SUPREME COURT
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Case No.: S244148

IN THE SUPREME COURT OF CALIFORNIA

ARAM BONNI

Plaintiff and Appellant,

vs.

ST. JOSEPH HEALTH SYSTEM, et al.

Defendants and Respondents

OPENING BRIEF ON THE MERITS

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

Appeal From The Superior Court Of Orange County
Case No. 30-2014-00758655
The Honorable Andrew P. Banks, Judge

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RESPONDENTS' OPENING BRIEF

I. ISSUE PRESENTED

"In light of *Kibler* [*v. Northern Inyo County Local Hospital Dist.* (2006) 39 Cal.4th 192] and *Park* [*v. Board of Trustees of California State University* (2017) 2 Cal.5th 1057], what stages of the official medical staff peer review process are within the protections of the anti-SLAPP statute?"

II. INTRODUCTION

This case presents an unprecedented opportunity to determine the full scope of the anti-SLAPP statute's application in lawsuits arising from the medical staff peer review process. The Court may now clarify the statute's breadth in a manner that will support hospitals and peer reviewers in meeting their statutory duty to protect the public from substandard medical care.

Plaintiff Aram Bonni, M.D., seriously injured multiple patients at two different hospitals. One of Dr. Bonni's patients almost died from surgical injuries he inflicted that resembled "gunshot wounds to the abdomen." Given his disastrous surgeries, Plaintiff underwent medical peer review, a statutorily mandated process by which hospital medical staffs evaluate a physician's competence, determine whether the physician may continue to practice medicine at the hospital, and report the results to government authorities. (See *Kibler*, 39 Cal.4th at p. 200 [Peer review "plays a significant role in protecting the public against incompetent, impaired, or negligent physicians."].) In response, Plaintiff filed a retaliation claim against the two

Defendant hospitals, a medical staff and its medical executive committee, and eight individual physicians who allegedly subjected him to a "lengthy and humiliating peer review process."

This case concerns the extent to which the speech and petitioning activity in medical peer review is protected under prong one of the anti-SLAPP statute, Code of Civil Procedure section 425.16 ("Section 425.16"). In *Kibler*, the Court held that peer review is an official proceeding. (*Kibler*, 39 Cal.4th 192.) In *Park*, the Court clarified that *Kibler* addressed "only whether statements in connection with but outside the course of such a proceeding can qualify as 'statement[s] ... in connection with an issue under consideration' in an 'official proceeding.'" (*Park*, 2 Cal.5th at p. 1070, quoting Code Civ. Proc., § 425.16, subd. (e)(2).) Neither *Kibler* nor *Park* addressed peer review conduct in furtherance of speech and petitioning activity under (e)(4) of the anti-SLAPP statute. This case squarely presents this issue and demonstrates that the entirety of medical peer review falls within the protections of the anti-SLAPP statute subdivisions (e)(2) and (e)(4).

As an initial matter, Section 425.16, subdivision (e)(2) protects most peer review activity, as statements made in connection with an official proceeding. Plaintiff targets a wide array of peer review speech and petitioning activity, including: (a) statements made during peer review committee meetings; (b) disciplinary recommendations; (c) statutorily mandated reporting to government authorities regarding unsafe care and proposed discipline; and (d) written notices submitted during the

peer review hearing process. All these communications are statements made before or in connection with an official proceeding under the anti-SLAPP statute's subdivision (e)(2).

To the extent any peer review actions Plaintiff alleges do not fit within subdivision (e)(2)'s scope, those actions are conduct in furtherance of speech and petitioning in connection with an issue of public interest, and protected by subdivision (e)(4). In particular, Plaintiff alleges that summary suspensions at both hospitals harmed him, as did one hospital board's final approval of recommended discipline. Summary suspensions and hospital board approval of recommended discipline are acts that further petitioning to government authorities regarding patient safety, which subdivision (e)(4) protects.

III. STANDARD OF REVIEW

The Court considers *de novo* whether a plaintiff's claims arise from activity protected under the anti-SLAPP statute. (*Wilson v. Cable News Network, Inc.* (2019) 7 Cal.5th 871, 884.) In making this determination, the Court considers the pleadings and supporting and opposing affidavits stating the facts upon which the liability or defense is based. (Code Civ. Proc., § 425.16, subd. (b)(2).)

IV. OVERVIEW OF MEDICAL PEER REVIEW

A. The Statutory Scheme Governing Peer Review.

A comprehensive statutory scheme governs peer review. A hospital's medical staff—acting under the hospital governing body's ultimate authority—is statutorily responsible for ensuring

patient safety. (See Cal. Code Regs., tit. 22, § 70703, subd. (a).) Hospitals that inadequately monitor and discipline their physicians are liable to patients for resulting injuries. (*Elam v. College Park Hospital* (1982) 132 Cal.App.3d 332, 341.) Hospitals and medical staffs protect patient safety through peer review, statutorily defined as the "process in which a peer review body[1] reviews the basic qualifications, staff privileges, employment, medical outcomes, or professional conduct of licentiates to make recommendations for quality improvement and education …." (Bus. & Prof. Code, § 805, subd. (a)(1)(A).)

The key statutes governing peer review are Business and Professions Code sections 805 et seq. ("Section 805") and 809 et seq. ("Section 809"). Section 805 describes peer review bodies' extensive reporting requirements to the California Medical Board. Section 809 codifies the fair procedure and administrative hearing aspects of peer review. (See *El-Attar v. Hollywood Presbyterian Medical Center* (2013) 56 Cal.4th 976, 986.)

In addition, medical staff bylaws guide peer review. (See generally, 2 AA 477 et seq. [Mission Bylaws]; 2 AA 327 et seq. [St. Joseph Bylaws].) By design, medical staff bylaws differ depending on the needs of each hospital and community. All bylaws, however, reflect the same statutory structure. (See Bus. & Prof. Code, § 809, subd. (a)(8) [requiring medical staff bylaws to implement Section 809].)

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[1] A "peer review body" includes a hospital's medical staff and its quality review committees. (Bus. & Prof. Code, § 805, subd. (a)(1)(B).)

B. Peer Review Communications and Actions.

Committee Discussions:[2] Peer review often begins when a person communicates concerns about a physician's patient care to medical staff leaders, peer review committees, or the hospital. (See, e.g., 2 AA 519, art. IX, § 2 [Mission Bylaws].) Peer review committees investigate the concerns and discuss their findings. (2 AA 542, art. XII, § 5.A.) The Medical Executive Committee ("MEC"), composed of elected or appointed leaders of the medical staff, may then investigate and debate the proper response to protect patients. (2 AA 544, art. XIII, § 2.B(8).)

MEC Disciplinary Recommendations: If warranted to protect patients, the MEC may recommend physician discipline. (2 AA 520, art. IX, § 5.) As relevant here, the MEC may recommend terminating a physician's privileges or denying a physician's reappointment application. (2 AA 520, art. IX, § 5.E; 2 AA 506, art. VI, § 4.B.) These recommendations trigger hearing rights, and do not take effect until after the physician waives or exhausts all hearing and appellate rights. (*Ibid*; 2 AA 527, art. X, § 3; *Sahlolbei v. Providence Healthcare, Inc.* (2003) 112 Cal.App.4th 1137, 1142.)

MEC Summary Suspensions: The MEC may also summarily suspend the physician's privileges—on an interim

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[2] The processes described here are simplified and focus on those parts relevant to Plaintiff's claims. (See Bus. & Prof. Code, § 805, subd. (a)(1)(A) ["peer review" includes "[a]ny other activities of a peer review body"]; see also 2 AA 545, art. XIII, § 2.B [listing 16 different MEC duties].)

basis while the physician exercises hearing rights—where "the failure to take that action may result in an imminent danger to the health of any individual." (2 AA 521, art IX, § 9.A; Bus. & Prof. Code, § 809.5, subd. (a).)

Peer Review Hearings: If the physician petitions for a hearing, he or she is entitled to written notice of the charges, limited discovery, and the right to call and cross-examine witnesses. (2 AA 528–529, art. X, §§ 6–8; Bus. & Prof. Code, § 809.3.) Hearings are usually held before a Judicial Review Committee ("JRC"), a jury-like body composed of a physician's peers. (2 AA 528, art. X, § 4; Bus. & Prof. Code, § 809.2, subd. (a).) Either the physician or the MEC may appeal the JRC's decision to the hospital's governing body. (2 AA 533, art. X, § 9.C; Bus. & Prof. Code, § 809.4, subd. (b).)

Governing Body Action: Ultimately—after the physician waives or exercises hearing and appellate rights—all disciplinary recommendations and summary suspensions are subject to final approval by the hospital's governing body, typically the hospital board. (2 AA 520, art. IX, § 6; 2 AA 522, art. IX, § 9.C(2); 2 AA 535, art. X, §§ 10.G, 11.) The hospital board is usually permitted "to exercise its independent judgment" in evaluating whether to accept, modify, or reject the recommended discipline. (See 2 AA 535, art. X, § 10.G; *Ellison v. Sequoia Health Services* (2010) 183 Cal.App.4th 1486, 1497.)

Court Review: After the governing body imposes discipline, the physician may seek court review by petitioning for a writ of administrative mandamus. (Code Civ. Proc., § 1094.5.)

C. Reporting to the Medical Board.

Peer review bodies must report most summary suspensions, denials of reappointment applications, and terminations, among many other triggering events, to the California Medical Board and the National Practitioner Data Bank ("NPDB"). (See Bus. & Prof. Code, §§ 805, 805.01; 42 U.S.C. § 11133; see also *Arnett v. Dal Cielo* (1996) 14 Cal.4th 4, 7 [Medical Board regulates the practice of medicine as an exercise of the state's "police power"].)

At the state level, peer review bodies report physician discipline to the California Medical Board through "805 Reports" and "805.01 Reports." (Bus. & Prof. Code, §§ 805, 805.01.) Failing to submit these reports carries serious consequences—a $100,000 fine per violation and, for medical staff leaders, potential separate actions against their own medical license for "unprofessional conduct." (Bus. & Prof. Code, §§ 805, subd. (k), 805.01, subd. (g), (h).)

Peer review bodies must also report disciplinary recommendations and other events to federal authorities through the NPDB. (See 42 U.S.C. § 11133; see also 42 U.S.C. § 11101 ["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."].) Peer review reporting is thus incorporated "into the overall process for the licensure of California physicians." (See *Kibler*, 39 Cal.4th at pp. 199-200.)

D. Peer Review Exists to Protect Public Safety.

"[T]he overriding goal of the state-mandated peer review process is protection of the public ...." (*Medical Staff of Sharp Memorial Hospital v. Superior Court* (2004) 121 Cal.App.4th 173, 181-182.) When physicians volunteer to participate in peer review, they perform a vital public service. The Legislature found: "Peer review, fairly conducted, is *essential* to preserving the highest standards of medical practice." (Bus. & Prof. Code, § 809, subd. (a)(3), emphasis added.) Thus, "while important, physicians' due process rights are subordinate to the needs of public safety." (*Sharp*, 121 Cal.App.4th at p. 182.)

V. FACTUAL AND PROCEDURAL BACKGROUND

A. Plaintiff's Dangerous Surgeries at Mission and St. Joseph Hospitals Triggers Peer Review.

Plaintiff, a urogynecologist, held medical staff privileges at Mission Hospital (from 2002 to November 2010) and St. Joseph Hospital (from July to September 2010). (1 AA 35; 3 AA 741.) After he seriously injured multiple patients, the medical staffs at both hospitals conducted peer review activities under their medical staff bylaws.

Mission Hospital Peer Review: In 2009, Plaintiff perforated a patient's bowel five times during a surgery at Mission Hospital. (3 AA 742.[3]) This case—and many others—triggered in-

[3] Each of the citations in Section V.A are to Plaintiff's declaration opposing Defendants' anti-SLAPP motion, or exhibits thereto.

depth peer review committee investigations. (*Ibid.*) Mission's Medical Executive Committee ("MEC") ultimately voted to summarily suspend Plaintiff's privileges and to recommend to the governing board that his application for reappointment be denied. (2 AA 457; 3 AA 744–745.)

Plaintiff requested and received an evidentiary hearing, which took over 30 sessions. (3 AA 747.) On April 22, 2014, the Judicial Review Committee ("JRC") issued a decision in the MEC's favor on the termination recommendation and partially in Plaintiff's favor on the summary suspension.[4] (3 AA 630.) Plaintiff and the MEC both appealed. (3 AA 738.) The Mission Appellate Committee, a subcommittee of the hospital's governing board, recommended confirming the summary suspension and denying Plaintiff's application for reappointment. (3 AA 740–741.) On December 18, 2014, the Mission Hospital Board of Trustees adopted the Appellate Committee's recommendations. (3 AA 792–794.) Plaintiff declined to challenge the Board's decision by filing a mandamus petition in superior court. As required by law, Mission reported its activities to the California Medical Board and NPDB. (See, e.g., 1 AA 237–238; 2 AA 459–472.)

St. Joseph Hospital Peer Review: In July 2010, while under investigation at Mission, Plaintiff joined St. Joseph's Medical Staff. (2 AA 434.) Three of Plaintiff's first six robotic surgeries at St. Joseph Hospital resulted in devastating patient

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[4] The JRC found that the summary suspension was reasonable and warranted to protect patients at the time it was imposed, but that its continuation was no longer necessary. (1 AA 95.)

injuries. (*Ibid.*) One of Plaintiff's patients nearly died. (*Ibid.*) A St. Joseph physician who responded emergently to the scene described Plaintiff's disastrous surgery attempt as resembling "gunshot wounds to the abdomen." (2 AA 440.)

St. Joseph's MEC recommended terminating Plaintiff's privileges, and summarily suspended his privileges in the interim to protect patients. (2 AA 312.) Plaintiff requested a hearing, which lasted for ten evidentiary sessions. (2 AA 434.) St. Joseph's JRC issued its decision on August 3, 2012,[5] and the MEC appealed. (2 AA 434.) Prior to the appellate hearing, however, the parties settled the matter on May 16, 2013. (2 AA 451–455.) In the settlement agreement, Plaintiff generally released St. Joseph from any and all claims. (*Ibid.*) Like Mission, St. Joseph reported its peer review activities to the California Medical Board and NPDB. (See 1 AA 235–236; 2 AA 315–322.) Due to the settlement, neither the St. Joseph MEC's termination recommendation nor its summary suspension was ultimately adopted by the hospital's governing board.

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[5] The JRC found that Dr. Bonni's poor surgical technique caused avoidable patient injuries in all three of the cases it reviewed. (See 2 AA 437, Charge 3; 2 AA 439, Charge 5; 2 AA 440, Charge 2.) It nevertheless recommended lifting the summary suspension on Dr. Bonni's non-robotics privileges, reasoning that "Dr. Bonni's poor surgical technique in the performance of robotic surgeries is [not] indicative of deficiencies in non-robotic surgeries." (2 AA 445.)

B. Plaintiff Files the First Amended Complaint and His Declaration.

On November 25, 2014, Plaintiff filed this lawsuit, accusing eight individual physicians, two hospitals, and a medical staff of a vast and elaborate conspiracy to retaliate against him through peer review. (See 1 AA 6.) Defendants St. Joseph Hospital of Orange and Mission Hospital Regional Medical Center are independent, 501(c)(3) nonprofit hospitals within St. Joseph Health System.[6] Defendants Christopher Nolan, Michael Ritter, Kenneth Rexinger, Farzad Masoudi, and Tod Lempert are physician Medical Staff members at Mission Hospital. Defendants Randy Fiorentino, Juan Velez, and George Moro are physician Medical Staff members at St. Joseph Hospital. All individual physicians Plaintiff sued were participants in the peer review hearing process at each hospital, as either medical staff leaders, hearing witnesses, or both.

In his First Amended Complaint ("FAC"), Plaintiff alleges retaliation in violation of California whistleblower statutes, specifically Health and Safety Code section 1278.5 and Business and Professions Code sections 510 and 2056.[7] (1 AA 6.) Plaintiff's FAC alleges that all Defendants conspired to engage in "a continuous course of conduct … designed to retaliate against

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[6] In July 2016, St. Joseph Health System combined with Providence Health & Services to create Providence St. Joseph.

[7] Plaintiff also alleged breach of contract and rescission of contract. (1 AA 6.) These contract-based causes of action are not at issue on appeal.

Plaintiff, and cause damage to his reputation" through peer review. (1 AA 12.)

On April 8, 2015, Defendants moved to strike the retaliation cause of action from the FAC pursuant to the anti-SLAPP statute. (1 AA 28-50.) In opposition, Plaintiff filed a declaration expanding on his allegations of retaliation. (1 AA 226 et seq.) According to Plaintiff's FAC and declaration, Defendants' alleged retaliatory acts included, inter alia:

Peer Review Committee Discussions:

- "Engaging in a campaign of character assassination which caused irreparable damage to Plaintiff's reputation." (1 AA 14.)
- "Making defamatory statements about Plaintiff." (*Ibid.*)
- At Mission, "communicat[ing] to the [peer review] committee that [Plaintiff] had a high complication rate with [his] surgeries ...." (1 AA 236.)

Peer Review Disciplinary Actions and Recommendations:

- At St. Joseph and Mission, the MECs summarily suspending Plaintiff's medical staff membership and clinical privileges. (1 AA 13.)
- At Mission, the MEC recommending denying Plaintiff's medical staff reappointment application. (1 AA 238–239.)

- At Mission, "having an Appellate Committee recommend to the Board that it reverse the findings of the JRC ...."[8] (1 AA 13.)
- At Mission, "the Board of Trustees adopting the recommendations of the Appellate Committee ...." (1 AA 13.)
- At St. Joseph, the MEC recommending "terminat[ing] Plaintiff's hospital membership and clinical privileges." (1 AA 14.)
- At St. Joseph, "coercing Plaintiff to enter into a [Settlement] Agreement dated May 15, 2013," before the termination recommendation could be finalized. (1 AA 14; see also 2 AA 451–455.)

Peer Review Hearing Statements and Appeals:

- At Mission and St. Joseph, providing Plaintiff with several "Notice[s] of Charges," which Plaintiff contends "were false" and "brought against [him] in retaliation." (1 AA 233–234.)
- At Mission, amending the "Notice of Charges," which Plaintiff contends "was a further act of retaliation." (1 AA 239–240.)
- "Mission took further retaliatory action against [Plaintiff] by appealing [the JRC] decision ...." (1 AA 241.)

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[8] See, supra, footnote 4.

- "St. Joseph further retaliated against [Plaintiff] by threatening to appeal [the JRC] decision ...." (1 AA 235.)

Peer Review Medical Board and NPDB Reporting:

- At Mission and St. Joseph, "[r]eporting Plaintiff's summary suspensions to the Medical Board of California and National Practitioner Data Bank ...." (1 AA 13.)
- At St. Joseph, "failing to use the specific language as agreed upon by the parties in reporting to the Medical Board of California and National Practitioner Data Bank." (1 AA 14.)

Plaintiff's FAC and declaration summarize these alleged retaliatory actions by Defendants as: "Abusing the powers of the peer review process and subjecting Plaintiff to a lengthy and humiliating peer review process for over two years ...." (1 AA 13; 1 AA 242.)

C. The Trial Court Grants Defendants' Special Motion to Strike.

On June 12, 2015, the trial court granted Defendants' anti-SLAPP motion. (4 AA 891–892.) The court found that the gravamen of Plaintiff's retaliation cause of action "is based on defendants' protected peer review activities (*Kibler*, 39 Cal.4th at p. 199)" and thus "the anti-SLAPP statute applies." (4 AA 892.) On prong two of the analysis, the trial court found that Plaintiff failed to provide admissible evidence that he made *any* patient safety complaints at St. Joseph Hospital. (*Ibid.*) Regarding Mission Hospital, the trial court found that "Plaintiff has not

presented any evidence indicating the hospital initiated the peer review process or revoked his privileges for complaining about patient safety concerns or advocating for medically appropriate healthcare." (*Ibid.*)

D. The Court of Appeal Reverses.

Plaintiff appealed. The Court of Appeal reversed the trial court's order granting Defendants' anti-SLAPP motion. (*Bonni v. St. Joseph Health System* (2017) 13 Cal.App.5th 851, disapproved of by *Wilson*, 7 Cal.5th 871.) The Court of Appeal reasoned that Plaintiff's cause of action for retaliation under Health and Safety Code section 1278.5 "*arises from* defendants' retaliatory purpose or motive, and not from how that purpose is carried out, even if by speech or petitioning activity." (*Id.* at p. 861.)

E. The Court Grants Defendants' Petition for Review.

Defendants petitioned for review of the Court of Appeal's opinion on two issues. First, Defendants asked whether a defendant's motive or intent should be considered in prong one of anti-SLAPP analysis in retaliation or discrimination cases. Second, Defendants asked, in light of *Kibler* and *Park*, what stages of the official medical staff peer review process are within the protections of the anti-SLAPP statute.

In *Wilson*, this Court answered the first question presented in Defendants' Petition for Review. (*Wilson*, *supra*, at p. 881.) It held that a plaintiff's allegation of a retaliatory motive for otherwise protected conduct does not eliminate application of the

anti-SLAPP statute on the first prong of the analysis. (*Ibid.*) *Wilson* expressly disapproved of *Bonni's* motive analysis. (*Id.* at p. 892.)

The Court granted Defendants' petition for review to determine, in light of *Kibler* and *Park*, what stages of the official medical staff peer review process are within the anti-SLAPP statute's protections.

ARGUMENT

The anti-SLAPP statute applies to causes of action targeting acts in furtherance of the rights of petition and free speech in connection with a public issue. Plaintiff's claims are rooted in Defendants' peer review statements and conduct in furtherance of speech and petitioning rights. Thus, Defendants have met their burden to show that Plaintiff's cause of action arises from protected activity under prong one of the anti-SLAPP statute.

I. ANTI-SLAPP LEGAL FRAMEWORK.

A. The Anti-SLAPP Two-Step Analysis.

The anti-SLAPP statute applies to a "cause of action against a person arising from any act of that person in furtherance of the person's right of *petition* or *free speech* under the United States Constitution or the California Constitution in connection with a public issue." (Code Civ. Proc., § 425.16, subd. (b)(1), emphasis added.) "To encourage 'continued participation in matters of public significance' and to ensure 'that this participation should not be chilled through abuse of the judicial process,' the Legislature expressly provided that the anti-SLAPP statute 'shall

be construed broadly.'" (*Simpson Strong-Tie Co., Inc. v. Gore* (2010) 49 Cal.4th 12, 21.)

The anti-SLAPP statute involves a two-pronged analysis. "A defendant's burden on the first prong is not an onerous one." (*Okorie v. Los Angeles Unified Sch. Dist.* (2017) 14 Cal.App.5th 574, 590.) To satisfy the first prong, the defendant need only show that a plaintiff's lawsuit "arises from" the exercise of free speech or petitioning rights under the anti-SLAPP statute. (See *Equilon Enterprises v. Consumer Cause, Inc.* (2002) 29 Cal.4th 53, 63.) Once that showing has been made, the burden shifts to the plaintiff, who must establish a probability of prevailing on the merits. (Code Civ. Proc., § 425.16, subd. (b)(1).)

B. The Legal Elements of Plaintiff's Retaliation Claim.

In determining whether Plaintiff's claims arise from protected activity, the Court must first "consider the elements of the challenged claim and what actions by the defendant supply those elements and consequently form the basis for liability." (*Wilson*, 7 Cal.5th at p. 884; see also *Park*, 2 Cal.5th at p. 1062 ["A claim arises from protected activity when that activity underlies or forms the basis for the claim."]; *Okorie*, 14 Cal.App.5th at p. 586 ["In determining whether a cause of action is based on protected activity, we 'examine the *principal thrust* or *gravamen* of a plaintiff's cause of action to determine whether the anti-SLAPP statute applies.'"].)

To establish a prima facie case of retaliation, Plaintiff must show that: (1) he raised complaints about patient safety; (2) he

was thereafter subjected to adverse actions; and (3) a causal link exists between his complaints and the adverse actions. (See Health & Saf. Code, § 1278.5, subd. (d)(1); Bus. & Prof. Code, §§ 510, 2056; cf. *Yanowitz v. L'Oreal USA, Inc.* (2005) 36 Cal.4th 1028, 1042.) Regarding the adverse action element, Health and Safety Code section 1278.5 provides that "discriminatory treatment ... includes, but is not limited to, ... any unfavorable changes in ... privileges ... or the threat of any of these actions ...." (Health & Saf. Code, § 1278.5, subd. (d)(2).)

II. PLAINTIFF'S CLAIM IS BASED ON STATEMENTS PROTECTED BY SECTION 425.16(e)(2).

Anti-SLAPP subdivision (e)(2) protects statements in connection with an "official proceeding." (See Code Civ. Proc., § 425.16, subd. (e)(2).) In *Kibler*, this Court held that peer review is an official proceeding, and thus statements in connection with peer review are protected. (*Kibler*, 39 Cal.4th at p. 198.) Recently, the Court clarified in *Park* that "a claim may be struck only if the speech or petitioning activity *itself* is the wrong complained of, and not just evidence of liability or a step leading to some different act for which liability is asserted." (*Park*, 2 Cal.5th at p. 1060.) In this case, Plaintiff's retaliation cause of action claims that Defendants' allegedly retaliatory peer review *statements* caused his injuries. (See 1 AA 13-14.)

A. Subdivision (e)(2) Protects Statements in Connection with an Official Proceeding.

In Section 425.16, subdivision (e), the Legislature listed four examples of "protected acts in furtherance of speech and petition rights." Subdivision (e)(2) protects "any written or oral statement or writing made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law." The anti-SLAPP statute's legislative history demonstrates that subdivision (e)(2) was "intended broadly to protect, inter alia, direct petitioning of the government and petition-related statements and writings." (*Briggs v. Eden Council for Hope & Opportunity* (1999) 19 Cal.4th 1106, 1120.)

1. *Kibler* Held That Peer Review Is An "Official Proceeding."

In *Kibler*, the Court held that "a hospital's peer review qualifies as 'any other official proceeding authorized by law' under subparagraph (2) of subdivision (e) *and thus a lawsuit arising out of a peer review proceeding* is subject to a special motion under section 425.16 to strike the SLAPP suit." (*Kibler*, 39 Cal.4th at p. 198, emphasis added.) As this Court recognized in *Kibler*, "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." (*Id.* p. at 201.) "To hold, as plaintiff Kibler would have us do, that hospital peer review proceedings are *not* 'official proceeding[s]

authorized by law' within the meaning of section 425.16, 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." (*Ibid.*)

2. *Park* Clarified That *Kibler* Addressed Protected Statements But Did Not Consider Decisions.

In *Park*, a university tenure decision case, the Court commented on *Kibler*'s scope.[9] It observed that in *Kibler*, the Court "did not consider whether the hospital's peer review decision and statements leading up to that decision were inseparable for purposes of the arising from aspect of an anti-SLAPP motion ...." (*Park*, 2 Cal.5th at p. 1069.) Rather, *Kibler* addressed "only whether statements in connection with but outside the course of such a proceeding can qualify as 'statement[s] ... in connection with an issue under consideration' in an 'official proceeding.'" (*Id.* at p. 1070, quoting Code Civ. Proc., § 425.16, subd. (e)(2).)

The Court emphasized that for anti-SLAPP purposes, courts must "distinguish between the challenged decisions and the

[9] Because *Park* was not a peer review decision, *amici* in that case did not include any peer review bodies, hospitals, or physician groups. Aside from references to *Kibler*, the *Park* Court received no briefing on hospital peer review.

speech that leads to them." (*Park*, 2 Cal.5th at p. 1067.) Ultimately, "a claim may be struck only if the speech or petitioning activity *itself* is the wrong complained of, and not just evidence of liability or a step leading to some different act for which liability is asserted." (*Id.* at p. 1060.)

Okorie v. Los Angeles Unified School District illustrates this critical distinction made in *Park*. There, a teacher sued his school district for retaliation after it removed him from teaching duties while investigating allegations that he had molested students. (*Okorie*, 14 Cal.App.5th at p. 593.) The Court concluded that although the teacher had been subjected to adverse employment actions, the bulk of his claims related to "statements or communicative conduct made by [school] personnel." (*Id.* at p. 592.) The *Okorie* court distinguished *Park* as follows:

> *Park's* complaint was based on the single act of denying plaintiff tenure based on national origin. In *Park*, plaintiff could have omitted allegations regarding communicative acts and still state the same claims. [*Park*, 2 Cal.5th at p.1068.] In contrast, Plaintiffs' complaint here is based collectively on a handful of decisions (unsupported by any evidence of discriminatory animus) *and* a wide array of allegedly injury-causing statements and communicative conduct by Defendants. In other words, the speech

> complained of here does not merely "supply evidence of animus." (*Ibid.*) Rather, the speech at issue is explicitly alleged to be the injury-producing conduct.

(*Id.* at p. 593, internal editing and quotation marks omitted; cf. *Laker v. Board of Trustees of California State University* (2019) 32 Cal.App.5th 745, 773 [the anti-SLAPP statute does not apply where "the speech is not—by itself—the basis of the claim"].) Because protected communications "formed the very heart of Plaintiffs' demands for relief," the *Okorie* court concluded that his retaliation claim arose from protected activity. (*Okorie*, 14 Cal.App.5th at p. 595.)

B. Plaintiff's Claim Arises from Protected Statements in Connection with an Official Proceeding.

As in *Okorie*, Defendants' protected peer review statements form "the very heart of Plaintiff['s] demands for relief." (See *id.* at p. 595.) Specifically, Plaintiff alleges that Defendants retaliated against him via: (1) statements made by physicians during peer review committee discussions; (2) MEC disciplinary recommendations to the hospital board; (3) reports to the Medical Board and NPDB; and (4) written notices submitted during the hearing and appellate process.

As described below, these statements and writings were made in connection with an official proceeding, peer review. As

such, they are protected statements within anti-SLAPP statute subdivision (e)(2). (See *Park*, 2 Cal.5th at p. 1060 ["a claim may be struck only if the speech or petitioning activity *itself* is the wrong complained of"].)

1. Peer Review Committee Discussions Are Protected Statements in Connection with an Official Proceeding.

According to Plaintiff, Defendants initially retaliated against him by criticizing his patient care during peer review committee discussions and otherwise "defaming" him. (See 1 AA 14 ¶ 16(16); see also 1 AA 12-15, 230, 235-236.) These committee discussions are statements in connection with an official proceeding—peer review. (See, e.g., *Kibler*, 39 Cal.4th at p. 201; *Okorie*, 14 Cal.App.5th at p. 594 ["Plaintiffs' investigation-related speech allegations ... were protected by the anti-SLAPP statute"].)

At its heart, peer review is a communicative process through which physicians, peer review committees, and the hospital board discuss, debate, and critique physicians' "basic qualifications, staff privileges, employment, medical outcomes, [and] professional conduct." (Bus. & Prof. Code, § 805, subd. (a)(1)(A)(i) [definition of peer review].) In relevant part, peer review committees evaluate and discuss physician performance. (See, e.g., 2 AA 542, art. XII, § 5.A.) These committee meetings and discussions then inform the MEC as it weighs potential disciplinary recommendations. (2 AA 545, art. XIII, § 2.B(8).)

Here, Plaintiff's cause of action arises from just such *communications*. Defendants' alleged retaliatory acts included "making defamatory statements about [him]" and "engaging in a campaign of character assassination." (1 AA 12-14.) In his declaration, Plaintiff avers that in 2010, "Mission referred [a concerning] case to the Quality Review Committee for outside review of [Plaintiff's] performance," which Plaintiff believes was "done in retaliation." (1 AA 230.) Plaintiff's only complaint against Defendant Dr. Rexinger is that he "communicated to the committee that [Plaintiff] had a high complication rate." (1 AA 236.) Plaintiff also alleges that—as part of the "Retaliation by Mission"—Plaintiff "attended a meeting with the Mission Ad Hoc Women & Infants Committee where two robotics cases [he] had completed at Mission were discussed." (1 AA 236.) As a result of Defendants' criticisms, Plaintiff alleges he suffered "humiliation," "embarrassment," and "irreparable damage to [his] reputation." (1 AA 14–15; *cf. Okorie*, 14 Cal.App.5th at p. 595 ["The complaint makes clear that the primary cause for this humiliation and embarrassment is LAUSD's speech and communicative conduct related to the investigation."].)

This "wide array of allegedly injury-causing statements and communicative conduct by Defendants" constitutes a necessary element of Plaintiff's claims—the alleged retaliatory acts. (See *Okorie*, 14 Cal.App.5th at p. 593.) By contrast, in ***Park***, the plaintiff's claim depended only on the denial of tenure, and *not* on "any statements, or any specific evaluations of him in the tenure process." (***Park***, 2 Cal.5th at p.1068.) "Plaintiff could have

omitted allegations regarding communicative acts or filing a grievance and still state the same claim." (*Ibid.*) Here, however, Plaintiff directly alleges it was Defendants' "character assassination" during peer review that caused him injury—namely, "irreparable damage to [his] reputation." (1 AA 14, ¶ 11.) Plaintiff's claims thus arise from protected statements in connection with an official proceeding—peer review—under Section 425.16, subdivision (e)(2).

2. MEC Recommendations Are Protected Statements in Connection with an Official Proceeding.

Plaintiff alleges that Defendants further retaliated against him when the St. Joseph MEC recommended terminating Plaintiff's privileges, and the Mission MEC recommended denying his reappointment application. (1 AA 234, 239; see also 2 AA 312; 3 AA 744–745.) These recommendations by peer review committees—the Medical Executive Committee—are no different from the protected peer review discussions and communications that preceded them. (See, supra, part II.B.1 [peer review committee discussions are protected under the anti-SLAPP].)

For the reasons described below, peer review recommendations are *statements* proposing discipline to the hospital board—not the final discipline itself. As such, MEC disciplinary recommendations are statements in connection with an official proceeding under anti-SLAPP subdivision (e)(2).

a. MEC Recommendations Are Proposals to the Hospital Board Regarding Physician Discipline.

The Legislature has defined "peer review" as "[a] process in which a peer review body reviews ... medical outcomes ... to *make recommendations* for quality improvement," including "whether a licentiate may ... continue to practice in a health care facility." (Bus. & Prof. Code, § 805, subd. (a)(1)(A)(i), emphasis added.) Under the Mission and St. Joseph Bylaws, the MEC "recommends" terminations or denials to the hospital's governing body—in this case, the hospital's board of trustees. (See 2 AA 520, art. IX, § 5; 2 AA 371, § 13.5.) The actual corrective action is taken by the hospital's board. (See, e.g., 2 AA 535, art. X, § 11.B; 2 AA 379, § 14.3.2; 2 AA 385, §§ 14.5.3, 14.5.5; see also *Hongsathavij v. Queen of Angels / Hollywood Presbyterian Medical Center* (1998) 62 Cal.App.4th 1123, 1143 ["Ultimate responsibility [for disciplinary action] is not with the medical staff, but with the governing body of the hospital."].) Until adopted by the board, the recommendations are merely the MEC's "final *proposed* action." (Bus. & Prof. Code, § 809.1, subd. (a), emphasis added; see also *ibid.* [physicians are notified that an "action against the licentiate has been *proposed* by the peer review body which, *if adopted*, shall be taken and reported"], emphasis added.)

MEC termination and denial recommendations trigger hearing rights. (2 AA 527, art. X, § 3; 2 AA 379, § 14.2.) After the initial JRC hearing, either the physician or the MEC may appeal the result to the hospital's governing body. (2 AA 533, art. X,

§ 10.A.; 2 AA 384, § 14.5.1.) The governing body then reviews the recommendation and is "allowed to exercise its independent judgment" in evaluating whether to accept, modify, or reject the recommended discipline. (See *Ellison*, 183 Cal.App.4th at p. 1497; 2 AA 385, § 14.5.5.c; 2 AA 534–535, art. X, § 10.G.) Critically, the MEC's recommendation does not take effect until after the physician waives or exhausts all hearing and internal appellate rights, and the board acts. (*Sahlolbei*, 112 Cal.App.4th at p. 1142.)

In this case, the Mission MEC's September 2011 application denial recommendation was followed by hearings and appeals, and did not ultimately take effect until over three years later in December 2014, when it was approved by the hospital board. (1 AA 239, 242, ¶¶ 25, 31.) At St. Joseph, the MEC's September 2010 termination recommendation was never approved by the hospital's governing body, and never became effective, because the parties settled while the MEC was still exercising its appellate rights. (1 AA 54, ¶ 9; 1 AA 75-79.)

Accordingly, MEC recommendations are statements—proposals to the hospital board—not actions. Because they are made in connection with peer review, MEC recommendations are statements made in connection with an official proceeding under anti-SLAPP subdivision (e)(2).

b. Unlike the Tenure Decision in *Park*, Recommendations Are Statements, Not Disciplinary Actions.

MEC recommendations—made in the middle of peer review, prior to further hearing rights, and subject to reversal before implementation by the hospital's board—are nothing like the final tenure decision the Court held was unprotected activity in *Park*. According to the *Park* respondent, Professor Park's "review proceedings were conducted at multiple levels within the university, including the Department Personnel Committee, the chair of the department, the dean, the provost and vice president of academic affairs, and the university president." (*Park*, 2 Cal.5th 1057, Respondent's Answer Brief on the Merits, at p. 9.) "At each level, the reviewer made a written recommendation" to the Board of Trustees of California State University, as the ultimate decision-maker. (*Ibid.*)

But Professor Park did not sue the Department Personnel Committee, the chair of the department, or even the university president for their *recommendations*. Instead, he sued the Board of Trustees alone for its final *decision*. The Court thus held that "[t]he elements of Park's claim ... depend[ed] not on the grievance proceeding, any statements, or any specific evaluations of him in the tenure process, but only on the denial of tenure itself ...."[10] (*Park*, 2 Cal.5th at p. 1068.) The distinction between *Park*'s final

[10] For the reasons described in Part III.C, *infra*, even a hospital board's final peer review disciplinary decision is protected activity under subdivision (e)(4) of the anti-SLAPP statute.

employment decision and the interim MEC recommendations here is critical because the latter is inherently communicative. (*See Park*, 2 Cal.5th at p. 1067 [emphasizing the need to "distinguish between the challenged decisions and the speech that leads to them"].)

Because of their communicative nature, MEC recommendations are more akin to the defendant's protected statements in *Briggs v. Eden Council for Hope & Opportunity*. There, the defendant non-profit organization counseled a tenant to sue her landlord. (*Briggs*, 19 Cal.4th at p. 1110.) The Court held that this recommendation constituted protected speech in connection with an official proceeding. (*Id.* at p. 1115.) MEC recommendations are likewise such speech.

Courts similarly view civil complaints as "statements or writings" in connection with an official proceeding under anti-SLAPP subdivision (e)(2). (See, e.g., *Neville v. Chudacoff* (2008) 160 Cal.App.4th 1255, 1261 ["statements, writings and pleadings in connection with civil litigation are covered by the anti-SLAPP statute"]; see also *Cabral v. Martins* (2009) 177 Cal.App.4th 471, 479–480.) The MEC's disciplinary recommendation is similar to a court complaint, in that it is a written proposal for relief to be tested at a hearing before a factfinder (the jury-like JRC or an arbitrator). (Bus. & Prof. Code, § 809.2, subd. (a).) Both are protected statements in connection with official proceedings under anti-SLAPP subdivision (e)(2).

Ultimately, disciplinary recommendations are steps along the peer review path—not the end. As communications from a

peer review committee (the MEC) to the ultimate decision-making body (the hospital board), such recommendations are statements or writings in connection with an official proceeding under the anti-SLAPP statute.

3. Medical Board and NPDB Reports Are Protected Statements in Connection with an Official Proceeding.

In addition to committee discussions and recommendations, Plaintiff claims Defendants' allegedly retaliatory reports to the California Medical Board and NPDB injured him. (See, e.g., 1 AA 13–14.) These reports, and the communicative conduct that led to them, are protected statements or writings made in connection with peer review under subdivision (e)(2).

a. Reporting to Government Authorities Is Protected Speech.

The Legislature created peer review specifically to "aid the appropriate state licensing boards in their responsibility to regulate and discipline errant healing arts practitioners." (Bus. & Prof. Code, § 809, subd. (a)(5).) Peer review bodies aid the California Medical Board and NPDB primarily by reporting disciplinary actions and recommendations. (See Bus. & Prof. Code, §§ 805, 805.01; see also 42 U.S.C. § 11133; American Medical Association, Code of Medical Ethics Opinion 9.4.2; *Kibler*, 39 Cal.4th at p. 200 ["Because a hospital's disciplinary action may lead to restrictions on the disciplined physician's license to practice or to the loss of that license [by Medical Board action], its

peer review procedure plays a significant role in protecting the public against incompetent, impaired, or negligent physicians."].)

Reports to government authorities, like the Medical Board and NPDB, are protected statements in connection with an official proceeding under the anti-SLAPP statute. (See, e.g., *ComputerXpress, Inc. v. Jackson* (2001) 93 Cal.App.4th 993, 1009 [complaints filed with SEC were protected under the anti-SLAPP statute]; *Comstock v. Aber* (2012) 212 Cal.App.4th 931, 941 ["The law is that communications to the police are within SLAPP."]; accord *Chabak v. Monroy* (2007) 154 Cal.App.4th 1502, 1512.)

Moreover, case law interpreting Civil Code section 47 ("Section 47"), the "official proceedings" privilege, confirms that Medical Board and NPDB reports are statements in connection with an official proceeding. Both Section 47 and the anti-SLAPP statute protect statements made in "any other official proceeding authorized by law." (Code Civ. Proc., § 425.16, subd. (e)(1)-(2); Civ. Code, § 47, subd. (b).) Courts look to case law interpreting Section 47 "as an aid in construing the scope of subdivision (e)(1) and (2)" of the anti-SLAPP statute. (See, e.g., *Flatley v. Mauro* (2006) 39 Cal.4th 299, 322-323.)

It is well settled that reports to the California Medical Board (formerly the Board of Medical Quality Assurance or BQMA) and NPDB are *absolutely* privileged under Section 47 as statements in connection with an "official proceeding." (See, e.g., *Joel v. Valley Surgical Center* (1998) 68 Cal.App.4th 360, 372 [NPDB report was absolutely privileged under Section 47]; *Dorn v. Mendelzon* (1987) 196 Cal.App.3d 933, 942 ["The [Medical Board]

report … unquestionably falls within the protection of this privilege."]; *Long v. Pinto* (1981) 126 Cal.App.3d 946, 948 ["There is no doubt the letter to [the Medical Board] is absolutely privileged."]; see also 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."].) Section 47 protects any "report of misconduct to 'an appropriate regulatory agency, even if the report is made in bad faith.'" (*Lemke v. Sutter Roseville Medical Center* (2017) 8 Cal.App.5th 1292, 1299 [report to Board of Registered Nursing was absolutely privileged].)

In addition, the anti-SLAPP statute protects mandated reporting. (See, e.g., *Blue v. Office of Inspector General* (2018) 23 Cal.App.5th 138, 156 [OIG's "mandatory" report required by law was protected speech under anti-SLAPP statute]; see also *Dorn*, 196 Cal.App.3d at p. 942 [In comparison to voluntary reporting, "[e]ven stronger policy considerations compel application of [the Civil Code section 47] privilege to a report to [the Medical Board] made under a good faith belief that the communication is required by law."].) Defendants' mandatory reporting to the Medical Board and NPDB was therefore protected.

b. Plaintiff's Claim Arises from Defendants' Protected Reporting to the Medical Board and NPDB.

Plaintiff's FAC and declaration make clear that Defendants' Medical Board and NPDB reports are "not incidental to—but integral to—[his] complaint and each cause of action alleged

therein." (See *Okorie*, 14 Cal.App.5th at p. 595.) Critically, the Medical Board and NPDB reports are "the conduct by which plaintiff claims to have been injured." (See *Park*, 2 Cal.5th at p. 1063 [The anti-SLAPP statute applies if "the defendant's conduct by which plaintiff claims to have been injured falls within one of the four categories described in subdivision (e)."].)

Regarding the summary suspensions, for example, Plaintiff complains not so much that they were imposed, but rather *that Defendants reported them*. (See, e.g., 1 AA 13–14.) For example, Plaintiff claims that he suffered damages because:

- "I have a permanent mark on my record under [NPDB]." (2 AA 243.)
- A medical group, West Medical, denied him employment "based on information obtained through the National Practitioner Data Bank (NPDB)." (*Id.* at 244.)
- "I had to go through a very stressful and lengthy investigation by the Medical Board of California ...." (*Ibid.*)
- "Every time I apply for reappointment at any medical facility, I will have to explain why I was suspended at Mission and St. Joseph." (*Ibid.*)

Plaintiff's alleged lost job opportunity at West Medical and the requirement that he explain to other facilities why he was suspended arise directly from the reporting. This is because medical facilities are legally required to check applicants' NPDB and California Medical Board 805 Reports. (Bus. & Prof. Code,

§ 805.5, subd. (a); 42 U.S.C. § 11135.) Whenever a physician applies for privileges at a hospital, and every two years thereafter, the hospital must query to determine whether an 805 Report or NPDB Report has been filed regarding that physician. (*Ibid.*) Failing to request an 805 Report is a crime. (Bus. & Prof. Code, § 805.5, subd. (c).) Similarly, Plaintiff's allegedly "stressful and lengthy investigation by the Medical Board of California" (see 1 AA 13) was triggered by Defendants' mandatory reporting obligations.

In short, Plaintiff's damages arise from Defendants' *reporting* to the Medical Board and NPDB. His claim thus arises from protected statements in connection with an official proceeding and is subject to the anti-SLAPP statute. (See *Okorie*, 14 Cal.App.5th at p. 593 [the anti-SLAPP statute applies where "the speech at issue is explicitly alleged to be the injury-producing conduct"].)

4. Written Notices Submitted During the Hearing and Appellate Process Are Protected Statements in Connection with an Official Proceeding.

Plaintiff also claims that Defendants retaliated against him by affording him the very peer review hearings and appellate rights he requested to challenge the MEC's recommendations. (See, e.g., 1 AA 13, 14.) Defendants' statements and writings during the hearing process, including the Notices of Charges and

Notices of Appeal, were protected communications under subdivision (e)(2) of the anti-SLAPP statute.

a. Participation in Litigation and Other Forums for the Resolution of Legal Disputes Is Protected Activity Under the Anti-SLAPP Statute.

Peer review is a "quasi-judicial" proceeding. (See, e.g., *Kibler*, 39 Cal.4th at p. 200.) It is well established that the anti-SLAPP statute protects statements in connection with judicial proceedings and related litigation activities. (See e.g., *G.R. v. Intelligator* (2010) 185 Cal.App.4th 606, 612 ["Under the plain language of section 425.16, subdivision (e)(1) and (2), as well as the case law interpreting those provisions, all communicative acts performed by attorneys as part of their representation of a client in a judicial proceeding or other petitioning context are per se protected as petitioning activity by the anti-SLAPP statute."]; see also *Borough of Duryea v. Guarnieri* (2011) 564 U.S. 379, 402 ["the Petition Clause protects the right of individuals to appeal to courts and *other forums established by the government for resolution of legal disputes*"], emphasis added.) The anti-SLAPP statute protects statements in connection with litigation, even if they violate procedural rules or statutes. (*G.R.*, 185 Cal.App.4th at p. 612 [party's failure to redact personal identifiers in court filing, contrary to the rules of court, did not eliminate anti-SLAPP protection].)

b. Plaintiff's Claim Arises from Defendants' Participation—And His Own Participation—in a Quasi-Judicial Peer Review Hearing.

Plaintiff alleges that Defendants' retaliatory conduct included statements and writings in connection with the quasi-judicial hearings and appeals he requested. For example, Plaintiff complains that the Mission and St. Joseph MECs provided him with "Notice[s] of Charges," which Plaintiff believes "were false" and "brought against [him] in retaliation." (1 AA 233–234, 239–240; see also 2 AA 566, 598.) Plaintiff alleges that when Mission amended its "Notice of Charges," that "was a further act of retaliation against [him]." (1 AA 239–240.) According to Plaintiff, Mission and St. Joseph "further retaliated against" him by appealing—and even by "threatening to appeal"—JRC decisions. (1 AA 235, 241, ¶¶ 17, 29.) Plaintiff complains that this process was "humiliating" for him and constituted "character assassination." (1 AA 11, 14.)

Peer review is a "quasi-judicial" forum in which the parties adjudicate grievances in a litigation-like setting. Through peer review, the parties hold hearings, introduce evidence, call and cross-examine witnesses, debate the law, and exercise appellate rights. (Bus. & Prof. Code, §§ 809.2, 809.3.) Speech in connection with these adjudicatory processes arises from protected activity, as it would with other forms of litigation. (Cf. *G.R.*, 185 Cal.App.4th at p. 612.) As in litigation, physicians adjudicating their rights through peer review are exercising their right to

petition. (See *Briggs*, 19 Cal.4th at p. 1115 [The "constitutional right to petition ... includes the basic act of filing litigation or otherwise seeking administrative action."].)

Plaintiff himself requested the hearings Defendants provided. (2 AA 433; 3 AA 747.) In presenting Plaintiff with a Notice of Charges, Defendants were not only fulfilling their statutory obligations to provide notice of the charges (Bus. & Prof. Code, § 809.1), but also acting in furtherance of *Plaintiff's* right to petition for redress (see Code Civ. Proc., § 425.16, subd. (b)(1)). The MEC's exercise of appellate rights was similarly protected speech in connection with a quasi-judicial official proceeding, as was Plaintiff's own appeal of the Mission JRC's decision. (See 3 AA 738.) Just as Plaintiff would be entitled to anti-SLAPP protection for lawsuits arising from his exercise of peer review appellate rights, so the MEC is entitled to anti-SLAPP protection for exercising *its* appellate rights. Accordingly, Defendants' statements in connection with a peer review hearing, in which Plaintiff and the MEC both exercised petitioning rights, were protected activities under Section 425.16, subdivision (e)(2).

In sum, peer review committee discussions, MEC recommendations, Medical Board and NPDB reports, and written notices submitted during the hearing and appellate process are all "written or oral statement[s] or writing[s] made in connection with an issue under consideration or review by a[n] ... official proceeding authorized by law," within the meaning of anti-SLAPP statute subdivision (e)(2). (Code Civil Proc., § 425.16, subd. (e)(2).) Because these statements form the gravamen of Plaintiff's

retaliation cause of action, Defendants have met their burden to show that Plaintiff's claims arise from protected activity under prong one of the anti-SLAPP analysis.

III. PLAINTIFF'S CLAIM IS BASED ON CONDUCT IN FURTHERANCE OF SPEECH AND PETITIONING RIGHTS PROTECTED BY SECTION 425.16(e)(4).

As demonstrated above, peer review is a continuous process, suffused with speech and petitioning. Nevertheless, to the extent the Court determines that any individual aspect of peer review is *not*, by itself, a "statement or writing" under subdivision (e)(2), such an act would still qualify as "conduct in furtherance of" the speech and petitioning surrounding it, under subdivision (e)(4) of the anti-SLAPP statute.

A. Neither *Kibler* nor *Park* Addressed (e)(4) and This Case Presents the Full Scope of Peer Review Activity for the Court to Address.

Neither *Kibler* nor *Park* squarely addressed what conduct subdivision (e)(4) protects. In *Kibler*, the Court decided the case under subdivision (e)(2), and thus had no need to "decide whether that remedy would likewise have been available under subdivision (e)(4) of section 425.16 ...." (*Kibler*, 39 Cal.4th at p. 203.) Similarly, in *Park*, the Court noted that "the University ha[d] not developed or preserved" an argument relying on Section 425.16, subdivision (e)(4). (*Park*, 2 Cal.5th at p. 1072.)

Until *Park*, litigants and multiple decisions by the Court of Appeal interpreted *Kibler* as holding that peer review activities were protected under subdivision (e)(2) of the anti-SLAPP statute. (See, e.g., *Nesson v. Northern Inyo County Local Hospital Dist.* (2012) 204 Cal.App.4th 65, 84, disapproved of by *Fahlen v. Sutter Central Valley Hospitals* (2014) 58 Cal.4th 655, and *Park*, 2 Cal.5th 1057; *Fahlen v. Sutter Central Valley Hospitals* (2012) 208 Cal.App.4th 491, 502, review granted and opinion superseded by *Fahlen*, 58 Cal.4th 655; *DeCambre v. Rady Children's Hospital-San Diego* (2015) 235 Cal.App.4th 1, 15, disapproved of by *Park*, 2 Cal.5th 1057; *Melamed v. Cedars-Sinai Medical Center* (2017) 8 Cal.App.5th 1271, 1285, review granted and held pending resolution of this case (*Bonni*).) *Park* clarified a more limited scope of *Kibler* and disapproved of *Nesson* and *DeCambre* to the extent that they overread *Kibler*. (*Park*, 2 Cal.5th at p. 1070.) The Court further explained the anti-SLAPP statute's application—particularly subdivision 425.16(e)(4)—in *Wilson*. *Wilson* was decided in 2019, after this case was already pending before this Court.

In cases like this, where the Court issues decisions that significantly inform the legal landscape while a case is pending on appeal, the Court may exercise its discretion to hear arguments raised for the first time on appeal. (See, e.g., *RN Solution, Inc. v. Catholic Healthcare West* (2008) 165 Cal.App.4th 1511, 1518.) Given the Court's rulings in *Park* and *Wilson*, Defendants respectfully request that the Court consider whether peer review

activities are protected not only under Section 425.16, subdivision (e)(2), but also under subdivision (e)(4).

B. Subdivision (e)(4) Protects Conduct in Furtherance of Speech and Petitioning Rights on Issues of Public Interest.

Section 425.16 subdivision (e)(4) protects "*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." (Emphasis added.) The California Legislature added subdivision (e)(4) to the anti-SLAPP statute out of concern that courts had "too narrowly construed California's anti-SLAPP suit statute." (Jul. 2, 1997, Assembly Judiciary Committee Analysis at p. 3.) The amendment "clarifies that constitutionally-protected *conduct* (the rights of free speech and of petition) is unequivocally protected by the statute ...." (*Ibid*, emphasis added.) The amendment also "clarif[ies] the Legislature's intent that the provisions of section 425.16 be construed broadly." (*Ibid.*)

Subdivision (e)(4) "insulate[s]" the exercise of free speech and petitioning rights by protecting "not only the act of speaking," but "any other conduct in furtherance" of speech and petitioning rights. (*Wilson*, 7 Cal.5th at p. 893.) Thus, the protected acts need not *constitute* speech or petitioning, so long as they advance those rights. (*Ibid.* ["[T]he text's reference to acts 'in furtherance' of speech or petitioning rights can also reasonably be read to extend to at least certain conduct that, though itself containing no expressive elements, facilitates expression."]; *Collier v. Harris*

(2015) 240 Cal.App.4th 41, 53 ["The acts need not constitute speech; they merely need to help advance or facilitate the exercise of free speech rights."].)

A primary limiting factor for subdivision (e)(4)—not stated with respect to subdivisions (e)(1) and (e)(2)—is that the speech or petitioning activity must be "in connection with a public issue or an issue of public interest." (Code Civ. Proc., § 425.16, subd. (e)(4); see also *Wilson*, 7 Cal.5th at p. 900.)

C. Public Health and Patient Safety Are "Issues of Public Interest."

As it relates to all of Defendants' peer review actions discussed below, Defendants' conduct related to speech and petitioning "in connection with a public issue or an issue of public interest." (Code Civ. Proc., § 425.16, subd. (e)(4).) Matters of health "are undeniably of interest to the public." (*Nagel v. Twin Laboratories, Inc.* (2003) 109 Cal.App.4th 39, 47.) Courts have specifically recognized the public interest role of medical peer review committees in protecting patient safety. (*Matchett v. Superior Court* (1974) 40 Cal.App.3d 623, 628 [peer review "committees are affected with a strong element of public interest"]; accord *Gill v. Mercy Hospital* (1988) 199 Cal.App.3d 889, 897 ["[W]e are cognizant of the strong public policy in favor of effective medical peer review by hospitals."]; *Clarke v. Hoek* (1985) 174 Cal.App.3d 208, 220 ["There is a strong public interest in supporting, encouraging and protecting effective medical peer review programs and activities."].) Peer review thus easily meets this requirement.

Moreover, where the conduct under subdivision (e)(4) is in furtherance of speech protected under subdivision (e)(2), the Court may conclude that the conduct relates to an "issue of public interest." (See, e.g., *FilmOn.com Inc. v. DoubleVerify Inc.* (2019) 7 Cal.5th 133, 151 ["We explained in *Briggs* that although the statutory preamble did not impose 'an across-the-board "issue of public interest" pleading requirement,' we understood the Legislature to *equate* statements made in certain official proceedings with matters of 'public significance.'"].) Because peer review is an "official proceeding" the Legislature has described as "essential" to public health, peer review conduct relates to "a public issue or an issue of public interest" under subdivision (e)(4). (See Bus. & Prof. Code, § 809, subd. (a)(3); *Kibler*, 39 Cal.4th at 201.)

D. Summary Suspensions Are Acts in Furtherance of Speech and Petitioning Rights Because They Further Prompt Reporting to Law Enforcement and the Safe Exercise of Hearing Rights.

Plaintiff alleges that the St. Joseph and Mission MECs retaliated against him by summarily suspending his privileges pursuant to Business and Professions Code section 809.5 ("Section 809.5"). (1 AA 13, ¶ 16(1), (2).) Summary suspensions are interim measures that protect patients from imminent danger, while the physician exercises his or her hearing and appellate rights. (Bus. & Prof. Code, § 809.5, subd. (a) [summary suspensions authorized "where the failure to take that action *may result in an imminent danger* to the health of any individual, provided that the licentiate

is *subsequently provided with the notice and hearing rights* set forth in Sections 809.1 to 809.4 ...."], emphasis added.) Peer review bodies are required to immediately report most summary suspensions lasting in excess of 14 days to the California Medical Board, and summary suspensions lasting 30 days or longer to the NPDB. (See Bus. & Prof. Code, § 805, subd. (e).)

As described in detail below, summary suspensions are protected acts under anti-SLAPP subdivision (e)(4). Reporting to the California Medical Board and NPDB is an exercise of speech and petitioning rights. Summary suspensions are acts in furtherance of such reporting, and thus are acts in furtherance of the exercise of speech and petitioning rights. Summary suspensions are also acts in furtherance of speech and petitioning rights in connection with quasi-judicial peer review hearings. Summary suspensions facilitate peer review hearings because they (a) initiate the hearings; and (b) protect patient safety while the physician and MEC exercise their hearing and appellate rights.

1. Summary Suspensions Are Protected Acts in Furtherance of Speech and Petitioning Because Hospitals Must Report to the Medical Board and NPDB.

Reporting to the Medical Board—a government law enforcement agency that investigates and prosecutes wrongdoing—is an exercise of the right to petition. (See *Borough,* 564 U.S. at p. 388 ["The right to petition allows citizens to express their ... concerns to their government ...."]; *Chabak*, 154

Cal.App.4th at p. 1512 ["Monroy's statement to the police arose from her right to petition the government and thus is protected activity."]; *Arnett*, 14 Cal.4th at p. 7 [California Medical Board regulates physicians as an exercise of the state's police power].)

Under the anti-SLAPP statute, *acts* that facilitate government investigations and police reporting constitute protected conduct in furtherance of speech and petitioning rights. (See, e.g., *Takhar v. People ex rel. Feather River Air Quality Management Dist.* (2018) 27 Cal.App.5th 15, 28 [holding that acts facilitating air district's investigation were protected acts in furtherance of petitioning rights under the anti-SLAPP statute]; *Blue*, 23 Cal.App.5th at p. 153 [holding that OIG's investigative conduct prior to issuing a report constituted protected acts in furtherance of petitioning activity, particularly as OIG was required by law to investigate]; see also *Gallanis-Politis v. Medina* (2007) 152 Cal.App.4th 600, 611.)

Conduct in furtherance of Medical Board reporting is similarly protected under subdivision (e)(4) of the anti-SLAPP statute, because it is conduct in furtherance of the exercise of speech and petitioning rights. When the St. Joseph and Mission MECs summarily suspended Plaintiff's privileges, they were acting to further prompt Medical Board reporting—i.e., petitioning.

Arguably, the most critical reports peer review bodies make relate to summary suspensions. (See Bus. & Prof. Code, § 805, subd. (e).) That is because these early 805 reports enable the Medical Board to act quickly if a physician poses a danger to the

public. (See Bus. & Prof. Code, § 2229, subd. (c) [Medical Board must actively "seek out" negligent physicians].) Upon receiving a summary suspension report, the Medical Board may then (and almost always does) issue a subpoena to the reporting peer review body to further investigate. (See Bus. & Prof. Code, § 2220, subd. (a); Gov. Code, § 11181.) The California Medical Board relies heavily on summary suspension reports to promptly identify potentially negligent physicians and to initiate investigations. (See Bus. & Prof. Code, §§ 805, subd. (e), 809, subd. (a)(5).)

Failing to provide anti-SLAPP protection to an MEC that summarily suspends a physician would necessarily chill related 805 reporting and investigations. As the Court of Appeal recognized in the litigation context: "[W]e can think of few better ways to burden [the right of petition] than to make it difficult and perhaps legally risky for people to investigate and find evidence to support potential claims." (*Tichinin v. City of Morgan Hill* (2009) 177 Cal.App.4th 1049, 1069 [holding that hiring an investigator was conduct within the protected "breathing space" of the right of petition].) Likewise, making summary suspensions difficult and legally risky discourages MECs from protecting patients while they continue investigating and reporting on physician care to the Medical Board and NPDB.

For these reasons, the MECs' summary suspensions were acts in furtherance of speech and petitioning rights under subdivision (e)(4) of the anti-SLAPP statute. Promptly reporting dangerous conduct to government agencies is petitioning activity the anti-SLAPP statute was designed to protect.

2. Summary Suspensions Are Protected Acts in Furtherance of Speech and Petitioning in Connection with Peer Review Hearings.

Summary suspensions are also protected acts in furtherance of speech and petitioning rights in connection with quasi-judicial peer review hearings. Pursuant to Section 809.5, the MEC may only impose a summary suspension "provided that the licentiate is subsequently provided with the notice and hearing rights set forth in Sections 809.1 to 809.4." (Bus. & Prof. Code, § 809.5, subd. (a); see also 2 AA 527, art. X, § 3(6).) Summary suspensions further the exercise of petitioning rights during such peer review hearings because they (a) initiate the hearings, and (b) preserve public safety while the physician and MEC exercise petitioning and appellate rights during those hearings.

a. Summary Suspensions Further Petitioning Rights Because They Initiate Peer Review Hearings.

Peer review is a quasi-judicial proceeding authorized by law. (*Kibler*, 39 Cal.4th at p. 200.) The right to petition protects acts in connection with such quasi-judicial proceedings. (See *Borough*, 564 U.S. at p. 387 [In addition to the courts, the "Petition Clause protects the right of individuals to appeal to ... other forums established by the government for resolution of legal disputes."]; see also *Barri v. Workers' Comp. Appeals Bd.* (2018) 28 Cal.App.5th 428, 461 ["We see no meaningful distinction between the 'right of access to the court' to pursue a cause of action, from

the right of access to an appropriate administrative hearing to pursue a workers' compensation claim."].)

Under subdivision (e)(4), the anti-SLAPP statute applies to conduct—not just speech—in furtherance of petitioning in judicial proceedings. For example, "filing, maintaining, and funding a lawsuit" are all protected acts in furtherance of petitioning rights under the anti-SLAPP statute. (*Sheley v. Harrop* (2017) 9 Cal.App.5th 1147, 1167–1168; accord *Chavez v. Mendoza* (2001) 94 Cal.App.4th 1083, 1087 ["It is well established that filing a lawsuit is an exercise of a party's constitutional right of petition."].) This Court has held that filing a complaint is protected activity under the anti-SLAPP statute, even if the complaint is filed with malicious intent. (*Jarrow Formulas, Inc. v. LaMarche* (2003) 31 Cal.4th 728, 735.) Accordingly, this Court and "every Court of Appeal that has addressed the question has concluded that malicious prosecution causes of action fall within the purview of the anti-SLAPP statute." (*Ibid.*)

When the MEC imposes a summary suspension, it is similarly acting in furtherance of petitioning rights under the anti-SLAPP statute. Like the act of filing a civil complaint, the act of imposing a summary suspension is petitioning conduct, regardless of the defendant's intent. (Cf. *Jarrow*, 31 Cal.4th at p. 734.) Both a complaint and a summary suspension initiate judicial or quasi-judicial proceedings. Both actions also seek specified relief from the reviewing body. When imposing a summary suspension, the MEC seeks action by the hospital's governing body on behalf of patients. Ultimately, the hospital

board is responsible for approving, denying, or modifying every summary suspension, after the physician exercises hearing rights. (See 2 AA 522, art. IX, § 9.C(2) [MEC may impose summary suspensions "pending final decision by the governing body"].)

Under the Court's precedents protecting the initiation of lawsuits, the MEC's disciplinary recommendations should likewise be protected as acts in furtherance of quasi-judicial peer review hearings under subdivision (e)(4).

b. Summary Suspensions Further Petitioning Rights Because They Protect Public Safety While Hearings and Appeals Proceed.

Summary suspensions are also acts in furtherance of speech and petitioning rights under anti-SLAPP subdivision (e)(4) because they support the safe exercise of hearing rights. Summary suspensions ensure that peer review hearings may proceed carefully and deliberately, without fear that patients will be harmed, or even die, in the meantime. In this way, they are not unlike preliminary injunctions in court, which preserve the status quo while the parties exercise petitioning rights. (See *Collier*, 240 Cal.App.4th at p. 53 ["The acts need not constitute speech; they merely need to help advance or facilitate the exercise of free speech [or petitioning] rights."].)

The risk to public safety from chilling such suspensions is apparent. In *Kibler*, for example, the MEC summarily suspended Dr. Kibler based on his "threats of physical violence, including

assault with a gun." (*Kibler*, 39 Cal.4th at p. 194.) In this case, St. Joseph's MEC summarily suspended Plaintiff's privileges after a patient almost died. (2 AA 434.)

In contrast with suspensions, termination recommendations do not take effect until *after* a physician exercises hearing rights. (*Sahlolbei*, 112 Cal.App.4th at p. 1142.) As a result, without the ability to impose summary suspensions, the MEC could not prevent even the most patently unsafe doctors—including gun-assault-threatening Dr. Kibler—from treating patients over the course of months while they exercise hearing rights. Summary suspensions are critical to a *safe* hearing and appellate process. (Cf. *Sharp*, 121 Cal.App.4th at pp. 181–182.) These acts further and protect the exercise of petitioning rights.

c. Protecting Summary Suspensions Furthers the Purpose of the Anti-SLAPP Statute.

Protecting MEC-imposed summary suspensions furthers the anti-SLAPP statute's goal of protecting participation in matters of public interest. In *Park*, the Court noted that "denying 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 p. 1071, commenting on *Vergos v. McNeal* (2007) 146 Cal.App.4th 1387.) Similar concerns arise from subjecting the MEC to liability based on summary suspensions that have not yet been tested in peer review hearings or approved by the hospital board. (See *Park*, 2 Cal.5th at p. 1071.)

Moreover, protecting MEC-imposed summary suspensions under the anti-SLAPP statute does not require immunizing them from serious scrutiny for at least two reasons. First, summary suspensions are subject to multiple layers of review by different parties through the peer review hearing and appellate process. The hospital board ultimately takes responsibility for each final summary suspension. (See 2 AA 522, art. IX, § 9.C(2).) The physician may also challenge the hospital board's approval of a summary suspension through a writ of administrative mandate. (Code Civ. Proc., § 1094.5.) Second, as discussed further below, the anti-SLAPP statute does not prohibit meritorious claims from proceeding; it "only provides a procedure for weeding out, at an early stage, *meritless* claims arising from protected activity." (*Baral v. Schnitt* (2016) 1 Cal.5th 376, 384.)

For the reasons stated herein, summary suspensions are acts in furtherance of safe hearing and petitioning rights. Protecting summary suspensions under anti-SLAPP subdivision (e)(4) also protects the petitioning rights that suspensions facilitate.

E. Hospital Board Disciplinary Decisions Are Acts in Furtherance of Speech and Petitioning Rights Because They Further Candid Reporting to Law Enforcement and the Exercise of Judicial Appellate Rights.

Although Plaintiff names Mission and St. Joseph Hospitals as Defendants, his allegations against those entities are few. St. Joseph's Hospital board never imposed any discipline on Plaintiff

because the parties settled. (See Part III.F., *infra.*) Plaintiff's claims regarding Mission Hospital are similarly sparse. As one of over 19 alleged retaliatory acts, Plaintiff claims that Mission's Board of Trustees retaliated against him in December 2014, when it adopted the MEC and Appellate Committee's disciplinary recommendations. (1 AA 13 ¶ 16(6); see also 3 AA 792-794.)

For the reasons described below, hospital board disciplinary actions, like those that took place at Mission, are protected "conduct in furtherance of the exercise of" speech and petitioning rights under anti-SLAPP subdivision (e)(4). Hospital disciplinary actions further the exercise of petitioning rights because they encourage petitioning to law enforcement agencies through candid reporting to the Medical Board and NPDB. They also further petitioning rights because they protect patients while the physician exercises appellate rights in court, by filing a writ of administrative mandate.

1. Hospital Board Disciplinary Decisions Are Protected Acts in Furtherance of Speech and Petitioning Because Hospitals Must Report to the Medical Board and NPDB.

Hospital boards are ultimately responsible for patient safety at their respective facilities. (*Kibler*, 39 Cal.4th at p. 201 ["[T]he 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 ...."]; *Hongsathavij*, 62 Cal.App.4th at p. 1143; 42 C.F.R. § 482.12.) Hospital boards participate in peer review by

evaluating and acting on physician disciplinary recommendations. (See *Ellison*, 183 Cal.App.4th at pp. 1496–1497 ["a hospital governing body may exercise its own independent judgment about evidence presented to a peer review committee"].) In these public service roles, the Legislature has charged the hospital board to "act exclusively in the interest of maintaining and enhancing quality patient care." (Bus. & Prof. Code, § 809.05, subd. (d).)

Hospital board disciplinary recommendations guide and inform hospital reporting to the California Medical Board and NPDB. When the hospital board approves a disciplinary recommendation, it must immediately report that action, and the reasons for the action, to the California Medical Board and NPDB for further investigation. (Bus. & Prof. Code, § 805, subd. (b); 42 U.S.C. § 11133; 45 C.F.R. §§ 60.6, 60.11, 60.12.) Under NPDB regulations, the hospital must also submit a report even if it *rejects* the MEC's recommendation. (45 C.F.R. § 60.6.)

Hospital board disciplinary decisions support candid and critical Medical Board and NPDB reporting. If the board decisions that trigger those reports are not protected, the right to freely report errant physicians to the Medical Board and NPDB is weakened. If hospital boards are subjected to frivolous lawsuits any time they approve disciplinary recommendations, they may avoid imposing that discipline. As a result, the Medical Board will not receive related reports, which the Legislature found to be crucial to public safety. (See Bus. & Prof. Code, § 809, subd. (a)(5).) "It is important to remember that license suspension, revocation or other similar disciplinary proceedings involving

licensees are not for the purpose of punishment but primarily to protect the public served by the licensee employed by a hospital." (*Cipriotti v. Board of Directors* (1983) 147 Cal.App.3d 144, 157.)

For this reason, hospital board disciplinary actions are unlike the university board's employment decision in *Park*. In *Park*, the Court observed that—as it related to subdivision (e)(4)—the university had failed 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 p. 1072.) In contrast, when a hospital board acts on an MEC disciplinary recommendation, it is acting in furtherance of *hospital speech and petitioning* on an identifiable matter of public interest: patient safety.

As described above regarding summary suspensions, the hospital itself engages in speech and petitioning through reporting to government agencies, specifically the Medical Board and NPDB. (See, e.g., *Chabak*, 154 Cal.App.4th at p. 1512 ["Monroy's statement to the police arose from her right to petition the government and thus is protected activity."]; *Arnett*, 14 Cal.4th at p. 7 [California Medical Board regulates physicians as an exercise of the state's police power].) Because disciplinary reporting is mandatory, the hospital's choice of discipline necessarily defines both the existence and content of the hospital's reports to the Medical Board and NPDB. Anti-SLAPP protections ensure that the hospital's reporting is free from the threat of frivolous lawsuits challenging the decisions that trigger those reports.

2. Hospital Board Disciplinary Decisions Are Protected Acts in Furtherance of Speech and Petitioning in Connection with Judicial Appellate Rights.

When the hospital board adopts an MEC disciplinary recommendation, it is also acting in furtherance of speech and petitioning rights in connection with ongoing appellate proceedings. Like a jury decision, hospital board decisions are acts in the middle of an adjudicatory process, and may be challenged through a direct appeal. Hospital board disciplinary decisions are thus protected acts in furtherance of petitioning and litigation rights under anti-SLAPP subdivision (e)(4).

The hospital Board's approval of a disciplinary recommendation is not the end of peer review litigation. Physicians may judicially challenge a governing body's decision by petitioning for a writ of administrative mandate. (Code Civ. Proc., § 1094.5.) In this case, Plaintiff thus had the option of exercising further appellate rights, which he chose not to do.

Because Plaintiff sued for retaliation, he was not *required* to exhaust his remedies first. (*Fahlen v. Sutter Central Valley Hospitals* (2014) 58 Cal.4th 655, 660.) However, if physicians wish to sue for any damages cause of action, other than retaliation, they must first seek and obtain a writ of administrative mandate from the courts. (See *Westlake Community Hospital v. Superior Court* (1976) 17 Cal.3d 465, 469.) Moreover, even physicians suing for retaliation are still entitled to simultaneously challenge the merits of the peer review decision

through a writ of administrative mandate.

In sum, hospital board decisions *always* trigger additional hearing and appellate rights, because the physician is entitled to petition the court for a writ of administrative mandate. (Code Civ. Proc., § 1094.5.) The physician may waive those rights, as occurred here. But the hospital board decision itself is merely one more step in the appellate process, ending when the physician waives his or her appellate rights or when the court issues a final decision.

As discussed above, acts in furtherance of litigation rights are protected conduct under subdivision (e)(4). (See, e.g., *Jarrow*, 31 Cal.4th at p. 734.) When parties pursue an administrative writ, or defend against one, they are acting in furtherance of the right of petition. (See *Briggs*, 19 Cal.4th at p. 1115 ["[T]he constitutional right to petition ... includes the basic act of filing litigation or otherwise seeking administrative action."].) Hospital board disciplinary decision are thus acts in furtherance of petitioning rights, in connection with ongoing quasi-judicial and judicial proceedings, pursuant to subdivision (e)(4).

F. Hospital Board Settlement Offers Are Acts in Furtherance of Speech and Petitioning Rights.

Because Plaintiff and St. Joseph settled during the peer review appellate process, St. Joseph's hospital board never adopted any disciplinary recommendations against Plaintiff. (2 AA 451–455.) Thus, the only retaliatory acts Plaintiff alleges involving St. Joseph's hospital, as an entity, are "inducing and/or coercing" Plaintiff to enter into a settlement agreement and

allegedly breaching the agreement by allegedly erroneous reporting to the California Medical Board and NPDB. (1 AA 13 ¶ 16(1)–(3).)

These claims arise from protected activity under the anti-SLAPP statute. Entering into a settlement agreement is protected by the anti-SLAPP statute. (See, e.g., *GeneThera, Inc. v. Troy & Gould Professional Corp.* (2009) 171 Cal.App.4th 901, 908; *Takhar*, 27 Cal.App.5th at p. 28.) Petitioning the Medical Board in supposed breach of a settlement agreement is also protected by the anti-SLAPP statute. (See *Mundy v. Lenc* (2012) 203 Cal.App.4th 1401, 1409 [defendant's conduct of allegedly breaching a settlement agreement by filing a civil complaint was protected under the anti-SLAPP statute]; see also Part II.B.3, *supra* [Medical Board reporting is petitioning activity].)

IV. PLAINTIFF'S RETALIATION CAUSE OF ACTION IS, AT A MINIMUM, "MIXED" WITH PROTECTED ACTIVITY.

Even if the Court determines that certain allegations supporting Plaintiff's retaliation cause of action arise from unprotected activity, the analysis does not end there. Pursuant to *Baral v. Schnitt,* courts must still consider whether Plaintiff's claims are nevertheless "mixed" with allegations of protected activity. (*Baral*, 1 Cal.5th at 395.)

Following *Baral*, the Courts of Appeal are divided as to whether courts should strike the entire cause of action, or only individual allegations of protected activity, when confronted with

a special motion to strike on a mixed cause of action. (Compare *Sheley*, 9 Cal.App.5th at 1170 [holding that individual allegations of protected activity should be stricken]; with *Okorie*, 14 Cal.App.5th at p. 588 [holding that where the gravamen of the claim is protected activity, the entire cause of action should be stricken, and explicitly disagreeing with the court's analysis in *Sheley*].)

Nevertheless, there *is* general agreement that courts should not "reward artful pleading" by ignoring causes of action that rely, at least in part, on protected speech and petitioning activity. As this Court explained: "[I]n cases involving allegations of both protected and unprotected activity, the plaintiff is required to establish a probability of prevailing on any claim for relief based on allegations of protected activity." (*Baral*, 1 Cal.5th at p. 395.) "Unless the plaintiff can do so, the claim and its corresponding allegations must be stricken." (*Ibid.*)

Plaintiff's myriad allegations related to peer review activity include examples that unavoidably implicate speech and petitioning rights in connection with peer review. (See, e.g., 1 AA 13-14 ["Making defamatory statements about Plaintiff" and "Abusing the powers of the peer review process ...."].) Accordingly, the Court should hold that Plaintiff's cause of action arises from protected activity, and thus "[P]laintiff is required to establish a probability of prevailing" on his claim. (See *Baral*, 1 Cal.5th at p. 395.)

V. PROTECTING PEER REVIEW UNDER PRONG ONE FULFILLS BOTH THE PEER REVIEW AND WHISTLEBLOWER STATUTORY MANDATES

A. Legal Protections Are Critical to the Integrity of Peer Review.

The threat of meritless lawsuits chills peer review participation. (See, e.g., Bus. & Prof. Code, § 805.01, California Bill Analysis, S.B. 700 Sen., 3/23/2010 ["some suspect that there is reluctance among physicians to serve on peer review committees due to the risk of involvement in related future litigation"]; *West Covina Hospital v. Superior Court* (1986) 41 Cal.3d 846, 851-852 ["If doctors who serve on [peer review] committees were subject in malpractice cases to the burdens of discovery and involuntary testimony on the basis of their committee work, the evidentiary burdens could consume large portions of the doctors' time to the prejudice of their medical practices or personal endeavors and could cause many doctors to refuse to serve on the committees."].)

Through numerous immunities, privileges, and discovery bars, the Legislature has repeatedly recognized, and sought to mitigate, this risk. (See, e.g., Civ. Code, §§ 43.7, 43.8, and Bus. & Prof. Code, § 809.08 [qualified immunities for peer review activities]; Civ. Code, § 47, subd. (b) and *Kibler*, 39 Cal.4th at p. 201 [absolute immunity for peer review activities]; Bus. & Prof. Code, § 805.1, subd. (b) and Evid. Code, § 1157 [discovery bars for peer review documents]; see also 42 U.S.C. § 11101; *Matchett*, 40 Cal.App.3d at p. 629.) Without anti-SLAPP protections, however, the risk of chilling peer review remains. (See *Kibler*, 39 Cal.4th at

p. 201 [denying anti-SLAPP protections "would further discourage participation in peer review by allowing disciplined physicians to file harassing lawsuits against hospitals"].)

Since *Kibler* was decided in 2006, changes in the law have increased the risk that peer review will be chilled by frivolous lawsuits. Recent decisions by this Court and the Court of Appeal have confirmed that physicians subject to discipline may file retaliation lawsuits against hospitals while peer review proceedings against the plaintiff are ongoing. (See *Fahlen*, 58 Cal.4th 655 [plaintiffs need not exhaust available administrative mandamus remedies before suing peer review bodies under Health and Safety Code section 1278.5]; *Armin v. Riverside Community Hospital* (2016) 5 Cal.App.5th 810 [plaintiffs need not complete peer review before suing peer review bodies under Health and Safety Code section 1278.5]; cf. Health & Saf. Code, § 1278.5 [defining discriminatory actions as including "the threat" of limiting privileges].) There is real risk that without meaningful anti-SLAPP protection, disciplined physicians will file, or will threaten to file, unmeritorious lawsuits to discourage ongoing peer review proceedings against them.

B. The Anti-SLAPP Statute and Section 1278.5 Both Protect Patient Safety Whistleblowers.

As the Court of Appeal has recognized, "[p]eer review proceedings are not just potential instruments of retaliation. They can also be the instrument by which alarms about patient care can be aired." (*Armin*, 5 Cal.App.5th at p. 835.) Thus defendant peer review committee members "have the same right

to be whistleblowers about [the plaintiff's] allegedly substandard care that [the plaintiff] has to be a whistleblower about theirs." (*Ibid.*)

The two-pronged structure of the anti-SLAPP statute and the statutory protections of Health and Safety Code section 1278.5 ("Section 1278.5"), ensure that *all* whistleblowers—peer review participants and disciplined physicians alike—are protected. Prong one of the anti-SLAPP statute protects health facilities, and their peer review committees, against meritless retaliation lawsuits by disciplined physicians. Section 1278.5 and prong two of the anti-SLAPP statute protects physician whistleblowers against retaliation by health facilities. (See Health & Saf. Code, § 1278.5, subd. (b)(1).)

To invoke prong one of the anti-SLAPP statute, peer review participants must demonstrate to the court that the disciplined physician has sued them based on protected peer review activity. In this first stage, the physician's mere allegation that the peer review was retaliatory does not defeat anti-SLAPP protections. (See, e.g.; *Wilson*, 7 Cal.5th at p. 888.) "But the plaintiff's second-step burden is a limited one." (*Id.* at p. 891.) To prevail in the second stage of the anti-SLAPP analysis, Section 1278.5 plaintiffs need only show a prima facie case of retaliation. In this showing, plaintiffs are aided by Section 1278.5's rebuttable presumption of a retaliatory motive if the allegedly retaliatory act occurs within 120 days of their protected complaint. (Health & Saf. Code, § 1278.5, subd. (d)(1).)

While meritorious lawsuits will meet the "minimal merit" standard of the anti-SLAPP statute with ease, frivolous lawsuits will not. (See *Wilson*, 7 Cal.5th at 891.) As the Court observed, "the anti-SLAPP statute neither constitutes—nor enables courts to effect—any kind of 'immunity'.... When a 'complaint is both legally sufficient and supported by a sufficient prima facie showing of facts to sustain a favorable judgment if the evidence submitted by the plaintiff is credited,' it is not subject to being stricken as a SLAPP." (*Jarrow*, 31 Cal.4th at p. 738, quoting *Navellier*, 29 Cal.4th at p. 93.)

Ultimately, the anti-SLAPP statute "only provides a procedure for weeding out, at an early stage, *meritless* claims arising from protected activity." (*Baral*, 1 Cal.5th at p. 384.) Applying the anti-SLAPP statute to all aspects of peer review protects California patients by shielding peer review participants from frivolous lawsuits, without preventing physicians from making meritorious challenges to disciplinary recommendations.

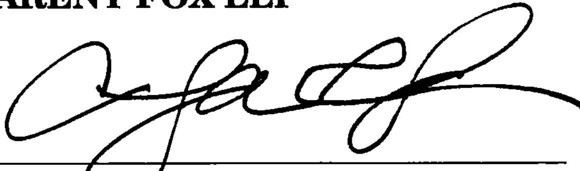
VI. CONCLUSION

Petitioning and speech are interwoven throughout peer review, and this public safety-oriented process deserves robust protection. Physicians and hospitals that engage in peer review should be vigorously protected by the first prong of the anti-SLAPP statute. Applying prong one of the anti-SLAPP statute to broadly protect peer review in all its forms will promote the vital policy concerns of protecting patients in California and across the

nation, while still protecting valid whistleblower claims under the second prong of the anti-SLAPP analysis.

Dated: January 17, 2020

ARENT FOX LLP

By: 

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CERTIFICATE OF COMPLIANCE

Pursuant to California Rules of Court, rule 8.520(c)(1), the undersigned hereby certifies that this Opening Brief on the Merits contains 13,845 words, exclusive of the cover page, tables, statement of the issue for review, signature block, and this certification, as counted by the Microsoft Word word-processing program used to general it.

Dated: January 17, 2020

By:

DEBRA J. ALBIN-RILEY

CERTIFICATE OF SERVICE

I am a citizen of the United States and employed in San Francisco County, California. I am over the age of eighteen years and not a party to the within-entitled action. My business address is 55 Second Street, 21st Floor, San Francisco, California 94105-3470. I am readily familiar with this firm's practice for collection and processing of correspondence for mailing with the United States Postal Service. On January 17, 2020, I placed with this firm at the above address for deposit with the United States Postal Service a true and correct copy of the within document:

OPENING BRIEF ON THE MERITS

[ ] (U.S. Mail) I am readily familiar with my employer's business practice for collection and processing of correspondence for mailing with the U.S. Postal Service, and that practice is that correspondence is deposited with the U.S. Postal Service the same day as the day of collection in the ordinary course of business. On this date, I placed the document(s) in envelopes addressed to the person(s) on the attached service list and sealed and placed the envelopes for collection and mailing following ordinary business practices.

I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on January 17, 2020, at San Francisco, California.

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Bonni vs. St. Joseph Health System, et al.

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