No. S259364

IN THE SUPREME COURT

OF THE STATE OF CALIFORNIA

SUNDAR NATARAJAN, M.D.,

Petitioner and Appellant,

vs.

DIGNITY HEALTH,

Respondent.

After a Decision of the Court of Appeal
Third Appellate District, No. C085906

San Joaquin County Superior Court
No. STK-CV-UWM-2-16-4821

RESPONDENT'S OPPOSITION TO APPELLANT'S MOTION TO STRIKE PORTIONS OF AMICUS BRIEF

MANATT, PHELPS & PHILLIPS, LLP
Barry S. Landsberg (Bar No. 117284)
Doreen Wener Shenfeld (Bar No. 113686)
*Joanna S. McCallum (Bar No. 187093)
2049 Century Park East, 17th Floor
Los Angeles, CA 90067
Telephone: (310) 312-4000
Facsimile: (310) 312-4224
jmccallum@manatt.com

Attorneys for Respondent DIGNITY HEALTH

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

CASES

STATUTES

TABLE OF AUTHORITIES
(continued)

Page

OTHER AUTHORITIES

RULES

I. INTRODUCTION

Appellant Sundar Natarajan, M.D. has moved to strike most of the amici curiae brief filed on December 1, 2020 by five individuals who are experienced hearing officers for physician peer review proceedings. The Hearing Officers' Brief presents relevant argument and perspective to assist the Court in its resolution of the issues in this case and Natarajan has presented no ground on which to strike it. Natarajan's motion should be denied.

II. THE MOTION TO STRIKE IS IMPROPER AND WITHOUT MERIT

A. A motion to strike is not the appropriate vehicle to express disagreement with views set forth in an amicus brief.

The purpose of an amicus curiae brief is to provide the Court with additional perspective and information that it would not otherwise have when deciding an important issue of California law and determining a rule that will apply to all stakeholders statewide. This Court repeatedly has made its position clear:

> Both our rules and our practice accord wide latitude to interested and responsible parties who seek to file amicus curiae briefs. Amicus curiae presentations assist the court by broadening its perspective on the issues raised by the parties. Among other services, they facilitate informed judicial consideration of a wide variety of information and points of view that may bear on important legal questions. For these reasons, *we are inclined, except in cases of obvious abuse of the amicus curiae privilege, not to employ orders to strike as a means of regulating their contents*.

(*Bily v. Arthur Young & Co.* (1992) 3 Cal.4th 370, 405, fn. 14

[emphasis added]; see also *Cornette v. Department of Transportation* (2001) 26 Cal.4th 63, 77 ["The amici curiae's brief raises a flurry of arguments, and plaintiffs have moved to strike most of them on the ground they were not presented in the trial court and not urged by the parties on appeal. Because amicus curiae presentations assist the court by broadening its perspectives on the issues raised by the parties, we are inclined, except in cases of obvious abuse of the amicus curiae privilege, not to employ orders to strike as a means of regulating their contents."].) Natarajan's motion does not mention these cases.

Therefore, Natarajan should have expressed his concerns with the Hearing Officers' Brief in his yet unfiled answer to that amicus brief.[1] (See Cal. Rules of Ct., rule 8.520(f)(7).) Indeed, he will likely do so, making this motion a waste of time. This Court is perfectly capable of deciding what information in an amicus brief holds relevance and value. But there is no reason to strike the Hearing Officers' amicus brief.

B. Natarajan has forfeited his objections to the Hearing Officers' Brief.

To the extent Natarajan's motion to strike presented any valid basis for striking an amicus brief (it does not, as discussed below), Natarajan has forfeited his objections by failing to assert them in the Court of Appeal.[2]

---

[1] Natarajan could simply have answered the amicus brief on the original due date of December 31. Instead, he sought and obtained an extension of time to answer amicus briefs, and filed this motion instead.

[2] It is ironic that Natarajan did not bother to object to these arguments in the Court of Appeal, which *is* a court of error and

In the Court of Appeal, three of the Hearing Officers (Moore, Coppo, and Zarbock) filed one amicus brief; another of the Hearing Officers (Harwell) filed another amicus brief. (See Exs. A, B.[3]) These two briefs make largely the same points as does the Hearing Officers' Brief in this Court. For example, the Hearing Officers' Brief here argues that experienced physician peer review hearing officers have unique qualifications that make them more effective hearing officers than other neutrals without that experience. (Hearing Officers' Brief, pp. 11-19.) The amicus briefs the Hearing Officers filed below made the same point. (See Amicus Brief of Carlo Coppo et al. ("Coppo Brief"), filed Dec. 17, 2018, pp. 11-14.) The Hearing Officers' Brief discusses the formal education and training for hearing officers offered through the California Society for Healthcare Attorneys (CSHA). (Hearing Officers' Brief, pp. 19-22.) The amicus brief filed by the Hearing Officers below discussed the same program. (See Coppo Brief, pp. 14-17.) The Hearing Officers' Brief argues that hearing officers' interest in preserving their reputation deters them from acting in a biased manner. (Hearing Officers' Brief, pp. 26-27.) The Hearing Officers' briefs below made the same point. (See Coppo Brief, p. 20.)

Natarajan did not move to strike the briefs filed by the

---

thus arguably is more confined to the record than is the Supreme Court when deciding law and policy.

[3] https://appellatecases.courtinfo.ca.gov/search/case/dockets.cfm?dist=3&doc_id=2236808&doc_no=C085906&request_token=NiIwLSEmTkw%2BWzBFSCJdUENIQEw6UTxbKyNOIzpSUCAgCg%3D%3D (Dec. 17, 2018 entries.)

Hearing Officers below. He did not accuse them of making improper factual assertions outside the record; did not argue that they were required to make a factual record in the trial court; did not argue that the discussion was irrelevant; and did not claim that they lacked credibility. Instead, he filed a single response to these two briefs, substantively addressing their arguments.

Therefore, to the extent any of the issues complained of in Natarajan's motion to strike actually exists, Natarajan cannot object to it being raised in this Court when he did not object to it being raised in the Court of Appeal.

C. The Hearing Officers' perspective is directly relevant to the issue before this Court.

Natarajan asks this Court to strike portions of the Hearing Officers' Brief because they are "irrelevant." This argument demonstrates Natarajan's failure to understand both the role of the Supreme Court and the purpose of amicus briefs.

The Rules of Court permit "any person or entity" to seek leave to file an amicus brief and require that the application "state the applicant's interest and explain how the proposed amicus curiae brief will assist the court in deciding the matter." (Cal. Rules of Ct., rule 8.520(f)(1), (3).) The Hearing Officers' application states that amici are "healthcare specialty lawyers whose careers span over 200 years" and explains that "[b]y presenting the perspective of experienced hearing officers on some of the issues presented by the parties, amici endeavor to assist this Court in understanding more completely the implications of its decision on the appeal. Neither Dr. Natarajan nor Dignity Health is in a position to address our viewpoint from

first-hand experience." (Hearing Officers' Brief, pp. 7, 9.) The Court granted the application and filed the brief. As noted, Natarajan still has an opportunity to respond with anything he wants to say. (Cal. Rules of Ct., rule 8.520(f)(7).)

But rather than simply responding to the brief, Natarajan asks the Court to strike most of it. According to Natarajan, the Hearing Officers' arguments are "irrelevant because they do not concern the events that occurred in this case, i.e., the hearing of Dr. Natarajan, or how Dignity Health holds hearings at the 39 hospitals it owns. . . . [T]his Court is required to render a decision based on the facts of this case." (Motion to Strike, p. 23.)

Natarajan is confused about review in the Supreme Court. This Court is not a court of error and did not accept review of Natarajan's case merely to ensure a particular result in his dispute. "The *court of appeal's* primary function is to review for *trial court error*; but the *supreme court's* purpose is to decide important legal questions and maintain statewide harmony and uniformity of decision. The supreme court's focus is *not* on correction of error by the court of appeal in a specific case." (Jon B. Eisenberg et al., Cal. Practice Guide: Civil Appeals and Writs (Rutter Group Nov. 2020) ¶13:1 [citing *People v. Davis* (1905) 147 Cal. 346, 348] [emphasis in original].)

Natarajan seems oblivious to the fact that this case no longer is merely a dispute about whether Robert Singer, the hearing officer in his case, was biased. Natarajan chose to *expand* the scope and impact of his dispute with Dignity Health regarding Singer when he asked this Court to review the case

and to express a binding opinion on what the hearing officer disqualification rule should be for every hearing officer in every peer review hearing and every hospital statewide. The notion that this Court must put on blinders and ignore information, context, and practical realities beyond the specific facts of Singer's engagement when it considers the matter and forms its opinion is simply wrong. This Court is poised to impose a rule that will affect, among others, all those who regularly serve as peer review hearing officers in California. Certainly, such individuals provide a valuable perspective that the parties cannot. Their views are directly relevant.

Moreover, the Hearing Officers' arguments are entirely in line with what an amicus brief is supposed to do. (See, e.g., *Ryan v. Commodity Futures Trading Comm.* (7th Cir. 1997) 125 F.3d 1062, 1063 (Posner, J.) ["An amicus brief should normally be allowed . . . when the amicus has an interest in some other case that may be affected by the decision in the present case . . . , or when the amicus has unique information or perspective that can help the court beyond the help that the lawyers for the parties are able to provide."].) As such:

> Amici advocate legal positions, examine policy issues, provide courts with unique perspectives, and point out the consequences of a court's action or inaction.
>
> . . .
>
> But the core role of an amicus is to make policy arguments that explain how adopting a new rule or rendering a particular decision will benefit or harm those who are not before the court, including other litigants and society as a whole. Policy arguments thus educate courts about practical considerations that courts may decide to factor into their legal analysis.

(Stephen G. Masciocchi, "What Amici Curiae Can and Cannot Do with Amicus Briefs" (April 2017) 46 Colo. Lawyer 23, 24 [footnotes omitted][4]; see also "Function and Role of *Amicus* Briefs in Public Health Litigation," Public Health Law Center[5] ["[A]n amicus' interest in the case is both more removed and frequently broader [than the parties']—an amicus may have an interest in another case that could be affected by the court's decision . . . . Or, the amicus may have 'unique information or perspective that could help the court' going beyond what the parties can, or wish to, provide."] [citation and footnote omitted].) "If an amicus brief that turns out to be unhelpful is filed, the [Court], after studying the case, will often be able to make that determination without much trouble and can then simply disregard the amicus brief. On the other hand, if a good brief is rejected, the [Court] will be deprived of a resource that might have been of assistance." (*Neonatology Assocs., P.A. v. Commissioner of Internal Revenue* (3d Cir. 2002) 293 F.3d 128, 133 (Alito, J.).)

The Hearing Officers' Brief provides the Court with unique perspectives and information about the consequences and practical considerations at play. Such information is relevant.

---

4 https://www.hollandhart.com/files/67900_What_Amici_Curiae_Can_and_Cannot_Do_with_Amicus_Briefs_CL_April_2017.pdf

5 https://www.publichealthlawcenter.org/sites/default/files/resources/phlc-fs-amicus.pdf

D. The Hearing Officers' Brief does not improperly rely on facts outside the record.

Natarajan argues that most of the Hearing Officers' Brief should be stricken because it relies on "facts" outside the record of this case. Natarajan is wrong here as well.

A court may properly "consider . . . assertions [by amici] even though they are not supported by citations to evidence in the record. '[I]t is not unusual for an amicus curiae brief to include factual material that is outside the record.'" (*Puentes v. Wells Fargo Home Mtg., Inc.* (2008) 160 Cal.App.4th 638, 648, fn. 7 [citing Jon B. Eisenberg et al., Cal. Practice Guide: Civil Appeals and Writs (The Rutter Group 2007) ¶ 9:210.1 and *Rivera v. Division of Indus. Welf.* (1968) 265 Cal.App.2d 576, 590, fn. 20].)[6] "[W]hen making policy arguments—which typically predict the effect of a legal ruling—amici can present 'factual information' that 'provides the basis for that prediction.' Furthermore, courts can be trusted to scrutinize the information to determine whether it is reliable and persuasive and to give it the weight it is due." (Masciocchi, *supra*, p. 24 [citation and footnotes omitted].)

While courts are reluctant to allow amici to raise new

---

[6] Natarajan proclaims *Puentes* is "incorrect" and an unwarranted extension of *Rivera*. However, *Rivera*—which did not involve a question about the scope of amici's arguments—addressed only the types of evidence that may be considered in Industrial Welfare Commission hearings, and noted by way of analogy that courts "habitually" cite "published research material on social and economic conditions" without cross-examination. (*Rivera*, 265 Cal.App.2d at 589-590 & fn. 20.) *Rivera* did not purport to impose limitations on amicus briefs.

issues not raised by the parties,[7] the Hearing Officers' Brief raises no new issues, but rather *directly responds* to assertions made by Natarajan and/or Dignity Health.[8] For example, the brief responds to Natarajan's assertion that retired judges and other neutrals are suitable hearing officers for hospital peer review proceedings. It also responds to Dignity Health's assertion that the broad disqualification rule Natarajan urges would be unworkable, impracticable, and unnecessary. The Hearing Officers' Brief does no more than provide the Court with the benefit of their experienced perspective on these precise issues already before the Court.

At any rate, much of what Natarajan characterizes as factual assertions outside the record are merely assertions and conclusions drawn from the peer review statutory scheme, case law interpretation of that scheme, and medical staff bylaws—including the St. Joseph's bylaws in the record of this case. (Hearing Officers' Brief, pp. 12-14, 16-19, 27-30.) All such items are front and center. For instance, Natarajan overlooks the

---

[7] See, e.g., *Professional Engineers in Cal. Gov't v. Kempton* (2007) 40 Cal.4th 1016, 1047, fn. 12.

[8] Even where an amicus does raise a new issue not raised below, this Court has observed that in some cases it may appropriately consider new issues that provide alternative grounds to affirm the Court of Appeal. (See *E.L. White, Inc. v. City of Huntington Beach* (1978) 21 Cal.3d 497, 511.) Moreover, the Court can consider new issues when it finds it appropriate to do so. (See, e.g., *Fahlen v. Sutter Central Valley Hospitals* (2014) 58 Cal.4th 655, 685-686 [discussing issue of federal preemption in amicus brief that "echo[ed]" and elaborated on the defendant's argument].)

statutory and bylaws basis of the Hearing Officers' argument that the responsibilities vested in hearing officers by statute and bylaws require unique knowledge and judgment borne of experience in peer review hearings. The assertion that jurists who have not undertaken the CSHA training will lack that knowledge and experience is a conclusion reasonably drawn from that premise. (Hearing Officers' Brief, pp. 23-24.) Notably, amicus curiae California Medical Association, which represents the interests of physicians such as Natarajan, similarly asserts that trained and experienced hearing officers are necessary.[9]

Natarajan's suggestion that if amici wanted to express a viewpoint in the Supreme Court proceedings, they were required to appear in the trial court and submit evidence is absurd. (Motion to Strike, pp. 16-17.) Amici are not parties to this case, they have no specific interest in the matters related to Natarajan's own hearing, and they had no reason to be interested in the matter at the trial court level or to put on evidence regarding the nature of the work of hearing officers. At the time of trial, there was no reason to anticipate that this case would

---

[9] See Amicus Curiae Brief of the California Medical Association, pp. 16-17 ("An experienced healthcare attorney is an expert on both peer review procedures and the nuanced legal considerations necessary to effectuate the nebulous task of 'impos[ing] any safeguards the protection of the peer review process and justice requires.' Bus. & Prof. Code §809.2(d). . . . The experience and knowledge required of CSHA's attorney hearing officers is necessary to navigate the myriad procedural and evidentiary issues that often arise during peer review proceedings.").

end up before this Court in a precedent-setting matter. Moreover, the case before the trial court was a petition for administrative mandamus to review the decision of the hospital board, which typically is confined to the administrative record. (See *Pomona Valley Hosp. Med. Ctr. v. Superior Court* (1997) 55 Cal.App.4th 93, 101.) Inviting interested observers into superior courts as amici, as opposed to courts of review, makes no sense.

Finally, Natarajan blatantly mischaracterizes *People v. Peevy* (1998) 17 Cal.4th 1184. Natarajan asserts that *Peevy* "held that evidence outside the record cannot be used to support a claim of systemic conduct." (Motion to Strike, p. 18.) By extension, he suggests that the Hearing Officers improperly rely on extrinsic evidence to support a claim that hospitals, medical staffs, and hearing officers systemically engage in "benign" conduct. (*Id.*, p. 19.) In fact, *Peevy* merely held that neither a party nor an amicus can introduce evidence on appeal to support an argument that was not made by the defendant below—regardless of what the argument is. In *Peevy*, the issue not raised below happened to be an assertion that the police engaged in particular systemic conduct, but *Peevy* did *not* say that extrinsic evidence cannot support a claim of systemic conduct under proper circumstances. The Court rejected the defendant's request for the Court to consider evidence that was not before the trial court and related only to this new issue. The Court likewise rejected attempts by amici to introduce the same or similar evidence, where "the issue upon which the exhibits are offered was not raised in the trial court, and no effort was made in that

court to supply similar evidence." (*Peevy*, 17 Cal.4th at 1205-1208 & fn. 4.)

The Hearing Officers' Brief provides no new facts and is a proper amicus brief.

E. The Hearing Officers are credible.

Natarajan's attack on the credibility of the Hearing Officers is obviously not an appropriate basis for a motion to strike. Rather, it goes to how much consideration to give their views as expressed in the amicus brief. Moreover, their purported lack of credibility arises only from the fact that they work as hearing officers and thus stand to gain or lose from the decision in this case. But *any* amicus has a point of view that reflects *its own stake* in the outcome of the case. That does not require that its views be stricken for lack of credibility. If it did, then countless amici would be prohibited from participating. It is not the role of an amicus to be neutral on the merits of the matter on which it is appearing as amicus.

Natarajan complains that he has not had the opportunity to cross-examine the Hearing Officers about the "factual foundations of their 'observations.'" (Motion to Strike, pp. 16-17.) He suggests that before they were permitted to appear as amici, he should have been entitled to dig into their own personal experiences of being hired by the same hospital system, their payment by hospitals, their other legal work for hospitals and medical staffs, and prior challenges to their service as hearing officers based on purported bias. (*Ibid.*) Such questions have nothing to do with the arguments the Hearing Officers are

advancing in their amicus brief. Rather, these types of questions would be potentially relevant only if one of these hearing officers were proposed to preside over a particular proceeding.

III. CONCLUSION

Natarajan's motion to strike should be denied.

Dated: January 7, 2021 MANATT, PHELPS & PHILLIPS, LLP

By: s/ Barry S. Landsberg
BARRY S. LANDSBERG
Attorneys for Respondent
DIGNITY HEALTH

PROOF OF SERVICE

I, Brigette Scoggins, declare as follows:

I am employed in Los Angeles County, Los Angeles, California. I am over the age of eighteen years and not a party to this action. My business address is Manatt, Phelps & Phillips, LLP, 2049 Century Park East, 17th Floor, Los Angeles, California 90067. On **January 7, 2021**, I served the within: **RESPONDENT'S OPPOSITION TO APPELLANT'S MOTION TO STRIKE PORTIONS OF AMICUS BRIEF** on the interested parties in this action addressed as follows:

Stephen D. Schear, Esq. Law Offices of Stephen D. Schear 2831 Telegraph Avenue Oakland, CA 94609 Telephone: (510) 708-9636 Email: steveschear@gmail.com Jenny Huang, Esq. Justice First 180 Grand Avenue, Suite 1300 Oakland, CA 94612 Telephone: (510) 628-0695 Email: jhuang@justicefirst.net Tara Natarajan 8111 Presidio Drive Cupertino, CA 95014 Telephone: (408) 250-7269 Email: tarabadwal@yahoo.com	*Attorneys for Petitioner and Appellant Sundar Natarajan, M.D.*

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

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this declaration was executed on **January 7, 2021**, at Los Angeles, California.

Brigette Scoggins

STATE OF CALIFORNIA
Supreme Court of California

PROOF OF SERVICE

STATE OF CALIFORNIA
Supreme Court of California

Case Name: **NATARAJAN v. DIGNITY HEALTH**
Case Number: **S259364**
Lower Court Case Number: **C085906**

1. At the time of service I was at least 18 years of age and not a party to this legal action.

2. My email address used to e-serve: **jmccallum@manatt.com**

3. I served by email a copy of the following document(s) indicated below:

Title(s) of papers e-served:

Filing Type	Document Title
OPPOSITION	Natarajan opp to motion to strike

Service Recipients:

Person Served	Email Address	Type	Date / Time
Tharini Natarajan Attorney at Law	tarabadwal@yahoo.com	e-Serve	1/7/2021 2:58:05 PM
Joanna McCallum Manatt Phelps & Phillips LLP 187093	jmccallum@manatt.com	e-Serve	1/7/2021 2:58:05 PM
Barry Landsberg Manatt Phelps & Phillips 117284	blandsberg@manatt.com	e-Serve	1/7/2021 2:58:05 PM
Stephen Schear Law Offices of Stephen Schear 83806	steveschear@gmail.com	e-Serve	1/7/2021 2:58:05 PM
Jenny Huang Justice First 223596	jhuang@justicefirst.net	e-Serve	1/7/2021 2:58:05 PM
Brigette Scoggins Manatt Phelps & Phillips LLP	bscoggins@manatt.com	e-Serve	1/7/2021 2:58:05 PM
Doreen Shenfeld 113686	dshenfeld@manatt.com	e-Serve	1/7/2021 2:58:05 PM

This proof of service was automatically created, submitted and signed on my behalf through my agreements with TrueFiling and its contents are true to the best of my information, knowledge, and belief.

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

1/7/2021
Date

/s/Joanna McCallum

Signature

McCallum, Joanna (187093)

Last Name, First Name (PNum)

Manatt Phelps & Phillips LLP

Law Firm