S244148

IN THE SUPREME COURT OF CALIFORNIA

ARAM BONNI,
Plaintiff and Appellant,

v.

ST. JOSEPH HEALTH SYSTEM et al.,
Defendants and Respondents.

AFTER A DECISION BY THE COURT OF APPEAL, FOURTH APPELLATE DISTRICT, DIVISION THREE
CASE NO. G052367

APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF; AMICUS CURIAE BRIEF OF CALIFORNIA HOSPITAL ASSOCIATION IN SUPPORT OF RESPONDENTS ST. JOSEPH HEALTH SYSTEM ET AL.

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APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF

Under California Rules of Court, rule 8.520(f), the California Hospital Association (CHA) requests leave to file the attached amicus curiae brief in support of respondents St. Joseph Health System, St. Joseph Hospital of Orange, Mission Hospital Regional Medical Center, The Medical Executive Committee of St. Joseph Hospital of Orange, Covenant Health Network, Inc., Covenant Health Network, Dr. Christopher Nolan, Dr. Michael Ritter, Dr. Kenneth Rexinger, Dr. Farzad Masoudi, Dr. Tod Lempert, Dr. Randy Fiorentino, Dr. Juan Velez, and Dr. George Moro (collectively St. Joseph).[1]

CHA represents over 400 hospitals and health care systems in California, comprising over 90 percent of the hospitals in the state. CHA remains ever cognizant of the fact that "the hospital itself is ultimately responsible for the health and safety of the patients it serves" and that " '[a] hospital has a duty to ensure the competence of the medical staff by appropriately overseeing the peer review process.' " (*El-Attar v. Hollywood Presbyterian Medical Center* (2013) 56 Cal.4th 976, 993 (*El-Attar*).) Thus,

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[1] CHA certifies that no person or entity other than CHA and its counsel authored this proposed brief in whole or in part and that no person or entity other than CHA, its members, or its counsel made any monetary contribution intended to fund the preparation or submission of the proposed brief. (See Cal. Rules of Court, rule 8.520(f)(4).)

CHA is committed to establishing and maintaining a financial and regulatory environment within which hospitals, health care systems, and other health care providers can offer high-quality patient care. To that end, CHA's members are active participants in the state-law mandated peer review process, and therefore have an important interest in seeing that the peer review process continues to serve the salutary and protective purposes that California law has entrusted to it. CHA promotes its objectives, in part, by participating as amicus curiae in important cases like this one.

This case raises important questions about the applicability of the anti-SLAPP statute to lawsuits based on and arising out of various aspects of hospital peer review proceedings. As the principal trade group representing hospitals in California, CHA has expertise and experience with the operation and intricacies of peer review procedures and their vital role in ensuring the quality and safety of health care for patients throughout the state. In that light, CHA submits the following amicus brief to elucidate the complexities of the peer review process, to explain how every step and component of that process constitutes petitioning activity protected by the anti-SLAPP statute, and to show that many lawsuits challenging peer review proceedings are based on such protected petitioning activity and thus subject to an anti-SLAPP motion.

CHA therefore requests that this Court grant its application for leave to file the attached amicus brief.

August 7, 2020

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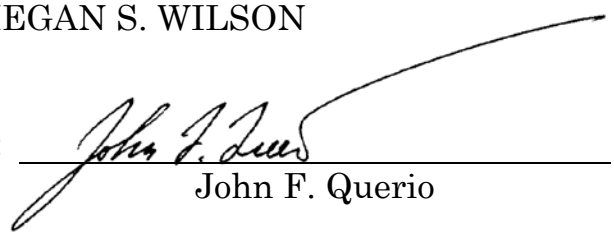
By: 
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AMICUS CURIAE BRIEF

INTRODUCTION

Code of Civil Procedure section 425.16,[2] California's anti-SLAPP statute, "allows defendants to request early judicial screening of legal claims targeting free speech or petitioning activities." (*Wilson v. Cable News Network, Inc.* (2019) 7 Cal.5th 871, 880-881 (*Wilson*).) Whether claims qualify for this process turns on whether they are based on activities described in subdivision (e) of section 425.16, which defines the conduct protected by the anti-SLAPP statute. (See *City of Montebello v. Vasquez* (2016) 1 Cal.5th 409, 421 (*City of Montebello*).) This appeal presents the question of whether, and to what extent, claims against hospitals and physicians arising from the peer review process are based on these protected activities and are therefore subject to an anti-SLAPP motion.

In *Kibler v. Northern Inyo County Local Hospital District* (2006) 39 Cal.4th 192, 201 (*Kibler*), this Court recognized that "membership on a hospital's peer review committee is voluntary and unpaid, and many physicians are reluctant to join peer review committees so as to avoid sitting in judgment of their peers." *Kibler* therefore held that an anti-SLAPP motion can be brought to challenge claims arising out of peer review proceedings. (*Id.* at p. 196.) To hold that critical parts of the peer

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[2] All further statutory references are to Code of Civil Procedure section 425.16 unless otherwise indicated.

review process do not qualify for protection under the anti-SLAPP statute would improperly "discourage participation in peer review by allowing disciplined physicians to file harassing lawsuits against hospitals and their peer review committee members rather than seeking judicial review of the committee's decision by the available means of a petition for administrative mandate." (*Id.* at p. 201.)

Mandated by statute and governed by hospital bylaws, peer review is the principal means by which hospitals and other medical institutions in California ensure high quality medical care and protect the health and safety of millions of patients every year by supervising and evaluating the professional conduct of physicians who are members of hospital medical staffs. Because this enterprise is of such vital importance to the general public and has serious implications for peer-reviewed physicians, California law and hospital bylaws lay out detailed procedures that must be followed in conducting peer review.

Protected speech and petitioning activities are inherent in virtually all aspects of the peer review process, including (1) the discussions peer reviewers have with each other during the investigation phase of a peer review proceeding, (2) the formal notices of charges that peer review committees issue to doctors facing disciplinary proceedings, (3) the documentary evidence and oral testimony offered at peer review hearings before the medical staff judicial review committee, (4) the written recommendation regarding a physician's privileges that the judicial review committee issues for review by the hospital governing board,

(5) the appeal process to the hospital's governing board, and (6) the reports regarding decisions to suspend, restrict, or terminate a physician's privileges that the hospital and medical staff are required by statute to make to the California Medical Board and the National Practitioner Data Bank.

Even those aspects of the peer review process that are not themselves speech or petitioning activity—such as hospital governing board decisions to summarily suspend, restrict, or terminate a physician's staff privileges—are nevertheless conduct protected by the anti-SLAPP statute. That conduct furthers the speech and petitioning activity inherent in the peer review process, which is undertaken in connection with an issue of public interest—i.e., the public's vital interest in removing unfit and incompetent doctors from the practice of medicine, protecting the health and safety of patients, and ensuring the highest quality of medical care in California hospitals.

In *Park v. Board of Trustees of California State University* (2017) 2 Cal.5th 1057, 1060 (*Park*), this Court addressed the nexus that must exist "between a challenged claim and the defendant's protected activity" for the claim to fall within the anti-SLAPP statute's scope. *Park* held that a discrimination claim arising from a university's decision to deny tenure to a professor was not based on activity protected under the anti-SLAPP statute. (*Id.* at pp. 1061-1062, 1068-1073.) But, in doing so, the Court left unanswered important questions regarding whether, and to what extent, the anti-SLAPP statute

applies in the different context of physician lawsuits challenging multiple aspects of a hospital peer review proceeding.

This case squarely presents those unanswered questions. The risk that peer review participation will be chilled absent anti-SLAPP protection has not abated in the years since *Kibler* was decided. In fact, that risk has ripened into an unfortunate reality in which doctors subject to peer review reflexively file retaliation lawsuits in order to achieve the very chilling effect against which *Kibler* warned. This Court should again take account of *Kibler*'s warning and issue a robust ruling protecting all participants in the peer review process by making clear that the anti-SLAPP statute is available as a powerful screening mechanism to weed out the sort of frivolous, harassing, and retaliatory physician lawsuits that have become all too common—no matter what phase or aspect of the peer review process such lawsuits target. The anti-SLAPP statute is a crucial bulwark of the peer review process in California, and this Court should reinforce it in this case to protect the effective functioning of peer review. In short, this Court should hold that all aspects of the peer review process are protected under the anti-SLAPP statute.

LEGAL ARGUMENT

I. Hospital peer review is a complex process consisting of protected petitioning activity at every step and embodying a vital public policy of California.

A. Hospital peer review entails a multi-step procedure that involves petitioning activity in every aspect of the process.

1. Peer review is mandated by statute to ensure quality patient care in every hospital.

"Decisions concerning medical staff membership and privileges are made through a process of hospital peer review." (*Mileikowsky v. West Hills Hospital & Medical Center* (2009) 45 Cal.4th 1259, 1267 (*Mileikowsky*).) "Every licensed hospital is required to have an organized medical staff responsible for the adequacy and quality of the medical care rendered to patients in the hospital. [Citations.] The medical staff must adopt written bylaws 'which provide formal procedures for the evaluation of staff applications and credentials, appointments, reappointments, assignment of clinical privileges, appeals mechanisms and such other subjects or conditions which the medical staff and governing body deem appropriate.' " (*Ibid.*) Minimum requirements for peer review are codified in California law. (*Ibid.*; see Bus. & Prof. Code, § 809 et seq.)

Hospital peer review is a multi-stage "process" in which a medical staff "reviews the basic qualifications, staff privileges, employment, medical outcomes, or professional conduct" of other members of the medical staff. (Bus. & Prof. Code, § 805, subd. (a)(1)(A)(i).) The goal of this process is for the medical staff

to "[a]ssess and improve the quality of care" and ultimately make the determination whether a doctor "may practice or continue to practice" at that facility. (*Id.*, subd. (a)(1)(A)(i)(I) & (II).)

2. Peer review committees investigate substandard medical care by physicians, provide notice of proposed adverse action to physicians, and commence judicial review committee proceedings.

Generally, hospital medical staffs carry out peer review functions through committees that "investigate complaints about physicians and recommend whether staff privileges should be granted or renewed." (*Mileikowsky*, *supra*, 45 Cal.4th at p. 1267; see *Arnett v. Dal Cielo* (1996) 14 Cal.4th 4, 10 (*Arnett*).) These peer review committees often informally investigate complaints or incidents involving staff physicians (*Arnett*, at p. 10), and such investigations often involve interviews, review of documentary evidence, exchange of correspondence, and committee meetings (see Bus. & Prof. Code, § 809.1, subd. (a)). Since such investigations are "written or oral statement[s] or writing[s] made in connection with an issue under consideration or review by . . . an official proceeding authorized by law [i.e., peer review]" (Code Civ. Proc., § 425.16, subd. (e)(2)), they constitute protected petitioning activity under the anti-SLAPP statute (see *Kibler*, *supra*, 39 Cal.4th at pp. 198-200; *Tichinin v. City of Morgan Hill* (2009) 177 Cal.App.4th 1049, 1061, 1068-1069 [city council's investigation of attorney's surveillance activity is protected activity under subdivision (e)(1) and (2); attorney's investigation in anticipation of asserting legal claims is protected by

constitutional right of petition]; *Hansen v. California Department of Corrections & Rehabilitation* (2008) 171 Cal.App.4th 1537, 1544 (*Hansen*) [employer's investigation of employee's allegedly criminal activity is protected activity under subdivision (e)(2)]; *Gallanis-Politis v. Medina* (2007) 152 Cal.App.4th 600, 610-612 [employer's investigation undertaken in response to discovery requests during pending litigation is protected activity under subdivision (e)(2)]).

When a peer review committee of the medical staff decides to recommend a "final proposed action" adverse to a staff physician's hospital privileges that would require reporting to the Medical Board of California, the peer review committee must provide the doctor written notice of the proposed action, including his or her right to request a hearing to review the proposed action. (Bus. & Prof. Code, § 809.1, subd. (b); see *Mileikowsky*, *supra*, 45 Cal.4th at pp. 1268-1269.) If the doctor requests a hearing, the peer review committee must also provide written notice of the reasons for the proposed action, including the acts or omissions with which the doctor is charged. (Bus. & Prof. Code, § 809.1, subd. (c).) This written notice of charges functions like an indictment or information in criminal proceedings, constitutes an integral part of the peer review process, and is protected petitioning activity as well. (See *Kibler*, *supra*, 39 Cal.4th at pp. 199-200; see also *Briggs v. Eden Council for Hope & Opportunity* (1999) 19 Cal.4th 1106, 1115 [" ' "constitutional right to petition . . . includes the basic act of filing litigation or otherwise seeking administrative action" ' "; " 'communications

preparatory to or in anticipation of the bringing of an action or other official proceeding are . . . entitled to the benefits of section 425.16' "].)

Thus, any aspect of a lawsuit challenging the conduct of a peer review investigation into a physician's actions or the decision to initiate peer review proceedings against the physician is based on protected activity within the meaning of the anti-SLAPP statute.

3. The judicial review committee conducts a hearing and provides a written recommendation regarding its factual findings. The physician has a right of appeal to the hospital governing board.

Upon the physician's request, he or she is entitled to a hearing before a neutral finder of fact, commonly known as a judicial review committee. (Bus. & Prof. Code, § 809.2, subds. (a) & (h).) The statutory provisions governing peer review set out detailed procedures for the conduct of this hearing, including an opportunity for voir dire and excusal of hearing panel members, discovery of documents and exchange of witness lists, the right to call and cross-examine witnesses and to present and rebut relevant evidence, the right to present a written closing argument, and the right to have a record made of the hearing. (*Id.*, §§ 809.2, subds. (c)-(h), 809.3, subd. (a).) At the hearing, the burden of production and proof rests with the peer review committee seeking adverse action against the doctor's privileges. (*Id.*, § 809.3, subd. (b)(1), (3).) The medical staff's bylaws must provide whether an accused physician may be represented by an

attorney during a hearing, but if the physician is not so represented, the medical staff may not be represented by an attorney either. (*Id.*, § 809.3, subd. (c).)

After the hearing is complete, the judicial review committee must provide the physician with a written decision containing its findings of fact and its conclusions connecting the evidence presented and its decision. (Bus. & Prof. Code, § 809.4, subd. (a)(1).) Typically, this written decision functions as the judicial review committee's recommendation regarding the physician's privileges, and the final decision is generally taken by the hospital's governing board upon appeal by the physician. (See OBOM 37-38.)

Where (as they generally do) the medical staff's bylaws provide a right of appeal to the hospital's governing board, the judicial review committee must inform the physician of the procedure for appealing its decision. (Bus. & Prof. Code, § 809.4, subd. (a)(2).) If the bylaws do afford an appeal mechanism, they must provide the physician with the right to appear and respond, to be represented by an attorney or other representative, and to receive the governing board's written decision. (*Id.*, subd. (b).) In such an appeal, the governing board is not an independent factfinder, but instead generally acts like an appellate tribunal, reviewing the judicial review committee's decision to determine if it was supported by substantial evidence. (*Smith v. Selma Community Hospital* (2008) 164 Cal.App.4th 1478, 1499-1500 (*Smith*).)

As this Court held in *Kibler*, *supra*, 39 Cal.4th at pages 199-201, every aspect of this peer review hearing and appeal process constitutes protected petitioning activity under the anti-SLAPP statute. Thus, any aspect of a lawsuit alleging that the plaintiff was harmed by statements made to the judicial review committee, testimony given before this committee, procedures followed by the committee, or other actions taken during this process is ipso facto based on such protected activity within the meaning of subdivision (e)(1) or (e)(2) of the anti-SLAPP statute, which protect statements made before, or in connection with an issue under consideration or review by, an official proceeding. (See Code Civ. Proc., § 425.16, subd. (e)(1), (2).)

4. In connection with the initiation of peer review proceedings, the medical staff may summarily suspend a physician's privileges.

In connection with the initiation of peer review proceedings, a hospital medical staff may summarily suspend a doctor's privileges "where the failure to take that action may result in an imminent danger to the health of any individual." (Bus. & Prof. Code, § 809.5, subd. (a).)

Where a medical staff summarily suspends a doctor's privileges, it is required to provide the doctor with the above-described notice and hearing rights that initiate the peer review process. (Bus. & Prof. Code, § 809.5, subd. (a).) Thus, a summary suspension of privileges functions as the initiation of a peer review proceeding and is therefore itself a form of protected

petitioning activity or, at the very least, conduct in furtherance of such petitioning activity. (See Code Civ. Proc., § 425.16, subd. (e)(1), (4).)

Furthermore, every summary suspension of privileges for longer than 14 days must be reported to the Medical Board of California (Bus. & Prof. Code, § 805, subd. (e)), and every summary suspension lasting longer than 30 days must be reported to the National Practitioner Data Bank (NPDB) under the federal Health Care Quality Improvement Act of 1986 (42 U.S.C. §§ 11133, subd. (a)(1), 11151). As explained at pages 26-27, *post*, these mandated reports are quintessential protected petitioning activities, and since they constitute conduct in furtherance of such protected activities (see Code Civ. Proc., § 425.16, subd. (e)(4)), summary suspensions of privileges are also protected under the anti-SLAPP statute on that basis as well.

5. The hospital governing board issues the final written decision regarding privileges, and the physician may seek judicial review of that decision via administrative mandamus.

At the end of the peer review process, the hospital governing board issues its written decision on any appeal, which is the final decision regarding the physician's staff privileges. The votes of individual governing board members (as well as the votes of individual judicial review committee members earlier in the peer review process) also constitute protected activity under the anti-SLAPP statute, as those votes are acts in furtherance of free speech or petitioning activity. (See *City of Montebello*, *supra*,

1 Cal.5th at pp. 412, 422-427 [city councilmembers' votes constitute protected activity under section 425.16, subdivision (e)(1) and (2)].)

Furthermore, the governing board's decision is reviewable in court by writ of administrative mandate. (See Bus. & Prof. Code, § 809.8; *Kibler*, *supra*, 39 Cal.4th at p. 200; *Smith*, *supra*, 164 Cal.App.4th at p. 1499.) "Thus, the Legislature has accorded a hospital's peer review decisions a status comparable to that of quasi-judicial public agencies whose decisions likewise are reviewable by administrative mandate." (*Kibler*, at p. 200.) As explained at pages 41-46, *post*, the governing board's final decision to restrict or terminate a physician's staff privileges constitutes conduct in furtherance of the speech and petitioning activity inherent in the peer review process in connection with the public interest in patient safety and quality of medical care, and is therefore protected under Code of Civil Procedure section 425.16, subdivision (e)(4).

6. The governing board is required by law to report certain adverse peer review actions to state and federal agencies.

Finally, along with summary suspensions, a hospital governing board's final decision to revoke or restrict a staff physician's privileges for a medical disciplinary reason (or the physician's voluntary resignation, leave of absence, or abandonment or withdrawal of a privileges renewal application with peer review charges pending) must be reported to the Medical Board of California, as well as to the NPDB if for longer

than 30 days. (Bus. & Prof. Code, § 805, subds. (b)-(c); 42 U.S.C. § 11133, subd. (a)(1).)

Failure to make such reports is a crime and constitutes unprofessional conduct by a physician. (Bus. & Prof. Code, § 805, subds. (k)-(l).) Persons making the required reports are immunized from civil and criminal liability. (*Id.*, § 805, subd. (j).) Hospitals evaluating a physician's first-time applications for staff privileges are required to request any such reports regarding the physician filed by other hospitals, and the Medical Board is required to disclose such reports. (*Id.*, §§ 805, subd. (h), 805.5, subds. (a)-(b).) Failure to request such reports is also a crime. (*Id.*, § 805.5, subd. (c).)

Through this reporting requirement, peer review "plays a significant role in protecting the public against incompetent, impaired, or negligent physicians" and "in the words of the Legislature, 'is essential to preserving the highest standards of medical practice' throughout California." (*Kibler*, *supra*, 39 Cal.4th at pp. 199-200.)

Just like all other reports to governmental authorities, these reports are core petitioning activity protected by the anti-SLAPP statute. (Code Civ. Proc., § 425.16, subd. (e)(1), (2) [anti-SLAPP protection extends to "any written or oral statement or writing made before a legislative, executive, or judicial proceeding, or any other official proceeding authorized by law" and "any written or oral statement or writing made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding

authorized by law"]; see *Comstock v. Aber* (2012) 212 Cal.App.4th 931, 941 ["The law is that communications to the police are within SLAPP"]; *Chabak v. Monroy* (2007) 154 Cal.App.4th 1502, 1512 [mandatory report of child abuse to investigative authorities is protected under anti-SLAPP statute]; *ComputerXpress, Inc. v. Jackson* (2001) 93 Cal.App.4th 993, 1009 [complaint filed with Securities and Exchange Commission is protected under anti-SLAPP statute]; cf. *Hansen*, *supra*, 171 Cal.App.4th at pp. 1546-1547 [reports of crimes to police or other regulatory agencies are protected by Civil Code section 47, subdivision (b) official proceedings privilege].)

Indeed, in the analogous context of the official proceedings privilege embodied in Civil Code section 47, subdivision (b), courts have held that mandated reports of hospital peer review decisions constitute protected petitioning activity. (*Joel v. Valley Surgical Center* (1998) 68 Cal.App.4th 360, 372; *Dorn v. Mendelzon* (1987) 196 Cal.App.3d 933, 941-943; *Long v. Pinto* (1981) 126 Cal.App.3d 946, 948; see *Lemke v. Sutter Roseville Medical Center* (2017) 8 Cal.App.5th 1292, 1299 [report to Board of Registered Nursing is protected by Civil Code section 47, subdivision (b) privilege]; cf. Bus. & Prof. Code, § 805, subd. (j) ["No person shall incur any civil or criminal liability as the result of making any report required by this section"].)

B. Hospital peer review proceedings involve a vital issue of public interest because they protect the public from incompetent and dangerous physicians.

California's anti-SLAPP statute was designed "to resolve quickly and relatively inexpensively meritless lawsuits" threatening speech and petitioning activities involving "matters of public interest." (*Newport Harbor Ventures, LLC v. Morris Cerullo World Evangelism* (2018) 4 Cal.5th 637, 639.) All aspects of peer review activities are undertaken in connection with such an issue of crucial public interest: California's public policy of safeguarding the public from incompetent and dangerous physicians.

Both this Court and the Legislature have long recognized the vital importance of the peer review process in this state as a means of ensuring high-quality medical care for all Californians. Peer review " 'is essential to preserving the highest standards of medical practice' throughout California" (*Kibler*, *supra*, 39 Cal.4th at p. 199, quoting Bus. & Prof. Code, § 809, subd. (a)(3)), "plays a significant role in protecting the public against incompetent, impaired, or negligent physicians" (*id.* at p. 200; see *Arnett*, *supra*, 14 Cal.4th at pp. 7, 11), and " 'will aid the appropriate state licensing boards in their responsibility to regulate and discipline errant healing arts practitioners' " (*Kibler*, at p. 200, quoting Bus. & Prof. Code, § 809, subd. (a)(5); see *El-Attar*, *supra*, 56 Cal.4th at p. 988 ["the 'primary purpose of the peer review process' . . . is 'to protect the health and welfare of the people of California by excluding through the peer review

mechanism "those healing arts practitioners who provide substandard care or who engage in professional misconduct" ' "]; *Mileikowsky*, *supra*, 45 Cal.4th at p. 267 [same]).

Indeed, the importance of the peer review process is so ingrained in the medical community that a hospital's governing board has the statutory authority to direct peer review committees to initiate investigations and disciplinary proceedings if they fail to do so on their own. (Bus. & Prof. Code, § 809.05, subd. (b).) Simply put, "it is the policy of the State of California to exclude, through the peer review mechanism . . . those [doctors] who provide substandard care or who engage in professional misconduct, regardless of the effect of that exclusion on competition." (*Id.*, § 809, subd. (a)(6).)

Peer review committees must act quickly and with a high degree of specialized knowledge to achieve the Legislature's goal of ensuring high-quality medical care and protecting the public and the medical profession from incompetent or negligent doctors. (See *Medical Staff of Sharp Memorial Hospital v. Superior Court* (2004) 121 Cal.App.4th 173, 181-182 (*Sharp*) ["the overriding goal[ ] of the state-mandated peer review process is protection of the public"]; see also *Kibler*, *supra*, 39 Cal.4th at p. 201.) The peer review committee is responsible not just for staff credentialing, but also for overseeing the results of every surgery, controlling in-hospital infections, and monitoring the handling and abuse of prescription medications. (*Fox v. Kramer* (2000) 22 Cal.4th 531, 538.)

To be effective, peer review must be conducted by medical staff with the technical knowledge necessary to make informed judgments about the accused doctor's quality of care. (Bus. & Prof. Code, § 809.05 ["It is the policy of this state that peer review be performed by licentiates"]; *id.*, § 809.2, subd. (a) [peer review body "shall include, where feasible, an individual practicing the same specialty as the licentiate"]; see *Sharp*, *supra*, 121 Cal.App.4th at p. 183 [substantial evidence standard applies because of medical expertise required]; *People v. Superior Court (Memorial Medical Center)* (1991) 234 Cal.App.3d 363, 373 ["it is crucial the committees be made up of health care professionals of the highest possible qualifications"]; Scibetta, *Restructuring Hospital-Physician Relations: Patient Care Quality Depends on the Health of Hospital Peer Review* (1990) 51 U. Pitt. L.Rev. 1025, 1032.)

Consequently, peer review "serves an important public interest." (*Kibler*, *supra*, 39 Cal.4th at p. 199; accord, e.g., *Yang v. Tenet Healthcare Inc.* (2020) 48 Cal.App.5th 939, 947 (*Yang*) ["qualifications, competence, and professional ethics of a licensed physician" implicate a "public issue" under the anti-SLAPP statute].) Claims premised on any aspect of the peer review process are therefore paradigmatic examples of lawsuits threatening activities involving an issue of public interest within the anti-SLAPP statute's scope.

II. Physician lawsuits arising out of the peer review process satisfy the first prong of the anti-SLAPP statute.

A. Physician lawsuits based on stages of the peer review process other than the final decision regarding privileges fall within the anti-SLAPP statute's protection.

1. Physician lawsuits alleging injury from the initiation or conduct of peer review proceedings or from mandatory reporting are based on protected communicative activity under section 425.16, subdivision (e)(1) or (2).

Disgruntled physicians whose privileges are restricted or terminated after peer review proceedings frequently file retaliatory lawsuits against the hospital and the members of the peer review committees and governing board that participated in the peer review process. These lawsuits take a variety of forms and target different aspects of the peer review process, but they are often based at least in part on activity protected under the anti-SLAPP statute. Specifically, they frequently assert causes of action that have as an element "written or oral statement[s] or writing[s] made before . . . [an] official proceeding authorized by law" or "made in connection with an issue under consideration or review by . . . [an] official proceeding authorized by law." (Code Civ. Proc., § 425.16, subd. (e)(1), (2).)

Some lawsuits allege that a peer review investigation was begun in retaliation for the plaintiff's protected activity or that peer review participants defamed the plaintiff during the investigatory process by criticizing the quality of his medical care

or other aspects of his professional conduct. (See OBOM 34-36.) Because a peer review committee investigation leading to a recommendation to restrict or terminate a physician's staff privileges is inherently communicative activity that consists entirely of written or oral statements "in connection with an issue under consideration or review by" a peer review proceeding—which is an "official proceeding authorized by law" (Code Civ. Proc., § 425.16, subd. (e)(2); see *Kibler*, *supra*, 39 Cal.4th at pp. 199-200)—any such lawsuits targeting acts undertaken as part of this phase of the peer review process are protected by the anti-SLAPP statute. This is so because the elements of such claims consist of speech or petitioning activities—i.e., the investigatory process involved in a peer review proceeding—protected by subdivision (e)(1) or (2) of the statute. (*Ante*, pp. 19-21.)

Physician lawsuits also frequently target the peer review committee's notice of charges that initiates the peer review hearing, often on a defamation or retaliation theory. (See OBOM 45-49.) Since such notices are "written . . . statement[s] . . . made before," or at least "in connection with an issue under consideration or review by," a peer review committee engaged in an "official proceeding authorized by law" (Code Civ. Proc., § 425.16, subd. (e)(1), (2); *Kibler*, *supra*, 39 Cal.4th at pp. 199-200), such lawsuits targeting the notice of charges also fall within the anti-SLAPP statute's ambit because they are based on the statements made in the notice.

Many such lawsuits also target testimony offered, or procedures followed, in the peer review hearing itself, alleging that such testimony was false and defamatory or that the hearing procedures were biased against the plaintiff or otherwise violated hospital bylaws or statutory requirements. Such claims by their nature have as an element a "written or oral statement . . . made before . . . [an] official proceeding authorized by law" (i.e., a peer review hearing) (Code Civ. Proc., § 425.16, subd. (e)(1)), and therefore are based on speech or petitioning activity protected by the anti-SLAPP statute.

Additionally, physician lawsuits often target the decision of the judicial review committee recommending restriction or termination of staff privileges. (See OBOM 36-38.) But such recommendations are not the final decision of the hospital regarding the plaintiff's staff privileges, which must instead be made by the hospital's governing board, generally in deciding an appeal by the physician. (See *Hongsathavij v. Queen of Angels/Hollywood Presbyterian Medical Center* (1998) 62 Cal.App.4th 1123, 1143 ["Ultimate responsibility [for disciplinary action] is not with the medical staff, but with the governing body of the hospital"].) Thus, physician lawsuits alleging injury from such interim recommendations by peer review or judicial review committees are also based on "written . . . statement[s] . . . made before . . . [an] official proceeding authorized by law" (Code Civ. Proc., § 425.16, subd. (e)(1)), and are accordingly based on speech or petitioning activity protected by the anti-SLAPP statute.

Another common basis for claims by a peer-reviewed physician is the mandatory report that the hospital and medical staff send to the California Medical Board and the NPDB after peer review results in restriction or termination of the physician's staff privileges or after a summary suspension of the physician's privileges initiates a peer review proceeding. (See OBOM 41-45.) As with plaintiff's lawsuit here, such claims often allege that these mandatory reports defamed the plaintiff and harmed his ability to practice medicine or apply for privileges at other hospitals (the latter consequence being the entire purpose of the statutory reporting requirement). As explained *ante*, pages 26-27, such reports are core petitioning activity protected by the anti-SLAPP statute. Therefore, any claims based on such reports are subject to the anti-SLAPP statute and to that extent must be shown to have a probability of prevailing under the anti-SLAPP statute's second step.

2. Physician lawsuits alleging injury from individual peer review committee members' votes regarding privileges are based on protected communicative activity under subdivision (e)(1) of the anti-SLAPP statute.

Peer-reviewed physicians also frequently sue the individual members of the peer review committees and hospital governing board who participated in the peer review process, discussed the physician's quality of care, reviewed documents and testimony, sat through lengthy hearings, and ultimately voted to recommend or to impose discipline in the form of summary suspension or

restriction or termination of staff privileges. This aspect of such lawsuits is particularly harassing and constitutes one of the biggest disincentives deterring doctors from participating in the peer review process. (Pp. 51-56, *post*.) To the extent such lawsuits name the individual peer review participants as defendants, the claims they assert are invariably based on those individual defendants' speech or petitioning activity protected under the anti-SLAPP statute.

Such claims against individual defendants based on summary suspensions of privileges or final decisions to terminate privileges are based on "written or oral statement[s] or writing[s] made before . . . [an] official proceeding authorized by law" (Code Civ. Proc., § 425.16, subd. (e)(1)) and are thus protected activity under the anti-SLAPP statute. Whether or not such suspension and termination decisions constitute protected activity by the hospital or the medical staff as an entity (they do, see pp. 39-46, *post*), individual committee members' votes to suspend or terminate a doctor's staff privileges are clearly protected speech made before (i.e., in the process of participating in the proceedings of) a peer review committee.

This Court's opinion in *City of Montebello* shows why that is so. In that case, a city sued several of its former city councilmembers for voting in favor of a waste hauling contract regarding which the councilmembers allegedly had a conflict of interest. (*City of Montebello*, *supra*, 1 Cal.5th at p. 412.) Relying on recent United States Supreme Court precedent, the city opposed the councilmembers' anti-SLAPP motion on the ground

that legislators' votes on proposed bills or other legislative proposals were not protected under the First Amendment and thus could not be protected activity under the anti-SLAPP statute. (*Id.* at pp. 420-421.) This Court rejected that argument, holding that (1) the coverage of the anti-SLAPP statute is broader than that of the First Amendment (*id.* at pp. 421-422), (2) "the councilmembers' votes, as well as statements made in the course of their deliberations at the city council meeting where the votes were taken, qualify as 'any written or oral statement or writing made before a legislative . . . proceeding' " (*id.* at pp. 422-423), and (3) "[a]nything they . . . said or wrote in negotiating the contract qualifies as 'any written or oral statement or writing made in connection with an issue under consideration or review by a legislative . . . body' " (*id.* at p. 423). Thus, "[t]he councilmember defendants' votes were cast in furtherance of their rights of advocacy and communication with their constituents on the subject of the . . . contract" and were accordingly protected activity under the anti-SLAPP statute. (*Ibid.*)

In similar fashion, votes on summary suspensions and privilege termination decisions taken by individual peer review committee or hospital governing board members are protected speech or petitioning activities inherent in those individuals' participation in the peer review process of which those votes form an inextricable and critical part. Just as the councilmembers' votes at a city council meeting, as well as the statements they made during that meeting, were protected under the anti-SLAPP

statute in *City of Montebello*, so too individual peer review committee and hospital governing board members' votes on privilege suspensions and terminations, along with the members' statements made in the committee meetings leading up to those votes, are protected statements made before an "official proceeding authorized by law" (Code Civ. Proc., § 425.16, subd. (e)(1))—namely, a peer review proceeding.

And anti-SLAPP protection for such individuals' votes is vitally necessary to avoid chilling their participation in the peer review process. What this Court said about the importance of anti-SLAPP protection for city councilmembers' participation in government in *City of Montebello* is equally true of peer review committee members here: " ' "Just as SLAPPs filed against individuals have a 'chilling' effect on their participation in government decision making, SLAPPs filed against public officials, who often serve for little or no compensation, may likely have a similarly 'chilling' effect on their willingness to participate in governmental processes." ' " (*City of Montebello*, *supra*, 1 Cal.5th at p. 426.)

3. *Park* does not require a different result.

All of these scenarios are different from the one this Court confronted in *Park*, *supra*, 2 Cal.5th 1057. In that case, the plaintiff was a university professor who sued for discrimination based on the university's decision to deny his application for tenure. (*Id.* at p. 1061.) While the university pointed to statements made in the evaluation process leading up to the decision to deny tenure and in the communication of that decision

to the plaintiff and argued that those statements constituted protected activity forming the basis for the plaintiff's discrimination claim, this Court rejected that view and held that the claim was based only on the tenure denial decision itself, which it held was not protected activity. (*Id.* at pp. 1067-1068.)

Peer review is a categorically different process, and as explained *ante*, pages 18-27, 31-37, many physician lawsuits arising out of the peer review process are indeed based on protected speech or petitioning activity inherent in the various stages of that process that precede the final disciplinary decision itself. For instance, the written decision of the judicial review committee recommending discipline to the hospital's governing board is protected activity, unlike the final tenure denial decision on which the plaintiff based his discrimination claim in *Park*, which is therefore inapposite here.

While the university in *Park* sought to analogize that case to peer review and this Court overruled two Court of Appeal decisions that overread *Kibler* regarding the anti-SLAPP statute's application to the peer review process (*Park*, *supra*, 2 Cal.5th at pp. 1069-1070), *Park* left open the question of how the anti-SLAPP statute applies to lawsuits arising out of peer review activity. Unlike the facts of *Park*, many aspects of the peer review process that constitute protected activity under the anti-SLAPP statute form the basis for various claims brought by physicians like plaintiff here, and those claims therefore satisfy the first prong of the anti-SLAPP statute.

B. Physician lawsuits alleging injury from decisions to summarily suspend, restrict, terminate, or decline to renew staff privileges are based on protected conduct in furtherance of speech or petitioning activity in connection with an issue of public interest under subdivision (e)(4) of the anti-SLAPP statute.

1. Summary suspensions of privileges are protected conduct in furtherance of peer review petitioning activity under the anti-SLAPP statute.

In addition to the aforementioned bases for many retaliatory physician lawsuits arising out of peer review activities that precede the final decision regarding a physician's staff privileges, many such lawsuits include claims targeting peer review committees' and/or hospital governing boards' decisions to summarily suspend, restrict, terminate, or decline to renew the plaintiff's staff privileges. Due to the unique nature and operation of the peer review process, such claims are also based on activity protected under the anti-SLAPP statute and thus satisfy the first step of the anti-SLAPP analysis.

However, claims based on decisions to suspend or terminate privileges differ from claims targeting other aspects of the peer review process. The latter are directly based on written or oral statements made before or in connection with an issue under consideration or review by an official body within the meaning of subdivision (e)(1) and (2) of the anti-SLAPP statute. By contrast, the former are based on conduct in furtherance of speech or petitioning activity in connection with an issue of

public interest and are therefore protected under subdivision (e)(4) of the anti-SLAPP statute.

Peer review committee or hospital governing board decisions to summarily suspend the staff privileges of a physician because the physician poses an imminent danger to the health or safety of patients or others at the hospital generally come at the beginning of the peer review process and indeed usually are the initiating event that puts the peer review mechanism in motion. (*Ante*, pp. 23-24.) When a peer review committee recommends, and the hospital's governing board decides to impose, summary suspension of a doctor's staff privileges, those actions automatically trigger two types of petitioning activities: (1) the summary suspension initiates the peer review process, as the physician must promptly be given notice of charges and be informed of his hearing rights (Bus. & Prof. Code, § 809.5, subd. (a)); and (2) the summary suspension must be reported to the California Medical Board (if longer than 14 days) (*id.*, § 805, subd. (e)) and to the NPDB (if longer than 30 days) (42 U.S.C. § 11133, subd. (a)(1)). (See *ante*, pp. 20-21, 26-27 [explaining why these actions constitute protected petitioning activity under anti-SLAPP statute].)

Furthermore, the summary suspension mechanism exists to preserve patient health and safety from dangerously incompetent physicians while the often lengthy peer review process plays out. (See *Sharp*, *supra*, 121 Cal.App.4th at pp. 181-182.) In all of these ways, summary suspension furthers the

exercise of the right of free speech and petition embodied in the peer review process.

2. Hospital governing board decisions to restrict or terminate privileges are protected conduct in furtherance of peer review petitioning activity under the anti-SLAPP statute.

For similar reasons, the hospital governing board's decision to restrict or terminate a physician's staff privileges (or to not renew such privileges) is also protected conduct in furtherance of petitioning activity under the anti-SLAPP statute. Such decisions are not merely the *end result* of an official proceeding that is designed to determine whether a physician should retain privileges at a particular hospital. Instead, the Legislature designed the peer review process as the *beginning* of the process that may prompt an evaluation by the California Medical Board of whether that physician should continue to have a license to practice medicine. (See *Kibler*, *supra*, 39 Cal.4th at pp. 199 ["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"], 200 [" '[p]eer review, fairly conducted, will aid the appropriate state licensing boards in their responsibility to regulate and discipline errant healing arts practitioners,' " quoting Bus. & Prof. Code, § 809, subd. (a)(5)].)

To that end, a hospital governing board's decision to terminate, restrict, or not renew a physician's staff privileges must be reported to the California Medical Board and the NPDB. (Bus. & Prof. Code, § 805, subd. (b); 42 U.S.C. § 11133,

subd. (a)(1).) And every hospital considering whether to grant or renew staff privileges to a physician is required to request any such report from the California Medical Board before making its decision. (Bus. & Prof. Code, § 805.5, subd. (a).) The Medical Board frequently follows up on such reports by opening investigations into reported physicians for purposes of determining whether action should be taken to revoke or restrict their license to practice medicine. In other words, the decision to restrict or terminate privileges is conduct in connection with petitioning activity directed at the broader licensing inquiry conducted by the California Medical Board.

Furthermore, the hospital governing board's decision to terminate privileges is appealable to the superior court via petition for writ of administrative mandate. (Code Civ. Proc., § 1094.5; see Bus. & Prof. Code, § 809.8.) The board's decision thus furthers the petitioning activity inherent in such an appeal via writ petition as well.

Thus, both summary suspensions and terminations of physicians' staff privileges further the speech and petitioning activity inherent in peer review.

3. Decisions to summarily suspend or terminate privileges are protected conduct in furtherance of speech and petitioning activity in connection with vital issues of public interest regarding patient safety and quality of medical care.

To constitute protected conduct under subdivision (e)(4) of the anti-SLAPP statute, peer review activity must not only be in furtherance of speech or petitioning activity but must also be in connection with an issue of public interest.

Under this Court's recent decision in *FilmOn.com Inc. v. DoubleVerify Inc.* (2019) 7 Cal.5th 133 (*FilmOn*), this inquiry entails a two-part test. First, the court must determine what issue of public interest the speech or petitioning activity in question implicates, by reference to its content. (*Id.* at p. 149.) Next, the court analyzes "what functional relationship exists between the speech [or petitioning activity] and the public conversation about some matter of public interest" by asking "whether a defendant—through public or private speech or conduct—participated in, or furthered, the discourse that makes an issue one of public interest" (*id.* at p. 151)—an analysis that entails looking at contextual factors "including the identity of the speaker, the audience, and the purpose of the speech" or petitioning activity (*id.* at p. 140).

Peer review activity easily satisfies *FilmOn*'s "in connection with . . . an issue of public interest" test, so summary suspensions and terminations of privileges in furtherance of peer review petitioning activities are protected under the anti-SLAPP statute. The peer review process is solely and exclusively concerned with

the vital public issues of ensuring patient safety and an acceptable level of quality medical care at California hospitals. (*Ante*, pp. 28-30.)

More particularly, the peer review process regulates whether physicians meet minimum required levels of competence consistent with patient safety and quality of care and thus whether they should retain staff privileges at an existing hospital, be granted staff privileges at a new hospital, or retain a license to practice medicine in California at all. (See *Kibler*, *supra*, 39 Cal.4th at p. 201 ["[T]he Legislature has granted to individual hospitals, acting on the recommendations of their peer review committees, the primary responsibility for monitoring the professional conduct of physicians licensed in California. In that respect, these peer review committees oversee 'matters of public significance,' as described in the anti-SLAPP statute."]; *Yang*, *supra*, 48 Cal.App.4th at p. 947 [whether a "licensed physician is deficient in" "qualifications, competence, and professional ethics" "is . . . a public issue"]; *Healthsmart Pacific, Inc. v. Kabateck* (2016) 7 Cal.App.5th 416, 429 ["members of the public, as consumers of medical services, have an interest in being informed of issues concerning particular doctors and health care facilities"].)

The context in which the speech and petitioning activity inherent in peer review takes place also satisfies the *FilmOn* test. This speech and petitioning is engaged in by peer review committees and their members, in the context of formal, official proceedings authorized by law and reviewable in court, for the

purpose of policing the competence of physicians on staff at a hospital in the interest of patient safety and quality of medical care. (*Ante*, pp. 18-30.) It is hard to imagine how an anti-SLAPP defendant could more clearly "participate[ ] in, or further[ ], the discourse that makes an issue one of public interest" (*FilmOn*, *supra*, 7 Cal.5th at p. 151) than this.

This Court's recent decision in *Wilson*, *supra*, 7 Cal.5th 871, confirms this conclusion. There, a journalist employed by CNN sued for discrimination and retaliation after he was terminated following an incident of plagiarism. (*Id.* at pp. 881-882.) CNN argued that the plaintiff's claims were subject to the anti-SLAPP statute because, among other things, they were based on CNN's conduct of terminating plaintiff for engaging in plagiarism, which was inimical to CNN's mission of reporting the news—an exercise of free speech rights in connection with an issue of public interest. (*Id.* at p. 897.)

This Court agreed with CNN's position on this point, holding that CNN's ability to carry out its mission depends on its ability to police plagiarism by its journalists, that "[d]isciplining an employee for violating such ethical standards furthers a news organization's exercise of editorial control to ensure the organization's reputation, and the credibility of what it chooses to publish or broadcast, is preserved," that "such decisions protect the ability of a news organization to contribute credibly to the discussion of public matters," and that "[t]he staffing decision [to terminate the plaintiff] thus qualifie[d] as 'conduct in furtherance' of CNN's 'speech in connection with' public matter"

under subdivision (e)(4) of the anti-SLAPP statute. (*Wilson*, *supra*, 7 Cal.5th at p. 898.)

Likewise here, decisions by hospital peer review committees and governing boards to suspend or terminate a physician's staff privileges are critical to the ability of the peer review process to protect patients and the general public from incompetent physicians and to ensure high quality medical care in this state—all of which are issues of vital public interest which cannot be achieved absent the speech and petitioning activity inherent in the peer review process. Thus, as in *Wilson*, summary suspension and termination of hospital privileges qualify as "conduct in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest." (Code Civ. Proc., § 425.16, subd. (e)(4).)

4. *Park* does not require a different result.

Park is not to the contrary. In that case, the defendant university did not develop any argument that its decision to deny tenure to the plaintiff was conduct in furtherance of the university's own speech or petitioning activity in connection with an issue of public interest under subdivision (e)(4) of the anti-SLAPP statute, so this Court did not examine that issue. (*Park*, *supra*, 2 Cal.5th at p. 1072.) Rather, the university in *Park* simply argued that its tenure decision was protected under subdivision (e)(1) and (2), a proposition this Court easily dismissed. (*Id.* at pp. 1067-1068.)

Thus, *Park* provides limited guidance here. Unlike the university tenure decision in *Park*, decisions to suspend, restrict, or terminate physician staff privileges are critical parts of the speech and petitioning activity inherent in the peer review mechanism, and are in connection with the vital public issues of ensuring patient safety and quality of medical care for all Californians. The Legislature created the peer review process not just to decide a physician's status at a particular hospital but rather as the first step in the state's licensing process for physicians. Hospitals are on the front lines of medical care and thus are in the best position to detect and investigate problems with individual doctors' performance and then report their findings to the state licensing agency, which reaches the ultimate licensing decision in aid of which the peer review process was created. While the tenure decision in *Park* was the end of the road, a peer review decision—by legislative design—is conduct in support of a petition that the state take further action to protect California patients. (See *ante*, pp. 25-30, 39-42.) Those decisions therefore are protected conduct under subdivision (e)(4) of the anti-SLAPP statute.

III. Excluding peer review proceedings from anti-SLAPP protection would deter doctors from participating in the peer review process and thereby negatively impact public health in California.

A. To succeed in protecting public health, peer review requires doctors to be frank in evaluating other doctors.

"The quality of in-house medical care depends heavily upon the committee members' frankness in evaluating their associates' medical skills and their objectivity in regulating staff privileges." (*Matchett v. Superior Court* (1974) 40 Cal.App.3d 623, 628.) Thus, increasing the burdens on participating doctors, including forcing them to defend against litigation, "would not only discourage participation by medical professionals in these volunteer review committees, but would stifle candor and impair objectivity in staff evaluations." (*Clarke v. Hoek* (1985) 174 Cal.App.3d 208, 220.) The result would be less effective peer review and diminished quality of medical care throughout the state.

Based in part on these policy considerations enacted by the Legislature, this Court in *Kibler* recognized that to exclude peer review from anti-SLAPP protection would "discourage participation in peer review by allowing disciplined physicians to file harassing lawsuits against hospitals and their peer review committee members rather than seeking judicial review of the committee's decision by the available means of a petition for administrative mandate." (*Kibler*, *supra*, 39 Cal.4th at p. 201; see Note, *The Health Care Quality Improvement Act of 1986: Will Physicians Find Peer Review More Inviting?* (1988)

74 Va. L.Rev. 1115, 1119 ["One fear of physicians is involvement in litigation . . . in the form of a suit filed by a physician who has been denied staff privileges" because " 'credentials committee' members are very likely to be the subjects of this type of legal attack"; see generally Jorstad, *The Legal Liability of Medical Peer Review Participants for Revocation of Hospital Staff Privileges* (1978-79) 28 Drake L.Rev. 692 [examining various types of claims brought against doctors serving on peer review committees].)

Moreover, it is essential that peer review committees do not hesitate to investigate allegations of substandard care or delay in making decisions about accused doctors' staff privileges. (Scibetta, *supra*, 51 U. Pitt. L.Rev. at p. 1033.) "Without enthusiastic participation of staff physicians in peer review activities, hospital quality efforts necessarily break down," endangering patient safety. (*Ibid.*)

Yet, peer review members face substantial burdens as a result of serving. (See *Westlake Community Hospital v. Superior Court* (1976) 17 Cal.3d 465, 486 (*Westlake Community Hospital*) [peer review members "must labor under a heavy burden"], superseded by statute on another ground as stated in *Armin v. Riverside Community Hospital* (2016) 5 Cal.App.5th 810, 821-825.) Serving on a hospital medical staff peer review committee is largely a voluntary and thankless job. "[M]embership on a hospital's peer review committee is voluntary and unpaid, and many physicians are reluctant to join peer review committees so as to avoid sitting in judgment of their peers." (*Kibler*, *supra*, 39 Cal.4th at p. 201; see *Arnett*, *supra*, 14 Cal.4th at p. 12

[peer review is conducted "by the physician's own colleagues practicing in the same hospital"].) Peer reviewers are called on to make decisions with serious repercussions for friends and colleagues. (*Kibler*, at p. 200 [hospital discipline can lead to restrictions on a doctor's ability to work or cause her to lose her medical license].)

Doctors serving on peer review committees may also fear retaliation from other doctors who become unwilling to refer to them due to peer review decisions they make. (Scibetta, *supra*, 51 U. Pitt. L.Rev. at pp. 1034-1035.) "The professional and financial success of each physician depends upon his or her colleagues" and their willingness to refer patients. (*Ibid*.) This burden underscores the fact that participation is generally unpaid, but doctors must make decisions that benefit the hospital as a whole, at the expense of negatively impacting their own financial interests. (*Id*. at p. 1035.)

By reassuring peer review participants that they can access the anti-SLAPP statute's early dismissal mechanism where meritless lawsuits attack peer review proceedings, this Court can help alleviate these concerns and encourage physicians to participate in the peer review process of policing and disciplining dangerous and incompetent physicians that is so important to safeguarding the public's health. (Cf. *Kibler*, *supra*, 39 Cal.4th at p. 201.)

B. Threats of litigation deter doctors from serving on peer review committees, thereby impairing the quality and safety of medical care in the state.

"The most serious obstacle to effective peer review is the potential fear felt by the reviewer that participation in an adverse recommendation will lead to a lawsuit against him or her personally." (Scibetta, *supra*, 51 U. Pitt. L.Rev. at pp. 1033-1034; Jorstad, *supra*, 28 Drake L.Rev. at p. 693 [peer review committee members "are increasingly becoming targets of [lawsuits by] disgruntled doctors"].) While various legal doctrines may allow peer reviewers to win some of these lawsuits eventually, "the prospect of having to defend even a meritless claim can chill the willingness of many to recommend the action necessary to improve hospital quality." (Scibetta, at p. 1034.) By contrast, the protection afforded by the anti-SLAPP statute helps ensure "harassing lawsuits" do not chill the vigor with which doctors serving on hospital medical staff peer review committees must carry out their weighty responsibilities. (*Kibler*, *supra*, 39 Cal.4th at p. 201; see *City of Montebello*, *supra*, 1 Cal.5th at p. 426 [anti-SLAPP statute protects public officials when they are sued for their votes on legislative proposals, and this protection encourages public officials to serve, often for little compensation and under chilling threat of litigation for their official conduct].)

These concerns are not just academic. In 2008, the Medical Board of California commissioned a study on peer review committees that substantiated those concerns. (Lumetra, Comprehensive Study of Peer Review in California: Final Report

(July 2008) <https://www.mbc.ca.gov/Download/Reports/peer-review.pdf> (hereafter Final Report) [as of Aug. 3, 2020]; see Bus. & Prof. Code, § 805.2, subd. (b).) The study found that a majority of doctors agreed to serve on peer review committees because of a genuine willingness and interest in the process, while a small minority pointed to hospital requirements or financial incentive. (Final Report, at p. 91.) Of participants approached to be on peer review committees in the last year before the report's publication, 25 percent declined, with 71.9 percent of those reporting concerns about peer review committee service interfering with their practice. (*Id*. at p. 92.) While most changes in peer review committee membership occurred at the expiration of a term, over a quarter of respondents indicated that members just dropped out (*ibid*.), suggesting the burdens of service outweighed the benefits.

Finally, when asked to identify deterrents to acting against a doctor's staff privileges with the concomitant obligation to report such actions to the Medical Board, 33.9 percent of peer review committee members reported concerns about taking actions against friends or colleagues, while 20 percent were reluctant to report for fear of retribution. Most pertinent here, 21.7 percent of respondents reported that the fear of being sued was an obstacle to statutory reporting. (Final Report, at p. 96.) Despite these concerns, a majority of doctors supported the use of peer review to ensure quality of medical care. (*Id.* at p. 97.)

The fear of retribution is increasingly well-founded. More and more, doctors against whom peer review proceedings are initiated reflexively file lawsuits claiming retaliation, defamation, and similar supposed wrongs against the hospital, the medical staff, and every individual participant in the peer review process. The goal of such sham lawsuits is always the same: to deter individual doctors from participating in peer review and to derail the peer review process by forcing some sort of negotiated resolution under which the peer reviewed doctor is not reported to the Medical Board and the NPDB. These lawsuits eviscerate the core purpose of the peer review process, which is to protect patient safety and the quality of medical care in California by preventing disciplined physicians from taking their practices to new hospitals and medical staffs, rather than facing broader consequences for their deficient care.

This is especially true with respect to physician lawsuits (like plaintiff's lawsuit in this case) claiming retaliation under Health and Safety Code section 1278.5. After this Court's decision in *Fahlen v. Sutter Central Valley Hospitals* (2014) 58 Cal.4th 655, physicians need no longer exhaust their remedies by petitioning for administrative mandamus review of an adverse peer review decision before filing such lawsuits. Since *Fahlen* was decided, it has become even more common for physicians who get wind of an imminent peer review proceeding against them to file a Health and Safety Code section 1278.5 lawsuit claiming retaliatory peer review. These lawsuits play out simultaneously with the peer review proceeding itself, greatly complicating the

conduct of peer review and hampering its effectiveness—which is, of course, the plaintiff's goal. This reality reinforces the need for anti-SLAPP protection to screen out meritless Health and Safety Code section 1278.5 claims at an early stage, to avoid burdening the peer review process to the point of complete dysfunction.

The experience of CHA's own member hospitals bears out these unfortunate trends. CHA's members are all too familiar with physicians who claim to have engaged in protected activity only *after* they are disciplined or learn that peer review is imminent, simply in order to set up a frivolous retaliation lawsuit. In such lawsuits, physician plaintiffs frequently allege that they are being subjected to sham peer review for some sort of ulterior motive, but sham peer review is virtually impossible given the panoply of procedural protections afforded to peer reviewed doctors and the sheer unlikelihood of the conspiracy that would be required amongst the peer review committee, the judicial review committee, the hearing officer, witnesses, experts, and the hospital governing board. The many procedural protections for peer reviewed doctors, described *ante*, pages 18-25, as well as the fact that peer reviewed doctors have the right to judicial review via a petition for writ of administrative mandate, all but eliminate any possibility of a physician losing privileges because of any such sham peer review process. And to the extent a physician plaintiff has evidence to substantiate a prima facie case in support of his claims, the anti-SLAPP procedure's second step will afford him the opportunity to present that evidence and will not prevent his

claims from proceeding if they have " ' "minimal merit." ' " (*Wilson*, *supra*, 7 Cal.5th at p. 884.)

While sham peer review is a fiction, the harmful consequences for peer review of physician retaliation lawsuits under Health and Safety Code section 1278.5 and similar statutes are all too real. Frivolous physician lawsuits deter individual physicians from participating in peer review. CHA's members are finding it increasingly difficult to identify physicians willing to serve on peer review committees, both because of those physicians' fear of being sued themselves and because of a general unwillingness to be deposed or dragged into discovery even in physician lawsuits against the hospital alone. Meritless physician lawsuits also undermine the collegial nature of peer review. When all participants expect a lawsuit by the peer reviewed physician, legal posturing replaces the collaborative remediation discussions among peer physicians that are supposed to be a hallmark of the peer review process. Finally, such lawsuits dramatically increase the costs of conducting peer review, which inevitably results in higher costs for patients.

Doctors who volunteer to serve on peer review committees deserve legal protections because they "take on, often without remuneration, the difficult, time-consuming and socially important task of policing medical personnel" to ensure the highest quality of medical care for Californians. (*Westlake Community Hospital*, *supra*, 17 Cal.3d at p. 484.) California courts have already recognized that "[c]andid and frank

participation in peer review proceedings is encouraged by assuring peer review activities will not be put to adverse use in a damage action." (*California Eye Institute v. Superior Court* (1989) 215 Cal.App.3d 1477, 1484.) This Court should not increase the burdens placed on peer review committee members and the peer review process as a whole by denying anti-SLAPP protection in retaliatory lawsuits filed by disgruntled physicians disciplined through the peer review process.

IV. To the extent any aspect of the peer review process is not protected under the anti-SLAPP statute, this Court should clarify that the mixed cause of action analysis under *Baral v. Schnitt* applies to physician lawsuits arising out of peer review proceedings.

As explained *ante*, pages 18-47, every stage of the peer review process consists of activity protected under the anti-SLAPP statute. However, to the extent this Court concludes that some, but not all, aspects of the peer review process fall outside the anti-SLAPP statute's protection, that is not the end of the analysis. In that case, this Court's guidance from *Baral v. Schnitt* (2016) 1 Cal.5th 376 (*Baral*) would come into play.

In *Baral*, this Court provided clear instructions regarding how mixed causes of action based on both protected and unprotected activity should be addressed under the first step of the anti-SLAPP analysis: "At the first step, the moving defendant bears the burden of identifying all allegations of protected activity, and the claims for relief supported by them. When relief is sought based on allegations of both protected and unprotected activity, the unprotected activity is disregarded at this stage.

If the court determines that relief is sought based on allegations arising from activity protected by the statute, the second step is reached." (*Baral*, *supra*, 1 Cal.5th at p. 396.)

Thus, under the *Baral* framework, mixed causes of action satisfy the first step of the anti-SLAPP analysis, shifting the burden to the plaintiff to state and substantiate a legally and factually sufficient claim with respect to the allegations of protected activity. (*Baral*, *supra*, 1 Cal.5th at p. 396.) If the plaintiff cannot do so at this second step, then "the claim is stricken. Allegations of protected activity supporting the stricken claim are eliminated from the complaint, unless they also support a distinct claim on which the plaintiff has shown a probability of prevailing." (*Ibid.*)

Physician lawsuits arising out of peer review typically target multiple aspects of the peer review process, from beginning to end. If this Court concludes that certain stages in the peer review process fall outside the protection of the anti-SLAPP statute but that other aspects of peer review are protected activity, then such physician lawsuits will typically present mixed causes of action based on both protected and unprotected activity. In these cases, *Baral* dictates that such mixed causes of action satisfy the anti-SLAPP statute's first step because they are based, at least in part, on protected activity. At the second step, the trial court would then examine the plaintiff's allegations based on protected peer review activity and determine if the plaintiff has presented sufficient evidence to demonstrate a probability of prevailing on those claims.

In this case, plaintiff argues that defendants waived their mixed cause of action argument under *Baral*. (ABOM 22-27.) Regardless of the procedural posture of the mixed cause of action argument in this case, numerous other cases presenting this issue are waiting in the wings and require guidance from this Court. Indeed, this Court granted review and held the case of *Melamed v. Cedars-Sinai Medical Center* (Oct. 6, 2017, B263095) [nonpub. opn.], review granted Jan. 17, 2018, S245420, which presents this same issue. The issue will return for decision by this Court whether the Court reaches it in this case or not. Thus, even if this Court concludes that defendants waived their mixed cause of action argument on the facts of this particular case, the Court should make clear in its opinion that the *Baral* framework fully applies to physician claims arising out of the peer review process, and that mixed causes of action in this context satisfy the first prong of the anti-SLAPP statute and move on to the second prong with respect to allegations based on protected peer review activity.

CONCLUSION

For the foregoing reasons and for the reasons explained in St. Joseph's briefs on the merits, the Court of Appeal's decision should be reversed.

August 7, 2020

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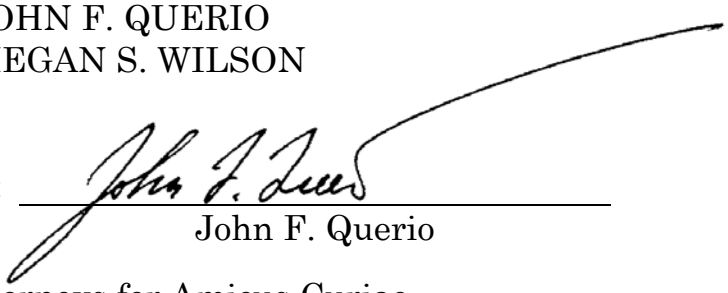
By: 
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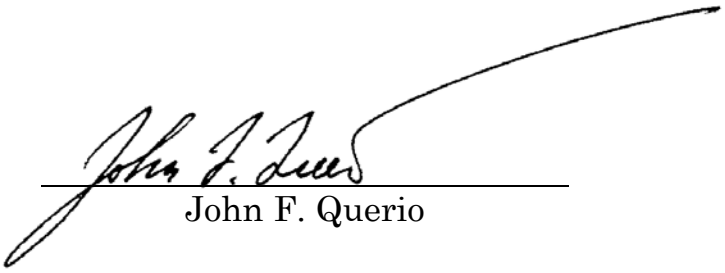

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Bonni v. St. Joseph Health System
Case No. S244148

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Supreme Court of California

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Date

/s/John Querio

Signature

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