by courts. "Section 1157 was enacted upon the theory that external access to peer investigations conducted by staff committees stifles candor and inhibits objectivity. It evinces a legislative judgment that the quality of in-hospital medical practice will be elevated by armoring staff inquiries with a measure of confidentiality." (*Willits v. Superior Court* (1993) 20 Cal.App.4th 90, 95 [citation omitted].)

Thus, section 1157 is focused on creating and preserving candor in an intra-professional peer setting by others expert in medicine, as well as to foster and protect a spirit of volunteerism when individual physicians with their own busy practices decide to take on the role of medical staff leader or committee member to sit in judgment of peer physicians.

Section 1157's prohibition against discovery of otherwise relevant evidence reflects a deliberate legislative choice to protect the confidentiality of hospital medical staff records to further the important public policy interest of patient safety, even though the Legislature knew that the result would be that plaintiffs would

be denied access to relevant documents. (See *Matchett v. Superior Court* (1974) 40 Cal.App.3d 623, 628-629; *West Covina Hospital v. Superior Court* (1984) 153 Cal.App.3d 134, 138 [section 1157 bar against discovery is so broad that it applies even where the documents sought "would in all likelihood lead to very material and admissible evidence. But the Legislature has made the judgment call that an even more important societal interest is served by declaring such evidence 'off limits'"]; *Alexander v. Superior Court* (1993) 5 Cal.4th 1218, 1227-1228 [reciting purposes of section 1157 of, inter alia, assuring that peer review committees "operate without fear of reprisal" and that committee members provide "negative information or constructive criticism" and "frank exchange[s]" with other peer reviewers] [citations omitted], disapproved on other grounds in *Hassan v. Mercy American River Hosp.* (2003) 31 Cal.4th 709.)[9]

[9] Health & Safety Code, section 1278.5, subd. (h) requires a court to enjoin, upon a medical staff's petition, the medical staff's compliance with any "evidentiary demands on a pending peer review hearing" by the plaintiff physician, "if the evidentiary demands from the complainant would impede the peer review process or endanger the health and safety of patients of the health facility during the peer review process." Thus, even a statute ostensibly focused on protecting physicians from retaliation, as is section 1278.5, recognizes the need to protect peer review from interference.

### C. The requirement that physicians exhaust internal and mandamus remedies for most causes of action limits harassing actions.

Finally, the exhaustion requirement that applies to most causes of action brought by physicians challenging peer review action furthers the policy of protecting peer reviewers and encouraging their participation in the process. The exhaustion rule requires that physicians must exhaust internal remedies and pursue and prevail on their judicial mandamus remedies before they may bring a lawsuit challenging a peer review decision and seeking tort damages. (*Westlake*, 17 Cal.3d at 469.) "[S]o long as such a quasi-judicial decision [of a hospital board following a peer review proceeding] is not set aside through appropriate review procedures the decision has the effect of establishing the propriety of the hospital's action." (*Id.* at 484.) The exhaustion requirement "affords a justified measure of protection to the individuals who take on, often without remuneration, the difficult, time-consuming and socially important task of policing medical personnel." (*Ibid.*; see also *id.* at 486 ["we believe [peer reviewers] are entitled to the modicum of protection provided by the [exhaustion] requirements"].)

In *Fahlen*, 58 Cal.4th 655, this Court ruled that Health & Safety Code section 1278.5, the physician whistleblower statute at issue in this case, is the one exception to the exhaustion requirement, in a departure from the otherwise uniform

statutory and judicial focus on protections for peer reviewers in order to encourage an effective physician peer review process. The decision focused on the specific provisions of section 1278.5 and on that statute's purpose to protect and encourage a different aspect of hospital and medical staff operations: reporting of concerns for patient safety by physicians and others. (*Fahlen*, 48 Cal.4th at 660-661.) The Court nonetheless repeatedly acknowledged the friction between (i) permitting a physician alleging retaliatory peer review to proceed in court without exhausting administrative and judicial remedies to overturn the otherwise binding findings of the hospital and (ii) the need to provide protections for peer reviewers. (*Id.* at 661-662, 669, 678-679, 680-682, 683-684.) The Court declined to resolve those concerns, leaving them for a future case with better factual development. But it said that these concerns could support limitations on timing of a retaliation suit pending an unfinished peer review of the plaintiff physician, the issues presented in the retaliation suit, and the remedies available in section 1278.5 actions. The Court further noted that HCQIA immunities for damages actions arising from peer review proceedings might be implicated. (*Id.* at 661-662, 677, fn. 10, 684, 685-686.)[10]

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[10] *Fahlen* reached this Court on review of an anti-SLAPP ruling. (*Fahlen*, 58 Cal.4th at 665-666.) The Court's ruling on the exhaustion issue was a merits determination at prong two of the anti-SLAPP motion review. The physician in *Fahlen* did not challenge the Court of Appeal's determination that his section

Several years after *Fahlen*, this Court held that the alleged retaliatory *motive* of an action is generally irrelevant at prong one of the anti-SLAPP statute and never dispositive of the question. (See *Wilson v. Cable News Network* (2019) 7 Cal.5th 871, 881, 889.) This holding partly reconciles the *Fahlen* rule that section 1278.5 claims need not be exhausted with the purpose of the anti-SLAPP law to avoid chilling participation in matters of public significance, including peer review—which is especially critical given the proliferation of often-meritless and harassing section 1278.5 suits in the wake of *Fahlen*. Under *Wilson*, where a section 1278.5 claim arises from protected peer review speech and activity, prong one of the anti-SLAPP law *is met*—thus accomplishing the protective purpose of the anti-SLAPP law regardless that the exhaustion requirement does not apply to this one claim. The plaintiff then must demonstrate a viable claim at prong two. While a valid section 1278.5 claim will survive prong two of the anti-SLAPP analysis, many section 1278.5 claims are not viable, at least in part because of the applicable privileges and immunities and discovery protections afforded by other laws.

### D. Broad application of the anti-SLAPP law is another important protection.

Consistent with the above protective measures that the

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1278.5 suit was subject to the anti-SLAPP statute.

Legislature, Congress, and the courts have implemented, the anti-SLAPP statute is another important tool to ensure that participation in peer review is encouraged and not chilled. The anti-SLAPP statute screens and dismisses at an early stage certain lawsuits that attack conduct falling within statutorily defined categories. (Code Civ. Proc., § 425.16, subd. (a); *Jarrow Formulas, Inc. v. LaMarche* (2003) 31 Cal.4th 728, 737 [section 425.16 is a "procedural device for screening out meritless claims"]; *Wilson*, 7 Cal.5th at 883-884 ["the anti-SLAPP statute is designed to protect defendants from meritless lawsuits that might chill the exercise of their rights to speak and petition on matters of public concern"]; *Baral v. Schnitt* (2016) 1 Cal.5th 376, 393 ["The anti-SLAPP procedures are designed to shield a defendant's constitutionally protected *conduct* from the undue burden of frivolous litigation."] [emphasis in original].) Courts have applied the statute with special vigor in the physician peer review setting, consistent with the statute's command that it be applied "broadly." (Code Civ. Proc., § 425.16, subd. (a).)

## V. THE ANTI-SLAPP LAW SHOULD BROADLY APPLY TO SUITS ARISING FROM ALL ASPECTS OF PHYSICIAN PEER REVIEW

The anti-SLAPP law must be interpreted and applied broadly to all aspects of the physician peer review process that supply the basis for a physician's retaliation or other claim. Lawsuits complaining about peer review activity might allege, for

example, that the initial complaints about the physician were false or unfounded, that the investigation was undertaken for improper reasons, that the hearing process was unfair, that statements made to other hospitals were defamatory or threatening, and/or that government reporting was unwarranted. The complaint in this case, for example, implicates all of these concerns and is a paradigmatic SLAPP in this context. The suits also may challenge not only the ultimate termination or disciplinary action, but also (like the complaint here) an interim summary suspension or temporary privileges restriction that was implemented to protect patients pending a full hearing on the charges. Unlike the circumstances before this Court in *Park*, a case arising out of a decision to deny tenure in the education setting, allegations based on physician peer review can rarely if ever be neatly parsed into preliminary or incidental "steps" and ultimate liability-causing action.

"Peer review is the process by which a committee comprised of licensed medical personnel at a hospital 'evaluate[s] physicians applying for staff privileges, establish[es] standards and procedures for patient care, assess[es] the performance of physicians currently on staff,' and reviews other matters critical to the hospital's functioning." (*Kibler*, 39 Cal.4th at 199; see also Bus. & Prof. Code, § 805, subd. (a)(1) [peer review is "[a] process in which a peer review body reviews the basic qualifications, staff

privileges, employment, medical outcomes, or professional conduct of licentiates to make recommendations for quality improvement and education, if necessary, in order to . . . [d]etermine whether a licentiate may practice or continue to practice in a health care facility, clinic, or other setting providing medical services, and, if so, to determine the parameters of that practice [or] [a]ssess and improve the quality of care rendered in a health care facility, clinic, or other setting providing medical services"].)

This "process" is seamless and ongoing and is comprised of steps that are not discrete. Speech, petitioning, and action are wholly intertwined into a multi-faceted process, and the final termination or disciplinary action cannot be viewed as (and rarely is) the only alleged basis for liability. All the while, the peer reviewers and peer review bodies are protecting the public and the hospital from problem physicians and from claims in malpractice suits alleging the hospital has negligently credentialed or retained an incompetent physician on the medical staff. (See *supra* Part III [citing *Elam*, 132 Cal.App.3d at 340-341; *Hongsathavij*, 62 Cal.App.4th at 1143].)

In the typical case complaining about peer review activity—including this case—the physician/plaintiff's claim is squarely based in substantial part on protected peer review communications and activity, where "the speech at issue is

explicitly alleged to be the injury-producing conduct." (*Okorie v. Los Angeles Unified Sch. Dist.* (2017) 14 Cal.App.5th 574, 593 [discrimination claim arose from protected speech where plaintiff alleged that he was humiliated by defendant's communications and investigations, including phone calls and letters to students' parents, a letter to the credentialing commission, and demands to him for return of computers].)

A physician's lawsuit typically alleges, for example, retaliation under section 1278.5, defamation, interference with economic relations, or conspiracy to deprive a physician of his right to practice, based not only on communications or even a single act or decision, but on a course of conduct or a network of inextricably interrelated parts of the peer review process. In this case, for example, the physician's allegations of retaliatory activity targeted statements made during peer review committee meetings, disciplinary recommendations, reporting to government authorities, written notices submitted during the hearing process, and summary suspension. The plaintiff also alleged a conspiracy to misuse the physician peer review process through a course of conduct in order to damage his reputation, that mandated reporting harmed his reputation, that the notice of charges was false and retaliatory, and that his summary suspension was retaliatory. (See St. Joseph's Opening Brief 34-49.) Such allegations are typical of physicians' lawsuits.

In *Park*, the Court rejected the defendant university's argument that "its tenure decision and the communications that led up to it are intertwined and inseparable," and therefore held that the plaintiff professor's lawsuit challenging the university's denial of tenure did not arise from protected speech. (*Park*, 2 Cal.5th at 1069.) In doing so, the Court rejected the contention that *Kibler* and cases applying it supported the theory that a decision and related communications were intertwined, explaining that *Kibler* had not considered that issue and that "*Kibler* does not stand for the proposition that disciplinary decisions reached in a peer review process, as opposed to statements in connection with that process, are protected." (*Id.* at 1069-1070.)

*Kibler* itself may not have stood for that proposition—which, as *Park* noted, was not before the Court in *Kibler*—but the proposition is nonetheless true. A typical lawsuit brought by a physician to challenge peer review activity differs substantially from the FEHA employment discrimination claim in *Park*. The FEHA claim alleged in *Park* necessarily arose only from the tenure decision itself—the "adverse employment action" required for a FEHA claim. The university's statements and communications leading up to the termination, and allegedly demonstrating a retaliatory motive, were not the *basis* of the asserted FEHA liability. "Communications disparaging Park,

without any adverse employment action, would not support a claim for employment discrimination, but an adverse employment action, even without the prior communications, surely could." (*Id.* at 1068.) "'Plaintiff could have omitted allegations regarding communicative acts or filing a grievance and still state the same claims.'" (*Ibid.* [citation omitted].)

*Park* thus drew a line between speech and activity that form the basis for asserted liability, and speech and activity that are merely incidental to, evidence of, or steps leading up to some discrete action on which the plaintiff's claim is based. *Park*, however, did not involve physician peer review and thus had no occasion to consider—and no record that would allow it to consider—the unique aspects of the physician peer review process that make challenges to the process unlike a FEHA or similar claim. In the physician peer review context, the basis for claimed liability generally is not a discrete and severable non-communicative "act" of discipline or termination.

Given the important legislative and judicial policy of encouraging participation in physician peer review by protecting those who do participate, the anti-SLAPP law should be broadly applied to suits attacking all intertwined stages of the peer review process. For example, if voting on recommendations to suspend or terminate a physician is not protected activity under prong one, then by casting a vote peer reviewers are subjecting

themselves to being forced to defend against lawsuits alleging retaliation and will think twice about voting for such discipline or even participating in peer review altogether. The natural desire to avoid being named in a lawsuit or even merely being deposed is itself a chilling effect that undermines the patient- and public-protective purpose for which the peer review process exists in the first place. *Park* involved no such considerations. Without the protections of the anti-SLAPP statute, it will be much harder to "preserv[e] the highest standards of medical practice." (*Kibler*, 39 Cal.4th at 199 [quoting Bus. & Prof. Code, § 809, subd. (a)(3)].)

## VI. PHYSICIAN PEER REVIEW IS PROTECTED UNDER SUBDIVISION (e)(2)

The essential nature of the peer review process is inherently communicative, and thus all or nearly all peer review activity is protected under subdivision (e)(2) as "any written or oral statement or writing made in connection with an issue under consideration or review by . . . any other official proceeding authorized by law[.]" (Code Civ. Proc., § 425.16, subd. (e)(2); see also *Kibler*, 39 Cal.4th at 199 [holding that physician peer review is an "official proceeding authorized by law" for purposes of subdivision (e)].)

In nearly every aspect, the physician peer review process is focused on communication: complaints about a physician's performance, competence, or behavior; medical staff inquiries into those complaints; peer review committee meetings to discuss

the physician; communication of advisories, warnings, and alleged threats to the physician; referral of physician cases for outside review and evaluation; recommendations to the hospital's board for disciplinary action; summary suspensions that prevent a physician from practicing and endangering patients pending his exercise of hearing rights; hearings requested by the physician to challenge those recommendations; deliberation following the hearings; appellate proceedings before the hospital board or a board committee; mandated reporting to state and federal government agencies of discipline imposed; and information sharing among hospitals. All of these activities are communications "made in connection with an issue under consideration or review by . . . an[] . . . official proceeding authorized by law[.]" To the extent a plaintiff's claim arises partially from such activity and partially from activity that does not fall within the protections of subdivision (e), this Court has explained that the claim must pass prong one. (See *Baral*, 1 Cal.5th at 396 ["When relief is sought based on allegations of both protected and unprotected activity, the unprotected activity is disregarded at this [prong one] stage."].)

These are precisely the types of alleged activity on which the complaint in this case is based. (See St. Joseph's Opening Brief 34-49 [discussing plaintiff's allegations that the medical staff retaliated against him by criticizing his patient care during

committee discussions, referring one of his cases for an outside review, communicating facts about his performance to a committee, recommending to the Board that his reappointment application be denied, filing Medical Board and NPDB reports, making statements and writings during the hearing and appellate proceedings].)

Another common factual scenario is when a physician resigns his/her medical staff membership and privileges in order to avoid the consequences of a pending investigation into his/her conduct. Section 805, subdivision (c) imposes a separate reporting requirement when a physician "receiv[es] notice of a pending investigation initiated for a medical disciplinary cause or reason or after receiving notice that his or her application for membership or staff privileges is denied or will be denied for a medical disciplinary cause or reason," and then resigns, takes a leave of absence, or withdraws or abandons a pending application or renewal request for privileges or membership. Where a physician sues alleging retaliation, interference with economic advantage, and/or defamation, for example, he is attacking nothing but his/her communications with peer reviewers and communications between the hospital and the mandated reporting agencies.

## VII. PHYSICIAN PEER REVIEW IS PROTECTED UNDER SUBDIVISION (e)(4)

Even if a particular peer review act or decision is deemed

not to have an essentially communicative character, it still may be protected activity under subdivision (e)(4).[11] Subdivision (e)(4) is a "catchall" provision, protecting "any *other conduct* in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest." (Code Civ. Proc., § 425.16, subd. (e)(4) [emphasis added].) "The reference to 'any other conduct' in subdivision (e)(4) . . . underscores its role as the 'catchall' provision meant to round out the statutory safeguards for constitutionally protected expression. . . . [Thus,] subdivision (e)(4) proves both broader in scope than the other subdivisions, and less firmly anchored to any particular context." (*FilmOn.com*, 7 Cal.5th at 144-145.)

Subdivision (e)(4) protects not only "expressive conduct" that itself communicates a view on a matter of public significance, but "can also reasonably be read to [protect] at least certain conduct that, though itself containing no expressive elements, facilitates expression." (*Wilson*, 7 Cal.5th at 893.) Even private speech that is closely connected to or in furtherance of a publicly significant issue may be protected. (*FilmOn.com*, 7 Cal.5th at 146.) Peer review decisions and actions, even if deemed not to be themselves communicative, nonetheless are

[11] In *Kibler*, the Court found it was unnecessary to reach the question of whether peer review proceedings are protected conduct under subdivision (e)(4). (*Kibler*, 39 Cal.4th at 203.)

likely protected as such "other conduct."

This Court recently explained the proper analysis for determining whether "other conduct" is in furtherance of speech and petitioning rights in connection with a public issue for purposes of subdivision (e)(4). "[C]ourts should engage in a relatively careful analysis of whether a particular statement falls within the ambit of 'other conduct' encompassed by subdivision (e)(4)." (*FilmOn.com*, 7 Cal.5th at 145.) Two requirements must be met for subdivision (e)(4)'s protection to apply. First, the conduct must be "in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech." (Code Civ. Proc., § 425.16, subd. (e)(4).) Second, the speech or petitioning that is furthered by the conduct must be "in connection with a public issue or an issue of public interest." (*Ibid.*)

*FilmOn.com* explained how these two requirements translate into a two-step test. Taking the requirements in reverse order, the court first asks what public issue is implicated and whether the speech involves a public conversation on the subject. At this step, the court considers the *content* of the speech. At the second step, the court asks what functional relationship exists between the conduct and the public conversation about a public matter. At this step, the court examines the *context* of the conduct. (*FilmOn.com*, 7 Cal.5th at

149-150.)

In *Yang*, the court applied the *FilmOn.com* analysis in the precise context of physician peer review, demonstrating that subdivision (e)(4) will often protect physician peer review-related activity. (*Yang*, 48 Cal.App.5th at 943.)

### A. Content: physician peer review is inherently a matter of public interest.

The first step, the "content" inquiry, looks to the speech/petitioning that is claimed to be "furthered" by the conduct at issue. The *Yang* court referred to this as the "public issue" step. (*Yang*, 48 Cal.App.5th at 947.) Physician peer review activity will virtually always meet this step.

This Court held in *Kibler* that physician peer review is an official proceeding authorized by law within the meaning of subdivision (e)(2). *Any* speech or petitioning that occurs "in connection with an issue under consideration or review by . . . any other official proceeding authorized by law" under subdivision (e)(2) *necessarily* meets the "public issue" requirement of the anti-SLAPP law. "A defendant who invokes either subparagraph (1) or subparagraph (2) of subdivision (e) of section 425.16, the anti-SLAPP statute, need not 'separately demonstrate that the statement concerned an issue of public significance.'" (*Kibler*, 39 Cal.4th at 198 [citation omitted].) "Under the plain terms of the statute it is the context or setting itself that makes the issue a public issue: all that matters is that

the First Amendment activity take place in an official proceeding or be made in connection with an issue being reviewed by an official proceeding." (*Briggs v. Eden Council for Hope & Opportunity* (1999) 19 Cal.4th 1106, 1116 [citation omitted]; *FilmOn.com*, 7 Cal.5th at 143-144 [noting that speech in connection with an authorized official proceeding under subdivision (e)(2) "*equate[s]* [to] a public issue" within the meaning of the anti-SLAPP statute] [citation omitted; emphasis in original].)

Thus, where conduct is claimed to be protected under subdivision (e)(4) because it is in furtherance of peer review speech/petitioning protected under subdivision (e)(2), the content requirement of subdivision (e)(4) is established.

Even if, for the sake of argument, peer review conduct did not further speech or petitioning in connection with a peer review "official proceeding," that merely means that the defendant must separately establish the public interest nature of the speech furthered by the conduct.[12] For all of the reasons discussed in Part II, *supra*, physician peer review—which is always focused directly on the qualifications and competence of a physician and public safety—is a matter of public interest for the purpose of the

[12] In *Wilson* and *FilmOn.com*, unlike in *Kibler*, there was no subdivision (e)(2)-protected official proceeding establishing the public issue criterion. Thus, the defendants had to separately show that the conduct furthered speech "in connection with a public issue or an issue of public interest."

subdivision (e)(4) inquiry. (See *Yang*, 48 Cal.App.5th at 947.)

### B. Context: physician peer review activity has a substantial functional relationship to protected peer review.

The "context" step of the *FilmOn.com* analysis also is met with respect to physician peer review decisions and other "conduct." The *Yang* court referred to this as the "functional relationship" step. (*Yang*, 48 Cal.App.5th at 947.)

Conduct is protected under subdivision (e)(4) to the extent it bears "a sufficiently substantial relationship to the [defendant's] ability to speak on matters of public concern to qualify as conduct in furtherance of constitutional speech rights." (*Wilson*, 7 Cal.5th at 894.) Thus, the second step of the subdivision (e)(4) analysis considers the context of the conduct to determine whether it has the requisite sufficient functional relationship to the speech on a public issue.[13] (*FilmOn.com*, 7

[13] Context is key to all categories of activity protected under the anti-SLAPP law. Context is *expressly* incorporated into subdivisions (e)(1)-(e)(3), which require that activity be connected to certain proceedings or a public forum—*i.e.*, a particular context. For example, in subdivisions (e)(1) and (e)(2), "the Legislature *equated* a public issue with the authorized official proceeding to which it connects, effectively defining the protected status of the statement by the context in which it was made." (*FilmOn.com*, 7 Cal.5th at 143-144 [quoting *Briggs*, 19 Cal.4th at 1117] [emphasis in original; internal quotation marks omitted].) Yet the absence of contextual language in subdivision (e)(4) does not mean context is irrelevant. "Nothing in subdivision (e)(4) or other portions of the statute supports the conclusion that subdivision (e)(4) is the only subdivision where contextual information is excluded from consideration in discerning the type

Cal.5th at 149-150.)[14]

The functional relationship analysis requires "'some degree of closeness' between the challenged statements and the asserted public interest." (*FilmOn.com*, 7 Cal.5th at 150; *Yang*, 48 Cal.App.5th at 948.) The statement must do more than "refer" to the subject of public interest; it "must in some manner itself contribute to the public debate." (*FilmOn.com*, 7 Cal.5th at 150; *Yang*, 48 Cal.App.5th at 948.) "What it means to 'contribute to the public debate' will perhaps differ based on the state of public discourse at a given time, and the topic of contention." (*FilmOn.com*, 7 Cal.5th at 150-151; *Yang*, 48 Cal.App.5th at 948.) In evaluating context, the identity of the speaker, the identity of the audience, and the purpose of the speech or conduct inform whether the conduct makes the requisite contribution to the

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of conduct and speech worthy of procedural protection. [¶] Indeed, that the language of the provision refers to '*other* conduct in furtherance' supports the inference that this provision encompasses conduct and speech similar to what is referenced in subdivision (e)(1) through (e)(3)." (*FilmOn.com*, 7 Cal.5th at 144 [emphasis in original].)

[14] "Conduct" under subdivision (e)(4) includes oral or written statements. (*Wilson*, 7 Cal.5th at 899-900.) *FilmOn.com* and *Yang* involved statements, not any other type of conduct. Thus, their discussions addressed the context in which a statement was made. However, these cases solely analyzed subdivision (e)(4), which is about "conduct," indicating that their discussion of context is equally applicable to non-speech conduct. (See *FilmOn.com*, 7 Cal.5th at 151 ["we examine whether a defendant—through public or private speech *or conduct*—participated in, or furthered, the discourse that makes an issue one of public interest"] [emphasis added].)

public debate to fall within the subdivision (e)(4) "catchall" provision. (*FilmOn.com*, 7 Cal.5th at 151-152 ["the inquiry of whether a statement contributes to the public debate is one a court can hardly undertake without incorporating considerations of context—including audience, speaker, and purpose"].)

*Yang* applied this test to a case arising from physician peer review.[15] The plaintiff doctor sued a hospital and others for defamation based on alleged statements disparaging her qualifications and discouraging other physicians from making referrals to her.[16] After first determining that statements about a doctor's qualifications to practice unequivocally concern a public issue, (see *Yang*, 48 Cal.App.5th at 947; see also *supra* Part II), the court went on to determine that the statements "demonstrate[] that defendants directly participated in and contributed to the public issue" of physician competence and qualifications, for two reasons.

First, the plaintiff alleged the statements were communicated to the doctor's patients and the general public.

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[15] The defendant hospital argued that its speech underlying the plaintiff's defamation claim was protected *both* because the statements were in connection with the peer review process (subd. (e)(2)) and because they were in furtherance of the exercise of free speech in connection with a public issue (subd. (e)(4)). (*Yang*, 48 Cal.App.5th at 944, 946.) The court determined the speech was protected under subdivision (e)(4) and did not address the subdivision (e)(2) argument. (*Id.* at 946.)

[16] The physician in *Yang* pled other causes of action that were not the subject of the defendant hospital's anti-SLAPP motion.

"This context is significant, because speech to the public about a doctor's qualifications furthers the public discourse on that matter." (*Yang*, 48 Cal.App.5th at 948.) Second, the court analogized the defendant's statements to other doctors that they should not refer patients to the plaintiff to consumer protection statements (which had been held to constitute protected speech), because the defendant had an interest in protecting patients' interests. "If anything, [the hospital's] statements about a medical provider are more readily categorized as contributing to a debate on a public issue than are statements aiming to protect consumers' purchasing of a product . . . , given that an individual's health and safety are more directly implicated with medical services." (*Id.* at 948-949.) The court explained: "Stating that a doctor should not have patients referred to her because she is unqualified and unethical is not a 'slight reference to the broader public issue' of physicians' qualifications; rather, it directly contributes to the discourse by contending a physician lacks those qualifications." (*Ibid.* [citing *FilmOn.com*, 7 Cal.5th at 152]; see also *Healthsmart Pacific*, 7 Cal.App.5th at 429 ["If [a doctor] and facilities with which he is affiliated are or have been engaged in wrongful conduct toward patients, the public has an interest in being informed about such conduct."]; *Fitzgibbons*, 140 Cal.App.4th at 523 [company's "financial ability to successfully operate the hospitals, and the potential harm to the public should

[it] fail" are public issues].)

This Court's recent decisions—outside of the physician peer review context—that consider whether a non-communicative act furthers speech on a public issue for purposes of subdivision (e)(4) further demonstrate how subdivision (e)(4) would apply in the physician peer review context. For instance, in *Wilson*, the Court considered the claim that CNN's termination of a journalist "qualifies as an act in furtherance of CNN's right to free speech" for purposes of subdivision (e)(4). (*Wilson*, 7 Cal.5th at 892.) The Court considered "whether, and when, a news organization's selection of its employees bears a sufficiently substantial relationship to the organization's ability to speak on matters of public concern to qualify as conduct in furtherance of constitutional speech rights." (*Id.* at 894.) Because the employee in question did not appear on air and had no editorial control over the content that CNN aired, the decision to fire him had no substantial relationship to CNN's speech on matters of public interest in airing the news. (*Id.* at 896-897.) On the other hand, the firing of the plaintiff due to alleged plagiarism *did* bear a substantial relationship to CNN's speech on matters of public interest in that CNN's "ability to participate meaningfully in public discourse on [public] subjects depends on its integrity and credibility" and "[d]isciplining an employee for violating such ethical standards [regarding plagiarism] furthers a news

organization's exercise of editorial control to ensure the organization's reputation, and the credibility of what it chooses to publish or broadcast, is preserved. These objectives lie 'at the core' of the press function." (*Id.* at 897-898.)

In *Park*, the Court considered the university's argument that its tenure decision implicated the public interest in the same way as did a broadcaster's decision to terminate an on-air personality. (*Park*, 2 Cal.5th at 1071-1072 [discussing *Hunter v. CBS Broadcasting, Inc.* (2013) 221 Cal.App.4th 1510].) The *Park* Court explained that in *Hunter*, the termination decision was protected conduct under subdivision (e)(4), not because the termination decision itself was of public significance, but because the decision related to the defendant's choice of who should present its broadcast messages on public issues. The *Park* Court held that the university had not made an argument to show a subdivision (e)(4) nexus between the university's tenure decision and its speech on any public issue. Yet the Court explained how the university hypothetically might have shown such a connection: "the University would have had to explain how the choice of faculty involved conduct in furtherance of *University speech* on an identifiable matter of public interest." (*Park*, 2 Cal.5th at 1072 [emphasis in original].)

When a hospital conducts peer review that leads to a decision to terminate a physician with competency or professional

conduct problems, the "fundamental relationship" nexus between the disciplinary decision and the hospital's speech on a public issue is clear. The ultimate commentary on "the qualifications, competence, and professional ethics of a licensed physician" and "[w]hether or not a licensed physician is deficient in such characteristics" is definitively "a public issue." (*Yang*, 48 Cal.App.5th at 947.) Peer review conduct such as disciplining or recommending the termination of a physician as part of the peer review process directly contributes to the public debate about a physician's competence and meets the context/functional relationship test. When a hospital's medical staff initiates a peer review investigation, suspends or terminates a physician, or imposes restrictions on her privileges, it is preventing that physician from practicing medicine on patients in a harmful manner and it is communicating to the public as well as the doctor's peers that there are serious problems with the doctor's competence and qualifications—purely patient-protective and public-oriented matters.

Moreover, imposition of such discipline likely triggers the statutory requirements to report the discipline to the Medical Board and to the NPDB, as well as to share the information with other hospitals, precisely to protect the public from the doctor simply moving on to practice on unsuspecting patients at a different, uninformed hospital. The entire purpose of the

reporting and information-sharing requirements is to disseminate information about problem doctors to prevent their movement. (See, e.g., 42 U.S.C. § 11101, subd. (2) ["There is a national need to restrict the ability of incompetent physicians to move from State to State without disclosure or discovery of the physician's previous damaging or incompetent performance."].)

## VIII. CONCLUSION

For the reasons discussed above and in Defendants/Respondents' briefing, amici respectfully submit that this Court should conclude that prong one of the anti-SLAPP statute broadly protects all facets of the physician peer review process and applies to lawsuits arising out of peer review.

Dated: August 7, 2020 MANATT, PHELPS & PHILLIPS, LLP

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DIGNITY HEALTH, SUTTER HEALTH, ADVENTIST HEALTH, MEMORIALCARE, AND SHARP HEALTHCARE

## CERTIFICATE OF WORD COUNT

Pursuant to California Rules of Court, rule 8.520(c) and (f), I certify that this Proposed Brief of Amici Curiae contains 9,733 words, not including the Application, table of contents, table of authorities, the caption page, or this Certification page.

Dated: August 7, 2020 MANATT, PHELPS & PHILLIPS, LLP

By: s/ Barry S. Landsberg
BARRY S. LANDSBERG
*Attorneys for Amici Curiae*
DIGNITY HEALTH, SUTTER HEALTH, ADVENTIST HEALTH, MEMORIALCARE, AND SHARP HEALTHCARE

## PROOF OF SERVICE

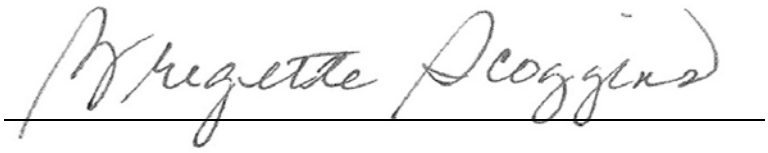
I, Brigette Scoggins, declare as follows:

I am employed in Los Angeles County, Los Angeles, California. I am over the age of 18 years and not a party to this action. My business address is Manatt, Phelps & Phillips, LLP, 2049 Century Park East, Suite 1700, Los Angeles, California 90067. On **August 7, 2020**, I served the within: **APPLICATION BY DIGNITY HEALTH, SUTTER HEALTH, ADVENTIST HEALTH, MEMORIALCARE, AND SHARP HEALTHCARE TO FILE BRIEF OF AMICI CURIAE IN SUPPORT OF DEFENDANTS AND RESPONDENTS; PROPOSED BRIEF** on the interested parties in this action addressed as follows:

| | |
|---|---|
| Mark Quigley<br>Greene Broillet & Wheeler<br>100 Wilshire Boulevard, 21st Floor<br>P.O. Box 2131<br>Santa Monica, CA 90407<br><br>Stuart B. Esner<br>Esner, Chang & Boyer<br>234 East Colorado Boulevard, Suite 750<br>Pasadena, CA 91101 | *Attorneys for Plaintiff/Appellant* |
| Lowell C. Brown<br>Debra J. Albin-Riley<br>Arent Fox LLP<br>555 West Fifth Street, 48th Floor<br>Los Angeles, CA 90013-1065 | *Attorneys for Defendants/Respondents* |

☒ **(BY ELECTRONIC SERVICE)** Based on a court order or an agreement of the parties to accept service by e-mail or electronic transmission via the Court's Electronic Filing System (EFS) operated by TrueFiling.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this declaration was executed on **August 7, 2020**, at Los Angeles, California.



Brigette Scoggins