IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

No. S259364

SUNDAR NATARAJAN, M.D., Petitioner and Appellant, v. DIGNITY HEALTH, Respondent.	Court of Appeal Case No. C085906 County of San Joaquin Superior Court No. STK-CV-UWM-20164821

PETITIONER'S OPENING BRIEF ON THE MERITS

AFTER THE PUBLISHED DECISION BY THE COURT OF APPEAL
THIRD APPELLATE DISTRICT
OF NOVEMBER 20, 2019

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INTRODUCTION AND SUMMARY OF ARGUMENT

This case presents the question whether physicians at private hospitals have the same right to a quasi-judicial hearing officer without an appearance of bias as individuals who are parties in other quasi-judicial administrative hearings, arbitrations, civil litigation or criminal prosecutions.

The foundation of physicians' right to fair hospital hearings is their right to maintain their hospital privileges absent good cause to terminate those privileges. Since 1959, California courts have recognized that doctors depend on hospital privileges to pursue their careers. (*Wyatt v. Tahoe Forest Hospital* (1959) 174 Cal.App.2d 709, 715-716.)

In 1977, this Court recognized the importance of hospital privileges to physicians when it held that they have a fundamental vested property interest in those privileges. (*Anton v. San Antonio Community Hospital* (1977) 19 Cal.3d 802, 823-825.) It held that all California hospitals must give physicians a fair hearing before terminating their hospital privileges. (*Ibid*.) In *Kibler v. Northern Inyo County Local Hospital Dist.* (2006) 39 Cal.4th 192, 199-200, this Court recognized the importance of hospital hearings to both the public and physicians, and held that they are official proceedings authorized by law comparable to quasi-judicial public agencies. In *Mileikowsky v. West Hills Hospital & Medical Center* (2009) 45 Cal.4th 1259, 1267-68, this Court described how adverse results of hospital hearings can destroy a physician's career, and reaffirmed physicians'

fundamental vested property interest in hospital privileges and their right to fair peer review.

This Court has also repeatedly held that physicians working in public and private hospitals have the same due process protections. In *El-Attar v. Hollywood Presbyterian Med. Center* (2013) 56 Cal.4th 976, 987, this Court quoted with approval *Anton*: "[A] physician may neither be refused admission to, nor expelled from, the staff of a hospital, *whether public or private,* in the absence of a procedure comporting with the minimum common law requirements of procedural due process." (Emphasis by Court in *Anton*.)

An unbroken line of U.S. Supreme Court and California precedent has emphasized that unbiased adjudicators are fundamental to due process, as this Court described in *Haas v. County of San Bernardino* (2002) 27 Cal.4th 1017*,* 1025-1032. When the Legislature codified physicians' common law right to a fair hearing, it enacted Business and Professions Code § 809.2[1] to protect physicians' right to an impartial hearing officer.

The appearance of bias is the standard applicable to adjudicators in all judicial and quasi-judicial proceedings in California, whether public or private, as will be shown below. When, as here, there is evidence that an adjudicator is subject to influence by personal financial interests, disqualification is subject to "the least forgiving scrutiny." (*Haas,* 27 Cal.4th at 1025.) In such cases, proof of

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[1] All statutory references are to the Business and Professions Code unless otherwise indicated.

actual bias is not required; the question is rather whether there was a possible temptation to the average judge not to be entirely fair. (*Ibid.*)

In this case, Respondent Dignity Health ("Dignity") was an economic competitor to Dr. Natarajan, with a substantial financial motive to eliminate his thriving hospitalist practice. (17 PAR 4170-4174; 19 PAR 4624.)[2] After initiating charges against Dr. Natarajan, Dignity appointed A. Robert Singer as the hearing officer. At that time, Singer had previously been chosen as the hearing officer for nine other Dignity hearings, and Dignity had paid him over $210,000 for his services. (AAR 318.) At the time of his appointment in Dr. Natarajan's case, nothing prevented Singer from serving again as hearing officer in any of Dignity's 34 hospitals. (1 PAR 251-252; 20 PAR 4846-4847; AAR 52-59.) Under *Haas*, Singer therefore had an appearance of bias, because he had a financial incentive to favor Dignity, in order to increase the likelihood of future remunerative appointments. (*Id.,* 27 Cal.4th at 1031.)

In the Court of Appeal, Dignity did not dispute that the hearing officer had an appearance of bias, but argued that the applicable standard was actual bias. (Dignity Brief ("DB", pp. 27-28.) The Court of Appeal adopted that argument. (*Natarajan v. Dignity Health* (2019) 42 Cal.App.5th 383, 390-391, "*Natarajan*".) It refused to apply the common law governing the selection of quasi-judicial

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[2] "PAR" is the Petitioner's Administrative Record prepared after the conclusion of the hearing and the internal hospital appeal. "AAR" is the Augmented Administrative Record filed after the trial court granted motions to augment.

hearing officers as set forth in *Haas* and *Yaqub v. Salinas Valley Memorial Healthcare System* (2004) 122 Cal.App.4th 474. (*Natarajan,* at 389.) It asserted that the common law did not apply to hospital fair hearings, despite its recognition that this Court "seemed" to apply common law principles to those hearings in *El-Attar.* (*Ibid.*)

Natarajan instead relied on a single isolated phrase from Section 809.2, subd. (b). It ignored both the purpose of Section 809.2 and the part of the statute that demonstrates that the Legislature intended for hospital hearing officers to be impartial, failing to follow fundamental rules of statutory construction. It also held for the first time in any California case that the "fair procedure" applicable to private hospital hearings does not provide the same protections as the constitutional due process required for public agency hearings affecting individual rights, contrary to *Applebaum v. Board of Directors* (1980) 104 Cal.App.3d 648, 657, and multiple other cases.

The appearance of bias standard not only *is* the law governing hospital hearings, it *should* be the law, because of California's strong public policies favoring fair peer review, public health and safety, and the integrity of our legal system. There is no rational basis for providing physicians who work at private hospitals less protection from biased hearing officers than physicians at public hospitals, or for believing that private hospital corporations are less likely to try to bend a quasi-judicial hearing in their favor than public agencies. To the contrary,

as this case demonstrates, private hospital corporations have incentives to unfairly tilt hearing procedures in their favor that do not exist in the public sector.

In addition, a holding in this case affirming that "fair procedure" provides the same basic protections as constitutional due process will avoid a challenge to California law as violating federal due process, because it will make clear that a physician's fundamental vested property interest in hospital privileges cannot be taken without due process.

ISSUE PRESENTED

This Court granted review of the following issue: "Does a physician with privileges at a private hospital have the right to disqualify a hearing officer in a proceedings for revocation of those privileges based on an appearance of bias (see *Haas v. County of San Bernardino* (2002) 27 Cal.4th 1017) or must the physician show actual bias?"

STATEMENT OF FACTS

A. Dr. Natarajan Was a Leading Hospitalist in Northern California.

After completing a dual residency program in internal medicine and pediatrics in Ohio in 2002, Dr. Natarajan began working as a hospitalist, then a new field of medicine. (16 PAR 3739-3740, 3749-3750.) In 2004, he started practicing in Modesto for the Gould Medical Group. (16 PAR 3742.) Based on his success with Gould, Stockton's Dameron Hospital hired him as the Hospitalist Director for its new hospitalist program. (16 PAR 3743-3745.) While at

Dameron, Dr. Natarajan was elected President of the Society of Hospitalist Medicine – Northern California Chapter and helped develop some of the first standards and guidelines for hospitalists. (16 PAR 3749-3750.) In 2007, Dignity (then "Catholic Healthcare West") hired Dr. Natarajan to be Director of its hospitalist group at St. Joseph's Medical Center in Stockton. (16 PAR 3750.)

Dr. Natarajan is a highly competent physician. At the time of his hearing, he had treated approximately 10,000 different hospitalized patients. (16 PAR 3756.) He has never been sued for malpractice. (*Ibid.*) Before St. Joseph's 2013 charges, no one had raised any issues about Dr. Natarajan's competence. (16 PAR 3742-3752.) While Director of Dignity's hospitalist group at St. Joseph's, there were no criticisms of the quality of his medical documentation or his medical care. In fact, he was praised for his excellent medical record-keeping practices. (16 PAR 3751-3752.) He scored extremely high on St. Joseph's objective measures of clinical competence. (8 PAR 1786-1825.) Peer evaluations of his competence were also consistently excellent. (*Ibid.*) Dr. Natarajan received several awards for providing compassionate care. (19 PAR 4648-4652.)

B. Dignity Was an Economic Competitor of Dr. Natarajan and Initiated the Termination of His Privileges.

In 2013, when Dignity initiated an investigation of Dr. Natarajan, it had a financial incentive to terminate his hospital privileges at St. Joseph's. In 2008, Dignity did not renew his contract as Director of its hospitalist group, after he

complained about inappropriate hospital practices. (16 PAR 3752-3754.) Dr. Natarajan then started his own group, Central Valley Hospitalists (CVH). (*Ibid.*) CVH thrived, because many of Stockton's primary care physicians decided to use it for hospitalist services. (6 PAR 1219; 17 PAR 4278-4282.) Dignity tried to buy out Dr. Natarajan's group but he refused. (6 PAR 1376.) By 2013, St. Joseph's own hospitalist group had lost approximately $600,000 each year in the five years after Dr. Natarajan's departure, because of its low patient census. (17 PAR 4170-4174; 19 PAR 4624.)

Dignity then acted to eliminate its competitor. In 2013, a St. Joseph's vice-president, Dr. Susan McDonald, initiated an investigation of Dr. Natarajan. (6 PAR 1359.) Although the investigation was supposed to be a medical staff investigation, hospital administrators and the hospital's attorney, Harry Shulman, attended the investigating committee's meetings. (5 PAR 1013; 1082; 1109; 1114; 1153; 1168; 1177; 6 PAR 1207; 1317; 1337.) Dr. Scott Neeley, a Dignity vice-president who was not a member of the medical staff, strongly advocated terminating Dr. Natarajan's privileges at those meetings. (6 PAR 1317-1325; 1337-1340; 15 PAR 3548-3549.) In violation of the hospital's bylaws, the hospital's Medical Executive Committee (MEC) never conducted its own investigation, despite Dr. Natarajan's request for an MEC investigation, before it issued a recommendation to terminate his privileges. (7 PAR 1608-1609; 6 PAR 1371-1379; 18 PAR 4320-4322.)

C. Dignity Refused to Appoint a Neutral Hearing Officer.

Dr. Natarajan requested a hearing on March 31, 2014. He asked for the hearing officer and physician hearing panel to be appointed by mutual agreement or to be neutrally selected. He described how Donald Wiley, the President of St. Joseph's, had attempted to weaken his group by trying to persuade local primary care physicians not to use it and by trying to hire away physicians from his group. He pointed out that the hospital had financial conflicts of interest that disqualified it from appointing the hearing officer. (1 PAR 216-219.)

He then described how hospitals usually appoint hearing officers who are hospital attorneys that have an economic incentive to please the hospitals in order to get future work. Dr. Natarajan offered to accept as a hearing officer any of 13 retired judges and a retired Court of Appeal justice. He further offered to consider any other retired judge or any other attorney qualified to serve as the hearing officer. He stated that if the parties were unable to agree on a hearing officer, he was willing to have the hearing officer selected by a superior court judge or other agreed-upon neutral party. (*Ibid.*)

Dignity ignored Dr. Natarajan's request for a neutral hearing officer and instead selected A. Robert Singer. (1 PAR 238-241.) At his voir dire, Singer testified that Todd Hecox, a Dignity attorney, initially called him about the appointment. (*Ibid.*) He further testified that after a gap in time, perhaps a week or two or possibly less, a hospital administrator or the Chief Medical Officer

(CMO) called him to confirm the appointment. (*Ibid.*) The hospital's CMO was Dr. Neeley, the hospital vice-president who had previously advocated Dr. Natarajan's termination. (15 PAR 3516.) Singer testified that following that conversation with the hospital administrator, Dignity sent him its proposed contract. (1 PAR 244-245.)

Discovery later ordered by the Superior Court shows that the fee agreement was sent by email on April 1, 2014, just one day after Dr. Natarajan's hearing request. (AAR 52.) The initial phone call therefore took place before Dr. Natarajan had even requested a hearing, if Singer was testifying truthfully. On April 2, 2014, the hospital sent Dr. Natarajan a letter stating that the hospital's president had selected Singer. (19 PAR 4655-4657.) Thus, it is undisputed that as a matter of fact, an agent of Dignity appointed Singer, contrary to Dignity's subsequent argument that it was actually the hospital's medical staff that appointed him. Donald Wiley, the hospital president that appointed Singer, was the same individual who had previously tried to weaken Dr. Natarajan's hospitalist group, as described above.

Harry Shulman, the attorney who represented both the hospital and the medical staff during the Natarajan hearing, had been Dignity's attorney for 30 years. (6 PAR 1346.) He had also been friends with Singer for at least 30 years. (1 PAR 269-271.) Singer has had several lunches with Shulman and has been to his house. (*Ibid.*) Since 2001, Singer has been the hearing officer for one of

Shulman's clients three to seven times in cases where Shulman was the attorney for the medical staff. (*Ibid*.) Singer stated at his voir dire that the physician did not win the hearing in any of those cases or in any other case in which Singer was the hearing officer. (1 PAR 272-273.)

D. Singer's Agreement to Serve as a Hearing Officer Was With Dignity, Not St. Joseph's, and Singer Had the Opportunity for Future Work at 33 Dignity Hospitals.

On April 1, 2014, Todd Hecox, a senior in-house counsel for Dignity, sent Singer a contract to serve as the hearing officer in Dr. Natarajan's case. (AR 53-55.)[3] The contract Hecox sent to Singer did not contain any limitation on Singer's ability to serve again as a hearing officer at St. Joseph's or any other Dignity facility. (*Ibid*.) Dignity's 2009 contract with Singer for hearing officer work at another hospital also did not contain any such provision. (AAR 56-59.)

Singer requested that his contract for the Natarajan case be changed to add a three-year limitation on his service as a hearing officer at St. Joseph's only after it became apparent that the *Haas* doctrine might be an issue in this case. On April 17, 2014, at 11:40 a.m., before Singer's voir dire, Dr. Natarajan requested a copy

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[3] Singer testified at his voir dire that he had signed an agreement to serve as the hearing officer in Dr. Natarajan's case and that Todd Hecox had not signed the contract. (1 PAR 246, 250-251.) However, that testimony was untrue on both counts. Hecox had signed the contract (AAR 55) and the contract was never signed by Singer. (*Ibid.*, 7 CT 1840.)

(References to "CT" are to the Clerks' Transcript, as [Volume] CT [page].)

of Singer's contract as hearing officer. (19 PAR 4785-4786.) At 1:35 p.m. the same day, Dignity's attorney Shulman referenced *Haas* in an email asserting that Singer had no obligation to disclose the agreement. (*Ibid.*) Less than 90 minutes later, Singer sent an email to Hecox suggesting a three-year limitation on his ability to serve as a hearing officer at St. Joseph's. (AAR 60.) Singer later admitted that receiving the emails about his contract and *Haas* may have triggered his request for the three-year limitation. (AAR 34.)

Both Singer and Dignity claimed below that St. Joseph's was a separate entity from Dignity. (1 PAR 245-246; 1 CT 145-148, 151-154.) However, after Dr. Natarajan challenged that claim, Dignity admitted that St. Joseph's was not a separate legal entity but only a fictitious business name. (7 CT 1838.)

The engagement letter was on Dignity letterhead and signed by a Dignity lawyer. (AAR 53-55.) Singer sent his bills for hearing officer work to Dignity and Dignity paid him. (AAR 71-266; 1 PAR 244.)

Singer testified in his voir dire that he had no expectation of future employment from Dignity. (1 PAR 1 268-269.) He also testified that he considered the medical staff as the entity that was responsible for his appointment, even though Dignity was "the payor." (1 PAR 242-244.) Singer's fee agreement did not preclude him from working at any of Dignity's 34 hospitals other than arguably St. Joseph's. (1 PAR 251-252; 20 PAR 4846-4847.) At his voir dire, Singer testified that he had "no clue" how many hospitals Dignity owned. (1 PAR

267.) Singer admitted at his deposition that his statement had been untrue, and that he actually knew that Dignity owned at least 10 hospitals "and presumably more." (AAR 36-37.)

E. At His Voir Dire, Singer Concealed That He Had Been Paid Over $210,000 By Dignity Since Leaving His Law Firm.

At his voir dire on April 24, 2014, Singer testified that Dignity had paid him for work as a hearing officer for seven different hospital hearings. (1 PAR 244; 1 PAR 262-266.) Discovery ordered by the Superior Court showed that Dignity or one of its affiliates had actually selected him to perform work on nine different hearings at that time. (AAR 318.) At the time of the voir dire, he was simultaneously engaged as a hearing officer for four different Dignity hospitals. (1 PAR 262-266.)

Singer refused to produce his fee agreement and written communications with Dignity despite Dr. Natarajan's pre-voir dire request for those documents. (1 PAR 231-237.) He refused to provide any information about his hourly rate for the Natarajan hearing (1 PAR 242); how much he had earned from past work for Dignity (1 PAR 264); why he had asked for his engagement letter to be changed to make himself ineligible to serve as a hearing officer for three years at St. Joseph's (1 PAR 248); the largest fee he had received as a hearing officer or his average fee for doing a hearing. (1 PAR 260.) At the conclusion of the voir dire, Singer denied Dr. Natarajan's request to make a written challenge to his service. (1 PAR

277-278.) After oral argument, he denied Dr. Natarajan's motion to disqualify him without stating his reasoning for that decision. (*Id.* at 290.)

Discovery ordered by the Superior Court showed that at the time of Singer's voir dire he had already earned over $210,000 from Dignity or Dignity-affiliated entities for his work as an attorney or hearing officer after leaving his prior law firm. (AAR 314-318.) He received another $168,835 for the four Dignity hearings that he was engaged in at the time of his voir dire. (*Ibid.*) He received $41,683 for an eleventh Dignity hearing after Dr. Natarajan's hearing was concluded. (*Ibid.*) In total, he received approximately $421,000 from Dignity after leaving his law firm in 2001. (The summary of billings on AAR 318 does not include the approximately $60,000 earned by Singer as counsel to a Dignity Medical Staff from 2001-2006.) (AAR 38-47; AAR 314-318.)

F. Dignity Paid a Substantial Part of Singer's Income.

At Singer's deposition, he testified that 51 per cent of his income in both 2011 and 2014 came from Dignity. (AAR 48-50.) In other years between 2010 and 2014, it varied from 13 to 24 percent of his income. (*Ibid.*)

G. The Hearing Officer Influenced the Outcome of the Hearing.

An example of the hearing officer's influence on the hearing was his ruling denying Dr. Natarajan's objection to Dr. Richard Goldman's service on the hearing panel. Dr. Goldman, like all of the panel members, was unilaterally appointed by Dignity. (19 PAR 4704.) He received direct compensation from Dignity for

serving as a medical director amounting to 5% of his income per year (2 PAR 501-502) and received an additional substantial financial subsidy of over $100,000 per year for staffing and office rent. (2 PAR 502, 525-526.) His practice was entirely dependent on the hospital's good will. (*Ibid.*) Dr. Goldman was friends with Judith Rego, a hospital manager who testified against Dr. Natarajan. (2 PAR 496-497; 20 PAR 4935; 14 PAR 3178.) Singer nonetheless overruled Dr. Natarajan's objection to Dr. Goldman. (3 PAR 571-579.)

The hearing officer made numerous rulings limiting Dr. Natarajan's evidence. (For example, see 22 PAR 5496-5501, 5694-5696; 25 PAR 6339-6344.) He also refused to give the hearing panel written jury instructions, even though the MEC, Dr. Natarajan and the hearing officer himself had agreed upon the content of the instructions, and Dr. Natarajan and the MEC agreed that the written instructions should be given. (34 PAR 9180-9184; 35 PAR 9317-9344; 9369-9375; 9387-9393; 9400.) The hearing officer did not give the panel any oral instructions on the law before they deliberated. Because his deliberations with the hearing panel were not recorded, there is no record of his oral instructions to the panel. (19 PAR 4528.) The hearing officer wrote the decision terminating Dr. Natarajan's privileges. (AAR 306.) The decision was his accumulation of negative facts he had compiled from the hearing with additional pejorative comments about Dr. Natarajan. (35 PAR 9426-9461.) Only one member of the hearing panel signed the decision, so it is unknown if four of the five hearing panel

members agreed to the decision. (35 PAR 9461.)

H. Dr. Natarajan Exhausted Dignity's Internal Appeal Procedure.

The only internal appeal mechanism available to Dr. Natarajan was an internal appeal in which the hospital's community board appointed three of its members to hear the appeal. (7 PAR 1621-1622.) Dr. Natarajan appealed based on the unfairness of the hearing. The appeal panel split on whether the appeal should be granted, rejecting the appeal on a two-to-one vote. (1 PAR 103, 211.)

PROCEDURAL HISTORY

On May 18, 2016, Dr. Natarajan filed a Petition for Administrative Mandamus in the Superior Court of San Joaquin County pursuant to Code of Civil Procedure § 1094.5, alleging that he had not received a fair administrative hearing from Respondent Dignity Health before it terminated his hospital privileges. (1 CT 1-23.)

The trial court granted Dr. Natarajan's Motion to Augment the Record to discover information that Singer had refused to provide at his voir dire. (1 CT 372-374.) It ordered Singer's deposition and required him to produce, inter alia, his fee agreement and his bills to Dignity. Dignity filed a Petition for a Writ of Prohibition in the Third District Court of Appeal challenging the augmentation. Its Petition was summarily denied on November 4, 2016. (Case No. C083162.) Singer nonetheless refused to attend the deposition and filed a motion for a protective order to prevent it. (2 CT 435, 455-456.) The trial court denied his

motion and again ordered his deposition. (3 CT 847-849.) After Singer's deposition, Dr. Natarajan filed a second motion to augment the record to add the transcript and documents from the deposition that was granted in part. (8 CT 2185-2186.)

After briefing and oral arguments on Dr. Natarajan's Petition, the trial court tentatively denied the writ. (8 CT 2188-2192.) Dignity prepared a Statement of Findings of Fact and Conclusions of Law that the Court issued. (9 CT 2513.) The Court denied the Petition on the grounds that the hearing officer's opportunity to obtain future work at Dignity hospitals other than St. Joseph's was not a "direct financial benefit" under Section 809.2, subd. (b) and that St. Joseph's had used objective standards in the hearing. (9 CT 2520.) The judgment denying the Petition was filed on September 27, 2017. (9 CT 2523-2524.)

Dr. Natarajan appealed. (9 CT 2563.) The California Hospital Association (CHA) and a group of hospitals headed by John Muir Health each filed amicus briefs in support of Dignity's position, as did four hospital hearing officers in two separate amicus briefs. The California Medical Association filed an amicus brief in support of neither party.

On October 22, 2019, the Court of Appeal issued an unpublished opinion denying Dr. Natarajan's Petition. The Court of Appeal issued a published opinion on November 20, 2019, following requests to publish by Dignity, the CHA, two hospital systems and two hearing officers. This Court granted review on February

26, 2020.

Dr. Natarajan seeks to reverse the Court of Appeal's decision and to obtain a writ of mandate overturning the adverse hearing decision on the ground that the hearing was unfair.

STANDARD OF REVIEW

Dignity's decision to terminate Dr. Natarajan's privileges can be upheld only if it was the result of a fair procedure. (Code of Civil Procedure § 1094.5, subd. (b).) Whether Dignity used a fair procedure is a question of law, which this Court must independently review de novo based on the administrative record. (*Pomona Valley Hospital Medical Center v. Superior Court* (1997) 55 Cal.App.4th 93, 101; *Rosenblit v. Superior Court* (1991) 231 Cal.App.3d 1434, 1443.)

LEGAL DISCUSSION

I.. THE APPEARANCE OF BIAS STANDARD APPLIES TO QUASI-JUDICIAL ADMINISTRATIVE HEARINGS, JUDICIAL HEARINGS AND ARBITRATIONS IN CALIFORNIA.

A. The Common Law Appearance of Bias Standard Applies to Ad Hoc Hearing Officers in Quasi-Judicial Hearings.

Because of the fundamental importance of impartial adjudicators in our system of justice, California law has applied the appearance of bias standard to judicial and quasi-judicial proceedings, both public and private, when there was evidence that an adjudicator's personal financial interest or other personal or

professional relationships might affect his or her neutrality.

In *Haas v. County of San Bernardino, supra,* this Court thoroughly analyzed the issue of the appointment of ad hoc hearing officers in administrative hearings, quoting with approval the holding in *Goldberg v. Kelly* (1970) 397 U.S. 254, 267, 271, that rudimentary due process requires an impartial decision maker in administrative hearings. (*Id.,* 27 Cal.4th at 1025.) The Court firmly held that the appearance of bias standard applies to administrative hearing officers who, as here, have a pecuniary interest in the outcome of a case because of the possibility of future employment by the hiring entity. (*Id.* at 1024-25, 1033.)

Haas applied a standard first used in *Tumey v. Ohio* (1927) 273 U.S. 510, 532, and more recently applied in *Caperton v. A. T. Massey Coal Co.* (2009) 556 U.S. 868*,* 886: whether the circumstances presented "a possible temptation to the average judge" to favor one side of the dispute. (*Haas,* at 1025-1026.) When an entity unilaterally controls the hiring of ad hoc hearing officers, they have a financial incentive to favor the hiring entity, to increase their chances of gaining more work in the future. (*Ibid.*)

Haas recognized that under U.S. Supreme Court precedent, disqualification of a judge for financial interests was required only if those interests were "direct, personal, substantial and pecuniary" rather than "slight." (*Id.* at 1031.) The Court then held that a "direct, personal, and substantial pecuniary interest does indeed exist when income from judging depends upon the volume of cases an adjudicator

hears and when frequent litigants are free to choose among adjudicators, preferring those who render favorable decisions." (*Id.* at 1031-1032.) The Court held that the ad hoc hearing officer hired by the defendant on a single occasion had a disqualifying pecuniary interest because she might be hired again in the future. (*Ibid.*)

Haas was the first California case to specifically address the problem of ad hoc hearing officers with an interest in pleasing the hiring entity to obtain future work. However, it was based on a long and consistent line of cases prohibiting adjudicators with a financial interest in the outcome of a hearing. As stated in *Haas*:

> While the rules governing the disqualification of administrative hearing officers are in some respects more flexible than those governing judges, the rules are not more flexible on the subject of financial interest. Applying those rules, courts have consistently recognized that a judge has a disqualifying financial interest when plaintiffs and prosecutors are free to choose their judge and the judge's income from judging depends on the number of cases handled. No persuasive reason exists to treat administrative hearing officers differently.

(*Id.* at 1024-25.)

Furthermore, as explained in *Haas,* this Court had previously recognized in *Andrews v. Agricultural Labor Relations Bd.* (1981) 28 Cal.3d 781*,* 793, n. 5, that when an adjudicator has a financial interest in the outcome, actual bias need not be proven. In such cases, the appearance of bias standard applies. (*Haas,* 27 Cal.4th

at 1032-34.)

Courts of appeal have occasionally drawn an incorrect distinction between a "probability of actual bias" standard and the "appearance of bias" standard. In fact, they are one and the same, as explained in *Andrews,* 28 Cal.3d 793, n. 5:

> Of course, there are some situations in which ***the probability or likelihood of the existence of actual bias*** is so great that disqualification of a judicial officer is required to preserve the integrity of the legal system, even ***without proof that the judicial officer is actually biased*** towards a party. [Citations omitted.] In California, these situations are codified in Code of Civil Procedure section 170, subdivisions 1-4. They include cases in which the judicial officer either has a personal or financial interest, has a familial relation to a party or attorney, or has been counsel to a party. The Legislature has demanded disqualification in these special situations regardless of the fact that the judicial officer nevertheless may be able to discharge his duties impartially. The evident and justifiable rationale for mandatory disqualification in all such circumstances is apprehension of ***an appearance of unfairness or bias.*** However, the instances addressed in section 170, subdivisions 1-4, are entirely distinct from a case in which bias itself is charged under subdivision 5 of that statute as the ground for disqualification. As explained above, the subjective charge of an appearance of bias alone does not suffice to demonstrate that a judicial officer is infected with actual bias.

(Emphases added.)

Haas applied a similar analysis:

> . . . [T]he adjudicator's financial interest in the outcome presents a "situation . . . in which experience teaches that the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable."

(*Id.,* 27 Cal.4th at 1027.)

> The appearance of bias that has constitutional significance is not a party's subjective, unilateral perception; it is the objective appearance that arises from financial circumstances that would offer a possible temptation to the average person as adjudicator. A procedure holding out to the adjudicator, even implicitly, the possibility of future employment in exchange for favorable decisions creates such a temptation and, thus, an objective, constitutionally impermissible appearance and risk of bias.

(*Id.,* 27 Cal.4th at 1034.)

The common law appearance of bias standard thus includes both "a *possible* temptation" element and a "*probability or likelihood* of actual bias" element, which might appear on the surface to be contradictory. They are not. As explained in *Haas*, the "possible temptation" standard requires objective facts indicating that an "average" adjudicator might be tempted to be partial to one side. If so, then there is a *probability* that some adjudicators would succumb to that temptation, making the risk of bias unacceptable. For example, some attorneys might be able to be completely fair to both sides if they were appointed as a hospital hearing officer by their father, the president of the hospital. Others would

favor their father's side. The risk of partiality is too great, so the appearance of bias standard would disqualify children of the appointing person, without proof of actual bias. Any particular hearing officer would only be subject to a possible temptation by the filial relationship. However, the *situation* creates a probability of bias that requires disqualification.

B. The Appearance of Bias Standard Also Applies to Superior Court Judges, Temporary Judges and Arbitrators.

After *Andrews,* in 1984, the Legislature enacted Code of Civil Procedure § 170.1 and explicitly made a strict appearance of bias standard applicable to superior court judges in all situations. Section 170.1, subd. (a)(6)(A)(iii) provides that a judge shall be disqualified if "[a] person aware of the facts might reasonably entertain a doubt that the judge would be able to be impartial." The standard for disqualification of judges is an objective one and not limited to actual bias. (*Christie v. City of El Centro* (2006) 135 Cal.App.4th 767, 776.) A judge must be disqualified if a reasonable person would entertain doubts concerning the judge's impartiality. (*Ibid.*)

Private attorneys serving as temporary judges likewise are disqualified if they have an appearance of bias, pursuant to the California Code of Judicial Ethics, canon 6D(3)(vii)(C), under California Rule of Court 2.831, subds. (d) and (e).

(*Hayward v. Superior Court of Napa County* (2016) 2 Cal.App.5th 10, 35.)[4] In *Hayward,* the Court observed that private attorneys serving as temporary judges operate in a context that greatly increases the likelihood of potential conflicts of interests, because they "commonly engage in continuing business relationships with lawyers likely to come before the court to which they are appointed—unlike public judges, who are precluded from doing so . . ." (Id. at 46.) The same issue of continuing business relationships applies to hospital hearing officers.

Likewise, attorneys and retired judges and justices serving as private arbitrators are also subject to disqualification if they have an appearance of bias. (*Haworth v. Superior Court* (2010) 50 Cal.4th 372, 381.) Proposed arbitrators are required to disclose any matter that would cause a person to reasonably doubt their impartiality. (*Ibid.*) Following such a disclosure, any party is entitled to disqualify the arbitrator. (*Ibid.*) An arbitrator's failure to make a required disclosure makes any subsequent arbitration award unenforceable if challenged. (*Ibid.*)

[4] In *Hayward,* a Petition for Review was granted but then dismissed. This Court denied requests for depublication of *Hayward.* (Case No. S237174, March 1, 2017.)

C. The Appearance of Bias Standard Applies to Hospital Hearings.

1. California Physicians Have a Right to an Impartial Hearing Officer Whether They Practice in Private or Public Hospitals.

Under California law, physicians in both private and public hospitals have a right to quasi-judicial fair hearings meeting minimal due process standards before their hospital privileges can be terminated. (*Anton v. San Antonio Community Hospital* ("*Anton*"), *supra,* 19 Cal.3d at 815-825.) In *Anton,* the Court emphasized that the same due process standards apply to both private and public hospitals, based on its earlier decision in *Pinsker v. Pacific Coast Society of Orthodontists* (1974) 12 Cal.3d 541 ("*Pinsker II"*) and on *Ascherman v. Saint Francis Memorial Hosp.* (1975) 45 Cal.App.3d 507. (*Ibid.*) Impartial adjudicators are an essential and indispensable part of due process. (*Haas, supra,* 27 Cal.4th at 1025.) The *Haas* doctrine prohibiting ad hoc hearing officers with an appearance of bias due to financial incentives to favor the hiring entities therefore should apply to both private and public quasi-judicial hospital hearings.

2. Physicians Have a Fundamental Vested Property Interest in Their Hospital Privileges That Cannot Be Taken Without Due Process.

Application of the *Haas* doctrine to private hospitals is also required because in California physicians have a fundamental vested property interest in

their hospital privileges. Physicians' right to a fair hearing before losing their hospital privileges evolved from the fundamental common law right of individuals to work for a living. (*Pinsker II, supra,* 12 Cal.3d at 550-552.) Private organizations that affect the public interest have long been required to follow common law fair hearing procedures before excluding or expelling individuals whose livelihood depends on membership in those organizations. (*Ibid.*) Such hearings must be both procedurally and substantively fair. (*Id.* at 553.)

Wyatt v. Tahoe Forest Hospital Dist., supra, 174 Cal.App.2d 709, was the first case to hold that physicians could not be denied hospital privileges without a fair hearing. *Wyatt* recognized that physicians ordinarily cannot fully practice their profession without access to a hospital. (*Id.* at 715.) It held that Dr. Wyatt's past problems with the State's medical board did not warrant denial of hospital privileges without a hearing on the question of whether he was currently qualified to have privileges. (*Id.* at 714-715.)

Wyatt involved a public hospital. Physicians' right to fair hearings was explicitly extended to private hospitals in *Ascherman v. San Francisco Medical Society* (1974) 39 Cal.App.3d 623, 631. *Ascherman* held that private non-profit hospitals are "quasi-public" entities, and that their control over hospital privileges was a fiduciary power to be exercised reasonably and for the public good. (*Id.* at 631, 644.) It further held that such hospitals could not deny physicians hospital privileges without minimal due process. (*Id.* at 631.)

In *Anton,* this Court followed *Pinsker II* and affirmed the *Ascherman* decision when it mandated fair hearings with due process for physicians in both private and public hospitals. (*Id.,* 19 Cal.3d at 815.) *Anton* also strengthened the requirement for fair hearings by basing its decision on the recognition that physicians have a fundamental vested property interest in their hospital privileges that cannot be taken without due process. (Id. at 823-825.) That holding was based on long-standing California case law recognizing that physicians have a fundamental property interest in their right to practice medicine, and the importance of doctors' careers to their lives:

> We think it manifest . . . that the decision before us has a substantial effect on a right which is "fundamental." "In determining whether the right is fundamental the courts do not alone weigh the economic aspect of it, but the effect of it in human terms and the importance of it to the individual in the life situation." (*Bixby v. Pierno*, *supra*, 4 Cal.3d 130, 144.) As the court said in *Edwards v. Fresno Community Hosp.* (1974) 38 Cal.App.3d 702, 705 . . . "Although the term 'hospital privileges' connotes personal activity and personal rights may be incidentally involved in the exercise of these privileges, the essential nature of a qualified physician's right to use the facilities of a hospital is a property interest which directly relates to the pursuit of his livelihood."

(*Anton,* at 823; see also, *Hewitt v. Board of Medical Examiners* (1906) 148 Cal. 590, 592.)

Anton reflects the reality that physicians ordinarily must spend at least eleven years working extremely hard in college, medical school and residency to become doctors; that using their knowledge and skills to heal the sick has rewards that are not merely financial; and that both physicians and hospitals have an extremely important public purpose in protecting the public health. When a physician's career hangs in the balance, far more is at stake than just who will get how much money, the issue in most civil litigation and arbitrations. Dr. Natarajan spent nearly 13 years in universities and residencies before becoming a hospitalist. (8 PAR 1745.) As a hospitalist, he cannot, of course, practice his specialty without access to a hospital. (16 PAR 3741-3742.) Without hospital privileges, he is denied access to those he trained to serve, protect and heal.

In *Mileikowsky v. West Hills Hospital, supra,* 45 Cal.4th 1259, this Court again recognized the importance of fair hearings to physicians and reaffirmed that they have a property interest in their hospital privileges directly connected to their livelihoods. The Court also recognized that an adverse hearing decision can have an immediate and devastating impact on a physician's career because of state and national reporting requirements: "A hospital's decision to deny staff privileges therefore may have the effect of ending the physician's career." (*Id.* at 1267-1268.) The Legislature has recognized that unfair peer review not only impacts physicians, but also has a negative impact on the public health by limiting access to medical care. (Business and Professions Code § 809, subd. (a)(4).)

Given the extremely high stakes for physicians, and the public interest in truly fair peer review hearings, doctors practicing in private hospitals are entitled to the same protection from adjudicators with an appearance of bias as doctors in public hospitals, or other litigants in quasi-judicial or judicial hearings.

3. Hospital Hearings Are Official Proceedings Comparable to Quasi-Judicial Public Agency Hearings.

In *Kibler v. Northern Inyo County Local Hospital District*, *supra*, 39 Cal.4th at 200, this Court held that a hospital hearing is an "official proceeding authorized by law" and that the Legislature has given these hearings "a status comparable to that of quasi-judicial public agencies . . ." *Kibler's* decision to provide anti-SLAPP protection to participants in private hospital hearings was based on the fact that the hearings are required by law; the Legislature's decision to give hospitals "primary responsibility for monitoring the professional conduct of California physicians;" the public interest in peer review; and the fact that hospital hearings are ordinarily only subject to review through a writ of administrative mandate pursuant to Code of Civil Procedure § 1094.5, the same as public administrative agencies. (*Id.* at 199-200.)

Kibler's holding that hospital hearings are official and "oversee 'matters of public significance'" recognized that those hearings are mandated by the State and serve an important public purpose. (*Id*. at p. 201.) They are essential both to identify substandard physicians and to protect the ability of competent physicians

to continue to practice. (Business and Professions Code § 809; *Mileikowsky v. West Hills Hospital & Medical Center, supra,* 45 Cal.4th at 1267-68.)

The integrity of the peer review process is therefore of great importance to the public health. If hospital peer review is manipulated for the purpose of eliminating competitors or whistleblowers, patients suffer from the loss of competent physicians. Peer review systems without integrity may also allow physicians who really should be disciplined to practice substandard care without legitimate scrutiny. When a hospital's peer review system lacks integrity, physicians aware of peer review favoritism or cover-ups will be unlikely to speak out, for fear that they too might become a victim of unfair peer review.

The official nature and public importance of peer review hearings supports giving physicians in private hospitals the right to a hearing officer without an appearance of bias, to help maintain the integrity of those hearings and to protect the public health.

4. California Common Law Has Applied the Appearance of Bias Standard to Hospital Hearings.

Three years after *Anton, Applebaum v. Board of Directors, supra,* 104 Cal.App.3d 648, applied the appearance of bias standard to hospital hearings, paraphrasing the holding in *Tumey v. Ohio, supra,* 273 U.S. at 532, that procedures that offer a possible temptation to the average judge to be unfair violate due process. (*Id.* at 660.) *Applebaum* held that common law fair procedure and

constitutional due process provided the same extent of protection. (*Id.* at 657.) It then held that a hearing had violated the appearance of bias standard because Dr. Applebaum's accusers had served in adjudicatory positions, although there was no evidence of actual bias. (*Id.* at 659.)

Applebaum's application of the appearance of bias standard was followed in *Hackethal v. California Medical Assn.* (1982) 138 Cal.App.3d 435, 443-445, *Lasko v. Valley Presbyterian Hospital* (1986) 180 Cal.App.3d 519, 527-530, and *Rosenblit v. Superior Court, supra,* 231 Cal.App.3d at 1445-1449, to invalidate hearings where physicians had not received adequate voir dire, notice, access to documents, findings and/or charges. These cases each applied the appearance of bias standard to hospital hearings.

In *Weinberg v. Cedars-Sinai Medical Center* (2004) 119 Cal.App.4th 1098, 1115, the Court of Appeal held that actual bias is the correct standard for administrative hearings. In that case, Dr. Weinberg asserted that the chief of the medical staff had an improper ex parte communication with the Board of the hospital, requiring reversal of the Board's decision. (*Ibid.*) In rejecting that claim, *Weinberg* cited *Southern Cal. Underground Contractors, Inc. v. City of San Diego* (2003) 108 Cal.App.4th 533, 549, for its holding on actual bias. *Southern Cal. Underground Contractors, Inc.,* in turn, relied on *Andrews v. Agricultural Labor Relations Bd., supra,* 28 Cal.3d at 791-794 for its holding that "in this context" actual bias applied. "In this context" presumably is a reference to the specific facts

in that case. Neither *Weinberg* nor *Southern Cal. Underground Contractors, Inc.* involved ad hoc adjudicators and neither discussed or applied the exception to the actual bias standard for financial interests and familial and professional relationships described in *Andrews'* footnote 5. *Weinberg* is inconsistent with *Andrews, Haas*, and the cases cited in the paragraph above. It also lacks any analysis of the question presented here. To the extent that *Weinberg* is interpreted to hold that only the actual bias standard applies to quasi-judicial administrative hearings, it is not a correct statement of California law.

Yaqub, supra, was the first case to consider whether the *Haas* doctrine applied to hospital hearings. It held that the hearing officer, a retired Court of Appeal justice, was disqualified because he had worked for the hospital system in the past and had a financial interest in potential future employment as a hearing officer for the same system. (*Id.,* 122 Cal.App.4th at 485-486.) *Yaqub* rejected the hospital's argument that the hearing officer was not an adjudicator subject to the *Haas* doctrine, noting that the hearing officer made key rulings on the admissibility of evidence, access to information and his own service as hearing officer. (*Id.* at 485.) It also noted that there was no evidence that the hearing officer had been actually biased, but found that the hearing had nonetheless been unfair because of the hearing officer's financial incentive to favor the hospital. (*Ibid.*)

Yaqub rested its holding not only on *Haas* but on the appearance of bias standard generally applicable to adjudicators. It cited the prohibition of a judge

with a financial interest in the proceedings under Code of Civil Procedure § 170.1, subd.(a)(3). (*Id.* at 486.) It also cited Canon 2 of the California Code of Judicial Ethics, which applies an appearance of bias standard stated as "whether a person aware of the facts might reasonably entertain a doubt that the judge would be able to act with integrity, impartiality, and competence" and *Hall v. Harker* (1999) 69 Cal.App.4th 836, 841, (disapproved on another ground in *Casa Herrera, Inc. v. Beydoun* (2004) 32 Cal.4th 336) which applied the same standard. (*Ibid.*)

This Court denied review of *Yaqub* and also refused to depublish it. (Case No. S128750.)

Although *Yaqub* involved a district hospital, not a word in the *Yaqub* decision suggests that its holding was based on the public status of the hospital, or any difference between "constitutional due process" and common law "fair procedure." To the contrary, *Yaqub* stated that its task was to determine if the plaintiff had received "fair procedure", not constitutional due process, indicating that it was applying common law fair procedure requirements. (*Id.* at 483.) Dignity conceded below that *Yaqub* did not rely on the hospital's public status in reaching its decision. (8 CT 2111, n. 15.) Likewise, the Court of Appeal's *Natarajan* opinion does not assert that *Yaqub* was based on constitutional due process because it involved a public hospital. (*Natarajan,* 42 Cal.App.5th at 391, n. 13.) There is no disagreement that *Yaqub* intended to apply *Haas* and the appearance of bias standard to hospital hearings in general.

In *El-Attar*, *supra*, the defendant was a private hospital and the issue was whether the plaintiff physician had received an unfair hearing. This Court referenced the lack of evidence that adjudicators involved in the case had a disqualifying pecuniary interest or similar conflict of interest as one of its reasons for not finding the hearing unfair. (*Id.,* 56 Cal.4th at 996.) In making that statement, this Court cited *Haas, Yaqub* and *Applebaum* in a context that makes it plain that the Court considered those cases applicable to private hospital hearings, thus effectively endorsing their holdings on the appearance of bias standard. (*Id.* at 996-997.)

In addition, as stated above, *El-Attar* quoted with apparent approval *Anton's* holding that minimum due process protections apply to both public and private hospitals. (*Id.* at 987.) Given that this Court refused to depublish *Yaqub* and then cited it with apparent approval, Dignity's suggestion that *Yaqub* has never had any precedential value is untenable. The most recent California Supreme Court case on hospital hearings thus supports the application of the appearance of the bias standard in both public and private hospital hearings.

II. THE COURT OF APPEAL'S GROUNDS FOR REJECTION OF THE APPEARANCE OF BIAS STANDARD ARE INCONSISTENT WITH CALIFORNIA LAW.

The Court of Appeal in this case correctly recognized that physicians are entitled to impartial adjudicators in hospital hearings, and that impartial adjudicators are a "core protection" and "fundamental to *any* fair administrative remedy, whether the remedy is governed by principles of 'fair procedure' or 'due process.'" (*Natarajan*, 42 Cal.App.5th at 389, quoting *Kaiser v. Superior Court* (2005) 128 Cal.App.4th 85, 104, emphasis in *Kaiser.*) Nonetheless, it holds that a hearing officer with an obvious financial incentive to favor Dignity was permissible because he purportedly had no "direct financial interest." (*Natarajan,* at 392.)

As the Statement of Facts demonstrates, the hearing officer in *Natarajan* had a considerably more egregious appearance of bias than the hearing officer in *Yaqub. Natarajan* did not dispute that Singer had an appearance of bias. Unable to distinguish *Yaqub* factually or legally, the Court of Appeal in *Natarajan* instead asserted that *Yaqub* had no value as legal precedent, but rather was "a derelict on the waters of the law" that had not been followed in any published opinion, and refused to apply the appearance of bias standard. (*Natarajan*, 42 Cal.App.5th at 391.)

The Court of Appeal's repudiation of the appearance of bias standard in

private hospital hearings was based on the following assertions:

1. Common law "fair procedure" applicable to private hospital hearings is different from, and provides less protection, than the "constitutional due process" applicable to public hospital hearings and all other public judicial and quasi-judicial hearings. (Id. at 388-391.)

2. The common law of California governing fair hearings was "supplanted" by the 1989 enactment of Business and Professions Code § 809 et seq. Therefore, any case after that date cannot be used to interpret those laws, including *Haas*, and no pre-1989 case addressed the central issue in the appeal. (*Id.* at 389-392.)

3. The only bias that can disqualify a private hospital hearing officer is if the hearing officer gains a "direct financial benefit from the outcome" as set forth in Section 809.2, subd. (b). According to *Natarajan,* that standard is substantively different than the "direct, personal, and substantial pecuniary interest" that *Haas* held exists when a hearing officer's income depends upon the volume of cases heard and the hiring entity is free to choose among adjudicators, preferring those who render favorable decisions. (*Natarajan* at 391-392; *Haas,* at 1031-1032.)

None of these assertions accurately reflect California law.

A. In Hospital Hearings, Fair Procedure Provides the Same Protections as Due Process.

Natarajan is the first decision to assert that constitutional "due process" requirements do not apply to claims of hospital hearing officer bias and that such

claims are subject only to "fair procedure" which is less demanding. Its holding that common law fair hearing procedures provide different and less protection than due process squarely contradicts *Applebaum, supra.* In *Applebaum,* the Court stated that because the actions of private institutions "are not necessarily those of the state," physicians' right to fair hearings arose from the common law rather than from the Constitution. (*Id.,* 104 Cal.App.3d at 657.)

However, the Court then held that common fair procedure provides ***the same extent of protection*** as constitutional due process, despite their different legal origins. (*Ibid.*) *Applebaum* thus effectively held that, as a practical matter, there is no difference between fair procedure and constitutional due process. It then used federal due process law to analyze whether the hearing violated Dr. Applebaum's common law right to fair procedure: "We see no impediment to an analysis of the situation using the precedents established under the due process concept." (*Id*. at 658.)

Natarajan asserts that *Applebaum's* holding was that "as a matter of *constitutional* law, even possibility [sic] of any unfairness is to be avoided." (*Natarajan*, at 390, emphasis in original.) Given that *Applebaum* was applying what it believed[5] was a common law right to fair procedure, that characterization is clearly erroneous. *Natarajan's* citation of *Applebaum* in support of its claim that a

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[5] Because *Applebaum* followed the 1977 decision in *Anton* that physicians have a fundamental vested property right in their hospital privileges, termination of a physician's privileges may actually require constitutional due process rights, as discussed in Section II(C)(6) below.

physician claiming a violation of fair procedure cannot rely on cases involving the constitutional right to due process (*Id.,* 42 Cal.App.5th at 389) is also incorrect, since *Applebaum* actually holds the opposite.

Natarajan's citation of four other cases as holding that due process precedents do not apply to the common law right of fair procedure process (*Id.* at 389) is incorrect. *Powell v. Bear Valley Cmty. Hosp.* (2018) 22 Cal.App.5th 263, 274; *Dougherty v. Haag* (2008) 165 Cal.App.4th 315, 317; and *Anton v. San Antonio Community Hospital* (1982) 132 Cal.App.3d 638, 653-654, ("*Anton II*") only asserted, consistent with *Applebaum*, that fair procedure rights have a different origin than constitutional due process, not that those rights provide lesser protection, or that Courts cannot use due process case law to analyze fair hearing rights. *Goodstein v. Cedars-Sinai Medical Center* (1998) 66 Cal.App.4th 1257, holds the opposite to *Natarajan*, quoting *Applebaum*: "The distinction between fair procedure and due process rights appears to be one of origin and not of the extent of protection afforded an individual . . ." (*Id.* at 1265.)

Kaiser v. Superior Court (2005) 128 Cal.App. 85, 101-102, is the primary case relied upon by *Natarajan* on this issue. (*Id.* at 388-389.) In *Kaiser,* the actual holding was limited to the decision that the plaintiff physician had failed to exhaust her administrative remedies, the doctrine the Court of Appeal applied to reject all of her claims. (*Id.* at 99-114.) In dicta, *Kaiser* did assert for the first time that cases based on constitutional due process cannot be relied upon in common

law fair procedures cases, contrary to *Applebaum.* However, *Kaiser* then quoted the holding in *Applebaum* that the extent of protection of fair hearing procedure and due process is the same and analyzed the plaintiff's claims in part using a due process analysis.

In reference to those claims, the *Kaiser* Court recognized that "an administrative remedy may be deemed inadequate if it fails to provide basic due process protections." (*Id.* at 102-103.) *Kaiser* did not hold, as does *Natarajan,* that fair procedure provides less protection than due process. *Kaiser* also did not decide whether the *Haas* doctrine applied to hospital hearings, holding instead that plaintiff's claims of a *Haas* violation had to be first presented to the hearing officer for decision, under the exhaustion of administrative remedies doctrine. (*Id.* at 109-111.)

In addition to *Goodstein v. Cedars-Sinai Medical Center*, *supra,* the following cases have all agreed with *Applebaum* that fair hearing procedures provide the same protection as due process: *Lasko v. Valley Presbyterian Hospital, supra,* 180 Cal.App.3d at 528; *Golden Day Schools v. State Department of Education* (2000) 83 Cal.App.4th 695, 708; and *Gill v. Mercy Hospital* (1988) 199 Cal.App.3d 889, 903. Thus, before *Natarajan*, there were at least five cases holding that the extent of protection was the same, and none held to the contrary. Accordingly, *Natarajan's* holding that fair procedure provides less protection than basic due process was an incorrect interpretation of California law.

Natarajan contains no logical or practical rationale for applying a different standard of fundamental fairness to private hospital hearings than the basic due process protections available to doctors in public hospitals and to other litigants in quasi-judicial and judicial hearings. In addition to the lack of precedents supporting *Natarajan* on this issue, there are important reasons involving the administration of justice and the public health for this Court to affirm that common law fair procedure provides the same basic protections as minimal due process guaranteed by the California and U.S. Constitutions.

Legally, as stated in *Applebaum,* "the essence of both rights is fairness." (*Id.,* 104 Cal.App.3d at 657.) However, fairness is a subjective concept, and what seems fair to one judge may not seem fair to another. As a result, there is a high risk of uneven or arbitrary enforcement of an undefined "fairness" requirement. This case is a perfect example. *Yaqub* held that it was unfair for a hearing officer to have a financial incentive to favor the hospital that hired him. *Natarajan* disagreed.

The due process requirement of impartial adjudicators has been a fundamental doctrine of Anglo-American jurisprudence since at least 1610. (*Haas,* 27 Cal.4th at 1026, n. 11.) The Fifth Amendment guarantee that no person shall be deprived of property without due process has been in place since 1791. As a consequence, there is a substantial body of case law clarifying what constitutes due process in a large variety of circumstances, how to determine whether a

hearing has been fair and what procedural safeguards are appropriate. Application of that case law to hospital hearings will help guide hospitals, hearing officers, trial and appellate courts when they are determining what constitutes a fair hearing for physicians.

Again, this case is a perfect example. The conflict between the holdings in *Yaqub* and *Natarajan* is resolved if this Court affirms the holding in *Applebaum* and the four cases that followed *Applebaum* that common law fair procedure provides the same protection as due process in regard to hospital hearings. If the *Haas* doctrine applies to this case, then it is obvious that the hearing officer should have been disqualified due to his appearance of bias.

Affirming the *Applebaum* holding also would avoid the irrationality of applying different standards to physicians working in public and private hospitals, even though all hospital hearings are official proceedings that serve a public function. (*Kibler, supra,* 39 Cal.4th at 199-200.) From a public health standpoint, there is no reason that physicians should have different chances of unfairly losing their careers depending on whether they work for a county or district hospital, or a non-profit or for-profit private hospital. From a legal standpoint, adopting the *Applebaum* holding would be consistent with the holdings in *Anton, supra,* that minimum due process applies to both public and private hospital hearings, and that physicians have a fundamental vested property interest in their hospital privileges. (*Anton*, *supra,* 19 Cal.3d at 823-825.) It would also be consistent with the

Legislature's decision that both public and private hospitals decisions are reviewed through a writ of mandate pursuant to Code of Civil Procedure § 1094.5, subds. (b) and (d).

Finally, affirming the holding in *Applebaum* on this issue has the additional virtue of avoiding a conflict with federal due process requirements, as discussed further below.

B. The Common Law Applies to Hospital Hearings.

1. Section 809 Et Seq. Did Not Supplant the Common Law.

Natarajan's assertion that Section 809 et seq. supplanted the former common law is purportedly based on *El-Attar, supra,* 56 Cal.4th at 986; *Mileikoswky, supra,* 45 Cal.4th at 1267; and *Powell, supra,* 22 Cal.App.5th at 273. (*Natarajan,* 42 Cal.App.5th at 389.) However, none of those cases remotely suggests that the common law was supplanted or replaced by Section 809 et seq. Rather, each of them states that Sections 809 et seq. "codified" the common law. (*El-Attar,* 56 Cal.4th at 988; *Mileikowsky,* 45 Cal.4th at 1267; *Powell,* 22 Cal.App.5th at 273.) To codify the common law is not the same as supplanting it. Codify means to collect the common law and put it into statutes. (*Black's Online Law Dictionary.*) "Supplant*"* means to supersede or replace. (*Merriam-Webster Online Dictionary.*)

Under black letter California law, statutes do not supplant the common law unless the Legislature's intention to do so is unmistakably clear, as repeatedly stated by this Court:

> As a general rule, "[u]nless expressly provided, statutes should not be interpreted to alter the common law, and should be construed to avoid conflict with common law rules. 'A statute will be construed in light of common law decisions, unless its language" 'clearly and unequivocally discloses an intention to depart from, alter, or abrogate the common law rule concerning the particular subject matter. . . .'" . . . Accordingly, "[t]here is a presumption that a statute does not, by implication, repeal the common law. . . . Repeal by implication is recognized only where there is no rational basis for harmonizing two potentially conflicting laws."

(*California Ass'n of Health Facilities v. Department of Health Services* (1997) 16 Cal.4th 284, 297, (citations omitted); see also, *Fahlen v. Central Valley Hospitals* (2014) 58 Cal.4th 655, 669; and *Aryeh v. Canon Business Solutions, Inc.* (2013) 55 Cal.4th 1185, 1193.)

There is not a word in Sections 809 et seq. that even suggests or implies that the Legislature intended to supplant the common law with the enactment of those statutes. There is certainly no unequivocal expression of an intent to do so. The stated purpose of the codification of hospital hearing procedures was not to alter the common law, but rather to opt-out of the federal Health Care Quality Improvement Act of 1986, which the Legislature found to be deficient. (Section 809, subds. (a)(1) and (a)(9)(A).)

Compared to Code of Civil Procedure §§ 170 -170.9 governing judges, and Code of Civil Procedure §§ 1281.6 - 1281.96 governing arbitrations, Section 809.2's provisions describing the selection and impartiality of hearing officers and panel members are extremely brief. The Legislature did not define "impartial" or state what standard of bias should apply to hearing officers and panel members. The statute does not even designate who selects them.[6] For that reason, judicial interpretation of Section 809.2 using the common law was almost certainly intended by the Legislature and is, in any event, clearly necessary. (*Aryeh v. Canon Business Solutions, Inc., supra,* 55 Cal.4th at 1193-1194.)

In that respect, this case is similar to *Haas.* In *Haas,* the statutes governing the selection of county hearing officers were, like Section 809 et seq., brief. They placed no limit on who could be selected, other than a requirement of five years experience as an attorney. (Government Code § 27724.) This Court did not hesitate to apply the common law appearance of bias standard to county hearing officers, despite the Legislature's failure to require that standard.

Natarajan recognizes that its view that Section 809 et seq. replaced the common law is contrary to this Court's opinion in *El-Attar,* stating: "but see *El-*

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[6] *Kaiser v. Superior Court*, *supra,* 128 Cal.App.4th at 109, inferred that the peer review body has the right to unilaterally appoint both hearing officers and panel members, apparently based on the fact that the subject physician was given the right to voir dire, but not the medical staff or hospital: "The statutes further provide a method for the physician to test the impartiality of the panel members and the hearing officer and to challenge them as necessary." (*Ibid.*)

Attar at pp. 990, 991, 994 [*seeming* to suggest that principles of common law can apply unless expressly contrary to § 809 et seq.]" (*Natarajan,* at 389, emphasis in in *Natarajan*.) *El-Attar* did not just "seem" to apply the common law; it expressly rejected the analysis adopted by *Natarajan.*

In *El-Attar,* the plaintiff physician argued that Section 809.6 should be strictly enforced, so a violation of the hospital bylaws required reversal of an adverse hearing decision. This Court rejected that contention, explicitly stating that it was applying the common law doctrine of fair procedure. (*Id.,* 56 Cal.4th at 990-991.) It then applied the common law to interpret Sections 809.05 and 809.6, expressly holding that the Legislature did not intend to displace the common law. (*Ibid.*) *El-Attar* also states that the holding in *Mileikowsky West Hills Hospital & Medical Center* (2009) 45 Cal.4th 1259 was "consistent with the peer review statute and the common law fair procedure doctrine." (*Id.* at 994.) *Natarajan's* failure to follow *El-Attar* has no support in the law and violates the obligation of a court of appeal to adhere to this Court's decisions. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450*,* 455.)

2. The Common Law Before Enactment of Section 809 Et Seq. Applied the Appearance of Bias Standard.

Following its assertion that Section 809 et seq. supplanted the common law, *Natarajan* takes the position that if the common law did apply, only pre-1989 common law could be considered in interpreting the law. (*Id.* at 389.) Its

reasoning for this conclusion is analytically unclear and unsupported by any explanation or citation to legal authority. Logically, if Section 809 et seq. supplanted the common law, one would expect that court decisions *before* enactment would be rendered irrelevant by the new statutes, not those after.

In any event, the assertion in *Natarajan* that no common law decision before 1989 addressed "the central issue on appeal" is incorrect. No pre-1989 case addressed the specific issue of whether an ad hoc quasi-judicial administrative hearing officer with a financial incentive to favor the hiring entity is permissible. However, there was ample common law precedent that an adjudicator with a financial interest in the outcome is not permitted, as described at length in *Haas,* 27 Cal.4th at 1025-1032.

Andrews v. Agricultural Labor Relations Bd., supra, which stated that the appearance of bias standard applied to adjudicators with a financial interest in the outcome, was decided in 1981. (*Id.,* 28 Cal.3d at 793, n. 5.) In addition, as shown in Section I(C)(4) above, the appearance of bias standard had been applied specifically to hospital hearings in *Applebaum, supra, Lasko v. Valley Presbyterian Hospital, supra, and Hackethal v. California Medical Assn., supra,* all pre-1989 cases. Since financial interest is the type of bias that "has long received the most unequivocal condemnation and the least forgiving scrutiny" (*Haas,* at 1025), those pre-1989 cases require reversal of the hearing decision in this case, even without consideration of *Haas.*

Natarajan's assertion that the common law governing hospital hearings requires a showing of actual bias, unlike due process (*Id.,* 42 Cal.App.5th at 390), is only supported by its somewhat cryptic footnote 11, which states: "By contrast [to due process], for purpose of *fair procedure* a court does *not* presume bias based on a mere appearance absent a factual showing." (Emphases in *Natarajan.*) This statement of law is incorrect, because it assumes that due process does not require a factual showing to demonstrate an appearance of bias.

As explained in Section I(A) above, due process requires an objective factual showing of a likelihood of bias before the appearance of bias standard applies. Footnote 11 is also misleading, because it implies that Dr. Natarajan did not make a factual showing that the hearing officer had an appearance of bias, when he obviously did. Footnote 11 is also confusing, because it appears to implicitly agree that the appearance of bias standard does apply when, as here, there is a sufficient factual showing, contrary to the Court's decision.

The only pre-1989 case that *Natarajan* cites in support of Footnote 11 is *Rhee v. El Camino Hospital* (1988) 201 Cal.App.3d 477, 494. *Rhee* stated that *Applebaum* was the leading case on the issue of impartial hospital hearings. (*Id.* at 490.) Following its review of the facts, it then stated that "bias cannot be presumed in the absence of facts establishing the probability of unfairness as a practical matter." (*Id.* at 490.) It thus applied the appearance of bias test. Nowhere in *Rhee* does it suggest or imply that a hearing officer can only be

disqualified based on a showing of actual bias. Thus, *Natarajan* cites no pre-1989 cases supporting a theory that the common law before the enactment of Section 809 et seq. required a showing of actual bias to disqualify a hearing officer.

3. The Court of Appeal's Assertion That Post-1989 Cases Cannot Be Used to Interpret Section 809 Has No Support in the Law.

In support of its footnote 11, *Natarajan* also cites two post-1989 cases. However, *Hongsathavij v. Queen of Angels Etc. Medical Center* (1998) 62 Cal.App.4th 1123, 1142, like *Rhee,* used the same standard applied in *Applebaum*, i.e., whether the facts demonstrated an unacceptable practical probability of bias. *Powell v. Bear Valley Cmty. Hosp., supra,* 22 Cal.App.5th at 280, merely echoed *Hongsathvij's* observation that a mere suggestion or appearance of bias is insufficient to render a hearing unfair, in a case not involving any claim of a hearing officer's financial interest in the outcome or other cognizable appearance of bias. (*Id.* at 280-281.) *Natarajan's* assertion that only pre-1989 common law can be used to interpret Section 809 et seq. is contradicted by its own extensive use of post-1989 common law in its opinion. In addition to *Hongsathavij* and *Powell, Natarajan* cited ten other post-1989 cases to support its decision.

The *Natarajan* Court's refusal to apply *Haas* because it was decided in 2002 is not only inconsistent with its own practice, it is entirely inconsistent with the fundamental rule described above requiring statutes to be harmonized with the

common law unless the Legislature expressly provides otherwise or there is a conflict between the statute and the common law. (*Laguna Beach v. Ca. Ins. Guarantee Assn.* (2010) 182 Cal.App.4th 711, 715-716.)

In *Fahlen, supra,* for example, the issue presented was the interpretation of Health and Safety Code § 1278.5, which was adopted in 1999 and then amended to protect physicians in 2007. (*Id.,* 58 Cal.4th at 667.) Nonetheless, in *Fahlen* this Court relied primarily on the cases of *State Bd. of Chiropractic Examiners v. Superior Court* (2009) 45 Cal.4th 963 and *Runyon v. Board of Trustees of California State University* (2010) 48 Cal.4th 760 to make its decision. (*Id.* at 671-678.) Likewise, *El-Attar*, 56 Cal.4th at 990, cites *Dougherty v. Haag* (2008) 165 Cal.App.4th 315, 338–343*,* as support for its holding. As noted above, *El-Attar* also cites both *Haas* and *Yaqub* as cases applicable to private hospital hearings.

Natarajan's position that *Haas* cannot be used to interpret Section 809 et seq. because it post-dated the enactment of the statutes is thus contrary to well-established California law.

C. Fundamental Rules of Statutory Construction Require the Application of *Haas* to Hospital Hearings.

1. Application of the *Haas* Doctrine Effectuates the Purpose of Section 809.2.

After denying the applicability of due process and the common law to the interpretation of Section 809 et seq., *Natarajan* relies almost exclusively on its own interpretation of Section 809.2 as the grounds for its decision. *Natarajan* asserts that when the Legislature adopted Section 809.2, it intended the prohibition on "direct financial benefit" to exclude the allegedly "ephemeral potential for bias" arising from the hearing officer having a financial incentive to favor the hospital system that appointed him. (*Natarajan,* 42 Cal.App.5th at 391-392.) However, in reaching that conclusion, it violates the most fundamental rules of statutory construction.

The goal and primary task of statutory construction is to give effect to the law's purpose. (*In re Corrine W.* (2009) 45 Cal.4th 522, 529.) California laws governing peer review have two purposes: to protect the public's ability to obtain high quality medical care and to protect physicians from unfairly losing their ability to practice their profession. (Section 809, subds. (3-7); *Mileikowsky*, *supra*, 45 Cal.4th at p. 1267.)

While the primary purpose of peer review in general is the public health and safety, the primary purpose of peer review *hearings* is plainly to protect

physicians' right to practice their profession. The common law origins of physician hearings in cases such as *Wyatt v. Tahoe Forest Hospital, supra, and Anton, supra,* demonstrate that their purpose was to protect physicians from unfair denial or loss of their hospital privileges.

The codification of the common law maintained that purpose. Section 809 et seq. contains seven statutes regulating the hearing process. Section 809.05 has the purpose of protecting the public health by giving hospital governing bodies the authority to act if hospital medical staffs fail to address problems with a physician's performance. Section 809.5 also primarily protects the public by permitting summary suspensions of physicians, although it also protects physicians by giving them hearing rights after suspensions.

The other five statutes all protect physicians by providing rights typically required by due process: the right to notice (Section 809.1); the right to impartial adjudicators and a timely hearing (Section 809.2); the right to see the evidence that is to be used against them, the right to call and cross-examine witnesses, and the right to present and rebut evidence (Section 809.3); the right to a written decision and to a written explanation of the appeal procedure, if one exists (Section 809.4); and the right to have Sections 809.1 through 809.4 consistently enforced, by prohibiting waiver of those rights (Section 809.6). Each of these five statutes limits a hospital's ability to terminate a physician's privileges and therefore functions primarily to protect physicians.

The primary purpose of Section 809.2 is clearly to protect physicians from unfair hearings. Subdivision (a) gives a physician charged with substandard care or professional misconduct a right to an impartial hearing panel or to arbitrators mutually chosen. Subdivision (b) prohibits a hearing officer with a financial interest in the outcome, and also prohibits the hearing officer from acting as a prosecutor. Subdivision (c) gives physicians the right to voir dire both hearing panel members and the hearing officer, and to challenge the impartiality of any of them.

It is a cardinal rule of statutory construction that statutory language must be given an interpretation that will promote rather than defeat the purpose of the law. (*Harry Carian Sales v. Agricultural Labor Relations Bd.* (1985) 39 Cal.3d 209, 223.) Allowing hearing officers with an appearance of bias because they have a financial incentive to favor the hiring entity would not be consistent with the purpose of Section 809.2 to protect physicians' right to impartial adjudicators. There is no rational argument that permitting hearing officers with an appearance of bias somehow promotes the purpose of Section 809.2. To the contrary, to do so would defeat the purpose of the statute and therefore must be rejected.

2. Section 809.2 Must Be Read as a Whole.

Natarajan is critical of *Yaqub* for not discussing Section 809.2, even though there is no reason to believe that the interpretation of the statute was raised as an issue by the parties. (*Natarajan,* 42 Cal.5th at 390-391.) *Natarajan,* on the other

hand, completely fails to discuss the impact of Section 809.2, subds. (a) and (c) on its analysis, instead considering a single phrase from subdivision (b) in isolation. In doing so, it fails to follow another fundamental rule of statutory construction. The meaning of a statute may not be determined from a single sentence. (*People v. Shabazz* (2006) 38 Cal.4th 55, 67-68.) Statutory language must be considered in the context of the entire statute of which it is a part, in light of the statutory purpose, and provisions related to the same subject matter must be harmonized to the extent possible. (*Id.*) ". . . [A]ll parts of a statute should be read together and construed in a manner that gives effect to each, yet does not lead to disharmony with the others." (*City of Huntington Beach v. Board of Administration* (1992) 4 Cal.4th 462, 468.)

Subdivision (a) shows that the Legislature wanted hearing panel members to be impartial. By giving physicians a right to voir dire both hearing officers and panel members, and the right to challenge them for partiality in subdivision (c), the Legislature clearly intended to require impartial hearing officers. Considered in context, the provision of subdivision (b) that hearing officers not receive a direct financial benefit from the outcome of the hearing is one part of an effort by the Legislature to ensure impartiality, not an attempt to limit physicians' ability to challenge hearing officers, as *Natarajan* effectively decides.

Subdivision (c) indicates that the Legislature wanted to avoid hearing officer bias based on any ground. *Natarajan's* analysis is especially flawed given

that subdivision (b) appears only to prohibit actions of the hearing officer *after* his appointment and does not describe the selection process. Subdivision (c), on the other hand, applies to the selection process, requiring both voir dire and impartiality. The rights described in subdivision (c) would be eviscerated by limiting hearing officer bias to the question of whether the hearing officer has a direct financial interest in the outcome. This is especially true because hearing officers are given the authority to decide on their own lack of impartiality. (Section 809.2, subd. (c).)

In this case, for example, other facts supporting disqualification include (1) the hearing officer's more than 30-year friendship with Harry Shulman, the hospital and medical staff's attorney during the hearing, who had done work for Dignity for 30 years and (2) Singer's frequent service as a hearing officer in cases in which Shulman was the hospital and/or medical staff's attorney. (1 PAR 269-271; 6 PAR 1346.)

In *Rossco Holdings Inc. v. Bank of America* (2007) 149 Cal.App.4th 1353, 1359, n. 13, the Court of Appeal quoted the trial court's statement: "It's a free chance at forum shopping and every lawyer dreams of that." If every lawyer dreams of getting to pick their judge, how much sweeter would it be to be able to have your client choose one of your friends as the adjudicator of your case? Under *Natarajan,* the hearing officer's past personal and business relationships with Shulman could not even be considered by a Court, either in isolation or combined

with other facts, in deciding whether the hearing officer had an appearance of bias, because they do not prove that the hearing officer had a direct financial interest in the outcome or actual bias. That result is not consistent with the Legislature's intent to have impartial hearing officers.

3. Section 809.2 Must Be Harmonized With *Haas.*

Natarajan also failed to apply the fundamental rule requiring the courts to harmonize statutes with the common law whenever possible, as described in Section II(B)(1), above. Here, it is exceptionally easy to harmonize the language in Section 809.2, subd. (b) with the common law because the words of the statute are nearly identical to the words used by this Court in *Haas.* The Legislature prohibited hearing officers from gaining "a direct financial benefit from the outcome" while *Haas* held that ad hoc hearing officers with a possibility of future employment by the hiring entity created a "direct, personal and substantial pecuniary interest" in the hearing outcome. (*Id.,* 27 Cal.4th at 1031-1032.)

It's difficult to imagine the Legislature and this Court being more in sync in the language being used. "Benefit" and "interest" are synonyms, and so are "financial" and "pecuniary," so the only differences between the two phrases are this Court's inclusion of the terms "personal and substantial." Thus, if anything, the *Haas* language sets a higher threshold than Section 809.2 for a disqualifying financial interest in the outcome, and enforcing that standard is entirely consistent with the statute's language and purpose.

4. The Legislature Rejected the CHA's Proposal to Override *Yaqub.*

Neither the parties nor the Court of Appeal have found any legislative history that sheds any light on the Legislature's intent when it enacted Section 809.2. However, the inclusion of the phrase "a direct financial benefit from the outcome" demonstrates that the Legislature shared the same purpose as *Haas* to prevent hearing officers with a financial incentive to favor a party in quasi-judicial hearings.

There is some pertinent legislative history post-dating the enactment of Section 809 et seq. This Court denied review and depublication of *Yaqub* on January 12, 2005. (Case No. S128750.) Less than a month later, on February 11, 2005, a CHA-sponsored bill, AB 366, was introduced into the Legislature. (Motion for Judicial Notice "MJN", Exhs. 1 and 3.)[7] The bill sought to reverse the *Yaqub* decision by adding the following provision to Section 809.2: "The possibility that the hearing officer might be engaged to serve in a similar capacity in other proceedings shall not establish grounds for disqualification." (MJN Exhs. 2 and 3.) The bill did not have enough support to even obtain a committee hearing and died without even a committee vote. (MJN Exhs. 4 and 5.)

The history of AB 366 not only shows the Legislature's complete lack of support for reversing *Yaqub,* it also demonstrates that the CHA understood that

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[7] Petitioner moved this Court for judicial notice of the legislative history of AB 366 on May 5, 2020.

Yaqub applied to private hospital hearings, since Section 809.2 only applies to private hospitals and not public hospitals. (Section 809.7.)

Natarajan also explains its refusal to apply *Haas* based on its assertion that the Legislature must only have intended to prohibit "present" pecuniary interests rather than the "potential" or "possible" pecuniary interests described in *Haas.* (Id. at 391-392.) That is a misreading of *Haas*, which clearly held that when an ad hoc hearing officer has the possibility of future employment with the hiring entity, s/he then has a *present* financial interest in favoring that entity.

5. Permitting Hearing Officers With an Appearance of Bias Is Not a Reasonable Interpretation of Section 809.2.

Other rules of statutory construction are that if a statute is subject to two alternative interpretations, the one that leads to the more reasonable result will be followed (*People v. Gonzalez* (2008) 43 Cal.4th 1118, 1126), and an interpretation that renders provisions of the law nugatory must be avoided. (*People v. Shabazz, supra,* 38 Cal.4th 55 at 67–68.) Here, if the holding in *Natarajan* were put in place, physicians could only disqualify a hearing officer that was a competitor with the physician or who entered into (and admitted) an agreement to be paid a bribe for influencing the hearing decision, or a bonus if the outcome was favorable to the hospital. These are the only situations that would constitute a "direct financial benefit from the outcome."

As a practical matter, hearing officers are virtually always attorneys and

never competitors with the subject physician. Nor would hospitals ever need to pay hearing officers bribes or bonuses, given that they could provide significant financial incentives for a hearing officer to favor them through repeated employment, as here. As a result, under *Natarajan,* the provision of Section 809.2 prohibiting a direct financial benefit in the outcome would provide no real protection to physicians from biased hearing officers. That is a less reasonable result than applying the *Haas* doctrine.

Section 809.2 does not specifically prohibit a hearing officer with familial relations to a party, as does *Andrews v. Agricultural Labor Relations Board, supra,* 28 Cal.3d at 793, n. 5, and Code of Civil Procedure § 170.1. If *Natarajan's* requirement of proof of actual bias were the law, a hospital CEO could appoint a family member as hearing officer. So long as that person denied any bias in favor of the hospital, the physician would have no recourse. That would not be a reasonable result and must be rejected.

In construing a statute, a court must consider the potential consequences of a particular interpretation. (*Joannou v. City of Rancho Palos Verdes* (2013) 219 Cal.App.4th 746, 752.) *Natarajan's* holding that only actual bias applies to hospital hearings would render nugatory the provisions of Section 809.2, subd. (c) providing for voir dire and challenges to a hearing officer's impartiality. As a practical matter, no attorney who accepts an appointment as a hearing officer is going to admit bias in favor of the hospital or medical staff that made the

appointment. To do so would cost the attorney not only the fees for that hearing, but effectively eliminate the possibility of any future appointments by the hospital. And, as a practical matter, there is no other way for a physician to prove actual bias other than a hearing officer's admission. "Absent a confession from [the hearing officer] about this particular case, which is not in this record, there is no way of knowing for certain whether she was biased in deciding Hall's case." (*Hall v. Superior Court of San Diego Cnty.* (2016) 3 Cal.App.5th 792, 809.) Thus, physicians would have no real protection from biased hearing officers if the actual bias standard applied.

6. A Holding That Fair Procedure Provides the Same Protection as Due Process Avoids a Conflict with Constitutional Due Process.

Another rule of statutory construction is that a statute should be construed, when reasonably possible, in a manner that preserves its constitutionality and avoids a constitutional issue that would arise from a contrary construction. (*Department of Corrections v. Workers' Comp. App. Bd.* (1979) 23 Cal.3d 197, 207.) In this case, a holding that fair procedure provides the same protection as due process would avoid a possible conflict with constitutional due process.

As described above, *Applebaum, supra,* 104 Cal.App.3d at 657, stated that "Since the actions of a private institution *are not necessarily* those of the state, the controlling concept in such cases is fair procedure and not due process."

(Emphasis added.) It then held that fair procedure and due process are the same, except for their origins. (*Ibid.*) However, *Applebaum*'s dicta suggesting that physicians do not have a constitutional right to due process did not consider the impact of *Anton, supra,* 19 Cal.3d 802, on California law. In *Anton*, the Court made two holdings that were extremely important: (1) physicians have a fundamental vested property interest in their hospital privileges, and (2) physicians are entitled to due process before their privileges can be taken away. (Id. at 823-824.) The relationship between those two holdings was not addressed in *Applebaum* and has not been addressed in other cases, either. However, the two holdings are clearly related. *Anton* determined that physicians with privileges at a private hospital have a right to due process *because* they have a fundamental vested property interest in those privileges. (*Ibid.*)

Applebaum did not consider that *Anton's* holding that physicians have a fundamental vested property interest in private hospital privileges established that the State could not take that property without due process, under the Fourteenth Amendment of the U.S. Constitution. (*Boddie v. Connecticut* (1971) 401 U.S. 371, 377-380.) The lack of analysis of this issue is understandable, because the holding in *Applebaum* that fair procedure provides the same protection as due process made any distinction in origin insignificant. However, *Natarajan's* holding for the first time that common law fair procedure provides a lesser degree of protection than constitutional due process makes the question of whether

constitutional due process applies to private hospital hearings a meaningful one.

There is no question that constitutional due process applies to the privileges of physicians working in public hospitals, because termination of those privileges results in the government taking a physician's property interest. (See, Business and Professions Code § 809.7; *Kaiser Foundation Hospitals v. Superior Court, supra,* 128 Cal.App.4th at 102, n. 15.) *Applebaum* determined, without analysis, that constitutional due process does not apply to private hospitals because the actions of private hospitals "were not necessarily" those of the State, thus suggesting the *possibility* of a lack of state action.

However, there is a viable argument that the actions of private hospitals do constitute state action and thus require constitutional due process.[8] The State has given private hospitals the responsibility to fulfill an important public health function: disciplining and reporting physicians whose conduct threatens the safety of patients. (*Kibler, supra,* 39 Cal.4th at 199-200.) To fulfill that purpose, it also has given them the power to take physicians' fundamental property interest in their hospital privileges. The State has thus delegated to private hospitals the power to take a physician's property, for the public purpose of protecting the public health:

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[8] Dr. Natarajan has not claimed in this case that his federal constitutional right to due process has been violated, reserving any federal due process claim for determination by federal courts.

> The statutory scheme delegates to the private sector the responsibility to provide fairly conducted peer review in accordance with due process, including notice, discovery and hearing rights, all specified in the statute.

(*Unnamed Physician v. Board of Trustees* (2001) 93 Cal.App.4th 607, 617.) "The Business and Professions Code sets out a comprehensive scheme that incorporates the peer review process into the overall process for the licensure of California physicians," and are official proceedings authorized by California law. (*Kibler,* 39 Cal.4th at 199-200.) The termination of physicians' privileges by private hospitals therefore may constitute action under color of state law under either a delegation theory (*Culbertson v. Leland* (9th Cir. 1975) 528 F.2d 426, 429-432) or an entwinement theory. (*Brentwood Academy v. Tennessee Secondary Sch. Athl. Ass'n* (2001) 531 U.S. 288, 295.)

This Court can avoid any current or future conflict with constitutional due process requirements by simply affirming California's long-standing common law rule as stated in *Applebaum* and the other cases described in Section 2(A), above: the fair procedure required for private hospital hearings provides the same protections as constitutional due process.

In addition to avoiding any conflict with the federal due process clause, such a holding will also serve to ensure that private hospitals provide physicians with hearings meeting prevailing standards of impartiality, as discussed further in Section III, below.

D. The Facts in the Present Case Present More Compelling Reasons for Disqualification Than the Facts in *Haas*.

Natarajan also tries to distinguish *Haas* by asserting that the factual situation is different, because "the county was the only player in the hearing officer game" in *Haas,* whereas Singer could find employment with other hospital systems. (*Id.,* 42 Cal.App.5th at 392.) However, the factual differences between this case and *Haas* strongly support reversal of the hearing decision at issue here.

The concurring and dissenting opinion of Justice Brown in *Haas* asserted that the opinion was incorrect in strictly forbidding a hearing officer with a financial incentive to favor the hiring entity, on the ground that the amount of potential earnings at issue was too small to constitute a real temptation to favor the County. (*Id.,* 27 Cal.4th at 1039-40.) Justice Brown noted that the hearing officer was paid a standard hourly rate, her primary employment was elsewhere, there was no evidence that she had any reasonable expectation of future employment with the County, and that the evidence indicated that there would not be a large volume of cases where ad hoc adjudicators would be needed. The hearings were therefore "not her bread and butter" and she was not dependent on them for her subsistence. (*Ibid.*) This Court's majority rejected Justice Brown's view, emphasizing the risk that adjudicators would favor possible "steady customers." (Id. at 1030.)

Dignity was nothing if not a steady customer of Singer, and his bread, butter, salad and entree. At the time of his appointment, he was working only as a

hearing officer. (1 PAR 255.) At the time Dignity appointed him, he had already been paid $210,000 by Dignity (AAR 318) and he was simultaneously serving as the hearing officer in four different Dignity hearings. (1 PAR 262-266.) Dignity provided more than half his income in both 2011 and 2014, and a significant percentage in the years in between. (AAR 48-50.) He ultimately received over $420,000 from Dignity, including over $40,000 for presiding over a Dignity hearing a year after the Natarajan hearing ended. (AAR 314-318.) At the time of the Natarajan hearing the hearing officer thus had a huge financial incentive to favor Dignity to obtain more lucrative work in the future.

Natarajan asserts that *Haas* does not apply because the hearing officer could also work for other hospital systems. (*Id.,* 42 Cal.App.5th at 392.) However, that fact did not negate his incentive to favor Dignity, it increased it. Winning a reputation as a hospital-friendly hearing officer, based on his work for Dignity, would only increase his opportunities for appointments by other hospital systems, thus increasing his potential income.

Likewise, *Natarajan's* claim that the hearing officer's past employment with defendant-controlled entities is "irrelevant" (*Id,* at 390, n. 10) does not reflect either California law or reality. In evaluating whether an adjudicator has an appearance of bias, past relationships with a party are always relevant. (See, e.g., *Andrews v. Agricultural Labor Relations Bd.,* supra, 28 Cal.3d at 793, n. 5 (past representation of a party); Code of Civil Procedure §§ 170.1, subd. (a)(2) and

1281.9; Code of Judicial Ethics 6(D)(3) and 6(D)(5)(a).) The theory that the hearing officer's nine prior selections as a hearing officer at Dignity hospitals, and his receipt of over $210,000 from Dignity, have no bearing on his appearance of bias would require this Court to ignore obviously salient facts.

Natarajan's theory that past employment is irrelevant is purportedly based on another Third District case, *Thornbrough v. Western Placer Unified School District* (2013) 223 Cal.App.4th 169, 186-190. (*Natarajan,* at 390, n. 10.) However, in *Thornbrough,* the Court held *Haas* was distinguishable because the challenge had been late and because *Haas* had presented an adequate record "demonstrating the tainted relationship between the hearing officer and the county." (*Id.* at 188, n. 17.) Here, it is undisputable that Dr. Natarajan presented his challenge to the hearing officer at the earliest possible time, and there is ample evidence of "a tainted relationship" between Dignity and the hearing officer. Furthermore, *Thornbrough* cited *Yaqub, supra,* with apparent approval, as follows:

> [S]ee *Yaqub v. Salinas Valley Memorial Healthcare System* (2004) 122 Cal.App.4th 474, 483–486, . . . [hearing officer in physician hospital privileges case recently had been on a the board of hospital foundation, and had presided over three other hearings, facts "sufficient to create a 'possible temptation' to favor the hospital."]

(*Thornbrough,* at 188.)

Thus, *Thornbrough* does not support *Natarajan's* claim that past employment by a hiring entity is "irrelevant." It also is contrary to *Natarajan's* assertion that *Yaqub* is "a derelict on the waters of the law."

Natarajan also flies in the face of the well-recognized real-life financial incentives that occur when private attorneys are engaged in presiding over quasi-judicial proceedings. *Haas* was based in significant part on its recognition of the incentive of private adjudicators to favor steady customers, as described above. See also, *Benjamin, Weill and Mazer v. Kors* (2011) 195 Cal.App.4th 40, 66-69, describing the same problem. The hearing officer's potential for future employment at Dignity hospitals may be the most critical factor demonstrating his appearance of bias under *Haas.* However, the combination of potential future employment plus a history of past employment makes an even stronger case for disqualification, as recognized in *Yaqub.*

III. PHYSICIANS ARE ENTITLED TO HOSPITAL HEARINGS MEETING THE PREVAILING STANDARD OF IMPARTIALITY.

Applebaum, supra, held that physicians are entitled to a hospital hearing that "meets at least *currently prevailing* standards of impartiality." (*Id.,* 104 Cal.App.3d at 657, emphasis added.) The Courts in *Hackethal v. California Medical Assn*., *supra*, 138 Cal.App.3d at 442, and *Lasko v. Valley Presbyterian Hospital*, *supra*, 180 Cal.App.3d at 528, agreed with that holding in cases concerning hospital hearings. *Blinder, Robinson Co. v. Tom* (1986) 181 Cal.App.3d 283, 295, and *Golden Day Schools v. State Department of Education*, *supra,* 83 Cal.App.4th at 710, applied the same rule to other types of administrative hearings. To Petitioner's knowledge, no case has ever held to the

contrary.

Haas established what is now the currently prevailing standard of impartiality for administrative hearing officers under California law and that standard therefore applies here. The fact that every other type of quasi-judicial or judicial hearing, whether public or private, also requires adjudicators without an appearance of bias, as described in Section I(B), above, also demonstrates that the appearance of bias standard is the prevailing standard of impartiality in California. It therefore applies to private hospital hearings.

IV. THE APPEARANCE OF BIAS SHOULD BE THE STANDARD APPLIED TO HOSPITAL HEARINGS.

The appearance of bias not only *is* the applicable standard under California law, as shown above, but it should be, based on the importance of maintaining the integrity of our system of justice, practical realities and policy considerations.

A. Impartial Adjudicators Are Fundamental to the Integrity of Our Legal System.

Under *Mathews v. Eldridge* (1976) 424 U.S. 319, 335, due process is generally a flexible legal concept, and the amount of process due an individual depends on the interest at stake; the risk of erroneous deprivation of that interest; the value of additional procedural safeguards; and the fiscal and administrative costs of a proposed safeguard. (Id. at 1035-36.) However, as explained in *Haas*, this flexibility does not apply to the requirement of impartial adjudicators, because

neutral decision-makers are so fundamental to our legal system: "'[t]he unfairness that results from biased decisionmakers strikes so deeply at our sense of justice that it differs qualitatively from the injury that results from insufficient procedures.'" (*Haas,* 27 Cal.4th at 1036, quoting *United Retail Wholesale Emp. v. Yahn McDonnell* (3rd Cir. 1986) 787 F.2d 128, 137-138.) This Court has an independent interest in ensuring that quasi-judicial systems adopted by the State are not subject to corruption, in order to preserve respect for our legal system and trust that it will operate fairly for those who use it.

Truly fair hearings should also reduce the number of petitions for writ of mandate, thereby promoting judicial efficiency.

B. Hospitals Have Strong Incentives to Appoint Hearing Officers That Will Favor Them.

Application of the appearance of bias standard and due process to hospital hearings is necessary because practical realities create a high probability that hospitals will on some occasions intentionally choose hearing officers that will not be neutral. Both non-profit and for-profit hospitals must maintain adequate revenues to pay their expenses. The latter must also generate additional revenue to provide income for their shareholders, given their corporate purpose. As a consequence, private hospital administrators work under pressure to increase revenue and decrease losses. Hospitals therefore have financial incentives to use their influence on peer review proceedings as a means of eliminating economic

competitors.

In this case, it is undisputed that Dignity was an economic competitor of Dr. Natarajan; that Dignity's hospitalist service at St. Joseph's Medical Center was losing approximately $600,000 a year; that it had tried to buy out Dr. Natarajan's practice; and that it tried to lure away some of the physicians in Dr. Natarajan's group. (6 PAR 1376; 17 PAR 4170-4174; 19 PAR 4624.) The hospital thus had a strong financial incentive to initiate a peer review investigation of Dr. Natarajan, influence the results of that investigation, and then use a hearing officer that would be helpful in terminating Dr. Natarajan's privileges.

Similarly, in *Smith v. Selma Community Hospital* (2008) 164 Cal.App.4th 1478, Dr. Smith was a competitor with the Adventist hospital system. As here, the hospital had first attempted to purchase Dr. Smith's practice. (*Id.,* 164 Cal.App.4th at 1489-1490.) When the buy-out failed, the hospital pursued peer review proceedings against him. The Court recognized that this evidence supported the inference that the hospital peer review proceedings were brought against him "for reasons other than public safety." (*Id.* at 1511.) In these or similar circumstances, hospitals cannot be expected to always act with absolute integrity and treat physician competitors with fairness. To the contrary, they must be "presumed to favor [their] own rational self-interest by preferring [adjudicators] who tend to issue favorable rulings." (*Haas,* 27 Cal.4th at 1031-32.) *Haas* recognizes the fundamental reality that humans act in their own self-interest most

of the time. Private hospitals, and their administrators and attorneys, are no exception to that rule.

Even when physicians are not economic competitors or whistleblowers, hospitals have an economic incentive to hire hearing officers that will favor the hospital. An adverse hearing decision, unless overturned through a writ of mandate, forecloses any action by the physician for wrongful termination of privileges, bad faith peer review, intentional interference with the right to practice one's profession, unfair procedure, and other common law torts arising from the events related to the hearing. (*Westlake Community Hospital v. Superior Court* (1976) 17 Cal.3d 465, 485-486.) Thus, a hospital can insulate itself from future tort liability by winning a hearing.

Private hospitals thus virtually always have financial incentives to tilt hospital hearings in their favor that are not present in quasi-judicial governmental hearings or in the courts. They also have the capacity, through appointment of ad hoc hearing officers, to choose adjudicators who are likely to favor them. The combination of these two facts creates a much higher risk of private hospital misuse of hospital hearings than in government hearings. Private hospitals should therefore be held to at least the same appearance of bias standard as superior court judges, administrative law judges, temporary judges and arbitrators. There is no rational basis for trusting that private hospitals, or their medical staffs, will never take unfair advantage of their power to appoint ad hoc adjudicators.

Dignity argued below that it was actually the hospital's medical staff and administration, not Dignity, that appointed the hearing officer, as a foundation for its argument that the hearing officer had no financial incentive to favor Dignity. (DB, pp. 45-46.) That argument is factually untrue. As described above, Dignity's corporate counsel asked Singer if he would be willing to serve, and then his appointment was formally confirmed by the hospital's President, as required by the hospital's bylaws. (1 PAR 238-241; 7 PAR 1616; 19 PAR 4655-4657.) The facts in this case demonstrate the reality of who actually picks hospital hearing officers – other hospital attorneys.

Todd Hecox, one of Dignity's in-house attorneys, or possibly one of his supervisors or Harry Shulman, selected Singer. (1 PAR 238-241; AAR 52-55.) Hospital presidents and the chiefs of medical staffs have no reason to be familiar with the pool of potential hearing officers. "It is . . . an attorney's duty to protect his client in every possible way. . . ." (*Flatt v. Superior Court* (1994) 9 Cal.4th 275, 289.) Hospital attorneys have an opportunity to protect their clients from liability by recommending other hospital attorneys known to favor hospitals. It can hardly be expected that they would fail to do so, given their duty to their clients, and their own interest in having their clients pleased with the results of the hearing.

C. Judicial Review Currently Provides Very Limited Protection to Physicians.

Dignity has argued that hospitals have no incentive to hold unfair hearings because they would then face the risk of having the results overturned on appeal. (DB, pp. 12, 33.) That argument carries no water, because judicial review of private hospital hearings is very limited and does not truly inspire fear of reversal. In 1977, *Anton* required independent review of hospital hearings by the courts because termination of a physician's hospital privileges affected a fundamental vested right. (*Id.,* 19 Cal.3d at 822-825.) However, the following year the CHA successfully sponsored legislation to overturn *Anton* by amending Code of Civil Procedure § 1094.5 to provide for only a substantial evidence review of district, municipal and private hospital hearings. (Section 1094.5, subd. (d).)

The substantial evidence standard is deferential. (*In re I.C.* (2018) 4 Cal.5th 869, 892.) Hospitals seeking to generate a plausible reason to terminate a physician's privileges can generally do so. Combing through a sufficient number of any doctor's medical records will invariably find documentation errors or decisions that can be retrospectively criticized by hospital-friendly experts.

There was no finding by the hearing panel that Dr. Natarajan violated the standard of care in a single case or that he had harmed a single patient with his medical care. (35 PAR 9426-9461.) Therefore the hearing officer focused primarily on the issue of allegedly delinquent completion of medical records.

(*Ibid.*) Because the substantial evidence rule is easily met, even this thin gruel likely would meet that standard. The courts will find that substantial evidence supports a hospital's decision unless the administrative findings are so lacking in evidentiary support that they are unreasonable, even if a different decision would have been more reasonable. (*Cipriotti v. Board of Directors* (1983) 147 Cal.App.3d 144, 155.) It is therefore nearly impossible for a physician to prove there was insufficient evidence to warrant discipline. Petitioner is not aware of a single case since the 1978 amendment to Section 1094.5 where the courts have overturned a hearing decision for lack of substantial evidence.

The only hope to reverse an adverse decision is to convince a court that the hearing was unfair. However, even that possibility has been slim, due in part to the very significant amount of resources it takes to go through a hearing, superior court review and appeal. Even though physicians have more capacity to fund a lawsuit than the average individual, they still often cannot compete with the virtually unlimited resources of an eleven billion dollar hospital system such as Dignity, or similar health care giants. (20 PAR 4846.)

In addition, the legal process including a petition for a writ ordinarily takes years. In this case, for example, the court proceedings took four years from the November 11, 2015, termination of Dr. Natarajan's privileges to the Court of Appeal's final decision. (PAR 211.) While a case makes its way through the trial court and the Court of Appeal, a physician may have diminished earnings, if any at

all, due to the termination of privileges and subsequent reports to the California Medical Board and National Practitioner Data Bank. (*Mileikowsky, supra,* 45 Cal.4th at 1267-68.)

In addition, the courts of appeal have generally been deferential to hospital decisions even on the question whether the hearing was unfair. (See, e.g., *Hongsathavij v. Queen of Angels Med. Center*, *supra,* 62 Cal.App.4th at 1142-1143; *Ellison v. Sequoia Health Services* (2010) 183 Cal.App.4th 1486, 1496-1500.) As a consequence, there are only a handful of hospital hearing decisions that have been reversed on the ground of unfairness since the enactment of Section 809 et seq.

The fact that hospitals are not intimidated by the prospects of an appellate reversal are demonstrated by the facts of this case. Singer was appointed eleven times as a Dignity hearing officer from 2005 through 2015. During that entire decade, *Yaqub* was the applicable law governing hospital hearings, as demonstrated by the CHA's efforts to reverse it in the Legislature described in Section II(C)(4) above. Nonetheless, Dignity continued to appoint Singer over and over again with no apparent concern that any of its hearings might one day be reversed on appeal. Since the CHA could not succeed in reversing *Yaqub* in the legislature, Dignity simply ignored it.

Thus, the only deterrent to hospitals appointing biased hospital attorneys is a firm application of the *Haas* doctrine by this Court. If hospitals understand that

appointing hospital attorneys with a financial incentive to favor them may actually lead to reversal of the hearing, and thereby increase their costs and subject them to tort liability, it may deter the repeated appointment of hospital attorneys with a financial incentive to favor the appointing hospital. On the other hand, if *Natarajan's* holding that physicians are not entitled to due process becomes the law, it will become virtually impossible for physicians to ever have an adverse hearing decision reversed. The purpose of Sections 809.1 - 809.4 to protect physicians' right to fair hearings will be effectively nullified.

V. THE CORRECT REMEDY IS A WRIT OVERTURNING DIGNITY'S DECISION.

In the courts below, Dignity asserted that Dr. Natarajan's only remedy is a "do-over" Dignity hearing. (DB, p. 54, n. 33) In making that argument, it relied only on *Johnson v. City of Loma Linda* (2000) 24 Cal.4th 61, which held that administrative findings not overturned in a mandamus action are binding in later civil actions. In *Johnson,* the plaintiff never succeeded in overturning the adverse hearing decision at issue because he waited too long to challenge it. (Id. at 68-69.) If Dr. Natarajan's Petition is granted, on the other hand, he will have succeeded in overturning the findings of the Dignity hearing, and he will not be bound by them in any later proceeding, nor required to have another Dignity hearing.

In governmental administrative hearings, the usual remedy for an unfair hearing is a remand for another hearing before the same agency. However, that

rule does not apply to hospital hearings under *Westlake Community Hospital v. Superior Court, supra,* 17 Cal.3d 465. *Westlake* is the leading case on the application of the exhaustion of administrative remedies doctrine to peer review hearings. It held:

> Once a court determines in a mandamus proceeding that an association's quasi-judicial decision cannot stand, ***either because of a substantive or procedural defect,*** the prevailing party is entitled to initiate a tort action against the hospital and its board or committee members or staff.

(*Id.* at 484, emphasis added.) Under *Westlake,* if Dr. Natarajan received an unfair hearing, he is entitled to file a superior court action for tort remedies. (*Id.* at 484, n. 9.) The same rule applies to both a damages claim and to a request for reinstatement of privileges. (*Id.* at 469.)

The *Westlake* rule makes sense. Dr. Natarajan should not be required to spend another five years on litigation that will cost hundreds of thousands of dollars by being forced to go through another hearing controlled by Dignity. Nothing would prevent Dignity from giving him another unfair hearing. Dr. Natarajan's sole remedy would be another petition for writ of mandate. An entity with Dignity's resources could continue this loop until Dr. Natarajan retires. This Court should grant Dr. Natarajan the only remedy he has requested, a writ of mandate overturning Dignity's decision to terminate his privileges, which will allow him to seek reinstatement and damages before a neutral judge and jury.

CONCLUSION

Fahlen v. Sutter Central Valley Hospitals, supra, recognizes that peer review may be used by hospitals for the illegitimate reason of retaliation against whistleblowers. (*Id.,* 58 Cal.4th at 677-679.) The Legislature also recognized that possibility when it amended Health and Safety Code § 1278.5, subd. (d)(2) in 2007 to prohibit retaliation against physician whistleblowers through the termination of hospital privileges.

In this case, there is undisputed evidence that Dignity had a substantial financial incentive to use peer review for another illegitimate purpose, eliminating a successful economic competitor. Since he did not have a whistleblower claim, Dr. Natarajan was forced to defend himself in a forum controlled by the hospital and its medical staff. *Natarajan* fails to consider or address the potential harm to the public health if hospitals are permitted to use peer review as a weapon against economic competitors. The appearance of bias rule is necessary to prevent unfair hospital hearings influenced by hearing officers who have a financial interest in pleasing the hospitals that hired them.

This Court should therefore affirm that the appearance of bias applies to private hospital hearings and that common law fair procedure provides the same protection as due process, and overturn the hearing decision below.

Dated: May 8, 2020

Respectfully submitted,

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CERTIFICATE OF WORD COUNT

Pursuant to Rule 8.360, subd. (b)(1), I certify that the attached brief uses the 13 point Times New Roman font and contains 18,270 words.

Dated: May 8, 2020

By Stephen D. Schear

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Sundar Natarajan, M.D.

PROOF OF SERVICE

Re: *Natarajan v. Dignity Health,* California Supreme Court Case No. S259364

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I declare under penalty of perjury the foregoing is true and correct.

Date: May 8, 2020
Oakland, California

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